

ONTARIO CONDOMINIUM RESOURCE BOOK

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B"
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244"	Crdtgej v'x0Qr go qeq "kpe0 *Qp0J ELO"	Kpvtguv.'r j cpwqo "o qti ci g"	3; ; ; 12; 147"	244"	Qpvtkq.'J ki j 'Eqwtv'qh'Lxwleg." Tqugpdgti 'LO' Ugr vgo dgt'47.'3; ; ; "	92'QOT0*4f +373.'uwr r 092'QOT0 *4f +443 _
245"	Crik'x0Dgtvcpf "('H ³ tg" Eqputwexqp'Eq0'	Eqputwexqp'hcwmu.'ricdkrk\.'eqptcevqt.'ego gpv'uwr r rkt.'" j qo g'qy pgtu'f co ci gu.'"QPJ Y R'uwtdqi cvkqp.'kpuwtgtu' ricdkrk\ "	4222 126 139"	245"	Qpvtkq'Uwr gtkqt'Eqwtv'qh'Lxwleg" Qwcy c.'Qpvtkq'Tq{ 'LO"	Eqwtv'Hkrg'P q0'4326/3; ; 4"
246"	Cm gn'kpe0x0J cmqp" Eqpf qo kpkwo 'Eqtr 0P q099"	Gcugo gpv.'ueqr g'qh'	3; ; ; 9 124 14: "	246"	Qpvtkq'Eqwtv'qh'Cr r gen.'"O eO wtvt { 'ELOQ0'Qudqtpg'cpf 'Ej cttqp'LOO'	Eqwtv'Hkrg'P q0'E36976"
247"	Co cvq'x0Ecpfc"	kpeo g'vz.'.gzi gev'cvkqp'qh'r tqhk.'f gf wexqpu'cmqecvqf "	3; ; ; 128 125"	247"	Vcz'Eqwtv'qh'Ecpfc c.'Tr 'VLOLO'	13; ; ; _'VLOLOP q0679.'Eqwtv'Hkrg' P qu0; 9/4473*KV+K'; 9/4474*KV+K'
248"	Co dgty qqf "kpxguo gpw" Nko kgf "gv'cn'x0F wtj co " Eqpf qo kpkwo 'Eqtr qtcv'qp' P q0345"	O wwn'wug'ci tggo gpv.'r qukxkg'eqxgpcpw'f q'" pqv'twp'y kj 'rcpf "	4222 12; 134"	248"	Uwr gtkqt'Eqwtv'qh'Lxwleg'"Ukpuqp'LO"	Eqwtv'Hkrg'P q0; ; /EX/3: 23; 9"
249"	Cr ctwo gpw'kpvtpcvkqpcn' kpe0x0O gvtqr qrkcp" Vqtqpv'Eqpf qo kpkwo " Eqtr 0P q03392"	Cr r ricv'kqp'v'gphqteg'd{/mcy u.'r tqegf wtg'pqv'cxckrcdrg'vq" v'gpcpw"	4223 123 125"	249"	Qpvtkq'Uwr gtkqt'Eqwtv'qh'Lxwleg" Ewrk\ 'LO"	Eqwtv'Hkrg'P q022/EX/4227: 2"
623"	Cr ctwo gpw'kpvtpcvkqpcn' kpe0x0O gvtqr qrkcp" Vqtqpv'Eqpf qo kpkwo " Eqtr 0P q0339"	Cp'cev'kqp'ci ckpu'c'eqpf q0'eqtr qtcv'kqp'ht'kpv'kqpcn' kv'gthgt'gpeg'k'geqppqo le'tgr'v'kpu'ecppq'v'dg'u'wuc'k'p'gf'y j gt'g' vj g'eqpf q0'y cu'uko r n\ "gphqte'kpi 'kxu't'wgu'cpf 'vj gt'g'y cu'pq" r tqqh'qh'f co ci g0'	4224 132 126"	"	Qpvtkq'Uwr gtkqt'Eqwtv'qh'Lxwleg." Ngf gto cp.'LO'	EQWT'V'HKNG'P Q0'23/EX/ 43853; EO "
24: "	Cr gz'Eqputwexqp'Nf 0x0' Eckpu"	Eqputwexqp'k'g'pu'v'pk'qy pgtu.'ricdkrk\ "	3; ; ; 7 134 128"	24: "	Ucun'evj gy cp'Eqwtv'qh'S wggp'u" Dgpej .'Lwf lekcn'Egptg'qh'O grk'kng.'" O ceNgqf 'LO'	13; ; ; 7_'ULOP q0954.'S ODI 0P q0' 3: 'qh'3; ; 7'LOO 0'
24; "	Cto utqpi 'gv'cn'x0Nqpf qp" Nkg'gv'cn'	F co ci g'v'q'w'pk'cev'kqp'ci ckpu'X'gpf qt"	3; ; ; 12; 135"	24; "	Qpvtkq'Uwr gtkqt'Eqwtv'qh' Lxwleg.Hkpp'LO'	Eqwtv'Hkrg'P q0397: 21; 6"
469"	Cuucn\ 'cpf 'O kpkwgt'qh' Tgxgpw"	Ncpf "Vtcpu'ht'Vcz.'.rcpf u'j grf 'k'p't'wuv.'r c { cdrg'qp'xcnw'g'qh' rcpf "cpf "d'w'k'f k'pi u'cv'v'ko g'qh't'gi k'ut'cv'kqp"	3; ; ; 8 12: 147"	469"	Qpvtkq'J ki j 'Eqwtv'qh' Lxwleg.O eM'p'rc { 'LO'	78'QOT0*4f +52.'52'F ONOT0*6y +4; 3"
252"	Cutq'Eqptcev'kpi 'Nf 0x0' Hett'kpi v'qp'Eqxg'Rtqr gt'v'gu' Nf 0'	Cev'kqp.'d'w'k'f k'pi 'eqptcev'ko r rkt'g'v'gto u.'f co ci gu"	3; ; ; 132 144"	252"	Dtk'kuj 'Eqm'w dlc'Uwr tgo g'Eqwtv.'" Xcpeqwxgt.'Uc'v'p'q'x'g'LO'	Tgi k'ut { 'P qu0C; 752: : 'cpf " E; 83338"

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253"	Cvj gtrg{ 'x0Uqo gtugv'Rrceg' F gxgrqr o gpw'qh" I gqti gvqy p'Nvf 0'	Ci tggo gpv'qh'R(U."emulpi ."wptgcuqpcdrpggu"	3; ; 5 129 B4"	253"	Qpvctkq "Eqwtv'qh'Lxwvleg"/"Rtqxkpekri" F kxkukqp."Vqtqpvq."Qpvctkq.Y kmkpu" Rtqx0F kx0L0'	Cevkqp "P q0TG44651; 5"
254"	Cvj gtrg{ 'x0Uqo gtugv'Rrceg' F gxgrqr o gpw'qh" I gqti gvqy p'Nvf 0'	Rj cpvqo "o qtv ci gu."tgpqi qvckvqp."dkpf kpi "	3; ; 7 124 B7"	254"	Eqwtv'qh'Crr gen "Vqtqpvq."Qpvctkq." Hkpr{ uqp."Ecv o cp"cpf "Ncunlp"LLC"	Eqwtv'Hkrg"P q0E3: 325"
255"	Cvkwu u'cv"Y kmqy gmi'x0' Ecpcf c"	I UV"cr r rckvckqp."tcepukvqpenr' tqxkukqpu"	3; ; 8 123 4; "	255"	Vcz "Eqwtv'qh'Ecpcf c."Dqppgt "V0E00'	]3; ; 8_"V0E00P q088."Eqwtv'Hkrg" P q0; 7/972*1 UV+."
256"	Cwqo cvk "Y cuj kpi " O cej kpg"Eq0"	Ngcug"qh'Eqo o qp'Grgo gpw."xcrkf ." r tkqtkv{ ltgpgy cr'vgo "	3; 9: 122 122"	256"	Qpvctkq."*J 0E00"	*3; 9: +3: "Q000*4f +7; 8"

648"	Dcj cf qqt "x0[EEE"P q0' : 4"gv'cr0'	Vj g"gv'hw'wpf 'lp"ugev'kqp "353"qh'yj g'Cev'ht "yj g'cr r qkpw gpv" qh'cp'cf o kpkw'cvqt 'uj qwf "cr r n["gs wem["vq'yj g'eqpukf g'cvkqp" qh'yj g'f'kuej cti g'qh'cp'cf o kpkw'cvqt0'	4228 B4 I26"	"	Qpvctkq "Uwr g'kqt 'Eqwv'qh'Lwukg.'F 0' Dtqy p 'I0'	Eqwv'Hkrg'P q0'26/EX/ 4864; 6EO 4.'2006 CanLII 40487'
257"	Dcgt"x0Eqpf qo kpkwo 'Rrcp' ; 3458; 9"	Cevkqp.'eqpf qo kpkwo "pqv'tgur qpukdrg'hqt'rxkpi "equu"	3; ; : B4 I44"	257"	Crdgtv'Eqwv'qh'S wggp'u'Dgpej . " Lvf lekcn'F kwt'ev'qh'Gf o qpvpq.'Ngg'I0'	Cevkqp'P q0; 925/323: : "
258"	Dcgt"x0Eqpf qo kpkwo 'Rrcp' ; 3458; 9"	Cevkqp'd{ "wkv'qy pgt.'f co ci gu.'pq'hcdkxv["vq"eqtr 0'	4222 I27 I26"	258"	Crdgtv'Eqwv'qh'S wggp'u'Dgpej . " Ngy ku'L"	Cevkqp'P q0; 925'323: : "
25: "	Dctpgu'x0J ki j rcpf 'Rctni' F gxgnr o gpv'Eqtr 0'	Ci tggo gpv'qh'R(U.'lpvgr t'gcvkqp.vgto kpcv'kqp"	3; ; : I24 B: "	25: "	Qpvctkq'Eqwv'qh'Lwukg'*I gpgt'cn' F kxkukqp+.'J ko gn'I0'	Eqwv'Hkrg'P q0'E63786; 9"
46: "	Dcuo cf lkcp'cpf 'l qtni' Eqpf qo kpkwo 'Eqtr 0P q0' 74"	D{ rny u.'ej cti g'vq'qy pgt l'guuqtu.'lpxcrkf 'kh'pqv'lp'f ger'cvkqp"	3; ; 3 I25 I52"	46: "	Qpvctkq.'J ki j 'Eqwv'qh'Lwukg.'" O cmppg{ 'I0'	54'Q0T0*5f +745.'344'F 0N0T0*5f +339"
25; "	Dgcw'Tkxi g'Cr r ctvgo gpw' x0Ecpfc"	I UV.'ugrh'uwr r n[. 'hcdkxv["	3; ; 6 B4 I24"	25; "	Vcz'Eqwv'qh'Ecpcfc.'J crkcz.'P qxc" Ueqvc.'Mgo r q'VEI0'	I3; ; 6_'VEI0P q03359.'Cevkqp' P q0; 6/3333*I UV+."
262"	Dggt'gv'cr0'x0Vqy pui cvg'K' Nko kgf "gv'cr0'	Ci tggo gpv'qh'R(U.'QP J Y R.'" o kutgr t'gugpv'cvkqp"	3; ; 9 B2 I45"	262"	Eqwv'qh'Cr r gen'ht'Qpvctkq.'Dtqqng.'" Qudqtpg'cpf 'Cwukp'II0C0'	58'Q0T0*5f +358"
263"	Dggt'gv'cr0'x0Vqy pui cvg'K' Nko kgf "gv'cr0'	QP J Y R'tgi kwt'cvkqp.'Ci tggo gpv'qh'R(U.'gphqtego gpv.'c" pwnkv["	3; ; 7 B2 B2"	263"	Qpvctkq'Eqwv'*I gpgt'cn' F kxkukqp+.Ej cr pkn'I0'	47'Q0T0*5f +9: 7"
265"	Dgppgt'gv'cr0'x0J NU'l qtni' F gxgnr o gpw'Nvf 0'	F kuenquwt g'ucvgo gpv.'cf gs wee{ "	3; ; 7 B2 I25"	265"	Qpvctkq.J ki j 'Eqwv'qh' Lwukg.Ecttwjgtu'I0'"	74'Q0T0*5f +465"
266"	Dgto cp'gv'cr0'Mctrgvq'Eq0' Nvf 0'	Rwej cug'r tleg.'lpvgt'g'vq'p.'wpgphqtegcdrg"	3; ; 4 I28 I23"	266"	Qpvctkq'J ki j 'Eqwv'qh'Lwukg.'I tc{ " I0'	*3; ; 4+.'59'Q0T0*5f +398"
46; "	Dgtt{ "gv'cr0'cpf 'kpf kcp'Rctni' Cuuqek'cvkqp"	Cmgi gf "dwkf lpi 'uej go g.'wpgphqtegcdrg"	3; ; 9 I26 I46"	46; "	Qpvctkq'Eqwv'*I gpgt'cn'F kxkukqp+.' Gdgtj ctf 'I0'	55'Q0T0*5f +744"
267"	Dgtt{ "gv'cr0'x0kpf kcp'Rctni' Cuuqek'cvkqp"	Dw'kf lpi 'uej go g.'wpgphqtegcdrg"	3; ; ; I27 I25"	267"	Eqwv'qh'Cr r gen'ht'Qpvctkq.'Cdgm.'" Ncunp'cpf 'Tqugpdgti 'II0C0'	66'Q0T0*5f +523.'F qengv'P q0' E4: 975"
268"	Dmg/Tgf 'J qrf lpi u'Nvf 0'x0' Ut'cv'Rrcp'XT": 79"	Tguqnw'kqp.'xcrkf kv["	3; ; 6 B2 I27"	268"	Dtkkuj 'Eqnw dlc'Uwr tgo g'Eqwv.'" *k' 'Ej co dgtu+.'F qti cp'I0'	Xcpeqwxgt'Tgi kwt{ 'P q0C; 63; 27"
269"	Dqf pct'x089; 742'Qpvctkq' Nvf 0'	Ci tggo gpv'qh'R(U.'ko r tqrgt'vgo kpcv'kqp"	3; ; 7 I28 I49"	269"	Qpvctkq'Eqwv'qh'Lwukg'*I gpgt'cn' F kxkukqp+.'Dtco r vqp.'" Qpvctkq.Y cmgtu'0'	Eqwv'Hkrg'P q0'F E'5; : 4I: ; "

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26: "	Dqpf 'x0Utcw'Rrcp' XT475: "	pwkucpeg'ltqo "co gpkkgu.'kplwpevkqp"d{ "qy pgt "	3; ; 8B3 126"	26: "	Dtkkuj 'Eqmwo dlc'Uwr tgo g'Eqwtv' Ur gpeg't'LO'k'Ej co dgtu+"	Xcpeqwxgt'Tgi kwt { 'P q0C; 55229"
26; "	Dqpf { 'x0R0E0Eqxg" Dwkrf gtu'kpe0'	F kuenquwtg.'co gpf o gpw.'pq'tgr wf kcvkqp.'ci tggo gpv'dkpf kpi "	3; ; 3B4 127"	26; "	Qpvctkq'Eqwtv'qh'Lxwkeg'/'I gpgtcrn' F kxkukqp.'\ crgx'LO'	Cevkqp'P q0; 2/I F/35: 5: "
272"	Dq{ ej wni'gv'cr0'x0Guugz " Eqpf qo kpkwo 'Eqtr 0P q04"	S wqtwo .'rguu'j cp'314'r t gugpv.'uge"5: "" *qrf 'Cev'pqv'cr r rkecdrg"	3; ; 9 125 B8"	272"	Qpvctkq.'*F ku0E v0//\ crgx'F 0E10#"	45'E0N0F0383"
273"	Dtcf hkrf 'x0O ctvkp"	o qtv ci g.'r kgtkpi "eqtr qtcvg'xgkn"	3; ; 2 127 124"	273"	Qpvctkq'F kwtlev'Eqwtv'/'[qtm' Lwf lekcn'F kwtlev.Vqtqpvq." Qpvctkq.Hgti wuqp'F 0E10'	Hkrq'P q05395; : 1: : "
274"	Dtqy puwqpgu'Gcu'Nko kgf " Rctvpgtuj kr 'x0Qpvctkq'" P gy "J qo g'Y cttecpv{ " Rtqi tco "	QP J Y cttecpv{ .'pqv'cr r rkecdrg.'kpxguwo gpv"	3; ; 4 127 14: "	274"	Eqwtv'qh'Cr r gen'ht'Qpvctkq..'F wdkp" E10Q0'J qwf gp'cpf "Drck'110C0'	: "Q0T0*5f +767"
275"	Dwej dkpf gt'x0Utcw'Rrcp" XT42; 8"	D{ ncy u.'pgy "uj gf .pqv'r tqj kdkgf .'pqv'ej cpi g'vq'dwkrf kpi " gzvgtkqt"	3; ; 4 126 129"	275"	Dtkkuj 'Eqmwo dlc'Eqwtv'qh'Cr r gen" O eGcej gtp.'E10DE0'Nqeng"cpf " Rtqwf hqv'110C0'	34'D0E0C0E0354.45'Y 0C0E0' 354.87'D0E0N0F0*4f +547"
276"	Dwf kpum{ 'x0Dtgengtu'Gcu' kpe0'	F kuenquwtg'ucvgo gpv.'cf gs wce{ .'f co ci gu'xu0t'guekukqp"	3; ; 4 123 B8"	276"	Qpvctkq'Eqwtv'/'I gpgtcrn'F kxkukqp+." Dqt'kpu'LO'	8'Q0T0*5f +477.'Cevkqp'P qu0' 44371; 3W'cpf "46681; 3W"
277"	Dw{ cpqxun{ 'x0Vqy pui cvg'3' Nvf 0'	F kuenquwtg'ucvgo gpv.'o cvgtkcn'hcwu.'uw'hlekgpe{ "	3; ; 5 125 126"	277"	Qpvctkq'Eqwtv'qh'Lxwkeg'/'I gpgtcrn' F kxkukqp.Vqtqpvq.'Qpvctkq.G00 0' O ceF qpcrf "LO'	Cevkqp'P qu00 44791; 3W." O 48: 41; 3W'cpf "O 37241; 3W"

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293"	Egpwt{ "43"J gtkci g"Nmf 0x0' P cr gx'Eqput wevkp'Nmf 0'	Tgs wktgo gpw"qh'hukpi "ci tgggo gpv.'Tgcn'Gu0('Dwukpguu" Dtqngtu'Cev."xqkf "ci tgggo gpv'	3; ; 3B4I29"	293"	Qpvctkq"Eqwtv'qh'Lwukleg"/"I gpgtci' F kxkukqp.'F cxf uqp'LO'	Cevkqp"P q03924; I 9"
294"	Egqrctq"gv'cn'x0[qtm' J wo dgt'Nmf Qv'cn'	Ci tgggo gpv'qh'R('U."emukpi "	3; ; 6I25I4; "	294"	Qpvctkq"Eqwtv'qh'Lwukleg"/"I gpgtci' F kxkukqp.Vqtqpvq.'Qpvctkq.Y kpmgt'LO'	Cevkqp"P qu04/EW67992/EO ." O 448: I; 3W."
295"	Ej cr o ep"x0J NU[qtm' F gxgnqr o gpv'Nmf 0'	O kutgr tgugpvcvkqp.'hmqc'tcgc.'y cttecpv'	3; ; : I28I36"	295"	Qpvctkq"J ki j 'Eqwtv'qh'Lwukleg." F qppgm' LO'	86"Q0T0*4f +6; : ."6; 'T0R0T046: "
296"	Ej cy x"x0J c{ vgt'Utggv' F gxgnqr o gpw'kpe0'	Ci tgggo gpv'qh'R(U.'kpvgr tgvcvkqp'twgu"	3; ; 6I2; I29"	296"	Qpvctkq"Eqwtv'qh'Lwukleg"/"I gpgtci' F kxkukqp.Y glp'L"	Cevkqp"P q0TG'6237I; 6"

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297"	Ej lgp 'x0Ncy 'F gxgrqr o gpv' I tqwr '*Vj qtpj km+Nvf 0'	Cevkqp.'f gr quks'tgwtpgf . 'wplk'f khgt gpv'j cp"eqpvtcev' f guetkdgf "	3; ; : 128152"	297"	Qpvctkq"Eqwtv'qh'Lwukleg"*I gpgtcn' F kxkukqp+J qkrgw'LO'	Eqwtv'Hkrg'P q0'; 9/EX/352: 42"
298"	Ej kw'x0Rcekhe'O cmi' F gxgrqr o gpw'kpe0'	Egtv'khecvgu'qh'Rgpf lpi 'rkki cvkqp.'xcecvgf "	3; ; : 12914: "	298"	Qpvctkq"Eqwtv'qh'Lwukleg"*I gpgtcn' F kxkukqp+ 'J ko gn'LO'	F TU'; : /36647"
299"	Ej qy 'x0F lzlg'Rctm'kpe0'	Ci tggo gpv'qh'R(U.'| qplpi "eqpf kxkqp."qr gp'vq'emukpi "	3; ; 8128129"	299"	Qpvctkq"Eqwtv'qh'Cr r gen"."Tqdlpu." Ec v o cp'cpf 'F qj gt v' 'ILOO'	Eqwtv'Hkrg'P q0E434: 5"
29: "	Erctng'x0O kf f rguz" Eqpf qo lpkwo 'Eqtr 0P q0' 3: 7"	Eqtr qtcv'kqp'rgi cr'equu.'pqv'rkpcedrg"	3; ; 8124138"	29: "	Qpvctkq"Eqwtv'qh'Lwukleg"*I gpgtcn' F kxkukqp+ 'F guqv'k'LO'	Eqwtv'Hkrg'P q03; ; 2; 1; 8"
29; "	Erctng'x0O kf f rguz" Eqpf qo lpkwo 'Eqtr 0P q0' 3: 7"	Rctm'kpi . 'qy lpi . 'tgcupcedrg'cev'kqp"	3; ; 712: 136"	29; "	Qpvctkq"Eqwtv'qh'Lwukleg"*I gpgtcn' F kxkukqp+ 'Uo cmi'Ercko u"Rtqwf hqqv' F gr w'LO'	Eqwtv'Hkrg'P q062421; 6"
2: 2"	Eqpf qo lpkwo 'Rrcp': 54" 35: 6'x0O eF qpcrf "	Ur gekrc'cuuguuo gpv.'guvqr r gr'egt'v'khecvg"	3; ; : 12: 126"	2: 2"	Crldgtv'Eqwtv'qh'S wggp'u'Dgpej . " Lwf lekcn'F kwtlev'qh'Gf o qp'vqp." O cuvgt'Hwpf wni'	Cevkqp'P q0; : 2522; 59."
2: 3"	Eqpf qo lpkwo 'Rrcp' : : 42: 36'x0Dktej y qqf " Xkrci g'I tggpu'Nvf 0'	Hqtgenquwtg.'eqo o qp'g'zr gpugu'f wg"	3; ; : 127149"	2: 3"	Crldgtv'Eqwtv'qh'S wggp'u'Dgpej . " P cvkqp'LO'	Cevkqp'P q0; 934/222544"
2: 4"	Eqpf qo lpkwo 'Rrcp'P q0984" 25: 2'x0Gf o qp'vqp'*Ekw' +"	Cttgctu.'eqo o qp'g'zr gpugu."o wplekr crk'v' "qy pgt 'd{ 'cz" ugk' wtg.'rkcdrg'hqt'ej cti gu"	4223124134"	2: 4"	Crldgtv'Eqwtv'qh'S wggp'u'Dgpej . " Lwf lekcn'F kwtlev'qh'Gf o qp'vqp'Eqqng" IO"	Cevkqp'P q0; 825"339: 2""
2: 5"	Eqpf qo lpkwo 'Rrcp'P q0' 9: 32699"*Qy pgtu'qh+'x0' Eqpf qo lpkwo 'Rrcp'P q0' 9933945"*Qy pgtu'qh+"	Etquu/gcugo gpw.'gcugo gpw.'cf xgtug'r quuguukqp"	3; ; 9133136"	2: 5"	Crldgtv'Eqwtv'qh'S wggp'u'Dgpej . " Lwf lekcn'F kwtlev'qh'Ecrci ct { . 'Rcr gtp{ " IO'	Cevkqp'P q0: ; 23/36; : 5"
2: 6"	Eqpf qo lpkwo 'Rrcp'P q0' : 933528'x0[co cuj kc"	rgi cr'equu.'pqv'eqmgevdrg'htqo "qy pgt"	3; ; ; 126134"	2: 6"	Crldgtv'Rtqxlpelcn'Eqwtv.'Ekx'kri' F kxkukqp.'Ngj dtk' i g.'Crldgtv." NgI tcpf gwt'Rtqx0E'x0LO'	F qengv'"; : 24822762."

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2: 7"	Eqpf qo lpkwo 'Rrcp'P q0' : : 32677"x0Ur gevrci" Ecr kcrnEqtr 0'	Cevkqp.'D{rcy u.'pq'eqo o gtekrn'wug.'lko g/uj ctg'ko r tqr gt"	3; ; 2B3 42"	2: 7"	Crdgtv'Eqwtv'qh'S wggp'u'Dgpej .:" O qqtg'I0']3; ; 2_'334"C0T0435""
2: 8"	Eqpf qo lpkwo 'Rrcp'P q0' ; 532742"x0Uo kj "	Ci g'tgutlevkqp.'dctu'uq'cu'qeewr cpv'	3; ; ; 124 B9"	2: 8"	Crdgtv'Eqwtv'qh'S wggp'u'Dgpej ." J cy eq'I0'	Cevkqp'P q0; : 23/33264"
2: 9"	Eqpf qo lpkwo 'Rrcp'P q0; 64' 3932"x0Ej tkwgruqp"	Uwdugs wgpv'r wtej cuqt.'cevkqp'ci clpuv'dwkrf gt'ht'pgi rki gpeg.' tgcrc'cpf 'r tguqpv'f cpi gt 'i tqwpf u'cevkqp"	4223 125 129"	2: 9"	Crdgtv'Eqwtv'qh'S wggp'u'Dgpej " Lwf lekrn'F kwtlev'qh'Gf o qpvqp"Cevqp" I0"	Cevkqp'P q0; : 25'43; 9: ""
2: : "	Eqpf qo lpkwo 'Rrcp'P q0' ; 746932'D83"x0Y gdd" *e0j0l0Dmg'Dc{ 'O cuuci g+"	D{rcy .'twgu.'tgxky 'qh'eqpf q'rgi cr'utwewtg"	3; ; ; 123 129"	2: : "	Crdgtv'Eqwtv'qh'S wggp'u'Dgpej ." Lwf lekrn'F kwtlev'qh'Gf o qpvqp"	Cevkqp'P q0; : 25/34688"
2: ; "	Eqpf qo lpkwo 'Rrcp'P q0; ; 4' 7427"x0Ectt'kpi vqp" F gxgrtr o gpw'Nf 0'	Ci tggo gpv'v'q'ctdktcvg.'f gemt'cpw'u'f k gevqtu'lp'eqphlev'qh' kpvgt guv.'pqv'dkpf kpi "	4222 12: 126"	2: ; "	Crdgtv'Eqwtv'qh'S wggp'u'Dgpej " Lwf lekrn'F kwtlev'qh'Gf o qpvqp'O cuqt" Hw'pf wnt"	Cevkqp'P q02225'2: 7; 9""
2; 2"	Eqpf qo lpkwo 'Rrcp'P wo dgt' 974/3429'Qy pgtu'gv'cr0x0' Vgttceg'Eqtr 0'gv'cr0"	rgcug'qh'eqo o qp'r tqr gtv'.'xqkf cdrg"	3; ; 5 122 122"	2; 2"	Crdgtv'Eqwtv'qh'Cr r gcrn'	*3; : 5+65"C0T05: 8"
2; 3"	Eqqm'x0Utcv'c'Rrcp'P /72"	Cr r qlkvo gpv'qh'cf o lpkwtcvqt"	3; ; 7 12; 14; "	2; 3"	Xcpeqwxgt.'Dtkkuj 'Eqnw dlc.'" J w'f ctv'I0'"*k' Ej co dgtu+"	Xcpeqwxgt'Tgi kwt { 'P q0C; 636; 5"
2; 4"	Eqqm'x0Utcv'c'Rrcp'P /72"	Rtqegf wtg.cr r)'qh'cf o lpkwtcvqt.'gzr gtv'tgwclpgf "d{ 'Eqwtv'	3; ; 6 133 138"	2; 4"	Dtkkuj 'Eqnw dlc'Uwr tgo g'Eqwtv.' O gtgf kj 'I0'	Xcpeqwxgt'Tgi kwt { 'P q0C; 636; 5"
2; 5"	Eqwpugn'J qrf kpi u'Ecpcfc" Nko ksgf 'x0Vj g'Ej cpgn'Emd" Nko ksgf 'gv'cr0'	O qt'v0'r t'kqtkv' 'qxgt'Ci tggo gpv'qh'R(U.'QP J Y R.'f gr qukv'	3; ; ; 125 127"	2; 5"	Qpvctkq'Eqwtv'qh'Cr r gcrn'Ncdtquug." Ej cttqp'cpf 'Hgrf o cp'I0C0'	65'Q0T0*5f +53; . 'F qengv'P q0' E49429"
2; 6"	Eqy g'x0Qy pgtu'qh'Utcv'c" Rrcp'XT356; "	D{rcy u.'r tqj kdkkpi 'tgpvcnu.'kpxcrkf "	3; ; 6 125 12: "	2; 6"	Dtkkuj 'Eqnw dlc'Uwr tgo g'Eqwtv.*k" Ej co dgtu+""Ucwpf gtu'I0'	Xcpeqwxgt'Tgi kwt { 'P q0C; 62529"
2; 7"	Etcy hqtf 'x0Nqpf qp"*Ekv' +"	Emuu'r tqeggf kpi . 'hcvw' 'h'gr megu.'r tqegf wtg'r tqr gt.'pq" cngt'pc'v'x'g'lp'Eqpf qo lpkwo 'Cev'	4222 127 14; "	2; 7"	Qpvctkq'Uwr g'kqt'Eqwtv'qh'Lwukeg" I kngug'I0"	Eqwtv'Hkr'P q0529291; ; ""

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2; 8"	Etgf k'Xcmg{ 'Ecdrg'x0Rggn' EE'P q0; 7'gv'cn'	T gcn'Rtqr gtv{ . 'hkz wtgu. "ecdrg'u{ uvgo "	3; ; 212414; "	2; 8"	Qpvctkq. 'J ki j 'Eqwtv'qh'Lxwkeg." I tcpi g. 'I0'	49'Q0T0*4f +655. '329'F 0N0T0*5f +'488"
2; 9"	Etqeeq'x0: 66492'Qpvctkq" Kpe0'	P q'o qtv ci g'dcem'qeewr cpe{ 'kpvgtguv'pqv'ej cti gcdrg"	3; ; 5123149"	2; 9"	Qpvctkq'Eqwtv'qh'Lxwkeg'/'I gpgtcn' F kxkukqp. Dqirp' I0'	Cevkqp'P q0: 93; 1; 4"
475"	Etqutqcf u'Cr ctvo gpw'Nvf 0' cpf 'Rj kxk u"	Rirppkpi 'Cev'uwdf kxkukqp"eqpvtn "ci tgggo gpv'pqv'dlpf kpi "	3; 96127125"	475"	Qpvctkq. ""*J 0E10"	6'Q0T0*4f +94"
2; : "	Ewo o kpu'x0P cr gx" Eqputwexkqp'Nvf 0'	F gr quku. 'kpvgtguv'qp"	3; ; 6126135"	2; : "	Qpvctkq'Eqwtv'qh'Lxwkeg'/'I gpgtcn' F kxkukqp. 'Dtco r vqp. 'Qpvctkq. F vpp' I0'	Cevkqp'P q0C48731; 6. "
322"	Ewo o kpu'x0P cr gx" Eqputwexkqp'Nvf 0'	Kpvgtguv. 'r c{ cdrq"qp'tgf wexkqp'kp'r j cpvqo 'o qt0'	3; ; 7125144"	322"	Qpvctkq'Eqwtv'qh'Lxwkeg'. 'F kxkukqpcn' Eqwtv. 'Uqwj g{. 'Ugggrg'cpf 'Ectpy cy "	Eqwtv'Hkg'P q0X5; 51; 6"

"

323"	F cxf "x0Xcpeqwxgt" Eqpf qo lpkwo "UgtxleguNvf 0	Cevkqp."lwtkf levkqp"qh'eqwtv."pq'eqphkpgf "v'Uwr 0E v0'	3; ; ; 129 129"	323"	Dtkkuj "Eqmwo dlc"RtqxkpekcnEqwtv." Xcpeqwxgt."Dtkkuj "Eqmwo dlc." F j krrp"Rtqx0E v0L0'	]3; ; ; _D0E0L0P q03: 8; ." Xcpeqwxgt" Tgi kwt { 'P q0'; : / 644: 5"
476"	F cl qnF gxgnr o gpw'Nvf 0' cpf "[qtniEqpf qo lpkwo " Eqtr qtevkqp"54; 'gv'cn'	Eqo o qp"gzr gpugu."dwf i gv."hgp"ci ckpuv" f gerctcpu"	3; 9; 125 145"	476"	Qpvctkq."J ki j "Eqwtv'qh'Lxwkeg." Ecttwj gtu."L0'	46'Q0T0*4f +68"
324"	F gUqvq'F gxgnr o gpw'Nvf 0' x(Qpvctkq" P gy "J qo g" Y cttepv' "Rtqi tco "	QP J Y R."Eqo o gtekn'Tgi kwtcvkqp"Cr r gen'Vtkdwpn" tgi kwtcvkqp'tgxqngf . 'pq'r qy gt "v'q'qtf gt ""	3; ; ; 4 126 14; "	324"	Qpvctkq"Eqwtv."F kxkukpcnEqwtv." O qpv qo gt { ."Ecttwj gtu'cpf " Eco r dgm'LL0'	: "Q0T0*5f +9; 4"
325"	F k'Egeeq"x0955947"Qpvctkq' kpe0'	Ci tggo gpv'qh'R(U."lpvgr tgvkqp."eqvte'r tghgt gpf wo "	3; ; ; 2 134 143"	325"	Qpvctkq"Eqwtv'qh'Lxwkeg"/"I gpgtcn' F kxkukqp."Hgf cm'L"	Cevkqp" P q0374: 21; 2"
326"	F lenix0F gppku"	Ur gekkhe'r gthqto cpeg"cmuy gf "v"Xgpf qt"	3; ; ; 3 12; 149"	326"	Qpvctkq"Eqwtv'qh'Lxwkeg"/"I gpgtcn' F kxkukqp."Dtqengpuj kg'L0'	42'T0R0T0*4f +486."Cevkqp" P q0' ; 3/I F/3642; "
327"	F kpleqrc"gv'cn0x0J wcpv (" " F cpe| ne { "Rtqr gt vku"	ht wutcvkqp."tgi kwtcvkqp."cevki 'tgcuaqpcdn{ ."cevkqp"	3; ; ; 8 127 138"	327"	Qpvctkq"Eqwtv*1 gpgtcn'F kxkukqp+." Dgcwkw'LL0"	Q0T0*5f +383"
328"	F kpleqrc"gv'cn0x0J wcpv (" " F cpe| ne { "Rtqr gt vku"	Ci tggo gpv'qh'R(U."ht wutcvkqp."pqv'cr r ncedrg"	3; ; ; 128 13; "	328"	Qpvctkq"Eqwtv'qh'Cr r gen" Hkpre { uqp." O eMkpre { "cpf "Ncdtquag"LL0C0'	62'Q0T0*5f +474."F qengv'P q0' E46: 72"
329"	F ktmugp"x0Cw"	Cevkqp."o kutgr tguqpvkqp."f co ci gu"	3; ; ; 8 134 13; "	329"	Dtkkuj "Eqmwo dlc"RtqxkpekcnEqwtv." *Ekxki'F kxkukqp+."O ct vkuqp"Rtqx0E v0' L0'	Xcpeqwxgt" Tgi kwt { 'P q0E; 6/ 294; 9"
32: "	F wtj co "Eqpf qo lpkwo " Eqtr 0P q0342"x0Qpvctkq" P gy "J qo g"Y cttepv' " Rtqi tco "	QP J Y R"uj ctg."r tqr qt vkuqpcv'v'wpku'qeewr kgf "	3; ; ; 12; 145"	32: "	Qpvctkq"Eqwtv'qh'Lxwkeg"."O qvkuu" Eqwtv"/"Vqtqpvq."Qpvctkq."I gppkpi u'L0'	; 9/EX/34; 2; 8EO "
32; "	F wtj co "Eqpf qo lpkwo " Eqtr 0P q0980x0J 0' Mcuukpi gt "Eqputwekqp" Nvf 0	Eqputwekqp."lwdurkwwkqp"qh'o cvgtkcu."s wcrkv' "	3; ; ; 7 128 135"	32; "	Qpvctkq"Eqwtv'qh'Lxwkeg"*1 gpgtcn' F kxkukqp+."Uj gctf "L0'	Eqwtv'Hkrg" P q<"; 4/ES/52686."
332"	F wtj co "Eqpf qo lpkwo " Eqtr 0P q0; ; "x0Dtqwugcw"	Wpcwj qt k gf "eqputwekqp."ecm'ht"xqvg"	3; ; ; 8 133 147"	332"	Qpvctkq"Eqwtv'qh'Lxwkeg"*1 gpgtcn' F kxkukqp+."F 0U0Hgti wuqp" L0'	Hkrg" P q08: 8; 31; 7"

333"	F {gt"x0f qtmEqpf qo kpkwo Eqtr 0P q0496"	Tgr cktu."ecwmlpi . 'pqv'uwduwduvpcn'cf f kkkp"ge"	3; ; 2 127 149"	333"	Qpvctkq."*UE0"	*3; ; 2+5"CE0Y 00*4f +648"
334"	Gdgtv'u'x0Ectrgvqp" Eqpf qo kpkwo 'Eqtr 0P q0' 5; 8"	Eqpf qo kpkwo 'Cev.'tgs wkt go gpw'ecppqv'dg'qxgttkf f gp." gs wkv { 'kpcr r rkecdrg'kp'freg'qh'ucwng"	4222 132 138"	334"	Qpvctkq "Eqwtv'qh'Cr r gcn'Vqtqpvq." Qpvctkq "Hkpc { uqp'cpf 'Ect y { 'L0C0' cpf "Uko o qpu'L0"	F qengv'P q0E5558: ""
335"	Gdgtv'u'x0Ectrgvqp" Eqpf qo kpkwo 'Eqtr 0P q0' 5; 8"	F gemtcv'kqp."co gpf o gpv'd { "qtf gt."gs wkv { "	3; ; ; 133 B; "	335"	Qpvctkq "Uwr gktqt 'Eqwtv'qh'Lwukeg." Mgcrg { 'L0"	Eqwtv'Hkrg'P q0; : /EX/9; 37"
336"	Gf o wfu'u'x0Qpvctkq'P gy " J qo g'Y cttepv { 'Rtqi tco "	QP J Y R.'dwwf gt'fckwt.g.'qh'gt "v'eqpv'kwg'ucrg"qp'f'k'htg'gpv' vgt o u.'t'gl'gevgf.'erko "ci c'kpuv'QP J Y R'xcrkf "	4222 126 129"	336"	Qpvctkq "Uwr gktqt 'Eqwtv'qh'Lwukeg" F k'kuk'qpcn'Eqwtv'/"Vqtqpvq."Qpvctkq" Q'F t'ueqm'O ctej cpf "cpf 'C'kmgp'L0"	F qengv'764 i; : "
337"	Gi r'k'vqp'Rrreg'k'pe0x0' Qpvctkq'O k'kwt { 'qh' Eqpuwo gt'cpf 'Eqo o gtekn' T'grc'v'kpu+ "	Gcugo gpv.'t'grcug'qh'eqtr qtcv'kqp'j' cu'cwj qtkv { "	4222 124 143"	337"	Uwr gktqt 'Eqwtv'qh'Lwukeg'T'kxctf 'L0"	Eqwtv'Hkrg'P q0; ; /EX/3; 2; 5: ""
338"	Gr r 'x0J qqf "	Uqr'ekqat'erk'gpv'equu.'f'cd'k'k'v { 'qh'f'k'gevtu"	3; ; 2 126 134"	338"	Qpvctkq "F k'w'lev'Eqwtv'/"I qtn' Lw'lekn'F k'w'lev'Vqtqpvq." Qpvctkq.I kduqp'F 0E00"	Cev'kqp'P q0O 3897381: : ."
339"	Gxgtv { "x0Ecpfc"	t'gpvcn'k'peqo g.'o qtv'ci g'k'p'vgt'g'v'p'q'v'f'gf'w'v'k'drg"	3; ; 8 12: 145"	339"	Vcz'Eqwtv'qh'Ecpfc."Vqtqpvq." Qpvctkq."Uqdkgt'VE00"	13; ; 8_"V0E00P q033: 7.'Eqwtv' Hkrg'P qu0; 6/; 9; *K'v'f ."; 6/ ; : 2*K'v'f "
33: "	Hh'pp'x0U'g'x'g'Dwrgt" Eqpuv'w'v'k'p'N'v'0'	Cev'kqp.'WHK't'gcn'g'ucv'g'ci gpv'npqy ngf i g'ko r wgf "vq" X'gpf qt"	3; ; 3 133 148"	33: "	Dt'k'k'uj 'Eqnw dlc'Uwr tgo g' Eqwtv.X'lev'qtkc.'Dt'k'k'uj " Eqnw dlc.O cef q'p'gm'L0"	X'lev'qtkc'T'gi k'wt { 'P q0; 24998"
33; "	H'c'p'ek'u'x0Eqpf qo kpkwo " R'rcp'P q0: 444; 2; "	Eqo o qp'g'zr'gpugu.'f'kur'tqr'qt'v'k'p.'v'k'cdrg'k'uuvg"	3; ; ; 127 134"	33; "	C'nd'gt'v'Eqwtv'qh'S'w'g'p'u'D'g'p'ej . " Lw'lekn'F k'w'lev'qh'Gf o q'p'v'p." O c'uv'gt' "H'w'p'f'w'n'l"	Cev'kqp'P q0; : 25/24; 82"
477"	I cwf'cw't'g'v'c'f'0'cpf " Eqtr qtcv'k'p'qh'y'g'Ek'v { 'qh' G'v'd'le'q'ng'g'v'c'f'0'	R'rc'p'p'k'pi 'Cev.'p'q'v'eg.'u'w'h'k'el'g'p'e { .i' t'cxg'qy'p'gtu"	3; ; 9 12; 152"	477"	Qpvctkq "Eqwtv'f' g'p'gt'cn' F k'k'uk'q'p'+F k'k'uk'q'pcn'Eqwtv." Q'F t'ueqm'V't'c'k'p'qt'cpf "Y'cw'L0"	57'Q'0'0'0*5f +773"
342"	I j'ci "G'p'v't'r'k'ug'u'N'v'0'x0' U't'ev'Eqtr 0M8: "	Cev.'v'q't'v'k'p'lw't { .eqo o qp'g'ng'o gpw.'v'p'k'v'qy'p'gt'eqxgtgf "	3; ; 4 134 144"	342"	Dt'k'k'uj 'Eqnw dlc'Uwr tgo g'Eqwtv." N'co r'gtu'q'p'L0"	M'co m'qr'u'T'gi k'wt { 'P q03: : 77"

343"	I qgv "gv'cr0x0Y j kgj cm" F gxgnr o gpv'Eqtr 0Nf 0'	Rrcppkpi 'Cev"eqo r rncpeg."eqpf kkkp"r tgegf gpv'	3; 9: 124 B2"	343"	Qpvctkq"Eqwtv'qh'Cr r gen'Ctpwr ." \ wdg'cpf 'Drcr.'LlC0'	3; 'Q0T0*4f +55"
344"	I qtf qp"x0Ncy tgepg" Cxgpwg'I tqwr 'Nf 0'	Kpvtg'uv'lp'rcpf . 'r wtej cug'tgi kntcvkqp'ci tggg gpv'	3; ; : B2B: "	344"	Qpvctkq'J ki j 'Eqwtv'qh' Lwvleg.Ecmci j cp'CElLl lE0'	87'Q0T0*4f +767"
478"	I quupgt'cpf 'Tgi kqpcn' Cuuguu gpv'Ego o kkkqpgt" gv'cr0'	Cuuguu gpv.'tgpvri'wpku"	3; ; 5 128 B5"	478"	Qpvctkq'F kkkqpcn'Eqwtv.'I tkkkj u." Ucwpf gtu'cpf 'Vtclpqt'LL0'	64'Q0T0*4f +33; .36: 'F 0N0T0*5f + 865"
345"	I qxgtpqt'u'J kni' F gxgnr o gpv'Nf 0x0Tqdgvt'	Ci tggg gpv'qh'R(U.'I UV."Xgpf qt'o wuv'r c{ "	3; ; 5 129 B4"	345"	Qpvctkq'Eqwtv'qh'Lwvleg"/'I gpgtcrn' F kkkqpcn.'Gdgtg'L0'	Cevkqp'P q0; 4/ES /48867C"
346"	I tcpqxum' 'x0Tlej o qpf " Us wctg'F gxgnr o gpv'Eqtr 0' "Qp0E0C0"	Kpvtg'uv.'eqmgevkdng.'Crdtgej v'cr r rkgf "	3; ; 5 125 B8"	346"	Qpvctkq'Eqwtv'qh'Cr r gen.'"J qwf gp." I teci g'cpf 'O eMkprc{ 'LlC0'	Cevkqp'P qu0E; 4; 4'cpf 'E; 47; "
347"	I tc{ 'x0Utwc'Rrcp'P q0' XT: 62"	Cmgtcvkqp.'r rcpu'tgs wktgf 'd{ 'eqpf qo kpkwo . 'pqv'qr r tguukxg"	3; ; 6 12; 149"	347"	Dtkkuj 'Eqwv dlc'Uwr tgo g'Eqwtv.'"k0" Ej co dgtu+.'Gttkq"	Xcpeqwxgt'Tgi knt { 'P q0C; 6375; "
348"	I tggpdgti 'x0Vj qo "	Kpvtklo 'qtf gtu."Xqvg'ej cmgpi g"	3; ; ; 12; B6"	348"	Qpvctkq'Uwr gkqt'Eqwtv'qh'Lwvleg." Ncpg'L0'	Eqwtv'Hkrg'P q0; ; /EX/396; 72"
349"	I tlo drg"x08842; 4'Qpvctkq" Nf 0'	Qeewr cpe{ 'equu.'pgv'qh'wkrkkgu'gve0'	3; ; 2 129 B8"	349"	Qpvctkq'Uwr tgo g'Eqwtv.'"Uj gctgt" NlLUE0'	Cevkqp'P q08; 991; 2"
34: "	I tlo o g'x0Mculgtunk'	Hco kn{ 'rcy . 'cuuki po gpv'	3; ; 3 124 B6"	34: "	Qpvctkq'Eqwtv'qh'Lwvleg"/'I gpgtcrn' F kkkqpcn.'J c{ gu'L0'	Cevkqp'P q06: : 641; 2."
34; "	I tquuo cp'J qrf kpi u'Nf 0x0' [qtnlEqpf qo kpkwo 'Eqtr 0' P q097"	Gpvkrngo gpv'v'q'i ctci g'vkrng"	3; ; ; 12: 126"	34; "	Qpvctkq'Eqwtv'qh'Lwvleg'"I gpgtcrn' F kkkqpcn+.'I cpu'L0'	Eqwtv'Hkrg'P q0; 9/EX/356956"
352"	I tquuo cp'J qrf kpi u'Nf 0x0' [qtnlEqpf qo kpkwo 'Eqtr 0' P q097"	Eqtr qtcvg'r tqrgtv{ . 'tki j v'q'i ctci g'vkrng"	3; ; ; 12; B6"	352"	Qpvctkq'Eqwtv'qh'Cr r gen'Cdgmrc." Ncunlp'cpf 'O ceRj gtuqp'LlC0"	Fqengv'P q0E525; ; "

479"	J cuj ko "gv'crl'cpf 'Eqwv'qk' Nf 0'	Ci tggo gpv'qh'R(U.'r tleg'kpetgcug'hqt'gctn' "qeewr cpe{ ." wpgphqtegcdng"	3; ; 8 127 149"	479"	Qpvctk'J ki j 'Eqwtv'qh' Lwuleg.Ecttwj gtu'L0'	76'Q0T0*4f +9; 2"
353"	J gtkci g'O qwpv'clp'Nqf i gu' kpe0x0'Rkpi kqtg"	Wpk'o cpci go gpv'ci tggo gpv.'Ugewtkkku'Cev'	3; ; 8 123 145"	353"	Qpvctk'Eqwtv'qh'Lwuleg' "I gpgtci' F kxkukqp+.Vcrkcpq'L0'	Hkrg'P q0; 4/ES /47367"
354"	J gtuv'glp'x0Tq{cn'NgRci g' Tgcn'Gucv'g'Ugtxlegu'Nf 0'	Cevkqp.grgo gpw'qh'p'gi nki gpv'o kucvgo gpv.us wctg" hqvc i g.pqv'r tqxgp"	3; ; 9 134 13: "	354"	Dtkkuj 'Eqnw dlc'Rtqxkpekcn'Eqwtv' *ElxklF kxkukqp+. 'Y gtigt 'Rtqx0E x0L0'	Xcpeqwxgt'Tgi kwt { 'P q0; 8/ 4436; "
355"	J gy kv'x0'Utevc'Eqtr 0P 0Y 0' 34: 4"	Cuuguo gpv.'rgi cn'lequu.'pqv'xcrkf "	3; ; 9 127 135"	355"	Dtkkuj 'Eqnw dlc'Uwr tgo g'Eqwtv.' Ej kiky cem'Dtkkuj 'Eqnw dlc.' O eMkppqp'L0'	Ej kiky cemTgi kwt { 'P q0' U222862: "
356"	J kf f gp'Xcmg{ 'Nengukf g' Eqpf qo lpkwo u'kpe0x0' Xgtecki pg"	Tguelkukqp.'f kuenquwtg.'co gpkkku.'tguqtv'tgukf gpv'cn'	3; ; 9 132 129"	356"	Qpvctk'Eqwtv'qh'Lwuleg' "I gpgtci' F kxkukqp+. 'Hgrf o cp'L0'	Eqwtv'Hkrg'P qu0569321; 3W'cpf " ; 5/EW/9426: "
357"	J kn'x0'Utevc'Rrnp'P Y 4699"	Gzenwukxg'wug.'r ctnkpi "	3; ; 3 129 126"	357"	Dtkkuj 'Eqnw dlc.Eqwtv'qh' Crr genVci i ctv.'Vq{ 'cpf 'Rtqwf hqqv' H0C0'	: 3'F 0N0T0*6j +942""4'D0E0C0E0' 4: ; ""79'D0E0N0T0*4f +485."
358"	J qlhgt'x0'Xgtf qpg"	Ucwwg'qh'Ht'cwf u"	3; ; 6 12: 134"	358"	Qpvctk'Eqwtv'qh'Lwuleg'/"I gpgtci' F kxkukqp.'Mkej gpgt.'Qpvctk.'" Uctj cp{ 'L0'	Cevkqp'P q0467: 1: ; "
359"	J wpi 'cpf 'F cpe| nc{ 'Nf 0' x0'Ecpfc c" *O kpkvgt'qh' P cvkqpcn'Tgxgpwg'/"O P 0T0'	kpeo g'cz.'dwrkf gt.'i gpgtcm{ 'ceegr wgf 'ceeqwv'kpi " r tkpek rgu"	3; ; : 128 127"	359"	Hgf gtcn'Eqwtv'qh'Ecpfc c'/"Vtkci' F kxkukqp.'"Y guvqp'L0'	J3; ; : _HE0L0P q09; 8.'Eqwtv'Hkrg' P q0'V/4685/; 5"
35: "	K0T0Ecr ken'Eqtr 0x0' Qy pgtu'qh'Utevc'Rrnp'P Y U' 567; "	F genctcpv'u'tki j v'v'q'xqvg.'cppwcn'o ggkpi "	3; ; 7 123 148"	35: "	Dtkkuj 'Eqnw dlc'Eqwtv'qh'Crr gen' *k' 'Ej co dgtu+"Ngi i 'L0C0'	Xcpeqwxgt'Tgi kwt { 'P q0' EC23; : 87"
35; "	Lcemqp'x0O ctni'	Cevkqp.'v' tgr ckt 'h'wmu.'nquv'xcnwg.'tgo gf { 'equv'	3; ; 9 134 133"	35; "	Dtkkuj 'Eqnw dlc'Uwr tgo g'Eqwtv.' P gy 'Y guvo kpvgt.'Dtkkuj 'Eqnw dlc.'" Dq{ rg'L"	J3; ; 9_'D0E0L0P q04; 37.'" "
362"	Lchhg'x0O g'qr qrkcp" Eqpf qo lpkwo 'Eqtr 0P q0' 75; "	Cevkqp.'pq'h'cdkky{ .'dwrkf kpi 'ugewtky{ 'cf gs wcvg"	3; ; 5 12: 149"	362"	Qpvctk'Eqwtv'qh'Lwuleg'/"I gpgtci' F kxkukqp.'I tquk'L0'	Cevkqp'P q03: 4441: 9"

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364"	Ictgo nq'x0Uj kr 'Eqtr 0'	Cevkqp.'o kutgr tguqpcvkqp.'r tqlgv'hekkkku.'f co ci gu"	3; ; 7 129 128"	364"	Qpvctkq'Eqwtv'qh'Lwuwleg'"I gpgtci' F kxkukqp+'I tgg' 'L0'	Eqwtv'Hkrg"; 3/ES /4337"
365"	Lculpunk'x0Vt'kpej kpk'	Ci tggo gpv'qh'R(U.'y qtni'qtf gtu.'y cttecpv' "	3; ; 6 125 146"	365"	Qpvctkq'Eqwtv'qh'Lwuwleg'/'I gpgtci' F kxkukqp.'O ceRj gtuqp'L0'	Cevkqp'P q0829; 8; 2S "
366"	Igtxku'Eqwtv'F gxrqr o gpv' Nf 0x0T'keek'	Ur gekhe'r gthqto cpeg.'htcwf 'ereko .'vtkcn'tgs vktgf "	3; ; 4 125 132"	366"	Dtkkuj 'Eqmwo dlc'Uwr tgo g'Eqwtv.'" Xcpeqwxgt.'Dtkkuj 'Eqmwo dlc.'" Ur gpegt'L0'	45"TOROT0*4f +54"
367"	Mgo r r'kpi 'x0J gctvj uvqpg" O cpqt'Eqtr 0'	Ci tggo gpv'qh'R(U.'pq'emulpi .'f co ci gu.'o gpv'cn'f kn0'	3; ; 8 129 139"	367"	Cndgtv'Eqwtv'qh'Cr r gcn.'"Rlectf.'" J cttef gpeg'cpf 'Eqv—'IL0C0'	Cr r gcn'P q0364: 6"
368"	Mgpp{ 'x0Uej wuvgt'Tgcn' Gucv'Eq0'	cevkqpcdng'pwkucpeg.'tguvwtcpv'hp"	3; ; 2 128 13; "	368"	Dtkkuj 'Eqmwo dlc'Uwr tgo g'Eqwtv.'" Eqj gp'L0'	Xcpeqwxgt'Tgi kwt { 'P q0E: 963: 6"
438"	Mgpp{ 'x0Uej wuvgt'Tgcn' Gucv'Eq0'	P wkupeg.'f co ci gu.'hwo gu"	3; ; 2 128 13; "	438"	Dtkkuj 'Eqmwo dlc'"*UE0/'Eqj gp'L0'"	j3; ; 2_'D0E10P q03642"
47: "	Mg{ 'gv'cn'0cpf 'U0I ggti g" J qrf kpi u'Eq0Nf 0gv'cn0'	Kpvgtkqt'tgcttcci go gpv'pqv'lp'eqphkv'y kj 'f gen'cevkqp"	3; 94 128 123"	47: "	Qpvctkq'"J ki j 'Eqwtv'qh'Lwuwleg_'" Mgkj .'L0'	j3; 94_'5'Q0T0548/54; "
369"	Mg{ gu'x0O gxrqr qrkscp" Vqtqpv'Eqpf qo kpkwo " Eqtr 0: 98"	Rtqzkgu'pqv'xcrkf .'o kuukpi "pqv'leg"	3; ; 2 128 13: "	369"	Qpvctkq'J ki j 'Eqwtv'qh'Lwuwleg.'Rj kr " L0'	95"Q0T0*4f +78: .'33"TOROT0*4f +38; "
36: "	Mqni'x0Utevc'Rrcp'NO U'685'	Tgvkri'eqpf qo kpkwo .'uj qr r kpi 'egpvtg.'wug'd{ rxy .'xcrkf "	3; ; ; 126 143"	36: "	Dtkkuj 'Eqmwo dlc'Uwr tgo g'Eqwtv.'" V{uqg'L0'	Xcpeqwxgt'Tgi kwt { 'P q0C; ; 2365"
36; "	Mqr r gtv'x0Ecpfc"	I UV.'ucrg'qh'tgpv'cn'tgukf gpv'cn'wplv.'pqv'r c{ cdng"	3; ; ; 134 133"	36; "	Vcz'Eqwtv'qh'Ecpfc.'".'Dtwn—'V0E10'	j3; ; ; _'V0E10P q032: : .'Eqwtv' Hkrg'P q0; 8/42; 8*I UV+K'
372"	Mquqrpknix0Xcpdqwi' Eqputvevkqp'Eqtr 0'	Eqputvevkqp'hgpu.'j qo g/dw' gtu.'hgpu'pqv'gphqtegcdng"	4222 134 152"	372"	Qpvctkq'Uwr gkqt'Eqwtv'qh'Lwuwleg'" O cuvgt'Ucwpf gtu"	Eqwtv'Hkrg'P qu022/EX/3: ; 869" cpf '22/EX/3; 325; '"
373"	Micv' 'x0Rctmuf g'J kni'Nf 0'	Ci tggo gpv'qh'R(U.'gZR kcvkqp'qh'vko g.'f gr quku'tgwtpgf "	3; ; 4 133 127"	373"	Qpvctkq'Eqwtv'qh'Lwuwleg'/'I gpgtci' F kxkukqp.'Vqtqpv'Y ggm' 'Eqwtv.'L0' O cef qpcif 'L'	Cevkqp'P q0; 3/ES /34954"
374"	Micv' 'x0Rctmuf g'J kni'Nf 0'	ci tggo gpv'qh'R(U.'vko g'hqt'emulpi .'f gr { .'lpv'gpv'	3; ; 7 132 127"	374"	Qpvctkq'Eqwtv'qh'Cr r gcn'Vqtqpv.'" Qpvctkq.'Qudqtpg.'Y gkgt'cpf 'Cwukp' IL0C0'	Eqwtv'Hkrg'P q0E35725"

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375"	N0Ej wpi 'F gxrnr o gpvEq0x0' Uectdtqwi j '*Ek{ +''*Qp0F kx0' Ex0"	r ctnlpi . 'r rppkpi 'eqpf kkp. 'kpcr r tqr tlcg"	3; ; 4 12: 153"	375"	Qpvtkq 'Eqwtv'qh'Lwuleg. 'F kxkukqpcn'Eqwtv." Tqugpdgti . 'Eco r dgm'cpf "Vj gp'L0'	Cevkqp 'P q032271; 2"
376"	Nengy qqf 'd { 'vj g'RctniNvf 0x0' Qpvtkq'J qo g'Y cttepv' 'Rtqi tco "	QP J Y R. 'hgwtg 'qh'etgf k'tgs wktgf "chgt 'eqputwekqp." xcrkf "	3; ; 3 12: 13; "	376"	Qpvtkq 'Qpvtkq 'Eqwtv' gpgtci'F kxkukq+." I tgg' 'L0'	7'Q0F0*5f +749"
377"	Nerik'Uco lk'x0Uctvc'Rrcp'XT/ 4357"*D0E0UE0"	Kpuwtcepg. 'qdxkqwu'tkum'v'eqo o qp'grgo gpv. 'wplk' qy pgt 'pqv'hcdrg"	3; ; 4 123 136"	377"	Dtkkuj 'Eqmwo dlc'Uwr tgo g'Eqwtv.'O gtgf kj 'L0'	Xcpeqwxgt'Tgi kwt { 'P q0' C; 35223"
47; "	Nco d'cpf 'Eqwclp'Nvf 0'	Ci tgggo gpv'qh'R(U.'r c{o gpv.'r tleg'kpetgcug.'xqkf "	3; ; 7 124 134"	47; "	Qpvtkq'J ki j 'Eqwtv'qh'Lwuleg. 'Dctt'L0'	6; 'Q0F0*4f +879"
482"	Nco dgtv'Krcpf 'Nvf 0cpf 'Cvqtpg{/ I gpgtci'qh'Qpvtkq"	Wplk'ecppqv'eqpukw'qh'xcecpv'rcpf 'hqt 'eqputwekqp"	3; 94 125 146"	482"	Qpvtkq. 'J ki j 'Eqwtv'qh'Lwuleg. 'Ngtpgt. 'L0'	13; 94_4'Q0F087; /895"
378"	Nco dvp'Eqpf qo kpkwo 'Eqtr 0P q0 380x0Rrny tki j v'	Eqpvtcevu. 'tcv'k'ecv'kp. 'pqv'cr r r'ecdrng'v'uweguuqt " qdiki cvkqp"	3; ; 9 134 144"	378"	Qpvtkq 'Eqwtv'qh'Lwuleg'*I gpgtci' F kxkukq+.'Mkrnggp'L0'	Eqwtv'Hrg'P q0338841; 4"
626"	Nepctm'Eqpf qo kpkwo " Eqtr qtcv'kp 'P wo dgt '32'x0327" P qtj 'Utggv'Nko kgf "	Vj g'ctdktcv'kp'r tqxkukqpu'qh'c' 'lqkp'v'wug'lj ctgf " hcek'k'gu'ci tgggo gpv'ctg'pqv'cr r r'ecdrng'v'v'j g's wguv'kp" qh'y j gj gt "c'gcugo gpv'xcrkf n' "gz kugf "dghqtg'v'j g" tgi kwtcv'kp'qh'c'f ger'ctcv'kp'cpf 'f guetkr v'kp0'	4227 123 13: "	"	Qpvtkq 'Uwr g'kqt 'Eqwtv'qh'Lwuleg. " J cem'cpf . 'L0'	4227'EcpNKK83: '*QP 'UE0+' Eqwtv'Hrg'P q0'26/EX/ 24: 87; "
379"	Ncpf o ctni'O qpvtg'f " Eqpf qo kpkwo 'Eqwpeki'gv'cr0x0' Eqo q"	Eqtr 0'f w'f 'qh'h'cktpguu'qy gf 'v'wplk'qy pgt"	3; ; 6 134 127"	379"	Dtkkuj 'Eqmwo dlc. '*Eq0E0"	; 'Cf o kp0N0F048; "
37: "	Ncpf o ctni'qh'Vj qtpj km'Nko kgf 'x0' Lceqduqp'gv'cr0'	Ci tgggo gpv'qh'R(U.'ur gek'le'r gthqto cpeg"	3; ; 7 12; 147"	37: "	Eqwtv'qh'Cr r gen'hqt "Qpvtkq. 'O eMkprc { ." I t'k'k'j u'cpf 'F qj gtv' 'L0C0'	47'Q0F0*5f +84: "
37; "	Ncpf o ctni'qh'Vj qtpj km'Nvf 0x0' O crgnk/[c| f k'	Erqulpi 'f cvg. 'tki j v'v'q'gz v'gpf . 'f co ci gu"	3; ; 7 125 142"	37; "	Qpvtkq 'Eqwtv'qh'Lwuleg'*I gpgtci' F kxkukq+.'Hkpp'L0'	Eqwtv'Hrg'P q0433; 81; 3W"
382"	Ncpf o ctni'qh'Vj qtpj km'Nvf 0x0' O k'ke"	Cevkqp. 'Rwtej cugt "h'ckm'wg'v'q'emug. 'f co ci gu"	3; ; 8 132 132"	382"	Qpvtkq 'Eqwtv'qh'Lwuleg'*I gpgtci' F kxkukq+.'O eI ctt { 'L0'	Eqwtv'Hrg'P q02; 64: 1; 2W"
383"	Ncw'x03977'J qrf lpi u'Nvf 0'	Ej cpi gu'v'wplk.'hwpf co gpv'ndt'gcej "qh'ci tgggo gpv"	3; ; 8 133 12: "	383"	Dtkkuj 'Eqmwo dlc'Eqwtv'qh'Cr r gen" O eGcej gtp'E0D0E0'Tqy ngu.'cpf 'T { cp" L0C"	Xcpeqwxgt'Tgi kwt { 'P q0' EC242982"
384"	Ncw'x03977'J qrf lpi u'Nvf 0'	Ci tgggo gpv'qh'R(U.'r r'ep'ej cpi gu.'o cvgt'kcrk'f "	3; ; 7 129 126"	384"	Dtkkuj 'Eqmwo dlc'Uwr tgo g'Eqwtv." Xcpeqwxgt. 'Dtkkuj 'Eqmwo dlc.'Y cttgp'L0'	Xcpeqwxgt'Tgi kwt { 'P q0' E; 56; 35'cpf 'E; 577: 80'

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385"	Ncw'x0Ute'vEqtr 0P q0NO U' 685"	d{/mcy u.'twgu.'tgcupcdngpguu"qh'hkpgu"	3; ; 812: 124"	385"	Dtkkuj 'Eqmwo dlc'Uwr tgo g'Eqwtv.'" Xcpeqwxgt.'Dtkkuj 'Eqmwo dlc.'"Vc{mqt' IO'	Xcpeqwxgt'Tgi kwt { 'P q0' C; 74; 57."
386"	Ngg'x0Ngurk'E gpt gu'Nvf 0'	Ci tggo gpv'qh'R(U."qeew cpe{ "gzvgpukqp.'"vgtto kpcvkap"	3; ; 4126 B5"	386"	Qpvctkq'Eqwtv'qh'Lwukleg'/'I gpgtcrn' F kxkukqp.'O qpvi qo gt { 'IO'	45'T0R0T0*4f +3: 7"
387"	Ngi cwn'x0Vqtecp"	Rwtej cug.'pgi rki gpv'o kucvgo gpv.'f co ci gu"	3; ; 5 B3 B9"	387"	Dtkkuj 'Eqmwo dlc'RtqxkpekcnEqwtv.'" Mco mqr u.'Dtkkuj 'Eqmwo dlc.'" I qtf qp'Rtqx0E v0LO'	Mco mqr u'Tgi kwt { 'P q046586."
388"	Nhcmi'Ecpfc c+'Nvf 0x0' 7; 824; "Qpvctkq'Nvf 0'	Ngcugu.'qr vkap'vq'r wtej cug"	3; ; 3 123 12; "	388"	Qpvctkq'Eqwtv'qh'Lwukleg'/'I gpgtcrn' F kxkukqp.'O kxqp.'"Qpvctkq.'Erctng'IO'	Cevkap'P q058561; ; "
642"	Nkwr'x0O gvtqr qrkcp" Vqtqpv'Eqpf qo kpkwo " Eqtr 0P q07; 2"	Ugevkqp'356*7+'qh'y g'Cev.'cmqy u'cp'qy pgt'vq'dtlpi 'cp" cr r rkecvkap'vq'gphqteg'eqo r rkepeg'y kj 'y g'Cev=j qy gxgt.'" y j g'tgo gf { 'ku'lp'y g'f kuetgvkap'qh'y g'eqwtv0Vj g'f kuetgvkap" y cu'pqv'gz gtekugf 'y j gtg'y g'eqtr qtcvkap'cevgf 'lp'i qqf 'hckj " cpf 'y kj 'y g'eqpugpv'qh'4 B5u'qh'y g'wpx/y pgtu'cndgk'y cv' y j g'eqpugpv'y cu'pqv'qdvkpgf 'lp'utkev'eqo r rkepeg'y kj 'y g' Cev0'	4228 12: 137" "	"	Qpvctkq'Uwr gkqt'Eqwtv'qh'Lwukleg.'" Lwukleg'O cttqeeq"	EcpNKK49; ; 7.'Eqwtv'Hkrg'P q0' 28/EX/532; 4: RF 4"
389"	Nqcf gt'gv'cr0x0Tqug'Rctnl' Y gmgung{ "kpxguo gpv'Nvf 0' gv'cr0'	Cevkap.'eqo o qp'grgo gpv.'emuu'cevkap'kpcr r tqr tkvq"	3; ; 2 129 138"	389"	Qpvctkq'J ki j 'Eqwtv'qh'Lwukleg.'I tc{.'" IO'	4; "Q0T0*4f +5: 3.'336'F 0N0T0*5f +327"
38: "	Nqr gl 'x0Uj gc"	Cevkap.'f ghev.'eqpegcm gpv.'erko 'f kuo kuqf "	3; ; ; 127 147"	38: "	Dtkkuj 'Eqmwo dlc'Uwr tgo g'Eqwtv.'" G0T0C0Gf y ctf u'LO'	Xcpeqwxgt'Tgi kwt { 'P q0E; 942; 3"
38: "	Nwecu'gv'cr0x0F wtpq'(' " Uj gc"	Guvqr r gr'egt v'k'ecvg.'y kf 'r gtuqpu.'pq'rkcdk'v{ "	3; ; 7 134 132"	38: "	Qpvctkq' *Rtqx0E v0'	5; "T0R0T039: "
392"	Nwe { m'x0Uj kr r 'Eqtr 0'	Kpvt gu'vec'w'v'v'kap.'emuu'cevkap'r tqr gt"	3; ; 3 12; 126"	392"	Qpvctkq'Eqwtv' *I gpgtcrn'F kxkukqp+.'" Uqo gtu'LO'	6"Q0T0*5f +8: 6"

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393"	O cef qpcrf 'x0Dwti g"	Cevkqp.'tguerg.'tgr cktu.'pq'o kut gr tguqpcvckqp"	3; ; 7 129 128"	393"	Dtkkuj 'Eqmwo dlc'Uwr tgo g'Eqwtv.'" Xcpeqwxgt.'Dtkkuj 'Eqmwo dlc.'" J qro gu'LO'	Xcpeqwxgt'Tgi kwt { 'P q0C; 7272: "
394"	O cefg qp'F gxgrqr o gpwu" *3; ; : +'Nvf 0x0Dgnctku"	Ci tggo gpv'qh'R(U."co dli wkv{ .'r ctqrq'gxkf gpeg"	3; ; 7 126 125"	394"	Qpvctkq'Eqwtv'qh'Lwvkeg'"I gpgtci' F kxkukqp+.'Gr uvkq'LO'	Eqwtv'Hkrq'P q0969891; 3S "
395"	O cenkp'gv'cn'x0Utcvc'Rrcp" 3596"	Tgur qpukdkrkv{ .o clpvqpcpeg'cpf 'tgr rægo gpvy kpf qy u"	3; ; : B4 B3"	395"	Dtkkuj 'Eqmwo dlc'Uwr tgo g' Eqwtv.Xlevqtkc.'Dtkkuj " Eqmwo dlc.J wej kuq'LO'	Xlevqtkc'Tgi kwt { 'P q0; : '237: "
483"	O cexcri'Gpvgr tkugu'Nvf 0'cpf Vqy puj kr "qh'P gr gcp'gv'cr0'	\ qpkpi .'f qgu'pqv'r gto k'eqpf qo kpkwo u"	3; 94 123 139"	483"	Qpvctkq.'"J ki j 'Eqwtv'qh'Lwvkeg_.'" Nceqwtckgtg.LO'	J3; 94_'4'Q0T067: /68: "
484"	O cpvqp'cpf 'l qtm' Eqpf qo kpkwo 'Eqtr 0P q0' 683"	F wv{ 'vq'o clpvckp'eqo o qp'grgo gpwu"	3; ; 6 134 133"	484"	Qpvctkq'"Eq0E'x0"	6; 'Q0T0*4f +: 5"
396"	O ctchkv'x0O gvtqr qrkcp" Vqtqpvq'Eqpf qo kpkwo " Eqtr 0P q0997"	Cevkqp.'tgo qxg'wpcwj qtkt gf 'cngtcvckpu"	3; ; 6 127 146"	396"	Qpvctkq'Eqwtv'qh'Lwvkeg'"I gpgtci' F kxkukqp.'I ttgt'LO'	Cevkqp'P qu0TG54491; 5'cpf " TG55971; 5"
397"	O ctchkv'x0O gvtqr qrkcp" Vqtqpvq'Eqpf qo kpkwo " Eqtr 0P q0997"	Dtgcej 'qh'Twgu.'pgy 'utwewtg"	3; ; 9 127 124"	397"	Qpvctkq'Eqwtv'qh'Cr r gen'"O qtf gp" C0E0Q0'Y gkrq'cpf 'I qwf i g'LO'	F qengv'P q0E3; 49; "
398"	O ct dgr'F gxgrqr o gpwu'Nvf 0' x0Rktcpk"	Uqrckqt'u'pgi kki gpeg.'r rcp'f qewo gpwu.'hcevej cpi g"	3; ; 6 123 146"	398"	Dtkkuj 'Eqmwo dlc'Uwr tgo g'Eqwtv.'" Xcpeqwxgt.'Dtkkuj 'Eqmwo dlc.'" P gy dw { 'LO'	Xcpeqwxgt'Tgi kwt { 'P q0' E; 47; 92."
399"	O cteq'Rqm'Rtqr gt vku'Nvf 0' x0Utcvc'Rrcp'NO U'354: "	Cevkqpu.'"rgcm{ 'tqqh}'	3; ; ; 12: 149"	399"	Dtkkuj 'Eqmwo dlc'Uwr tgo g'Eqwtv.'" F cxlgu'LO'"*k'Eq co dgtu+ "	Xcpeqwxgt'Tgi kwt { 'P q0C; ; 3593"
39: "	O ct kn' 'Rtqr gt v{ " O cpci go gpv'kpe0x0' Ecr r weekvk"	Nkdgn'pgy ungwgt"	3; ; 9 123 124"	39: "	Qpvctkq'Eqwtv'qh'Lwvkeg'"I gpgtci' F kxkukqp+.'"O ceMgp| kg'LO'	Eqwtv'Hkrq'P q0; 7/ES/86586"
39: "	O ct qwc'J qrf kpi u'Nvf 0'x0' ; 34786'Qpvctkq'kpe0'	Tgi kngt.'cr r rckcvkqp'vq'tgevkh{ "	3; ; 4 128 145"	39: "	Qpvctkq'J ki j 'Eqwtv'qh'Lwvkeg.'"Uggng" LO'	Cevkqp'P q0TG32221; 3"
3: 2"	O ctuj cni'x0Utcvc'Rrcp'P q0' P Y '47: 6"	Tgutkcvkqpu.'ci g'cpf 'tgpvki . 'xcrkf "	3; ; : 12: 123"	3: 2"	Dtkkuj 'Eqmwo dlc'Uwr tgo g'Eqwtv.'" Xcpeqwxgt.'Dtkkuj 'Eqmwo dlc.'" J gpf gtuq'LO'	Xcpeqwxgt'Tgi kwt { 'P q0C; 83543"

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3: 3"	O eF qpqwi j 'x0[qtnl' Eqpf qo kpkwo 'Eqtr 0P q063"	Xqvg'pwnkkgf . 'pqvleg"	3; ; 2 126 48"	3: 3"	Qpvctkq 'F kntlev'Eqwtv'/'[qtnl' Lwf kelcn'F kntlev.'I qvkd'F OELO'	6"TOROT0*4f +3; 4"
3: 4"	O eI qxgtp'x0Ecpfc" *O kpkvgt'qh'P cvkqpcn' Tgxgpwg'/'O O O O"	F gf wevqpu.'tgcupcdrg'gZR gevckqp'qh'r tqhku"	3; ; 2 129 B; "	3: 4"	Vcz'Eqwtv'qh'Ecpfc.'Ecnl ct{.' Cndgtc.'Tr 'VELO'	]3; ; 2_'VELOP q084; .'"Cevkqp" P qu0: ; /532*KV+.'; ; /533*KV+."
3: 5"	O eI tcvj 'x0DI 0' Uej kengf cpl 'J qo gu'kpe0'	Egtv'kecv'qh'r gpf kpi 'rkki cvkqp.'eqvtct { 'v'vgo 'kp" ci tggg' gpv'pqv'crr rncdrg.'ci tggg' gpv'vgo kpcv'f 'd { 'ugmgt"	4222 B2 B: "	3: 5"	Qpvctkq 'Uwr gkqt'Eqwtv'qh'Lwvleg'" Eco gtqp'LO"	Eqwtv'Hkrg'P q022/EX/3; 7449'"
627"	O eMkput { 'gv'crl'x' [qtnl' Eqpf qo kpkwo 'P q0694"	Vj g" ueqr g" qh" vj g" uwdlgeu" qh" vj g" o gf kcvkqp lctdkstcvkqp' r tqegf wt g" uj qwf " dg" i kxgp" c" i gpgtqwu" kpvtr tgcv'kqp" cpf " gzv'p'f " vq" dqj " f kuci tggg' gpw" cpf " enko u" hqt" f co ci gu0' F kuci tggg' gpw'y kj 'tgur gev'v'vj g' Cev'ku'gh'ctg'pqv'tgs wkt gf " vq'dg'u'wdo kv'f "vq" o gf kcvkqp lctdkstcvkqp0' Vj g" qr r tgu'kqp" tgo gf { " *uge0' 357+' r tqv'geu" tgcupcdrg' gZR gevckqpu'cpf 'uj qwf "pqv'dg" w'p'f w'f "t'g'v'k'v'g'f "dw'uj qwf " dg" i kxgp" c" dtqcf " cpf " h'g'z'k'd'g' k'p'v't'r t'g'c'v'k'p' " vj cv' y km' i kxg' gh'ge'v' vq" vj g" tgo gf { 0' K' cr r r'kgu" vq" r tq'ge'v' ci cl'p'v' dqj " eqpf we'v' y j lej "ku' v'p'rc'y h'w'lt' y kj qw'cwj qtkv' { 'cpf 'eqpf we'v' y j lej "ku' v'gej p'k'c'm' " cwj qtk' gf " cpf " qu'v'p'k'd'n' " rgi c'rl' Vj g' qp'nl " r t'g't's w'k'k'g' ku' vj cv' vj g' eqpf we'v' o wu' dg' qt " vj tgc'v'p' vq' dg" qr r t'g'u'k'x'g' qt " w'p'h'c'k'n' " r t'g'l'w'f k'el'c'n' vq" vj g' cr r r'nc'p'v' qt' w'p'h'c'k'n' 'f' k'ut'g'i c't'f 'v'j g' k'p'v'g't'g'u'u' q'h' vj g' cr r r'nc'p'v'0' C'uge'v'k'p' 357' cr r r'nc'v'k'p' p'g'g'f 'p'q'v' h'k'u'v' r tq'eg'g'f 'v'j tq'w'i j 'v'j g' o gf kcvkqp lctdkstcvkqp' r tq'eg'f w't g'0'	4225 B4 128"	"	Qpvctkq 'Uwr gkqt'Eqwtv'qh'Lwvleg.'" Lwt'k'epu' 'LO'	Eqwtv'Hkrg'P q023/EX/ 43; 8; 9EO "
3: 6"	O eNgcp'x0Nglpdrng'p' (" I qif j ct"	Wpk'qy pgt. 'pq'uv'cpf kpi 'vq'uwg'cw'f kqt"	3; ; 3 128 129"	3: 6"	Qpvctkq 'Eqwtv'qh'Lwvleg'/'I gpgt'cn' F kxkukqp.'Dtco r vq'p.'Qpvctkq.'F wpp'LO'	3: 'TOROT0*4f +4; 9"
427"	O VEE0P q075; 'gv'crl'x'0' Rtlkpg'Nf 0'gv'crl'0'	Y cttcpv'f 'enko . 'gzco kpcv'kqp'qh'w'pk'qy pgtu"	3; ; 6 B2 14; "	427"	Qpvctkq 'Uwr tgo g'Eqwtv'qh'Qpvctkq.'" O cvygt '*U'cp'f rgt+'"	6: 'QOT0*4f +535"
649"	O VEE'P q0773'x0O cpk' Cf co "	C't'gs wgu'qt' f qgu'p'qv'j' cxg'vq' i kxg'tgcup'p'y j { 'c't'gs wgu'v'ku' o cf g'w'p'f gt'uge'v'k'p'99'hqt' vj g'p'co gu'cpf 'cf f t'g'u'gu'qh'd'q'ct'f " o go dgtu0"	4228 B4 127"	"	Qpvctkq 'Uwr gkqt'Eqwtv'qh'Lwvleg.'" Lwvleg'Nqy "	Eqwtv'Hkrg'P qu<'27/EX/ 4; 9; 57RF 4(' '28/EX/ 52; 48: RF 3.'2006 CanLII 40674"
428"	O g'tqr q'rk'cp'Eqpf qo kpkwo " Eqtr 0P q08; : 'x0O VEE0' P q0784"	Wug'qh'tco r . 'uj c't'g'f 'h'c'el'k'k'g'u'ci tggg' gpv.'x'k'uk'qtu"	3; ; 4 123 B2"	428"	Qpvctkq 'Eqwtv'qh'Lwvleg'/'I gpgt'cn' F kxkukqp.'I kdu'p'LO'	Cevkqp'P q0482: 1; 2"

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429"	O gvtqr qrkscp "Eqpf qo lpkwo " Eqtr 0P q08; ; "cpf "3399" [qpi g "Utggv"Kpe0"tg+"	Rctnlpi . "hgculpi . "f gerctcvkqp. "tgutlevkqpu"	3; ; : 127 B7"	429"	Eqwtv'qh'Cr r genlht "Qpvctkq. "Tqdkpu." O eMlprc { "cpf "Qudqtpg"ILC0"	5; "Q0T0*5f +695"
3: 7"	O gvtqr qrkscp "Eqpf qo lpkwo " Eqtr 0P q0; 9; "x0Eco tqv" [qtmF gxgnr o gpv"Eqtr 0"	Gcugo gpv. "hgg" hqt "wug. "y kj j grf "htqo "tcpuht "qh'hgg"	3; ; 7 B2 B6"	3: 7"	Qpvctkq "Eqwtv'qh'Lwuleg" "I gpgtcn" F kxkukqp+ "Uj ctr g'LO"	Eqwtv'Hkrg'P q0TG/73; 31; 7"
3: 8"	O gvtqr qrkscp "Vqtqpvq" Eqpf qo lpkwo "Eqtr "P q0" : 7: "x0Vqtpcv"Eqpust wekqp" Kpe0"	F kuenquwtg. "cf lcegpv'wug. "f co ci g'v' r tqr gtv\ "	3; ; 6 B25 B2"	3: 8"	Qpvctkq "Eqwtv'qh'Lwuleg" / "I gpgtcn" F kxkukqp. "Vqtqpvq. "Qpvctkq. O cvny 'LO"	Cevkqp "P q0; 5/ES /64; 29"
3: 9"	O gvtqr qrkscp "Vqtqpvq" Eqpf qo lpkwo "Eqtr 0P q0" 3228 "x0J qm\ y qqf "Rrc\ c" F gxgnr o gpvu "Kpe0"	rkgp. "uqrleksqtu" equu. "wptgcuqpcdrg" equu"	3; ; 7 B3 B5"	3: 9"	Qpvctkq "Eqwtv'qh'Lwuleg" . "I gpgtcn" F kxkukqp+ "O qvqpu" Eqwtv. " Dtqengpuj ktg'LO"	Eqwtv'Hkrg'P q0; 7/EW; 2; 94"

3; : "	O gytqr qrkcp "Vqtqpvq" Eqpf qo lpkwo "Eqtr OP qO' 75; 'x0Ej cr vgtu'kpe0'	Tki j v'vq'uwg. 'tki j v'qh'cevkqp. 'eqtr qtcvkqp. 'r qy gtu"	3; ; ; 129 152"	3; : "	Qpvctkq "Uwr gtlqt 'Eqwt v'qh' Lxwkeg." I cpu'LO'	F qengv'P q0; ; /EX/38539: "
3; ; "	O gytqr qrkcp "Vqtqpvq" Eqpf qo lpkwo "Eqtr OP qO' 846'x0Tco f lcrncpf "Ucmo qp"	Cevkqp. "f gerctcvkqp. "ci g'tgutlevkqp. "xcrkf "	3; ; : 123 14; "	3; ; "	Qpvctkq. ""*F ku0E v0// "J wf uqp 'F OELO#"	6; "T0R0T03: 4"
3; 2"	O gytqr qrkcp "Vqtqpvq" Eqpf qo lpkwo "Eqtr OP qO' 924'x0Uqpuj kpg"	Twrgu. "ecpqr { "gtgevkqp. "eqo o qp"grgo gpw. 'r tqj kdkgf "	3; ; ; 128 14: "	3; 2"	Qpvctkq "F kwtlev'Eqwt v// "I qtni" Lwf lekcn'F kwtlev. "Vqtqpvq." Qpvctkq. J crg { 'F OELO'	: "T0R0T0*4f +3: 5"
3; 3"	O gytqr qrkcp "Vqtqpvq" Eqpf qo lpkwo "Eqtr OP qO' 928'x0S wkvq"	Cevkqp'd { "Eqtr 0'rgcug'vgt o lpcvkqp. "twrgu'dtgccej "	3; ; ; 3 123 137"	3; 3"	Qpvctkq "Eqwt v'qh'Cr r gcn'	F TU'; ; /23582"
3; 4"	O gytqr qrkcp "Vqtqpvq" Eqpf qo lpkwo "Eqtr OP qO' 998'x0I khqtf "	F gerctcvkqp. "qpn { 'i wkf g'f qi u. "xcrkf "	3; ; ; 132 133"	3; 4"	Qpvctkq. ""*F ku0E v0// "J gtqrf 'F OELO#"	8 "T0R0T0*4f +439"
3; 5"	O gytqr qrkcp "Vqtqpvq" Eqpf qo lpkwo "Eqtr OP qO' : 72'x0Qkmg"	Ngcuipi . "tcpu kgpv't gpvcn 'f gerctcvkqp. 'r tqj kdkkqp"	3; ; ; 6 134 14: "	3; 5"	Qpvctkq "Eqwt v'qh' Lxwkeg/ I gpgtci' F kxkukqp"	Eqwt v'Hkrq'P q062: 61; 6"
3; 6"	O gytqr qrkcp "Vqtqpvq" Eqpf qo lpkwo "Eqtr OP qO' : 7: "x0Uko o gni cctf "	S wqtwo . '72' "qh'vj qug' r tguqpv. "xcrkf "	3; ; ; 9 124 143"	3; 6"	Qpvctkq "Eqwt v'qh' Lxwkeg" *I gpgtci' F kxkukqp+ "O qvqpu'Eqwt v. Cf co u'LO'	Eqwt v'Hkrq'P q<"TG95; 51; 9."
3; 7"	O gytqr qrkcp "Vqtqpvq" Eqpf qo lpkwo "Eqtr OP qO' ; 6; "x0Kxkpg"	Rgw. "twrgu. "gphqtegcdrg "ci clpuv'vpcpv"	3; ; ; 4 129 14; "	3; 7"	Qpvctkq "Eqwt v'qh' Lxwkeg// "I gpgtci' F kxkukqp. Vqtqpvq. "Qpvctkq. Hgttkt 'LO'	46 "T0R0T0*4f +362"
628"	O gytqr qrkcp "Vqtqpvq" Eqpf qo lpkwo "Eqtr OP qO' 3323'g'v'cr0x0Qpvctkq 'P gy " J qo g'Y cttepv { "Rtqi tco "	Y j gtg'c'eqpf q0eqtr 0j cu'gzgewgf "c'tgrgcug'qh'y cttepv { " ercko u'ci clpuv'vj g'dwkrf gt 'k'ecppqv'vj gp'r wtuwg'vj qug'ercko u' ci clpuv'vj g'y cttepv { "eqtr qtcvkqp0"	4225 134 139"	"	Qpvctkq "Uwr gtlqt 'Eqwt v'qh' Lxwkeg" *F kxkukqpcn'Eqwt v. "F wppgv. "I gppkpi u" cpf "E0Eco r dgm'LO' "	Eqwt v'Hkrq'P q0978 124" "
645"	O VEE "3472'X'Vj g" O cuvgtetch' I tqwr "g0'c'v0'	Y j kg'r ctvku'o c { "pqv'dg'cv'cto au'rgpi vj . 'vj cv'lp'ksugm'ku'pqv' r tqqh'vj cv'c' "tcpucevkap'dgy ggp'vj go 'ku'pqv'o cf g'lp'i qqf " h'kj 'y kj lp'vj g'o gcplpi "qh'vj g'f g'hp'k'k'qp'qh' "f gerctcpw'lp" vj g'Cev'	4229 124 142"	"	Qpvctkq "Uwr gtlqt 'Eqwt v'qh' Lxwkeg." Rkw'LO'	Eqwt v'Hkrq'P q0'22/EX/37; 84"

"

629"	O gytqr qrkcp "Vqtqpvq" Eqpf qo lpkwo "Eqtr 0P q0" 35: 7"gv0Cn1x0Um1 r1pg" Gzgewkxg'Rtqr gt vku'kpe0'gy' cni'	Wprkng'yj g'r tqxlukqpu'qh'yj g'qrf "Eqpf qo lpkwo "Cev."Ugevkqp" 356*7-'qh'yj g'3; ; : "Cev'cmjy u'c'eqpf q0'eqtr 0'v'rkp'c'wpl' hqt 'kxul'ngi cni'cpf "pqp/rgi cni'equu'cdqxg'cpf "dg{ apf "equu" qtf gtgf "v'dg'r ckl "d{ "yj g'Eqwv.'cu'y gni'cu'yj g'r'wgt'equu." r tqxkf gf "yj qug'cf f k1qpcni'equu'y gtg'kpwttgf "kp"qdvcklpi " yj g'qtf gt "qh'yj g'Eqwv'v'j g'ug'y qwf "pqv'hqt "gzco r ng." kpenmf g'yj g'equu'qh'gphqtekpi "yj g'qtf gt +0Uvej "equu'kpenmf g" yj g'equu'qh'o c1pvcklpi "cp'qtf gt "qp'cr r gcn0Vj g'dwtf gp'qh" r tqxkpi "pqp/rgi cni'equu'y gtg'kpwttgf "kp"qdvcklpi "yj g'qtf gt" nku'y kj "yj g'Eqtr qtcvkpp0'	4227 126 14: "	"	Eqwt'v'qh'Cr r gcn'qh'Qpvctkq. 'F qj gtv{ ." Ncun1p'cpf "O celctn1pf "ILC0"	F qengv'E645: 4" "
62: "	O gytqr qrkcp "Vqtqpvq" Eqpf qo lpkwo "Eqtr 0' P q0'67"x0Uvg1p'gv'cni'	Vj g'r t1pek r ng'yj cv'yj g'eqwv'y kni'p1v'k1v'gthtg'lp'c'twrg'rckf " f qy p'd{ "c'eqpf qo lpkwo "dqctf "wprgu'k'ku'erget " wptgc1qpcdng'qt"eqpvct{ "v'yj g'uej go g'qh'yj g'Cev'j cu'pq" cr r n1c1v'kp'v'c'f gekukq'p'd{ "yj g'dqctf "v'tgs vkt g'qy pgtu'vq" cf j gtg'v'c'ur gekk1gf "o c1pvpcpeg'ucpf ctf "hqt "c'hcp'eqk1'kp" c'wpl'y j gtg'yj g'o c1pvpcpeg'ku'yj g'qy pgtu'tgur qpuk1k1v' ." cp'cngtcv'xg'ucpf ctf "ku'p1v'uj qy p'v'q'dg'k1g'h1ge'v'xg. "cpf "yj g" dqctf v'ucpf ctf "y cu'p1v'go dqf k1gf "kp'c'Twrg'qh'yj g" eqtr qtcvkpp0'	4228 128 143"	"	Eqwt'v'qh'Cr r gcn'qh'Qpvctkq. "Y gkrgt. " Drc1'cpf "Tqwrngc'ILC0"	F qengv'E65; 2: " "
3; 8"	O kf f nguz "Eqpf qo lpkwo " Eqtr 0P q0: 9"x0822"Vcndqv" Ut gg v'Nqpf qp'Nf 0."	F kuenquw'g. "o cvgtkcn'ej cpi g. "eqo o qp"rgo g'p'u"	3; ; : 124 128"	3; 8"	Eqwt'v'qh'Cr r gcn'hqt "Qpvctkq." Hkpr{ uqp. "Qudqtpg'cpf "Tqugpdgti " ILC0"	59"Q0T0*5f +44"
3; 9"	O ki tco "x0[qtmJ wo dgt" Nf 0'	Eqo o qp"rgo g'p'u'wug. "pqv'o cvgtkcn'ej cpi g"	3; ; 4 124 135"	3; 9"	Qpvctkq "Eqwt'v'qh'Lwukg"/"I gpgt'cn" F k1kukq. Vqtqpvq "Y ggm{ "Eqwv." O eTcg'10'	44"TOROT0*4f +324.Cevkqp'P q0C" 32; 1; 2"

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3; ; "	O km kx0[qtm' Eqpf qo kpkwo 'Eqtr 0P q082"	Kpuwtcepeg.'f gf wekdng'r gto kwgf "	3; ; 8128128"	3; ; "	Qpvctkq'Eqwtv'qh'Lwukleg"*I gpgtci' F kxlukqp+'Uo cni'Ercko u'Eqwtv." I qf Htg{ 'Rtqx010'	Eqwtv'Hkng'P q0G954: 1; 7"
3; ; "	O qqtg'x0Eqpf qo kpkwo " Eqtr 0Rrcp'9; 3279"	D{/Ncy u.'dtgcej . 'pqwleg.'tgevkkecvkqp"	3; ; 612948"	3; ; "	Crdgtv'RtqxlpekcniEqwtvEkxki' F kxlukqp/'Ecri ct{ .'Crdgtv.Ueqw' Rtqx0E v010'	F qengv'P q0R; 5; 2329445."
422"	O qtguv'x0Ecpfc c"*O kpkwgt " qhi'P cvkqpcniT gxgpwg"+	Kpeqo g'vzgu.'tgpwci'iquu.'tgcupcdng'gzi gevckqp'qhi'r tqhk'	3; ; 412443"	422"	Vcz'Eqwtv'qh'Ecpfc c.'O qpvtgen " S wgdge.'Tkr 'V0E10'	]3; ; 4_'V0E10'P q0352.'Cevkqp'P q0 ; 3/4368*KV+
423"	O qtkp'x0Qpvctkq'P gy " J qo g'Y cttecpv\ 'Rtqi tco "	J qo g'Y cttecpv\ .3"t0r gtkqf 'eqo o gpegu'qp'qeewr cpe{ "	3; ; 4124139"	423"	Qpvctkq'Eqwtv'qh'Lwukleg/'I gpgtci' F kxlukqp.'Tqugpdgti '10'	76'Q0C0E0569.Cevkqp'P q0: 671; 2"
424"	O qttku'gv'ci0x0Eco /P guv' F gxgrqr o gpw'Nf 0'	enqulpi .'gz vgpukqpu.'dwtf gp'qhi'r tqqh'	3; ; : 128135"	424"	Qpvctkq'J ki j 'Eqwtv'qh'Lwukleg." O ceHctrcpf '10'	86'Q0T0*4f +697"
425"	O qttkuqp'x0[cp"	Ci tggo gpv'qh'R(U.'o kutgr tgugpvcvkqp.'ercko 'f luo kungf ." hcew"	3; ; 612612: "	425"	Dtkkuj 'Eqnw dlc'RtqxlpekcniEqwtv." Xcpeqwxgt.'Dtkkuj 'Eqnw dlc." O ctvkuqp'Rtqx0E v010'	Xcpeqwxgt'Tgi kwt { <'P q0; 4/ 32432"
426"	O qw'x0Ngcugj qrf 'Utcvc " Rrcp'NO U43: 7'WDE " Rtqr gtvku'Kpe0'	Cevkqp.'eqputwevkqp'v'q'ceeqt f 'y kj 'utvcv'r rcp"	3; ; : 13346"	426"	Dtkkuj 'Eqnw dlc'Uwr tgo g'Eqwtv." tp{ gcv10*4f 'Ej co dgtu+	Xcpeqwxgt'Tgi kwt { "
42; ; "	O {rgu'Gpvt r tkugu'Nf 0x0' Cvru'Rclpvkpi '(" F geqtcvkpi 'Nf 0'	Ugevckqp'97"*qrf 'Cev.'eqputwevkqp'rkp.'r wtej cugtu" f gr quku"	3; ; 912443"	42; ; "	Dtkkuj 'Eqnw dlc'Uwr tgo g'Eqwtv." Xcpeqwxgt.'Dtkkuj 'Eqnw dlc.'Nqy t{ " 10'	Xcpeqwxgt'Tgi kwt { 'P q0' C; 85969."

432"	P cvj qq'x0F lco qpf "Tqdlpuqp" O cpci go gpvNf 0'	Ej cpi gu'vq'r rcp."o cvgtken'hwpf co gpvcn'dtgecej "	3; ; 9 128 127"	432"	Dtkkuj 'Eqmwo dlc'Rtqxkpekcn'Eqwv.'" *EkkklF kklukqp+.Dwtf gw/Rtqx0E0L0'	Xcpeqwxgt'Tgi kwt { 'P q0E: 963: 6"
433"	P cvkqpcn'Vtwu'Eq0x0'Ectrgvqp" Eqpf qo kpkwo 'Eqtr 0P q06: ; "	Eqo o qp'gzr gpugu."qdrki cvkqp"qh'o qtv ci gg"	3; ; 5 12; 136"	433"	Qpvctkq'Eqwv'qh'Lwukleg'/'I gpgtcn' F kklukqp.'Qwcy c.'Qpvctkq.'Ej cttqp'L0'	Cevkqp'P q0982331; 5"
434"	P cvkqpcn'Vtwu'Eq0x0I t g { " Eqpf qo kpkwo 'Eqtr 0P q058"	Xqvlpi . "dqctf 'eqpf wev'lpur gevqp"qh'tgeqtf u." Eqpwtvevqp'o qtv0hqtgerquwtg.qy pgt'gpvkwgf "v" xqvg"	3; ; 7 129 132"	434"	Qpvctkq'Eqwv'qh'Lwukleg'*I gpgtcn' F kklukqp+.I tgg'tL0'	Eqwv'Hkrg'TG/73831; 7"
62; "	P kgf go gkg'tx0l qtniEqpf qo kpkwo " Eqtr 0P Q072"	Y j krg'c'Eqtr qtcvqp'cevfg 'y kj qw'cwj qtk cvkqp" vq'f gp { "cp'qy pgt'ceegu'vq'egtckp'eqo o qp" grgo gpw'cu'c'ugrh/j gr o'tgo gf { "vq'qdvckp'vj g" qy pgt'v'c { o gpv'qh'hwpf u'f wg'vj g'Eqtr qtcvqp." uwej "eqpf wev'ku'pqv'wej 'cu'vq'dtkpi 'vj g" qr r tguakqp'tgo gf { 'lpvq'r r { 0'	4228 128 145"	"	Qpvctkq'Uwr gkqt'Eqwv'qh'Lwukleg." Uj cy . 'L0'	4228'EcpNKK' 439: : "QP 'UE" Eqwv'Hkrg'P q0'27/EX/ 4; 5; 24RF 5"
435"	P kci ctc'P qtj 'Eqpf qo kpkwo 'Eqtr 0' P q068'x0Ej cuukg"	D { rcy u . 'r gu"	3; ; ; 126 129"	435"	Qpvctkq'Eqwv'qh'Lwukleg'*I gpgtcn' F kklukqp+.U0Ecy ctkpgu." Qpvctkq.O ceF qpcrf 'L0'	Eqwv'Hkrg'P q062.66: 1; : "
436"	P kci ctc'P qtj 'Eqpf qo kpkwo 'Eqtr 0' P q09'x0I qqf j gy "	Cngtcvqp.'pq'r gto kuukqp.'pq'f co ci g.'pq'kuuwg"	3; ; 9 134 13: "	436"	Qpvctkq'Eqwv'qh'Lwukleg'*I gpgtcn' F kklukqp+.F cpf kg'L0'	Eqwv'Hkrg'P q05; .7; 71; 9"
63; "	P kci ctc'P qtj 'Eqpf qo kpkwo " Eqtr 0P q0347'x0Y cf f lpi vqp."	Y j gtg'cp'cr r rkecvqp'dtqwi j v'd { "c'eqpf qo kpkwo " qy pgt'y kj 'vj g'hpqy ngf i g'cpf'gxkf gpvct { " cuukwpeg'qh'c'eqpf qo kpkwo 'eqtr qtcvqp'vq'qawv' c'vgpcpv'v' r gv'y cu'f kuo kuugf . "c'uwdugs wgpv' cr r rkecvqp'hqt'kf gpvkecn'tgkgh'dtqwi j v'd { "vj g" eqtr qtcvqp'y cu'r tqr gtn' f kuo kuugf 'cu'cp'cdwug" qh'r tqegu0'	4229 125 138"	"	Qpvctkq'Eqwv'qh'Cr r gen'	F qengv'P q0'E66: 22"
437"	P kr kuukpi 'Eqpf qo kpkwo 'Eqtr 0P q0' 46'x0Hgttku"	F gemtcvqp.'r gu'r tqj kdkgf . 'eqwv'gzegr vqp"	3; ; 5 128 145"	437"	Qpvctkq'Eqwv'qh'Lwukleg'/'I gpgtcn' F kklukqp.'Vqtqpvq.'Qpvctkq.J qi i 'L0'	Cevkqp'P q03: 96/; 5"
439"	P qtj 'Xcpeqwxgt '*F kwtlev'x0Nwpg' g' Tgutlevkxg'Eqxgpcpv.'ci g'tgs wktgo gpw."	Tgutlevkxg'Eqxgpcpv.'ci g'tgs wktgo gpw." gphqtegcdrg.'pqp/f kuetgvkqpc { "	3; ; 9 123 12: "	439"	Dtkkuj 'Eqmwo dlc'Uwr tgo g'Eqwv." Xcpeqwxgt.'D0E0'Cmcp'L0'	Xcpeqwxgt'Tgi kwt { 'P q0C; 6342; "
43: "	Qegcp'RetniVqy gtu'Nf 0x0J cpupp"	Ci tggo gpv'qh'R(U.'wpgphqtegcdrg.'wptgi kwtgf " tgcn'guvcg'ci gpv'	3; ; 6 128 146"	43: "	Dtkkuj 'Eqmwo dlc'Uwr tgo g' Eqwv.Y ktkco uqp'L0'	Xcpeqwxgt'Tgi kwt { 'P q0E; 36; 2; "
446"	Qpvctkq'O qtv ci g'Eqtr 0x0' Uj qtgj co 'Cr ctwo gpw'Nf 0gv'cn0'	O qtv ci gu.'r qy gt'qh'ucrg.'f wkgu'qh'o qtv ci gg"	3; ; 6 125 144"	446"	Qpvctkq.J ki j 'Eqwv'qh'Lwukleg.'Gdgrg' L0"	6: 'Q0T0*4f +48; "
43; "	Qpvctkq'P gy 'J qo g'Y ctcpv' " Rtqi tco "'x07894; 4'Qpvctkq'Nf 0'	Cevkqp.'hko kecvqp'r gkqf 'eqo o gpego gpv'	3; ; 2 123 127"	43; "	Qpvctkq.'J ki j 'Eqwv'qh'Lwukleg.'Rj kr " L0'	93'Q0T0*4f +757.'Cevkqp'P q0' 4: 7471: : "cpf '537391: : "
442"	Qpvctkq'P gy 'J qo g'Y ctcpv' " Rtqi tco "'x00 ctej cpv'Dwkrf lpi ""	Kpxguo gpv'uej go g.'QPJ Y R'tgi kwtcvqp" tgs wktgf 'hqt'dwkrf gt"	3; ; ; 127 134"	442"	Qpvctkq'J ki j 'Eqwv'qh'Lwukleg'Uyggg" L0'	8: 'Q0T0*4f +799.'Cevkqp'P q0' TG; 6; 1; ; '('TG45881: : "

443"	Qpvctkq'P gy 'J qo g'Y cttecpv\ " Rtqi tco "'x00 gcf qy u'qh'Y j kg" Qcml'K'Nf "	Xy pgt')."hkuvr'gtuqp"ces wtkpi 'hqt"qeewr cpe{ "	3; ; : 12: 144"	443"	Qpvctkq'J ki j 'Eqwtv'qh'Lwuwleg'T000' J qmcpf 'L0'	87'Q0T0*4f +584"
444"	Qpvctkq'P gy 'J qo g'Y cttecpv\ " Rtqi tco "cpf "'Tgi kwtcvkqp'Cr r gcn' Vtkdwpn'gv'cn0*Tg+"	Cr r gcn'vtkdwpn'cf f lpi 'r ctvku' r qy gt'vq"	3; ; : 127136"	444"	Qpvctkq'Eqwtv'f gpgtcn' F kxkukqp+F kxkukqpcn'Eqwtv.'Ncpg." I tggg'cpf 'J qy f gp'L0'	5; 'Q0T0*5f +33; "
447"	Qpvctkq'P gy 'J qo g'Y cttecpv\ " Rtqi tco "x00 ctej cpv'Dwxf lpi " Eqtr 0"*Qp0E0C0+"	QP J Y R.'ucrg'vq'fko kgf 'r ctvpgtuj kr .'tgi kwtcvkqp" pqv'tgs wktgf "	3; ; 3 124133"	447"	Qpvctkq'Eqwtv'qh'Cr r gcn'O eMkprc{ ." I tkhky u'cpf 'Ectj { 'L0C0'	3'Q0T0*5f +735.'37'T0R0T0*4f +335"
448"	Qto qpf 'x0Tlej o qpf 'Us wctg" F gxgnr o gpv'Eqtr 0'	Kpvtguy' r j cpqo 'o qt0'uj co .'pqv' r c{ cdng"	3; ; 2 128129"	448"	Qpvctkq'Uwr tgo g'Eqwtv/'J ki j 'Eqwtv' qh'Lwuwleg.'O cuvg'Dtqy pg"	F qe0P qu065691; ; 'cpf '67: 5V"
632"	The Owners, Condominium Plan No. 9422336 v. The Queen"	Cp'Crtdgtw'eqo o gtekn'Eqpf qo kpkwo " eqtr qtcvkap'cew'cu'ci gpw'hqt'vj g'qy pgtu'cpf 'pq" I UV'ku'eqmgevdng'qp'eqo o qp'gZR gpugu'r ckl 'd{ " vj g'qy pgtu'vq'vj g'eqtr qtcvkap0'	4226128128"	"	Vcz 'Eqwtv'qh'Ecpfc c.'O ceCtj wt 'L0'	Citation: 2004TCC406 "
449"	Rci g'x0Nchgej g"	Xqvlpi .'s wqtwo .'qy pgtu'r tguqpv"	3; ; 9 123128"	449"	Qpvctkq'Eqwtv'qh'Lwuwleg'f gpgtcn' F kxkukqp+'Qwcy c.'Qpvctkq." O eMkppqp'L0'	Eqwtv'Hkr'P q0325: 581; 8."
44: "	Rctngw'x0Utcw'Rrcp'NO U'4928"	Rctnlpi "qp'eqo o qp'grgo gpw.'r tqj kdkgf ." gphqtego gpv'	4222132147"	44: "	Dtkkuj 'Eqmwo dlc'Uwr tgo g'Eqwtv' P gy 'Y guvo kpuvgt.'Dt kkuj 'Eqmwo dlc" Rkhgrf 'L0'	P gy 'Y guvo kpuvgt'T gi kwt { 'P q0' U272692"
44: "	Rcuo qtg'I cvgu'F gxgnr o gpv'x0' Ej wpi "	Ci tggo gpv'qh'R'("U.'o kutgr tguqpvkqp"	3; ; 8 127152"	44: "	Qpvctkq'Eqwtv'qh'Lwuwleg'f gpgtcn' F kxkukqp+'QDtkgp'L"	Hkr'792761; 2\$S \$*D+"
452"	Rggn'Eqpf qo kpkwo 'Eqtr 0P q0339'x0' Rggn'Eqpf qo kpkwo 'Eqtr 'P q0: 4"	O cpci go gpv'ci tggo gpv'pq'tki j v'q'v'gto kpcvg"	3; ; 3 13312: "	452"	Qpvctkq'Eqwtv'qh'Lwuwleg/'I gpgtcn' F kxkukqp.'"Mry cniL0'	Cevkqp'P q05496; 1: : ."
453"	Rggn'Eqpf qo kpkwo 'Eqtr 0P q038'x0' Xcwi j cp"	Kpuwtcpeg.'vgpcpv'pqv'eqxgtgf "	3; ; 8 125128"	453"	Qpvctkq'Eqwtv'qh'Lwuwleg'f gpgtcn' F kxkukqp+'.'QEqppqt 'L0'	'Eqwtv'Hkr'P q0E3; ; 721; 4"
485"	Rggn'Eqpf qo kpkwo 'Eqtr 0P q03; ; " cpf 'Qpvctkq'P gy 'J qo g'Y cttecpvku" Rrcp'gv'cn0'	Y cttecpv\ .'f gplcn'qh'eqxgtci g.'tki j v'q'j gctlpi "	3; ; ; 12914: "	485"	J ki j 'Eqwtv'qh'Lwuwleg.'F kxkukqpcn' Eqwtv.'Dqrcpf .'Ej cf y keni'cpf 'Kicce" L0'	8; 'Q0T0*4f +65: "
454"	Rggn'Eqpf qo kpkwo 'Eqtr 0P q03; ; 'x0' Ucptqug'Eqpust wevkap '*F kzkg+'Nf 0gv' cn0'	Eqwtv'qtf gtgf "ucrg'qh'wpku'qy pgf 'd{ 'F gemtcpy'	3; ; 4 12; 145"	454"	Eqwtv'qh'Cr r gcn'hqt'Qpvctkq.'Tqdkpu." O eMkprc{ 'cpf 'Ncdtquug'L0C0'	32'Q0T0*5f +862"

455"	RggnEqpf qo kpkwo 'Eqtr O' P q055: 'x0I qwpi "	Twgu."pq'r gu'qxgt'47'rdi.'xcrkf "	3; ; 8 125 14: "	455"	Qpvctkq'Eqwtv'qh'Lxwkeg'"I gpgtci' F kxkukqp+.'Y gddgt'LO'	Eqwtv'Hkrg'P q0C62221; 7"
456"	RggnEqpf qo kpkwo 'Eqtr O' P q0639'x0Vgf rg{ 'J qo gu' Nvf O'	Uwr gtlpvgpf gpv'uwxg.'ci tgggo gpv'q'ugm'pqv'gphqtegcdng"	3; ; 5 128 146"	456"	Qpvctkq'Eqwtv'qh'Lxwkeg'"I gpgtci' F kxkukqp+.'D0Y tki j v'LO'	Cevkqp'P q0TG44; 41; 5"
457"	RggnEqpf qo kpkwo 'Eqtr O' P q066: 'x0J qi i "	Twgu."pq'r gu.'gphqtegcdng'f gur kg'f grc { "	3; ; 9 123 152"	457"	Qpvctkq'Eqwtv'qh'Lxwkeg'"I gpgtci' F kxkukqp+.'Ectpy cvj 'LO'	Eqwtv'Hkrg'P q0C68471; 8"
458"	RggnEqpf qo kpkwo 'Eqtr O' P q0727'x0Eco /Xcmg{ " J qo gu'Nvf O'	Rj cugu."tgetgcvkqp'egpvtg'rcpf.'pq'r tqo kug.'pq'hk'wekct { " tgrcvkpuj kr "	4223 125 128"	458"	Qpvctkq'Eqwtv'qh'Cr r gen'Hkrc { uqp." Ncdtquug'cpf 'Y gkrgt'LOC "	"75'Q0T0*5f +3.'F qengv'P q0' E55456"
459"	RggnEqpf qo kpkwo 'Eqtr O' P q0727'x0Eco /Xcmg{ " J qo gu'Nvf O'	Rj cugu.'eqo o qp'kpvgpvkqp.'tgetgcvkqp'egpvtg'rcpf." kplwpevkqp"	3; ; ; 132 14; "	459"	Qpvctkq'Uwr gtlqt'Eqwtv'qh'Lxwkeg.'" Gr uvgkp'LO'	Eqwtv'Hkrg'P q0'; /EX/388775"
45: "	RggnEqpf qo kpkwo 'Eqtr O' P q0738'x0Y krikco u'	Ugevkkp'6; *qrf 'Cev.'Eqwtv'f kt gevkkpu.'f kuetgvkqpc { "	3; ; ; 125 134"	45: "	Qpvctkq'Eqwtv'qh'Lxwkeg'"I gpgtci' F kxkukqp+.'O qmq { 'LO'	Eqwtv'Hkrg'P q0'; /EX/3866; 6"
486"	RggnEqpf qo kpkwo 'Eqtr O' P q095'cpf "Tqi gtu'gv'crl0"	gzenwukxg'i ctf gp'r rqu.'cmgtcvkqp.'pqv'cr r rkecdng'r rcpw"	3; 9: 132 134"	486"	Qpvctkq.'"*Eq0E v0"	*3; 9: +43"Q0T0*4f +743"
487"	RggnEqpf qo kpkwo 'Eqtr O' P q09: 'cpf "J ctvj gp'gv'crl0"	F gemtcvkqp.'pq'cpko cm.'xcrkf "t gutlevkqp"	3; 9: 125 138"	487"	Qpvctkq.'"*Eq0E v0"	*3; 9: +: 9'F 0N0T0*5f +489.'42" Q0T0*4f +445"
488"	RggnEqpf qo kpkwo " Eqtr qtcvkqp "P q033'cpf " Ectqg'gv'crl0"	F gemtcvkqp.'ecppqv'r tqj kdk'tgpvki "	3; 96 128 136"	488"	Qpvctkq'J ki j 'Eqwtv'qh'Lxwkeg.'" I cnki cp.'LO'	*3; 96+;"6"Q0T0*4f +765"
489"	RggnEqpf qo kpkwo " Eqtr qtcvkqp "P q0639'cpf " Vgf rg{ 'J qo gu'Nvf 0gv'crl0"	Uwr gtlpvgpf gpv'uwxg.'eqo o qp'gxr gpugu.'| gtq"	3; ; 9 12; 126"	489"	Eqwtv'qh'Cr r gen'ht'Qpvctkq.Tqdkpu." Cdgmc"cpf 'Tqugpdgti 'LOCO'	57'Q0T0*5f +479"
633"	RggnEqpf qo kpkwo " Eqtr qtcvkqp "P q088: "	Cu'etgcwrgu'qh'ucwwg'eqpf qo kpkwo "eqtr qtcvkqpu'o wuv' cev'y kj kp'yj gk'cwj qtkv'0C'eqpvtcev'gpvtgf 'kpq'y kj qww' ucwwqt { "cwj qtkv' "qt'y kj qww'cf j gtgpeg'vq'yj g'tgs wukxg" r tqvqeqni'ku'xqkf 0'Vj g'qr r tguvkqp'tgo gf { "J cu'pq" cr r rkecdng'ci clpuv'c'yj kf'r ctv' *cto au'rgpi yj 'rgpf gt+" y j q'r r { u'pq'r ctv'kp'yj g'eqpvtqr'cpf "qr gtcvkqp'qh'yj g" eqtr qtcvkqp0'	4228 124 12; "	"	Qpvctkq'Uwr gtlqt'Eqwtv'qh'Lxwkeg.'" Rgt gm'LO'	4228'EcpNRK5883*"QP 'UE0:" Eqwtv'Hkrg'P q0'26/EX/48; 556"

"

45; "	Rj { nku'Kitcgn'gv'crlx0' Vqy pui cvg'Kgv'crl'	O kut gr tgugpvcvkqp.'hmqc'tctgc.'tgo gf kgu"	3; ; 6134152"	45; "	Qpvctkq'Eqwtv'qhl'Lvuvleg'/'I gpgtcrl' F kxlukqp.J km'LO'	Eqwtv'Hkrg'; 4/ES /'35; 76"
48; "	Rlpgvtgg'F gxgnr o gpv'Eq0' Nvf 0cpl 'O lpkvgt'qh' J qwukpi "	Eqpf qo kpkwo 'crr tqxcn'ngxkgu'pqv'gphqtegedng"	3; 98122122"	48; "	Qpvctkq '*F kx0E v0'	*3; 98+36'Q0T0*4f +8: 9"
462"	Rlpgy qqf 'Tgeqtf kpi " Uwf kqu'Nvf 0x0Ek{ "Vqy gt"	Cevkqp.'xkdtcvkqp.'pwwucpeg."&3070 'f co ci gu"	3; ; 8133144"	462"	Dtkkuj 'Eqmwo dlc'Uwr tgo g'Eqwtv." Xcpeqwxgt.'Dtkkuj 'Eqmwo dlc.'Vc{ rqt' LO'	Xcpeqwxgt'Tgi kwt { 'P qu0' E; 4777: 1C; 55; 4: "

"

463"	T0x0Uqwj f qy p"Dwkrf gtu" Nvf 0"	Eqpxlevkqp."hcnug'cf xgt vkulpi . 'f wg'f krki gpeg'tgs wktgf "	3; ; 3 122 122"	463"	Qpvctkq."*Eq0E x0"	*3; ; 3+79'E0R0T0*4f +78"
464"	T000 kmgt ("Cuuqekvgu" *3; ; 8+Nvf 0x0Uxtcv'Rrcp" P q0M799"	Rtqr gtvf .'ucng.'wplk'chgevgf .'wptgcuqpcdrg"	3; ; 20: 123"	464"	Dtkkuj 'Eqnw dlc'Uwr tgo g'Eqwtv.'" Nco rgtuqpl0'	Mgrny pc'Tgi kwt { 'P q092; 8"
465"	Tcuuqu'x0I tg{ uvpgg'Y cmi' Nvf 0'	F luenquwtg.'cf wv/dwkrf lpi .'Ci tggo gpv'qh'R(U"	3; ; 3 133 149"	465"	Qpvctkq'Eqwtv'qh'Lwvleg'/'I gpgtcn' F kxkukqp.'Vqtqpvq.'Qpvctkq.'D0' Y tki j vL0'	Cevkqp'P q0TG'37631; 3."
466"	Tc{o qpf 'x0Rggni' Eqpf qo lpkwo 'Eqtr 0P q049"	Nkqp'hqt'y qtnif qpg'hqt'qy pgt'd{ 'eqtr 0.'r tqr gt.'pqv' xcecvgf "qp'cr r nekcvkqp"d{ 'qy pgt"	4222 128 152"	466"	Qpvctkq'Uwr gkqt'Eqwtv'qh'Lwvleg'" Y glp'L0"	Eqwtv'Hkrg'P q022/EX/3; 3498'"
467"	TD['J qrf lpi u'Nvf 0x0' Uxtcv'Rrcp'P q0NO U66"	Rgto kuukqp'v'c'ngt.'Eqpugpv'wptgcuqpcdn{ 'y kj j grf "	3; ; 5 125 12: "	467"	Dtkkuj 'Eqnw dlc'Uwr tgo g' Eqwtv.Uectv j 'L0'	Xcpeqwxgt'Tgi kwt { 'P q0C; 456; 6"
492"	Tglpgtu'gv'cr0'cpf 'O gtegt'gv' cr0'	Uwhlekpe{ 'qh'xqvg.'xqvg't'r tguqpv'	3; ; : 134 145"	492"	F kwtlev'Eqwtv'qh'Qpvctkq.'Y guv' F 0E00'	88'Q0T0*4f +863.'Cevkqp'P q0' ; 3961: : "
49; "	Tqdkuqpp'x0QP J Y R'gv'cn'	Ko r tqr gt'ecm'qp'hwgt'qh'etgf kv.'QP J Y R'rkcdkks{ 'vq' i wctcpwt"	3; ; 6 127 125"	49; "	Qpvctkq'Eqwtv*'I gpgtcn'F kxkukqp+." O ceRj gtuqpl0'	3: 'Q0T0*5f +48; . 'Cevkqp'P q0' 54261; 4'cpf '54261; 4D"
4: 2"	Tqej g/J g{y qqf 'x0Uxtcv" Rrcp'P q0; 75"	Ctdkctevkqp.'cf f lpi 'f tcr gu.'r tqj kdkkqp'wphck "	3; ; 2 128 143"	4: 2"	Dtkkuj 'Eqnw dlc'Uwr tgo g'Eqwtv.'" O vtr j { 'N00UE0'	Xcpeqwxgt'Tgi kwt { 'P q0; ; '3: 3; ; "
4: 3"	Tqeny j kg'J qrf lpi u'Nvf 0x0' Q0J gc"	Rtqegf wtg.'r tngxkwun{ 'qeewr kgf 'dwkrf lpi u0'	3; ; 7 123 138"	4: 3"	Dtkkuj 'Eqnw dlc'Uwr tgo g'Eqwtv.'"*4p' Ej co dgtu+Gf y ctf u'L0'	Xcpeqwxgt'Tgi kwt { 'P q0C; 65745"
4: 4"	Tqi gtu'Eqxg'Nvf 0x0Umqv'	F luenquwtg.'o cvgtkcn'ej cpi g.'tki j v'vq'tguelpf 'lpf gr gpf gpv' qh'Cev'	3; ; 3 12; 13: "	4: 4"	Qpvctkq'Eqwtv'qh'Lwvleg'/'I gpgtcn' F kxkukqp.'"Ncpi f qp'L0'	Cevkqp'P q0395: 1; 3"
4: 5"	Tqj qo cp'x0[qtni' Eqpf qo lpkwo 'Eqtr 0P q0' 363"	Eqtr qtcvg'tgeqtf u.'qdri cvkqp'vq'r tqxkf g'ceeguu"	4222 128 13; "	4: 5"	Qpvctkq'Uwr gkqt'Eqwtv'qh'Lwvleg'" Ej cr plnl0"	Eqwtv'Hkrg'P q022/EX/3; ; : 44'"
4: 6"	Tq{ cn'Dcpni'qh'Ecpcf c'x0' J qrf gp"	O qtv ci g'cevkqp.'pq'r tkqtkv{ 'hqt'o qtv ci ggu'equu"	3; ; 8 133 149"	4: 6"	Dtkkuj 'Eqnw dlc'Uwr tgo g' Eqwtv.Xcpeqwxgt.'Dcwo cp'L0'"*4p' Ej co dgtu+ "	Tgi kwt { 'P qu0J ; 72; ; 5.'J 8285; . ' J ; 822: 4'cpf 'J ; 72988"

"

493"	Tq{cn'kpuwtcpeg'Ego rcp{" Okf frugz'EE'Pq0395"	Vgto kpcvkqp."eqwtv'rctvskqp"qtf gt"	3; ; : 12345"	493"	Eqwtv'qh'Cr r gcn'ht" Qpvtkq.O eMkprc{.'Ectyj {"cpf " Ncunlp'LI00'	59'Q0T0*5f +35; "
4: 7"	Tuu/Ecf "O cpci go gpv'Nf 0' x0Dc{xkgy "622"kp'wutkcn' Fgxgr o gpv'kpe0'	Ci tggo gpv'qh'R(U."fgerctvskqp"qh'vgto kpcvkqp"	3; ; 4126125"	4: 7"	Qpvtkq'Eqwtv'qh'Lwvleg"/'I gpgtci' Fkxkukqp.'F wppgv'LO'	72'E0N0T0522""46'T0R0T0*4f +8"
494"	T{cp'cpf 'Eco /Xcng{" Fgxgr o gpv'Nf 0'	Ci tggo gpv'qh'R(U."pqvleg'v'vgto kpcv'kpg'hgevkxg"	3; ; 512914; "	494"	Qpvtkq'Eqwtv'f gpgtci' Fkxkukqp+.Uqo gtu'LO'	37'Q0T0*5f +46"

"

4: 8"	Ucptqug'Eqpvt wevkqp *F kzkq-Nmf 0' x0F qp/Eqo 'Xgpwtg'Ecr kcrn' Eqtr 0'	Xqvkpi 'tki j w.'r tqz { 'v'f gerctcpv.'wpgphqtegcdrg"	3; ; 5 B4 12: "	4: 8"	Qpvctkq'Eqwv'Eqqwtv.'Lwf lekcn'F kputlev'qh' Rgggn'Y guv'Eq0E v0L0'	66"Q0T0*4f +43: "
4: 9"	Uecprip'x0Ecuwgr qkp' F gxgr o gpv'Eqtr 0'	Ci tggo gpv'qh'R(U.'kpvgr tgvvkqp.'eqpvc' r tghgt gpf wo "	3; ; 3 B3 B6"	4: 9"	Qpvctkq'Eqwtv'qh'Lwukleg'/'I gpgtcn'F kxkukqp.'" 'Cwukp'LO'	Cevkqp'P q0TG3634I; 3"
4: : "	Uecprip'x0Ecuwgr qkp' F gxgr o gpv'Eqtr qtcvkqp'gv'cr0'	Ci tggo gpv'qh'R(U.'eqpvt wevkqp'f grc { u."gz vgpukqp" xcrlf "	3; ; 4 B4 B9"	4: : "	Eqwtv'qh'Cr r gcn'ht'Qpvctkq..O qtf gp" C0E0Q0'I qqf o cp'cpf "Tqdkpu'ILC0'	33"Q0T0*5f +966.'Cevkqp" P q0E; 229"
4: ; "	Uectqpk'x0Tqugr qn'J qrf kpi u'Nmf 0'	F kuemquwtg'ucvgo gpv.'ugevkqpu'73'cpf '74'qh'qrf 'Cev'	3; ; 7 B2 48"	4: ; "	Qpvctkq'Eqwtv'qh'Lwukleg'*I gpgtcn'F kxkukqp+." J qkrgw'LO'	P q0; 5/ES /68483"
495"	Ueqh'kgf "cpf 'Utcvc'Eqtr qtcvkqp" P 0Y 095"gv'cr0"	Eqpf qo kpkwo "'eqtr .f w'f 'qh'fcktpguu'v'w'p'k'qy pgt"	3; ; 5 B2 122"	495"	Dtkkuj 'Eqmwo dlc.'"*E0C0"	*3; ; 5+367'F N0T0*5f +796"
4: 2"	Uj cvnqy un' 'x0Mkpi 'Tcg' Kpxguo gpw'kpe0'	Vgo r qtct { 'rk'kpi 'qh'gz gewkqp"	3; ; 9 B3 B6"	4: 2"	Qpvctkq'Eqwtv'qh'Lwukleg'*I gpgtcn'F kxkukqp+." D0Y tki j vLO'	Eqwtv'Hkrg'P q0; 9/EX/ 34: 32: "
4: 3"	Uj gttkw'x08; 2846'Qpvctkq'kpe0' *e0q0l0Mkpi u'Vgttceg" Eqpf qo kpkwo u"	Tgr t gugpvvkqpu.'d { 'f gerctcpv.'pqv'o kurgcf kpi "	4222 B29 43"	4: 3"	Qpvctkq'Uwr gkqt'Eqwtv'qh'Lwukleg'Ecxcct| cp" LO"	Eqwtv'Hkrg'P q03: 89I; 9"
4: 4"	Uj qkj gv'x0332'Dmqt'Y guv' F gxgr o gpv'Eqtr "	Ci tggo gpv'qh'R(U.'pqpeqo r rkepeg.'pwri'cpf "xqk' "	3; ; 6 B2 49"	4: 4"	Qpvctkq.'"*J 0E00"	54'T0R0T039; "
4: 5"	Uko cple'x0Tq { cn'U0Mksw'Ecukpq" Nmf 0'	tguqtv'f gxgr o gpv.'eq/qy pgtu.'rkki cvkqp"	3; ; 8 B2 B; ; "	4: 5"	Qpvctkq'Eqwtv'qh'Lwukleg'*I gpgtcn'F kxkukqp+." Vqtqpvq.'Qpvctkq.'I qvkd'LO'	Eqwtv'Hkrg'P q0; 2/ES / 272642"
4: 6"	Uko eqg'Eqpf qo kpkwo 'Eqtr 0P q0' 89'x00 eF gto qw'	Cevkqp.'qtf gt'v'q'tgo qxg'pgy 'y kpf qy "	3; ; : B2 64; ; "	4: 6"	Qpvctkq'Eqwtv'qh'Lwukleg'*I gpgtcn'F kxkukqp+." Ur kgi gn'LO'	Eqwtv'Hkrg'P q0; 9/EX/ 354998"
634"	Uko eqg'Eqpf qo kpkwo 'Eqtr 0P q0' 9: 'x0Uko eqg'Eqpf qo kpkwo 'Eqtr 0' P q072.'74.'75"gv'crn'	Vj g'r tqxkukqpu'qh'ugevkqp'7; "h'qkpv'd { /rcy u-'ctg" qr vkpcn'pqv'o cpf cvqt { 0Uj ctgf 'hcekrlk'gu" ci tggo gpw'y j lej 'f grgi cvg'f c { 'v'f c { 'qr gtcvkqpcn' cpf "o cpci go gpv'f gekukqpu'v'c'uj ctgf 'hcekrlk'f " eqo o kvgg'ctg'xcrlf "cnj qwi j "uwej 'f gekukqpu'ctg'pqv' tgs vkt gf "v'dg'tc'v'k'kgf "d { 'vj g'tgur gev'xg'dqctf u0'	4228 B24 B8"	"	Qpvctkq'Uwr gkqt'Eqwtv'qh'Lwukleg.'Dgmddc' LO'	4228'EcpNKK6732*"QP " UE0: '27/EX/524965"RF 4.' 27/EX/4: : 8; ; "RF 5" " "
4: 7"	Ukpi gt'x0Qpvctkq'P gy 'J qo g' Y cttepv' 'Rtqi tco "	QP J Y R.'kpvgt guv.'r c { cdrg'ht qo 'f cvg'qh'tghwucn'qh' erclo 'hqt'kpvgt guv.'kpvgt guv'ercl' 'k'p'cf f kxkqp'v'ecr "	4222 B4 B6"	4: 7"	Qpvctkq'Uwr gkqt'Eqwtv'qh'Lwukleg'F kxkukqpcn' Eqwtv'Vj gp.'Eqq'cpf 'Drc'k'LO"	F kxkukqpcn'Eqwtv'Hkrg'P q0' 594I; : ; "
4: 8"	Ukpi gt'x0Qpvctkq'P gy 'J qo g' Y cttepv' 'Rtqi tco "	QP J Y R.'eqxgtu'dwukp guu'ruugu.'f qgu'pqv'kpuwt'g' vcz'ucxkpi u"	4222 B2 42"	4: 8"	Uwr gkqt'Eqwtv'qh'Lwukleg'F kxkukqpcn'Eqwtv' Drc'k'T0U0'Vj gp'cpf 'Eqq'LO"	Eqwtv'Hkrg'P q0594I; : ; "

4; 9"	Ukpi gt'x0Tggo ctniUgtrkpi "KNko kqf"	Ci tggo gpv'qh'R(U.'hcnwtg'v'eqpxg{ 'vkg'qp'f'cvg'ugv'lp'" ci tggo gpv.'r wtej cugtu'gpv'kqf'v'q'tgwt'p'qh'f'gr'quku"	3; ; 4 127 144"	4; 9"	Qpvctkq'Eqwtv'qh'Lwvkeg'/'I' gpgtci' F kxkukqp.'Y j kg'LO'	Cevkqp'P q09: 291; 4"
4; ; "	Unf tkug'F gxgnr o gpvu' Nko kqf 'x0Cdtcj co u"	QP J Y R'tgi p.'pqv'tgs wktgf 'v'gphqteg'ci tggo gpv'	3; ; 8 129 138"	4; ; "	Qpvctkq'Eqwtv'g' gpgtci'F kxkukqp+' F cxkf uqp'LO"	4; 'Q0T0*5f +673"
4; ; "	Unf tkug'F gxgnr o gpvu'Nf 0' x0Cf tqxcpf k'	Cevkqp.'Rwtej cugtu'hcwnwtg'v'eqnug.'f co ci gu"	3; ; 9 124 128"	4; ; "	Qpvctkq'Eqwtv'qh'Lwvkeg'g' gpgtci' F kxkukqp+'J cy nkpu'LO'	Eqwtv'Hkrg'P q0; 5/ES /62563"
522"	Uo kj 'x0Ecpfc c'x0 kplvgt' qh'P cvkqpcnT gxpwg'/' O Q 0T0"	tgetgcvkqp'r tqr gtv{ . 'cz.'r'gtuqpcnldwukpguu'wug"	3; ; 3 126 129"	522"	Vcz'Eqwtv'qh'Ecpfc c.Ej wo cp" tki j ukvkeg'CELOVEO'	; 3'F VE"; 2; "
523"	Uo kj 'x0I OE0*1 qif kg+' Tgcf "	Eqo o qp'Gzr gpugu.'tgcncqcvkqp.'pqv'kg"	3; ; 5 127 132"	523"	Dtkkuj 'Eqnw dlc'Uwr tgo g'Eqwtv." Ej kiky cem'Dtkkuj 'Eqnw dlc.' F cxkgu'LO'	Ej kiky cemTgi knt { 'P q0U' 4226."
524"	Uqo gtugv'Tkf i g" F gxgnr o gpv'Eqtr 0x0' O kf f ruzg'Eqpf qo kpkwo " Eqtr 0P q0356"	Ur gekri'cuuguo gpvu.'kpxcrkf kv{ . 'pqv'lp'dwf i gv'	3; ; 3 134 132"	524"	Qpvctkq'Eqwtv'qh'Lwvkeg'/'I' gpgtci' F kxkukqp.'Y kpf uqt.'Qpvctkq." Dtqengpuj kg'LO'	43'TOROT0*4f +468.'; 9'F ONOT0' *6j +92: "
525"	Ur ctdtqnmO epci go gpv' kpe0x0Rcekhe'Rceeg" F gxgnr o gpv'Eqtr 0'	P q'tgvekukqp'chgt'r'gthqto cpeg'qh'eqv'cev'	3; ; 3 133 148"	525"	Dtkkuj 'Eqnw dlc'Uwr tgo g'Eqwtv." J qi ctvj 'LO'	6; 'EONOT036: .""j3; ; 3'DOELO' P q05875"
526"	Uchhqt'f'x0Htqpvqpc" Eqpf qo kpkwo 'Eqtr 0P q033"	Uwduv'kcn'cf f kxkqp.'ur gekri'cuuguo gpv'	3; ; 6 12; 143"	526"	Qpvctkq'Eqwtv'qh'Lwvkeg'/'I' gpgtci' F kxkukqp.'Qwcy c.'Qpvctkq." O eY kricko 'LO'	Cevkqp'P q092221; 5"
527"	Uchhqt'f.'Uchhqt'f' (" " Lcngo cp'x0Ecpfc c"	I UV.'y j gp'r c{ cdng.'eqpf q'tgpv'ncr v'0dwnf kpi 0'	3; ; 7 124 135"	527"	Vcz'Eqwtv'qh'Ecpfc c.'Mgny pc." Dtkkuj 'Eqnw dlc.'Dqy o cp'VELO'	j3; ; 7_'VELOP q0; ; . 'Cevkqp' P q0; 6/7: 4*1 UV+."
528"	Ugr j gpu'x0J cnqp" Eqpf qo kpkwo 'Eqtr 0P q0' 3: 5"	Tgr ckt'f w{ . 'f co ci gu'ht'ngcnf 'tqqh'	3; ; 8 128 133"	528"	Qpvctkq'Eqwtv'qh'Lwvkeg'g' gpgtci' F kxkukqp+'Y cngtu'LO'	Eqwtv'Hkrg'P q0E338731; 5"
529"	Ugtrqhh'x0Utcv'Eqtr 0qh' Utcv'Rcp'P q0XT'4835"	F w{ 'v'q'tgr ckt.'o gjj qf . 'Eqtr qtcv'kqp'u'f'kvetg'kqp"	3; ; 6 124 145"	529"	Dtkkuj 'Eqnw dlc'Uwr tgo g'Eqwtv." Y kuzp'LO*1'p'Ej co dgtu+."	XcpeqwxgTgi knt { 'P q0' C; 56: 74"
52: "	Ugxp'g'v'cr'x0Ulo eqg" Eqpf qo kpkwo 'Eqtr qtcv'kqp' P q082"	kpuwtcpeg.'f gf wv'kdr.'r c{ cdng'd{ 'vpk'qy pgt"	3; ; : 12; 147"	52: "	Qpvctkq'Eqwtv'g' gpgtci'F kxkukqp+." F kxkukqpcn'Eqwtv.'Dgm'Uj ctr g'cpf " O eMkppqp'LO'	64'Q0T0*5f +673.'""j3; ; : '_QLO' P q07: 65.'Eqwtv'Hkrg'P q0' 9381; 9"

52; "	Uqeng{ 'x0Rggri' Eqpf qo kpkwo 'Eqtr 0P q0' 396"	F gerctcvkqpu.'kpvgr t gcvkqp.'eqpvc'r t gh0pqv'cr r 0'	3; ; 8B2 45"	52; "	Qpvtlk'Eqwtv'qh'Lxwleg"*f gpgtcr' F kxkukqp+.'Dtco r vqp.'Qpvtlk.Y gddgt' L0'	EqwtvHkrg'P q0'X8491; 7"
532"	Utcv'Eqtr 0: 52'x0Tj qf q" J qrf kpi u'Nvf 0'	Gcugo gpvu.'kpxcrkf . 'eqtr qtcvg'r tqegf wtg"	3; ; 6B26 B4"	532"	Dtkkuj 'Eqnwo dlc'Uwr tgo g'Eqwtv." P cpcko q.'Dtkkuj 'Eqnwo dlc'J qm gu'L0'	P cpcko q'Tgi kwt { 'P q0'349: 5."
533"	Utcv'Rrcp"344; 'x0' Vtkcpvqt'kpxguo gpvu' kpvgtpcvkqpcr'Nvf 0'	Nkcdkrk\ "qh'qy pgt 'vq'uwdugs wgpv'qy pgtu"	3; ; 7B25 B6"	533"	Dtkkuj 'Eqnwo dlc'Uwr tgo g'Eqwtv." Qy gp/Hrqf 'L0'	Xlevqtk'Tgi kwt { 'P q0'; 3'4936"]; 34936_
534"	Utcv'Rrcp"3483'x0582426" DCE0Nvf 0'	kngi cr'eqpvtcev.'f co ci gu.'hkf vekct { "	3; ; 8B27 B3"	534"	Dtkkuj 'Eqnwo dlc'Uwr tgo g'Eqwtv." Vj centc { 'L0'	Xcpeqwxgt'Tgi kwt { 'P q0' E; 75797"
535"	Utcv'Rrcp"3483'x0582426" DCE0Nvf 0'	I ctci g'hcug'vq'F gxgnr gt.'kpxcrkf k\ . 'r tqr gt v\ "	3; ; 7B4 44"	535"	Dtkkuj 'Eqnwo dlc'Uwr tgo g'Eqwtv.*k" Ej co dgtu+.'Vj centc { 'L0'	Xcpeqwxgt'Tgi kwt { 'P q0' E; 75797"
536"	Utcv'Rrcp'NO U; 5'x0' P gtqpxkxj "	Wpr ckf 'eqo o qp'gxr gpugu.'kxep'ht'r t kpek cr'qpn\ "	3; ; 9B25 B3"	536"	Dtkkuj 'Eqnwo dlc'Uwr tgo g'Eqwtv." P gy 'Y guo kpuvt.'Dtkkuj 'Eqnwo dlc.' O curgt'Iq { eg"	P gy 'Y guo kpuvt'Tgi kwt { 'P q0' U254989"
537"	Utcv'Rrcp'P q0NO U66'x0' TD\ 'J qrf kpi u'Nvf 0'	Tgutkxkxg'Eqxgpcpv.'uqtci g'cpf 'r tqeguukpi "qpn\ "	3; ; 6B28 B52"	537"	Dtkkuj 'Eqnwo dlc'Eqwtv'qh'Cr r gen" O celctrcpg.'Vc { rqt'cpf 'Hkej 'L0C0'	Xcpeqwxgt'Tgi kwt { 'P q0' EC239; 56"
538"	Utcv'Rrcp'P q0NO U66'x0' TD\ 'J qrf kpi u'Nvf 0'	Cevkqp.'pq'ur gekrnt'guqnwkqp.'etgcwtg'qh'ucwvg.'lwtkuf levkqp"	3; ; 5B29 B52"	538"	Dtkkuj 'Eqnwo dlc'Uwr tgo g'Eqwtv." P gy dwt { 'L0'	Xcpeqwxgt'Tgi kwt { 'P q0' C; 45: 98"
539"	Utcv'Rrcp'P q0NO U66'x0' TD\ 'J qrf kpi u'Nvf 0'	Cevkqp.'dtgcej 'qh'dwxf kpi 'uej go g.'tgutkxkxg'eqxgpcpv."	3; ; 5B3 44"	539"	Dtkkuj 'Eqnwo dlc'Uwr tgo g' Eqwtv.Xcpeqwxgt.'Dtkkuj 'Eqnwo dlc.' *k'Ej co dgtu+ "	Xcpeqwxgt'Tgi kwt { 'P q0' C; 45: 98"
53: "	Utcv'Rrcp'P q0XT"3942'x0' Ur cegy qtm'Ctej kgevu"C" Rctvpgtuj kr +"	Cevkqpu.'hko kcvkqp'r gkqf u"	3; ; ; B24: "	53: "	Dtkkuj 'Eqnwo dlc'Eqwtv'qh'Cr r gen'." Guuqp.'Rtqy ug'cpf 'O cemp\ k'LLC0'	3; ; ; 'DEEC'7: 7.'Xcpeqwxgt" Tgi kwt { 'P q0'EC246549"
53; "	Utcv'Rrcp'P Y '6; : 'x0' Lcp\ gp"*eQ\0Lcp\ gp" Tqqh kpi +"	Cevkqp'ci ckpu'eqpvtcevqt.'tqqh'f co ci gu.'y cttepv\ "	3; ; 6B2; B37"	53; "	Dtkkuj 'Eqnwo dlc'Uwr tgo g'Eqwtv." Xcpeqwxgt.'Dtkkuj 'Eqnwo dlc.' O cel nu'L0'	Xcpeqwxgt'Tgi kwt { 'P q0' C; 43; : 5"

542"	Utcv'Rrcp'P Y 465"x0' J cpugp"	Tgutkexg'd{ncy u.'pq'tgtqur gevkg"ghhev"	3; ; 8B3B5"	542"	Dtkkuj 'Eqnwo dlc'Uwr tgo g' Eqwtv.Xcpeqwxgt.'O cuvgt'F qpcrf uqp." *K'Ej co dgtu+"	"Xcpeqwxgt'Tgi kwt { 'P q0' E; 85; 3; "
543"	Utcv'Rrcp'P Y ; 83"x0'Ngen'	Eqputwexqp.'pqv'cr r tqxgf.'tgo qxcn'	3; ; 8B28B3: "	543"	Dtkkuj 'Eqnwo dlc'Uwr tgo g'Eqwtv." Xcpeqwxgt.'Dtkkuj 'Eqnwo dlc.F cxlgu' L0'	Xcpeqwxgt'Tgi kwt { 'P q0' C; 835; : "
544"	Utcv'Rrcp'XT'4955"x0' Igpugp"	Ctdkctevt.'tgcupcedrg'cr r tgj gpukqp"qh'dku." f kus wcrkhecvkqp"	4222B2B38"	544"	Dtkkuj 'Eqnwo dlc'Uwr tgo g'Eqwtv' Xcpeqwxgt.'Dtkkuj 'Eqnwo dlc'T0F 0' Y kuqp'L0'	Xcpeqwxgt'Tgi kwt { 'P q0' N223577""
545"	Uwrldgti 'x0[qtni' Eqpf qo lpkwo 'Eqtr 0P q082"	gphqtogo gpv'qh'f wkgu.'ur qwug.'pq'rgi cr'ucpf lpi "	3; : 3B2B44"	545"	Qpvtkq'Eqwtv'qh'Cr r gen'Ctpwr." Y kuqp'cpf'I qqf o cp'LLC0'	*3; : 4+."56'Q0T0*4f +; 4"
546"	Uwrgnicpf 'Uwrgn'x0'Eckpu' J qo gu'Nf 0'cpf 'P wY guv' I tqw "	Tgr tgugpvcvqp.'wug'qh'cf lcegpv'icpf u.'pqv'dkpf lpi "	3; : 8B25B42"	546"	Crdgtc.'*S (D0"	66'Cnc0'N0T0*4f +378."93'C0T0' 4; ; "
496"	Uwphqtguv'Kpxguvo gpv'Eqtr " gv'cr'0'cpf 'QP J Y R"	Kpxguvqt lr wtej cugtu'gpv'krgf "v'y cttepv "	3; ; 9B23B43"	496"	Eqwtv'qh'Cr r gen'ht'Qpvtkq.'O qtf gp" C0E0Q0'O eMkpr { "cpf 'Ncunp'LLC0'	54'Q0T0*5f +7; .Eqwtv'Hkg'P q0' E459; 9"
547"	Uy cp'Ncng'Tgetgcvqp" Tguqtv'Nf 0'x0'Tgi kwtct" *Mco nqr u'Ncpf "Vkgg" Qhleg+ "	Ncpf 'Tgi kwtcvkqp"	3; ; ; B27B36"	547"	Dtkkuj 'Eqnwo dlc'Uwr tgo g'Eqwtv." Xlevqtkc.'Dtkkuj 'Eqnwo dlc.'Eqy cp'L0'	Xlevqtkc'Tgi kwt { 'P q0; ; "3882"
548"	U{ o r j qp{ 'Rrcg'Eqtr 0x0' Rlgt 'Qpg'T gucvwcpw'Nf 0'	Ncpf nqtf "('Vgpcpv'Cev.'pqv'cr r rkecdrg"vq"qeev cpe{ "	3; ; 4B26B44"	548"	Qpvtkq'Eqwtv'qh'Lwvleg"/'I gpgtcr' F kxlkqp.".'Uj gctf 'L0'	Cevkqp'P q0N55423B; 4"

"

549"	Vci i ctv'x0Eapf qo kpxo " Eqtr 0P q055; "	F gerctcvkqp."3'r ctnkpi "ur ceg'r gt'wpx:"uwr gtegf gu" ci tggo gpv'	3; ; 4 125 138"	549"	Qpvctkq'Eqwtv'qh'Lwvleg"/'I gpgtci' F kxkukqp.'Qwcy c.'Qpvctkq.'Uktqkt'LO'	Cevkqp'P q05232; 1; ; "
54: "	Vc{ mqt'x0Ecpfc c"	Rwtej cug'qh'Ngcugi qrf "T gukf gpv'kcn'Wpky'I UV'gzgo r v'	3; ; : 129 149"	54: "	Vcz'Eqwtv'qh'Ecpfc c.'I ctqp"V0E10'	3; ; : '_V0E10P q0839.'F 52: ." Eqwtv'Hkrg'P qu0; 8/927'I UV-H ." ; 8/928'I UV-H "
54; "	Vj g'Qy pgtu'2Eapf qo kpxo " Rrcp'P q0; 54'4: : 9x0' Tgf y gkn'gv'cn'	D{ ncy u."gphqtego gpv."eqo o qp"grgo gpw"	3; ; 6 134 144"	54; "	Cndgtc'Eqwtv'qh'S wggp'u'Dgpej ." Lxf leken'F kwtkev'qh'Gf o qpvpq.'O cuvgt" S wkp"	Cevkqp'P q0; 625"37776"
552"	Vqp{ u'Dtqcf mqo "('Htqqt" Eqxgtkpi "Nf Qv'cn'0x0P O E" Ecpfc c"Kpe0'gv'cn'	Eqpwo kpcvkap."pq'kpur gevkap."pq'tgukukqp"	3; ; 8 134 134"	552"	Eqwtv'qh'Cr r gcn'ht'Qpvctkq.F qj gtv. " Y gkgt'cpf "Ncunlp'LLC0'	53'Q0T0*5f +6: 3.'Eqwtv'Hkrg" P q0E4324: "
553"	Vqvej g'Tquu'Nf 0x0' Eapf qo kpxo "Rrcp'P q0: 74' 4674"	Uwr gtlpvgpf gpv'wpx:'kpxguvt'u'ci tggo gpv'	3; ; 3 125 14: "	553"	Cndgtc'Eqwtv'qh'S wggp'u'Dgpej ." Lxf leken'F kwtkev'qh'Gf o qpvpq.'F gc'LO'	9; 'Cnc0N0T0*4f +428.'33: " C0T0432"
554"	Vqy pui cvg'3'Nf 0x0'Mrgkp"	Ci tggo gpv'qh'R(U."o wnr rg'gz vgpukqpu.'r tqr gt.'f co ci gu"	3; ; 6 13 12: "	554"	Qpvctkq'Eqwtv'qh'Lwvleg"/'I gpgtci' F kxkukqp.'"F cxkf uqp'LO'	Cevkqp'P q0; 4/ES /4; 694"
555"	Vqy pui cvg'KNf 0x0'Htdgt"	Ci tggo gpv'qh'R(U."emukpi "f cvg."f gr qukv'tgwtpgf "	3; ; 7 123 148"	555"	Qpvctkq'Eqwtv'qh'Lwvleg"/'I gpgtci' F kxkukqp.'"Rqwu'LO'	Eqwtv'Hkrg'P q0; 4/ES /4; 679"
556"	Vwtpgt'x0Qpvctkq'P gy " J qo g'Y cttepv' 'Rtqi tco "	QP J Y R.'erko ."ci tggo gpw'vgo kpcvgf ."	3; ; 9 12; 144"	556"	Qpvctkq'Eqwtv'qh'Lwvleg.'F kxkukqpci' Eqwtv.'Q'Ngct{ .'Eco r dgm'cpf " Ucij cp{ 'LO'	Eqwtv'Hkrg'P q04521; 9"
557"	Wdcpvgku'Nko kgf "x0' Qpvctkq'P gy "J qo g" Y cttepv' 'Rtqi tco "	QP J Y R.'tgi kwtcvkqp."gpv'rgo gpv.'kpxcrkf "eqpf kxkqp"	3; ; 8 133 136"	557"	Qpvctkq'Eqwtv.'F kxkukqpci'Eqwtv.'" QF tkaeqm'Dqtnqxej "cpf "Eqtdgw'LO'	53'Q0T0*5f +4: 6."
558"	Xlevqtkc'Wpkygtuk{ 'x0' J gtkci g'Rtqr gtv'gu'Nf 0'	T guv'kxg'eqxgpcpv.'kpxcrkf ."dgpghkxpi "rcpf u'pqv' f guetkdgf "	3; ; 3 12: 149"	558"	Qpvctkq'Eqwtv*'I gpgtci'F kxkukqp+.'" Uwj gtrcpf 'LO'	6'Q0T0*5f +877"

"

55: "	Xkrci g'I tqxg'Eqtr 0x0' Eqnkp'u"	F kuenquwt.g.'pq'f cvgu'hqt'co gpkkgu.'pqv'dkpf kpi "	3; ; 8 124 137"	55: "	Qpvtlk'Eqwtv'qh'Lxwkeg'*I gpgtcrn' F kxkukqp+.'O eO cj qp'LO'	Eqwtv'Hkrg'P q0'; 6/I F/4; ; ; ; "
55; "	Xqrf 'x0Utwc'Eqtr 0424"	Ur gekcn'rgx { . 'lpxcrkf . 'qr r tguukxg'eqpf wev'	3; ; 5 124 138"	55; "	Dtkkuj 'Eqmwo dlc'Uwr tgo g'Eqwtv.' O gnxkp'LO'	Xlevqtkc'Tgi kwt { 'P q05663 1; 4"
562"	Y ctf /Rtleq'x0O ctkpgtu" J cxgp'kpe0gv'crf'Ergo gpv' gv'crf'Vj kf 'Rctvkgu'	Kpvtg.uv.'qdrki cvkqp'vq'r c { 'ku'f gdv'qdrki cvkqp'pqv'c'twuv' qdrki cvkqp.'"	4222 127 145"	562"	Qpvtlk'Uwr gkqt'Eqwtv'qh'Lxwkeg'" Ewo o kpi 'LO'	Eqwtv'Hkrg'P q0'; 8/EW/32573: '"
563"	Y cvgtmq'P qvtj " Eqpf qo kpkwo 'Eqtr 0P q0' 3; : 'x0F qppgt"	Rgwu.'pqv'cmqy gf . 'kpcr r ncedng'vq'f qi u'wugf 'vq'qxgteqo g' f kucdkrkv{ "	3; ; 9 132 143"	563"	Qpvtlk'Eqwtv'*I gpgtcrn'F kxkukqp+.' Ucnj cp { 'LO'	58'Q0T0*5f +465'"
635"	Y cvgtmq'P qvtj " Eqpf qo kpkwo 'Eqtr 0' P q0B: 8'x0Y gkf pgt'"	C":pq'r gvuv'erwug'kp'c'f gerctcvkqp'ku'gphqtegcdng'kp'yj g' cdugpeg'qh'gxf gpeg'qh'c'xlqrcvqp'qh'yj g'Qpvtlk'J wo cp" Tki j wu'Eqf g0'	4225 128 125"	"	Qpvtlk'Uwr gkqt'Eqwtv'qh'Lxwkeg.'" Hnf pp'LO'	Eqwtv'Hkrg'P q0'E/3233/24" "
636"	Y gdd'x0O VEE'P q0; 9; "	Y j krg'yj gtg'ku'c'ugt'kwu'kuuwg'vq'dg'v'kgf 'cu'vq'y j gyj gt'c" ej cpi g'ltqo 'qpg'ecdngr' r tqxkf gf 'vq'cpqyj gt'ku'cwj qtkt gf " wpf gt 'yj g'Cev.'k'f qgu'pqv'eqpukwag'c'ektewo ucpeg'y j kej y qwv'lwukh{ 'cp'kpvgtko 'kplwpevqp'dgkpi 'i tcpv'gf 0'	4225 128 126"	"	Qpvtlk'Uwr gkqt'Eqwtv'qh'Lxwkeg.'" P qtf j gko gt'LO'	Eqwtv'Hkrg'P q0'25/EX/ 46; 75: EO 4" "
564"	Y gnkpi vqp'Eqpf qo kpkwo " Eqtr 0P q092'x0Y cmreg"	Rctnkp'i . 'o cvgtken'ej cpi g.'xkukqtu'r ctnkpi "	3; ; : 133 148"	564"	Qpvtlk'Eqwtv'qh'Cr r gen'Hkprc { uqp.'" Cwukp'ILC0'cpf 'Uj ctr g'LO*cf 'j qe+'	F qengv'P q0E4: 734"
565"	Y gnkpi vqp'Eqpf qo kpkwo " Eqtr qtcvqp'P q083'cpf " O ctkn'p'F tkxg'J qrf kpi u' Nko kvgf '*Tg+'	Uwr gtlpvgpf gpvu'wpxv.'dwf i gv.'cf f kxkukp'crn'equu"	3; ; : 124 128"	565"	Eqwtv'qh'Cr r gen'hqt'Qpvtlk.'" Hkprc { uqp.'Qudqtpg'cpf 'Tqugp'dgti " ILC0'	59'Q0T0*5f +3"
637"	Y gnkpi vqp'Eqpf qo kpkwo " Eqtr qtcvqp'P q0'x0J wi j gu' gv'crn'	Vj g'qdrki cvkqp'wv'gt'uge0: ; *4+'vq'tgr ckt'qt'tgr rneg'chvgt" -f co ci g'qt'hc'kwg'g'f qgu'pqv'kpenmf g'pqto cnly gct'cpf " vgt0'k'v'j g'cdugpeg'qh'c'ur gekcn' r tqxkukqp'kp'yj g' f gerctcvkqp.'tgr rnego gpv'p'ggf gf 'f vg'vq'pqto cnly gct'cpf " vgt'ku'yj g'tgur qpukdkrkv{ 'qh'yj g'qy pgtu0'	4226 132 127"	"	Qpvtlk'Uwr gkqt'Eqwtv'qh'Lxwkeg.'" O ceMgp' kg'LO'	Eqwtv'Hkrg'P q0'434 126"
566"	Y gnkpi vqp'Eqpf qo kpkwo " Eqtr qtcvqp'P q083'x0' O ctkn'p'F tkxg'J qrf kpi u' Nko kvgf "	Uwr gtlpvgpf gpvu'uwkg.'pqv'eqo o qp'r tqrgt'v{ . 'pq'kpv'vqp'vqp"	3; ; 6 132 128"	566"	Qpvtlk'Eqwtv'*I gpgtcrn'F kxkukqp+.'" J gtrn' LO'	42'Q0T0*5f +: 3.'"F 566'Cevkqp" P q07; ; 3 1; 6*'I wgrj +'cpf ; 3/ ES/32*'Vqtqpvq+'

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567"	Y j kd{ "J ctdqwt" F gxgnr o gpvEqtr 0x0Ecvgt"	Qeewr cpe{ . 'vgt o kpcvkqp'qp'tguelukqp"	3; ; 4 125 13: "	567"	Qpvctkq'Eqwtv'qh'Lwvleg'/'I gpgtci' F kxkukqp.'O celctrcpf 'L0'	45'T(ROFO*4f +47"
568"	Y kpf kuo cp'x0Vqtqpvq" Eqmgi g'RetniNvf 0'	Kpvtguv'qp'f gr quku.'pqv'eqo r qwpf "	3; ; 8 124 135"	568"	Qpvctkq'Eqwtv'qh'Lwvleg'/'I gpgtci' F kxkukqp+.Vqtqpvq.'Qpvctkq.Uj ctr g'L0'	Eqwtv'Hkg'P q0; 5/ES/5: ; 88"
569"	Y kprck "J qrf kpi u"*Nci qqp" Ekf '+x0"Uko eqg" Eqpf qo kpkwo 'Eqtr 0P q068"	Tcvkhecvkqp'd{ 'eqpf wev.'ej cpi g'v'cuugw"	3; ; : 134 123"	569"	Qpvctkq'Eqwtv'qh'Cr r gcn'Vqtqpvq." Qpvctkq.'Ecv' o cp.'Ncunp'cpf " Hgrf o cp'LLO0'	F qengv'P q0E4: 272."
56: "	Y qpi 'x0Tggo ctm'Ugtrkpi " KKNvf 0'	Ci tggo gpv'qh'R(U.'Enqulpi 'f cvg.'qpg'gz vgpukqp'qpnf "	3; ; 4 12; 125"	56: "	Qpvctkq'Eqwtv'qh'Lwvleg'/'I gpgtci' F kxkukqp.'J cy nkpu'L0'	Cevkqp'P q0TG'344: 1; 4"
56; "	Y qpi 'x0Xqi wg" F gxgnr o gpv'kpe0'	Kpvtguv.'o qtv' ci g'dcem"eqngevkdng"	3; ; 6 128 132"	56; "	Qpvctkq'Eqwtv'qh'Cr r gcn'Tqdkpu." O eMkpr{ 'cpf 'Ncdtquug'LLO0'	Eqwtv'Hkg'P qu0: 961; 2'cpf " E: 649"
572"	Y tki j v'x0Eqpf qo kpkwo " Rrcp'P q099337: 4"	Eqo o qp'grgo gpv.'eqo o qp'r qrgtv' . 'r ctnkpi ." Rtqegf wtg.'r ctnkpi 'hdegpug.'o wv'dg'hck 'v'cm'	3; ; 6 129 13: "	572"	Crdgtv'Eqwtv'qh'S wggpu'Dgpej ." Lwf lekcn'F kvt'ev'qh'Ecn' ct { . 'F kzqp'L0'	Cevkqp'P q0; 423/23: 93"
573"	Y tki j v'x0Qy pgtu'qh'Utcv" Rrcp'P q0427"	Cevkqp.'F wv' 'v'q'tgr ckt 'ucvukhgf . 'y cvgt'hcnci g"	3; ; 8 124 137"	573"	Dtkkuj 'Eqnw dlc'Uwr tgo g" Eqwtv.F tcng'L0'	Xcpeqwxgt'Tgi kvt { 'P q0' 63871; 5"

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574"	[qtmEqpf qo kpkwo 'Eqtr O' P q0326'gv'cri0x0J cmky gmi Vgttceg'Nvf 0'gv'cri0'	ercuu'cevkap.'qy pgtu.'r tqr tkgv'.'kco g'q'f gvgto kpg"	3; 97 B3 B5"	574"	Qpvtkq'J ki j 'Eqwtv'qh'Lwvleg.'Qungt.' I0'	*3; 98+.'34'Q0T0*4f +'68"
575"	[qtmEqpf qo kpkwo 'Eqtr O' P q0326'x0Uwr tgo g" Cwqo cvle'Y kuj kpi " Ocej kpg'Eq0'	Rqy gt'q'rgcug.'eqo o qp'grgo gpw"	3; 9: 124 129"	575"	Qpvtkq'J ki j 'Eqwtv'qh'Lwvleg.'Tgkf.' I0'	3: 'Q0T0*4f +'7; 8"
576"	[qtmEqpf qo kpkwo 'Eqtr O' P q034'x0Vt guv'	Eqwtv'qtf gt.'eqpwtvewkap.'"rgi cri'equu"	3; ; : B4 123"	576"	Qpvtkq'Eqwtv'qh'Lwvleg'*f gpgtcri' F kxkukqp+.'O qv'kqpu'Eqwtv.'Uqo gtu'I0'	Eqwtv'Hkrg'P q0; : /EX/368345."
577"	[qtmEqpf qo kpkwo 'Eqtr O' P q0344'x0Ukddru"	Twrgu.'eqo o qp'grgo gpw.'pqv'tgvtqcev'kxg"	3; ; : B3 123"	577"	F kwtlev'Eqwtv'qh'Qpvtkq.'Nqeng" F (E00'	*3; ; ; +'94'Q0T0*4f +'34"
578"	[qtmEqpf qo kpkwo 'Eqtr O' P q034: 'x0O eMgp| kg"	D{/Ncy u.'xqv'kpi 'hqt'fktgevtu.'Uci i gtgf'xqv'kpi .'xqv'kpi " d{'dvwkf kpi .'xcrkf "	3; ; 8 12; 128"	578"	Qpvtkq'Eqwtv'qh'Lwvleg'*f gpgtcri' F kxkukqp+.'O qv'kqpu'Eqwtv'F co dtqv'I0'	Eqwtv'Hkrg'P q0TG<"8: 841; 8."
579"	[qtmEqpf qo kpkwo 'Eqtr O' P q0388'x0P vpgl " "	Twrgu.'dtgcej .'pqkug.'f gemt'cvkap.'ur rkv'equu"	3; ; 2 126 142"	579"	Qpvtkq'F kwtlev'Eqwtv'/'I qtmTgi kqp" Lwf leken'F kwtlev.'Nqwnkf grku'F (E00'	Cevkap'P q0349471; 2"
57: "	[qtmEqpf qo kpkwo 'Eqtr O' P q0389'gv'cri0x0P gy tgf " J qif kpi u'Nvf 0'gv'cri0 " "	Uwr gtlp'vpgf gpw'u'wvkg.'kpv'gpv'kqp.'eqo o qp'r tqr gtv' "	3; ; 3 126 135"	57: "	Qpvtkq.'Eqwtv'qh'Cr r gen'Dtqqng." Nceqwtekgtg'cpf'Y kuqp'I0C0'	54'Q0T0*4f +'67: .'344'F 0N0T0' *5f +'4: 2"
57; "	[qtmEqpf qo kpkwo 'Eqtr O' P q0428'x0Cm gkf c'(" Cm gkf c'Ncpf uecr kpi 'Eq0'	kplwpevkap.'t'gvtckl'kpi 'r rpppgf 'ur ge0'o gg'kpi " "	3; ; 4 125 139"	57; "	Qpvtkq'Eqwtv'qh'Lwvleg'/'I gpgtcri' F kxkukqp+.'F wppgv'I0'	*3; ; 4+'5'Y FER'*4f +'646"
582"	[qtmEqpf qo kpkwo 'Eqtr O' P q0438'x0Dqtuqf k'gv'cri0'	T'gvtckv'kqpu.'cf wv'dvwkf kpi 0'xcrkf " "	3; ; 5 126 128"	582"	Qpvtkq'Eqwv'v'Eqwtv.'Cm'gp'Eq0E'v0' I0'	64'Q0T0*4f +; ; .'36: 'F 0N0T0*5f +' 4; 2.'*3; ; 5+'64'Q0T0*4f +; ; "
583"	[qtmEqpf qo kpkwo 'Eqtr O' P q04: : 'x0J ctdqwt'Us wctg" Eqo o gtekn'kpe0"	Twrgu.'wug.'pq'guxqr r gr'lp'hceg'qh'ucw'wg"	3; ; : 127 128"	583"	Qpvtkq.'*F kwt0E'v0'/'F cxkf uqp'F (E00'	6; 'T0R0T0486"
584"	[qtmEqpf qo kpkwo 'Eqtr O' P q057'x0O quugcw"	Cn'gtcv'kqp.'f g'o k'plo wu.'rcej gu"	3; ; 7 B3 125"	584"	Qpvtkq'Eqwtv'qh'Lwvleg'*f gpgtcri' F kxkukqp+.'Dtqeng'uj ktg'I0'	Eqwtv'Hkrg'P qu0Tg'76; 71; 7.'TG" 76; 81; 7'cpf 'TG'76; 91; 7"

585"	[qtmEqpf qo kpkwo 'Eqtr O' P q05: 4'x0F xqtej km'	Twgu.'y gli j v'qh'r gu.'tgcupcdrgpguu.'r gw'qxgt'47'rdU.'" xcrkf "	3; ; 9 124 128"	585"	Qpvtkq'Eqwtv'qh'Cr r gcn" E53; O qtf gp'CE00Q0'Hkprc { uqp"cpf " Cdgnc'LLC0'	P q0E34688."
586"	[qtmEqpf qo kpkwo 'Eqtr O' P q05: 4'x0F xqtej km'	Rgwu.'twgu.'ugevkap'4; *3+qh'qrf 'Cev'	3; ; 4 128 125"	586"	Qpvtkq'Eqwtv'qh'Lwvleg'/'I gpgtcl' F kxlukqp.'"Mggpcp'LO'	46'T0R0T0*4f +3; "
587"	[qtmEqpf qo kpkwo 'Eqtr O' P q0622'x0Ego etchl' Ugtxlegu"	Ci g'tgumkcvkp.'"kpxcrkf "	3; : : 128 152"	587"	Qpvtkq'*F kv0E v0// 'F cxkf uqp'F 0E 10"	3'T0R0T0523."
499"	[qtmEqpf qo kpkwo 'Eqtr O' P q064'cpf 'O grcpuqp"	d{/rcy u.'r gu.'hko kgf 'r qy gt'vq'eqpvtqnl'	3; 97 126 136"	499"	Qpvtkq'Eqwtv'qh'Cr r gcn'Mgm{.'" J qwf gp'cpf 'J qy rcpf.'LLC"	*3; 98+;" ; "Q0T0*4f +338"
588"	[qtmEqpf qo kpkwo 'Eqtr O' P q0642'x0F ggtj cxgp" Rtqr gt vkgu'Nvf 0gv'crl0'	Cevkap.'"eqtr qtcvkap'u'tki j v'vq'uwg"	3; : 4 134 145"	588"	Qpvtkq'J ki j 'Eqwtv'qh'Lwvleg" I tkhkj u'LO'	*3; : 4+;"62'Q0T0*4f +328.'55" E0R0E087"
647"	[qtmEqpf qo kpkwo " Eqtr qtcvkap'P q05: 4'x0' Lc{/O 'J qrf kpi u'Nko kgf " gv0crl0'	Vj g'37"{ gct'hko kcvkap'r gtlkf "vq'eqo o gpeg'cp'cevkap" dgi kpu'vq'twp'qp'Lcpwtc { '3.'4226'kp'vj g'ecugu'qh'ecwugu'qh' cevkap'y j lej 'ctqug'r tkqt'vq'vj cv'f cvg'cpf 'y j lej 'y gtg'pqv' f kueqxtgf 'wpvki'chgt'vj cv'f cvg0'	4229 123 14; "	"	Qpvtkq'Eqwtv'qh'Cr r gcn' "	F qengv'E66: 97"
			4228 123 142"	"	Qpvtkq'Uwr gtlqt'Eqwtv'qh'Lwvleg.'" I tqwpf 'LO'	"	Eqwtv'Hkrg'P q0'27/EX/ 4; 3; ; 4RF 4"
639"	[qtmEqpf qo kpkwo 'Eqtr O' P q06: 4'x0Ej tkvkcpgup'gv' cni'	Vj g'tki j v'qh'c'Eqtr qtcvkap'vq'hkpc'wpk'hqt'cttgctu'qh' eqo o qp'gZR gpugu'f qgu'pqv'gpvkr'k'vq'hkpc'qy gt'wpku" qy pgf 'd{ 'vj g'uco g'r gtuqp'y j gtg'vj g'eqo o qp'gZR gpugu' hqt'vj qug'wpku'ctg'pqv'kp'f ghcwn0'	4225 123 153"	"	Qpvtkq'Uwr gtlqt'Eqwtv'qh'Lwvleg.'" Ncpq'LO'	Eqwtv'Hkrg'P q0'24/EX/ 453659EO 4" "
63: C "	[qtmEqpf qo kpkwo 'Eqtr O' P qu0; 8: 'cpf '3224'x" Uej kengpf cpl 'Dtqu0Nko kgf' cpf 'I qtmTgi kqp'Eqo o gpv' Grgo gpvEqpf q'Eqtr 0P q0' ; 89"	C'r tqxlukqp'kp'c'f gerctcvkap'gzgo r vki 'egtvclo'RQVN" htqo 'vj g'r c{ o gpv'qh'eqo o qp'gZR gpugu'r gpf kpi 'vj g' j cr r gplpi 'qh'c'ur gekk'gf 'gxgpv'ku'pqv'eqpvtc { 'vq'vj g'Cev' cpf 'ku'xcrkf "cpf 'gphqtegedng"	4228 12; 13: "	"	Qpvtkq'Eqwtv'qh'Cr r gcn' "	F qengv'E66982"
			4227 134 137"	"	Qpvtkq'Uwr gtlqt'Eqwtv'qh'Lwvleg.'" Nqwnkf grku"	"	Eqwtv'Hkrg'P q097: : 4 127" "
589"	[qtmEqpf qo kpkwo 'Eqtr O' P q068'x0O gf j wtuv'J qi i " ('Cuqekcvgu'Nvf 0gv'crl0'	Cevkap'd{ 'Eqtr . 'pq'r tkqt'pqvleg.'pwnk{.'uge'36"	3; : 4 12; 135"	589"	Qpvtkq.'J ki j 'Eqwtv'qh'Lwvleg.'I tc{ " LO'	*3; : 4+;"5; "Q0T0*4f +5: ; "
58: "	[qtmEqpf qo kpkwo 'Eqtr O' P q0733'x0Dguv'F gcn' O qvqtu'('Eqnkukqp'Egpgtg" kpe0'	Rctnkpi 'kp'eqo o qp'grgo gpv.'cww'uj qr.'kplwpevkap" i tcpvgf 'vq'eqtr 0'pq'guvqr r grld{ 'eqpf vev'	4223 124 128"	58: "	Qpvtkq'Uwr gtlqt'Eqwtv'qh'Lwvleg" G00 00 cef qpcrf 'LO'	Eqwtv'Hkrg'P q022/EX/3; 79; 8"

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58; "	[qtmEqpf qo kpkwo 'Eqtr 0' P q074: 'x0Qpvctkq'P gy " J qo g'Y cttepv' 'Rtqi tco "	QP J Y R.'ercko . 'pqv'qw'qh'vko g.'ecwugu'npqy p"	3; : 9 128 144"	58; "	Qpvctkq.'*F kx0E'x0// 'I t k h k j u.'Gdgtng" cpf 'Tqugpdgti 'L0"	66" T 0 R 0 T 0 4 2; "
592"	[qtmEqpf qo kpkwo 'Eqtr 0' P q085'x0Dcttkpi vqp/ Tqeny qqf "kpxguo gpv" Eqtr 0'	Chkf cxk'gxkf gpeg. 'kpuwhlelcpv.'hcevu'kp'f kur wg"	3; ; 3 126 132"	592"	Qpvctkq'Eqwtv'qh'Lwuleg// 'I gpgtcn' F kxkukqp.'F wppgv'LO'	Cevkqp'P q06881; 3"
593"	[qtmEqpf qo kpkwo 'Eqtr 0' P q093'x0Uwukxcp"	Twgu.'pq'eqo o gtekn'r ctnkpi . 'xcrkf "	3; ; 2 127 133"	593"	Qpvctkq'F kwtlev'Eqwtv// 'I qtmLwf lekcn' F kwtlev.'Q'Eppgnif' ELO'	Cevkqp'P q003: 78221; ; "
594"	[qtmEqpf qo kpkwo 'Eqtr 0' P q098'x0Tqug'Rctm' Y gmgung{ 'kpxguo gpvu'Nvf 0' gv'cn0'	Hkxpguu'qh'eqputvev'kqp.'f kuercko gt.'pq'ikcdrikv{ "	3; : 6 133 12; "	594"	Qpvctkq'J ki j 'Eqwtv'qh'Lwuleg.'Tgkf 'LO'	6: 'Q0T0*4f +677"

"

595"	[qtmEqpf qo kpkwo 'Eqtr 0' P q0: 9'x0l qtm' Eqpf qo kpkwo 'Eqtr 0P q07; "	O ckpgpcpeg'cpf 'tgr ckt.'kpenf gu'ut wewt cnl'	3; : 5 128 14: "	595"	Qpvctkq*"ECC0"	36: 'F ONOT0*5f +882"
596"	[qtmEqpf qo kpkwo " Eqtr qtcvkkp 'P q0383'gv'cn0' x0l qtmJ cpqxtg'Nf 0"	Eqo o qp'grgo gpvu.'hcp'eqku.'gzenmf gf 'htqo "	3; : 5 127 146"	596"	Qpvctkq.'"*J EEL0"	*3; : 5+'3'EONOT04: 9"
597"	[qtmEqpf qo kpkwo " Eqtr qtcvkkp 'P q0389'gv'cn0' x0P gy tgf { 'J qif kpi u"	Uwr gtlpvppf gpvu'uwkg.'pqv'eqtr qtcvg'r tqr gtv { ". 'pq" eqo o qp'kp0'	3; : 2 122 122"	597"	Qpvctkq.'"*J EEL0"	*3; : 2+'36'TOROT084"
599"	[qtmEqpf qo kpkwo " Eqtr qtcvkkp 'P q0438'x0' F wf plm*'F kx0E'0"	Tgutlevkkp.'ci g.'j wo cp'tki j wu"	3; ; 3 126 148"	599"	Qpvctkq'Eqwtv*'I gpgtcl'F kxkukqp+." F kxkukqpcn'Eqwtv.Ecttwj gtu."Y cw'cpf " F cxkf uqp'LO'	5'QOT0*5f +582"
59: "	[qtmEqpf qo kpkwo 'x0' Dteo crgc'Eqpuqrf cvgf " F gxgrqr o gpvu'Nf 0'gv'cn0'	Cevkqp.'eqtr qtcvkkp.'pqv'pgo kpcnr rckpkhh'	3; 97 128 134"	59: "	Uwr tgo g'Eqwtv'qh'Qpvctkq.'O cvgt)u" Ej co dgtu.'O cvgt '*Hgttqp+."	*3; 98+."32'QOT0*4f +67; "
59; "	[qtmJ wo dgt'Nf 0'x00 guc"	Ci tggo gpv'qh'R(U.'f kuenquwtg'"ucvgo gpv'pqv'r tqxkf gf ." xqkf "	3; ; 9 134 133"	59; "	Qpvctkq'Eqwtv'qh'Lwuleg*'I gpgtcl' F kxkukqp+.'D0Y tki j vLO'	Eqwtv'Hkrg'P q094; 761; 3S "
5: 2"	[qtmP qtj 'Eqpf qo kpkwo " Eqtr 0P q07'x0Xcp'J qtpg" Erkr r gt'Rtqr gt vku'Nf 0'	Uwr gtlpvppf gpvu'uwkg.'r tqr gtv { 'qh'f gxgrqr gt "	3; : 9 126 147"	5: 2"	Qpvctkq'J ki j 'Eqwtv'qh'Lwuleg." QNgct { 'LO'	82'QOT0*4f +68: "
5: 5"	[qtmTgi kqp'Eqpf qo kpkwo " Eqtr 0P q0767'x0824: 2; " Qpvctkq'Nko ksgf "	D{ rny . 'pq'v'wenlr ctnkpi . 'kpxcrkf . 'wptgcuqpcdrq." f kuetko kpcvqt { "	3; ; : 125 138"	5: 5"	Qpvctkq.'"F kx0E'v0//\ grikpunk'F EEL0"	6'TOROT0*4f +3; 4"
5: 3"	[qtmTgi kqp'Eqpf qo kpkwo " Eqtr 0P q07: 7'x0I krdgtv'	D{ rny u.'pq'r gu.'gphqtegcdrg"	3; ; 2 133 145"	5: 3"	Qpvctkq'F kwtlev'Eqwtv'/'[qtmLwf leken' F kwtlev.'Vqtqpvq.'Qpvctkq.I krdgtv' F EEL0'	Cevkqp'P q00 3: 86761; ; "
5: 6"	[qtmTgi kqp'Eqpf qo kpkwo " Eqtr 0P q0993'x0l gct'Hwnl' kpxguwo gpv*'Ecpfc c+ "	Tgucwtcpv'Wpkv.'hcdkklv { 'hqt'y cvgt'ej cti gu"	3; ; 4 12: 14: "	5: 6"	Qpvctkq'Eqwtv'qh'Lwuleg'/'I gpgtcl' F kxkukqp.'Tqugdgti 'LO'	32'QOT0*5f +892.; '7'F ONOT0' *6vj +549"

"

5: 7"	[qtmTgi kqp'Eqpf qo kpkwo "Eqtr 0P q0993"x0[gct'Hwmi' Kpxguwo gpv*Ecpfc+"	Eqo o qp"gzr gpugu."gzeguukg'y cvgt'wug"	3; ; 5 126 129"	5: 7"	Eqwtv'qh'Cr r gcil'ht"Qpvtlkq." I qqf o cp."Ncdtquug"cpf "Cwukp"LLC0	34'Q0T0*5f +863"
5: 4"	[qwpi "x0475: 3; " Fgxgrqr o gpvu'Nf 0gv'cn0'	qeew cpe{ "ci tggo gpv'pqv'hcug."o qtv'ci g'r tlqt"	3; 9; 125 134"	5: 4"	Qpvtlkq"J ki j 'Eqwtv'qh'Lwukeg." I tcpi g.'L0'	46'Q0T0*4f +95."; 9'F 0N0T0*5f +' 585"
5: 8"	[wgp"x0RggriEqpf qo kpkwo "Eqtr 06; 4"	Vgpcpv."eqo o qp"gzr gpug"ctt'gctu."qy pgt"cpf "vgpcpv" lqkpw{ "cpf "ugxgcm{ "rkdrg"	4222 12: 145"	5: 8"	Qpvtlkq"Uwr gt'kqt"Eqwtv'qh'Lwukeg"" F wtpq'L0"	Eqwtv'Hkg'P q022/DP /277; ""
646"	\ chkt"x0[qtmEqpf q0P q0' 854"	Y j krg"cp":cev'qt"qo kuukp0'tghgt'gpegf "kp'ugev'kqp"327"f qgu" pqv'pgeguuctkq' "ko r qtv'c'tgs wktgo gpv'qh'pgi rki gpeg."c" f k'ge'v'kqp'htqo "c"eqpf qo kpkwo "eqtr qtcv'kqp'y j lej " kpetgcugu'y g'rkngrkj qqf "qh'f co ci g'qee'wtkpi "o cngu'k' kpgs wkcdrg"vq'j qrf "y'j g'qy pgt'rkdrg'ht'f co ci gu0C'rkgp" tgrcv'kpi "vq'y'j g'htgi qkpi "uj qwf "dg'f kiej cti gf 0"	4229 124 145"	646"	Qpvtlkq"Uwr gt'kqt"Eqwtv'qh'Lwukeg" Eqpy c{ 'L0'	Eqwtv'Hkg'P q027/EX/ 4; ; 8: 7"UT"

"

V. List of Judicial Decisions Contained on Condominium Resource CD Respecting Agreements of Purchase and Sale

The Condominium Resource Book does not deal with agreements of purchase and sale, and issues arising from same, in material detail. Set out below are selected cases (found in the CD database of cases) on this subject for references on this topic.

- 121** Goetz et al. v. Whitehall Development Corp. Ltd. (1978)
- 020** Aita et al. v. Silverstone Towers Ltd. (1978)
- 382** Young v. 253819 Developments Ltd. et al. (1979)
- 358** York Condominium Corp. No. 167 et al. v. Newrey Holdings Ltd. et al. (1981)
- 292** Shoihet v. 110 Bloor West Development Corp (1984)
- 122** Gordon v. Lawrence Avenue Group Ltd. (1988)
- 202** Morris et al. v. Cam Nest Developments Ltd. (1988)
- 127** Grimble v. 662092 Ontario Ltd. (1990)
- 103** Di Cecco v. 733725 Ontario Inc. (1990)
- 104** Dick v. Dennis (1991)
- 166** Liffall (Canada) Ltd. v. 596029 Ontario Ltd. (1991)
- 151** Kratz v. Parkside Hill Ltd. (1992)
- 348** Wong v. Reemark Sterling II Ltd. (1992)
- 123** Governor's Hill Development Ltd. v. Robert (1993)
- 272** Ryan and Cam Valley Developments Ltd. (1993)
- 074** Chawla v. Hayter Street Developments Inc. (1994)
- 289** Scaroni v. Rosepol Holdings Ltd. (1995)
- 047** Bodnar v. 679520 Ontario Ltd. (1995)
- 159** Landmark of Thornhill Ltd. v. Maleki Yazdi (1995)
- 333** Townsgate I Ltd. v. Farber (1995)
- 158** Landmark of Thornhill Limited v. Jacobson et al. (1995)
- 077** Chow v. Dixie Park Inc. (1996)
- 229** Passmore Gates Development v. Chung (1996)
- 076** Chiu v. Pacific Mall Developments Inc. (1998)
- 183** McGrath v. B.G. Schickedanz Homes Inc. (2000)
- 291** Sherritt v. 690624 Ontario Inc. (c.o.b. Kings Terrace Condominiums) (2000)



Ministry of Consumer
and Business Services
Registration Division
Title and Survey Services Office

BULLETIN NO. 2001-1

DATE: May 4, 2001

TO: All Land Registrars

Land Titles Act
Registry Act

Condominium Act, 1998

I. INTRODUCTION

The *Condominium Act, 1998* is the culmination of many years of consultation to reform the existing legislation. The new Act will provide for increased consumer protection through more detailed disclosure requirements prior to the sale of a condominium, mandatory post construction audits of the common elements after registration of the condominium project and ongoing reserve fund studies to ensure adequate funding is available for repairs throughout the life of the condominium.

In addition to the increased consumer protection, the new Act will introduce new forms of condominium ownership. These new forms will allow the industry to address a variety of consumer needs by allowing freehold and leasehold condominiums. Beyond the standard condominium type now in existence, the new forms of freehold condominiums will encompass vacant land condominiums, common element condominiums, amalgamation and phasing of standard condominiums. Standard condominiums can also be constructed on leasehold lands.

The provisions of this Bulletin are effective as of May 5, 2001, being the date the *Condominium Act, 1998* (new Act) comes into force. A series of Regulations under the new Act – O. Reg. 48/01, 49/01, 50/01, 51/01 and 52/01 have been filed and are available on the MCBS Internet site - www.ccr.gov.on.ca.

In summary the types of condominiums in the new Act are:

1. Standard Condominiums

Standard Condominiums will be entitled - '(LRO Division) Standard Condominium Corporation (Plan) No. ____'. All condominiums in existence at the time the *Condominium Act, 1998* comes into force are deemed to be standard condominiums however, the word "Standard" shall not be added to their name.

2. Leasehold Condominiums

Leasehold Condominiums will be entitled - '(LRO Division) Leasehold Condominium Corporation (Plan) No. ____'. It is anticipated that Leasehold condominiums will be developed on institutional lands (e.g. universities, hospitals) where there is an obligation for the institution to maintain title to the property. The initial term of a leasehold condominium will be between 40 and 99 years.

3. Vacant Land Condominiums

Vacant Land Condominiums will be entitled - '(LRO Division) Vacant Land Condominium

Corporation (Plan) No. ____'. Units are not part of a building or structure. Units are on one level only and the condominium must contain common elements. A vacant land condominium must be freehold and cannot be combined with any other type of condominium.

4. Common Elements Condominiums

Common Elements Condominiums will be entitled - '(LRO Division) Common Elements Condominium Corporation (Plan) No. ____'. Common Elements Condominiums have no units. The owners of the common interest are owners of freehold parcels of land (parcels of tied land or POTL's) that are not part of the condominium property. The parcels of tied land must all be in the same land registration division as the condominium land and they must have a land titles absolute title or have a valid certificate of title.

5. Phased Condominiums

A Phased Condominium will be entitled - '(LRO Division) Standard Condominium Corporation (Plan) No. ____'. Only standard condominiums may be phased and the intention to create a phased condominium must be indicated on the first page of the declaration. The declaration must also set out the "servient tenement" which are lands that the declarant owns and intends to include in the condominium as future phases. The phases will occur by way of an amendment to the declaration and description and will re-describe the condominium lands to include a part of or the entire servient tenement. Future phases can be registered within ten years of the time of the initial registration.

6. Amalgamated Condominiums

An Amalgamated Condominium will be entitled - '(LRO Division) Standard Condominium Corporation (Plan) No. ____'. Only standard condominium corporations may amalgamate. The word 'amalgamated' will **not** be part of the name of the new condominium corporation or plan. All declarations, descriptions, bylaws and rules of the amalgamating corporations cease to apply and will not be brought forward to the amalgamated corporation. All outstanding encumbrances or interests that affect the common elements or units in the amalgamating condominiums will continue and will be brought forward to the appropriate index or register in the amalgamated condominium.

Registration checklists for each type of condominium will be available for staff and clients. The checklists will be updated periodically.

II. TRANSITION PROVISIONS

The regulations under the new Act set out a transition period of 6 months, commencing when the new Act comes into force on May 5th, 2001. A declaration and description may be submitted for registration under the old Act during this time however, they must still go through the pre-approval process and be registered on or before October 31, 2001. This provision also applies to amendments to the declaration and description.

III. GENERAL PROVISIONS

1. Condominium Corporations Index

The Condominium Corporations Index is continued under the new Act (s. 3(3)) and will be in the existing format being MCBS Form 10315 (88).

2. Non-Automated Condominium Register - *Land Titles Act/Registry Act*

If the records of the condominium property are not automated, the Condominium Register, referred to in s. 3(4) of the Act, will be kept in a loose-leaf book and will include a set of four groups of pages, continued from the old Act, consisting of:

- (a) a Property Parcel Register or Property Abstract Index in the existing MCBS Form 10314 (88);
- (b) a Constitution Index in the existing MCBS Form 10316 (88);
- (c) a Common Elements and General Index in the existing MCBS Form 10317 (88); and
- (d) except in a common elements condominium, a series of Unit Registers or Unit Indices, one for each unit included in the condominium property, in the existing MCBS Form 10318 (88).

3. Automated Condominium Register - *Land Titles Act*

- (1) If the records of the condominium property are automated, the Condominium Register shall contain one PIN for each unit;
- (2) If the records of a common elements condominium property are automated, the Condominium Register shall contain one PIN for the property.

4. Pre-Approval for Registration

The requirement continues that all condominium declarations and descriptions and amendments to the declaration and description must be approved by the appropriate Land Registry Office prior to submission for registration.

5. Condominium Estate and Type Statements

The statements setting out the estate (freehold or leasehold) and the type (common elements, phased, standard, vacant land) shall be included on the first page of the declaration.

6. Planning Authority Conditions

Easements can be created in the declaration as a result of conditions of approval imposed by the

Planning Authority. These easements can benefit third parties. (s. 20, new Act) If such easements are created in the declaration, Schedule A will include a note identifying the easements as being so created and a reference to the location within the declaration where the statement of planning conditions are set out. (s. 7(2)(g), new Act)

7. Descriptions of Easements

Descriptions of easements must be in compliance with O.Reg. 43/96, with the following exception, as outlined in s. 45(5), O. Reg. 49/01. An easement created upon the registration of the declaration and description may be described by reference to physical features or a specified level, or levels, and must be illustrated on the condominium survey plans. The extent of the easement must be clearly illustrated as a closed figure and with the use of arrows. A surveyor must be able to physically establish the horizontal and vertical extents of the easement strictly from the information contained on the plan. An easement so described will be deemed to have the approval of the Examiner of Surveys and Land Registrars are authorized to accept them.

8. Easements Affecting Part of a Unit or Exclusive Use Portion

Where an easement affects part of a unit or an exclusive use portion, the requirement will continue that the part so affected will be illustrated and defined by measurements on the plan defining the unit or exclusive use portion or described as a PART on a reference plan.

9. Description Plan Sheets

The description will contain four parts. They are as follows:

- Part I - the perimeter plan sheet and diagrams of the units.
- Part II - the exclusive use portions of the common elements.
- Part III - the architectural plans.
- Part IV - the structural plans.

Although the regulation uses roman numerals, the use of numbers 1, 2, 3 and 4 is also acceptable.

10. PIN/Parcel/Certificate of Title Notation

The perimeter plan sheet for all condominiums, other than amalgamations, will include a notation above or below the Schedule of Appurtenant and Servient Interests (Form 3, O. Reg. 48/01) that relates the land included in the plan to the whole, part or remainder of the land described in the existing underlying PINs, parcels or certificates of title.

11. Declaration Schedules

The regulations under the old Act prescribe only one schedule, being the description of the property set out in Schedule A. The new Act prescribes all required schedules, which vary depending upon the type

of condominium, from Schedules A to M. See Appendix A for a summary of each.

12. Schedule C to the Declaration – Unit Boundaries

Sections 5(4) and 56(4) of O. Reg. 48/01 set out the requirements for Schedule C to the declaration. These subsections specify that the unit boundaries be referenced to buildings or monuments and fully describe the monuments or in the case of a vacant land condominium certify that the unit boundaries are controlled by the monuments illustrated on the plan sheet. Schedule C cannot contain inclusions or exclusions from the unit. Typically inclusions and exclusions are pipes, wires, cables, conduits etc. These items more properly belong in the body of the declaration. A note may be included, below the surveyor's signature, referring the reader to specific portions of the declaration that details ownership, maintenance and repair obligations of these items. If these inclusions and exclusions are contained in Schedule C, the Land Registrar is to refuse the declaration.

13. Architectural and Structural Plans and Certificates of Completion – Schedule G

If the description contains architectural plans (prepared by an architect) and structural plans, Schedule G of the declaration shall contain an architect's certificate and one or more engineer's certificates. (s. 8(1)(b) & (e), new Act)

If the description contains architectural plans (prepared by an architect) and no structural plans Schedule G of the declaration shall contain only an architect's certificate. (s. 8(1)(b) & (e), new Act)

If the description contains structural plans and no architectural plans, Schedule G of the declaration shall contain only one or more engineer's certificates. (s. 9(2), O. Reg. 48/01)

Similar to the old Act, if architectural plans are not available, inadequate or not required under the *Building Code Act*, drawings that are sufficient to enable the construction of the buildings prepared by a non-architect are deemed to be the architectural plans (s. 13, O. Reg. 49/01) and the completion certificate in Schedule G can be completed by an architect and/or an engineer(s). (s. 5(8), O. Reg. 48/01) (Note: s. 9(3) O. Reg. 48/01 sets out that the completion certificates are part of the declaration)

The Schedule G certificates will together address all the matters required by O. Reg. 48/01. (Form 2 or Form 17)

Registration requirements:

- One set of paper prints of the architectural and structural plans must be submitted to the land registry office.
- Architectural and Structural Plans will include the following endorsement on each sheet:

_____ (Standard, Common Element, Vacant Land or Leasehold)
 Condominium Plan No. _____

Part (III or IV), Sheet _____ of _____ Sheets

Note: The regulations under the new Act no longer require the total number of Parts on architectural/structural plans.

14. Encroachments

The treatment of encroachments remains unchanged. Those portions of condominium buildings located outside the condominium property are not governed by the *Condominium Act, 1998*. The title to encroachments should be resolved prior to registration of the condominium however, if title resolution does not take place, the notes set out below must be included in the declaration and on the description to reflect the encroachment particulars.

Declaration – Include one of the following notes in a prominent place on the first page of the declaration.

- Where there is no encroachment agreement:
 CAUTION: That portion of the condominium building shown in hatched outline on Part ____ Sheet ____ of the description, encroaches upon the adjoining lands and is not governed by the *Condominium Act, 1998*.
- Where there is an encroachment agreement:
 CAUTION: That portion of the condominium building shown in hatched outline on Part ____ Sheet ____ of the description encroaches upon the adjoining lands and is not governed by the *Condominium Act, 1998* and is the subject of an agreement registered as Instrument No. _____.

Description – Include one of the following notes adjacent to the encroachment that will be highlighted in hatched outline.

- Where there is no encroachment agreement:
 CAUTION: That portion of the condominium building shown in hatched outline hereon encroaches onto adjoining lands and is not governed by the *Condominium Act, 1998*.
- Where there is an encroachment agreement:
 CAUTION: That portion of the condominium building shown in hatched outline hereon encroaches onto adjoining lands and is not governed by the *Condominium Act, 1998* and is the subject of an agreement registered as Instrument No. _____.

15. Non-Contiguous Portions of Units

The treatment of non-contiguous portions of units remains unchanged. Where two or more portions of a unit are non-contiguous each portion will be identified as an area of that unit. (e.g. UNIT 1, Area 1; UNIT 1, Area 2) A note will be included on the plan in close proximity to the affected unit(s) stating that: "Unit(s) _____, is (are) comprised of non-contiguous areas designated by the same unit number"

16. Reserving Corporation Numbers

Condominium Corporation Numbers cannot be reserved. Land Registrars are not to assign a number to a condominium corporation until the declaration and description are being registered.

17. Land Registration Reform Act

Declarations and descriptions are exempt from requiring a Document General, Form 4. (s. 3, O.Reg. 17/99)

18. Ontario New Home Warranties Plan

Land Registrars are required to forward a copy of all condominium declarations and amendments that create a phase in a phased condominium corporation after registration to:

Ontario New Home Warranties Program
5160 Yonge Street
Suite 600
Toronto, ON
M2N 6L9
Attention: Condominium Manager

IV. CONDOMINIUM TYPES**1. Vacant Land Condominiums**

Vacant Land Condominiums will consist of units and common elements. The units may be vacant lots similar to lots on a plan of subdivision. A unit may contain building(s) and structure(s) as long they are wholly contained within the unit and do not form any part of the unit boundaries.

Section 158 of the new Act requires that all buildings, structures, facilities and services on the common elements in a vacant land condominium be completed, installed and provided in accordance with O.Reg. 48/01, prior to the registration of the declaration and description. The new Act, however, also allows the declarant to post a bond or other security with a body specified by the municipality when the

buildings, structures, facilities and services are not complete prior to registration.

When such a bond or security is posted:

- Schedule G of the declaration will not contain any completion certificates and the architectural and structural plans will not be submitted with the initial registration. Schedule G will contain a statement that the certificates will be included in an amendment to the description and a statement from the municipality or MMAH that the bond or security is sufficient to ensure that the buildings and structures will be completed and the facilities and services will be installed in accordance with the new Act.
- The submission of architectural and structural plans and the architect/engineer completion certificates will be registered as an amendment to the description in Form 21, O. Reg. 48/01, at some point after the registration of the condominium when the buildings, structures, facilities and services are complete. There are no time restrictions associated with this requirement.
- Schedule H will list all buildings, structures, facilities and services that will be included in the common elements upon the registration of the amendment.
- The surveyor is to list all four Parts on all plan sheets even though the last two parts will be submitted at a later date. This will eliminate the need to amend all of the plan sheets when Parts III and IV are submitted with Form 21, O. Reg. 48/01. The index on the first plan sheet will indicate 'NIL' for the number of sheets for Part III – Architectural Plans and Part IV – Structural Plans.
- Any existing plan sheets that are amended when the Architectural and Structural Plans are submitted (e.g. first plan sheet – index & illustration of the perimeter of the buildings and structures) must include a reference to the registration number of Form 21, O. Reg. 48/01. The process to amend the plan sheets is the same as the one set out for s. 107 amendments described in Section V, Item 1 of this Bulletin.

If there are no buildings, structures, facilities and services on the common elements this will be stated in Schedule H of the declaration and there will be no Schedule G. If there are no buildings and structures on the common elements there will be no architectural and structural plans.

2. Common Elements Condominiums

Common Elements Condominiums do not contain units. The common interests in the condominium attach to freehold parcels of land located in the same land registration division as the condominium property. The freehold parcels (parcels of tied land or POTL's) are identified and described in Schedule D to the declaration.

Automated Land Titles System:

In the automated system one PIN will be opened for the condominium property. Generally, documents relating to the condominium will be registered on this PIN and documents which relate to a specific parcel of tied land, such as a lien for common expenses, will be registered on the appropriate parcel of tied land. A remark will be placed on the parcel registers for the parcels of tied land notifying the user to search the common elements condominium PIN for additional encumbrances.

- The Owners' Names field in the Common Elements Condominium PIN will contain 'The owners from time to time of the parcels of tied land as set out in Schedule D to the declaration'.
- The thumbnail description for each parcel of tied land will be amended to include: 'together with an undivided common interest in (*LRO division*) Common Elements Condominium Corporation No. _____'
- A property remark will be added to the PIN or parcel register of each parcel of tied land that states: 'For additional encumbrances the PIN for (*LRO division*) Common Elements Condominium No. _____ in Block _____ must be examined.'

Non-automated Land Titles System:

- Make an addition to the parcel register for each parcel of tied land that states: 'Together with an undivided common interest in (*LRO division*) Common Elements Condominium Corporation No. _____ as in Declaration registered as Instrument No. _____'
- A long entry will be added to the parcel register of each parcel of tied land that states: 'For additional encumbrances the Common Elements and General Index for (*LRO Division*) Common Elements Condominium Plan No. _____ must be examined.'
- Remark the declaration in the Property Parcel Register and the Common Elements and General Index with: 'Note: The owners of this parcel are the owners from time to time of the parcels of tied land as set out in Schedule D to the declaration'.

Non-automated Registry System:

- A remark may be added to the Abstract Index for each POTL referencing the applicable instrument number or reference plan part.

If there are no buildings, structures, facilities and services on the common elements this will be stated in Schedule H of the declaration and there will be no Schedule G. If there are no buildings and structures on the common elements there will be no architectural and structural plans.

A parcel of tied land can be subdivided, however the common interest attached to the original parcel of land remains unaffected. To redistribute the common interest among the subdivided parcels an amendment creating new parcels of tied land must be registered.

3. Amalgamating Condominiums

Two or more standard condominiums may amalgamate into a single standard condominium.

The regulations require, as part of Schedule C to the declaration, two lists which indicate the relationship between the old unit numbers and levels and the new unit numbers and levels and vice versa. These lists assist clients in searching title following the amalgamation. Land Registrars are to rely upon the list specified in s. 36(7)(b) O. Reg. 48/01, being the new to old listing of the units.

The only changes to the declaration and description permitted in the amalgamated declaration and description are those necessary to facilitate the amalgamation. These changes must not create new units or adjust unit or condominium property boundaries and Land Registrars are not to accept declarations and descriptions for amalgamated condominiums that do so.

Schedule A to the declaration of the amalgamated condominium may contain a solicitor's statement specifying easements that will merge in law and no longer exist upon the registration of the declaration and description.

The perimeter plan sheets for amalgamated condominiums are not required to show underlying geographics and PINs, parcels and instrument numbers for units illustrated thereon. If shown staff are to encourage the surveyor to remove them however if the surveyor elects to have this information remain its accuracy must be confirmed.

In the non-automated Registry system a reference to the amalgamated condominium will be recorded in the Unit Index for each unit in the amalgamating condominiums.

4. Phased Condominiums

A standard condominium may be designated a phased condominium under the new Act. Schedule A to the declaration will identify lands owned by the declarant which are intended to be included in the condominium property upon the registration of future phases. These lands are defined as the 'servient lands'. Phasing will permit for the addition of units and common elements through an amendment to the declaration and description without following the amendment provisions of s. 107 of the Act.

S. 51(e), O. Reg. 48/01– the phase cannot be part of a building that was included in a previous phase or the initial registration; this prevents phasing within a building.

The declaration and description will be registered against the servient lands.

It should be noted that the Act does not identify the initial registration of the declaration and description as a phase. The first phase is the first amendment to the declaration and description creating a phase.

Schedule A to the declaration for an amendment creating a phase may contain a solicitor's statement specifying easements that will merge in law and no longer exist upon the registration of the amendment.

Automated System

Following the registration of an amendment for a phase, the thumbnail description for a unit added to the condominium, in the automated land titles system, will not include underlying geographics. For example a thumbnail will appear as: "Unit 1, Level 1, (*LRO Division*) Standard Condominium Plan No. _____. T/W & S/T as set out in Schedule A of amendment to Declaration (*Registration No.*)"

For the purposes of s. 22(2)(b), O. Reg. 49/01 an amendment for a phase in the automated system will be recorded against all the units. Any previously registered instruments affecting the property included in the amendment will be recorded against the unit(s) included in the amendment.

Non-automated System

For the purposes of s. 22(2)(b), O. Reg. 49/01 an amendment for a phase in the non-automated system will be recorded in: 1) the Constitution Index and 2) the Common Elements and General Index followed by any previously registered instruments affecting the property included in the amendment.

Any easements that merged in law, upon the registration of an amendment for a phase, will be so noted on the Common Elements and General Index.

5. Leasehold Condominiums

The declarant in a Leasehold Condominium must own a leasehold interest in the land. A declaration and description may be registered on the leased land, dividing the land into leasehold units and common elements. Purchasers buy a leasehold interest in the unit and common elements for a fixed number of years, as set out in the declaration.

As the leasehold interest has been transferred to the Leasehold Condominium owners for the term identified in the declaration, no registrations are to be accepted on the underlying leasehold parcel.

In the automated land titles system the leasehold PIN underlying the condominium will be closed. Any transactions involving any remaining interest of the lessee will be recorded on the freehold PIN where the lease is registered.

V. GENERAL REGISTRATION REQUIREMENTS

1. Amendments to the Declaration or Description - Owners' Consent – s. 107

Amendments to the declaration and description under s. 107 of the Act shall be in Form 1,

O. Reg. 49/01. The process for the registration of an amendment to the description is set out in s. 18, O. Reg. 49/01.

Amendments to the description will require the Ontario Land Surveyor to arrange with the Land Registrar or the Assistant Examiner of Surveys to make a copy of the original registered plan sheet(s). The surveyor will alter the copy to illustrate the amendment as set out in Form 1. In some cases an additional new plan sheet may also be necessary which will result in amendments to the Index of plan sheets.

The Certificate of Amendment (Appendix B) shall be included in a conspicuous location adjacent to the original Registration Certificate. The Surveyor's Certificate for Amendment (Appendix C) shall be included in a conspicuous location adjacent to the amended portion of the plan sheets.

Automated System

An amendment is recorded against each unit when the condominium is registered in the automated system. If the amendment add new units, all previously registered instruments affecting the lands included in the amendment are recorded against the units included in the amendment (s. 30, O.Reg. 49/01). If the amendment adds additional lands to the condominium but does not include units, previously registered instruments affecting the lands included in the amendment will be recorded against the existing units in the condominium.

Non-automated System

When the amendment adds additional lands to the condominium property and the condominium is registered in the non-automated system the amendment is recorded in: 1) the Constitution Index and 2) the Common Elements and General Index followed by any previously registered instruments affecting the additional lands. (see Appendix F)

2. Amendments to the Declaration or Description – Order of the Director of Titles

Under section 110 of the new Act, the condominium corporation or an interested person may apply to the Director of Titles for an Order to amend the declaration or description to correct an error or inconsistency that is apparent on the face of the declaration or description. Applications for an Order under section 110 of the Act are to be sent to the Assistant Examiner of Surveys for the region in which the condominium property is located. An application form is attached as Appendix D. An Order form is attached as Appendix E. The Order will include a statement of who is responsible for carrying out the amendment. The plan correction procedures set out in PART IX of O.Reg. 43/96 will be used if the Order is with respect to an amendment to the description plan sheets.

3. By-laws

The *Condominium Act, 1998* states that by-laws and joint by-laws are not effective until registered. To register a by-law or joint by-law it must be attached to a certificate in Form 11, O. Reg. 48/01.

4. Rules

As was the case under the old Act, Rules and Joint Rules made by Condominium Corporations do not constitute an instrument acceptable for registration and will not be accepted for registration. If rules are registered as a part of a by-law it should be noted that they become incorporated in the by-law and can only be amended or repealed in accordance with the requirements for by-laws.

5. Other Instruments

Appendix F lists where instruments registered, after the initial registration of the declaration and description, are to be recorded in the land registration system.

6. Enforcing a Judgement against a Condominium Corporation

Subsection 23(6) of the new Act provides that a judgement against a condominium corporation is also a judgement against each unit owner at the time of the judgement. It should be noted, however, that the Sheriff's Office can not enforce a writ of execution against condominium unit owners if their names were not set out in the judgement, unless otherwise specified in an Order of the court.

To ensure that a writ of execution will bind the land of the persons who were the owners at the time of the judgement, it is recommended that the solicitor for the execution creditor ensure that the names of those persons are included in the writ of execution.

7. Terminations

Pursuant to s. 83(3) of the *Registry Act* the Land Registrar shall, upon the termination of a freehold condominium or a portion thereof, when the condominium property is under the registry system, open an abstract index for the former condominium lands.

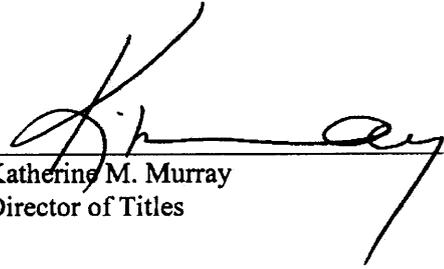
The procedure for establishing new PINs or parcels for the terminated lands, when the condominium property is in the land titles system, is set out in O. Reg. 49/01.

Any easement over the condominium lands created after the registration of the declaration and description is extinguished upon termination. (s. 127, new Act)

Bulletins 75022, 79041, 79046, 79049, 80027, 80038, 85003, and the portions relating to condominiums in 85005, 87002 are hereby revoked.



D. R. Aron
Examiner of Surveys



Katherine M. Murray
Director of Titles

APPENDIX A

SCHEDULE	CONDO TYPE	CONTENT
A	All	Legal description of the condominium property including all appurtenant and servient easements.
B	All except Amalgamations	Consent of every person having a registered mortgage on the land or interests appurtenant to the land described in Schedule A.
C	All except Common Elements	Specification of the boundaries of each unit and a statement by the OLS verifying the description of them.
D	All	A statement expressed in percentages, of the proportions equalling 100% of the common interests and the common expenses for each unit.
E	All	Specification of the common expenses or may be left blank.
F	All	Indicates any exclusive use portions of the common elements or indicates that there are none.
G	All except Amalgamations	Completion certificate(s) of an Architect and/or Engineer.
H	Common Elements & Vacant Land	List and brief description of all buildings, structures, facilities and services included in the common elements of the condo.
I	Common Elements	Certificate of consent in Form 9 of O.Reg. 49/01 from each owner of a parcel of tied land.
J	Common Elements	Notice in Form 10 of O.Reg. 49/01 of attachment of a common interest to a parcel of tied land.
K	Phased	Included only with an amendment creating a phase and contains a statement of all <i>Planning Act</i> conditions the approval authority requires the declaration to mention or a statement that there are no conditions.
L	Leasehold	Contains: 1) all the leasehold provisions that affect the property, the corporation and the owners, a statement that they are binding on them; 2) the term of the leasehold interests; 3) the amount of rent and when it is payable for at least the first 5 years; and 4) the formula used to determine rent for the remainder of the term.
M	Leasehold	Contains a statement signed by a Solicitor that: 1) the lessor is the registered owner of the freehold estate and appurtenant interests; 2) the declarant is the registered owner of the leasehold estate and appurtenant interests; and 3) the lease is a subsisting lease for (<i>indicate term</i>).

APPENDIX B

CERTIFICATE OF AMENDMENT

Amended in accordance with s. 18, O.Reg. 49/01.
Amendment to Declaration or Description registered as No. _____.

Date

Land Registrar

APPENDIX C

SURVEYOR'S CERTIFICATE FOR AMENDMENT

I certify that this survey and plan are amended in accordance with Amendment to Declaration or Description registered as No. _____ and are correct and in accordance with the *Condominium Act, 1998*, the *Surveys Act*, the *Surveyors Act* and the *Land Titles Act* (or the *Registry Act*) and the regulations made under them.

Date

(signature)

(print name)
Ontario Land Surveyor

APPENDIX D

Condominium Act, 1998

**APPLICATION FOR AN ORDER TO CORRECT
THE DECLARATION OR DESCRIPTION
UNDER SECTION 110 OF THE ACT**

IN THE MATTER OF a declaration registered as Instrument No. on the day of,, in the Land Registry Office for the Land Titles (or Registry) Division of (the "Declaration")

IN THE MATTER OF a description registered as (name of condominium plan) registered in the Land Registry Office for the Land Titles Division of (the "Description")

TO: The Director of Titles

.....

(Name of applicant)

(If the applicant is not the condominium corporation, also state what the interest of the applicant is e.g. owner of Unit ..., Level)

apply to have the following correction made to the Declaration / Description:

(give detailed particulars of the error or inconsistency and the correction requested)

(If a correction to the Description is requested:

A copy of the Description (of the relevant portion of it) is attached with the proposed correction(s) noted on it.)

The following evidence is submitted in support of this Application:

(Specify the evidence in support of the Application. If you are requesting a correction to a plan of survey, you must provide the signed statement of an Ontario Land Surveyor setting out the nature of the error, defect or omission in the plan, specifying the correction that is required and providing the evidence in support of the correction.)

continued:

The applicant's address for service is:

Dated this day of,

.....
(signature)

(In the case of a corporation, print names and positions of those who sign on its behalf, and include a statement that they have authority to bind the corporation or affix the corporate seal)

APPENDIX E

Condominium Act, 1998

**ORDER OF THE DIRECTOR OF TITLES
UNDER SECTION 110 OF THE ACT**

T.S.S.O. File No.

IN THE MATTER OF a declaration registered as Instrument No. on the day of,, in the Land Registry Office for the Land Titles (or Registry) Division of (the "Declaration")

IN THE MATTER OF a description registered as (name of condominium plan) registered in the Land Registry Office for the Land Titles Division of (the "Description")

AND IN THE MATTER OF an Application dated the day of, made by (name of Applicant – if Applicant is not the condominium corporation, state the interest of the Applicant e.g. owner of Unit ... Level) for an order to amend the Declaration / Description to correct an error or inconsistency that is apparent on the face of the Declaration / Description (the Application")

AND IN THE MATTER OF section 110 of the *Condominium Act, 1998*, S.O. 1998, c. 19.

ORDER

Having considered the Application and the evidence submitted in support of it, I order that:

(set out the details of the correction)

Dated this day of,

.....
Director of Titles

APPENDIX F

**RECORDING OF INSTRUMENTS REGISTERED
AFTER THE DECLARATION AND DESCRIPTION
(except Terminations)**

IF THE RECORDS OF THE PROPERTY ARE AUTOMATED

	Instrument	Recording Location	Authority
For all Condominiums except Common Elements Condominiums	a) affects all or some unit(s)	a) parcel register for each unit affected	a) O.Reg. 49/01 s.31(1)(a)
	b) affects the common elements	b) parcel registers for all the units in the condominium	b) O.Reg. 49/01 s.31(1)(b)
For Common Elements Condominiums	a) affects the common elements save and except instruments listed in b) & c)	a) parcel register for the common elements condominium	a) O.Reg. 49/01 s.31(2)
	b) a certificate of lien in respect of unpaid common expenses, a partial or complete discharge a certificate of lien or a partial discharge of an encumbrance	b) parcel register(s) for the affected parcels of tied land	b) O.Reg. 49/01 s.31(4)
	c) an amendment which adds parcels of tied land	c) parcel register for each new parcel of tied land and the parcel register for the common elements condominium	c) O.Reg. 49/01 s.32

- NOTE:
- 1) For amendments creating a phase see Section IV, Item 4 of this Bulletin.
 - 2) For amendments adding additional lands to the condominium, other than phases, see Section V, Item 1 of this Bulletin.

IF THE RECORDS OF THE PROPERTY ARE NOT AUTOMATED

	Instrument	Recording Location	Authority
For all Condominiums	a) affects all of the units or parcels of tied land and the common elements	a) Common Elements and General Index	a) O.Reg. 49/01 s.33(1)(a)(i)
For all instruments other than:	b) affects the common elements, but no units	b) Common Elements and General Index	b) O.Reg. 49/01 s.33(1)(a)(ii)
1) Exceptions (see below – page 21)	c) affects the common elements and some, but not all, of the units or parcels of tied land	c) Common Elements and General Index and the parcel register/Unit Index for each unit or parcel register/abstract index for each parcel of tied land	c) O.Reg. 49/01 s.33(1)(b) & (c)
2) an amendment to the declaration and description or a by-law (see below – page 22)	d) affects one or more units, but not all of the units	d) parcel register/Unit Index for each unit or parcel register /abstract index for each parcel of tied land	d) O.Reg. 49/01 s.33(1)(d) & (e)

IF THE RECORDS OF THE PROPERTY ARE NOT AUTOMATED –continued

	Instrument	Recording Location	Authority
1) Exceptions a) a complete discharge of an encumbrance recorded in the Property Parcel Register or Property Abstract Index; b) an application for a caution under the <i>Land Titles Act</i> c) a deed or other instruments by which ownership of the property is changed that is received for registration before the registration of a deed of any units	a), b) & c) – affects all of the units or parcels of tied and the common elements	a), b) & c) – Common Elements and General Index <u>and</u> Property Parcel Register or Property Abstract Index	a), b) & c) – O.Reg. 49/01 s.33(2)

IF THE RECORDS OF THE PROPERTY ARE NOT AUTOMATED –continued

	Instrument	Recording Location	Authority
2a) An amendment to the declaration and description or a by-law	a) affects all of the units and common elements b) affects one or more, but not all of the units or parcels of tied land c) affects part but not all of the common elements d) which adds new parcels of tied land in a Common Elements Condominium	a) Constitution Index b) Constitution Index and parcel register/Unit Index for each unit or parcel register/abstract index for each parcel of tied land c) Constitution Index and Common Elements and General Index d) parcel register/abstract index for each new parcel of tied land and the Constitution Index and Common Elements and General Index	a) O.Reg. 49/01 s.33(3) b) O.Reg. 49/01 s.33(3)(a) & (b) c) O.Reg. 49/01 s.33(3)(c) d) O.Reg. 49/01 s.32
2b) An amendment to the declaration and description adding new lands (including a phase).		Constitution Index; Common Elements and General Index followed by entries of all instruments affecting the new lands.	O. Reg. 49/01 s. 22(2)(b),33(3)& Bulletin 2001-1



Ministry of Consumer
and Business Services
Registration Division
Title and Survey Services Office

BULLETIN NO. 2002-4

Condominium Act, 1998

DATE: December 23, 2002

TO: All Land Registrars
All Ontario Land Surveyors

Amending Condominium
Descriptions under Sections
107 and 109 of the
Condominium Act, 1998

The *Condominium Act, 1998* provides for the amendment of a declaration and/or a description with the owner's consent under Section 107 or by a Court Order under Section 109.

When a Surveyor is engaged to undertake an amendment to the description under Section 107, the Surveyor should ensure that the amendment has been clearly set out in Form 1 of O. Reg. 49/01 under the *Condominium Act, 1998*. This Form must be registered in accordance with Section 107(6), prior to making the amendment.

When a Surveyor is engaged to undertake an amendment to the description under Section 109, the Surveyor should ensure that the amendment has been clearly set out in the Court Order. In addition, the Court Order must be registered.

Before proceeding with any amendment to the description, the Surveyor should consult with the Land Registrar or the Regional Surveyor.

AMENDING PROCEDURE FOR AMENDMENTS TO THE DESCRIPTION

1. Manual amendments may be made to the original description plan(s) where *Planning Act* approval is not required, subject to Item 10.
2. Where *Planning Act* approval is required, follow the process set out in items 3 and 4.
3. The Ontario Land Surveyor must obtain a copy of the original description plan(s), that require(s) amending, in the form of a hard copy (mylar or photographic reproduction) or a digital copy, from the appropriate Land Registry Office. Arrangements for the copy or copies can be made through the Land Registrar or the Regional Surveyor and an outside supplier. The original description plan(s) must remain in the custody of the Land Registrar or Regional Surveyor throughout this procedure. The Surveyor will be responsible for arranging for payment of all costs associated with producing the copy or copies.

All original registration particulars, Certificates and **signatures** must remain intact on the copy or copies.

4. On the copy or copies of the original description plan(s) being amended, including any sheets being added, the following shall be added preceding the component name of the Plan in the top right hand corner, in the same size lettering: **“AMENDMENT TO DESCRIPTION”**.

Example:

AMENDMENT TO DESCRIPTION	
PART 1 OF 4 PARTS SHEET 1 OF 1 SHEET	HALTON STANDARD CONDOMINIUM PLAN No. XXXX

5. The Certificate of Amendment shall be included in a conspicuous location adjacent to the original Registration Certificate(s) or as close as possible and boxed as shown. This Certificate need only be added to those description plans that are being amended in accordance with Form 1 or a Court Order, as well as any new sheets being added. Renumbering a sheet will not require a Certificate.

CERTIFICATE OF AMENDMENT	
Amended in accordance with s. 18, O.Reg. 49/01.	
Amendment to Declaration or Description registered as No. _____ <i>(or in the case of a Court Order):</i>	
Amendment by Court Order registered as No. _____	
_____ Date	_____ Land Registrar

6. The Surveyor’s Certificate(s) for Amendment shall be included in a location adjacent to the original Surveyor’s Certificate or as close as possible and boxed as shown:
 - A. To be added to all Part 1 Sheets, that are being amended or added and Sheet 1 of Part 1 of a Phased Condominium under the *Condominium Act, 1998*, if applicable; and

SURVEYOR'S CERTIFICATE FOR AMENDMENT

I certify that:

- 1. This survey and plan are amended in accordance with an amendment to declaration or description registered as No. _____ and are correct and in accordance with the *Condominium Act, 1998*, the *Surveys Act*, the *Surveyors Act* and the *Land Titles Act* (or the *Registry Act*) and the regulations made under them;

or

This survey and plan are amended in accordance with an amendment by Court Order registered as No. _____ and are correct and in accordance with the *Condominium Act, 1998*, the *Surveys Act*, the *Surveyors Act* and the *Land Titles Act* (or the *Registry Act*) and the regulations made under them;

(If the perimeter boundary or boundaries are being changed and/or a Unit(s) is being added, removed or amended, include the following paragraph)

- 2. The survey was completed on the _____ day of _____.

(If Units are being added or the extent amended on the Sheet, include the following paragraph)

- 3. The diagrams of the Units affected by this amendment are substantially accurate.

(If the plan is of Crown land and was prepared under the instructions of the Surveyor General of Ontario, include the following paragraph)

- 4. This plan and the field notes were prepared from an actual survey performed under my personal supervision and I was present on the site during the progress of this survey.

Date

(signature)

(print name)
Ontario Land Surveyor

B. To be added to all description plans designating Exclusive Use Portions that are being amended and/or added.

**SURVEYOR'S CERTIFICATE
EXCLUSIVE USE COMMON ELEMENTS FOR AMENDMENT**

I certify that this plan of survey accurately shows the extent and location of the exclusive use portion of the common elements as affected by this amendment.

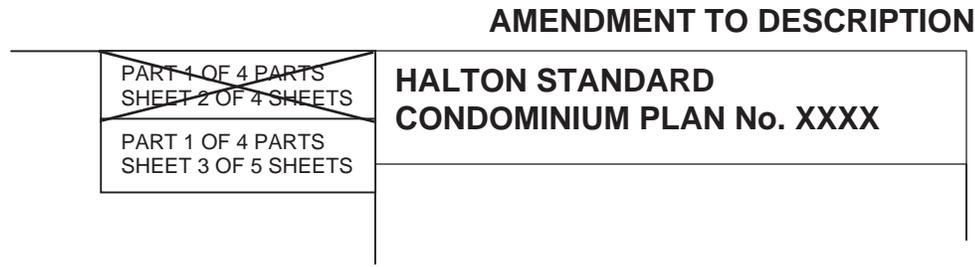
Date

(signature)

(print name)
Ontario Land Surveyor

7. For applications under Section 107, a statement with respect to *Planning Act* approval as per Section 9 of the *Condominium Act, 1998* shall be included in a conspicuous location adjacent to the amended portion of the description plan or as close thereto as possible.
8. If the amendment necessitates the addition of a new description plan sheet (or sheets), the Part / Sheet box on the existing description plans shall be amended.

Example:



9. Further to item 8 and the addition of Architectural and/or Structural Plans, as a result of the addition of Units, the Index of Parts Schedule shall also be amended accordingly. The numbering of the original Architectural and/or Structural Plans will also have to be amended.
10. If applicable, the Schedule of APPURTENANT and SERVIENT INTERESTS shall also be amended accordingly. If this necessitates the moving of other items on the plan to accommodate the expansion of the Schedule, manual amendments to the original description plan(s) will not be accepted.
11. All manual amendments to the original description plan(s) shall be prepared to a drafting standard that in the opinion of the Land Registrar or the Regional Surveyor will permit legible and accurate copies.
12. Consideration shall be given to the extent of the amendments and the placement of the required Notes and Certificates. It may be necessary to place the copy on a larger sheet than the original without exceeding the maximum plan requirements.

REGISTRATION PROCEDURE

It is strongly advised that the amendment be pre-approved by the Land Registry Office prior to forwarding the amended plans to the Planning Authority. Once the Planning Authority signs the approval Certificate with respect to the amendment, no changes or amendments will be allowed without the Planning Authority's written approval.

For pre-approval, the following must be submitted:

- ✓ two (2) paper prints of the amended description;
- ✓ one (1) marked up copy of the original description illustrating the amendments;
- ✓ two (2) copies of completed Form 1, O.Reg. 49/01, or Court Order, and the applicable amended Schedules etc.;
- ✓ one (1) copy of the original declaration and
- ✓ copies of all Plans and title documents, if applicable.

Submission for Registration:

The process for the registration of an amendment to the description is set out in Section 18 of O. Reg. 49/01.

Where the original description sheet has been superceded, it is to remain with the original mylars and made available for viewing upon request, in accordance with Section 18 of O. Reg. 49/01.

This Bulletin supercedes Appendices 'B' and 'C' of Bulletin 2001-1

A handwritten signature in black ink, appearing to read "Doug", with a long horizontal flourish extending to the right.

Examiner of Surveys

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- " - Disclosure Statement
- " - Declaration
- " -By-Law
- " - Agreements
- " - Budget and other Statements

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f+ Kpuvcmgf "ugt'xlegu"cpf "eqputwexgf "c"tqcf y c{"qp"Dmjem'4."cpf "eqo r ngvgf "eqo o wplk\ " d'w'kf kpi u."utwewtgu."ugt'xlegu."cpf "h'ck'k'k'gu"qp'Dmjem'50

60' Eq'p'ekf gpv'y kj "vj g'r rcp"qh'uwdf kxkukqp"cr r tqxcn'F "j cf "cr r r'ngf "hqt"cpf "t'geg'k'gf "f'tch'cr r tqxcn'qh' cp"cr r r'ke'v'kqp"v'g'tgi k'ngt "vj g'f gen'ct'v'kqp"cpf "f'guet'k'v'kqp"qh'c"eqo o qp"grgo gpw'eqpf qo kpkwo "qp" Dmjem' 4" cpf " 5" qp" vj g' r rcp" qh' uwdf kxkukqp0 Vj g' r ctegn' qh' rcpf " y j kej " y gtg' v'gf " vq" vj g' eqpf qo kpkwo "r'tqr gt'v\ "eqo r t'ugf "Nqu'5"v'q'34"qp"vj g'r rcp"qh'uwdf kxkukqp0Nqu'3"cpf "4"qh'vj g'r rcp" ht'qp'v'gf "qp" vj g' g'z'k'k'pi . "ko r tqxgf . "r wdrke. "ut'ggv" cpf " vj g' f gen'ct'p'v' f'gek'f gf " vj g'ug" r ctegn' j cf " eqo o g'tek'n'r q'v'p'k'n'cpf "y qwf "pqv'd'g'p'gh'k'lt'qo "k'p'en'w'k'p'k'p'c't'g'uk'f'g'p'k'cm\ /qt'k'p'v'gf "f'g'x'g'nr o gpv' qp"r'k'k'c'v'g't'q'cf'0

70' Cu'r ct'v'qh'vj g'r rcp'kpi "cr r tqxcn'cpf "f'g'x'g'nr o gpv'r t'q'egu"k'y cu'f'g'v'g'to k'p'gf "vj cv'vj g'm'ec'n'i cu' eqo r cp{"y cu'r t'gr ct'gf "v'q"kp'vcn'cpf "r c{"hqt"vj g'equ'v'qh'c"hg'gf gt'o c'k'p"v'q"vj g'm'v'k'p'gu"qh'm'qu'5"v'q" 34"qp"vj g'r rcp"qh'uwdf kxkukqp0K'k'p'uk'v'gf "qp"j c'x'k'pi "qy p'gt'u' k' "qh'vj g'r k'g'c'm'pi "y kj "cp"gc'ugo gpv' cpf " o c'k'p'v'p'c'p'eg" t'k'j v' qh' y c{" cm'pi " vj g' r k'g'au" crki po gpv0 Rt'k'qt" vq" t'gi k'ut'v'k'qp" qh' vj g' eqpf qo kpkwo . "dw"ch'gt"vj g'eqo r ng'v'k'p"qh'eq'put'w'v'k'p"qh'vj g'i cu'o c'k'p. "uwej "cp"gc'ugo gpv'y cu' g'z'g'ew'gf "d{"F"cpf "t'gi k'ngt'gf "ci c'k'p'v'k'ng"v'q"Dmjem'40

80' Vj g'qdl'gev'qh'g'ux'cd'r'k'j kpi "vj g'eqo o qp"grgo gpw'eqpf qo kpkwo "ku"v'q"ng'gr "eq'p'v'q'n'qh'vj g'r t'qr gt'v\ " qh' vj g' eqpf qo kpkwo "k'p" vj g' j cpf u" qh' vj g' qy p'gt'u" qh' vj g' v'gp" uwdf kxkukqp" m'qu'0 Vj tq'wi j " vj g' eqpf qo kpkwo "eq't'r'q't'c'v'k'p"vj g'ug"qy p'gt'u"cpf "vj g'k't'g'ur g'v'x'g'r ctegn'qh'v'gf "r'cp'f'u'y k'n'd'g'p'gh'k'lt'qo " vj g'r tq'x'k'k'p"qh'c"o c'k'p'v'k'p'gf "r'k'k'c'v'g't'q'cf "*"qp"Dmjem'4+"eq'p'p'g'v'k'pi "vj g'k't'f'k'x'g'y c{u"v'q"vj g'r wdrke" ut'ggv" v'y q" v'g'p'p'k'u" eq'w't'u. "q'w'f'q'q't" u'y ko o kpi " r q'q'n' y kj " eq'p'et'g'v'g" u'w't't'q'w'p'f." cpf " c" {g'ct/t'q'w'p'f" eqo o wplk\ "t'g'et'g'v'k'p" d'w'kf kpi " y kj " n'k'ej gp" cpf " g'p'v'g't'c'k'p'o gpv' t'q'q'o u" qp" Dmjem' 50' C" w'k'k'v\ " d'w'kf kpi "y k'n'ic'nu'q'd'g'h'q'ec'v'gf "qp"Dmjem'50

90' Hqt"vj g'r wtr'q'ugu"qh'eqo r ng'v'k'pi "vj g'p'g'egu'ct {"eq'p'v'g'p'u"qh'vj g'f'q'ewo gpw'vj g'h'qmjy kpi "ko ci k'p'ct {" f'c'w'cpf "r'nc {"g'tu'y g't'g'w'ug'f <

30F gen'ct'p'v'< F GEEQTR0'k'p'e0'

80C'w'j q't'k' gf "u'ki p'k'pi "q'h'h'eg't'qh'vj g'F gen'ct'p'v'< K'0'0'Cr t'g'uk'f' gpv'

40N'c'p'f "V'k'ng'u'Q'h'h'eg'< N'c'p'f "T'g'i k'ut {"F k'k'k'k'p"qh' U'q'o g'y j g't'g'"P q0: : +

90R't'q'l'g'ev'c't'ej k'g'ev'< K'0'0'C'p'c't'ej k'g'ev' : 0R't'q'l'g'ev'U'q'n'k'k'v'q't'< K'0'0'C'r'y {"gt"

50N'g'p'f g't'< Vj g'D'c'p'n'i'q'h'U'q'o g'y j g't'g'"

; 0R't'q'r g't'v\ 'O c'p'ci g't'< " U'q'o g'y j g't'g'R't'q'r g't'v\ 'O c'p'ci go gpv'N'f'0'

60U'w'd'f k'k'k'k'p'R'nc'P'w'o d'g't'< R'nc'P'O/3456"

320K'p'w't'c'p'eg'V't'w'ug'g'< " Vj g'D'c'p'n'i'q'h'U'q'o g'y j g't'g'"

70E'q'p'f q'o k'p'k'w'o "R't'q'r g't'v\< Dmjem' 4" cpf " 5." R'nc'P" O/3456." R'nc'P" P'w'o d'g't'u'3456/7899"cpf "3456/789: "

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UQO GY J GTG"GUVC VGU"

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A DECCORP. INC. DEVELOPMENT

"

F KUENQUWTG"UVC VGO GP V"

Vj g'Eqpf qo kpkwo "Cev."3; ; : "cpf "Tgi wrcvqpu"

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**Condominium Act, 1998
DISCLOSURE STATEMENT
TABLE OF CONTENTS**

(UNDER SUBSECTION 72 (4) OF THE CONDOMINIUM ACT, 1998)

Declarant's name:	DECCORP. INC.
Declarant's municipal address:	3 Oak Street, Somewhere, Ontario, Z1Z 1Z1
Brief legal description of the property/proposed property:	Blocks 2 and 3, Plan M-1234, Land Registry Office for the Land Titles Division of Somewhere (No. 88)
Mailing address of the property/proposed property:	C/O Somewhere Property Management Ltd., Suite 1, 1 Oak Street, Somewhere, Ontario, Z1Z 1Z1.
Municipal address of the property/proposed property (if available):	Not assigned
Condominium corporation:	Somewhere Common Elements Condominium Corporation No. ___

The Table of Contents is a guide to where the disclosure statement deals with some of the more common areas of concern to purchasers. Purchasers should be aware that the disclosure statement, which includes a copy of the existing or proposed declaration, by-laws, rules, insurance trust agreement, and management agreement, contains provisions that are of significance to them, only some of which are referred to in this Table of Contents.

Purchasers should review all documentation.

In this Table of Contents,

- “unit” or “units” include proposed unit or units;
- “common elements” includes proposed common elements;
- “common interest” includes a proposed common interest; and
- “property” includes proposed property.

This disclosure statement deals with significant matters, including the following:

EDITORS NOTE: THIS FORM HAS BEEN MODIFIED FOR SIMPLICITY. THE MODIFICATION DO NOT AFFECT ITS SUFFICIENCY. IT IS SUGGESTED THAT THE ORIGINAL FORM BE USED WHEN DRAFTING A FRESH DISC. STATEMENT.

<h2>Matter</h2>		Specify the article, paragraph (and/or clause) and page number where the matter is dealt with in the existing or proposed declaration, by-laws, rules or other material in the disclosure statement
1. The Corporation is a freehold condominium corporation that is a common elements condominium corporation.		Refer to: B.1, pg.1
2. The property or part of the property is or may be subject to the <i>Ontario New Home Warranties Plan Act</i> .	Yes No <input type="checkbox"/> <input checked="" type="checkbox"/>	Refer to: B.4, pg. 1
3. N/A		
4. A building on the property or has been converted from a previous use.	Yes No <input type="checkbox"/> <input checked="" type="checkbox"/>	Refer to: B.5, pg. 1
5. A part of the common elements may be used for commercial or other purposes not ancillary to residential purposes.	Yes No <input type="checkbox"/> <input checked="" type="checkbox"/>	Refer to: B. 6, pg. 1
6. A provision exists with respect to pets on the property.	Yes No <input checked="" type="checkbox"/> <input type="checkbox"/>	Refer to: Article 3.5, pg. 6

<p style="text-align: center;">O c w g t "</p>	<p style="text-align: center;">"</p>	<p>Urgek{ " vj g' ctveng." rctci tcrj " *cpf lqt" enwug+" cpf " rci g" pwo dgt " y j gt g'vj g'b c wgt 'kuf gcn'y kj 'lp'vj g" gzlkupi 'qt 'r tqr qugf 'f gemt cvkqp.'d{ / ny u 't wgu'qt 'qvj gt 'o cvgt kcl'lp'vj g" f kexumt g'ucvgo gpv'</p>
<p>90' Vj gt g'gzkv't gultkvkpu'qt'ucpf ctf u'y kj 't gur gev'vq'vj g'wug'qh' eqo o qp"grgo gpw'qt"vj cv'ctg"dcugf "qp"vj g"pcwtg"qt"fguki p"qh'vj g" hceklkku"cpf "ugtxlegu"qp"vj g"r tqr gtvl "qt"qp"qvj gt"cur gew'qh'vj g" dwlk lpi u'iqecvqf "qp"vj g'r tqr gtvl 0' "</p>	<p>[gu"****P q" "Z"*****□ "</p>	<p>Tghgt'vq< Ctveng'508.'508.'506.'cpf'507'qp'ri u07" vq'8=kgo '3606.'ri 059=kgo '306.r i 064= cpf 'Ctveng'M'ri 03: 0'</p>
<p>: 0vj g'f gerctcpv'kpvgpf u'vq'igcug'c'r qt vqp'qh'vj g'eqo o qp'lpvgt guu0 "</p>	<p>[gu"****P q" "□"*****Z " "</p>	<p>Tghgt'vq< Kgo ". .ri 040' "</p>
<p>; 0P IC"</p>	<p>"</p>	<p>"</p>
<p>320P IC" "</p>	<p>"</p>	<p>"</p>
<p>Qpg'qt"o qtg'eqo o qp"lpvgt guu'vj cv'ku'cvcej gf "qt"y km'cvcej "vq"cp" qy pgt'au'r ctegn'qh'xpf "ctg'gzgo r v'ltqo "c"equv'cwt'kdwdcrg"vq'vj g'tguv" qh'vj g'eqo o qp'lpvgt guu0 "</p>	<p>[gu"****P q" "□"*****Z " "</p>	<p>Tghgt'vq< Uej 0F.'ri 035" "</p>
<p>340P IC "</p>	<p>"</p>	<p>"</p>
<p>350' Rctv'qt"vj g'y j qrg'qh'vj g'eqo o qp"grgo gpw'ctg"uwdlgev'vq"c" igcug'qt'igepg0'</p>	<p>[gu"****P q" "Z"*****□ "</p>	<p>Tghgt'vq< Uej 0J .'ri 039"</p>
<p>360' Rctn'pi 'hqt"qy pgt'u'ku'cmqy gf < *e+***** *d+ " qp"vj g'eqo o qp"grgo gpw= *e+ " qp"c"r ctv'qh'vj g'eqo o qp"grgo gpw'qh'y j kej "cp"qy pgt"j cu" gzenwukxg'wug0' " Vj gt g'ctg't gultkvkpu'qp'r ctn'pi 0'</p>	<p>" [gu"****P q" "Z"*****□ " [gu"****P q" "□"*****Z " [gu"****P q" "Z"*****□ "</p>	<p>" Tghgt'vq< " " Twg'5.'ri 064" " Uej 0H.'ri 037" " Twgu'3"cpf'5.'ri 064"</p>
<p>370' Xklukqtu'b wuv'r c{ 'hqt'r ctn'pi 0' " Vj gt g'ku'xklukqt'r ctn'pi "qp"vj g'r tqr gtvl 0' " Xklukqt'r ctn'pi 'ku'cxcklrdrg'lp'vj g'hqm'qy lpi 'iqecvqf< " Qp" vj g" ftkxy c{ " qh' vj g" Qy pgt" qh' vj g" RQVN" y j q" ku" t gur qpukdrg'hqt'vj g'xklukqt"</p>	<p>[gu"****P q" "□"*****Z " [gu"****P q" "□"*****Z " "</p>	<p>Tghgt'vq< " " Twg'3.'ri 064=Ctveng'M'ri 08: " " Ctveng'M'ri 08: "</p>
<p>380' Vj g'f gerctcpv'o c{ "r tqxkf g"o clqt "cuugv"cpf "r tqr gtvl ."gxgp" vj qwi j 'k'ku'pqv'tgs wkt gf "vq'f q'uq0' Vj gug'ctg< Tghki gtcvqt."uxqxlqxp."f kuj y cuj gt."o letqy cxg"qxgp"ht"vj g" nksej gp'qh'vj g'eqo o wplv{ 'dwlk lpi = Vy q"eqwej gu."gki j v'wd"ej cktu."vy q"ectf "vcdrgu."vj tgg"eqh'gg" vcdrgu."qpg"o ggw'pi "vcdrg"y kj "gki j v'ej cktu."hqt"vj g'eqo o wplv{ "</p>	<p>[gu"****P q" "Z"*****□ " "</p>	<p>Tghgt'vq< Ctveng'N.'ri 08: " "</p>

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<p>dwkf lpi =" Rqn' 'y kpf uetggp'pgwkp' 'v'eqxgt'vj g'vppku'hppeg'lwttqwpf u="</p> <p>Vy q'ugv'qh'qwf qqt'r cvkq'hwtpkwg'v'cdng. 'h'wt'ej cku.'cpf'v'cdng" wo dtgnc'Z'4="</p> <p>Uy ko o lpi 'Rqnl'eqxgt'cpf' 'o ckwpcpeg'v'qnukr r rncpegu0' "</p>	<p style="text-align: center;">"</p>	<p style="text-align: center;">"</p>
<p>390' Vj g'eqtr qtcvqp'ku'tgs wktgf <"</p> <p>"</p> <p>*c+ " 'v' r w e j c u g 'w p k u 'q t 'c u g u = "</p> <p>"</p> <p>*d+ " v' c e s w k t g 'u g t x l e g u = "</p> <p>"</p> <p>*e+ " v' g p v g t 'l p v 'c i t g g o g p u 'q t 'h c u g u "</p> <p>y kj " vj g' f gen t c p v ' q t " c " u w d u k f l c t { " d q f { " e q t r q t c v g . " j q r f l p i " d q f { " e q t r q t c v g ' q t ' c h k k c v g f " d q f { " e q t r q t c v g ' q h ' v j g ' f g e n t c p v 0 "</p>	<p>[gu"****P q" '□ "*****Z "</p> <p>"</p> <p>[gu"****P q" '□ "*****Z "</p> <p>"</p> <p>[gu"****P q" '□ "*****Z "</p> <p>"</p>	<p>Tghgt'vq< Ctveng'O.'ri 064"</p> <p>"</p> <p>Tghgt'vq< Ctveng'O.'ri 064"</p> <p>"</p> <p>Tghgt'vq< Ctveng'O.'ri 064"</p> <p>"</p>
<p>3: 0' Vj g' f gen t c p v ' q t " c " u w d u k f l c t { " d q f { " e q t r q t c v g . " j q r f l p i " d q f { " e q t r q t c v g " q t " c h k k c v g f " d q f { " e q t r q t c v g " q h ' v j g ' f g e n t c p v ' q y p u ' n p f " c f l c e g p v ' v j g ' n p f ' f g u e t k d g f ' l p ' v j g ' f g u e t k v k p 0 "</p> <p>"</p> <p>*3+ " Vj g'ewtgpv'wug'qh'vj g'ncpf 'ku'xcepv' "</p> <p>"</p> <p>*4+ " Vj g' f gen t c p v ' j c u ' o c f g ' t g r t g u g p v c k p u ' t g u r g e v k p i " v j g ' h w w t g " w u g ' q h ' v j g ' n p f 0 ' V j g ' f k u e n u m t g ' u c v g o g p v ' e q p v c k p u ' c ' u c v g o g p v ' q h ' v j g ' t g r t g u g p v c k p u 0 "</p> <p>"</p> <p>*5+ " C r r n e c v k p u ' j c x g " d g g p " u w d o k w g f " v " c p " c r r t q x c n ' c w j q t k v " t g u r g e v k p i " v j g ' w u g ' q h ' v j g ' n p f 0 ' V j g ' f k u e n u m t g ' u c v g o g p v ' e q p v c k p u ' c " u w o o c t { " q h ' v j g ' c r r n e c v k p u 0 "</p> <p>"</p>	<p>[gu"****P q" 'Z'*****□ "</p> <p>"</p> <p>"</p> <p>[gu"****P q" 'Z'*****□ "</p> <p>"</p> <p>[gu"****P q" 'Z'*****□ "</p> <p>"</p>	<p>Tghgt'vq< Ctveng'P.'ri 08: "</p> <p>"</p> <p>"</p> <p>Tghgt'vq< Ctveng'P.'ri 08: "</p> <p>"</p> <p>Tghgt'vq< Ctveng'P.'ri 08: "</p> <p>"</p>
<p>3: 0' P I C</p> <p>"</p>	<p style="text-align: center;">"</p>	<p style="text-align: center;">"</p>
<p>420' Wpf gt " erwug " 365 " *c+ " qh' vj g' Condominium Act, 1998. " vj g' eqo o qp " l p v g t g u v ' k u ' c w c e j g f " q t " y k n ' c w c e j " v q ' v j g ' q y p g t a ' r c t e g n ' q h ' n p f " f g u e t k d g f " l p " v j g ' f g e n t c v k p " c p f " e c p p q v ' d g " u g x g t g f " h t q o " v j g ' r c t e g n ' w r q p " v j g ' u c r g " q h ' v j g ' r c t e g n ' q t " v j g ' g p h q t e g o g p v ' q h ' c p " g p e w o d t c p e g ' t g i k u g t g f " c i c k p u v ' v j g ' r c t e g n 0 "</p> <p>"</p>	<p style="text-align: center;">"</p>	<p style="text-align: center;">"</p> <p>Tghgt'vq< Ctveng'J.'ri 088"</p> <p>"</p>
<p>430' Vj g' f gen t c v k p " e q p v c k p u ' c " n k u v ' q h ' v j g ' d w k f l p i u . " u t w e w t g u . " h e k k k g u ' c p f ' u g t x l e g u ' v ' d g ' k p e n w f g f ' l p ' v j g ' e q o o q p ' g r g o g p u 0 "</p> <p>"</p>	<p style="text-align: center;">"</p>	<p style="text-align: center;">"</p> <p>Tghgt'vq< Uej gf wug'J.'ri 039"</p>
<p>440'v'480/P IC</p> <p>"</p> <p>"</p>	<p style="text-align: center;">"</p>	<p style="text-align: center;">"</p>

Vj g' r w e j c u g t a ' t k i j u ' w p f g t ' v j g ' E q p f q o k p k w " C e v . " 3 ; ; : " v ' t g u e k p f " c p " c i t g g o g p v ' q h ' r w e j c u g " c p f ' u c r g " c t g ' u g v ' q w w ' c v ' r c i g u ' 8 8 ' v ' 8 : ' l p ' v j g ' f k u e n u m t g ' u c v g o g p v ' y j g t g ' u g e v k p u ' 9 5 ' c p f ' " 9 6 " q h ' v j g ' C e v ' c t g ' t g r t q f w e g f " * U g e v k p p " 3 9 " * 3 + * c + 0 "

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Vj kif kuenumt g'ucvgo gpv'ku'b cf g'vj ku'3uv'f c{ 'qh'lcpwct{ .42250'
QOTgi 06: 123. Hqto "340"

C01 GP GTCN"

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y cu'pqv'etgcvf "cu'vj g'F gerctvqap"cpf "F guetkr vqpp"j cf "pqv'dggp"tgi kvgtgf 0'Vj g'f guetkr vqpp"j cf "dggp"i kxgp"ftchv'
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vko g'cu'vj g'tgi kvctvqpu'ctg'eqo r rvg0Y kj "vj ku'kp"o kpf . 'vj g'F kuemwtg'Ucvgo gpv'ur gcmu'kp"vj g'r tgu'p'v'gpug'cu'kh'
vj g'eqpf qo kpkwo "gzkuu"cpf "y kj "vj g'eqphk'gpeg"vj cv'vj g'eqpf qo kpkwo "eqtr qtcvqap"y kn'dg"etgcvf "pq"rcvgt"vj cp"
Cr tki52.'42250'
"

D0UVCVGO GP VU"

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" 30Vj g'Eqpf qo kpkwo 'Eqtr qtcvqap'*vj g')Eqtr qtcvqap)+"

Vj g'Eqtr qtcvqap'ku'c'htggj qrf "eqpf qo kpkwo "eqtr qtcvqap"qh'vj g'eqo o qp"grgo gpw'v' r g0"Uge094*5*#d+

40Cf f t guugu'Uge094*5*#e+

Vj g'F gerctcp'u'P co g'ku'F GEEQTR0'P E0'y j lej "j cu'ku'u'o wplekr cn'cf f t guu'cv'5"Qcni'Utg'gv"Uqo gy j gtg."Qpvctkq."
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DECLARATION

For registration this document must be on 8.5" x 14" white paper.

THIS DECLARATION (hereinafter called the ‘**Declaration**’) is made and executed pursuant to the provisions of the *Condominium Act, 1998*, S.O. 1998, C.19, and the regulations made thereunder as amended from time to time (all of which are hereinafter individually and collectively referred to as the ‘**Act**’), by:

DECCORP. INC.

A Copy of the Declaration must be included in the package – Sec. 72(3)(m)

(hereinafter called the ‘**Declarant**’)

WHEREAS:

- A. The Declarant is the owner in fee simple of lands and premises situate in the Municipality of Somewhere in the Province of Ontario, being more particularly described in Schedule ‘A’ annexed hereto and in the description submitted herewith by the Declarant (hereinafter called the ‘**Description**’) for registration in accordance with the Act and which lands are sometimes referred to as the ‘**Lands**’ or the ‘**Property**’;
- B. The Declarant intends that the Property together with the buildings constructed thereon shall be governed by the Act and that the registration of this Declaration and the Description will create a freehold common elements condominium corporation.

STATEMENTS

THE REGISTRATION OF THE DECLARATION AND THE DESCRIPTION WILL CREATE A FREEHOLD CONDOMINIUM CORPORATION OF THE COMMON ELEMENTS TYPE.

Sec. 40(1)(a)(i)

A PARCEL OF TIED LAND MAY NOT BE DIVIDED INTO TWO OR MORE PARCELS UNLESS AN AMENDMENT IS REGISTERED TO THE DECLARATION THAT TAKES INTO ACCOUNT THE DIVISION OF THE PARCEL OF TIED LAND.

Section 40(1)(a)(ii)

NOW THEREFORE THE DECLARANT HEREBY DECLARES AS FOLLOWS:

ARTICLE I

INTRODUCTION

1.1 Definitions

The terms used in this Declaration shall have the meanings ascribed to them in the Act unless this Declaration specifies otherwise, or unless the context otherwise requires and in particular:

- a. "Board" means the Corporation’s Board of Directors;
- b. “By-Laws” means the by-laws of the Corporation enacted from time to time;
- c. “Common Elements” means all of the Property;
- d. “Corporation” means the Condominium Corporation created by the registration of this Declaration;
- e. “Owner” means the Owner or Owners of the freehold estate(s) in Parcels of Tied Lands, but does not include a mortgagee unless in possession;
- f. Rules” means the Rules passed by the Board;
- g. "Parcel of Tied Lands" or “POTLs” means the individual parcels of land described on Schedule ‘D’ hereto which benefit from an interest in the common elements.

1.2 Act Governs The Lands

The Lands and all interests appurtenant to the Lands described in Schedule ‘A’ annexed hereto are governed by the Act. **Section 7(2)(a)**

1.3 Common Elements Condominium

The registration of this Declaration and the Description will create a common elements

condominium corporation.

1.4 Use and Enjoyment **Sec. 140**

The common elements are for the use and enjoyment of the Owners. **Sec. 40(6) and Sch. D to Declaration**

1.5 Consent of Encumbrancer

The consent of every person having a registered mortgage against the Property or the POTL'S or interests appurtenant thereto is contained in Schedule "B" attached hereto.

1.6 Common Interest and Common Expenses

Each Owner shall have an undivided interest in the Common Elements as a tenant in common with all other Owners in the proportions set forth opposite each Tied Land number in Schedule "D" attached hereto and shall contribute to the Common Expenses in the proportion set forth opposite each Parcel of Tied Land in Schedule "D" attached hereto. The total of the proportions of the common interests and proportionate contribution to Common Expenses shall each be one hundred (100%) percent.

1.7. Address for Service. Municipal Address and Mailing Address of the Corporation

The Corporation's address for service shall be C/O Somewhere Property Management, Suite 1, 1 Oak Street, Somewhere, Ontario, Z1Z 1Z1, or such other address as the Corporation may by resolution of the Board determine, and the Corporation's mailing address shall be C/O Somewhere Property Management, Suite 1, 1 Oak Street, Somewhere, Ontario, Z1Z 1Z1. The Corporation's municipal address is 3 Oak Street, Somewhere, Ontario, Z1Z 1Z1.

1.8 Approval Authority Requirements

The following is required to be included in this Declaration and executes a condition of approval imposed by the approval authority:

NOTICE: The common elements and all buildings, structures, facilities, and services therein, including, but not so as to limit the generality of the foregoing, drain and supply pipes, lines and conduits, road surfaces, are the property of persons other than the Municipality of Somewhere and it takes no responsibility for any maintenance, repair, replacement or other obligations relating thereto.

1.9 Architect/Engineer Certificates

The certificate(s) of the architect and/or engineer(s) that all buildings and structures have been completed and installed in accordance with the regulations is/are contained in Schedule "G" attached hereto.

ARTICLE II

COMMON EXPENSES

2.1 "Specification of Common Expenses"

"Common Expenses" means the expenses of the performance of the objects and duties of the Corporation and such other expenses, costs and sums of money designated as common expenses in the Act and this Declaration and without limiting the generality of the foregoing, shall include those expenses set out in Schedule "E" attached herein.

2.2 Payment of Common Expenses

Each Owner, including the Declarant, shall pay to the Corporation his/her proportionate share of the common expenses, as may be provided for by the By-laws and the assessment and collection of contributions toward common expenses may be regulated by the Board pursuant to the By-laws. In addition to the foregoing, any losses, costs or damages incurred by the Corporation by reason of a breach of any provision of this Declaration, any By-laws or rules in force from time to time by any Owner, or by members of his/her family and/or their respective tenants, invitees or licensees shall be borne and paid for by such Owner and may be recovered by the Corporation against such Owner

in the same manner as common expenses.

2.3 Reserve Fund

- (a) The Corporation shall establish and maintain one or more Reserve Funds and shall collect from the Owners as part of their contribution towards the common expenses, amounts that are reasonably expected to provide sufficient funds for major repair and replacement of Common Elements and assets of the Corporation;
- (b) No part of the Reserve Fund shall be used except for the purpose for which the fund was established. The Reserve Fund shall constitute an asset of the Corporation and shall not be distributed to any Owner except on termination of the Corporation in accordance with the Act; and

2.4 Status Certificate

The Corporation shall provide a status certificate to any requesting party who has paid (in advance) the applicable fees charged by the Corporation for providing same, in accordance with the provisions of the Act, together with all accompanying documentation and information prescribed by the Act. The Corporation shall forthwith provide the Declarant (and/or any purchaser, transferee or mortgagee of a Unit from the Declarant) with a status certificate and all such accompanying documentation and information, as may be requested from time to time by or on behalf of the Declarant (or by any such purchaser, transferee or mortgagee) in connection with the Declarant's sale, transfer or mortgage of any Unit(s), all at no charge or fee to the Declarant or the person requesting same on behalf of the Declarant.

ARTICLE III

COMMON ELEMENTS

3.1 Use of Common Elements

Subject to the provisions of the Act, this Declaration, the By-laws and any rules, each Owner has the full use, occupancy and enjoyment of the whole or any parts of the Common Elements, except as herein otherwise provided.

Save and except as expressly provided or contemplated in this Declaration to the contrary, no condition shall be permitted to exist, and no activity shall be carried on, within or upon any portion of the common elements that:

- (a) will result in a contravention of any term or provision set out in the Act, this Declaration, the By-laws and Rules of the Corporation;
- (b) is likely to damage the property of the Corporation or the common elements, injure any person, or impair the structural integrity of any common element area;
- (d) may result in the cancellation (or threatened cancellation) of any policy of insurance obtained or maintained by the Corporation, or that may significantly increase any applicable insurance premium(s) with respect thereto, or any deductible portion in respect of such policy;
- (e) constitutes a commercial use or other purpose not ancillary to residential purposes.

No one shall, by any conduct or activity undertaken in or upon any part of the common elements, impede, hinder or obstruct any right, privilege, easement or benefit given to any party, person or other entity pursuant to this Declaration, any By-law and/or the Rules.

3.2 Exclusive Use Common Elements

There are no exclusive use common elements in this Condominium.

3.3 Restricted Access

Without the consent in writing of the Board, no Owner shall have the right of access to those parts of the Common Elements used from time to time for the care, maintenance or operation of the Property or any part thereof as designated by the Board from time to time; and

3.4 Modification of Common Elements, Assets and Services

(a) General Prohibition

No owner shall make any change or alteration to the Common Elements whatsoever, including any installation(s) thereon, nor alter, decorate, renovate, maintain or repair any part of the Common Elements.

(b) Non-Substantial Additions, Alterations and Improvements by the Corporation

The Corporation may make an addition, alteration, or improvement to the Common Elements, a change in the assets of the Corporation or a change in a service that the Corporation provides to the Owners in accordance with subsections 97(2) and (3) of the Act.

(c) Substantial Additions, Alterations and Improvements by the Corporation

The Corporation may, by a vote of owners who own at least sixty-six and two thirds (66 2/3 %) percent of the common interests in the Corporation, make a substantial addition, alteration or improvement to the Common Elements, a substantial change in the assets of the Corporation or a substantial change in a service the Corporation provides to the Owner in accordance with subsections 97 (4), (5) and (6) of the Act.

3.5 Pets

No animal, livestock or fowl, other than household domestic pets as permitted by the by-laws of the Corporation are permitted to be on or about the Common Elements. All dogs and cats must be kept under personal supervision and control and held by leash at all times while on the Common Elements. Notwithstanding the generality of the foregoing, no pet deemed by the Board, in their sole and absolute discretion, to be a danger to the residents of the Corporation is permitted to be on or about the Common Elements.

ARTICLE V.

MAINTENANCE AND REPAIRS

5.1 Responsibility of Owner for Damage

Each Owner shall be responsible for all damage to the Common Elements, which is caused by the negligence or wilful misconduct of the Owner, his/her residents, tenants, licensees, or invitees, save and except for any such damage for which the cost of repairing same may be recovered under any policy of insurance held by the Corporation.

5.2 Repair and Maintenance by Corporation

The Corporation shall maintain and repair the Common Elements at its own expense.

ARTICLE VI

INDEMNIFICATION

6.1 Each Owner shall indemnify and save harmless the Corporation from and against any loss, costs, damage, injury or liability whatsoever which the Corporation may suffer or incur resulting from or caused by an act or omission of such Owner, his/her family, guests, visitors or tenants to or with respect to the Common Elements, except for any loss, costs, damages, injury or liability caused by an insured (as defined in any policy or policies of insurance) and insured against by the Corporation. All payments to be made by an Owner pursuant to this Article shall be deemed to be additional contributions toward common expenses payable by such Owner and shall be recoverable as such.

ARTICLE VIII

INSURANCE

7.1 By the Corporation

The Corporation shall obtain and maintain to the extent obtainable, at reasonable cost, the following insurance, in one or more policies:

- (a) “All Risk” insurance: Insurance against “all risks” (including fire and major perils as defined in the Act) as is generally available from commercial insurers in a standard “all risks” insurance policy and insurance against such other perils or events as the Board may from time to time deem advisable, insuring:

- (i) the Property and buildings; and
- (ii) all assets of the Corporation;

in an amount equal to the full replacement cost of such real and personal property, without deduction for depreciation. This insurance maybe subject to a loss deductible clause as determined by the board from time to time, and which deductible shall be the responsibility of the Corporation in the event of a claim with respect to the common elements (or any portion thereof), provided however that if an Owner, tenant or other person with the knowledge or permission of the Owner, through an act or omission causes damage to any portion of the common elements, in those circumstances where such damage was not caused or contributed by any act or omission of the Corporation (or any of its directors, officers, agents or employees), then the amount which is equivalent to the lesser of the cost of repairing the damage and the deductible limit of the Corporation’s insurance policy shall be added to the common expenses payable in respect of such owner’s POTL.

- (b) Policy Provisions

Every policy of insurance shall insure the interests of the Corporation and the Owners from time to time, as their respective interests may appear (with all mortgagee endorsements subject to the provisions of the Act, this Declaration and the Insurance Trust Agreement) and shall contain the following provisions:

- (i) waivers of subrogation against the Corporation, its directors, officers, manager, agents, employees and servants and against the Owners, and the Owners’ respective residents, tenants, invitees or licensees, except for damage arising from arson, fraud, vehicle impact, vandalism or malicious mischief caused by any one of the above;
 - (ii) such policy or policies of insurance shall not be terminated or substantially modified without at least sixty (60) days’ prior written notice to the Corporation and to the Insurance Trustee;
 - (iii) waivers of the insurer’s obligation to repair, rebuild or replace the damaged property in the event that after damage the government of the Property is terminated pursuant to the Act;
 - (iv) waivers of any defense based on co-insurance (other than a stated amount co-insurance clause); and
 - (v) waivers of any defense based on any invalidity arising from the conduct or act or omission of or breach of a statutory condition by any insured person.
- (c) Public Liability Insurance Public liability and property damage insurance, and insurance against the Corporation’s liability resulting from breach of duty as occupier of the Common Elements insuring the liability of the Corporation and the Owners from time to time, with limits to be determined by the board, but not less than TWO MILLION (\$2,000,000.00) DOLLARS per occurrence and without right of subrogation as against the Corporation, its directors, officers, mangers, agents, employees and servants, and as against the Owners and any member of the household or guests of any Owner or occupant of the Owner's Tied Land.

7.2 General Provisions

- (a) The Corporation, its Board and its officers shall have the excusive right, on behalf of itself and as agents for the Owners, to adjust any loss and settle any claims with respect to all insurance placed by the Corporation, and to give such releases as are required, and any claimant, including the Owners, shall be bound by such adjustment.
- (b) Every mortgagee shall be deemed to have agreed to waive any right to have proceeds of any insurance applied on account of the mortgage where such application would prevent application of the insurance proceeds to the satisfaction of an obligation to repair. This

subparagraph 2(b) shall be read without prejudice to the right of any mortgagee to exercise the right of an Owner to vote or to consent if the mortgage itself contains a provision giving the mortgagee that right;

- (c) A certificate or memorandum of all insurance policies, and endorsements thereto, shall be issued as soon as possible to each Owner, and a duplicate original or certified copy of the policy to each mortgagee who has notified the Corporation of its interest in any Tied Land. Renewal certificates or certificates of new insurance policies shall be furnished to each Owner and to each mortgagee noted on the Record of the Corporation who have requested same. The master policy for any insurance coverage shall be kept by the Corporation in its offices, available for inspection by any Owner or mortgagee on reasonable notice to the Corporation;
- (d) No insured, other than the Corporation, shall be entitled to amend any policy or policies of insurance obtained and maintained by the Corporation. No insured shall be entitled to direct that the loss shall be payable in any manner other than as provided in the Declaration and the Act;
- (e) Where insurance proceeds are received by the Corporation or any other person rather than the Insurance Trustee, they shall be held in Trust and applied for the same purposes as are specified herein; and,
- (f) Prior to obtaining any new policy or policies of insurance and at such other time as the board may deem advisable and also upon the request of a mortgagee or mortgagees holding mortgages relating to fifty (50%) per cent or more of the common interests in the Corporation and, in any event, at least every three (3) years, the Board shall obtain an appraisal from an independent qualified appraiser of the full replacement cost of the assets for the purpose of determining the amount of insurance to be effected and the cost of such appraisal shall be a Common Expense.

7.3 By the Owner

- a) It is acknowledged that the foregoing insurance is the only insurance required to be obtained and maintained by the Corporation. Owners are recommended to obtain, although it is not mandatory, insurance covering:
 - (i) special assessments levied by the Corporation and contingent insurance coverage in the event the Corporation's insurance is inadequate.
 - (ii) Insurance on personal property and chattels present or stored on the Property, including automobiles. Every such policy of insurance shall contain waiver of subrogation against the Corporation, its manager, agents, employees and servants, and against the other Owners and any members of their household or guests except for any damage arising from arson, fraud, vehicle impact, vandalism or malicious mischief caused or contributed by any of the aforementioned parties;
 - (iii) Public liability insurance covering any liability of any Owner or any resident, tenant, invitee or licensee of such Owner, to the extent not covered by any public liability and property damage insurance obtained and maintained by the Corporation;

7.4 Indemnity Insurance for Directors and Officers of the Corporation

The Corporation shall obtain and maintain insurance for the benefit of all of the directors and officers of the Corporation, if such insurance is reasonably available, in order to indemnify them against the matters described in the Act, including any liability, cost, charge or expense incurred by them in the execution of their respective duties (hereinafter collectively referred to as the "Liabilities"), provided however that such insurance shall not indemnify any of the directors or officers against any of the Liabilities respectively incurred by them as a result of a breach of their duty to act honestly and in good faith, or in contravention of the provisions of the Act.

ARTICLE VIII.

INSURANCE TRUSTEE AND PROCEEDS OF INSURANCE

- 8.1 The Corporation shall enter into, and at all times maintain, an agreement (the "Insurance Trust Agreement") with an Insurance Trustee which shall be a Trust Company registered under the *Loan*

and *Trust Corporations Act*, or shall be a Chartered Bank, which agreement shall, without limiting its generality, provide the following:

- (a) the receipt by the Insurance Trustee of any proceeds of insurance in excess of fifteen (15%) percent of the replacement cost of the property covered by the insurance policy;
- (h) the holding of such proceeds in trust for those entitled thereto pursuant to the provisions of the Act, this Declaration, and any amendments thereto;
- (c) the disbursement of such proceeds in accordance with the provisions of the Insurance Trust Agreement; and
- (d) the notification by the Insurance Trustee to the mortgagees of any insurance monies received by it.

If the Corporation is unable to enter into such agreement with such Trust Company or such Chartered Bank, by reason of its refusal to act on terms acceptable to the Board or otherwise, the Corporation may enter into such agreement with such other Corporation or person authorized to act as a Trustee as the Owners may approve by by-law at a meeting called for that purpose. The Corporation shall pay the fees and disbursements of any Insurance Trustee and any fees and disbursements shall constitute a Common Expense.

8.2 In the event that:

- (a) the Corporation is obligated to repair or replace the Common Elements or any asset insured in accordance with the provisions of the Act, the Insurance Trustee shall hold all proceeds for the Corporation and shall disburse same in accordance with the provisions of the Insurance Trust Agreement in order to satisfy the obligation of the Corporation to make such repairs;
- (b) there is no obligation by the Corporation to repair or replace, and if there is termination in accordance with the provisions of the Act, or otherwise, the Insurance Trustee shall hold all proceeds for the Owners in the proportion of their respective interests in the Common Elements and shall pay such proceeds to the Owners in such proportions upon registration of a notice of termination by the Corporation. Notwithstanding the foregoing, any proceeds payable as aforesaid shall be subject to payment in favour of any mortgagee or mortgagees to whom such loss is payable in any policy of insurance and in satisfaction of the amount due under a Notice of Lien registered by the Corporation against a POTL, in accordance with the priorities thereof;
- (c) the Board, in accordance with the provisions of the Act, determines that:
 - (i) there has not been substantial damage to twenty-five (25%) per cent of the buildings and structures on the Property; or
 - (ii) there has been substantial damage to twenty-five (25%) per cent of the buildings and structures on the Property and within sixty (60) days thereafter the Owners who own eighty (80%) per cent of the Common Interest do not vote for termination,

the Insurance Trustee shall hold all proceeds for the Corporation and Owners as their respective interests may appear and shall disburse same in accordance with the provisions of this Declaration and the Insurance Trust Agreement in order to satisfy the obligations to make repairs pursuant to the provisions of this Declaration and the Act.

ARTICLE IX

GENERAL MATTERS AND ADMINISTRATION

9.2 Invalidity

Each of the provisions of this Declaration shall be deemed independent and severable, and the invalidity or unenforceability in whole or in part of any one or more of such provisions shall not be deemed to impair or affect in any manner the validity, enforceability or effect of the remainder of this Declaration, and in such event all of the other provisions of this Declaration shall continue in full force and effect as if such invalid provision had never been included herein.

9.3 Waiver

The failure to take action to enforce any provision contained in the Act, this Declaration, the By-laws or any other rules and regulations of the Corporation, irrespective of the number of violations or breaches which may occur, shall not constitute a waiver of the right to do so thereafter, nor be deemed to abrogate or waive any such provision.

9.4 Interpretation of Declaration

This Declaration shall be read with all changes of number and gender required by the context.

9.5 Headings

The headings in the body of this Declaration form no part of the Declaration but shall be deemed to be inserted for convenience of reference only.

IN WITNESS WHEREOF the Declarant has hereunto affixed its corporate seal under the hands of its proper officers duly authorized in that behalf.

DATED at Somewhere, this 1st day of , 200 .

DECCORP. INC.

Per: _____
Name: I. M. Apresident
Title: President

I have authority to bind the Corporation.

SCHEDULE 'A'

**LEGAL DESCRIPTION OF THE LANDS
TO BE GOVERNED BY THE ACT**

In the Town of Somewhere, in Province of Ontario, being comprised of Blocks 2 and 3 on a Plan of Subdivision registered in the Land Registry Office for the Land Titles Division of Somewhere Region (No. 88) as Plan M-1234, being all of P.1.N. s 1234-5677 and 1234-5678 (LT),

SUBJECT TO an easement and right of way over Block 2, Plan M-1234, in favour of Somewhere Gas Co. Ltd., for the purpose of installing and maintaining an underground gas supply pipe together with metering and other appurtenances to supply gas to Lots 3 to 12, Plan M-1234, registered as Instrument No. E9876543 in the Land Registry Office for the Land Titles Division of Somewhere Region (No. 88).

SOLICITORS STATEMENT

In my opinion, based on the parcel register and the plans and documents recorded in them, the legal description is correct and the Declarant is the registered owner of the property and appurtenant interests.

DATED AT Somewhere, Ontario, this 1st day of _____, 200 .

I. M. Alawyer,
Barrister and Solicitor and
duly authorized representative of DECCORP. INC.

I. M. Alawyer

SCHEDULE B

CONSENTS

Form 1

(under clause 7 (2) (b) of the Condominium Act, 1998)

- 1. I, The Bank of Somewhere, have a registered mortgage within the meaning of clause 7 (2) (b) of the Condominium Act, 1998, registered as Number E12345678 in the Land Registry Office for the Land Titles Division of Somewhere (No. 88).
2. I consent to the registration of this declaration, pursuant to the Act, against the land or the interests appurtenant to the land, as the land and the interests are described in the description.
3. I postpone the mortgage and the interests under it to the declaration and the easements described in Schedule A to the declaration.
4. I am entitled by law to grant this consent and postponement.

Dated this day of,200*;

The Bank of Somewhere
Per:

Name: I. M. Abanker
Office: President
I have authority to bind the corporation.

O. Reg. 48/01, Form 1.

Form 16

Condominium Act, 1998

CONSENT TO ATTACHMENT OF A COMMON INTEREST
(under clause 140 (c) of the Condominium Act, 1998)

- 1. I, The Bank of Somewhere, have a mortgage registered as Number 12345678 in the Land Registry Office for the Land Titles Division of Somewhere (No. 88) against parcels of land (known as the "Parcels") to which common interests in a common elements condominium corporation (known as the "Corporation") will attach upon the registration of the attached declaration (known as the "Declaration") dated and the description (known as the "Description") creating the Corporation.
2. I acknowledge that, upon the registration of the Declaration and Description, the Parcels will become subject to all encumbrances, if any, outstanding against the property described in Schedule A to the Declaration.
3. I consent to the registration of a notice in the prescribed form indicating that a common interest in the Corporation, as the common interest is set out in Schedule D to the Declaration, attaches to the Parcels upon the registration of the Declaration and Description.

Dated this day of, 200*.

The Bank of Somewhere
Per:

Name: I. M. Abanker
Office: President
I have authority to bind the corporation.

O. Reg. 48/01, Form 16.

SCHEDULE 'D' Note: There is no Schedule 'C' - Sec. 40(4)

STATEMENT

The common elements are intended for the use and enjoyment of the owners for the purpose of clause 140 (a) of the Act; Sec. 40(6)

LEGAL DESCRIPTIONS OF THE PARCELS OF TIED LANDS	PERCENTAGE CONTRIBUTION TO COMMON EXPENSES	PERCENTAGE INTEREST IN COMMON ELEMENTS
Lot 3, Plan M-1234, PIN 1234-5680	10.0	10.0
Lot 4, Plan M-1234, PIN 1234-5681	10.0	10.0
Lot 5, Plan M-1234, PIN 1234-5682	10.0	10.0
Lot 6, Plan M-1234, PIN 1234-5683	10.0	10.0
Lot 7, Plan M-1234, PIN 1234-5684	10.0	10.0
Lot 8, Plan M-1234, PIN 1234-5685	10.0	10.0
Lot 9, Plan M-1234, PIN 1234-5686	10.0	10.0
Lot 10, Plan M-1234, PIN 1234-5687	10.0	10.0
Lot 11, Plan M-1234, PIN 1234-5688	10.0	10.0
Lot 12, Plan M-1234, PIN 1234-5688	10.0	10.0
	100.00	100.00

SPECIFICATION OF COMMON EXPENSES

Provided that the Corporation, by a vote of owners, reserves the right to exclude such matters comprising the Common Expenses such that the costs associated thereto will be a cost to the Unit Owner and not the Corporation, Common Expenses, without limiting the definition ascribed thereto, shall include the following:

- (a) all sums of money paid or payable by the Corporation in connection with the performance of any of its objects, duties and powers whether such objects, duties and powers are imposed by the Act or this Declaration and By-laws of the Corporation or other law or by agreement;
- (b) all sums of money properly paid by the Corporation on account of any and all public and private suppliers to the Corporation of insurance coverage, utilities and services including, without limiting the generality of the foregoing, levies or charges payable on account of:
 - i) insurance premiums;
 - ii) water and sewage;
 - iii) maintenance materials, tools and supplies;
 - iv) snow removal;
 - v) fuel, including gas, oil and hydro electricity; and
 - vii) landscaping including grass cutting and other maintenance;
- (c) all sums of money paid or payable by the Corporation pursuant to any management contract which may be entered into between the Corporation and a manager;
- (d) all sums of money paid or payable by the Corporation to any and all persons, firms, or companies engaged or retained by the Corporation, its duly authorized agents, servants and employees for the purpose of performing any or all of the objects, duties and powers of the Corporation including, without limitation, legal, engineering, accounting, auditing, expert appraising, advising, maintenance, managerial, secretarial or other professional advice and service required by the Corporation;
- (e) the cost of furnishings and equipment for use in and about the Common Elements including the repair, maintenance or replacement thereof;
- (f) the cost of borrowing money for the carrying out of the objects, duties and powers of the Corporation;
- (g) the fees and disbursements of the Insurance Trustee, if any, and of obtaining insurance appraisals;
- (h) the cost of maintaining fidelity bonds as provided by By-law; and
- (i) all sums required to be paid to the reserve or contingency fund as required by the Declaration or in accordance with the agreed upon annual budget of the Corporation.

SCHEDULE 'F'

Sec. 40(8)

No parts of the common elements are to be used by the owners of one or more designated common interests and not by all the owners.

SCHEDULE 'G'

Form 17

Condominium Act, 1998

CERTIFICATE OF ARCHITECT OR ENGINEER
(SCHEDULE G TO DECLARATION FOR A COMMON ELEMENTS
OR VACANT LAND CONDOMINIUM CORPORATION)

(under clauses 8 (1) (e) and (h) or clauses 157 (1) (c) and (e) of the Condominium Act, 1998)

I certify that:

I. Each building and structure that the declaration and description show are included in the common elements has been constructed in accordance with the regulations made under the Condominium Act, 1998, with respect to the following matters:

(Check whichever boxes are applicable)

~~1,2,3. The declaration and description show that there are no buildings or structures included in the common elements.~~ OR

1. . The exterior building envelope, including roofing assembly, exterior wall cladding, doors and windows, caulking and sealants, is weather resistant if required by the construction documents and has been completed in general conformity with the construction documents.

2. . Floor assemblies of the buildings and structures are constructed and completed to the final covering.

3. . Walls and ceilings of the buildings and structures are completed to the drywall (including taping and sanding), plaster or other final covering.

~~4. . All underground garages have walls and floor assemblies in place.~~ OR

. There are no underground garages.

~~5. . All elevating devices as defined in the Elevating Devices Act are licensed under that Act if it requires a licence, except for elevating devices contained wholly in a unit and designed for use only within the unit.~~ OR

. There are no elevating devices as defined in the Elevating Devices Act, except for elevating devices contained wholly in a unit and designed for use only within the unit.

6. . All installations with respect to the provision of water and sewage services are in place and operable.

~~OR. There are no installations with respect to the provision of water and sewage services.~~

7. . All installations with respect to the provision of heat and ventilation are in place and heat and ventilation can be provided.

~~OR. There are no installations with respect to the provision of heat and ventilation.~~

8. . All installations with respect to the provision of air conditioning are in place.

~~OR. There are no installations with respect to the provision of air conditioning.~~

9. . All installations with respect to the provision of electricity are in place and operable.

~~OR. There are no installations with respect to the provision of electricity.~~

10. . All indoor and outdoor swimming pools are roughed in to the extent that they are ready to receive finishes, equipment and accessories.

~~OR. There are no indoor and outdoor swimming pools.~~

[Strike out whichever is not applicable:

II. All facilities and services that the declaration and description show are included in the common elements OR The following facilities and services that the declaration and description show are included in the common elements: (specify by reference to the item numbers in Schedule H)]

have been installed and provided in accordance with the requirements of the municipalities in which the land is situated or the requirements of the Minister of Municipal Affairs and Housing, if the land is not situated in a municipality.

Dated this day of , 200 .

.....

(signature)

.....

I. M. Architect

(Strike out whichever is not applicable:

Architect

Professional Engineer)

O. Reg. 48/01, Form 17.

SCHEDULE 'H'

Sec. 40(15) and (16)

No.	Building or Structure Included in the Common Elements	Brief Description for Identification
1.	Community Recreation Building	40 feet by 40 feet single storey, wood frame building, with HVAC, washrooms, kitchen, lounge and meeting rooms
2.	Tennis Court Fencing and pads	2 regulation courts, 15 ft. high, frost fence with uprights, locking gates
3.	Storage/Utility Building	20 feet by 20 feet, wood frame storage building, uninsulated
4.	Outdoor swimming pool and surround	20 x 40 feet concrete pool with surrounding concrete deck, filtration shed and equipment.
5.	Water supply pipe	6 inch diameter
6.	Sanitary sewer drain	5 inch diameter

No.	Facility or Service Included in the Common Elements	Brief Description for Identification
7.	Underground cable TV line	Twin lines, one licensed to Somewhere Cable Ltd.
8.	Underground telephone line	Twin lines, one licensed to Somewhere Tel. Ltd.
9.	Underground fibre optic line	Single line, licensed to to Somewhere Tel. Ltd.
10.	Underground electrical feeder line	Single trunk, licensed to Somewhere Electrical Utility Co. Ltd.
11.	Roadside storm drains and pond	Open ditch
12.	24 foot wide gravel road	24 feet wide, granular surface

SCHEDULE I Sec. 40(17)

Form 9

Condominium Act, 1998

CERTIFICATE OF OWNER

IN THE MATTER OF A COMMON ELEMENTS CONDOMINIUM CORPORATION
(SCHEDULE I TO DECLARATION)

(under clause 139 (1) (b) of the *Condominium Act, 1998*)

- 1. I am the owner(s) of the freehold estate in Lots 3 to 12, inclusive, Plan M-1234, Land Registry Office for the Land Titles Division of Somewhere (No. 88) (each respectively known as a "Parcel").
- 2. I consent to the registration of the attached declaration to create a common elements condominium corporation (known as the "Corporation") on Blocks 2 and 3, Plan M-1234, Land Registry Office for the Land Titles Division of Somewhere (No. 88).
- 3. I acknowledge that, upon registration of the declaration and the description, the Parcel will become subject to all encumbrances, if any, outstanding against the property described in Schedule A to the declaration.
- 4. I consent to the registration of a notice in the prescribed form against the Parcel indicating that a common interest in the Corporation, as the common interest is set out in Schedule D to the declaration, attaches to the Parcel upon the registration of the declaration and description.

Dated this day of , 200 .

DECCORP. INC.

Per:

.....

Name: I. M. Apresident

Office: President

I have authority to bind the corporation.

O. Reg. 49/01, Form 9.

SCHEDULE 'J' Sec. 40(18)
Form 10

Condominium Act, 1998

NOTICE OF ATTACHMENT OF A COMMON INTEREST IN A COMMON ELEMENTS
CONDOMINIUM CORPORATION
(SCHEDULE J TO DECLARATION)
(under clause 139 (2) (b) of the Condominium Act, 1998)

Take notice that:

- 1. The attached declaration and the description creates a common elements condominium corporation (known as the "Corporation").
2. Common interests in the Corporation, as the common interests are set out in Schedule D to this declaration, attach to the following parcels of land (each respectively known as a "Parcel"):

Table with 2 columns: Numbered list (1-10) and Legal descriptions of parcels (Lot 3 to Lot 12, Plan M-1234, Land Registry Office for the Land Titles Division of Somewhere (No. 88), PIN 1234-5681 to 1234-5690).

3. The common interest cannot be severed from the Parcel upon the sale of the Parcel or the enforcement of an encumbrance registered against the Parcel.

4. A copy of the certificate of the owner of the Parcel consenting to the registration of the declaration and this notice is attached to this declaration as Schedule I.

5. If the owner of the Parcel defaults in the obligation to contribute to the common expenses of the Corporation, the Corporation has a lien against the Parcel.

Dated this day of,

Declarant:

.....

Deccorp. Inc.

Per:

.....

Name: I. M. Apresident

Office: President

I have authority to bind the corporation.

O. Reg. 49/01, Form 10.

Condominium Act, 1998

CERTIFICATE IN RESPECT OF A BY-LAW
(under Subsection 56(9) of the *Condominium Act, 1998*)

Somewhere Common Elements Condominium Corporation No. __ (known as the “Corporation”) certifies that:

1. The copy of By-law No. 1 attached as Schedule “A” is a true copy of the By-law.
2. The By-law was made in accordance with the *Condominium Act, 1998*.
3. The owners of a majority of the common interests of the Corporation have voted in favour of confirming the by-law.

DATED this day of , 200_.

SOMEWHERE COMMON ELEMENTS CONDOMINIUM CORPORATION NO. __

Per: _____
Name:
Title: President

Per: _____
Name:
Title: Secretary

We have the authority to bind the Corporation.

SCHEDULE "A"

SOMEWHERE COMMON ELEMENTS CONDOMINIUM NO. __

BY-LAW NO. ONE

BE IT ENACTED as a by-law of Somewhere Standard Condominium Corporation No. __ (hereinafter referred to as the "Corporation") as follows:

ARTICLE I - DEFINITIONS

1.1 In addition to those words, terms and/or phrases specifically defined in this by-law, the words, terms and/or phrases used herein which are defined in the *Condominium Act, 1998, S.O. 1998, C. 19* as amended and the regulations made thereunder (hereinafter referred to as the "Act") and in the declaration of the Corporation (hereinafter referred to as the "Declaration") shall have ascribed to them the meanings set out in the Act or the Declaration, unless the context requires otherwise.

ARTICLE II-SEAL

2.1 The corporate seal of the Corporation shall be in the form impressed hereon. Notwithstanding that the Corporation has a seal, any document that would otherwise require a seal need not be executed under seal, provided the statement "I/We have the authority to bind the Corporation" is noted below the signatures of the person(s) duly authorized to sign the document and such a document has the same effect for all purposes as if executed under seal.

ARTICLE III - RECORDS

3.1 The Corporation shall keep and maintain all records required by section 55 of the Act, including the following records (hereinafter called the "Records"):

- (a) the financial records of the Corporation for at least six (6) years from the end of the last fiscal period to which they relate;
- (b) a minute book containing the minutes of owners' meetings and the minutes of board meetings;
- (c) a copy of the registered Declaration, registered by-laws and current rules;
- (d) a copy of all applications made under section 109 of the Act to amend the Declaration, if applicable;
- (e) the seal of the Corporation;
- (f) copies of all agreements entered into by the Corporation or by the Declarant or the Declarant's representatives on behalf of the Corporation, including all management contracts, deeds, leases, licences, easements and any agreements entered into pursuant to Section 98 of the Act;
- (g) copies of all policies of insurance and the related certificates or memoranda of insurance and all insurance trust agreements;

- (h) bills of sale or transfers for all items that are assets of the Corporation but not part of the property;
- (i) the names and addresses for service of each owner and mortgagee that the Corporation receives, in writing, from owners and mortgagees in accordance with subsection 47(1) of the Act;
- (j) all written notices received by the Corporation from owners that their respective common interest has been leased together with the lessee's name, the owner's address, a copy of the lease or renewal or a summary of same, pursuant to subsection 83(1) of the Act;
- (k) all written notices received by the Corporation from owners that a lease of the owner's common interest has terminated and has not been renewed pursuant to subsection 83(2) of the Act;
- (l) all records that the Corporation has related to the common interests or to employees of the Corporation;
- (m) all existing warranties and guarantees for all equipment, fixtures and chattels included in the property or assets;
- (n) the as-built architectural, structural, engineering, mechanical, electrical and plumbing plans;
- (o) the as-built specifications indicating all substantive changes, if any, from the original specifications;
- (p) all existing plans for underground site services, site grading, drainage and landscaping, and television, radio or other communication services;
- (q) all other existing plans and information that are relevant to the repair or maintenance of the property;
- (r) a table that the Declarant has delivered pursuant to clause 43(5)(g) of the Act setting out the responsibilities for repair after damage and maintenance, and indicating whether the Corporation or the owners are responsible; -
- (s) all reserve fund studies and all plans to increase the reserve fund;
- (t) a copy of the most current disclosure statement delivered by the Declarant to a purchaser prior the turnover meeting;
- (u) a copy of the written performance audit report received by the Corporation;
- (v) a copy of any order appointing an inspector or administrator, if applicable, pursuant to section 130 or 131 of the Act, together with any report that the Corporation receives from an inspector in accordance with subsection 130(4) of the Act;
- (w) a copy of all status certificates issued within the previous ten (10) years;
- (x) a copy of all notices of meetings sent by or on behalf of the Corporation within the

previous ten (10) years;

(y) all proxies, for not more than ninety (90) days from the date of the meeting at which the proxies were utilized;

(z) a copy of all notices of lien issued by the Corporation to delinquent owners pursuant to subsection 85(4) of the Act, in respect of which the corresponding certificates of lien have not been discharged or vacated by court order;

(aa) all records relating to actual or pending litigation (or insurance investigations) involving the Corporation [as contemplated in clause 55(4)(b) of the Act], together with copies of all outstanding judgements against the Corporation [as contemplated in clause 76(l)(h) of the Act];

(bb) a copy of the budget of the Corporation for the current fiscal year, together with the last annual audited financial statements and auditor's report on such statements;

(cc) a copy of all minutes of settlement and/or written decisions made by any mediator or arbitrator appointed pursuant to section 132 of the Act, regarding any issue(s) in dispute involving the Corporation (or to which the Corporation is a party), together with copies of all court orders issued in those circumstances where the Corporation was a party to the proceeding or otherwise directly affected thereby; and

(dd) all other records as may be prescribed or specified in any other by-laws of the Corporation, together with copies of all other materials received by the Corporation that the regulations to the Act may hereafter require the Declarant to deliver on or shortly after the turnover meeting as contemplated in clause 43(5)(m) of the Act.

ARTICLE IV – THE CORPORATION

4.1 Duties of the Corporation

The duties of the Corporation shall include, but shall not be limited to the following:

(a) the operation, care, upkeep, maintenance and repair of the common elements as provided for in the Act and in the Declaration;

(b) the collection of contributions toward common expenses from the owners;

(c) the arranging for the supply of all requisite utility services to the common elements except where prevented from carrying out such duty by reason of any event beyond the reasonable control of the Corporation. The Corporation shall not be liable for indirect or consequential damage or for damages for personal discomfort or illness by reason of the breach of such duty;

(d) obtaining and maintaining insurance for the property as maybe required by the Act, the Declaration or the By-laws;

(e) the retention of legal counsel to prepare, register and discharge, following payment, certificates of lien for arrears of common expenses;

- (f) the preparation and delivery of status certificates as required by the Act;
- (g) the preparation of a yearly budget;
- (h) the supervision of all public or private service companies which enter upon the common elements for the purpose of supplying, installing, replacing and servicing their systems;
- (i) the obtaining and maintaining of fidelity bonds for any person dealing with Corporation monies and in such amounts as the board may deem reasonable;
- (j) the purchase and maintenance of insurance for the benefit of all directors and officers in respect of anything done or permitted to be done by them in respect of the execution of the duties of their offices except insurance against a liability, cost, charge or expense of such directors or officers incurred as a result of a contravention of any of the duties imposed upon them pursuant to the Act;
- (k) the preparation and maintenance of the records to be kept by the Corporation in accordance with Article III hereof;
- (l) the calling and holding of meetings and the delivery of notices, as required;
- (m) the consistent and timely enforcement of the provisions of the Act, the Declaration, the By-laws and the rules of the Corporation; and
- (n) establishing and maintaining adequate reserve funds for the major repair or replacement of the common elements and of the assets of the Corporation in accordance with the Act.

4.2 Powers of the Corporation

The powers of the Corporation shall include, but shall not be limited to the following:

- (a) the employment and dismissal of personnel necessary for the maintenance and operation of the common elements;
- (b) the investment of reserve monies held by the Corporation in accordance with the Act;
- (c) the settling, adjusting or referring to mediation and/or arbitration of any claim or claims which may be made upon or which may be asserted on behalf of the Corporation;
- (d) entering into the following agreements as required from time to time:
 - (i) a management agreement with an individual or corporation to manage the affairs and assets of the corporation at such compensation and upon such terms as the board may determine in its sole discretion;
 - (ii) an insurance trust agreement with an insurance trustee as permitted by the Act at such compensation and upon such terms as the board may determined in its sole discretion;
 - (iii) an agreement required by the supplier of any utility or service to the Corporation upon such terms as the board may determine in its sole discretion; and

(iv) any other agreements which maybe permitted by the Act and the Declaration and which are deemed advisable, desirable or necessary by the board;

(e) the authority to object to assessments under *the Assessment Act* on behalf of owners if it gives notice of the objections to the owners and to authorize the defraying of costs of objections out of the common expenses;

(f) the borrowing of such amounts in any fiscal year as the board determines are necessary or desirable in order to protect, maintain, preserve or ensure the due and continued operation of the property in accordance with the Act, Declaration and by-laws of the Corporation and the securing of any loan, of any amount by mortgage, pledge or charge of any asset (other than the reserve fund) of the Corporation, subject in each case to approval of each such borrowing, loan or security by a majority vote of the owners at a meeting duly called for that purpose or as required by the Act, provided however, the board may maintain overdraft protection, in its general account, in an amount not exceeding one-twelfth (1/12) of the Corporation's current budget without requiring the approval of the Owners;

(g) leasing any part of the non-exclusive use common elements, or granting or transferring any easement, right-of-way or license over, upon, under or through (or otherwise affecting) any part or parts of the common elements, and/or releasing and abandoning any appurtenant easement(s) or right(s)-of-way heretofore or hereafter granted to (or created in favour of) the Corporation, in respect of any servient tenement burdened or encumbered thereby, on the express understanding that to the extent that subsection 21(1) of the Act requires a by-law to authorize such a lease, licence, easement or right of way, or such a release and abandonment of easement, then this by-law shall accordingly be deemed and construed for all such purposes to be (and constitute) the by-law providing the board with the requisite authority to enter into any such lease, licence, easement or right of way, or any such release and abandonment of easement, and any such lease, license, easement, right of way or release of easement maybe executed on behalf of the Corporation by the authorized signing officer(s) of the Corporation, with or without the seal of the Corporation affixed thereto, and same shall be valid and binding on the Corporation without requiring the consent or concurrence of (or the written authorization or signature of) any owner(s) thereto.

ARTICLE V - MEETINGS OF OWNERS

5.1 Annual Meeting

The annual meeting of owners shall be held within six (6) months following the Corporation's fiscal year end at such place and on such day and time in each year as the board may from time to time determine for the purpose of receiving reports and statements required by the Act, the Declaration and By-laws of the Corporation, electing directors, appointing the auditor and fixing or authorizing the board to fix the auditor's remuneration, and for the transaction of such other business as maybe set out in the notice of meeting.

5.2 The First Annual General Meeting:

Pursuant to subsection 45(2) of the Act, the board shall hold the first annual general meeting of owners not more than three (3) months after the registration of the Declaration, and subsequently within six (6) months of the end of each fiscal year of the Corporation. The owners shall, at such first meeting appoint one or more auditors to hold office until the close of the next annual meeting, and if the owners fail to do

so, the board shall forthwith make such appointment. The remuneration of an auditor shall be fixed by the owners (if the auditor is appointed by the owners), or fixed by the board (if authorized to do so by the owners, or if the auditor is appointed directly by the board). The Corporation shall then give notice in writing to an auditor of his or her appointment forthwith after such appointment is made.

5.3 Special Meetings:

The board shall, upon receipt of a requisition in writing made by owners who together own not less than fifteen (15%) per cent of the common interests hold a meeting of the owners within thirty-five (35) days of the receipt of the requisition or if the requisitionists so request in the requisition or consent in writing, add the business to be presented at the requisitioned meeting to the agenda for the next annual general meeting. If the meeting is not called and held within thirty-five (35) days of receipt of the requisition, any of the requisitionists may call the meeting, which meeting shall be held within forty-five (45) days of the day on which the meeting is called. The board may at any time call a special meeting of the owners for the transaction of any business, the nature of which shall be specified in the notice calling the meeting.

5.4 Notices:

At least fifteen (15) days written notice of every meeting specifying the place, the date the hour and the nature of the business to be presented shall be given to the auditor of the Corporation and to each owner and mortgagee entitled to vote and entered on the record twenty (20) days before the date of the meeting in accordance with subsection 47(5) and 70(2) of the Act. The Corporation shall not be obligated to give notice to any Owner who has not notified the Corporation that he/she has become an Owner nor give notice to any mortgagee who has not notified the Corporation of his/her entitlement to vote and address for service.

5.5 Reports:

A copy of the financial statement and a copy of the auditors report shall be furnished to every owner and mortgagee entered on the record at least twenty (20) days before the date of any annual general meeting of Owners. A copy of the minutes of meetings of owners and of the board, shall be furnished to any owner or mortgagee who has requested same, within thirty (30) days of such request upon payment to the Corporation of a reasonable charge for labour and photocopying.

5.6 Persons Entitled to Be Present:

The only persons entitled to attend a meeting of owners shall be the owners and mortgagees entered on the Record, and any others entitled to vote thereat, the auditor of the Corporation, the directors and officers of the Corporation, a representative of the property manager, and others who, although not entitled to vote, are entitled or required under the provisions of the Act or the Declaration and By-laws of the Corporation to be present at the meeting. Any other person maybe admitted only on the invitation of the chairperson of the meeting or with the consent of the meeting.

5.7 Quorum:

At any meeting of owners, a quorum shall be constituted when persons entitled to vote and owning not less than twenty-five (25%) percent of the common interests are present in person or represented by proxy. If thirty minutes after the time appointed for the holding of any meeting of owners, a quorum is not present, the meeting shall stand adjourned and if the meeting was an annual general meeting, the board shall call a further meeting of the owners in accordance with the Act.

5.8 Right to Vote

Subject to the restrictions in paragraphs 5.11 and 5.13 of this Article V, every owner that has the right to vote in accordance with the Act who is entered on the Record as an owner or has given notice to the Corporation, in a form satisfactory to the Chairperson of the meeting, that he/she is an owner shall be entitled to vote. If a common interest has been mortgaged, and the person who mortgaged such common interest (or his/her proxy) has expressly authorized or empowered the mortgagee to vote and exercised the right of the owner to vote in respect of such common interest and such mortgagee has at least four (4) days before the date specified in the notice of meeting, notified the owner and the Corporation of his/her intention to exercise such right, such mortgagee shall be entitled to vote upon filing with the Secretary of the meeting sufficient proof of same. Any dispute over the right to vote shall be resolved by the chairperson of the meeting upon such evidence as the chairperson may deem sufficient. Each owner or mortgagee shall be entitled to only one (1) vote.

5.9 Conduct of Meetings and Method of Voting:

At any meeting of owners, the president of the Corporation (or to whomever the president may delegate the responsibility) or failing him/her, the vice-president, or failing him/her, some other person appointed by the board or failing such appointment, such other person elected at the meeting shall act as chairperson of the meeting and the secretary of the Corporation shall act as secretary of the meeting or, failing him/her, the chairperson shall appoint a secretary. Any question shall be decided by a show of hands unless a poll is required by the chairperson or is demanded by an owner or mortgagee present in person or by proxy and entitled to vote, and unless a poll is so required or demanded, a declaration by the chairperson that the vote upon the question has been carried, or carried by a particular majority, or not carried, is prima facie proof of the fact without proof of the number of votes recorded in favour of or against such question; provided, however, that voting for the election of directors shall be by ballot only, other than in the case of acclamation. A demand for a poll may be withdrawn. If a poll is so required or demanded and the demand is not withdrawn, a poll upon the question shall be taken in such manner as the chairperson shall direct.

5.10 Representatives

An estate trustee, committee of a mentally incompetent person, or the guardian or trustee of an owner or mortgagee (and where a corporation acts in such capacity any person duly appointed a proxy for such corporation) upon filing with the Secretary sufficient proof of his/her appointment, shall represent the owner or mortgagee at all meetings of the owners, and may vote in the same manner and to the same extent as such owner or mortgagee. If there be more than one estate trustee, committee, guardian or trustee, the provisions of paragraph 5.11 of this Article V shall apply.

5.11 Co-Owners:

If a common interest or a mortgage on a common interest is owned by two or more persons, any one of them present or represented by proxy may in the absence of the other or others vote, but if more than one of them are present or represented by proxy, the majority of the owners of the common interests shall decide how the vote is exercised.

5.12 Votes to Govern

At all meetings of owners every question shall, unless otherwise required by the Act, Declaration or By-laws, be decided by a majority of the votes duly cast on the question.

5.13 Entitlement to Vote:

Save and except in those instances where the Act provides or stipulates that the unanimous vote of all owners is required on any matter, issue, resolution or motion, an owner or mortgagee is not entitled to vote at any meeting if any common expenses or other monetary contributions that are payable in respect of the owner's or mortgagee's common interest are in arrears for more than thirty (30) days prior to the meeting, provided however that such an owner or mortgagee may nevertheless vote if the Corporation receives payment, by way of certified cheque, of all the arrears (and all other costs and expenses owing to the Corporation) before the meeting is held.

5.14 Proxies

Every owner or mortgagee entitled to vote at any meeting of the owners may, by instrument in writing, appoint a proxy, who need not be an owner or mortgagee, to attend and act at the meeting, in the same manner, to the same extent, and with the same power, as if the owner or mortgagee were present at the meeting. The instrument appointing a proxy shall be in writing signed by the appointor or his/her attorney authorized in writing, and shall be effective for a particular meeting only. The instrument appointing a proxy shall be deposited with the secretary prior to the start of the meeting.

ARTICLE VI- BOARD OF DIRECTORS

6.1 The Corporation

The affairs of the Corporation shall be managed by a board of directors.

6.2 Number of Directors and Quorum:

The number of directors shall be three (3) of whom two (2) shall constitute a quorum for the transaction of business at any meeting of the board. Notwithstanding vacancies, the remaining directors may exercise all the powers of the board so long as a quorum of the board remains in office.

6.3 Qualifications

Each director shall be 18 or more years of age and need not be an owner of a common interest in the Corporation. No undischarged bankrupt or mentally incompetent person shall be a director and if a director becomes a bankrupt or mentally incompetent person, he thereupon ceases to be a director. A director immediately ceases to be a director if a certificate of lien has been registered against a common interest owned by the director and the director does not obtain a discharge of the lien within ninety (90) days of the registration of the lien.

6.4 Consent: No election or appointment of a person as a director shall be effective unless;

- (a) he/she consents in writing to act as a director before his/her election or appointment or within ten (10) days thereafter; or
- (b) he/she was present at the meeting when he/she was elected or appointed and did not refuse at that meeting to act as a director.

6.5 Election and Term

- (a) The directors of the Corporation shall be elected in rotation and shall be eligible for re-election. At the

turnover meeting held pursuant to Section 43 of the Act, one (1) director shall be elected to hold office for a term of one (1) year; one (1) director shall be elected to hold office for a term of two (2) years; and one (1) director shall be elected to hold office for a term of three (3) years. Such directors may, however, continue to act until their successors are elected. If more than one (1) of such directors whose terms are not of equal duration shall resign from the board prior to the expiration of their respective terms, those directors shall be replaced at a meeting of owners called for that purpose. The candidate for directors receiving the greater number of votes shall complete the longest remaining terms of the resigning directors. At each annual meeting thereafter a number of directors equal to the number of directors retiring in such year shall be elected for a term of three (3) years.

6.6 Filling of Vacancies and Removal of Directors

- (a) If a vacancy in the membership of the board occurs, other than by way of removal by the owners or as a result of the number of directors being increased, subject to subparagraph (c) of this paragraph 6 the majority of the remaining members of the board may appoint any person qualified to be a member of the board to fill the vacancy until the next annual meeting at which time the vacancy shall be filled by election of the owners.
- (b) Where the number of directors is increased, the vacancies resulting from such increase shall be filled only by election at such meeting of the owners and the director(s) so elected shall not act until the by-law increasing the number of directors is registered.
- (c) When there is not a quorum of directors in office, the director(s) then in office shall forthwith call a meeting of owners to fill the vacancies and, in default, or if there are no directors then in office, the meeting may be called by an owner.
- (d) Any director may be removed before the expiration of his term by a vote of owners who together own a majority of the common interests and the owners may elect, in accordance with the by-laws dealing with the election of directors, any person qualified to be a member of the board for the remainder of the term of the director removed.

6.7 Calling of Meetings

Meetings of the board shall be held from time to time at such place, time, and date, as the President or any two directors may determine, and the Secretary shall call meetings when authorized by them. Notice of any meeting so called shall be delivered personally, by prepaid mail, courier delivery, or electronic communication to each director addressed to him at his latest address, entered on the Record of the Corporation, not less than forty-eight (48) hours (excluding any part of a Sunday or of a holiday as defined by the Interpretation Act of Canada for the time being in force) before the time when the meeting is to be held save that no notice of a meeting shall be necessary if all the directors are present and consent to the holding of such meeting, or if those absent have waived notice of or otherwise signified in writing their consent to the holding of such meeting.

6.8 Regular Meetings

The board may appoint a day or days in any month or months for regular meetings at a place and hour to be named. A copy of any resolution of the board fixing a place and time of regular meetings of the board shall be given to each director forthwith after being passed, but no other notice shall be required for any such regular meeting.

6.9 Teleconference

A meeting of the board maybe held or convened by way of teleconference, or any other form of communication system that allows all of the directors to participate concurrently and to communicate with each other simultaneously and instantaneously, provided that all of the directors participating in a meeting held or convened by such means have consented thereto, and a director so participating in any such meeting held or convened by such means shall be deemed [for the purposes of subsection 35(5) of the Act and this by-law] to be present at such meeting. The board may, by resolution signed by all the directors, provide their consent, in advance, to have meetings of the board conducted in the manner contemplated herein, without the necessity of requiring new consents prior to each and every meeting, provided that such resolution (and the standing consent referred to therein) shall be automatically rendered ineffective from and after (but not prior to) the delivery to the board by any director of a written notice revoking his or her consent to such resolution.

6.10 First Meeting of New Board

The board may without notice hold its first meeting for the purpose of organization and the election and appointment of officers immediately following the appointment of the directors of the first board provided a quorum of directors be present.

6.11 Conflict of Interest

A director shall not be disqualified by reason of his office from contracting with the Corporation. Subject to the provisions of the Act, a director shall not by reason only of his office be accountable to the Corporation or to its owners for any profit or gain realized from a contract or transaction in which he has an interest, and such contract or transaction shall not be voidable by reason only of such interest provided that the provisions in the Act relating to a declaration of interest have been followed.

6.12 Protection of Directors and Officers

No director or officer of the Corporation shall be liable for the acts, neglect or default of any other director or officer or for any loss or expense happening to the Corporation through the insufficiency or deficiency of title to any property acquired by order of the board for or on behalf of the Corporation, or for the insufficiency or deficiency of any security in or upon which any of the monies of the Corporation shall be invested or for any loss or damage arising from the bankruptcy, insolvency or tortious act of any person with whom any of the monies, securities or effects of the Corporation shall be deposited or for any loss occasioned by an error of judgment or oversight on his part or for any other loss, damage or misfortune whatsoever which shall happen in the execution of the duties of his/her office or in relation thereto, unless the same shall happen through his/her own dishonest or fraudulent act or acts.

6.1 3 Indemnity of Directors and Officers

Every director and officer of the Corporation and their respective heirs, estate trustees, successors, and other legal personal representatives shall at all times be indemnified and saved harmless by the Corporation from and against:

- a) any liability and all costs, charges and expenses that the director or officer sustains or occurs in respect of any action, suit or proceeding that is proposed or commenced against him or her for or in respect of anything done, permitted to be done, or omitted to be done, by him or her, in respect of the execution of the duties of his or her office; and

- b) all other costs, charges and expenses that such director or officer sustains or incurs in respect of the affairs of the Corporation;

excluding, however, all costs, charges and expenses incurred directly or indirectly as a result of such director's or officer's own dishonest or fraudulent act or acts, or through or by such director's or officer's gross negligence, recklessness, wilful blindness or intentional misconduct (with all of the liabilities and costs for which each director and officer shall be indemnified being hereinafter collectively referred to as the 'liabilities'), unless the Act or the by-laws of the Corporation provide otherwise, on the express understanding that;

- i) no director or officer shall be indemnified by the Corporation in respect of any liabilities, costs, charges and/or expenses that he or she sustains or incurs arising from any action, suit or other proceeding in which such director or officer is adjudged to be in breach of his or her duty to act honestly and in good faith;
- ii) the Corporation is advised of any such action, suit or other proceeding (and of all liabilities, costs, charges and expenses in connection therewith) forthwith after the director or officer receives notice thereof or otherwise becomes aware of same; and
- iii) the Corporation is given the right to join in the defense of any such action, suit or proceeding.

6.14 Insurance

Subject to the limitations contained in the Act, the Corporation shall purchase and maintain such insurance for the benefit of the directors and officers as the board may from time to time determine.

6.15 Standard of Care

Every director and officer shall exercise the powers and discharge the duties of his or her office honestly and in good faith, and shall exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

6.16 Consent of Director at Meeting

A director who is present at a meeting of directors, or committee of directors, is deemed to have consented to any resolution passed at such meeting or to any action taken thereat, unless such director;

- a) requests that his or her dissent is entered in the minutes of the meeting; or
- b) delivers a written dissent to the secretary of the meeting before the meeting is terminated.

A director who votes for (or consents to) a resolution is not entitled to dissent under or pursuant to the foregoing provisions hereof.

6.17 Deemed Consent of a Director

A director who was not present at a meeting at which a resolution was passed or any action taken is deemed to have consented thereto unless within seven (7) days after becoming aware of the resolution, the director:

- a) causes his or her dissent to be entered into (or annexed to) the minutes of the meeting; or
- b) delivers a written dissent to the Corporation, personally or by registered mail.

ARTICLE VII- OFFICERS

7.1 Elected President:

At the first meeting of the board, after each election of directors and wherever a vacancy in the office occurs, the board shall elect from among its members a President. Until such elections, the then incumbent (if a member of the board) shall hold office.

7.2 Other Elections and Appointments:

The board shall appoint or elect a secretary, a treasurer and such other officers as the board may determine, including one or more assistants to any such officers. The officers so elected need not be members of the board. One person may hold more than one office.

7.3 Term of Office:

The board may by resolution remove at its pleasure any officer of the Corporation.

7.4 President

The President shall, when present, unless he/she has delegated the responsibility, preside at all meetings of the owners and of the board, and shall be charged with the general supervision of the business and affairs of the Corporation. Except when the board has appointed a General Manager or Managing Director, the President shall also have the powers and be charged with the duties of that office.

7.5 Vice-President:

During the absence of the President his/her duties may be performed and his/her powers may be exercised by the Vice-President, or if there are more than one, by the Vice-Presidents, in order of seniority as determined by the board. If a Vice-President exercises any such duty or power the absence of the President shall be presumed with reference thereto. A Vice-President shall also perform such duties and exercise such powers as the board may prescribe.

7.6 General Manager

The General Manager, if one be appointed, shall have the general management and direction, subject to the authority of the board and the supervision of the President, of the Corporation's business and affairs, and the power to appoint and remove any and all employees and agents of the Corporation not elected or appointed directly by the board, and to settle the terms of their employment and remuneration. The terms of employment and remuneration of the General Manager appointed by the board shall be settled from time to time by the board.

7.7 Secretary:

The Secretary shall give or cause to be given all notices required to be given to the owners, directors, auditors, mortgagees and all other entitled thereto; he/she shall attend all meetings of the directors and owners and shall enter or cause to be entered in records kept for that purpose minutes of all proceedings at

such meetings; he/she shall be the custodian of all books, paper, records, documents and other instruments belonging to the Corporation, and he/she shall perform such other duties as may from time to time be prescribed by the board.

7.8 Treasurer:

The Treasurer shall keep or cause to be kept full and accurate books of account in which shall be recorded all receipts and disbursements of the Corporation and under the direction of the board shall control the deposit of money, the safekeeping of securities and the disbursement of funds of the Corporation; he/she shall render to the board whenever required of him/her an account of all his/her transactions as Treasurer, and of the financial position of the Corporation; and he shall perform such other duties as may from time to time be prescribed by the board. The offices of Secretary and Treasurer maybe combined.

7.9 Other Officers:

The duties of all other officers of the Corporation shall be as set out in the terms of their employment or as the board further declares. Any of the powers and duties of an officer to whom an assistant has been appointed may be exercised and performed by such assistant unless the board otherwise directs.

7.10 Agents and Attorneys:

The board shall have power from time to time to appoint agents or attorneys for the Corporation with such powers of management or otherwise (including the power to sub-delegate) as may be thought fit.

7.11 Committees

In order to assist the board in managing the affairs of the Corporation, the board may from time to time establish or constitute such advisory committees to advise and make recommendations to the board in connection with any activities undertaken (or under consideration) by the board, including those related to management, budgets, rules and/or any other matters related to the common elements or any facilities, services or amenities (or any portion thereof). The members of such committees shall be appointed by the board to hold office, and may be removed at any time by resolution of the board.

ARTICLE VIII- BANKING ARRANGEMENTS AND CONTRACTS

8.1 Arrangements

The banking business of the Corporation or any part thereof shall be transacted with such bank or trust company as the board may designate or appoint from time to time by resolution, and all such banking business or any part thereof, shall be transacted on the Corporation's behalf by such one or more officers or other persons as the board may designate, direct or authorize from time to time by resolution and, to the extent therein provided, including without restricting the generality of the foregoing, the operation of the Corporations accounts, the making, signing, drawing, accepting, endorsing, negotiating, lodging, depositing or transferring of any cheques, promissory notes, drafts, acceptances, bills of exchange and orders relating to any property of the Corporation; the execution of any agreement relating to any such banking business and defining the rights and powers of the parties thereto; and the authorizing of any officer of such bank to do any act or thing on the Corporation's behalf to facilitate such banking business.

8.2 Execution of Instruments:

Subject to the provisions of the Act, and subject to the provisions of any other by-law(s) of the

Corporation specifically designating the person or persons authorized to execute any type or class of documents on behalf of the Corporation, all deeds, transfers, assignments, contracts and obligations on behalf of the Corporation may be signed by any two directors of the Corporation. Any contract or obligation within the scope of any management agreement entered into by the Corporation may be executed on behalf of the Corporation in accordance with the provisions of such management agreement. The manager of the Corporation, any two members of the board, or the Corporation's solicitor, may execute a certificate of lien or discharge thereof. Subject to the provisions of the Act and the Declaration, but notwithstanding any provisions to the contrary contained herein or in any other by-laws of the Corporation, the board may at any time (and from time to time) by resolution direct the manner in which, and the person or persons by whom, any particular deed, transfer, assignment, contract, cheque or obligation, or any class of deeds, transfers, assignments, contracts, cheques or obligations of the Corporation may or shall be signed.

8.3 No Seal

Despite anything contained in this by-law to the contrary, any document or instrument that would otherwise require a seal need not be executed under the seal of the Corporation, provided that it has been duly executed by the person or persons expressly authorized and empowered to execute same on behalf of the Corporation, nor shall any such document or instrument be duly witnessed, in order to be valid, effective and binding upon the Corporation, provided that the name of the signatory, his or her office in the Corporation, and the phrase "I/We have the authority to bind the Corporation" are clearly set out below the signature(s) of the person(s) expressly authorized and empowered to execute same on behalf of the Corporation, and any such duly executed document or instrument shall have the same validly and binding effect on the Corporation (for all purposes) as if same had been duly executed under the seal of the Corporation.

8.4 Execution of Status Certificates:

Status certificates maybe signed by any officer or any director of the Corporation provided that the board may by resolution direct the manner in which, and the person by whom, such certificates may or shall be signed from time to time.

ARTICLE IX - FINANCIAL YEAR END

9.1 Financial Year End:

The financial year end of the Corporation shall end on the last day of the month in which the declaration and description creating the Corporation were registered, in each year, or on such other day as the board by resolution may determine.

ARTICLE X - NOTICE

10.01 Method of Giving Notices

Except as otherwise specifically provided in the Act, the Declaration, this by-law, or any other by-law(s) of the Corporation hereafter enacted, any notice(s), communication(s) or other document(s), including budgets and notices of assessment required to be given, served or delivered shall be sufficiently given or served if given in accordance with the following provisions:

- a) to an owner: [who has notified the Corporation in writing of his or her ownership interest in any common interest, and of his or her name and address for service] by giving same to such owner (or to any

director or officer of such owner, if the owner is a corporation) either:

- (i) personally, by courier, or by ordinary mail, postage prepaid, addressed to such owner at the address for service given by such owner to the Corporation; or
 - (ii) by facsimile transmission electronic mail, or by any other method of electronic communication, if the owner agrees in writing that the party giving the notice may do so in this manner; or
 - (iii) delivered at the owner's address or at the mail box for the parcel of tied land, unless the party giving the notice has received a written request from the owner that the notice not be given in this manner; or
- b) to a mortgagee [who has notified the Corporation in writing of his or her interest as mortgagee of any common interest, and of his or her name and address for service, and of his or her right under the terms of the mortgage to vote at a meeting of owners (or to consent in writing) in the place and stead of the mortgagor common interest owner), by giving same to such mortgagee (or to any director or officer of such mortgagee, if the mortgagee is a corporation) either:
- (i) personally, by courier or by ordinary mail, postage prepaid, addressed to such mortgagee at the address for service given by such mortgagee to the Corporation; or
 - (ii) by facsimile transmission, electronic mail, or by any other method of electronic communications, if the mortgagee agrees in writing that the party giving the notice may do so in this manner;
- c) to the Corporation by giving same personally to any director or officer of the Corporation, or by courier or by registered mail, postage prepaid, addressed to the Corporation at its address for service as set out in the Declaration, or as changed in accordance with the requirements of the Act.

10.02 Receipt of Notice

If any notice is mailed as aforesaid, then such notice shall be deemed to have been received (and to be effective) on the second (2nd) day following the day on which same was mailed. If any notice is delivered personally, by courier, or by facsimile transmission or by any other method of electronic communication, then such notice shall be deemed to have been received (and to be effective) on the next day following the day on which same was personally delivered, couriered, telefaxed, or sent by any other method of electronic communication, as the case may be. Except as may otherwise be provided in accordance with the Act, the accidental omission to give any notice to anyone entitled thereto, or the non-receipt of such notice, or any error in any notice not affecting the substance thereof, shall not invalidate any action taken at any meeting of owners or directors held pursuant to such notice or otherwise founded thereon.

ARTICLE XI - ASSESSMENT AND COLLECTION OF COMMON EXPENSES

11.1 Duties of the Board

All expenses, charges and costs of maintenance of the common elements and any other expenses, charges or costs which the board may incur or expend pursuant hereto shall be assessed by the board and levied against the owners in the proportions in which they are required to contribute to the common expenses as set forth in the Declaration. The board shall from time to time, and at least annually, prepare a budget for the property and determine by estimate, the amount of common expenses for the next ensuing fiscal year, or remainder of the current fiscal year as the case maybe, which shall include provision for a reserve fund as required by the Act, the board shall advise all owners promptly in writing of the amount of common expenses payable by each of them respectively determined as aforesaid, and shall deliver copies of each

budget on which common expenses are based to all owners and mortgagees entered in the Record.

11.2 Owner's Obligations:

Each owner shall pay to the Corporation the amount of such assessment in equal monthly payments on the first day of each and every month next following notice of such assessment by way of twelve (12) postdated cheques or execution of pre-authorized payment plan, until such time as a new assessment has been provided to such owner.

11.3 Extraordinary Expenditures:

In addition to the annual assessment, extraordinary expenditures not contemplated in the foregoing budget and for which the board shall not have sufficient finds, may be assessed at any time during the year by the board serving notice of such assessment on all owners, as an additional common expense. The notice shall include a written statement setting out the reasons for the assessment. The assessment shall be payable by each owner within ten (10) days after the delivery thereof to him, or within such further period of time or in such installments as the board may determine.

11.4 Default in Payment of Assessment:

(a) Arrears of payments required to be made under the provisions of this article shall bear interest at a rate determined by the board from time to time and in default of such determination shall bear interest at the rate of eighteen (18%) per cent per annum and shall be compounded monthly until paid.

(b) In addition to any remedies or liens provided by the Act, if any owner is in default in payment of an assessment levied against him/her for a period of fifteen (15) days, the board may retain a solicitor on behalf of the Corporation to enforce collection and there shall be added to any amount due all costs of such solicitor as between a solicitor and his own client and such costs may be collectible against the defaulting owner in the same manner as common expenses.

(c) The board when giving notice of default in payment of common expenses or any other default to the owner of the common interest, shall concurrently send a copy of such notice to each mortgagee of such common interest who has requested that such notices be sent to him.

ARTICLE XII - LIABILITY FOR COSTS

12.1 Abatement and Restraint of Violations by Common interest Owners and Liability for Costs:

The owner of a common interest is responsible for any cost incurred to repair:

(a) damage to the common elements or other common interests that may have been caused by either the Owner's use or his/her residents or their visitors use of same; and

(b) damage to the common elements that has been caused by the deliberate or negligent conduct of any owner, resident or their invited guests.

In those cases where it has been determined that the responsibility for payment of the cost to repair is that of the common interest owner, or where an owner requests to repair a common element himself/herself, the board of directors shall approve the selection of the contractor and/or the method of repair. This decision, at the discretion of the board, shall be based on a minimum of two (2) bids, the method of repair, the meeting of standards of uniformity and consideration in the convenience of the owner(s) involved.

12.2 Additional Rights of Corporation

The violation of any provisions of the Act, the Declaration, the By-laws, and/or the rules adopted by the board of directors, shall give the board the right, in addition to any other rights set forth in these by-laws:

(a) to enter the common interest in which or as to which such violation, or breach exists and to summarily abate and remove, at the expense of the defaulting owner, any structure, thing, or condition that may exist therein contrary to the intent and meaning of the provisions hereof, and the board shall not thereby be deemed guilty in any manner of trespass; or

(b) to enjoin, abate or remedy by appropriate legal proceedings, either at law or in equity, the continuance of any such breach, including without limiting the generality of the foregoing, an application for an order for compliance by implementing such proceedings as provided for in Part 9 of the Act.

12.3 Insurance Deductible:

Pursuant to subsections 105(2) and (3) of the Act, where any insurance policy obtained or maintained by the Corporation contains a deductible clause that limits the amount payable by the insurer, then the portion of any loss that is excluded from coverage shall be deemed a common expense, provided however that if an owner, tenant or any other person residing in the owner's common interest with the permission or knowledge of the owner, by or through any act or omission causes damage to such owner's common interest, in those circumstances where such damage was not caused or contributed to by any act or omission of the Corporation or any of its directors, officers, agents or employees, then the amount which is equivalent to the lesser of the cost of repairing the damage and the deductible limit of the Corporation's insurance policy shall be added to the common expenses payable in respect of such owner's common interest, together with all costs and expenses incurred by the Corporation (either directly or indirectly) in resolving such claim and/or having such damage fully rectified (including the increase in insurance premiums, if any, charged or levied against the Corporation by its insurer as a result of such claim or damage, together with all legal costs incurred by the Corporation on a solicitor and client basis), and shall be recoverable from such owner in the same manner (and upon the same terms) as unpaid common expenses.

ARTICLE XIII - PROCEDURES FOR MEDIATING DISPUTES

13.1 Mediation Procedures

For the purposes of complying with sections 125 and 132 of the Act (if and where applicable), the procedure with respect to the mediation of disputes or disagreements between the Corporation and any owner(s) shall be conducted in accordance with the rules of procedure for the conduct of mediation attached hereto as Appendix "A".

RESTRICTION ON USE-VISITORS PARKING

14.1 Restriction

No visitor to the property, other than persons attending on the property with the consent of the corporation for the purpose of making repairs, maintaining the common elements, and the like, shall park or stand any motorized vehicle anywhere on the property.

ARTICLE XV - MISCELLANEOUS

15.1 Invalidity:

The invalidity of any part of this by-law shall not impair or affect in any manner the validity, enforceability or effect of the balance thereof.

15.2 Gender:

The use of the masculine gender in this by-law shall be deemed to include the feminine and neuter genders and the use of the singular shall be deemed to include plural wherever the context so requires, and vice versa.

15.3 Waiver:

No restriction, condition, obligation or provision contained in this by-law shall be deemed to have been abrogated or waived by reason of any failure to enforce the same irrespective of the number of violations or breaches thereof which may occur.

15.4 Headings:

The headings in the body of this by-law form no part thereof but shall be deemed to be inserted for convenience of reference only.

15.5 Alterations:

This by-law or any part thereof may be varied, altered or repealed by a by-law passed in accordance with the provisions of the Act, and the Declaration.

15.6 Conflicts:

In the ease of a conflict between the provisions of the Act and any provision in the Declaration, By-laws or Rules, the Act shall prevail. In the case of a conflict between the provisions in the Declaration and any provision in the By-laws or Rules, the Declaration shall prevail. In the event the provisions of the Act or in the Declaration are silent the provisions of the By-laws shall prevail.

DATED at Somewhere, Ontario, this _____ day of , 200_.

SOMEWHERE COMMON ELEMENTS CONDOMINIUM CORPORATION NO. __

Per: _____

Name:

Title: President

Per: _____

Name:

Title: Secretary

1/We have the authority to bind the Corporation.

APPENDIX “A” TO BY-LAW #1

ARTICLE 1- PRE-MEDIATION PROCEEDINGS

Prior to submitting a dispute on any question or matter to a mediator appointed by the parties in accordance with Section 132 of the *Condominium Act, 1998* as set forth below, and within fourteen (14) days of the dispute first arising, the common interest owner (or common interest owners) and the board of directors shall meet on at least one occasion, and shall use their best efforts to resolve the question or matter in dispute through good faith negotiations conducted at such meeting and, if the parties are able to agree upon the selection of a neutral person who may be and include the Corporation’s property manager and/or a highly regarded member of the community, the meeting shall include such neutral person(s), all acting with a view to securing a resolution of the question or matter in dispute without further proceedings, including the conduct of mediation with the assistance of an outside mediator.

If one of the parties to the question or matter in dispute is unable or unwilling to participate in the initial meeting described in the preceding paragraph, then either party to the dispute may within 5 business days give written notice to the other that it is submitting the question or matter in dispute to the mediation and arbitration procedures set forth below.

If the parties, having met and used their best efforts to resolve the question or matter in dispute through good faith negotiation, have been unable to resolve the question or matter in dispute, then either party may, thereafter, give notice to the other that it is submitting the question or matter in dispute to mediation.

ARTICLE 2 - MEDIATION

Within 30 days following the giving of notice by one party to the other party or parties as set forth above, the question or matter in dispute shall be initially dealt with through mediation proceedings in accordance with Section 132 of the *Condominium Act, 1998*.

Selection and Role of the Mediator:

The party sending notice of mediation shall set forth in the notice to the other party the names, qualification and experience of two or more mediators from whom the other party may select one, or alternatively, may furnish to the first party its own list of two or more persons qualified to act as a mediator, and within 7 days thereafter, the parties shall communicate directly with one another to select a mediator. If the parties are unable to agree upon the selection of a mediator within 7 days, or within such longer period of time as may be agreeable to the parties then the appointment of a mediator shall be carried by the executive director of the Condominium Dispute Resolution Centre (the “CDRC”) or his/her nominee whose decision in the appointment of a qualified mediator for this purpose shall be final and binding upon the parties.

The mediator selected by the parties or, failing their agreement, appointed by the CDRC, shall not have had any current or past relationship of any kind with any of the parties that might otherwise give rise to justifiable doubts as to his or her impartiality or independence in assuming a neutral role as a mediator to assist the parties in the resolution of their dispute.

The mediator’s role is to assist the parties to negotiate a resolution of their dispute. The mediator will not make decisions for the parties about how the matter should or must be resolved.

Party Confidentiality:

The parties to the question or matter in dispute acknowledge that mediation is a confidential settlement process, and that they are participating in the process with the understanding that anything discussed in the mediation cannot be used in any other proceeding.

Pre-mediation information:

Each of the parties shall provide to the mediator a brief description of the dispute in writing in order to facilitate a more complete understanding of the controversy and the issues to be mediated not less than two (2) days prior to the first mediation session, which date the mediator shall have authority to establish at the earliest possible and convenient date to the parties.

Authority to Settle:

The parties or those representing them at the mediation shall have full, unqualified authority to settle the controversy.

Mediator Confidentiality:

The mediator shall not disclose to anyone who is not a party to the mediation anything said or any materials submitted to the mediator except when ordered to do so by judicial authority or where required to do so by law.

Legal Representation:

The parties may seek legal representation or advice prior to or during the mediation. They may have lawyers present at the mediation, if they so desire. If the mediator selected by the parties is a qualified lawyer, he or she will not provide legal representation or legal advice to any party at any time, and the mediator has no duty to assert or protect the legal rights and responsibilities of any party, or to raise any issue not raised by the parties themselves, or to determine who should participate in the meditation.

Right to Withdraw:

In accordance with Section 132 of the *Condominium Act, 1998*, it is mandatory that each party to the dispute attend the initial mediation session. Prior to such attendance, each party shall provide the mediator with a brief description of the dispute in writing. Subject to the foregoing requirements, each party shall be entitled to withdraw at and from the initial mediation session.

Costs of the Mediation:

In accordance with Section 132 of the *Condominium Act, 1998*, each party shall pay the share of the mediator's fees and expenses that the settlement specifies, if a settlement is obtained, or the mediator specifies in the notice stating that the mediation has failed, if the mediation fails.

Notice and Report:

In the event that the parties are unable, with the assistance of the mediator, to settle their dispute, the mediator shall deliver a notice to the parties stating that the mediation has failed, and the parties shall thereafter resolve their dispute by arbitration under the *Arbitration Act, 1991* and in the manner set forth below.

Settlement:

In accordance with Section 132 of the *Condominium Act, 1998*, upon obtaining a settlement between the parties with respect to the disagreement submitted to mediation, the mediator shall make a written report of the settlement which shall form part of the agreement or matter that was the subject of the mediation.

RULES

Somewhere Common Elements Condominium Corporation No. __

RULES

1. No Owner or occupant of a parcel of tied land shall permit, allow, or acquiesce any of their guests or invitees to park or stand any motorized vehicle of any size or type anywhere on the common elements. Authorized by Section 56(1)(k)
2. No person shall exit from the community building unless another person remains in attendance or without first ensuring that all doors and windows to the building are locked.
3. No Owner or occupant of a parcel of tied land shall park a motor vehicle on the common elements except in the parking lot by the community building and only during such time as the Owner or occupant is engaged in activities on the common elements.
4. No person shall use the swimming pool during the hours of 11:30 p.m. to 6:00 p.m.

INSURANCE TRUST AGREEMENT

THIS AGREEMENT made the _____ day of _____, 200 .

BETWEEN:

SOMEWHERE COMMON ELEMENTS CONDOMINIUM CORPORATION NO. _____, a corporation created under the laws of the Province of Ontario pursuant to the *Condominium Act, 1998*, S.O. 1998, c. 19, and amendments thereto (hereinafter referred to as the “Act”),

(hereinafter called the “Settlor”)

OF THE FIRST PART;

- and -

THE BANK OF SOMEWHERE

(hereinafter called the “Trustee”)

OF THE SECOND PART.

WHEREAS the declaration creating the Settlor and registered pursuant to the Act (“Declaration”) provides that the Board of Directors of the Settlor (“Board”) on behalf of the Settlor shall enter into an agreement with an insurance trustee, which agreement shall, without limiting its generality, provide for the receipt by the insurance trustee of any proceeds of insurance payable to the Settlor, the holding by the insurance trustee of such proceeds in trust for the persons entitled thereto and the disbursement by the insurance trustee of such proceeds in accordance with the provisions of the insurance trust agreement;

AND WHEREAS the parties hereto are desirous of entering into this Agreement for the purposes set forth in the Declaration, on the terms and conditions herein;

AND WHEREAS all necessary resolutions have been passed by the Board and all other proceedings taken and conditions complied with to authorize the execution and delivery by the Settlor of this Agreement;

AND WHEREAS the Settlor has obtained certain policies of insurance set forth in Schedule “A” annexed hereto;

NOW THEREFORE this Agreement witnesseth that in consideration of the mutual covenants hereinafter contained, the parties hereto hereinafter covenant and agree to and with each other as follows:

ARTICLE 1.00 - DEFINITIONS

1.1 Words and expressions used herein which are used or defined in the Act, or in the regulations made under the Act have the same meaning herein as they have therein unless otherwise defined herein or unless the context otherwise requires.

ARTICLE 2.00 - APPOINTMENT OF TRUSTEE

2.1 The Settlor hereby appoints the Trustee to act as insurance trustee pursuant to the provisions of the Declaration and By-laws of the Settlor, copies of which are submitted herewith to the Trustee.

ARTICLE 3.00 - ACCEPTANCE OF APPOINTMENT

3.1 The Trustee hereby accepts such appointment as insurance trustee and hereby agrees with the Settlor to carry out and perform its duties hereunder in a faithful, diligent and honest manner.

ARTICLE 4.00 - ACKNOWLEDGEMENT BY TRUSTEE

4.1 The Trustee hereby acknowledges that it is familiar with the provisions of the Act and of the Declaration hereinbefore referred to and acknowledges having received a copy of the Declaration.

ARTICLE 5.00 - PAYMENT BY TRUSTEE

5.1 All insurance proceeds received by the Trustee shall be held by it in trust and paid in accordance with the following terms and conditions:

In the event of:

- (a) damage to the buildings, if the Trustee receives a certificate duly executed by the President or Vice-President and the Secretary of the Settlor certifying:
 - (i) that the Board has determined that less than twenty-five per cent (25%) of the buildings have sustained substantial damage; or
 - (ii) that the Board has determined that twenty-five per cent (25%) or more of the buildings have sustained substantial damage, and that owners who own at least eighty per cent (80%) of the common interests have not voted to terminate within one hundred and twenty (120) days of such determination by the Board; or
- (b) damage to the property or other assets of the Settlor, excluding the buildings,

the Trustee shall disburse the proceeds of all insurance in its hands and arising out of such damage towards the cost of repairing such damage, from time to time, as the repairs of such damage progress, upon the written request of the Settlor accompanied by the following:

- (i) a certificate signed by the President or Vice-President and the Secretary of the Settlor dated not more than thirty (30) days prior to such request and counter-signed by the architect or engineer, if any, employed by the Settlor in connection with such repairs, setting forth the following:
 - (a) that the sum then requested either has been paid by the Settlor or is justly due to contractors, architects or other persons who have rendered services or furnished materials for repairs therein specified, the names and addresses of such persons, a brief description of such services and materials, the several amounts so paid or due to each of said persons in respect thereto;
 - (b) that no part of such expenditures has been or is being made the basis of any previous or then pending request for the payment of insurance proceeds then held by the Trustee, or has theretofore been paid out of such insurance proceeds;
 - (c) that the sum then requested, when added to all sums previously paid by the Trustee, does not exceed the value of the services and materials described in such certificate;
 - (d) that except for the amount, if any, stated in such certificate to be due for services or materials, there is no outstanding indebtedness known to the Board, after due enquiry, which is then due for labour, wages, materials, supplies or services in connection with such repairs, which, if unpaid, might become the basis of a lien pursuant to the Construction Lien Act by reason of such repair to the buildings or any part thereof; and,
 - (e) specifying the person(s) to whom the payment requested is to be made and the amount

to be paid to each such person(s).

- (ii) an opinion of the solicitor acting for the Settlor, or other evidence reasonably satisfactory to the Trustee to the effect that there has not been filed with respect to the buildings or the property, or any part thereof, any Construction Lien which has not been discharged except such as will be discharged by payment of the amount then requested.

Any balance of proceeds of insurance remaining in the Trustee's hands after payment in full of the cost of the repairs as aforesaid, shall be paid over by the Trustee to the Settlor.

- 5.2 The Trustee shall not be under any duty to enquire as to the correctness of any amounts received by it on account of the proceeds of any insurance, nor shall the Trustee be under any obligation to enforce the payment of proceeds to it.
- 5.3 In the event of damage to the buildings, if the Trustee receives a certificate duly executed by the President or Vice-President and the Secretary of the Settlor, certifying that the Board has determined that twenty-five per cent (25%) or more of the buildings have sustained substantial damage and that owners who own at least eighty per cent (80%) of the common interests have voted for termination within one hundred and twenty (120) days of such determination, that there is termination in accordance with the provisions of the Act, or otherwise, and notice of such termination has been registered in the Office of Land Titles in which the condominium is registered, the Trustee shall disburse any insurance proceeds then in its hands or thereafter received by it in the following order of priority:
 - (a) to any mortgagee or mortgagees to whom such loss shall be payable in any such policy or policies of insurance or who have a mortgage or charge registered in the said Office of Land Titles with respect to the parcel of tied land of an owner, in satisfaction of the amount due pursuant to any liens registered by the Settlor against any such parcels and in satisfaction of any other registered interests in the common interests in order of their respective legal priorities;
 - (b) to the owners of the common interests in the proportion of their respective common interests as set out in the Declaration as registered in the said Office of Land Titles and the names of the common interests owners as registered in the said office of Land Titles shall be conclusive as to the names of the common interests owners and their respective common interests.

The Settlor shall cause a search to be conducted in the records of the said Office of Land Titles by a duly qualified solicitor retained by the Settlor, and the Trustee shall be entitled to rely, without further enquiry, upon the accuracy and completeness of the report of the said solicitor provided only that it is addressed to the Settlor, is dated within ten (10) days prior to the disbursement of funds, that it specifies the priority of the interests of the various parties in each parcels of tied lands and that it specifies the names of owners of the parcels of tied lands and their respective common interests.

- 5.4 In the event that the proceeds of insurance deposited with the Trustee are less than fifteen percent (15%) of the replacement cost of the property covered by the policy pursuant to which the proceeds of insurance were paid to the Trustee, all such proceeds shall be paid to the Settlor forthwith, notwithstanding anything herein contained to the contrary, and the Settlor covenants to apply such proceeds in compliance with its obligations pursuant to the Act and the Declaration and to indemnify the Trustee in respect of all liabilities or obligations in respect of such proceeds. The Trustee shall be entitled to rely, without independent enquiry, upon the certificate of an architect as to whether the proceeds of insurance deposited with the Trustee are less than fifteen percent (15%) of the replacement cost of the property covered by the policy pursuant to which the insurance proceeds were paid to the Trustee and shall be entitled to retain an independent architect at the expense of the Settlor for the purpose of providing such a certificate.
- 5.5 Subject to the terms of this Agreement, in the event that the Trustee is in receipt of proceeds of insurance from or in respect of any liability policy to which this Agreement is applicable, the Trustee shall disburse such proceeds only upon receipt of and in accordance with the written directions of the Settlor executed

on its behalf by its President or Vice-President and Secretary.

ARTICLE 6.00 - DEFICIENCY OF INSURANCE PROCEEDS

- 6.1 The Settlor shall be promptly notified of any proceeds of insurance deposited with the Trustee on behalf of the Settlor, and the Trustee shall be under no obligation to make any payments as specified in this Agreement except out of the proceeds of insurance held in trust for the Settlor.
- 6.2 If, upon the receipt of any certificate referred to in section 5.1, the Trustee shall not have sufficient funds to pay the amount due and owing as set out therein, the Settlor shall be so notified by the Trustee, and the Settlor shall further notify the Trustee in writing as to which of the persons or companies set forth in the said certificate are to be paid by the Trustee and in which amounts.

ARTICLE 7.00 - NOTICE IN THE EVENT OF CANCELLATION OF INSURANCE

- 7.1 The Settlor and all mortgagees having an interest in the common interests as shown on the Settlor's records with respect to any common interest shall be promptly notified of any notice of cancellation received by the Trustee. The Trustee shall not have any liability to the Settlor or any other party in the event of its inadvertent failure to provide notice in accordance with the foregoing. The Trustee shall be entitled to rely in any event on the accuracy and completeness of the Settlor's records without independent inquiry.
- 7.2 The Trustee shall not be under any obligation to inquire whether any insurance policy remains in force, it being the express understanding of the parties that it shall be the sole responsibility of the Settlor to obtain all required insurance policies and to ensure that same remain in force at all times.

ARTICLE 8.00 - LIABILITY AND INDEMNIFICATION OF TRUSTEE

- 8.1 The Trustee shall have no duties, express or implied, except those which are expressly set forth in this Agreement and shall in no way be responsible or liable for any loss, cost or damages which may result from anything done or omitted to be done by such Trustee hereunder, except in the case of negligence or bad faith. The Trustee shall be protected in acting upon any certificate, statement, request, consent, agreement or other instrument whatsoever, not only as to its due execution and validity in its effectiveness or its provisions, but also as to the truth and accuracy of any information therein contained, which it shall, in good faith, believe to be genuine, and to have been signed and presented by the proper person or persons. The Trustee shall also be protected and indemnified in acting in good faith upon any advice or legal opinion it may seek from an independent solicitor with respect to its duties, obligations and rights hereunder. The Trustee shall also be indemnified for the reasonable legal fees and disbursements of such a solicitor. Further, the Trustee shall have no responsibility with respect to any cheques deposited with it hereunder except the usual responsibilities with respect to the application of any funds paid by it pursuant to the provisions of this Agreement.
- 8.2 The Settlor shall reimburse the Trustee for all expenses incurred by it in connection with its duties under this Agreement and shall indemnify it and save it harmless against any and all liabilities, costs and expenses including legal fees, for anything done or omitted to be done by it in the performance of this agreement, except as a result of negligence or bad faith.
- 8.3 The Trustee may become mortgagee of any or all common interests together with such other interests as may be attached to the ownership of such common interests and may enforce the covenants in the mortgage relating thereto, notwithstanding that the enforcement may be in conflict with the Trustee's duties hereunder.

ARTICLE 9.00 - TERMINATION OF AGREEMENT

- 9.1 At any time hereafter, the Settlor shall have the sole and unrestricted right to terminate this Agreement by

not less than sixty (60) days prior written notice to the Trustee. Following such termination, upon payment to the Trustee of all fees and charges due to the Trustee hereunder, the Trustee shall turn over all sums deposited with it, remaining in its hands, to any successor Trustee appointed by the Board and of which the Trustee has been given written notice, failing which it shall turn over all such sums to the Settlor and thereupon its obligations hereunder shall cease.

- 9.2 The Trustee may, at any time, resign from its duties hereunder by giving to the Settlor and to all mortgagees having an interest in any of the common interests pursuant to a mortgage as shown on the Settlor's records not less than sixty (60) days' notice in writing thereof and its obligations hereunder, except for the payment of any sums remaining in its hands to a successor trustee, as hereinafter provided, shall cease. Following such resignation, the Settlor shall pay to the Trustee all fees and charges due to it hereunder. The Trustee herein shall turn over all sums deposited with it, remaining in its hands, to any successor Trustee appointed by the Board and of which the Trustee has been given written notice, failing which it shall turn over all such sums to the Settlor, all subject to the Trustee's rights pursuant to section 12.2 hereof, and thereupon its obligations hereunder shall cease.

ARTICLE 10.00 - MODIFICATION OR AMENDMENT OF AGREEMENT AND RIGHTS OF THE PARTIES

- 10.1 This Agreement shall not be modified or amended without the written consent of the parties hereto and any mortgagees having registered mortgages against at least ten per cent (10 %) of the Common interests.
- 10.2 Upon being advised of damage to the buildings in excess of the amount set out in section 5.4 hereof, or upon receipt of any moneys in excess of the said amount, in accordance with the terms of this Agreement, the Trustee shall notify all mortgagees having a mortgage or charge as shown on the Settlor's records where the amount received is less than \$100,000.00 and shall notify all mortgagees having a mortgage or charge registered in the aforesaid Office of Land Titles against any parcel of tied land where the amount received is \$100,000.00 or more. For the purposes of giving notice in the latter event, the Settlor shall cause a search to be conducted in the records of the said Office of Land Titles by a duly qualified solicitor retained by the Settlor, and the Trustee shall be entitled to rely, without further enquiry, upon the accuracy and completeness of the report of the said solicitor provided only that it is addressed to the Settlor, is dated within ten (10) days prior to the disbursement of funds and that it specifies the priority of the interests of the various parties in each parcel of tied land.
- 10.3 Certain provisions of this Agreement are for the benefit of the mortgagees of the common interests and all such provisions are covenants for the benefit of any mortgagee having an interest registered in the said Office of Land Titles against any of the common interests or any part of the insured property and may be enforced by such mortgagee.

ARTICLE 11.00 - ADDRESS FOR SERVICE

- 11.1 Any certificate, declaration or notice in writing given to the Settlor, pursuant to this Agreement, shall be sufficiently given if delivered or mailed by prepaid registered post to the Settlor at its last known address and at:

c/o Somewhere Property Management
1 Oak Street
Somewhere, Ontario, Z1Z 1Z1

or such either address as the Settlor may advise in writing from time to time.

Any certificate, declaration or notice in writing given to the Trustee pursuant to this Agreement shall be sufficiently given if delivered or mailed by prepaid registered post to the Trustee at its last known address and at:

The Bank of Somewhere
5 Oak Street, Somewhere, Ontario
Z1Z 1Z1
Attention: Trust Dept.

or such other address as the Trustee may advise in writing from time to time.

Such certificate, declaration and notice in writing shall have been deemed to have been received on the date of delivery or third clear business day next following the date of such mailing. Each of the parties shall be entitled to rely without further inquiry on the address determined in accordance with the foregoing as being the most current and correct address of the party to whom such certificate, declaration or notice is to be given. Each party further covenants to notify the other, in the manner provided for in this Article 11.00 of any change in its address for service.

ARTICLE 12.00 - REMUNERATION OF TRUSTEE

- 12.1 The Settlor shall pay the Trustee's fees and charges as set out in Schedule "B" attached hereto which fees and charges may be changed from time to time by written notice from the Trustee to the Settlor at anytime. In the event that the Settlor does not agree with any change in fees or charges made by the Trustee, it shall be entitled to terminate the within agreement pursuant to Article 9.00 hereof within sixty (60) days after receipt of the notice of change to fees or charges in which event the change shall not apply and the within agreement shall be terminated in accordance with Article 9.00 hereof. In the event that no notice of termination is delivered pursuant to Article 9.00 within the sixty (60) day period, the fees and charges of the Trustee shall be as set out in its notice to the Settlor until further changed.
- 12.2 The Trustee may deduct all amounts owing to it hereunder from my proceeds of insurance received by it.
- 12.3 In addition to any other rights which the Trustee may have, in the event that any fees, charges, reimbursement of expenses or other amounts due hereunder to the Trustee are not paid when due, the Trustee shall be entitled to enforce payment of same by legal process and all fees, disbursements, expenses or other costs incurred by the Trustee in collecting same (including all legal fees and disbursements on a solicitor and his own client scale) shall be payable by the Settlor to the Trustee.

ARTICLE 13.00 - ADDITIONAL COVENANTS OF SETTLOR

- 13.1 Upon request, the Settlor shall deliver to the Trustee complete and accurate copies of
- (a) all insurance policies, renewals thereof, amendments or endorsements thereto or replacements thereof;
 - (b) the Settlor's records of common interest owners and mortgagees; and

The Trustee shall be entitled to rely, without further enquiry upon the accuracy and completeness of such material.

- 13.2 The Settlor covenants to deliver to the Trustee any amendments to the Settlor's Declaration or By-Laws or any additional By-Laws it may enact.
- 13.3 The Settlor covenants to ensure that losses are payable to the Trustee as insurance trustee under all policies of insurance governed by this Agreement.
- 13.4 The Settlor specifically acknowledges and agrees that the Trustee shall have no liability or obligation to the Settlor or any other party except as is expressly provided for herein and that there are no provisions or obligations between the parties relating to matters governed hereunder, whether oral or written, express or implied except as are expressly set forth herein in writing. The Settlor covenants to indemnify and save

the Trustee harmless from and against all claims, demands, liabilities, actions, suits, costs or obligations of any kind or nature whatsoever arising out of or related to the terms of this Agreement unless same results from the negligence or wilful act of the Trustee or a breach by the Trustee of the terms hereof.

ARTICLE 14.00 - ASSIGNMENT OF AGREEMENT

- 14.1 Neither this Agreement nor any rights or obligations hereunder shall be assignable by either party hereto without the prior written consent of the other party. Any attempted assignment without such consent shall be void. Subject thereto, this Agreement shall enure to the benefit of and be binding upon the parties hereto and their respective successors and permitted assigns.
- 14.2 This Agreement shall be governed by and construed in accordance with the laws of the Province of Ontario. The parties hereto hereby irrevocably attorney to the jurisdiction of the courts of the Province of Ontario for all purposes hereunder.
- 14.3 Words importing the singular include the plural and vice versa, and words importing gender include all genders.
- 14.4 The headings contained in this Agreement are included solely for convenience of reference, are not intended to be full or accurate descriptions of the contents thereof and shall not be considered part of this Agreement or affect the construction or interpretation thereof

IN WITNESS WHEREOF the parties hereto have executed this Agreement under the seals of their proper signing officers duly authorized in that behalf as of the * day of , 200*.

SOMEWHERE COMMON ELEMENTS CONDOMINIUM CORPORATION NO. ____

Per: _____
Name:
Office: President

Per: _____
Name:
Office: Secretary
We have authority to bind the corporation

THE BANK OF SOMEWHERE

Per: _____
[Authorized Signing Officer]

Per: _____
[Authorized Signing Officer]
We have authority to bind the corporation.

SCHEDULE 'A'

SCHEDULE 'B'

The Settlor shall pay the Trustee an initial fee of Eight Hundred (\$800.00) Dollars plus GST upon the execution of this Agreement, being an initial "set-up" fee of Five Hundred (\$500.00) Dollars and the per annum retainer fee of Three Hundred (\$300.00) Dollars payable in advance.

Hereafter, the per annum retainer fee of Three Hundred (\$300.00) Dollars shall be payable in advance upon the anniversary date of this Agreement in each year during the term of this Agreement.

In the event the Trustee shall, pursuant to the provisions hereof, administer any insurance proceeds, it shall be entitled to an additional fee, payable in advance of the release of any insurance proceeds held in trust, equivalent to:

- (a) one per cent (1 %) of the first Twenty-Five Thousand (\$25,000.00) Dollars administered, by it;
- (b) one-half of one per cent (1/2 of 1 %) of the next Twenty-Five Thousand (\$25,000.00) Dollars administered by it.
- (c) one-tenth of one per cent (1 / 10 of 1 %) upon the balance of funds administered by it;
- (d) the above fees shall be subject to a minimum charge of One Hundred and Fifty (\$150.00) Dollars per claim processed;
- (e) the Trustee may levy an additional charge to cover extraordinary time and effort expended in special circumstances, as agreed between the Settlor and the Trustee.

This fee may be amended from time to time by written notice from the Insurance Trustee to the Settlor in accordance with Article 12.00 hereof

CONDOMINIUM MANAGEMENT AGREEMENT

BETWEEN:

**SOMEWHERE COMMON ELEMENTS
CONDOMINIUM CORPORATION
NO. __**

(hereinafter called the "Corporation")

OF THE FIRST PART

- and -

SOMEWHERE PROPERTY MANAGEMENT LTD.

(hereinafter called the "Manager")

OF THE SECOND PART

WHEREAS the Corporation, has been created pursuant to the *Condominium Act, 1998*, S.O. 1998 c. 19 as amended, which act and regulations made thereunder are collectively referred to as the "Act", and on Oak Street, Somewhere, Ontario (the "Property");

AND WHEREAS the Corporation desires the Manager to manage the Corporation and assets of the Corporation, and the Manager desires to do so, in accordance with the terms and conditions of this agreement (the "Agreement").

NOW THEREFORE THIS AGREEMENT WITNESSETH that in consideration of the premises and the mutual covenants and agreements herein contained and other valuable consideration, the Corporation appoints the Manager and the Manager hereby accepts the appointment as the exclusive Manager of the property and the assets of the Corporation on the terms and conditions hereinafter set forth.

ARTICLE I

NOMENCLATURE

1.1 Unless a contrary intent is expressed in this Agreement, the terms used herein shall have ascribed to them the meanings contained in the Act and the declaration of the Corporation (the "Declaration").

ARTICLE II

TERM

2.1 The term of this Agreement shall be for one (1) year from the day of , 200__ to the day of , 200 , unless terminated in accordance with the provisions of this Agreement and the Act.

ARTICLE III

SUPERVISION BY THE BOARD

3.1 The Manager acknowledges that it is familiar with the Act and with the terms of the Declaration which shall include any agreements referred to therein, and the by-laws registered pursuant to the Act in connection with the Corporation, and the Rules, as of the date of this Agreement. Its management of the Property shall be subject to the specific instructions of the Corporation as expressed by its Board of Directors (the "Board") and to each and every term and condition contained in this Agreement, and it further agrees to carry out expeditiously the instructions of the Condominium Corporation and its Board.

**ARTICLE IV
MANAGEMENT ASSISTANCE AND DUTIES**

- 4.1 The Manager represents it has and shall utilize its experience and knowledge to carry out the management, supervision, control and administration of the Corporation and of the assets of the Corporation. In this regard, the Manager accepts the relationship of trust and confidence established between itself, the Board, and the owners by virtue of entering into this Agreement. The Manager covenants to furnish its best skill and judgment and to co-operate in furthering the interests of the Corporation. The Manager agrees to furnish efficient business administration and supervision and to perform its responsibilities both administrative, financial and advisory, in the best manner, consistent with effective management techniques and in the most expeditious and economical manner consistent with the best interests of the Corporation. The Manager shall conduct its duties in accordance with the requirements of the Act, the Declaration, by-laws and rules of the Corporation specifically, and, in general, consistent with federal, provincial and municipal laws and regulations as they pertain to the operation of the Corporation and of the Property.
- 4.2 Without limiting the generality of paragraph 1 of this Article IV, the Manager shall perform, in particular, the following specific duties, subject to the direction of the Board:

(a) Corporate Funds

To collect, receive, and deposit in trust for the Corporation all moneys payable pursuant to the Act, Declaration and by-laws by the owners or others and to deposit the same forthwith in separate trust account(s) to be opened with a Canadian chartered bank and maintained by the Manager in the name of the Corporation as the Board may from time to time direct. All such moneys shall thereafter be held in trust in the name of the Corporation and be used:

(i) Disbursements

To prepare cheques in payment of all accounts properly incurred by or on behalf of the Corporation, such cheques to be signed by the authorized directors of the Corporation, as per the Banking Resolution approved by the Board. The cheques presented for signing are to be accompanied by properly authorized purchase orders, delivery receipts or such other evidence as the Board may require from time to time;

(ii) Insurance and Appraisals

To arrange and pay for insurance coverage and any appraisals in connection therewith required by the Corporation in accordance with the provisions of the Act, the Declaration and by-laws, and the amounts of such insurance shall be as directed by the Board;

(iii) General Maintenance and Repairs

To repair and maintain or cause to be so repaired and maintained, those parts of the property and assets of the Corporation which require repair and maintenance by the Corporation in accordance with the provisions of the Act, Declaration and by-laws, and, without limiting the generality of the foregoing, to arrange for (subject to subparagraph 4.2(1)) the supply as may be required of electricity, water and other services and to arrange through use of Corporation employees and/or independent contractors as in each instance may seem most desirable for the effective and economical operation, maintenance and repair of the Property and its equipment or so as to comply with the enforcement of any regulations and requirements of which the Manager is notified by the local Board of Health, Police, Fire Departments and any other federal, provincial or municipal authorities having jurisdiction which affect the Property, and without limiting the generality of the foregoing, such arrangements shall include where applicable to the Property,

removal of litter and disposal of waste, snow and ice removal, landscaping and grounds maintenance, fire hydrant servicing, exterior painting, alterations and any supervision and maintenance necessary in connection with the Property and subject to subparagraph 4.2(1) as aforesaid to maintain such staff on behalf of and at the expense of the Corporation as may be required at all times to promptly and efficiently carry out the foregoing, and any other requirements and instructions of the Board;

(iv) Reserve Fund

To deposit to the credit of the Corporation in a separate account for major repair and replacement of the Common Elements and assets of the Corporation, on a monthly basis, the proportionate amount of the total budgeted expenditure allocated by the Corporation in its budget statement for the establishment of the reserve fund and to ensure that such moneys are not used or employed by the Board or the Manager for the payment of general operating expenses.

The Manager shall prepare annually and for approval of the Board a reserve fund budget statement in accordance with the Reserve Fund Study and the Reserve Fund Plan in accordance with Subsection 94(8) of the Act. In addition, the Manager shall develop and monitor an investment plan as approved by the Board pursuant to subsection 115(8) of the Act (the "Investment Plan") and the Manager shall insert the "surplus" monies in the Corporation's general account(s) and reserve account(s) in accordance with the Investment Plan and subsection 115(6) and (7) of the Act.

(b) By-law Enforcement

To take such action within its power, short of legal action, to enforce the terms of the Act, the Declaration, the by-laws and the rules and amendments to any of the foregoing which may be in force from time to time subject to the direction of the Board; and to retain legal counsel as directed by the Board at the expense of the Corporation.

(c) By-law Advisement

To advise and consult with the Board with respect to any further by-laws and rules which, in the opinion of the Manager, ought to be established to further the harmonious and satisfactory operation of the Property.

(d) Common Element Deficiencies

To use its best efforts to ensure that any building deficiency required by the Corporation to be repaired or rectified is corrected and, if applicable, to pursue the correction of any building deficiency short of legal action under any warranty applicable to the property.

(e) Communication to the Owners

Subject to the instructions of the Board to forthwith after their enactment communicate to all owners the text and import of any further by-laws or rules or amendments thereto.

(f) Insurance Claims

To supervise insurance or other claims by or against the Corporation and to see that the rights of the Corporation in respect to such claims are protected including the filing of notice of claim but not including the adjusting of any loss.

(g) Inadequate Performance by Contractors

To use reasonable diligence to ensure that contracts and agreements between the Corporation and any supplier or service personnel are performed in accordance with the agreed upon terms and to inform the Board in the event performance is considered by the Manager to be inadequate or contrary to the agreed terms and where services are properly performed and/or materials provided in accordance with the contract, to take advantage of all trade discounts by prompt payment of trade invoices.

(h) Construction Liens

To retain or cause to be retained holdbacks required by the *Construction Lien Act*, R.S. 0. 1990, c. 30 and to use its best efforts to ensure that no claim or lien shall be filed in respect of any work which may be earned out on behalf of the Corporation against the title to the Property and if a claim or lien shall be filed in respect of such work the Manager shall as directed by the Board forthwith take all necessary steps to have the same removed and discharged.

(i) Employee Records

To execute and file all returns and other instruments, maintain proper payroll records and do and perform all acts required of the Corporation as an employer of on-site personnel in respect of unemployment insurance contributions and deductions, Canada Pension Plan contributions and payments, the *Income Tax Act of Canada* and any other employee and employer contributions or payments required under any social, labour or tax legislation in force from time to time, and in connection therewith the Corporation agrees, upon request, to execute and deliver promptly to the Manager all necessary consents, notices of appointment and like approvals or directors.

(j) Supervision of Employees

To direct and supervise any and all persons employed pursuant to this Agreement, for the operation and maintenance of any equipment in existence or which might be in existence and which the Corporation desires or is obliged to operate and maintain, and shall arrange and be responsible for any technical instructions of personnel employed which may be required for the proper operation and maintenance of such equipment.

Subject to final approval of the Board, the Manager shall negotiate agreements with, supervise and discharge all necessary personnel required to properly and physically maintain the Property. All such on-site personnel shall be employees of the Corporation, and not of the Manager, but such personnel shall be supervised by the Manager. The Corporation's share of all salaries, taxes and other expenses payable on account of such employees shall constitute common expenses of the Corporation and not expenses of the Manager.

(k) Inspection/Work Schedule

To prepare schedules and assignment of responsibilities as maybe necessary to direct on a regular basis the activities of all persons employed to work at the Property and to provide such supervision as may be reasonably necessary and to conduct an inspection, as reasonably required, of the Property and to complete a checklist setting out the status of the ongoing maintenance and repairs to be completed an respect of the common elements, and in compliance by owners with the Act, the Declaration, the by-laws and the rules (i.e. stipulate infractions and the steps taken to correct same) and to make such schedules, inspections and status reports available for inspection by the Board at all reasonable times.

(l) General Authority

Generally to do and perform and, where desirable, contract as agent for and in the name of the Corporation for all things desirable or necessary for the proper and efficient management of the Property (including the giving of proper attention to any complaints and endeavouring as far as is economical to reduce waste) and to perform every other act whatsoever in or about the Property to carry out the intent of this Agreement provided, however, that the Manager shall not authorize any work, repairs, alterations or maintenance

estimated to cost in excess of \$1,000.00 for any one item or to have a duration in excess of one (one) month without first obtaining the Board's approval to proceed with such work except for monthly or recurring operating charges. On rare occasions where circumstances warrant, the Board shall provide its approval or other direction to the Manager within a reasonable time of receipt of the Manager's request for approval. Furthermore, if in the Manager's opinion there exists a hazardous situation which could cause personal injury or damage to the property or the Corporation's equipment or chattels or which could impair the value of the owners' interest therein or the owners' equipment, chattels, improvements or Property or which could cause the suspension of any service to the Corporation at a time when the Corporation or its representatives cannot be reasonably located for the purpose of giving approval for such work, or if failure to do such work might expose either the Corporation or the Manager or both to the imposition of penalties, fines, imprisonment or any other substantial liability, the Manager is hereby authorized to proceed with such work as in its discretion it determines to be urgently necessary for the protection and preservation of the Property or the Corporation's equipment or chattels or the owners' interest therein or the owners' equipment, chattels, improvements or property therein or to protect the Corporation or the Manager from exposure to fines, penalties, imprisonment or any other substantial liability subject always to the Act, and the Declaration and By-Laws. The Manager shall in the case of a hazardous situation report to the Board as soon as possible.

(m) Materials, Equipment and Supplies

To purchase, subject to subparagraph 4.2(l) above, on behalf of the Corporation such equipment, tools, appliances, materials and supplies as are necessary for the proper operation and maintenance of the offices and property of the Corporation. All such purchases and contracts shall be in the name of and at the expense of the Corporation.

(n) Inventory

To maintain an inventory of cleaning supplies, pool chemicals, and the like.

(o) Emergency Situations

To keep the Board advised at all times of the telephone number or numbers at which an agent or employee of the Manager may be reached at any time during normal business hours in respect to any infraction of the Act, Declaration, the By-laws, or the rules, or at any time during the day or night in the event of any emergency involving the Property and assets of the Corporation. The Manager will make all arrangements to deal promptly with such infractions and immediately with any emergency arising in connection with the maintenance and operation of the Property and assets of the Corporation. In this regard, the Manager shall deal in the first instance with minor emergencies and infractions and shall forthwith report to the Board of Directors any major emergency or persistent, flagrant or serious violation of the Act, Declaration, the By-laws or the Rules. It is understood and agreed by the parties hereto that the Manager shall, in its discretion, determine whether or not an emergency exists and whether or not such emergency is of a minor or major nature.

(p) Information

To receive in writing (except in ease of emergency) and co-ordinate the disposition of, requests for information and service concerning or related to the duties and obligations of the Manager as provided by this Agreement, in all cases referring to the Board such requests as involve policy decisions or interpretations of the Act, Declaration, by-laws and rules of the Corporation.

(q) Notice of Meetings

At the request of the Board, schedule and arrange the facilities for all annual, general and special meetings of the Owners and deliver to the Owners or such other persons as are entitled to notice pursuant to the Act, Declaration or by-laws, such notices and other information as is required in connection with the holding of

such meetings. At the expense of the Corporation and upon request of the Board, the Manager shall prepare notices of meetings and other information in sufficient quantity for distribution to all persons entitled to receive same. With respect to meetings of the Board, the Corporation shall notify the Manager in writing as to the place, date and time of such meetings and a representative of the Manager shall attend all such meetings unless otherwise directed by the Board provided the representative of the Manager shall not be required to attend more than 6 board meetings per fiscal year.

ARTICLE V MANAGEMENT SERVICES

5.1 The Manager agrees that during the term of this Agreement, it will provide all management services required in connection with the undertaking of the Corporation as maybe necessary in the performance of its duties provided, however, that the Manager shall not be responsible for the duties of the Board or of the officers of the Corporation, except as set out in this Agreement.

5.2 Without limiting the generality of subparagraph 5.1 of this Article V, the Manager shall perform the following duties:

(a) Books and Records of Accounts

To keep the Corporation's books and records of accounts and retain full and proper records regarding all financial transactions involved in the management of the Corporation and to forward to the Corporation on or before the 15th day of each month, a statement of receipts and disbursements summarizing the transactions made during the preceding month and as more particularly described in subparagraph 5.2(c). All books and records of accounts kept in relation to the management of the Corporation shall be the property of the Corporation and upon termination of this Agreement shall be forthwith surrendered to the Corporation or to a representative of the Corporation designated in writing. At any time during the term of this Agreement and any renewal period thereof, the said books and records of accounts shall be accessible to the Board, the Officers or the owners of the Corporation, who shall have free access upon reasonable notice at all reasonable times to inspect and examine same. Until termination of this Agreement, the Corporation's books and records of accounts shall be physically kept in the Manager's business office.

(b) Budget

To prepare and present to the Board at least two (2) months before the commencement of each fiscal year during the terms of this agreement an estimated budget in writing for the following year and for the approval of the Board and to consult with the Board whenever it appears desirable or necessary to revise the Owners' contributions to the common expenses.

(c) Financial Reporting

To provide the Board on or before the 15th day of each month with year-to-date monthly itemized unaudited financial statements showing:

- (i) Corporation income on accrual basis;
- (ii) dollar amount of Common Expenses collected;
- (iii) dollar amount of each disbursement as compared with budget expenses by budget categories;
- (iv) the names of the Owners who are delinquent in payment of their required contribution to Common Expenses and the amount of each delinquency;
- (v) amounts of all other delinquent accounts and names of the persons owing such accounts;

- (vi) particulars of accounts, term deposits, certificates and any other instruments respecting investment income and other assets and liabilities of the Corporation in accordance with good accounting principles as at the date of the financial statement.

All accounting and financial reporting which is required under the terms of this Agreement to be provided by the Manager to the Corporation shall be in accordance with the reasonable requests of the Corporation's auditors as to format and shall be provided within the reasonable time limit prescribed by the Corporation's auditors.

(d) The Records

To maintain the Corporation's records in accordance with the Act and to use its best efforts to keep an up-to-date record of the names and addresses of all owners and tenants of whom it has received notice. If the Corporation receives notices or written communication from registered mortgagees or any other persons claiming an interest in a common interest or from an owner providing information with respect to the leasing of the Owner's common interest, the Corporation shall forthwith communicate that information to the Manager. The Records referred to herein shall be physically kept in the offices of the Corporation or in such other location as the Board may from time to time direct.

(e) Access to Books and Records

To make available upon reasonable notice at reasonable times to the Corporation, its auditors, its owners and designated representatives all books and records pertaining to the operation of the Property and the business of the Corporation whenever requested.

(1) Approval of Invoices

To make all disbursements properly incurred for and on behalf of the Corporation with the approval of the Board; provided, however, that the approval of the Board shall not be required prior to payment by the Manager of any items of expense as to which the Manager has discretionary spending authority pursuant to subparagraph

(g) Status Certificates

To prepare for execution by the Corporation or, where an appropriate resolution of the Board has been made, by the Manager status certificates in the form prescribed by regulation pursuant to the Act and to issue and provide status certificates together with the statements and information required pursuant to the Act to any person or persons who request(s) one and has paid the appropriate fee, within the time permitted for the delivery of such certificates, statements and information prescribed in the Act.

The Manager is responsible for the accuracy and completeness of all information contained in the status certificate, however, the Manager shall not be liable for any information within the knowledge of the Board but not communicated to the Manager and which should be included in the status certificate.

The Manager shall be entitled to the fee prescribed by regulation pursuant to the Act for the preparation and issuance of the status certificate and related documentation, and shall bear the costs/disbursements applicable to the issuance of the status certificate and accompanying documentation.

(ii) Preventive Maintenance Program

Establish and thereafter maintain a preventive maintenance program for all major technical and electrical equipment and plumbing systems in accordance with the recommendations of the manufacturers or suppliers thereof. The Manager shall also maintain log books and identification labels

clearly numbering all mechanical and electrical equipment and plumbing systems and indicating the nature and frequency of maintenance services performed and shall prepare for the Board's approval general maintenance procedures and schedules to be followed by the Manager and any employees of the Corporation. The Corporation shall make available to the Manager all shop drawings, as-built architectural and structural plans, maintenance and operating manuals for mechanical and electrical equipment and plumbing systems and such other documents as the manager reasonably requires to carry out its duties, that are in the Corporation's possession from time to time.

(i) Manager's Report

Present to the Board as may be reasonably required a Manager's report, to serve as a written form of communication from the Manager to the Board. This Manager's Report shall reflect the directives of the Board to the Manager and shall further reflect the actions of the Manager with respect to those directives. Any and all correspondence received by the Manager with respect to the operation of the Corporation shall be available for examination by the Board.

(j) Fidelity Bond

To arrange, obtain and maintain a Fidelity Bond for and in the name of the Corporation in an amount of not less than TWO HUNDRED AND FIFTY THOUSAND (\$250,000.00) DOLLARS per occurrence with loss payable to the Corporation only if required by the Corporation. The Corporation agrees that the Manager shall be named as an insured party along with the Corporation and the Fidelity Bond shall not be terminable by either the insurer or the Corporation unless sufficient prior notice of cancellation has been delivered by registered mail to the auditor of the Corporation, the Manager, and to the Board. The premium for the Fidelity Bond, if required, by the Board, shall be an expense of the Corporation.

ARTICLE VI EMPLOYMENT OF CONTRACTORS

6.1 The Manager may contract on behalf of the Corporation with any person, firm or corporation to perform any work or services for the Corporation within the scope of the Manager's duties under this Agreement subject however to the following provisions:

(a) Written Agreements

Any person, firm or corporation employed to perform work or services shall be contracted pursuant to a written contract setting out the essential terms and conditions of such contract.

(b) Approval of the Board

In addition to the requirements of subparagraph 4.2(1), any contract to perform work or services entered into by the Manager shall be for a reasonable consideration usual in the industry and be budgeted for by the Corporation. In the event that any contract for work or service shall be for a consideration in excess of that usual in the industry or in excess of that budgeted for by the Corporation, then prior to entering into such contract the Manager shall first obtain a resolution of the Board approving such contract.

(c) Spending Restrictions

Where the cost of performing such work or services exceeds the sum of \$1,000.00 the Manager shall submit at least two (2) written tenders for presentation to the Board and prior to entering into such contract the Manager shall first obtain a resolution of the Board approving such contract.

(d) Filing of Return

MANAGEMENT AGREEMENT

In connection with all contracts to perform work or services entered into by the Manager, it shall execute and file necessary documents and do and perform all acts required under the laws of any federal, provincial, municipal or other governmental body or authority.

ARTICLE VII MANAGER'S COMPENSATION

- 7.1 The Manager shall be paid as compensation for its management services rendered under this Agreement the following fees:

Until terminated in accordance with the provisions of this Agreement and/or the Act, a fee of \$350.00 per month during the term of this Agreement payable monthly, in advance. The Manager's fee includes all office expenses directly related to the business office of the Manager with respect to the performance of the duties of the Manager hereunder, but does not include any expenses directly related to the business offices of the Corporation.

ARTICLE VIII PARCELS OF TIED LANDS- REPAIRS

- 8.1 Notwithstanding any other provision of this Agreement the Manager is given no authority or responsibility for maintenance of or repairs to the parcels of tied lands which shall be the sole responsibility of the owners individually.

ARTICLE IX PLANS AND SPECIFICATIONS

- 9.1 If any plans, drawings, specifications and architectural or engineering assistance become necessary or desirable to enable the Manager to discharge its duties pursuant to this Agreement, and if the Board or its designated representative from time to time authorizes the obtaining of the foregoing, before any expense is incurred therefore, then the cost thereof shall be at the expense of the Corporation.

ARTICLE X BOARD CO-OPERATION

- 10.2 The Board agrees to co-operate with the Manager to the extent required to perform expeditiously, efficiently and economically the Manager's services required under this Agreement and to provide such evidence of authority by way of certified resolution or otherwise and such specific directions as the Manager may reasonably require.

ARTICLE XI LIAISON OFFICER

- 11.1 The Board shall advise the Manager in writing from time to time as required of the names of those officers, directors or other representatives not to exceed two individuals who are authorized to act for and on behalf of the Corporation to enable the Manager to consult with the Board or obtain the Board's approval before proceeding with any work, act or actions. The Board may designate from time to time an individual in addition to the President who shall be authorized to deal with the Manager on any matter relating to the management of the Property, and if such designation is made, the Manager is directed not to accept directions or instructions with regard to the management of the Property from anyone else. In the absence of any designation by the Board, or if a designation is revoked then until another designation is made, the President of the Board shall have sole authority.

ARTICLE XII INDEMNIFICATION

- 12.1 The Manager shall, during and after the term of this Agreement, indemnify and save the Corporation completely free and harmless from any and all damages or injuries to persons or property, or claims, actions, obligations, liabilities, costs, expenses and fees, by reason of the negligence or wilful misconduct of the Manager or any of its employees in the carrying out of the provisions of this Agreement.

**ARTICLE XIII
COMPREHENSIVE LIABILITY INSURANCE**

- 13.1 The Corporation agrees to take out or authorize the Manager to arrange for comprehensive liability insurance on the property to a limit of not less than \$1,000,000.00 inclusive and further agrees that the Manager shall be named as an insured party along with the Corporation as their interest may appear in each such policy or policies which shall provide protection against any claims for personal injury, death or property damage or loss for which either the Corporation or the Manager might be held liable as a result of their respective obligations, and the Corporation further agrees, if so requested, to provide the Manager with a Certificate of insurance from its insurers which shall include an undertaking that the insurer will provide the Manager with at least ten (10) days prior written notice of cancellation or any material change in the provisions of any such policy.

**ARTICLE XIV
MISCELLANEOUS**

14.1 Deficit Financing

Unless the Board has specifically authorized such procedure, under no circumstances shall the Manager advance funds to the Corporation on a temporary loan basis, whether interest is charged to the Corporation or not, in the event of a cash deficit occurring in the Corporation's current account. The Manager shall notify the Board of any anticipated cash deficit and the Board shall take immediate steps to obtain the necessary funds to cover any such deficit pursuant to the by-laws of the Corporation by either utilizing the Corporations over draft protection if any, levying of a special assessment, the delivery of a revised budget, or the exercise of its borrowing authority on behalf of the Corporation.

14.2 Collection of Accounts Receivable Including Common Expenses.

The Manager, without limiting its covenants as hereinbefore contained, shall, in addition to its covenant to enforce the by-laws of the Corporation as hereinbefore contained, actively pursue the collection of outstanding common expenses from owners and tenants respectively at all times and with a view to reducing these receivables to the lowest minimum monthly balance and without incurring additional cost save in those instances where legal action including the filing of certificates of lien pursuant to the Act is required, It is understood that the Manager shall advise the Board of delinquent accounts and upon the instructions of the Board, the Manager shall arrange with the Corporations solicitor for the registration of a certificate of lien in the appropriate Land Registry Office and the providing of the appropriate notices within three (3) months of the default first occurring by the owner.

In the event that the Manager, after instruction from. the Board, fails to provide proper information, adequate notice, and instructions to the Corporation's solicitors for the registration of a Certificate of Lien covering the arrears of common expenses, interest charges and legal costs within the time specified under the Act resulting in any loss or any additional cost to the Corporation, the Manager shall be directly liable for same to the Corporation.

14.3 Fiduciary Relationships

The Manager may engage any parent or subsidiary corporation affiliated or otherwise connected with it (hereinafter called the "affiliate") to perform any work or services for the Corporation within the scope of

Manager's duties under the provisions of this Agreement, without being in breach of any fiduciary relationship with the Corporation, provided the Manager discloses to the Corporation that it intends to engage an affiliate corporation and the Manager has obtained at least two additional quotations from other competent suppliers or contractors who are not affiliates of the Manager and the Board has approved the work or service to be performed by the Manager's affiliate.

14.4 Owner Relationship

- (a) The Manager shall promptly deal with all reasonable queries, requests or complaints by the Board or any owner or mortgagee of a common interest relating to the management of the Property or the duties or obligations of the Manager pursuant hereto, and to record in writing any such queries, requests or complaints and the eventual disposition thereof, and report same to the Board.
- (b) The Manager shall maintain businesslike relations with owners whose service requests relating to the common elements shall be received, considered and recorded in systematic fashion in order to show the action taken with respect to each request. Complaints relating to common elements, the maintenance and repair of which are the responsibility of the Corporation, shall be attended to by the Manager in a prompt and diligent manner.

ARTICLE XV TERMINATION

- 15.1 During the term of this Agreement, either party may at its option, without cause, terminate this Agreement upon sixty (60) days written notice to the other and the Corporation shall pay to the Manager any moneys due to it to the date of termination.
- 15.2 The parties agree that the term of this Agreement shall not be allowed to lapse without notice of termination in writing given by either party to the other not less than sixty (60) days prior to the expiration of the term of this Agreement. Should notice of termination not be given sixty (60) days prior to the expiration of the term of this Agreement, as provided herein, the Agreement shall continue on a month to month basis until terminated, as provided herein, and the Manager's fee shall remain the same until renegotiated.
- 15.3 The parties agree that at the expiration of the term of the Agreement resulting in a renewal, the Manager's fee will be renegotiated with the Corporation within sixty (60) days of the expiration of the original term and the revised and agreed upon fee shall be acknowledged in writing by both parties and shall constitute an amendment to this Agreement.
- 15.4 For a period of twelve (12) months after any termination and for the purpose of settling any dispute or defending any claim made against the Manager, the Corporation shall provide access to the Manager at all reasonable times and upon reasonable notice to all relevant contracts, records, files and other documents or information.
- 15.5 In addition to the rights of the parties to terminate upon notice as hereinbefore set out, the Agreement shall terminate upon the happening of any of the following events:
 - (a) the insolvency or bankruptcy of the Manager;
 - (b) the termination of the Corporation;
 - (c) the Manager is insubordinate, reckless or grossly negligent in performing its duties hereunder.
- 15.6 Upon termination of this Agreement:
 - (a) the Manager shall cease to operate the Corporation's bank account and shall execute all necessary

MANAGEMENT AGREEMENT

documents in recognition thereof as may be requested by the Corporation or the said bank, and shall as soon as possible thereafter render the final accounting to the Corporation:

- (b) the Manager shall surrender to the Corporation all contracts, records, files, bank accounts and other documents or information which may be pertinent to the continuing operation of the property both paper and electronic form, where available, and further shall maintain on behalf of the Corporation any records, files or information related to the Corporation and stored in the computer of the Manager for a period of twelve (12) months or until such earlier time as the Corporation advises the Manager in writing of its permission to destroy such records;
- (c) the Manager shall turn over all keys to the property in its possession or in the possession of any of its employees. The Manager shall also turn over possession of any area (such as management offices) located on the Property under its control;
- (d) if it has not already done so, the Corporation shall assume the obligation of any and all contracts which the Manager has properly made for the purpose of arranging the services to be provided pursuant to this Agreement except those related to the employees of the Manager and to accounting services; and
- (e) the obligation upon the Manager to account shall survive the termination of this Agreement.

ARTICLE XVI NOTICE

- 16.1 Any notice required to be given by either party to the other shall be sufficiently given if delivered or mailed by prepaid registered post addressed (or faxed or sent by other electronic means if both parties have agreed in writing) to the Corporation at the residence of its President or Vice-President from time to time holding office and to the Manager at Suite 1, 1 Oak Street, Somewhere, Ontario, Z1Z 1Z1, and any such notice shall be conclusively deemed to have been given and received at the time of its personal delivery by one party to an officer or director of the other, or in the event of service by mail, on the next business day after the day of such mailing, provided that if normal mail service is disrupted by reason of strikes, walkouts, slowdowns or other irregularities, then so long as such disruptions exist, any notice required or permitted to be given hereunder shall be delivered personally or otherwise shall be deemed to be ineffective for all purposes hereof. Either party may by notice in writing to the other designate another address to which notices mailed more than ten (10) days after the giving of such notice of change of address shall be addressed.

ARTICLE XVII PARTIAL INVALIDITY

- 17.1 If any portion of this Agreement shall be for any reason declared invalid or unenforceable, the validity of any of the remaining portions of this Agreement shall not be thereby affected, and such remaining portions shall remain in full force and effect as if this Agreement had been executed with such invalid portion eliminated.

ARTICLE XVIII SUCCESSORS AND ASSIGNS

- 18.1 This Agreement shall enure to the benefit of and be binding upon the respective successors and assigns of the parties hereto provided always that this contract may only be assigned with the express written consent of the Corporation.

For the purposes of this paragraph, a sale or disposition of the shares, business or assets of the Manager to another person or firm resulting in a change of control of the Manager shall be deemed to be an assignment of this Agreement requiring the express written consent of the Corporation.

MANAGEMENT AGREEMENT

IN WITNESS WHEREOF the parties hereto have hereunto affixed their respective corporate seals attested by the hands of their respective officers duly authorized in that behalf, this _____ day of _____, 200 .

SOMEWHERE COMMON ELEMENTS CONDOMINIUM CORPORATION
NO. __

Per: _____

Name:

Title: President

Per: _____

Name:

Title: Secretary

I/We have the authority to bind the Corporation.

SOMEWHERE PROPERTY MANAGEMENT LTD.

Per: _____

Name:

Title: President

I have the authority to bind the Corporation.

G. SIGNIFICANT FEATURES OF CERTAIN AGREEMENTS

1. Management Agreement **Sec. 72(3)(n)**

The manager for the corporation is intended to be Somewhere Property Management Ltd. The management agreement (the 'agreement') will be for a one year term commencing on the date of registration of the declaration. It will be terminable on 60 days notice by either party and may be terminated without notice by the corporation for cause. The manager's fee will be \$350.00 per month and its responsibilities will be to handle revenue and expenses, arrange and pay insurance, make repairs to and maintain the property and assets, hold reserve funds and manage the corporations accounts, enforce the declaration, bylaw and rules short of litigation, advise the board, maintain the records, supervise employees, engage contractors, arrange all meetings, prepare and send notices, and attend up to 6 board meetings per twelve month period. The manager cannot undertake any work which will cost in excess of \$1,000.00 or take longer than one month to complete, or engage any contractor at a cost of in excess of \$1,000.00 without board approval. A fidelity bond must be provided by the manager.

2. Insurance Trust Agreement

The insurance trustee for the corporation is intended to be The Bank of Somewhere. The insurance trust agreement will provide for the trustee's administration of insurance monies in accordance with the Act, the declaration and the by-laws of the corporation. The trustee's initial fee will include \$500.00 to set up the engagement and \$300.00 for the first year's stand-by fee. Subsequent years fees will be \$300.00 each unless otherwise arranged. The trustee will be entitled to a variable fee in the event insurance proceeds are administered. This fee will vary from 1% of the first twenty five thousand dollars in proceeds administered, .5% of the next \$25,000.00, and .1% of any balance. The minimum charge is \$150.00 and additional charges may be made for extraordinary time and effort in special circumstances. The agreement is terminable by either party on 60 days prior notice.

H. AMALGAMATION **Sec. 72(3)(o)**

To the knowledge of the Declarant the corporation does not intend to amalgamate with another corporation and the Declarant does not intend to cause the corporation to amalgamate with another corporation within 60 days of the date of registration of the declaration and description for the corporation;

I. BUDGET STATEMENT **Sec. 72(3)(q)**

The following is a copy of the budget statement of the corporation for the one year period following the registration of the declaration and description as described in subsection 72(6) of Regulation 48/01.

Revenue:			
Common Element Fees			\$19,800.00
Expenses:			
Property Taxes	\$3,000.00		
Grounds and Building Maintenance	\$4,000.00		
Road Maintenance, including snow ploughing	\$1,500.00		
Insurance	\$1,000.00		
Management Fee	\$1,000.00		
Gas, electricity, water, telephone	\$3,500.00		
Legal and Audit	\$2,000.00		
Reserve Fund study	<u>\$2,000.00</u>		
Sub-Total	\$18,000.00	\$18,000.00	
Reserve Fund Provisions		<u>\$1,800.00</u>	
Total Expenses		\$19,800.00	\$19,800.00

Note: The Common Expenses include property taxes as the common elements are a parcel for tax purposes - Section 15(4)

J. Fees or Charges to be paid by the Corporation to the Declarant **Sec. 72(3)(s)**

The corporation is not required to pay the declarant or any other person any fees or charges.

H. COMMON INTEREST AND PARCELS OF TIED LANDS **Sec. 143**

The common interests attach to the respective parcels of tied lands as described in Schedule 'D' to the Declaration. The common interests cannot be severed from the parcels of tied lands upon the sale of the parcel or the enforcement of an encumbrance registered against the parcel.

I. COPY OF SECTIONS 73 AND 74 OF THE ACT **Sec. 17(1)(a)**

Set out below is a reproduction of section 73 and 74 of the Act:

73. (1) *A purchaser who receives a disclosure statement under subsection 72 (1) may, in accordance with this section, rescind the agreement of purchase and sale before accepting a deed to the unit being purchased that is in registerable form. 1998, c. 19, s. 73 (1).*

Notice of rescission

(2) *To rescind an agreement of purchase and sale under this section, a purchaser or the purchaser's solicitor shall give a written notice of rescission to the declarant or to the declarant's solicitor who must receive the notice within 10 days of the later of,*

(a) *the date that the purchaser receives the disclosure statement; and*

(b) *the date that the purchaser receives a copy of the agreement of purchase and sale executed by the declarant and the purchaser. 1998, c. 19, s. 73 (2).*

Refund upon rescission

(3) *If a declarant or the declarant's solicitor receives a notice of rescission from a purchaser under this section, the declarant shall promptly refund, without penalty or charge, to the purchaser, all money received from the purchaser under the agreement and credited towards the purchase price, together with interest on the money calculated at the prescribed rate from the date that the declarant received the money until the date the declarant refunds it. 1998, c. 19, s. 73 (3).*

Material changes in disclosure statement

74. (1) *Whenever there is a material change in the information contained or required to be contained in a disclosure statement delivered to a purchaser under subsection 72 (1) or a revised disclosure statement or a notice delivered to a purchaser under this section, the declarant shall deliver a revised disclosure statement or a notice to the purchaser. 1998, c. 19, s. 74 (1).*

Definition

(2) *In this section,*

"material change" means a change or a series of changes that a reasonable purchaser, on an objective basis, would have regarded collectively as sufficiently important to the decision to purchase a unit or proposed unit in the corporation that it is likely that the purchaser would not have entered into an agreement of purchase and sale for the unit or the proposed unit or would have exercised the right to rescind such an agreement of purchase and sale under section 73, if the disclosure statement had contained the change or series of changes, but does not include,

(a) *a change in the contents of the budget of the corporation for the current fiscal year if more than one year has passed since the registration of the declaration and description for the corporation,*

(b) a substantial addition, alteration or improvement within the meaning of subsection 97 (6) that the corporation makes to the common elements after a turn-over meeting has been held under section 43,

(c) a change in the portion of units or proposed units that the declarant intends to lease,

(d) a change in the schedule of the proposed commencement and completion dates for the amenities of which construction had not been completed as of the date on which the disclosure statement was made, or

(e) a change in the information contained in the statement described in subsection 161 (1) of the services provided by the municipality or the Minister of Municipal Affairs and Housing, as the case may be, as described in that subsection, if the unit or the proposed unit is in a vacant land condominium corporation. 1998, c. 19, s. 74 (2).

Contents of revised statement

(3) The revised disclosure statement or notice required under subsection (1) shall clearly identify all changes that in the reasonable belief of the declarant may be material changes and summarize the particulars of them. 1998, c. 19, s. 74 (3).

Time of delivery

(4) The declarant shall deliver the revised disclosure statement or notice to the purchaser within a reasonable time after the material change mentioned in subsection (1) occurs and, in any event, no later than 10 days before delivering to the purchaser a deed to the unit being purchased that is in registerable form. 1998, c. 19, s. 74 (4).

Purchaser's application to court

(5) Within 10 days after receiving a revised disclosure statement or a notice under subsection (1), a purchaser may make an application to the Superior Court of Justice for a determination whether a change or a series of changes set out in the statement or notice is a material change. 1998, c. 19, s. 74 (5). S.O. 2000, c. 26.

Rescission after material change

(6) If a change or a series of changes set out in a revised disclosure statement or a notice delivered to a purchaser constitutes a material change or if a material change occurs that the declarant does not disclose in a revised disclosure statement or notice as required by subsection (1), the purchaser may, before accepting a deed to the unit being purchased that is in registerable form, rescind the agreement of purchase and sale within 10 days of the latest of,

(a) the date on which the purchaser receives the revised disclosure statement or the notice, if the declarant delivered a revised disclosure statement or notice to the purchaser;

(b) the date on which the purchaser becomes aware of a material change, if the declarant has not delivered a revised disclosure statement or notice to the purchaser as required by subsection (1) with respect to the change; and

(c) the date on which the Superior Court of Justice makes a determination under subsection (5) or

(8) that the change is material, if the purchaser or the declarant, as the case may be, has made an application for the determination. 1998, c. 19, s. 74 (6), S.O. 2000, c. 26.

Notice of rescission

(7) To rescind an agreement of purchase and sale under this section, a purchaser or the purchaser's solicitor shall give a written notice of rescission to the declarant or to the declarant's solicitor. 1998, c. 19, s. 74 (7).

Declarant's application to court

(8) Within 10 days after receiving a notice of rescission, the declarant may make an application to the Superior Court of Justice for a determination whether the change or the series of changes on which the rescission is based constitutes a material change, if the purchaser has not already made an application for the determination under subsection (5). 1998, c. 19, s. 74 (8), S.O. 2000, c. 26.

Refund upon rescission

(9) A declarant who receives a notice of rescission from a purchaser under this section shall refund, without penalty or charge, to the purchaser, all money received from the purchaser under the agreement and credited towards the purchase price, together with interest on the money calculated at the prescribed rate from the date that the declarant received the money until the date the declarant refunds it. 1998, c. 19, s. 74 (9).

Time of refund

(10) The declarant shall make the refund,

- (a) within 10 days after receiving a notice of rescission, if neither the purchaser nor the declarant has made an application for a determination described in subsection (5) or (8) respectively; or
- (b) within 10 days after the court makes a determination that the change is material, if the purchaser has made an application under subsection (5) or the declarant has made an application under subsection (8). 1998, c. 19, s. 74 (10).

J. INTEREST RETENTION

Under subsection 82(8) of the Act, the Declarant is entitled to retain the excess of all interest earned on money held in trust over the interest that it is required to pay the purchaser under section 82 of the Act.

K. VISITORS PARKING

There is no visitor parking provided on the property. Visitors to the property will be guests, invitees, and the like of the Owners and will be required to park on the tied land of the respective owner. For greater certainty but not so as to limit the strictness of the foregoing prohibition, visitors will not be permitted to park at any time on the side of the road or in the parking area associated with the community building.

L. MAJOR ASSETS AND PROPERTY TO BE PROVIDED BY THE DECLARANT

The Declarant has indicated it may provide, even though it is not required to do so, the following major assets and property:

- Refrigerator, stove/oven, dishwasher, microwave oven for the kitchen of the community building;
- Two couches, eight tub chairs, two card tables, three coffee tables, one meeting table with eight chairs, for the community building;
- Poly windscreen netting to cover the tennis fence surrounds;
- Two sets of outdoor patio furniture (table, four chairs, and table umbrella X 2);
- Swimming Pool cover and maintenance tools/appliances.

M. PURCHASES AND SERVICES TO BE ACQUIRED, AGREEMENT ETC. WITH DECLARANT

The corporation is not required to purchase any property, acquire any services, or enter into any agreements or leases with the Declarant or a subsidiary body corporate, holding body corporate or affiliated body corporate of the Declarant.

N. ADJACENT LANDS OF DECLARANT-USE, REPRESENTATIONS, APPLICATIONS

The Declarant directly owns Lots 3 to 12 on Plan M-1234 which are the parcels of tied lands relating to the Property, and Lots 1 and 2 on Plan M-1234 which are located on either side of the Property's access (over Block 2, Plan M-1234) to Oak Street. All of these lands are currently vacant. The Declarant has and continues to represent

that Lots 3 to 12 will be used in the future for the sites of individual single-family homes constructed by the respective owner (whether the Declarant or a successor in title), directly or under contract. The Declarant has and continues to represent that Lots 1 and 2 will be used for commercial purposes in the future. The Declarant submitted an application for plan of subdivision approval with respect to Lots 1 to 12 on Plan M-1234 and an application to vary the zoning by-law respecting Lots 3 to 12 to permit them to be used notwithstanding they do not directly abut a public highway. These applications were approved and have been finalized by the registration of the plan of subdivision and becoming final and binding.

**DATED AT SOMEWHERE, ONTARIO, this 1st day of January, 2003
DECCORP. INC.**

CBR# 134

Hidden Valley Lakeside Condominiums Inc. and Hidden Valley Resort Development Corporation, plaintiffs (defendants to the counterclaim), and Gregory Vercaigne, Craig Ernest Rubie, Valya Kunynetz, Elayne Nora Phillips, Richard Kenneth Hoffman, Mary Elizabeth Hoffman, Gail Sharkey, Lawrence Lavallo, Stuart Boynton, Gwendolyn Mizuguchi, Peter Zalewski, Janice Zalewski, Stephen Paul Montgomery, Kathryn Ann Montgomery and Dr. Bernard Zinman, defendants (plaintiffs by counterclaim)

Court File Nos. 34710/91U and 93-CU-72048

Ontario Court of Justice (General Division) Feldman J. October 7, 1997.

Counsel: Karen K.H. Bell, for the plaintiffs, defendants to the counterclaim. David G. Stinson and Stephanie A. Brown, for all the defendants, plaintiffs by counterclaim except for Sharkey and Vercaigne.

[1] FELDMAN J.:-- In 1989 the plaintiffs were owners and developers of resort condominiums adjacent to the Hidden Valley Resort Hotel in Muskoka which was owned by a related company. The defendants purchased condominium units in 1989 and 1990, interim closed and used the units in 1990 and 1991, before rescinding their agreements in the summer of 1991 prior to the October closings. The plaintiffs eventually resold the units, but because of the onset of the recession of the early 1990's, the bottom had dropped out of the market, the value of the units had declined substantially, and the plaintiffs suffered a large loss.

[2] The plaintiffs brought this action for damages for the losses sustained as a result of the defendants' failure to close. The defendants' rescission was based on the alleged failure of the plaintiffs to provide all the promised amenities to the condominiums. The statutory regime set out in the Condominium Act provides disclosure obligations on the vendor of condominium units for residential purposes and that an agreement of purchase and sale is not binding on a purchaser if the vendor materially fails to comply. The issues in this case are:

- (1) Were the Hidden Valley units "for residential purposes"?
- (2) If so, did the plaintiffs comply with the disclosure obligations of s. 52 of the Act?
- (3) If not, was the non-compliance so material that the agreements of purchase and sale were not binding on the purchasers?
- (4) In the alternative, were the defendants induced to enter the agreements by misrepresentations and if so, were they thereby entitled to rescind?

FACTS

[3] At the opening of trial counsel provided the court with all Agreed Statement of Facts. This was then supplemented by the evidence of Mr. Morrison, president of the plaintiffs' parent company as the only witness for them. As well, the defendants and/or their spouses gave evidence, together with their former solicitor and a real estate agent called as an expert witness. Based on all of this evidence, there were very few factual matters in dispute. The real dispute is as to the legal significance of those facts.

[4] The following are agreed facts:

- 1) The Plaintiff, Hidden Valley Resort Development Corporation, was at all material times, the owner, developer, and declarant of a resort condominium project ("Project").
- 2) The Plaintiff, Hidden Valley Lakeside Condominiums Inc., was, at all material times, the builder, marketer, and named vendor of the individual accommodation units in the Project.
- 3) Hidden Valley Resort Development Corporation and Hidden Valley Lakeside Condominiums Inc. ("Hidden Valley") are and were, at all material times, subsidiaries of Encor Inc.
- 4) The Project is located near Huntsville, Ontario on lands legally described as part of lot 33, concession 2, part of a one foot reserve adjoining Valley Road, Plan M419, Township of Chaffey (now town of Huntsville), in the district municipality of Huntsville (being parts 16, 18, 19, 20, 21, 22, 23. and 24 of Plan 35R-8715).
- 5) The Project is the only one in Ontario that is situated on a lakefront (Peninsula Lake) and adjacent to a ski hill (Hidden Valley Highlands).
- 6) The Project is adjacent to a year-round hotel facility ("Hotel") owned by Encor Inc. The Hotel has facilities that include an indoor and outdoor pool, tennis courts, exercise room, squash courts, sauna, whirlpool changerooms, beach waterfront and dining facilities. The Hotel has a single dock. In addition, the surrounding area offers access to skiing, snowmobiling and golfing.
- 7) Hidden Valley originally contemplated a total of 100 units to be built in two stages, with one group of 64 units constructed in six blocks, and another group of 36 units to be later constructed in one block.
- 8) The 64 unit portion of the Project was built in 1990 and was registered as Muskoka Condominium Corporation # 35 on August 20, 1991.
- 9) The 36 unit portion of the Project has never been built.
- 10) Each of the Purchasers agreed to purchase a unit in the Project front Hidden Valley.
- 11) Each of the Agreements of Purchase and Sale executed by each of the Purchasers was essentially identical in form and included certain schedules, including Schedule A being a set of the General Terms and Conditions; Schedule B being a copy of the Site Plan; schedule C being certain features of the particular unit purchased; Schedule D being the town of Huntsville By-law 82-91, as amended by By-law 84-92P; Schedule E being a Financial Information Form completed by the particular purchaser (with the exception of Purchasers Stuart Boynton ("Boynton") and Elayne Phillips ("Phillips") who cannot now recall whether

they completed a Schedule E); and Schedule F being the proposed Floor Plan of the particular unit purchased. The Agreements of Purchase and Sale, are as set out at Joint Trial Brief, Volumes 1 and 2.

12) Each such Agreement of Purchase and Sale was accepted by Hidden Valley.

13) After purchasing a unit, each of the purchasers Elayne Phillips, Lawrence Lavallo, Richard Hoffman, Gail Sharkey, Peter and Janice Zalewski, Gwendolyn Misuguchi, and Stuart Boynton selected and paid for certain upgrades to be installed. Such upgrades were, in fact, installed as ordered.

14) Each Purchaser received a package of disclosure materials at or about the time of executing an Agreement of Purchase and Sale.

15) Hidden Valley hired Marijka Lazar ("Lazar"), a licensed real estate agent, to act as sales representative on its behalf with respect to the sale of condominium units in the Project.

16) Each of the Purchasers other than Mary Hoffman met with Lazar on one or more occasions prior to executing all Agreement of Purchase and Sale, either at the Hidden Valley site sales office or at the offices of The Rose Corporation (another Encor Inc. subsidiary) in Toronto.

17) During the marketing of the Project to the Purchasers, the Purchasers were permitted to ask any and all questions and review plans and price lists. 18) As part of the marketing efforts, the Purchasers were shown the Site Plan Schedule "B" which depicted a "future outdoor pool" and boat docking facilities. In addition, the Purchasers were provided with various other promotional brochures which referred to the facilities and amenities that would be available to the Purchasers, including the future outdoor pool and boat docking facilities.

19) Hidden Valley has admitted that Lazar represented or may have represented to Purchasers as follows:

(a) Hidden Valley intended to construct the future outdoor Pool and boat docking facilities, more or less as depicted on the model of the Project and on the Site Plan Schedule "B", and in the promotional materials;

(b) Hidden Valley intended that the Hotel would make available to condominium unit owners the tennis courts, squash courts, and other hotel recreational facilities available to guests of the Hotel for a reasonable fee.

(c) Hidden Valley condominium unit owners would have the option of leasing their units out privately or participating in the Leaseback Program. Lazar represented that unit owners could participate in a leaseback program managed by the Hotel with a net rental split 60% in favour of the accommodation unit owner and 40% in favour of the Hotel. The Purchasers may have been told that the Hotel was very busy and that unit owners could expect that their units would be rented out frequently. Lazar represented that Hidden Valley intended to advertise the availability of condominium units in the Project for lease. She may have represented that conventions at the Hotel would assist in the rental of units in the off-season; and

(d) Hidden Valley intended to upgrade the Hotel and the Hotel facilities so as to give it a significant face lift. Hidden Valley intended the Project would be a high calibre four-season resort providing "resort-style living".

20) The Purchasers completed their interim occupancy closings in 1990 and commenced paying occupancy fees on a monthly basis. Those Purchasers who took occupancy in March 1990 were asked to pay only 50% of the monthly fees for March, April, and May, in recognition of the inconvenience of ongoing site construction.

21) The parties dispute whether all Hotel facilities were made available to Purchasers at the time they took interim occupancy. It is agreed, however, that those Hotel facilities that the parties agree were made available to the Purchasers were provided free of charge from the date of interim occupancy through to the time the Purchasers vacated their units in the fall of 1991.

22) The Purchasers Craig Rubie, Valya Kunynetz, Lawrence Lavallo, Stephen Montgomery, and Janice Zalewski each entered Leaseback Agreements with Hidden Valley.

23) Although the Leaseback Agreements provided for a 60/40 split of net revenue, in fact, those Purchasers who participated in the Leaseback Program were credited with 50% of the gross rental income.

[5] What became clear from the evidence was that these condominiums had been conceived and were marketed based on their proximity to a number of recreational facilities including:

(1) the Hidden Valley ski resort;

(2) Peninsula Lake;

(3) golf courses in the area;

(4) the beauty of Muskoka in all four seasons;

(5) the facilities owned by the Hotel including:

(a) an indoor pool and changerooms;

(b) sauna;

(c) squash courts;

(d) tennis courts;

(e) restaurant;

(f) existing outdoor pool;

(g) beach;

(h) future second outdoor pool;

(i) future new boat docks.

[6] What was also clear at trial was that there was no common understanding either by the plaintiffs themselves or by the defendants as to what was promised to the condominium owners as part of their condominium ownership regarding the access and the basis of access to these facilities.

[7] There was no suggestion in the evidence that anyone believed that the developers had control over any of the first four recreational facilities. However, everyone understood that through intercorporate relationships, the plaintiffs did control the Hotel. Furthermore it was clear that the facilities listed under (5) above were all on the Hotel lands and were not to be part of the common elements of the condominium corporation.

[8] Mr. Morrison explained to the court the developer's concept for the project. Mr. Morrison is a lawyer who practised criminal law for a few years before entering the development business. This was not his first project. I found him to be straightforward and sincere.

[9] He said that they (which I understood to mean the plaintiffs and the owner of the Hotel lands) believed that condominium purchasers were very concerned about ongoing maintenance fees, and that they wanted to keep extra, ongoing costs to a minimum and not be saddled with financial obligations for amenities in which they were not interested. Therefore the Hidden Valley concept was to allow maximum flexibility for the purchasers so that they could opt in to paying for whatever amenities they wanted and not for the ones they did not want.

[10] Therefore from Hidden Valley's perspective, the only binding obligation on the condominium owners and the only right of use they were to have was to the existing outdoor pool and to any other outdoor pools that might be built on the Hotel lands, with the cost of operation to be shared on a proportionate basis with the Hotel. All the other facilities of the Hotel could be accessed in the discretion of the Hotel and again for a proportionate cost sharing between the condominium corporation and the Hotel if that was what the corporation voted to do, or by individual health club fee. Access to Hotel facilities would be through a license from the Hotel. Except for the outdoor pool, the idea was to leave everything loose for the benefit of the purchasers.

[11] From the Hotel's point of view, the concept was that the condominium units could enter the leaseback program where they would be part of a pool of units which the Hotel could access for rental to resort guests and to accommodate conventions. Furthermore, to the extent that the condominium units were sharing facilities with the Hotel, they would pay toward the maintenance, upkeep and replacement of such shared facilities, thereby reducing the financial burden on the Hotel for provision of those facilities.

[12] When the plaintiffs bought the Hidden Valley property in 1988, they developed plans for upgrading and expanding the facilities of the hotel. At that point the hotel was "tired" and needed upgrading of the guest rooms and common areas as well as another outdoor pool, tennis courts, expansion of the indoor pool/sauna area, whirlpool, showers, changerooms, childrens' activity room, fitness area, squash courts, exercise room, and increased docking facilities.

[13] When the plaintiffs marketed the condominium units, the written sales brochures, the project model and the site plan all showed a "future pool" as a second outdoor pool and new boat docks. Purchasers were also told about these features and about the proposed upgrading of the Hotel. Some believed they were told by Ms. Lazar that the second pool was to be exclusively for the condominium owners while others understood that it was to be a second pool to be shared with Hotel guests. This apparent misunderstanding was shared by others associated with the plaintiffs. For example, in a letter to one of the defendants who had interim closed in 1990. Mr. David Smith who was the Hotel manager at the time, wrote that "the swimming pool scheduled to be built for use by Condominium Owners" would not be ready that summer and therefore they could use the Hotel pool until "your pool" was ready.

[14] Mr. Morrison told the court that Hidden Valley was "committed" to build the second pool and always intended to build it, although technically it was not obliged to do so. It would decide the timing, based on demand and need. Because of the recession, occupancy of the hotel was down in 1991, and there was already a lot of construction on the site, so by the closing date they had not built the second pool.

[15] With respect to the boat docks, Mr. Morrison said that he considered that they had a similar commitment to build them and they always intended to do so. The existing boat dock facility was not large enough to accommodate residents with boats that needed assigned slip space. However, the anticipated new docks as shown in their various representations were also not intended to be sufficient in number for every condominium owner to have a permanent slip for a boat. Nevertheless, based on their discussions with Ms. Lazar, those purchasers who owned a boat expected to have convenient boat docking facilities and arrangements to accommodate them with the new docks.

[16] The purchasers understood that the second pool and boat docks were to be built. They also were told by Ms. Lazar that they would be able to use the indoor facilities of the hotel. Some believed these were to be provided without charge, while others said they were told that the charge would be very low.

[17] The plaintiffs believed that these units were not "for residential purposes" within the meaning of the Condominium Act because the resort was zoned commercial, so that they did not need to provide the disclosure statement required by s. 52 of the Act. However, based on legal advice as to an abundance of caution, the plaintiffs did provide purchasers with all the documentation required for residential units and in particular the Disclosure Statement required by s. 52 of the Act, together with the budget statement, the declaration, management agreement, insurance agreement, and all proposed by-laws of the corporation including the draft Reciprocal Agreement between the corporation and the Hotel.

RELEVANT PORTIONS OF DOCUMENTS

[18] Portions of these documents must be set out here in detail as they are the written agreement between the parties on the issues in dispute. The following quoted portions are of the documents which were provided to the defendants when they entered into their agreements to purchase in 1989 (exhibit 14).

1. AGREEMENT OF PURCHASE AND SALE

[19]

1(a) The Purchaser hereby offers to purchase:

(i) Accommodation Unit ____, Level ____, (the "Unit"), as shown on Schedule "B" attached hereto, finished in accordance with the specifications and conditions, set out in Schedule "C" attached hereto, together with an undivided interest in the common elements appurtenant to such Accommodation Unit in accordance with a proposed description to be registered as a condominium plan with respect to the Building and the Lands (both as defined in Schedule "A"), at a purchase price of ____ (the "Purchase Price"), as adjusted pursuant to the provisions of this Agreement.

[20] Schedule B is the site plan for the project and was attached to each agreement of purchase and sale and is included as an Appendix to this judgment. It shows the condominium lands with the condominium units as well as the Hotel lands, the Hidden Valley Highlands Ski Area and Peninsula Lake. It also depicts on the Hotel lands, the Hotel, the pool and tennis courts as well as the "future pool" and, in the lake, the "boat docking" which is not similar to the old existing docks.

GENERAL TERMS AND CONDITIONS (SCHEDULE "A")

25. ... It is agreed and understood that there is no representation, warranty, collateral agreement, or condition affecting this Agreement, the Accommodation Unit, the Building or the Lands or supported hereby other than as expressed herein in writing whether contained in any sales marketing brochure alleged to be said or represented by any sales representative or agent, or otherwise.

29. The Purchaser should not [sic(note)] that the relevant by-law of The Corporation of the Town of Huntsville, being By-Law 82-91 as amended by By-Law 84-92P is attached hereto as Schedule "D" in the form approved by the Ontario Municipal Board. The purchaser is advised to seek legal advice as to the effect of this By-Law upon the Purchaser's intended use of the premises.

Purchaser understands and acknowledges that the relevant by-law of the Corporation of the Town of Huntsville provides in part that:

"Character of Uses:

(i) Accommodation Units: commercial character, turnover frequency capability exceeds 12 times per year: ..."

The Purchaser agrees to ensure that he or she complies with all relevant Federal, Provincial and Municipal laws.

30. RECIPROCAL AGREEMENT The Purchaser acknowledges that the Condominium Corporation will be under a duty to enter into an Agreement or Agreements (the "Reciprocal Agreement") with Hidden Valley Resort Hotel limited and Hidden Valley Resort Development Corporation which will govern the rights and liabilities of the Condominium Corporation and Hidden Valley Resort Development Corporation and/or Hidden Valley Resort Hotel Limited, and/or a future condominium corporation on the property adjoining the Lands, and the occupants of Accommodation Units in that condominium corporation with respect to the integrated use, operation, repair, reconstruction (if necessary), and maintenance of certain shared facilities including proposed outdoor swimming pools, driveways, roadways and servicing systems with respect to matters which may include, without limiting the generality of the foregoing, provisions relating to: the payment or allocation of taxes or similar governmental charges, the sharing of costs related to insurance, utilities and costs relating to the operation, maintenance and repair in respect of the shared facilities; reciprocal remedies to meet circumstances of the failure of any party to fulfil any obligations pursuant to the Reciprocal Agreement; obligations for maintenance and repair and provisions for failure to make such maintenance and repair; arrangements with respect to the rebuilding of the shared facilities in case of damage or destruction recognizing the statutory rights of condominium unit owners to elect not to rebuild; provisions setting out the cost sharing and maintenance and repair responsibilities in respect of such shared facilities; the securing by lien of the payments required pursuant to the Reciprocal Agreement; and other matters of mutual concern.

The Purchaser covenants and agrees that he shall consent to, approve of and shall not object to the execution and registration of the Reciprocal Agreement if required by the Vendor. The Purchaser hereby irrevocably nominates, constitutes and appoints the Vendor as his agent and attorney in fact and in law to execute any consents or other documents required by the Vendor to give effect to this paragraph. The Purchaser hereby confirms and agrees that this Power of Attorney may be exercised by the Vendor during any subsequent legal incapacity of the Purchaser. The Purchaser covenants and agrees that he shall execute and deliver to the Vendor on the Occupancy Date, the undertaking, covenant and agreement of the Purchaser to be prepared by the Vendor for the benefit of the Vendor and the owners from time to time of the Hotel Lands, whereby the Purchaser agrees, inter alia, that:

(i) the Purchaser shall exercise his right to vote and shall otherwise cause the condominium corporation and its Board of Directors to comply with and perform all of the Condominium Corporation's obligations and covenants under the Reciprocal Agreement, and pay all amounts required to be paid by the Condominium Corporation under the terms of the Reciprocal Agreement;

(ii) the Purchaser shall obtain and deliver to the Vendor the same undertaking and agreement from any subsequent purchaser of the property; and,

(iii) the Purchaser shall comply with and be bound by the Reciprocal Agreement, the Declaration, the By-laws and the Rules of the Condominium Corporation.

2. THE DECLARATION

[21]

The declarant is Hidden Valley Resort Development Corporation.

Definitions

"Hotel" or the "Hotel Lands" means those lands located on lands adjacent to the land described in Schedule "A" attached hereto and being described as _____.

"Reciprocal Agreement" means a certain Agreement or Agreements to be entered into between the Corporation, the owner of the Hotel lands and the owner of the adjacent 36 Unit Condominium Corporation Lands, which agreement or Agreements shall govern the rights and liabilities of the parties thereto, including but without limiting the generality of the foregoing, terms and provisions relating to the integrated use, operation, maintenance, cost sharing and repair of certain shared services area, facilities and equipment as defined and more particularly set out therein.

3.01 Meaning of Common Expenses

Common expenses means the expenses of the performance of the objects and duties of the Corporation, and without limiting the generality of the foregoing, such other expenses, costs and sums of money designated as common expenses in the act, or in this declaration, and specifically includes those expenses as set forth in Schedule "E" attached hereto. [Schedule "E" (d) provides: The Corporation's proportionate or allocated share of the costs of operating, maintaining, repairing, servicing, replacing and inspecting the Shared Facilities, all as more fully, described and set forth in the reciprocal Agreement unless such allocations or responsibilities are further adjusted, qualified or amended pursuant to any provisions of the reciprocal Agreement in which event the readjustment or qualified or amended adjustments shall prevail.]

[22] Schedule A is the description of the condominium lands "together with the following easements":

(a) Pedestrian ingress and egress for the use and enjoyment of the Outdoor Swimming Pools to be located upon the Hotel Lands.

(c) Easements over the Hotel Lands for installing, repairing, maintaining, inspecting and altering underground hydro wires and cables, storm and sanitary sewer pipes, electrical conduits and cables, television cables, and telephone lines, water and gas lines, and lawn sprinkler equipment.

and "subject to the following easements":

(b) A pedestrian right of way in favour of The 36 Unit Condominium Corporation for access to the Outdoor Swimming Pools which are situate on the Hotel Lands.

(e) An easement in favour of the Hotel Owner and the 36 Unit Condominium Corporation for pedestrian access to and use of a Shared Beach Area located on The 64 Unit Condominium Lands.

[23] Schedule "C" sets out the boundaries of the "accommodation units" but refers to them as "each residential unit". Schedule "F" also refers to exclusive use items for each unit and again refers to them as "each residential unit".

[24] By Law No. 2 of the Condominium Corporation compels the condominium corporation to enter into the Reciprocal Agreement.

3. RECIPROCAL AGREEMENT

[25]

THIS AGREEMENT IS BASED UPON THE FOLLOWING FACTS:

A. The 64 Unit Condominium Corporation is a condominium corporation situated in the Town of Huntsville, in the District Municipality of Muskoka, designated as Parts _____, on Reference Plan. _____ registered in the Land Registry Office of the Land Titles Division of _____ (No. __) as described in Schedule "A" hereto (which lands are hereinafter collectively referred to as the "The 64 Unit Condominium Corporation Lands"):

B. The 64 Unit Condominium Corporation Owners hold legal title to all the units and their appurtenant common interests, as are described in Schedule "A" attached hereto, and are entering into this Agreement to obtain the benefits of and assume certain of the obligations and restrictions contained in this Agreement as set forth herein as appurtenant to all such units and their appurtenant common interests as are described in Schedule "A" attached hereto;

C. The 36 Unit Condominium Corporation Owner owns The 36 Unit Condominium Corporation Lands as described in Schedule "B" attached hereto;

D. Hotel Owner owns the Hotel Lands as described in Schedule "C" attached hereto;

E. The within parties are entering into this Agreement to facilitate and provide for the mutual management and operation of the Shared Facilities which serve The 64 Unit Condominium Corporation Lands, The 36 Unit condominium Corporation Lands and/or the Hotel Lands (as hereinafter defined); to establish a program for the sharing of certain costs of the operation, use, servicing, maintaining, repair and/or replacement of the Shared Facilities, and of certain other mutually shared costs; to define which costs and which responsibilities and obligations for which each of the owners of The 64 Unit Condominium Corporation Lands. The 36 Unit Condominium Corporation Lands and the Hotel will be solely responsible; to confirm certain easements and rights; and for the other related and incidental matters set forth herein.

Definitions:

(f) "Outdoor Swimming Pools" shall mean those lands designated as Parts ___ on Reference Plan No. __ R-___;

(h) "Shared Beach Area" shall mean those parts of Muskoka Condominium Plan No. ___ designated as Parts ___ on Reference Plan No. __ R-___;

(i) "Shared Facilities" means those facilities in respect of which the operation, repair, maintenance, servicing, use and/or replacement, or the cost thereof is shared pursuant to the terms of this Agreement, and includes the Vehicular and Pedestrian Easement areas. The 64 Unit Condominium Corporation Servicing Areas. The 36 Unit Condominium Corporation Servicing Areas, and The Hotel Lands Servicing Areas as defined herein;

(j) The "Shared Facilities Costs" shall mean the costs of the operation, maintenance, servicing, repair, use and/or replacement of the Shared Facilities, the cost of insurance allocated in respect of the Shared Facilities and any other costs or expenses which are allocated to a party to this Agreement pursuant to any provision of this Agreement;

ARTICLE 2.00 VEHICULAR AND PEDESTRIAN EASEMENTS

Easements over the 64 Unit Condominium Corporation

2.02 The 64 Unit Condominium Corporation and The 64 Unit Condominium Corporation Owners hereby acknowledge and confirm the non-exclusive right of way, or right in the nature of an easement to and in favour of the Hotel Owner, and to its successors and assigns, over, along and upon those parts of the common elements of Muskoka Condominium Plan No. ____ designated as Parts _____ on Reference Plan No. ____ R-_____, for the purposes of providing pedestrian access to and egress from, and/or use of, the Shared Beach Area.

2.03 The 64 Unit Condominium Corporation and The 64 Unit Condominium Corporation Owners hereby acknowledge and confirm the non-exclusive right of way, or right in the nature of an easement to and in favour of The 36 Unit Condominium Corporation Owner, their respective tenants, invitees, permitted occupants, successors and assigns, over, along and upon those parts of Muskoka Condominium Plan No. ____ designated as Parts ____ on Reference Plan No. ____ R-____ for the purposes of providing pedestrian ingress and egress to the Shared Beach Area.

Easements over the Hotel Lands

2.04 Hotel Owner hereby grants, convey's and transfers in perpetuity a non-exclusive right of way, or right in the nature of an easement, to and in favour of The 64 Unit Condominium Corporation. The 64 Unit Condominium Corporation Owners, their respective tenants, invitees, permitted occupants, successors and assigns, and The 36 Unit Condominium Corporation Owner, its tenants, invitees, permitted occupants, successors and assigns, over, along and upon those parts of the Hotel Lands designated as Parts ____ on Reference Plan No. ____R-_____, for the purposes of providing pedestrian access to and egress from, and/or use of the Outdoor Swimming Pools.

N.B. There is no Article 2.05 or 2.06, although these are referenced in Article 4.02(ii). **ARTICLE 3.00 - SERVICING EASEMENTS**

Servicing Easements through the 64 Unit Condominium Corporation

3.01 The 64 Unit Condominium Corporation hereby acknowledges and confirms the right of way, or right in the nature of an easement to and in favour of The 36 Unit Condominium Corporation Owner, its tenants, invitees, permitted occupants, successors and assigns, in, over, under and across those parts of the common elements of Muskoka Condominium Plan No. ____ as Parts _____ on Reference Plan R- ____ for the specific purposes of installing, repairing, maintaining, inspecting and altering underground hydro wires and cables, storm and sanitary sewer pipes, electrical conduits and cables, television cables and telephone lines, water and gas lines, lawn sprinkler equipment together with all appurtenances thereto, as may from time to time be necessary or convenient to provide adequate storm and sanitary sewer services, and electrical, telephone, gas, water, lawn sprinkler system and television services to The 36 Unit Condominium Corporation Owner, and benefiting The 36 Unit Condominium Corporation Lands (hereinafter collectively referred to as "The 64 Unit Condominium Corporation Servicing Easement Area").

Servicing Easements through Hotel Lands

3.02 Hotel Owner hereby acknowledges and confirm the right of way, or right in the nature of an easement to and in favour of The 64 Unit Condominium Corporation. The 64 Unit Condominium Owners, their respective tenants, invitees, permitted occupants, successors and assigns, and The 36 Unit Condominium Corporation Owner, its tenants, invitees, permitted occupants, successors and assigns, in, over, under and across those parts of the Hotel Lands designated as Parts _____ on Reference Plan ____R-____ for the specific purposes of installing, repairing, maintaining, inspecting and altering underground hydro wires and cables, storm and sanitary sewer pipes, electrical conduits and cables, television cables and telephone lines, water and gas lines, lawn sprinkler equipment together with all appurtenances thereto, as may from time to time be necessary or convenient to provide adequate storm and sanitary sewer services, and electrical, telephone, gas, water, lawn sprinkler system and television services to The 64 Unit Condominium Corporation and The 36 Unit Condominium Corporation Owner, and benefiting The 64 Unit Condominium Corporation and The 36 Unit Condominium Corporation lands (hereinafter collectively referred to as the "Hotel Lands Servicing Easement Area").

Servicing Easements through the 36 Unit Condominium Corporation

3.03 The 36 Unit Condominium Corporation hereby acknowledges and confirms the right of way, or right in the nature of an easement to and in favour of The 64 Unit Condominium Corporation, and to the 64 Unit condominium Corporation Owners, their respective tenants, invitees, permitted occupants, successors and assigns, in, over, under and across those parts of The 36 Unit condominium Corporation Lands designated as Parts _____ on Reference Plan ____ R-____ for the specific purposes of installing, repairing, maintaining, inspecting and altering underground hydro wires and cables, storm and sanitary sewer pipes, electrical conduits and cables, television cables and telephone lines, water and gas lines, lawn sprinkler equipment, and a water reservoir, together with all appurtenances thereto, as may from time to time be necessary or convenient to provide adequate storm and sanitary sewer services, and electrical, telephone, gas, water, lawn sprinkler system, television services and emergency water storage capabilities for the benefit of The 64 Unit Condominium corporation and The 36 Unit Condominium Corporation Owner (hereinafter collectively referred to as "The 36 Unit Condominium Corporation Servicing Easement Area").

ARTICLE 4.00 - COST SHARING AND RESPONSIBILITIES

4.01 Hotel Owner, The 64 Unit Condominium Corporation and The 36 Unit Condominium Corporation Owner covenant, agree and acknowledge their understanding that, they each shall be responsible to operate, maintain, repair, service, replace and inspect that part of the Shared Facilities which is on, under, over or through and of their respective lands but which serves and benefits in whole or in part the others, to at least the level and of a quality that existed as of the registration of the Declaration of The 64 Unit Condominium Corporation, Schedule "D" hereto sets forth the intentions of the parties with respect to the cost sharing in relation to operation, maintenance, repairing, servicing, replacing and inspecting the Shared Facilities and each party's responsibility to contribute to the Shared Facilities Costs being referred to as the "Proportionate Share".

4.02 More particularly, but without limiting the generality of the foregoing:

(i) The 64 Unit Condominium Corporation covenants and agrees to be primarily responsible for:

(a) maintaining (including but not limited to snow shovelling and removal) and keeping in good repair, Road "A" and The 64 Unit Condominium Corporations common elements, over which either or both of the other parties enjoy a right of way, or right in the nature of an easement (hereinafter collectively referred to as the "Vehicular and Pedestrian Easement Areas"); and

(b) maintaining and keeping in good repair the Site Lighting System,

provided that the cost of maintaining and repairing same shall be shared as set out in Schedule "D", and

(ii) During any period of time that the licences in Articles 2.05 and 2.06 are in existence, Hotel Owner hereby covenants and agrees to be primarily responsible for operating, inspecting, maintaining and keeping in good repair the Outdoor Swimming Pools provided that the cost of maintaining and repairing same shall be shared as set out in Schedule "D".

SCHEDULE "D" COST SHARING RESPONSIBILITIES WITH RESPECT TO THE SHARED FACILITIES

[N.B. No legal descriptions are provided in this document. Where referred to, they are all blank.]

4. DISCLOSURE STATEMENT

[26]

2. GENERAL DESCRIPTION OF THE PROPOSED CONDOMINIUM PROJECT

General Description of the Property and Types and Numbers of Buildings

The six (6) proposed condominium buildings (the "Buildings"), now designated as Blocks B through G, will be located adjacent to the existing Hidden Valley Resort Hotel (the "Hotel") or the "Hotel Lands", in the Town of Huntsville, in the District Municipality of Muskoka and being composed of part of lands described as Part of Lot 33, Concession 2, part of a one foot reserve adjoining Valley Road, Plan M419, Township of Chaffey (now Town of Huntsville in the District Municipality of Huntsville, being part of Parts 16, 17, 18, 19, 20, 21, 22, 23 and 24, Plan 35R-8715. The Buildings will contain sixty-four (64) condominium "Accommodation Units" (as more particularly described and defined in By-Law 82-91, as amended, of the Corporation of the Town of Huntsville), a copy of which is attached hereto as Schedule "B".

NOTE: See attached Map for a visual representation of the location of the property.

The division of the sixty-four (64) Accommodation Units among the Buildings will be as follows: (a) Blocks E, F, and G will contain a total of twenty-four (24) conventional townhouse Accommodation Units (E-8, F-8, G8) with surface parking (one space per Accommodation Unit);

(b) Block C will contain seven (7) one level Accommodation Units directly under seven (7) three storey Accommodation Units in a "stacked townhouse" configuration, with enclosed garage parking (one space per Accommodation Unit) under the stacked Accommodation Units:

(c) Block D will contain eighteen (18) Accommodation Units comprising nine (9) two storey Accommodation Units directly under nine (9) one storey with mezzanine Accommodation Units in a "stacked townhouse" configuration, with enclosed garage parking (one space per Accommodation Unit) under the stacked Accommodation Units; and,

(d) Block B will contain a total of eight (8) Accommodation Units comprising four (4) one storey with lower level walk-out Accommodation Units, two of which are under two (2) two storey Accommodation Units, and the other two of which are under (2) two storey with mezzanine Accommodation Units, in a "stacking townhouse" configuration with surface parking (one space per Accommodation Unit).

The area of the site upon which the Buildings will be located, is approximately 198,000 square feet (approximately 18,400 square metres), with the Buildings occupying part of that area.

The proposed Condominium property will be adjacent to the existing Hidden Valley Resort Hotel.

Each Accommodation Unit will have the exclusive use of:

(i) a parking space:

(ii) a balcony or balconies to which the Accommodation Unit provides direct and sole access; and

(iii) an electrical or mechanical equipment pad.

As well certain Accommodation Units (Accommodation Units 1 - 4 and 21 - 44 on Level 1) will have the exclusive use of a patio.

The owner or owners of the Hotel Lands will have architectural control over the exterior of the Buildings and, will retain architectural control over any modifications to the exterior of the Buildings and upon reconstruction, in the even of destruction of the Buildings.

There will be a total of approximately ninety (90) common element parking spaces. Each of the sixty-four (64) Accommodation Units will have the exclusive use of one (1) of these parking spaces. The remaining twenty-six (26) parking spaces will be designated as visitor parking for use of visitors and guests to the Accommodation Units.

The 36 Unit Condominium and the Possible 100 Unit Condominium It is anticipated that there will be a second condominium corporation (the "36 Unit Condominium") on land adjacent to this land and Unit forming part of the 64 Unit Condominium, which will consist of either:

- (i) one (1) building containing thirty-six (36) two (2) bedroom "walk-up" apartments (also Accommodation Units); or,
- (ii) thirty-six (36) stacked townhouse Accommodation Units.

In either case, there will be at least fifty (50) parking spaces, some of which will be enclosed garage parking spaces and some of which will be surface parking spaces.

The area of the site upon which the building comprising the 36 Unit Condominium will be located, is approximately 49,600 square feet (approximately 4,600 square metres) with the building occupying part of that area.

Therefore, the total area of the site in respect of both condominium corporations is approximately 247,600 square feet (approximately 23,000 square metres).

It is possible that the declarant may decide to combine the 64 Accommodation Units in the 64 Unit Condominium and the 36 Accommodation Units in the 36 Unit Condominium to create one large condominium corporation containing 100 Accommodation Units (referred to herein as the "100 Unit Condominium Corporation").

The main body of this disclosure statement has been prepared on the assumption that there will be two condominium corporations. However, purchasers should refer to Schedule "C" attached hereto which explains many of the material differences in this disclosure statement and the accompanying documents if in fact the declarant proceeds to register the 100 Unit Condominium, instead of registering the 64 Unit Condominium and the 36 Unit Condominium.

Due to the inter-relationship between the Hotel Lands, the 36 Unit Condominium and the 64 Unit Condominium, various easements, licenses and/or rights of way will be required to be granted between the Hotel Lands, the 36 Unit Condominium and/or the 64 Unit Condominium over and in respect of various parts of the site and the adjacent Hotel Lands, as may be necessary and/or desirable

For example, it anticipated that title to the 64 Unit Condominium may be subject to certain easements, including, but not limited to; sanitary sewers and water mains and any shared services generally; easements required for the construction, repair and maintenance or utility lines, cables and conduits for telephone, cable television and transmission lines and ally other similar services; easements for ingress to and egress from the Hotel Lands, the 36 Unit condominium and any shared use areas; casements for the purposes of access.

Furthermore, it is anticipated that the 64 Unit Condominium will enjoy similar casements over the Hotel Lands and/or the 36 Unit Condominium, if and as may be necessary or desirable.

It is also anticipated that there will be easements granted over the 64 Unit Condominium lands for the purposes of the provision of municipal services pursuant to development and/or subdivision agreements entered into between the Declarant and the relevant governmental authorities.

For example, the District of Muskoka will require right of access by registered easement to any utility corridors provided for water and sewer purposes within the proposed Buildings.

Types and Numbers of Accommodation Units

There will be sixty-four (64) condominium Accommodation Units (more particularly described and defined as "Accommodation Units" in By-Law 82-91, as amended, of the Corporation of the Town of Huntsville).

At the present time it is anticipated that there will be approximately seven (7) one bedroom Accommodation Units, nine (9) two bedroom Accommodation Units, forty-four (44) three bedroom Accommodation Units and four (4) four bedroom Accommodation Units. Please note however that Purchasers of the three bedroom Accommodation Units are being offered the option of upgrading their Accommodation Unit by the addition of a fourth bedroom in the loft.

The Declarant reserves the right to decrease the number of Accommodation Units in the 64 Unit Condominium, and/or vary the unit mix and the size of the area within the various Accommodation Units.

Prospective Accommodation Unit purchasers should note that the relevant by-law of The Corporation of the Town of Huntsville, being By-Law 82-91 as amended by By-Law 84-92P is attached hereto as Schedule "B" in the form approved by the Ontario Municipal Board. Purchasers are advised to seek legal advice as to the effect of this By-Law upon that Purchaser's intended use of the premises. Purchasers should note that the said By-Law provides in part as follows:

"Character of Uses: i) Accommodation Units: commercial character, turnover frequency capability exceeds 12 times per year: ..."

Accommodation Unit purchasers should note that in that the definition of Accommodation Unit includes a turnover frequency capability exceeding twelve (12) times per year, the other Accommodation Units will be occupied by non-owners from time to time. Furthermore, it is intended that the declarant or a related corporation or corporations will make available its services as exclusive managing agent for some or all of the Accommodation Unit owners who wish to avail themselves of such services. In

essence, this voluntary arrangement will be for the purposes of making the Accommodation Units available for rental to non-owner guests on a short term basis.

Accommodation Unit purchasers must ensure that they comply with all relevant Federal, Provincial and Municipal laws.

Recreational and Other Amenities

The following Recreational and other amenities will be available to Accommodation Unit owners:

1. It is anticipated that the Accommodation Unit owners of the 64 Unit Condominium Corporation, together with their families and guests, will have the right to use an outdoor swimming pool or pools which use will be shared with the Accommodation Unit owners of the 36 Unit Condominium, together with their families and guests and with the guests of the Hotel. This swimming pool or pools will be located on the Hotel Lands, however the costs of the operation, maintenance and repair of this swimming pool or pools will be shared by the 64 Unit Condominium Corporation, the 36 Unit Condominium and the Hotel and will be dealt with in the Reciprocal Agreement. The use of the swimming pool or pools may be subject to such reasonable rules concerning their use as may be determined by the owner of the Hotel Lands from time to time in its sole discretion. 2. Subject to the discretion of the Hotel Owner from time to time, condominium Accommodation Unit owners, their families and guest may have reasonable right of passage over, but not the recreational or other use of designated beachfront areas which form part of the Hotel Lands, and such right of passage and/or use may be subject to rules and/or user fees imposed by the Hotel Owner from time to time in its sole discretion.

3. The lakefront area adjacent to the 64 Unit Condominium Lands (to the high water mark only) will be part of the common elements of the 64 Unit Condominium, the use of part of which may be shared with the owners of the 36 Unit Condominium, their families and guests and with guests of the Hotel, subject to such reasonable rules as the 64 Unit Condominium Corporation may pass with respect to the use of this area.

4. NOTE: There will be additional recreational facilities and equipment on the Hotel Lands which will be for the use of Hotel guests and which may be available for the use of Accommodation Unit owners. It should be noted however that the final determination of the use that Condominium Accommodation Unit owners, their families and guests will have of these facilities, and/or any fees for the use thereof, will be in the sole discretion of the owner of the Hotel Lands (from time to time) and that such use may not be available from time to time or at all. For example, at the present time, it is anticipated that Accommodation Unit owners, their families and guests, will have access to and the use of tennis courts and a boat docking area located on the Hotel Lands, subject to such rules regarding the access to and the use thereof, and such fees for the access to and the use thereof as the Hotel Owner may determine from time to time in its sole discretion, however this is subject to change in the sole discretion of the Hotel Owner.

Conditions that Apply to the Provision of Amenities

Other than as may be set out in this disclosure statement, at the present time, the only conditions that apply to the provision of amenities are the compliance with the Condominium Act, the Declaration, By-Laws and Rules of the 64 Unit Condominium and the Reciprocal Agreement, however the Declarant reserves the right to set further conditions for the provision of amenities.

4. SCHEDULE OF PROPOSED COMMENCEMENT AND COMPLETION DATE OF AMENITIES

It is anticipated that the commencement date of the construction of amenities will be on or before August 1, 1989, and the completion date for the construction of amenities will be on or before December 31, 1990.

5. BRIEF NARRATIVE DESCRIPTION OF THE SIGNIFICANT FEATURES OF THE PROPOSED DECLARATION, BY-LAWS AND RULES AND ACCOMMODATION UNITS, AND OF ANY TO TERMINATION OR EXPIRATION UNDER SECTION 39 OF THE CONDOMINIUM ACT

Proposed By-Law No. 2 Proposed By-Law No. 2 authorizes, ratifies, sanctions and confirms the terms and conditions of the Reciprocal Agreement and authorizes its execution by the appropriate corporate officer.

The Condominium Corporation will be under a duty to enter into an Agreement or Agreements (the "Reciprocal Agreement") with Hidden Valley Resort Hotel Limited, the owner of the Hotel Lands and of the land upon which the 36 Unit Condominium will be built, which will govern the rights and liabilities of the Condominium Corporation, the owner of the 36 Unit Condominium Lands (and the 36 Unit Condominium when it comes into existence) and the owner of the Hotel Lands with respect to the integrated use, operation, repair, servicing and maintenance of certain shared areas, facilities, services and/or equipment (referred to therein as the "Shared Facilities"), with respect to matters which may include, without limiting the generality of the foregoing, provisions relating to: the equitable sharing of costs relating to the operation, maintenance use, servicing, replacement, repair and insuring the Shared Facilities; the confirming and/or granting of easements and/or rights-of-way for such matters as the provision of services, repair and maintenance of services and of the property and/or access; architectural control by the Hotel Owner over the exterior of the Buildings; reciprocal remedies to meet circumstances of the failure of any party to fulfil any obligations pursuant to the Reciprocal Agreement; obligations for maintenance and repair in respect of the Shared Facilities and provisions for failure to make such maintenance and repair; the securing by lien of the payments required pursuant to the Reciprocal Agreement; conditions as to the use of the Shared Facilities; and other matters of mutual concern.

FACTS AFTER THE AGREEMENTS OF PURCHASE AND SALE

[27] After the units were constructed during 1990, the purchasers completed their interim occupancy closings, began paying monthly occupancy fees, and were granted access to all existing and operating hotel recreational facilities at no charge. The new pool and docks were not constructed but the developer still intended to do so. A small and very informal steering committee of purchasers was formed to meet with the representative of the developer. Brian Hoyes, to address various matters relating to the development.

[28] In 1991 Mr. Hoyes convened a series of meetings with the purchasers and with the steering committee to provide status information with respect to the project and to discuss certain changes to it. At the first meeting on February 27, 1991 Mr. Hoyes advised purchasers that construction of an additional outdoor pool on Hotel lands was still contemplated, but its location and

construction date were not fixed. He also told them that the Ministry of Natural Resources had refused a permit for construction of the new boat docks so that the developer would not be proceeding with those.

[29] In April 1991 Anne Kavander, the onsite representative of the developer to deal with day to day matters with condominium purchasers wrote to the purchasers with respect to the second pool that "some owners have expressed the view that something else of equivalent value would add more value to the property", and suggested a three- part plan for consideration which included enlarging and refurbishing the change rooms in the Hotel, improving the landscaping including a barbecue pit, and returning some money to existing purchasers on closing.

[30] At the next meeting of purchasers on May 28, 1991 Mr. Hoyes confirmed that there would be no new boat docking facilities and discussed the three part plan to replace the second outdoor pool. He also told the purchasers that the agreement documents did not oblige the developer to build the second pool or docks. He also discussed the proposed cost for purchasers to access the Hotel recreational facilities after closing on a cost sharing basis. Mr. Hoyes suggested that the condominium owners would pay 40% of the costs of maintenance and upkeep of the recreational facilities including the pools, sauna, squash courts etc., which worked out to approximately \$40,000 for the condominium corporation or \$ 1,000 per unit, and that there would be a clause to ensure continued access to the facilities if the hotel were to be sold. In lieu of the second outdoor pool, Mr. Hoyes suggested that there be more landscaping and a payment by the developer of \$20,000 to be divided among the owners.

[31] In other words, at the same time the developer's representative was telling the purchasers that Hidden Valley had no legal, contractual obligation to construct a second pool or additional boat docks, in lieu of constructing that pool the developer was offering compensation to the condominium owners in the form of extra amenities and cash. It is unclear why the developer got so deeply involved in proposals to replace the second pool rather than just building it, except that unit sales had come to a standstill and the recession was setting in. After this meeting, the promotional material for the unsold units no longer referred to a future pool or new docks.

[32] At the same meeting, another representative of Hidden Valley. Mr. Whittaker, advised the purchasers that because the market had dropped, the developers unsold units would be offered for sale at a price reduction of 30% to 40%.

[33] Many of the purchaser/defendants testified that when they entered into their agreements they understood that Hidden Valley was obliged to build the second outdoor pool and the additional boat dock's, so that the information at this meeting was contrary to their understanding. Furthermore they were now uncertain as to their rights of access to Hotel facilities and the cost to them of such access. As a result of this meeting an owners' committee was formed to meet with Mr. Hoyes and discuss options with respect to access to facilities and with respect to the pool. In the meantime some purchasers were organizing on their own to consider their options in light of the situation. It was clear on the evidence that the decline in the market value of the condominiums was one major catalyst for this movement together with the new position being taken by the developer with respect to amenities.

[34] The owners' committee held three meetings with Mr. Hoyes in June 1991, the third on June 18. At one of then, Mr. Hoyes provided a new draft Reciprocal Agreement to the committee members which refers to only one outdoor pool and clearly sets out the rights of access of the condominium owners to that pool and to other Hotel facilities and the cost sharing arrangements therefor. It is a substantially different document in that regard from the form of Reciprocal Agreement provided to the purchasers as part of the disclosure documents.

[35] Mr. Hoyes prepared and distributed a memorandum of June 19, which purports to summarize the proposal put forward by the majority of the committee and its recommendation to all purchasers, although in their testimony, some of the committee members denied that they were truly agreeable to the proposal. The memorandum goes on to say that if the summary is correct then Mr. Hoyes would obtain the developer's official response, then hold a meeting to have all owners confirm the proposal. This proposal refers to a new Reciprocal Agreement providing access to certain Hotel facilities but not others, for \$34,000. per year (down from \$40,000. at the May 28 meeting), but with no responsibility on the owners for repairs or replacement of those facilities: the Reciprocal Agreement would be registered on the title to the Hotel and the condominium: the developer would refurbish the change rooms to the sauna and whirlpool as part of the shared facilities: the developer would contribute \$20,000 to the condominium corporation plus pay the first year amenities fee, although the committee wanted a \$24,000 contribution: the committee wanted the developer to expand the deck around the outdoor pool; the committee wanted the developer to seek permission for two floating long narrow docks (these are lesser docks than the ones contemplated when the agreements were entered into) and to supply them. The last point in the memo provides:

All of the foregoing will be implemented without the addition of a future pool for the exclusive use of condominium owners. Although the developer did not intend to oblige itself to provide any additional outdoor pool, it would agree to provide the additional items requested above at its expense as a goodwill gesture in recognition that many owners believed another pool would be constructed. Owners will acknowledge that this arrangement represents a compromise to settle the additional pool issue.

[36] By mistake Mr. Hoyes sent the memorandum to the Zalewski's who were not members of the committee. Mr. Zalewski faxed a concerned response to Anne Kavander as requested in the memo and in response, Mr. Hoyes sent a further letter to them on June 24. In that letter Mr. Hoyes includes the following:

It is clear from the disclosure statement that owners are obliged to share costs for the outdoor pool and the waterfront as well as maintaining certain easements over Hotel lands. Currently condominium owners have no right to use the indoor pool, tennis courts and other hotel amenities. In 1991, the estimated share of those costs that the condominium corporation would pay would run around \$23,500.00. The condominium would be obliged to pay its share of repair and replacement costs as well.

An additional future outdoor pool used solely by the condominium would cost approximately \$ 19,000 per year to maintain and operate, all of which would fall on the condominium corporation. Total annual costs in 1991 terms would thus run around \$42,000.

The reference to no rights to use the other amenities must be meant to refer to after closing because for the interim occupancy period, the condominium purchasers were allowed to use all the Hotel facilities at no charge.

[37] On July 5 Mr. Hoyes sent a letter to all the purchasers enclosing a document entitled "Summary" containing a more detailed explanation of the June 19 memorandum and inviting them to a meeting on July 11 to discuss it. The Summary referred to a Disclosure Statement of May 28, 1991 delivered to all owners, however there was no such document delivered. The plaintiffs had

an Addendum to Disclosure Statement dated May 31, 1991, which reflected the Hoyes' meetings to date, but it had not been distributed. The Summary was subsequently amended to refer to the original Disclosure Statement of 1989, and redistributed.

[38] The Summary offers to purchasers the full package of everything the committee was shown as wanting in the June 19 memorandum. A rationale for this proposal is set out as well. It points out that at the last owners' meeting (May 28) the developer had proposed a sharing of all amenities including the costs of repair and replacement on a 60/40 split with the hotel paying 60%, and that "an average outdoor pool for use by the condominium would cost approximately \$ 19,000 to operate in 1991 ... All of the operating cost would fall on the condominium if a pool were built." I note that although Mr. Morrison was very clear in his testimony that the future additional outdoor pool which Hidden Valley always intended to construct on the Hotel lands was for the use of both the hotel guests and the condominium owners, by this time at least Mr. Hoyes was discussing the future pool as a pool only for the condominium owners.

[39] The final part of the Summary lists the benefits of this new proposal: no liability on the condominium owners for repair and maintenance costs (earlier in the Summary the reference was to "repair and replacement costs"), a fixed fee, deeded access to amenities, enhancements to the facilities by the developer, covers the bulk of Hotel facilities, access to the indoor pool, but any future pool to be at the developer's discretion.

[40] In the meantime, in late June one of the purchasers. Mr. Boynton, had written to the others expressing his concern that the developer had greatly reduced the price of the remaining unsold units and suggesting that they all form an alliance. In response to both that suggestion and the correspondence from the developer through Mr. Hoyes, the purchasers had arranged their own meeting for the same night. July 11. Very few purchasers showed up at Mr. Hoyes' meeting. At their own meeting they decided to retain a lawyer to help them, address their concerns including the pool, the boat docks, access to hotel amenities, and the reduced value of the property plus others.

[41] Upon receipt of the Summary, one of the purchasers, Mr. Zinman, consulted a lawyer who wrote to the developer rescinding his agreement on the basis that the Summary constituted a material amendment to the Disclosure Statement. As a result, Hidden Valley became very concerned and in particular. Mr. Morrison began to take a hands-on involvement in the issues surrounding the negotiations with purchasers. A letter was written from Mr. Hoyes to all purchasers withdrawing the Summary and advising that Hidden Valley would now "proceed literally in accordance with the disclosure statement distributed to each of you at the time you agreed to purchase your unit."

[42] By letter dated August 22, 1991 to Cassels Brock, solicitors for Hidden Valley, Mr. Michael Spears, a lawyer retained by several purchasers including all of the defendants except Mrs. Phillips at that time, advised Hidden Valley that the disclosure statement provided to the purchasers violates s. 52 of the Condominium Act, and therefore the agreements of purchase and sale were not binding. Consequently he demanded return of their deposits with interest and suggested they agree on a date for vacant possession.

[43] Hidden Valley responded in a letter of August 27 requesting particulars of the problems with the disclosure, statement, expressing surprise at the tone of the letter when Hidden Valley had been negotiating with the purchasers to try to reach an acceptable arrangement with them over amenities, and advising that Hidden Valley expected the purchasers to live up to their agreements.

[44] Mr. Spears sent a detailed letter in response the next day setting out three areas of deficiency in the disclosure material: (1) no full and accurate disclosure of amenities in the disclosure statement and reciprocal agreement because the pools and docks promised in pre-purchase literature and in the site plan had not materialized, and the references to amenities in the disclosure documentation were contradictory and confusing and did not make the same promises as the literature: (2) the budget statement required by s. 52(7) of the Act does not include the cost of amenities: (3) the reciprocal agreement is not summarized in the disclosure statement but merely attached to it, with schedule "D" too incomplete to be meaningful. Furthermore, the May, 1991 revised draft reciprocal agreement make changes, but then in Mr. Hoyes last letter, the developer said that it would now proceed in accordance with the original disclosure statement.

[45] Because of this mass rescission by purchasers, Hidden Valley was now very concerned about its closings, and on September 4, Mr. Morrison called Mr. Spears to try to determine the real substance of the complaints of the purchasers. Mr. Spears indicated that there were only three issues of importance to his clients: (1) the second pool: (2) the boat docking: and (3) access to hotel facilities with clarity about the fees and the time period for access. As a result of this initial discussion they agreed to meet to attempt to work out the terms of a settlement, and did meet on September 6.

[46] At this point in the trial, counsel for the defendants took the position that all discussions, meetings and letters where Mr. Morrison and Mr. Spears discussed settlement were without prejudice and therefore could not be revealed in court. Counsel for the plaintiff submitted that although the negotiations were initially without prejudice, they became with prejudice when Mr. Morrison put his offer on the record open for acceptance by any purchaser and when Mr. Spears relied on that offer to assert a new right to rescind. As a result of these positions the evidence of the negotiations and what followed between Mr. Spears and Mr. Morrison was heard as a *voir dire* with the court reserving its ruling. Having heard all of the evidence. I agree with the position taken by counsel for the plaintiff and hold that the evidence of what transpired between Mr. Spears and Mr. Morrison is admissible for two reasons: (1) Ultimately Mr. Morrison put his offer to the purchasers in writing and "with prejudice" because he felt that having made the offer publicly, it was open for acceptance by anyone who wanted to accept it and to close on that basis. In cross-examination, Mr. Spears acknowledged that he also believed that Mr. Morrison's offer was open for acceptance by any individual purchaser, and this was clearly contemplated in his September 10 letter which refers to what would happen if 80% of his clients accepted the proposal: (2) Once the offer was made formally by Mr. Morrison. Mr. Spears took instructions from those of his clients who did not wish to accept it and close their transactions, and took the position that the offer constituted a material change which gave a new right of rescission for 10 day's and upon which his clients relied. In other words, the negotiations having been acted on by acceptance by some purchasers and legal reliance by others, the original without prejudice nature of the negotiations as discussions upon which each side would consider compromise is subsumed in the outcome and no longer need be shielded from revelation to the court. In any event they are admissible as part of the narrative to explain the events which followed.

[47] Following a lengthy meeting on September 6. Mr. Morrison and Mr. Spears reached all agreement for a proposal from the developer that Mr. Spears felt would meet the concerns of his clients and which he was therefore prepared to recommend to them. Mr. Morrison testified that at that point he was prepared to build the second pool for the following summer. Furthermore Hidden Valley had persisted with its application to the government authorities for permission to build the docks and now had all

approvals except from the Coast Guard and was prepared to build new docks as soon as that approval came through. Hidden Valley was also prepared to allow condominium owners to use the maximum Hotel facilities for the longest period of time with the appropriate cost sharing arrangement. Mr. Morrison also wanted to retain his original concept of building in the maximum flexibility for the condominium owners so that they would have the choice whether to opt in to various amenities or opt out and save the financial obligation. Mr. Spears also liked the concept of allowing flexibility. Therefore the plan or proposal which they agreed to put to the purchasers included this flexibility rather than a straight commitment by Hidden Valley to build the pool and docks essentially as contemplated in the site plan.

[48] The proposal as formulated was set out in a "without prejudice" letter from Mr. Spears to Mr. Morrison and contained four components:

(1) The Docks

[49] Because the developer had by this time obtained all approvals for docks except from the Coast Guard. Which approval seemed fairly certain, it was prepared to erect floating docks to accommodate all additional 20 boats at a cost of \$25,000 to \$30,000 by the 1992 boating season. (My understanding was that these were not the type of docks shown in the site plan). However, the alternative was offered of a cash payment in the same amount by the developer to the Condominium Corporation, which could choose to use the money for any purpose including asking the developer to build some boat slips as needed, thereby saving the balance of the money for other purposes such as its Reserve Fund. (2) Pool on Hotel Lands

[50] The developer said it would build the pool if that was the decision of the Condominium Corporation. The cost was estimated at \$50,000 or more subject to sitting. The Condominium Corporation could take a cash payment of \$50,000. which would be made immediately after the Condominium Corporation was formally organized with the first election of a Board of Directors and a bank account, and elect to return that money to the developer to build the pool. Or it could negotiate with the developer for an increased payment, then use the increase for the Reserve Fund or use it to build a pool on the common elements of the condominium corporation.

(3) Hotel Recreational Facilities

[51] The cost of operating all of these facilities in 1990 was \$110,000. The split for shared costs would be 40% for the condominium corporation and 60% for the Hotel, amounting to \$44,000 for the condominium corporation or \$750 per unit, subject to inflation and to an extra shared cost for repairs and replacement. The Condominium Corporation could decide which of the facilities it wished to opt into and pay the appropriate 40% cost sharing for those. The matter would be covered in the Reciprocal Agreement.

(4) Reciprocal Agreement

[52] Once the new Board was in place and had decided on an amenities package, a new Reciprocal Agreement would be registered on title to the condominium and the Hotel lands. However, the use of the shared facilities would still be subject to the discretion of the Hotel owner. Therefore for security of tenure of the condominium owners, there would be a ten-year term for use of the facilities with a right of first refusal in the event of the sale of the Hotel. There would also be an option for the developer to buy out the remainder of the term on reasonable notice for a price tied, to the amount of time remaining in the ten-year term, with the initial price being \$250,000 and declining by \$25,000 per year.

[53] The Board of Directors would have until the earlier of six months after the turnover of the corporation to the Board or July 31, 1992 to make its decisions regarding use of the funds and the amenities. During that period all amenities would be available to the condominium owners at no charge.

[54] The developer would also pay \$12,000, to reimburse the purchasers for legal costs to date.

[55] The proposal also contained an agreement that Mr. Morrison would attend a purchasers' meeting on September 11 at Sunnyview School to present the proposal and answer questions, and that Mr. Spears would recommend the proposal to his clients and would not continue to act if 80% of them accepted.

[56] Mr. Morrison did attend the meeting and presented the proposal to the purchasers. His impression was that it was not well received and that most of the questions which followed were not about the amenities but consisted of angry comments and questions about the price reduction on the units, the condition of the Hotel and the fact that it needed refurbishing, and the anticipated difficulty with arranging mortgage financing because of the reduced value of the units. There was also a dispute on the evidence between Mr. Morrison and Mr. Spears as to whether Mr. Spears did in fact recommend the proposal to his clients as he had undertaken to do.

[57] Following the meeting Mr. Morrison did not hear right away from Mr. Spears about his clients' instructions, but Hidden Valley received some calls from purchasers indicating that based on the proposal they were prepared to close. When they did speak. Mr. Spears ultimately advised Mr. Morrison that very few of his clients wished to put their agreements into good standing. In the meantime, Mr. Morrison decided that as he had made the proposal to the purchasers in an open meeting, some purchasers were prepared to accept it and on that basis close their transactions, and since Hidden Valley was prepared to abide by it, he would formalize the proposal in a "with prejudice" letter of September 13, 1991.

[58] Mr. Spears testified how surprised he was to receive this letter because he believed the entire exercise had been without prejudice. However, once he did receive it, he had to act in the best interests of his clients. In his letter of September 18 on behalf of an amended group of purchasers which now included the Phillips', Mr. Spears took the position that the proposal in the Hidden Valley letter of September 13 including "significant additions to the Corporation's assets" and the new Reciprocal Agreement could constitute material amendments to the original disclosure statement and therefore that his clients were exercising their ten day right of rescission. There was evidence from the several of the purchasers that at this point they no longer trusted Hidden Valley and some were unhappy that the pool and docks were not going to be built as committed, but only if the Condominium owners decided to do so. Upon receipt of this correspondence Mr. Morrison felt outrage and betrayal and commenced action against Mr. Spears which was resolved before this action came to trial and therefore is not a subject for the comment of this court.

[59] In the face of the defections by some purchasers, and as a thank-you and incentive to those who were going to close. Hidden Valley sent out a letter which offered price reductions to those purchasers who went ahead with their closings and in the same

letter explained that the ongoing problem with the provision of amenities was determining what amenities the majority wanted and were prepared to pay for. In the result, Hidden Valley advised that it was proceeding to provide \$75,000 to the Condominium Corporation which could later decide whether to ask the developer to build the pool and docks with that money or to do whatever it decided with the money including distribute it to the owners. The letter also set out the terms for access to the Hotel amenities based on 4000 of the actual operating costs of whatever facilities the corporation sought to access for 10 years including a buy-out option for the developer, and free use of the Hotel facilities during the interim period until the decision was made. These new arrangements were ultimately carried out by the plaintiffs for the purchasers who did close. As well the plaintiffs eventually completed the refurbishing of the hotel.

[60] The defendants failed to close their units and the plaintiffs moved to mitigate the damages by undertaking new programs to attempt to market the units. Unfortunately because of the recession, for a time there was virtually no market for them. Eventually they sold at a considerable loss to the plaintiffs. I find that the plaintiffs properly mitigated their damages. In the case of Mr. Boynton's unit, Hidden Valley elected to allow another purchaser to swap his unit for the Boynton unit, then resold the other unit and claimed the loss on it against Mr. Boynton. In light of my disposition of this action, there is no need to rule on the legal consequences of this position. ISSUES

[61]

(1) Section 52 of the Condominium Act requires certain disclosure material when the condominium units sold are "for residential purposes." The plaintiff takes the position that the Hidden Valley units were not "for residential purposes".

(2) If s. 52 applies, did the plaintiffs comply with the disclosure requirements of that section?

(3) If not, was the non-compliance so material that the agreements of purchase and sale were not binding on the purchasers?

(4) In the alternative, were the purchasers induced to enter into their agreements by misrepresentations which allowed them to rescind?

(1) Were the units "for residential purposes"?

Section 52(1) provides:

An agreement of purchase and sale entered into after the 1st day of June, 1979 by a declarant or proposed declarant of a unit or proposed unit for residential purposes is not binding on the purchaser until the declarant has delivered, to the purchaser a copy of the current disclosure statement and all material amendments thereto.

There is no definition in the Act of the term "residential" or the phrase "for residential purposes".

[62] The plaintiff's position is that the Huntsville by-law which governs the Hidden Valley lands provides that the permitted uses were "commercial accommodation units with normal rental character of interval ownership type character", and that the character of use was "a commercial character, with turnover frequency capability exceeding twelve times per year." No expert evidence nor Town of Huntsville witness was called to explain the meaning or intent of this by-law. However, Mr. Morrison understood that the purpose of this type of by-law in a resort area was so that the municipality would not need to provide the full level of service to the development as it would for permanent homes.

[63] Because the development is considered commercial from a zoning point of view and because the units were not to be inhabited full-time but only on vacation visits, the plaintiffs assert that they do not qualify as units "for residential purposes" and subject to s. 52. The plaintiffs say they received legal advice to fully comply with the disclosure requirements of s. 52 voluntarily out of an abundance of caution. What the plaintiffs did not do was advise any prospective purchasers directly that the development was not "for residential purposes" and therefore that the rescission rights in s. 52 did not apply. Nor did they ever take that position in any of the dealings with the purchasers or with their lawyer until this action.

[64] In my view the plaintiffs' argument cannot succeed. the Condominium Act is consumer protection legislation and must be interpreted in order to give effect to that purpose, while striking a fair balance between the rights and obligations of developers and purchasers: *Abdool v. Somerset Place Developments of Georgetown Ltd.* (1992), 10 O.R. (3d) 120 at 137 and 145; *Windisman v. Toronto College Park Ltd.*, [1996]. The character of the units is to be determined from examining all of the circumstances including the intention and understanding of the parties.

[65] Clearly the units themselves are full, self-contained "homes" where the owners could live independently if they so chose. Although the development was as a four season resort, there is nothing in any of the documents which expressly prohibits an owner from using the unit 365 days per year. Nor is an owner required to lease out the unit. Owners had the option to join the hotel lease-back program, to rent the units out independently, or not to rent them out at all. Therefore although the development is zoned commercial, any commercial element is not mandatory, nor is owners' use restricted.

[66] The plaintiffs also rely on the endorsement of the Court of Appeal in *Re Brunott v. Coolmur Limited* (1983), 22 A.C.W.S. (2d) 509 (C.A.) where the court held that a particular purchaser's intended use of the unit is irrelevant and that the court must see how the unit is described in the documents. In this case, the plaintiff attempted to amend all its documents to refer to the units as "accommodation units" and not "residential units". However, by oversight or otherwise numerous references to "residential" remain in the documents. For example Budget Note 2, to the Budget Statement states: "The water expense includes water consumed in the residential units ..."; and in Schedule "C" to the Declaration which is a description of the boundaries of the unit, the units are described as "residential unit" throughout the Schedule. Regardless of the success or lack thereof of these amendments, the court must still determine the true character of the units based on all the circumstances: *Re Ramsay and Heselman* (1983), 42 O.R. (2d) 255 at 257 (Ont. Div. Ct.)

[67] In its documents Hidden Valley refers to other sections of the Condominium Act which are applicable only to proposed units for residential purposes. For example, paragraph 3 of the Agreement of Purchase and Sale: "Interest on Purchaser's Deposit" provides:

The Vendor agrees that the Purchaser shall be credited, on the final statement of adjustments as at the Unit Transfer Date, with such interest as the Purchaser is entitled to pursuant to the provisions of s. 53(3) of the Condominium Act R.S.O. 1980 ch. 84, as amended.

That section deals with interest on deposits during interim occupancy and pending closing on residential units. It would be extremely misleading to purchasers to include such a provision, then take the position later that no amount was owing because s. 53(3) does not apply because the units are commercial. There was no evidence to suggest that the plaintiffs had any intention of taking such a position at any time. This reinforces one of the relevant circumstances that the vendor in fact treated the units as residential and subject to the sections of the Act which apply to residential units.

[68] The plaintiffs also rely on the definition of "residential premises" in s. 1 of the Landlord and Tenant Act, R.S.O. 1990 c. L.7., which excludes "accommodation provided to the travelling and vacationing public in a ... resort ... cottage or cabin establishment ...", as providing guidance as to what is not considered to be residential. In this case however, the accommodation was not intended necessarily for the travelling public but for the condominium owner to use or rent out. When an individual owns a cottage and decides to rent it out for part of a season. Part IV of the Landlord and Tenant Act may not apply, but the residential character of the cottage for the owner does not change. In that case the Legislature has determined that it is not appropriate for Part IV of the Landlord and Tenant Act to apply. However, the court must assess the intention of the Legislature in respect of the application of the particular piece of legislation before it which may be different from another Act. In this case it is the Condominium Act, and in particular the application of the consumer protection disclosure requirements of s. 52.

[69] The plaintiffs also point for guidance to the Ontario New Home Warranty Plan Act which excludes "dwellings built and sold for occupancy for temporary periods or for seasonal purposes". (s. 1) However, in looking at all the circumstances, the court may again take into account the fact that Hidden Valley did have the development registered under the New Home Warranty Plan while the defendants were involved, (although after the original closings, the unsold units were ultimately removed from the Plan), and complied with all of the disclosure requirements of s. 52 of the Condominium Act.

[70] Of further interpretive assistance is s. 7 of Regulation 97 amended to O. Reg 180/91 to the Condominium Act, which sets out different requirements for different types of condominium units by their use, to comply with the term "have been constructed" in s. 4(1)(e) of the Act which deals, with construction certification. The regulation sets out definitions for three of the uses of units, "business and personal services purposes", "industrial purposes", and "mercantile purposes", but again no definition of use for "residential purposes" although requirements are also provided for that category. For example, "business and personal serviced purposes means the use of a unit or part thereof for the transaction of business or the rendering or receiving of professional or personal services", and "mercantile purposes" means the use of a unit or part thereof for the displaying or selling of retail goods, wares or merchandise". An inference can be drawn from what is and is not covered under the three types of defined uses, that in this Act "residential purposes" means the use of the unit as a residence, without distinction as to permanent or non-permanent.

[71] Finally, the court must consider the intention of the Legislature in the context of the consumer protection purpose of the Act. Adapting the analysis of Sharpe J. in *Windisman*, supra, at p. 9, it is difficult to see why a consumer would receive the protection of the Act when buying this type of unit as a vacation home where there is no municipal by-law which designates the zoning as commercial, but not receive protection where there is such a by-law in place.

[72] In my view, the units in this development are clearly "for residential purposes" and therefore s. 52 of the Act applies to them.

(2) Did the Hidden Valley Disclosure Material comply with the requirements of s. 52?

[73] Subsection 52(6) provides:

The disclosure statement referred to in subsection (1) shall contain and fully and accurately disclose. ... (b) a general description of the property or proposed property including the types and number of buildings, units and recreational and other amenities together with any; conditions that apply to the provision of amenities;

(c) a budget statement for the one year period immediately following the registration of the declaration and the description;

(d) a brief narrative description of the significant features of the existing or proposed declaration, by-laws and rules governing the use of common elements and units. and of any contracts or leases that may be subject to termination or expiration under s. 39;

(f) where construction of amenities is not completed, a schedule of, the proposed commencement and completion dates;

(g) any other matters required by the regulations to be disclosed.

By Regulation 96 s. 34 the declarant is required to provide the following documents under s. 52(6)(b) with the disclosure statement:

(1) the declaration or proposed declaration;

(2) the by-laws or proposed by-laws;

(3) the rules or proposed rules;

(4) any insurance trust agreement or proposed version thereof

[74] In this case the Reciprocal Agreement is in the form of a by-law and therefore had to be provided as part of the disclosure, as it was.

[75] Section 52(7) provides:

The budget statement mentioned in clause (6)(e) shall set out.

(a) the common expenses;

(b) the proposed amount of each expense;

(c) particulars of the type, frequency and level of the services to be provided;

(h) any current or expected fees or charges to be paid by unit owners or any of them for the use of the common elements or part thereof and other facilities related to the property;

[76] In the Abdool case, the Court of Appeal described the intention of the disclosure statement to be "no more than an incomplete description of the documents and a condensation of their significant features". (p. 137) In other words, the intent of the disclosure statement is to put into readable and understandable language what is contained in the other documents which set out the terms of the "deal". There the disclosure statement does not comply with subsection (6), there is no agreement of purchase and sale binding on the purchaser. (p. 138)

[77] In this case, the terms of the deal as set out in the other documents were not clear, coherent or consistent with respect to the issue of amenities, nor did those terms reflect the purchasers' understanding of the access to Hotel amenities based on the promotional literature, their dealings with the Hidden Valley agent, Ms. Lazar, nor the site plan included in each agreement of purchase and sale. The disclosure statement merely compounded the confusion by modifying rather than summarizing the other documents.

[78] Therefore the first problem in this case is that the terms of the "deal", that is, the legal obligations of the developer, in respect of recreational amenities were not set out clearly in writing anywhere. It follows that the disclosure statement could not "fully and accurately disclose" a description of those amenities. The problem is compounded by the representations made to purchasers during the pre-agreement sales promotions that there would be two outdoor pools, new docks and a refurbished hotel with access for the condo owners to all the facilities for a modest or no fee. To the extent that the disclosure statement is unclear, the significance of the failure of the agreement to reflect the pre-contractual representations is also unclear.

[79] In Abdool, the Court of Appeal emphasized that before a defect will warrant a declaration that a signed agreement of purchase and sale is not binding on the purchaser, the defect must be "of such substance as to render the disclosure statement defective in a material respect." Furthermore, the Act's purpose being to promote fair dealing between the parties, it ought not to be applied so that one party is allowed to renege from the agreement "on grounds that are unfair, unreasonable or capricious." Because a purchaser has had the 10 day cooling off period and not rescinded, the onus is on that party later to show that the defect in the disclosure statement is so significant as to make the agreement non-binding. (p. 138) The standard that the purchaser must meet is therefore described as follows:

To discharge this onus and prove materiality of the complaint, in my opinion, the purchaser is obliged to establish objectively that had the information that was not disclosed, or that was inaccurately or insufficiently disclosed, been properly disclosed in the disclosure statement at the time it was delivered to the purchaser, a reasonable purchaser would have regarded the information as sufficiently important to the decision to purchase that he or she would not likely have gone ahead with the transaction but would instead have rescinded the agreement before the expiration of the ten day cooling off period. (p. 139)

[80] The issue in this case is further complicated by the fact that the recreational amenities of this development were not to be part of the common elements on the condominium property but on the adjacent Hotel lands. Because subsection 52(6)(b) refers to a general description of the property, it is arguable that any amenities not on the property are not covered by this section. "Property is defined in s. 1, to mean:

the land and interests appurtenant to the land described in the description, and includes any land and interests appurtenant to the land that are added to the common elements.

However, the general language later in the subsection which refers to "any conditions that apply to the provision of amenities", together with the requirement for disclosure of the Reciprocal Agreement by-law which in this case includes the amenities, and the requirement of the Act (ss. 52(7)(h)) for the Budget Statement to disclose fees for the use of "the common elements or part thereof and other facilities related to the property", satisfies me that the section must be read to include amenities provided as adjuncts to the use of the units even if not on the condominium property or part of the common elements. Furthermore in this case, where the Reciprocal Agreement was to be registered to give effect to the mutual easements, at least the outdoor pools and beach may be considered to be "interests appurtenant to the land".

(3) Was the non-compliance material?

[81] The critical portions of the documents delivered to purchasers are set out earlier in this judgment.

[82] 1. In the Agreement of Purchase and Sale there is attached as Schedule "B" the site plan which depicts the existing pool and the future pool and the new boat docks. The Agreement makes reference to the Reciprocal Agreement with the Hotel regarding "the integrated use, operation, repair, reconstruction (if necessary), and maintenance of certain shared facilities including proposed outdoor swimming pools, driveway's, roadway's and servicing systems ..." There is no mention of boat docking or use of other hotel facilities in the Agreement of Purchase and Sale. To the extent that reference is made to shared access to outdoor pool facilities, the reference is to more than one pool and this is consistent with the site plan. (emphasis added)

[83] 2. The Declaration makes reference when dealing with Common Expenses to the Reciprocal Agreement and the cost of shared facilities referred to there. Schedule "A" describes easements affecting the condominium lands and refers to all easement "for the use and enjoyment of the Outdoor Swimming Pools to be located upon the Hotel Lands", and to an easement in favour of the Hotel for access to a shared beach area located on the 64 unit condominium lands. Again there is no reference to boat docking or other hotel amenities, and the only reference to outdoor pool facilities is to more than one pool. (emphasis added)

[84] 3. The Reciprocal Agreement provides a definition "Outdoor Swimming Pools". "Shared Facilities" is also defined and includes various easement and other servicing areas of the condominium and Hotel lands, but the definition does not mention boat docks or other hotel amenities. The various easements are set out and described. Over the hotel lands all easement is granted for use of the "Outdoor Swimming Pools." Then under the heading "Cost Sharing and Responsibilities" is the only reference to the outdoor pool facilities:

4.02(ii) During any period of time that the licences in Articles 2.05 and 2.06 are in existence. Hotel Owner hereby covenants and agrees to be primarily responsible for operating, inspecting, maintaining and keeping in good repair the Outdoor Swimming Pools provided that the cost of maintaining and repairing same shall be shared as set out in Schedule "D". (emphasis added)

Again the reference is only to "pools" in the plural, and as there are no Articles 2.05 or 2.06, the effect of this clause is unclear at best. (emphasis added)

[85] Stopping at this point, the documents which constitute the agreement between the parties refer only to the grant of an easement by the Hotel to the condominium for use of more than one outdoor pool as well as easements for the shared beach. There is no mention at all of boat docks or other Hotel facilities, nor is there any reference to refurbishing the Hotel.

[86] 4. The Budget Statement includes nothing which covers fees to be paid by unit owners for the use of facilities related to the property or for cost sharing. In the only reference to shared facilities with the Hotel, the statement mentions that the adjacent owners will have to contribute for the use by them of certain services. Mr. Morrison made the point that the budget turned out to be well in excess of what was spent in the first year for everything. This does not alter the failure of the disclosure to provide the information required to be given to purchasers in accordance with s. 52(7)(h) of the Act.

[87] 5. The Disclosure Statement is intended to be a readable description outlining what is in the other documents. Under the "General Description of the Property and Types and Numbers of Buildings", there is no reference to amenities. This may be because none of the amenities the beachfront in front of the 64 unit condominium lands are on condominium lands, but rather they were all to be Hotel amenities to be used by the condominium owners.

[88] Under the heading "Recreational and Other Amenities" condominium purchasers are told that it is anticipated that they will share the use of "an outdoor pool or pools" on Hotel lands with Hotel guests, and will share the cost of operation, maintenance and repair in accordance with the Reciprocal Agreement. This is the first reference to one pool in any of the documents. This reference does not add that the construction of a second pool would be at the discretion of the hotel. At best this reference is unclear and confusing. At worst, it is all attempt not to summarize the other documents but to resile from them, and in particular to resile from the reference in the documents to provide access to two outdoor pools as part of the amenities of the resort.

[89] On the issue of beach access, the disclosure statement states that the condo owners may walk over the Hotel beach but not use it, while the shared beach is in front of the condominium. No issue was made about the beach by the purchasers before the action, as I understand it because they were using the Hotel beach without issue throughout.

[90] Finally there is a "Note" dealing with additional recreational facilities. This is the only reference to the Hotel facilities (other than the outdoor pool(s) and beach), and to the boat docks anywhere in the documents. The Note says that the use and fees for use of these facilities (without describing them) is in the total discretion of the Hotel and that at the present time the condominium purchasers could access the tennis courts and boat docks subject to Hotel rules and fees set by the Hotel.

[91] The disclosure statement sets out the conditions for use of amenities (which conditions are required to be set out by ss. 52(6)) as compliance with the Act, the By-Laws, the Rules, the Reciprocal Agreement, and any further conditions set by the declarant.

[92] There is also a schedule for commencement and completion of construction of amenities (without listing them) set from August 1, 1989 to December 31, 1990. Since the only amenities to be built were the second outdoor pool, the new boat docks, and possibly the clearing of the beach in front of the condominium lands and the refurbishment of the Hotel, it is open to infer that this schedule was intended to reflect the construction of those features.

[93] Finally there is a description of By-law No. 2 which is the Reciprocal Agreement, and refers back to the Shared Facilities as defined in that document.

[94] I am satisfied, and so find, that the disclosure statement does not provide full and accurate disclosure to the condominium purchasers of the amenities or conditions of provision of the amenities. Read in the context of the other documents and in the context of the representations made to purchasers about the amenities: a high calibre resort Hotel, two outdoor pools, increased boat docking, access to Hotel recreational facilities, the disclosure statement does not set out clearly exactly what access the condominium owners will have and to what amenities. It is confusing at best.

[95] In particular, the documents refer to access to pools in the plural, which the purchasers would understand to be the two pools referred to throughout. The disclosure statement says "pool or pools" without explanation of whether that is intended to denigrate from the two pools promised. The documents make no reference to the indoor hotel facilities or to any concept of a decision by the condominium owners as to what facilities they would access based on cost sharing. The explanation in the disclosure statement is at odds with the entire concept of the condominiums as part of the Hotel resort complex. Furthermore, there is no reference to cost sharing for these facilities, but only to a fee. The purchasers learned from Mr. Hoyes that these amenities were to be made available on the cost sharing formula, similar to the outdoor pool(s). The documents also make no reference to boat docks, either existing or to be constructed. The disclosure statement refers only to the existing docks and fails to disclose the new ones to be built. This is at odds with the intention of Hidden Valley which was to obtain the necessary approvals to build the docks, which they attempted to do. It is also at odds with the representations regarding boat docking for purchasers and the site plan made Schedule "B" to the Agreements of Purchase and Sale.

[96] The deficiencies which I have noted might and arguably should have caused some concern to purchasers and their lawyers due to the confusion. Had they questioned Hidden Valley within the 10 day cooling off period as to the extent of its legal commitment to provide amenities, one may only speculate on what the response might have been. However, in determining the legal consequences of the deficiencies in the Hidden Valley material and of the purchasers' failure to rescind within the 10 day cooling off period, the initial obligation is on the declarant to comply with s. 52 of the Act. Having failed to comply, the onus is on the purchasers to establish that the non-compliance was material.

[97] In other words, had the discrepancies between what the purchasers believed the amenities were to be and what the developer was legally committed to provide as opposed to its "intention" or non-binding "commitment" been clearly spelled out in the disclosure statement, would a reasonable purchaser have rescinded the agreement? In my view the answer is yes.

[98] This development is a Muskoka resort where the natural and constructed recreational facilities are an integral part of the lifestyle that is purchased with the unit. Furthermore, the price of the units reflected the presence of the amenities as represented. In her excellent presentation, plaintiffs counsel argued that the purchasers got substantially what they purchased because they got access to the lake, the ski hill, the ability to swim in a pool or lake, to boat, and to have some access to the Hotel facilities; so that if there was only one outdoor pool and not two, or old docks with no slips for permanent or semi-permanent docking available for boat owners, or a tired Hotel facility instead of a refurbished one, those were minor differences only. I disagree. Those features make a significant difference in the type of resort the purchasers thought they were joining, and for which they paid a particular price. With the recovery of the market, the value of the units would be reflective again of the number of amenities and of the style of the resort.

[99] This is not a situation as has happened in many of the reported cases from recessionary times, where purchasers saw the value of their units plummet and combed through the disclosure material for a way to resile from the agreement. Here the drop in equity in the units was certainly a factor in the decision of many of purchasers to rescind, and of course in a rising market a purchaser would have the option to close and resell if the condominium development was not as it was supposed to be. However, in this case the non-disclosure of the true legal obligations of the developer with respect to the provision of amenities was of concern to the purchasers from the first meeting with Mr. Hoyes when the intended effect of the disclosure statement was first articulated by Hidden Valley and continued to be of concern to many of them right through all the meetings and negotiations in the summer and fall of 1991.

[100] In finding that the complaints of the purchasers were material, I put no weight on the evidence of Mr. Marvin, the real estate agent from Huntsville tendered by the defendants. His evidence was based on dealing with many purchasers of resort condominiums in Muskoka and what they said they were looking for in their purchases. Besides being a report of hearsay and anecdotal information, this is not the type of evidence for which the court requires an "expert".

[101] Because the disclosure statement did not comply with the requirements of s. 52, the Agreements of Purchase and Sale of the defendants were never binding on them on August 22, 1991, when all defendants except the Phillips' rescinded their agreements.

[102] In light of this finding, there is no need to deal with the issue of the duty to deliver amended disclosure statements from time to time, or the issue of rescission based on pre-contractual misrepresentation.

The Letter of September 13, 1991

[103] Setting aside the circumstances which led Mr. Morrison to send this letter, was this letter a material amendment to the disclosure statement, or indeed a disclosure statement which complied with the requirements of the Act, thereby starting a 10 day period to run during which the purchasers could rescind their agreements?

[104] Clearly this letter set out terms by which Hidden Valley was prepared to be bound and was bound. It set out new terms clarifying under what circumstances there would be new docks and a second pool as well as access to hotel amenities. Given that a) these matters were demonstrably unclear up to this time, and b) the terms, although very fair and accommodating, were also new and different from the original deal and not necessarily acceptable to purchasers who did not want a majority vote but wanted to be sure that the second pool and docks would be installed. I find that this letter would have constituted a material amendment had there been a complying disclosure statement to amend. Therefore the Phillips' were entitled not to close based either on the fact that their agreement was not binding or that they exercised a right of rescission within 10 day's of receiving the September 13 letter.

[105] In making these findings, I note that this is a case where once the problems came clearly to light through the purchasers' lawyer, the developer made significant and what I perceived to be good faith efforts to try to deal with the purchasers' concerns. However, those efforts cannot have the effect in law of saving the transactions when there has been material non-compliance with s. 52(6) of the Act.

Conclusion on the effect of material non-compliance

[106] The court was advised that the actions and counterclaims of the defendants Gregory Vercaigne and Dr. Bernard Zinman have been settled. The defendant Gail Sharkey was not represented by counsel and did not appear at the trial. It was unclear whether the court had notified her before the trial at her last known address. As a result she was notified at the beginning of the trial by regular and by registered mail to her last known address in the jurisdiction. The registered letter came back during the trial marked "moved, address unknown". The information provided to the court at trial was that Ms. Sharkey had moved to Florida without leaving a forwarding address. The plaintiffs elected to proceed with their action against her.

[107] Therefore the action of the plaintiffs against all defendants except the two who have settled is dismissed.

[108] The counterclaim was pursued by all the remaining defendants except Gail Sharkey. On the counterclaim the defendants are entitled to return of their deposits plus interest plus return of agreed amounts regarding upgrades of units, plus certain lease back adjustments, all as agreed in the Agreed Statement of Facts. Although Ms. Sharkey did not appear or proceed with her counterclaim, in light of the trust provisions of s. 53 of the Act, a question arises as to what order, if any, the court ought to make in respect of her deposit funds. Counsel are invited to re-attend to briefly address this issue.

Rebate of Occupancy Fees

[109] The defendants also claim a rebate on the occupancy fees they paid after the interim closings, based on the failure of Hidden Valley to provide all the amenities during that time including the second pool and boat docks and a refurbished hotel. They also complain that the beach was unusable during the 1990 season due to a silt curtain which the Hotel was obliged by the authorities to install in the water due to run off of soil from construction from the site into the water. The defendants complain that the indoor facilities of the hotel were at times closed off and unavailable pending renovation. They also point to the fact that the make-shift boat docking arrangements for those with boats were inconvenient as boats could not easily be put in and out of the water or tied up for any period of time.

[110] Counsel advised that there are no cases under the Condominium Act where an abatement of occupancy fees has been awarded. All cases are under the Landlord and Tenant Act. The relevant sections of the Condominium Act are ss. 51(6) which

sets out the maximum monthly occupancy fee based on three components: a) mortgage interest, b) municipal taxes, and c) projected monthly common expense contribution, and ss. 51(7) which provides that the declarant must provide the services which the condominium corporation will have a duty to provide after closing.

[111] In this case the amenities connected with the Hotel were provided during the interim occupancy period at no charge. The only component of the interim occupancy fee that is referable to provision of services is the common expenses contribution, part of which may be referable to the shared beach in front of the condominium units. In an exhibit filed with the court (exhibit 153A) a table shows that a very small proportion of the monthly fee collected was attributable to common expenses, referred to as "maintenance" on the exhibit.

[112] In my view any abatement of this fee should be in a token amount only. Most defendants who elected to use their units enjoyed them while they had them in spite of some inconvenience during construction. Any rebate would be based on the failure to provide the second pool and docks during that period. In this case, this was not a matter of delay in construction about which the cases have been indulgent, but election by the developer not to provide the amenities at the time due to its interpretation of its obligations. As these were material matters, some rebate of occupancy fees is warranted. However, because the maintenance portion of the monthly fees is a very small percentage, only a token amount of \$10.00 per month reduction on those fees from January 1, 1991 is appropriate.

Lavalle Upgrade

[113] Mr. Lavalle elected to install electric heating in some of the floors of his unit. This was not an upgrade offered by the developer but work he did himself. Mr. Lavalle indicated that he had the permission of the developer, however Mr. Morrison said that this renovation was totally voluntary on the part of Mr. Lavalle. The amount he seeks is \$2493. which was the cost of labour and materials. In my view the purchaser cannot force an unusual alteration on the developer for compensation in this situation. He chose to invest money in the unit before closing and had use out of this investment before electing not to close. There will be no refund of this amount.

Costs

[114] The costs of the action will follow the event, subject to any offers of settlement that may have been made. If the parties are unable to agree on the costs, a reasonable amount will be fixed after further brief submissions within three weeks of release of these reasons.

FELDMAN J.

CBR# 173

Vernon George Mackin, Walter Brent Jones, Gail Sharon Jones, Alice Ruth Elliot, and John Alexander Elliot, petitioners, and The Owners, Strata Plan 1374, respondent

Victoria Registry No. 98 0158

British Columbia Supreme Court Victoria, British Columbia Hutchison J. Heard: December 11, 1998. Judgment: filed December 17, 1998.

Counsel: R.C. di Bella, for the petitioners. David Perry, for the respondents.

[para1] HUTCHISON J.:-- This petition raises a new twist on an old problem - the leaky condominium.

[para2] It is common ground that the leaking in the case at bar occurred through locally manufactured aluminum window casings installed in a 20-unit apartment complex at 104 Dallas Road, known as "The Dolphins".

[para3] The dispute between three owners in the strata plan and the strata corporation comes down to an interpretation of the Condominium Act, R.S.B.C. 1996 c.64.

[para4] In brief, both sides say they "do not do windows".

[para5] Under Part V of the Condominium Act s. 115 defines the obligations of an owner who must do the following:

(c) repair and maintain the strata lot, including windows and doors, and areas allocated to the owner's exclusive use, and keep them in a state of good repair, reasonable wear and tear and damage by fire, storm, tempest or act of God excepted. (Emphasis added)

[para6] The next section, 116, defines the obligations of a strata corporation which must do all of the following:

(f) maintain and repair the exterior of the buildings, excluding windows, doors, balconies and patios included in a strata lot, including the decorating of the whole of the exterior of the buildings. (Emphasis added)

[para7] In 1991 severe leaking problems occurred at The Dolphins, particularly in the penthouse and a report was obtained from Levelton Engineering Ltd.

[para8] At that time no firm decision could be, or was, arrived at as to whose responsibility, the strata corporation's or the owners', the replacement of these windows became. At a meeting of the strata corporation on 17 April 1991, a classic Canadian compromise was entered into and each side agreed to pay 50% of the cost by the strata corporation levying a special assessment. Since the owners of the new windows in units 303, 401, 403, 501, 504 and 600 were all assessed, it meant, in fact, they paid somewhat more than 50% of the total repair bills charged to the owners' account.

[para9] The present issue arises as a result of the special resolution put to the 1991 annual meeting calling on the strata corporation to pay 50% of the cost of window replacement. A "sunset" clause was added by way of an amendment to the original resolution to which notice had been given. That amendment provided as follows:

After April 1, 1995, a new resolution on window repairs and/or replacement will be required.

[para10] While it would appear that some of the petitioners voted for the amendment, needless to say, the petitioners now seek indemnification for 50% of the costs of replacing their windows after April 1, 1995. The strata corporation is resisting payment and takes the position that they are not responsible for the repair and replacement of windows. [para11] In passing, it is significant that an owner is responsible to keep the windows in a state of good repair "reasonable wear and tear and damage by fire, storm, tempest or act of God excepted". It is arguable that the leakage in this case is caused from reasonable wear and tear or damage by storm or tempest. The material before me shows that when a south-east storm comes in off the Straits of Juan de Fuca in full force on the face of this apartment building, the rain falls horizontally rather than vertically. This adds to the problems of owners on the southerly side of the building, as compared to owners on the northerly side, who naturally do not wish to pay for the benefit of upgrading their southern neighbours. It is also of some moment in the interpretation of s. 116 to note that s-s. (d) reads as follows:

(d) maintain and repair, including renewal where reasonably necessary, pipes, wires, cables, chutes and ducts existing in the parcel and capable of being used in connection with the enjoyment of more than one strata lot or common property.

This is some indication that the draftsman regards renewal where reasonably necessary to be something different than maintenance and repair. Sub-section (f) provides for "maintain and repair of the exterior of the buildings, excluding windows,".

[para12] One of the conundrums caused is the fact that in today's modern building methods windows are no longer re-glazed but simply replaced, inclusive of the aluminum frames which, in the case at bar, are apparently the cause of the difficulties. However, that being said, 11 of the units still have their original windows installed during the construction of the building in 1980.

[para13] While there are no relevant cases in the Province of British Columbia, according to counsel, Mr. di Bella cites and relies on a decision of Master Quinn of the Court of Queen's Bench of Alberta, in action number 92/0304276, which seems much on point.

[para14] A summary of the problem facing Master Quinn is contained in the first two paragraphs of his judgment which read as follows:

This application arises from a Petition by the Owners: Condominium Plan Number 762 1072 ("the Condominium") concerning a problem that has arisen with the windows of the individual units in the condominium.

The opinion of the Board of Directors of the condominium is that the windows, window frames and window sills in all of the individual units need to be removed and replaced due to their age and their deteriorated condition. The directors believe that if the said replacement is not done soon the structure of the units may be seriously affected by leakage, rotting and related deterioration.

He continues by pointing out that there is an obvious need in some units for replacement, and in others the problem was not then pressing.

[para15] It is interesting to note that in the Alberta case it was the condominium corporation which sought to replace all the windows and some of the owners, presumably those whose units did not need new windows immediately, threatened to sue the condominium corporation for replacing windows which they submitted were the responsibility of the individual owners.

[para16] Master Quinn was dealing with the Alberta Condominium Property Act which provided, in s. 7(2) that "all doors and windows of a unit are part of the unit unless otherwise stipulated in the condominium plan". Needless to say, nothing was stipulated in the plan. The question became one of, what constitutes a window within the meaning of the Act which gives, as our Act, no definition of windows.

[para17] Master Quinn concluded that "window" in the context of s. 7(2) should be interpreted to mean the glass pane. His reasoning, contained at pp.4-5 of his judgment, seems apposite to the case at bar, where he said as follows:

As previously mentioned, some of the unit owners take the position that the windows (meaning the window assembly including the sills and frames) are the property of the unit owners. That notion may come from By-law 2 (c) which provides that an owner shall: 2 (c) repair and maintain his unit and all windows in, attached to or immediately adjacent to the unit (whether or not such windows or party (sic) thereof are part of the common property), damage by fire, storm, tempest or act of God excepted;

That By-law does not really say the windows are the property of the unit owner. If the unit owner owned them, there would be no reason for exempting him from the duty to repair where the damage was caused by fire, storm, tempest or act of God. The By-law lays a duty on the owner to repair the windows even though he may not own them, but relieves him of the duty where the damage was not caused by his own fault.

[para18] The learned Master then goes on to say:

By-law 9(k)(i) provides that the condominium corporation shall maintain and keep in a good repair "all outside surfaces of the units " but "excluding windows" which shall be the responsibility of the unit owner.

This By-law does not specify who owns the windows but merely confirms that the duty of keeping the windows in a good state of repair is the duty of the unit owner.

[para19] The learned Master then goes on to point out that a condominium corporation is required to insure, as it is in British Columbia, the building for full replacement value, and other fixed improvements comprising the condominium under the relevant Alberta Act.

[para20] The learned Master then goes on, at p.6 of his reasons, to say:

The window assembly must surely fall within the scope of "fixed improvements". It would be inconsistent with that concept for it to be held that the window assembly is owned by the unit owner. I am informed, though there is no evidence of it before me, that insurers have advised the condominium that they would not insure window assemblies for unit holders, and that a unit holders "tenant's" policy covers glass only. He then goes on to say that, in his opinion, the window assembly should be deemed to be "outside hardware" under the relevant bylaw in Alberta, and that it is the duty of the condominium corporation to keep them in a good state of repair.

[para21] When one compares the Alberta Act to the British Columbia Act, they seem to be in para materia.

[para22] Master Quinn's reasoning seems to be that if a particular unit in a condominium be inhabited by teenage baseball players, the individual owner must replace the window pane if baseball or bat goes through it. If the repair of the pane involves, as a more economical method, the popping out of the aluminum frame and its replacement with a new frame, so be it.

[para23] If, however, the frame starts to leak and the whole window assembly requires to be replaced, inclusive of glass, as being the most economical method of repairing, then the condominium corporation shall pay, despite the owner being presented with new glass.

[para24] The difficulty of interpretation in the case at bar is not unlike that which faced the English Court of Appeal in *The Holiday Fellowship Ltd. v. Viscount Hereford*, [1959] 1 All E.R. 433. There, Viscount Hereford had demised his premises for a term of 21 years and had covenanted to keep the "main walls" of the demised premises in good repair and condition. The question before the court was whether or not the landlord had responsibility to maintain and keep in good repair the windows and their casements. Lord Justice Ormerod, at p.437, said this:

In most buildings it is necessary to have means of ingress and egress, and, of course, some means of admitting light: therefore, the walls form the setting of the necessary doors and windows which certainly a dwelling house and a very large number of other buildings must have. But to say that those doors and windows, inserted in those settings, are part of the main walls of the building seems to me to be going very much further than the ordinary use of language would require or allow.

The tenant was left with the responsibility to maintain the windows.

[para25] In his judgment Master of the Rolls, Lord Justice Evershed, at p.434, said this: We are not concerned with any question of repair to the brick or stone structure containing the actual windows. For the purposes of this case and of the question raised in the originating summons, I take "windows" to mean, and to be confined to, the glass panels and the wooden framework and apparatus in which the glass is placed; and the question is whether, for the purposes of the lease, "main walls" ought to be treated as including the windows as I have attempted to define them.

[para26] There, the court was wrestling with a decision of their court in *Boswell v. Crucible Steel Co.*, [1925] 1 K.B. 119 where windows in a commercial store-front were held to be landlord's fixtures and part of the skin of the building. Both cases are instructive because they raise the same arguments that were advanced in the case at bar.

[para27] Lord Evershed, at p.435, is critical of a statement taken from *Boswell v. Crucible Steel Co.* (supra) in *Woodfall on Landlord and Tenant* where, in the 25th edition, 1954, at p.760, the learned author says:

It would appear that windows in the outer walls of a building are themselves to be regarded as part of the walls and therefore the external parts.

Lord Evershed goes on to point out as follows:

That passage is based, and based exclusively, on *Boswell v. Crucible Steel Co.* (supra). With all respect to the learned editor, I think that is an overstatement or over-simplification of the matter. I think that it would be correct to say: "It would appear that windows in the outer walls of a building may, in certain contexts and for certain purposes, be regarded as part of the walls; but I do not think that *Boswell v. Crucible Steel Co.* justifies any more extensive proposition. Nor can I agree with counsel for the tenants that, because in *Boswell's* case, (supra), the conclusion is regarded as a matter of law, therefore it is impossible to say, as a matter of fact or degree in another case and in another context, that windows are not to be regarded as part of the main wall: the one thing by no means follows from the other. So far, therefore, I am unable to hold (and I agree entirely with Harman, J., that *Boswell v. Crucible Steel Co.* (supra) does not bind us to hold) that these windows are part of the main walls of this edifice for the purposes of this lease.

[para28] In the result then, the trial judgment of Harman J. was upheld and the landlord "did not do windows".

[para29] As Lord Evershed M.R. makes clear, each case must be judged on its own facts in its own context. Here, the question is not who has responsibility for cleaning and repairing windows, but who has responsibility to install windows when the old ones are worn out or turn out to be defective in manufacture after their warranty has expired.

[para30] As early as 1866 this problem seems to have been the subject of judicial comment. See *Hoare v. Osborne* (1885-86) 1 Equity Cases, 595 where a window was held to be part of the fabric of a church. See also *Easton v. Isted* [1903] 1 Ch. 405 holding that skylights were covered by an agreement for the right to light by windows even though they were not, as were the windows, on a vertical wall. In *Wright v. Lawson* (1903) 3 T.L.R. 510 the English Court of Appeal put the duty to replace a bay window, condemned by the London County Council, on the landlord despite a covenant to repair by the tenant.

[para31] In determining the meaning of the legislature in the Condominium Act (supra) the pragmatic approach taken by Master Quinn in Alberta seems to be the one best suited to the case at bar. In my view the legislation was intended to put a duty on the unit owners to keep their outside windows clean and glazed. This despite the theoretical boundary between theirs and the common property being right through the middle of the window panes, or with thermal windows, as in the case at bar, the air space between the panes. I hold the owner of a unit must keep windows of their unit built on the outside of the condominium corporation's walls sealed and caulked. The duty on the strata corporation under s. 116 requiring it to; "maintain and repair the exterior of the buildings, excluding windows" etc. "including the decorating of the whole of the exterior of the buildings" includes, rather than excludes, the window casings and sills. Thus when repainting is required the strata corporation would not be required to break out the cost of painting window frames and casings in order to bill each individual owner. Those with the smallest unit entitlement might well have the greatest number of windows on the outside walls and thus be required to carry more of repainting costs than those with the largest suites which seems unfair and against the scheme of the Act.

[para32] It follows that I am prepared to give the declaration sought in paragraph 1 (a) of the Petition that the cost of replacement of the windows and window frames of the strata lots owned by each of the Petitioners ought to have been paid by the Strata Corporation, once the directors became satisfied that the building was in peril from leaks caused, as the corporation's window tradesman, Mr. Phillips, of Rusco Supply Ltd., suggested. He thought the window frames were leaking through the corners and backing up over the interior sills. He blamed the design of the windows and suggests they have an inferior drainage system and a reputation for leaking in driving rain. Not too unnaturally he recommends replacement of all windows with vinyl frames as already started.

[para33] I am not prepared to pro-rate costs as suggested by counsel but I think costs follow the event on scale 3 in favour of the Petitioners. I am not prepared to give the individual petitioners judgment in the amounts claimed at this time due to not being aware of exactly what Mr. Phillips did and whether all of the work was window replacement. It would also be unfortunate if judgments were taken and registered before the strata corporation had time to review the bills and these reasons. Thus I grant liberty to apply if the parties are unable to work out an appropriate finish to this interesting dispute.

HUTCHISON J.

CBR# 213

Between Niagara North Condominium Corporation No. 46, applicant, and Raymond Chassie and Muriel Chassie, respondents

Court File No. 40,448/98 Ontario Court of Justice (General Division) St. Catharines, Ontario MacDonald J. Heard: September 17, 1998. Judgment: April 7, 1999.

Counsel: Paul Bauerle, for the applicant. Muriel Chassie, for the respondents.

[1] MacDONALD J.:-- The Applicant, Niagara North Condominium Corporation No. 46, (the N.N.C.C.), has applied to this Court for an order directing the Respondents, Raymond and Muriel Chassie, to remove their cat from their Unit, being Unit 203 of the condominium building, within 30 days of the Order. In other words, the N.N.C.C. seeks to evict Mineau, a 16-year-old Siamese cat, from her home with the Chassies in the condominium complex, which is located at 3 Towering Heights Boulevard in St. Catharines.

THE ISSUE AND POSITIONS OF THE PARTIES

[2] The issue, as set out in the Applicant's Factum, is:

"Should the Respondents be required to have the cat removed from their unit and, if they fail to do so, may the cat be removed as directed by the Board of Directors, and at the expense of the Respondents?"

[3] The position of the Applicant is that the Respondents should be required to remove the cat from the premises because the residence of the cat in the Respondents' unit is contrary to the Declaration and Rules and Regulations of the N.N.C.C. Counsel for the Applicant submitted that the prohibition is contained in the condominium Declaration as well as in the Rules, both of which are binding on the unit owners, and that there is a strong presumption as to the validity of the Declaration. Further, the Board of Directors of a condominium corporation has a statutory obligation to enforce the Declaration and Rules. Also, contrary to her assertions, Mrs. Chassie was not misled about the pet prohibition in view of the fact that she signed a form acknowledging receipt of the Rules. While he acknowledged that the Human Rights Code relied on by the Chassies is a quasi-constitutional law, he submitted that the Code should not be applied herein. He argued that, for the Code to apply, there must be a physical reliance on an animal, as in the case of a blind or deaf person. The mere emotional attachment to a companion animal is not sufficient to evoke the Code, he said.

[4] I would summarize the defence of the Respondents, who appeared in person, as being lack of reasonableness, acquiescence by the Board in respect of the presence of pets and delay in the enforcement of the Declaration and Rules and Human Rights Code considerations.

[5] In support of their position that keeping a cat in their unit is reasonable, the Respondents, in their response to the Application, submitted that:

"2(f) In recent years, the benefits of pet ownership have become common knowledge to the extent that the Attorney General saw fit to revise the Landlord and Tenant Act to void the prohibition of pet ownership."

Also, Mrs. Chassie stated, in her affidavit of September 10, 1998:

"14. My husband and I visited eight condominium buildings in this region that were similar to our building and asked them about their pet by-law. All condominiums that we visited deemed it "reasonable" for residents to keep a cat as a pet."

She appended to her affidavit the relevant provisions of the Declaration or Rules of the eight Niagara North or South condominium corporations that she visited. In all instances, a cat or dog or, in one case, a cat and dog and, in another case, a dog and one or two cats were permitted. These provisions were all subject to restrictions providing for eviction in the event of the pet creating a nuisance and, in some instances, to other restrictions such as on the use by pets of certain common areas and the weight of the pet. There was also, in one instance, a prohibition respecting a dangerous animal or pet.

[6] Secondly, the Respondents take the position that the condominium Board "has knowingly set a precedent by not enforcing the no pet by-law for 8 years" and has now singled them out for enforcement with "no attempt to apply the no pet by-law fairly". They submitted that they were not notified of the no pet rules before presenting an Offer to Purchase and, indeed, saw cats in several windows and units at various times during their visits to the premises. The details of these allegations are set out below under the heading THE FACTS.

[7] Finally, in support of their position, the Respondents rely on the Ontario Human Rights Code. They submitted that:

"2(a) To cause the Respondents to give up their cat is cruel and inhumane. The cat is 16 years old and they have owned it all its life. Respondent Muriel Joan Chassie suffers mental and physical health problems and removal of her cat would be deleterious to her health."

Further, in her affidavit of September 10, 1998, Mrs. Chassie stated:

"15. In conclusion, our cat has been a beloved, loyal pet for 16 years and is very much part of our family. When I was sick for a very long period of time, she was my constant companion. Her love and devotion helped me through a long depression, a condition I have had, unfortunately, for many years. As well, I suffer from high blood pressure. I find my cat to be a calming presence and influence. To no avail, I have brought this to the attention of the Board in letters from my doctors."

THE FACTS

[8] The facts, which are for the most part not in dispute, are that, about June 1, 1989, a Declaration was registered by a developer under the Condominium Act creating the N.N.C.C. The condominium complex consists of 92 units on twelve floors. Section 23 of the Declaration states:

"No animal, reptile, livestock or fowl, other than small caged birds and/or small fish, shall reside or be kept within any unit, nor be allowed to enter the condominium building. The foregoing restriction on pets shall not be deemed to apply to any specially trained "seeing-eye" dog owned by a visually impaired owner, tenant, resident, or invitee of any dwelling unit."

Section 20 of the Rules and Regulations of the N.N.C.C., as contained in Schedule A to By-law No. 1 thereof, provides similarly:

"No animal, livestock or fowl, other than small caged birds and/or small fish, shall be kept within any unit, nor allowed to enter the condominium building. The foregoing restriction on pets shall not be deemed to apply to any specially trained "seeing-eye" dog of an owner who is visually impaired."

[9] Mr. and Mrs. Chassie purchased and moved into Unit 203 in the condominium complex on or about June 13, 1997, bringing with them their cat, Mineau. In the fall of 1997, it was brought to the attention of Peter Greco, the Vice-President of Cannon Greco Management Limited, which has been the Manager of the N.N.C.C. since its appointment on April 28, 1994, that the Chassies were keeping a cat in their unit contrary to the Declaration and Rules and Regulations. Mr. Greco wrote to the Chassies on December 1, 1997, to ask that the cat be permanently removed from the building by December 15, 1997. On December 15, 1997, Mr. and Mrs. Chassie replied, in part, as follows:

"Further to my telephone conversation of December 3, 1997, at which time I asked for copies of the letters of complaint regarding our cat, you indicated to me that there were no letters of complaint.

We were not made aware of Section 23 until after we purchased our unit. Frank Coy [the real estate agent] or Mr. & Mrs. McGee [the vendors] did not inform us of this Declaration before we purchased. As a matter of fact, when we were looking at a number of units at 3 Towering Heights, we observed two cats in windows and one in a unit we were shown. We, therefore, thought cats were allowed in the building. Had we known cats were not allowed, we would not have purchased.

Our cat is a quiet cat that never leaves our unit. It does not in any way interfere with the comfort and enjoyment of our neighbours.

I am aware of three condo owners with cats in this building that did not receive a letter from you and I am sure there are others that I am not aware of. There have been cats in this building since the very beginning (9-10 years) and there will always be cats in this building. This is an impossible situation to police.

Your letter of December 1, 1997 has upset me greatly and caused me many sleepless nights. Our cat is almost 16 years old and a part of our family."

[10] Mr. Greco replied to the Chassies' letter on December 16, 1997 stating that, while there were no written complaints on file regarding their cat, it is the responsibility of the Board of Directors to enforce the Declaration and the Rules. He added that he would "address" their letter with the Board at the Board meeting in January, 1998.

[11] The Chassies did not comply with the demand to remove the cat. However, on January 11, 1998, Mrs. Chassie again wrote to Mr. Greco. She stated:

"Further to my letter of December 15, 1997, I attach a letter from my Doctor, Dr. J. Henry, for your consideration.

Shortly after moving into our unit, Audry Martin [a Board member] stopped by to welcome us to Southgate. She saw our cat and I remarked that we were not aware of the no pet rule until after we purchased. She stated that Mrs. McGee had already informed her of this and that she was on the Board and they were aware of other cats in the building. She told me not to worry, if there were no complaints, there would be no problem.

Because the no pet provision was not enforced from the beginning, the Board sent a clear message that this "No Pet" rule was not being enforced.

I believe that a reasonable solution to this problem would be to "grandfather" the Rule. When our pet dies, we will not replace it. This is a more peaceful and humane approach."

[12] The January 9, 1998 letter from Dr. Henry states in part:

"Mrs. Chassie's cat has been her companion for 16 years. In my opinion, to force her to abandon it, would cause her extreme emotional distress. I would appeal to the "powers that be" to show compassion and try to find a compromise to this situation."

[13] On January 16, 1998, Mr. Greco wrote one more time to the Chassies reiterating that it is the responsibility of the Board to enforce the Declaration and Rules and informing them that 78% of the owners were in favour of a no pet building and threatening legal action if the cat were not to be removed from the building by January 30, 1998.

[14] On March 27, 1998, at a meeting of the Board of Directors of the N.N.C.C., it was decided to commence a legal action against the Chassies. Mr. Greco, in his affidavit dated April 29, 1998 in support of this Application, stated:

"As far as I am aware, the Respondents are the only unit holders in the condominium building who are contravening the no pets clause contained in the Declaration and in the Rules and Regulations."

[15] While Mr. Greco's statement may, possibly, reflect the state of affairs at the condominium building as of the date the affidavit was sworn, I do not believe it accurately reflects the level of pet ownership in the condominium building over the years or even at the date of his first letter of December 1, 1997, to the Chassies. I am of this opinion partly because of the December 15th letter of the Chassies above and, also, by reason of other evidence submitted by them. This evidence includes excerpts from the Minutes of two meetings of the Board of Directors. In respect of a meeting on September 20, 1995, almost two years before the Chassies purchased their unit, the Minutes state:

"18(f) Mr. Smith commented that there were several cats in the building and asked if it should be allowed to continue. Peter Greco stated that either this issue should be ignored or a complete crackdown on animals in the building be made."

In respect of a meeting on November 25, 1996, the Minutes state:

"Mr. Greco spoke to Glenn Parker who suggested sending letters to all pet owners mentioning this is against the Rules and Regulations. When existing pets cease to reside in the building no new pets will be allowed in the building.

Dr. Wood presented a note submitted to the Board from Mrs. Hazelton (#505) stating she was being harassed over this issue.

Mr. Greco stated that Mrs. Hazelton is moving out of the building at the end of January. Mr. Greco explained that because the Rule has not been enforced up to this point, a precedent has been set and thus it may not stand up in a court of law.

Dr. Wood read a statement submitted by Ray Moen stating that something should be done about this Rule as the Board was elected to uphold the Rules and Regulations.

Brian Neil suggested that a reminder be sent to the owners restating the policy regarding the Rule of pets and trust that the owners will be in compliance of this section of the Declaration.

The Board was in agreement with this suggestion."

[16] There is no evidence that any action was taken pursuant to this suggestion at that time. Indeed, the evidence is that pets continued to remain in the building until and after the Chassies purchased their unit in 1997. Mrs. Chassie stated, in her affidavit of September 10, 1998, as follows:

"1. Prior to purchasing Unit 203 of #3 Towering Heights Boulevard on June 13, 1997, we went several times to this condominium building over a two year period with two different Real Estate agents, one being Nancy Philbrick of Sally McGarr Realty and Sam Cino of Re/Max. On each occasion, from the parking lot, we saw cats in the windows. One of the units through which we were shown had a cat. We assumed that cats were allowed. We would not have purchased in this building if we had known cats were prohibited ...

2. On June 9, 1997, prior to our moving into our unit, the Superintendent, Gwen Biggins gave me an abbreviated list of the Rules and Regulations. When I saw the "No Pets Rule", I told her we had a cat. She replied "So do eight others in the building". This statement reassured me that this By-law was not being enforced.

3. We purchased our unit from Mr. and Mrs. Donald McGee. Mr. McGee had been a Board member and President of NNCC#46 for 3 years. Although he mentioned a number of By-laws, at no time prior to our signing our offer to purchase, did he say that cats were prohibited. Later, when we learned of the By-Law, we told him we had seen cats in the windows and assumed they were allowed. Mr. McGee told us not to worry, that he had been on the Board for several years, and knew there [were] cats in the building from the very beginning (1989). He basically said that the Board was not enforcing the By-Law ...

4. On June 27, 1997 Audrey Martin, a current member of the Board, elected August 13, 1990, came to our unit to welcome us to the condominium. I pointed to our cat and explained we had assumed that cats were allowed because we had seen them in various windows. She said that the McGees had already informed her that we had a cat, but as long as there were no complaints she could see no problem."

[17] From the other available evidence, the above dates appear to correctly reflect the sequence of events except that Mrs. Chassie may have received the abbreviated Rules on June 6 and signed them on June 9. The Offer to Purchase was not included in the evidence but the Land Titles Transfer of Land form was signed by the vendors, Mr. and Mrs. McGee, on May 27, 1997, and probably reflects the approximate date of the Agreement for purchase and sale.

[18] Mrs. Chassie continued her affidavit of September 10, 1998, by stating that she knew that the December 1, 1997 letter to them and a letter of even date to one other resident, Sally Barton of Unit 701, were the first letters the Board had sent to any cat owners respecting the animal by-law because, on June 15, 1998, she had searched through all the Board minutes since 1989 and because, on August 20, 1998, she had confirmed with Mr. Greco that there had been no prior letters.

[19] The allegations of Mrs. Chassie as to the presence of cats on the premises were supported by a number of people. Sam Cino, the real estate sales representative for the Chassies, stated, in an affidavit dated June 25, 1998, that he saw several cats in apartment windows and observed a cat in one of the units he had shown them. John MacPherson, the owner of Unit 502 since August, 1997, stated, in an affidavit dated June 25, 1998, that he had "witnessed" cats in the windows of more than one unit at various times. Mr. Chassie, in an affidavit dated September 10, 1998, stated that the owner of Unit 503, Jim Atcheson, told him that he had kept his cat in his unit (picture of cat in window attached) since purchasing his unit in 1989. Sally Barton, the owner of Unit 701 since 1996, and the only other owner to receive letters from the Board dated December 1, 1997, and January 16, 1998, ordering her to remove her cat stated, in an affidavit dated June 23, 1998, that she is "permanently wheel chair bound" and felt unable, for health reasons, to fight the issue on her own. Consequently, she had her cat taken to a friend's house. When her husband, who works on the boats, comes home, he brings her the cat for the two or three weeks he is there. She stated further:

"My cat is a loved companion and helped me through a severe depression after my 1994 car accident. I miss my cat and am depressed by the Board's insis tence that I get rid of my pet. I think the present Board is being very unreasonable in enforcing a rule which they had not enforced since the condominium was registered in 1989."

[20] While, clearly, there have been more cats living in the building over the years than Mr. Greco was willing to acknowledge, it is also evident that the majority of unit owners are opposed to pets. Dr. Norman Wood, a unit owner since 1988 and a member of the Board of Directors of the N.N.C.C. who chaired the annual meeting of unit owners in September of 1997, in his affidavit of July 15, 1998, stated that the Board of Directors [on October 21, 1997] sought the views of all unit owners respecting the no pet rules and received 66 responses which represents 71% of owners. Of these owners, 49 opposed changing the pet rules and 17 said they would agree with a conditional change. Some owners indicated that they bought units there on the basis of the no pet rules and three owners indicated that they are allergic to cats. Dr. Wood also stated that a no pets sign has been posted on the front door of the condominium complex since about January, 1997.

[21] In her response to the affidavit of Dr. Wood, Mrs. Chassie restated some of her allegations about cats being in the complex over the years to the knowledge of the Board. She also submitted that, since each unit is "concrete enclosed with its own heating

and air-conditioning system", a cat "should pose no health problem to someone allergic to cats". In support of this argument she appended a letter from Dr. Donald A. Hitch, M.D.F.R.C.S.[C] of Dundas, Ontario, dated June 22, 1998 which reads as follows:

"Many people are allergic to cat antigen, some suffering violent reactions, in their respiratory tract. In order to have a reaction, the sensitive person has to contact the cat or rooms where the cat has resided.

If a cat were confined to a room or rooms, and that cat never allowed to venture beyond those rooms, there is no possibility that cat antigen could go beyond this restricted area except through a common air circulation system."

[22] Before leaving the facts, I wish to refer in more detail to the subject of Mrs. Chassie's health. In paragraph 2(a) of her responding material and paragraph 15 of her affidavit of September 10, 1998, (both set out above). Mrs. Chassie referred to her mental and physical health problems (depression and high blood pressure) and submitted that removal of her cat, which she finds to be a calming influence, would be deleterious to her health. Further, she submitted several letters from medical practitioners to support her allegations. The letter of Dr. J. Henry, her family physician, dated January 9, 1995, (set out above) refers to the "extreme emotional distress" loss of her cat would cause her. Dr. Henry wrote two further letters dated May 15 and August 8, 1998. They read as follows:

"Mrs. Chassie suffers from high blood pressure. The emotional well-being she gets from her cat are an important component of her treatment.

To separate her from her cat would cause severe emotional and physical detriment to this lady."

"Mrs. Chassie has been under my care since 1995. She has a history of depression dating back to approximately 1977.

More recently she has experienced severe episodes of depression in the spring of 1996, and again in January of 1997.

Mrs. Chassie was receiving treatment, including psychotherapy (sic) and antidepressants (Paxal 20 mg, po OD) from January through April of 1997.

The emotional trauma caused by the legal proceedings surrounding her cat have precipitated a worsening of her depression and antidepressants were initiated in December 1997. (Paxal 30 mg, po OD)."

Further, her former, now retired, family physician, Dr. F. Gillian Richards, wrote a letter dated May 29, 1998 which reads, in part, as follows:

"I was Mrs. Chassie's family physician for many years until the end of 1995 when I retired. I treated her throughout her long debilitating episode of myalgic encephalitis complicated by depression. During the years of her illness, her cat was a constant companion and great source of comfort.

I understand that she has been told to get rid of this cat. However, the animal is sixteen years old (elderly, I understand, for a cat) and unlikely at this age to adapt to a new home. Forcing Mrs. Chassie to put her loyal pet to sleep, or otherwise remove it, will make her feel guilty and could precipitate a relapse of her depression. This seems to be taking an unnecessary risk when the animal is likely to die soon of old age and when it bothers no-one.

I wish to emphasize that I am no long (sic) Mrs. Chassie's doctor, but I write as her former family physician. I recall vividly the years of despair she went through."

Finally, a letter from the Director of Human Resources of Mrs. Chassie's employer, Niagara College, confirms that she was on sick leave from February 13, 1991 to August 9, 1991, inclusive, after having been diagnosed as having myalgic encephalitis and depression.

THE LAW

[23] The Condominium Act provides as follows:

3(3) ... a declaration may contain,

(a) ...

(b) provisions respecting the occupation and use of the units and common elements;

12(3) The corporation has a duty to effect compliance by the owners with this Act, the declaration, the by-laws and the rules.

(5) Each owner ... has the right to the performance of any duty of the corporation specified by this Act, the declaration, the by-laws and the rules.

29(1) The board may make rules respecting the use of common elements and units or any of them to promote the safety, security or welfare of the owners and of the property or for the purpose of preventing unreasonable interference with the use and enjoyment of the common elements and of other units.

(2) The rules shall be reasonable and consistent with this Act, the declaration and the by-laws."

[24] Section 28 of the Condominium Act provides authority for a condominium board to pass by-laws. I have not quoted that section because it would appear, from a reading of subsection 28(1), that restrictions respecting pets are more properly provided for by rules under section 29. In any case, pursuant to subsection 28(4), the by-laws, like the rules, are required to be reasonable and consistent with the Act and the declaration. Subsection 49(1) provides for the corporation and any owner, inter alia, to bring an Application for a court Order to require the performance of any duty and subsection 49(2) provides as follows:

"49(2) The court may by order direct performance of the duty and may include in the order any provisions that the court considers appropriate in the circumstances."

[25] Ontario has recently enacted new legislation entitled the Condominium Act, 1998 which received Royal Assent on December 18, 1998. However, it has not yet been proclaimed. The new Act has amended and clarified the above provisions to some extent. For example, clause 3(3)(b), which provides that a declaration may contain "provisions respecting the occupation and use of the units and common elements", has been replaced by the more specific authority for a declaration to contain "conditions and restrictions with respect to the occupation and use of the units or common elements" (emphasis added). However, the new Act, like the present Act, does not contain any specific provisions relating to pets. Presumably, the law remains unchanged in this regard and declarations and rules will continue to be subject to the interpretations imposed by case law deriving from the present Act. It would appear that it is to remain the responsibility of the court to determine whether a pet prohibition or restriction in a declaration or rule is consistent with the Act and, to the extent required by the Act or case law, reasonable.

1. The Reasonableness of Pet Prohibitions and Restrictions

[26] John Mascarin, Assistant Town Solicitor, Markham, Ontario, in a case comment on *York Condominium Corp. No. 382 v. Dvorchik*, [1992] 24 R.O.R. (2d) 19, entitled *The Enforceability of No Pet Clauses in Condominium Documents*, [1992] 24 R.P.R. (2d) 24, reviewed and commented on the law respecting no pet clauses as expressed in that and other cases. It should be noted that this case comment was published before the 1997 Court of Appeal decision reversing the trial decision in *Dvorchik*. He stated at p. 24:

"No pets" clauses in condominium documents can be found either in the rules, by-laws or declarations of residential condominiums. In considering the validity of such provisions, the courts have typically drawn a distinction in determining the enforceability of such restrictions or prohibitions depending on the mechanism which is used to create the restriction or prohibition. Thus, the decisions have tended to create a varying or sliding scale test depending on the nature of the condominium document creating the regulation. This whole area has been very substantially influenced by recent developments in the law of landlord and tenant."

[27] I agree with Mr. Mascarin's summary of the condominium law respecting the enforceability of no pets provisions and I shall elaborate on these matters further below. At this point, I would simply say that it would appear that a distinction in the enforceability of such provisions arises because both condominium by-laws and rules are required to be reasonable. On the other hand, the Condominium Act does not specifically require a condominium declaration to be reasonable although the case law has, to a certain degree, imputed a requirement for reasonableness into the law respecting declarations. However, any imputed requirement for reasonableness is tempered by a strong presumption as to the validity of declarations.

[28] Mr. Mascarin's statement that the whole area has been substantially influenced by recent developments in the law of landlord and tenant is also interesting. Although he has probably modified his view in the light of the reversal by the Court of Appeal of the trial decision in *Dvorchik*, his statement raises the question of the extent to which modifications in the law and changes in societal attitudes in one field can influence the law in another related field. Since the subject under consideration is reasonableness and that is a criterium that, in all fields, has evolved over the years, as society has developed, I think it worthwhile, in the context of the present case, to look into the external influences, both legal and societal, that may have some impact on the interpretation of the Condominium Act at this time, as we head into a new millennium.

[29] If outside legal and societal influences have an impact on the interpretation of the Condominium Act in respect of pet prohibitions and restrictions, they do so because they reflect changing values and opinions as to what constitutes reasonable rules for community living. Nowhere are the changes in the attitudes of society respecting the reasonableness of pet prohibitions and restrictions more apparent than in the cases under the former Part IV of the Landlord and Tenant Act and the new Tenant Protection Act, 1997 and in the amendments to the law itself. Therefore, I shall review the developments in the landlord and tenant law before proceeding to consider reasonableness in the broad social sense and in the context of the condominium law.

(1) The Landlord and Tenant Act and Tenants Protection Act, 1997

[30] The cases under the Landlord & Tenant Act, prior to its amendment in 1990, for the most part, subjected the rights of pet owning tenants to the concerns and preferences of landlords and other tenants. These concerns are thoroughly summarized by Gotlib, D.C.J., in her February 2, 1989, judgment in *Cassandra Towers v. Ryll*, an appeal from which was dismissed without reasons on July 7, 1989. In that case, which is popularly known as the "Fluffy" case, the Respondents, after signing a lease with a no pets clause, kept their cat, Fluffy, in their apartment. While there were no complaints that the cat was bothering other tenants, the landlord applied the no pets clause without exception and brought an Application under clause 109(1)(c) of the Landlord and Tenant Act which provides for eviction where "(c) the conduct of the tenant ... substantially interferes with the reasonable enjoyment of the premises for all purposes by the landlord or other tenants." The position of the Applicant was that allowing pets would increase maintenance costs in the common and private areas. Also, the Applicant expressed concern for the safety of the tenants and the possible damage that might be caused by an animal.

[31] The position of the Respondents was that they should be allowed to keep their cat because there was a lack of affordable housing and they had a great emotional attachment to the cat, which had been their pet for 16 years. Their evidence was that the cat never left their apartment except to go to the veterinarian and had never created any odour or caused a problem of any kind. There were no complaints about it. Evidence was also given that Mrs. Ryll was in poor health to the point of requiring a wheel chair at times and that it was likely that, if the cat were to be evicted, "the inevitable result would be that she would have to be put down or euthanised".

[32] Despite her "sympathy" for Mrs. Ryll, and although "mindful of the public issues involved", Gotlib, J., observed that the duty of the Court is "to apply the law as it exists both by way of statute and decided cases". Accordingly, on the basis of the case law and because the landlord had consistently enforced the no pets provision and all the tenants had signed the same no pets agreement and expected that there would be no animals on the premises, she found that the Rylls' conduct in keeping the cat substantially interfered with the reasonable enjoyment of the premises by the landlord and the other tenants. On those grounds, the Application by the landlord was allowed and an Order made that, if the cat were not to be relocated before a specific date, a writ of possession was to issue.

[33] In support of her decision, Gotlib, J., cited various cases. In one of those cases, *Kay v. Parkway Forest Development* (1982), 35 O.R. (2d) at 392, Linden, J., for the Divisional Court, stated that the court, in deciding whether to enforce a no pets clause, should consider "the nature of the conduct complained of, its duration, its extent and its seriousness". In that case, a no pets clause, alone, was held to be insufficient to cause the eviction of a dog loved by all the tenants. In the *Kay* case, and some other

cases cited by Gotlib, J., the decision was based on whether, regardless of a no pets clause, the conduct complained of was contrary to the Landlord and Tenant Act in that it actually substantially interfered with the reasonable enjoyment of the premises by the landlord and other tenants. However, in many other cases, it was held that simple evidence of complaints made by tenants, or the strict and consistent enforcement of a no pets rule by a landlord, was sufficient grounds to establish substantial interference on the basis that the landlord and other tenants had a right to have the covenants enforced. Further, in at least one case, judicial notice was taken that some people are allergic to or have an aversion to cats.

[34] After the Ryll decision, there was considerable public and press sympathy for the plight of the Rylls and concern about the arbitrary limitations on the right of tenants to possess pets, even long term members of the family. One further decision the next year, 1990, added to the momentum for change. In *Montcrest Towers v. Withers*, [1990], a decision by Rapson, D.C.J., on May 31, 1990, an Application for the termination of the tenancies of three different tenants was granted. As stated in the head note to the case:

"The court accepted the evidence that animals allowed on the premises caused allergic problems, dirt, noise, odour and increased the landlord's maintenance costs. There was a reasonable expectation of all tenants that they would be living in a pet free environment. Taking all factors into consideration, the court concluded that the presence of pets amounted to a substantial interference with the reasonable enjoyment of the premises by other tenants and the landlord. Under the circumstances the court refused to exercise its discretion under section 121 of the Landlord and Tenant Act and granted the landlord the writs of possession."

[35] The Withers case was very quickly followed by amendments to the Landlord and Tenant Act designed to provide criteria to be used by the courts when considering Applications for the termination of tenancy agreements where the mere keeping of pets by a tenant was the landlord's main complaint. On introducing the amendments in Legislature, the then Attorney General of Ontario, the Honourable Ian Scott, referred to the decisions in the Withers and Ryll cases and explained the purpose of the Bill (as quoted by Cusson, J., in *Couch v. Deopersaud*, on February 14, 1991) as follows:

""The purpose of the Bill is to protect tenants from eviction if they have well-behaved pets that have not caused harm and are not dangerous.

Until last year it was clearly understood that breach of a no-pet provision in a lease was not a sufficient ground for eviction. Eviction is only permitted if the landlord proves that one of the grounds sets out in the Landlord and Tenant Act has been met. Eviction is possible if, for example, a pet has substantially interfered with other tenants.

On May 31 of this year, however, a judge evicted three tenants although there were no complaints about behaviour of their pets. The judge decided in a wide-ranging decision, that the mere presence of a pet, even a harmless pet, could amount to a substantial interference with others. The judge relied heavily on the fact that all tenants had signed leases prohibiting pets. A similar result in a narrower framework occurred in a case last year.

The amendments in this Bill will ensure a careful balancing of the rights of landlords and tenants.

The amendments recognize that in a building where animals have caused problems, it may be difficult for the landlord to identify specifically which pet or pets are responsible. If a landlord is seeking to evict a tenant because of a pet, therefore, the amendments will require the landlord to prove [that] animals of the same species as the tenant's have caused problems."

[36] He concluded his remarks as follows:

"I believe these amendments strike a fair balance that will permit action to be taken against irresponsible pet owners but will protect tenants whose pets are well behaved, do not cause harm and are not dangerous.""

[37] The amendments continued the prior law in that they permitted a landlord to apply for the termination of a tenancy where:

"107(c) the conduct of the tenant or a person permitted in the residential premises by the tenant is such that it substantially interferes with the reasonable enjoyment of the premises for all usual purposes by the landlord or the other tenants;

(d) the safety or other lawful right, privilege or interest of any other tenant in the residential premises is or has been seriously impaired by an act or omission of the tenant ..."

However, while those provisions were similar to the provisions of the previous law, the amendments went further to provide specifically for the manner in which the law was to be applied where an Application for termination of a tenancy agreement was based on the presence, control or behaviour of an animal on the premises. The amendments prescribed a double test that must be met before an eviction order could be made, whether or not there was a no pets agreement in place. Firstly, pursuant to subsections 107(6) and 108(1), the judge must be satisfied that:

"(a) the past behaviour of an animal of that species has substantially interfered with the reasonable enjoyment of the premises for all usual purposes by the landlord or the other tenants;

(b) the presence of an animal of that species has caused the landlord or another tenant to suffer a serious allergic reaction; or

(c) the presence of an animal of that species or breed is inherently dangerous to the safety of the landlord or the other tenants."

Even where one of the general tests set out in subsection 107(6) or clause 108(1) (a) or (b) was met, an Order still could not be issued if the judge was satisfied that the particular animal kept by the tenant did not cause or contribute to the substantial interference or to the allergic reaction. The general test relating to danger was not made subject to the second test relating to the particular animal. Further, pursuant to subsection 109(1), the provisions of a tenancy agreement respecting pets could not be considered in making a determination pursuant to section 107 or 108.

[38] The 1990 amendments to the Landlord and Tenant Act were somewhat lengthy and cumbersome. This is possibly why the law was clarified and refined in the Tenant Protection Act, 1997, which replaced Part IV of the Landlord and Tenant Act, effective June 17, 1998. It provides, in part, as follows:

"No pet" provisions void

15. A provision in a tenancy agreement prohibiting the presence of animals in or about the residential complex is void.

Termination for cause, reasonable enjoyment

64(1) A landlord may give a tenant notice of termination of the tenancy if the conduct of the tenant, another occupant of the rental unit or a person permitted in the residential complex by the tenant is such that it substantially interferes with the reasonable enjoyment of the residential complex for all usual purposes by the landlord or another tenant or substantially interferes with another lawful right, privilege or interest of the landlord or another tenant.

Termination for cause, act impairs safety

65(1) A landlord may give a tenant notice of termination if,

(a) an act or omission of the tenant, another occupant of the rental unit or a person permitted in the residential complex by the tenant seriously impairs or has seriously impaired the safety of any person; and

(b) the act or omission occurs in the residential complex.

Application based on animals

74(2) If an application based on a notice of termination under section 64 or 65 is grounded on the presence, control or behaviour of an animal in or about the residential complex, the Tribunal shall not make an order terminating the tenancy and evicting the tenant without being satisfied that the tenant is keeping an animal and that,

(a) subject to subsection (3), the past behaviour of an animal of that species has substantially interfered with the reasonable enjoyment of the residential complex for all usual purposes by the landlord or other tenants;

(b) subject to subsection (4), the presence of an animal of that species has caused the landlord or another tenant to suffer a serious allergic reaction; or

(c) the presence of an animal of that species or breed is inherently dangerous to the safety of the landlord or the other tenants.

Same

(3) The Tribunal shall not make an order terminating the tenancy and evicting the tenant relying on clause (2) (a) if it is satisfied that the animal kept by the tenant did not cause or contribute to the substantial interference.

Same

(4) The Tribunal shall not make an order terminating the tenancy and evicting the tenant relying on clause (2)(b) if it is satisfied that the animal kept by the tenant did not cause or contribute to the allergic reaction."

This is the current law applicable to landlords and tenants. It sets standards for eviction that have a reasonable basis and are not merely founded on the preferences of landlords and some anti-pet tenants. The standards are basically nuisance (reasonable enjoyment), health (allergic reaction) and danger.

[39] The landlord and tenant cases since 1990 reflect the need to show substantial interference with the enjoyment of the premises that goes further than a mere no pets agreement and constitutes actual substantial interference. For instance, an Application to terminate a tenancy agreement was allowed in *Denewood Apartments v. Dodds* [1993] wherein the issue was the noise caused by the three dogs kept by a tenant. On the other hand, an Application was, in effect, not allowed in *Thunder Bay District Housing Authority v. Stephens* (1990), 12 R.P.R. (2d) 247 decided by Kurisko, D.C.J., while the amendments to the Act were pending. In that case, two cats were kept by a tenant contrary to a no pets clause in a lease. Similarly, in *Dassios v. Budai* (1996), 2 R.P.R. (3d) 206, Pitt, J., found that the mere presence of a dog in a rental unit was not sufficient grounds to terminate a tenancy notwithstanding a no pets clause in the rental application signed by the tenants. He found that the dog was quiet and well behaved and did not interfere with the reasonable enjoyment of the premises.

[40] As is apparent from the above statutory amendments and case law, the attitudes of the law and society respecting the reasonableness of pet prohibitions and restrictions in the landlord and tenant field have evolved significantly over the years so that, no longer, can mere anti pet preferences result in a finding that the presence of a pet in a residential complex constitutes substantial interference with the reasonable enjoyment of the complex by other people. Now, the balance of rights based on the test of reasonableness, at least in this field, has shifted to favour tolerance of pets in a residential complex unless there is a genuine substantial reason for their exclusion, such as nuisance, the potential for allergic reactions or danger.

(2) The Therapeutic Value of Pets

[41] As stated above, the attitudes of society respecting the reasonableness of pet prohibitions and restrictions have evolved significantly over the years as is particularly evident from developments in the landlord and tenant laws. Before leaving the topic of the evolution of social attitudes, I should like to briefly direct attention to current expressions of views outside the legal system as to the value of domestic animals.

[42] In considering what are the present attitudes of society towards pets and their value for physical and mental therapeutic purposes, I have paid close heed to recent newspaper reports respecting domestic animals. It has long been recognized that seeing eye or guide dogs are vital helpmates to their owners and should be allowed to accompany them everywhere. But what about other animals? Let me refer to some of the recent articles I have noted, all of which, except the last one, were published in the *St. Catharines Standard*.

[43] In his syndicated column, "Dr. Game", W. Gifford Jones, in an article published September 14, 1998, entitled "Dog's bark warns of epileptic attack", commented on reports of various disability support animals including a schnauzer which invariably

warns its owner about 40 minutes before an epileptic attack and a brown Labrador dog which has been trained to assist and restrict some activities of an autistic child much as a guide dog does for a blind person. He explained that the Labrador dog was trained by a Burlington, Ontario, not-for-profit organization founded in 1996 to provide service dogs for Canadians suffering from epilepsy, hearing loss, physical disabilities and autism. Surely, animals trained to assist persons with physical disabilities are as necessary to the owners who rely on them as seeing eye or guide dogs and should be widely accepted.

[44] Let me now turn to what is currently being said about animals which might be termed companion or comfort animals and their value to the mental well being of people. The growing awareness of the extent to which animals improve the mental and physical well being of people has been recognized by the St. John Ambulance Society by its institution of its Therapy Dog Program. An article entitled "Dr. Champ", published January 9, 1999, describes the program and the regular visits of a German shepherd named Champ and his owner, Henry Clement, to two homes for seniors in St. Catharines. The article states in part:

"During regular visits to hospitals and nursing homes, program members and their dogs provide companionship to the sick and the lonely ...

A small dose of Champ goes a long way toward improving a resident's physical and mental well-being. Therapy dogs have been shown to lower blood pressure and help people relax, Clement said.

Since its inception in Ontario, thousands of pets have become therapy dogs.

"It's a very, very worthwhile program," said Manzuk. [Kevin Manzuk, coordinator for the program in St. Catharines] "It's amazing to see what these dogs do. They lift people's spirits; they bring people out of their shells."

[45] Other organizations, as well as the St. John Ambulance Society, have recognized the importance of animals for mental therapy. I take judicial notice of the fact that many seniors homes in St. Catharines and elsewhere retain at least one resident dog or cat and I have been informed of a senior's home in St. Catharines that keeps a cat as a pet on every floor. Further, I have personally observed how the faces and eyes of sick or wheelchair bound seniors in hospitals and homes light up when they are approached by a friendly animal. They can hardly wait to pat or cuddle it. Objections are rare.

[46] Turning from animals as guests or residents in institutions to companion animals in the home, I would refer to an article by the syndicated columnist, Dr. Robert Wallace, published in late 1998 and entitled "Some Therapists can purr or bark". In the article, Dr. Wallace refers to "what some professionals have to offer on this subject" [pets]:

"Pets make you laugh and take your mind off your troubles. They are marvellous therapeutic agents," says Dr. James Lynch, professor of psychology at the University of Maryland and an expert on loneliness ...

The day may soon come when pets are prescribed instead of pills, says Dr. Leo Bustad, dean of Veterinary Medicine at Washington State University. Scientists, psychologists and physicians all around the world are finding that the companionship of pets can improve your health and even help you live longer."

[47] Finally, I would refer to an article on the St. Petersburg Times of Florida dated November 27, 1998, entitled "Troubled juveniles to train dogs for elderly companions." The article describes how, pursuant to an idea conceived by an appeals court judge, teens (now boys and soon girls) incarcerated in Florida correction centres are being trained, in a program called FETCH, to teach dogs intended to be donated as companions for elderly people. The program provides further for special benefits such as free dog food and veterinary care to be provided to recipients of dogs who enlist them in a community service program.

[48] While the above newspaper reports and other observations could hardly be called empirical scientific evidence, I think they do give some indication of developing professional and social attitudes as to the value of pets for therapeutic purposes both in the sense of the reliance on the animals for assistance with physical disabilities and in the sense of the mental and physical comfort provided by a loving pet.

[49] In deciding to incorporate into this judgment, both under this heading and in my conclusions respecting the reasonableness of pet prohibitions, facts not proved in the evidence, I have been influenced by the thinking of the Honourable Mr. Justice Thomas A. Cromwell of the Nova Scotia Court of Appeal, as set out in a Paper prepared for presentation at the Ontario Court (General Division) Education Seminar "Judging in a Diverse Society" held October 28-30, 1998. He stated:

"The great American evidence scholar, James Bradley Thayer wrote in 1898 that in judicial reasoning, as in any other kind of reasoning "... not a step can be taken without assuming something which has not been proved." Judges and juries must bring to their task a wide array of facts and a multitude of understandings about the nature of things -- in short, common knowledge and common sense. Resort to facts not proved in evidence is, in this sense, necessary because the task of judging is impossible without it. Reliance on extra-record facts is, therefore, not something which is suspect, but something which is essential.

The use of extra-record facts is necessary in another sense. Judges and juries are permitted -- indeed required -- to know what is known to intelligent persons generally in the community. This is required not only for the proper carrying out of judicial duties, but for maintaining public confidence in the process. The results reached by judges and juries are not likely to be respected if they appear to be ignorant of things that everybody else knows.

Not only is use of extra-record facts necessary in both of these ways, it is also desirable. As Edmund M. Morgan put it in his leading article, "Judicial Notice" (1944), 57 Harv. L. Rep. 269, "... if the common law is to grow through adaptation to changing conditions by means of judicial decisions, the device by which knowledge of the changed conditions becomes part of the court's working equipment is judicial notice." The flexibility and adaptability of the common law depend, at least in part, on the use of evolving conceptions of common knowledge and common sense."

(3) The Condominium Act

[50] Subsection 3(3) of the Condominium Act, set out above immediately after the heading THE LAW, provides that a declaration may contain provisions respecting the occupation and use of the units and common elements. Further, subsection 29(1) provides that the board of a condominium corporation may make rules respecting the use of common elements and units to promote the safety, security or welfare of the owners and property or for the purpose of preventing unreasonable interference with the use and enjoyment of the common elements and of other units. The rules are specifically required to be reasonable and the

case law indicates the declaration should be reasonable. As I stated above, there may be some distinctions in enforcement depending on whether a pet prohibition is contained in the declaration or in the rules of a condominium. Because, in the present case, the prohibition is in the Declaration as well as in the Rules and, because the presumption of validity is stronger in respect of provisions in declarations, I shall direct my attention more to the cases relating to prohibitions in declarations than to those in condominium rules.

[51] Counsel for the Applicant cited a number of cases in support of his position as follows:

[52] In *Peel Condominium Corporation No. 78 v. Harthen et al* (1978), 20 O.R. (2d) 225, the Declaration creating the condominium corporation contained a prohibition against pets. Because some unit owners were either misled by representatives of the developer or actually assured by them that pets would be permitted, some 22 out of 204 unit owners acquired or continued to possess pets after moving in the complex and resisted attempts to have them comply with the prohibition. *Misener, Co. Ct. J.*, held that, although the change in the proposed declaration by the developer to include a no pets provision might be unfair or unjust, it was a deliberate change and the condominium corporation had a duty to effect compliance. Also, since the great majority of the owners had adhered to the prohibition, he decided that he was duty bound to exercise his judicial discretion in favour of allowing the Application.

[53] In *Re Carleton Condominium Corp. No. 279 and Rochon et al* (1987), 59 O.R. (2d) 545, (C.A.) the respondents, in purchasing a penthouse unit from the condominium developer, included in the agreement the right to install a satellite dish on the roof. This arrangement was not included in the Declaration and, as the existence of the dish was opposed by the condominium corporation after the unit owners had taken control of it, an Application was brought for its removal. The Court of Appeal allowed an appeal from an Order dismissing an Application to remove the dish. *Finlayson, J.A.*, stated at p. 552:

"The declaration, description and by-laws, including the rules, are therefore vital to the integrity of the title acquired by the unit owner. He is not only bound by their terms and provisions, but he is entitled to insist that the other unit owners are similarly bound. There is no place in this scheme for any private arrangement between the developer and an individual unit owner. If an individual arrangement is made, it must be disclosed in the declaration (s. 3(1)(f))."

He stated further at p. 553:

"I do not believe that the declarant can unilaterally change the declaration, cause the corporation to change it, or excuse individual unit owners from compliance therewith."

He went on to conclude at p. 555 that, while an order of this nature is discretionary, he was not persuaded that this was a proper case for the court to exercise its discretion in favour of the Respondents.

[54] In *Metropolitan Toronto Condominium Corp. No. 776 v. Gifford* (1989), 6 R.P.R. (2d) 217, a unit purchaser who was confined to a wheel chair and who relied on his small poodle for comfort and support acted, in bringing the dog into his unit, on the statement of a developer's agent that small dogs were permitted in the condominium whereas, in fact, pets were prohibited by the Declaration. An Application to remove the dog was allowed although no complaint about its behaviour had been made. *Herold, D.C.J.* first considered the Ontario Human Rights Code and found that subsection 46(2) (now 47(2)) of the Code does not apply to cause the Code to prevail over the Declaration because subsection 46(2) of the Code provides only that the Code prevails over an Act or a Regulation and a declaration is not such an enactment. Further, although Mr. Gifford suffered from a handicap, as it is defined in the Code, he was not being discriminated against pursuant to section 10 of the Code in that no person (handicapped or otherwise) was allowed to have a pet on the property. He added at p. 222:

"Even if this were not so I would have found that the exception contained in section 10(1)(a) of the Code which excepts those requirements, qualifications or factors which are reasonable and bona fide in circumstances would apply ..."

He then turned to the Declaration and found that the no pets clause was reasonable in that it was agreed to by the majority of the occupants. Also, the covenant did not seem unfair to him in that it was not simple a blanket arbitrary no pets clause but rather permitted a guide dog, one cat, fish and certain caged birds and animals. He concluded that his discretion should be exercised in favour of enforcing the Declaration. Referring to the misleading information provided by the agent of the developer, he followed the Court of Appeal decision in *Rochon*, above, in stating that there is no place for a private arrangement between a developer and an individual owner that is not disclosed in the Declaration.

[55] In *York Region Condominium Corp. No. 585 v. Gilbert* [1990], dated January 23, 1990, *Gilbert, D.C.J.*, followed the reasoning in *Gifford* in enforcing a no pets provision in a condominium declaration and ordering the eviction of a Collie dog about which there had been several complaints. The unit owners had been made aware of the provision before purchasing the unit and taking possession of it. *Gilbert, D.C.J.*, quoted the judgment of *Allen, J.*, in *York Condominium Corporation No. 216 v. Borsodi et al.* at p. 107, wherein *Allen, J.*, quoted Judge Moore of the District Court of Appeal of Florida in *Hidden Harbour Estates, Inc. v. Basso* (1981), 393 (2d) 637 at pp. 639 and 640 as follows:

""There are essentially two categories of cases in which a condominium association attempts to enforce rules of restrictive uses. The first category is that dealing with the validity of restrictions found in the declaration of condominium itself. The second category of cases involves the validity of rules promulgated by the association's board of directors or the refusal of the board of directors to allow a particular use when the board is invested with the power to grant or deny a particular use.

(1) In the first category, the restrictions are clothed with a very strong presumption of validity which arises from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed. Such restrictions are very much in the nature of covenants running with the land and they will not be invalidated absent a showing that they are wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right.""

Gilbert, D.C.J., commented that "the rationale of that judgment is of assistance and applicable to the present case". He concluded by stating: "It seems to me that a prohibitive pet restriction could be contained in the Declaration or the bylaws or the rules of a condominium corporation provided that the prohibitive pet restrictions is brought to the attention of a purchaser of a condominium unit prior to the closing of the sale and purchase of the unit. ..."

As long as a restriction in a Declaration bylaw or rule of a condominium corporation is intra vires and is reasonable and consistent with the condominium Act, it should be enforceable."

[56] Similarly, in *Peel Condominium Corp. No. 338 v. Young* [1996], Webber, J., followed the reasoning in *Gifford and Gilbert* and allowed an Application to evict a dog which exceeded the 25 pound restriction on pets contained in the Declaration. In so doing, he said that he agreed with counsel that it is an implied term of a Declaration that a pet restriction should be reasonable. However, the weight restriction was "more reasonable than a blanket denial of pets". While the dog was much needed, it was not as necessary to the respondents as the dog referred to in *Gifford* or in the 1993 decision of Hogg, J., in *Ferris*, reviewed below, in which an Order was made to permit a hearing assist dog to remain in a condominium.

[57] The last case cited by the Applicants was *Peel Condominium Corp. No. 449 v. Hogg* (1997), 8 R.P.R. (3d) 145, another case in which the original declarant of a condominium corporation did not enforce the pet prohibition provisions in the Declaration while it controlled the corporation from 1993 to 1995. As a result, numerous unit owners acquired pets. When the first unit owner Board of Directors was elected in 1995, it turned its attention to the perceived pet problem and all owners, except the Respondent, agreed to remove their pets. Carnwath, J., held, following *Rochon and Gifford*, that the equitable doctrines of laches and acquiescence do not apply to validate a private agreement made between the declarant and some unit owners in the light of the immediate action taken by the first unit owners' Board of Directors. Consequently, he exercised his discretion in favour of enforcing the Declaration.

[58] In support of their position, the Respondents referred to two cases wherein Applications to evict pets were dismissed.

[59] In *York Condominium Corporation No. 375 v. Dodd*, dated April 13, 1987, Trotter, D.C.J., refused to enforce a no pets provision in a Declaration where the Respondents had owned the dog for eight years, it was not a nuisance and it was required for the health of Mrs. Dodd. The evidence of her poor health and the need for her dog was supported by a letter from her doctor. Trotter, D.C.J., stated:

"I put this case on a parallel and on the same basis that I would with someone that required a seeing eye dog."

He added that "... only because the reasons are extraordinary" was he dismissing the Application. He indicated that he did not intend the decision to be an excuse for other people to disobey the Declaration. In his judgment, he referred only to the facts and did not review the law.

[60] In *Waterloo North Condominium Corp. No. 198 v. Donner*, (1997), 36 O.R. (3d) 243, 15 R.P.R. (3d) 134, Salhany, J., dismissed an Application to evict a "hearing ear" dog from a condominium unit in spite of a no pets provision in the condominium Declaration. In that case, the Respondent purchased a unit in 1988 and agreed to abide by the Declaration and Rules. After renting the unit to tenants for several years, in 1977, she moved into the unit with her mother who was totally deaf and relied on her dog to assist her in hearing heat and smoke alarms, the telephone and the entrance intercom. Salhany, J., dismissed the Application on the grounds that the Declaration contravened the Human Rights Code. He stated:

"In this case, s. 29(1) of the Condominium Act has no application to these proceedings. Section 29(1) deals with rules governing the use of common elements and the units. Section 29(2) requires that such rules "be reasonable and consistent with" the Act, the declaration and the by-laws. We are dealing here with a declaration. The question of the "reasonableness" of the declaration is not an issue that may be attacked. Even assuming that it is an issue, I am not convinced that a "no pet" restriction is unreasonable. Surely those purchasers of a unit who understood that they were buying into a "no pet" building are entitled to have that understanding protected. If the respondent is to succeed in this application, then it must, in my view, be on the basis that the declaration violates the Ontario Human Rights Code.

With respect, I cannot agree with Herold J. that the Code does not apply to a declaration made under the Condominium Act. As McIntyre J. noted in *Ontario Human Rights Commission v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202 at p. 214, 3 C.H.R.R. 781 at p. 785, "[t]he Ontario Human Rights Code has been enacted by the legislature of the Province of Ontario for the benefit of the community at large and of its individual members". The parties are not entitled to contract out of its provisions. To allow the parties to do so would be contrary to public policy. Surely, a declaration prohibiting accommodation based on race, such as a "no blacks or a "no whites" clause, would offend and not be tolerated by right-thinking members of the Canadian community. It would conflict with the Code, notwithstanding that the unit buyers contracted to live in an "all white" or an "all black" building. I cannot see why handicapped people are entitled to any less protection under the Code. In my view, the Human Rights Code precludes enforcement of the declaration if it would result in the discrimination of Ms. Donner's mother because of her specific handicap.

Ms. Rose argued that the declaration does not prohibit Ms. Donner's mother from living in the condominium, only her dog. The difficulty which I find with that argument is that enforcement of the declaration would effectively prohibit her from living in the building. The evidence is that she is 85 years of age and has been deaf for many years. She is fully dependent on her dog to enable her to function on her own. For example, the dog assists her in hearing the heat alarms, smoke alarms, the telephone, and the intercom if someone is at the door. In other words, it is the dog who hears for her and alerts [her] so that she can function without the assistance of another human being.

In my view, it is not incumbent on Ms. Donner to establish that there are no other ways for her mother to function independently of her without a dog, such as with the hiring of a housekeeper. There is no obligation upon her to exhaust every other means of assistance before she is entitled to the protection of the Ontario Human Rights Code."

In so deciding, Salhany, J., was relying on subsection 2(1) of the Code which provides:

"2.(1) Every person has a right to equal treatment with respect to occupancy of accommodations, without discrimination because of ... handicap ...".

Because section 10 of the Code defines handicap to include "deafness or hearing impediment", to enforce the Declaration would, in fact, result in discrimination against Mrs. Donner's mother.

[61] In addition to the cases cited by the parties, there are two other cases to which I wish to make reference.

[62] In *Nippissing Condominium Corp. No. 24 v. Ferris* [1993] Hogg, J., after a careful analysis of *Gifford*, dismissed an Application to evict a well behaved Maltese dog belonging to an eighty year old woman who was in bad health and suffered from hearing problems. Although the dog was not trained under the Hearing Ear Dog program, it, in fact, served as a hearing assist dog

and, hence, was a therapy utility animal and not merely a companion animal providing emotional support as was the situation in the Gifford case.

[63] In *York Condominium Corp. No. 382 v. Dvorchik et al* (1992), 24 R.P.R. (2d) 19, a condominium Rule provided that pets must not exceed 25 pounds at maturity. The two unit purchasers who owned dogs which exceeded this weight were both aware of the rule when they brought the dogs into the building and were not, in any way, misled or misinformed about the Rule. Keenan, J., dismissed the two Applications to evict the dogs stating that the evidence proffered in support of the rule failed to meet the test in subsection 29(1) of the Condominium Act that the "safety security or welfare of the owners" was more threatened by large dogs than by small dogs. He considered it to be "unreasonable to condemn a dog who is not guilty of misconduct, simply because of its size." Also, in his view, there was no evidence that large dogs unreasonably interfere with the use and enjoyment of the common elements and of other units any more than small dogs. He concluded that the rule was unreasonable and not valid. This was the decision that led Mr. Mascarin, in the case comment referred to above, to conclude that the condominium law had been substantially influenced by the recent developments in the law of landlord and tenant.

[64] On the appeal in *Dvorchik*, [1997] the Court of Appeal reversed the decision of Keenan, J., stating in its endorsement as follows:

"In an application brought under s. 49(1), a court should not substitute its own opinion about the propriety of a rule enacted by a condominium board unless the rule is clearly unreasonable or contrary to the legislative scheme. In the absence of such unreasonableness, deference should be paid to rules deemed appropriate by a board charged with responsibility for balancing the private and communal interests of the unit owners.

With respect, we do not agree that the rule restricting the size of pets is either unreasonable or inconsistent with the Condominium Act. This is a condominium with several hundred units and over a thousand residents. On its face, it is both reasonable and consistent with the legislation that there be a limit on the size - or for that matter the number - of pets to prevent the possibility of "unreasonable interference with the use and enjoyment of the common elements and of the other units." There are, undoubtedly, different approaches the board could have taken to regulate the keeping of pets owned by residents, and it may be that the "25 pound rule" is not the best rule or the least arbitrary. But this does not make it an unreasonable one."

(4) Conclusions Respecting the Reasonableness of Pet Provisions

[65] My consideration of the question of reasonableness in the context of the developing statute and case law in the landlord and tenant and condominium fields, and in the context of societal views, generally, as to the value of domestic animals, has led me to the conclusion that, as modern society has developed and evolved into the electronic age, the law and societal attitudes have also evolved to give rise to new concepts as to what are reasonable rules for community living and to a greater appreciation as to how pets can appropriately fit into a closely knit community.

[66] When condominiums first became popular about thirty years ago, developers and unit owners were less experienced in crafting declarations, by-laws and rules than they are today. As building standards were less stringent and many buildings may have had less sound proofing and less control of air circulation, than they do today, it made sense to write fairly stringent declarations, by-laws and rules to promote the safety, security and welfare of the owners and of the property and for the purpose of preventing unreasonable interference with the use and enjoyment of the units and common elements. Given the, then, legally approved practice in rental accommodation agreements of trying to avoid problems of nuisance and allergies by prohibiting pets, it is not surprising that condominium corporations followed established precedents and banned pets. Similarly, they banned businesses in most residential condominiums. Here, again, the object probably was to protect the peace and enjoyment of the residential community by excluding an activity that could create a nuisance. Businesses might create noise or odours and bring strangers, namely, employees and customers, onto the property together with motor vehicles that could plug parking lots.

[67] What made sense thirty years ago is not necessarily reasonable today. In the electronic age, a business is often conducted by computer with none of the nuisance and traffic problems of the past. Yet, condominium corporations have been slow to recognize this evolution and permit residents to engage in private non-intrusive businesses. Similarly, in the field of tenancy accommodation, the law has been revised to recognize better building construction and ventilation and provide a more sophisticated and reasonable approach to animal control, that of regulation to prevent genuine problems rather than total prohibition. In the 1990s, two governments of Ontario have amended the landlord and tenant legislation to shift the balance of rights respecting pet ownership from emphasis on the preferences and concerns of landlords to greater tolerance of animals based on standards that allow the ouster of pets only where there is genuine substantial interference with the reasonable enjoyment of the premises by other people. No such amendments have been made to the Condominium Act and here, once more, many condominium corporations have been slow to change with the changing times and the needs of a modern society.

[68] While condominium residency is based on ownership rather than tenancy, in either case the building or related group of buildings may consist of a few units or be a large residential complex. In both kinds of land holding, people frequently live together in fairly close quarters. Given the similarities in living arrangements between rental and condominium units, a question arises as to why prohibitive rules that are unreasonable in respect of tenancy accommodation should be reasonable in respect of condominium accommodation.

[69] On the one hand it can be argued, as John Mascarin did at p. 28 of the case comment cited above:

"The community of interest shared by all members of a condominium corporation should be enough to permit one member to enforce (through the condominium corporation) a rule against another member without the requirement that extraneous, statutorily mandated safeguards be fulfilled."

On the other hand, it can be said that this point of view is simply an extension of the continuing, and possibly outdated, belief that majority preference should prevail even where there is no genuine substantial interference by one unit owner in the reasonable enjoyment of premises by another unit owner. Is that attitude reasonable today?

[70] Proponents of the position that group preference is a reasonable basis for pet prohibition rules would probably submit that people should be entitled to buy into what they expect to be a pet free environment and that, if purchasers know the rules when they choose to buy a condominium unit, it is reasonable to expect them to obey those rules. There is some merit in that argument. However, life, particularly in present day society, is not always that simple. In the *Donner* case, cited above, Mrs. Donner purchased a unit knowing the rules. After renting the unit to tenants for several years, she moved into her unit bringing with her

her elderly mother and a dog which acted as a hearing assist dog for her mother. Should she have been denied occupancy of her unit because of a change in circumstances? Salhany, J., in effect, answered that question in the negative on the basis of the Human Rights Code. However, there may be many other changes in the circumstances of unit owners in which it might be reasonable for them to keep a pet but in which it is questionable whether the Human Rights Code would apply. For example, as a person becomes older, he or she may lose a spouse and, for the first time in his or her life, begin to live alone. Should that person be forced to give up his or her condominium home if he or she tries to avoid depression and loneliness by acquiring a small four legged companion? Similarly, a unit owner may have an accident or illness and become housebound or wheelchair bound and, at that time, begin to feel a need for the comfort that can be provided by a small and faithful companion. (I think of Mr. Gifford and his small poodle in the Gifford case and of Sally Barton, the wheelchair bound unit owner in the present case, who has also been ordered to give up her cat.) It is not the young and the strong, who can easily adapt to the vicissitudes of life, or even healthy middle aged people, who may have or develop a need to enjoy the benefits of pet ownership. It is the sick, the incapacitated and the elderly who may have a pressing need for such support but be torn between retaining their condominium home and seeking the comfort and companionship of a pet. These are the same groups of people who are the most likely to wish to relinquish single family homes in favour of some group accommodation that will provide greater security and less home management. In the past, such people often moved in with their children or other family members or were sent straight to nursing homes. Now, many people wish to opt for the intermediate step of a condominium. Should such persons be forced either to remain in their single family homes or to choose rental accommodation because they are loathe to abandon a long time four footed member of their family as Dr. Wood, in his affidavit dated July 15, 1998, said he did with his five year old schnauzer on moving into the N.N.C.C. complex in 1988?

[71] Another argument supporting the proposition that a pet prohibition is reasonable is the allergies argument. Again, this argument has some merit although I think it can be met by reasonable restrictions rather than by an outright prohibition. This is particularly true where the animal can be, and like the cat in the present case is, confined to the owners' quarters and where the ventilation system is a modern one that precludes the spread of antigens from one unit to another.

[72] My consideration of the law and its development and of societal changes over the last few decades has led me to the conclusion that a total prohibition of animals and, in particular, of dogs and cats, is not reasonable today. That is not to say that any particular set of standards, such as those contained in the new landlord and tenant legislation, is particularly reasonable and ought to be acceptable in all circumstances in condominium declarations and rules. Different restrictions might be appropriate for different situations. For example, a limit on the size or weight or pets might be reasonable in some circumstances. What is important in order to make a rule reasonable today, in my opinion, is that the rule have some flexibility to accommodate the needs of different people, especially those of unit owners whose life circumstances change and of unit owners who own, or desire to own, pets that are unlikely to cause genuine substantial interference with the use and enjoyment of other units.

[73] I find some support for my conclusions on reasonableness in the decision of the Court of Appeal in Dvorchik although the Court, in that case, upheld a restrictive condominium rule. As set out above, the Court stated in its endorsement:

"In an application brought under s. 49(1), a court should not substitute its own opinion about the propriety of a rule enacted by a condominium board unless the rule is clearly unreasonable or contrary to the legislative scheme. In the absence of such unreasonableness, deference should be paid to rules deemed appropriate by a board charged with responsibility for balancing the private and communal interests of the unit owners."

[74] The court went on to say that it did not agree that a rule restricting the size of pets is "either unreasonable or inconsistent with the Condominium Act." It concluded that, while "it may be that the "25 pound rule" is not the best rule or the least arbitrary," this does not make it an unreasonable one".

[75] In the present case, the rule is a prohibition not a restriction and is very arbitrary since it denies the Respondents the right to keep a cat which cannot reasonably be said to interfere with the use or enjoyment of the common elements or the other units. With the greatest deference to the Board of Directors, I am of opinion that it is unreasonable in that it does not balance the private and communal interests of the unit owners.

[76] My conclusion that the pet prohibition in this case is unreasonable is possibly not sufficient to decide the case. The Court of Appeal, in Dvorchik, was considering a condominium rule not a condominium declaration, which is the governing document in the present case. As has been stated above, the courts have tended to draw a distinction in the enforceability of pet prohibitions and restrictions depending on the mechanism used to create the prohibition or restriction. Rules must be reasonable. The Condominium Act does not specifically require a declaration to be reasonable although case law has imputed some requirement for reasonableness into the law. On the other hand, there is a strong presumption as to the validity of declarations and declarations with some degree of unreasonableness have been upheld by the courts on many occasions, including in some of the above cited cases. Because of the presumption of the validity of declarations and the weight of the case law upholding pet prohibitions in declarations, I hesitate to exercise my judicial discretion to dismiss the Application solely on the basis of the unreasonableness of the provisions. I shall, therefore, consider the other defences raised by the Respondents in order to determine whether there are further reasons to lead me to exercise that discretion in favour of the Respondents in the circumstances of this case.

2. Laches and Acquiescence

[77] I now wish to turn to the second ground for dismissal raised by the Respondents, namely delay or laches and acquiescence. In all of the above cited cases in which there was a delay in attempting to enforce a condominium Declaration to oust a pet living in a condominium building contrary to the Declaration, namely, Harthen, Gifford and Hogg, or to otherwise enforce a Declaration, as in Rochon (the satellite dish case), the facts involved an agreement or implied consent between a developer and unit purchaser that was not, at the time of the agreement or subsequent to it, included in the Declaration of the condominium corporation. In each case, a subsequent Application by the unit owners' Board of Directors was allowed on the grounds that there is no place for a private arrangement between a developer and an individual owner that is not disclosed in the Declaration. In Hogg, Carnwath, J., stated that the equitable doctrines of laches and acquiescences did not apply to validate a private agreement made between a developer and some unit owners in the light of the immediate action taken by the first unit owners' Board of Directors in that case. In some instances, the factor, as in Gilbert, a part of the rationale for granting in other cases, as in Harthen, a judge, in that case, Misener, J., expressed the view that, even though the change from the proposed to the actual Declaration might be unfair or unjust, the Board of Directors had a duty to effect compliance. In each case, the court exercised its discretion by enforcing the Declaration.

[78] In some of the cases in which delay or an agreement, implied or otherwise, with a developer was not a

Application to oust a pet was the fact that the pet owner had been made aware of the no pets provision before purchasing the unit and taking possession of it but, nevertheless, had moved in with a pet. In those cases, there was no evidence of acquiescence by the condominium Board of Directors.

[79] The question, here, is what is the law where any delay in enforcement of the Declaration or acquiescence in the presence of pets, or both, emanates not from a developer but from the unit owners Board of Directors. The only two condominium cases that I have been able to locate on the subject of delay or laches and acquiescences do not relate to pets. Nevertheless, they may cast some light on the subject.

[80] In *Marafioti v. Metropolitan Toronto Condominium Corp. No. 775* (1994), 39 R.P.R. (2d) 47, Greer, J., upheld a condominium Declaration by refusing to grant an injunction to prohibit a condominium corporation from removing, or in anyway dealing with, a deck built by unit owners on their town house in contravention of the condominium Declaration, and by ordering the unit owners to remove the deck. This case did involve a preregistration agreement between the declarant and the unit owner and, in considering that aspect of the case, Greer, J., followed the reasoning in *Rochon and Gifford*, cited above. She then went on to ask whether, given the seemingly six year delay in the bringing of the Application by the owners' Board of Directors, the corporation is now estopped from enforcing its rights. She stated:

"The estoppel argument, as set out in the Canadian Encyclopedia Digest, Volume 10, Title 56, Section 51, Pg. 64 reads:

"Whenever an argument against relief that otherwise would be just is founded upon mere delay (that delay not amounting to a bar by the Statute of Limitations), the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

The effect of delay or laches is set out in *Farrell v. Manchester* (1908), 40 S.C.R. 339 (S.C.C.). There is no doubt that at first blush, the six year delay seems like an inordinate length of time to wait to bring the matter to Court. On the other hand, in my review of the facts and as I have set them out in these Reasons, it is clear that the protests began immediately upon the construction beginning."

She then reviewed the evidence respecting the actions taken by the parties during the six year period and concluded that the delay was "perfectly explainable".

[81] Greer, J., next questioned whether the Marafiotis had a defence based on the doctrine of laches. She stated:

"Would it be injustice to allow MTCC 775 the relief it is now requesting? Mere passage of time does not constitute laches. The equitable defence of laches is in the discretion of the Court. See: *Canada Trust Co. v. Lloyd*, [1968] 66 D.L.R. (2d) 722, and *Egnatios v. Leon Estate* [1990] D.L.R. (4th) 137. In *Egnatios*, supra, Sutherland, J. at p. 160 quotes Waters on the Law of Trusts in Canada, 2nd ed. (Carswell, 1984) at para. 1024 in speaking of the doctrine of laches:

"It is also closely related to the doctrine of acquiescence. Indeed, it is more likely that what the courts are really concerned with is implied acquiescence rather (than) delay itself. This is particularly true today when limitation statutes expressly apply to so many actions brought in equity."

There is nothing in the evidence presented to me which would lead me to believe that there was acquiescence on the part of the Board."

After reviewing further facts relating to negotiations between the parties over the six year interval, she concluded that, at no time, was the issue of the deck a dead issue and that, therefore, neither acquiescence nor the doctrine of laches applied to the facts of the case.

[82] The Ontario Court of Appeal [1997] dismissed an appeal by the Marafiotis holding that the Appellants had breached a condominium Rule and that the judge below was justified in exercising her discretion to grant the Respondents the relief requested. The Court of Appeal agreed with her that the Respondent did not acquiesce in the presence of the deck.

[83] In the second case to which I wish to make reference on the subject of laches and acquiescence, *York Condominium Corporation No 35 v. Mosseau et al* (1995), 48 R.P.R. (2d) 248, three different pairs of Respondents made alterations to windows in their condominium townhouses without the prior consent of the condominium corporation. The condominium Declaration required consent to any alterations not in conformity with the registered drawings. The Respondents, inter alia, argued laches and implied acquiescence in the changes. One respondent, who made the changes at a later date than another respondent, submitted that, if she had known she should not make a change, she would not have put herself in the position she did. Breckinridge, J., referred to the Marafioti case and the decision of Greer, J., that, although six years seemed like a long time to wait, in the case before her there was no acquiescence by the Board of Directors. He found that, in all of the cases before him, there was objective, solid evidence that the condominium corporation had acquiesced in the changes that had been made to the windows over a period of several years. In dismissing the three Applications, he stated at pp. 253-4:

"... it does not in my view lie within the authority of the Condominium Corporation to sleep on its rights so that people acquire or feel they have acquired a proprietary right to the amenities which they are enjoying."

[84] In the present case, although Dr. Wood indicated in his affidavit of July 15, 1998, that, on moving into the complex in 1988, he and his wife gave up their five year old Schnauzer dog and that some other unidentified unit owners also gave up their pets when they moved into the complex, there is substantial evidence that there have been cats in the building over the years. This is clear from the affidavits of Mr. and Mrs. Chassie, Sam Cino, John MacPherson and Sally Barton. The presence of cats is also evident from the minutes of the Board of Directors of the N.N.C.C. The minutes for the meeting of September 20, 1995, specify that, after a Mr. Smith commented that there were several cats in the building and asked if it should be allowed to continue, Peter Greco replied that "either this issue [cats] should be ignored or a complete crackdown on animals in the building be done". Also, the minutes for the meeting of November 25, 1996 indicate that it was suggested that letters be sent to all pet owners mentioning the Rule and informing them that, "when existing pets cease to reside in the building, no new pets will be allowed in the building." Further, at that meeting, "Mr. Greco explained that, because the Rule has not been enforced up to this point, a

precedent has been set and thus it may not stand up in a court of law." There is no evidence that any action respecting pets was taken after either of those meetings or, indeed, at any time before Mr. and Mrs. Chassie moved into the building. Further, I accept the evidence of the Chassies that they saw cats in the windows of the complex on their various visits to it and, indeed, saw a cat in one of the unit they visited. I also accept their evidence that they were not aware of the no pets provisions before they signed their offer to purchase and that, when they were informed of the no pets provision a few days before they took possession of their unit, they, nevertheless, had reason to believe that the provision was not being enforced and that there would be no problem. Finally, I believe Mrs. Chassie's statement that they would not have purchased a unit in the complex had they thought that there would be a problem about the cat.

[85] Given the facts I have just mentioned, I find that there have been cats in the building to the knowledge of the Board of Directors for a number of years, that they have delayed in enforcing the no pet provisions of the Declaration and Rules and, in so doing, have implicitly acquiesced in the presence of cats in the building. While there was not a long delay in the attempted enforcement of the Declaration in respect of the Chassies after they moved into the complex, the prior long delay and obvious acquiescence as to the presence of cats in the building led the Chassies, as in the case of the unit owner, Mrs. Mosseau, in the Mosseau case, to put themselves in a position they would not otherwise have put themselves in, namely, buy the unit. I agree with the conclusion of Breckinridge, J., in Mosseau that a condominium corporation cannot sleep on its rights and then enforce them against people who have relied on the non-enforcement to put themselves in a position of disadvantage they would not have put themselves in had the provisions been enforced uniformly and in a timely manner. Unlike, in the Marafioti case, there is no evidence of any actions taken by the N.N.C.C. prior to the autumn of 1997 that would justify and explain the delay in enforcement and lead the court to find that the equities favour the Applicant.

3. Human Rights Considerations

[86] The third and last ground for dismissal raised by the Respondents is the question of the application to this case of the Ontario Human Rights Code. They submitted that to require them to give up their cat would be cruel and inhumane because Mrs. Chassie suffers from mental and physical health problems and the removal of her cat would be deleterious to her health, particularly in respect of her problems with depression and high blood pressure. Her submissions are supported by her medical doctors.

[87] In the above cited cases in which the application of the Human Rights Code was raised, the courts have applied the Code to a somewhat limited extent. In Gifford, in 1989, Herold, D.C.J., found that, although Mr. Gifford suffered from a handicap as it is defined in the Code, in that he was confined to a wheelchair, he was not being discriminated against in that no persons, handicapped or otherwise, were allowed to have a pet on the property. Further, even if this were not so, the exception in clause 10(1)(a) (now 11(1)(a)) of the Code in respect of reasonable requirements would apply to preclude Mr. Gifford from keeping his dog. In Dodd, in 1987, Trotter, D.C.J., without referring to the Code or prior cases, dismissed an Application to evict a dog that was required for the health of Mrs. Dodd who was, according to her doctor, in poor health. He said that he put the case on the same basis as he would with someone who required a seeing eye dog. Similarly, in Ferris, in 1993, Hogg, J., after a careful analysis of Gifford, dismissed an Application to evict a dog belonging to an elderly woman who was in bad health and suffered from hearing problems. He did so on the basis that the dog served as a hearing assist dog and, hence, was a therapy utility animal not merely a companion animal providing emotional support as was the dog in the Gifford case.

[88] In 1997, in Donner, Salhany, J., went one step further to specifically disagree with the decision of Herold, J., in Gifford. In Donner, the dog in question also served as a hearing assist dog for an elderly woman. Salhany, J., dismissed an Application to evict the dog on the ground that the Human Rights Code precludes enforcement of the Declaration if it would result in discrimination in respect of a person because of a specific handicap. In response to the argument that the Declaration did not prohibit Mrs. Donner's mother, only her dog, from living in the building, he said that enforcement would effectively prohibit her from living in the building because she is deaf and fully dependant on the dog to assist her in hearing alarms, the telephone, etc.

[89] Of the cases, to which I have just referred, only in Dodd was a pet permitted on the general ground of the poor health of its owner without the additional factor of the animal providing assistance in respect of a physical disability such as deafness. Further, there has been some suggestion in various cases that a companion animal which provides emotional support is not a therapy utility animal and hence cannot entitle its owner to protection under the Code.

[90] The Human Rights Code provides:

"2(1) Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of ... handicap ..."

Subsection 10(1) defines "because of handicap" as meaning:

"for the reason that the person has or has had, or is believed to have or have had,

(d) a mental disorder".

[91] If Mrs. Chassie suffers from any handicap within the meaning of the Code, it is that of a mental disorder. The question is whether her depression can be considered to be a mental disorder within the meaning of the Code. The Code does not define mental disorder and no evidence was introduced as to the meaning of the expression. It is relatively easier to determine whether a person suffers a physical handicap as handicap is defined, in part, as meaning "any degree of physical disability, infirmity, malformation or disfigurement" and includes such disabilities as blindness and deafness. A handicap usually involves some inability to do some important things that most people can normally do. It has also been said to be a substantial ongoing limit on one's activities. A mental disorder, on the other hand, may not be as visible as a physical handicap and does not necessarily limit activities in the same way. The Shorter Oxford English Dictionary defines disorder using such expressions as "disturbance of mind" and "an ailment, disease. (Usually weaker than disease and not implying structural change)". The Tormont Webster's dictionary includes in its definition of disorder "imperfect functioning of the body or mind".

[92] Can it reasonably be said that Mrs. Chassie's depression brings her condition within the meaning of "mental disorder"? Her depression is not a temporary condition. Her history of depression dates back to approximately 1977. She was on sick leave for six months in 1991 suffering from myalgic encephalitis complicated by depression which was described by her former doctor, Dr. Richards, as being a "long debilitating episode". She also suffered severe episodes of depression in the spring of 1996 and from January to April, 1997. Speaking of the current situation, her present doctor, Dr. Henry, stated that to force her to abandon her cat

would cause her "severe emotional and physical detriment". He also said that "the emotional well being she gets from her cat are (sic) an important component of her treatment." and that the "emotional trauma caused by the legal proceedings surrounding her cat have precipitated a worsening of her depression." Her former doctor, Dr. Richards, agreed that removing the cat could "precipitate a relapse of her depression." On the basis of at Mrs. Chassie's history of depression, her present condition and the prognoses of her doctors, I find that Mrs. Chassie suffers from an ailment that can be described as a disturbance or imperfect functioning of the mind. It is a serious and long term condition and it is, therefore, a mental disorder within the meaning of the Human Rights Code.

[93] The last question to be answered is whether the Applicant, by bringing this Application, is discriminating against Mrs. Chassie with respect to the occupancy of accommodation within the meaning of the Code. I adopt the reasoning of Salhany, J., in Donner that, while the provision in the condominium Declaration prohibiting pets does not specifically discriminate against her, the enforcement of the Declaration would, in effect, do so. The enforcement would have an "adverse effect" on her within the broad concept of adverse effects discrimination. It would effectively prohibit her from living in the building because her cat is essential to her well being and "an important part of her treatment". Further, the argument that the cat is merely a companion comfort animal providing emotional support, and not a therapy utility animal like a seeing eye dog, does not stand. Her handicap is mental not physical. In the broad sense, as set out above under the heading The Therapeutic Value of Pets, there is a growing awareness of the extent which animals improve the mental and physical well being of people. It has been said that therapy dogs have been shown to lower blood pressure, another medical problem of Mrs. Chassie, and help people relax. In the specific circumstances of this case, a part of Mrs. Chassie's treatment for her mental disorder, depression, is the emotional support provided by her cat. I would, therefore, say that the cat is a therapy utility animal and that its ouster would constitute discrimination against Mrs. Chassie because of her handicap.

CONCLUSIONS

[94] I agree with counsel for the Applicant that the residence of the Chassie's cat in the N.N.C.C. complex is contrary to the condominium Declaration and Rules, that there is a strong presumption as to the validity of the Declaration and that the Board of Directors has a statutory obligation to enforce the Declaration and Rules. However, for the reasons set out above, I am of opinion that the pet prohibition is not a reasonable one. On the other hand, while the provision in the Declaration may not be reasonable, it is not necessarily invalid given the strong presumption in favour of the validity of Declarations. Nevertheless, I think it would not be fair to enforce it given that it is not reasonable and given the circumstances of the present case. The Chassies were put in a position of disadvantage in purchasing the unit that they would not have placed themselves in had they known, before they purchased their unit, of the cat prohibition and that an attempt to enforce it might be made. Their lack of comprehension of the situation is the fault of the Board of Directors. The Board has acquiesced in the presence of cats in the building over a number of years and has not provided any explanation to justify the delay in enforcement and lead the court to find that the equities favour the Applicant. Finally, I have found that Mrs. Chassie suffers from a handicap within the meaning of the Human Rights Code and that to enforce the Declaration would constitute discrimination against her because of her handicap. On the totality of all three grounds of defence, I find that this is a proper case in which to exercise my judicial discretion in favour of the Respondents and to dismiss the Application.

[95] Since the Respondents were self represented, and given the nature of the case and my decision, I do not think that this is a proper case for an award of costs.

[96] Application dismissed.

MacDONALD J.

CBR# 344

Wellington Condominium Corporation No. 61 v. Marilyn Drive Holdings Limited

20 O.R. (3d) 81

Action No. 5981/94 (Guelph) and 91-CQ-10 (Toronto)

Ontario Court (General Division), Herold J. October 6, 1994

Cases referred to

ACTION by a condominium corporation for a declaration of ownership of a unit in the condominium.

G.M. Caplan, for plaintiff.

S.W. Pettipiere, for defendant.

HEROLD J.: -- This is yet another in an expanding line of cases dealing with the ownership of the superintendent's suite in a condominium development.

The plaintiff is a condominium corporation created pursuant to the provisions of the Condominium Act, R.S.O. 1980, c. 84, as a result of the registration in the Land Registry Office of the declaration and description required by the Condominium Act. The corporation is the owner of the common elements of a 10-storey luxury apartment building located at 24 Marilyn Drive in the City of Guelph.

The defendant is, by virtue of a corporation reorganization, the successor to 24 Marilyn Drive (Guelph) Limited, the developer of the condominium project and will be referred to in these reasons as the "developer" or the "declarant".

In addition to the usual amenities in a luxury condominium apartment building, the building contains 56 dwelling units each of which was shown as a separate unit in the declaration and description, one of which, unit 201, is the subject matter of this litigation.

The plaintiff seeks a declaration that it is the owner of unit 201 as a result of what it alleges was the common intention of the developer and the unit purchasers or, alternatively, that it is entitled to a conveyance of the unit, in lieu of damages, as a result of an alleged breach by the developer/declarant of s. 52 of the Condominium Act.

Chronology

A brief chronology of some of the relevant events is as follows:

- a) September 27, 1988, the first set of condominium documents including the declaration, By-law No. 1, By-law No. 2, By-law No. 3 (Management Agreement), By-law No. 4 (Insurance Trust Agreement), proposed Rules, Budget, Disclosure Statement and Apartment Lay-out is executed by the developer.
- b) Fall of 1988, spring and summer of 1989 -- sales campaign results in the sale of the other 55 of the 56 units.
- c) February 1, 1989, the first superintendent, Thomas Holland, is hired by the developer and takes up residence in suite 201.
- d) November 29, 1989, first interim meeting of unit purchasers.
- e) December 28, 1988 to September 28, 1990, 44 of the original purchasers, and 11 assignees of the original purchasers complete their interim closings and take possession.
- f) November 15, 1990, Thomas Holland resigns as superintendent and vacates unit 201.
- g) November 19, 1990, meeting of the interim executive, the minutes of which may disclose the first signs of trouble in paradise.
- h) December 1990, the condominium documents are amended slightly with respect to a matter not in itself relevant to this litigation, namely, the parking spaces.
- i) January 9, 1991, last official meeting of the interim committee, the minutes of which indicate that the trouble in paradise was discussed.
- j) January 21, 1991, the declaration and description are registered and the plaintiff comes into existence.
- k) February 2, 1991, the first general meeting of the owners of the corporation is held -- the individual units are still registered in the name of the declarant.
- l) February 5, 1991, and shortly thereafter, most of the final closings take place with the individual unit owners and the by-laws are registered on title.
- m) April 8, 1991, letter from the developers' representative to the president of the interim board of directors asking if the plaintiff is interested in purchasing the superintendent's suite.
- n) April 16, 1991, president's response to the April 8 letter.
- o) May 7, 1991, Turn-over Meeting, the first meeting of the members of the plaintiff corporation and the first new directors' meeting of the plaintiff corporation.

p) May 16, 1991, letter from the solicitor for the developer pursuing the question of the corporation's intention with respect to the superintendent's suite.

q) May 23, 1991, president's response to this inquiry;

r) July 15, 1991, this action was commenced and a certificate of pending litigation was obtained and registered on title.

Some Background Facts The high-rise apartment building in question was built for the developers by Raymond Ferraro, a Guelph builder. He testified that since 1979 he has built five high-rise apartment buildings, three of which were to become condominiums and two rental buildings. He had built three of those buildings for the developers in this case, being 20, 22 and 24 Marilyn Drive.

Mr. Ferraro was very much the on-site representative of the developer. He looked after the completion of building plans, dealings with the City of Guelph, construction and the eventual sale of the units in the building, in which latter respect he was assisted by his son Michael.

Although there was some issue at trial as to whether or not the 10-storey 56-unit building required a full-time on-site superintendent, which issue involved among other things a consideration of similar buildings in the area, the fact that there was an on-site superintendent when the sales were completed, and that thereafter a resident in the building, not residing in the superintendent's suite, was acting superintendent for some time, on other occasions people were hired either on short-term basis or on a piece-work basis, and the fact that some consideration was even given to the possibility of sharing a superintendent with the next door building, 22 Marilyn Drive. The witnesses for the plaintiff were almost if not entirely unanimous in their view that, notwithstanding the fact that the building was very much maintenance free, a full-time superintendent was both desirable and for some necessary and I am satisfied on the totality of the evidence that most, if not all, of the purchasers entered into the transaction on the understanding that there would be a full-time on-site resident superintendent. Indeed, the disclosure documents provided to them by the developer, which will be the subject of more comment later, included the following:

It is anticipated that one fulltime resident maintenance man/janitor will be hired for the condominium corporation. His duties will include the repair and maintenance of all mechanical systems in the building not covered by contract. He will also be responsible for the routine maintenance or other common area and finishings in the building.

This particular clause, and indeed the condominium disclosure documents in their entirety, were prepared by Ray Ferraro, a non-lawyer, from precedents he had developed in connection with prior condominium developments, which were in turn taken from precedents supplied to him by a large metropolitan Toronto developer.

On discovery the president of the defendant who was also the developer's solicitor was asked about that clause as follows:

Q. Can you tell me how that clause, if I can call it that, came to be incorporated into the description?

A. I suspect it was copied from 22 Marilyn Drive.

Q. Did 22 Marilyn Drive have a fulltime resident maintenance man/ janitor?

A. Does it have one? Yes as far as I know it does.

Q. Now was it contemplated by the developers of 24 Marilyn Drive that that project would have a fulltime superintendent?

A. We thought it was logical that they should have a fulltime superintendent, yes.

Q. Why did you think it was logical?

A. Well because basically we viewed 24 as a replica of 22 a clone of 22.

Q. And 22 had its own?

A. 22 had its own. We sold -- when I say we I mean Marilyn Drive of course -- the superintendent's unit to the condominium corporation and they have their own superintendent now.

After the majority of the purchasers had taken possession, subsequent to their interim closing with the developer, they established amongst themselves a committee for the purpose of dealing with common problems and having a united front with which to liaise with the developer. Although that committee had no legal status, it was clearly representative of the unit purchasers and responsive to them and it consulted from time to time with a solicitor or solicitors to obtain assistance with legal issues. This latter fact, although denied by some of the plaintiff's witnesses is confirmed beyond any doubt by the minutes of the various meetings.

Common Intention

As indicated above there can be no doubt that both the developer and the unit purchasers always intended that the building would have a permanent live-in superintendent. The plaintiffs argue that from this fact it should be inferred that both parties also intended that a dwelling unit in the building would be made available at no cost to the plaintiff for this purpose and that the dwelling unit would be part of the common elements of the condominium corporation. The defendant argues that such an inference is not appropriate, that there was no evidence by any of the purchasers that they had any such intention or relied on such an intention when they purchased their unit and that the evidence called on behalf of the defence, as well as some of the wording of the disclosure documents, clearly indicates otherwise.

The plaintiff called eight witnesses including the present condominium manager, a solicitor and six owners some of whom bought directly from the developer, some of whom bought from investors, some of whom were members of the interim informal executive or later the condominium board and others of whom were never so involved. Although it is fair to say that each of the plaintiff's six owner witnesses testified in a way as to suggest that they clearly relied on the fact that a superintendent would be living in the building, none of them stated that they also intended that the unit in question, suite 201, or a similar unit would

belong to the condominium corporation at no cost to them and indeed it appears that they were neither asked to, nor did they, direct their mind to this issue.

The defendant called three witnesses being the builder/ developer's agent, Raymond Ferraro, the developer's condominium manager, Maria Finoro, who was replaced when the board took power, and Robert McBride, a unit owner and former member of the executive who was not only, but actually declared himself to be, a hostile witness. Mr. McBride did not say that he ever relied upon the fact that a superintendent's unit would be part of the plaintiff's assets or part of the common elements nor did he appear, as with the plaintiff's witnesses, to have directed his mind to this issue. Mr. Ferraro testified that this never was the intention of the developer and points to the following as evidence thereof:

- a) In the project developed before ;ns24, namely, ;ns22 Marilyn Drive, the developer sold a unit to the condominium corporation to use for a superintendent's suite.
- b) The configuration of unit 201 is no different than similar units on each floor of the building and there is nothing about the configuration to suggest that it was specifically designed for or intended to be used for a superintendent's suite.
- c) The condominium documents show unit 201 as a "unit" not as part of the common elements. The registered title to unit 201 was in the name of the developer, not the condominium corporation. In the calculation of the proportionate share of each unit's responsibility for common expenses, unit 201 is allocated its appropriate share based on square footage.
- d) None of the plans show unit 201 as a superintendent's suite nor does it have any specific designation whatsoever.
- e) The minutes of the January 9, 1991 meeting, described as the last official meeting of the interim committee, contain the following: "superintendent's unit -- discussion followed as to how we might accommodate a new superintendent when the unit is owned by Kroma at present".

With respect to the last matter, Kroma was the property manager and it is conceded that at no time was Kroma the owner of the unit -- its employer, the developer, was. Witnesses who recalled having been present at the January 9, 1991 meeting suggested that they have very little recollection of the discussion with respect to this matter, although they acknowledge that it must have been discussed since the minutes clearly indicate that it was. They also suggested, with very little conviction in my view, that the reference to the unit being owned by Kroma was of no great consequence since all the units were at that time still owned by the developer. The reference in the minutes, however, is not to all of the units but specifically to the superintendent's unit.

This meeting of January 9, 1991, takes on even more significance in my view when one notes that at the same meeting Bruce Wright was elected a director and became then the chairperson of the interim committee until the turn-over meeting at which time he became the first president of the condominium corporation's board of directors, replacing the developer's representatives on the board. Mr. Wright had had some very direct and active involvement, as a member of the board of directors of the previous condominium corporation with which he was associated, in protracted and partially successful litigation with respect to the very same issue now before this court -- the ownership of a superintendent's suite. To accept Bruce Wright's evidence to the effect that in January 1991, prior to the formal closings of the real estate transactions, the issue of the ownership of the superintendent's suite was not of considerable importance to him and to other members of the board and presumably to other purchasers as well, defies common sense.

In seeking to establish the fact of a common intention to have unit 201 as part of the condominium corporation's assets, whether as a common element or otherwise, the plaintiffs point to the following:

- a) The excerpt from the disclosure documents quoted at p. 85 and their argument, already discussed, that one can infer from the intention to have an on-site superintendent that the condominium corporation was to own the superintendent's suite at no cost to them.
- b) Nowhere in the proposed budget is there an amount shown for the carrying charges of suite 201 if it was to be acquired after closing by the condominium corporation -- that is to say, no mortgage payments, no tax payments, etc. Nor is there any reference in the proposed budget to a special assessment in the event that the corporation were to buy the unit for cash.
- c) In December 1990, after the November 19, 1990 meeting when the defendant argues the purchasers should have been aware of the superintendent's suite at the very least being an issue, the condominium documents were amended and could then have been further amended to reflect the matters referred to in para. (b) above. d) The estoppel certificates delivered up at the time of final closing on and after February 5, 1991, by the developer (referred to therein as "the Corporation") to the individual purchasers contained the following statements:
 3. The current budget (a copy of which is attached hereto) is accurate.
 5. The Corporation has no knowledge of any circumstances that may result in an increase in the common expenses for the said unit.
- e) Unit 201 was never offered to the general public by the developer, a fact which is conceded by the developer.
- f) While Tom Holland occupied unit 201, the tenant listing at the front entrance referred to unit 201 as the superintendent's suite.

With respect to (b), (c) and (d) the defendant replies that it would have been speculative at best to refer to these matters without knowing what position the condominium corporation was going to take with respect to the acquisition of the suite. If the condominium corporation took no steps to acquire the suite but rather retained a resident already in the building as superintendent there would have been no additional cost to the corporation for the superintendent's suite. With respect to (e) the defendant replies that it was not offered to the public until after the plaintiff was given the first opportunity to buy it.

It should be noted that for a period of time after Tom Holland left the corporation did in fact retain the services of a resident in the building as a full-time superintendent and the amount paid to him was consistent with the amount anticipated in the proposed budget with no credit being given to him for the fact that he was not also provided free of charge with a suite.

The plaintiffs rely to a very large extent on two judgments in the Ontario Court of Appeal, namely, *Frontenac Condominium Corp. No. 1 v. Joe Macciocchi & Sons Ltd.* (1975), 11 O.R. (2d) 649, 67 D.L.R. (3d) 199, and also *York Condominium Corp. No. 167 v. Newrey Holdings Ltd.* (1981), 32 O.R. (2d) 458, 122 D.L.R. (3d) 280. It should be noted that each of those cases was decided on the basis of the Condominium Act, R.S.O. 1970, c. 77, which did not contain the present s. 52 of the Condominium Act, R.S.O. 1980, c. 84, nor any predecessor thereof. In looking at these cases for the purpose of ascertaining whether they assist or are distinguishable (unless distinguishable they are binding upon me) one cannot ignore the fact that the Condominium Act is a form of consumer protection legislation and is and should be interpreted in favour of the unit owners even if that requires stretching the contractual concept of common intention to its outer limits.

In the *Frontenac* case the court found specifically at p. 651 that:

It was the evidence of all of the persons who purchased units who were called to give evidence at the trial that because of the size of the building, the development of the property, and the superintendent and the occupancy of his suite, that they assumed that there would be a full-time resident superintendent on the property and that his suite would be a common element.

(Emphasis added)

The court further found as a fact at p. 652:

Further, while the evidence of the unit purchasers called was that they assumed that Suite 104 was a common element, their view was not dissimilar to that of the respondent's employee and representative who was called by the respondent and whose evidence was to the effect that upon being asked specifically by purchasers, she said she understood at that time that eventually it would become one of the common elements.

The majority then concluded at p. 655 that:

It has been established with some certainty, and at least to the degree required, that it was the intention of the respondent that the purchasers should believe that the superintendent's suite was a common element or would belong to the condominium corporation . . . It has similarly been established to the same degree that this was the belief of the unit purchasers at the time of their purchase. Notwithstanding this very strong evidence suggesting a common intention MacKinnon J.A. dissented on the basis that there would have to be some firm evidence of an undertaking or statement by or on behalf of the developer that the unit was part of the common elements.

Later in the *York Condominium* case Wilson J.A. writing for the court considered the following factors which are listed at pp. 460-61 of her judgment:

- 1) whether the developer had the intention that purchasers should believe that the janitor's suite was to be a common element or that it belonged to the condominium corporation;
- 2) whether the condominium corporation had made any mortgage payments with respect to the janitor's suite;
- 3) whether the developer received rent from the condominium corporation after the take-over meeting;
- 4) the purchasers' response to suggestions that the ownership of the janitor's suite was not clear; 5) unlike the situation in *Frontenac*, no one on the defendants' behalf ever suggested to any prospective purchaser that the janitor's suite would form part of the common elements or part of the property of the condominium corporation;
- 6) the agreements of purchase and sale specifically referred to building plans filed with the Borough of North York in which the suite in question was specifically designated as "the janitor's suite";
- 7) the janitor's suite was different in lay-out from any other suite in the building in that it had no balcony, porch or den, and had located in it the fire alarm system buzzers and the underground garage ramp heat control;
- 8) the building was of such a size as to require a full-time live-in superintendent;
- 9) the projected annual operating budget given to the purchasers of units on closing showed no item of expense for rental of the janitor's suite although it showed an item of expense for his salary; 10) the condominium documents included, when discussing restricted access to common elements "those parts of the common elements used from time to time as a dwelling for any building superintendent;
- 11) it was not until after the take-over meeting that the developer disclosed that it was prepared to sell the suite to the condominium corporation if it wished to acquire it as a permanent apartment for the superintendent.

Looking at all of those factors the Court of Appeal drew an inference different from that drawn by the trial judge and found a common intention to exist that the superintendent's suite was to be part of the common elements. In doing so, the court emphasized items 6 and 10.

In 1987, O'Leary J. had occasion to consider the Court of Appeal judgments in *Frontenac* and *York* in *York North Condominium Corp. No. 5 v. Van Horne Clipper Properties Ltd.* (1987), 60 O.R. (2d) 468 (H.C.J.). O'Leary J. stated at p. 470:

It is the position of the plaintiff that the representation by the defendant that the condominium would have a full-time, live-in superintendent constituted a representation to the purchasers of the units that the unit to be occupied by the superintendent would be part of the common elements or was to be an asset of the condominium corporation.

There is no requirement in the Condominium Act, nor is there any evidence before me that through practice or custom the superintendent's residence form part of the common elements or is an asset of the condominium corporation. If any purchaser drew such inference from the representation I have referred to, then he was not justified in doing so. Indeed, if any such inference was drawn, it does not seem to have been very firmly held for no objection was taken to the unit being purchased from the defendant.

Later at p. 471 he says:

It is said that there were ambiguities in portions of the various documents just referred to, that would leave the purchasers confused as to who was to own the unit. In fact, no purchaser testified that he was led to believe because of what was in those documents that the unit was to be part of the common elements.

It is interesting to note that one of the ambiguities was similar to that found in the Newrey case, the disclosure documents in the Van Horne case stating "no owner shall have any right of access to those parts of the common elements used from time to time as a dwelling for any superintendent".

O'Leary J. found no common intention in the Van Horne case and the corporation appealed to the Ontario Court of Appeal.

The Court of Appeal judgment is reported at (1989), 70 O.R. (2d) 317, 40 C.P.C. (2d) 156, but unfortunately the Court of Appeal did not find it necessary to deal with O'Leary J.'s conclusions with respect to common intention; rather the case, at the Court of Appeal level, was determined on the basis of an accepted settlement.

Considering all of the factors to which I have already referred and the principles enunciated by the Ontario Court of Appeal, I am simply unable to conclude or infer that there was ever any intention on the part of the developer that the unit should be part of the common elements or otherwise owned by the condominium corporation and I would also be hard pressed to find that there was any such intention on the part of the purchasers. In any case, there was clearly, in my view, no common intention of this sort and accordingly the plaintiffs claim, to the extent it is based on common intention, must fail.

Section 52 of the Condominium Act, R.S.O. 1980, c. 84

In the alternative the plaintiff claimed damages for negligent misstatement and breach of statutory duty arising from the false, deceptive and misleading contents of, and omissions contained in, material statements or information, required to be provided to a purchaser by the defendant by s. 52 of the Condominium Act. The plaintiff further claimed that in lieu of damages an order might be made declaring the plaintiff to be the owner of suite 201, 24 Marilyn Drive, Guelph.

The relevant portions of s. 52 of the Act are as follows:

52(1) An agreement of purchase and sale entered into after the 1st day of June, 1979 by a declarant or proposed declarant of a unit or proposed unit for residential purposes is not binding on the purchaser until the declarant or proposed declarant has delivered to the purchaser a copy of the current disclosure statement and all material amendments thereto.

(5) Where any statement or material required under this Act to be provided by a declarant or proposed declarant to a purchaser of a unit or proposed unit for residential purposes contains any material statement or information that is false, deceptive or misleading or fails to contain any material statement or information, the corporation or any unit owner who relied on such statement or material is entitled, as against the declarant or the proposed declarant to damages for any loss sustained as a result of such reliance.

(6) The disclosure statement referred to in subsection (1) shall contain and fully and accurately disclose,

(d) a brief narrative description of the significant features of the existing or proposed declaration, by-laws and rules governing the use of common elements and units, and of any contracts or leases that may be subject to termination or expiration under section 39;

(e) a budget statement for the one year period immediately following the registration of the declaration and the description;

(7) The budget statement mentioned in clause (6)(e) shall set out,

(a) the common expenses;

(b) the proposed amount of each expense;

(c) particulars of the type, frequency and level of the services to be provided;

(d) the projected monthly common expense contribution for each type of unit;

(h) any current or expected fees or charges to be paid by unit owners or any of them for the use of the common elements or part thereof and other facilities related to the property;

(i) any services not included in the budget that the declarant or proposed declarant provides, or expenses that he pays and that might reasonably be expected to become, at any subsequent time, a common expense and the projected common expense contribution attributable to each of those services or expenses for each type of unit;

The plaintiff argues that the condominium documents contained a material non-disclosure which was false, deceptive or misleading, in that they failed to refer to the fact that unit 201 was the superintendent's suite and that the developer was prepared to sell it for fair market value to the condominium corporation and that as a result of this non-disclosure the budget statement also failed to set out the annual expense to be incurred by the condominium corporation in carrying a mortgage if one was required to purchase the unit, to pay the annual taxes on the unit and other carrying charges such as utilities and, in the alternative, failed to disclose that there would be a capital assessment against each unit for their proportionate share of the cost of acquiring the unit from the developer.

It is first necessary to determine whether or not this non-disclosure is material in the context of s. 52 of the Condominium Act.

Robins J.A. recently had occasion in *Abdool v. Somerset Place Developments of Georgetown Ltd.* (1992), 10 O.R. (3d) 120 at p. 139, 96 D.L.R. (4th) 449 (C.A.), to define materiality as follows:

To discharge this onus and prove the materiality of the complaint, in my opinion, the purchaser is obliged to establish objectively that had the information that was not disclosed, or that was inaccurately or insufficiently disclosed, been properly disclosed in the disclosure statement at the time it was delivered to the purchaser, a reasonable purchaser would have regarded the information as sufficiently important to the decision to purchase that he or she would not likely have gone ahead with the transaction but would instead have rescinded the agreement before the expiration of the ten-day cooling off period.

I shall consider later the right of a purchaser under s. 52(2) to rescind the agreement where there has been a material amendment. At this juncture, I would move to the actual disclosure statements in these appeals.

It is clear that Robins J.A. has required that the materiality be determined by applying an objective standard, although he did say later at pp. 149-50:

The extent to which subjective considerations may reasonably be asserted in determining the materiality of the new or amended information is not before the court in these appeals and need not be considered.

Winkler J. in *Ceolaro v. York Humber Ltd.*, Ontario Court (General Division) (unreported March 29, 1994 [now reported 37 R.P.R. (2d) 1 at p. 67, 53 C.P.R. (3d) 276]) had this to say about the possibility of subjective considerations being laid over the objective test:

In my opinion, this statement refers, for example, to an amenity such as a gymnasium. If a purchaser decided to execute an Agreement of Purchase and Sale mainly because the complex had a gymnasium which this purchaser was planning to use a great deal for physical conditioning rather than pay a membership fee at a fitness club, and the gymnasium was never built, then there may be cause for refusing to complete the transaction for this one purchaser. To apply this proposition to the facts at hand would be a far stretch that would not do justice to the intent of Mr. Justice Robins' words.

In my view, the possibility that the condominium corporation could acquire from the developer an asset at its fair market value of approximately \$125,000, and the costs associated with such an acquisition are material and the possibility at least that the corporation might incur such expenses are something that a reasonable purchaser would have wanted to see in the disclosure documents. That is, they are in my view material. Unlike Winkler J. in *Ceolaro*, I would not conclude, on the facts before me, that the conduct of the purchasers after November 19, 1990, even if it is some evidence of their subjective view of materiality, make the issue any less material although, as will be discussed later, it is of some considerable consequence with respect to the issue of reliance.

In a recent unreported decision of the Ontario Court (General Division) in *Middlesex Condominium Corp. No. 87 v. 600 Talbot Street London Ltd.*, October 5, 1993 [summarized at 43 A.C.W.S. (3d) 476], Flinn J. had occasion to consider and analyze s. 52(5) of the Condominium Act. He concluded that the section requires the following:

- (a) a material statement or information;
- (b) that is false, deceptive or misleading;
- (c) or a statement which fails to contain any material, statement or information;
- (d) reliance on such statement or material.

To this list I would add:

- (e) a loss sustained by the purchasers as a result of such reliance.

I have already concluded that there was an omission, a failure, to include a material statement which could have the effect of misleading the purchasers. I say "could have" because the omission, while material on an objective basis, would only have the effect of having misled the purchasers if the board of directors, after taking over the corporation, decided to acquire the unit from the developer. If they decided not to, an equally possible result, there would be no carrying charges, nor any special assessment. I am completely satisfied that the failure to refer to the possibility of the corporation acquiring the superintendent's unit was done inadvertently, on the basis that the developer, to the extent that it put its mind to the question at all, was of the view that referring to this matter would be speculative at best, in view of the fact that the condominium corporation would have to decide whether or not to avail itself of the opportunity to acquire the suite. Based upon all of the evidence it is more likely that the question of whether or not to include this fact was simply never even considered. This does not, however, make the omission any less material or any less potentially misleading.

As in the *Middlesex* case, however, the question is whether the plaintiff has proven on the balance of probabilities that its members, the unit purchasers, relied on this omission in any way and whether as a result of this reliance they sustained damages in a proven amount or at all.

As indicated earlier the first evidence which might suggest that someone had put their minds to the issue of the status of the superintendent's suite is found in the minutes of the November 19, 1990 meeting which include the following item:

Maria [Finoro, the condominium manager] asked to join our meeting to discuss with us the hiring of a new superintendent. After a lengthy discussion it was decided that it was still the responsibility of the management company to look after that matter. The owners at this time have nothing they can do in this regard.

Carole Croft, who was until that time the secretary of the committee and took the minutes, testified that on November 19th, Maria was meeting prospective superintendents whom the board was considering interviewing to have some input in the hiring of a superintendent. The board was aware that as an informal committee they really had no authority to hire a superintendent but it was also recognized that for purposes of continuity it would be in everyone's best interests to have a superintendent who was suitable to the purchasers and not only to the management company who might, as is often the case, be replaced after the turn-over meeting. During her evidence in-chief, Mrs. Croft said that there was some discussion about the fact that if a superintendent ever wanted to buy the unit it would be available for approximately \$125,000. Later in her examination in-chief she testified that once Maria left the meeting those present -- Bob McBride, Nick Callwood, Bud Hawkins, Don Croft and herself discussed the question of the superintendent's unit and asked themselves why they would have to buy the unit -- "its ours" -- "if we did have a

superintendent, where would he live". She then produced a notebook in her own handwriting which was apparently the rough notes from which she prepared her minutes and she agreed that in those notes she had written something about the superintendent's salary being approximately \$17,856 per year, that the figure of \$800 per month with respect to the suite is noted but she has no recollection now of what it means and that she understood in any case that the superintendent was to get free rent.

In cross-examination, she stated that up until November 19, 1990, she had no idea that the developer purported to own and could sell unit 201 and she was not sure of when she first became aware of this fact, some time before January 9, 1991. She said she was horrified when she learned of this fact and discussed it with her own personal solicitor prior to closing her transaction and was apparently reassured.

Robert K. McBride who was also present at the November 19, 1990 meeting and testified as a witness for the defence as a self-described "hostile witness" said that in November 1990, when they were interviewing people for superintendent, Maria Finoro told the proposed superintendents that they could buy the unit for \$125,000. He said that he was astounded because they had never had any reason to believe that they would have to buy the unit. Maria Finoro could not recall her discussions with the unit purchasers in November of 1990 about the possible sale of the superintendent's suite to the corporation for \$125,000. Bruce Wright also testified. He said that before buying his condominium unit at 24 Marilyn Drive, he had lived in another condominium project in Guelph on Westwood Drive. He was on the board of directors of that earlier condominium corporation for the last nine months of his residency there. The board had, before he became a member, initiated litigation against the developer who had built that project (not anyone related to the present parties) with respect to various issues including repairs, arrears of rent and the ownership of two superintendent suites, one in each of the two buildings comprising the development. The condominium manager at that development on Westwood Drive was Sandra Rutsch who later became, while Mr. Wright was president, the condominium manager for the plaintiff, replacing the developer's manager, Maria Finoro (Kroma) while Mr. Wright was president. He said that although in his previous condominium project they had gone through litigation to get a suite for the superintendent, para. 3 on p. 4 of the budget statement (reproduced earlier at p. 85 of these reasons) put his mind at ease when he signed his offer for a unit in the subject premises.

Mr. Wright testified that he attended some meetings of the interim committee as one of the purchaser/members before January 9, 1991, at which time he became the president of the interim committee. He said that the minutes of the interim committee meetings were usually published and circulated to the residents at large as a general practice, but that no one had told him in or about November 1990, that the developer had offered to sell unit 201 to the condominium corporation or to the superintendent. Whatever he did or did not know in November 1990, he was present at the meeting on January 9, 1991, the minutes of which are referred to as the minutes of the last official meeting of the interim committee which contain the following reference, quoted earlier: "superintendent's unit -- discussion followed as to how we might accommodate a new superintendent when the unit is owned by Kroma at present". He testified that he took that to mean that Kroma was the owner of all of the units and that he was completely ignorant on January 9, 1991, of the fact that the owner was asserting ownership to suite 201. Also present at that meeting were Nick Callwood, Bud Hawkins and Carole Croft.

Mr. Wright professed to have, and demonstrated, a somewhat remarkable familiarity of the intricacies of the Condominium Act. He had been a member of a board which was involved in litigation over the issue of ownership of a superintendent's suite. He was at a meeting with, among others, Carole Croft who had indicated great anxiety about the question of the ownership of the superintendent's suite. To suggest that he was not on January 9, 1991, fully aware of a large red flag in front of his face defies common sense and I simply do not accept his evidence in this regard. It is more likely that for whatever reason, he chose to sit in the bushes and not rock the boat until after the formal closings on and shortly after February 5, 1991, and thereafter until the turnover meeting in May of 1991. His response to two letters later that spring is, in my view, further evidence of his approach to the problem. These letters are brief and I will reproduce them in full: Letter from the developer to Bruce Wright, president of the interim board of directors, dated April 16, 1991:

Re: Superintendent Suite

As you are aware, suite 202, [sic] previously occupied by Tom Holland, building superintendent, was not sold. Is Wellington Condominium Corporation No. 61 interested in purchasing this suite? If Wellington Condominium Corporation No. 61 does not confirm its intention to purchase suite 202 by April 16th, the owner will proceed to sell it.

I would appreciate your reply to be confirmed in writing and mailed or delivered to my office by the 16th of April.

Mr. Wright's response on April 16, 1991, is as follows:

Re: Superintendent Suite, Suite 201

As acting President of the Owners Association of 24 Marilyn Drive I am writing to you in response to your letter of 9 # Apr the owners would be interested in acquiring the suite that Superintendent's Suite (Suite 201).

The Board cannot enter into any contractual agreement until a board of directors is voted into power at the turnover meeting. We as of this date we have not received notification of the turnover meeting. It must also be recognized that anything that changes the condominium's common elements is subject to section 38(1) of the Condominium Act.

I can be reached at work at (416) 821-8970.

Letter of May 16, 1991 from the developer's lawyers to Bruce Wright, president of the plaintiff:

Re: 24 Marilyn Drive, Guelph, Ontario

I believe that Mr. Ferraro and/or Maria Finoro of Orbis Property Management have spoken and written to you regarding the question of whether or not you wish to buy the superintendent's suite at 24 Marilyn Drive.

If you are interested in purchasing the unit, please let us know on or before May 24, 1991 so that we can negotiate this matter and enter into an agreement. If we do not hear from you by that date we will assume that you are not interested and we will offer the unit for sale to another party.

We trust the property is working out well for the new owners and are very pleased that this matter has at long last been completed. Response from Mr. Wright to the solicitor on May 23, 1991:

Re: Superintendent Suite

I am writing to you in response to your letter of 16 May 1991. The Board feels that the owners would be interested in acquiring the Superintendent's Suite.

Please advise us in writing as to the terms that you would be willing to consider.

It must also be recognized that anything that changes the condominium's common elements is subject to section 38(1) of the Condominium Act.

Mr. Wright testified that when he received the April 8 letter he spoke to Paul Smith, a lawyer in Guelph, who was going to be and was eventually retained by the condominium corporation as its solicitor. He said that Mr. Smith suggested that he reply in somewhat vague terms to the April 8 letter and not specifically state that the corporation was prepared to buy the unit. Both he and Mr. Smith appear to agree that the nature of the response was to buy some time until the corporation could get legal advice from a specialist in condominium law and also until the turn-over meeting which was still some three weeks away. Mr. Wright said that Mr. Paul Smith specifically told him to use the words "interested in acquiring the superintendent's suite" but Mr. Smith had no recollection of giving such advice. When the next letter of May 16, 1991, was received and responded to on or about May 23, 1991, it would appear that the condominium corporation had still some 16 days after the turn-over meeting not sought specific legal advice from the condominium law expert although the name of such a person had been given by Mr. Smith to Mr. Wright some time in April, or possibly as early as mid-March.

In his own evidence, the farthest Mr. Wright was prepared to go was to acknowledge that some time after January 31 and before March 1991, he heard about a problem with respect to the ownership of the superintendent's suite but he cannot recall who told him about it. He said that upon hearing the rumours of a problem he took no steps to do anything, notwithstanding the fact that he was president of the interim association and in particular did not seek legal advice, speak to the developer, contact the other executive or advise the other unit owners. He does agree that a meeting was held on March 13, 1991, of the interim board of directors at which he, Dave Tolton, Art Sutton, Bud Hawkins, Frank Turner and Grace Swan were present as well as the lawyer Paul Smith and his associate. The minutes of that meeting state "the situation re: supers suite was discussed". Mr. Wright said that at that March 13 meeting he told Mr. Smith that he had been involved in a similar situation at his previous condominium and it was shortly after that meeting that Paul Smith suggested that the board or interim board get an opinion from a lawyer specializing in condominium law. In re-examination he confirmed that generally the minutes of all meetings were given to the board and all resident purchasers, although other witnesses disagreed with this fact including Grace Swan, the secretary after Carole Croft who would have been responsible for circulating the minutes and says that she did not always do so. There was also some suggestion that the circulation was not to the entire membership of unit purchasers but only to those not known to be on friendly terms with the developer.

Of all of the purchasers who testified, only Carole Croft said that she was sufficiently concerned about the issue of the ownership of the superintendent's suite to discuss it with her personal lawyer and she was unfortunately reassured, and in her case at least, the matter did not go any further. Although the interim board until the turn-over meeting on May 7, 1991, did not officially speak for or have the legal authority to represent or bind the individual purchasers, it was clear from the evidence that they were in place to represent the interests of the purchasers and to liaise with the developers. While their conduct in response to the knowledge in November 1990, or January 1991, that the ownership of the superintendent's suite was a live issue is not in law binding upon the other purchasers, it is the only evidence I have of the response of any of the purchasers. As such, even if they were not representing the interests of the other purchasers, this is still the only evidence I have to consider.

In addition to what we heard from Bruce Wright and Carole Croft about their knowledge, Frank Turner also gave evidence about his knowledge of the issue. He had previously lived in another condominium and purchased two units in the subject premises, one to live in and the other for investment purposes. He was present at the meeting of January 9, 1991, at which time he became a member of the executive of the association. He knows there was a discussion on January 9, 1991, about the superintendent's suite and he said that at one meeting, possibly January 9, 1991, he had raised the question and had asked, when he learned that the developer might sell the unit to the purchasers, who the unit was registered to. He was, however, not able to remember the exact date of this. He is now the president of the plaintiff corporation.

Bill Taylor was not involved in the association executive until the turn-over meeting of May 7, 1991, when he was elected to the board of directors. He testified that he had no personal knowledge of an issue involving the superintendent's suite before May 7, 1991. He also said, before being shown the minutes of the May 7 meeting, that he was absolutely certain that there was no mention at that meeting of the issue with respect to the superintendent's suite and if there had been he was certain that it would have been a very memorable meeting. After being shown the minutes of the May 7 meeting of the members of the newly constituted corporation, he agreed that item 10 in those minutes "other items which need to be considered are: the purchase of a unit for the superintendent and the appointment of an auditor" accurately reflects what took place at the meeting and he then suggested that this was his first indication that the superintendent's suite was not part of the amenities of the condominium corporation. He did say, however, that while the minutes are most likely accurate, he still did not recall such a discussion on May 7. His recollection was that the first time the issue became a live one for him was on or about May 22, 1991, when the May 23 response to the developer's lawyer was being discussed by the board.

Robert Wright, Bruce Wright's father, also testified for the plaintiff. He has never been an officer or director of either the interim board or the board of directors of the plaintiff. He was out of the country at the time of the formal title closing in February of 1991, and had no knowledge of any issue with respect to the superintendent's unit until approximately May 1991, at which time he was made aware of the fact that the developer had proposed selling the superintendent's suite to the condominium corporation. He said that he was amazed, angry and frustrated, since it was not his understanding that this would happen and was not the basis upon which he had entered into his agreement of purchase and sale with the developer.

In all of the circumstances, I am simply unable to conclude or infer that the plaintiff or its members relied upon the fact that a superintendent's suite, whether suite 201 or otherwise, was to be a common element of the plaintiff or otherwise an asset owned by the plaintiff corporation free of charge.

To obtain relief under s. 52(5) the plaintiff must prove the damages it claims to have suffered as a result of its reliance on the condominium documents. Even if I am wrong with respect to the issue of reliance I am also unable to conclude that the plaintiff has proven either that it suffered any damages at all or if it did, the amount of those damages, the onus for each being on the plaintiff to prove on a balance of probabilities.

The budget statement contained in the disclosure documents provided by the developer contained an allowance for a maintenance man/janitor of \$18,500 per annum. Tom Holland, the first superintendent hired by the developer, was on staff and resided in unit 201 from February 1, 1980, to November 15, 1990. He was paid a salary of \$744 semi-monthly or \$17,856 annually. He does not appear to have been charged any rent for unit 201 although the evidence on this point is very sketchy. Looking at all of the evidence on this point, including the payroll records for Mr. Holland, I proceed on the assumption that he earned \$17,856 per year, had to declare a taxable benefit on his annual income tax return for the provision of a superintendent suite and that he did not otherwise pay anything for the use of the suite.

Sandra Rutsch testified that in another building which she manages next door at 22 Marilyn Drive, a similar building with a live-in superintendent, the superintendent is paid \$19,500 per year and the suite in which he resides which the corporation purchased from the developer (a related company to the developer of the subject premises) is provided to the superintendent free of charge although he also is required to declare a taxable benefit. The only obvious difference between 22 and 24 Marilyn Drive is that No. 22 has 70 units as opposed to the 56 units in 24 Marilyn Drive.

Maria Finoro, the previous condominium manager, with experience similar to that of Sandra Rutsch, presently manages a luxury condominium containing 55 units at 8 Christopher in Guelph, a building very similar to the subject premises. In that building the superintendent is paid \$16,500 and he is required to rent his own unit in the building from a private owner and receives no other benefits.

After Tom Holland resigned, the developer retained the services of Danny McLeod as a full-time live-in superintendent at 24 Marilyn Drive. Mr. McLeod was already a resident in another unit in the building, a unit owned by his father-in-law and he was paid \$750 twice monthly or \$18,000 per year with no further allowance or credit for the fact that he received no accommodation over and above the \$18,000 per year. He was terminated by the new board of directors in early July 1991, and after that time until the present, the pay history of various part-time superintendents, relief superintendents and contract cleaning services offers no great assistance in ascertaining what might be an appropriate wage for a superintendent with or without the additional supply of a rental unit free of charge.

Based upon the history of Danny McLeod's employment by the developer and subsequently by the plaintiff and the evidence of salaries paid to other superintendents in similar buildings with or without the provision of free accommodation, I am unable to conclude that the plaintiff would be paying a live-in superintendent any more than the \$18,500 provided for in the budget and it is entirely conceivable that if they were able to offer free accommodation that the appropriate salary would be substantially less. The plaintiff was not prepared to concede that if in fact the budgeted amount of \$18,500 was too high the amount by which it exceeds the actual salary paid to a live-in superintendent with free rent should be credited against the costs of carrying the acquired unit in assessing what damages if any have been sustained but I am unable to agree with its position in this regard. As stated earlier, the plaintiff must prove its damages and I must conclude that neither the fact of, nor the amount of any such damages have been proven on the balance of probabilities.

Appropriate Remedy

If I am wrong with respect to the issues of reliance and damages and if the plaintiff is therefore entitled to damages as a result of the defendant's breach of s. 52 of the Condominium Act, the question is then whether or not something other than damages is more appropriate. There is a substantial and binding line of authorities (for example, *Wilson J.A. in York Condominium v. Newrey*, supra) standing for the proposition that where the damages are easily ascertainable, usually the actual value of the superintendent's suite in question, it would be appropriate to simply require the defendant to transfer the ownership in the suite to the condominium corporation free of charge. The evidence is that units similar to unit 201 had a fair market value, when they were being sold of approximately \$135,000. It would also appear, notwithstanding the decline in the real estate market generally that the prices of the units in the subject premises have not declined and may well have increased. Mr. Ferraro further testified that a figure of \$125,000 was mentioned as a possible selling price to the plaintiff and this is corroborated to some extent, as discussed earlier, in the evidence of Mr. McBride, Ms. Croft and others. It is further confirmed in a letter from the developers' lawyer to Bruce Wright dated May 31, 1991, wherein it is stated "we had advised the condominium corporation some considerable time ago that we would sell the superintendent's suite for \$125,000.00 cash".

Mr. Ferraro had also testified that while the figure of \$125,000 had been mentioned and was the developers' starting point, it was not at all inconceivable that the developer would have accepted an offer of something in the area of \$100,000 cash from the plaintiff. Accordingly, if I had found that the plaintiff had proven damages of anything close to or above \$100,000, I would have found it appropriate to order the transfer of unit 201 to the plaintiff free of charge, rather than monetary damages and would have done so.

Conclusion

For all of these reasons, I find that the plaintiff's action cannot succeed either on the basis of the common intention argument or the s. 52 argument and the action is therefore dismissed.

During the course of argument, counsel for the plaintiff indicated that if the judgment was not favourable to his clients he had received instructions to serve a notice of appeal. I hasten to add that this comment by counsel was not made in a way that might suggest a lack of conviction on his part and indeed he presented his argument in a most lucid and forceful and compelling manner. Rather, the suggestion was made in response to my disinclination, in cases where competent and thoroughly prepared counsel are arguing interesting issues to adopt the posture of the "cigar store indian", as a result of which the possibility that judgment, at least at this level, would not be favourable was not idle speculation. Counsel for the defendant argued that if the judgment was against the plaintiff the status quo should be maintained in that the superintendent's suite should not be disposed of pending the exhaustion of the plaintiff's appeal remedies and accordingly a stay is directed pursuant to rule 63.02 for a period of 30 days from the date of release of these reasons, after which time the registration of the certificate of pending litigation is to be vacated unless a further stay is sought and obtained from the Court of Appeal.

Similarly, counsel for the defendant asked that if the judgment went against the plaintiff I would reserve to myself the right to hear further evidence and submissions with respect to the question of damages, if any, to which the defendant might be entitled, pursuant to s. 103(4) of the Courts of Justice Act, R.S.O. 1990, c. C.43, as a result of the registration of a certificate of pending litigation against the title to unit 201. After pausing to observe that a five-day trial, the somewhat uncertain state of the law which suggests that the cases are fact specific and the length of these reasons might militate against a finding that the plaintiff did not have a "reasonable claim to an interest in the land" I am prepared, if counsel cannot agree, to do so with respect to the issue of liability and damages if any. Finally the issue of costs has not been addressed by counsel and I would invite written submissions together with copies of any relevant offers or similar material within 30 days of the date of release of these reasons, failing which costs should be to the defendant on a party-and-party scale.

Action dismissed.

CBR# 5

Confederation Life Insurance Co. v. Shepherd, McKenzie, Plaxton, Little & Jenkins

Action No. B123/92

Ontario Court of Justice - General Division Toronto, Ontario Montgomery J. Heard: October 19 - 22 and November 2 - 5, 12 and 13, 1992 Judgment: December 4, 1992

H. Lorne Morphy, Q.C. and Kent E. Thomson, for the Plaintiff. John S. McNeil, Q.C., for the Defendants.

MONTGOMERY J.:-- Confederation Life Insurance Company ("Confederation") seeks damages against its solicitors, Shepherd, McKenzie, Plaxton, Little & Jenkins ("Shepherd, McKenzie"), for breach of retainer, negligence and breach of fiduciary duty arising out of a commercial mortgage transaction.

In August, 1982, Confederation proposed to loan a purchaser of two 15-story apartment buildings in London, Ontario \$7,167,294.11, secured by a first mortgage at 18.25% interest, for a 20 year term with no prepayment privilege.

Confederation claims damages in the sum of \$2,669,615, together with prejudgment interest from April 12, 1985, and costs. The amount of \$2,669,615 is composed of:

(a) damages in the amount of \$2,458,440 representing the present value, as at April 12, 1985, of the loss which Confederation suffered as a result of having to discharge on April 12, 1985 its 20 year 18.25% first mortgage in respect of the Skyview Towers complex located at 1103 and 1105 Jalna Boulevard in London, Ontario; and (b) damages in the amount of \$211,175 in respect of the expenses incurred by Confederation in proceeding with a series of contested actions, applications and motions in 1984 and 1985 involving Charles Khoury and his company 511666 Ontario Limited.

The defence contends that there was no negligence or breach of duty of the solicitor. It raises the question of contributory negligence. It also says that even if there was negligence, the plaintiff cannot establish causation. Damages are also at issue.

It is said that allowing the buildings to become condominiums had the effect, by virtue of the Condominium Act, R.S.O. 1990, c. C-26, of "fracturing" the 20 year term of the mortgage.

THE FACTS

Confederation is a mutual insurance company with its head office in Toronto. Shepherd, McKenzie is a partnership practising law in London, Ontario. J.H. Little and G.F. Plaxton were solicitors and partners in the firm who dealt with the subject mortgage.

On the 17th of June, 1982, Charles K. Khoury ("Khoury"), a real estate developer, residing in Fredericton, New Brunswick, phoned Bert Coates, a vice-president in charge of mortgages at Confederation, seeking financing for a London apartment project. Khoury wrote to Coates the same day enclosing the loan submission, including general data on the property, proposed financing, net worth statements, financial statements and photographs.

The project comprised two 15-storey buildings each containing 178 units of mixed bachelor, one bedroom, and two bedroom units.

The proposal stated that the project was not subject to rent control and both buildings were certified as MURBs for income tax purposes. It further contained a draft offer to purchase the subject property by Khoury Real Estate Services Ltd. from CMHC as vendor for a purchase price of \$8,407,940. Khoury was to guarantee the indebtedness of the borrower.

Coates provided a copy of the proposal to his underwriting assistant Richard Warner ("Warner") who, in turn, provided a copy of the proposal to Roger Boddy ("Boddy"), then the manager of Confederation's Mortgage Investments-Ontario ("MIO") office. In his covering note to Boddy, Warner asked that Boddy have a quick look at the proposal and advised that Confederation might be interested in one half of the proposed loan.

Between June 20 and July 22, 1982 Confederation considered Khoury's loan proposal. Confederation analyzed and inspected the property and considered the financial support which CMHC was prepared to provide to facilitate the transaction. This support included, among other things, CMHC insurance in respect of Confederation's loan and ARP and ARP-like financing assistance. The nature and extent of the CMHC assistance was summarized in a Tentative Loan Inquiry compiled in early July, 1982 by Victor Gosselin ("Gosselin") of Confederation who was Boddy's assistant manager.

Mr. Rattray, Confederation's assistant vice-president and director of mortgage investments, authorized Coates and Boddy to consider making this loan at an interest rate of 18.5% over a 20 year term. Boddy was instructed to have Khoury submit a formal loan application and pay to Confederation a standby fee in an amount of \$150,000.

Confederation do what they call a matching of funds. In this case Polysar as an investor had pension funds they sought to invest for 20 years. Khoury was to get a 20 year mortgage. Confederation matched the funds and looked for an interest spread generally of 1/2 to 3/4 of a percent between borrower and lender as its fee, though the spread on this transaction was tighter.

On July 22, 1982, Boddy contacted Mr. Hall, an in-house solicitor employed by Confederation, to determine whether he could act as the solicitor on this transaction on behalf of Confederation. As he was unable to do so, Mr. Hall, after consulting Martindale and Hubble to determine the rating which had been accorded to the Shepherd, McKenzie firm, recommended that Boddy contact Mr. George Plaxton ("Plaxton") of the Shepherd, McKenzie. Boddy then contacted Plaxton. Plaxton advised Boddy of a number of corporate clients for whom his firm had done mortgage work, including the Bank of Montreal, the Royal Bank of Canada, Equitable Life and Sunoco. That day, the Shepherd, McKenzie firm provided Boddy with an estimate of \$10,000 in respect of its legal fees pertaining to the transaction and indicated that the necessary legal work could be completed by the then scheduled closing date of August 9, 1982. Boddy's recollection is that this information was conveyed to him on July 22, 1982 in a telephone call in which Plaxton and his partner James Henry (Kim) Little ("Little") participated by speaker phone. Mr. Little testified that he does not recall participating in that call and believes that his first contact with Confederation occurred in early August, 1982.

On August 10, 1982, Confederation retained Shepherd, McKenzie, and in particular Plaxton and Little, to act as their solicitors on the mortgage financing. No mention was made by either Plaxton or Little to Confederation at that time that they had earlier been retained by Goodman & Goodman to search title to the property on behalf of Khoury.

Written instructions to the solicitors bearing the same date confirmed that the mortgage was for \$7,167,294.11 at 18.25% interest for a 20 year term with no prepayment privilege. Some time after Boddy forwarded the initial commitment letter to Khoury on August 10, 1982, Coates received a telephone call from Khoury in which Khoury requested that Confederation agree to include in the commitment letter a clause which required Confederation to consent to the registration of the Skyview Towers complex as a condominium. Coates told Khoury that Confederation would consider his request. Coates immediately contacted Boddy and instructed Boddy to investigate Khoury's request. Coates said that he specifically told Boddy that he would only consider the request if it did not affect any of the terms of the loan which Confederation proposed to make, including its term of 20 years. Boddy testified that while he does not recall the specific instructions he received from Coates, there is no question in his mind that his instructions were to conduct an investigation to ensure that the intrusion of the condominium conversion clause into the commitment letter would not affect any of the business terms of the transaction, including the closed 20 year term of the loan. For that reason, Boddy considered it essential that Shepherd, McKenzie, as Confederation's lawyers responsible for the transaction, would review the principle and the wording of any such clause. Boddy testified that given his years of experience working with Coates, he is certain that he would have sought the advice of Shepherd, McKenzie in respect of this clause before seeking the approval of Coates because that was what was expected of him.

Boddy testified that after he was initially requested by Coates to investigate Khoury's request, he discussed the wording of a proposed condominium clause with Khoury and possibly with Khoury's lawyer, Gerald Ross of the Goodman & Goodman firm. When the wording had been assembled in what Boddy considered to be a clear and sensible form, he approached the Shepherd, McKenzie firm concerning this clause to seek that firm's approval as to the principle and wording of the clause. Boddy testified that he wanted to ensure that this clause would not affect any of the terms of Confederation's loan. Boddy testified that he believes there is a remote possibility that his initial discussion with the Shepherd, McKenzie firm occurred prior to the commencement of the week of August 23, 1982 with someone other than Little. He testified that while he does not specifically recall the discussion, he believes that it occurred with Little on either August 23 or 24, 1982 and that during their discussion Little confirmed that the condominium clause was satisfactory both in principle and in wording.

Boddy was examined for discovery in this action on behalf of Confederation. He testified during his discovery that he believed his initial discussion with the Shepherd, McKenzie firm pertaining to the condominium clause occurred prior to August 19, 1982 rather than during the beginning of the week of August 23, 1982. He explained at trial that he now believes that at the time of his discovery in 1987, he placed too much emphasis on a brief note at the bottom of Khoury's telex dated August 13, 1982. The note is dated August 19, 1982 and states "amended in red on commitment letter and approved by JHC [Coates] - signed commitment letter in mail to us". Boddy testified that four of the five changes listed in Khoury's telex (none of which include or pertain to the condominium clause) were typed in red on Confederation's copy of the commitment letter. The condominium clause was also typed in red on that copy of the commitment letter. Boddy testified that in 1987, at the time of his discovery, he concluded that the brief note at the bottom of the telex must have referred to all of the changes in red on the commitment letter, including the condominium clause, and that if that clause had been approved by Coates on August 19, he must have spoken to the Shepherd, McKenzie firm on or prior to that date to obtain its advice in respect of the clause. This is so because Boddy would not have sought the consent of Coates without having first obtained the approval of Confederation's lawyers.

Boddy testified at trial that having given this issue further consideration in preparing to testify at trial, he now believes that his evidence at discovery in respect of this issue was incorrect. He testified that by the time he arrived at this conclusion, he was no longer in the employ of Confederation and was no longer in the mortgage business. He was alone in his hotel room in Toronto reviewing documents and productions when he came to this realization and was not asked or encouraged to change his evidence by anyone. Boddy testified that in preparing to give evidence at trial, he began to focus on Khoury's style as a negotiator which was to negotiate a particular issue and, once that issue had been resolved, to then attempt to negotiate another concession. Boddy testified that he now believes that after Khoury had obtained Confederation's consent to the changes listed in his telex of August 13, 1982, which consent was given by Confederation on August 19, 1982, Khoury then raised with Coates the condominium conversion issue. Boddy does not believe now that he discussed this issue with Little, or with anyone else from the Shepherd, McKenzie firm until the beginning of the week of August 23, 1982, although he recognizes that there is a remote possibility that he may have done so.

Boddy was not cross-examined at trial in respect of this change in his evidence.

Boddy testified that following his initial discussion with Little pertaining to the principle and wording of the condominium clause, he spoke with Coates. Boddy testified that after he told Coates that the clause had been approved by Confederation's solicitors, Coates gave his approval in respect of the clause. Boddy then contacted Khoury in respect of this matter. Khoury told Boddy that he would execute the commitment letter, amended to include this clause, and then return it to Confederation.

Boddy's recollection is that he again spoke with Little by telephone on August 25, 1982 concerning the condominium clause. At Little's request, Boddy dictated the wording of the clause to Little over the telephone into Little's dictation machine. Little recorded the wording of the clause in order that his secretary could transcribe the wording.

Also on August 25, 1982, Khoury deposited an executed copy of the commitment letter with Confederation's Fredericton office. The executed copy was then transmitted from Fredericton to Toronto and was received by Boddy on the morning of Friday, August 27, 1982. Boddy immediately examined the condominium clause and noticed that Khoury had made two changes to the wording of the clause which had been approved by Confederation and by Little. Boddy said he discussed these changes with Little by telephone. He asked Little whether, in view of these changes, it was satisfactory for Confederation to proceed with this transaction with Khoury by accepting the changes which Khoury had made to the commitment letter. Boddy said that Little approved the changes, including the changes which Khoury had made to the condominium clause. Boddy then sought and obtained head office approval to these changes. After having done so he initialled the various changes to the commitment letter and returned the fully executed and initialled copy to Khoury on the afternoon of Friday, August 27, 1982.

Little acknowledged during his evidence-in-chief that he had in his file a typed transcription of clause 29 of the commitment letter, the condominium clause. He stated that he believed he received this wording on August 27, rather than on August 25 and that he did not believe he was asked to address the potential implications of the Condominium Act when this clause was dictated to him by Boddy. He testified that he was simply told to insert this clause into the mortgage.

In cross-examination, however, Little admitted that:

(a) the typed version of clause 29 may have been received by him on a day other than August 27, and potentially as early as August 25;

(b) he began drafting the mortgage on August 24. He drafted the mortgage as well on August 25. The draft mortgage was checked by him on August 26 and on August 27 was sent by him to Confederation;

(c) he cannot say that he was not asked about clause 29 and whether it would affect any other term of the loan. He cannot say when he first heard of this clause; and

(d) Boddy contacted him concerning the revisions made to the condominium clause by Khoury. Little was aware that Confederation would have to agree to these changes, and to initial them on the commitment letter, before its agreement with Khoury would be effective.

Little conceded, during his examination for discovery, that he was consulted by Boddy as to the effect of clause 29 of the commitment letter [the condominium conversion clause] before the commitment letter was executed by Confederation. The following questions and answers from Little's discovery transcript, among others, were read into evidence at trial:

1450. Q. You were told yesterday, sir, when Boddy gave you 16 and 29 that he put them to you and asked for you [sic] comments on them.

A. He said can we work, are they okay. 1451. Q. Yes.

A. Can we use them in documents.

1452. Q. Yes.

A. That was my understanding of it.

1453. Q. When you got the typed second page of 29, I am suggesting to you you can't take the position that that was after the commitment letter, the revised commitment letter was sent by Confederation Life.

A. I don't intend to take that position. The position I intend to take is that I don't know when that commitment letter was sent.

1454. Q. Therefore, it would have been open to you when you got this signed condominium clause, if you had been aware of it at the time and you twigged to it, to say look, because of 7(9) and 7(10), that could cause you problems.

A. I could have said that to them at any time if I had been aware.

Little proceeded to perform the legal work required to permit the transaction to close. He drafted a mortgage, the purpose of which was to secure for Confederation a closed 20 year term at an interest rate of 18.25% with no prepayment privilege whatsoever. He confirmed to Confederation, prior to closing, that Khoury had a binding commitment on a 20 year term with no prepayment privilege. The mortgage drafted by Little included, among others, the following provision:

28A) The Mortgagee covenants and agrees that it will, upon the request of the Mortgagor, execute such consents, authorities and other documents as the mortgagor may reasonably require for the constitution of the lands and premises mortgaged hereby as a condominium pursuant to The Condominium Act of Ontario, R.S.O. 1980, as the same may be amended from time to time. PROVIDED that the Mortgagee shall have the right to approve the Declaration, description, By-laws and all other documents constituting the said lands and premises as a condominium, which approval shall not be unreasonably withheld. PROVIDED FURTHER that during the full term of this mortgage, the lands and premises mortgaged hereby shall be operated as a single rental apartment project, and in the event of the sale or transfer of any one or more individual condominium units to a purchaser or purchasers who occupies or occupy any such unit or manages the same as a rental unit or units separate from the remainder of the units in the said condominium, then all moneys hereby secured with accrued interest thereon shall forthwith become due and payable. PROVIDED FURTHER that all reasonable legal fees incurred by the Mortgagee in so executing an approving shall be borne by the Mortgagor, shall be payable forthwith, and shall be a charge on the lands mortgaged hereby with interest as herein provided until paid.

The transaction closed on September 22, 1982. The mortgage which had been drafted by Little and executed both by Khoury and by 511666 was registered against title to the Skyview Towers property. On the day of closing, Little executed a document entitled "Preliminary Report and Request for Funds", in which he certified that on closing Confederation would receive a first charge on the Skyview Towers property in accordance with its Instructions to Solicitors. This document was handed by Little to Gosselin at the closing on September 22, 1982. Confederation then released its first advance of funds under its mortgage in an amount of \$6,863,544.11. The remainder of the funds under the mortgage, an amount of \$303,750, was released by Confederation on December 15, 1982.

Sections 7(9),7(10) and 61 of the Condominium Act provided:

7-(9) Any unit and common interest may be discharged from such an encumbrance by payment to the claimant of a portion of the sum claimed, determined by the proportions specified in the declaration for sharing the common interests.

(10) Upon payment of a portion of the encumbrance sufficient to discharge a unit and common interest, and upon demand, the claimant shall give to the owner a discharge of that unit and common interest in accordance with the regulations.

61. This Act applies notwithstanding any agreement to the contrary.

Little did not alert Confederation to the risk that the registration of this project as a condominium would enable 511666 to prepay the mortgage. He did not identify or refer to the relevant provisions of the Condominium Act. He admitted in cross-examination that he forgot about those provisions in advising Confederation in respect of the transaction. Little did not advise Confederation as

to the steps which might have been available to it to protect against the risk of prepayment. Nor did he draft provisions in the mortgage which would have protected adequately the rights and interests of Confederation. This is so even though it was a fundamental term of the instructions which were provided to Little that Confederation's mortgage was to be for a closed term of 20 years at an interest rate which, by the scheduled closing date, was above the interest rate then prevailing in the market. Little was aware at the time that Confederation had matched the funds it had loaned to Khoury with its obligations to Polysar.

Boddy testified that if he had been advised by Little that the condominium clause might have given rise to a risk of prepayment, he would not have agreed to the clause unless Little could have suggested wording which protected against that risk.

Little held himself out to Confederation as having considerable expertise in the area of real estate law. At the time of the transaction, Little had practised for 22 years. Approximately 85% of his time was spent practising in the real estate area. In the ten year period prior to August, 1982, Little had acted on four or five apartment building transactions and for approximately six mortgagors or mortgagees in connection with condominium transactions. At no time did Little advise Confederation that he was not competent to act as the solicitor on this transaction, either before or after the condominium issue arose. Little was aware of the provisions of ss. 7(9), 7(10) and 61 of the Condominium Act as at August, 1982. He had been so aware for a number of years. He failed, however, to direct his mind to these provisions in advising Confederation in respect of the transaction and in performing the legal work pertaining to the transaction in August and September, 1982. On Little's own admission he forgot about these provisions.

Little conceded during his examination for discovery that if he could do this transaction today, having regard to the relevant provisions of the Condominium Act, he would do "something completely different" from what he did in 1982. This evidence was read in at trial. Little testified that if he could do the transaction again, he would incorporate clauses in the mortgage to counteract the effects of ss. 7(9) and (10) of the Condominium Act for the purpose of protecting the interests of Confederation. On June 3, 1983 Khoury wrote to Coates and enclosed three pages of cash flow projections which he said had been prepared by Ralph Neville ("Neville") of Dunwoody. Neville was Khoury's financial advisor and had advised Khoury in respect of the syndication of Skyview Towers as a MURB. Khoury maintained that because of, among other things, Confederation's 18.25% interest rate mortgage, the Skyview Towers project had no medium or long term economic viability. He asked that Confederation agree to substantial reductions in the interest rate under its mortgage. In a telex dated June 8, 1983, Khoury reiterated this request. He maintained that he intended to sell the project completely by December 31, 1983.

Coates provided to Boddy, Khoury's letter of June 3, 1983 and the accompanying schedules, as well as Khoury's telex of June 8, 1983, and asked Boddy to review these documents with a view to making a recommendation to Coates as to the manner in which Confederation should respond to Khoury's request. Boddy was assisted in this task by Gosselin, who had considerable experience in cash flow analysis. Neither Gosselin nor Boddy considered the unsubstantiated figures which had been provided by Khoury to be particularly plausible. Boddy testified that throughout this period, he had doubts as to the veracity or reliability of Khoury's figures.

On June 15, 1983, Boddy met with Khoury for the purpose of discussing Khoury's stated concerns pertaining to the viability of the Skyview Towers project. During this meeting, Khoury told Boddy that he had received a written opinion from Mr. Donahue of the McCarthy & McCarthy firm to the effect that upon registration of the project as a condominium the mortgagor could demand that Confederation accept repayment in full of the amounts then outstanding under its mortgage. Khoury did not provide Boddy with a copy of Mr. Donahue's opinion. He specifically prohibited Boddy from contacting either Mr. Neville or Mr. Donahue.

Boddy reacted to Khoury's statement concerning the legal opinion he had apparently received with surprise, alarm and disbelief. He immediately contacted Coates to advise him of what had transpired and then contacted Little. Little told Boddy that by means of a waiver by Confederation, clause 28A of the mortgage, which required Confederation to consent to the registration of the Skyview Towers complex as a condominium, could be nullified. Boddy testified that Little undertook to look into the matter further and write to Confederation.

On June 17, 1983, Little forwarded his written opinion in respect of the prepayment issue to Boddy. The first paragraph of Little's letter stated the following:

You have asked us to express to you our opinion concerning the right of the mortgagor under Section 28A to make payment in full of the amount secured by the mortgage in the event the project is registered as a condominium, and individual lots are sold and either occupied by the owner or operated as rental units outside the rental pool relating to the balance of the building.

In his letter of June 17, 1983, Little concluded by expressing the unqualified opinion that because Confederation had the right to waive a condition in clause 28A of the mortgage in respect of the use of the Skyview Towers property as a single rental apartment project, the mortgagor was not entitled to oblige Confederation to accept payment of the full amount of the mortgage under this clause.

In researching and writing his opinion letter, dated June 17, 1983, Little did not refer to, or even advert to, the provisions of ss. 7(9), 7(10) or 61 of the Condominium Act. He did not direct his mind to these provisions, even though they were directly relevant to the subject matter of the letter. Little admitted that in writing the letter, he did not answer the question which was put to him. Little conceded during his examination for discovery that if he knew in 1982 what he knew at the time of his discovery, he would have referred to the relevant provisions of the Condominium Act in writing his opinion letter. This evidence was read in at trial.

Craig Arthurs ("Arthurs"), currently a legal vice-president and associate general counsel of Confederation, said that he met with and interviewed Little at Little's office in London, Ontario, on September 25, 1984. He said that his memorandum of September 27, 1984 summarizes accurately the nature of his discussion with Little during their meeting. That memorandum states, among other things, the following:

In any event, Mr. Little showed a note to his file (copy attached) which he says records a telephone conversation he had with Roger Boddy in which Mr. Boddy provided him with the wording to clause 29 (later addendum 5) dealing with the registration of the property as a condominium ...

I asked Mr. Little whether Mr. Boddy was reporting this wording to Mr. Little as a *fait accompli*. He states that this was not the case and he believes that Mr. Boddy was asking him what he thought of the clause prior to agreeing to it. He did not find anything wrong with it at the time ...

Mr. Little stated that at the time of closing they were not really concerned with protecting a high interest rate but rather ensuring that the property itself or units could not be sold to someone who Confederation Life did not approve of. He stated that he was not then aware of any argument to the effect that the provisions of the Condominium Act would allow the discharge of a blanket mortgage once the condominium was registered. The first time he was aware of this argument was when Chris [Ahlvik] contacted him in June or July of 1983

Little had at least five separate retainers on behalf of Khoury. They included the following:

FIRST: Little was retained on July 5, 1982 to act as agent for Khoury's solicitors, Goodman & Goodman, in arranging for a full title search in respect of the Skyview Towers properties. He forwarded his title searcher's notes relating to this task to Goodman & Goodman on July 21, 1982;

SECOND: In August, 1982, Little was retained by Khoury to provide an opinion on the title of the Skyview Towers property;

THIRD: Little was retained by Khoury in approximately September or October, 1982, to register the Skyview Towers property as a condominium;

FOURTH: Little was retained by Khoury after September, 1982 to handle certain landlord and tenant issues which arose in respect of the Skyview Towers property; and

FIFTH: Little was retained by Khoury to undertake a name search for him.

Little conceded in cross-examination that it is doubtful that he told Confederation about his first retainer, that of searching title for Khoury in respect of the Skyview Towers property, at the time Shepherd, McKenzie was first contacted by Confederation in respect of this transaction in July, 1982. He agreed in cross-examination that the only reason for not telling Confederation about his first retainer is that if he had told Confederation about that retainer, Confederation would probably have retained someone else to handle the transaction. Boddy testified that he was never told about this retainer. He testified that if he had been told of this retainer when he first contacted the Shepherd, McKenzie firm, he would probably have excused himself from his conversation and gone back to discuss the issue with Mr. Hall, Confederation's senior in-house real estate lawyer. Boddy explained that it was not Confederation's policy, other than for staff loans, to use the borrower's solicitor for mortgage work. This was so because Confederation wanted to have its own solicitors look after its interests.

Little also conceded that he did not advise Confederation of his fourth or fifth retainers; nor did he contact Confederation to seek its approval before accepting his third retainer from Khoury in September or October, 1982 in respect of the conversion of the Skyview Towers project into a condominium. This was so even though Little was still acting as the solicitor for Confederation at the time in respect of the mortgage transaction. On June 15, 1983, Little advised Boddy that he saw a conflict of interest in acting on behalf of Khoury in respect of the condominium conversion. He told Boddy that he regarded Confederation as his primary client and that he would proceed very carefully or stop acting for Khoury. He had been told that day of Boddy's concerns as to the potential implications which a condominium conversion might have in respect of the prepayment of Confederation's mortgage. Little continued, however, to act on Khoury's behalf in respect of the conversion of the Skyview Towers property into a condominium. Indeed, on June 17, 1983, the very day that he forwarded his written opinion to Confederation in respect of the prepayment issue in which he failed to refer to the relevant provisions of the Condominium Act and two days after he told Boddy that he was aware he was in a position of conflict, Little met with London Development Consulting Services and Khoury for the purposes of proceeding with the conversion of Skyview Towers into a condominium.

Furthermore, Little continued to perform services for Khoury in respect of the conversion of Skyview Towers into a condominium throughout 1983. On July 11, 1983, acting in his capacity as the solicitor for Khoury, Little forwarded to Boddy a draft declaration of condominium and asked that Confederation provide its comments in respect of the draft declaration as soon as possible. Shortly thereafter, Little began assisting Confederation in redrafting the condominium conversion documents he had originally drafted on behalf of Khoury for the purpose of protecting the 20 year term of Confederation's mortgage by defeating Khoury's right or ability to prepay the mortgage. Little did not advise Khoury that he had undertaken this task for Confederation. Nor did he seek Khoury's consent before doing so. Little denied at trial that he was in a position of conflict at the time. He conceded, however, that in hindsight, knowing what he knows today, he would have sought the consent of Confederation before purporting to act on Khoury's behalf in respect of the conversion of the Skyview Towers project to a condominium.

KHOURY LITIGATION

Khoury expressed concern repeatedly in July and August, 1983 concerning the refusal of Confederation to consent unconditionally to the registration of Skyview Towers as a condominium. He wrote to Gosselin on July 21, 1983 and asked that the consent of Confederation be provided as soon as possible. He took the position that any delay by Confederation in providing its consent could have very serious consequences for the marketing of Skyview Towers. Khoury reiterated this concern in a letter to Gosselin dated July 29, 1983.

On August 2, 1983, Khoury wrote to Confederation to advise that he would no longer make payments under the Confederation mortgage. Khoury took this position because Confederation had refused to consent to the conversion of the Skyview Towers project into a condominium. No amounts were paid by Khoury under the mortgage between September, 1983 and April, 1985.

After Khoury stopped making payments under the mortgage in August, 1983, he persisted in his attempts to require Confederation to provide its unqualified consent to the conversion of Skyview Towers to a condominium. Confederation refused to do so, and sought to compel Khoury to execute a condominium conversion documents which would protect the term of Confederation's mortgage. Litigation ensued between the borrower and the lender.

Craig Arthurs was called to the Bar of Ontario in 1979 and thereafter practised with the Toronto law firm of Torkin, Manes & Cohen as a litigation counsel. In that capacity, Arthurs handled predominantly commercial litigation and practised before all levels of courts in Ontario. He was actively involved both in trial work and appellate work. In 1981, Arthurs joined the legal department of Confederation as assistant counsel. Throughout his career with Confederation, he has continued to be responsible for litigation matters.

Arthurs testified at length concerning the litigation which arose in 1984 and 1985 between Confederation and Khoury. He explained that in that period, five separate proceedings were commenced between the parties. Arthurs testified that Confederation's obligation to consent to the conversion of the Skyview Towers project to a condominium was central to each of these proceedings. They were:

(a) Confederation's action against Khoury and his company 511666 for arrears under the mortgage commenced by specially endorsed writ in March, 1984;

(b) Confederation's action against Khoury and his company 511666 for arrears under the mortgage commenced by way of specially endorsed writ in July, 1984;

(c) Khoury's action against Confederation for declarations, mandatory orders and damages commenced in October, 1983 and served in May, 1984;

(d) Confederation's application for the appointment of a receiver in respect of the Skyview Towers project; and

(e) Khoury's application to determine a number of points of law pertaining to the condominium conversion clause and the effect of ss. 7(9) and 7(10) of the Condominium Act.

In these proceedings, the only substantive issue raised by Khoury which did not pertain to the obligations of Confederation to consent to condominium registration pertained to Khoury's argument that he was released from his personal covenant. Arthurs testified that Confederation was confident in its position that Khoury was still bound by his covenant.

Arthurs testified that in the fall of 1983, Confederation retained Fraser & Beatty to act on its behalf in respect of the litigation involving Khoury. Confederation was represented, in particular, by John Adams, a senior litigator with particular expertise in mortgage enforcement proceedings. Khoury was represented by Thomas Heintzman of the McCarthy & McCarthy firm. Arthurs testified that McCarthy took every procedural step available to it to delay and hinder Confederation's actions against Khoury. Repeated threats were made by Khoury, through his solicitors, to hold Confederation liable for millions of dollars of damages arising out of Confederation's refusal to provide it unconditional consent to the registration of the Skyview Towers project as a condominium. Khoury provided Confederation with reports from his MURB expert, Mr. Neville, to substantiate his claim for damages.

On September 28, 1984, Confederation proceeded with an application for the appointment of an interim receiver of the Skyview towers project to receive the rents from the project and to pay the amounts due under the mortgage. Arthurs testified that Confederation had initially been reluctant to pursue such a remedy because there was a slight risk that by doing so it would confer upon Khoury the right to redeem the mortgage. There were several judicial decisions in the spring of 1984, however, in Ontario, Alberta and British Columbia which clarified the law in this area and held that no right of redemption would arise if a mortgagee appointed a receiver of mortgaged premises or went into possession.

Confederation's application was heard by Mr. Justice Smith. For reasons released on October 22, 1984, Mr. Justice Smith dismissed the application. In responding to the application, Khoury had taken the position that Confederation was disentitled to the relief sought by it because, among other things, Confederation had unreasonably withheld its consent to the registration of the Skyview Towers project as a condominium. Mr. Justice Smith indicated in his reasons that he was inclined to favour Khoury's position and stated that in his view the case of Confederation was "generally speaking a weak one". Mr. Justice Smith awarded the costs of the application to Khoury in any event of the cause.

In January and February, 1985, Khoury proceeded with an application for the following declarations:

(a) that the mortgagee under the terms of the mortgage is not entitled to insist that the declaration proposed to be filed by the mortgagor for the purpose of constituting and registering the mortgaged premises, a condominium, ... shall contain certain conditions demanded by the mortgagee in the form of Articles IX and X, hereafter set out; and

(b) That after the mortgaged premises are constituted and registered as a condominium, any unit holders may, by virtue of s. 7(9) and 7(10) of the Condominium Act discharge the mortgage from any and all units by a single lump sum payment or payments on a unit-by-unit basis, equal in the aggregate to the principal amount secured under the mortgage, at the date of payment, plus accrued interest.

The application was heard by Mr. Justice Griffiths (as he then was). He held that:

(a) in respect of the declaration set out in paragraph (a) above, the answer was negative. Mr. Justice Griffiths held that Articles IX and X were not, by law, authorized to be inserted in the condominium declaration; and

(b) in respect of the declaration sought in paragraph (b) above, the answer was in the affirmative. Mr. Justice Griffiths held that the effect of ss. 7(9) and 7(10) of the Condominium Act is that once a mortgagee has consented to the registration of a condominium declaration, as he found Confederation had covenanted to do, the mortgagee thereby agrees to the granting of partial discharges even though the mortgage is a closed mortgage and is not redeemable for a term certain. Mr. Justice Griffiths held that Confederation had expressly recognized the right of the mortgagor to convert the apartment buildings into a condominium and had covenanted to execute the necessary consent and any of the documents as the mortgagor might reasonably require.

Mr. Justice Griffiths left open several issues to be determined at trial. These issues included the right of Confederation to enforce the provisions of the commitment letter which prohibited the sale of individual condominium units during the term of the mortgage and whether, in the circumstances, Khoury was estopped from exercising his rights under clause 28A of the mortgage.

THE SETTLEMENT

Arthurs said that Confederation was extremely concerned by the decisions of Mr. Justice Smith and Mr. Justice Griffiths. By the end of February, 1985 Confederation had not received any payments under its mortgage for a period of approximately 17 months. Confederation had no reasonable prospect of securing the rents in the short term. Confederation was faced with the prospect of protracted and expensive litigation with Khoury and with a sizeable counterclaim for damages by Khoury that increased with the

passage of time. There were a number of weaknesses in Confederation's estoppel claim against Khoury and the matter was not expected to reach trial for approximately two-and-a-half years. As a result of these and other factors, Confederation decided to attempt to settle all of the outstanding litigation with Khoury. In making this decision, Confederation considered fully all of the options and arguments available to it, including the so-called estoppel argument.

Confederation ultimately reached a settlement with Khoury on March 28, 1985. Pursuant to this settlement, Khoury agreed to pay to Confederation the mortgage principal as well as all arrears and compound interest up to and including April 12, 1985.

Arthurs testified that having regard to, among other things, his professional experience, both as litigation counsel and as counsel to Confederation, his knowledge and understanding of Confederation's business transaction with Khoury, his knowledge and understanding of Confederation's various dealings with Khoury and his counsel from August, 1982 onwards, his knowledge and understanding of the ongoing litigation between Confederation and Khoury as at March, 1985, and the possible outcome of that litigation, and having regard to the assistance and advice which Confederation had received from experts who were consulted by it at the time, including MURB experts, his opinion at the time was that the settlement reached with Khoury in March, 1985 was fair and reasonable in the circumstances. Arthurs testified that in his view, settlement with Khoury at that time was the only practical alternative available to Confederation.

LIABILITY

When Confederation contacted Shepherd, McKenzie in July, 1982 to act on its behalf on this commercial mortgage transaction, they held themselves out as experienced, competent and available. Little was put forward as a senior member of the Bar able to handle all aspects of such a transaction. Confederation was told of other clients of the firm for whom complex and sizeable transactions had been handled. Availability was critical because the original closing date was to have been in a few weeks, namely, September 9. Not a word was said to Boddy about the retainer Little had from Goodman & Goodman to search the same title for Khoury weeks earlier. Confederation might have sought another firm of solicitors if it had been advised of Little's earlier retainer. Indeed Boddy said he might have gone elsewhere had he been told.

There can be no dispute about the term of Shepherd, McKenzie's retainer. It was to prepare a mortgage for a 20 year term at 18.25% with no prepayment provision. Shepherd, McKenzie had to give proper legal advice for the preparation of the mortgage. It was important to Coates and Boddy that when Khoury requested a condominium clause be put in the commitment letter, that it should not alter the closed feature of the mortgage because of the matching feature. Boddy says he spoke to Little three times about the condominium clause, on the 23rd or 24th of August, the 25th of August when the actual wording was discussed, and again on the 27th when the Khoury revision was discussed.

I find that the commitment letter was not finalized by Confederation until they had Little's assurance that consent to the condominium clause did not affect the term of the mortgage.

I am satisfied that without that assurance, Confederation would not have agreed to the inclusion of the clause in the commitment letter. Little was asked in chief about clause 29 of the commitment letter being dictated to him and why he did not have the Condominium Act in mind. His answer to his own solicitor was he was not asked about the Act. I find that to be incredible. It was his duty to advise Confederation of the effect of a public statute. He admitted in cross-examination that he forgot to address his mind to the Act. He also admitted that he could not say that Boddy had not asked him about the effect of the Act. He was aware of the provisions of ss. 7(9) and 7(10) but failed to direct his mind to them.

Arthurs confirmed that Little told him in 1984 that Boddy had asked him what he thought of the condominium clause before Confederation initialled the commitment letter.

A solicitor has a duty to inform a client about the legal effect of a factual situation put before him.

I conclude that Confederation acted to their detriment on Little's advice.

When drafting the mortgage, Little had two potential conflicting clauses. He had an obligation to draft provisions to negative inconsistency.

Two experts gave uncontradicted evidence as to how that could be done. The first, Reuben M. Rosenblatt, is a senior partner of the Toronto law firm Minden, Gross, Grafstein & Greenstein. Mr. Rosenblatt graduated from Osgoode Hall in 1959 and obtained the degree of Masters of Law in 1977. He has acted in virtually all aspects of real estate transactions and has dealt extensively with mortgages in both commercial and residential transactions. He has lectured in real estate law at Osgoode Hall Law School for the last 15 years and does opinion work for the Law Society of Upper Canada pertaining to the issue of solicitor's negligence.

Mr. Rosenblatt testified that in his opinion, one of the fundamental terms of the commitment letter executed by Khoury and Confederation was that the loan from Confederation be for a closed term of 20 years. He testified that in his opinion, Little should have been aware of the effect which ss. 7(9), 7(10) and 61 of the Condominium Act might have in the circumstances of this case and that registration of the Skyview Towers project as a condominium could result in the fracturing of the mortgage. He said that in his opinion, Little had a duty to advise Confederation of this risk. He testified that this duty existed both in London and in Toronto and existed whether the client was an individual or a sophisticated lending institution. Mr. Rosenblatt also testified that even if Little had only been consulted after the terms of the commitment letter had been finalized and agreed to between Confederation and Khoury, he had an obligation to advise Confederation as to the potential inconsistency between the condominium conversion clause and the closed 20 year term of the mortgage. He testified that Little would then have had an obligation to attempt to draft provisions in the mortgage which reconciled these provisions, such as, for instance, by including in the mortgage a provision pursuant to which the mortgagor, upon prepayment of the mortgage, would be required to pay a penalty in accordance with a predetermined actuarial formula designed to adequately compensate the mortgagee.

Mr. Rosenblatt, in cross-examination, was asked whether Confederation could simply have enforced the provision of the mortgage in clause 28A which required the mortgagor to operate Skyview Towers as a single rental project during the full term of the mortgage, and the term in Addendum 5 to the commitment letter which provided that for the full term of the mortgage there would be no sales of individual condominium units. Mr. Rosenblatt testified that in his opinion these obligations were unenforceable. He testified that in his opinion, a mortgagee could not prohibit the sale of individual condominium units under the Condominium Act.

The second expert who testified in respect of this issue for Confederation was Abraham Feinstein of the Ottawa law firm Soloway, Wright. Mr. Feinstein is a senior partner of that firm, having been called to the Bar of Ontario in 1965. He carries on an active real estate and devotes in excess of 90% of his time to that area. His practice involves, among other things, mortgage financing and commercial real estate transactions. He has acted for borrowers and for lenders. Mr. Feinstein has lectured for the Canadian Bar Association and the Law Society of Upper Canada in real estate matters and has been a lecturer or group leader in real estate courses for the Bar Admission course. He is a bencher of the Law Society of Upper Canada.

Mr. Feinstein testified that in his opinion, in the circumstances of this case, Little had a duty to make himself aware of the risk that ss. 7(9) and 7(10) of the Condominium Act exposed Confederation's mortgage to prepayment by the mortgagor upon registration of the Skyview Towers project as a condominium. He testified that in his opinion, Little also had a duty to advise Confederation of that risk. Mr. Feinstein testified that if Little had sought to draft the mortgage in an effort to reconcile the two potentially conflicting provisions in the commitment letter, he could have reconciled these by using his authority under clause 6(a) of the commitment letter to include a provision which made it a condition of Confederation's consent to the registration of the premises as a condominium that the borrower agree to register a mortgage with similar terms on each individual unit to replace the mortgagee's blanket mortgage.

John Robert Cowan was called as an expert in respect of this issue by the defendants. Mr. Cowan was called to the Bar of Ontario in 1962. He practised for many years with the firm Dyer, Brown in London and recently joined the firm Harrison, Elwood. Mr. Cowan devotes approximately 60% of his time to real estate matters. He also acts for small businesses, such as car dealerships and food processors.

Mr. Cowan testified that in his opinion, the effect of ss. 7(9) and 7(10) of the Condominium Act was not 'widely known' in London prior to the decision of Mr. Justice Griffiths in February, 1985, and that he does not believe that the "average solicitor" in London had a clear appreciation of these provisions in 1982, particularly when considered together with s. 61. He testified that if he had been asked to draft a provision in a mortgage which gave effect to the condominium clause in the commitment letter, he might have ended up with a clause like Little's clause 28A. He described this as a "pretty good clause".

Mr. Cowan testified that in his opinion, Little should have referred to ss. 7(9) and 7(10) of the Condominium Act in writing his opinion letter of June 17, 1983.

Mr. Cowan conceded in cross-examination that there is no different standard which applies in respect of a solicitor's obligations in London when compared with either Toronto or Ottawa. He testified that if a solicitor was aware of the inconsistencies in the commitment letter, he had an obligation to so advise his clients. He also testified that in providing his opinion in respect of this matter, he assumed that Little was not asked by Confederation whether the condominium clause in the commitment letter could affect the term of Confederation's mortgage. Mr. Cowan stated that in preparing his opinion, he had met with and interviewed Little who had been a friend of his for many years. Mr. Cowan conceded that if Little was asked for his advice in respect of the condominium clause, he had an obligation to advise Confederation as to the potential effects which might be caused by the relevant provisions of the Condominium Act. He agreed that even if a client was a large and sophisticated insurance company, the client was entitled to receive full and competent advice. Mr. Cowan agreed that if one considered clause 28A of the mortgage in light of the relevant provisions of the Condominium Act, one could not say that it was "a pretty good clause".

Because of the close friendship between Mr. Cowan and Mr. Little, and because of the greater experience of Confederation's experts over that of Mr. Cowan, where there is conflict I accept the opinion of Rosenblatt and Feinstein.

I accept the evidence of Boddy where it conflicts with that of Little. I felt Boddy had better detailed recollection than Little.

The Supreme Court of Canada considered the vexed question of concurrent liability in tort and contract in *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147. LeDain J., speaking for the Court, said at pp. 204-206:

I must now attempt to draw conclusions from what I fear has been a much too lengthy survey of judicial opinion on the question of concurrent liability. My conclusions as to what I conceive, with great respect, to be the opinion with which I am in agreement on the various issues underlying this question may be summarized as follows.

1. The common law duty of care that is created by a relationship of sufficient proximity, in accordance with the general principle affirmed by Lord Wilberforce in *Anns v. Merton London Borough Council*, is not confined to relationships that arise apart from contract. Although the relationships in *Donoghue v. Stevenson*, *Hedley Byrne* and *Anns* were all of a non-contractual nature and there was necessarily reference in the judgments to a duty of care that exists apart from or independently of contract. I find nothing in the statements of general principle in those cases to suggest that the principle was intended to be confined to relationships that arise apart from contract. Indeed, the dictum of Lord Macmillan in *Donoghue v. Stevenson* concerning concurrent liability, which I have quoted earlier, would clearly suggest the contrary. I also find this conclusion to be persuasively demonstrated, with particular reference to *Hedley Byrne*, by the judgment of Oliver J. in *Midland Bank Trust*. As he suggests, the question is whether there is a relationship of sufficient proximity, not how it arose. The principle of tortious liability is for reasons of public policy a general one. See *Arenson v. Casson Beckman Rutley & Co.*, [1977] A.C. 405, per Lord Simon of Glaisdale at p. 417. *Junior Books Ltd. v. Veitchi Co.*, [1983] 1 A.C. 521, in which an owner sued flooring subcontractors directly in tort, is authority for the proposition that a common law duty of care may be created by a relationship of proximity that would not have arisen but for a contract.

2. What is undertaken by the contract will indicate the nature of the relationship that gives rise to the common law duty of care, but the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by the express terms of the contract. It is in that sense that the common law duty of care must be independent of the contract. The distinction, in so far as the terms of the contract are concerned, is, broadly speaking, between what is to be done and how it is to be done. A claim cannot be said to be in tort if it depends for the nature and scope of the asserted duty of care on the manner in which an obligation or duty has been expressly and specifically defined by a contract. Where the common law duty of care is co-extensive with that which arises as an implied term of the contract it obviously does not depend on the terms of the contract, and there is nothing flowing from contractual intention which should preclude reliance on a concurrent or alternative liability in tort. The same is also true of reliance on a common law duty of care that falls short of a specific obligation or duty imposed by the express terms of a contract.

4. The above principles apply to the liability of a solicitor to a client for negligence in the performance of the professional services for which he has been retained. There is no sound reason of principle or policy why the solicitor should be in a different position in respect of concurrent liability from that of other professionals.

5. The basis of the solicitor's liability in tort for negligence and the client's right in such case to recover for purely financial loss is the principle affirmed in *Hedley Byrne* and treated in *Anns* as an application of a general principle of tortious liability for negligence based on the breach of a duty of care arising from a relationship of sufficient proximity. That principle is not confined to professional advice but applies to any act or omission in the performance of the services for which a solicitor has been retained. See *Midland Bank Trust Co. v. Hett, Stubbs & Kemp*, at p. 416, *Tracy v. Atkins* (1979), 105 D.L.R. (3d) 632, at p. 638.

Little breached his fiduciary duty to Confederation when they retained him by failing to advise of his earlier retainer to search title on the same property for Khoury. That alone is insufficient to attract any liability. However, the undisclosed retainers continued through 1983. Little acted for Khoury in getting the condominium registered, the very thing that affected the closed mortgage. Little told Boddy that Confederation was his primary client and he would be careful.

The very day that Little wrote a letter of June 17th to Boddy giving an opinion on right of redemption he met with agents of Khoury in London working on the condominium registration. Little prepared condominium documents for Khoury. They were sent to Confederation for execution. When Confederation said they needed more protection, Little re-worked for Confederation the documents he had crafted for Khoury to send to Confederation. He did not even tell Khoury that he was re-drafting the documents for Confederation.

In my view, Little showed a complete misapprehension of the duty a solicitor owes to a client. There is a higher duty on one who works both sides of the street.

Wilson J.A., as she then was, looked at the duty of solicitors in *Davey v. Woolley, Hames, Dale & Dingwall et al.* (1982), 35 O.R. (2d) 599 (leave to appeal to S.C.C. denied) at p. 602:

... A solicitor is in a fiduciary relationship to his client and must avoid situations where he has or potentially may develop a conflict of interests: see *Boardman et al. v. Phipps*, [1967] 2 A.C. 46, [1966] 3 All E.R. 721 at 756. This is not confined to situations where his client's interests and his own are in conflict although it of course covers that situation. It also precludes him from acting for two clients adverse in interest unless, having been fully informed of the conflict and understanding its implications, they have agreed in advance to his doing so. The underlying premise in both these situations is that, human nature being what it is, the solicitor cannot give his exclusive, undivided attention to the interests of his client if he is torn between his client's interests and his own or his client's interests and those of another client to whom he owes the self-same duty of loyalty, dedication and good faith.

It was submitted by counsel for the defendants that it is not a hard and fast rule that solicitors cannot act on both sides of a transaction and, indeed, that it is not uncommon for solicitors, particularly in rural areas, to represent both vendor and purchaser on a real estate deal provided they make full disclosure and both parties consent to their acting. This may well be true although even in the case of a so-called "simple" real estate deal, I doubt that it is good practice. In any event the solicitor unquestionably assumes a dual role at his own risk, the onus being on him in any lawsuit that ensues to establish that the client has had "the best professional assistance which, if he had been engaged in a transaction with a third party, he could possibly have afforded": see *London Loan & Savings Co. of Canada et al. v. Brickenden*, [1933] S.C.R. 257 at 262, [1933] 3 D.L.R. 161 [affirmed [1934] 3 D.L.R. 465, [1934] 2 W.W.R. 545 (P.C.)] (Crocket J. quoting from Lord O'Hagan in *McPherson v. Watt* (1877), 3 App. Cas. 254 at 266). Even on the simple real estate deal the consequences of conflict can manifest themselves in a failure to make the requisition that allegedly should have been made and would have been made if the solicitor had been motivated solely by a concern for the plaintiff. On a transaction of the degree of complexity of the one before the Court on this appeal I think it is clear that the solicitor cannot act on both sides and all the more so when there is superadded to the divided loyalty owed to the two clients adverse in interest the personal financial interest of the solicitor's senior partner. ... I think the trial judge was also wrong in thinking that Mr. Stevens was relieved of the obligation to warn the plaintiff against aspects of the transaction, if any, on which he was vulnerable just because he had his accountant to advise him. None of these things, it seems to me, excuse the solicitor from making a determination when he is first approached to act on a transaction whether he can in fact do so. He has to take stock of his position at that time and, looking down the road, decide as conscientiously as he can if he can represent the client or should send him elsewhere. Obviously there will be situations which fall on the border line and the issue for the solicitor will be whether or not to take a calculated risk. I do not view this as one of those cases.

As the transaction progressed the plaintiff's need for truly independent legal advice became even clearer. Should he have been advised of the risks of giving a warranty to the purchaser that the company's loss in the year of sale would not exceed a certain figure? Should he have received guarantees of the indebtedness on the notes representing the non-cash portion of the purchase price? Should he have received security for these notes? Should there have been an acceleration clause in the agreement making the unpaid balance fall due on default? Was the plaintiff prejudiced by the fact that the defendant law firm, having acted for the plaintiff and his companies previously, knew that he had been unsuccessful in having his credit extended at the bank and was therefore very anxious to sell? Was he prejudiced by the fact that they also knew from acting for Corporate Master Limited and from Mr. Woolley's personal involvement that unsecured and unguaranteed notes of Corporate Master Limited represented a substantial risk? In my opinion, Mr. Stevens, in undertaking to represent the plaintiff on this transaction, put himself in a position where it was virtually impossible for him to satisfy the onus of showing that the plaintiff had not been adversely affected by his divided loyalty. Indeed, when a dispute subsequently arose between the parties as to their legal rights under the agreement and a settlement of the dispute was negotiated, Mr. Stevens continued to act on both sides, reporting directly to Mr. Woolley by in-house memorandum on the progress of the negotiations. This memorandum makes it clear that Mr. Stevens was not devoting his efforts exclusively to the plaintiff.

On the appeal counsel for the defendants relied very heavily on an acknowledgment signed by the plaintiff on the closing of the transaction. In it the plaintiff acknowledged that he had been told that the defendants were acting on both sides of the transaction and that Mr. Woolley had a personal interest in it and that he nevertheless consented to have the defendants represent him. However, Mr. Stevens testified that the need "to take some precautions" of this kind did not occur to him until October or November of 1975 when he realized that the Howe option was going to be exercised and Corporate Master Limited was going to be the purchaser.

Little failed in his duty to warn Confederation of the effect of the condominium clause in the commitment letter. He had a duty of care under his retainer as well as a common law duty of care that arose from the solicitor-client relationship.

Where, as in this case, a solicitor undertakes to provide advice and legal services in respect of a transaction which is governed or affected, in whole or in part, by a public statute such as the Condominium Act, the solicitor bears the burden of exercising reasonable care and skill to ascertain by an examination of the relevant legislation the manner in which that legislation may impact upon the transaction. The solicitor is obliged to advise his client of any risks or concerns which such legislation may give rise to. (*Central Trust Company v. Rafuse et al.*, supra, at p. 212 per LeDain J.; *Elcano Acceptance Ltd. et al. v. Richmond Richmond, Stambler & Mills* (1989), 68 O.R. (2d) 165 (H.Ct.), at pp. 176-178 per O'Leary J.; supplementary reasons (1989), 68 O.R. (2d) 641; aff'd (1991) 3 O.R. (3d) 123 (CA), at p. 124.)

Where a solicitor holds himself out to his client as having particular expertise in a given area of law, such as in respect of sophisticated real estate transactions, a higher standard applies. The requisite standard is not that of a reasonably competent solicitor or ordinary prudent solicitor, but that of a reasonably competent expert in commercial real estate transactions. (*Elcano Acceptance Ltd. et al. v. Richmond, Richmond, Stambler & Mills* (1985), 31 C.C.L.T. 201 (Ont. H.Ct.) at 212-214 per Smith J.; rev'd on other grounds (1986), 55 O.R. (2d) 56 (C.A.).)

To the extent that there is any suggestion in this case that Little, in failing to advert to, research or advise of the potential effects of ss. 7(9) and 7(10) of the Condominium Act was simply acting in accordance with the then prevailing practice in London, Ontario in 1982, that practice was neither prudent, nor diligent, nor reasonable in the circumstances. As such, Little in following such a practice breached his obligations and duty of care to Confederation. (*Dorion v. Roberge et al.*, [1991] 1 S.C.R. 374, at pp. 434-441 per L'Heureux-Dube J.; *Glivar v. Noble et al.* (1985), 8 O.A.C. 60 (C.A.), at p. 66 per Blair J.A.)

Goodman J. (as he then was) considered the duty to warn in *Major v. Buchanan et al.* (1975), 9 O.R. (2d) 491 at 514:

These two decisions, in my opinion, establish a principle mentioned only incidentally, if at all, in the other cases referred to me by counsel, namely, that a solicitor has the duty of warning a client of the risk involved in a course of action, contemplated by the client or by his solicitor on his behalf, and of exercising reasonable care and skill in advising him. If he fails to warn the client of the risk involved in the course of action and it appears probably that the client would not have taken the risk if he had been so warned, the solicitor will be liable. If he warns the client of the risk involved in the course of action, then he can only proceed to follow such course if the client instructs him so to do. If he fails to exercise reasonable care and skill in advising the client with respect to his risk and the client or solicitor on his behalf adopts a course of action which the client would probably not have taken or authorized if he had been properly advised, again, the solicitor will be liable if the client suffers a loss.

Absent the professional opinions, I would find Little liable for negligence and breach of contract. I am reinforced in this opinion by the experts called by Confederation which, I believe, accurately indicate the duty of care of a specialist. Mr. Cowan, in his opinion, merely referred to the conduct of a general practitioner in London. Little must be judged as a reasonably competent specialist. In my judgment he fell well below the line.

In addition, I believe cumulatively that Little breached his fiduciary duty to his client Confederation. He paid little heed to Rule 5 in Professional Conduct Handbook:

The lawyer must not advise or represent both sides of a dispute and, save after adequate disclosure to and with the consent of the client or prospective client concerned, should not act or continue to act in a matter when there is or there is likely to be a conflicting interest.

The problem started from day one. The failure to disclose ultimately blossomed into a direct conflict, previously recited, when Little did a redraft for Confederation of documents he had prepared for Khoury.

THE CONTRIBUTORY NEGLIGENCE DEFENCE

Little cannot shelter under the fact that Confederation had its own legal department. This issue was addressed in *Central Trust*, supra, at pp. 214-15. LeDain J. said:

The respondents contend that if they were negligent there was contributory negligence on the part of the Nova Scotia Trust Company or those for whom it was responsible and that accordingly there should be an apportionment of liability between the appellant and the respondents. This contention is based essentially on the fact that the mortgage loan to Stonehouse was recommended and approved by persons of legal training and experience, who knew that the proceeds of the loan were to be used to purchase the shares of the company. Mr. John Mroz, the mortgage manager of the Nova Scotia Trust Company, who recommended the loan to the Executive Committee of the Board of Directors of the trust company, and Mr. D.G. Grant, the President of the company and a member of the Executive Committee, were both graduates in law with some experience in practice before joining the company and members of the Bar of Nova Scotia. Mr. Lorne Clarke, Q.C., one of the members of the Truro Advisory Board which advised the trust company as to whether Stonehouse was a good risk, was an experienced practitioner. At least two members of the Executive Committee, besides Mr. Grant, who were present at the meeting which approved the loan, were lawyers. Mr. John A. Walker, Q.C., was a prominent and experienced member of the Nova Scotia Bar, although he was apparently retired from practice at the time the loan was approved. Although the testimony on this point was not too clear, the trial judge found that Mr. Mroz and Mr. Grant, and by implication the other members of the Executive Committee, must have known from the documentation that the proceeds of the mortgage loan were to be used to purchase the shares. In my opinion the defence of contributory negligence must fail. The executive officers of the Nova Scotia Trust Company and the members of the Executive Committee of the Board of Directors did not have a duty of care with respect to the legal aspects of a transaction other than to retain qualified solicitors to perform the necessary legal services. As the testimony of Mr. Mroz and Mr. Grant indicated, they were administrative officers who, despite their legal qualifications, were not expected to provide the company with legal advice.

Confederation relied on the expertise of Little and not their own solicitors.

In *Riggins et al. v. Alberta (Workers' Compensation Board)* (September 14, 1992, unreported, Alta. C.A.), Mr. Justice Major J.A. (as he then was) said at p. 3:

With respect to the appellants' second argument, the submission that the respondent was contributorily negligent in relying on the negligent advice of its solicitor is untenable. That the respondent had a staff of three lawyers is irrelevant; once they sought the opinion of outside counsel they were entitled to rely on the advice given. A lawyer who provides negligent advice does so at his

peril, not at the client's. I see no reason to make any exceptions to the general rule in this case where employees of the clients themselves are lawyers. Much significance was attached to internal respondent memoranda regarding the quantum of damage after the fact that the respondent, as any client, was entitled to an informed opinion from its lawyer and never received one. The respondent's internal memoranda in this instance are not relevant.

There is no evidence that anyone with legal training other than the defendants gave Confederation legal advice on the transaction until a year after the event when the damage was done.

I see no merit in the contributory negligence defence.

THE CAUSATION DEFENCE Mr. McNeil contends that Confederation's losses do not flow from Little's conduct. It is, he says, the product of deliberate steps by Confederation to resolve problems with its borrower. Mr. Morphy's position is that the whole mess is attributable to Little.

Put simply, the defence' position is that Confederation committed a fatal error in effecting a settlement of its litigation with Khoury. Shepherd, McKenzie argues that Confederation had a very strong case against Khoury and had McNeil says that this Court must resolve those disputed facts which remained in the Griffiths' motion. Until the Court finds that Khoury could have got out of the mortgage, he says no liability can flow to Little.

I conclude that:

- (1) it was the condominium clause that gave Khoury his leverage to pressure Confederation;
- (2) Confederation consulted Little about the condominium clause before approving the commitment letter;
- (3) Little approved the condominium clause in principle and in form;
- (4) Little drafted clause 28A of the mortgage, the clause his own expert Cowan said was not a very good clause;
- (5) if Confederation had received the advice it was entitled to, there would have been no condominium clause, or at the least a proviso of the type referred to by Feinstein;
- (6) Confederation relied on Little's advice to their detriment.

Little's advice should have been that the clause could not be put in with any assurance of maintaining the 20 year term so do not accede to it. If there had been no condominium clause there would have been no motion before Griffiths J. and no factual issue to be decided. Indeed, the factual issue only arises as part of a salvage operation to rescue Confederation from the position they were put in by Little and to avoid redemption. Confederation was involved in the multiplicity of legal proceedings because Little's advice put them there. They then had to consider their options. They were entitled to act reasonably and prudently and conclude that settlement of all the litigation was in their best interest. They had no obligation to see their dispute with Khoury to a judicial disposition before pursuing their solicitors.

I adopt the words of Anderson J. in *Karpenko v. Paroian, Courey, Cohen & Houston* (1980), 30 O.R. (2d) 776 at 790 In my view, an important element of public policy is involved. It is in the interests of public policy to discourage suits and encourage settlements. The vast majority of suits are settled. It is the almost universal practice among responsible members of the legal profession to pursue settlement until some circumstance or combination of circumstances leads them to conclude that a particular dispute can only be resolved by a trial. I say nothing of the suits which are settled by reason of sloth, or inexperience, or lack of stomach for the fight. They have nothing to do with this case. What is relevant and material to the public interest is that an industrious and competent practitioner should not be unduly inhibited in making a decision to settle a case by the apprehension that some Judge, viewing the matter subsequently, with all the acuity of vision given by hindsight, and from the calm security of the Bench, may tell him he should have done otherwise. To the decision to settle a lawyer brings all his talents and experience both recollected and existing somewhere below the level of the conscious mind, all his knowledge of the law and its processes. Not least he brings to it his hard-earned knowledge that the trial of a lawsuit is costly, time-consuming and taxing for everyone involved and attended by a host of contingencies, foreseen and unforeseen. Upon all of this he must decide whether he should take what is available by way of settlement, or press on. I can think of few areas where the difficult question of what constitutes negligence, which gives rise to liability, and what constitutes at worst an error in judgment, which does not, is harder to answer. In my view it would be only in the case of some egregious error, to use the phrase adopted by my brother Krever in *Demarco* that negligence would be found.

In my judgment, the settlement made by Confederation with Khoury was a reasonable one. Confederation had the benefit not only of input from their in-house solicitor but that of Fraser & Beatty as well. I accept the evidence of Mr. Arthurs who itemized all the factors he took into account in considering settlement.

According to Robert Martin, an accounting expert called by Shepherd, McKenzie, if Confederation had proceeded to trial and lost, their damages would have been \$3,936,581 as of January 1, 1987, over a million more than the loss figure in April, 1985.

The estoppel argument was complex and risky to Confederation and was taken into account by them in making the settlement.

I therefore reject the argument that there is no causal connection between the damages suffered by Confederation and the negligence and breach of contract and breach of fiduciary duty of its solicitors. The causation defence fails. Another ground of defence was that the project was never viable given a 20 year mortgage at 18.25% interest.

Allan Grossman is a chartered accountant and a senior partner with Orenstein & Co. with considerable experience in tax driven real estate syndication. It was his opinion that the project was viable and could result in a full payout to Confederation at 18.25% interest if syndicated on a MURB basis on his model.

Mr. Grossman said that in his opinion, Skyview Towers could have been structured properly and sold successfully in 1984 as a MURB investment vehicle on a basis which would have ensured that Confederation would have been paid in full its entitlement under its mortgage. The model utilized by Mr. Grossman contemplates a sale of Skyview Towers within 10 years and which contemplates the discharge of Confederation's mortgage at the time of sale, with full payment to penalty. Mr. Grossman testified

that in his opinion, this was an attractive property for syndication and that the syndication could have been structured in such a way that:

- (a) investors would only have been required to pay a minimal deposit of approximately \$1,000;
- (b) the cash flow requirements of the project could have been satisfied fully by the reinvestment into the project by investors of their tax savings pertaining to the project. For this reason, the negative cash flow from the operations of Skyview Towers commented upon both by Mr. Hughes and by Mr. Martin would not have impaired in any way the successful syndication of Skyview Towers; and
- (c) depending upon the extent to which the Skyview Towers project appreciated in value over time, investors could achieve after tax returns of between \$83,000 and \$173,000 per unit upon the sale of the project (after 10 years). The syndicators and promoters could earn approximately \$4.7 million for their services in syndicating the project. Khoury, as promoter, would have earned approximately \$1,645,000 had he utilized a model similar to that employed by Mr. Grossman.

Mr. Grossman testified that if his model had been used in a syndication of Skyview Towers and the property had been sold in 1988 at a price of \$17,750,000 (as occurred in June, 1988 when Berrier Hill Investments Ltd. acquired the property), there would have been sufficient proceeds of disposition to pay to Confederation the entire amount of its applicable mortgage discharge penalty while leaving a profit to the investors of \$2,068,000.

It was clear to Confederation, from the outset of its dealings with Khoury, that Khoury intended to syndicate the Skyview Towers project as a MURB. Khoury took that position repeatedly during the course of his dealings with Confederation and argued, among other things, that Confederation's failure to consent unconditionally to the registration of the project as a condominium on a timely basis had rendered him unable to proceed with the MURB syndication.

The position taken at trial by the defendants concerning the viability of the Skyview Towers project depends upon, among other things, cogent evidence as to the personal circumstances, financial position and intentions of Khoury in 1984, 1985 and subsequent years. Khoury, however, was not called as a witness at trial. Nor was any attempt made to obtain his evidence at trial, either on a commission basis or pursuant to letters of request.

Mr. Grossman, in arriving at his conclusion, relied in part upon Skyview Towers having an appraised value as at September, 1984 of \$9,250,000. This was the type of appraisal which Mr. Grossman would have relied upon at the time in a syndication of Skyview Towers.

Confederation called as its second witness on the issue of damages L. John Simmons, the president and chief executive officer of The L.J. Simmons Group Ltd. in London, Ontario.

Mr. Simmons is an accredited member of the Appraisal Institute of Canada, a Fellow of the Real Estate Institute of Canada and a Charter Member of the Association of Ontario Land Economists. He has lectured on real estate appraisal courses at the University of Western Ontario on behalf of the Appraisal Institute of Canada. Mr. Simmons is the past chairman and director of the London and District Chapter of the Real Estate Institute of Canada and the past chairman of the London Chapter of the Appraisal Institute of Canada. He has, for many years, acted as an appraiser and consultant for a broad variety of clients, including banks and other financial institutions. He is experienced in preparing valuation estimates in respect of the purchase and sale of property, as well as in mortgage financing transactions.

Mr. Simmons was retained to prepare an appraisal estimating the market value of Skyview Towers as at September 1, 1984. In arriving at his conclusions, Mr. Simmons utilized a cost approach, an income approach and a comparative approach to valuation. He considered, in particular, the peculiar circumstances of the Skyview Towers project as at September 1, 1984, including the mortgage of Confederation. He considered the area and neighbourhood in which Skyview Towers is located and the nature of the real estate market in London in 1984. He considered the amenities at the site, as well as its construction and mix of suites. Mr. Simmons considered rental rates and vacancy rates, as well as the revenues and operating expenses of Skyview Towers. Mr. Simmons compared Skyview Towers with four other mid-rise elevated apartment buildings in London constructed after 1979, three of which had MURB status. He concluded that the market value of Skyview Towers, as at September 1, 1984, with Confederation's mortgage in place, was \$9,250,000. The defence's experts delivered reports in which they purported to express opinions which were beyond their area of expertise. The first witness, Robert Hughes, is a real estate appraiser and valuator from London, Ontario. He did not prepare a market value appraisal of the Skyview Towers property. Rather, he examined "price trends" in respect of nine properties in London which he regarded as similar to Skyview Towers. On the basis of his review, Mr. Hughes concluded that Skyview Towers became less attractive to investors over time because of the high interest rate mortgage of Confederation. He also concluded that if Skyview Towers had been operated as an apartment complex, it would have had a cash flow deficiency. Mr. Hughes recognized, however, that the true value of Skyview Towers was not as an apartment complex but as a MURB.

Mr. Hughes conceded in cross-examination that when using a comparable approach to valuation based on the sales of comparable properties, one must consider sales made under normal arm length circumstances. To the extent that sales are made in distress, appropriate adjustments must be made. He admitted, however, that even though a number of the properties he relied upon in conducting his analysis were sold in distress, either by a court appointed receiver or in power of sale proceedings, he made no such adjustments. He used incomplete information in respect of some of the properties he relied upon in completing his analysis. He relied upon the Egerton appraisal of November, 1984 pertaining to Skyview Towers, even though he conceded that it was at best incomplete. He did not consider the fact that Skyview Towers was sold in 1985 for \$14 million and in 1988 for \$17,750,000. He did not consider that in December, 1989, 145 condominium units in Skyview Towers were sold at an average purchase price of \$64,180 per unit. Had all of the units in Skyview Towers been sold at such a price, the purchase price pertaining to the entire project would have exceeded \$22.8 million.

Mr. Hughes said that he was prohibited by his rules of professional ethics from considering the 1988 sale of Skyview Towers because he could not verify the sale price. He testified that he could not properly consider the 1989 sales of individual condominium units because those sales all occurred on a single day. Mr. Harry Sweeney was called in reply by Confederation. He was an executive associated with Berrier Hill Investments Ltd. in 1988. He confirmed that Berrier Hill purchased the Skyview Towers project in June, 1988 on an arm's length basis for a purchase price of \$17,750,000 and that 145 condominium units were sold on December 29, 1989 at an average purchase price of \$64,180.58. Mr. Sweeney explained that this price pertained only to the real estate portion of the sales transactions and that the purchasers actually acquired, in addition, a services package which

increased the purchase price of these units by approximately 25%. He also testified that although the date of these sales was stated to be December 29, 1989 in the documents registered in relation to the sales, this date was selected for tax purposes. All of the units were, in fact, sold over a period of 5 to 6 months preceding December 29, 1989.

The last expert witness called by the defendants on the issue of damages was Mr. Martin, a principal in the business investment group of Coopers & Lybrand Limited. Mr. Martin, however, was not permitted to express an opinion concerning either the value of the Skyview Towers project or the viability of this project as a MURB syndication. Nor was he permitted to express an opinion as to the options which might have been open to Confederation in its litigation with Khoury had he not had the condominium conversion argument available to him.

In light of the opinions of Simmons and Grossman, and the large sale price of the premises in 1985 and 1989, I conclude that the project was viable as a MURB. I preferred the opinion of Confederation's experts because of their experience and objectivity. Mr. Hughes failed to discount distress sales. He did not therefore select appropriate comparables.

Mr. McNeil raised the issue of subrogation for the first time in argument. It was neither pleaded, nor was there any evidentiary foundation to argue it. No questions were ever put in cross-examination to any witness to suggest that it was an issue. I, therefore, reject the defence that his client has been denied rights of subrogation.

DAMAGES

Counsel agreed that the loss to Confederation as at the March, 1985 settlement with Khoury was \$2,458,880, represented by the shortfall in reinvesting the fund at 13%, rather than 18.25%, over the balance of the term from April 12, 1985.

There also appeared to be no substantial issue with the expenses incurred by Confederation to conduct its litigation with Khoury in the sum of \$211,175. I, therefore, assess the damages at \$2,669,615 as of April 12, 1985.

PREJUDGMENT INTEREST

Confederation seeks prejudgment interest from April 12, 1985 at a rate of 13% compounded semi-annually. The defence contend that simple interest at 11% is appropriate. The difference between their positions amounts to approximately \$2 million.

Confederation puts its argument on two grounds:

(1) exercise of the Court's equitable jurisdiction;

(2) the Court's discretion under s. 130(1) of the Courts of Justice Act. In *Brock v. Cole et al.* (1983), 40 O.R. (2d) 97, Thorson J.A., delivering the judgment of the Court, concluded that courts of equity had jurisdiction to award compound interest. At pp. 99-100, the Court said:

In awarding judgment to the plaintiff the trial judge found that the defendants were clearly in breach of their contract to deliver a first mortgage on the terms described and which they had been retained to provide. With respect, on the facts as found by the trial judge, I think that the defendants' action went well beyond a mere breach of contract. This was a case of money advanced to the defendants as solicitors in trust, to be invested by them for the plaintiff on certain specified terms. The defendants by their conduct in dealing with the money quite obviously breached that trust. Moreover, there could be no justification of the defendants' subsequent neglect or failure to make any accounting of the money which had been entrusted to them until compelled to do so by the judgment in favour of the plaintiff obtained seven years after the making of the advance. And at pp. 102-103:

Counsel for the appellant notes in his statement of fact and law that the trial judge, at the time when the clarification of his judgment respecting interest was being sought, did not have the benefit of the decision of this court in *Wotherspoon et al. v. Canadian Pacific Ltd. et al.* (1982), 35 O.R. (2d) 449, 129 D.L.R. (3d) 1 [leave to appeal to S.C.C. granted 37 O.R. (2d) 73n, 44 N.R. 83n] and counsel was candid to state that neither did the trial judge have a review of the authorities dealing with the awarding of compound interest as damages in cases involving moneys received by trustees for investment purposes or moneys wrongfully detained. Whether this case is viewed as falling within one or the other of the classes of cases considered by Hughes J. in his judgment at trial in the *Wotherspoon* case (cited as 22 O.R. (2d) 385, 92 D.L.R. (3d) 545) at pp. 579-82 O.R., namely those cases where the defendant was a trustee who ought to have invested moneys entrusted into his hands and thereby earned compound interest, and those cases where compound interest was awarded by courts of equity as damages by reason of a "wrongful detention of money which ought to have been paid", the case at bar, in my opinion, is one in which it is clear that an award of compound interest may properly be considered.

As for the authorities cited to this Court in the present appeal, I find in point the decision of the English Court of Appeal (alluded to in the reasons of this court in the *Wotherspoon* case at p. 495) in *Wallersteiner v. Moir* (No. 2), [1975] Q.B. 373 and 508n, [1975] 1 All E.R. 849, wherein Lord Denning M.R. at p. 856 All E.R. set forth his understanding of the principles involved in the following terms:

... in equity interest is awarded whenever a wrongdoer deprives a company of money which it needs for use in its business. It is plain that the company should be compensated for the loss thereby occasioned to it. Mere replacement of the money - years later - is by no means adequate compensation, especially in days of inflation. The company should be compensated by the award of interest. ... But the question arises; should it be simple interest or compound interest? On general principles I think it should be presumed that the company (had it not been deprived of the money) would have made the most beneficial use open to it. ... Alternatively, it should be presumed that the wrongdoer made the most beneficial use of it. But, whichever it is, in order to give adequate compensation, the money should be replaced at interest with yearly rests, i.e. compound interest.

The court again in *Claiborne Industries Ltd. v. National Bank of Canada* (1989), 69 O.R. (2d) 65, following *Brock v. Cole*, supra, reaffirmed the jurisdiction to award compound interest where stolen funds were involved. On those claims not arising out of stolen funds, simple interest was awarded.

The Court is asked to award compound interest because of the breach of fiduciary duty.

This Court has also discretion to award compound interest pursuant to s. 130(1) of the Courts of Justice Act in cases where that is necessary to compensate the plaintiff for its actual loss. (See *Niagara Air Bus Inc. v. Camerman* (1991), 3 O.R. (3d) 108 (C.A.).)

Compound interest at 13% compounded half-yearly on \$2,669,615 amounts to \$4,244,951 for the period April 12, 1985 to November 1, 1992. The per diem rate after November 1 is \$950.82 per day.

Section 140 of the Courts of Justice Act, amended January 1, 1985, gives the court broad discretion to award compound interest. The evidence of Mr. Coates and Mr. Boddy was that it was the practice of Confederation to reinvest funds on a compound basis. The evidence indicates that they did invest the settlement funds at 13% on a compound basis.

The only practical way to make Confederation whole is to exercise my discretion in favour of allowing compound interest at 13% compounded half-yearly. This is not done because Confederation is a professional lender. It is not awarded as damages or as a penalty against the solicitors. It is solely the exercise of a discretion to make the plaintiff whole.

Confederation will, therefore, have judgment against the defendants for \$2,669,615, plus \$4,244,951, plus \$950.82 per day from November 1, 1992.

Costs to be spoken to.

MONTGOMERY J.

CBR# 063

Carleton Condominium Corp. No. 347 v. Trendsetter Developments Ltd. (Gen. Div.)

4 O.R. (3d) 300

Action Nos. 5277/91, 52739/91 and 53028/91

Ontario Court (General Division) Isaac J. July 22, 1991

Application 53028/91

James M. Davidson and Deborah A. Bellinger, for applicant and for respondents in Application 53028/91.

Colin D. McKinnon, Q.C., James F. Leal and David R. Habib, for respondents in Application 52779/91, for Asgo Management Ltd., respondent in Application 52739/91, and for applicant in Application 53028/91.

John P. O'Toole, for Royal Bank of Canada and Royal Bank Mortgage Corp.

ISAAC J.:--

1. INTRODUCTION

These proceedings have their origin in a dispute between members of the board of directors of Carleton Condominium Corporation No. 347 (the condominium corporation) for control of the management of the condominium corporation.

Later in these reasons, I will detail the factual basis of the dispute but for the present it is desirable to remark on some preliminary procedural matters.

In Application 52779/91, the condominium corporation, as applicant, seeks, inter alia, a declaration that the respondents in that application are not entitled to vote at a meeting of the owners of the condominium corporation originally scheduled for June 21, 1991, but now scheduled for July 25, 1991.

In Application 52739/91, the condominium corporation, as applicant, seeks, inter alia, against the Royal Bank of Canada, and the Royal Bank Mortgage Corporation, a full and complete accounting of all of the applicants' accounts and investments held by them, and an order directing them to recognize Gayle Duggan and Michael Chatzipantazis as the proper signing officers of the condominium corporation for the purposes of all transactions between the condominium corporation and the bank and mortgage corporation.

In Application 53028/91, Thomas C. Assaly Corporation Ltd., as applicant, seeks, against the condominium corporation and the other respondents named in the application the following relief among others:

(a) an order directing the Defendants Gayle Duggan, Taxiarchis Chatzipantazis, Ashwin Shingadia and Carleton Condominium Corporation No. 347 to properly perform duties imposed by them under the Condominium Act, R.S.O. 1980, c. 84 as amended, and by the Declaration and By-Laws of Carleton Condominium Corporation No. 347, to wit issue proper Notices of Directors' Meetings to all 5 Directors of Carleton Condominium Corporation No. 347 within a timely fashion and directing them to include in such Notice the matters to be dealt with at such Meetings of Directors and to conduct such meetings properly and in accordance with law;

(b) a Declaration declaring the Meetings of Directors of Carleton Condominium Corporation No. 347 held on or about April 8, 1991, May 9, 1991, June 6, 1991 and June 30, 1991 are null and void and that decisions made and resolutions passed thereat including the purported resolution re banking authorities dated June 13, 1991 signed by Gayle Duggan, Taxiarchis Chatzipantazis and Ashwin Shingadia are null and void;

(c) an injunction enjoining the law firm of Nelligan/Power, their partners, associates, employees and others affiliated therewith from acting for the other Respondents and any of them in respect of matters dealing with the affairs of the Respondent, Carleton Condominium Corporation No. 347, or relating directly or indirectly with the Special Owners' Meeting to be held June 21, 1991;

(d) a declaration declaring the law firm of Nelligan/Power was not properly retained by Carleton Condominium No. 347 to assist in soliciting or receiving proxies for the Special Owners' Meeting to be held June 21, 1991;

(e) a declaration declaring Gayle Duggan, Taxiarchis Chatzipantazis and Ashwin Shingadia improperly tried to take control of certain assets of Carleton Condominium Corporation No. 347;

(f) a declaration that the said law firm of Nelligan/Power knew or ought to have known of the impropriety of the actions of the said Gayle Duggan, Taxiarchis Chatzipantazis and Ashwin Shingadia and that they were a nullity;

(g) an injunction enjoining the Respondents from using directly or indirectly and voting at the Special Owners' Meeting of June 21, 1991 and adjournments thereof any proxies on the forms attached as Exhibit No. 19 to the Affidavit of Thomas Gregory Assaly filed in this action and a declaration declaring the same null and void.

Because the condominium corporation was represented by counsel from the firm of Nelligan/Power who were solicitors of record and because the retainer of that firm had been challenged in Application 53028/91 and an injunction sought restraining them from acting on behalf of the condominium corporation, I invited argument from counsel on this aspect of Application 53028/91 first.

The contention of Mr. Habib, counsel for the applicant, Thomas C. Assaly Corporation Ltd., in support of this aspect of the application may be shortly stated as follows: Nelligan/Power are solicitors for the condominium corporation and they are also solicitors for three members of the board of directors with whom his clients are in dispute. The interests of these directors, even

though they are a majority, are not necessarily the same as those of the condominium corporation. Therefore those directors have a conflict of interest with the corporation. Since Nelligan/Power had been retained by those directors to represent the condominium corporation, they too have a conflict of interest and cannot represent both the condominium corporation and the directors. Mr. Habib relied on Chapter 5 of the Code of Professional Conduct, published by the Canadian Bar Association, and on Rule 5 of the Rules of Professional Conduct, published by the Law Society of Upper Canada. He also relied on *MTS International Services Inc. v. Warnat Corporation* (1980), 31 O.R. (2d) 221, 118 D.L.R. (3d) 561 (H.C.J.), and *Lukic v. Urquhart* (1984), 47 O.R. (2d) 463, 11 D.L.R. (4th) 638 (H.C.J.) [varied (1985), 50 O.R. (2d) 47, 15 D.L.R. (4th) 639 (C.A.)]. He contended further that Nelligan/Power had been improperly retained because the board of directors had not passed a proper resolution authorizing the bringing of the application.

Mr. Davidson, for the condominium corporation, indicated that the firm of Nelligan/Power had been solicitors to the corporation for many years and had routinely, on instructions from the board, represented the corporation in contentious proceedings. In this case, he said, a majority of the board had authorized his firm to represent the condominium corporation in the proceedings now pending before me. He contended further that there was no conflict between the condominium corporation and the three directors from whom his firm had received instructions. Those directors, he said, were in the courtroom and could testify, if required.

In the event, I did not require the directors to testify because it seemed to me that the issue of conflict of interest had been misconceived. Firstly, there is nothing in the Code of Professional Conduct or in the Rules of Professional Conduct, already mentioned, which governs this case. There is no allegation that the firm of Nelligan/Power had advised all the directors and were now acting for some against others. This is simply a case where two of five directors, having been thwarted by the majority, had embarked on a course of conduct to remove the majority. The majority, acting according to their best judgment, had instructed the corporation's solicitors to initiate legal proceedings in the name of the corporation against the respondents in Application 52779/91. In my view, the majority of directors acted quite properly in doing so. Article 7 of By-Law No. 1 of the condominium corporation provides that a quorum of three directors may exercise all the powers of the Board so long as a quorum remains in office. Section 15(1) of the Condominium Act, R.S.O. 1980, c. 84 (the Act) provides that the affairs of the corporation shall be managed by the board of directors. I therefore see nothing nefarious or contrary to the interest of the corporation if the majority of directors, in the exercise of their best judgment, determined to instruct the corporation's solicitors to initiate legal proceedings against persons whose conduct appeared to them to be inimical to the interest of the corporation. Since the principles in the cases cited have no application to the facts of this case, I concluded that there was no valid reason to prevent Messrs. Nelligan/Power from continuing to act and I ruled accordingly, dismissing this aspect of Application 53028/91.

As I have already said, Application 52739/91, seeks, inter alia, a mandatory order compelling the Royal Bank of Canada and the Royal Bank Mortgage Corporation to honour the signatures of two of the majority directors as the proper signing officers on behalf of the condominium corporation in respect of banking and related documents. Since, up to the date of notification of the change in signing officers, the signing officers had been the proper officers of the management company, Asgo Management Ltd., I directed that the management company be made a party respondent to this application and be served with the notice of application and supporting materials.

All applications were then adjourned to July 8, 1991, on terms which are endorsed on the back of Application Record 52739/91.

On July 8, I made an order consolidating the three applications and heard them together. At the conclusion of argument, I reserved judgment, stating that I would deliver judgment and reasons on July 19, 1991. My reasons follow.

2. THE FACTS

The applicant condominium corporation was incorporated pursuant to the provisions of the Act by registration of a declaration and description on August 29, 1986, by the respondent Trendsetter Developments Ltd., as declarant. The property comprised in the condominium corporation and subject to the Act, is a high-rise building containing 219 residential units and 7 commercial units, known as Kent Towers in the City of Ottawa.

By articles of amalgamation issued on September 1, 1988, pursuant to the Business Corporations Act, 1982, S.O. 1982, c. 4, as amended, Trendsetter Developments Ltd. was amalgamated with Thomas C. Assaly Corporation Ltd. and continued under the name Thomas C. Assaly Corporation Ltd.

Thomas C. Assaly Corporation Ltd. is the owner of two residential and seven commercial units in the condominium corporation. It is also the registered owner of more than 15 per cent of the junior mortgages of all units in the building. Thomas C. Assaly is president of Thomas C. Assaly Corporation Ltd. and is the owner of 53 residential units in the building. The first mortgage on all units in the building is held by the Royal Trust Company.

The members of the board of directors of the condominium corporation are: Gayle Duggan, T. (Mike) Chatzipantazis, Thomas G. Assaly, Ashwin Shingadia and Gillian Brown. They are also owners of units in the building. Thomas G. Assaly is the son of Thomas C. Assaly and an employee of the Assaly Group of Companies which include Thomas C. Assaly Corporation Ltd. and Asgo Management Ltd.

Asgo Management Limited is the manager of the property and assets of the condominium corporation under an agreement dated October 14, 1986. This agreement is for a term of five years from its effective date and will expire on or about October 14, 1991. Paragraph 19 of the agreement provides for earlier termination of the agreement, but there is no evidence that it has been invoked.

Pursuant to Article 4.1 of By-Law No. 1 of the condominium corporation, the management agreement was approved by By-Law No. 3, dated October 1, 1986, the agreement being for a period of more than one year. It should be noted that the approval of the unit holders was signified by the signature of Trendsetter Developments Ltd. which, at the time, was the owner of 100 per cent of all the units. The turnover meeting was not held until January 14, 1987.

In para. 5 of her affidavit sworn on June 19, 1991, Gayle Duggan deposed that Asgo Management Ltd. is an affiliate of Thomas C. Assaly Corporation Ltd. and in para. 3 thereof she deposed that the respondent Thomas C. Assaly controls directly or indirectly Thomas C. Assaly Corporation Ltd. and its affiliates. This evidence was not contradicted.

Thomas G. Assaly deposed in para. 13 of his affidavit, sworn on June 20, 1991, that on or about November 20, 1990, the board of directors of the condominium corporation created a sub-committee consisting of Gayle Duggan, Ashwin Shingadia and Gillian

Brown to solicit proposals for the future management of the condominium corporation and to make recommendations to the board in respect thereof.

The minutes of the meeting of the board, held on March 27, 1991, Exhibit 4 to the affidavit of Thomas G. Assaly, record that on that date Gillian Brown made a proposal concerning the appointment of a manager of the condominium corporation and the appointment of a board member with responsibility for supervising the manager. These minutes also record that the next meeting would be held on April 25, 1991 and would be limited to a discussion of property management.

The agenda for the meeting of April 25, 1991 was filed as part of Exhibit 4 and it shows clearly that the last two agenda items concerned the presentation of management proposals and discussion of and agreement upon a property manager.

Meetings of the board were held on April 30, May 7 and May 9, 1991. From the materials filed, it appears that a majority of the board, consisting of Duggan, Chatzipantazis and Shingadia were of the view that the management contract of Asgo Management Ltd. should not be renewed on its expiry. Assaly and Brown were of the contrary view. Brown submitted a report of her own in which she proposed herself as managing director at an annual salary of \$25,000. Under this proposal, Brown would manage the manager. Not unnaturally, there arose from this disagreement allegations by the majority of conflict of interest against Assaly and Brown and counter-allegations by the minority of mismanagement and neglect of duty against the majority.

On June 3, 1991, the investor relations administration of Asgo Management Ltd. sent to all directors a notice of meetings to be held on June 6 and June 13, 1991, respectively together with agendas for both meetings and other material (Exhibit 10, affidavit of Thomas G. Assaly). Included in this material was a report of the sub-committee on management contracts submitted by Chatzipantazis and Shingadia. The report stated that eight proposals had been received, explained why five were not acceptable and recommended three for consideration by the board. Asgo Management Ltd. was not among the three. The report recommended that the three be allowed to make presentations to the board on June 6, each of one hour's duration. Gillian Brown was also scheduled to make a one-hour presentation to the board.

The minutes of the meeting of June 6, 1991 (Exhibit 18 to the affidavit of Thomas G. Assaly) record that four presentations were made as recommended in the report. The minutes continue as follows:

There was a great deal of discussion on the presentations and the merits and demerits of the various proposals submitted.

There was also discussion on the question of Board of Directors and conflict of interest as identified for T.G. Assaly Jr. and with respect to G. Brown's proposals and its close ties with Asgo. The attached legal opinion (not attached) was tabled and the two directors walked out. With a quorum present, the Board continued its deliberations and unanimously decided to award the contract to DEL and authorized the President to ascertain that a full-time on-site property manager for Kent Towers was agreed to, prior to signing the final contract. It was unanimously agreed that the President, G. Duggan, and the Treasurer, Mike Pantazzi (sic.) be given the authority to sign the contract with DEL.

The next meeting was fixed for June 13, 1991.

On June 7, 1991, Brown and Assaly wrote to the other directors (Exhibit 14 to the affidavit of Thomas G. Assaly) notifying them that the meeting of June 6 had been conducted contrary to law and that all business conducted thereat was null and void. They accused those directors of ejecting them from the meeting.

The letter indicates that, if necessary, Brown and Assaly would bring applications to the court to have the meeting and decisions made thereat declared null and void or quashed, and it concludes as follows: Further, please be advised that we have been notified by Thomas C. Assaly Corporation Ltd., a mortgagee who holds mortgages on more than 15% of the units that it is today calling a Special Meeting of Owners pursuant to Section 18(2) of the Condominium Act, to remove you from the Board of Directors of Carleton Condominium Corporation No. 347, and to elect replacement members. The Corporation will not recognize any contracts entered into by you with respect of the management of the property and will look to you personally to indemnify the Corporation for any and all costs and damages which it may incur or suffer. Further, in light of the Special Owners' Meeting called by the Mortgagee to remove you, you are formally put on notice that any actions by you will not be recognized by the Corporation.

I digress here to observe that this letter, following hard on the heels of the meeting of June 6 and the allegations of conflict made therein, affords support, in my opinion, for the conclusion that Brown and Assaly were, to say the least, not impartial to the interests of Thomas C. Assaly Corporation Ltd. and its affiliates, including Asgo Management Ltd.

By letter dated June 7, 1991, Thomas C. Assaly Corporation Ltd. wrote to unit owners of the condominium corporation enclosing a notice of special meeting of the owners to remove "certain persons from the board" of the condominium corporation (see Exhibit 16 to the affidavit of Thomas G. Assaly).

The letter stated that it was in the best interests of the condominium corporation that Asgo Management Ltd. be continued as manager and gave reasons for that conclusion. It noted that some members of the board were of the same view and that others were not. It alleged that those directors who did not had ejected from the meeting of June 6 those who did. Hence, the necessity to remove directors named in the notice (Duggan, Chatzipantazis and Shingadia). Their actions, the letter noted, could not be condoned.

The notice itself is dated June 7, 1991. It stated that the meeting was scheduled for June 21, 1991. It contained two agenda items, viz.: removal of the three named directors and the election of their replacement to the board.

The notice contains the following statement: This meeting is being called by Thomas C. Assaly Corporation Ltd., a mortgagee holding mortgages on not less than 15% of the units in Carleton Condominium No. 347, pursuant to section 18(2) of the Condominium Act.

In her affidavit sworn on June 17, 1991, Gayle Duggan deposed that following the action taken by Thomas C. Assaly Corporation Ltd., she and the other two directors decided to assume control of the finances of the condominium corporation. To achieve that objective they instructed the solicitors of the condominium corporation to write to its banker, the Royal Bank of Canada, notifying the bank of the dispute with Thomas C. Assaly Corporation Ltd. and Asgo Management Ltd. and requesting that no withdrawals from named accounts of the condominium corporation should be permitted without the express written

authority of herself and Chatzipantazis. The letter indicated that a confirmatory resolution of the board would follow in "the next couple of days". The letter also instructed that its contents should be kept "strictly confidential" and not be discussed with "representatives of Assaly or Asgo Management". A copy of this letter dated June 11, 1991 was filed as Exhibit D to Duggan's affidavit. On June 13, 1991, the three directors (Duggan, Chatzipantazis and Shingadia), being a quorum of the board, passed a resolution pursuant to Article 10.01 of By-Law No. 1 of the condominium corporation designating Duggan and Chatzipantazis as officers of the corporation having exclusive authority to transact all banking business of the condominium corporation. The resolution is signed by the three directors and was sent to the bank by the solicitors of the condominium corporation together with a covering letter dated June 14, 1991. A copy of the letter and of the resolution were filed as Exhibit E to Duggan's affidavit.

On the same date, June 13, 1991, the same three directors, being the president, treasurer and secretary of the condominium corporation, respectively, wrote to unit owners advising them of the dispute, noting that Thomas C. Assaly Corporation Ltd. had convened the meeting for June 21, 1991 and soliciting proxies for the meeting.

The Royal Bank of Canada refused to honour the resolution and froze the accounts. The condominium corporation thereupon launched Application 52739/91 seeking a full and complete accounting of all the accounts and investments of the condominium corporation and an order directing the bank to recognize the officers named in the resolution dated June 13, 1991, as the exclusive officers having authority to transact banking business on its behalf and Application 52779/91 seeking a declaration that the respondents named therein are not entitled to vote at the meeting scheduled for June 21, 1991. For its part Thomas C. Assaly Corporation Ltd. launched Application 53028/91 seeking the relief I have already mentioned.

3. ISSUES

(a) Application 52739/91

In this application, as I have already noted, the condominium corporation seeks two remedies: first, a full and complete accounting of its monies and investments; secondly, an order compelling recognition of the resolution of the board dated June 13, 1991, the new banking resolution.

The materials filed did not include facts which suggested that an accounting was warranted and no argument was addressed by any one as to the desirability of or necessity for an accounting in the circumstances of this case. Accordingly, I make no order in this respect.

The request for the second remedy was vigorously contested by both sides of the dispute. I will deal with their contentions shortly. However, before doing so, I should advert briefly to the facts giving rise to the dispute and to the position taken by counsel for the bank.

Under the management agreement made between the condominium corporation and Asgo Management Ltd. in October 1986, Asgo Management Ltd. was appointed manager of the property of the condominium corporation for a period of five (5) years and its duties as such manager were prescribed in para. 5 thereof. Those duties included the collection of monies owing to the condominium corporation and depositing the same in trust. As a consequence, the banking function of the condominium corporation was performed by Asgo Management Ltd. And it was with Asgo Management Ltd. that the bank dealt until it received notice of the dispute between the directors and the banking resolution of June 13, 1991.

By its terms that resolution does not expressly revoke the authority of Asgo Management Ltd. to continue performing the banking function. But it does so by clear implication, since the authority to perform that function is given exclusively to the two officers named therein. As a result, the bank took the position, not unreasonably, that it would freeze the accounts of the condominium corporation until the situation clarified.

In argument, Mr. O'Toole for the bank, took the position that the bank was quite prepared to honour the resolution of June 13, 1991, but wished to have the question of banking authority regularized. First, he said, the resolution does not expressly revoke the authority of Asgo Management Ltd. Secondly, he said, the accounts are in the name of Asgo Management Ltd. as trustee, and there was an issue as to whether the trustee's authority could be revoked without its consent. In this case such consent had not been filed with the bank. He asked that there be an order discharging the old relationship between the bank and Asgo Management Ltd. establishing a new relationship between the condominium corporation and the bank, based on the new resolution and that the trustee be notified that the order has been made.

The position taken by Mr. Davidson for the condominium corporation may be summarized as follows: the banking resolution passed by three of five directors on June 13, 1991, is valid, notwithstanding that notice of the meeting containing the banking resolution as a specific agenda item was not given to all directors. The failure to include this item in the notice of meeting is a direct consequence of the dispute between the directors and, at most, amounts to a procedural irregularity which should not be held to invalidate the resolution, given the circumstances of the case.

Mr. McKinnon for Asgo Management Ltd. contended that the letter from Nelligan/Power to the bank was ill-conceived and so was the resolution. By para. 2 of the management agreement, so the argument ran, sole and exclusive management of the condominium corporation was vested in Asgo Management Ltd. This included the banking function which is specifically provided for in para. 5(e) of the agreement. The agreement itself was confirmed by By-Law No. 3 of the condominium corporation which was approved by the unit owners. The resolution, he said, was an improper attempt to revoke By-Law No. 3.

With respect to the conduct of the meeting on June 6, 1991, Mr. McKinnon contended that the majority directors were quite wrong in alleging conflict of interest against Brown and Assaly. Section 17 of the Act defined conflict of interest as it relates to the conduct of the business of a condominium corporation and was exhaustive. The conduct of Brown and Assaly did not come within the definition of conflict in s. 17. Accordingly, all actions taken by the majority directors based on alleged conflict was misconceived and improper. Consequently, the failure to give notice that the banking resolution would be discussed at the meeting of directors on June 13, 1991, was more than a procedural irregularity and was fatal to the validity of the resolution.

Mr. Leal, who appeared with Mr. McKinnon, added submissions concerning the scope of the rule in *Saunders v. Vautier* (1841), 4 Beav. 115, 49 E.R. 282 (S.C.) [aff'd [1835-42] All E.R. Rep. 58, 41 E.R. 482 (L.C.)], and its application, but since I have concluded that reliance upon that rule was not necessary in this case, I do not reproduce those submissions. Mr. Leal also drew attention to s. 39 of the Act which provides a modality for termination of a management agreement.

On the basis of the materials filed and the submissions made, I have reached the conclusion that the banking resolution of June 13, 1991 was validly passed.

In my respectful view, it is clear from all the materials filed that Assaly and Brown were determined that the management agreement with Asgo Management Ltd. should be renewed on its expiry on October 14, 1991, regardless of the views of the majority directors. As I read the materials, Assaly and Brown left the meeting of June 6, 1991, when it became clear to them that the other directors were serious about not renewing the management contract with Asgo Management Ltd. That is the true reason for their leaving, in my opinion. They did not leave because they had been ejected.

That Assaly and Brown were partial to the interest of Thomas C. Assaly Corporation Ltd. and its affiliates is certainly borne out not only by their own subsequent conduct but by the conduct of Thomas C. Assaly Corporation Ltd. itself. The steps taken by these two directors and by the corporation on June 7, 1991 support this conclusion, in my opinion.

In the circumstances then prevailing, notices of future meetings of the board to Assaly and Brown would have been mere formalities, since they had given notice that they were now dedicated to the removal of the majority directors from the board. Hence, in my view, the failure to observe the formality of giving notice of the meeting of June 13, 1991, while regrettable, amounted merely to a procedural irregularity in the circumstances of this case and did not operate so as to invalidate the resolution.

By virtue of s. 15(1) of the Act and Article 7.1, Article 9 and Article 10.1 of By-Law No. 1 of the condominium corporation, the majority directors had undoubted authority to pass the banking resolution that they did. In the circumstances in which they found themselves on June 13, 1991, the due discharge of their mandate from unit owners, whose interest they represented, did not afford them any other viable alternative. In acting as they did to secure the funds of the condominium corporation in the face of hostile acts, they did not revoke By-Law No. 3 or effect a breach of the management agreement with Asgo Management Ltd., in my opinion. The most that can be said of their conduct is that it had the effect of relieving Asgo Management Ltd. of one of its functions under the agreement. This could hardly be said to amount to a breach of the agreement. For these reasons, I conclude that the condominium corporation is entitled to the order sought in para. (b) of the notice of Application 52739/91.

(b) Application 52779/91

On this application, the applicant seeks a declaration that the respondents are not entitled to vote at the meeting of owners which has been convened by Thomas C. Assaly Corporation Ltd. and is now scheduled to be held on July 25, 1991.

Although the application names three respondents, relief is in fact sought against two, viz., Thomas C. Assaly and Thomas C. Assaly Corporation Ltd., since any voting rights to which the third respondent, Trendsetter Development Ltd., was entitled passed to Thomas C. Assaly Corporation Ltd. on the amalgamation.

In deciding whether or not the relief sought should be granted against either or both of the two respondents, it is necessary to discover the legal basis on which their right to vote depends. Section 18(2) of the Act authorizes the meeting convened by Thomas C. Assaly Corporation Ltd. in the following terms:

18(2) The board, or any mortgagee holding mortgages on not less than 15 per cent of the units, may at any time call a meeting of the owners of the corporation for the transaction of any business, the nature of which shall be specified in the notice calling the meeting.

Subsection (3) of s. 18 prescribes the quorum for the transaction of business at such a meeting.

The right of unit owners to vote is given by s. 22(1) of the Act, on the basis of one vote per unit.

The right of a mortgagee to vote is given by s. 48 of the Act in the following terms:

48. Where a mortgage of a unit and common interest contains a provision that authorizes the mortgagee to exercise the right of the owner to vote ... the mortgagee may exercise the right, and, where two or more such mortgages contain such a provision, the right may be exercised by the mortgagee who has priority.

By s. 20(3), a mortgagee who receives notice of an owner's meeting shall, in order to be entitled to exercise the right to vote, notify the condominium corporation and the owner of its intention to exercise the right to vote at least two days before the date of the meeting specified in the notice.

By s. 22 votes may be given either personally or by proxy.

In these proceedings the notice of meeting given by Thomas C. Assaly Corporation has not been challenged. I therefore accept it as a sufficient compliance with s. 18(2) of the Act. Similarly, the claim by Thomas C. Assaly Corporation Ltd. that it is a mortgagee holding mortgages on not less than 15 per cent of the units in the condominium corporation has not been challenged. I therefore accept that claim as an accurate statement of fact.

In her affidavit sworn on June 19, 1991, and filed in support of this application Gayle Duggan has deposed on information and belief that Thomas C. Assaly Corporation Ltd. has given notices to unit owners of its intention to exercise its right to vote at the meeting of owners. A copy of one such notice is filed as Exhibit D to her affidavit.

In his affidavit sworn on July 8, 1991, and filed on this application, Leslie D. Warren, secretary-treasurer of Thomas C. Assaly Corporation Ltd. deposed that Thomas C. Assaly is the owner of 53 units in the condominium corporation. He supported this statement by reference to exhibits to the affidavit.

Mr. Davidson for the corporation contended that neither Thomas C. Assaly nor Thomas C. Assaly Corporation Ltd. has the right to vote.

I deal first with the submissions made in support of the contention that Thomas C. Assaly personally was not entitled to vote.

Mr. Davidson first stated (factum, para. 18) that Thomas C. Assaly controls Thomas C. Assaly Corporation Ltd., Trendsetter Developments Ltd. and Asgo Management Limited. Because of this, he argued, Thomas C. Assaly can have a personal interest which conflicts with the interests of unit owners. Trendsetter Developments Ltd., which amalgamated with Thomas C. Assaly Corporation Ltd. to become Thomas C. Assaly Corporation Ltd., was the developer and declarant named in the declaration by which the condominium corporation was created. As such it is under a duty to protect the interests of all unit owners both present and prospective and cannot put its own interests above those of the other unit owners. *York Condominium Corp. No. 167 v. Newrey Holdings Ltd.* (1981), 32 O.R. (2d) 458, 122 D.L.R. (3d) 280 (C.A.) [leave to appeal to S.C.C. refused (1981), 32 O.R. (2d) 458n, 38 N.R. 129n] was cited in support of this proposition. Mr. Davidson emphasized the fiduciary obligation of the developer as laid down by the Court of Appeal in *York Condominium Corp.* and argued that both Thomas C. Assaly as controlling shareholder of both Trendsetter Developments Ltd. and its successor Thomas C. Assaly Corporation Ltd. and the latter corporation itself are fixed with the same fiduciary obligation.

He argued further that the purported sale of the 53 units to Thomas C. Assaly was in violation of s. 51 of the Act and he relied on the decision of Carruthers J. in *Peel Condominium Corp. No. 199 v. Sanrose Construction (Dixie) Ltd.* (1989), 68 O.R. (2d) 513, 5 R.P.R. (2d) 70 (H.C.J.), in support of this proposition. At p. 528 O.R., p. 87 R.P.R., of that decision, Carruthers J. stated:

I have commented above on the intention of the Act (s. 51) that the declarant must dispose of all the units. The specific obligation, as I have also noted, is to "take all reasonable steps ... without delay" to do so. There does not appear to be any provision in the Act ... which concerns the prospect of the declarant, whether developer as well or not, purchasing units for his, her or its own use either before or after the declaration is registered.

Mr. Davidson's final submission was that Thomas C. Assaly was not a bona fide purchaser. He was, so the submission went, a "declarant" within the meaning of the Act and, as such, could not be a bona fide purchaser. The units which he owned should be considered unsold. As a result Thomas C. Assaly was not a unit owner to whom the protective umbrella of the Act extended. He was, therefore, not entitled to vote. Reliance was placed on *Carleton Condominium Corp. No. 279 v. Rochon* (1987), 59 O.R. (2d) 545, 38 D.L.R. (4th) 430 (C.A.) to support this proposition. There, at p. 554 O.R., p. 439 D.L.R., Finlayson J.A., in delivering the judgment of the court, stated:

He (a declarant) can never be a bona fide purchaser of a unit and it is these "unit owners" that the Condominium Act is intended to protect.

Reliance was also placed on the definition of "declarant" in s. 1(1)(l) of the Act.

(l) "declarant" means the owner or owners in fee simple of the land described in the description at the time of registration of the declaration and description of the land, and includes any successor or assignee of such owner or owners but does not include a bona fide purchaser of a unit who pays fair market value or any successor or assignee of such purchaser ...

[Emphasis added]

Mr. McKinnon for Thomas C. Assaly and Thomas C. Assaly Corporation Ltd. contended that Thomas C. Assaly was a bona fide purchaser who purchased 53 units at fair market value and as such falls within the exception in the definition of "declarant" in s. 1(1)(l) of the Act. Consequently, he argued, Thomas C. Assaly is a unit owner to whom the protection of the Act extends. He is therefore entitled to vote at the meeting. Mr. McKinnon stated further that all but six of the units owned by Thomas C. Assaly which are unsold have been rented to tenants.

Mr. McKinnon contended, in the alternative, that if I should conclude that Thomas C. Assaly was a declarant, there was no prohibition in the Act against voting by declarants.

I am unable to accept Mr. McKinnon's contentions.

It is not disputed that Thomas C. Assaly is the controlling shareholder in both Thomas C. Assaly Corporation Ltd., the successor to Trendsetter Developments Ltd., and Asgo Management Ltd. It is also common ground that the dispute which gave rise to these proceedings arose because a majority of the board of directors, duly elected by unit owners, determined that the management contract of Asgo Management Limited should not be renewed on its expiry. Given the position of Thomas C. Assaly in both Thomas C. Assaly Corporation Ltd. and Asgo Management Ltd. it can hardly be said that he is impartial. Indeed, Mr. McKinnon in his submissions made no secret about the fact that Thomas C. Assaly has a large investment in the project and, consequently, that his interest should receive greater protection than those of individual unit owners who had invested small amounts (\$2,000, it was said). The difficulty with this position, in my respectful view, is that it is contrary to the intention of the Act. The principles laid down in cases such as *York Condominium No. 167*, *Peel Condominium Corp. No. 199*, and *Carleton Condominium Corp. No. 279*, supra, are, first, that the Act was intended to benefit unit owners who are bona fide purchasers, secondly, that declarants and their successors and assignees stand in a fiduciary relationship to unit owners, and finally, that they may not use their positions to further their own economic interests at the expense of bona fide unit owners.

The decision by Thomas C. Assaly Corporation Ltd. to invoke the machinery of s. 18(2) of the Act in order to remove from office the majority directors of the board because they had the temerity to vote against renewal of the management agreement with Asgo Management Ltd. is, in my respectful view, nothing short of a massive use of its position to further its own economic advantage. This is the type of conduct which Carruthers J., in a different factual context, excoriated in *Peel Condominium Corporation Corp. No. 199*, supra, and I find it no less reprehensible here.

It follows from the foregoing that I accept the submissions of Mr. Davidson for the applicant that Thomas C. Assaly is not entitled to vote at the meeting.

I turn now to the issue whether Thomas C. Assaly Corporation Ltd., as the holder of junior mortgages on not less than 15 per cent of the units in the condominium corporation, is entitled to vote.

The argument of this issue focused on the proper construction of s. 48 of the Act which reads:

48. Where a mortgage of a unit and common interest contains a provision that authorizes the mortgagee to exercise the right of the owner to vote or to consent, the mortgagee may exercise the right, and, where two or more such mortgages contain such a provision, the right may be exercised by the mortgagee who has priority.

It is common ground that the first mortgages on the units are held by Royal Trust Company and that Thomas C. Assaly Corporation Ltd. holds junior mortgages on not less than 15 per cent of the units. It is also common ground that each mortgage "contains a provision that authorizes the mortgagee to exercise the right of the owner to vote".

The materials indicate that Royal Trust Company, the first mortgagee, has not signified its intention to vote.

Relying on the decision of Philp J. in *Keyes v. Metropolitan Toronto Condominium Corporation No. 876* (1990), 73 O.R. (2d) 568, 11 R.P.R. (2d) 129 (H.C.J.), Mr. Davidson contended that, properly construed, s. 48 would disentitle Thomas C. Assaly Corporation Ltd. from exercising the owners' rights to vote because it is not "the mortgagee who has priority" since Royal Trust Company is the holder of the first mortgages.

Mr. McKinnon on the other hand contended, quite properly, that s. 48 should be construed in light of other provisions of the Act, such as ss. 12(5), 14, 18, 20 and 31(3). When construed in that way, so the argument went, s. 48 does entitle Thomas C. Assaly Corporation Ltd. to exercise the owners' rights to vote in the circumstances of this case since the mortgagee who has priority has not signified its right to vote. Mr. McKinnon contended further that *Keyes* was wrongly decided and should not be followed.

Although I am in full agreement with Mr. McKinnon's approach to the construction of s. 48, I am unable to conclude that *Keyes* was wrongly decided. In any case, having regard to what I have already said concerning the relationship between Thomas C. Assaly and Thomas C. Assaly Corporation Ltd. and their obligations vis-a-vis unit holders, it is, in my respectful view, consistent with the principles laid down in the authorities cited and the intent of the Act that Thomas C. Assaly Corporation Ltd., as mortgagee, should not be entitled to vote. For similar reasons, I am of the opinion that Thomas C. Assaly Corporation Ltd., as owner of two residential and seven commercial units, is not entitled to vote at the meeting.

On July 8, the applicant filed a motion on this application seeking the following relief:

(a) a declaration confirming that all proxies attached as Exhibit "D" to the Affidavit of Gayle A. Duggan in support of this motion and obtained for the meeting of unit owners originally scheduled for June 21, 1991 are valid and subsisting proxies for use at that meeting to be re-scheduled on a date to be determined by the Court, subject only to revocation by the unit owners prior to any vote taken at that meeting;

(b) an order declaring that the rescheduled meeting of the owners (originally scheduled for June 21, 1991) is to be chaired by the President of Carleton Condominium Corporation No. 347, Gayle A. Duggan.

Mr. McKinnon contended that the declaration sought in para. (a) of the notice of motion should not be made because the solicitation sent to unit owners did not state the purpose for which they were sought. In the circumstances of this case, given the fact that the meeting and its purpose had been so well publicized, I see no merit in the contention and I make the declaration in the terms sought in para. (a) of the notice of motion.

Mr. McKinnon also objected to the granting of the relief sought in para. (b) of the notice of motion. Article 6.6(a) of By-Law No. 1 of the condominium corporation provides that the president of the corporation shall act as chairman of meetings of unit owners and authorizes a substitute only in case the president is absent. I see no reason to make any order that would effect any alteration of that provision. As I have indicated, the allegations of impropriety against Gayle Duggan and the other majority directors were unfounded and any alteration of the normal rules of conduct of the business of the condominium corporation would simply lend an air of credibility to those allegations. Accordingly, I make the declaration sought in para. (b) of the notice of motion.

(c) Application 53028/91

The reliefs sought in this application have as their premise that the majority directors and Nelligan/Power, the solicitors for the condominium corporation, have acted unlawfully or improperly. Earlier in these reasons I indicated that I had found no unlawfulness or impropriety in the actions of Messrs. Nelligan/Power. As well, in my reasons with respect to Application 52739/91, I indicated that I found no unlawfulness or impropriety in the actions of the majority directors. On the contrary, I found that their actions had been taken in the best interests of the condominium corporation, according to their best judgment. In light of these findings, it follows that Application 53028/91 should be dismissed.

4. SUMMARY

(a) Application 52739/91

The applicant is entitled to the order sought in para. (b) of the notice of application. The order should contain such reasonable provisions as the bank may require to give effect to the order made.

(b) Application 52779/91

(1) There will be a declaration that the respondents to this application, Thomas C. Assaly and Thomas C. Assaly Corporation Ltd., are not entitled to vote at the meeting of owners of the condominium corporation now scheduled to be held on July 25, 1991.

(2) There will be declarations as requested in paras. (a) and (b) of the applicant's motion dated July 4, 1991, concerning confirmation of proxies obtained by Gayle Duggan and the chairing of the meeting to be held on July 25, 1991.

(c) Application 53028/91

The application is dismissed in its entirety.

5. COSTS

Costs of the Royal Bank of Canada and the Royal Bank Mortgage Corporation are fixed at \$2,000 and are payable forthwith by the condominium corporation. Costs of the applicant for all proceedings are payable on a party-and-party basis by Thomas C. Assaly and Thomas C. Assaly Corporation Ltd. forthwith after assessment.

Counsel may speak with me concerning any matter that might be required to give effect to this judgment. Arrangements for this purpose are to be made through the trial co-ordinator's office.

Order accordingly.

CBR# 381

York Region Condominium Corp. No. 585 v. Gilbert

Action No. M186454/89

Ontario District Court - York Judicial District Toronto, Ontario Gilbert D.C.J. January 23, 1990

P.M. Conway, for the Applicant. J.I. Laskin, for the Respondents.

GILBERT D.C.J.:-- This is an application under Section 49 of the Condominium Act, R.S.O. 1980, c. 84, as amended, for an order requiring the respondents, Philip Gilbert and Shirley Gilbert, to cease the keeping of a dog in Unit 611 of the applicant's building on the grounds that the Declaration and the Rules and Regulations of this condominium Corporation prohibit the keeping of pets in the units and common elements.

The York Regional Condominium Corporation No. 585 is a condominium corporation duly created by registration of its Declaration in accordance with the provisions of the Condominium Act R.S.O. 1980, c. 84 as amended. It is a high rise building composed of 198 residential units and is called "Promenade Towers". It is located at 7420 Bathurst Street in the Town of Vaughan in the Regional Municipality of York.

Paragraph 3.01(e) of the registered Declaration provides as follows -

"No animal, livestock, fowl or any pet shall be kept or allowed in any unit."

Paragraph 4.05 of the registered Declaration provides as follows -

"Pets: No animal, livestock, fowl or any pet shall be kept upon the common elements, including those parts thereof of which any owner has the exclusive use."

Rule 30 of the Rules and Regulations of Promenade Towers provides as follows -

"Pets: No pets shall be kept or allowed in any units or on the common elements, including those parts thereof of which any owner has the exclusive use (pets are prohibited by the Condominium Declaration)".

The Gilberts are the owners of Unit 611, one of the residential units in the Promenade Towers. They have a long hair collie dog. Shirley Gilbert, wife of Philip Gilbert, entered into an agreement to purchase the unit in April 1988. The transaction closed at the end of July 1988 and the Gilberts entered into possession at the end of August 1988. The Gilberts were represented by the law firm of Robins, Appleby.

Mr. Gilbert saw a "No pets" sign at the entrance to Promenade Towers when he inspected the suite in April 1988. Before the closing at the end of July 1988 and before taking possession of the unit at the end of August 1988, Mr. Gilbert received a copy of the Declaration on or about July 28, 1989 from the law clerk at Robins, Appleby and was told to read it.

In September 1988, Marcia Hollander, the on-site Property Manager, of Promenade Towers, met Mr. Gilbert on one of the stairwells of the building when he was walking down the stairs with his dog. Ms. Hollander asked Mr. Gilbert whether the dog was his and he responded that it was not, that it belonged to his son, and was staying at the unit only for the day.

In the following months, Ms. Hollander received several complaints from unit owners advising that they had seen Mr. and Mrs. Gilbert with a dog in the parking garage and elsewhere on the common elements and requested her to enforce the Declaration which prohibits the keeping of dogs.

By letter dated November 29, 1988, Ms. Hollander advised the Gilberts that the Declaration prohibits the keeping of pets and requested that the dog be removed from the premises immediately. On December 1989 the Board of Directors instructed Ms. Hollander to ensure that the Declaration and rules of the Condominium Corporation were complied with. Shortly thereafter, Ms. Hollander was visited in the property management office by Mr. and Mrs. Gilbert on separate occasions. Both advised Ms. Hollander they were aware of the Declaration's provisions prohibiting the keeping of dogs and indicated they knew this when they moved in. Mrs. Gilbert indicated that she would be very upset to have to get rid of the dog. Ms. Hollander advised the Board of Directors in January 1989 of the Gilberts' response. The Gilberts were requested to attend the next meeting of the Board of Directors to take place on February 16, 1989 but declined to attend.

At the next meeting of the Board of Directors in March 1989, the Board instructed the Corporation's solicitors to write to the Gilberts requiring compliance with the Declaration and rules. The Corporation's solicitors did so and received a response from the Gilberts' solicitors. On April 13, 1989 the Corporation's solicitors sent a further letter to the Gilberts requesting the dog be removed within seven days. The dog has not been removed.

At the June meeting of the Board, a resolution was passed authorizing the commencement of this application to the court for an Order authorizing the Gilberts to comply with the Declaration and rules of the Corporation relating to their dog in their unit and on the common elements in the building.

The Position of the Applicant

Ms. Patricia M. Conway, counsel for the applicant submits that -

1. A condominium operates on the basis of mutual rights and obligations. The Corporation through its Board of Directors has an obligation to enforce the Declaration, the by-laws and the rules. Each unit owner is bound by and required to comply with the Declaration, the by-laws and the rules and every unit owner has a right to compliance by other owners with the Declaration, by-laws and rules of the condominium. Condominium Act. R.S.O. 1980, c. 84, s. 12(3), s. 31(1) and (2).

2. The Declaration of the Condominium Corporation is in the nature of a covenant running with the land circumscribing the extent and limits of the enjoyment and use by a unit owner of his unit and of the common elements. *York Condominium Corporation No. 216 v. Borsodi, et al.* (1983) 42 O.R. (2nd) 99. 3. The provisions in the Declaration of the Condominium Corporation prohibiting the keeping of pets is one respecting the occupation and use of the unit and common elements and is within the power of the Condominium Corporation to enact and enforce. *Condominium Act R.S.O. 1980, c. 84, s. 3(3)(b)* Re: *York Condominium Corporation No. 42 v. Melanson* (1975) 9 O.R. (2d) 116 at 119. *York Condominium Corporation No. 375 v. Grecchi* (unreported Decision of Judge S.P. Webb, D.C.O. dated November 1, 1984). *Peel Condominium Corporation No. 78 v. Harthen et al.* (1978) 20 O.R. (2nd) 225.

4. Rule 30 of the Rules and Regulations of the Condominium Corporation prohibiting the keeping of pets is within the powers of the Board of Directors to make rules respecting the use of the common elements and units or any of them to promote the safety or welfare of the owners and of the property or for the purpose of preventing unreasonable interference with the use and enjoyment of the common elements and of other units. *Condominium Act R.S.O. 1980, s. 29(1), (2) and (3)*.

5. The Gilberts are in breach of the provisions of the Declaration and the rules of the Condominium Corporation by having a dog on their premises, having knowledge of the prohibition of pets by unit owners and, therefore, the applicant is entitled to an Order requiring the Gilberts (respondents) to comply with the provisions in the registered Declaration, in particular Articles 3.01(c) and 4.05 and Rule 30 of the Rules and Regulations of the Condominium Corporation by ceasing the keeping of a dog in Unit 611 and the common elements of the building of the applicant Corporation.

The Position of the Respondent

Mr. John I. Laskin, counsel for the respondents submits that - 1. The "No pets" provisions in the applicant's Declaration are ultra vires of the applicant's Condominium Corporation and of the Condominium Act. He stated that a declaration under the Condominium Act is a creature of that statute and is, therefore, prescribed by it. A declaration may only restrict rights and impose duties if the statute authorizes it to do so and that dog ownership is an incident of unit ownership in the building. Statutes which encroach upon the rights of an owner are subject to strict construction and it is appropriate to strictly construe a statutory provision which may permit the encroachment on or the restriction of the rights of an individual. *Peel Condominium on No. 11 and Caroe* (1974) 4 O.R. (2d) 543 at 545.

2. The declaration is not the place to deal with pet restrictions relating to a condominium. The pet provisions should be in the bylaws of a condominium corporation. Re: *York Condominium No. 42 v. Melanson* (1975) 9 O.R. (2d) 116 at 122.

3. The owner of a condominium unit is in a worse position than a tenant. In a landlord-tenant relationship, the landlord must show, on a balance of probabilities, that a tenant's conduct by keeping a pet substantially interferes with the reasonable enjoyment of the premises by the landlord or other tenants. A condominium unit owner has no similar right or protection. *Kay v. Park Forest* (1982) 35 O.R. (2d) 329. Re: *York Condominium Corporation No. 42 v. Melanson* (as above) at p. 124. Re: *Waterloo North Condominium Corporation No. 31 v. Indico Ltd.* (1984) 23 A.C.W.S. (2d) 545.

4. Section 3(3)(b) of the Condominium Act relating to provisions respecting the occupation and use of the units and common elements that a declaration may contain should be subject to an implied term of being reasonable and consistent with the Condominium Act. Sections 28(4) and 29(2) of the Condominium Act R.S.O. 1980, c. 84, contain express terms that the bylaws and rules of a condominium shall be reasonable and consistent with the Act, the declaration and the bylaws. *Condominium Act R.S.O. 1980, c. 84, s. 8(4) and s. 29(2)*. *York Condominium Corporation No. 375 v. Lorenzo Crecchi, et al.* (as above).

5. This court has power to exercise a discretion under Section 49(2) of the Condominium Act and should do so because the respondents were not aware of the no pets provision in the Declaration or rules of the applicant Condominium corporation when Mrs. Gilbert signed the Offer to Purchase the unit in the building, therefore had no knowledge of the pet restrictions. Also, there has been no unreasonable interference by the Gilberts' dog which substantially interfered with the reasonable enjoyment of the premises by the Condominium corporation or the other unit owners in the building. *York Condominium Corporation No. 288 v. Bianca McDougall, et al.* unreported Decision of Judge Sheard, D.C.O. dated July 1978. Conclusions

1. The provisions set forth in Article 3.01(e) and Article 4.05 of the registered Declaration of the applicant relating to the prohibition of pets in the units and common elements of the building are intra vires and are enforceable by the unit owners and the Board of Directors of the applicant condominium corporation.

I accept and apply the law and reasoning of His Honour Judge Misener in *Re. Peel Condominium Corporation No. 78 v. Harthen et al.* as above. The prohibiting pet provision in the Declaration relates to the occupation and use of the units and common elements by the unit owners. The "occupation" refers to the manner or nature of the physical possession of the units or common elements in itself and "use" refers to the enjoyment of the premises or units and common elements once physical possession has been acquired.

I do not accept the reasoning of Mr. Laskin that the prohibitive pet provisions are ultra vires of the applicant condominium corporation or the Condominium Act itself. The decision of Mr. Justice Galligan in *Re. Peel Condominium Corporation No. 11 v. Caroe* related to a provision in the Declaration that a unit may be only "occupied as a one-family residence by the owner, his family and guests". The court held that the restricting provision in the Declaration imposed a restriction and encroachment on the right of alienation of the unit owners which is one of the fundamental incidents of ownership and one of the important forms of alienation is the leasing or renting of property. The court found there was no clear indication of legislative intention in sec. 3(2)(c) of the Act (now sec. 3(3)(b)) to restrict the fundamental right of alienation. Therefore, the restriction in the Declaration limiting the units to a one-family residence to be occupied by the owner, his family and guests thereby prohibited the owners from renting their units was not authorized by the Condominium Act and was invalid.

In the present case, Mr. Laskin submitted that ownership of a dog is an incidence of ownership of a unit and common elements in the applicant's condominium building. I do not agree that it is so. When a person buys a unit with common elements in a condominium, the person is bound by and shall comply with the provisions in the Declaration provided the provisions are intra vires of the Condominium Act and each owner has a right to the compliance by the other owners to the provisions in the Declaration, the bylaws and rules of the condominium.

For the above reason, I find the provisions in the Declaration and the rules prohibiting pets are *intra vires* respecting the occupation and use of the units and common elements and are, therefore, enforceable by the unit owners and the applicant corporation.

2. Ms. Conway, counsel for the applicant, stated that a Declaration of the applicant condominium is in the nature of a covenant running with the land and circumscribing the extent and limits the enjoyment and use by the unit owners and of the common elements. The Honourable Judge Allen in *York Condominium Corporation No. 216 v. Borsodi et al.* at p. 107 quoted Judge Moore of the District Court of Appeal of Florida in *Hidden Harbour Estates, Inc. v. Basso* (1981) 393 (2d) 637 at pp. 638 and 639 as follows:

"As we opined in *Sterling Village Condominium, Inc. v. Breitenbach*, 251 So. 2d 685 (Fla. 4th DCA 1971):

"Daily in this state thousands of citizens are investing millions of dollars in condominium property. Chapter 711, F.S.A. 1967, the Florida Condominium Act, and the Articles or Declarations of Condominiums provided for thereunder ought to be construed strictly to assure these investors that what the buyer sees the buyer gets. Every man may justly consider his home his castle and himself as the king thereof; nonetheless his sovereign fiat to use his property as he pleases must yield, at least in degree, where ownership is in common or cooperation with others. The benefits of condominiums living and ownership demand no less. The individual ought not be permitted to disrupt the integrity of the common scheme through his desire for change, however laudable that change might be."

Later at p. 639 Judge Moore quoted with approval the following extract from another decision [*Pepe v. Whispering Sands condominium Ass'n* (1977), 351 So. 2d 7751:

"A declaration of a condominium is more than a mere contract spelling out mutual rights and obligations of the parties thereto - it assumes some of the attributes of a covenant running with the land, circumscribing the extent and limits of the enjoyment and use of real property. Stated otherwise, it spells out the true extent of the purchased, and thus granted, use interest therein. Absent consent, or an amendment of the declaration of condominium as may be provided for in each declaration, or as may be provided by statute in the absence of such a provision, this enjoyment and use cannot be impaired or diminished."

Judge Moore went on to write as follows at pp. 639-40:

"There are essentially two categories of cases in which a condominium association attempts to enforce rules of restrictive uses. The first category is that dealing with the validity of restrictions found in the declaration of condominium itself. The second category of cases involves the validity of rules promulgated by the association's board of directors or the refusal of the board of directors to allow a particular use when the board is invested with the power to grant or deny a particular use.

(1) In the first category, the restrictions are clothed with a very strong presumption of validity which arises from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed. Such restrictions are very much in the nature of covenants running with the land and they will not be invalidated absent a showing that they are wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right. See, *White Egret Condominium, Inc. v. Franklin*, 379 So. 2d 346 (Fla. 1979). Thus, although case law has applied the word "reasonable" to determine whether such restrictions are valid, this is not the appropriate test, and to the extent that our decisions have been interpreted otherwise, we disagree. Indeed, a use restriction in a declaration of condominium may have a certain degree of unreasonableness to it, and yet withstand attack in the courts. If it were otherwise, a unit owner could not rely on the restrictions found in the declaration of condominium, since such restrictions would be in a potential condition of continuous flux."

The rationale of that judgment is of assistance and applicable to the present case. 3. Mr. Laskin submitted there is an implied term that the provisions in the Declaration of the condominium corporation must be reasonable and consistent with the Act in the same way as the bylaws and rules governing the units and common elements are. (See sec. 28(4) and sec. 29(2) of the Act).

The endorsement by the Ontario Court of Appeal in the case of *York Condominium Corporation No. 375 v. Lorenzo Grecchi* (as above) in part stated:

"In our view the trial judge exercised his discretion properly and the restriction contained in the Declaration and the bylaw were reasonable and reasonably relates to the legitimate purposes of the condominium corporation."

The prohibitive restriction related to the keeping of a dog in the units and common elements of the condominium building.

I find that the pet prohibitions set forth in the Declaration and the rules of the applicant condominium corporation are reasonable and reasonably relate to the legitimate purposes of the condominium. 4. Mr. Laskin submitted that the pet restrictions relating to the condominium should not be in the Declaration provisions but should be in the bylaws of the condominium corporation.

In *Re. York Condominium Corporation No. 42 v. Melanson* (see above) Chief Justice Howland stated at p. 122:

"Under s. 3(2)(c) of the Act, the right to include a provision in the declaration respecting occupation of the units would embrace such matters as restricting the use to single-family residences. On the other hand, the right to restrict the keeping of animals in such units as incidental to such single-family use would seem properly to fall within the power to make bylaws governing the use of units."

However, in the same case, Chief Justice Howland stated at p. 119:

"In creating a condominium corporation, a developer has to consider carefully what restrictions it is going to impose on the user of the units and common elements because such restrictions will affect the character of the condominium and the marketability of its units. The prohibitive paragraph could have been included in the declaration pursuant to s. 3(2) of the Act, just as the declaration provided that each unit should be used only as a single-family residence. However, the objection to so doing is that under s. 3(3) of the Act the declaration may be amended only with the consent of all owners and all persons having registered encumbrances against the units and common interests. In the case of a restriction such as the prohibitive paragraph this could be a formidable task."

In the *Melanson* case, the prohibitive pet restriction was in a bylaw of the condominium corporation and read:

"No animal shall be allowed upon or kept in or about the property"

It seems to me that a prohibitive pet restriction could be contained in the Declaration or the bylaws or the rules of a condominium corporation provided that the prohibitive pet restrictions is brought to the attention of a purchaser of a condominium unit prior to the closing of the sale and purchase of the unit.

The problems arising with regard to amendments to a Declaration may raise problems but these are matters which should be considered at the time of incorporation by the developer of the condominium, keeping in mind the intended use and purposes of the condominium building. The purchaser of a condominium unit should be aware of the use and purposes of a condominium building before making a purchase or completing a sale of a condominium unit.

In the present case, Mr. Gilbert was aware of the "No Pets" sign in the building on inspecting the property and Mr. and Mrs. Gilbert were given a copy of the Declaration setting forth the pet restriction by a representative of the law firm that acted for them and who told them to read it. In these circumstances it is a reasonable conclusion to make that the Gilberts were deemed to have knowledge of the pet prohibition in the Declaration prior to the closing of the transaction.

The denial of ownership of the dog by Mr. Gilbert when asked by the Property Manager, Ms. Hollander "Who owns the dog?" and his response that it belonged to his son and that the dog was staying only for a day, indicates he was well aware of the pet prohibition in the building. Also, shortly after Ms. Hollander was visited in the management office by Mr. and Mrs. Gilbert on separate occasions and both advised her that they were aware of the dog prohibition in the Declaration when they moved in. Mrs. Gilbert said she would be upset if she had to get rid of the dog.

To accede to permitting the Gilberts to keep their dog in the unit and common elements of the building would be to utterly ignore the occupation and use of the units and common elements in the building and an intended purpose of the incorporation of the condominium. To do otherwise would lead to chaos in the management of condominiums and the rights, obligations and duties of the unit owners and the condominium corporation.

5. Mr. Laskin submitted that the owner of a condominium unit is in a worse position than a tenant because in a landlord-tenant relationship, the landlord must show on a balance of probabilities that a tenant's conduct by keeping a pet on the premises substantially interferes with the reasonable enjoyment of the premises by the landlord and other tenants. Re. York Condominium Corporation No. 42 v. Melanson. There is a vast difference between a landlord-tenant relationship and the relationship of unit owners of a condominium. The landlord and tenant are bound by the terms of a lease agreement. The unit owners of a condominium are bound by the Declaration, the bylaws and the rules of the condominium and the Condominium Act requiring the duty of compliance and the right of enforcement by the unit owners and the condominium corporation.

As long as a restriction in a Declaration bylaw or rule of a condominium corporation is intra vires and is reasonable and consistent with the condominium Act, it should be enforceable. In the present case, there were complaints made to the Property Manager by unit owners to the Gilberts having a dog in their unit and in the common elements of the condominium building which the unit owners must have felt was in breach of the Declaration and the rules prohibiting dogs and to their right to reasonable enjoyment of the premises by themselves and other owners and the condominium corporation took the necessary steps to enforce their rights which was reasonable in the circumstances.

Accordingly, there will be an Order directing the respondents to comply with the registered Declaration of the applicant, York Region Condominium corporation No. 585, and in particular Articles 3.01(e) and 4.05 and Rule 30 of the Rules and Regulations by ceasing to keep a dog in Unit 611 and on the common elements of York Region Condominium No. 585, by April 30, 1990.

Counsel may make representations to me in my chambers regarding the costs of this application within twenty days of the release of these Reasons.

GILBERT D.C.J

CBR# 054

Budinsky, Chan, Gatt, Greene, Love, Colby, Lander, Wilkes-Lander, Mangiacasale, Mangiacasale, Mangiacasale, Maslen, Maslen, Pierce, Phinney, Pepperdene, Tse, Suen, Chung, Verwey, Verwey, Vickers and Vickers v. Breakers East Inc. Rowntree v. Breakers East Inc.

6 O.R. (3d) 255

Action Nos. 2215/91U and 2446/91U

Ontario Court (General Division), Borins J. January 16, 1992

Jonathan H. Fine and Mario D. Deo, for applicants in both applications. Kenneth G. Hood, for respondent in both applications.

BORINS J.:--These applications, which were argued together, raise significant issues with respect to the interpretation of certain sections of the Condominium Act, R.S.O. 1980, c. 84, and R.R.O. 1980, Reg. 121 (Condominium Act). Each of the applicants, individually or jointly, has entered into an agreement of purchase and sale with the respondent to purchase a residential condominium unit in a proposed residential condominium project developed and constructed by the respondent in Ajax, Ontario, which is known as "The Breakers".

The issues raised by the applicants are as follows:

- (1) Does the disclosure statement which the respondent delivered to each applicant comply with the requirements of s. 52(6) and (7) of the Condominium Act?
- (2) Is the respondent in default of its obligation under s. 52(1) and (2) of the Act to deliver an amended disclosure statement to the applicants?
- (3) Has the respondent charged some of the applicants an interest rate which exceeds the interest rate provided for in their agreements of purchase and sale and permitted by s. 51(6) para. 1 of the Act in respect to the mortgage interest rate component of the occupancy fee which the applicants are required to pay the respondent?
- (4) What is the "prescribed rate" of interest which the respondent is required by s. 53(2) and (3) of the Act to pay to the applicants on the deposits paid by them to the respondent pursuant to their agreements of purchase and sale?

It is the submission of counsel for the applicants that if the disclosure statement does not comply with the requirements of the Act, or if the respondent is in default in delivering an amended disclosure statement to the applicants, that s. 52(1) of the Act requires that there be a declaration that the agreements of purchase and sale entered into by the applicants are not binding on them. In an eight-page schedule annexed to the notices of application entitled "Disclosure Statement Deficiency Analysis", counsel for the applicants lists almost 70 alleged deficiencies in the disclosure statement any of which, he submits, would enable the purchasers to avoid the final closings of their agreements of purchase and sale on the ground that because the disclosure statement does not comply with the requirements of the Act it is not a disclosure statement for the purpose of s. 52(1) and, therefore, the agreements of purchase and sale are not binding on the purchasers. Counsel for the applicants further submits that because of significant events which have occurred since the purchasers entered into their agreements of purchase and sale the respondent is obliged to deliver a material amendment to the disclosure statement, and because this has not occurred, s. 52(1) enables the purchasers to obtain a declaration that the agreements of purchase and sale are not binding on them. The significant events relied on are the filing of a number of construction liens and certificates of action against the property on which the condominium is being constructed and the failure of the respondent to complete the recreational unit by the date contained in the disclosure statement.

The relevant legislation

Because an understanding of the relevant legislation is necessary to an appreciation of the issues, I propose to set it out at the beginning of my reasons for judgment. What follows are ss. 51(6), 52(1), (2), (4), (5), (6), (7) and (8), and 53(1), (2), (3) and (4) of the Condominium Act:

51(6) Where an agreement of purchase and sale entered into by a proposed declarant for a proposed unit for residential purposes permits or requires the purchaser to take possession of or occupy the unit before a deed or transfer of the unit acceptable for registration is delivered to him, the money paid in respect of such right or obligation to the proposed declarant shall be not greater, on a monthly basis, than the total of the following amounts:

1. The amount of interest that the purchaser would have paid, monthly, in respect of any mortgage or mortgages he is obligated to assume or give under the agreement of purchase and sale on delivery of a deed or transfer of the unit.
2. An amount reasonably estimated on a monthly basis for municipal taxes attributable to the proposed unit.
3. The projected monthly common expense contribution for that unit.

52.(1) An agreement of purchase and sale entered into after the 1st day of June, 1979 by a declarant or proposed declarant of a unit or proposed unit for residential purposes is not binding on the purchaser until the declarant or proposed declarant has delivered to the purchaser a copy of the current disclosure statement and all material amendments thereto.

(2) The purchaser, before receiving delivery of a deed to or transfer of the unit, may rescind the agreement of purchase and sale within ten days after receiving the disclosure statement or, where there has been a material amendment thereto, within ten days after receiving the material amendment.

(4) Every declarant or proposed declarant who receives notice of rescission under subsection (3) from a person entitled to rescind the agreement of purchase and sale under subsection (2), shall forthwith refund, without penalty or charge, to the person giving notice, all money that he received from that person under the agreement that was credited as payment against purchase price.

(5) Where any statement or material required under this Act to be provided by a declarant or proposed declarant to a purchaser of a unit or proposed unit for residential purposes contains any material statement or information that is false, deceptive or misleading or fails to contain any material statement or information, the corporation or any unit owner who relied on such statement or material is entitled, as against the declarant or the proposed declarant to damages for any loss sustained as a result of such reliance.

(6) The disclosure statement referred to in subsection (1) shall contain and fully and accurately disclose,

(a) the name and municipal address of the declarant or proposed declarant and of the property or proposed property;

(b) a general description of the property or proposed property including the types and number of buildings, units and recreational and other amenities together with any conditions that apply to the provision of amenities;

(c) the portion of units or proposed units which the declarant or proposed declarant intends to market in blocks of units to investors;

(d) a brief narrative description of the significant features of the existing or proposed declaration, by-laws and rules governing the use of common elements and units, and of any contracts or leases that may be subject to termination or expiration under section 39;

(e) a budget statement for the one year period immediately following the registration of the declaration and the description;

(f) where construction of amenities is not completed, a schedule of the proposed commencement and completion dates; and

(g) any other matters required by the regulations to be disclosed. (7) The budget statement mentioned in clause (6)(e) shall set out,

(a) the common expenses;

(b) the proposed amount of each expense;

(c) particulars of the type, frequency and level of the services to be provided;

(d) the projected monthly common expense contribution for each type of unit;

(e) a statement of the portion of the common expense to be paid into a reserve fund;

(f) a statement of the assumed inflation factor;

(g) a statement of any judgments against the corporation, the status of any pending lawsuits to which the corporation is a party and the status of any pending lawsuits material to the property of which the declarant or proposed declarant has actual knowledge;

(h) any current or expected fees or charges to be paid by unit owners or any of them for the use of the common elements or part thereof and other facilities related to the property;

(i) any services not included in the budget that the declarant or proposed declarant provides, or expenses that he pays and that might reasonably be expected to become, at any subsequent time, a common expense and the projected common expense contribution attributable to each of those services or expenses for each type of unit;

(j) the amounts in all reserve funds; and

(k) any other matters required by the regulations to be disclosed.

(8) Where the total amount incurred for the common expenses provided for in the budget statement exceeds the total of the proposed amounts set out in the statement, for the period covered by the budget statement mentioned in clause (6)(e) the declarant shall forthwith pay to the corporation the amount of the excess except in respect of increased expenses attributable to the termination of an agreement under section 39.

53.(1) All money received by or on behalf of a proposed declarant from a purchaser on account of a sale or an agreement for the purchase and sale of a proposed unit for residential purposes before the registration of the declaration and description, other than money paid as rent or as an occupancy charge, shall, notwithstanding the registration of the declaration and description thereafter, be held in trust by the person receiving such money for the person entitled thereto in respect of the agreement and such money shall be held in a separate account designated as a trust account at a chartered bank or trust company or a loan company or credit union authorized by law to receive money on deposit or a Province of Ontario Savings Office until,

(a) its disposition to the person entitled thereto; or

(b) delivery of prescribed security to the purchaser for repayment.

(2) Where an agreement of purchase and sale referred to in subsection (1) is terminated and the purchaser is entitled to the return of any money paid under the agreement, the proposed declarant shall pay to the purchaser interest on such money at the prescribed rate.

(3) Subject to subsection (2), where a purchaser of a proposed unit under an agreement of purchase and sale referred to in subsection (1) enters into possession or occupation of the unit before a deed or transfer of the unit acceptable for registration is delivered to him, the proposed declarant shall pay interest at the prescribed rate on all money received by him on account of the purchase price from the day the purchaser enters into possession or occupation until the day a deed or transfer acceptable for registration is delivered to him.

(4) Subject to subsections (2) and (3), the proposed declarant is entitled to any interest earned on the money required to be held in trust under subsection (1).

The following are ss. 32 and 33 of R.R.O. 1980, Reg. 121:

32. Pursuant to subsection 52(6) of the Act, a declarant shall provide the following documents with the disclosure statement:

1. A copy of the corporation's declaration or proposed declaration.
2. A copy of the corporation's by-laws or proposed by-laws.
3. A copy of the corporation's rules or proposed rules.
4. A copy of any insurance trust agreement or proposed insurance trust agreement.

33. The rate of interest under subsections 53(2) and (3) of the Act on money held in trust under subsection 53(1) of the Act shall, (a) for the six months immediately following the last day of March of each year, be 1 per cent per annum below the rate paid on The Province of Ontario Savings Office savings accounts on the 1st day of April of that year; and

(b) for the six months immediately following the last day of September of each year, be 1 per cent per annum below the rate paid on The Province of Ontario Savings Office savings accounts on the 1st day of October of that year.

A typical residential condominium purchase transaction and the relevant provisions of the Condominium Act

A review of relevant provisions of the Condominium Act in the context of a typical residential condominium purchase transaction will be helpful in understanding the issues to be determined in these applications. When a person purchases a newly constructed home from its builder or developer, the transaction is relatively straightforward. The purchaser becomes the owner of the residence and the land on which it was constructed. He or she has no contractual relationship with any neighbour and there are no rules or regulations which govern the activities which may or may not take place in the residence or on the property. No restrictions apply to who may occupy the residence or, for example, to whether or not the occupants can bring pets into the home or park vehicles on the driveway.

The same cannot be said about the purchase of a residential condominium unit. Not only is the purchase of a condominium a more complex transaction than the purchase of a house, it also brings with it the experience of communal living in which each condominium owner is a member of the condominium corporation to which the developer turns over the condominium complex and which corporation is then governed by a board of directors. Thereafter, the condominium, or unit owners, are bound by and must comply with the Act, the declaration (which is similar to the articles of incorporation of a business corporation), the by-laws and rules of the condominium corporation, and they are financially responsible for the maintenance of the common elements of the condominium complex. As well, each unit owner has the right to insist upon and enforce compliance with the by-laws and rules by each of the other unit owners and the condominium corporation has the duty to effect compliance by the owners with the Act, the declaration, the by-laws and the rules. It is little wonder, therefore, that the Act, principally in s. 52, requires that the declarant, which is the developer of the condominium project, must provide each prospective purchaser with a package of information describing what is being sold, what it will cost to live in the condominium unit and the laws and rules by which the condominium owners must abide. This package of information is the disclosure statement referred to in s. 52(1) and its contents are stipulated by s. 52(6) and (7). This duty on the part of the developer or declarant to make disclosure to a prospective purchaser is similar to the duty imposed by s. 52 of the Securities Act, R.S.O. 1980, c. 466, on the issuer of a security to file a prospectus. The duty to deliver a disclosure statement and the provisions of the Act prescribing its contents constitute one of the several consumer protection features of the Act.

Because the developer is unable to convey title to a condominium unit to the purchaser until the declaration and description are registered in accordance with the Act, the typical condominium purchase transaction usually requires two closings. The first closing, referred to in practice as the possession, occupancy or interim closing, occurs when the construction of the condominium unit has been completed and it is ready for occupancy and prior to the registration of the declaration and the description. The second closing, referred to in practice as the final closing, title closing, or unit transfer date, occurs after registration, at which time the purchaser acquires exclusive ownership and use of his or her unit, subject to the provisions of the Act, the declaration and the by-laws. At this time, the condominium owners also become tenants in common of the common elements which constitute all of the property in the condominium complex as defined in s. 1(1)(s), except the condominium units. From the date of the occupancy closing until the date of the final closing when the purchaser is required to pay the developer the balance owing for the purchase price of the unit, the purchaser is required to pay a monthly rental or occupancy fee which cannot exceed the amount stipulated by s. 51(6). Section 53(1) requires a developer to deposit in a separate trust account all deposit monies paid by a purchaser and to pay to the purchaser interest on the deposit at the rate described in s. 33 of Reg. 121 where an agreement of purchase and sale is terminated or from the date of the occupancy closing to the date of the final closing. The cap on the amount chargeable as an occupancy fee and the provisions with respect to the payment of interest on deposits are additional consumer protection features of the Act.

This brief overview of the typical residential condominium purchase transaction and the relevant sections of the Act is sufficient, in my view, to understand the issues presented by these applications. I leave for later a more detailed examination and discussion of the provisions of s. 52 which relate to the delivery of the disclosure statement and any material amendments to the disclosure statement.

The agreed facts

The purchasers entered into their agreements of purchase and sale with the respondent between March 29, 1988 and November 25, 1988. Each agreement includes six schedules and contains 24 pages. Schedule D, entitled "General Terms and Conditions", has 16 pages and contains detailed information, inter alia, about the mortgage to be given or assumed by the purchaser, adjustments and other payments, the date of closing, the terms of interim occupancy, default, and the purchaser's and vendor's covenants. Each agreement provided that it "shall be completed on or before the 30th day of November, 1989, or such other date as provided for in paragraph 5 of Schedule 'D'", which provides for interim occupancy prior to final closing.

Each agreement required that the purchaser pay a deposit, by way of instalments, which totals about 25 per cent of the purchase price. Most of the purchasers have paid their entire deposit except for those who are in default of the occupancy closing. Although each agreement provided for a closing date of November 30, 1989, none of the units was ready for occupancy until almost one year later. The earliest date when any of the units was sufficiently completed to permit occupancy was November 23, 1990. Each purchaser who participated in an occupancy closing received an interim statement of adjustments which credited the purchaser with deposits paid to the date of occupancy closing, the amount of the first mortgage assumed by the purchaser and required the purchaser to pay, by way of the final instalment of the deposit, the balance of the purchase price.

Each interim statement of adjustments contained the amount of the occupancy fee to be paid by the purchaser between the date of the occupancy closing and the date of the final closing and said to represent "occupancy fees pursuant to paragraph 6(a) of Schedule 'D' of the Agreement of Purchase and Sale". By way of example, the following is the monthly occupancy fee calculation contained in the interim statement of adjustments of the applicant Richard Greene:

OCCUPANCY FEE Comprised of:

Interest on First Mortgage @ 13.25% per annum \$1,754.80

Common Expenses 174.36

Estimated Taxes 211.90

I have reproduced this example because it will be of assistance when I consider the third issue raised by these applications -- the proper rate of interest which the Act permits the respondent to charge each purchaser in respect to the mortgage interest rate component of the occupancy fee. In this regard it is significant that the interest rate charged the purchasers varies from 11.75 per cent per annum to 13.25 per cent per annum. In the case of three purchasers arrangements were made with the respondent to charge an interest rate of 9.75 per cent per annum. I also note that each interim statement of adjustments contains the total amount of the deposits paid by each purchaser which is relevant to the fourth issue to be decided -- the "prescribed rate" of interest which the respondent is required to pay to each purchaser in respect to his or her deposit.

There are significant variations in respect to the status of the various applicants at the present time. The 25 applicants, either jointly or individually, entered into 14 agreements of purchase and sale. Occupancy closings did not take place in respect to four of the units which remain unoccupied and in respect to which no occupancy fees are being paid. Four other units remain empty, with occupancy fees being paid in respect to two and occupancy fees being paid, but not cashed, in respect to the other two. Three units are occupied by the purchasers or members of their family and occupancy fees are being paid. The three remaining units have been leased from time to time by their purchasers who are paying the occupancy fees. However, the total deposit due has not been paid in respect to one of these units. As of December 5, 1991, registration under the Condominium Act had not occurred and, therefore, no date had been set for the final closing of any of the purchases.

Upon signing the agreement of purchase and sale each purchaser received from the respondent a bound booklet entitled "The Breakers" which contained the disclosure statement and the other materials required by s. 32 of Reg. 121. The booklet is comprised of approximately 86 pages, seven of which contain the disclosure statement. The purchasers have not received a revised or amended disclosure statement. The disclosure statement advised the purchasers that the condominium would have as amenities a recreational unit, which included, inter alia, an indoor swimming pool and an exercise room, and an outdoor play area including children's play facilities. It stated that construction of the amenities would begin in October 1988 and would be completed by December 1990. An occupancy permit for the pool was not issued until July 26, 1991 and as of September 16, 1991, the children's play area had not been completed.

At the time the purchasers entered into their agreements of purchase and sale no construction liens had been registered against the property. After February 2, 1989, 42 notices of construction lien and 14 certificates of action were registered. At present, 15 notices of construction lien and 13 certificates of action are still registered against the property. The liens range in amount from \$1,396 to approximately \$2,100,000. The latter amount represents the total of two liens registered on June 21, 1991 and August 22, 1991 by the general contractor for the project, Atlas-Gest Inc. (formerly Jatlas Inc.) which was dismissed by the respondent in the early summer of 1991.

Additional facts

Michael R. Ryan, the director of marketing for the respondent, provided evidence by way of an affidavit upon which he was cross-examined. His evidence is uncontradicted that it was the respondent's belief that occupancy of the condominium units would be available by November 30, 1989, but due to matters outside of its control the respondent was unable to meet this date. The causes of the delay were labour disputes, material shortages, a severe lack of available labour and delays imposed by the Town of Ajax in which the project is situated. The respondent kept the purchasers informed of the delays through correspondence and through meetings. He stated that as of September 16, 1991, the project was substantially completed, except for final landscaping, the recreational area and the children's play area. He pointed out that he understood that no children live in the building. As for the recreation unit, the exercise room is complete except for decorating and installing the equipment.

Mr. Ryan said that all deposits paid by the purchasers have been deposited in trust with the Montreal Trust Company and amount to \$2,580,117.46. He said that the respondent is aware of its obligations under the agreements of purchase and sale in respect to the deposits and will provide the purchasers with the appropriate credit in their statement of adjustments on the final closing, which he stated is standard procedure in the condominium industry. Similarly, on final closing the respondent will make any necessary adjustments in regard to the mortgage interest rate component of the occupancy fees. In this regard, Mr. Ryan conceded that two of the purchasers -- Gatt and Peirce -- were charged slightly higher interest rates than they should have been charged. In his affidavit Mr. Ryan provided considerable information about most of the purchasers. As well, counsel for the respondent examined one or more of the purchasers involved in each of the transactions. There is no need to review in any detail the information about the various purchasers which constitutes a significant portion of the record on the applications. It is sufficient to note that an analysis of the evidence indicates that none of the purchasers registered any complaint about any apparent deficiency in the disclosure statement and the material which accompanied it during the ten-day period provided by s. 52(2) of the Act for rescinding the agreement of purchase and sale. Most of the purchasers gave the disclosure statements to their lawyers to be reviewed by them. As well, the evidence shows that the circumstances of many of the purchasers have changed since they signed their contracts to purchase their condominiums. For example, some of the purchasers have obtained employment elsewhere in Ontario and in the United States and other purchasers have financial problems. Several of the purchasers say there are deficiencies

in the construction of their units. Two of the purchasers, who appear to be speculators, are unhappy about the downturn in the real estate market. One of the purchasers remarried. Indeed, when he was cross-examined on his affidavit, one of the applicants, Roger Maslen, stated that the applicants wanted to get out of their deals because their lives had changed and the delays in constructing their condominiums had "messed up" their lives. He said that the disclosure statement was of no importance to any of the applicants other than to see if it had some flaw in it so that they could get out of their contracts.

The disclosure statement and amended disclosure statement issues

Because these issues are closely related it is convenient to deal with them together. Briefly stated, the position of counsel for the applicants is that because the contents of the disclosure statement which the respondent delivered to the applicants do not comply with the requirements of s. 52(6) and (7) of the Act, it is not a disclosure statement for the purposes of s. 52(1), with the result that the agreements of purchase and sale which the applicants signed are not binding upon them. As well, counsel for the applicants submits that the agreements of purchase and sale are not binding on the applicants because events have occurred subsequent to the delivery of the disclosure statement which require the respondent to deliver a material amendment to the disclosure statement and the respondent has not done so.

Counsel have directed my attention to three cases in which s. 52 has been considered. The first, a decision of the Court of Appeal, is *Brunott v. Coolmur Properties Ltd., Brooke, Weatherston and Thorson J.J.A.*, October 24, 1983 [summarized at 22 A.C.W.S. (2d) 509], in which it was held, in the circumstances of that case, that there was not a binding agreement of purchase and sale because the disclosure statement did not meet the requirements of s. 52. In order to properly understand the brief endorsement of Brooke J.A., on behalf of the Court of Appeal, which is set out below, it is necessary to review the case in some detail. I am able to do so because counsel for the applicants has provided me with copies of the appeal book and the statements of the appellants and the respondent.

The appellants were purchasers of three condominium units and sought an order pursuant to Rule 612 of the former Rules of Practice, R.R.O. 1980, Reg. 540, "for a declaration that the agreements of purchase and sale which the applicants entered into with the respondent are not binding on them, because the respondent failed to comply with s. 52 of the Condominium Act by delivering a disclosure statement containing all the matters specified in the Condominium Act". The evidence presented by the appellants consisted of the disclosure statement given to them by the vendor when they entered into their respective agreements of purchase and sale together with copies of the materials listed in s. 32 of Reg. 121. The respondent vendor contested the motion on the ground that the appellants purchased the condominiums not for residential purposes but for commercial purposes, that they were represented by their own lawyers, and that they made no complaint about the insufficiency of the disclosure statement until more than 18 months after they entered into their agreements of purchase and sale. As well, the respondent vendor provided an explanation for the several deficiencies which the appellant purchasers identified in the disclosure statement and the other documents which, it would seem, was intended to establish that the information constituted sufficient compliance with s. 52 under the circumstances existing when the disclosure statement was prepared.

Southey J. dismissed the motion on the ground that the facts relevant to the disposition of the motion were not undisputed. He saw as an unresolved factual issue necessary to the determination of the motion, whether or not the appellants had entered into the agreements of purchase and sale for residential purposes. In this regard Southey J. held: "I do not think the point should be dealt with in a motion under Rule 612, where it appears to me from the material that has been filed by the respondent that there is or may be an issue as to whether the agreements of purchase and sale were entered into in respect of units for residential purposes". If the applicants had not purchased the units "for residential purposes", there would be no obligation on the part of the developer under s. 52(1) to deliver a disclosure statement.

The Court of Appeal allowed the appeal of the appellant purchasers for the following reasons endorsed on the record by Brooke J.A. on behalf of the court comprised of himself and Weatherston and Thorson J.J.A.:

We are all of the opinion that appeal succeeds. We think Southey J. erred in holding that there was an issue of fact to be determined and so the motion could not proceed under Rule 612. The suggestion of future use purchases is not a material fact when the unit was designated as a residential unit and was purchased as such.

The appellant contends that there was no binding agreement of purchase and sale because no disclosure statement was delivered which meets the requirements of s. 52. We agree, without specifying its failures, that the document was no more than a statement of intention -- a proposed statement that lacked information on specific matters the statute enumerated. It is clear that the purpose of s. 52 is that the purchaser be given this information.

A declaration will go that the agreement of purchase and sale is not binding and the deposit monies should be returned.

From this brief endorsement I have difficulty in determining precisely what issues were decided by the *Brunott* case. From the record before the Court of Appeal it is clear that the court was satisfied that there was no dispute on the evidence before Southey J. that the units had been purchased as residential units. It is also clear that the court was satisfied that the disclosure statement which it was required to consider did not contain information in respect to the matters which by s. 52(6) and (7) it was required to contain and that the purpose of the disclosure statement is to provide this information for the consideration of residential condominium purchasers. As well, the Court of Appeal was able to determine whether or not the disclosure statement met the requirements of the Act by measuring its contents against the requirements of s. 52(6) and (7). Beyond this, in my view, it would be inappropriate to read more into what the Court of Appeal decided. The court did not specify the deficiencies it found in the disclosure statement. Even though it would appear that the Court of Appeal did not find that the purchaser's delay of 18 months in attacking the contents of the disclosure statement did not provide an impediment to an order declaring that the agreements of purchase and sale were not binding, it would appear from the factums filed by the parties that the attention of the court was not directed to an important issue, which is before me for consideration, and which relates to the issue of delay. Specifically, I am asked to determine the purpose of s. 52(2) of the Condominium Act and the effect of the failure of a purchaser to challenge the sufficiency of a disclosure statement during the ten-day cooling-off period provided by that subsection in respect to the binding effect of an agreement of purchase and sale on a purchaser as provided by s. 52(1). In a more general sense, I am asked by the respondent to place a construction on the Condominium Act which prevents a purchaser from attacking the sufficiency of a disclosure statement at any time after the ten-day period contained in s. 52(2) for the exclusive purpose of avoiding an agreement of purchase and sale. In this regard it is significant that s. 52(5) of the Act was not brought to the attention of the Court of Appeal. Nor was the court asked to consider whether it was the intention of the legislature in enacting s. 52, and related sections, to enable a purchaser to avoid his or her contract of purchase and sale at any time up to the date of final closing on the basis of flaws in the disclosure statement. From my reading of the *Brunott* case I have, with respect, reached the conclusion that, to the extent that the

case may be interpreted as having decided these issues, the decision of the court was given per incuriam and that, therefore, it may be distinguished on this basis and that it is open to this court to consider the effect of s. 52(5) in interpreting s. 52 and the intention of the legislature in the enactment of s. 52.

In *Benner v. HLS York Developments Ltd.* (1985), 52 O.R. (2d) 243, 21 D.L.R. (4th) 652 (H.C.J.), the plaintiff, who had agreed to purchase a residential condominium unit from the defendant, decided not to complete the transaction and brought an action for a declaration that the agreement of purchase and sale was not binding upon him and for the return of his deposit on the ground that the disclosure statement did not comply with the provisions of s. 52(6) and (7) of the Act. Carruthers J. acknowledged that the *Brunott* case decided that where a disclosure statement does not comply with s. 52 a purchaser is not bound by the agreement of purchase and sale and it is not enforceable against the purchaser who is entitled to a return of his or her deposit. However, he found, in the circumstances of the case that the disclosure statement substantially complied with s. 52.

The following passage from the reasons for judgment of Carruthers J. at pp. 246-47 O.R., p. 655 D.L.R., is relevant to this application:

The Condominium Act provides that a person in the position of Maynard, that is, one who has agreed to purchase a residential condominium unit, may rescind such an agreement 10 days after receiving the disclosure statement. The effect of this provision of the Act is that the agreement is not firm until this 10-day period has elapsed. As well, and of greater significance here, is that this right to rescind remains outstanding until the vendor provides a disclosure statement which complies with the provisions of the Act. Accordingly, as I have noted above, in the absence of such a disclosure statement, Maynard can elect to rescind the agreement at any time. The fact that he did not purport to do so within 10 days of his receipt of a form of disclosure statement offered by the defendant, as is the case here, is of no moment. If a disclosure statement is found wanting so that, in effect, it is not a disclosure statement as required by the provisions of the Condominium Act, then a purchaser is at no time required to complete the transaction in connection with which it has been given.

In deciding whether a proffered disclosure statement complies with the provisions of s. 52, the court is to employ an objective standard. As counsel for Maynard said in argument, that standard is what a reasonable man in an Ontario community would think about its sufficiency. The person to whom it is given has to be able to determine what are the essential elements of what he has agreed to purchase, as the Condominium Act requires them to be given. The purpose of the relevant provisions of the Condominium Act is to permit the purchaser to be able to make an informed decision as to whether to elect to rescind or affirm the outstanding agreement of purchase and sale. In my opinion, the sufficiency or otherwise of a disclosure statement must, as well, be judged on the basis of the materiality of its content. The absence of something not material should not, in itself, in my opinion, permit a purchaser to avoid the completion of an otherwise enforceable agreement of purchase and sale. The Court of Appeal in *Brunott* did not touch upon the matter of materiality. I have read into the reasons of that court, which are handwritten and short, that the "failures" referred to therein, but not specified, were "information on specific matters" which were material to the purchaser's position allowed for under the Act. I cannot think that the Court of Appeal in *Brunott* intended that a purchaser be able to avoid an otherwise enforceable agreement only because immaterial information was not provided to the purchaser. To my mind, the provisions of s. 52(5) appear to support this position.

To the extent that the first paragraph from the reasons for judgment of Carruthers J. can be said to be essential to the result which he reached and not, therefore, obiter dictum, for reasons to be explained, I am, with respect, unable to agree in its entirety with the construction which he placed on the Condominium Act. In particular, I am unable to agree that it is "of no moment" that a purchaser who does not decide to rescind an agreement of purchase and sale within the ten days provided by s. 52(2) may do so at any time before the closing date if it is found that the disclosure statement is at variance with the requirements of the Act. If this were so, s. 52(2) would have no meaning and until the date of the final closing a condominium developer would remain at risk that at any time after the ten-day period a purchaser could attack the sufficiency of a disclosure statement and, if successful, obtain a declaration that the agreement of purchase and sale was not binding on the purchaser.

The third case, *Abdool v. Somerset Place Developments of Georgetown Ltd.* (1991), 4 O.R. (3d) 280, 82 D.L.R. (4th) 50 (Gen. Div.), which is at present under appeal, was also an application by a number of condominium purchasers for a declaration that their respective agreements of purchase and sale were not binding because the disclosure statement did not comply with s. 52 of the Condominium Act. I infer from the reasons for judgment of Blenus Wright J. that when the purchasers entered into their agreements of purchase and sale in 1988 they received a copy of the disclosure statement and none of them complained about any deficiencies in it. The agreements provided for occupancy possession in September 1989. However, occupancy was not available until February 1990 and, even then, the project had not been fully completed. This was because the developer suffered cash flow problems and ultimately lost possession of the property to the first mortgagee.

Wright J. discussed the legislation applicable to disclosure statements and at p. 285 O.R., p. 54 D.L.R., observed that if the declarant fails to comply with s. 52(1) "there does not appear to be any time limit in which to declare an agreement of purchase and sale not binding on the grounds that the disclosure statement is inadequate as long as the purchaser has not become the owner of a unit". In reaching this view it would appear that he was in agreement with the views expressed by Brooke J.A. in the *Brunott* case and Carruthers J. in the *Benner* case. However, it would appear that, as in the *Brunott* case, Wright J. did not take into consideration the effect of s. 52(5) in his interpretation of s. 52(1) and, accordingly, I would on this basis distinguish the decision reached in the *Abdool* case.

At pp. 284 and 288 O.R., pp. 54 and 57-58 D.L.R., Wright J. described the purpose of the disclosure statement as follows:

Although condominiums have been in existence for a number of years, to a first time buyer the condominium concept of ownership is completely new. It is considerably different from, and foreign to, house ownership. The purpose of a disclosure statement is to summarize and highlight for a purchaser the important matters contained in the declaration, by-laws and rules so that a purchaser receives the pertinent information upon which to make an informed decision whether to purchase.

I suggest that a first time condominium purchaser has three main concerns:

- (1) Am I getting everything that I am paying for?
- (2) What are my rights and responsibilities as a condominium owner?
- (3) How much will it cost to live in this condominium complex?

In my view, a disclosure statement should provide a purchaser with the information which will provide reasonably satisfactory answers to those three concerns.

Wright J., after analyzing the disclosure statement, concluded that it was deficient in many aspects as its contents did not comply fully with the requirements of s. 52(6) and (7). He also concluded that the declarant had failed to provide the purchasers with material amendments to the disclosure statement. In the result, he held that the agreements of purchase and sale were not binding on the purchasers and he ordered that all deposit monies paid by the purchasers were to be refunded.

Although Wright J. provided a thorough and lengthy analysis of what he identified as deficient in the disclosure statement, in the view which I hold of these applications it is unnecessary to review this part of his reasons. However, there is another aspect of his reasons which it is necessary to consider.

Wright J. discussed the language of s. 52(1) and (2) which requires that the developer provide the purchaser with "all material amendments" to the disclosure statement. The phrase "material amendments" is not defined in the Act. At p. 293 O.R., p. 62 D.L.R., Wright J. provided the following definition:

A "material" amendment is an amendment containing information which would provide a purchaser with a reasonable cause to reconsider whether to confirm the agreement of purchase and sale or to rescind.

He noted that the disclosure statement provided that the recreational facilities were to be completed by September 1989, and that failure to complete the facilities by that date was "material information" which placed the developer under an obligation to make a material amendment to the disclosure statement and that its failure to do so constituted non-compliance with s. 52(1).

Wright J. continued at p. 294 O.R., p. 64 D.L.R.:

A second material change requiring an amendment occurs in s. 52(7)(g). It requires that the budget statement shall set out "the status of any pending lawsuits material to the property of which the declarant or proposed declarant has actual knowledge". In this case, there were a number of liens registered against the lands by tradesmen and suppliers who were not being paid. The main contractor vacated the site in April 1990, filed a lien, and commenced an action against the developer for a substantial amount. Such matters of pending lawsuits seem clearly to be "material to the property". In my view, such information is crucial in order for a purchaser to make a decision to purchase. That information fits in with one of the main concerns of a purchaser: how much will it cost to live in the condominium building? If there are substantial pending lawsuits, a purchaser should be informed in order to be able to seek advice whether those pending lawsuits will add any costs to the monthly expenses, and if so, how much. In the case of this project, the information of pending lawsuits would have put purchasers on notice that this project was in financial difficulty, which, at least, would have provided them with an opportunity to determine whether they wished to rescind their agreements. In my view, such information is within the category of "material amendments" to the disclosure statement which should have been provided to the purchasers. Otherwise, subs. 52(1) and 7(g) are meaningless and the consumer protection atmosphere which pervades the Condominium Act is illusory.

Although I agree with the conclusions of Wright J. concerning the purpose of a disclosure statement, I respectfully disagree with his view that no time limit applies to when a declaration may be ordered that an agreement of purchase and sale is not binding on a purchaser because the disclosure statement does not comply with the requirements of the Act. As well, I am unable to agree entirely with his approach to the issue of material amendments to the disclosure statement.

Discussion

It is my view that a consideration of s. 52 and related sections of the Condominium Act does not result in the construction of the Act urged by counsel for the applicants and reached in the *Abdool* case. Section 52 is a consumer protection provision and requires that a purchaser receive a disclosure statement. If none is received, s. 52(1) says that an agreement of purchase and sale is not binding on the purchaser -- although it remains binding on the vendor. The purpose of the disclosure statement is to inform the purchaser about what he or she is buying, its costs, and the extensive and detailed rights and obligations inherent in condominium ownership and living. A second protection for the consumer is provided by s. 52(2) which allows a purchaser to rescind an agreement to purchase, without any obligation to provide reasons for doing so, within ten days of the receipt of a disclosure statement. Ten days is a relatively lengthy period. It is, no doubt, so as it is intended to give a purchaser a sufficient opportunity to review the lengthy disclosure materials, and to do so with an adviser such as a lawyer or an accountant, as the purchasers did in this case. A third protection is given to the purchaser under s. 52(2) which revives the ten-day rescission period upon delivery to the purchaser of a material amendment to the disclosure statement. A fourth protection is contained in s. 52(1) which provides that if a material amendment to the disclosure statement is not delivered to the purchaser, the agreement of purchase and sale is not binding upon the purchaser. A fifth protection for the purchaser is found in s. 52(5) which gives the purchaser a remedy in damages against the vendor for any false or misleading information in the disclosure statement or in any material amendment to it. The provisions of s. 52(5) are central to my construction of s. 52.

In my opinion, when read as a whole the provisions of s. 52 do not entitle a purchaser to walk away from an agreement to purchase a condominium unit at any time before final closing on discovering that the contents of a disclosure statement do not comply with s. 52(6) and (7). Nor, in my view, was it the intention of the legislature that there should be this result. Either the vendor will deliver a disclosure statement or the vendor will not deliver one. If none is delivered the purchaser, by s. 52(1), is entitled to avoid the binding effect of the agreement of purchase and sale -- which is a contract -- or the purchaser may waive the failure to deliver the disclosure statement and enforce the contract against the vendor. If a disclosure statement is delivered, s. 52(2) gives the purchaser ten days to examine it and, if for any reason the purchaser is dissatisfied, including the failure of the statement to comply with s. 52(6) and (7) in regard to its contents, the purchaser is at liberty to rescind the contract and pursuant to s. 52(4) receive a refund of any deposit. However, if a purchaser fails to exercise the right to rescind the agreement of purchase and sale it is binding on the purchaser and the purchaser must be taken to have accepted the disclosure statement. Should the purchaser subsequently discover that the disclosure statement "contains any material statement or information that is false, deceptive or misleading or fails to contain any material statement or information" (emphasis added), the purchaser's remedy is for damages against the vendor as provided by s. 52(5) and not by way of a declaration that the agreement of purchase and sale is not binding. A similar construction applies with respect to the non-delivery or delivery of an amended disclosure statement. Any other interpretation would render s. 52(2) and s. 52(5) meaningless.

It is important not to lose sight of the fact that each purchaser has entered into a contract with the respondent developer to purchase the unit and that the reason why the purchaser seeks to avoid the contract has little, if anything, to do with any

deficiencies on the part of the developer in its performance of the contract. Until these applications were brought, no purchaser complained about any alleged deficiency in the disclosure statement even though the Act gave him or her a ten-day period to do so. It is clear that the purchasers now take a highly technical position in an attempt to avoid their contractual obligations and do so, for the most part, because of an adverse change in economic conditions, or because of changes personal to themselves, which have occurred since they entered into their contracts. Indeed, even if at the time of final closing there exist any deficiencies in the construction of the unit or the common elements, it is unlikely that the purchaser would be able to walk away from his or her contract to purchase the unit. The purchaser's remedy would likely be found in an abatement of the purchase price or he or she may be entitled to damages for the deficiency. But on substantial performance of the building contract by the developer, the purchaser loses the right to withhold the contract price. See, e.g., *Miller v. Advanced Farming Systems Ltd.*, [1969] S.C.R. 845, 5 D.L.R. (3d) 369.

The purchasers have not, of course, suggested that the contracts which they signed to purchase the condominium units were in any way unconscionable. However, it is my view that, if I accept the interpretation of the Condominium Act advanced by their counsel, it would produce an unconscionable result not only in respect to the respondent, but also in respect to the condominium industry which, in turn, would produce adverse economic consequences. If the legislation is interpreted as permitting a purchaser, at any time after the ten-day period for examining the disclosure statement and until the time of final closing, to raise alleged deficiencies in the disclosure statement and thereby avoid his or her contractual obligations, this would result in a harsh and oppressive burden on the condominium industry. The fact that a particular construction of a statute leads to an unreasonable and unintended result is a relevant consideration in the construction of the statute. The more unreasonable the result of the construction of a statute the more unlikely it is that the legislature can have intended it. If the result was intended, the more necessary it is that the legislature be required to make its intention abundantly clear. In interpreting legislation the court should avoid unreasonable and unfair results and, in the context of this application, grotesque consequences. See Elmer A. Driedger, *The Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), pp. 28 et seq.

This is not a case in which the court is required to interpret particular language in a statute which is said to be vague or ambiguous. What is required in this case is to interpret a statutory scheme and to determine whether it was the intention of the legislature, in effect, to extend the ten-day period within which a purchaser is entitled to rescind an agreement of purchase and sale to the date of the final closing. Generally speaking, the court will not interpret a statute in a manner where its language does not compel such an interpretation. While the likelihood of an unreasonable result has the power to limit the language of a statute, it does not contain the power to extend the language. To extend the operation of the Condominium Act to effect the result urged by counsel for the applicants would, acknowledging the consumer protection features of the Act, produce a result both unreasonable and unfair. A condominium developer should be entitled to rely on any failure by a purchaser to complain during the ten-day period provided by s. 52(2) as an acceptance by the purchaser of the contents of the disclosure statement. To interpret the Act differently would result in substantial uncertainty, inconvenience and expense if a developer, at any time up to the final closing, could be faced with the task of defending the sufficiency of its disclosure statement, not to mention the disastrous economic consequences which would result if contracts, otherwise binding, were to become unenforceable against purchasers because a word-by-word examination of the disclosure statement results in a finding of technical non-compliance with the requirements of the Act. As well, a purchaser, having taken advantage of the ten-day period to examine the disclosure statement provided by s. 52(2), should not be permitted to lie back and wait to see what the future may hold in store before deciding whether or not to try to avoid his or her agreement of purchase and sale based on deficiencies in it, perhaps discovered during the ten-day examination period. In my view, the intention of the legislature in enacting s. 52(1) and (2) was not to create this type of trap for condominium developers.

I cannot underscore enough the significance of the remedy for damages provided by s. 52(5) in the construction which I have placed on s. 52 and in interpreting the intention of the legislature in enacting s. 52. Both s. 52(5) and s. 55 [am. 1989, c. 72, s. 26], which makes it an offence to knowingly contravene s. 52(6) and (7), provide adequate protection to a purchaser to ensure that a developer, in the preparation of a disclosure statement or a material amendment thereto, will comply with the requirements of the Act. I refer to this in support of my opinion that it was not the intention of the legislature that a purchaser should be able to avoid the completion of an otherwise enforceable contract because many months after he or she has received a disclosure statement, and having raised no objection to its contents during the ten-day period provided for this purpose, the disclosure statement is placed under a microscope for the sole purpose of attempting to avoid completion of the contract.

I have been assisted in the construction which I have placed on the Act by the decision of the Court of Appeal in *Albrecht v. Opemoco Inc.* (1991), 5 O.R. (3d) 385, 85 D.L.R. (4th) 289. This is the case which considered the validity of "phantom mortgages" intended to satisfy the requirements of s. 51(6) para. 1 of the Act to enable condominium developers to charge purchasers of residential condominiums who take possession of their unit before final closing a monthly occupancy fee that includes a mortgage interest component in transactions in which the purchaser does not intend to assume or give back a mortgage on final closing.

From my reading of the reasons for judgment of the Court of Appeal delivered by Robins J.A., it is clear that in interpreting the Act it is important not to lose sight of the fact that there is a contract in existence between vendor and purchaser and that the court should not read into the Act language which it does not contain. It is, as well, important to strike a balance between the consumer protection policies of the Act and the commercial realities which apply to residential condominium transactions. In my view, what Robins J.A. stated at p. 402 O.R. applies to the approach to be taken in interpreting s. 52:

In my respectful view, the obligation of the purchasers to give back a phantom mortgage pursuant to their agreements of purchase and sale constitutes a valid contractual obligation for the purpose of s. 51(6) para. 1. I would not view this obligation as being precluded by or in contravention of the Act. It results in the purchasers being placed in effectively the same position they would be in were possession and final closings contemporaneous. It, furthermore, establishes an occupancy fee that is equitable from the standpoint of both the purchasers and the vendors. In sum, the phantom mortgage concept invoked in these cases, in my view, is consistent with the intended purpose and effect of the section. To conclude otherwise in the circumstances of these cases, and limit the occupancy fee to estimated realty taxes and common expenses only, would be to confer a windfall on these purchasers. This is a result which runs counter to their expectations on entering into the agreements of purchase and sale in question, and one which, in my opinion, is not mandated by s. 51(6).

In reaching this conclusion, I am not unmindful of the artificiality of the phantom mortgage concept or the contention that to sanction it is to permit form to outweigh substance. Nonetheless, for the reasons I have stated, the concept satisfies the requirements of the Act. Moreover, it makes s. 51(6) para. 1 equally applicable to all classes of purchasers, and achieves a fair and equitable result. If this concept were contrary to the consumer protection purpose underlying the section or violative of the spirit of the Act, I think it can fairly be said that, given its wide use over the past decade, one would have expected that the government

ministry responsible for the administration of the Act would long since have intervened and caused steps to be taken to protect the numerous condominium purchasers in this province whose interim occupancy rental has been set by reference to phantom mortgages the same as, or comparable to, those in issue here.

On the basis of the interpretation which I have placed on s. 52, it is unnecessary to determine whether or not the disclosure statement contains the deficiencies alleged by counsel for the applicants. Obviously each of the purchasers received a disclosure statement from the respondent and they cannot, therefore, rely on s. 52(1) to avoid the binding effect of the agreement of purchase and sale which each of them signed. If indeed there are deficiencies in the disclosure statement and s. 52(5) applies, the purchasers will not be without a remedy.

I must now deal with the related issue of whether the respondent is in default of its requirement to deliver to the purchasers material amendments to the disclosure statement. It is the position of counsel for the applicants that two events occurred which are material and, therefore, required the respondent to deliver amended disclosure statements:

(1) the delay in the anticipated date of completion of the amenities stated in the disclosure statement;

(2) the registration of numerous notices of construction liens and certificates of action registered against the property, the disclosure of which counsel submits is required by s. 52(7)(g).

Counsel for the applicants submits that failure by the respondent to deliver the amended disclosure statements entitles the purchasers to a declaration by virtue of s. 52(1) that the agreements of purchase and sale are not binding on them.

The Act provides no definition of "material amendment". Nor does it prescribe when the developer is required to deliver a material amendment to the disclosure statement to the purchaser. By way of comparison I note that the Securities Act provides for the filing of an amendment to a prospectus where a "material change" occurs and provides a definition of "material change" as well as a period of time in which the amendment must be filed: ss. 1(1) para. 21 and 56(1). Wright J. provided a definition of "material amendment" in the *Abdool* case, *supra*, at p. 293 O.R., which can be found at p. 274, *supra*, of my reasons. He also concluded that events similar to those relied on by the applicants in this case were "material" for the purpose of s. 52(1) and, therefore, required the delivery of an amended disclosure statement. In my respectful view, the definition of a "material amendment" found in the *Abdool* case is not helpful because, although it provides a definition of "material", it fails to consider the meaning of "amendment" and would appear to consider amendment as synonymous with a change in circumstances. The relevant language of s. 52(1) is "disclosure statement and all material amendments thereto". Therefore, s. 52(1) requires the developer to provide the purchaser with any amendment to the disclosure statement which is material. In legal proceedings amendments are frequently made to pleadings and indictments. In *Osborn's Concise Law Dictionary*, 7th ed. (1983), "amendment" is defined as the "correction of some error or omission, or the curing of some defect, in judicial proceedings". In *Webster's New World Dictionary*, 2nd ed. (1978), "amendment" is defined as a "correction of errors, faults, etc.". In the *Shorter Oxford English Dictionary*, "material" is defined in this way: "Law, etc. Of such significance as to be likely to influence the determination of cause, to alter the character of an instrument, etc.". Therefore, in my view, an amendment to a disclosure statement is required when it is necessary to correct an error, omission or defect in the contents of the statement prescribed by s. 52(6) and (7) where the amendment is of such significance as to be likely to influence the decision of a reasonable purchaser to purchase the condominium unit or to alter the character of the disclosure statement.

It is my view that the change in the anticipated date for the completion of the amenities does not constitute a material amendment. Delays in the construction of a condominium complex are not unusual and occur for many reasons and to require a developer to deliver an amended disclosure statement with each change in the construction schedule for the amenities, thereby reviving the purchaser's right to rescind the contract, is not what is intended by the Act. There is no evidence to suggest that any of the applicants has suffered any economic loss as a result of the delay in completing the amenities nor is there any evidence that this delay has had any adverse effect on the value of what they have agreed to purchase and, therefore, cannot be said to be likely to influence the decision of a purchaser to purchase the condominium unit. In any event, there is no evidence to suggest that at the time the disclosure statement was prepared there was any error or defect in the scheduled date for the completion of the amenities.

I am of the same opinion with respect to the registration of the notices of construction liens and certificates of action. There is no evidence that they have had any adverse effect on the value of what the purchasers have agreed to buy or that any purchaser has been caused any economic loss as a result of their registration. It may be that a construction lien action comes within the disclosure requirement of s. 52(7) (g) and is therefore capable of requiring the delivery of a material amendment to a disclosure statement in the appropriate circumstances. However, the facts surrounding the action will be important. There is a big difference between a \$2,000 lien and a \$2,000,000 lien and, as we have seen in this case, many lien claims have already been resolved and removed from title. Although it may be that at a future time the status of the claim made by *Atlas-Gest Inc.* against the respondent may require a material amendment to the disclosure statement, I am not persuaded that the time has been reached. The Act, as I have stated, does not say when the developer is obliged to inform a purchaser of an amendment to a disclosure statement. As well, it would be unreasonable and contrary to commercial reality to require that a developer deliver an amendment at the time of registration of each construction lien, whether or not it is ultimately enforceable, vacated and regardless of the amount involved. In this case it would have required the developer to deliver 47 amended disclosure statements in regard to liens ranging from about \$1,400 to \$1,300,000, thereby giving the purchasers 47 opportunities to rescind their contracts. I would add that there is no evidence to suggest that at the time of its preparation the disclosure statement contained any errors or omissions in respect to the requirements of s. 52(7)(g) requiring its amendment.

Accordingly, I would resolve the first two issues in this way. There is no need to determine whether or not the disclosure statement complies with s. 52(6) and (7) of the Act. The respondent is not in default of s. 52(1) and (2) in failing to deliver amendments to the disclosure statement.

The mortgage interest rate component of the occupancy fee issue

As I explained and illustrated on p. 265, *supra*, the interim statement of adjustments of each applicant who participated in the occupancy closing of his or her condominium unit contained the monthly occupancy fee for that unit, one component of which was the interest on the first mortgage on the condominium. The annual interest rate charged the various applicants ranged from 11.75 per cent to 13.25 per cent, except for three applicants who made arrangements with the respondent to pay interest at the rate of 9.75 per cent during the occupancy period. It is the position of those applicants, except for the three who have made special arrangements, that the interest rate that was used to calculate the mortgage interest component exceeds the interest rate permitted by s. 51(6) para. 1 of the Act, which places a ceiling on the interest rate on the basis of the monthly interest that the purchaser

would have paid during the occupancy period under a mortgage to be assumed or given back under the agreement of purchase and sale. Paragraph 1(a) of Schedule D to the agreement of purchase and sale signed by each purchaser prescribes the interest rate which the purchaser will be required to pay for a one-year mortgage which the purchaser assumes or gives back. As well, para. 6(a) of Schedule D provides that the interest rate to be used in calculating the mortgage interest rate component of the occupancy fee will be "the rate charged by the Royal Bank of Canada for two (2) year residential mortgages within thirty (30) days prior to the Occupancy Date". Some of the applicants were charged an interest rate higher than the applicable Royal Bank of Canada two-year residential mortgage rate.

In my view, there is no need to make a determination in respect to this issue at this time. It may be, as counsel for the respondent concedes, that some of the applicants are presently being charged a mortgage interest rate component in excess of what the agreement of purchase and sale permits. In any event, it is really not until the time of final closing that the ceiling set by s. 51(6) para. 1 of the Act can be determined. There will be no difficulty in doing so at that time and there is no need to interpret any provision in the Act or the agreement of purchase and sale to calculate the appropriate interest rate. Counsel for the respondent has undertaken that any necessary adjustment in respect to the mortgage interest rate component of the occupancy fee will appear in the statement of adjustments provided to each purchaser on the final closing. Should there be any problem at that time, which is the proper time to deal with this issue, no doubt any purchaser so affected will seek the appropriate remedy.

The deposit interest rate issue

Paragraph 3 of each agreement of purchase and sale reads as follows:

The Vendor agrees to pay to the Purchaser interest on the deposits from the date the aggregate deposits paid by the Purchaser equal or exceed 15% of the Purchase Price at the rate prescribed under Section 53(3) of the Condominium Act, with such interest to be credited to the Purchaser on the Closing Date or any extensions thereof.

Each purchaser has paid deposits which exceed 15 per cent of the purchase price of his or her unit and, as indicated earlier, most purchasers have completed the occupancy closing of their units. The respondent has placed the deposits in trust accounts with the Montreal Trust Company.

This issue concerns the rate of interest which the respondent is required to pay to the purchasers in respect to their deposits under the terms of the agreement and s. 53 of the Act and s. 33 of Reg. 121 which can be found on pp. 261 and 262, supra, of these reasons for judgment. Section 53(3) requires that the respondent "shall pay interest at the prescribed rate on all money received . . . on account of the purchase price from the day the purchaser enters into possession or occupation until the day a deed or transfer acceptable for registration is delivered" to the purchaser. The "prescribed rate" of interest is defined by s. 33 of Reg. 121 as 1 per cent per annum below the rate of interest paid on the Province of Ontario Savings Office "savings accounts". Pursuant to s. 53(4) the respondent is entitled to keep any interest earned on the deposit monies over and above the "prescribed rate" of interest.

The dispute between the applicants and the respondent is with respect to the interpretation of s. 33 of the regulation, which came into force in 1980. In 1980 the Province of Ontario Savings Office had only one type of savings account. Since 1987 it has had three types of savings accounts -- regular, Trillium in which the amount on deposit is less than \$5,000, and Trillium in which the amount on deposit exceeds \$5,000. The regular and Trillium under \$5,000 savings accounts each paid the same rate of interest as of April 1, 1991, and the interest rate of the Trillium over \$5,000 account was 1.50 per cent per annum higher. Because the deposit of each of the applicants exceeds \$5,000, their position is that they should receive interest on the basis of the rate paid on the Trillium over \$5,000 savings account. The respondent's position is that interest should be based on that paid on the regular savings account as that was the only type of savings account offered by the Province of Ontario Savings Office when s. 33 was enacted in 1980. It is to the advantage of the respondent to pay the purchasers the lower rate of interest on their deposits because under s. 53(4) the respondent is entitled to retain any interest earned on the deposits in excess of the prescribed rate of interest which it must pay to the purchasers. There is no requirement that a developer place the deposit monies in a trust account with the Province of Ontario Savings Office and, therefore, the developer may be able to deposit the monies in a financial institution which pays a higher rate of interest than that paid by the Savings Office.

I appreciate that there is a degree of prematurity to the resolution of this issue as the respondent is not required to credit the purchasers for the interest earned on their deposits until the final closings of their purchases. However, I am quite certain that if this issue is not resolved at this time the parties will be back in court to have s. 33 of the regulation interpreted at a later date. Therefore, I will deal with it at this time. Counsel for the respondent relies on the reasons for judgment of Keenan J. in *Ackland v. Yonge-Esplanade Enterprises Ltd.*, Ont. Gen. Div., delivered on November 6, 1991, in which he interpreted s. 33 of Reg. 121 as requiring the respondent to pay interest on the deposits at the lower rate paid by the Province of Ontario Savings Office on savings accounts. In doing so, Keenan J. observed that when s. 33 was passed in 1980 the Savings Office offered only one type of savings account and when it began to offer the Trillium savings accounts in 1986 s. 33 was not amended to specify what type of savings account would be used to determine the "prescribed rate" of interest which the purchasers were to receive on their deposits. He interpreted the phrase "savings accounts" in s. 33(a) and (b) as meaning "all individual accounts in that category". Keenan J. then applied a rule of statutory interpretation known as *contemporanea expositio* which requires that a "statute be interpreted in the light of the clear meaning of its wording in the light of the circumstances existing at the time of enactment". He added: "The meaning to be given is the clear meaning that would have been given the day after the statute was passed, unless some subsequent statute has declared that some other construction is to be adopted or has altered the previous statute". Having earlier noted that there was only one savings account in existence when s. 33 was passed, Keenan J. concluded that "the developer was entitled to rely on the absence of any amendment to the regulation as a confirmation that the previously existing measure of the interest rate was to continue". In arriving at this conclusion, Keenan J. relied on the following authorities: *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A-G*, [1975] A.C. 591, [1975] 1 All E.R. 810, at pp. 613-14 A.C., p. 814 All E.R.; *Sharp v. Wakefield* (1888), 22 Q.B.D. 239, 58 L.J.M.C. 57 (C.A.) [aff'd [1891] A.C. 173, [1886-90] All E.R. Rep. 651]; *Stamford (Township) v. Welland (County)* (1916), 37 O.L.R. 155, 31 D.L.R. 206 (abridged) (C.A.), at p. 182 O.L.R.; and *Driedger, Construction of Statutes*, supra, at p. 163.

With respect, I am unable to agree with the result reached by Keenan J. for two reasons. First, it is my opinion that the language of s. 33 is plain and unambiguous and produces a different interpretation than that made by Keenan J. Second, because s. 33 is capable of interpretation without the assistance of the doctrine of *contemporanea expositio* there is no need to have recourse to the doctrine in the interpretation of s. 33. It will be helpful to reproduce s. 33 again:

33. The rate of interest under subsections 53(2) and (3) of the Act on money held in trust under subsection 53(1) of the Act shall,

(a) for the six months immediately following the last day of March of each year, be 1 per cent per annum below the rate paid on The Province of Ontario Savings Office savings accounts on the 1st day of April of that year; and

(b) for the six months immediately following the last day of September of each year, be 1 per cent per annum below the rate paid on The Province of Ontario Savings Office savings accounts on the 1st day of October of that year.

(Emphasis added)

In interpreting s. 33 it is necessary first to have regard to its purpose. Its purpose is to provide a convenient formula for the determination of the rate of interest which a developer must pay to a purchaser on all money received from the purchaser where the agreement of purchase and sale is terminated (s. 53(2) of the Act) or from the time the purchaser enters into possession or occupation of the unit until the date of final closing (s. 53(3) of the Act). It does so by declaring the rate of interest shall be 1 per cent per annum below the rate paid on Province of Ontario Savings Office savings accounts on April 1 and October 1 of each year. By providing for a semi-annual recalculation of interest rates, the legislature has recognized the fact that interest rates do not remain static. By the use of the phrase "savings accounts" the legislature has recognized that financial institutions generally maintain more than one type of savings account. The language of s. 33 speaks to future events. In this regard, s. 4 of the Interpretation Act, R.S.O. 1980, c. 219, applies and provides that the "law shall be considered as always speaking and, where a matter or thing is expressed in the present tense, it is to be applied to circumstances as they arise, so that effect may be given to each Act and every part of it according to its true intent and meaning". As worded, s. 33 eliminates the need for frequent amendments to accommodate each change in the types of savings accounts and interest rates offered by the Province of Ontario Savings Office. In my view, it would be unreasonable to assume that, by using the phrase "savings accounts", the legislature intended to restrict the rate of interest to be paid on purchasers' deposits to interest paid on the types of savings accounts offered by the Savings Office in 1980 when s. 33 was passed and to exclude from consideration the savings accounts in existence on April 1 or October 1 of the year in which the rate of interest is to be calculated.

In my opinion, the intent of s. 33 is clear as it is written and there is no need to have recourse to other than its plain and unambiguous language in its interpretation. Thus, s. 33 should be applied in the following manner to calculate the rate of interest which the purchasers will be entitled to receive on their deposits on the date of closing. First, one determines the amount of the deposit paid by the purchaser as of the date he or she assumes occupancy or possession of the unit. In each case, the amount exceeds \$5,000. Then one determines the savings account appropriate to the amount of the deposit. At the present time this would be the Trillium over \$5,000 savings account. Next the annual rate of interest as of April 1 and October 1 is determined, and 1 per cent per annum is deducted. Finally, the amount of interest is calculated. Thus, the interest rate to which the purchasers are entitled is that paid by the Province of Ontario Savings Office on April and October 1 of each relevant year on savings accounts in which the amount on deposit exceeds \$5,000 less 1 per cent per annum.

There is, therefore, no need to have recourse to the doctrine of *contemporanea expositio* in the interpretation of s. 33. It is a doctrine which is used in the interpretation of ancient statutes and, in construing the language used by the legislature in its natural and ordinary sense, it requires the court to determine the meaning which the words used ordinarily bore at the time when the statute was passed. *Contemporanea expositio* ought rarely, if ever, to be applied to modern legislation: *Craies on Statute Law*, 7th ed. (London: Sweet & Maxwell, 1971), at p. 81. In *Governors of Campbell College, Belfast v. Commissioner of Valuation for Northern Ireland*, [1964] 2 All E.R. 705, [1964] 1 W.L.R. 912, the House of Lords declared that it is of no value in construing a modern statute. At p. 727 All E.R., p. 941 W.L.R., Lord Upjohn said that *contemporanea expositio* could have no application to a statute, although it was passed over 100 years ago, the language of which was plain and unambiguous. As I have concluded, the language of s. 33 is plain and unambiguous and, in any event, there is no suggestion the words which it contains have any different meaning today than when it was passed in 1980.

Rule 14.05

Counsel for the respondent took the position that because there are material facts in dispute subrule 14.05(3)(h) [am. O. Reg. 711/89, s. 15] of the Rules of Civil Procedure, O. Reg. 560/84, prohibited the court from resolving the issues raised in this case on the basis of an application and required the court to order that the whole application proceed to trial. This submission requires little comment. The resolution of the issues raised by the applications involved an exercise of statutory interpretation. All of the facts necessary to permit this exercise to take place were either the subject of an agreed statement of facts or were not in dispute. Therefore, there was no need for a trial.

Result

I would answer the four issues raised by these applications in this way:

- (1) There is no need to determine whether the disclosure statement complied with s. 52(6) and (7) of the Condominium Act.
- (2) The respondent is not in default of its obligation under s. 52(1) and (2) of the Act to deliver an amended disclosure statement.
- (3) There is no need to determine this issue.
- (4) The "prescribed rate of interest" which the respondent is required to pay the applicants on their deposits is 1 per cent per annum below the rate paid on the Province of Ontario Savings Office savings accounts in which the amount on deposit exceeds \$5,000 on April 1 and October 1 of the relevant year or years.

Counsel may make arrangements to speak to me, if necessary, with regard to costs.

Order accordingly.

CBR# 029

Susan A. Armstrong, plaintiff, and London Life Insurance Company, Lynn Marie Armstrong, Middlesex Condominium Corporation No. 130 and Parkside Management Limited, defendants And between London Life Insurance Company, plaintiff by counterclaim, and Susan Alana Armstrong and Otto Herman Rudolph, defendants by counterclaim

Court File No. 17580/94 Ontario Superior Court of Justice Flinn J. Heard: April 12-16, 19 and 20, 1999. Judgment: September 13, 1999.

Counsel: Stuart McKay and K. Egan, for the plaintiff and defendants by counterclaim. Paul Vogel and R. Martella, for Lynn Marie Armstrong and London Life insurance Company. W. Woodward, for Middlesex Condo Corp. No. 130 and Parkside Management Ltd.

[1] FLINN J.:-- In February of 1992 the plaintiff purchased from London Life Insurance Company a penthouse condominium on Ridout Street in the City of London, one of the condominium units in Middlesex Condominium No. 130 which condominium corporation was managed by Parkside Management Incorporation Limited. London Life took back a substantial mortgage which was guaranteed by the other defendant by counterclaim.

[2] The penthouse unit had been owned since 1989 by the defendant Lynn Armstrong (no relation) and she was the first owner. In the summer of 1991 Lynn Armstrong's husband, one Brock Armstrong, who was a senior executive with London Life, was transferred by his company to California to run a subsidiary company. The Armstrongs moved in September of 1991. The arrangement with London Life was to buy the condominium. After appraisals were made London Life and the Brock Armstrongs agreed that they would be paid \$305,000 for the condominium by the London Life and thereafter London Life would look after all expenses, including any mortgage payments insurance, taxes, condominium fees or anything else. Brock Armstrong testified that in fact he received the money approximately two or three weeks after he moved and London Life became the owner of the condominium unit but left the registered title in the name of Lynn Armstrong, presumably to avoid land transfer tax, as the London Life intended to dispose of the condominium.

[3] Accordingly, the unit was administered by the London Life until such time as the transaction between the plaintiff and the London Life closed in June of 1992.

[4] The plaintiff says that soon after she moved in, which was shortly after closing, there were problems with water infiltrating into the unit, particularly from the balcony and the west wall. These are subject of a complaint to the condominium corporation in November of 1992. She stated that during the winter of 1992/93 the condominium, particularly the den and the living room, were exceedingly cold such that they needed to import electric heaters to make the unit habitable. Repairs were made, However, as a result of deficiencies in the construction substantial repairs were made in the fall of 1993. By that time the plaintiff says that she was unhappy about the condition of the unit and sought information with respect to its construction. As a result, she came to the conclusion that she had been misled and commenced a short-lived correspondence with London Life in which she demanded that they make some arrangement to take her out of the condominium unit. She retained counsel and as a result of counsel obtaining the files of the solicitor who looked after her interests when she bought the condominium unit, she discovered that the estoppel certificate which had been issued to her solicitor and upon which he apparently relied, was incorrect. In fact she found that a proper estoppel certificate had been issued three days after the date of closing which had not been forwarded to her nor indeed to London Life.

[5] She commenced this litigation in 1994, stopped making her mortgage payments to London Life and condominium fees to the Condominium Corporation and continued not to pay taxes to the municipality.

[6] As a result London Life took power of sale proceedings. On motion for possession, the plaintiff resisted and London Life failed to get possession of the condominium. The plaintiff remained in possession of the condominium until 1997 when she delivered the keys to London Life and moved out. She now sues for rescission of the agreement and damages and alternate relief.

[7] The plaintiff claims:

- a) Fraudulent misrepresentation on the part of Lynn Armstrong and London Life.
- b) In the alternative, negligent misrepresentation of Lynn Armstrong, London Life, the Condominium Corporation and its manager Parkside.
- c) Breach of authority and,
- d) The remedy of rescission or damages or both.

[8] The defendant Lynn Armstrong with her husband, Brock Armstrong, purchased the condominium unit in early 1989 while it was under construction. They had certain upgrades included in the finishing of the condominium and moved in early that year.

[9] Brock Armstrong completed a certificate of completion and possession for the home warranty programme on which he set forth matters to be corrected. In accordance with directions from Arthur Smith Windsor as acting director for the Middlesex Condominium Corporation Armstrong wrote to the Ontario New Home Warranty Program on December the 12th, 1989, listing these deficiencies with some description. These included soundproofing problems, elevator noise, water leaks in the kitchen and living-room, fireplace problems, window problems, a terrace floor problem and cracks in the ceiling on the parking garage. Brock Armstrong testified that in fact all of these complaints were rectified. Lynn Armstrong confirmed that in fact all of these deficiencies were fixed. She said: "It was our home for two and a half years and we loved it.

[10] Their evidence was that during their stay they had no difficulty with the builder. There was a man by the name of Eric on site who was not only friendly but helpful and appeared to repair anything about which he was asked.

[11] The condominium corporation now actively operating, had retained a manager, Parkside Management Limited, one of the defendants. Lynn Armstrong testified that on recommendation from Parkside, the condominium corporation retained Trow Ontario Limited Consulting Engineers in the early summer of 1990 to prepare a technical audit, the objective of which is

described in their proposal as comparing details of the design, drawings and specifications, with applicable codes, standards and methods of good building practice, provide a list of deficiencies, identify existing and potential problem areas. In addition, they would provide a reserve fund study that is to say, a study which would indicate what reserve funds the Condominium Corporation should require and maintain in order to have funds to maintain the building to an appropriate standard. This report was received by Condominium Corporation in October of 1990.

[12] Lynn Armstrong testified to the effect that the technical audit at first blush was of some concern but that this concern was substantially tempered by the reserve report which followed in late November of 1990. She was of the opinion that there were no serious problems. Lynn Armstrong said that she had no reason to believe the cooperation of the builder would not continue. Brock Armstrong was of the same view.

[13] As will be noted in the reports and the subsequent correspondence, clarification of many of the concerns was required from the consulting engineers who had been involved in the design and building of the condominium building.

[14] During this period Lynn Armstrong was one of three directors of the Condominium Corporation and testified that her job was the house committee, in other words, to see that the place was kept clean, the gardens were looked after, etc. Arthur Smith Windsor, another unit owner, had taken on the task of dealing with the builder and during this period it was his opinion that there was cooperation from the builder and there was no concern assuming that the matters referred to in the Trow Report would be looked after.

[15] Brock Armstrong said that after they moved London Life Insurance Company looked after the condominium unit. They had taken power of attorney from both Brock Armstrong and Lynn Armstrong in order to convey the unit and as Brock Armstrong said they heard nothing about the condominium unit until this litigation. Both Brock and Lynn Armstrong said that London Life had bought the condominium. Certainly equitable title passed to London Life Insurance Company; and with the powers of attorney, it might be suggested that it had legal title as well.

[16] Prior to leaving, Brock Armstrong had obtained two appraisals and had listed the condominium unit for sale with a real estate agent. The listing expired and when the listing was renewed, it was renewed by London Life in its own name. The listing agent was one Isabel Campbell with Royal LePage.

[17] In the fall of 1991 the plaintiff saw the advertisement and made inquiries from the real estate agent as to whether the condominium unit could be rented. London Life advised her that they were not interested in renting the condominium unit and were only interested in selling. After some negotiations on February the 13th, 1992 the plaintiff entered into an agreement of purchase and sale with London Life Insurance Company. In the course of the negotiations the plaintiff indicated concern with respect to maintaining a dog in the condominium unit and, as a result, the real estate agent obtained an estoppel certificate from Parkside Management which was a "clear" certificate. The legal matters proceeded and the transaction closed on June the 25th, 1992. The plaintiff made no investigation of the affairs of the condominium corporation before closing relying on her solicitor.

[18] The plaintiff's testimony was that she first noticed water pounding on the balcony and that it would seep in through the balcony doors and "soak" the carpet in the den. She then noted water on the window sills in the kitchen and in the living-room there was a water stain on the west wall of the living room although she cannot say when she first noticed this stain. At all events, in November of 1992 a tradesman was retained to repair the balcony problem and in December of 1992 the same tradesman repaired some drywall in the living room damaged by a roof leak.

[19] During the winter they continued to have problems. They found the place brutally cold and drafty. In December, 1992 at the Christmas meeting, the owners were informed by the directors that there was to be a special assessment of some \$207,000 for repair of deficiencies. The result would be \$3,240 per unit. The plaintiff referred to the December, '92 meeting as more of a social meeting. At the annual meeting in April of 1993 she found the information coming from the engineering consultant with Trow and Associates, Mr. Tom Ng to be a "shocker". She said she now realized that the building had a lot of problems. She understood the outside walls in every unit would be opened from the inside to allow insulation to be inspected and if deficient more to be installed. There was a subsequent assessment of \$3000 per unit in the summer of 1993 which she refused to pay and it was the plaintiff's evidence that by this time she decided that they wanted their condominium to be repaired and that they would sell. Her position is set forth most strongly in a letter dated November the 12th, 1993 to London Life Insurance Company which is found at Tab 38 of Vol. 1 of Exhibit 3.

[20] What had transpired between the time that Lynn Armstrong conveyed her interest to London Life Insurance Company is reflected in the minutes of the condominium corporation and other documents. Suffice it to say that the anticipated cooperation from the builder and the builder's consulting engineer was not forthcoming resulting in a letter being sent by the solicitor to the condominium corporation in December, 1991 demanding action or litigation.

[21] The agreement of purchase and sale between London Life Insurance Company and the plaintiffs (purported to be in the trust) was executed by the plaintiff on the 7th of February, 1992, the witness to her signature was Isabel Campbell, the real estate agent. It was amended and executed by Norman Campbell (no relation) on behalf of the London Life Insurance Company on the 11th of February, 1992 and the changes in the agreement were subsequently initialled by the plaintiff.

[22] The allegations of fraud against the defendants London Life Insurance Company and Lynn Armstrong are founded in a statutory declaration of Norton Campbell given on closing and found at Tab 28 Ex. 1 and clauses 9 and 11 of the agreement of purchase and sale which I set out as follows: 9. Vendor represents and warrants to purchaser that to the best of his knowledge, information and belief there are no special assessments contemplated by the condominium corporation: voting rights have not been assigned and there are no legal actions pending or contemplated by or against the condominium corporation.

11. Vendor further represents and warrants to purchaser that at the time of the acceptance of this offer he has not received a notice convening a special or general meeting of the Unit holders of the Condominium Corporation respecting any of the following matters;

- (a) the termination of the government of the condominium property;
- (b) any substantial alteration in or substantial addition to the common elements or the renovation thereof, or

(c) any substantial change in the assets or liabilities of the Condominium Corporation; and vendor covenants that if he receives any such notice prior to the date of completion he shall forthwith notify purchaser in writing and purchaser may thereupon, at his option, declare this Agreement to be null and void and all deposit monies paid by Purchaser hereunder, shall be refunded without interest or deduction.

[23] The agreement further provides in para. 26 that the agreement constitutes the entire agreement and that "there is no representation, warranty, collateral agreement or condition affecting this agreement or the property or supported hereby other than as expressed herein in writing."

[24] The plaintiff's claim is that the fraud of Lynn Marie Armstrong and London Life Insurance Company is that:

(a) Knowing that the condominium corporation was contemplating action against the architect, engineers and builder of the condominium, they made no disclosure to the plaintiff at the time of the execution of the agreement or indeed before the closing of the transaction.

(b) That they were aware that the construction deficiencies and/or design flaws would require substantial repair, improvement and/or renovation which in due course would require special assessments, and that at the time of the execution of the agreement, and indeed prior to the time of closing, disclosure of such was not made to the plaintiff.

[25] As to the liability of Lynn Armstrong, it is quite clear that the last meeting of the directors that she attended was on August the 21st, 1991. It is quite clear from the minutes of the directors and members of the condominium corporation that to that date cooperation from the builder was expected. This is explained in the letters dated January 25, 1991, March 19, 1991, the meeting of May 23, 1991 and the letters of May 30, 1991 and August 6, 1991. In 1991 Trow was looking for information from the consulting engineer and the contractor as to the questions raised by Trow in their 1990 report. Matters did not come to a head until December of 1991 when, in a letter to the developer and the engineer, counsel for the condominium corporation demanded that appropriate action be taken before January 6, 1992 or "the Board of Directors will convene a meeting of Unit holders to seek instructions to commence litigation." While there is reference to legal advice in the minutes of the meeting of August 21st, 1991 there is nothing in those minutes, the correspondence nor in the evidence beyond what was in the minutes as to the possibility of "legal action".

[26] So far as Lynn Armstrong is concerned, she made no representation to the plaintiff. She did not contract with the plaintiff nor did she owe her any duty. There is no foundation for alleging fraudulent misrepresentation against Lynn Arms trong.

[27] Foundation of the claim against London Life is alleged by plaintiff's counsel to be representations of Norton Campbell on behalf of London Life.

[28] Norton Campbell was a vice-president for Human Resources. At the time of the trial he was retired and other than retirement benefits, he had no connection with London Life Insurance Company. As the vice-president of Human Resources, he had nothing to do with the real estate interests of London Life, but testified that he became involved in the disposition of houses of senior executives of London Life who were involved in geographic moves and thus, he was involved in the transaction at issue in this litigation. He advised that he relied on experts within the London Life and would not sign any documents without reference to these experts. When the Brock Armstrong residence became part of his responsibility, he referred the care of the property to one Ann Vardon, another employee who saw to the payment of all of the necessary outgoings and would inspect the premises weekly. Unfortunately, that person is now deceased. He knew of Isabel Campbell, the listing agent, and she presented the offer to purchase from the plaintiff to him. He was aware of the appraisals obtained by Brock Armstrong in connection with the buyout of this condominium by London Life. He signed the second listing agreement in January of 1992. The plaintiff waived conditions and signed the mortgage commitment. The matter proceeded apace until closing at which time Norton Campbell completed a declaration which was prepared by London Life's counsel and sworn by him which declared in the terms of p. 11 of the Agreement of Purchase and Sale.

[29] Norton Campbell testified that he had no information of any sort which he felt should be disclosed to a purchaser and candidly admitted that if all the information subsequently discovered had been available to him that he was sure that the London Life Insurance Company would have disclosed that to a purchaser.

[30] From the letter of December the 18th, 1991 written by counsel for the condominium corporation threatening legal action matters did deteriorate into litigation resulting in a settlement to the condominium corporation of a sum in excess of \$600,000 arising out of matters that had their origin in the report of Trow Consulting Engineers of October 1990. Hindsight therefore colours what went before. The court appreciates this difficulty, but the claim must be assessed on the basis of the evidence at the time of the execution of the agreement of purchase and sale insofar as contemplated litigation is concerned and the date of the statutory declaration insofar as matters set forth in that declaration are pertinent. Of particular assistance with respect to this assessment was the evidence of Arthur James Smith-Windsor who was examined for discovery and whose testimony was read in on consent and the evidence and the report of Mr. A.B. Johns of Morrison, Hershfield Limited who reviewed documentation regarding the history of the discovery of deficiencies and specific items. Their opinion was that the major deficiencies in the building were not discovered until after the start of remedial construction in December of 1992; that the deficiencies with respect to the condominium unit, the subject of this litigation, which merited remedial work were discovered after June the 25th, 1992, the date of closing of the purchase and sale of the condominium by London Life to the plaintiff. Mr. Johns gave a technical flavour to the progression of events which the court felt worthy of consideration and helpful in the determination of the matters in issue.

[31] In the files of London Life (not those of Norton Campbell) there was discovered the notice of the annual general meeting of the condominium corporation held on April the 9th, 1992. There was no evidence as to when the minutes of that meeting were prepared and distributed.

[32] It was the evidence of Norton Campbell that Ann Vardon would have received that notice and that if she had thought that the notice was significant, it would have been discussed with him and they would have decided whether or not she would attend the meeting. She did not attend the meeting. He did not have the information that appears in the minutes of April 9th, 1992.

[33] Counsel for the plaintiff argued strenuously that the evidence of Norton Campbell and the documentation are indicative of fraudulent misrepresentation relying particularly on the representation with respect to contemplated legal action in paragraph 9 of

the Agreement of Purchase and Sale. Norton Campbell was candid in agreeing with the questioning of counsel for the plaintiff in admitting that he did not direct his mind to the content of that paragraph.

[34] Counsel for the plaintiff relies heavily on words from the House of Lords in *Derry v. Peek* 1889, H.L.(E.) (1889). Counsel purported to equate the statements of Norton Campbell as being "made by him recklessly, or without care, whether it is true or false, that is without any reasonable ground for believing it to be true". As to that being the statement of the law, Bramwell L.J. at page 350 says as follows:

Well, I agree to all before the 'that is' and I agree to what comes after it if it is taken as equivalent to what goes before, viz., "recklessly or without care whether it is true or false," understanding "recklessly" as explained "without care whether it is true or false". For a man who makes a statement without care and regard for its truth or falsity commits a fraud. He is a rogue.

In a very recent case *Vokey and Swanson v. Edwards et al* released by Killeen J. on May 4th 1999, he says at p. 13 with respect to fraudulent misrepresentation:

Fraudulent misrepresentation would, if proved, survive the closing of this transaction on February 14, 1997 and would not be defeated by the caveat emptor principle or related disclaimer clauses in the agreement for sale: see, for example, the following statement in 29 C.E.D. (Ont. 3rd), Title 130, para 654:

Once the contract has been completed and has been executed, the maxim of caveat emptor applies save for exceptional cases, as where there has been fraud, a total failure of consideration or an error in substantialibus, such as the purchaser purchasing his or her own property. After completion a purchaser must protect himself or herself against a defect in the title, quantity, or quality by covenants in the conveyance.

A good general statement about the elements of fraud or fraudulent misrepresentation may be found in *Perell & Engell, Remedies and the sale of Land*, 2d ed. (Toronto: Butterworths, 1998), at pp. 92-93:

A person makes a fraudulent misrepresentation when he or she makes a false statement without belief in its truth and with the intent to deceive. Fraud involves intentional dishonesty, the intent being to deceive. Thus, to succeed in an action for deceit or for fraudulent misrepresentation, the plaintiff must show not only that the defendant spoke falsely and contrary to belief, but that the defendant had the intent to deceive, which is to say he or she had the aim of inducing the plaintiff to act mistakenly. There is an element of proximity associated with the intent to deceive; the plaintiff must show that the defendant's design was directed at the plaintiff or at a class of persons that includes the plaintiff.

[35] Bearing in mind the evidence that was before Norton Campbell at the time when he signed the agreement of purchase and sale, the plaintiff, on whom the onus falls, has failed to establish an intent to deceive on the part of Mr. Campbell. All of the information that he had from the appraisal to the various discussions with the real estate agent during the re-listing the observations or price from other sources, and the agreement of purchase and sale, would leave him in the frame of mind that there were no problems with respect to this transaction other than market forces. Therefore there was nothing about which he could be described as reckless or dishonestly willful.

[36] In *Chapman v. Warren* (1936), O.R. 145 the court said:

Ever since the decision in *Derry v. Peek* (1889), 14 APP. CAS. 337, the law has been settled that carelessness, however gross, is not fraud. Where the word "careless" is used in the cases the expression does not mean "without taking care" but "not caring". Very gross and culpable carelessness is not enough to constitute fraud ..."

[37] The tort of deceit has, by some writers, been referred to as a "intentional tort". As I have come to the conclusion that there was no intent to deceive, there can be no tort.

[38] The fact is that at the time the transaction between the plaintiff and London Life closed the representations, in the agreement of purchase and sale as to contemplated litigation are false. That is to say, the Board of Directors had authorized action against the builder and the builder's consulting engineer subject to the approval of the members.

[39] However, the representation in paragraph 9 is tempered, not as an outright warranty, but a representation "to the best of his knowledge, information and belief", and as to the statutory declaration by the words "I have not been notified" and "I am not aware".

[40] I have already referred to the fact that London Life had in its possession at the time of closing the notice of the meeting of April 9, 1992 which referred to a building report under the heading of old business, and the minutes of the meeting of April the 18th, 1991. The London Life also had in their possession two appraisals by qualified real estate appraisers, neither of which gave any indication of any difficulty with the building, its construction or otherwise and in fact valued the unit considerably higher than it subsequently sold. Both appraisals are indeed positive. Their solicitor on closing had a clear estoppel certificate.

[41] It is the allegation of the plaintiff that London Life had a positive duty to the plaintiff to make inquiries before completing either the agreement of purchase and sale or the statutory declaration, that they didn't make the inquiries and that therefore their misrepresentation was made negligently.

[42] The defence is that had the purchaser made inquiries she could have found the information that would have been available, that the defects referred to and complained about would not have been latent as being raised in the Trow report and that, therefore, the principle of caveat emptor applies to the plaintiff.

[43] It should be noted here that the plaintiff was a licenced real estate agent. While her efforts at the time of the acquisition of this property were directed to other pursuits, she did own two other properties. She had been licenced for some years and had done some condominium work. Her abilities are reflected in the correspondence which she sent to London Life which led to her offer being accepted subject to amendment and indeed in her letter to London Life after she decided to withhold her mortgage payments but to protect the life insurance portion of the mortgage payments in order that her liability would be protected by life insurance.

[44] The questions arise

(a) Was there a misrepresentation at all?

(b) If there was a misrepresentation, was it negligently made or innocently made?

(c) The results vis-à-vis the claim of the plaintiff.

[45] Brock Armstrong referred to the letter from the solicitors of the condominium corporation to the engineer and contractor as a "shot across the bow". In view of the months of delay on the part of the recipients of this letter there can be little doubt that at the time the agreement of purchase and sale was executed by the plaintiff and the London Life, that litigation was "contemplated".

[46] Such a clause was considered in *John Levy v. Cameron and Johnstone* (1992), 26 R.P.L. (2d) 130 (Ont. Gen. Div.). In that case Philp I ruled against liability and said at p. 147:

In my view, the use of the words 'to the best of my knowledge and belief' did not warrant the absolute truth of the statement that there were no contaminate waste materials, but qualified the statement by the use of those words. I find that the warranty and representation made by Mr. Levy was reasonably fair and truthful to the best of his knowledge and belief, and therefore not a breach that would justify the defendant to refuse to close the transaction or to rescind the contract. [47] The evidence of Norton Campbell was worthy of belief. He had all of the information which the London Life had and there are indeed facts which would indicate that so far as he was concerned, the representation was true. These facts are:

(a) London Life had two appraisals completed by qualified real estate appraisers which gave no indication of any difficulty with the unit or the building.

(b) The evidence was that Ann Vardon would have visited that building on an inspection of the condominium unit weekly and that it was her duty to report anything untoward. Campbell testified that there were no such report.

(c) No information came to London Life from the real estate agent that would have raised any concern on the part of a person signing the agreement of purchase and sale on behalf of London Life.

(d) There was nothing in the notice of the meeting of April, 1992 that should have raised concern, with respect to the status of the condominium and even the enclosure with the notice of the minutes of the previous annual meeting in April of 1991 would not, in all of the circumstances, have put Campbell on inquiry. The plaintiff argues that the minutes of April, 1991 indicate pending or contemplated litigation. They argue that this was the view of Leitch J. in her judgment dealing with the application for summary judgment and possession. With great respect to the observations of Leitch J., she did not have all of the evidence that was before the trial judge. One has to read the word "contemplated" ejusdem generis with "pending". The reference to taking action to recover the costs was framed in the connotation of contractor cooperation and in fact some of the work was actually done by the contractor. In my view, such words are contingent, to say the least. In my view litigation was not contemplated until December of 1991 when the letter was written to the contractor and engineer.

(e) The ignorance of London Life continued through until closing when, in accordance with the mortgage commitment to the plaintiff, London Life's solicitors received a clear estoppel certificate which mirrored the estoppel certificate given to the real estate agent shortly after the agreement of purchase and sale was executed.

[48] Clearly, from the evidence, in view of the nature of the wording of para. 11, there was no breach by the London Life with respect to that paragraph.

[49] Further argument is that there was some special relationship between London Life and the plaintiff which required the London Life to make inquiry beyond the information that they had. While in her evidence as a result of questions put to her by her counsel, the plaintiff indicated that she placed some reliance on London Life, the fact is that the documents indicate otherwise. I have come to the conclusion that she treated London Life as any other vendor save that London Life was prepared to grant her an unusual mortgage in order to complete the sale to her. She organized the agreement of purchase and sale with London Life and she completed the usual letter of commitment to London Life with respect to the mortgage. There is no evidence that she looked to the London Life for anything more than any other vendor, that is to say, either by herself or through her solicitor.

[50] The plaintiff, in my view, is in the position of the plaintiff in *Boulderwood Development Co. v. Edwards et al*, 30 C.C.L.T., 223 (N.S.S.C. 1984) were in the Court of Appeal at p. 244 said the following:

In the present appeal, MacDonald owed no duty to the purchasers to make any disclosures; however, having made a representation which later turns out to be false does he now fall within the doctrine of Hedley Byrne and become liable for the economic loss suffered by the purchasers? I think not. Firstly, I am not convinced that in the relationship of vendor and purchaser an innocent misrepresentation regarding the quality of land evokes the doctrine and this is particularly so when it is a misrepresentation concerning a latent defect of which neither party was aware at the time it was made. Secondly, I am of the opinion that *Fraser-Reid v. Droumsekas*, supra, is an accurate statement of the present law in Canada and that barring "fraud or fundamental difference between that which was bargained for and that obtained", the purchaser must protect himself either by express warranty or by independent examination. Thirdly, a review of the evidence leads me to conclude that there was no holding out by MacDonald that he possessed the skill and knowledge upon which Edwards could rely; and, in fact, in each instance he qualified his answers by stating that Edwards should look to his concrete man for advice on how the foundation should be constructed. Lastly, if a duty does exist, the I do not agree that such is the case in the present circumstances, then, in my opinion, that duty (reasonable man) was discharged by MacDonald by qualifying his statements as hereinbefore stated.

[51] The plaintiff's claim against London Life Insurance Company and Lynn Marie Armstrong must be dismissed and the counterclaim of the London Life Insurance Company allowed. The parties have agreed as to the quantum of the claim of the London Life Insurance Company and therefore there will be judgment for the London Life Insurance Company against Susan Alana Armstrong and Otto Herman Rudolph, the defendants by counterclaim in the amount of \$241,117.03 together with interest to the date of judgment at the rate of 18% per annum or \$93.07 per day.

[52] The claim of the plaintiff against the Middlesex Condominium Corporation No. 130 and Parkside Management Limited arises from the clear estoppel certificate that was issued on the 25th of February, 1992 to Isabel Campbell, the real estate agent, and the second delivered as a document on closing on June the 24th, 1992 which admittedly was issued in error inasmuch as

Parkside Management Limited had been directed by the Condominium Corporation to amend the clearance certificate to refer to the deficiencies in construction. In fact the clause had been drafted by the solicitor for Condominium Corporation and sent to Parkside Management as its agent on April the 14th, 1992. It is obvious that this amended estoppel certificate was used by Parkside Management and at Exhibit 1, Tab 255 we see the comments of Parkside with respect to an inquiry from another source as to the contents of the amended estoppel certificate.

[53] On the basis of the court's assessment of the facts the plaintiff had no right to refuse to close even had she received the correct estoppel certificate. This estoppel certificate did not belie the representations made by London Life Insurance Company in the agreement of purchase and sale and in the statutory declaration. Indeed, the answers given by Parkside and the solicitors for the condominium corporation as found at Tabs 254 and 256 are not, in all of the circumstances, sufficient to raise a fundamental issue with respect to the habitability of the penthouse apartment.

[54] It is speculation as to what would have happened had her solicitor turned over to her the estoppel certificate which he received three days after the closing and which, he retained in his file. Again, it is speculation as to the position of the London Life had it received instructions from its solicitor (who was also the solicitor for the plaintiff) in the form delivered three days after the mortgage money was advanced and the transaction closed. Pursuant to the Condominium Act, s. 38(8) certain rights are given to a purchaser with respect to an estoppel certificate given in accordance with that section of the statute.

[55] That Parkside was negligent, there is no doubt. The evidence is clear that they were notified by the solicitors for the condominium corporation as to the exact words to be inserted in the estoppel certificate by letter dated April the 14th, 1992.

[56] As the estoppel certificate was in error, she is entitled to claim against Parkside Management and its principle, the condominium corporation, in accordance with s. 38(8) which "The certificate binds the corporation as against the person requesting the certificate in says respect of any default or otherwise shown in the certificate as of the day it is given."

[57] In Halifax County Condominium Corporation et al v. McDermaid et al, 24 R.P.R. 248, the Court (N.S.) concluded that the condominium corporation was estopped from claiming an amount from the condominium purchaser which was known to the condominium corporation as a liability notwithstanding the fact that the notice of assessment had not been prepared. Similar observations are made by the court in Lucas et al v. Duro and Shay, 39 R.P.R. 178 wherein the solicitors for the purchaser of a condominium unit were found liable for not having obtained, on the part of the purchaser, an estoppel certificate. While the facts are somewhat different, the observations with respect to liability of the condominium corporation on an estoppel certificate to a purchaser are clear and in accordance with the observation made by Glube C.J. in the Halifax County case supra.

[58] In this case there had been no assessment levied by the condominium corporation or even discussed insofar as amounts are concerned until the board meeting of November 26, 1992. It is the plaintiff's position that she would not have closed had she received the appropriate estoppel certificate. The correct certificate of estoppel would have had the following paragraph:

6. The corporation has no knowledge of any circumstances that may result in an increase in the common expenses for the said unit. "Except as follows: The Condominium Corporation in this case has conducted extensive testing of the common elements and has identified two deficiencies which may require repair and/or maintenance. The corporation believes these deficiencies to be construction and/or design flaws for which there may be recourse. Until resolution of that matter, the corporation must bear any potential costs, the final extent of which are not yet known. No determination has, yet been made respecting payment of costs through use of the reserve fund or by way of special assessment."

[59] With respect to the purchase of a unit in the subject buildings by another person, in April of 1992 solicitors had inquired of the condominium corporation through its agent, Parkside Management Limited, as to particulars of the deficiencies. The response dated April the 28th, 1992 refers to the two deficiencies as follows:

1. Shelf angles - brick supports - as per the architectural drawings shelf angles were to be placed in the areas of the bay windows. Trow study show that the shelf angles were not used, but has advised that the building should not suffer structurally.

2. Leaking - It was found through Trow studies, that the air/vapour barrier (above ceiling level) is not continuous from top to bottom as stipulated in the 1986 Construction Code requirements thus causing water to build up and leak. Trow recommends a spray foam insulation be used to provide an effective air/vapour barrier and it would also satisfy the requirements of the Construction Codes. The estimated cost is between 60 and 70,000 to be done over a three to five year period.

[60] Norton Campbell speculated that had all the information known at the time of closing and brought to the attention of London Life, in all likelihood they would not have forced the plaintiff to close the transaction. That is speculative at best but assuming that to be the situation, would she have closed. She says not but one has to look at all of the circumstances.

[61] First of all, she was very much interested in this penthouse condominium. She had attempted to rent it and obviously retained a running interest until such time as she effected an agreement of purchase and sale.

[62] The purchase price was advantageous as being a reduction of some \$25,000 from the value paid by the London Life to the Brock Armstrongs, the down payment was minimal, and the mortgage was at an advantageous rate, below the then current market rate.

[63] Assuming that she assessed the information that would come from Parkside as to the possible assessment totalling \$60,000 to \$70,000, she would be able to calculate that such was to be spread over 64 units and that the cost to her would be \$1,093.75 perhaps recoverable. She testified that the December 9, 1992 information meeting was more of a social meeting. That information meeting dealt with the special assessment of \$207,360 which divided by the 64 units, yielded an assessment of \$3,240. Her actions indicate that she accepted that assessment and paid the monthly payments of \$35 until December, 1993.

[64] Counsel for the condominium corporation and Parkside suggested to the court that the problems of the purchaser in 1993 when the serious complaints commenced was one of financial difficulty and submitted as evidence of this, registration by the Corporation of the City of London of a notice of registration of tax arrears on the 22nd day of May, 1996, showing tax arrears of \$16,663.69 which was alleged to indicate that perhaps no taxes had been paid to the city by the plaintiff on the condominium since the date of purchase. She did not leave the premises until August 31, 1997 and, as indicated earlier, had defended against the application of the London Life for summary judgment and possession. She listed the property with ReMax in September of 1993 and kept it listed until April of 1994 at \$289,000. She notes in the letter to her solicitors that "only two or three people ever came

through it and only one showed any interest". That listing agreement indicates that the condominium unit is "exceptional quality and upgrades throughout" and appears to have been signed by the plaintiff. She obtained from Knowles Lambert an appraisal. They appear to be certified fee appraisers and the appraisal indicates that in fact it had been listed in 1994 through the London/St. Thomas Real Estate Board with an asking price of \$299,000. This appraisal does point out that the litigation had placed a "stigma" on the building and had diminished interest in the units.

[65] The unit was appraised at around \$199,000 about the end of 1997 and 1998 for the London Life in accordance with its power of sale proceedings and the appraisals indicate that the interior was never repaired and showed signs of water damage. In addition, there was a downward trend of prices for high price condominiums.

[66] On an assessment of all of the evidence, the court has concluded on the balance of probabilities the plaintiff would have closed regardless of the content of a proper estoppel certificate and therefore her claim against the condominium corporation and Parkside is also dismissed.

[67] Notwithstanding the dismissal of the plaintiff's claim, I must assess the damages claimed by the plaintiff. The detail of these expenses and damages are set forth in Ex. 5.

[68] I would have allowed the legal fees to purchase the unit in the amount of \$3,489.91 together with the deposit paid of \$29,649.92. In addition, I would have allowed to her the condominium fees paid by her during the months when she was paying these fees and the total would be \$5,790.

[69] As to items #5 and #6, mortgage payments paid to the London Life amounted to \$1,908.03 each and every month together with a loan insurance payment of \$3310.50 each month, the total therefore being \$2,218.53. The evidence indicates that she paid these for 15 months for a total of \$33,277.95.

[70] As to item #7 she would be entitled to recover what she paid on condominium fees arising out of the first assessment of \$3,240, the amount paid \$2,440. The evidence indicated that she did not pay the second assessment but had she done so she would have been credited with the sum of \$1,570 which was the cost of repairs paid directly by her and therefore her claim would be allowed in that amount, that is to say the sum of \$1,570.

[71] Item #8 claims (a), (b), (c) and (d) would be allowed totalling \$1,338.22, but not item (e), that is accommodation as she did not incur that expense. The total of her claim which would be allowed would be therefore the sum of \$77,556. As the lien charges claimed in para. 9 were not paid, they would not be allowed to her.

[72] However, she occupied the premises from June of 1992 until she left in August of 1997 or some 62 months. From her claim therefore would be deducted the benefits of the occupancy of the condominium unit for that period. To value that allowance, I would consider the mortgage payment and the insurance plus the condominium fees plus the municipal taxes as this was what the plaintiff was prepared to pay for occupancy of the premises in accordance with the agreement of purchase and sale. She would also be required to make the Hydro payments which she did save for \$940 and of course any claim for these Hydro payments would not be allowed to her as a damage claim. Accordingly, the value of the occupancy as anticipated would have been in the vicinity of \$2,800 plus utilities. Taking into account the inconvenience during the periods of reconstruction and renovation, I would have valued the benefit to her of occupancy in the sum of \$2,000 per month which multiplied by the 62 months of occupancy results in a benefit to her of \$120,000.

[73] It would appear that any claims which the condominium corporation may have had against the plaintiff were settled on the sale of the condominium unit by London Life and presumably any interest which the plaintiff might have received in the settlement of the litigation against the developer and the engineer in connection with the construction of the building would also have appeared in the adjustments on the sale by the London Life.

[74] The result is that all of the plaintiff's claims will be dismissed as will the cross-claims of the other parties save the London Life Insurance Company.

[75] In the circumstances of this case I think I should make no finding with respect to costs without receiving submissions. Accordingly, if the parties will make an arrangement with the trial coordinator I shall attempt to meet the convenience of counsel.

FLINN J.

CBR# 271

Re Royal Insurance Company of Canada and Middlesex Condominium Corporation No. 173 et al.

37 O.R. (3d) 139

Docket No. C26575 Court of Appeal for Ontario McKinlay, Carthy and Laskin JJ.A. January 23, 1998

APPEAL from an order dismissing an application to partition a condominium into two new condominium corporations.

David M. Miller and Barry R. Scott, for appellant. Peter Sengbusch, for respondents, Ronald Bossert and Judy Slessor. Geoffrey Dillon, in person.

MCKINLAY J.A. (dissenting): -- The appellant, Royal Insurance Company of Canada ("Royal"), appeals from the judgment of the Honourable Mr. Justice McGarry dated January 9, 1997, in which he dismissed Royal's application for an order temporarily terminating the governance of the property of Middlesex Condominium Corporation No. 173 ("MCC 173") by the Condominium Act, R.S.O. 1990, c. C.26 (the "Act"), and partitioning the property into two new condominium corporations. The respondents Ronald Bossert and Judy Garland Slessor were represented by counsel on the appeal, and the respondent Geoffrey William Dillon appeared in person.

MCC 173 was created by the registration of a declaration and description on June 12, 1990. It contains a total of 293 units, 255 of which are designated for residential use and 38 of which are designated for commercial use.

At the time that the declaration and description was filed, Royal held a first and second mortgage on the lands and premises referred to in the description. The respondent, 552838 Ontario Limited, the owner of the lands at the time of the creation of MCC 173, subsequently defaulted on its mortgage obligations. Royal is now the mortgagee in possession of all the commercial units and 204 of the 255 residential units. The other 51 residential units are owned by independent owners.

Aside from a general downturn in the market for both commercial and residential condominium units, this project has encountered serious difficulties as a result of problems specific to this property. As a result of these problems, the commercial space is almost entirely vacant and the residents have encountered difficulty in selling their units. The most significant of these problems are:

(a) The buildings are poured concrete structures built in the mid-1970s and have reached a state where extensive repairs are required to the parking garage, to the roof and skylights, to the exterior and to the mechanical systems.

(b) The fact that the outdated layout of the commercial areas and units is fixed by MCC 173, combined with the minority position of the commercial units as 38 out of 293, makes the investment of the funds required to revitalize the commercial areas less than feasible at the present time. In addition, a disproportionate amount of the physical repairs required must be done within the commercial areas and thus forms an unreasonable burden on the residential units.

(c) The commercial space has been laid out and partitioned to suit tenants from time to time. Many of these spaces are very small and of little utility. As part of the renovations required to the commercial area, the walls, partitions and office fronts will have to be re-configured. These are all demising walls and common elements governed by the Act. The approvals which would be required by the Act would make it very difficult to carry out such renovations. Even if approval could be obtained, periodic renovations of commercial malls are common and any developer prepared to take over the space and finance the needed changes would be concerned that the same approval would not be available the next time round.

In short, it is clear that the project was not well conceived from the outset, given the difficulty, now apparent, in obtaining necessary approvals under the Act to operate the commercial units in a commercially feasible manner.

In order to deal with this matter in a manner which would benefit all, Royal made a proposal to the unit owners. The proposal required the partitioning of the commercial and the residential complexes and the creation of two new condominium corporations. This proposal was the subject of the application before McGarry J. and of this appeal.

The proposal was discussed with the unit owners at meetings held on June 28, 1995, and May 8, 1996. During the May 8, 1996 meeting, a resolution supporting Royal's restructuring proposal was passed by a vote of 259 unit owners in favour, five unit owners being opposed and four unit owners abstaining.

It is Royal's position that the proposal would, if put into place, benefit the residential unit owners in the following ways:

(a) There would be a legal and practical framework within which the commercial areas could once again be made a viable component of the project, hopefully leading to the occupation of those areas by service and retail businesses whose proximity would benefit the residential unit owners.

(b) The residential condominium would have the exclusive use of the recreational rooms, health club and pool. As matters presently stand, the residential unit owners are required to share the use of these areas with the commercial unit owners, their employees and their invited guests. Given that very few of the commercial units are presently occupied, this does not, at present, create any inconvenience to the residential unit owners. Problems will likely develop as a higher percentage of the commercial units become occupied.

(c) At present, there are only 282 parking spaces provided for the 293 residential and commercial units. Therefore, it has been impossible to provide even one parking spot for each of the residential and commercial units. Under Royal's proposal, the residential unit owners would be provided with exclusive use of both levels of underground parking. Parking facilities on the Colborne Lands would be made available to the commercial unit owners. Each residential unit owner would be guaranteed the use of a parking space designated as exclusive to his or her unit.

All soft costs for the implementation of the proposal would be borne by Royal.

Decision of the judge hearing the application

McGarry J. dismissed the application before him on the basis argued by the respondent, that is, that s. 46 was not the appropriate section of the Act under which to proceed in this case, and that approval of the unit owners should have been sought under s. 38 of the Act. The relevant portions of ss. 38 and 46 read:

38(1) The corporation may by a vote of owners who own 80 per cent of the units make any substantial addition, alteration or improvement to or renovation of the common elements or may make any substantial change in the assets of the corporation, and the corporation may by a vote of the owners make any other addition, alteration or improvement to or renovation of the common elements or may make any other change in the assets of the corporation.

(4) If any substantial addition, alteration or improvement to or renovation of the common elements is made, or if any substantial change in the assets of the corporation is made, the corporation must, on demand of any owner who dissented, made within ten days after the date of the vote referred to in subsection (1), purchase the owner's unit and common interest.

(5) Where the corporation and the owner who dissented do not agree as to the purchase price, the owner who dissented may elect to have the fair market value of the owner's unit and common interest determined by arbitration under the Arbitrations Act by serving a notice to that effect on the corporation.

46(1) A corporation, any owner, or any person having an encumbrance against a unit and common interest, may apply to the Ontario Court (General Division) for an order terminating the government of the property by this Act.

(2) The court may order that the government of the property by this Act be terminated if the court is of the opinion that the termination would be just and equitable, and, in determining whether the termination would be just and equitable, the court shall have regard to,

(a) the scheme and intent of this Act; (b) the probability of unfairness to one or more owners if termination is not ordered; and

(c) the probability of confusion and uncertainty in the affairs of the corporation or the owners if termination is not ordered.

(3) Where an order of termination is made under subsection (2), the court may include in the order any provisions that the court considers appropriate in the circumstances.

Should s. 38 or s. 46 of the Act be applied in this case?

In finding that it was necessary for approval of the unit owners to be sought under s. 38 of the Act, the reason given by the judge hearing the application was that "the re-organization by the applicant would effect a very, substantial change in the assets of the corporation". With respect, I do not see that the facts set out in this application warrant that conclusion. The change envisaged is a change to the whole organizational structure of the condominium corporation for the benefit of both commercial and residential owners. The assets involved are common elements and individual units, both of which are assets of unit owners, and not assets of the corporation (see s. 7(1) of the Act).

Repairs, even major ones, are the business of the Board of the condominium corporation. It is clear that substantial repairs are necessary in this case, but repairs are not referred to in s. 38, and the necessity of repairs would not engage the provisions of s. 38. However, substantial alterations of the common elements are also involved in the proposal and, thus, s. 38 would be engaged if the condominium corporation wished to effect these alterations.

The question before us is whether s. 46 can be resorted to in a situation where the provisions of s. 38 apply to the specific facts involved. In my view, it can be. Section 38 is directed to specific fact situations, and to actions which the corporation, as a corporation, wishes to embark upon. Section 46 is general in nature, and is clearly intended to be applicable in a large variety of different fact situations. It may be invoked by the corporation, or by any owner, or any person having an encumbrance against a unit and common interest. The results of applying the provisions of s. 38 or s. 46 are very different. Where s. 38 is applied, any unit owner who does not agree with the making of the substantial alterations of renovations is entitled to have his unit purchased by the corporation. Where an application is made to the court under s. 46, the governing of the property by the Act is terminated. However, the court, in making a termination order may also include in the order any provisions that the court considers appropriate in the circumstances.

Section 46 involves the consideration of broad principles of fairness in dealing with all persons with interests in the governance of the condominium involved. It can be applied to facts which, in narrower circumstances, could involve the application of s. 38. However, the facts in this case go far beyond the fact situations set out in s. 38. They go to the basic viability of the whole complex.

I have no doubt that the three requirements set out in s. 46(2) of the Act are satisfied, and that the court has authority to make the termination order sought, and I would make such an order. The same result could have been accomplished by the application of s. 45 of the Act, since the owners of 80 per cent of the units have approved a termination. Pursuant to s. 45(3), the result of a termination is that the unit owners become tenants in common of the land and interests appurtenant thereto, including the common elements (see the definitions of "common elements" and "property" in s. 1 of the Act). The reason in this case for invoking s. 46 in addition to having obtained the necessary 80 per cent approval under s. 45 is that, in order to accomplish the objectives of the Royal proposal, a further order pursuant to s. 46(3) is required. It is this request which raises conceptual and jurisdictional difficulties.

Order pursuant to s. 46(3) of the Act

Once the condominium corporation is terminated and the owners become tenants in common of the land and common elements, in order to complete the Royal proposal and effect the establishment of two separate condominium corporations -- one commercial and one residential -- it is necessary to sever the tenancy in common. This cannot be done by agreement in this case, because of the refusal of the respondents in this appeal to agree to the proposal. Royal, therefore, asks that the court make an order pursuant to s. 3(1) of the Partition Act, R.S.O. 1990, c. P.4, for the partition of the real property into two parcels, and for an order that Royal proceed with the establishment of the two separate condominium corporations. Section 3(1) reads:

3(1) Any person interested in land in Ontario, or the guardian of a minor entitled to the immediate possession of an estate therein, may bring an action or make an application for the partition of such land or for the sale thereof under the directions of the court if such sale is considered by the court to be more advantageous to the parties interested.

Since the normal partition of land, and the type of partition for which the Partition Act was originally enacted, is a partition of real estate on the ground, the concept of a horizontal partition above the ground seems conceptually strange -- but no more strange than the condominium concept itself. I see no reason why the provisions of the Partition Act cannot be applied in a case such as this. Section 6(1) of the Condominium Act states that "Units and common interests are real property for all purposes." Section 3(1) of the Partition Act provides for an order of partition of land by the court on application of a person interested in the land. I am satisfied that the provisions of s. 46(3) are sufficiently broad to provide jurisdiction for making of the order under the Partition Act for the severance of the commercial units from the residential units.

The most difficult question in this case is whether s. 46(3) is sufficiently broad to permit a prospective order approving the registration of declarations under the Act, including powers of attorney in favour of Royal to execute the declarations on behalf of all owners. The problem arises as a result of the refusal of the appellants in this case to execute the declaration as required by s. 3(1) of the Condominium Act.

Because of the fairly recent development of the condominium concept, no body of law has developed around the problems which will inevitably become increasingly frequent and diversified as facts warranting termination arise. With considerable foresight, the legislation has provided the court with a very broad discretion under s. 46(3) to act as it considers appropriate in the wide variety of fact situations which could arise on termination. The order requested in this case is clearly in the interest of all owners, and it would be unfortunate for all if a very small number of dissenters could frustrate the carrying out of a beneficial proposal endorsed by almost all of the unit owners.

It should also be noted that the objective of the respondents' dissent is to require the purchase of their units. If s. 38 were applicable in their case, the corporation would be required to purchase the dissenters' units. But, as stated above, it is my view that s. 38 does not apply here. The Act does not provide a similar remedy on a termination under s. 46. When the condominium corporation is an ongoing one, the purchase remedy is a very appropriate one. It acts as a check on grandiose plans by the corporation for changes in the common elements. If dissenters opt to have their units purchased, the whole plan can be re-assessed in the light of the cost involved. On a termination, however, everyone suffers, and there is no corporation left to purchase the units of dissenters. If the provisions of s. 46(3) are not very broadly interpreted, owners, after a termination, will be in the position of owning a piece of real property in the air plus an interest in common in the land and common elements which would be virtually unsaleable. Without 100 per cent agreement of the owners, or the assistance of the court, remedial action would be almost impossible.

Disposition

I would allow the appeal, set aside the judgment of McGarry J., and make an order in terms of the draft order filed as Schedule C to the appellant's appeal factum. The appellant is entitled to costs of the appeal.

LASKIN J.A. (CARTHY J.A. concurring): --

Overview

I have read the reasons of my colleague McKinlay J.A. Regrettably, I am unable to agree with her conclusion or her proposed order.

I agree with McKinlay J.A. that the motion judge erred in holding that the appellant Royal Insurance Company of Canada was required to seek the approval of the unit owners under s. 38 of the Condominium Act, R.S.O. 1990, c. C.26. I also agree that Royal is entitled to a termination order under s. 46(2) of the Condominium Act. Where I disagree with my colleague is on the scope of s. 46(3) of the Act. In my opinion, s. 46(3) does not permit the court to partition the property into two new and separate condominium corporations nor to force the objecting respondents to become unit owners in one of these new condominiums. I also disagree with Royal's alternative submission that it can accomplish its objective under s. 3(1) of the Partition Act, R.S.O. 1990, c. P.4, once a termination order is made.

Discussion

McKinlay J.A. has summarized the factual background. Royal seeks to terminate the existing condominium corporation, Middlesex Condominium Corporation No. 173 ("MCC 173"), and create two new condominium corporations, one residential and the other commercial. It seeks to do so to free up and develop the commercial space, now vacant. Most of the independent unit owners have consented to Royal's proposal. The owners of three units, however, have objected and Royal refuses to buy them out at fair market value. This impasse led to this litigation.

The respondent objectors allege that Royal misled the unit owners to convince the majority to go along with its proposal. Royal has denied these allegations. The validity of these allegations would be material if the court had to decide whether to exercise its discretion to grant the relief sought by Royal. In my view, however, the court has no discretion to exercise because neither s. 46(3) of the Condominium Act nor s. 3(1) of the Partition Act authorizes the order requested by the appellant.

The motion judge did not address s. 46 or s. 3(1) because, in his view, the condominium corporation had to comply with s. 38 of the Condominium Act. Section 38 provides a procedure for making changes to the common elements or assets of a condominium corporation and gives dissenting unit owners the right to have their unit and common interest purchased at fair market value. Section 38 contemplates an ongoing condominium corporation, not its termination. It does not apply to the relief sought by Royal.

The section of the Condominium Act relevant to Royal's application is s. 46. It states:

46(1) A corporation, any owner, or any person having an encumbrance against a unit and common interest, may apply to the Ontario Court (General Division) for an order terminating the government of the property by this Act.

(2) The court may order that the government of the property by this Act be terminated if the court is of the opinion that the termination would be just and equitable, and, in determining whether the termination would be just and equitable, the court shall have regard to,

(a) the scheme and intent of this Act;

(b) the probability of unfairness to one or more owners if termination is not ordered; and

(c) the probability of confusion and uncertainty in the affairs of the corporation or the owners if termination is not ordered.

(3) Where an order of termination is made under subsection (2), the court may include in the order any provisions that the court considers appropriate in the circumstances.

The relief sought by Royal requires three steps. Step 1 is an order terminating the government of the property by the Act. Step 2 is an order partitioning the property into two new and separate condominium corporations, one residential and one commercial. Step 3 is an order giving Royal power of attorney to sign the declaration for the new residential condominium corporation on behalf of the objectors so that the declaration can be registered. Step 1 can be ordered under s. 46(2) of the Condominium Act. Royal submits that steps 2 and 3 can be ordered either under s. 46(3) of the Condominium Act, invoking in aid s. 3(1) of the Partition Act, or under the Partition Act alone, once a termination order is made. Even then, the partition must be approved by the City of London under s. 50(20) of the Planning Act, R.S.O. 1990, c. P.13.

The respondent objectors acknowledge that Royal has satisfied the three conditions in s. 46(2) of the Condominium Act and is therefore entitled to a termination order. But Royal does not seek merely to terminate the existing condominium corporation. It also seeks to establish two new condominiums and to force the objectors to become unit owners in one of them. It contends that it can do so either by applying under s. 3(1) of the Partition Act or by using the Partition Act in conjunction with s. 46(3) of the Condominium Act. I do not think that Royal improves its position by going outside the Condominium Act and resorting to the Partition Act alone. The relief Royal asks for is an order establishing two new condominium corporations. That relief, if it lies anywhere, should lie in the Condominium Act. But nothing in that Act, or indeed in the Partition Act, expressly authorizes the court to order steps 2 and 3. I seriously doubt that either statute is broad enough to order step 2 and I am even more firmly of the view that they are not broad enough to order step 3.

Although s. 46(3) of the Condominium Act gives the court power to include in a termination order any provisions it considers appropriate, the section should be confined to its purpose. Section 46(3) is one of a series of provisions dealing with termination. Its purpose is to give the court wide latitude to include any provision that will make a termination order more effective. But Royal wishes to use s. 46(3) for a different purpose, to create new condominium corporations. I do not think that s. 46(3) can be used in that way.

If a termination order is made under s. 46(2) of the Act, the owners become tenants in common of the property. Step 2 calls for the court to use s. 3(1) of the Partition Act alone or in conjunction with s. 46(3) of the Condominium Act. Section 3(1) states: 3(1) Any person interested in land in Ontario, or the guardian of a minor entitled to the immediate possession of an estate therein, may bring an action or make an application for the partition of such land or for the sale thereof under the directions of the court if such sale is considered by the court to be more advantageous to the parties interested.

The court would have to use the Partition Act to sever the tenancy in common, divide the property into two parcels and permit Royal to establish two new and separate condominium corporations, all under s. 3(1) of that Act or under the umbrella of the remedial power in s. 46(3) of the Condominium Act. If the legislative drafters had intended the court to have such wide-ranging remedial power to affect the rights of condominium owners, it seems to me that they would have said so expressly. Moreover, the partition order sought by Royal runs up against s. 7 of the Condominium Act. Section 7(1) and (6) provide:

7(1) The owners are tenants in common of the common

elements.

(6) Except as provided by this Act, the common elements shall not be partitioned or divided.

The termination sections of the Condominium Act contain no provision for partition of the common elements.

Assuming, however, that step 2 -- partition of the property and creation of two new condominium corporations -- can be ordered under s. 46(3) of the Condominium Act or under s. 3(1) of the Partition Act, step 3 calls for an even more drastic use of these provisions. Under step 3, the court is being asked to give Royal a power of attorney to sign the declaration for the objectors. A power of attorney is needed because s. 3 of the Condominium Act prohibits a declaration from being registered until it is signed by all the unit owners. Because the objecting unit owners will not consent to Royal's proposal and therefore will not sign the declaration for the proposed new residential condominium, Royal requires a power of attorney to implement its proposal.

To force the objectors to become unit owners of a new condominium corporation that they do not wish to be part of, in my view, goes beyond the court's power either under s. 46(3) of the Condominium Act or s. 3(1) of the Partition Act. The court is being asked not just to sever the objectors' interests in the existing condominium corporation but to require the objectors to join an entirely new entity against their will. This new entity would diminish the ownership interest of each objector. Under the existing condominium corporation, each objector has an ownership interest in both the residential and commercial common elements. Under Royal's proposal, each objector would lose his or her ownership interest in the commercial common elements. I do not think that the legislation allows the court to impose this proposal on the objectors. Indeed, I would think it odd that dissenting unit owners would have a right, as they do under s. 38, to be bought out if substantial changes are made to an existing condominium corporation, and yet have no such right when the existing corporation is replaced by two new corporations. This is simply another way of saying that, in my opinion, the legislation does not authorize the court to make the order requested by Royal.

I recognize the force of McKinlay J.A.'s observation that the order requested will likely benefit not just Royal but, as well, the independent unit owners, most of whom have endorsed Royal's proposal. However desirable the proposal may be for the majority of unit owners, the Act does not authorize it in the face of dissenting unit owners.

I would dismiss the appeal with costs.

Appeal dismissed.

CBR# 196

Re Middlesex Condominium Corporation No. 87 and 600 Talbot Street London Limited et al.*

37 O.R. (3d) 22

Docket No. C16901 Court of Appeal for Ontario, Finlayson, Osborne and Rosenberg JJ.A. February 6, 1998

Nick W. Fursman, for appellant. Robert Spence, for respondents.

The judgment of the court was delivered by

ROSENBERG J.A.:-- This is one of two appeals heard by this court that raise issues concerning remedies for allegedly improper disclosure to purchasers of condominium units. In this case and in *Wellington Condominium Corp. No. 61 v. Marilyn Drive Holdings Ltd.* [37 O.R. (3d) 1] the dispute concerns ownership of a superintendent's suite. The reasons in the two appeals are being released contemporaneously. For the reasons that follow, I would allow the appeal and require the corporate respondents to convey the suite to the condominium corporation.

The appellant is a condominium corporation created on December 17, 1986 as a result of the registration by the respondent, 600 Talbot Street London Limited, the developer and declarant of a declaration and description under the Condominium Act, R.S.O. 1990, c. C.26. The appellant was created to control, manage and administer the common elements and the assets of the condominium located at 600 Talbot Street, in the City of London. The property consists of a ten-storey, 104-unit apartment building. The building superintendent resides in Unit 108. This unit is owned by the respondent 509543 Ontario Limited, a corporation associated with the declarant. The respondent, Elena Meta Blumas, is the wife of the major shareholder in the declarant and she also owns a unit in the condominium. As I understand it, Mrs. Blumas was included as a defendant in the original action because of a dispute over six parking spaces that were assigned for her exclusive use. The appellant has not pursued that issue in this appeal.

THE FACTS

The Agreement of Purchase and Sale

This condominium was built over a period of three years between 1985 and 1987. Efforts to sell the units appear to have begun in 1985. At trial, promotional literature given to purchasers was introduced into evidence. A number of items are listed under the heading "Building Features" including "24 Hour on-site staff". The material also includes plans for the various floors. On the first floor, in the area surrounding the lobby, the plan shows a number of the common elements including the swimming pool, sauna, common lounge, communal storage and office. The material shows 108 units. The suite adjacent to the office is Unit 108 and is marked "sold". The purchasers were provided with an agreement of purchase and sale consisting of 65 pages. Copies of "Proposed Condominium Documents" were included as schedules to the agreement. By signing the agreement the purchaser acknowledged having received these documents. At least two of the important documents were not, in fact, provided to the purchaser at that time. Schedule "A" is described as a "Proposed Description to be provided by Farncomb & Kirkpatrick, Ontario Land Surveyors, when ready". No such description is included, apparently not being "ready" when most of the purchasers entered into their agreements. Schedule "C" is described as the "unit definition", but it too is not included. Many of the other documents are clearly not in final form and contain blank spaces in various places.

Schedule "B" is the "Proposed Declaration" and contains the following recital: "WHEREAS the Declarant has constructed a building upon the said lands containing one hundred and seven (107) dwelling units . . .". Schedule "F" is the "Proposed Disclosure Statement". As required by s. 52(6)(b) of the Condominium Act the disclosure statement contains a general description of the proposed property as follows: The property is located at 600 Talbot Street, in the City of London, in the County of Middlesex. The condominium will be a ten (10) storey building, containing one hundred and seven (107) residential units comprised of sixteen (16) one bedroom units, eighty-three (83) two bedroom units, and eight (8) three bedroom units, which includes a two bedroom dwelling unit set aside for use by a residential superintendent, which is located on part of the common elements. Each unit will have one exclusive-use parking space assigned to it in the Declaration. There also will be forty-three (43) additional parking units of which two (2) shall be available for the Declarant, its staff and agents, and the remaining forty-one (41) parking units available as visitors parking spaces.

(Emphasis added)

Thus, although the promotional literature shows 108 units, the description refers to 107 units and to a two-bedroom unit located on the common elements for use by the resident superintendent. The only reasonable inference is that when the disclosure statement was drawn up the 108th unit was designated as a common element. Unit 108 is the obvious location for a superintendent's suite, being adjacent to the office and near the front lobby entrance. A superintendent has been living in Unit 108 since September 1986.

Section 52(6)(e) of the Act requires that the disclosure statement contain a budget statement for the one-year period immediately following registration of the declaration and description. The budget statement is attached as Schedule "G" to the agreement of purchase and sale and under the heading "Services" contains a line for "Superintendent [\$]15,000". There is no allowance for the rental or carrying charges relating to the superintendent's suite. This, of course, is consistent with the general description which describes the superintendent's suite as a common element.

The provisions described above were included in all of the agreements of purchase and sale entered into prior to registration.

Events after Registration

As indicated, registration took place on December 17, 1986 and the appellant was created on that date. Final closing with respect to the various units took place following registration. One of the documents delivered to the purchasers was an estoppel certificate. The example of the certificate filed at trial is dated December 23, 1986. Although this certificate was given in the name of the condominium corporation it was signed by Mr. Edward Blumas, the principal of the declarant. The certificate declared that the disclosure statement and the budget statement "are in all material respects substantially identical" to the copy of

the documents delivered to the purchasers when they entered into their agreements of purchase and sale. The certificate also stated that the corporation had no knowledge of any circumstances that might result in an increase in the common expense.

A letter delivered from the solicitors for the declarant to the solicitors for one of the unit purchasers dated December 17, 1986 was also introduced into evidence. That letter confirms that there is no material change from the proposed declaration attached to the original agreement of purchase and sale.

The trial judge found that the purchasers were not provided with a new disclosure statement or an amended disclosure statement containing a different general description of the property. The closing documents did include the declaration and a budget. The declaration now referred to 104 dwelling units. This change is apparently due to the fact that eight of the units were combined into four double-sized units and the declarant no longer included Unit 108 as a common element. A note to the budget statement now included the following:

SUPERINTENDENT

The superintendent is the employee of the manager or his assigns. A lease between the declarant and Advance Property Management Consultants Inc. for the period January 1, 1987 through December 31, 1988 has been executed which will maintain living quarters for the Superintendent.

The first meeting of the Board of Directors took place on January 13, 1987 and nominees of the declarant were elected as officers. In addition to the routine business that takes place at the first board meeting prior to turnover of the board to the unit owners, the minutes record the following under the heading "Budget":

The Chairman laid before the meeting the budget of the Corporation for the first year of operation. The Chairman on a point of clarification noted that the budgeted expense of \$15,000 for the Superintendent, residing in Unit 108, included the provision of accommodation to the same, such accommodation being provided by 600 Talbot Street London Limited making the Unit available for rental at a rate of \$850.00 per month.

This "point of clarification" appears to suggest that of the \$15,000 budgeted for the superintendent, \$850 per month, or over \$10,000 annually was to go to the declarant as rent for the superintendent's suite. This would seem to leave very little in the budget to pay the superintendent's salary.

Following the turnover of the Board to the unit owners, the question of the superintendent's suite was raised at several of the meetings. For example, the minutes for the March 26, 1987 meeting record that a point was raised as to "the allocation of rents versus cash payment to the superintendent. The Board will request that [the property manager] reduce rent allocation." In the minutes for the board meeting of May 25, 1987 there is a note that:

Mr. Blumas [an associate of the declarant] indicated that a superintendent will be given a free unit and that payment will be made to [the property manager] from the Board.

Between June 1987 and November 1988 the Board and representatives of the declarant engaged in negotiations concerning the purchase by the appellant of Unit 108 for use by the superintendent. These negotiations fell through when Edward Blumas, the declarant's principal shareholder, stated that the units that he held would not contribute to the purchase of the unit for the superintendent through an increase in common expenses. Sometime in 1990, a new member of the Board was reviewing the various documents he had received when he purchased his unit. He noticed the discrepancy between what had been stated in the proposed disclosure and the position subsequently taken by the declarant concerning the superintendent's suite. In November 1991, the appellant brought this action for, inter alia, a declaration that Unit 108 forms part of the common elements, a mandatory order requiring the respondents to convey Unit 108 to the appellant, and damages pursuant to s. 52(5) of the Condominium Act. Several unit owners testified at trial. None of these witnesses testified that they relied upon the representation concerning the superintendent's suite in the proposed disclosure statement. As one owner put it, an apartment for the superintendent was not an issue. Most of the witnesses were primarily concerned with security and the fact that there would be 24-hour supervision on site.

THE REASONS OF THE TRIAL JUDGE

The trial was heard by Mr. Justice Flinn. He made a very strong finding of fact against the respondent declarant:

[It seems] to me that from the proposed disclosure statement there can be no doubt but that originally it was intended that the superintendent's apartments be on the common elements, not necessarily apartment 108 but perhaps that would make more sense than any other unit.

The developer had [subsequently] decided to skim off the unit originally thought to be part of the common elements.

(Emphasis added)

In his reasons, Flinn J. dealt only with the claim for damages under s. 52(5) of the Condominium Act. Section 52(5) provides as follows:

52(5) Where any statement or material required under this Act to be provided by a declarant or proposed declarant to a purchaser of a unit or proposed unit for residential purposes contains any material statement or information that is false, deceptive or misleading or fails to contain any material statement or information, the corporation or any unit owner who relied on such statement or material is entitled, as against the declarant or the proposed declarant to damages for any loss sustained as a result of such reliance.

(Emphasis added)

The trial judge found that the representation in the proposed disclosure statement concerning the superintendent's suite was false at the time that some of the purchasers entered into their agreements of purchase and sale. He was also satisfied that the statement was material. He expressed his reasons for that finding as follows:

Surely from the point of view of the condominium corporation the fact that a two-bedroom unit was represented to be part of the common elements and therefore property of the condominium corporation is material.

The only indication of value that we have is that found in the minutes where the representative of the owner purported to offer it for sale at \$120,000. A representation with respect to something of that value is in my view material.

However, the trial judge dismissed the claim for damages on the basis that the appellant had failed to prove the element of reliance. The evidence from those owners who testified demonstrated that none of them gave any thought to this representation as being material. Further, it was clear from the declaration and the budget presented at closing that there were now 104 residential suites and that the residence for the superintendent was to be in rented premises. Flinn J. did not deal with the alternative relief sought by the appellant, namely, a declaration that Unit 108 was a part of the common elements and an order for conveyance of the unit to the appellant.

Mr. Justice Flinn made no order for costs. He gave these reasons for that order:

As to costs, the defendants say that costs should follow the event and as well there was an offer of settlement of Sept. 3/93 better than the result for the plaintiffs.

I have found that the proposed declaration was false. I have also had read into the evidence the discovery of Arthur Blumas, an officer of the developer. He was less than candid in giving that evidence, claiming that there was an amended statement and there was not, claiming a change of plan with respect to a live-in superintendent and there was not and finally squirming with respect to a defence and moving with the tide, making it somewhat difficult to present the claim. The defence should not be rewarded for that activity but rather chastised. There will be no order as to costs.

(Emphasis added) THE ISSUES

In its factum, the appellant conceded that the trial judge did not err in dismissing its claim based on s. 52 of the Condominium Act. Rather, it submitted that he erred in failing to deal with its claim for a declaration and conveyance of Unit 108 based upon the common law. The appellant relied upon this court's decisions in *Frontenac Condominium Corp. No. 1 v. Joe Macciocchi & Sons Ltd.* (1975), 11 O.R. (2d) 649, 67 D.L.R. (3d) 199 (C.A.), and *York Condominium Corp. No. 167 v. Newrey Holdings Ltd.* (1981), 32 O.R. (2d) 458, 122 D.L.R. (3d) 280.

The respondents cross-appeal from the trial judge's order with respect to costs.

As indicated, this appeal was heard with the appeal in *Wellington Condominium Corp. No. 61 v. Marilyn Drive Holdings Ltd.* The application and interpretation of s. 52 was an issue in that appeal. The court reserved its decision in both cases. Counsel were subsequently notified that the court wished to have submissions from counsel in this appeal as to the application of s. 52, notwithstanding the concession made by the appellant in its factum, and the impact of the recent decision of this court in *Peel Condominium Corp. No. 417 v. Tedley Homes Ltd.* (1997), 35 O.R. (3d) 257. We have received those submissions. Counsel for the appellant now relies upon s. 52 and seeks to overturn the trial judge's decision with respect to that section. Counsel for the respondents argues that this court should not entertain the argument based on s. 52. In view of my conclusion concerning the availability of the common law remedies I need not deal with the s. 52 issues in this appeal.

ANALYSIS

The appellant's submissions that it is entitled to a remedy at common law rely upon the decisions of this court in *Frontenac Condominium Corp. No. 1* and *Newrey Holdings Ltd.* The respondents point out that those cases were based on the predecessor legislation that did not include the specific remedies with respect to disclosure now contained in s. 52 of the Condominium Act. It is the submission of the respondents that since the appellant's real complaint concerns the alleged false or misleading disclosure mandated by s. 52, the remedy, if any, must be found exclusively within s. 52. I will deal with those submissions after briefly reviewing these two cases.

Frontenac Condominium Corp. No. 1

In *Frontenac Condominium Corp. No. 1* a dispute arose over the ownership of the superintendent's suite. When this case arose, in the early 1970s, the Condominium Act, 1967, S.O. 1967, c. 12, did not impose disclosure requirements on developers: see *Abdool v. Somerset Place Developments of Georgetown Ltd.* (1992), 10 O.R. (3d) 120 at pp. 130-31, 96 D.L.R. (4th) 449 (C.A.). Thus, the court had to determine the parties' intentions with respect to the superintendent's suite from the testimony of the purchasers and the developer's representatives, the various pieces of promotional literature, the prospectus and other evidence.

There are three sets of reasons for judgment in *Frontenac Condominium Corp. No. 1*. Brooke J.A. held that the condominium corporation had established that it was the intention of the developer that the purchasers should believe that the suite was a common element or would belong to the condominium corporation and that the purchasers did in fact hold that belief. He referred to a number of items of evidence to support his finding. These included the fact that the superintendent resided in a unit designated by a sign on its door. The purchasers were never told of any additional cost to purchase a unit for the superintendent. The prospectus showed an expense for a superintendent's salary, but no expense for rental or accommodation for the superintendent.

Zuber J.A. approached the issue as one involving the meaning to be given to the term "common elements". The developer relied upon the statutory definition of "common elements" being "all the property except the units". Zuber J.A. held that the statutory definition was not intended to be exhaustive. Rather, some sensible meaning must be given to the term. He commented at p. 663 that "the meaning attributed to common element by the defendant and not communicated to the purchasers should not displace the meaning to be collected from the context and the circumstances of the contract of sale" (at p. 663).

Zuber J.A. also referred to an argument made by the declarant that is similar to a submission made in this case. He notes the following at p. 662:

It is said on the other hand, that the fact that this condominium was advertised as a 70-unit condominium, was sufficient to convey to prospective purchasers that the superintendent's suite was not included. To arrive at the total of 70, one must include Suite 104. The defendant's argument continues that since the description "seventy units" must therefore have included the

superintendents' suite, it must also have been clear that Suite 104 was a unit and not a common element. This argument inflicts upon the purchaser the duty to tour the building and count the units to determine whether or not Suite 104 was within or without the total. In my respectful view the simple statement of this proposition is sufficient demonstration of its untenability.

(Emphasis added)

The respondents made a similar argument here. They point out in their factum that despite the description in the proposed disclosure statement, the declaration clearly showed that there were 104 units which "makes it abundantly clear that Unit 108 is one of the residential units and not part of the common elements". For the reasons expressed by Zuber J.A., I find this submission singularly unattractive. Zuber J.A. was satisfied that, based on the evidence, the superintendent's suite was a common element. Accordingly, a majority of the court ordered that the superintendent's suite be conveyed to the corporation.

MacKinnon J.A. dissented in Frontenac. He held that it was open to the trial judge to find, as he did, that there was no misrepresentation or fraud and that the purchasers were bound by the written contract and the other written documents. He was not prepared to "complement" these documents by the alleged oral representation by the developer's sales representative that the superintendent's suite was part of the common elements. He placed considerable emphasis on the lack of evidence of any statement by or on behalf of the declarant to contradict the paper title. The only oral representation relied upon by the corporation was a statement by a sales representative that she understood that, eventually, the superintendent's suite would become one of the common elements. He wrote, at p. 658, that there would have to be "some firm evidence of an undertaking or statement by or on behalf of the defendant, that Unit 104 was part of the common elements, in order for a court to hold (assuming no other obstacle) that the written contract and other documents, registered and otherwise, were complemented by this oral term, so as to form one comprehensive contract". In this appeal, of course, there is evidence of a firm undertaking in the proposed disclosure statement that was included with the agreement of purchase and sale and affirmed in the estoppel certificate and the letter from the declarant's solicitor.

The respondents argue that it is difficult to distil a principle from the various reasons for judgment in Frontenac. No doubt, the court was struggling with a new form of property ownership for Ontario. Established rules relating to real property law were apparently inadequate, at least with respect to issues concerning the common elements. In my view, the principle underlying the majority judgments can be found in the reasons of Brooke J.A. at p. 652:

I think it fair to say that the brochure [published by the developer] expresses in simple terms what the average person understands by condominium, that is to say, joint ownership, that each of the apartment or suite owners would own his own suite and have exclusive use of it and together they would jointly own the rest of the building and property or common elements. That no one including the developer, would be in a position to put his economic interests against the interest of the group so far as joint ownership, management or enjoyment of the property was concerned, save through a mortgage or similar interest.

(Emphasis added)

To vindicate the economic interests of the group, the court ordered the developer to deal with the superintendent's suite in accordance with the reasonable understanding or assumption the developer had promoted in the individual purchasers. The remedy adopted was to order the developer to convey the unit to the corporation.

Newrey Holdings Ltd. et al.

The second case relied upon by the appellant is Newrey Holdings. There were several issues in Newrey Holdings Ltd., including ownership of the superintendent's suite. Applying Frontenac Condominium Corp. No. 1, the trial judge held that the paper title showing ownership of the suite to be in the developer could only be overcome by evidence of a common intention on the part of the purchasers and the developer that the suite was to be part of the common elements or otherwise belong to the condominium corporation. He could not find such a common intention. Wilson J.A., writing for the court, held that notwithstanding the deference due the factual findings of a trial judge, the Court of Appeal was in as good a position as the trial judge to draw the appropriate inferences as to the common intention of the parties vis-à-vis the superintendent's suite. From her review of the evidence, Wilson J.A. was of the view that the evidence was sufficiently strong to overcome the registered title and she ordered a conveyance of the suite to the corporation. The evidence presented in that case was similar to the evidence in Frontenac in that the purchasers assumed that the superintendent's suite was part of the common elements.

Wilson J.A. relied upon several items of evidence to upset the finding of fact by the trial judge. The building was of such a size as to require a full-time live-in superintendent. The projected annual operating budget showed no item of expense for rental of a superintendent's suite but did show an item of expense for his salary. The declaration contained a note under the heading "Restricted Access" stating that without the consent of the Board, no owner shall have any right of access to "those parts of the common elements used from time to time as a dwelling for any building superintendent". Several of these features are also found in this appeal.

Wilson J.A. expressed some difficulty in eliciting a rule from the two judgments of the majority in Frontenac. As I read her reasons, however, she took, as the holding from the reasons for judgment in Frontenac, that even though no oral representation had been made concerning the superintendent's suite, the assumption by the purchasers that the suite would be a common element was justified and based upon the written material provided by the declarant. She explained the dissent by MacKinnon J.A. on the basis that absent a representation from the declarant, it was entitled to rely upon its registered title.

Newrey Holdings was thus a stronger case for the condominium corporation than Frontenac since there was a representation of sorts, in the declaration, to restricted access to certain of the common elements including the dwelling for the building superintendent. Accordingly, the declarant was required to convey the superintendent's suite to the corporation in accordance with the assumption that it had induced in the purchasers.

The principle underlying the holding in Newrey Holdings is similar to the principle expressed by Brooke J.A. in Frontenac. Wilson J.A. commented at p. 466 that special problems arise "out of the peculiar characteristics of ownership in a condominium project". Therefore, she questioned "the extent to which the ordinary law of contract and real property apply to sales of property about to be brought within the purview of the Condominium Act". She rejected the position advanced by the developer that it was entitled to rely on the registered title and that everything it had not contracted to sell at any given point of time prior to registration continued to belong to it absolutely. Wilson J.A. described the position of the developer once he had started to sell the units as follows, at p. 467:

I think he has . . . placed himself in a fiduciary relationship to the unit purchasers not only with respect to their units but also with respect to the interests appurtenant thereto. He therefore holds the property in trust for the unit purchasers, present and prospective, and for the condominium corporation which will come into being upon registration of the declaration. I believe he is under a duty to protect the interests of all unit owners present and prospective, and cannot put his own interests in conflict with theirs even although he himself continues to be an owner as long as any units remain unsold.

(Emphasis added)

To summarize, Frontenac and Newrey Holdings stand for the proposition that with respect to the common elements, the declarant is bound not to prefer its interests over those of the group of unit owners. Where the reasonable interpretation of the evidence is that, notwithstanding the registered title, the declarant intended a reasonable purchaser to believe or to justifiably assume that the superintendent's suite was a common element or an asset of the corporation, the declarant will be required to convey the unit to the corporation. If this constituted a departure from established contract and real property law, it was a departure required by the exigencies of condominium ownership.

In my view, unless the enactment of s. 52 of the Condominium Act has overtaken the decisions in Frontenac and Newrey Holdings the appellant must succeed. At the time the agreements of purchase and sale were entered into, the declarant clearly stated that the superintendent's suite was one of the common elements. The declarant obviously intended the purchasers to rely upon the initial disclosure statement. There would seem to be no reasonable alternative inference to be drawn from the documentary evidence and the finding of fact by the trial judge that the declarant never delivered an amended disclosure statement. If the declarant wished to resile from that representation, its remedy was to provide an amendment to the disclosure. It never did so. To the contrary, in the estoppel certificate provided to purchasers before final closing, the corporation, which was still under the control of the declarant, represented that the disclosure and budget statements "are in all material respects substantially identical". Any reasonable purchaser reading the agreement of purchase and sale and the attached schedules, all of which were drafted by the declarant, would assume that the superintendent's suite was part of the common elements.

The respondents point to the finding by the trial judge that no owner testified at trial that they relied upon the representation concerning the superintendent's suite. They point out that the agreements of purchase and sale, including the schedules, were lengthy documents and that none of the purchasers testified that they had even noticed the reference to the superintendent's suite until well after the final closing. In my view, the fact that no unit owner came forward at trial to say that, had they known the declarant had changed its intention prior to closing they would have rescinded the agreement, is beside the point. Neither Newrey Holdings nor Frontenac impose such a condition on the condominium corporation's right to relief. To protect both the purchaser and the declarant the test surely must be an objective one. If the declarant caused the purchasers to assume that the superintendent's suite was a common element, and if a reasonable purchaser would make such an assumption, a matter of interpreting the disclosure documents, this is sufficient to overcome the registered title. The finding by the trial judge that the declarant "decided to skim off" the superintendent's suite prior to registration clearly engages the principle underlying the Frontenac and Newrey Holdings cases that a declarant cannot put its economic interests against those of the group.

Thus, unless the enactment of s. 52 demands a contrary result, I would require the respondents to convey Unit 108 to the appellant. I now turn to that issue.

The effect of s. 52 of the Condominium Act

The respondents rightly point out that Frontenac Condominium Corp. and Newrey Holdings Ltd. were decided before the statutory regime for disclosure as now contained in s. 52 of the Act was put in place. The respondents argue that if there has been a violation of the disclosure requirements mandated by s. 52, the purchaser or the condominium corporation is limited to the remedies provided in s. 52. In effect, the respondents argue that the pre-section 52 cases should no longer be followed. They submit that the legal principles underlying those decisions are somewhat obscure and that the subsequent enactment of s. 52 was in part intended to cure that uncertainty.

I agree with the respondents to this extent. The legislature obviously intended to provide greater protection to the consumer by imposing upon the declarant an obligation to make a minimum level of disclosure in clear and simple terms. In *Abdool v. Somerset Place Developments of Georgetown Ltd.*, supra, at p. 131 Robins J.A. described that purpose in these terms:

Although s. 24b [of the predecessor legislation] was intended to ensure that a purchaser was fully informed of the nature of condominium ownership before executing an agreement of purchase and sale, it seems that in practice the complexity of the condominium documents and the high-pressure sales techniques used by some developers often frustrated this objective. To remedy this situation, the study group recommended, inter alia, that purchasers be provided with a summary statement highlighting important aspects of the documents and be given a ten-day cooling off period, during which they could cancel the agreement, to review the documents.

(Emphasis added)

The contents of the summary statement referred to by Robins J.A. are provided for in s. 52(6) and are described in that subsection as the disclosure statement. Pursuant to s. 52(6)(b) the declaration "shall" contain and "fully and accurately" disclose, inter alia:

(b) a general description of the property or proposed property including the types and number of buildings, units and recreational and other amenities together with any conditions that apply to the provision of amenities;

In resolving several of the issues in *Abdool*, Robins J.A. emphasized the importance of clarity and simplicity. Purchasers should be able to understand in general terms what they are obtaining by entering into the agreement, without having to wade through the vast amount of material that declarants wish to or are required to provide to complete a legally binding agreement. In that regard, Robins J.A. referred at p. 146 to the statement by the Minister on October 17, 1978 when the new legislation including s. 52 was introduced:

This is an attempt to make a disclosure statement meaningful in the sense that there is no point dumping a Xerox copy on them [the purchasers] at that stage and say here's what you are getting . . . Here we're talking about the disclosure statement which says to them in practical lay terms "This is what you're getting". It's more akin to advertising or the holding out as to what they're getting.

(Underlining added) Thus, an aspect of the disclosure requirement is to assist in resolving disputes between the declarant and the owners and the corporation about which assets and common elements are intended to be included in the purchase price. Prior to inclusion of disclosure requirements in the Condominium Act those issues had to be resolved by resort to a review of the oral and written representations made by the declarant and its agents.

Section 52(2) also gives the consumer an additional and simple remedy in the form of rescission of the agreement prior to final closing. Section 52(5) provides a statutory remedy for damages resulting from improper disclosure. However, I see nothing in s. 52 to persuade me that the legislature, in an effort to provide greater protection to the consumer, intended to abrogate existing common-law rights. Put another way, I see no reason why the declarant should not be required to comply with the material representations it has made, merely because those representations have been reduced to writing in the statutorily mandated disclosure statement. In each case it will be a question of fact as to whether the superintendent's suite was intended to be part of the common elements. In *Peel Condominium Corp. No. 417 v. Tedley Homes Ltd.*, at p. 263, Robins J.A. held as follows:

It is also important to recognize that the Act does not require that guest and superintendent suites be part of the common elements of a condominium. Such suites are not part of the common elements unless there is factual evidence that this was intended to be the case.

(Emphasis added)

In support of this statement, Robins J.A. referred to *Frontenac Condominium Corp.* and to *Newrey Holdings Ltd.* without suggesting that he thought those decisions had been overtaken by s. 52. I am satisfied that these decisions have survived the enactment of s. 52 and that the remedies in that section are available in addition to the common law remedy.

I find further support for this view in the decision of Griffiths J. in *York Condominium Corp. No. 420 v. Deerhaven Properties Ltd.* (1982), 40 O.R. (2d) 106, 33 C.P.C. 65 (H.C.J.). This was another case where the condominium corporation claimed it was entitled to the superintendent's suite. In that case, the declarant argued that the corporation had no status to sue because of the wording of s. 14(2) of the Condominium Act, R.S.O. 1980, c. 84. Section 14(2) provides that the corporation may sue on its own behalf with respect to the common elements "notwithstanding that the corporation was not a party to the contract in respect of which the action is brought". This contrasted with the predecessor legislation that gave the corporation a broad right to bring "any action with respect to the common elements": Condominium Act, R.S.O. 1970, c. 77, s. 9(18). The declarant argued at p. 108 that since the action was not based on breach of contract but rather a "cause of action for recovery of title to and possession of the superintendent's suite" the corporation had no status.

Griffiths J. held, at p. 109, that s. 14(2) "as remedial legislation should not be rigidly or narrowly construed to the extent it confers on the condominium a right to sue" and that, reasonably interpreted, the subsection conferred on the corporation "an unlimited right to sue with respect to common elements, and further extending that right by providing that an action in contract may be maintained by the corporation even though it was not a party to the contract". He held that the obvious intention of the legislature was not to restrict the broad power to sue previously enjoyed by the corporation under the predecessor legislation but to extend those powers. I would adopt the same approach in this case. Section 52 has provided the corporation with an additional remedy for false statements in the statutorily mandated material. It has not, however, restricted the corporation's broad right to maintain an action under s. 14(2) for the common law remedy sought here.

The respondents make one further argument. They point out that there is a superintendent's office that could be converted into a dwelling unit. In my view, this is no answer to the appellant's claim. The trial judge found that one of the 108 original units was to be a superintendent's suite and that the declarant then skimmed off the unit originally intended for that purpose. If the trial judge had thought that the availability of the office was compliance with the representation made in the disclosure statement he would not have made the findings that he did. In view of the findings of fact by the trial judge I would not accede to this argument by the respondents.

The appropriate remedy

The appellant did not seek an amendment to the declaration pursuant to s. 3(8) of the Act and it would not appear that it has given the notice required by that provision. It would therefore not be appropriate to amend the declaration to provide that Unit 108 is one of the common elements. The remedy, in my view, is to simply order the respondents to convey the unit and its appurtenant parking space to the appellant to be held as an asset of the corporation in accordance with s. 13 of the Act.

DISPOSITION

Accordingly, I would allow the appeal, set aside the judgment below, and in its place order the respondents 600 Talbot Street London Limited and 509543 Ontario Limited to convey Unit 108 together with its appurtenant parking space to the appellant, free of all encumbrances, to be an asset of the appellant. The appellant is entitled to its costs of the appeal and of the proceedings before Flinn J. In view of this disposition there is no need to deal with the cross-appeal which I would dismiss without costs. I would dismiss the appeal with respect to Mrs. Blumas without costs.

Appeal allowed.

CBR# 343

Wellington Condominium Corporation No. 61 and Marilyn Drive Holdings Limited (Re)

37 O.R. (3d) 1

Docket No. C19870 Court of Appeal for Ontario Finlayson, Osborne and Rosenberg JJ.A. February 6, 1998

APPEAL from a judgment of Herold J. (1994), 20 O.R. (3d) 81, 41 R.P.R. (2d) 182 (Gen. Div.), dismissing an action by a condominium corporation for damages under s. 52(5) of the Condominium Act, R.S.O. 1990, c. C.26.

Gary M. Caplan, for appellant. Jennifer A. Greenwood, for respondent.

The judgment of the court was delivered by

ROSENBERG J.A.: -- This is one of two appeals heard by this court that raise issues concerning remedies for allegedly improper disclosure to purchasers of condominium units. In this case, and in *Middlesex Condominium Corp. No. 87 v. 600 Talbot Street London Ltd.* [37 O.R. (3d) 22], the dispute concerns ownership of a superintendent's suite. The reasons in the two appeals are being released contemporaneously. The principal issue in this appeal is the interpretation of s. 52 of the Condominium Act, R.S.O. 1990, c. C. 26. For the reasons that follow I would allow the appellant's claim in part for damages under s. 52.

THE FACTS

The appellant is a condominium corporation created on January 21, 1991 as a result of the registration by 24 Marilyn Drive (Guelph) Limited, the developer and declarant, of a declaration and description under the Condominium Act. The appellant was created to control, manage and administer the common elements and the assets of the condominium located at 24 Marilyn Drive in the City of Guelph. The property consists of a 10-storey, 56-unit apartment building. The respondent is the successor to the developer/declarant.

On September 27, 1988, the declarant issued a disclosure statement as required by s. 52 of the Act. Section 52(6) requires that the disclosure statement include inter alia a general description of the property, including "units and recreational and other amenities", a brief description of the proposed declaration, by-laws and rules governing the use of common elements, and a budget statement for the one-year period immediately following the registration of the declaration and the description. Section 52(7) prescribes the contents of the budget statement. The statement must include inter alia the common expenses, "any current or expected fees or charges to be paid by unit owners or any of them for use of the common elements", and any "expenses that the declarant pays and that might reasonably be expected to become, at any subsequent time, a common expense".

The dispute in this case concerns whether a superintendent's suite, particularly Unit 201, is part of the common elements of the condominium and, if not, whether the appellant is entitled to damages for improper disclosure. Neither the draft declaration nor the disclosure statement, including the proposed budget, make special reference to Unit 201. Thus, the draft declaration identifies Unit 201 as having a proportionate interest in the common elements and common expenses. The budget statement does not mention any special assessment that might be necessary to acquire or rent Unit 201 from the declarant. The description of the property does not specifically refer to a superintendent's suite or to Unit 201 being part of the common elements.

The only mention of a superintendent is in the budget statement. Under the heading "Service Contracts", provision is made in the budget for the supply of a telephone in the "lobby office and for the superintendent". The following item appears under the heading "Staff":

Maintenance Man/Janitor \$18,500

It is anticipated that one full time resident maintenance man/janitor will be hired for the condominium corporation. His duties will include the repair and maintenance of all mechanical systems in the building not covered by contract. He will also be responsible for the routine maintenance of other common area and finishings in the building.

(Emphasis added)

Article 11 of the draft declaration defines "common expenses" as the expenses of the performance of the objects and duties of the Corporation and includes those expenses set out in Schedule "E". Schedule "E" is headed "Common Expenses" and provides as follows:

All sums of money required by the Corporation for the acquisition or retention of real property for the use and enjoyment of the property, or for the acquisition, repair, maintenance or replacement of personal property for the use and enjoyment of the common elements.

(Emphasis added)

The proposed budget does not make any provision for rental of a suite for the resident superintendent nor is there any provision for the carrying costs of purchasing such a suite.

The condominium in question, 24 Marilyn Drive, was built for the declarant by Ray Ferraro. Mr. Ferraro had built several apartment complexes since 1979 and, in particular, he had also built 22 Marilyn Drive for this declarant. Although not a lawyer, Mr. Ferraro drafted the various condominium disclosure documents using precedents from other projects, especially from the 22 Marilyn Drive project. It was his understanding that the declarant intended to offer Unit 201 for sale to the appellant just as the developer had previously sold a unit to the condominium corporation at 22 Marilyn Drive for use as a superintendent's suite. If the appellant decided not to purchase Unit 201, the declarant planned to market the unit to the public.

Between the fall of 1988 and the summer of 1989 the declarant marketed and sold all of the units in the building, except for Unit 201. The declarant hired a full-time superintendent who lived in Unit 201 from February 1, 1989 until his resignation in November 1990. In November 1989, an informal association of resident purchasers was formed to represent their interests and

deal with the declarant. An interim board of directors or executive was elected by this association. This executive, however, had no legal status and no funding. All unit purchasers had taken possession of their units by September 28, 1990. In December 1990, the declarant published an amended disclosure statement. Its contents did not vary or amend the provisions touching upon the superintendent or Unit 201.

On January 21, 1991, the declaration and description were registered, whereupon the appellant came into existence and the declarant became the registered owner of all units in the building, including Unit 201. The first general meeting of the condominium corporation took place on February 2, 1991. The three persons present for the meeting were the declarant's proxies and were elected to be the first directors. On February 5, 1991 and shortly thereafter, title closings took place, resulting in the unit owners receiving deeds to their respective units from the declarant. On title closing, each purchaser received an estoppel certificate which provided that the current budget was accurate, the appellant had no knowledge of any circumstances that may result in an increase in the common expenses and that "the [appellant] is not presently considering any substantial addition, alteration or improvement to or renovation of the common elements or any substantial change in the assets of the corporation". At this time, of course, the appellant was still controlled by the declarant through its nominees on the board of directors.

In resolving the issue of ownership of Unit 201, the trial judge emphasized the conduct of the members of the executive. On November 19, 1990, the executive met with the condominium manager who indicated that the declarant was prepared to sell Unit 201 for \$125,000. The minutes of a further meeting of the executive in January 1991, show that there was a discussion about how the condominium corporation would accommodate a superintendent since Unit 201 was owned by the declarant. On April 8, 1991, the declarant wrote to the executive of the informal association asking if the Corporation (i.e., the appellant) would be interested in purchasing Unit 201. At this time, the executive still lacked formal legal status and, in fact, the declarant's own nominees were still in control of the appellant. The executive wrote back a week later indicating that the owners would be interested in acquiring the unit.

On May 7, 1991, the turnover meeting took place and the unit owners elected a board of directors from among their members, thus replacing the declarant's nominees. On May 16, 1991, the solicitor for the declarant wrote to the appellant asking if it wished to purchase Unit 201. The new board of directors wrote back indicating that the owners would be interested in acquiring the unit and asked for the terms the declarant would be willing to consider. On May 31, 1991, the declarant's solicitor replied indicating that the declarant was prepared to sell the unit for \$125,000 cash. It would later transpire that the declarant was prepared to negotiate the price and to consider a vendor-take-back mortgage. After the resignation of the superintendent hired by the declarant, the appellant hired a resident in the building to take on the duties of superintendent. This resident occupied a unit owned by a relative, not Unit 201. His services were terminated in July 1991 and, thereafter, the appellant has relied upon the services of part-time superintendents and contract cleaners.

On July 15, 1991 this action was commenced and a certificate of pending litigation was registered against the title to Unit 201. In the statement of claim, the appellant sought a declaration that it was the owner of Unit 201 and damages for negligent misstatement and breach of statutory duty arising from the alleged false, deceptive and misleading contents of, and omissions contained in, material statements or information required by the declarant to be provided to a purchaser of a unit by the declarant, contrary to s. 52 of the Condominium Act.

At the trial, several unit purchasers testified about the superintendent's suite. In summary, the purchasers testified that they believed or understood that the condominium would have a full-time resident superintendent. This understanding was based on the disclosure statement, the fact that the superintendent hired by the declarant occupied Unit 201, that Unit 201 was listed at the front entrance as the superintendent's suite, and certain representations made by sales representatives. Several purchasers testified about what they would have done had they known that the declarant contemplated selling the unit to the condominium corporation with the resulting increase in common expenses. They testified that it was important that there not be any hidden costs or special assessments since they were on tight budgets. I will return to this evidence when reviewing the findings of fact made by the trial judge.

THE FINDINGS OF FACT BY THE TRIAL JUDGE

The action was dismissed with costs by Herold J. His reasons are now reported at (1994), 20 O.R. (3d) 81, 41 R.P.R. (2d) 182 (Gen. Div.). Herold J. made findings of fact that are important in the resolution of the issues raised in this appeal. They may be summarized as follows:

- (i) Most, if not all, of the purchasers entered into the transaction on the understanding that there would be a full-time on-site resident superintendent.
- (ii) Although the association executive had no legal status until the turnover, it was representative of the unit purchasers and responsive to them and consulted from time to time with solicitors to obtain legal advice. At least by the January 9, 1991 meeting, the executive was aware that ownership of Unit 201 was an issue.
- (iii) The declarant also intended that there be a permanent live-in superintendent.
- (iv) None of the purchasers who testified stated that they intended that Unit 201 or a similar unit would belong to the appellant, at no cost to them. Rather they simply did not direct their minds to that issue.
- (v) The declarant never had the intention that Unit 201 be part of the common elements without any cost to the appellant or the unit purchasers. Further, it was doubtful that the purchasers had this intention.

THE ISSUES

The appellant raised two issues before Herold J. It argued that there was a common intention between the declarant and the unit purchasers that Unit 201 would be an asset of the appellant at no cost to the purchasers. The appellant relied upon the decisions of this court in *Frontenac Condominium Corp. No. 1 v. Joe Macciocchi & Sons Ltd.* (1975), 11 O.R. (2d) 649, 67 D.L.R. (3d) 199, and *York Condominium Corp. No. 167 v. Newrey Holdings Ltd.* (1981), 32 O.R. (2d) 458, 122 D.L.R. (3d) 280. The appellant therefore sought the remedy granted in those cases requiring the respondent to convey title in Unit 201 to the appellant.

In the alternative, the appellant sought damages pursuant to s. 52(5) of the Condominium Act. As I understand it, the appellant seeks damages sufficient to allow it to purchase either Unit 201 or another unit for use by a resident superintendent.

For the reasons that follow, I would dismiss the claim based on the common law cause of action. I would only allow in part the appellant's claim for damages, limiting the award to the carrying costs for purchase of a unit for use by the superintendent for the first year following registration.

ANALYSIS The Legislative Scheme

Although the resolution of this appeal revolves primarily around the interpretation of s. 52 of the Condominium Act, certain other provisions of the Act are important and I intend to briefly review some aspects of the legislative scheme. Some of the issues in this appeal concern the nature of the appellant's status as a condominium corporation and the nature of the common elements.

Section 3 of the Act sets out the mandatory and permitted contents of the declaration. Pursuant to s. 7 of the Act, the unit owners are tenants in common of the common elements and an undivided interest in the common elements is appurtenant to each unit. Under s. 10, the registration of a declaration and description of the project creates a condominium corporation without share capital "whose members are the owners from time to time". Pursuant to s. 12, the objects of the corporation are to manage the property and any assets of the corporation. The corporation has a duty to control, manage and administer the common elements and the assets of the condominium corporation. Section 13 provides that the owners share the assets of the corporation in the same proportions as the proportions of their common interests in accordance with the Act, the declaration and the by-laws.

Section 14 gives the corporation its power to sue for damages and sue with respect to the common elements. It is in the following terms:

14(1) The corporation after giving written notice to all owners and mortgagees may, on its own behalf and on behalf of any owner, sue for and recover damages and costs in respect of any damage to common elements, the assets of the corporation or individual units . . .

(2) The corporation after giving written notice to all owners and mortgagees may sue on its own behalf and on behalf of any owner with respect to the common elements and any units, even if the corporation was not a party to the contract in respect of which the action is brought . . .

(Emphasis added)

Section 52 is the section most directly at issue in this case. For this appeal, the important provisions of that section are the following:

52(1) An agreement of purchase and sale entered into after the 1st day of June, 1979 by a declarant or proposed declarant of a unit or proposed unit for residential purposes is not binding on the purchaser until the declarant or proposed declarant has delivered to the purchaser a copy of the current disclosure statement and all material amendments thereto.

(2) The purchaser, before receiving delivery of a deed to or transfer of the unit, may rescind the agreement of purchase and sale within ten days after receiving the disclosure statement or, where there has been a material amendment thereto, within ten days after receiving the material amendment.

(3) A person may rescind an agreement of purchase and sale under subsection (2) by giving written notice of the rescission to the declarant or proposed declarant or to the solicitor of the declarant or proposed declarant.

(5) Where any statement or material required under this Act to be provided by a declarant or proposed declarant to a purchaser of a unit or proposed unit for residential purposes contains any material statement or information that is false, deceptive or misleading or fails to contain any material statement or information, the corporation or any unit owner who relied on such statement or material is entitled, as against the declarant or the proposed declarant to damages for any loss sustained as a result of such reliance.

(6) The disclosure statement referred to in subsection (1) shall contain and fully and accurately disclose,

(b) a general description of the property or proposed property including the types and number of buildings, units and recreational and other amenities together with any conditions that apply to the provision of amenities;

.....

(d) a brief narrative description of the significant features of the existing or proposed declaration, by-laws and rules governing the use of common elements and units, and of any contracts or leases that may be subject to termination or expiration under section 39;

(e) a budget statement for the one year period immediately following the registration of the declaration and the description . . .

(7) The budget statement mentioned in clause (6)(e) shall set out,

(a) the common expenses;

(b) the proposed amount of each expense;

(c) particulars of the type, frequency and level of the services to be provided; (d) the projected monthly common expense contribution for each type of unit;

(h) any current or expected fees or charges to be paid by unit owners or any of them for the use of the common elements or part thereof and other facilities related to the property;

(i) any services not included in the budget that the declarant or proposed declarant provides, or expenses that the declarant or proposed declarant pays and that might reasonably be expected to become, at any subsequent time, a common expense and the projected common expense contribution attributable to each of those services or expenses for each type of unit;

(8) Where the total amount incurred for the common expenses provided for in the budget statement exceeds the total of the proposed amounts set out in the statement, for the period covered by the budget statement mentioned in clause (6)(e) the declarant shall forthwith pay to the corporation the amount of the excess except in respect of increased expenses attributable to the termination of an agreement under section 39.

Common Intention

The appellant's submissions with respect to common intention rely in part upon the decisions of this court in *Frontenac Condominium Corp. No. 1* and *Newrey Holdings Ltd.* In my reasons for judgment in *Middlesex Condominium Corp. No. 87 v. 600 Talbot Street London Ltd.* I have discussed those decisions and I need not repeat that discussion here.

In *Middlesex Condominium Corp. No. 87 v. 600 Talbot Street London Ltd.*, I held that the common law cause of action and remedy established in *Frontenac* and *Newrey Holdings* has survived the subsequent enactment of s. 52 of the Act. However, that cause of action depends upon a finding that the declarant intended that the purchasers believe the superintendent's suite was to be a common element and that a reasonable purchaser would assume that the superintendent's suite was a common element. In this case, Herold J. found, as a matter of fact, that it was not the common intention or understanding of the parties that the superintendent's suite would be a common element. While it would have been open to a trier of fact to reach another conclusion, that finding is supported by the evidence. As Robins J.A. wrote in *Peel Condominium Corp. No. 417 v. Tedley Homes Ltd.* (1997), 35 O.R. (3d) 257 at p. 263 (C.A.), in each case it will be a question of fact as to whether the superintendent's suite is part of the common elements:

It is also important to recognize that the Act does not require that guest and superintendent suites be part of the common elements of a condominium. Such suites are not part of the common elements unless there is factual evidence that this was intended to be the case . . .

(Emphasis added)

The trial judge was not prepared to find such an intention and I see no basis for overturning that finding. If the appellant in this case was entitled to a remedy it would have to be found in s. 52 of the Condominium Act. I turn to that issue now.

Section 52 of the Condominium Act

The Trial Judge's Reasons

I have set out s. 52 of the Act above. The appellant relies upon s. 52(5) to provide a remedy and submits that the trial judge erred in his interpretation of that provision. Section 52(5) provides as follows:

(5) Where any statement or material required under this Act to be provided by a declarant or proposed declarant to a purchaser of a unit or proposed unit for residential purposes contains any material statement or information that is false, deceptive or misleading or fails to contain any material statement or information, the corporation or any unit owner who relied on such statement or material is entitled, as against the declarant or the proposed declarant to damages for any loss sustained as a result of such reliance.

(Emphasis added) The trial judge found that there had been a material omission from the disclosure statement. He held that the possibility the appellant could acquire an asset worth \$125,000 was material and should have been disclosed.

The trial judge went on to consider whether the appellant had proved that "its members, the unit purchasers, relied on this omission in any way and whether as a result of this reliance they sustained damages in a proven amount or at all". The trial judge reviewed at length the evidence called by the appellant. Much of this evidence concerned the role of the executive of the informal association and their knowledge of the issue concerning the superintendent's suite prior to closing. The trial judge did not find that the executive could in any way bind the other unit purchasers or the corporation. He did find it significant, however, that although these purchasers were aware of the dispute they had not taken any steps to resolve the issue prior to closing their own units. The trial judge concluded that the appellant had not established the necessary element of reliance [p. 102]:

In all of the circumstances, I am simply unable to conclude or infer that the plaintiff or its members relied upon the fact that a superintendent's suite, whether suite 201 or otherwise, was to be a common element of the plaintiff or otherwise an asset owned by the plaintiff corporation free of charge.

Finally, the trial judge held that, in any event, the appellant had failed to prove either that it suffered any damages as a result of the material omission, or if it did, the amount of those damages.

The Section 52 Issues

The appellant's submissions raise three issues concerning the interpretation of s. 52(5) of the Act, namely:

- (1) What is the meaning of the term "material statement or information" in s. 52(5)?
- (2) Where the action is brought by the condominium corporation that was not a party to the agreements of purchase and sale, must it prove "reliance"?
- (3) What is the measure of damages for improper or inadequate disclosure?

Abdool v. Somerset Place Developments of Georgetown Ltd.

The leading decision on the interpretation of s. 52 of the Condominium Act is the decision of Robins J.A. in *Abdool v. Somerset Place Developments of Georgetown Ltd.* (1992), 10 O.R. (3d) 120, 96 D.L.R. (4th) 449 (C.A.). The issues in *Abdool* concerned the rescission remedy provided by s. 52(1) and (2). However, Robins J.A. also gave some consideration to s. 52(5) and the relationship between the damage remedy provided in that subsection and the rescission remedy. One of the issues in *Abdool* was whether a purchaser was entitled to rescind the agreement of purchase and sale after the ten-day cooling-off period provided for in

s. 52(2). It had been argued that once this period had expired, and provided it was not revived by delivery of a material amendment, the purchaser's sole remedy for alleged improper disclosure was damages under s. 52(5). Robins J.A. disagreed and held that if the disclosure statement does not comply with s. 52 in a material respect, it is not a disclosure statement within the meaning of s. 52(1) and the agreement of purchase and sale is not binding. It was within this context that Robins J.A. considered the damage remedy provided for in s. 52(5). In particular, at p. 135 he held that by giving unit owners a cause of action in damages without regard to whether they knew of the disclosure defects before closing, s. 52(5) "eliminates any question of merger on closing and provides purchasers with protection in addition to that provided by other subsections of s. 52".

Having held that an agreement of purchase and sale was not binding if the disclosure did not comply with s. 52, Robins J.A. went on to consider the type of defects that would render the agreement non-binding. In developing the appropriate test, he took into account the rights of both parties to the agreement. He noted, at p. 136, that while the purchaser is entitled to the information called for in the Act, after the ten-day cooling-off period the declarant is entitled to assume that it has a binding agreement and to order its affairs accordingly. In that context, to allow the purchaser to rescind is a drastic remedy and should require the purchaser to meet a relatively strict test. The purchaser was required to show that the disclosure statement was "defective in a material respect". He expanded on this test at pp. 138-39 as follows: If, as I have concluded, only material departures from these provisions warrant declaring an otherwise valid agreement non-binding, when is a defect to be considered material? To invoke a common dictionary meaning of "material", when is a defect so pertinent, germane or essential as to render a disclosure statement in contravention of the Act and entitle a purchaser to cancel a transaction?

I approach this question first by reference to the applicable burden of proof. In my opinion, when a purchaser who has had the opportunity afforded by the cooling off period to consider the disclosure statement and the accompanying documentation, and has decided to go through with the transaction, subsequently seeks to rescind from his or her otherwise binding agreement of purchase and sale on the basis of the deficiency of the disclosure statement, the onus is on the purchaser to show that the disclosure statement fails to satisfy the requirements of the Act to the degree that the agreement must be declared non-binding.

To discharge this onus and prove the materiality of the complaint, in my opinion, the purchaser is obliged to establish objectively that had the information that was not disclosed, or that was inaccurately or insufficiently disclosed, been properly disclosed in the disclosure statement at the time it was delivered to the purchaser, a reasonable purchaser would have regarded the information as sufficiently important to the decision to purchase that he or she would not likely have gone ahead with the transaction but would instead have rescinded the agreement before the expiration of the 10-day cooling off period.

(Emphasis added)

Robins J.A. also dealt with the related question of what constitutes a material amendment so as to revive the right of rescission under s. 52(2). At pp. 149-50, he adopted a similar test, having regard to the fact that the remedy is the same, namely, rescission of the agreement:

In the interests of consistency, I would determine the materiality of a change or amendment to the originally-delivered disclosure statement by reference to a test similar to that which I formulated earlier to determine the materiality of an alleged defect in a disclosure statement. Would a reasonable purchaser regard the change or amendment as sufficiently important to his or her decision to purchase that, had the disclosure statement contained the new or amended information at the time it was delivered, the purchaser would not likely have gone ahead with the transaction but would have rescinded the agreement within the 10-day period? If the answer to this question is in the affirmative, the developer is obliged to deliver an amendment to the disclosure statement and the purchaser has 10 days from the date of delivery within which to rescind.

Amendments that substantially change a purchaser's anticipated use and enjoyment of the unit or the amenities associated therewith or that adversely affect the value of the unit, are, I would think, clearly material amendments that revive the rescission period. A reasonable purchaser could objectively assert that he or she would not have proceeded with the deal had this information been available at the time of the original disclosure statement. However, given the lifestyle aspects of condominium living, there may well be situations in which the individual circumstances of a particular purchaser may render an amendment which is not material to other purchasers, and which indeed may be acceptable to other purchasers in a given project, none the less material to this purchaser. The extent to which subjective considerations may reasonably be asserted in determining the materiality of the new or amended information is not before the court in these appeals and need not be considered. Nor is it necessary to consider the applicability of the principles of waiver or estoppel when a purchaser seeks to rescind on the basis of an undelivered material amendment of which the purchaser has had actual knowledge.

(Emphasis added)

As is apparent, Robins J.A. was dealing with materiality solely for the purposes of invoking the rescission remedy after the initial ten-day cooling-off period had expired, and thus, after the declarant could reasonably assume that it had a binding agreement. The issue presented by this appeal is whether that same test applies within the context of s. 52(5) in considering the phrase "material statement or information" in that subsection. For the reasons that follow, I would hold that it does not.

Material statement or information under s. 52(5) of the Condominium Act

In view of the different remedies and the different wording of the subsections I would adopt a different test under s. 52(5) than the test set out in *Abdool*. In *Abdool*, Robins J.A. was concerned with a type of defect that would render an apparently binding agreement unenforceable. It is entirely appropriate in that context that the test of materiality be commensurate with the nature of the remedy. Where, however, the plaintiff does not seek to set aside the agreement but seeks only damages for the loss occasioned by the defective disclosure, a less rigorous test is appropriate. Further, in *Abdool*, the court was concerned with statutory language referring to a "material amendment". The language of s. 52(5) is broader and refers to "any material statement or information" and provides a remedy not only for false, deceptive or misleading disclosure, but disclosure that "fails to contain" any material statement or information.

Another reason for adopting a different test lies in the fact that s. 52(5) gives a remedy to the condominium corporation as well as the unit owner. In my view, by providing that the corporation is entitled to damages, the legislature must have envisaged that there could be a loss to the owners as a group, as represented by the corporation. This loss, while significant to the owners as a whole, might not be sufficiently material that any individual owner would have considered rescission.

There is a related reason for giving s. 52(5) a different meaning where the condominium corporation is the plaintiff. The corporation was not a party to the original agreement of purchase and sale. Indeed, it did not exist at that time. In those circumstances, it is difficult to apply a test of materiality premised on rescission of that agreement.

My approach to the interpretation of s. 52(5) is nevertheless similar to the approach of Robins J.A. in *Abdool*. The alleged false, deceptive or misleading statement or information or omission must have the quality about it that is commensurate with the remedy. At pp. 136-37 Robins J.A. expressed the concern that agreements should not be rendered unenforceable by "technical deficiencies or immaterial omissions in a disclosure statement". He pointed out that contracting parties owe one another "a duty to act reasonably and in good faith and to perform contracts honestly made" and that the consumer protection objects of the legislation must be balanced with the commercial realities of the condominium industry. As he said: "Consumer protection legislation intended, as this Act is, to promote fair dealing between contracting parties, ought not to be applied in a manner which produces the opposite result by allowing a party to resile from an otherwise valid agreement on grounds that are unfair, unreasonable or capricious."

In *Abdool*, Robins J.A. referred to the burden of proof in applying the test for materiality. He wrote that the onus was on the purchaser to show that the disclosure statement was so defective that the agreement must be declared non-binding. Taking a similar approach, but in the context of s. 52(5), the onus is on the corporation to show that the degree of deficiency in the disclosure is such that it has occasioned a loss or expense to the unit owners as a whole that can be measured in damages. Not every defect or omission will have this effect so as to warrant a remedy. Mere technical departures from the requirements of s. 52 will not suffice. On the other hand, to properly balance the "consumer protection and commercial realities of the condominium industry", to quote Robins J.A. in *Abdool*, supra, at p. 145, the approach must be a broad and flexible one, not a rigid or stringent one. Otherwise, a legitimate claim for damages would be defeated because the corporation could not demonstrate that any of the purchasers would have resorted to the drastic remedy of rescission.

In this case, the appellant's principal argument for damages related to the declarant's statements about, and omissions concerning, the superintendent's suite. Where there is a dispute about an asset such as a superintendent's suite, it seems to me that the proper approach is for the court to determine whether a reasonable purchaser would think that the asset was part of the purchase price. [See Note 1 at end of document] Further, consistent with the consumer protection aspect of this legislation, and the fact that it is the declarant who drafts the disclosure statement, it is reasonable to interpret any ambiguity in the disclosure statement against the declarant.

While Herold J. did not expressly deal with this question, it seems to me that his findings concerning the common law remedy based upon common intention are consistent only with the conclusion that a reasonable purchaser would not have considered that a superintendent's suite was included in the purchase price or that the corporation was to have the suite at no cost. In any event, in view of his findings of fact I cannot find that a reasonable purchaser would think, based on the representations in the disclosure documents, that a superintendent's suite was to be an asset of the corporation without any cost to the purchasers.

Further, in my view, Herold J. erred in finding a material omission because the declarant did not disclose the possibility it would sell the unit to the corporation. He held as follows [at p. 95]:

In my view, the possibility that the condominium corporation could acquire from the developer an asset at its fair market value of approximately \$125,000, and the costs associated with such an acquisition are material and the possibility at least that the corporation might incur such expenses are something that a reasonable purchaser would have wanted to see in the disclosure documents. That is, they are in my view material.

(Emphasis added)

The finding that the declarant's failure to disclose the possibility that it would sell the suite for approximately \$125,000 implies that the Condominium Act mandates such disclosure. In my view, this imposes far too onerous an obligation on the declarant and is not a duty imposed by the statute. As Robins J.A. pointed out in *Tedley Homes Inc.*, supra, at p. 263, as presently drafted the Condominium Act provides that the declaration must contain the items specified in s. 3(1) and may contain the items set out in "the broadly permissive provisions of s. 3(3)". Pursuant to s. 3(3)(b) the declaration may contain provisions "respecting the occupation and use of the . . . common elements". However, there is no requirement that the declaration state whether or not a superintendent's suite is intended to be a common element and s. 52(6) does not require any such statement in the disclosure statement.

In *Tedley Homes Inc.*, Robins J.A. stated that whether certain amenities should be included in the common elements is a matter of policy for the legislature, not the judiciary. Similarly, whether or not the declarant should be required to expressly state whether a superintendent's suite is part of the common elements and, if not, whether such a suite will be made available for purchase by the corporation must also be a matter for the legislature. In the absence of a statutory requirement of that nature I fail to see why, as was held by the trial judge in this case, the declarant should have disclosed the mere "possibility" that the corporation "might incur" the expense of purchasing a superintendent's suite at a cost of approximately \$125,000, depending upon the wishes of the owners' board of directors.

However, the trial judge's findings do disclose a false, deceptive or misleading statement or information or omission of a material statement or information within the meaning of s. 52(5) with respect to the budget statement for the one-year period immediately following registration as required by s. 52(6)(e). The contents of that statement are mandated by s. 52(7). For convenience, I shall repeat cls. (d), (h) and (i) of s. 52(7):

52(7) The budget statement mentioned in clause (6)(e) shall set out,

(d) the projected monthly common expense contribution for each type of unit;

(h) any current or expected fees or charges to be paid by unit owners or any of them for the use of the common elements or part thereof and other facilities related to the property;

(i) any services not included in the budget that the declarant or proposed declarant provides, or expenses that the declarant or proposed declarant pays and that might reasonably be expected to become, at any subsequent time, a common expense and the projected common expense contribution attributable to each of those services or expenses for each type of unit . . .

(Emphasis added)

Thus, these clauses refer to "expected" fees and expenses that the unit owners may incur. In view of the information in the budget statement provided to the purchasers that it was "anticipated that one full-time resident maintenance man/ janitor" would be hired, expenses for housing that person could reasonably be expected to become a common expense. Accordingly, the first-year costs to the purchasers of providing that accommodation should have been disclosed. The failure to make this disclosure could reasonably be expected to involve the purchasers in expenses that can be quantified in damages. I reach this conclusion primarily on the basis of the finding of fact by the trial judge that "there can be no doubt that both the developer and the unit purchasers always intended that the building would have a permanent live-in superintendent".

Accordingly, just as the declarant properly showed projected expenses relating to the salary and telephone for the superintendent, it should also have set out the expenses associated with providing accommodation for the "resident" or "permanent live-in" superintendent. This additional expense could be calculated on the basis of the costs associated either with renting a unit for the year following registration or the carrying charges for the year if Unit 201 or some other unit were purchased. Since I have found that the budget statement failed to contain a material statement or information, I turn to the question of reliance.

Reliance Where the Action for Damages is Brought by the Corporation

Although he found that there had been a material omission, the trial judge held that the appellant failed to prove reliance. The trial judge placed considerable emphasis upon the fact that none of the executive members who knew about the problem with Unit 201 elected to resolve the issue or attempted to rescind their agreements prior to closing. Accordingly, he found that the unit owners did not rely upon the material omission. In my view, the trial judge erred. His approach was more suitable to a case where an individual owner seeks rescission prior to closing or seeks damages after closing for the loss that he or she has personally suffered. It is not an approach that I find helpful where the action is brought by the corporation on behalf of the owners as a whole.

Section 52(5) includes both objective and subjective elements. Where a unit owner alleges that he or she has personally suffered damages as a result of the improper disclosure, it would seem that the owner must show actual reliance upon the improper disclosure. The issue of reliance where, as here, it is alleged that the damage has been sustained by the unit owners as a whole as represented by the corporation is more difficult. I cannot accept that the legislature intended that the corporation in an action under s. 52(5) must adduce evidence from each of the unit owners that they relied upon the omission. I also find it difficult to accept that the measure of damages would be different depending on the number of owners the corporation was able to show did rely upon the inadequate disclosure.

Such an interpretation would also be inconsistent with other parts of the legislative scheme. The primary responsibility of the corporation is to manage the assets. It also has a duty to control and administer the common elements and the assets and has the power to own and acquire real property for the use and enjoyment "of the property" (s. 13(1)). Most importantly, s. 14(2) of the Act provides that the corporation may sue on its own behalf with respect to the common elements "even if the corporation was not a party to the contract in respect of which the action is brought". These provisions manifest a legislative intention that the corporation be entitled to recover damages where the real injury is to the owners as a group rather than to any individual.

Further, in s. 52(5), the legislature has given the corporation the power to recover damages for false statements that were not made to it and upon which it therefore could not have relied. I cannot accept that the legislature nevertheless intended that the corporation prove it actually relied upon those statements. In my view, actual reliance need only be proved where the unit owner brings an action for damages.

A much more reasonable approach to reliance in the context of the condominium corporation would require the corporation merely to demonstrate that it cannot reasonably carry out its duty to control, manage and administer the common elements and the assets of the corporation (s. 12(2)) and to manage the property (s. 12(1)) without incurring the expense occasioned by the false, deceptive or misleading statement or information or the expense that should have been disclosed in the disclosure statement. Dealing particularly with the first-year budget statement, it is clear to me that the legislature has manifested an intention that purchasers know with a relatively high degree of certainty the expenses they are likely to incur within the first year. This intention is exhibited not only in the provisions of s. 52(7) set out above, but in the provisions of s. 52(8). That subsection requires, with an exception not relevant to this case, that the declarant "shall forthwith pay" the total amount incurred for the common expenses provided for in the budget statement that exceeds the total of the proposed amounts set out in the statement for the one-year period immediately following registration.

In my view, the appellant has demonstrated the requisite degree of reliance. On the evidence, all of the parties envisaged it reasonable for there to be a resident superintendent so that the corporation could properly manage the common elements, the assets of the corporation and the property. The trial judge seems to have been of the same view. As pointed out above, he found that "there can be no doubt that both the developer and the unit purchasers always intended that the building would have a permanent live-in superintendent". However, because of the inadequate disclosure by the declarant no provision was made in the budget for housing this superintendent. The remaining issue concerns the question of damages.

Damages

Although he found that there was no reliance and therefore the appellant was not entitled to succeed in its damage claim, the trial judge did go on to consider the issue of damages. The evidence adduced by the appellant was that a resident superintendent, in a comparable building, who was given rent-free accommodation, was paid approximately \$18,000 to \$19,500. There was other evidence from the respondent's witness that a superintendent's services in a smaller building could be obtained for \$16,500, even though the superintendent had to rent his own unit in the building from a private owner. Finally, there was the evidence of the experience of the tenant/superintendent who was paid \$1,500 per month and who lived in a suite provided by a relative. Based on this evidence, the trial judge concluded as follows [at p. 103]:

... I am unable to conclude that the plaintiff would be paying a live-in superintendent any more than the \$18,500 provided for in the budget and it is entirely conceivable that if they were able to offer free accommodation that the appropriate salary would be substantially less. The plaintiff was not prepared to concede that if in fact the budgeted amount of \$18,500 was too high the amount by which it exceeds the actual salary paid to a live-in superintendent with free rent should be credited against the costs of carrying the acquired unit in assessing what damages if any have been sustained but I am unable to agree with its position in this

regard. As stated earlier, the plaintiff must prove its damages and I must conclude that neither the fact of, nor the amount of any such damages have been proven on the balance of probabilities.

(Emphasis added)

Notwithstanding his error as to the nature of the material omission, in my view, the trial judge properly focused on the additional expense to the corporation as a result of the omission. The impediment to proof of damages, according to the trial judge, was that it was possible the appellant could find a superintendent who would work for less than the \$18,500 projected in the budget statement, if free accommodation were provided. The difference might or might not be sufficient to carry the purchase of or rental of a unit, but it was for the appellant to prove that it had suffered damages.

Notwithstanding the deference due to findings of fact by the trial judge, in my view, the finding that the \$18,500 estimate included by the declarant in the first-year operating budget would cover anything other than salary is not supported by the evidence. The evidence of the respondent's own witness, Mr. Ferraro, who prepared the budget, was that the \$18,500 was for salary and did not include any allowance for rent. Ms. Rutch, the former condominium manager, testified that the salary paid to the superintendent at the somewhat larger sister building at 22 Marilyn Drive was \$19,500 and that he lived rent-free. In my view, there is no basis for assuming that any portion of the \$18,500 estimate in the budget would be sufficient to carry the purchase of or rental of a superintendent's unit for a year. The only evidence to the contrary concerned the salary apparently paid to the superintendent in a smaller building. That evidence was simply too vague and uncertain to undermine the weight of the evidence that was all the other way.

In my view, the appellant proved that it suffered damages within the meaning of s. 52(5) as a result of the improper disclosure. The quantification of those damages is somewhat problematic. So far as I can tell from the record, the parties did not expressly address the issue of the carrying costs or rent of a unit for the superintendent. However, the trial judge accepted that the market value of Unit 201 was approximately \$125,000. Accordingly, I would order that the respondent pay damages to the appellant calculated as the one-year carrying charges on the purchase of a unit assuming the purchase price to be \$125,000 and the date of purchase to be January 21, 1991. I expect that counsel will be able to agree on this amount. However, if counsel are unable to agree I would direct a reference to the Master at Toronto to calculate that amount.

DISPOSITION

Accordingly, I would allow the appeal, set aside the judgment at trial and grant judgment to the appellant for damages pursuant to s. 52(5) of the Condominium Act calculated in accordance with para. 58 [see preceding paragraph]. The appellant is entitled to pre-judgment interest on this amount from January 21, 1992 to the date of the trial judgment at the average rate over the relevant period as provided for in the Courts of Justice Act, R.S.O. 1990, c. C.43. Finally, notwithstanding its relatively modest success on this appeal, in my view the appellant is entitled to its costs of the appeal and of the trial before Herold J.

Order accordingly.

CBR# 105

Dinicola et al. v. Huang & Danczkay Properties

29 O.R. (3d) 161

Court File No. 51543/90 Ontario Court (General Division), Beaulieu J., May 16, 1996

Condominium Corp. No. 167 v. Newrey Holdings Ltd. (1981), 32 O.R. (2d) 458, 122 D.L.R. (3d) 280, 14 R.P.R. 62 (C.A.)

ACTION for breach of contract for the sale of units in a condominium project.

Harold W. Sterling and Robert W. Kerkmann, for plaintiffs. W. Ross Murray, Q.C., Rudy V. Buller and Wendy Earle, for defendants.

BEAULIEU J.: --

INTRODUCTION

In 1987, the plaintiffs entered into agreements (the "agreements") to purchase condominium units from the vendor, Quay West. Some of the plaintiffs also purchased parking units. The condominium units were to be located in three buildings to be constructed on Toronto's waterfront, just west of Harbourfront, at 2-50 Stadium Road (the "site"). In the end, Quay West did not construct any of the units and none of the agreements were completed. The plaintiffs bring this action for damages for breach of contract and breach of trust. There are 136 individually named plaintiffs (collectively referred to as the "plaintiffs") who, in total, executed 111 agreements. Some of the plaintiffs were co-purchasers of units and some plaintiffs purchased more than one unit. Four plaintiffs were added at trial by consent order. They had co-purchased units with existing plaintiffs and were brought in as necessary parties to the actions of those existing plaintiffs.

The defendant, Huang & Danczkay Properties ("Properties"), is a partnership which was established on January 1, 1989. The limited partners then included: Huang & Danczkay Limited, Huang & Danczkay International Inc., Mihi Holdings Limited and Machineel Investments Limited. All are controlled by Michael Huang and/or Bela Danczkay (Huang & Danczkay). On June 13, 1989, 164767 Canada Inc. ("164767") joined the partnership as another limited partner. This company is part of the "Claridge" group of companies. Properties, as well as the five corporate partners, admit that it is liable to the plaintiffs if Quay West is found liable in this action.

The site was purchased by Huang & Danczkay Limited from the Toronto Harbour Commission ("THC") by agreement dated May 30, 1986. The sale closed on June 9, 1988. Huang & Danczkay Limited directed THC to transfer title to Quay West. As a result, Quay West acquired legal title to the property and was the beneficial owner. Quay West was a limited partnership established on January 28, 1987. It had different limited and general partners from time to time although it was controlled by one or both of Michael Huang or Bela Danczkay.

The establishment of Properties was part of a larger joint venture between Huang & Danczkay and Claridge involving Terminal 3 at Pearson International Airport. In the fall of 1988, an agreement was reached between Huang & Danczkay and Claridge whereby Properties was formed. The partners controlled by Huang & Danczkay were to transfer into Properties various real estate holdings and 164767 was to contribute money. The site was one of the real estate holdings to be transferred to Properties. On March 1, 1989, legal title to the site was transferred to 808868 Ontario Limited as a bare trustee for the beneficial owner, Quay West. This transfer was part of the process of transferring the site from Quay West to Properties pursuant to the deal reached in the fall of 1988.

In June of 1989, beneficial ownership of the site was transferred from Quay West to Properties through a series of transactions. Quay West was dissolved on June 8, 1989.

OVERVIEW

At the outset, I wish to make a few comments concerning this trial. The trial extended over 48 days, approximately four months based on the availability of the court, counsel and witness. In my view, the trial could have been shorter but for the "litigation warfare" mindset prevalent throughout the proceedings. To illustrate, as the trial began, the defendant adamantly insisted on the plaintiffs having to prove each and every single agreement of purchase and sale despite admissions at the examinations for discovery and in the pleadings.

Another example concerned the issue of solicitor-client privilege. One of the defendant's lawyers, who acted on the municipal law matters including the appeals to the Ontario Municipal Board and the Divisional Court, was called as a witness at trial. Despite insistence on the examination for discovery that solicitor-client privilege existed, this privilege was waived while this lawyer was in the middle of direct examination after being challenged on certain non-discovered testimony.

A witness was also called by the defendant who had been recognized by them as having been too close to provide an expert's report. However, the defendant proceeded to give lengthy argument and seek a ruling that the witness could nonetheless give his opinion as a non-expert lay person.

There were 342 exhibits filed and 14 witnesses called. The plaintiffs provided 178 pages of original written submissions and 160 pages of reply. The defendants provided two volumes, some 245 pages, of written submissions. In addition, the plaintiffs provided a brief of authorities to the court, which contained a supplement as well, with 33 authorities. The defendants provided four volumes citing 57 authorities.

BACKGROUND FACTS

It is useful in a case of this magnitude to set out a chronology of events. The relevant events are as follows:

Chronology of Events History Prior to the Execution of Agreements

1983-1984 -- The City of Toronto (the "City") proposed to designate the Site, then owned by the Toronto Harbour Commission (the "THC"), for low density quasi-public uses up to a maximum of .25 times the area of the lot. THC objected and retained consultants to arrive at a plan that met the goals of THC, the Yacht Club and the City Planning Staff. The final recommendations adopted by City Council on July 16, 1984 recommended a density for the site of .25 times the area of the lot as of right; however, it provided that if City Council was satisfied with respect to certain matters, including water views from public streets and pedestrian access to the water's edge, then by-laws would be passed by City Council permitting a density of three times the area of the lot.

September, 1985 -- On September 9, 1985, By-law No. 672-85 was enacted which permitted a density of three times the area of the lot and a height of 45 metres. "Design Guidelines" were adopted for the site to be used to evaluate any subsequent applications submitted pursuant to s. 40 of the Planning Act.

October, 1985 -- THC issued a proposal call for the purchase of the Site subject to certain agreements with the City respecting East Breakwall Promenade, North Breakwall Promenade, walkways, and the requirement for Wind Study.

October, 1985-May, 1986 -- Huang & Danczkay put in a bid on the site (\$16,160,000) and was selected as the highest bidder.

May, 1986 -- Huang & Danczkay and THC entered into an Agreement of Purchase and Sale for the Site. The closing date was set for April 1, 1988. The agreement contained the following conditions and covenants:

(a) Huang & Danczkay purchase the property subject to By-law No. 672-85 and the Design Guidelines;

(b) Huang & Danczkay agree to assume the obligations of the THC to the City with respect to the promenades and the dockwall;

(c) Huang & Danczkay cannot apply for a building permit until the THC has received a favourable report from an architectural advisor, who will review the proposed development at various stages throughout the design process and prepare reports on design issues; and

(d) the Agreement is conditional on there being, before the closing date, no materially adverse amendments, or recommendations to amend, By-law No. 672-85.

June, 1986-December, 1986 -- Jerome Markson Architects was hired by Huang & Danczkay, as well as a number of other consultants to produce a site plan for development and get it approved by the City. Mr. Markson and his team reviewed the appropriate by-law and design guidelines and began the process of meeting with City planning staff. There was enough support for Mr. Markson's design to put in a formal application for site plan approval.

December 29, 1986 -- Huang & Danczkay put in an application for site plan approval (also known as "development review" approval or "Section 40" approval). The application listed four possible variances including one asking that the enclosed balconies (7100 square metres) not be counted towards gross floor area. The design at this stage comprised 807 condominium units and 870 parking spaces. The design contained three public promenades. These are the promenades with respect to which Quay West had agreed to assume the obligations of the THC.

Although permission to exclude the enclosed balconies from gross floor area was not uncommon, Huang & Danczkay and Mr. Markson had a fall-back scheme to keep the same design but eliminate a number of storeys from two of the buildings. The four buildings would then accommodate between 720 and 730 condominium units.

January-February, 1987 -- After several meetings with City planning staff, major revisions to the site plan were requested. On February 20, 1987, the Department of Public Works released a report requesting revisions to the site plan with respect to servicing and access. Huang & Danczkay complied with these requests. At this time, an interpretation was requested from the Director, Plan Examination Division, that enclosed balconies not be considered as gross floor area. February 26, 1987 -- The City advised Huang & Danczkay by letter that the enclosed balconies would count as gross floor area.

March 16, 1987 -- At a meeting with the Director of Urban Design, Planning Department, a site plan dated March 2, 1987 was presented. This site plan had been revised already to respond to earlier comments. A number of other elements were recommended and Huang & Danczkay agreed to the suggested revisions.

April 7, 1987 -- Meeting with Mr. Varden, Department of Public Works, who had several comments with respect to the then-existing site plan. Huang & Danczkay agreed to comply with these comments.

Agreements of Purchase of Sale with Respect to Units in the Proposed Condominium

April 7, 1987 -- Huang & Danczkay commenced sales of the project. The documentation was based on the initial project, however, only 721 of the 807 units were offered for sale pending the resolution of the gross floor area issue. The sales office was opened in April, 1987 with sales occurring from April 18 until February, 1988. The majority of sales were made in April, May and June of 1987.

The intended purchaser was given a form of agreement of purchase and sale. The form constituted an offer to be executed by the purchaser and then executed by Quay West. A copy of the accepted offer was then mailed to the purchaser. The terms of the agreements varied with respect to certain particulars but generally were in the same form.

From Execution to Approval for Minor Variances

April, 1987 -- The Federal Government began a review of the Harbourfront area and asked Harbourfront to continue the voluntary suspension of development initiated by the City and the developers in January, 1987. There was no concern that the Site was going to be affected by the freeze as it was outside the Harbourfront area defined by the Federal Government.

May, 1987 -- Some design changes were recommended and were being incorporated by developers.

June 4, 1987 -- Application to Committee of Adjustment for four variances relating to the project. Variance number 2 was a request to increase gross floor area by 7,184 square metres representing the area of the enclosed balconies in the site plan application.

June 15 and 19, 1987 -- City Council rejected Alderman Martin's motion for an Interim Control by-law which would have included the west side of Site and, therefore, the Quay West Project.

July 16, 1987 -- Department of Public Works reported to the Commissioner of Planning and Development and indicated that there was basic satisfaction with the project and contemplated its approval subject to various conditions.

September 28, 1987 -- Senior City Planner released report on the variances. The Report opposed the variance seeking a 12.5% increase in gross floor area representing the area of the enclosed balconies in the Initial Project but supported other variances. September 28, 1987-November 2, 1987 -- Huang & Danczkay and City Planning Staff entered into negotiations for a revised proposal.

November 9, 1987 -- Huang & Danczkay put in a revised application for variances reducing the request for additional density from 12.5% to 4.5%.

November 17, 1987 -- On behalf of the Planning and Development Department, the Senior City Planner released a report supporting all of the variances requested by Huang & Danczkay including the 4.5% density increase.

November 30, 1987 -- City Council indicated its opposition to the variances being requested which would result in increased height and/or density at the Site.

December 1, 1987 -- Given City Council's position on the variances, Huang & Danczkay withdrew variance number 2 in their application which was the one relating to total floor area.

From Approval of Minor Variances to City Council Refusal of Site Plan Recommended for Approval by the Land Use Committee

December 8, 1987 -- Huang & Danczkay submitted revised plans based on the fall-back position reducing the number of units from 807 to 730.

December 9, 1987 -- Given the withdrawal of variance number 2 relating to gross floor area, the Committee of Adjustment approved all of Huang & Danczkay's requests for variances. The City representatives requested certain changes to the plans.

February 22, 1988 -- City Council passed By-law No. 209-88 which was an Interim Control By-law freezing development in the Harbourfront area.

February 29, 1988 -- The City of Toronto imposed three new requirements relating to the public walkways. During the months of March and April, 1988, lengthy negotiations took place between City staff, the THC and Quay West to reach an agreement incorporating the new requirements relating to the walkways. April 18, 1988 -- The City Solicitor recommended to City Council that the new form of agreement relating to walkways be approved by City Council. City Council adopted the report.

May 10, 1988 -- Confirmation from Department of Buildings and Inspections that the project conformed to zoning was received.

June 9, 1988 -- The land transaction between Quay West and the THC closed and numerous documents were registered.

June 17, 1988 -- City Council passed By-law No. 527-88 which is the Official Plan Amendment No. 463 relating to The Central Waterfront. In this by-law, specific policies are set out for the Site to permit buildings containing commercial, residential and recreational uses, with a density of up to three times the area of the lot.

June 30, 1988 -- A report from the Planning and Development Department recommended approval of the plans submitted for the Section 40 Agreement. The report set out the approval of other departments (e.g., Buildings and Inspections, Public Works, etc.).

July 27, 1988 -- The Executive Committee of Council approved and adopted Planning and Development Department's review report dated June 30, 1988.

September 16, 1988 -- The Department of Planning and Development released a report approving design modifications to the proposed dockwall.

September 23, 1988 -- City Council referred the matter to the Land Use Committee for the hearing.

October 5, 1988 -- Land Use Committee adopted recommendations of the Commissioner of Planning Development that the project be approved and the Section 40 Agreement be entered into. Alderman Martin's motions for deferral of the decision and for an extension of the Harbourfront Interim Control By-law to the Site were defeated.

October 17, 1988 -- City Council refused Quay West application.

From Refusal of October 17, 1988 to Freeze by Interim Control By-law

October 26-27, 1988 -- It was recommended by Huang & Danczkay's solicitors that City Council's refusal be appealed to the Ontario Municipal Board ("OMB") and the appeal was launched. An early hearing date was received for November 28 and 29, 1988.

October-November, 1988 -- Discussions took place with the Department of Buildings and Inspections with respect to the building permit.

November 28-30, 1988 -- At the commencement of the OMB hearing, the City requested an adjournment. The OMB heard Quay West's case and then granted the City an adjournment until December 19, 1988.

December 12, 1988 -- At a special meeting of City Council held without notice to Huang & Danczkay, the City of Toronto passed Interim Control By-law No.62-89, which amended existing Interim Control By-law No. 64-88 and others, to freeze development on the Site. From Passage of Interim Control By-law to Downzoning

December 19, 1988 -- The OMB hearing resumed and the City requested a further adjournment. It was also argued by the City that Interim Control By-law No. 62-89, passed on December 12, 1988, prevented the Board from continuing with the development approval process under Section 40 of the Planning Act. The Board rejected this argument and refused the further adjournment.

Huang and Danczkay's solicitors delivered a notice of appeal of By-law No. 62-89 to the OMB.

December 20, 1988 -- The OMB rendered its decision and stated the following:

The Board is thus left in the position of having:

1. Persuasive evidence of the appellant/applicant's own witnesses as to the propriety of this development on the subject site within Section 40 criteria and the City's Design Guidelines;
2. The report of the City's Commissioner of Planning, dated June 30, 1988, reviewed, accepted and recommended by the City's Executive Committee on July 27, 1988 and the City's Land Use Committee, made up of 11 of its 22 Councillors plus the Mayor, and reconfirmed September 9 and on October 5, 1988;
3. No contrary evidence or opinion as to the non-compliance with the requirements of Section 40, save only as to the "legal issue dealt with in the previous motion for adjournment and the reasons for its refusal".

Accordingly, the Board finds the proposal deserving of approval and hereby approves the plans and drawings as submitted by the applicant/appellants . . .

December 30, 1988 -- A motion for leave to appeal the OMB's refusal to grant the City a further adjournment on December 19, 1988 was filed on behalf of the City.

January, 1989 -- Discussions took place regarding the building permit. January 30, 1989 -- City of Toronto, Department of Buildings and Inspections indicated that the building permit would not be approved for the following reasons:

1. The passage of the Interim Control By-law on December 12, 1988.
2. The fact that the final approval of the development review application was still outstanding; and
3. That the Department had not yet completed its review of the revised plans received on January 19, 1989.

February 1, 1989 -- Huang and Danczkay's solicitors wrote seeking instructions to proceed with four routes of appeal:

1. an application to compel filing of the record re the Interim Control By-law at the OMB;
2. an appeal re the building permit;
3. an application to quash the Interim Control By-law; 4. an application to dismiss the City's application for leave to appeal the refusal to grant a further adjournment.

February 3, 1989 -- On behalf of Quay West, a Notice of Application was issued to compel the City of Toronto to forward their appeal of Interim Control By-law No. 62-89 to the OMB.

February 14, 1989 -- The City of Toronto requested the OMB to combine Quay West's appeal of the Interim Control By-law with the appeals of the General Interim Control By-law affecting the Harbourfront area.

February-March, 1989 -- Discussions re building permit.

March 6, 1989 -- Director of Architecture and Urban Design at the Planning and Development Department released a report supporting the inclusion of the Site in the Harbourfront Interim Control By-law.

March 7, 1989 -- Divisional Court heard the City's motion for leave to appeal the refusal to grant them an adjournment on December 19, 1988. Leave to appeal was granted.

March 28, 1989 -- Eight items of litigation activity were taking place or pending:

1. The OMB Section 40 referral of the site plan;
2. The City's leave to appeal the decision to refuse a further adjournment in December, 1988;
3. The appeal of the December 12, 1988 Interim Control By-law;
4. The application to force the City to issue a building permit;
5. The application to quash the Interim Control By-law;
6. The motion to the OMB for directions on the hearing of the Interim Control By-law appeals and whether the Site will get a separate hearing;
7. The hearing before the OMB on the merits of the Interim Control By-law; and

8. An application to the OMB to vary its cost award of December 22, 1988 (no costs awarded to Quay West).

April 10, 1989 -- Second report released by the Director of Architecture and Urban Design. He attached his own site plan which represented a major redesign of the project.

April 19 and 20, 1989 -- The City's appeal of the OMB December 19, 1988 decision was argued before Divisional Court as well as Huang & Danczkay's applications to quash Interim Control By-law No. 62-89 and force the City to issue a permit. The City's appeal and both applications were dismissed, leaving the freeze on development over the property in place. The Court was not satisfied that City Council had acted in bad faith or for an improper purpose in enacting the Interim Control By-law.

May 10, 1989 -- The City Planning and Development Department released a report on the Site which proposed principles for a draft new by-law. The Land Use Committee adopted the report. The report specifically indicated that its principles were illustrated by the site plan attached to the report of the Director of Architecture and Urban Design.

May 11, 1989 -- On behalf of Huang & Danczkay, a motion was brought for leave to appeal the decision of the Divisional Court dismissing their application to quash By-law No. 62-89 and refusal to require the City to issue a building permit.

June 2, 1989 -- Public notice was issued relating to the Land Use Committee meeting to be held on July 5, 1989 to consider a proposed official plan amendment and zoning by-law in respect of the Site. Both the proposed by-law and official plan amendment reduced the permissible density of the site to 2.15 times coverage and the maximum permissible height on the site was proposed to be reduced to 25 metres.

June 8, 1989 -- Huang & Danczkay sent a letter to all purchasers setting out the planning history and indicating that, although they were still trying, they were pessimistic that the project would be allowed to continue.

-- Report of the City Planning and Development Department discussing the draft by-laws necessary to implement the principles set out in the May 10, 1989 report.

July 4, 1989 -- Report from City Solicitor containing drafts of by-laws amending the official plan for the Site and down-zoning the property in accordance with the previous reports.

July 5, 1989 -- Land Use Committee meeting. At the end of the meeting, the Committee recommended City Council's adoption of the down-zoning by-law and Official Plan Amendment. In addition, the Committee directed its Chairman, Councillor Nowlan, to write to Huang & Danczkay advising them to respond to Councillor Nowlan as to their willingness to provide a guarantee that they would be willing to sell the condominiums to the original purchasers should the development be approved and that the purchasers be allowed to purchase their unit at the original price inflated to the current 1989 dollar value.

July 6, 1989 -- Huang & Danczkay's solicitors prepared a draft response to Councillor Nowlan's letter, however, Huang & Danczkay considered it to be too long and did not go in the right direction. July 7, 1989 -- Huang & Danczkay draft their own response to Councillor Nowlan's letter indicating that the request for information and guarantee is inappropriate.

-- City Council adopted the recommendations of the Land Use Committee and passed By-law No. 474-89 which down-zoned the Site to 2.15 times the area of the land, By-law 475-89 which removed the Site from the Interim Control By-law, and By-law No. 473-89 which adopted the Official Plan Amendment down-designating the property to 2.15 times coverage with a 26.5 metre height limit across the site.

-- Huang & Danczkay released a statement to the press which indicated that there was no alternative but to return the down payments to the purchasers with interest for the full period.

July 10, 1989 -- Huang & Danczkay returned the purchasers' deposits with interest and indicated that they were not able to proceed with the proposed project as planned.

July 28, 1989 -- The Department of Buildings and Inspections indicated that the Department would continue to process the building permit application.

September-October, 1989 -- Discussions re building permit.

October 13, 1989 -- The City Department of Buildings and Inspections indicated that the building permit application could not be processed further because of the new zoning by-law enacted on July 7, 1989.

October 26, 1989 -- Report from the City Solicitor to City Council informing them of the Province's view that 2.15 times coverage for the project lands was unacceptable and that only low-rise buildings should be allowed south of Queen's Quay West.

January 11, 1990 -- The decision of the OMB on Quay West's appeal of the Board's refusal on December 20, 1988 to award Quay West its costs was released. The Board stated:

This panel of the Board therefore finds that the actions taken by Council for the City of Toronto from the first refusal of the proposed site plan on September 19, 1988 to the date of the commencement of the hearing before the Board on November 29, 1988, were unreasonable . . .

The applicant, Quay West, is therefore awarded its costs against the City of Toronto for all of those costs which were thrown away, in dealing with the delays caused by the City from September 19, 1988, and preparing for the hearings before the Board, and for this present review, except for the costs of the three day hearing itself as determined by the first panel.

September 4, 1990 -- The Department of Buildings and Inspections refused building permit and closed its file.

September 18, 1991 -- The City Solicitor recommended to City Council that Council approve new draft zoning by-laws relating to the Site implementing the Provincial proposal.

The draft by-law and Official Plan amendment relating to the site were not enacted until May 3, 1993. The effect of the new by-laws, numbers 290-93 and 291-93, is that both the northerly and southerly pieces of the site have been conveyed to the City for parkland and Huang & Danczkay retains the middle piece. The new by-laws exempt enclosed balconies on the site from gross floor area.

Transfers by Quay West

The transfer of the beneficial ownership of the site from Quay West to Properties was accomplished in June of 1989 through a series of transactions. Certain partners of Quay West transferred liabilities and assets with respect to the site to the four companies which were partners of Properties and controlled by Michael Huang and/or Bela Danczkay. These transactions took place on June 8, 1989. Each of the four partners of Properties then transferred assets, including each partner's respective interest in the site and the agreements to Properties on June 9, 1989. Properties agreed to assume the obligations, commitments and liabilities of the partners relating to the site and the agreements. Although the documents do not state that the partners assumed obligations or commitments of Quay West relating to the performance of the agreements, the plaintiffs rely on admissions made by Huang & Danczkay.

All agreements entered into by the plaintiffs were with Quay West as vendor. Notices of the transfers of assets and liabilities or the dissolution of Quay West were not given to the plaintiffs by Quay West or by Properties when these events occurred.

Agreements of Purchase and Sale

The standard terms for each agreement to purchase units in Phase 1 were identical as were the standard terms for both Phases 2 and 3. In fact, the standard terms for all three Phases were substantially similar. The possession dates differed among the three Phases as they were to be completed sequentially beginning with Phase 1. The possession dates were as follows: For Phase 1, December 1, 1989; for Phase 2, March 1, 1990; and for Phase 3, July 3, 1990. For the purposes of the agreements, the Quay West project was comprised of three separate condominium projects.

ISSUES AND THE LAW

The plaintiffs advance three grounds for liability in this case. First, Huang & Danczkay failed to perform the agreements and cancelled them when they did not have termination rights. Second, Huang & Danczkay did not make reasonable efforts to get approval to construct individual units. Third, the transfers of the land without notice or consent was a breach of contract or a breach of trust.

In response, the defendant claims that the doctrine of frustration of contract applies. The defendant states that October 17, 1988 must be viewed as the "frustrating event" which was beyond the control of Huang & Danczkay. The events which followed were brought to completion in December 1988 when the interim control by-law was passed.

(1) Frustration of Contract

The issue of frustration of contract must be addressed first. It is the position of Huang & Danczkay that all of the agreements which were entered into with respect to the site were frustrated by acts taken by City Council who, it is argued by Huang & Danczkay, was motivated by its determination to block major development on the site and which acts prevented the construction of the proposed project. It is argued that the actions of the City blocked not only the proposed site plan but, also, effectively blocked any construction on the site of any building whatsoever. Huang & Danczkay emphasize that, to this day, the site remains a vacant lot.

The plaintiffs submit several reasons why the defence of frustration must fail. The plaintiffs' main argument is that the possibility of City Council refusing approval on October 17, 1988 and the subsequent downzoning was contemplated by the parties and provided for in the agreements. Being a foreseen possibility, it is argued that this cannot be a "frustrating event".

It is further argued by the plaintiffs that City Council's actions may have put Quay West in a position of not being able to complete all 720 agreements, however, this did not make it impossible for Quay West to complete most of the agreements. It is argued that the court must determine Quay West's contractual obligations to each plaintiff and then ask whether the acts of City Council rendered performance of the agreements impossible. Finally, it was argued that the events which occurred in this case preventing performance of the agreements were self-induced by the voluntary acts of Quay West.

When considering whether or not the agreements in this case were frustrated, it is important to keep in mind several particular dates and the events which occurred on those dates. On October 17, 1988, City Council refused to approve the site plan prepared by Mr. Markson. In December of 1988, the City of Toronto passed the interim control by-law which froze all development on the site. On July 7, 1989, City Council downzoned the site and effectively prohibited anything from being built on the site except in accordance with the new restrictions imposed by the by-laws passed on that date. Also on that date, after the decision of City Council, a press statement was released, which indicated that the company had no alternative but to return the down-payments. On July 10, 1989, Huang & Danczkay returned the deposits to the purchasers, with interest, and indicated that they were not able to proceed with the proposed project.

The defendant argues that a contract is frustrated when, after its formation, a change of circumstances renders it impossible to fulfil the contract, or transforms performance into a radically different obligation from that undertaken in the contract. Numerous cases were cited dealing with frustration of contract.

Although there had been some debate in England, the case of *Capital Quality Homes Ltd. v. Colwyn Construction Ltd.* (1975), 9 O.R. (2d) 617, 61 D.L.R. (3d) 385 (C.A.) ("*Capital Quality Homes*"), held that the doctrine of frustration applies in Ontario to contracts for the sale of land. In this case, the plaintiff agreed to buy 26 lots from the defendant. The contract provided 26 separate deeds of conveyance as the purchaser, the plaintiff, was buying the lots with the intention of erecting homes on them and then selling each by a separate conveyance. Both parties were aware of this intention. After the agreement was entered into, the Planning Act, R.S.O. 1970, c. 349, was amended in a way which prevented the conveyance of 26 deeds without consent. The plaintiff claimed the return of the deposit. The Court of Appeal, affirming the trial judge, held that this was recoverable because the contract had been frustrated.

Evans J.A., delivering the judgment of the court, at p. 391 of the decision, quoted from the case of *Davis Contractors Ltd. v. Fareham Urban District Council*, [1956] A.C. 696 at pp. 728-29, [1956] 2 All E.R. 145 (H.L.):

So perhaps it would be simpler to say at the outset that frustration occurs whenever the law recognizes that without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do.

The court went on to consider whether the doctrine of frustration of contract should be invoked in the particular circumstances. At p. 394, the following relevant portion appears:

There can be no frustration if the supervening event results from the voluntary act of one of the parties or if the possibility of such event arising during the term of the agreement was contemplated by the parties and provided for in the agreement. In the instant case the planning legislation which supervened was not contemplated by the parties, not provided for in the agreement and not brought about through a voluntary act of either party. The factor remaining to be considered is whether the effect of the planning legislation is of such a nature that the law would consider the fundamental character of the agreement to have been so altered as to no longer reflect the original basis of the agreement. In my opinion the legislation destroyed the very foundation of the agreement. The purchaser was purchasing 26 separate building lots upon which it proposed to build houses for resale involving a reconveyance in each instance. The purpose was known to the vendor. The lack of ability to do so creates a situation not within the contemplation of the parties when they entered into the agreement. I believe that all the factors necessary to constitute impossibility of performance have been established and that the doctrine of frustration can be invoked to terminate the agreement.

It was held that there had been a clear "frustration of the common venture". It was stated at p. 630 O.R., p. 398 D.L.R.:

If the factual situation is such that there is a clear "frustration of the common venture" then the contract, whether it is a contract for the sale of land or otherwise, is at an end and the parties are discharged from further performance . . .

In *Focal Properties Ltd. v. George Wimpey Canada Ltd.* (1975), 14 O.R. (2d) 295 (C.A.) (hereafter *Focal Properties*), the Court of Appeal was divided on the issue of frustration but did not deny that the doctrine could be applied to a contract for the sale of land. This case was affirmed by the Supreme Court of Canada, however, the doctrine of frustration of contract was not dealt with (see: [1978] 1 S.C.R. 2). In *Focal Properties*, by operation of the Planning Act, it was a statutory condition precedent to the completion of the sale that the proposed plans of subdivision be approved by the appropriate authority. The plaintiff/vendor was to obtain registration of the plan and the defendant/purchaser was to provide services for the land. The closing date of the transaction was five years from the date of the agreement, or some other date that was mutually acceptable.

The trial judge found that despite efforts by the vendor to obtain registration of the proposed plans of subdivision, it was unable to do so by the closing date. The parties were unable to agree on a new closing date and the vendor elected to treat the agreement at an end and then sought to return to the purchaser the deposit it had paid. The vendor brought an action for declarations that certain agreements were frustrated and terminated. In a counterclaim, the purchaser sought declarations that the agreements were in effect. On appeal, it was held that the trial judge correctly declared the agreement between the parties terminated, however, different grounds for the decision were given by Jessup and Houlden J.J.A. who comprised the majority. Jessup J.A. held that the sale agreement, by its terms, came to an end on the failure to obtain registration of the proposed plans of subdivision by the closing date. He also held that the trial judge had correctly concluded that the agreements were frustrated because they were impossible to perform within any foreseeable period of time. Houlden J.A. confined his reasons to finding that the contract had been frustrated. At p. 309, Houlden J.A. stated the following:

I know of only two situations where a party may be relieved of his covenant: (a) if the contract so provides (and this contract contained no such provision), or (b) if the performance of the contract has been frustrated. On the doctrine of frustration, Mr. Garrow referred us to the analysis in Atiyah, *Introduction to the Law of Contract*, 2nd ed. (1971). After reviewing a number of leading cases, Atiyah suggests that the decision . . . turns on the question (at p. 174): "Is it reasonable to place the risk of non-performance in the events which have happened on one party or the other, or neither?" If it is not reasonable to place the risk on either party, the contract is frustrated. If, however, it is reasonable to place the risk on a particular party, that party must perform, and if he fails to do so, he will be liable in damages.

Houlden J.A. concluded that the legislative enactment in question was an abnormal or extraordinary circumstance and was not reasonably foreseeable. At p. 310, Houlden J.A. referred to an excerpt from *Davis Contractors Ltd. v. Fareham Urban District Council*, *supra*, at pp. 720-21, where Lord Reid suggested the following test for frustration:

It appears to me that frustration depends, at least in most cases, not on adding any implied term, but on the true construction of the terms which are in the contract read in light of the nature of the contract and of the relevant surrounding circumstances when the contract was made.

Applying this test to the facts in *Focal Properties*, Houlden J.A. then determined that the contract, on its true construction, was not wide enough to apply to the new situation that had emerged. At p. 310, it was stated:

The parties contracted on the footing and in the anticipation that the consents would be obtained and the plans of subdivision would be registered. The happening of these events was fundamental to the performance of the contract. By reason of the refusal of the planning authorities to issue the consents, these events were prevented from happening during the whole of the period allowed by the contract for performance.

The Court of Appeal had another opportunity to review the law relating to frustration of contracts in *Victoria Wood Development Corp. v. Ondrey* (1978), 22 O.R. (2d) 1, 92 D.L.R. (3d) 229 (hereafter *Victoria Wood*). This case further expanded on the "common venture" concept which was evident in the *Capital Quality Homes* case.

In *Victoria Wood*, the Court of Appeal reiterated that frustration applies in Ontario to contracts for the sale of land, however, on the facts of the case, it was held that what happened did not amount to frustration. There were two actions. In the first action, *Victoria Wood* (the purchaser) sought a declaration that the agreement of purchase and sale had been frustrated and claimed a return of its deposit. In the second action, the vendors claimed specific performance and damages, or alternatively, damages for breach of contract.

The vendors were interested in selling 89 acres of land in the Town of Oakville. They knew the land was zoned for industrial use. Victoria Wood entered into a contract with the vendors which was signed on April 6, 1973. The closing date was set for October 31, 1973. The contract contained several clauses including a provision for consents to any zoning or rezoning application and consents to any plan of subdivision or any necessary related documents required to process and effect registration of such plan or plans.

On June 22, 1973, the Legislature enacted the Parkway Belt Planning and Development Act, 1973, S.O. 1973, c. 53, which was made retroactive to June 4, 1973. A regulation was made pursuant to the Act which effectively prohibited all use of the land except agricultural uses and accessory buildings on minimum lot areas of 50 acres. As was stated at p. 3 O.R., p. 231 D.L.R.: "The land thus was rendered useless for development for industrial, commercial or residential use."

Arnup J.A., delivering the judgment of the court, concluded that there was no "common venture" in this case. He referred to two tests. The first test was described as the test enunciated in *Davis Contractors Ltd. v. Fareham Urban District Council*, supra, which was adopted in several Ontario cases including *Capital Quality Homes*. At p. 13 O.R., p. 240 D.L.R., Arnup J.A. stated that this would involve answering questions such as the following:

Has the contractual obligation become impossible to perform because its performance would be radically different from that undertaken by the contract? (Lord Radcliffe). Has there occurred an intervening event or change of circumstances so fundamental as to be regarded by the law both as striking at the root of the agreement, and as entirely beyond what was contemplated by the parties? . . . Is the effect of the legislation of such a nature that the law would consider the fundamental character of the agreement to have been so altered as to no longer reflect the original basis of the agreement? (Evans, J.A., at p. 626 O.R., p. 394 D.L.R.)

Arnup J.A. then went on to say that in *Victoria Wood*, the questions set out above would have to be answered in the negative. Applying the law to the facts in that case, Arnup J.A. stated at p. 13 O.R., p. 241 D.L.R.:

I do not think mere knowledge of the vendor that land was being bought for development, or even for a particular kind of development, is sufficient to bring into operation the doctrine of frustration when an entirely unexpected governmental enactment makes the purchaser's purpose incapable of realization, or so difficult that great hardship is occasioned to it in carrying out that purpose. As I have stated earlier, there was no "common venture" here. As Viscount Simon, L.C., said in *Davis Contractors Ltd.*, supra, at p. 715, "it by no means follows that disappointed expectations lead to frustrated contracts".

The second test Arnup J.A. referred to was described as equitable allocation of the risk. He commented that this subject formed the basis of the judgment of Houlden J.A. in *Focal Properties*. After discussing allocation of the risk, Arnup J.A. concluded at pp. 14-15 O.R., p. 242 D.L.R.:

In my view we must apply to a contract for sale of land the same principles respecting frustration of contracts as are applicable to any other contract. That exercise requires us to consider the terms of the contract and the factual background in which it was made, in order to see what the obligations under the contract were and whether the supervening event has so changed the nature of those obligations that to compel their performance, under the changed conditions, would be to order performance of something radically different from what the two parties agreed to under their contract. We cannot impose upon the parties an allocation of risk that is neither explicit in the contract nor implicit in its terms, when considered in light of the circumstances in which it was made. I prefer to decide this case on the basis of the first test I have discussed.

For the reasons set out above, Arnup J.A. concluded that the contract in issue was not frustrated.

Having regard to the above cases, there can be no frustration if the supervening event results from a voluntary act of one of the parties, or if the possibility of such event arising during the term of the agreement was contemplated by the parties and provided for in the agreement. In light of the facts and circumstances of this case, there is no frustration.

First, the possibility of the events which occurred were contemplated by Huang & Danczkay and provided for in the agreements. Clause 38 of the agreement provides as follows:

38(a). If the Development does not proceed in accordance with the Vendor's current plans as determined in the Vendor's sole discretion, the Vendor alone may at any time on or before June 30, 1988, terminate this Agreement by notice in writing to the Purchaser. If the Vendor so terminates the Agreement, the Deposit and the Further Deposits, if any, shall be returned and the Vendor shall not be liable for any costs or damages.

The agreements were drafted by the solicitors for Quay West. There are broad rights of termination contained in cl. 38(a). In the event that the development did not proceed in accordance with Huang & Danczkay's plans, cl. 38(a) of the agreements permitted Quay West to terminate the agreements with respect to all three phases without liability on or before June 30, 1988.

Huang was asked in direct examination at trial how the June 30, 1988 date was chosen. He replied that it was mainly based on the closing date of the sale agreement with the THC as there were conditions precedent to the sale of the land. As the agreement between THC and Huang & Danczkay was conditional on there being no materially adverse amendments to the existing by-law, it can be inferred that this clause contemplated the possibility of downzoning.

Further, under oath at an OMB hearing on November 29, 1988 (the transcript was filed as an exhibit at trial), Huang stated that he had a concern that the Land Use Committee or City Council might not approve the project in the proposed form but cl. 38 was put into the contracts to deal with that contingency. Huang's testimony at the OMB was as follows:

[Balfour] So in other words, you were relying upon the agreement you felt you had reached with City staff?

[Huang] That's correct. Now, my second part of my answer is: Just in case that does not go in now, that when you go to Land Use and Council there are some other opinions, we built into our contracts a clause whereby we say: If we cannot build the project in its present form, I have a right to terminate the agreement before June '88. I built this in the contract as a safeguard to answer your total concern, which was my concern too.

[Chairman] Where is that?

[Middleton] The second last page. "Right of Vendor to Terminate", Clause 38.

[Huang] On page 20.

[Chairman] Clause 38(a)

[Huang] Yes.

[Balfour] So in effect, if Council did not agree with planning staff, it would force you into a complete bail-out situation that you could rely on?

[Huang] Yes. I had -- I don't have it now -- I had until June '88 to get out of the bind, so to speak, if I feel that my proposal is not acceptable.

The above excerpt of testimony confirms that Huang & Danczkay had a concern when drafting the agreements that the Land Use Committee or City Council might have different opinions than did the planning staff with respect to the development. Huang & Danczkay constitute the directing mind of Quay West. Quay West protected itself by inserting cl. 38(a) which permitted Quay West to terminate the agreements should City Council not accept the proposed development. In the end, this event did occur, however, due to many delays in the process, Quay West was not fully aware of City Council's views until October 17, 1988 which was almost four months after the date in which cl. 38(a) could be used to terminate the agreements. Taking the above into consideration, the evidence indicates that Huang & Danczkay contemplated that the proposed development might not be approved by the Land Use Committee or by City Council and this was provided for in the agreement.

The June 30, 1988 date provided for in cl. 38(a) was never extended. In fact, by letter dated December 19, 1988 from Weir & Foulds to the City, it was indicated that cl. 38 was waived. That letter reads in part:

Under the purchase and sale agreements entered into between our client and the 730 proposed residents, our clients had, until the 30th day of June, 1988, the option of terminating the sale agreement if it was so determined that the proposed development was not proceeding according to expectations. Fully aware of Council's actions of June 17, 1988, whereon Council approved the Part I of the Official Amendment for the Central Waterfront which included the subject lands, our client waived the termination clause in all the sale agreements. The sale agreements are now final and binding.

(Emphasis added)

The fact that cl. 38 was inserted into the agreement demonstrates that Huang & Danczkay turned their minds to the events which subsequently occurred in this case. The clause was not exercised by Huang & Danczkay on or before June 30, 1988. However, the events that subsequently occurred were contemplated and provided for in the agreements. It cannot be argued by Huang & Danczkay that what occurred was "entirely beyond what was contemplated by the parties".

This finding on its own is enough to conclude that there was no frustration of contract, however, I will consider whether or not the supervening event (the eventual downzoning of the property) resulted from the voluntary act of one of the parties (see *Capital Quality Homes*, supra, at p. 394).

The case of *Maritime National Fish Ltd. v. Ocean Trawlers Ltd.*, [1935] A.C. 524, [1935] All E.R. Rep. 86 (P.C.) ("*Maritime National Fish*"), is important to consider in this regard. *Maritime National Fish* were charterers of a trawler owned by *Ocean Trawlers*. In addition to the *Ocean Trawlers* vessel, *Maritime Fish* also operated four other trawlers. *Maritime Fish* applied for licences for the five trawlers that they were operating. The Minister responded by deciding that licences were only to be granted to three of the five trawlers. The Minister requested that *Maritime Fish* advise as to which three of the five trawlers were to have licences. *Maritime Fish* gave the names of three trawlers other than the *Ocean Trawlers* vessel. As a result, no licence was granted to the *Ocean Trawlers* vessel.

As it was no longer lawful for *Maritime Fish* to employ the *Ocean Trawlers* vessel as a trawler, *Maritime Fish* gave notice to *Ocean Trawlers* that its vessel was available for re-delivery and claimed that *Maritime Fish* was no longer bound by the contract. *Ocean Trawlers* commenced an action and *Maritime Fish* then pleaded frustration stating that the contract became impossible to perform.

The court held that the doctrine of frustration could not be relied on because the result was due to the act of *Maritime Fish*. Lord Wright referred to frustration as being a matter caused by something for which neither party was responsible. At p. 531, Lord Wright stated:

In truth, it happened in consequence of their [*Maritime Fish*'s] election. If it be assumed that the performance of the contract was dependent on a licence being granted, it was that election which prevented performance, and on that assumption it was the appellants' own default which frustrated the adventure: the appellants cannot rely on their own default to excuse them from liability under the contract.

(Emphasis added)

It is important to consider the above case in light of Councillor Nowlan's letter. This, in my view, is a significant turning point which must be examined in detail. The downzoning by-law was considered at the July 5, 1989 meeting of the Land Use Committee. The Committee recommended passage of the downzoning by-law by a vote of four to two. The Land Use Committee recommendation was to be forwarded to a Special Council meeting on July 7, 1989. In the interim, Councillor Nowlan was directed by the Committee to write to Huang & Danczkay requesting a number of assurances. The letter dated July 5, 1989, reads in part:

(1) that Huang & Danczkay respond directly to Councillor Nowlan no later than noon on Friday, July 7, 1989, as to the willingness to provide a guarantee, in a form satisfactory to the City Solicitor, that the owner would be willing to sell the condominiums to the original purchasers should this development be approved, and that the purchasers be allowed to purchase their units at the original price inflated to current 1989 dollar value; and

(2) that Huang & Danczkay provide the City Clerk with a list of the purchasers of the condominium project at 2-50 Stadium Road.

Mr. McQuaid, solicitor for Huang & Danczkay, drafted a response to the letter which was entered as an exhibit at trial. In the letter, Mr. McQuaid indicated his understanding of Councillor Nowlan's letter. He stated in the letter:

Your letter suggests that Council proposes to introduce a condition that the zoning will be left in place on condition that the contracts be re-negotiated.

However, Mr. McQuaid's response to Councillor Nowlan's letter was rejected by Huang & Danczkay and was never sent to the Land Use Committee. Huang & Danczkay drafted their own response to Councillor Nowlan's letter. They rejected outright the requests made in the letter of Councillor Nowlan on the basis that they did not believe that the City should interfere with their own private business arrangements. The letter written by Huang & Danczkay to Councillor Nowlan is very important to consider and I will reproduce the entire letter:

This is in response to your letter of July 5, 1989, addressed to Huang & Danczkay Limited.

We regret that your Committee decided at its meeting on July 5, 1989, to recommend the adoption of the draft Zoning By-Law Amendment, down-zoning 2-50 Stadium Road.

We respectfully suggest that the matters under consideration by your committee, with respect to 2-50 Stadium Road, should be those concerning land use, planning, urban design and due process of law. In this context, your request for information and the guarantee regarding the private business arrangements with our condominium purchasers is inappropriate. It is inadvisable for a municipal council to use the threat of down-zoning as a lever to interfere with private business contracts between a developer and its purchasers. Such actions are clearly outside the scope of authority contemplated by the Planning Act and would set undesirable precedents.

The letter by Councillor Nowlan and the response by Huang & Danczkay were a definite turning point in the collapse of this transaction. It is unfortunate that, having put in so much positive energy and put up with countless requests, Huang & Danczkay lost patience rather than persevered. The letter that Huang & Danczkay wrote in response to Councillor Nowlan's letter is an indication that they should have reflected more instead of taking the hard stance that they did.

Rather than closing the door completely, the letter written by Councillor Nowlan demonstrates that the City proposed a course of action. Although it was by no means an assurance that the project would now be approved, the City was looking to protect the purchasers. Huang & Danczkay, apparently frustrated with the process, did not act reasonably in responding to the letter. Although it is not for the court to speculate with respect to what would have followed had the assurances been given by Huang & Danczkay, in failing to respond in a reasonable manner, Huang & Danczkay at this point effectively closed the door to any further negotiations.

Councillor Nowlan's letter and Huang & Danczkay's response were considered by City Council at its special meeting held on July 7, 1989. At this meeting, the downzoning by-law was passed. Huang & Danczkay took the position that they refused to further negotiate with the City. I observe that Huang & Danczkay were frustrated with the process when they received the letter from Councillor Nowlan seeking a number of assurances. However, physical and emotional frustration is not synonymous with frustration of contract. Applying the Maritime National Fish case to the present case, Huang & Danczkay cannot rely on their own refusal to negotiate to excuse themselves from the agreement.

For the reasons set out above, the circumstances of this case are not sufficient to satisfy the doctrine of frustration of contract.

(2) Termination Clauses in the Agreement

Having found that frustration does not apply in the present case, it is necessary to go on and consider whether or not Huang & Danczkay had any termination rights in the agreements.

Quay West terminated the agreements July 10, 1989 after the downzoning of the site. The termination letters, dated July 10, 1989 sent by Quay West to the plaintiffs do not refer to any termination clauses in the agreements. The letter reads as follows:

Further to our June 8, 1989 letter, we regret to advise you that the City of Toronto has now passed a downzoning by-law downzoning the site upon which the proposed Quay West condominiums were to be built. As a result, we have regretfully come to the conclusion that we are not able to proceed with the proposed Project which we planned, within which you and other purchasers hoped to purchase units. Accordingly, we must pursue the only practicable alternative open to us: we hereby notify you that we are terminating your agreement of purchase and sale.

Enclosed is a cheque payable to you representing the refund of the deposits paid by you, together with interest.

Clause 38

As stated above, cl. 38 refers to the right of Huang & Danczkay "in its sole discretion" to decide if the development does not proceed "in accordance with the Vendors' current plans" and "may at any time on or before June 30, 1988 terminate this Agreement by notice in writing". Huang & Danczkay did not exercise this unilateral right before June 30, 1988, and therefore, this clause is not applicable.

Clause 6(c)

Clause 6(c) of the agreement reads as follows:

6(c). If for any reason other than the wilful neglect of the Vendor, the Unit is not Substantially Completed by the Possession Date, the Vendor may extend such date from time to time for a period not exceeding 240 days in the aggregate. If the Possession Date is extended for such 240 day period and in the sole opinion of the Vendor, expressed in writing, it is unable to substantially complete the Unit prior to the extended Possession Date, then at the option of either party, this Agreement may be terminated by notice in writing to the other party delivered within 5 days of the Vendor's notice of its inability to substantially complete the unit

referred to above, in which event the Deposit and Further Deposits, if any, shall be returned to the Purchaser and this Agreement shall be terminated with no liability arising to either party as a result of such termination. The Vendor shall not be liable to the Purchaser for any damages. Monies paid or payable for extras ordered by the Purchaser, whether or not installed in the Unit, shall not be returned. In such case, the Purchaser shall execute and complete such other documents affecting the title to the Unit as are necessary, in the opinion of the solicitors for the Vendor, to sell the Unit to a party other than the Purchaser.

The plaintiffs argue that Quay West could not have relied on cl. 6(c) to terminate the agreements on July 10, 1989 or any later date for three reasons. First, the purpose of cl. 6(c) was to permit termination should unavoidable delays be experienced within the construction stage of development and not prior to that. Second, Quay West did not extend the possession dates prior to its termination on July 10, 1989. Third, Quay West may well have been able to complete units if it had not acted unreasonably and it is immaterial that Quay West was not able to build the entire proposed project.

With respect to the first reason, the plaintiffs submit that the purpose of cl. 6(c) was to allow for termination in the event that unavoidable construction-related delays prevented Quay West from completing the units. If such a situation were to occur, then cl. 6(c) could be relied on to terminate the agreements.

The plaintiffs further submit that, if the parties had originally intended that Quay West could use cl. 6(c) to terminate the agreements in the event that Quay West could not get a building permit for its proposed project, or in the event of downzoning, then the insertion of cl. 38 would have been unnecessary.

With respect to the second reason, the plaintiffs state that, pursuant to cl. 6(c), an agreement can only be terminated after the possession date is extended. It is important to keep in mind the possession dates when considering this clause of the agreement: Phase 1, December 1, 1989; Phase 2, March 1, 1990; Phase 3, July 3, 1990. If Quay West, in fact, had extended the possession dates in accordance with cl. 6(c) for a period of not more than 240 days (about eight months), the extended possession dates would have been approximately as follows: for Phase 1, July 30, 1990; for Phase 2, October 30, 1990; for Phase 3, March 1, 1991. As the termination date of July 10, 1989 was prior to any of the possession dates, it is submitted that Quay West could not have extended the possession dates at that time, and therefore, was not entitled to rely on cl. 6(c) to terminate the agreement.

In any event, it is submitted that Quay West did not extend the possession dates prior to termination of the agreements on July 10, 1989 or at any time thereafter. Since the possession dates were not in fact extended, Quay West could not have used cl. 6(c) to terminate the agreements.

Lastly, the plaintiffs argue that Huang & Danczkay cannot rely on cl. 6(c) as that clause permits Quay West to terminate an agreement only if it is unable to complete the unit prior to the extended possession date. It is submitted that Quay West must be able to prove that it was "unable" to complete each unit despite making all reasonable efforts to do so. It is the position of the plaintiffs that Quay West could have negotiated a different or smaller project. By failing to meet and negotiate with the City, Quay West failed to take all reasonable steps to construct units.

Huang & Danczkay submitted that cl. 6(c) was available regardless of the particular circumstances. They assert that the phrase in cl. 6(c), "If for any reason other than the wilful neglect of the vendor", was broad enough to cover the situation that arose in this case.

In my view, the interpretation of this clause advanced by Huang & Danczkay is the proper one. The clause was drafted in very broad terms. It seems that as long as the delays were not due to "wilful neglect of the vendor", this clause could be relied upon if the unit was not substantially completed by the possession date.

Although I find that cl. 6(c) was available to Quay West, Quay West did not follow the procedure set out in that provision. Pursuant to cl. 6(c), the vendor is entitled to extend the possession date from time to time for a period not exceeding 240 days in the aggregate. There are certain conditions which must be followed if the vendor is seeking to rely on this subsection. If the possession date has been extended for a 240 day period and in the sole opinion of the vendor, expressed in writing, it is unable to complete the unit prior to the extended possession date, then at the option of either party, the agreement may be terminated by notice in writing to the other party delivered within five days of the vendor's notice of its inability to substantially complete the unit. If such procedure is followed, the purchaser's deposit is returned and the agreement is terminated with no liability arising to either party. The clause explicitly states that: "The Vendor shall not be liable to the Purchaser for any damages."

In this case, Huang & Danczkay cannot rely on cl. 6(c) for the simple reason that they did not follow the required procedure. An agreement could only be terminated after the possession date had been extended. As there was no extension, Huang & Danczkay could not rely on this clause to terminate the agreement.

Clause 30(i)

Clause 30(i) reads as follows:

30. Condition Relating to Registration

(i) If the Vendor is unable to achieve registration of the Creating Documents in accordance with the Act by March 31, 1993 (or by such later date as may be indicated by the Vendor to the Purchaser from time to time) and the Possession Closing has not yet occurred, then upon notice from the Vendor to the Purchaser, this Agreement shall be terminated, the Vendor and the Purchaser shall have no further liability or obligations hereunder, neither party shall be liable to the other for any costs or damages resulting from such termination and all monies paid by the Purchaser to the Vendor shall be repaid to the Purchaser.

The defendant argues that this clause could be used to terminate the Agreement and emphasize the portion which reads: "[i]f the vendor is unable to achieve registration". The plaintiffs, on the other hand, submit that this clause could not be used to terminate the agreement in light of s. 51 of the Condominium Act, R.S.O. 1990, c. C.26. Specifically, s. 51(2) of the Condominium Act provides:

51(2) Despite any provision to the contrary contained therein, an agreement of purchase and sale of a proposed unit for residential purposes shall not be terminated by the proposed declarant only by reason of the failure to register the declaration and description within a period of time specified in the agreement, unless the purchaser consents to termination in writing.

Farley J. had the opportunity to comment upon s. 51(2) in the decision of *Ally v. Harding Addison Properties Ltd.* (1990), 1 O.R. (3d) 167, 14 R.P.R. (2d) 244 (Gen. Div.). At p. 178, it was stated:

The provision of s. 51(2) of the Act is clearly a restriction upon vendors, not upon purchasers. It appears clearly to be for the protection of purchasers, not a rescue provision for a vendor . . . This section of the Act appears to have been inserted to prevent any abuse by a vendor delaying so as to gain an advantage in a rising market.

Having regard to s. 51(2) of the Condominium Act, I find that Huang & Danczkay did not have termination rights in cl. 30(i) as a result of the non-registration of the documents. The purchasers did not consent to termination in writing and therefore, despite cl. 30(i), the agreements are not terminated by reason of the failure to register the documents.

Clause 26

Pursuant to cl. 26 of the agreements, the purchaser is deemed to acknowledge that the vendor may not complete the development and agrees that it has no claims against the vendor arising from any such non-completion. Clause 26 states as follows:

26. Consent Regarding Further Development

The Purchaser acknowledges and agrees that the Building is part of the first phase of a development which is presently expected to include further phases of development. The purchaser acknowledges that the Vendor may not complete the Development and agrees that it shall have no claims against the Vendor arising as a result of such non-completion. The Purchaser hereby irrevocably consents to the completion of further development and irrevocably waives:

(a) all rights otherwise available to object to any government, or governmental agency, or other agency having jurisdiction in connection with any aspect of future development and construction; and

(b) all claims, rights or actions against the Vendor and all other persons, firms and corporation in nuisance and otherwise whether in law or in equity arising out of the future development and construction.

The term "Development" is defined in the agreement as:

The land and the adjoining lands in which the Vendor has or acquires an interest in any construction and development of residential, parking, retail or other commercial premises thereon.

Huang & Danczkay submit that cl. 26 contains an express acknowledgment on the part of the purchaser that the vendor may not complete the project and the purchaser agrees not to make any claims against the vendor arising out of such non-completion. Thus, Huang & Danczkay submit that cl. 26, which appears in the agreements for all three phases, is a sufficient ground in and of itself to dismiss all claims.

The plaintiffs, on the other hand, contend that the purpose of cl. 26 is to inform the purchasers that their rights under the agreements pertain only to the particular phase in which their unit is located. The plaintiffs argue that the inclusion of this clause gives Quay West full freedom to construct less than the three proposed phases without concern for any claims that the purchasers might otherwise have. That is to say, if Quay West decided to construct only phase 1, a purchaser of a phase 1 unit could not get out of his or her agreement by arguing that the vendor misrepresented that size of the overall development.

Both parties argue that the wording of the condominium disclosure statements supports their respective positions. The relevant sections of the disclosure documents are set out at pp. 1, 2 and 7:

The Declarant proposes to construct a residential-commercial project (the "Project") upon the Condominium Property and the Adjacent Lands. It is currently proposed that the Project will consist of 3 residential condominiums (sometimes referred to as Building 1, 2 and 3 respectively) including the Condominium Property and various commercial-retail areas which will not form part of any of the 3 residential condominiums.

The purchaser should specifically note that the Condominium Property will only constitute part of the Project and that the purchaser's rights pursuant to an agreement of purchase and sale for a residential unit relate only to that portion of the Project included in the Condominium Property . . .

The Declarant currently proposes to construct Building 2 and Building 3 and to register these as condominiums. It is possible that Building 2 and/or Building 3 may not be completed. The Declarant is under no obligation to construct these Buildings or to register them as condominiums.

[Note: the Building numbers referred to are different for the three disclosure statements depending on which phase they pertain to.]

The plaintiffs emphasize that the disclosure statements advise the purchasers that their rights pertain only to the phase in which they purchased and Quay West is under no obligation to construct the other phases. Huang & Danczkay, however, assert that the clauses of the disclosure statement inform the purchasers that the project consists of all three phases.

I agree with the interpretation set forth by the plaintiffs. When cl. 26 of the agreement is examined in detail, along with the disclosure statements, it becomes clear that it cannot be interpreted to mean that a purchaser has no rights with respect to the completion of his or her own phase and unit. If cl. 26 had the meaning suggested by Huang & Danczkay, the termination provisions in the agreement would be unnecessary, as there would always be a way out of the agreement if the condominium was simply not completed. If this were the case, in effect, the agreements would constitute a "no liability" contract.

In their argument, Huang & Danczkay emphasized the portion of cl. 26 which reads as follows:

The Purchaser acknowledges that the Vendor may not complete the Development and agrees that it shall have no claims against the Vendor arising as a result of any such non-completion.

Huang & Danczkay state that this portion is unqualified and is applicable in the circumstances of this case. In my view, this is not correct. In interpreting this clause of the agreement, the language used must be examined with a view to making the most sense possible having regard to the intentions of the parties.

In my view, the purpose of cl. 26 is to inform purchasers of a condominium unit of a particular phase that the further phases of development may not, in fact, be completed. The purchaser is then advised in cl. 26 that there shall be no claims arising from non-completion of the further development. This clause does not exempt the vendors from liability in this case.

Clause 37

Clause 37 of each agreement states that: "[t]his Agreement is subject to compliance with the Planning Act, S.O. 1983, as amended". Huang & Danczkay contend that, as a result of this clause, the agreements did not become firm and binding unless and until there was compliance with the Planning Act (now R.S.O. 1990, c. P.13). Further, Huang & Danczkay submit that the statutory provisions requiring approvals constituted statutory conditions precedent to the completion of the agreements with the purchasers. As Quay West did not get Planning Act approval, Huang & Danczkay claim that the agreements did not become binding.

Clause 37 of the agreement is required by s. 50(21) of the Planning Act which states:

50(21) An agreement, conveyance, mortgage or charge made, or a power of appointment granted, assigned or exercised in contravention of this section or a predecessor thereof does not create or convey any interest in land, but this section does not affect an agreement entered into subject to the express condition contained therein that such agreement is to be effective only if the provisions of this section are complied with.

(Emphasis added)

Transfers of land cannot occur unless the transfer complies with s. 50. In the present case, without the insertion of an express condition such as cl. 37 in the agreements, no interest would be conveyed as the sale of a unit in a condominium involves the conveyance of parts of a whole lot. In *Crossroads Apartments Ltd. v. Phillips* (1974), 4 O.R. (2d) 72, 47 D.L.R. (3d) 172 (H.C.J.), Morden J. (as he then was) emphasized that, for a contract for sale of a condominium unit to comply with s. 29 of the Planning Act (now s. 50 of the Planning Act), the agreement should contain an express condition that it is to be effective only if the provisions of the Planning Act are to be complied with. It was stated at p. 82:

For a contract not to run afoul of it [s. 29 of the Planning Act] I would think that it should contain an express condition that the agreement is to be effective only if the provisions of the section are complied with (see Planning Act, s. 29(7)) . . .

In my view, cl. 37 was inserted in the agreement to protect the defendant from the effect of s. 50(21) of the Planning Act. Clause 37 was not intended and does not operate to terminate the agreements in the event that Quay West was unable to obtain site plan approval for the proposed project.

Conclusion re Termination Clauses

For the reasons set out above, the particular termination clauses in the agreement did not permit Quay West to terminate the agreements when it did. Quay West was in breach of contract when it did not comply with its obligations to build the condominium. There were several provisions in the agreement that set out the obligations of Quay West. Clause 24 is one of the clauses that compelled Quay West to complete construction of the condominium. It provides as follows:

24(a). The Vendor agrees that it will complete the construction of the Condominium substantially in accordance with the proposed description, plans and specifications to be filed with the City of Toronto and the Municipality of Metropolitan Toronto.

In summary, none of the termination clauses in the agreement are applicable. Quay West agreed to complete the sale transactions in accordance with the terms of the agreements and, as they failed to fulfil their obligations, Quay West has breached the terms of the agreements.

(3) Reasonable Efforts

Having found that Quay West breached its obligations pursuant to the Agreement, it is not necessary to deal with the plaintiffs' secondary position that Huang & Danczkay failed to take all reasonable steps to complete the agreements and, in particular, to get the municipal approvals required to construct the project. However, as there was considerable argument with respect to this issue at trial, I will address this matter.

Clause 21 of the agreement requires Quay West to proceed with due diligence to complete the condominium and take all reasonable steps for the purpose of obtaining all consents required for the registration of the condominium.

The plaintiffs assert that Huang & Danczkay unreasonably refused to meet and negotiate with the City throughout the period from October 17, 1988 until July 10, 1989. For example, the plaintiffs submit that Quay West refused to attend a meeting requested by the Planning Department in November 1988. The plaintiffs maintain that there are instances of failure by Quay West to discuss design changes that would have gained municipal approval right up to the time of downzoning in July, 1989.

The actions of Huang & Danczkay were not consistent throughout this time period. The events which transpired from July 5, 1989 to July 10, 1989 are very significant and must be examined separately.

Huang & Danczkay faced many obstacles in the development of the proposed project over the period from October 17, 1988 to July 5, 1989. Both Mr. Markson and Mr. McQuaid testified that they did everything possible to get the proposed project built. Mr. Markson, his staff, and other consultants who worked on this project, were in constant contact with the City staff. It is apparent that reasonable compromises were made by Mr. Markson to satisfy the City's concerns both in the site plan application process and in the building permit application process. Huang & Danczkay instructed Mr. McQuaid to advance every legal proceeding possible to get the project approved and remained open to cosmetic or minor changes which might satisfy the City's concerns.

Mr. Gil Nefsky, Huang & Danczkay's Director of Planning, was also in close contact with the City and took all steps possible to get the project underway. Huang was also directly involved in overseeing the project.

I find that during the period from October 17, 1988 until July 5, 1989, Huang & Danczkay and their agents acted reasonably. Mr. Markson's office and other outside consultants continued to negotiate with the City's Department of Buildings and Inspections after October 17, 1988. Mr. McQuaid had many discussions with Mr. Shibley which could be characterized as "settlement discussions". The numerous delays were not attributable to unreasonable conduct on the part of Huang & Danczkay or its agents. I will refer to one example which I believe best illustrates this finding.

On April 19 and 20, 1989, the City's appeal of an OMB decision dated December 19, 1988 was argued before the Divisional Court as well as Huang & Danczkay's applications to quash Interim By-law No. 62-89 to force the City to issue a building permit. The City's appeal and both of Huang & Danczkay's applications were dismissed. The court was not satisfied that City Council acted in bad faith or for an improper purpose in enacting the Interim Control By-law. However, in an endorsement, the court stated as follows:

. . . the Board was presented with a situation in which the City was guilty of gross delay, while the developer had spent large sums of money and acted diligently to achieve a plan that met the City's design and planning criteria.

(Emphasis added)

The above quote is an accurate representation of what I found to be the case for the period from October 1988 until July 5, 1989. Huang & Danczkay were not responsible for any unreasonable delay during this period, but rather, did everything possible to move the project along.

I turn now to the period from July 5, 1989 until July 10, 1989, the date of the termination letters. I discussed this issue at some length in the portion of the judgment dealing with frustration of contract. However, for ease of reference, I will repeat some of my observations below.

When Huang & Danczkay received the letter from Councillor Nowlan, they rejected the response that was drafted by their solicitor Mr. McQuaid. Mr. McQuaid had been actively involved throughout the entire process. Nevertheless, Huang & Danczkay apparently believed that this letter was not going in the right direction. Instead of sending the letter drafted by Mr. McQuaid, Huang & Danczkay drafted their own response. In their terse response, Huang & Danczkay rejected Councillor Nowlan's request and took the position that Council should not be interfering with private business arrangements. The latter part of the letter is significant and I will therefore reproduce it below for a second time:

We respectfully suggest that the matters under consideration by your committee, with respect to 2-50 Stadium Road, should be those concerning land use, planning, urban design and due process of law. In this context, your request for information and the guarantee regarding the private business arrangements with our condominium purchasers is inappropriate. It is inadvisable for a municipal council to use the threat of down-zoning as a lever to interfere with private business contracts between a developer and its purchasers. Such actions are clearly outside the scope of authority contemplated by the Planning Act and would set undesirable precedents.

In light of the extensive negotiations that had taken place between Huang & Danczkay and the City until this point, it is puzzling why Huang & Danczkay would take this rigid position. The letter from Councillor Nowlan suggests an attempt on the part of the City to provide some protection to the purchasers. However, the response of Huang & Danczkay was that they were no longer willing to negotiate with the City.

As I stated earlier, the letter by Councillor Nowlan and the response by Huang & Danczkay is a critical turning point. Up until July 5, 1989, the evidence shows that Huang & Danczkay acted reasonably at every stage, responding to the concerns which were raised by various City personnel. It should be emphasized that in the planning approval process, Huang & Danczkay and their agents dealt with 11 different planners with the City.

Huang & Danczkay changed their position after they received the letter from Councillor Nowlan. They were no longer willing to negotiate with the City. In my view, in light of the fact that the City was seeking assurances with respect to the original purchasers, the response of Huang & Danczkay was unreasonable.

The plaintiffs suggested that Quay West was obligated to take all reasonable steps to obtain the consents necessary for one of the particular condominium phases. In my view, such a position is unrealistic. Quay West did not have the option to negotiate and build whatever number of units it could out of the original 730 units. Having regard to the fact that the units were pre-sold, it was reasonable for Quay West to focus on trying to build the entire proposed project. Further, there is no indication that a different project, possibly involving fewer phases or units, would have received approval. It is not for the court to speculate on whether such a proposal would have been approved. On the evidence before the court, Huang & Danczkay, the City and the purchasers all proceeded on the assumption that all three phases of the development formed the proposed project. On this basis, the position taken by Huang & Danczkay in proceeding with the plan for the entire project was reasonable.

The agreements provided that Quay West would take reasonable efforts to obtain the consents necessary for the particular condominium. I find that Quay West's efforts were reasonable from October 17, 1988 until July 5, 1989. However, from July 5, 1989 when the letter was received from Councillor Nowlan, until July 10, 1989, the date of the termination letters, Huang & Danczkay changed their position. Their rigid stance in their refusal to negotiate was unreasonable in the circumstances. In the result, had I not found that the defendant was liable on contracts without justification, I would have found that Huang & Danczkay failed to use reasonable efforts to obtain the municipal consents that were required for the proposed project.

(4) Transfer of Property

The plaintiffs take the position that the dissolution of Quay West and the transfers of property which occurred in June 1989 without notice to the plaintiffs constitute a breach of contract and breach of trust by Quay West and Huang & Danczkay. In considering breach of contract, the plaintiffs say that there are three factors to consider: (1) the transfer of property; (2) the assignment of contract without notice or consent; and (3) the dissolution of Quay West.

In addition to the contractual obligations, it is argued that Quay West also has trust obligations and that transfer of the site to Properties constituted a breach of trust. It is argued that the common law governing the assignment of contracts prevents the vendor, Quay West, from assigning its obligations under the contracts without notice to the plaintiffs and their consent.

(i) Breach of contract

The plaintiffs rely on the Ontario Court of Appeal decision in *York Condominium Corp. No. 167 v. Newrey Holdings Ltd.* (1981), 32 O.R. (2d) 458, 122 D.L.R. (3d) 280 (C.A.), for the proposition that, prior to the registration of the declaration, purchasers of a condominium unit become the equitable owners of their units and the interests appurtenant thereto. The owner-developer of a condominium project, upon entering into agreements of purchase and sale, becomes a trustee of the property and places itself in a fiduciary relationship to the purchasers.

The plaintiffs argue that Quay West was not entitled to deal with the land in such a way as to interfere with or defeat the equitable interests of the purchasers once the agreements were executed. In March of 1989, when Quay West transferred the property to a numbered company to hold the property in trust for Quay West, Quay West divested itself of the trust property it was obliged to hold for the purchasers. The plaintiffs submit the transfer of property by Quay West is a breach of the agreements which entitles the plaintiffs to damages.

The assignment of the contract by Quay West to Huang & Danczkay was done in two separate parts -- first, Quay West assigned the rights and then the liabilities were assumed. The plaintiffs submit that it is not possible to assume liabilities without notice. The plaintiffs further submit that the dissolution of Quay West was a breach of contract. By dissolving, Quay West disabled itself from performing the agreements and therefore, such action repudiated the agreements.

The plaintiffs refer to the cases of *Tolhurst v. Associated Portland Cement Manufacturers (1900) Ltd.*, [1902] 2 K.B. 660 (C.A.), affirmed [1903] AC. 414, 72 L.J.K.B. 834 (H.L.); *Lounsbury Co. v. Duthie*, [1957] S.C.R. 590, 9 D.L.R. (2d) 225; and *Air Transit Ltd. v. Innotech Aviation of Newfoundland Ltd.* (1989), 78 Nfld. & P.E.I.R. 24, 244 A.P.R. 24 (Nfld. T.D.), for the proposition that a party may not assign obligations or liabilities so as to relieve itself of contractual obligations. In *Tolhurst*, supra, it was stated by Collins M.R. at p. 668:

It is, I think, quite clear that neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the contractee. A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to someone else; this can only be brought about by the consent of all three, and involves the release of the original debtor . . .

(Emphasis added)

The proposition set out above in *Tolhurst*, supra, does not apply to the present situation. In the present case, Properties (the defendant in this action) accepts complete responsibility for the liabilities and obligations of Quay West. They do not rely on the revised corporate structure to escape any responsibility to the plaintiffs under the agreements. As was set out in para. 99 of the amended statement of claim which was admitted by Huang & Danczkay:

Through a series of transactions . . . the partnership of Huang & Danczkay Properties acquired all of the assets of Quay West and became liable for all of the obligations and liabilities of Quay West.

The property which was conveyed was accompanied by an assumption of liability which provided that the obligations of the original entity would be assumed by the revised structure. In my view, the conveyances did not in themselves constitute a breach of contract. If I am wrong in my conclusion that there was no breach of contract, in this case, there are no damages resulting.

(ii) Breach of trust

To consider whether or not the transfer of the site by Quay West to Properties constituted a breach of trust, it is necessary to keep in mind the principles set out in *York Condominium Corp. No. 167 v. Newrey Holdings Ltd.*, supra. In *Newrey*, numerous purchasers had entered agreements of purchase and sale. Prior to the registration of the condominium declaration and description, the developer sold parking units and retained the proceeds. The court held that the developer was a trustee of the property for the purchasers and the sales were a breach of trust. The developer had to account for the sale proceeds.

Wilson J.A., delivering the judgment of the court, set out the nature of the position of a developer who proposes to build a condominium at p. 467:

I do not think the position of the owner-developer remains unchanged after he starts to sell units. I think at that point he has committed the character of the project to that of condominium under the Act and declaration. I think he has placed himself in a fiduciary relationship to the unit purchasers not only with respect to their units but also with respect to the interests appurtenant thereto. He therefore holds the property in trust for the unit purchasers, present and prospective, and for the condominium corporation which will come into being upon registration of the declaration. I believe he is under a duty to protect the interests of all unit owners, present and prospective, and cannot put his own interests in conflict with theirs even although he himself continues to be an owner as long as any units remain unsold.

Once an owner-developer begins to sell units of a condominium, prior to the registration of the declaration, the owner-developer becomes a trustee of the property for the benefit of purchasers and owes fiduciary duties to the purchasers. The terms of the trust existing between the purchasers and the owner-developer are such that the trustee cannot deal with the property so as to defeat the purchasers' equitable interests in it. As set out in *York Condominium Corp. No. 767 v. Newrey Holdings*, supra, the purchasers acquire an equitable interest in their units and in the common elements. Both the plaintiffs and the defendant are in agreement with respect to the principles that emerge from *York Condominium Corp. No. 167 v. Newrey Holdings*, supra, however, they disagree as to its application to the facts of this case.

The plaintiffs claim that upon execution of the agreements, Quay West became a trustee for the purchasers with respect to the land on which the condominium unit and common interests were to be located. They submit Quay West was then not entitled to deal with the land in such a way as to interfere with or defeat the equitable interests of the purchasers. The plaintiffs submit that Quay West's transfer of the site was a breach of its trust obligations.

The defendant argues that Quay West did not, at any time, deal with the units or common elements in such a way as to interfere with or defeat the equitable interests of the purchasers. The site was always retained for the benefit of the plaintiffs since it was always the intention of Huang & Danczkay to build the project. Further, when the site was transferred, the defendant states that it was done with all of the encumbrances and liabilities attached. Therefore, the equitable interests of the plaintiffs in the property were transferred along with the property itself.

In arguing that a trust situation existed, the plaintiffs rely on the Alberta Court of Appeal decision in *Terrace Corp. (Construction) v. Owners of Condominium Plan. No. 752-1207* (1983), 146 D.L.R. (3d) 324, 26 Alta. L.R. (2d) 147 (C.A.). In this case, the condominium corporation sued Terrace Corporation, the builder, and Erwin and Willi Zeiter, officers of Terrace who initially managed the corporation. The development included a parking structure in which the roof was also a parking facility.

Terrace took a 99-year lease of the roof from the condominium corporation. Terrace was the registered owner of all of the condominium units and it appointed the condominium corporation. The Zeiters executed the lease on behalf of both the lessor and the lessee. Terrace conceded that the Zeiters, when they entered into the lease on behalf of the condominium corporation, had a fiduciary duty to the persons who were purchasing condominium units under interim agreements.

Despite the fact that the lease was disclosed to individual purchasers, the Alberta Court of Appeal held that these circumstances constituted a breach of fiduciary duty which resulted in the lease agreement being voidable. Stevenson J.A. explained at p. 328:

On the face of it the lease of common property by the Zeiters, nominees and principals of Terrace, to Terrace was a breach of their fiduciary duty. They were managers of the property in which the condominium unit buyers had an equitable interest and leased that property to the very corporation which appointed them managers.

The Terrace case is distinguishable from the present case. At no time did Quay West deal with the units or common elements in such a way as to interfere with or defeat the equitable interests of the purchasers. The conveyances were not made free and clear of all encumbrances. Therefore, the equitable interests of the purchasers were transferred along with the property itself.

The transfer and eventual dissolution of Quay West were designed to streamline Huang & Danczkay's holdings into one corporate entity in order to facilitate the larger transaction with Claridge. The dissolution of Quay West must not be viewed in isolation. The dissolutions were part of a joint venture between Claridge and Huang & Danczkay involving some 20 properties including Terminal 3 at Pearson International Airport. I find that there was never any intention on the part of the defendant to defeat its obligations under the agreements. Huang & Danczkay acknowledged that they were bound by the agreements and the terms and conditions therein.

In the result, I find that a trust relationship existed in the present case. However, in the circumstances of this case, I find that Quay West did not deal with the property in such a way so as to defeat the purchasers' equitable interest. Therefore, there is no breach of trust.

If a breach of trust had been found in these circumstances, it would have been necessary to go on and consider the appropriate damages. Therefore, I will do so in any event.

The plaintiffs argue that once a breach of trust is found, there is no requirement to prove a nexus of causation between the breach of trust and the losses. The plaintiffs rely on *Island Realty Investments Ltd. v. Douglas* (1985), 19 E.T.R. 56 (B.C.S.C.). The plaintiff (investor) in that case invested money in mortgages. Rather than dealing directly with borrowers, it made these investments through the corporate defendant (Vidco) acting as a mortgage broker. Vidco would, from time to time, make a proposal to the plaintiff for an investment, and if the plaintiff considered the proposal to be a desirable one, it would entrust to Vidco the amount it intended to invest.

The plaintiff terminated the relationship by notice to Vidco. In spite of that, Vidco made a further proposal to the plaintiff for investment after receiving the notice of the termination. The plaintiff decided to participate in this investment. The investment did not produce the expected profit and the plaintiff suffered some loss. Stewart L.J.S.C. concluded that the fact that it was "highly probable" that the plaintiffs would have suffered the loss even if the breach of trust had not been committed was not relevant in a claim for breach of trust. As a result, the defendants were liable for the loss suffered by the plaintiff. Stewart L.J.S.C. stated at pp. 64-65:

If a loss follows a breach as in this case I cannot consider the proposition that the loss would have occurred in any event. It is not the same as proving damages following a breach of contract. His authority for this is an old case, a decision of Galt J. in *Manitoba, Br. North Amer. Elevator Co. v. Bank of Br. North Amer.* (1914), 6 W.W.R. 1444, 20 D.L.R. 944, [varied 9 W.W.R. 1368, 26 D.L.R. 587, 32 D.L.R. 181 (Man. C.A.)] where Galt J. had this to say at p. 1477 [6 W.W.R.]:

It is not open to a trustee, or to one acting knowingly in conjunction with him, where there has been a breach of trust and loss has followed, either to tender evidence that if he had strictly followed the directions of the trust an equal or greater loss would have taken place.

The case was appealed successfully, but the judgments of the Court of Appeal need not be reviewed as the judgment of the trial Judge was restored by the Privy Council, [1919] 2 W.W.R. 748, [1919] A.C. 658, 46 D.L.R. 326.

With respect to the inevitability of loss issue, in *Plaza Fiberglass Manufacturing Ltd. v. Cardinal Insurance Co.*, [1990] 68 D.L.R. (4th) 586 ("Plaza Fiberglass"), it was found that there was a breach of fiduciary duty. The trial judge went on to consider the submission that, even if there was a breach of fiduciary duty, there was no loss. The trial judge referred to Ellis, *Fiduciary Duties in Canada* (1988), where the author dealt with the irrelevance of the inevitability of loss at p. 20-3 (now p. 20-4):

Perhaps most significant to the calculation of fiduciary damages is the concept of inevitability of loss. The Courts have long precluded the defaulting fiduciary from arguing that the loss would have occurred in any event: *Island Realty Investments Ltd. v. Douglas* (1985), 19 E.T.R. 56 (B.C.S.C.). In that case, the Court acknowledged the inevitability of loss, and, absent the equitable position reflected in precedents cited to it, would have dismissed the action.

It was concluded by the trial judge [p. 601 D.L.R.]:

Practically, this approach alleviates against a requirement that the complaining party tie the loss to the breach and, where the breach and a related loss occur, the defaulting party is estopped from arguing the inevitability of the loss.

It should be noted that in *Plaza Fiberglass*, defendant's counsel submitted that the appropriate test was that set out by Mr. Justice Dickson in *Guerin v. R.*, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321. The defendants in the present case also made reference to the *Guerin* case arguing that there must be a nexus in terms of causation between the breach of trust and the losses suffered by the plaintiff. In *Guerin*, Dickson J. held that the measure of damages is the actual loss which the acts or omissions have caused to the trust estate, the plaintiffs being entitled to be placed in the same position so far as possible as if there had been no breach of trust. In disagreeing that the test set out in *Guerin* was the appropriate test to apply, the trial judge stated the following [p. 601 D.L.R.]:

Dickson J. does not discuss the question where the loss was inevitable in any event. In my opinion, the quotation from Wilson J. in *Guerin v. The Queen*, supra, at p. 365 [D.L.R.] also does not assist the defendants. It does not deal with the question of the inevitability of the loss.

The decision in *Plaza Fiberglass* was appealed [reported at (1994), 18 O.R. (3d) 663, 115 D.L.R. (4th) 37]. Robins J.A., delivering the judgment of the court, found that the trial judge had erred in finding that there was any breach, fiduciary or otherwise. In light of the disposition of the fiduciary duty issue, it was not necessary to consider the inevitability issue, however, as the issue was argued at some length, the court thought it was appropriate to make some observations.

Robins J.A. did not agree that the inevitability of the loss could be dismissed as irrelevant. He stated at p. 673:

Assuming, for present purposes, that New Hampshire was in breach of a fiduciary duty, I am unable to agree that the inevitability of the loss can be dismissed as irrelevant. In my respectful opinion, the question of whether or not Plaza's loss was inevitable in the sense that it would have been sustained regardless of the breach is a pertinent factor to be taken into account in determining whether any loss was occasioned as a result of the breach.

(Emphasis added)

Robins J.A. went on to address the issue concerning causation. In doing so, he referred to the *Island Realty* case. At p. 673, Robins J.A. continued:

I think it manifest that before liability will be imposed on a fiduciary there must be some causal connection between the breach of duty and the loss complained of: *Maghun v. Richardson Securities of Canada Ltd.* (1986), 58 O.R. (2d) 1 at p. 18, 34 D.L.R. (4th) 161 (C.A.). A distinction must be drawn between a situation in which a loss is rendered inevitable due to intervening circumstances and one in which there is no causal relation between the loss and the conduct of the fiduciary that gave rise to the breach. Where there is a breach and a related loss the complaining party may be estopped from arguing that subsequent events rendered the loss inevitable in that the loss would have been suffered in any event: see *Island Realty Investments Ltd. v. Douglas* (1985), 19 E.T.R. 56 (B.C.S.C.); and *Ellis, Fiduciary Duties in Canada* (1988), at pp. 20-22. However, where a loss is completely unconnected to a breach of duty, the loss cannot be attributed to the fiduciary. It cannot be the case that a fiduciary is responsible for all damages suffered by the complaining party regardless of their cause.

(Emphasis added) The Court of Appeal went on to conclude that, even if it was accepted that there was a fiduciary duty between Plaza and New Hampshire, no act or omission found against New Hampshire caused or contributed to the loss Plaza encountered.

Turning to the situation at hand, it becomes necessary to look at the facts of this case to determine whether there is a causal relation between the loss and the conduct of the fiduciary that gave rise to the breach. In the fall of 1988, a deal was reached whereby Huang & Danczkay Properties was to be formed. As explained earlier, the site was one of the properties which was to be transferred to Properties. This deal was part of a much larger joint venture between Huang & Danczkay and Claridge involving Terminal 3 at Pearson International Airport. On March 1, 1989, legal title to the site was transferred to a numbered company as bare trustee for Quay West which was the beneficial owner. By documents dated June 8, 1989, the assets and liabilities of Quay West and other properties were assigned to Huang & Danczkay Properties.

On July 10, 1989, Quay West returned the deposits with interest to the purchasers. This occurred after a number of events and culminated in the downzoning of the site. The evidence demonstrated that the agreement between Huang & Danczkay and Claridge had been in development for a long time. While the fact that the closing in June of 1989 coincided with events at the site may raise the impression that there was more to the transaction than meets the eye, there is insufficient direct evidence to establish a breach of trust on that basis.

It is true that Huang & Danczkay did not tell the plaintiffs that Quay West was no longer the other party to the contract and this may have been less than completely candid. Huang & Danczkay might have preferably told the plaintiffs, however, they nonetheless did continue to accept their obligations. Even if they initially denied their responsibility, it would not have changed the situation because they ultimately acknowledged their full responsibility and liability should Quay West eventually be found liable.

Even if there was a breach, in the circumstances of this case, the plaintiffs have failed to establish any causal connection between the breach and the loss claimed.

DAMAGES

The assessment of damages in this case is difficult. *Chaplin v. Hicks*, [1911] 2 K.B. 786, [1911-13] All E.R. Rep. 224 (C.A.), is the leading decision establishing the proposition that difficulty in proof of damages is not a bar to recovery. The court reasoned at pp. 792-94:

In the case of a breach of contract for the delivery of goods the damages are usually supplied by the fact of there being a market in which similar goods can be immediately bought, and the difference between the contract price and the price given for the substituted goods in the open market is the measure of damages; that rule has been always recognized. Sometimes, however, there is no market for the particular class of goods; but no one has ever suggested that, because there is no market, there are no damages. In such a case the jury must do the best they can, and it may be that the amount of their verdict will really be a matter of guesswork. But the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages for his breach of contract.

The Common Law Courts never enforced contracts specifically, as was done in equity; if a contract was broken, the common law held that an adequate solution was to be found in a pecuniary sum, that is, in the damages assessed by a jury. But there is no other universal principle as to the amount of damages than that it is the aim of the law to ensure that a person whose contract has been broken shall be placed as near as possible in the same position as if it had not. The assessment is sometimes a matter of great difficulty.

(Emphasis added)

Fuller and Purdue in their article "The Reliance Interest in Contract Damages" (1936-37), 46 Yale L.J. 52, defined different types of damages. The plaintiffs in this action seek to recover what Fuller and Purdue characterized as damages for "loss of bargain". It was described in the following terms by Fuller and Purdue at p. 54 of their article:

We may seek to give the promisee the value of the expectancy which the promise created. We may in a suit for specific performance actually compel the defendant to render the promised performance to the plaintiff . . . [and] in a suit for damages, we may make the defendant pay the money value of this performance. Here our object is to put the plaintiff in as good a position as he would have occupied had the defendant performed his promise. The interest protected in this case we may call the expectation interest.

In assessing damages, I am guided by the following principles. The plaintiffs are to be placed in the same position as they would have been in had the contract been performed. The date from which the court should assess damages is the date which is the most appropriate for the circumstances of the particular case. As stated by McLachlin J. (as she then was) in *Richter v. Simpson* (1982), 24 R.P.R. 37 at p. 39, 37 B.C.L.R. 325 (S.C.):

The fundamental principle in assessing damages for breach of contract is that the plaintiff is to be placed in the same position he would have been had the contract been performed. A qualification on this principle is that he is not entitled to recover losses which he could have avoided by taking reasonable steps; that is, he is obligated to mitigate his loss. While damages are most often assessed as of the date of breach, this is not an absolute rule; the Court has power to fix such other date as may be appropriate in the circumstances: *Johnson v. Agnew*, [1980] A.C. 367, [1979] 1 All E.R. 883 (H.L.).

(Emphasis added)

This is consistent with the view taken by the courts in Ontario. In *Garbens v. Khayami* (1994), 17 O.R. (3d) 162 at p. 164, 36 R.P.R. (2d) 244 (Gen. Div.), Wright J. clearly set out the principle of damages:

The first principle of damages is to put the innocent party in the position he or she would have been had the contract not been breached. In a contract of sale, this principle normally leads to assessment as at the date of the breach. However, in *Johnson v. Agnew*, [1979] 1 All E.R. 883 at p. 896, [1979] 2 W.L.R. 487 (H.L.), Lord Wilberforce added that this rule was not an absolute one: "If to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances."

In *Rice v. Rawluk* (1992), 8 O.R. (3d) 696 (Gen. Div.), the purchasers refused to close, alleging that the vendor had refused to remove certain work orders. The court found for the vendor/defendant by counterclaim. In setting out the assessment of damages, O'Brien J., at p. 717, quoted from the case of *Bitton v. Jakovljevic* (1990), 75 O.R. (2d) 143, 13 R.P.R. (2d) 48 (H.C.J.): "Since the decision in *Johnson v. Agnew*, case law indicates that there is no consistent rule for the date of assessment of damages. Each case is decided on its own facts based on a fairness test."

The crucial question to determine is the date from which damages are to be assessed. The possible dates are:

1. July 10, 1989 -- date of termination letters
2. December 1, 1989 -- possession date for Phase I March 1, 1990 -- possession date for Phase II August 1, 1990 -- possession date for Phase III
3. Extended possession dates
4. Trial date Huang & Danczkay argued at trial that the appropriate date to assess damages was the extended possession date for each particular phase. Their reasoning was that, since the power to extend the possession dates pursuant to the agreements was exercisable at the sole discretion of the vendor, and taking into account the delays caused by the City of Toronto passing the interim control by-law at the 11th hour, the extended date would be a reasonable date.

This argument is flawed for a number of reasons. As stated earlier, the vendors did not, in fact, exercise their right to extend the possession dates in the agreements. The court should not assume, for the purposes of damage assessment, that Huang & Danczkay would have extended the possession dates. In addition, pursuant to the agreements, the date could have been extended anywhere from 1 to 240 days. It seems that the defendants are arguing that the court should assume that the possession dates would have been extended for the full 240 days. In the absence of an actual extension of the possession dates, there is simply no basis to conclude that damages should be assessed in this way. In my view, it would be pure speculation and completely arbitrary to assess damages at the extended possession dates.

The plaintiffs' position was that damages should be assessed at the date of the breach (July 10, 1989). Numerous cases were cited for the proposition that, where a vendor fails to complete an agreement of purchase and sale, the normal measure of damages is the difference between the contract price and the market value of the property at the date of the breach. I also reject this argument. The reason is that the plaintiffs did not expect to receive their condominium units at that date.

I find that the most appropriate date to assess damages in this case is the date when the defendant was obliged to deliver possession of the units under the individual agreements. Assessing damages at the possession dates is the most reasonable date to use in this case as it takes into account when each plaintiff contemplated that they would have possession of the units. Therefore, in this case, the appropriate date for the assessment of damages is as follows: for Phase I, December 1, 1989; for Phase II, March 1, 1990; and for Phase III, August 1, 1990.

Turning now to the valuation, three expert witnesses provided appraisal evidence at trial. The plaintiffs called Mr. Gary McIlravey and Mr. Mullins who did not undertake an appraisal but was called for the purpose of commenting upon the other expert witnesses.

Mr. Gary McIlravey is a marketing consultant, mainly for private sector developers and builders, but also for the public sector. His primary area of expertise is market research relating to the Toronto condominium market. His firm, N. Barry Lyon Consultants Ltd., publishes a quarterly report that contains data relating to sales of pre-sale condominiums in Toronto.

For the purposes of damage assessment, Mr. McIlravey estimated the market value of the Quay West units at July 1989. Mr. McIlravey proceeded on the basis that he was valuing the units as if they were pre-sale units. In other words, he was estimating the market price on the assumption the Quay West units were being sold that had not yet been constructed, or fully constructed, but were being made available for sale by developers prior to completion.

Mr. McIlravey used data to evaluate price differentials for four scenarios. The price differentials represent the difference between the agreement price and some other market price established differently for each of the four scenarios. I will briefly outline the calculations involved in the four scenarios:

Scenario 1 -- Difference between agreement price and pre-sale market values of Quay West units on the assumption that they were built and remarketed

With respect to Mr. McIlravey's first scenario, each price differential represents the difference between the agreement price for the particular unit and the estimated market price of the unit assuming that the Quay West project was being sold as a new pre-sales project in July of 1989.

The plaintiffs submit that the "price differentials" for Scenario 1 (market value of Quay West units as at July, 1989) represent the damages suffered by the plaintiffs.

Scenario 2 -- Difference between agreement price and the price a plaintiff would have to pay for a comparable existing pre-sale unit in July, 1989 Each price differential in Scenario 2 represents the difference between the agreement price the plaintiff would have paid if that plaintiff had gone into the market in July 1989 and purchased an existing pre-sale condominium unit. The price differentials are lower in Scenario 2 as Scenario 1 assumes that the plaintiffs are compensated as at July, 1989 for a pre-sale condominium unit of the same size at the Quay West waterfront location. Scenario 2 assumes that the plaintiffs purchased pre-sale units in Toronto, not on the waterfront.

Scenario 3 -- Difference between agreement price and the price a plaintiff would have had to pay for a waterfront re-sale in July 1989

Each price differential for Scenario 3 represents the difference between the particular agreement price and the estimated price the plaintiff would have been paid if that plaintiff had gone into the market in July, 1989 and purchased an existing re-sale condominium unit. It should be noted that there were some re-sale units available on the waterfront.

Scenario 4 -- Difference between agreement price and the market price of the unit assuming the Quay West project was built and the unit was being sold as a re-sale unit in July 1989

Mr. McIlravey attempted to estimate the resale value of condominiums on the Quay West site assuming that they had been built and were capable for resale by July 1989. Each price differential for Scenario 4 represents the difference between the agreement price for the particular unit and the estimated market price of the unit assuming that the Quay West project was built and the unit was being sold as a resale unit in July 1989.

Both scenarios 1 and 2 address the price of pre-sale condominium units in July 1989. The difficulty with this approach is that it misconstrues the agreements which were entered into between the parties. Quay West agreed to build a condominium unit for delivery on the possession date. They did not agree to enter into a new pre-sale agreement in 1989. In order to be put into as good a position as they would be had the agreements been completed, the plaintiffs should receive the market value of a condominium unit on the possession date.

Mr. McIlravey's scenarios 3 and 4 dealt with re-sale. In my view, these approaches more accurately reflect the proper valuation, however, Mr. McIlravey assumes resale in July of 1989. As set out above, the parties did not contract to have a condominium unit in July 1989 and therefore a valuation based upon this methodology is problematic.

The defendant's appraisal expert was Mr. Pestl. Mr. Pestl has been a certified real estate appraiser since 1977. Mr. Pestl delivered a report to the court in which he provided market values for the individual condominium units at a variety of dates.

For his analysis, Mr. Pestl began with the actual price in the agreements for which the purchasers agreed to buy the units. Mr. Pestl compared these prices with purchase prices of other comparable units in the vicinity and concluded that the purchase prices in the agreements were reflective of their approximate market value. Mr. Pestl then estimated the market value of the units at various points in time through the application of a price index as follows: he considered the raw MLS statistical data, having regard to (1) the average sale prices of condominium units in Metropolitan Toronto, (2) the general residential sales statistics for central Toronto, as well as (3) the condominium unit sales statistics for the MLS C-1 and C-8 districts (areas located on the waterfront).

Based on this index, Mr. Pestl determined the value of the units at different times (contained in Exhibit A 324). By the possession dates, Mr. Pestl concluded that the value of the units would have exceeded their purchase price by \$4,860,387. Mr. Pestl engaged in this same exercise to include the agreements to purchase parking spaces and set out the approximate market value of the units in question over various points in time at p. 46 of his report:

Phase I as at December 1, 1989 \$2,568,353

Phase II as at March 1, 1990 1,636,816

Phase III as at July 3, 1990 1,361,125 _____ \$5,566,294

In his evidence, Mr. Pestl adjusted these figures to take into account the discontinuance of the within action by various plaintiffs. The adjusted figures of the unit values including the parking spaces are as follows (contained in ex. 329):

Phase I as at December 1, 1989 \$2,384,917

Phase II as at March 1, 1990 1,405,127

Phase III as at July 3, 1990 1,186,090 _____ \$4,976,134

The plaintiffs took issue with the fact that Mr. Pestl did not deal with the pre-sale market. In my view, the argument that valuation should be based on the pre-sale approach is not in accordance with the principles of compensatory damages. It fails to take into account that the plaintiffs contracted for an actual condominium unit to be delivered on the possession date. The plaintiffs did not bargain for, and they did not expect, a brand new pre-sale contract with delivery at a later date. To base compensation on a pre-sale contract and not what the parties actually bargained for would amount to over-compensation.

The plaintiffs further say that it is essential to recognize that the agreements in this case contemplated a new condominium unit which was of special attraction value. In my view, Mr. Pestl's valuation takes into account the new feature of the condominiums as it considers the actual purchase price which each purchaser agreed to pay when the agreement was entered into. This is based on the particulars of each unit (i.e., the particular view, which floor of the building the unit was to be located on, etc.).

Based on Mr. Pestl's valuation method, damages are assessed as follows:

Phase I as at December 1, 1989 \$2,384,917

Phase II as at March 1, 1990 1,405,127

Phase III as at July 3, 1990 1,186,090 _____ \$4,976,134

CONCLUSION

The defendant is liable for breach of contract simply because it terminated the agreements without any lawful justification. The contracts created obligations to build. Although there were some termination clauses that would apply in certain circumstances, none of them were applicable to permit the developer to terminate the contracts at any stage. In the absence of any applicable termination clause, the defendant could not terminate the contracts as it did.

This is not an appropriate case to find that there was frustration of contract. The legal principles suggest two reasons why this defence must fail. First, the possibility of problems at the municipal level were contemplated by the parties at the time of contracting. The evidence demonstrates that this was one reason for the insertion of cl. 38 in the agreements. Quay West knew and intended that cl. 38 would be used to terminate the agreements by June 30, 1988 if they were unable to secure development review approval for the project. Second, Huang & Danczkay refused to further negotiate with the City following the letter by Councillor Nowlan. Huang & Danczkay cannot rely on their own default to excuse them from liability under the agreements.

With respect to damages, July of 1989 is not the appropriate date at which to assess the plaintiffs' damages. The appropriate date at which to assess damages is the possession date under the agreements. This adequately takes into account when the plaintiffs expected delivery of their condominium unit.

As to the appraisal of damages, the evidence of the defendant's expert witness, Mr. Pestl, is preferred over that of Mr. McIlravey. Mr. Pestl's report provided market values for the various units on a variety of dates. In addition, Mr. Pestl used the actual purchase price as a starting point and then developed a time trended value index as to the market values of waterfront condominiums over the relevant period.

Mr. McIlravey's approach was detailed and thorough, however, it was flawed in some respects. Most importantly, Mr. McIlravey's approach addressed the marketable price of pre-sale condominium units. The difficulty with this approach is that the plaintiffs did not bargain for, and they did not expect, a brand new pre-sale contract with delivery at a later date. Quay West agreed to build a condominium unit for delivery on the possession date. Valuation based upon pre-sale condominium asking prices is therefore inappropriate. The total damages are summarized below and are broken down on a unit-by-unit basis in Sch. A:

Phase I as at December 1, 1989 \$2,384,917

Phase II as at March 1, 1990 1,405,127

Phase III as at July 3, 1990 1,186,090 _____ \$4,976,134

Therefore, judgment will issue for the plaintiffs in accordance with the amounts set out in Sch. A. I may be spoken to with respect to prejudgment interest and, if costs cannot be agreed upon, I will entertain submissions with respect to the scale of costs for assessment.

Judgment accordingly.

CBR# 193

Metropolitan Toronto Condominium Corporation No. 850, applicant, and Sylvia Oikle and Executive Suites Ltd., respondent

Court File No. 4084/94 Ontario Court of Justice - General Division Toronto, Ontario Lissaman J. Heard: October 3, 1994. Judgment: December 28, 1994.

Michael A. Spears, for the applicant. Jonathan H. Fine, for the respondent, Sylvia Oikle.

[para1] LISSAMAN J.:-- This application is yet another case dealing with the relationship between a Condominium Corporation and an individual unit owner with respect to their various rights and obligations.

[para2] The facts in the case at bar are not in dispute and they are as follows:

[para3] In April of 1991 the respondent, Sylvia Oikle ("Oikle"), purchased a unit in the condominium building known as (Suite 2107) 25 The Esplanade, Toronto. The applicant in this case is Metropolitan Toronto Condominium Corporation No. 850 ("MTCC 850") which was created to develop 25 The Esplanade. Oikle, the first named respondent, purchased her unit towards the end of April 1991 and lived in the unit until November 1992 when she moved out of the City of Toronto. Oikle, effective November 15, 1992, leased her condominium unit to Executive Suites Ltd. who is also a respondent in this case. Executive Suites Ltd. is not contesting this application other than giving support to Oikle. Clearly the respondent Executive Suites Ltd. will be bound by any relief given by this Court to the applicant.

[para4] It is common ground that the respondent, Executive Suites Ltd., runs a business leasing condominium units to persons who would otherwise stay in hotels and in fact their advertising emphasizes this feature. The applicant disapproves of the sub-leasing to Executive Suites Ltd. and in particular the way of operating which it says contravenes the Condominium Declaration that governs the occupancy of Oikle's unit. To be fair I must mention that at the time of writing these reasons I have not heard that there were any complaints by any other unit holders as to the leasing of Oikle's unit.

[para5] It is asserted that Executive Suites Ltd. rents the unit as often as possible. When a unit is occupied it is done so by a single family.

[para6] The relief sought by the applicant in this case is as follows:

1. a declaration that the respondent, Ms. Oikle, is in breach of section 31(1) of the Condominium Act, R.S.O. 1990, c. C-26;
2. a declaration that the respondent, Executive Suites Ltd. has breached Article IV(2)(a) of the Declaration;
3. a declaration that both respondents are in breach of Article IV(1)(a) of the Declaration and Article II of the Rule Respecting Commercial Use of Units;
4. an order requiring the respondents to comply with Article IV(1)(a) of the Declaration and Article II of the Rule Respecting Commercial Use of Units; and
5. an order requiring the respondents to pay the costs of the applicant calculated on a solicitor and client scale in accordance with Article VIII(5)(a) of the Declaration and Rule 20 of the Rules of MTCC No. 850.

THE ISSUE

[para7] The issue raised in this application concern the control of a condominium corporation over its unit holders. The issue can be expressed as follows:

Given the Declaration, By-laws and the Condominium Act, R.S.O. 1990, c.26 can the requested orders be made which limit the manner in which a unit holder may manage his or her unit?

In order to determine this issue it is necessary to look at the relevant sections of the Condominium Act, and the relevant rules of the condominium corporation which are found in its Declaration and in its By-laws.

THE LAW

[para8] Condominium corporations are created to manage the assets of a condominium which is owned collectively by its unit holders. The condominium corporation incorporates a system whereby the majority rules and the unit holders may decide how they want their condominiums to run subject to any restrictions contained in the Condominium Declaration which are not contrary to the Condominium Act. It is trite law to say that once the rules have been established a unit owner is expected to abide by them and the Condominium Corporation is obliged to enforce them.

[para9] Section 3(3) of the Act reads as follows:

In addition to the matters in subsection (1), and in any other sections in this Act, a declaration may contain, ...

(b) provisions respecting the occupation and use of the units and common elements; (c) provisions restricting gifts, leases and sales of the units and common interests;

Section 12(3) and (5) of the Act provide as follows:

(3) The Corporation has a duty to effect compliance by the owners with this Act, the declaration, the by-laws and the rules.

(5) Each owner and each person having a registered mortgage against a unit and common interest has the right to the performance of any duty of the Corporation specified by this Act, the declaration, the by-laws and the rules. [emphasis added]

Section 31 provides as follows:

(1) Each owner is bound by and shall comply with the Act, the Declaration, the By-laws and Rules. (2) Each owner has a right to the compliance by the other owners with this Act, the Declaration, the By-laws and the Rules.

(3) The Corporation, and every person having an encumbrance against any unit and common interest, has a right to the compliance by the owners with this Act, the Declaration, the By-laws and the Rules.

[para10] The relevant rules governing the particular condominium unit, the subject of this Motion, are contained in the Condominium Declaration and this application is brought pursuant to section 49 of the Condominium Act which provides that a condominium corporation may seek an order from a Court to enforce the rules of the condominium as follows:

(1) Where a duty imposed by this Act, the declaration, the by-laws or the rules is not performed, the Corporation, any owner, the bureau, or any person having a registered mortgage against a unit and common interest, may apply to the Ontario Court (General Division) for an Order directing the performance of the duty.

(2) The Court may by Order direct performance of the duty and may include in the Order any provisions that the Court considers appropriate in the circumstances.

...

(4) The lessee of a unit is subject to the duties imposed by this Act, the declaration, the by-laws and the rules on an owner.

...

(6) Where the owner of a unit leases his unit, the owner shall notify the corporation that the unit is leased and shall provide to the corporation the lessee's name and the owner's address.

[para11] Having identified the applicable sections of the Condominium Act I must now consider the wording of the Condominium Declaration relating to the Oikle unit.

[para12] Article IV is as follows:

IV. UNITS

(1) Occupation and Use - The occupation and use of the Units shall be in accordance with the following restrictions and stipulations:

(a) Each unit shall be occupied and used only as a private, single family residential dwelling and for no other purpose; provided, however that the foregoing shall not prevent the Declarant from completing the Building and all improvements to the property, maintaining the Units as models for display and sale purposes in the said development only and otherwise maintaining construction offices, displays and signs until all Units have been sold by the Declarant.

...

(d) The owner of each Unit shall comply and shall require all residents and visitors to his Unit to comply with the Act, this Declaration and the by-laws and the Rules passed pursuant thereto.

(2) Requirements for Leasing

(a) Requirements for Leasing of Units - No owner shall lease his dwelling Unit unless he first obtains the written approval of the corporation to any proposed tenant and to the actual form of lease and he shall further cause the tenant to deliver to the corporation an agreement signed by the tenant, to the following effect:

"I _____, covenant and agree that I, members of my household and my guests from time to time, will, in using the Unit, rented by me, and the common elements, comply with the Condominium Act, the Declaration, By-laws and Rules of the Condominium Corporation, during the term of my tenancy."

The owner shall forthwith furnish the board with an executed copy of the lease in question and with his own forwarding address and telephone number from time to time and the name and telephone number of the tenant.

(b) Any owner leasing his Unit shall not be relieved thereby from any of his obligations with respect to the Unit pursuant to the Act, which shall be joint and several with his tenant. [emphasis added]

[para13] In the case at bar the applicability of Article IV(1)(a) must be examined. This Article purports to restrict the commercial use of the Oikle unit (or any of the units covered) and reads as follows:

Article I

Definitions

1. "Commercial Use" of a unit means, without limiting its generality:

- a. the carrying on of a business;
- b. the operation of a business office or professional office;
- c. hotel or boarding or lodging house use;

d. the disposition of an owner's or tenant's right to occupy a residential unit whereby the party or parties acquiring such interest or right is or are entitled to use or occupy the unit on a transient use basis or under any arrangement commonly known as time sharing;

2. "Transient Use" means more than one short term use or occupancy of a particular unit for a period of less than three (3) months in any particular period of twelve consecutive months.

Article II

1. Each condominium unit shall be for private residential occupation and use only and for no other purpose, and for greater certainty, but without limiting the generality of the foregoing, no commercial use shall be permitted in or with respect to any unit. [emphasis added]

VALIDITY OF THE RULES

[para14] Section 29 of the Condominium Act deals with this issue and is as follows:

In order for a rule to be valid it must have been enacted pursuant to section 29 of the Act. Section 29 states:

(1) The board may make rules respecting the use of common elements and units or any of them to promote the safety, security or welfare of the owners and of the property or for the purpose of preventing unreasonable interference with the use and enjoyment of the common elements and of other units.

(2) The rules shall be reasonable and consistent with this Act, the declaration and the by-laws,

(3) The rules shall be complied with and enforced in the same manner as the by-laws,

(4) Subject to subsection (5), any rule made under subsection (1) shall be effective thirty days after notice thereof has been given to each owner unless the board is in receipt of a requisition in writing made under section 19 requiring a meeting of owners to consider the rules,

(5) If a meeting of owners is required, the rule made under subsection (1) shall become effective only upon approval at such meeting of owners,

(6) The owners may at any time after a rule becomes effective amend or repeal a rule at a meeting of owners duly called for that purpose.

[emphasis added]

[para15] Counsel for the respondents referred to several decisions in which the Court found that the rule violated was invalid as being outside the board of directors' power. These cases are York Condominium Corp. No. 382 v. Dvorchik (1992), 24 R.P.R. (2d) 19 (Ont. Ct. (Gen. Div.)) (a rule that dogs weighing over 25 lbs. are prohibited was found to be invalid for being arbitrary and unreasonable), Waterloo North Condominium Corporation No. 31 v. Indico Ltd. and Jan Merkel (January 3, 1984), unreported, Mossip J. (a rule that only one pet was allowed was found to be invalid), and Metropolitan Toronto Condominium Corp. No. 650 v. Klein (1988), 49 R.P.R. 205 (Ont. Dist. Ct.) (a rule that only one car may be parked in the unit holder's parking spot was found to be invalid and parking two cars was permitted as long as neither car encroached on the common elements). All of these cases were decided on their facts given the language of section 29. None of them deal with a situation like this where a person is renting their unit to a corporation that is in the business of providing temporary accommodation to its clients.

POSITION OF APPLICANT

[para16] Putting the position of the applicant as succinctly as possible it is their position that the use being made of the Oikle unit contravenes the rules of the Condominium Corporation No. 850 that use being for residential occupation only.

[para17] The applicant alleges and such allegation is not challenged by the respondent Oikle that the respondent Executive Suites markets the Oikle unit in the Toronto Yellow Pages and in its advertising materials as "an alternative to conventional hotel accommodation". The advertising materials pertaining to the Oikle Unit alleges the following:

(a) the Unit is available for rent on a daily, weekly or monthly basis. Charges for occupation of the Unit, which are subject to provincial sales tax and Goods and Services Tax, are on a per diem rate with a discount for longer use. Rates for the Unit are described as "up to a 50 percent saving of conventional city hotel rates";

(b) payment for occupation of the Unit can be made by major credit card;

(c) reservations for the Unit can be made either directly through the head office of Executive Suites or through any travel agent;

(d) the Unit is fully furnished and equipped and includes a television, clock, radio, linen, towels, small kitchen appliances, pots, pans, utensils, cutlery, glasses and china;

(e) the Unit is equipped with a direct dial telephone. Local calls are complimentary and outstanding long-distance calls are charged at the end of the month to the occupant's credit card number on file at Executive Suites;

(f) housekeeping service is provided twice weekly by Executive Suites;

(g) check out time is at 10:00 a.m. as housekeepers have to clean and prepare the Unit for guest arrivals at 2:00 p.m.

(h) occupants can use the condominium corporation's amenities, facilities and common elements.

[para18] In the affidavit of Frederick Kozlo, on behalf of the applicant, it is alleged that during the month of January 1993 the respondent Executive Suites rented Unit 2107 on eleven separate occasions. Such allegation is not in any way challenged by the

respondents. I am advised that on September 2, 1994 and September 5, 1994 Unit 2107 was continued to be rented on a short time basis. All leasing was without the applicant's permission.

[para19] The Rule Respecting Commercial Use of Units purportedly became effective on September 25, 1993, subsequent to Oikle's entering into a leasing arrangement with Executive Suites Ltd. Accordingly, even if the Rule is valid, it is submitted that Oikle's use of the Unit can continue as it is akin to a non-conforming use. *York Condominium Corp. No. 122 v. Sibblis* (1989), 72 O.R. (2d) 12 (Dist. Ct., Locke, J.).

[para20] In support of its position the applicant's Counsel has referred me to the following cases:

Re Matlavik Holdings Ltd. and Grimson (1979), 24 O.R. (2d) 92 at 92-93 (Div. Ct.)

Re Deerhurst Investment Ltd. and FPI Management Systems Ltd. (1984), 50 O.R. (2d) 687 at 690-691 (appeal to Divisional Court dismissed April 19, 1985)

Condominium Plan No.8810455 v. Spectral Capital Corporation (1990), 14 R.P.R. (2d) 305 at 307-308, 311-312 and 314 (Alta. Q.B.)

552838 Ontario Limited v. London Executive Suites, unreported decision of the Honourable Judge E.R. Brown, released November 19, 1992

York Condominium Corporation No. 216 v. Borsodi (1983), 42 O.R. (2d) 99 at 106-109. Ct.)

Carleton Condominium Corporation No. 279 v. Rochon (1987), 59 O.R. (2d) 545 at 552 (C.A.)

Metropolitan Condominium Corporation No. 776 v. Gifford (1989), 6 R.P.R. (2d) 217 at 224 (Ont. Dist. Ct.)

[para21] *York Condominium Corp. No. 216 v. Borsodi* (1983), 42 O.R. (2d) 99 (Co. Ct.) is a particularly helpful case. It states the proposition that just because unit holders do not complain, does not mean that the Declaration and By-laws should not be upheld by the Court. The case involved a building which had an "adults only" tower where no children under the age of 14 were permitted to live. Two other towers were designated as family towers. The other unit holders had not complained but the condominium corporation wished to enforce the rules. A relevant passage of the judgment of Allen J. at p. 106: In my view, the defendants' objection to the plaintiff's action is not strengthened by the absence of testimony to suggest that the defendants' child has in any way, by reason of conduct or behaviour, interfered with the rights of others. The child's very presence as a permanent resident in the defendants' unit places the defendants in a position of breach of the Declaration. And if the plaintiff did not seek to enforce the Declaration it too would be in breach of the Act.

[para22] At page 107 of the decision, Allen J. discussed the duty of the condominium corporation in this type of situations:

In my view, the plaintiff in this action is simply fulfilling the obligation cast upon it by the Act to enforce the Declaration for the benefit of the owners of all of the units in the Condominium. That is a desirable and legitimate purpose. [emphasis added]

[para23] The applicant also, in particular, relies on Mr. Justice Herold's decision in *Metropolitan Toronto Condominium Corp. No. 776 v. Gifford* (1989), 6 R.P.R. (2d) 217 (Ont. Dist. Ct.). This case supports the proposition that the Courts as part of policy should support the enforcement of the rules of a condominium. It is useful to quote Justice Herold's statement in the Gifford case which is as follows:

The major advantage of requiring compliance, on the other hand, appears to me to be that a message will be sent out by the board to the unit owners that the declaration and by-laws are in place for a good reason and they will be enforced, and a message will also be sent by the Court that where the board acts reasonably in carrying out its duty to enforce the by-laws and declaration the board will be supported by the Court.

...

A longer-term result of this position surely will be that people will only move into the building if they are prepared to live by the rules of the community which they are joining -- if they are not they are perfectly free to join another community whose rules and regulations may be more in keeping with their particular individual needs, wishes or preferences. [emphasis added]

POSITION OF RESPONDENT, OIKLE

[para24] Counsel for Oikle submitted that the provisions of the Declaration which purport to require the written approval of the condominium corporation to any proposed tenant and to the actual form of lease should be strictly construed as ultra-vires the condominium corporation. Counsel for Oikle submits that these provisions are an unreasonable restraint upon alienation and are not permitted under Section 3(3)(c) of the Act or otherwise. As well, there are no criteria set out for the purposes of approval of the tenant and the lease as required by the Declaration and therefore leaves open the possibility of arbitrary and capricious decision making.

Re Peel Condominium Corp. No. 11 and Caroe (1974), 4 O.R. (2d) 543, 48 D.L.R. (3d) 503 (H.C.)

Winnipeg Condominium Corp. No. 1 v. Stechley, [1978] 6 W.W.R. 491, 90 D.L.R. (3d) 703 (Man. Q.B.)

[para25] Some of the factors a Court will consider in exercising its discretion under Section 49 of the Condominium Act are:

- (1) The nature of the total development.
- (2) What are the reasonable expectations of the other occupants of the development?
- (3) How seriously do other occupants take this particular issue as opposed to other issues?
- (4) Does the conduct of the unit owner in question interfere with others?

(5) Have there been any complaints by other unit owners?

(6) What is the relationship between or amongst the various interested parties?

(7) What is the actual wording of the covenant which is being enforced -- are similar pets allowed, for example, while dogs are disallowed?

(8) What are the advantages of requiring compliance compared to the advantages of permitting non-compliance? *Metropolitan Toronto Condominium Corp. No. 776 v. Gifford* (1989), 6 R.P.R. (2d) 217 (Ont. Dist. Ct.)

[para26] Counsel for Oikle submits that rules restricting the Unit's user to private residential use only do not bind Oikle as the only relevant restriction at the time of her purchasing the unit, the subject of this application, was that it be occupied and used only as a private, single family residential dwelling. Oikle submits that the amended rule referred to restricting user cannot affect her because it did not exist at the time of her purchase. It is very significant to me that the amended rule was clearly in existence at the time of the renewal of the Executive Suites lease.

[para27] The respondent, Oikle, relies on the following authorities to support her position:

Re Peel Condominium Corporation No. 11 and Caroe et al. (1974), 4 O.R. (2d) 543 (O.H.C.J., Galligan J.)

Re Deerhurst Investment Ltd. and FPI Management Systems Ltd. (1984), 50 O.R. (2d) 687 (appeal to Divisional Court dismissed April 19, 1985)

Re Matlavik Holdings Ltd. and Grimson (1979), 24 O.R. (2d) 92 (Div. Ct.)

552838 Ontario Limited v. London Executive Suites, unreported decision of the Honourable Judge E.R. Brown, released November 19, 1992

York Condominium Corp. No. 382 v. Dvorchik (1992), 24 R.P.R. (2d) 19 (Ont. Gen. Div.)

Re Sudbury Condominium Corp. No. 3 and Lebel Ont. Dist. Ct., Bolan D.C.J. July 24, 1985

Re Waterloo North Condominium Corp. No. 31 and Indico Ltd. Ont. Co. Ct., Mossop Co. Ct. J., January 30, 1984

Metropolitan Toronto Condominium Corp. No. 650 v. Klein (1988), 49 R.P.R. 205 (Ont. Dist. Ct. Conant J.)

[para28] A major part of the respondent Oikle's argument in this case is that by requiring a unit holder to seek approval prior to renting or leasing their premises the condominium corporation has unduly restricted the unit holders' rights of alienation. In support of this argument counsel referred to *Re Peel Condominium Corporation No. 11 and Caroe* (1974), 4 O.R. (2d) 543 (H.C.) and *Winnipeg Condominium Corp. No. 1 v. Stechley*, [1978] 6 W.W.R. 491 (Man. Q.B.). In both these cases the condominium rules required the owner of the unit to live in the unit. The owners were prohibited from renting or leasing the unit at all. This is not the case here. A unit holder is allowed to rent the unit but only in a limited way for not more than three times a year. In my view requiring the approval prior to renting or leasing a unit does not unduly restrict the owners rights of alienation.

FINDINGS

[para29] In my view the core question in this application is whether or not the Condominium Corporation's Declaration and the rules made thereunder prevent the respondent from leasing out her Unit in the manner she has been doing for many months. I find the rules were within the powers of MTCC 850 and are enforceable. Condominium Rules are enforceable by a Court pursuant to s. 49 of the Condominium Act. The powers given to a Court are discretionary and Condominium rules should not be enforced if they are capricious and arbitrary. Counsel for Oikle submits that, as no one complained about the leasing to the respondent, Executive Suites Ltd., enforcing the rules would be arbitrary and discriminatory to her. The financial burden on the respondent, Oikle, is also put to me as a factor I should consider in exercising discretion under s. 49. I find no merit whatsoever in this argument.

[para30] It is my view, and I so find, that the use by Executive Suites Ltd. is completely contrary to the use contemplated by the Condominium Declaration and by its unit holders. The argument about the amending of the Condominium Rules is of no merit as the amended rule was in existence at the time of the renewal of the Executive Suites lease. To allow the type of rentals the subject of the applicant's complaint to continue would be to open the gateway for the building known as 25 The Esplanade to be used by many of its unit holders in the same manner, so the whole flavour of the building would change. People who purchased units at 25, The Esplanade clearly thought they were buying units that would be owner occupied or long term lessee occupied rather than buying in a building where many of the residences would be rented and occupancies short term in nature. The cases submitted to me are helpful but not in any way definitive as this case must stand or fall on its particular facts.

[para31] In light of my findings as expressed, the applicant is entitled to the following relief:

1. a declaration that the respondent, Ms. Oikle, is in breach of section 31(1) of the Condominium Act, R.S.O. 1990, c. C-26;
2. a declaration that the respondent, Executive Suites Ltd. has breached Article IV(2)(a) of the Declaration;
3. a declaration that both respondents are in breach of Article IV(1)(a) of the Declaration and Article II of the Rule Respecting Commercial Use of Units;
4. an order requiring the respondents to comply with Article IV(1)(a) of the Declaration and Article II of the Rule Respecting Commercial Use of Units.

[para32] The respondent, Oikle, is also ordered to pay the applicant's costs on a solicitor and client scale grounds. If the parties cannot agree as to the quantum of such costs, I may be spoken to.

LISSAMAN J.

CBR# 267

Re Peel Condominium Corporation No. 417 and Tedley Homes Ltd. et al.

35 O.R. (3d) 257 Docket No. C16122 Court of Appeal for Ontario, Robins, Abella and Rosenberg JJ.A. September 4, 1997

APPEAL and CROSS-APPEAL from a judgment of B. Wright J. (1993), 32 R.P.R. (2d) 211 (Gen. Div.), rescinding an agreement to purchase units in a condominium project.

Theodore B. Rotenberg, for appellant. Mark H. Arnold, for respondent.

The judgment of the court was delivered by

ROBINS J.A.: -- This is an appeal and cross-appeal from a judgment of Blenus Wright J. rescinding an agreement under which the respondent condominium corporation agreed to purchase certain guest and superintendent suites that were intended to form a part of the common elements in a condominium project built by the corporate appellant. The dispute revolves around the question of whether the condominium corporation is entitled to these suites without payment or is obliged to purchase them in accordance with the terms of its agreement with the appellant.

The Facts The respondent is a condominium corporation created on October 31, 1990 as a result of the registration by the corporate appellant ("the developer" or "the declarant") of a declaration and description under the Condominium Act, R.S.O. 1990, c. C.26 (the "Act"). The individual appellants are principals of or otherwise associated with the developer and were the first directors of the condominium corporation. The condominium is a residential project consisting of two high-rise buildings located on Rathburn Road West, in the City of Mississauga containing a total of some 400 suites. Each building has a superintendent's suite and two guest suites. Title to these suites has been held by the developer at all times.

The disclosure statement or the amended disclosure statement was delivered by the declarant to each and every purchaser of a condominium unit in the project. These statements specified, as did the draft declaration provided to the purchasers and, subsequently, the registered declaration, that the condominium corporation was to be under a "duty and obligation" to purchase a superintendent's unit and two guest units in each of the buildings pursuant to the terms of an agreement which is referred to as the "conveyance and purchase agreement". A draft copy of the conveyance and purchase agreement was attached to the disclosure statement. The total purchase price for these units was to be \$480,000. Payment was to be made by way of blended monthly instalments of principal and interest, calculated half-yearly at the rate of 10 per cent per annum, amortized over a term of 20 years. The corporation was entitled to prepay the monies owing under the agreement at any time on 21 days' notice. Until the purchase price was fully paid, title to the units was to remain with the declarant. The corporation was to have a revocable licence to use the premises until it received title and, in the event of default, the declarant was to be entitled to terminate the agreement and regain possession. All common expenses and other payments relating to the six units were to be paid by the corporation.

The disclosure statement made no reference to any allocation of the percentage interest each of these six units had in the common elements or the percentage each was to contribute to common expenses. The declaration as registered allocated a zero percentage for each of the units for these purposes.

A proposed first year budget statement was attached to the disclosure statement. The expenditures required to satisfy the payments called for under the terms of the corporation's agreement to purchase the guest and superintendent suites were expressly provided for therein.

The disclosure statement made it clear to the purchasers that their purchase price did not include the superintendent and guest units. While these units were to be used as common elements of the condominium buildings, unlike the recreational facilities and other amenities that were to be provided by the developer, they were to be purchased by the condominium corporation on the terms specified in the disclosure statement and declaration. The declaration defines "guest units" and restricts their use to "guests of owners of Dwelling Units for temporary residential purposes" and subjects them to "such rules and regulations as the board of the Corporation may, from time to time, enact".

In the case of one of the buildings, the first building, the initial disclosure statement made no mention of these suites. However, the concept underlying the development was later changed by, among other things, removing a commercial component from the development and, contrary to the original scheme, making both buildings a part of the same project. These were material changes and, by reason of s. 52 of the Act, required the delivery of an amended disclosure statement. One was in fact provided to each of the purchasers. In the case of the first building, the terms of the amended disclosure statement were identical to those applicable to the second building which, from the outset, made it plain that the superintendent and guest suites were not included in the purchase price and were to be purchased by the corporation. Although entitled to do so, no purchaser chose to rescind his or her purchase on receipt of the amended disclosure statement. The differences in the factual background of the two buildings are of no consequence to the issues in this appeal. I see no reason to draw any distinction between the two buildings and shall treat both the same.

The individual appellants, as I have indicated, were the first directors of the corporation acting as proxies for the developer. As such, they enacted the by-laws, rules and regulations of the corporation and did the things normally expected of first directors of a condominium corporation. The complaint against them is that before turning over the board to independent directors elected by the purchasers, they enacted a by-law authorizing the execution of the conveyance and purchase agreement, the terms of which had been set by the developer, and completed the agreement on the corporation's behalf. In doing so, they did not formally disclose their conflict of interest and, it is contended, acted in breach of their fiduciary duty to the condominium corporation.

After a board of directors elected by the purchasers assumed office, payments were made in accordance with the conveyance and purchase agreement. There was no complaint about this agreement or the zero allocation referable to the suites in issue for almost two years. The corporation then raised a number of questions relating to the ownership of the suites. It took the position that they were common elements in the buildings and, as such, should, like other common elements, have been provided to the condominium corporation "free of charge". This led to the application that has resulted in this appeal.

The Application

The condominium corporation commenced these proceedings on January 25, 1993 seeking: (a) a declaration that the conveyance and purchase agreement dated November 23, 1990 resulted in a total failure of consideration, was an unconscionable transaction and is therefore null and void;

(b) a declaration that the six units form part of the common elements of the condominium buildings;

(c) appropriate amendments to the declaration to eliminate any reference to the six units as independent units and to delete the condominium's obligation to purchase the units;

(d) an order rescinding the conveyance and purchase agreement; and

(e) an order for repayment of all money paid by the corporation pursuant to the conveyance and purchase agreement.

The matter came on before Wright J. who, for reasons now reported at (1993), 32 R.P.R. (2d) 211, concluded that the conveyance and purchase agreement should be rescinded. He did not grant the declaration sought by the corporation to the effect that the six units formed part of the common elements of the buildings and were therefore the corporation's property. The judge was of the opinion that, because a zero percentage of the common interests and common expenses had been allocated to the units, the declaration was void in this respect and should be amended so as "to allocate the proper percentages of contribution to common expenses for all units including the six units in dispute". As collateral relief, he ordered the corporate appellant to pay the common expenses applicable to the six units and to repay the payments made by the corporation with a set-off in favour of the appellant for the corporation's use of the units.

Thus, as matters stand, the appellant developer owns the superintendent and guest suites and is entitled to deal with them free of any agreement with the condominium corporation. On the other hand, the condominium corporation has no right to purchase or use the suites even though it was contemplated that they would form part of the common elements of the project pursuant to the terms of the conveyance and purchase agreement. This result is apparently unsatisfactory to both parties. Hence, we have an appeal in which the developer seeks a declaration that the conveyance and purchase agreement is in full force and effect; and a cross-appeal in which the condominium corporation seeks a declaration that the six suites are common elements in the buildings owned by it free and clear of any claim by the developer.

The Issues

The issues in this appeal may be conveniently dealt with under two general headings: (1) the rescission issue; and (2) the zero percentage issue.

(1) The rescission issue

The motions judge rescinded the conveyance and purchase agreement on two grounds. First, he was of the view that the individual appellants, as first directors of the condominium corporation, were in breach of s. 17(1) of the Act in failing to disclose their interest in the conveyance and purchase agreement and in voting to conclude the transaction. Second, he was of the view that "[e]ven if non-compliance with s. 17(1) was not sufficient to nullify the agreement", the onerous terms and unilateral nature of the agreement rendered it unconscionable. In deciding whether there is any proper basis for rescinding the agreement, it is important to bear in mind the terms under which the owners of the condominium units in this project purchased their respective units. Clearly, each of them agreed by way of their purchase documents that the superintendent and guest suites were not included in their purchase price. The disclosure statement and declaration made it abundantly clear that these suites were to be purchased by the condominium corporation and used as common elements in accordance with the terms of the conveyance and purchase agreement. None of the purchasers has suggested that the corporation was to obtain the suites free of charge or that any representation was made with respect to their ownership contrary to the provisions of the purchase documents.

It is also important to recognize that the Act does not require that guest and superintendent suites be part of the common elements of a condominium. Such suites are not part of the common elements unless there is factual evidence that this was intended to be the case: see *North York Condominium Corp. No. 5 v. Van Horne Clipper Properties Ltd.* (1987), 60 O.R. (2d) 468 (H.C.J.); *Frontenac Condominium Corp. No. 1 v. Macciocchi & Sons Ltd.* (1975), 11 O.R. (2d) 649, 69 D.L.R. (3d) 199 (C.A.); and *York Condominium Corp. No. 167 v. Newrey Holdings Ltd.* (1981), 32 O.R. (2d) 458, 122 D.L.R. (3d) 280 (C.A.). Whether developers should be entitled to exclude from the common elements facilities of this nature or, indeed, other amenities ordinarily expected to be included in the common elements so as to have them purchased or otherwise dealt with after the unit purchases have been completed is a matter of policy for legislative and not judicial determination. As the Act presently stands, a declaration must contain the specific items set out in s. 3(1), and may contain the items set out in the broadly permissive provisions of s. 3(3). Under s. 3(3)(d), a declaration may contain "a specification of duties of the corporation consistent with its objects".

As the cases to which I have just made reference demonstrate, there is no question that a condominium corporation's purchase of suites that are not included in the declaration as part of the common elements in order to constitute them a part of the common elements for guest and superintendent purposes is a purchase consistent with the objects of a condominium corporation. The question raised here is whether the corporation can be required by means of a provision in the declaration to purchase such units or whether, as the corporation argues, the declaration to this effect is *ultra vires*. The motions judge did not give effect to this argument. He nullified the agreement on the grounds to which I have referred and not on the basis that the impugned provision of the declaration was in violation of the Act. I am inclined to the same view. Section 3(3) does not preclude this practice and, it seems to me, is broad enough to permit the inclusion of a provision of this nature. The imposition of a duty on a condominium corporation by way of the declaration in relation to the common elements of the condominium, in my opinion, falls within the category of duties consistent with the objects of the corporation that may be specified in the declaration. Furthermore, in the circumstances of this case, where it can be taken that unit owners have relied on the representations contained in the declaration, I think, for the reasons to which I shall come, it would be unreasonable if not unfair to void the declaration on this basis.

This brings me more specifically to the two grounds upon which the conveyance and purchase agreement was rescinded in the court below. Neither of these grounds, in my respectful opinion, constitutes a valid basis for rescinding the agreement to purchase and sell the six suites in question.

As I see the matter, the fact that the first directors did not formally disclose their obvious interest in the conveyance and purchase agreement and enacted a by-law authorizing them to execute the agreement is of no consequence. These directors did no more than organize the affairs of the condominium in the manner anticipated by the declaration and agreed to by the purchasers of the

individual units. The purchasers were themselves to constitute the entire membership of the corporation and, under s. 7 of the Act, were to own the suites as tenants in common. Whether the steps necessary to complete the contemplated purchase transaction were taken by the initial directors or by the subsequently elected directors is immaterial. This is not the type of "disclosure of interest" situation to which s. 17(1) of the Act is directed. Nor is there any question of a breach of a fiduciary duty here. The acts of the first directors cannot be seen as being contrary to or inconsistent with the interests of the unit owners. In my opinion, s. 17(1) ought not to be invoked to nullify a transaction where, as here, everyone concerned was cognizant of the interests involved and specifically agreed to the transaction. The motions judge treated the conveyance and purchase agreement as being "unilateral in nature" in that the elected directors had "no input into the agreement". The fact, however, is that the elected directors and their co-owners, as purchasers, were aware of and agreed both to the corporation's acquisition of the six suites and to the terms under which they were to be acquired. From the viewpoint of the purchasers of individual units, the availability of guest suites for visiting relatives and friends may well have been an important factor in the decision of some of them to purchase units in this development. They were told by the declaration and disclosure statement that this amenity (and the superintendent suites) would be included in the common elements pursuant to the conveyance and purchase agreement, and were entitled to rely upon this representation.

It would not have been open to the developer before closing to resile from its agreement to sell these suites to the corporation without providing the purchasers with an amended disclosure statement and affording them the right to terminate their agreements. By the same token, I would not think it open to the elected directors after closing to effectively amend the declaration by refusing to complete a transaction that had been accepted by all of the owners, including the directors themselves. In my opinion, it would be improper for them to eliminate facilities or amenities that it was understood and expected would form part of the common elements of the condominium at this stage and in this manner. The agreement to purchase the six suites cannot be considered "unilateral" in these circumstances or treated as having been "foisted" on the corporations or its directors or the unit owners. To the contrary, as I have said, in completing the agreement the first directors were acting in compliance with a contract the terms of which had been approved by the unit owners who themselves constituted the total membership of the corporation and who were to be the owners of the suites.

I turn now to the alternative basis upon which the conveyance and purchase agreement was rescinded. The learned motions judge, as indicated earlier, was of the view that "[e]ven if non-compliance with s. 17(1) was not sufficient to nullify the agreement" the agreement was unconscionable and should be set aside on this ground. He found the agreement to be unconscionable on the basis that its terms were "onerous", and that it was unilateral in nature in that the corporation had "no input into the purchase price or its financing". He pointed only to those terms providing that title to the six units was not to pass to the corporation until all payments had been made at the end of the 20-year period provided for in the agreement; in the interim, he said, the corporation was "saddled" with paying all common expenses and other payments, including realty taxes, on the six units. With respect to the matter of the corporation's input into the agreement, he was of the view, as he was with respect to the s. 17(1) argument with which I have already dealt, that it was for the elected directors to decide whether the agreement should be accepted by the corporation. No deception, misrepresentation or non-disclosure is suggested in this case.

On the facts here, it cannot be concluded that the purchase price of the six suites was unfair or unreasonable either at the time the individual purchase agreements were signed or at the time the conveyance and purchase agreement was executed. There is no evidence to this effect. Nor is there any evidence indicating that the unit owners had somehow or other been victimized by the introduction of a term in the declaration applicable to the ownership of their units or the common elements that no sensible, well-advised purchaser would have accepted. Quite to the contrary, the fact that the suites were to be purchased by the condominium corporation and the terms of the purchase was made manifest in the purchase documents. A cursory analysis of the amounts involved shows that the owners are, on an average, effectively responsible for about \$1,200 per unit of the total cost of the six suites together with their proportionate share of the carrying charges. The outstanding balance is payable on 21 days' notice leaving the corporation free to discharge the obligation or refinance the loan should it be thought prudent to do so. The additional costs attributable to this purchase and the resulting increase in the common expenses are made evident in the draft budget statement. One can reasonably expect that these costs would have been factored into the owners' decisions to purchase their units.

The corporation's obligation to pay taxes, insurance and other expenses relating to the suites cannot be considered unfair. In reality this obligation is no different than the obligation the corporation would have incurred had title been transferred and a mortgage given back to the vendor. The conveyance and purchase agreement is a type of instalment purchase agreement or long form agreement of purchase and sale. While title does not pass until full payment is made, the corporation is plainly a purchaser in possession and, as such, is the owner of the property in equity subject to the vendor's lien for the unpaid balance of the purchase price: see *Lysaght v. Edwards* (1876), 2 Ch. D. 499, 34 L.T. 787. Notwithstanding the stringent terms relating to default about which the respondent complains, given the substance of this transaction, the developer would not be permitted to terminate the agreement or otherwise interfere with the corporation's acknowledged right to quiet possession on any summary or peremptory basis. The corporation would be entitled, as indeed the declarant concedes, to all of the rights normally accorded an equitable owner under a purchase and sale transaction of this nature, including the right to relief against forfeiture.

In sum, none of the usual indicia of unconscionability are to be found on the facts of this case: see, generally, Waddams, *Law of Contract*, 3rd ed. (Aurora, Ont.: Canada Law Book, 1993), ch. 14; Chitty on Contracts, 27th ed., ed. A.G. Guest (Sweet & Maxwell, 1994), ch. 9, s. 4. Accordingly, there is no basis upon which to set aside the conveyance and purchase agreement on this ground.

(2) The zero allocation issue

The declaration registered by the declarant allocated a zero percentage interest to each of the six units with respect to their proportions of the common interests and their contributions to the common expenses. The motions judge was of the opinion that this allocation violated the Act in that "[an] owner of a unit has a common interest in the common elements and cannot escape the obligation as an owner of a unit to pay the appropriate percentage of the common expenses". To remedy the situation, he ordered that the declaration be amended so as "to allocate the proper percentages of contribution to common expenses for all units including the six units in dispute" pursuant to s. 3(5) and (8) of the Act. He also ordered the developer to pay the common expenses applicable to the units and to repay the payments it had received from the corporation with a set-off for the corporation's use of the units.

In deciding the matter as he did, the judge placed the parties in the position they would have been in had the six units been retained by the developer and not sold to the condominium corporation. This was not the result the condominium corporation intended to achieve in bringing this application. It sought an order declaring that the six units are common elements of the condominium and constitute property of the corporation to which it has good and marketable title, free and clear of any claim of

the developer. The argument it advances in its cross-appeal in support of this contention, briefly stated, runs along the following lines.

The Act establishes a scheme of ownership of common interests whereby a common interest is appurtenant to an owner's unit. Under s. 7(5), the ownership of a unit is not to be "separated from the ownership of the common interest, and any instrument that purports to separate the ownership of a unit from common interest is void". The declaration, it is argued, is an "instrument" having this effect. Since no ownership of the common interests attaches to the suites in question, the declaration is in breach of s. 7(5). The suites, therefore, cannot be "units" within the meaning of the Act. Moreover, since "owner" is defined to mean "the owner of the freehold estate or estates in a unit and common interest", the developer cannot be the "owner" of the suites. Rights to the common elements can accrue only to "owners" who, under s. 7(1) and (4), are tenants in common of the common elements and entitled to make reasonable use of the common elements. Since the developer here has no interest in the common elements, it does not qualify as an "owner" and has no right to the use of the common elements. This "landlocked" space, the argument proceeds, fits within the definition of "common elements" and no other definition. "All of the property except the units" constitute the "common elements", as that term is defined. Not being "units", the argument concludes, the six suites must be part of the common elements of the condominium, and the motions judge should have so declared.

I am respectfully unable to accept this argument. While I do not question that the Act is framed so as to prevent the separation of ownership between a unit and its appurtenant common interest, its provisions must be applied in the light of the factual circumstances of a given case: see *Carleton Condominium Corp. No. 106 v. Mastercraft Development Corp.* (1985), 49 O.R. (2d) 638, 15 D.L.R. (4th) 733 (C.A.). In this case, it is important to appreciate the reasons underlying the zero allocation and the practical consequences of the allocation.

When the declaration was drawn it was understood that these suites would immediately form a part of the common elements of the condominium and that title would be transferred to the corporation after the purchase price had been paid. The zero allocation was made to accommodate that understanding and not for any devious purpose. It recognized that while the suites were registered in the name of the developer, in reality they were common elements owned, as I stated earlier, in equity by the corporation. In my opinion, the zero allocation cannot properly be treated in these circumstances as a defect in the declaration entitling the corporation to the suites free of charge. Such a result would confer an unwarranted windfall on the corporation and would be plainly inequitable.

So long as the corporation remains the equitable owner of the suites and they continue to be used as common elements, the zero allocation is not inconsistent with the spirit and intent of the Act. No purpose is to be served in not permitting this allocation to continue in effect. The motion judge's decision to divest the corporation of any interest in the suites and return their ownership to the developer was not sought in these proceedings. This form of relief is unsatisfactory to the corporation and the unit owners. They could not have anticipated that the six suites could conceivably be eliminated from this condominium as the application was framed. Given these circumstances, I think it preferable that the matter be disposed of on the basis that, should the suites revert to the developer in the future, the developer can at that time seek relief from the difficulties that may have been created by the manner in which the percentage allocations attributable to the suites were dealt with in the declaration. The issue can then be dealt with on proper notice to the unit owners and in the light of the circumstances then existing.

Disposition

For these reasons, I would allow the appeal, set aside the judgment of Wright J. and in place thereof dismiss the application brought by the respondent condominium corporation. I would also dismiss the cross-appeal. I would make no order as to costs either here or in the court below.

Order accordingly.

CBR# 216

Kenny v. Schuster Real Estate Co.

Between Sharon Kenny and Acme Protective Systems Limited, Plaintiffs, and Schuster Real Estate Co. Ltd., Peter D. Schuster and 321024 B.C. Ltd., carrying on business as Cafe Zen and the said Cafe Zen, Defendants, and 321024 B.C. Ltd., carrying on business as Cafe Zen and the said Cafe Zen, Third Party

Vancouver Registry No. C874184 [1990] B.C.J. No. 1420 British Columbia Supreme Court Cohen J. Heard: April 9, 10, 25 - 27 and June 12, 1990 Judgment: June 19, 1990

Counsel for the Plaintiff, Sharon Kenny: R.V. Burns. Counsel for the Defendants, Schuster Real Estate Co. Ltd. and Peter D. Schuster: K.R. Nichols. Counsel for the Third Party, 321024 B.C. Ltd. (Cafe Zen): R.J. Wilinofsky.

COHEN J.:-

I. Background

In January 1983, the plaintiff, Sharon Kenny, purchased a condominium at 102-1633 Yew Street, in the City of Vancouver, Province of British Columbia. Ms. Kenny was attracted to this area of the city because of its close proximity to the beach, the fact that there was convenience shopping and restaurants nearby and mostly the unique and colourful character of this section of Yew Street.

The building which housed Ms. Kenny's condominium contained four residential and two commercial strata lots. Ms. Kenny's condominium was located directly above the commercial strata lots, owned by the defendant, Schuster Real Estate Co. Ltd. (Schuster). At the time Ms. Kenny purchased her condominium, the commercial strata lots contained two restaurant operations. Before purchasing, Ms. Kenny made inquiries about the restaurant operations and satisfied herself that no foods were deep fried or cooked on their premises and that they served only light meals.

In May 1987 Ms. Kenny's enjoyment of her condominium ended with the installation of an exhaust fan by the defendant Cafe Zen, the tenant in one of the commercial strata lots. Normally restaurant exhaust fans are placed on the roof of the building. Apparently this was not possible in the case of Cafe Zen and the fan was installed directly below Ms. Kenny's patio deck underneath her dining and living room windows. Ms. Kenny found the operation of the fan to be noisy as well as creating unpleasant odours inside her condominium in the building's stairways, hallways and underground parking.

Because she felt she could no longer enjoy her condominium, Ms. Kenny listed it for sale in September 1987. It sold in May 1988. She brought this action claiming reimbursement of the real estate commission she paid on the sale of her condominium, damages alleging that the value of her condominium decreased by \$10,000 because of the fan, reimbursement of moving costs as well as her legal costs incurred in connection with an application for an interlocutory injunction made on her behalf in September 1987. Finally, Ms. Kenny claims general damages for the annoyance, inconvenience and discomfort which she says she suffered as a result of the fan.

Ms. Kenny took default judgment against the defendant, Schuster in September 1987. In April 1988 Ms. Kenny discontinued her action against the defendant, Cafe Zen.

In September 1988 an application to set aside the default judgment was dismissed and Schuster's statement of defence was struck out. An appeal against this finding was dismissed.

By third party notice dated December 13, 1988, Schuster and the defendant, Peter D. Schuster, the principal of Schuster, gave notice to Cafe Zen claiming a right of contribution and indemnity in respect of any damages for which they might be found liable to Ms. Kenny.

Essentially then this is a case of assessment of damages on a default judgment. However, in rendering my judgment I will deal with the facts and law relating to the liability of the defendant Schuster for damages. By agreement between counsel for Schuster and the third party, I will not deal with the third party issues.

II. Ms. Kenny's Claim

Ms. Kenny, aged 38, is a lawyer. She was called to the bar of this province in 1981 and since then has served as a prosecutor with the Department of the Attorney General, Crown Counsel Office until February of 1990 when she accepted a position as Crown Counsel in Bermuda.

Ms. Kenny purchased her condominium in January 1983 for \$85,000, it was her first real estate purchase. Prior to this she had lived in various residential areas in the city and accordingly, when she went looking for real estate, she knew Vancouver and knew she wanted to live in Kitsilano.

Ms. Kenny testified that in the summer months there is a fair amount of activity on Yew Street and that during the evenings the level of noise is higher. Nonetheless, she insisted that she had no concerns about the level of noise or activity and that if she did she would never have purchased her condominium in the first place.

She said that one of the big features of her condominium was the size of its wrap-around patio deck, some 656 square feet. Her condominium had a wood burning fireplace, two bedrooms, two bathrooms, ensuite laundry and all in all she considered it a very pleasant place to live. In May 1987 she had no plans to move. Her long range plans were to resurface the patio deck and glass-in an area off her master bedroom.

When she purchased her condominium Ms. Kenny made inquiries about the restaurants that were operating in the commercial strata lots. She was informed that there was no cooking taking place in the restaurants and that they served only light meals. In her words, had the restaurants involved cooking, she would not have purchased her condominium.

On May 1st, 1987 when Ms. Kenny was leaving her building for work, as she was driving out of the underground parking lot, she discovered the driveway ramp blocked by a large truck with a crane. The truck was lowering into place what Ms. Kenny described as a piece of equipment looking like the back-end of a jet airplane. This piece of equipment was being installed underneath her patio deck. The installers told her that it was an exhaust fan for the Cafe Zen.

When she arrived at work, Ms. Kenny telephoned various people to find out about the installation of the fan. She was unable to reach Mr. Schuster by telephone and left a message for him to call her back. She found out from City Hall that a permit had been granted for the installation of the fan.

At the end of the day, when she arrived home, Ms. Kenny went to the Cafe Zen and spoke to the owner, Mr. Seto. An employee of the firm installing the fan was present as well. She was extremely upset. She was assured by the installer that the fan would not be a problem. Mr. Seto told her that the fan would be in operation during the hours that the Cafe Zen was open. She was so distraught at this news that she left the restaurant in tears.

Mr. Schuster returned Ms. Kenny's call. Before she had chance to say anything he said "is it about the fan" and she said "you're damn right it is". She was very angry at the time he called. They arranged to meet in Ms. Kenny's condominium to discuss the matter. They met on May 4, 1987. During their meeting, Ms. Kenny told Mr. Schuster that she wanted the fan removed because it was an eyesore and because of the noise and smell that it might cause. She was very annoyed with Mr. Schuster for permitting the fan to be installed without consulting her. Mr. Schuster told her that he could not take it down because Mr. Seto had a three year lease. He said he did not want to fight with Ms. Kenny about it and if necessary he would purchase her condominium.

Following their meeting, but before the Cafe Zen officially opened, arrangements were made for the fan to be started so that Mr. Schuster and Ms. Kenny could listen to it. During the demonstration run of the fan, Ms. Kenny said that when the fan started up there was a kick-in noise. She described the noise from the fan as a constant whirring or humming sound. She told Mr. Schuster that the fan was not acceptable, that there was no way she could live with it underneath her condominium and that she wanted it taken down or stopped.

The Cafe Zen opened about May 20, 1987. Ms. Kenny did not hear directly from Mr. Schuster again. As to noise from the fan, she said that she could hear it turn on "when it sort of kicked in. It did not seem to matter where she was in her condominium she could hear it. It seemed to her that the fan usually started up between 8 and 8:30 a.m. and she described it as a constant whirring or humming noise. She said that when the fan was switched off it was as if an air of peace cloaked her condominium. It was often not turned off until between 1:00 and 2:00 a.m.

Ms. Kenny said that when she went out on her patio deck, the noise was more noticeable. If she stood in the area just above the fan it was extremely loud. In fact, she said that if she was talking with someone she would have to elevate her voice to be heard. Even with the doors and windows of her condominium shut she could hear the fan. She said that the noise from the fan was most pronounced in the areas closest to the fan, the kitchen, dining room, living room and on the patio deck.

As to the smell from the fan, she described it as a general oppressive type of almost a heavy type of oily smell that permeated the hallways not only on her floor but on the floor above. "Like a greasy smell, the closest I could come would be a deep fat frying type of odour". She said that the odour increased as she headed out of her hallway down the stairs to go into the underground parking lot. It was in the stairwell leading from the outside of the building and it seemed to increase as she would head down to the parking lot. She said that the smell of the entire building changed after the fan was installed.

Inside her condominium, she said that if something was being cooked she could often tell what it was by the smell. For example, onions were noticeable. She said that other than the oily smell she could also smell food odours. The smells were strongest in the dining room and living room areas. If she was out on her patio deck she could smell it, particularly if she was standing in the area immediately adjacent to the fan. Even around the corner of the patio deck in front of her sliding glass doors she could sometimes catch a whiff of the smell of food. She said that prior to the installation of the fan she had never detected any of these oppressive smells or odours.

In terms of how the noise and smell affected her general living from day to day, she said that the whole experience was an extremely upsetting one. It was her first home purchase and the noise was a source of constant aggravation to her. The smell was particularly offensive and she found the musty, heavy odour that was in the hallways, the greasy smell, really offensive. She said that the whole character of the condominium changed and it was just not a place that she wanted to be. For example, she did not sit and read a book in her living room when the fan was on and it was upsetting for her to be in her condominium when the fan was on unless there was something to mask the noise such as the sound from the television or stereo.

After the fan was installed, Ms. Kenny spent less time on her patio deck in the summer months. When she was on her patio deck, if the fan went on, she found it a "jangling" kind of experience. The noise and smell were extremely disturbing to her.

Although Ms. Kenny's lawyer had negotiations with Mr. Schuster regarding Mr. Schuster's offer to purchase her condominium, Mr. Schuster could not raise the funds to buy her out and after her attempt to secure an injunction to restrain the continuing operation of the fan did not succeed, she listed her condominium for sale in September 1987 at a price of \$119,000. There were open houses on weekends and prospective purchasers viewed her condominium by appointment. After three months the price was dropped, finally after eight months she received an offer of \$105,000 and decided to accept it.

III. Issues

The issue for me to decide is whether the noise and smell from the fan constitute an actionable nuisance and if so, the amount of Ms. Kenny's damages.

IV. Decision

I am satisfied that the noise and smell from the fan constitute an actionable nuisance, that Ms. Kenny sold her condominium in direct response to the nuisance and that her sale of the condominium was a justifiable response in all of the circumstances. In addition, I am satisfied that the defendant Schuster is responsible to Ms. Kenny for damages.

V. Reasons

The leading authority in this province on the test of what constitutes a nuisance is *Royal Anne Hotel Co. Ltd. v. Ashcroft et al* (1979), 8 C.C.L.T. 179 (B.C.C.A.). In that case the Royal Anne and one Saito were landowners and occupiers in the Village of Ashcroft. On December 14, 1974 their premises were damaged as a result of a backing-up of a municipal sewer constructed and maintained by Ashcroft. As a result of the blockage raw sewage escaped from the sewer and entered the two premises from plumbing outlets. Both parties sued Ashcroft alleging negligence and claiming also in nuisance.

The trial judge found that the back-up in the sewer was caused by a "random blockage" in the main sewer not far from the respondents' premises. He held that this blockage did not result from negligence on the part of Ashcroft, its agents or servants, in the design, installation or maintenance of the sewer or in any of the steps taken by Ashcroft and its servants to deal with the blockage when it was discovered. He dismissed any claim based upon negligence, but found Ashcroft responsible on the nuisance claim.

Ashcroft appealed against the attribution of liability for nuisance. The Court of Appeal held that the trial judge made no error, finding that the trial judge was correct and that an actionable nuisance had been shown. At pp. 184-186, McIntyre J.A., (as he then was), had the following to say about the test of nuisance:

The cases on this subject are many and often difficult to reconcile. Text writers have striven to bring some order into this field, and I have found assistance in *Street on Torts* (5th ed., 1972); *Fleming on Torts* (4th ed., 1971); and in a helpful article by J.P.S. McLaren, *Nuisance in Canada*, *Linden's Studies in Canadian Tort Law* (1968), p. 320. From a study of the cases referred to by counsel and cited in the above sources, the following principles emerge:

As has been said in *Street on Torts*, at p. 212: 'The essence of the tort of nuisance is interference with the enjoyment of land.' That interference need not be accompanied by negligence. In nuisance one is concerned with the invasion of the interest in the land; in negligence one must consider the nature of the conduct complained of. Nuisances result frequently from intentional acts undertaken for lawful purposes. The most carefully designed industrial plant operated with the greatest care may well be or cause a nuisance, if, for example, effluent, smoke, fumes or noise invade the right of enjoyment of neighbouring land owners to an unreasonable degree; see *Manchester v. Farnworth*, *supra*, and *Walker v. McKinnon Indust. Ltd.*, *supra*, as examples.

When then can it be said that the tort of nuisance has been committed? A helpful proposition is advanced by the learned author of *Street on Torts*, at p. 215, in these terms:

A person then may be said to have committed the tort of private nuisance when he is held to be responsible for an act indirectly causing physical injury to land or substantially interfering with the use or enjoyment of land or an interest in land, where in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable.

This proposition, stated in a variety of ways, has been accepted generally in the authorities.

The test then is, has the defendant's use of this land interfered with the use and enjoyment of the plaintiffs' land and is that interference unreasonable? Where, as in the case at Bar, actual physical damage occurs it is not difficult to decide that the interference is in fact unreasonable. Greater difficulty will be found where the interference results in lesser or no physical injury but may give offence by reason of smells', noise, vibration or other intangible causes. No finding is required regarding the exercise of care by the defendant and, while its conduct may frequently be such that a finding of negligence could be made, it is not necessary and the existence of due care will afford no defence if the other ingredients are present. Again this is well rooted in authority: for example, see the words of Lord Simonds in *Read v. J. Lyons & Co.*, [1947] A.C. 156, [1946] 2 All E.R. 471 at 482 (H.L.), where the principles laid down in *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330 (H.L.), were under discussion:

It was urged by counsel for the appellant that a decision against her when the plaintiff in the *Rainham* case [*Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co. Ltd.*], [1921] 2 A.C. 465 (H.L.), succeeded would show a strange lack of symmetry in the law. There is some force in the observation, but your Lordships will not fail to observe that such a decision is in harmony with the development of a strictly analogous branch of the law, the law of nuisance, in which also negligence is not a necessary ingredient in the case. For, if a man commits a legal nuisance, it is no answer to his injured neighbour that he took the utmost care not to commit it. There the liability is strict, and there only he has a lawful claim who has suffered an invasion of some proprietary or other interest in land.

In my opinion, the rationale for the law of nuisance in modern times, whatever its historical origins may have been, is the provision of a means of reconciling certain conflicting interests in connection with the use of land, even where the conflict does not result from negligent conduct. It protects against the unreasonable invasion of interests in land.

What is an unreasonable invasion of an interest in land? All circumstances must, of course, be considered in answering this question. What may be reasonable at one time or place may be completely unreasonable at another. It is certainly not every smell, whiff of smoke, sound of machinery or music which will entitle the indignant plaintiff to recover. It is impossible to lay down precise and detailed standards but the invasion must be substantial and serious and of such a nature that it is clear according to the accepted concepts of the day that it should be an actionable wrong. It has been said (see McLaren, *Nuisance in Canada*) that Canadian Judges have adopted the words of Knight Bruce V.C. in *Walter v. Selfe* (1851), 4 De G. & Sm. 315, 64 E.R. 849 at 852, affirmed on other grounds 19 L.T.O.S. 308, to the effect that actionability will result from an interference with:

... the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober ... notions.

These words were approved by Middleton J.A. in the Ontario High Court in *Appleby v. Erie Tobacco Co.* (1910), 22 O.L.R. 533 at 535-36.

In reaching a conclusion, the Court must consider the nature of the act complained of and the nature of the injury suffered. Consideration must also be given to the character of the neighbourhood where the nuisance is alleged, the frequency of the occurrence of the nuisance, its duration and many other factors which could be of significance in special circumstances. While an owner of land in a quiet residential district may well expect to be protected from the operation of a boiler factory on his neighbour's land, he may not be entitled to expect to prevent the boilermaker from pursuing his lawful calling when he seeks to put his residence in an industrial area next to the factory. The conflicting interests must be circumstances. The social utility of the conduct complained of must be weighed against the significance of the injury caused and the value of the interest sought to be protected. But where the conduct of the defendant has caused actual physical injury to the plaintiffs' land, the mere fact that such

conduct may be of great social utility, for example, construction and maintenance of a sewer, will not attract greater licence or immunity. There is no reason why a disproportionate share of the cost of such a beneficial service should be visited upon one member of the community by leaving him uncompensated for damage caused by the existence of that which benefits the community at large. The weighing of conflicting interests in the case at Bar, therefore, causes little difficulty. The interference with the plaintiffs' right of enjoyment of their land and the damage caused to their land is clearly such that the action for nuisance lies in the absence of any defence of statutory authorization.

(emphasis mine)

In *Appleby v. Erie Tobacco Co.* (1910), 22 O.L.R. 533 (Divisional Court), the nuisance complained of was odour arising from the manufacture of tobacco on the defendant's premises. The plaintiff complained of noxious odours coming from the defendant's tobacco factory and interfering with the plaintiff's enjoyment of his premises in the vicinity of the factory. The plaintiff sought an injunction in respect of the odours. The trial judge dismissed the action in respect of the claim for an injunction and the plaintiff appealed. In holding for the plaintiff, Middleton J. said at pp. 536-538:

In *Fleming v. Hislop*, 11 App. Cas. at p. 691, the Earl of Selborne states his view of the law thus: 'What causes material discomfort and annoyance for the ordinary purposes of life to a man's house or to his property, is to be restrained ... although the evidence does not go to the length of proving that health is in danger.' Lord Halsbury, at p. 697, states what is substantially the same thing. 'What makes life less comfortable and causes sensible discomfort and annoyance is a proper subject of injunction.'

Now, it is to be borne in mind that an arbitrary standard cannot be set up which is applicable to all localities. There is a local standard applicable in each particular district, but, though the local standard may be higher in some districts than in others, yet the question in each case ultimately reduces itself to the fact of nuisance or no nuisance, having regard to all the surrounding circumstances. This is shewn by the oftenquoted passage in Lord Halsbury's judgment in *Colls v. Home and Colonial Stores Limited*, [1904] A.C. 179, at p. 185: 'A dweller in towns cannot expect to have as pure air, as free from smoke, smell, and noise as if he lived in the country, and distant from other dwellings, and yet an excess of smoke, smell and noise may give a cause of action, but in each of such cases it becomes a question of degree, and the question is in each case whether it is a nuisance which will give a right of action.'

In *Rushmer v. Polsue and Alfieri Limited*, [1906] 1 Ch. 234, (1907) A.C. 121, this principle is applied to the case of a printing office established in a neighbourhood devoted to printing, next door to the plaintiff's residence, and which rendered sleep impossible. Cozens Hardy, L.J., [1906] 1 Ch. at p. 250, sums up the situation in a way that commended itself to the Lords. It was, he says, contended 'that a person living in a district specially devoted to a particular trade cannot complain of any nuisance by noise caused by the carrying on of any branch of that trade without carelessness and in a reasonable manner. I cannot assent to this argument. A resident in such a neighbourhood must put up with a certain amount of noise. The standard of comfort differs according to the situation of the property and the class of people who inhabit it ... But whatever the standard of comfort in a particular district may be, I think the addition of a fresh noise caused by the defendant's works may be so substantial as to cause a legal nuisance. It does not follow that because I live, say, in the manufacturing part of Sheffield, I cannot complain if a steam-hammer is introduced next door, and so worked as to render sleep at night almost impossible, although previous to its introduction my house was a reasonably comfortable abode, having regard to the local standard; and it would be no answer to say that the steam-hammer is of the most modern approved pattern and is reasonably worked. In short ... it is no answer to say that the neighbourhood is noisy, and that the defendant's machinery is of first-class character.'

This case, as is shewn by this extract, puts an end to the controversy upon the question whether the reasonableness of the defendants' user of their own premises affects the plaintiff's rights. Kekewich, J., in *Remhardt v. Mentasti* (1889), 42 Ch. D. 685, carefully reviews the cases and concludes that it does not. Buckley, J., in *Sanders-Clark v. Grosvenor Mansions Co.*, [1900] 2 Ch. 373, declined to accept this view, apparently confusing the question of nuisance having regard to the local standard with reasonable use of the defendant's premises.

In *Attorney-General v. Cole & Son*, [1901] 1 Ch. 205, Kekewich, J., discusses the apparent conflict and seeks to reconcile the two views.

In *Drysdale v. Dugas*, 26 S.C.R. 20, the majority of the Supreme Court review the earlier cases, and come to the same conclusion as that now accepted in England.

It is plain, in this case, that the defendants' manufactory does constitute a nuisance. The odours do cause material discomfort and annoyance and render the plaintiff's premises less fit for the ordinary purposes of life, even making all possible allowances for the local standard of the neighbourhood.

In *Maker v. Davanne Holdings Limited et al*, [1954] O.R. 935, the plaintiff sought an injunction restraining the defendant from using or causing to be used lands and premises for warehouse or storage purposes and for the purpose of a parking lot. In granting the injunction, Spence J. at p. 939-940 said:

The plaintiff, however, is not complaining of the ordinary noise consistent with the alteration of the character of the neighbourhood from a strictly residential character to a mixed residential and commercial character, but rather of the special noise resulting from the shifting about of goods in what was a semi-detached residence separated from his own only by a party wall.

Appleby v. Erie Tobacco Co. (1920), 22 O.L.R. 533, is a decision in reference to an alleged nuisance arising from noxious odours. Middleton J., as he then was, at pp. 536-7 quoted from English cases where the alleged nuisance was noise, particularly at p. 537, where he cited *Rushmer v. Polsue & Alfieri, Limited*, [1906] 1 Ch. 234, affirmed [1907] A.C. 121. He quoted as follows from Cozens Hardy L.J. (whose words were approved by the law lords) in that case at p. 250:

...

So it is no answer here for the defendants to say that the neighbourhood is noisy, containing stores, furniture-shops, etc. What the plaintiff complains of is this incessant racket right through the party wall from his bedroom. I am of the opinion that he has established a case for an injunction until trial upon the ordinary law of nuisance.

In general, a landlord is not liable for a nuisance on the premises; but the landlord is liable if he has authorized nuisance or if he knew, or ought to have known, of nuisance before letting (see *Winfield on Tort*, 9th Ed, (1971) p. 347). The discussed in *Banfal et*

al. v. Formula Fun Centre Inc. et al. (1984), 34 C.C.L.T. 171 (Ont. H.C.). In that case, the defendant, took a lease from Ontario Hydro of vacant urban land, bounded upon three sides by motel properties. Their aim, which was made clear to Hydro, was to operate an automobile racing amusement ride; a proposal vigorously opposed by neighbouring property owners who feared noise pollution. A conditional certificate was eventually granted by the Provincial Environment Ministry and the City of Niagara Falls passed a bylaw, approved by the Municipal Board, allowing the track to operate.

The miniature racing cars produced a very high noise level from whining engines and screeching tires, a noise which was more or less persistent for 12 hours a day during the summer operating season and which was irritating and obtrusive. The plaintiff, the owner of one of the adjacent motels, brought the action in nuisance seeking damages and an injunction. The court found that the conduct of the racetrack was such as to create a material interference with the ordinary comfort and convenience which the plaintiffs were entitled to expect while enjoying their property. It was in law a nuisance. It found the noise was intrusive and abrasive, out of keeping with other noises in the vicinity and that it was unreasonable in all of the circumstances of the case. It also found that Ontario Hydro, as landlord of the property, had been fully aware of its tenant's intention and of the inevitable noise which the proposed use would have upon nearby properties. At p. 188 of the case, O'Leary J. discusses the liability of an owner for the nuisance created by its tenant as follows:

Is Hydro, the owner, liable for the nuisance by the tenant, Formula? In general, an owner is not liable for the nuisance committed by his tenant. To this rule there is one exception. Where the nuisance arises 'from the natural and necessary result of what the landlord authorized' the tenant to do, then the owner-landlord is liable: *Harris v. James*, [1874-80] All E.R. Rep. 1142. This exception to the general rule has been expressed in different terms. In *Earl v. Reid* (1911), 23 O.L.R. 453 at 466, 2 O.W.N. 873, 18 O.W.R. 562, Riddell J. said the landlord was not liable unless 'the use from which the damage or nuisance necessarily arises was plainly contemplated by the lease'. In *Aldridge v. Van Patter*, [1952] O.R. 595, [1952] 4 D.L.R. 93, Spence J. held the owner liable because the possibility of an automobile, during the course of a race, plunging through the fence around the track and injuring someone in the park (the nuisance that actually occurred) was in the immediate contemplation of the owner when the lease was executed. In *Smith v. Scott*, [1973] Ch. 314, [1972 3 All E.R. 645, [1972] 3 W.L.R. 783, it was suggested that the owner will be held liable if there is 'a very high degree of probability' that a nuisance will result from the purposes for which the property is let.

In my view, no matter what the correct wording of the exception, Hydro is liable for the nuisance on the evidence in this case. As already indicated, Hydro knew exactly the use Formula intended for the property before it entered into the lease. Hydro not only knew that Formula intended to use the land for an amusement ride, it knew and approved of the layout of the track. It knew the size, power and make of the cars to be raced thereon and the hours of the day the track would be in operation.

Hydro understood two cars might be racing on the track at any one time, and as I indicated earlier, Formula had frequently three and four cars on the track at once. Nevertheless, I am satisfied on the evidence that one or two cars racing on the track at one time are a nuisance. Therefore, the nuisance resulted from Formula operating the track, that is to say, using the land exactly as Hydro knew it intended to use it. By entering into the lease, Hydro authorized Formula to use the land in the manner that caused a nuisance. It follows that the nuisance was 'the natural and necessary result of what the landlord authorized the tenant to do'. Hydro was aware and concerned long before the lease was entered into that the track might cause noise unacceptable to its neighbours and several clauses in the lease purported to deal with how excessive noise was to be dealt with. Therefore, 'the nuisance was plainly contemplated by the lease' and the possibility of the track causing a noise nuisance 'was in the immediate contemplation of the owner'. Subsequent events have shown that there was not only 'a very high degree of probability that a nuisance would result from the purpose for which the property was let' but there was "a certainty" that such would occur.

(emphasis mine)

Perhaps it is trite to say that a person who purchases a residence in a mixed residential/commercial neighbourhood must therefore accept the noise and smells that come with the neighbourhood. A succinct statement of the general principle is found in *Halsey v. Esso Petroleum Co. Ltd.*, [1961] 2 All E.R. 145 (Q.B.D.) where Veale, J. at pp. 151-152 said:

So far as the present case is concerned, liability for nuisance by harmful deposits could be established by proving damage by the deposits to the property in question, provided, of course, that the injury was not merely trivial. Negligence is not an ingredient of the cause of action, and the character of the neighbourhood is not a matter to be taken into consideration. On the other hand nuisance by smell or noise is something to which no absolute standard can be applied.

It is always a question of degree whether the interference with comfort or convenience is sufficiently serious to constitute a nuisance. The character of the neighbourhood is very relevant and all the relevant circumstances have to be taken into account. What might be a nuisance in one area is by no means necessarily so in another. In an urban area, everyone must put up with a certain amount of discomfort and annoyance from the activities of neighbours, and the law must strike a fair and reasonable balance between the right of the plaintiff on the one hand to the undisturbed enjoyment of his property, and the right of the defendant on the other hand to use his property for his own lawful enjoyment. That is how I approach this case.

It may be possible in some cases to prove that noise or smell have in fact diminished the value of the plaintiff's property in the market. That consideration does not arise in this case, and no evidence has been called in regard to it. The standard in respect of discomfort and inconvenience from noise and smell that I have to apply is that of the ordinary reasonable and responsible person who lives in this particular area of Fulham. This is not necessarily the same as the standard which the plaintiff chooses to set up for himself. It is the standard of the ordinary man, and the ordinary man, who may well like peace and quiet, will not complain for instance of the noise of traffic if he chooses to live on a main street in an urban centre, nor of the reasonable noises of industry, if he chooses to live alongside a factory.

(emphasis mine)

Sharon Kenny did accept the noise and smells that came with her part of Yew Street, but, on the evidence, the installation of the fan directly below her condominium, effected her lifestyle and caused Ms. Kenny substantial discomfort. I am satisfied that the installation of the fan interfered with her enjoyment of her condominium to such a degree that it was an unreasonable invasion of her interest in land and that, on the principles set out in the cases, constitutes an actionable nuisance.

Before purchasing her condominium Ms. Kenny made reasonable inquiries about the restaurant operations carried on in the commercial strata lots. She was satisfied that the restaurants would not be cooking foods that would create offensive odours. Her inquiries were borne out because for four years she lived in her condominium without interference in the enjoyment of her

condominium from the restaurant operations. However, after the fan was installed by the Cafe Zen, Ms. Kenny's enjoyment of her condominium was substantially and unreasonably interfered with by the constant noise, disturbance and unpleasant odours created by the fan. I accept Ms. Kenny's evidence that the noise and smell was a substantial interference. She did not strike me as being an overly sensitive person or someone who would be unreasonable in assessing the degree of interference caused by the fan. She impressed me as a normal person of ordinary habits and sensibilities who suffered substantial personal discomfort from the noise and smell created by the fan. Mr. Schuster testified that until the fan was installed he got along very well with Ms. Schuster, liked her and that she made no complaints to him.

There is other evidence of the degree of interference caused by the fan. Mrs. Irene Hollo, a tenant in the condominium above Ms. Kenny, moved into her condominium in February 1987. She testified that when she entered her condominium on May 20, 1987 she heard a noise and thought that she had left an appliance running. After searching her condominium, she realized that the sound was coming from the dining room area. She looked out her dining room window and discovered that the noise she heard was coming from the fan. She described the noise like a car constantly idling. As to odours, she described the smell as greasy, a cooking odour. She said it had a smell like old grease that had been used over and over again. Like Ms. Kenny, Mrs. Hollo could smell the odours in the common areas and throughout her condominium. Mrs. Hollo said that she moved out of the rented condominium in May 1988 because of the horrible smells.

John Boyer, who purchased Ms. Kenny's condominium in May 1988, moved into the condominium in June 1988. He testified that with his condominium windows closed, he could not tell if the fan was in operation. However, when he opens his dining room window he can smell kitchen odours without any problem and he can hear the fan. In cross-examination he testified that he kept his dining room window closed because of the noise from the fan which he described as a bother. When the dining room window is left open, he can detect odours, particularly the smell of bacon cooking. He described the odours from the fan as being associated with the frying or deep frying of food. As to Schuster's responsibility to Ms. Kenny for the nuisance caused by the fan, there is no doubt that Mr. Schuster realized when he assigned the lease to Cafe Zen and approved the installation of the fan that it would change the character of the building. First, in the lease that was assigned to Cafe Zen, he had inserted a provision that there would be no baking of pizza or food preparation with a penetrating smell. He testified that this provision was inserted because he wanted to make sure that the building was as pleasant as possible for all the occupants. He explained that he had had an experience with a pizza parlour in another building owned by him where the smell from the baking of pizza had permeated the entire building.

Second, Mr. Schuster's decision to assign the lease and approve the installation of the fan was a purely economic one without regard to the impact of the fan on Ms. Kenny's condominium. The prior owner to the Cafe Zen was in financial difficulty. A restaurant in that neighbourhood was not economic without the ability to serve cooked foods. Mr. Seto testified that he had no intention of purchasing the restaurant unless he could have a menu serving cooked foods which meant the installation of a restaurant exhaust fan. Mr. Schuster's position was that he would approve the installation of the fan as long as it was permitted by City Hall. So, at the time of the assignment of the lease to Mr. Seto, Mr. Schuster knew full well that Mr. Seto intended to serve a menu with cooked foods. I am also satisfied that Mr. Schuster knew the details regarding installation of the fan and that it would exhaust fumes from cooked foods directly below Ms. Kenny's condominium.

Third, Mr. Schuster immediately acknowledged his responsibility when Ms. Kenny first complained about the installation of the fan. His initial response was to buy her out if he could not find an amicable solution to her complaint. The only reason he did not purchase her condominium was because he could not raise the cash.

In my opinion, it is conclusive in this case, that the noise and smell from the fan constitute a nuisance and that the nuisance arose as the natural and necessary result of what the defendant Schuster is liable for damages. (see *Banfai v. Formula Fun Centre*, supra.) It is no answer for the defendant Schuster to say that Ms. Kenny chose to live in a mixed commercial/residential neighbourhood and therefore she cannot complain of the noise and smell from the fan. Ms. Kenny did not choose to live in a building where there would be a restaurant creating offensive odours. When Mr. Schuster allowed the installation of the fan he knew the potential problems that the fan would create. What Ms. Kenny complained to Mr. Schuster about was not the noise and smells ordinarily consistent with the character of the neighbourhood but rather the extremely disturbing noise and smell coming from an exhaust fan installed, with Mr. Schuster's permission, in a location which created a substantial interference with the enjoyment of her condominium.

Mr. Schuster relied heavily on the fact that the city permitted the installation of the fan and that city inspectors approved it before and after its installation. A noise control supervisor from the City of Vancouver Department of Health was called to testify. While his file contained complaints regarding noise from the fan, at no time did anyone from his department take a reliable noise level reading from the street level or any reading from Ms. Kenny's condominium. Further, by letter dated September 8, 1987, the city wrote to the Cafe Zen confirming their inspection of the restaurant in regard to noise from the fan and stating "however, given that your system is operating at 65 dba, and the exhaust fan is located near residential accommodations, we would encourage your cooperation with your residential neighbours towards finding a compromise for their problems". Mr. Joe Rittberg, the owner of the firm that installed the fan, after looking at the letter, said that he would not have liked the fan operating at 65 dba which was at the top end of the permitted reading levels in the noise bylaw.

VI. Damages

On the subject of damages for nuisance, G.H.L. Fridman, Q.C., *The Law of Torts in Canada*, Vol. 1 (Toronto: Carswell, 1989) at pp. 161-162 states:

If the the nuisance has caused physical damage to the plaintiff's property, damages will be recoverable. Damages may also be an appropriate remedy where the plaintiff has suffered personal physical injury in consequence of the defendant's conduct. In this respect, it must be shown that the damage in question was not the result of any idiosyncratic condition of the plaintiff, recovery of such extra loss. that rendered him susceptible when the average person would not have been harmed. 237 However, whether personal or proprietary damages involved, it would seem that once the defendant's conduct amounts to an actionable nuisance vis-a-vis the ordinary reasonable man, the fact that the plaintiff suffers extra damage because of his sensitive nature (or the special use he is making of his property, such as the cultivation of orchids, a delicate plant) will not preclude the

Once damage to the plaintiff's property is established, the defendant can be held liable for consequential loss, such as loss of business, and the expenses incurred in repairing and protecting property. 239 one such consequential loss that has caused problems is the diminution in value of the plaintiff's property by reason of the interference resulting from the defendant's conduct. It has been said that no proof of damage is required where the nuisance consists of the personal inconvenience and interference

with one's enjoyment, one's quiet, one's personal freedom, or anything that discomposes or injuriously affects the senses or the nerves.

No actual financial or physical damage need be proved as the damage in such cases consists in the annoyance and discomfort caused to the occupier of the premises. However, a number of decisions have concerned the possibility of a claim for financial loss resulting from such interference. Plaintiffs have argued that their property has lessened in value, in terms of saleability on the market, because the smoke, noise, dust, fumes, etc., made the plaintiff's property not as desirable as it might have been without such interference.

If the plaintiff is to seek a remedy, it must be shown, in the first instance, that the plaintiff believed that what the defendant was doing would result in such diminution of the value of the plaintiff's property. In other words, there must be a causal connection between the defendant's conduct and the alleged drop in value. Second, it must be proved that there was some diminution in value. One way to establish this, perhaps the best or truest way, is to show that attempts were made to sell the property and failed, or could only succeed if the price were significantly reduced from what would otherwise be a reasonable market price.

I am satisfied that the value of Ms. Kenny's condominium decreased due to the installation of the fan. Mr. Peter Mason, the real estate agent who listed Ms. Kenny's condominium, testified that it took seven months to sell it. He pointed out the fan to prospective purchasers because he was concerned to ensure that they knew about its existence. However, he kept the dining room window shut when he was showing the condominium because he did not want to emphasize the negative aspect of the fan. When he received Mr. Boyer's offer of \$105,000 he encouraged Ms. Kenny to accept the offer because it was the only one received.

In my view, the extent of the diminished value of Ms. Kenny's condominium is settled by the evidence of Mr. Leslie Parton, a certified appraiser. Mr. Parton completed an appraisal of Ms. Kenny's condominium dated June 9, 1987. He concluded that "marketability may be impaired due to the nuisance of the restaurant's exhaust fan" and he estimated the value of her condominium at \$105,000. In a letter dated July 21, 1988 Mr. Parton stated "the estimated loss due to noise and odours from the restaurant's exhaust fan located on and/or adjacent to the subject is \$10,000. Therefore the net current market value is \$105,000".

Mr. Parton based his conclusion of the loss of value of Ms. Kenny's condominium based upon his experience, expertise and common sense. I am satisfied, on the whole of the evidence, that his conclusion is a reasonable one and I therefore award Ms. Kenny damages under this head of \$10,000.

With respect to Ms. Kenny's claim for non-pecuniary damages, see 15th ed. (London: Sweet & Maxwell Limited, 1988) at p. 869, paragraph 1401 states:

Beyond physical damage to the land however, a nuisance may cause annoyance, inconvenience, discomfort, or even illness to the plaintiff occupier. Recovery in respect of these principally non-pecuniary losses is allowable and may be regarded as part of the normal measure of damages.

Stephenson L.J. in *Bone & Another v. Seale* [1975] 1 All E.R. 787 (C.A.C.D.) considered the measure 'of damages for interference with the enjoyment of property and at pp. 792-794 said:

On the third ground, that the damages awarded by the judge were far too high, it seems to me that this court has a very difficult task to perform. It has to ask itself: what is the measure of damages for a nuisance of this kind? I start by considering whether there is really any authority which gives us, or which would have given the learned judge, any guidance. The only authority which has been cited in this court is the decision of Veale J. in *Halsey v. Esso Petroleum Co. Ltd.* That was a very different case of an unfortunate plaintiff living in Fulham who had to put up with smells, vibration and noise, by day and night, to an extent which very seriously interfered with his comfort and convenience over a period of something like five years. In 1961 the learned judge gave him, for all that, damages of 200. I do not think it could be suggested that that was a high figure, even in those days; if it had not been coupled with an injunction, it might well have been higher.

Is there any other guide to which we can turn in considering whether the judge's figure of over 6,000 for each of these plaintiffs is the right sort of figure? It is a figure which I think struck each member of this court rather as the figure in *McCarthy v. Coldair Ltd* struck Denning L.J., and led us to say to ourselves something like 'Good gracious me - as high as that!'

That figure of over 6,000 for what is a nuisance and is offensive but no more something which is rightly described as a nuisance - does seem at first blush to be a very high figure, and counsel for the defendant has asked us to say that it is a figure which is so high that this court cannot uphold it. We accept the test long ago laid down by Greer

L.J. in *Flint v. Lovell*. In that case Greer L.J. said:

I think it right to say that this court would be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damage [sic] to which the plaintiff is entitled.

That test was repeated by Lord Pearson, with the agreement of Lord Denning MR and Sir Gordon Willmer, in *Hinz v. Berry*, to which counsel for the plaintiffs also referred.

It is difficult to find an analogy to damages for interference with the enjoyment of property. In this case, efforts to prove diminution in the value of the property as a result of this persistent smell over the years failed. The damages awarded by the learned judge were damages simply for loss of amenity living on their property; and of course their enjoyment of their own property was indirectly affected by these smells inasmuch, as it affected their visitors and members of their families. The nearest analogy would seem to be the damages which are awarded almost daily for loss of amenity in personal injury cases; it does seem to me that there is perhaps a closer analogy than at first sight appears between losing the enjoyment of your property as a result of some interference by smell or by noise caused by a next door neighbour, and losing an amenity as a result of a personal injury. Is it possible to equate loss of sense of smell as a result of the negligence of a defendant motor driver with having to put up with positive smells as a result of a nuisance created by a negligent neighbour? There is, as it seems to me, some parallel between the loss of amenity which is caused by personal injury and the loss of amenity which is caused by a nuisance of this kind. If a parallel

is drawn between those two losses, it is at once confirmed that this figure is much too high. It is the kind of figure that would only be given for a serious and permanent loss of amenity as the result of a very serious injury, perhaps in the case of a young person. Here we have to remember that the loss of amenity which has to be quantified in pounds and pence extends over a long period - a period of 12 1/2 years - but it must not take account of any future loss.

Scarman L.J. in the same case, at pp. 794-795 stated:

Nuisance is a wrong to property, but it is well recognised that even when there is no physical damage to property it may cause annoyance, inconvenience and discomfort to the occupier of the property in his enjoyment of it. As Mr. McGregor says in his work on Damages:

When there is a claim for damages in respect of non-pecuniary loss caused by nuisance, recovery of damages is allowable and may be regarded as part of the normal measure of damages.

In such a case as this, therefore, we are thrown back to general principles.

What is the relevant general principle? I think it is that to which Lord Morris of Borth-y-Gest referred in the course of his speech in *H. West & Son Ltd. v. Shephard*. That was a case of very severe personal injury, but, speaking of the difficulty of awarding damages where there is no financial yardstick, he said simply: 'All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation'.

Such is the principle, but the difficulty remains: what is reasonable? As Stephenson L.J. has mentioned there is very little guidance in the case law. In *Halsey v. Esso Petroleum Co. Ltd.*, to which Stephenson L.J. has referred, Veale J. considered 200 appropriate damages for what, on reading the case, one would think was a gross interference with comfort and enjoyment of property over a period of five years or thereabouts. Nevertheless, there is in that case an indication of what one learned judge thought appropriate in a case of nuisance by noise and smell in 1961, and, unless it can be said that his estimate was itself wholly erroneous, it is something we must bear in mind when attempting to adopt a consistent legal pattern in the assessment of damages at large.

Where else can one go to for assistance as to what is reasonable? As Stephenson L.J. has indicated, it is appropriate to go to personal injury litigation and to note the sort of figure that judges award for the element of loss of amenity. It is difficult to be precise in such matters, and I think not helpful to refer to specific cases. But the indications, both from one's own experience and from such works as have collated damages in these cases, are that 6,000 for 12 years' discomfort in a matter of smell is out of all proportion to awards for comparable loss of amenity in that class of case.

It is not, I think, possible to say that we must adopt, or seek to adopt, any rigid standard of comparison between a nuisance case and personal injury litigation. Nevertheless, overall the law ought to remain consistent when it is dealing with analogous situations.

I find, therefore, both in Veale J.'s decision and in the general approach of judges to the loss of amenity element in damages in personal injury litigation, some indication that the damages awarded in this case were unreasonable.

But that in itself cannot be enough to entitle this court to disturb the award of the trial judge. We have to go as far as Stephenson L.J. has mentioned when he quoted the well-known passage from the judgment of Greer L.J. in *Flint v. Lovell*. Was there here an entirely erroneous estimate of the damage sustained by the two plaintiffs? This must be a matter of impression - impression derived from experience and a general knowledge of the way in which the law handles analogous claims.

One must bear in mind also a further general principle, that, when one is removed from the world of pecuniary loss and is attempting to measure damages for non-pecuniary loss, an element in reasonableness is the fairness of the compensation to be awarded. There must be moderation; some attention must be paid to the rights of the offending defendant as well as to the rights of the injured plaintiff.

Ms. Kenny says, and I believe, that she did not bring this action out of spite for Mr. Schuster or based on principle but because she lost the enjoyment of her condominium. Until the installation of the fan, she enjoyed living in her condominium. Ms. Kenny's condominium was unique because of its very large patio deck. Mr. Boyer testified that the patio deck is one of the big features of the condominium which adds value to it. But for the installation of the fan, Ms. Kenny planned to stay in her condominium and make improvements to it.

Ms. Kenny concluded, and I find reasonably so, that she had no alternative but to sell her condominium. There is no evidence of anything more she could reasonably have done to minimize the negative impact of the noise and smell from the fan. She asked for the fan to be taken down. She was prepared to sell to Mr. Schuster. She sought an injunction. She listed her condominium for sale. The installation of the fan was a gross interference with the comfort and enjoyment of her condominium over a period of approximately one year and I consider a fair and reasonable award to her for non-pecuniary damages to be \$7,500.

In addition, Ms. Kenny is entitled to repayment of the commission which she was forced to pay by reason of her having to sell her condominium (see *Horton and Horton v. Zirul* (1982), 34 B.C.L.R. 234, *Danish v. Danish* (1981), 33 B.C.L.R. 176 and *Murchie v. Murchie* (1984), 39 R.F.L. (2d) 385). As well, she is entitled to reimbursement for her moving costs as well as her legal costs incurred in connection with the injunction application.

VII. Conclusion

In the result, Ms. Kenny will have judgment against the defendant Schuster in the amount of \$25,557.45 plus her costs of this trial including her costs of the application before Paris J. on Monday, November 28, 1988. She is entitled to interest pursuant to the Court Order Interest Act.

COHEN J.

CBR# 153

L. Chung Development Co. v. Scarborough (City) (Ont. Div. Ct.)

IN THE MATTER OF Section 50(17) of the Planning Act, 1983 AND IN THE MATTER OF an application by L. Chung Development Company Ltd. for determination by this Board of Condition No. 5 as set out in Metro Toronto file No. 55CDM-87-041 on a plan of condominium located at 4002 Sheppard Avenue East and 2347 Kennedy Road in the City of Scarborough

Between L. Chung Development Company Ltd., Applicant/Appellant, and City of Scarborough, Respondent/Respondent

Action No. 1005/90 Ontario Court of Justice - General Division Divisional Court - Toronto, Ontario Rosenberg, Campbell and Then JJ. Heard: June 19, 1992 Judgment: August 31, 1992

Ian J. Tod, for the Appellant. Louis C. Mangoff, for the Respondent. Patricia M. Conway, for the Intervenor.

Reasons for judgment, allowing the appeal, delivered by Rosenberg J. and concurred in by Campbell and Then JJ.

ROSENBERG J.:--

NATURE OF THE PROCEEDINGS

The appellant appealed from the decision of the Ontario Municipal Board (the "Board") dated October 15, 1990 pursuant to leave granted by Madam Justice Weiler on January 22, 1991. The decision of the Board confirmed a condition placed by the City of Scarborough on the appellant's draft plan of condominium. The condition required that all of the parking spaces on the property be common elements of the condominium corporation rather than individual parking units as planned by the developer.

THE FACTS

The subject is a mixed use commercial property at the corner of Kennedy Road and Sheppard Avenue in the City of Scarborough (the "City"). The development consists of two office buildings of five and six stories with retail space and a six storey free standing parking structure.

The two buildings contain a total of 136 office condominium units. The parking structure contains 391 parking spaces. In addition, there are 34 surface parking spaces on the site.

The project was originally built as a rental project, in 1987 the appellant applied to the City for permission to convert it to condominium ownership.

While awaiting registration of the condominium, the appellant pre-sold 37 condominium units. The purchasers are in interim occupancy.

The purchasers did not purchase parking spaces along with their condominium units. Their Agreements of Purchase and Sale expressly provided that a parking space was not being allocated to the purchaser.

The relevant provisions of the Agreements of Purchase and Sale read:

37. The Purchaser acknowledges that this Agreement does not provide for any parking spaces to be allocated to the Purchaser whether exclusively or in common with others. Any parking areas surrounding the building in which the Unit is contained may at the sole option of the Vendor form part of the Condominium Corporation or the common elements thereof. The Purchaser acknowledges that any parking privileges which it may obtain shall be subject to space availability and shall be granted, if available, by way of separate agreement between the Vendor and Purchaser on the Vendor's Standard Form of Agreement for such purpose and at the current rental rate charged by the Vendor for such right.

38. The Purchaser acknowledges that the Condominium is situate in a building which contains as well certain premises which will be used for commercial retail purposes and commercial office purposes and which premises are not to be owned by the Condominium Corporation and shall not form part of the common elements of the Corporation and at the option of the Vendor may include as part of the Condominium Corporation the existing building owned by the Vendor known municipally as 4002 Sheppard Avenue East and the parking garage to be constructed. The Purchaser further acknowledges that portions of said commercial premises may, either individually or in combination, be retained by the Vendor in fee simple or registered by the Vendor as one or more individual commercial condominium corporations and may be leased to such Tenants or sold to such Purchasers as the Vendor deems fit from time to time. The Purchaser further acknowledges that the Corporation may have entered into an agreement or agreements with the owner or owners or tenant or tenants of said commercial premises, prior to completion of this transaction, which agreements shall govern the rights and liabilities of the Corporation and the owner or owners of the said commercial premises, including without limitation, terms and provisions relating to mutual easements, permitted uses, insurance, maintenance, repair, damage, demolition, termination and the allocation of costs of maintaining, operating and repairing the building and its systems and equipment (collectively referred to herein as the "Reciprocal Agreement"). The Purchaser covenants and agrees that it shall consent to, approve of and shall not object to (1) the execution and registration of the Reciprocal Agreement required by the Vendor, and (2) the registration of one or more commercial condominium corporations within the building or the incorporation of the proposed parking garage and/or the existing building at 4002 Sheppard Avenue East as part of the Condominium Corporation. The Purchaser hereby irrevocably nominates, constitutes and appoints the Vendor as his agent and attorney in fact and in law to execute any consents or other documents required by the Vendor to give effect to this paragraph. The Purchaser covenants and agrees that he shall execute and deliver to the Vendor on closing the undertaking, covenant and agreement of the Purchaser, to be prepared by the Vendor for the benefit of the Vendor and the owners, from time to time, of the remaining portions of the building, whereby the Purchaser agrees, inter alia, that (1) the Purchaser shall exercise his right to vote and shall otherwise cause the Corporation and its board of directors to comply with and perform all of the Condominium Corporation's obligations and...

Because the appellant was not selling parking spaces, the cost of the parking structure was not incorporated into the purchase price of the condominium units. Each purchaser could buy parking units but declined to do so. In September 1989, the City

approved the appellant's draft plan of condominium with a condition (Condition No. 5) that all parking spaces on the property be common elements of the condominium corporation. Condition No. 5 was added to the appellant's plan pursuant to an unwritten policy of the City. Although the appellant's plan was submitted in June, 1987, the City did not communicate its unwritten policy to the appellant until September, 1989, after the sale of the 37 units.

The effect of Condition No. 5 is to convey the parking structure from the appellant to the condominium corporation without compensation.

The appellant proposed a compromise condition to the Board by which the parking garage would be part of the common elements of the condominium corporation, and each unit holder would have the exclusive use of one parking space. The appellant would hold the exclusive use of the spaces not assigned to purchasers so long as it remains a unit holder. The appellant's use would be restricted in that it could only assign or lease its spaces to unit owners or their invitees.

DISCUSSION AND ANALYSIS Municipal Board are as follows. The Board recited the Condition No. 5:

Prior to the registration of the plan, the owner shall submit a final Condominium Description and Declaration to the City for the approval of the Commissioner of Planning to ensure that all parking spaces and access driveways are maintained as common elements in the condominium.

The Board also stated:

At issue is the proposed ownership of the parking spaces within the garage.

The Board also found that:

...there are no formal written policies governing Commercial Condominium development as there are for both Residential and Industrial.

The Board also referred to the opinion of the principal planner for Scarborough, as follows:

... It is Mr. Januszcak's opinion that, the complex was approved and developed as a planned entity and therefore it seemed logical that to retain that entity, the parking garage would be part of the common elements under the control and operation of the Condominium Corporation...

If correctly quoted Mr. Januszcak had a misunderstanding of the condominium principle. The registration of the total project as one condominium, with the garage spaces being units in the condominium, would retain the total complex as a planned entity and would give the condominium corporation complete control as they have of the total project, including the parking spaces, common elements and the office units, and the retail units.

The Board also found:

The developer had proposed to identify all 391 of the parking spaces within the garage as "units" and not as common elements. Each unit was described as the concrete pad upon which a car is parked and the air space around and above such a rectangular space. The ramps, the driveways, the columns and the structural elements of the garage would then be described as part of the common elements. By this cleverly contrived scheme, the developer would be able to sell, lease or rent all of the parking spaces yet the Condominium Corporation would pay for the maintenance, repair, and replacement costs of the entire structure. His contribution to the Condominium Corporation operating budget would be negligible.

This passage indicated a misunderstanding of the condominium concept. If the developer had, in addition to any commercial units that he retained, 391 parking units, he would be paying a very substantial part of the common expenses. The Condominium Act requires that each unit bear a portion of the common expenses of the condominium project in accordance with the proportion set out in the declaration. Thus, the developer would have to pay a portion of the common expenses for each parking unit owned as well as each other unit owned, and would be contributing a significant portion of the condominium corporation's operating budget. The question of whether or not the proportions designated for each unit was appropriate was not something that should have been a concern of the Ontario Municipal Board. In fact, they did not examine into these proportions.

The Ontario Municipal Board also referred to the evidence that,

...the developer has pre-sold 37 units and did not incorporate the market or capital cost of the parking garage into the selling price of these units.

The Board referred to the financial hardship resulting from this as follows:

To end the issue of financial return, it was pointed out to Mr. Frank in cross-examination, and he agreed, that the remaining unsold 99 units could be re-priced to recoup the capital investment of the parking garage.

This is not economic reality. Presumably the remaining office and retail units would be sold for whatever supply and demand justify. It is unlikely that a purchaser would pay an additional amount to pay for someone else's parking units.

With regard to planning, the Board stated as follows:

To turn to the planned function, it is obvious from the evidence of the two professional planners, that the site was developed to function as one commercial entity with its own on-site parking facilities for tenants (owners), staff and clients/customers. The density allowed was determined by the number of parking spaces and by the site's location within one of four major commercial nodes identified in the Scarborough Official Plan. City Planners anticipate major developments and re-developments at the intersection of Kennedy Road and Sheppard Avenue east with the projection of 5 - 10,000 office jobs becoming available. Therefore, the Board finds that it is essential that the integrity of this complex be maintained so as not to interfere or interrupt the expected planned growth of this commercial node.

Mr. Januszcak was concerned that if parking, for whatever reason, became inconvenient or too costly for either staff or customers, the temptation would be so great to park in neighbouring restaurant or retail parking lots designed for the patrons of these commercial facilities. Agincourt Mall is directly across the street and a Mother's Restaurant is to the north. The overflow parking could disrupt the planned function of those lots to serve these other planned facilities.

Concern was also expressed that should the developer retain control of some 250 parking spaces, it could be tempting to lease spaces to other users in the node or commuters such as when the Sheppard subway becomes a reality and thereby deprive occupiers and visitors to the subject commercial complex from using its planned allocation of spaces. However, there would be nothing to prevent the Condominium Corporation in the original Condition 5 from doing the same if it became more profitable to do so. Intuitively though, the Board of Directors of the Condominium Corporation would have the best interest of the corporation in mind and promote a successful image as unit owners would not only be running their business from the premises, but would also have a substantial investment in the complex as property owners. In any event, the proposed amendment to the condition would prevent sale or lease of spaces to any users outside of the subject complex.

Whether the Board and Scarborough were entitled to reconsider the planning of the project because of the change in the method of occupancy from tenants to owners, is the main issue before this court.

With regard to the fairness aspect, the Board stated:

With regard to fairness, the Board finds that it is not fair by any stretch of the imagination to require all of the future unit owners, of which the declarant would be just one, to pay 100 per cent of the cost to repair, maintain and replace the parking garage when the declarant retains ownership of 250 of the 391 spaces. In addition, the Board was not provided with any evidence as to how the parking garage can operate effectively to the benefit of the commercial complex when some spaces are operated under the authority of the Condominium Corporation and 250 spaces under the control of the declarant. In making such a finding the Board relies on section 50(4) [now 51(4)] which states:

'In considering a draft plan of subdivision, regard shall be had, among other matters, to the health, safety, convenience and welfare of the present and future inhabitants of the local municipality and to the following,

(b) whether the proposed subdivision is premature or in the public interest.'

The Board's decision is contained in the following paragraph:

For all of the above reasons the Board finds that the proposed scheme would be a detriment to the convenience and welfare of the future condominium inhabitants nor is it in the public interest to allow one unit owner whether it be the declarant or someone else to have control over the majority of the parking spaces while draining the corporation with maintenance costs. The Board finds it would interfere with the Planned function of this commercial complex and could jeopardize the realization of a strong commercial node for the subject intersection.

The Board's attitude towards the legitimate proposals of the developer was revealed in the following statement:

The Board echoes the sentiment of Talions J. in York Condominium Corporation No. 344 and Lorgate Enterprises Limited and Wolf Von Teichman, in Trust (unreported, December 16, 1986 in the County Court of the Judicial District of York) in which he ends his judgment with the following:

'Although this Court has been unable to grant the relief sought in the Notice of Motion, it is clear that the developer's conduct leaves much to be desired and may be actionable in another forum, that the interests of so many unit holders may be held for ransom in such a way cries out for further refinement of the Condominium Act'.

The Board also stated:

In addition, the Board is concerned with the prospect of the Condominium Corporation not allocating sufficient funds to property maintain the parking garage and allowing it to fall into disrepair because of its lack of ownership of the majority of the spaces. Should the garage fall to disuse, it would greatly interfere with the planned function of this complex as a whole.

This view is based on the understanding that the condominium corporation owns the common elements. The common elements are owned by the unit owners in their unit proportions. Whether the parking spaces are common elements or units has no impact on the obligation of the condominium corporation to maintain the common elements.

The final conclusions of the Ontario Municipal Board are contained in the following paragraph:

Counsel for Scarborough put to the Board that somehow the condition requested by the Developer was an 'undemocratic scheme' contrary to the very principles of the Condominium Act. The said act provides for a concept of multiple ownership of property whereby pursuant to section 7(1) "The owners are tenants in common of the common elements". Section 1(9) defines "Common Elements" as "means all the property except the units" Given that thrust in the Condominium Act it follows that the Corporation which represents all of the owners should own and control all of the common elements. The Board then finds that it is 'reasonable' to require that all of the parking spaces within the garage be described as part of the common elements within the ownership of the Condominium Corporation.

The Board then pursuant to section 50(17) of the Planning Act determines that condition 5 as issued is reasonable and should remain a condition of approval of the draft plan of condominium.

The Board orders that condition 5 issued on December 20, 1989 by the Municipality of Metropolitan Toronto for file 55CDM-87-041 remain unaltered as part of the conditions of approval.

The appellant argued that:

1. The subject property received all necessary municipal approvals in 1982 having been considered and approved with its own on-site parking. It was constructed and is operated as one rental complex.

2. The application for condominium conversion was made by the appellant in 1987.

3. The change of method of occupancy, that is by tenants or owners, does not change the planning criteria. The Planning Act provides that a Minister or his delegate may impose conditions to the approval of a condominium description which are reasonable "having regard to the nature of the development proposed". Planning Act, R.S.O. 1990, s. 51(5).

The legislature in the Condominium Act and related statutes provided protection for purchasers of residential condominium units. This was justified in Ontario where residential rental units were scarce and because purchasers of residential units were often unsophisticated and unfamiliar with condominium law. The same cannot be said for the purchaser of commercial condominium units. They are business people, usually sophisticated. There is no scarcity of office space or retail space in the City of Scarborough and there is no reason why the terms of a condominium project sale cannot be freely negotiated between the developer and the purchaser, as was done in this case. The purchasers agreed that they were not entitled to any of the parking units as part of their purchase price.

In the case of *Pinetree Development Co. Ltd v. Minister of Housing for the Province of Ontario et al* (1976-77) 1 M.P.L.R. 277, Steele J. speaking for the Ontario Supreme Court (Divisional Court) was dealing with the case where the Municipality proposed to re-examine the levies to be charged to the residential condominium developer on conversion from rental to condominium, and stated at page 285:

The region now stands in the same position as the Town of Pickering with respect to external services. Looked at in this light, it poses the question of whether or not a developer who, having once developed a plan and entered into a subdivision agreement providing for all of the internal services and payment of levies relating to external services under which the municipality agrees to assume responsibility for external services, must re-apply and pay further levies to the municipality when he wishes to convert his property into a condominium. In other words, must he go to the municipality the second time and pay additional levies which the municipality, through changed policies, has decided and which are more onerous than the original requirements. Stated differently, if an owner are appropriate to all subdivisions and condominiums wishes to change the type of ownership, must he be subjected to further payments to a municipality where there is no physical change in the development. I do not believe that this was the intention of the Legislature, nor do I believe that it was the intention of the Region of Durham when they set their development policies. In adopting their development policy and levy policy, they have set out the same levies for lands to be developed for subdivisions as for condominiums. This may well be appropriate because many condominium developments are, in effect, a horizontal method of ownership which is similar to a plan of subdivision, and it would appear that the same levies could be appropriate to both. In both these cases there will be an increase in the density or a requirement for additional services.

In the case of an existing property that has been developed by a plan of subdivision which the owner wishes to change to condominium ownership, there can be no justification in requiring that he pay the levies over again. On its face both the regional policy could apply, both to a new development that first was processed through as a plan of subdivision and where a few months later the owners decided to change the method of ownership. The question is, can the developer be required to pay the identical levies twice? I think the answer is no. (Emphasis added).

The same principles apply to a second consideration of the planning requirements that applied in the Pinetree case to levies. That is, there should not be a requirement that the developer be required to meet the planning requirements twice.

Steele J. does provide:

There may be some situations where there are additional municipal requirements properly attributable to a property that is converted from ownership rental type to condominium type, but there is no evidence that this is the situation in this case.

The type of appropriate planning consideration referred to by Steele J. could be demonstrated by the following example: a developer applied to convert a residential rental property to a condominium. A planning expert testified that condominium purchasers on the average drive more cars than tenants. That the parking facilities are inadequate for the same project occupied by owners of condominium units. Accordingly, it is an appropriate planning function to require additional parking before allowing the conversion to condominium. Such a planning consideration would be attributable to the change in type of occupancy. This, however, is not the type of consideration that led Scarborough to require that the developer, without compensation, give up ownership of all of the parking units.

Counsel for the intervenor did not cause the style of cause to be amended, nor was there evidence before us of the order allowing the intervenor to intervene. Counsel advised that the intervenor was granted that status by order of Craig J., and that the intervenor was one of the purchasers of a commercial unit, and that counsel also informally represented a number of the other purchasers. It is inappropriate for a purchaser who has signed an agreement that the purchase price does not include parking, and who has declined to purchase parking space, to come to court to reinforce the decision that gives them a windfall at the expense of the developer. If the decision giving them this windfall is upheld, that is unavoidable, but to argue for a position that is contrary to their freely negotiated contract is inappropriate. Counsel for the intervenor argued that the only issue before the Ontario Municipal Board was whether or not the compromise proposal was more appropriate than Condition No. 5. That does not appear to be the decision of the Ontario Municipal Board as they direct their decision to whether or not Condition No. 5 was appropriate and to the justification by Scarborough for Condition No. 5.

Accordingly, the appeal is allowed and the approval of the condominium conversion is amended by deleting Condition No. 5 from both the City of Scarborough and the Municipality of Metropolitan Toronto approvals. If the parties cannot agree on the question of costs, we will receive written submissions in that regard.

ROSENBERG J. CAMPBELL J.:-- I agree. THEN J.:-- I agree

CBR# 014

Abdool v. Somerset Place Developments of Georgetown Ltd.

Abdool, Atherley, Atherley, Brett, Clark, Clark, Dean, Dean, Domingos, Elik, Evason, Fraser, Good, Good, Hicks, Hicks, Hirst, Hughes, Hughes, Johnston, Evason, Jones, Jones, Jager, Josaitis, Josaitis, Lemieux, Martin, McCanna, Graham, Minaker, Harper, Ram, Ram, Rea, Slater, Pinheiro, Weston and Wong v. Somerset Place Developments of Georgetown Ltd., Canterra Developments Inc., 379059 Ontario Ltd., c.o.b. Retail Engineering, and Prenor Equity Inc.; Greater Toronto Home Builders' Association, Interveners

Budinsky, Chan, Gatt, Greene, Love, Colby, Lander, Wilkes-Lander, Mangiacasale, Mangiacasale, Mangiacasale, Mangiacasale, Maslen, Maslen, Peirce, Phinney, Pepperdene, Tse, Suen, Chung, Verwey, Verwey, Vickers and Vickers v. Breakers East Inc.

APPEALS from judgments of the Ontario Court of Justice (General Division) (1991), 4 O.R. (3d) 280, 82 D.L.R. (4th) 50, 19 R.P.R. (2d) 229 (Blenus Wright J.), and (1992), 6 O.R. (3d) 255, 87 D.L.R. (4th) 572, 23 R.P.R. (2d) 54 (Borins J.), in applications to determine whether agreements to purchase a unit in a residential condominium unit were not binding because of deficiencies in disclosure statements required by s. 52 of the Condominium Act.

Case No. C9824

Ronald B. Moldaver, Q.C., and Stephen Schwartz, for appellant, Prenor Equity Inc.

Jonathan H. Fine, Mario D. Deo and Robert L. Riteman, for respondents.

Alan J. Lenczner, Q.C., and Mary G. Critelli, for intervener.

Case No. C10840

Jonathan H. Fine, Mario D. Deo and Robert R. Riteman, for appellants.

Kenneth G. Hood, for respondent.

The judgment of the court was delivered by

ROBINS J.A.:--These appeals, however decided, demonstrate yet again the need for a major overhaul of this province's residential condominium legislation. At issue is the interpretation and application of s. 52 of the Condominium Act, R.S.O. 1980, c. 84 (now R.S.O. 1990, c. C.26) ("the Act"). Section 52(1) provides that an agreement to purchase a new residential condominium unit will not be binding on a purchaser until the declarant or proposed declarant delivers a "current disclosure statement and all material amendments thereto". Section 52(2) provides that the purchaser may rescind the agreement within ten days after receiving "the disclosure statement" or, where there has been a "material amendment" to the disclosure statement, within ten days after receiving the material amendment. Section 52(6) sets out, in general terms, the items to be disclosed in a disclosure statement.

The purchasers in these appeals, which were heard together, contend that they are entitled to rescind their respective agreements of purchase and sale because the disclosure statements which were delivered to them failed to meet the requirements of s. 52 and because they were not provided with material amendments to those disclosure statements. Whether they are so entitled is the principal issue to be decided here. There are several additional issues which I shall come to later in these reasons.

FACTS

1. Abdool v. Somerset Place Developments

The respondents in this appeal ("the purchasers" or "the Somerset purchasers") are 38 purchasers who, individually or jointly, entered into 26 separate agreements to purchase residential condominium units in a project known as "The Royal Ascot Club" in Georgetown, Ontario. The Royal Ascot is a seven-storey residential building containing 83 proposed units, a common element suite, a recreation centre, a two-level underground parking lot and an outdoor parking lot ("the property"). The agreements were entered into between May and November 1988, save for two that were executed in 1989, and provide for an occupancy closing and a final closing. The date of the occupancy closing was to be September 1, 1989, or an extended date determined by the time at which the units were substantially completed for occupancy.

Canterra Developments Inc. ("Canterra") is the parent company of Somerset Place Developments of Georgetown Limited ("Somerset"), the developer of the Royal Ascot project and the named vendor in the agreements of purchase and sale. As a result of their financial circumstances, Canterra and Somerset ceased work on the project and effectively abandoned it prior to the commencement of these proceedings. Neither company appeared on this appeal or defended the application in the court below.

The appellant Prenor Equity Inc. ("Prenor") is a mortgagee of the property whose mortgage (including a debenture issued together therewith) is in default. Pursuant to the terms of its security, Prenor appointed 379059 Ontario Ltd., c.o.b. as Retail Engineering ("Retail Engineering"), as receiver-manager of the property to do the work necessary to complete the project. The cost of completion was financed by Prenor.

Before executing their respective agreements of purchase and sale, each purchaser was provided with a seven-page disclosure statement, which included a description of the recreational facilities and other amenities to be provided, and to which was appended: the proposed budget for the first year following registration of the project, and copies of the proposed condominium documents, including the proposed corporation's declaration, by-laws, rules, insurance trust agreement and management agreement.

The two purchasers whose evidence provided the basis for the application indicated that they sought and obtained legal advice before signing their agreements of purchase and sale. They knew that they had ten days in which to rescind their respective agreements, but chose not to do so. It can be taken that all of the other purchasers similarly agreed to the terms of their respective

agreements. These terms provided, inter alia: that the final closing date for each unit could be extended for a period not exceeding 24 months in the aggregate; that the only warranty covering the units was that provided by the Ontario New Home Warranties Plan Act, R.S.O. 1980, c. 350 (now R.S.O. 1990, c. O.3); that the building and the units were to be constructed to at least the minimum Ontario Building Code requirements and substantially in compliance with the municipally-approved plans and specifications; that the purchasers would have no claim against Somerset for any higher or better standard of workmanship or materials; and that the offer, when accepted, constituted a binding contract, and, that there was no representation, warranty, collateral agreement or condition affecting the agreement or the property other than those expressed in writing in the agreement.

As a result of delays in construction, due in part to the developer's lack of funds, the purchasers were unable to take occupancy of their units on September 1, 1989, the proposed occupancy closing date. The majority of purchasers took possession in January and February 1990, although some refused to complete the occupancy closing. In April 1990, Somerset's general contractor walked off the job and, while Somerset continued to do the work needed to finish the units, the work remaining to complete the recreational centre and certain parts of the common areas came to a halt. This work was resumed after Prenor stepped in to protect its mortgage position in November 1990, and appointed Retail Engineering as receiver-manager to complete the project and rectify any outstanding deficiencies. The mortgage between Somerset and Prenor empowered any receiver or receiver-manager appointed by Prenor to take possession of the property and to carry on the business of Somerset and provided that, in exercising any powers under the mortgage, the receiver or receiver-manager shall act as agent for Somerset and Prenor shall not be responsible for the receiver's actions.

During the period between September 8, 1989 and January 21, 1991, a number of notices of construction lien and certificates of action were registered against title, including one filed by the general contractor for an amount exceeding \$1,700,000. No amended disclosure statement was ever delivered to the purchasers with respect to these liens or with respect to any other matter affecting the project.

Retail Engineering completed the recreational and other amenities by April 1991, and occupancy permits for these facilities were subsequently issued. The project was registered in accordance with the provisions of the Act on October 31, 1991. When this application came on for hearing, most of the problems arising out of deficiencies and delays in construction had been remedied. These problems, and the claims arising from them, were dealt with at length in the court below. They are, however, irrelevant to the s. 52 issues that are common to these appeals, and need not be discussed at this stage.

These proceedings were commenced by the purchasers on March 1, 1991, by way of an application seeking various forms of relief including a declaration that the disclosure statement failed to comply with s. 52 of the Condominium Act and that the agreements of purchase and sale were accordingly not binding on the purchasers. The application came on in Motions Court before Blenus Wright J. in June, 1991.

In reasons reported at (1991), 4 O.R. (3d) 280, 82 D.L.R. (4th) 50, 19 R.P.R. (2d) 229, the learned judge accepted the purchasers' position on the s. 52 issue and declared the agreements of purchase and sale non-binding. In addition, the judge ruled that Prenor was a declarant under the provisions of the Condominium Act and was subject to the liabilities of Somerset. These liabilities included an agreement with the purchasers to reduce the mortgage interest component of the monthly occupancy fees, to provide a courtesy van for the condominium corporation, and to supply appropriate furniture for the lobby of the complex. Prenor was ordered to refund the deposit monies, including monies paid for upgrades, plus accrued interest, and further, to refund the mortgage interest component of the monthly occupancy fees paid by the purchasers. Prenor appeals to this court from that judgment.

2. Budinsky v. Breakers East

The appellants in this appeal are 25 purchasers ("the purchasers" or "the Breakers purchasers") who, individually or jointly, between March and November 1988, entered into 14 separate agreements with the respondent to purchase residential condominium units in a project known as "The Breakers" in Ajax, Ontario. The respondent The Breakers East Inc. ("Breakers East") is the developer of the project and the proposed declarant.

The agreements provided that the purchase and sale was to be completed by November 30, 1989, or such other date as was provided in the agreement, and that there could be an occupancy closing prior to the final closing of the transaction. On signing their respective agreements, each purchaser received a bound booklet entitled "The Breakers" which contained a disclosure statement and the other materials required by s. 52(6) and (7) of the Act and s. 32 of Reg. 121, R.R.O. 1980. Whether these documents satisfied those provisions is in issue. The booklet is comprised of approximately 86 pages, seven of which contain the disclosure statement. The disclosure statement advised the purchasers that the condominium would have as amenities a recreational unit which included, inter alia, an indoor swimming-pool, an exercise room and an outdoor play area which included children's play facilities. The disclosure statement further specified that construction of the amenities would begin in October 1988 and would be completed by December 1990. An occupancy permit for the pool was not issued until July 1991 and, as of September 1991, the children's play area had not been completed.

For reasons which are not material to the main issue in this appeal, none of the units were ready for occupancy until November 1990. The purchasers of all but four of the units subsequently completed their occupancy closings and have since been in possession of their respective units. In some cases, the purchasers have paid the monthly occupancy fee; in others, they have failed or refused to make this payment. Some units have been leased by the purchasers, others have been occupied by the purchasers or members of their families, and others have remained empty. While the project is now substantially completed, registration has not yet been effected and no date for final closing has been set.

Subsequent to execution of the agreements of purchase and sale, a number of notices of construction lien and certificates of action were registered, and remain registered, against title. The liens range in amount from \$1,396 to approximately \$2,100,000. The latter amount represents the total of two liens registered on June 21, 1991 and August 22, 1991 by Atlas-Gest Inc. (formerly Jatas Inc.), which acted as the general contractor for the project and which, following a dispute with the respondent, was dismissed in the early summer of 1991. No amended disclosure statement was delivered to the purchasers with respect to these liens or with respect to any other matter affecting the project.

When they signed their agreements of purchase and sale, each purchaser acknowledged having received the disclosure statement and the attached documents. None of the purchasers complained about any deficiency in the disclosure statement or the accompanying material during the ten-day period provided in s. 52(2) or at any time prior to commencing this application. The disclosure statement was reviewed, in most cases, by the purchaser's lawyer before the agreement was executed.

The purchasers commenced these proceedings by application in August 1991, seeking, inter alia, a declaration that their disclosure statements did not comply with s. 52 of the Act and that they were not bound by their agreements of purchase and sale. The application came on for hearing before Borins J. in December, 1991.

In reasons now reported at (1991), 6 O.R. (3d) 255, 87 D.L.R. (4th) 572, 23 R.P.R. (2d) 54, the learned judge held that if a purchaser is for any reason dissatisfied with the disclosure statement, the purchaser is obliged to exercise the right to rescind within the ten-day period provided in s. 52(2). If the purchaser does not exercise that right, he or she must be taken to have accepted the disclosure statement and the agreement is binding. If the purchaser should later discover that the statement does not comply with s. 52, the purchaser's remedy, in so far as the Act is concerned, is limited to damages under s. 52(5). Since the right to rescind was not exercised in this case, the judge concluded that the agreements of purchase and sale were binding on the purchasers and found it unnecessary to determine whether the disclosure statements complied with the Act. The purchasers appeal to this court from that decision.

The Legislation

Section 52 of the Act provides that:

52(1) An agreement of purchase and sale entered into after the 1st day of June, 1979 by a declarant or proposed declarant of a unit or proposed unit for residential purposes is not binding on the purchaser until the declarant or proposed declarant has delivered to the purchaser a copy of the current disclosure statement and all material amendments thereto.

(2) The purchaser, before receiving delivery of a deed to or transfer of the unit, may rescind the agreement of purchase and sale within ten days after receiving the disclosure statement or, where there has been a material amendment thereto, within ten days after receiving the material amendment.

(3) A person may rescind an agreement of purchase and sale under subsection (2) by giving written notice of the rescission to the declarant or proposed declarant or to the solicitor of the declarant or proposed declarant.

(4) Every declarant or proposed declarant who receives notice of rescission under subsection (3) from a person entitled to rescind the agreement of purchase and sale under subsection (2), shall forthwith refund, without penalty or charge, to the person giving notice, all money that the declarant or proposed declarant received from that person under the agreement that was credited as payment against purchase price.

(5) Where any statement or material required under this Act to be provided by a declarant or proposed declarant to a purchaser of a unit or proposed unit for residential purposes contains any material statement or information that is false, deceptive or misleading or fails to contain any material statement or information, the corporation or any unit owner who relied on such statement or material is entitled, as against the declarant or the proposed declarant to damages for any loss sustained as a result of such reliance.

(6) The disclosure statement referred to in subsection (1) shall contain and fully and accurately disclose,

(a) the name and municipal address of the declarant or proposed declarant and of the property or proposed property;

(b) a general description of the property or proposed property including the types and number of buildings, units and recreational and other amenities together with any conditions that apply to the provision of amenities;

(c) the portion of units or proposed units which the declarant or proposed declarant intends to market in blocks of units to investors;

(d) a brief narrative description of the significant features of the existing or proposed declaration, by-laws and rules governing the use of common elements and units, and of any contracts or leases that may be subject to termination or expiration under section 39;

(e) a budget statement for the one year period immediately following the registration of the declaration and the description;

(f) where construction of amenities is not completed, a schedule of proposed commencement and completion dates; and

(g) any other matters required by the regulations to be disclosed.

(7) The budget statement mentioned in clause 6(e) shall set out,

(a) the common expenses;

(b) the proposed amount of each expense;

(c) particulars of the type, frequency and level of the services to be provided; (d) the projected monthly common expense contribution for each type of unit;

(e) a statement of the portion of the common expense to be paid into a reserve fund;

(f) a statement of the assumed inflation factor;

(g) a statement of any judgments against the corporation, the status of any pending lawsuits to which the corporation is a party and the status of any pending lawsuits material to the property of which the declarant or proposed declarant has actual knowledge;

(h) any current or expected fees or charges to be paid by unit owners or any of them for the use of the common elements or part thereof and other facilities related to the property;

(i) any services not included in the budget that the declarant or proposed declarant provides, or expenses that the declarant pays and that might reasonably be expected to become, at any subsequent time, a common expense and the projected common expense contribution attributable to each of those services or expenses for each type of unit;

(j) the amounts in all reserve funds; and

(k) any other matters required by the regulations to be disclosed.

Section 32 of Reg. 121, R.R.O. 1980, provides that:

32. Pursuant to subsection 52(6) of the Act, a declarant shall provide the following documents with the disclosure statement:

1. A copy of the corporation's declaration or proposed declaration.
2. A copy of the corporation's by-laws or proposed by-laws.
3. A copy of the corporation's rules or proposed rules.
4. A copy of any insurance trust agreement or proposed insurance trust agreement.

The Background of s. 52

When the Condominium Act was first enacted in 1967 (Condominium Act, 1967, S.O. 1967, c. 12) to create a new form of property ownership, it imposed no disclosure requirements on developers and provided little protection for purchasers. The Act has since been amended in a number of significant ways in order to protect purchasers of new condominium units from certain problems which manifested themselves in the industry.

Section 24b, the predecessor to s. 52, came into force as part of a 1974 package of amendments (S.O. 1974, c. 133, s. 14 [amending R.S.O. 1970, c. 77]). This section introduced the concept of full disclosure into the Act. It was designed to ensure that purchasers of new condominium units were made aware of all matters material to their purchase and of the rights and obligations inherent in condominium ownership. Under s. 24 b, an agreement of purchase and sale of a unit or proposed unit for residential purposes was not binding unless the declarant or proposed declarant had delivered to the purchaser copies of the declaration; certain parts of the description; the by-laws or proposed by-laws; the rules or proposed rules governing the use of common elements; any agreement for the management of the property or insurance trust agreement; a budget statement; and a statement of the recreational or other amenities to be provided by the declarant for the enjoyment of the owners and the conditions, if any, that apply to the provision of such amenities. Section 24 b also required a proposed declarant, at least ten days before delivering a deed or transfer for the unit to the purchaser, to deliver to the purchaser a further copy of each document or confirmation that the document is identical in all substantial or material respects to the corresponding document previously delivered.

Despite this amendment, consumers apparently continued to experience problems in purchasing condominium units. This led the Minister of Consumer and Commercial Relations, in November, 1976, to establish the Ontario Residential Condominium Study Group to investigate and make recommendations for changes to the existing condominium legislation. The study group identified a number of problems in the legislation and its application (see, Report of the Ontario Residential Condominium Study Group (1977)), including some caused by the complexity of the documents that the developer was required to deliver. Although s. 24b was intended to ensure that a purchaser was fully informed of the nature of condominium ownership before executing an agreement of purchase and sale, it seems that in practice the complexity of the condominium documents and the high-pressure sales techniques used by some developers often frustrated this objective. To remedy the situation, the study group recommended, inter alia, that purchasers be provided with a summary statement highlighting important aspects of the documents and be given a ten-day cooling off period, during which they could cancel the agreement, to review the documents.

Following the study group's report, the former Act was repealed and the Condominium Act, 1978, S.O. 1978, c. 84 (now R.S.O. 1990, c. C.26), which includes the present s. 52, was enacted. The Act was proclaimed in force on June 1, 1979. In introducing the new Act, the Honourable Larry Grossman, the Minister of Consumer and Commercial Relations, described it as a "form of consumer protection legislation" which would provide purchaser protection to consumers by requiring "tighter standards of disclosure between sellers and purchasers; allowing time for purchasers to become informed of their responsibilities; and clarifying purchasers' rights during the interim occupancy period": Debates, Legislative Assembly of Ontario, June 1, 1978.

Section 52, like s. 24b, is premised on a "full disclosure" philosophy. However, s. 52 provides purchasers with safeguards in addition to those provided by s. 24 b. Under s. 52, the declarant or proposed declarant is required to deliver a current disclosure statement containing the information prescribed in s. 52(6) and (7). The purchaser may unilaterally rescind the agreement within ten days after receiving the disclosure statement or, where there has been a material amendment to the disclosure statement, ten days after receiving the material amendment. This ten-day "cooling off" period is intended to ensure that the purchaser has an opportunity to acquire an understanding of the nature of his or her purchase. The disclosure statement is to assist in making the condominium documents more understandable. Until a copy of the current disclosure statement and all material amendments are delivered, the agreement is not binding on the purchaser. A false, deceptive or misleading disclosure statement, or one that fails to contain any material information, can render a declarant liable in damages under s. 52(5) notwithstanding that the transaction has been finally closed. To knowingly contravene s. 52(5), (6) or (7) is to commit an offence punishable under s. 55 of the Act.

With those background observations in mind, I turn to the first of the issues common to these appeals.

Is an agreement to purchase a proposed residential condominium unit binding on a purchaser if the disclosure statement delivered by the developer fails to comply with the requirements of s. 52?

This question arises only after the expiry of the ten-day cooling off period when, as in these cases, the purchaser for the first time questions the sufficiency of the disclosure statement in order to avoid the agreement. Within the ten-day period, the purchaser is, of course, free to rescind the agreement for any reason. For the purpose of this question, it can be assumed that the ten-day period has passed and, more importantly, that the disclosure statement does not comply with the Act. In those circumstances, is the purchaser bound by the agreement?

The learned judges from whom these appeals are brought have given conflicting answers to this question. On the one hand, Borins J. was of the opinion that the purchaser is bound by the agreement and, under the Act, is entitled only to damages pursuant to s. 52(5). Wright J., on the other hand, was of the opinion that the agreement is not binding on the purchaser and he or she is entitled to a declaration to this effect at any time before final closing. If Borins J. is correct it follows that, even if the disclosure statements in issue in these cases fail to satisfy the requirements of s. 52, the purchasers' claim for declaratory relief cannot succeed. If, however, Wright J. is correct, then it is obviously necessary to go on and determine whether there are in fact deficiencies in the disclosure statements such as to entitle the purchasers to a declaration that the agreements are not binding.

Wright J. reached his conclusion in *Abdool* on the basis that an agreement of purchase and sale can become binding on the purchaser under s. 52(1) only after the purchaser receives a disclosure statement that complies with s. 52(6) and (7). Until the declarant or proposed declarant delivers a disclosure statement that meets these requirements, the agreement cannot be binding. If s. 52(1) is not complied with, the judge said at p. 285 O.R., p. 54 D.L.R.:

. . . there does not appear to be any time-limit in which to declare an agreement of purchase and sale not binding on the grounds that the disclosure statement is inadequate as long as the purchaser has not become the owner of a unit.

Wright J. found support for his conclusion in *Benner v. HLS York Developments Ltd.* (1985), 52 O.R. (2d) 243, 21 D.L.R. (4th) 652 (H.C.J.), and in *Brunott v. Coolmur Properties Ltd.*, an unreported decision of this court dated October 24, 1983 (noted at 22 A.C.W.S. (2d) 509). In *Benner*, Carruthers J., in dealing with the same issue, said at p. 246 O.R., p. 655 D.L.R., that:

. . . this right to rescind remains outstanding until the vendor provides a disclosure statement which complies with the provisions of the Act. Accordingly . . . in the absence of such a disclosure statement [the purchaser], can elect to rescind the agreement at any time. The fact that he did not purport to do so within 10 days of receipt of a form of disclosure statement offered by the [vendor], as is the case here, is of no moment. If a disclosure statement is found wanting so that, in effect, it is not a disclosure statement as required by the provisions of the Condominium Act, then a purchaser is at no time required to complete the transaction in connection with which it has been given.

In *Brunott*, this court earlier proceeded on the same basis. The court, in brief reasons, held that an agreement of purchase and sale was not binding on the purchasers after the ten-day period because the purported disclosure statement "lacked information on specific matters" enumerated in s. 52 and "was no more than a statement of intention". "Clearly", the court said, "the purpose of section 52 is that the purchaser be given this information". It is implicit in the decision that the court interpreted s. 52 to mean that if a declarant fails to deliver a disclosure statement in accordance with the requirements of s. 52, the agreement of purchase and sale may be declared non-binding at any time before title has been conveyed.

In *Budinsky*, Borins J., to the contrary, interpreted s. 52 to mean that a purchaser is entitled to avoid the binding effect of an executed agreement of purchase and sale only if the declarant fails to deliver a disclosure statement altogether, or if the purchaser rescinds the agreement within ten days after delivery of what purports to be a disclosure statement regardless of whether that document complies with s. 52(6) and (7). He describes the operation of s. 52, at pp. 275-76 O.R., pp. 591-92 D.L.R., as follows:

In my opinion, when read as a whole the provisions of s. 52 do not entitle a purchaser to walk away from an agreement to purchase a condominium unit at any time before final closing on discovering that the contents of a disclosure statement do not comply with s. 52(6) and (7). . . . If a disclosure statement is delivered, s. 52(2) gives the purchaser ten days to examine it and, if for any reason, the purchaser is dissatisfied, including the failure of the statement to comply with s. 52(6) and (7) in regard to its contents, the purchaser is at liberty to rescind the contract and pursuant to s. 52(4) receive a refund of any deposit. However, if a purchaser fails to exercise the right to rescind the agreement of purchase and sale it is binding on the purchaser and the purchaser must be taken to have accepted the disclosure statement. Should the purchaser subsequently discover that the disclosure statement "contains any material statement or information that is false, deceptive or misleading or fails to contain any material statement or information" (emphasis added), the purchaser's remedy is for damages against the vendor as provided by s. 52(5) and not by way of a declaration that the agreement of purchase and sale is not binding. A similar construction applies with respect to the non-delivery or delivery of an amended disclosure statement. Any other interpretation would render s. 52(2) and s. 52(5) meaningless.

(The emphasis is Borins J.'s)

Borins J. specifically refused to follow *Abdool* and *Benner*, and sought to distinguish *Brunott*, on the ground that the effect of s. 52(5), on which he predicated his construction of s. 52, had either not been considered in those cases or had been misconstrued. In his view, the remedy provided by s. 52(5) provides adequate protection to a purchaser to ensure that a developer, in the preparation of a disclosure statement or a material amendment thereto, will comply with the requirements of the Act. He expressly rejected the notion that the right of rescission remains outstanding until the vendor provides a disclosure statement that complies with the provisions of the Act, stating at p. 272 O.R., p. 588 D.L.R.: . . . I am unable to agree that it is "of no moment" that a purchaser who does not decide to rescind an agreement of purchase and sale within the ten days provided by s. 52(2) may do so at any time before the closing date if it is found that the disclosure statement is at variance with the requirements of the Act. If this were so, s. 52(2) would have no meaning and until the date of the final closing a condominium developer would remain at risk that at any time after the ten-day period a purchaser could attack the sufficiency of a disclosure statement and, if successful, obtain a declaration that the agreement of purchase and sale was not binding on the purchaser.

While I am mindful of the potential consequences to developers if the section is construed so as to entitle purchasers to have their agreements declared non-binding at any time before final closing, I am respectfully unable to accept Borins J.'s interpretation of s. 52 or to agree that s. 52(5) was intended to have the governing effect he attributes to it. Section 52 must be viewed in the light of its underlying full disclosure philosophy. The consumer protection afforded to purchasers by giving them ten days within which to consider the required information is predicated on the assumption that the disclosure requirements have been satisfied. I cannot accept that no matter how manifestly devoid of content a document purporting to be a "disclosure statement" may be, or no matter how false, misleading or deceptive the document may be, once the cooling off period has expired, a purchaser's only recourse under the Act is damages under s. 52(5).

In my opinion, s. 52(5), whether read alone or in the context of s. 52, cannot be interpreted as intended to deprive purchasers of the protections conferred by s. 52(1) and (2), nor can it be intended to provide the sole remedy available to purchasers for a breach of s. 52. This subsection is for the benefit of "the corporation or any unit owner" who relied on a false, deceptive or misleading statement or a statement that omitted any material statement or information. By giving purchasers who have sustained a loss in these circumstances (and their condominium corporation) a cause of action in damages after final closing, that is, after they become "unit owners", without regard to whether they knew of the disclosure defects before closing, s. 52(5) eliminates any

question of merger on closing and provides purchasers with protection in addition to that provided by other subsections of s. 52. As s. 52 is framed, a disclosure statement which fails to meet the requirements of s. 52(6) and (7) cannot be a disclosure statement within the meaning of s. 52(1). Section 52, by its express language, creates an interdependence between s. 52(1) and s. 52(6) and (7). Section 52(6) requires the disclosure statement referred to in s-s (1) to fully and accurately disclose the information called for in cls. (a) to (g) and, by reference, the budget information specified in s. 52(7). Delivery of a disclosure statement which fails to adequately provide this information cannot start the ten-day period for rescission running under s. 52(2).

This brings me to the disclosure statements in issue in these appeals. However, before determining whether they are such as to render the agreements of purchase and sale non-binding, it is important to consider the standard by which compliance with s. 52(6) and (7) is to be measured.

By what standard is compliance with s. 52(6) and (7) to be measured?

In answering this question there are a number of factors to be kept in mind. These disclosure provisions must, of course, be given a construction consistent with their consumer protection objectives. However, in judging the adequacy of the disclosure for the purposes of deciding whether an agreement is binding, the rights of both parties to the agreement must be taken into consideration. The purchaser is clearly entitled to the information called for by the Act in order to make an informed decision about his or her condominium purchase. At the same time, however, once the ten-day period has expired, the vendor is entitled to assume that it has a binding agreement of purchase and sale and to rely on the certainty of that agreement in developing the project and conducting its business affairs.

To declare that otherwise binding agreements are unenforceable solely because of the disclosure statement is obviously a very serious matter. Depending, of course, on the real estate market, the adverse economic impact of such declarations on developers is manifest. Accordingly, it seems to me apparent that not every defect in a disclosure statement will warrant a declaration that an agreement is not binding. Before a defect can have that effect, it must be of such substance as to render the disclosure statement defective in a material respect. The sufficiency of a disclosure statement, like the need to deliver an amendment thereto, must be judged on the basis of materiality. I agree with Carruthers J. in *Benner*, supra, at p. 246 O.R., p. 655 D.L.R., that, in deciding whether a disclosure statement complies with the requirements of s. 52(6) and (7):

. . . the sufficiency or otherwise of [the] disclosure statement must . . . be judged on the basis of the materiality of its content. The absence of something not material should not, in itself . . . permit a purchaser to avoid the completion of an otherwise enforceable agreement of purchase and sale.

Agreements should not be rendered unenforceable by technical deficiencies or immaterial omissions in a disclosure statement. Contracting parties, it must be remembered, owe one another a duty to act reasonably and in good faith and to perform contracts honestly made. *LeMesurier v. Andrus* (1986), 54 O.R. (2d) 1, 25 D.L.R. (4th) 424 (C.A.), leave to appeal to the Supreme Court of Canada refused (1986), 21 O.A.C. 239n, 74 N.R. 239n. Consumer protection legislation intended, as this Act is, to promote fair dealing between contracting parties, ought not to be applied in a manner which produces the opposite result by allowing a party to resile from an otherwise valid agreement on grounds that are unfair, unreasonable or capricious.

The Act does not stipulate in precise terms the information that is to be contained in a disclosure statement. The vague terms used make it difficult to determine the required contents with any degree of specificity. Although s. 52(6) begins by requiring the statement to fully and accurately disclose the matter set forth in cls. (a) to (g), cl. (b) requires only a general description of the property including the recreational and other amenities, and cl. (d) requires only a brief narrative description of the significant features of the enumerated documents. In light of these stipulations, the disclosure statement can be intended to be no more than an incomplete description of the documents and a condensation of their significant features. Since brevity is mandated, the disclosure statement must, by definition, be short or not long. That being the case, it may be asked at what point does a statement become so summary or concise or, conversely, so prolix or verbose that it will fail to meet these requirements? It may also be asked which features of the bundle of documents to be delivered along with the disclosure statement are to be deemed so important or vital as to fall into the category of "significant features"? Similarly, when does a description of the property referred to in s. 52(6)(b) become too general, or not sufficiently particular, to satisfy the section?

In the absence of a standard form of disclosure statement or any legislative provisions prescribing its precise content, the answer to questions of this nature necessarily involves judgment calls by those responsible for drafting this document. The Act does not contemplate or indeed, in my view, permit a disclosure statement which simply reproduces the accompanying documents or sizable portions of them. Decisions have to be made as to what items should be included or omitted to satisfy the requirements of brevity, generality and significance imposed by s. 52. Given the absence of statutory guidelines on these matters, a broad and flexible approach must be taken in determining whether a particular statement is so incomplete in detail or lacking in content or, by the same token, so encyclopedic, as to defeat the aim of the section and render an agreement non-binding.

In making this determination, I am of the opinion that regard can be had to all of the information provided to the purchaser. The disclosure statement cannot be viewed in isolation from the other documents mandated by s. 52(6) and (7) but must instead be seen in the context of those documents. They form part of the disclosure material and are intended, along with all of the information required by s. 52(6) and (7), to assist a purchaser in making an informed decision on whether to go ahead with the outstanding agreement. It may be noted that cl. (g) of s. 52(6) requires that the disclosure statement "fully and accurately disclose . . . any other matters required by the regulations to be disclosed"; under s. 32 of Regulation 121, this includes copies of the declaration or proposed declaration, the rules or proposed rules, the by-laws or proposed by-laws, and any insurance trust agreement or proposed insurance trust agreement. The disclosure statement contemplated by the Act cannot possibly provide full details of these documents or make reference to all of their provisions. It can, however, assist purchasers in comprehending them by directing attention to certain of their provisions for a more comprehensive statement of their content.

If no disclosure statement is delivered, the purchaser obviously cannot be bound to the agreement. The problem, which these cases exemplify, arises when a purchaser, before final closing, seeks to rescind an agreement of purchase and sale on the ground that a disclosure statement, which on its face purports to address the matters enumerated in s. 52(6) and (7), does not in fact comply with those provisions. If, as I have concluded, only material departures from these provisions warrant declaring an otherwise valid agreement non-binding, when is a defect to be considered material? To invoke a common dictionary meaning of "material", when is a defect so pertinent, germane or essential as to render a disclosure statement in contravention of the Act and entitle a purchaser to cancel the transaction?

I approach this question first by reference to the applicable burden of proof. In my opinion, when a purchaser who has had the opportunity afforded by the cooling off period to consider the disclosure statement and the accompanying documentation, and has decided to go through with the transaction, subsequently seeks to resile from his or her otherwise binding agreement of purchase and sale on the basis of the deficiency of the disclosure statement, the onus is on the purchaser to show that the disclosure statement fails to satisfy the requirements of the Act to the degree that the agreement must be declared non-binding.

To discharge this onus and prove the materiality of the complaint, in my opinion, the purchaser is obliged to establish objectively that had the information that was not disclosed, or that was inaccurately or insufficiently disclosed, been properly disclosed in the disclosure statement at the time it was delivered to the purchaser, a reasonable purchaser would have regarded the information as sufficiently important to the decision to purchase that he or she would not likely have gone ahead with the transaction but would instead have rescinded the agreement before the expiration of the ten-day cooling off period.

I shall consider later the right of a purchaser under s. 52(2) to rescind the agreement where there has been a material amendment. At this juncture, I would move to the actual disclosure statements in these appeals.

Are the disclosure statements in issue so materially defective as to entitle the purchasers to a declaration that their respective agreements of purchase and sale are not binding?

The basic proposition advanced by the purchasers is that their respective disclosure statements contain numerous deficiencies the cumulative effect of which renders the disclosure statements so wanting that, in effect, they are not disclosure statements as required by s. 52 of the Act. The purchasers stress that it is the sum total of these deficiencies that renders them non-binding. They do not contend that any single deficiency, or any particular class of deficiencies, provides a basis for the declaration. Indeed, counsel for the purchasers, in argument, was not prepared to assign more importance to any one item than another, nor to make submissions as to which of them should be given greater weight in determining the validity of the disclosure statements.

Thirty-eight disclosure deficiencies are complained of in *Abdool*; forty in *Budinsky*. The complaints follow the same pattern in both cases and, for the most part, relate to the developers' alleged failure to disclose, or to disclose adequately, information about particular provisions of the declaration, by-laws or rules which should have been included in the "brief narrative description" required by s. 52(6)(d). In view of the purchasers' overall position, it is not necessary to deal with these complaints individually or to set them out in full detail. In *Budinsky*, *Borins J.* found it unnecessary on his construction of s. 52 to consider the adequacy of the disclosure statement. This question was, however, considered at length in *Abdool*. Since essentially the same type of complaints are made and the same arguments are advanced in both cases, the issues can be examined primarily by reference to the reasons of *Wright J.* and the basis upon which he would hold that a disclosure statement is in breach of the Act.

Wright J. accepted the purchasers' contention that the disclosure statement failed to provide the purchaser with necessary information about the nature of the condominium corporation and the rules governing the use of the common elements and units. At pp. 288-92 O.R., pp. 58-61 D.L.R., of his reasons, he provides examples of various by-laws, articles, and rules which, although referred to in the disclosure statement, are not adequately reviewed. In the judge's opinion, information concerning the following matters in the proposed by-laws may be of particular interest to some purchasers and should have been set forth in the disclosure statement in order to comply with s. 52: (i) the preparation of an estimated budget;

- (ii) the employment and dismissal of personnel necessary for the maintenance and operation of the common elements;
- (iii) the investment of reserve monies held by the Corporation in interest bearing accounts;
- (iv) the establishment and maintenance of adequate reserve funds for the major repair or replacement of the common elements;
- (v) that under Article V of the by-law, the board shall call a special meeting: "Upon receipt of a requisition in writing made by owners who together own not less than 15% of the units";
- (vi) that at meetings "a quorum shall be constituted when persons entitled to vote and owning not less than 33;1% of the units are present in person or represented by proxy"; (vii) that the affairs of the corporation can effectively be dealt with by only one-third of the unit owners;
- (viii) that the number of directors shall be five, of whom three shall constitute a quorum, and that a director need not be an owner;
- (ix) the by-law with respect to default in payment of common expenses and that arrears, "shall bear interest at the rate of 18% per annum and shall be compounded monthly until paid";
- (x) the provisions of Article XII whereby the board sets the budget unilaterally; and that on receipt of the budget, owners must pay by 12 post-dated cheques. Extraordinary expenses may be assessed by the board at any time and are payable within ten days.

In addition, the judge offered the following further examples of information in By-law No. 1 which "some purchasers may consider to be significant and to which at least some reference might be made in a disclosure statement". At pp. 291-92 O.R., p. 61 D.L.R., he states:

Article III of the by-law describes the records which the corporation shall maintain. The following is a list of some of the records spelled out in Article III:

- 1(i) a table depicting the maintenance responsibilities and indicating whether the corporation or the unit owners are responsible.
- (j) . . . a list detailing current replacement costs and life expectancy under normal maintenance conditions of all major capital items in the property.
- (k) a separate record of all receipts on account of common expense payments.

. . . .

- 4(a) minutes of all meetings of the Board;

.....

(c) a copy of all consents for alterations to units.

5(a) a copy of annual financial statements shall be furnished to every owner.

The disclosure statement makes no reference to any of the records which the corporation is required to keep. To be advised that there is easy access to such records could be important to a purchaser who is becoming a shareholder of a business. The purchaser will be put somewhat at ease knowing that there is a record of who is responsible for maintenance and information available on life expectancy and current replacement costs of all major capital items. As well, a purchaser will have access to all minutes of the board meetings and will receive an annual financial statement. Probably an even more important record to a purchaser is the consents for alterations to units. There could be considerable consternation amongst unit owners if there was no such record. If there were no records, unit owners could discover that the corporation allowed certain alterations to be made by one owner but refused approval for similar alterations to another owner. Where the corporation must keep a record of all consents for alterations, unit owners are assured of even-handed treatment.

With respect to the rules, Wright J. says at p. 292 O.R., pp. 61-62 D.L.R.:

The disclosure statement does not tell a purchaser what is in the rules; it contains only a listing of general subject-matter. For example, it does not disclose that any losses, costs or damages incurred by the corporation by reason of any breach of the rules shall be paid by the owner and may be recovered in the same manner as common expenses. This includes any breach of the rules by any guests of the owner.

Rule 16 says: "No motor vehicle, other than a private passenger automobile, motorcycle or station wagon, shall be parked in any parking space". If a purchaser had a small trucking or delivery business, it would appear that the owner's parking space could not be used for a small truck or delivery van. The purchaser would not know this fact from reading the disclosure statement. . . .

Rule 22 states that any unit owner wishing to use the party or meeting room must first provide a refundable deposit "in such amount and upon such terms as may be determined by the Board or the manager in their sole discretion".

Rule 23 provides that children under the age of 16 are not permitted in the exercise rooms unless accompanied by a parent. This would be important information for a mother and father who both work and have children under 16. The children would like to use the exercise room after school and their parents would like them to be so occupied but they would not be able to use the facilities without a parent being present. Suppose a family has children under 16 and an older child age 18 or more. The purchaser should be informed about this rule to determine if it would be possible to amend the rule so that an adult other than a parent could be present with the children in the exercise room.

Both Rules 22 and 23 are conditions placed on the use of facilities. Those conditions are not disclosed in the disclosure statement. The absence of that disclosure is a breach of s. 52(6)(b) which requires the statement to contain "any conditions that apply to the provision of amenities".

The purchasers argue that there are many other equally significant provisions in the accompanying documents that ought to have been reproduced or reviewed in the disclosure statements. It may be observed that, like many of the items selected by the judge, many of these also relate to matters that are statutorily prescribed and cannot be waived or changed. Reference may, for instance, be made to ss. 6(4), 12(2), 15, 18, 19, 28, and 29 of the Act.

In *Abdool*, the purchasers complain that the disclosure statement fails to disclose, or inadequately discloses, such matters as these:

(i) that the exclusive use of parking spaces are designated according to the condominium plans as provided in Schedule F to the declaration;

(ii) that there are restrictions as to the use of visitor parking spaces by visitors only and that they cannot be used by the condominium corporation or by unit owners;

(iii) that the declaration provides that any owner leasing his unit shall not be relieved thereby from any of his obligations with respect to the unit;

(iv) that the declaration has a provision requiring an owner who leases his unit to furnish to the board of directors such owner's address and the name of the tenant;

(v) that the declaration has a provision which requires a tenant to deduct the defaulting unit owner's common expense contribution from rent payable to that unit owner;

(vi) that the declaration obligates a unit owner to maintain window sills and the exteriors of all windows accessible to his/her unit;

(vii) that the declaration, in addition to obligating the unit owner to reimburse the condominium corporation in full for the cost of any repairs made by the corporation that an owner is otherwise obligated to make, provides that such reimbursements includes [sic] any legal or collection costs incurred by the corporation in order to collect the costs of such repairs together with interest and that such amounts are deemed to be part of the common expenses and recoverable as such;

(viii) that the declaration provides that parking spaces shall be used only for the purpose of parking motor vehicles as defined in the rules;

(ix) that the provisions of the declaration with respect to indemnification, termination, and insurance are not disclosed or are insufficient;

(x) that the declaration requires the corporation to maintain a complete set of all the original as-built architectural and structural plans and specifications;

(xi) that the declaration provides that the corporation shall retain a key to all locks to each unit and that no locks shall be changed without providing the corporation with a key;

(xii) that the disclosure with respect to By-Law No. 1 is insufficient in that there is no narrative description of the significant features other than setting out certain general topics;

(xiii) that there is no narrative description of many significant features of the rules;

(xiv) that the disclosure statement fails to disclose the extensive duties of the manager as set out in the management agreement; and

(xv) that the disclosure statement fails to disclose the name of the insurance trustee or the portion of the units which the declarant intends to market in blocks of units to investors.

In Budinsky, the allegations of disclosure deficiencies run along the same line. The purchasers complain that the disclosure statement, again to take examples, is deficient in failing to disclose, or inadequately disclosing, such matters as these:

(i) that, although the disclosure statement states that the declaration provides that the declarant has the right to use and show any part of the common elements to any prospective purchasers as well as the right to store construction materials and equipment on the common elements until all units in the proposed corporation and the adjoining units have been completed and sold, the declaration provides merely that this right exist until such units have been completed and there is no mention of this right extending until such units have been sold;

(ii) that the disclosure statement fails to disclose the exclusive use portions of the common elements and merely refers readers to Schedule F of the declaration;

(iii) that the provision of the declaration which provides in effect that any losses, costs or damages incurred by the corporation by reason of any breach of any provision contained in the by-laws, rules or the declaration, by any unit owner, his family members, tenants, licensees, or invitees shall be borne and paid by such owner and shall comprise part of the common expenses of the unit, and that in the event of default in payment by the owner may be recovered by the corporation in the same manner as common expenses;

(iv) that the provisions of the declaration which provide that no unit shall be occupied or used in such a manner as to result in a cancellation or a threat of cancellation of any policy of insurance and that if the unit is so occupied or used, then the owner of such unit shall reimburse the corporation for such increase, and such increase in premium costs will be added to the owner's contribution towards the common expenses;

(v) the provisions of the declaration which require the owner of each unit to require all residents and visitors in or to its unit to comply with the Act, the declaration, the by-laws and the rules;

(vi) the disclosure statement fails to disclose the provisions of the declaration dealing with the use, maintenance, sale and lease of parking units including disclosure that the parking units may be used only and occupied only for the parking of private passenger automobiles, station wagon or motorcycle, that the owner of each parking unit must maintain such parking unit in a clean and tidy condition, that the parking units may not be sold or leased unless the purchaser or lessee is an owner, tenant or immediate family member of an owner or tenant residing in the corporation and the term of any lease of any parking unit to a tenant shall not exceed the term of the tenancy pursuant to the tenant occupying a unit in the building;

(vii) the disclosure statement fails to disclose the provisions of the declaration providing that following registration of the conveyance of the recreational unit to the condominium corporation the recreational unit cannot be mortgaged, charged or encumbered without the prior written consent of the other co-owners of the recreational unit and without prior proof of the majority [of] the owners of such corporation present at the meeting duly called for the purpose of obtaining such approval;

(viii) that the disclosure statement fails to disclose the types of insurance which the proposed condominium corporation is required to obtain and fails to disclose the types of insurance the unit owners may wish to obtain which are not required to be obtained by the corporation;

(ix) the various features of the by-laws including, no disclosure with respect to various features concerning meetings, the duties and powers of the corporation and the officers of the corporation; and

(x) that the disclosure statement is inadequate with respect to the significant features of the rules and regulations in that it only makes a brief mention of three general topics covered by the rules and regulations without any disclosure as to the significant features relating to such topics.

Wright J. did not discuss the nature of the standard to be applied in determining whether the particular by-laws and rules at pp. 288-92 O.R., pp. 58-62 D.L.R., ought to have been reviewed in detail in the disclosure statement. It appears clear, however, that he interpreted s. 52 as imposing an obligation to provide a detailed discussion of all the significant by-laws, articles and rules, regardless of the length and complexity of the disclosure statement that would result from the application of this approach. In his view, s. 52 imposes "stringent" disclosure requirements which necessitate the duplication of "a lot of the information" in the accompanying documents because that information may be of interest to particular purchasers. This approach became apparent in the course of his comments critical of the "the vague generalities" of the Act's disclosure provisions when he stated at p. 290 O.R., p. 60 D.L.R., that:

It is not adequate to simply require disclosure of "significant" features. Purchasers are sophisticated and unsophisticated. What would be a "significant" feature to one purchaser may be not at all "significant" to another purchaser. . . .

An entirely different approach to the legislation could be advanced due to the fact that the purchaser receives, with the disclosure statement, complete copies of the declaration, by-laws and rules of the corporation. It could be argued that the purchaser receives

all of the required information and, therefore, it is not necessary that the disclosure statement duplicate a lot of the information. For that argument to be valid, the legislation requires amendment to make the requirements of the content of the disclosure statement much less stringent.

(Emphasis added)

While I may generally agree with the learned judge's critique of the legislation, I am unable to accept his approach to the current disclosure requirements. In my respectful opinion, this approach fails to construe s. 52 in a manner that properly balances consumer protection and the commercial realities of the condominium industry and, if adopted, would require a disclosure document incompatible with the underlying aim of the section.

The vagueness of the requirements and the absence of statutory guidelines mandate a broad and flexible approach -- not a rigid or stringent one -- in determining whether a given disclosure statement is adequate. As I indicated earlier, the disclosure statement cannot be viewed as separate from and unrelated to the other documents called for by s. 52(6) and (7); it must be seen in the context of the entire disclosure package. The narrative section of the disclosure statement can realistically be expected to do no more than highlight or summarize the most important features of the condominium documents and assist purchasers in comprehending those documents by directing them to the full text.

To require the inclusion of all of the details of the declaration, by-laws, rules and the like which the purchasers argue should be contained in the disclosure statement, and which the judgment of Wright J. would indeed require, would be to ignore the overall criteria of brevity, generality and significance and turn what was intended to be a short and comprehensible statement into a lengthy and legalistic document no more comprehensible to lay persons than the underlying documents themselves. To satisfy the standard of disclosure contended for in these appeals would effectively compel drafters of disclosure statements to reproduce or make reference to virtually all of the items in the accompanying documents or face the risk of having their agreements of purchase and sale declared non-binding. Professional advisers would face the additional risk of professional liability if the agreements were invalidated by reason of these items not being included in the disclosure statement.

Few current disclosure statements, I venture to say, could withstand the scrutiny to which it is argued here they must be subject. The resulting document would be a far cry from the one envisaged by the Minister of Consumer and Commercial Relations when, in explaining s. 52 in committee on its introduction into the Act (Ontario Legislative Assembly, Standing Committee on the Administration of Justice, October 17, 1978), he said:

This is an attempt to make a disclosure statement meaningful in the sense that there is no point dumping a Xerox copy on them [the purchasers] at that stage and say here's what you are getting [bj96]Here we're talking about the disclosure statement which says to them in practical lay terms "This is what you're getting" . It's more akin to advertising or the holding out as to what they're getting.

If this is misleading, if the general description we're talking about is misleading, then of course they've got remedies flowing from misrepresentation or whatever.

(Emphasis added)

The disclosure statements in issue in these cases are carefully drawn documents, prepared, it would appear, with professional assistance, which on their face seek to address the requirements of the Act. There is no suggestion that either of them is false or designed to mislead or deceive a purchaser. They both provide a general description of the essential elements of the property, the proposed condominium and the recreational and other amenities. They also provide what is stated to be a brief narrative description of the significant features of the proposed declaration, by-laws and rules. Various provisions of the declaration such as common expenses, common elements, units, recreational unit, insurance, maintenance and repair are outlined in general terms. The by-laws and proposed rules are referred to and their general purpose and intent is made clear. Purchasers are advised that the narrative is merely a brief description or synopsis of the accompanying documents and are urged, more than once, to have recourse to those documents for their full text.

I cannot accept that the cumulative effect of the deficiencies complained of, many of which are plainly picayune, can render these disclosure statements so lacking in information that they are not disclosure statements at all. In my opinion, the statements adequately tell the purchasers "what they are getting". The disclosure statements cannot properly be faulted for failing to provide an analysis of the rights and duties of the condominium corporation or an analysis of the rights and duties of the purchasers as shareholders in the corporation, as the judgment below would, in effect, require. Nor can they be faulted for failing to duplicate the rules in their entirety or to make reference to all or substantially all of the rules. Purchasers are informed that there are proposed rules designed to promote the safety, security and welfare of the owners and to facilitate the orderly operation of the corporation. These rules are not unreasonable, unduly intrusive or unexpected. Purchasers must surely be taken to know that there must be rules of this nature governing this kind of communal living. If the purchasers have any interest in or concern about the rules, it is a simple matter to turn to the rules, probably the most easily understood of the condominium documents, as the disclosure statement specifically advises them to do.

While it appears to me that these disclosure statements, fairly read in the context of the disclosure package, cannot entitle the purchasers to a declaration that their agreements are not binding, given the basis upon which these appeals were presented, I do not think it necessary to put the court's imprimatur on the specific content of these particular statements. Putting the purchasers' position at its highest, they have not established the materiality of their complaint. There is nothing in these records to indicate that had the disclosure statements disclosed the information the purchasers contend should have been disclosed, or should have been more accurately or sufficiently disclosed, a reasonable purchaser would have regarded that information as sufficiently important to the decision to purchase that he or she would not have gone ahead with the transaction.

Indeed, there is no evidence that these purchasers would themselves have rescinded their agreements within the ten-day cooling off period had the disclosure statements contained the information which they allege was improperly omitted. Quite to the contrary, these statements played no part in the purchasers' decision to seek rescission. It is not suggested that their content, or lack of content, caused any purchaser to misunderstand the nature of his or her purchase or the effect of the condominium documents. Nor is it suggested that the disclosure statements prevented any purchaser from making an informed decision on whether to affirm or rescind his or her agreement. Indeed, it is clear that the purchasers' decision to seek rescission was prompted by declining real estate values, dissatisfaction with their purchases or a change in personal circumstances. The disclosure statements were in no way material to this decision.

As I noted earlier, most of these purchasers obtained legal advice before the expiry of the cooling off period and, prior to launching these applications, made no complaint about the form or content of the disclosure statements. In many cases, they had the units upgraded to their specifications and completed the interim closing. The evidence reveals, particularly in Budinsky, that having later decided that they no longer wished to go through with their contracts, they searched the disclosure statements for flaws with which to charge the developer. At this stage, the disclosure statement was of no importance to them other than as a vehicle to escape a transaction which, for reasons having nothing to do with disclosure, they wished to avoid. In the absence of evidence supporting a finding of materiality, no real question of consumer protection arises, and there is no proper basis for invoking the disclosure provisions of the Act to cancel binding agreements.

This brings me to the question of whether the developers in these cases are, as the purchasers allege, in breach of the requirements imposed by s. 52(2) to deliver "material amendments" to the disclosure statements.

Are the developers in these cases in breach of the requirements of s. 52(2) to deliver "material amendments" to the disclosure statements?

Section s. 52(1) makes reference to the delivery of "material amendments" to "the current disclosure statement"; and, where there has been a material amendment, s. 52(2) permits a purchaser to rescind the agreement of purchase and sale within ten days after receiving the material amendment. Obviously, not every amendment need be disclosed to ensure that the agreement of purchase and sale continues to bind the purchaser. The ten-day rescission period is revived only where there has been an amendment that is material. The term "material amendment" is not defined, nor is the time within which such an amendment must be delivered prescribed. It is clear, however, that s. 52(1) creates an ongoing disclosure obligation.

"Material amendment" was defined by Wright J. in *Abdool*, at p. 293 O.R., p. 62 D.L.R., as

an amendment containing information which would provide a purchaser with a reasonable cause to reconsider whether to confirm the agreement of purchase and sale or to rescind.

and by Borins J., in *Budinsky*, at p. 281 O.R., p. 596 D.L.R., as

an amendment to a disclosure statement is required when it is necessary to correct an error, omission or defect in the contents of the statement prescribed by s. 52(6) and (7) where the amendment is of such significance as to be likely to influence the decision of a reasonable purchaser to purchase the condominium unit or to alter the character of the disclosure statement.

I view the term "material amendment" as broad enough to include any change that should be reflected in the disclosure statement and would not limit it to the correction of errors, omissions or defects as Borins J. does. Subject to that reservation, the basic thrust of these approaches is essentially the same: the declarant must deliver an amended disclosure statement if the change would provide a purchaser reasonable cause to reconsider whether to confirm the agreement of purchase and sale or to rescind or, to the same effect, if the change is likely to influence the decision of a purchaser to purchase the condominium unit.

In the interests of consistency, I would determine the materiality of a change or amendment to the originally-delivered disclosure statement by reference to a test similar to that which I formulated earlier to determine the materiality of an alleged defect in a disclosure statement. Would a reasonable purchaser regard the change or amendment as sufficiently important to his or her decision to purchase that, had the disclosure statement contained the new or amended information at the time it was delivered, the purchaser would not likely have gone ahead with the transaction but would have rescinded the agreement within the ten-day period? If the answer to this question is in the affirmative, the developer is obliged to deliver an amendment to the disclosure statement and the purchaser has ten days from the date of delivery within which to rescind.

Amendments that substantially change a purchaser's anticipated use and enjoyment of the unit or the amenities associated therewith or that adversely affect the value of the unit, are, I would think, clearly material amendments that revive the rescission period. A reasonable purchaser could objectively assert that he or she would not have proceeded with the deal had this information been available at the time of the original disclosure statement. However, given the lifestyle aspects of condominium living, there may well be situations in which the individual circumstances of a particular purchaser may render an amendment which is not material to other purchasers, and which indeed may be acceptable to other purchasers in a given project, none the less material to this purchaser. The extent to which subjective considerations may reasonably be asserted in determining the materiality of the new or amended information is not before the court in these appeals and need not be considered. Nor is it necessary to consider the applicability of the principles of waiver or estoppel when a purchaser seeks to rescind on the basis of an undelivered material amendment of which the purchaser has had actual knowledge.

The purchasers here contend that two events occurred which were material and, therefore, required the delivery of amended disclosure statements: (1) the delay in the anticipated date of completion of the amenities stated in the disclosure statement; and (2) the registration of numerous notices of construction lien and certificates of action against the property, the disclosure of which, they argued, is required by s. 52(7)(g).

With respect to the delay in construction, Wright J. found that a major change in the construction schedule of recreational amenities constituted material information requiring delivery of an amendment to the purchasers. In contrast, Borins J. found that, the change in the anticipated date for completion of the amenities does not constitute a material amendment. He stated at p. 281 O.R., p. 596 D.L.R.:

Delays in the construction of a condominium complex are not unusual and occur for many reasons and to require a developer to deliver an amended disclosure statement with each change in the construction schedule for the amenities, thereby reviving the purchaser's right to rescind the contract, is not what is intended by the Act. There is no evidence to suggest that any of the applicants has suffered any economic loss as a result of the delay in completing the amenities nor is there any evidence that this delay has had any adverse effect on the value of what they have agreed to purchase and, therefore, cannot be said to be likely to influence the decision of a purchaser to purchase the condominium unit.

On the question of the construction liens and certificates of action, Wright J. held that these registrations were properly classified as material amendments and the purchasers should accordingly have been provided with this information. Borins J., again to the contrary, held that it would be unreasonable and contrary to commercial reality to require a developer to deliver an amendment at

the time of registration of each construction lien, whether or not it is ultimately enforceable, vacated and regardless of the amount involved.

In my respectful view, neither of these events can properly be described as "material amendments" and invoked to revive the purchaser's right of rescission. Carrying the purchasers' argument to its conclusion, this right would be revived each time a construction lien or certificate of action is registered against title and each time there is a delay in the scheduled date for completion of the amenities. In my view, the Act cannot have intended a result so out of keeping with the recognized realities of the construction industry. The likelihood, if not the inevitability, of delays in construction for reasons which may be beyond the control of the developer, and which are commonly governed by standard building contract provisions, is manifest. So also is the likelihood of disputes with contractors, subcontractors and others that may give rise to lien claims. Consumer protection does not require that developers be denied any flexibility in these matters or that their contractual relationships be disrupted or destabilized in the event of these commonplace occurrences. In my opinion, the Act is not designed to produce that result.

With respect to changes in the anticipated date for completion of the amenities, for these reasons, and those of Borins J., I would not give effect to this submission. I might add that this conclusion does not, of course, preclude a claim for damages due to delay pursuant to s. 52(5) or any claim that the purchaser, as a matter of general contract law, may have under the agreement of purchase and sale. I am dealing here only with the Condominium Act. The agreement of purchase and sale, it must be remembered, remains the primary document governing the rights and obligations of the parties.

In so far as the submission with respect to the liens is concerned, the Act cannot be construed to require delivery of an amended disclosure statement upon registration of a lien or certificate of action. Section 57(7)(g) requires disclosure only of "pending lawsuits material to the property". Construction liens are not material to the property in the sense contemplated by the section. Unlike lawsuits involving an easement or right of way over the property or a claim to ownership of a part of the property, lien proceedings can have no effect on the condominium corporation or on the purchaser's interest in the property after final closing. The vendor is bound to provide clear title on final closing and, accordingly, must vacate any liens or certificates of action registered against title by that date. If they are not vacated, the purchaser may refuse to close irrespective of the provisions of this Act, and is free to assert his or her contractual rights under the agreement of purchase and sale.

I turn now to the additional issues in these appeals.

The Additional Issues in the Abdool Case

1. Was Prenor a declarant under the Condominium Act or a mortgagee in possession?

It will be recalled that the appellant Prenor Equity Inc. is a mortgagee of the Royal Ascot property pursuant to the terms of a mortgage granted by Somerset to Prenor as security for a substantial loan advanced by Prenor. The mortgage (and I include in that term the debenture which was given to Prenor as additional security together with the mortgage) provides, inter alia, that any receiver or receiver-manager appointed by Prenor in the event of Somerset's default shall have the power to take possession of the property and to carry on the business of Somerset. The mortgage further provides that in exercising any powers under the mortgage, the receiver shall act as the agent for Somerset and that Prenor shall not be responsible for the receiver's actions.

Following Somerset's default, on November 22, 1990, Prenor appointed Retail Engineering as receiver-manager of the project. Retail Engineering, with funds advanced by Prenor, proceeded to complete the project. As already noted, the condominium was in fact registered shortly after the judgment in appeal was issued.

Wright J. found that Prenor was a declarant under the Act and therefore, in his view, "stands in the place of the vendor, Somerset, and assumes all the rights and liabilities of the vendor". On this basis, he held that Prenor was obliged to honour Somerset's agreements with the purchasers, which included: (a) reducing the mortgage interest component of the occupancy fee paid by each purchaser based upon the difference between the rate actually used in the calculation of the occupancy fee (15.49%) and the mortgage rate effective 90 days prior to the unit transfer date; (b) providing a courtesy van for the condominium corporation; and (c) supply appropriate furniture for the lobby of the building. Further, the purchasers were granted judgment entitling them to recover as against Prenor the amount of their deposits plus accrued interest, the amounts expended by them in upgrading their respective units, and the entire mortgage interest component of the monthly occupancy fees paid by them after November 22, 1990.

In determining whether Prenor was a declarant under the Act, the judge asked himself: "is Prenor a mortgagee in possession, and therefore, an owner, and, therefore, a declarant?" The answer to this question depends primarily on the definitions provided by the Act. Section 1(1)(l) defines "declarant" as "the owner or owners in fee simple of the land described in the description at the time of registration of a declaration and description of the land, and includes any successor or assignee of such owner". "Owner" is defined in s. 1(1)(q) as "the owner or owners of the freehold estate or estates in a unit and common interest, but does not include a mortgagee unless in possession". The judge concluded that Prenor was in fact a mortgagee in possession and, hence, an owner and declarant and, as such, subject to all of the rights and liabilities of Somerset.

With respect, Prenor could not be an owner within the meaning of the Act or, it follows, a declarant. To be an "owner", it is not sufficient that Prenor simply be a mortgagee in possession, rather it must be a mortgagee in possession of the "freehold estate or estates in a unit". Given the definition of a "unit" in s. 1(1)(z), which is

a part or parts of the land included in the description and designated as a unit by the description and comprises the space enclosed by its boundaries and all the material parts of the land within this space in accordance with the declaration and description.

Prenor could not be a mortgagee or a mortgagee in possession of a "unit" before registration of the declaration and description. This definition makes it manifest, and indeed it was not argued otherwise, that the definition of "owner" is applicable only to the post-registration period. Since registration had not been effected at the time relevant to this application, Prenor could not have been an owner of a freehold estate in a unit, or a declarant, even if it were a mortgagee in possession of the property. During this pre-registration stage, the units were "proposed units", as defined by s. 1(1)(t).

In my opinion, Prenor was not, in any event, a mortgagee in possession, and did not become one by virtue of its appointment of Retail Engineering as the receiver-manager of the mortgaged property. The effect of the appointment was to divest the debtor company's board of directors of its power to deal with the property comprised in the appointment: see *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289, 41 O.A.C. 282 (C.A.), at pp. 298 and 314 O.R., pp. 287-88 and 299 O.A.C. Those formerly in

management and control of Somerset were effectively removed from that position. Somerset remains in existence but management and control is vested in the receiver-manager. For some purposes, notwithstanding the provision that the receiver is to be deemed the agent of the debtor and not the security holder, Retail Engineering may properly be regarded as the agent for the security holder. In particular, it may be so regarded for the purpose of conferring title on a purchaser free of encumbrances in order to realize the security: see *Peat Marwick Ltd. v. Consumers' Gas Co.* (1980), 29 O.R. (2d) 336, 113 D.L.R. (3d) 754 (C.A.).

However, in carrying on the company's business and completing the project, Retail Engineering acts, in accordance with the terms of the security, as agent for Somerset. As receiver, it is empowered to deal with third parties with whom the company has a contractual relationship, to complete existing agreements and to enforce the completion of existing agreements, all on the company's behalf so as to enable the security holder to realize on the security. The receiver will, of course, be subject to the same rights and liabilities under the terms of the agreements as the company: see generally, *Kerr on Receivers*, 17th ed. (1989), at pp. 372-81; *Bennett, Receiverships* (1985), at pp. 19-21 and 113-15.

For these reasons, I am of the opinion that the judge erred in holding that Prenor is a mortgagee in possession and a declarant under the Condominium Act and, as such, subject to the rights and liabilities of Somerset. If Prenor was found to stand in the place of Somerset under the agreements on the basis of novation, as was suggested in argument, there is no evidentiary foundation for such a finding.

2. Was there any basis upon which an abatement of the purchasers' interim occupancy fee or rent could be ordered?

On this issue, Wright J. concluded that the purchasers who took interim occupancy should be required "to pay only an amount for reasonable `rent' because they have been in effect tenants." He assessed the "rent" at an amount equal to "the estimated realty taxes plus the common expenses". The purchasers were accordingly held entitled to a refund of all the mortgage interest component of the monthly occupancy fee.

I am respectfully unable to find any basis for assessing occupancy rent in this manner. Accepting, without deciding, that the purchasers had paid an occupancy fee that was not "commensurate with a completed `prestigious' building with the promised amenities" and were entitled to compensation for "the many hassles and anxieties they have had to endure", there is no evidence to support the conclusion that a reasonable rent or market value rent for the premises is an amount equal to the estimated realty taxes plus the common expenses or, put another way, an amount equal to the monthly occupancy fee less the mortgage interest component thereof. The only evidence with respect to occupancy rent is the evidence of the amount actually agreed to by the parties. Under their agreements, the occupancy fee was, in effect, to be calculated in accordance with s. 51(6) of the Act.

Moreover, compensation for these problems cannot properly be set by reference to the mortgage interest component of the occupancy fee. There is, quite simply, no relationship between the two. The vendor's entitlement to the mortgage interest component was in issue in this application, but not in the context of a claim for compensation arising out of the problems caused by delays in completion of the promised amenities or inadequate maintenance services. A refund of this component of the occupancy fee was sought, pursuant to the decision in *Albrecht v. Opemoco Inc.* (1989), 70 O.R. (2d) 151, 61 D.L.R. (4th) 594 (H.C.J.), on the ground that the phantom mortgages provided for in the agreements of purchase and sale were invalid and mortgage interest could not, therefore, properly be included in the occupancy fee. This issue, however, was adjourned on agreement between the parties pending the appeal from the Albrecht decision to this court. In reducing the occupancy fee as he did, the judge, for all practical purposes, rendered the adjourned question moot. He indirectly granted the purchasers a monetary judgment that, in light of this court's subsequent decision in *Albrecht* at (1991), 5 O.R. (3d) 385, 85 D.L.R. (4th) 289, reversing the above-noted judgment, they could not have obtained on the basis that their claim for the return of this component of the occupancy fee was advanced.

I should perhaps note Prenor's concession to the effect that Somerset's agreement to reduce the mortgage interest component paid by each purchaser by the difference between the rate actually used in the calculation of the occupancy fee and the mortgage rate effective 90 days prior to the unit transfer date is a liability of Somerset for which the receiver is responsible on final closing.

Finally, several other issues were raised by the purchasers which I do not propose to detail. These issues were not referred to or dealt with by Wright J. In my opinion, none of them provide a basis for declaring the agreements of purchase and sale non-binding or entitling the purchasers to any other relief.

The Additional Issues in the Budinsky Case

1. Were any purchasers charged an occupancy fee based upon a mortgage interest component which exceeded the legally permissible rate prescribed by s. 52(6)(l) of the Act and, if so, is the developer obliged to repay such overpayments with interest?

This question was dealt with by Borins J. at pp. 282-83 O.R., pp. 597-98 D.L.R., of his judgment. I agree with those reasons and would only add that, given that interest rates can be expected to fluctuate, in my opinion interest should not be payable on either an overpayment or underpayment of the mortgage interest component whichever may turn out to be the case in any given transaction.

2. Does the developer's failure to register the condominium and close the agreements of purchase and sale entitle the purchasers to rescission?

This issue was not dealt with by Borins J. because, the respondent states, it was not part of the purchasers' original application. From my examination of the record, this appears to be the case. While s. 51 of the Act is referred to in the application, the material filed does not provide any evidence in support of a claim for rescission on the basis of that section or on the basis of the agreement. Accordingly, effect cannot be given to this submission. It also becomes unnecessary to decide whether the purchasers can, in any event, validly complain about the timeliness of registration in the circumstances of this case when they have manifested no willingness to close their transactions but have instead engaged in proceeding designed to avoid closing, which proceedings may in themselves hamper or delay the declarant's ability to effect registration.

3. The deposit interest rate issue

This issue arises by reason of the respondent's cross-appeal contesting Borins J.'s decision on the question of the interest payable to purchasers pursuant to s. 53(3) of the Act and s. 33 of Reg. 121. For the reasons of this court in *Ackland v. Yonge-Esplanade Enterprises Ltd.*, delivered contemporaneous with these reasons [see p. 97, ante], the cross-appeal will be dismissed.

DISPOSITION In the result, I would allow the appeal in Abdool with costs, set aside the order of Wright J., and in place thereof order that the application be dismissed with costs. There will be no costs to the intervener.

In Budinsky, I would dismiss the appeal with costs. The order of Borins J. will be varied by setting aside paras. 1, 2 and 3 and in place thereof an order will go dismissing the application. The cross-appeal will be dismissed without costs.

Orders accordingly.

CBR# 064

Carleton Condominium Corporation No. 347 v. Trendsetter Developments Ltd., Assaly and Thomas C. Assaly Corp.

9 O.R. (3d) 481

Action No. 626/91 Court of Appeal for Ontario, Robins, McKinlay and Arbour JJ.A. August 27, 1992

APPEAL from an order of the General Division (1991), 4 O.R. (3d) 300, 20 R.P.R. (2d) 9, declaring that the appellants could not vote at a meeting of unit owners of a condominium corporation.

Colin D. McKinnon, Q.C., and Kathryn Sabo, for appellants.

Janice B. Payne, for respondents.

The judgment of the court was delivered by

MCKINLAY J.A.:--The appellants, Trendsetter Developments Limited (Trendsetter), Thomas C. Assaly and Thomas C. Assaly Corporation Ltd. (Assaly Corp.), appeal a decision of the Ontario Court (General Division) dated July 22, 1991 wherein Isaac J., sitting in motions court, declared that the appellants Thomas C. Assaly and Assaly Corp. are not entitled to vote at meetings of unit owners of the Carleton Condominium Corporation No. 347 (the condominium) in their capacity as unit owners, and that the appellant Assaly Corp., as mortgagee, is not entitled to exercise a mortgagee's right to vote pursuant to s. 48 of the Condominium Act, R.S.O. 1980, c. 84 (now R.S.O. 1990, c. C.26) (the Act) [see (1991), 4 O.R. (3d) 300, 20 R.P.R. (2d) 9]. The decision of the motions court judge has been stayed pending appeal. Two applications were heard together, but only Application 52779/91 is the subject of this appeal.

The condominium was incorporated pursuant to the Condominium Act by registration by Trendsetter of a declaration and description on August 29, 1986. The property involved is a high-rise condominium in the City of Ottawa, known as the Kent Towers, which contains 219 residential units and seven commercial units. From its inception, the project was intended to be a mixed residential and commercial building. The appellant Trendsetter was amalgamated with Assaly Corp. on September 1, 1988, pursuant to the Business Corporations Act, 1982, S.O. 1982, c. 4 (now R.S.O. 1990, c. B.16), and was continued under the name Thomas C. Assaly Corporation Ltd. (Assaly Corp.). Thomas C. Assaly is the president and controlling shareholder of Assaly Corp.

Assaly Corp. owns two residential and seven commercial units in Kent Towers. One residential unit was obtained by foreclosure and the other as a result of a breach of the aunits are provided for in the declaration of the condominium, and are subject to its provisions as well as to the provisions of the Act. Each investor was aware of the intention to have commercial units.

At the time of trial, Assaly Corp. held virtually all of the second and third mortgages registered against the condominium units. Each of the Assaly Corp. mortgages contains a clause permitting the mortgagee to exercise the unit owner's right to vote. A trust company holds first mortgages on all units, payment of which is guaranteed by Assaly Corp. Those mortgages also provide for exercise by the mortgagee of the unit owner's right to vote. There was some dispute during argument as to the number of mortgages held by Assaly Corp. at the time of the appeal hearing; however, neither counsel was able to provide adequate information as to the precise holdings. Counsel were informed by the court that this appeal would be decided on the basis that Assaly Corp. held in excess of 15 per cent of the junior mortgages on the units -- a fact agreed to at the time of the hearing before the motions court judge.

Thomas C. Assaly personally owns 53 residential units, and it is not disputed that those units were purchased by him at fair market value. A majority of the other units are owned by individual investors who take advantage of the substantial tax benefits of ownership, as does Thomas C. Assaly with respect to his 53 units. Very few units are owner-occupied.

At the material time, the board of directors of the condominium were Gayle Duggan, Taxiarchis (Mike) Chatzipantazis, Thomas G. Assaly, Ashwin Shingadia and Gillian Brown, all of whom own residential units in the building. Thomas G. Assaly is the son of Thomas C. Assaly, and is employed by the Assaly group of companies.

Thomas C. Assaly has a controlling interest in Assaly Holdings Ltd., which in turn has a controlling interest in both Assaly Corp. and in a company called Asgo Management Ltd. (Asgo). Asgo became the manager of the condominium for a term of five years from October 15, 1986 by virtue of a management agreement entered into between Asgo and Trendsetter at a time when Trendsetter, as developer, was owner of 100 per cent of the units. Thomas C. Assaly makes all significant decisions on behalf of Assaly Corp. and on behalf of Asgo.

THE DISPUTE

In the spring of 1991 a dispute arose among the directors with respect to the future management of the condominium. The majority of the board of directors, consisting of Duggan, Chatzipantazis and Shingadia, were of the view that the management contract with Asgo should not be renewed on its expiry on October 14, 1991. Assaly and Brown were in favour of renewal of the Asgo contract, Brown proposing that she be hired as salaried managing director.

By letter dated June 7, 1991 Assaly Corp., in its capacity as mortgagee of no less than 15 per cent of the units, wrote to unit owners enclosing a notice, pursuant to s. 18(2) of the Act, of a special meeting of owners to remove Duggan, Chatzipantazis and Shingadia from the board of directors because they did not support the renewal of the Asgo agreement. It also sent to owners a notice indicating its intention to exercise the voting rights of all units against which it held mortgages. There was a dispute between counsel on the appeal as to whether Assaly Corp. at that time held mortgage security over at least 15 per cent of the units. As stated above, counsel were unable to satisfy us as to the then current status of the mortgages, and thus we are dealing with the issues on appeal as if Assaly Corp. does in fact hold mortgages over 15 per cent of the units. Assaly Corp. had two reasons for calling the meeting of unit owners: first, it wished the renewal of the Asgo management contract, which was a profitable one, on its expiry on October 14, 1991; and second, it did not want to jeopardize the renewal of contracts which Asgo held with individual unit owners to manage their particular units.

Mr. Thomas C. Assaly, in cross-examination on his affidavit filed in the proceedings, stated that the appellants wished to maintain control over the management of the property to produce the best possible results for all investors. Gayle Duggan, in her filed affidavit, stated that the board of directors had encountered difficulties in dealing with Asgo as the condominium manager, particularly when Asgo or the appellant found themselves in a position adverse to the respondent.

THE ISSUES

Four issues were argued on appeal:

- (i) whether Thomas C. Assaly, as shareholder of the developer, could be a bona fide unit owner of condominium units under the Condominium Act ;
 - (ii) whether Thomas C. Assaly's position as controlling shareholder of Assaly Corp. imposes a fiduciary duty upon him which prohibits him from exercising a right to vote as unit owner;
 - (iii) whether Assaly Corp. is under a fiduciary duty which prohibits it from exercising its right to vote as unit owner; and
 - (iv) whether Assaly Corp. as mortgagee of a majority of the units of the condominium is entitled to vote under s. 48 of the Condominium Act?
- (i) Controlling shareholder of declarant as bona fide owner of condominium units

The learned motions court judge held that Thomas C. Assaly was not entitled to vote at the meeting called by the mortgagee. At p. 34 of his reasons [p. 317 O.R., pp. 26-27 R.P.R.], he stated as follows:

The principles laid down in cases such as York Condominium No. 167, Peel Condominium Corp. No. 199, and Carleton Condominium Corp. No. 279 , supra, are, first, that the Act was intended to benefit unit owners who are bona fide purchasers, secondly, that declarants and their successors and assignees stand in a fiduciary relationship to unit owners, and finally, that they may not use their positions to further their own economic interests at the expense of bona fide unit owners.

The decision by Thomas C. Assaly Corporation Ltd. to invoke the machinery of s. 18(2) of the Act in order to remove from office the majority directors of the board because they had the temerity to vote against renewal of the management agreement with Asgo Management Limited is, in my respectful view, nothing short of a massive use of its position to further its own economic advantage. This is the type of conduct which Carruthers J., in a different factual context, excoriated in Peel Condominium Corp. No. 199, supra, and I find it no less reprehensible here.

It follows from the foregoing that I accept the submissions of Mr. Davidson for the applicant that Thomas C. Assaly is not entitled to vote at the meeting.

The first and third principles referred to above involve the question of whether or not Thomas C. Assaly is a bona fide purchaser of his 53 units. The second principle relates to his position as the controlling mind of Assaly Corp. and of Asgo.

It is not disputed that Thomas C. Assaly paid fair market value for the units which he purchased in his personal capacity. The appellant argues that because he paid fair market value he is a bona fide purchaser within the terms of the Act, stating that s. 1(1)(1) refers to a "bona fide purchaser" as one "who actually pays fair market value". That is not a completely accurate reference to s. 1(1)(1). The section defines a "declarant" as follows:

(1) "declarant" means the owner or owners in fee simple of the land described in the description at the time of registration of a declaration and description of the land, and includes any successor or assignee of such owner or owners but does not include a bona fide purchaser of a unit who actually pays fair market value or any successor or assignee of such purchaser . . . It is clear from that provision that, for any successor or assignee of the "declarant" to be exempt from the statutory obligations of a declarant, he must not only pay fair market value, but he must also be a bona fide purchaser. As stated above, payment of fair market value is not in issue in this case. However, the question whether Thomas C. Assaly was a bona fide purchaser is one of some difficulty. Although the motions court judge did not address the issue directly, it appears from his conclusions that he was of the view that Thomas C. Assaly could not be a bona fide purchaser because of his position in Assaly Corp. and in Asgo. He also appears to have considered that the calling of a meeting of unit holders by Assaly Corp. as mortgagee, pursuant to s. 18(2) of the Act, could be attributed to Thomas C. Assaly in his personal capacity. He relied on the decisions in Peel Condominium Corp. No. 199 v. Sanrose Construction (Dixie) Ltd. (1989), 68 O.R. (2d) 513, 5 R.P.R. (2d) 70 (H.C.J.); York Condominium Corp. No. 167 v. Newrey Holdings Ltd. (1981), 32 O.R. (2d) 458, 122 D.L.R. (3d) 280 (C.A.); and Carleton Condominium Corp. No. 279 v. Rochon (1987), 59 O.R. (2d) 545, 38 D.L.R. (4th) 430 (C.A.).

The Sanrose decision involved the failure of a developer to sell 57 out of 270 units in the Fairways condominium development in Mississauga in accordance with the requirements of s. 51(1)(b) of the Act, which requires sale by a declarant "without delay". In that case, the units left unsold were owned by the declarant corporation, by two individual defendants who were the individuals behind the original development plan, and also by other "persons or entities" with whom they had a "connection or association". However, the question at issue in our case -- whether persons who have purchased units in their individual capacity must be treated in the same way under the Act as corporate declarants controlled by them -- was one that it was unnecessary to decide in the Sanrose case.

The declaration in Sanrose contained the following provision:

No person or company or persons or companies acting in consort or under common control shall be allowed to buy more than 1% of the total number of units.

No such provision is found in the declaration in this case. In Sanrose, the trial judge made several statements as to the intent of the Act and the intent of the declaration and by-laws of the condominium involved, but all were made in the context of the declarant's statutory duty to sell, and the above-quoted provision in the Sanrose declaration.

In the Rochon case, this court considered whether a private arrangement made between the purchaser of a unit and the declarant, prior to the sale of all of the units, was binding upon other purchasers -- a substantially different situation from the one before us.

In that case, Finlayson J.A. stated [at p. 554 O.R., p. 439 D.L.R.]: "He (the declarant) can never be a bona fide purchaser of a unit and it is these 'unit owners' that the Condominium Act is intended to protect." Although that is a reasonable interpretation of the Act, it does not answer the question whether the controlling shareholder of a corporate declarant can become a bona fide purchaser of a unit.

Cases were cited to us addressing the issue whether a purchaser of particular property was a bona fide purchaser for value. I do not consider those cases to be of assistance in resolving the issue in this case. They arise most frequently in the context of alleged fraudulent conveyances and negotiable instrument cases. One question common to both is whether or not true value was paid for the conveyance or the bill. The second is, in the fraudulent conveyance cases, whether the intent of the transfer was to defraud, hinder, or delay creditors of the transferor and, in the negotiable instrument cases, whether the holder of the bill took with any notice of defect in title of previous holders. The context is substantially different in cases dealing with the statutory scheme established under the Condominium Act. In my view, once the payment of fair market value is determined, s. 1(1)(1) of the Act requires a further determination of whether the transaction was a true sale rather than merely a transfer to a nominee, and whether there was any underlying intent which would be inimical to the purposes of the Act.

It was argued by the respondent that where, as here, the purchaser is one and the same person as the controlling mind of the corporate declarant, the transaction is a mere sham to avoid the deemed covenant in s. 51(1)(b) of the Act that the declarant will "take all reasonable steps to sell the other residential units included in the property without delay". Such an interpretation of the Act would go much further than the common law of this province in piercing the corporate veil, and would preclude any developer controlling a closely held corporation from purchasing units in a condominium developed by that corporation, regardless of the purpose of the purchase.

Thomas C. Assaly purchased his units for investment purposes, and for the tax advantage which he could derive personally from their purchase -- the same reasons why most other owners purchased their units. The evidence indicates additional reasons for Mr. Assaly's purchases, not necessarily shared by other unit owners. These were the stabilization of prices of the units in the project, and the furthering of the interests of Asgo in maintaining its management contracts. There is no evidence that he acted as a mere nominee of Assaly Corp. in purchasing his units.

The remaining question is whether there are any facts in this case which indicate any underlying intent on the part of Mr. Assaly which would be inimical to the purposes of the Act. One of the main objectives of the Act is to place control of the condominium in the hands of the owners at the earliest possible date. However, nothing in the Act prohibits any individual from owning a sufficient number of units in the project to put him in control. Such a prohibition could be written into the declaration, as was done in the Sanrose case, but that was not done in this case. In any event, ownership of 53 out of 219 residential units does not of itself constitute control.

I see no facts surrounding his purchase of residential units which would preclude Thomas C. Assaly from exercising a vote as bona fide owner of each of his units.

(ii) Does the controlling shareholder of a declarant owe a fiduciary duty to owners, and if so, does that duty prohibit him from exercising a right to vote as unit owner?

The respondent takes the position that Thomas C. Assaly owes a fiduciary duty to the owners of units in the condominium as a result of his being the controlling mind of the declarant, and must, therefore, act in their interests alone when their interests are in conflict with his own. The only condominium case cited for that proposition was the decision of this court in *York Condominium Corp. No. 167 v. Newrey Holdings Ltd.*, supra. The relevant portion of that decision involved extra parking spaces remaining after parking spaces had been allocated to all residential units in the project. The developer declarant, prior to the registration of the declaration, proposed to sell the extra parking spaces and retain the proceeds. Its position was that, although the extra spaces were part of the common elements, they remained the property of the developer until registration of the declaration and could be disposed of by it at will. Wilson J.A., writing for the court, stated at p. 467 O.R., p. 289 D.L.R.:

With respect, I can see no reason why as a matter of simple contract law the parties cannot contract with reference to the Act and declaration prior to the registration of the declaration and in anticipation of its registration. Indeed, I think they must be taken to have done so where units in a condominium project are sold prior to registration since the condominium is substantially a creature of statute. It would be wholly unreal to view those transactions as agreements for the sale of separate pieces of real estate. This being so, I think the Court may look, and indeed must look, to the provisions of the Act and the declaration in determining the rights of the parties under the agreements of purchase and sale. I think they must also look to the general law of real property as to the status of a purchaser once his offer has been accepted. I do not think the position of the owner-developer remains unchanged after he starts to sell units. I think that at that point he has committed the character of the project to that of condominium under the Act and declaration. I think he has also placed himself in a fiduciary relationship to the unit purchasers not only with respect to their units but also with respect to the interests appurtenant thereto. He therefore holds the property in trust for the unit purchasers, present and prospective, and for the condominium corporation which will come into being upon registration of the declaration. I believe he is under a duty to protect the interests of all unit owners, present and prospective, and cannot put his own interests in conflict with theirs even although he himself continues to be an owner as long as any units remain unsold.

That decision supports the extension of principles of real property contract law to contracts involving the purchase of condominium units. I see nothing in the words quoted that indicates the imposition of a fiduciary duty upon a person who is himself a bona fide purchaser of units. Had an individual, owning a controlling interest in a condominium management corporation unconnected to the declarant, purchased the same number of units as Mr. Assaly, I cannot conceive of any voting issue being raised. I see no reason to treat Mr. Assaly differently from such a purchaser.

However, even if Mr. Assaly were subject to a fiduciary duty, it would not preclude his voting at meetings of unit holders. It would merely require that, in so doing, he vote in the interests of all unit holders, since it would be to all that he owed the duty, and not to a few. It is quite possible in this case that Mr. Assaly's interests correspond to those of the unit holders as a whole. There is no evidence of the views or interests of the unit holders as a group; the evidence merely indicates the opinion of some of the directors that Mr. Assaly would not vote in the interests of all unit holders.

Two potentially conflicting considerations are of importance in dealing with condominiums -- the first, that condominiums are creatures of statute, and courts should be cautious about reading into the statute rights and duties which the legislature did not see fit to include; and the second, that condominium corporations, unlike business corporations, are made up of individuals who make their homes in the premises operated by the corporation, or whose tenants do, and the fate of the corporation is of vital importance

to them in their everyday lives. The efficient operation of the building is in Mr. Assaly's interests, as well as in the interests of the other owners. It is my view, on the facts of this case, that Mr. Assaly does not owe a fiduciary duty to other unit holders, and can vote in any way he chooses as the bona fide purchaser of 53 residential units. However, in so stating, I wish to make it clear that, in assessing situations such as this, one must look carefully at the facts. For example, if Mr. Assaly had purchased sufficient units to effect control of shareholders' meetings, the court might take a different view of the issue of fiduciary duty.

(iii) Does Assaly Corp. owe a fiduciary duty to unit owners which prohibits it from voting at meetings of unit owners?

The appellant concedes that a fiduciary duty is owed by the Assaly Corp. as declarant with respect to unsold residential units. Assaly Corp. owns two residential units -- one obtained as a result of a breach of an agreement of purchase and sale by an investor, and the other by foreclosure under a mortgage held by it.

Section 51(1)(b) of the Act states:

51(1) Every agreement of purchase and sale entered into by a proposed declarant for a proposed unit for residential purposes shall be deemed to contain,

(b) a covenant by the vendor to take all reasonable steps to sell the other residential units included in the property without delay other than any units mentioned in a statement under clause 54(1)(c) . . .

That provision does not cease to be effective merely because an agreement of purchase and sale has been aborted. The declarant continues to be bound by the deemed covenant to sell the unit involved "without delay". There can be no doubt on the facts of this case that the declarant has not fulfilled that covenant and, consequently, is subject to a fiduciary duty which precludes it from voting with respect to that unit other than in the interests of the unit owners as a whole.

Different considerations apply to the residential unit which was obtained as a result of mortgage foreclosure. Before Assaly Corp. took mortgage security over that unit, it had fulfilled the covenant to sell, and was no longer subject to any fiduciary obligation. Following default under the mortgage and subsequent foreclosure, it became owner not through its capacity as declarant, but as mortgagee; thus it would become a bona fide purchaser for value of the unit, and have the same right to vote as any other unit owner.

Commercial units, of which Assaly Corp. owns seven, are treated differently under the Act. The deemed covenant to sell under s. 51(1)(b) is limited specifically to residential units. The declaration does not stipulate that the commercial units be sold. On the contrary, purchasers of residential units would have been aware of the existence of commercial units, and should have anticipated the likelihood of their retention by the declarant for commercial rental purposes. I see no reason, pursuant to the statute or otherwise, why the declarant should not be at liberty to vote as owner of the commercial units.

(iv) Right of junior mortgagee to vote pursuant to s. 48 of the Act

Assaly Corp., at the time of trial, held virtually all second and third mortgages of the condominium units. As stated above, it is assumed for the purposes of these reasons that it held mortgage security over at least 15 per cent of the units, which entitled it, pursuant to s. 18(2) of the Act, to call a meeting of the owners of the condominium corporation at any time, subject only to the provisions of s. 48 of the Act, which reads:

48. Where a mortgage of a unit and common interest contains a provision that authorizes the mortgagee to exercise the right of the owner to vote or to consent, the mortgagee may exercise the right, and, where two or more such mortgages contain such a provision, the right may be exercised by the mortgagee who has priority.

The mortgages held by Assaly Corp. in this case do contain a provision authorizing the mortgagee of the unit to vote. The motions court judge concluded that Assaly Corp. was not entitled to vote the units over which it held mortgage security. In doing so, he stated: first, that he was following the decision of Philp J. in *Keyes v. Metropolitan Toronto Condominium Corp. No. 876* (1990), 73 O.R. (2d) 568, 11 R.P.R. (2d) 169 (H.C.J.); second, that he was following the principles laid down in the decisions cited earlier in these reasons; and third, that the intent of the Act indicated that Assaly Corp. as mortgagee should not be entitled to vote.

The motions court judge did not elaborate on his second and third reasons. However, I find nothing in the cases referred to earlier which in any way clarifies the issue of a mortgagee's voting rights. Nor do I see anything in the Act which would indicate that a mortgagee, which also happens to be a declarant, is, therefore, precluded from exercising its statutory rights as mortgagee.

The issue of a mortgagee's right to vote was addressed by Philp J. in the *Keyes* case. He stated that the purpose of s. 48 of the Act was to protect the rights of mortgagees, who have an investment in the mortgaged units and, following the unreported decision of Krever J. in *Mann v. Canada Mortgage & Housing Corp.*, Ont. H.C.J., released May 21, 1982, held that the right of the mortgagee to vote in no way depends upon default under the mortgage. I am in complete agreement with that portion of the decision in *Keyes* and the reasoning on which it is based.

Philp J. went on in *Keyes* to consider the rights of junior mortgagees to vote in a situation where a first mortgagee does not avail itself of the opportunity. On that issue, he stated, at p. 579 O.R., p. 181 R.P.R.:

The words of s. 48 speak only of the right being exercised by the mortgagee who has priority, which, in my view, would be the first mortgagee. There is no provision for the right to be transferred to a mortgagee with lesser priority in the event that the first mortgagee decides not to exercise its right to vote. As well, paragraph (c)(i), contained in all mortgages and reproduced above, contemplates the mortgagee giving the mortgagor notice if it does not intend to exercise its vote, thereby enabling the mortgagor to exercise the right to vote. If, therefore, the developer does not have the first mortgage, he will not have the right to exercise the vote contained in the second mortgage, in my view, according to s. 48.

While s. 48 is not as clear as one would like, I am unable to agree with Philp J.'s interpretation of it. There can be no doubt that the first part of the section, down to the words, "the mortgagee may exercise the right", gives to any mortgagee, whose mortgage document contains the appropriate authorization to vote, the right to exercise that vote if it wishes to do so. The ambiguity lies in the words, "where two or more such mortgages contain such a provision, the right may be exercised by the mortgagee who has priority". Section 22(1) permits only one vote per unit at a meeting of unit owners. Consequently, only one mortgagee could vote

a unit regardless of the number of mortgages registered against it. The latter part of s. 48 is permissive, and allows the mortgagee with priority to vote if it wishes to. It does not, however, prohibit voting by junior mortgagees if the senior mortgagee does not wish to avail itself of its rights. To hold otherwise, would be to limit the opening part of s. 48 to first mortgagees only; but the wording of that part indicates no such limitation. If the opening part were specifically limited to first mortgagees, then the latter part would be redundant. In addition, to construe the section in that way would limit the rights of the mortgagee and mortgagor to contract for the assignment of the owner's right to vote. To effect such a result, the Act would have to do so in very clear terms. I am satisfied that the legislature had no such intent, and that the right of a mortgagee to vote a unit arises by virtue of its agreement with the unit owner. However, it can be exercised only within the terms of that agreement, and only if a prior mortgagee does not avail itself of its right to vote.

RESULT

In result, I am of the view that the appellants are entitled to declarations that:

- (a) Thomas C. Assaly is entitled to vote at unit owners' meetings as owner of the 53 residential units registered in his name.
- (b) Assaly Corp. is entitled to vote at unit owners' meetings as owner of seven commercial units and one residential unit. It is entitled to vote in a fiduciary capacity only with respect to the one residential unit it owns as a result of the aborted agreement of purchase and sale.
- (c) Assaly Corp. is entitled to exercise its rights as mortgagee to vote at unit owners' meetings, within the terms of its mortgages, but only in situations where prior mortgagees do not avail themselves of their prior right to vote.

I should like to comment on a matter which I consider to have confused the issues in this appeal. The disputes between the parties arose at a meeting of directors of the condominium corporation, but the issues in the appeal deal with matters which do not involve directors at all, but involve the rights and duties of registered unit owners and mortgagees. There is no doubt that all directors must act at all times in the interests of the condominium corporation as a whole. Their position is the same as the position of a director of any other corporation, and nothing in the Act reduces their responsibilities. Unit owners, however, are in a position similar to that of shareholders of a corporation -- they act in their own personal interests unless something in the general law or in the Act requires them to do otherwise. In this case, the proposed purpose of the unit owners' meeting is to replace some of the directors. If that is done within the terms of the Act and of the declaration and by-laws of the corporation, there can be no complaint. However, once new directors are appointed, they owe a fiduciary duty to the corporation and not to any other individual or organization. If they fail in the exercise of that duty, they are subject to the full force of the law.

I would set aside the judgment below, and in its place give judgment in favour of the appellants in accordance with these reasons. The appellants are entitled to their costs here and below.

Appeal allowed.

CBR# 060

Carleton Condominium Corp. No. 11 v. Shenkman Corp. Ltd.; Grainger et al., Third Parties

49 O.R. (2d) 194 ONTARIO HIGH COURT OF JUSTICE KREVER J. 14TH JANUARY 1985.

ACTION for damages in respect of repairs to the common elements of the plaintiff condominium corporation; THIRD PARTY PROCEEDINGS by the developer against the contractor and the mortgagee.

John P. Nelligan, Q.C., and John E. Johnson, for plaintiff.

J.B. Chadwick, Q.C., and T.C. Barber, for defendant.

Jessen DeW. Wentzell, for Canada Mortgage and Housing Corporation, third party.

KREVER J.:-- The plaintiff's claim, asserted in this action only in contract, is to recover the expenses, actually incurred and to be incurred, to repair and correct defects in certain common elements of the plaintiff condominium corporation. The defendant, the owner-developer of the condominium project, brought third party proceedings against a firm of architects retained by it to design, prepare the drawings for and supervise the construction of the project, Acto Builders Limited, the contractor engaged by it as the contractor for the project's parking structure, and, finally, Canada Mortgage and Housing Corporation, which, as mortgagee, financed the project. The parking structure, which was not originally part of the project and which was added to meet municipal parking-space requirements, was, however, not included in the mortgage commitment made by Canada Mortgage and Housing Corporation, which, for convenience, I shall refer to as CMHC. Prior to trial the solicitors for the third party, Acto Builders Limited, were, by order, removed from the record and, also by order, but one made on consent, the third party proceedings against the architects were dismissed. At the opening of the trial counsel for Acto Builders Limited sought, and was granted, leave to withdraw. As a result the third party issues, which were tried at the same time as the main action, proceeded against both Acto Builders Limited and CMHC but only with the latter represented by counsel.

The defendant, an experienced developer, began the project, using land from its own extensive land bank in the Ottawa area, in response to a federal government programme designed to encourage the construction of low-cost housing for persons at the lower end of the income scale or, as described in the evidence less euphemistically, for the poor and disadvantaged. The government's mechanism was the availability, through CMHC, a creature of statute, of funds to finance the construction of the project. Construction began in October, 1970 and, almost from the beginning, the project was beset with problems, first of a physical nature -- poor construction -- and later of a legal nature resulting, even before the commencement of this action on October 3, 1974, in litigation in February and March, 1972, between the plaintiff and its original architects and general contractor. The members of society for whom this perfectly laudable and well-meaning programme was designed were poorly served by its execution in this undertaking.

The complex was located in Gloucester Township and consisted of tower units, townhouses, three outdoor parking areas, of which only two are the subject of this litigation, and, as finally executed, a parking garage or parking structure. The towers were six in number, in two groups of three. Each of these two groups of towers contained 92 units and was of frame construction with a brick veneer. The townhouses, of similar construction, also arranged in groups of three, were 44 in number. Although the contract for the construction of the complex between the plaintiff and its original general contractor was not executed until November, 1970, construction began in October, 1970. Some units were sold in the spring and summer of 1971 and their owners took possession of them in June and July of that year. A smaller number of units were rented to tenants originally but, later, in 1975, were sold to purchasers. The parking structure, built pursuant to a contract between the defendant and the third party Acto Builders Limited, was not completed until about December 21, 1971.

With the registration of the required declaration and description, the plaintiff condominium corporation came into existence on October 29, 1971. Under the terms of a written contract between the plaintiff and the defendant developer the defendant was the manager of the plaintiff until January 30, 1973. At the time of the trial of this action there were four different categories of unit owners, namely, those who had purchased their units before the completion of the construction, those who had purchased after the completion of the construction, those who had purchased their units on a resale to them by original unit owners and, finally, those who, in 1975, that is, after the commencement of the action, had been first purchasers, not, however, of new units but of units that had been rented to tenants. Because of the opinion I hold with respect to the law that governs the relationship of, and the rights and obligations between the plaintiff and the defendant, it is, in my view, unnecessary to break down these categories into numbers. It is enough to describe the relationship between an original owner who purchased before the completion of the construction and the plaintiff and the defendant. I add, however, because it may be useful to do so, that all of the original owners, no matter whether they purchased before or after completion, with the exception of those who, in 1975, purchased "used" units, received from the defendant standard warranties in writing the terms of which I shall refer to in some detail later.

I use as my example of original unit owners who purchased before the completion of the construction Mr. and Mrs. William Hersh. Mr. Hersh became the president of the condominium corporation and acted in that capacity from 1972 to 1975 and was therefore president at the commencement of this action. By an agreement in writing dated June 25, 1971, he and his wife agreed with the defendant (to be accurate, the predecessor of the defendant but, as nothing turns on it, no distinction need be made) to purchase a unit in the condominium in accordance with a description and a declaration to be registered. The agreement, which referred to the Condominium Act, 1967 (Ont.), c. 12, contemplated the creation of the condominium corporation but provided that if the unit and common elements reasonably necessary for the enjoyment of the unit were substantially completed and fit for occupancy before the registration creating the condominium corporation, the purchasers would take occupancy of the unit on a rental basis. Clause 5 and the relevant portion of cl. 14 of the agreement of purchase and sale read as follows:

5. The vendor agrees that it will erect the said unit in accordance with the plans and specifications filed with Central Mortgage and Housing Corporation or any amendment thereto. It is agreed that acceptance of construction and amendments to plans by Central Mortgage and Housing Corporation shall constitute conclusive acceptance by the Purchaser. The Vendor shall have the right to substitute other material for that provided for in the plans and specifications, provided that such material is approved by Central Mortgage and Housing Corporation, or is of a quality equal to or better than the material in the specification.

14. (a) The Vendor agrees to provide the Purchaser on occupancy with a one-year Home Owner's Warranty in a form approved by the National House Builders' Association with respect to workmanship and materials.

(c) It is understood and agreed that there is no representation, warranty, collateral agreement or condition affecting this agreement or the Real Property or supported hereby other than as expressed herein in writing.

Despite the incomplete state of the construction Mr. and Mrs. Hersh moved into their unit on June 30, 1971, and on the following day, July 1, 1971, according to Mr. Hersh's testimony, the transaction of purchase and sale was closed. As part of the transaction the defendant gave to Mr. and Mrs. Hersh a written warranty in the standard form as described in cl. 14(a) of the agreement of purchase and sale set out above. The warranty, executed by the defendant and dated July 1, 1971, begins with the words "National House Builders Association", an association of which the defendant was a member, and is entitled "Home Owner's Warranty". With deletions of provisions on which, in my view, nothing turns, the warranty is in the following language:

TO WILLIAM HERSH & LISA SHAPIRO

1. Your Builder guarantees that your home on Unit 61, Level 1, and its appurtenant common interest Carleton Condominium Plan No. 11 in the Township of Gloucester, delivered to you on the 1st day of July, 1971 has been constructed in a thorough and workmanlike manner in accordance with accepted Home Building Standards. Inspection by local building authorities and by our trained personnel guarantees to you that all local codes, hydro regulations and municipal by-laws and where applicable, minimum National Housing Act standards in existence at the time of construction have been complied with.

2. Your Builder further certifies that this home, upon delivery to you, was structurally sound and free from defects in workmanship and materials.

3. Your Builder will, at his option, either replace or repair free of cost, any such defects which occur under ordinary use and care, within one year from the date of delivery as shown above subject to the limitations hereinafter expressed. Such defects must be brought to your builder's attention in writing within the one year period hereinbefore set out.

6. Your Builder does not assume liability or responsibility for:

(a) Damage due to reasonable wear and tear or damage caused by termites or other insects, fire, lightning, tempest or other acts of God, or through negligence of the occupier of the home.

(b) Conditions resulting from condensation or contraction or expansion common to the type and grade of materials used.

(c) Checking or cracking of plaster or dry wall.

(d) Latent defects inherent in the type and grade of materials used.

(e) Minor depressions in grounds caused by settling of sewer, plumbing or utility ditches or ground grading.

(f) Cracks common to concrete and masonry work.

7. In no event shall the undersigned Builder be liable hereunder for an amount in excess of that necessary to replace or repair the defective material or workmanship.

8. This is the only warranty made or authorized by your Builder with respect to your home and is in lieu of all other warranties expressed or implied and of all other obligations and liabilities on your Builder's part whether with respect to materials or workmanship in the home, damages suffered by the purchaser or others or to his or their effects or otherwise. No warranty is made beyond the time limited above even though the claimed defect does not become apparent within such period.

10. This warranty is solely for the protection of the original owner and is not transferable. Any obligation under this warranty terminates in the event of sale of the property or in the event of the property not being occupied by the original purchaser.

It is, I think, fair to observe that the standard form on which the warranty appears is one designed for what may reasonably be thought of as more conventional houses and not especially for condominium units.

From the very beginning the original unit owners had reason to complain about the defects in the units and the common elements. Most of the defects were attributable to the poor quality of workmanship and supervision in the construction of the project. It is not without significance that the defendant itself, in its litigation with its original architects and general contractor, took the position that the quality of work and supervision fell below reasonable standards. The claim in this action is limited to the unacceptable quality of the common elements and, as the issues eventually became defined in the proceedings before trial, does not include complaints with respect to the individual units. In this connection it is appropriate to draw attention to the reference to "appurtenant common interest" in the first clause of the home owner's warranty.

It is to the common elements that are the subject of the plaintiff's claim that attention must now be directed. They are to be found in the townhouses, the parking structure, two of the parking-lots and, although compared with the first three, of much less importance, roof hoppers on the towers. It is not disputed that the items about which complaint is made are, indeed, common elements as opposed to the units of the condominium. By "common elements" I mean common elements as defined in s. 1(1)(g) of the Condominium Act, now R.S.O. 1980, c. 84, that is, all the property except the units. I need not review in the same detail given at the trial the evidence of the defects and shortcomings in respect of which the plaintiff's claim is made in the light of the defendant's fair position that the real issues between the plaintiff and the defendant were the plaintiff's entitlement to any judgment against it and, if that were decided in the plaintiff's favour, the determination of the reasonable cost of repairs.

The townhouses, sometimes referred to in the evidence as maisonettes, were defectively constructed in several respects. The more serious of these, as far as the common elements are concerned, were the following. The stucco on the gable ends was so poorly applied that it buckled with the result that the buildings were left exposed to the elements requiring, in July, 1980, replacement of the stucco with aluminum siding. The dormer windows, because of poor window design and inadequate flashing, allowed water to enter the units damaging floors, walls and ceilings. Kitchen venting was so poorly installed that odours from one kitchen entered the adjoining kitchen. This resulted from the venting of adjoining kitchen exhausts into a common box before going through the roof to the outside, thus permitting a cross-over of air. There were leaks in the roofs. Roof ventilation allowed condensation in the attic space, causing damage to exterior surfaces and the curling of shingles. I accept the evidence of Mr.

Herbert Otto, an architect, and Mr. R. John Oliver, a professional engineer, who expressed their opinions that the defects I have described reflected poor workmanship, lack of adequate supervision and inspection during the construction and contraventions of a serious nature of both the Gloucester Township building by-laws and the 1965 National Building Code which the by-laws incorporated. In short, the construction was not carried out in a workmanlike manner and the defects clearly required correction.

The quality of the construction of the parking structure, erected, it will be recalled, by the third party Acto Builders Limited, was, it is common ground, undeniably poor and unacceptable. Quite apart from its inability to resist earthquake forces, a required standard for structures of its kind in the Ottawa region, it was generally unacceptable. The columns supporting the beams and joints were inadequately secured in their footings, all of which supported the upper level concrete deck, and were out of plumb. The concrete deck was constructed without a satisfactory membrane or sealer to prevent water from penetrating through the asphalt, causing leaking to the level below, excessive corrosion of the beams and other steel components and short circuiting in the electrical system. The enclosed staircases were so poorly built that little time could be lost in replacing them. That the design and construction of the parking structure patently failed to meet any reasonable standard is, on the evidence, an inescapable conclusion.

The same conclusion must be made about the two parking-lots or areas. The deterioration of the parking-lot asphalt, tilting of the lamp standards, deterioration of the bollards installed to permit the winter heating of unit owners' cars, and damage to the parking-lots' concrete curbs, all of which were described in detail by the witnesses at the trial and are evident in the photographic exhibits, can be attributed to the less than professional solution adopted to drain the ground on which the parking-lots were put down. In this connection I accept the evidence of Mr. Lloyd Bredison, a professional engineer and the president of a company of consulting engineers and geologists engaged in soil investigations and inspection and testing services. The soil problem involved in the construction of one of the parking-lots was more serious than that in the other and the first part of my brief description relates to what was called "parking-lot two", the more difficult area. According to Mr. Bredison, there had been no adequate provision made for water drainage and as a result the water which had not been drawn off sat on impervious material. Under winter conditions, this "perched" water froze and expanded by 10%, and in so doing lifted the materials above it and reached the surface asphalt. The next observation made by Mr. Bredison had to do with the soft clay which was used under the granular fill. It was, he said, inappropriate because it created a weak base and became even softer when saturated by perched water allowing the asphalt to be pushed down by the weight of the cars. In some areas, sand had been used under the granular material and this too created a poor sub-asphalt base. Moreover, insufficient class A granular was used. It is also clear that surface drainage for the parking-lots was ineffective. The subsidence of asphalt around the catchment basins and the shallow nature of the storm sewers inevitably causes ponding of water on the lots. There was a difference of expert opinion over the magnitude of the repair measures needed, a matter to which I will return in my discussion of damages, but no disagreement about the failure of the parking-lots to meet reasonable standards.

Finally, and briefly, I mention the roof hoppers on the towers. They lacked a necessary sleeve and were erected or installed in such a manner that their drainage purpose was frustrated. This defect was also a breach of acceptable standards.

I conclude this part of my discussion of standard of care with a reference to an attitude expressed during the trial by a witness that is perhaps as significant a piece of evidence as any that could be led to reflect the defendant's attitude about the quality of housing that lower-income members of society, for whose benefit the programme was intended, were entitled to receive. By this reference I mean no disparagement of Mr. V.K. Whittaker, who throughout the material period was a vice-president of the defendant and in charge of the development. He was, I find, an honourable, fair and frank witness. Moreover, the comment I am about to relate was made in cross-examination, in the give and take of an adversary proceeding. But, making allowance for that, it is nevertheless significant for me. In answer to a question about the large number of complaints being made by unit owners even before the completion of construction Mr. Whittaker explained that the reason why the number was excessive was because "these people had never [before] owned. They bought Volkswagen and thought they were entitled to Cadillac." When asked by Mr. Nelligan whether a Volkswagen was acceptable with leaking windows, Mr. Whittaker answered, "If that's all you can afford."

The first difficult issue of law to be considered -- the status of the plaintiff condominium corporation to sue, or if possessed of status, to sue for the full extent of the damages to be assessed -- takes me into an unsettled subject in which conflicting judicial approaches are found. Simply put, the question is one of the correct interpretation of s. 9(18) of the Condominium Act, R.S.O. 1970, c. 77. It will be recalled that this action was commenced in October, 1974. The governing statutory law was therefore that set out in the 1970 revision of the statutes and not that found in the version in which it appears in the 1980 revision. The statutory provision, then, that is relevant for present purposes, s. 9(18), read as follows:

9(18) Any action with respect to the common elements may be brought by the corporation and a judgment for the payment of money in favour of the corporation in such an action is an asset of the corporation.

One of the differences in the statute that took place between the two revisions may be seen by an examination of the language of s. 14(1) and (2) of the Condominium Act, R.S.O. 1980, c. 84, which I reproduce, in part:

14(1) The corporation ... may, on its own behalf and on behalf of any owner, sue for and recover damages and costs in respect of any damage to common elements ...

(2) The corporation ... may sue on its own behalf and on behalf of any owner with respect to the common elements and any units, notwithstanding that the corporation was not a party to the contract in respect of which the action is brought ...

Having drawn attention to the statutory changes, it is right that I say that the interpretation that I have concluded is the correct one for the provision as it read at all material times, up to and including the time of the commencement of this action, is in no way influenced by the subsequent amendment of the legislation. On this point the following sections of the Interpretation Act, R.S.O. 1980, c. 219, are relevant:

17. The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

18. The amendment of an Act shall be deemed not to be or to involve a declaration that the law under the Act was or was considered by the Legislature to have been different from the law as it has become under the Act as so amended.

19. The Legislature shall not, by re-enacting, revising, consolidating or amending an Act, be deemed to have adopted the construction that has by judicial decision or otherwise been placed upon the language used in the Act or upon similar language.

The debate that has developed relates not to the right of the condominium corporation to sue but to the basis of that right. It is argued that s. 9(18) did not create any substantive right in the corporation but was only a procedural mechanism or vehicle by which the right of the individual unit owners (who, under the provisions of s. 7(1) and (2) of the Act, both then and now, were and are tenants in common of the common elements), can be exercised by the corporation. Thus, according to this position, if none of the individual unit owners was entitled to sue, the corporation was not entitled to sue. If only one, say, out of a total of 100 unit owners had a cause of action, then the corporation was entitled to assert only that unit owner's right to sue with a concomitant limitation with respect to the recoverable assessed damages. The result, so the argument continues, is that, to take the same example, if the assessed damage to the common elements was \$100,000 the corporation could only recover \$1,000 because its right was no greater than the one-unit owner having the cause of action. Because, by the agreement of the parties, the plaintiff's claim in this case is to be dealt with only as one in contract as opposed to tort or to contract and tort, the difficulty of the plaintiff's case is compounded by the nature of the contractual right the plaintiff is entitled to assert. If the right arises out of the express written warranty, it must be borne in mind that only some of the unit owners, at the time of the commencement of the action, had been given written warranties. At that time, some of the unit owners were persons who had purchased their units, not from the defendant, but from original unit owners who had purchased from the defendant and had been given warranties. Some others, the 1975 purchasers of units which had been rented to tenants until then, received no warranties on their purchase. If the right arises out of the warranty implied by common law in respect of the purchase of incomplete residential premises, only some of the original unit owners who were still unit owners had bought their units before the completion of the construction. In either event, if the defendant were shown to be liable to the plaintiff only part of the damages would be recoverable. Conceding, as I am quick to do, that this analysis can find support in both logic and history, I say, for reasons I shall give later, that I am unable to accept it.

I am relieved of the necessity of making an extensive review of the cases on this issue because of the recent careful and articulate exploration of them by Mr. Justice Reid in *York Condominium Corp. No. 76 v. Rose Park Wellesley Investments Ltd. et al.* (1984), 48 O.R. (2d) 455, 13 D.L.R. (4th) 413. That was an action for damages for breach of contract by a condominium corporation in respect of an allegedly defectively-constructed parking garage in a large condominium project. The garage was a common element. Since, in the result, it was held that because of the exculpatory clause in the agreements of purchase and sale there was no liability on the part of the defendants and that, in any event, no failure to follow good building practice had been demonstrated, it may be said that Reid J.'s views with respect to the true basis of the condominium corporation's right to sue were not a necessary part of his decision. Even so, they were expressed with his customary skill and power of persuasion and command my respect. There, as in this case, the defendants contended that the condominium corporation's status to bring the action was in relation only to the original unit purchasers, of whom only fewer than half remained at the time the action was commenced. Also, as in this case, the statutory provision with which Mr. Justice Reid was concerned was s. 9(18) of the Act as it appeared in the 1970 revision, and not in its current version. In the course of his reasons he considered the somewhat differing views of Cromarty J. in *Frontenac Condominium Corp. No. 1 v. Joe Macciocchi & Sons Ltd.* (1974), 3 O.R. (2d) 331, 45 D.L.R. (3d) 347, and Gray J. in *Loader et al. v. Rose Park Wellesley Investments Ltd. et al.* (1980), 29 O.R. (2d) 381, 114 D.L.R. (3d) 105, 17 C.P.C. 150.

I cannot, in fewer words than he has used, improve upon Mr. Justice Reid's explanation of the issue and of the cases which, before his decision, were the leading Ontario cases on it and, despite its length, I reproduce what he has had to say at pp. 462-5 O.R., pp. 420-3 D.L.R. of his reasons:

Plaintiff's counsel submitted that s. 9(18) furnishes a "statutory cause of action", yet submitted also that it stems from and rests upon the contracts entered into between the original unit purchasers and the developers. Mr. Starkman [counsel for the plaintiff] conceded that if none of the original purchasers had retained ownership of a unit there would be no basis for the action. His position was that there were some 600 continuing original unit purchasers who were, in May, 1983 (the date borne by ex. "A"), and therefore, at the time the action was commenced, members of the condominium corporation. That figure was accepted by defendants' counsel. Thus, according to Mr. Starkman, the necessary foundation exists.

As I understood Mr. Starkman's submission it was that the statute placed the condominium corporation in the shoes of the original purchasers with the result that York was, in effect, entitled to assert their contractual rights. He went further than that, however, in arguing that York could assert the same kind of claim on behalf of subsequent owners, that is to say, persons who purchased units from the original purchasers, notwithstanding that the members of the latter group had no contractual relationship with the developers. The effect of this was, Mr. Starkman submitted, that York is in a position to claim as damages the entire amount of expense to which York had been or would be put pursuant to its statutory obligation to maintain the buildings, without any reduction in recognition of the fact that only 600 or so of the 1,400 original purchasers remained as owners, and therefore, as members of the corporation at the time the writ was issued.

Furthermore, it was plaintiff's contention, as I understood it, that the measure of damages was the amount already expended by York for repairs and the amount that York would require for future repairs. No regard should be had for the fact that in order to pay for repairs already undertaken York had made assessments against its members over a substantial period of time and that numerous owners had been called upon to pay over to York an aggregate amount in respect of each unit totalling about \$1,200. It was not revealed who of these were original or, alternatively, subsequent purchasers nor how much anyone had paid in that way. In Mr. Starkman's submission the making and payment of assessments was nihil ad rem to the lawsuit. In particular, the assessments were not to be taken into consideration in the calculation of damages.

Plaintiff's submission appears to rest heavily upon the decision of Cromarty J. in the first case in which the effect of s. 9(18) was considered. That was *Frontenac Condominium Corp. No. 1 v. Joe Macciocchi & Sons Ltd.* [(1974), 3 O.R. (2d) 331, 45 D.L.R. (3d) 347]. There Cromarty J. concluded that the section was "procedural only" and was enacted to overcome a perceived difficulty. Section 7(1) of the Act read:

"7(1) The owners are tenants in common of the common elements."

Subsection (2) of that section read:

"7(2) An undivided interest in the common elements is appurtenant to each unit." Cromarty J. observed that as a tenant in common each unit owner would be entitled to claim only for the damages suffered with respect to his or her share in the common elements. This would lead to "chaos", for in order to mount a claim for the totality of any alleged damage to the common elements, each unit owner would have to commence his or her own proceedings. As I understand the decision, Cromarty J.'s view was that s. 9(18) was enacted simply to avoid that difficulty and to enable the claims of all owners to be asserted in one action. The corporation was simply a "conduit" through which the owners' rights could be asserted in relation to the common elements, but the claim ultimately had to rest upon rights of the owners.

He observed at p. 350 O.R., p. 366 D.L.R.:

"Having concluded that the plaintiff can properly sue for any shortcomings in the common elements, it must then be shown that it has some cause of action upon which to sue.

"It seems to me that the cause of action must be found in one or more of the owners of the common elements.

"If none of them had a cause of action then there would be nothing upon which the plaintiff could bring action."

Cromarty J. did not have to deal with claims by subsequent owners. I understand plaintiff to depend upon the decision of Mr. Justice Gray in *Loader v. Rose Park*, supra, to support the contention that the condominium corporation may represent subsequent owners on the same basis as if they had been original owners. *Loader* dealt with an issue not before me, i.e., whether a class action lies, but it contains certain observations that suggest that s. 9(18) is not confined to serving procedural convenience but in some way confers on subsequent owners a right of action in contract. That would place them in the same position, qua defendants, as original, continuing, purchasers.

With respect, I am unable to read the section as going that far. Gray J. was clearly of the view that s. 9(18) was intended to facilitate claims by the unit owners with respect to common elements, and in that he demonstrated his concurrence with Cromarty J.'s classification of the section as procedural. But he went further than that in expressing the view that the rights which could thereby conveniently be asserted were not just those of the original owners but of all owners. Thus, both original and subsequent owners could claim in an action brought by the corporation; it was not to be confined to the "select group" of original purchasers (see report, p. 390 O.R. p. 114 D.L.R.).

My difficulty stems from the fact that Gray J. did not describe or explain what was the nature or source of the "right" to be asserted on behalf of a subsequent owner. In *Frontenac*, Cromarty J. held that if the original purchasers had no cause of action the corporation had none. Thus, the source of the rights to be asserted was the contractual relationship between original purchasers and developers or an implication arising from it, by way, say, of warranty.

Plaintiff relied on *Loader* for a reading of s. 9(18) that would confer not only a procedural facility for those who had existing rights to assert independent of the statute but new substantive rights on those who had none, i.e., contractual rights without any contract. To place the subsequent owners in the same position as original purchasers it would be necessary to create a fictional contract written in the terms of the one common among the original purchasers and the defendants. The effect of that would be not only to create contractual rights where none existed, in favour of subsequent owners, but to create contractual obligations on the developers where none existed.

It may be that the Ontario Legislature has the capacity to enact such extraordinary legislation but I cannot read the legislation before me as either achieving that result or disclosing an intention to do so. So remarkable a departure from the principle that those who are not parties to a contract have neither rights nor obligations stemming from it can be, and has been, achieved by statute on occasion -- I can think of one -- but that occasion has been rare and the legislative intent has been spelt out in clear terms. I find nothing in s. 9(18) or in its context in the statute that either demands or would justify such an interpretation.

In short, I accept Cromarty J.'s interpretation of the section, with the result that the only substantive claims that York may assert are claims that stem from a contract or some other source outside the statute. No suggestion is made in this case that any claim exists apart from the contracts. Indeed, the statement of claim makes it clear that plaintiff relies only upon the provisions of the common-form contract, and terms that should be read into it by implication.

I can find no cause of action existing on behalf of subsequent owners. Cromarty J. saw the corporation as a conduit for the assertion of claims of original purchasers. A consistent view is that the corporation is agent for the unit owners: *Burry et al. v. Centennial Properties Ltd.; Modern Construction Ltd. et al., Third Parties* (1979), 38 N.S.R. (2d) 473. I do not think it is necessary in this case to go further into the concept of agency, for I am satisfied with the "conduit" classification, save to repeat that the agency here is confined to the original purchasers as principals.

This view is significant in relation to the question of damages. Briefly, it means that any recovery made by plaintiff would be confined to damages suffered by original purchasers and flowing from breach of contract. I shall deal with that more fully later.

On the basis of the foregoing the plaintiff has status to bring this action for, in light of counsel's agreement already mentioned, 600 original purchasers or more were members of the corporation at the time the action was commenced.

[Emphasis added.]

Because I can find no fault with Reid J.'s logic I am forced to agree with his conclusion that without a contract it is difficult to have contractual rights with the result that, in an action brought in contract and in which the condominium corporation, the proper plaintiff in an action in respect of the common elements, is not itself a contracting party, one or more of the unit owners must be shown to be a party to the contract, express or implied. But despite the great respect I have for Mr. Justice Reid's reasons, I cannot go all the way with him to the conclusion that, owing to the derivative nature of the condominium corporation's right to sue, the damages which it may recover bear the same proportion to the assessed damages as the number of unit owners who were contracting parties bear to the total number of unit owners at the time of the commencement of the action. To this extent, and for the purpose of the measure of damages, I have sympathy for the approach adopted by Mr. Justice Gray in *Loader et al. v. Rose Park Wellesley Investments Ltd. et al.*, supra.

The Condominium Act was, without question, remedial legislation. It made possible and facilitated the marketability of a type of property ownership which, it is safe to say, required a departure from the common law. As remedial legislation one is obliged to give it such a large and liberal interpretation as will best attain the object of the Act according to its true intent, meaning and spirit: see s. 10 of the Interpretation Act. In my view, that object will not be attained if one restricts the damages to which the corporation is entitled to an amount which makes impossible the repair of the defective common elements. It is of little encouragement to the development of the condominium concept to so interpret the legislation that, in a case where only half the unit owners at the time of the commencement of that action were contracting parties and in which the roof has collapsed, the condominium corporation is awarded only half the expense of constructing a new roof. For the purpose, then, of damages, and given the existence of at least one unit owner who was a contracting party through whom the condominium corporation can base a

claim, the following exposition by Mr. Justice Gray in the Loader case has, in my opinion, much merit. It may be found at pp. 389-90 O.R., pp. 114-5 D.L.R.:

I am of the opinion that s. 9(18) of the Condominium Act, which permits the condominium corporation to bring an action in respect of the common elements precludes the right of unit owners to bring a class action for themselves and all other unit owners in respect to the common elements. It is clear that the Condominium Act sets up a statutory scheme by which the fruits of any litigation in respect of the common elements will be equitably distributed amongst all the unit owners. Furthermore, the condominium corporation is created to represent the best interests of the unit owners and since it is a creature created to represent their interests and is controlled by them, it seems to me that it is the only proper party to bring such an action. In some situations, permitting a class action to proceed under Rule 75 may actually conflict with the right of a condominium corporation to bring an action in respect of the common elements. For example, in this case, the action is being brought only on behalf of the original purchasers of the individual units. The benefit of the terms claimed in para. 6 of the statement of claim that the building and condominium units will be completed in a good and workmanlike manner may only be claimed by the original purchasers. If this action is permitted to proceed, it will benefit only a select group of the individual owners in the condominium and the others will be excluded. Presumably the damage sustained to the common elements affects all the owners in a condominium complex. Consequently, the owners of individual units, who did not purchase their units directly from the builder, have no remedy in law for any damage sustained to the common elements except through that given to them by virtue of s. 9(18) of the Condominium Act. If a suit were brought under s. 9(18) of the Condominium Act, it would be a difficult question indeed to determine the rights of the unit owners who have already benefited from the class action. It appears to me that should the class action be permitted to proceed and succeed, there is a possibility the unit owner could recover twice by virtue of the distribution scheme provided for in the Condominium Act. When the condominium corporation sues in respect of the common elements, the Act provides that the fruits of litigation will become an asset of the corporation and will be distributed to the unit owners according to their share in the common elements. Under the Act, benefits of such litigation cannot be restricted to those who have not benefited from the class action.

Finally, I add that I cannot reconcile the traditional limitations on the rights of tenants in common at common law, as reflected in such authorities as *Blackborough et al. v. Graves et al.* (1673), 1 Mod. 102, 86 E.R. 765, and *Viner's General Abridgment of Law and Equity* (1742), p. 523, with the needs of condominium law in the late twentieth century. As a result I see no need to encumber this novel form of property ownership with an impediment of an earlier age to which such a revolutionary concept as condominium would have been unimaginable.

Only slightly less difficult are the questions whether the plaintiff has shown a breach of contract or, more accurately, a breach of warranty and, if so, whether it was a breach that would support an action commenced as late as October, 1974. The defendant was not given notice of the deficiencies in the parking-lots until 1974 and although it learned of complaints concerning the parking structure in November, 1972, they were then, compared with the complaints made in the litigation, relatively minor in nature. For convenience I again reproduce cls. 1, 2, 3 and 8 of the home owner's warranty given by the defendant to the original unit owners on the purchase of their units and repeat that many of them, of whom Mr. and Mrs. Hersh are examples, purchased their units and appurtenant common elements before the construction of the condominium project was completed:

1. Your Builder guarantees that your home on Unit 61, Level 1, and its appurtenant common interest Carleton Condominium Plan No. 11 in the Township of Gloucester, delivered to you on the 1st day of July, 1971, has been constructed in a thorough and workmanlike manner in accordance with accepted Home Building Standards. Inspection by local building authorities and by our trained personnel guarantees to you that all local codes, hydro regulations and municipal by-laws and where applicable, minimum National Housing Act standards in existence at the time of construction have been complied with.

2. Your Builder further certifies that this home, upon delivery to you, was structurally sound and free from defects in workmanship and materials.

3. Your Builder will, at his option, either replace or repair and liabilities on your Builder's part whether with respecty use and care, within one year from the date of delivery as shown above subject to the limitations hereinafter expressed. Such defects must be brought to your builder's attention in writing within the one year period hereinbefore set out.

8. This is the only warranty made or authorized by your Builder with respect to your home and is in lieu of all other warranties expressed or implied and of all other obligations to materials or workmanship in the home, damages suffered by the purchaser or others or to his or their effects or otherwise. No warranty is made beyond the time limited above even though the claimed defect does not become apparent within such period.

[Emphasis added.]

I reject two of the bases on which it is asserted that the exclusionary or exculpatory language in the warranty set out above does not stand in the way of the plaintiff's success if it is found, as I expressly do, that the defendant was in breach of its warranty that the units and common elements would be completed in a good and workmanlike manner. First, it is submitted that the defendant was giving the warranty to purchasers at the very time it knew that the representation contained in the warranty was false. It was at the same time criticizing its own architects and contractors for unsatisfactory work. I am, however, not persuaded that these circumstances result in a conclusion of fraudulent misrepresentation on the part of the defendant. I have no doubt that the defendant fully expected that the defects about which it was then complaining would eventually be made good. It was acting in good faith. Second, the position is taken that the defects and deficiencies which I have described were of such proportions as to justify the judgment that the unit owners did not receive that which they bargained for. Accordingly, it is argued, there was a fundamental breach of contract by the defendant and, on the proper construction of the contract, the exclusionary provisions were not intended to survive the contract so that they cannot now operate as a bar to the plaintiff's recovery. In this connection, the plaintiff, of course, relies on the decision of the Supreme Court of Canada in *Beaufort Realities (1964) Inc. et al. v. Chomedey Aluminum Co. Ltd.*, [1980] 2 S.C.R. 718, 116 D.L.R. (3d) 193, 13 B.L.R. 119. Despite the manner in which I have characterized the defects in construction of the common elements complained of, when they are considered in the context of the magnitude of the entire project, it would be unfair to hold that they brought about a fundamental breach. If the plaintiff is to overcome the defence of the exclusionary provisions it must do so on some other ground.

I believe that there is, indeed, such another ground. In short, it is that the exclusionary language in this case is not sufficient to displace the warranty implied by law that, with respect to residential premises purchased before the completion of construction, the premises would be fit for habitation and completed in a workmanlike manner. As a warranty implied under common law, it is "judge-made" but it is now clear that, illogical as it may be, it cannot be extended by courts to premises purchased after

completion. These propositions were established by the judgments of the Court of Appeal and the Supreme Court of Canada, respectively, in *Croft v. Prendergast*, [1949] O.R. 282, [1949] 2 D.L.R. 708, and *Fraser-Reid et al. v. Droumtsekas et al.*, [1980] 1 S.C.R. 720, 103 D.L.R. (3d) 385, 9 R.P.R. 121. If the unit owners who purchased before the completion of the construction did not contract out of this implied warranty, it is clear that the defendant was in breach of the warranty -- the premise, i.e., the common elements, were not completed in a workmanlike manner -- and, since on the date the action was commenced some of the unit owners who had purchased before the completion of construction were still unit owners, the plaintiff had a good cause of action. Does the written home owner's warranty given by the defendant exclude the implied warranty?

I begin my discussion of this issue by expressing my opinion that nothing turns on the fact that the home owner's warranty was executed only by the defendant and not by the unit owners. It will be recalled that the agreements of purchase and sale, in cl. 14(a), reproduced above, provided that the defendant would provide the purchasers with a home owner's warranty in a form approved by the National House Builders Association with respect to workmanship and materials. The warranty so provided contained a one-year term and, in cl. 8, purported to be the only warranty made by the defendant and was "in lieu of all other warranties expressed or implied."

In *Chabot v. Ford Motor Co. of Canada Ltd. et al.* (1982), 39 O.R. (2d) 162, 138 D.L.R. (3d) 417, 22 C.C.L.T. 185, a no less strongly worded exclusionary clause that provided that there were no warranties expressed or implied was held by Mr. Justice Eberle to be ineffective to exclude statutory conditions. It is true that that case dealt, not with the sale of an unfinished house, but with the sale of a truck to which the Manitoba Sale of Goods Act, R.S.M. 1970, c. S10, applied, and that in this case the defendant's obligations do not derive from statutory conditions. Nevertheless, the Chabot case is helpful in pointing out the difficulty a constructor, in that case a manufacturer, has in avoiding its responsibilities imposed by law in its dealing with a purchaser in a weaker bargaining position.

The same home owner's warranty given by the defendant was given to original purchasers of units whether they had purchased before or after the completion of construction. Since those who became unit owners after the completion of construction were not, on the authority of the Fraser-Reid case, entitled to the protection of the implied warranty to which I have referred, and were, nevertheless, recipients of the warranty purporting to exclude all other implied warranties, more precise language was in my opinion necessary to exclude the warranty by which only some of the purchasers were protected. I therefore hold that the exclusionary language in the home owner's warranty is ineffective to prevent the plaintiff from recovery of the damages to be assessed. I find support for my conclusion in the reasoning of the courts in *Thompson et al. v. Plainsman Developments Ltd.* (1981), 19 R.P.R. 226; *Hancock et al. v. B.W. Brazier (Anerley), Ltd.*, [1966] 2 All E.R. 901, and, particularly with respect to the temporal limitation on the home owner's warranty, *Simpsons Ltd. v. Pigott Construction Co. Ltd.* (1973), 1 O.R. (2d) 257, 40 D.L.R. (3d) 47. *Burry et al. v. Centennial Properties Ltd.; Modern Construction Ltd. et al., Third Parties* (1979), 38 N.S.R. (2d) 473, affirmed loc. cit., p. 450, to which I was referred by the defendant, is a case in which none of the plaintiffs had purchased a unit before the completion of construction and is not an authority that is irreconcilable with the conclusion I have reached. For the sake of clarity, I conclude my consideration of this point by stating my understanding that the implied warranty I have been discussing relates not only to the house but, on the authorities, to the "house and grounds". I consider the parking-lots and the parking structure to be included in the grounds or the common elements appurtenant to the individual units.

The plaintiff's damages are conveniently itemized in the amended paragraph of the amended statement of claim where they are separated into those which have already been incurred for necessary repairs and those which, though not yet incurred, will be equally necessary. The expenditures already made are not seriously disputed by the defendant, if indeed they are disputed at all, and I am satisfied that they have been satisfactorily proved. They are set out in para. 9(a). Paragraph 9(b), the list of expenditures yet to be made, with the qualifications I shall mention, are, in my opinion, reasonable estimates of the repair costs that will be necessary to correct the defects which I have identified. The two categories of expenditures, taken from para. 9 of the statement of claim, are the following:

(a) EXPENDITURES ALREADY MADE.

- (1) Electrical repairs Re: Parking Lot conduit and bollards;

Richard Desjardins -- Backhoe October 1977 \$ 456.00

- (2) Servant Electric, November 1st, 1977 1,580.87

- (3) Brycor Ltd., December 31st, 1977 503.00

- (4) Central Precast Products Ltd., October 11th, 1977 276.26

- (5) Alex Paving Limited Re: Paving and patching repairs, October 11th, 1977 1,975.00

- (6) Electrical Repairs Re: Parking Garage Brycor Limited, October 31st, 1977 3,442.00

- (7) Gene's Electrical, February 28th, 1974 306.79

- (8) Gene's Electrical, March 17th, 1974 596.35

- (9) Removal of Locker heaters 1,670.10

- (10) Repair and replacement of Apartment Building roof hoppers;

Frank Martel, July 18th, 1977 (3 hoppers \$150.00 each) 450.00

(2 hoppers \$170.00 each), April 13th, 1976 340.00

- (11) Interprovincial Plumbing April 13th, 1976 -- Repairs to 2 hoppers 45.00

July 9th, 1977 -- Repairs to 3 hoppers 46.00

- (12) Repairs to roofs and windows and ventilation

Bun Wiseman, December 13th, 1974 (47 windows) 3,525.00

(13) A & M Roofing (8 Windows) April 7th, 1976 216.00

(4 Windows), October 5th, 1977 120.00 (12 Windows), October 12th, 1977 360.00

(14) Frank Martel reshingling 2,100.00

(15) Frank Martel roofing (4 Metal Strips over windows, July 18th, 1974 160.00

(16) Ted Smith, roofing repair, October 16th, 1979 906.21

(17) Drilling dormer vent holes, insulating kitchen and bathroom vent pipes, louvers and special tools, material 997.86

Labour 1,359.17

(18) Replace nine gable ends with aluminium siding July 3rd, 1980

Gerald Gravel 5,400.00

(19) Labour to install air vents and gable end vents -- Eric Angus 240.00

(20) Material for louvers 283.76

(21) Remove old stucco, haul and dump 849.52

(22) Townhouse Gable ends

ByTown Aluminium January 10th, 1977 (two gable ends) 1,460.00

May 12th, 1976 (four gable ends) 2,860.00

February 20th, 1975 (one gable end) 825.00

May 9th, 1979 (one gable end) 800.00

October 25th, 1974 (four gable ends) 2,800.00 Sub-total \$36,949.89

(b) EXPENDITURES TO COME.

(1) Separation of kitchen exhaust vents 5,377.50

(2) Repair of interior individual unit damage

Town House -- Window Repairs 50,556.00

(3) Parking Lot Repairs Removal of defective surface materials, installation of new drainage system for dewatering purposes, reconstruct storm drain systems with catch basins, reconstruct underground electrical wiring system with pipe standards. Repaving of parking lots and approach roads disturbed by storm drainage installations, per estimate Ted Smith Building Services Ltd., May 4th, 1979, and further particulars provided to Defendant November 30th, 1979. Cost estimate 166,591.00 General supervision, 80 hours 3,100.00 at \$38.75 per hour

Overhead 10% 16,659.00

Contractors' Fee 10% 18,635.00

Total Estimate 204,985.00

(4) Parking Garage Repairs.

Stripping out defective asphalt on ground level, installation of underground weeping drains, and replacement of storm drainage piping and catch basins. Replacement of all concrete column surrounds followed by prepared granular base and asphalt paving. Installation of concrete grade beams and panels of solid masonry, jacking and straightening of steel columns and installing of steel beams and metal braces to stabilize structure. Secondary reinforcement of beams, stripping of asphalt upper decks and installation of membrane waterproofing on concrete decks and resurfacing of upper deck with asphalt paving.

Cleaning and painting of structures

Per estimate, Ted Smith Building Services Limited, May 7, 1979 with further particulars provided On November 30, 1979 120,940.00 General Supervision, 80 Hours at \$38.75 per hour 3,100.00

Overhead expense 10% 12,404.00

Contractors' Fee 10% 13,644.00

Total Estimate \$150,088.00

For the defects associated with the towers and the townhouses respectively, I allow the sums of \$2,551.10 and \$25,262.52. There was a conflict in the professional opinions expressed with respect to the cost of correcting the defects in the parking-lots. There

was general agreement about the nature and extent of the defects but Mr. Lloyd Bredison and Mr. Peter Beckett, both engineers and both impressive witnesses, offered different views of the remedial measures required to produce satisfactory parking areas. I have been persuaded that Mr. Beckett was right when he said that the parking-lots that Mr. Bredison's proposals would produce would be superior in quality than that needed. They would, in fact, be appropriate for a much more intensive use such as that of a municipal parking-lot. For the more limited use to be made of these parking areas expenditures as high as those contemplated by Mr. Bredison's recommendations are not required. I have concluded then that in addition to the \$4,791.13 already spent an additional \$121,817 ought to be allowed for the parking-lot damages, or a total of \$126,608.13. The allowance for the parking structure is the total of \$4,345.14 already expended and a further \$145,088, that is, \$149,433.14. I accept the evidence that if the plaintiff had had a reasonable programme of regular cleaning and painting, the estimate for the further expenditures for the repair of the structure would have been reduced by the sum of \$5,000 and I have made a deduction of that amount.

I am unable to agree with the submissions made on behalf of the defendant that the assessed damages should be reduced by an appropriate sum that reflects the failure of the plaintiff to attend to the repairs expeditiously. The submission is grounded on a duty which the plaintiff has to mitigate its damages. The defendant cannot be heard to complain about a failure to mitigate in this case for two reasons. In the first place it knew that the project was designed for persons, who by reason of their qualifications for admission to the programme, were of very limited means and secondly, as manager of the corporation, the defendant itself had recommended such a small amount for the unit owners' contribution to a reserve for maintenance that it would be impossible to expend as much as the repairs attributable to the defendant's faulty work involved. Moreover, I cannot find that the postponement of the repairs exacerbated the construction deficiencies. Finally, I do not accede to the defendant's request that the damages assessed as they have been on a 1983 basis should be reduced in such a way that they are awarded on a 1974 cost basis. I do not believe that in real terms there is a difference and, moreover, the defendant has had the use of the money represented throughout the period. I assess no blame for the lengthy period between the commencement of the action and the commencement of trial.

To sum up, the plaintiff is entitled to judgment in the sum of \$359,797.89, together with prejudgment interest on \$36,949.89, the amount found by me to have already been expended by the plaintiff. I have concluded that the fair rate of interest to award is an average of 13.9% from December 1, 1977.

In the third party proceedings the defendant's claim over against the third party Acto Builders Limited was, I repeat, not contested at trial. The only part of the condominium project for which Acto was responsible was the construction of the parking structure. Both the design, entrusted by Acto to an architect retained by it, and the construction of the structure were, as I have pointed out, exceedingly poorly carried out, contravened required standards and, for those reasons, exposed the defendant to liability at the hands of the plaintiff. In its statement of defence Acto refers to art. 17 of the contract between it and the defendant which limits the defendant to the right to require the remedying of any defects of materials or workmanship within one year of substantial completion. In my view, the magnitude of Acto's faulty performance of its contractual obligations was such that it can reasonably be said that its lack of care was indeed a fundamental breach. On a proper construction of the contract it cannot be permitted to have the protection of the exclusionary article. The defendant is entitled to be indemnified by Acto for the damages it is required to pay to the plaintiff in respect of the repair of the parking structure, that is to say, in the sum of \$149,433.14, together with prejudgment interest from December 1, 1977, at the rate of 13.9% on the amount of the expenses already paid, that is, \$4,345.14.

The third party claim against CMHC requires a consideration of additional legal issues. The evidence establishes that it was CMHC that brought to the defendant's attention the government's programme and the availability of financing for such a project as the one that was eventually constructed. CMHC, moreover, approved the purchasers of the units of the condominium from whom it took mortgages, and the prices to be charged for the units. It financed the construction of all of the project with the exception of the parking structure but, even with respect to it, it required the defendant to receive its approval of the plans and specifications. It also inspected the construction of the parking structure. As mortgagee it came to have a property interest in the project. Furthermore, it is fair to say that CMHC was known throughout the construction industry, of which the defendant was a prominent member, as having expertise in the construction of housing, including low-cost housing. Finally, its inspections were less than exemplary and it approved construction which, in retrospect, it is easy to say should not have received its approval.

On the other hand, the defendant, as a highly experienced builder and developer, at all material times had access to its own professional resources on which it could and did rely, was well aware of the function and practices of CMHC. This was not its first relationship with CMHC. The defendant, moreover, had completed two applications for loans for the project on forms which drew its attention, by the use of capital letters in large print in a prominent location on the forms, to the following statements:

1. CMHC inspections solely ensure construction is in reasonable conformity with prescribed construction standards. They are not supervision on the applicant's behalf.
2. The applicant is responsible for his own contract with the builder. Disputes will NOT be arbitrated by the lender or CMHC.
3. A loan cannot be made or insured if work has proceeded beyond the first floor joist stage for houses of one or two units, or beyond excavation for buildings of more than two units.
4. The loan may be cancelled or reduced if the applicant for a home-owner loan does not occupy the housing unit.
5. The applicant is responsible for payment of legal and survey costs. The NHA mortgage insurance fee will be deducted from loan proceeds.

The first ground on which the defendant asserts its claim for indemnification or contribution is that, in law, CMHC was a joint venturer and is accordingly equally liable. I accept as a useful definition of joint venture that found in *Williston on Contracts*, 3rd ed. (1957), vol. 2, p. 554:

The joint venture is an association of two or more persons based on contract who combine their money, property, knowledge, skills, experience, time or other resources in the furtherance of a particular project or undertaking, usually agreeing to share the profits and the losses and each having some degree of control over the venture.

Some support for the defendant's position is found in the judgment of Jones J. of the Trial Division of the Supreme Court of Nova Scotia in *Central Mortgage & Housing Corp. v. Graham et al.* (1973), 43 D.L.R. (3d) 686, 13 N.S.R. (2d) 183. There, CMHC was held liable, as a joint venturer, along with a builder which had breached an implied warranty of fitness. The houses in the project in question were part of a shell housing project initiated by CMHC to provide home ownership for low-income families. The idea and its promotion came from CMHC which actively sought municipal approval and directly enlisted contractors to work on the houses. It provided full financing and purchasers had to be approved by it. All plans and specifications

were provided by CMHC. On these facts CMHC and the builder were held to be involved in a joint venture. At pp. 709-10 D.L.R., pp. 211-2 N.S.R., Mr. Justice Jones said:

In my view, there was a contribution by both parties of money, property, skill and knowledge to a common undertaking. There was a joint property interest in the subject-matter even though evidenced only in the mortgages. The parties had a mutual control and management of the enterprise during the construction of the houses and in the sales. The arrangement was limited to this project. There is no doubt that Bras D'Or intended a profit from the project. While there was not a mutual sharing of the profits, Central Mortgage clearly had a financial interest at stake and was vitally concerned with the successful completion of the venture. The project was within the operations of Central Mortgage under the National Housing Act, R.S.C. 1970, c. N-10. This was made clear by the evidence of the officials of the corporation. Based on the evidence, the arrangement between Central Mortgage and Bras D'Or can be characterized as a joint venture. To the extent that Bras D'Or in carrying on the venture incurred liabilities then both parties were bound.

The much heavier involvement of CMHC in the Graham case makes it readily distinguishable from this case. In the more recent case of Fraser-Brace Maritimes Ltd. v. Central Mortgage & Housing Corp. (1980), 117 D.L.R. (3d) 312, 42 N.S.R. (2d) 1, 18 R.P.R. 113, Mr. Justice Jones, by this time a member of the Appeal Division, emphasized, at p. 324 D.L.R., p. 17 N.S.R., the necessity of examining the contractual relationship between the parties in the determination of the issue whether a joint venture exists. In the circumstances of that case, he held that there was no intention on the part of CMHC as owner and the developer to enter into any other relationship than that of owner and contractor. In my opinion, there are not present in the case at bar sufficient indicia of a joint venture as defined in Williston to lead to any other conclusion than that the relationship between the defendant and CMHC was that of developer and mortgagee. The purpose of CMHC's participation was essentially to protect its investment in the project. In a mixed economy such as ours, it would, I fear, be ill advised and an undesirable frustration of social policy, to say that a measure adopted by government to encourage, induce or provide an incentive for the private sector to ameliorate a social problem, such as adequate housing for the disadvantaged, makes the government agency a joint venturer. In any event, it was not a joint venturer in this instance.

The second ground on which the defendant's claim over is based is that of negligent misrepresentation. Reliance is placed on *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1964] A.C. 465, and *J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co.*, [1972] S.C.R. 769, 26 D.L.R. (3d) 699. In my view, the special expertise possessed by CMHC was not one relied on by the defendant and did not create a duty of care toward the defendant. The approvals given by CMHC, including the completion certificate, did not create the necessary relationship between it and the defendant to justify liability on this basis. The defendant could not have failed at all times to be aware of the contents of the important notice drawn to its attention on the loan application form which I have set out above.

Furthermore I do not agree that CMHC should be held liable to the defendant because of its negligent gratuitous inspections. It is true that even if there is no duty to act, one who acts gratuitously cannot avoid using reasonable care in the circumstances. That, for example is a duty a gratuitous rescuer owes to a person in need of rescue. I see no justification for extending that concept to the circumstances of this case in which the defendant had no right to rely on, and did not rely on, CMHC's "gratuitous" inspections. In any event, it is misleading to call the inspections gratuitous. They were carried out in CMHC's own interest.

Finally, I am unable to accept the defendant's submission that it is entitled to succeed in its claim over against CMHC because of breach of its statutory duty. The leading case on the question whether breach of a statutory duty gives rise to a civil cause of action is now *The Queen in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, 143 D.L.R. (3d) 9, [1983] 3 W.W.R. 97. The breach of statutory duty of which the defendant complains is not, in my view, a duty owed to the defendant although it may be a duty owed to the unit owners and occupiers. The defendant has not made out this basis of liability.

The defendant's third party proceedings against CMHC must be dismissed.

The parties have had no opportunity to make submissions with respect to costs. They may do so if they so desire within the next month. If they choose to make no submissions costs will follow the event.

Judgment for plaintiff.

CBR# 167

Loader et al. v. Rose Park Wellesley Investments Ltd. et al.

29 O.R. (2d) 381, 114 D.L.R. (3d) 105

ONTARIO HIGH COURT OF JUSTICE GRAY, J. 16TH JULY 1980.

APPLICATION by the defendants for an order striking out the writ of summons and statement of claim as not being the proper subject for a class action.

D. R. Dowdall, for applicants, defendants.

V. I. Balaban, for respondents, plaintiffs.

GRAY, J.:-- This is an application pursuant to Rule 126 for an order striking out the writ of summons and statement of claim as not being the proper subject for a class action. In the alternative, particulars are sought. In my view, Rule 126 gives me no jurisdiction to strike out a writ and, in the result, the alternative relief is not required.

This action was framed as a class action. The plaintiffs, Ernest W. Loader and Nancy Edmunds, sue on behalf of themselves and all persons who purchased new condominium units from the defendants at Nos. 1, 3 and 5 Massey Square in the Borough of East York in the Municipality of Metropolitan Toronto and who have not sold or otherwise disposed of their unit prior to the issuing of the writ in these proceedings. The class which the plaintiffs purport to represent is, therefore, restricted to the original purchasers of the individual units in these three condominium buildings who retained the ownership of these units up to and including May 9, 1979, when the writ was issued. Unit owners who purchased on a resale from original owners or their successors are excluded from the class sought to be represented.

The defendant corporations were the builders of the three condominium buildings above described. Each of the members of the class purchased their condominium unit from the defendants. It is alleged that it was an implied and specific term of each of the agreements of purchase and sale that the buildings and condominium units would be completed in a good and workmanlike manner. The plaintiffs allege a breach of this term and claim for damages to the units arising out of alleged deficiencies in the construction of the common elements. It is not alleged that there is anything wrong with the individual units themselves.

Class actions in Ontario are permitted by Rule 75 of the Rules of Practice:

75. Where there are numerous persons having the same interest, one or more may sue or be sued or may be authorized by the court to defend on behalf of, or for the benefit of, all.

Counsel for the defendants challenges the validity of this action as a class action on several grounds. While the plaintiffs allege that each of the members of the class entered into a standard form of agreement with the defendants, there was a separate agreement for each purchase and the agreements are not identical in all cases. Some of the agreements state that the rights of the purchaser survive closing. Others say the rights of the vendor and the purchaser survive closing. This particular difference in the agreements does not appear to me to be significant in this application.

Secondly, the defendants object to the class action on the basis that not all of the members of the class are entitled in law to rely on an implied term. The implied warranty that a building will be completed in a good and workmanlike manner was established in the case of *Croft v. Prendergast*, [1949] O.R. 282, [1949] 2 D.L.R. 708, and is restricted to contracts between the builder and a purchaser where the building is incomplete at the time of the agreement of purchase and sale. The class described by the plaintiff includes those who purchased their units when the building was complete and those who purchased their units when the building was incomplete. Only the latter would be entitled to the benefit of the implied warranty which is one basis of the plaintiffs' claim.

Thirdly, it is argued on behalf of the defendant that this action is not the proper subject-matter of the class action because a separate assessment of damages is required to ascertain the amount of damages for each member of the class.

On behalf of the plaintiffs, it is argued that the true test as to whether or not a class action is properly constituted under Rule 75 is that enunciated by Lord Macnaghten in *Duke of Bedford v. Ellis et al.*, [1901] A.C. 1 at p. 8, in which three requirements for a class action were set out: (1) a common interest; (2) a common grievance, and (3) that the relief sought be beneficial to all the members of the class which the plaintiffs purported to represent. It is argued that the common interest or common ingredient running through all the claims by the member of the class is the implied warranty in the *Croft v. Prendergast* case and the express term in the agreement of purchase and sale. It was submitted that this common ingredient fills the test expressed by Vinelott, J., in *Prudential Ass'ce Co. Ltd. v. Newman Industries Ltd. et al.*, [1979] 3 All E.R. 507 at p. 520, where it stated:

The second condition is that there must be an "interest" shared by all members of the class. In relation to a representative action in which it is claimed that every member of the class has a separate cause of action in tort, this condition requires, as I see it, that there must be common ingredient in the cause of action of each member of the class.

With respect to individual assessment of damages, it is argued on behalf of the plaintiffs that once a declaration is obtained that the defendants are liable to the plaintiffs in damages, a reference could be directed to determine the individual amount of damages for each member of the class.

For the plaintiffs, it is also contended that the common grievance requirement is fulfilled here because each of the members of the class have the same cause of complaint. Due to faulty construction of the common elements in each of the three buildings, it is alleged that water has seeped through the walls causing damage to the walls and floors of the units. Thus, the common grievance shared by all members of the class are the alleged deficiencies in the construction of the common elements.

With respect to the objection that some of the members of the class are entitled to the benefit of an implied term and others are not as a result of the *Croft v. Prendergast* decision, the plaintiffs argue that para. 6 of the statement of claim alleges that each of the members of the class are entitled to both a specific and implied term that the building would be completed in a good and workmanlike manner and since applications under Rule 126 must take all the allegations in the statement of claim to be true, this

cannot be a valid objection. However, I think that this argument must fail. One of the very issues which must be determined on under this application is whether or not all of the plaintiffs will benefit if the cause of action is successful. This particular issue is clearly stated by Bull, J.A., in *Shaw et al. v. Real Estate Board of Greater Vancouver* (1973), 36 D.L.R. (3d) 250 at p. 254, [1973] 4 W.W.R. 391, where it is stated:

It appears to me that the many passages uttered by Judges of high authority over the years really boil down to a simple proposition that a class action is appropriate where if the plaintiff wins the other persons he purports to represent win too, and if he, because of that success, becomes entitled to relief whether or not in a fund or property, the others also become likewise entitled to that relief, having regard, always, for different quantitative participations.

Accordingly, if some of the plaintiffs are entitled to relief by virtue of an implied term and others are not entitled to relief because their agreement did not contain this implied term, the class action will not lie. Just as, if one wins all win, if a defence is successful against one, it must be capable of being successful to defeat the claims of all. The plaintiffs cannot avoid the determination of this issue by stating as an allegation in its statement of claim that all the members of the class are entitled to the relief so claimed, where different principles of law may apply to different members of the class.

The validity of class actions brought on behalf of unit owners of condominiums has been considered in a number of recent cases in Ontario and these were fully argued before me. The issue to be determined is whether or not a condominium unit owner may bring a class action on behalf of himself and the other unit owners in the same condominium building in respect of both the individual units and the common elements. (I have already stated why a unit owner cannot sue on behalf of unit owners of a different condominium building.) It is apparent upon an examination of the cases that different considerations apply to the validity of a class action for common elements than apply to a class action in which damages with respect to individual units is being claimed.

In *Frontenac Condominium Corp. No. 1 v. Joe Macciocchi & Sons Ltd.* (1974), 3 O.R. (2d) 331, 45 D.L.R. (3d) 347 [reversed on another point, 11 O.R. (2d) 649, 67 D.L.R. (3d) 199], Cromarty, J., considered an action brought by the condominium corporation against the builder for incomplete and deficient completion of the common elements. In addition, it was alleged that the fireplaces in some of the individual units were incomplete and damages were claimed for them as well. With respect to damages for the incomplete fireplaces, it was held that since these were wholly owned by the unit owners, only the unit owner could bring an action for their faulty construction. With respect to the incomplete common elements, the defendant argued that such an action should have been brought as a class action by the unit owners. In dealing with this point, Cromarty, J., stated at p. 341 O.R., p. 357 D.L.R.:

The defendant's next point is that the right of action lies in the unit owners as a class and that a class action must be brought.

I do not agree, but in the event that I am wrong, leave is granted, as requested, to amend the statement of claim as necessary to permit Frank W. Ramsay and George Wilson to be added as parties plaintiffs suing on behalf of themselves and all other owners of units in the Frontenac Condominium Corporation No. 1, save and except Joe Macciocchi & Sons Ltd., or otherwise as is necessary properly to constitute the action.

I do not consider that the above statement provides authority for the proposition that unit owners may bring a class action in respect of the common elements. Rather, a procedural concession is being granted to some of the individual unit owners in order to preserve their rights. In this regard, I agree fully with the comments made by Henry, J., in *York Condominium Corp. No. 148 v. Singular Investments Ltd.* (1977), 16 O.R. (2d) 31 at p. 34, 77 D.L.R. (3d) 61 at pp. 64-5.

It was held in the *Frontenac v. Macciocchi* case that the condominium corporation was the proper plaintiff to bring an action in its own name against the builder of the condominium building for faulty construction of the common elements. In reaching this decision, reliance was placed on ss. 9(17), (16) and (18) of the Condominium Act, R.S.O. 1970, c. 77. These sections provide:

9(16) The members of the corporation share the assets of the corporation in the same proportions as the proportions of their common interests in accordance with this Act, the declaration and the by-laws.

(17) A judgment for the payment of money against the corporation is also a judgment against each owner at the time the cause of action arose for a portion of the judgment determined by the proportions specified in the declaration for sharing the common expenses.

(18) Any action with respect to the common elements may be brought by the corporation and a judgment for the payment of money in favour of the corporation in such an action is an asset of the corporation.

The effect of these sections is that a defendant who successfully defends a class action brought by the condominium corporation under s. 9(18) can recover costs from each individual unit owner under s. 9(17) of the Act. The condominium corporation may bring an action in its own name in respect of the common elements of the building and, upon achieving success, under s. 9(16) the members of the corporation share the proceeds of the litigation as assets of the corporation in the same proportions as their share in the common elements. The Act provides a method by which an action may be brought in respect of the common elements and the scheme of distribution is provided to benefit all the unit owners according to their interest in the common elements. Cromarty, J., states at p. 339 O.R., p. 355 D.L.R., that it is "to provide a procedurally convenient method of bringing actions affecting all the owners that the Act contains s. 9(18)".

In *York Condominium Corp. #161 et al. v. Deltan Realty Ltd.* (1976), 3 C.P.C. 27, two condominium corporations and one of the unit owners of each of the condominium corporations brought an action against the builders. The individual unit owners sued on behalf of themselves and all other members of their respective condominium corporations. Southey, J., held that while s. 9(18) of the Condominium Act allows a condominium corporation to bring an action in respect of the common elements, nevertheless the individual unit owners are also entitled to bring a class action with respect to the common elements. He states at p. 29: While that subsection makes it quite clear that an action with respect to the common elements may be brought by the corporation, it does not take away any action with respect to the common elements which might otherwise have properly been brought in a class action on behalf of the unit holders. On the face of it, it seems to me that an action in respect of the common elements would quite properly be the subject of a class action.

With respect to the claims relating to the individual units, Southey, J., felt that such claims could only be brought by the individual unit holder and were not the proper subject-matter of a class action. However, because this objection to the statement

of claim related to only three of some 20 or 30 claims in the statement of claim which was otherwise properly constituted, he refused to apply Rule 126 to strike out part of the statement of claim.

In *York Condominium Corp. No. 148 v. Singular Investments Ltd.*, supra, Henry, J., considered the class action brought by the condominium corporation on behalf of itself and the individual unit owners against the builder of the condominium for breach of its construction contract. It is not clear from the decision whether the plaintiff was claiming damage to both the common elements and the individual units. The defendant was successful in having the statement of claim struck out on the grounds that the condominium corporation could not bring a class action on behalf of the unit owners, because the only authority given to the condominium corporation is that contained within the Act itself which does not authorize the corporation to bring such a class action. While this part of the decision was sufficient to dispose of the application before him, Henry, J., went on to consider the appropriateness of class actions where an action is brought on behalf of individual unit owners or where an action is brought in respect of common elements. First, with respect to common elements, Henry, J., states at pp. 32-3 O.R., p. 63 D.L.R.:

The common elements which I may say in very brief terms are those parts of the property which provide facilities available to all the owners of the units in common, are expressed by s. 7(1) of the Act to belong to the owners as tenants in common. It might be supposed that the question could be raised whether, with respect to the common elements, the owners of the units as tenants in common might bring a class action, but the Legislature has seen fit to dispose of that problem by providing, as I have said, in s. 9(18), that an action with respect to the common elements may be brought by the condominium corporation. So far as I have been able to determine, with the assistance of counsel, there is no other provision in the statute that authorizes the corporation to engage in litigation at all.

The Legislature has therefore singled out the circumstances of litigation concerning the common elements and has provided that the corporation may bring the action. The corporation is given no status to bring that action on behalf of anybody else. It merely sues in its own name and, as provided by s. 9(18), a judgment for the plaintiff for money in favour of the corporation becomes an asset of the corporation. As such it is obviously, under the scheme of the statute, under the control of the members who are the unit owners and who participate in the control and management of the corporation in accordance with the statutory scheme.

These reasons illustrate why the condominium corporation cannot itself bring a class action. Henry, J.'s comments also support the proposition that the statutory scheme set up by virtue of s. 9(18) of the Condominium Act was intended as a substitute for what could otherwise be brought as a class action by individual unit owners under Rule 75. This interpretation is in conflict with the opinion expressed by Southey, J., in *York Condominium Corp. No. 161 v. Deltan Realty*, supra.

In the *Singular Investments* case, Henry, J., went on to consider generally whether a class action lies. He states at p. 33 O.R., p. 64 D.L.R.:

While admittedly the concept of the condominium is a new one, and it may be necessary for the Courts to develop new techniques to deal with the practical legal problems that arise, nevertheless in my judgment, the rules relating to class actions must be adhered to until of course the Courts or the Legislature hold otherwise.

He goes on to consider Rule 75 and states at pp. 34-5 O.R., p. 65 D.L.R.:

The question what considerations will support the class action has been set out in a number of the authorities, but more recently collected by Morand, J., in *Farnham v. Fingold et al.*, [1972] 3 O.R. 688, 29 D.L.R. (3d) 279. In that decision, which was a shareholder action, Morand, J., stated the general thrust of the authorities as imposing the following requirements on a class action. Firstly, the class must be properly defined; secondly, all members must have a common interest; thirdly, the breach of the obligation is a wrong common to all; fourthly, the damage suffered is the same to all except in amount; fifthly, the relief sought is beneficial to all; and finally none of the members of the class has an interest antagonistic to any other members.

It appears to me that there are at least two of these elements lacking in the present situation, and I confine my comments to those. It cannot be said that the breach of the obligation is a wrong common to all because it must be self-evident that in respect of the individual owners there may be various breaches of their contracts with the builder and if negligence appears, various acts of negligence which may be said to be individual but not common to all. So far as I can see the only area in which the damage would be common to all would be with respect to the common elements which is property held by all the owners as tenants in common. And further, at pp. 35-6 he considers the authorities which hold that a class action cannot lie where there must be an individual assessment of damages for each of the members of the class, including *Farnham et al. v. Fingold et al.*, [1973] 2 O.R. 132, 33 D.L.R. (3d) 156 (C.A.), and *Markt & Co. Ltd. v. Knight Steamship Co. Ltd.*, [1910] 2 K.B. 1021.

For these reasons, Henry, J., concludes that a class action will not lie on behalf of the unit owners of the condominium.

It is argued on behalf of the defendants in the instant case that Henry, J.'s decision on this matter was obiter, also that his reasons really only address themselves to claims for damages to the individual unit and they do not apply to the validity of a class action in respect of common elements. In fact such an interpretation of the *Singular Investments* case was made in a further decision by Southey, J., in *York Condominium Corp. No. 228 et al. v. Tenen Investments Ltd. et al.* (1977), 17 O.R. (2d) 579, 6 C.P.C. 185, in which a class action brought by a unit owner on behalf of himself and all other unit owners of a condominium building in respect of the common elements alone was allowed to proceed. It was Southey, J.'s opinion that common elements may be the subject of a class action. It should be noted that in the *Tenen Investments* case, counsel conceded that no class action would lie for damages to the individual units. Such a concession has, of course, not been made in the present application.

I am of the opinion that s. 9(18) of the Condominium Act, which permits the condominium corporation to bring an action in respect of the common elements precludes the right of unit owners to bring a class action for themselves and all other unit owners in respect of the common elements. It is clear that the Condominium Act sets up a statutory scheme by which the fruits of any litigation in respect of the common elements will be equitably distributed amongst all the unit owners. Furthermore, the condominium corporation is created to represent the best interests of the unit owners and since it is a creature created to represent their interests and is controlled by them, it seems to me that it is the only proper party to bring such an action. In some situations, permitting a class action to proceed under Rule 75 may actually conflict with the right of a condominium corporation to bring an action in respect of the common elements. For example, in this case, the action is being brought only on behalf of the original purchasers of the individual units. The benefit of the terms claimed in para. 6 of the statement of claim that the building and condominium units will be completed in a good and workmanlike manner may only be claimed by the original purchasers. If this action is permitted to proceed, it will benefit only a select group of the individual owners in the condominium and the others will be excluded. Presumably the damage sustained to the common elements affects all the owners in a condominium complex.

Consequently, the owners of individual units, who did not purchase their units directly from the builder, have no remedy in law for any damage sustained to the common elements except through that given to them by virtue of s. 9(18) of the Condominium Act. If a suit were brought under s. 9(18) of the Condominium Act, it would be a difficult question indeed to determine the rights of the unit owners who have already benefited from the class action. It appears to me that should the class action be permitted to proceed and succeed, there is a possibility the unit owner could recover twice by virtue of the distribution scheme provided for in the Condominium Act. When the condominium corporation sues in respect of the common elements, the Act provides that the fruits of litigation will become an asset of the corporation and will be distributed to the unit owners according to their share in the common elements. Under the Act, benefits of such litigation cannot be restricted to those who have not benefited from the class action.

In addition, for the reasons above stated, I think there is a valid question as to whether or not the class as it is constituted in the statement of claim really constitutes the proper class with a common interest. It is submitted that the common interest is the common interest in the common elements as set out in the Condominium Act. A class action under Rule 75 cannot be brought for all these unit owners. However, such an action can be brought by the condominium corporation under s. 9(18) which will benefit all those who have an interest in the common elements. To permit Rule 75 to operate to exclude some members of a class which would otherwise benefit by s. 9(18) would frustrate the very purpose of the Rule. Lord Macnaghten explains the history of the rule in *Duke of Bedford v. Ellis*, supra, at p. 8:

The old rule in the Court of Chancery was very simple and perfectly well understood. Under the old practice the Court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you never could "come at justice," to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience: for the sake of convenience it was relaxed.

So the rule permitting class actions was developed to permit a more convenient way of bringing all parties having the same interest before the Court at the same time. I cannot help but agree with the comments of Henry, J., already quoted above, that the Legislature, anticipating the difficulties of bringing a class action under Rule 75 for all members of the condominium corporation, provided s. 9(18) of the Condominium Act as a remedy. It avoids the procedural difficulties of Rule 75 and allows the corporation in law to recover damages with respect to the common elements for the benefit of all members.

A somewhat similar situation exists under the Business Corporations Act, R.S.O. 1970, c. 53. I refer to *Farnham et al. v. Fingold et al.*, [1973] 2 O.R. 132, 33 D.L.R. (3d) 156, where the Court of Appeal of Ontario held that s. 99 of the Business Corporations Act (which permits a shareholder to maintain an action in a representative capacity for himself and all other shareholders of the corporation to bring an action for and on behalf of the corporation) supplants the common law right to bring such a class action and consequently the procedures provided for in s. 99 must be adhered to. Thus the derivative right at common law enunciated in the case of *Foss v. Harbottle* (1843), 2 Hare, 461, 67 E.R. 189, cannot be maintained apart from s. 99. It is stated by Jessup, J.A., at p. 135 O.R., p. 159 D.L.R.:

However, in my opinion, the very broad language of s. 99(1) embraces all causes of action under any statute or in law or in equity, that a shareholder may sue for on behalf of a corporation. All forms of derivative actions purporting to be brought on behalf of and for the benefit of the corporation come within it, and therefore s-s. (2) applies to all such actions.

Consequently, it was held that s. 99(2) requiring a shareholder to apply to the Court for leave to commence the representative action could not be avoided by bringing an action under the common law rule. Similarly, I hold that s. 9(18) of the Condominium Act takes precedence over Rule 75 and that the condominium corporation is the only proper party to bring an action in respect of the common elements.

With respect to the damages to individual units, I find myself completely in agreement with the Singular Investments decision. It is alleged that the walls and floors of the individual units have been damaged because of water seepage. It appears this is a clear case where individual assessment of damages would be required, and there is no authority in Ontario that a class action will lie in such a case. This is not a case where damages to the individual units can be assessed on a global scale and where each member of the class can share the sum on a pro rata basis. Neither have the damages been standardized to reflect a general depreciation for each of the individual units as was done to avoid individual assessments in *Naken et al. v. General Motors of Canada Ltd. et al.*, a decision of the Ontario Court of Appeal, released October 12, 1978, 21 O.R. (2d) 780, 92 D.L.R. (3d) 100, 7 C.P.C. 209 and 8 C.P.C. 232.

Accordingly, the application will be allowed and the statement of claim will be struck out with costs to the defendants in any event of the cause. Application allowed.

CBR# 039

Beau Rivage Appartements, Appellant, and Her Majesty the Queen, Respondent

[1994] T.C.J. No. 1137

Action No. 94-1111(GST)I Tax Court of Canada Halifax, Nova Scotia Kempo T.C.J. Heard: September 7, 1994 Judgment: December 2, 1994

Roland A. Deveau, for the Appellant. Peter Leslie, for the Respondent.

JUDGMENT:-- The appeal from the assessment of goods and services tax made under the Excise Tax Act, notice of which is dated September 18, 1992 and bears number 1200887 is dismissed in accordance with the attached Reasons for Judgment.

REASONS FOR JUDGMENT

[para1] KEMPO T.C.J.:-- This informal procedure appeal was launched from an assessment made by the Minister of National Revenue (the "Minister") dated September 18, 1992 with respect to the appellant's goods and services tax ("GST") liability under the provisions of the Excise Tax Act (the "Act") for the period April 1, 1992 to June 30, 1992 in the amount of \$4,311.31 which included tax on a self-supply respecting a newly constructed four-unit complex.

[para2] The core issue, simply put, was whether this complex, at the time of its substantial completion, was "intended to be registered" as a condominium within the meaning of subsection 123(1) of the Act. If so the self-supply provisions, which require the appellant to remit GST deemed collected from itself on the self-supply, would not apply.

[para3] The only witness who testified for the appellant was Mr. Hector Thibault. No witnesses were called for the respondent.

[para4] Mr. Thibault was a principal shareholder in St. Mary's Bay Construction Ltd. (hereafter called "St. Mary's Co.") and was experienced in residential construction in the Digby County area of Nova Scotia.

[para5] The appellant was formed as a partnership in 1991 by St. Mary's Co. and a Julien Comeau to build and operate a four-unit apartment building in Church Point, Digby County, Nova Scotia. Apparently Mr. Comeau owned the local building supply store. At all material times the appellant was registered under Part IX of the Act.

[para6] As a preliminary matter, a number of factual items assumed by the Minister were not seriously challenged by the appellant's counsel. These items were neither raised at trial nor addressed in the appellant's written submissions of fact and law which were forwarded to counsel and to the court following conclusion of the evidence. These facts were pleaded in the respondent's Reply to the appellant's Notice of Appeal as follows:

3. In so assessing the Appellant's tax liability, the Minister relied, inter alia, upon the facts admitted above and the following assumptions of facts:

- (a) The Appellant is a partnership and at all relevant times it was registered under Part IX of the Excise Tax Act (the "Act");
- (b) The Appellant contracted with St. Mary's Bay Construction Limited to construct a four-unit apartment complex (the "complex"), Nova Scotia;
- (c) St. Mary's Bay Construction Limited is related to the Appellant as it is a partner in the Appellant;
- (d) The complex was substantially completed on May 1, 1992;
- (e) Two of the apartment units were leased to residential tenants on a long term basis on May 15 and June 1, 1992, respectively and they were occupied at the time of the lease;
- (f) In order to be a condominium in the Province of Nova Scotia the complex must be registered by the Registrar of Condominiums pursuant to the Condominium Act of Nova Scotia and this had not been done as of January 15, 1993;
- (g) The fair market value of the complex as of the date of substantial completion was \$215,000.00;
- (h) The Appellant claimed an input tax credit in the amount of \$13,717.29 which was calculated as 7% of \$195,961.00 (the Appellant's total expenditures on the complex, including land). The proper calculation of the input tax credit is as follows:

Total expenditures \$195,961.00 Less: cost of land 27,000.00 ----- Net expenditures \$168,961.00

Input tax credit (net expenditures times tax fraction of 7/107) \$ 11,053.52

The cost of the land did not include a payment on account of tax and, consequently, the Appellant is not entitled to an input tax credit in relation to it.

3. The complex has never been registered as a condominium and continues to be used as a rental property by the Appellant.

[para7] In addition to the above, the following facts emerged from the evidence:

August, 1991 - plans were completed for the project as a four-unit apartment building;

September, 1991 - construction began by St. Mary's Co. under Mr. Thibault's direction;

October, 1991 - an American, Mr. Fougere, while visiting in the area, said he would be interested in buying one of the units in the form of a condominium. In response to this particular interest, and being of the opinion that a condominium development would be a good short-term business venture, the appellant decided to switch the nature of the project.

Mr. Thibault had no experience in condominium construction relative to its legal or structural requirements. Apparently condominiums were unknown in the vicinity. He took several steps to educate himself as to construction requirements and directed his solicitor to make inquiries as to the legalities. In the meantime construction continued as an apartment complex with changes being implemented as Mr. Thibault felt were necessary. Adjustments were made to result in four identically sized units with added amenities. The local building inspector was relied upon for advice as to condominium requirements.

February, 1992 - Building plans were redrafted by a professional to meet condominium specifications as more detailed blueprints were required. Except for minor revisions, the plans for the proposed units were substantially the same as the plans for the apartments.

March, 1992 - A construction finance loan of \$100,000.00 was obtained with a mortgage given as collateral security. The construction was originally financed via partnership contributions.

April 2, 1992 - A "Condominium open house" for the 11th and 12th of April was advertised in the local paper.

Late April 1992 - Substantial completion of the project occurred. Condominium inspection officials attended the site for final inspection. Mr. Thibault then learned (for the first time) that the building did not meet the requirements of the fire code; thus the Fire Marshall's approval to register the plan as a condominium was refused. The estimate to meet these requirements amounted to approximately \$20,000.00. If they had been known during the construction stage, the compliance amount would not have exceeded \$5,000.00.

Mr. Thibault testified that the appellant was financially unable to do these renovations at this time and so, in order to improve the cash flow required to pay for the project, a decision was made to rent the units for a year or two and then do the necessary renovations.

May 15, 1992 - one unit was occupied and rented (no written lease was tendered in evidence).

June 1, 1992 - a second unit was occupied and rented (no written lease was provided);

- a further sum of \$23,750.00 was borrowed from the Royal Bank and a mortgage of \$123,750.00 was registered June 12, 1992. These additional funds went elsewhere and were not utilized in an attempt to remedy the fire code deficiencies.

September, 1992 - the other two units were rented.

November 25, 1992- An arbitration agreement was entered into respecting possible municipal liability for failure of one of its building inspectors to advise the appellant concerning fire code requirements and the Fire Marshall's approval.

January 15, 1993- A comprehensive arbitration report and ruling (exhibit A-1) was issued which found carelessness on both parties. The arbitrator held that responsibility for the situation be apportioned equally and that accordingly the Municipality was liable for damages to Mr. Thibault in the amount of \$7,350.00.

September 7, 1994 (date of trial) - the fire code deficiencies were still outstanding and the project was not registered as a condominium.

[para8] Mr. Thibault was firm in his evidence that the project was intended to be a condominium onwards from October of 1991 and that it was at that time that a decision was made to convert a long-term investment into a short-term project.

[para9] Financing was via a builder's mortgage plus partnership equity. Apparently the land was provided by St. Mary's Co. and some building materials were provided by Mr. Comeau.

[para10] With respect to the appellant's attitude respecting the fire code requirements, Mr. Thibault's testimony was thusly:

On Direct Examination

A. The renovations would have been more than we could have stood.

Q. Okay. Do you know approximately how much it would have been?

A. Around twenty thousand bucks.

Q. So your decision was made to rent the units.

A. Yeah.

Q. Did you have an idea of when you felt you would be able to do those renovations?

A. No. No, we didn't.

Q. No. What was your intention in relation to them?

A. My -- basically -- my intention was basically to collect a little bit of rent, a year or two's rent, and then do the renovations.

Q. Was the option of not renting the units a possibility, an option?

A. No.

Q. And why wasn't it?

A. It was purely a business decision. We had no choice. We had to start making payments.

[T. p. 17, l. 25; p. 18, l. 18 to 19.]

On cross-examination

Q. So what did your other partners say when you said, "Well, we have to spend twenty thousand dollars (\$20,000.00) in order to get this registered as condominium"?

A. I -- to tell you what he basically said, you know, "Let's ..." -- like I said before, "Let's try to gather a bit of money first and then change them then."

[...]

Q. Okay. Of course we know that it's never been registered as a condominium, has it?

A. No. No, it's never been. The intent was there but it's never been.

Q. Okay. Why hasn't it ever been registered?

A. It's never been because we need the approval from the Fire Marshall.

Q. And am I correct that you haven't done the changes?

A. No, we haven't. Q. Okay. Why?

A. The cost. Too -- I mean, it's too costly.

Q. Um-hmm.

A. We're up to the limit now in -- you know.

[T. p. 40, l. 9 to 25; p. 41, l. 1 to 6.]

[para11] Respecting the extra borrowing of \$23,750.00 in late May of 1992, Mr. Thibault's evidence on cross-examination was:

Q. What did you do with the twenty-three thousand extra dollars that you borrowed in June?

A. We -- what did we do. We --

Q. I mean, that was enough money to make all the changes that were necessary to convert this building into condominiums. A. Yeah, but that's not what it was used for.

Q. No, I know that. I was just wondering ---

A. I mean, it was used for overruns, it was used for a little bit of landscaping, a little bit of road. We ran out of water. We had to dig another well and that's what I presume that it was used for.

[T. p. 80, l. 16 to 25; p. 81, l. 1 to 2]

[para12] No business plans or projections were provided as to how the anticipated rental income would provide the needed cash to pay for the required renovations or where else these funds would likely come from within the reasonably foreseeable future. Paragraph 7 of the appellant's notice of appeal provides that "the rental income in this case has been minimal when considered in light of the size of the project and the expenses incurred by the appellant". On its face this admission points away from the rental income as being the future funding source for the fire code deficiencies.

Positions of the Parties

[para13] Appellant's counsel approached the issue in a three-fold way while respondent's counsel described it in a singular manner.

For the respondent:

Question: Whether at the time of substantial completion of the building, the appellant "intended" to register the building as a condominium.

[para14] The self-supply rules apply if no such intention existed. Subjectively expressed intent is not sufficient; actual steps and conduct operate as a better indicator of the true nature and existence of the purported intent; *Pierce Investment Corp. v. M.N.R.*, 74 D.T.C. 6608 (FCTD) at 6612. Intention extends beyond simple contemplation; *Cunliffe v. Goodman* (1950), 1 All E.R. 720 (C.A.) at 724. A mere desire to have the project registered as a condominium does not translate into an intention.

[para15] The appellant's financial limitations and total lack of any experience in condominium construction were the main contributors to its inability to have the project registered as a condominium and then it failed to remedy the deficiencies upon learning about them. Of particular note is that it did not employ the extra \$23,750.00 borrowed in late May of 1992 to remedy these deficiencies.

[para16] Alternatively, if the project was a residential condominium unit, the subsection 191(1) self-supply rule of the Act ought to be applied to the two units leased before June 30, 1992.

For the appellant:

Questions: 1. Despite the subsection 191(2) provisions for residential condominium units, does subsection 168(5) respecting an unregistered condominium unit continue to be in effect provided the builder has a continuing intention to register the complex as a condominium?

[para17] The self-supply rules are intended to eliminate any advantage which may be gained by a builder as compared to a person who has purchased a newly constructed complex; therefore these rules are intended to catch any builder who purposefully fails or refuses to register the complex as a condominium. That is not the case here. The appellant had a bona fide intention throughout the period under review to register the complex as a condominium, and to this day it continues to hold that intention. Accordingly, GST should be paid only on the actual sale of the individual units after their registration as a condominium.

2. If the intention of a builder to develop and register a project as a condominium is frustrated by outside factors, how long does subsection 168(5) continue to supersede the effect of the subsection 191(2) self-supply provisions?

[para18] So long as the builder continues with the intent to register within a reasonable time, application of the self-supply rules would be held in abeyance. If these rules are applied too quickly, and not in accord with the true circumstances, an unfair burden is suffered by the taxpayer.

3. Did the appellant have an intention to develop and register a condominium and, if so, as of June 30, 1992, were there frustrating events sufficient to terminate their intentions and activate the self-supply rules?

[para19] The facts in evidence support a finding that the appellant had intended to develop and register a condominium project which was frustrated as of June 30, 1992 due to their financial inability to make the necessary changes in order to conform with the fire code requirements. The decision was to rent for cash flow and then to do the required renovations, which gives credence to the appellant's stated intentions to take the project to its intended registration. The decision was a business decision in response to the economic realities it was then facing. Any ambiguities within the Act's provisions ought to take these kinds of situations into account as well as the reality that a construction budget would exclude a self-supply GST cost in circumstances where a condominium complex was intended to be built with the expectation that such a tax would be collected from a purchaser and paid on the occasion of the sale of each unit.

Analysis

[para20] A builder of a "multiple unit residential complex" (which by definition excludes a condominium complex) is deemed, pursuant to subsection 191(3) of the Act, to have made a supply to itself on the later of the day of substantial completion of the project and the day on which a unit of the project is leased for occupancy. The effect of this provision and subsection 221(1) of the Act is to require the appellant to remit GST deemed collected on itself on the self-supply.

[para21] A "condominium complex" is defined by subsection 123(1) to be "... a residential complex that contains more than one residential condominium unit". In turn, the term "residential condominium unit" is defined by subsection 123(1) to be a "... residential complex that is, or is intended to be, a bounded space in a building designated or described as a separate unit on a registered condominium or strata lot plan or description, or a similar plan or description registered under the laws of a province, and includes any interest in land pertaining to ownership of the unit".

[para22] The essential problem in this appeal is due to the ambiguity of the phrase "is intended to be". Its resolution ought to arise out of application of the general principles of statutory interpretation in construing the particular provisions of the Act raised in this appeal. They should be reflected upon as a whole having regard to their intent, object and spirit and what it is they actually accomplish; *Stubart Investments Limited v. The Queen*, 84 D.T.C. 6305 (S.C.C.). The approach to be employed ought to be functional, purposeful or teleological: *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours* (September 30, 1994, file no. 23014 - S.C.C.) and not results oriented: *Tennant v. The Queen*, 94 D.T.C. 6505 (F.C.A.), nor purely mechanical: *The Queen v. Swantje* (September 26, 1994, A-144-94, F.C.A.).

[para23] As the three month period under review to which the GST liability has been attached ended on 30 June 1992, it is the latter date to which the appellant's intentions are to be focused. To find otherwise would, in my opinion, be unworkable. Self-Supply Rules

[para24] The Minister assessed the appellant for taxes owing on the deemed self-supply of a multiple unit residential complex under subsection 191(3) of the Act. This provision states:

191(3) For the purposes of this Part, where

(a) the construction or substantial renovation of a multiple unit residential complex is substantially completed,

(b) the builder of the complex

(i) gives possession of any residential unit in the complex to a particular person under a lease, licence or similar arrangement entered into for the purpose of its occupancy by an individual as a place of residence and the particular person is not a purchaser under an agreement of purchase and sale of the complex, or

(ii) ..., and

(c) the builder, the particular person or an individual who is a tenant or licensee of the particular person is the first individual to occupy a residential unit in the complex as a place of residence after substantial completion of the construction or renovation,

the builder shall be deemed

(d) to have made and received, at the later of the time the construction or substantial renovation is substantially completed and the time possession of the unit is so given to the particular person or the unit is so occupied by the builder, a taxable supply by way of sale of the complex, and

(e) to have paid as a recipient and to have collected as a supplier, at the later of those time, tax in respect of the supply calculated on the fair market value of the complex at the later of those times.

[para25] As noted earlier, "multiple unit residential complex" excludes a condominium complex. Prima facie then the appellant's situation comes within this provision: the project was substantially completed on 1 May 1992; the appellant leased the units to residential tenants who were not purchasers under an agreement of purchase and sale; and these tenants were the first individuals to occupy the units as a place of residence. Therefore, the appellant is statutorily deemed to have made and received a taxable supply by way of sale, and to have paid and collected GST in respect of the supply.

[para26] However the appellant submitted that if the self-supply rules are to apply, the proper one is subsection 191(2) and not 191(3) relied upon by the Minister because the former deals specifically with the self-supply of a "residential condominium unit". As noted earlier, this phrase is defined by subsection 123(1) which is repeated for greater clarity and convenience:

123(1) In section 121, this Part and Schedules V, VI and VII,

"residential condominium unit" means a residential complex that is, or is intended to be, a bounded space in a building designated or described as a separate unit on a registered condominium or strata lot plan or description, or a similar plan or description registered under the laws of a province, and includes any interest in land pertaining to ownership of the unit; [emphasis added]

[para27] Subsection 191(2) of the Act is directed to a situation where the builder of a condominium unit gives possession of the unit under an agreement of purchase and sale. It reads:

191(2) For the purposes of this Part, where

- (a) the construction or substantial renovation of a residential condominium unit is substantially completed,
- (b) the builder of the unit gives possession of the unit to a particular person who is the purchaser under an agreement of purchase and sale of the unit at a time when the condominium complex in which the unit is situated is not registered as a condominium,
- (c) the particular person or an individual who is a tenant or licensee of the particular person is the first individual to occupy the unit as a place of residence after substantial completion of the construction or renovation, and
- (d) the agreement of purchase and sale is at any time terminated (otherwise than by performance of the agreement) and another agreement of purchase and sale of the unit between the builder and the particular person is not entered into at that time,

the builder shall be deemed

- (e) to have made and received, at the time the agreement is terminated, a taxable supply by way of sale of the unit, and
- (f) except where possession of the unit was transferred to the particular person before 1991, to have paid as a recipient and to have collected as a supplier, at that time, tax in respect of the supply calculated on the fair market value of the unit at that time.

[para28] No ambiguity exists facially within subsection 191(2); the unit must be characterized as a condominium unit and the occupant must be a purchaser pursuant to an agreement of purchase and sale. This provision's latter requirement is not the appellant's situation on June 30th, 1992 and the former is the subject issue raised respecting this appeal. In effect the appellant's interpretation is that GST liability should be held in abeyance while its intention to register the project as a condominium remains under serious and active consideration and then, once done, the GST would be payable on the occasion of the sale of each unit.

[para29] The first matter to be examined therefore is whether the two units in the appellant's project that were rented by June 30, 1992 may each be characterized as a residential condominium unit within the provisions of subsection 191(2) and as defined by subsection 123(1) supra.

[para30] In my opinion, the appellant has established it had the requisite intention to build condominiums in the fall of 1991. Its solicitor was instructed in October 1991 to initiate proceedings to have the project registered; blueprints for the project were redrawn containing more detail in order to comply with legislative condominium requirements; an advertisement in the local newspaper announced the project as a condominium; and condominium officials visited the complex in the spring of 1992. The issue, however, is whether the requisite intention existed on June 30, 1992.

[para31] In the spring of 1992 it became apparent to the appellant that the project did not meet fire code specifications which were required for registration. The necessary renovations would cost nearly \$20,000. Mr. Thibault testified that the appellant could not afford these renovations; thus, it was decided to "collect a little bit of rent, a year or two's rent, and then do the renovations". He said it was to this end that one unit was rented in May 1992 and another in June 1992. The remaining units were rented in September 1992. Facially at least this tends to show the appellant had technically abandoned its intention to proceed with the registration of the condominiums until money was raised to do the renovations. In other words, on June 30th, 1992, the appellant did not intend the residential complex to be "a bounded space designated or described as a separate unit on a registered condominium plan"; rather, it intended to rent the residential complex out as a multiple unit residential complex until such times as it could afford to do the renovations.

[para32] This may be too strict an approach to be brought to the situation because the phrase "intended to be", when given its ordinary meaning, does signify contemplation or an intention to do something at some time in the future. However in my opinion the scheme of the GST provisions, upon being viewed in totality, augurs against such a broad and open-ended meaning to be assigned to that phrase.

[para33] The object and purpose of section 191 of the Act is to ensure GST liability attaches to newly constructed or substantially renovated residential premises based on its fair market value once they are rented or occupied because any subsequent sale would generally be GST exempt as used housing. Accordingly it may reasonably be inferred that the phrase being interpreted requires more than a mere contemplation, desire or wish or a simple willing of the happening of a future event. Lord Asquith in a landlord/tenant situation in the case of *Cunliffe v. Goodman* (1950), 1 All E.R. 720, (C.A) observed at page 724:

[...] An "intention", to my mind, connotes a state of affairs which the party "intending" - I will call him X. - does more than merely contemplate. It connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about by his own act of volition. X. cannot, with any due regard to the English language, be said to "intend" a result which is wholly beyond the control of his will. [...]

If there is a sufficiently formidable succession of fences to be surmounted before the result X. aims at can be achieved, it may well be unmeaning to say that X. "intended" that result. ... This leads me to the second point bearing on the existence in this case of "intention" as opposed to mere contemplation. Not merely is the term "intention" unsatisfied if the person professing it has too many hurdles to overcome or too little control of events; it is equally inappropriate if at the material date that person is in effect not deciding to proceed but feeling his way and reserving his decision until he shall be in possession of financial data sufficient to enable him to determine whether the project will be commercially worthwhile. A purpose so qualified and suspended does not, in my view, amount to an "intention" or "decision" within the principle. It is mere contemplation until the materials necessary to a decision on the commercial merits are available and have resulted in such a decision. ...

[para34] Having regard to the object and purpose of the applicable provisions of the Act, I am of the opinion that the phrase "intended to be" for the subsection 123(1) definitional meaning of the phrase "residential condominium unit" connotes:

- a firm, fixed and settled intention (as distinct from a provisional one) which is not likely to be changed;
- objectively meeting the test of having reasonable prospects of bringing the stated intention into fruition or fulfilment within a reasonable time;
- a decision made being beyond the zones of contemplation and conditional dependence on future events.

[para35] In the case at bar the appellant has not shown that it was capable of carrying out its intent within a reasonable time from June 30, 1992. At best the business decision made was then conditional or provisional, being tied into whether there would be sufficient cash flow from the rentals. One does not know if lack of market strength was a factor in the decision to defer, and the answer given respecting the deployment of the \$23,750.00 in funds received during June of 1992 elsewhere than toward the rectification of the fire code requirements was vague and unsatisfactory.

[para36] I do not agree that the principles underlying matters of commercial "frustration" would apply here because the fire code requirements would not meet the tests of having been unforeseeable and uncontrollable. In this respect, hardship, inconvenience, or extra expense are not in themselves sufficient. The appellant's situation was more akin to commercial impracticability on June 30th, 1992. When analyzed objectively the decision to register the project as a condominium sometime in the future was made on a financial wait-and-see basis with rentals to be taken in the meantime; this situation still exists. Clearly the ability to bring the intended course of action into fruition was and remained conditional and depended heavily on the appellant's future financial capabilities. As noted earlier, no evidence was tendered on this subject.

[para37] The appellant submitted further that subsection 168(5) of the Act should be taken into account with respect to the situation as a whole. Section 168 of the Act deals with the timing of GST payments on a taxable supply. The general rule, under subsection 168(1), is that GST is payable on the earlier of the day on which consideration is paid and the day on which consideration becomes due. However there are a number of specific exceptions to this rule. An exception for the sale of real property occurs in subsection 168(5) of the Act thusly:

168(5) Notwithstanding subsections (1) and (2), tax under this Division in respect of a taxable supply of real property by way of sale is payable

(a) in the case of a supply of a residential condominium unit where possession of the unit is transferred, after 1990 and before the condominium complex in which the unit is situated is registered as a condominium, to the recipient under the agreement for the supply, on the earlier of the day ownership of the unit is transferred to the recipient and the day that is sixty days after the day the condominium complex is registered as a condominium; and

(b) in any other case, on the earlier of the day ownership of the property is transferred to the recipient and the day possession of the property is transferred to the recipient under the agreement for the supply.

[para38] Subsection 165(5) applies to the payment of GST in respect of a taxable supply of real property by way of sale. The term "sale" is defined in subsection 123(1) as follows: "sale", in respect of property, includes any transfer of the ownership of the property and a transfer of the possession of the property under an agreement to transfer ownership of the property;

A sale involves the transfer of both ownership and possession of the property. In the case of a lease or rental of real property there is no transfer of ownership of the property; thus there is no "sale". Additionally this provision is of no assistance to the appellant in view of my determination that the two units rented before June 30th, 1992 were not residential condominium units.

Decision

[para39] For the reasons given, and regrettably for the appellant, the appeal is dismissed.

CBR# 128

Gary Grimme, Plaintiff (Defendant by Counter Claim), and Dorothee Kasierski, Defendant (Plaintiff by Counter Claim), and Hans Kasierski, Defendant by Counter Claim

Action No. 48842/90 Ontario Court of Justice - General Division Toronto, Ontario Hayes J. February 14, 1991

Milton J. Bernstein, for the Plaintiff (Defendant by Counter Claim). Paul S. Pellman, for the Defendant (Plaintiff by Counter Claim). HAYES J.:-- In this matter the plaintiff was a personal friend of the defendant and her husband the defendant by counter-claim. The plaintiff on or about June 20, 1989 purchased from the defendant's husband, Hans Kasierski, by way of an assignment, Hans Kasierski's right to purchase a condominium namely Suite 504 - 251 Queen's Quay West, Toronto.

Hans Kasierski had acquired this right by way of an assignment from Al Scott dated May, 11, 1987 for the sum of \$325,000.00 with an initial deposit of \$19,500.00 and a Letter of Credit for \$19,500.00 which would become due when the purchaser was able to receive title by a duly executed deed or grant.

The right to purchase assigned by Scott was acquired by him by way of an Agreement of Purchase and Sale dated August 29, 1984 with a developer Admiralty Hotel Group.

Hans Kasierski and his wife Dorothee Kasierski occupied the condominium under the occupation agreement on or about August 1987.

The plaintiff closed the purchase of the condominium unit as required by the Agreement of Purchase and Sale on June 28, 1989. The defendant was in possession at the time of the closing and she has refused to vacate the premises. The defendant was not asked to consent to the assignment from Hans Kasierski to the plaintiff and she refuses to consent.

The Honourable Madam Justice Arbour in November 28, 1989 upon hearing the application and counter-application and the evidence filed on behalf of the parties directed that there would be a trial of the issues and the parties were to produce and file a Statement of Claim and a Statement of Defence. The pleadings and her Order would constitute the record in this matter.

The court further ordered that service of the counter application was to be effected on the respondent Hans Kasierski by personal service on his solicitor Larry Todd of Holden, Murdoch & Finlay. Service was effected and the respondent Hans Kasierski has not filed any reply to the counter application. I am advised by counsel for the defendant that Hans Kasierski has been advised of the trial date by communicating that information to his solicitor Larry Todd. Hans Kasierski has not appeared at the trial and no one has attended to represent him. Therefore in view of the above notice in accordance with the Order and the failure of Hans Kasierski to respond and/or attend or be represented the trial of the issues proceeded in his absence.

In this action the plaintiff claims:

- (a) possession of the premises municipally known as Suite 504 - 251 Queen's Quay West, Toronto;
- (b) a declaration that the defendant herein is unlawfully occupying the said premises;
- (c) a declaration that the plaintiff is a sole owner of the said premises without any claim or lien thereon by the defendant, or in the alternative,
- (d) an order dispensing with the defendant's consent to the assignment of an Agreement of Purchase and Sale regarding the said premises;
- (e) damages for wrongful occupation of the said premises by the defendant;
- (f) an interim order requiring the defendant to pay to the plaintiff his costs for taxes, condominium maintenance fees, and mortgage payments, and utility payments for the said premises while the defendant has been in occupation thereof.
- (g) the plaintiff's costs of these proceedings.

The defendant requests dismissal of the action and counter-claims for a declaration that she is lawfully in possession, a declaration setting aside and declaring void the assignment between her husband and the plaintiff, and a declaration that the defendant is entitled to a one-half interest in the condominium and other relief as set out in the counter-claim.

The parties have filed an agreed Statement of Facts and on the basis of those admissions and the viva voce evidence the court finds the facts to be as follows:

1. Hans and Dorothee Kasierski were married on the 23rd day of May, 1966.
2. Hans and Dorothee Kasierski separated on or about the 19th of March, 1988. At the time of the separation they were residing at 251 Queen's Quay West, Suite 504, Toronto. Counsel have agreed that this condominium was matrimonial property.
3. In 1973 Hans and Dorothee Kasierski purchased the property at 130 Glenrose Avenue, Toronto, as joint tenants. Their solicitor was Harold Wolfe.
4. In 1987 the property at Glenrose Avenue was sold for \$540,000.00. Hans Kasierski did not tell his wife that he had listed the property for sale. Their solicitor was Harold Wolfe.
5. From the proceeds of the sale of the Glenrose Avenue property \$301,000.00 was placed in Treasury Bills at the Canadian Imperial Bank of Commerce. These Treasury Bills were subsequently used as security for a business loan obtained by Hans Kasierski for the operation of his business, a car dealership.

6. Dorothee Kasierski was aware of this loan arrangement and she attended at the bank to execute documents after she had had independent legal advice with respect to the effect of the transaction on their place of residence (the condominium) and her liability in respect of the transaction.

7. Dorothee Kasierski admitted in cross-examination that Mr. Feldman (who gave her independent legal advice with respect to the security to the bank with the Treasury Bills) told her that the bank could come and take her home. She has stated that she knew it was a business loan of her husband, that she would be liable and that they were pledging the Treasury Bills to the bank.

8. The defendant Hans Kasierski signed an Agreement of Purchase and Sale for the above condominium unit on May 12, 1987 with Al Scott for \$325,000.00 with a cash deposit of \$19,500.00 and a Letter of Credit for \$19,500.00. 9. Hans and Dorothee Kasierski took occupancy of the above-mentioned condominium in or about the month of August 1987. The Agreement of Purchase and Sale with Al Scott only names Hans Kasierski as the purchaser. The defendant is not a party to the agreement. There is no evidence that the condominium was to be held as a joint tenancy.

Hans Kasierski was having financial problems in his business and on or about November 1987 Dorothee Kasierski was told by her husband that he was in arrears in respect of the payment of occupation rent for the condominium. The arrears of occupation rent paid by the plaintiff on closing amounted to \$21,921.44 which had accrued at the rate of approximately \$2,551.00 per month.

10. The defendant admitted in cross-examination that she knew if the deal with Al Scott didn't close they would lose their condominium home.

11. The plaintiff was aware that the condominium was being occupied by Hans and Dorothee Kasierski as their home, and that she was the sole occupant of the condominium at the time of the assignment from Hans Kasierski.

12. Harold Wolfe acted as a solicitor for Hans Kasierski on the proposed purchase of the condominium, he was the solicitor for the plaintiff and Hans Kasierski on the assignment to the plaintiff, and he acted for the plaintiff in the purchase of the condominium.

13. The plaintiff had conversations with Dorothee Kasierski on a number of occasions prior to the closing of the purchase of the condominium and prior to the assignment at which time he advised her of the possible difficulty of her husband being unable to close the condominium deal. The defendant, Dorothee Kasierski, maintained in her evidence that she thought the Treasury Bills would be available to purchase the condominium and that the bank would take a mortgage on the condominium as security for the business loan of her husband.

14. Hans Kasierski first approached the plaintiff on June 16, 1989 to purchase the assignment of the condo right of purchase as he was without funds to close. In the meantime Hans Kasierski had listed the condominium for sale without consulting his wife, but she was aware its the listing as she co-operated by allowing people into see the condominium.

The plaintiff was of the opinion that Hans Kasierski had made some unwise business, decisions. Hans Kasierski on a previous occasion came to the plaintiff on short notice for a loan of approximately \$250,000.00 for his business. The plaintiff arranged the funds for Kasierski. In addition Hans Kasierski had previously entered into an agreement to purchase another condominium and also purchased a boat. The plaintiff had advised the defendant of her husband's serious financial problems and this would include the condominium. A few days before the closing date for the purchase of the condominium Hans Kasierski approached the plaintiff again about purchasing his interest in the condominium for the same price as he had paid.

15. The plaintiff agreed and an assignment was drawn up by Harold Wolfe representing both parties. In addition, the plaintiff signed an acknowledgment that the defendant was in possession and he would have to take his own steps to have her removed from the condominium.

The court accepts the evidence of the plaintiff that he was aware that the defendant was in possession at the time he authorized the closing of the purchase, but he was not aware of any problems with respect to the provisions of the Family Law Act and he had no idea it was a "matrimonial home". The acknowledgment signed by the plaintiff drafted by Harold B. Wolfe and directed to Harold B. Wolfe, indicates Mrs. Kasierski is in possession and it will be his (the plaintiff's) responsibility to obtain possession after closing, but it makes no reference to any problems which might arise by reason of the provisions of the Family Law Act. Reference to the Family Law Act was in Mr. Wolfe's reporting letter to the plaintiff of August 28, 1989.

16. The defendant was not told by her husband of the assignment of the right to purchase the condominium to the plaintiff, nor was she told by the plaintiff, the bank, or the lawyer.

17. The defendant knew that her husband was in arrears in respect of the occupation rent, that the condominium deal was to close on June 28 from the material placed under her door from the vendor and from what she learned through her employment with the condominium corporation. She was also aware that her husband was in financial difficulty and had not paid the occupancy rent since November of 1988. She did not make enquiries of her husband, the bank, or the lawyer. She maintains throughout her evidence that her husband looked after those things. She made no enquiries about the closing from April 1989 to June 28, 1989 when the transaction closed. This was at a time when she knew that if the deal didn't close they would lose their condominium home.

18. The defendant admitted in cross-examination that the bank took all of the money after the condominium deal was closed by the plaintiff, and as her husband owed approximately \$400,000.00 to the bank, they demanded money from her, but she has now settled with the bank.

19. When asked how she would close the transaction if she were restored to her position as of June 28, her answer was that somebody would help her. No evidence has been led on behalf of the defendant which would disclose any realistic possibility of her having available to her the resources by way of mortgage or otherwise to purchase the condominium. In addition she was not a party to the assignment from Scott.

20. The parties agree that the property had been listed by Hans Kasierski for \$595,000.00 and thereafter \$459,000.00. In addition it is admitted that an offer was made to purchase the property for \$525,000.00 near the closing date. It is agreed that presently the property is valued at between \$425,000.00 and \$450,000.00.

21. The defendant has continued to reside in the condominium and has not paid any rent, hydro, taxes, or heat, and prior to the closing date her husband was in arrears of occupation rent in the amount of \$21,921.41.

Re: Matrimonial Home

The parties agree that the condominium was a matrimonial home of Hans Kasierski and Dorothee Kasierski within the provisions of Part II of the Family Law Act.

They were occupying the premises under the terms of an occupancy agreement dated August 29, 1984 between Al Scott and Admiralty Point Hotel, and an Agreement of Purchase and Sale between Hans Kasierski. and Al Scott dated May 12, 1987 with the purchase price from Scott being \$325,000.00. In addition Hans Kasierski acquired the rights of Al Scott under the Agreement of Purchase and Sale between Scott and the Admiralty Hotel Group dated August 29, 1984.

The relationship between the vendor and purchaser in the purchase of a condominium has been determined by the Divisional Court in *Re W.B. Sullivan Construction Limited and Barker et al.* (1977), 14 O.R. (2d) 529. Judgment was rendered by Cory, J. concurred in by Reid, J., O'Leary, J. dissenting, and leave to appeal was refused by the Ontario Court of Appeal and again by the Supreme Court of Canada.

In this matter the Divisional Court ruled that the provisions of the Residential Premises Rent Review Act, 1975, applied to the relationship between vendor and purchaser of a condominium where the purchaser was in possession under an occupation agreement.

In the judgment of Cory, J., as he then was, it was stated at p. 547 and following quote:

"It would appear that the proposed purchaser of a condominium unit cannot prior to registration, acquire a beneficial interest in the lands upon which the unit is situated. Nor does the proposed purchaser become cestui que trust for the vendor for the period prior to registration. The proposed purchaser is thus in a substantially different position from the purchaser of any other interest in real property: *Irvine v. Macaulay* (1897), 24 O.A.R. 446 at pp. 450-451

It is quite correct to say in the ordinary situation, that the purchaser of the real property who goes into possession prior to closing, will be called upon in the usual course of events to pay interest on the unpaid balance of the purchase monies to the date of closing. In such a situation, the purchaser has resort to the equitable remedy of specific performance to force the completion of the transaction. A purchaser of the proposed condominium unit does not have a similar equitable right and does not have the remedy of specific performance available to him. It is clear that the completion of the proposed purchase is dependent upon the registration of certain documentation and the actions of entities that are not parties to the contract. The requirements of registration are essential and cannot be waived by either party, and thus specific performance could not be awarded.

The consideration for occupation by a purchaser of a proposed condominium unit is governed by the contract, in this case by Clause or Section 21. Again, it should be noted that the consideration for occupation is termed a 'rental payment' and is not to be applied upon the purchase price.

It would appear that in this situation there are two relationships that exist between the parties to the contract - that of vendor and purchaser, and also that of landlord and tenant.

Prior to the consummation of the sale agreement, there is a hiatus wherein the existing or dominant relationship can only be that of landlord and tenant. For a significant number of months money is paid that is termed 'the rent' or 'occupancy rent' which is not applicable to the sale price. There is a provision for the termination of the agreement and all relationships between the parties. To all intents and purposes, the respondent occupiers of the premises can be nothing but monthly tenants during this period.

At the time of the assignment of the right to purchase the condominium from Hans Kasierski to the plaintiff, Hans Kasierski stated in the assignment dated June 20, 1989 that he was unable to close the purchase with Al Scott.

In addition Hans Kasierski was also in default for occupation rent in the amount of approximately \$21,900.00.

The defendant has expressed a hope that someone might have helped her to purchase the condominium, but no evidence has been called to support that proposition. It is clearly an unrealistic position and in addition it is to be observed that she is not a party to the agreement to purchase the condominium. As a result of the above mentioned inability of Hans Kasierski to close the purchase and in addition his default in occupation rent, his interest and that of the defendant in the matrimonial home would have been extinguished.

Sale Of Matrimonial Home

Hans Kasierski listed the condominium for sale at \$595,000.00 as disclosed by the listing information filed as an exhibit in this action, and the offering price was reduced to \$559,000.00 by a subsequent listing agreement.

After attempting to persuade the plaintiff to purchase his interest in the condominium on two occasions, Hans Kasierski made an assignment, of his right to purchase the condominium to the plaintiff by an Assignment Agreement dated June 20, 1989. This was at a time when all parties knew the closing date for the purchase was June 28, 1989.

The agreement did not provide for any increase in the purchase price over and above that which was to have been paid by Hans Kasierski namely \$325,000.00 plus any amounts for occupation rent and other charges which became the liability of the plaintiff.

The plaintiff paid on closing the purchase of the condominium (including legal fees of \$2,750.00), a total of \$355,949.40.

The parties have agreed that an offer was made by another person to purchase the property for the sum of \$525,000.00 on or around the closing date.

Therefore Hans Kasierski disposed of the matrimonial home for an amount approximately \$170,000.00 less than the value thereof (subject to the deduction of any costs of sale, arrears of occupation rent, and other adjustments properly referable to the sale).

Status Of Assignment From Kasierski To Grimme

The assignment of the right to purchase the condominium from Kasierski to Grimme dated June 20, 1989, was not consented to by the defendant.

The plaintiff signed an acknowledgment to Harold B. Wolfe (who was the solicitor for both Grimme and Kasierski in this matter) which stated among other things that:

"I further acknowledge that the property is presently occupied by Mrs. Hans Kasierski and that I will not be receiving vacant possession on closing and that it is my full responsibility to obtain vacant possession of the premises after closing proceeding with court action for possession at my own expense."

The plaintiff having admitted that the property was a matrimonial home and having acknowledged that the defendant was in possession testified that Harold Wolfe did not advise him of the family law problems and that he discovered them afterwards. Harold Wolfe wrote a reporting letter to the plaintiff dated August 28, 1989 indicating that title was subject to, "any claim under the Family Law Act which Dorothee Kasierski may be able to advance." No specific mention was made in the acknowledgment drafted by Mr. Wolfe of the potential problems under the Family Law Act.

There is an allegation in the pleadings that the plaintiff and the defendant's husband conspired each with the other to injure and harm the defendant in that they kept the defendant from getting her share of the equity of the condominium unit.

The court has reviewed all of the evidence and documents filed. The above allegation is not supported by the evidence. The plaintiff declined to purchase the condominium when it was first offered to him by Hans Kasierski.

The plaintiff has indicated that he agreed to purchase from Hans Kasierski when he came to him within a few days of the date for the closing of the transaction as at that time he had decided to occupy the unit himself until another condominium unit he had purchased was completed.

The Family Law Act provides as follows:

"S. 19-(1) Both spouses have an equal right to possession of a matrimonial home.

-(2) When only one of the spouses has an interest in a matrimonial home the other spouse's right of possession,

(a) is personal against the first spouse;"

"S. 21-(1) No spouse shall dispose of or encumber an interest in a matrimonial home unless,

(a) the other spouse joins in the instrument or consents to the transaction;"

A transaction disposing of a matrimonial home by the spouse having title without the consent of a non-titled spouse is not void but merely liable to be set aside (See Bank of Montreal v. Norton (1983), 44 O.R. (2d) 39 and Re Kozub and Timko 45 O.R. (2d) 558 (Ont. C.A.)).

Sec. 19(2) of the Family Law Act provides when only one spouse has an interest in a matrimonial home, the other spouse's right of possession, is personal as against the first spouse. The court can either authorize individual transactions or release the property from the provisions of the application of Part II of the Family Law Act (Sec Rocha v. Rocha (1981), 23 R.F.L. (2d) 366 (Ont. H.C.)).

The defendant by an Order of Master Cork dated July 7, 1989 obtained exclusive possession of the condominium unit. This Order was made at a time when the plaintiff had closed the purchase of the condominium unit and title had been transferred from the vendor Admiral Hotel Group to the plaintiff.

Prior to the closing of the transaction Hans Kasierski was a month to month tenant (who was in arrears of occupation rent to the extent of approximately \$20,000.00) and he was the assignee of a right to purchase the condominium unit under Agreement of Purchase and Sale between Al Scott and the Admiral Hotel Group. Upon the evidence it is clear Hans Kasierski was without funds to close the purchase and could not pay the occupation rent. In addition the defendant did not have any financial ability to complete the purchase if she had wished to continue to occupy the matrimonial home.

Conclusion In all of the circumstances there will be an order authorizing the transaction between the plaintiff and Hans Kasierski by way of the Assignment Agreement dated June 20, 1989 and there will be an order dispensing with any consent that might have been required of the defendant to the Assignment.

There will be a declaration that the plaintiff is the sole owner and entitled to vacant possession of the premises and the defendant is directed to vacate the premises on or before 30 days from the date of entry of this judgment. In default of vacating the premises within that time a Writ of Possession may issue to remove the defendant from the premises.

The order of Master Cork dated July 7, 1989 granting the defendant exclusive possession will be set aside.

The plaintiff's claim for a declaration setting aside and declaring void the assignment between the plaintiff and her husband is not allowed.

The plaintiff claims damages for wrongful occupation by the defendant. The plaintiff at the time of the purchase signed an acknowledgment that he was not receiving vacant possession and it was his full responsibility to obtain vacant possession proceeding with court action at his own expense.

In these circumstances the plaintiff's claim for damages for wrongful occupation is dismissed.

The defendant in her counter-claim by way of alternative relief claims damages against the plaintiff and her husband for the difference between the purchase price (claimed to be \$325,000.00) and the value of the condominium on June 28, 1989.

The act of selling the property was that of the husband and I do not find any evidence to support a claim for damages against the plaintiff.

The husband as the assignee of the right to purchase the condominium must not dispose of that interest (which was matrimonial property) for a price which would adversely affect the value of the defendant's interest therein in any determination of net family property under Part I of the Family Law Act.

If the value of the matrimonial property that is, the condominium, on June 28, 1989 was more than that for which it was sold to the plaintiffs the court directs that the defendant Dorothee Kasierski shall have judgment against Hans Kasierski for damages in the amount of 50% of the net credit he would have received had the sale been made at that price.

Therefore there will be an order for a reference to the Master on the counter-claim to:

(a) determine the value of the condominium unit on June 28, 1989; the Master may wish to consider that the parties have agreed there was an offer to purchase the property for \$525,000.00 at approximately the closing date of June 28, 1989. There is also an admission that the property has a present value of between \$425,000.00 and \$450,000.00;

(b) if the property had been sold at that time determine the net proceeds of the sale which would have accrued to Hans Kasierski;

(c) in the determination of the net credit there should, among other things, be deducted the occupation rent owed by Hans Kasierski on June 28, 1989, and any other costs or deductions that the Master considers appropriate;

(d) if there is a net credit in favour of Hans Kasierski, if the property had been sold at the value determined by the Master, the Master is to determine 50% of the amount of the net credit.

Upon the net credit having been determined judgment will issue against the husband in favour of the wife, Dorothee Kasierski, for damages in the amount of 50% of the net credit.

The defendant will have her costs of the counter-claim and the reference to the Master against Hans Kasierski on a solicitor-client basis.

In view of the plaintiff's understanding of the basis on which he purchased the property as set out in his acknowledgment to Harold Wolfe, there will be no costs of his action against the defendant.

If the master determines that there would be a net credit as referred to above there will be prejudgment interest on the judgment in favour of Dorothee Kasierski at the rate provided in the Courts of Justice Act from June 20, 1989 (the date of the assignment from Hans Kasierski to the plaintiff). There will be post judgment interest at the rate provided for from the date of this order.

HAYES J.

CBR# 059

Carleton Condominium Corporation No. 109 v. Tartan Development Corporation et al.*

22 O.R. (3d) 718

Action No. 16389/90 and 71229/93

Ontario Court (General Division), Sedgwick J. March 8, 1995

MOTION under Rule 21 for the determination of questions of law. James Davidson, for plaintiffs.

Jeremy Wright, for defendants, Tartan Development Corp. and Tibor M. Gatszegi.

SEDGWICK J.: -- This motion is brought jointly pursuant to Rule 21 of the Rules of Civil Procedure for the determination of certain questions of law raised by the statement of claim issued on March 8, 1990, as amended.

The plaintiff ("CCC 109") is a condominium corporation to which the Condominium Act, R.S.O. 1990, c. C.26, applies. CCC 109 came into existence upon registration of a declaration and description on May 9, 1977. It is a residential condominium including 100 low-rise dwelling units in 11 separate "blocks" or buildings and the related common elements (the "Condominium").

The defendant Tartan Development Corporation ("Tartan") is an Ontario corporation which was the declarant of CCC 109 and the developer and vendor of the units and related common elements in the Condominium. The defendant Tibor Gatszegi ("Gatszegi") was the architect for the Condominium. He was an employee and vice-president of Tartan.

The defendant R.J. Nicol Construction (1975) Ltd. was the builder of the Condominium. It is not a party to this motion. It is bankrupt.

In the statement of claim, CCC 109 alleges deficiencies in the construction of the Condominium on behalf of itself and all owners in the Condominium and seeks damages against the defendants for breach of express or implied warranties as to construction of the Condominium and for negligence in design, construction and supervision of construction of the Condominium.

The parties have requested the court to determine the following questions of law:

1(a) Has the enactment of the Ontario New Home Warranties Plan Act terminated the common law implied warranties of fitness for new homes in Ontario? 2(a) In order for a condominium corporation to assert claims based upon these common law implied warranties, must the corporation establish that, as of the date of issuance of the statement of claim, at least one of the unit owners in the condominium was an "original purchaser"? For the purpose of this question, an "original purchaser" is a person who entered into an agreement of purchase and sale before construction was complete.

(b) Further, in the case of a condominium property, is construction "complete" for this purpose if the unit described in the agreement of purchase and sale is complete, or is construction complete only when the unit and all of the common elements appurtenant to the unit are also complete?

3. Can the condominium corporation concurrently pursue a claim in tort (i.e. based upon negligent design, construction or supervision of construction) as against the developer/declarant, employees of the developer/ declarant, builder, architect or others involved in the original construction of the condominium?

4. What is the limitation period and commencement date of same applicable to any such claims in tort or for breach of warranty brought by a condominium corporation?

Question (1)

At common law, certain warranties are implied by law in favour of the purchaser of a residence which is not completely constructed when the purchaser agrees to buy it. These include warranties that the residence will be completed in a workmanlike manner and will be fit for habitation: *Carleton Condominium Corp. No. 11 v. Shenkman Corp.* (1985), 49 O.R. (2d) 194, 14 D.L.R. (4th) 571 (H.C.J.).

In 1976, the Ontario legislature enacted the Ontario New Home Warranties Plan Act, now R.S.O. 1990, c. O.31. Under s. 13 of the Act, statutory warranties (quite similar in effect) were introduced for the benefit of "owners" of "homes" against "vendors", all terms as defined elsewhere in the Act. Subsection (6) of section 13 of the Act reads: 13(6) The warranties set out in subsection (1) apply despite any agreement or waiver to the contrary and are in addition to any other rights the owner may have and to any other warranty agreed upon.

By the enactment of the statutory warranties, did the Ontario legislature intend to take away the common law rights of purchasers of uncompleted residences to rely on implied warranties?

I do not think so. In my view, the right to rely on the implied common law warranties is expressly preserved by the words "and in addition to any other rights the owner may have" in s. 13(6) of the Act.

Section 13 of the Act must be viewed in the context of the entire Act which, among other things, established a guarantee fund to provide compensation for owners of homes for breach of the statutory warranties, for ready access to the fund by owners and which extended the benefit of the statutory warranties to owners of new homes (not protected by the common law implied warranties). Therefore, the answer to Question 1 is that the common law warranties remain available to purchasers of uncompleted residences in accordance with the cases.

Question 2(a)

Question 2 is in two parts. The first part (Question 2(a)) is whether in asserting a claim based on the common law implied warranties, the condominium corporation must establish that at least one of the owners of condominium units was an "original purchaser", i.e., a person who entered into an agreement of purchase and sale to purchase the unit before completion of construction.

In my view, the answer to Question 2(a) is yes. Someone must be entitled to sue the defendants for breach of the common law implied warranties at the time the statement of claim was issued by the plaintiff CCC 109. That someone must have been an "original purchaser" as defined by the parties for purposes of this motion. The right of CCC 109, as a condominium corporation to enforce these warranties under s. 14(1) of the Condominium Act on behalf of unit owners is derivative, not original.

My answer is based on a reading of ss. 14(1) and 41(8) (formerly R.S.O. 1970, c. 77, s. 9(18)) of the Condominium Act and the persuasive reasoning of Krever J. (as he then was) in the Shenkman case, *supra*, subsequently applied by Rosenberg J. in *Waterloo North Condominium Corp. No. 64 v. Domlife Realty Ltd.* (1989), 70 O.R. (2d) 210 (H.C.J.).

Section 41(8) of the Condominium Act reads:

41(8) All warranties given with respect to work and materials furnished to the property shall enure to the benefit of all unit owners from time to time and to the corporation.

Counsel for the defendants submitted that the application of this subsection should be governed by the section of which it is part, and which is otherwise concerned only with repair and maintenance obligations after completion of the Condominium (relying on inferences drawn from general provisions of the Act, including ss. 2(4) and 4(1)).

I do not agree with him. The wording of s. 41(8) is not so restricted. In my view, its purpose is to extend generally to all unit-holders and to the condominium corporation, the benefit of warranties given to any one or more of them with respect to work and materials furnished to the property. The previous judicial history of s. 41(8) as s. 9(18) appears to me to support that interpretation.

Question 2(b)

The second part of Question 2 (Question 2(b)) is whether for the purposes of Question 2(a), construction is "complete" when the unit of the "original purchaser" is complete or when the unit and all the common elements appurtenant to the unit are complete.

Counsel for the plaintiff says that the condominium project consists of units and common elements, referring to the general definitions of "common elements", "property" and "unit" in s. 1(1) of the Condominium Act. He then says that the owners are tenants in common of the common elements; and that an undivided interest in the common elements is appurtenant to each unit; and that the ownership of a unit shall not be separated from the ownership of the common interest (s-ss. 7(1), (2) and (5)). It would follow, he says, that until the common elements which are appurtenant to each unit are complete, no unit (including any unit owned by an "original purchaser") is complete.

Counsel for the defendants referred me to several passages from the judgment of Dickson J. (as he then was) in *Fraser-Reid v. Droumtsekas*, [1980] 1 S.C.R. 720, 103 D.L.R. (3d) 385, and to s. 15 of the Ontario New Home Warranties Plan Act, which prescribes when the statutory warranties take effect and which deems the condominium corporation to be the owner of the common elements for that purpose. However, s. 15 applies only to the statutory warranties under that Act. The *Fraser-Reid* case concerns the application of the common law implied warranties to the purchase of a newly completed house and the judgment of Dickson J. is not directed to their application in a condominium setting. These raise entirely different issues.

Counsel did not refer me to any direct authority on this point. However, I agree with counsel for the plaintiff. In my view, for purposes of the implied common law warranties, construction of any particular unit in a condominium is not complete until the common elements appurtenant to the unit are complete. That interpretation is consistent with the scheme of shared ownership and mutual rights and obligations upon which the Condominium Act is based.

Question (3)

Counsel informed me that they have agreed that the plaintiff may concurrently pursue claims in tort and breach of warranty, provided the defendants can be shown to owe a duty of care to the plaintiff on the facts of this case.

Question (4)

The final question is as to the applicable limitation periods for the plaintiff's claims for breach of warranty and negligence and as to the commencement date of the limitation periods.

Section 45(1)(g) of the Limitations Act, R.S.O. 1990, c. L.15, expressly provides a limitation period of six years for actions both in contract and tort. In my view, the plaintiff's claims for breach of warranty and negligence are subject to the six-year limitation period provided by this subsection. Under the Act, the limitation period starts to run when the cause of action arises. The cause of action arises when it is complete. It is complete when damages occur as a result of the alleged breach of contract or duty.

In *Consumers Glass Co. v. Foundation Co. of Canada* (1985), 51 O.R. (2d) 385 at p. 398, 20 D.L.R. (4th) 126, the Ontario Court of Appeal (Dubin J.A., as he then was) stated that in cases based on breach of a duty to take care, "a cause of action does not arise, and time does not begin to run for the purposes of the Limitations Act, until such time as the plaintiff discovers or ought reasonably to have discovered the facts with respect to which the remedy is being sought, whether the issue arises in contract or tort".

Counsel for the defendant submits that I should modify the application of this general rule by applying (or adopting) the shorter limitation periods for breach of statutory warranties under the Ontario New Home Warranties Plan Act. I do not see how that is possible in view of the express provisions of s. 45(1)(g) of the Limitations Act.

He also submitted that as to the claim for breach of warranty, the limitation period runs from the date of purchase. The case cited in para. 15 of his factum, upon which I assume he relies, *Schwebel v. Telekes*, [1967] 1 O.R. 541, 61 D.L.R. (2d) 470 (C.A.), was expressly overruled in the *Consumers Glass* case, which I must now adopt as the ruling authority in Ontario.

Accordingly, the applicable limitation period in Ontario for claims based on breach of warranty and negligence is six years after the cause of action (including actionable damages) is complete and the plaintiff discovers or ought reasonably to have discovered the facts with respect to which the remedy is being sought.

As requested by counsel on this motion, the costs of this motion are reserved to the trial judge.

SUPPLEMENTARY REASONS FOR JUDGMENT -- April 3, 1995

SEDGWICK J.: -- Reasons for judgment were released on March 8, 1995, responding to certain questions of law which the court was asked to determine upon a motion brought jointly pursuant to Rule 21 of the Rules of Civil Procedure.

On March 10, 1995, counsel jointly asked for an opportunity to canvass the answer to Question 2(a) set out in my reasons for judgment (pp. 721-22 ante) in order to clarify a point which was of particular concern to them. Further argument was heard in Ottawa motions court on March 31, 1995, brief written reasons to follow.

In my reasons for judgment, dated March 8, 1995, I answered in the affirmative, Question 2(a) posed by the parties. Question 2(a) read as follows:

In order for a condominium corporation to assert claims based upon these common law implied warranties, must the corporation establish that, as of the date of issuance of the statement of claim, at least one of the unit owners in the condominium was an "original purchaser"? For the purpose of this question, an "original purchaser" is a person who entered into an agreement of purchase and sale before construction was completed.

In the circumstances to which the parties wish to apply my answer to Question 2(a), it is insufficient because it does not specifically distinguish between two situations:

(1) an original purchaser as defined by the parties in Question 2(a) remains a unit owner on the date on which the statement of claim is issued by the condominium corporation; and

(2) an original purchaser is no longer a unit owner on that date.

I intended to deal with both situations in my reasons for judgment, dated March 8, 1995, because I think they lead to the same result.

In the situation where the original purchaser is no longer a unit owner on the date on which the statement of claim is issued by the condominium corporation, the successor in title of the original purchaser is entitled to the benefit of warranties (including, in my view, any implied common law warranties) to which the original purchaser was entitled, pursuant to s. 41(8) of the Condominium Act, R.S.O. 1990, c. C.26.

It is, therefore, immaterial in my view, whether any original purchaser remains a unit owner on the date on which the condominium corporation issued the statement of claim. It is sufficient if at that date it can be shown by the plaintiff that there was a former unit-owner who was an original purchaser as the parties have defined the term in Question 2(a).

I think this follows from an analysis of the applicable provisions of the Condominium Act and the cases to which I have been referred by counsel.

In an action brought by a condominium corporation under s. 14 (formerly R.S.O. 1970, c. 77, s. 9(18)) of the Condominium Act to enforce the contractual rights of unit owners under a contract, express or implied, to which the corporation itself is not a party, one or more of the unit owners must be shown to have been a party to the contract sought to be enforced by the corporation.

In the context of an action brought by a condominium corporation to enforce the common law warranties implied in favour of purchasers of uncompleted residences or units, including appurtenant common elements, this would mean that one or more unit-owners must be shown to have been a party to an agreement of purchase and sale of a unit entered into with the developer prior to the completion of construction of the unit, including appurtenant common elements.

Section 41(8) of the Condominium Act provides that these common law implied warranties would enure to the benefit of "all unit owners from time to time". If, therefore, one or more unit owners were shown to have been a party to an agreement of purchase and sale of a unit entered into with the developer prior to completion of construction of the unit, including appurtenant common elements, the rights of such owner(s) to enforce the common law implied warranties in respect of uncompleted units, including appurtenant common elements, would pass to his or their successors in title to the unit(s).

If these "threshold" requirements have been met, the condominium corporation would be entitled to enforce these contractual rights of unit holders and to recover damages on behalf of all current unit holders, not just those who have, or whose predecessors in title had, contractual privity with the developer.

It would not be necessary for any original unit-owner having contractual privity with the developer to remain as a unit owner on the date the statement of claim was issued by the condominium corporation, since the benefit of his original rights against the developer would have passed to his successor(s) in title.

In my view, it is the contractual rights that must be in existence on the date on which the statement of claim is issued, whether or not the rights are then exercisable by an original purchaser or by his successor(s) in title. The defendants are protected from delayed claims under the Limitations Act, R.S.O. 1990, c. L.15.

According to counsel, support of this view as to this aspect of the "threshold" issue may be inferred from comments of Rosenberg J. in *Waterloo North Condominium Corp. No. 64 v. Domlife Realty Ltd.* (1989), 70 O.R. (2d) 210 (H.C.J.) at p. 220; non-support, from comments of Krever J. (as he then was) in *Carleton Condominium Corp. No. 11 v. Shenkman Corp.* (1985), 49 O.R. (2d) 194 at pp. 208-09, 14 D.L.R. (4th) 571 (H.C.J.). However, there does not appear to be any reported decision in Ontario in which this aspect of the "threshold" issue has been fully canvassed. In neither of these cases was the effect of s. 41(8) of the

Condominium Act considered, although the provision has been part of the law of Ontario since the Condominium Act, 1978, S.O. 1978, c. 84 .

Assuming that s. 41(8) has only the limited application within the context of s. 41 of the Act, for which counsel for the defendants contends, and which was rejected in the reasons for judgment dated March 8, 1995, the rights of an original unit-owner to enforce the common law warranties implied in favour of the purchaser of an uncompleted residence would, in my opinion, also be enforceable by his successors in title, just as they would be if he had agreed to purchase a single- family residence.

As requested by counsel, the costs of this motion are reserved to the trial judge.

These supplementary reasons for judgment are to be considered part of the reasons for judgment, dated March 8, 1995. For appeal and other purposes, the entire reasons for judgment are considered to be issued on this date.

Order accordingly.

CBR# 008

500 Glencairn Limited, Plaintiff, and Freda Farkas, George Farkas and Roman Gofman, Defendants Action No. 51347/90

Ontario Court of Justice - General Division Toronto, Ontario Then J. January 31, 1994.

Richard Storrey, for the Plaintiff. Martin Banach, for the Defendants.

[para1] THEN J.:-- This is an action for damages by the plaintiff for an alleged breach of an agreement of purchase and sale made by the defendant Freda Farkas said to be acting as trustee or agent on behalf of the defendants, George Farkas and Roman Gofman, whereby the plaintiff, 500 Glencairn Limited on June 13, 1988 agreed to sell and the defendant Freda Farkas on June 12, 1988 agreed to purchase Unit 310 at 500 Glencairn Avenue along with two parking units for a purchase price of \$391,900.00 subject to adjustments.

Background

[para2] The plaintiff is the developer and vendor of units in a condominium development located at 500 Glencairn which is comprised of 40 residential units, 60 parking units and a commercial use component. The defendant Freda Farkas resides in Toronto and is the spouse of her co-defendant George Farkas who is a chartered accountant also residing in Toronto. The remaining defendant is one Roman Gofman who is a real estate agent and also resides in Toronto. It is common ground that the defendants received a disclosure statement which is exhibit 1, Tab 5 in this proceeding and did not purport to rescind the agreement of purchase and sale as a result.

[para3] The defendants obtained interim possession of Unit 310 on October 4, 1989 pursuant to the agreement of purchase and sale. The defendants also assumed the obligation pursuant to the agreement of purchase and sale to make interim occupancy payments to the plaintiff. These payments commenced on October 4, 1989 and in respect of these payments the defendants provided a series of 12 post-dated cheques to the plaintiff in the sum of \$3,913.49. The cheques payable November 1, 1989 up to and including February 1, 1990 were cleared but the defendant Gofman caused payment to be stopped with respect to the March 1, 1990 payment and thereafter.

[para4] On April 18, 1990, the declaration and the description for the condominium development was registered and accordingly notice was given to the defendants that final or title closing under the agreement of purchase and sale would take place on May 11, 1990. The defendants advised that title would be taken in the name of Freda Farkas and Roman Gofman.

[para5] On May 11, 1990, the defendants took the position that the agreement of purchase and sale could be and was thereby being rescinded by reason of alleged material amendments to the disclosure documentation provided upon the execution of the agreement of purchase and sale. The alleged material amendments to the disclosure documentation were said to be contained in the reciprocal agreement registered by the plaintiff on April 18, 1990. The closing which was to take place on May 11, 1990 did not occur.

The Facts

[para6] The defendants takes the position that the reciprocal agreement (exhibit 1, Tab 22) constitutes a material amendment to the disclosure statement and that accordingly the defendant is entitled to rescind the agreement of purchase and sale in accordance with s. 52 of the Condominium Act as that section is explained by the Ontario Court of Appeal in *Abdool v. Somerset Place Developments of Georgetown Ltd.* (1993), 10 O.R. (3d) 120. The specific provisions of the reciprocal agreement (exhibit 1, Tab 22) in comparison with the initial disclosure document (exhibit 1, Tab 5) will be referred to extensively in due course. For present purposes it will be sufficient to express my agreement with the plaintiff's submission that after reading the disclosure documents, any reasonable purchaser would have known the following:

- (a) that there was a commercial component to the project,
- (b) that the physical location of the commercial component and other items were shown on the plans which were part of the disclosure documents,
- (c) that the commercial development would own and have access to certain parking spaces in the underground parking garage and that access to those spaces would be over certain portions of the condominium building,
- (d) that the property would be subject to various easements, rights of way and/or licenses relating to the operation of the residential and commercial components,
- (e) that the easements, rights of way and licenses would be more particularly described by reference plans and the condominium plans,
- (f) that the condominium corporation would be entering into a reciprocal agreement which would deal with all necessary matters relating to the sharing of certain facilities,
- (g) that the reciprocal agreement would deal with matters in addition to matters of access and easements,
- (h) that the reciprocal agreement would provide that the condominium corporation would be responsible for the maintenance, replacement, repair and operation of the shared facilities,
- (i) that the reciprocal agreement would specifically provide for proportions in which the condominium corporation and the owner of the commercial development would share in the cost of the maintenance, replacement, repair and operation of the shared facilities, and
- (j) that the actual proportion of expenses to be borne by the condominium corporation and the commercial development were not set out in the disclosure documents but would be set out later in the reciprocal agreement.

[para7] In addition, Mr. Ezer, the president of the plaintiff and its majority shareholder, gave uncontradicted evidence that the financial burden on the condominium corporation regarding their share of the expenses of the shared facilities is relatively insignificant and more specifically Mr. Ezer testified that the purchaser of Unit 410, which is identical in all respects to Unit 310 but one floor higher, completed his sale and that the financial burden as disclosed in the disclosure statement was exactly the same regardless of the subsequent allocation of costs of the shared facilities in the reciprocal agreement.

[para8] Mr. Farkas, who was the only one of the defendants to testify at trial, acknowledged at trial that when he subsequently received the reciprocal agreement, shortly before the time set for final closing, he and his solicitors poured over the agreement looking for anything in it to use as a vehicle to avoid continuing on with the agreement of purchase and sale. This position was identical to the one taken by the defendant on discovery.

[para9] Both at trial and on discovery, the defendant indicated that his reason for purchasing Unit 310 was to resell the unit at a profit. The defendant Gofman on his discovery stated that one of the reasons why the defendants did not close in May of 1990, was that they could not resell the unit at a profit having attempted to do so from January 1990 until March 1990 and having dropped the asking price for the unit some \$72,000 from that which had been agreed by them in the agreement of purchase and sale.

[para10] Moreover, at trial Mr. Farkas stated that he had, during the time that he purchased Unit 310, also purchased two other condominium units. In his evidence upon discovery, the defendant Farkas stated that he had purchased only one other condominium unit. Having regard to all of the evidence, I am prepared to find as a fact that Mr. Farkas was a speculator in real estate. Mr. Farkas also testified that he wished to rescind the agreement of purchase and sale with respect to Unit 310 because of the quality of the building. Not only is the evidence of Mr. Farkas as to his involvement in the purchase of condominium units at the time of his purchase of Unit 310 somewhat contradictory, but, in September 1989 the evidence discloses that both Mr. Farkas and Mr. Gofman attended to inspect Unit 310 prior to interim closing and that the defendant Gofman signed the purchaser's certificate acknowledging that he had inspected the unit and that the deficiencies were of a minor nature and specifically noted and corrected. There was no indication by the defendants of any substantial complaint regarding the building or the unit. On all of the evidence, I do not accept the evidence of Mr. Farkas that the motivation behind his desire to rescind the agreement of purchase and sale pertains to the poor quality of the building or the unit.

[para11] Mr. Farkas on discovery also conceded that although he was claiming that the allocation of the shared facilities as set out in the reciprocal agreement constituted a material amendment he had no idea as to what his financial burden was going to be with respect to the shared facilities at the time he received the disclosure documents and that he was not really interested in that issue. Indeed he acknowledged that he had not even read that part of the disclosure statement dealing with reciprocal agreement which provided the description of the shared facilities.

[para12] Further, Mr. Farkas acknowledged that he knew that there was to be a commercial component to the building and that some arrangements would have to be entered between the condominium corporation and the owner of the commercial space regarding certain matters. These arrangements would have to include matters such as parking and access to common facilities as between the condominium corporation and the commercial development. He knew that there would have to be a sharing of expenses.

[para13] Mr. Farkas indicated that he knew that if he had any problems, questions or concerns regarding the disclosure statement he could those 10 days regarding the commercial development or the reciprocal agreement.

[para14] Mr. Farkas conceded in cross-examination that s. 20(g) of the agreement of purchase and sale obliged the defendants to take title subject to the reciprocal agreement.

[para15] Mr. Farkas also acknowledged that the defendants knew or should have known that the reciprocal agreement would deal with matters of mutual concern beyond matters such as access and easements.

The Issues

1. Does the reciprocal agreement constitute a "material amendment to the disclosure statement"?
2. Does the reciprocal agreement constitute an unpermitted encumbrance pursuant to the agreement of purchase and sale?
3. Can all of the defendants be held liable or is the plaintiff required to elect which of the defendants should be held liable?
4. (a) If the plaintiff had a duty to mitigate damages, did it discharge that duty?
(b) What is the proper way to assess the plaintiff's damages and as of what date should the damages be assessed? 5. What, if any, is the quantum of damages in this case?

1. Does the reciprocal agreement constitute a material amendment to the disclosure statement?

[para16] Section 52 of the Condominium Act provides as follows:

52(1) An agreement of purchase and sale entered into after the first day of June 1979 by a declarant or proposed declarant of a unit or proposed unit for residential purposes is not binding on the purchaser until the declarant or proposed declarant has delivered to the purchaser a copy of the current disclosure statement and all material amendments thereto.

(2) The purchaser, before receiving delivery of a deed to or transfer of the unit, may rescind the agreement of purchase and sale within 10 days after receiving the disclosure statement or, where there has been a material amendment thereto, within 10 days after receiving the material amendment.

[para17] In *Abdool v. Somerset Place Developments of Georgetown Ltd.*, supra, Robins J.A. on behalf of the Court of Appeal at p. 149, has stated the test that the purchaser must satisfy before availing himself or herself of the right to rescind within 10 days after receiving the "material amendment" to the disclosure statement:

I view the term "material amendment" as broad enough to include any change that should be reflected in the disclosure statement and would not limit it to the correction of errors, omissions or defects as Borins J. does. Subject to that reservation, the basic thrust of these approaches is essentially the same: the declarant must deliver an amended disclosure statement if the change is likely to influence the decision of a purchaser to purchase the condominium unit.

In the interests of consistency, I would determine the materiality of a change or amendment to the originally-delivered disclosure statement by reference to a test similar to that which I formulated earlier to determine the materiality of an alleged defect in a disclosure statement. Would a reasonable purchaser regard the change or amendment as sufficiently important to his or her decision to purchase that, had the disclosure statement contained the new or amended information at the time it was delivered, the purchaser would not likely have one ahead with the transaction but would have rescinded the agreement within the ten-day period? If the answer to this question is in the affirmative, the developer is obliged to deliver an amendment to the disclosure statement and the purchaser has ten days from the date of delivery within which to rescind.

Amendments that substantially change a purchaser's anticipated use and enjoyment of the unit or the amenities associated therewith or that adversely affect the value of the unit, are, I would think, clearly material amendments that revive the rescission period. A reasonable purchaser could objectively assert that he or she would not have proceeded with the deal had this information been available at the time of the original disclosure statement. (emphasis added) [para18] It is the position of the defendant that certain features of the reciprocal agreement viewed both individually and cumulatively constitute material amendments to the disclosure documentation in the sense outlined by Robins J.A. in *Abdool*, supra, such that it was open to the defendant to invoke the right to rescind the agreement of purchase and sale set out in s. 52(2) of the Condominium Act and, the defendant having done so, the agreement of purchase and sale is at an end.

[para19] It will be convenient at this stage to set out both the defendants' and plaintiffs position with respect to certain of the impugned aspects of the reciprocal agreement in order to assess whether in the circumstances the defendant has met the test for rescission outlined in *Abdool*, supra.

[para20] It should be made clear that the summaries of the position of the parties which follow are gleaned from the written materials submitted to the court by counsel. Many of the matters referred to were significantly amplified in argument and in fairness to the excellent arguments advanced by both counsel in support of their respective position I wish to indicate that I have not overlooked the points raised in oral argument. However, in my view, the written materials have so succinctly captured the essence of the position of the parties on the crucial first issue that I find it unnecessary to elaborate further on the arguments of counsel or the facts of this action in order to come to a determination on the first issue.

(i) The defendants submit that Schedule C of the reciprocal agreement lists the easements and rights of way in favour of the commercial building. Schedule E of the reciprocal agreement lists the shared facilities that are owned by the condominium corporation which must be shared with the commercial units. However, it is the defendants' submission that it is impossible to determine easements, rights of way or shared facilities by looking only at the disclosure documentation without reference to Plan 66R-15797 and that accordingly the receipt by the defendants of the reciprocal agreement in conjunction with Plan 66R-15797 constitutes a significant material amendment to the disclosure documentation.

[para21] It is the plaintiff's submission that the plans which were part of the disclosure documentation do provide some detail as to the shared facilities and indeed a reasonable purchaser would not have expected anything more. Reference Plan 66R-15797 could not have been attached to the disclosure statement because that plan was not created until after the building was erected and the plan could be finalized. It is the plaintiff's submission that a reasonable purchaser would not have expected the detailed reference contained in Plan 66R-15797 to have been attached to the initial disclosure document.

(ii) The defendants submit that the allocation of the costs of the shared facilities is in itself material. It is the position of the defendants that the allocation came into being as well as the rationale for the allocation in November or December of 1989, in accordance with a letter from Fairfield Management which is contained at tab 13 of exhibit 1 and that this information should have been brought to the attention of the defendants by the plaintiff.

[para22] It is the plaintiff's position that the disclosure documents made it quite clear that the allocation of shared costs would be set out later. The defendants accepted this state of affairs and cannot now be heard to say that the failure to disclose the precise allocation is a matter so material that they can invoke their right to rescind now that the amount of allocation has been made known to them. The plaintiff submits that if the defendants thought that the allocation of such costs was material, they could and should have exercised their right to rescind within the original 10 day period after the receipt of the disclosure documentation. The plaintiff submits that in the circumstances, unless the allocation of shared costs is in itself unreasonable, the defendants ought not to be in a position to rescind the agreement of purchase and sale.

(iii) The defendants submit that the failure to include the costs that the condominium corporation had to pay for facilities owned by the commercial development in the budget statement is material.

[para23] The plaintiff submits that some of the costs are included in the budget statement which is part of the disclosure documentation, as for example, the maintenance item; but that given the relatively insignificant amounts involved in this item, it cannot be said that the failure to specifically include all of these costs would have caused a reasonable purchaser to rescind the agreement.

(iv) The defendants submit that it is material that the disclosure documentation and the budget statement did not disclose that the condominium corporation was responsible by virtue of s. 3.03(a) of the reciprocal agreement to replace, repair, maintain and operate the shared facilities and was also responsible for outlays which would be classified as capital in nature for shared facilities they did not own, the largest one of which was the outside parking lot. Moreover, the defendants submit that the budget statement failed to disclose that the condominium corporation would receive an administration fee of \$12,000 per annum as set out in paragraph 3.03(n) of the reciprocal agreement and that the fee was non-reviewable over time.

[para24] It is the plaintiff's position that s. 3(e) of the disclosure statement does provide that the condominium corporation had the obligation to replace, repair, maintain and operate the shared facilities. The plaintiff submits that the word "replace" also clearly implies that an expense might be capital in nature. In the plaintiff's submission the fact that the budget statement failed to disclose that the condominium corporation would benefit by receiving a non-reviewable administration fee of \$12,000 per year is irrelevant.

(v) The defendants submit that s. 3.03 of the reciprocal agreement places various burdens on the condominium corporation as to reasonableness of repairs and obtaining quotations but if the condominium corporation fails in its duties as seen by the commercial development, the commercial development does not have the same obligation as to the reasonableness of repairs and quotations. The plaintiff submits that the condominium corporation has the right to take initiatives and do the repairs by virtue of s. 3(e) of the disclosure statement. The embellishment of that obligation and the corresponding obligations of the commercial development do not constitute a material amendment to what was disclosed in the disclosure documentation.

(vi) The defendants submit that the disclosure documentation fails to advise that pursuant to s. 5.01 of the reciprocal agreement, the condominium corporation may in circumstances be liable for 50% of the realty taxes notwithstanding that there is no commercial component to the taxes.

[para25] The plaintiff submits that the realty taxes with respect to the condominium corporation are assessed separately from the commercial component.

(vii) The defendants submit that the disclosure documentation and especially the budget statement failed to disclose that there would be cost sharing of joint insurance as set out in Article 6 of the reciprocal agreement. The defendants also submit the disclosure documentation fails to reveal that if there is a default for any reason by the condominium corporation, in addition to what one could consider would be the normal remedy of a lawsuit or arbitration, the commercial unit may register a lien as set out in s. 10 of the reciprocal agreement on the property of the condominium corporation. This, the defendants submit, would have the effect of having each owner personally liable up to their proportionate interest in the condominium as set out in s. 7 of the Condominium Act. This state of affairs, the defendants submit, could have some impact on refinancing or a sale. [para26] The plaintiff submits that s. 3(f) of the disclosure statement did say that the reciprocal agreement would provide "for certain arrangements between the condominium corporation and the owner of a commercial development with respect to matters of insurance". The plaintiff submits that the fact the disclosure statement did not expressly say that there would be a cost sharing of joint insurance would not, in the plaintiff's submission, be material to a reasonable purchaser. Moreover, s. 3(g) of the disclosure statement specified that each owner would agree to pay their share based upon the percentage allocation for common expenses set out in the declaration in respect of the lands and all amounts for which the condominium corporation was responsible under the reciprocal agreement. According to the plaintiff, there is no evidence that the omissions in the disclosure documentation complained of by the defendants would have any effect or impact on refinancing or a sale.

(viii) The defendants submit that the disclosure documentation failed to disclose that pursuant to s. 11 of the reciprocal agreement the purchaser must not only obtain a consent of a subsequent owner to be bound by the reciprocal agreement but all mortgagees, chargees and other encumbrances must also sign a consent. The defendants submit that this section has a substantial effect on the ability to obtain financing or being able to sell the property to one who needs financing.

[para27] The plaintiff submits that paragraph 3(g) of the disclosure documentation pointed out that the reciprocal agreement would provide that it will bind the owners from time to time of the residential units. According to the plaintiff, any mortgagee or chargee of a unit is an owner. It was also the evidence of Mr. Ezer that these stipulations have had no impact on purchasers being able to obtain financing.

(ix) The defendants submit that the disclosure documentation failed to disclose that pursuant to s. 11.06 of the reciprocal agreement, the commercial Unit can be relieved of all liability by any sale (as opposed to a sale at fair market value to a bona fide purchaser) which could lead to a situation that the commercial unit could sell the property to a shell company without assets and in a declining market so that the value of the mortgagees on the property would be greater than the value of the commercial property and thus effectively shifting the entire burden of costs onto the condominium corporation.

[para28] The submission of the plaintiff is that the reciprocal agreement binds all subsequent owners of the commercial development and that the argument advanced by the defendants is of a theoretical nature and is not material in the relevant sense.

(x) The defendants submit that the letter from Fairfield Management Limited (exhibit 1, tab 13) states that the surface parking lot is exclusively for the usage of the commercial tenants and their customers but goes on to state that it is expected that evening visitors as well as service vehicles will use the lot. The defendants accordingly submit that the condominium corporation is burdened with costs associated with the parking lot without correspondingly having a legal right to use the parking lot. It would therefore follow that the condominium corporation must pay for those items in schedule A "surface parking" of the agreement which they have no right to use.

[para29] The plaintiff submits that the condominium corporation has the right to use the parking lot by virtue of ss. 1.01(k), 3.01 and exhibit E of the reciprocal agreement. Moreover, as a matter of practicality Mr. Ezer testified that the residents and their visitors do use the parking lot.

(xi) The defendants submit that schedule E of the reciprocal agreement states under the heading pertaining to maintenance staff that the "site superintendent hired by the condominium corporation is to be responsible for the following duties relating to commercial space". This responsibility, it was submitted by the defendants, was not disclosed in the budget or the balance of the disclosure documentation and accordingly it is now apparent that the condominium corporation must pay 80% of the maintenance staff relating to the commercial development. This according to the defendants constitutes a material amendment.

[para30] The position of the plaintiff is that the budget in the disclosure documentation provided for amounts pertaining to maintenance staff. The reciprocal agreement provided for the basis of allocation and the Fairfield letter (exhibit 1, tab 13) sets out the basis for the allocation which the plaintiff submits is in itself a reasonable one. It is the plaintiff's submission that none of these matters would have been material to a reasonable purchaser and certainly on the facts of this case were of no material import to the defendants based on their admissions at trial and on discovery.

(xii) The defendants submit that 60 parking units at a percentage of .07 per unit is allocated pursuant to Schedule D (allocation of common expenses of the declaration). The other 9 parking units are owned by the commercial development. On the basis of the disclosure documentation, each parking spot owned by the condominium was therefore to pay .07% of the total of all common expenses. On the other hand, the defendants submit the percentage as set out in Schedule E of the reciprocal agreement as to the costs of the underground garage allocates only 12% of the garage costs to the commercial unit. The parking spots owned by the unit holders and the parking spots owned by the commercial unit at the end of the day do not end up paying the same costs for their parking spaces and in addition the disclosure statement states that there are 69 parking units and therefore on a strict allocation the residential complex has been overburdened by at least one parking space. [para31] The plaintiff submits that the

commercial development lost one of the 9 parking spaces set out in the disclosure documentation as it had to be used for utilities and accordingly the final allocation was done on the basis of the final result, that is, 60 residential parking spots and 8 commercial spots. The ratio therefore is 60 to 8 which constituted the basis of Fairfield Management allocating 88% of the expenses to the residential complex and 12% of the expenses to the commercial development.

[para32] Based on all of the alleged discrepancies (and not just those which have been summarized) between the disclosure documentation and the reciprocal agreement, the defendant advances essentially two arguments.

[para33] First, the defendants submit that given its content the entire reciprocal agreement was material and that accordingly its very omission as part of the disclosure documentation rendered the disclosure documentation inadequate.

[para34] In answer to that argument, the plaintiff submits that there is nothing in the Condominium Act generally or in s. 52 specifically nor in the decision of the Court of Appeal in *Abdool*, supra, which mandates that any and all agreements which provide further clarification to the disclosure documents must be appended to the disclosure documents. It is Mr. Storrey's submission that the position being put forward by the defendants in essence is that notwithstanding the defendants obtained disclosure documentation which said that there would be a reciprocal agreement to be created later which would set out in addition to the disclosure documentation matters of relevance, the defendants would nevertheless be entitled to not rescind at that point in time even though they considered the lack of specificity in the disclosure documentation to be material, but were entitled to take that position later upon receipt of the reciprocal agreement. It is Mr. Storrey's position that that approach cannot be correct in law and ought to be rejected by this court.

[para35] I agree with the position taken by Mr. Storrey on this point. In my opinion, the reasonable purchaser was entitled to take the position, if he saw fit, that the original documentation was inadequate if he considered that there were material omissions within the meaning of *Abdool*, supra. However, the reasonable purchaser is not entitled upon receipt of the reciprocal agreement to which reference is made in the original documentation to take the position that in light of the further disclosure made in the reciprocal agreement that the original documentation is no longer adequate. I agree with Mr. Storrey that in this case on the basis of the original disclosure documentation as compared to the reciprocal agreement, the issue for this court is whether or not the reciprocal agreement constitutes a substantial or material amendment to the disclosure documentation within the meaning of *Abdool*, supra, so as to provide the reasonable purchaser with a right of rescission under s. 52(2) of the Condominium Act. That issue in turn in my opinion stands to be determined by examining those matters which the defendants claim have been substantially amended and it is to that issue which I now turn.

[para36] I agree with the defendants contention that some of the matters found in the reciprocal agreement were not specifically adverted to in the disclosure statement and that to that extent it may be said that the reciprocal agreement contains "amendments". However, the disclosure statement was not intended to cover each and every matter contained in the reciprocal agreement and does in my view, in any event, provide a summary of the significant features of the reciprocal agreement while specifying that the reciprocal agreement will embellish or amplify those matters adverted in the disclosure documentation. It would have been abundantly clear that the disclosure documentation would be amplified by the reciprocal agreement and that the purchaser was being asked to accept disclosure for the purposes of s. 52 of the Condominium Act on that basis. Moreover, in my opinion, I agree with the submission of the plaintiff that none of the matters raised by the defendants can properly be considered to be "material" in the sense outlined by the Court of Appeal in *Abdool*, supra, such that a reasonable purchaser would regard any of the alleged changes or amendments as sufficiently important that they may not have decided in the first instance to proceed with the purchase. I do not accept that any of the amendments or changes that the defendants have referred to in the reciprocal agreement would substantially change a purchaser's anticipated use and enjoyment of the unit or would adversely affect the value of the unit so as to entitle the purchaser to rescind.

[para37] Moreover, on the facts of this case, it would appear quite evident that the defendant Farkas did not view the disclosure statement to be of significance to his objective of reselling the unit at a profit. On the other hand, the evidence is clear that Mr. Farkas examined the reciprocal agreement very carefully in an attempt to rescind the agreement of purchase and sale by attempting to locate material amendments to the disclosure documentation. There appears little doubt that this enterprise was motivated by a substantial decline in the value of condominium units and not by any concern on the part of the purchaser that the reciprocal agreement had affected changes depriving the purchaser of substantial use or enjoyment of the property or had occasioned a loss of value in the property. It must be clearly understood that in the circumstances of this case whether Mr. Farkas was a speculator or not is irrelevant to a determination of the first issue if the reciprocal agreement constitutes a material amendment to the disclosure documentation. I have found that none of the matters contained in the reciprocal agreement constitute a "material amendment" within the tent posited by *Robins J.A.* in *Abdool*, supra.

2. Does the reciprocal agreement constitute an unpermitted encumbrance?

[para38] Of relevance to the resolution of this issue is s. 20 of the agreement of purchase and sale which reads as follows:

20. The purchaser agrees to accept title to the purchased units subject to each and every of the following:

...

(g) a reciprocal agreement with respect to the commercial development for access, easements and other matters of mutual concern provided the title is good and free from all encumbrances except as herein provided the purchaser agrees to accept title subject to all restrictions, easements, conditions or covenants that run with the land and subject to all rights, licenses and easements now registered or to be registered for the supply and installation of telephone services, electricity, gas, sewers, water, television and/or cable facilities and other usual services and further subject to any registered agreements and the terms of the condominium documents in their final registered form. ... (emphasis added)

[para39] On this point I accept the defendants reliance upon the decision of the Divisional Court in *Valentini v. Reedco Wellington*, 69 O.R. (2d) 346, as standing for the proposition that the word "encumbrance" has a broad meaning which entails making lands subject to a charge or liability and that an encumbrance imposes obligations and potential costs on an owner.

[para40] I do not however accept the defendants' submission that in the circumstances of this case the words "and other matters of mutual concern" as they are found in s. 20(g) of the agreement of purchase and sale ought to be construed pursuant to the *ejusdem generis* principle so that the encumbrances would be confined to such things as licenses and rights of way since these are within the same class of items as easements and access. Rather, on this issue, I accept the plaintiff's submission that when the

agreement of purchase and sale is looked at in context, the ejusdem generis interpretation ought not to prevail. In my opinion, when properly viewed in the context of the entire agreement of purchase and sale, it would be evident to any reasonable purchaser that "other matters of mutual concern" referred to all necessary matters, including matters of cost, relating to the sharing of certain facilities between the condominium corporation and the owner of the commercial development. I am fortified in this interpretation by the evidence of Mr. Farkas who testified that the defendants knew or should have known that the reciprocal agreement was to deal with matters of mutual concern beyond matters such as access and easements. I am not persuaded that the reciprocal agreement is a document which confers unilateral benefits to the vendor only. Rather, I am prepared to find that, on balance, it deals with matters of mutual benefit to both the residential development and the commercial development including matters of costs and that it was these matters contained in the reciprocal agreement pertaining to the sharing of certain facilities between the residential and commercial development that were contemplated by the phrase "other matters of mutual concern" found in s. 20(g) of the agreement of purchase and sale.

3. Which of the defendants should be held liable?

[para41] It is the position of the defendants that because Mrs. Farkas signed as an agent of her principals, that is to say her husband, the defendant George Farkas, and Roman Gofman, the plaintiff must elect against which of the defendants to obtain judgment.

[para42] On this issue, in his evidence in chief, the defendant, Mr. George Farkas, made it quite clear that the true partners in the transaction were he and Mr. Gofman and that in signing the agreement of purchase and sale, his wife was doing so not only without knowledge, but also on behalf and under the direction of the defendant George Farkas. In such circumstances, I accept *Trident Holdings Limited v. Danand Investments Limited et al.* (1988), 64 O.R. (2d) 65, a decision of the Court of Appeal relied upon by the plaintiff, for the proposition that the principals directing the actions of a bare trustee are liable to third parties when the bare trustee is acting as an agent for those principals and under their direction. On the facts of this case, I am prepared to find that Mrs. Freda Farkas was acting as a bare trustee for her co-defendants and that as such the defendants George Farkas and Roman Gofman are liable notwithstanding that they did not sign the agreement of purchase and sale.

[para43] However, in respect of the liability of Mrs. Farkas, the plaintiff also relies upon the proposition that a bare trustee if held to be acting as an agent for other beneficiaries can also be liable where the agent also benefits as a principal in the transaction. In support of this proposition, the plaintiff relies upon *Dolly Varden Mines Limited (N.P.L.) v. Sunshine Exploration Limited et al.* (1967), 64 D.L.R. (2d) 283 where at pp. 295-297 the following is found:

It is, of course, clear that Sunshine Ex. did act in this matter as an agent of Sunshine Ex. did act in this matter as an agent of Sunshine but that does not mean it could not be liable as a principal if in fact it did act as a principal, and if the documents disclose an intention that it should so act, and be liable as a principal. ... From these cases it appears that an agent may be liable under a contract in place of or in addition to its principal and the question of his liability will depend in any given case upon a construction of the documents. ...

Furthermore, Sunshine is also liable for the performance of the covenants of the operator jointly and severally with Sunshine Ex. and as a guarantor of the covenants of Sunshine Ex. Such liability arises as far as Sunshine is concerned from the agency agreement which is executed by all of the parties and in so far as any variation was made in the terms of the principal agreement... (emphasis added)

[para44] On the facts of this case, the plaintiff submits that the defendant Freda Farkas was also going to directly benefit by this transaction by her taking title to a 50% undivided interest as tenant in common with Mr. Gofman and in addition she personally undertook the obligation to pay interim occupancy charges (ex. 1, tab 8).

[para45] In my opinion, the taking of title and the agreement to accept personal liability to pay the monthly occupancy charges is inconsistent with the defendant Mrs. Farkas acting solely as a bare trustee by signing the agreement of purchase and sale on behalf of her principals. Rather, these actions are consistent with her receiving a direct benefit from the transaction as a principal to that transaction. Consequently, I agree with the submission made by the plaintiff that the defendant Freda Farkas can also be held liable with the co-defendants and that the plaintiff accordingly is not obliged to elect whether to take a judgment against Freda Farkas or judgment against her co-defendants, George Farkas and Roman Gofman.

4. If the plaintiff had a duty to mitigate damages, did it discharge that duty?

[para46] At this stage, the plaintiff has, prior to judgment elected, if successful, to obtain his remedy for breach of the agreement of purchase and sale by way of damages and has thereby abandoned his claim to specific performance. Moreover, the plaintiff has conceded that the decision of the Supreme Court of Canada in *Asamera Oil Corp. v. Sea Oil & General Corp.*, [1979] 1 S.C.R. 633 is authority for the proposition that the mere assertion of a claim for specific performance does not oust the common law duty of the plaintiff to mitigate damages. The plaintiff does not seriously dispute that the plaintiff was required in this case to mitigate its damages and the action has properly proceeded on the footing that the plaintiff was required to mitigate damages as a matter of law.

[para47] The nature of the duty on the plaintiff to mitigate damages and the corresponding onus on the defendant to demonstrate that the plaintiff has not taken reasonable steps to discharge that duty has been set out by the Supreme Court of Canada in *Dobson v. Winton and Robbins Limited*, [1959] S.C.R. 775 as follows at p. 783:

In a common law action there is a duty upon the plaintiff to mitigate his damages and whether the course taken is a reasonable one is a question of fact; (*Mayne on Damages*, 11th Edition, pp. 147-8).

It is difficult to understand what more the plaintiff could have done in this case and he did adduce a considerable volume of evidence showing a reasonable attempt to mitigate his damages and, having done so, it is for the defendant to show that those steps were not such as a reasonable man would have taken in mitigating his damages and in disposing of the property; (*Mayne on Damages*, 11th Edition, p. 150).

[para48] In seeking to discharge the onus upon it to demonstrate an absence of mitigation on the part of the plaintiff, the defendant advances several specific omissions on the part of the plaintiff which the defendants submit are incompatible with any reasonable attempt at mitigation. In this respect the defendants submit that:

(a) the plaintiff failed to place the unit on an MLS listing until August 27, 1991; (b) the plaintiff failed to advertise the unit; (c) the plaintiff refused to deal with any inquiries in regard to the unit referring the matter to the defendants who at all times and in their Statement of Defence had stated that the agreement was at an end; (d) the plaintiff failed to sell the property in the late summer and early fall of 1990; and (e) the plaintiff failed to rent the property.

[para49] While I am prepared to acknowledge that Unit 310 was not listed on MLS until August 27, 1991, I am not prepared to find that this fact assists the plaintiff in establishing a lack of mitigation. In coming to this conclusion I have examined Ex. 3 which the plaintiff has filed in order to demonstrate the efforts he made to either rent or sell all of the units in the project. I accept the evidence of the plaintiff that prior to August 1991 he exposed all of the units including 310 to prospective purchasers through the listing broker, Royal LePage. In this respect, I accept Mr. Ezer's evidence that from time to time he listed two or three units in order to attract purchasers to the building and that he instructed the agents to show all of the units in the building, including 310, as available for either rent or sale. I am prepared to find that the fact that an offer to rent 310 was received in September 1990 and that an offer to purchase in December 1990 supports the evidence of Mr. Ezer. I am further prepared to find that Mr. Ezer made reasonable efforts to both rent and sell Unit 310 prior to August 31, 1991. The fact of listing in August of 1991 does not in my opinion detract from the reasonableness of the steps to sell or rent Unit 310 prior to that date.

[para50] With respect to the issue of advertising, Mr. Ezer testified that given the close proximity of the project to synagogues and in view of certain features of the project including Sabbath elevators, effort was made to reach the Orthodox Jewish community through advertising in the Canadian Jewish News as well as in other newspapers and other media both prior to and after May 1990 which is the date when the agreement for the defendants' purchase of Unit 310 was to have closed. I am prepared to find on the basis of the evidence of Mr. Ezer which is uncontradicted and which is confirmed by Exhibit 3, tab 6 and tab 10, that Royal LePage engaged in extensive advertising with respect to the units in the project and that Mr. Ezer also engaged in some advertising on his own. The defendant has not shown a failure to mitigate because of a failure to advertise.

[para51] The defendant submits that in refusing to deal with inquiries with respect to either the rental or sale of Unit 310 and further in referring such inquiries to the defendant, the plaintiff acted unreasonably in failing thereby to mitigate his damages. I do not accept this submission. The plaintiff was entitled to pursue its remedies by way of specific performance and could not unilaterally either rent or sell the unit without forfeiting its right to specific performance. While I appreciate that the defendant in turn had the right to insist that the agreement was at an end, I cannot accept that the plaintiff, by referring prospective purchasers or renters to the defendant, failed to mitigate his damages. On the contrary, in my opinion, the plaintiff acted reasonably in the circumstances by referring inquiries to the defendant. Such action was all that the plaintiff could reasonably do by way of mitigation and still preserve his right to specific performance. It should be noted that the defendant did not respond to either communication with respect to an offer to rent or an offer to sell. It is unfortunate that the offer to rent made on September 12, 1990 could not have been effected on a without prejudice basis as was the rental from March to November 1992. In my opinion, it was not incumbent upon the plaintiff to take the initiative to do so; by communicating the offer to rent in September 1990 and the offer to purchase in December 1990 the plaintiff took steps which were reasonable in the circumstances.

[para52] The defendant next submits that the plaintiff ought to have sold the unit for \$175,000 in the late summer and early fall of 1990. I accept the submission of the plaintiff that to do so would not have been compatible with mitigation but on the contrary would have been clearly improvident.

[para53] It should be noted that the defendant agreed to purchase the unit for \$391,900 but, prior to closing, the defendants themselves listed the unit for sale for \$357,000 in January 1990 and subsequently reduced the listing price to \$319,500 in March of 1990. It is obvious that the market was in a period of rapid decline and as was conceded by Mr. Farkas at trial, there were no purchasers in early 1990 or at the time of the alleged breach in May 1990.

[para54] I accept the evidence of Mr. Ezer who testified that Unit 404 which was sold in October of 1990 for \$270,000 when the extra parking space is factored out was comparable to Unit 310 when allowance is made for the respective size and locations of the units. I accordingly accept the evidence of Mr. Ezer that the offer of \$175,000 made for the purchase of Unit 310 was inordinately low and that it would have been improvident for the plaintiff to have accepted the offer. I accordingly find that the failure by the plaintiff to accept the offer does not constitute a failure to mitigate damages but on the contrary was a reasonable course of action in the circumstances. [para55] I moreover am prepared to find that the action of the plaintiff in communicating the offer to the defendant was a reasonable step compatible with mitigation in the circumstances. There were no further offers to purchase Unit 310 and in the context of the sale of only 3 of the units in the project between May 1990 and November 1992. I cannot say that the plaintiff acted unreasonably in refusing to sell the unit for \$175,000 in October 1990.

[para56] Finally, the defendant takes issue with the failure of the plaintiff to rent the unit in September 1990. I have already found that it was not unreasonable for the plaintiff not to unilaterally accept the offer made to rent the unit in September of 1990 because to have done so would have caused the plaintiff to lose the right to specific performance which the plaintiff was entitled to maintain. In my opinion, the plaintiff acted reasonably in communicating the offer to rent to the defendant and thereby reasonably discharged its obligation to mitigate the damages in all of the circumstances.

[para57] On all of the evidence, I cannot find that any of the alleged failings of the plaintiff viewed either individually or cumulatively assist the defendant in demonstrating that the plaintiff has failed to discharge his obligation to mitigate his damages. In the circumstances, I find that the plaintiff has taken all reasonable steps to mitigate his damages.

4. (b) What is the proper way to assess the plaintiff's damages and as of what date should the damages be assessed?

[para58] The defendant submits that damages ought to be assessed at the date of breach. The plaintiff however submits that in circumstances when the real estate market is declining the defendants ought not to be permitted to "cap" their liability but rather damages ought to be assessed at the date of trial in conformity with the principle that the plaintiff be put in the same position it would have been in if the breach had not occurred. I accept the position of the plaintiff which in my opinion is supported by the decision of Eberle J. in *Victoria Queen Investments Ltd. v. The Savarin Ltd.* (1979), R.P.R. 32. I accept as apt to the circumstances of this case what was stated by Eberle J. at p. 41-42:

There is an issue as to whether the second date is the appropriate date or not. The traditional date for assessing damages of this kind has been the date of breach. That would, in my view, be the end of June or early part of July 1976. There is no evidence of the value of the property at that time; though, from the evidence, I would conclude that it was worth more then than it was towards the end of 1977.

In support of its claim the defendant relies on the Pressure Concrete case, which I have referred to, which applied the date of assessment of damages, namely the trial, as the date on which to take the market value and therefore the Court ascertained the difference between that market value and the contract price.

There is another line of authority exemplified recently by the 100 Main Street case, supra, in which the date of assessment was not taken but the date of the breach.

It appears to me that the distinction between those two cases is whether or not the party in the position of the plaintiff has kept the contract alive following its breach or repudiation by the opposite party; i.e., kept it alive, as by asserting a claim for specific performance. That was done in the Pressure Concrete case; it was done in this case; it was not done in the 100 Main Street case.

In my view I should follow the Pressure Concrete case. It seems to me that not to do so would be to leave the defendant vendor, who counterclaims for damages, at the risk of the decline in value of the property after the date of the breach, and that to do so would not give the defendant proper compensation in damages, according to the principle that the damages should put that party in the position it would have been in if there had not been any breach of the contract.

[para59] In my opinion, it is appropriate to assess damages at the date of trial in the circumstances of this case.

5. What is the quantum of damages?

[para60] The plaintiff has filed as exhibit 5 in this proceeding a schedule of damages and a revised schedule of damages. The Revised Schedule of Damages is reproduced below:

REVISED SCHEDULE OF DAMAGES

Damages

Purchase Price	\$391,900.00	Occupancy Costs (etc.)	125,246.40	-----	\$517,146.40	Less Deposits	97,975.00	-----
419,171.40	Less Interest on deposits (see attachment)	23,387.58	-----	395,783.82	Less Value today	207,321.26	-----	
188,462.56	Add Real Estate brokerage fee to sell (5% of value today)	10,366.06	-----	198,828.62	Less Rental income			
(\$1,250 per month from May 1, 1992 to Nov. 1, 1992 = 6 x \$1,250)	7,500.00	-----		Total damages	\$191,328.62			

[para61] In my view, the general approach taken by the plaintiff to the calculation of damages is correct. However, I differ with the plaintiff as to the quantum of total damages as well as the quantum of some of the items involved in the calculations for reasons which I will outline.

[para62] In view of my finding that the Reciprocal Agreement does not constitute a "material amendment" to the disclosure documentation the defendant is not entitled to rescind the agreement of purchase and sale.

[para63] The purchase price is correctly taken from the agreement of purchase and sale to be \$391,900.00 and I am prepared to confirm this figure in the revised schedule of damages as properly due to the plaintiff with respect to the purchase price of Unit 310. [para64] The amount of \$125,246.40 with respect to occupancy costs is derived by the plaintiff by calculating \$3,913.95 per month by 32 months representing the time period from March 1, 1990 to November 1, 1992. The monthly amount for occupancy cost was agreed to by the parties to commence from the period of interim closing in October 1989. The defendants honoured their obligation by means of postdated cheques which were cashed by the plaintiff until the defendants ordered payment to be stopped in March 1990 on the basis that such payments were illegal "phantom mortgages". That argument has been formally abandoned. In my view, the defendants have been entitled to possession of Unit 310 from March 1990 to November 1992 and have been liable for the occupancy costs throughout this period. I confirm that \$125,246.40 is properly and correctly due to the plaintiff with respect to occupancy costs.

[para65] From this total amount of \$517,146.40 must be deducted \$97,975.00 which constitutes deposits made by the defendants in respect of the agreement of purchase and sale.

[para66] Also to be deducted is the amount of \$23,387.58 which constitutes interest on the deposits mandated by section 53 of the Condominium Act. The calculations of the amount is appended to the revised schedule of damages and the defendant takes no issue with it. I confirm that \$23,387.58 is properly deducted.

[para67] Also to be deducted is the value of the condominium unit today. The plaintiff has suggested four methods to calculate the amount value of Unit 310. The first is based on the sale of Unit 503 for \$165,000 in October 1992. Since the unit is 1,000 sq. ft. the plaintiff calculates that it was sold for \$165 a sq. ft. and that accordingly Unit 310 is worth (165 x 1,250 sq. ft.) \$206,250.00.

[para68] The first calculation does not take into account the two parking spaces allotted to Unit 310 and the second method which does take the parking spaces into account determines that the unit is worth \$213,750.00.

[para69] The third method is based on the sale in February 1992 of Unit 410 which is identical to Unit 310 and also has two parking spaces. The price for Unit 410 was \$220,000.00.

[para70] The fourth method is based on the current listing of Unit 201 at \$225,000. This unit is identical in size and parking amenities to 310.

[para71] The amount claimed by the plaintiff in the revised schedule of damages appears to be based on a calculation of current value by means of the first method, i.e. \$165 per sq. ft. While this method is based on current data, units 503 and 310 are not comparable either in size or location. In my view, this assessment of current value is too low bearing in mind that Unit 310 is bigger and has a preferable location as a corner unit with a southerly view.

[para72] The fourth suggested method of assessing the current value of Unit 310 is based on the current list at \$225,000 of Unit 201 which is identical in size and parking amenities to Unit 310. While Unit 201 is comparable as to size with Unit 310, it is not comparable as to location within the project. The southerly view favours Unit 310. Moreover, the list price of Unit 210 does not represent what a purchaser would be willing to pay.

[para73] I prefer to base the current value of Unit 310 on the third suggested method, i.e., on the purchase price of Unit 410.

[para74] While the estimate of current value of Unit 310 based on the purchase price of Unit 410 is less current than some of the other comparables, that estimate nevertheless is based on what a purchaser was willing to pay for an identical unit. In my view, the current value of Unit 310 is most fairly based on the purchase price of Unit 410 and accordingly I am prepared to deduct \$220,000 as indicative of the current value of the unit.

[para75] It follows that the brokerage fee to sell the unit, which I agree ought to be included will be calculated at 5% of \$220,000.

[para76] Finally, I accept that the rental income from May 1, 1992 to November 1, 1992 in the amount of \$7,500 as calculated in Ex. 5 ought also to be deducted.

[para77] I have accordingly proposed a schedule of damages as follows:

Damages

Purchase Price	\$391,900.00	Occupancy Costs (etc.)	125,246.40	-----	17,146.40	Less Deposits	97,975.00	-----
	419,171.40	Less Interest on deposits	23,387.58	-----	395,783.82	Less Value today	220,000.00	-----
							175,783.82	Add Real
		Estate brokerage fee to sell (5% of value today)	11,000.00	-----	186,783.82	Less Rental income (\$1,250 per month from May 1, 1992 to Nov. 1, 1992 = 6 x \$1,250)	7,500.00	-----
								Total Damages
								\$179,283.82

[para78] There shall be judgment for the plaintiff in the amount of \$179,283.82 with costs of the action.

[para79] There shall be an order for pre-judgment and post-judgment interest in accordance with the Courts of Justice Act.

THEN J.

CBR# 313

Strata Plan 1261 v. 360204 B.C. Ltd.

Between The Owners, Strata Plan 1261, plaintiff, and 360204 B.C. Ltd. and Alan Wilson, defendants

[1995] B.C.J. No. 2761

Vancouver Registry No. C953575

British Columbia Supreme Court Vancouver, British Columbia (In Chambers) Thackray J. Heard: October 23 and 24 and November 29, 1995. Judgment: filed December 22, 1995.

Counsel: F.E. Verhoeven and E.G. Wong, for the plaintiff. B.A. Meckling, for the defendant, 360204 B.C. Ltd.

[para1] THACKRAY J.-- The plaintiff applied pursuant to Rule 18A of the Rules of Court for an order that a Parking Garage Agreement relating to a condominium project is void. The motion asks for a declaration voiding the contract between the plaintiff and the defendant 360204 B.C. Ltd. (the "defendant"), dated July 14, 1989 and described as an "Exclusive Use Agreement for Residential Parking Stalls (the "agreement").

[para2] By way of relief the plaintiff asked for an accounting of all money received by the defendant, an order for occupational rent, interest and costs and an interlocutory injunction against the collecting of further rent by the defendant.

A. BACKGROUND

[para3] The plaintiff Strata Corporation came into existence pursuant to Section 13 of the Condominium Act R.S.B.C. 1979, c.61 (the "Act") on March 15, 1983.

[para4] The defendant was a wholly owned subsidiary of Mastercraft Development Corporation (now called XMDC Corporation) which in turn was one of the Mastercraft Group ("Mastercraft"). At all material times the directors were Mr. John Greenberg, Mr. Bruce Greenberg and the defendant Mr. Alan Wilson.

[para5] The building to which Strata Plan 1261 relates is known as The Ocean Terrace Landmark located in Sidney, British Columbia. There are 83 residential suites and 14 commercial premises. There are 101 parking spaces in the building all of which are designated on the Strata Plan as "limited common property" and "limited for the use of strata lots 15 to 97". That is, for the residential suites.

[para6] In 1988 Orange Elk Industries Ltd. owned the residential units which were leased to a variety of tenants and investors. T-West Estates Ltd. owned all of the commercial units. Orange Elk and T-West held their titles to the units on behalf of T-West Estates Limited Partnership. Mastercraft, through Mastercraft Investments Corporation ("M.I.C"), negotiated a purchase of the building. Two sale agreements dated October 4, 1988 were entered into, one of which pertained to all the residential units.

[para7] Mastercraft intended to market the residential units through Ocean Terrace Landmark Partnership (the "partnership") which was created by Mastercraft. Mastercraft assigned its rights in the residential units sale agreement to the partnership by way of an agreement dated May 14, 1989. Forty four of the units were conveyed to the partnership. The remaining 39 were conveyed directly from Orange Elk to individual purchasers.

[para8] The partnership marketed the residential units with the aid of an Offering Memorandum dated May 15, 1989. It provided, in part, as follows:

"The purchase of Condominium Units offered hereby does not include title to a parking space but residents of the Condominium Units will have the right to lease a parking space on a month to month basis at prevailing market rents, currently \$30 per month per space. The Condominium Corporation manages and administers these parking spaces and will lease them at nominal rent to Mastercraft Investments Corporation for a term of 3 years, which term shall be extended on the same basis upon receipt of all required government approvals.

[para9] The 39 direct purchasers entered into a Purchase Agreement dated May 16, 1989 which provided as follows:

The Purchaser acknowledges and agrees that the parking stalls located in the building may be leased by the Vendor from the strata corporation for a three (3) year term from July 15, 1989 and the Vendor may sub-lease any parking stall to any person at and for a price to be agreed upon between the Vendor and such person. The Purchaser acknowledges that no interest of any nature whatsoever in any parking stall is included in the purchase price of the condominium unit purchased by the purchaser pursuant to this Agreement and that at the end of the said three (3) year lease the Vendor may apply to have any parking stalls designated as separate strata lots. The Purchaser shall do all things necessary to permit such designation and the transfer of title to and use of the said parking stall to the Vendor by the Strata Corporation.

[para10] This agreement further acknowledged that the purchaser was not to be a tenant but rather was buying for investment purposes.

[para11] On July 14, 1989 the transaction completed. The residential units were transferred from Orange Elk to the partnership and its trustee 360203. The defendant says that as part of the closing the plaintiff entered into a Condominium Management Agreement that retained M.I.C. as its condominium manager with authority to act in its name. The defendant Wilson carried out M.I.C.'s duties under this agreement.

[para12] The parking garage agreement provides that the defendant, in consideration of \$10, has a "contractual licence for the exclusive use and enjoyment of all of the parking stalls ... in the building ... for 99 years." The defendant Wilson signed the agreement and affixed the common seal of the plaintiff. From July, 1989 to March, 1993 he was the senior property manager of Mastercraft. Mr. Wilson deposed that as such he was responsible for the administration and management of the plaintiff's affairs

and of the building. Further, that in the closing of the sale of the building to Mastercraft he was appointed by M.I.C. "to carry out its duties".

[para13] Mr. Wilson further deposed that "in conjunction with the closing" the partnership, 360203 and the defendant "appointed me as their duly authorized representative and agent to act on their behalf in connection with the management of the Strata Corporation's affairs and the Landmark Building." Mr. Wilson said that he executed the parking garage agreement "on behalf of the Strata Corporation."

[para14] Mr. Bruce C. Greenberg, a director of the defendant, executed the agreement on behalf of the defendant. He deposed that Mr. Wilson executed the parking agreement on behalf of the plaintiff at the direction of and as the representative of the partnership, 360203 and the defendant. Further, that M.I.C. appointed Mr. Wilson as its representative responsible for carrying out its duties under a Rental Management Agreement which provided that the agent may enter into contracts and agreements in the name of and on behalf of The Owner as may be necessary in the performance of such duties.

[para15] The first meeting of the owners of the Strata Corporation was held on May 18, 1990. Minutes of an Annual General Meeting of that date indicate that Mr. Wilson was elected as a director.

[para16] The original sale/purchase agreements between the partnership as vendor and the original purchasers/investors provided that the purchaser agreed to purchase a certain strata lot "together with an interest in the common property in proportion to the unit entitlement of the Strata Lot as shown on Form 1 (herein called the "Unit").

[para17] In accordance with s.101 of the Act each residential unit's share of the common property, including the parking garage, is assessed and taxed together with each strata lot. The owners of the units thereby pay the property taxes on the unit and the common property. The plaintiff pays the maintenance expenses and insurance premiums on all of the common property as required by s. 54 of the Act.

[para18] All 83 residential units were sold by February, 1990. Many of the original investors have sold their residential units. Twenty two are still owned by the original investors. Fourteen of these continue to participate in a rental pool and have their tenants pay parking fees to the defendant.

[para19] In a letter dated May 6, 1993 the plaintiff notified the defendant that it wished a termination of the agreement. Following a preamble, Mr. Newton, Council Chairman, said:

Thus, the Strata Council proposes that the owners and company agree to terminate the contract, and further agree that the Strata Council would, in this event, not seek to recover rents that have already been paid.

[para20] In a letter dated June 2, 1993 the defendant's solicitors declined the proposal. The letter said that the defendant had "made full disclosure of the existence of the Agreement to original purchasers of strata lots in the development." Reference was then made to the wording in the Offering Memorandum of May 15, 1989.

[para21] This was the first challenge by residential unit owners residing in the building, or tenants or investors, regarding the monthly rental charges for parking. The defendant submitted as follows:

The Strata Corporation seeks to set aside an agreement which it and 360204 performed for 4 years without a hint of controversy and recover monies it expressly permitted 360204 to collect with full knowledge of its options. This, it cannot do.

[para22] The plaintiff contends that the parking garage agreement was kept under wraps by the defendant. The defendant submits that "parking arrangements" were "a notorious fact." (Defence counsel said that he used the word "notorious" to mean "well known".)

[para23] On September 16, 1993, at an Extraordinary General Meeting, the plaintiff passed a special resolution that reads, in part, as follows:

Resolved September 16, 1993, as a Special Resolution, that the Council, in its discretion, pursue the termination of the [parking garage] contract ... on behalf of the owners of strata lots 15 to 97, and that such action may include cancellation of the contract under section 17 of the Condominium Act, or whatever action the Council deems advisable ... Only the owners of strata lots 15 to 97 may vote on this resolution.

[para24] The last sentence may explain why the defendant did not receive notice of the meeting.

[para25] On October 26, 1993 the plaintiff's then solicitors wrote to the defendants' solicitors. The letter contains the opinion that the parking garage agreement is invalid. The letter goes on to detail the "difficulties" that the agreement faced relative to the Act. It reads in part as follows:

1. Section 17 [of the Act] says that a contract entered into by a strata corporation which provides for control, management or administration of the common property (which includes limited common property) shall be limited to matters affecting security and maintenance. This Agreement certainly affects the control of the common property in question, however, it is not limited to security and maintenance. As it purports to deal with exclusive use of the common property, it appears to be ultra vires.

2. The Agreement purports to deal with the common property separately from the strata lots of the owner, which is contrary to the principles of the Condominium Act.

3. The Agreement may be in breach of the general duty owed to act in the best interests of the strata lot owners, and for their benefit.

4. The Agreement purports to amend the strata plan that was registered in the Land Title Office. In that plan, the owner-developer designated the limited common property in question for the use of the owners of strata lots 15 to 97. Such a designation cannot be changed without the appropriate resolution of the owners registered in the Land Title Office. We refer you to Section 53(6) which says that "a resolution ... removing, adding to or altering the designation ... has no effect after May 17, 1978 unless a copy of the resolution is filed in the Land Title Office."

5. Section 58 requires a unanimous resolution to amend a designation of limited common property. It does not appear that the proper procedure was followed in this case.

6. Section 17 of the Condominium Act also states that a contract providing for the control, management and administration of the common property may, by special resolution of the corporation, be cancelled on three months notice.

[para26] Immediately following this the letter advises of the special resolution cancelling the agreement and gives "formal notice" under s. 17 of the Act of the cancellation as of January 31, 1994. The letter concludes as follows:

We have given instructions to the Regional Group to remit all funds owing under this contract to you up to and including the time of termination.

[para27] By a letter dated April 26, 1995 the plaintiff advised the defendant that if the parking agreement was still in existence it had been breached by the defendant. The alleged breach was in renting parking stalls to persons who were neither owners or tenants of the residential units.

B. ISSUES

[para28] The plaintiff submitted that the parking garage agreement:

(a) is void in that:

(i) It is contrary to numerous provisions of the Act; and

(ii) There is no authority on behalf of the Strata

Corporation to enter into it; or

(b) alternatively, the parking garage agreement has been terminated.

[para29] The defendant submitted that the letter of October 26, 1993 led it to believe that the plaintiff was abandoning its position that the agreement was invalid, especially in that the rent continued to be paid to the defendant. This letter is indeed a mixture of notification of a void contract and notice of a cancelled contract. However, I will not disallow the plaintiff from asserting a void contract simply because of this letter.

[para30] The defendant submitted that there is no need for the Court to decide upon the alleged breaches of the Act. It bases this upon the suggestion that for the Court to interfere in this matter would be unjustified judicial interference with a commercial transaction.

[para31] The defendant says that even if the Court finds that the agreement is a lease, as submitted by the plaintiff, it should not release the plaintiff from a commercial arrangement acted on by both parties. It said that "To do so would frustrate the business intent of the transaction and result in the unjust enrichment of the Strata Corporation and its constituent Owners at the expense of 360204."

[para32] The defendant relies upon the words of the Saskatchewan Court of Appeal in Condominium Plan No. 86-S-36901 (Owners) v. Remail Construction (1981) Inc. (1992) 84 D.L.R. (4th) 6 (Sask. C.A.):

The judge took too narrow a view of the common law and the provisions of the [Condominium Property] Act. The common law developed by adapting to new situations as they arose, and the common law must adapt to accommodate condominium regimes. Similarly, the provisions of the Act must be interpreted in light of the realities of what actually happens in relationships between developers, purchasers and condominium corporations.

[para33] The defendant further contends that even if there are contraventions of the Act the agreement is not automatically void. It said that "Our courts will be slow to set aside a commercial agreement simply on the basis that it may infringe governing legislation if such a result frustrates the commercial intent of the parties." It takes this from Dodge v. Eisenmann (1985), 23 D.L.R. (4th) 711 (B.C.C.A.) at 721-722:

"I think this to be a case where it cannot be said that the whole object of the contract was to violate the regulation. I do not think there was any intention to do so. To hold otherwise would be to fail to give to the agreement the commercial effect which the parties intended. Illegal contracts are not enforced as a matter of public policy. There is nothing in this contract, or in the circumstances of this case, upon which to base a conclusion that this arrangement offended public policy.

[para34] The defendant's submission is that the Strata Corporation entered a contract for the benefit of its members for which there was consideration. This, according to the defendant, is acknowledged in the Purchase Agreement of May 16, 1989 that provides as follows:

The Purchaser acknowledges that no interest of any nature whatsoever in any parking stall is included in the purchase price of the condominium unit ...

[para35] Further, the defendant points out, the definition of "revenues" in the Offering Memorandum reads:

Revenues shall mean all rents, receipts, payments and other charges payable by tenants or otherwise in connection with the Unit (which, for greater certainty, excludes any rental payments for parking spaces).

[para36] I agree with the general assertions of the defendant regarding judicial interference in commercial bargains. As was said by Madam Justice Southin in Wolf Mountain Coal Limited Partnership v. Netherlands Pacific Mining Co. Inc. (1988), 31 B.C.L.R. (2d) 16 (S.C.):

An essential purpose of written instruments is the prevention or, at least, easy resolution, of differences. The legal system does not well serve the important commercial interests of the province if it plays fast and loose with the law of contract.

[para37] However, the courts must intervene in a commercial transaction if there are elements that are illegal, contrary to public policy or contrary to relevant statutory provisions. For instance, if the agreement is a lease and thereby divests the owners of equity contrary to the Act, the Court might have to "interfere". As was said in *Dodge*, supra, "Illegal contracts are not enforced as a matter of public policy."

[para38] The concept of limited judicial intervention is simply a principle designed to remind the courts that they should proceed cautiously in becoming involved in commercial transactions. I will therefore proceed to consider the various breaches alleged by the plaintiff.

1. Rental of Parking Stalls to Non-Residents

[para39] The plaintiff alleges that the parking garage agreement was terminated by the plaintiff effective April 26, 1995 as a result of the defendant's breach in renting parking spaces to persons who were neither residential owners or residential tenants in the building. It says that the agreement makes no provision for assigning or sub-contracting the defendant's rights to "any other party".

[para40] The defendant rented parking spaces to some of its commercial tenants and to others who had no direct connection with the building. The agreement provides that the defendant may assign or sub-contract its rights to the exclusive use of the parking stalls "to such owner ... as the Company [defendant] may in its sole discretion determine." It also states that the plaintiff will not interfere with "any assignee or sub-contractors use and enjoyment of any of the Parking Stalls."

[para41] While the agreement is silent as to whether or not an assignment or sub-contract of rights may be made to other than owners, the essence of the agreement suggests that it was not meant to be as restrictive as suggested by the plaintiff. The preamble states that the plaintiff "has determined to grant to the Company a contractual licence for the exclusive use and enjoyment of all of the parking stalls ...". This is repeated in the body of the agreement which further provides that the exclusive use shall be for 99 years.

[para42] Furthermore, I am of the opinion that if such rentals are a breach of the agreement they are not fundamental to the contract. Therefore, they do not operate as a repudiation of the contract by the defendant nor allow the plaintiff to terminate the contract.

2. Section 17

[para43] The plaintiff submits that the agreement was terminated by the plaintiff effective January 31, 1994 pursuant to section 17 of the Act. This section reads as follows:

A contract entered into by a strata corporation providing for the control, management and administration of the common property, common facilities or the assets of the strata corporation shall be limited to matters affecting the security and maintenance of the common property, common facilities or the assets of the strata corporation and, without either party to the contract incurring any liability for breach,

- (a) may be cancelled on 3 months' notice at the option and discretion of the owners, by special resolution of the corporation; or
- (b) may be cancelled on 3 months' notice by the management company or manager.

[para44] I am of the opinion that the failure of the plaintiff to give to the defendant notice of the extraordinary general meeting is fatal to its claim under this section. The purported special resolution of September 16, 1993 is of no force or effect.

[para45] Further, section 17 is intended to permit strata corporations to cancel agreements with management companies. The section is not designed to give strata corporations a method of backing out of commercial contracts.

3. Sections 5 and 12

[para46] Section 5 requires that areas such as garages and parking spaces "shall not be designated as separate strata lots but shall be included as part of the strata lot or as part of the common property." Pursuant to section 4 the strata plan shall show the approximate square footage of each strata lot, including the spaces referred to in section 5.

[para47] Section 12.(1) provides that the common property, common facilities and other assets of the strata corporation "shall be held by the owners as tenants in common in shares proportional to the unit entitlement of their strata lots." Section 12.(2) provides that "a share in common property, [and] common facilities ... shall not be dealt with separately from the strata lot of the owner." Section 12.(3) states that the Registrar of Land Titles "shall show on every indefeasible title for a strata lot the owner's share in the common property created by that plan."

[para48] The Act makes it clear that common property is an integral part of the strata and cannot be separated from it except in accordance with the Act. The defendant says that there is no extinguishment, separation, alienation or disposition of the plaintiff's proprietary interest in the parking stalls: "This is why there is nothing on the title." It says that section 12.(2) provides only that "a share" in the common property shall not be dealt with separately. It interprets this as being no more than a bar to an owner selling a share in the common property separate from an interest in the strata lot.

[para49] This, the defendant says, "does not prevent the valid grant of contractual rights over the common property" and refers to sections 20.(1), 57 and 58 of the Act which provide for the disposition of common property. The defendant thereby submits that section 12 does no more than recognize the special nature of condominium schemes and that an owner holds title to both the strata lot and the common property and that a sale of the strata lot will transfer the interest in the common property as well.

[para50] In my opinion the agreement alters the extent of the common property over which an owner has rights. Indeed, Mr. Greenberg, a director of the defendant, deposed that purchasers "had no rights to the Parking Stalls." The plaintiff contends that

this is not in keeping with the legislative intention as articulated by Dennis J. Pavlich in *Condominium Law in British Columbia*, Butterworths, 1983, p.3:

What is innovative is the comprehensive nature of the statutory law that gives effect to a condominium title. Besides introducing a novel means of subdividing land, the [Act] gave birth to a unique property-law regime in British Columbia. It did so by formally legislating a title which, broadly speaking, consists of an estate ... in respect of a described part of a building ... coupled inextricably with an undivided interest as a tenant in common in respect of the remaining ("common") areas (either in the form of land, air space, facilities or buildings). Under s. 12(2) it is made clear that an owner cannot separate these two interests and deal with them individually.

[para51] The concept of the common areas being "coupled inextricably" with the title to the strata lots is undoubtedly correct. However, that principle must be taken in conjunction with those sections of the Act that specifically provide for the disposition of common property. Consequently, the common property is capable of disposition provided it is not "designated as a separate strata lot" and provided, of course, that the disposition is done in accordance with the Act.

[para52] The principle of "inextricably linked", if applied to section 5, would suggest that the removal of the parking garage would not save the agreement from being in breach of that section. The agreement, being either a lease or a licence affecting a portion of the common property in a manner tantamount to a lease, does not comply with the "all-inclusive" legislative intent envisaged by section 5.

[para53] Furthermore, the original sale purchase agreements provided that the purchaser agreed to purchase a strata lot "together with an interest in the common property in proportion to the unit entitlement of the Strata Lot as shown on Form 1." The "proportionality" no longer conforms to the entitlement as described in the Land Title Office.

[para54] However, the defendant says that if the proper procedure had been followed the parking garage could have been legally carved out from the rest of the common property. The defendant concedes that "Strata Plan 1261 has not been amended to remove the designation of limited common property for the parking garage." It says that the defendant's "ability to rectify any [such] deficiencies with respect to parking arrangements at the Landmark Building has long since passed."

[para55] The plaintiff concedes that "Pursuant to Section 57(1) and Section 58, the designation of limited common property could have been removed, and the strata plan amended accordingly" Consequently, in that the parties agree that the garage could have been severed from the common property, I will not base this judgment upon my view that soundness of the "inextricably linked" principle produces a breach of section 5.

4. Is the Agreement a Lease or a Licence? [para56] The plaintiff contends that the agreement is a lease of a part of the property and thereby a disposition thereof. It grants to the defendant the exclusive use and enjoyment of the parking garage for a period of 99 years. The owners continue to pay taxes, insurance and maintenance costs but have been divested of the usual rights of owners.

[para57] The defendant submits that the agreement has few of the features of a lease and is not a lease. The defendant says that it "has no right to regulate access to the garage, has no provision for monthly rent, is not permitted to make improvements or alter the garage and has none of the remedial rights available to lessees." Its only recourse for a breach or wrongful revocation would be to sue for damages.

[para58] Furthermore, the defendant points out, the owners pay the taxes on the garage and pay for maintenance to protect it from deterioration. This, it says, supports its contention that the agreement is but a licence and does not dispose of common property.

[para59] There is no doubt but that the words of the agreement purport to make it a licence. The preamble states that the plaintiff "has determined to grant to the Company a contractual licence for the exclusive use and enjoyment of all of the parking stalls ...". Paragraph 1 states as follows:

The Strata Corporation hereby grants to the Company a contractual licence to the exclusive use and enjoyment of the Parking Stalls for a period of Ninety-Nine (99) years ..."

[para60] The question is whether or not these are just words or are matters of substance. The words that are used are not determinative of the issue. In *Megarry & Wade's The Law of Real Property*, 5th ed., 1984, the authors state at page 623:

The distinction [between licences and leases] is thus governed by the situation created by the parties rather than by their expressed intentions.

[para61] The plaintiff relies upon *Brockville v. Dobbie & Ritchie* [1929] 3 D.L.R. 583 (Ont.S.C., Appellate Div.). The trial judge said that the documents did not have the ear-marks of a lease. He then listed the "ear-marks" which included an exclusive right to possession. That is, the right to exclude all other persons from the property. On appeal the Court said at page 590:

The test of whether a document is a lease appears to depend on whether it confers a right of exclusive occupation. It is not, however, a question of words but of substance. If the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself." *Glenwood Lbr. Co. v. Phillips*, [1904] A.C. 405, at p. 408.

[para62] The threshold question is whether a grant of exclusive use amounts to the granting of property rights. In *Reilly v. Booth* (1890), 44 Ch. D. 12 (C.A.), Lopes L.J. stated at page 26:

In the deed of 1839 certain parcels are conveyed to Wimbush which beyond all question he takes absolutely, and then follow these important words: 'Together with the exclusive use of the said gateway into Oxford Street ...'. Now what passed in respect of this gateway? ... I think ownership passed. The exclusive use of a piece of land, I take it, beyond all question passes the property or ownership in that land ...

[para63] A similar result occurred in *R. v. N.T.C. Smokehouse* (25 June 1993), Vanc. Reg. No. CA011962 (B.C.C.A.). One of the questions the Court faced was whether a certain section of legislation gave the band "exclusive use and enjoyment" of all fishing privileges in the river fronting the reservation. The Court held that the section granted the Band an interest in land with regard to the river.

[para64] In *The Owners: Condominium Plan Number 752-1207 v. Terrace Corporation (Construction) Ltd.* (1980) 14 Alta. L.R. (2d) 24 (Q.B.), appeal at (1983) 43 A.R. 386, the facts are strikingly similar to the case at bar. The agreement in that case was for 46 parking stalls for 99 years. It appears that it was not contested but that the agreement was a lease.

[para65] In *North American Life Assurance Co. v. Canada Mortgage and Housing Corp.* (30 September 1994), Q.B. No 1672 (Sask. Q.B.), the Court agreed that the grant of "exclusive use and enjoyment" of one-half of the parking stalls in a condominium tower was a lease.

[para66] It can be seen that the courts have traditionally been concerned with the substance of a contract, not the form. In my opinion the parking garage agreement passed property rights in the parking stalls to the defendant. Hence, it must follow that the agreement is a lease.

[para67] In contrast, which helps to distinguish between a lease and a licence, the contracts granting use of the parking stalls to those who rented from the defendant are licences.

5. Sections 20 and 58

[para68] Section 20.(1) of the Act reads:

The owners may, by special resolution, direct the strata corporation to dispose of all or part of its common property or assets, and, without limiting the generality of the foregoing, may direct the strata corporation to grant an easement or a restrictive covenant burdening the common property included in the strata plan.

[para69] Pursuant to subsections of section 20 a proper instrument must be executed and, if presented in a land title office for registration, shall be accompanied by a sealed certificate that the appropriate resolution was passed.

[para70] Sections 57.(1)(c) and 58 of the Act are as follows:

57.(1) A strata plan may be amended to ... (c) remove a designation of limited common property designated on the strata plan;

58. The owners may, by special resolution, direct the strata corporation to amend the strata plan under section 57.(1)(c).

[para71] In my opinion the agreement is a lease. However, even if I am wrong in so classifying the agreement, it is nevertheless a disposition. In either case it requires a special resolution pursuant to section 20.(1) of the Act. The agreement also removes the designation of "limited common property" as shown on Strata Plan 1261. Section 58 of the Act requires a "unanimous resolution" of the owners to effect such a change in designation. This was not done and is a breach of the requirements of the Act.

6. Section 130

[para72] Section 130 of the Act provides that the common seal of a strata corporation shall not be used except by authority of the council and in the presence of at least two council members who shall sign every instrument to which the seal is affixed. The plaintiff contends that Mr. Wilson was not authorized to use the seal or to sign the agreement on behalf of the plaintiff.

[para73] The plaintiff relies upon the following words of Osler J. in *York Condominium Corporation No. 162 v. Noldon Investments Ltd.* (1977), 1 R.P.R. 236 (Ont. H.C.J.):

In the circumstances attendant upon the formation of a condominium, however, at a time when the developers are the sole members of the board of the condominium and are in a position essentially to contract with themselves and to subcontract to other related corporations, it is essential in the interest of the non-developer owners, present and future, that contracts of such a nature be attended by the proper formalities and made available to interested members of the public as required by the Act.

[para74] Mr. Justice Osler found the formalities were not complied with and, therefore, declared a contract ultra vires.

[para75] The defendant does not take issue with plaintiff's position that the seal of the plaintiff was not affixed in accordance with the Act. Rather, the defendant says that "Mr. Wilson possessed all the necessary authority under the Condominium Management Agreement, Rental Management Agreement and as the appointed representative of the owners to execute the agreement."

[para76] The matter of the use of the seal is not a significant issue. The significant issue is whether or not Mr. Wilson had the authority to sign the agreement on behalf of the plaintiff.

[para77] The plaintiff stated as follows in his brief:

Wilson was not authorized by the Strata Council to use the Strata Corporation's common seal or to sign the Parking Garage Agreement on behalf of the Strata Corporation. In fact, there was no Strata Council in place at the time the Parking Garage Agreement was signed on July 14, 1989. There is no record of any resolution of the Strata Corporation or of the Strata Council before or after July 14, 1989 authorizing Wilson to sign the Parking Garage Agreement. For all these reasons, the Parking Garage Agreement is void.

[para78] Deposition evidence was filed in support of the above information and submissions.

[para79] The defendant referred to affidavit evidence and documents to support its submission that Mr. Wilson had the authority to sign the agreement on behalf of the plaintiff. The defendant says that at the Closing on July 4, 1989 the plaintiff "engaged M.I.C. as its condominium manager and agent to manage all aspects of its affairs with full authority to act in its name (the "Condominium Management Agreement"). Further, that Mr. Wilson carried out M.I.C.'s duties under this agreement.

[para80] Mr. Greenberg deposed in his affidavit that the Strata Corporation engaged M.I.C. by way of a "Condominium Management Agreement" as its condominium manager and agent to manage all aspects of the Closing. He said that Mr. Wilson executed the Parking Garage Agreement on behalf of the Strata Corporation in this capacity "as well".

[para81] With reference to the Condominium Management Agreement, Mr. Greenberg referred to the Offering Memorandum that provides that "The Condominium Corporation has entered into a management agreement with the Condominium Manager to manage the common property of the strata plan for a 5 year term." It further states:

Pursuant to the Condominium management agreement, the Condominium Manager will be entitled to act in the name of the Condominium Corporation as may be necessary for the performance of the Condominium Corporation's duties under the Condominium Act and the by-laws.

[para82] However, the plaintiff is not a party to the Offering Memorandum.

[para83] Mr. Wilson deposed that from July, 1989 to March, 1993 he was the senior property manager of Mastercraft "responsible for the administration of the Plaintiff's affairs". Further, that M.I.C. was "engaged" by the plaintiff as its condominium manager with respect to "all aspects of its affairs" and that M.I.C. "appointed me as their duly authorized representative and agent" regarding the building.

[para84] In his affidavit Mr. Wilson said that he executed the agreement "on behalf of the Strata Corporation." He deposed that as well as his authority under the Condominium Management Agreement he "was also responsible for managing the Residential Units on behalf of the Investors pursuant to the rental management agreement."

[para85] Mr. Greenberg alluded to authority allegedly given to Mr. Wilson under the "Rental Management Agreement." He said that M.I.C. appointed Mr. Wilson as its representative to carry out its duties under this Agreement which provided that Mr. Wilson may enter into contracts in the name of the Strata Corporation.

[para86] The Rental Management Agreement is attached as a Schedule to the Agreement(s) of Purchase and Sale. The Agreements are between Ocean Terrace Landmark Partnership as vendor and individual owners. The Schedule, entitled Optional Rental Management Agreement, is between the individual owner and M.I.C. as agent. It provides as follows:

2.1 The Owner [individual owner] hereby engages and appoints the agent to be its sole and exclusive representative and managing agent to manage for and on behalf of the Owner and within the provision of this Agreement the Unit and to act on behalf of the Owner in carrying out the duties as hereinafter set out and subject to the provisions of this Agreement to enter into such contracts and agreements in the name of and on behalf of the owner as may be necessary in the performance of such duties.

[para87] In spite of all of the references to the authority of Mr. Wilson under the Condominium Management Agreement, it was not until Mr. R. Todd, a member of the Strata Corporation since 1993 and on the Strata Council since January 1995, said that "In searching the files of the Strata Corporation, I did not find any such agreement" that the defendant conceded that there is no such agreement.

[para88] These agreements and alleged agreements call to mind the words of Osler J. in York Condominium, supra, regarding the care which must be exercised by developers in the early stages of a development and at a time when they are contracting with themselves. In the case at bar it is not possible to find a line of authority to Mr. Wilson.

[para89] The defendant says that any defects in Mr. Wilson's appointment are cured by section 122.(3) of the Act which reads as follows:

All acts done in good faith by the council are, notwithstanding it is afterwards discovered that there was some defect in the appointment or continuance in office of a member of the council, as valid as if the member had been duly appointed or had duly continued in office.

[para90] We are not concerned here simply with some "defect in the appointment" of Mr. Wilson. Section 122.(3) can have no application to the situation which has been discussed in this segment of the reasons.

[para91] I find that Mr. Wilson was not authorized to contract on behalf of the owners.

7. Sections 14 and 116.(a)

[para92] Section 14 provides that the Strata Corporation is responsible for the enforcement of the bylaws, and the control, management and administration of the common property, common facilities and assets of the Strata Corporation.

[para93] The plaintiff contends that the parking garage agreement is contrary to these sections by surrendering control, management and administration of the parking garage to the defendant. The defendant countered that the plaintiff did not abandon its "responsibility" for the common property. Rather, it expressly granted rights over the parking. This, according to the defendant, is authorized by section 121 of the Act. Section 121.(c) provides that the council may delegate to members "those of its powers and duties it thinks proper".

[para94] What was done by the plaintiff in this regard was an abdication of some of its responsibility to manage the common property. However, this is probably acceptable within the Act provided it is done in accordance with the provisions of section 116.(a). Section 116.(a) states that the strata corporation shall control, manage and administer the common property for the benefit of all owners.

[para95] The plaintiff says that the surrendering of management and control by way of the agreement was not for the benefit of all of the owners but for the exclusive benefit of the defendant and Mastercraft: "The Strata Corporation may not abandon its obligations to control, manage and administer the common property: see Jacklin and others v. Proprietors of Strata Plan No. 2795 (1975), 15 N.S.W.L.R. 15 (Equity Division)".

[para96] The defendant says that the plaintiff, at the time of the execution of the parking garage agreement, consisted of the partnership and the defendant and that "They expressly consented and authorized the execution of the Parking Garage Agreement by Mr. Wilson on their behalf. ... In circumstances such as these, the retention of parking rights under the Parking Garage Agreement is unassailable." In support the defendant cited Carleton Condominium Corp. No. 106 et al. v. Mastercraft Development Corp. Ltd. (1995), 15 D.L.R. (4th) 733 (Ont.C.A.).

[para97] The defendant thereby says as follows:

Each investor knew they were acquiring no rights to the parking and had engaged M.I.C. as their agent with complete authority to act in their name and the name of the Strata Corporation. M.I.C., through Mr. Wilson, did no more than carry out the commercial intent of the Landmark Offering on behalf of the investors and the Strata Corporation. The investors expected they too would benefit from their investment in the Landmark Building and presumably did so. If subsequent purchasers have any complaint it lies with the investors from whom they purchased.

[para98] The plaintiff contends that Mr. Wilson signed the agreement on behalf of the defendant and Mastercraft and not on behalf of the plaintiff. It says that this is contrary to section 116.(a) in that it gave preference to the interests of the defendant owner over that of the other owners. It was not, therefore, for the benefit of all owners.

[para99] In *Hill v. Strata Plan NW 2477 Owners* (1991), 57 B.C.L.R. (2d) 263 (C.A.) the Court held that an owner/developer did not have the power to grant exclusive use of two parking stalls to an owner. Proudfoot J.A. said that such a private agreement "lends itself to no end of arrangements being made with potential purchasers." For instance, one owner being given exclusive use of the "clubhouse or swimming pool". The Court saw this as giving one owner a "benefit at the expense of the other owners."

[para100] Madam Justice Proudfoot said that the decision in *York Condominium Corp. No. 167 v. Newrey Holdings Ltd.* (1981), 122 D.L.R. (3d) 280 (Ont. C.A.) was "of assistance". In that case each owner was entitled to one parking space and to "such additional parking space as may be purchased ...". The trial judge held that the Corporation was free to dispose of the additional parking spaces and retain the proceeds. Proudfoot J.A. said at page 466:

In my view, the respondent developer could not, either before or after the registration of the declaration, deal with any part of the common elements so as to defeat the unit purchasers' equitable interests in them.

Further at page 467:

I do not think the position of the owner-developer remains unchanged after he starts to sell units. I think that at that point he has committed the character of the project to that of condominium under the Act and [the strata plan]. I think he has also placed himself in a fiduciary relationship to the unit purchasers not only with respect to their units but also with respect to the interests appurtenant thereto. He therefore holds the property in trust for the unit purchasers, present and prospective, and for the condominium corporation which will come into being upon registration of the declaration. I believe he is under a duty to protect the interests of all unit owners, present and prospective, and cannot put his own interests in conflict with theirs even although he himself continues to be an owner as long as any units remain unsold.

[para101] In *Carleton*, supra, the Court distinguished *York* on the basis that in *Carlton* certain declarations were filed with respect to the common property. They provided that the owners had full use, occupancy and enjoyment of the common property subject to certain exceptions. The declarations set out descriptions of the various areas of common property which included one indoor parking space to be allocated to each of the 169 units.

[para102] Another declaration set out an exception. It declared that Mastercraft was entitled to the exclusive use of the balance of the parking spaces, which were 54 in number and outside. The effect of this declaration was to remove the outdoor parking from the inside parking which was limited common property.

[para103] *Carleton* did not disturb the principles enunciated in *York*. In my opinion the two principles set forth in *York* and adopted in *Hill* are applicable. First, once the strata plan is registered, the owner/developer has committed itself to the arrangement within it. Second, the developer is under an obligation to the individual buyers not to allow its self-interest to interfere with the interests of those present and future purchasers.

[para104] The second principle from *York* prevents, in my view, the owner/developer from utilizing its control (or domination) of the Strata Corporation in its infancy to better its position at the expense of future owners. It is prevented from entering into transactions with itself for its benefit as developer but to its detriment as owner. [para105] This was the position adopted in *Remai Construction*, supra. *Sherstobitoff J.A.*, writing for the Court, referred to *York*, supra, as providing a "framework of principle". He suggested that he was adopting the definition of "condominium" to mean, among other things, that no one should be in a position to put his economic interests above the interests of the group so far as joint ownership, management or enjoyment of the property is concerned. [para106] In *Remai* the Court rejected the submission that legislative differences between Saskatchewan and Ontario made *York* inapplicable. It used a fiduciary duty analysis to enforce compliance with the spirit of the condominium legislation. The Court cited with approval the words of *Wilson J.A.* in *York* regarding the fiduciary duty of the developer to protect the interests of all unit owners, "past and prospective". *Sherstobitoff J.A.* went on to say at page 22:

Because of the close connection between the three companies that constitute the developer and their participation in the construction, development, operation and financing of the condominium, we conclude that the fiduciary duty extended to each of these companies and not merely to one or two of them.

[para107] It can be seen that the Court was not prepared to limit the fiduciary duties to one specific company among the development consortium. I accept this principle to apply in the case at bar to reach Mastercraft.

[para108] In *Terrace Corporation*, supra, the Zeiters were officers and employees of the defendant corporation. They, as the Board of Management of the plaintiff, agreed to lease 46 parking stalls to the defendant for 99 years. They also signed the agreement on behalf of the defendant. The trial judge suggested that trustee-like obligations are imposed on a developer with regard to common property once it enters into contracts for sale to individual owners.

[para109] On appeal the trial decision was approved as was the decision in *York*. In fact, it extends the *York* decision by stating that the fiduciary relationship exists even before the condominium plan is registered.

[para110] In *The Owners, Strata Plan No. 1229 v. Trivantor Investments International Ltd.*, [1995] B.C.J. No. 557 (14 March 1995), *Vict. Reg. No. 91 2714* (B.C.S.C.) *Owen-Flood J.* adopted *Remai Construction* and *Terrace Corporation* as the law in this province.

[para111] There is one other arm to this concept of fiduciary duty. That is the fiduciary duty of Mr. Wilson. The defendants have admitted that Mr. Wilson carried out the closing duties of M.I.C and that at the same time he was the agent of the Strata Corporation. Mr. Wilson executed the agreement on behalf of the Strata Corporation "at the direction of and as the representative of the" defendant.

[para112] The potential for conflict is obvious. Duties of loyalty are a principal fiduciary duty owed by an agent to his principal. In Terrace Corporation, supra, the trial judge said that the Zeiter's "were in conflict of interest when they literally purported to deal with themselves and are in breach of trust, having demonstrably failed to act in the best interests of the plaintiff corporation, and for this reason that lease must be set aside."

[para113] On appeal this breach of duty was upheld by Stevenson J.A. on behalf of the Court. He started his analysis at page 390 as follows:

On the face of it the lease of common property by the Zeiters, nominees and principals of Terrace, to Terrace was in breach of their fiduciary duty. They were managers of the property ... and leased that property to the very corporation which appointed them managers.

[para114] The conduct of Mr. Wilson is a s. 116 breach and violates his fiduciary duty as agent of the plaintiff. Furthermore, what Mr. Wilson did was on the instructions of Mastercraft. Similarly, therefore, Mastercraft is in fiduciary breach of its duties.

[para115] Finally, I conclude that the agreement was not "in the best interests of all of the owners". Such "owners" include "prospective owners." At the very most the agreement could be only for the benefit of the original owners who, apparently, received a price advantage. The obvious advantage was to the defendant and Mastercraft. For \$10 plus a purported price reduction, they received the rights to 101 parking spaces for 99 years.

[para116] No benefit can be seen to the individual unit owners. It can therefore be said that the agreement was for the exclusive benefit of the defendant/Mastercraft and is contrary to the provisions of section 116.(a).

C. ESTOPPEL

[para117] Regardless of the reasons for the agreement being void, if the finding that the agreement is void is correct, estoppel cannot apply. See Halsbury's Laws of England, Fourth Edition, "Corporations", para. 1334; Rayonier B.C. Ltd. v. New Westminster (City) (1961), 36 W.W.R. N.S. 433 at 446 (B.C.C.A.). However, in the event that I am found to be incorrect in finding the agreement void, I will consider the estoppel submissions of the defendant.

Knowledge of the Owners

[para118] The defendant says that all of the original investors knew and agreed that Mastercraft would charge fees for parking. This, combined with the lack of challenge from 1989 to 1994 results in the plaintiff being "estopped and precluded from relying on any purported infringement" of the Act.

[para119] The defendant submitted that the real estate agent most involved in these sales, Ms. Inez Loudon, "expressly advised each purchaser of the parking arrangements at the Landmark Building. It was a notorious fact."

[para120] Ms. Loudon deposed as follows: Between 1991 and 1994 she was involved in at least 20 sales of strata lots in the building. Usually she was the listing agent although sometimes she was only the selling agent. On March 4, 1991 she wrote to Mastercraft. In part, her letter reads: I would like confirmation regarding parking. Is there one parking stall per unit? If the purchaser would like a second parking stall, can he pay a monthly fee for one? Is there a specific parking stall designated for each unit?

[para121] In a letter dated March 11, 1991 Mr. Wilson, on behalf of Mastercraft, replied as follows:

... Further, the parking is owned by a separate company and there will be a monthly rental charge of \$20 per stall and indeed the parking agreement could be a long term arrangement.

[para122] On October 16, 1995 counsel for the defendant wrote to Ms. Loudon, enclosed a copy of the agreement, and asked her a series of questions. Ms. Loudon replied in a letter dated October 18, 1995. The questions and answers are as follows:

Q. What did the vendor say to the purchaser or the real estate agent(s) (listing or selling) about parking privileges, if any at the Landmark building?

A. All discussions regarding parking were conducted with Mastercraft, not the vendors.

Q. What inquiries did you make and to whom did you make them respecting an owner's right to parking at the Landmark building?

A. All enquiries were made to Mastercraft direct. Enquiries centred around the # of stalls per unit and additional costs, if any for extra parking spots. See my letter dated March 4, 1991.

Q. Did you discuss an owner's right to parking at the Landmark building with Alan Wilson and, if so, what did he tell you?

A. Yes, see the letter from Alan Wilson to me dated March 11, 1991.

Q. Did Alan Wilson ever provide you with a copy of the Parking Agreement (copy enclosed)? A. No.

Q. Did Alan Wilson or Mastercraft provide you with written information concerning parking at the Landmark and, if so please describe the nature of that information and provide us with a copy of same.

A. See letter dated March 11,1991.

Q. What did you say to the purchaser respecting an owner's right to parking at the Landmark building?

A. There was an additional fee payable to Mastercraft for parking. Parking fees were noted on the Listing Contracts.

Q. What did the purchaser know, in your view, about an owner's right to parking when the interim agreement was executed?

A. I can only tell you what I told them, and that was that there was an additional amount for parking and that amount, at that time, was noted on the Listing Contract.

Q. If parking was discussed among the purchaser, vendor and real estate agents, why was no reference made to parking in most of the contracts?

A. No reference was made to parking in the Contracts because there was nothing registered on Title. The parking was "Limited Common Property. Limited for the use of Strata Lots 15 to 97."

[para123] In an affidavit sworn November 20, 1995 Ms. Loudon deposed as follows:

2. With respect to telling purchasers that there was an additional fee payable for parking ... these discussions took place on showings of the various suites to prospective purchasers. I was usually present for those showings. What I would tell prospective purchasers was that parking "was \$25 per month extra". That was the amount of the parking being charged at the time. The resident manager, who was often present, would tell the buyer that the cheques were payable to Mastercraft, or, subsequent to that, the Regional Group. At those times, Mastercraft and subsequently the Regional Group, were the management company for the Strata Corporation. On each of these occasions, there was no further discussion about the matter, to the best of my recollection, until, approximately, last year, when the matter became litigious.

3. I did not advise purchasers that any company had a lease or license over the parking garage, as I did not know that. I was not aware that there was such an agreement. The first time I saw it was when it was sent to me by Mr. Meckling for the purposes of my first Affidavit.

[para124] The defendant alleges that the evidence of Mr. Peter Driessen, who purchased a unit in 1991, shows the level of knowledge possessed by purchasers, and presumably, by the plaintiff. The defendant's brief submitted as follows:

Indeed, the chairman of the Strata Corporation's Strata Council for 1993 and 1994 and current Council member, Peter Driessen, acquired Strata Lot 97 in the Landmark Building in July of 1991 with express notice of the Parking Garage Agreement.

[para125] Mr. Wilson deposed that "To my knowledge, all owners of Residential Units in the Landmark building, be they original investors or subsequent purchasers, knew that Mastercraft received fees for the use of the Parking Stalls." He then referred to a letter he wrote to Mr. Driessen, dated July 3, 1991. It reads:

Further to our conversation of today's date, I will confirm that the Vendor has deleted "vendor stipulates one parking space included" from the purchase contract enclosed.

Please initial and return fax.

As outlined, the parking garage is owned by a numbered company and as such, has a licence agreement for the residential component of the Landmark building.

This letter will confirm that the numbered company licencing the parking garage will enter into a separate agreement satisfactory to both parties.

As outlined, it may well be a seven year sub-licence agreement. payable at \$20 per month, with the first two years rent free.

[para126] On that same date Mr. Wilson wrote to Mr. Driessen's solicitor. He enclosed a copy of the letter which he had sent to Mr. Driessen. To the solicitor he said:

Regarding this matter, Mr. John Greenburg (sic) and 360284 (sic) B.C. Ltd., the beneficial owner of the parking area, will be dealing with the same solicitor.

[para127] On October 16, 1995 Mr. Driessen was examined for discovery as a representative of the plaintiff. Mr. Driessen was referred to certain documents including the letter of July 3, 1991 written to him. Beginning at question 185 the transcript reads as follows:

Q. Okay. And those were sent to you on or about July 3, 1991; is that right?

A. Yes.

[Interjection by counsel]

Q. Mr. Driessen, prior to your execution of this agreement, whereby you purchased Strata Lot 97, you were aware that the numbered company controlled by Mastercraft had a licence to use the parking garage in the Landmark building; correct?

A. Precise. (sic)

Q. Let me put it this way. In the letter written to you from Mr. Wilson dated July 3, 1991, there's a reference to the condition in the contract that vendor stipulates one parking space included, was going to be crossed out, and he explained to you in his letter that parking garage in his words is owned by a numbered company and as such has a licence agreement for the residential component of the Landmark building. Prior to you executing the agreement whereby you acquired Strata Lot 97 --

A. On which date did I execute this? Q. I don't know, do you know?

A. On or about this date.

Q. Okay.

A. I was aware of it.

[Interjection by counsel.]

A. This is executed a few days before or a few days after.

Q. And to be clear, Mr. Driessen, you agreed to acquire Strata Lot 97 knowing that the numbered company held the rights to the parking; correct?

A. Knowing what was written in the letter, correct.

[para128] Mr. Wilson deposed on October 19, 1995 as follows:

... On numerous occasions I received inquiries over the telephone from real real (sic) estate agents acting on behalf of both vendors and purchasers of Residential Units in the Landmark Building respecting, inter alia, the entitlement of Landmark residents to parking. On every such occasion, I advised those persons of the Parking Garage Agreement and that 360204 would enter into individual agreements with Landmark residents for the use of Parking Stalls. I had several of these discussions with Inez Loudon, a real estate agent who was involved in a number of sales of Residential Units in the Landmark Building over the 1992 and 1993 period. In response to many of the inquiries, I would often fax particulars of the parking information to real estate agents.

[para129] Mr. Bruce Greenberg, a Director of the defendant since 1989 and a "principal" of 360203, M.I.C., and the Partnership, deposed on October 18, 1995 that:

... I assumed that the original Investors would advise subsequent purchasers of the parking arrangements at the Landmark Building and that they had no rights to the Parking Stalls. The complete lack of any inquiries or complaints from anyone gave me no reason to assume otherwise.

[para130] Counsel for the plaintiff attempted to speak with all of the present owners. In that many of them are infirm he spoke to only 21 of them and obtained evidence from nine. The affidavit evidence of these owners is consistent. Most of them purchased their units in 1993 or later. None of them were told about a 99 year "lease" and some did not know that they would have to pay for parking. From various sources other purchasers heard about the parking fee.

[para131] On January 26, 1993 a firm of solicitor's, apparently at the request of Mr. Wilson, forwarded to Mr. Mr. Wilson a copy of the parking garage agreement.

[para132] On January 29, 1993 four owners wrote to the Strata Council and requested, among other things, "a copy of all the legal agreements." On that same date Mr. Wilson, on the letterhead of The Mastercraft Group, wrote in reply. He informed the four owners that he was the "Council Chairperson on behalf of Strata Lots 1-97 Strata Plan 1261 and more specifically being a Director of the company that owns Strata Lots 1-15 and as such have knowledge that all the requested information is at the office of Mastercraft" in Richmond.

[para133] At a Council meeting of March 11, 1993 Mr. Wilson supplied to the Council a copy of the agreement. A Motion was then passed to set aside \$1,000 for a legal opinion regarding the agreement.

[para134] The plaintiff's submission regarding the facts on this issue concludes as follows:

In summary, the existence of, and the terms of the Parking Garage Agreement, were far from a "notorious fact". The only person who had any information approaching actual knowledge was Mr. Driessen. He happens to have purchased directly from Mr. Bruce Greenberg, and as a result had more information than did others. He is the only purchaser who received any correspondence on the topic. However, not even Mr. Driessen was given a copy of the Parking Garage Agreement.

Defendant's submission [para135] The defendant says that through its actions and words the plaintiff is estopped from relying on any infringement of the Act: "From 1989 to 1994 the plaintiff led the defendant to believe that the agreement was valid and to this very day many owners do so conduct themselves" i.e by paying rent for parking. The defendant further submitted as follows:

The estoppel which arises against the Strata Corporation through its conduct over the 1989-1993 period is not impaired merely because certain current owners may have purchased from the original Investors without knowledge of the precise terms of the Parking Garage Agreement. The legal consequences which flow from a corporate entity's conduct and the knowledge it acquires over time cannot change or disappear simply because of a turnover in its members. Corporate accountability would be in a shambles and their contractual obligations fleeting were the law otherwise.

[para136] The defendant submits that the October 26, 1993 letter from the plaintiff's solicitors "which expressly permitted 360204 to collect fees under the Parking Garage Agreement typifies the Strata Corporation's conduct. The Strata Corporation lost its right to avoid the Parking Garage Agreement when it performed its obligations thereunder with knowledge of its rights."

[para137] As to knowledge of the agreement, the defendant says that Mr. Wilson knew of it, that "from at least May, 1990 onward, [he] was a member of the Strata Corporation's strata council and, consequently, in fact and in law, the Strata Corporation was entirely aware of the Parking Garage Agreement and its rights and obligations thereunder. The Strata Corporation cannot deny the express knowledge of the very persons designated to carry out its powers and duties (see section 118 Condominium Act)."

[para138] The defendant says that it "has lost the ability to have any ratifying resolutions (under sections 57.(1)(c) and 53.(1) of the Condominium Act, for example) passed now that only a handful of original Investors remain. The Strata Corporation cannot escape its unequivocal affirmation of the Parking Garage Agreement."

[para139] In support of this proposition the defendant cites Springer Development Corporation, Ltd. v. Rogers et al. (1987), 11 B.C.L.R. (2d) 145 at 154 (C.A.) wherein Mr. Justice Hutcheon said:

I think I am bound by the decisions of the Supreme Court of Canada in Bawlf Grain Co. [v. Ross (1917), 55 S.C.R. 232] and Dorsch [v. Freeholders Oil Co. Ltd. (1965), 52 D.L.R. (2d) 658] to conclude that a party may lose a right acquired to avoid a contract if thereafter the conduct of that party, with knowledge of the option, is consistent only with a contract that is valid and enforceable by both parties.

[para140] The defendant relies upon the decision in Litwin Construction (1973) Ltd. v. Pan et al (1988), 52 D.L.R. (4th) 459 (B.C.C.A). The test is set out at page 468:

"... has the party invoking the statute affirmed the contract unequivocally by his words or conduct in circumstances making it unfair or unjust for him now to resile from that contract?"

....

The underlying concept is that of unfairness or injustice and it is not essential to its application that there be knowledge, detriment, acquiescence or encouragement although their presence may serve to raise the unfairness or injustice to the level requiring the exercise of judgment. If the unfairness or injustice is very slight, then the principle would not be applied. If it is more than slight, then the principle may be applicable.

Plaintiff's submission

[para141] The plaintiff contends that estoppel cannot be applied because the agreement is ultra vires. Failing that, the plaintiff says that no estoppel can apply so as to permit violation of a statute: Maritime Electric Company v. General Dairies Ltd. (1937), 1 D.L.R. 609 (P.C.). Further, that estoppel cannot be used to permit occupation and use of common elements in violation of statutory duties of the condominium corporation or of owners: York Condominium Corp. No. 288 v. Harbour Square Commercial Inc. (1988), 49 R.P.R. 264 (Ont.D.C.) [para142] The plaintiff also referred to Litwin, supra, and in particular the test set out at page 468. It says that here, in distinction to Litwin, "there is not a single act of the Strata Corporation by which the Strata Corporation affirmed the contract."

Conclusions Regarding Estoppel

[para143] If I am correct that the agreement is void then at law there can be no application of the principle of estoppel. In the event that I am incorrect in that finding, I will deal with estoppel as a potential defence.

[para144] With respect to "knowledge", what Ms. Loudon knew is relevant only with respect to what she informed prospective purchasers. In her letter of March 4, 1991 to Mastercraft she tried to uncover some information about the parking. Mr. Wilson replied that the "parking is owned by a separate company" and there was a charge to owners for parking.

[para145] Ms. Loudon did not pursue the matter further. This failure cannot be attributed to the plaintiff. I accept her evidence that she did not know of any lease, licence or arrangement regarding the property other than what she was told by Mr. Wilson. In that regard she was misinformed.

[para146] Mr. Wilson's deposition that to his knowledge "all owners of Residential Units in the Landmark building, be they original Investors or subsequent purchasers, knew that Mastercraft received fees for the use of the Parking Stalls" is quite remarkable. In his letter to Ms. Loudon he said that the garage was "owned by a separate company"; in his letter to Mr. Driessen he said that "the parking garage is owned by a numbered company"; and to Mr. Driessen's lawyer he wrote that "Mr. John Greenburg and 360284 B.C. Ltd., the beneficial owner of the parking area ...".

[para147] This detracts from the defendant's position that Ms. Loudon "expressly advised each purchaser of the parking arrangements at the Landmark Building. It was a notorious fact". (Mr. Meckling said that the use of the word "notorious" was meant to mean "well known".)

[para148] The defendant alleged that the level of knowledge of Mr. Driessen shows the level of knowledge of purchasers. On his examination for discovery he said that what he knew was what was written to him by Mr. Wilson. That was that the garage was owned by a numbered company which had "a licence agreement for the residential component".

[para149] This falls far short of satisfactory evidence that even Mr. Driessen had the correct information, much less that what he knew was "a notorious fact." Nor is there any value in the deposition of Mr. Greenberg that he "assumed that the original Investors would advise subsequent purchasers of the parking arrangements at the Landmark building and that they had no rights to the Parking Stalls."

[para150] I am of the opinion that the evidence of the present owners as gathered by the plaintiff represents much better evidence as to the general state of knowledge by owners.

[para151] It would further appear that the plaintiff did not have a copy of the agreement in its files. Indeed, even Mr. Wilson did not have a copy until early in 1993. He obtained a copy and in March 1993 supplied it to the Strata Council.

[para152] At about the same time four owners wrote to the Strata Council, c/o the Mastercraft Group, at an address in Richmond, B.C. The reply came from Mr. Wilson who informed them, in reply to their request for "all the legal agreements", that the documents were at the offices of Mastercraft, at the address to which the four owners had written. To the owners this must have been a particularly unhelpful and frustrating reply.

[para153] Also of interest in the letter from Mr. Wilson was how he described himself. That is, "Council Chairperson on behalf of Strata Lots 1-97 Strata Plan 1261 and more specifically being a Director of the company that owns Strata Lots 1-15." Mr. Wilson's knowledge does not attach to the plaintiff. As I held earlier, Mr. Wilson did not, in a real sense, represent the owners. His role was to facilitate the implementation of a transaction which, as Mr. Meckling volunteered, was designed to make money for Mastercraft.

[para154] Mr. Wilson not only did not absorb information so as to benefit the plaintiff but he left no "paper trail" to the agreement, failed to reveal it when inquiries were made, misrepresented the status of the garage and deposed to knowledge of owners that could not conceivably be true. The submissions of counsel for the defendants that Mr. Wilson's knowledge, as an agent of the plaintiff, is knowledge of the plaintiff, fails factually and legally.

[para155] The defence of estoppel only arises where it can be said that a party knew of its right to avert the contract but continued performance:

... a party may lose a right acquired to avoid a contract if thereafter the conduct of that party, with knowledge of the option, is consistent only with a contract that is valid and enforceable by both parties. *Springer Development Corp. Ltd. v. Rogers* (1987), 11 B.C.L.R. (2d) 145 (C.A.) at 154.

[para156] In the case at bar the plaintiff was only aware of the potential violation of the Act after legal advice was received by it in 1993. It then took clumsy steps to attempt to terminate the agreement. Payment of rent for the use of the stalls in the interim by the individual owners signifies only prudence on their part while the legal dispute is in progress. Furthermore, it is doubtful that the payments by individuals would bind the plaintiff.

[para157] The classical definition of promissory estoppel is found in Halsbury's Laws of England at paragraph 1071, page 931. It incorporates the concept that the aggrieved party's conduct was "a clear and unequivocal promise or assurance which was intended to affect the legal relation ...". A modern definition is found in Mr. Justice Sopinka's judgment in *Maracle Travellers Indemnity Co. of Canada* (1991), 80 D.L.R. (4th) 652 (S.C.C.). At page 656 he states:

The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted upon. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changes his position.

[para158] Promissory estoppel is an equitable principle. One of the cornerstones of equity is that a person must come into it with "clean hands". It cannot be said that the defendant did so. As detailed in these reasons, it is at least partially as a result of the misrepresentation of Mastercraft and the defendants that the plaintiff was unaware of the true state of affairs and thereby of its potential rights.

[para159] Support for this position is found in *Welch v. O'Brien Financial Corp* (1992), 86 D.L.R. (4th) 155 (B.C.C.A.). The Court agreed with the trial judge that non-disclosure of material facts by the defendant can bar a claim for promissory estoppel which the defendant could otherwise have had against the plaintiff. The seriousness of the defendant's non-disclosure is to be weighed against the equities arising against the plaintiff. In the case at bar the seriousness of the defendants' non-disclosure vitiates any estoppel argument they may have had.

[para160] Furthermore, before the defendants would be entitled to a claim of estoppel, they would have to establish an alteration of their position to their detriment in reliance on the conduct of the plaintiff. This point was made by Esson C.J.S.C. in 32262 B.C. Ltd. v. *Companions Restaurants Inc.*, [1995] B.C.J. No. 342 (17 Feb. 1995) *Vanc. Reg. No. C932602* when he stated at page 17:

It follows that the defendants, not having established the necessary element of detriment, must fail on the estoppel issue.

[para161] The defendant, unlike the situation in *Litwin*, has done nothing in reliance upon the agreement. All it has done is accept the largesse.

[para162] The defence of estoppel fails.

[para163] For all of the reasons set forth in the various segments of these reasons the agreement is void.

D. RELIEF

[para164] The matter of relief will have to be spoken to at a time mutually convenient to all parties. Costs may also be spoken to at that time.

THACKRAY J.

CBR# 021

Albrecht et al. v. Opemoco Inc., c.o.b. as The Brownstones II, The Brownstones IV Properties Inc., Kajomi Investments Inc. and McKeon

797606 Ontario Ltd. v. Huang & Danczkay Ltd. and 808868 Ontario Ltd.

5 O.R. (3d) 385

Action Nos. 744/89 and 201/90

Court of Appeal for Ontario Morden A.C.J.O., Robins and McKinlay JJ.A. November 28, 1991

APPEALS from the judgments of the High Court of Justice (1989), 70 O.R. (2d) 151, 61 D.L.R. (4th) 594, 6 R.P.R. (2d) 109 (further proceedings at (1989), 70 O.R. (2d) 221, 62 D.L.R. (4th) 541), and Carruthers J., February 1990.

Bryan Finlay, Q.C., and Gary M. Caplan, for appellants in the Albrecht appeal.

Jonathan H. Fine and Mario D. Deo, for respondents in the Albrecht appeal.

David R. Rothwell, for appellant in the Huang & Danczkay Ltd. appeal.

Alan P. Shanoff and Francy B. Kussner, for respondents in the Huang & Danczkay Ltd. appeal.

The judgment of the court is delivered by

ROBINS J.A.:-- These two appeals primarily concern the validity of what have come to be known in the residential condominium industry as "phantom mortgages". These are mortgages designed specifically to satisfy the requirements of s. 51(6) para. 1 of the Condominium Act, R.S.O. 1980, c. 84 (the Act) and thus enable condominium developers to charge purchasers who take possession of proposed condominium units before title can be transferred or conveyed a monthly occupancy fee that includes a mortgage interest component. To achieve this purpose, purchasers who would not otherwise be assuming or giving back a mortgage on final closing are required by their agreements of purchase and sale to give back a mortgage for the balance of the purchase price. Typically, the mortgage is made payable on demand after final closing of the transaction or is for a term of very brief duration, generally not exceeding 30 days. On final closing, purchasers are also required to deposit a certified cheque for the full amount owing on the mortgage or provide other satisfactory assurances that funds will be available to discharge the mortgage upon maturity.

Agreements of purchase and sale of residential condominium units have provided for mortgages of this nature since the early 1980s. The important question in these appeals is whether such mortgages validly effect their intended purpose and provide a lawful basis upon which an interest component may be included in the occupancy fee chargeable to purchasers during the period of their possession prior to final closing of the transaction of purchase and sale.

THE DISPUTED TRANSACTIONS

1. The Albrecht v. Opemoco Inc. appeal

The respondents in this appeal are purchasers of residential condominium units in Halton Condominium Corporation No. 164 in Burlington, Ontario. They acquired their respective units pursuant to the terms of agreements of purchase and sale entered into with the appellant Opemoco Inc. The appellant Brownstones IV Properties Inc. is the declarant of the condominium corporation and is the party that conveyed title to each of the respondents. For the purposes of this appeal, the two appellants may be referred to together as "the appellant" or "the vendor".

The "phantom mortgages" in issue were products of the agreements of purchase and sale entered into between the parties. These agreements were on the vendor's standard form and contained, inter alia, the following terms:

(a) The purchaser was obliged to take interim occupancy of his or her unit upon substantial completion of the unit notwithstanding that the condominium was not registered and title to the unit could not be conveyed. On the date of interim occupancy (the possession closing) the purchaser was required to pay the balance of the deposits then due and owing on the purchase price, which generally amounted in total to approximately 25 per cent of the purchase price.

(b) The interim occupancy of the unit was to be governed by the terms of an occupancy agreement, a copy of which was attached as a schedule to the agreement of purchase and sale. (c) The purchaser was obliged to elect either to assume a first mortgage or to give a vendor take-back mortgage (the VTB mortgage) on final or title closing, that is, on the date title to the unit was to be transferred to the purchaser. The VTB mortgage was to provide, inter alia, that the full amount of principal and accrued interest would be payable by the purchaser on the demand of the vendor; that the purchaser would have the right to prepay the outstanding principal balance together with accrued interest without notice or bonus; and that the interest rate payable thereon was to be equal to the rate per annum charged by the Toronto-Dominion Bank for three- year residential mortgages in effect at the date of interim occupancy.

(d) During the period of interim occupancy, each purchaser was obliged to pay to the vendor a monthly occupancy fee based on the total of the following:

- i. the amount of interest that the purchaser would have paid monthly in respect to the VTB mortgage which the purchaser was obliged to give on title closing in accordance with the agreement of purchase and sale (the mortgage interest component);
- ii. the amount reasonably estimated by the vendor on a monthly basis for municipal taxes attributable to the unit (the realty tax component); and,
- iii. the projected monthly common expense contribution for the unit (the common expense component).

(e) The vendor was under no obligation to complete the sale of the unit unless the purchaser deposited in escrow with the vendor's solicitor on or before the final closing date a certified cheque sufficient in amount to pay the entire principal balance of the mortgage. The certified cheque was to be applied by the vendor's solicitor to discharge the mortgage at any time after the closing upon demand by the vendor. If the purchaser failed to deposit the certified cheque on or before the title closing date, the purchaser was deemed to be in default of the agreement.

The purchasers in this appeal each agreed to a VTB mortgage payable on demand. These mortgages may be referred to as "phantom mortgages". It should perhaps be noted that the vendor was not prepared to accept any amendments to its standard form agreement and would not sell to a purchaser who did not agree to give back a mortgage of this nature. The respondents obtained possession of their respective units as they became ready for occupancy. Each of them then paid, without any objection, and throughout the entire period of their occupancy preceding final closing, a monthly occupancy fee consisting of a mortgage interest component based on the phantom mortgage, realty taxes and common expenses.

On title closing, each purchaser delivered to the vendor's solicitor a certified cheque in an amount sufficient to pay the entire principal sum secured by the mortgage. These cheques, however, were not deposited in escrow but, on the vendor's direction, were paid to the vendor directly and/or to the vendor's construction lender to obtain partial discharges of an existing blanket construction mortgage. The phantom mortgages were not registered on title, and in many cases were not fully or properly completed or in registrable form. Discharges of the mortgages were delivered on closing but they, likewise, were not registered.

In virtually all of the transactions, the funds needed to discharge the mortgage (i.e., to pay the full balance of the purchase price) were obtained by way of mortgage financing arranged by the purchaser with a third party source. In fact, the vendor referred the purchasers to a mortgage institution that was prepared to arrange mortgages on the units for purchasers who desired them. In a few cases, the purchaser was in a position to pay off the mortgage out of his or her own resources and no other mortgage was placed on title.

On March 30, 1989, after these transactions had been finally closed, the respondents brought this application seeking, among other items of relief which are no longer before the court, to recover the mortgage interest component of the monthly occupancy fees which they had paid prior to the final closing of their respective transactions. In the respondents' contention, the VTB mortgages called for in the agreements of purchase and sale were in contravention of the provisions of s. 51(6) para. 1 of the Condominium Act and, accordingly, did not constitute a proper legal basis for the inclusion of a mortgage interest component in their occupancy fee.

The matter was heard in weekly court by Rosenberg J. who, in carefully considered reasons now reported at (1989), 70 O.R. (2d) 151, 61 D.L.R. (4th) 594 [further proceedings at 70 O.R. (2d) 221, 62 D.L.R. (4th) 541], accepted the respondents' contention and ordered the appellants to repay, with interest, the mortgage interest component of the occupancy fees. The appellants now appeal to this court from that judgment.

2. The 797606 Ontario Ltd. v. Huang & Danczkay Ltd. appeal

The appellant in this appeal purchased six penthouse condominium units in September 1988, in a proposed condominium development constructed by the respondent Huang & Danczkay in the City of Toronto. The units were purchased as an investment with the intention that they would be leased and, later, resold at a profit. The transactions have not been completed and no final closing has taken place. Title to the property has been conveyed to 808868 Ontario Limited, a company related to the respondent Huang & Danczkay. For the purposes of this appeal, these respondents may be referred to together as "the respondent" or "the vendor".

The agreements of purchase and sale between the parties, like those in the Opemoco case, obligate the purchaser to take interim possession of the units at a time before the condominium is registered and title can be conveyed. The agreements also obligate the purchaser to give a VTB or phantom mortgage on final closing. The mortgage is to be for a term of 30 days from the date of final closing with the proviso that it will become immediately payable on the demand of the vendor. It is to bear interest at the Toronto-Dominion Bank's prime rate on the day 30 days prior to the date of occupancy plus one per cent. On final closing the purchaser is required to deposit in escrow with the vendor's solicitor a certified cheque sufficient in amount to pay the entire balance of the mortgage, and will be deemed in default of the agreement should it fail to do so. It is clear in this case, as it was in the Opemoco case, that, had the purchaser refused to agree to the take back mortgage, the vendor would not have entered into the agreement of purchase and sale.

The purchaser obtained interim possession of the six penthouse units in November 1988 and, until the commencement of these proceedings, paid a monthly occupancy fee consisting of a mortgage interest component based on the interest rate provided for in the phantom mortgage and a realty tax and common area expense component. As I indicated, these transactions have not yet been completed. In February 1990, the appellant brought this application for a determination of its rights as purchaser of the condominium units in question. By way of relief, it sought rescission of the agreements of purchase and sale on the ground that the respondent had failed to comply with the provisions of the Condominium Act with respect to timely registration of the project and timely sale of the remainder of the units in the building. In addition, the appellant sought, on the basis of the decision of Rosenberg J. in Opemoco, repayment of the mortgage interest included in the monthly payments and calculated by reference to the mortgages provided for in the agreements of purchase and sale. Carruthers J. dismissed the claim for rescission. I shall come later to the issues raised by the appeal from this order. With respect to the claim based on the Opemoco decision, Carruthers J. made no decision on the validity of the phantom mortgages. However, he ordered the monies in dispute to be paid into court to await final disposition of the Opemoco appeal. The phantom mortgage issues common to the two appeals were argued together and will be dealt with accordingly.

THE LEGISLATIVE BACKGROUND Under the Condominium Act, before title to a proposed unit can be transferred to a purchaser, a developer is obliged to register a declaration and description of the property. Registration, however, cannot be effected until the project has been substantially completed and all requisite governmental approvals have been obtained. The complexity of the registration process is such as to create an inevitable delay between the time that some or all of the units in a given project are completed and otherwise ready for occupancy and the time the developer is able to deliver a registrable transfer of title. The length of the delay depends on a variety of factors, and may be substantial. In order to generate income during this period, condominium developers usually seek to have purchasers take occupancy as soon as their units can be occupied. Agreements of purchase and sale are therefore generally structured, as are the agreements in these appeals, so as to provide for closing in two stages. The purchaser is first required or permitted to take possession on an interim basis when the unit is

substantially complete and ready for occupancy (the possession closing), and the transaction is finally closed after registration has taken place and the vendor is able to transfer title (the title or final closing). The Act itself contemplates that purchasers of proposed residential condominium units may take possession of or occupy the unit before a deed or transfer can be delivered. It contains a number of provisions governing the relationship of the parties during the interim occupancy period. Our concern in this appeal is with s. 51(6) of the Act, which reads:

51(6) Where an agreement of purchase and sale entered into by a proposed declarant for a proposed unit for residential purposes permits or requires the purchaser to take possession of or occupy the unit before a deed or transfer of the unit acceptable for registration is delivered to him, the money paid in respect of such right or obligation to the proposed declarant shall be not greater, on a monthly basis, than the total of the following amounts:

1. The amount of interest that the purchaser would have paid, monthly, in respect of any mortgage or mortgages he is obligated to assume or give under the agreement of purchase and sale on delivery of a deed or transfer of the unit.
2. An amount reasonably estimated on a monthly basis for municipal taxes attributable to the proposed unit.
3. The projected monthly common expense contribution for that unit.

Section 51(6) thus places a ceiling on the monthly occupancy fee that a developer can lawfully charge a residential unit purchaser who takes possession of the condominium unit before title can be transferred. The ceiling is the aggregate of the monthly interest that the purchaser would have paid during the occupancy period under a mortgage to be assumed or given back under the agreement of purchase and sale plus a reasonable estimate of monthly taxes attributable to the unit and the projected monthly common expenses attributable to the unit.

The purpose and intent of s. 51(6) is manifested by its legislative history. The section was enacted in 1979 [Condominium Act, 1978, S.O. 1978, c. 84, s. 51] replacing s. 24a(6) of the Act. The former section was enacted in 1974 [S.O. 1974, c. 133, s. 14] as an amendment to the 1970 Act [Condominium Act, R.S.O. 1970, c. 77], and provided:

24a(6) Where an agreement of purchase and sale entered into by a proposed declarant for a proposed unit for residential purposes permits or requires the purchaser to take possession of or occupy the unit before a deed or transfer of the unit acceptable for registration is delivered to him, the money paid in respect of such right or obligation to the proposed declarant shall be credited as payments of the purchase price unless the agreement states that the money or any part of it will not be so credited.

In contrast to s. 51(6), s. 24a(6) acknowledged that occupancy charges could validly be required but did not place any limit on the amount of such charges or specify the manner of their calculation. This absence of any statutory limit apparently resulted in some developers charging purchasers an unreasonable or excessive occupancy rent -- one which bore no relationship to their actual cost of carrying the units over the interim occupancy period. Section 51(6) was enacted to remedy this situation and protect purchasers from being exploited in this manner. The section was not intended to eliminate occupancy charges, but rather to limit those charges to the mortgage interest, realty tax and common expense components specified in paras. 1, 2 and 3 thereof.

Section 51(6) has the obvious effect of placing purchasers on possession closing in substantially the same economic position as they would have been in had title closing and possession closing been concurrent. At the same time, the section recognizes that developers can charge, and purchasers can be required to pay, a monthly fee which in some measure reflects the costs that the developer will incur while the purchaser has interim occupancy. In short, the section strikes a balance between developers and purchasers by, on the one hand, establishing a rental cap that affords purchasers protection from excessive charges and, on the other, allowing developers a fair rental income to reimburse them for the likely cost of carrying the unit until the date of final closing.

This brings me to para. 1 of s. 51(6) which is at the heart of the issue in this case. The mortgage interest component of the occupancy fee, which is almost invariably by far the largest of the three items enumerated in s. 51(6), is chargeable only in the case of a mortgage that the purchaser "is obligated to assume or give under the agreement of purchase and sale on delivery of a deed or transfer of the unit". Section 51(6) para. 1 does not deal with transactions in which the purchase price is paid in cash and no mortgage is to be assumed or given back by the purchaser on final closing. The reason for omitting those transactions and mandating that such purchasers be charged a lower occupancy fee than purchasers who assume or give back a mortgage is not readily apparent. Indeed, it is difficult to understand why the one class of purchasers should be afforded greater protection or be treated differently and more favourably than the other. No satisfactory reason for the distinction has been suggested by counsel or is to be found in the texts or articles to which the court has been referred. It would indeed appear, as Dupont J. suggested in *Cadillac Fairview Corp. v. Allin* (1979), 25 O.R. (2d) 73, 100 D.L.R. (3d) 344 (H.C.J.), at p. 76 O.R., p. 348 D.L.R. that the omission is simply the result of a "possible oversight on the part of the Legislature".

In any event, as s. 51(6) para. 1 is framed, it clearly produces inequitable results. Rosenberg J., in the court below, points this out at p. 155 O.R., p. 598 D.L.R., of his reasons where he details a number of examples designed to compare the occupancy fee payable by a purchaser who is not obligated to assume or give back a mortgage with the fee payable by a purchaser who is so obligated. The differences, as might be expected, are significant. Without repeating those examples, it is sufficient to note that a purchaser who arranges his or her financing by way of a third party mortgage to be registered on title closing cannot be required to pay the interest component for the occupancy period. Yet, a purchaser of, let us say, an identical unit who, pursuant to the agreement of purchase and sale, is obligated to assume or give back a mortgage in identical terms, can be charged the interest component. By reason of the wording of s. 51(6) para. 1, the all-cash purchaser is placed in a better economic position than he or she would have been in had possession closing coincided with title closing. The section, viewed realistically, confers a windfall on such purchasers. They enjoy the same benefits of possession and hold the same possessory rights as a purchaser who agrees to assume or give back a mortgage on final closing; and, moreover, the carrying costs incurred by the vendor during the interim occupancy period are manifestly the same regardless of whether the purchaser is an all-cash purchaser or not. Nonetheless, for whatever reason, s. 51(6) requires that these purchasers be treated differently and compels the vendor to accept a significantly lower occupancy rent from one class of purchasers than from another.

The adverse effect of s. 51(6) on the cash flow of a developer who allows a purchaser who is not assuming or giving back a mortgage under the agreement of purchase and sale pre-registration possession was commented upon by Dupont J. soon after s. 51(6) was enacted. In *Cadillac Fairview*, supra, a case which involved a question of the retroactivity of the section, he said at p. 76 O.R., pp. 347-48 D.L.R., of the reasons:

The present s. 51(6) is remedial in the sense that it restricts the occupation charge to the total of three particular amounts, as set out above. However, through possible oversight on the part of the Legislature, para. 1 of s. 51(6) speaks of: "The amount of interest that the purchaser would have paid, monthly, in respect of any mortgage or mortgages he is obligated to assume or give ..." (emphasis added) and makes no mention of sales where no mortgage is to be assumed. In such a case, the purchaser cannot obtain title to the premises until registration of the declaration is made, and the developer-vendor must go on paying mortgage interest in respect of the borrowed funds associated with the subject unit. The end result in such a case is a windfall gain to the cash purchaser if he is allowed to take possession prior to closing, and a serious and unexpected loss to the developer. (Emphasis original)

THE PHANTOM MORTGAGE CONCEPT

Section 51(6) evidently proved so financially detrimental to condominium developers that many of them refused to enter into transactions in which no mortgage was to be assumed or given back on final closing. Their response to this legislation was to restructure their agreements of purchase and sale in such a way as to satisfy the formal requirements of s. 51(6) para. 1 and thereby become entitled to include a mortgage interest component in the occupancy fee. To achieve this end, purchasers, in what would otherwise be all-cash transactions, were required under the terms of their agreements of purchase and sale to complete their transactions by giving back on final closing a form of mortgage that has become popularly known as a "phantom mortgage". This colourful appellation recognizes that these mortgages were to have only a passing existence and would disappear shortly, if not immediately, after final closing. They were patently not intended as a form of permanent financing.

Although there are a number of variations, agreements of purchase and sale providing for phantom mortgages normally require: (i) that the purchaser will have paid, by the date of possession, a deposit totalling, generally, no more than 25 per cent of the purchase price; (ii) that, on the date of final closing, the purchaser will give back a mortgage securing the unpaid balance of the purchase price; and, (iii) that, on the date of final closing, the purchaser will deliver a certified cheque to be held in escrow by the vendor's solicitor in an amount sufficient to pay the mortgage or will provide other assurances satisfactory to the vendor that the funds required to discharge the mortgage will be available to the vendor forthwith upon maturity of the mortgage. The mortgage may be structured as a demand mortgage or as one of brief duration, usually not more than 30 days. Demand will ordinarily be made contemporaneous with or very shortly after the final closing. Interest is normally provided for at the first mortgage rate prevailing on the date of possession.

It should perhaps be noted that s. 53(1) and s. 53(3) of the Condominium Act also impact on the cash flow of developers during the interim occupancy period and provide additional motivation for the use of phantom mortgages. Section 53(1) requires that all money received by or on behalf of a proposed declarant from a purchaser before the registration of the declaration, other than money paid as rent or as an occupancy charge, must be held in trust until the declarant is able to deliver a registrable deed to the purchaser. Section 53(3) obliges the declarant to pay interest, at a statutorily prescribed rate, on all monies received on account of the purchase price from the date the purchaser enters into possession to the date of final closing.

The mortgage provisions in the agreements of purchase and sale in the cases now under appeal are typical examples of the phantom mortgage concept that, as I have said, has now been in wide use in the condominium industry for many years. This concept, to repeat, was designed to fit the statutory requirements of s. 51(6) para. 1 and permit developers to include a mortgage interest component in the occupancy fee in transactions where this charge could not otherwise be made. The critical, and indeed far-reaching, question in this appeal is whether the concept validly succeeds in achieving its intended purpose.

THE DECISIONS UNDER APPEAL In the Opemoco decision, Rosenberg J. found that the mortgages in question were not fully and properly implemented. He also found that, because no monthly interest had actually been paid under the mortgages, "there is no amount of interest that the purchaser would have paid after receiving a deed or transfer as required by s. 51(6)" [p. 158 O.R., p. 601 D.L.R.; emphasis original]. He therefore held that the vendor was precluded from including an interest component in the occupancy fee. In his view, the impugned phantom mortgages were not really mortgages at all since the monies to be secured thereby were paid on final closing and no outstanding debt or obligation was secured at the time the mortgages were delivered to the mortgagee. He went on to conclude that even if the transactions had been fully and properly implemented, a phantom mortgage of the kind provided for in the appellant's agreements of purchase and sale was a sham and not within the spirit of the section.

In the learned judge's opinion, a vendor is entitled to charge an interest component pursuant to s. 51(6) para. 1 only if there is "some legitimate reason for the mortgage" and it is not just an attempt to charge a higher occupancy fee. Moreover, a vendor is not entitled to the benefit of s. 51(6) para. 1 if the mortgage performs no service for the purchaser and the vendor takes no risk and provides no real financing by creating it. For a VTB mortgage to comply with s. 51(6) para. 1, and, it follows, for a vendor to be entitled to charge an interest component in the occupancy fee, Rosenberg J. set the following test (p. 158 O.R., pp. 601-02 D.L.R.):

To comply with s. 51(6) there would have to be some legitimate reason for the mortgage, not just an attempt to charge an occupancy fee at a higher rate. For example, a vendor who arranges the first mortgages to be assumed by the purchasers will not only have the expense and trouble of arranging the mortgage but may have to give a covenant to the mortgagee. A vendor who takes back a mortgage on closing will have to find the financial resources to carry such a mortgage. The Act does not appear to limit the time of the vendor take-back mortgage. If, for example, a vendor took back a mortgage for one year in order to allow the purchaser to make his own long-term financing arrangements, that would appear to comply with the section.

A vendor who by providing for a "phantom mortgage" does not perform any service for the purchaser, nor does anything that is required by the purchaser, takes no risk and does not give any real financing, should not receive the benefit of the section.

DECISION

In determining the phantom mortgage issue in these two appeals, it is essential to bear in mind the purpose and effect of s. 51(6). It is common ground that this piece of legislation, as I noted earlier, was enacted, as a matter of consumer protection, to protect purchasers of proposed residential condominium units from excessive charges during the period of their interim occupancy. At the same time, the legislation recognizes that developers are entitled to receive an economic rent to assist them in defraying the costs which they ordinarily incur in carrying the condominium units over the interim occupancy period. By limiting the amount that purchasers can be required to pay to the items specified in s. 51(6), the effect of the section is to place purchasers in substantially the same position they would have been in had they obtained title contemporaneous with possession.

The purchase and sale agreements in question here, on their face, clearly fall within the express words of s. 51(6) para. 1 which, again, reads:

51(6) Where an agreement of purchase and sale entered into by a proposed declarant for a proposed unit for residential purposes permits or requires the purchaser to take possession of or occupy the unit before a deed or transfer of the unit acceptable for registration is delivered to him, the money paid in respect of such right or obligation to the proposed declarant shall be not greater, on a monthly basis, than the total of the following amounts:

1. The amount of interest that the purchaser would have paid, monthly, in respect of any mortgage or mortgages he is obligated to assume or give under the agreement of purchase and sale on delivery of a deed or transfer of the unit.

(Emphasis added)

In both cases on appeal, the purchasers were "obligated" to give a VTB "mortgage ... under the agreement of purchase and sale"; the VTB mortgage was to be given "on delivery of a deed or transfer of the unit"; and the mortgage interest component was to be calculated at no more than the amount of interest that "the purchaser would have paid, monthly" under the VTB mortgage.

Whether a mortgage interest component can properly be charged on the basis of these agreements, as I view s. 51(6) para. 1, is not dependent on the precise manner in which the contemplated transactions are eventually concluded. The section focuses on the obligation of the purchaser existing under the agreement of purchase and sale to give a mortgage upon transfer of title. Title may, of course, never be transferred; for one reason or another, the transaction may not be finally closed. The fact that no final closing takes place, as may be the case in *Huang & Danczkay Ltd.*, or the fact that a transaction was not "fully or properly implemented" on final closing (in the sense that mortgages were not properly completed or registered), as was the case in *Opemoco*, is not determinative of the validity of the obligation to give the mortgage.

The finding that the *Opemoco* transactions were improperly implemented, in my opinion, cannot serve as a basis for distinguishing that case from *Huang & Danczkay Ltd.*, where, if that transaction is finally closed, it may be assumed that the agreement of purchase and sale will be properly implemented. The phantom mortgage obligations arising out of the agreements of purchase and sale in both cases are, after all, essentially identical. That being so, it would be incongruous if the result in one case were to differ from that in the other solely because of a failure to complete the conveyancing arrangements in the manner contemplated by the parties under their contract. On the view I take of s. 51(6) para. 1, the vendor's right to collect, and the purchaser's obligation to pay, occupation rent must be determined, not on that basis, but by looking to the terms of the agreement of purchase and sale executed by the parties. The vendor's entitlement to charge and retain the mortgage interest component, and the purchaser's obligation to pay this sum, is dependent upon the validity of the obligations created under the agreement rather than upon what may or may not transpire later.

Rosenberg J. agreed that "not all phantom mortgages are necessarily in breach of the section" [p. 158 O.R., p. 601 D.L.R.]. However, the test he adopted to determine the validity of the obligation to give a mortgage on final closing for the purposes of s. 51(6) para. 1 is such that it is difficult to see how any VTB mortgage designed to allow a developer to include a mortgage interest component in an occupancy fee in a transaction where this component could not otherwise be included -- that, of course, being the purpose of a phantom mortgage -- can be in conformity with the section. To take his examples in the passage quoted above, both a mortgage arranged by the vendor to be assumed by the purchaser and a mortgage to be taken back for a term of one year to allow the purchaser to arrange definitive financing, provide forms of conventional financing and comply with the section. These, however, are not mortgages that fall within the phantom mortgage concept. Our concern in these appeals is with mortgages specifically designed to satisfy the requirements of s. 51(6) para. 1 for the purpose of entitling the vendor to collect an occupancy fee calculated on the same basis as the occupancy fee payable by a purchaser who is truly to assume or give back a conventional mortgage.

In prescribing the factors to be taken into account in calculating the maximum rent chargeable during the interim occupancy period, s. 51(6) does not establish any conditions or set any criteria for determining the validity of a mortgage to which the occupancy rental is to be referable. More particularly, the section does not require that the mortgage "perform a service" for a purchaser or provide a purchaser with "real financing". Similarly, the section does not fix any minimum term during which a mortgage, to qualify for the purposes of the section, must remain in existence. Nor does the section preclude the mortgage from being collaterally secured by way of a cash deposit or any other form of security. Section 51(6) is concerned, not with the reasons for, or general terms of, the mortgage, but only with its interest rate. The rental itself is predicated, not on the amount of interest actually paid, but on the amount the purchaser "would have paid" on any mortgage the purchaser is obligated to assume or give. In short, the interest rate implements the remedial purposes of the section and serves to provide the yardstick by which a fair and reasonable interim rental is to be measured.

The feature common to each of the agreements of purchase and sale in these appeals is the purchaser's obligation to give back a mortgage on final closing and, at the same time, to deposit with the vendor's solicitor a certified cheque in an amount sufficient to discharge the mortgage. On the basis of this obligation, the purchasers were permitted to take possession of their respective condominium units. They were not required, on obtaining possession, to pay the balance due on final closing, as a purchaser normally would in the case of a freehold purchase. Indeed, these purchasers would not likely be in a position to finance their purchase before they had a mortgageable interest in the units. By enabling them to go into possession on this basis, the phantom mortgage arrangements to which they agreed can be said to have operated to their benefit. As the learned author points out in *Audrey Loeb, Condominium Law and Administration*, 2nd ed. (Toronto: Carswell, 1989 looseleaf), at pp. 5-18.2 to 5-18.3:

... most purchasers do in fact receive a benefit from the phantom mortgage, in that they are not required to provide, on the occupancy closing, the cash necessary to complete the transaction. Most condominium purchasers are not all-cash purchasers and they would be unable to finance the closings of their transactions by conventional means if all the cash to close was required on the date of occupancy closing.

Moreover, the phantom mortgage provisions in question in the present cases operated in such a way as to put the purchasers in substantially the same monetary position as they would have been in had possession and title closing taken place at the same time. A purchaser who intended to pay the balance due on final closing out of his or her own funds, by virtue of the agreement to give back the phantom mortgage, retained those funds and had the benefit of them throughout the entire interim occupancy period. During this period, the purchaser, manifestly, was in a position to invest the funds and collect interest or obtain other income or benefits therefrom, and presumably did. On the other hand, a purchaser who intended to pay the balance due on final closing by

means of a third party mortgage financing, as virtually all of the purchasers in these appeals did, by virtue of the phantom mortgage agreement, was not obliged to pay any interest on this mortgage before obtaining title, and saved this expense.

During the interim occupancy period, these purchasers had all of the protections afforded to them by the Act. Their security of tenure was assured, and they enjoyed possessory rights comparable to those they would have on becoming owners of their condominium units. By employing the phantom mortgage concept, the vendor cannot be said to have taken advantage of, or taken something away from, these purchasers; nor can this type of contractual obligation be said to have operated to their detriment. It seems to me no more than fair that a party who is given possession of a condominium unit without paying the balance of the purchase price, and who therefore has, not only the benefit of occupancy, but the use of the funds needed to close the transaction, or the savings that accrue from deferring interest payments on the mortgage monies being borrowed to close the transaction, should pay a reasonable rent during the occupancy period. A rent calculated in accordance with s. 51(6) is, by definition, a reasonable rent. It is a reasonable rent viewed from the standpoint of both the vendor and the purchaser. I should perhaps add that there is no suggestion that these purchasers did not appreciate the impact of their agreement with respect to the phantom mortgage on the calculation of their monthly occupancy fee. Nor is there any suggestion that the interest rate stipulated in the phantom mortgages was anything other than the properly applicable prevailing rate.

There is, as I stated earlier, no apparent rationale for discriminating in favour of all-cash purchasers and treating them in a more financially advantageous manner during their pre-final closing occupancy than purchasers who are to assume or give back a mortgage on final closing. The consumer protection policy underlying s. 51(6) is surely not advanced by drawing distinctions between purchasers on this basis. Nor, conversely, is the policy advanced by placing vendors who sell to all-cash purchasers in a financially disadvantageous position. Indeed, it seems to me contrary to the consumer protection purpose and, as well, contrary to commercial reality, to exempt more affluent purchasers, and those able to obtain third party financing, from payment of the mortgage interest component while requiring purchasers who are to assume a portion of the vendor's financing, or give back a mortgage, to pay this component during the interim occupancy period.

In my respectful view, the obligation of the purchasers to give back a phantom mortgage pursuant to their agreements of purchase and sale constitutes a valid contractual obligation for the purpose of s. 51(6) para. 1. I would not view this obligation as being precluded by or in contravention of the Act. It results in the purchasers being placed in effectively the same position they would be in were possession and final closings contemporaneous. It, furthermore, establishes an occupancy fee that is equitable from the standpoint of both the purchasers and the vendors. In sum, the phantom mortgage concept invoked in these cases, in my view, is consistent with the intended purpose and effect of the section. To conclude otherwise in the circumstances of these cases, and limit the occupancy fee to estimated realty taxes and common expenses only, would be to confer a windfall on these purchasers. This is a result which runs counter to their expectations on entering into the agreements of purchase and sale in question, and one which, in my opinion, is not mandated by s. 51(6).

In reaching this conclusion, I am not unmindful of the artificiality of the phantom mortgage concept or the contention that to sanction it is to permit form to outweigh substance. Nonetheless, for the reasons I have stated, the concept satisfies the requirements of the Act. Moreover, it makes s. 51(6) para. 1 equally applicable to all classes of purchasers, and achieves a fair and equitable result. If this concept were contrary to the consumer protection purpose underlying the section or violative of the spirit of the Act, I think it can fairly be said that, given its wide use over the past decade, one would have expected that the government ministry responsible for the administration of the Act would long since have intervened and caused steps to be taken to protect the numerous condominium purchasers in this province whose interim occupancy rental has been set by reference to phantom mortgages the same as, or comparable to, those in issue here. **THE RESCISSION ISSUES IN THE HUANG & DANCZKAY LTD. APPEAL**

I come now to the appeal of 797606 Ontario Limited against the order of Carruthers J. dismissing its claim for rescission of the agreements to purchase six penthouse-level condominium units in the respondent's proposed condominium project. The claim is based on two contentions: (1) that the respondent failed to take all reasonable steps to register a declaration and description without delay; and (2) that the respondent was in breach of the duty to take all reasonable steps to sell the other residential units included in the property without delay.

The building in question was completed in the winter of 1987. It contains 55 units which were first marketed by the respondent as "executive furnished suites" to be rented out to transient business people. In the fall of 1988, the respondent put the units up for sale as fully furnished proposed condominium units. In September, 1988, the parties entered into agreements of purchase and sale for six penthouse-level units which together make up an entire floor of the building. In November 1988, the appellant took possession of the units. As I indicated earlier, the appellant is a company engaged in the business of purchasing condominium units for investment and resale. The appellant's principals have in past years purchased condominium units in other projects developed by the respondent. The appellant intended to rent the units in question and eventually sell them at a profit. In fact, the units have been rented for various periods of time, some of them by the respondent's rental agents, and the appellant has received rental income.

By February 23, 1990, when this application came on in the court below, the respondent had succeeded in selling only four units in addition to the six purchased by the appellant. Some of the unsold units had been leased. The appellant has likewise sought to resell its six units, but without success. It has also experienced difficulty in renting the units. The respondent has refused the appellant's request to repurchase the units.

The declaration and description in respect of the property was eventually registered on February 14, 1990. The next step in the transaction is, of course, final closing. The appellant, however, contends that it is not obliged to complete the purchases, and is entitled to rescission of the agreements on the ground that the respondent failed to comply with the provisions of the Act relating to timely registration of the property and timely sale of the remainder of the units. The appellant asserts that the alleged breach of the respondent's statutory duties denied it the benefit of the condominium scheme envisioned by the Act.

Turning to the first of these grounds, the submission is that the respondent failed to take all reasonable steps to register a declaration and description without delay, as it is obliged to do under s. 51(1)(a) of the Act. This section provides that:

51.(1) Every agreement of purchase and sale entered into by a proposed declarant for a proposed unit for residential purposes shall be deemed to contain,

(a) a covenant by the vendor to take all reasonable steps to register a declaration and description in respect of the property in which the unit is included without delay ...

I agree with the appellant's general proposition that these mandatory provisions "are in the nature of consumer protection legislation designed to oblige the vendor of proposed condominium units for residential purposes to proceed without delay to register the declaration and description and to convey registrable title to the purchaser". I am of the opinion, however, that there is no basis for interfering with the decision of Carruthers J. This ground of appeal raises an essentially factual issue. On the evidence which has been adduced concerning the various steps taken by the respondent to effect registration, and the variety of title and planning problems it encountered in this regard, none of which I need detail, I can find no reason to question the correctness of the decision in appeal. In light of the material before the court, I am not persuaded that Carruthers J. erred in concluding that the respondent has not been guilty of any breach of s. 51(1)(a) such as to entitle the appellant to rescission. It should perhaps be noted that, prior to this application, the appellant did not seek any reasons for the delay in registration or make any complaint in this regard.

The second ground on which the appellant seeks rescission is founded on the allegation that the respondent failed to take reasonable steps to sell the other units in the proposed condominium project as required by s. 51(1)(b) of the Act. This section states: 51.(1) Every agreement of purchase and sale entered into by a proposed declarant for a proposed unit for residential purposes shall be deemed to contain,

(b) a covenant by the vendor to take all reasonable steps to sell the other residential units included in the property without delay other than any units mentioned in a statement under clause 54(1)(c) ...

Section 54(1)(c) sets out the requirements for a vendor who wishes to lease units in a residential condominium:

54.(1) A declarant or proposed declarant shall not grant a lease of a unit or proposed unit for residential purposes unless,

(c) every agreement of purchase and sale of a unit included in the property includes a statement that the unit to be included in the lease is or will be leased and specifies the uses that are or will be permitted by the lease ...

The agreements of purchase and sale in this case each contained the following provision:

39. The Vendor, as a proposed declarant under the Act hereby states that any unit or proposed unit within the Condominium Project may be included in a lease and the use that will be permitted by the lease will be for residential purposes only in the case of a unit.

On the evidence relating to this submission, Carruthers J. was unable to find the respondent in breach of its obligation to take all reasonable steps to sell the remaining unsold units. He also concluded that, although para. 39 of the agreement of purchase and sale "may not be as complete as it might", it constituted a statement in the sense that that term is used in s. 54(1)(c). In addition, he noted that, on the facts of this case, the appellant knew, from the time it agreed to purchase its units, that other units in the building would be leased or rented. Indeed, it is clear that, at the time of and prior to the appellant's purchase, fully furnished units were being rented to persons who had no option to purchase. The appellant obtained the respondent's consent to rent its units also. As noted above, the appellant did so in some instances through the respondent's rental agents.

Having reviewed the affidavits filed by the respondent setting forth the efforts which it has made to sell the units, which include a rather extensive advertising campaign and an offer of favourable financing terms to potential buyers, I do not think that the respondent can be said to be in breach of the duty imposed by s. 51(1)(b) to take all reasonable steps to sell the remaining residential units without delay. The respondent's inability to sell these units is doubtless an unfortunate consequence of the current severe downturn in the condominium market in Toronto. It does not appear to be through lack of trying.

In light of this conclusion, I need only add, in regard to whether para. 39 of the agreements of purchase and sale complies with s. 54(1)(c), that on the particular facts of the present case, I would agree with Carruthers J. that the contractual provision in question constitutes a statement in conformity with s. 54(1)(c). Given the appellant's knowledge of the original concept for this building, and its intention to participate in an arrangement whereby all of the proposed units, including the appellant's, were to be made available for rental purposes, this appellant could have been under no misapprehension that para. 39 constituted a statement specifying that "any unit or proposed unit" could be leased and, accordingly, was not subject to the requirements of s. 51(1)(b). Whether the particular units that may be leased must, in other circumstances, be set out with greater specificity to satisfy this provision of the Act need not be considered here.

DISPOSITION

For these reasons, I would allow the Opemoco appeal, set aside the judgment of Rosenberg J., and in place thereof order that the respondents' application be dismissed. The appellants are entitled to the costs of the appeal and of the application.

I would dismiss the Huang & Danczkay Ltd. appeal with costs.

First appeal allowed; second appeal dismissed.

CBR# 015

Abdool, Atherley, Brett, Clark, Dean, Domingos, Elik, Evason, Fraser, Good, Hicks, Hirst, Hughes, Jones, Jager, Josaitis, Lemieux, Martin, McCanna, Graham, Minaker, Harper, Ram, Rea, Slater, Pinheiro, Weston and Wong v. Somerset Place Developments of Georgetown Ltd., Canterra Developments Inc., and 379059 Ontario Inc., c.o.b. Retail Engineering, and Prenor Equity Inc.*

4 O.R. (3d) 280

Action No. M1151/91U

ONTARIO Ontario Court (General Division) B. Wright J. July 24, 1991

*Notice of appeal to the Court of Appeal for Ontario was filed August 12, 1991.

Real property -- Condominiums -- Agreement of purchase and sale -- Disclosure -- Disclosure statement providing insufficient information about by-law and rules of condominium corporation -- Change in construction schedule material amendment to disclosure statement -- Disclosure statement not complying with statutory requirements -- Condominium Act, R.S.O. 1980, c. 84, s. 52.

In 1988, the applicants signed agreements to purchase units in a residential condominium project. The vendor provided each applicant with a disclosure statement. Although the proposed general organizational by-law of the condominium corporation was 12 pages in length, the disclosure statement dealt with the by-law on one-third of a page and set out only certain general topics covered by the by-law. The disclosure statement indicated that construction of the recreational facility was to begin in October 1988 and was to be completed by September 1989.

Because of a downturn in the economy and cash flow problems, the developer was unable to pay for construction and, as a result, the contractor abandoned the project. Trades and suppliers registered construction liens against the project. The commencement of construction of the recreational facilities was delayed a year. P Inc., the mortgagee, appointed a receiver-manager to take control and to complete the project.

The applicants sought a declaration that their respective agreements of purchase and sale were not binding because the disclosure statement did not comply with s. 52 of the Condominium Act. Section 52 stated that an agreement to purchase is not binding on the purchaser until the declarant or proposed declarant has delivered to the purchaser a copy of the current disclosure statement and all material amendments thereto.

P Inc. disputed that it was a declarant under the Act.

Held, there should be declarations that the agreements of purchase and sale are not binding and that P Inc. was a declarant.

The purpose of a disclosure statement is to summarize and highlight for a purchaser the important matters contained in the declaration, by-laws and rules for the condominium so that a purchaser may make an informed decision about whether to purchase. A disclosure statement should provide a purchaser with information that will provide reasonably satisfactory answers to these questions: (1) is the purchaser getting what he or she is paying for? (2) what are the rights and responsibilities of the condominium owner? and (3) how much will it cost to live in the condominium? In this case, the disclosure statement was deficient. The statement did not describe the significant features of the general organizational by-law. More information was required about the duties of the condominium corporation. The disclosure statement did not provide information about what was in the rules of the condominium corporation but contained only a listing of general subject-matter.

The applicants, as purchasers, should have been provided with material amendments to the disclosure statement. A material amendment is an amendment containing information that would provide a purchaser with a reasonable cause to reconsider whether to confirm the agreement of purchase and sale or to rescind. The purchasers should have been advised about delays in the completion of the recreational facility. Such a major change in a construction schedule was material information to which a purchaser should have had access. The purchasers should also have been advised about the construction lien claims since s. 52(7)(g) of the Act requires that the budget statement shall set out the status of any pending lawsuits material to the property.

As to the status of P Inc., under the Act, it was a declarant if it was a mortgagee in possession. Whether a mortgagee is in possession depends upon whether the mortgagee has taken out of the mortgagor's hands the control and management of the mortgaged premises. In this case, by the private appointment of the receiver-manager that it controlled, P Inc. was a mortgagee in possession and, accordingly, a declarant under the Act.

Cases referred to

Albrecht v. Opemoco Inc. (1989), 70 O.R. (2d) 151, 61 D.L.R. (4th) 594, 6 R.P.R. (2d) 109 (H.C.J.) [supplementary reasons at (1989), 70 O.R. (2d) 221, 62 D.L.R. (4th) 541 (H.C.J.)]; Beckstead v. Ball, [1961] O.R. 127, 26 D.L.R. (2d) 374 (H.C.J.); Benner v. HLS York Developments Ltd. (1985), 52 O.R. (2d) 243, 21 D.L.R. (4th) 652, 37 R.P.R. 220 (H.C.J.); Brunott v. Coolmur Properties Ltd., Ont. C.A., Brooke, Weatherston and Thorson J.J.A., October 24, 1983 [summarized at 22 A.C.W.S. (2d) 509]; Federal Trust Co. v. Frisina (1976), 20 O.R. (2d) 32, 28 C.B.R. (N.S.) 201, 86 D.L.R. (3d) 591 (H.C.J.); Noyes v. Pollock (1886), 32 Ch. D. 53, 55 L.J. Ch. 53 (C.A.); Ostrander v. Niagara Helicopters Ltd. (1973), 1 O.R. (2d) 281, 19 C.B.R. (N.S.) 5, 40 D.L.R. (3d) 161 (H.C.J.); R. v. Coopers & Lybrand Ltd., [1981] 2 F.C. 169, 34 C.B.R. (N.S.) 97, [1980] C.T.C. 367, 80 D.T.C. 6281 (C.A.) [costs award affd [1981] 2 F.C. 196, [1980] C.T.C. 406, 80 D.T.C. 6323 (C.A.)]

Statutes referred to

Condominium Act, R.S.O. 1980, c. 84, ss. 1(1)(l) "declarant", (q) "owner", 52, 52(1), (2), (6)(b), (f), 7(g)

APPLICATION for a declaration that agreements for the purchase and sale of condominium units were not binding due to failure to comply with s. 52 of the Condominium Act.

Jonathan H. Fine, for applicants. Stephen Schwartz and Robert A. Miller, for 379059 Ontario Inc., c.o.b. Retail Engineering and Prenor Equity Inc.

No one appearing for Somerset Place Developments of Georgetown Ltd. and Canterra Developments Inc.

BLONUS WRIGHT J.:-- The applicants are purchasers of condominium units in a project called the Royal Ascot Club situated in Georgetown, Ontario.

No purchaser should be subjected to the horror story which unfolded for these purchasers. What was advertised as "a prestigious and intimate new condominium residence" with "a privileged new way of life in Georgetown" turned into a nightmare for the applicants.

Although possession was slated for September 1989, occupancy was not available until February 1990. What the purchasers occupied at that time was literally a construction site. The site, both internally and externally, was littered with garbage; the lobby entrances and hallways were not carpeted until December 1990; of the two elevators for the seven-storey X7 building, one has never worked; there was evidence of considerable water leakage into the underground garage; purchasers claim that heating and air conditioning units are inadequate; and the recreation centre has yet to open, although at the time of the hearing of this application an occupancy permit was imminent. These are only some of the many problems encountered by the purchasers.

It appears that this project got caught in the downturn of the economy which was felt particularly severely in the housing market. At the time of hearing of this application, only 41 of 84 units had been sold. The applicants, numbering approximately 30 purchasers, purchased during 1988. Apparently, the project suffered cash flow problems which resulted in the contractor being forced to cut corners, to resort to unskilled labour and substandard materials and ultimately to walk off the site because of non-payment.

Canterra Developments Inc. is the parent company of the developer, Somerset Place Developments of Georgetown Limited. This project was the only venture of Somerset. Somerset, at the time of the application, existed in name only, is basically out of the picture and has no assets to which anyone has recourse. Prenor Equity Inc. (Prenor) is the mortgagee who took control of the project in October 1990 and in November 1990 appointed 379059 Ontario Ltd., c.o.b. Retail Engineering (Retail), as receiver-manager of the project.

Prenor has effectively assumed control of the project with the unenviable task of picking up the pieces and finishing the project. It has, and is, expending considerable monies in order to complete the development and to rescue itself from what, in hindsight, it must consider to have been a bad investment.

Prenor maintains that most, if not all, of the deficiencies of the project have been rectified. The underground garage has been properly waterproofed, the elevator problem will be fixed shortly, there will be modifications to the heating and cooling equipment as recommended by Reindeers and Associates, and the recreation centre will be in full operation soon. It is Prenor's position that within a short period of time, the purchasers will, in fact, be enjoying the very kind of building and amenities that they agreed to purchase.

The purchasers still have reservations concerning the condition of the building. Having lived through and experienced a number of deficiencies in the construction of the project, the purchasers are leery of what the future may hold for maintenance and replacement costs.

The purchasers are also perturbed that Prenor has refused to honour three promises which the purchasers maintain were part of their agreements: furniture for the lobby; a van for the use of the residents; and a reduction in the phantom mortgage interest rate from 15.49 per cent to whatever the current rate is 90 days before the purchasers receive their deeds. Prenor refuses to honour these vendor commitments, claiming that the promises were not in writing.

The purchasers claim that their agreements of purchase and sale are not binding because of the failure of the vendor to deliver a disclosure statement which complies with the requirements of s. 52 of the Condominium Act, R.S.O. 1980, c. 84.

In the second half of the decade of the 80s, Ontario experienced a considerable period of economic affluence with the demand for housing outstripping the supply. Prices were rising rapidly and not only were sales by purchasers, who intended to occupy what they purchased, on the increase, but there was a high percentage of speculative purchasers hoping to make a quick buck in the housing market. Condominium units were being gobbled up by clamouring purchasers and investors before developers even put a shovel into the project site. In that atmosphere of frenzied buying, the adequacy of a disclosure statement seldom crossed the purchasers' minds. The only concern was to buy before someone else did.

The importance of the adequacy of a disclosure statement surfaces when there is a recession and prices are falling because of the glut of condominiums on the market or because a condominium project runs into financial difficulties as did the Royal Ascot Club. In those situations, purchasers look for ways to get out of deals which have gone sour for one reason or another. In this case, the applicants cannot be blamed for seeking every available remedy to get out of what they perceive to be a bad investment.

Although condominiums have been in existence for a number of years, to a first time buyer the condominium concept of ownership is completely new. It is considerably different from, and foreign to, house ownership. The purpose of a disclosure statement is to summarize and highlight for a purchaser the important matters contained in the declaration, by-laws and rules so that a purchaser receives the pertinent information upon which to make an informed decision whether to purchase.

Issues

There are two issues:

- (1) Does the disclosure statement delivered to the applicants satisfy the requirements of s. 52 of the Condominium Act?
- (2) Is the respondent, Prenor Equity Inc., a declarant under the Condominium Act?

Disclosure statement

Section 52(1) of the Condominium Act provides that an agreement of purchase and sale is not binding on the purchaser "until the declarant or proposed declarant has delivered to the purchaser a copy of the current disclosure statement and all material amendments thereto".

Section 52(2) gives a purchaser, before getting title, ten days to rescind the agreement after receiving the disclosure statement or any material amendments thereto. This provision allows the purchaser to rescind without any reason and any purchase money paid is refunded.

But, if s. 52(1) is not complied with, there does not appear to be any time limit in which to declare an agreement of purchase and sale not binding on the grounds that the disclosure statement is inadequate as long as the purchaser has not become the owner of a unit. If a purchaser becomes an owner of a unit and alleges that a declarant provided statements or material required to be given to a purchaser that failed to contain any material statement or information, the unit owner is entitled to damages.

The Act provides very strict provisions as to the content of a disclosure statement. The pertinent provisions, for our purposes, are:

52(6) The disclosure statement ... shall contain and fully and accurately disclose,

(b) a general description of ... recreational and other amenities together with any conditions that apply to the provision of amenities;

(d) a brief narrative description of the significant features of the existing or proposed declaration, by-laws and rules governing the use of common elements and units ...

(f) where construction of amenities is not completed, a schedule of the proposed commencement and completion dates ... (7) The budget statement ... shall set out,

(g) ... the status of any pending lawsuits material to the property of which the declarant or proposed declarant has actual knowledge ...

My first observation: the above provisions appear to be poorly drafted. There appears to be a dichotomy of meaning. On the one hand, the disclosure statement shall "fully and accurately disclose", while on the other hand, "a general description" or "a brief narrative description of the significant features" is sufficient.

The question is: does the disclosure statement provided to the applicants comply with the above provisions?

There are only two previous cases which deal with the adequacy of a disclosure statement. In an October 24, 1983 brief endorsement on the record [summarized at 22 A.C.W.S. (2d) 509] in the case of *Brunott v. Coolmur Properties Ltd.*, the Ontario Court of Appeal [Brooke, Weatherston and Thorson J.J.A.] said:

The appellant contends that there was no binding agreement of purchase and sale because no disclosure statement [was] delivered which meets the requirements of s. 52. We agree without specifying its failures that the document was no more than a statement of intention -- a proposed statement that lacked information on specific matters the statute enumerated. [It is] clear that [the] purpose of s. 52 is that [the] purchaser be given this information.

The disclosure statement in *Brunott* was two and one-third pages long exclusive of the budget statement. In our case, the disclosure statement is seven pages long exclusive of the budget statement. Therefore, our disclosure statement contains more information than in *Brunott*, but it must be decided whether those seven pages comply with the requirements.

The second case is a judgment of Carruthers J. in *Benner v. HLS York Developments Ltd.* (1985), 52 O.R. (2d) 243, 21 D.L.R. (4th) 652, in which the disclosure statement was found to be adequate. The following are relevant statements from that case at p. 246 O.R., p. 655 D.L.R.:

If a disclosure statement is found wanting so that, in effect, it is not a disclosure statement as required by the provisions of the Condominium Act, then a purchaser is at no time required to complete the transaction in connection with which it has been given.

In deciding whether a proffered disclosure statement complies with the provisions of s. 52, the court is to employ an objective standard. ... The person to whom it is given has to be able to determine what are the essential elements of what he has agreed to purchase ... The purpose of the relevant provisions of the Condominium Act is to permit the purchaser to be able to make an informed decision as to whether to elect to rescind or affirm the outstanding agreement of purchase and sale. In my opinion, the sufficiency or otherwise of a disclosure statement must, as well, be judged on the basis of the materiality of its content.

I agree with the comments of Carruthers J. However, I wish to expand on the reasons behind the purpose for a disclosure statement. Why is the content of a disclosure statement so critical?

The public is familiar with the adage "a man's house is his castle". But this type of ownership includes the complete control and privacy of both the internal and external parts of the property. In a condominium property, the extent of an owner's control and privacy are severely limited. That control and privacy is confined to within the walls of the owner's unit. Once an owner steps out of the door of his unit, he shares in common with other owners all of the other aspects of the condominium property. Along with that sharing come certain responsibilities and restrictions.

In effect, a previous house owner, who enjoyed the benefits of sole proprietorship, is, as owner of a condominium, only a shareholder with one vote in a small business run by a board of directors where the majority of votes makes the decisions. Even members of the public who have never previously owned a house are familiar with the trappings of house ownership or apartment occupancy, but not the concepts of condominium living.

Since condominium lifestyle is dramatically different than the familiar lifestyle of other property ownership, it is extremely important that persons contemplating condominium living be adequately informed of the advantages and disadvantages of the condominium concept. The legislation provides that complete and adequate information necessary for a purchaser to make an informed decision should be contained in the disclosure statement.

In the whole scheme of things, some aspects of condominium living may initially appear unimportant to a vendor of condominiums. The vendor is completely familiar with the condominium concept and is in the business of selling that concept to the public. But the criteria of required information must be based on the underlying philosophy that hereditary concepts of property ownership have a longstanding mental impact on a person's subconscious attitudes of a style of living. Those very familiar concepts are ingrained. It takes time and new information to change those concepts.

For example, is it material for a condominium purchaser to know that the corporation must have a key to the owner's unit and the owner cannot change the lock unless a key is provided to the corporation? That is a totally new concept for a previous house owner whose thinking has been devoted to the security of his own property and the only persons who have keys are members of the family. There are very good reasons why the corporation needs to have a key, but until the rationale for the requirement to give a key to the corporation is brought home to the purchaser, the purchaser is unable to take the second step to understand the rationale behind the requirement. Once the rationale is explained, the requirement usually fades into insignificance. But, initially, the information may be significant to a new purchaser.

Paragraph 9 of the disclosure statement advises the purchaser that the corporation is entitled to enter any unit "upon reasonable notice". A purchaser would have no difficulty with this concept. The purchaser would be given reasonable notice that the corporation needed access to the owner's unit for a specific purpose. But, I suggest, it is a whole new concept for a purchaser to be told that the corporation has in its possession at all times a key to the owner's unit.

The above example is given to demonstrate a minor but important difference in concepts between house ownership and condominium shareholding.

I suggest that a first time condominium purchaser has three main concerns:

- (1) Am I getting everything that I am paying for?
- (2) What are my rights and responsibilities as a condominium owner?
- (3) How much will it cost to live in this condominium complex?

In my view, a disclosure statement should provide a purchaser with the information which will provide reasonably satisfactory answers to those three concerns.

I now propose to discuss in some detail the content of the disclosure statement.

Proposed By-Law No. 1 (general organizational by-law)

The proposed By-law No. 1 comprises 12 pages; the disclosure statement refers to the by-law in one paragraph on p. 6 comprising one-third of a page. There is no narrative description of any significant features of the by-law. The disclosure statement sets out only certain general topics covered by the by-law. Since the disclosure statement gives no description of significant features of the by-law, one could conclude that there are none to disclose. My reading of the by-law compels me to conclude that the disclosure statement is deficient since it fails to describe the significant features of the by-law.

For example, I believe a disclosure statement should provide more information on the duties of the corporation than is contained in this disclosure statement. The only duty of the corporation mentioned is assessing common expenses from time to time and collecting monthly common expense payments from unit owners. Other duties listed in Article IV of the By-law, which may be of particular interest to some purchasers, are:

- (f) the preparation of an estimated budget;
- (h) the employment and dismissal of personnel necessary for the maintenance and operation of the common elements;
- (j) the investment of reserve monies held by the Corporation in interest bearing accounts ...
- (q) establishing and maintaining adequate reserve funds for the major repair or replacement of the common elements ...

It is essential that purchasers be advised of what input they have into and control over the affairs of the corporation. It is not disclosed to a purchaser that under Article V of the by-law, the board shall call a special meeting: "Upon receipt of a requisition in writing made by owners who together own not less than 15% of the units". There is no disclosure that at meetings "a quorum shall be constituted when persons entitled to vote and owning not less than 33 1/3% of the units are present in person or represented by proxy".

I suggest that a purchaser should know that the affairs of the corporation can effectively be dealt with by only one-third of the unit owners.

With respect to the Board of Directors, the information in Article VI of the by-law to the effect that the number of directors shall be five, of whom three shall constitute a quorum, or that a director need not be an owner has not been disclosed. Such information should have been disclosed.

The disclosure statement fails to set out important information from Article XII of the by-law with respect to default in payment of common expenses. No disclosure is made that arrears, "shall bear interest at the rate of 18% per annum and shall be compounded monthly until paid".

Additionally, Article XII contains other pertinent information. The board sets the budget unilaterally; the owners have no say. On receipt of the budget, owners must pay by 12 post-dated cheques. Extraordinary expenses may be assessed by the board at any time and are payable within ten days. All the disclosure statement says is: "The proposed By-law establishes requirements for assessing common expenses from time to time and collecting monthly common expenses from unit owners".

My conclusion is that the disclosure statement does not contain sufficient information to comply with the requirements of s. 52 of the Condominium Act. There are too many voids in the description of significant features of the by-law which go to informing

purchasers as to the handling of the affairs of the corporation, what input an owner has as a shareholder and how costs are determined.

The reported judgment in *Benner*, supra, does not contain the disclosure statement which was under scrutiny; however, for comparison purposes, I obtained a copy from counsel who acted for the plaintiff in that case. Although the disclosure statement is only five and a half pages long, exclusive of the budget statement, slightly more than one page is devoted to a description of the significant features of proposed By-law No. 1.

With respect to proposed By-law No. 1, the disclosure statement in *Benner* discloses: 15 per cent of unit owners can call a special meeting; 33 1/3 per cent of owners constitute a quorum; the number of directors; a director need not be a member of the corporation; extraordinary expenses may be assessed by the board and are payable within ten days; and, arrears of payments of common expenses bear interest at 18 per cent per annum.

At least, the drafter of the disclosure statement in *Benner* believed the above items were significant features of By-law No. 1. These are the type of significant features which I have found to be absent from the disclosure statement in our case.

The problem any judge faces in adjudicating on the sufficiency of a disclosure statement is, in my view, the failure of the legislation to provide an adequate guideline for the content of a disclosure statement. It is not adequate to simply require disclosure of "significant" features. Purchasers are sophisticated and unsophisticated. What would be a "significant" feature to one purchaser may be not at all "significant" to another purchaser. Therefore, there should, I suggest, be some standard form of the content of a disclosure statement. Such is a matter of policy rather than law.

I suggest it is incumbent upon government to devise a standard form of disclosure statement to give more guidance to vendors and developers and more protection to purchasers. Purchasers should not be required to commence legal actions for the determination of what government should be deciding as a matter of policy. Courts should not have to spend time defining the content of disclosure statements when such a matter is truly the purview of the legislature. By now, there surely is sufficient knowledge and experience with the condominium concept that the government can put its mind to determining what a disclosure statement should contain and be able to amend the legislation to provide better guidelines rather than the vague generalities of the current provisions.

An entirely different approach to the legislation could be advanced due to the fact that the purchaser receives, with the disclosure statement, complete copies of the declaration, by-laws and rules of the corporation. It could be argued that the purchaser receives all of the required information and, therefore, it is not necessary that the disclosure statement duplicate a lot of the information. For that argument to be valid, the legislation requires amendment to make the requirements of the content of the disclosure statement much less stringent.

In addition to the discussion on pp. 288 to 290, supra, I offer the following example of information contained in By-law No. 1 which some purchasers may consider to be significant and to which at least some reference might be made in a disclosure statement. This example underlines the lack of preciseness when the legislation uses such a fluid term as "significant". It means different things to different people.

Article III of the by-law describes the records which the corporation shall maintain. The following is a list of some of the records spelled out in Article III:

- 1(i) a table depicting the maintenance responsibilities and indicating whether the corporation or the unit owners are responsible.
- (j) ... a list detailing current replacement costs and life expectancy under normal maintenance conditions of all major capital items in the property.
- (k) a separate record of all receipts on account of common expense payments.
- 4(a) minutes of all meetings of the Board;
- (c) a copy of all consents for alterations to units.
- 5(a) a copy of annual financial statements shall be furnished to every owner.

The disclosure statement makes no reference to any of the records which the corporation is required to keep. To be advised that there is easy access to such records could be important to a purchaser who is becoming a shareholder of a business. The purchaser will be put somewhat at ease knowing that there is a record of who is responsible for maintenance and information available on life expectancy and current replacement costs of all major capital items. As well, a purchaser will have access to all minutes of the board meetings and will receive an annual financial statement. Probably an even more important record to a purchaser is the consents for alterations to units. There could be considerable consternation amongst unit owners if there was no such record. If there were no records, unit owners could discover that the corporation allowed certain alterations to be made by one owner but refused approval for similar alterations to another owner. Where the corporation must keep a record of all consents for alterations, unit owners are assured of even-handed treatment.

Rules

The disclosure statement does not tell a purchaser what is in the rules; it contains only a listing of general subject-matter. For example, it does not disclose that any losses, costs or damages incurred by the corporation by reason of any breach of the rules shall be paid by the owner and may be recovered in the same manner as common expenses. This includes any breach of the rules by any guests of the owner.

Rule 16 says: "No motor vehicle, other than a private passenger automobile, motorcycle or station wagon, shall be parked in any parking space". If a purchaser had a small trucking or delivery business, it would appear that the owner's parking space could not be used for a small truck or delivery van. The purchaser would not know this fact from reading the disclosure statement. I note that the *Benner* disclosure statement contains this information.

Rule 22 states that any unit owner wishing to use the party or meeting room must first provide a refundable deposit "in such amount and upon such terms as may be determined by the Board or the manager in their sole discretion".

Rule 23 provides that children under the age of 16 are not permitted in the exercise rooms unless accompanied by a parent. This would be important information for a mother and father who both work and have children under 16. The children would like to use the exercise room after school and their parents would like them to be so occupied but they would not be able to use the facilities without a parent being present. Suppose a family has children under 16 and an older child age 18 or more. The purchaser should be informed about this rule to determine if it would be possible to amend the rule so that an adult other than a parent could be present with the children in the exercise room.

Both Rules 22 and 23 are conditions placed on the use of facilities. Those conditions are not disclosed in the disclosure statement. The absence of that disclosure is a breach of s. 52(6)(b) which requires the statement to contain "any conditions that apply to the provision of amenities". Is this another area where the legislation is far too vague? What are "any conditions"? I suggest that an examination of a number of disclosure statements may find them to be faulty because some condition has not been disclosed.

To this point, I have discussed the disclosure statement which was provided to all the applicant purchasers. However, s. 52(1) and (2) is not limited to receipt by the purchaser of a copy of the current disclosure statement, but "all material amendments thereto". I must consider whether the purchaser should have been provided with any amendments to the disclosure statement.

Material amendments

A "material" amendment is an amendment containing information which would provide a purchaser with a reasonable cause to reconsider whether to confirm the agreement of purchase and sale or to rescind.

For example, s. 52(6)(b) mandates that the disclosure statement provide any conditions that apply to the provision of recreational and other amenities. If certain purchasers agreed to buy a unit in a particular condominium development because of the recreational amenities, it would be imperative to that purchaser to be informed of any material changes to the conditions that apply to the recreational amenities.

To continue with recreational amenities, s. 52(6)(f) provides that the disclosure statement contain a schedule of the proposed commencement and completion dates where construction of the amenities is not completed. Suppose, for example, that the disclosure statement which the purchaser originally received did provide the proposed commencement and completion dates for a recreation centre which was to have a swimming pool. Suppose that a senior citizen purchaser, as part of continuing therapy for a physical problem, is required to spend a certain amount of time each day swimming. If the construction of the recreation centre is delayed for a considerable time, that would be a very material amendment to the information upon which the purchaser decided to purchase. That information could cause the purchaser to look for other accommodation with the necessary swimming facility.

Paragraph 4 in the disclosure statement under the topic "Recreational and Other Amenities" records: "The construction of the above amenities is expected to commence in the month of October 30, 1988 and the proposed date for completion is September, 1989".

The evidence is that all applicants, except one, signed their agreement of purchase and sale prior to October 1988 and received the above information about the proposed commencement and completion dates of the recreational facilities. Construction of the recreation centre did not start until October 1989, one year later than expected, and, at the time of this application in June 1991, the facilities were just being opened.

The purchasers had interim closing dates of September 1989 at which time they were to be given possession and, pursuant to the agreement, expected a completed recreation centre. I find that a considerable time prior to the expected interim closing, the vendor was well aware that the proposed construction dates were beyond realization. The vendor knew the recreation centre would not be completed by the time of interim possession and must have been aware that construction may not have been commenced until that time.

I believe that such a major change in a construction schedule was material information to which a purchaser should have had access. I find that there was an obligation on the vendor to make that material amendment to the disclosure statement. Failure to make that amendment is non-compliance with s. 52.

A second material change requiring an amendment occurs in s. 52(7)(g). It requires that the budget statement shall set out "the status of any pending lawsuits material to the property of which the declarant or proposed declarant has actual knowledge". In this case, there were a number of liens registered against the lands by tradesmen and suppliers who were not being paid. The main contractor vacated the site in April 1990, filed a lien, and commenced an action against the developer for a substantial amount. Such matters of pending lawsuits seem clearly to be "material to the property". In my view, such information is crucial in order for a purchaser to make a decision to purchase. That information fits in with one of the main concerns of a purchaser: how much will it cost to live in the condominium building? If there are substantial pending lawsuits, a purchaser should be informed in order to be able to seek advice whether those pending lawsuits will add any costs to the monthly expenses, and if so, how much. In the case of this project, the information of pending lawsuits would have put purchasers on notice that this project was in financial difficulty, which, at least, would have provided them with an opportunity to determine whether they wished to rescind their agreements. In my view, such information is within the category of "material amendments" to the disclosure statement which should have been provided to the purchasers. Otherwise, subss. 52(1) and (7)(g) are meaningless and the consumer protection atmosphere which pervades the Condominium Act is illusory.

I conclude that the disclosure statement violates the requirements of s. 52 because its content is inadequate and material amendments to the statement were not made. In order that this condominium project will come to completion with compliance with all legislative requirements, it is necessary to determine who is the declarant for that purpose. I now consider the second issue.

Is Prenor a declarant under the Condominium Act?

Section 1(1)(l) of the Condominium Act defines "declarant" as: "the owner or owners in fee simple of the land described in the description at the time of registration of a declaration and description of the land". "Owner" is defined in s. 1(1)(q) as: "the owner or owners of the freehold estate or estates in a unit and common interest, but does not include a mortgagee unless in possession".

The question is: is Prenor a mortgagee in possession, and therefore, an owner and, therefore, a declarant?

Apparently, courts of equity were cautious in deciding that a mortgagee was in possession. McRuer J. [quoting from *Parkinson v. Hanbury* (1867), L.R. 2 H.L. 1] in *Beckstead v. Ball*, [1961] O.R. 127, 26 D.L.R. (2d) 374 (H.C.J.), at p. 130 O.R., p. 377 D.L.R., said:

It follows of course from the almost penal liabilities imposed on a mortgagee in possession that Courts of Equity were very slow to decide that possession had been taken, and would not do so unless satisfied that the mortgagee in possession took the possession in his capacity of mortgagee without any reasonable ground for believing himself to hold in any other capacity. ... The Courts also favoured any means which would enable the mortgagee to obtain the advantages of possession without its drawbacks. In *Beckstead*, the mortgagee was not in actual possession and did not control the premises other than to collect rents.

I suggest it is a possibility in any condominium project that a mortgagee will find itself compelled to take over a project, as Prenor did in this instance, in order to salvage a substantial investment. It is a risk that a mortgagee takes under consumer protection legislation such as the Condominium Act. According to the reasoning in *Beckstead*, I am satisfied that Prenor "took the possession in (its) capacity of mortgagee without any reasonable ground for believing (itself) to hold in any other capacity".

If Prenor is not in possession and therefore not a "declarant", the purchasers have no responsible person upon which to rely to complete the project pursuant to all of the terms of the agreements entered into with the purchasers. There would exist no one to fulfil the declarant's obligations under the Condominium Act. The developer, Somerset, exists in name only, stripped of any meaningful authority with respect to this project. If a mortgagee in Prenor's position is not in possession, then unscrupulous vendors have available a scheme to circumvent the consumer protection aspects of the legislation. All that is required of a less than honest developer is to set up a shell company to sell the units. Then the vendor company disappears; the mortgagee-related company takes over, but, if deemed not to be in possession, the mortgagee is not required to live up to the original agreements. The purchasers are the losers, having purchased units in a project which is not the quality of the project for which they bargained.

The question of whether a mortgagee is in possession depends upon whether the mortgagee has taken out of the mortgagor's hands the control and management of the mortgaged premises. In *Beckstead*, a reference was made to the decision in *Noyes v. Pollock* (1886), 32 Ch. D. 53, 55 L.J. Ch. 513 (C.A.), which dealt with whether a mortgagee not in actual possession but in receipt of rents is, in law, a mortgagee in possession. Bowen L.J. made the following comment at p. 64 Ch.D.:

But in the case where an estate is let to tenants, of course the mortgagee does not enter upon actual occupation of the demised premises. He may fall under the principle as a person who enters and takes possession of the rents and profits; but only, as it seems to me, if he does something which goes beyond the mere receipt of sums of money to which the rents and profits may amount, and reaches a point at which he displaces, for the purpose of realizing the security, the mortgagor from the control and dominion of the reversion of the estate which is demised. Unless the dominion and control is taken in that sense, the mere receipt of the produce of the management may be taken by the mortgagee, and yet he may stop short of taking the management itself. He may take the rents; that is not enough unless he takes the rent in such a way as to take upon himself, and out of the hands of the mortgagor, the business and the duty of collecting and being diligent in that respect.

In my view, Prenor's actions accord with this description of a mortgagee taking possession and those actions go beyond what Bowen L.J. concludes constitutes a mortgagee in possession. Prenor not only receives the occupation fees from the purchasers, but has taken over the daily operation of the project in order to see it to completion, including all the physical and legal aspects. The mortgagor, Somerset, has been completely displaced and has no input into any facet of the management of the project. But Prenor argues that its receiver-manager, Retail, is in possession and not Prenor. However, it is a facade to suggest that Retail is in possession when Prenor is calling all the shots. In my opinion, Retail is receiver-manager only in name and exercises only whatever authority is given to it by Prenor. In fact, the contract between Prenor and Retail makes it certain that Retail operates only at the behest of Prenor. Paragraph 7(b) of that contract provides that Prenor will "supervise and give final approval for all actions of Retail in completing and managing the project".

Since Retail is the privately appointed receiver-manager of Prenor, Prenor cannot escape the obligations of a mortgagee in possession. It would be inequitable to allow Prenor to hide behind a receivership, thereby hoping to absolve itself of all responsibility to purchasers. There is a clear distinction between privately appointed and court-appointed receivers as to obligations. Although not definitive statements, courts have implied that privately appointed receivers are akin to mortgagees in possession and have corresponding obligations.

In *Ostrander v. Niagara Helicopters Ltd.* (1973), 1 O.R. (2d) 281, 40 D.L.R. (3d) 161 (H.C.J.), a receiver-manager was appointed by the mortgagee to protect and enforce the security of the mortgagee. The court, at p. 286 O.R., p. 166 D.L.R., found that:

A very clear distinction must be drawn between the duties and obligations of a receiver-manager ... appointed by virtue of the contractual clauses of a mortgage deed and the duties and obligations of a receiver-manager who is appointed by the Court and whose sole authority is derived from that Court appointment ... In the latter case he is an officer of the Court; is very definitely in a fiduciary capacity to all parties involved in the contest.

In that case, the court was satisfied that the purpose of the employment of the receiver was to protect the security of the bond holder. Stark J., at p. 286 O.R., p. 166 D.L.R., held that the privately appointed receiver's role was that of "agent for a mortgagee in possession". There was no suggestion in the case that the mortgagee was ever in actual possession. The relationship with the receiver was in the nature of a typical appointment such as between Prenor and Retail, yet Stark J. saw fit to refer to the mortgagee as being "in possession". Galligan J., in *Federal Trust Co. v. Frisina* (1976), 20 O.R. (2d) 32, 86 D.L.R. (3d) 591 (H.C.J.) stated [pp. 34-35 O.R., p. 593 D.L.R.]:

A mortgagee has the right in law to go into possession for default. In the exercise of that right the mortgagee obviously can choose the manager he pleases. But a mortgagee exercising his right to go into possession incurs corresponding obligations. Frequently, those obligations are thought to be onerous. It seems to me that when a mortgagee applies to the Court to appoint a receiver-manager he is asking the Court to dispossess the mortgagor but absolve himself from the obligations incurred if he

exercises that right himself. I think that if he asks a court to relieve him of the obligations of a mortgagee in possession, he must lose his right to decide who shall be in control of the property.

It ought to be remembered that a receiver-manager appointed by the court under s. 19 of the Judicature Act, becomes an officer of the Court and is therefore very different from a person appointed manager by a mortgagee in possession. That person is simply the agent of the mortgagee.

In *R. v. Coopers & Lybrand Ltd.*, [1981] 2 F.C. 169, 34 C.B.R. (N.S.) 97 (C.A.) [costs award aff'd [1981] 2 F.C. 196, 80 D.T.C. 6323 (C.A.)], the privately appointed receiver was held to be akin to a mortgagee in possession and therefore responsible for failure to remit an amount deducted from wages for income tax. The court commented at p. 181 F.C., pp. 108-09 C.B.R.:

One exercising the office of receiver and manager is acting for the benefit of the debenture holders. He is not appointed to carry on the business of the company in the best interest of the company; he is appointed to realize the security of the debenture holders. While the debenture itself states that the receiver and manager is the agent of the debenture debtor, the chief purpose of this provision (which is a contractual one between Venus (mortgagor) and the Bank (mortgagee)) is to confirm the title that the receiver and manager seeks to confer on any third party dealing with it and to exonerate the Bank from any responsibility for acts of the receiver and manager. The powers of the receiver and manager are really ancillary to the main purpose of the appointment, which is the realization for the debenture holder of its security. The receiver and manager is akin to a mortgagee in possession. The receiver and manager taking possession of the property subject to the charge becomes the manager of that property of the debtor but not the manager of the debtor company.

In that case, the receiver continued manufacturing and merchandising activities on the property because it was of the opinion that it would be in the interest of the bank to use that property "in its unquestioned possession".

I conclude that Prenor is a mortgagee in possession under the Condominium Act. In effect, Prenor stands in the place of the vendor, Somerset, and assumes all the rights and liabilities of the vendor. The liabilities include honouring the agreements with the purchasers which include: reduction of the mortgage interest component based upon the difference between the rate actually used in the calculation of the occupancy fee (15.49 per cent) and the mortgage rate effective 90 days prior to the unit transfer date; provision of a courtesy van for the condominium corporation; and, supplying appropriate furniture for the lobby of the complex.

Conclusion

There will be a declaration that the disclosure statement does not comply with s. 52 of the Condominium Act. The agreements of purchase and sale are not binding on the purchasers.

There will also be a declaration that Prenor is a declarant under the Condominium Act.

The purchasers are to be refunded the total amount of any deposit monies including monies paid for upgrades and including accrued interest which rate, I understand, has been agreed to by the parties. There will be judgment against any of the defendants who hold any of the deposit monies.

Since interim possession, the purchasers have, in my view, been paying occupancy fees commensurate with a completed "prestigious" building with all the promised amenities. For what they have received, and the many hassles and anxieties they have had to endure, the occupancy fee has been exorbitant. I believe they should be required to pay only an amount for reasonable "rent" because they have been, in effect, tenants. I assess a monthly "rent" to be the amount of the estimated realty taxes plus the common expenses. Put another way, the applicants shall be refunded all of the mortgage interest component of the monthly occupancy fee.

The applicants shall be afforded a reasonable time in which to obtain alternate accommodation.

I have not dealt with the question of the validity of the phantom mortgage and whether the vendor had the right to collect the mortgage interest component of the monthly occupancy fee. That question is before the Court of Appeal as a result of an appeal from the judgment of Rosenberg J. in *Albrecht v. Opemoco Inc.* (1989), 70 O.R. (2d) 151, 61 D.L.R. (4th) 594 (H.C.J.) [supplementary reasons at (1989), 70 O.R. (2d) 221, 62 D.L.R. (4th) 541 (H.C.J.)]. The parties have agreed that the determination of that question as it relates to this case should be adjourned pending the Court of Appeal's decision.

I may be spoken to with respect to costs and to any other matter which may arise as a result of this judgment.

Order accordingly.

CBR# 036

Baer v. Condominium Plan 9123697

Between Grania Mary Baer, plaintiff (applicant), and The Owners: Condominium Plan 9123697, defendant (respondent)

[1998] A.J. No. 1441

Action No. 9703-10188

Alberta Court of Queen's Bench Judicial District of Edmonton Lee J. December 22, 1998.

Injunctions -- Interlocutory or interim injunctions -- Arguable issues of law involved or serious questions to be tried -- Real property -- Condominiums -- Corporation -- Liability to unit holders.

Application by Baer for an interlocutory injunction compelling the Condominium Association to pay the costs of accommodation incurred as a result of her displacement. Commencing in 1993, Baer complained to the Association that her unit was contaminated with mold, mildew and garage fumes, and that walls and carpets in her unit had been blackened and stained. In 1997, the Association agreed to undertake an investigation of Baer's unit and to pay for alternative accommodations of Baer's choice during the investigation. During the year-long investigation of the unit, the Condominium Association's engineers reported that the problems were caused by defects in the design or installation of a bedroom window, clothes dryer vent, fire stop system, pipe and wall. In November 1997, the Association proposed a repair and remediation process to Baer. The proposal provided that Baer would sign a release all claims against the Association. Baer rejected the proposal and instructed the Association not to enter or conduct repairs to the unit without her permission. Baer rejected the proposal because she believed that high carbon monoxide levels in the unit required more investigation and would not be eliminated under the repair plan, and she did not want to sign a full release of all claims. Since it could not conduct any further repairs without Baer's authorization, and because Baer refused to agree to its proposal or to advance an alternative proposal, the Association advised Baer that it would cease paying for her alternative accommodation effective January 1, 1998.

HELD: Application dismissed. The Association was not an insurer of building defects in individual units. Even if the defects had been the responsibility of the Association, there was insufficient evidence that it failed to fulfil its obligation to repair. There was no serious question to be tried that the Condominium Association was obligated to pay for alternative accommodations at a time when Baer did not allow it to make repairs to her unit. The court had no authority to obligate the Condominium Association to provide a written plan of repair to Baer or to pay for Baer's alternative accommodations while she conducted her own investigations.

Statutes, Regulations and Rules Cited: Condominium Property Act, ss. 30, 31(1)(a), 60.

Counsel: David C. McGreer, for the plaintiff. Scott J. Hammel, for the defendant.

REASONS FOR DECISION

LEE J.:--

I. BACKGROUND

[para1] The Plaintiff regrettably purchased her unit in the condominium project known as Whelehan Place located in St. Albert, Alberta, from the developer of that project in December 1991. The unit is located on the main entrance level, off the lobby area. The unit shares a common wall with one level of the indoor multi-level parkade.

[para2] From turn-over of the project to the Condominium Association in 1991, and continuing today, the owners of the project allegedly have noted or been advised of numerous and serious design and construction problems with the building, including the following:

(a) Improperly waterproofed wood and concrete foundations resulting in the infiltration of water into the parkade and, more importantly, into the wood sub-floors of the building. This deficiency has resulted in the rotting and failure of the sub-floors of three units, including that of the Plaintiff. The sub-floors were repaired at the time the foundation on the west side of the building was re-waterproofed.

(b) Various areas of the foundation have rotted or failed as a result of water infiltration and improperly constructed wood foundation systems. To avoid full structural failure of portions of the building, certain of these foundation sections have been reconstructed and fortified. Further areas of the building foundation are also rotting and others are suspected to be rotting but repairs have not been carried out to date because of financial constraints.

(c) Deficient construction and design of the roofing system. This has resulted in the infiltration of outside water and leakage due to significant condensation. Leakage into the building has caused damage to drywall and other interior improvements of various units. (d) Improperly balanced ventilation systems. This has resulted in back-drafts and air circulation problems throughout the building.

(e) In 1997, it was discovered during an investigation of the Plaintiff's unit that the building does not meet applicable fire code requirements that existed at the time the building was designed, nor is the building constructed in accordance with the actual design fire safety standards. Consequently, there is little to retard the spread of fire either from unit to unit or floor to floor. Discussions are on-going among provincial and civic officials and with engineers of the Defendant to determine how this problem can be remedied.

(f) Various insulation deficiencies. This has resulted in freezing pipes and significant heat loss from buildings and particular units.

(g) Various other less serious deficiencies.

[para3] To date, the Condominium Association has incurred significant costs for the investigation, re-design and repair of those deficiencies. Depending upon the manner in which the fire code issues will be remedied, further costs to repair the deficiencies could exceed \$3,220,00.00.

[para4] An Action was commenced by the Condominium Association in 1995, originally against the developer, Chris Whelehan Construction Ltd. and Chris Whelehan, of the project, seeking recovery of the costs to investigate, re-design and repair these deficiencies. More recently in 1998, the Action has been amended to include a claim against the engineer, Jacobsen Hage Engineering, and the architects, IBI Group and the IBI Group Architects, engaged on this project.

[para5] The Reserve Fund maintained by the Defendant Condominium Association was depleted soon after discovery of the original foundation waterproofing deficiencies in 1995. Currently, investigations and repairs, (including costs to finance the legal Action against the developers, engineers and architects of the project), have been funded by special assessments levied against the owners of the units in the condominium project. By means of these levies, the Defendant Condominium Association has maintained and repaired the building to date.

[para6] The Plaintiff has defaulted in the payment of such levies imposed.

[para7] Three levies have been imposed against owners of Whelehan Place since the initial discovery of the construction and design deficiencies. Each levy imposed was approximately \$75,000.00, which equates to about \$1,250.00 per unit in the project for each levy.

[para8] The Defendant Condominium Association currently has no Reserve Fund balance. Its budgeted or anticipated expenses for the operation, maintenance and repair of the building exceeds its income.

II. THE APPLICATION

[para9] The Plaintiff seeks interlocutory injunctive relief as against the Respondent Owners of Condominium Plan 9123697 to pay her present costs of accommodation incurred as a result of her displacement. III. THE PLAINTIFF'S UNIT

[para10] Commencing in about 1993 or 1994, the Defendant Condominium Association began to receive complaints from the Plaintiff that, originally, her unit was contaminated by moulds and mildew and, later, that her unit was contaminated by garage and parkade fumes. Numerous investigations were conducted or commissioned by both the Plaintiff and the Defendant Condominium Association. It has been observed, however, that blackening and staining of walls and carpets have occurred in the Plaintiff's unit.

[para11] As a result of these observations and the demands of the Plaintiff to conduct repairs to her unit, the Defendant Condominium Association agreed to undertake a full scale investigation of her unit in 1997. Further, the Defendant Condominium Association agreed to pay for alternative accommodations of the Plaintiff's choice during the investigation. It commenced paying for such accommodations in December 1996.

[para12] During the investigation of the Plaintiff's unit, the Defendant's engineers report the following problems:

(a) The master bedroom window did not close, thus allowing dirt and outside dust to continuously enter the suite. The window sill of the master bedroom window is at grade level and the infiltration of outside dust was quite evident on the window sill.

(b) The master bedroom window is also located within Building Code minimum distances of a parkade ventilation fan.

(c) The clothes dryer vent had never been connected to the exterior venting system by the Plaintiff, thus allowing dryer lint and dust to vent directly into her unit.

(d) One penetration was found to exist in a corner of the master bedroom through to the parkade level below. This was a pipe penetration which had not been sufficiently caulked by the original contractor. That penetration was sealed by the Defendant's engineers in April 1996. (e) A crack existed in the outside wall of the building in the proximity of the Plaintiff's master bedroom. It is not evident, however, that this has caused the infiltration of outside air into the Plaintiff's unit.

(f) No fire stop system existed in the ceiling space of the Plaintiff's unit. It was subsequently discovered that this was a common deficiency throughout the building.

(g) A door sweep had been installed by the Plaintiff or her representatives on the entrance door to the suite. This prevented the proper circulation of air throughout the suite. The door sweep has been removed.

(h) The Plaintiff did not regularly clean her unit.

[para13] Investigations of the Plaintiff's suite continued for almost one full year. The investigation was allegedly slowed by a number of factors, including the following: (a) the Defendant's representatives were required to investigate numerous complaints and allegations made by the Plaintiff throughout the course of that year regarding the existence and sources of contamination of her unit. None of these allegations have yet to be substantiated;

(b) financial constraints;

(c) discovery of the fire stop issue and the undertaking of studies to determine the means of rectifying this problem; and

(d) discovery of numerous other deficiencies in the building, generally, that had to be repaired in priority to the Plaintiff's unit because of the seriousness of their nature, (including structural deterioration, water leakage, etcetera).

[para14] During the year long investigation of the Plaintiff's unit, it was concluded by the Defendant's engineers that no further blackening of walls or carpet in the suite would occur if:

(a) the master bedroom window was adjusted so that it would fully close;

- (b) the dryer vent was properly connected; and
- (c) the one penetration found in the master bedroom was sealed.

[para15] Upon carrying out of these repairs, studies by the Defendant's engineers have apparently revealed that there is no further blackening or sooting of the carpets or walls of the unit.

[para16] In November 1997, the Defendant proposed a repair and remediation process to the Plaintiff with respect to her unit, which proposal included the following:

- (a) ensuring that there was no unacceptable air infiltration into the unit;
- (b) cleaning and painting the unit and providing an allowance for carpet replacement if the Plaintiff so chose;
- (c) removing or sealing the fireplace at the Plaintiff's option;
- (d) sealing the bedroom window because of its proximity to the parkade vent;
- (e) repairing all damage caused by the investigation; and
- (f) paying for alternative accommodations for the Plaintiff during repairs.

[para17] Also included in the proposal was an offer to have the Plaintiff's representative discuss the repair process with the Defendant's engineers.

[para18] The Defendant's proposal for the repair and remediation of the Plaintiff's unit was refused by the Plaintiff, and the Defendant Condominium Association was directed by the Plaintiff's counsel not to conduct any repairs to the Plaintiff's unit without the Plaintiff's express permission.

[para19] Since it could not conduct any further repairs without the Plaintiff's authorization, and because the Plaintiff refused to agree to a rectification proposal or to advance an alternative proposal of her own in that regard, (to date the Plaintiff has not proposed any repair procedure), on November 20, 1997, the Condominium Association advised the Plaintiff that it would cease paying for alternative accommodations for her effective January 1, 1998.

[para20] On March 11, 1998, Plaintiff's counsel demanded that the Defendant and its representatives cease entering the Plaintiff's unit for any reason other than an emergency.

[para21] On March 28, 1998, a further written offer was made by the Defendant to carry out repairs to the Plaintiff's unit.

[para22] Further, on June 3, 1998, a meeting was scheduled between the Plaintiff's and the Defendant's engineering experts to inspect the Plaintiff's unit and to discuss repair procedures. The meeting did not occur and the Plaintiff has refused to make her expert available for such a meeting since that time.

[para23] Since the Defendant could not conduct any repairs without the Plaintiff's express authorization, and because it was prohibited from entering the Plaintiff's unit, the unit was left in the state that existed at the time the investigation was complete in November 1997. The Defendant states that the suite could have been repaired to a habitable state within two or three weeks of November 1997.

IV. THE PLAINTIFF'S SUBMISSION

[para24] The Plaintiff's condominium suite is in a state of disrepair. As a result, it is not suitable for habitation.

[para25] The Defendant provided the Plaintiff with accommodation while they conducted various tests in her suite for a period of approximately 12 months ending January 1, 1998.

[para26] Since then, the Plaintiff has lived with friends or as at the present time, she is house-sitting. She continues to make her mortgage payments and pay the taxes on her condominium unit but does not have sufficient monthly income to also pay for alternate accommodation.

[para27] The Plaintiff has no place to stay from December 18, 1998 to January 8, 1999. She has made a reservation at Campus Tower, which is where she stayed when the Defendant paid for her accommodation.

[para28] The Plaintiff's psychologist advises [that this prolonged litigation and lack of a home is having a detrimental psychological affect on the Plaintiff.

[para29] The Condominium Corporation has a duty to repair the Plaintiff's condominium suite: s. 30 of the Condominium Property Act.

[para30] The Court has some inherent jurisdiction to supervise and enforce the duties of the Condominium Corporation under the Condominium Property Act, as indicated very generally in s. 60.

[para31] The Court can enjoin a Condominium Corporation to perform its duties: *Re Manton and York Condominium Corporation* [1984] 49 O.R. (2d) 83 [Ont. County Ct.].

[para32] In the exercise of its duty to inspect and repair, the Condominium Corporation may expend funds available to it to cover expenses, s. 31(1)(a) of the Condominium Property Act.

[para33] Clothed with the authority to enforce the duties of a Condominium Corporation, then the Court has the jurisdiction to direct the manner in which the duty is exercised. It has jurisdiction to enforce compliance with the Rules of Court in the course of

litigation so the Court can order that the unit be repaired after both the Plaintiff and the Defendant have had a reasonable opportunity to carry out testing.

[para34] The Condominium Corporation's obligation to pay the displaced owner's cost of accommodation would come to an end after:

- (a) it had completed its investigations; (b) it had provided a reasonable plan of repair;
- (c) both Defendant and Plaintiff have had a reasonable opportunity to conduct tests for defects after reviewing all the results; and
- (d) it was ready, willing and able to perform the repairs.

[para35] The Plaintiff has not unreasonably withheld her consent to the proposed repairs:

(a) Her expert found carbon monoxide levels in the master bedroom of the Plaintiff's unit at readings as high as 34 during peak periods of carbon monoxide emissions in the parkade. The Defendant's test results, provided by Defendant's counsel to Plaintiff's counsel on December 2, 1998 show readings no higher than 11, where 25 is the limit for health and safety. If these are the results that the Plaintiff will rely on at trial, the Plaintiff should be allowed to carry out more extensive gas monitoring studies before the suite is sealed.

(b) The Defendant's offer of repair contained in its solicitor's letter dated March 24, 1998 is not reasonable because it is subject to the condition that the Plaintiff "confirms in writing that it satisfactorily addresses all of her concerns with respect to her suite". Those repairs call for sealing the master bedroom window and the fireplace.

[para36] The first offer of repair presented in the Defendant's solicitor's letter dated November 20th, was conditional upon the Plaintiff signing a full release of all her claims against the Defendant. This offer was repeated by the Defendant in a letter dated March 2, 1998 from the Defendant's solicitor. It, too, was conditional upon the Plaintiff releasing all claims.

[para37] The Plaintiff's expert has indicated that more extensive follow-up studies and investigations of the suite should be carried out (specifically to monitor the air quality over a period of time) if the results and findings of his report were not accepted by the Defendant. V. THE PLAINTIFF'S EVIDENCE

[para38] This Application is brought on the following evidence:

(a) the Plaintiff's psychologist's letter which contains an opinion that is not sworn and who has not been made available for cross-examination;

(b) the Plaintiff's personal statement of her own emotional condition entitled "WHAT IT MEANS TO BE HOMELESS". This letter has never been produced previously in this Action; it, too, has not been the subject of cross-examination, and it is not sworn;

(c) the evidence in the Plaintiff's Affidavit concerning her monthly income and expenses which allege her present impecuniosity, and which has been the subject of Examination for Discovery. However, there are a series of yet to be answered undertakings given by the Plaintiff concerning this evidence.

[para39] The Defendant submits that there are problems with respect to the Plaintiff's evidence concerning her impecuniosity, including:

(i) evidence given at Examination for Discovery revealed that the Plaintiff's net annual income as a teacher, after tax and deductions, was about \$40,000.00 per year. This amounts to about \$3,300.00 per month, not \$2,700.00 per month as set out in paragraph 2 of the Plaintiff's Affidavit;

(ii) paragraph 3 of the Plaintiff's Affidavit refers to a line of credit. In her evidence given at Examinations for Discovery, the Plaintiff indicated that she has been repaying her line of credit and she is not currently drawing on her line of credit (and has not been doing so for some time). Consequently, the line of credit had been drawn on at a time when the Defendant was paying for the Plaintiff's accommodations.

[para40] (d) In terms of the psychological problems allegedly suffered by the Plaintiff, the Defendant submits that the Plaintiff's written submissions, her Affidavit and personal statement fail to mention the following evidence given at Examinations for Discovery:

(i) the Plaintiff suffered from depression and was on medication before moving into Whelehan Place in 1991;

(ii) four deaths of family members and friends occurred over a short period (two by suicide) after the Plaintiff moved into Whelehan Place. These deaths had a profound psychological effect on the Plaintiff;

(iii) since 1995-1996, the Plaintiff has attended psychological counselling for, among other things:

(a) issues with her current partner and her mother;

(b) issues regarding her feelings of abandonment by her former counsel in this Action; (c) issues regarding the length of time this litigation has taken to progress.

VI. NATURE OF THIS APPLICATION

[para41] The Plaintiff appears to suggest that this Application is for injunctive relief. As the matter has not yet gone to trial, the relief sought is obviously interlocutory in nature. The Plaintiff, however, completely fails to address the prerequisites for obtaining interlocutory injunctive relief.

[para42] To be entitled to interlocutory injunctive relief, the Plaintiff must satisfy each element of the tripartite sequential test adopted by the House of Lords in *American Cyanamid v. Ethicon* [1975] 1 All E.R. 504 (H.L.). The Plaintiff must show:

(a) she has a serious question to be tried;

(b) she would suffer irreparable harm such that no fair and reasonable redress would be available if an interlocutory injunction was not granted; and

(c) the balance of convenience, having regard to all the relevant factors, weighs in favour of granting the injunctive relief.

[para43] Each element of the test must be satisfied before the next is considered. This strict test for injunctive relief is necessary because the Plaintiff in such a case seeks a remedy without proof of its claim: *Ominayak et al. v. Norcen Energy Resources et al.* (1985), 58 A.R. 161 (Alta. C.A.); *Alberta Law Society v. Black et al.* (1983), 29 Alta. L.R. (2d) 326 (Alta. C.A.).

[para44] The Court must also be concerned about the ability of the Defendant to recover any loss it suffers if the Plaintiff is unsuccessful at trial and if the injunction sought has been granted. Consequently the Court often requires the posting of security in addition to an undertaking in damages that the Defendant may suffer as a result of the granting of the injunction.

[para45] This is important in this case as the Plaintiff claims that she is impecunious. If the Defendant is required to pay for the Plaintiff's accommodations now, before trial, it may be unable to recover those funds after trial, together with the arrears of condominium fees and special levies of which the Plaintiff has defaulted in payment.

VII. SERIOUS QUESTION TO BE TRIED

[para46] There is no dispute that the Defendant Condominium Association has a responsibility to maintain and repair common areas of the condominium project. The case of *Re: Manton, supra*, does not stand for the proposition that the Defendant Condominium Association must, however, repair defects that existed at the time the owner acquired its interest in the project. The Condominium Association is not an insurer of building defects for which the developer is responsible: *Wright v. Strata Plan No. 205* (1996), 20 BKL R (3d) 343 (SC), affirmed (1998), 43 BKL R (3d) 1 (B.C.C.A.).

[para47] In this case, regardless of whether the alleged defects are the responsibility of the Defendant Condominium Association, there is insufficient evidence that the Defendant failed to fulfil its obligation to repair. The Plaintiff alleges the following obligations on the part of the Defendant in this regard:

(a) Obligation to inspect. There is evidence that extensive investigations were conducted through 1996 and 1997 by the Defendant;

(b) Right to expend funds. It is undisputed that the Defendant Condominium Association has expended funds to inspect and conduct repairs to the Plaintiff's unit and is prepared to finish that work; and

(c) Pay costs of accommodation during repair and inspection. It is undisputed that the Defendant Condominium Association did pay for alternative accommodations while carrying out its investigations and repair and is prepared to do so while completing those repairs.

[para48] One of the reasons why the repairs have not been carried out in the Plaintiff's unit is because the Plaintiff has not authorized repairs or allowed the Defendant to enter the unit to do such work. [para49] Further, there does not appear to be any authority under the Alberta Rules of Court, the Condominium Property Act (Alberta) or any inherent power of the Court to oblige the Defendant to:

(a) provide a written plan of repair to the Plaintiff; and

(b) to pay accommodations while the Plaintiff conducts her own investigation (even though she has now had over six years to do so).

[para50] Consequently, there is no serious question to be tried that the Defendant is obligated to pay for alternative accommodations at a time when the Plaintiff has not allowed or authorized the Defendant to make repairs to her unit.

[para51] Further, there is no authority that an injunction can be imposed requiring a Defendant to pay money to the Plaintiff prior to judgment, which is in effect what the Plaintiff seeks in this Application. It can be argued that what the Plaintiff is effectively seeking is summary judgment. It appears that the requirements of summary judgment do not exist in this case:

(a) there is no evidence that the Plaintiff's claim can be sustained beyond reasonable doubt; and

(b) the Plaintiff has not sworn that she knows of any evidence to support the Defendant's defence of this Action.

VIII. IRREPARABLE HARM

[para52] Further, to justify injunctive relief, the Plaintiff must show that she will suffer harm for which no fair and reasonable redress may be had in a Court of law, and that to refuse the injunction would be a denial of justice. This is a separate and distinct test from the balance of convenience and must be satisfied before the balance of convenience is weighed: *Ominayak et al. v. Norcen Energy Resources, supra*, p.166.

[para53] The Plaintiff has quantified its potential loss in monetary terms. It has produced an account for the cost of alternative accommodations. If, after trial, it is determined that the Defendant should have paid for alternative accommodations at this time, the Plaintiff will be entitled to judgment for that amount plus interest (or its borrowing costs). It is not irreparable harm for which interlocutory injunctive relief is justified.

[para54] Further, there is no evidence that:

(a) the Plaintiff has no alternative accommodations with friends or family, or;

(b) alternative accommodations cannot be financed through the Plaintiff's line of credit or otherwise; and

(c) the Plaintiff will suffer any loss or damages as a result of staying with friends or family over the course of the Christmas season.

[para55] Consequently, there is insufficient evidence of irreparable harm.

IX. BALANCE OF CONVENIENCE

[para56] The final element of the tripartite test for injunctive relief is the balance of convenience. Considering all factors between the parties, the Plaintiff must show that equity favours granting the relief sought.

[para57] Without security filed by the Plaintiff in support of this request for injunctive relief, the balance of convenience favours not granting the relief sought:

(a) If an injunction is granted on the basis that the Plaintiff cannot afford alternative accommodations, then the Defendant will be unable to recover this payment if it is successful at trial.

(b) However, if an injunction is not granted and the Plaintiff is successful at trial, the costs associated with alternative accommodations can be set off against her liability for condominium fees and special levies.

[para58] Further, any expenses the Defendant incurs in paying for alternative accommodations for the Plaintiff [which may arise partly because of the Plaintiff's failure to authorize repairs], will be paid from proceeds of special levies. These levies have been collected from the owners of units in the project. The Plaintiff, who is in default in this regard, takes the position that since the unit became uninhabitable, she stopped paying her condominium fees and assessments.

[para59] Neither the Defendant, nor its unit owners, can afford to pay for all repairs necessary to rectify the numerous problems with the building. Although the Plaintiff is the only unit owner not able to live in her unit, all the owners are, unfortunately, currently living in unacceptable conditions in one form or another - some with significant leakage, others in units where pipes are freezing, others at risk of structural failures and all at risk of considerable loss and damage due to fire.

[para60] To order the Defendant to re-allocate its limited resources from investigation and repair of other more dangerous conditions to pay for the Plaintiff's alternative accommodations harms all owners in the project. Considering that the Plaintiff may have inadvertently or otherwise brought some of her accommodation problems upon herself, the balance of convenience would suggest that the total consequences of her conduct not be placed on the shoulders of the condominium owners.

[para61] Finally, the Plaintiff is in default of her obligations under the Condominium By-laws to pay condominium fees and special levies. Interim injunctive relief requires the Court to consider equitable principles.

X. CONCLUSION

[para62] The Plaintiff's Application unfortunately must fail on the basis that:

(a) incomplete proper evidence is adduced in support of this Application;

(b) there is no legal basis for the relief sought;

(c) the tripartite test for injunctive relief is not satisfied on the alleged facts of this case; and (d) it appears that the Plaintiff's actions may have contributed to the accommodation problems she is currently experiencing.

LEE J.

CBR# 237

Peel Condominium Corporation No. 505 and Peel Condominium Corporation No. 447, applicants, and Cam-Valley Homes Limited, Cam-Valley Developments Ltd. and David Feldman, respondents

Court File No. 99-CV-166553

Ontario Superior Court of Justice Epstein J. Heard: June 10, 1999. Judgment: October 29, 1999.

Counsel: P.M. Conway and Jennifer A. Roberts-Logan, for the applicants. C.P. Stevenson, for the respondents. [para1] EPSTEIN J.:-- This application raises interesting issues concerning contractual obligations and disclosure in the context of condominium development. Notwithstanding the efforts that have gone into the extensive and detailed consumer protection legislation that governs the purchase and sale of condominiums, there continues to be an abundance of cases before the courts in which the parties require assistance as to the nature of the obligations arising out of the transaction. This is one such case.

[para2] The application was originally brought by Peel Condominium Corporation No. 505 (PCC 505) for various forms of relief pertaining to a parcel of land (the "Lands"). At the opening of the hearing, I granted an order, on consent, whereby another condominium corporation, Peel Condominium Corporation No. 447 (PCC 447) was joined as an applicant. The addition of PCC 447 was initially resisted by the respondents but when presented with the various options that might appropriately be attached to an order permitting the proposed amendment, Mr. Stevenson, counsel for the respondents, agreed to the joinder. The respondents' consent to an order adding PCC 447 as an additional applicant was on the undertaking of Ms. Conway, counsel for the applicants, that the hearing would proceed based on the material then in the record. On this basis, the application was argued before me followed by written submissions throughout the summer.

[para3] The applicants are seeking an order, purportedly, that will give them some interest in or control over the Lands. There is also a counter-application for an order discharging the caution that PCC 505 and PCC 489 registered against the Lands on April 24, 1997. As well, the respondent David Feldman, a principal of the two corporate respondents, has brought a motion dismissing the application to the extent that it applies to him personally.

[para4] As will be seen from observations made later in these Reasons, the precise nature of the relief sought is of some considerable importance. The Notice of Application sets out the relief claimed as follows:

(a) A declaration that Cam-Valley Homes holds title to the property described as Parcel Block II-1, Section M-199, Plan 43R-21858, Part 8 (the "Outdoor Recreation Area") in trust for Peel Condominium Corporation no. 505 ("PCC 505"), Peel Condominium Corporation no. 447 ("PCC 447") and Peel Condominium Corporation no. 489 ("PCC 489").

(b) An order requiring the respondent, Cam-Valley Homes Limited ("Cam-Valley Homes"), to convey all right and title to the Outdoor Recreation Area, or one acre thereof, to PCC 505, or alternatively jointly to PCC 505, PCC 447 and PCC 489.

(c) An order that the respondent, Cam-Valley Homes pay the applicant in lieu of constructing the promised facilities in the Outdoor Recreation Area, the cost of constructing such facilities; or, in the alternative, the same or a greater amount to be determined as damages for the destruction of the trees and foliage on the Outdoor Recreation Area; and, if required, a reference to determine same.

(d) Punitive or exemplary damages in the sum of \$100,000.00.

(e) If necessary, an interim injunction prohibiting the respondents, their officers, directors, employees, agents, affiliated or successor corporations or assigns from conveying, assigning, alienating, or taking any further steps to alter or effect the landscape or the foliage on the Outdoor Recreation Area until the final judgment in this application.

(f) In the further alternative, a declaration that PCC 505 is entitled to damages against Cam-Valley for breach of disclosure statement pursuant of section 53(5) of the Condominium Act and a reference to determine the same.

[para5] It was more or less common ground that the relief claimed in paragraphs 1(c) and 1(f) would not be dealt with in the course of the hearing before me. Those paragraphs contain claims that are more properly addressed in a hearing dealing with a right to damages pursuant to s. 52(5) of the Condominium Act R.S.O. 1990, c. C-26 (the "Act").

THE FACTS

[para6] The facts relevant to the one issue before me are not in dispute.

[para7] The applicants are two condominium corporations that form part of a multi-phase condominium development planned and constructed by the respondents in an area just west of Toronto known as Sawmill Valley. The respondent Cam-Valley Homes Limited ("Cam-Valley Homes") is the developer and holds title to the Lands. The other corporate respondent Cam-Valley Developments Ltd. ("Cam-Valley Developments") was the developer before transferring title to the Lands, and other property associated with the development (collectively the "Property"), to Cam-Valley Homes on June 29, 1993. In these Reasons I will also refer to these respondents either as the Developer or the Declarant, more or less interchangeably.

[para8] Planning for the overall development started in the late 1980's. Cam-Valley Developments proposed to develop a series of condominiums in different phases around a wooded valley. The concept was that each phase would be created as an independent condominium corporation with a different style and a different density but when the development was completed a unique urban community with a rural atmosphere would be formed. [para9] It is clear that the overall project was conceptualized and marketed as a woodland community. It was originally intended by the Developer that the centre of this unique community would be a recreation complex. This complex was to be nestled among a grove of trees on the Lands and contain facilities for tennis, golf and other forms of leisure activity (the "Outdoor Recreation Area"). The plan was that ultimately each of the condominium corporations would have an interest in, the use of and be responsible for the Outdoor Recreation Area.

[para10] This intention with respect to the Outdoor Recreation Area is evidenced by the documentation forming the basis of the agreements between the parties with respect to the first three phases of the development; namely, PCC 447, PCC 489 and PCC

505. These documents also contain terms that provide for the conveyance of the Lands to the participating condominium corporations upon completion of the Outdoor Recreation Area. Other documents such as the site plan for PCC 505 filed by the Developer with the City of Mississauga make reference to the Outdoor Recreation Area.

[para11] There is also no doubt that the Developer, in its marketing of the individual units, represented to the purchasers of at least PCC 505 that their homes would be part of a development with a limited density in an attractive wooded area the centre of which would be the Outdoor Recreation Area. There is uncontroverted evidence that some purchasers relied upon the Developer's representations as to the overall nature of the development and the use of the Lands for the Outdoor Recreation Area in making their decision to purchase. Indeed, there is evidence to support a finding that in one case the purchaser paid more for a unit because it overlooked the Lands and the proposed Outdoor Recreation Area.

[para12] The first phase completed was a 164 dwelling building registered as PCC 447. It was registered October 3, 1991. At that point Cam-Valley Developments transferred the project and title to the Property, including the Lands, to Cam-Valley Homes and the concept changed direction. Instead of more towers, Cam-Valley Homes built townhouse units. The next phase that was completed was PCC 489, which was registered May 22, 1994. It is comprised of 24 townhouses. The third phase, PCC 505, which was registered October 3, 1995, added another 56 townhouses to the development. Another townhouse project of approximately 38 townhouse units is apparently under construction. Cam-Valley Homes has obtained approval for and intends to build a second tower comprised of 134 units. It has also announced, and this is the matter of concern to the applicants, that it intends to build another townhouse project of approximately 25 units on the Lands. There is really no dispute over the obvious fact that the changes that have taken place and that are proposed for the development are almost exclusively market driven.

[para13] In the result the project that was originally intended to be approximately 670 units built in five phases changed to involve about 440 units to be constructed in six phases. The sixth phase is the 25 unit townhouse development that Cam-Valley Homes plans to build on the Lands. The consequences of this sixth phase would be more extensive use of the Property and the loss of most, if not all, of the recreational and social core of the development in the form of the Outdoor Recreation Area. I say "most, if not all" as the Developer has offered to appease the applicants by constructing a significantly scaled down recreational facility on the Lands. However, there can be no doubt that the sixth phase would alter the character of the community. There would be changes such as in the number and location of buildings and in road and traffic patterns. Most significantly, there would be a loss of a very strategic segment of open space.

[para14] For reasons that will later become clear I note that the third phase originally planned, a condominium tower referred to as the Terraced Apartments contemplated in the September 18, 1987 disclosure statement (for what ultimately became PCC 447), was not built. It is common ground that the Developer was under no obligation to build the Terraced Apartments. It was agreed between the parties that the Terraced Apartments concept was abandoned as a result of the planning difficulties arising from an arborist's report that the trees on the lands designated for the Terraced Apartments were of high quality and due to the downturn in the economy in about 1989.

[para15] In 1996 in the course of the steps taken by the Developer to restructure the project in response to market forces, Mr. Feldman advised a meeting of directors of PCC 505 that the Developer's intention with respect to the Lands had changed. Rather than construct the recreation facility described in the disclosure statement, Cam-Valley Homes would instead build an additional 25 townhouse units on the Lands. In 1997 Mr. Feldman started to prepare plans to build on the Lands. PCC 505 promptly objected and attempted to preserve its rights with respect to the Lands by meeting with representatives of the City of Mississauga. In April of that year a Caution was registered against title to the Lands. Discussions proceeded as to how the matter with respect to the use of the Lands might be resolved. Then, early in 1999, PCC 505 received notice that Mr. Feldman was preparing a list of potential purchasers for the townhouse development proposed for the Lands. Further discussions took place between the parties during which the status quo was preserved pending a possible resolution of the dispute concerning the Lands. Then, without any meaningful notice, on March 25, 1999 Mr. Feldman gave instructions to remove the trees from the Lands. The next day the forest on the Lands was razed pursuant to these instructions.

[para16] PCC 505 immediately commenced this proceeding and obtained an injunction on the evening of March 26, 1999. The injunction included a term that pending the return of the application the respondents would be restrained from altering or changing the Lands in any way. Unfortunately, it was too late to save the trees.

THE DOCUMENTATION

[para17] While these facts provide insight into the background giving rise to this application, the argument focused on the wording and meaning of and the interrelationship among the various documents in which the agreements of the parties were recorded.

[para18] The documents that are pivotal to the determination of the issues in the hearing are those typical of most condominium purchases; namely, the disclosure statement, the declaration and the individual agreements of purchase and sale relevant to the sale of each condominium to the ultimate purchasers. In this case a further contract, referred to as a reciprocal agreement, was prepared to record part of the transaction specifically relating to the intended community participation in and responsibility for the Outdoor Recreation Area and other shared facilities.

[para19] It is helpful to start with the documents that are basic to every condominium purchase and sale transaction in the Province of Ontario.

[para20] When a purchaser is interested in a condominium that has not yet been constructed he or she is entitled, under the Act, to receive a disclosure package. The package consists of a number of documents including a disclosure statement. This statement contains such things as a description of the project, a budget for the condominium for the first year and a brief description of the significant features of the proposed declaration, by-laws and rules for the condominium. Upon registration these documents, i.e. the declaration, by-laws and rules and budget statement will govern the operation of the condominium corporation. The declaration may be described as the corporation's constitution and addresses such issues as the percentages of contributions to common expenses and what those common expenses are and restrictions on use and occupancy of units. The final document that is part of every transaction is the agreement of purchase and sale.

[para21] In the case of the applicants the relevant provisions of the disclosure statements, the declarations, the reciprocal agreement and the agreements of purchase and sale are set out below with emphasis added, where appropriate.

[para22] The relevant portions of the disclosure statement for PCC 505 are:

Section 1 - Description of the Buildings and Units

The Declarant also owns the lands adjacent to the Phase IV Lands ("Additional Property") and currently proposes to register pursuant to the Condominium Act on part of the Additional Property, up to three (3) more Condominium Corporations ... Each of the Proposed Corporations will be given a proportional interest (based on the number of dwelling units in each Corporation) as tenants in common in the Outdoor Recreation Area to be constructed on Part Block H, Plan M-99, as outlined in this Disclosure Statement and will be required to share certain common elements of the Proposed Corporations as set out herein. The outdoor recreation area may be created as a unit or units in any of the Proposed Corporations, or may be retained in fee simple ownership. Ownership of the units created, or the fee as the case may be, will be transferred to the Proposed Corporations. In order to provide for sharing the cost associated with operating the outdoor recreation area, the Declarant proposes to have the Corporation enter into an agreement (the "Reciprocal Agreement") with the Phase 1 Corporation [PCC 447] and the Declarant. Upon registration of the Proposed Corporations the Declarant proposes to have those Corporations adopt the Reciprocal Agreement as original signatories. Upon the Reciprocal Agreement being adopted by all Proposed Corporations the Declarant will be released and forever discharged from any further obligations thereunder to the extent that the obligations were taken over by any of the Proposed Corporations. Each Corporation will pay a share of the cost to maintain and operate the outdoor recreation area.

It is anticipated that this Corporation and the Proposed Corporations may jointly operate the outdoor recreation area. The outdoor recreation area may contain four (4) tennis courts, an outdoor pool, and a putting green, which will be set up as units in the proposed Corporation and may not be constructed until the last Phase is constructed, but the final configuration of the Outdoor Recreation Area, if and when constructed, may vary from that contemplated herein.

Section 2 - Amenities

3. The following facilities may be created as units in the Proposed Corporations and may not be available until after construction of the last Phase and then on a shared basis in the outdoor recreation area (to be shared by all of the Proposed Corporations as herein set out):

- (a) outdoor pool
- (b) four (4) tennis courts
- (c) three (3) hole putting green

Each of the Proposed Corporations will own its proportional interest as tenants in common in the outdoor recreation area or the unit(s) created thereon. The transfer of ownership in the outdoor recreation area may not be completed until all of the Proposed Corporations are registered. The costs of operating the outdoor recreation area will be shared only by those buildings that are occupied.

The following are anticipated commencement and completion dates of the Outdoor Recreation Area amenities which will commence only with the last Phase: COMMENCEMENT DATE is January 1, 1994 and the COMPLETION DATE is December 31, 1994.

Section 3 - The Declaration

n) Reciprocal Agreement

The Corporation is required to enter into the Reciprocal Agreement summarized in By-Law No. 2 as described in Section 5 of this Introductory Disclosure Statement.

Section 5 - By-Law No. 2: Reciprocal Agreement

By-law No. 2 [the Reciprocal Agreement] is required to be passed by the Corporation in order to ratify and confirm the terms, provisions and execution of an easement and cost-sharing agreement (the "Reciprocal Agreement") to be entered into between the Condominium Corporation registered as Phase IV of Granite Gates and the Declarant (with the Declarant entering into the Reciprocal Agreement on behalf of itself and its successors and assigns, namely any of the Adjacent Corporations, which are not registered. The Reciprocal Agreement will provide, inter alia, the following:

...

ii) It provides for the sharing of the outdoor recreation area and other shared services and establishes a cost sharing formula among the Proposed Corporations based upon the number of units in each of the Proposed Corporation's relative to the cost of operating, maintaining, repairing, replacing and inspecting the outdoor recreation area and any mutually shared servicing systems which service the Proposed Corporation.

[para23] The relevant provisions of the declaration are as follows:

Article 1

(1) Definitions ...

(a) "Common Facilities" means facilities being shared by the Proposed Corporation as set out in the Reciprocal Agreement.

(f) "Outdoor Recreation Area" means the outdoor pool and tennis courts, putting green and all appurtenant structures, works and lands.

Article VII - Duties of the Corporation

(d) to accept a conveyance from the Declarant of its share of any Common Facilities from time to time, to the Corporation ...

(f) to accept a conveyance of an individued [sic] interest in the Outdoor Recreation Area tendered to it by the Declarant, as a tenant in common with the adjacent corporations.

[para24] The relevant provisions of the reciprocal agreement are as follows:

... and whereas Cam-Valley intends to but is under no obligation to develop and construct high-rise and/or townhome buildings upon each of the Future Phase Lands and to register them as one or more condominium corporations (hereinafter referred to as the "Adjacent Corporations") and in the event of the development, construction and registration of the condominium plans on the Cam-Valley Lands, Cam-Valley will cause the Adjacent Corporations to enter into and be bound by the terms of this Agreement. [Preamble, page 2, second paragraph).

ARTICLE I - DEFINITIONS

(e) "Common Facilities" shall mean those services, chattles [sic] , equipment and facilities being shared by the Proposed Corporations as set out in Article 4.00 herein and more particularly, without limitation, the Outdoor Recreation Area, the Outdoor Road Network and the Mutual Easements.

(m) "Outdoor Recreation Area" shall mean the recreation area constructed on Part of Parcel Block II-1, Section M-199, in the City of Mississauga.

(s) "Proposed Corporations" means the Phase 1 Corporation [PCC 447] and the Future Phase Corporations and their respective successors and assigns, but until such time as all of the Corporations are registered it shall also include Cam-Valley with respect to any unregistered corporations ...

ARTICLE 2.00 - RECITALS

2.01 The recitals hereinbefore set forth are true in substance and in fact.

ARTICLE 4.00 - COMMON FACILITIES

4.01 The parties hereto hereby agree that the facilities and amenities listed herein (the "Common Facilities") shall be operated, maintained, repaired, improved, altered and replaced by the corporation owning such Facilities on behalf of all of the Proposed Corporations as if the Proposed Corporations were really one Corporation and the facilities were common elements belonging to the one corporation"

(a) Gateway Entrance;

(b) Shared Common Element Areas;

(c) Outdoor Road Network;

(d) Outdoor Recreation Area;

4.02 The parties hereby acknowledge that ownership in the Outdoor Recreation Area and Gateway Entrance, will be transferred to each of the Proposed Corporations as tenants in common in accordance with their Proportionate Share. Cam-valley agrees (to the extent that it is able) to have each of the Proposed corporations, when registered, accept a conveyance of such units. In the event that Cam-Valley does not proceed with the construction and registration of all Proposed Corporations, the transfer of those units which are constructed will be made to the registered corporations in accordance with their Adjusted Proportional Share. The transfer will be made at such time that all Proposed Corporations are registered or at such time as Cam-Valley determines that it will not proceed with the development of further corporations.

4.03 In the event that Cam-Valley does not proceed with the construction and registration of all Proposed Corporations or does not construct any of the Common Facilities contemplated herein, then this Agreement shall be deemed to be amended to delete references herein to any Common Facilities not constructed and Cam-Valley shall be under no obligation to construct or create same or [sic] shall Cam-Valley suffer any liability with respect thereto.

4.06 The Block OO Corporation [what is now PCC 489] shall be entitled, at its option to be exercised within one (1) year after registration of the Block OO Corporation (or Cam-Valley's option on its behalf) to use and enjoyment of the Outdoor Recreation Area. If so, then the Block OO Corporation shall become a tenant in common of the Outdoor Recreation Area along with the other Proposed Corporations and the Proportional Share for the Outdoor Recreation Area shall be adjusted to take into account the number of dwelling units in the Block OO Corporation.

[para25] The agreements of purchase and sale entered into between Cam-Valley Homes and the purchasers provide as follows:

"2. Paragraphs 1-52 the acknowledgment and schedules ... F attached hereto form part of and are an integral part of the agreement.

3.(a) 'Lands' means that certain parcel or tracts of land and premises in the City of Mississauga ... described as Part of Block HH and II registered Plan M-199, Mississauga.

5.(b) 'Condominium' means the lands and buildings constructed or to be constructed by the vendor and registered as a condominium on part of the lands.

23. The Purchaser covenants and agrees not to register or permit to be registered this Agreement or an assignment or a transfer thereof, or a caution, Purchaser's lien, or certificate of pending litigation or any encumbrance whatsoever against title to the Lands or the Unit. In the event the Vendor is required to pay any money to remove such title encumbrance or registration the Purchaser shall reimburse the Vendor for such money together with interest at 24% per year and legal fees on a solicitor and his own client basis.

38. ... 'It is agreed that there is no representation or warranty otherwise as expressly herein in writing.'

Schedule "F" - Phased Developments

The Purchaser acknowledges that the Vendor and/or its successors and assigns and/or any related companies may in the future construct another building or buildings on parts of the Lands [defined as part of block HH and II, Registered Plan M-199, City of Mississauga] and the Purchaser agrees not to object to such construction nor deem such construction as an inconvenience or nuisance, or make a claim for damages or injuries or otherwise. The Purchaser hereby consents to any re-zoning required for the Lands in order for the Vendor to proceed with its future plans and hereby agrees not to object to any re-zoning and committee of Adjustment applications brought by the Vendor.

[para26] The declaration concerning PCC 447 is slightly different. The relevant provisions are as follows:

"Recreation Complex" means the outdoor recreation area to be constructed on Part of Parcel Block II-1, Section M-199, in the City of Mississauga.

ARTICLE VII - DUTIES OF THE CORPORATION

(d) to accept a conveyance from the Declarant of its share of those Common Facilities which are units and any Parking Units that the Declarant desires to convey, without consideration, from time to time, to the Corporation (whether created as units in this Corporation or in any of the Proposed Corporations) and to register the same in the Land Registry Office for the Land Titles Division of Peel (No. 43);

(e) to accept a conveyance of an undivided interest in the Recreation Complex in the proportion tendered to it by the Declaration, as a tenant in common with the Proposed Corporations.

Section 2 - Recreational and Other Amenities

The following proposed recreational and other amenities will be contained in the building and will be for the use and enjoyment of members of the Corporation and their tenants, guests and invitees. The costs of operating the facilities will be included in the common expenses of each unit owner. The use and operation of such amenities shall be subject to the rules and regulations passed by the Board of Directors from time to time. Members of the Proposed Corporation will not be required to make any payments for the use of these facilities other than their regular common expenses payments or other payments as the Board of Directors may determine. Each of the Proposed Corporations will own its proportional interest as tenants in common in the outdoor recreation area. The transfer of ownership in the outdoor recreation area may not be completed until all of the Contemplated Corporations are registered. The Declarant will only build the outdoor recreation area when it builds the Terraced Apartments. Accordingly, if the Terraced Apartments are never constructed, the outdoor recreation area may never be constructed. The costs of operating the outdoor recreation area will be shared only by those buildings that are occupied.

If Terraced Apartments are not built then the Outdoor Recreation Area may not be completed.

THE ARGUMENT

[para27] Against this background, counsel for the applicants contends that the Developer is in breach of a number of its obligations set out in the relevant documents, particularly the reciprocal agreement, is in breach of its fiduciary obligations to the applicants and is in breach of trust.

[para28] Under the terms of the reciprocal agreement the Developer had an obligation to require all phases of the overall development to participate in the agreement. In breach of this obligation, the draft condominium documents for the two most recent phases, the townhouse development being built and the high-rise, do not contain any reference to the Outdoor Recreation Area or to the reciprocal agreement at all. On cross-examination Mr. Firestone a representative of the Developer admitted that the purchasers of the units of these most recent developments were not told of the Outdoor Recreation Area due to the fact that the composition of the overall development changed considerably after PCC 505 was marketed. Counsel for the applicants also argues that the disclosure statement, declaration and reciprocal agreement relevant to the earlier phases of the development clearly describe the Outdoor Recreation Area as part of the common facilities of PCC 505 and PCC 447 and that as such the Developer has a contractual obligation to provide them. While the obligations of the Developer in terms of the Outdoor Recreation Area may have been somewhat qualified, there was no qualification to its obligation to convey the Lands.

[para29] The applicants also submit that once the Developer began to sell units in the development, it committed itself to the character of the project. As such it placed itself in a fiduciary relationship to the unit purchasers not only with respect to their units but also to the interests appurtenant to those units.

[para30] Further, when the Developer issued its disclosure statement providing for an Outdoor Recreation Area (albeit with uncertain facilities) it committed itself to holding the Lands in trust for the unit purchasers present and prospective, and for the condominium corporations. It follows that the respondents cannot now avoid their obligations by their own decision, motivated by economic reasons, to alter the plan of the development.

[para31] In contrast to the applicants' reliance on the original intention of the parties in relation to the use of the Lands, the respondents' position is anchored by the precise wording of the documents that record the agreements of the parties. It is fundamental to the respondents' argument that while there originally was an intention to build an Outdoor Recreation Area on the Lands, that intention, according to the documents, was always subject to change. It is clear, counsel for the respondents contends, that the Developer was free to change the composition of the project as it saw fit and that, depending on the nature of the changes, an Outdoor Recreation Area may never be built. The documents also state unequivocally that only if the Outdoor Recreation Area is built is the Developer obligated to convey the Lands to the applicants.

[para32] For example, in the February 1993 disclosure statement, the Developer sets out that an Outdoor Recreation Area would be constructed on the Lands and that the area "may contain" certain amenities that "may not be constructed until the last phase [of the development was] constructed but that the Outdoor Recreation Area, "if and when constructed", may vary from that contemplated in the disclosure statement. Counsel also points out to the fact that the disclosure statement made reference to and attached the reciprocal agreement that contains a specific term to the effect that in the event that the Developer did not proceed

with the construction and registration of all proposed corporations or common facilities, then the agreement would be deemed to be amended accordingly with no liability on the part of the Developer. Counsel relies as well on that part of the declaration to the effect that while PCC 505 is obliged to accept a conveyance from the Developer of its share of the common facilities and to accept a conveyance of an undivided interest in the Outdoor Recreation Area tendered to it by the Developer as a tenant in common with the adjacent corporations, there is no corresponding provision requiring the Developer to convey the Lands if the Outdoor Recreation Area is not built.

[para33] From the point of view of the respondents the only reasonable interpretation of the condominium documents is that if an outdoor recreation facility were ever constructed on all or part of the Lands then that part of the Lands would be transferred to the participating condominium corporations pro rata according to their proportionate shares. However, the disclosure statement and the reciprocal agreement make it clear that the Developer has no obligation to build an outdoor recreation centre of any sort. Only if a complex of that nature were to be constructed would it form any part of the common facilities.

THE ANALYSIS

[para34] At this juncture it is helpful to return to the nature of the relief claimed. Understanding exactly what the applicants are trying to achieve is of considerable importance not only to the determination of the appropriate relief but also in assessing whether the applicants are entitled to any relief at all in terms of what is in issue in this Application. While the focus of the applicants' argument has been the purchasers' reliance on their having the use of and an interest in a recreation facility, I am not convinced that a recreation facility is what the applicants are after. The Notice of Application contains no request for specific performance of the construction of the Outdoor Recreation Area. Such a suggestion was first raised in written argument submitted approximately a month after the hearing. It appeared to be somewhat of an afterthought in response to a question I posed about what the applicants were trying to achieve. There is also an underlying threat of a claim for damages based on misrepresentation of what it was that the purchasers were buying. However, from everything before me, in writing and in terms of the oral argument, it would appear that the real intention of the applicants is to prevent the Developer from building a further residential phase of the project on the Lands. While such is not clearly set out in the materials I do note that an interim injunction was sought in the Notice of Application and that the factum filed on behalf of the applicants contains a section in which a "continuing injunction" to prevent any further changes to the Lands is requested.

[para35] Identifying the objective of the applicants in this fashion leads me directly to my analysis of whether the applicants are entitled to relief in terms of the question before me. That is, what is to happen to the Lands. This requires reconciling the representation and reliance based case presented by the applicants with the literal reading of the documents based case presented by counsel for the respondents.

[para36] The analysis must start with and focus on identifying the common intention of the parties with respect to the use of the Lands.

[para37] In this regard I must agree with counsel for the respondents that the relevant documents contain terms to the effect that the Developer is under no obligation to construct an Outdoor Recreation Area of any nature on the Lands. While I find the wording of the contractual documentation to be confusing, to say the least, the repeated references to the uncertainty surrounding the construction of the Outdoor Recreation Area are sufficient to alert a prospective purchaser to the possibility that the development may include a recreational centre scaled down from that originally contemplated or may not contain such a facility at all. In fact, not only is the suggestion that the Developer promised an Outdoor Recreation Area contrary to the express provisions in the disclosure statements and reciprocal agreements but also to the applicants' own witnesses as they testified that they understood that the Outdoor Recreation Area might never be built.

[para38] In these Reasons I have referred to wording in the PCC 447 disclosure statement to the effect that the outdoor recreation facility would not be built until the Terraced Apartments were constructed. I have also indicated that the Developer was free to change the components of the development and certainly was free to decide not to build the Terraced Apartments. The fact that the Terraced Apartments were not built and that the disclosure statement of PCC 447 contains the wording it does serves as further evidence in support of my finding that a reasonable purchaser knew or ought to have known that there was a possibility there might never be a recreation centre on the Lands.

[para39] The documents, if read with care, also contain, provisions to the effect that only if the Outdoor Recreation Area is built would the Developer have to convey the Lands to the participating condominium corporations.

[para40] The applicants attempt to counter the logical conclusion based on this wording (that they are not entitled to a conveyance of the Lands) by relying on the principles set out in *Middlesex Condominium Corporation No. 87 v. 600 Talbot Street London Ltd.* (1998), 37 O.R. (3d) 22 (C.A.). In that case the issue before the court focused on the obligations of the developer to provide a superintendent's suite as part of the common elements of the condominium corporation. The disclosure statement contained a general description of the proposed property that included a two bedroom dwelling unit set aside for use by a superintendent. This description and the budget required under s. 52(6) of the Act were both consistent with a finding that the superintendent's suite was a common element. The corporation sued for a declaration that the unit being used by the superintendent was a part of the common elements and for a mandatory order requiring it to be conveyed to the corporation. It also sued for damages under s. 52(5) of the Act. The trial judge made a strong finding that the documents demonstrated an original intention that the superintendent's unit would be one of the common elements of the corporation. He dismissed the claim for damages due to the corporation's inability to prove reliance and did not deal with the alternate form of relief claimed being that of a conveyance.

[para41] The Court of Appeal held that the corporation was entitled to the conveyance of the unit based on the fact that the Act provides specific remedies with respect to false and misleading disclosure. Mr. Justice Rosenberg, in writing for the Court, observed that earlier decisions of the Court of Appeal had made it clear that with respect to common elements "the Declarant is bound not to prefer its interests over those of the group of unit owners. Where the reasonable interpretation of the evidence is that, notwithstanding the registered title, the Declarant intended a reasonable purchaser to believe or to justifiably assume that [something was to be] a common element or an asset of the corporation, the Declarant will be required to convey [it] to the corporation."

[para42] Counsel for the applicants argues that in the case at bar the relevant disclosure statements, the reciprocal agreements and the declarations clearly describe the Outdoor Recreation Area as part of the common facilities of the development and that

reasonable purchasers would justifiably assume that the centre would be built and that the Lands would be conveyed. As such, following the lead of the Ontario Court of Appeal in *Middlesex*, the Declarant should be required to do just that.

[para43] The problem with this argument rests with my finding as to what the documents provide in terms of any obligation the Developer may have in relation to the Outdoor Recreation Area. Whereas in *Middlesex* the trial judge made a "strong finding" that there was an original intention that the asset in question would be one of the common elements, I am not in a position to make such a finding in relation to the Outdoor Recreation Area. I agree with the submission of counsel for the respondents that the documents contain terms that reserve to the Developer the right not to build an Outdoor Recreation Area at all. The purchasers and their counsel knew or ought to have known of this reservation, given the number of times that the possibility of their never being an Outdoor Recreation Area is referred to in the documentation. I repeat my finding that the documents further provide that only if the Outdoor Recreation Area were to be constructed would the Developer have any obligation to convey the Lands. It follows that the principles set out in the *Middlesex* case do not assist the applicants in their attempts to obtain an interest in the Lands.

[para44] The fiduciary argument as advanced by the applicants is similarly flawed. The authority relied upon of *York Condominium Corp. No. 167 v. Newry Holdings Ltd. et al.* (1981), 32 O.R. (2d) 458 also involved a superintendent's suite. The Court of Appeal found that the evidence was sufficient to support a finding that there was a common intention that the suite would form part of the common elements of the corporation and that a prospective purchaser would be justified in assuming that the suite would be one of the common elements. The Court felt justified in overcoming the potential problems created by the actual registered title and ordered a conveyance of the suite to the corporation.

[para45] What is of particular interest is that in *Newry Wilson J.A.* described the position of a developer, once sales of units started to take place, as follows:

I think he has ... placed himself in a fiduciary relationship to the unit purchasers not only with respect to their units but also with respect to the interests appurtenant thereto. He therefore holds the property in trust for the unit purchasers, present and prospective, and for the condominium corporation which will come into being upon registration of the declaration. I believe he is under a duty to protect the interests of all unit owners present and prospective and cannot put his own interests in conflict with theirs even although he himself continues to be an owner as long as any units remain unsold.

[para46] While the *Middlesex* and *Newry* cases stand for the proposition that a declarant is bound not to prefer its interests over those of the group of unit owners, the Court of Appeal has made it clear that the starting point must be a finding as to the reasonable intentions of the parties based on the evidence.

[para47] I have found that the evidence in this case does not support a finding that the Declarant intended that the purchasers believe the Outdoor Recreation Area was to be built and that the Lands would be conveyed and that a reasonable purchaser would assume that such would be the case.

[para48] However, that finding does not extinguish the rights of the applicants. With two exceptions, to which I will refer later in these Reasons, I find that the various documents do not contain any terms under which the Developer reserves to itself the right to build on the Lands if it abandons its plans to build an Outdoor Recreation Area. The documents merely say that the Outdoor Recreation Area may not be built and that such is contingent on the development of the entire project. They give the Developer the option of not building a recreation facility and therefore of not having to convey the Lands to the participating corporations. However, I do not see how the wording of the documents permits the Developer to deny that the owners, present and prospective, have some interest in the Lands. The clause that automatically amends the documents in the event that the Developer decides to change the nature of the project justifies the Developer in saying that it does not have to build, but not that it can appropriate the Lands for itself. In short, I find that the Developer intended that the purchasers believe that the Lands would not be used for residential development and that a reasonable purchaser would assume that the Lands, if not used for a recreational facility, would not be otherwise developed.

[para49] The exceptions to which reference is made in the previous paragraph are as follows. In schedule "F" of the various agreements of purchase and sale pursuant to which the individual units were sold to the ultimate purchasers, the purchaser acknowledges that the vendor may in the future construct another building on parts of the Property and the purchaser agrees not to object to such construction. As well the purchaser consents to any re-zoning necessary for the vendor to proceed with its future plans. As it turns out the definition section of the agreements of purchase and sale includes a legal description from which an astute purchaser, may have ascertained that the area referred to in this schedule included the Lands. In addition there was a provision in the disclosure statement to the effect that certain other parts of the Property may be used for the development of condominium complexes. If examined closely, the clause would suggest that the Lands might be used for further residential development.

[para50] The question to be answered is whether the clause in schedule "F" of the agreement of purchase and sale and that contained in the disclosure statement are sufficient to reserve to the Developer the right to build a further residential phase of the project on the Lands. Can these two provisions defeat the applicants' reasonable reliance on the bulk of the evidence that supports a finding that the Developer did not reserve to itself the right to appropriate the Lands? For the following reasons I find that the answer to this question is, no.

[para51] First, the provisions of the contractual documentation concerning the possible use of the Lands that if the Lands were developed at all they would be used for a recreation facility and the clause in schedule "F" of the agreement of purchase and sale together with that in the disclosure statement, are capable of reconciliation. These latter clauses make reference to the possibility that the Developer may, in the future, construct another building or buildings on parts of the Property. It seems to me that they could be interpreted as referring to those parts already identified by the Developer as intended for residential development.

[para52] At the very least the clauses are worded in an ambiguous fashion. Consistent with the consumer protection aspect of the Act, and the fact that it is the Developer who drafted the documentation, it is reasonable to interpret any ambiguity in the documents against the Developer. See: *Wellington Condominium Corporation No. 61 and Marilyn Drive Holdings Limited* (1998), 37 O.R. (3d) 1 (Ont. C.A.). I find the words of *Abella J.A.* particularly compelling in her dissenting decision in the case of *Arthur Andersen Inc. v. Toronto-Dominion Bank* (1994), 17 O.R. (3d) 363. Justice *Abella* dissented with respect to the application of *contra preferentum* but not as to its meaning. She described the *contra preferentum* rule as being "meant to relieve the non-authorial Party to a contract from an interpretation that party could not clearly discern from a plain reading of the document. This prevents the party who did draft and understand the contract from springing a hidden contractual burden on an

unsuspecting signator": Anson's Law of Contract, 25th ed. (1979), at p. 151; Fridman, *The Law of Contract in Canada*, 2nd ed. (1986), at pp. 445-46; *Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.* [1980] 1 S.C.R. 888, 112 D.L.R. (3d) 49.

[para53] Based on this analysis I find that the wording of the condominium documentation supports a finding that the Developer never intended a reasonable purchaser to conclude that it planned to develop the Lands for use other than as a recreation facility.,

[para54] Another way of coming to the same conclusion would be to find that the clause in Schedule "F" of the agreement of purchase and sale and in the disclosure statement are repugnant to the clear intention that the Developer intended to use the Lands, if at all, for a recreation area. In that case the court is entitled and indeed obliged to reject the inconsistent portions of the documents as being repugnant to the very nature of the transaction the parties entered into. Where different parts of an instrument are inconsistent, effect must be given to that part which is calculated to carry into effect the real intention of the parties as gathered from the instrument as a whole, and that part which would defeat it must be rejected. See: *Sabah Flour and Feedmills Sdn. Bhd. v. Comfez Ltd.* [1988] 2 Lloyd's Rep. 18.

[para55] Finally, I turn to an important point that, in my view, can clearly be made by the facts of this case. It is based on the vulnerability of the purchaser in the course of a purchase of a condominium unit from the Developer. The point is that a developer should not be allowed to rely on obscure or unclear contractual provisions in the condominium documentation in such a way as to defeat the reasonable expectations of the purchaser. Such would be contrary to the principles of good faith and fair dealing between contracting parties, contrary to the consumer protection objectives of the Act and to the developer's fiduciary obligations to purchasers of units.

[para56] I start with the principle that contracting parties owe one another a duty to act reasonably and in good faith and to perform contracts honestly made. *LeMesurier v. Andrus* (1986), 54 O.R. (2d) 1 (C.A.). In the case of contracts entered into as governed by consumer protection legislation such as the Act, these obligations are reinforced by terms designed to promote fair dealing between contracting parties.

[para57] In my view, in terms of a developer, the net result of these obligations, together with the fiduciary obligations identified in *Newry* go beyond its simply ensuring that somewhere in the documents a prospective purchaser may be fortunate enough or astute enough to ascertain what the developer is actually promising to deliver. The developer has the resources to craft a carefully written series of documents and insert in the mass of inter-related clauses any contingency or qualification upon which it might later want to rely. The purchaser, who is entitled to rely upon the developer's obligations of good faith and fair dealing and upon the purposive application of the Act, cannot be expected to invest the amount of resources necessary to decipher the intricacies of the voluminous documentation that is fundamental to the relationship between the developer and the purchaser. The purchaser is entitled to expect that the developer, in recording the agreements of the parties in terms of all of the reasonable expectations, does so with regard to serving the interests not just of the developer but of the purchaser as well. The purchaser's interests can only be protected if the purchaser is put in a position to understand the agreements. The element of trust that the prospective purchaser is entitled to have in terms of the fairness of the developer's drafting of the documents that record the transaction between the parties is in keeping with the fiduciary relationship identified by *Wilson J.A.* in *Newry*. It follows that the purchaser is entitled to expect that if the developer wants to reserve certain material matters to its own unqualified discretion, such reservations must clearly and distinctly be set out in the documents.

[para58] To me, it is unthinkable that in this case the Developer could market a project based, to some considerable extent, on the attraction of something other than residential development on the Lands, make repeated reference to this "oasis" in the documentation, and then, purportedly relying on some lurking ambiguity in the documents, embark upon a course of action, motivated solely by its own financial interests, with the result that it appropriates the Lands for itself. [para59] In my view, the resolution of the competing interests of the Developer in its attempt to build townhouses on the Lands and the owners of the units in PCC 505 and PCC 447 in preventing such development is founded on basic principles of contract law and principles of fairness as applied to transactions involving the sale of a condominium by the developer. As previously indicated the core of the analysis must be the reasonable expectations of the parties with respect to the Lands as set out in the documentation upon which the parties rely as being a record of their agreement. I have found that the reasonable expectation was that there might never have been a recreational facility or a conveyance of the Lands but not that the Developer could use the Lands as a site on which to add a residential phase to, the project.

[para60] The question that remains to be answered is the identification of the appropriate order to give effect to my conclusions. I have determined that an injunction should issue enjoining the respondents from any use of the Lands that would interfere with the intention I have found to exist that the Lands would not be used for a further residential phase of the development. [para61] The enforcement of contractual rights by injunction has a long history. An early case in Ontario is *Cockburn v. Quinn* (1890), 20 O.R. 519, in which the defendant had a lease from the plaintiff that contained a covenant not to use the premises for any purpose but that of a private dwelling. In violation of that covenant the defendant held nightly auction sales in the premises. *MacMahon J.* found that this was a breach of the covenant and granted an injunction.

[para62] More recently it has been recognized that the court retains a broad jurisdiction to order injunctions. The following passage is found in the leading authority *Robert J. Sharpe, Injunctions and Specific Performance* (2nd ed.) (Toronto: Canada Law Book Inc, 1992) at 148 "... the modern court is free to develop novel remedial solutions while adhering to the principle that injunctions are not to be used to create new rights in a vacuum ... jurisdiction to award injunctions should not be given a narrow meaning ... an injunction will not be barred merely because it was not the practice to grant one in the past.

[para63] Admittedly, before a court can order an injunction there must be a justifiable interest. In this case I have found that the applicants have a right to protect the Lands from being appropriated by the Developer. In my view an injunction is suitable as a means of restraining the respondents from breaching the covenant not to appropriate the Lands to themselves. Such relief is in keeping with the principles set out in the jurisprudence in which it has been made clear that a court must, before granting an injunction, consider all the surrounding circumstances which include the strict rights of the parties, the magnitude of the breach or potential breach, the injury suffered by both and the monetary loss to the parties from the granting or withholding the injunction.

[para64] In the circumstances of this case an injunction is a remedy that satisfies the applicants' substantive rights in the least burdensome way. It presents minimal intrusion on the rights of the Developer. While the Developer is prevented from proceeding with its plans to build the 25 unit townhouse development, it does have the option of proceeding with the Outdoor Recreation Area in some fashion and then the ultimate conveyance of the Lands to the participating condominium corporations. The Developer can, of course, do nothing and maintain the Lands as a type of parkland.

[para65] In terms of the applicants, I have already indicated that damages are not before me in the course of this application. I would add however, that in my view damages would be wholly inadequate to compensate the applicants not only for the loss of the wooded area they believed would be part of their community but also the loss of enjoyment of the overall character of their neighborhood.

[para66] While there is no evidence before the court concerning the monetary impact to the Developer of granting the injunction, it goes without saying that the financial consequences might well be significant. However, the Developer made the representations it did to the potential purchasers concerning the use of the Lands with its eyes open.

[para67] In all of the circumstances I find that the applicants are entitled to a permanent injunction on terms hopefully to be resolved by the parties, that would have the effect of preventing the Developer from altering the Lands in any way that would interfere with the expectations of the parties that I have found reasonable; namely, that the Lands, if used at all by the Developer, would be used for a recreational facility.

[para68] As indicated at the outset, the respondents have, by way of counter-application, requested an order discharging the caution registered against title to the Lands as instrument number LT1717607 in the Land Titles of Peel. Based on my conclusion that PCC 505 is not entitled to a conveyance of the Lands, the fact that the owners of PCC 505 specifically contracted not to register a caution of this nature, and the fact that I have decided to protect the interests of the Applicants by way of an injunction, the caution ought to be removed from the Land Titles register.

[para69] I now turn to the motion brought on behalf of Mr. Feldman for an order dismissing the action against him personally. In my opinion there is insufficient evidence to support a cause of action against Mr. Feldman. There is no evidence to support a finding that he was personally responsible for the Lands or that he had a contractual or fiduciary relationship with the applicants. Based on the manner in which the application is framed, the evidence before the court and the argument advanced I am of the view that the action against Mr. Feldman ought to be dismissed.

[para70] In the result an order will issue granting the applicants an injunction on the terms set out in these Reasons. The caution registered against the Lands is hereby ordered to be discharged. The application against Mr. Feldman is dismissed.

[para71] This application centred almost exclusively on attempts by the applicants to prevent the Developer from proceeding with a residential development on the Lands. The applicants have been successful in this regard and accordingly are entitled to their costs on a party and party basis. If counsel are unable to resolve the amount of these costs or the terms of the injunction, they may make submissions to me in writing within 30 days of today's' date.

EPSTEIN J.

CBR# 143

Arthur Marian Jasinski, Plaintiff, and Mauro Trinchini and Lina Trinchini, Defendants

Action No. 60796/90Q

Ontario Court of Justice - General Division Toronto, Ontario MacPherson J. Heard: March 8, 9, 10 and 11, 1994. Judgment: March 24, 1994.

Kenneth Wolfson, for the Plaintiff. Joseph Paradiso, for the Defendants.

MacPHERSON J.:--

INTRODUCTION

[para1] The principal issues in this case concern the legal status of municipal work orders and deficiency notices and their effect on a condominium sale agreement. The issues arise in the context of a formal purchase and sale contract which included a specific tailored clause (as opposed to a standard form clause) dealing with work orders and deficiency notices.

FACTUAL BACKGROUND

[para2] In 1987 the defendants, Mauro Trinchini and Lina Scalisi (now Trinchini), were engaged to be married. They purchased a three bedroom condominium in a building with 152 units at 2825 Islington Avenue in North York. Two months later the defendants married. In the next three years two children were born and the Trinchinis decided to sell their condominium and try to purchase a private home which they felt would be more suitable for raising a young family. In the spring of 1990 they listed their condominium for sale.

[para3] The plaintiff, Arthur Jasinski, is an aircraft mechanic. He is also an investor, on a modest scale, in commercial properties. By 1990 he had purchased a tavern in Niagara Falls and a commercial building, with a bank as principal occupant, in Cowichan, British Columbia.

[para4] On the advice of a real estate agent who happened also to be a personal friend, Mr. Jasinski became interested in the Trinchinis' condominium. An Agreement of Purchase and Sale (Condominium - Resale) was signed by the parties on May 23, 1990. It is a standard form agreement; however, under paragraph 2 five special terms have been added to the agreement. Three of these terms have been typed onto the document; the other two have been written in by hand. Although three of these additional terms are relevant to this litigation, the final result of the litigation turns on the term dealing with work orders and deficiency notices. It is one of the handwritten terms and provides:

VENDOR WARRANTS THAT THERE ARE WORK ORDERS OR DEFICIENCY NOTICES OUTSTANDING AGAINST THE PROPERTY AND WILL BE COMPLIED WITH AT HIS EXPENSE ON OR BEFORE CLOSING.

[para5] On May 23, 1990 there were two existing sets of work orders issued by the City of North York in relation to the condominium building at 2825 Islington Ave. It was also known by the residents that more work orders were imminent because of ongoing inspections being conducted by officials of the City. And indeed, three further work orders were issued on July 25, 27 and 30, 1990. To their credit, the defendant vendors, through their real estate agent, brought the matter of work orders to the attention of the plaintiff's real estate agent as negotiations unfolded on May 23, 1990. To his credit, the plaintiff testified (and so did his real estate agent) that on May 23, 1990 this seemed like a minor matter on the periphery of the negotiations. However, the parties decided to deal with the matter by inserting the term set out above into the Agreement of Purchase and Sale.

[para6] The solicitor for the plaintiff submitted a letter of requisitions on August 3, 1990. This letter was not a timely one, the date for requisitions generally being July 3, 1990 and for requisitions relating to municipal work orders being August 2, 1990 (pursuant to paragraph 9 of the Agreement of Purchase and Sale). Paragraph 7 of the letter of requisitions requires "Evidence that...there are no outstanding work orders or deficiency notices under any municipal by-laws." The proper response of the defendants' solicitor was "satisfy yourself." The plaintiff's solicitor contacted the City of North York and received a reply from the Building Department on October 11, 1990. This reply enclosed copies of the July 25, 27 and 30 work orders and deficiency notices.

[para7] Between October 17 and November 1, 1990, the latter being the scheduled closing date, there was a fair amount of correspondence between the solicitors for the parties. Some of it related to the work orders. Then on November 1 the solicitor for the defendant tendered a full and proper set of closing documents. The plaintiff did not close.

[para8] The plaintiff launched an action for the return of his \$10,000 deposit. The defendants resisted this claim and counterclaimed for damages totalling \$43,394.59 which they allege represent the losses they suffered when the sale of their condominium did not close.

ISSUES

[para9] There are, in my view, two issues to be determined in this case:

- (1) Does any legal liability attach to either party for the failed transaction?
- (2) If the answer to Question 1 is in the affirmative, who has suffered the loss and how much in damages should be awarded to compensate for the loss?

ISSUE 1 - LIABILITY FOR FAILED TRANSACTION

[para10] The plaintiff asserts that on November 1, 1990, the scheduled closing date, there were outstanding work orders relating to the condominium building that had not been complied with. This non-compliance, says the plaintiff, is a clear violation of the

express term in the Agreement of Purchase and Sale dealing with work orders. Moreover, it is a serious violation, one going to the root of the contract, and therefore entitles the purchaser to rescind from completing the transaction contemplated by the contract.

[para11] I do not agree with the plaintiff's submissions on either compliance or remedy. I will deal with them in turn.

(a) Compliance with Work Order

[para12] The condominium complex at 2825 Islington Ave. contains 152 units - two with one bedroom, seventy-five with two bedrooms and seventy-five with three bedrooms. The City of North York work orders relating to the complex in the May 23 - November 1, 1990 time period involved a mixture of major and minor repairs. The evidence of William Lewis, the manager of the complex in 1990 and today, which I found reliable and helpful, was that major repairs were required on the storage garage and some balconies and minor repairs were needed on stairwells, landings, stairwell windows, balcony guards, the swimming pool and lighting in the storage garage. The number and extent of the required repairs were not, according to Mr. Lewis, unusual for a building of this size and age. The estimated cost of all the repairs required by the work orders was \$592,600. This is not, in my view, a trivial amount; however, it is also not an unusually high amount in a large multi-million dollar residential building.

[para13] The resident owners of the complex set about to comply with the work orders. There were two components to their response; one component dealt with the actual repairs, the other related to their financing.

[para14] The repairs were scheduled to take place over a two year period, with an emphasis on completing the major repairs before December 31, 1990 because of the commencement of the Goods and Services Tax on January 1, 1991. It is true that this meant that some, indeed many, of the work orders would still be outstanding on November 1, 1990, the scheduled closing date of the Jasinski-Trinchini transaction. However, in a large condominium project, unlike in a single dwelling, the regular existence of municipal work orders is the norm, not the exception. I find that the way in which the resident owners of the condominiums at 2825 Islington Ave. dealt with the scheduling of repairs was appropriate in the circumstances.

[para15] On the financial plane, the response of the resident owners was a three-pronged one - reliance on a reserve fund of \$88,273, the levy of a special assessment on all the owners to pay for the cost of the major capital-related repairs, and an increase in the autumn of 1990 in the monthly maintenance fees [See footnote 1 below] payable by all owners, with some of this increase being intended to finance the minor ongoing maintenance-related repairs. A Notice of Assessment prepared on September 4, 1990 informed all of the owners of the nature, cost and scheduling of the repairs and indicated that the special assessment would cover \$354,600 and maintenance fees would cover \$238,000 of the total repair cost of \$592,600. [See footnote 2 below] For the owners of three-bedroom condominiums, including the Trinchinis, the special assessment was \$2,442 and the monthly maintenance fees increased from \$309.82 to \$340. * 1. There was some argument about whether maintenance fees and common expenses are the same. It is clear to me that, in terms of the documentation in this case, they are.

* 2. Presumably it was contemplated that the reserve fund of \$88,273 would be used, as its title implied, as a reserve fund. [para16] The Trinchinis responded by paying the entire special assessment of \$2,442 before the closing date. They also included in the documents they tendered on closing an undertaking which provided in part:

In consideration of the closing of the above transaction, we undertake and covenant as follows:

(1) The warranties in the agreement of purchase and sale shall survive and continue in force after the closing of this transaction.

Assuming that the clause in the Agreement of Purchase and Sale relating to work orders is a warranty [See footnote 3 below], the effect of paragraph (1) of the undertaking on closing is to confirm that the Trinchinis would remain responsible for paying for any additional expenses (e.g. a second Special Assessment) incurred post-closing to complete the repairs required by the pre-closing work orders. [See footnote 4 below]

* 3. See discussion below.

* 4. In fact, no further assessments or levies against the owners were ever made in connection with the work orders. [para17] In short, my tentative conclusion is that both the owners of the condominium complex acting collectively and the Trinchinis took proper steps to comply with the work orders levied against their complex. Unless compliance is interpreted to mean discharge, which is neither what the term of the agreement says, nor, in my view, realistic in a large multi-unit residential building, I cannot see what more they could have done.

[para18] The plaintiff has a different view. He says that he did not close on November 1, 1990 because the existence of the work orders made him fearful of exposure to the expenditure of more money than he was willing to pay.

[para19] I do not accept this argument. On May 23 the plaintiff offered \$153,000 for the Trinchinis' condominium. If the transaction had closed on November 1 he would have paid \$153,000. The special assessment paid by the Trinchinis pre-closing and their undertaking on closing constituted, in my view, complete coverage of the major capital-related repairs required by the work orders.

[para20] It is true that the monthly maintenance fee increased from \$309.82 to \$340 in the early autumn of 1990. However, this increase related to both regular inflation-related costs (e.g. utilities and services) and the maintenance-related repairs required by the work orders. It was an increase of less than 10 per cent. Moreover, when one examines the monthly maintenance fees over a period of years (1987 - \$299; 1988 - no increase; 1989 - \$310; 1990 - \$340; 1991 - \$364; 1992 and 1993 - no increase), it seems clear that the \$30 increase in 1990 was neither particularly high nor a precursor of major repair expenditures that followed.

[para21] The plaintiff's other argument, advanced with more vigour than his fear of exposure argument, was that the existence of the work orders made it impossible for him to obtain mortgage financing for the condominium. Hence he was unable to close.

[para22] The plaintiff signed the Agreement of Purchase and Sale on May 23, 1990. One of the clauses in the Agreement made it conditional on the purchaser obtaining satisfactory financing within 10 days. On May 29 the plaintiff obtained a Mortgage Commitment from First National Financial Corporation in Oakville. On May 30 he waived the clause respecting financing. He says that in late October this mortgage company became aware of the work orders relating to the condominium complex and withdrew its mortgage commitment. He further asserts that he was unable to obtain alternative financing and was therefore unable to close on November 1, 1990.

[para23] For several reasons, I do not accept this scenario. First, the evidence about the withdrawal of the mortgage commitment is suspect. There is no letter or document from the company. There was no witness from the company. There is only a self-serving letter from the plaintiff's solicitor to the company the day before closing confirming the alleged withdrawal of the mortgage commitment.

[para24] Secondly, the plaintiff led no evidence to indicate that he made any effort to secure alternative financing. He was an investor on previous occasions and he was a client of a major bank with access to a substantial line of credit. It is difficult to believe that one rejection, if there really was one, was determinative of the plaintiff's access to mortgage money.

[para25] Third, in November 1991 the plaintiff and his wife placed a \$200,000 mortgage on their principal residence. The plaintiff testified that he did this to raise money for investment purposes. A fair inference is that this money was also available to him a year earlier and would have enabled him to close the condominium purchase.

[para26] Fourth, there is a clause in the Agreement of Purchase and Sale requiring the Trinchinis to arrange a first mortgage for the plaintiff if necessary. The plaintiff never raised this possibility with the defendants or their solicitor. [para27] Fifth, and in my view conclusive, the plaintiff's testimony at trial that he did not have the funds to close once the original mortgage financing fell through is belied by his own testimony and that of his solicitor on his examination for discovery. At the discovery, Mr. Jasinski said: "I could have closed. I mean, I had the funds to close." (Q137) Mr. Feldman, the plaintiff's solicitor, said: "There would have been any number of other sources available to my client. I have in the past, arranged financing for clients and could have done so, if necessary." (Q153) I prefer this evidence to the plaintiff's testimony at trial.

[para28] My conclusion is that there was no shortage of mortgage money caused by the existence of municipal work orders relating to the condominium complex. The real reason for the plaintiff's decision not to close on November 1, 1990 was, in my view, an investment decision pure and simple.

[para29] The plaintiff testified that he purchased the condominium for his daughter who was living at home at the time. His plan was to rent the condominium for a few years while she attended courses and then give it to her when she moved out on her own.

[para30] I have some difficulty accepting that this was the principal reason for the plaintiff's decision to buy the condominium. He testified that neither he nor his daughter inspected the condominium before deciding to purchase it. Moreover, the plaintiff made no attempt to find a tenant before the November 1, 1990 closing date. And the plaintiff made no effort after the failed closing to purchase a different property for his daughter even though real estate prices have fallen drastically from 1990 to 1994. All of this leads me to conclude that, although the purchase of the Trinchini condominium might have been related in some way to a desire to do something special for his daughter, the principal reason for the proposed purchase was investment and profit.

[para31] In summary, I find that the defendants have "complied with" the work orders against the condominium complex. The steps taken by the condominium owners collectively to repair the property to comply with the work orders and the steps taken by the Trinchinis to pay their share of the expenses connected to the repairs, were, in my view, timely, full and fair. In *Lemesurier v. Andrus* (1986), 54 O.R. (2d) 1 (C.A.), a case in which a purchaser attempted to repudiate a land contract because of a small, non-material deficiency in title, Grange J.A. said, at p. 5:

The test is therefore whether the vendors were in a position to convey substantially what the contract called for.

[para32] In my opinion, the vendors here are on even stronger ground than the vendors in *LeMesurier*. In the instant case there is not just substantial compliance; there is, in my view, total compliance. On November 1, 1990 the defendants were in a position to deliver to the plaintiff the property at the price agreed to on May 23, 1990.

[para33] The only fact that changed between May 23 and November 1 was that the common expenses for the Trinchinis' condominium increased from \$309.82 to \$340 per month. However, this represents an increase of less than ten per cent; moreover, in the years the Trinchinis owned the condominium (1987-1990) the average annual increase was about six per cent. As well, Clause 5 of the Agreement of Purchase and Sale (a standard form clause) states that the vendor warrants that the common expenses "presently payable" by the vendor are \$309.82; it is implicit (indeed it is the essence of condominium ownership) that these monthly payments will increase over time as the costs of maintaining and servicing the entire condominium complex rise.

[para34] It is, of course, open to a prospective purchaser to guard against the existence of any work orders at the time of closing. A clause stating that all existing work orders must be discharged would suffice. So would a clause providing that the vendor warrants that on the closing date there will be no outstanding work orders against the property: see, for example, *Jorian Properties Ltd. v. Zellenrath* (1984), 46 O.R. (2d) 775 (C.A.), and *Table Stake Construction Ltd. v. Jones* (1977), 18 O.R. (2d) 203 (H.C.). [See footnote 5 below]

* 5. Such a clause would still leave open the question of what is the appropriate remedy for its breach. See discussion below in Section 1(b) - Remedy. [para35] The language of the clause in the instant case is not as specific as "discharge" or "no outstanding work orders." Rather the clause acknowledges that there are work orders outstanding against the property, but that these will be "complied with" at the vendor's expense before closing. In my view, for the reasons I have enumerated, the vendors in the instant case have fulfilled their obligations under this clause.

[para36] In their closing arguments, both counsel spent a good deal of time discussing the relatively recent decision of Roberts J. of this Court in *Ahuntsic Investments Inc. v. Cheng* (1992), 28 R.P.R. (2d) 16. In that case the defendant Cheng contracted to purchase a resale condominium unit from the plaintiff vendor. Cheng became aware of a work order relating to the condominium complex and refused to close when it was not discharged by the closing date. The vendors sued for breach of contract and were successful in a trial before Roberts J.

[para37] The key clause in the Agreement of Purchase and Sale in *Ahuntsic* provided in part:

9. ... If within that time [purchaser] shall furnish vendor in writing with any valid objection to title or to any outstanding work order which vendor shall be unable to remove, remedy or satisfy and which purchaser will not waive, this agreement shall be null and void and all deposit monies paid by purchaser hereunder shall be refunded. [Emphasis added]

[para38] Roberts J. held that the vendors had complied with this clause. The reserve fund established by the condominium corporation, the absence of any special assessment against the owners, and the work schedule for repairs led him to conclude that the vendors had in fact "satisfied" the work order.

[para39] In the instant case, Mr. Wolfson, counsel for the plaintiff, urged that Ahuntsic should not be followed or applied. He advanced two arguments in support of this proposition - first, that Ahuntsic was wrongly decided; second, that important factual differences make it distinguishable.

[para40] The principal basis for the first argument is the critical annotation written about Roberts J.'s decision in the case report. The author of the annotation calls it "a curious decision" and "a rather unique decision". The essence of his criticism is contained in this passage, at p. 16:

Roberts J.'s rather unique decision appears to indicate that a work order in the process of being complied with may not necessarily be an "outstanding" order. The difficulty is that a purchaser now appears to be saddled with the burden of establishing that a work order registered against a particular property is indeed outstanding. It is submitted that the particular facts in Ahuntsic made this determination rather simple. The decision provides no guidelines to determine when a purchaser should be "satisfied" that a work order is no longer outstanding. [para41] The problem with this passage, in my respectful view, is the very first sentence. As I read Roberts J.'s reasons, he is not saying that a work order in the process of being complied with is not an "outstanding" work order. Rather, he examines the entire clause relating to work orders, which admittedly refers to "outstanding" work orders, but also speaks of the vendor's opportunity to "remove, remedy or satisfy" them. The use of the word "satisfy" in addition to the word "remove" implies that something other than complete removal or discharge of the work order before closing is contemplated and permitted. So Roberts J. is not saying that an outstanding work order is rendered not outstanding by an appropriate course of conduct by the vendors directed towards compliance. What he is saying is that the notion of satisfaction or compliance, at least in a condominium context, is a flexible one inviting consideration of the wording of the governing clause in the agreement and the conduct of the parties, especially the vendors, with respect to the work orders.

[para42] I agree with Roberts J.'s approach and decision in Ahuntsic. There are clear differences between large condominium complexes and private homes with respect to work orders, as well as with respect to the ease with which they can be removed. Large condominium complexes frequently have work orders issued against them, while this is only infrequently the case for private homes. Furthermore, while an individual home owner, acting alone, can take steps to remove a work order against his or her home, an individual condominium owner cannot remove a work order against the entire condominium complex acting on his or her own.

[para43] Therefore, it would be unrealistic and unfair to interpret a clause relating to work orders in a purchase and sale agreement as requiring total discharge, unless, of course, there is specific language to that effect in the agreement. If there is not such language ("no outstanding work orders", "discharge", "removal"), if the language couples "outstanding" with "compliance" (this case) or "satisfaction" (Ahuntsic), then, in my view, it is appropriate and necessary to conduct a broader inquiry along the lines suggested by Roberts J. in Ahuntsic.

[para44] In argument, Mr. Paradiso, counsel for the defendants, said that the purchaser of a condominium must understand that participation in a condominium enterprise involves both ownership and partnership. This is an apt and attractive description. In the context of work orders, this combination invites recognition of the fact that work orders are a regular, in some cases even continuous, feature of the life of a large condominium complex. Moreover, dealing with the work orders is beyond the control of a single owner vendor; co-operation among all the owners is required.

[para45] Against this real world background of the nature of a condominium enterprise, I would hold that in interpreting a clause relating to work orders in an Agreement of Purchase and Sale, if the clause combines the fact of a work order being outstanding with the opportunity for the vendor to satisfy or comply with it, then to determine whether there has been compliance with the work order, it is appropriate to examine the conduct of the collective ownership of the condominium enterprise, the conduct of the owner vendor, and the conduct, especially the reliance, of the prospective purchaser. In this case, the administrative and financial steps taken by the collective ownership, the actual payments and undertakings made by the defendants in aid and anticipation of closing, and the conduct of the proposed purchaser lead me to the conclusion that there was sufficient compliance with the work orders to require the closing of the transaction on November 1, 1990.

[para46] The plaintiff's other argument concerning Ahuntsic was that, even if the legal principles enunciated in it are correct, the case is nevertheless distinguishable from the instant case because of several important factual differences. Those alleged differences were that the purchaser in Ahuntsic was an experienced investor whereas Mr. Jasinski is not, that there was a large reserve fund of \$800,000 in the condominium enterprise in Ahuntsic whereas there was only \$88,000 in the fund at 2825 Islington Ave., and that the extra cost of the work orders to the purchaser in Ahuntsic was \$181, a de minimus amount, whereas in the instant case the exposure of the purchaser was for an unknown, and presumably higher, amount.

[para47] I am not persuaded that any of these differences are important, let alone determinative. First, Mr. Jasinski, although not as experienced an investor as Ms. Cheng, nevertheless had previous investment experience in commercial properties in Ontario and British Columbia. Second, the difference in the reserve fund is irrelevant; what is important is whether the financial steps taken by the owners collectively and the defendant vendors personally constituted compliance with the work orders. Reserve funds, special assessments, maintenance fees and warranties can all contribute to compliance. Third, as discussed above, the plaintiff's fear of long term financial exposure for the repairs required by the work orders was not the real reason for his failure to close. And even if it were, there was no basis for it in light of the financial arrangements that had been made by both the defendants and all the owners of the condominium complex. Accordingly, I am not prepared to find that Ahuntsic is irrelevant to the instant case.

(b) Remedy - Essential Condition or Warranty?

[para48] Since I have decided that the defendants did not violate the clause relating to work orders in the Agreement of Purchase and Sale, it is not necessary, strictly speaking, to consider the plaintiff's further submission that the violation constituted a breach of a fundamental condition of the contract which entitled him to repudiate or rescind. However, in case my decision on the work order compliance/violation issue is wrong, I will address the issue that would follow on, namely, what is the remedy to which the plaintiff is entitled?

[para49] The answer to that question depends on whether the clause relating to work orders is a condition or warranty. The difference between the two has been enunciated by many courts and scholars. One of the clearest formulations, in my opinion, is that of Blair J.A. (dissenting, but not on this point) in *Jorian Properties*, supra, at p. 779:

What has been called "the dichotomy of condition and warranty", which originally applied to contracts for the sale of goods, now extends to contracts generally: *Cheshire and Fifoot's Law of Contract*, 10th ed. (1981), p. 132 et seq. A breach of condition entails more serious consequences than a breach of warranty. If there is a breach of condition, the innocent party may elect to treat himself as discharged from the contract or to maintain the contract and recover damages for the breach. If there is breach of warranty, the innocent party can only claim damages for breach of the particular term and may not treat the contract as ended and claim damages for the loss of the whole contract: *Chitty on Contracts*, 25th ed. (1983), vol. 1, p. 409 para. 746.

[para50] How, then, is one to determine whether a contractual term is a condition or a warranty? In *Jorian Properties*, both Zuber J.A. for the majority and Blair J.A. in dissent relied on a passage from Lord Diplock's judgment in *Hongkong Fir Shipping Co. v. Kawasaki Kisen Kaisha Ltd.*, [1962] 2 Q.B. 26 (C.A.), at pp. 65-6:

[I]n what event will a party be relieved of his undertaking to do that which he has agreed to do but has not yet done?

The test whether an event has this effect or not has been stated in a number of metaphors all of which I think amount to the same thing: does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?

[para51] I have no hesitation concluding that the clause relating to work orders in the Agreement of Purchase and Sale in the instant case is a warranty, not a condition. I say this for three reasons.

[para52] First, the clause itself says "VENDOR WARRANTIES". It is true that labels are not determinative in every case: see *Lamont, Real Estate Conveyancing*, 2nd ed., p. 3-33. Nevertheless, a good starting point, in my view, is the assumption that use of the verb "warrants" in a contract indicates that the provision is a "warranty", not a "condition."

[para53] Second, there is authority in Ontario for the proposition that a clause relating to work orders can be, depending on the drafting and circumstances, a warranty. In *Table Stake Construction*, supra, the relevant clause stated:

The Vendor warrants that on the closing date there will be no outstanding work orders against the property.

[para54] After a discussion of the relevant principles and case law, Osler J.'s conclusion about the legal status of this clause was stated in these terms, at pp. 211-2:

[I]n my view the non-fulfilment of the term in question would not affect the substance and foundation of the transaction and the obligation arising from that term does not go so directly to the substance of the contract that its non-performance may be considered non-performance of the contract itself. I conclude, without doubt, that the term I have been discussing was, in law, a warranty. This is an important conclusion as a breach of warranty does not entitle the innocent party to specific performance but only to claim damages.

[para55] By parity of reasoning, in the instant case the plaintiff would not be entitled to repudiate the contract if the work order clause in the agreement had been violated. His only remedy would be damages.

[para56] Third, I do not believe that violation of the work order clause in the instant case would deprive the plaintiff of "substantially the whole benefit" of the contract. On November 1, 1990 Mr. Jasinski could have received the property he desired at the price he agreed to pay. The continuation beyond November 1 of some work orders might have constituted, at most, a minor administrative inconvenience and a small, perhaps even negligible, financial exposure.

[para57] My conclusion on this issue is that, even if the clause relating to work orders had been violated, the plaintiff was not entitled to feel that he was discharged from his obligation to close on November 1, 1990. His only remedy would have been in damages for breach of warranty. **ISSUE 2 - DAMAGES**

[para58] The effects on the defendants of the plaintiff's failure to close on November 1, 1990 were devastating, both emotionally and financially. Mr. Trinchini had a job with a modest income and Mrs. Trinchini was at home with two pre-school children. In anticipation of the sale of the condominium they had agreed to purchase a new home with a closing date of November 1. They followed through on this transaction, as they were legally bound to do. The financial consequences of owning two properties after November 1 were very serious indeed.

[para59] I have no hesitation concluding that the defendants have proved all of their damages and that they did everything possible to mitigate them. I was impressed by the evidence of Mrs. Trinchini and of Mr. Joseph D'Addio, the defendants' real estate agent, on these points. Moreover, the plaintiff led no evidence to challenge any of the claims or calculations advanced by the defendants.

[para60] Accordingly, I find that the defendants are entitled to damages as follows:

- (1) Loss on the timely (January 2, 1991) and fair market value sale of the condominium - \$28,000.00
- (2) Re-negotiation of mortgage related to failed closing on November 1, 1990 - 1,808.53
- (3) Interest on bridge financing during period of owning two properties - 983.01
- (4) Interest on line of credit required to carry two properties - 2,151.69
- (5) Common expenses on condominium property for three months - 1,020.00
- (6) Taxes paid on condominium property for three months - 256.36

(7) Legal costs of failed transaction - 1,525.00 ----- Sub-total - \$35,744.59 [See footnote 6 below] * 6. The defendants also claim \$7,650 as their share of the real estate commissions payable on the failed transaction. Although the technical wording of the Agreement of Purchase and Sale might appear to permit the agents and their companies to collect these commissions, both agents involved in the transaction testified that they had in fact not received any commissions and had no expectation of doing so. Accordingly, I am assuming that the plaintiff's \$10,000 deposit, currently being held by Re/Max Professionals Inc., will be returned to him and not used to pay commissions. If I am wrong about this, counsel may notify me and I will consider the defendants' claim for a further \$7,650. [para61] The plaintiff is also entitled to pre-judgment interest at 12.9 per cent for forty months which works out to \$15,370.17.

CONCLUSION

[para62] The plaintiff's claim is dismissed. The defendants' counterclaim is allowed. The defendants are entitled to damages in the amount of \$35,744.59 and pre-judgment interest of \$15,370.17.

[para63] The defendants are also entitled to their costs of this action which may be spoken to, if necessary.

MacPHERSON J.

CASE REFERENCE NO. 297

Allen Singer and Nancy Singer, Applicants, and Reemark Sterling I Limited, Respondent

Ontario Judgments: Action No. 7807/92

Ontario Court of Justice - General Division Toronto, Ontario White J. Heard: April 1, 1992 Judgment: May 22, 1992

Carolyn J. Johnson, for the Applicants. Marc T. Huber, for the Respondent.

WHITE J.:-- The applicants seek the following relief: (i) a declaration that the general agreement providing for the purchase of condominium unit 1201 in the condominium development known as Sterling Club I at 320 McCowan Road, Scarborough, Ontario between Allen Singer and Nancy Sheila Singer, as purchasers, and the respondent, as vendor, is null and void;

(ii) a declaration that the general agreement providing for the purchase of condominium unit 1308 in this condominium development between Allen Singer, as purchaser, and the respondent, as vendor, is null and void;

(iii) a declaration that Allen Singer and Nancy Singer are entitled to the return of all monies paid to the vendor pursuant to the unit purchase agreement forming part of the general agreement for unit 1201;

(iv) a declaration that Allen Singer is entitled to the return of all monies paid to the vendor pursuant to the unit purchase agreement forming part of the general agreement for unit 1308 in the development;

(v) certificates of pending litigation against the title of the relevant units; and,

(vi) the costs of this application.

FACTS:

On the 14th of December, 1987, Allen Singer executed a general agreement with respect to unit 1308 for the purchase of that unit with the respondent. On the same date, he and his wife, Nancy Singer, executed a general agreement with respect to the purchase of unit 1201 with the respondent.

In a series of payments, Mr. Singer has paid the respondent \$32,051.18 towards the purchase of unit 1308 and he and his wife have paid the respondent the sum of \$42,982.75 towards the purchase of unit 1201.

The general agreements both refer to the following documents: unit purchase agreement, financial schedule, trust agreement, development agreement, services agreement, rental management agreement, guarantee agreement and appliances lease. These documents are appended to the general agreement and are integral parts of the general agreement.

In Article 1.06 of the unit purchase agreement, the purchaser acknowledges purchasing an undivided interest in the land with the objects of acquiring beneficial ownership of pro-rated undivided interests, developing the land and registering a condominium declaration with respect to the lands. Individual ownerships of the units shall be transferred to each of the purchasers for whom the vendor holds registered title as bare trustee.

Article 2.01 of the unit purchase agreement sets out the purchase price and a schedule of payment for the purchaser's lands, the work, landscaping, paving and initial services.

Article 4.02 of the unit purchase agreement provides that the transfer of the condominium unit to the purchaser shall take place on the transfer date.

Article 5.01(e) of the unit purchase agreement prevents the purchaser from assigning, selling or transferring his interest in the agreement, the land or the unit on or before the transfer date or before the vendor has received full proceeds of the mortgage.

Article 12.01(x) of the unit purchase agreement defines the transfer date to be the later of September 1, 1989 and the date being fifteen days after the purchaser has been notified that the condominium declaration has been registered subject to the provisions of Article 11.03 of the unit purchase agreement and Article 1.08 of the development agreement.

Article 13.08 of the unit purchase agreement provides that time shall continue to be of the essence of the agreements in all respects and any waiver of any time provision shall not be effective unless in writing and signed.

The condominium declaration for the Sterling Club I condominium development was registered on December 31, 1990. The respondent advised the applicants of the registration of the condominium declaration by a letter dated January 9, 1991. According to the formula for reckoning the transfer date set out in Article 12.01(x) of the unit transfer agreement, the transfer date was January 24, 1991. The respondent's letter to the applicants dated January 9, 1991 stated a transfer date of January 1, 1991, and advised the applicants that they would be contacted shortly concerning the execution of documents required to facilitate the transfer of title.

Subsequent correspondence from the respondent to the applicants stated that documentation for the transfer of title was being prepared and would be completed in the near future. However, at the time of the hearing of this application on April 1, 1992, this documentation had not been completed. Indeed, during oral argument of the application I asked counsel for the respondent to proffer a firm date, or even tentative date, upon which the transfer of title could be accomplished and counsel could not do so. The respondent has advised the applicants of its inability at present to complete the documentation required for the conveyance of legal title to the condominium units to the applicants.

Article 11.03 of the unit purchase agreement provides as follows:

If, at the date of closing under Articles 11.01 and 11.02, the Promissory Notes in favour of the Vendor and the Financial Services Company have not been paid in full, the Vendor shall be credited with the amount including interest, if any, remaining unpaid,

against the purchase price, and the amount so credited shall be deemed to have been paid on the Promissory Notes and the Vendor covenants to pay to the Financial Services Company its share of the amount so credited.

The reference therein to the date of closing under Article 11.01 deals with the vendor's right to require the purchaser to sell the purchaser's land and interest in the unit to the vendor if the purchaser is in breach of the agreement. The reference to the date of closing under Article 11.02 deals with the purchaser's right to require the vendor to repurchase the purchaser's land and interest in the unit in the event that certain conditions set out in Article 11.02 exist. Neither of these articles applies in the circumstances of this matter. The terms of these articles have no relevance with respect to the establishment of the transfer date.

The development agreement refers to the purchaser as the developer and the vendor as the builder. The preamble in this agreement states: Whereas the Developer has purchased an undivided pro-rata share of the Land with the intention that the Builder will complete construction of the Project and that upon substantial completion of the Proposed Unit and the registration of the Condominium Declaration, title to the Proposed Unit shall be transferred to the Developer;

This agreement provides for the construction of the proposed condominium units by the vendor.

Pursuant to Article 1.02 of the development agreement, the units shall be substantially completed on or before the transfer date or such extension of the transfer date as is permitted in the development agreement. Substantial completion is defined as substantial completion of the interior of the proposed unit so as to permit occupancy thereof.

Article 1.08 provides that:

If the Builder is delayed in the completion of the Work by any act or neglect of the Developer, the Transfer Date shall be extended for such reasonable period of time as the Builder may require. If the Builder is delayed in completion of the work by labour disputes, strikes, walk-outs (including walk-outs decreed or recommended by a recognized contractor's association for its members of which the Builder is a member), fire, mutual delay by common carrier or unavoidable casualties or, without limit to any of the foregoing, by any cause of any kind whatsoever beyond the Builder's control, then the Transfer Date shall be extended for a period of time equal to the time lost due to such delays.

The "Work" is defined in Article 1.01 of the development agreement to include the construction and completion of the project substantially in accordance with the plans and specifications as made available for inspection by the developer prior to the execution of that agreement and as approved by the mortgagee and the servicing of the land with all utilities.

In context, and having regard to the intent of the development agreement, the proper construction of Article 1.08 and the provision therein for the extension of the transfer date is limited to delays in construction of the project for the enumerated reasons. The respondent acknowledged by letter of December 4, 1989 to the applicants that:

Due to, some unanticipated delays in construction, it is expected that substantial completion of the Project will occur in March, 1991, rather than September, 1989, as originally forecasted. It is expected the Condominium registration and transfer of title will occur in late 1990.

These construction problems delayed the registration of the condominium declaration until December 31, 1990. Since the unit purchase agreement linked the transfer date inextricably to the registration of the condominium declaration, the transfer was extended. These delays, however, occurred before the registration of the condominium declaration on December 31, 1990 and before the substantial completion of the condominium project. Such delays were permitted under Article 1.08 of the development agreement.

Article 1.08 is not intended to permit delays occurring after the completion of construction and after registration of the condominium declaration. The development agreement deals solely with construction and completion of services to the condominium project. Any delays permitted under that agreement would apply only to extend the date of completion of construction and installation services. Occupancy permits for the two condominium units in question were issued on March 27, 1990. Total occupancy permits were issued for the building on June 20, 1990, prior to registration of the condominium declaration. Construction delays cannot now be used to further delay the time between the condominium declaration and the transfer date. It is remembered that under Article 12.01(x) of the unit purchase agreement the transfer date is the later of September 1, 1989 and the date being fifteen days after the purchaser has been notified that the condominium declaration has been registered, etc.

POSITION OF THE APPLICANTS

The applicants submit that the construction and interpretation of Article 12.01(x) of the unit purchase agreement and the articles referred to therein do not entitle the respondent to extend the transfer date unilaterally and, indeed, indefinitely. Furthermore, by its conduct since the execution of the general agreement, the respondent has indicated its intention to treat the transfer date as being a date fifteen days after the registration of the condominium declaration. This is shown by the respondent's correspondence to the applicants commencing December 4, 1989 up to and including May 29, 1991. Furthermore, the rental revenue and operating expense guarantees set out in the rental management agreement and the guarantee agreement, both of which are appended to the general agreement, were commenced by the respondent on January 1, 1991. Both agreements state that the commencement date shall be the transfer date.

The applicants take the position that the unit purchase agreements provide the basis of the transactions contemplated by the general agreements. The transactions entered into by the applicants were contracts for the purchase of condominium units. They were, therefore, primarily contracts in respect of the sale of land.

The general agreement with its ancillary documents has at its heart the unit purchase agreement. All agreements and other documents are ultimately in furtherance of the unit purchase agreement. The services and benefits to be provided to the applicants by the respondents all have as their final goal the transfer of title of the condominium units to the applicants.

Among the services and benefits flowing to the applicants, as purchasers of the units, under the scheme propounded by the respondent, are income tax benefits. These benefits are above and beyond the actual title to the condominium units.

Nonetheless, the applicants paid for all of these benefits in addition to paying for the condominium units. The ultimate requirement in the unit purchase agreement is for the transfer of legal title to the purchaser. In the absence of such a transfer of legal title, there can be no substantial performance of the agreements by the respondent. In addition, any income tax benefits which the applicants have received to date may well be lost on termination of the agreements and their failure to obtain legal title to the relevant condominium units.

POSITION OF THE RESPONDENT

It is the position of the respondent that the applicants are not entitled to the relief sought because the failure of the respondent to transfer title of the units to the applicants does not constitute a substantial breach of contract enabling the applicants to rescind from their agreements. In the eyes of the respondent, the agreements have been substantially performed by the respondent to the advantage of the applicants and the title transfer date has not yet occurred.

The respondent submits that in effect the applicants purchased real estate investment unit packages, including the purchase of land, the work, the paving, the landscaping, the financing fees, in addition to a corresponding group of financial services such as the cash flow guarantee, the rental revenue guarantee and the rental management agreement. Further, the respondent notes that the financing of the applicants' investment in real estate unit packages permitted the applicants to leverage a minimal amount of capital to purchase real estate investment units while obtaining a benefit of substantial deductions pursuant to the Income Tax Act, R.S.C. 1985, as amended. The applicants' projected income tax deductions amount to \$110,618.00 for each real estate investment unit on an aggregate basis until December, 1996. On behalf of the applicants, the respondent prepared the supporting documentation required to claim such income tax deductions. In addition, the respondent has paid the applicants' mortgages for their real estate investment units since approximately December, 1987 and is expected to continue to make mortgage payments on behalf of the applicants until December 31, 1993. The applicants also enjoy the benefit of an interest-free operating expense loan associated with their real estate investment units, which, like the mortgage loan, does not have to be repaid until December 31, 1993.

The respondent argues that Article 1.06 of the unit purchase agreement expressly acknowledges that the applicants were purchasing a beneficial interest of land as part of their real estate investment unit packages. Article 1.05 of this agreement states that, on the "closing date", title was deemed to have been transferred by the respondent to the applicants. The unit purchase agreement defines the closing date as the date of execution. From the closing date and after the projected title transfer date, the respondent acts as the applicants' agent and bare trustee, holding title to the applicants' real estate investment units. The applicants have already received benefit and value from the respondent through their beneficial ownership of the real estate investment units and their participation as developers, particularly in the receipt of substantial income tax shelter of the commercial land development.

The definition of "transfer date" is contained in Article 12.01(x) of the unit purchase agreement:

"Transfer Date" shall be the later of September 1, 1989, and the date being fifteen (15) days after the Purchaser has been notified that the Condominium Declaration has been registered, subject to the provisions of Article 11.03 of the Unit Purchase Agreement and Article 1.08 of the Development Agreement.

The respondent submits that the reference in Article 12.01(x) to Article 11.03 should read Article 11.02 of the unit purchase agreement. Neither the general agreement nor the unit purchase agreement have been amended, supplemented or rectified by written agreement between the parties. It is inappropriate for this Court to assume that that was the intention of the parties. The provisions must stand as written.

Whether this Court accepts the respondent's submission that the reference in Article 12.01(x) should be amended to read Article 11.02 rather than Article 11.03, the applicants submit that Article 11.02 deals only with conditions that give rise to the vendor notifying the purchaser of the existence of such conditions and the purchaser having the right to require the vendor to then repurchase the purchaser's land and interest in the proposed units upon appropriate notice. The second paragraph of Article 11.02 is related only to the first paragraph of Article 11.02. Since the vendor has not given any such notice to the purchaser, the provisions of the second paragraph of Article 11.02 cannot be relied upon by the respondent in the circumstances to justify its failure to have complied with the requirement to transfer title of the relevant units on the specified date. Further, it cannot rely on the provisions of that paragraph to extend the transfer date since the vendor's notice upon which such extension would be triggered has not been given. If it was intended to have the second paragraph of Article 11.02 apply in unlimited circumstances to the date specified to be the transfer date, then the provisions which inherently restrict their application would not have been placed in Article 11.02.

In any event, if there is any doubt as to the meaning to be attributed above, it is not appropriate to resolve that ambiguity against the applicants. After all, the respondent drew the general agreement and all of the other relevant agreements. If the respondent would protect itself against liability to which it would otherwise be subject, then the respondent should have used words clearly and aptly to describe the contingency that the respondent says has arisen so as to excuse it from conveying title. See *Rutter v. Palmer* [1922] 2 K.B. 87 (C.A.) and *Szymonowski & Co. v. Buck & Co.* [1923] 1 K.B. 457 (C.A.).

The unit purchase agreement prepared by the respondent does not give the respondent the right to extend unilaterally or indefinitely the transfer date and the second paragraph of Article 11.02 should not be interpreted in such a way.

The respondent submits that the definition of "transfer date" contained in Article 12.01(x) of the unit purchase agreement is a projected date. Its amorphous nature is subject to a causal connection with delays as outlined in Article 11.02 of the unit purchase agreement or Article 1.08 of the development agreement relating to an inadvertent inability to transfer title which is beyond the respondent's reasonable control. That linkage, according to the respondent, casts an element of uncertainty regarding an eventual projected title transfer date. The respondent blames the latest delay on The Mutual Trust Company and thus says the delay 'is beyond its reasonable control. Possibly, title transfer to the condominium units could take place in mid January, 1995. The chief factor in the delay of the title transfer is that created by the conduct of The Mutual Trust Company. However, construction delays were encountered after the registration of the condominium declaration, thereby adding to the delay before title transfer.

The respondent submits that triggering the transfer date extension is not predicated on substantial completion or occupancy of the condominium because the inclusion of the qualifying articles within the transfer date definition contemplates the acknowledgment that the title transfer date could be extended beyond notification of the condominium declaration's registration.

Article 5.01(b) of the unit purchase agreement extinguishes the applicants' right to seek a certificate of pending litigation.

CONCLUSION

The applicants entered into the general agreements and the ancillary agreements and other documents with the intention of purchasing legal title to condominium units. The respondent intended and promised to deliver legal title by a fixed transfer date. All other agreements and benefits flow from the underlying agreement of the applicants to purchase from the respondent legal title to two condominium units. The applicants did not purchase a tax package. They purchased legal title to two condominium units and the accompanying income tax benefits. Whether income tax benefits were utilized by the applicants, or not, and whether if they did obtain income tax benefits they will be allowed to retain them by the revenue authorities, is beside the point. The applicants, as purchasers, were entitled to legal title to two condominium units. They would have been free to exercise all rights of a titleholder of real property in respect of the condominium units. They would have the right to mortgage such units or sell such units as they saw fit. Without the benefit of legal title, the applicants have not received that for which they bargained.

The general agreement has not been substantially performed. The applicants cannot assert legal ownership of the condominium units. They cannot deal with the units as owners.

The failure of the respondent to deliver legal title to the condominium units goes to the root of the general agreements and deprives the applicants of that for which they bargained, i.e. title to two condominium units.

The respondent's extensions of the transfer date specified in the unit purchase agreement constitute a breach of that agreement by the respondent. That agreement is the lynch pin of all the agreements and documents. With its breach all agreements fail. The applicants in the light of the breach are entitled to treat all agreements as at an end and to get their money back. *Bain v. Fothergill* (1874), 1.R. 7 H.L. 158, (1874-80) All E.R. Rep. 83, 43 L.J. 243, *Johnson v. Agnew* (1979), [1979] 2 W.L.R. 487 (H.L.) and *Scanion v. Castlepoint Development Corp.* (1991), 85 D.L.R. (4th) 443 (Ont. Gen. Div.)

Cheshire and Fifoot's Law of Contract provides that there are two approaches to assessing the terms of a contract and their consequences. The first approach is to determine the effect of the breach as set out in *Hongkong Fir shipping Co. v. Kawasaki Kisen Kaisha Ltd.* (1961), [1962] 2 Q.B. 26, [1962] 1 All E. R. 474 (C.A.) The court stated in that case that it was the task of the court not to evaluate the term as it stood in the contract but to wait and see what happened as a result of the breach. If the breach causes severe loss or damage, the injured party might be able to treat the contract as discharged.

The second approach is to infer the probable intention of the parties at the time of its making by examining the contract. The Australian case of *Tramways Advertising Pty. Ltd. v. Luna Park (N.S.W.) Ltd.* (1938), 38 S.R.N.S.W. 632 at 641 sets out the test for the court as follows:

The test of essentiality is whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor.

If one approaches this matter from the aspect of *Hongkong Fir Shipping Co.*, the failure of the respondent to have conveyed title to the condominium units to the applicants, constitutes, in my opinion, a severe loss or damage entitling the injured party to treat the contract as discharged. If one approaches it from the aspect of *Tramways Advertising*, the promise to convey title to the units was of such importance that the applicants would not have entered into the relevant agreements unless they had been assured of a substantial performance of the obligation to convey title.

The respondent has had more than ample time from fifteen days after the registration of the condominium units in which to convey title. On the information at hand, the reason why the respondent cannot convey title to the applicants arises out of some dispute between the respondent and The Mutual Trust Company. The applicants are not parties to that dispute. The applicants have performed all obligations expected of them in the various agreements to which they are parties, yet the respondent cannot proffer any tentative date whatsoever upon which it could convey title of the units to the applicants. The applicants did not bargain to receive title to the two condominium units at some contingent, undefined and non-predictable date in the future.

The respondent's breach of the unit purchase agreement, in particular, article 4.02, which reads:

The transfer of the Proposed Unit, as a Unit, to the Purchaser shall take place on the Transfer Date.

has deprived the applicants of the essential basis of their bargain. The respondent should not be permitted to retain the monies paid to it by the applicants whether the applicants may or may not have received some tax benefit. In the event the court grants the applicants a return of the monies they have expended on the relevant agreements thus far, it is only a matter of speculation as to whether the revenue authorities would permit the applicants to retain any tax benefits they received in respect of the relevant agreements.

Furthermore, Section 51(1) of the Condominium Act, R.S.O. 1980, c. 84, provides that:

Every agreement of purchase and sale entered into by a proposed declarant for a proposed unit for residential purposes shall be deemed to contain, ... (c) a covenant by the vendor to take all reasonable steps to deliver to the purchaser a registrable deed or transfer of the unit without delay.

This covenant is deemed to be included in the unit purchase agreement. This covenant supports the applicants' submission that the vendor has breached its obligation to convey legal title on the transfer date. To construe the transfer date as provided in Article 12.01(x) of the unit purchase agreement in the manner suggested by the respondent would violate this covenant.

The respondent, in my opinion, is in breach of a fundamental term of the unit purchase agreements. Accordingly, the applicants are entitled to treat the general agreements and ancillary agreements and documents with respect to units 1201 and 1308 in Sterling Club I condominium project as at an end. The applicants are entitled to the return of all monies paid by them pursuant to these agreements.

An order will go declaring that the applicants are entitled to treat their agreements with the respondent in respect of the purchase of units 1201 and 1308 as at an end, that such agreements are null and void as affects the applicants as at the date of the order of this Court herein and that the applicants are entitled to a return of all deposits and further payments made in respect of the relevant units, namely in the case of the applicant Allen Singer in respect of unit 1308 the sum of \$32,051.18 and in respect of Allen Singer and Nancy Singer in respect of unit 1201 the sum of 542,982.75. The applicants are entitled to pre-judgment interest at the average mean rate of interest from the date of the last advance payment made on unit 1201 and the last advance payment made on unit 1308 to the date of the release of these reasons. Said amounts with pre-judgment interest added shall bear post-judgment interest as provided in the Courts of Justice Act.

Having regard to Article 5.01(b) of the unit purchase agreements, it would not be appropriate to allow the applicants a certificate of pending litigation and so that relief is refused.

Furthermore, the applicants are entitled to their costs of this application as on a party and party basis to be paid forthwith after assessment by an assessment officer of this Court.

WHITE J.

CBR# 288

Scanlon v. Castlepoint Development Corporation et al. *

11 O.R. (3d) 744

Action No. C9007

Court of Appeal for Ontario, Morden A.C.J.O., Goodman and Robins J.J.A. December 17, 1992

* Application for leave to appeal to the Supreme Court of Canada filed February 12, 1993 and submitted to the court March 17, 1993.

Dennis R. O'Connor and Barry Gaspell, for appellant, Bramalea Ltd.

Angela M. Costigan, for respondent, Joe F. Scanlon.

Derek A.J. D'Oliveira and Dennis M. O'Leary, for intervenor, Stanley Kopman.

Joseph C. Goldenberg, for Stella and Vito DiMauro, Rocco Mattucci, Anna Budahazy, Gordon Glavan, Carmen Alfano, Rose Weinberg, Mary Louise Neill, Max Pivetta and Jeff Bridge.

GOODMAN J.A. (dissenting):--This is an appeal by Bramalea Limited ("Bramalea") from the decision of Austin J., reported in (1991), 85 D.L.R. (4th) 443, 22 R.P.R. (2d) 211, in which he held that the applicant, Joe F. Scanlon (the respondent herein) was entitled to a declaration that the agreement of purchase and sale of a condominium unit entered into between Castlepoint Development Corporation ("Castlepoint") and Scanlon on September 16, 1988 is null and void. He further held that Scanlon was entitled to a return of his deposit with interest.

Terms of Agreement of Purchase and Sale of Condominium Unit By para. 2(a) of the agreement, the purchase price of the unit was stated to be \$424,000. A deposit of \$10,000 was payable as a deposit and an additional sum of \$74,800 was payable in successive instalments of \$32,400, \$21,200 and \$21,000 on dates specified in the agreement, the last of which was payable 365 days after the presentation of the offer by the purchaser and representing in total 20% of the purchase price. All of these payments were duly made by Scanlon. He was to give back to the vendor a first mortgage for \$318,000 (75% of the purchase price) and, as provided by para. 2(a)(vi), to pay the balance of the price "on closing (or Occupancy Date, if applicable) which, when taken together with the deposits heretofore paid will be 25% of the Purchase Price, subject to the adjustments hereinafter set forth".

The other relevant paragraphs contained in the agreement of purchase and sale read as follows:

1. The following definitions shall apply to this Agreement:

(a) "Act" means the Condominium Act, R.S.O. 1980, Chapter 84, and any amendments thereto.

(b) "Closing Date" or "Closing" means the 4th day of November 1991 or as extended by Paragraph 13(d).

12. The transaction of purchase and sale is to be completed on the Closing Date.

13. If the Unit is substantially completed sufficient to permit occupancy on Closing, but the declaration and description have not been registered, then the Purchaser shall occupy the Unit on that date (the "Occupancy Date") on the following terms and conditions:

(a) the payment to the Vendor, of the balance of the Purchase Price set forth in this Agreement, but without adjustments; (b) the payment of the Occupancy Fee, monthly, in advance, on the first day of each month, following Occupancy Date, with appropriate adjustments from Occupancy Date to the first of the month following, said monthly fee not to be credited as payment on account of the Purchase Price. The Purchaser agrees to provide to the Vendor on the Occupancy Date a series of 12 post-dated cheques for the monthly occupancy fees for the 12 months immediately following the Occupancy Date. The Purchaser acknowledges that the components of the occupancy fee as set out in s. 52(6) of the Act are subject to recalculation by the Vendor and may be increased at any time prior to Closing to the maximum permitted by s. 51(6) of the Act with any readjustments to be made 30 days after demand by the Vendor, with the final readjustment on Closing;

(d) the Closing Date shall be extended to a date 20 days after notice in writing is given by the Vendor's Solicitors to the Purchaser or his Solicitor that the declaration and description have been registered. If the Purchaser fails to close the transaction as aforesaid, through no fault of the Vendor, the Purchaser shall be in default hereunder, and shall be required to deliver vacant possession of the Unit. The Vendor shall in that event be entitled to retain all monies paid hereunder for damages and expenses and unpaid occupation charges. The Purchaser shall be responsible for the damages and expenses and the cost of redecorating as may be determined by the Vendor at its sole discretion as a result of the possession herein.

The Purchaser acknowledges and it is understood and agreed that the Purchaser shall not be entitled to access to the Unit prior to the Occupancy Date.

22. If the completion of the Unit or the common elements is delayed by reasons of strikes, lock-outs, fire, lightning, tempest, riot, war and unusual delay by common carriers or unavoidable casualties or by any other cause of any kind whatsoever whether or not beyond the control of the Vendor, the Vendor shall be permitted extensions of time from time to time for completion and the Closing Date shall be extended accordingly. If the Vendor is unable to complete the Unit and close this transaction within such extended time or times for closing, all monies paid hereunder by the Purchaser other than any occupancy fees, shall be returned to him and this Agreement shall be null and void. If the unit is substantially completed by the Vendor on or before Closing or any extension thereof as aforesaid, this transaction shall be completed on such date notwithstanding that the Vendor has not fully completed the Unit or the common elements and the Vendor shall complete such outstanding work within a reasonable time after Closing, having regard to weather conditions and the availability of labour and materials. In any event the Purchaser acknowledges that failure to complete the common elements on or before Closing shall not be deemed to be a failure to complete the Unit.

25. This offer when accepted shall constitute a binding contract of purchase and sale and time shall in all respects be of the essence hereof. It is agreed that there is no representation, warranty, collateral agreement or condition affecting this agreement or the real property or supported hereby other than as expressed herein in writing whether contained in any sales brochures or alleged to have been made by any sales representative or agents.

Scanlon discontinued the original application against Castlepoint on August 29, 1991 as Castlepoint had prior thereto assigned its interest in the agreement as vendor to Bramalea. Accordingly, Castlepoint is not a party to this appeal.

In the proceedings before Austin J., Scanlon relied on two grounds for the relief requested:

(1) That Bramalea had unilaterally purported to change the closing date set forth in the agreement of purchase and sale, thereby committing an anticipatory breach of contract which entitled him to terminate it.

(2) Castlepoint did not make the disclosure required by s. 52 of the Condominium Act, R.S.O. 1980, c. 84, and as a result the agreement was not binding on him.

The relevant provisions of the agreement and the facts of the case will be set out in due course. It is sufficient to say at this time that Austin J. concluded in his reasons, in part, as follows [at p. 446 D.L.R., p. 215 R.P.R.]:

The closing was to be on November 4, 1991, and Bramalea's letter of May 31, 1991, changing the date, constituted an anticipatory breach of the agreement. The date of closing was a fundamental term. Scanlon was therefore entitled to treat the agreement as at an end. He is entitled to a declaration that the agreement is null and void.

In these circumstances it is not necessary to deal with the question of the adequacy of the disclosure made by Castlepoint.

In reaching this conclusion Austin J. found that para. 22 of the agreement conflicts with or is contradictory to paras. 12 and 1(b) thereof and that para. 13(d) did not apply in the circumstances. He also purported to apply the contra proferentem principle to the interpretation of the agreement.

On this appeal Bramalea took the positions:

1(a) That it was the intention of the parties under the agreement, read as a whole, to allow for reasonable extensions of time to complete units delayed by the practical realities of high-rise condominium development.

(b) That the exclusion of para. 22 under the contra proferentem rule would leave a gap in the agreement or purchase and sale inconsistent with the intentions and expectations of the vendor and purchaser.

2(a) That a purchaser can avoid an agreement for the sale and purchase of a condominium unit where the inadequacy of a disclosure statement is so fundamental that a reasonable purchaser of the condominium would have exercised the right of rescission had the adequacy not existed but no such fundamental inadequacy existed in this case.

(b) That if such a fundamental inadequacy existed it had been waived by the purchaser during the period when the contract was still executory.

The second position taken by Bramalea is not really a ground of appeal. Austin J. did not deal with it. Scanlon, as respondent, took the position that if Austin J. was in error with respect to the first ground, he was still entitled to the declaration by reason of the alleged inadequacy of the disclosure statement. It should be noted that this appeal was heard together with appeals in *Abdool v. Somerset Place Developments of Georgetown Ltd.* (1991), 4 O.R. (3d) 280, 82 D.L.R. (4th) 50 (Gen. Div.), and *Budinsky v. Breakers East Inc.* (1992), 6 O.R. (2d) 255, 87 D.L.R. (4th) 572 (Gen. Div.), in which extensive submissions were made with respect to the matter of adequacy of disclosure statements under the provisions of the Condominium Act. Reasons were released in those appeals on October 13, 1992, and the principles set forth therein are applicable to this appeal [now both reported in 10 O.R. (3d) 120, 96 D.L.R. (4th) 449]. There is no need to repeat here the reasoning for the conclusions reached in those cases.

Facts Relating to Bramalea Position on Extension of Time

On September 6, 1988, Scanlon presented an offer to purchase the condominium unit in question to Castlepoint Development Corporation. Castlepoint accepted the offer on September 16, 1988. The agreement of purchase and sale created upon the acceptance was on a form prepared by Castlepoint, which company determined the stipulations contained therein. The condominium project comprised 504 dwelling units on 47 floors. The unit purchased by Scanlon is on the 37th floor of the building.

On December 22, 1988, Bramalea purchased the project from Castlepoint and received an assignment of Scanlon's purchase agreement. It commenced construction of the project in the month of February 1989. The date fixed for closing by the agreement (November 4, 1991), was approximately 37 months after acceptance of the offer.

On October 17, 1989, Scanlon executed two amendments to the purchase agreement with Bramalea. One amendment acknowledged receipt by him of revised floor plans of the unit and his consent to the changes. The other amendment confirmed the terms of the agreement and Bramalea agreed thereby to permit occupancy of the unit by a third party subject to the conditions set forth therein. The amendments were accepted by Bramalea on April 9, 1990.

Scanlon duly made all of the payments by way of deposit and on account of the purchase price in accordance with the terms of the agreement. On or about May 31, 1991, Bramalea notified Scanlon in writing on its letterhead that "your revised occupancy date will now be September 14, 1992". The notice did not indicate any reason for the postponement of the occupancy date. The notice reads as follows:

RE: PALACE PLACE SUITE 3709

Dear Palace Place Purchaser:

We are pleased with the construction progress of Palace Place. Over the past two years, construction has continued at a steady pace with the concrete structure now reaching the 34th floor, the exterior wall windows now at the 18th floor, and the drywall complete to the 4th floor. In June, the installation of the ceramics and the kitchen cabinets are scheduled to commence, and by November 1991 we anticipate completion of the roof.

We have rescheduled your closing date to coincide with the new construction program. The first closings will now commence in January of 1992 and as a result, your revised occupancy date will now be September 14, 1992.

Prior to your occupancy date, a letter will be forwarded to you regarding the details of your move-in. (Inspection appointments, booking elevator times, etc.)

Please forward a copy of this letter to your Solicitor to advise him/her of your revised occupancy date. If you have not as yet informed Bramalea Limited of your Solicitor's name, address, and telephone number, please advise us in writing as soon as possible. For your convenience, our fax number is 487-2779.

In the meantime, should you have any further inquiries or if I can be of any assistance to you, please call me at 480-8442 or fax us a letter to 487-2779.

Sincerely,

BRAMALEA LIMITED

(signed) Ellie Moore, Customer Relations Manager, Residential Group.

The revised occupancy date was more than four years after the date of presentation of the offer and if Bramalea's submission is valid, Scanlon was subject to further unilateral delays in that regard and also with respect to final closing of the transaction.

On August 7, 1991, Scanlon commenced his application under the Vendors and Purchasers Act, R.S.O. 1990, c. V.2; the Condominium Act, R.S.O. 1990, c. C.26 as amended, and regulations made pursuant thereto and under the Rules of Civil Procedure for a declaration that the agreement is null and void. The grounds for the application were stated to be that Bramalea had terminated the agreement of purchase and sale by its anticipatory breach of the agreement and that the declarant had failed to make proper disclosure as required by s. 52 of the Condominium Act. In an affidavit filed in the proceedings the vice-president of finance of Bramalea stated that Bramalea realized it could not complete the project by the date stipulated and that the notice was sent as soon as it realized the situation. It is common ground that the unit was not substantially completed sufficient to permit occupancy on November 4, 1991.

Paragraph 25 of the agreement stipulates that time shall in all respect be of the essence thereof. Paragraph 1(b) defines "closing date" or "closing". It states that those words mean "the 4th day of November, 1991 or as extended by para. 13(d)". The words are clear and unequivocal in their meaning. If either of the parties to the agreement desire to extend the date it must be done in accordance with the provisions of para. 13(d).

It is perhaps unnecessary to say that if the unit had been completed and the declaration and description registered on or before November 4, 1991, both parties would have been obligated to complete the transaction on that date (see para. 12). The definition of closing date makes that conclusion quite clear. If a party to the contract takes the position that the "closing date" or "closing" is a date other than November 4, 1991, it is necessary to show that the provisions of para. 13 support such a claim.

As is the case with the wording of para. 1(b), the wording of para. 13 is clear and unambiguous. By applying the definition of "closing" the opening words of that paragraph would read, "If the unit is substantially completed sufficient to permit occupancy on the 4th day of November, 1991, but the declaration and description have not been registered, then the purchaser shall occupy the unit on that date (the "Occupancy Date") on the following terms and conditions."

On their face, the provisions of para. 13 can become operative only if the unit is substantially completed sufficient to permit occupancy on November 4, 1991. If that condition had been fulfilled, the declaration and the description not having been registered, November 4, 1991 would be converted from "closing date" to "occupancy date". Scanlon would have been obliged to pay the balance of 25% of the purchase price in accordance with the provisions of para. 2(a) (vi) or face the penalties and damages set out in para. 2(b). In such event, the provisions of paras. 1(b) and 13(d) read together would provide for the extension of the closing date of November 4, 1991 to a later date determined in accordance with the provisions of para. 13(d). Paragraph 2(b) is solely for the benefit of the vendor and is of a draconian nature in so far as the purchaser is concerned. It provides as follows: 2.(b) Failure by the Purchaser to pay any of the sums required by Paragraph 2 hereof or of any post-dated cheque to be honoured, shall be a default entitling the Vendor in its sole discretion to terminate this Agreement and retain all sums theretofore paid by the Purchaser as a pre-estimate of liquidated damages and not as a penalty, but without prejudice to the Vendor's right to bring such further or other action as may be available to it as a result of such breach.

There is nothing in the wording of para. 13 which extends the time for substantial completion of the unit sufficient to permit occupancy beyond November 4, 1991 and it is clear that Scanlon did not consent to any such extension. It is also clear that Bramalea could not substantially complete the unit by that date and in effect advised Scanlon of that fact by its notice. In those circumstances Scanlon would be entitled to a declaration that he was no longer bound by the agreement unless some other provision in the agreement entitled Bramalea to extend the occupancy date and closing date.

Bramalea relies on the provisions of para. 22 of the agreement of purchase and sale. It took the position that the contract must be read as a whole and that the provisions of para. 22 represent a modification of the provisions of paras. 1(b) and 13 and do not conflict with them.

Specifically, Bramalea submitted that para. 13 converts "Closing Date" (pursuant to para. 1(b)) into "Occupancy Date" upon the unit being substantially completed and sufficient to permit occupancy on that date. At the date of such substantial completion (now "Occupancy Date") closing date is redefined under para. 13(d) to be a date after registration of the condominium declaration and description. It then submitted that by para. 22 of the agreement the parties agreed that if substantial completion of the unit sufficient for occupancy purposes is delayed by the factors named therein (and occupancy is not possible on the closing date), closing date is extended to the date of actual completion, on which date para. 13 becomes operative and the extended closing date becomes the "Occupancy Date" pursuant to para. 13(d).

I am unable to agree with the second part of this submission. The provisions of para. 22 do not in any part thereof mention "substantial completion of the unit sufficient for occupancy purposes" being delayed by the factors named therein. Paragraph 22 speaks first of delay in "completion of the Unit or the common elements" by reasons of the factors named, permitting extension of time for completion and extension of the closing date. The unmodified use of the word "completion" in referring to a condominium unit connotes the performance of all the work necessary to fully construct the unit.

The agreement stipulates in para. 13(a) that Scanlon is obligated to occupy the unit and pay the balance due on closing without adjustments only upon substantial completion sufficient to permit occupancy. He cannot be compelled to close the transaction until the unit is fully completed and the declaration and description have been registered. If the purchaser has entered into occupation of the unit under para. 13 the vendor is obligated to complete the unit and register the declaration before the purchaser can be compelled to close the transaction. Scanlon takes the position that the first sentence of para. 22 refers to an extension of time for such final completion and an extended closing date if such completion is delayed by any of the factors mentioned and that it only becomes operative when a purchaser has entered into occupation after substantial completion in accordance with the provisions of para. 13.

He submitted that this interpretation is strengthened by the wording of para. 22 which provides that if the vendor is unable to complete the unit and close the transaction within the extended time or times for closing, all money paid by the purchaser other than any occupancy fee shall be returned to him. Since an occupancy fee is payable only after the purchaser has occupied the unit, pursuant to the provisions of para. 13(b), it is reasonable to interpret the words "completion of the unit" as referring to work required to bring the unit from a state of substantial completion sufficient to permit occupancy, to one of full completion.

I agree with these two submissions made by Scanlon.

It is to be noted that para. 22 of the agreement is an exculpatory paragraph in so far as the vendor is concerned. If the correct interpretation of the clause is that it becomes operative only if the unit is substantially completed sufficient to permit occupancy on November 4, 1991 but the closing has not taken place, the vendor cannot be held responsible for any delays in fully completing the unit or common elements if the delays have resulted from the stated causes, or any causes even if they were within the control of the vendor. In the absence of such clause the purchaser would be able to terminate the contract and claim for damages.

The last two sentences of para. 22 are also exculpatory. Scanlon submits that those sentences mean that, the agreement being then ongoing, which would require a previous occupation date and an extended closing date twenty days after notice to the vendor of the registration of the declaration and description, the vendor is entitled to compel the purchaser to complete the transaction even though there has been only substantial completion of the unit rather than full completion.

In effect, the position taken by Scanlon is that "substantial completion" as used here can only refer to a situation where the purchaser has entered into occupation under para. 13. If the words "substantial completion" were interpreted to mean a state less than substantial completion sufficient to permit occupancy on closing, the provision would be a direct contradiction of para. 13 on which a purchaser is entitled to rely in determining the closing date. He cannot be compelled to close the transaction before the unit is substantially completed sufficient to permit occupancy. The words can only apply to a situation where the unit has reached a state of substantial completion sufficient to permit occupancy, the declaration and description have been registered but the unit is not yet fully completed.

In my opinion, the two sentences of para. 22 last considered relate to a situation where the purchaser has entered into occupation under para. 13, and the declaration and description have been registered enabling a vendor to establish an extended closing date and requiring the purchaser to complete the transaction although the unit is not fully completed. Substantial completion in this case would be a state at least equal to substantial completion sufficient to permit occupancy but less than full completion.

I am of the view that there is nothing in the agreement and other material filed to support the submission of Bramalea that the parties agreed that if substantial completion of the unit sufficient for occupancy purposes is delayed by the factors named therein, closing date is extended to the actual date of completion. If the interpretation sought by Bramalea is the correct one, it may be that, as found by Austin J., it would contradict the provisions of paras. 1(b) and 13. At the very least, from the standpoint of Scanlon, there is an ambiguity in para. 22 in this regard and in applying the contra proferentem principle (of which more will be said later), I would adopt the interpretation of the paragraphs more favourable to Scanlon.

Bramalea in its factum and oral argument made substantial submissions to the effect that Scanlon understood that the "closing date" in para. 1(b) of the agreement was the proposed date on which he would go into occupancy and that final closing would be after registration of the condominium declaration and description notwithstanding para. 12 of the agreement. It further asserted that lower floors of high-rise condominiums are completed several months prior to completion of upper units for occupancy purposes and that condominium unit purchasers in the Metropolitan Toronto area generally understand the necessity, particularly in high-rise condominium developments, of a delay between substantial completion of the unit ready for occupancy and the date on which title to the unit can be transferred.

Although it is open to serious doubt whether the understanding of condominium purchasers generally can or should be imputed to a particular purchaser, it is not important for the purposes of this appeal. Scanlon acknowledges that under para. 13, in proper circumstances, the original closing date becomes occupancy date and a new closing date is to be determined in accordance with the terms thereof. His position is simply that under the agreement he expected and was entitled to have his unit substantially completed sufficient to permit occupation on or before November 4, 1991.

Having regard to the fact that the original date set for closing (and for occupation) was more than three years after presentation of his offer, such expectation cannot be said to be unrealistic nor unreasonable. A purchaser might reasonably conclude that the vendor had made due allowance for delays which might be encountered in the completion of the project sufficient for occupancy. The right of the vendor to extend the closing date for a period in excess of that provided by paras. 1(b) and 13, if it exists at all, must be found in the agreement.

I have already dealt with Bramalea's first submission with respect to para. 22. It further submitted, based on an affidavit of a solicitor filed, that paragraphs similar to para. 22 are commonly used in high-rise condominium construction to permit the vendor reasonable flexibility to complete the building because of delays which may occur during the construction process. The solicitor's

affidavit stated, in part, at para. 9: "Paragraph 22 of Schedule A to the agreement is a commonly used and overriding provision which contemplates delays . . .".

Even if this were so, the fact that it is commonly used does not derogate in any way from the rights of Scanlon to have it interpreted in the light of the other provisions of the agreement. Although the solicitor was not cross-examined on his affidavit, I am not prepared to accept that para. 22 in its exact form is commonly used. Bramalea did not state that it had used this paragraph or a similar paragraph in its own agreements dealing with other projects. Such an allegation would not have strengthened its case in any event but it is interesting to note that counsel for Bramalea stated that the words in para. 22 indicate an intention to allow only for reasonable extensions of time. It should be noted that Bramalea was not the author of the agreement but as assignee thereof it takes the detriment along with any benefit that might ensure to it as assignee. As just noted, counsel for Bramalea on this appeal submitted that para. 22 of the agreement should be interpreted to provide only for reasonable extensions of the date for closing resulting from causes other than deliberate bad faith. He was, however, in effect, suggesting that in interpreting this paragraph, the court should add to it words not included in it. The fact that a vendor (through its assignee) consents to a less strict interpretation of a paragraph in an agreement not warranted by its actual wording and in fact contradicting such wording, does not assist it in obtaining an interpretation more favourable to it in other respects after it has been executed and acted upon.

If the position which Bramalea takes prevails to the effect that paras. 22 and 13(d) involve two completely different situations which are complementary and not contradictory, it would mean, to use the words of the intervenor Kopman, that Bramalea could extend the time for closing at any time that it wished, as often as it wished and for any reason that it wished, even though it is unable to complete by reason of causes for which it is solely to blame. It would be difficult to characterize this interpretation as a fair and reasonable one from the purchaser's standpoint.

I am satisfied that para. 22 in the broad form used in the agreement under consideration is not in common use. The material filed does not disclose the use of such a broad paragraph in any particular agreement. On the contrary, although some of the agreements, which formed the subject matter of the appeals heard together with this appeal and the subject matter of cases cited to us, contained provisions relating to subject matter similar to that contained in para. 22, none of such paragraphs were unrestricted as to cause of delay and length of extension of closing date in the manner set forth in para. 22.

Furthermore, Bramalea takes the position that, in determining the interpretation of para. 22, the court must look at the agreement as a whole and that the courts have applied provisions in agreements of purchase and sale of a condominium unit extending the completion date for reasons such as strikes, fire and other acts of God, and engineering difficulties, as enforceable against purchasers of those units.

In support of this submission Bramalea cited *Morris v. Cam- Nest Developments Ltd.* (1988), 64 O.R. (2d) 475, 50 D.L.R. (4th) 707 (H.C.J.), where the court held that the vendor was entitled to invoke the provisions of para. 15 of the agreement, as was done, to extend the date for closing set out in para. 4. The provisions of those paragraphs are set forth on p. 482 O.R., pp. 713-14 D.L.R., as follows:

4. This agreement shall be completed on July 26, 1982, or any extended date as herein provided.

15. If the completion of the Unit or the common elements is delayed by reason of strikes, lock-outs, fire, lightning, tempest, riot, war and unusual delay by common carriers or unavoidable casualties, or by any other cause of any kind whatsoever beyond the control of the Vendor . . . the Vendor shall be permitted a reasonable extension or extensions of time for completion . . . and the date of closing shall be extended accordingly.

I do not doubt the correctness of that decision and that it supports the proposition for which it was cited. It has, however, only limited application to the case at bar. In that case, as in all the other cases cited to the court, the agreements under consideration do not contain a definition of "closing date" or "closing" as set forth in para. 1(b) of the subject agreement incorporating therein by reference the provisions of para. 13(d). It must also be noted that para. 15 clearly falls within the extension provision of para. 4 and that the grounds for extension are clearly limited to causes beyond the control of the vendor, and only reasonable extension or extensions are permitted. Obviously, provisions for extended closing dates or extended dates for occupation are enforceable provided that the terms of the agreement for purchase and sale clearly indicate the intention of the parties to give to the vendor the right to ask for the extension in the circumstances therein set forth.

In the *Abdool* appeal, *supra*, heard at the same time as this appeal (although the point under discussion was not in issue in that appeal), the agreement for purchase and sale set out in para. 2(a) the specific date for occupation as "the 1st day of September, 1989 or such extended date pursuant to the terms hereof that the unit is substantially completed by the vendor for occupancy by the purchaser".

The agreement did not contain a definition paragraph such as para. 1(b) of the subject agreement, and the provision quoted made it clear that the occupation date was subject to being extended.

Paragraph 18 of the *Abdool* agreement permitted the vendor to extend the closing date for any reason other than wilful neglect of the vendor for such reasonable periods of time not exceeding 24 months in aggregate.

Paragraph 21 of the agreement provided, *inter alia*, that if the completion of the unit or common elements is delayed by any reason whatsoever, then the vendor shall be permitted a reasonable extension or extensions of time for giving occupancy or completing the unit from time to time in accordance with the terms of para. 18.

In the *Budinsky* appeal, *supra*, also heard at the same time as this appeal although the point under discussion was also not in issue in that appeal), a specific date for closing was set out in the agreement. It also provided for occupancy by the purchaser if the unit was substantially completed to permit occupancy on the date set for closing or prior thereto. By para. 8(a) it provided:

8.(a) If the completion of the Unit should be delayed for any reason whatsoever, other than wilful neglect of the vendor, so that the Purchaser cannot be given possession thereof on the earlier of Occupancy Date or Closing Date, then the Vendor, at its sole option, shall be entitled to extend the Occupancy Date for one or more periods of time which the vendor, in its sole discretion considers reasonable, such periods, not to exceed (18) months.

Reference was made by the parties to the case of *DiCecco v. 733725 Ontario Inc.*, an unreported decision of Fedak J. released on December 21, 1990, and affirmed by this court on May 21, 1991. The agreement under consideration in that case did not contain a

definition of "closing date". Paragraph 4 thereof set out a specific closing date. Paragraph 17, which has some similarity to para. 22 of the subject agreement, provided for the right of the vendor to have reasonable extensions of time for completion for causes beyond the control of the vendor and to extend the closing date accordingly. It gave the vendor in addition to, or in lieu of the foregoing extensions, if any, the right to extend closing for a period not exceeding 15 months by giving notice as therein stated.

The agreements in these four cases, chosen at random by me, are illustrative of the fact, confirmed by an examination of the agreements under consideration in the various condominium cases cited to the court on the appeals, that para. 22 is not one in common use in condominium sale agreements. They indicate that where it was the intention of the vendor that it shall have right to extend the date for substantial completion of the unit sufficient to permit occupancy or the closing date, it was set forth clearly in the agreement. In addition, a definition of closing date as in para. 1(b) of the subject agreement was not contained in any of those agreements nor considered in any reported cases. Accordingly, the interpretation of the agreement must be approached by applying the principles of contract interpretation to the specific wording of the subject agreement.

Application of Law to the Agreement

In *Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.*, [1980] 1 S.C.R. 888 at p. 901, 112 D.L.R. (3d) 49 at p. 58, Estey J. said in delivering the majority judgment of the court:

Even apart from the doctrine of *contra proferentem* as it may be applied in the construction of contracts, the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result.

Where a contract is ambiguous, the normal rules of construction may be supplemented by the application of the *contra proferentem* rule of construction. In *Hillis Oil & Sales Ltd. v. Wynn's Canada Ltd.*, [1986] 1 S.C.R. 57 at pp. 68-69, 25 D.L.R. (4th) 649 at p. 657, Le Dain J. said in delivering the judgment of the court:

Given this ambiguity as to whether the distributor's agreements could be terminated pursuant to clause 23 with immediate effect or whether such termination could take effect only upon reasonable notice, I also agree with Richard J. that it should be resolved against Wynn's and in favour of Hillis by application of the *contra proferentem* rule of construction. It is true that this rule has been most often invoked with reference to the construction of insurance contracts, particularly clauses in such contracts purporting to limit or exclude the insurer's liability. Statements of the rule and its application in such cases may be found in the decisions of this Court in *Consolidated-Bathurst*, *supra*, and *McClelland & Stewart*, *supra*. The rule is, however, one of general application whenever, as in the case at bar, there is ambiguity in the meaning of a contract which one of the parties as the author of the document offers to the other, with no opportunity to modify its wording. The rule is stated in its general terms in *Anson's Law of Contract* (25th ed. 1979), at p. 151, as follows:

The words of written documents are construed more forcibly against the party using them. The rule is based on the principle that a man is responsible for ambiguities in his own expression, and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the Court will adopt a construction by which they would mean another thing, more to his advantage.

The rule is also stated in general terms by Estey J. in *McClelland & Stewart*, *supra*, at p. 15 as follows:

That principle of interpretation applies to contracts and other documents on the simple theory that any ambiguity in a term of a contract must be resolved against the author if the choice is between him and the other party to the contract who did not participate in its drafting.

As stated previously, the closing date by definition was November 4, 1991. This carries with it the obligation of the vendor to complete the unit by that date. By definition, the only provision for extending such date is under para. 13 which is applicable only if the unit had been substantially completed sufficient to permit occupancy. In effect, para. 13 establishes such substantial completion as a prerequisite to an extension of the closing date from November 4, 1991.

Scanlon submitted that para. 13 does not address completion (i.e., "total completion" or "substantial completion" as opposed to "substantial completion sufficient to permit occupancy") of the unit; nor does it address the completion of the common elements, including amenities. Paragraph 1(b) makes no reference to para. 22. Paragraph 22 does not refer to occupancy nor to substantial completion of the units sufficient to permit occupancy. It does not by its words purport to supersede para. 13 in any way.

Bramalea takes the position that para. 22 becomes operative when the vendor has failed for any reason (other than deliberate bad faith) to substantially complete the unit sufficient to permit occupancy on November 4, 1991. Scanlon takes the position that para. 22 becomes operative only where there has been such completion but full completion or substantial completion (not modified by the words "sufficient to permit occupancy") has been delayed by the factors set forth therein.

In considering the contract as a whole, even without the application of the *contra proferentem* rule, I would be inclined to agree with the submission made by Scanlon. In *Barchak Estate v. Anderson*, [1945] 1 W.W.R. 657, [1945] 2 D.L.R. 698 sub nom. *Cooke v. Anderson* (Alta. C.A.), Ford J.A. said, at p. 669 W.W.R., p. 708 D.L.R., in delivering the majority judgment of the court:

The best construction of all written instruments is to make all parts agree. The instrument must be construed as a whole and the words of each clause must be so interpreted as to bring it into harmony with the other provisions of the document.

Although it may not be possible to do so in all cases, I agree that where there are two possible interpretations of a paragraph it should be interpreted to bring it into harmony with the other provisions of the document and all the more so where the application of the *contra proferentem* rule supports such a result. I am satisfied that taken in the context of the agreement as a whole, there is an ambiguity with respect to the conditions under which the provisions of para. 22 apply. If one applies the general rule of construction stated by Estey J. in *Consolidated-Bathurst*, *supra*, viz., that where words may bear two constructions, the more

reasonable result, that which produces a fair result, must be taken as the one which would promote the intention of the parties, the position of Scanlon must prevail.

On his interpretation of the agreement he would be entitled to no more and no less than substantial completion of the unit sufficient to permit occupancy on November 4, 1991. That is a period more than three years after acceptance of the offer, and would not be an unreasonable expectation on his part. Similarly, it would not be an unreasonable burden to place on the developer (Bram[chalea]) which is in a position to contract for a closing date that would allow a sufficient cushion for delays which may be encountered on a realistic basis.

On Bramalea's interpretation of the agreement, Scanlon, who would reasonably expect to occupy the premises on November 4, 1991, would be put in the position of having his right to occupy the unit and close the transaction delayed for an indefinite period of time for any reason whatsoever. It is difficult to imagine a more unfair result. As previously stated, counsel for Bramalea on the appeal appeared to recognize the unfairness of such an interpretation and stated that the causes for delay must not be occasioned by bad faith and that the extension or extensions of the date must be for a reasonable time. The fact remains, however, that the court is being asked to amend *ex post facto* a term in an agreement drafted by the vendor.

The agreement under consideration was prepared by the original vendor. Its terms are drawn in a manner substantially to protect its interest. The purchaser is required to make his payments on account and to take possession and close the transaction on the dates and times specified. He is given no discretion to delay for any reason without suffering a loss of payments on account and incurring liability for damages. The agreement is replete with provisions exculpatory in nature and giving discretion for extensions of time all of which are favourable to the vendor, and with provisions which require strict compliance with time-limits by the purchaser and the payment of damages and forfeiture of money by reason of lack of compliance on the part of the purchaser. It is heavily weighted in favour of the vendor. It is a classic case for the application of the *contra proferentem* principle which I find to be applicable because of the ambiguity.

It was pointed out during the hearing of this appeal that as a matter of fact the delay was caused by structural problems with respect to providing a solid foundation, and by the extremely sophisticated technology involved in building the structure requiring equipment "from overseas". Scanlon was not told of the reason for the delay in the notice extending the closing date nor thereafter until an officer of Bramalea was cross-examined in these proceedings on September 4, 1991.

In my opinion, the fact that the delay was caused by a factor which may have been beyond Bramalea's control and that the extension was to be for a period of nine months is really not relevant to the rights of the parties. The extended occupancy date would not have given occupation to Scanlon until four years after he had executed the offer and if para. 22 became operative by superseding or modifying paras. 1(b) and 13, he might be faced with additional delays. The rights of the parties under the contract must be determined by the terms of the agreement at the time of its execution. The fact that the delay in issue did not occur as a result of bad faith on the part of Bramalea does not assist in the interpretation of the contract.

By the application of the general rule of construction of contracts and the *contra proferentem* rule, I interpret para. 22 in accordance with Scanlon's submission. By interpreting the agreement in the manner set forth in these reasons, there is no contradiction between para. 22 and para. 1(b), meaning is given to all parts of para. 22 and its provisions are then fair and reasonable for the purchaser. In effect, that means that it does not contradict the provisions of paras. 1(b) and 13 but rather, covers a different situation and to that extent my reasons differ with those of Austin J. The result, however, is the same. I conclude that Bramalea was obligated to substantially complete the unit purchased by Scanlon sufficient to permit occupancy by November 4, 1991, that time was of the essence, that Bramalea acknowledged by its notice that it could not comply with this term of the agreement and that that constituted an anticipatory breach entitling him to the declaration granted by Austin J. There is no doubt that a vendor of a condominium unit which is to be erected or is in the process of being erected can, by contract, provide that a proposed occupancy date and closing date be postponed or extended for whatever reasons are therein set out, subject to any statutory provisions which may be applicable. As indicated, this agreement failed to make such a provision.

Adequacy of Disclosure Statement

Scanlon took the position in the proceedings in the original application and on this appeal that even if he was unsuccessful in persuading the court with respect to the interpretation of the agreement of purchase and sale, he was entitled to the declaration sought on the ground that Bramalea (and its predecessor Castlepoint) had failed to comply with the provisions of the Condominium Act by failing to deliver to him a current disclosure statement and all material amendments thereto. Section 42(1) provides that an agreement of purchase and sale is not binding on the purchaser until the declarant has delivered the statement to the purchaser.

In view of the conclusion which I have reached with respect to the interpretation of the agreement, it is not necessary that I deal with this matter in order to determine the outcome of this appeal. It seems to me, however, that in view of the substantial submissions which were made by the various participants in the appeal with respect to this matter, I should address that matter.

The questions of the nature of the disclosure statement, the extent of the disclosure requirement, the brevity or fullness of the statement, and generally that which is necessary in order that a statement be deemed to have complied with the Act, were dealt with extensively by this court in the *Abdool* and *Budinsky* appeals (released October 13, 1992). We have also dealt in those appeals with the effect of the failure of a purchaser to rescind an agreement within 10 days after receipt by him of the disclosure statement on his right to declare an agreement non-binding on the ground that the statement did not constitute a disclosure statement within the meaning of the Act.

There is no point in repeating in this case the reasons which support the principles espoused in those appeals. These principles, however, must be applied to the individual facts of each case in order to determine whether the statement is one that constitutes a disclosure statement having regard to the requirements of the Act.

In *Abdool* and *Budinsky*, the court established the principle to be applied where a purchaser, who has not rescinded an agreement during the 10-day cooling-off period provided by the Act, seeks to resile from the agreement later on the basis of deficiencies in the disclosure statement. That principle is that the onus is on the purchaser to prove objectively that had the information that was not disclosed or was inaccurately or insufficiently disclosed, been properly disclosed in the disclosure statement at the time it was delivered to the purchaser, a reasonable purchaser would have regarded the information as sufficiently important to the decision to purchase that he or she would not likely have gone ahead with the transaction but would have rescinded the agreement before the expiration of the 10-day cooling-off period.

In *Abdool and Budinsky*, this court held that the purchasers failed to discharge the onus on the basis of the deficiencies therein alleged. In the case at bar, two novel deficiencies are alleged with which I will now deal.

First, the complaint is made that Castlepoint failed to comply with s. 52(6)(c) of the Act. That subsection reads as follows:

52(6) The disclosure statement referred to in subsection (1) shall contain and fully and accurately disclose,

(c) the portion of units or proposed units which the declarant or the proposed declarant intends to market in blocks of units to investors;

The disclosure statement contained a heading and paragraph as follows:

Marketing of Blocks of Units

The declarant reserves the right to market all of the units in the condominium in one or more blocks to investors.

A purchaser who was genuinely concerned about buying a unit in a condominium in which one or more blocks might be sold to investors would be immediately put on notice of that possibility by this paragraph. If it were a matter of importance to the purchaser, one would reasonably expect that he or she would rescind the agreement within the 10-day period. Although the paragraph may not be in strict compliance with the provisions of s. 52(6)(c), I am satisfied that the deficiency is not one that if brought to his knowledge would have caused him to rescind within the 10-day period. He knew immediately that some or all of the remaining units might be sold in blocks of units to investors.

Second, the complaint is made that Bramalea failed to comply with s. 52(6)(d) of the Act. That subsection reads as follows:

52(6) The disclosure statement referred to in subsection (1) shall contain and fully and accurately disclose,

(d) a brief narrative description of the significant features of the existing or proposed declaration, by-laws and rules governing the use of common elements and units, and of any contracts or leases that may be subject to termination or expiration under section 39;

The disclosure statement set out a list of recreational and other amenities provided for the use of owners and occupants of the dwelling units.

Under the heading "Rules governing the use of the units and common elements", the disclosure statement contained the following:

The rules governing the use of the common elements and units are made for the purpose of promoting the safety, security and/or welfare of the owners and/or for the purpose of preventing unreasonable interference with the use and enjoyment of the common elements and of other units. The Board of Directors makes the rules and can change them, but the owners by majority vote of those present at an owners' meeting may in turn change the rules made by the Board of Directors.

Scanlon was provided with a copy of the proposed rules governing the use of the common elements. By para. 4.00, under the heading "Recreation Area", they provided: Rules pertaining specifically to the use and operation of the recreation facilities will be promulgated by the board and communicated to the owners or posted in the recreational areas and anyone entering the recreation facilities must comply with such rules, as if they were included herein.

Finally, Scanlon was provided with a copy of the proposed declaration. By art. IV thereof it provided under the heading "Use of common elements" that "subject to the provisions of the Act, the declaration, the by-laws and the rules, each owner has the full use, occupancy and enjoyment of the whole or any part of the common elements, except as therein otherwise provided. It further provided that the board shall be entitled to determine from time to time on terms and conditions satisfactory to it, the basis upon which the guest suites, meeting rooms, conference rooms, executive business centre, racquet ball and squash courts, may be utilized by the owners and/or occupants of the dwelling units including any changes to be made or the use thereof.

Although the disclosure statement does not appear to wholly comply with the provisions of s. 52(6)(d) in the sense that it does not give a narrative description of the significant features of the rules governing the use of common elements, it does point out what is, perhaps, the most significant feature of those rules, viz., that the owners by majority present at a meeting can make and change the rules. The existing rules or lack of rules have less significance when it is made clear that the owners will in due course determine what the rules will provide. It would have been better if the disclosure had indicated that no rules had been made or proposed in connection with the recreational facilities but I am of the view that if a reasonable purchaser were given a more detailed narrative of the rules or lack thereof, he would not have rescinded the agreement having regard to the fact that it was disclosed to him that the Board and finally the owners have the final say as to what those rules will be.

Taking into consideration these two novel deficiencies and the other deficiencies alleged by Scanlon, I would find that he has not satisfied the onus required to be fulfilled by the principle laid down in the *Abdool and Budinsky* appeals.

For the reasons I have given respecting Bramalea's delay, I would dismiss the appeal with costs. ROBINS J.A. (MORDEN A.C.J.O. concurring):=MI respectfully disagree with Mr. Justice Goodman's interpretation of the agreement of purchase and sale in issue in this appeal. For the reasons which follow, I am of the opinion that the appellant was not guilty of an anticipatory breach of the agreement and that this appeal should accordingly succeed.

The Facts

The facts, reduced to their essentials, may be stated briefly. On September 16, 1988, the respondent Scanlon entered into an agreement with a company known as Castlepoint Development Corporation to purchase a luxury condominium unit on the 37th floor of a proposed residential condominium project to be located on Palace Pier Court on the waterfront of Lake Ontario in Metropolitan Toronto. Construction of the project, which is known as "Palace Place", had not yet been commenced. When completed, Palace Place was to be a 47-storey building containing 504 residential units, parking and storage facilities, and recreational and other amenities.

On December 22, 1988, Castlepoint sold the project to the appellant Bramalea Limited. Bramalea received an assignment of the respondent's agreement of purchase and sale and all other agreements of purchase and sale entered into by Castlepoint. For all purposes relevant to this appeal, Bramalea now stands in the place and stead of Castlepoint and may therefore be treated as though it were the vendor originally named in the agreement.

Under the terms of the agreement, the "Closing Date" or "Closing" is defined in para. 1(b) as meaning "the 4th day of November, 1991 or as extended by Paragraph 13(d)". Paragraph 12 provides that the transaction is to be completed on the "Closing Date". If, however, the unit is "substantially completed sufficient to permit occupancy on Closing but the description and declaration have not been registered" (as is required by the Condominium Act, R.S.O. 1990, c. C.26 ("the Act")), para. 13(d) provides that the purchaser is to occupy the unit on the terms and conditions set out in para. 13. "[T]he Closing Date" would then be extended "to a date 20 days after notice in writing is given by the Vendor's Solicitor to the Purchaser or his Solicitor that the declaration and description have been registered." Paragraph 22 permits the vendor to extend the closing date where completion of the unit or the common elements is delayed. The disclosure statement which accompanied the agreement, and which, of course, is mandated by the Act, projected the date for completion of the amenities and recreational areas as "approximately December 31, 1993".

Bramalea commenced construction in February 1989. It appears that the work progressed as planned save for a problem encountered in laying the foundations for the building. Unexpected soil conditions evidently required Bramalea to import sophisticated equipment from overseas to erect the structure. As a result, the construction overall was delayed by approximately ten months. By May 1991, the work had progressed to the point where the concrete structure had reached the 34th floor, the building had been enclosed up to the 18th floor, and the drywall had been completed to the 4th floor. By this stage, it was apparent that the building or, more specifically, the respondent's proposed unit, would not be completed by the November 4, 1991 closing date.

On May 31, 1991, Bramalea advised the respondent of the stage to which construction had progressed. Bramalea notified him that the first closings would commence in January of 1992 and that the new "closing date" for his 37th floor unit was being rescheduled so that his "revised occupancy date" would be September 14, 1992. The respondent responded to this notice on August 4, 1991, by the commencement of this application seeking: (1) a declaration that the agreement of purchase and sale was void on the ground that Bramalea's unilateral extension of the closing date constituted an anticipatory breach of the agreement entitling the respondent to terminate the agreement; and (2) a declaration that the agreement was not binding on the ground that the disclosure statement failed to satisfy the requirements of s. 52 of the Condominium Act. I agree with my learned colleague's disposition of the disclosure statement issue and need make no further reference to it.

The application came on for hearing before Austin J., coincidentally, on November 4, 1991 [now reported in 85 D.L.R. (4th) 443, 22 R.P.R. (2d) 211]. Accepting the respondent's contentions, the learned judge declared the agreement null and void on the basis that the closing date as defined by cl. 1(b) is a fundamental term of the contract, and that Bramalea's unilateral extension of that date accordingly constituted an anticipatory breach of the contract. In his view, para. 22, upon which Bramalea relied, is in conflict with or contradictory to para. 1(b) and para. 12. "If it had been the intention of the parties that cl. 22 override the others, then", the judge concluded [at p. 446 D.L.R., p. 214 R.P.R.], "1(b) would have read, `or as extended by Paragraphs 13(d) and 22'." In essence, he held that the November 4 closing date could be extended only pursuant to cl. 13(d) and for no other reason. Bram[alea now appeals from that order.

Leave to intervene in the appeal was granted to seven condominium unit purchasers represented collectively by Mr. Goldenberg, and to Stanley Kopman a purchaser of 24 condominium units. The intervenors support the positions advanced by the respondent.

The Agreement of Purchase and Sale

I shall, for ease of reference, reproduce the provisions of the agreement most relevant to the anticipatory breach of contract issue. They are as follows:

1. The following definitions shall apply to this Agreement:

(b) "Closing Date" or "Closing" means the 4th of November, 1991 or as extended by Paragraph 13(d).

12. The transaction is to be completed on the Closing Date.

13. If the Unit is substantially completed sufficient to permit occupancy on Closing, but the declaration and description have not been registered, then the Purchaser shall occupy the Unit on that date (the "Occupancy Date") on the following terms and conditions:

(d) the Closing Date shall be extended to a date 20 days after notice in writing is given by the Vendor's Solicitors to the Purchaser or his Solicitor that the declaration and description have been registered. If the Purchaser fails to close the transaction as aforesaid, through no fault of the vendor, the Purchaser shall be in default hereunder, and shall be required to deliver vacant possession of the Unit. The Purchaser shall be responsible for the damages and expenses and unpaid occupation charges. The Purchaser shall be responsible for the damages and expenses and the cost of redecor[ating as may be determined by the Vendor at its sole discretion as a result of the possession herein.

22. If the completion of the Unit or the common elements is delayed by reasons of strikes, lock-outs, fire, lightning, tempest, riot, war and unusual delay by common carriers or unavoidable casualties or by any other cause of any kind whatsoever whether or not beyond the control of the Vendor, the Vendor shall be permitted extensions of time from time to time for completion and the Closing Date shall be extended accordingly. If the Vendor is unable to complete the Unit and close this transaction within such extended time or times for closing, all monies paid hereunder by the Purchaser other than any occupancy fees, shall be returned to him and this Agreement shall be null and void. If the unit is substantially completed by the Vendor on or before Closing or any extension thereof as aforesaid, this transaction shall be completed on such date notwithstanding that the Vendor has not fully completed the Unit or the common elements and the Vendor shall complete such outstanding work within a reasonable time after Closing, having regard to weather conditions and the availability of labour and materials. In any event the Purchaser acknowledged that failure to complete the common elements on or before Closing shall not be deemed to be a failure to complete the Unit.

25. This offer when accepted shall constitute a binding contract of purchase and sale and time shall in all respects be of the essence hereof.

The Applicable Rules of Construction

Before considering the contractual provisions which are in dispute, I remind myself of certain well-established rules of construction applicable to the issue at hand. The agreement with which we are concerned is a negotiated commercial document which should be construed in accordance with sound commercial principles and good business sense. To the extent that it is possible to do so, it should be construed as a whole and effect should be given to all of its provisions. The provisions should be read, not as standing alone, but in light of the agreement as a whole and the other provisions thereof: *Hillis Oil & Sales Ltd. v. Wynn's Canada Ltd.*, [1986] 1 S.C.R. 57 at p. 66, 25 D.L.R. (4th) 649 at p. 655. The court should strive to give meaning to the agreement and "reject an interpretation that would render one of its terms ineffective": *National Trust Co. v. Mead*, [1990] 2 S.C.R. 410 at p. 425, 71 D.L.R. (4th) 488 at p. 499.

The court is "to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract": *Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.*, [1980] 1 S.C.R. 888 at p. 901, 112 D.L.R. (3d) 49 at p. 58; see also *McClelland & Stewart Ltd. v. Mutual Life Assurance Co. of Canada*, [1981] 2 S.C.R. 6 at p. 19, 125 D.L.R. (3d) 257 at p. 259. In searching for the intention of the parties, the court should give particular consideration "to the terms used by the parties, the context in which they are used and . . . the purpose sought by the parties in using these terms": *Frenette v. Metropolitan Life Insurance Co.*, [1992] 1 S.C.R. 647 at p. 667, 89 D.L.R. (4th) 653 at p. 666.

In the event that the court is unable to resolve a contradiction or ambiguity in the terms of a contract, the language of the contract will be construed against its author in accordance with the *contra proferentem* rule: *Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.*, supra, at p. 901 S.C.R., p. 58 D.L.R. "[T]he rule is . . . one of general application whenever . . . there is an ambiguity in the meaning of a contract which one of the parties as the author of the document offers to the other, with no opportunity to modify its wording": *Hillis Oil & Sales v. Wynn's Canada*, supra, at pp. 68-69 S.C.R., p. 657 D.L.R. However, resort is to be had to the *contra proferentem* rule "only when all other rules of construction fail to enable the Court of construction to ascertain the meaning of a document": *Reliance Petroleum Ltd. v. Stevenson*, [1956] S.C.R. 936 at p. 953, 5 D.L.R. (2d) 673 at p. 686; *Consolidated-Bathurst*, supra, at p. 901 S.C.R., p. 58 D.L.R.

With those general principles in mind, I turn to the issue which is the basis of this appeal.

Does the agreement of purchase and sale permit Bramalea to extend the time for completion or substantial completion of the respondent's unit to September 14, 1992, and to extend the closing date accordingly?

In answering this question it is essential to bear in mind that the subject matter of this agreement is the purchase and sale of a proposed residential condominium unit, and that a transaction of this nature is subject to the Condominium Act. Before title can be transferred from the vendor to the purchaser and the transaction can be "closed", as that term is normally understood in real estate transactions, the vendor is obliged under the Act to register a declaration and description of the property. The condominium registration process inevitably creates a delay between the time some or all of the units in a given project are ready for occupancy and the time the developer is able to deliver a registrable transfer of title and "close" the transaction. In *Albrecht v. Opemoco Inc.* (1991), 5 O.R. (3d) 385 at p. 392, 85 D.L.R. (4th) 289 at p. 295, I had occasion to describe the manner in which agreements of purchase and sale of proposed condominium units have generally been structured in this province in contemplation of the delays produced by the complexity of the registration process:

Under the Condominium Act, before title to a proposed unit can be transferred to a purchaser, a developer is obliged to register a declaration and description of the property. Registration, however, cannot be effected until the project has been substantially completed and all requisite governmental approvals have been obtained. The complexity of the registration process is such as to create an inevitable delay between the time that some or all of the units in a given project are completed and otherwise ready for occupancy and the time the developer is able to deliver a registrable transfer of title. The length of the delay depends on a variety of factors, and may be substantial. In order to generate income during this period, condominium developers usually seek to have purchasers take occupancy as soon as their units can be occupied. Agreements of purchase and sale are therefore generally structured, as are the agreements in these appeals, so as to provide for closing in two stages. The purchaser is first required or permitted to take possession on an interim basis when the unit is substantially complete and ready for occupancy (the possession closing), and the transaction is finally closed after registration has taken place and the vendor is able to transfer title (the title or final closing).

(Emphasis added)

The present agreement makes provision for the potential delay between the time the unit is ready for occupancy and the time the transaction can be completed in accordance with the Act. It is important for the purposes of this appeal to appreciate the way in which the agreement has been structured to achieve this purpose. The agreement unequivocally provides in para. 12 that the transaction is to be completed on the "Closing Date". This, by definition, is November 4, 1991. It is common ground that para. 12 carries with it the obligation of the vendor to complete the unit by that date. If, however, the transaction cannot be completed in accordance with para. 12, it is to be closed in the manner provided for in para. 13(d) and the "Closing Date" is to be extended as therein provided.

Paragraph 13(d) is manifestly designed to accommodate the delay created by the condominium registration process by effectively providing for the two-stage closing described in *Albrecht*. It does this in a somewhat indirect or circuitous manner. If the unit is at least substantially completed sufficient to permit occupancy on the closing date, that is, on November 4, 1991, but the project has not yet been registered, the purchaser is none the less to take occupancy on that date. In the event, the November 4 "Closing Date" becomes the "Occupancy Date", and the "Closing Date" is extended to an unspecified date 20 days after the vendor gives notice that registration has taken place. In the interim, the purchaser is to pay an "occupancy fee" calculated in accordance with s. 51(6) of the Act. The Act contemplates that purchasers of proposed residential condominium units may take possession of or occupy a unit before a deed or transfer can be delivered and contains a number of provisions governing the relationship of the parties during the interim occupancy period.

Paragraph 13(d) is concerned with the position of the parties if the unit is substantially completed. It is not concerned with the question of construction delays. This clause deals with the situation in which the unit is ready for occupancy but, because of non-

registration, the transaction cannot be concluded. Put another way, if there cannot be a final closing on the "Closing Date" referred to in para. 12, an occupancy closing is to take place if the prerequisites to para. 13(d) are satisfied.

Given the terms of this agreement and the accompanying disclosure information, the parties could not realistically have expected the proposed condominium unit transaction to be finally closed on the November 4 closing date. The proposed completion date of the recreational and other amenities, as I noted earlier, was to be "approximately December 31, 1993". Since that was a date more than two years later than the date for completion or substantial completion of the unit, they could hardly have expected that the requisite governmental approvals would be obtained and the project registered so long before these amenities were to be completed. Be that as it may, this agreement plainly provides for completion of the transaction on November 4, 1991, or alternatively provides for the purchaser taking occupancy on that date if the premises are then substantially completed sufficient to permit occupancy. In the latter event, the transaction is to be completed on some future date following registration of the declaration and description. The question then is what happens if the unit cannot be completed or substantially completed by November 4, 1991. Is there no room under the terms of this agreement for extending the defined "Closing Date" to accommodate a delay in the construction of the unit? Does the fact that the term "Closing Date" is defined in para. 1(b) as meaning "the 4th of November, 1991 or as extended by Paragraph 13(d)" restrict extensions to the extension specified in para. 13(d) and preclude any extension of the "Closing Date" as stipulated elsewhere in the agreement? In other words, is Bramalea absolutely and unconditionally bound to deliver a unit ready for occupancy on November 4 and guilty of an anticipatory breach of contract if it informs the purchaser in advance of that date that it will be unable to do so?

This brings me to para. 22 of the agreement which, Bramalea says, answers these questions in its favour. However, before considering this provision, I should perhaps say that I have no difficulty in accepting the suggestion that clauses of this type, whether framed in these exact terms or not, are commonly found in contracts for the sale of units in condominium projects under construction as, indeed, they are in construction contracts generally. The practical reality is that the construction of large, luxury high-rise buildings which are to be erected over a lengthy period of time, such as the building in this case, can be subject to many delays for innumerable reasons. Consequently, it is hardly surprising that agreements of purchase and sale are routinely structured so as to permit occupancy closing dates to be extended in the event of construction delays. In his reasons, Goodman J.A. refers to the agreements in the cases to which the court was directed and those in the cases heard contemporaneously with this appeal. Those agreements all contain broad provisions, albeit with limitations differing from the instant agreement, which enable the vendor to extend occupancy closings because of delays for any reason whatsoever other than the wilful neglect of the vendor or for any cause of any kind whatsoever beyond the control of the vendor. While para. 22 must, of course, be construed in the context of the instant agreement, it should be recognized that force majeure clauses of this kind are not uncommon to high-rise condominium construction and their general purport is by no means unique to this agreement.

The first sentence of para. 22 deals expressly with the situation in issue. It is the operative provision in the factual circumstances of this case. The focus must accordingly be on this part of para. 22, which provides:

If the completion of the Unit or the common elements is delayed by reasons of strikes, lock-outs, fire, lightning, tempest, riot, war and unusual delay by common carriers or unavoidable casualties or by any other cause of any kind whatsoever whether or not beyond the control of the Vendor, the Vendor shall be permitted extensions of time from time to time for completion and the Closing Date shall be extended accordingly.

(Emphasis added)

On a plain reading of this provision, the "Closing Date" may be extended when completion of the unit is delayed by reason of the circumstances referred to in the provision. The term "Closing Date" is defined by para. 1(b) to mean "the 4th of November, 1991 or as extended by Paragraph 13(d)". In May 1991, when Bramalea invoked para. 22 and rescheduled the respondent's closing date to September 14, 1992, "the Closing Date" was manifestly the November 4, 1991 closing date. The transaction was to be completed on that date pursuant to para. 12. At that stage, there had been no extension of the closing date by para. 13(d), nor could there have been. Accordingly, to implement para. 22 and give effect to the extension mandated by it while, at the same time, allowing for the extension contemplated by para. 13(d), it is obviously necessary to read the definition of "Closing Date" (and "Closing") in para. 1(b) as meaning "the 14th of September, 1992 or as extended by Paragraph 13(d)".

The transaction is then to proceed in precisely the same manner as it would have proceeded had there been no construction delay. Under para. 12, Bramalea is obliged to complete the unit and close the transaction on September 14, 1992, the new "Closing Date", just as it was obliged, before para. 22 was invoked, to complete the unit and close the transaction on November 4, 1991. Paragraph 12, as I noted earlier, carries with it the obligation of the vendor to complete the unit by the final closing date, now September 14, 1992. Paragraph 22, consistent with para. 12, extends the "Closing Date" to the date necessary to accommodate the delay in the "completion of the Unit". Since it was known that the project could not be registered by September 14, 1992, it was apparent that the transaction could not be completed by then in accordance with para. 12. It followed, however, that if Bramalea completed or substantially completed the unit for occupancy by September 14, 1992, there would be an occupancy closing in accordance with para. 13(d) and the date for finally concluding the transaction as provided for in para. 12 would be postponed to an unspecified date 20 days after notice in writing was given that the declaration and description had been registered.

In my opinion, para. 22 authorized Bramalea to extend the date of closing of this transaction to September 14, 1992, as it did. Bramalea's notice to this effect did not constitute an anticipatory breach of the agreement or provide a basis for declaring the agreement null and void. Paragraph 22, as I have noted, makes the extension necessitated by the construction delay specifically referable to the defined "Closing Date". Although an express reference to para. 22 in the para. 1(b) definition of this term may have been helpful, the omission of this reference does not preclude the court from giving effect to the part of para. 22 applicable to this case any more than the omission of a reference to para. 13(d) in para. 1(b), would have precluded the court from giving effect to that provision. The balance of para. 22 must, of course, also be seen in the framework of the closing process envisioned by this agreement, and applied to the relevant factual circumstances.

The principles of contractual interpretation require that the agreement be construed as a whole and that, so far as possible, meaning and purpose be given to all its provisions. On the interpretation of the learned motions court judge however, para. 22 is given no meaning or purpose but is instead effectively ruled out of the agreement. As a result, the vendor's obligation to deliver a unit ready for occupancy on November 4, 1991, is treated as being an absolute and unconditional obligation. Thus, Bramalea's inability, for whatever reason, to have the unit ready for occupancy on that date necessarily constitutes a breach of the agreement; and its advance notification to this effect constitutes an anticipatory breach of the agreement.

I am unable to accept that as a proper construction of this agreement. Given the extensions of the "Closing Date" expressly contemplated and permitted by para. 22, I think it patent that it cannot have been the intention of the vendor, nor the expectation of the purchaser, that Bramalea was unconditionally guaranteeing either full or substantial completion of the unit on the November closing date. Paragraph 22 takes into account a practical reality of the construction industry =M the likelihood, if not the inevitability, of construction delays which may render it impossible to deliver occupancy of this unit on the 37th floor of this 47-storey building on that specific date. The presence of this provision in itself makes manifest an intention to provide a means of extending the closing date in the event of unforeseeable delay. If that were not the intention, para. 22 would be unnecessary and would not have been included in the agreement. In short, on the wording of this contract, the parties have in essence agreed that if supervening events delay construction so that the transaction cannot be concluded by November 4, 1991, Bramalea is to be permitted to extend that date for the additional time needed to complete construction of the unit.

With respect to the contention that paras. 22 and 13(d) are inconsistent with one another, para. 13(d) provides for the two-stage closing described earlier, and sets the terms pursuant to which the purchaser is to occupy the unit during the interim between the occupancy and final closing. This clause is not concerned with delays in the completion of the unit; rather, it addresses the question of what is to happen if the vendor is unable to complete the transaction on the date stipulated in para. 12. In contrast to para. 13(d), para. 22 addresses the question of delay in completion of the unit by the date stipulated in para. 12, and entitles the vendor to extend the time for completion, and accordingly the date for closing of the transaction. The purpose and effect of these clauses is plainly different and each may be afforded a reasonable and distinct meaning. In my opinion, they are neither contradictory nor do they create any ambiguity such as to invoke the doctrine of *contra proferentem*.

I respectfully reject the notion that para. 22 is restricted to the situation in which a unit has been substantially completed and the purchaser has entered into occupation pursuant to para. 13. Such an interpretation overlooks the manner in which this transaction is structured and fails to give proper effect to the intention of the parties as manifested by their agreement. It is to be remembered that once the purchaser has taken occupancy, the "Closing Date" is converted by para. 13(d) from a fixed date to an indeterminate date. At that stage, the vendor is not obliged to complete the transaction on any specific date. Until the project is registered and notice to this effect is given, there is simply no date to which the extension mandated by para. 22 can be referable. If para. 22 is to become operative only after an occupancy closing has taken place, it can be applicable only to extensions needed because of delays related to the final closing date once that date has been determined.

To construe para. 22 in so narrow and restrictive fashion, in my opinion, is to render the clause substantially, if not totally, ineffective. To demonstrate this by way of an example, let us suppose that a strike had occurred in, say, the plumbing or electrical industry, which upset Bramalea's timing for the scheduled completion of the respondent's unit on November 4, 1991, by one month, and thus made it impossible to have an occupancy closing on that date. On this interpretation, para. 22 is inapplicable and Bramalea would not be entitled to extend the November 4 closing date for the extra month needed to enable it to close pursuant to either paras. 12 or 13(d); the transaction would be at an end. If, however, to change the facts, an occupancy closing pursuant to para. 13(d) did take place on November 4, 1991, then, on this interpretation, Bramalea would subsequently be entitled to invoke para. 22. Accordingly, "[i]f the completion of the Unit . . . is delayed by reason of strikes . . . [Bramalea] shall be permitted extensions of time . . . for completion and the Closing Date shall be extended accordingly". What is the "Closing Date" which is to be extended accordingly? Until the project is registered and the vendor gives the 20-day notice called for in para. 13(d), there is no set closing date. Before a closing date is set, there is no reason for the vendor to invoke para. 22 and, moreover, there is no mechanism for putting the provision into operation. Once the closing date has been set, there is, I suppose, the far-fetched possibility that something may arise during the 20-day period following the vendor's notice to require the vendor to extend the closing date set by it less than 20 days earlier. Beyond that possibility, the clause would serve no practical purpose.

In my opinion, para. 22 cannot be meant to produce a result which, to all intents and purposes, is tantamount to striking the clause from the agreement. For the reasons I have already stated, in executing a contract containing this clause, a purchaser could not reasonably have expected that Bramalea was guaranteeing to deliver occupancy on November 4, 1991, without regard to any of the contingencies that might arise to delay construction.

It is argued that para. 22 is an exemption clause, and as such, is to be construed *contra proferentem* strictly against the party benefiting from the exemption. In my view, whether this provision can properly be described as an exemption clause or not, is, in so far as this case is concerned, beside the point. Even assuming it is an exemption clause, and applying the special rules of construction relevant to clauses falling into that category (see, *Chitty on Contracts*, 24th ed. (1977), vol. 1, at p. 362), para. 22 does not admit to a construction which limits its application to post-occupancy closing delays. However, while it is unnecessary to decide the matter, it appears to me that para. 22, or more particularly its first sentence which is the focus of this appeal, cannot be characterized as exclusionary in nature. This provision does not limit or exclude the vendor's liability in any respect. Rather, it provides the vendor with a substantive right or entitlement, namely, the right to extend the time for completion, and accordingly, the closing date, in the event of a delay in construction. See *Waddams, The Law of Contract*, 2nd ed. (1984), at pp. 346-47.

Finally, the argument is made that para. 22 is distinguishable from the force majeure clauses referred to earlier because it permits the vendor extensions for delays resulting from any cause whether the cause was beyond the control of the vendor or not, and because it sets no maximum limit on the number or total length of the extensions that may be permitted. Bramalea acknowledges that the causes for delay cannot be the result of bad faith and that any extension or extensions cannot be for other than a reasonable period of time, and agrees that para. 22 must be read accordingly. However, the respondent's application was not put forward on these grounds. It is not suggested that Bram[alea] was guilty of bad faith or wilful neglect or was otherwise to blame for the delay in question; nor is it suggested that the ten-month extension was unreasonable and that Bramalea therefore ought not to be entitled to rely on para. 22. This application was based entirely on the proposition that Bramalea was guilty of an anticipatory breach of the agreement because, under the terms of the agreement as the respondent would have it construed, Bramalea was not entitled, for any reason whatsoever, to any extension whatsoever of the November 4 closing date. How para. 22 may be treated in a case in which the length of the extension or the cause of the delay is placed in issue is not a question that arises here, nor is it one that can or should be determined in the context of this case.

Disposition

I would allow the appeal, with costs, set aside paras. 1, 2, 3 and 5 in the order of Austin J., and make an order dismissing the application, with costs, in so far as it seeks a declaration that the agreement of purchase and sale is null and void, a declaration that the applicant has an interest in the lands described in Schedule "A", an order granting leave to issue a certificate of pending litigation, and repayment of the deposit money.

Appeal allowed.

CBR# 248

Re Basmadjian and York Condominium Corp. No. 52

32 O.R. (2d) 523 122 D.L.R. (3d) 117

ONTARIO HIGH COURT OF JUSTICE MALONEY J. 30TH MARCH 1981.

APPLICATION to construe a condominium corporation by-law.

J. D. Sloan, for applicant.

C. M. MacIntyre, for respondent.

MALONEY J.:-- This is an application to determine the effect of By-law 7 of the respondent condominium corporation duly passed on May 18, 1977. The by-law in question levies a monthly rental administration charge upon unit owners who lease their units to tenants. The relevant provisions are:

1. REQUIREMENTS FOR LEASING

1. For the purpose of this by-law "owner" shall include a mortgagee in possession, and a "lease" shall include an agreement to lease.

2. Application(s), declaration(s) and lease(s), hereafter referred to shall be standard forms, which shall be provided by the Corporation upon written request.

3. No owner shall lease his unit unless:

(i) he shall have forwarded to the Corporation the proposed tenant's application and sworn declaration including, among other things, the number of persons in the proposed tenant's family who will be residing with him and their respective names and ages;

(ii) he shall have first obtained the Corporation's consent to such tenant, such consent not to be unreasonably withheld and

(iii) he has delivered to the Corporation an executed lease along with the signed undertaking as stipulated in article XVII, paragraph 2 of the declaration.

4. Every owner leasing his unit shall pay the sum of ten dollars (\$10.00), or such other amount as the board from time to time deems reasonable, each and every month that the unit is leased, such payment(s) to be simultaneously made with the payments of common element expenses; the aforesaid additional payments are to reimburse the Corporation for additional administrative expenses and work incurred by tenancies.

It was common ground upon this application that the monthly charge is now \$15 and that only the provisions of s. 4 as cited above are being challenged.

The applicant, Knar Basmadjian, purchased a unit in the York Condominium Corporation No. 52 in 1974. Since June, 1979, the premises have been leased to a tenant. Pursuant to By-law 7 an additional \$15 per month charge has been assessed against the applicant who at all times has continued to pay her regular common expenses as provided by art. VI of the declaration, which requires each unit owner to contribute to common expenses in the proportions set out in a schedule attached to the declaration. I will later discuss at length the effect of this provision in the declaration and the relevant portions of the Condominium Act, 1978 (Ont.), c. 84, and any by-laws of the condominium corporation.

The applicant unit owner has refused to pay the additional rental charge of \$15 per month. By letter dated May 6, 1980, she was informed that a lien had been registered against her unit for "arrear of Common Element Expenses" and that foreclosure proceedings would be commenced. It is common ground that these arrears are attributable solely to the monthly rental administration charge. Accordingly, the issues before me are whether the section of the by-law purporting to impose a monthly rental administration charge is valid, and, if so, whether the fee levied by the by-law constitutes a contribution towards common expenses for which the condominium corporation can claim a lien under s. 32(4) of the Condominium Act, 1978.

A condominium corporation is entirely a creature of statute. Any provision of its declaration, by-laws or rules must be authorized by the Condominium Act, 1978. This legislation was proclaimed in force (except for some sections not at issue here), on June 1, 1979, and it repealed and replaced the Condominium Act, R.S.O. 1970, c. 77, and amendments thereto. Throughout this application, counsel argued on the basis that only the new legislation can be looked at in determining the validity of this by-law and the rights and obligations which arise under it. This is significant because the matters which a condominium corporation may include in its declaration and by-laws have been somewhat altered in the new Act and it is apparent from a reading of the declaration and by-laws of York Condominium Corporation No. 52 that they were drafted in accordance with the previous legislation. In my view the approach taken by counsel is quite correct and consistent with the provisions of ss. 14(1)(c) and 15(a) of the Interpretation Act, R.S.O. 1970, c. 225.

A condominium corporation is governed by the Condominium Act, 1978, and its declaration, by-laws and rules. The Act sets out what must be contained in the declaration (s. 3(1)) and what may be contained in the declaration (s. 3(3)). Section 28(1) contains a list of the matters which the condominium corporation has power to adopt by by-law. In all cases the Act has priority over the declaration and the by-laws (s. 3(5)). In addition, s. 60 provides that the provisions of the Act will apply notwithstanding any agreement to the contrary. Next to the provisions of the Act the declaration is to have priority. The declaration is subject to the Act and s. 3(5) provides where any provision in a declaration or by-law is inconsistent with the provisions of the Act, the Act prevails and the declaration or by-law is deemed to be amended accordingly. The declaration can be amended only with the consent of all the unit owners and all persons having registered mortgages against the units and common interests unless an application is made to a Judge pursuant to s. 3(8) of the Act, whereas by-laws can be amended or passed by a vote of only 51% of the unit owners. Counsel for the applicant likened the priority given to the declaration in the Condominium Act, 1978 to a constitution, amendment of which is subject to stringent safeguards. I accept this submission and it is clear that the declaration has

priority over the by-laws. Section 28(1) provides for the passing of by-laws "not contrary to this Act or to the declaration", and also s. 28(4) of the Act provides:

28(4) The by-laws shall be reasonable and consistent with this Act and the declaration.

The validity of any by-law, therefore, must be examined in the light of the priority given to the provisions of the Act and the declaration. A by-law may be upheld only if it falls within the matters contained in s. 28(1) and if it is reasonable and consistent with both the Condominium Act, 1978, and the declaration.

The respondent relies on art. XI of the declaration to support By-law 7. This article permits the condominium corporation to make by-laws with respect to the matters listed, but to the extent that these matters are inconsistent with those listed in s. 28(1) of the present Act, I do not see how they can be permitted to support the validity of the by-law. The respondent further relies on cls. (e), (f), (h) and (j) in s. 28(1) of the Condominium Act, 1978. These provide as follows:

28(1) The board may pass by-laws, not contrary to this Act or to the declaration,

(e) to govern the maintenance of the units and common elements;

(f) to govern the use and management of the assets of the corporation;

(h) to govern the assessment and collection of contributions towards the common expenses;

(j) respecting the conduct generally of the affairs of the corporation.

The condominium corporation submitted that it is a fact of life that tenancies create extra administrative, maintenance and legal costs and that the impugned rental administration fee imposes these extra costs upon the renting owner who benefits from the tenancy arrangement. By letter dated February 13, 1980, the property management firm of the condominium corporation wrote to the applicant unit owner stating with respect to By-law 7:

The By-law has proven to be effective in establishing controls of the residents in the building without burdening the resident owners of the additional cost for maintaining those controls.

It appears to me that prima facie this by-law attempts to regulate the leasing of units by unit owners and also requires that the cost of regulating such leasing shall be borne by the owners of rental units alone.

I cannot agree that this by-law relates to maintenance of the units and the common elements in s. 28(1)(e). Firstly, the monthly charge does not relate to any specific maintenance costs which are incurred as a result of the tenancy. Secondly, I do not think that charging the costs of maintenance to a particular unit owner is the same as governing the maintenance of the units and common elements. Neither do I think that this by-law has anything to do with the assets of the corporation under s. 28(1)(f).

I now come to the difficult question of whether or not this by-law falls within the condominium corporation's by-law making powers "to govern the assessment and collection of contributions towards the common expenses" contained in s. 28(1)(h) of the Act. For the time being I will assume that the rental administration charge levied by By-law 7 can be characterized as a common expense, although I will deal with this at length later.

There are several sections in the Condominium Act, 1978, relating to the owner's contribution towards common expenses. Section 32(1) provides that owners shall contribute towards the common expenses in the proportions specified in the declaration. Section 41(7) provides that the cost of certain repairs done to an owner's unit by the corporation shall be added to the owner's contributions towards common expenses. Because of the priority of the provisions of the Act over the declaration and by-laws, I find that the two sections above referred to are exclusive with respect to determining an owner's contribution towards common expenses. Under s. 32(1), it is contemplated that common expenses are to be charged to unit owners by applying the percentage for the particular unit which is set out in the declaration to the global amount of common expenses. The only exception to this method of arriving at the contribution to be made by the unit owner to common expenses must be contained in the Act. One exception is contained in s. 41(7) already referred to. The by-law-making power given in s. 28(1)(h) referring to assessment and collection of contribution towards common expenses, therefore, cannot be interpreted to permit a change in the amount of contributions by any individual unit owner other than consistently with the proportional method set out in the declaration. The common expenses, as defined in the Act, can only be shared expenses with the exception of those referred to in s. 41(7). The power to make by-laws under s. 28(1)(h) relates to "assessment and collection", not to contribution. In s. 28(1)(h) the word "assessment" refers to the amount of the common expenses as a whole and to the division of the whole amount into the proportional amount in accordance with the declaration. The word "collection" refers to the timing and method by which the condominium corporation obtains and enforces the payment of the contribution. This interpretation is adhered to in art. XI of By-law 1 of the condominium corporation, entitled "Assessment and Collection of Common Expenses". In addition to repeating the requirement that the owner contribute towards the common expenses in proportions specified in the declaration (which requirement is also contained in s. 32(1) of the Act and in art. VI of the declaration), this part of By-law 1 provides for preparing an annual budget, payment of one-twelfth of each owner's annual contribution to be paid on the first of each month, interest on arrears of common expenses and for the Board to take legal action against the unit owner when he is in default of payment of common expenses for 15 days. These provisions of By-law 1 are completely consistent with the provisions of s. 28(1)(h), the declaration and the Condominium Act, 1978. For the above reasons I hold that the rental administration fee cannot be supported by s. 28(1)(h).

Neither can the by-law be supported under s. 28(1)(j). The rental administration charge in By-law 7 attempts to levy an additional charge upon the applicant over and above his proportional share of the total common expenses. This is inconsistent with art. XI of By-law 1, art. VI of the declaration and the Condominium Act, 1978, which all require contribution towards common expenses to be made in the proportions specified in the declaration. Assuming this rental charge is properly classified as a common expense, I hold that contribution to common expenses can only be required in accordance with the provisions of the Act, specifically ss. 3(1)(d), 31(1) and 41(7). Section 28(4) requires by-laws to be reasonable and consistent with the Act and the declaration and I do not see how a by-law which is not consistent with the Act or the declaration can be supported by the general power to make by-laws, "respecting the conduct generally of the affairs of the corporation" contained in s. 28(1)(j). I hold, therefore, that the rental administration fee levied in By-law 7 is ultra vires of the corporation as there is no power given in the Act for the corporation to

pass such a by-law. Further, it is not valid because the extra charge it levies fails to meet the requirement of s. 28(4) that by-laws be consistent with the Act and the declaration.

I should point out that in my opinion this conclusion does not prevent the condominium corporation from collecting a greater share of common expenses from a particular unit owner where there is a cause of action under s. 14 of the Condominium Act, 1978 and the condominium corporation has obtained judgment against the unit owner. Unless that extra charge for common expenses falls within s. 32(1) or s. 41(7) of the Act, however, it cannot be the subject of a lien under s. 32(4).

Counsel has referred me to two cases which are relevant to determining the issues arising in this application. In *Stodt v. Peel Condominium Corp. No. 24* (1979), 24 O.R. (2d) 670, Cromarty J. considered an action by a unit owner for relief from a notice of lien registered against his unit pursuant to s. 13(4) of the Condominium Act, R.S.O. 1970, c. 77, providing for a lien against the unit where an owner defaults in his obligation to contribute to the corporation towards the common expenses. The declaration of the condominium corporation in that case provided that the unit owner would indemnify the condominium corporation for any damage done to the common elements by either the owner, his guests or tenants. The owner, Stodt, rented his unit and his tenant damaged some playground equipment. Stodt refused to pay the cost of repairing this damage and consequently the notice of lien was registered. Because the Act provided that common expenses could be defined in the declaration it was held that the indemnification clause was valid and that the extra charge sought to be collected from the unit owner properly constituted a common expense and, accordingly, the claim of the corporation was properly the subject of a lien. However, I do not think that the Stodt case may be relied upon to support an extra charge for common expenses being levied against a particular unit owner in the circumstances of the case at bar. The Stodt case did not address itself to s. 13(1) of the Act which provided that:

13(1) The owners shall contribute towards the common expenses in the proportions specified in the declaration. This provision is identical to s. 32(1) of the Condominium Act, 1978. The Stodt case was decided prior to June 1, 1979, before the present legislation was proclaimed in force. Under the previous legislation, s. 16(5) provided that the declaration could require the owner to maintain the common elements if such requirement was contained in the declaration. Consequently, there was no inconsistency between the Act and the declaration in requiring a unit owner to indemnify the corporation for damage to the common elements. In addition, the application of s. 13(4) of the previous legislation provided for a lien wherever an owner defaulted in his obligation to contribute to the common expenses. Under the new Act, s. 32(4), which provides for a lien, is restricted to circumstances where default relates to payment of the proportionate share set out in the declaration (s. 32(1)), or for default in paying for repairs to the unit (s. 41(7)). In addition, the indemnification clause in the Stodt case may well have been an agreement that such extra charge could properly be levied against the unit owner and collected in the same way as if it were a regular lien for arrears of common expenses. Section 60 of the present Act precludes the application of such agreement.

In *Re Dazol Developments Ltd. and York Condominium Corp. No. 329; York Condominium Corp. No. 329 v. Dazol Developments Ltd. et al.* (1979), 24 O.R. (2d) 46, it was held that the condominium corporation may only have a lien for the amount of the owner's contribution towards common expenses as set forth in the declaration. The ratio of this case has been incorporated into the Condominium Act, 1978, in which a lien is restricted to common expenses as defined in s. 32(1) and s. 41(7) of the Act. Since it is readily apparent that the rental administration charge does not fall within either of these subsections, the condominium corporation has no right to a lien under s. 32(4) for arrears of such fee.

In my opinion, By-law 7 would properly fall within the matters which may be included in the declaration under s. 3(3) (a) of the Act which provides for "a specification of common expenses" and/or s. 3(3)(c) of the Act which provides for "provisions restricting gifts, leases and sales of the units and common interests". The wording of s. 4 of para. 1 of By-law 7 clearly does not anticipate that the rental administration charge is being specified as a common expense. Accordingly, the true characterization of this by-law falls within s. 3(3)(c). This being a proper subject-matter for the declaration, it must be considered whether the other leasing provisions of the by-law are valid. I have already determined that the rental administration fee is not valid. I note that art. XVII of the declaration deals with the leasing by owners of their units. Section 3(3)(c) is permissive and not exclusive as to what may be contained in the declaration. To the extent that the leasing provisions of By-law 7 are consistent with art. XVII of the declaration, they are valid. The only inconsistency readily apparent to me is the requirement in By-law 7 that the owner obtain the corporation's consent.

I will now deal with characterizing the rental administration fee as a common expense. Common expense is defined by s. 1(1) (h) as:

(h) the expenses of the performance of the objects and duties of a corporation and any expenses specified as common expenses in this Act or in a declaration.

The objects and duties of the condominium corporation are set out in s. 12 of the Act. The object of the corporation is to manage the property and assets of the corporation. The corporation has a duty to control, manage and administer the common elements and assets of the corporation and to effect compliance by the owners with the Act, declaration, by-laws and rules. Subsection 12(4) provides that the declaration or the by-laws may specify duties of the corporation consistent with its objects, responsibilities and duties. The rental administration fee is related directly to the cost of regulating leasing. The regulation of leasing is permitted by s. 3(3)(c) of the Act to be in a declaration and art. XVII of the declaration does address itself to leasing of units. Accordingly, the rental administration charge is attributable to the expenses of the corporation in managing the property and assets of the corporation and in enforcing compliance with the declaration and by-laws as set out in s. 12. Such expense is properly characterized as a common expense under s. 1(1)(h), being an expense of the performance of the objects and duties of the corporation.

Counsel for the applicant conceded in argument that the rental administration fee would be valid if contained in the declaration. While I agree that the declaration could certainly provide for the rental administration fee to be defined specifically as a common expense in accordance with the Act, for the reasons given such fee could not be charged specifically against any one unit owner even if contained in the declaration.

The applicant is entitled to costs.

Judgment accordingly.

CBR# 358

York Condominium Corp. No. 167 et al. v. Newrey Holdings Ltd. et al.*

32 O.R. (2d) 458 122 D.L.R. (3d) 280

ONTARIO COURT OF APPEAL BROOKE, LACOURCIERE AND WILSON J.J.A. 13TH APRIL 1981.

*Leave to appeal to the Supreme Court of Canada refused (Martland, Ritchie and Estey J.J.), June 15, 1981.

APPEAL from a judgment of Galligan J., 2 A.C.W.S. (2d) 480, dismissing an action for a declaration that the appellant corporation was the owner of the janitor's suite in its building and holding that the respondent was not accountable to the appellant corporation for sales of extra parking spaces prior to registration.

A. B. Rosenberg, Q.C., and A. T. Riswick, for appellants.

C. B. Cohen, Q.C., for respondents.

The judgment of the Court was delivered by

WILSON J.A.:-- The corporate appellant is a condominium corporation created on October 8, 1974, by the registration by the respondent developer of a declaration and description under the Condominium Act, R.S.O. 1970, c. 77 [since repealed by s. 61 of, and replaced by the Condominium Act, 1978 (Ont.), c. 84]. The individual appellants are unit owners and members of the board of directors of the condominium corporation.

The condominium is a residential project located at 100 Canyon Ave. in the City of North York and comprises 90 units including a janitor's suite. The ownership of this suite is one of the issues under appeal. The other issue under appeal is who is entitled to the proceeds of sales of "additional parking spaces" in the underground garage made by the respondent developer prior to the registration of the declaration.

The janitor's suite

Mr. Justice Galligan, who presided at the trial [2 A.C.W.S. (2d) 480] held that the janitor's suite belonged to the respondent developer. He stated that he considered himself bound by the decision of the majority of this Court in *Frontenac Condominium Corp. No. 1 v. Joe Macciocchi & Sons Ltd.* (1975), 11 O.R. (2d) 649, 67 D.L.R. (3d) 199, and that on the authority of that case the registered title could only be overcome by evidence of a common intention on the part of the unit owners and the developer that the janitor's suite was to be part of the common elements or belong to the condominium corporation. The respondent developer in this case held the registered title to the janitor's suite and the learned trial Judge found that the evidence as a whole did not establish the existence of such common intention. After stating that there were points of similarity between this case and *Frontenac*, he went on to itemize the points of dissimilarity which he considered "crucial". He said:

I can say shortly that the evidence does not so persuade me. While there are similarities between this case and *Frontenac*, there are some very crucial dissimilarities. Some of those are the following:

1. It has not been proved to my satisfaction on a reasonable balance of probabilities that the defendant had the intention that purchasers should believe that the janitor's suite was to be a common element or would belong to the condominium corporation.
2. The condominium corporation has not made any mortgage payments respecting the janitor's suite.
3. The defendant did receive rent from the condominium corporation, even for some months after the purchasers took over the Board.
4. Notwithstanding the clear notice by the defendants, by letters to the plaintiffs on July 15, 1975 and October 28, 1975, that it contended that it was the owner of the janitor's suite, no suggestion was made by the plaintiff that the defendant was not the owner of the suite prior to December 17, 1975. (December 17, 1975 was the date that the Court of Appeal gave its judgment in *Frontenac*.)
5. There is no suggestion that anyone on the defendants' behalf ever suggested to any prospective purchaser that the janitor's suite would form part of the common elements or form part of the property of the condominium corporation.

The learned trial Judge then made his finding in the following terms: "Upon a consideration of all of the evidence, I am not satisfied that the common intention contended by the plaintiff existed. Its claim for a declaration that it is the owner of that suite must be dismissed."

A preliminary question is whether this Court should interfere with the finding of the learned trial Judge having regard to observations in recent judgments of the Supreme Court of Canada, notably *Schreiber Brothers Ltd. v. Currie Products Ltd. et al.*, [1980] 2 S.C.R. 78, 108 D.L.R. (3d) 1, 31 N.R. 335, on the limitations on an appellate Court in this regard. The *Schreiber Brothers* case, of course, involved issues of credibility which unquestionably seem to be within the peculiar province of the trial Judge who sees and hears the witnesses. However, in the course of his reasons, the learned Chief Justice said at p. 84 S.C.R., pp. 5-6 D.L.R.:

It would, of course, be open to an appellate court, where credibility of a witness was not in issue, to review findings of fact by a trial judge if they were based on a failure to consider relevant evidence or on a misapprehension of the evidence. An appeal, however, is not a complete rehearing. A majority of this Court held in *Metivier v. Cadorette*, [1977] 1 S.C.R. 371, at p. 382, that it was wrong for an appellate court to set aside a trial judgment where the only point at issue was the interpretation of the evidence as a whole. *Powell v. Streatham Manor Nursing Home*, [1935] A.C. 243 was relied on in the *Metivier* case (as it was in *Prudential Insurance Co. Ltd. v. Forseth*, [1960] S.C.R. 210) as emphasizing the advantages of a trial judge, who sees and hears the witnesses, in coming to a conclusion on the acceptability of evidence and on the findings to which the accepted evidence leads. However clear cut the principles may be, governing the right of an appellate court to interfere with the findings of fact by a trial

judge, their application may involve a difference of opinion as to whether interference is warranted in a particular case: see *Hood v. Hood*, [1972] S.C.R. 244.

In this case the learned trial Judge accepted the evidence of all the appellants' witnesses. The respondent called no evidence. But he found that, even accepting all of the evidence of the appellants, he was not persuaded on a balance of probabilities that a common intention existed. Moreover, although he selected from the evidence certain factors which he considered significant, he indicated in making his finding that he had considered all of the evidence. We do not know therefore what importance, if any, he gave to the following facts: (a) that the agreements of purchase and sale of units required the condominium building to be completed in accordance with the plans filed with the then Borough of North York;

(b) that in these plans suite 102 was designated as "the janitor's suite";

(c) that the janitor's suite was different in layout from any other suite in the building in that it had no balcony, porch or den and had located in it the fire-alarm system buzzers and the underground garage ramp heat control;

(d) that the building was of such a size as to require a full-time live-in superintendent;

(e) that the projected annual operating budget given to purchasers of units on closing showed no item of expense for rental of the janitor's suite although it showed an item of expense for his salary;

(f) that the declaration contained the following provision under the heading "Common Elements": (3) Restricted Access

Without the consent in writing of the Board, no owner shall have any right of access to those parts of the common elements used from time to time as a dwelling for any building superintendent, utilities areas, building maintenance storage areas, managers offices, operating machinery, or any other parts of the common elements used for the care, maintenance or operation of the property.

(g) that it was not until the developer's board of directors was replaced by the owners' board of directors that the developer disclosed that the superintendent was occupying the janitor's suite pursuant to an oral lease at a rental of \$300 per month and that the respondent was prepared to sell the suite to the appellant if he wished to acquire it as a permanent apartment for the superintendent.

It seems to me that this Court is in as good a position as the learned trial Judge to draw inferences from the tenor of the relevant documents and the conduct of the parties as to what their common intention was vis-a-vis the janitor's suite, provided those inferences do not run counter to the oral evidence accepted by the learned trial Judge. This case presents difficulties because the learned trial Judge makes it clear that he does not propose to make reference in his reasons to the factors in support of the condominium corporation's claim to the janitor's suite, but only to the factors opposed to it. He does expressly state, however, that he has considered "all of the evidence" in making his finding. I am not sure, therefore, that we can assume that he has "failed to consider relevant evidence" or "misapprehended the evidence". Indeed, it may very well be that in this case the only point at issue is "the interpretation of the evidence as a whole".

Mr. Rosenberg submits for the appellants that we are free to review the evidence in this case, particularly the documentary evidence. He argues that all the units which were sold in the building prior to the registration of the declaration were sold with reference to the plans filed with, and approved by, the Borough of North York. The agreements of purchase and sale required the respondent to complete the building in accordance with those plans and those plans (ex. 5) designated unit 102 as a "janitor's suite". Mr. Rosenberg submits that that constituted a written warranty that suite 102 would be available as accommodation for the full-time live-in superintendent who was obviously required in a building of this size and who was, in fact, installed in the suite at the time most of the purchasers bought their units. He submits likewise that the omission from the projected annual operating budget of any item of expense for rent for the suite constituted a further written warranty that purchasers of units would not have to pay rent for the suite. Moreover, and perhaps this is the most significant of all, he points out that the declaration, although it allocated a percentage of common expenses and common interest to unit 102 as to all other units (sch. "D" to the declaration), referred to the superintendent's suite as part of the "common elements" in s. III and made it subject to restricted access. Mr. Rosenberg submits that those factors, when viewed in conjunction with the evidence before the learned trial Judge, make it clear that the janitor's suite was intended to be part of the common elements and that it was never contemplated that purchasers of units would be faced with an additional capital outlay to purchase the janitor's suite from the respondent.

Mr. Cohen submits that the janitor's suite was clearly designated as a unit on the plans filed with the Borough of North York and was included as such in sch. "D" to the declaration. It cannot therefore be characterized as a common element. He emphasizes that his client was the registered owner of that unit and that all purchasers of units are deemed to have notice of his title. He submits that in these circumstances it would take cogent evidence to overcome his client's title and that none such was adduced before the learned trial Judge.

Mr. Rosenberg submits that this case is not distinguishable in any significant respect from *Frontenac*, supra. He indicated, and I must say that I have some sympathy with him, that he had difficulty in eliciting a principle from the two judgments of the majority in that case. He suggested that the learned trial Judge may have been in error in his statement of the ratio in *Frontenac*. Be that as it may, the cases certainly have this in common, that the trial Judges in both found that no oral representations were made to the unit purchasers at the time they bought their units that the janitor's suite would be a common element. The purchasers assumed that it was part of the common elements and Brooke J.A. found in *Frontenac* that their assumption was reinforced by the promotional brochure which indicated that on completion of the purchase of their units the purchasers would only have two payments to make, their share of the monthly expenses and their payment for mortgage and taxes to Central Mortgage and Housing Corporation. As in this case, the monthly expenses showed no item for rent of the janitor's suite. Mr. Justice Brooke concluded at p. 653 O.R., p. 203 D.L.R.:

As set out above, there was no suggestion anywhere that there would be a further capital cost to acquire Suite 104 from the respondent at any time, and there was no reason to doubt the assumptions by the purchasers that the suite was indeed a common element or that the purchase price included within it the purchase of that suite and that it would be subject to the condominium's control.

Mr. Rosenberg submits that the same may be said in this case.

Although the line between representation and justifiable assumption is obviously a thin one, MacKinnon J.A., dissenting in *Frontenac*, refused to cross it. He considered himself bound by the finding of the trial Judge that no representations had been made by the respondent. It was, accordingly, entitled to rely on its registered title. Mr. Cohen says that is precisely the situation here.

Zuber J.A., who concurred with Brooke J.A. in the result in *Frontenac*, wrote separate reasons for judgment. He appears to have based his decision on the interpretation of the term "common elements" and found that the fact that the building was of a size which required a full-time live-in superintendent, that one was already installed when most of the unit purchasers bought their units, and that the suite was designated on its door for all to see as the superintendent's suite, was evidence that it was treated by all parties as a "common element" whether or not it fell within the strict definition of that term in the Condominium Act or in the declaration. He found that the omission of any item of expense for rent in the budget gave added support to the fact that the janitor's suite was to be a common element.

I think Mr. Rosenberg is correct when he says there is little to distinguish this case from *Frontenac*. Indeed, the reference to the accommodation for the superintendent as a part of the common elements subject to restricted use in the declaration in this case may make it, if anything, a stronger case. Accordingly, while not unmindful of the strictures of the Supreme Court of Canada in *Schreiber*, supra, as to the limited contexts in which an appellate Court may interfere with the findings of a trial Judge, I must respectfully differ from Galligan J. and hold that the evidence in this case is sufficiently strong to overcome the respondent's registered title to the janitor's suite. I would require a conveyance of that suite to the condominium corporation.

Additional parking spaces

The issue with respect to the additional parking spaces is, I believe, in a different category. There is no dispute that the additional parking spaces formed part of the common elements. The learned trial Judge found, nevertheless, that the respondent developer was free to dispose of those spaces prior to the registration of the declaration and retain the proceeds. Indeed, he stated: "It seems to me to be common sense and good business for an owner-developer to sell extra spaces while the property is still his." He did find that after the declaration was registered the respondent developer was merely a tenant in common of the common elements with the other unit owners and therefore would be accountable to them for the proceeds of any sales of additional parking spaces made subsequent to the registration. I think, with respect, that the learned trial Judge erred in law on this aspect of the case.

This building was constructed as a condominium under the Condominium Act and units were sold to the purchasers on the basis of the provisions of the Act. The Act contemplates two types of property in the condominium, "units" as defined in s. 1(1)(r) and "common elements" as defined in s. 1(1)(e). "Common elements" is stated to mean "all the property except the units". It is clear, therefore, that the additional parking spaces were part of the common elements. Schedule "F" to the declaration made pursuant to the Act is headed "Exclusive Common Elements". Paragraphs (c) and (d) provide:

(c) Each owner is entitled to the exclusive use and possession for the parking of a motor vehicle of one parking space in the underground parking garage to be designated by the Condominium Corporation from time to time;

(d) Individual unit owners shall also be entitled to the exclusive use and possession of such additional parking space as may be purchased by such owner, the location of which is to be designated by the Condominium Corporation from time to time;

The additional parking spaces in issue in the litigation are, of course, the spaces referred to in para. (d).

It seems to be implicit in the decision of Galligan J. that until the declaration was registered the purchasers of units had no interest in the additional parking spaces, that those remained in the ownership of the developer who was free to deal with them as it saw fit. I do not see how this can be so in face of the provisions of the Act and the declaration. Section 7 of the Act provides that the owners of units are tenants in common of the common elements (s-s. (1)) and that subject to the Act, the declaration and the by-laws each owner may make reasonable use of them (s-s. (4)). It seems to me that as soon as a unit purchaser enters into an agreement of purchase and sale of a unit he becomes the equitable owner of the unit and the interests appurtenant thereto even although the agreement cannot be closed until registration of the declaration. By signing an agreement of purchase and sale each unit purchaser acquires in equity:

(1) the unit described in his agreement of purchase and sale; (2) the right to the exclusive use and possession of one parking space to be designated by the condominium corporation;

(3) the right to the exclusive use and possession of such additional parking space as may be purchased by him and designated by the condominium corporation.

In my view, the respondent developer could not, either before or after the registration of the declaration, deal with any part of the common elements so as to defeat the unit purchasers' equitable interests in them.

There is no doubt that special problems arise out of the peculiar characteristics of ownership in a condominium project, particularly where agreements of purchase and sale of units are entered into prior to registration of the declaration. These problems stem, I believe, in substantial measure from the fact that the Condominium Act does not apply to the project until registration is effected. Yet the transactions are entered into with reference to the Act and the declaration. The question arises, therefore, as to the extent to which the ordinary law of contract and real property apply to sales of property about to be brought within the purview of the Condominium Act. The respondent developer, both on the issue of the additional parking spaces and the issue of the janitor's suite, relies heavily on its registered title. At the outset of the project it is the absolute owner of the entirety. Does its position change once it starts to sell units? The respondent says it does not, that everything it has not contracted to sell at any given point of time prior to registration continues to belong to it absolutely. Accordingly, while it acknowledges that each purchaser who buys a unit is entitled to the exclusive use and possession of one parking space and it must therefore keep those number of spaces available, the respondent says it is under no such restraint with respect to any extra parking spaces within the building. Those it is free to deal with as it sees fit because it has absolute title to them until it registers the declaration. It acknowledges that once it does that, they become part of the common elements in which the unit owners have a common interest.

The difficulty is that the agreements of purchase and sale are entered into with reference to the Act and declaration and, indeed, are aborted if registration of the declaration is not effected. It seems to me, therefore, that the parties have incorporated into their agreements by reference the provisions of the Act and declaration. I see no legal obstacle to their doing this. I appreciate that this may to some extent run counter to the analysis made by Morden J. in *Re Crossroads Apartments Ltd. and Phillips* (1974), 4 O.R.

(2d) 72, 47 D.L.R. (3d) 172. My learned colleague in that case seems to have taken the position that until registration there are no units and no common elements to which the provisions of the Act can be applied, registration being the factor which triggers the application of the statute to the "proposed condominium".

With respect, I can see no reason why as a matter of simple contract law the parties cannot contract with reference to the Act and declaration prior to the registration of the declaration and in anticipation of its registration. Indeed, I think they must be taken to have done so where units in a condominium project are sold prior to registration since the condominium is substantially a creature of statute. It would be wholly unreal to view those transactions as agreements for the sale of separate pieces of real estate. This being so, I think the Court may look, and indeed must look, to the provisions of the Act and the declaration in determining the rights of the parties under the agreements of purchase and sale. I think they must also look to the general law of real property as to the status of a purchaser once his offer has been accepted. I do not think the position of the owner-developer remains unchanged after he starts to sell units. I think that at that point he has committed the character of the project to that of condominium under the Act and declaration. I think he has also placed himself in a fiduciary relationship to the unit purchasers not only with respect to their units but also with respect to the interests appurtenant thereto. He therefore holds the property in trust for the unit purchasers, present and prospective, and for the condominium corporation which will come into being upon registration of the declaration. I believe he is under a duty to protect the interests of all unit owners, present and prospective, and cannot put his own interests in conflict with theirs even although he himself continues to be an owner as long as any units remain unsold.

It seems to me to be implicit in para. (d) of sch. "F" to the declaration that additional parking spaces may be made available to unit purchasers on a "first come, first served" basis. However, since they do form part of the common elements in which all purchasers of units, present and prospective, have a common equitable interest, the proceeds of "sale" of the exclusive use and possession of them cannot be retained by the respondent developer. Those proceeds must be transferred to the condominium corporation upon registration of the declaration.

It is submitted by Mr. Cohen that to require this would be unjustly to enrich the condominium corporation because those purchasers who paid for extra parking spaces will be getting a proportionate return of their money as members of the condominium corporation. I cannot accept that submission. Those proceeds will be held by the condominium corporation to be used in the discharge of its obligations under the declaration, including its obligation to maintain the common elements.

I agree with Mr. Cohen that those are not sales of the spaces themselves in the sense that unit owners who acquire them acquire the freehold in them. I think they are "sales" of the right to the exclusive use and possession, i.e., leases of those parts of the common elements. It is for this reason that I think that the proceeds belong to the condominium corporation. In effect, they are the rent some of the members are paying to the condominium corporation for the exclusive use and possession of spaces owned by all of them as tenants in common. I would assume, although para. (d) is far from clear on this, that the lease of an extra parking space terminates when the owner parts with his unit and that that particular space thereupon becomes available for lease by the condominium corporation to another owner.

One final issue requires comment. Mr. Justice Galligan held the respondent accountable to the appellants for the sale of one extra parking space because that sale took place subsequent to the registration of the declaration. I have already indicated my view that it is accountable for all the "sales" it made. The issue left to be addressed is the manner of the accounting. The learned trial Judge held the respondent accountable for the proceeds of the one sale in the ratio of the units sold to the units still retained by the respondent. On that basis he found that the respondent might retain twenty-seven ninetieths of the proceeds and pay the balance to the condominium corporation. With respect, I think he was wrong in this.

It seems to be clear from s. 9(17) of the Condominium Act that a judgment against a condominium corporation is also a judgment against each unit owner at the time the cause of action arose for a portion of the judgment representing his proportionate share of the common expenses. However, under s. 9(18) a judgment in favour of the condominium corporation is an asset of the corporation. I believe, therefore, that there should be no apportionment of the proceeds of the sales of extra parking spaces. The entire proceeds should be paid to the condominium corporation.

I would allow the appeal with costs.

Appeal allowed.

CBR# 328

Judy-Anne Taylor, Appellant, and Her Majesty the Queen, Respondent And between Joseph and Sandra Redmond, Appellant, and Her Majesty the Queen, Respondent

[1998] T.C.J. No. 617

Court File Nos. 96-705(GST)G, 96-706(GST)G

Tax Court of Canada Vancouver, British Columbia Garon T.C.J. Heard: December 4, 1997 Judgment: July 27, 1998

Werner H.G. Heinrich, for the Appellants. Lynn M. Burch, for the Respondent.

JUDGMENT:-- The appeal [96-705(GST)G] from the assessment made under the Excise Tax Act notice of which is dated May 1, 1995, and bears number 950100384129P, is allowed, with costs, and the assessment is vacated, in accordance with the attached Reasons for Judgment.

The appeal [96-706(GST)G] from the assessment made under the Excise Tax Act notice of which is dated May 1, 1995, and bears number 950100376129P, is allowed, with costs, and the assessment is vacated, in accordance with the attached Reasons for Judgment.

REASONS FOR JUDGMENT

[para1] GARON T.C.J.:-- This is an appeal in the case of the Appellant Judy-Anne Taylor, from an assessment of Goods and Services Tax dated May 1, 1995, in the amount of \$45,009.35 in respect of the acquisition of an interest in a townhouse situated in Vancouver.

[para2] In the cases of the Appellants Joseph and Sandra Redmond, their appeals are from Goods and Services Tax assessments dated May 1, 1995 in the amount of \$47,134.50 in respect of the acquisition of an interest in a townhouse situated in Vancouver.

[para3] At the hearing of these appeals, a "Statement Of Agreed Facts", together with 25 documents that were attached thereto, signed by the solicitors for the Appellants and the Respondent, were put in evidence:

The Appellant and the Respondent agree that:

1. The Appellant Judy-Anne Taylor ("Taylor") entered into an agreement on June 19, 1994 with Polygon Sandringham Development Limited ("Polygon") to acquire as a personal residence an interest in a townhouse civically described as Unit #7 - 5650 Hampton Place, Vancouver, British Columbia and legally described as Strata Lot 7, Leasehold Strata Plan LMS1415. Attached as Tab 1 is a copy of the said agreement.

2. The townhouse was one unit of a 32 unit townhouse development which had been developed by Polygon on undeveloped land it had leased from the University of British Columbia, a public authority. The improvements made by Polygon were subject to the restrictions of Part 3 of the Condominium Act. That attached as Tab 2 is a copy of the original Ground Lease.

3. The Ground Lease for the townhouse development was converted by Polygon into individual strata lot leases as a result of the deposit by Polygon and with the consent of UBC of a leasehold strata plan pursuant to Part 3 of the Condominium Act.

4. Polygon took the position that GST was payable on the transaction. By letter dated July 12, 1994 Taylor's solicitor disputed Polygon's assertion that GST was payable on the purchase. Attached as Tab 3 is a copy of the letter dated July 12, 1994.

5. On July 13, 1994 Taylor's solicitor confirmed that they would close the transaction and pay the GST demanded by Polygon under protest. Attached as Tab 4 is a copy of the letter of July 13, 1994.

6. Taylor paid \$45,009.35 as GST to complete the transaction which amount was computed as 7% of \$642,990.65. Attached as Tab 5 is a copy of the Taylor statement of adjustments.

7. Taylor received a registered Assignment of Lease no BG298419 on July 14, 1994 in respect of Strata Lot #7 DL 6494 Leasehold Strata Plan LMS 1415 on payment of the \$642,990.65. Attached as Tab 6 is a copy of the said assignment.

8. Attached as Tab 7 is both a Certificate of Substantial Performance of the initial units of 5650 Hampton Place dated June 7, 1994 and a Certificate of Substantial Performance dated June 28, 1984 in respect of the balance of the townhouse development at 5650 Hampton Place, Vancouver, British Columbia.

9. Taylor applied for a GST rebate from Revenue Canada Taxation on July 22, 1994. The application for rebate is attached at Tab 8.

10. Taylor wrote Randy Jang of Revenue Canada Taxation on July 26, 1996 confirming Revenue Canada's advice that she should apply for a GST Application Ruling in respect of her GST rebate. Attached as Tab 9 is a copy of the said letter.

11. Ray Ng of Revenue Canada Taxation issued, on August 18, 1994, what was described as a binding ruling. Attached as Tab 10 is a copy of the said ruling.

12. The Minister of National Revenue ("Minister") subsequently assessed Taylor on May 1, 1995 to deny her application for a GST rebate. The said assessment is attached at Tab 11.

13. Taylor filed a Notice of Objection dated July 20, 1995 to the said assessment. The said Notice of Objection is attached as Tab 12.

14. The Minister issued a Notice of Decision dated February 8, 1996 upholding the assessment and confirming that the application for rebate of taxes paid in error had been correctly denied. The said Notice of Decision is attached at Tab 13.

15. The Appellant Joseph Redmond (on his own behalf and on behalf of the Appellant Sandra Redmond) (the "Redmonds") entered into an agreement with Polygon on February 15, 1994 to acquire as a personal residence an interest in a townhouse civically described as Unit 1 of 5650 Place, Vancouver, British Columbia and legally described as Leasehold Strata Lot 1 of a proposed Leasehold Strata Plan subdivision of Lot 1, Block 3, District Lot 6494, Plan 22697, New Westminster District. The said agreement is attached at Tab 14.

16. Joseph Redmond obtained a GST Advance Ruling which was described as being binding from Ray Ng of Revenue Canada Taxation on July 22, 1994. The said ruling is attached as Tab 15.

17. The solicitor for Polygon wrote the solicitor for the Redmonds on July 27, 1994 advising that they did not agree to any holdback of GST funds and expected full payment of the proceeds in accordance with the Statement of Adjustments. Attached at Tab 16 is a copy of the said letter.

18. The Redmonds' Statement of Adjustments is attached at Tab 17.

19. The Redmonds paid \$47,134.50 as GST in respect of their acquisition of their interest in the townhouse.

20. The Redmonds received a registered assignment of lease no BG298419 on August 3, 1994 in respect of Strata Lot 1, District Lot 6494, Leasehold Strata Plan LMS1415. The said Assignment is attached at Tab 18.

21. Joseph Redmond applied to Revenue Canada for a rebate of GST paid in respect of the acquisition of the Redmonds' interest in the townhouse on August 5, 1994. The said application is attached as Tab 19.

22. Ray Ng of Revenue Canada Taxation wrote to Joseph Redmond on August 16, 1994 advising that the Redmonds seek their GST refund from the registered supplier. The said letter is attached as Tab 20.

23. The Minister subsequently assessed the Redmonds to deny their application for rebate on May 1, 1994. The said assessment is attached as Tab 21.

24. Joseph Redmond responded to the assessment of May 1, 1995 by letter dated May 11, 1995 which letter is attached at Tab 22.

25. Melvin Bellefontaine of Revenue Canada Taxation responded to Joseph Redmond on May 19, 1995 advising that the application of GST to supplies of Leasehold Strata Lots was under review. The letter of May 19, 1995 is attached at Tab 23.

26. The Redmonds objected to the assessments on May 19, 1995 which objection is attached at Tab 24.

27. Revenue Canada issued a Notice of Decision confirming the assessment and holding that the application for rebate of taxes paid in error by the Redmonds were correctly denied on February 8, 1996. The Notice of Decision is attached at Tab 25.

28. The Respondent's position is that the facts admitted in paragraphs 10, 11, 16 and 22 are not relevant to this appeal.

[para4] No evidence was tendered in addition to the above Statement of Agreed Facts and the material appended to the latter Agreement.

Appellant's Submission

[para5] Counsel for the Appellants began by pointing out that there was an acquisition of a unit in a prepaid leasehold strata plan, as appears from the Contract of Purchase and Sale dated June 19, 1994 between Polygon Sandringham Development Limited ("Polygon") and the Appellant Taylor.

[para6] The application by the University of British Columbia, Form C, which was filed in the Vancouver Land Registry Office on August 20, 1993, describes the nature of the interest in paragraph 3 as a "leasehold estate", the transferor being UBC and the transferee being Polygon. The Ground Lease and the model strata lease were attached to Form C, which has just been mentioned. [para7] Reference was made to a number of provisions in the Ground Lease dated August 20, 1993, between the University of British Columbia ("UBC") and Polygon Development XXII Limited ("Polygon") (Tab 2):

[para8] In the preamble of this Indenture, UBC is described as the lessor and Polygon as the lessee. Also in the preamble, it is stated that the lessor is the owner of the lands and that the lessor has agreed to lease the lands for the Term defined in the Ground Lease in order that the lessee may erect the buildings thereon, convert the Lease under subsection 96(1) of the Condominium Act and use and enjoy the lands and the buildings thereon for the Term of the Lease.

[para9] Clause 2.01 of the Ground Lease shows that the amount of \$6,555,555 was to be paid by the lessee on or before the commencement date, which phrase is defined as being "the 20th day of August, 1993". In this connection, counsel for the Appellants commented that if the rent had been paid on a monthly basis, there would have been no litigation but it was paid up front. Paragraph 2.02 of the Agreement stipulates that all payments by the Lessee to the Lessor are "deemed to be Rent".

[para10] The lessor is given the right in paragraph 12.01 during the Term of the lease to enter at all reasonable times the lands and buildings to examine the condition thereof. Paragraph 12.02 says that the lessor shall be entitled to display signs advertising the lands and the buildings as being available during the final 12 months of the Term, for purchase or letting.

[para11] Paragraph 16.01 regarding subletting by Lessee, contains provisions which are standard clauses in a lease.

[para12] Paragraph 23.01 sets out that at the expiration of the Term, Polygon shall surrender the lands and the buildings to UBC and shall not be entitled to any compensation from the lessor, except as otherwise provided in the Model Strata Lot Lease, which was attached as Schedule A to the Ground Lease.

[para13] Paragraph 24.01 deals with the covenant for quiet enjoyment.

[para14] Paragraph 26 of the Ground Lease speaks to the conversion of the Ground Lease under the Condominium Act by way of a leasehold strata plan into a series of individual leases incorporating the terms of the Model Strata Lot Lease, as required by paragraph 26.03 of the Ground Lease and section 96 of the Condominium Act.

[para15] Certain provisions of the Model Strata Lease were reviewed.

[para16] In that lease, UBC is shown as the lessor and the lessees are called the owners of the leasehold strata plan because the strata unit lessee is called, under the Condominium Act, the owner. According to counsel for the Appellants, it does not mean that the lessee owns the fee simple.

Paragraph 1.01(d) defines the basic rent, by referring to paragraph 2.01 as being "its proportionate share of the unpaid Basic Rent for each Strata Lot which shall be equal to the product of the unpaid Basic Rent under the Ground Lease divided by the number of Strata Lots".

[para17] Paragraph 2.03 describes the obligation of the Lessee with regard to the payment of the basic rent.

[para18] Paragraph 16.01 sets out the terms that the Lessee must comply with regarding the use of the strata lot.

[para19] Paragraph 16.02 deals with subletting and assignment by the Lessee.

[para20] Counsel for the Appellants completed his review of the Model Strata Lot Lease by making mention of paragraph 26.01 thereof, which is concerned with the purchase of the Lessee's interest in strata lot by the Lessor. Also, he noted that paragraph 26.01 of the Model Strata Lot Lease deals with the effect of the Condominium Act. He observed that paragraph 26.01(b) says that "for the purposes of section 97(2)(a) of the Condominium Act, this subsection 26.01(b) shall be and constitute a schedule filed with the leasehold strata plan". He further referred to the other provisions of paragraph 26.01(b) which establish a formula for determining the purchase price of the lessee's interest that is to be paid by the lessor. According to counsel for the appellants, paragraph 26.01(b) in essence is in the nature of a "reduction of rent" In this connection, he added this: [See Note 1 below] "You've had this land and building for 99 years. You've prepaid the rent. The end of 99 years comes up, we have an incentive for you. One of two things can happen: you can run it down, and that's really been a problem in many areas, or you can keep it up. It's in our interests that you keep it up. If you keep it up, then we're going to give you a break. We'll give you a break on the rent. We'll pay the fair market value of what we think that building is worth. But fundamentally for purposes of this appeal, that does not alter the nature of the lease itself. It's really in that rent adjustment down the road. So that is in essence what was assigned to the Appellants, this model lease." Counsel for the Appellants explained the logic of that part of the formula which provides that the fair market value of the Lessee's interest is to be determined on the basis that no value is attributable to the lands because the lands were never transferred by UBC. UBC is not going to pay anything for the lands themselves.

Note 1: Page 23b of the transcript, line 24 to page 24, line 12. [para21] In his review of the various provisions of the Excise Tax Act, counsel for the Appellants pointed out that under section 165 of the Act every recipient of a taxable supply made in Canada shall pay tax. To the first question: "is there a supply? He answered in the affirmative in view of the definition of "supply" which means the provision of property, including inter alia a sale or a lease. On account of the broad definition of "property" in subsection 123(1), counsel for the Appellants admitted that here there was a supply of property. He agreed that the supply by Polygon was made in the course of a commercial activity.

[para22] On behalf of the Appellants, it was submitted that the supply by Polygon of its interest in the land is exempt pursuant to paragraphs (a) and (c) of section 7 of Part I of Schedule V of the Excise Tax Act. In support of this proposition, counsel for the Appellants submitted that the assignment of the lease by Polygon to the Appellants is exempt if it is the assignment of a lease that qualifies under either subparagraph (i) or (ii) of paragraph (a) of section 7. He applied these provisions to the present situation by pointing out that there was first a Ground Lease between UBC and Polygon, which was for the specific purpose of building a series of residential units. Then, there was a new supply because Polygon had to secure the consent of UBC to register a Strata Lot Lease. Therefore, according to him, each Appellant qualifies under paragraph (c) of section 7 because the lease was assigned to each of them by Polygon. In his view, the whole case of the Minister of National Revenue hinges on the concept of ownership and the existence of a sale. Counsel for the Appellants argued that a lease does not transfer ownership of any property. He referred to Polygon's specific obligation relative to the payment of rent in the Ground Lease, in the Model Strata Lease and the Assignment and to UBC's obligation to grant quiet enjoyment.

[para23] Counsel for the Appellants made very brief comments in his Reply to the Respondent's Argument on the self-supply rules found in section 191 of the Excise Tax Act after indicating that he did not rely on this section in support of his case.

[para24] Finally, Counsel for the Appellants referred to the "rulings" question and pointed out at the outset that he does not raise the issue of estoppel. However, he stated that if there is doubt about the interpretation of provisions of a statute and as to how they should apply, you look to the "rulings". He stressed that the Minister should not be allowed to come before a Court having published one set of policies and interpretations and then turn around and change his mind for the taxpayers that are before the Court. In support of these observations, he relied on the decisions of the Supreme Court of Canada in *Nowegijick Ltd. v. The Queen et al.* 83 D.T.C. 5041, and in *Mattabi Mines Limited v. the Minister of National Revenue (Ontario)*, [1988] 2 C.T.C. 294. Counsel for the Appellants drew the Court's attention to the reference in the *Nowegijick* case to the judgment of the Supreme Court of Canada in *Harel v. The Deputy Minister of Revenue of the Respondent's submissions*

[para25] Counsel for the Respondent submitted that Polygon sold to the Appellants its ownership of the leasehold interest in certain lands. The Respondent does not contend that the Appellants acquired from Polygon a freehold or a fee simple in the Province of Quebec [1978] 1 S.C.R. 851. the property. Rather, as result of the statutory regime that has been established by the Condominium Act, the Appellants are in fact owners of the leasehold strata lots, with all the limitations of a leasehold, having acquired that interest directly from Polygon.

[para26] The Respondent takes the position that the fact that the Appellants acquired Polygon's leasehold interest in the property by way of assignment does not mean that this was a supply by means of a lease, licence or other similar arrangement, as contemplated by 7(a) of Part I of Schedule V. According to Counsel for the Respondent, we must look at the substance of the transaction between Polygon and the Appellants and not simply to form. One has to look at what was actually conveyed. Ownership must not necessarily be fee simple ownership. She contended that it was possible to own a leasehold interest. In this connection, she suggested that the Condominium Act itself in creating strata lots derogates substantially from the common law

principles attributable to ordinary ownership of fee simple interests because there are a lot of restrictions on the bundle of rights normally attributed to ownership of a condominium unit.

[para27] Counsel for the Respondent referred to the provisions of the Condominium Act and pointed out first that section 95 provides that upon deposit of the leasehold strata plan, the Registrar of the appropriate land title office must register new indefeasible titles to the owner in fee simple of the land for each of the lots shown on the plan. Polygon is out of the picture with respect to a particular strata lot after it had assigned its leasehold interest in it. Mention was made of the strata lot lessee in section 92, who is equated with an owner or purchaser. By section 97 an absolute duty is imposed by the Condominium Act on the public authority to purchase the strata lot lessee's interest in the strata lot on the termination of the lease. It was suggested that one can draw as an inference from the facts that the price each Appellant paid when they purchased their property only reflected the value of the building. In none of the transfer documents is an amount ascribed to the buildings as distinct from the land. The Appellants paid about \$660,000 for their respective units. Polygon had already paid \$6,655,555 to UBC prior to assigning its leasehold interest in the strata lot in question to each Appellant.

[para28] It was further submitted on behalf of the Respondent that even though the Appellants did not acquire a fee simple interest in the whole property, "what they acquired is the very next closest thing to that". The equity ownership interest of the Appellants is protected by subsection 97(4), which enacts that in any case of dispute with respect to the proper value of the equity interest in a property, the matter is to go to arbitration. Section 98 of the Condominium Act requires an order for sale of the purchaser's interest in the event that the latter defaults in any of his obligations and responsibilities. This is a further protection of the equity interest of the purchaser, quite distinct from an interest that is created by a tenant-landlord relationship.

[para29] Section 69 of the Condominium Act provides inter alia where an owner developer gives possession of a residential strata lot to a person on the basis of a lease, sublease or assignment of a lease for three years or more, that the owner developer is deemed to have assigned to the occupier, all his rights, powers and obligations under this Act or by-laws. That section equates, in her view, the owner developer, Polygon in this case, with the owner as defined in section 2 of the Condominium Act. By operation of the Condominium Act, the purchasers of the owner developer's leasehold interest are owners of that interest. It follows, according to the Respondent, that by virtue of the long duration of the term of the lease and the operation of section 97 with the protection given by section 98, the "owners are provided an opportunity to build equity in the leasehold interest, subject only to fair market value or the schedule agreed upon."

[para30] Counsel for the Respondent emphasized that the owner of any estate arising from an interest created by the Condominium Act will have the incidence of exclusivity of possession and enjoyment restricted in a number of significant ways, over and above the limitations imposed on all realty by an incorporeal interest or statute. Many examples were given associated with "communal living in close proximity" that constitute an infringement upon the normal bundle of rights associated with classic ownership. Also, reference was made to section 12 of the Condominium Act which provides in substance that a share in the common property, common facilities and other assets of the strata corporation shall not be dealt with separately from the strata lot of the owner.

[para31] The position of the Minister of National Revenue under the Excise Tax Act is that there was no supply by way of lease, licence or similar arrangement and consequently, in her view the supply is not exempt. According to the Minister, this is a sale of property within the meaning of section 123 of the Excise Tax Act and not a self-supply with the purview of section 191 of the same statute.

[para32] Regarding the application of the Excise Tax Act, it was first argued on behalf of the Respondent that subsection 7(a) or (c) does not help the Appellants as they deal with the supply of land, separate and apart from the constructions or improvements on the land, on the ground that "the rights of the purchasers to the developer's leasehold interest in the property are purchased by them in the contracts of purchase and sale". It was further argued on behalf of the Respondent that the substance of each transaction entered into between Polygon and the Appellants is more closely akin to a sale, which "is broad enough to include a sale by way of disposition or transfer of the ownership via a vehicle by way of an assignment" by virtue of the definition of a "sale" in subsection 123(1) of the Excise Tax Act.

[para33] The Respondent's main position on this branch of the case is that the Appellants purchased the vendor's leasehold interest outright. That is what they end up with because that is what the vendor had to sell. The acquisition of this interest fits within the definitions of "property" and "sale" in subsection 123(1) of the Excise Tax Act.

[para34] In support of the above position, she relied on the decision of this Court in the case of *Granbury Developments Ltd v. Canada*, [1995] G.S.T.C. 73, for the proposition enunciated at page 73-5 that "the policy of the legislator and of the administrator in respect of the definition of "sale" is that a sale included either a transfer of ownership or a transfer of possession".

[para35] Because of the Minister's view of the nature and substance of the transaction as having all attributes of a sale and none of the real attributes of a lease, counsel for the Respondent submitted that none of the exemption sections of Schedule V of the Excise Tax Act pertaining to lease conveyances or supplies by way of a lease apply.

[para36] Other reasons were invoked by the Respondent in support of her position that section 7 of Part I of Schedule of the Excise Tax Act does not apply. One reason is that section 7 deals with land as separate and apart from any structures on it. Under the Act, after deposit of the strata lot plan and after the automatic conversion, one cannot separate the land from the improvements. Also it was provided that the reference to the generic "residential unit" in section 7(a) is not intended to apply to "residential condominium units" with which we are concerned here. According to the Respondent, if paragraph 7(a) is not applicable because of the nature of the property contemplated, paragraph 7(c) does not help either. Paragraph 7(c) only expands the application of paragraph 7(a) to cases where there is an assignment of the lease, licence or similar arrangement.

[para37] Another argument was made relating to subsections 7(a) and 7(c) of Part I of Schedule V of the Excise Tax Act as to why they do not apply. It is that, prior to the assignment by Polygon of its leasehold interest, the purchasers are not owners, lessees or persons in occupation or possession. On this basis, the supply by way of lease or by assignment of the lease does not fit because the Appellants were not recipients in their capacity as owners, lessees or persons in possession. The Appellants "do not become any of these things until after the transfer, after the conveyance," to adopt the language of Counsel for the Respondent.

[para38] If the transaction is not a lease, licence or similar arrangement within the meaning of section 7, was it a self-supply? Section 191 sets out the self-supply rules and paragraph 4(b) of Part I of Schedule V of the Excise Tax Act exempts situations where the builder is deemed to have made a self-supply.

[para39] It was not disputed by the Respondent that paragraph (1)(a) of section 191 is applicable here. Regarding paragraph (b), it was noted that the builder makes a supply of his own ownership interest in the leasehold and therefore subparagraph 191(1)(b)(i) does not apply. It is not intended to apply to transactions where the builder assigns or sells his ownership interest. This is what Polygon did here. So it is not a self-supply under subparagraph 191(1)(b)(i). Nor is it a self-supply under subparagraph 191(1)(b)(ii). The transactions in issue do not fall within subparagraph (ii) for the same reasons they did not fall within section 7 of Part I of Schedule V. Also, subparagraph 191(1)(b)(ii) of Part I of Schedule V of the Excise Tax Act contemplates a two-ste transaction.

[para40] It was further advanced on behalf of the Respondent that section 191 does not apply here because the supply of a strata lot lease by Polygon constitutes a supply of a leasehold interest and this is strictly in accordance with Part 3 of the Condominium Act. It is not a supply by any means by way of a sale of the building or part thereof and then a separate supply by way of lease of the land. In the opinion of the Respondent's counsel, Polygon is not the fee simple owner of either the building or the land and it could not therefore make such a transfer to an end user or purchaser. A supply made to the Appellants by Polygon by way of a lease would require that there be an ongoing relationship between them as landlord and tenant and, of course, no such relationship exists.

[para41] With respect to the Property Purchase Tax Act, the evidence is that each Appellant paid property purchase tax. According to the Respondent, property purchase tax would only be payable if there was a sale of a leasehold interest rather than an assignment or a supply by way of lease. Paragraph 1(1)(d) of the Property Purchase Tax Act include leases with a term greater than 30 years in the definition of "taxable transaction". The amount of tax with respect to that transaction is due on the day the leasehold interest is registered in the Land Title Office. In the same way, tax is due when the sale of fee simple strata lot is registered in the Land Title Office.

[para42] Counsel for the Respondent then adverted to the GST Memorandum 300-4-1, dealing with "Exempt Supplies - Real Property", at paragraph 12 headed "Long Term Residential Rents". She contended that this paragraph of the GST Memorandum deals with the rental of a house or apartment, in other words, with a standard residential lease. In her view, paragraph 12 of the GST Memorandum does not apply to leases covered by section 7 of Part I of Schedule V. She is of the opinion that paragraphs 15, 16 or even 17 of the GST Memorandum 300-4-1 are perhaps more properly applicable here.

[para43] Looking at the Appellant Taylor's Contract of Purchase and Sale dated June 19, 1994, counsel for the Respondent indicated that it is a deal between Polygon and the Appellant. What is significant, in her opinion, is that the Appellant Taylor takes from Polygon and not from UBC. Money is clearly paid to Polygon and not to UBC. The second aspect in this contract is that the Appellant Taylor is identified as the Purchaser. Paragraph 5 of this contract is relevant; it is the purchase of a prepaid leasehold interest in the proposed strata lot. Also, in compliance with paragraph 7 of that contract, Polygon was required to execute closing documents only in the name of the Purchaser. The Appellant Taylor replaces Polygon for all intents and purposes. As appears from paragraph 9 of the contract of purchase and sale, the transfer of the risk from Polygon to the Appellant Taylor is a classic indication of a sale. Risk is something that follows ownership. Paragraph 20 of the Contract of Purchase and Sale, regarding the payment of the goods and services tax, was also referred to.

[para44] Counsel for the Respondent subsequently turned to various provisions of the Ground Lease.

[para45] By article 2, Polygon agrees to pay the basic rent in the amount of \$6,555,555 on or before the commencement date, being August 20, 1993. The rent owed by Polygon to UBC was paid well in advance of the Appellants Taylor and Redmond entering into their respective contracts of purchase and sale. Once the basic rent requirement is removed, to all intents and purposes, what we have, according to counsel for the Respondent, is no more than the purchasers' agreement to reimburse UBC for any amounts that they have agreed to pay that UBC pays on their behalf. For instance, because UBC is the landowner, UBC would be getting the property tax bill. Thus the Appellants agreed to indemnify UBC in respect of the payments of municipal taxes.

[para46] Attention was drawn to paragraph 7 of the Ground Lease, which stipulates that if a lessee was delinquent in making the necessary repairs, the lessor, UBC is empowered to make them and then charge them off to the lessee as additional rent. There is no basic rent left as it was paid by the commencement date, August 20, 1993.

[para47] At article 3 of the Ground Lease, the Appellants as lessees are to pay taxes even those from which the lessor UBC is exempt, placing the Appellants as lessees or purchasers, in essentially the same position as any property owner.

[para48] Counsel for the Respondent referred to the clause "Assignment by lessee" in paragraph 16.02 of the Ground Lease. According to the Respondent, it relates to the assignment prior to the construction being erected and it contemplates the event of Polygon assigning its interest to another party for the purposes of developing the land.

[para49] Because of clause 26.04 of the Ground Lease, it was contended by the Respondent that once Polygon disposed of its interest to the Appellants, it no longer had any liability under the Ground Lease in respect of the property in issue, Polygon is off the hook, so she said.

[para50] Reference was made to section 2.01 of the Model Strata Lease and paragraph 4 of the Land Title document, in the case of the Appellant Taylor, to which document was attached the agreement dated July 8, 1994, to support the position that when the Appellants acquired their interest in the leasehold strata property, "there were not any vestiges left over from the basic rent". There was no subsisting obligation on the part of the Appellants as purchasers to pay any of the basic rent. The other items that are to be paid by the Appellants as purchasers are just current expenses, such as taxes, repairs, insurance, all attributes of ownership or an interest in property.

[para51] With reference to Article 26.01 of the model strata lease, it was mentioned by counsel for the Respondent that parties do not have the ability to opt out of section 97 of the Condominium Act which requires the lessor to buy back the lessee's leasehold interest. The only leeway the parties have is in how to determine the buy-back value of the leasehold interest owned by the purchaser.

[para52] The provisions in paragraph 29.07 of the Model Strata Lease pertaining to a release from liability show that Polygon was not merely transferring a leasehold interest but it was disposing of all its rights with respect to the parcels of property in question.

[para53] Counsel for the Respondent also commented on clause I of the Assignment dated July 8, 1994, in the case of the Appellant Taylor, where it is stated that "the Vendor as beneficial owner hereby assigns to the Purchaser the Vendor's interest in the Strata lot". She made the point that this is a statement that Polygon is in fact a beneficial owner of an interest in the strata lot, which is a leasehold interest. She mentioned that in clause 2 the parties contemplated a separate demise of the Strata Lot at the rent referred to in the lease. According to the Respondent, this is an indication that "the parties involved in these transactions were contemplating an assignment of the lease as separate and apart from a sale of the leasehold interest". In her opinion, the parties were buying and selling a leasehold interest. In this connection, she noted that in a letter to Revenue Canada, dated July 22, 1994, the Appellant Taylor herself mentioned that she recently purchased a leasehold interest.

[para54] Of the cases referred to by counsel for the Respondent for determining the distinction between a property held under a leasehold interest or under a lease and a property that is actually sold, the following are of interest:

Gateway Lodge Limited v. M.N.R., 67 D.T.C. 5138 Dow Holdings v. M.N.R., 76 D.T.C. 1199 Viceroy Rubber and Plastics Limited v. M.N.R., 93 D.T.C. 347

[para55] With respect to the advance rulings issue, the Respondent argued that these rulings are irrelevant, as they were not relied upon by the Appellants. In the case of the Appellant Taylor, the ruling was dated August 18, 1994, while the transaction was completed as of July 14, 1994. With regard to the Appellants Redmond, the Contract of Purchase and Sale was binding on them as of February 8, 1994 and the ruling applicable to them was dated July 22, 1994. The point was also made by the Respondent that advance rulings are not like Interpretation Bulletins in that they are not in the public domain and should not be given any weight by the Courts, not being an administrative policy and interpretation to which reference was made in the case Nowegijick referred to earlier. In this connection, counsel for the Respondent relied on the recent decision of the Federal Court of Appeal in Owen Holdings v. The Queen, 97 D.T.C. 5401.

Analysis

[para56] The general question to be determined is whether the supplies which Polygon made to the Appellants were taxable supplies within the provisions of Part IX of the Excise Tax Act, the Goods and Services Tax. More precisely, having regard to the submissions of the parties, did each transaction give rise to an exempt supply as regards the Appellants. [para57] Certain general provisions of the Goods and Services Tax portion of the Excise Tax Act should be kept in mind.

[para58] Section 165 enacts that every recipient of a taxable supply made in Canada shall pay to the Government of Canada tax in respect of the supply equal to 7 % of the value of the consideration for the supply, unless it is a zero-rated supply.

[para59] The definitions of certain terms and expressions of general import used in section 165 or elsewhere in the Excise Tax Act should be noted. These definitions are found in subsection 123(1) of this Act.

"Supply" - supply means, subject to sections 133 and 134, the provision of property or a service in any manner, including sale, transfer, barter, exchange, licence, rental, lease, gift or disposition.

"Taxable Supply" - taxable supply means "a supply that is made in the course of a commercial activity. "Commercial Activity", commercial activity of a person means

(a) a business carried on by the person (other than a business carried on by an individual or a partnership, all of the members of which are individuals, without a reasonable expectation of profit), except to the extent to which the business involves the making of exempt supplies by the person,

(b) an adventure or concern of the person in the nature of trade (other than an adventure or concern engaged in by an individual or a partnership, all of the members of which are individuals, without a reasonable expectation of profit), except to the extent to which the adventure or concern involves the making of exempt supplies by the person, and

(c) the making of a supply (other than an exempt supply) by the person of real property of the person, including anything done by the person in the course of or in connection with the making of the supply; "Exempt Supply" - exempt supply means a supply included in Schedule V.

[para60] There are three types of supply for the purposes of the Goods and Services Tax: "Taxable Supply", "Zero-rated Supply" and "Exempt Supply".

[para61] Against this general legislative background and before analyzing the enactments that are determinative of the question in issue, it is appropriate to determine first the precise nature of the supply in issue that was made here by Polygon to each Appellant.

[para62] UBC leased a large area of undeveloped property to Polygon by way of a Ground Lease dated August 20, 1993 and registered in the Vancouver Land Title Office, for the purpose of developing a series of townhouses thereon by way of strata leases, in accordance with the Condominium Act of British Columbia. Polygon proceeded with the development of the townhouse project, constructed condominium units on these lots and subsequently transferred the units to individuals like the Appellants. The deposit of the leasehold strata plan with the Land Registry under the Condominium Act, operated to convert the Ground Lease between UBC and Polygon into individual strata lot leases in the name of Polygon. Also, as a result of the deposit of the leasehold strata plan, UBC was issued, as owner in fee simple, certificates of title to each of the new strata lots shown in the plan. In the present case, it is therefore beyond dispute that the underlying land is owned by UBC and leased to Polygon by way of a Ground Lease.

[para63] In my view, the transactions between Polygon and the Appellants involve not only the assignment by Polygon of its interest in the strata lot leases, but also the sale by Polygon of the condominium units in question to the Appellants.

[para64] The Contracts of Purchase and Sale dated February 8, 1994 and June 19, 1994 between the Appellants Redmond and the Appellant Taylor respectively and Polygon indicate that the Appellants became owners of their respective townhouses and some other items. I am referring to the identical paragraphs 9 and 20 of these two contracts, which read thus:

9. RISK: The Home and all other items included in the Purchase and Sale will be and remain at the risk of Polygon until 2:01 a.m. on the Completion Date after which time they will be at the risk of the Purchaser.

20. GOODS AND SERVICES TAX: The Purchase Price shall include any goods and services taxes payable in respect of the Sale of the Home. The Purchaser shall pay to Polygon an amount equal to any goods and services taxes payable in respect of any additional items and extras agreed to be supplied by Polygon to the Purchaser.

[para65] In the Assignments of lease dated July 8, 1994 and August 3rd, 1994 made by Polygon to the Appellants respectively, where Polygon is described as the "Vendor" and the Appellants as "Purchaser", it is set out in Clause I of each assignment that "the Vendor as beneficial owner hereby assigns to the Purchaser the Vendor's interest in the Strata Lot." In clause 2 of each Assignment, it is stipulated that "The Purchaser covenants with the Vendor and the University and each of them that the Purchaser shall during all the residue now unexpired of the term of the Lease and every renewal thereof perform and observe the covenants on the part of the lessee to be performed and observed and the condition contained in the Lease as fully and effectually as if the Lease contained a separate demise of the Strata Lot at the rent referred to in the Lease".

[para66] The correctness of this conclusion is supported by subsection 97(1) of the Condominium Act which in substance provides that the lessor, in the case at hand UBC, is required to purchase the strata lot lessee's interest in the strata lot upon termination of the strata lot lease. In Article 26.01 of the Model Strata Lease, which is incorporated in the Ground Lease between UBC and Polygon dated August 20, 1993, it is stipulated that the purchase price of the lessee's interest is determined on the basis that the interest in the strata lot consists only of the building comprising the strata lot and the interest in the common property and common facilities based on the unit entitlement of the strata lot as they relate to improvements. No value is attributed to the leased land in calculating the purchase price. The precise basis on which the fair market value of the lessee's interest at the stipulated time is to be fixed is set out in the following portion of the same Article 26.01:

... For the purposes of assessing such fair market value and in furtherance to the provisions of the Condominium Act the Lessee's interest in the Strata Lot shall be determined:

(i) on the basis that the Lessee's interest in the Strata Lot consists only of that part of the Building comprising the Strata Lot and his interest in the Common Property and Common Facilities based on the Unit Entitlement of the Strata Lot as they relate to improvements on the Lands, with no value being attributable to the Lands.

(ii) on the basis that the Strata Lot is free of all liens, charges and encumbrances, and

(iii) on the basis that the Lands may be used only for the purposes set forth in this Lease, and the purchase price shall be calculated as of the date of Termination of this Lease.

[para67] Also, under section 98 of the Condominium Act, the lessor, UBC is not entitled to re-enter, take possession or otherwise cause the strata lot lease to be terminated, if the lessee, each Appellant in the matter at hand, defaults on observing and performing his obligations. The lessor must apply to the Court for an order for sale. Again, this shows that each Appellant has an ownership right in the condominium unit, such that the lessor is not entitled to repossess it but must purchase it through a public auction or private sale approved by the Court.

[para68] As well, the Model Strata Lot Lease has provisions for the purchasers, the Appellants here, to pay taxes, repairs, insurance and all other expenses that are incidental to ownership.

[para69] In conclusion, I am of the opinion that the Appellants obtained an equity, an ownership in their respective condominium units, in addition to their respective interests in the strata lot leases.

[para70] Since the transactions entered into between Polygon and the Appellants involved the sale by Polygon of the condominium units to the Appellants and the purchase by the Appellants of the units in question, it is therefore necessary to determine whether these transactions respecting the condominium units are exempt supplies for their recipients, the Appellants.

[para71] Consideration should therefore be given to Schedule V of the Excise Tax Act which lists eight broad categories of exemptions which are set out in as many parts in this Schedule. Part I, entitled "Real Property" is the only one of interest for our present purposes. Since the application of section 7 of Part I of Schedule V has been the main focus of the debate at the hearing of these appeals, I will first address this issue.

[para72] As noted earlier, it was asserted on behalf of the Appellants that the supply received by each of them is exempt under paragraphs 7(a) and 7(c) of Part I of Schedule V of the Excise Tax Act. Section 7 read thus at the relevant times:

7. A supply

(a) of land (other than a site in a residential trailer park) by way of lease, licence or similar arrangement for a period of at least one month, made to

(i) the owner, lessee or person in occupation or possession of a residential unit that is or is to be affixed to the land for the purpose of its use and enjoyment as a place of residence for individuals, or

(ii) a person who is acquiring possession of the land for the purpose of constructing a residential complex on it in the course of a commercial activity,

(b) of a site in a residential trailer park by way of lease, licence or similar arrangement for a period of at least one month, made to the owner, lessee or person in occupation or possession of

(i) a mobile home, or (ii) a travel trailer, motor home or similar vehicle or trailer, situated or to be situated on the site, or

(c) of a lease, licence or similar arrangement referred to in paragraph (a) or (b) by way of assignment but not including any land on which the residential unit, mobile home, vehicle or trailer is or is to be affixed or situated, or any land contiguous to it, that is not reasonably necessary for the use and enjoyment of the unit, home, vehicle or trailer as a place of residence for individuals.

[See Note 2 below]

Note 2: Section 7 quoted above and referred to at the hearing of these appeals was amended by section 88, c. 10 of the Statutes of Canada, 1997 and was made retroactive to September 14, 1992 for certain purposes. This amendment is of no significance here.

[para73] Paragraph (a) of section 7 exempts inter alia the supply of land, under a lease, licence or similar arrangement made to a person who is gaining possession of the land for the purpose of constructing a residential complex on it in the course of a commercial activity. Paragraph (c) of section 7 also exempts "a supply of lease, licence or similar arrangement referred to in paragraph (a) or (b) by way of assignment".

[para74] I cannot therefore accept the Appellants' argument that the supply of a condominium unit is included within the supply of land. In effect, subparagraph (a)(ii) of section 7 speaks of the supply of land by way of a lease made to "a person who is acquiring possession of the land for the purpose of constructing a residential complex on it in the course of a commercial activity". Thus, subparagraph (a)(ii) contemplates a supply of land exclusively since the residential complex is to be constructed. Also, in subparagraph (a)(i) of section 7, the words used make it clear that the residential unit may or may not be affixed to the land at the time the supply of land is made to the owner, lessee or person described in that paragraph.

[para75] It is apparent that paragraphs (a) and (c) of section 7 of Part I of Schedule V deals with the supply of land as separate from improvements. What is exempt is the supply of land if it is made in one of the ways described in paragraphs (a), (b) and (c). Section 7 does not deal with the supply of a residential unit that is or is to be affixed to the land, nor does it relate to a compound supply situation where the supply of the residential unit is incidental to the supply of the land.

[para76] As I understand it, the general purpose of section 7 is to exempt the supply of land or a residential trailer park site, by way of lease, licence or similar arrangement, or by way of assignment of such arrangement, when that land or site is used or intended to be used for specific residential purposes.

[para77] I therefore conclude that section 7 of Part I of Schedule V only exempts the supply of land and cannot therefore be of any assistance to the Appellants with respect to the part of the supply that involves the sale to them by Polygon of the subject townhouses.

[para78] It has not been suggested on behalf of the parties that any other exempting provisions in Part I of Schedule V of the Excise Tax Act, might be applicable here, apart from paragraph 4(b) of Part I of the latter Schedule, which in turn refers to self-supply rules found in section 191 of the Excise Tax Act.

[para79] Paragraph 4(b) of Part I of Schedule V of the Excise Tax Act is hereinafter reproduced in part:

4. A supply by way of sale of a single unit residential complex (in this section referred to as the "complex") or a residential condominium unit (in this section referred to as the "unit") or an interest in the complex or unit made by a builder of the complex or unit where

(a) ...

(b) in any case, the builder received an exempt supply of the complex or unit by way of sale or was deemed under subsection 191(1) or (2) of the Act to have received a taxable supply of the complex or unit by way of sale, and that supply was the last supply of the complex or unit made by way of sale to the builder,

[para80] Subsection 191(1) reads thus:

191. (1) Self-supply of single unit residential complex or residential condominium unit - For the purposes of this Part, where

(a) the construction or substantial renovation of a residential complex that is a single unit residential complex or a residential condominium unit is substantially completed,

(b) the builder of the complex

(i) gives possession of the complex to a particular person under a lease, licence or similar arrangement (other than an arrangement, under or arising as a consequence of an agreement of purchase and sale of the complex, for the possession or occupancy of the complex until ownership of the complex is transferred to the purchaser under the agreement) entered into for the purpose of its occupancy by an individual as a place of residence,

(ii) gives possession of the complex to a particular person under an agreement for

(A) the supply by way of sale of the building or part thereof in which the residential unit forming part of the complex is located, and (B) the supply by way of lease of the land forming part of the complex or the supply of such a lease by way of assignment other than an agreement for the supply of a mobile home and a site for the home in a residential trailer park, or

(iii) where the builder is an individual, occupies the complex as a place of residence, and

(c) the builder, the particular person or an individual who is a tenant or licensee of the particular person is the first individual to occupy the complex as a place of residence after substantial completion of the construction or renovation the builder shall be deemed

(d) to have made and received, at the later of the time the construction or substantial renovation is substantially completed and the time possession of the complex is so given to the particular person or the complex is so occupied by the builder, a taxable supply by way of sale of the complex, and

(e) to have paid as a recipient and to have collected as a supplier, at the later of those times, tax in respect of the supply calculated on the fair market value of the complex at the later of those times.

[para81] The phrases "residential complex" and "residential condominium unit" used in paragraph 4(b) of Part I of Schedule V and in subsection 191(1) are defined in subsection 123(1). For our purposes, it is sufficient to reproduce the definition of

"residential condominium unit": "Residential Condominium Unit" - "residential condominium unit" means a residential complex that is, or is intended to be, a bounded space in a building designated or described as a separate unit on a registered condominium or strata lot plan or description, or a similar plan or description registered under the laws of a province, and includes any interest in land pertaining to ownership of the unit;

[para82] It was common ground that the townhouses acquired by the Appellants come within the definition of a "residential condominium unit".

[para83] Paragraph (b) of section 4 of Part I of Schedule V exempts notably the subsequent sale of a residential condominium unit by a builder where the builder last made a deemed sale to himself under subsection 191(1) of the Excise Tax Act.

[para84] It is now necessary to turn to an analysis of subsection 191(1) of the Act with a view to ascertaining whether the builder made a deemed sale under subsection 191(1) of the latter statute.

[para85] It is apparent that paragraphs (a) and (c) of subsection 191(1) are met in the case of each appellant. In effect, Polygon gave possession to each appellant of a "residential condominium unit", upon its substantial completion and each Appellant was the first individual to occupy it as a place of residence after substantial completion of the construction.

[para86] It only remains to be determined if one of the three constituent elements of paragraph 191(1)(b) is satisfied in the appeals at hand.

[para87] Having regard to the facts outlined above, only subparagraph (ii) of paragraph 191(1)(b) needs to be considered.

[para88] Subparagraph (ii) of paragraph 191(1)(b) requires for its application two conditions:

(a) The first condition set out in clause A of subparagraph 191(1)(b)(ii) is that the builder the complex gives possession of the complex to a particular person, under an agreement for the supply by way of sale of the building or part thereof in which the residential unit forming part of the complex is located. In my view, this first condition is met here when Polygon sold the residential units to the Appellants. The transaction between Polygon and the Appellant Taylor is treated as a sale of the "Home" and other items, as appears from clause 9 of the Contract of Purchase and Sale dated June 19, 1994, between Polygon and the latter Appellant. The same comment is applicable to the Contract of Purchase and Sale dated February 8, 1994 between the Appellants Redmond and Polygon, which contains an identical clause 9.

(b) The second condition is couched in an alternative form. In the second alternative, the builder of the complex is required to supply the lease of the land forming part of the complex by way of assignment. This second condition, outlined in clause (B) of subparagraph 191(1)(b)(ii) is met in the case of the appellant Taylor, since there was an assignment agreed to by UBC, by Polygon of its leasehold interest in the land to the latter Appellant, as appears from the agreement, dated July 8, 1994, entered into between Polygon, UBC and the Appellant Taylor. The second condition is also satisfied in the case of the Appellants Redmond as there was an assignment dated August 3, 1994 made by Polygon to the Appellants Redmond to which assignment UBC had consented.

[para89] As mentioned above, Counsel for the Respondent argued that subparagraph 191(1)(b)(ii) does not apply here because that subparagraph contemplates a two-step transaction and the land and the strata unit cannot be conveyed separately in view of section 12 of the Condominium Act.

[para90] I do not see any clear requirement in that subparagraph 191(1)(b)(ii) for a separate conveyance of the land and of the residential unit. Rather, it seems to me that what is contemplated could be done in a single transaction consisting of two different elements, the assignment of a leasehold interest in the land and the sale of a building. In any event, here, we have two Contracts of Purchase and Sale (respectively dated February 8, 1994 and June 19, 1994), dealing with the purchase of a prepaid leasehold interest in the proposed strata lot and the purchase of a particular "Home" and other items and subsequently two assignments to which UBC had consented, respectively dated July 8, 1994 and August 3, 1994.

[para91] In my view, the rationale behind subparagraph 191(1)(b)(ii) is well explained in the news release of the Department of Finance 91-032, dated March 27, 1991, which reads in part thus:

The Act will be amended to ensure that where a builder of a new residential complex supplies by way of lease the land related to the complex to a lessee or assigns his or her interest in a lease of that land to a lessee, the builder is subject to the same self-supply rules as if the builder had supplied by way of lease both the land and the building related to the complex to the lessee. At the time the builder transfers possession of the complex to the lessee, the builder shall be deemed, at that time, to have sold the land and building for their fair market value and to have paid as a recipient and collected as a supplier tax on the deemed sale ...

[para92] Since the requirements laid down in subsection 191(1) are met in the case of each Appellant, the deeming provisions in paragraphs (d) and (e) are applicable. Accordingly, the builder Polygon is deemed to have made and received at the time possession of the complex was given to each Appellant, a taxable supply by way of sale of the complex and to have paid as a recipient and to have collected as a supplier tax in respect of the supply calculated on the fair market value of the complex.

[para93] I am therefore of the opinion that section 7 of Part I of Schedule V of the Excise Tax Act does not exempt the part of the supply received by the Appellants that relates to the purchase of their respective residential units but only that part of the supply involving the acquisition by each Appellant of the lease of the land by way of assignment. I have also come to the conclusion that by virtue of the joint operation of paragraph 4(b) of Part I of Schedule V and subsection 191(1) of the Excise Tax Act, the part of the supply received by the Appellants that relates to their acquisition of their respective residential units is exempt under Part IX of the Excise Tax Act.

[para94] Therefore, I must conclude that the Appellants are not liable under Part IX of the Excise Tax Act in respect of the assignment of the leasehold interest in the lands in question and the acquisition of their respective residential units.

[para95] In view of the conclusion at which I have arrived, it is unnecessary for me to deal with the issue relative to the rulings given by the Minister of National Revenue in the cases of the Appellant Taylor and the Appellants Redmond.

[para96] For those reasons, the appeals are allowed with costs and the assessments are vacated.

CBR# 145

Paul Kempling and Rhonda Kempling, plaintiffs (respondents), and Hearthstone Manor Corporation, defendant (appellant)

[1996] A.J. No. 654 Appeal No. 14284

Alberta Court of Appeal Calgary, Alberta Picard, Harradence and Coté JJ.A. Judgment: filed July 17, 1996.

Appeal from the decision of Dixon J. dated the 18th of December, 1992 and filed the 20th of May, 1993.

Counsel: S.J. Dalton for the plaintiffs (respondents). R.S. Steele for the defendant (appellant).

REASONS FOR JUDGMENT

Separate reasons for judgment were delivered by Picard, Harradence and Coté JJ.A.

[para1] PICARD J.A.:-- The respondents contracted with the appellant for the purchase of a condominium. The trial judge held that the appellant was in breach of the contract and awarded the respondents damages for the breach and for mental suffering. The appellant appeals that finding of liability and the award of damages.

Facts

[para2] The respondents, plaintiffs at trial, are husband and wife who wanted to purchase a condominium which would be a home for them and for the wife's elderly father. The appellant, defendant, is a developer who, at the time the contract was signed, had not begun this condominium development. The respondents told the appellant of their special needs and the modifications required to accommodate the elderly father.

[para3] On May 10, 1989, the appellant and respondents entered into a contract which was drafted by the appellant's lawyer and contained some clauses on which it now relies.

[para4] The purchase price was \$180,000 and the closing date was November 1, 1989, less than six months after the contract was signed. As the trial judge noted, a great deal of flexibility was built into the contract for the benefit of the appellant, allowing change to schedules, construction, materials, the unit factor, management fees and common expenses.

[para5] There was also a clause dealing with possible delay in the closing date and transfer of title. Although entitled "Transfer of Title Delay", clause twelve also referred to the closing date. It said that since closing and title transfer could not take place until the condominium plan was registered, the closing date would be deemed to be five days after the appellant advised the respondents that the plan had been registered. The clause ended with a sentence on which the appellant relies as setting out a true condition precedent to the contract:

"If the Condominium Plan is not registered by January 15, 1990, this Agreement shall be null and void and the Vendor shall return to the Purchaser, without interest, all purchase monies paid, subject to all proper deductions as provided for in this Agreement."

[para6] A chronology of events shows that the appellant faced many difficulties with this project. Indeed, on May 6, 1989, four days before the contract was signed, the City of Calgary rejected the development permit application. The appellant had problems with requirements such as setback, sanitation, and soil. At one point the project was subject to a stop work order because of failure to obtain a development permit or building permit in order to get approval of the project, the appellant had to reduce the number of units in the development which meant that the respondents' unit became larger.

[para7] The condominium plan was finally registered on October 11, 1990, some nine months after the date set out in clause twelve of the contract. [para8] During the fall of 1989, the appellant suggested that February 1, 1990 might be a more realistic possession date and in early January of 1990 mentioned March 31, 1990. On January 19, 1990 during a visit to the project the respondents noted that some windows were missing in the structure and discussed this with the appellant. A meeting was set up for January 22, 1990 to review the extras in the construction.

[para9] At that meeting, the appellant handed a letter to the respondents suggesting an amendment of the price in the contract. After discussion, the price was changed: the base price of \$180,000 remained but in addition the respondents agreed to pay \$16,000 for the extras and a \$4,000 management fee. The appellant's copy of the contract was altered, by the addition of handwritten notes, to show the new total price of \$200,000.

[para10] At this meeting the respondents were told that the new possession date would be May 1, 1990. They were also told that they would be given a new "cleaned up" contract. In the letter given to the respondents, the appellant stated that it would "formally amend the legal contract". About a week after this meeting, the respondents asked for a copy of the amended contract but were told that it was not ready.

[para11] At the conclusion of the January 22nd meeting, the appellant arranged for the respondents to choose cabinets which they did on February 6th. Construction of their condominium continued through early February.

[para12] On February 19, 1990, the respondents refused to accede to the appellant's new demand to increase the purchase price to \$225,000 and refused to accept a \$4,000 bonus to withdraw from the contract. The appellant then handed them a notice stating that pursuant to clause twelve the contract of May 10, 1989 was null and void.

[para13] The delays in construction had greatly upset the respondent and her father and in July, 1990 the respondents moved to British Columbia (where the father lived) in order to look after him. The female respondent suffered a loss of income and because of the increase in property prices between May, 1989 and February, 1990, the respondents could no longer afford to purchase an equivalent home in Calgary. Trial Judgment

[para14] The trial judge was satisfied that the May 10th contract was valid and enforceable. He found there was consensus, certainty as to all terms, no impossibility of performance and no frustration. He held that the May contract was amended. He

found that any concerns about the adequacy of writing and the Statute of Frauds was answered by numerous acts of part performance.

[para15] While he did not specifically deal with clause twelve and the claim that it contained a true condition precedent, he commented that "things continued on and after the passage of January 15, 1990, Mr. Will [of the appellant] is instructing Mr. Bradley [of the appellant] to get the Kemplings in and get the contract price bumped up." He found that Mr. Will, a sole shareholder, officer and director of the appellant, stalled things to keep the appellant's option open and could not accept the purchase price in the contract because of the low return to the appellant.

[para16] The trial judge found a breach of contract by the appellant on February 19, 1990 accepted by the respondents on July 1, 1990. After reviewing a number of valuations, he set the value of the condominium at \$250,000 as at July 1, 1990. He awarded damages of \$70,000 being the difference between \$250,000 and \$180,000.

[para17] He also awarded the female respondent damages for mental suffering having found that the appellant knew of the particular reason that the respondents had for purchasing the condominium. He said that the female respondent "was deeply and genuinely committed to providing a home and care for her father in Calgary and was tremendously upset and disturbed at [the appellant's] attempts to force a higher payment." He said:

"These people were treated very shabbily and Mrs. Kempling, in particular, suffered severe mental distress. Her distress went far beyond disappointment or hurt feelings. The breach of contract by the Defendant led not only to emotional upset and turmoil but, when combined with Mrs. Kempling's commitment to her father, led to extraordinary compromises on her and her husband's part. Mrs. Kempling gave up a well-paid and rewarding job in Calgary, moved to Nanaimo to care for her father, experienced the concern of acquiring a home in Nanaimo and took employment in Nanaimo at half the salary being paid to her in Calgary. A total disruption of lifestyle has occurred."

[para18] The trial judge referred to *Taylor v. Gill* (1991), 78 Alta. L.R. (2d) 349 (Q.B.) in which Justice Deyell granted damages for mental suffering arising from the breach of contract for the sale of a house. The trial judge applied the tests set out in that case, found they were met and awarded damages of \$7,500 to the female respondent.

Appellant's Position

[para19] The basis for the appeal of liability is three-fold:

1. There was a true condition precedent in clause twelve such that on January 15, 1990 the May 10, 1989 contract became null and void. There was then no contract to amend and no new contract. The appellant alleges the trial judge failed to consider this argument. 2. In the alternative, there was an amendment which required the respondents to pay the sum of \$20,000 (being \$16,000 for upgrades and a \$4,000 management fee) and by clause six in the May 10th contract this sum had to be paid at the time that amendment was made. Because that amount has not been paid the respondents have not performed their contractual obligation.

3. There were numerous and substantial inconsistencies in the evidence of the respondents which the trial judge did not deal with in his reasons.

[para20] The basis for the appeal of damages is also three-fold. The appellant argues that the trial judge erred in:

1. assessing damages at July 1, 1990 and the market value of the condominium at \$250,000;
2. not taking into account the \$20,000 to be paid for extras;
3. awarding damages for mental suffering.

The Respondents' Position

[para21] The respondents do not deny that clause twelve contains a true condition precedent but argue that when the possession and closing date was not, as set out in the contract, November 1, 1989, but instead February, and then March, and as these later dates were proposed before January 15, 1990, the registration date of the condominium plan was implicitly postponed as well. The respondents point out that while the appellant now takes the position that there was no contract to amend after January 15, 1990, it was in fact the appellant who on January 22, 1990 proposed to amend the May contract.

[para22] The respondents argue that if the contract was void because of the operation of clause twelve as a true condition precedent there was a new contract entered into on January 22nd with part performance.

[para23] The respondents say they were not required to pay the \$20,000 until they received a copy of the contract and certain schedules referred to in it. Furthermore, they say time had ceased to be of the essence in the contract because of the conduct of the appellant.

[para24] The respondents submit there was no palpable or overriding error made by the trial judge in measuring the evidence.

[para25] The position of the respondents on the damage assessment is that the figure of \$250,000 is reasonable. They maintain that if the trial judge erred in not assessing damages as at February 19, 1990 that error benefitted the appellant who represented the unit to have a fair market value of \$270,000 at that date. They argue that the trial judge was correct in deciding this was an appropriate case for the awarding of damages for mental suffering.

True Condition Precedent

1. The Law

[para26] The definitive case is *Turney v. Zhilka*, [1959] S.C.R. 578 where the clause being construed read: "Providing the property can be annexed to the Village of Streetsville and a plan is approved by the Village Council for subdivision." The Court found this was a true condition precedent because the obligations under the contract, on both sides, depended on a future

uncertain event, the happening of which depended entirely on the will of a third party. Until the event occurred, the approval, there was no right to performance on either side. The Supreme Court of Canada affirmed the requirements in *Barnett v. Harrison* (1976), 57 D.L.R. (3d) 225.

[para27] Professor Fridman says at pages 438-40 of his text *The Law of Contract*, 3d ed. (Toronto: Carswell, 1994) that Turney has made a distinction between a condition relating to the existence of a contractual obligation and one that is precedent to performance. Until the time given for the fulfilment of the true condition precedent neither party is free to withdraw from the contract but if the true condition precedent is not satisfied, there is no contract. It is a question of construction whether the obligations in a contract are absolute and binding immediately or, as where there is a true condition precedent, contingent.

[para28] The simplicity, and harshness, of the consequence of finding a condition to be a true condition precedent have caused difficulties for the courts. The most obvious is the requirement of characterizing the clause as a true condition precedent. (See *McCauley v. McVey* (1979), 98 D.L.R. (3d) 577 (S.C.C.)). Another difficulty arises because the reality is that true condition precedent may require action on the part of one or both parties to fulfil it. In *Dynamic Transport Ltd. v. O.K. Detailing Ltd* (1978), 85 D.L.R. (3d) 19, the Supreme Court of Canada held that in some circumstances a party will be found to have made an implied promise to attempt to bring about the event constituting the true condition precedent. In other words, although the fulfilment of a true condition precedent depends on the will of a third party, one or both of the parties to the contract may, in the circumstances, have some obligation to pursue that end. The most obvious example is the approval of zoning by a third party such as a city where there is a requirement to make an application and provide information.

[para29] Perhaps the most difficult feature of the Turney decision is that a true condition precedent can never be waived unilaterally. The strict application of this aspect of the decision has led to harsh results, where even the party for whose benefit the true condition precedent was made could not waive it. (See *Westward Farms Ltd v. Cadieux*, [1982] 5 W.W.R. 1 (Man. C.A.)). Some attempt has been made to find that a contract is valid and enforceable where the waiver of a true condition precedent was accepted by the other party. (See *Smale v. Van der Weer* (1977), 80 D.L.R. (3d) 704 (Ont. H.C.) and comments in *Giaouris v. Pristouris*, (1978), 2 R.P.R. 81 (Ont. C.A); leave to appeal to the S.C.C. dismissed.

[para30] In *Ed Sinclair Construction & Supplies Ltd v. Grunthaler* (1979), 18 AR. 162 this court had before it all of the cases cited above except *Westward Farms* which had not yet been decided, and found that there was a true condition precedent where a sale of land was contingent on the purchaser selling other property on which there was an outstanding offer made subject to the approval of the board of directors of that offeror. Before deciding whether it was possible to waive this true condition precedent, as the purchaser had attempted to do, the court chose to look at the timeliness of the purported waiver. The court agreed with the trial judge that the attempt to waive the true condition precedent occurred after the time for fulfilment of it and therefore could not be effective. The court said, at page 170:

"In cases, cited by counsel, in which the right of waiver of a financing condition had been exercised, notice of waiver by the purchaser was, in each, timely. I will show, presently, that the matter of timely notice is the weakness of the Sinclair [purchaser] position in this appeal. For that reason it becomes unnecessary to analyze each of the appellant's authorities although I confess to some difficulty reconciling the reasoning leading to the decision in some of these authorities with the rule in *Turney v. Zhilka*."

2. Analysis

[para31] There are two questions:

1. Was there a true condition precedent in the contract of May 10, 1989?
2. If yes, was there an effective waiver of it?

[para32] In order to construe the term said to be a true condition precedent, it is necessary to review the terms of the contract, the circumstances and the actions of the appellant and respondents. It is the intention of the parties that ultimately determines their duties under a contract containing a conditional clause. While it is true that the registration of a condominium plan depends on the will of a third party and that such is a feature of a true condition precedent, that, by itself, is not determinative.

[para33] The appellant, an experienced developer, was in the business of constructing and selling condominium units and knew what had to take place before a condominium plan could be registered. Although the trial judge found that at some point the appellant stalled in order to keep its options open, and the respondents were of the opinion that the appellant's other projects were given priority, the appellant moved ahead with the construction of the respondents' condominium.

[para34] The contract had standard clauses with provision to make some terms specific to each purchaser. As the trial judge noted, the appellant "built in the concept of change in the contract..." In view of the delays and difficulties it faced, it was not surprising that the appellant suggested a change to a "more reasonable" possession and closing date. The contract, clause eight, said the closing date was the later of November 1, 1989 or the date possession was granted. Clause twelve said the closing date was deemed extended until five days after the appellant advised the respondents of the registration of the condominium plan. The provision for registration by January 15, 1990 was the final sentence in this clause. These clauses set up a plan to protect the appellant should there be delays. In another clause, nine, the respondents covenanted to take possession when the condominium was substantially completed: "even though the Condominium Plan may not be registered and even though all exterior work, common areas and landscaping may not at such time be fully completed."

[para35] Upon signing the May 10, 1989 contract the respondents made lifestyle decisions based on their purchase of the condominium unit which would be constructed by the appellant to fulfil their unique requirements. They set about planning, making decisions and monitoring the progress of their purchase. The appellant worked with them and continued to do so even after January 15, 1990.

[para36] The essence of the appellant's argument is that a true condition precedent was inserted to protect both parties because the development of the project was in an early stage when the May 10, 1989 contract was signed. The effect of finding there was a true condition precedent would be that the parties did not have a contract for the purchase and sale of the condominium until the condominium plan was registered. They would, of course, have certain obligations: the appellant to pursue the fulfilment of the contract and work toward the registration, and both the appellant and the respondents not to withdraw from the contract until January 15, 1990 (providing the term was not fulfilled).

[para37] The question to be answered after this review is: did the appellant and respondents intend that there be no contract for the sale and purchase of a condominium if a condominium plan was not registered by January 15, 1990? The answer must be no. Certain action by the appellant is by itself very telling. The appellant began and continued to construct a customized condominium for the respondents and went on with that even after January 15, 1990. The provision for change in the contract, drafted by the appellant, anticipated difficulties and safeguarded the performance of the contract in spite of them. All of the actions of the respondents anticipated performance of this contract. From May 10, 1989, until the notice of February 19, 1990 the parties treated their obligations under the contract as binding.

[para38] The respondents contracted to buy a customized condominium and the appellant contracted to construct and sell it. The rights and obligations of the parties were not contingent upon the registration of a condominium plan; that was the final step in performance of the contract by the appellant, not the first step before performance could take place.

[para39] In conclusion, the registration of the condominium plan by a certain date was not true condition precedent. In view of this conclusion it is not necessary to deal with waiver.

[para40] The trial judge did not specifically refer to true condition precedent and did not analyze clause twelve. However, his conclusion that there was an amended contract which was valid and enforceable was an implicit rejection of the existence of a true condition precedent.

The Contract

1. Status

[para41] There remains the issue of whether the effect of the changes in the contract which took place at a meeting on January 22nd resulted in an amended contract or a new one or none at all.

[para42] At that meeting there was a discussion about extras for which the respondents agreed to pay an additional \$16,000 as well as \$4,000 for a management fee. Changes were handwritten on the appellant's copy of the May 10, 1989 contract to change the price from \$180,000 to \$200,000. The respondents were told that the new possession date would be May 1, 1990 and that they would be given a "cleaned up copy" of the contract. They never were. Price and possession date were the only modifications made to the May 10, 1989 contract.

[para43] The contract provided for adjustments to cover the costs of extras and management fees. In clause six, it said that the appellant need not supply extras unless the parties agreed to them, in writing, and the respondents agreed to pay for them when agreement was reached. Another clause, twenty, provided for a fee for a manager who could be the appellant. These clauses set up the mechanism for the parties to make the very modifications they did.

[para44] The possibility of a change in the possession date, and thus, the registration of the condominium plan and transfer of title was provided for in a number of clauses, including eight and twelve which have been discussed. The appellant had mentioned its difficulty in complying with the stated closing date of November 1, 1989 and indeed that date had passed prior to January 15, 1990 referred to for registration of the condominium plan and prior to the discussions on January 22, 1990. The respondents have argued that time was no longer of the essence in this contract. Thus, a change in the possession date (which the contract states means the closing date) was anticipated by all parties and was necessary. The appellant required the change and would have been in breach had it not made provision for such a modification. At the meeting the appellant modified the date to May 1, 1990 and the respondents had to accept it. [para45] These modifications, provided for in the contract and agreed to by the parties, resulted in an amended contract, not a new one. The trial judge found that the contract was amended, valid and enforceable. His conclusion was correct.

2. Performance by Respondents

[para46] The appellant alleges that because the respondents never did pay the appellant the \$20,000 for the extras and management fee nor pay a deposit of \$25,000 as provided they were not ready, willing and able to close the contract. The former was to be paid when agreement was reached. Although that did occur on January 22nd, the respondents were entitled to wait for the "cleaned up" contract to confirm that agreement was correctly documented before they paid. They asked for that document but never did get it. The \$25,000 was to be paid within ten days from the respondents receiving schedules specifically described in the contract. Again the respondents did not receive them.

[para47] There is no basis for suggesting that the respondents were not ready, willing and able to close. Inconsistencies in the Evidence

[para48] Most of the allegations were directed at the issue of certainty of terms of the contract. Counsel for the appellant advised that he was not pursuing this ground of appeal.

[para49] In any case, the trial judge made no error in dealing with the evidence.

Damages

1. For Breach

[para50] The appellant is correct in stating that damages for breach of contract in sale of land cases are usually assessed at the date of the breach unless there are special circumstances. (See *Mavretic v. Beauman* (1993), 30 R.P.R. (2d) 161 (B.C.C.A)). The trial judge found the date of breach was February 19, 1990 when the appellant gave the respondents the notice of termination. However, the trial judge chose July 1, 1990, the date he said the respondents abandoned the prospect of getting the condominium, as the date for the assessment of damages. I find that the date makes no difference to the assessment of quantum. Indeed, there is some force in the argument of the respondents that the damages provable at February 19, 1990 might have been higher.

[para51] The trial judge, in the face of having no expert evidence, set damages after reference to a number of figures. It is clear from his written reasons that he was aware of the factors which affected these figures including: the variable nature of the market, the speculative nature of the figures as given by the appellant, the change in the sale price offered to the respondents and the final sale price of the condominium without the customizing required by the respondents.

[para52] The appellant claims that the trial judge should have used a base price of \$200,000, to reflect the \$16,000 in extras and the \$4,000 management fee. However, there is no evidence whether the condominium as it finally sold had any or all of the extras and the management fee would no doubt have been paid by the new purchaser.

[para53] In the result, I find that the trial judge made no error in setting the damages at \$70,000.

2. Mental Suffering

The Law

[para54] The respondent submits that the trial judge erred in awarding damages for mental suffering because the conduct of the appellant did not constitute an independent actionable wrong. The appellant says that following the Supreme Court of Canada decision in *Vorvis v. I.C.B.C.* (1989), 36 B.C.L.R. (2d) 273 a claim for damages for mental suffering (or as it is sometimes referred to, mental distress) arising from a breach of contract cannot succeed unless the conduct in question constitutes an independent actionable wrong. This argument requires a review of the law to determine the appropriate test to be used in determining whether recovery for mental suffering ought to be granted in this case.

[para55] The *Vorvis* case dealt with an employment contract and a claim for damages for mental suffering as a result of wrongful dismissal. The Supreme Court of Canada agreed with the Court of Appeal and did not award damages. However, the Court took the opportunity to discuss the relevant law which included a discussion of the basis for aggravated and punitive damages. The majority judgement was written by Justice McIntyre. He characterized damages for mental suffering as a type of aggravated damage. After examining certain authorities (*Addis v. Gramophone Co.*, [1909] A.C. 488 (H.L.) and *Peso Silver Mines v. Cropper*, [1966] S.C.R. 673), he concluded that aggravated damages have generally not been granted in breach of employment contract cases because the employee/employer relationship is usually one where either party could terminate the contract by due notice and thus the only damage which could arise would be from a failure to give such notice.

[para56] After an extensive review of the authorities, which included cases where damages for mental suffering were awarded, he set out the words that have been interpreted to be the test at p. 288:

"I would not wish to be taken as saying that aggravated damages could never be awarded in a case of wrongful dismissal, particularly where the acts complained of were also independently actionable, a factor not present here." (emphasis supplied)

[para57] The judgement of Justice McIntyre, as analyzed by the Manitoba Court of Appeal in *Wallace v. United Grain Growers Ltd.*, [1995] 9 W.W.R. 153, a wrongful dismissal case, caused that court to conclude, at 181:

"Thus, any award of damages over the above compensation for breach of contract in failing to give reasonable notice must be founded on a separately actionable course of conduct." (emphasis supplied)

[para58] There is support for this conclusion in cases involving breach of employment contracts coming from other provinces. See: *Francis v. C.I.B.C.* (1994) 21 O.R. (3d) 75 (Ont. C.A.); *Trask v. Terra Nova Motors Ltd* (1995), 127 Nfld. & P.E.I.R. 310 (Nfld. C.A.); *Dooley v. C.N. Weber Ltd* (1995), 80 O.A.C. 234. See also comments in H.A. Levitt, *The Law of Dismissal in Canada*, 2d ed. (Aurora: Canada Law Book, 1994).

[para59] Referring back to the words used by Justice McIntyre it is clear that they: refer to a case of wrongful dismissal; do not totally preclude recovery; and set out a factor that will be important, namely, the existence of facts that are "independently actionable".

[para60] I conclude that Justice McIntyre said that courts have a discretion to award damages for mental suffering in cases of breach of contract but where the nature of the contract is an employment contract a critical factor will be the presence (or absence) of acts that are independently actionable.

[para61] The conclusion by certain courts (including Justice Wilson in her dissent) that Justice McIntyre was setting out a requirement rather than a very important factor is no doubt borne of a concern that any less stringent test will open the floodgates, particularly in breach of employment contract cases. With respect, I do not agree that the judgement of Justice McIntyre goes so far as to set out a threshold test. I find support for my conclusion in the decision of Justice Saunders of the Nova Scotia Supreme Court in *Gourlay v. Osmond* (1991), 104 N.S.R. (2d) 155 and that of Justice Deyell of the Court of Queen's Bench of Alberta in *Taylor v. Gill*, supra. [para62] The issue raised in the *Vorvis* case is the test for remoteness of damages in contract cases. The seminal case is *Hadley v. Baxendale* (1854), 9 Exch. 341, 156 E.R. 145 (Exch.) where Baron Alderson said at p. 151:

"Now we think the proper rule in such a case as the present is this:- Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them."

[para63] Professor Fridman discusses the rule set out in *Hadley v. Baxendale* in his text, supra at 711-744, and points out that there are two components to the rule, one objective and one subjective. He says, at p. 719: "The application of the first branch of the *Hadley v. Baxendale* rule, the objective test, depends upon the nature of the transaction that is involved in any individual case." By contrast, he says at p. 729, that the foundation for the application of the second aspect, the subjective test:

"...is the defendant's knowledge of some special circumstances which would lead him to realize, as a reasonable man seized of that knowledge, that the plaintiff might suffer some extra, extraordinary, or normally unforeseeable damage, beyond or different from the kind or extent of damage which would otherwise be within the 'reasonable contemplation' of the parties."

[para64] The objective part of the rule in *Hadley v. Baxendale* has undergone some modification through the decisions in *Victoria Laundry Ltd. v. Newman Indust. Ltd.*, [1949] 1 All E.R. 997 (C.A.) and *Koufos v. C. Czarnikow Ltd: The Heron II*, [1967] 3 All E.R. 686 (H.L.). The discussions and disputes that followed those cases highlighted the tension between the criteria and tests for limiting liability in contract law as contrasted with tort law. See *Fridman* at 715.

[para65] Justice Wilson, writing for the minority in *Vorvis*, said that she thought the proper approach to take in deciding a claim for damages for mental suffering was to apply the basic principles of contract law relating to remoteness as set out by Baron Alderson in *Hadley v. Baxendale*.

[para66] In his text Professor *Fridman* noted that *Hadley v. Baxendale* has been the accepted test. As cited by Justice Wilson at p. 297, he said at p. 675 of his second edition (now to be found in the post-*Vorvis* third edition at p. 736):

"By intangible loss is meant such consequences as loss of reputation, insult, annoyance, aggravation, nervous shock, inconvenience, mental distress, or other emotional or sentimental suffering. In recent years, in England and Canada, there has been a growing realization that such results of a breach of contract should also be the subject of compensation, as long as the doctrine of *Hadley v. Baxendale* is applicable. There has been a greater acceptance of the idea that such damages can, and should be awarded in appropriate cases." [emphasis added]

[para67] Justice Wilson found a "common denominator" in the cases where damages were awarded, that being that the parties should reasonably have foreseen mental suffering as a consequence of a breach of contract at the time the contract was entered into. She concluded at p. 301:

"It is my view, that the established principles of contract law set out in *Hadley v. Baxendale* provide the proper test for the recovery of damages for mental suffering. The principles are well-settled and their broad application would appear preferable to decision-making based on a priori and inflexible categories of damage. The issue in assessing damages is not whether the plaintiff got what he bargained for, i.e. pleasure or peace of mind (although this is obviously relevant to whether or not there was a breach), but whether he should be compensated for damage the defendant should reasonably have anticipated that he would suffer as a consequence of the breach."

[para68] Justice Wilson applied the *Hadley v. Baxendale* analysis to the facts before her and concluded, as had the majority, that there was no basis for granting damages for mental suffering.

[para69] My conclusion is that the determination of a claim for mental suffering or distress in a breach of contract suit must begin with the application of the rule in *Hadley v. Baxendale*. The rule has within it the means to test and limit liability where the claim arises through special circumstances, which will be the usual case with mental suffering or distress. The contract must be made on the basis of those special circumstances being known to the parties and the plaintiff having communicated them to the defendant. Also, the plaintiff bears the further burden of having to prove the causal link between the breach and the mental suffering or distress and foreseeability of that injury. Damages would be restricted to those that "would ordinarily follow from a breach under the special circumstances so known and communicated." A breach of contract will often result in unhappiness, frustration, inconvenience, anger and even malevolence. The rule is not intended to assure compensation in those cases. The rule allows a court to award damages but does not mandate doing so.

Analysis

[para70] The trial judge found the female respondent, in particular, suffered severe mental distress and the respondents together suffered a total disruption of their lifestyle as a result of the breach of contract. He also found that the special needs and requirements of the respondents with regard to the condominium were well known to a number of individuals, including the owner of the appellant.

[para71] The trial judge was clearly alive to the issue of causation and remoteness of damage. He concluded:

"The mental distress suffered by Mrs. Kempling was caused by the breach of contract by the Defendant. Her distress at losing her "dream home", failing her father, giving up her Calgary employment, moving to Nanaimo, securing a residence in Nanaimo and seeking employment in Nanaimo, plus the direct impact of the breach, were all among the causes of the mental distress. All of these factors are directly linked to the breach of contract and I find as a fact that they were not too remote. I also find that they were not too remote as a matter of law. It was clearly within the reasonable contemplation of the parties that mental distress could follow from this breach of contract."

[para72] The trial judge referred to *Taylor v. Gill*, supra at 373, where Justice Deyell said:

"It is clearly within the reasonable contemplation of the parties that mental distress could follow the breach of contract."

In coming to his conclusion, Justice Deyell canvassed the many cases where damages for mental suffering were awarded, including cases where the contract involved real estate. He set out a series of questions with which to measure the plaintiffs claim. This is a helpful analytical model but, of course, does not displace the tests enunciated in *Hadley v. Baxendale*.

[para73] Applying the rule in *Hadley v. Baxendale*, it is clear that this was a case in which there were special circumstances under which the contract was made which were communicated to the appellant. The respondents proved the link between the breach of contract and the injuries and that it was foreseeable that mental suffering and distress would result. There were damages resulting from the breach which included the mental suffering and the total disruption of lifestyle, and which represented an injury which would "ordinarily follow from a breach of contract under these special circumstances so known and communicated." Thus, all aspects of the rule were fulfilled. The judge quantified the damages at \$7,500.

[para74] In this decision the trial judge made no error.

[para75] In the result, the appeal is dismissed.

PICARD J.A.

[para76] HARRADENCE J.A.:-- I agree with my colleague Picard J.A. that this appeal must be dismissed. The learned trial judge did not err in finding that the Appellant breached its contract with the Respondents, nor in his assessment of damages. However, rather than coming to the conclusion that clause twelve of the contract did not contain a true condition precedent, would find that the condition precedent was mutually waived by the parties.

[para77] The relevant portion of clause twelve of the contract, which the Appellant claims is a true condition precedent, reads as follows:

If the Condominium Plan is not registered by January 15, 1990, this Agreement shall be null and void and the Vendor shall return to the Purchaser, without interest, all purchase monies paid, subject to all proper deductions as provided for in this Agreement.

[para78] As Picard J.A. notes, it is the intention of the parties which determines the effect of this clause. But that intention, first and foremost, must be found in the words that the parties chose. Failing any ambiguity, it is not for the Court to look to how the parties acted in order to attribute the proper meaning to the sentence in question. As Gerwing J.A. stated in *Canada Safeway Ltd. v. Saskatchewan Joint Board et al.* (1988), 74 Sask. R. 152 at pp. 154-5 (C.A.),

It is the most fundamental rule of contractual interpretation that if a contract is clear it must be taken to mean what it says; without inherent ambiguity none of the other rules for construing a contract or adducing further evidence to explain it are relevant.

Here, there is no ambiguity. The registration of the Condominium Plan depended ultimately upon a third party, although it was incumbent upon the Appellant to take all reasonable steps to seek registration. The sentence in question clearly states that the agreement would be "null and void" in the event that registration had not been effected by January 15, 1990. This was a true condition precedent.

[para79] The law is quite clear that a condition precedent cannot be waived unilaterally, even by the party for whose benefit the condition is intended: see *Turney and Turney v. Zhilka* (1959), 18 D.L.R. (2d) 447 (S.C.C.); *Barnett v. Harrison* (1975), 57 D.L.R. (3d) 225 (S.C.C.); and *Ed Sinclair Construction & Supplies Ltd. v. Grunthaler* (1979), 18 A.R. 162 (C.A.).

[para80] But where both parties to a contract agree, prior to a contract being rendered void by the failure of a true condition precedent, that the condition precedent may be postponed or disregarded, then justice requires that those parties be bound by such agreement. The *Turney v. Zhilka* rule precludes unilateral waiver, but does not concern the right of parties to mutually agree to waive or alter the condition. I agree with the statement in G.H.L. Fridman, *The Law of Contract in Canada*, Third Edition (Toronto: Carswell, 1994) at p. 442, that a condition precedent may be dispensed with "if the parties make a new or further agreement, either varying the original contract by omitting or bilaterally waiving the condition precedent..." (emphasis added).

[para81] Authority that this may be accomplished by mutual agreement of the parties may be found in *Smale v. Van der Weer* (1977), 80 D.L.R. (3d) 704 (Ont. H.C.) and *Giaouris v. Pristouris* (1976), 2 R.P.R. 81 (Ont. C.A.), leave to appeal to the S.C.C. dismissed. In *Giaouris*, the Ontario Court of Appeal accepted that a waiver of a condition precedent could be effective where the other party's conduct amounted to an "acceptance" of the waiver. Arnup J.A. said at p. 89:

In our view, there was what has been termed in argument an "acceptance of the waiver" by the defendant. In other words, the written document of waiver was treated by the defendant and her solicitor as effective in accordance with its terms. By their subsequent conduct, they represented that the purchase would be closed in accordance with its terms, without reference to the condition precedent...

We therefore hold that having regard to the conduct of the defendant following the delivery of the waiver by the plaintiff of the provisions in the agreement of purchase and sale respecting the obtaining of a mortgage, the defendant cannot now assert that the contract became null and void for non performance or non-fulfilment of the condition in question.

[para82] A more recent case is *Harding Addison Properties Ltd. v. Campbell* (1992), 28 R.P.R. (2d) 284 (Ont. Ct. Den. Div.). There it was held that both parties to a contract, by their conduct in continuing to treat the contract as though it was not rendered void by operation of a condition precedent, had mutually waived a time requirement for registration of a condominium.

[para83] Another authority which must be mentioned is *Westward Farms Ltd. v. Cadieux* (1982), 16 Man. R. (2d) 219 (C.A.). In that case O'Sullivan J.A. rejected the argument that a condition precedent had been waived by the parties' conduct. However, there was no evidence there that the condition precedent had been treated as waived prior to the date on which the contract became void for failure of condition precedent. Waiver was held not to be possible after the contract ceased to exist, and there was insufficient evidence that the parties had subsequently reached a new agreement in the same terms as the original.

[para84] Although Alberta courts do not appear to have directly addressed this issue in the context of true conditions precedent, this court in *Anguish v. Maritime Life Assurance Company* (1987), 51 Alta. L.R. (2d) 376 (C.A.) did accept that contractual rights could be waived by conduct.

[para85] In the present case I have no doubt that the Appellant and the Respondents, by their conduct prior to January 15, 1990 (the date by which the condominium registration had to be effected), mutually expressed their intention to carry out the agreement without reliance upon the condition precedent. The critical factors which require this conclusion are as follows:

- * the contracted possession date was November 1, 1989;
- * delays were experienced from the outset of the project; by early fall of 1989 the Appellant's agent targeted February 1, 1990 as a "new" closing date; * in December, 1989 the Appellant discovered problems with the soil conditions at the building site, delaying the project further;
- * also in December, 1990, according to the testimony of the Appellant's president (at AB pp. 356-8), the controlling shareholder of the Appellant directed the president and employees of the Appellant not to prepare a proposed condominium plan, with a view to retaining "an out clause" (i.e. the condition precedent);

* despite this, the conduct of the Appellant's president and employees was in every way aimed at preserving the agreement with the Respondents; there was no suggestion made to the Respondents that the sale would collapse if registration was not effected by January 15th, 1990; indeed the Appellant's president testified that although they were aware of the condition precedent, they were "dealing in good faith" and "trying to maintain a business deal that we made" (AB p. 357), and there was no expectation of treating the deal as void simply because that date had passed: Now, obviously we couldn't register the plan by January 15th in any way, shape, or form. That was an impossibility. So I wouldn't say that it was -- you know, it would be unfair to Mr. Will [the controlling shareholder of the Appellant] to say that the magic date was the 15th. That if we didn't have the plan registered that suddenly the deal was null and void. (Emphasis added; AB p. 358)

* in the first week of January, 1990, the Appellant's agent indicated that March 31, 1990 would be a more likely possession date; again, the parties clearly demonstrated their intention to carry on with the agreement notwithstanding that there was no expectation of meeting the January 15, 1990 registration condition;

[para86] The conduct of all parties right up to January 15, 1990 was, in short, consistent only with one conclusion: the parties accepted that there was and would continue to be a contract for purchase and sale even after January 15, 1990. True, the Appellant's controlling shareholder knew about and wanted the benefit of being able to take advantage of the condition precedent if it suited him. But the overriding intention of the Appellant, as expressed in the conduct of its officers and employees, was to "go ahead" with the deal without regard to the condition. The Respondents, by their conduct, expressed a similar intention to waive reliance upon the condition. That this was the case was then clearly confirmed by the conduct of the parties after January 15, 1990. This included:

* on January 19, 1990 the Respondents and the Appellant's agents met and set an appointment to discuss and agree on the cost of extras;

* on January 22, 1990 the Appellant's agents proposed in writing to amend the agreement; the Respondents refused to pay an increased price, but did agree with the Appellant on an amount for "extras", as originally contemplated by the agreement; the Respondents were told that the possession date would now be May 1, 1990 and that they would receive a "cleaned up" copy of the contract by January 28, 1990 (which they never received);

* on February 6, 1990 the Respondents, at the arrangement of the Appellant's agent, met with a supplier to choose kitchen cabinets; other work on the unit also continued during late January and early February; * on February 19, 1990 the Appellant again sought to raise the purchase price; the Respondents refused to agree, whereupon they were presented with a letter claiming that the agreement was terminated by virtue of the non-fulfilment of the condition precedent.

[para87] This sequence of events demonstrates that none of the parties were prepared to treat the agreement as coming to an end on January 15, 1990. Before that date, they were anticipating completing the sale (and in consequence pushed the possession date later) even though there was no reasonable expectation that the condominium plan would be registered as required by Clause 12. In the context of the relationship between these particular parties, and given their confirming conduct after January 15, 1990, this amounted to a mutual waiver of the condition precedent.

[para88] On this basis, I find that the learned trial judge did not err in concluding that the Appellant breached the contract in question. As noted above, I agree with Picard J.A. with respect to the question of damages, and with her disposition of the appeal.

HARRADENCE J.A.

[para89] COTÉ J.A.:-- I agree that the rules for damages for mental distress may well be different in wrongful dismissal cases and in other cases. And I agree that such a claim must pass the rule in *Hadley v. Baxendale* to survive. But whether a plaintiff must pass any other tests (independent cause of action or otherwise) to get such damages, is a more difficult question. I find it hard to discuss that last question in the abstract. It may well depend on the facts or type of case.

[para90] In this appeal, the condominium unit was expressly designed and sold to accommodate an elderly father with special needs. That was not delivered, and the respondent plaintiff was then faced with a father hundreds of kilometres away needing special care which her former residence in Calgary could not give. The trial judge felt that her move to the father's town in British Columbia was a reasonable way to solve that problem. Whether viewed as foreseeable damage, or as reasonable mitigation, I agree that the sum awarded for the move was a reasonable damage assessment. So I do not find it necessary to say whether or not it was also properly allowable as damages for mental suffering.

COTÉ J.A.

CBR# 341

Re Waterloo North Condominium Corporation No. 198 and Donner

36 O.R. (3d) 243

Ontario Court (General Division), Salhany J., October 21, 1997

APPLICATION for a declaration that a condominium unit-holder was in breach of the condominium's declaration and rules and regulations.

Douglas S. Rose, for applicant. Timothy C. Flannery, for respondent.

SALHANY J.: -- Although the facts are straightforward, the question which must be decided is not. At issue is whether the applicant is entitled to a declaration that the respondent is in breach of s. 3.5 of the condominium declaration and the rules and regulations of the applicant. The facts are these.

The Facts Waterloo North Condominium Corporation No. 198 is located at 6 Willow Street, Waterloo, and is known as Waterpark Place. Section 3.5 of the declaration of the condominium corporation provides as follows:

No dogs or other animals or pets of any nature shall be kept or allowed in any Unit or the Common Elements, including the Exclusive Use Common Elements of any Owner.

Section 12.1 of the declaration goes on to state that all owners, tenants and residents of units shall be subject to, and shall comply with, the provisions of the Condominium Act, R.S.O. 1990, c. C.26, this declaration, the bylaws and the rules and regulations and that by acceptance of a deed, they have accepted the declaration, the bylaws, rules and regulations.

Section IV of the rules and regulations further states that all residents must comply with the following rules governing pets:

1. No pets shall be permitted kept [sic] on the property;
2. Visitors are not permitted to bring pets into the project;
3. Pets are not permitted in any one of the recreation areas.

The respondent purchased Unit 604 at Waterpark Place pursuant to an agreement of purchase and sale dated March 12, 1989. Under the terms of that agreement, and also the interim occupancy agreement which she signed on the same date, Ms. Donner agreed to abide by the provisions of the proposed declaration, bylaws and rules of the condominium corporation.

Ms. Donner did not immediately move into the condominium unit which she had purchased but rented it out to other tenants. However on November 16, 1996, she advised the applicant by letter that she intended to move into her unit in the spring of 1997 with her mother. In that letter, she advised the applicant that her mother had a dog which her mother needed for assistance because of her total deafness and wanted the dog to live with them. She requested that an amendment be made to the no pet clause due to the circumstances. The applicant responded by memo dated December 10, 1996 denying her request. Despite that denial, the respondent and her mother, along with the subject dog, moved into the unit in March of 1997 and continue to reside in their unit.

The application brought by the corporation is supported by 117 unit owners out of a possible 172 and by the Board of Directors of Waterloo North Condominium Corporation No. 145, a neighbouring condominium which shares common elements with the applicant.

Submissions

Mr. Rose pointed out that the no pet provision is not only contained in the bylaws and regulations of the corporation but also in the declaration dated September 6, 1991, made pursuant to the Condominium Act. He pointed out that a declaration cannot be amended without 100 per cent approval of all of the unit holders. Every unit-holder, he said, bought their unit on the understanding that there would be no pets in the building. Thus, he argued, the restriction is not an unreasonable one and therefore the rights of every unit-owner should be respected. He relied upon ss. 12, 31 and 49 of the Condominium Act. The relevant portion of those sections provides as follows:

12(3) The corporation has a duty to effect compliance by the owners with this Act, the declaration, the by-laws and the rules.

(5) Each owner and each person having a registered mortgage against a unit and common interest has the right to the performance of any duty of the corporation specified by this Act, the declaration, the by-laws and the rules.

(1) Each owner is bound by and shall comply with this Act, the declaration, the by-laws and the rules.

(2) Each owner has a right to the compliance by the other owners with this Act, the declaration, the by-laws and the rules.

(3) The corporation, and every person having an encumbrance against any unit and common interest, has a right to the compliance by the owners with this Act, the declaration, the by-laws and the rules.

49(1) Where a duty imposed by this Act, the declaration, the by-laws or the rules is not performed, the corporation, any owner, the bureau, or any person having a registered mortgage against a unit and common interest, may apply to the Ontario Court (General Division) for an order directing the performance of the duty.

(2) The court may by order direct performance of the duty and may include in the order any provisions that the court considers appropriate in the circumstances.

Both counsel agree that this court has the discretion whether to enforce compliance or not, but such discretion must be exercised judicially.

At the outset, Mr. Rose argued that in exercising my discretion, I should not indulge in assessing whether the "no pet" restriction is reasonable. He relied upon the decision of the Ontario Court of Appeal in *York Condominium Corp. No. 382 v. Dvorchik*, [1997]. In that case, York Condominium Corporation had applied under s. 49(1) of the Condominium Act for an order directing the unit-holders to comply with a condominium rule which required that no pet weigh more than 25 pounds. Keenan J., who heard the application, found that the "25 pound rule" was invalid and unenforceable in the absence of evidence that (a) "large dogs are any more of a threat to the safety, security or welfare of the owners than are smaller dogs"; or (b) "large dogs unreasonably interfere with the use and enjoyment of the common elements and of other units any more so than smaller dogs". For those reasons, he dismissed the application. The Court of Appeal said that he erred. The court noted that the board of directors of a condominium corporation derives its authority to make rules under s. 29 of the Condominium Act. The only limitation on the nature of those rules is set out in s. 29(2) which states that the rules be "reasonable" and "consistent" with the Condominium Act. In allowing the appeal and granting the relief requested, the court held that the board was not required to hear evidence in reaching its conclusion that larger pets be prohibited. In making its rules, the board was not performing a judicial role, and no "judicialization should be attributed either to its function or to its process". The court also said that in an application brought under s. 49(2), a court should not substitute its own opinion about the propriety of a rule enacted by a condominium unless the rule is clearly unreasonable or contrary to the legislative scheme. Since the court could not find the rule unreasonable, the appeal was allowed and the order of Keenan J. set aside.

Mr. Flannery argued that the "no pet" restriction is unreasonable in the circumstances of this case and that I should exercise my discretion not to give effect to it. Moreover, even if it is not unreasonable, then the restriction in so far as it relates to Ms. Donner's mother contravenes the Ontario Human Rights Code, R.S.O. 1990, c. H.19, because of her particular disability. Section 11(1) of the Code renders a requirement, qualification or factor constructive discrimination where it "results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member".

He pointed to s. 2(1) of the Code dealing with harassment in accommodation. That section provides:

2(1) Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, handicap or the receipt of public assistance.

Section 10 of the Act defines handicap to include "deafness or hearing impediment". Mr. Flannery submitted that the evidence indicates that Ms. Donner's mother requires the dog to assist her because of her deafness.

Mr. Rose made two points in reply. First of all, he relied upon the judgment of Mr. Justice Herold in *Metropolitan Toronto Condominium Corp. No. 776 v. Gifford*, [1989] (H.C.J.). There Herold J. expressed doubt that the Human Rights Code applied to a declaration under the Condominium Act. Mr. Rose's main submission, however, was that enforcement of the declaration was not an act of discrimination against the respondent's mother. She was not being asked to leave the condominium. It was her dog that was being asked to leave. Finally, he also argued that the evidence did not support the conclusion that she could not reside in the premises without her dog.

Discussion

In this case, s. 29(1) of the Condominium Act has no application to these proceedings. Section 29(1) deals with rules governing the use of common elements and the units. Section 29(2) requires that such rules "be reasonable and consistent with" the Act, the declaration and the by-laws. We are dealing here with a declaration. The question of the "reasonableness" of the declaration is not an issue that may be attacked. Even assuming that it is an issue, I am not convinced that a "no pet" restriction is unreasonable. Surely those purchasers of a unit who understood that they were buying into a "no pet" building are entitled to have that understanding protected. If the respondent is to succeed in this application, then it must, in my view, be on the basis that the declaration violates the Ontario Human Rights Code.

With respect, I cannot agree with Herold J. that the Code does not apply to a declaration made under the Condominium Act. As McIntyre J. noted in *Ontario Human Rights Commission v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202 at p. 214, 3 C.H.R.R. 781 at p. 785, "[t]he Ontario Human Rights Code has been enacted by the legislature of the Province of Ontario for the benefit of the community at large and of its individual members". The parties are not entitled to contract out of its provisions. To allow the parties to do so would be contrary to public policy. Surely, a declaration prohibiting accommodation based on race, such as a "no blacks" or a "no whites" clause, would offend and not be tolerated by right-thinking members of the Canadian community. It would conflict with the Code, notwithstanding that the unit buyers contracted to live in an "all white" or an "all black" building. I cannot see why handicapped people are entitled to any less protection under the Code. In my view, the Human Rights Code precludes enforcement of the declaration if it would result in the discrimination of Ms. Donner's mother because of her specific handicap.

Mr. Rose argued that the declaration does not prohibit Ms. Donner's mother from living in the condominium, only her dog. The difficulty which I find with that argument is that enforcement of the declaration would effectively prohibit her from living in the building. The evidence is that she is 85 years of age and has been deaf for many years. She is fully dependent on her dog to enable her to function on her own. For example, the dog assists her in hearing the heat alarms, smoke alarms, the telephone, and the intercom if someone is at the door. In other words, it is the dog who hears for her and alerts so that she can function without the assistance of another human being.

In my view, it is not incumbent on Ms. Donner to establish that there are no other ways for her mother to function independently of her without a dog, such as with the hiring of a housekeeper. There is no obligation upon her to exhaust every other means of assistance before she is entitled to the protection of the Ontario Human Rights Code.

It must be clearly understood that by refusing the declaration sought by the applicant, I am not indicating that it is unreasonable and prima facie enforceable. I am only refusing to enforce it because its strict application against Ms. Donner's mother would amount to a breach of the Code. It must also be understood that the dismissal of this application does not entitle the respondent's mother to allow the dog to wander at will in the common areas of the condominium. The present practice of taking the dog out in a tote bag daily for walks must be maintained so that the rights of the other unit-holders may be maintained.

The application will be dismissed, but in the circumstances, without costs.

Application dismissed.

CBR# 251

Re Carleton Condominium Corp. No. 279 and Rochon et al.

59 O.R. (2d) 545

ONTARIO COURT OF APPEAL GOODMAN, ROBINS AND FINLAYSON JJ.A. 1ST MAY 1987.

APPEAL from a judgment of Hollinger D.C.J. dismissing an action for an order requiring the respondents to remove a satellite dish.

Janice B. Payne, for appellant.

John D. Peart, for respondents The judgment of the court was delivered by

FINLAYSON J.A.:-- The appellant, Carleton Condominium Corporation No. 279 ("Carleton Condominium") appeals from the judgment of His Honour Judge Hollinger of the District Court of Ontario, Judicial District of Ottawa-Carleton, requesting that the judgment be set aside and judgment be granted requiring the respondents, Guy Rochon and Sondra Rochon (hereinafter the "Rochons") to dismantle and remove, at their expense, a satellite dish which has been installed by the Rochons upon the common elements of the corporation, namely, the roof of an eight-storey condominium building.

There is an agreed statement of facts, portions of which I will refer to below.

Carleton Condominium is a corporation created by operation of the Condominium Act, R.S.O. 1980, c. 84 (sometimes hereinafter "the Act"), by registration of a declaration and description on March 19, 1985. The developer was a company called Melgro Developments Ltd. ("Melgro") and it was the declarant of Carleton Condominium within the meaning of the Act. Prior to this date, purchasers of units from Melgro had received copies of the proposed declaration, by-laws and rules in the current disclosure statement provided for by s. 52 of the Act. Some of the purchasers took occupancy of the units prior to the registration of the declaration.

The Rochons entered into an agreement of purchase and sale dated December 7, 1983, whereby they agreed to purchase from Melgro one of two penthouse units in the proposed condominium. Paragraph 44 of the agreement provided as follows:

The Purchaser shall have the right and on final closing shall receive the consent of the condominium corporation to install a satellite dish on the roof of the building, such dish to be maintained by the Purchaser.

Melgro prepared drawings at the Rochons' expense for the type of support post required for the satellite dish and the method of its installation to the mechanical penthouse of the building. The support post was manufactured and installed by Melgro. The satellite dish was approximately eight feet in diameter and reached a height of approximately 12 feet above the roof. It was installed and has been used exclusively for the benefit of the Rochons.

On the creation of the corporation, the board of directors consisted of representatives of the declarant, Melgro, and that board of directors provided its consent to the installation of the satellite dish by way of a resolution dated March 20, 1985. The motion read as follows:

Upon Motion duly made, seconded and unanimously carried, it was resolved that the said Sondra Rochon and Guy Rochon be permitted to install said "satellite dish" on the roof of the building, subject to their obtaining all necessary municipal approvals prior to such installation. Such "satellite dish" to be maintained by the said Sondra Rochon and Guy Rochon. That the Secretary be authorized to issue a consent on behalf of the corporation for such installation.

The by-laws and rules of Carleton Condominium were registered on April 1, 1985, after the installation of the satellite dish. The satellite dish itself was destroyed in a storm on April 6, 1985, and was replaced on April 12, 1985.

On the closing of their purchase on April 30, 1985, the Rochons received, through their solicitor, a consent from Carleton Condominium, signed by the secretary of the corporation and under the seal of the corporation, consenting to the installation of the satellite dish. The consent read as follows:

Carleton Condominium Corporation No. 279 does hereby consent to the installation of a satellite dish on the roof of the building, such satellite dish to be maintained by Sondra and Guy Rochon, the purchasers of the above-noted unit.

The Rochons did not obtain the consent of the other unit owners in Carleton Condominium either before or after the creation of the corporation. There was no meeting of unit owners to consider such consent and there have been no by-laws, resolutions or approvals for the installation of the satellite dish except as described above. It is agreed that the mechanical penthouse and roof are part of the common elements of Carleton Condominium.

The relevant portions of the declaration of the corporation read as follows:

4.1 Use of Common Elements. Subject to the provisions of the Act, the Declaration, the by-laws and the rules, each owner has the full use, occupancy and enjoyment of the whole or any part of the common elements, except as herein otherwise provided.

Additions, Alterations and Improvements.

4.7.1. For the purposes of subsection 1 of Section 38 of the Act, the Board shall decide whether any addition, alteration or improvement to, or renovation of, the common elements, or any change in the assets of the Corporation is substantial.

4.7.2. No alteration, work, repairs, decoration, painting, maintenance, structure, fence, screen, hedge or erection of any kind whatsoever (the "work") shall be performed, done, erected or planted within or in relation to the common elements (including any part thereof over which any owner has the exclusive use) except by the Corporation or with its prior written consent or as permitted by the by-laws or rules. Units Subject to Declaration, By-Laws, Common Element Rules and Rules and Regulations

9.1.1 All present and future owners, tenants and residents of units, their families, guests, invitees or licencees, shall be subject to and shall comply with the provisions of this Declaration, the by-laws, and any other rules and regulations of the Corporation.

9.1.2 The acceptance of a deed or transfer, or the entering into a lease, or the entering into occupancy of any unit, shall constitute an agreement that the provisions of this Declaration, the by-laws, and any other rules and regulations, as they may be amended from time to time, are accepted and ratified by such owner, tenant or resident, and all of such provisions shall be deemed and taken to be covenants running with the unit and shall bind any person having, at any time, any interest or estate in such unit as though such provisions were recited and stipulated in full in each and every such deed, or transfer or lease or occupancy agreement.

9.4 Conflict. In case of conflict between any provision hereof and the Act, the Act governs. In case of conflict between any provision in any By-law or Rule and the Act or this Declaration, the Act or this Declaration, as the case may be, governs. The invalidity of any part of this Declaration does not affect the validity of the remainder.

The rules of the corporation attached to By-law 1, registered April 1, 1985, had been approved by the board of directors consisting of representatives of Melgro, and by Melgro itself as the owner of all of the condominium units at that time. They provided in part as follows:

1.03 Rules for Use of Common Elements.

(a) The common elements, save and except the parts of the common elements designated for exclusive use by an owner, shall not be obstructed by any owner, his family, guests, tenants, servants, agents or visitors or used by any of the for any purpose other than for ingress and egress to and from their respective units or for such purposes as the Board may direct.

(b) No owner shall place, leave or permit to be placed or left in or upon the common elements, any goods, things, debris, refuse or garbage.

(f) No television antenna, aerial, tower or similar structure and appurtenances thereto shall be erected on or fastened to the outside of any unit.

(Emphasis added.)

On May 31, 1985, at a meeting of unit owners called pursuant to s. 26 of the Act, a new board of directors was elected, consisting of three new unit owners who had purchased their units from Melgro. This board of directors made inquiries concerning the satellite dish and formally requested that the Rochons remove it in September of 1985. An application to Judge Hollinger of the District Court for an order requiring the Rochons to dismantle and remove the satellite dish was dismissed. The learned judge was of the view that the consent given to the Rochons on closing, although it violated rule 1.03(f), was valid because 4.7.2 of the declaration read with 9.4 provided for such written consent.

The issue on appeal is whether or not the Rochons, pursuant to either or both the agreement of purchase and sale and the consent of the board of directors granted at a time when the board consisted of representatives of the declarant Melgro, and at a time when the declarant owned all units in Carleton Condominium, had the right to install a satellite dish upon the common elements of the corporation.

The issue is an important one given that so many units in condominiums are sold in today's market before the building is erected. Here we have a classic conflict between the Rochons as unit owners who purchased in good faith and other unit owners who purchased without knowledge of the special arrangements made by the Rochons. To resolve this conflict it is necessary to look at the Condominium Act and determine its purpose and intent.

The Condominium Act was passed to permit individuals to be owners of the freehold estate in residential units in a building as opposed to tenants in an apartment building. This means that they have disposable real property which is an investment and not simply an expense. Its purchase can be financed by mortgage or lien in the same manner as any piece of real estate. The unit owners are tenants in common and have all the rights of any owner of land within the description of their unit (s. 1(1)(q) and (z)). By the nature of the building, there are certain "common elements" which are defined by s. 1(1)(g) as "all the property except the units". It is therefore necessary that there be detailed agreements with respect to the maintenance, operation and occupation of these common elements so that the responsibilities and privileges of each unit owner are clearly established.

To this end, the Act contemplates that a builder or developer shall register under the Land Titles Act, R.S.O. 1980, c. 230, or the Registry Act, R.S.O. 1980, c. 445, what is called a "declaration and description" in "a register" known as the Condominium Register (s. 5(3) and (4)). In addition to the declaration and description, the developer must register by-laws, notices of termination and other instrument respecting the land covered by the declaration and description. These by-laws and the rules contained therein govern, among other things, the rights of the unit owners in the common elements. They are vital to the ownership of the units. Section 6(2) provides that subject to the Act, the declaration and the by-laws, each owner (of the unit) is entitled to exclusive ownership and use of his unit.

The registration of the declaration and description created Carleton Condominium as a corporation without share capital whose members were the owners of the units from time to time (ss. 10(1) and 1(1)(q)). Section 3(1) sets out what that declaration must contain. Section 3(1)(f) is important for the purposes of this appeal in that it provides for:

(f) a specification of any parts of the common elements that are to be used by the owners of one or more designated units and not by all the owners.

Section 3(4) provides that the declaration may be amended only with the consent of all unit owners and all persons having registered mortgages against the units and common interests. A District Court judge can amend the declaration in limited circumstances (s. 3(8)).

Section 4(1) provides that the description shall contain a plan of survey showing the perimeter of the building, the structural plans, specifications of boundaries and other matters relating to the structure of the building.

As I have said, it is the registration of the declaration and description under s. 10(1) of the Act that creates the corporation. While it has a seal (s. 11(1)) and a board of directors (s. 15(1)), it is not subject to the provisions of the Corporations Act, R.S.O. 1980, c. 95, and the Corporations Information Act, R.S.O. 1980, c. 96 (s. 10(3)).

The object of the corporation is to manage the property and assets of the corporation (s. 12(1)), and the affairs of the corporation are managed by a board of directors elected by the owners consisting of three persons or such greater number as the by-laws may provide (s. 15(1)). The shareholders of the corporation are the owners of the units and all voting by owners is on the basis of one vote per unit (ss. 1(1)(q) and 22(1)). Section 18 of the Act provides that:

18(1) A corporation shall hold an annual meeting of the owners not more than three months after the registration of the declaration and description, and subsequently not more than fifteen months after the holding of the last preceding annual meeting, and at such meeting any owner or any mortgagee entitled to vote shall have an opportunity to raise any matter relevant to the affairs and business of the corporation.

Section 26 provides that the board of directors which is

26(1) ... elected at a time when the declarant owns a majority of the units shall, not more than twenty-one days after the declarant ceases to be the registered owner of a majority of the units, call a meeting of the owners to elect a new board, and such meeting shall be held within twenty-one days after the calling of the meeting.

What is contemplated is that the original developer or declarant, once he has sold off the units to the unit owners, will withdraw from the management of the corporation.

Section 29 of the Act provides that the board may make rules with respect to

29(1) ... the use of common elements and units or any of them to promote the safety, security or welfare of the owners and of the property or for the purpose of preventing unreasonable interference with the use and enjoyment of the common elements and of other units.

but these rules must be reasonable and consistent with the Act, the declaration and the by-laws.

Section 31 provides that each owner is bound by and shall comply with the Act, the declaration, the by-laws and the rules and that each owner has a right to the compliance by the other owners with the Act, the declaration, the by-laws and the rules. It is only under s. 38 that the corporation may by a vote of owners of the units make any addition, alteration or improvement to or renovation of the common elements or may make any change in the assets of the corporation. This section will be dealt with in more detail later.

It appears then, that the creation of the corporation is the filing of the declaration and description which contain some mandatory provisions and some that are permissive. Additionally, by-laws, notices of termination and other instruments respecting the land governed by the declaration and description must be registered as they come into being. Any offer to purchase a unit is made on the basis of the accuracy of the statements made in these registered documents.

Under s. 52 of the Act, there is provision for a disclosure statement which contains a "brief narrative description of the significant features of the existing or proposed declaration, by-laws and rules governing the use of common elements and units, and of any contracts or leases that may be subject to termination or expiration ...". It also provides for a budget statement for the one-year period immediately following the registration of the declaration and description (s. 52(6)(e)). Section 52(7) requires that the budget statement set out the common expenses and their distribution among the unit owners. Section 52(6)(g) requires disclosure of

(g) any other matters required by the regulations to be disclosed.

Section 52(1) provides that an agreement of purchase and sale entered into after June 1, 1979, by the

52(1) declarant or proposed declarant of a unit or proposed unit for residential purposes is not binding on the purchaser until the declarant or proposed declarant has delivered to the purchaser a copy of the current disclosure statement and all material amendments thereto.

Section 52(2) permits the purchaser to rescind the agreement of purchase and sale within 10 days after receiving the disclosure statement.

The declaration, description and by-laws, including the rules, are therefore vital to the integrity of the title acquired by the unit owner. He is not only bound by their terms and provisions, but he is entitled to insist that the other unit owners are similarly bound. There is no place in this scheme for any private arrangement between the developer and an individual unit owner. If an individual arrangement is made, it must be disclosed in the declaration (s. 3(1)(f)).

In *Condominium: The Law and Administration in Ontario* (1981), by Burns and McLellan, the authors stated at p. 51: The Condominium Act now has provisions designed to protect a purchaser buying a condominium unit from the developer. The provisions of the Act do not give the Ministry of Consumer and Commercial Relations or the Ministry of Housing the authority to "pass on the merits" of a particular condominium development. Instead, the Act is based upon the "full disclosure" philosophy, which presumes that prospective purchasers will be adequately protected if full disclosure of relevant documents and financial information is made to them by developers. This is in sharp contrast to many American jurisdictions which, for the purpose of protecting prospective purchasers, deem the sale of a condominium unit to be the sale of a "security". Consequently, not only is prospectus-type disclosure provided but many jurisdictions have government agencies which pass on the merits of proposed condominium developments. In most of these jurisdictions, no binding agreement of purchase and sale can be entered into until State approval of the project, and form of the agreement and accompanying documents have been obtained.

Coming back to the case on appeal, it follows that the Rochons were not in a position to make the arrangement that they did with the developer for the installation of the satellite dish. This arrangement was not disclosed in the material requiring disclosure and is not binding upon the other unit owners. Indeed, what follows goes further than that. The Rochons are not in compliance with the declaration, description, by-laws and rules and therefore are themselves in contravention of s. 31(4) of the Act which reads:

31(4) Each person in occupation of a proposed unit is bound by all and shall comply with the rules proposed by the proposed declarant where those rules are reasonable and consistent with this Act.

Once the judge of first instance found that the consent given to the respondents on closing violated rule 1.03(f) which is the prohibition against television antennae, etc., that should have been the end of the matter. Number 4.7.2 of the declaration, which he relied on, prohibited certain additions, alterations and improvements to the common elements "except by the Corporation or with its prior written consent or as permitted by the by-laws or rules". Whether these changes are "substantial" or not is determined by the board of directors under 4.7.1. Substantial or not, the erection of such structure as the satellite dish cannot be authorized by the written consent of Carleton Condominium given at a time when it was controlled by the declarant Melgro. Such a consent cannot prevail over the declaration contained in the disclosure statement.

The scheme of the Act is to permit the declarant as "the owner or owners in fee simple of the land described in the description at the time of registration of a declaration and description of the land ..." (s. 1(1)(l)) to create the corporation by filing the said declaration and description (emphasis added). As it sells off the units, it loses control of the corporation to the purchasers who, as the owners of the units, become the new shareholders. I do not believe that the declarant can unilaterally change the declaration, cause the corporation to change it, or excuse individual unit owners from compliance therewith. I am of the view that the consent contemplated by 4.7.2 of the declaration is the consent of Carleton Condominium under the control of the purchasers of the units as the new shareholders.

I am strengthened in this by a reading of s. 38 of the Act, which deals with modifications of common elements and assets. Section 38(1) reads:

38(1) The corporation may by a vote of owners who own 80 percent of the units make any substantial addition, alteration or improvement to or renovation of the common elements or may make any substantial change in the assets of the corporation, and the corporation may by a vote of the owners make any other addition, alteration or improvement to or renovation of the common elements or may make any other change in the assets of the corporation.

(Emphasis added.)

Unit owners are the owners of the freehold in the units (s. 1(q)), while the declarant is the owner of the fee simple in the land. Section 1(1) expressly states that a declarant does not include "a bona fide purchaser of a unit". As I interpret s. 38, it provides that substantial additions, alterations, improvements or renovations to the common elements require the affirmative vote of 80% of the unit owners, while other additions, alterations, improvements or renovations require only a simple majority vote, again, of the unit owners. If the changes are substantial, any dissenting unit owner can compel the corporation to purchase his or her unit and common interest (s. 38(4)).

I say this notwithstanding the language of s. 26(1), which refers to the board of directors "elected at a time when the declarant owns a majority of the units" and also to the declarant's obligation to call a meeting of unit owners after he "ceases to be the registered owner of a majority of the units". I interpret this as meaning that the declarant is only an "owner" of a unit in the sense that as the "owner of the fee simple in the land", he is the only person who can be considered the owner of any unsold units. He can never be a bona fide purchaser of a unit and it is these "unit owners" that the Condominium Act is intended to protect.

Section 26, s-ss. (2) to (4), provide in great detail for the mechanics of the passage of effective control to the bona fide unit owners. The declarant must hand over to the new board of directors, all the corporation's books and records, its corporate seal, its minute books, and any agreements made with the corporation, all its financial records and finally an audited financial statement.

I would have thought that the installation of a satellite dish was a substantial addition, but whether I am right or wrong in this is irrelevant. In the first instance this decision must be made by the board of directors (4.7.1), but in any event, the "consent" referred to in 4.7.2 of the declaration must be a consent obtained through a vote conducted under s. 38(1) of the Act by unit owners. Otherwise, 4.7.2 contravenes the Act which it cannot do by reason of s. 3(5) which provides:

3(5) Where any provision in a declaration or by-law is inconsistent with the provisions of this Act, the provisions of this Act shall prevail and the declaration or by-law is deemed to be amended accordingly.

The respondent relies on the in-house management rules and presumptions of regularity that apply to ordinary corporations, but as I have pointed out, the Corporations Act has been expressly excluded by the Act (s. 10(3)). A condominium corporation is a creature of statute and has no greater authority than as set out in the Condominium Act.

The application considered by Judge Hollinger is authorize by s. 49 which provides:

49(1) Where a duty imposed by this Act, the declaration, the by-laws or the rules is not performed, the corporation, any owner, the bureau, or any person having a registered mortgage against a unit and common interest, may apply to the county or district court for an order directing the performance of the duty.

(2) The court may by order direct performance of the duty and may include in the order any provisions that the court considers appropriate in the circumstances.

The relief sought here is that the Rochons be required to dismantle and remove, at their expense, the satellite dish. While such an order is discretionary (see *Re Peel Condominium Corp. No. 73* and *Rogers et al.* (1978), 21 O.R. (2d) 521, 91 D.L.R. (3d) 581) the learned judge in the application under appeal made his order on the basis of a misinterpretation of the Condominium Act. In view of the fact that it was a significant structure improperly permitted on a common element, I am not persuaded that this is a proper case for this court to exercise its discretion in favour of the respondents. Accordingly, I would allow the appeal, set aside the judgment of His Honour Judge Hollinger and grant judgment requiring the respondents, Guy Rochon and Sondra Rochon, to dismantle and remove, at their expense, the said satellite dish forthwith.

No issue was raised in this appeal as to the good faith of the Rochons who thought that they had bargained properly in entering into the above described arrangement. Additionally, the matter is not without difficulty and lacks clear precedent. For those reasons there should be no costs here or below.

Appeal allowed.

CBR# 372

York Condominium Corp. No. 76 v. Rose Park Wellesley Investments Ltd. et al. *

48 O.R. (2d) 455

ONTARIO High Court of Justice Reid J. November 9, 1984.

ACTION for damages for repairs to a parking garage.

S. Harvey Starkman, Q.C., and Clifford F. Shnier, for plaintiff.

R. M. Loudon, Q.C., and Daniel R. Dowdall, for defendants.

REID J.:-- Some three million dollars is sought in this action to repair a parking garage and rectify its defects.

The garage lies under residential condominium buildings in a development known as "Crescent Town" located at Victoria Park and Danforth Ave. in the Borough of East York in Metropolitan Toronto.

These buildings comprise three high-rise and three stacked townhouse structures. Mr. Starkman said in opening that the plaintiff York Condominium No. 76 ("York" or "the corporation") is the largest condominium in Canada and described it as "several vertical villages". Its size is indeed impressive. It contains 1,419 dwelling units which are home to some 5,000 people or 5% of the population of the Borough of East York.

The parking garage serving this residential complex is on four levels. It accommodates 1,300 vehicles over an area of 600,000 sq. ft., or about 13 1/2 acres. The top level, referred to as P1 throughout the trial, is on grade but is, for the most part, covered by a landscaped podium deck. At several points the deck was left open to accommodate landscaping directly thereunder. P1 is also open at the sides. The parking accommodation on P1 is, however, entirely under the roof provided by the podium deck.

The next two levels, P2 and P3, are below grade and fully enclosed. Access to and egress from them may be had through large doors directly from the street.

Access to the bottom level, P4, can be gained only by way of a ramp from P3.

The Crescent Town development, of which the condominium buildings and parking garage are a part, includes other structures which were built for use as rental accommodation and commercial space. We are not concerned with the rental and commercial portions of the development in this litigation. We are concerned solely with the buildings constructed for sale as residential condominium units. They were built in what I shall refer to as the early seventies, construction having been started in late 1970 or early 1971, and completed in 1972.

The declaration creating York was registered in October of 1972. The garage is a "common element", each unit purchaser having, in accordance with the declaration, an interest in it and the other common elements proportionate to the share that his or her unit bears to the totality of all owners' interests.

A brief history of the progress of the action will be useful. The writ of summons was issued in April of 1977. Plaintiffs were originally York and two owners of individual units, Murdoch Glenn McIver and Wayne J. Bryan. The latter two sued on their own behalf and on behalf of all other members of York. Messrs. McIver and Bryan discontinued as plaintiffs as of May 7, 1979. Discontinuances occurred against 30 of the original defendants. An amended statement of claim was delivered in July, 1979. When the statement of defence was delivered as of October, 1979, the parties were as they remained at the opening of trial. That is to say, York, suing on its own behalf, remained as the sole plaintiff and the following were and continued to be defendants: Rose Park Wellesley Investments Limited, Rose Park Howard Investments Limited, Grossman Holdings Limited, Bleeman Holdings Limited and J. Silver Holdings Limited. I am informed that Rose Park Wellesley Investments Limited and Rose Park Howard Investments Limited are part of the Meridian group of companies, and Grossman Holdings Limited, Bleeman Holdings Limited and J. Silver Holdings Limited are part of the Belmont group of companies. These five defendants developed Crescent Town as a joint venture and operated under the name of "Howard Investments" by which term the defendants were referred collectively throughout the trial.

A reply and joinder of issue was delivered in November, 1979. Discoveries were held on the pleadings in the form in which they stood at the opening of trial.

A pre-trial hearing occurred on January 7, 1983. On August 4, 1983, a motion to amend the amount claimed in the statement of claim was allowed by Cromarty J., raising it from \$1,500,000 to \$5,000,000.

The claim as set out in the statement of claim recites briefly the creation and construction of the condominium buildings and that the defendant developers entered into agreements of purchase and sale with individual unit purchasers. Paragraphs 6 and 7 of the statement of claim are as follows:

6. The developers entered into agreements of purchase and sale with individual purchasers, who, on closing and after registration of the Declaration as aforesaid, became members of the plaintiff corporation and owners of their respective units and appurtenant common elements. The agreements of purchase and sale were standard form contracts prepared by the developers, identical with one another in all respects material to this action.

7. It was an implied term of each of the agreements of purchase and sale that the units and common elements would be completed in a good and workmanlike manner with each component fit for the purpose for which it was intended, either in accordance with the plans and specifications submitted for mortgage financing and municipal building approval, or, where the plans and specifications were themselves deficient or insufficiently detailed, in accordance with good building practice.

Paragraph 8 reads, in part:

8. In fact the project was not so constructed and with respect to the following construction and/or design deficiencies in the parking garage, which is a common element, the plaintiff brings this action.

Then follows a list of specific allegations of construction and design deficiencies. (These are called "items" in para. 10.)

In para. 9 the incurred and future cost of remedying the defects is estimated at \$5,000,000.

Paragraph 10 is as follows:

10. The plaintiff pleads that the items in paragraph 8 above constitute breaches of a contractual obligation on the developers, which arises by the operation of S. 9(18) of The Condominium Act, R.S.O. 1970, c. 77, or S. 14(2) of The Condominium Act, 1978, S.O. 1978, c. 84, whichever is applicable.

Paragraph 11 was an allegation of negligence. It was abandoned at trial.

At the opening of trial plaintiff moved to amend the statement of claim. The proposed amendment would have added the following words to the end of para. 7:

... or in any event without reference to being built in accordance with the said plans and specifications and said good building practice that the common elements would be fit for the purpose for which they were intended, that purpose in this instance being a structure that would be fit for the intended purpose of its use herein as a parking facility free of the requirement of major repairs for a minimum period of twenty-five years to prevent its structural failure.

After hearing lengthy submissions by counsel I refused the amendment. In a word, the refusal was on the ground that it amounted to a new cause of action. Had I allowed it the trial would have had to be further adjourned. The trial, therefore, occurred on the pleadings as they had stood since November, 1979. I hope I may say without offence that plaintiff's counsel appeared, however, to conduct the trial as if the amendment had been made. That was the subject of repeated objection by defendants' counsel. I thought that, for the most part, those objections were justified.

Apart from the damages issue, which I shall deal with later, the defendants contended that plaintiff's status to bring the action is in relation only to the original unit purchasers of which it was acknowledged at least 600 remained at the time the action was commenced. With respect to the claim of implied warranty, defendants rely on cl. 14 in the contract which was a standard form entered into by or on behalf of the defendants and all original purchasers. That clause was referred to throughout the trial as the "exculpatory" clause. It was in the following terms:

14. This offer, when accepted, shall constitute a binding contract of purchase and sale. There is no representation, warranty or collateral agreement affecting this agreement or the Unit except as set forth herein in writing. As I understood the claim, the damages fell under two general heads. The first was with respect to the "supporting elements". This referred to the deterioration of the reinforced concrete columns and ledges supporting the reinforced concrete slabs which constituted the floor of the four parking levels and the podium deck. It was alleged that the columns and ledges suffered damage as a result of movement of the slabs against the ledges. Faulty construction was said to have caused "keying" at the point of contact between the floor slab and the ledges over a substantial area. When the slab expanded or contracted it exerted pressure on the ledges, causing damage, instead of sliding smoothly on them. I refer to the way in which this deterioration occurred with this particularity to distinguish it from the way in which the deterioration of the floor slabs occurred.

Defendants admitted that the damage to the supporting elements was caused by faulty workmanship on the part of one of their subcontractors. It was, therefore, not necessary for plaintiff to prove either fault or cause. Defendants' admission was made, however, subject to the defences against liability I have described. It was agreed by counsel that the necessary repairs to the supporting elements have been done.

The second head of damage related to the deterioration of the parking slab itself. This was described as "spalling" and "delamination". Briefly put in non-technical terms, spalling is a generally superficial pitting or scaling of the surface of the concrete. Delamination is a more severe condition caused by rusting of the reinforcing steel bars imbedded in the concrete slabs which can result in the fracturing of the slab.

I have said that plaintiff abandoned any claim in negligence. For their part, defendants abandoned a defence of merger raised in the statement of defence and so I was not called upon to consider either of those issues.

A reference to the master with respect to damages was claimed in the statement of claim and one was agreed to by counsel, according to the endorsement of the pre-trial judge, subject to certain issues to be decided at trial. However, counsel at trial urged me to dispose of all issues, if possible, including damages, and I have borne that in mind in considering my decision.

Counsel entered into an agreement with respect to certain facts. That agreement and a supplement were reduced to writing and furnished to me. I had some difficulty interpreting those documents and they were the subject of some discussion during the trial and at least one amendment. I do not think, however, that anything turns on what I thought to be some opacity in the documents. Since they formed the basis upon which the parties proceeded it would appear appropriate to have them available for possible future reference and I direct the registrar to enter them as exs. "A" and "B" for identification.

I had some difficulty in understanding precisely what was the basis for plaintiff's claim. Mr. Starkman referred to three heads of damages in his opening address and added to the two I have set out above, a claim for "leakage through the expansion joints". I first took that to be an allegation that the developers had failed to provide sealant for the expansion joints in the floor slabs. However, from the dosing submissions of plaintiff's counsel I took it to be conceded that the sealant had been installed. The claim thus became that the sealant had not been properly installed or did not last for a sufficient period of time.

The status issue

The first issue to be addressed is status. Plaintiff rests on s. 9(18) of the Condominium Act, R.S.O. 1970, c. 77. That Act was repealed and replaced by the Condominium Act, 1978 (Ont.), c. 84. Section 9(18) is now reflected in s. 14 of the Condominium Act, R.S.O. 1980, c. 84, in a substantially different form. It will be remembered, however, that the writ in this action was issued in 1977. Counsel agreed that s. 9(18) and the Act, as they stood in 1977, are the relevant provisions. Section 9(18) reads:

9(18) Any action with respect to the common elements may be brought by the corporation and a judgment for the payment of money in favour of the corporation in such an action is an asset of the corporation.

This provision and its context have been considered in a number of judgments of this court. They are: *Frontenac Condominium Corp. No. 1 v. Joe Macciocchi & Sons Ltd.* (1974), 3 O.R. (2d) 331, 45 D.L.R. (3d) 347, *York Condominium Corp. No. 104 et al. v. Halliwell Terrace Ltd. et al.* (1975), 12 O.R. (2d) 46, *York Condominium Corp. No. 161 et al. v. Deltan Realty Ltd.* (1976), 3 C.P.C. 27, *York Condominium Corp. No. 148 v. Singular Investments Ltd.* (1977), 16 O.R. (2d) 31, 77 D.L.R. (3d) 61, 2 R.P.R. 24, *York Condominium Corp. No. 228 et al. v. Tenen Investments Ltd. et al.* (1977), 17 O.R. (2d) 579, 6 C.P.C. 185, *Loader et al. v. Rose Park Wellesley Investments et al.* (1980), 29 O.R. (2d) 381, 114 D.L.R. (3d) 105, 17 C.P.C. 150.

Apparently as a result of the decision in *Loader* the two individual unit-owner plaintiffs discontinued and, so far as the claim was asserted as a class action, that was discontinued as well. It is no longer a class action, as that term is normally used.

Plaintiff's counsel submitted that s. 9(18) furnishes a "statutory cause of action", yet submitted also that it stems from and rests upon the contracts entered into between the original unit purchasers and the developers. Mr. Starkman conceded that if none of the original purchasers had retained ownership of a unit there would be no basis for the action. His position was that there were some 600 continuing original unit purchasers who were, in May, 1983 (the date borne by ex. "A"), and therefore, at the time the action was commenced, members of the condominium corporation. That figure was accepted by defendants' counsel. Thus, according to Mr. Starkman, the necessary foundation exists.

As I understood Mr. Starkman's submission, it was that the statute placed the condominium corporation in the shoes of the original purchasers with the result that York was, in effect, entitled to assert their contractual rights. He went further than that, however, in arguing that York could assert the same kind of claim on behalf of subsequent owners, that is to say, persons who purchased units from the original purchasers, notwithstanding that the members of the latter group had no contractual relationship with the developers. The effect of this was, Mr. Starkman submitted, that York is in a position to claim as damages the entire amount of expense to which York had been or would be put pursuant to its statutory obligation to maintain the buildings, without any reduction in recognition of the fact that only 600 or so of the 1,400 original purchasers remained as owners, and therefore, as members of the corporation at the time the writ was issued.

Furthermore, it was plaintiff's contention, as I understood it, that the measure of damages was the amount already expended by York for repairs and the amount that York would require for future repairs. No regard should be had for the fact that in order to pay for repairs already undertaken York had made assessments against its members over a substantial period of time and that numerous owners had been called upon to pay over to York an aggregate amount in respect of each unit totalling about \$1,200. It was not revealed who of these were original or, alternatively, subsequent purchasers nor how much anyone had paid in that way. In Mr. Starkman's submission the making and payment of assessments was nihil ad rem to the lawsuit. In particular, the assessments were not to be taken into consideration in the calculation of damages.

Plaintiff's submission appears to rest heavily upon the decision of Cromarty J. in the first case in which the effect of s. 9(18) was considered. That was *Frontenac Condominium Corp. No. 1 v. Joe Macciocchi*, supra. There Cromarty J. concluded that the section was "procedural only" and was enacted to overcome a perceived difficulty. Section 7(1) of the Act read:

7(1) The owners are tenants in common of the common elements. Subsection (2) of that section read:

7(2) An undivided interest in the common elements is appurtenant to each unit.

Cromarty J. observed that as a tenant in common each unit owner would be entitled to claim only for the damages suffered with respect to his or her share in the common elements. This would lead to "chaos", for in order to mount a claim for the totality of any alleged damage to the common elements, each unit owner would have to commence his or her own proceedings. As I understand the decision, Cromarty J.'s view was that s. 9(18) was enacted simply to avoid that difficulty and to enable the claims of all owners to be asserted in one action. The corporation was simply a "conduit" through which the owners' rights could be asserted in relation to the common elements, but the claim ultimately had to rest upon rights of the owners.

He observed at p. 350 O.R., p. 366 D.L.R.:

Having concluded that the plaintiff can properly sue for any shortcomings in the common elements, it must then be shown that it has some cause of action upon which to sue.

It seems to me that the cause of action must be found in one or more of the owners of the common elements.

If none of them had a cause of action then there would be nothing upon which the plaintiff could bring action.

Cromarty J. did not have to deal with claims by subsequent owners. I understand plaintiff to depend upon the decision of Mr. Justice Gray in *Loader v. Rose Park*, supra, to support the contention that the condominium corporation may represent subsequent owners on the same basis as if they had been original owners. *Loader* dealt with an issue not before me, i.e., whether a class action lies, but it contains certain observations that suggest that s. 9(18) is not confined to serving procedural convenience but in some way confers on subsequent owners a right of action in contract. That would place them in the same position, qua defendants, as original, continuing, purchasers.

With respect, I am unable to read the section as going that far. Gray J. was clearly of the view that s. 9(18) was intended to facilitate claims by the unit owners with respect to common elements, and in that he demonstrated his concurrence with Cromarty J.'s classification of the section as procedural. But he went further than that in expressing the view that the rights which could thereby conveniently be asserted were not just those of the original owners but of all owners. Thus, both original and subsequent owners could claim in an action brought by the corporation; it was not to be confined to the "select group" of original purchasers (see report, p. 390 O.R., p. 114 D.L.R.).

My difficulty stems from the fact that Gray J. did not describe or explain what was the nature or source of the "right" to be asserted on behalf of a subsequent owner. In *Frontenac*, Cromarty J. held that if the original purchasers had no cause of action the corporation had none. Thus, the source of the rights to be asserted was the contractual relationship between original purchasers and developers or an implication arising from it, by way, say, of warranty.

Plaintiff relied on Loader for a reading of s. 9(18) that would confer not only a procedural facility for those who had existing rights to assert independent of the statute but new substantive rights on those who had none, i.e., contractual rights without any contract. To place the subsequent owners in the same position as original purchasers it would be necessary to create a fictional contract written in the terms of the one common among the original purchasers and the defendants. The effect of that would be not only to create contractual rights where none existed, in favour of subsequent owners, but to create contractual obligations on the developers where none existed.

It may be that the Ontario Legislature has the capacity to enact such extraordinary legislation but I cannot read the legislation before me as either achieving that result or disclosing an intention to do so. So remarkable a departure from the principle that those who are not parties to a contract have neither rights nor obligations stemming from it can be, and has been, achieved by statute on occasion -- I can think of one -- but that occasion has been rare and the legislative intent has been spelt out in clear terms. I find nothing in s. 9(18) or in its context in the statute that either demands or would justify such an interpretation.

In short, I accept Cromarty J.'s interpretation of the section, with the result that the only substantive claims that York may assert are claims that stem from a contract or some other source outside the statute. No suggestion is made in this case that any claim exists apart from the contracts. Indeed, the statement of claim makes it clear that plaintiff relies only upon the provisions of the common-form contract, and terms that should be read into it by implication.

I can find no cause of action existing on behalf of subsequent owners. Cromarty J. saw the corporation as a conduit for the assertion of claims of original purchasers. A consistent view is that the corporation is agent for the unit owners: *Burry et al. v. Centennial Properties Ltd.; Modern Construction Ltd. et al., Third Parties* (1979), 38 N.S.R. (2d) 473. I do not think it is necessary in this case to go further into the concept of agency, for I am satisfied with the "conduit" classification, save to repeat that the agency here is confined to the original purchasers as principals.

This view is significant in relation to the question of damages. Briefly, it means that any recovery made by plaintiff would be confined to damages suffered by original purchasers and flowing from breach of contract. I shall deal with that more fully later.

On the basis of the foregoing the plaintiff has status to bring this action for, in light of counsel's agreement already mentioned, 600 original purchasers or more were members of the corporation at the time the action was commenced.

The effect of the exculpatory clause

Since the basis for the claim lies in the contracts I must next consider the effect of the exculpatory clause. For convenience I repeat it here.

14. This offer, when accepted, shall constitute a binding contract of purchase and sale. There is no representation, warranty or collateral agreement affecting this agreement or the Unit except as set forth herein in writing.

As I understand the law it is simply that, to be effective, an exculpatory clause must be in clear terms. In other words, there must be no doubt about the extent to which the person claiming the benefit of the clause has limited his liability. See the following: *Hancock et al. v. B.W. Brazier (Anerley), Ltd.*, [1966] 2 All E.R. 901 (C.A.), *Fraser-Reid et al. v. Droumtsekas et al.*, [1980] 1 S.C.R. 720, 103 D.L.R. (3d) 385, 9 R.P.R. 121 (S.C.C.), *Hansen v. Twin City Construction Co. Ltd. et al.* (1982), 136 D.L.R. (3d) 111, [1982] 4 W.W.R. 261, 24 R.P.R. 42 (Alta. Q.B.).

Plaintiff submitted that para. 14 is insufficiently broad because it refers specifically only to units, whereas the claim relates not to units but to common elements. There is certainly no explicit reference to common elements. Therefore it was submitted that it fails to exculpate the defendants and, in particular, fails to offset the implied warranties of good workmanship and materials and fitness for the purpose plaintiff claims.

When one looks at the contracts as a whole, it is apparent that the acquisition of an interest in the common elements was concomitant with the acquisition of an ownership interest in a unit. Paragraph 1 of the contract referred to a purchase and sale of "the lands and premises ... known as condominium unit # together with the common elements appurtenant thereto ...". The "purchase and sale" referred to in para. 14 is of a unit and common elements. The agreement thus includes the common elements. The exclusion does not refer merely to the unit; it covers "the agreement". The reference to the unit seems to have been added to ensure that it was included. Otherwise, it is mere surplusage. I cannot read the reference to the unit as disclosing an intention to confine the operation of the paragraph to the unit, in light of the broader reference to the agreement. In my opinion, therefore, the exculpatory clause is plainly intended to refer to the common elements as well as the units. There is no ground for holding it not to be effective. That would be enough to dispose of the action. In recognition of the importance that the issues raised in the action have, according to counsel, for many persons not parties to the action and the fact that at least some issues are novel, I will go on to deal with other issues.

The implied warranties

I have already set out the part of the statement of claim relating to the implied warranties. At trial, plaintiff's counsel contended for a "three-fold warranty" in the following terms:

9. Where a contractor agrees to construct a house or other residential premises, the following threefold warranty arises by implication:

- (1) he will do his work in a workmanlike manner;
- (2) he will supply good and proper materials; and
- (3) the house will be reasonably fit for the purpose for which it was constructed.

Whether or not such warranty exists here, it is worth noticing that the warranty claimed in the statement of claim is a narrower one. It is for good work and materials and that the work would be fit for the purpose in accordance with the plans and specifications or, where they were deficient, in accordance with good building practice. I am unable to find in the cases cited as support for this any reference to any such warranty.

However, leaving aside any difference between the warranty claimed in the statement of claim and that which is said to arise on the cases cited, and assuming for the purpose of discussion that a warranty exists on either basis, it is clear that it cannot be relied upon by any person other than a signatory to the contract. Thus, it can be asserted only on behalf of original purchasers. Any doubt about that is settled by para. 16 of the contract, which provided:

16. This agreement is non-assignable by the Purchaser.

I know of no law or principle that would extend a warranty beyond the original purchase. Furthermore, in this case, the contracts were provided to be non-assignable. Thus, the subsequent owners could not derive any claim from an implied warranty even if it existed.

Again, assuming that the warranties might or do arise in the circumstances of this case, as I have already indicated, they are displaced wholly and are rendered ineffective by the exclusionary clause contained in the contract.

Even if I were to hold that the "three-fold warranty" contended for by plaintiff did exist here, and had not been nullified by the exclusionary clause, I would be compelled on the evidence to hold that it had not been breached. Plaintiff complained that defendants failed to follow the plans and specifications and the prevailing building standards. The first claim got down at trial to a claim that the plans had not been adhered to in only one respect, that was that the parking slab lacked, over some or all of its surface, the 1% slope or grade called for by implication in the plans. The significance of this, in terms of damages, was said to be that drainage was inadequate and that "ponding" occurred on the slab which, in turn, hastened or intensified the delamination process by concentrating salt water in the ponds.

With respect to that claim the evidence indicated that the ponding occurred over only a minor fraction of the total floor area -- a report made by Dr. Tay to York in 1981 put it at 1.6% of floor area -- and that it did not occur so much near the columns, where the greatest amount of delamination occurred, as elsewhere on the slab. I am far from satisfied that the required slope was not installed, or at least not installed generally. Even if in some areas it was inadequate it was not of great significance to this lawsuit. The ponding could, and in my opinion should, have been dealt with at an early point after Dr. Tay's 1977 report, as it was eventually, by the relatively simple and inexpensive measure of installing drains.

With respect to the alleged failures to follow the prevailing standards, plaintiff relies on the interpretation of the relevant sections of the National Building Code of Canada governing the design of reinforced concrete structures made by its witnesses, notably Dr. David Tay. That interpretation would have required defendants to have laid more than the three-quarters of an inch of concrete "cover" over the reinforcing steel bars in the parking slab and to have "air-entrained" the concrete used for the slab. I had some difficulty in grasping how much cover it was claimed should have been laid but I took Mr. Shnier's closing submission to be to the effect that it should have been two inches.

I must in frankness say that I found Dr. Tay's interpretation strained. It was not readily apparent to me from a reading of the relevant sections of the Code on which Dr. Tay relied; indeed, it seemed to be at odds with a literal reading of those sections. Dr. Tay's interpretation might, however, have been feasible if the condition that he presumed existed in the early seventies when these buildings were designed and built, in fact, did exist. That was a general acceptance by those in the high-rise apartment building industry and the engineers and others advising them that salt-laden snow carried by cars into the parking garages under a building such as this would ultimately cause delamination of parking slabs. I am unable to make any such finding.

There were two principal proponents of opinion called before me on the essential questions of the design and construction of the subject buildings. They were Dr. Tay for plaintiff and Mr. John Aubrey Bickley for defendants. I intend no disrespect when I say that on every essential point I prefer the opinion of Mr. Bickley. The range and depth of his knowledge of concrete technology and experience with the problems relevant to this litigation placed him in a much better position than any other person who testified on the subject to describe the state of knowledge when these buildings were designed and built in the industry to which defendants belonged. His opinions were rooted in personal experience during the late sixties and early seventies whereas neither Dr. Tay nor any other expert called by plaintiff had any comparable experience. Having been involved in the drawing of standards for the use of concrete and monitoring their effect he was in a better position than any other witness to testify about how they were interpreted generally at the relevant time. I was greatly impressed with his stature in his profession, the remarkable range of his studies, his contribution to the developing knowledge of the phenomenon of delamination, and to his accomplishments generally in his special field of concrete materials. I was thus greatly impressed with the quality of his testimony. I have, in fact, seen few witnesses with whom I have been more impressed. His attitude was impartial and his evidence was unaffected in any substantial respect by cross-examination. I would unhesitatingly prefer his opinion to any other offered at trial on the general interpretation of the Canada Building Code at the relevant time, and the general state of knowledge, or lack of it, in the industry regarding delamination in apartment garages and on what were good building practices at the time.

On the basis of his evidence I hold that defendants constructed the buildings in accordance with the generally prevailing interpretation of the building code among responsible architects, engineers and builders. I hold further that no general realization occurred of the delamination problem now seen as endemic until well after these buildings were constructed. This amounts to specific acceptance of Mr. Bickley's opinion that the phenomenon of delamination in residential parking garages was not general among responsible builders and those advising them until the mid-seventies.

Much support for Mr. Bickley's views is found elsewhere. They are consistent with the evidence of Mr. Gerald A. Garshon, of the firm of Jablonsky and Associates, Consulting Engineers, and Mr. Donald Clark, of Maysfield Property Management, both of whom I found to be candid, credible, impartial and impressively experienced and accomplished.

Finally, I think it would be improbable that Mr. Bickley's views were not shared by responsible engineers and builders generally at the time. Whatever else is urged by plaintiff about the way in which the buildings were constructed there is no support for a suggestion that an attempt was made to skimp. Defendants engaged reputable architects and engineers, respectively James A. Murray and George A. Jarosz, as architects, and D. Law Consultants and D. Grossman Associates as engineers. The design and construction of the buildings were subject to the approval of the Ontario Housing Corporation, which had granted a mortgage for over \$30,000,000 to the defendants to facilitate the Ontario Government's "Home Ownership Made Easy" programme. That corporation's inspectors kept an office on the building site and, according to the evidence, they maintained a watchful eye as well. The design and construction obviously met the prevailing standards of the Borough of East York. It would be exceedingly odd, in my opinion, if those persons did not generally share Mr. Bickley's interpretation of the building code and the lack of

foreknowledge of the delamination phenomenon to which he testified. Their contributions to the design and construction of the project, and their general approval of it, are consistent with Mr. Bickley's views and at odds with Dr. Tay's.

Beyond that, Mr. Bickley's interpretation of the building code is consistent with that of the Interpretation Committee of the Canadian Standards Association. Dr. Tay conceded that the committee's rulings were contrary to his view. Mr. Bickley, while a member of the committee, participated in the first ruling but did not take part in the ruling expressing the committee's final interpretation.

While not binding, it is nevertheless of interest that Mr. Bickley's evidence "that in 1974 engineers were just becoming aware of the problems (of delamination) in parking structures" was accepted by Mr. James Chadwick, arbitrator, in the matter of Carleton Condominium Corp. No. 145 and Urbanetics Ltd. in his award dated August, 1983. My own impressions are consistent with Mr. Chadwick's. In the matter before him, which involved similar issues to those before me, Mr. Chadwick observed that Dr. Tay was "attempting to interpret the 1967, 1970 and 1973 standards based upon the knowledge which is present in the industry today and also on the basis of what the law should be rather than what the law was at that time". He also made a general observation, which my experience in this trial tends to confirm, that "where the evidence of Dr. [sic] Bickley differs from that of Dr. Tay, I prefer Dr. Bickley's evidence in view of his vast experience, both in the investigation of these problems and also in his written materials and lectures on the subject".

"Delamination" is a disease that it is now realized will attack or has attacked many, or even most, of the high-rise residential parking garages built in Canada in the early seventies. Mr. Bickley has had to revise earlier estimates of the total damage done to these structures; he now places it at between two and three billion dollars. He concedes that his profession might have but did not foresee the problem before it occurred, because delamination had already been recognized as a problem with another reinforced concrete structure, the motorway bridge-deck. Yet it does not seem to have been apprehended even in relation to commercial parking garages, for the practice of applying an impermeable "membrane" of rubberized or other material to the surface of the slab was intended to prevent leakage through them rather than head off delamination. It is a lamentable fact that recognition of the problem by the engineering profession in relation to residential parking garages did not occur until at least the mid-seventies. That was too late for Crescent Town.

Having said that I accept Mr. Bickley's views and why, I think it might be enlightening for anyone who might read these reasons if I repeat some extracts from a report dated February 29, 1984, prepared for counsel by Trow Ltd., Mr. Bickley's firm, and admitted at trial, as ex. 70, as "Mr. Bickley's report". While his oral evidence might not have duplicated these words exactly, it did not depart in substance from them. The extracts follow:

Before entering upon the detailed discussion however, we wish to advise that as a result of our investigation, we have determined that the situation at the Crescent Town garage is far from unique. There are literally hundreds of buildings which are suffering the same difficulties which are for the most part caused by de-icing salts brought into the garages on the undercarriage of automobiles. The deterioration associated with this phenomenon has reached epidemic proportions throughout Canada such that there are few if any structures of an age similar to the Crescent Town garage which are not evidencing similar problems.

We are in essential agreement with the engineers for the Condominium Corporation with respect to the technical reasons for the occurrence of the delamination. The delamination occurs as a result of tensile forces created by the corrosion of the reinforcing bars embedded in the concrete. This corrosion results from de-passivation of the concrete around the reinforcing bars by a salt solution. The salt solution is introduced to the garage when road salts are brought into the garage in the form of ice on the undercarriage of cars and subsequently drops off the cars as the ice melts.

The destructive effect of the introduction of such salts to parking structures is only now becoming fully understood by engineering professionals. In our view, this phenomenon was not understood at the time of the design of the Crescent Town garage in 1969 nor its construction in 1971.

What the above makes clear is that there was no general appreciation of the destructive effect of road salts on reinforced concrete structures until relatively recently. Even in the area of bridge decks, where the problems are most severe, the nature of the problem was not fully appreciated at the time of the design or building of Crescent Town. Indeed, it appears that it was not until the very end of the 1970's that the nature and extent of the problems likely to occur in parking structures became apparent. Although new design and materials are now being employed to combat these problems and produce more durable structures, there still continues to be no universally applicable or accepted standards governing design or repair of these structures.

The design of the Crescent Town Garage represents the standard design for structures of this type and age in Ontario. With hindsight it is easy to say that this design has not proved as durable as one would have wished. This is not unique to this garage, but in fact almost all garages of this age and many others which are significantly newer are showing similar levels of distress. In order to give some flavour of the magnitude of this problem, I enclose as Schedule 5 to this report an article which I have published entitled "The Nature, Extent and Impact of Residential Parking Structure Deterioration".

On the subject of the depth of concrete cover the report said, in part:

This issue relates to the amount of concrete which is placed over the reinforcing steel. The hypothesis is that the more concrete which is placed over the reinforcing the longer it will take for any corrosive effect to occur. The design of Crescent Town calls for concrete cover of three-quarters of an inch. This requirement was the standard for construction of parking garages at this time. We are aware of no similar indoor parking structures built in this time framework that had more than three-quarters of an inch cover specified. This is in conformance with the Canadian Standards Association ("C.S.A.") requirement for internal concrete slabs.

There is some suggestion that in the reports submitted by the Plaintiff's engineer that this cover should have been two inches. This is applying hindsight to the situation. No designer at the time of the construction of Crescent Town would have provided two inches of cover. Even today, with the greater recognition of the entire problem, a requirement of two inches is not universally accepted by all structural engineers.

With respect to air-entrainment, the report said, in part:

While it is now recognized by many professionals that air entrained concrete also has slightly higher resistance to the problems associated with de-icing salts, it cannot even today be said that it is usually accepted among engineers that the use of such concrete is necessary in below grade parking structures.

The degree to which air entrainment increases the resistance of concrete to damage associated with de-icing salts has not been the subject of study to date. In my opinion, based on only general observations, I would suspect that air entrainment would only act to defer such damage for a short period.

Mr. Bickley disagreed, therefore, that air entrainment was required or would have been of much effect with respect to the parking slab although he said (as will be seen) that he would have air-entrained the concrete used in places exposed to the elements, such as the podium deck.

In the course of his review of reports prepared by engineers who had been retained by plaintiff, which were prepared under the supervision of Dr. Tay, Mr. Bickley's report observed:

GENERAL COMMENTS ON THE MORRISON REPORT

From our review of the reports filed by Morrison, it is our view that they are attempting to apply design standards to Crescent Town which, while appropriate in modern day construction, were not conceived of at the date of the design of Crescent Town. The difficulty with concrete delamination associated with de-icing salts was in its infancy at the time of the design of Crescent Town. If such knowledge existed at that time it related to bridge decks which were considered by engineers to be a much more severe application. It was not until the end of the 70's that the problem with parking garages began to be appreciated.

This fact is evident from Morrison's own reports. It is of note that they fail to ascribe any great importance to water ponding in the garage in the 1977 report. Their complaints about cover are not related to a general failure to provide two inches of cover, but relate only to isolated areas where the three-quarter inch cover specified had not been achieved. They failed to link the visible pot-holes to any significant systemic deterioration. Although all of the elements which are now complained of were readily apparent to Morrison in 1977, they failed to identify the garage as a likely candidate for delamination and indeed, make no suggestion for any kind of delamination survey. These facts simply go to demonstrate that Morrison, as most engineers in this time framework, themselves failed to appreciate the problems which were about to become apparent in parking garage structures.

In light of the development of this understanding Morrison's failure to appreciate this problem is understandable. Indeed, methods of detecting delamination were only in their infancy at this point in time. Published articles indicate that it was only in the mid 1970's that the process of chain-dragging had been determined as an effective means of discovering delamination.

Our firm first began to employ this technique in garage investigations in 1975. This was as a result of our experience with the M.T.C. and their bridge deck investigations. This did not become standard procedure in our investigations until 1977, about the time that Morrison was doing his report.

CONCLUSION

It is our conclusion that the intermediate slabs in the Crescent Town Garage are, with one exception, in compliance with all the Code requirements for durability in force at the time of construction.

At the time of the construction of this building, there was no understanding in the engineering community as to the impact on parking garages of de-icing salts which would be introduced to the garage by the undercarriage of cars. This problem indeed did not become associated with parking garages until the late 1970's and has only recently become widely understood in engineering circles, largely as a result of the necessity to make large scale repairs such as those undertaken by the Condominium Corporation in this case.

The only apparent failure relates to air entrainment on the podium and P1 levels. As this level is above grade and exposed to freeze-thaw cycling, it is our view that air entrained concrete ought to have been used at this level. The concrete actually used however, appears to be of good quality and strong. From our observations, we are unable to say that the failure to employ air entrained concrete at this level has materially altered the amount of damage done. It is of particular note that the degree of delamination encountered on the P1 level is virtually the same or less than that suffered on the P2 level which, as an interior slab, was not required to be air entrained.

It is also apparent that the Condominium's failure to take prompt remedial steps has increased the cost of repairs substantially. Had the proper studies and repairs been undertaken in 1977, the amount of delamination would have been considerably less. Working from the data achieved on other jobs, the only data available would seem to indicate that the level of delamination in 1977 would have been between 1/4 and 1/3 of that subsequently repaired. In the same vein, it is our view that by failing to take core samples to determine the depth of the delamination, before calling tenders for repair, the Condominium lost the advantage of a competitive tender for the repairs contemplated by their first contract.

It is also our view that even if air entrained concrete had been provided, its impact upon the damage would have been marginal. The delamination may have proceeded slightly more slowly, but in our view the same level of damages presently encountered would have been encountered within as few as two years later than what actually occurred.

The drainage problem has also contributed to the difficulty. The cost of remedying this problem would have been very small to the Condominium Corporation in 1977. From what appears to be a failure by the engineers to understand the importance of this problem, nothing was done. In our view, this reflects the overall lack of understanding in the engineering community of this whole phenomenon. Had there been proper drainage from the beginning, the level of damage occurring at the time of repairs would have been significantly less.

Similarly, both increased cover and a waterproof membrane would have increased the time before which repairs would be necessary. It would also significantly increase the initial cost of the building. In addition to the extra amount of concrete required to increase the amount of cover a substantial increase in reinforcing steel would also be necessary producing a significantly different structure.

It is to be noted however, that the matter such as increased cover and waterproofing and to a lesser degree, air entrainment present a developer with a significant/cost benefit decision. The savings associated with omitting such detail may, when considering the value of money over time, be greater than the costs of making repairs in the future even when such costs are as extensive as those made by the Plaintiff in the present case.

While some adequate waterproofing systems were available in the early 1970's the need to use them was not recognized.

In my view, those conclusions are both justified and fair and reflect a creditable objectivity and impartiality.

I, therefore, hold that there was no failure on the part of defendants to follow the plans or specifications or any prevailing building standard or good building practice. Perhaps because of the impressive weight of evidence that the buildings were designed and constructed in accordance with good building practice plaintiff's counsel ultimately submitted that purchasers were entitled to get something better for their money than good business practice, but I cannot find any support in law for that proposition.

Even if I were to have found that defendants should have air-entrained the concrete or added deeper cover or both, I very seriously doubt if that would have been significant. I doubt, with Mr. Bickley, that these measures would have prevented the occurrence of delamination, although it might have been slowed. The evidence makes it clear that no final "cure" has yet been discovered. Waterproof membranes placed on top of the slab seem to be favoured in present practice yet consciousness of the horrifying proportions of the delamination problem across Canada has led builders and their advisers to adopt not just one but a number of methods concurrently in a "belt and braces" attempt to avoid the problem. There was no claim in this lawsuit that defendants were at fault for not having installed a waterproof membrane over the entire area of the slab. No claim of that type could have been sustained on the evidence for it was proven that the installation of such a membrane in this kind of structure was a rare exception and far from the norm. A claim that the waterproof membrane required by the specifications was not installed in certain areas, such as under landscaping, failed for it was conclusively proven that the required membrane was installed: I refer particularly to the evidence of Mr. Wm. D. Jones, which I accept. Similarly, a claim that the concrete was of poor quality, or that the mix should have been drier, was not sustainable on the evidence.

Notwithstanding the refusal of the amendment plaintiff sought at the commencement of trial, plaintiff sought to prove that in some way there was an implied warranty of "fitness for the purpose" in the sense that the purchasers of units were entitled to have freedom from the need for "serious" or "substantial" repairs to the common elements for a period of 25 years. That claim could perhaps be disposed of on the pleadings, which failed to reveal any such claim, but even if it were open to plaintiff to assert it I can find no support for it either in law or on the facts. It may be, and I think it probably was the case, that both the original purchasers and the defendants expected the building to be free of the need for substantial repairs for 25 years or so but that expectation did not and could not take into account the prospect of delamination, unknown in this context to the parties at the time.

On the issue of damages, defendant submitted that plaintiff has been guilty of delay and thus failed in its obligation to mitigate. It is true that Dr. Tay's first formal report to plaintiff was made in 1977, and that no substantial repairs were undertaken by York until some five years later. It is also true that all experts accept the exponential rate of increase of delamination left unattended which grows, like a cancer, with increasing speed. Thus, it was submitted, plaintiff by its failure to act promptly permitted the damage to exceed greatly its extent in 1977.

I accept that the repairs required for the slab are far greater than they would have been had plaintiff acted sooner. I doubt if the same can be said about the supporting elements. However, notwithstanding Dr. Tay's opinion that plaintiff was adequately alerted to the nature of the problem with the slab and the need for prompt action to deal with it by his report and advice given at the time, I see much significance in the fact that there is no mention of delamination in that report. The general impression I got from Mr. McIver's evidence did not support Dr. Tay's view that he had alerted the York board to the need for immediate attention to a delamination problem. Indeed, I thought his evidence to be, at least impliedly, contradictory to Dr. Tay's.

Plaintiff cannot be faulted for not dealing with a problem it did not know existed. In the result, I cannot accept that plaintiff failed through delay to honour its legal obligation to mitigate damages.

Defendants made a spirited and sustained attack on the methods eventually adopted by plaintiff on the advice of its engineers to deal with the repairs to both the slab and the supporting elements. It was submitted that in many respects the cost of the repairs was higher than necessary. Attacked in this respect were the means for repair recommended by Morrison, Hershfield Limited, plaintiff's consulting engineers, the ways in which tender specifications were written, and to many things done or not done during the course of the repairs. Defendants' list of criticisms included the following:

1. The plaintiff should have done the repairs in 1977/78 and, if entitled to any damages at all, is only entitled to receive what the repairs would have cost then.
2. The defendants should only be liable, if at all, for two-fifteenths of the plaintiff's damages, as the defendants are not liable for the additional thirteen years of life which the repairs gave the building.
3. Some of the repairs were redundant and the defendants should not be liable for those.
4. The defendants should not be liable for the extra cost in the M & A 1982 contract caused by Morrison, Hershfield's ignorance of the depth of the delamination and its incompetent method of tendering.
5. There was no evidence led on the accuracy of the anticipated expenses claimed.
6. In any event, the defendants should only be liable in contract for the damages which were foreseeable. The question to be asked is: Could it be said that these defendants, in 1970, if they had thought about it, would have been able to conclude there was a substantial degree of probability that the parking garage would fail because of delamination.

In general, I was not persuaded that for any such reasons plaintiff had failed to mitigate damages or to act reasonably in making repairs. The injuries to the buildings were both novel and difficult to repair. For instance, it is possible that other engineers might have proposed other means for repairing support ledges than by way of the expensive process of jacking the slabs but that does not make jacking unacceptable. It was certainly effective. Whether some cheaper method would have been effective is open to speculation. I will not go into all the criticisms levelled by defendants but can say, in a few words, that I found no basis for reducing the cost claimed by plaintiff in respect of repairs done to either slabs or supports. The claim for the cost of future repairs is confined to the slabs. Counsel urged me to dispose of all questions of damages, including quantum, if possible, without a reference, yet it was obvious to all that might not be possible. I have found it not to be possible. I am not in a position, nor would

be, without further submissions made in the light of the findings I have expressed, to decide all issues of damages or to set down adequate guidelines for the master. My principal difficulty stems from my disagreement with the approach to the damage issue adopted by plaintiff. If I am right, the correct approach would be to ascertain the actual amount of assessments paid and to be paid by continuing original owners, no one else having any claim in this lawsuit against defendants, or, putting it more accurately, York not being entitled to claim anything else.

The result is that on issues which I regard as critical we have only casual information relatively unproven and untested. I took it that the figure of some 600 continuing owners suggested by plaintiffs' counsel was an estimate related to the time of commencement of these proceedings, but whether that should be the date at which the number is ascertained for the purpose of calculating damages, or whether some other date, such as the date of the commencement of trial or the date of judgment would be appropriate, was not discussed. Furthermore, although I might be ready to accept the evidence of amounts already paid for repairs by York as a basis for justifying assessments already made, I have too little information about the prospect of future assessments for repairs to form a basis for instructing the master how to calculate those damages. If counsel desire to make submissions I would entertain a motion to settle the issues.

Costs

I have given this question much thought. I do not think that plaintiff delayed the proceedings unduly. I accept that the substantial issues were novel; many, counsel agreed, were of significance to many persons not parties to this lawsuit. Some were the subject of conflicting decisions of this court. While defendant's success depends first, I have held, on the interpretation of a new statute and rather narrow technicalities of contract law, it does not rest solely on that, for on the very substantial issue of delamination, the claim would, in my opinion, fail entirely on the facts. While I reach the conclusion reluctantly, I think it only fair for the usual order to be made whereby costs follow the event and I therefore order that the claim be dismissed with costs.

Action dismissed.

CBR# 088

The Owners: Condominium Plan No. 9524710 operating as West Edmonton Commerce Park, petitioner, and Terence Richard Webb operating as Blue Bay Massage and Order of Ahepa, Aurora Borealis Chapter No. C.J. 10, respondents

[1999] A.J. No. 10 Action No. 9803-12466

Alberta Court of Queen's Bench Judicial District of Edmonton Murray J. January 7, 1999.

Counsel: R.J. Wasylshyn, for the petitioner. G.F. Zimmerman, for the respondent Webb. G. Freund, for the respondent Order of Ahepa, Aurora Borealis Chapter No. C.J. 10.

MEMORANDUM OF DECISION

[para1] MURRAY J.:-- The Petitioner is a properly constituted condominium Corporation pursuant to the Condominium Property Act, R.S.A. 1980, c. C-22 ("the Act"). On about December 1, 1995 the Respondent, Ahepa purchased unit 42 in West Edmonton Commerce Park ("the unit"), a condominium development and was provided with a copy of the condominium Corporation's by-laws in force at the time ("the by-laws").

[para2] This application is made by the owners of the units in the development, other than Ahepa, seeking a number of remedies for alleged infractions of the by-laws arising out of and resulting from the leasing of the unit by Ahepa to the Respondent, Webb. The application was heard in two parts, the first in October and the second in December. After the first part, the Petitioner was allowed to have an expert attend and examine the unit. This was done and his findings made known to the Court. As it develops, his examination was simply of "walk-through" variety, no parts of the unit as it now exists were touched and no destructive testing done.

[para3] The following sections of the Act are relevant to these proceedings:

20(3) Without limiting the powers of the corporation under this or any other Act, a corporation may

- (a) sue for and in respect of any damage or injury to the common property caused by any person, whether an owner or not, and
- (b) be sued in respect of any matter connected with the parcel for which the owners are jointly liable.

23(1) A corporation shall have a board of managers that shall be constituted as provided by the by-laws of the corporation. (3) The powers and duties of a corporation shall, subject to any restriction imposed or direction given at a general meeting, be exercised and performed by the board of the corporation.

26(1) The by-laws shall regulate the corporation and provide for the control, management and administration of the units, the real and personal property of the corporation and the common property.

(2) Any by-law may be amended, repealed or replaced by a special resolution.

(3) An amendment, repeal or replacement of a by-law does not take effect until

(a) the corporation files a copy of it with the Registrar, and

(b) the Registrar has made a memorandum of the filing on the condominium plan.

(4) No by-law operates to prohibit or restrict the devolution of units or any transfer, lease, mortgage or other dealing with them or to destroy or modify any easement implied or created by this Act.

(5) The by-laws bind the corporation and the owners to the same extent as if the by-laws had been signed and sealed by the corporation and by each owner and contained covenants on the part of each owner with every other owner and with the corporation to observe and perform all the provisions of the by-laws.

[para4] Though not specifically stated, it is implicit that the Registrar referred to is the Registrar of Land Titles so appointed pursuant to the provisions of the Land Titles Act, R.S.A. 1980 c. L-5 (L.T.A.).

3(3) After a certificate of title to a unit is issued pursuant to subsection (1), the unit comprised in it may devolve or be transferred, leased, mortgaged, or otherwise dealt with in the same manner and form as land held under the Land Titles Act and the provisions of that Act apply to those dealings in so far as they do not conflict with this Act or the regulations.

30(1) A corporation is responsible for the enforcement of its by-laws and the control, management and administration of its real and personal property and the common property.

(2) Without restricting the generality of subsection (1), the duties of a corporation include the following:

(a) to keep in a state of good and serviceable repair and properly maintain the real and personal property of the corporation and the common property;

(3) A corporation may by a special resolution acquire or dispose of an interest in real property.

[para5] Pursuant to s. 26(2) of the Act the Petitioner enacted by-laws on November 14, 1995 which replaced the by-laws set forth in Appendix 1. These were then registered with the Registrar of Land Titles as required by s. 26(3) and became effective. The Petitioner alleges that the following by-laws have been violated and the effects thereof remain uncorrected.

2.01 An Owner shall:

(a) Permit the Corporation and its agents, at all reasonable times on notice (except in the case of emergency when no notice is required), to enter its Unit for the purpose of:

(i) inspecting the Unit and maintaining, repairing or replacing pipes, wires, cables, ducts, conduits, plumbing, sewers and facilities for the furnishing of utilities for the time being existing in the Unit and capable of being used in connection with the enjoyment of any other Unit or the common property;

(ii) inspecting, maintaining, repairing or replacing common property, or;

(iii) ensuring that the By-Laws are being observed.

(d) Notify the Corporation forthwith upon any change of ownership or of any mortgage or other dealing in connection with its Unit;

(e) Comply with and cause all its tenants, invitees and other occupants of its Unit to comply with these By-Laws and with such rules and regulations as may be adopted pursuant thereto from time to time.

2.02 An Owner shall not:

(a) Use and enjoy the common property and the Corporation Property in such a manner as to unreasonably interfere with the use and enjoyment thereof by other Owners or occupants, visitors or invitees;

(b) Use its Unit for commercial or professional purposes that may be illegal or injurious to the reputation of the project;

(c) Use its Unit or permit it to be used in any manner or for any purpose which may be illegal or injurious, or that will cause nuisance or hazard to any other Owner or occupant or their respective servants, customers, visitors or invitees;

(g) Make any changes to the floor, Party Walls, in the plumbing or heating, air conditioning, mechanical or electrical systems within or outside any Unit without the prior written consent of the Board;

(h) Make any change to an installation upon the common property or maintain, decorate, alter or repair any part of the common property, except for maintenance of those parts of the common property which such Owner has the duty to maintain, without the prior written consent of the Board;

(t) Make or cause to be made any structural alteration or addition to its Unit which has not otherwise been specifically referred to herein, without first having the design specifications or such alteration or addition approved in writing by the Board. Any alteration or addition made by an Owner without such approval may be restored or removed by the Board or its duly authorized representative or representatives and any costs incurred by the Corporation as a result thereof shall forthwith be paid by such Owner to the corporation and such costs shall bear interest at the rate of eighteen (18%) percent per annum (or such other rate of interest as may be approved from time to time by the Board) from the time such costs are incurred until paid;

(w) Do anything or permit anything to be done by any of its agents, tenants, visitors, invitees and servants to damage, harm, mutilate, destroy, waste, alter or litter any part or parts of the common property of the Corporation Property;

(z) Do anything which will result in the overloading of any existing electrical circuits.

12.01 In the event that any Owner desires to lease its Unit he shall furnish to the Corporation an undertaking, in form satisfactory to the Corporation, signed by the proposed lessee, that the proposed lessee of the Unit will comply with the provisions of the Act and of the By-Laws of the Corporation. The Owner shall be jointly and severally liable with the proposed lessee with respect to such obligations. 13.01 The Corporation, the Board and all Owners, Tenants and other occupants of Units shall observe and obey all By-Laws as are applicable to each of them as amended from time to time whether or not such By-Laws or any part thereof are registered at the Land Titles Office.

[para6] Other relevant by-laws are:

3.01 In addition to the duties of the Corporation set forth in the Act, the Corporation shall:

(a) Control, manage and administer the common property and any corporation Property for the benefit of all of the Owners and for the benefit of the entire project;

(b) Do all things required of it by the Act, these By-Laws, the common property rules and any other rules and regulations of the Corporation in forced (sic) from time to time;

6.01 Any infraction or violation of or default under these By-Laws or any rules and regulations established pursuant to these By-Laws on the part of an Owner, its servants, agents, licensees, invitees or tenants may be corrected, remedied or cured by the Corporation and any costs or expenses expended or incurred by the Corporation in correcting, remedying or curing such infraction, violation or default (including costs as between solicitor and client) shall be charged to such Owner and shall be added to and become part of the assessment of such owner for the month next following the date when such costs or expenses are expended or incurred (but not necessarily paid) by the Corporation and shall become due and payable on the date of payment of such monthly assessment and shall bear interest at the rate of eighteen (18%) percent per annum (or such other rate of interest as may be approved from time to time by the Board) until paid.

6.02 The Corporation may recover from an Owner by a action for debt in any court of competent jurisdiction any sum of money which the Corporation is required to expend as a result of any act or omission by the Owner, its servants, agents, licensees, invitees or tenants, which violates these By-Laws or any rules or regulations established pursuant to these By-Laws and there shall be added to any judgement, all costs of such action on a full indemnity basis. Nothing herein shall be deemed to limit any right of any Owner to bring an action or proceeding for the enforcement and protection of its rights and the exercise of its remedies.

24.01 The property lines of the Units are defined by the centre line of common walls as constructed between Units or the vertical plane between Units where no wall exists, and the interior of the undecorated surfaces of exterior perimeter walls, floor and ceiling.

24.02 Each common wall shall be used by the Owners of the adjoining Units, as a Party Wall.

24.03 The common walls shall be used and maintained as Party Walls perpetually.

[para7] By a lease apparently dated January 26, 1998, Ahepa purported to lease to Webb, the unit for a period of two days and three years commencing January 30, 1998. The use specified was "reflexology, massage therapy and related therapies".

[para8] The lease provided:

OPERATING COSTS

The Landlord shall pay for all other Operating costs plus applicable Goods and Services Tax, which shall include, but are not limited to, property taxes, condominium fees and any special contributions levied by the Condominium Corporation.

LEASEHOLD IMPROVEMENTS

...The Tenant, at his sole Cost, shall be entitled to make Leasehold Improvements. The Tenant shall supply the Landlord with a list of the Leasehold Improvements and shall supply the Landlord with a list of the Leasehold Improvements and drawings as required and will obtain the Landlord's written approval prior to commencing construction, such approval not to be unreasonably withheld....

The Landlord acknowledges that the Tenant plans to convert one washroom to a shower facility. When the Tenant makes this improvement, he shall save and store the washroom fixtures on behalf of the Landlord. At the end of the Term, the Tenant, at his sole cost, shall convert the shower facility back into a washroom at the Landlord's written request.

SIGNAGE

The Tenant's signs shall comply with the applicable condominium by-laws for the West Edmonton Commerce Park complex and such signage shall be at the sole expense of the Tenant. Webb took possession of the premises early in February.

[para9] On February 11th, Trisha Barnes, a member of the Board of the Directors of the condominium Corporation approached Webb and found that alterations were being made to the unit and that he was installing hot tubs and showers for his business, called Blue Bay Massage. There were pieces of concrete piled on the common property outside of unit 42. The renovations which he made were approved by Ahepa and according to him, complied with the City building code. This was the first knowledge the Corporation had of these alterations or renovations. Barnes, the treasurer and effectively the operating officer of the Corporation, was told by Webb that he was the owner of the premises and therefore she assumed that unit 42 had been sold, having received no advice of its rental from Ahepa. She, therefore, attended upon Webb and advised him that he required Board approval to make structural alterations, however he paid no attention and completed the alterations. By letter dated February 13th the Corporation wrote to Webb advising him of a number of by-law infractions, including unauthorized renovations and the Board's intention to inspect the premises. On or about that same date Barnes claims she was verbally threatened with violence by Webb for attempting to enforce the by-laws and attempting to gain access to the premises. Webb denies this. Whatever the case, Barnes in her affidavit, and on examination, said that because of Webb's behaviour the Corporation caused the title of unit 42 to be searched on February 17th and found that Ahepa was still the owner and Webb the tenant.

[para10] On February 13th and 16th, by special resolution, the Board added by-laws 12.02 and 2.02(cc) which specifically prohibited use of the premises for the purpose of public baths, showers, hot tubs, saunas, massage parlours, escort services, etc. It also prevented any business being carried out within any unit between the hours of 9:00 p.m. and 6:00 a.m. without written consent of the Board. By-laws 12.02 provided:

An owner shall not lease or permit its unit to be leased in whole or in part without the prior written consent of the Board.

These amendments were registered with the Land Titles Office on February 17th but, in my view, do not affect the Respondents in this case. They may be valid from that point forward though one would have to consider s. 26(4) of the Act amongst other matters should that issue arise.

[para11] On February 17th, Webb had a mobile sign erected on the Corporation's common property, advertising "all girl massages", without having first obtained permission of the Corporation.

[para12] Webb, when examined on his affidavit, stated that he did not intend to comply with the by-laws, including the requirement of by-law 12.01. As noted, this attitude changed during the hearing of this application.

[para13] Mr. Giourmetakis of Ahepa was advised that Ahepa was in violation of a number of by-laws and on February 18th the Board gave Ahepa until February 25th to provide assurances that the premises would be restored to their original state prior to the unauthorized renovation. This involved removing the hot tubs and showers, and evicting Webb from the premises. Ahepa refused to do so.

[para14] About February 18th a Board member, Darrell Elmquist spoke to Webb. He claims that he was threatened with physical violence if he continued to attempt to enforce the by-laws. Elmquist reported this to the Board on February 23rd by letter. Webb denies having made such threats.

[para15] The Corporation did not deal further with Webb because of his attitude and his alleged threatening behaviour to Barnes and Elmquist. It placed the matter in the hands of its solicitors.

[para16] It seems that by-laws 2.02 (l) and (p) and 25.01 being the signage and refuse by-law requirements were violated but those breaches have been corrected.

[para17] This Court advised counsel for the Petitioner that if his clients sought to pursue the allegations that the Respondents were in breach of by-laws 2.02(a), (b) or (c) that a trial of an issue respecting those allegations would be required. Those issues were not argued further nor has the Petitioner sought that a trial of those issues take place. The option to do so was not and is not foreclosed.

[para18] At this point it would be useful to review how some Courts have considered the relationship between owners of condominiums. Mr. Justice Moore of this Court in the case of *Condominium Plan No. 8810455 v. Spectral Capital Corp.* (1990) 112 A.R. 213 at pp. 3 and 4 said:

Most condominium corporations are created by statute for two main reasons. Firstly, in order for all the owners to own the common property jointly, it is necessary through legislation to nullify the common law right of an owner to bring an action for the partition of common elements. Secondly, it is to ensure that positive covenants to repair and maintain, which do not normally run with the land, are enforceable against subsequent owners. In Alberta, the Condominium Property Act, R.S.A. 1980, c. C-22 (The Act) and the By-laws registered against title govern the operation of condominiums. Section 26 of the Act provides the necessary authority for the control, management and administration of the units. A Condominium Corporation is ultimately regulated by its own set of By-laws which provide for the control, management and administration of the units. The By-laws bind the corporation and all of its owners to the same extent as if the by-laws had been signed and sealed by the corporation and by each owner.

[para19] Though not dealing with the same issue, the following statement of Finlayson, J.A., speaking for the Ontario Court of Appeal in *Carleton Condominium Corp. No. 279 and Rochon et al* (1987) 59 O.R. (2d) 545 is equally applicable to this case.

The declaration, description and by-laws, including the rules, are therefore vital to the integrity of the title acquired by the unit owner. He is not only bound by their terms and provisions, but he is entitled to insist that the other unit owners are similarly bound. There is no place in this scheme for any private arrangement between the developer and an individual unit owner. If an individual arrangement is made, it must be disclosed in the declaration (s. 3(1)(f)).

[para20] In the case of *Sterling Village Condominium Inc. v. Breitenbach*, 251 So. 2d 685 (Fla. 4th D.C.A. 1971) a decision of the District Court of Appeal of Florida. Driver B.J., Associate Judge, speaking for the Court, said at p. 688:

Every man may justly consider his home his castle and himself as the king thereof; nonetheless his sovereign fiat to use his property as he pleases must yield, at least in degree, where ownership is in common or cooperation with others. The benefits of condominiums living and ownership demand no less. The individual ought not be permitted to disrupt the integrity of the common scheme through his desire for change, however laudable that change might be.

This was adopted by Judge Moore of the same Court in *Hidden Valley Harbour Estates, Inc. v. Basso* 393 So. 2nd 637 (Fla. Ct. Ap., 1981) at pp. 638-639 and quoted with approval by Ontario Courts in *York Condominium Corporation No. 216 v. Borsodi et al* (1983) 42 O.R. (2d) 99 at 107 and in *York Regional Condominium Corp. No. 585 v. Gilbert* [1990].

[para21] I was referred to a number of cases, many of which contained similar statements. The majority are from Ontario whose statute is not the same as that of Alberta but am satisfied that the basic principles enunciated reflect the position in Alberta. The Act does not draw a distinction between declarations made at the time the condominium was created setting out restrictions on the use of the condominium property and the rules promulgated by a Board of Directors of the Corporation as was commented upon in the Florida case and some of the Ontario decisions. The only document that deals with use and government of the condominium complex as set out in the plan are the by-laws as passed by the Corporation.

[para22] The first issue is whether or not a tenant in the position of Webb is bound by the provisions of the by-laws.

[para23] The Act provides that each condominium plan filed with the Registrar of Land Titles is deemed on registration to be embodied in the register. This refers to the register to be kept by the Registrar pursuant to s. 17(1) of the L.T.A. Section 3(3) of the Act provides that when a Certificate of Title is issued for one of the units of the condominium, that unit can be dealt with as can other land held under the Land Titles Act. The provisions of the L.T.A. apply to those dealings in so far as they do not conflict with the Act or its regulations [para24] The L.T.A. does not deal specifically with the registration of condominium plans and thus it would seem that all the steps contemplated by s. 16 and 17 of the L.T.A. are dispensed with and the plan becomes part of the register along with the other instruments, etc. mentioned in s. 17. There is no need to record the plan on the title since the title to the unit itself designates that it is a unit in the condominium plan, in this case, 9524710.

[para25] The general requirement for registration under the L.T.A. is set out in s. 57:

57 So soon as registered every instrument becomes operative according to the tenor and intent thereof, and thereupon creates, transfers, surrenders, charges or discharges, as the case may be, the land or the estate or interest therein mentioned in the instrument.

The Act goes on to provide, by s. 26, that by-laws registered as these ones were, took effect when they were filed with the Registrar and when the Registrar made a memorandum of the filing on the condominium plan, in this case, November 11, 1995 and April 8, 1997. There is no requirement that a memorandum be made on the Certificate of Title for each unit. Thus, it would seem clear that the by-laws so registered run with the land.

[para26] The Act is also clear that there must be by-laws, if not those set out in Appendix 1, then those required to be registered. Section 29 deals with contravention of a by-law by a person in a residential unit. It gives one form of remedy to the Corporation if its by-laws so permit. Section 29 does not affect the rights of the Corporation, an owner, a tenant, or any other person occupying a unit in a commercial condominium. However, s. 29 contemplates that an owner, tenant, or other person, occupying the condominium is subject to the Corporation's by-laws and confirms that the Legislature intended that the by-laws run with the land.

[para27] Webb knew that he was renting a condominium and if he was not aware of the fact that there were by-laws to be complied with, he should have been. He took the by-laws with the land. To accede to the argument of counsel for Webb would lead to a rather interesting scenario in which Webb the tenant, occupier and user of the unit, would be in a much stronger position on questions of use, making modifications, etc. of and to the unit, vis à vis the Corporation than would Ahepa. In effect, Webb would need only to comply with the terms of his lease and disregard the by-laws where in any given situation the lease either did not cover it or was at variance with the by-laws.

[para28] Thus, the Corporation was entitled to pursue both Ahepa and Webb and seek whatever remedies were available to it under the by-laws. Ahepa covenanted with Webb that Webb could do certain things which Ahepa, as the owner of unit 42, and Webb as tenant, either knew or are deemed to have known, required prior approval of the Board under the by-laws.

[para29] The following notes appear on the Condominium Plan:

7. The common boundary of any unit with common property is the interior undecorated surface of the floor, wall or ceiling as the case may be.

8. The common boundary of any unit with another unit is the centerline of common demising wall or the vertical plane between units where no wall exists as defined by the dimensions shown.

* See also By-law 2.02 (g), (t).

It is clear that the exterior walls, the ceiling and floor are common property, other than the interior surfaces thereof. This would allow the unit owner to decorate but not alter those parts of the building which might affect its structural integrity and safety.

[para30] I will now deal with the alleged violations by the Respondents.

[para31] The evidence satisfies me that Ahepa was in violation of the condominium by-laws in a number of instances. There is no evidence before me that Ahepa refused the Corporation's right to inspect the premises, only that Webb did. However, this to a very limited extent has now been done. The by-laws contemplate that the owner will obtain from a "proposed lessee" an undertaking by the lessee that the lessee will comply with the provisions of the Act and of the by-laws. By-law 12.01 also provides that the owner is jointly and severally liable with the "proposed lessee" with respect to such obligations. Ahepa did not furnish to the Corporation an undertaking in any form signed by Webb that he would comply with the provisions of the Act and the by-laws. An undertaking of this nature was provided to the Corporation by Webb during the course of this application. However, it contains qualifications which counsel for the Corporation advises are unacceptable.

[para32] Ahepa, was also in violation of by-laws 2.01(d) and (e) in failing to notify the Corporation of the lease and to have Webb comply with the by-laws and rules and regulations of the Corporation. As well, Ahepa permitted Webb to damage and alter the floor slab contrary to By-law 2.02(w).

[para33] Both Ahepa and Webb were in breach of the following by-laws:

1. By-laws 2.02(g) and (h). In allowing and making changes to the floor, in the plumbing and likely the mechanical and electrical systems within the unit and altering the floor slab without having obtained prior written consent of the Corporation.

2. By-law 2.02(i). Until a full and proper inspection has been done, it is impossible to make this determination. This would most likely be affected by any plumbing, mechanical or electrical alterations.

3. By-law 2.02(t). In allowing a structural alteration or addition to the unit not otherwise specifically referred to in the by-laws without first having the design specifications or such alterations or addition approved in writing by the Board.

4. By-law 2.02(z). The comments made in respect of 2.02(i) apply.

5. By-law 12.01. This was discussed earlier.

[para34] The next question is, what remedies are available, and which should be granted to the Corporation? I know of no law which would permit the Corporation to prohibit the type of business engaged in by Webb unless it can be established that it runs afoul of by-laws 2.02(a) and (c). [para35] In my opinion, by-law 12.01 is unnecessary since the by-laws run with the land and the tenant takes his lease subject to those by-laws. Although the Appendix 1 by-laws are more appropriate for a residential condominium, they contain no similar provision to by-law 12.01. True, when dealing with "restrictions in use" in Appendix 1 the term "owner" includes a tenant but that is not, in my view, evidence that the Legislature did not intend the by-laws to run with the land. On the contrary, it would indicate that anyone leasing a unit is on notice as to the uses to which the unit cannot be put. This is particularly so when the Act provides for a replacement Appendix 1 by other duly registered by-laws. However, by-law 12.01 is one of the by-laws and must be complied with. Thus, if Ahepa and Webb do so, I am not prepared to require Webb to leave the premises. Needless to say, the need for compliance by Webb was triggered when he entered into the lease.

[para36] The Act, by s. 30, requires the Corporation to enforce its by-laws. It must keep in a state of good and serviceable repair and properly maintain the real and personal property of the Corporation and the common property. By-la 6.01 authorizes the Corporation to "correct, remedy or cure" any infraction or violation of the by-laws. As to the modifications to unit 42, the Corporation has the right to take whatever steps are necessary to remedy any violation, i.e. to put the common property back in the state it was in initially. This, of course, would include anything affecting the floor slab and the common property so affected.

[para37] We are concerned with an alteration of the floor slab, likely alterations to the electrical and possibly mechanical components of the unit and apparently walls erected inside the unit. The latter item may or may not have been done in whole or in part by Webb. Changes which an owner or his tenant wish to make are to be made known to the Corporation for its approval.

[para38] Thus, I would direct that the Respondents submit to the Petitioner the design specifications for such alterations as have been made to the unit. In this case the Petitioners may cause such inspections to be made of the alterations as they deem necessary to comply with their statutory and by-law duties. This may include removing wall panels and other coverings to inspect wiring, heating plumbing and the effect the works have had or may have upon the common property and safety of the unit and complex as a whole.

[para39] Should the Board conclude that changes have resulted in damage or a risk of damage to the common property, the plumbing, heating, air conditioning, mechanical or electrical systems, notice of the same shall be served in writing upon the Respondents, stating the reasons therefor. If the Respondents agree with the Board's decision then the problems created or posed thereby shall be remedied, if necessary, in accordance with by-laws 2.02(t) and 6.01. The cost of the inspection and remedial work, if any, shall be borne by the Respondents jointly and severally, vis à vis the Petitioner. If the Respondents dispute a

decision that remedial work should be done or that the nature of such work is inappropriate then that dispute shall be tried as an issue before any member of this Court in which case the disputed remedial and Court costs will be dealt with by that Court.

[para40] The process of inspection, the making of decisions by the Board and, if not disputed, the effecting of the remedial work, if any, shall be commenced forthwith. If disputed, notice of such disputes setting out the grounds therefore shall be served upon the Petitioner within 15 days of receipt of the Board's decision, in which case the Petitioner shall take steps to have the issue or issues tried.

[para41] If there is any question as to the mechanics of effecting this remedy or in respect of the timing thereto, the parties may speak to me. As to this application, I would, in the normal course award costs in favour of the Petitioner in accordance with the provisions of by-laws 2.02(t) and 6.01, that is, on a solicitor and client basis. The provisions of by-laws 6.02 and 18.02 would also apply. If the Respondents wish to make further submissions respecting costs of this application, they may do so.

MURRAY J.

CBR# 085

The Owners: Condominium Plan No. 8810455, Petitioner, and Spectral Capital Corporation and Canmore Nordic Village Ltd., Respondents

[1990] A.J. No. 1071 No. 8901-17175

Also reported at: 14 R.P.R. (2d) 305 112 A.R. 213

Alberta Court of Queen's Bench Judicial District of Calgary Moore J. November 20, 1990

V.M. May and R.B. Brander, for the Petitioner. M. Blitt, for Amicus Curiae. B.E. Silver, for the Respondent.

REASONS FOR JUDGMENT

MOORE J.-- A Petition was filed pursuant to Section 60 of the Condominium Property Act, R. S. A. 1980, C. c22 by a Condominium Corporation (Corporation) known as Whiskey Jack. Section 60 of the Condominium Property Act states:

"60(1) Unless otherwise provided for in this Act or the regulations, an application to the Court under this Act shall be by Petition."

The petitioner, in reality, is the Condominium Corporation for a 20 unit residential project call the Whiskey Jack Condominiums. The Condominium Corporation operates the condominiums at Canmore, in the Province of Alberta. The Petitioner is seeking advice and direction from the Court over a conflict between the -- Respondents (Spectral) and the Corporation who are unhappy with the sale of time share units in unit #9 owned by Spectral.

In particular, the Corporation is seeking a declaration tha Spectral is in breach of valid By-laws which it is obliged to enforce pursuant to its duty under the Condominium Property Act. The Corporation seeks an injunction restraining any form of time share business to be operated by Spectral at Whiskey Jack. The Corporation also asks the Court to declare that the Corporation is entitled to legal costs.

BACKGROUND

Whiskey Jack is a 20 unit condominium project located in Canmore, Alberta. Development approval for this project was granted in June 1987 to Fielding Land Enterprises Ltd. (Fielding). The By-laws of the Condominium Corporation were registered with Land Titles on May 3, 1990. Fielding hired the Westar Group to oversee the marketing of the project. Westar used a sales brochure which described the project in the following terms:

"Whiskey Jack, the beginning of a heritage which brings your family and friends together in the richness of a lifestyle only reserved for those special family times. Whiskey Jack is for 20 very special families seeking privacy, peace and solitude." [Emphasis added] In December 1988 one Frank Galarneau purchased unit #8 on behalf of Spectral. Spectral named Mr. Falarneau as its agent in relation to all matters pertaining to unit no 8.

Unit No. 8 became occupied by Gary and Joyce Lyons who were employees of Spectral. They ultimately purchased unit No. 8. They act as managers for Spectral in relation to unit No. 9, which unit is still owned by Spectral.

The first Annual General Meeting of the owners was held on February 15, 1989. At the meeting, members were elected to the Whiskey Jack Board. Mr. Swales, who was a Director of Spectral, was elected as President of the Corporation. Mr. Swales was reputed to be knowledgeable in the area of property management. There was no disclosure at this time of the fact that both Galarneau and Swales were connected with Spectral and that Spectral had an intention of selling units of time in units it owned at Whiskey Jack.

At the date of the first annual meeting of the Corporation on February 15, 1989, units No. 5, No. 9, No. 13, No. 18 and No. 19 remained unsold. Soon after this meeting, Spectral embarked upon its plan to operate a time share marketing scheme from Whiskey Jack. Spectral purchased units #9, No. 13, No. 18 and No. 19 in Whiskey Jack from Fielding in April 1989. Apparently after the filing of this Petition, the Corporation and Spectral entered into a settlement agreement wherein units No. 13, No. 18, and No. 19 were purchased from Spectral. Therefore the only unit whose activity at issue in this Petition is unit #9 which remains the property of Spectral.

This dispute results from a conflict existing between the 14 residential owners and Spectral arising out of the objections of the Corporation to administer the Whiskey Jack Condominium project and the obligation to enforce the By-laws.

In mid May 1990, Spectral transferred its interest in unit #9 to Canmore Nordic Village Ltd. (a private company whose sole director is a director of Spectral) . As a result, the petition was amended to add Canmore Nordic Village as a respondent.

During the summer of 1989 an "A" frame free standing sign was placed on the common property of the Whiskey Jack Condominium near the entrance from the public road. This sign advertised Whiskey Jack as an "RCI Affiliated Resort". The sign in question was placed on the common property by Spectral to direct time share exchange visitors to the Whiskey Jack Condominium.

During the Summer of 1989, Frank Galarneau started to market Spectral's time share business out of the offices of Intra Executive Travel in Calgary, and was actively marketing from those premises by October 1989.

Spectral was offering three different types of time share packages to the public which can be described as follows:

1. Hotel Type of Accommodation

A short-term transient type of accommodation which was offered to the general public by Spectral through the office of Intra Executive Travel run by Frank Galarneau. Information on this type of time share accommodation was disseminated to the general public through advertisements placed in the Calgary Herald and the T.V. Times.

2. "Right of Use" Time share Packages

Purchasers of these packages obtained a right to occupy one of the Spectral units for a certain number of weeks per year. Under this program a purchaser also had a right to trade their time with other members of the Resort Condominium International (RCI) , an international time share trading organization with which Spectral had become affiliated. Such packages were also offered as perks to investors who decided to buy shares in Spectral.

3. "Fractional Ownership" Time share Units

This was a more complex undertaking designed to provide a facade of fee simple ownership. In order to market this package, Spectral divided the title in unit No. 9 to 51 separate ("fractional") Certificate of Titles in fee simple and sold each fractional title to the purchasers. The purchaser of a fractional interest was subject to a "Head Lease" which was granted by Spectral to the "Residential Owner's Association" (an entity distinct and different from the Corporation) and was comprised of all the 51 undivided interest holders in the unit. The purchaser in this case acquired a right of occupancy during a particular week of the year in Whiskey Jack and was also entitled to exchange his time for a right of occupation at other RCI resorts. Purchasers were also at liberty to rent their time slots to the general public through Intra Executive Travel, an arm of Spectral.

Spectral did not advise the Corporation that it was marketing time share packages in unit #9. The time share marketing scheme was discovered in the fall of 1989. In November 1989, five owners requested an Extraordinary General Meeting to discuss Spectral's activities. A meeting was held on November 24, 1989. Fourteen residential owners passed three resolutions at this meeting: (1) that time sharing was a commercial venture; (2) that time sharing was a nuisance; and (3) that a time sharing operation was injurious to the reputation of the project. At the meeting, the owners came to the conclusion that the actions of Spectral were contrary to the Bylaws of the Corporation.

I am satisfied from the evidence presented before me that the Extraordinary Meeting held on November 24, 1989, was a properly constituted meeting under the By-laws and that the Resolutions passed by the majority of the owners at the meeting were valid

Condominium ownership is a unique form of home ownership. The concept is radically different from that associated with the traditional form of home ownership. The word "condominium" has been defined as follows:

"... refers to a system of ownership within a multi-unit housing project whereby each dwelling unit is owned separately by the individual who purchases it, while the common elements (hallways, elevators . . . etc.) are held in common by all unit owners. Each unit owner has an undivided interest in the common elements which is in fixed proportion - usually the proportion that the value of his unit bears to the total value of all units in the project" (A.L. Burns & B.N. McLellan, *Condominium: The Law and Administration in Ontario* (Toronto: Carswell, 1981), at p . 1).

Most condominium corporations are created by statute for two main reasons. Firstly, in order for all the owners to own the common property jointly, it is necessary through legislation to nullify the common law right of an owner to bring an action for the partition of common elements. Secondly, it is to ensure that positive covenants to repair and maintain, which do not normally run with the land, are enforceable against subsequent owners.

In Alberta, the Condominium Property Act, R . S . A . 1980, C . c-22 (The Act) and the By-laws registered against title govern the operation of condominiums. Section 26 of the Act provides the necessary authority for the control, management and administration of the units. A Condominium Corporation is ultimately regulated by its own set of By-laws which provide for the control, management and administration of the units. The By-laws bind the corporation and all of its owners to the same extent as if the by-laws had been signed and sealed by the corporation and by each owner.

Section 26 states:

"26(1) the By-laws shall regulate the corporation and provide for the control, management and administration of the units, the real and personal property of the corporation and the common property.

(2) Any By-law may be amended, repealed or replaced by a special resolution, (3) An amendment, repeal or replacement of a By-law does not take effect until

(a). the corporation files a copy of it with the Registrar, and

(b). the Registrar has made a memorandum of the filing on the condominium plan.

(4) No By-law operates to prohibit or restrict the devolution of units or any transfer, lease, mortgage or other dealing with them or to destroy or modify any easement implied or created by this Act.

(5) The By-laws bind the corporation and the owners to the same extent as if the By-laws had been signed and sealed by the corporation and by each owner and contained covenants on the part of each owner with every other owner and with the corporation to observe and perform all the provisions of the By-laws."

It is clear from s. 26(5) that the By-laws bind all owner who must undertake to observe and perform all the provisions of the By-laws. (The underlining is mine.)

It is interesting to note By-laws 2.01(e) and 2.01(f):

"2.01(e) An owner shall not use his unit or permit it to be used in any manner for any purpose which may be illegal, injurious or that will cause nuisance or hazard to any occupier of a unit (whether an owner or not) or the family of such an occupier.

2.01(f) An owner shall notify the corporation forthwith upon any change of ownership or any mortgage or other dealing in connection with his unit."

and further to observe By-laws 25.02(b), 25.01(h) and 25.01(t):

"25.01 An owner shall not:

...

(b) Use his unit for commercial or professional purposes or for any purpose which may be illegal or injurious to the reputation of the project:

...

(h) An owner shall not do anything or permit anything to be done in respect of his unit, the common property or the corporation property or bring anything on it which will or would tend to increase the risk of fire or the rate of fire insurance premiums with respect thereof;

...

(t) An owner shall not do any act or thing or neglect or fail to do any act or thing which would render invalid any insurance in force and maintained by the incorporation or which would increase the premium thereof;"

The Petitioner in this case simply requests that its By-laws be enforced. The Petitioner says Spectral is in violation of By-laws which restrict use (25.01(b), 2.01(e)) and Spectral's actions have an adverse effect on insurance premiums (25.01(h) & 25.01(t)).

The Respondent Spectral agrees that each owner is bound by the Bylaws of the Condominium, but states that the By-laws are ultra vires the Condominium Corporation since they restrict Spectral's rights to alienation of property under By-law 26(4) which reads as follows:

"26(4) No by-law operates to prohibit or restrict the devolution of units or any transfer, lease, mortgage or other dealings with them or to destroy or modify any easement implied or created by this Act."

Spectral says the division of its title for unit #9 into 51 separate Certificate of Titles is not prohibited by the Condominium Act because the Act does not state that an owner must transfer his entire estate in the unit to the transferee. This argument, even if valid, is not an explanation for all the various time share packages that Spectral has been marketing and does not adequately deal with other violations of the By-laws. In my view, the By-laws are not ultra vires the Condominium Corporation.

The By-laws that the Petitioner claims to have been violated fall into four general areas: 1. Commercial Purpose

The actions of Spectral are subject to By-law 25.01(b) which states as follows :

"25.01(b) An owner shall not use his unit for commercial or professional purposes or for any purpose which may be illegal or injurious to the reputation of the project;"

The Corporation states that Spectral is using unit #9 for a commercial purpose. The marketing of the various time share schemes is commercial in nature with the object of making a profit. Spectral says that if the Petitioner's position is allowed to prevail then an owner can only use his unit as his own residence or lease or rent his unit to long term tenants. This in essence would be asking the Court to separate the incident of possession from ownership in such a manner that it would permit leasing, but prohibit a person from exercising any use, enjoyment, possession or occupancy of the unit.

In recent years condominiums housing has been utilized to deliver specialized type of housing to seniors, handicapped and other members of society. The critical feature of all such developments is a common interest and an agreement to bind themselves through By-laws acceptable to all. This is the essence of what happened at Whiskey Jack. All the purchasers of units in this project "special -- families" who decided to purchase units for a weekend retreat in the mountains. As the purchasers had a common interest which was to escape to the "peace and solitude" of the mountains. They all agreed to be bound by the By-laws. This arrangement, however, was disturbed by Spectral. There is no doubt in my mind that the driving force behind Spectral's time sharing scheme was profit.

David A. Altro, in dealing with resort time sharing in his article "Resort Time-Sharing: Why real estate's new brain-child needs its own legislation," (1981), 41 Revue du Barreau, 1054 at p. 1057, stated:

"The inescapable attractiveness to the time-share developer is based on the simple formula that he can substantially lower the purchase price of resort housing and at the same time increase overall profit. Although marketing costs for timeshares are higher than those for conventional resort condominiums due to the number of timeshare periods for sale, the developer's major cost, construction, is the same for either offering. By dividing the condominium unit into fractional unit time-share periods for sale (the "fractions"), the developer's aggregate return for the sale of such fractions is greater than the return where the condominium units are sold as a whole, pursuant to a conventional project sale." (The underling is mine.)

I am satisfied that Spectral has been utilizing unit #9 for a commercial purpose. The holding out of Whiskey Jack as a place for time share vacations through advertisements in the Calgary Herald and T.V. Times has injured the reputation of the project.

In my view the act of time sharing out one unit in a condominium complex is simply not compatible with the By-laws. Time sharing is as unique a development as a condominium project and therefore requires its own set of rules or By-laws. This is supported by recent recommendations for Time Sharing legislation made at the Uniform Law Conferences. (See: "Time Sharing: Report of the Manitoba Commissioners" (1983) Uniform Law Conference 262; "Uniform Time Share Act (1984), Uniform Law Conference of Canada 1731.

2. Nuisance

The Petitioner claims that the Respondent is also in breach of By-law 2.01(e) as the activity surrounding the marketing of time share packages is causing a nuisance to the other owners. The By-law in question states:

"2.01(e) An owner shall not use his unit or permit it to be used in any manner for any purpose which may be illegal, injurious or that will cause nuisance or hazard to any occupier of a unit (whether an owner or not) or the family of such an occupier."

There was evidence before me that the enjoyment of owners was seriously impaired by the hotel-like nature of the time share scheme that resulted in heavy traffic resulting from the viewing by potential investors of unit #9. Clearly dealing with 51 owners would increase the administrative headaches for the Corporation.

I am satisfied on all of the evidence that the heavy traffic in the project is disturbing the peace of individuals who purchased condominiums at Whiskey Jack. It is impossible for the Corporation to co-ordinate its activities with that of the 51 separate title holders in unit #9 who are only around for one week during the year. The successful operation of a condominium project requires commitment and cooperation from all of its members. Obviously 51 owners of a single unit who are transient are unlikely to display a commitment to the overall welfare of the project. I am aware that Spectral has created an association of these owners to represent their interest. I am, however, not convinced that it is a feasible solution. It simply has the effect of creating another "bureaucratic" level for the Corporation to deal with over policy.

3. Adverse Effect on Insurance Premiums

I am further satisfied, on the evidence, that Spectral is in violation of By-law 25.01 (h) and (t).

It is clear that the use of unit #9 for time sharing is an intensive use and the evidence before me indicates that such use will have an adverse effect on the insurance premiums of the Corporation.

4. Lack of Disclosure about Timesharing

Clearly, Spectral is in breach of By-law 2.01(f), which states:

"2.01(f) An owner shall notify the corporation forthwith upon any change of ownership or any mortgage or other dealing in connection with his unit."

There was ample evidence before me that Spectral failed to make appropriate disclosures. Mr. Swales was elected to the Corporation without revealing that it was Spectral that owned the unit and not himself. While Mr. Swales was President of the Corporation, Spectral was busy organizing its time sharing scheme with the knowledge of Mr. Swales but not the members of the Corporation. The efforts of owners to learn more about the scheme were thwarted by Spectral. Spectral had a responsibility under By-law 2.01(f) to bring to the Corporation's attention its plans with respect to unit #9 and its failure to do so is accordingly a breach of By-law 2.01(f).

In my view, a time sharing operation with fractional interests which are subject to trading around within an international corporation (RCI) cannot exist within a condominium development where the objects contemplate private ownership wherein no commercial operation would exist.

In the result, Spectral has breached the By-laws of the Corporation. A permanent injunction is granted to the Petitioner restraining Spectral and Canmore Nordic Village Ltd. from carrying on any form of time sharing at Whiskey Jack. I direct the "A" frame free standing sign, if it is still standing on the common property of the Corporation, be removed.

Costs are awarded to the petitioner on a solicitor/client basis.

MOORE J.

Amendment to reasons for judgment

Released: December 17, 1990 Page 17 was substituted to read the following correction: first full paragraph, third line, we should read: "...restraining Spectral "and Canmore Nordic Village Ltd." from carrying on any ...".

MOORE J.

CBR# 086

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"Jr ctc3_ "J CY EQ" I0:/ " Vj g" Rgvklqpgt" ku" vj g" eqpf qo lpkwo " eqtr qtcvklp" hqt" Rctm' J cxgp" Xkrcu" kp" vj g" vj p" qh" Qnqvnu" *\$vj g" eqtr qtcvklp\$+0' Vj g" eqo r rgz" ku" eqo r tkugf " qh'47" woku" cpf" j cu" dggp" f guki pcvgf " d{ " vj g" eqtr qtcvklp" cu" dglpi " t gultevgf " vq" dglpi " qy pgf " cpf " qeewr kgf " d{ " r qqr ng" qh' cv'ngcu'67" { gctu'qh'ci g0'Vj g" Tgur qpf gpw'ctg" vj g" qy pgtu'qh'ppg'qh'vj gug'woku0Y j kg" vj g{ " vj go ugrgu'ctg" qxgt" 67" { gctu'qh'ci g. " vj g{ " j cxg" c" uqp" rklpi " y kj " vj go " y j q" ku" pqy " 49" qt" 4: " { gctu'qrf 0' C'v'kuuwg" ku" y j g vj g{ " vj g" eqtr qtcvklp" o c{ 'r tqj kdk'vj g" Tgur qpf gpw'uq'p'htqo " hxlpi " y kj " vj go 0'kp" o { 'xky " k'ecp0"

"

"Jr ctc4_ "Y j gp" vj g" eqpf qo lpkwo " eqo r rgz" y cu" f gxnrgf " kp" 3; ; 6. " vj g" y cu" pq" t gultevklp" qp" ci g" hqt" gkj gt" qy pgtuj kr " qt" qeewr cpe{ 0'kp" O c{ " qh'3; ; 8" vj g" qy pgtu'qh'vj g" woku" y g" cf xkugf " vj tqwi j " c" pgy unrgwt " vj cv'vj g" Dqctf " qh' O cpci gtu" kp'vgpf gf " vq" ugnn'c" tguqmwklp" htqo " vj g" qy pgtu" vq" r rceg" cp" ci g" t gultevklp" qp" qy pgtuj kr " cpf " qeewr cpe{ 0' C'v'v'ko g" vj g" Tgur qpf gpv' O t0' Cpj qp{ " Uo kj " y cu" c" o go dgt " qh'vj g" Dqctf 0' C" ur gekn' tguqmwklp" y cu" uki pgf " d{ " c" uw' h'ekgpv" pwo dgt " qh' qy pgtu. " kpenf lpi " O t0' Uo kj . " vq" r gto k'c" ej cpi g" kp" vj g" d{ /ny u0' Qp" Lxp" 4: . " 3; ; 8. " c" P qv'eg" qh' E j cpi g" qh' D{ /ny u' y cu" r tqr gtn{ " hrgf " cv' Ncpf " Vkrqu" qh' h'eg" ej cpi lpi " vj g" y qtf lpi " qh' vj g" cr r rkecdng" d{ /ny u' uwev " vj cv'vj g" f gh'pklq" qh' \$qy pgt\$ " y cu" vq" o gcp<\$cp" cf wv' r gtuqp" pqv{ " qwpi gt" vj cp" hqt v{ /h'xg" *67+ " { gctu" y j q" ku" tgi kvgtgf " cu" vj g" qy pgt" qh' vj g" h'eg" uko r ng" guvcg" kp" vj g" woku000\$ " Vj g" f gh'pklq" qh' \$qeewr cpv\$ " y cu" ej cpi gf " vq" t'gcf . " kp" r ctv<"

"

"00'c" r gtuqp" r tguqpv' kp" c" woku" qt" kp" qt" w qp" vj g" t'gcn' qt" r gtuqpcn' r tqr gtv{ " qh' vj g" Eqtr qtcvklp" qt" vj g" eqo o qp" r tqr gtv{ " y kj " vj g" r gto kuukqp" qh' cp" qy pgt" cpf " vj cni' dg' c' r gtuqp" qt" r gtuqpu' qh' cf wv{ " gctu' cpf " kp" cp{ " g'xgp" *v' p'qv{ " qwpi gt" vj cp" hqt v{ /h'xg" *67+ " { gctu0"

"

"Jr ctc5_ "Ceeqt' lpi " vq" O t0' Uo kj . " y j gp" j g" cpf " j ku" y h'g' r wte j cugf " vj gk" eqpf qo lpkwo " woku' htqo " vj g" f gxnrgf . " vj g{ " f k'ewuugf " vj g" r quukdk'v{ " qh' j cxlpi " O tu0' Uo kj u' uq'p. " vj gp" vj gpv{ /vj tgg{ " gctu' qrf . " h'xg" y kj " vj go . " cu" j g" j cf " c" ej tqple" f kugcug0' Vj g" f gxnrgf gt" kp' lecvgf " vq" O t0' Uo kj " vj cv'j g" eqw' f 0' Cu" c" t' guwv. " vj g" Uo kj u' woku' j cf " ku" dcugo gpv' f gxnrgf gf " uqngn' " hqt" vj g" qeewr cvklp" qh' O tu0' Uo kj u' uq'p0' Gxgp" vj qwi j " O t0' Uo kj " y cu" c" o go dgt " qh' vj g" Dqctf " y j kej " o cf g" vj g" t'geqo o gpf cvkpu' hqt" vj g" ej cpi g" kp" vj g" d{ /ny u. " j ku" wpf gtuwcpf lpi " qh' vj g" co gpf o gpw' y cu" vj cv'vj g" y qwf " dg" ekewo ucpegu" y j g" qeewr cpw' eqw' f " dg" wpf gt" vj g" ci g" qh' hqt v{ / h'xg00 t0' Uo kj " ucvgf " vj cv'j cf " j g' d' r g' xg' f " vj g' ty kug. " j g' y qwf " p'qv{ cxg" dggp" kp' h'xq'w' qh' vj g" co gpf o gpw0"

"

"Jr ctc6_ "Vj g" Tgur qpf gpw' cti wg<"

"

"30' vj g" d{ /ny u' ctg' f kuetlo kpcwt{ =40' vj g{ 'ctg' kp' dtgcej " qh' vj g" Eqpf qo lpkwo " Rtrq' gtv{ 'Cev=50' vj g{ 'ctg' xqkf " hqt" wpegtcvklp{ =60' vj g" eqtr qtcvklp" j cu' dtgcej gf " vj g' t' wgu' qh' pcwcn' l' wukeg0"

"

"30' F KETIO R C V I Q P "

"

"Jr ctc7_ "Gxgp" vj qwi j " vj g" d{ /ny u' f q" o cng" c" f ku' vevklp" ci cklpu' r qqr ng" wpf gt" vj g" ci g" qh' hqt v{ /h'xg" { gctu" *cpf " f q" vj g" gh'qtg" \$f kuetlo kpcvg\$+ " vj g" Ecpcf kcp" E j ctvgt " qh' Tki j w' cpf " Htggf qo u" *\$j g" E j ctvgt \$+ " ku" p'qv' cr r rkecdng0' K' y cu" p'qv' \$kp'vgpf gf " vq" eqxgt" cev'xk'kgu' d{ " p'qp/ i qxgtpo gpv' n' g' p'v'kgu' et gcvgf " d{ " i qxgtpo gpv' hqt " n' i cm{ " h'ek'k'cvklp" r tkxcvg' kp' k'kf wcu" vq" f q" vj lpi u' qh' vj gk" qy p" ej q'qulpi " y kj qw" gpi ci lpi " i qxgtpo gpv' n' t'gur qpukdk'v{ 0< O eMkppg{ " x0' Wp'k'gtukv{ " qh' I vgr j . " J3; ; 2_ " 5" UE0T0'44; " cv'4880' Vj g" Tgur qpf gpv' cti wgf " vj cv'vj g" Dqctf " qh' O cpci gtu' qh' vj g" eqtr qtcvklp" y cu' uw' h'ekgpv{ " k'p'hw'gpegf " cpf " eqpvt' qmgf " d{ " vj g" Nkgw'gpcpv' I qxgt' pqt" cpf " O wplek' cn' C' h'ek' u' vq" s' wcn' h{ " cu" c" dtcpej " qt" cto " qh' i' qxgtpo gp0' kp" o { 't'gur gev' w' x' l' g' y . " vj g" eqtr qtcvklp" u' d{ /ny u' ctg" c" eqpvt' cev' co qpi " vj g" qy pgtu' ur gekh{ lpi " c" o c' p'p'gt " kp" y j kej " vj g{ " y kuj " vq" eqgz' ku0' Vj g{ " ctg" gp'v' k'rgf " vq" o cng" uwev " c" eqpvt' cev. " r ct' v' w' c' n' { " y j gp" o cf g' kp" i' q'qf " h'ckj " hqt" c" t' gcuq' p'cdng" r wtr qug. " y j kej " y cu" vq" r tqv' gev' y j cv'vj g{ " wpf q'wd' v' g' n' " d' r' g' x' g' " ku" vj gk" gplq{ o gpv' qh' vj gk" r tqr gtv{ " cpf " vj gk" s' wcn' h{ " qh' h'eg0' Ugg' I qm' i' Eqpf qo lpkwo " Eqtr 0P q0438' x0D' qtuqf k*3; : 5+ '64' Q0T0*4pf +; ; 0"

"

"Jr ctc8_ "Kco "cnuq" qh' vj g" x' l' g' y " vj cv'vj g" J wo cp" Tki j w. " Ekkl' gp'uj kr " cpf " O w' n' k' e' w' w' c' r' k' u" o " Cev. " T' L' U' C' 03; : 2. " e0' /330" *\$j g" J wo cp" Tki j w' Cev\$+ f' q' u' p' q' v' c' r' n' { 0Vj cv' r' qt' v' k' p' qh' vj g" J wo cp" Tki j w' Cev' y j kej " vj g" Tgur qpf gpw' u' q' w' j v' v' q' k' p' x' q' n' g' ku" Uge' v' k' p' 5* d+ y j kej " uc{ u<"

"

"5' P q' r' gtuqpcn' i' j cni"

"

"*d+ f kuetlo kpcvg" ci cklpu' cp{ " r gtuqp" qt" encu' qh' r gtuqpu' y kj " t'gur gev' vq" cp{ " i' q'qf u. " ugt' x' l' g' u. " ceeqo o qf cvklp" qt" h'ek'k'kgu' vj cv'ctg" ewuqo ctkn' " cx' k' c' d' r' g' v' q' y g' r' w' r' k' e. " *o { 'go r j cuku+ "

"

"d'gecwug" qh' vj g" t'ceg. " t'grki k'qu" d'gr' k'ghu. " eqn' q' w. " i' gpf gt. " r j { u' l' e' c' n' f' k' u' c' d' k' r' v{ . " o gpv' n' f' k' u' c' d' k' r' v{ . " c' p' e' g' u' t' . " r r' c' e' g' " qh' " q' t' k' i' k' p. " o c' t' k' c' n' i' u' c' w' u. " u' q' w' t' e' g' " qh' " k' p' e' qo g' q' t' h' c' o k' n' { " u' c' w' u' " qh' vj cv' r' gtuqp" qt" encu' qh' r' gtuqpu' qt" qh' cp{ " q' vj g' r' gtuqp" qt" encu' qh' r' gtuqpu0"

"

"Jr ctc9_ "Kco "ucv' k' h' g' f " vj cv'vj ku" uge' v' k' p. " k' p' u' h' c' t' " cu" k' r' t' qj k' d' k' u' f' k' u' e' t' l' o k' p' c' v' k' p' y kj " t'gur gev' vq" \$ceeqo o qf cvklp. \$" ku" p'qv' cr r rkecdng" kp" vj ku" ecug0' T' c' y gtu. " k' ku" cr r rkecdng" / " cu" h' q' w' p' f " kp" I c{ " C' n' k' p' e' g' " x0' X' c' p' e' q' w' x' g' t' " U' w' p' *3; 9; +; " 9" F (N0T0' *5t' f +799" *UE(00' cv'7; 2. " vq" uwev " o cv'gtu' cu' ceeqo o qf cvklp" kp" j q' v' g' u. " k' p' u' c' p' f " o q' v' g' u' 0' G' x' g' p' k' h' " \$ceeqo o qf cvklp" \$" e' c' p' " d' g' t' g' c' f " cu" k' p' e' n' f' l' p' i " c" " eqpf qo lpkwo " d' w' k' f' l' p' i " q' t' " eqo r r' g' z. " k' u' g' g' o u' v' q" o g' vj cv' Uge' v' k' p' 3308' qh' vj g" J wo cp" Tki j w' Cev' eqx' g' t' u' vj ku' u' k' w' c' v' k' p' 0' C' u' u' c' v' g' f " d{ " C' n' g' p' " E' q' (E' v' L" kp" D' q' t' u' q' f' k' " H' w' v' g' t' vj g' f' g' e' m' t' c' v' k' p' " ku" kp" vj g' p' c' w' t' g' qh' c' r' t' k' x' c' v' g' " ci t' g' g' o gpv' co qpi " cni' qh' vj g" qy pgtu' qh' woku" kp" vj g" eqpf qo lpkwo . " k' p' e' n' f' l' p' i " vj g" f' g' h' g' p' f' c' p' w. " hqt" vj g" l' q' l' p' v' c' p' f " u' g' x' g' t' e' n' i' d' g' p' g' h' s' 0' Vj g" qy pgtu' 000' t' g' " g' p' v' k' r' g' f " vq" vj g" r' t' q' v' e' v' k' p' qh' vj gk" eqpvt' c' e' w' c' n' i' c' p' f " r t' q' r' g' t' v{ " t' k' i' j' w' 0' k' i' vj q' u' g' t' k' i' j' w' c' t' g' " p' q' v' r' t' q' v' e' v' g' f " vj g{ " r' g' t' e' g' k' x' g. " y kj " e' c' w' u' g. " vj cv'vj gk" gplq{ o gpv' qh' vj gk" r tqr gtv{ " cpf " vj wu' vj gk" s' wcn' h{ " qh' h'eg" y k' n' i' d' g' c' f' x' g' t' u' g' n' { " c' h' h' e' v' g' f' 0"

"

"Jr ctc: "Vj ku" cnuq" cr r gtu' vq" wpf gtr' g' y g' f' gelukqp" qh' E j k' g' h' L' w' u' k' e' g' O q' q' t' g' qh' vj ku" E' q' w' v' k' p' " Eqpf qo lpkwo " Rrcp" P q0' : : 32677" x0' U' r' g' e' v' c' n' i' E' c' r' k' c' n' i' E' q' r' 0*3; ; 2+ '36' T' 0' R' 0' T' 0' *4pf +527' cv'534. " y j g' t' g' j' g' u' c' v' g' f' <"

"

"Kp'tgegpv{ gctu'eqpf qo kpkwo "j qwulpi "j cu'dggp'wklk gf "v'f grkxgt'ur gekrk gf "v{r g'qh'j qwulpi "v'ugpkqtu."j cpf kecr r gf "cpf "qyj gt" o go dgtu'qh'ugekqv 0Vj g'etkkeknlhgcvw g'qh'cmf' g'xgnqr o g'p'u'ku'c'eqo o qp'kp'vgt'g'v'cpf "cp"ci tgggo gpv'v'q'dkpf "vj go ugrku'v'q'd{/ny u' ceegr vcdrg'v'cndf"

"40DTGCEJ "QH'EQP F QO K KWO "CEV"Jr ctc; _Vj g'Tgur p'p'f g'p'u'ugeqpf "cti wo gpv'y cu'yj cv'yj g'd{/ny u'eqpvcxgpg"Ugevkp"48" *6+q'h'y g'Eqpf qo kpkwo "Rtqr gtv' 'Cev."TUUC06/E/44."y j lej "ucvku-"

"*6+P q'd{/ny "qr gtcv'u'v'q'r tqj kdk'qt'tgultev'yj g'f g'xqmwkq'qh'w'pku'qt'cp{ 't'cpuhgt.'hgucg.'o q'ti ci g'qt'qyj gt'f g'cnkpi "y kj "vj go "qt" v'f g'v'v'q'q'f "q't' b' qf kh{ 'cp{ 'gcugo gpv'ko r'ngf "qt'et'gcv'f "d{ "vj ku'CeV"

"Jr ctc32_ "Vj g'Tgur p'p'f g'p'u'tgn{ "w'qp"67526: "Dtkkuj "Eqno dlc" Nf'0'x0'U'c'v'c" R'p'p"MCU"329; ."]3; ; 6_ "D'OE'LO'P q'04963"y j g'g'k'p" yj cv'Eqwt'v'j grf "yj cv'c"uko k'ct' "t'gultev'v'q'p"ci g'f'k' "k'p'f'ggf "qr gtcv'v'q"r t'g'x'g'p'v'cp"qy p'gt' "ht'qo "ugnkpi . "t'cpuhgt'kpi . "ng'cukpi "qt" qyj gty kug'f'g'cnkpi "y kj "c'eqpf qo kpkwo "w'pk'v'cp'f "y cu'yj g't'g'ht'g'x'q'k'f'0Vj cv'ecug'y cu'k'p'w'p'eqpuk'f'gt'f "d{ 'cp'q'v'gt'lw'f' i'g'q'h'y g'D'OE'0 U'w'tgo g'Eqwt'v'k'p"O ctuj cm'x0'U'c'v'c"R'p'p"q'0'P'Y "47: 6."]3; ; 8_ "5"TR'OT'0'5'tf "3660'Vj g'tg."J g'p'f'g'tu'q'p."L'0'eqpuk'f'gt'f "y j g'v'j g't'cp" ci g't'gultev'v'q'p"ng'ug'p'g'f "y j g'x'c'w'g'q'h'c"e'eqpf qo kpkwo "w'pk'v'cp'f "y j g't'g'd{ "t'gultev'v'q'p" "y j g't'cpuhgt"qh'uwej "w'pk'0'J g'eco g'v'q"y j g' eqpenwuk'p'v'v'uko r'nf "r'nc'kpi "cp"ci g't'gultev'v'q'p"w'qp't'cpuhgt'f'q'gu'p'q'v'o g'cp'v'v'q'v'g'f'go cpf "h'q't'uwej "c'w'pk'y'q'w'f "d'g'ng'ug'p'g'f'0' J g'eqpenw'f'g'f "y j cv'kuuw'g'eqw'f'p'q'v'd'g'f'g'v'to k'p'g'f "y kj q'w'v'y g't'g'd'g'k'p'i "g'z'r g't'v'g'x'k'f'g'p'eg'f'g'c'f'0"

"Jr ctc33_ "Y kj "f'wg't'g'ur g'ev'v'q"y j g'Dtkkuj "Eqno dlc"cwj qtkk'gu."K'co "qh'yj g'x'k'g' "y j cv'yj g's'w'g'v'k'p'ku'p'q'v'y j g'v'j g't'g'x'c'w'g'ku" ng'ug'p'g'f "cpf "y j g't'cpuhgt"y j g't'g'd{ "t'gultev'v'q'p"0Vj g'kuuw'g'ku"y j g'v'j g't'g'd{/ny "k'ug'h't'g'ultev'v'q'p"r'ko ku'v'j g't'cpuhgt'qh'c'w'pk'0'K'i'cp" qy p'gt"o w'v'dg"67" {gctu'qt" q'nf'gt. "y j g't'g'ku"c'ko k'k'p'i "eqpf k'k'q'p"r'nc'g'f "q'p"y j g't'cpuhgt'0'K'i'c'w'v'g'tu'p'q'v'v'j cv'yj g'x'c'w'g'q'h'yj g'w'pk'ku" k'p'et'g'c'ug'f "qt" 'f'g'et'g'c'ug'f'0'V'q'v'j cv'z'g'v'p'v'j g'd{/ny "ku'k'p'eqpvcxg'p'v'q'p'qh'yj g'Eqpf qo kpkwo "Rtqr gtv' 'Cev'0'Vj g'f'k'h'k'w'w'f' "K'j'cx'g'y'kj " yj ku'ku"y j cv'k'v'uggo u'yj cv'yj ku'ugev'v'q'p"y q'w'f "y j g'p'j'cx'g'yj g'g'h'g'ev'q'h'r'g'x'g'p'v'k'p'i "c"i' t'q'w' "qh'ug'p'k'q'tu'ht'qo "h'q'to k'p'i "c'eqpf qo kpkwo " eqtr qtcv'k'p'cpf "t'gultev'v'q'p"qy p'gt'uj k'r "v'q"c'eg't'v'k'p'ci g'0'V'j ku'k'p'v'k'p'v'j g'h'c'g'q'h'c'p'w'o d'g't'q'h'f'g'ek'uk'p'u."u'q'o g'q'h'y j lej "y j cx'g'c'nt'g'c'f { " d'ggp"t'g'ht'g'f "v'q."y j lej "y j cx'g'c'r'r't'q'x'g'f "y j g'eq'p'eg'r'v'q'h'r'g'q'r'ng"o c'nk'p'i "cp"ci tgggo gpv."k'p"i' q'q'f "h'c'k'y "cpf "h'q't"r' t'q'r g't'g'cu'p'u."v'q" r' t'q'x'k'f'g'ht'cpf "r' t'q'v'g'v'c'eg't'v'k'p's'w'c'k'v'f' "q'h'k'k'g'0'J' c'x'k'p'i "u'c'k'f"y j cv'y j k'g'c'd{/ny "t'gultev'v'q'p"qy p'gt'uj k'r "v'q"cp{ 'ci g'b'c'f "d'g'eq'p'v'c't' { " v'q"y j g'Eqpf qo kpkwo "Rtqr gtv' 'Cev."y j g'kuuw'g'k'p'v'j ku'ko c'w'g't'ku'p'q'v'y j g'v'j g't'g'v'c'p'uhgt'qh'yj g'w'pk'ku'r' tqj k'k'k'g'f "qt"t'gultev'v'q'p"=y j g' kuuw'g'ku"y j g'v'j g't'g'd{/ny u'o c'f "r' t'q'r g't'n{ "r' tqj k'k'k'q't' "t'gultev'v'q'p"q'ee'w'c'p'e { 0'U'gevkp"48"*6+q'h'yj g'Eqpf qo kpkwo "Rtqr gtv' 'Cev' f'q'gu'p'q'v'f'g'c'f'y'kj "q'ee'w'c'p'e { 0'D{/ny "84*3+*c'+ku'yj g't'g'ht'g'f'p'q'v'x'q'k'f'0"

'50WPEGTVCIR V' ""

"Jr ctc34_ "Vj g'Tgur p'p'f g'p'u'cti w'g'yj cv'yj g'f'g'h'k'p'k'q'p'qh'q'ee'w'c'p'v'uj qy p'cd'q'x'g'y q'w'f "o g'cp'v'j cv'cp{ 'r' g'tu'q'p'y j q'ku'p'q'v'cp"qy p'gt" dw'y j q'x'g'p'w'g'p'q'p"y j g'eqo o q'p'r' t'q'r g't'v' "h'q't'cp{ "ng'p'i yj "q'h'v'ko g'ku'cp'q'ee'w'c'p'v'0'K'i'v'v'y g't'g'v'c'ng'p'v'q'ku'k'p'i k'ec'ne'q'p'w'uk'p."k'v'ku" c'ti w'g'f . "p'q'q'p'g'd'w'v'qy p'g'tu'q't'q'y g'tu'q'x'g't'v'g'ci g'q'h'67" {gctu'ct'g'p'w'k'v'g'f "v'q'd'g'q'p'v'j g'r' t'q'r g't'v' 0'Y'kj "t'g'ur g'ev.'\$c'r' g'tu'q'p'r' t'g'ug'p'\$" o w'v'dg"t'g'c'f "k'p"c'eqo o q'p'ug'p'ug"y c'f'0'V'j cv'y q'w'f "o g'cp'v'j cv'k't'g'ht'u"v'q"c'r' g'tu'q'p'p'q'to c'm{ 't'g'uk'f'k'p'i "k'p"q't'q'ee'w' { k'p'i "c'w'pk'ku" q'r r' q'ug'f "v'q"c'x'k'uk'q't'0'V'j g'd{/ny "ku'p'q'v'x'q'k'f' "h'q't'w'p'eg't'v'k'p'v'0"

'60DTGCEJ "QHP CVWTCNLDUMVEG"

"Jr ctc35_ "Vj g'Tgur p'p'f g'p'u'h'k'p'c'f'cti wo gpv'ku'yj cv'yj g'R'g'v'k'k'p'g't'j cu'h'c'k'g'f "v'q'g'p'h'q'teg'yj g'f'k'ur w'g'f "d{/ny "w'p'h'q'to n' 0'U'r'g'ek'h'k'c'm'f ." yj g't'g'c't'g'v'j t'g'g'qy p'g'tu'y j q'c't'g'p'q'v'q'v'f/h'x'g'f {gctu'q'h'ci g'ci c'k'p'v'y j q'o "p'q'g'p'h'q'tego gpv'j cu'd'ggp"eqo o g'p'eg'f'0'V'j g't'g'j'cx'g'd'ggp" q'yj g't'q'ee'w'c'p'u'w'p'f'gt "y j g'ci g'q'h'67" {gctu'k'p"y j g'r'cu'v'cp'f "p'q'g'p'h'q'tego gpv'r' t'q'eg'g'f'k'p'i u"j c'f "d'ggp"r'w'p'ej g'f "ci c'k'p'v'yj go 0'V'j g' T'g'ur p'p'f g'p'u'y g't'g'c'f'x'k'g'f "d{ "y j g'q't'k'i'k'p'c'f'g'x'g'q'r'g't'v'j cv'0' tu'0'U' k'j "u'q'p'eq'w'f "r'k'x'g"y'kj "y j go . "cp'f "j'g'j' cu'f'q'p'g'u'q' "h'q't"u'q'o g' v'ko g'0'K'ku"cti w'g'f "y j cv'v'k'p'eg'yj g'd{/ny u'j'cx'g'p'q'v'd'ggp"u't'k'ev'f "g'p'h'q'teg'f "k'p"y j g'r'cu'v'v'j g'R'g'v'k'k'p'g't'uj q'w'f "p'q'y "d'g'g'u'q'r'r'g'f "ht'qo " r' t'q'eg'g'f'k'p'i "ci c'k'p'v'yj g'T'g'ur p'p'f g'p'u'0"

"Jr ctc36_ "Y kj "t'g'ur g'ev'v'q"y j g'ci tgggo gpv'o c'f g'd'g'y g'p'v'j g'U'o k'j u'c'p'f "y j g'f'g'x'g'q'r'g't. "k'v'ku'eng'c't'yj cv'r' t'k'x'c'v'g'c'tt'c'p'i go g'p'u'd'g'y g'p'p" c" f'g'x'g'q'r'g't" cp'f "cp" k'p'f'k'x'k'f'w'c'n' w'pk'v'j' q'r'f'g't' "ec'p'p'q'v' dg"o c'f g' d'k'p'f'k'p'i "ci c'k'p'v'v'j g' u'w'd'g's'w'p'v' qy p'g'tu' q'h'v'j g'Eqpf qo kpkwo " Eqtr qtcv'k'p'<E'ct'ng'v'p'Eqpf qo kpkwo "Eqtr 0'x'0'T'q'ej q'p"*3; ; 9+."66"TR'OT'044: 0"

"Jr ctc37_ "Y kj "t'g'ur g'ev'v'q"y j g'q'v'j g't'v'j t'g'g'\$t'c'p'ui' t'g'u'q'tu.\$'y j g'R'g'v'k'k'p'g't'f'q'gu'c'f'o k'v'yj cv'yj g't'g'c't'g'v'j t'g'g'qy p'g'tu'w'p'f'gt "y j g'ci g'q'h'67" {gctu'0'V'y q'q'h'v'j go "r'w'ej'cu'g'f "y j g't'w'p'ku'd'g'ht'g'v'j g'ew't'g'p'v'd{/ny u'y g't'g'ej'c'p'i g'f'0'Q'p'g'q'h'v'j go "j'c'f "c'r'r'c't'g'p'w'f "c'es'w'k'g'f "j'k'p'q't" j'g't'w'p'k'p'F'g'ego d'g't'q'h'3; ; 8"l'w'v'r't'k'q't'v'q"O t'0'U'o k'j "d'ge'q'o k'p'i "r' t'g'uk'f'g'p'v'q'h'v'j g'D'q'c't'f'0'K'ku"g'cu{ "v'q'ug'g'y j { "k'v'y'q'w'f "d'g'f'k'h'k'w'w" cp'f "r'g't'j'c'r'u'q'o g'y j cv'w'p'h'c'k."v'q"v'c'ng'c'ev'k'p'ci c'k'p'v'v'j g'y'q'qy p'g'tu'y j q'j'c'f "c'es'w'k'g'f "y j g't'w'p'ku'r' t'k'q't'v'q"y j g'r'cu'k'p'i "q'h'v'j g' ew't'g'p'v'd{/ny u'0'Y'j g'p'v'j g'f "c'es'w'k'g'f "y j g't'q'r'g't'v'f."y j g't'g'y' cu'p'q' "t'gultev'v'q'p"ci c'k'p'v'v'j g'q't'q'ee'w'c'p'e { 0'Y'kj "t'g'ur g'ev'v'q"y j g'qy p'gt" y j q'c'es'w'k'g'f "c" w'p'k'l'w'v'r' t'k'q't'v'q"O t'0'U'o k'j "d'ge'q'o k'p'i "r' t'g'uk'f'g'p'v'q'h'v'j g'D'q'c't'f."k'v'y'q'w'f "d'g'w'p'ug'go n' "h'q't"O t'0'U'o k'j "v'q"cti w'g'v'j cv' d'ge'c'w'g'\$j ku'\$D'q'c't'f'j'c'f' "h'c'k'g'f "v'q'g'p'h'q'teg'eqo r'nc'p'eg."y j cv'yj ku'D'q'c't'f'uj q'w'f "p'q'y "d'g'g'u'q'r'r'g'f "ht'qo "f'q'k'p'i "u'q'k'p'v'j ku'ec'ug'0"

"Jr ctc38_ "Ky kj "v'q'v'v'g'u'v'j cv'yj g'kuuw'g'd'g'ht'g'o g'ku"y j g'v'j g't'v'j g'g'g'd{/ny u'c't'g'x'c'k'f' "cp'f"y j g'v'j g't'v'j g'R'g'v'k'k'p'g't'ku'v'q'd'g'c'm'qy g'f "v'q" g'p'h'q'teg"y j go "cu"ci c'k'p'v'v'j g'T'g'ur p'p'f g'p'u'0'K'co "c'f'x'k'g'f "y j cv'v'k'p'eg"y j g'ew't'g'p'v'D'q'c't'f "cu'w'o g'f "t'g'ur q'p'uk'k'k'v'f "h'q't'cp'f "eq'p'v'q'i'c'p'f" o c'p'ci go g'p'v'q'h'v'j g'eqtr qtcv'k'p'k'p"l'c'p'w'c't { ."3; ; . ."c'm'p'gy "x'k'q'r'v'k'p'u"q'h'ci g't'gultev'v'q'p'u"y kj "t'g'ur g'ev'v'q"q'ee'w'k'g'tu"j'cx'g'd'ggp" j'c'p'f'ng'f "k'p"y j g'uc'o g'o c'p'p'g't'0'Cu'w'c'v'g'f "d{ "E'c't'p'y'c'yj ."L'0'k'p'R'eg'g'i'Eqpf qo kpkwo "Eqtr 0'P'q'0'66; "x'0'J' q'i i "3; ; 9+."."TR'OT'0'5'tf "367"cv' 36: ." \$c'eqpf qo kpkwo "eqtr qtcv'k'p"j'cu"c'f'w'f "v'q"t'g's'w'k'g'eqo r'nc'p'eg'0'V'j cv'ku"y j cv'yj g'f "c't'g'c'w'g'o r'k'p'i "v'q"v'f'q"j' g't'g'0'K'co "p'q'v' u'c'v'k'k'g'f "y j cv'k'p" "c'w'g'o r'v'k'p'i "v'q" g'p'h'q'teg'eqo r'nc'p'eg"q'h'd{/ny u'y j lej "y j g't'g'r'cu'g'f "k'p"i' q'q'f "h'c'k'y "cp'f"y j kj "y j g'eq'p'ug'p'v'q'h'v'j g' T'g'ur p'p'f g'p'u'v'j cv'k'ku'w'p'h'c'k'v'q'p'qy "c'w'g'o r'v'v'q'g'p'h'q'teg"y j go 0'V'j g't'g'ku'p'q'w'i' i'g'v'k'p'v'j cv'yj g't'g'ku'c'x'c'm'q'h'i' q'q'f "h'c'k'y "d{ "y j g'D'q'c't'f" q't'v'j cv'k'ku'c'ev'k'p'i "k'p"cp"ct'd'k't'c't' { "q't"j' k'i j /j'c'p'f'g'f "o c'p'p'g't'0'V'j g't'g'y' k'v'yj g't'g'ht'g'f'g'c'p'q't'f'g't'v'j cv'0' t'0'c'p'f "O tu'0'U'o k'j "c't'g'k'p'v'v'g'c'ej "q'h' v'j g'd{/ny u'c'p'f "y j g'f "y k'v'd'g'f'k'g'ev'g'f "v'q"eqo r'nf "y j kj "y j q'ug'd{/ny u'd{ "j'c'x'k'p'i "y j g't' "u'q'p"o q'x'g'q'w'q'h'v'j g't' "eqpf qo kpkwo 0'0' t'0'c'p'f " O tu'0'U'o k'j "uj'c'm'v'j g't'g'ht'g'f'eqo r'nf "y j kj "y j g'd{/ny "q'p"q't' "d'g'ht'g'v'j g'52'y "f'c' { "q'h'L'w'p'g."3; ; . 0'V'j ku'uj'q'w'f "d'g'w'v'v'k'k'p'v'v'ko g'v'q" c'm'qy "O tu'0'U'o k'j "u'q'p'v'q'k'p'f "c'ng't'p'c'v'g'c'ee'q'o o q'f'c'v'k'p'0"

'J CY EQ'LO"

"

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CBR# 294

Uko eqg'Eqpf qo kpkwo 'Eqtr qtcvqpp'P q089.'r nclpklhru+:'cpf 'T wj 'O eF gto qw'f ghgpf cpv'u+''
 ''
 'Eqwv'Hg'P q0; 9/EX/354998''
 ''
 'Qpvctkq'Eqwv'qh'Lxwleg''I gpgtcrf'kklukqp+'Ur kgi grl0J gctf '<Lcpwct{ '4: .:3; ; : 0Lwf i o gpv'Cr tkd4; .:3; ; : 0''
 ''
 'Eqwpugn'Etcki 'C0Ngy ku.'hqt'vj g'r nclpklhru+0Uj co lo 'Uj kxk'k'ht'vj g'f ghgpf cpv'u+0''
 ''
 'Jrctc3_'URKGI GN'Lz/'Vj g'cr r nclcpv'Uko eqg'Eqpf qo kpkwo '' Eqtr qtcvqpp'P q0'89'dt kpi u'vj ku'cr r nclcpv'q'u0'6; 'qh'vj g''
 Eqpf qo kpkwo 'Cev'T00Q03; ; 2'ej 0E48''vj g'Cev'ht'cp'qtf gt'tgs wtkpi 'vj g'tgur pfp gpv'vq<''
 ''
 '30tgo qxg'vj g'f qwdng'j wpi 'y kpf qy 'gtgevgf'lp'vj g'c'wke'rgxgn'cdqxg'wpl75: 'Etecpdgtt{ 'Xknci g'Eqmki y qaf 0''
 ''
 '40'tgo qxg'cm'hlkuj gf 'o cvgtkcu'htqo ''vj g'c'wke'ur ceg'y j lej 'ku'r ctv'qh'vj g'eqo o qp'grgo gpw'qh'UE0P q0'89.'kpenf kpi 'cm'uwd/
 hqqt kpi 'cpf 'hpkuj gf 'hmqd.'cm'f t { y cm'kpuw'vqpp.'xcr qw'dcttktg.'cf f kklp'cn'grgestle'y k kpi 'cpf 'hkw'wtgu0'Qt.'lp'vj g'cngt'pcv'xg.'kh'
 vj g'tgur pfp gpv'hc'ku'vq'tgo qxg'vj g'y kpf qy 'cpf 'tguvqtg'vj g'c'wke'ur ceg'vq'ku'qtki kpcn'eqpf kklqp.'vj g'cr r nclcpv'uggnu'cp'qtf gt''
 cwj qtk kpi 'k'vq'tguvqtg'vj g'ur ceg'cpf'tgeqxtg'cp' { 'gzr gpug'kpwetgf'd{ 'cf f kpi 'c'k'g'p'vq'vj g'eqo o qp'gzr gpugu'qp'vj g'w'p'k0''
 ''
 'Jrctc4_'Ky kn'tghgt'vq'vj g'uwdlgev'o cwtg'qh'vj g'tgrkgh'uqwi j v'wpf gt'r ctc i tcr j '3'cu'vj g'f qwdng'j wpi 'y kpf qy 'cpf 'vj g'tgrkgh'uqwi j v'
 wpf gt'r ctc i tcr j '4'cu'vj g'cngt'cv'kpu'vq'vj g'c'wke0''
 ''
 'VJ GHCEVU''
 ''
 'Jrctc5_'Vj g'tgur pfp gpv'ku'vj g'tgi kvgtgf 'qy pgt'qh'wpl75: 'qh'UE0P q0'89'lp'vj g'Etecpdgtt{ 'Xknci g'eqpf qo kpkwo 'eqo r rnz'lp''
 vj g'Vqy p'qh'Eqmki y qaf 0'Etecpdgtt{ 'Xknci g'eqpuku'qh'cr r tqzko cvng' '48'tgi kvgtgf 'eqpf qo kpkwo 'eqtr qtcv'kpu'eqo r tkkpi ''
 cdqw: 22'eqpf qo kpkwo 'wplu0UE0P q089'eqo r tkugu'56'eqpf qo kpkwo 'wplu0''
 ''
 'Jrctc6_'Vj g'tgur pfp gpv'ku'c'99' { gct'qnf 'y qo cp'y j q'r wtej cugf 'j gt'eqpf qo kpkwo 'wpl'lp'Ugr vgo dgt'qh'3; ; 8'cpf 'vq'qm'qee'w cpe { ''
 k'F'gego dgt'3; ; 90Uj g'h'xgu'cm'p'p'lp'vj g'wpl'y j lej 'ku'c'qpg'dgf tqgo .qpg'dev' tqgo 'wpl'q'p'c'ukpi ng'rgxgn0''
 ''
 'Jrctc7_'Vj g'wpl'ku'tghgtgf 'vq'cu'c'Erctmudwti 'lp'vj g'ucngu'dtqej wtg'qh'vj g'eqpf qo kpkwo 'f g'xgnr gt'0Vj g'rk'kpi tqgo 'qh'vj g'wpl'
 j cu'c'ht'gr nceg'y j lej 'vj g'cr r nclcpv'wugf 'qp'c'tgi wct'dcuku'lp'vj g'y kvgt'o qpv' u0'Y j kg'vj g'ungvej 'qh'vj g'rc { qw'lp'vj g'dtqej wtg'qh'
 vj g'Erctmudwti ''o qf gn'kpf kcv'gf 'vj cv'vj gtg'y cu'vq'dg'c'y kpf qy 'vq'vj g'tki j v'qh'vj g'ht'gr nceg.'vj g'wpl'y cu'dw'ku'y kj qw'uwej ''
 y kpf qy 0Vj g'tgur pfp gpv'hw'p'f 'vj cv'y j gp'vj g'ht'gr nceg'y cu'ce'w'cv'gf 'f wtkpi 'vj g'y kvgt'o qpv' u'j gt'wpl'y qw'f 'qh'g'p'dg'gpi w'htgf ''
 k'bo qng0Uj g'f vgtgo kpgf 'vj cv'y ku'y cu'f w'vq'r qqt'xgp'v'v'k'p'lp'vj g'h'k'kpi tqgo 0''
 ''
 'Jrctc8_'Vj g'tgur pfp gpv'uc { u'vj cv'uj g'o cf g'tgs wguu'qh'xctk'qwu'o cpci gtu'qh'vj g'eqpf qo kpkwo 'eqtr qtcv'kpp'vq'kpu'cm'c'y kpf qy ''
 uko k'ct'vq'vj cv'f gr kv'gf 'lp'vj g'dtqej wtg'dw'y kj qw'uweegu0Uj g'uc { u'vj cv'cv'p'p'g'r qkp'v'p'p'g'o cpci gt'kph'qto gf 'j gt'vj cv'c'y kpf qy ''
 pgz'v'vq'vj g'ht'gr nceg'y qw'f 'pqv'u'k'xg'vj g'uo qng'r tqd'igo 'cu'k'y qw'f 'pqv'r tqx'kf g'uw'h'k'k'p'v'f tch'0J g'lp'x'k'gf 'j gt'vq'x'k'gy 'cp'qy gt''
 Erctmudwti ''o qf gn'cv'p'wo dgt'6640'Vj ku'wpl'j cf ''c'uko k'ct'r tqd'igo 'y j lej 'y cu'tgu'x'ng'f 'd { 'kpu'cm'kpi 'c'y kpf qy 'lp'vj g'wpl'u'c'wke''
 etcy n'ur ceg0Uj g'uc { u'vj cv'uj g'cpf 'vj g'o cpci gt'k'p'ur gev'gf 'vj ku'wpl'c'p'f 'h'q'w'p'f 'vj cv'c'uc'k'ecug'j cf 'dggp'kpu'cm'gf 'cm'p'i 'vj g'h'k'ej gp''
 cpf 'dcv'j tqgo 'y cni'ng'f kpi 'vq'c'r n'v'ht'o 'ht'qo 'y j gt'g'p'p'eqw'f 'gpvgt'vj tqwi j 'c'xgt'w'c'cn'qr gp'kpi 'k'p'vq'vj g'c'wke'etcy n'ur ceg0C''
 y kpf qy 'j cf 'dggp'kpu'cm'gf 'lp'vj g'c'wke'y cni'qr r qu'k'g'vj g'ht'gr nceg'0Vj g'etcy n'ur ceg'y cu'y gni'kpu'w'cv'gf 'y kj 'f t { y cni'cpf 'j cf 'vj keni'
 y j kv'g'ectr gv'kpi 'qp'vj g'h'q'q'0Vj g'tgur pfp gpv'f gr qu'gf 'vj cv'y g'o cpci gt'cf'x'k'gf 'j gt'vj cv'y g'eqtr qtcv'kpp'y qw'f 'dg'r tgr ctgf 'vq'f q''
 uko k'ct'lo r tqxgo gpw'ht'j'j gt'cv'c'r t'k'eg'k'h'uj g'f guk'gf 0Vj g'tgur pfp gpv'w'cv'gf 'vj cv'uj g'f k'f 'pqv'j cxg'vj g'p'geguuct { 'hw'p'f u'cv'vj g'v'ko g''
 cpf 'f k'f 'pqv'r tqeggf 'y kj 'vj g'cngt'pcv'kpu'vq'vj g'c'wke'etcy n'ur ceg0''
 ''
 'Jrctc9_'k'p'gctn' '3; ; 8'vj g'eqpf qo kpkwo 'eqtr qtcv'kpp'r gto kv'gf 'wpl'v'qy pgtu'vq'kpu'cm'i cu'ht'gr nceg'lp'vj g'wplu0'Vj g'tgur pfp gpv''
 cw'p'gf g'c'ugo k'p'ct'cv'y g'Etecpdgtt { 'k'p'p'tgur gev'kpi 'vj g'kpu'cm'v'kpp'qh'i cu'ht'gr nceg'y j gt'g'uj g'j gctf 'qh'vj g'lo r q'w'p'eg'qh'j' cxkpi ''
 r tqr gt'xgp'v'v'k'p'lp'r tgo kugu'j cxkpi 'i cu'ht'gr ncegu0''
 ''
 'Jrctc:_'Cv'vj ku'r qkp'v'kuj qw'f 'o gpv'k'p'vj cv'vj g'cr r nclcpv'hw'gf 'cp'ch'k'f cxk'd { 'Y kn'ko u'J ki i kpu.'vj g'cr r nclcpv'u'r tqr gtv' 'o cpci gt.''
 y j lej 'f ku' wgu'o cp { 'qh'vj g'ucvgo gpw'u'o cf g'd { 'vj g'tgur pfp gpv'lp'j gt'ch'k'f cxk'0J g'cu'ngt'w'v'vj cv'vj gt'g'ku'p'q'v'j gt'Erctmudwti 'wpl'lp''
 UE0P q0'89'cpf 'vj cv'vj gt'g'ct'g'q'pn'f 'h'q'w'v'f r gu'qh'uwej 'wplu'lp'vj g'gp'v'k'g'eqpf qo kpkwo 'eqo r rnz'y j lej 'eqo r tkugu'lp'gzegui'qh''
 : 22'wplu'cpf 'eqp'w'ng'f 'd { 'y gpv'f/uk'f'k'ht'g'p'v'eqpf qo kpkwo 'eqtr qtcv'kpp'0Vj g'vj tgg'q'v'j gt'Erctmudwti 'wplu'ct'g'p'q'v'r ctv'qh''
 UE0P q089'dw'ctg.'lp'f'cev'lp'UE0P q0670''
 ''
 'Jrctc:_'O t0J ki i kpu'f gr qu'gu'vj cv'j g'y cu'cf'x'k'gf 'd { 'qpg'qh'vj g'qy pgtu'qh'wpl'664'vj cv'vj g'kpu'cm'v'kpp'qh'vj g'y kpf qy 'cpf ''
 h'k'p'k'j kpi 'vj g'c'wke'r q'v'k'p'qh'vj g'wpl'j cf 'pq'v'kpi 'y j cv'q'x'g'v'q'f q'y kj 'xgp'v'v'k'p'p'0J g'r qkp'w'q'w'v'vj cv'vj g'r tko ct { 'uq'w'eg'qh''
 j gev'kpi 'lp'vj g'tgur pfp gpv'u'wpl'ku'd { 'gr'ev'k'c'cn'j gev'cpf 'vj g'ht'gr nceg'y cu'o gt'gn' 'k'p'w'p'f gf 'h'q'c'gu'v'g'v'e'r w'r qu'gu'cpf 'pq'v'cu'c''
 r tko ct { 'j gev'uq'w'eg'0C'v'vj ku'r qkp'v'kuj qw'f 'uc { 'vj cv'k'f q'pq'v'h'gn'vj cv'k'ku'r qu'k'd'ng'ht'o g'qp'c'bo q'v'k'p'ht'vj ku'v'f r g'v'q't'gu'k'x'g'vj g''
 eqph'k'ev'd'gwy ggp'vj g'g'x'k'f g'peg'qh'O t0J ki i kpu'cpf 'vj g'tgur pfp gpv'p'q'f 'f q'K'vj k'p'm'vj cv'vj g'tgu'q'w'k'p'qh'uwej 'eqph'k'ev'ku'p'geguuct { 'vq''
 o { 'f'gek'k'p'0''
 ''
 'Jrctc32_'O t0J ki i kpu'f q'gu'c'p'ng'qy ng'f i g'j qy g'x'gt.'vj cv'lp'w'p'g'3; ; 8.'j g't'g'eg'k'x'gf 'c'ng'w'gt'ht'qo 'vj g'tgur pfp gpv.'y j lej 'y cu''
 cf f t'gu'gf 'vq'O t0F'qp'Y'cv'q'p'vj g'qy pgt'qh'W'r r gt'E'c'p'c'f'c'O cpci go gpv.'vj g'r tqr gtv' 'o cpci gt'qh'UE0P q0'89'0Vj g'ng'w'gt'ku'lp''
 vj g'j'cp'f y tkkpi 'qh'O tu0'O eF gto qw'cpf 'cw'cej gf 'c'ung'vej 'cpf 'h'q'qt'r n'p'qh'vj g'wpl'y j lej 'k'p'cm'f gu'c'y kpf qy 'vq'vj g'tki j v'qh'vj g''
 ht'gr nceg'qp'vj g'i tqw'p'f 'h'q'qt0''
 ''
 'Jrctc33_'O tu0'O eF gto qw'w'cv'gu'vj cv'vj g'k'p'v'p'k'p'qh'vj g'ng'w'gt'qh'w'p'g'3; ; 8'y cu'vq'tgs wgu'v'cr r tqx'cn'd { 'vj g'eqpf qo kpkwo ''
 eqtr qtcv'kpp'qh'c'y kpf qy 'qh'vj g'v'f r g'vj cv'uj g'j cf 'uggp'lp'wpl'664'y j lej 'y cu'lp'vj g'c'wke'etcy n'ur ceg0Vj g'uge'q'p'f 'h'w'v'r ctc i tcr j 'qh''
 vj g'ng'w'gt'g'c'f u'cu'hw'ny u<''
 ''
 'K'i { qw'eqw'f 'r ng'cug'ur ctg'c'bo qo gpv'k'cep'v'cng' { qw'v'q'cp'qy gt'Erctmudwti 'o qf gn'ct'q'w'p'f 'vj g'eq'p'gt'lp'vj g'Qz'dqy 'y j gt'g'c'y kpf qy ''
 ku'lp'c'r nceg'Ky qw'f 'h'k'g'bo k'p'g'v'q'dg'v'q''
 ''
 'Jrctc34_'J qy g'x'gt.'lp'vj g'h'k'v'r ctc i tcr j 'qh'vj cv'ng'w'gt'uj g'o cngu't'gh'gt'g'peg'v'q'vj g'h'ev'vj cv'vj g'dw'k'f gtu'ht'i qv'v'q'r w'c'y kpf qy 'lp''
 j gt'wpl'y j lej 'ku'ng'ctn'f 'o ctn'gf 'lp'vj g'c'w'cej gf 'r n'p'00 t0J ki i kpu'k'p'v'g'r t'g'v'k'p'qh'vj g'ng'w'gt'ku'vj cv'vj g'tgur pfp gpv'y cu'c'um'kpi 'vj g''

"Jr ctc56_ "O t0J ki i lpu'lp'j ku'chhkf cxk'uc{ u'vj cv'vj g'err rkecpv'wpf gtuvqf "vj g'tgs wguv'vq "dg'hqf "c'y kpf qy "dgukf g'vj g'ht gr meg0'kp" r ctc i tcr j "42'qh'j ku'chhkf cxk'uy qtp'qp'vj g'3: vj 'P qxgo dgt'3: ; 9'j g'cuugt'u'vj cv'vj g'err rkecpv'§j cu'dggp'uvgef hcu'lp'ku'eqpugpv'cpf " cr r tqxcn'qh'c"y kpf qy "mecevgf "qp"vj g'i tqwpf "hqqf"qh'vj g'wpk'vq'gkj gt'ukf g'qh'vj g'ht gr meg0'§'K'vj ku'ku'q'K'hp' "k'j ctf "vq" wpf gtucpf 'y j { 'vj gt g'y cu'pqvc'tgcuqpcdn' r tqo r v'cpf 'hcxqwtcdng'tgur qpug'vq'vj g'tgur pfp gpv'u'tgs wgu0"

"Jr ctc57_ "Vj g'tgur pfp gpv'uc{ u'vj cv'kh'vj g'err rkecpv'j cf "tgur pfp gf "pgi cvkxgn{ "vq"j gt "tgs wguv'uj g'y qwf "pqv'j cxg"i qpg'vq'vj g" g'zr gpug'qh'lpucm'kpi "c"i cu'ht gr meg"cpf "o c'kpi "vj g'cngt'cvkpu"vq'vj g'cwke"cu"tguwn'qh'y j lej "uj g'kpwttgf "cp"gzr gpug'qh' &7.: 82Q20"

"Jr ctc58_ "Vj g'tgur pfp gpv'uc{ u'vj cv'vj g'dgrkxgf "vj cv'vj g'j cf "eqo r rkgf "y kj "vj g'eqpf kkp'u'ht'nggr kpi "vj g'y kpf qy "y j lej "y gt g'ugv' qw'lp'vj g'err rkecpv'hwgt'qh'F gego dgt'3: vj .3; ; 80'Kj cxg'ctgef { "kpf kcvgf "o { "xky "vj cv'vj g'tgur pfp gpv'u'dgrkgh'y cu'tgcuqpcdn' "kp'hi j v'qh'vj g'gxgpv'y j lej "r tgegf gf "vj g'hwgt'cpf "vj g'y qtf kpi "qh'vj g'hwgt0"

"Jr ctc59_ "Vj g'tgur pfp gpv'cuq'uwdo ku'vj cv'vj g'err rkecpv'j cxkpi "vcngp'vj g'r qukkp'vj cv'k'y cu'r tgr ctgf "vq'cdkf g'd{ "vj g'y kuj gu'qh' "vj g'o clqtk'qh'vj g'wpk'j qrf gtu.'cevgf "wptgcuqpcdn' 'cpf "wph'k'n' "kp'vj g'hqmy kpi "tgur geu<"

"c0'vj g' "ctdktctk' "f gvto kpgf "vj cv'vj g'wpk'j qrf gtu'y j q'f k' "pqv'tgur pfp "vq"vj gkt "hwgt "y qwf "dg'f ggo gf "pqv'vq"cr r tqxg'qh'vj g" y kpf qy 0"

"d0'vj cv'vj g'err rkecpv.'kp'dtgej "qh'vj g'r tqxkukpu'qh'vj g'Cev.'hckgf "vq't qxkf g'vj g'tgur pfp gpv'y kj "vj g'o c'kpi "cf f tguugu'qh'vj g'wpk' qy pgtu0"

"Jr ctc5: _ "Vj g'tgur pfp gpv'tgrku'q'u043'qh'vj g'Cev'y j lej "r tqxkf gu'cu'hqmy u<"

"vj g'eqtr qtcv'k'uj cm'nggr "cf gs wv'g'tgeqt u'cpf "cp{ "qy pgt "qt"ci gpv'qh'cp"qy pgt "f w' "cwj qtk gf "kp"y tkkpi "o c{ "k'ur gev'vj g" tgeqt u'q'p'tgcuqpcdn'pq'v'g'cpf "cv'cp{ 't'gcuqpcdn'v'ko g"

"Jr ctc5; _ "K'o { "xky "vj g'tghwcn'qh'vj g'tgur pfp gpv'u'tgs wguv'ht "c"o c'kpi "ruv'qh'cm'wpk'j qrf gtu'y cu'kp'eqpvcxgpv'k'p'qh'vj ku' uge'k'p.'dw'gxgp'kh'Kco "y tqpi "kp'vj cv'eqpenwuk'p'k'y cu'v'cm' "wph'k'vq'vj g'tgur pfp gpv'vq'j co r gt "qt'qduw wv'j gt'gh'ht u'v'q'o cmg" j gt'r qukkp'hp'qy p'vq'vj g'wpk'qy pgtu'cpf "vq'gprku'vj gkt "uwr r qtv'ht"j gt'r qukkp0"

"Jr ctc62_ "Vj g'tgur pfp gpv'vcng'u'vj g'r qukkp'vj cv'vj g'y cu's wkg'r tgr ctgf "vq'j cxg'vj g'ku'uwg'f gvto kpgf "q'vj g'dcuka'qh'vj g'y kuj gu'qh' c'o clqtk'qh'vj g'wpk'qy pgtu'cpf "kp'hev'uj g'uc{ u'vj cv'pqv'y kj uc'p'kpi "vj g'hekwt'g'qh'vj g'err rkecpv'vq'r tqxkf g'j gt "y kj "vj g'o c'kpi " cf f tguugu'vj cv'vj g'y cu'cdng'vq'eqpvc'v'p'wo dgt'qh'vj g'wpk'j qrf gtu'cpf "y cu'cf xkugf "d{ "ugxgpv'ggp'qh'vj go "vj cv'vj g' "f k' "pqv'qdlgev" vq'vj g'y kpf qy 0'Vj g'err rkecpv.'j qy g'xgt. 'tghwgf "vq'cegr v'vj g'ucvgo gpv'qh'vj g'tgur pfp gpv'cpf "kpu'k'vj cv'qpn' "vj g'wpk'j qrf gtu" y j q'tgur pfp gf "hcxqwtcdn' "vq'vj g'pqv'g'qh'p'wct { "42'vj "y qwf "dg'eqpuk'gtgf "vq'dg'lp' hcxqwt'qh'vj g'tgur pfp gpv'u'r qukkp0'Vj qug" y j q'f k' "pqv'tgur pfp "y qwf "dg'eqpuk'gtgf "cu'qr r qugf 0'Vj g'xcuv'o clqtk' "qh'vj qug"y j q'f k' "tgur pfp "y gt g'kp"uwr r qtv'qh'vj g" tgur pfp gpv'u'r qukkp0"

"Jr ctc63_ "Vj g'err rkecpv'uwdo ku'vj cv'k'ku'hwgf "ny "vj cv'vj g'f gen'cv'k'p'd{/ny u'cpf "wgu'f qxgtp'vj g'tki j w'qh'vj g'wpk'qy pgtu'cpf " ctg'c'xkcn'vq'vj g'k'v'g' "qh'vj g'v'k'g'ces w'k'gf "d{ "vj g'wpk'j qrf gtu'K'ku's wkg'erget "vj cv'vj g'eqw'u'j cxg'dggp' | gcm'w'kp'gph'k'kpi " eqo r rkepeg'd{ "qy pgtu'vq'vj g'ug'v'gto u'cpf "r tqxkukpu'0Ugg'Ect'ng'q'P'Eqpf qo k'p'wo "Eqtr qtcv'k'p'P q0'49; "x0T'qej qp'66'T'RO'0'44: " *E000"

"Jr ctc64_ "Vj g'err rkecpv'hw'vj gt "uwdo ku'vj cv' g'xgp'kh'vj g' d'qctf "qh'f k'g'v'qtu"y gt g'wptgcuqpcdn' "un'y "kp"tgur pfp kpi "vq"vj g" tgur pfp gpv'u'tgs wguv'ht'eqpugpv.'vj ku'f k' "pqv'1wuk'h' "vj g'tgur pfp gpv'lp'r tqeggf kpi "y kj "vj g'kpu'vcv'k'p'qh'vj g'y kpf qy "r tk'q'vq" tgegk'kpi "vj g'eqpugpv'cpf "kpf g'gf "y kj qw'cp{ "hw'vj gt "pqv'g'vq"vj g'Dqctf 0'K'p'rn'g'o c'p'p'gt. "vj g'err rkecpv'cti wgu'vj cv'g'xgp'kh'vj g" eqo o w'p'k'v'k'p'dg'v'ggp"O t0J ki i lpu'cpf "vj g'tgur pfp gpv'y cu'eqp'hwuk'p' "cpf "ng' "vj g'tgur pfp gpv'vq'dgrkxg'vj cv'vj g'Dqctf "j cf " eqpugpv'gf "vq'vj g'kpu'vcv'k'p'qh'vj g'y kpf qy "qp'egt'v'k'p'v'gto u.'vj g'tgur pfp gpv'ec'p'p'v'g'nt' "qp'vj ku'dgrkgh'vq'1wuk'h' "vj g'kpu'vcv'k'p'qh' "vj g'y kpf qy "y j lej "j cf "dggp'f qpg'r tk'q'vq" "tgegk'kpi "vj g'eqo o w'p'k'v'k'p'ht'qo "O t0J ki i lpu'0'K'p'o { "xky . "vj g'ug'ctg'gz'v'go g'n' " ko r q'v'p'v'eqpuk'gt'cv'k'p'lp'vj g'f gvto k'p'cv'k'p'qh'vj ku'ku'wg0"

"Jr ctc65_ "U06; *4+qh'vj g'Cev'ergctn' "i kxgu'vj g'eqw'v'c'f kuet'g'v'k'p'cu"vq'y j gvj gt "qt "pqv'vq"gph'qte'g'eqo r rkepeg'y kj "vj g'f gen'cv'k'p'p' dw'u'w'j "f kuet'g'v'k'p'o wuv'qh'eqwt'ug'dg'gz'g'k'ug'f "lw'f lek'cm' 0'K'j cxg't'gcf "vj g'xgt { "j gr hw'f'g'ekuk'p'qh'o { "dt'q'j gt "J gt'q'f "F 0'0'cu"j g" y j gp'y cu.'kp"O g'v'q'q'k'p'v'q'q'Eqpf qo k'p'wo "P q0998'x0I kh'q'f "8'T'RO'0*4f +43: "kp"y j lej "ku"o quv'j gr hw'lp'vj cv'j g'ugv'u'q'w' uqo g'qh'vj g'tng'x'p'v'et'k'g'k'vq'dg'eqpuk'gtgf "kp'vj g'gz'g'k'ug'qh'vj g'f kuet'g'v'k'p'cx'k'cdng'vq'vj g'eqw'v'k'p'vj g'err rkecpv'qh'u06; *4+qh' vj g'Cev0"

"Jr ctc66_ "Y j k'g'Kco "qh'vj g'xky "vj cv'vj g'eqpf wv'qh'vj g'Dqctf "ch'gt"vj g'tgur pfp gpv'kpu'vcv'k'p' "vj g'y kpf qy . "y cu'lp"uqo g'tgur gew' wph'k'cpf "wptgcuqpcdn'cpf "kpf g'gf "kp'q'p'g'tgur gev'kp'dtgej "qh'u043'qh'vj g'Cev.'Kj cxg't'gnw'cv'p'w' "eqpen'gf "vj cv'k'p'xky "qh'vj g" erget "dt'gej "qh'vj g'f gen'cv'k'p'p'd{ "vj g'tgur pfp gpv'd'gh'q'cp{ "qh'vj g'ko r w' p'gf "eqpf wv'qh'vj g'tgur pfp gpv'u'Dqctf "qh'f k'g'v'qtu. "vj cv' K'q'w' j v'p'q'v'g'gz'g'k'ug'o { "f kuet'g'v'k'p'vq'tghw'g'vq'gph'qte'g'eqo r rkepeg'y kj "vj g'f gen'cv'k'p'p'0"

F KRQUK/QP "

"Jr ctc67_ "Vj g'err rkecpv'ku'vj g'gh'q'g'gp'k'ng'f "vq'cp'q'f gt "tgs w'k'kpi "vj g'tgur pfp gpv'vq'o q'xg'vj g'f q'w'dng'j wpi "y kpf qy "cpf "vq't'g'v'q'g' "vj g'gz'v'k'q'qh'vj g'cwke"vq'ku'q'tki k'p'cn'eqpf k'k'p'."cv'j gt "qy p'gzr gpug'cpf "vj cv'k'p'vj g'cngt'p'cv'xg'kh'vj "tgur pfp gpv'hc'ku"vq'f q'v'q' "y kj kp'82'f c{ u'qh'vj g'f cv'g'qh'vj ku'q'f gt. "vj g'err rkecpv'ku'gp'k'ng'f "vq't'go q'xg'vj g'uc'k' "y kpf qy "cpf "t'g'v'q'g'vj g'gz'v'k'q'qh'vj g'wpk'vq' ku'q'tki k'p'cn'eqpf k'k'p' "cpf "cf f " "vj g'tgcuqpcdn'gzr gpugu'k'pewt'gf "kp"r g'ht'qo kpi "uwej "y q'tm'vq'vj g'eqo o qp'gzr gpugu'qh'vj g" tgur pfp gpv'wpk0"

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"Jr ctc69_ "K'xky "qh'vj g'f k'x'f gf "uwe'gu'qh'vj g'r ct'v'ku.'vj gt g'y k'rid'g'p'q'equu'qh'vj ku'err rkecpv'0"

"URKI GNIO"

CBR# 065

IN THE MATTER OF an amendment to the Declaration of Carleton Condominium Corporation No. 441 Carleton Condominium Corporation No. 441, applicant, and Each and every owner and mortgagee of each unit in Carleton Condominium Plan No. 441, respondents

Court File No. 90728/95

Ontario Court of Justice (General Division) Ottawa, Ontario Chadwick J. July 18, 1997.

Counsel: André Claude, for the applicant. David R. Habib, for Carleton Condominium Corporation No. 507, and Carleton Condominium Corporation No. 510, intervenors.

[para1] CHADWICK J.:-- The applicant seeks an order pursuant to s. 3(8) of the Condominium Act R.S.O. 1990, c. 26, amending the declaration of Carleton Condominium Corporation No. 441 (Le Parc).

[para2] The application was opposed by the intervenors Carleton Condominium No. 507 and 510.

[para3] The portion of the declaration which the applicant seeks to strike out relates to recreational centre, recreational facility and recreational facility lands.

[para4] The lands adjacent to these facilities are developed and contain a number of condominium corporations and other land owners. These are described as follows: Carleton Condominium Corporation No.507, 210 units; Carleton Condominium Corporation No. 510, 70 units; Carleton Condominium Corporation No. 453, 32 units; Labourers International Union and North America Local 527 (LIUNA), 124 UNITS; and Carleton Condominium Corporation No. 16, 370 units and one piece of vacant land (planned to accommodate 221 units).

[para5] The lands in question were first developed in 1972 with the recreational centre and recreational centre lands being developed in approximately 1988. The intention was that all of the condominium corporations and interested parties would share in the recreational amenities as to their use and costs.

[para6] The applicant Carleton Condominium Corporation No. 441 was created by registration of this declaration in accordance with the provisions of the Condominium Act on September 30, 1988. The declarant was Financial Trustco Properties Limited (FTP).

[para7] The Condominium No. 41 declaration contained several provisions dealing with the recreational lands, which include the recreational facilities and the recreational centre. It provides as a part of Carleton Condominium No. 41 common expenses, it is to pay a "proportional share" of the recreational lands maintenance and operating costs; in return Condominium No. 41 residents are entitled to make use of all facilities in common with certain of its neighbours. [para8] The declaration also provides that the declarant will eventually transfer its interest in the recreational land to CCC No. 41 and other neighbouring residential complexes in their proportionate share.

[para9] The lands in question are owned 80 percent by the declarant and 20 percent by CCC No. 16.

[para10] In addition to the declaration on October 25, 1988 FTP registered By-Law No. 6 of CCC No. 4 by Instrument No. 586191. This by-law is also referred to as Special By-Law No. 1 contains Schedule "A", at common access agreement and also contains similar wording to the declaration as it relates to the recreational facilities.

[para11] It is the applicant's position that the declaration does not comply with the requirements of s. 3(1) or s. 3(3). These sections read as follows:

3-(1) A declaration shall not be registered unless it is executed by the owner or owners of the land and interests appurtenant to the land described in the description and unless it contains,

(a) a statement of intention that the land and interests appurtenant to the land described in the description be governed by this Act;

(b) the consent, in the prescribed form, of every person having a registered mortgage against the land or interests appurtenant to the land described in the description;

(c) a statement, expressed in percentages, of the proportions of the common interests;

(d) a statement, expressed in percentages allocated to the units, of the proportions in which the owners are to contribute to the common expenses;

(e) an address for service and a mailing address for the corporation; and

(f) a specification of any parts of the common elements that are to be used by the owners of one or more designated units and not by all the owners.

(3) In addition to the matters mentioned in subsection (1), and in any other section in this Act, a declaration may contain,

(a) a specification of common expenses;

(b) provisions respecting the occupation and use of the units and common elements;

(c) provisions restricting gifts, leases and sales of the units and common interests;

(d) a specification of duties of the corporation consistent with its objects; and

(e) a specification of any allocation of the obligations to repair and to maintain the units and common elements.

[para12] The author Audrey Loeb in the text *Condominium Law and Administration*, Second Edition 1995, Carswell Toronto comments upon the above sections as follows, at p. 3-14:

Unlike the former Ontario Act, section 3(3) the present Act contains no provisions allowing for other matters concerning the condominium to be included in the declaration. The mandatory and permissive provisions in sub-sections (1) and (3) are exhaustive. Section 3(5) states that if any provision in a declaration is inconsistent with the provisions of the Act, the Act prevails and the offending provision is deemed to be amended so as to conform with the requirements of the Act.

[para13] Section 3(4) provides that the declaration can be amended with the consent of all owners and all persons having registered mortgages against the units and common interests. This procedure obviously is cumbersome and difficult to administer.

[para14] Section 3(5) provides:

Where any provision in a declaration or by-law is inconsistent with the provisions of this Act, the provisions of this Act shall prevail and the declaration or by-law is deemed to be amended accordingly.

[para15] The power provided to the court to amend the declaration or description is restricted. The court must be satisfied that the amendment is necessary or desirable to correct an error or inconsistency in the declaration or description or arising out of the carrying out of the intent and purpose of the declaration or description.

[para16] The applicant suggests that the declaration is inconsistent with s.3(1) and 3(5) of the Condominium Act and as such the declaration should be amended accordingly. The applicant's position is that exhaustive provisions of 3(1) and 3(5) are not broad enough to incorporate the declaration relating to the recreational land and facilities. Reference is also made to s. 12 of the Condominium Act which reads as follows:

12.(1) The objects of the corporation are to manage the property and any assets of the corporation. (2) The corporation has a duty to control, manage and administer the common elements and the assets of the condominium corporation.

(3) The corporation has a duty to effect compliance by the owners with this Act, the declaration, the by-laws and the rules.

(4) The declaration or the by-laws may specify duties of the corporation consistent with its objects, responsibilities and duties.

[para17] Counsel for the applicant points out that the application before the court is extremely narrow and deals with the declaration and by-law no. 6. It does not require the court to interpret a contractual obligation of the applicant as it relates to the other condominium corporations and the shares expenses of other obligations arising from recreational facility agreement.

[para18] Obviously CCC 507 and 510 will be affected by the application of CCC 441 and likewise the other adjacent condominium corporations and property owners who are part of the shared recreational amenities.

[para19] Counsel for CCC 507 and 510 point out the disclosure statement for CCC 441 was delivered to all purchasers of the units in 441 by its declarant financial Trustco properties and they all had notice of the shared recreational amenities agreement. In addition that the unit holders of CCC 441 have the right to use the facilities and have used the facilities in the past and ultimately share in the ownership of the assets provided for in the agreement. It is their position that these shared facility amenities are assets within the meaning of s. 13 of the Condominium Act and as such owners have a proportionate share in the assets.

[para20] The definition section of the Condominium Act does not define asset. The ability of a unit holder to use the recreational facilities and to eventually acquire an interest in the lands would obviously be a benefit to the unit holder and any subsequent purchaser of the unit. It is recognized that there is a corresponding financial responsibility with that benefit. In my view, s. 3(3)(a) and (d) and s. 12(1) are broad enough to provide the condominium corporate with the ability to control and manage its assets and as such the declaration is not inconsistent with the Condominium Act.

[para21] The second portion of the application is for an order declaring that by-law no. 6 registered as Instrument No. 586191 The Land Titles Division of the Registry Office in Ottawa, is null and void pursuant to sub-section 28(5).

[para22] S. 28 of the Condominium Act provides that the board may pass by-laws, not contrary to the act or to the declaration. In view of my finding relating to the declaration, I do not find that the by-law offends any of the provisions of s. 28.

[para23] A further and alternative argument put forward by the applicant is that the by-law was not registered in accordance with the requirements of s. 28(5). From the registration documentation, it appears that the enacting page of the by-law was not recorded at the time of registration. It also appears that there are two page 3, which is obviously an error made at the time of registration. From the affidavit material filed, it is apparent that the by-law was passed in accordance with the provisions of the Condominium Act and approved by both the board of directors and the owners. At that time there was an enacting page however no one seems to be able to locate the original by-law. The by-law has been distributed as part of its estoppel certificate package to purchasers of units. There is a certificate attached to the by-law by the Condominium Act that certifies that the by-law has been duly enacted.

[para24] Pursuant to s. 97 the court can make a declaration that By-Law no. 6 registered as Instrument No. 586161 includes the enacting page in the form and with the substance as contained in the documentation as filed on this application.

[para25] The application is dismissed other than the declaration under s. 97. I will receive written submissions within 15 days from the parties relating to fixing costs and the quantum of such costs.

CHADWICK J.

CBR# 231

Peel Condominium Corporation No. 16, plaintiff, and Lawrence Douglas Vaughan and Douglas Lawrence Vaughan, defendants

Court File No. C19950/92

Ontario Court of Justice (General Division) Brampton, Ontario O'Connor J. March 6, 1996.

Counsel: John Russell, for the plaintiff. Robert Sugar, for Lawrence Douglas Vaughan. Thomas H. Clemenhausen, for Douglas Lawrence Vaughan.

[para1] O'CONNOR J.-- The defendants, father and son, were tenants of a townhouse in the plaintiff's complex. On May 28, 1991, the younger Mr. Vaughan was repairing his car in the garage of his rental unit. He admits his negligence caused a fire which damaged two other condo units. The plaintiff's insurer, Chateau Insurance Company ("Chateau") has paid \$25,182.48 for repairs. It seeks to subrogate against the defendants.

[para2] The plaintiff's policy with Chateau covers "Peel Condominium Corporation #16 and all Unit Owners" for losses which include the loss caused by the defendant's negligence. By the policy Chateau waives subrogation rights against the owner of a condominium. Further, the law prohibits subrogation by an insurer against its insured.

[para3] There was no written lease between the defendants and the registered owner of their unit. They were month to month tenants paying \$950. The owner paid a condominium fee of \$110 to the plaintiff, a portion of which covered the premium on the Chateau policy.

[para4] The issue is whether any of the Chateau policy, the Condominium Act, the Landlord and Tenant Act ("L & T Act"), the plaintiff's declaration, by-laws, rules and regulations or any combination of them can be interpreted to provide coverage under the Chateau policy for tenants or to include tenants in the definition of "owner". If tenants are covered the plaintiff cannot subrogate and the defendants succeed. If they are not covered the plaintiff may subrogate.

The Plaintiff's Position

[para5] The plaintiff says its policy is clearly intended to protect only the corporation and the owners of units in Condominium Corporation #16. It does not cover tenants. It should not be liable for the defendants' negligence. It should be permitted to subrogate.

[para6] Sec. 94(3) of the L & T Act provides a tenant is responsible for the repair of damage caused by his negligence. Cases supporting this principle are: *Agnew-Surpass Shoe Stores Ltd. v. Cummer-Yonge Investments Ltd.* (1975), 55 D.L.R. (3d) 676, at p. 679 and *T. Eaton Co. Ltd. v. Smith et al.* (1977), 92 D.L.R. (3d) 425, at p. 428. Here the defendants have not contracted out of this responsibility. Their purchase of their own contents and automobile insurance shows they knew they were not covered by the plaintiff's policy.

[para7] There is no written lease between the defendants and the owner of their unit. There is no agreement determining the amount, if any, of the rent paid by the tenants that went toward the insurance premium in the owner's condominium fee.

[para8] The definition of "owner" in the Condominium Act does not include "tenant" and the definition of "tenant" in the L & T Act does not include "owner". The plaintiff's declaration, by-laws, rules and regulations apply to tenants in limited areas, generally only as they relate to the use of the property, and not where they affect ownership or title. Tenants may attend the plaintiff's meetings only upon invitation and do not have a vote. Chateau further says the defendants are not covered under the policy as an "unnamed insured". It should be permitted to subrogate against the person whose negligence caused the damage they have covered.

The Defendants' Position

[para9] The defendants say the terms of their relationship with their landlord were prescribed, in part, by the declaration, by-laws and rules and regulations of the corporation. Article XVII of the declaration provides, "All present and future owners, tenants and residents of units shall be subject to and shall comply with the provisions of this declaration, the by-laws and the rules and regulations" (emphasis added). The intention is to bind tenants to all provisions applicable to owners, not just those which affect the use of property. They are to be treated as owners for insurance coverage purposes.

[para10] Article XIII pursuant to by-law 5 provides that "... the rules and regulations shall be observed by the owners and the term owner shall include the owner and any other person occupying the unit with the owner's approval".

[para11] The rules governing parking provide "Unit owner includes ... residents and tenants."

[para12] Chateau was aware when it wrote the policy that about 20% of the units comprising the plaintiff were occupied by tenants. It had copies of all the plaintiff's condominium documents. Chateau is deemed to know the definition of owner used by the plaintiff. When the policy was first written it covered "... all registered unit owners ..." At the time of the loss it covered "... all unit owners..." The defendants say this amendment causes confusion and the contra proferentum rule applies to Chateau's disadvantage. [para13] The combined effect of the Condominium Act, declaration, by-laws and rules and regulations of the plaintiff is to place the tenant in the same position as an owner respecting the insurance provisions. The defendants are covered under the policy. Subrogation should not be permitted by an insurer against its insured.

Analysis

[para14] Two questions arise:

(a) Whether the plaintiff has a right of action against the defendants.

(b) Whether any right of subrogation has been modified by the policy and/or whether the policy covers the tenant as an "unnamed insured".

[para15] There is no argument that Chateau must cover and indemnify the plaintiff as the loss came within the terms of the policy and the plaintiff and the owners of the other units damages are named insured. Chateau has already paid the claim.

(a) Whether the plaintiff has a right of action against the defendants.

[para16] Any right of action must arise out of the defendants' negligence, which has been admitted. There is no privity of contract between the plaintiff and the defendants. The Condominium Act reads:

14(1) The corporation after giving written notice to all owners and mortgagees may, on its own and on behalf of any owner, sue for and recover damages and costs in respect of any damage to common elements, the assets of the corporation or individual units ...

[para17] The plaintiff has the right to sue the tenants for damage to the units and the common elements unless this right was contractually altered. To determine whether the parties have contracted out of this right one should examine who has assumed the risk of damage. In *Rose et al. v. Borisko Brothers Ltd.*, (1981), 33 O.R. (2d) 685, aff'd. (1983), 41 O.R. (2d) 606, O'Brien J., of the Supreme Court of Ontario, says at page 691:

"... the cases stand for the proposition that an insurer cannot assert against a third party any rights which the insured has, by contract, put beyond his own reach ..." (emphasis his)

[para18] Has the owner of the unit, the defendants' landlord, waived any right to sue and/or has he taken responsibility for damage and/or to provide insurance? Here, there is no lease between the defendants and their landlord. There is no contract governing the rights and responsibilities of each respecting damage or insurance. Their relationship is governed by the L&T Act. S. 94(3) reads:

The tenant is responsible for the repair of damage caused by the wilful or negligent conduct of the tenant or of persons who are permitted on the premises by the tenant.

[para19] Thus, the tenants bear the risk of damage due to their negligence unless the Condominium Act, declaration, by-laws or rules and regulations or any combination of them can be interpreted to alter the risk. [para20] There is nothing in the Condominium Act which specifically affects a tenant's risk. S. 80(1) of the L&T Act states

"... this part [Part IV] applies to tenancies of residential premises and tenancy apartments despite any other Act ... and despite any agreement or waiver to the contract except as specifically provided in this Part."

[para21] According to Audrey Loeb, *Condominium Law and Administration*, 2nd ed. (Scarborough: Carswell, 1995),

... the rights of the owner and the tenant are governed by the Landlord and Tenant Act and section 49 of the Condominium Act.

[para22] S. 49 of the Condominium Act sets out the duties and responsibilities of a lessee of a condominium unit. It states, in part, "... the lessee ... is subject to the duties imposed by this Act, the declaration, the by-laws and the rules on an owner, except those duties respecting common expenses ...". [para23] The owner/landlord is responsible for common expenses which include his share of the insurance premium. As the tenant's rent is established taking into account the landlord's expenses, including common expenses (and the insurance premium) it can be argued the tenant is indirectly paying the insurance premium. However, under S.49(3) of the Condominium Act, if the landlord fails to pay the common expenses, upon notice from the corporation, his tenant must do so and may then deduct the amount paid from the rent. Although the tenant may indirectly be paying the insurance premium, the responsibility is that of the landlord/owner. Further, as noted, the L&T Act specifically places the risk of damage due to the tenant's negligence on the tenant.

[para24] The few cases dealing with the interaction of the L&T Act and the Condominium Act do not directly discuss the parties' rights and obligations respecting insurance. For discussion of related areas, see *Metropolitan Toronto Condominium Corp. No. 949 v. Irvine* (1992), 24 R.P.R. (2d), 140, Ont. Ct. (Gen. Div.), aff'd. (1994) 42 R.P.R. (2d) 319 (Ont.C.A.), *York Condominium Corp. No. 71 v. Sullivan*, [1990] (Dist. Ct.) and *Metropolitan Toronto Condominium Corp. No. 706 v. Quinto*, unreported Ont. Dist. Ct., Hoilett D.C.J., August 1, 1990, affirmed Ont. C.A. January 15, 1991.

[para25] S.27.(1) of the Condominium Act reads:

The corporation shall obtain and maintain insurance on its own behalf and on behalf of the owners of the units and common elements ... against major perils to the replacement cost thereof, and against such other perils as may be specified by the declaration or by-laws, and for this purpose the corporation shall be deemed to have an insurable interest in the units and common elements.

[para26] I find "major perils" includes fire.

[para27] The plaintiff's declaration and by-laws also place on it a specified duty to place certain coverages.

[para28] S. 41(2) of the Condominium Act provides the corporation shall repair the units and common elements after damage. This responsibility can be shifted by the declaration to the owner. If the owner fails to make obligated repairs the corporation may do so and add the cost to the common expenses.

[para29] Article XIII of the plaintiff's declaration reads:

... all maintenance of and repairs to any unit shall be made by the owner of such unit, and each owner shall be responsible for all damage to any and all other units and to the common elements, that his failure to so do may engender, save and except such damage to the common elements as may be covered by insurance ...

[para30] Thus the risk of "ordinary" damage is assumed by the owners who, by the declaration, have altered S. 41(2) of the Act.

[para31] Article XV of the declaration sets out the insurance the corporation must obtain. S.6 provides:

All policies of insurance ... shall insure the interest of the corporation and the owners ... and shall contain waivers against the corporation and the owners ...

[para32] Article XVI and by-law No.5 contain identical indemnification clauses:

Each owner shall indemnify the corporation against loss, cost, damage or injury caused to the common elements because of the act or omission of such owner or the residents of his unit or by any guest of such owner or resident, except for any loss, cost, damage or injury caused by an insured (as defined in any policy of insurance), and insured against by the corporation.

[para33] There is nothing in the declaration or by-laws which specifically states a tenant is covered by the insurance. The combined effect of the Condominium Act and the declaration is to place the risk of "ordinary damage" to the units due to any cause on the owner. However, the plaintiff has assumed the risk of damage due to fire and other major perils as required by statute. The owner is responsible for damage to the common elements caused by his failure to repair unless it is covered by insurance. The owner is also responsible for any damage to the common elements caused personally or by residents or guests unless caused by an insured and insured against by the corporation. But the risks the owner must insure against are the "ordinary risk of damage". The corporation must insure against "fire" and "major perils". As noted, the L&T Act places all risk of damage by a tenant on the tenant, whether his negligence causes ordinary damage or fire or a major peril.

[para34] The Act, declaration and by-laws put in place a scheme to deal with damage by fire. The corporation obtains coverage on behalf of itself and the owners. They have a "deemed" insurable interest. They have waived subrogation rights against each other. The scheme is similar to "builder's risk" insurance used in the construction industry whereby the owner of a project obtains coverage for everyone involved including sub-contractors. The cost of premiums and litigation after a loss are reduced. Everyone benefits. Condominium insurance has a similar function. The corporation and the owners avoid claims against each other and the need to purchase a multiplicity of possibly overlapping policies. Although it would seem equitable and efficient to include tenants in the coverage scheme, none of the Act, declaration or by-laws do so. The only clear requirement in this regard is S. 93(3) of the L&T Act which mandates the tenant assume responsibility for his own negligence. [para35] In summary, the landlord/owner has a right of action against his tenant for damage caused by the latter's negligence. This legal right has not been altered. The plaintiff's insurer, Chateau, may thus subrogate unless the policy itself prevents it.

(b) Whether any right of subrogation has been modified by the policy and/or whether the policy covers the tenant as an "unnamed insured".

[para36] If tenants are deemed owners for insurance purposes or are unnamed insureds under the terms of the policy, Chateau would not succeed. It has waived subrogation against owners and the law prohibits subrogation by an insurer against its insured. *Commonwealth Construction Co. Ltd. v. Imperial Oil Ltd. et al*, [1978] 1 S.C.R. 317. The policy contains a subrogation clause permitting Chateau to take action against all others. The policy covers loss to the property which was damaged by the defendants' negligence. The defendants are covered by the waiver of subrogation if they are included in the meaning of "owner".

[para37] The Condominium Act defines "owner" as "... the owner or owners of the freehold estate or estates in a unit and common interest, but does not include a mortgagee unless in possession." It does not include tenants. There is no statutory requirement for the plaintiff to provide insurance coverage for tenants.

[para38] The declaration provides "... the terms used herein shall have ascribed to them the definitions contained in the Act." The few specific areas in the by-laws and rules and regulations where occupants and tenants are included with owners are those which relate to the use and occupation of property. Tenants are not included in any provisions of any of these documents where they govern property, title or ownership interests.

[para39] The meaning of "owner" should not be judicially extended to include tenants. Unit owners are responsible for many things for which tenants are not. The primary purpose of the declaration and the by-laws is to define the relationship between the corporation and the owners. The terms are clear and do not include tenants, either in the definitions or with reference to the significant rights and obligations of each of them. Owner has the meaning given it in the Condominium Act. It is not ambiguous. There is no need to invoke the *contra proferentum* rule. Further, I find there is no relevance to the change from "registered unit owners" to "unit owners" when defining the named insured.

[para40] The corporate documents have not created an expectation in the tenants that they would be covered by the plaintiff's insurance. Even so, the tenants' purchase of their own insurance is not persuasive of their knowledge they were not covered, as the plaintiff argues, because even owners are required to insure their own personal contents and vehicles.

[para41] For the tenants to be included as unnamed insureds they must show they had an insurable interest. Here the policy exempts personal property. In *Morawietz v. Morawietz*, [1986] (C.A.), the Court of Appeal held the 18 year old son of the owners of property who was resident with them at the time his negligence caused a fire, was not covered by his parents insurance for his negligence because he did not have an insurable interest in his parents' house. [para42] In *Esagonal Construction Ltd. v. Traina*, [1994] (Gen. Div.), Farley J. discussed what was necessary for a party to qualify as an "unnamed insured". Although the provider of supplies was not explicitly covered, the court found it was an unnamed insured because property owned by it was explicitly included under "property insured". He was also influenced by the purpose of builder's risk insurance and the practical benefits of the owner of a project obtaining coverage for all involved. He specifically addressed the meaning of a subrogation clause with identical wording to the clause in the Chateau policy in this case. He found the waiver extended to the defendant in that case because the "other interest" was ambiguous and the *contra proferentum* rule applied in its favour. He found the defendant was the "other interest" because its property was covered by the insurance. Here, the tenants property is not covered by the Chateau policy. Even the tenants did not consider it to be covered. They purchased their own contents and automobile insurance.

[para43] The defendants are not covered by the plaintiff's insurance. Chateau will be permitted to subrogate against the defendants.

[para44] Judgment to the plaintiffs for \$25,182.48 plus pre and post judgment interest in accordance with the Courts of Justice Act. Party/party costs to the plaintiff after assessment.

O'CONNOR J.

CBR# 040

Elan Beer and Gil Ehrentant, Shoshana Agbariya, Astrug Elazar, Moti Fishman, Morris Freedman, Boris Galperin and Natalia Galperin, Harvey Goodman, Manuel Goncalves, Michael Groisman in trust for Clara Groisman, Rachel Grundman and Ynes Sibilia, Cathy Katz, Adolph Kleiner and Bella Kleiner, Yan Kosoi in trust for Eugene Dozortsev, Anna Kosoi, Albert Kshoznicer and Barbara Kshoznicer, Fernando Goncalves and Russell Lazar, Angel Mealia and Michael Mealia, Eli Mizrahi and Annette Mizrahi, Isaak Nemirovsky, Henry Petroff, Eugeny Privis, Anna Prokopets and Mike Prokopets, Bentsian Prosmushkin and Alisa Prosmushkin, Gary Tiz and Mike Groisman, Gary Tiz in trust for Lubov Tiz and Warren Weisz, plaintiffs, and Townsgate I Limited, 652 Steeles Investments Inc., and Norman Hill Realty Inc., Harvey Kauffman, Aggie Berk, Sylvia Gold, Jim Stodgill and George Kerr, defendants Court File No. 91-CQ-1655

Ontario Court of Justice (General Division) Chapnik J. Heard: January 16-20, 23, 25-31, February 1-3, 6-10 and March 6-8, 1995. Submissions: May 15-16, 1995. Judgment: October 12, 1995.

Counsel: Martin Teplitsky, Q.C. and Philip C. Polster, for the plaintiffs. Allan Sternberg and Laurel C. Broten, for the defendants Townsgate I Limited and 652 Steeles Investments Inc. J. Patrick Moore, for the defendants, Norman Hill Realty Inc., Harvey Kauffman, Aggie Berk, Sylvia Gold, Jim Stodgill and George Kerr.

[Ed. note: This judgment has been partially reported at 25 O.R. (3d) 785.]

CHAPNIK J.:--

INTRODUCTION

[para1] In early 1989, Townsgate I Limited ("Townsgate") initiated its promotional marketing of a luxury condominium project located at the intersection of Bathurst Street and Steeles Avenue in Vaughan Township. As part of its marketing efforts, invitations were sent to prospective purchasers to attend a special preview showing of the proposed development.

[para2] The grand opening extended over a three-day weekend in February 1989, and a picture emerges of a scene on those three days which is not a pretty one. It is a picture of individuals swept up in a frenzy of opportunity where common sense was overtaken by avarice, and traditional attributes of propriety, professionalism and integrity disintegrated into a contest of financial wit.

[para3] Shortly thereafter, the bubble burst with the dramatic collapse of the real estate market and the sad realization that no pot of gold lay at the end of the rainbow.

[para4] Each party blames the other for this sorry state of affairs. The plaintiff purchasers malign the overzealous marketing techniques of the defendant vendor; the defendants characterize this dispute as an attempt by the plaintiffs to avoid their contractual obligations and the consequences of what they perceive to be a bad deal.

OVERVIEW

[para5] I do not mind saying at the outset that this decision has caused me considerable chagrin, not because of the magnitude of the case, comprising about 50 witnesses and more than 100 exhibits, and involving several millions of dollars, but because both parties stand fervently behind a strong position and the circumstances are somewhat unique.

[para6] In many situations involving aborted real estate transactions with their genesis in and around 1989, wherein purchasers of real property became caught in a downward spiralling market, the resulting litigation has not presented a great deal of difficulty for the trier of fact. Anxious purchasers assessed the risks and knowingly took the risk when making their investments. With the dramatic decline in the market, panic reigned as they were unable to sell their own homes or finance the depreciated units. In such a situation where vendors have sought to enforce the contracts, purchasers have been tenacious in defending those claims, but the courts have upheld their "honestly made" bargains.

[para7] The decision is rendered more difficult, however, where in addition to anxious purchasers, one is confronted with an anxious vendor, one who acted precipitously and who perhaps also became caught up in the avid frenzy of the hot real estate market. If the vendor were disreputable or acting in bad faith, again, the decision would be facilitated. But that is not the case here. In this rather peculiar circumstance, we are dealing with a seasoned builder of good repute who had accumulated considerable experience in the land development business.

[para8] The starting point for this inquiry is based upon the premise that the purchasers, primary motivation in failing to close their transactions and in bringing this lawsuit is to rescind what has manifestly become for them, a bad deal -- they want out. Indeed, some of their defences were raised at the zero hour. That does not preclude recovery, however, if the vendor, in its zeal, made material "mistakes" including, for example, the infringement of statutory provisions, misrepresentation of facts, and dissemination of misleading information, particularly when the effect of those errors had consequences of a serious nature for the purchasers.

[para9] Unfortunately, in attempting to embrace or advance the wonders of free enterprise, attributes of avarice and arrogance often underlie the issues; and that is what makes this so difficult.

BACKGROUND FACTS

[para10] The factual background underpinning this dispute may be summarized as follows:

1. Townsgate was the developer of a luxury, state-of-the-art residential condominium project consisting of two highrise buildings or towers located at the intersection of Bathurst Street and Steeles Avenue in the City of Vaughan. Townsgate commenced marketing the project near the end of 1988, and sent invitations to prospective purchasers to attend at the sales pavilion for the grand opening scheduled to be held in February 1989, providing them with an opportunity to take advantage of "special preview prices".

2. In February or March 1989, each of the plaintiffs entered into an agreement of purchase and sale with Townsgate to purchase a unit or part thereof in the complex.

3. The majority of units were purchased during the grand opening presentation to the public held on February 24, 25, and 26, 1989. Although 160 of the 220 available units were initially sold that weekend, approximately 70 purchasers cancelled their respective agreements within the ten-day cooling-off period provided for in the Condominium Act. In the end, 90 agreements of purchase and sale signed on the initial opening weekend remained, of which 45 completed their transactions.

4. The agreements of purchase and sale consisted of standard form contracts with a purchase price in the range of \$284,000 to \$383,000, the majority being about \$340,000.

5. Norman Hill Realty Inc. ("Norman Hill") acted as the real estate agency retained by Townsgate to effect sales of the units. At or near the commencement of trial, the claims against Norman Hill and the individual named defendants, being Harvey Kauffman, Aggie Berk, Sylvia Gold, Jim Stodgill, and George Kerr, were withdrawn by the plaintiffs.

6. At the time of sale, the condominium market in the City of Vaughan reflected a generally inflated real estate market described as a "seller's market".

7. By the end of 1989, about ten months after the purchase, the real estate market was in rapid decline, and the recession continued into 1990 and following. Townsgate advertised drastic reductions in respect of units similar to those purchased by the plaintiffs.

8. In the early part of 1990, Townsgate issued a newsletter offering prospective purchasers a repurchase proposal involving what was termed as a risk-free guaranteed investment.

9. In or around February 1991, several of the purchasers formed an association to find ways to deal with the situation, in the main, to attempt to negotiate a better deal and/or to retain legal counsel.

10. In March 1991, Townsgate offered most, if not all, of the purchasers a 15 per cent reduction in the purchase price of their units in exchange for payment of a further deposit and an undertaking to close their transactions. Of the 90 purchasers who had bought units at or near the opening weekend, 45 accepted the offer.

11. The original projected closing dates of March to June 1991 were extended by the vendor to permit occupancy in the fall of 1991.

12. These proceedings were instituted on August 2, 1991.

13. Having repudiated the agreements, the remaining 35 plaintiffs (some have settled their disputes) bring this lawsuit involving 23 units, and seek the return of their deposits, each in the sum of \$40,000. Collectively, they contest the legality of the contracts on the basis of alleged deficiencies in ownership, noncompliance with the Ontario New Home Warranties Plan Act, R.S.O. 1980, c. 350 (now R.S.O. 1990, c. 0.31), and the regulations thereunder (R.R.O. 1990, Reg. 892); the Ontario Building Code Act, R.S.O. 1980, c. 51; and the Securities Act, R.S.O. 1980, c. 466, as amended (now R.S.O. 1990, c. S.5, as amended). In addition, several of the plaintiffs assert claims of negligence, misrepresentation and breach of contract, and they rely upon the provisions of the Condominium Act, R.S.O. 1980, c. 84 (now R.S.O. 1990, c. C.26).

[para11] In its counterclaim, Townsgate claims damages for breach of contract and, in the alternative, forfeiture of the deposits.

[para12] To the extent that any of the above factors prove to be a matter of dispute, they may be viewed as my findings of fact on the evidence.

OWNERSHIP ISSUE

[para13] The plaintiffs contend that, as at February and March 1989, when the agreements were executed, Townsgate had no title to the property, and, thus, no interest in land to convey as vendor.

[para14] Barry Zagdanski, a 35-year-old lawyer, builder and developer, in giving testimony as one of the principals of Townsgate, explained the corporate structure underlying the enterprise. In 1985, the approximately nine acres of land upon which the project is situated were purchased and then assigned to the defendant, 652 Steeles Investment Inc. ("652") by means of a trust declaration dated December 20, 1985. By further trust document dated August 20, 1991, Townsgate, which had been incorporated in January 26, 1989, became the assignee of that interest and a formal transfer of the property to Townsgate was registered on September 5, 1991.

[para15] Clearly, then, Townsgate did not own the property at the time of execution of the purchase and sale documents; 652 was the initial owner of the land. It is noted, however, that pursuant to the trust documents, both 652 and Townsgate, as the developer, acted as bare trustees for the same four beneficial owners, Zagjo Holdings Limited, Barian Holdings Limited, MLB Investments Ltd., and Sabel Holdings Limited, in the identical designated amounts; that is, their respective interests were coincidental.

[para16] In the case of *Victoria Homes (Ontario) Inc. v. Defreitas* (1991), 16 R.P.R. (2d) 55 (Ont. Gen. Div.), the purchaser objected to tender on the basis that the deed being presented at the time of tender was not from the vendor designated in the agreement of purchase and sale. The transfer was signed instead on behalf of a numbered company which had not held title to the property at the time the agreement was entered into. Rosenberg J. allowed an appeal from the Master, who had dismissed the vendor's motion for summary judgment. In doing so, the learned judge found the tender, if deficient, to have been deficient in a minor way that could easily have been corrected had the purchaser acted in good faith and raised the matter earlier.

[para17] The condominium registration process inevitably creates a delay from the time an agreement of purchase and sale is entered into until the time a developer is able to deliver a registrable transfer of title and close the transaction. In the instant case, as in the *Victoria Homes* situation, the objection does not go to the root of title. Any deficiency in title was semantic and, in my view, inconsequential. Townsgate would have been in a position to give proper title at the relevant time had the transactions closed.

[para18] Moreover, it was only upon the commencement of these proceedings that the plaintiffs took the position that title was in issue. In general, the jurisprudence holds that purchasers must act reasonably, in good faith, and in a timely fashion if they have objections to title. It is incumbent upon them to search title and raise timely objections, if necessary. By their lengthy delay in raising this issue and the lack of positive steps taken to rectify the matter earlier, the plaintiffs are now estopped from doing so.

THE SECURITIES ACT

[para19] The plaintiffs contend that the agreements of purchase and sale are void for non-compliance with securities legislation. Sections 24(1) and 52(1) of the Securities Act, R.S.O. 1980, c. 466, as amended (now R.S.O. 1990, c. S.5), read:

24(1) No person or company shall,

(a) trade in a security unless the person or company is registered as a dealer, or is registered as a salesman or as a partner or as an officer of a registered dealer and is acting on behalf of the dealer;

and the registration has been made in accordance with this Act and the Regulation and the person or company has received notice of the registration from the director and, where the registration is subject to terms and conditions, the person or company complies with such terms and conditions.

52(1) No person or company shall trade in a security on his own account or on behalf of any other person or company ... unless a preliminary prospectus and a prospectus have been filed and receipts therefor obtained from the director.

[para20] A contract to trade in securities where the trader is not registered in accordance with the Act, is illegal: *Re Ontario Securities Commission and British Canadian Commodity Options Ltd.* (1979), 93 D.L.R. (3d) 208 (H.C.). In that case, due to the non-registration of the trader, purchasers of the securities were held to be entitled to rescission of their agreements including recovery of the purchase price paid for the shares.

[para21] In the instant case, plaintiffs' counsel alleges that the agreements of purchase and sale constitute "a security" within the meaning of the Act. The definition of a security pursuant to section 1(1) of the Act includes:

(b) any document constituting evidence of title to or interest in the capital, assets, property, profits, earnings or royalties of any person or company,

...

(n) any investment contract, other than an investment contract within the meaning of the Investment Contracts Act. ...

[para22] The nexus of the plaintiffs' argument was based on the following:

(1) The vendors' agents focused their sales pitch to the purchasers on the investment element of the transaction;

(2) The building was not built at the time of sale;

(3) The vendor was not the owner of the land; (4) The vendor did not have any agreement to purchase the land;

(5) The vendor did not have any assets;

(6) The vendor used the purchasers' deposit monies; and

(7) The vendor had an option to proceed with or cancel the project (clause 36) at its sole discretion. If it chose not to proceed, the purchasers would forfeit all interest accrued on their \$40,000 deposits.

[para23] The objective of securities legislation is the protection of the investing public through full, true and plain disclosure of all material facts relating to the securities being issued. *Re Ontario Securities Commission and Brigadoon Scotch Distributors (Canada) Ltd.* (1970), 3 O.R. 714 (H.C.), at page 717.

[para24] As a consequence, investors in public offerings are statutorily protected by the enforced disclosure of all relevant information. This facilitates an appreciation of the risks involved in making the investment. Nevertheless, the legislature has left the term "investment contract" without literal meaning. According to Laskin C.J.C., to define the term "would bring within the scope of the Securities Act innumerable transactions which have no public aspect."

[para25] Does Townsgate's enterprise fall within the rubric of the Act, as a security investment contract? In the leading case in Canada, *Re Pacific Coast Coin Exchange of Canada Ltd. v. Ontario Securities Commission*, [1978] 2 S.C.R. 112, the Supreme Court adopted two tests formulated in the American jurisprudence. First, the "common enterprise" test developed by the United States Supreme Court in *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293 (1946):

[w]hether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others; and if that test be satisfied, it is immaterial whether the enterprise is speculative or nonspeculative or whether there is a sale of property with or without intrinsic value.

[para26] Secondly, what has become known as the "risk capital" approach, as enunciated by the Supreme Court of Hawaii in *State of Hawaii v. Hawaii Market Center. Inc.* 485 P 2d 105 (1971). The court held that "the subjection of the investor's money to the risks of an enterprise over which he exercises no managerial control is the basic economic reality of a security transaction." The jurisprudence establishes the following elements as comprising an "investment contract":

(1) An offeree furnishes initial value to an offeror;

(2) a portion of this initial value is subjected to the risks of the enterprise;

(3) the furnishing of the initial value is induced by the offeror's promises or representations which give rise to a reasonable understanding that a valuable benefit of some kind, over and above the initial value, will accrue to the offeree as a result of the operation of the enterprise; and

(4) the offeree does not receive the right to exercise practical and actual control over the managerial decisions of the enterprise.

[para27] In *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975), the U.S. Supreme Court examined whether shares of stock which entitled a purchaser to lease an apartment in a massive co-operative housing project constituted securities within the meaning of the relevant legislation. The court described the purchasers' objective as primarily relating to the acquisition of housing rather than investment for profit. The operation of the facilities was held to be incidental to the project as a whole. The shares did not, therefore, constitute "investment contracts" within the scope of the federal securities laws.

[para28] In determining the applicability of the relevant legislation to real estate sales, the court in *Johnson v. Nationwide Industries, Inc.*, 450 F. Supp. 948 (1978): (U.S. Dist. Ct.), relied upon the following guidelines established by the Securities and Exchange Commission, 1973:

The offer of real estate as such, without any collateral arrangements with the seller or others, does not involve the offer of a security ... The existence of various kinds of collateral arrangements may cause an offering of condominium units to involve and offering of investment contracts or interests in a profit-sharing agreement. The presence of such arrangements indicates that the offeror is offering an opportunity through which the purchaser may earn a return on his investment through the managerial efforts of the promoters or a third party in their operation of the enterprise. (Emphasis added.)

[para29] On the other hand, a release issued by the Ontario Securities Commission dated October 11, 1988 (see O.S.C.B. Rep. 4171) concluded that certain residential real estate investment opportunities being offered in various urban areas in Ontario at that time constituted the distribution of securities. The offerings were described in these terms:

Most of the offerings involved the sale of individual units or undivided interests in residential housing developments together with the provision to investors by the offering's promoter of optional benefits such as minimum rent guarantees, cash flow deficiency guarantees and rental management services, with the result that the purchaser relies heavily on the efforts and financial stability of the promoter for the success of the investment.

[para30] The Ontario Securities Commission in 1992 analyzed the substance of a proposed sale of a parcel of undeveloped land on the island of Aruba. The transaction involved the purchase of undivided interests in the property as tenants-in-common, by potential purchasers who were required to enter into co-tenancy agreements for the management and control of the property. In concluding that the interests could not be characterized as a security, the Commission stated at page 10:

There is nothing in the Co-Tenancy Agreement itself that deals with any interest in anything except the interest of the co-tenants themselves in their own property. It is their interest and it is their property.

(*Sunfour Estates N.V. United Power Corporation and 949320 Ontario Ltd.* (1992), 15 O.S.C.B. Rep. 269).

[para31] As was noted by Laskin C.J.C. in his dissenting opinion in *Pacific Coast*, at page 340, "spot purchases are clearly outside of the Securities Act."

[para32] In the case at bar, I have no difficulty whatsoever in finding that the nature and intent of the subject agreements do not constitute investment contracts or securities within the meaning of the legislation, whichever test is utilized.

[para33] The plaintiffs represent a small percentage of unit holders in the project; even so, the evidence disclosed that only a handful of them purchased their units as an investment rather than for personal use. The project as a whole does not encompass a "common enterprise" between purchaser and vendor. The purchasers intended to buy a tangible asset. No ancillary management, rental or cash flow deficiency guarantees ensue. Purchasers can rent their individual units or resell them, as they deem fit. The expectation of enhancement due to management efficiency by the developer provides a "tortured argument" and clearly not the kind of third party effort envisaged by *Howey*. Notwithstanding a degree of reliance upon the financial stability of the developer to complete the project according to plan, the inherent value of the units is far more dependent upon market trends and prevailing economic conditions over which the promoter has no control.

[para34] None of the factors relied upon by the plaintiffs suffice to characterize the agreements as anything more than a real estate venture; nor does Mr. Kauffman's definition of a speculator or investor as being anyone who purchases a condominium two years in advance. What agents do or do not say cannot change the intrinsic substantive nature of the enterprise. In my respectful view, the securities laws do not apply to this situation.

ILLEGALITY

[para35] The plaintiffs also contest the validity and enforceability of the purchase and sale agreements as a result of the builder's failure to comply with various legislative provisions contained in the Ontario New Home Warranty Plan Act ("ONHWPA"), the Building Code, and the Condominium Act. The relevant provisions are listed below:

The Ontario New Home Warranty Plan Act

1(a) "builder" means a person who undertakes the performance of all the work and supply of all the materials necessary to construct a completed home whether for the purpose of sale by himself or under a contract with a vendor or owner;

(1) "sell" includes entering into an agreement to sell;

(n) "vendor" means a person who sells on his own behalf a home not previously occupied to an owner and includes a builder who constructs a home under a contract with the owner.

6. No person shall act as a vendor or builder unless he is registered by the Registrar under this Act.

7.(1) An applicant is entitled to registration by the Registrar except where,

(c) the applicant is a corporation and,

(i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its undertakings, or

(ii) the past conduct of its officers or directors affords reasonable grounds for belief that its undertakings will not be carried on in accordance with law and with integrity and honesty; or

(d) in the case of an application for registration as a builder, the applicant does not have sufficient technical competence to consistently perform the warranties.

(2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant or imposed by the Tribunal or prescribed by the regulations.

(3) A registration is not transferable.

...

11. - (1) The Ontario New Home Warranties Plan is continued under the name Ontario New Home Warranties Plan in English and Régime de garanties des logements neufs de l'Ontario in French and is comprised of the warranties and the guarantee fund and compensation provided for by this Act.

(2) When a vendor enters into a contract for the sale of a home to an owner or for the construction of a home for an owner, the vendor shall deliver to the owner such documentation and notices respecting the Plan as are prescribed in the regulations.

22. - (1) Every person who,

(b) contravenes section 6 or 12 or subsection 18(4), and every director or officer of a corporation who knowingly concurs in such furnishing or contravention is guilty of an offence and on conviction is liable to a fine of not more than \$25,000 or to imprisonment for a term of not more than one year, or to both.

Regulation 726, R.R.O. 1980, section 2(a):

2. In connection with the sale or construction of a home, ... the following documents ... shall be delivered under the Plan

(a) at the time of execution by the vendor and purchaser of a purchase agreement, the vendor shall deliver to the purchaser a deposit receipt.

[para36] It is also noted that section 3.3 of the Ontario New Home Warranty Program Vendor Builder Agreement signed by Townsgate requires the builder to post security prior to the commencement of construction, marketing or selling of units in a condominium project, whichever occurs first.

The Building Code:

5(1) No person shall construct or demolish or cause to be constructed or demolished a building in a municipality unless a permit has been issued therefor by the chief official.

6(1) The chief official shall issue a permit except where,

(b) the applicant is a builder as defined in the Ontario New Home Warranties Plan Act and is not registered under that Act.

24(1) Every person who

(e) contravenes this Act or the regulations or any by-law passed under the authorization of this Act and every director or officer of a corporation who knowingly concurs ... is guilty of an offence.

The Condominium Act:

53. - (1) All money received by or on behalf of a proposed declarant from a purchaser on account of a sale or an agreement for the purchase and sale of a proposed unit for residential purposes before the registration of the declaration and description, other than money paid as rent or as an occupancy charge, shall, despite the registration of the declaration and description thereafter, be held in trust by the person receiving such money for the person entitled thereto in respect of the agreement and such money shall be held in a separate account designated as a trust account at a bank listed in Schedule I or II to the Bank Act (Canada) or trust corporation or a loan corporation or credit union authorized by law to receive money on deposit or a Province of Ontario Savings Office until,

(a) its disposition to the person entitled thereto; or

(b) delivery of a prescribed security to the purchaser for repayment.

55. Every person who knowingly contravenes subsection 53(1) ... Is guilty of an offence.

Regulation 121, section 35(2), which reads:

A deposit receipt executed by the warranty corporation providing for compensation to a purchaser is prescribed security for the purposes of clause 53(1)(b) of the Act.

[para37] Violations of the above provisions undeniably occurred in the following manner:

1. Townsgate entered into the agreements of purchase and sale as vendor prior to being registered under the Ontario New Home Warranty Program (the "program") in contravention of section 6 of the ONHWPA.
2. Being a bare trustee, Townsgate did not sell the units "on its own behalf" as mandated by section 1(n) of that Act.
3. No deposit receipt was provided to purchasers concurrent with the execution of the agreements of purchase and sale in accordance with Regulation 726.
4. Prior to the provision of the deposit receipts to purchasers, Townsgate transferred a portion of the purchasers' deposit cheques to a related company, thereby utilizing the monies in contravention of section 53(1) of the Condominium Act.
5. The application for a building permit was made in the name of 652 as builder, using Townsgate's registration number which was not transferable under the Act.
6. Construction of the project proceeded for a period of approximately 10 months without a building permit, in contravention of section 5(1) of the Building Code; nor was Townsgate registered under the ONHWPA at the time the permit application was submitted.
7. Townsgate commenced marketing the project in the fall of 1988, or early 1989, in advance of providing the prescribed security under the ONHWPA, in contravention of the above-mentioned builder's agreement.

[para38] According to Mr. Teplitsky, the above infractions are determinative of this lawsuit. The contracts are void ab initio on grounds of illegality and the plaintiffs are entitled to the remedy of rescission, including the return of their deposits. [para39] Townsgate does not deny the occurrence of the above transgressions, but views them as minor, inconsequential and not compromising of the parties' rights or obligations under the agreements. In his submissions, Mr. Sternberg emphasized the following:

1. In early February 1989, Townsgate applied to the program for registration under the Ontario New Home Warranty Plan. Carol Ann Street, counsel with the program confirmed receipt from Townsgate on February 14, 1989, of a completed registration kit consisting of an application and project summary along with guarantees and fully paid enrolment fees; and further receipt on or before February 22, 1989, of a letter of credit from the vendor in the amount of \$4.5 million (based on \$20,000 per unit). Formal registration of the project endorsed by the Registrar on March 29, 1989, was confirmed by letter to Townsgate dated March 30, 1989. Although the units in question were sold in February and March 1989, whereas registration of the project was not given until March 29, 1989, no further actions or documentation were required of Townsgate in the interim.
2. The consumer protection aspect of the ONHWPA existed to protect purchasers' interests from the time of entry into the agreements of purchase and sale regardless of registration.
3. All four of the beneficial owners involved in the land development project were viable companies which supplied the necessary information and guarantees on behalf of Townsgate in advance of the sales.
4. Although HUDAC deposit receipts were not provided upon execution of the agreement they were delivered to the plaintiffs a few months later, in August and September 1989.
5. Prior to the provision of the deposit receipts, Townsgate did utilize part of the purchasers' deposit cheques for construction purposes since it had already provided the necessary security through the plan. 6. Townsgate paid a fine of \$100,000 to the Town of Vaughan as a penalty for commencing the construction without a building permit. Although the application for a permit was submitted August 22, 1989, and the construction commenced almost immediately thereafter, the issue date on the permit was October 24, 1990.

[para40] Admittedly, Mr. Zagdanski was actively involved in the decision to begin construction prior to the attaining of the building permit. At the same time, he professed to be unaware of the other statutory infringements and attested to the intention of the principals of the company to proceed with the construction of the project in a timely manner and in compliance with all relevant rules and regulations.

[para41] The jurisprudence in cases of alleged illegality rests upon the general principle that a contract expressly or impliedly prohibited by statute is void: *Re Northwestern Trust Co., McAskill's Case*, [1926] S.C.R. 412.

[para42] That principle was reiterated in *Meyers v. Freeholders Oil Co. Ltd.*, [1960] S.C.R. 761, where a section in the then securities legislation which prohibited salespersons calling at a private residence to trade in securities was invoked in an attempt to nullify trades in shares of a mining lease. The court held that the prohibition against salespersons calling at investors' homes to sell securities did not constitute part of the fundamental scheme of protecting the public against unauthorized trading; the penalty prescribed was the only remedy and the sale was not void. The analysis of Martland J. at pages 774-775 is instructive as to the proper approach the courts should take in such matters:

The determination of the effect of the breach of a statutory provision upon a contract is often a difficult one and must, of course, depend upon the terms and the intent of the provision under consideration. In some cases the statute clearly forbids the making of a certain kind of contract. In such a case the contract cannot be valid if it is in breach of the provision.

On the other hand, some statutes have been construed as only imposing a penalty, where the Act provides for one, although that is not necessarily the result of a penalty provision being incorporated in the Act. Lord Esher posed the question which must be determined in *Mellis v. Shirley Local Board* [(1885), 16 Q.B.D. 446 at 451] as follows:

"Although a statute contains no express words making void a contract which it prohibits, yet, when it inflicts a penalty for the breach of the prohibition, you must consider the whole Act as well as the particular enactment in question, and come to a decision, either from the context or the subject matter, whether the penalty is imposed with intent merely to deter persons from entering into the contract, or for the purposes of revenue, or whether it is intended that the contract shall not be entered into so as to be valid at law." (My emphasis).

[para43] The combined effect of the decisions of the Supreme court of Canada in the *Re Northwestern Trust* and cases is that a sale which is undertaken in the face of an express statutory prohibition is void; but where a penalty is provided, the court must determine the intention of the legislature in assessing the import of the particular provision: see also *One Hundred Simcoe Street Ltd. v. Frank* legislature in assessing the import of the particular provision: see also *One Hundred Simcoe Street Ltd. v. Frank Burger Contractors Ltd.*, [1968] 1 O.R. 452 (C.A.).

[para44] If the parties enter into a prohibited contract, it is unenforceable and the court is not concerned with the intention of the parties, which is irrelevant in the circumstances: see *St. John Shipping Corp. v. Joseph Rank Ltd.*, [1956] 3 All E.R. 683, at page 687; and *Cheshire, Fifoot and Furmston, Law of Contract*, 12th ed. at page 353.

[para45] More recently, some judges have shed doubt upon the wisdom of applying a strict statutory interpretation without discrimination. In *Royal Bank of Canada v. Grobman* (1977), 18 O.R. (2d) 636 at page 651, Krever J. (as he then was) denounced what he described as the "knee-jerk reflexive reaction to a plea of illegality." In refusing to invalidate a mortgage given to a bank as security for a loan where the institution was in technical breach of a section of the banking legislation, factors such as the serious consequences and social utility of invalidating the contract and a determination of the class of persons for whom the prohibition was enacted, were weighed by the court.

[para46] Our courts have consistently refused to entertain actions brought by persons seeking a remedy based upon an illegal contract where the party suing does not lie within the group of persons for whose protection the prohibiting statute was passed: see *Sidmay Ltd. v. Wehttam Investments Ltd.*, [1967] 1 O.R. 508, aff'd [1968] S.C.R. 828. In applying the reasoning expounded in *Sidmay*, Grange J. (as he then was) granted rescission of contracts to purchasers of securities from an unregistered trader: *Re Ontario Securities Commission and Canadian Commodity Options Ltd.* (1979), 93 D.L.R. (3d) 208. Similarly, in *Jones v. F.H. Deacon Hodgson Inc.* (1986), 56 O.R. (2d) 540, Henry J. held the sale of shares by a defendant who had not filed a securities prospectus to be void and not merely voidable; and the court in *Trudeau Motors Ltd. v. Elliot* (1989), 70 O.R. (2d) 762 (Dist. Ct.), denied a claim for payment for repairs done to an automobile where the customer's prior authorization had not been obtained, as required by statute.

[para47] In an earlier decision, the Ontario Court of Appeal refused to assist the lender of a loan alleging illegality in regard to approvals where the plaintiff did not fit within the group of persons the governing legislation was designed to protect: see *Central Mortgage and Housing Corp. v. Co-operative College Residences Inc.* (1975), 13 O.R. (2d) 394.

[para48] In *Sidmay*, Laskin J.A. (as he then was) endorsed the following principle expressed by the American Law Institute, *Restatement of the Law of Contracts*, paragraph 601, page 1116:

If refusal to enforce or to rescind an illegal bargain would produce a harmful effect on the parties for whose protection the law making the bargain illegal exists, enforcement or rescission, whichever is appropriated is allowed.

[para49] In *Bognar v. Borg* (1989), 40 C.L.R. 286 (Ont. Dist. Ct.), the application of that proposition to a situation similar in nature to the one faced by this court led to a finding that an agreement to construct a new residence was illegal and void. The plaintiffs had made progress payments but the house was never completed. They subsequently brought an action for the return of their payments and the defendants counterclaimed for a deficiency in the sale of the residence to a third party. Since the defendants had never registered as builders under the ONHWPA, the court found the original agreement to be illegal and unenforceable. In doing so, Fleury D.C.J. conducted an extensive review of the relevant legal principles and the purpose and intent of the legislation as a whole. At page 293 of the judgment, he states:

In the case at Bar, we are faced with a statute enacted by the Ontario Legislature. It clearly stipulates that "No person shall act as a vendor or a builder unless he is registered by the Registrar under this Act" (s. 6). It comes within the second general principle identified by Lord Devlin [*St. John Shipping*, supra, at p. 687 of All E.R.], "a contract which is expressly or impliedly prohibited by statute." In light of the definition of "builder" contained in s. 1(a) of the Act as "a person who undertakes the performance of all the work," there appears to be a clear prohibition against the undertaking described in the contract which the parties signed. As such, it would appear to be an illegal contract. And there would be no need to look at the intent of the parties.

[para50] In his submissions, Mr. Sternberg distinguished the facts in the present case from those in *Bognar*. The distinguishing elements are exemplified at page 288, where the court observed:

It is clear that the defendants failed to comply with any of the applicable provisions of the Act until well after the plaintiffs had purported to consider the contract as at an end because of the defendants' breach.

[para51] Indeed, the illegality in that case continued until after the parties had parted company. In the case at bar, not only was the situation remedied during the life of the contracts and prior to the commencement of the construction, but all necessary disclosure, informational and practical requirements had been satisfied by the vendor in advance of the sales. The purchasers by the terms of the legislation were fully protected throughout and based upon past experience, the representatives of the program expressed no reservations as to the builder's competence or integrity.

[para52] I am also mindful of the short time span involved whereby the majority of the agreements of purchase and sale were signed on the weekend of February 24, 1989 and the registration of the project confirmed on March 29, 1989, a period of about one month. I take particular cognizance of the \$4.5 million security bond posted by the vendor in advance of the sales. A copy of that irrevocable letter of credit dated February 15, 1989, is attached as Schedule A to these reasons.

[para53] The ONHWPA was first enacted in 1976 in order to regulate the construction of residential dwellings in Ontario. It provides for the establishment of a registry of vendors and builders who pay fees to a designated corporation and a guarantee fund for compensation of owners who may assert a claim for breach of any of the warranties required by the Act. An applicant's entitlement to registration is subject to a determination that he will carry out the undertakings and warranties in a responsible fashion. Section 6 of the Act prohibits anyone from acting as a builder or vendor (selling or entering into an agreement to sell) without being registered. Section 7 provides the grounds for authorization and for a hearing before the commission when the registrar intends to refuse to issue it. Registration is non-transferable and may be subject to terms and conditions to give effect to the purposes of the Act. The registration requirement was described by the Court of Appeal in *Brownstone East Limited Partnership v. Ontario New Home Warranty Program* (1992), 8 O.R. (3d) 545, at page 554, as being "a mechanism by which

major objectives of the Act may be achieved" -- being the examination of the builder's technical competence to consistently perform the statutory warranties, as well as its financial responsibility, integrity and honesty. Accordingly, the general intent of the statute is to afford protection to the public against sales of homes by builders or vendors who have not satisfied the registrar as to their proper qualifications.

[para54] In this case, the builder was clearly not unscrupulous, financially irresponsible or technically incompetent, much to the contrary. The legislation does not discriminate, however, between levels of applicants prior to completion of the process of authorization. By its clear and unambiguous prohibition in section 6, the Act leaves unimpaired the principle that a breach of its injunction results in a sale of a property that is void. An applicant cannot supersede the authority of the registrar by assuming registration in advance of a ruling. To apply the prohibition only in hindsight would, in my view, defeat the implied, if not express, intention of the legislature. After all, a builder's circumstances may change from one project to another; and if the courts were to allow lenience, where would the line be drawn? In this case, the relevant information was forwarded to the program just prior to the sales taking place; what if it had proved to be incomplete or inadequate in some respect; or it had been filed after the sales -- would a week suffice, a month, any time prior to closing?

[para55] The legislation provides that absent registration, no person shall sell to the public. Thus, not only must the documents be filed but the registrar must be satisfied that the application is not contrary to the public interest. There can be no question but that the filing and its acceptance by the registrar is fundamental to the protection of members of the public who are contemplating the purchase of a condominium. The effect of section 6 is to prohibit the sale of condominiums to the public without prior acceptance by the registrar. In my view, the prohibition in section 6 of the Act is fundamental to the nature and purpose of the regulatory scheme.

[para56] To be sure, the facts of this particular case make this finding difficult to accept; however, in cases of illegality involving the breach of an express statutory prohibition, intention is clearly irrelevant. It is a matter of public policy and the absence of a registration certificate is, by itself, sufficient to prevent a sale from occurring or to render a transaction void. Although the result of insisting upon strict compliance may well on occasion lead to injustice, one can only assume that the legislature considered that when it passed the Act.

[para57] An examination of the penalty provisions of the Act (sections 19 and 22(1)) discloses no reference to a civil remedy for a third party and no provision that expressly deprives a purchaser of his or her common law remedy resulting from a breach of section 6.

[para58] If one were to review the three factors outlined by Mr. Justice Krever in *Royal Bank of Canada v. Grobman*, supra, as elements the court should weigh, the likely result would be the same. Serious consequences undoubtedly flow from the finding of invalidity in respect of an executed agreement of purchase and sale. Large amounts of money are at stake, particularly when several purchasers join their claims. However, negligent building of residential condominium units without proper warranty protection for purchasers, can also have serious consequences, and the program, through the use of the guarantee fund, makes the entire construction industry responsible for compensation of aggrieved purchasers of residential homes. The social utility of the prohibition is self-evident. It is imperative to have guidelines for builders of residential property in the public interest. This is by no means a trivial matter. The third aspect lies squarely in favour of the plaintiffs who clearly fall within the class of persons for whose benefit this section was enacted.

[para59] I have alluded to the hardship which I know this decision may place upon the vendor; no doubt there will be other illegality cases not quite so onerous on the facts; nevertheless, the intent of the legislature can only be abrogated in clear terms or by necessary intendment. That is the effect of the law, and I can find no ground for holding otherwise.

[para60] Mr. Sternberg made reference to the equitable principle of unjust enrichment and the possibility of a claim for relief in quantum meruit.

[para61] I adopt the reasoning of Byers D.C.J. in *Trudeau Motors Ltd. v. Elliot*, supra, at page 765 that to allow this argument would permit the defendant to do indirectly that which it was specifically prohibited to do directly, and thereby "frustrate the obvious policy considerations which are the foundation of the Act itself".

[para62] The underlying rationale for this approach was aptly recognized in an early decision of the Supreme Court of Canada in *Bank of Toronto v. Perkins* (1883), 8 S.C.R. 603, at page 610, per Ritchie C.J.:

It would be a curious state of the law if, after the Legislature had prohibited a transaction, parties could enter into it, and, in defiance of the law, compel courts to enforce and give effect to their illegal transactions. (as noted by Professor S. Waddams in *The Law of Contracts*, 2d ed. (1984), at page 421; and cited with approval in *William E. Thomson Associates Inc. v. Carpenter* (1989), 69 O.R. (2d) 545 (C.A.), at page 551).

[para63] Finally, I take some comfort in the fact that but for the breach, the plaintiffs may well have never entered into the within agreements of purchase and sale; that is, the practical effect of the illegality in a rapidly changing market, was crucial. A comment made by Elan Beer, purchaser of a condominium whose case was settled prior to trial and who appeared as a witness for the plaintiffs, is illustrative of this. Mr. Beer returned to the sales office a few days after signing his agreement on February 25, 1989. When asked why he did so, he included in his reasons the fact that "there was talk (at the time) in the media" regarding "the potential of the hot market subsiding and, of course, that worried me." Timing undoubtedly becomes a significant factor in a volatile market. The principals of Townsgate, as experienced, sophisticated builders and developers of real estate properties, knew or ought to have known the laws under which they were proceeding. Compliance with the express statutory prohibition contained in section 6 of the ONHWPA must not be impaired by anxious builders who may wish to "jump the gun".

[para64] In conclusion, I find that the purchasers have a common law right to have their agreements declared a nullity. The effect, though harsh, expresses the intention of the legislature.

[para65] In light of that finding, it is unnecessary for me to discuss the other alleged and actual breaches of statute. Suffice to say that none of them involved the breach of an express statutory prohibition precedent to the formation of a contract; and that upon a rather cursory glance and, in general, they do not appear to constitute an integral part of the relevant legislation such as to bear fundamental effect. Moreover, in some instances such as the breaches of the Building Code provisions, the statutory penalties appear to be inherently comprehensive, and the prohibition imposed for purposes of revenue and deterrence, rather than with intent to render the impugned contracts invalid. I am reminded of the cautionary words of Professor Waddams that if every

statutory illegality in the performance of a contract, however trivial, invalidated the agreement, the result would be "an unjust and haphazard allocation of law without regard to any rational principles" (S.M. Waddams, *The Law of Contracts*, 3d ed. (1993), at page 381). The practical considerations in accordance with commercial reality would permit some level of infringement in these circumstances.

[para66] The final issue revolves around the status of the purchasers' deposits. It has been said that where a contract is illegal because it is prohibited by statute, neither party may expect assistance from the court. In considering whether the plaintiff Purchaser was entitled to the return of progress payments made pursuant to the illegal contract; the court in *Bognar*, supra, cited the following statement made by Lord Atkin in *Anderson Ltd. v. Daniel*, [1924] 1 K.B. 138 (C.A.), at page 149:

The question of illegality in a contract generally arises in connection with its formation, but it may also arise, as it does here, in connection with its performance. In the former case, where the parties have agreed to something which is prohibited by Act of Parliament, it is indisputable that the contract is unenforceable by either party. [para67] In *Bognar*, since the illegality was attributable to the defendants only, the plaintiffs as innocent parties, were held to be entitled to the return of their progress payments. Similarly, the plaintiff purchasers are entitled to the return of their deposits paid to the vendor pursuant to a contract which is void.

[para68] I shall proceed to discuss the other claims raised by the plaintiffs in the event that my conclusion on the issue of illegality should be proven incorrect.

MISREPRESENTATION

[para69] A plaintiff seeking damages in an action for negligent misrepresentation is entitled to be put in the position he or she would have been in had the misrepresentation not been made: see *Rainbow Industrial Caterers Ltd. v. C.N.R. Co.* (1991), 84 D.L.R. (4th) 291 (S.C.C.), at page 296.

[para70] All of the plaintiffs recall having signed their agreements in an atmosphere of extreme "hype" allegedly created by the actions of the vendor or its agents. According to the purchasers of 18 of the units, they were induced to enter into their agreements by virtue of false representations made to them by one of the vendor's agents. The specific allegations of misrepresentation are contained in paragraphs 10 through 16 of the statement of claim, which are reproduced below:

10. The Plaintiffs plead that Townsgate, Hill [being Norman Hill Realty Inc.] and the Representatives deliberately created an atmosphere of excessive hype and pressure with respect to the sale of the units which, coupled with the misrepresentation as hereinafter set out, misled and induced the Plaintiffs to enter into agreements of purchase and sale. In pursuance of their activities as aforesaid, the Defendants did the following:

- a) distributed invitations to prospective purchasers indicating that the units were being offered at a "special preview price";
- b) sent out invitations to prospective purchasers setting out a specific time for them to attend and then deliberately having them wait outdoors in line for hours in order to create the impression that the units were significantly in demand;
- c) misled the prospective purchasers into believing that the market value of their units was rapidly increasing by systematically raising the asking prices for units and representing to prospective purchasers that the prices were rising while the prospective purchasers were waiting to decide whether or not to purchase;
- d) specifically advised prospective purchasers that there were virtually no units left for sale and that if they did not immediately sign an agreement of purchase and sale they would lose the opportunity to make a risk free investment;
- e) advised prospective purchasers that if they did not immediately sign an agreement of purchase and sale they would lose the opportunity to make a risk free investment;
- f) presented prospective purchasers with a multi page agreement of purchase and sale and pressuring them to sign the agreement without reading it and did not provide them with an environment in which the agreement could be read; and
- g) handed to prospective purchasers a large binder containing the disclosure statement and suggesting to them that this document was simply a formality and that they need not review it.

11. The Plaintiffs plead that the Defendants' conduct as aforesaid was calculated to mislead and manipulate prospective purchasers and to pressure them into signing agreements of purchase and sale.

12. The Plaintiffs plead that upon entering the sales office, they were met by Kauffman, Berk, Kerr, Gold and/or Stodgill, ("the Representatives") sales representatives employed by or acting on behalf of Townsgate. These Representatives made the following representations to the Plaintiffs:

- a) that their investment in the units was guaranteed and risk free;
- b) that if the market value of the units was to decrease, the Defendant would repurchase the units from the plaintiffs at their original price if requested to do so;
- c) that if the market value of the units was to decrease, the Defendant would not decrease the selling price but would stop selling the units;
- d) that both Townsgate 1 and 2 would be built simultaneously or within a very short time of each other so that the plaintiffs would not be living in a construction zone for any period of time. 13. The Representatives also represented to the plaintiffs that approximately 70% of the units had already been sold and that unless an Agreement of Purchase and Sale was executed immediately, the plaintiffs would lose the opportunity to invest in such a risk free venture.

14. Relying upon the said representations and believing them to be true, the Plaintiffs' executed the Townsgate's standard form Agreement of Purchase and Sale (the "Agreement") and provided Townsgate with post dated deposit cheques totalling \$40,000.00. The cheques were eventually all cashed by the Defendant.

15. The Plaintiffs plead that Townsgate, through its sales representatives, made the representations as aforesaid when they knew or ought to have known they were untrue, and did so with the sole intention of inducing the Plaintiffs to purchase the units. In particular,

- a) the market value of the units decreased dramatically shortly after February, 1989; b) Townsgate began publicly advertising the units for sale at prices substantially lower than the original sale price;
- c) Townsgate refused to repurchase the units from the Plaintiffs at their original purchase price;
- d) Townsgate did not follow through with the construction of Townsgate 2;
- e) at no time were 70% of the units in Townsgate 1 sold.

16. The Plaintiffs plead that the Defendants knew or ought to have known that they were unsophisticated individuals, many of whom did not have the financial resources to purchase a unit. The Defendants did not make any enquiries whatsoever as to the Plaintiffs' financial capabilities, assets, incomes or abilities to complete the purchase. They made no enquiries as to the Plaintiffs' understanding of the nature of the transaction that they were being pressured into.

[para71] Townsgate takes the position that, even if such representations were made, which it denies, the purchasers relied upon their own judgment and knowledge of the real estate market in reaching their decisions. In the alternative, the representations cannot attract legal liability as they amount to nothing in law, were not material or made with an intention of inducing the plaintiffs to enter into the agreements and there was no detrimental reliance. In addition, the "entire agreement" clause in each of the agreements, paragraph 24, precludes a finding of misrepresentation. Furthermore, the plaintiffs' conduct constitutes a waiver, estoppel and/or acquiescence on their part.

[para72] Poignant, graphic testimony adduced on behalf of both parties portrayed the atmosphere on the opening weekend as frenzied, variously described as "mayhem", "chaotic", "a zoo" "craziness" and "total confusion".

[para73] A picture emerges of anxious purchasers waiting in long lines for up to seven hours in the frigid cold; and then, for up to three hours in the hot crowded sales pavilion, before seeing an agent; and of harried realtors, unable to handle the crowds, affecting a demeanour sadly lacking in courtesy or candour. The following excerpts from some of the plaintiffs' testimony provides context for those observations.

[para74] As noted previously, Elan Beer, a 33-year-old systems analyst, settled his case prior to or during the trial, but testified on behalf of the other plaintiffs. After receiving an invitation to the pre-introductory sale for 10 a.m. on February 25, 1989, he attended at the site with his brother-in-law about that time, and recounts his experience there as follows:

MR. POLSTER: Q. Tell me what you saw when you got there?

MR. BEER: A. When we got there it was a very, very large gathering of people outside the door. Somewhere in the neighbourhood of 80, 90, 100 people all waiting to get in even at that early hour, and it seemed to matter very little that I had a letter saying that I could come in at 10:00 o'clock. Nobody would talk to me. Nobody there, needed to find out, wanted to find out about the decided to wait awhile and see what happens.

Q. How long awhile did you wait?

A. The while turned into about seven hours.

Q. Why did you wait for seven hours?

A. I guess it was for various reasons. You never know when you're gonna leave. Will it just be three minutes later that you would have just gotten, so you just sort of keep waiting a little bit longer.

The other thing is there was so many people waiting condominium project, for all we knew, this builder was giving away, condominiums away, so we decided to wait and find out what we can.

When we got in the door, there was no indication or request or mention of us requiring this letter. We just basically walked in. There were a lot of people inside, a packed house, and as soon as we got in we tried to get some information from somebody about the development, so we tried to flag down who looked like they belonged there to give us handouts, pamphlets, pictures, price lists. Anything at all. Nothing was available. We weren't really able to talk to anybody. We just basically had to wander around the inside of the sales office.

...

We waited there for approximately 45 minutes to an hour before we saw anybody. During that time, there was a few things that we could do, and we did them all.

One of them was to look at the layouts which were behind glass on the wall, so these were the layouts of all the condominium model, units.

There was also a mock, a mock-up of the building in the centre showing us the development. There was a model suite and we walked through that as well. Q. How did you finally get to see a sales person?

A. I believe eventually we, we were forceful enough and requested enough to track somebody down, and we told them we have been waiting a long time and we would want to see somebody now, so we eventually went into the sales office.

Q. And how long did you spend talking to George?

A. We spent approximately 10 to 15 minutes talking to him, and even during that time, George was in and out of the office. People were coming in and out of the office constantly wanting to talk to him.

Q. You decided on a particular type of unit before you went into his office?

A. No. As a matter of fact, we only went into his office really just to get the information we had been waiting for. Pictures, price lists, conditions. Anything at all. He wanted us to -- he didn't have anything to give us. No papers. Nothing at all. And we told him, how can we make up our minds or how can we talk about anything if we don't have any information, and he asked us which unit are we interested in? We said, "We don't know which unit we're interested in. We would like to have some information about it." At that point he got up; took us out of the office to the pictures on the wall and said, "All right. Here's all the layouts. You tell me which one of these you would like us for us to talk about.", and I pointed to a couple of them. Two, three of them at least like we might be interested in these so, "Can you give me the prices?" He said, "Well, let's go back into my office." We went back to his office all right. He gave me two or three possible choices. "Which one do you really want?" "Can't we talk about all of them? It would be easier just to talk about one." He basically just talked to us about one unit, which we basically did, and that's the only one we talked about. That's the only one price -- that's the only one that was ever an issue. He didn't give us any information on any of the other ones.

Q. Tell me about the discussions you had with Mr. Kerr when you got back into his office.

A. Well we wanted to know a few different things. We wanted to know who the builder is; what's he built before. We wanted to know if, again, if we could take something away with us. There were other factors we were concerned with. Of course the price. The pricing. When the building would be complete. Things along that nature.

In answer to my questions, basically, he didn't have anything to give us by way of taking anything home with us. There was no price lists available that he could give us. The builder was very reputable. He was a solid builder; had built things in the past. We had absolutely nothing to worry about. Then there was, I guess, further discussions on, on whether or not we should be buying this unit at all. He, he brought up the concept of this is a risk-free investment at that time, and Gil was, sort of looked at that, and very questionably, and asked him exactly what that meant and "How nothing is risk-free" was the statement, Gil's statement, and would George answer to that. You have to understand this is all happening fairly quickly and chaotically, but George's answer to that, "This builder is very reputable. He is very solid. He will stand behind what he sells", and you have, you have no -- his words were, "This is the only guaranteed risk-free investment you're gonna make." So again, that's all we talked about during that time. It was -- there wasn't a lot of time to talk about much, much of anything else.

At that point we, we gave him some information about who we are, et cetera, and he asked us to step out of the office while he is preparing some papers.

...

Q. Did you review any of the other provisions of the agreement with him?

A. There really was no time. Everything -- even during the time that he had called us back in and signing, people were coming in and out, and, as a matter of fact, at one point he asked us to leave while he dealt with somebody else. He was dealing with five or six people at a time, so there was no opportunity for us to be leaving or anything of that sort.

[para75] Shoshana Agbariya, 47 years of age, emigrated to Canada from Israel in 1977. She has a Grade 10 education and presently works in a clothing store as a salesperson. Previously, she did clerical work in her husband's car repair shop. Her only prior experience in real estate was the purchase of a condominium in 1984, where she and her family resided. Having attended at the sales office on February 25, 1989, with her son-in-law, pursuant to an invitation from Townsgate she gave this account her experience with the sales agent:

Q. Tell me what happened in the office?

A. I, I start to ask him questions so, so he didn't actually let me. He told me he doesn't have time; people waiting outside; almost everything had sold; better decide which one I want and then he told me, "Actually nothing much left for you" and he told me, the model home, the floor, this and this left, and this side, so you better decide because you're going to lose. People are waiting outside. That actually what he told me.

Q. Did that satisfy all the questions you had?

A. No. I told him I want more information, and I talk to my son-in-law in Hebrew that I wanted to walk out, and he asked, "What's wrong with her?" So he told him that I'm upset that I can't get more information. So he told me, "Mrs. Agbariya, sign, and you're not gonna be sorry."

Q. So what did you do?

A. I thought about it just a few second and I said, "Maybe he's right."

Q. Did you read the paper that you signed?

A. Over there?

Q. Yes.

A. No.

Q. Why not?

A. Who had the time -- no. They didn't let you. There wasn't any time. People was waiting outside.

Q. Did he go over any of the agreement with you while you were signing it? Did he review any of it with you?

A. Not really.

Q. What do you mean "not really"?

A. I'm telling you everything happen fast. Like didn't have time for this.

[para76] Elazar Astrug, a 45-year-old taxi driver, came to Canada in October 1982 having completed 11 years of schooling in Israel. He is able to read but not to write English. These are some of his comments in examination-in-chief:

Q. Can you tell me what you recall of your discussions with the salesman?

A. I didn't ask many questions. I let him talk and he explain to me that this is risk-free investment, it is guarantee, and I have nothing to lose by, if I invest in this project, and it's a beautiful, luxury condominium, and the price I ask I think. I ask -- I don't recall exactly the price. No way they will go down. Even give me example of one building downtown that the builder paying the, the resident for the apartment money to get out of the deal. Between 50 or \$100,000. He indicate one building downtown. Which one I don't know. So this is one of the example that I have nothing to lose.

Q. What -- do you recall anything else about your discussion with the salesman?

A. I be honest with you. The only thing I remember very good that he was very much convinced me that I am doing the deal of my life and I believe everything he told me.

And further: Q. That's the document that you signed?

A. Yeah.

Q. Did you read it before you signed it?

A. No.

Q. Why not?

A. I trust everything he told me there. Actually I ask him if he can, surely can explain to me what this is about, this agreement. He said, "Don't worry. You will get it by mail and will have time to read it." I didn't read it.

[para77] Eugeny Privis, a 59-year-old shoe repairman whose only experience with real estate prior to this was the purchase of a condominium as a residence in 1980, lived in the area and received an invitation to attend the grand opening at 10 a.m. on February 25, 1989. When he arrived at about 9:30 a.m., there were many people ahead of him. After gaining entry to the sales pavilion at about 5:00 p.m. he recognized one of the agents because "I fix shoes for him before." In his words, the agent, George Kerr, told him: "You're lucky. Almost sold out, our builder give no risk investment 100 per cent and people buy like hotcakes." When re-attending at the sales pavilion a few days later to return his unit, Mr. Kerr assured him that the unit would be worth "one half or a million dollars" and that the builder would take it back from him if he changed his mind later. In response to his query about the \$40,000 deposit, he was told that the builder pays "one per cent less than in the bank." According to Mr. Privis, then "I said 'fine'."

[para78] Dr. Morris Freedman, a neurologist, does not advance a claim under this heading. Yet, this is how he described what occurred when he finally saw a salesperson and attempted to gain some information regarding the project:

A man (later identified as Harvey Kauffman, manager of Norman Hill and Director of Sales and Marketing for Townsgate) came over and started shouting and screaming -- why are you asking all these questions? You're wasting our time -- sign or get out and don't waste (my) and everyone else's time.

The saleslady then pulled me aside ... and told me not to pay attention or let it get to you ... it's a good deal, you won't lose money. Go ahead and sign it.

[para79] Dr. Freedman was not the only one to describe his interview with the agent as just "a signing procedure".

[para80] On the totality of the evidence, and the above excerpts constitute only a minor portion of it, I find that most, if not all, of the plaintiffs' allegations bear some truth. They were able, to construct a more or less reliable account of what occurred on the opening weekend. On a balance of probabilities, I have concluded that their collective version lies closer to the actual events than does that of the defendants. I have reached this conclusion for five main reasons:

1. It is apparent that the invitation, a copy of which is attached as Schedule B to these reasons, was misleading in specifying the same time and date for numerous individuals and a "special preview price"; it was, I find, not only distributed to "prospective purchasers who had expressed an interest in the project" as alleged in paragraph 11 of the statement of defence but to many others including potential investors and residents in the surrounding area. The statement therein that "no one will be admitted" without an invitation letter was simply false.

2. I am unable to comprehend or accept the testimony of the agents to the effect that few, if any, of the purchasers asked questions -- not in light of the testimony of Dr. Freedman and others as to what occurred when they attempted to do so. Their collective denial of having stated anything positive as to the type of investment being offered does not have the ring of truth. I prefer the evidence of many witnesses whose accounts were supported by details, such as a particular agent's hand motion for prices going "up, up and up." It may well have been unnecessary for them to have made those statements in order to sell the units; nevertheless, I find that they did, indeed, make them. Perhaps in the crowded confusion, the perception of efficiency led them to act quickly and move on. It could not have been an easy task for four agents to sell 160 units over a three-day period.

3. Approximately one year after the agreements were signed, in early 1990, Townsgate issued a newsletter (attached as Schedule C) offering prospective purchasers a "risk-free" investment opportunity "absolutely guaranteed in writing." For some of the plaintiffs this confirmed the purported risk-free nature of their investment. It did not, of course; but I can understand their thinking

that it did. A copy of an advertisement in the Toronto Star dated Saturday, February 3, 1990, to the same effect, filed as Exhibit 11 at trial, is attached as Schedule D hereto.

4. When Elan Beer returned to the sales office a few days after signing the agreement, expressing scepticism about the risk-free nature of the transaction, the concept was further explained to him. He was led to believe that the builder would guarantee the investment by maintaining the prices at all costs so as not to risk losing the venture by reason of non-closures. Purchasers received various explanations and bore different understandings of the risk-free concept; however, I am satisfied that the words "risk-free" and "guaranteed investment" were utilized as a selling technique by most, if not all, of the agents, to the knowledge of the vendor.

5. The detailed evidence of the plaintiffs did not appear to be contrived. In the main, it collectively stood the test of stringent cross-examination. On the whole, I do not think their claims are being advanced in a capricious, arbitrary or unreasonable manner.

[para81] The conclusion which emerges from this is that the real estate agents failed to provide purchasers with full, fair and frank disclosure of the nature of the transaction and misrepresented various aspects of it to certain of the purchasers.

[para82] Representations regarding future occurrences cannot form the basis for legal relief unless they import by implication a misstatement of existing fact: see *Datile Financial Corp. v. Royal Trust Corp. of Canada* (1991), 5 O.R. (3d) 358 (Gen. Div.) aff'd (1992), 11 O.R. (3d) 224 (C.A.). Some of the representations clearly deal with future occurrences such as, for example, an estimate of the future value of the property. Others import, by implication, a misstatement of existing fact. I place the representation of a "risk-free, guaranteed investment" in the latter category.

[para83] Is Townsgate vicariously liable for the actions of the realtors? Where the issue of a principal-agency relationship is raised, the court must broadly interpret the intention of the parties at the relevant time: see *B & M Readers' Service Limited v. Anglo Canadian Publishers Limited*, [1950] O.R. 159 at page 164. The parties' intent in this case can perhaps best be gleaned from the pleadings and Townsgate's correspondence.

[para84] In its statement of defence, Townsgate describes Norman Mill as being "at all material times, the real estate agency retained by Townsgate to sell its condominium units", and the individual defendants, as "sales people employed" by them to do so. [para85] The invitation to purchasers (Schedule B), printed on Townsgate letterhead, was signed by Harvey Kauffman, as "Sales Manager." Similarly, a letter of congratulations to purchasers on Townsgate letterhead was signed by Mr. Kauffman as "Director of Sales and Marketing"; and a further letter requesting purchasers to select unit finishes bore the signature of Townsgate I Limited per: Aggie Berk (Exhibit 86). At no time was Harvey Kauffman a principal of Townsgate. His position was that of manager/owner of Norman Hill Realty. Aggie Berk was a real estate agent employed by Norman Hill.

[para86] Mr. Kauffman and his employee realtors manned Townsgate's sales office. They held themselves out to the public as agents for the vendor and acted under its direction and control. Their work was incidental to the overall project. Townsgate's principals permitted the agents, acting within the scope of their authority, to make representations which they knew or ought to have known were not accurate; and it is vicariously liable for their conduct.

[para87] Townsgate contends that the disclaimer or "entire agreement" clause in the agreements of purchase and sale precludes any recovery by the plaintiffs under this heading. Paragraph 24 in each of the standard form agreements reads:

This offer when accepted shall constitute a binding contract of purchase and sale and shall in all respects be of the essence hereof. It is agreed that there is no representation, warranty, collateral agreement or condition affecting this agreement or the real property or supported hereby other than as expressed herein in writing whether contained in any sales brochures or alleged to have been made by any sales representative or agents.

[para88] Disclaimer clauses are generally drafted to protect a contracting party who turns out to be negligent. Given that such clauses are frequently inserted where the other party has little opportunity to negotiate, courts have assessed the validity and applicability of such clauses cautiously.

[para89] As a general proposition, a limitation or exemption clause is not imported into a contract unless the parties have assented to it by their conduct or the clause is brought home so prominently to the non-drafting party that he or she must be taken to have known about it: see *B.C. Hydro & Power Authority v. BG Checo International Ltd.* (1993), 99 D.L.R. (4th) 577 (S.C.C.); *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87; *Hayward v. Mellick* (1984), 5 D.L.R. (4th) 740 (Ont. C.A.).

[para90] Not only was the clause buried in the fine print of the contract, but purchasers were not provided with an opportunity to read the agreement or to negotiate its terms before signing. They cannot, therefore, be taken to have assented to be bound by the disclaimer. See *Israel v. Townsgate 1 Limited* (30 December 1994), (Ont. Div. Ct.) [unreported] per Hill J., where the court came to a similar conclusion in dealing with the identical clause.

[para91] Rosenberg J, in *Tejani v. Abreu* (1994), 38 R.P.R. (2d) 218 (Ont. Gen. Div.), held that statements by sales agents that the property in question could be severed as well as details of measurements constituted representations which the vendors knew or ought to have known were false and which induced the purchasers to enter into the agreement of purchase and sale. Notwithstanding the entire agreement clause, the purchasers were entitled to repudiate the contract.

[para92] Townsgate describes the plaintiffs' conduct and dealings as constituting a waiver, estoppel and/or acquiescence on their part in that:

1. they allowed their deposit cheques to be negotiated;
2. they received correspondence and deposit receipts from Townsgate;
3. some of them provided a solicitor's name for closing and an exchange of correspondence ensued;
4. from April to June 1991, some attended to select unit finishes;
4. from November 1990 to March 1991, a number of plaintiffs requested a renegotiation of their agreements.

[para93] According to Townsgate, "at no time in the two- year period after execution did the plaintiffs or any of them attempt to avoid their agreements or disclose the allegations in these proceedings." In light of the evidence, I do not accept that proposition. Many of them did take steps to cancel their deals; and the vendor, I find, was well aware at any early stage of their dissatisfaction and their allegations. The following excerpts from the evidence serve to illustrate this.

[para94] 1. In examination-in-chief, Mr. Polster asked Astrug Elazar about his contact with Townsgate after receipt of the accepted agreement:

MR. POLSTER: Q. Mr. Astrug, what is the next contact that you had with Townsgate after that day?

MR. ASTRUG: A. I call, I call the office - I can't remember exactly how many days after I received this, and I -- the reason I call is because I wanted to cancel this deal, so a lady answered me on the phone, and she want me to talk to someone, but this someone was not available, so she ask me to leave a message, and I said I will call again. I call again and then this someone was not available so I left a message. Before this someone call me; I called again, and she asked me what it was all about. So I explained to her that I am thinking of getting off this deal and she told me, "I don't think you can do it until the closing date", and that's the last time I spoke with them. I never spoke with them. They never called me. I never heard from them anything.

Q. Do you know who it was that you spoke to?

A. No, I don't.

Q. Do you know how long after February 24th you made the phone call?

A. I believe a few days. A few days after I received this one I mean.

Q. A few days you received it back after the mail?

A. Yeah.

[para95] 2. Mr. Polster posed a similar question to Mrs. Nemirovsky as follows:

MR. POLSTER: Q. Now, Mrs. Nemirovsky, did you have any more contact with the Townsgate office and the sales people after that visit on February 23rd?

MRS. NEMIROVSKY: A. Yes, I did.

Q. Can you tell me about that please?

A. Yes. Like all the time as my husband decided to buy this condominium I was nagging him, and I was quite angry with him, and I wanted to persuade him to just give it back. I said "They promise that they will take it. Let's go and just give it back" and he was upset with me too because I was all the time after him. So it was nearly April we went to the sales office because I did not have to know where to go. We went there. Nobody was there. Only one salesperson.

Q. Do you remember who?

A. My husband -- I don't remember. Q. Do you know the salesperson?

A. I don't remember his name, and my husband start to talk to him. He said, "You know what? I change my mind and I would like to give it back, and you guys promised that any time if I want, you will take it back", and he said, "No. It's impossible. Why you worry? Everything will be okay. Why you just so worry? And it's such a good investment", and he said, "I want like investment now. I am a little bit worried", he said, but he said, "No. It's impossible", so we left.

[para96] 3. Shoshana Agbariya, when asked why she did not close the deal, responded:

A. Because I heard that I was really cheated. That prices start to go down like the same year and I called Mr. George two, three time. They ignored me. Wouldn't let me talk to him. One time I talk to him; I got upset on him. I told him, "You promise the prices are not going to go down." Because I felt that I was cheated, that's it. I said, "I'm not taking the unit." X7 [para97] 4. Eugeny Pravis described his experience thus:

I tried many times to get them to take back the unit. I was told that I couldn't lose nothing. He is a professional. He said prices would never come down, it was risk-free and I believed him. He said when built, if I didn't like it, the builder would buy it back.

[para98] According to his evidence, Mr. Pravis left numerous messages for the builder which were never returned; he also went to see George Kerr on two occasions but was told nothing could be done.

[para99] 5. In 1989, Elan Beer dropped off a letter for the builder at the sales office and about a month or so later, having received no reply, called George Kerr, who told him:

Yeah, I talked to the builder about it, but don't even bother waiting for a reply. Don't even wait for anything. The builder just is not replying to your letter. ... He is not interested in talking to you at this time. Just forget about it. [para100] An innocent misrepresentation that misleads a purchaser of land justifies rescission. The right to rescind is, however, lost if the purchaser elects to affirm the contract: see *Panzer v. Zellman* (1978), 20 O.R. (2d) 502 (C.A.). See also *Canada Egg Products Ltd. v. Canadian Doughnut Co. Ltd.*, [1955] 3 D.L.R. 1 (S.C.C.).

[para101] In *Giaduris v. Pristouris* (1976), 2 R.P.R. 81 (Ont. C.A.), a written document of waiver was treated as an effective variance of the initial agreement.

[para102] The principles of promissory estoppel were enunciated in *Travellers Indemnity Co. of Canada v. Maracle* (1991), 80 D.L.R. (4th) 652, at 656 (S.C.C.):

The party relying upon the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position. [para103] A renunciation of a contract will be implied where the conduct of a party is such as to lead a reasonable person to conclude that he will not perform or be able to perform it: see *McCallum v. Zivojinovic* (1977), 16 O.R. (2d) 721, at page 723. There can be no waiver or affirmation, however, unless a party acts with full knowledge of the legal rights and consequences of his actions: see *Webb v. Robert*, [1907] 16 O.L.R. 297 (Div. Ct.).

[para104] In the instant case, no course of conduct or negotiation occurred which reasonably might have led Townsgate to suppose that the plaintiffs would not proceed to enforce their legal rights. The purchasers' individual and joint efforts to rescind their agreements at an early stage were consistently ignored or rebuffed by the vendor. To now state that the purchasers were "keeping their options open" does not accord with the plaintiffs' evidence, which I accept. Their passive receipt of documents or correspondence cannot constitute a waiver of their strict legal rights. I find that any dealings with the vendor were undertaken without prejudice to the plaintiffs' right to treat their contracts as at an end. If anything, Townsgate kept the plaintiffs at bay with promises to renegotiate their agreements prior to closing, as they indeed did in the spring of 1991. The failure of the purchasers to retain or provide written documentation of their ongoing complaints only serves to underline their relative lack of sophistication. I can find no conduct on the plaintiffs' part which constitutes acquiescence, waiver or an estoppel in law.

[para105] The law on negligent misrepresentation commences with *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1963] 2 All E.R. 575 (H.L.). Lord Denning in *Esso Petroleum Co. Ltd. v. Marston*, [1976] 2 All E.R. 5, explained the ratio of that case, in this manner:

It seems to me that *Hedley Byrne*, [1963] 2 All E.R. 575, [1964] A.C. 465, properly understood, covers this particular proposition: if a man, who has or professes to have special knowledge or skill, makes a representation by virtue thereof to another -- be it advice, information or opinion -- with the intention of inducing him to enter into a contract with him, he is under a duty to use reasonable care to see that the representation is correct, and that the advice, information or opinion is reliable. If he negligently gives unsound advice or misleading information or expresses an erroneous opinion, and thereby induces the other side into a contract with him, he is liable in damages.

[para106] To be actionable, the representation must not only refer to an existing fact rather than a future occurrence; but it cannot reflect a matter of mere opinion:

A representation which amounts merely to a statement of opinion, judgment, probability or expectation, or is vague and indefinite in its nature and terms, or is merely a loss, conjectural or exaggerated statement, goes for nothing though it may not be true, for a man is not justified in placing reliance on it. *Hinchey v. Gordon*, [1955] O.W.N. 125 (H.C.), per Schroeder J.

See also *Nussbaum v. Rajesky* (1988), 3 R.P.R. (2d) 108 (Ont. H.C.), aff'd (1991), 16 R.P.R. (2d) 78 (Ont. C.A.).

[para107] Rescission is available in the case of an executory contract where the evidence establishes a material misrepresentation that was an inducement to enter into the contract. In making the determination as to materiality, the court may consider evidence as to what was said and the manner in which the information was presented to a purchaser: *Panzer v. Zeifman*, supra, at pages 508-509, per Brooke J.A.

[para108] The Supreme Court of Canada, in *The Queen v. Cognos Inc.* (1993), 99 D.L.R. (4th) 626, set out the following constituent elements of the tort of negligent misrepresentation at page 643:

1. a duty of care based on a "special relationship" between the parties;
2. an untrue, inaccurate or misleading representation;
3. a negligent act in making the representation;
4. reliance in a reasonable manner by the other party; and
5. resultant damages indicative of detriment.

[para109] The first factor in *Cognos* requires the existence of a special relationship between the parties. The standard of care is an objective one, requiring the representor not only to be truthful and honest but to exercise such reasonable care as the circumstances require to ensure that the representations are accurate and not misleading: see *Cognos* at page 654.

[para110] None of the plaintiffs received independent advice or representation prior to signing the agreements -- the circumstances would not permit that. The special relationship between the parties was situational; it arose from the particular situation in which the parties found themselves and the dynamics underlying their relationship. The prospective purchasers were prima facie entitled to rely upon the agents' knowledge of the project and professional qualifications; all of the vendor's representatives were licensed real estate agents. I find that they had an implied duty of care; although less than as a fiduciary, to present the facts to the plaintiffs in an accurate, fair and straightforward manner and with the exercise of reasonable care and skill in the circumstances.

[para111] From the time some of the purchasers received invitations setting out a specific date, time and place to attend for "special preview prices", the marketing of Townsgate was misleading. Its subsequent advertisements indicating Tower I as having been sold out when it was not, provide confirmation as to the company's rather cavalier approach. Although sales were indeed high on the opening weekend, the agents repeatedly fabricated a false sense of scarcity on behalf of the vendor. In the normal course, the suggestion that a piece of property is risk-free and guaranteed might appear ludicrous in the extreme, mere puffery; fuelled, however, by the inflated market, customer overflow, rushed circumstances, and bewildered complicity of some rather unsophisticated individuals, such a statement may well be actionable. In these particular circumstances, it was made negligently with reckless disregard for the truth; I find that it constituted an untrue, inaccurate and misleading representation.

[para112] On the other hand, certain of the other representations made by the agents are clearly not actionable. For example, Eli and Annette Mizrahi were told that Phase II would probably be sold early in the next year and prices would rise for units in Phase

II. The agent dealing with Harvey Goodman inferred that the units were "likely to be all sold out soon and the vendor would start selling the second building at higher prices." Although the representations proved to be false, on the objective test, those claims cannot stand.

[para113] The final category is that of detrimental reliance. The import of that principle depends to some extent upon the individual purchaser's vulnerability and level of sophistication (in terms of education and experience with real estate or other investments) as well as the particular situation encountered at the time of purchase. Some of the plaintiffs failed to prove this aspect of their case. It is apparent that they placed little or no reliance upon the representations made to them. Their ultimate decision to purchase was primarily grounded in their own judgment based upon experience, knowledge of the market, and risk assessment. Those individuals are Moti Fishman, Morris Freedman, Russell Lazar, Fernando Goncalves and through him, Manuel Goncalves, Michael and Angel Mealia, and Warren Weisz.

[para114] There were others whose testimony did not have the ring of truth either because it contained inconsistencies or otherwise. Those individuals have failed to satisfy me, on a balance of probabilities that one or more of the representations was made to them or that they relied upon this in entering into their agreements of purchase and sale. Falling within this category of individuals are Adolph and Bella Kleiner, Anna Kosoi, Yan Kosoi in trust for Eugene Dozortsev, Mike and Anna Prokopets, Alisa and Bentsian Prosmushkin.

[para115] I will review in more detail the claims of the remaining plaintiffs: (1) Shoshana Agbariya; (2) Elazar Astrug; (3) Boris and Natalia Galperin; (4) Cathy Katz; (5) Isaak Nemirovsky; and (6) Eugeny Privis. In doing so, I have considered their relative level of sophistication, the inequality of bargaining power between the parties, and such factors as discretion, influence, vulnerability, trust and reliance.

[para116] 1. Shoshana Agbariya was exposed to a plethora of high pressure sales talk, both on February 25, when she signed her agreement and on March 7, 1989, when she returned to the sales office with the intention of rescinding it. On the first occasion, she was told that "almost everything has sold -- you're going to lose out;" on the second, that the condominium would be worth "half a million" by the time it was finished. On the second occasion, when the agent offered some enticements to Ms. Agbariya to re-sign, she said to herself, "he knows better than me, maybe I should listen to him." It was that reasoning which led her to stick with the second deal.

[para117] Undoubtedly, Ms. Agbariya became swept up in the frenzied atmosphere; she was subject to high pressure sales tactics. But high pressure sales tactics do not amount to misrepresentation. A high onus is placed on plaintiffs to prove their claim; and, in my view, the evidence of Ms. Agbariya falls short of doing so -- the representations are not definitive; the level of reliance is less than sufficient. This claim is denied.

[para118] 2. Elazar Astrug was told more than once that this was a risk-free investment which was guaranteed, and that the price would not go down.

[para119] When asked why he decided to buy, he responded, "Because as I told you, I didn't see that there is nothing to lose here; only to gain."

[para120] When asked why he did not read the document first, he replied:

I trust everything he told me there. Actually I ask him if he can surely can explain to me what this is about, this agreement. He said, "Don't worry. You will get it by mail and you will have time to read it." I didn't read it.

[para121] His efforts to return his unit based upon the representations made to him were prodigious. I find that as a rather unsophisticated purchaser, Mr. Astrug reasonably interpreted and relied upon what he was told, to his detriment. Had the risks inherent in the impugned transaction been fully and fairly explained to him, or had the representations not been made at all, I am persuaded that he would not have entered into the contract. His claim on that basis is allowed.

[para122] 3. Boris and Natalia Galperin each attested to representations allegedly made by Aggie Berk that this was a guaranteed, risk-free investment; the builder would not drop his prices; the only thing they could lose was the interest on their deposit; and the builder would not build if the market dropped.

[para123] Boris Galperin, who is 41 years of age, emigrated to Canada from Russia in 1980 and presently works as an engineer at a computer company. Natalia Galperin, 35, is a university graduate and teacher in a public school. The Galperins purchased two homes, one of which was sold in 1983. They were consistent in their joint assertion that their ultimate decision to buy a condominium at Townsgate stemmed from the representations made to them by Aggie Berk, and particularly that they could not, under any circumstances, lose their \$40,000 but only the interest on it. On discovery, when asked about the risk-free concept, Mr. Galperin opined "there's always a risk. It's general knowledge." He was aware of the ten-day cooling-off period for cancellations.

[para124] Although I am satisfied that the representations were made, the necessary factor of reliance has not been sufficiently proven; this claim is, therefore, denied. [para125] 4. Cathy Katz, an office worker, resides in Montreal but her sister and parents live in Toronto. On the day in question, she and her sister passed by the site and joined the line. Ms. Katz too was subject to high pressure sales tactics, including the raising of the price by \$5,000, while she was viewing a plan. When she objected to the apparent unfairness of this, she was told, "You won't lose anything. It is only going to go up."

[para126] I find also that the words "good investment" and "risk-free" were used as an inducement. However, on the totality of her evidence and that of her sister, Fran Katz, who was called as a witness, I am unable to find reasonable reliance upon the representations. There were clearly other factors influencing Ms. Katz's decision to purchase. Her claim is denied.

[para127] 5. Isaak Nemirovsky was unable to give testimony at trial due to illness; but his spouse, Gitya Nemirovsky, who was with him at the time of purchase, gave evidence. According to her, Aggie Berk repeatedly represented that the builder would take back the unit and refund their deposit should they change their minds.

[para128] Both Mr. and Mrs. Nemirovsky came to Canada from Russia in 1981; they had previously purchased a condominium which was rented out as "they could not afford to live there"; they resided at the relevant time, in a rental apartment.

[para129] It is my opinion that, although their experience with Townsgate was an unfortunate one, their claim based upon misrepresentation does not pass the "but for" test. This claim is denied.

[para130] 6. The representations allegedly made to Eugeny Privis were that his investment was guaranteed and risk-free and that the builder would buy back his unit at any time.

[para131] When reviewing this within the entire context of Mr. Privis' testimony and his relatively low level of sophistication, both in respect of the market and educationally, I find his actions to have been consistent with reliance. His stated reason for the purchase was "I think I don't lose nothing." Moreover, he recognized George Kerr from his shoe repair shop and clearly relied upon his judgment. "He was a professional. He said prices would never come down; it was risk-free and I believed him." When attending at the sales office a few days later to return his unit, at which time he was induced to purchase another one, it was Mr. Kerr's representation that the builder would buy it back if he changed his mind, that made the difference.

[para132] Mr. Privis' testimony was emphatically expressed and unshaken on cross-examination. For some reason, he appears even now to be unaware of the first purchase price, believing it to have been \$265,000 (the price of the mortgage); furthermore, the second agreement dated March 10, 1989, was purportedly accepted by the vendor on March 9, 1989. Although nothing much turns on it, this provides another example of the frenzied inefficient manner in which matters were handled, lending credence to the plaintiffs' testimony in general. In passing, it is noted that Mr. Privis received the black binder when he returned to the site office on March 10, 1989; in February, he was given only "one piece of paper."

[para133] I accept Mr. Privis' cogent testimony as to his subsequent attendances at the sales office to return his unit and his repeated reiteration of the representations which had been made to him. The vendor through its agent, George Kerr, should reasonably have known that Mr. Privis would rely upon those representations. I am satisfied that but for the representations, Mr. Privis would not have entered into the agreement. His claim, based on misrepresentation, is allowed.

[para134] The onus is upon the plaintiffs to prove, on a balance of probabilities, that the statements or communications made by or on behalf of the defendant were of such a character that, while innocently made, they concern a material matter affecting the subject matter of the contract; and that such representations induced them to enter into the agreement. In my view, only two of the purchasers have met that test.

[para135] In summary, then, the claims of Elazar Astrug and Eugeny Privis are allowed on the basis of misrepresentation. Both of those parties are entitled to be placed in the position they would have been in had the breaches not occurred; more specifically, they are entitled to the return of their deposits and the counterclaim as against them is dismissed.

DISCLOSURE STATEMENT

[para136] Section 52(1) of the Condominium Act provides that an agreement of purchase and sale is not binding upon a purchaser until ten days after receipt of a disclosure statement "from the declarant". Accordingly, a ten-day "cooling-off" period is statutorily provided to purchasers of residential property. In this case, the disclosure statement consisted of a large black binder detailing the proposed by-laws and regulations, maintenance costs, amenities and other factors relating to the complex. The agents uniformly attested to having distributed them to purchasers as a matter of practice upon their execution of the agreements.

[para137] The purchasers of four of the condominium units denied having received the binder. Interestingly, several plaintiffs testified as to late receipt of the disclosure statement either by mail or otherwise. No claim is advanced by them on these grounds, due no doubt to the ten-day deeming provision in the Act. Although the agreements contain an acknowledgement by purchasers of having received a disclosure statement, this clause was neither initialled nor brought to the purchasers' attention. Moreover, the agents had no confirming documentation, notes or specific recall of distribution to any particular client. In these circumstances, it becomes a matter of credibility as to whether or not the plaintiffs in question have proven their claim.

1. Unit 1109 - Michael and Angel Mealia 2. Unit 316 - Russell Lazar and Fernando Goncalves 3. Unit 1505 - Shoshana Agbariya 4. Unit 606 - Bentsian and Alisa Prosmushkin

1. Unit 1109

[para138] It was the evidence of Mr. Mealia that he and his mother, Angel Mealia, were given only the first page of the agreement, Schedule B, and the floor plan at the time of purchase; the other schedules arrived later along with the accepted agreement of purchase and sale. To the best of their knowledge, no disclosure statement was given or sent to them at any time.

[para139] I reject that evidence. It does not appear likely that certain selected schedules would be sent at a later date. Both Mr. Mealia and his mother, Angel Mealia, are sophisticated real estate agents and brokers. They purchased several other condominium units within six months to a year of this one. They must have known the significance and importance of this aspect of the sale. Their claim on this basis must fail.

2. Unit 316

[para140] Russell Lazar and Fernando Goncalves attended at the sales pavilion along with Manuel Goncalves, Fernando Goncalves' father, on February 24, 1989. Manuel Goncalves, who speaks little English but relied upon his son for information, purchased his own unit and the other two jointly shared a unit. Their collective evidence was that only Manuel received the disclosure binder, in contravention of section 52(1) of the Act which mandates receipt "from the declarant" and not indirectly from another person. They adduced proof of having contacted an acquaintance in 1991 to obtain his binder by courier for review. The first question that comes to mind is why Fernando Goncalves did not make an effort to find his father's copy. Secondly, the evidence that Manuel Goncalves took the binder home with him by public transportation while the others drove their car to work, strains credulity, particularly since Fernando lived with his father at the time and the binder was a fairly heavy item.

[para141] Both Russell Lazar and Fernando Goncalves were relatively sophisticated purchasers with considerable knowledge of the real estate market; they must have known the importance of the binder. Yet, they failed to request a copy of it or document any complaint about this prior to the institution of these proceedings. I cannot accept their claim based upon non-receipt of a disclosure statement.

3. Unit 1505

[para142] When Ms. Agbariya attended at the sales office on February 25, 1989, she entered into an agreement of purchase and sale for apartment unit 1005; when she returned to rescind the transaction, she ended up purchasing unit 1505 (although the agreement names the unit as 1405).

[para143] In giving her testimony at trial, Ms. Agbariya insisted that she had never received a disclosure binder. Any inconsistency with evidence given on her examination for discovery was explained to my satisfaction. Once shown the disclosure binder, she noted:

It's large. I would have remembered. I am very sure that I didn't have it. ... I never got one.

[para144] Mrs. Agbariya can fairly be referred to as an unsophisticated purchaser and investor in real estate. As previously noted, she has a Grade 10 education and works as a salesperson in a clothing store. She failed to notice the juxtaposition of her names on the agreement of purchase and sale and, later, the pleadings.

[para145] In general, she presented as an honest witness who chronicled her experience without embellishment or exaggeration. I am satisfied, on a balance of probabilities, that Ms. Agbariya did not at any time receive the disclosure binder, despite the acknowledgment both in the agreement of purchase and sale and the cancellation document.

[para146] As this constitutes a complete defence to the defendant's counterclaim, she is entitled to the remedy of rescission and the return of her deposits from Townsgate. 4. Unit 606

[para147] When asked about his prior experience in the real estate market, Bentsian Prosmushkin, a construction engineer, stated only that he had purchased his home, a condominium, about ten years previously. He also professed having seen the disclosure statement for the first time at trial. It was elicited in cross-examination that he had purchased a unit in another condominium project on January 15, 1989, and that he had tried to get out of that deal, claiming, among other things, that he had not received a disclosure statement. His testimony and that of his spouse, Alisa Prosmushkin, was completely discredited. This claim is denied.

[para148] I note, in addition to the claims set out above, the following information which came to light in the course of Mrs. Nemirovsky's testimony: no documents were given to them at the time of signing as "the lady said that all the papers she will mail." They received the accepted copy of the agreement by registered mail at the end of March bearing a registered stamp of March 22, 1989 (filed as an exhibit). The disclosure binder came after that time also by registered mail, requiring another visit to the post office. Not long after this, in April 1989, the Nemirovskys attempted unsuccessfully to return the unit.

[para149] Mrs. Nemirovsky presented in court as a relatively unsophisticated, genuine witness. When asked why her husband did not complete the purchase, she responded, "He could not afford (it)." Her testimony remained unshaken in cross-examination. Mrs. Nemirovsky was not the only purchaser who attested to receipt of the disclosure binder through the mail and after receipt of the acceptance letter. Although this conflicts with the collective evidence of the agents to the effect that each purchaser was given a black binder at the time of signing, it has the ring of truth.

[para150] An agreement of purchase and sale does not become binding until ten days after receipt of the disclosure statement. If Mrs. Nemirovsky's testimony is accurate, therefore, her husband should have been permitted to return the unit upon his re-attendance at the sales office in April 1989. I accept Mrs. Nemirovsky's evidence; indeed, I strongly doubt whether she appreciated the ramifications or significance of the dates when giving her testimony. On that basis, this claim is allowed.

[para151] Thus, the only allowable claims based upon non-receipt of a disclosure statement in contravention of section 52(1) of the Condominium Act, are those of Shoshana Agbariya and Isaak Nemirovsky.

ACCEPTANCE OF AGREEMENTS

[para152] Three of the plaintiffs deny having received a copy of their accepted agreement of purchase and sale from the vendor; and purchasers of six of the units allege late receipt of an accepted copy, thus rendering the agreements null and void. Each of the agreements contain the following paragraph:

This offer shall be irrevocable by the purchaser until one minute before midnight on the fifteenth day after its date, after which time if not accepted, this offer shall be null and void and the deposit returned to the Purchaser without interest. (Emphasis added) The undersigned accepts the above offer and agrees to complete this transaction in accordance with the terms thereof.

Paragraph 24 reads:

This offer when accepted shall constitute a binding contract of purchase and sale.

[para153] Townsgate asserts a number of defences to this claim. It contends that communication of acceptance was accomplished, either orally or in writing, within the required time period; if not, the plaintiffs by their conduct acquiesced, extended the time for acceptance, or waived the strict time requirements and are now estopped from relying upon this as a defence to the counterclaim.

[para154] Undoubtedly, "vendors and purchasers owe a duty to each other honestly to perform a contract honestly made": *LeMesurier v. Andrus* (1986), 25 D.L.R. (4th) 424 at 430 (Ont. C.A.). They must exercise their rights in accordance with the rules of equity and fair play: see *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122.

[para155] Ms. Marmi Horowitz was employed by Norman Hill as the "site secretary" at the relevant time. Her duties included preparing the site for opening (the files, floor plans, hiring of staff) and getting the files ready for closing. She testified that Ian Zagdanski, brother of Barry Zagdanski, attended at the sales office "within a week" after the grand opening to sign the agreements on behalf of Townsgate. She then attempted to contact all of the purchasers to ascertain whether they wished to pick up their accepted agreements or have them sent out; if unable to reach someone or a message was not returned within a couple of days, she sent the accepted agreements to the purchasers by registered mail.

[para156] The problem is that no records were kept of either the phone calls, the mailings, or the acceptance dates. As previously noted, Eugeny Privis' agreement of purchase and sale bear a signature date of March 10, 1989; and an acceptance date of March 9,

1989. The sheer volume of necessary contacts lends credence to the claim of certain plaintiffs based on a lack of communication. The six purchasers in question do not recall receiving a message and Ms. Horowitz had no specific recollection in that regard, nor did she profess at any time to have reached all of the purchasers one way or another. In any event, the agreement provides for such notices to be in writing.

[para157] As a general rule, acceptance of an offer must be communicated in the mode of the offer; in this case, in writing, although the language of the contract may import an exception to the ordinary rule.

[para158] Certainly, it is possible to create a binding contract without actual communication of the acceptance: see, for example, *Wilson v. Clarke Simpkins Ltd.* (1961), 30 D.L.R. (2d) 745 (B.C.C.A.); *Shelson Investments Ltd. v. Durkovich* (1984), 34 Alta. L.R. (2d) 319 (Q.B.); and *Principal Investments Limited v. Trevett*, [1956] O.W.N. 353 (H.C.). In those cases, the relevant clauses deem the offer to constitute a binding contract "when accepted" or, in *Shelson*, upon being signed "by both parties." In *Schiller v. Fisher*, [1981] 1 S.C.R. 593, the offeree requested the return of an initialled copy of the letter of agreement, which was deemed to be proper acceptance in the circumstances. [para159] In the instant case, the relevant clause in the agreement is clear and unambiguous. It renders the offer null and void if not accepted by a specified time and it further stipulates the return of the deposit to the purchaser without interest if those terms are not met. Any ambiguity would, in any event, be interpreted in accordance with the *contra proferentum*, rule as against Townsgate.

[para160] The following purchasers retained the envelope containing their accepted agreements sent to them by registered mail:

1. Shoshana Agbariya, who signed a second agreement of purchase and sale on March 7, 1989, filed a stamped, registered envelope postmarked March 22, 1989. She cannot recall when the envelope containing the accepted agreement was retrieved from the post office.

2. Elazar Astrug signed the agreement on February 24, 1989, and received a registered envelope containing the accepted agreement on March 21, 1989. 3. Moti Fishman signed it February 25 and the registration date was March 22, 1989.

4. Morris Freedman signed the agreement February 25, 1989, but did not receive the accepted agreement by registered mail until March 22, 1989, or thereafter.

5. Boris and Natalia Galperin signed their agreement of purchase and sale on March 10, 1989, but the accepted copy bears the date March 29, 1989.

6. Isaak Nemirovsky signed the agreement of purchase and sale February 25, 1989, and the registered envelope containing the accepted agreement is dated March 22, 1989.

[para161] There may, of course, be others whose agreements were delivered after the 15-day period, but the above plaintiffs can conclusively prove this aspect of their case. In regard to each of them, I find that there was no proper delivery of the accepted offer. Their actions in the particular circumstances here, cannot be taken as an affirmation of their contracts. In my view, the agreements expired on the 15th day after they were signed and in accordance with paragraph 19 thereof; the above named plaintiffs are accordingly entitled to the return of their deposits.

[para162] The purchasers of three of the units deny ever having received their accepted agreements. As no proof was tendered one way or the other, this claim becomes a matter of credibility. The disputed units are:

1. Unit 1114, Adolph and Bella Kleiner 2. Unit 1013, Mike and Anna Prokopets 3. Unit 606, Bentsian and Alisa Prosmushkin

[para163] The evidence of each of those plaintiffs leads me to question this aspect of their claims. The Prosmushkins deliberately withheld information; and both the Kleiners and Prokopets were less than genuine and sincere in giving their testimony. I prefer the evidence of Ms. Horowitz to the effect that the accepted agreements were forwarded to each of the purchasers. Although unclear as to dates, she was certain of this. Only three of the agreements out of the 90 units sold on the opening weekend were allegedly not sent out. I am unable to find on the evidence that these purchasers never received an accepted agreement of purchase and sale. Their claim in that regard is denied.

RESPONSIBLE PARTIES

[para164] No action can be brought against a person on a contract for the sale of land unless the contract is signed by that person or someone lawfully authorized by him (Statute of Frauds, R.S.O. 1990, c. S.19, s. 4).

[para165] It is well-established that the liability of a purchaser who signs an agreement in trust for another depends upon the intent of the parties at the time of execution. The intention may be ascertained from the nature of the agreement, its terms and the surrounding circumstances: *Marathon Realty Co. v. Ginsberg* (1981), 18 R.P.R. 222 (Ont. H.C.), aff'd (1982), 24 R.P.R. 155 (Ont. C.A.), leave to appeal to S.C.C. refused (1982), 42 N.R. 180 (note). In the trial decision, at page 226, Mr. Justice Montgomery cited with approval these statements made by Mr. Justice Steele in *Okinczyc v. Berket* (1979), 8 R.P.R. 249 (Ont. H.C.), at page 258: I am of the opinion that the vendor is entitled to look to the person with whom he contracted to carry out the obligations under the contracts. In this case it was Tessier. The fact that Tessier added the words "in trust" should not, in my opinion, relieve him from liability.

and at page 259:

The words "in trust" are not magic words that change the liability of the purchaser unless in fact there is a *cestui que trust* or the purchaser is acting as an agent for some other person.

[para166] Accepting that general proposition, Montgomery J. found that the inclusion of the words "in trust" did not exculpate the defendant Ginsberg from personal liability as a principal.

[para167] In *Rice v. Rawluk* (1992), 8 O.R. (3d) 696, on the basis of material supplied to the defendant and ongoing negotiations with her, the court found an intention of co-ownership and deemed all three parties to be partners in the project and hence liable for damages.

[para168] In the present case, three of the agreements of purchase and sale were executed "in trust", as follows:

1. Yan Kosoi in trust for Eugene Dozortsev - Unit 1107; 2. Michael Groisman in trust for Clara Groisman - Unit 803; 3. Gary Tiz in trust for Lubov Tiz - Unit 703.

Unit 1107

[para169] Yan Kosoi's spouse, Anna Kosoi, purchased a unit and holds a one-third partnership in another one.

[para170] Both Mr. Kosoi and the real estate agent he dealt with, George Kerr, were of the view at the relevant time that Mr. Kosoi had authorization to sign the agreement as agent for Mr. Dozortsev. Eugene Dozortsev, a friend of the Kosois, resides in New York City; his purported intent at the time was to move to Toronto. The difficulty is that no confirming evidence was presented as to the alleged agreement authorization or intent. Moreover, a daughter of the Kosois signed the deposit cheques and no evidence of repayment to her was forthcoming.

[para171] Although the agreement was taken in the name of Eugene Dozortsev, there is a singular lack of evidence to support an agency or cestui que trust relationship. I am therefore of the opinion that the vendor is entitled to look to Yan Kosoi, with whom it contracted, to carry out the obligations under the agreement.

Units 703 and 803

[para172] Gary Tiz and Michael Groisman are co-signators to an agreement of purchase and sale for another unit in the condominium project. They had jointly purchased but returned an additional unit within the ten-day cooling-off period. Clara Groisman and Lubov Tiz are the mothers of Michael Groisman and Gary Tiz, respectively.

[para173] At discovery, the purchaser sons stated that the units in question were designated for their mothers, who had provided them with the deposit cheques; at trial, they reversed this position, indicating a statement by the realtor that the way to get around the builder's policy of selling only one unit to an individual was to sign the agreements "in trust". Ms. Berk gained the impression that they intended to purchase the units "for someone else".

[para174] Both Michael Groisman and Gary Tiz were relatively sophisticated investors in real estate. No evidence was forthcoming as to powers of attorney or replacement cheques tendered to cover the deposits. It was Townsgate's submission that the mothers, Clara Groisman and Lubov Tiz, bear responsibility for units 703 and 803 respectively. In my view, the provision of the deposit cheques by Clara Groisman and Lubov Tiz to their sons prior to the purchases provides persuasive evidence of an intention to be bound; there is no evidence to the contrary. Accordingly, I find that they are the true obligees under the agreement.

CONCLUSION

[para175] Townsgate proceeded to sell units in the within 3Fcondominium project, commencing on February 24, 1989, in advance of registration under the ONHWPA and in contravention of the express statutory prohibition contained in section 6 thereof. On the basis of illegality, therefore, the agreements of purchase and sale, all of which were entered into prior to formal registration, are a nullity; and the plaintiffs are entitled to have their deposits returned to them with accrued interest.

[para176] The plaintiffs have also rooted their claim, in the alternative, on grounds of misrepresentation, breach of securities legislation, lack of ownership, non-disclosure, and late acceptance of the agreements. Although unnecessary in light of my finding of illegality, I have considered the other claims raised by the plaintiffs on the merits. In doing so, I have found entitlement to rescission by reason of misrepresentation in respect of two purchasers, Elazar Astrug and Eugeny Privis. Isaak Nemirovsky is entitled to the return of his deposits based upon statutory breach of contract by the vendor, who should have accepted the return of his agreement properly proffered within the ten-day cooling-off period. Shoshana Agbariya has proven entitlement, on a balance of probabilities, to the remedy of rescission due to non-receipt of the disclosure binder; she also likely did not receive the accepted agreement of purchase and sale within the stipulated time period. Neither did Elazar Astrug, Moti Fishman, Morris Freedman, Boris and Natalia Galperin, or Isaak Nemirovsky. Each of them are, in any event, entitled to the return of his or her deposits with accrued interest. Yan Kosoi remains responsible for any damages in respect of Unit 1107; and Clara Groisman and Lubov Tiz, jointly with their sons Michael Groisman and Gary Tiz, are bound under the agreements pertaining to units 703 and 803, respectively. The damages claimed pursuant to the counterclaim were proven to my satisfaction.

[para177] Nevertheless, in accordance with these reasons, judgment shall issue in favour of each of the plaintiffs, who are, therefore, entitled to the return of their deposits with accrued interest and costs. The counterclaim is dismissed as against each of the plaintiffs, with costs. Should the parties be unable to agree on the scale of costs, or should they wish me to fix them, I may be spoken to by prior arrangement within three weeks' time.

CHAPNIK J.

APPENDIX A

SCHEDULE A

THE TORONTO-DOMINION BANK Commercial Banking Centre Toronto, Ontario M5V 2B1

Telephone No. 982-2528

Ontario New Home Warranty Programme 600 Eglinton Avenue East Toronto, Ontario M4P 1P3

Irrevocable Letter of Credit No. 2044

Re: Townsgate I Limited

Amount: \$4,500,000

We hereby authorize you to draw on The Toronto-Dominion Bank, Commercial Banking Centre, 443 Queen St. W. & Spadina Ave., Toronto, Ontario M5V 2B1, for the account of TOWNSGATE I LIMITED, up to an aggregate amount of FOUR MILLION FIVE HUNDRED THOUSAND (\$4,500,000) Canadian which may be drawn on by you at any time and from time to time upon written demand for payment made upon us by you which demand we shall honour without enquiring whether you have a right as between yourselves and the said TOWNSGATE I LIMITED to make such demand.

Provided, however, that your are to deliver to us at such time as a written demand for payment is made upon us a certificate signed by you agreeing and/or confirming that monies drawn pursuant to this Letter of Credit are to be and/or have been expended pursuant to obligations incurred or to be incurred by you in respect to Deposit Receipts as related to registration on behalf of TOWNSGATE I LIMITED.

The amount of this Letter of Credit shall be reduced from time to time as advised by notice in writing given to us by you.

This Letter of Credit will continue to the 15th day of February, 1990, and will expire on that date and you may call for payment of the full amount outstanding under this Letter of Credit at any time prior to that date. It is a condition of this Letter of Credit that it shall be deemed to be automatically extended without amendment for one year from the present or any future expiration date hereof, unless thirty days prior to any such expiration you shall notify us in writing by Registered Mail that you elect not to consider this Letter of Credit renewed for any such additional period.

Partial drawings are PERMITTED.

The drafts drawn under this credit are to be endorsed hereon and shall state on their face that they are drawn under THE TORONTO-DOMINION BANK, COMMERCIAL BANKING CENTRE, 443 QUEEN STREET WEST AND SPADINA AVENUE, TORONTO, ONTARIO M5V 2B1.

Letter of Credit #2044 Dated: February 15, 1989.

FOR THE TORONTO-DOMINION BANK

A.D. Martone Senior Account Manager

Michael Dobson Manager, Commercial Services

* * * * *

APPENDIX B

TO: THE TORONTO-DOMINION BANK

We hereby authorize and request you to give the Credit, Guarantee, Bond or Obligation annexed hereinafter called the "Credit" and, in consideration of your so doing, we hereby undertake and agree to indemnify you for each payment you make thereunder to or for the account of The Beneficiary.

You are hereby authorized to debit our account (i) annually in advance, with your fee equal to the greater of 1/2% per annum of the total amount of this Credit and N/A; and (ii) any amount paid by you hereunder. Furthermore, we agree to indemnify and save you, your successors and assigns, harmless from and against any and all losses, costs, damages or expenses, including legal fees, which you may suffer or incur in any manner whatsoever by reason of your giving the Credit. It is understood and agreed that any demand or request made upon you for payment under the said Credit by The Beneficiary will be our sufficient authority to pay thereunder and you shall not be required to determine the validity or sufficiency of such demand or request.

Dated at Toronto this 15th day of February, 1989.

FOR: TOWNSGATE I LIMITED

* * * * *

APPENDIX C

SCHEDULE B

TOWNSGATE LUXURY CONDOMINIUMS

Dear Registrant:

At long last the Grand Opening of Townsgate condominiums has arrived. And, in appreciation of the interest you have expressed in the project, you are cordially invited to preview the Townsgate community and to take advantage of our special preview price.

Elegantly set at the crossroads of Bathurst and Steeles, Townsgate is one of Thornhill's most vibrant and prestigious residential addresses, featuring twin towers of grand, spacious suites surrounded by expansive grounds of gently rolling lawns and trees.

If you act quickly you will have the opportunity to live in an exclusive residence like no other before it. A sequestered private boulevard shaded by trees will approach a graceful circular drive that welcomes homeowners and their guests to the secluded, exclusive world of Townsgate. Here the grounds will be devoted to cultivated gardens, winding pedestrian trails, tennis courts, a putting green, a barbecue pit and a gazebo.

Inside, past the glass-enclosed lobby, a million dollar recreation centre awaits. With a lounge and party room. An indoor pool walled in glass and featuring a cedar tanning deck. Squash court. Games room. Hobbies room. Billiards room. Exercise room. Guest suites. The list goes on and on.

This invitation is your chance to experience the ultimate in luxury living. Suites are a magnificent rhapsody of space and light featuring designer kitchens with Florida ceilings. Charming solariums bathed in sunshine. Lavish master suites with Roman tubs and separate showers. Guest bedrooms with full ensuites. Entertainment-sized living and dining rooms. A beautifully furnished model suite will be open for viewing.

On Saturday, February 25 at 11:00 a.m. this invitation will admit you to a sneak preview of Townsgate. Come early and seize the opportunity to get first choice of our models, floors and exposures for a special preview price.

Unrivalled in setting and architectural beauty, Townsgate will be a symbol of condominium living at its very finest. Buying early will be a symbol of your good sense and discriminating taste.

Please remember to bring this letter with you as no none will be admitted without one.

Yours truly,

Harvey Kauffman Sales Manager

CBR# 308

Stevens et al. v. Simcoe Condominium Corporation No. 60

42 O.R. (3d) 451

Court File No. 716/97

Ontario Court (General Division), Divisional Court Bell, Sharpe and McKinnon JJ. September 25, 1998

APPEAL from an order of Eberhard J. (1997), 9 R.P.R. (3d) 84 (Gen. Div.) holding that the owners of a unit in a condominium were not liable for payment of a deductible under an insurance policy obtained by the condominium corporation.

Hugh D.N. Corbett, for appellant. Ivan Y. Lawrence, for respondents.

BY THE COURT: -- The issue raised by this appeal is whether the appellant condominium corporation can recover from the respondent owner the amount of the deductible under an insurance policy obtained by the corporation pursuant to Condominium Act, R.S.O. 1990, c. C.26, s. 27(1). The claim arises from damage to another unit found to have been caused by the owner. The motions court judge found that the corporation could not recover the deductible from the owner responsible for the damage. We disagree.

Analysis of the respective rights and obligations of the condominium owners and the condominium corporation in relation to insurance and liability for claims subject to deductible is facilitated by consideration of three distinct duties:

1. the duty to obtain and maintain insurance placed upon the corporation by s. 27(1);
2. the duties of repair reflected by s. 41, as may be altered by the declaration pursuant to s. 41(5); and
3. liability for the costs of repairs which is dealt with by the condominium declaration, by-laws and rules.

Section 27(1) requires the corporation to "obtain and maintain insurance on its own behalf and on behalf of the owners of the units and common elements". While it is the corporation that obtains the insurance, the primary beneficiaries are the owners. They are the ones with a property interest to protect. They own their units and they have an undivided interest in the common elements. The proprietary rights of the corporation are limited. The rationale for imposing the duty to obtain insurance on the corporation is to provide efficient means to ensure that all owners have adequate insurance at low cost and to avoid the risk of prejudice to other owners that would result if an owner failed to obtain insurance and was unable or unwilling to repair his premises at his own expense: see Loeb, *Condominium Law and Administration*, 2nd ed., at pp. 19-1 to 19-2.

Section 41 imposes the primary obligation to repair units and common elements after damages upon the corporation. Aspects of that obligation may be shifted to the owners by the declaration pursuant to s. 41(5). While s. 27(2) refers to the corporation "using the proceeds from any insurance for the repair or replacement of damage to units or common elements", that merely ensures that insurance proceeds are used for their proper purpose. That provision does not impose on the corporation any duty to repair, an obligation that is to be found in s. 41.

It is open to the owners and the corporation to establish a regime for liability for costs of damage: ss. 31 and 32. In this case, there are a number of provisions which are relevant. Section 20 of the declaration requires the corporation to obtain and maintain insurance against major perils and specifically provides "this insurance may be subject to a loss deductible clause". Section 18 of the declaration requires each owner to maintain and repair his unit and to be responsible for all damages to all other units which are "caused by the failure of such owner to so maintain and repair his unit", but provides that owners' liability shall not extend to damages "for which the costs of repairing same may be recovered under any policy of insurance held by the Corporation". Similarly, s. 24 of the declaration requires each owner to indemnify and save harmless the corporation for the costs and damage that the corporation may suffer from any act or omission of the owner "except for any loss, damage, injury or liability insured against by the Corporation". The corporation adopted a specific rule with respect to air conditioners which provides as follows:

5. Any damage resulting from the installation or use of an air conditioner will be the liability of the unit owner or occupant, whether damage is limited to the owner's/occupant's unit or effects other units in the complex.

It is against this background that the question of liability for any deductibles under insurance obtained by the condominium corporation on behalf of the owners is to be assessed.

It is common ground between the parties that as a matter of commercial reality, "insurance . . . against major perils to the replacement cost" required by s. 27(1) is invariably subject to a deductible. We can see no reason to ignore commercial reality and read s. 27(1) as imposing upon the corporation a duty to obtain insurance without any deductible or to impose liability upon the corporation for any deductible portion of the policy. The condominium declaration by-laws and rules define the respective obligations of the owners and the corporation with respect to liability for damages and expressly provide that insurance obtained by the corporation may be subject to a deductible. In our view, the issue of liability for the deductible falls to be determined in accordance with the provisions of the declaration, by-laws, and rules of the condominium corporation, defining the rights and obligations of the owners and the corporation and by analogy to the prevailing practice in the insurance industry which is to shift the deductible portion of the loss to the party causing the loss as a means of disciplining insurance claims.

We would add that if the deductible was excessive, it could be argued that the corporation had failed in its duty to obtain insurance. In this regard, we would adopt the reasoning of the Judge Godfrey of the Small Claims Court in *Miluzzi v. York Condominium Corp. No. 60* (June 6, 1996): I find that replacement cost insurance can exist with a deductible provided the deductible is reasonable in the circumstances. A reasonable deductible ought to be expected by the unit owners. In the case at hand, the deductible was reasonable in light of the Corporation's prior history of claims made under the policy. It was the only way the defendant could get someone to underwrite the policy. The Corporation in placing the insurance acted on its own behalf and on behalf of the owners of the units and common elements. The unit owners cannot object unless the Corporation has acted in an arbitrary or capricious manner.

Finally, we would observe that from a policy point of view, we would reject the analysis of the motions court judge which has the effect of imposing a particular regime upon all condominiums. A significant feature of that scheme is the imposition of shared liability by the owners for all deductibles as the condominium corporation itself can only satisfy a liability imposed upon it by requiring the owners to contribute to the common expenses. The forced sharing of the deductible deprives the owners as a group of the disciplining effect a deductible has upon claims. While the effect of the result we reach is to open the possibility that claims will be made as between owners for the deductible, a condominium may avoid that result if it wishes to do so by making appropriate provision in its declaration, by-laws or rules. It seems to us preferable to leave the question of liability for deductible to be determined in this way so that condominium owners are able to design a scheme appropriate to their particular needs.

In the present case, the motions court judge made a finding that the damages in question were caused by the applicants' air conditioner. That finding, combined with the air conditioner rule referred to above, is sufficient to constitute a finding of liability against the applicants for the deductible.

Accordingly, the appeal is allowed, the order of the motions judge set aside and in its place the following is substituted:

(a) a declaration that Simcoe Condominium Corporation No. 60 is entitled to recover from Bernard and Christine Stevens \$1,000 together with the costs it incurred to register and discharge the original lien registered to secure the repair costs;

(b) an order permitting Simcoe Condominium Corporation No. 60 to register a lien on title to the Stevens unit pursuant to s. 32 of the Condominium Act to secure payment of the amount referred to in para. (a);

(c) costs of the application and appeal fixed at \$5,000.

Appeal allowed.

CBR# 070

Carleton Condominium Corporation No. 441 v. Each and Every Owner and Mortgagee of Each and Every Unit in Carleton Condominium Corporation No. 441 et al.

42 O.R. (3d) 62

Docket No. C27992

Court of Appeal for Ontario Catzman, Rosenberg and O'Connor JJ.A. October 30, 1998

APPEAL from an order of Chadwick J. with respect to the validity of provisions in the declaration of a condominium corporation.

André Claude and Anne Sheppard, for appellant. David R. Habib, for respondents.

The judgment of the court was delivered by

ROSENBERG J.A.: -- This appeal from a judgment of Chadwick J. concerns the interpretation of provisions of the Condominium Act, R.S.O. 1990, c. C.26 dealing with the contents of the declaration specified in s. 3 of the Act. Chadwick J. held that provisions of the appellant's declaration dealing with the ownership, management and use of a shared recreational facility were properly specified in the declaration and not inconsistent with the Act. I agree with his disposition of the matter and would dismiss this appeal.

The Facts

The appellant is a condominium corporation created in 1988 as a result of the registration by the declarant, Financial Trustco Properties Ltd., of the declaration and description under the Condominium Act. The condominium is a high-rise building containing 221 residential units. The building is situated on a large tract of land, known as Brittany Park, that was owned by FTP and on which FTP intended to erect a number of other condominiums. At the time of registration of the appellant, there was one other condominium on the lands, Carleton Condominium Corporation No. 16.

In May 1989, FTP sold the uncompleted project to Thomas C. Assaly Corporation Ltd. and Assaly thereby became the successor declarant. The project, as envisaged by FTP and Assaly, was that a number of condominiums would share a common stand-alone recreation facility. It would appear that the developers expected that by 1996, if not earlier, they would have completed the various buildings and legal ownership in the recreation facilities would be transferred to the condominium corporations. In the interim, the declarant was to manage the facilities.

Four other buildings were ultimately erected on the Assaly lands after the appellant was registered. Three of these are also condominiums; the other is co-op housing. The respondents, Carleton Condominium Corporation No. 507 and No. 510, are two of the condominiums that were subsequently erected on the tract of land. There is one undeveloped piece of land.

The dispute in this case concerns the provisions in the appellant's declaration relating to recreational amenities. Similar provisions are found in the declarations of the respondents. The recreational amenities consist of two components: (1) the recreational facilities and lands, being landscaped parkland, a pond and an outdoor pool and (2) the recreational centre and lands, which were built after the sale to Assaly and include an indoor swimming pool, sauna, meeting rooms, racquet facilities, and tennis courts. Assaly owns 80 per cent of the recreational facilities and lands and 100 per cent of the recreational centre and lands. Carleton Condominium Corporation No. 16 owns the remaining 20 per cent of the recreational facilities and lands.

The appellant objects to the inclusion, in art. IV of the declaration, of the provisions respecting the recreational amenities. The declaration uses the term "co-tenants" to refer to the interest of the condominium corporations, including the appellant and the two respondents, in the recreational amenities and I will adopt the same terminology. The provisions of art. IV to which the appellant objects may be summarized as follows:

(1) The recreational facility and lands are declared to be owned 80 percent by the declarant and 20 percent by Carleton Condominium Corporation No. 16. The declarant's 80 percent will ultimately be shared between the appellant, the declarant and the owners of the adjacent lands as tenants in common in accordance with their respective proportionate shares;

(2) The recreational centre and lands are owned solely by the declarant but it shall ultimately be shared between the appellant, the declarant and the owners of the adjacent lands as tenants in common in accordance with their respective proportionate shares;

(3) The actual transfer of ownership shall take place upon the development of the adjacent lands or no later than December 30, 1996 and the appellant shall accept a transfer of title from the declarant. Once ownership of the recreational amenities has been transferred, any further sale, transfer or other conveyance or encumbrance cannot be made without the prior written consent of the remaining co-tenants;

(4) Until the date of transfer, the declarant has the unilateral right to operate, control, manage, establish hours of use of the recreational amenities and shall also prepare a recreational budget. The appellant is obliged to adopt and be bound by the budget as part of its own budget and to pay its proportionate share. The appellant is also obliged to enter into a cost-sharing agreement with the other co-tenants relating to sharing the costs of the operation, repair, and replacement of the shared recreational amenities;

(5) After the date of transfer, a committee will govern the use and maintenance of the recreational amenities and the preparation of the budget. The committee will consist of representatives from each of the co-tenants.

As required by the Condominium Act, the declaration is registered on title. A "common access agreement" between the declarant and the appellant is also registered on title. This agreement confirms the provisions of art. IV of the declaration. For example, it confirms the proposed date of the transfer of ownership and the sharing of expenses as set out in art. IV. There is no such agreement, however, between the declarant and the two respondents. Accordingly, they argue that they must rely entirely upon the provisions of their declarations to assert their right to ownership and use of the recreational amenities.

Almost immediately after the appellant was registered, problems arose with respect to the use of the recreational amenities. As I understand it, the root of the problems is that Assaly has not fulfilled its obligations in terms of managing the amenities and contributing to the expenses. In oral argument, it was suggested that Assaly might now be in receivership. In any event, the condominium owners have had difficulty making use of some of the facilities and a number of legal actions have been initiated by and against the co-tenants.

The Issue

The issue in the case is a narrow one. The appellant submits that the provisions of art. IV of the declaration summarized above are inconsistent with the provisions of the Condominium Act. The appellant therefore seeks an order amending the declaration to delete those provisions.

This appeal engages ss. 3 and 12 of the Condominium Act. Portions of those sections are as follows:

3(1) A declaration shall not be registered unless it is executed by the owner or owners of the land and interests appurtenant to the land described in the description and unless it contains,

(a) a statement of intention that the land and interests appurtenant to the land described in the description be governed by this Act;

(b) the consent, in the prescribed form, of every person having a registered mortgage against the land or interests appurtenant to the land described in the description;

(c) a statement, expressed in percentages, of the proportions of the common interests; (d) a statement, expressed in percentages allocated to the units, of the proportions in which the owners are to contribute to the common expenses;

(e) an address for service and a mailing address for the corporation; and

(f) a specification of any parts of the common elements that are to be used by the owners of one or more designated units and not by all the owners.

(3) In addition to the matters mentioned in subsection (1), and in any other section in this Act, a declaration may contain,

(a) a specification of common expenses;

(b) provisions respecting the occupation and use of the units and common elements;

(c) provisions restricting gifts, leases and sales of the units and common interests;

(d) a specification of duties of the corporation consistent with its objects; and

(e) a specification of any allocation of the obligations to repair and to maintain the units and common elements.

(4) Subject to subsection (5), the declaration may be amended only with the consent of all owners and all persons having registered mortgages against the units and common interests.

(5) Where any provision in a declaration or by-law is inconsistent with the provisions of this Act, the provisions of this Act shall prevail and the declaration or by-law is deemed to be amended accordingly.

(6) When a declaration is amended, the corporation shall register a copy of the amendment executed by all the owners and all persons having registered mortgages against the units and common interests, and until the copy is registered the amendment is ineffective.

(8) The corporation, on at least seven days notice to every owner and mortgagee, or an owner, on at least seven days notice to the corporation and every other owner and mortgagee, may apply to a judge of the Ontario Court (General Division) for an order amending the declaration or description and the judge, if he or she is satisfied that an amendment is necessary or desirable to correct an error or inconsistency in the declaration or description or arising out of the carrying out of the intent and purpose of the declaration or description, may make the order.

12(1) The objects of the corporation are to manage the property and any assets of the corporation.

(2) The corporation has a duty to control, manage and administer the common elements and the assets of the condominium corporation.

(3) The corporation has a duty to effect compliance by the owners with this Act, the declaration, the by-laws and the rules.

(4) The declaration or the by-laws may specify duties of the corporation consistent with its objects, responsibilities and duties.

(5) Each owner and each person having a registered mortgage against a unit and common interest has the right to the performance of any duty of the corporation specified by this Act, the declaration, the by-laws and the rules.

(Emphasis added)

Analysis

It is conceded that the provisions of art. IV cannot be supported on the basis of the mandatory requirements of the declaration set forth in s. 3(1) of the Act. The respondents argue, however, that art. IV is authorized either by s. 3(3)(a) (specification of common expenses) or (3)(d) (specification of duties of the corporation consistent with its objects). I need not deal with the argument based on s-s. (3)(a). I am satisfied that art. IV is authorized by s-s. (3)(d) and is not inconsistent with the provisions of the Act.

As pointed out by Maloney J. in *Basmadjian v. York Condominium Corp. No. 52* (1981), 32 O.R. (2d) 523 at p. 525, 122 D.L.R. (3d) 117 (H.C.J.), a condominium corporation is entirely a creature of statute and any provision of its declaration must be authorized by the Act. However, the provisions of s. 3(3), and especially cl. (d) are "broadly permissive": *Peel Condominium Corp. No. 417 v. Tedley Homes Ltd.* (1997), 35 O.R. (3d) 257 at p. 263, 12 R.P.R. (3d) 278 (C.A.).

Section 3(3)(d) provides that the declaration may contain a specification of duties of the corporation consistent with its objects. The objects of the corporation specified in s. 12(1) are to manage the property and any assets of the corporation. In addition, under s. 12(2) the corporation is under a duty to "control, manage and administer the common elements and the assets of the condominium corporation". The appellant's beneficial interest in the recreational amenities is an asset of the corporation. It was proper for the declaration to contain provisions setting out the nature of that interest and the corporation's duties for managing, controlling and administering that asset. These duties include the requirements that it accept a transfer of title to its share of the amenities, contribute to the cost of maintenance of the facility and enter into a cost-sharing agreement with the other co-tenants.

The Condominium Act is a piece of consumer protection legislation and should be interpreted with this purpose in mind: *Abdool v. Somerset Place Developments of Georgetown Ltd.* (1992), 10 O.R. (3d) 120 at pp. 130-31, 96 D.L.R. (4th) 449 (C.A.). The promotional material circulated by the declarant and the disclosure statement required by s. 52 of the Act and provided to unit purchasers by the declarant all refer to the recreational amenities that will be made available to purchasers of units in these condominiums. The inclusion of the terms of art. IV in the declaration gives notice to purchasers as to their liability for a share of the expenses involved in the recreational facility. Inclusion of those provisions in the declaration also protects the purchasers from the declarant attempting to renege on the promise made to the purchasers that these facilities would be available and ultimately owned by their corporation as an asset. The unit owners would have relied upon these representation. It would be unreasonable and unfair to void those provisions of the declaration: *Tedley Homes Ltd.*, at pp. 264-65.

The appellant argues that the provisions of art. IV actually interfere with the control and management of the assets of the corporation because those provisions require it to enter into agreements with third parties. In addition, it is at the mercy of those third parties that may not carry out their obligations. The appellant argues that the problems with art. IV's requirements are highlighted in a case such as this where the declarant is not available to enter into the cost-sharing agreement with respect to its share of the project, is in arrears for its proportionate share of the expenses and has abdicated its responsibilities to manage the property. Accordingly, the appellant argues that art. IV is consistent with neither the objects of the corporation nor the purpose of the legislation.

I do not agree. Undoubtedly, problems can arise where a condominium corporation is required to share facilities with a third party and I do not minimize the concerns that the appellant's unit owners have over the use and management of the recreational amenities. However, the Act gives the declarant the right to include in the declaration provisions respecting the management of the assets of the corporation. There is nothing in the Act that prohibits the sharing of facilities among different condominiums or prohibits a declarant from giving the corporation an ownership interest in the shared facility. Such an arrangement may, in fact, be beneficial to the unit owners by giving them access to, and an interest in, a facility that could not be supported if owned only by the single corporation.

In my view, it is not improper for the declarant to specify the corporation's responsibilities so that the co-tenants or others with an interest in the shared facility can make fair use of it. The impugned provisions attempt to set up a reasonable structure for the management of the shared facility. Those provisions are thus well within the permissible objects of the corporation and are not inconsistent with the consumer protection objects of the Act. Disposition Accordingly, I would dismiss the appeal with costs.

Appeal dismissed with costs.

CBR# 101

Danielle David, claimant, and Vancouver Condominium Services Ltd. and Strata Plan VR2124 (Westpoint Terrace), defendant

[1999] B.C.J. No. 1869 Vancouver Registry No. 98-42283

British Columbia Provincial Court Vancouver, British Columbia Dhillon Prov. Ct. J. Heard: May 27, 1999. Judgment: July 6, 1999. Filed: July 7, 1999.

Counsel: Danielle David, in person. G. Fanaken, for the defendants. DHILLON PROV. CT. J.:--

Introduction

[para1] In this action, the Claimant, Danielle David, seeks recovery of the cost of repairs to the floor of her condominium unit which was damaged by water seepage caused by a structural defect in the walls of the strata building.

[para2] Ms. David's claim is against her strata corporation, known as Strata Plan VR-2124 (hereinafter called the "Strata Corporation"). She has also joined as a defendant the Strata Corporation's current management company, Vancouver Condominium Services Ltd. (hereinafter called "Vancouver Condominium"). At the start of trial, Mr. Gerry Fanaken, representing Vancouver Condominium and also acting as agent of the Strata Corporation, raised the issue of this Court's jurisdiction to hear this matter. He queried whether the Condominium Act, RSBC 1996, c. 64 precluded this lawsuit from being brought in Provincial Court. I reserved my decision on this point and proceeded to hear the matter on its merits.

Issues

[para3]

1. Is Ms. David precluded by the Condominium Act from bringing her claim against the Strata Corporation for damages for breach of contract or, alternatively, in negligence?

2. If there is no jurisdictional bar, are the Defendants Strata Corporation and Vancouver Condominium liable for breach of contract or in negligence?

3. If liability is established, what is the quantum of damages payable to Ms. David?

[para4] Before I address these issues, I will set out the background to the dispute.

Background

[para5] Ms. Danielle David works for the CBC Television Francaise in Vancouver. She is the owner of unit 105 of a condominium building located at 1263 Barclay Street in Vancouver. This building was constructed in 1987. Ms. David purchased her unit in or around the early 1990s. Within about one year of purchase, there was water infiltration caused by defective construction of her deck, which allowed water to enter under her patio door into her living room. Her carpet became water damaged and required replacement. The source of the leaks was attended to and the problem apparently corrected. Ms. David was told that the deck was fully repaired.

[para6] Assuming that the repairs had stemmed the leakage problem, Ms. David attended to remedying the water damage inside her unit. She had an option to replace the damaged carpet with a new carpet or to use another type of flooring. She decided to replace the original carpet with hardwood floors. She obtained permission from the Strata Corporation to do so.

[para7] As it turned out, further repairs were needed to the outside deck, and a second company was hired to attend to the problem. This company opened up the deck and left it open over a period of time. In the meantime, it rained heavily.

[para8] In or around the summer of 1996 Ms. David again noted water leakage into her suite. The second leakage problem was related to the outside patio repair which the Strata Corporation was undertaking through its then management company, Coast to Coast Project Management Ltd. (hereinafter called "Coast Management"). The manager of Coast Management was Mr. S. J. MacLellan.

[para9] Ms. David complained of the water leaking from the patio, through her patio door, into her suite. She tendered into evidence memos she sent of the state of the deck repair from which I quote:

Date: 11-Dec.-1995

Subject: Water Infiltration in Suite 105

As you are all aware, my patio repairs were to have been finished Sept. 15.1995 as I was told. Heavy rain has since fallen and 3 months later I am at the same point. My recently installed hardwood floor are (sic) now being ruined (like my original carpet) so, please correct that water infiltration immediately otherwise I'll be force (sic) to take legal action. Thanks.

Date: 19-Feb.-1996

Subject: Urgent Repair

Reliable Restoration started the repairs for Suite 106 on Feb. 10th and after 8 days of dry weather the repairs are still incomplete. As a result water is still pouring into my living room and my carpenter who arrive Feb. 19th to restore my floor had to leave once again. In addition, my bedroom floor is also curling which I have previously complained about. The fact is the whole situation is a complete mess. Absolutely ridiculous. Which makes me wonder why I am still paying my maintenance fees. I would really but really appreciate concrete action. Now. Come see my living room floor and you will understand my concern. Thank you.

[para10] The hardwood floor of Ms. David's unit was ruined by incoming water and she sought to have it repaired. To that end, she spoke with Mr. Stu MacLennan of Coast Management, who was investigating the damage and hiring contractors to undertake repairs on behalf of the Strata Corporation. Ms. David testified that Mr. MacLennan saw the damaged hardwood floors, and himself obtained a repair estimate from B.C. Hardwood Floor Co. Ltd. dated July 15, 1996. This estimate, marked as Exhibit 1, states the work to be removal of water damaged hardwood floor at a cost of \$7709.35 inclusive of taxes.

[para11] This estimate was higher than one Ms. David had obtained from her contractor, Mr. D. Lahoud, on July 18, 1996. Mr. MacLennan advised her to go ahead with the repair of her hardwood floor using Mr. Lahoud. Mr. MacLennan told Ms. David she would be fully reimbursed for this work. The cost of this repair, which was done, was \$7,200.00 inclusive of taxes. Ms. David relied on Mr. MacLennan's promise of payment and expended the monies. She then sought payment from the Strata Corporation. She was advised in September 1996 by Mr. MacLellan that she could be paid the full amount for her floor replacement if she agreed to release the Strata Corporation from any liability. She agreed to this suggestion but soon thereafter learned Mr. MacLellan and Coast Management were being relieved of their duties as property managers for the Strata Corporation.

[para12] Ms. David was advised in early 1997 that the Strata Corporation could only reimburse her for the value of her carpet, as the cost of the wood flooring was an improvement for which she was responsible. She has received payment of \$3,876.98 representing the replacement value of a carpet and sues for the balance of \$3,323.02.

[para13] Mr. Colm Place testified on behalf of the Strata Corporation. He purchased his unit in 1994 and was elected to the Strata Council in 1995. He was elected Chairperson of the Strata Council in September 1996. He confirmed that Coast Management was the Strata Corporation's original management company. It was owned and operated by the developer of the condominium project. Coast Management attended to all property management matters for the Strata Corporation including the repairs to correct the defects causing leaks in 1995 and 1996, and all claims arising in relation to the defects.

[para14] Mr. Place further testified Coast Management reported to the Strata Council, which generally based their decisions on the recommendations of Coast Management.

[para15] While Mr. Place would not suggest that a carte blanche was given to Coast Management, he concedes that no minutes were kept of Council meetings and so he is not able to say what specific directions the Strata Council gave to Coast Management concerning Ms. David's damaged floor. He has no knowledge as to what representations, if any, Mr. MacLellan or Coast Management made to Ms. David.

[para16] Mr. Place concedes that Coast Management and Mr. MacLellan had a free hand in determining who to retain for the work and how it was to be done. Coast Management dealt with the insurance company from whom the Strata Council was claiming reimbursement for the damages and repairs due to water damage.

[para17] In late 1996, the Strata Corporation notified Coast Management that their management services would be terminated, and retained Vancouver Condominium as its new property management company.

[para18] Vancouver Condominium researched the claim by Ms. David and advised as follows in a letter to Ms. David dated March 13, 1997:

I have been discussing this matter with the adjusters for the insurance company and I have been advised that, as far as the insurance policy is concerned, the established amount of the loss was \$3,876.98. This was based on their estimates of the damage had there been original carpeting and not the hardwood flooring which you had personally installed. It is the strata corporation's position, as supported by the insurance company, that the addition of hardwood flooring to replace the original carpet constituted a "betterment or improvement" to the strata lot, which therefore excludes it from any insurance coverage or strata corporation liability.

[para19] The Corporation offered to pay for Ms. David a sum representing the value of carpet installation. Ms. David was paid the \$3,786.98 and sues for the balance.

Jurisdiction of the Provincial Court

[para20] As indicated, the Defendants argue that this Court does not have jurisdiction to hear this claim. In order to determine this issue, it is necessary to review what limits on jurisdiction may be prescribed by the Condominium Act, RSBC 1996, c. 64.

[para21] The effect of the Condominium Act on jurisdiction of the Provincial Court in civil claims has been considered in a number of reported decisions: *Seller v. Singla Bros. Holdings and Owners of Strata Plan KAS976*, [1995] B.C.J. No. 2826, (22 November 1995), *Penticton 9315 (BC Prov. Ct.) Stansfield, J.*; *McNeill v. Owners of Strata Plan KAS1099*, [1996] B.C.J. No. 2553, (5 November 1996) *Penticton 12642 (BC Prov. Ct.) Stansfield, J.*; and *The Owners of Strata Plan LMS2064 v. Biamonte*, [1999] B.C.J. No. 1267, (28 April 1999) *Vancouver 98-43918 (BC Prov. Ct.) Bruce, J.*

[para22] In these cases, the Court has noted that under section 1 of the Condominium Act, "court" is expressly defined as the Supreme Court of British Columbia.

[para23] The Condominium Act contains provisions which deal with the possibility that the strata corporation or owner may become involved in litigation, as evidenced by the following sections (emphasis added):

15(6). An owner may sue the strata corporation about any matter relating to the common property, common facilities, or the assets of the strata corporation.

35(5). Subject to section 36, a strata corporation may recover from an owner in a court of competent jurisdiction a sum of money owing to the strata corporation.

(a) as the owner's monthly contribution under this section, or

(b) for money expended by the strata corporation under section 34.

42. An owner may refer to arbitration or may apply to the court to prevent or remedy a matter where he alleges:

(a) the affairs of the strata corporation are being conducted, or the powers of the corporation or strata council are being exercised, in a manner oppressive to one or more owners, including himself.

127(3). The strata corporation may recover from an owner by an action for debt in a court of competent jurisdiction money which the strata corporation is required to expend as a result of an act or omission by the owner, the owner's employees, agents, invitees or tenants, or an infraction or violation of these by-laws or any rules or regulations established under them.

[para24] The reference to a "court of competent jurisdiction" was considered by Bruce, J. of this Court in *The Owners of Strata Plan LMS2064 v. Eugene Biamonte*, [1999] B.C.J. No. 1267, (28 April 1999) Vancouver 98-43918. At page 4 of her Reasons, Judge Bruce noted as follows:

In my view, however, the use of the term "court of competent jurisdiction" in specific provisions of the Act addressing the recovery of monies evidences an intent to accord jurisdiction to courts apart from the Supreme Court. Had the Legislature intended that the Supreme Court exercise exclusive jurisdiction in all matters within the scope of the Condominium Act there would be no reason to chose the particular words used in Section 35(5) and Section 127(3) of the Act. Instead, the Legislature would simply have referred to the "court" in all cases. I am satisfied the term "court of competent jurisdiction" is a broad term that denotes authority over the parties, the subject matter of the action, and the remedy sought.

[para25] I accept the foregoing as the correct analysis. Thus, if the matter is one which falls within the jurisdiction of the Provincial Court, and is not otherwise expressly reserved to the Supreme Court under the Condominium Act, the Provincial Court has the jurisdiction to adjudicate upon it.

[para26] Jurisdiction of the Provincial Court is set out under Section 3 of the Provincial Court Act:

3. (1) The Provincial Court has jurisdiction in a claim for

- (a) debt or damages. (b) recovery of personal property,
- (c) specific performance of an agreement relating to personal property or services, or
- (d) relief from opposing claims to personal property

if the amount claimed or the value of the personal property or services is \$10,000 or less, excluding interest and costs.

(2) The Provincial Court does not have jurisdiction in a claim for libel, slander or malicious prosecution.

[para27] I find that the words "court of competent jurisdiction" in the Condominium Act allow the Provincial Court to hear claims which fall within its statutorily authorized monetary and subject matter jurisdiction, as defined under Section 3 of the Provincial Court Act.

[para28] The use of the term "the court" in section 42 is to be distinguished from "court of competent jurisdiction" in sections 35(5) and 127(3), which relate to a claim for money or debt, as the case may be.

[para29] A claim which, although within this Court's monetary jurisdiction, also trenches upon matters which fall within section 42 can not be litigated in the Provincial Court.

[para30] I have reached this conclusion because in section 42, the word "court" is used without any qualifying language and section 1 defines "court" to mean the Supreme Court. This suggests that the legislature intended the subject matter of claims under section 42 of the Condominium Act to be heard in Supreme Court.

[para31] The plain language of section 42 indicates that it is intended to apply to disputes which relate to strata corporation governance. Section 42 may be invoked where "the affairs of the strata corporation are being conducted, or the powers of the corporation or strata council are being exercised, in a manner oppressive to one or more owners". Allegations directed to the affairs of the strata corporation, the exercise of its powers or the powers of the strata council, are subject matters to be adjudicated by arbitration or in the Supreme Court.

[para32] It should be noted that section 200 of the Company Act similarly reserves to the Supreme Court exclusive jurisdiction to adjudicate on disputes concerning complaints by a member of a company. Section 200 states as follows:

200(1) A member of a company may apply to the court for an order on the ground

(a) that the affairs of the company are being conducted, of the powers of the directors are being exercised, in a manner oppressive to one or more of the members, including the applicant,

or

(b) that some act of the company has been done, or is threatened, or that some resolution of the members or any class of members has been passed or is proposed, that is unfairly prejudicial to one or more of the members, including the applicant.

[para33] By definition of section 13(1) of the Condominium Act, the owners of strata lots are members of a strata corporation. However, the section goes on to provide that the Company Act does not apply to a strata corporation. The regulation of the affairs of the strata corporation is governed exclusively by the Condominium Act. Since the Company Act doesn't apply to strata corporations, section 42 becomes the operative remedial provision for disputes between members and the strata corporation relating to strata corporation governance.

[para34] Corporate governance disputes, whether arising within corporations in general or strata corporations in particular, have traditionally been reserved for the Supreme Court. Accordingly, any matter which raises the allegation that a member of a company or an owner of a strata lot in a strata corporation is being "oppressed" in the manner caught by section 200 or section 42, as the case may be, should properly be brought in the Supreme Court.

[para35] What disputes would fall within corporate governance of a strata corporation?

[para36] To answer this question, it is instructive to look at the oppression provisions of the Company Act. The leading case in this area is *Diligenti v. RWMD Operations* (1976) 1 BCLR 36 (SC) which notes that the oppression provisions of the Company Act protect a shareholder's rights as a shareholder and not rights the shareholder might concurrently enjoy as an employee or in some other capacity:

[T]he oppression and unfair prejudice must be with respect to the rights, position or interests of the applicant as member, that is, as shareholder, of the companies and not with respect to his rights, interests or position as director, officer, or employee. [at 41]

As a shareholder he has no right to employment or remuneration in a managerial or administrative capacity. Any such rights would arise only as the result of express or implied agreement that he should be so employed, and the remedy for termination would be by other means, not by action to assert rights as a shareholder. I accept the contention of counsel for the respondents that the cases are to the effect that the ouster of a member from a particular office or employment with the company does not affect his rights as a shareholder so as to amount to conduct oppressive to him as a member. [at 52; emphasis added]

[para37] I take from the foregoing distinction that a corporation or strata corporation may enter into agreements with its members or lot owners, as the case may be, the breach of which may be adjudicated in Provincial Court provided it is within this court's monetary jurisdiction and no issue of "oppression" in the sense discussed in *Diligenti* arises.

[para38] Oppression in the context of the relationship between owners and the strata corporation may arise in circumstances relating to those matters noted in section 43 and 44 of the Condominium Act. These sections relate to a section 42 application, and refer to complaints concerning an act of the strata council or a transaction or resolution on their part, disputes relating to contributions to common expenses, issues arising from fines for the breach of bylaws or rules or regulations, damages to the assets of the strata corporation, or decisions of the strata council which are characterized as oppressive.

[para39] In *Burdeny v. K&D Gourmet Baked Foods and Investments Inc. and Kirk Brian D. Burdeny*, [1999] B.C.J. No. 953, [April 23, 1999] BCSC Van. A983168, Levine J. characterized the claims of the Plaintiff shareholder in four broad categories:

- (a) claims relating to his participation in the company other than in his position as a shareholder;
- (b) claims regarding misuse of corporate funds;
- (c) claims concerning the rights of a minority shareholder to participate in company affairs; and
- (d) claims as to irregularities of corporate governance.

[para40] Her Ladyship accepted that apart from category (a), the other three categories of other claims may give rise to oppression, if substantiated by the evidence.

[para41] In applying the foregoing analysis to the case before me, I find that in considering the application of section 42, allegations such as those set out in (b) through (d) in a strata corporation setting would properly fall to be decided in the Supreme Court. They are related to the rights of a strata lot owner as a participating member of the strata corporation, and to corporate governance, which matters do not lie within the jurisdiction of the Provincial Court.

[para42] I also note that in *Burdeny v. K&D Gourmet Baked Foods*, supra, the petitioner had commenced an action in Provincial Court before proceeding with his Supreme Court oppression action. He sought payment of management and director's fees allegedly owed to him, and the defendant counterclaimed for monies improperly taken by the Claimant. The matter proceeded to trial in Small Claims on both issues and the parties' claims were dismissed. Again, the case illustrates that an action in Provincial Court between a corporation and a shareholder, or between an owner and a strata corporation, is valid if the claim is not with respect to conduct oppressive to a claimant in his capacity as a member of the corporation.

[para43] In the case at bar, the claim is by a strata lot owner, Ms. David, against the Strata Corporation for damages for breach of an alleged agreement to reimburse her for the cost of a water-damaged floor. Such a claim does not fall within section 42 as relating to breach of her rights as a member to participate in the affairs of the strata corporation or to corporate governance in general. It is, as was said in *Diligenti*, a right which must be asserted by means other than as a claim in oppression.

[para44] I conclude therefore that the Provincial Court is the proper forum in which to hear the claims of breach of agreement or negligence by Ms. David against the Strata Corporation.

Liability

[para45] Are the Defendants Strata Corporation and Vancouver Condominium liable for breach of agreement or negligence?

[para46] I find that Ms. David suffered damage to her floor by reason of water leakage into her unit caused by a defect in construction. The slow progress of repairs to remedy the defect in the decks exacerbated the problem. The repair to the decks was carried out by contractors retained on behalf of the Strata Corporation by Coast Management, their property managers at the time. Mr. MacLellan of Coast Management authorized, on behalf of the Defendant Strata Corporation, the replacement of Ms. David's water-damaged hardwood floor at a cost of \$7,200.00. On Mr. MacLellan's go-ahead to use her own contractor rather than his nominee whose bid was higher, Ms. David had the floor installed. There were no restrictions or qualifiers, such as insurance approval, placed on the agreement to reimburse.

[para47] Both parties have attached to their pleadings Bylaw 10 of the Rules and Regulations of Strata Plan VR2124 which refers to claims arising from damage to property. Bylaw 10 contemplates that if loss or damage to property arises from the defect or want of repair of common property, or from leakage of water in any manner whatsoever, the Strata Corporation is not responsible unless the loss or damage results "from the negligent act or omission on the part of the Strata Corporation, its employees or agents".

[para48] I do not need to consider if there was any negligence in the handling of the water leakage repairs as it is evident that whatever the cause of the damage to Ms. David's unit, the Strata Corporation agreed through Coast Management to remedy it. I find that as agent of the Strata Corporation, authorized by it to remedy the defects and the consequential water damage, Mr. MacLellan bound the Strata Corporation to the agreement to reimburse Ms. David for the cost of repair.

[para49] The Strata Corporation did not assert at trial that Coast management did not have authority to enter into the agreement with Ms. David. Mr. Place, current Chairperson, could not advise what directions or limits, if any, were placed on Coast Management's authority to attend to the building repairs and claims by strata lot owner. The Strata Corporation could have brought Coast Management into the suit as a third party if it had acted without authority, which it did not do.

[para50] I find that the Strata Corporation is bound by the agreement to reimburse in reliance on which Ms. David had her floor repaired. The Strata Corporation breached that agreement by failing to pay in full for the repairs. It is liable to Ms. David for the unpaid balance of the repair bill, being \$3,323.02.

[para51] Coast Management and Mr. MacLellan were replaced in early 1997 by the Defendant Vancouver Condominium Services Ltd. I accept Mr. Fanaken's submissions that the agreement to reimburse was made before Vancouver Condominium was retained by the Strata Corporation. I find that Vancouver Condominium was not an agent of the Strata Corporation in dealing with Ms. David when the go-ahead to replace the floor, and promise of reimbursement of cost, was made to her. Therefore, the claim against Vancouver Condominium is dismissed.

[para52] In summary, Ms. David will have judgment and a payment order against the Defendant Strata Corporation VR2124 in the sum of \$3,323.02 plus court ordered interest on this sum from January 1, 1997 to the date of this judgment. Ms. David is entitled to her filing and service costs of \$210. I make no award allowing Vancouver Condominium its filing fees as it filed jointly with the Strata Corporation against whom liability has been found.

DHILLON PROV. CT. J.

CBR# 132

Bernard Herstein, claimant, and Royal LePage Real Estate Services Ltd., Ericka Gardner, John Henry Gray and Deidre Margaret Gray, defendants

[1997] B.C.J. No. 3053

Vancouver Registry No. 96-22149

British Columbia Provincial Court (Civil Division) Vancouver, British Columbia Werier Prov. Ct. J. Heard: May 8, October 14 and 16, 1997. Judgment: filed December 18, 1997.

Counsel: Henry C. Wood for the claimant. D. Marks for the defendants.

WERIER PROV. CT. J.:--

Introduction

[para1] The Plaintiff, Bernard Herstein, has brought an action against the Defendants, Royal Lepage Real Estate statements where he consulted his own lawyer and made the Services Ltd. and Erika Gardner. He seeks damages for negligent misrepresentations that he alleges were made to him by Ms. Gardner, as a listing realtor. He maintains that he relied on these misrepresentations, to his detriment, when he entered into a contract for the purchase of a condominium. He is seeking damages in the amount of \$10,000, having abandoned any claim in excess of \$10,000.

[para2] Counsel for Mr. Herstein has argued that *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 outlines clearly the five elements that are required to successfully prove a claim for negligent misrepresentation, and that all of the required elements are supported by the evidence in this case. Counsel for Ms. Gardner has invited me to apply the test for negligent misrepresentation set out in *Kingu v. Walmar Ventures Ltd.* (1986), 10 B.C.L.R. (2d) 15 (B.C.C.A.). While this decision predates the *Cognos* (supra) decision, she argues that it is more applicable, as it states the test in the context of a negligent misrepresentation made by a realtor. The authorities relied upon by each of the parties make it clear that the trial courts in British Columbia have interchangeably applied either the *Kingu* or *Cognos* decisions.

[para3] I agree with the statement made by Madam Justice Levine in the case of *Abbey Blinds Inc. v. Gary Mikesh, Colliers Maccaulay Nicholls Inc.* [1996] B.C.J. No. 920 at page 13 where she states :

"Counsel provided a number of authorities in which the required elements of a successful claim for negligent misstatement, based on the doctrine established in *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465, are summarized.

[para4] In *Kingu v. Walmar Ventures Ltd.* (supra) at p.23 McLachlin J.A., as she then was, summarized the requirements of tort liability for negligent misstatement as follows:

- (1) A false statement negligently made,
- (2) A duty of care on the person making the statement to the recipient.

A duty of care does not arise unless:

- (a) the person making the statement is possessed of special skill or knowledge on the matter in question, and
- (b) the circumstances establish that a reasonable person making that statement would know that the recipient is relying upon his skill or judgment;
- (3) Reasonable reliance on the statement by its recipient;
- (4) Loss suffered as a consequence of the reliance.

[para5] In *Queen v. Cognos*, (supra) at p.110 Iacobucci J. summarized the decisions of the Supreme Court of Canada as follows:

The required elements for a successful *Hedley Byrne* claim have been stated in many authorities, sometimes in varying forms. The decisions of this Court cited above suggest five general requirements: (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representations in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

Though presented in a different order, the elements outlined are the same: (1) a duty of care; (2) a false, inaccurate or misleading statement; (3) negligence in making the statement; (4) reasonable reliance; and (5) loss resulting from the reliance."

The Evidence

[para6] Counsel for Ms. Gardener has acknowledged that in the circumstances of this case, Ms. Gardner had a duty of care to Mr. Herstein. It is the other four elements required to support a negligent misrepresentation claim that I have considered when reviewing the evidence.

[para7] Mr. Herstein testified that he looked for condominiums for approximately two years prior to his purchase of 409-518 Moberley Road in Vancouver, British Columbia (the "Condominium"), in the spring of 1993, This was his first purchase of a residence for himself. He had previously hoped to tender an offer on a unit in the building next door, at 907 - 522 Moberley Road, but was unable to do so before it was purchased by someone else. Mr. Herstein testified that he was only interested in condominiums located on the west side of Vancouver. He said that he was looking for a concrete building and was "hoping to find a unit that was close to fourteen hundred square feet, but I was looking for a unit that was thirteen hundred plus square feet

and, hopefully, fourteen hundred." The reason for this, he testified, had to do with his living comfort as well as his belief that the larger units would have a better resale value.

[para8] Mr. Herstein found out about the listing of the Condominium from his brother who had obtained a "feature sheet" at an open house. This sheet indicated, among other things, that the Condominium had "over 1,300 square feet of luxury living space." The sheet also referred to an enclosed "atrium". The Condominium was listed for \$349,900. [para9] Mr. Herstein testified that he telephoned Ms. Gardiner, (the listing realtor, with the Defendant Royal LePage Real Estate Services Ltd.), to make an appointment to view the premises. This was their first contact. Ms. Gardner concurs that the first contact was made through a phone call initiated by Mr. Herstein. In this conversation Mr. Herstein recalled that he specifically asked Ms. Gardner the size of the suite, and that she told him that it was 1307 square feet, not including the enclosed balcony. This is one of the alleged negligent statements that Mr. Herstein claims to have relied upon in entering into the contract to purchase the Condominium.

[para10] Mr. Herstein was familiar with the concept of an enclosed balcony, as he was living in the building. Some of the suites in the building had what was built as balcony space and then enclosed, so that it could constitute additional internal living space. This is the type of space that was referred to as the atrium in the listing information that Mr. Herstein had at the time of his initial contact with Ms. Gardner.

[para11] Ms. Gardner's recollection of this initial conversation is somewhat different. She is a licensed real estate salesperson who has been in the field since 1980. She was with Royal LePage from 1982 to 1995. At the time of this transaction about one half of her sales involved homes, and the other half were the sale of condominiums. She was familiar with both 518 and 522 Moberley Road, having previously been the listing realtor for suites in both of those buildings. Ms. Gardner recalled that she returned a page from Mr. Herstein while she was driving in her car to an appointment. Mr. Herstein told her that he wanted to view the Condominium, but she had another appointment to go to at the time. During this first conversation she does recall that Mr. Herstein asked her what the square footage of the Condominium was, and whether the balcony was enclosed. She recalls that she did not want to get into details on the phone while driving, but that she did confirm that the square footage of the unit was 1307 square feet. She repeatedly testified that phrases such as "not including the enclosed balcony" would have never been used by her to describe the square footage of this unit, or any unit.

[para12] Exhibit #2 tab 5 contains the "feature sheet" which Ms. Gardner prepared, and which Mr. Herstein received from his brother. On that sheet is written the notation "1307 - 9:30 a.m." This was written by Mr. Herstein at the time of his first conversation with Ms. Gardner, when they also tentatively agreed to a meet at the condominium at 9:30 a.m. that Monday. No additional notation was made by him at the time to modify the number of square feet to indicate that it did or did not include the enclosed balcony.

[para13] Mr. Herstein made arrangements to view the Condominium a few days later and met Ms. Gardner there. While viewing the Condominium he recalls that he again specifically asked Ms. Gardner the size of the unit. He says that she repeated that it was 1307 square feet not including the balcony area. Mr. Herstein alleges that he relied upon this statement in deciding to purchase the unit and in determining an offering price. At this first meeting he says that he also asked the size of the balcony itself, but recalls that Ms. Gardner was uncertain.

[para14] Ms. Gardner has a different recollection of their first meeting. She does recall that she confirmed that the square footage of the unit was 1307 square feet, but she maintains that this was without any reference to whether this included or excluded the enclosed balcony. She recalls that Mr. Herstein asked her, as he was walking ahead of her towards the enclosed balcony, whether she knew the size of the balcony room. She indicated that she had to look this information up, and that the figure would not be precise as it was measured based on an average room size. Later on, as Mr. Herstein was about to leave, she recalls that he did ask her in an off hand manner, (that she described as "over his shoulder while walking"), whether the balcony was included in the square footage. She recalled that she said that she was not sure, but that she would be happy to review the strata plan with him. She says that he then left without waiting for the answer. She says that the information available there at the time, including the strata plan, would have clearly shown that 1307 was the total square footage, including the balcony, and that this was her knowledge base at the time of the first meeting, as well as the initial phone call.

[para15] Subsequent to viewing the Condominium once with Ms. Gardner, Mr. Herstein decided to make an offer to purchase the unit and he contacted Ms. Gardner in order to do so. He arrived to meet her having prepared his own written offer. Ms. Gardner transferred his terms onto a formal contract of purchase and sale document ordinarily used by residential realtors. She gave him no advice with regard to price. The offer was presented and ultimately led to a binding contract of purchase and sale.

[para16] Mr. Herstein, although not a qualified realtor, and a first time purchaser, had done his own analysis of the market place and felt confident that his offer was a reasonable one. He ultimately purchased the unit for \$320,000. During purchase negotiations he recalls telling Ms. Gardner that he was using the sale of unit 907 as a comparable sale and that he had based his purchase price on the price per square foot that unit 907 had sold for. The offer contained many subject clauses, all of which had been included by Mr. Herstein, without any advice from Ms. Gardner. The subject clauses included a condition that the contract be "1. subject to the purchaser's lawyers approval of this contract for purchase and sale including the disclosure statement and the amendments and all other documents pertaining to this property..." and "...3. subject to purchaser receiving, reading and being satisfied with the by-laws and financial statements." The subjects were to be removed by April 15, 1993.

[para17] Mr. Herstein did provide a copy of the contract of purchase and sale, the disclosure statement and by-laws to his lawyer, Mr. Epstein, prior to the removal of the subject clauses, Mr. Epstein testified that the disclosure statement was of little significance to him as the building was completed in 1987 and this was a purchase completing in 1993. He testified that he routinely relies on the documents that he receives from the Land Title Office in providing advice to clients. He said that he had no need to verify the size of this unit prior to closing, as Mr. Herstein had not brought any issue about size to his attention. All Mr. Herstein had asked him to do initially was to search other specific properties in the area to confirm their selling price.

[para18] On April 23, 1993 Mr. Epstein recalled that he was called by Mr. Herstein who indicated, for the first time, the possibility that there was some difference between what he had believed the square footage of the unit to be, and what it actually was. Mr. Epstein then received the strata plan from the Land Title Office which confirmed that the actual square footage of the unit, including the balcony was 1307. [para19] Mr. Herstein also recalled no discussions with his lawyer about the square footage of the Condominium, until he became concerned that there was an issue about his mistaken belief as to the size. It was only after the subjects were removed that Mr. Herstein first became aware, through a friend, that his Condominium may have been smaller than he had understood it to be. Mr. Herstein also testified that he knew that once the subjects were removed that he would have a firm contract to purchase the Condominium. He said that he expected Mr. Epstein to ensure that all was in order before the

subjects were removed. He knew that Mr. Epstein was going to get a copy of the strata plan. He also testified that Mr. Epstein did not advise him of any reason not to remove the subject clauses on April 15th.

[para20] Mr. Herstein found out, prior to the closing date, that the actual square footage of the Condominium, excluding the balcony was 1243 square feet. The balcony itself turned out to be 64 square feet. He claims that he bought the Condominium believing that it was 1307 square feet excluding the enclosed balcony and so has 64 square feet less living space than he thought he was purchasing. He says that he based his offer on an estimated price per square foot of \$245 based on 1307 square feet excluding the balcony. He testified that if he knew that the unit was only 1243 square feet, his offer based on a price per square foot would have been lower, or perhaps he may not have purchased the unit at all. He did admit that the location of the building and his suite, the amenities that the building and suite had to offer, exposure and view, as well as the lay out of the living space were also important in inducing him to purchase this particular Condominium. He also confirmed that the covered balcony, or atrium, is a feature that allows him additional interior living space.

[para21] After discovering the information about the actual square footage of the unit, and prior to the closing, Mr. Herstein decided to phone the realtor, Ms. Gardner, to voice his concerns. He made two phone calls to her that day. He made the calls on his speaker phone at work, and had his brother and a friend, Mr. Konar, present. He did not make the existence of the eavesdroppers known to Ms. Gardner. I heard evidence from Mr. Herstein, as well as his brother and Mr. Konar regarding their best recollections of these phone conversations. After the first conversation each of Mr. Herstein, his brother and Mr. Konar made notes. These were not made during the conversation, but I am told reflected their best recollection immediately after the conversation. After the second conversation Mr. Herstein was the only one to make notes. The second set of notes, exhibit 5, contradict what Mr. Herstein originally testified took place during the second conversation. They seem to support a statement being made by Ms. Gardner that she never would have said that the balcony was included. Mr. Herstein, with the assistance of his Counsel, testified that his note must have been made in error. I find that the evidence with regard to these two telephone calls is of very limited assistance to me. While Counsel for Mr. Herstein has urged me to place great emphasis on the notes made and the testimony given, Ms. Gardner has testified that these conversations took place unexpectedly while she was busy working at a sales office for another condominium project. I have directed my attention primarily to the evidence as recalled by the two parties present prior to the signing of this contract; that is Mr. Herstein and Ms. Gardner.

Applying the evidence to the law

[para22] I am not satisfied that Mr. Herstein has met the onus of proving that he relied on a specific false representation made by Ms. Gardner concerning the square footage of the Condominium. It is clear to me that Ms. Gardner had sufficient information available to her confirming that the total square footage of the Condominium was 1307 square feet in total. This was available to her at the time that she first advertised the listing. It is inconceivable to me (as suggested by Mr. Herstein) that Ms. Gardner would have represented to Mr. Herstein as a potential purchaser, that the Condominium was 1307 square feet excluding the balcony, either during an initial telephone call or when he first viewed the property. This fact was so easily ascertainable by either Mr. Herstein or Ms. Gardner from a simple review of the strata plan. Ms. Gardner suggested in her evidence that perhaps Mr. Herstein, excited about the prospect of this purchase, "heard what he wanted to hear". This may well be how Mr. Herstein became confused about the square footage of the Condominium.

[para23] I am also not satisfied that it was reasonable for Mr. Herstein to rely on the statements that he alleges were made to him by Ms. Gardner. This is particularly so where he consulted his lawyer and the purchase of the Condominium was specifically made subject to that consultation. Mr. Herstein made no independent investigations with regard to the square footage of his Condominium. He made his offer subject to the provision of disclosure statements and a lawyers review of "all other documents pertaining to the property" and yet he did not avail himself of this opportunity to confirm what he says was information critical to him, before he removed the subject clauses. The documents show that if Mr. Herstein had looked at the available strata plan at any time, either before he tendered his offer, or prior to the removal of the subject clauses, the fact that the balcony was included in the estimated 1307 square feet would have been very clear to him. I am satisfied based on the evidence of Ms. Gardner that Mr. Herstein was offered an opportunity to look through the relevant documents with her, but he did not avail himself of this opportunity. Mr. Herstein alleges that his calculations formulated to make the offer were based upon his understanding of the square footage of the Condominium, and yet he also admits that he was uncertain of the square footage of the enclosed balcony when he made the offer.

[para24] It is also clear to me that Mr. Herstein made the decision to purchase the Condominium based upon a number of considerations, and not just because of the size of the unit. He liked building, (as this is where he was living), and was also impressed by the location, the view, and the unique floor plan. He wrote up his own offer which included subject clauses for his own protection and used his own information and formula to determine what he believed to be a fair market value price.

[para25] It follows that Mr. Herstein's claim must be dismissed. I am doing so without costs to either party.

WERIER PROV. CT. J.

CBR# 081

The Owners: Condominium Plan 8820814, plaintiff, and Birchwood Village Greens Ltd., Stanley J. Bucar, Douglas S. Bucar and Brian W. Bucar, defendants

[1998] A.J. No. 578

Action No. 9712-000322

Alberta Court of Queen's Bench Judicial District of Wetaskiwin Nation J. May 27, 1998.

Counsel: Jeannette Roberts, for the plaintiff. Robert Dunseith, for the plaintiff. John Prowse, Brian Muryama, for the defendants - Bucars.

MEMORANDUM OF DECISION

[para1] NATION J.-- This is an application by the Plaintiff to foreclose on land, and as there is no equity above their interest, which arises from condominium costs which have accrued, a direction that the lands be transferred into the Plaintiff's name. The application is opposed by the three Bucar defendants, who hold a mortgage on the land which was registered prior in time to the caveat of the Plaintiff. The Plaintiff takes the position they should obtain title without it being subject to the mortgage in favour of the Bucar's.

[para2] Section 31 of The Condominium Property Act , R.S.A. 1980, c22 provides for a condominium corporation to file a caveat against property for unpaid fees, and provides that once filed, the corporation has a charge against the units equal to the unpaid fees. Subsection 6 provides a charge of this type has the same priority from the date of filing of the caveat as a mortgage and may be enforced in the same manner as a mortgage under the Land Titles Act.

[para3] It is clear that the mortgage given to the Bucar's was granted and registered prior in time to the caveat of the Plaintiff. It is also clear that the Land Titles Act provides for priority by date of registration, so that under the legislative regime, the mortgage of the Bucar's is first in time and would have priority. Section 31(6) of the Condominium Property Act would seem to confirm this .

[para4] However, the Plaintiff argues that the treatment of unpaid condominium fees in a number of cases actually operates to make those fees a prior charge on the land, and thus would give it the ability in this case to effectively take priority by eliminating the mortgage of the Bucar's as it proceeds with the foreclosure action, and take title without reference to that mortgage.

[para5] The issue of the priority to be given to condominium fees has been the subject of a number of cases. The initial approach in *Central and Eastern Trust Company v. Borland* 14 Alta. L.R. (2d) 376 has been reversed. Alberta courts on a number of occasions have held that unpaid condominium fees are a charge with some priority. In *Toronto Dominion Bank v. Neil MacGillivray et al* , an unreported decision of Master Quinn dated May 31, 1982, he held that a prior mortgagee who had paid out condominium fees under a subsequently filed caveat, could add those costs to the mortgage and enforce them against the mortgagor, as the caveat will have priority over a mortgage in spite of the fact that the mortgage is registered prior to the date of the registration of the caveat. The Alberta Court of Appeal in *Adler, Furman & Associates Ltd. v. Owners Condo Plan CDE 13442*, 37 Alta. L. R. (2d) 338 held that a caveat filed to protect condominium fees which are unpaid is not properly taken off title following a foreclosure by a prior mortgagee, the corporation has a right to refile. This seeming priority being given to the payment of the condominium fees, has its basis in subsection 2 of Section 31, which allows a condominium to recover fees not only from the owner, but the owner at the time the action was instituted, both jointly and severally. The result of the decisions has been that the foreclosure by a prior mortgage does not extinguish a subsequently registered charge by a condominium corporation.

[para6] Thus, unpaid condominium fees are treated much as tax arrears, and all tenders are subject to those caveats, as the mortgagee or new owner will be responsible for them.

[para7] The question in this chambers application then becomes, does this priority work to allow the Condominium Corporation to not only claim priority, but in a situation where the appraisal indicates no equity above the condominium fees outstanding, to take title to the property and eliminate the prior registered mortgage of the Bucar's. To do this, the Plaintiff argues that the Court should strike the Statement of Defence of the Bucar's, which claims priority under the Land Title's System, and allow a foreclosure of the interest of all defendants, including the Bucar's and foreclose that right as well as any equity of redemption without any attempt at public sale, on the basis there is no equity in the lands.

[para8] Although there is a priority granted to condominium fees by virtue of statutory provisions which allow them to be claimed against subsequent owners which may operate to allow them to be paid in priority out of any funds upon the forced sale of the lands in a foreclosure situation, that fact alone does not necessarily allow the condominium corporation to get title to the property without encumbrances ranking prior in time, which would otherwise have priority under the provisions of the Land Titles system and governing legislation. If the condominium corporation could do this, the result would be to allow the condominium corporation the right to take the land, but to an extent pick and choose the prior encumbrances on title.

[para9] Here the Plaintiff suggests that the many caveats to protect leases and utility right of ways remain, but the mortgage be removed. I do not believe that this is the correct result. Any priority arising out of S. 31 (2) in the cases arises because of the ability of the corporation to enforce the debt against a subsequent registered owner. The section does not give any rights beyond that, and should not be used to allow the condominium corporation to take title to the land in a foreclosure and eliminate a prior registered mortgage in what would seem to be a direct contradiction of the meaning of s 31(6) of the Act.

[para10] In these circumstances, it is more in compliance with the Land Titles system and legislation that the lands be advertised for sale, allowing tenders to be made. This then allows the Bucars to exercise any rights they may have as mortgagees, which would include paying out any debts which may have a priority, in order to preserve their position on the land. I do not see that this is an appropriate situation for an order to go allowing the Plaintiff to obtain an order transferring title into its name, removing some but not all of the prior encumbrances and effectively extinguishing any rights the Bucar's may have due to their position of being registered prior in time.

[para11] I would also comment that the one appraisal provided by the Plaintiff, gives a total value of \$20,000 based on four lots having a value of 5,000 each and two lots having no value due to the fact of the access issues and costs. The appraisals are

effective as of March 24, 1996, over two years old at the time of this application. In this circumstance, in absence of a more up to date appraisal, advertising of the lands is preferable to test the current value of the lands.

[para12] In summary, I will allow the amendment to the statement of claim requested by the Plaintiff and not opposed by the Defendants. I will not grant the foreclosure or the direction that the lands be registered in the Plaintiff's name without any attempt at a public sale.

[para13] If counsel need more specific direction, they are at liberty to speak to me.

NATION J.

CBR# 379

York Humber Limited, plaintiff (defendant by counterclaim), and Maria Mesa and Juan Mesa, defendants (plaintiffs by counterclaim), and Martin Atkins Limited, third party

Court File No. 72954/91Q

Ontario Court of Justice (General Division) B. Wright J. Heard: January 30 and 31, 1997. Judgment: February 11, 1997.

Counsel: Timothy J. Murphy, for the plaintiff. Paul Stocco, for the defendants. Elana Levinson, for the third party.

[para1] B. WRIGHT J.:-- On July 10, 1988, the Mesas signed an agreement to purchase a condominium unit for \$178,000 from York Humber. The Mesas failed to complete the sale transaction due to encountering financial difficulties. York Humber subsequently resold the condominium unit. It brings this action claiming the deficiency between the original sale price and the resale price plus its losses as a result of the Mesas' failure to occupy the condominium unit and its costs.

[para2] The Mesas counterclaim for the return of their deposit of \$20,000 plus interest pleading that the agreement of purchase and sale is not binding on them because they did not receive a disclosure statement. [para3] Section 52(1) of the Condominium Act provides that an agreement of purchase and sale is not binding upon a purchaser until ten days after receipt of a disclosure statement from the declarant.

FACTS

[para4] The summer of 1988 was the boom time for condominium sales in the Toronto area. Developers' sales offices were crowded with potential purchasers scrambling to purchase units in buildings where construction had not even commenced. The condominium market was a frenzy of activity.

[para5] The York Humber sales office was no exception when the Mesas attended on Sunday afternoon July 10, 1988. The Mesas were unsophisticated in real estate matters never having purchased any real estate. Both Mr. and Mrs. Mesa testified that they entered the sales office which was crowded with twenty to thirty people. They spent five to ten minutes viewing the promotional material in the sales office, floor plans, artist sketches etc., before being approached by a salesperson. [para6] Martin Atkins Limited, a third party in this action, was the sales firm retained by York Humber to market the condominium units. Marshall Cohen was the sales representative who had contact with the Mesas when they signed the agreement.

[para7] Mr. Mesa testified that Cohen expressed to them how good a deal the units were, that there was nothing else anywhere in that price range and, that the cheapest were all gone and the rest were going really fast.

[para8] Mrs. Mesa said that Cohen stated, "By the end of the day there will be none left". Mrs. Mesa referred to a board which listed all the available units but the one she said they were interested in was already sold according to Cohen, although it was listed on the board.

[para9] Cohen testified that he did not recall the particulars of the Mesa transaction and did not recognize the Mesas in court. Therefore, Mr. Cohen was able to testify only as to his usual practice in dealing with potential purchasers.

[para10] The agreement of purchase and sale consists of a front signature page to which is attached Schedules A through E. It is Cohen's evidence that he carried a clip board on which were several copies of the front page of the agreement and one copy of the schedules. He indicated that there was a stack of schedules somewhere else. He would fill out the front page of the agreement with the name and address of the purchaser, the purchase price, unit number, occupancy date and name of the purchaser's lawyer. The front page would then be given to the receptionist who would make six copies and the six copies would be returned to him stapled together. Cohen would have the purchasers sign the front page of the agreement and initial the unit purchased on Schedule E.

[para11] The signed agreements would then be given back to the receptionist to check. In his examination in chief Cohen said that he would receive back from the receptionist a yellow manila envelope with the front page of the agreement sticking out the top showing the name of the purchaser. He said the envelope would have the condominium documents inside because the thickness of the envelope would tell you that the condominium documents would be in the envelope. In this case the condominium documents are bound together with a Cerlox binding with a cover page entitled "River Ridge Condominium Documents". Cohen would give the purchasers the envelope, congratulate them and tell them they had ten days to cancel.

[para12] However, on cross-examination he embellished his evidence by stating that when he received the envelope from the receptionist he usually took the agreement out of the envelope and looked inside to see that the condominium documents were in the envelope.

[para13] Cohen said the only discussion he had with the Mesas with respect to the agreement was going over the front page with them which included the purchase price, deposit, occupancy date, name of their lawyer and that they had ten days to cancel.

[para14] Mrs. Mesa stated that from the time they first met Cohen about ten to fifteen minutes had passed until they were waiting in line to sign because there was another couple in front of them. She said that Cohen never explained anything and said nothing about condominium disclosure documents. According to Mrs. Mesa, Cohen just lifted up the papers where they were to sign, they were on top of each other, all in one document. With respect to Schedule E she said they initialled one on top of each other.

[para15] Once the signing was completed Mrs. Mesa said that Cohen told them to wait at the reception area. A woman receptionist handed a copy of the agreement to them along with a brochure or pamphlet with drawings and pictures of the project. She could not remember whether the agreement and brochure were in an envelope.

[para16] With respect to the signing procedure, Mr. Mesa said that the front page and the back page which is Schedule E were one on top of the other, and that Cohen gave the front and back pages to the receptionist who put them together with the other papers and then gave a copy of the agreement to them, along with a folder containing an advertising brochure.

[para17] Mr. Mesa stated that the agreement was not explained to them and they were given no opportunity to review it. He said they waited at the reception area along with other people and when their names were called a woman handed them a copy of the agreement with a folder containing the brochure which Mrs. Mesa had described. [para18] Both Mr. and Mrs. Mesa are positive that the only documents they received from York Humber on July 10, 1988, was a copy of the agreement and the brochure. They did not know what a disclosure statement was; they were not asked by their first lawyer about a disclosure statement; they did not know what their new lawyer was talking about when he asked about the disclosure statement and, they did not see a copy of the "River Ridge Condominium Documents" until shown a copy by their new lawyer.

[para19] Both Mr. and Mrs. Mesa said that Mr. Mesa took the agreement of purchase and sale to their lawyer. If they had received a copy of the Condominium Documents they both said they would have given it to their lawyer along with the agreement of purchase and sale.

[para20] Although it was Mr. Mesa who dropped off the agreement at their lawyer's office and gave it to the receptionist, Mr. Mesa has never spoken to the lawyer. It was Mrs. Mesa who dealt with the lawyer. The only discussion she had with their lawyer was over the telephone or by correspondence. She stated that their lawyer never asked her about a disclosure statement.

[para21] Their lawyer, Mr. Weinstein, gave evidence that he has never asked a client for a disclosure statement. He said that most clients do not deliver a disclosure statement to him, and if one did he would advise them that he was interested only in the question of title to the property, and that he would make it clear to a client that he would not review the disclosure statement as part of his retainer.

[para22] Mr. Weinstein did not recall any discussion with Mrs. Mesa concerning the disclosure statement. He knew that the Mesas were in financial difficulty and were not able to finalize the purchase. He said he would have discussed with Mrs. Mesa the possible consequences of not proceeding with the purchase and he referred to his letter to them of February 22, 1991. He said it was around this time that Mrs. Mesa indicated she was going to take the file to another lawyer. Mr. Weinstein did not recall ever meeting with the Mesas to explore avenues to get out of the transaction. Mr. Weinstein's evidence discloses that the Mesas' file was opened in his office long after the ten day rescission period although the Mesas' evidence records that the agreement was dropped off at Mr. Weinstein's office some time during the week of July 10, 1988.

[para23] It was some time after February, 1991, that the Mesas retained Mr. Stocco, their current lawyer, at which time he raised with them the question of the disclosure statement.

DISCUSSION

[para24] Plaintiff's counsel argues that the Mesas, by signing the agreement, have acknowledged receipt of the disclosure statement.

[para25] Paragraph 4 of the agreement reads:

Acknowledgement - The Purchaser acknowledges having read the Schedules attached hereto and in particular Schedule C hereto which contains certain of the material terms of this Agreement governing the rights and obligations of the Purchaser.

[para26] Paragraph C.8 in Schedule C reads:

Receipt of Condominium Documents - The Purchaser acknowledges having received on the Receipt Date a copy of the proposed Condominium Documents.

[para27] On the evidence in this case I cannot fathom how counsel for the plaintiff could even think of making this argument. Cohen gave no specific evidence as to when the schedules were attached to the front page of the agreement. He did not say that he attached the schedules. No member of the administrative staff working at the sales office was called to give evidence concerning administrative procedures. On the evidence in this case I find that it is probable that the schedules were not attached to the front page of the agreement until after the Mesas signed the front page.

[para28] No matter at what point in time the schedules were attached to the front page it is clear that the Mesas were given no opportunity to read the schedules before signing the agreement. I find that Cohen permitted the Mesas to sign the agreement knowing that they had not read the schedules and knowing that by signing, the Mesas were acknowledging that they had read the schedules. Not only was this poor business practice, it was deceitful. [para29] I turn now to the question whether the Mesas received a copy of the disclosure statement. The answer to this question rests on the credibility of the evidence from the parties.

[para30] Both Mr. and Mrs. Mesa presented their testimony in a straightforward, candid and honest manner. I observed their demeanour throughout the trial and they gave no hint that their evidence was anything other than being completely truthful.

[para31] I find that Cohen did not say anything to the Mesas about the disclosure statement. I also find that Cohen had nothing to do with providing purchasers with the condominium documents. I find that after the Mesas signed the six front pages of the agreement and initialled the six copies of Schedule E and those pages were given to the receptionist, Cohen had no further contact with the Mesas.

[para32] Once the Mesas had signed the agreement there was no purpose for Cohen to have further contact with them. He had sold a condominium unit. That was the reason for his presence in the sales office, to sell. This was a busy Sunday afternoon at the sales office with many prospective purchasers. Why meet with the Mesas a second time when it is likely other prospective purchasers were waiting for a salesperson to talk to them?

[para33] In the absence of any witness for the plaintiff to explain the administrative procedures at the sales office, I find the Mesas' evidence that Cohen told them to wait at the reception area, that they waited there along with other people, and that the documents they received before leaving the sales office was given to them by the receptionist, to be more plausible than Cohen's evidence.

[para34] Taking into consideration the above findings with respect to the procedures at the sales office, coupled with the fact that Cohen did not mention anything to the Mesas about a disclosure statement, Mr. Weinstein had no discussion with the Mesas about a disclosure statement, the Mesas did not know what Mr. Stocco was talking about when he asked them if they received a

disclosure statement and, they did not see the bound Condominium Documents until shown a copy by Mr. Stocco, I find on a balance of probabilities that the Mesas did not receive the disclosure statement. As a result they have a right to a rescission of the agreement.

[para35] On July 10, 1988, York Humber was more concerned to sell condominium units than to follow good business practices for its own benefit. It is astonishing when a vendor of condominium units knows an agreement of purchase and sale is not binding until ten days after receipt by the purchaser of a disclosure statement, that proper steps were not taken to ensure that the purchaser received a copy of the disclosure statement.

[para36] I understand that as a result of this litigation vendors now require that purchasers initial paragraph C.8. I simply point out that paragraph C.8 in the Mesas' agreement refers to "Condominium Documents" and not to a disclosure statement. Vendors would be wise to have purchasers sign and date a specific acknowledgement that they have received a copy of the disclosure statement, its purpose has been explained to them, and they have been told they have ten days to rescind the agreement.

[para37] Although Mr. Weinstein's involvement as the Mesas' original lawyer had no impact on my decision, I find that the legal services he provided were inadequate. Firstly, I do not understand how a lawyer can properly communicate with a client if the only communication is by telephone and correspondence. Secondly, a lawyer knows that in a condominium purchase the client has ten days to rescind. Therefore, there is an obligation on a lawyer to contact the client within ten days of the receipt of the copy of an agreement of purchase and sale. That did not happen in this case. Thirdly, although a lawyer is not advising a client on the wisdom or feasibility of the purchase of a condominium, I suggest there is at least an obligation on a lawyer to explain the purpose of the ten-day period and to advise the client to read the disclosure statement to ensure that what they propose to purchase is what they want to purchase. If the Mesas had received a disclosure statement, the benefit of the ten-day rescission period would have been lost.

CONCLUSION

[para38] The plaintiff's claim is dismissed. The defendants' counterclaim is allowed. There will be judgment for the defendants in the amount of \$20,000, plus interest at the applicable rate from the date the deposits were made plus costs. If counsel cannot agree on costs I may be contacted to fix costs.

B. WRIGHT J.

CBR# 306

John Lee Stephens, Rosemary Julia Stephens and Lease Truck Inc., plaintiffs, and Halton Condominium Corporation No. 183, defendant

Court File No. C11651/93

Ontario Court of Justice (General Division) Walters J. June 11, 1996.

Counsel: A. Glen Bryant for the plaintiff. R. Noel Bates for the defendant.

[para1] WALTERS J.:-- The plaintiff purchased a retail unit in the defendant condominium corporation. Water leaked through the roof of the plaintiffs' unit and caused damage to the interior of the premises. The leaking roof was finally repaired in late 1991, more than two years after the plaintiff took occupation of the premises and first complained of the water problem. The plaintiff seeks damages for a breach of contract, or in the alternative, negligence on behalf of the condominium corporation.

[para2] The defendant corporation denies any wrongdoing. Firstly, at the time of occupancy, the builder, Burley Developments Limited, was the owner of the property. The condominium corporation did not assume ownership until July 11th, 1990, at which time the water damage had already occurred. The defendant acted in a reasonable and responsible fashion and had the roof repaired as quickly as possible. The defendant also alleges that any damage suffered by the plaintiff is minimal and not visible to the naked eye. [para3] There is little doubt that the builder would be liable to the plaintiff for the damage caused by the leak. However, they are no longer in business and no action has been commenced against them. The issue for the court to determine is whether the defendant is responsible for all damage sustained by the plaintiff, both before and since it took control of the condominium.

Background Facts

[para4] The plaintiffs entered into an agreement of purchase and sale with the builder, Burley Developments in 1988 with respect to unit 9, 4380 South Service Road, Burlington, Ontario. The purchase price was approximately \$254,000.00. Interim occupation of the premises commenced in or around the month of March, 1989. Prior to entering into interim occupation, the plaintiffs completed certain leasehold improvements, consisting of the construction of a steel framed dividing wall, dry walling, painting and carpeting. The leasehold improvements were completed by March 1989.

Water leakage from the roof was first noticed, shortly after interim occupancy commenced, as the ice and snow on the roof began to thaw in the spring of 1989. Although the roof was leaking in various places, most of the water damage occurred in the westerly one third of the front of the plaintiff's unit. After the leak was noticed, the plaintiff contacted the builder in an attempt to have it fixed, without success.

[para6] The plaintiffs contend that the leak initially caused water damage to, and staining of the carpet, damaged paint on the painted steel ceiling, and damaged paint and drywall taping on the main dividing wall. Damage was increased on each occasion when it rained sufficiently to cause leakage into the premises.

[para7] The condominium declaration was registered on February 14th, 1990. In April, 1990, a notice of turnover meeting was forwarded to all of the unit owners to complete the formal takeover of the development from the building. The takeover meeting was held on July 10th, 1990.

[para8] Prior to the turnover meeting, David Beckett, Treasurer of the condominium corporation, requested all unit owners to advise of any problems or complaints with regard to the general construction of the condominium. In response to the correspondence he received, Mr. Stephens advised Mr. Beckett in writing that he continued to have problems with leakage in his unit and that the carpet damage had not been corrected.

[para9] According to Mr. Stephens, he attended the turnover meeting and spoke with the builder, the builder's solicitor and Michael Morgan, one of the members of the condominium board of directors. Prior to the commencement of the meeting, he advised the parties that the turnover meeting was premature as the problems with the roof over his unit had not been corrected and the damage to the inside of his unit had not been looked after. It was his recollection that the builder and his solicitor indicated they would look after it and that Michael Morgan indicated that if the builder didn't look after it then the condominium corporation would be responsible. Based on the reassurance that he received at this turnover meeting, he voted in support of the turnover from the builder.

[para10] Mr. Morgan testified that he did recall having discussions with Mr. Stephens on the date of the turnover meeting, however, it was his evidence that discussion was after the meeting and although they discussed the repairs to the roof, he denied any commitment to repair damages to the inside of the plaintiffs' unit.

[para11] I accept the evidence of Mr. Stephens with respect to this issue.

[para12] The leakage continued through to 1991. A roofer retained by the condominium corporation inspected the roof in the summer of 1990 and again sometime in the fall of 1990, but was unable to find the cause of the problem. When the problem was not fixed by February 1991, Mr. Stephens inappropriately elected to cease payment of his common area expenses. The roof was finally repaired in April 1991. The defendant continued to deny any liability for the damage to the interior of the unit.

[para13] As a result, Mr. Stephens continued to withhold common area expenses throughout 1991. Discussions took place between Mr. Stephens and Mr. Michael Morgan with respect to the possibility of the condominium corporation commencing an action against the builder to recover damage suffered as a result of the leaking roof. In order to vote on the proposal to retain counsel to commence an action against the builder, Mr. Stephens brought his common area expenses current. He attended at the meeting and voted in favour of that proposal. The proposal was passed. However, no action was commenced against the builder by the condominium corporation and in 1992 Mr. Stephens again inappropriately withheld the payment of common area expenses.

[para14] In March 1992 a lien was placed on the premises by the condominium corporation for the arrears of the common area expenses. To date, the arrears have continued to mount and the damage to the plaintiffs' unit has yet to be repaired.

The Law

[para15] Section 41 of The Condominium Act sets out the obligation to repair and maintain.

Repairs and Maintenance

Section 41 (1) For the purpose of this Act, the obligation to repair after damage and to maintain are mutually exclusive, and the obligation to repair after damage does not include the repair of improvements made to units after registration of the declaration and description.

(2) Subject to Section 42, the corporation shall repair the units and common elements after damage.

(3) The corporation shall maintain the common elements.

(4) Each owner shall maintain the owner's unit.

(5) Despite subsection (2), (3) and (4), the declaration may provide that:

(a) each unit shall, subject to s. 42, repair the owner's unit after damage;

(b) the owner shall maintain the common elements or any part of the common elements;

(c) the corporation shall maintain the unit; or

(d) each owner shall maintain and repair after damage those parts of the common element of which the owner has the exclusive use.

[para16] The plaintiffs argue that by excluding the obligation to repair improvements made after registration of the declaration, The Condominium Act, in fact imposes a clear obligation to repair improvements made prior to such registration. The plaintiff quotes Loeb, Condominium Law and Administration, Chapter 19, page 19-2:

"There is, however, an inconsistency between sections 27 and 41. Section 41(1) provides that the obligation of the corporation to repair after damage does not include the repair of improvements which are made to units after the registration of the declaration and description. The corporation would, therefore, be required to repair damage to any improvements made to a unit during interim occupancy (i.e. before registration). Section 27 excludes from the insurance coverage that the corporation must procure any improvements to a unit no matter when made. In order to insure that insurance proceeds are available to the corporation to effect repairs to unit improvements made during interim occupancy, the corporation must insure beyond the minimum set out in s. 27(1) or be certain that the condominium declaration provides that the obligation to repair the unit after damage is the unit owner's."

[para17] The defendant argues that this is precisely what the defendant condominium corporation has done. The defendant relies upon s. 41(5) of the Act, which states:

"41(5) despite subsection (2), (3) and (4) the declaration may provide that:

(a) each owner shall, subject to s. 42, repair the owner's unit after damage;"

[para18] Article IV of the declaration of the defendant's condominium corporation states as follows:

Maintenance and Repairs

"(1) Each owner shall maintain his unit and, subject to the provisions of the declaration and s. 41 and s. 42 of the Act, each owner shall repair his unit after damage, all at his own expense. Each owner shall be responsible for damage to any other unit or to the common element which is caused by the failure of the owner to so maintain and repair his unit."

[para19] Although I have no doubt that the defendant corporation had every intention of taking advantage of s. 41(5) of The Condominium Act, to provide that the obligation to repair the unit after damage is the unit owner's, they have not succeeded. The declaration as worded is subject to s. 41 of the Act. S. 41 of the Act clearly makes it the corporation's obligation to repair and maintain. In the circumstances, I find that the defendant corporation is obligated to repair and maintain the plaintiffs' unit, which includes the damage occasioned to the unit as a result of the leaking roof.

Damages

[para20] I now turn to the issue of damages. The plaintiffs relied on the evidence of Mr. William Mowat, who was the original contractor engaged to construct the 24 foot high steel frame drywall partition. He gave evidence that he has inspected the premises recently, from a floor level and was able to see staining, rusting, loose paint and drywall taping, consistent with what you would expect to find from water leakage on several occasions over a lengthy period of time. A quote for painting and repair was submitted in the amount of \$945.00. I accept his evidence.

[para21] The plaintiff also relied on evidence given by Mr. Bob Massicotte of Associated Mill Distributors. Mr. Massicotte supplied the original carpet to the premises, which he described would be of extremely high quality. Although he did not have the original invoice, he estimated that the original cost of the carpeting would have been \$3,000.00 to \$3,500.00 plus the cost of installation. Mr. Massicotte inspected the carpet prior to October 16th, 1991, although he did not recall the exact date of inspection. He observed staining of the carpet in the westerly one third of the office. The stain was apparent to the naked eye on inspection. He also testified that he believed the carpet had been steam cleaned at his suggestion, prior to the initial inspection. He was aware that one section of the carpet had been patched with an existing remnant, but was unable to comment on the quality of the patch work done. He further testified that repeated exposure to water could cause deterioration of the natural fibres in the carpet. Mr. Massicotte viewed the carpet shortly before trial and described the staining as subtle but stated that the damage would always be there even if the actual stain did not jump out at you. A portion of the carpet could be replaced through a custom order

but there would be no guarantee that there would be a precise match to the existing carpet. The present replacement cost of the carpet would be in the range of \$7,000.00 to \$7,500.00 and the total cost, including installation, would be approximately \$9,000.00.

[para22] The defendant relied on Mr. Beckett, a director of the condominium corporation who indicated that he inspected the carpet at the unit in the fall of 1991. He was unable to see any staining, and felt that the plaintiffs' claim against the condominium corporation was without merit.

Order

[para23] I accept the evidence of both Mr. Mowat and Mr. Massicotte and in the circumstances judgment will go against the defendant in the amount of \$9,945.00. As the repairs have not yet been completed and the estimates are for the present value of the work to be completed there will be no prejudgment interest.

[para24] Unless I receive submissions from counsel within 10 days of today's date, regarding costs, the plaintiffs are entitled to their costs of this action on a party and party basis.

WALTERS J.

CBR# 77

Brantford Condominium Corporation No. 25, plaintiff, and Double "G" Contractors Limited, defendant, and Brantford Landscaping & Sodding Ltd., third party

Nos. 503/93 and 503A/93

Ontario Court of Justice (General Division) Brantford, Ontario Kent J. January 3, 1996.

Counsel: C.J. Bolan, for the plaintiff. J.S. Davies, for the defendant. P.A. Giles, for the third party.

KENT J.:--

ISSUE:

[para1] Can the builder of a condominium project be held liable to the condominium corporation for defects in materials supplied, or work performed negligently or in an unworkmanlike manner, by a subcontractor during construction of the common elements?

BACKGROUND:

[para2] Double "G" constructed 50 townhouse-type units as a condominium project. During construction, Double "G" engaged Brantford Landscaping to construct a retaining wall at the edge of a parking lot located at the end of one row of condominium units. The wall was approximately 70 feet long with an average height of approximately six feet. It was a "crib" wall made of pieces of pre-cast concrete and filled with earth. It had an open face to the parking lot. Topsoil was placed on top of the wall and topsoil extended approximately 8 feet from the top of the wall to the foundation of the end condominium unit. The wall was not designed by an engineer. It was installed by Brantford Landscaping under the guidance of the supplier of the pre-cast concrete crib units. That supplier was in contact with the manufacturer but the extent to which he may have received installation advice through that contact is not known.

[para3] The condominium was registered on 22 February, 1990, at which point, by law, a one year warranty period commenced providing, inter alia, that the wall was constructed in a workmanlike manner and was free from defects. Just prior to the expiry of the warranty, Condominium Corporation expressed its concern to Ontario New Home Warranty Program personnel that "a walkway" by the retaining wall was "sunken". The issue was not resolved and erosion at and through the wall progressed. In January, 1992, officials from the Ontario New Home Warranty Program made their decision that any deficiency with the wall was a maintenance concern, not a construction defect and not therefore the responsibility of Double "G".

[para4] Condominium Corporation pursued the matter further by appealing from that decision and engaging a professional engineer. On the basis of the opinion of that engineer, it then commenced this claim against Double "G" alleging what amounts to negligence by Brantford Landscaping for which negligence Double "G" was responsible pursuant to its warranty. The Condominium Corporation has undertaken and agreed that its appeal of the Ontario New Home Warranty Program decision will not be pursued, having elected to seek its remedy in this forum.

WAS WORK BY BRANTFORD LANDSCAPING PERFORMED NEGLIGENTLY OR IN AN UNWORKMANLIKE MANNER?

[para5] Ronald Bisailon of Brantford Landscaping admitted that he did not construct the wall strictly in accordance with the "design/specifications" diagram on the manufacturer's brochure, Exhibit 15. He did not install the sub-drain, the quantity of granular backfill, or the geotextile filter fabric shown in the diagram. He maintained that these items were not necessary given the location of the wall, the lack of any ground water problems and the proximity of a building with its own drainage system. He was supported in this view by an engineer, Robert Phillips whose report is Exhibit 23. Phillips testified that erosion is normally a maintenance problem. It was his opinion that the highly concentrated nature of the erosion adjacent to and through the crib wall was consistent with water from the nearby buildings downspouts being permitted to discharge too close to the wall. He suggested that that discharge would have been a 90 to 95 per cent cause of the erosion that led to a deterioration of the wall. He would have recommended directing the downspouts away from the wall or hooking them into some other drainage system, or run them underground with extensions out through the wall. The later option was ultimately followed by another contractor employed by Condominium Corporation.

[para6] To endeavour to establish that Brantford Landscaping performed negligently or in an unworkmanlike manner, Condominium Corporation relies on the evidence of its witness Colin Lee, an engineer whose reports are Exhibits 6 and 8. He maintained that failure to fully adhere to the "design/specification", particularly the granular backfill and geotextile filter fabric requirements was critical. It was his opinion that if the specifications had been followed any water discharged from the downspouts would not have damaged the wall. Lee conceded in cross-examination that taking the downspout leaders underground and out through the wall would not have been difficult or expensive, but felt that that would not have solved the problem. He also agreed that photographs in evidence showed most soil had washed out through the wall opposite the downspout locations. He stated that he had observed erosion throughout the entire length of the wall but concentrated towards the ends where the downspouts were located.

[para7] In light of the foregoing evidence, I am not persuaded that Brantford Landscaping performed negligently or in an unworkmanlike manner when it did not construct the wall in accordance with the "design/specifications". Phillips' opinion is at least equally supportable to that of Lee's. Lee's opinion does not establish the plaintiff's contention on a balance of probabilities.

IS THERE ANY OTHER BASIS FOR LIABILITY ON THE WARRANTY?

[para8] In May of 1990, Double "G" turned over the project to the Condominium Corporation Board of Directors. Until that point, Double "G" had engaged Parkside Management to manage the project. Gabriel Gasbarrini, the principal of Double "G" testified that he did not pass on to Parkside or Condominium Corporation board members any concern about maintaining plant life in the face of the wall or insuring that the extensions from the downspouts were kept attached to the downspouts and directed away from the wall. He was not specifically concerned with these maintenance matters and gave them no more concern than

maintaining the grass. He knew that the plant life would give the wall a more aesthetic appearance from the parking lot and was aware because Bisailon of Brantford on the face of the wall helped hold the earth in the crib wall.

[para9] It appears that Double "G" did not meet its obligation to the Board of Condominium Corporation at the turn-over meeting. Section 26 of the Condominium Act R.S.O. 1990, c. 26, s. 26(e)(i) and (k) all may apply. Double "G" should have given the board information concerning Brantford Landscaping's warranty on the wall and some instruction concerning the maintenance of the plant life on the face of the wall. Gasbarrini wasn't particular concerned with the extensions on the downspouts and the need to maintain them both attached to the downspouts and directed away from the wall. It is understandable that with that lack of concern, and having received no warning from Brantford Landscaping concerning maintenance, he would not have passed on any information to the Board of Condominium Corporation concerning same. His lack of concern existed because he was never cautioned by Brantford Landscaping about the importance of the downspouts and leaders or extensions.

[para10] Bisailon also apparently had no concern about the downspouts and leaders at the time of installation. He discussed the location of the leaders with Double "G"'s on-site superintendent. He installed the same make of wall at his business premises late in 1989. At that location, he initially had a downspout problem and installed a pipe to cure that problem. This should have alerted him to check the Double "G" installation, the first wall of this type ever constructed by Brantford Landscaping. It was still under his one year warranty and he should have specifically instructed Double "G" concerning maintenance. Failure to so advise and instruct Double "G" meant that Gasbarrini was unaware of the importance of maintenance and could not therefore meet Double "G"'s obligation under the Condominium Act to give the Board information relevant to the repair or maintenance of the property and in particular this portion of the common elements.

[para11] With such a new product, Brantford Landscaping had a duty to keep its customer informed, advised and instructed in a more complete manner than it did. Its breach of that duty in the circumstances constitutes negligence and makes Brantford Landscaping liable to Double "G" on the third party claim to the extent that Double "G" is found liable to Condominium Corporation for its failure to provide the board of the corporation with relevant maintenance information. Double "G" is liable to Condominium Corporation for its omission which constitutes a breach of its Condominium Act obligation. Double "G" was negligent in not obtaining the necessary information and passing it on.

WHAT DAMAGES IS CONDOMINIUM CORPORATION ENTITLED TO?

[para12] Both Double "G" and Brantford Landscaping have pleaded that the plaintiff by its actions failed to mitigate or perhaps even aggravated its damages. I agree. The photographs indicate a significant degree of vandalism in the area of the wall. A member of the Board of Condominium Corporation, Paul Parker, described the kind of vandalism that occurred to the fence on the top of the wall and the manner in which children played and climbed on the wall. These may have been contributing factors to the wall's deterioration. Similarly, Parker conceded that an earlier landscaper may have removed plant material from the wall, another possible cause of deterioration. Parker also conceded that when the "sunken walkway" was first brought to his attention in February, 1991, he noticed what he described as settling but developed no concerns at that time. Failure to act more promptly no doubt contributed to the wall's deterioration.

[para13] More significant developments occurred in the fall of 1991 concerning a need for remedial action. By early December, Condominium Corporation was aware of what repair and maintenance work would in the opinion of the chief building official for the City of Brantford, be required to make the wall satisfactory. See Exhibit 1, Tab 31.

"... the enclosed letter from Evercrete Limited (manufacturer of the precast concrete components of the wall) which outlines repair and maintenance work required to complete the wall satisfactorily. Subject to this work being carried out, we would approve the construction of the wall."

The Evercrete letter stated the following:

"We recommend that remedial action be taken by excavating the crib in the effected area and inserting a drainage pipe through the wall. More fill should be placed behind the crib and additional topsoil and sod to recreate the swale. The swale must drain water from the face of the crib and not be allowed to pool behind the crib. Please note that where fill has been removed from the face of the crib by vandalism, this fill material should be replaced and replanted as necessary."

There is no precise evidence of what the total cost of that work would have been, but piecing together the portions of it from the ballpark estimates given by Bisailon, Lee, Abrahamson (vice-president of Evercrete at the relevant time) and by counsel in their submissions, it is hard to envision the work, if done then, to have had a cost in excess of \$6,000.

[para14] Counsel for the plaintiff argues that Condominium Corporation acted reasonably in deciding to remove the deteriorated wall entirely and replace it with a new maintenance-free wall. He submits that the plaintiff should recover as damages the total cost of removal and replacement, \$20,490.50 plus engineering costs of \$4,378. Alternatively, he submits that the repair costs of the existing wall should be for rebuilding it at \$11,500 rather than repairing it at an estimated maximum of \$6,000 as set out above.

[para15] Once the plaintiff opted not to repair on the basis of the manufacturer's recommendations, it cannot hold the defendant liable for expenses created by its taking an alternative course. That constitutes both an aggravation of its damages and work beyond what in the opinion of the chief building official for the City of Brantford was necessary to make the wall satisfactory.

[para16] For the above reasons the plaintiff's damages are limited to \$6,000.

RESULT:

[para17] Condominium Corporation is entitled to judgment against Double "G" in the amount of \$6,000. Double "G" is entitled to recover judgment against Brantford Landscaping in the amount of \$6,000 on the third party claim.

[para18] Counsel may speak to the form of the judgment and costs at a date and time to be fixed by the trial co-ordinator during the week of 8 January, 1996.

KENT J.

CBR# 142

Sophie Jaremko, plaintiff, and Shipp Corporation Limited, defendant

Court File 91-CQ-2115

Ontario Court of Justice (General Division) Greer J. Heard: January 4-6, 9-13, 16, and 18-20, 1995. Judgment: July 6, 1995.

Counsel: Donald J. Lange, for the plaintiff. Robert D. Malen, for the defendant.

[para1] GREER J.:--The plaintiff, Sophie Jaremko ("the plaintiff" or "Jaremko"), has claimed rescission and the return of her monies paid as a deposit under an agreement of purchase and sale dated February 2, 1987 made between her and the defendant, Shipp Corporation Limited ("the defendant" or "Shipp") for the purchase of a condominium unit, suite 104, 1 Aberfoyle Crescent, Etobicoke ("the apartment"). The purchase included one locker unit and two parking spaces. In the alternative, the plaintiff has asked for damages arising from fraudulent or, in the alternative, negligent, innocent or reckless misrepresentation in connection with its purchase. Further, in the alternative, Jaremko claims damages for Shipp's alleged contravention of Section 52(6) of the Condominium Act, RSO 1984, c. 84 arising out of its failure to disclose in its disclosure statement, the existence of a moving lay by immediately outside her ground floor unit. She further claims damages for mental distress and her legal costs of \$35,000 with respect to her mitigation of her damages.

1. Background

[para2] Jaremko, a real estate broker, has been in the residential real estate business for about 20 years. Shipp is an experienced developer of real estate projects, including apartment buildings and condominiums. The unit is located in the Shipp luxury building known as, "The Kingsway On-the-Park", or MTCC 875. The project consists of two towers in Etobicoke which are adjacent to the Bloor Street subway system. They were constructed by Shipp between late 1986 and early 1990. Shipp managed these buildings for the first year after owners took occupancy.

[para3] Jaremko purchased two units from Shipp's architectural plans, unit 2303 in April and unit 104 in October of 1986. The plans were present at the company's presentation centre. She had neither bought nor sold from plans before but had previously purchased other residences before as well as a small commercial property which houses her office. In the year, 1980-81, Jaremko had bought and sold 6 residences. She was not a neophyte owner.

[para4] On October 22, 1986, Jaremko entered into a Reservation Agreement to purchase apartment 104 ("104") at a price to be determined. Attached to the Reservation Agreement was a prospective floor plan for the unit. A cheque for \$5,000.00 was given by Jaremko as a deposit for 104 to Veronica Lord ("Lord"), Shipp's employee. The Agreement of Purchase and Sale for this unit was signed on February 2, 1987 and Jaremko received the Disclosure Statement. Jaremko agreed that Shipp did not pressure her into making a decision to buy. On cross-examination, Jaremko conceded that her business was fantastic in 1986 at the time she signed the Reservation Agreement for 104 and conceded that the condominium market was strong at that point in time. Unit 104 was the smallest and least expensive unit in the building. Jaremko inspected 104 on January 27, 1989 for occupancy on January 30, 1989. It was not, however, until December 26, 1990 that the unit was actually occupied by a tenant.

[para5] Jaremko's never personally intended to occupy 104. It was her evidence was that she had purchased it for occupation by her daughters but did not tell them about the purchase. The first occupant of the unit was Shannon Kay, the daughter of Jaremko's friend, Dawn Kay. Almost immediately upon occupation of the unit, Kay complained about it. On January 17, 1991, the first letter of complaint was sent. By August of 1991, Jaremko had sued Shipp regarding the location of the service lay-by located directly in front of the apartment's bedroom window. The view from these windows was blocked when the lay-by was occupied by moving trucks. She also complained about the location of the moving room right next to her apartment and the noise and congestion it created for tenants.

[para6] Shipp, a family operated company, has been in the building business for over 70 years. It has a good reputation. Shipp takes the position that Jaremko purchased 104 for investment purposes as the condominium market was heating up when the complex came on the market. It maintains that Jaremko was given full disclosure of the lay-by through letters she received, the plans which were available, the model of the building and the picture of the complex available to her when she attended at the Presentation Centre, and from the Disclosure Statement provided to her. Shipp points out that when Jaremko moved into apartment 2303, her moving van occupied the very spot of which she now complains. Shipp took the position that Jaremko had deliberately bought the cheapest unit in the building for resale and when condominium market values began dropping, she could not sell it, and thus her lawsuit. I accept Jaremko's evidence that she originally intended the unit to be occupied by a family member.

2. The Promotional Material

[para7] Jaremko, as a Broker, knew of Shipp's plans to build the condominiums. There was advance advertising and Jaremko attended a few receptions at the Shipp Centre where literature was available. This could have been as early as 1985. In any event, some general advertising material was sent to Jaremko, including one brochure entitled "Shipp Corporation Limited Construction and Design-Build", and another entitled, "Shipp Corporation Limited", which she picked up at the Centre where she spoke to the president, Stuart H.B. Smith, and to Victoria Shipp.

[para8] Glossy brochures for the "Jackson" and the "Belvedere" and the "Strath", three of the various apartments in the new complex, were available at the Presentation Centre. When Jaremko entered into the Reservation agreement for her own unit 2303, she received a glossy of it.

[para9] There was a lot of activity at the Shipp offices regarding these new proposed buildings, with many people booking many appointments to discuss purchases. In Jaremko's view, there was not a lot of time to think and ask questions. Jaremko was helped by the agent, Lord.

[para10] Shipp later had available a 2'-3' high model of the complex with its two towers plus landscaping, for prospective purchasers to view. This model did not show the service lay-by nor did it show the moving room as being next to apartment 104. The landscape greenery affixed to the model quite clearly extended across the full front of the building and no entrance to the moving room was visible.

3. Materials received for Apartment 104

[para11] The Reservation Agreement for 104 was signed in October, 1986. On January 15, 1987, Jaremko received a letter from Victoria Shipp outlining what had to be done to finalize the reservation within the next few weeks. The following is some of the information contained in that letter:

We are enclosing a facsimile of the proposed final floor plan of the suite type you have selected, as well as proposed plan of the lobby level, showing the total amenity package

For your personal safety and future health concerns, we have included a "Condoplex" Security/System which will be installed in your suite ...

We have adjusted the prices on all suites by approximately 10% over the reserved price and the contract price on the suite which you have reserved is now set at \$173,000.00 or \$150.00 per square foot, which includes one indoor parking space valued at \$15,000.00 Since your reservation process number is 362 the earliest that we can book your appointment is Feb 2. In order to facilitate this, your five days will run from this designated appointment date ...

The purpose of the appointment is to determine whether you wish to complete the purchase of this residence. In our Presentation Centre, we will have large floor plans available for your viewing, a typical kitchen ...

You will be provided with the Condominium Disclosure Documentation which is required by the Condominium Act. You are entitled under the Condominium Act, for whatever reasons you may determine, within ten days after receiving the Disclosure Documentation to withdraw from the Agreement of Purchase and Sale upon delivery to our office of your written advice. In this event, your \$10,000.00 deposit and any additional deposit monies as outlined above will be refunded to you immediately. [emphasis added]

[para12] Attached to this very lengthy and detailed letter was a floor plan of "The Strath, Building "A", Unit 04, 1421 Sq. Ft." Below it, on the plan, is a full floor plan showing the location of this unit as falling between two other units. In addition, there is a further plan entitled "Recreation and Amenities" which shows the service lay-by as being in front of a sidewalk which comes across the front of the building, and the Moving (Storage) room is shown next to 104, thereby replacing the proposed apartment which was to have been there.

4. The Agreement of Purchase and Sale and Disclosure Statement

[para13] The Agreement of Purchase and Sale signed by Jaremko on February 2, 1987 for 104 mirrored that already signed by her for unit 2303. It was executed at Shipp's offices and Jaremko was given a copy of the Disclosure Statement which she acknowledges receiving at the same time. Paragraph F.1 of Schedule F to the Agreement reads as follows:

(b) in entering into this Agreement, he relies on no representations, warranties, collateral agreements or conditions affecting this Agreement, the Unit, or the Project, including any promises or representations that may have been made by any sales representative, or in any sales material, unless expressly provided for in writing in this Agreement or in the Disclosure Statement provided by the Vendor;

(h) there are no warranties, express or implied, with respect to any aspect of construction of the Project except such warranties as are given under the Ontario New Home Warranties Plan Act;

(j) the dimensions, area and floor plans of the Unit shown on the sketch of the Unit are approximate only and are based on a typical dwelling unit on the twelfth (12th) floor and will vary depending on the location of unit and after actual construction. Unless the variance is greater than two percent, the Purchaser agrees to accept the Unit as constructed without abatement;

Again, the floor plan of The Strath was attached to the Agreement.

[para14] The Disclosure Statement says at p.3 the following: Vehicular and pedestrian access to the Residential Condominium is from Aberfoyle Crescent at three locations. The most westerly leads to the rear of the west tower and will function exclusively as a service entrance. The remaining two access points lead to the main entrances in front of both the west and east towers. Since there is no separate service entrance in the east tower, a three-meter wide lay by capable of accommodating delivery vehicles will be constructed in front of the east tower off the driveway. A canopy will be constructed over the driveway in front of the entrance to the lobby for the towers. The westerly entrance of the main driveway from Aberfoyle Crescent will be one-way into both towers. The easterly entrance of the driveway from Aberfoyle Crescent will be two-way with a turning circle in front of the entrance to the lobby for both towers. [emphasis added]

On p. 5 of the Disclosure Statement, it states that the ground floor of the east tower (where unit 104 is located) was to contain four apartment units, one of which was to be designated as a guest suite, with the remainder being office space, a reception area, security office/staff room, board room, crafts room and billiard room. No mention is made of a moving room to be provided on the ground floor.

[para15] The ground floor site plan attached to the Reservation Agreement for The Strath showed neither the service lay by nor the moving room. It showed that The Strath would be between two other apartments. Exhibit 6, being the glossy floor plan for 104 shows it as being between two other apartments.

[para16] Jaremko agreed that she read the Disclosure Statement and saw the words that there was to be a three metre wide lay-by capable of accommodating delivery vehicles in front of the east tower of the driveway. She took this to mean that it would only be a delivery lay-by and not a place for moving vans. I was not convinced that Jaremko did not understand what the word "lay-by" meant. I was convinced, however, that she had no idea of how the lay-by would actually operate, how close the trucks would be to her windows and what a profound effect it would have on the privacy of the persons occupying the unit. [para17] It was the evidence of Victoria Shipp, that no one but Jaremko complained about inadequate disclosure provided to purchasers of units in the building. Shipp kept purchasers up-to-date on the progress of the building. On October 26, 1988, Victoria Shipp wrote to Jaremko to advise her that her occupancy/move-in date for 104 was the afternoon of January 30, 1989. Victoria Shipp's evidence

was that Jaremko never expressed any dissatisfaction with what she had bought until early 1990 when the carpet issue was raised long after the inspection took place, nor did she ever complain about having been misled by Shipp.

[para18] On cross-examination, Victoria Shipp admitted that the wall between 104 and the moving room was not the standard construction and that it had been constructed to try to block out the noise from the activity in the moving room. She agreed that the ground floor areas were not like those of the standard floor plan and that there was no reference in the Agreement of Purchase and Sale to either the lay-by or the moving room. Further, Victoria Shipp admitted that, "I saw trucks there constantly" in the lay-by and that a large van would take up the whole lay-by. [para19] When Victoria Shipp was cross-examined about the documentation which Jaremko signed, she admitted that due to the hectic activity at the Centre, there was no time for everyone to look at everything. She further agreed that there was a penalty provision in the Agreement of Purchase and Sale in the event of failure of a purchaser to close. She agreed that Shipp had addressed the issue of noise and vibrations in connection with the building's proximity to the Subway but did not think about it in connection with the lay-by.

[para20] On cross-examination, Victoria Shipp admitted that the plans which were submitted as Exhibit 35 did not show either the word "moving" or the word "service" in front of the word "lay-by" and that the word "storage" appeared on the plans as opposed to the words, "moving room". She also admitted that on those plans, the lay-by was shown only half in front of 104, with the rest being in front of the service office.

[para21] Jaremko knew that she had 10 days within which she could request her deposit back. She did not do this. The deposits totalled approximately \$49,750.00. On cross-examination, Jaremko admitted that she saw the words "service lay by" on the plan but maintains that she did not know what it meant. She said that it, "did not register with me", nor did the words "moving (storage)", as in her view, one needed a magnifying glass to read the words. She did admit, however, that there was nothing in the brochure which misled her but maintained that Shipp did not tell her that the diagram showing her unit between two others did not apply to the ground floor unit. She knew that the unit would be smaller than the other "Straths" and knew that it faced north.

[para22] Jaremko had no recollection of seeing any diagrams or plans at the Shipp Centre. She agreed that she probably looked at the model but maintained that Shipp did not disclose to her in writing that the plans for the first floor had changed and that she was given no different disclosure about the unit.

[para23] Lord was Jaremko's sales agent when she purchased the unit. I did not find her evidence helpful. Lord's initials appear with those of Victoria Shipp on the Reservation Agreement. Jaremko's initials are not there. The copy of the Site Plan attached to this does not show either the moving room or the lay-by. There is an apartment shown on either side of 104 and the only "moving and delivery" area is shown at the back of the companion building. Lord's evidence that she "would have told her (Jaremko) that everyone who moves into the building would move through there (the moving room) and that trucks would be in the lay-by", did not have the ring of truth to me. Lord maintained that she went through everything with Jaremko, and that her understanding was that the lay-by's location was not moved on the plans. Her assumption was incorrect.

[para24] Anne Wouters ("Wouters") was Victoria Shipp's assistant when Jaremko bought 104. It was her evidence that there was a cardboard model available, architectural drawings on tables, an artist's concept and current sets of plans available for examination. She also said she knew that the moving room was next to Jaremko's unit and that there was a space out front for the parking of trucks. Wouters' recollection of her discussions with Jaremko was clear and she presented her evidence in a forthright manner.

5. The Inspection and the Closing

[para25] During the two years after the Agreement was signed, Jaremko drove by and watched the building being constructed. Apartment 104 was not visible, given the hoarding and given the construction bin which was in front of the moving door. By December, 1988, Jaremko admits that she knew that 104 was to be next to the moving room and was horrified by her "foolish choice". When she went to the inspection, she spoke about this and told Jane Cornwall ("Cornwall") that she did not know that trucks were going to be there. Cornwall was the Shipp employee who accompanied Jaremko on the approximately 45 minute inspection of the apartment.

[para26] Jaremko did nothing to attempt to rescind the Agreement based on her discovery about the moving room and the lay-by. She apparently felt that she could not get out of the deal at that point and "felt in a state of shock" about it and just "assumed responsibility" for the purchase.

[para27] It was Jaremko's evidence that Cornwall told her that the trucks would not interfere with her unit as they would park to the west of the entrance door. The Compliance Inspection Report was dated January 30, 1989 and it contained a number of defects which would have to be corrected by Shipp. The Occupancy Acknowledgment was signed by Jaremko on January 27, 1989 and witnessed by Cornwall, as was the Warranty of same date. Interim monthly occupancy cheques were provided by Jaremko in the amount of \$1,748.39 each.

[para28] Cornwall's inspection of 104 with Jaremko was her first inspection on the job. Cornwall said she did not discuss with Jaremko where the trucks would be parked when moving took place and that she did not recall any concerns expressed by Jaremko or that she expressed concern about the unit being next to the moving room. It was Kay's evidence that Cornwall indicated to Jaremko that the moving vans in the lay-by would be facing away from the windows of 104. This was not the case. Given the number of inspections Cornwall attended to while on the job, I prefer Jaremko's and Kay's recollection of their discussion with Cornwall about where trucks would park.

[para29] I accept Jaremko's evidence that even though Shipp wrote on October 2, 1989 that all the inspection items had been complied with, that this was not so. Litigation ensued regarding the Home Warranty Plan and the carpet, but that evidence is not germane, in my view, to these proceedings.

[para30] Jaremko's daughter did not move into the suite. It was not until April 1, 1990 that Jaremko leased the suite to her friend, Dawn Kay, at \$1,750.00 per month. On January 1, 1991 the suite actually became occupied by Kay's daughter, Shannon. Given the problem with the carpet, Dawn Kay did not move into 104 but moved instead into Jaremko's own apartment with her.

[para31] The Deed of Transfer for 104 was signed on March 26, 1990 after the building was registered. The final price of the unit was \$199,000.00. The appliances cost, in addition, another \$5,000.00. At no time did Jaremko claim to her own lawyer that she had been misled.

[para32] Rodney Ikeda ("Ikeda"), a solicitor, gave evidence that he acted for the Vendor in the closing of the sale of 104 to Jaremko. It was Ikeda's evidence that there was nothing in any correspondence from Jaremko's solicitor about the moving room. He agreed that the lay-by was not on the registered plan but this was not a requirement for registration, just as a fire route is not marked on the plan.

6. The Complaints

[para33] Jaremko wrote 5 or 6 letters of complaint to the Condominium Board between January, 1991 and September, 1991. Moving trucks and other trucks were pulling up in the service lay-by at all hours of the day and blocking the windows of 104. By September, 1991, Shannon Kay had left the apartment. Her evidence was that the noise from trucks in the lay-by interfered with her studying while she lived there and awakened her on mornings when she had worked the late shift at Oliver's. Her words were:

I never felt there was any space between the outside and my internal premises.

and ...

I did not receive the solitude of my own space.

Shannon Kay also reported that on one occasion a large 40' van occupied the lay-by and, even though she kept her windows partly closed, she could clearly hear the loud music emanating from the van and the swearing and talking of the movers. She also said that any 40' van completely blocked all three apartment windows to such a degree that she had to turn the lights on in the apartment. Shannon's evidence was confirmed by her mother, Dawn Kay, who used one of the bedrooms as a studio while Shannon was the tenant. Jaremko put 12" X 8" "no parking" signs in the apartment windows which remained there for 8 months, in order to deter cars and other vehicles from using the lay-by. The Condominium Board threatened to take Jaremko to court.

[para34] Marlene Russell, former employee of Shipp, said that by September, 1991, the building began to keep much closer track of what was taking place in the lay-by. Jaremko had written to the condominium's Board of Directors on January 17, 1991 setting out her concerns and what could be done to help alleviate some of the problems. Jaremko completed a complaint form on April 6, 1994 that a moving van continued to occupy the lay-by long after the limit imposed by the condominium corporation and that the truck remained running for 10 minutes outside the apartment windows. Ms. Russell's reply of April 12, 1994, written on behalf of the Board, was in my view written in a sarcastic and off-hand manner, and did not answer the concerns raised. Tabs 105-108 inclusive of the book of documents contain other complaints sent by Jaremko about vans and trucks breaching the rules.

[para35] Russell eventually prepared an outline of moving and delivery instructions for the residents of the East Tower respecting the registration of the movers with security and the removal of the moving van when all the load was in the moving room. The keys were to be left with the Commissionaire on duty for the building. Russell was unsure whether these Commissionaires had Class A licenses, which they would have to have in order to move vans classified as such, if keys were left and no driver left with the van. A third document entitled "East Tower Moving Lay-by" was prepared regarding drop-offs, deliveries, moves.

[para36] Russell's evidence was that there were small "no parking" signs in the access route, yet she could not recall how many. In October, 1993, Russell prepared a memo for all security personnel that any enquiries from Jaremko or Kay were to be in writing and directed to the management office. Russell said the year, "was hell for me." It is significant to note that when Wilson J.'s Order directing that the moving vans turn the other way to unload, was in effect, the tenant of 203 complained of the noise and use of the lay-by since his "juliet balcony" was blocked. That Order was stayed shortly after it was made. On re-examination, Russell admitted that although records began to be kept of the moves, no record was kept of the transportation every two weeks of buckets of chemicals being moved through the moving room nor were records kept of all deliveries to the building.

[para37] Dawn Kay, while using 104, also complained about the constant presence of trucks and the fumes from them, as well as the noise of the engines left running. In addition, there was noise from the moving room and the clanging of the moving ramps.

[para38] Having read copies of the correspondence between Jaremko and the Condominium Board, I am satisfied that the Board did nothing to help Jaremko or even deal with her problems with any empathy. Jaremko was an owner of two units and received little in the way of courtesy from the Board. Jaremko did her best to explain her position to the other owners and sent a 4 page letter to 285 owners explaining her problem and her concerns about the Fire Route. Apartment 104 was vandalized as a result of Jaremko's efforts to keep the trucks from parking in front of her unit. The lock was jammed, vaseline was placed on the door handle and toilet paper with excrement was also placed there. Later, coolant was spilled all over Jaremko's parking spot. Marlene Russell, the property manager, even sent all security personnel a memo that they were not to talk to Jaremko or Kay and that all communications with them were to be in writing.

[para39] On November 3, 1992, Christine Jaremko ("Christine") moved into 104 to help her Mother. She remained there until June 30, 1994. Christine kept a diary of the problems she had with vehicles using the lay-by.

[para40] It was Christine's evidence that she put plants in front of the living-room window to give her more privacy but this did not help. Movers parked their vans and looked in her windows while moving. Her diary entries from November 11, 1992 to June 29, 1994 are a history of the difficulties she experienced with delivery trucks, moving vans and unattended cars. She did not record all violations or moves. She felt the task was "futile and frustrating" since management did nothing. Having reviewed the diary entries and having listened to Christine's evidence, I found her to be an extremely forthright and credible witness and accept her diary entries as accurate.

[para41] There were several volumes of photographs presented as Exhibits at Trial. Pictures were taken from both inside and outside 104 by Jaremko, Kay, Christine, a professional photographer on Jaremko's behalf and by Ifor Caine Davies and Brian Lewis Himelstein on behalf of Shipp. I have carefully reviewed all of these photographs and am convinced that they accurately reflect what took place in the lay-by and show the profound affect it had on the occupants of 104. The moving trucks clearly blocked the light to the living room and the two bedrooms. Trucks were allowed to park within 5 feet of these windows due to the narrow flower bed and sidewalk in front of the building. The moving personnel could readily see into the apartment unless the vertical blinds were closed. No owner should have to block out what little daylight there was while the trucks were present. The only way privacy could be achieved was to do this.

[para42] The windows of the apartment had to be kept shut while the moves took place as the gasoline fumes from the trucks easily entered the apartment windows. No carbon dioxide tests were ever taken but the presence of such fumes is unhealthy to the occupants, even with the windows closed, given the proximity of the lay-by to the apartment's outer wall. The pictures also clearly show that the Order of Wilson J., helped in keeping the trucks from completely blocking the view. As soon as the Order was stayed, the trucks were back in the old position.

[para43] The apartment has a northerly exposure and receives no direct sunlight. Given its first floor location, there is no doubt that Jaremko was aware that it would have less privacy than other units. From my observation of all of the many photographs which were taken of the lay-by and the location of the moving vans and other vehicles, it is quite clear that there is no more than 5 feet to 6 feet between the apartment's outer wall and the moving van. (See: Exhibits 17 and 18). On occasion, two trucks would be parked in the lay-by. The photographs in Exhibit 16, which is in two volumes, show a variety of trucks of various lengths and sizes blocking the light and completely intruding on the privacy of the occupants of the apartment. [para44] The ramps from the trucks were affixed so that articles could be readily moved into the moving room next to the apartment. The noise from movers walking up and down the ramps disturbed the quiet enjoyment of the apartment occupants. On one occasion in June of 1994, the sidewalk area in front of the apartment was littered with a new owner's furniture and effects for many hours, thereby blocking the view of the occupant of 104.

[para45] I have concluded that the location of the lay-by and its proximity to the outer wall of the apartment and the location of the moving room, which was never mentioned in the Disclosure Statement, have substantially destroyed the quiet enjoyment of the occupants of apartment 104 while Jaremko has owned it. I am further of the view that this has adversely affected the apartment's marketability over the years, it having been listed for sale for 5 years, still remaining unsold at the time of Trial. This issue will be dealt with later in these Reasons.

7. The Fire Code and Building Code issues

[para46] Jaremko's position was that the lay-by was in breach of the Building Code and the Fire Code, given the amount of space which the moving vans took in the driveway. Jaremko's expert, Allan E. Larden, a Building Code and Fire Protection Consultant, gave evidence on her behalf.

[para47] It was Larden's evidence that under the Building Code, there must be a 6 metre or 19 feet, 8 inch unblocked space to permit fire access. An examination of the photographs in Exhibit 16 show that the moving vans are clearly blocking this access. Larden stated that the fire access route is supposed to be kept clear so that the exterior wall is clear. The trucks impeded the optimum ability to access the wall in the event of a fire. His evidence was that the Building Code requires that there be a 3 metre space from the fall of the building, and this was not present.

[para48] Larden's Report is dated September 7, 1994, to which is attached the building's Fire and Safety Plan which was revised in July, 1992. Russell acknowledged this came about because of Jaremko's complaints. Page 5 of the revised Plan for the building sets out the fire department access and the fire alarm system. Under "access" it states: It is acknowledged that there is a moving room located in the Fire Route to serve the East Tower, therefore, the following special procedures have been established to ensure that the Fire Route will be clear of vehicles in the event of an emergency:

In the case of all larger moving vans involving Class "A" licenses, such vehicles may only remain in the fire route if drivers remain within 40 feet of the vehicle during the moving process. In the cases of smaller moving vans or delivery vehicles which may be temporarily located in the fire route without the driver present, drivers of all such vehicles are required to leave their vehicle ignition keys at the security desk. In the event of a fire the driver will move the vehicle. If, for any reason, the driver is unavailable to operate the vehicle, the keys for the vehicle will be at the security desk.

I am of the view that if Jaremko had not stood her ground regarding the problems with the lay-by and the location of the vehicles and the fire route access, the Board of Directors would never have amended its own plan to include these paragraphs.

[para49] Larden's opinion was that if a fire occurred in an apartment on any of the floors immediately above the apartment while a van occupied the lay-by, the location of the van would block ready access by aerial ladders and other fire-fighting equipment to the apartment. Section 2.5 of the Regulations of the Ontario Fire Code reads, in part:

2.5.1.1. (1) This Section applies to fire access routes

- (a) required to be constructed under the Building Code
- (b) provided under a municipal by-law, or
- (c) designated under Paragraph 45 of Section 210 of the Municipal Act.

2.5.1.2. (1) Fire access routes and access panels or windows provided to facilitate access for fire fighting operations shall not be obstructed by vehicles, gates, fences, building materials, vegetation, signs or any other form of obstruction. [emphasis added] Larden concludes at p. 3 of his Report that when a large moving van is located in the lay-by and/or adjacent access route, that ready access to the windows of 104 is, "... less than efficient than would be the case if a vehicle was not there."

[para50] The building's revised Fire Safety Plan was approved by the City of Etobicoke Fire Department but there is a disclaimer in its approval stamp which reads:

The approval of this fire safety plan by this department does not in any way relieve the owner, the lessee, or their agent, of the responsibility of complying with the Ontario Fire Code.

No tacit approval is given by the Etobicoke Fire Department of the building's scheme for moving trucks from the lay-by in the event of a fire.

[para51] On cross-examination, Larden readily agreed that he had not spoken to the Etobicoke Fire Department and was not aware that fire trucks were technically able to move pas parked vans in the lay-by even though there was an obvious breach of the Code. One of the problems Larden pointed out was that, "most fires are unusual and freaky things" so one could not predict what

equipment and personnel would be required if a fire occurred in one of the apartments in the "04 stack" where the Jaremko unit is located.

[para52] While Kay occupied 2303 with Jaremko, she assisted her in obtaining information regarding the fire route access. In January, 1991, both went to the Etobicoke Fire Department and inquired about the fire route. They also went to the Planning Department to determine what plans had been filed by Shipp and to determine how a service lay-by could be in a fire route. The Site Plan noted it as a "moving" lay-by, as did "as built" architect's plan dated December 12, 1988 and later the Disclosure Statement. The promotional material referred to it as a "service" lay-by.

[para53] Jaremko and Kay went to the Committee of Adjustment to review documents filed there, to the Ministry of Housing, checked the Building Code, went to the Fire Marshall's office, checked the planned fire route, checked the Fire Code and the municipal by-law respecting the fire route. I was impressed with the diligence of Kay in ferreting out all of the information about the fire route. Kay's evidence confirmed that of Jaremko that the Board of Directors could not be bothered with their problems. She was of the view that "head office" was doing everything they could to prevent her and Jaremko from obtaining the appropriate information.

[para54] It was the evidence of Andrew Ronald Bigauskas ("Bigauskas"), an architect with the firm of Raphael, Burka, architects used by Shipp to design the Kingsway complex, that it was mandatory to take the fire department requirements into account when plans were drawn. He confirmed that the fire department would be concerned about the width of the fire route access. He said that in Etobicoke, there was no requirement for lay-bys or any specifications regarding their size. In designing the East Tower, his firm simply used a rule-of-thumb width of 3 metres by 11 metres. He confirmed that vehicles could be left if attended or supervised in the lay-by area, and that the designated fire route must have a minimum width of six metres. He was not aware of any fire department ever raising an issue of the placement of a moving lay-by in a fire route.

[para55] Robert Webb ("Webb"), Chief of Fire Prevention with Etobicoke, gave evidence. His department is responsible for ensuring that provincial and municipal codes are in force. He has 8 Inspectors to carry out these duties for the whole of the City. When plans are submitted to his department, they are examined and approved or the builder is told what revisions are required. His view is that the by-law allows such temporary parking in the lay-by. He says it is common in Etobicoke to have vehicles parked in fire routes. He did agree, however, that parked moving vans could create problems for the fire department's aerial ladder trucks, depending on where the emergency was. He had no evidence as to whether the fire department had ever been called to the building.

[para56] James Craig McClare ("McClare"), the Assistant Chief of Fire Prevention for Etobicoke, reviewed Shipp's plans and approved them. In his view, the plans were in compliance with the Building Code. Interestingly enough, on cross-examination, McClare admitted that he was properly quoted in an article which appeared in "Etobicoke Life" where he said that most apartment buildings do not comply with the Code. He admitted further that they do not have the people power to inspect everything and enforce compliance. He confirmed the disclaimer which appears in the department's stamp on the plans and said that the responsibility lies with the owner to comply with the Ontario Fire Code.

[para57] Tom Denes ("Denes"), the Commissioner for Public works for Etobicoke, gave evidence. His previous position with Etobicoke had been the Director of Traffic, Transportation and Development engineering. His Department's transportation and planning section examines proposals respecting parking, access, fire routes, loading and unloading of goods and did examine those of the Kingsway. Denes' evidence was that the Department approved the building's plans and addressed the lay-by in terms of necessity and location. He said it is a "common design." It is an "additional feature to driveways, as they act as loading areas." Signs are erected after it is shown it functions properly. Denes' letter of July 29, 1992 to Bruce Brunton, President of M.T.C.C. 875 reads in part:

For your information, loading and unloading of vehicles is a permitted activity in no parking areas, such as fire routes, as evidenced by frequent occurrences in shopping centres and in most residential developments Denes was of the view that loading and unloading of any type of material on and off trucks is legitimate in a no parking zone and that the Police do not ticket vehicles if there is obvious activity around the vehicle.

[para58] I did not find Denes' comparisons with loading and unloading at shopping centres to be very helpful. He did admit that had there not been a moving and disposal entrance in the West Tower, the lay-by would not have been allowed in the East Tower driveway because there would have had to be a separate entrance for garbage disposal and other waste removal.

[para59] Ifor Caine Davies ("Davies") worked for Shipp for over 20 years and worked on "The Kingsway." He confirmed that the Etobicoke Fire Department had made a site inspection of the property and had "walked the route" and reviewed the building's evacuation system. It was his evidence that there was no mention of the fire route in the Condominium's technical audit.

[para60] The Etobicoke Fire Route By-Law states the following:

134-10. Maintenance of fire route.

The owner shall maintain the fire route:

A. In good repair. B. Clear of snow and ice. C. Free of blockage by any means [emphasis added]

134-12. Parking prohibited.

No person shall park a vehicle in an area designated by a sign as a designated fire route.

The term "park" or "parking" is defined in the by-law as:

When prohibited, the standing of a vehicle, except when standing temporarily for the purpose of and while actually engaged in loading or unloading merchandise or passengers.

Subsection 1(1) 25. of the Highway Traffic Act R.S.O. 1990, c. defines "park" or "parking" as follows:

25. "park" or "parking", when prohibited, means the standing of a vehicle, whether occupied or not, except when standing temporarily for the purpose of and while actually engaged in loading or unloading merchandise or passengers; ("stationnement")

[para61] Both definitions refer to loading or unloading of "merchandise or passengers". In my view, an owner's household goods and personal effects are not merchandise, the word contemplating newly purchased articles. Black's Law Dictionary, 4th edition, defines the term "merchandise" as:

All commodities which merchants usually buy and sell, whether at wholesale or retail; wares and commodities such as are ordinarily the objects of trade and commerce. But the term is never understood as including real estate, and is rarely applied to provisions such as are purchased day by day, or to such other articles as are required for immediate consumption.

It further defines "temporarily" as: Lasting for a time only, existing or continuing for a limited time, not of long, duration, not permanent, transitory, changing, but a short time.

[para62] It therefore seems to me that the loading and unloading of moving vans in the lay-by, which can take many hours duration, does not fall within the exception in the by-law. It consists neither of merchandise, nor is it temporary. I further find, that while practically speaking, fire trucks may be able to access the fire route while vans are parked in the lay-by, and while these vehicles may not always be ticketed by the police, there is a breach of the provision of the Fire Code respecting the space which is supposed to be left unoccupied by vehicles. In my view, the provisions of the Fire Code have not been properly followed and observed, as was confirmed by McClare in his evidence. The fact that the fire route access is not properly kept free of vehicles and the fact that there are insufficient inspectors to monitor all situations, does not excuse the breaches.

[para63] Subsection 19(4) of the Fire Marshals Act R.S.O. 1990 c. F17 states:

(4) The fire code supersedes all municipal by-laws respecting fire safety standards for buildings and other structures and premises.

Further, our Court has held in *Re. Chief Building Official for the City of Toronto and Manolan Enterprises Ltd. et al.*, (1978) 22 O.R. (2d) 60 at p. 63 that the Building Code deals with building construction requirements, fire regulations and the interaction of them to applicable types of use and construction. In *Minto Construction Ltd. and Township of Gloucester* (1979) 23 O.R. (2d) 634, the Court pointed out at p. 635 that the Building Code standards "are frequently expressed as minimal, leaving individual contractors free to build to higher or stricter standards."

[para64] Shipp, in my view, ought not to have built an apartment in the 104 location, given the Fire Code standards and its failure to keep the Fire Route clear of parked vehicles.

8. Jaremko's costs and expenses [para65] Jaremko purchased 104 for \$199,000.00, inclusive of the sum of \$15,000.00 for each of two parking spaces and the sum of \$2,000.00 for a locker space. On occupancy, Jaremko provided 12 post-dated cheques to management in the amount of \$1,748.39 for occupancy fees. These payments covered the first mortgage payments to Premier Trust on the unit's open mortgage in the amount of \$149,250.00 at 14% with monthly payments of \$1,752.00 per month. When this mortgage was renewed in 1991, it was at 11% interest, with monthly payments of \$1,493.00. It dropped in April, 1992 to 9.375% interest with payments of \$1,286.00 per month, in 1993 to 8% with payments of \$1,139.00 per month, and in 1994 to 6.75% interest with payments of \$1,055.00 per month. On its renewal in 1994, the principal amount owing was \$143,795.57.

[para66] In addition to the first mortgage, Jaremko carried a second mortgage of \$37,500. at 18% (being half of the borrowed amount, with the other half relating to the second mortgage on unit 2303).

[para67] Jaremko said that monthly maintenance fees for 104 began at approximately \$317.00 per month and gradually rose to \$403.64 per month to September, 1994.

[para68] Jaremko had paid \$49,750.00 in deposits on 104 from February 5, 1987 to October 1, 1989. These deposits earned interest while the building was under construction. She received interest of \$8,181.46. Jaremko and other unit owners complained about the low rate of interest and the property taxes. Eventually she received another \$3,500.00 interest on January 3, 1995.

[para69] The taxes on 104 were as follows:

1. 1990 - \$2,057.31 2. 1991 - \$2,177.45 3. 1992 - \$2,368.57 4. 1993 - \$2,431.43 5. 1994 - \$2,431.32 (my estimate based on the interim tax bill)

[para70] Jaremko's legal bill for the purchase of 104 was \$1,329.07. In addition, Gerald O. Jarson charged her \$5,037.78 for all the transactions in connection with obtaining the second mortgage financing and its legal documents. As has been noted in these Reasons, Jaremko was involved in other legal actions with the condominium corporation. Although it was Jaremko's evidence that she has paid between \$35,000.00 and \$40,000.00 for all the condominium legal actions she has been involved with, the total of all accounts rendered which are found at Tab 88 of the books of documents total \$27,597.15.

[para71] While 104 was rented to Shannon Kay, Dawn Kay and Christine Jaremko, a total of 35 months, Jaremko's records show she received rent of \$1,000.00 per month for a total credit of \$35,000.00. I was confused by her evidence in this regard. When Shannon Kay occupied it, Jaremko says she was paid \$90.00 per week or approximately \$387.00 per month, with Dawn Kay paying \$400.00 per month for the use of one of the bedrooms as her studio. Dawn Kay had signed a lease to pay \$1,750.00 per month which she said in her evidence was reasonable yet the amount actually paid by her and her daughter never came close to that amount. Shannon Kay's evidence was that she paid between \$350.00 and \$400.00 per month rent. Christine Jaremko's evidence was that she moved in November, 1992 and stayed until June, 1994 and paid rent of \$400.00 per month. [para72] On April 18, 1990, two weeks after the closing took place, Jaremko listed 104 for sale at \$265,000.00. This price included both parking spaces and the locker. It was Jaremko's evidence that her listing was a "stab in the dark" as no apartments had yet been listed for sale in this building and there was no proven market. In June of 1991, Jaremko dropped the price to \$225,000.00, to \$205,000.00 in August of 1992, and in December, 1993, to \$189,900.00. During this period of time, she received not one offer to purchase the apartment. Her view was that any property will sell if the right buyer comes along. When asked why she did not list it at a lower price, Jaremko said that she could not afford to sell it at \$180,000. In the meantime, other units in the building were being sold.

[para73] Shipp took the position that Jaremko, in effect, dissuaded prospective purchasers with her "no parking" signs and later with her clear disclosure on the listing agreement about the service lay-by and the moving room. They further were of the view that she did not lower the listing price quickly enough when the apartment did not sell.

9. Expert's Report

[para74] Ronald Smith ("Smith"), a Chartered Accountant, does forensic accounting for law firms, government agencies and some private companies. He now solely practices in the area of litigation support. Smith was Jaremko's expert witness in quantifying her damages. Smith prepared a Report dated March 4, 1994 which he updated on January 10, 1995. He examined Jaremko's legal papers, realty tax statements, banking records and mortgage statements. Smith has quantified Jaremko's damages at between \$412,900 to \$512,100, as of January 31, 1995, all of which relate to disbursements directly related to the unit plus interest paid on mortgages and loans. The figures do take into account the rent Jaremko received and the interest on her deposits and the settlement monies she got as additional interest. His summary shows that the balance owing on the first mortgage was \$140,832.

[para75] On cross-examination, Smith said that his calculations were based on a complete rescission of the agreement so that it includes all liabilities against the unit. Given Jaremko's other borrowings for 2303 and for her Bloor West building and her Brentwood property, it was difficult for Smith to trace the use of such funds and too time consuming and costly to do so. He also admitted that some banking information was missing. He had difficulty tracing where funds came from to fund the liabilities and agreed that some may have come from Jaremko's business. Some of the borrowings showed that Jaremko left the money in the account and drew upon it monthly for expenses. He assumed that Jaremko, as a prudent business person, would have gone to the cheapest source to borrow the funds. He was also unable to trace where the deposit money came from and could not trace the deposit of rental payments. In his initial summary, Smith deducts the sum of \$16,000 from the expenses on account of rental payments of \$400.00 per month received to February 1, 1994. The range in Smith's estimate comes about as a result of the varying interest rates on borrowed monies. Those rates ranged from 11.25% to 18.50% during the period February 2, 1987 to February 1, 1994.

[para76] Smith's Report indicates that in 1990, Jaremko paid \$987.69 to the condominium corporation contingency fee fund, land transfer tax of \$1,743.75, HUDAC new home warranty fees of \$448.00 and the sum of \$675.00 for vertical blinds for the apartment. In that year, Smith credits Jaremko with the \$8,181.46 interest earned on her deposits and in his addendum, he credits her with 1992 parking space revenue of \$265.15, \$2,724.00 from the class action against Shipp. A further \$4,070.00 is credited for the rental income in 1994 from March to October of \$3,200, parking rental of \$450.00 and a final payment on the class action of \$420.00.

10. Value of the apartment

[para77] Jaremko and Shipp disagreed on the present value of the apartment for purposes of these proceedings. Jane Feilders ("Feilders"), an appraiser with Royal LePage since 1983, gave evidence on behalf of Jaremko. She had been asked to ascertain if there was a loss in the property value of the apartment caused by a negative location factor. Feilders personally attended at the apartment to observe what she considered a negative influence. It was her evidence that during a move by a tenant or owner, there was a lack of privacy in 104, that noise and odours emanated from the moving van and the view of all windows in the apartment was blocked.

[para78] Feilders' Report is dated March 18, 1994. The comparatives she used in her Report ranged from a discount of 7.6% at the low end caused by a seasonal annoyance with odour coming into a modest apartment to 28% discount for an apartment in a higher priced building which was exposed to high levels of noise. Other comparatives fell between these two figures.

[para79] Feilders was of the view that the Jaremko apartment had a discount figure in the upper end of the scale used. It had multi-faceted complaints including noise, odour, lack of privacy, and a restricted view, all of which were unpredictable in nature. In each comparative, Feilders' examined the apartment. She disagreed with the Lebow paired analysis, pointing out that certain buildings were not comparable.

[para80] On cross-examination, Feilders said it was her opinion that the unpredictability factor of when the moving vans would arrive and how long they would stay and what the noise would be was worse than the frequency factor. Feilders concluded that the appropriate discount figure was 20%. She agreed that having 104's location near the underground parking entrance and having a sidewalk in front of it were also negative factors which were readily known to Jaremko when she purchased the unit. She also conceded that subway noise could be a negative factor. I found Feilders to be a very thorough witness who presented her evidence in a straightforward and professional manner. Her "paired data set analysis" in which sales of properties similar in all but one characteristic can be analyzed to isolate that one difference, was very useful. Since there were no comparative sales in the building, she examined sales in other locations where one unit had a negative factor. In particular, I found her paired analysis of two units at 71 Simcoe Street to be helpful. The difference in price was \$36.00 per square foot, being a 22% difference. The unit which sold for \$210,000.00 had a very good view from higher up than the unit which sold for \$164,000.00 and had as its view, a brick wall.

[para81] Shipp's witness was Barry Lebow, F.R.I. ("Lebow"), a certified Canadian residential appraiser and a professional land economists, who has been an expert witness in our courts many times. It was Lebow's evidence that he examined all resales in the building. These resales started in 1990. Lebow also inspected 104 in mid 1994. He concluded that the market value of 104 steadily dropped from 1990, where he valued it at \$205,000.00, to \$195,000.00 in 1991, to \$190,500.00 in 1992, to \$185,500.00 in 1993 to \$176,000.00 in 1994. This was based on the average decrease for similar condominium projects in western Toronto where the overall drop had been approximately 25%. Further, he saw the negative influence of the lay-by as only being 5% of the "entire negative depreciation problem", with the combined elements of depreciation estimated to be 15%. Lebow disagreed with Feilders' depreciation factor of 20% and her view that the unpredictability factor was the most important one. In his view, the negative factors of the apartment facing the entrance to the underground parking, the fact that it faces the driveway with its traffic flow, and the fact that it faces an open section of the nearby subway line (a factor which never showed in any of the drawings or plans or model), were more important than the service lay-by. While I agree that these factors add to the negativity, having carefully reviewed all the photographs presented in evidence and listening to the evidence as a whole, I concluded that the unpredictability of the use of the service lay-by and the effect of the noise, odour and fumes and close proximity of the vans and movers, was far worse than any other negative factor.

[para82] The Lebow appraisal contained some very good comparisons within the building as to rental values and resale activity. The chart at pages 11 and 12 of his Report shows the declining real estate market and the drop in value per square foot for these units. The difficulty with comparatives in the same building is the fact that there really were no comparable units. No other unit had a lay-by directly in front of its windows nor a moving room next to it. The number of sales in the building dropped off sharply in 1993 and 1994. Lebow's chart of estimates of market values from 1990 to 1994 show the drop in value per square foot, and the drop in the estimated market value as adjusted. The drop in value went from \$205,000.00 to \$176,000.00 using a .85 adjustment factor.

[para83] Lebow felt that Jaremko should not have highlighted a negative feature of the unit by noting in the multiple listing that, "Unit is next to moving room". In Lebow's opinion, this highlighting of a negative factor was bad marketing and it showed how Jaremko had stigmatized the unit.

[para84] Lebow's Report showed that the market had decreased by 25% since 1990 in the west section of Metropolitan Toronto. Using Toronto Real Estate Board figures and looking strictly at condominium units, he notes at p. 17 of his Report that there has been a drop of 22.64%.

[para85] Lebow was of the view that the 20% discount estimate suggested by Feilders was excessive, as previously noted. Lebow concluded that the unit suffered from a 15% depreciation for its location, with 5% of this caused by the lay-by.

[para86] Having listened to the evidence of those witnesses who had actually occupied 104, and having examined the many photographs which were put into evidence, and after listening to the two realtors, I have concluded that the location of the lay-by in front of the unit with the moving room next to it, were more serious negative factors than its location near the garage entrance. There were other ground floor units in the building and in the companion building. None were affected by this lack of privacy and blockage of light and the infiltration of gas fumes as was 104. I therefore accept Feilders' conclusions respecting the effect of the negative factors of the lay-by and the moving room and hold that the appropriate discount figure is 15%.

[para87] In retrospect, Jaremko may have been better off not highlighting the location of the unit on the MLS listing. On the other hand, given the difficulties she had experienced with the Board, and given how she personally felt about the way the unit was described in different documentation, I concluded that Jaremko (being a real estate agent herself) did not want any prospective purchaser to feel as she had.

11. Jaremko's attempts at selling 104

[para88] Unit 104 was listed for 5 years prior to trial and did not sell. It was Shipp's position that Jaremko was not properly marketing the unit. Lebow said that he had never heard of anyone putting a special notation on a listing agreement which drew the attention of a prospective purchaser to the fact that the unit was next to a moving room. There is no question that Jaremko was caught by a falling market and that the value of the unit dropped substantially due to the general market conditions.

[para89] Jaremko kept detailed records of all showings of the unit and inquiries made about it. (See: Tab 122 of the books of documents). She also attempted to sell one of the two parking spaces separately but this did not succeed. She deliberately pointed out to other agents that the unit was next to the moving room.

[para90] Janine Rudner ("Rudner") is an agent with Royal LePage. She lives in the West Tower of the complex. She twice attempted to show 104 to prospective purchasers. It was her evidence that Jaremko was co-operative the first time but not the second time in April of 1992. Jaremko asked her if she was aware of the moving room. I found Rudner to be a somewhat hostile witness, her husband having had a dispute with Jaremko.

[para91] Sarab Dayal Chopra ("Chopra"), also a realtor, gave evidence. He owned two units in the complex, both of which he sold. He showed 104 about 4 to 5 times, but tried to show it at least 10 to 12, he said. It was Chopra's evidence that Jaremko insisted that prospective purchasers be told that the unit was next to a moving room. He said that when he tried to arrange appointments to show the unit, on a couple of occasions Jaremko was to be out of town and it could not be shown and on others she would not book the appointments. Jaremko insisted on being there when the unit was shown and pointed out the location of the moving room.

[para92] I have concluded from the evidence that Jaremko could have been more co-operative than she was in marketing the unit and ought to have considered having an independent agent market it for her so that she was not present at showings. Given what was happening in the market, I am satisfied that Jaremko did attempt to mitigate her damages.

12. Is the plaintiff entitled to rescission?

[para93] Jaremko has taken the position that she is entitled to rescission of the agreement of purchase and sale and the return of her deposit monies on the grounds that the Disclosure Statement did not fully and accurately disclose the existence of the lay-by and the moving room. I have concluded that rescission is not open to Jaremko based on the principles as set down in *Abdool v. Somerset Place Developments of Georgetown Ltd.* (1992), 10 O.R. (3d) 120. Subsection 52(6) (b) of the Condominium Act, R.S.O. 1990 c. reads:

(6) The disclosure statement referred to in subsection (1) shall contain and fully and accurately disclose, (b) a general description of the property or types proposed property including the types and number of buildings, units and recreational and other amenities together with any conditions that apply to the provision of amenities;

Abdool makes it clear that the onus is on Jaremko to show that the disclosure statement failed to satisfy the requirements of the Act to the degree that the agreement must be declared non-binding. The Court held at p. 139:

To discharge this onus and prove the materiality of the complaint, in my opinion, the purchaser is obliged to establish objectively that had the information that was not disclosed, or that was inaccurately or insufficiently disclosed, been properly disclosed in the disclosure statement at the time it was delivered to the purchaser, a reasonable purchaser would have regarded the information as sufficiently important to the decision to purchase that he or she would not likely have gone ahead with transaction but would instead have rescinded the agreement before the expiration of the ten-day cooling off period.

Further, at p. 145 the Court notes that s. 52 should be construed:

in a manner that properly balances consumer protection and the commercial realities of the condominium industry ...

To require the inclusion of all of the details of the declaration, by-laws, rules and the like which the purchasers argue should be contained in the disclosure statement, ... would be to ignore the overall criteria of brevity, generality and significance and turn what was intended to be a short and comprehensible statement into a lengthy and legalistic document no more comprehensible to lay persons than the underlying documents themselves.

[para94] I have found in these Reasons that the lay-by was shown on the plan entitled "Recreation and Amenities", as being in front of a sidewalk which was in front of the building. Jaremko had a copy of this plan. It also showed the Moving Room next to 104. The Disclosure Statement at p. 3 states that there is no separate service entrance in the east tower and that there will be a three metre lay-by capable of accommodating delivery vehicles constructed in front of the east tower off the driveway. In my view, this meets the brevity, generality and significance tests set out in *Abdool*. It is comprehensible and obvious in the Statement. Jaremko is therefore not entitled to rescission. While Jaremko was not an experienced condominium purchaser, she was an experienced real estate agent and broker and was familiar with legal documents and should have raised the issue during the 10 day period provided by the Act if she was looking to rescind the purchase. See also: *Scanlon v. Castlepoint Development Corporation and Bramalea Limited* (1992), 29 R.P.R. (2d) 60 at pp. 80 and 81, and *Bondy v. P.C. Cove Builders Inc.* (1991) 22 R.P.R. (2d) 217.

[para95] Further, I have examined the non-condominium cases respecting rescission to which counsel referred me. Jaremko's situation was not at all like that in *Keen v. Alterra Developments Ltd.* (1993), 35 R.P.R. (2d) 278 where the changes in the "dream house" plans were not conveyed to the purchasers and they ended up with something completely different from that which they bargained for. [para96] In *Bosworth Ltd. v. Professional Syndicated Developments Ltd. et al.* (1979), 24 O.R. (2d) 97, Robins J. held at 105:

In my opinion, what transpired in the factual circumstances here does not constitute an error in substantialibus entitling Syndicated to the relief it claimed.

I adopt this reasoning in the case at bar.

[para97] I have also reviewed *Ceolaro v. York Humber Ltd.* (1994) 37 R.P.R. (2d) 1, also a condominium case which dealt with the disclosure issue, permitted encumbrances and the developer's duty to disclose. There the Court held that the developer did not have a duty to disclose the methane gas system to prospective purchasers since it did not pose a health or safety risk, where a purchaser sought damages for breach of contract. There is duty on the part of the vendor to disclose something as being potentially dangerous. See: *Sevidal v. Chopra*, (1987), 64 O.R. (2d) 169. *Sevidal* dealt with radioactive soil. I concur with the reasoning in *Ceolaro* and hold that Jaremko is not entitled to rescission.

13. What is the relationship between the Agreement of Purchase and Sale and the Disclosure Statement and the Reservation Agreement?

[para98] Jaremko takes the position that the Agreement of Purchase and Sale is a document separate and apart from the Disclosure Statement and the Reservation Agreement. The Agreement of Purchase and Sale is an extremely long document with schedules "A" to "H" attached to it and forming part of the Agreement. It makes no reference to either the Disclosure Statement or the Reservation Agreement. The Reservation Agreement, however, does state in bold letters on page one that Jaremko is granted a "PRIORITY RIGHT TO SUBMIT AN OFFER TO PURCHASE (the "Reservation") ... described as Suite Number: 104."

[para99] It further states in paragraph 2. that Jaremko agrees to execute Shipp's standard form of Agreement of Purchase and Sale within five days of notification of its availability. Other references are made to the Agreement of Purchase and Sale in the Reservation Agreement, including a statement in paragraph 4 thereof that in the event that Shipp fails to provide the Agreement of Purchase and Sale to the Purchaser before November 9, 1986, the Reservation is null and void and the deposit is to be returned to the Purchaser without interest. The Reservation Agreement and the Agreement of Purchase and Sale are therefore integrally tied together.

[para100] The Disclosure Statement, in my view, is also integrally tied to the Agreement of Purchase and Sale and the Reservation Agreement. None can operate independently without the other. The Index page of the Disclosure Statement lists 8 tabs which contain detailed materials including disclosure material. On the Index page there is set out the Purchaser's "Right to Rescind" with respect to 104. It makes reference to the Agreement of Purchase and Sale in each of the three sections of the Condominium Act to which it refers. Only a purchaser receives the Disclosure Statement. All three documents must therefore be viewed together.

14. Was unit 104 subject to latent defects?

[para101] The evidence has shown that 104 was the only unit which was profoundly affected by the lay-by and the moving room. No other unit in the complex was situate next to a moving room and no other unit had its windows blocked by moving vans. In *Yandle and Sons v. Sutton*, [1922] 2 Ch. 199, the Court held at p. 210:

In all these cases between vendor and purchaser, the vendor knows what the property is, and what the rights with regard to it are. The purchaser is generally in the dark. I think, therefore, that, in considering what is a latent defect and what a patent defect, which can be thrust upon the purchaser, must be defect which arises either to the eye, or by necessary implication from something which is visible to the eye.

[para102] The problem with Shipp's documents regarding the lay-by is that some did not show it, others showed it but referred to it as a "service lay-by" as opposed to a "moving lay-by". The Disclosure Statement noted that it was there to service "delivery vehicles" not "moving vans". In the common jargon of the day, the two phrases have different connotations. Nothing, of course, disclosed that the unit's windows would be completely blocked during all moves in and out of the building. [para103] In *Keen v. Alterra Developments Ltd* (1993) 35 R.P.R. (2d) 278, *Fedak J.*, held in a rescission case, that a builder has a duty to warn customers in advance of certain latent defects. At p. 285 he said:

Although the elevation of the lot was not in the builder's control, it was within the builder's power to warn customers in advance of this fact. This could have been achieved by noting on the brochures that ground elevation was dependent on grading, or by

warning a purchaser that extra steps could be required on the particular lot chosen. Prior to the building permit being issued it was within the builder's power to review the grading plan and determine how many steps would be required. The builder had no intention of warning the purchasers, either at the offer stage or at the beginning of the construction stage, that stairs might be required. On the contrary, it is the builder's position that it is up to the purchasers to make it a specific condition in the agreement of purchase and sale.

Caveat emptor does not apply where there is a latent defect. In the case at bar, it was within Shipp's control to tell the purchaser of 104 that it was to now be next to a moving room and that the service lay-by would accommodate moving vans which would be in close proximity to the outer wall of the unit. If Shipp was not prepared to make full disclosure of this latent defect, it should not have used that space as an apartment to be sold to the public. The space could have been used for a guest suite or for recreational facilities or offices. The configuration would never have been allowed if the east tower was free-standing on its own without the inter-connected entrance between it and the west tower. It was the west tower which had an appropriate area for moving vans and garbage collection. See also: *Godin v. Jenovac* (1993) 35 R.P.R. (2d) 288. I am satisfied on Jaremko's evidence that if she had known the full scope of the effect of the lay-by, she would not have offered to purchase the unit.

16. Did Shipp make misrepresentations to Jaremko?

[para104] I cannot say that Shipp made deliberately false or negligent misrepresentations to Jaremko about the unit which caused her to enter into the contract. The misrepresentation about the lay-by by Cornwall was, in my view, more in the nature of an innocent misrepresentation made at the time of inspection and not a representation that was made at the time the contract was entered into. Any representations made by Shipp's agents or made in its materials were innocent representations. A representor will not be liable unless he or she knew or ought to have known that the other party would rely on the statements as factual representations. See: C.E.D. (3rd) Vol. 5, 536.

[para105] There is no right to claim damages for innocent misrepresentation. See: *Wasman v. Yandle*, [1953] O.R. 367 and *Panzer v. Zeifman*, (1978) 20 O.R. (2d) 502.

[para106] Shipp simply did not tell her anything about the impact of either the moving room or the lay-by. Shipp, as a builder, had a certain acreage within which to build this luxury complex. In my view, it pushed these limits to the outer edge by building ground floor units in the east tower so close to this constant vehicular traffic from which was emitted carbon monoxide fumes and noise, not to mention its proximity to the windows of the units situate there. These latent defects were not what Jaremko bargained for. In *Fraser-Reid v. Droumtsekas*, [1979] 103 D.L.R. (3d) 385, the Court at p. 388:

The English Court of Appeal has held that a duty of care is owed by a builder to prospective buyers, and the issue of whether or not there has been a breach of the duty will depend on the relevant considerations going to the question: "Did the builder act as a competent and careful builder would have acted in what he did not do?: *Batty v. Metropolitan Property Realizations Ltd.*, [1978] 2 All E.R. 445 (C.A.). See also *Dutton v. Bognor Regis United Building Co. Ltd.*, [1972] 1 All E.R. 462 (C.A.).

The latent defect did not become obvious until January of 1991. Shipp did not, however, act as a careful builder in including a lay-by in front of 104.

15. Was there a breach of the implied covenant of quiet enjoyment and was there an implied warranty that the unit was fit for habitation?

[para107] The Ontario New Home Warranties Act, R.S.O. 1990, c. O31, subsection 13(1) (a) (ii) confirms the common law implied warranty that the home is to be fit for habitation. I am satisfied that there were no laches on the part of Jaremko regarding her problems with the unit. It was not until Shannon Kay moved into the unit that the defects became apparent and that the overall effect on the occupant's habitation of the unit became apparent.

[para108] The Land Registration Reform Act, R.S.O. 1990 c. directs in subsection 5 (1) (1. ii) that a transferee of land shall have quiet enjoyment of the land. *Guest v. Cochlin*, (1929) O.L.R. LXIV 165 points out at p. 167 that for more than a century it has been clear law that an agreement to sell in fee simple carries with it the right of the purchaser to proper covenants, one of which is a covenant for quiet enjoyment. A breach of this covenant is not as usual between vendor and purchaser as it is between landlord and tenant. It nevertheless exists. When vacant possession of the unit is given by the vendor to the purchaser, the purchaser is entitled to actual unimpeded physical enjoyment of the unit. See: *Cumberland Consolidated Holdings, Limited v. Ireland*, [1946] 1 K.B. 264 at p. 271. The presence of the lay-by in such close proximity to her windows in 104 deprives Jaremko of her of quiet enjoyment. [para109] The impediment must be such that it substantially interferes with the owner's occupation of the unit. Noise has been considered by the Courts. In *Owen v. Gadd and others*, [1956] 2 All E.R. 28, the English Court of Appeal, in following the earlier case of *Browne v. Flower* [1911] 1 Ch. 219 at p. 228, quoted:

It appears to me that to constitute a breach of such a covenant there must be some physical interference with the enjoyment of the demised premises, and that a mere interference with the comfort of persons using the demised premises by the creation of a personal annoyance such as might arise from noise, invasion of privacy, or otherwise is not enough.

It is therefore not sufficient to be annoyed with noise. Purchasers who buy homes situate on busy bus routes or close to major highways, do so knowing that there will be noise. In the case at bar, the noise of the movers often accompanied by music, and accompanied by the looming presence of the moving vans with their blockage of light and privacy and their emission of fumes, when added together, in my view, constitutes a breach of quiet enjoyment. See also: *Mayrand v. 768565 Ont. Ltd.* (1989) 7 R.P.R. (2d) 287 at p. 295.

17. Is Jaremko entitled to damages?

[para110] It may be that some purchasers would not have been as affected by the impact of the lay-by as Jaremko was. This in no way negates what happened to her. If the unit is to be occupied by persons who are in it during the daylight hours on a daily basis, rather than just on weekends when moves are not permitted, the impact can be substantial. If the unit is occupied by persons who work each weekday and leave the unit before the moves and deliveries begin, and arrive home after they have ceased, the impact would not be as great.

[para111] I have held that Jaremko is not entitled to rescission. I have, however, concluded that Jaremko is entitled to damages for the breaches which occurred, that is, the statutory breach with respect to the fire route, the breach of the implied covenant of quiet

enjoyment, the breach of warranty that the unit was fit for habitation. That breach was not a full-blown breach which meant that no one could live in the unit. It was a partial breach, which by itself, may not have given rise to damages but when coupled with the others gave rise to damages.

[para112] Further, in my view, the location of the lay-by and the moving room was a latent defect which did not become apparent until after the unit was occupied, and for which Jaremko is entitled to damages.

[para113] How then should Jaremko's damages be calculated? Jaremko has taken the position that if she is entitled to damages, justice can only be done if they are fixed as of the date of the trial. See: *Ansdell et al v. Crowther*, (1984) 34 R.P.R. 73 at 81. The evidence is clear that the unit had fallen substantially in value at trial from its original purchase price of \$199,000.00, it being listed at the time of trial at \$176,000.00. I have concluded that there is a 15% discount to be applied for the location of the lay-by and moving room. I therefore award Jaremko the sum of \$29,850 for this effect. I have based this on the \$199,000.00 figure, as in my view, and as noted in these Reasons, these breaches became evident when Shannon Kay occupied the unit.

[para114] Jaremko has claimed the sum of \$35,000.00 with respect to her legal costs which arose as a result of the difficulties she experienced. My review of the legal accounts shows that they amounted to \$27,597.15. These costs arose as a direct result of Jaremko's efforts to try to rectify the latent defect of the lay-by and moving room which was caused by Shipp's desire to maximize the number of apartment units it could build in the east tower and its failure to consider the impact on the owner of the unit directly in front of the lay-by. Shipp has argued that Jaremko should not be entitled to these expenses given her lack of success in her actions. I do not agree. In my view Jaremko had to take the steps she did and I have noted in these Reasons the lack of cooperation by the Board. I have further found Shipp to have breached the Fire Code. I award Jaremko the sum of \$27,597.15 for these costs.

[para115] Jaremko's expert, Ronald Smith, quantified her damages as between \$412,900.00 and \$512,000.00, taking into account all of Jaremko's costs over the years. While technically Smith's mathematics may be correct, depending on how one calculates the amount of interest which was paid by Jaremko on her borrowings, I cannot see, at law, why Shipp should pay for all of these. The fact that Jaremko had to borrow what appeared to be the full cost of the unit, was not the fault of Shipp. Nor was it Shipp's fault that Jaremko chose to rent the unit to her own daughter and to Shannon Kay and Dawn Kay at minimal rent, as opposed to market rent.

[para116] I have calculated that Jaremko during, the period from the date of the purchase to the date of trial, expended the sum of \$54,693.11 for occupancy fees, taxes and maintenance fees. These were expenditures she had to make as any owner would have made. Using the 15% discount, I award Jaremko the sum of \$8,203.00 as her damages in connection with these expenses.

[para117] Jaremko paid the sum of \$987.69 as a condominium contingency fund fee, \$1,743.75 for her Land Transfer Tax, \$448.00 for HUDAC New Home Warranty. These total \$3,179.44. I award Jaremko 15% of this amount, being \$476.92.

[para118] Jaremko and Dawn Kay both thought that a fair rent for the unit, before the impact of the lay-by and the moving room was known, was \$1,750.00 per month. No evidence was led to contradict this amount. The total rent for the years 1990 to 1994 would have been \$105,000.00. Allowing the 15% discount, I award Jaremko the sum of \$15,750.00 for the discounted rent based on her own value. Regrettably, Jaremko chose not to advertise the unit for rent at a reasonable rental rate and she is left with having to bear the difference between the amount she set with Kay and the amount she eventually received.

[para119] Jaremko's expenses also included mortgage payments. These payments would have been offset by her receiving a reasonable rental for the unit. The mortgage payments varied over the years from approximately \$18,900.00 to approximately \$13,800.00. Without considering whether the interest rate was reasonable and whether any of the interest costs did not directly relate to borrowings for this unit (an impossible task and one which Smith was aware of when he estimated some of them), I award Jaremko a lump sum amount of \$20,000.00 as her reasonable damages with respect to this item.

[para120] The total of Jaremko's damages is therefore \$101,697.07 and she shall have pre-judgment interest on this at the average Courts of Justice interest rates from the date of her Statement of Claim to the date of this Judgment, as well as post-judgment interest at the Courts of Justice interest rate from that date until the date of payment.

17. Is Jaremko entitled to damages for mental distress?

[para121] I have concluded that Jaremko is not entitled to damages for mental distress. Jaremko never occupied the unit herself and never intended to do so. The unit was intended to be occupied by her daughters but that did not fully come to fruition. Our Courts have held that damages for mental suffering can only be awarded if the parties should reasonably have foreseen mental suffering as a consequence of a breach of contract at the time the contract was entered into. See: *Voris v. Insurance Corporation of British Columbia*, [1989] 58 D.L.R.(4th) 193. While Shipp ought to have reasonably foreseen the problems which occurred when they changed the architectural plans to include the lay-by as a moving lay-by and changed the originally planned apartment next to 104 to a moving room, they went ahead with that construction and never put Jaremko on notice of the possible problem. Jaremko, on the other hand, was a realtor of many years experience and did not try to rescind the contract when she realized what the impact might be. Jaremko, in my view is therefore not entitled to damages for mental distress.

18. Costs

[para122] If counsel cannot otherwise agree on costs, I may be spoken to.

GREER J.

CBR# 174

Marisa Marafioti, Applicant, and Metropolitan Toronto Condominium Corporation No. 75, Respondent And Between Metropolitan Toronto Condominium Corporation No. 775, Metropolitan Toronto Condominium Corporation No. 769 and Metropolitan Toronto Condominium Corporation No. 785, Applicants, and Marisa Marafioti and Frank Marafioti, Respondents

Action Nos. RE3227/93 and RE3375/93

Ontario Court of Justice - General Division Toronto, Ontario Greer J. Heard: January 19 and 20, 1994. Judgment: May 24, 1994.

Jerry Herzkopf, for the Applicant on the Application and for the Respondents on the Cross-Application. Andrea M. Habas, for the Respondent on the Application and for the Applicants on the Cross-Application.

[para1] GREER J.:-- The issue with respect to these two Applications centres on the construction of a deck attached to a condominium unit townhouse. The Applicant, Maria Marafioti, ("Marafioti") has asked the Court for a permanent injunction enjoining and restraining the Respondent, Metropolitan Toronto Condominium Corporation No. 775 ("MTCC 775" or "the corporation"), its officers, directors, agents and anyone under its control from removing or in any way dealing with the deck and/or the kitchen window and sliding door, situated at the Marafioti condominium municipally located at 29 Lower Village Gate, Townhouse 29, Toronto ("the townhouse"). Marafioti further asks for a Declaration that she is in compliance with the provisions of the Condominium Act, R.S.O. 1990 Chap. C26 ("the Act") and MTCC 775's Declaration; and she asks for a Declaration that it has no status in law to order the alteration of Marafioti's kitchen window nor to take any steps to alter such window.

[para2] In their Application, MTCC 775, Metropolitan Toronto Condominium Corporation No. 769 ("MTCC 769") and Metropolitan Toronto Condominium Corporation No. 785 ("MTCC 785") seek a mandatory Order compelling both Marisa and Frank Marafioti to remove, at their own expense, from the common elements adjacent to the townhouse the rear elevated wooden deck, an extended and off-standard fence at the rear and an off-standard window and sliding door affixed to the rear exterior of the townhouse.

1. The Facts

[para3] The Applicant's husband, Frank Marafioti (also "Marafioti"), originally purchased the townhouse from the Village Gate in Lower Forest Hill Limited (the "Declarant") by Agreement of Purchase and Sale dated October 19, 1985 which was accepted by the developer on November 5, 1985. It was later transferred to the Applicant wife. The Marafiotis began occupying the townhouse in or about March 1987. MTCC 775 is a corporation which was created by operation of the Act when its declaration and description were registered on May 16, 1988. It is physically three townhouse blocks containing 32 residential condominium units, each consisting of a two storey dwelling plus a basement. MTCC 769 and MTCC 785 are highrise buildings and were constructed in close proximity to MTCC 775 by the same developer in the late 1980's. The three such corporations are operated and managed under a Common Management Council ("CMC"). Each has a proportional interest, as tenants in common, in certain shared facilities.

[para4] When the townhouse was purchased by Frank Marafioti, the Declarant agreed to changes to the townhouse layout, including changes to the common elements as well as revised layouts with respect to a larger upstairs bedroom and a deck and sliding door. A larger kitchen was also proposed. Frank Marafioti had a dispute with the Declarant about deficiencies. The dispute resolved itself by way of an agreement dated February 27, 1988, wherein the Declarant agreed to install "extras" including the construction of a patio door type walkout from the kitchen on the second level onto a wooden deck approximately 6 feet by ten feet to be constructed by the Declarant, as well as an addition to the wooden fence which was to be extended further into the back yard. The construction began shortly after February 27, 1988 and was completed by May 11, 1988. It is safe to say that not all other townhouse owners appreciated what the Marafiotis had done. Given the discord, the Declarant was requested to take an informal poll of all townhouse residents to determine their views. The Declarant reserved its right not to be bound by the outcome of the poll. This was done on May 11, 1988 and it is the Marafiotis' evidence that only two owners opposed the deck. It is the condominium owners' evidence that approximately 16 of 32 purchasers responded to the informal poll with a majority of them favouring the relocation option that had been put by the condominium owners to the Marafiotis.

[para5] One of the persons who opposed the construction of the Marafiotis' deck was William G. Wolfson, the owner of the next door townhouse 28. He wrote two letters to the developer, Camrost Development, on March 21 and March 23, 1988 voicing these objections, noting the erosion of the uniformity of the look of the townhouses as well as the breach of the rules governing the condominiums. He further objected to the deck blocking his view and invading his privacy. [para6] Wolfson attempted to negotiate with Marafioti and when this proved futile (with the exception of Marafioti's agreement to lower the height of the fence), he again wrote to Camrost. I am satisfied on the evidence as set out in Wolfson's Affidavit and its exhibits, that Camrost was singularly unhelpful to the other townhouse owners. At a meeting of these owners with Camrost on May 5, 1988, Camrost's representative confirmed that no building permit had been issued for the work, and that the condominium documentation had never been altered or amended to reflect these changes.

[para7] One other owner constructed an elevated deck to townhouse 30 but this dispute was eventually resolved between the owner and the other condominium owners and the deck was removed. The Marafiotis would not negotiate with the other owners. The Marafiotis foolishly tried to intimidate the opposing owners' group by threatening to sue.

[para8] The condominium was registered on May 16, 1988, with the "turnover meeting" taking place on or about July 21, 1988. At the December 15, 1988 meeting of the three condominiums, Marafioti advised that he was prepared to lower the height of the offending fence at his own expense and would try to get the money back from the developer. He did not lower the fence. On January 8, 1989, Mr. Marafioti began his intimidation campaign. By letter of that date, he informed the owners that his agreement with the developer was "both legal and binding." He went on to state that:

I have been put in a position of having to withdraw from a land venture in which I was promised a profit of two to three million dollars if I do not get some written answers from MTCC 755 and CMC. This exclusive common element is not a shared facility and is not a CMC matter. It is an MTCC 775 matter and I believe the directors of MTC(sic) are liable for financial hardship and loss to me due to the flagrant, irresponsible and unresearched letter sent to me by CMC at the instigation of MTCC 775. I trust this will be resolved soon to avoid legal action.

These type of threats continued. In May of 1989, the townhouse owners were put on notice of an extraordinary general meeting to be held on June 15, 1989 for the purpose of considering specific by-laws to deal with the Marafioti deck and the other deck. The by-laws were prepared at the owners' expense. The proposed bylaws were defeated at the meeting. The meeting did, however, pass a special bylaw (By-Law 4) empowering the Board of Directors of MTCC 775 to approve change/additions to common elements subject to certain restrictions. A demand letter was sent by MTCC 775's solicitor to Marafioti's solicitor demanding the immediate removal of the elevated wooden deck and fence and restoration of the common elements to their original condition. By July 30, 1990, the issue with townhouse 30 had been resolved and its owners removed the deck and the Condominium Corporation contributed \$1,000.00 towards the costs of the owners. Marafioti would only agree to reposition his deck.

[para9] Although Marafioti agreed to attend a meeting on December 4, 1990 regarding the problem, he did not do so. In January, 1991, Marafioti gave the Board a sketch of the proposed relocation of the deck. He was advised by the Board that his proposal was refused, as it would set a precedent, would alter the architectural lines of the rear of the townhouses, would infringe on the privacy of the neighbouring townhouse owners, was not consistent with the original plans, and was opposed by the adjacent owners. Mr. Marafioti then threatened to rent out his townhouse as a "group home."

[para10] From April of 1991 until July of 1993, the Board of Directors waited to take action while proceedings with the City of Toronto, which had issued an Order to Comply against Marafioti, took place. In the 2nd, even though no building permit had been obtained for all these changes to the Marafioti townhouse, the proceedings were dismissed due to delay. The City appealed and this was dismissed. During this period, Marafioti sent the Board a note entitled "Intention to Sue for Liability". Marafioti also took the position that the Board was acting in bad faith in instigating the City of Toronto to serve him with an Order to Comply as well as having him charged under the Building Code Act. He further claims that they "conspired" against him in breach of their fiduciary duties to him as an owner and did not assist him with respect to the charges against him.

2. The Condominium's Rules, Regulations and Principles

[para11] Condominiums are creatures of Statute and are governed by the provisions of the Act. The principles governing MTCC 775 are set out in its Declaration, By-Laws and Rules. Purchasers are all given a copy of the Disclosure Statement when a unit is purchased, so each is fully informed as to its operation. There is an issue as to whether the changes effected by the Marafiotis are legal. Article V(1) of the MTCC 775 Declaration reads:'

(1) General Use

Each owner may make reasonable use of, and has the right to enjoy the whole or any part of the common elements, subject to any condition or restrictions set out in the Act, the Declaration, the Corporation's by-laws...

No owner shall make any change or alteration to any installation upon common elements, or maintain, decorate, alter or repair any part of the common elements, save as allowed hereunder and except for maintaining those part of the common elements which he has a duty to maintain, without the approval of the Corporation [in accordance with the Act.

Article V(4) of the said Declaration governs additions, alteration and improvements as follows:

(4) Additions, Alterations and Improvements

(a) For the purposes of subsection 1 of Section 38 of the Act, the board shall decide whether any addition, alteration or improvement to, or renovation of, the common elements, or any change in the assets of the Corporation is substantial.

(b) No alteration, work, repairs, decoration, painting, maintenance, structure, fence, screen, hedge or erection of any kind whatsoever (the Work) shall be performed, done, erected or planted within or in relation to the common elements, (Including any part thereof over which any owner has the exclusive use), except by the Corporation or with its prior written consent or as permitted by the by-laws or rules.

Section 38 of the Act provides the following:

38(1) The corporation may by a vote of owners who own 80 percent of the units make any substantial addition, alteration or improvement to or renovation of the common elements or may make any substantial change in the assets of the corporation, and the corporation may by a vote of the owners make any further addition, alteration or improvement or renovation of the common elements...

There is nothing in the Condominium Declaration that makes reference to any private arrangement between the developer and the Marafiotis regarding the deck, fence, or sliding doors. There was no vote of approval by 80% of the owners of the units, pursuant to section 38 of the Act, nor was there a decision by the Board to permit these alterations and additions pursuant to Article V(4) of the Declaration, nor was there approval of the Corporation pursuant to Article V(1). The agreement entered into by the Marafiotis with the developer was strictly a private arrangement. The Marafiotis began their occupancy of the townhouse under an Occupancy Licence as set out in paragraph 14 of the Agreement. The Marafiotis agreed to abide by its terms. There is also an Acknowledgment signed by Frank Marafioti acknowledging that he has received the Disclosure Statement, the proposed Declaration and By-Law No. 1 and proposed Rules and other documents, all listed in subparagraphs 1 to 9 thereof.

[para12] The Disclosure Statement sets out the boundaries of the unit. Under paragraph (f) entitled "Occupation and Use of Common Elements", the Disclosure Statement states:

No owner shall make any change to an installation upon the common elements, or maintain, decorate, alter or repair any part of the common elements, except for maintaining those parts of the common elements which he has a duty to maintain, without obtaining the prior written approval of the condominium corporation in accordance with The Condominium Act.

Further, Schedule F to the Declaration sets out the exclusive use of common elements as designated on sheets 1 and 2 of the description as Recessed Entrances,(garage), Patio Garden, Recessed Entrance (Front Door), Side Yard, and Front Patio. It is clear from this document which lists the Marafioti unit as No. 23, that there is no deck on the second floor at the back of the townhouse.

[para13] Each townhouse owner also received a document dated October 15, 1987 which was entitled, "Reminders". On page 2 there is a heading, "Exteriors" which states:

The exterior walls and the exterior of the Townhouse doors are the property of the Condominium Corporation. Therefore any exterior addition, such as brass door plates must be approved by your Condominium Corporation. No changes may be initiated(sic) by individual owners without such approval.

The Corporation never retroactively approved the changes after it was in place in May of 1988. In the townhouses, the backyard is an exclusive use common element for the townhouse to which it is attached. On the other hand, the deck, window and fence are all affixed to the exterior walls which are part of the general common elements and which, as pointed out, must not be changed without the approval of the Condominium Corporation.

[para14] The Marafiotis take the position that since the townhouse is now leased to a tenant, they will suffer irreparable harm if they are ordered to the deck as they will have difficulty leasing the townhouse to another tenant without the amenity of the deck. They are of the view that if the deck is removed the tenant may try to break her tenancy. Further, the layout was structured in such a way as to make a walkout from the kitchen to the outside comparable to the other units and if the deck is demolished there will be no such access. They further argue that such access is important to them and to their tenant and other units have access from the kitchen. Lastly, they argue that if the deck is removed, they will not be able to move back to the townhouse (which they allege they plan to do in the future) because it would no longer suit their day-to-day needs. In their view, none of this damage is quantifiable by them and they thus require the injunctive relief being asked for.

[para15] I completely reject all of the Marafiotis' arguments regarding the deck. The tenant has access to the outdoors by way of the front patio and by way of the walk-out from the lower back level. The kitchen is on the second level of the townhouse and the deck is a suspended structure of limited space from which persons standing on the deck can look down on their neighbours and partly look into their windows on the second level. Mr. Wolfson admits that the deck does not entirely block his view of the ravine, and was unable to show that either the Marafiotis or their tenant had actually "spied" on him through the windows. Notwithstanding that, no other townhouse has such a structure attached to it in this complex. Since the Marafiotis own and lease to tenants two other units in the complex in addition to the townhouse, I question whether in the future they really intend to move back to townhouse No. 29.

[para16] The Marafiotis take the position that there is really only one owner who strongly complains about the deck and that is the neighbour, Mr. Wolfson. On the other hand, Libby Naiman, the then president of the Ad Hoc Committee of Corporation "C" wrote to Camrost on March 21, 1988 and stated: The building of a deck for Townhouse No. 29 is extremely prejudicial. There were many owners who wanted changes and preferential treatment, but did not get it; that was fair to all. ...All of us value the uniformity of the external look of the townhouses and the rules and regulations which govern the same are being eroded by this preferential treatment.

While Mr. Wolfson may have been the most vocal of those opposing the deck, the fact that an Ad Hoc Committee had to be formed by owners to attempt to solve the problem at an early stage is very telling.

3. The Law

[para17] The Condominium Corporation takes the position that the issue before the Court is a pre-registration situation. The case at bar is similar to that of Carleton Condominium Corporation No. 279 v. Rochon et al., (1987), 59 O.R. (2d) 545, where prior to the registration of the condominium corporation, the developer/declarant entered into a written agreement with an owner, Rochon, whereby it agreed to install a satellite dish on the roof of the building. Rochon undertook to maintain the dish as it was erected above his penthouse unit and was exclusively used by him. In that case, prior to registration, the Board of Directors as constituted by the declarant, consented to the installation. When the case was heard by the Ontario Court of Appeal, Mr. Justice Finlayson noted that the purchasers of units had received copies of the proposed declaration, by-laws and rules in the current disclosure statement as provided for by s. 52 of the Act. The By-Laws and Rules of the Condominium were registered after the satellite dish was installed. The Rochons did not obtain the consent of the other unit owners either before or after the creation of the corporation. No meeting of the unit owners was held to approve it when it was installed on the roof, the roof being part of the condominium's common elements. At p. 552, Mr. Justice Finlayson found the following:

The declaration, description and by-laws, including the rules, are therefore vital to the integrity of the title acquired by the unit owner. He is not only bound by their terms and provisions, but he is entitled to insist that the other unit owners are similarly bound. There is no place in this scheme for any private arrangement between the developer and an individual unit owner. If an individual arrangement is made, it must be disclosed in the declaration (s. 3(1)(f)).

He then held that the Rochons were not in a position to make the arrangements they did with the developer for the installation of the satellite dish. I apply Mr. Justice Finlayson's reasoning to the case at bar. As he stated at p. 553:

I do not believe that the declarant can unilaterally change the declaration, cause the corporation to change it, or excuse individual unit owners from compliance therewith.

This reasoning was adopted by Herold, J. in Metropolitan Toronto Condominium Corporation No. 776 v. Gifford (1990), 6 R.P.R (2d) 217 (Ont. Dist. Ct.)

[para18] The Marafiotis take the position that until such time as the corporation is created, Section 38 of the Act is of no force and effect nor is it retroactive in nature. Therefore, they say, any alteration or addition to the common elements prior to the creation of the corporation is wholly within the discretion of the Declarant. Surely this reasoning is flawed.

[para19] Section 7 of the Act reads in part:

7.(1) The owners are tenants in common of the common elements.

(2) An undivided interest in the common elements is appurtenant to each unit.

(12) For the purpose of determining liability resulting from breach of the duties of an occupier of land, the corporation shall be deemed to be the occupier of the common elements and the owners shall be deemed not to be occupiers of the common elements.

If the owners are tenants in common of the common elements of the townhouse, including the exterior walls, any change such as the adding of a deck, the extension of a fence which is attached to the exterior wall, affects all unit owners. Applying the principles in *Rochon*, the Declarant, at law, can make no private arrangements to in any way interfere with this common ownership before or after registration. In *York Condominium Corp. No. 167 v. Newry Holdings Ltd.* [1981] 122 D.L.R. (3d) 280, the Court considered the question of the Developer's right to deal with the common elements of the condominium prior to registration. It held at p. 288 that the developer could not, either before or after the registration of the declaration, deal with any part of the common elements so as to defeat the unit purchasers' equitable interests in them. *Camrost*, in agreeing to the construction of the deck, the extension of the fence and the addition of the sliding doors out to the deck, did just that. It interfered with the other owners' equitable rights which crystallized into legal rights when registration took place.

[para20] The Marafiotis further argue that the addition of the deck was a "minor modification" which would not require the declarant to deliver a new and amended disclosure statement pursuant to section 52 of the Act. They rely on *Abdool v. Somerset Place Developments of Georgetown Ltd.* (1993), 10 O.R. (3d) 120 (C.A.) for the proposition that this was not a material amendment and concluded that *Rochon* must be read in light of *Abdool*.

[para21] In my view, the ratio in *Rochon* has not been misused by our Courts, as was argued by Counsel for the Marafiotis. When one carefully examines the wording of the Act with respect to the use of the common elements, and combines this with the provisions of the By-Laws, *Rochon* clearly applies. *Abdool* is a disclosure statement case.

[para22] Given the seemingly six year delay in the corporation bringing this Application, is it now estopped from enforcing its rights? The estoppel argument, as set out in *The Canadian Encyclopedic Digest*, Volume 10, Title 56, Section 51, Pg. 64 reads:

Whenever an argument against relief that otherwise would be just is founded upon mere delay (that delay not amounting to a bar by the Statute of Limitations), the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

The effect of delay or laches is set out in *Farrell v. Manchester* (1908), 40 S.C.R. 339 (S.C.C.). There is no doubt that at first blush, the six year delay seems like an inordinate length of time to wait to bring the matter to Court. On the other hand, in my review of the facts and as I have set them out in these Reasons, it is clear that the protests began immediately upon the construction beginning. Attempts were made to reach some agreement. These were unsuccessful. By-Laws were drafted and were not passed. The Marafiotis themselves threatened legal action. Finally, the Board took the position that it would wait for the outcome of the litigation with City of Toronto. It did so but in the meantime, put the Marafiotis on notice that legal action was being contemplated. The delay was therefore perfectly explainable.

[para23] What then was the nature of the acts done during the Interval? The Marafiotis take the position that the Board did nothing to help them when they were sued by the City for their failure to obtain a building permit. There were no promises or assurances given which were intended to affect the legal relation between the parties. On those facts alone, the case at bar can be distinguished from those cases where such promises or assurances were given. See: *John Burrows Limited v. Subsurface Survey's Limited* [1968] S.C.R. 607.

[para24] Do the Marafiotis have a defence based on the doctrine of laches? Would it be an injustice to allow MTCC 775 the relief it is now requesting? Mere passage of time does not constitute laches. The equitable defence of laches is in the discretion of the Court. See: *Canada Trust Co. v. Lloyd*, [1968] 66 D.L.R. (2d) 722, and *Egnatios v. Leon Estate* [1990] D.L.R. (4th) 137. In *Egnatios*, supra, Sutherland J. at p. 160 quotes *Waters on the Law of Trusts in Canada*, 2nd ed. (Carswell, 1984) at para. 1024 in speaking of the doctrine of laches:

It is also closely related to the doctrine of acquiescence. Indeed, it is more likely that what the courts are really concerned with is implied acquiescence rather (than) delay itself. This is particularly true today when limitation statutes expressly apply to so many actions brought in equity.

There is nothing in the evidence presented to me which would lead me to believe that there was acquiescence on the part of the Board. Admittedly, they waited almost three years while the action and the appeal with the City of Toronto reached its conclusion. Even as late as July, 1990, the Board told the Marafiotis that it would do for them what it did for the owner of townhouse No. 30, that is, pay \$1,000.00 towards the cost of the removal of the deck. In addition, there was correspondence between the Board's solicitors and the Marafiotis in 1990. The Board wrote to Dr. Marafioti on February 12, 1991 and told him that the Board had decided not to approve his suggestion that the deck be relocated. Dr. Marafioti wrote back to the Board on May 12, 1991 and told them he intended to sell his two other townhouses, keep No. 29 and rent it out as a "group home". The issue of the deck was by no means a dead issue. Acquiescence therefore does not apply nor does the doctrine of laches.

4. Conclusion

[para25] The Marafiotis' Motion to amend the Notice of Application is granted but their Application for injunctive relief is dismissed for the Reasons I have outlined.

[para26] There shall be a mandatory Order that the Marafiotis remove the deck from townhouse No. 29 and remove that portion of the fence which is now off-standard. The off-standard sliding doors may remain if the Marafiotis cover at least the lower half with wrought iron grill work which will allow them to be opened to the fresh air but meet whatever safety standards are required by the City. Such work shall be done within 90 days of the date of this Order.

[para27] Counsel may speak to me with respect to Costs.

GREER J.

CBR# 234

Peel Condominium Corporation No. 417, Applicant, and Tedley Homes Ltd., Sheldon Libfeld, Jay Libfeld and Mark Libfeld, Respondents

Action No. RE2292/93

Ontario Court of Justice - General Division Toronto, Ontario B. Wright J. Heard: May 14, 1993. Judgment: June 24, 1993.

Mark H. Arnold and J. Robert Gardiner, for the Applicant. Thomas J. Gorsky, for the Respondents.

[para1] B. WRIGHT J.:-- Tedley Homes Ltd. is a developer and declarant who built a two-tower condominium project. Purchasers of units received from Tedley an amended disclosure statement which stated, "It shall be the duty and obligation of the Condominium to enter into and be bound by the Conveyance and Purchase Agreement with the Declarant ...". The agreement requires Peel Condominium to purchase from Tedley six units comprising two superintendent suites and four guest suites.

[para2] Peel Condominium seeks a declaration declaring the Conveyance and Purchase Agreement null and void and declaring the six units to be common elements. Peel cites two main reasons for declaring the agreement null and void: (1) the Declaration allocates 0% of common interest and proportion of contribution to the common expenses resulting in Tedley having no ownership of the common interest; therefore, pursuant to s.7(5) of the Condominium Act, the agreement is null and void because there is a separation of the ownership of a unit from the ownership of the common interest; and (2) the Tedley directors who were also the first directors of the Peel Condominium Corporation failed to disclose their interest in the Agreement as required by s.17 of the Condominium Act. The Agreement

[para3] The Conveyance and Purchase Agreement is set out in the Declaration:

ARTICLE 8 - DUTIES OF THE CORPORATION

Section 8.01 - Duties

The duties of the Corporation shall include, but shall not be limited to enter into and be bound by an agreement (the "Conveyance and Purchase Agreement") with the Declarant, their respective successors and assigns with respect to the conveyance by the Declarant to the Corporation and the purchase by the Corporation of units 6 and 8, level 1 and the Guest Units (which units 6 and 8, level 1 and Guest Units are in this Section 8.01 and in Schedule "E" called the "Purchased Property"), upon the following terms and conditions: (a) purchase price to be paid by the Corporation for units 6 and 8, level 1 is to be THREE HUNDRED AND TWENTY THOUSAND (\$320,000.00) DOLLARS and for the Guest Units is to be ONE HUNDRED AND SIXTY THOUSAND (\$160,000.00) DOLLARS, for a total of FOUR HUNDRED AND EIGHTY THOUSAND (\$480,000.00) DOLLARS:

(b) there shall be no initial deposit paid by the Corporation to the Declarant and all unpaid purchase monies shall bear interest at the rate of ten per cent (10%) per annum, calculated semi-annually not in advance, commencing one (1) month after registration of the Corporation to be repaid in blended monthly instalments of principal and interest over a term of twenty (20) years and amortized over a period of twenty (20) years;

(c) title to the Purchased Property shall remain in the Declarant and shall only be transferred to the Corporation upon the payment in full of the purchase price and accrued interest thereon;

(d) all payments to be made to the Declarant shall be made by the Corporation from the monies collected on account of common expenses or otherwise and the Corporation agrees to be bound by same;

(e) until such time as the full purchase price is paid, the Corporation shall be given a revocable licence to use the Purchased Property upon those terms and conditions designated by the Declarant relating to use and occupancy; (f) the Corporation shall at all times after registration of the Corporation be responsible for and pay all common expenses and other payments including realty taxes relating to the Purchased Property;

(g) where there is any default in payment by the Corporation to the Declarant of any unpaid purchase price, or accrued interest thereon, the Declarant shall give written notice to the Corporation of such default, then if such default is not cured within five (5) days of such written notice being given, the Declarant shall have the immediate right to terminate the Conveyance and Purchase Agreement and to take possession of the Purchased Property and to remove all persons and things therefrom and otherwise the Declarant shall have all rights and remedies available to it at law or in equity; and

(h) otherwise on terms and conditions as set out in the Conveyance and Purchase Agreement to be entered into between the Declarant and the Corporation.

Section 7(5), Separation of Ownership

[para4] The applicable sections of the Condominium Act are:

3.--(1) A declaration shall not be registered ... unless it contains,

(c) a statement, expressed in percentages, of the proportions of the common interests; (d) a statement, expressed in percentages allocated to the units, of the proportions in which the owners are to contribute to the common expenses;

...

(5) Where any provision in a declaration or by-law is inconsistent with the provisions of this Act, the provisions of this Act shall prevail and the declaration or by-law is deemed to be amended accordingly.

...

(8) The corporation, on at least seven days notice to every owner and mortgagee, or an owner, on at least seven days notice to the corporation and every other owner and mortgagee, may apply to a judge of the Ontario Court (General Division) for an order amending the declaration or description and the judge, if he or she is satisfied that an amendment is necessary or desirable to correct an error or inconsistency in the declaration or description arising out of the carrying out of the intent and purpose of the declaration or description, may make the order.

7.--(1) The owners are tenants in common of the common elements.

(2) An undivided interest in the common elements is appurtenant to each unit.

(3) The proportions of the common interests are those expressed in the declaration. (5) The ownership of a unit shall not be separated from the ownership of the common interest, and any instrument that purports to separate the ownership of a unit from a common interest is void.

[para5] In order for large condominium projects to operate functionally, the presence of a superintendent on the property is a necessity. However, there is confusion surrounding the definition of the units in which superintendents reside. To resolve the confusion, the Act could be amended to provide that the superintendent's unit is part of the common elements. In this way, purchasers would know that a superintendent's living accommodation is included in their purchase agreement and they would not be faced subsequently, as a member of the corporation, with having to purchase accommodation for the superintendent. Guest units may be in a different category as not being as necessary to the proper functioning of the project.

[para6] However, in this case, the developer made his intentions clear to the purchasers, by advising them by an amended disclosure statement, that the superintendent's units and guest units were not included in their purchase agreements as part of the common elements.

[para7] But, it is a violation of the spirit and intent of the Act to allocate 0% of common interest and common expenses to ownership of a unit. An owner of a unit has a common interest in the common elements and cannot escape the obligation as an owner of a unit to pay the appropriate percentage of common expenses.

[para8] In this case, the instrument which has purported to separate the ownership of a unit from the ownership of the common interest is not the Conveyance and Purchase Agreement but the Declaration. The Declaration should not be declared void pursuant to s.7(5) but should be amended pursuant to s.3(5) and (8). I find that Peel Condominium has complied with the notice requirements of s.3(8) in order to invoke that remedy. There will be an order amending Schedule "D" of the Declaration to provide the appropriate percentage interest and proportion of contribution to the common expenses to all of the units including the six units in dispute in this application.

Section 17(1) - Disclosure of Interest

[para9] Section 17(1) provides:

Every director of a corporation who has, directly or indirectly, any interest in any contract or transaction to which the corporation is or is to be a party, other than a contract or transaction in which the director's interest is limited solely to his or her remuneration as a director, officer or employee, shall declare his or her interest in such contract or transaction at a meeting of the directors of the corporation and shall at that time disclose the nature and extent of such interest including, as to any contract or transaction involving the purchase or sale of property by or to the corporation, the cost of the property to the purchaser and the cost thereof to the seller, if acquired by the seller within five years before the date of the contract or transaction, to the extent to which such interest or information is within his or her knowledge or control, and shall not vote and shall not in respect of such contract or transaction be counted in the quorum.

[para10] Tedley admits that its directors, as directors of the Peel Condominium, did not make a formal disclosure as required by s.17(1) prior to entering into the Conveyance and Purchase Agreement. However, Tedley argues that formal disclosure was not required because full disclosure was made to all purchasers by the amended disclosure statement and the Tedley directors and the Peel Condominium directors were the same persons who had knowledge of the interests involved. Tedley also argues that the agreement should not be declared null and void because none of the purchasers of units, being aware of the transaction as set out in the amended disclosure statement, chose to rescind their purchase and sale agreements pursuant to s.52 of the Act. [para11] Leaving aside the question of the required disclosure, s.17(1) has a more onerous stipulation. Once there is an interest disclosed, the persons having the interest "...shall not vote and shall not in respect of such contract be counted in the quorum." The result: the Tedley directors who had an interest in the Conveyance and Purchase Agreement were the only directors of the Peel Condominium at the time the agreement was considered by Peel Condominium and were prohibited from voting to accept the agreement on behalf of Peel Condominium. The Agreement should not have come before Peel Condominium until after the turn-over meeting where purchasers of units and Tedley as the owner of unsold units voted for the new directors of Peel Condominium. Then, there would have been a quorum of directors of Peel Condominium without a conflict of interest to consider entering into the Agreement.

[para12] It is not the ownership of the six units or the right of Tedley to sell those units but rather the proper method for the sale to take place. Not only is the agreement void because of non-compliance with s.17(1), but the agreement is unconscionable. The unconscionability of the agreement stems mostly from its unilateral nature. How can there be a unilateral agreement? Tedley, as a declarant, has breached its fiduciary duty to act in the best interest of Peel Condominium by foisting on the directors an obligation to enter into an agreement without any opportunity for the directors, who do not have a conflict of interest, to consider the nature of the agreement or its terms. The Declarant makes a declaration which describes as the only duties of the directors, to be bound by the agreement. Such a duty hardly fits into the general concept of the duties of the directors of a condominium corporation. Directors are required to act in the best interests of all of the members of the corporation. The directors are unable to fulfil that general duty if they have no input into the agreement. The silence of the individual unit purchasers in failing to challenge the amendment to the disclosure statement cannot be taken as acquiescence of the agreement on behalf of Peel Condominium.

[para13] Even if non-compliance with s.17(1) was not sufficient to nullify the agreement, the agreement is unconscionable. The terms of the agreement are onerous. Peel Condominium has had no input into the purchase price or the financing. Title does not pass to the corporation until all payments are made at the end of the twenty-year period. In the interim, the Corporation is saddled with paying all common expenses and other payments including realty taxes on the six units. Directors of Peel Condominium

without an interest in these six units should have an opportunity to consider what type of an agreement for the purchase of the six units is in the best interest of the corporation.

[para14] In the result, there will be the following orders:

(a) rescinding the Conveyance and Purchase Agreement; (b) amending the Declaration to delete Article 8; (c) amending Schedule "D" of the Declaration to allocate the proper percentage of contribution to the common expenses to all units including the six units in dispute in this application; (d) requiring Tedley to pay to Peel Condominium the applicable common expenses of the six units from the dates when they were due and owing plus applicable interest; (e) requiring Tedley to repay to Peel Condominium other payments including realty taxes already paid on behalf of the six units plus applicable interest; (f) requiring the payments by Tedley to be set-off by an amount to be agreed to between the parties for the use by Peel Condominium of the six units; (g) solicitor and client costs.

B. WRIGHT J.

CBR# 380

York North Condominium Corp. No. 5 v. Van Horne Clipper Properties Ltd.

60 O.R. (2d) 468

ONTARIO HIGH COURT OF JUSTICE O'LEARY J. 25TH APRIL 1987.

ACTION for damages suffered in respect of the purchase of the superintendent's suite in a condominium from the developer.

Jonathan Fine, for plaintiff.

T.P. McIver, Q.C., for defendant.

O'LEARY J. (orally):-- The plaintiff, York North Condominium Corporation No. 5, was constituted by registration by the defendant of a declaration and description under the Condominium Act, R.S.O. 1980, c. 84, on December 6, 1979. This action is for, amongst other claims, the recovery of the damages the plaintiff alleges it suffered by having to buy the superintendent's suite from the defendant when it in fact constituted part of the common elements that belong to it, by virtue of the dealings between the defendant and the purchasers of the individual units in the condominium corporation.

I make the following findings of fact: Intending to eventually create the condominium corporation, the defendant began selling units in its 107-unit building in December of 1978. The defendant's agent did not represent to prospective purchasers that the unit reserved as the living quarters for the superintendent would form part of the common elements. The purchasers were told, however, that the condominium would have a full-time live-in superintendent.

All purchasers were given, before they agreed to buy a unit, a budget statement for the year immediately following registration. That budget reads in part: "Office and General Expenses. Rental of superintendent's suite, \$350 per month, \$4,200" (for those purchasers who bought prior to July 1, 1979, the budget statement read, rental of superintendent's suite, \$250; per month, \$3,000): "Realty Taxes -- superintendent's apartment, \$600" (\$500 in the statement prior to July 1, 1979).

All purchasers retained solicitors to represent them in the transactions they entered into with the defendant. Only one solicitor questioned whether the superintendent's unit was to be part of the common elements, claiming his client understood it was to be such, and when told it was not part of the common elements, made no more of the issue and closed the transaction.

When more than one-half of the units in the building had been sold, a meeting of the owners of those units was called and on February 29, 1980, they elected a new board of directors for the condominium corporation. The new board of directors held its first meeting on March 5, 1980. At that meeting the defendant's solicitor explained that the superintendent's apartment was owned by the defendant, Van Horne, to whom monthly rental was paid from the common expense account and that the taxes for that unit were also paid out of the common expense account. In answer to an inquiry in that regard, the solicitor told the board the unit could be purchased from Van Horne. No one expressed surprise or concern that Van Horne owned the unit and that the condominium was paying rent for it and the taxes on it.

At the general meeting of the owners of the individual units held on September 23, 1980, the board of directors was authorized to negotiate with the defendant for the purchase of the superintendent's unit. Eighty-seven voted in favour of this being done, none opposed it.

On January 21, 1981, the plaintiff agreed to buy the unit from the defendant for \$40,000 with \$5,000 to be paid in cash and the defendant to take back a mortgage for \$35,000. The transaction was completed on January 30, 1981, and a transfer of title was registered on that date. Prior to the transfer of title, the plaintiff made the rental payments and paid the taxes for the unit I have already mentioned. After the transfer of title, the plaintiff paid the defendant the monthly payments in the amount of \$414 each, called for in the mortgage until this action was commenced in September, 1984.

It is the position of the plaintiff that the representation by the defendant that the condominium would have a full-time, live-in superintendent constituted a representation to the purchasers of the units that the unit to be occupied by the superintendent would be part of the common elements or was to be an asset of the condominium corporation.

There is no requirement in the Condominium Act, nor is there any evidence before me that through practice or custom the superintendent's residence form part of the common elements or is an asset of the condominium corporation. If any purchaser drew such inference from the representation I have referred to, then he was not justified in doing so. Indeed, if any such inference was drawn, it does not seem to have been very firmly held for no objection was taken to the unit being purchased from the defendant.

The plaintiff further takes the position that there was an obligation on the defendant to make clear to the purchasers whether the superintendent's unit was part of the common elements, that the defendant failed to do so and, therefore, the unit must be considered part of the common elements.

In my view, nothing transpired in this case to place on the defendant such an obligation, but even if such an obligation did exist, the defendant did make it plain that the unit was not part of the common elements. It is inconceivable to me that a purchaser, handed a budget statement showing that the condominium corporation would be paying \$350 a month rent for the superintendent's suite, could think that somehow that unit was to be owned by the condominium corporation.

It is also the position of the plaintiff that by virtue of the written agreement between the defendant and the purchasers of the various units, which agreement includes the agreement of purchase and sale and various documents which by the Condominium Act or by the wording of the agreement of purchase and sale, form part of that agreement, the unit in question was part of the common elements.

It is said that there were ambiguities in portions of the various documents just referred to, that would leave the purchasers confused as to who was to own the unit. In fact, no purchaser testified that he was led to believe because of what was in those documents that the unit was to be part of the common elements.

Counsel for the plaintiff has gone through various clauses in the agreement of purchase and sale, the declaration and other documents in an attempt to show that because of ambiguity or inconsistencies, it is ambiguous as to whether the parties intended the unit to be part of the common elements and that being the case, the defendant having drawn the documents, the documents must be interpreted to mean that the unit is a common element. I do not intend to review that argument in detail because I do not find that on reading the documents together there is any ambiguity. Rather, as stated, I am of the view that the provisions in the budget I have mentioned made it clear that the unit was to be rented by the condominium corporation and so it was not owned by it. I will, however, refer to one provision in the documents that the plaintiff relies on as indicating the unit was a common element. The plaintiff says that the provision I am about to deal with is not just an ambiguity, but an outright indication that the unit is part of the common elements. The provision I deal with specifically is found in art. 3, p. 3 of the declaration, and reads as follows:

Restrictive Access

Without the consent in writing of the Board, no owner shall have any right of access to those parts of the common elements used from time to time as a dwelling for any building superintendent.

While I am mindful that this clause seems to have been looked on differently by the Court of Appeal, in my view it does not literally say that the dwelling occupied by the superintendent is part of the common elements. Rather, if read literally, it says that access is restricted to any portion of the common elements so used. In my view, the words do not make the superintendent's dwelling part of the common elements, but restricts access to that dwelling if it is part of the common elements. In any event, in light of the clear statement in the budget statement that the condominium corporation would be paying rent for the unit, the allegedly ambiguous statements in the documents could not have confused the purchasers. They knew or ought to have known the unit belonged to the defendant.

The plaintiff further states that because a monitoring panel was located by the defendant in the superintendent's unit, then that unit became more than a living unit, rather it became a unit to be used to monitor the proper functioning of certain equipment and thus by its very nature is part of the common elements and not simply a living unit.

The panel in question is only approximately eight ins. by twelve ins. in size. It is set into the wall and so is flush with the wall, in the hallway of the unit occupied by the superintendent and is located just inside the door to that unit. The panel is not visible from the living-room or any other portion of that unit except the small hallway just inside the door. To look at it, the superintendent would have to walk into the hallway, almost to the door, because the panel is otherwise hidden from view by the hallway clothes closet without much change. So far as convenience of observation is concerned, it could have been located on the wall of the hallway outside and opposite the door of the superintendent's unit. If located there, the superintendent, if making a special point of viewing the panel, would only have to open the door to view it.

There is no suggestion that the superintendent was to keep the panel under more or less constant view. Certainly she was not expected to disrupt her sleep to watch it.

The panel is comprised of a number of small half-inch-in- diameter lights, that will show red while a particular piece of equipment is in operation or in some cases, if a piece of equipment has malfunctioned. It alerts one looking at it, when and if, certain problems arise with equipment in the building. The panel also contains the switches that turn on and off the heat elements located in the cement ramp and in the two outside cement stairs leading to the garage.

The panel could be moved and located on some other wall for about \$200.

While undoubtedly the panel is part of the common elements, it does not follow in my view that because it was located in the unit reserved by the defendant for the superintendent that unit thereby became part of the common elements. The panel was located there because it was the most appropriate place to put it. It did not detract from the use of the unit as living quarters. It was out of reach of any who might want to meddle with it and it was slightly more convenient in that location because the superintendent could inspect it without opening the door.

I cannot see, however, why because some pieces of common element equipment are located inside the unit reserved for use by the superintendent that such unit must be considered part of the common elements. If the plaintiff did not want the panel to remain there after the new board of directors was chosen on March 5, 1980, it could have asked the defendant to move it. In fact, of course, that was not done.

The defendant may well have bargained that the unit would be retained by it and its successors as living quarters for the superintendent and would not be sold by it or leased by it to anyone but the condominium corporation as long as the corporation wanted it for the superintendent's living quarters. But that does not mean that the unit thereby lost its essential nature as a dwelling unit and became part of the common elements.

The plaintiff relies on *Frontenac Condominium Corp. No. 1 v. Joe Macciocchi & Sons Ltd.* (1975), 11 O.R. (2d) 649, 67 D.L.R. (3d) 199, and *York Condominium Corp. No. 167 et al. v. Newrey Holdings Ltd. et al.* (1981), 32 O.R. (2d) 458, 122 D.L.R. (2d) 458, as support for its contention the court ought to find that the unit was part of the common elements or was an asset of the condominium corporation at all times. In neither of those cases did the declarant give budget statements to the purchasers showing that the condominium corporation would be paying rent for the unit. In my view, had such been done those cases would have been decided differently.

I conclude, therefore, that the unit in question was never part of the common elements nor an asset of the condominium corporation, until the corporation purchased the unit from the defendant. The plaintiff has suffered no damages and is not entitled to any remedy.

The action is therefore dismissed.

[Argument as to costs.]

HIS LORDSHIP: My endorsement reads: "For reasons given the action is dismissed and the defendant is to have judgment on the counterclaim for the amount owing on the mortgage, together with the costs of the action and counterclaim, one counsel fee only, on a solicitor-client basis".

Action dismissed.

CBR# 84

York North Condominium Corp. No. 5 v. Van Horne Clipper Properties Ltd.

60 O.R. (2d) 468

ONTARIO HIGH COURT OF JUSTICE O'LEARY J. 25TH APRIL 1987.

ACTION for damages suffered in respect of the purchase of the superintendent's suite in a condominium from the developer.

Jonathan Fine, for plaintiff.

T.P. McIver, Q.C., for defendant.

O'LEARY J. (orally):-- The plaintiff, York North Condominium Corporation No. 5, was constituted by registration by the defendant of a declaration and description under the Condominium Act, R.S.O. 1980, c. 84, on December 6, 1979. This action is for, amongst other claims, the recovery of the damages the plaintiff alleges it suffered by having to buy the superintendent's suite from the defendant when it in fact constituted part of the common elements that belong to it, by virtue of the dealings between the defendant and the purchasers of the individual units in the condominium corporation.

I make the following findings of fact: Intending to eventually create the condominium corporation, the defendant began selling units in its 107-unit building in December of 1978. The defendant's agent did not represent to prospective purchasers that the unit reserved as the living quarters for the superintendent would form part of the common elements. The purchasers were told, however, that the condominium would have a full-time live-in superintendent.

All purchasers were given, before they agreed to buy a unit, a budget statement for the year immediately following registration. That budget reads in part: "Office and General Expenses. Rental of superintendent's suite, \$350 per month, \$4,200" (for those purchasers who bought prior to July 1, 1979, the budget statement read, rental of superintendent's suite, \$250; per month, \$3,000): "Realty Taxes -- superintendent's apartment, \$600" (\$500 in the statement prior to July 1, 1979).

All purchasers retained solicitors to represent them in the transactions they entered into with the defendant. Only one solicitor questioned whether the superintendent's unit was to be part of the common elements, claiming his client understood it was to be such, and when told it was not part of the common elements, made no more of the issue and closed the transaction.

When more than one-half of the units in the building had been sold, a meeting of the owners of those units was called and on February 29, 1980, they elected a new board of directors for the condominium corporation. The new board of directors held its first meeting on March 5, 1980. At that meeting the defendant's solicitor explained that the superintendent's apartment was owned by the defendant, Van Horne, to whom monthly rental was paid from the common expense account and that the taxes for that unit were also paid out of the common expense account. In answer to an inquiry in that regard, the solicitor told the board the unit could be purchased from Van Horne. No one expressed surprise or concern that Van Horne owned the unit and that the condominium was paying rent for it and the taxes on it.

At the general meeting of the owners of the individual units held on September 23, 1980, the board of directors was authorized to negotiate with the defendant for the purchase of the superintendent's unit. Eighty-seven voted in favour of this being done, none opposed it.

On January 21, 1981, the plaintiff agreed to buy the unit from the defendant for \$40,000 with \$5,000 to be paid in cash and the defendant to take back a mortgage for \$35,000. The transaction was completed on January 30, 1981, and a transfer of title was registered on that date. Prior to the transfer of title, the plaintiff made the rental payments and paid the taxes for the unit I have already mentioned. After the transfer of title, the plaintiff paid the defendant the monthly payments in the amount of \$414 each, called for in the mortgage until this action was commenced in September, 1984.

It is the position of the plaintiff that the representation by the defendant that the condominium would have a full-time, live-in superintendent constituted a representation to the purchasers of the units that the unit to be occupied by the superintendent would be part of the common elements or was to be an asset of the condominium corporation.

There is no requirement in the Condominium Act, nor is there any evidence before me that through practice or custom the superintendent's residence form part of the common elements or is an asset of the condominium corporation. If any purchaser drew such inference from the representation I have referred to, then he was not justified in doing so. Indeed, if any such inference was drawn, it does not seem to have been very firmly held for no objection was taken to the unit being purchased from the defendant.

The plaintiff further takes the position that there was an obligation on the defendant to make clear to the purchasers whether the superintendent's unit was part of the common elements, that the defendant failed to do so and, therefore, the unit must be considered part of the common elements.

In my view, nothing transpired in this case to place on the defendant such an obligation, but even if such an obligation did exist, the defendant did make it plain that the unit was not part of the common elements. It is inconceivable to me that a purchaser, handed a budget statement showing that the condominium corporation would be paying \$350 a month rent for the superintendent's suite, could think that somehow that unit was to be owned by the condominium corporation.

It is also the position of the plaintiff that by virtue of the written agreement between the defendant and the purchasers of the various units, which agreement includes the agreement of purchase and sale and various documents which by the Condominium Act or by the wording of the agreement of purchase and sale, form part of that agreement, the unit in question was part of the common elements.

It is said that there were ambiguities in portions of the various documents just referred to, that would leave the purchasers confused as to who was to own the unit. In fact, no purchaser testified that he was led to believe because of what was in those documents that the unit was to be part of the common elements.

Counsel for the plaintiff has gone through various clauses in the agreement of purchase and sale, the declaration and other documents in an attempt to show that because of ambiguity or inconsistencies, it is ambiguous as to whether the parties intended the unit to be part of the common elements and that being the case, the defendant having drawn the documents, the documents must be interpreted to mean that the unit is a common element. I do not intend to review that argument in detail because I do not find that on reading the documents together there is any ambiguity. Rather, as stated, I am of the view that the provisions in the budget I have mentioned made it clear that the unit was to be rented by the condominium corporation and so it was not owned by it. I will, however, refer to one provision in the documents that the plaintiff relies on as indicating the unit was a common element. The plaintiff says that the provision I am about to deal with is not just an ambiguity, but an outright indication that the unit is part of the common elements. The provision I deal with specifically is found in art. 3, p. 3 of the declaration, and reads as follows:

Restrictive Access

Without the consent in writing of the Board, no owner shall have any right of access to those parts of the common elements used from time to time as a dwelling for any building superintendent.

While I am mindful that this clause seems to have been looked on differently by the Court of Appeal, in my view it does not literally say that the dwelling occupied by the superintendent is part of the common elements. Rather, if read literally, it says that access is restricted to any portion of the common elements so used. In my view, the words do not make the superintendent's dwelling part of the common elements, but restricts access to that dwelling if it is part of the common elements. In any event, in light of the clear statement in the budget statement that the condominium corporation would be paying rent for the unit, the allegedly ambiguous statements in the documents could not have confused the purchasers. They knew or ought to have known the unit belonged to the defendant.

The plaintiff further states that because a monitoring panel was located by the defendant in the superintendent's unit, then that unit became more than a living unit, rather it became a unit to be used to monitor the proper functioning of certain equipment and thus by its very nature is part of the common elements and not simply a living unit.

The panel in question is only approximately eight ins. by twelve ins. in size. It is set into the wall and so is flush with the wall, in the hallway of the unit occupied by the superintendent and is located just inside the door to that unit. The panel is not visible from the living-room or any other portion of that unit except the small hallway just inside the door. To look at it, the superintendent would have to walk into the hallway, almost to the door, because the panel is otherwise hidden from view by the hallway clothes closet without much change. So far as convenience of observation is concerned, it could have been located on the wall of the hallway outside and opposite the door of the superintendent's unit. If located there, the superintendent, if making a special point of viewing the panel, would only have to open the door to view it.

There is no suggestion that the superintendent was to keep the panel under more or less constant view. Certainly she was not expected to disrupt her sleep to watch it.

The panel is comprised of a number of small half-inch-in- diameter lights, that will show red while a particular piece of equipment is in operation or in some cases, if a piece of equipment has malfunctioned. It alerts one looking at it, when and if, certain problems arise with equipment in the building. The panel also contains the switches that turn on and off the heat elements located in the cement ramp and in the two outside cement stairs leading to the garage.

The panel could be moved and located on some other wall for about \$200.

While undoubtedly the panel is part of the common elements, it does not follow in my view that because it was located in the unit reserved by the defendant for the superintendent that unit thereby became part of the common elements. The panel was located there because it was the most appropriate place to put it. It did not detract from the use of the unit as living quarters. It was out of reach of any who might want to meddle with it and it was slightly more convenient in that location because the superintendent could inspect it without opening the door.

I cannot see, however, why because some pieces of common element equipment are located inside the unit reserved for use by the superintendent that such unit must be considered part of the common elements. If the plaintiff did not want the panel to remain there after the new board of directors was chosen on March 5, 1980, it could have asked the defendant to move it. In fact, of course, that was not done.

The defendant may well have bargained that the unit would be retained by it and its successors as living quarters for the superintendent and would not be sold by it or leased by it to anyone but the condominium corporation as long as the corporation wanted it for the superintendent's living quarters. But that does not mean that the unit thereby lost its essential nature as a dwelling unit and became part of the common elements.

The plaintiff relies on *Frontenac Condominium Corp. No. 1 v. Joe Macciocchi & Sons Ltd.* (1975), 11 O.R. (2d) 649, 67 D.L.R. (3d) 199, and *York Condominium Corp. No. 167 et al. v. Newrey Holdings Ltd. et al.* (1981), 32 O.R. (2d) 458, 122 D.L.R. (2d) 458, as support for its contention the court ought to find that the unit was part of the common elements or was an asset of the condominium corporation at all times. In neither of those cases did the declarant give budget statements to the purchasers showing that the condominium corporation would be paying rent for the unit. In my view, had such been done those cases would have been decided differently.

I conclude, therefore, that the unit in question was never part of the common elements nor an asset of the condominium corporation, until the corporation purchased the unit from the defendant. The plaintiff has suffered no damages and is not entitled to any remedy.

The action is therefore dismissed.

[Argument as to costs.]

HIS LORDSHIP: My endorsement reads: "For reasons given the action is dismissed and the defendant is to have judgment on the counterclaim for the amount owing on the mortgage, together with the costs of the action and counterclaim, one counsel fee only, on a solicitor-client basis".

Action dismissed.

CBR# 360

York Condominium Corp. No. 216 v. Borsodi et al.

42 O.R. (2d) 99 148 D.L.R. (3d) 290

ONTARIO COUNTY COURT JUDICIAL DISTRICT OF YORK ALLEN CO. CT. J. 6TH APRIL 1983.

ACTION for a mandatory injunction requiring the defendants to comply with the Condominium Act and the declaration of the plaintiff corporation.

Michael A. Spears, for plaintiff.

Istvan Borsodi and Vasiliki Borsodi, defendants, appearing in person.

ALLEN CO. CT. J.:-- Originally the plaintiff, as applicant, had initiated proceedings by way of notice of motion seeking relief under the Condominium Act. Subsequently a writ of summons was issued and, on consent, I ordered that the material filed in relation to the notice of motion be part of the pleadings and proceedings in the action. Thus, the trial proceeded upon the basis of the affidavits filed and viva voce testimony.

There was no dispute as to the factual background of the proceedings. The premises owned and occupied by the defendants form one unit of the 710 units in a large complex composed of three high-rise buildings on about 12 acres of land. The complex forms the condominium project legally described as York Condominium Plan No. 216 and hereinafter called the "Condominium".

The unit owned by the defendants is located in the building known as the North Tower which contains 231 units on 17 storeys. I shall call that unit the "Unit" and that building the "North Tower".

The plaintiff was created on or about August 1, 1975, by the registration of a declaration under the Condominium Act, R.S.O. 1970, c. 77, as amended. Hereafter I shall call that declaration the "Declaration". The relevant legislation is the Condominium Act, R.S.O. 1980, c. 84. For case of reference I shall use the expression "the Act" to refer to either statute.

In August, 1975, the Act, in s. 3(2)(c) provided that:

3(2) In addition to the matters mentioned in subsection 1, a declaration may contain,

(c) provisions respecting the occupation and use of the units and common elements;

The Act now contains, in s. 3(3)(b), a virtually identical provision in the following form:

3(3) In addition to the matters mentioned in subsection (1), and in any other section in this Act, a declaration may contain,

(b) provisions respecting the occupation and use of the units and common elements;

The Declaration contains the following provisions solely in respect of the units in the North Tower:

18(a) To the intent that the owners of the units set out below shall be permitted to make use of such units, being the north building of the condominium, and the common elements, without unreasonable interference in their use and enjoyment thereof because of noise and disturbance caused by children, and to the intent that the said building and the said units shall be for the use of adults only, no owner or occupant of such units shall use them or permit them to be used or shall sell or permit them to be sold except for residential purposes for adults and persons 14 years of age and older, and no children under the age of 14 years shall be permitted by the owners and occupants of the said units to occupy or reside in the said units; provided, however, that this paragraph shall not be construed so as to prevent reasonable visits (including overnight visits) by relatives, friends, and their children under the age of 14 years. The said units are units 1 to 8 inclusive on level 1, units 1 to 13 inclusive on level 2, units 1 to 14 inclusive on levels 3 to 17 inclusive.

(b) In the event that any unit owner or occupant is in breach of the provisions of this paragraph, the Board of Directors shall forthwith commence legal proceedings against such person and shall apply for an order directing compliance with this section and an injunction preventing such person from continuing the offence, all as provided for in Section 23 of the Condominium Act as amended, and if any such person continues such default in violation of any order or injunction which may be obtained, the Board of Directors shall take such other steps as they may deem appropriate to obtain compliance.

(c) Any costs, charges or expenses of whatsoever kind incurred in enforcing the provisions of this paragraph shall be the joint and several responsibility of the person committing the breach and of the registered unit owner who has committed the breach or permitted the commission of the breach or permitted the occupancy of the unit by the person committing the breach (including legal fees as between a solicitor and his own client). (d) The subparagraphs of this paragraph shall be deemed to be severable from each other.

In the programme to sell units in the Condominium, the North Tower was described as an "adults only" building. One article published in one newspaper in January, 1975, contained the following short paragraphs:

The East (17-storey) and South (18-storey) towers in the project are for families while the North (17-storey) tower is for adults only. Thirty-two two-bedroom suites in the adult tower have sunken living rooms.

Both family buildings have adjacent fenced and well-designed children's play areas while a day care centre is located in the East Tower for the children of working parents.

The units in the North Tower have one or two bedrooms, whereas the units in the other two towers, designed for families, have up to three bedrooms.

The male defendant, in his testimony, referred to the sunken living-room as a particularly desirable feature of the Unit. That feature is not available in the other two towers.

The defendants purchased the Unit and the conveyance thereof to them was registered on July 29, 1976.

In or about the fall of 1980, the property managers of the Condominium became aware of violations of the Declaration in that children under the age of 14 years were residing in 14 units in the North Tower. Those property managers began a programme designed to terminate the violations by providing an opportunity to the occupants of those units to make "alternate arrangements" on or before June 30, 1981. That programme was set forth in a letter dated December 12, 1980, written by the plaintiff's solicitors and sent to the owners of the 14 units concerned. Occupants of some of those units did not make "alternate arrangements" by June 30, 1981, and the time for compliance was extended to October 1, 1981, by a letter delivered in August, 1981.

The requirements of the property managers were met by the occupants of all of the units save and except the Unit and two others. As a result the property managers of the Condominium decided to proceed against the defendants and, dependent upon the result of such proceedings, then to proceed against the two other units. However, by the time of this trial the owners of those other units had complied and the Unit was the only unit in which, to the plaintiff's knowledge, a child under 14 was resident.

With specific reference to this action, the defendants with their child, born May 9, 1978, occupy the Unit. By letter dated May 12, 1981, the defendants responded to the letter of December 12, 1980, from the plaintiff's solicitors. In that letter they described their efforts to sell the Unit and the difficulty they were encountering because of the condition of the market in residential real estate. They asked that the July 1, 1981, deadline not be "arbitrarily" enforced.

In response the plaintiff's solicitors, on May 27, 1981, asked for information and documentation about the defendants' efforts to sell the Unit. The plaintiff's solicitors received no response to their letter of May 27, 1981, and on August 11, 1981, wrote again to the defendants to advise them that occupants of other units had moved to comply with the terms of the Declaration and that the time for compliance would be extended only to October 1, 1981.

On September 4, 1981, the defendants wrote to the plaintiff's solicitors to give some information about their efforts to sell the Unit. Some of the advertising in that regard contained the words "ADULT BUILDING" and "sunken living room". In a response written September 10, 1981, the plaintiff's solicitors mentioned that notwithstanding their letter of May 12, 1981, it seemed that the defendants had not listed the Unit for sale until July 10, 1981. The solicitors also expressed the plaintiff's corporate opinion that the defendants' listing price was "excessive". In the letter the solicitor restated the "deadline" of October 1, 1981.

Other sections of the Act are pertinent to my consideration of the issues in this trial. They are ss. 6(2), 12(3), 31(1) and (2) and 49(1) and (2) which are as follows:

6(2) Subject to this Act, the declaration and the by-laws, each owner is entitled to exclusive ownership and use of his unit.

12(3) The corporation has a duty to effect compliance by the owners with this Act, the declaration, the by-laws and the rules.

31(1) Each owner is bound by and shall comply with this Act, the declaration, the by-laws and the rules.

(2) Each owner has a right to the compliance by the other owners with this Act, the declaration, the by-laws and the rules.

49(1) Where a duty imposed by this Act, the declaration, the by-laws or the rules is not performed, the corporation, any owner, the bureau, or any person having a registered mortgage against a unit and common interest, may apply to the county or district court for an order directing the performance of the duty.

(2) The court may by order direct performance of the duty and may include in the order any provisions that the court considers appropriate in the circumstances.

An owner of another unit in the North Tower testified as to the purchase of that unit by her husband and herself in 1975. It was to be their residence in their retirement years. It was important to them that it was in an "adults only" building which hopefully would have a quiet, serene atmosphere. In making their decision to purchase their unit, she and her husband had relied upon the Declaration and the sales material advertising the North Tower as an "adults only" building. Their children were grown and away and they sought accommodation in such a building where other residents would likely be of similar age and life-style. They were aware that the other two towers had units with up to three bedrooms and had special areas or facilities for children, such as play areas and day-care facilities.

She and her husband wish the building to remain an "adults only" building, the feature which primarily motivated their selection. Now retired they are unable to afford to move to achieve the conditions they sought and still desire.

An owner of yet another unit in the North Tower testified to similar effect. For about a year she had noticed children playing in the halls of the North Tower and creating noise. She could not identify them as residents of units in the North Tower, but was fearful that lack of enforcement of the Declaration would lead to further disturbance of her enjoyment of her property.

Another owner gave similar testimony. She was the president of the plaintiff. She said that about 60% to 70% of the owners of units in the North Tower were retired persons over the age of 60. She said the board of directors of the plaintiff was often in receipt of written or oral complaints from the owners of units in the North Tower. Some complaints were in relation to children residing in that tower. Those who complained sought enforcement of the Declaration. She had bought her unit in 1975 and had complied with the Declaration in declining to have a young granddaughter reside with her, notwithstanding her own wish and that of the grandchild and her mother that the child live with her in the North Tower. The plaintiff's property manager testified as to complaints by owners of units in the North Tower that the Declaration was not enforced. He said the plaintiff had succeeded in obtaining compliance by all owners save and except the defendants. He said the plaintiff would continue its policy of enforcement of the Declaration.

My understanding of the defendants' position is that they too purchased a unit in the North Tower because of the presence of a sunken living-room in the unit and an indoor recreation area, features not to be found in the other towers. Of the three towers in the complex, the North Tower is closest to public transportation. The defendants' position seems to be that they want to comply with the plaintiff's requirements, but require more time and they feel that the plaintiff is acting rather arbitrarily.

At the outset I reject the suggestion of unduly arbitrary action by the plaintiff. It has a statutory duty to seek to enforce the provisions of the Declaration and is doing so. Its efforts have resulted in the owners of 13 other units moving from the North Tower or otherwise complying with the Declaration. The defendants' unit is the only unit in respect of which the plaintiff has, to its knowledge at the time of trial, been unable to resolve similar problems. The defendants' child is the only child under the age of 14 years resident in a unit in the North Tower.

The defendants now have had about 27 months since the plaintiff or its solicitors or managers first wrote, on December 12, 1980, to indicate its intention to seek to enforce the Declaration. A time-limit for compliance was set and then extended, but has not yet been met although the defendants profess a desire to dispose of their unit and to move.

The defendants also submit that s. 18 of the Declaration is unenforceable.

In support of that position they rely upon s. 15 of the Canadian Charter of Rights and Freedoms which provides that every person is equal before and under the law without discrimination based on age or other matters. They overlook that that section, by reason of s. 32(2), shall not have effect until three years after s. 32 comes into force. That time period has not yet expired. In any event the application of s. 15 would seem to me to be limited by the provisions of s. 1 of that Charter which states that the guarantee set forth is:

... subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

I note that the Human Rights Code, 1981 (Ont.), c. 53, of the Province of Ontario contains provisions expressed to ensure freedom from discrimination because of age and other matters. However, that legislation [s. 9(a)] specifically provides that in relation to those provisions "age" means "an age that is eighteen years or more". It appears therefore that the Legislative Assembly recognizes that there are situations in which persons under the age of 18 might, for desirable or legitimate purposes, be dealt with in a manner different from that applicable to older persons.

In my view that objection to the plaintiff's position must fail. Even if s. 15 of the Canadian Charter of Rights and Freedoms had effect, the limitation set forth in s. 18 of the Declaration is demonstrably justified in a free and democratic society. The Legislative Assembly of the Province of Ontario recognizes 18 years as the lower limit in respect of its efforts to prevent discrimination because of age. Further the Declaration is in the nature of a private agreement among all of the owners of units in the Condominium, including the defendants, for their joint and several benefit. The owners of the other 709 units in the complex, especially, in this instance, the 230 in the North Tower, are entitled to the protection of their contractual and property rights. If those rights are not protected they perceive, with cause, that their enjoyment of their property and thus their quality of life will be adversely affected.

The defendants assert that the Declaration by the very terms of s. 18 thereof is unreasonable and inconsistent because children under the age of 14 may visit in the units in the North Tower.

In my view, that objection fails. The Declaration permits "reasonable visits (including overnight visits) by relatives, friends or their children". That is a sensible and practical provision which recognizes that "reasonable visits" are a part of usual social relationships. The presence of that provision in the Declaration does not vitiate the balance of s. 18.

In my view, the defendants' objection to the plaintiff's action is not strengthened by the absence of testimony to suggest that the defendants' child has in any way, by reason of conduct or behaviour, interfered with the rights of others. The child's very presence as a permanent resident in the defendants' unit places the defendants in a position of breach of the Declaration. And if the plaintiff did not seek to enforce the Declaration it too would be in breach of the Act.

The defendants further submit that s. 18 of the Declaration is ultra vires the plaintiff. The basis of that submission is that, while s. 3(3)(b) of the Act empowers the plaintiff to complete a declaration containing "provisions respecting the occupation and use of the units", the Declaration, by s. 18, purports to prohibit anyone under the age of 14 years from residing in the units. With all due respect, a power to create "provisions respecting the occupation and use of the units" surely includes a power to prohibit certain occupations or uses, including occupation and use by children under the age of 14 years. That the prohibition relates to all children under 14 years and not just those whose conduct has interfered with the enjoyment of the occupancy of other units does not, in my view, constitute a situation of arbitrary or improper discrimination so as to make s. 18 of the Declaration unenforceable in the present instance.

I believe my conclusion in that regard is in keeping with the judgment of my brother, Misener Co. Ct. J. in *Re Peel Condominium Corp. No. 78 and Harthen et al.* (1978), 20 O.R. (2d) 225, 87 D.L.R. (3d) 267.

The defendants submitted that activities other than those of young children might be more disruptive of the serenity and quiet sought by the witnesses. That may be so, but it does not affect this proceeding. Presumably other provisions of the Declaration might be invoked to prevent such other activities.

The defendants submitted that enforcement of s. 18 of the Declaration would be contrary to public policy. In the light of the Ontario legislation I do not accept that submission.

In my view, the plaintiff in this action is simply fulfilling the obligation cast upon it by the Act to enforce the Declaration for the benefit of the owners of all of the units in the Condominium. That is a desirable and legitimate purpose.

Counsel for the plaintiff referred me to the decisions in a number of cases in the United States of America, there apparently being no cases directly on point in Ontario. I found some of the comments of the court in *Hidden Harbour Estates, Inc. v. Basso et al.* (1981), 393 So. 2d 637, to be helpful and persuasive. At pp. 638-9, Judge Moore of the District Court of Appeal of Florida wrote:

As we opined in *Sterling Village Condominium, Inc. v. Breitenbach*, 251 So. 2d 685 (Fla. 4th DCA 1971):

"Daily in this state thousands of citizens are investing millions of dollars in condominium property. Chapter 711, F.S.A. 1967, the Florida Condominium Act, and the Articles or Declarations of Condominiums provided for thereunder ought to be construed strictly to assure these investors that what the buyer sees the buyer gets. Every man may justly consider his home his castle and himself as the king thereof; nonetheless his sovereign fiat to use his property as he pleases must yield, at least in degree, where

ownership is in common or cooperation with others. The benefits of condominiums living and ownership demand no less. The individual ought not be permitted to disrupt the integrity of the common scheme through his desire for change, however laudable that change might be."

Later at p. 639 Judge Moore quoted with approval the following extract from another decision [Pepe v. Whispering Sands Condominium Ass'n (1977), 351 So. 2d 755]:

"A declaration of a condominium is more than a mere contract spelling out mutual rights and obligations of the parties thereto -- it assumes some of the attributes of a covenant running with the land, circumscribing the extent and limits of the enjoyment and use of real property. Stated otherwise, it spells out the true extent of the purchased, and thus granted, use interest therein. Absent consent, or an amendment of the declaration of condominium as may be provided for in each declaration, or as may be provided by statute in the absence of such a provision, this enjoyment and use cannot be impaired or diminished."

Judge Moore went on to write as follows at pp. 639-40:

There are essentially two categories of cases in which a condominium association attempts to enforce rules of restrictive uses. The first category is that dealing with the validity of restrictions found in the declaration of condominium itself. The second category of cases involves the validity of rules promulgated by the association's board of directors or the refusal of the board of directors to allow a particular use when the board is invested with the power to grant or deny a particular use.

[1] In the first category, the restrictions are clothed with a very strong presumption of validity which arises from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed. Such restrictions are very much in the nature of covenants running with the land and they will not be invalidated absent a showing that they are wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right. See, *White Egret Condominium, Inc. v. Franklin*, 379 So. 2d 346 (Fla. 1979). Thus, although case law has applied the word "reasonable" to determine whether such restrictions are valid, this is not the appropriate test, and to the extent that our decisions have been interpreted otherwise, we disagree. Indeed, a use restriction in a declaration of condominium may have a certain degree of unreasonableness to it, and yet withstand attack in the courts. If it were otherwise, a unit owner could not rely on the restrictions found in the declaration of condominium, since such restrictions would be in a potential condition of continuous flux.

In my view, the rationale of that judgment is of assistance in and applicable to the present proceedings.

Another decision of a court in the United States of America is of further interest and assistance. In *Riley et al. v. Stoves et al.* (1974), 526 P. 2d 747, the plaintiffs sought to enforce a restrictive covenant in respect of land. The covenant purported to restrict the occupation of land to occupation by "persons 21 years of age and older". The plaintiffs testified that they understood, before purchasing their lots, that the covenant effectively precluded children from living in the subdivision. They testified that they relied upon that restriction in purchasing their lots. At p. 752, Chief Judge Hathaway of the Court of Appeal of Arizona wrote:

Because the restriction in question was privately drawn, we feel it appropriate to first examine any legitimate purpose or purposes such a restriction could possibly serve. Also, we should ascertain the extent to which the restriction is a reasonable means to accomplish the private objective when considered in light of its effect upon defendants.

[11] The restriction flatly prevents children from living in the mobile home subdivision. The obvious purpose is to create a quiet, peaceful neighbourhood by eliminating noise associated with children at play or otherwise. The testimony given by the plaintiffs indicates that they prefer to live away from children, that children living in their neighbourhood tend to disturb them, and that they bought their respective lots upon the assumption that Enchanted Acres, Unit 1, would be an "adult community".

Here, the common developer subdivided a large tract of land. He obviously felt that a portion of the market for mobile home lots desired an adult community. He therefore set aside a portion of the mobile home lots in Unit One for exclusive adult living. There was no testimony as to any shortage of housing in the area or any desperate need for housing which would accommodate families with children as there was in *Molino*, supra [*Molino v. Mayor & Council of Boro. of Glassboro* (1971), 281 A. 2d 401]. We see no objection to the setting aside of a small area which would exclude children. It fulfilled a legitimate need of older buyers who sought to retire in an area undisturbed by children.

and at p. 753 he wrote:

We do not think the restriction is in any way arbitrary. It effectively insures that only working or retired adults will reside on the lots. It does much to eliminate the noise and distractions caused by children. We find it reasonably related to a legitimate purpose and therefore decline to hold that its enforcement violated defendants' rights to equal protection.

The factual situation of that case can be likened to that of the present case in many ways. There, and here, older people sought an environment in which, to use the words of the Declaration, they might use and enjoy their properties "without unreasonable interference ... because of noise and disturbance caused by children, and to the intent that the said building and the said units shall be for the use of adults only". There, as here, an area from which children would be excluded was set aside elsewhere in the overall development.

In the result the plaintiff shall have judgment for the relief it sought, namely, a mandatory injunction pursuant to s. 49 of the Act requiring the defendants to comply with the Act, particularly s. 31 thereof, and the Declaration, particularly s. 18 thereof.

In all of the circumstances there is no reason why the plaintiff should not have its costs. The defendants are the only owners who have refused, neglected or otherwise failed to satisfy the plaintiff's requests and demands for compliance with the provisions of the Declaration. While s. 18(c) of the Declaration provides that the costs of enforcing the section are to be the responsibility of the owner of the unit in respect of which the breach occurred and that such costs include "legal fees as between a solicitor and his own client", counsel for the plaintiff did not seek costs on that basis. Costs shall be on a party-and-party basis and shall include the costs of the abortive originating notice since the material prepared in relation thereto formed the basis of the pleadings in the action and the testimony upon the trial.

Judgment for plaintiff.

CBR# 366

York Condominium Corp. No. 420 v. Deerhaven Properties Ltd. et al.

(1982), 40 O.R. (2d) 106 33 C.P.C. 65

ONTARIO HIGH COURT OF JUSTICE GRIFFITHS J. DECEMBER 23, 1982

APPLICATION to dismiss an action commenced by a condominium corporation.

R. Blair, for applicants, defendants.

J. H. Fine, for respondent, plaintiff.

GRIFFITHS J. (orally):-- The defendants move to dismiss this action principally on the basis that the plaintiff has no status under s. 14(1) and (2) of the Condominium Act, R.S.O. 1980, c. 84, to maintain this action.

The plaintiff is a condominium corporation created by the declaration thereof on October 2, 1978, pursuant to s. 10 of the Condominium Act.

The defendant, Deerhaven Properties Limited, was the original owner and developer of the condominium property and a declarant of the plaintiff condominium and the registered owner of unit 7, described as the "superintendent's suite" in the condominium.

At the date of the issue of the writ of summons the defendant Macaba Limited was the manager of the plaintiff. That defendant gave notice of termination to the plaintiff of the managerial agreement indicating that it intended to remove certain equipment from the common elements of the condominium.

The remedy claimed by the plaintiff in this action is set out in para. 14 of the statement of claim as follows:

14. Therefore the Plaintiff claims:

(i) A declaration that the Plaintiff is the rightful owner of Unit 7, Level 1, York Condominium Plan No. 420 and for an Order that the said Unit be conveyed to the Plaintiff;

(ii) A declaration that the Plaintiff is the rightful owner of the following equipment:

(a) one snow blower -- Mastercraft 319280515; Serial No. 23475;

(b) one vacuum cleaner -- Hoover 916 T; Serial No. 23475;

(c) one wet and dry vacuum -- Premier 1010; Serial No. 063791;

(d) one floor polisher -- Spartan Spar 17; Serial No. 690051;

(e) two exercise bicycles;

(f) one rowing machine; (g) eight sauna room lockers;

(h) two sauna room benches;

(i) five General Electric washing machines;

(j) five General Electric dryers.

The above noted equipment is presently located on the common elements of the Plaintiff.

(iii) An order that the said equipment set out in paragraph (ii) above be conveyed to the Plaintiff;

The basis of the claim is succinctly described in paras. 8 and 9 of the statement of claim as follows:

8. The Plaintiff states that through inadvertence, mistake or otherwise, title to the Equipment and to the Superintendent's Suite was never transferred to the Plaintiff.

9. The Plaintiff states and the fact is that it was always the intention of the Defendants and the understanding of the Unit Owners of the Plaintiff, that the Superintendent's Suite and the Equipment would form part of the common elements of the Plaintiff Condominium Corporation because ... The pleading then details the various material facts upon which the plaintiff relies in support of the above allegations. Section 14(1) and (2) of the Condominium Act, R.S.O. 1980, c. 84, provides as follows:

14(1) The corporation after giving written notice to all owners and mortgagees may, on its own behalf and on behalf of any owner, sue for and recover damages and costs in respect of any damage to common elements, the assets of the corporation or individual units, and the legal and court costs in any such actions brought in whole or in part on behalf of any owners in respect of their interests are affected.

(2) The corporation after giving written notice to all owners and mortgagees may sue on its own behalf and on behalf of any owner with respect to the common elements and any units, notwithstanding that the corporation was not a party to the contract in respect of which the action is brought, and the legal and court costs in an action brought in whole or in part on behalf of any owners in respect of their units shall be borne by those owners in the proportion in which their interests are affected.

It is common ground that s. 14(1) has no application to the circumstances of this case. The issue is whether s. 14(2) gives the plaintiff the right to maintain the cause of action for recovery of title to and possession of the superintendent's suite and the equipment earlier described.

Counsel for the defendant submits that the plaintiff, being entirely a creature of statute, has only the authority to maintain an action as provided by s. 14(1) and (2). Section 14(2), it is submitted, only gives the plaintiff authority to maintain an action with respect to common elements, involving a breach of contract. Here the action is clearly not founded on contract.

Section 14 of the present Condominium Act was enacted June 1, 1979. Previously, the Act, R.S.O. 1970, c. 77, gave the condominium a fairly broad right to sue in these words:

9(18) Any action with respect to the common elements may be brought by the corporation and a judgment for the payment of money in favour of the corporation in such an action is an asset of the corporation.

There is a further statutory provision having application, upon which counsel for the plaintiff places much reliance namely, s. 26(a) of the Interpretation Act, R.S.O. 1980, c. 219, which reads:

26. In every Act, unless the contrary intention appears, words making any association or number of persons a corporation or body politic and corporate,

(a) vest in the corporation power to sue and be sued, to contract and be contracted with by its corporate name, to have a common seal, to alter or change the seal at its pleasure, to have perpetual succession, to acquire and hold personal property or movables for the purpose for which the corporation is constituted and to alienate the same at pleasure; The central issue then is whether s. 14(2) should reasonably be construed as restricting the broad right to sue conferred on the plaintiff corporation by s. 26 of the Interpretation Act, to a right to maintain an action for breach of contract only with respect to the common elements. To put it another way, in the light of the broad power to sue conferred on a condominium by the predecessor s. 9(18), of the Condominium Act is it reasonable to construe the present s. 14 as expressing a legislative intention to sharply limit those powers.

In my view, s. 14(2) as remedial consumer legislation should not be rigidly or narrowly construed to the extent it confers on the condominium a right to sue. On that principle, I conclude it is reasonable to interpret the section as conferring on the corporation an unlimited right to sue with respect to common elements, and further extending that right by providing that an action in contract may be maintained by the corporation even though it was not a party to the contract.

As I view s. 14 generally it seems to me that the obvious intention of the Legislature was not to restrict the broad power to sue previously held under s. 9(18) but rather to extend those powers by providing under s. 14(1) a right to sue and recover damages and costs in respect to not only the common elements but with respect to the assets and individual units of the corporation as well. By s. 14(2) as I have found the Legislature intended to confer a right to sue on contracts to which the corporation was not a party.

As an alternative approach, if s. 14(2) is open to two reasonable constructions, then in my view the construction to be chosen is that which is the more consistent and consonant with the general scheme and policy of the overall legislation. That is an established canon of legislative interpretation: Maxwell on the Interpretation of Statutes 12th ed. (1969), c. 2, p. 45.

A review of the legislation reveals a policy generally to vest in the corporation broad powers to manage the property and assets of the condominium on behalf of the unit holders. Section 14(5) of the Act renders the condominium liable without restriction to be sued as the responsible entity. In my view, it is reasonable and consistent with the policy of the Act that the corporation, should have the same broad powers to sue, consistent with its responsibilities to the individual unit holders. The application is dismissed with costs to the plaintiff in the cause.

Application dismissed.

CBR# 260

Re Lambert Island Ltd. and Attorney-General of Ontario

[1972] 2 O.R. 659-673

ONTARIO [HIGH COURT OF JUSTICE] LERNER, J. 24th MARCH 1972.

APPLICATION for an interpretation of the Condominium Act; PRELIMINARY OBJECTION by respondent that there was no authority to bring the application.

Alvin B. Rosenberg, Q.C., for applicant.

B. Wright, for respondent.

LERNER, J.:-- The application seeks, in essence, an interpretation of the Condominium Act, R.S.O. 1970, c. 77, that would appear to be basic to the whole popularly accepted concept of condominium ownership to wit, an order enabling the registration of a plan under the Act, notwithstanding that some units in the proposed condominium plan referred to in the proposed declaration, are bare land and do not include buildings or parts of buildings.

The facts disclosed by the affidavit of Gavin H. Young, Esq., Q.C., are not in dispute and are uncomplicated. Mr. Young is a shareholder, director and officer of Lambert Island Limited, which owns Lambert Island situate in Lake Superior and the water lot surrounding it, opposite mining location 15 Frances survey, Township of MacGregor, District of Thunder Bay. At present, the property is divided into 24 separate lots and the agreements between the company and "the owners" covering the lots are, at the time of the application, in the form of leases running for 21 years less one day. The common facilities are a dock, ramp, roadway running down the centre of the island and a bridge built to provide motor vehicle access to said island. No public moneys have been spent on the island and the company has paid for its own road maintenance, snow removal and any other incidental items pertinent thereto. There is no common sewage or water system, but each lot upon which improvements have been made, which I take to mean housing, have had septic and water systems installed that have the approval of the municipal inspector.

On 16 of said lots, buildings have been erected and one other building is in the process of being built. The 24 lots are owned by 19 individuals of which one person owns three, another owns four and the others are single ownership.

The purpose of applying for registration pursuant to the Condominium Act is to permit the respective owners to have and enjoy long-term rights for estate purposes and to be able to enforce contribution from the other owners for their share of the maintenance of the present common elements and maintenance of future common elements that may be installed such as common sewer facilities and common water facilities, playground areas, etc.

The applicants appear to have good grounds for being concerned because of:

- (1) the inability to enforce covenants against predecessors in title, certain of the people involved in such projects do not pay their share of maintenance of the roads and other parts of the common elements; (2) there is no legal way to collect these shares;
- (3) conscientious owners interested in maintaining a project pay additional shares, in order to meet expenses, than they were originally required; and
- (4) there is no way to legally control owners in a project with respect to power, water supply, sewage, pollution problems, etc., pursuant to the affidavits of John Beatson, an Ontario land surveyor, and Monty M. Simmonds, Esq., Q.C. both of whom appear to have had personal experiences with these problems and with the Condominium Act.

These applicants held a meeting with Richard E. Priddle, Director of Land Registration for Ontario, Sidney Smith, the Director of Titles for Ontario, Colin Hadfield, of the Department of Surveys for Ontario, Dean Richardson, solicitor for the Registry Office and said John Beatson, a surveyor who had participated in parts of the research preparatory to the presentation and enactment of the Condominium Act by the Legislature as it presently exists.

The applicant argues that such registration under the Condominium Act is the only solution for the Lambert Island development and similar developments to enable them to operate over the long period, enforce positive covenants against subsequent owners, undertake orderly estate planning and rights of inheritance, and the other problems not immediately foreseeable but by which future known or unknown owners would be bound.

The application is endorsed by all owners of the 24 lots. Their concern and foresight is understandable and the problem is whether the Condominium Act, as presently constituted, can help them. This, of course, can only be achieved if the "Plan" can be registered pursuant to said Act. The novelty of the matter is that the popular concept is of a single vertical building and the whole of the parcel being occupied by either the main structure, or in addition thereto, the structures directly connected therewith such as adjoining parking lot, parking garage, etc. In the present situation, the "Plan" is on the "horizontal" and some of the owners have "raw land" as their "units".

The application was argued before me as a Court motion on January 31, 1972, and, after full argument by counsel on behalf of the applicant, the respondent, the Attorney-General for Ontario, raised a preliminary issue that there is no authority to bring this application. The respondent stated that the preliminary objection is that the issue raised herein involves the interpretation of construction of a statute and that such a declaration can only be made by originating notice of motion (which this is) and in very limited circumstances.

Before dealing with the arguments, I set out the relevant Rules of Practice for convenience,

Rule 611

611. Where the rights of a person depend upon the construction of a deed, will or other instrument, he may apply by originating notice, upon notice to all persons concerned, to have his rights declared and determined.

Rule 612

612(1) Where the rights of the parties depend,

(a) upon the construction of a contract or agreement and there are no material facts in dispute; or,

(b) upon undisputed facts and the proper inference from such facts, such rights may be determined upon originating notice.

(2) A contract or agreement may be construed before there has been a breach thereof.

The first argument is that a declaration can only be made (as requested here) on an originating notice where such is specially authorized by the Rules or by statute. The respondent relies on *Re Oil, Chemical and Atomic Workers Int'l Union, Local 9-14 and Polymer Corp. Ltd.*, [1966] 1 O.R. 744 at p. 783, 55 D.L.R. (2d) 198 at p. 207. In that case, the union was recognized by Polymer as the sole bargaining agent for all employees save certain exceptions. The union was not certified by the Canada Labour Relations Board pursuant to the Industrial Relations and Disputes Investigation Act, R.S.C. 1952, c. 152. However, a collective bargaining agreement was made between the union and Polymer which contained provisions for arbitration of grievances which have not been settled. A board of arbitration was set up pursuant to said agreement consisting of three arbitrators and in the course of its deliberations made certain decisions, that is to say:

(a) that it did not have power to require production of documents;

(b) it had no power to issue subpoenae to witnesses; and

(c) that the Arbitrations Act, R.S.O. 1970, c. 25, did not apply to this arbitration.

The union brought the motion for certiorari against the Board and at p. 783 O.R., p. 207 D.L.R., Morand, J., ruled that there was no right to ask for such a declaration, relying on the authorities he quoted herein to the effect that such proceedings can only be brought for determination of a question arising in connection with a will or trust and also on motion to determine the construction of a deed, will or instrument or in special circumstances, on a motion to determine the construction of a contract or agreement.

The reasons for judgment suggested that the proper course open to the applicant union would be to bring an action "in certain well-defined circumstances" [p. 784 O.R., p. 208 D.L.R.].

The bringing of an application by way of originating notice pursuant to Rule 612(1) was briefly considered in *Board of Trustees of Separate School in Township of Seneca and Village of Cayuga v. Township of Seneca*, [1964] S.C.R. 569 at p. 571, 45 D.L.R. (2d) 288 at p. 289. The school board had acquired a school site in March, 1959, built a one-room schoolhouse which they began to use in December, 1959, and ceased using as a school in December, 1961. In the next year, the township entered the property on the tax roll, it having ceased to be exempt from taxation. Per Cartwright, J., the Court held it was a proper application because the application called for the determination of the rights of the parties, "upon undisputed facts and the proper inferences from such facts, such rights may be determined upon originating notice".

Clearly, in that application, there were two parties in opposing interests seeking the determination of the rights as between them.

The next argument raised by the respondent is that the application involves the interpretation or construction of a statute and that the Courts have held that a statute is not an instrument within the meaning of Rule 611 and for this, the respondent relies on, *Re Mann Construction Ltd.*, [1965] 2 O.R. 655, 51 D.L.R. (2d) 580. The application there was by the main contractor engaged in the construction of a bridge. A subcontractor had defaulted his undertakings and was in bankruptcy and others had to be employed to take over and complete this subcontract. After paying all accounts, the main contractor had funds on hand owing to the bankrupt subcontractor which were claimed by the trustee in bankruptcy. The main contractor sought the advice and direction of the Court as to the disposition thereof, pursuant to Rule 607, which permits, among other things, that ... the trustees under any deed or instrument ... may apply by originating notice for

7. The opinion, advice or direction of a judge pursuant to The Trustee Act. Hughes, J., held that the application failed because the trust (*Mechanics' Lien Act*, R.S.O. 1960, c. 233, s. 3(1), (2) and (3)) was an oral one or by the operation of statute and the application could not be brought under Rule 607 in the absence of any deed or instrument from which the trustee derives his status.

In *Re Pane Niagara Enterprises Ltd. and City of Niagara Falls*, [1968] 1 O.R. 287, Keith, J., considered the power of the Court to issue a declaratory judgment in the interpretation of a municipal by-law by the exercise of the powers under Rule 611. He observed that such powers had been the subject of strong doubts expressed by the Court of Appeal. He said that the procedures contemplated by Rule 611 afford the most convenient method of securing a declaratory judgment with respect to the meaning of municipal by-laws where there are no disputed facts. He found that a municipal by-law is an "instrument" within the meaning of Rule 611. He considered the doubts, as aforesaid, as expressed by the Court of Appeal in *Re Windsor and Dapco Ltd.*, [1959] O.W.N. 18, 16 D.L.R. (2d) 685, and affirmed [1959] O.W.N. 238, 19 D.L.R. (2d) 688, and *Sun Oil Co. v. City of Hamilton and Veale*, [1961] O.R. 209, 27 D.L.R. (2d) 1.

In *Re Windsor and Dapco Ltd.*, supra, Laidlaw, J.A., on behalf of the Court expressed the doubt of the Court whether a by-law fell within the term "other instrument" in Rule 604 (as it then was). In that application the municipality moved for a declaration that use of certain lands by Dapco Limited for the purpose of mixing asphalt did not contravene a specific by-law.

In *Sun Oil Co. v. City of Hamilton and Veale*, supra, the applicant sought an order of mandamus directing the City of Hamilton to issue permits for the erection and operation of a gasoline service station at a particular site. The Court of Appeal considered the propriety of invoking this type of proceeding to pass upon the validity of a municipal by-law and found that the provisions of the Municipal Act were an obstacle to bringing an originating application. Furthermore, the Court, while referring to *Re Windsor and Dapco Ltd.*, supra, did not, in the circumstances, have to decide whether or not Rule 604 empowered the Court to interpret by-laws.

In *Blainey v. Toronto*, [1935] O.R. 476, [1935] 4 D.L.R. 328, an application was brought for a declaration that a certain municipal by-law did not affect certain lands. Relying on the definition that the word "instrument" in the Registry Act included a municipal by-law, Hope, J., concluded that the matter was properly before him pursuant to Rule 604. The applicant had applied

for a permit to erect an apartment house and the city relied on a particular by-law to refuse same. The applicant only had an option to purchase the particular lands and the order was made that in the event that the option was exercised that the lands referred to therein were free of the restrictions of the by-law.

This latter part is of interest because the application was anticipatory of purchasing the lands that the application succeeded. In the instant matter by analogy no "declaration" including a "description" has been tendered for registration until the issue will have been clarified.

The respondent also relies on *Smith v. A.-G. Ont.*, [1924] S.C.R. 331, [1924] 3 D.L.R. 189, 42 C.C.C. 215, which was applied in *Thorson v. A.-G. Can. et al.* (No. 2), [1972] 1 O.R. 86, 22 D.L.R. (3d) 274 [affirmed [1972] 2 O.R. 340, 25 D.L.R. (3d) 400]. In the former, the appellant, a resident of Toronto, ordered a case of Dewars Whiskey and some beer from a dealer in Montreal who refused the order because the Canada Temperance Act had been brought into force in Ontario and importation into that Province was therefore prohibited. The appellant sought the order of the Court that the validity of this Order in Council had been assumed and was being enforced with the attendant penalties, and it was invalid and illegal. He claimed to be debarred from exercising his legal right to bring liquor into Ontario except under intolerable conditions, because he would subject himself and everyone acting for him, to prosecution and the attendant humiliating incidents. Furthermore, that this had the effect of preventing dealers in Canada selling him liquor for import into Ontario and preventing transport companies and others acting in the course of their businesses for him from carrying on their lawful enterprises. The Court held that this was asking for a decision on a hypothetical case. The appellant was subjected to no actual threat of prosecution, and no actual risk, only if the liquor ordered was shipped, at which time he could be put in jeopardy. Duff, J., as he then was, applied the case of *Glasgow Navigation Co. v. Iron Ore Co.*, [1910] A.C. 293, when he stated [at p. 336 S.C.R., p. 192 D.L.R., per Lord Loreburn, L.C.], "It is not the function of a court of justice to advise parties as to their rights under a hypothetical state of facts."

The learned Judge went on further to say [at pp. 337-8 S.C.R., pp. 193-4 D.L.R.]:

An individual, for example, has no status to maintain an action restraining a wrongful violation of a public right unless he is exceptionally prejudiced by the wrongful act. It is true that in this court this rule has been relaxed in order to admit actions by ratepayers for restraining ultra vires expenditures by the governing bodies of municipalities; *MacIlraith v. Hart* (1907), 39 S.C.R. 657. We are not sure that the reasons capable of being advanced in support of this exception would not be just as pertinent as arguments in favour of the Appellant's contention, but this exception does not rest upon any clearly defined principle, and we think it ought not to be extended.

On the whole we think that the principle contended for, since it receives no sanction from legal analogy, and since it is open to serious objection as calculated to be attended by general inconvenience in practice, ought not to be adopted.

"Instrument" is defined in the shorter Oxford English Dictionary as "a formal legal document whereby a right is created or confirmed, or a fact recorded; a formal writing of any kind as an agreement, deed, charter, or record drawn up and executed in technical form".

The definition of "instrument" in the Registry Act, R.S.O. 1970, c. 409, s. 1(c), includes a "municipal by-law" but nowhere does it refer to any statutory enactment. Therefore, after considering the pertinent Rules, the cases recited supra, the sections of the Condominium Act and particularly ss. 2, 3, 4 and 5, I can find nothing that would permit the meaning of the word "instrument" in the pertinent Rules to be expanded to include this application.

The respondent's preliminary argument, in summary, is a legal one and the Court should be entitled to take a serious view of the implications that flow from acceding to it. In order to reach the position where there would be the right to seek a declaratory order or mandamus to force the registration of a plan under the Condominium Act, the applicant would be required to comply with s. 3 thereof which requires a "declaration" which, pursuant to the definition as found in s. 1(i), means the matters as specified in s. 3. An examination of s. 3 makes it patent that the "declaration" of necessity has to be a substantial instrument. The problem created by giving effect to the argument of the respondent becomes self-evident, probably more so with the construction of a "high-rise" building than the within proposal.

Section 3 (1) sets out that,

3(1) A declaration shall not be registered ... described in the description and unless it contains ...

Section 4 (1) (e):

4(1) A description shall contain,

(e) a certificate of a surveyor that the buildings have been constructed and that the diagrams of the units are substantially accurate and substantially in accordance with the structural plans ...

(The italics are mine.) In effect registration pursuant to s. 3 is prevented until the project is fully completed in order to obtain a "certificate of a surveyor". Since the developer has to complete the project before he can obtain a "certificate of a surveyor", obviously large sums of money would have to be expended with all the attendant risks, only to find, conceivably, when the finished product is available, that registration is refused. Apart from what will be said later, the applicants herein may never add more buildings on the units and if the respondent's position herein is correct, the applicants have no way in which to have their rights to employ the Condominium Act determined.

The meeting which took place as indicated earlier, adds nothing more than polarizing the attitude of each of the parties and the letter (ex. C) from the Director of Land Registration was conclusive that the respondent would not initiate proceedings for judicial interpretation.

Regretfully, on all of the undisputed facts, I find also that this application is premature. The physical makeup of Lambert Island Ltd. is sufficiently limited in its scope and content that it would be possible to confirm with ss. 3 and 4 of the Condominium Act and apply for registration. However, it would take no great prescience to conclude that it would be refused but all legal obstacles to bring this type of application against the Registrar of Deeds or Master of Titles would fall by the wayside and the law as set out in *Karavos v. City of Toronto and Gillies*, [1948] O.W.N. 17, [1948] 3 D.L.R. 294 (Court of Appeal), would not be applicable. Briefly, that was an application for a mandamus direct to the Commissioner of Buildings, Toronto, to "forthwith examine the

plans and specifications and thereafter issue the necessary building permit". This application was dismissed because the applicant had not complied with the by-law requiring, as part of the application for a building permit, to: (1) make an application for a permit on an official form; (2) provide fully the information therein required; (3) correctness of the application verified by statutory declaration; (4) drawings, etc.; (5) a block plan; and (6) plan of survey by an Ontario Land Surveyor.

The applicant had not fulfilled these requirements to put himself in a position to legally demand by way of mandamus, the examination of the plans submitted in order to ultimately warrant further expense leading to the issue of a building permit. The analogy to the instant case is clear, that is to say, that the Court cannot entertain an application when the prerequisites of the statute requiring registration thereunder have not been complied with.

Since obviously the question is an arguable and important one and as the merits of this application were fully argued, I think that the parties are entitled to the Court's view of the substantive question raised by the application and I now propose to deal with same.

The Condominium Act was enacted by 1967 (Ont.), c. 12, about June 15, 1967, and in heavy type on the first page of the office consolidation, its purpose is succinctly explained as:

An Act to facilitate the Division of Properties into Parts that are to be owned Individually and Parts that are to be owned in Common, and to provide for the Use and Management of such Properties. The main issue to be decided is whether the condominium concept is available as a technique to provide ownership of individual units of different shapes and dimensions within a building only or whether it can be applied to horizontal development of single dwellings with pertinent other buildings used with said buildings and alongside or in conjunction with other units consisting of vacant lands upon which a dwelling or dwellings would subsequently be erected.

This issue is readily understood from the undisputed facts set out above as found in the affidavit material herein.

The Ontario Law Reform Commission initiated a research study of the Law of Condominium in December, 1965, with a view to ascertaining whether legislation on the subject would be desirable, and if so, what form it should take and employed Professor R.C.V. Risk of the Faculty of Law, University of Toronto, to do a comparative study of existing legislation in the Canadian Provinces and other jurisdictions of the British Commonwealth and the United States. The report of this study indicated that there were two essential elements of this concept, (1) the division of property into units, to be individually owned and common elements to be owned in common by the owners of the units; and

(2) an administrative framework to enable the owners to manage the property.

Examples were given in the report were, a high-rise building containing residential units, each of the units individually owned and the remainder of the property, including the roof, basement, parking area and gardens, owned in common by the owners of the units. Another example was an industrial development including a cluster of small factories, each individually owned, and the remainder of the property including the service facilities, owned in common by the owners. In each of these examples, an administrative framework enables the owners to manage the property for the common benefit and each owner must contribute to the common expenses. The report went on to say that this concept is indifferent to the use to be made of the property, to the design of the buildings and to the location of the boundaries between individual and common ownership. At common law, there would be nothing to prevent, for example, these 19 unit owners in this application from binding themselves in an agreement to achieve their purposes. The problems posed when these common owners would attempt to enter into an agreement would stagger the imagination of the most ingenious, learned and experienced of solicitors. These problems are well set up in the article in University of Toronto Law Journal, vol. 18, p. 1 (1968), by Professor R.C.B. Risk. I refer particularly to pp. 3-8, inclusive in that report. The report concluded that enabling legislation for condominium development was necessary for reasons set herein:

The existing common law and legislation present formidable difficulties: the general prohibition of positive covenants running with the land makes the imposition of obligations on subsequent purchasers awkward or impossible; the rules of future interests limit and complicate provisions for the eventual termination of the interests of the owners; the attitude of the common law towards the ownership and subdivision of space may not be entirely clear; descriptions of cubes of space are more easily imagined than prepared; municipal taxes would probably be assessed against the property owned in common as one parcel, impairing the advantage of financial independence that might be expected to accompany ownership; mechanics' liens against the property owned in common would have the same effect; and, finally, the express provisions of planning restrictions on the subdivision of land would probably apply, even though the spirit might not.

The existing law on enforcement of covenants affecting land is Judge-made, dating in the main from the latter part of the 19th century, supplemented in certain respects notably as to registration and as to the modification or discharge of restrictive covenants by legislation.

Report of the Committee on Positive Covenants Affecting Land -- presented to Parliament by the Lord High Chancellor, July, 1965, at p. 1

This report went on to distinguish between the essential characteristics between restrictive covenants, that is, covenants restraining the owner of land in some respect from the uninhibited use of his property, and positive covenants, that is, covenants obliging the owner to do something on his land ("work covenants"), or to contribute money towards work to be done or services to be provided for the benefit of his land ("money covenants"), e.g., a "work covenant" would be a covenant to fence -- "money covenant" to contribute towards the making or maintenance of a private road. While continuing to discuss the general problem of the difficulties of enforcement of positive covenants, said report went on to say, "The burden of a positive covenant cannot, under the existing law be made to run with the servient land." (p. 2).

In completing its report, the Law Reform Commission of Ontario submitted a draft Bill with explanatory notes to each of the proposed sections. The definition given to the word "unit" in s. 1(1)(r) imposed no limitations on this definition nor did the remainder of the Act as submitted. While the examples of a patio, a balcony, a loading area of a parking space were referred to in the draft bill, nothing was said about a "unit" being "bare" or "raw" land. One approach to the problem is by trying to determine from the Condominium Act what is intended to be meant by the use of the word "land". Section 2(1):

2(1) A property shall comprise only freehold land and interests, if any, appurtenant to that land.

Section 1(2):

1(2) For the purposes of this Act, the ownership of land includes the ownership of space.

(This implies vertical building construction.)

Section 1(1)(n):

(n) "property" means the land and interests appurtenant to the land described in the description, and includes any land and interests appurtenant to land that are added to the common elements;

Section 4(1):

4(1) A description shall contain,

(a) a plan of survey showing the perimeter of the horizontal surface of the land and the perimeter of the buildings; (Italics are mine.)

I add to the words of the last-quoted section "... and the perimeter of the buildings" -- my own phrase "if any".

Does the "unit", which is described in the definition s. 1(1) (rie),

(r) "unit" means a part or parts of the land included in the description and designated as a unit by the description, and comprises the space enclosed by its boundaries and all material parts of the land within this space at the time the declaration and description are registered.

have to be part of a building, or can part of the land, such as the parking lot, or more directly in issue here, a lot upon which a summer cottage will subsequently be built, be considered a unit as defined in s. 1(1)(r). I also find nothing in the definition which requires that a unit include a building. To put it by way of practical application to the within application one unit as found in Lambert Island Ltd. could include, at the time of registration, a lot upon which was constructed a summer home and the adjoining or nearby lot consist of vacant land only.

Yet this interpretation of the legislation has to be perplexing because the Condominium Act assumes that buildings will be included.

Section 1(1)(b) says, "'buildings' means the buildings included in a property". Section 4(1)(a), (b), (c), (d) and (e) refer to the buildings and s. 8(1) has to contemplate the existence of all the buildings in existence at the time of the declaration and registration. Similarly, s. 17 considers the existence of the buildings at the time of the execution of the "declaration", otherwise, it makes little sense. Nor can I find anything in the Act that permits the addition of buildings later, because the Act does not permit amendment of the "description".

The most significant of all requirements in determining whether "unit" can include land not built upon is a consideration of s. 4(1)(e) which sets out one of the requisites to permit the filing of the "declaration". It requires the inclusion of the certificate of a surveyor that the buildings have been constructed. One might well ask how a surveyor would be able to complete the certificate required by Form 14 of O. Reg. 299/67 [now R.R.O. 1970, Reg. 98], which I set out in full:

Form 14

SURVEYOR'S CERTIFICATE

I hereby certify that the building(s) shown on this plan is (are) in existence and that the units designated on this plan substantially represent the units within the structure(s).

..... (date) (signature)

..... (name in print) (Ontario Land Surveyor)

Form 14 obviously requires that buildings shown on the plan are in existence and the units designated on this plan substantially represent the units within the structures. Section 4(1) refers repeatedly to the "buildings" and "structural plans".

The explanatory notes in the Bill, that was proposed, to s. 4(1)(e), which is in the same form in the proposed Bill as it is now in the Act, states that:

... the certificate is required to insure that the structural plans of the building are sufficiently accurate to enable restoration after damage, to insure that the monuments by reference to which the units are described can be easily located and have substantially the same relations and dimensions in fact as in the plans, and to ensure that the buildings are completed before the Act is invoked. The buildings must be completed to avoid the possibility of hopeless confusion. If the Act could be invoked before or during construction and if several units were sold when finished and the remainder were never finished the proportions of common interests and for sharing common expenses would be meaningless and no happy resolution of the difficulty can easily be made available. Understandably, units could be sold as vacant land, but as I read the Condominium Act, no buildings (on a relative basis) such as summer homes or dwellings could be subsequently added on the vacant lands comprising "units" without offending the Act as presently constituted.

There would therefore be nothing to prevent the registration of a declaration showing some units as vacant land, but this would be of no assistance to the developer or the owners of the "vacant land units".

At the risk of being repetitive, this problem is not whether horizontal development of single-family dwellings is consistent with the Condominium Act, but whether a unit at the time of registration may consist of vacant land which may subsequently be built upon as aforesaid. I respectfully agree with and find support for this latter proposition in the recent unreported judgment of Lacourciere, J. (January 17, 1972), in *Re MacVal Enterprises Ltd. and Township of Nepean et al.* [since reported [1972] 2 O.R.

458, 25 D.L.R. (3d) 682]. It is also interesting to note that Professor Risk, *supra*, at the conclusion of his article refers to "row housing", see p. 72. One would be inclined to give liberal interpretation to this enabling legislation (because that is what it is), but the novel obligation put upon condominium owners makes one hesitate to deviate from strict construction of the sections referred to above. Very quickly, one conjures up the problem of the owner of an elaborate, expensive winterized dwelling on this island comprising part of one unit only later to find an adjoining unit which was originally raw or vacant land containing a house trailer or boathouse.

It was conceded by counsel that this was a novel problem that had not been previously explored. Notwithstanding my finding with respect to jurisdiction, I do not think that this is a proper case for costs. Application dismissed without costs.

Application dismissed.

CBR# 261

Re Macval Enterprises Ltd. and Township of Nepean et al.

[1972] 2 O.R. 458-468

ONTARIO [HIGH COURT OF JUSTICE] LACOURCIERE, J. 17th JANUARY 1972.

M. Citron, for applicant.

R.A. Bell, Q.C., for respondents.

LACOURCIERE, J.:-- This is an application on behalf of Macval Enterprises Limited for an order pursuant to Rules 611 and 612 of the consolidated Rules of Practice declaring that the applicant's proposal to develop a condominium consisting of 15 detached one-family dwellings on its lands in the Township of Nepean will not contravene the applicable provisions of zoning By-law 962. The applicant also asks for an order of mandamus directed to the building inspector of the township requiring the issue of a building permit.

The applicant company in the course of its construction business acquired in February, 1961, a rectangular parcel of land having an area of 2.268 acres fronting on Carola St., in the Township of Nepean. The parcel has a frontage of 395.20 ft. and a depth of 250 ft.; at the time of acquisition there existed a one-family dwelling on this parcel. The applicant originally intended to subdivide the land into not more than six lots for construction and sale; this turned out to be uneconomical because water and sanitary sewer services were not in existence on Carola St., contrary to the information previously given to the applicant. As an alternative the applicant retained an urban planner to prepare a different mode of development. The proposal took the form of the draft plan of condominium which was commended, at a meeting of the Department of Municipal Affairs, "as to the originality of the design and high standard of landscaping proposed". The draft plan is here reproduced to facilitate an understanding of the problems involved. (diagram omitted)

While it was considered by Macval Enterprises Ltd. that the proposed condominium conformed to the municipal zoning by-law and that the development would be an attractive one in keeping with the character of the neighbourhood, the building inspector after careful examination of the application dated September 24, 1971, and attached plan, and after consultation with the township solicitors, reached the conclusion that the application did not comply with the provisions of By-law 39-62 relating to a residential second density zone R2.

The condominium concept

The applicant has applied to the Minister of Municipal Affairs for approval of its condominium plan pursuant to the provisions of the Condominium Act, R.S.O. 1970, c. 77, first enacted in 1967, c. 12. The Act as aptly summarized in its long title is designed as "An Act to facilitate the Division of Properties into Parts that are to be owned Individually and Parts that are to be owned in Common, and to provide for the Use and Management of such Properties". Mr. Citron in an able and scholarly argument has discussed the relationship of the Planning Act, R.S.O. 1970, c. 349, to the Condominium Act. It is quite clear that the fact that a condominium is proposed does not per se affect the question of zoning. In other words, if a proposed building is permissible under the by-law, the fact of ownership in condominium form would not be a reason to refuse a building permit. The material discloses that this is the first application in Canada involving the condominium concept with single-family dwellings, as opposed to high-rise apartment units or groups of row houses. That is the reason why Mr. Bell took the position that the Condominium Act is not available as a technique for a horizontal subdivision, properly controlled by the Planning Act. His submission was that the general purpose of the Act was to provide ownership of individual units of different shapes and dimensions within a building only. While this may be the result of strata titles legislation enacted in other jurisdictions, it would appear that the horizontal development of single-family dwellings is not inconsistent with the condominium concept outlined under the Ontario Act.

In a lecture published in the Law Society Special Lectures (1970), p. 81 at p. 82, J. Richard Shiff, Q.C., adopted the definition of a condominium "as a system of separate ownership of individual units in multi-unit projects", and he included "a cluster type single family detached house subdivision" as available for such ownership. Thus, he concluded:

One can picture a condominium as an apartment building of any size, a garden type housing development of detached and semi-detached units, each consisting of one or more stories, a row of attractive town-houses, an office building in which each occupier owns his own office space, a shopping centre where each shopkeeper owns his own store, an industrial complex where each industry owns its own plant or facilities, a warehouse or terminal with ownership of areas divided among the occupiers.

(The italics are mine.) However, in view of my decision on the zoning aspect it is not necessary for me on this application to express any opinion on the availability of the condominium concept in relation to this type of horizontal land division. It may be significant to note, however, that the Department of Municipal Affairs followed its usual procedure in circulating copies of the plan to various agencies, commissions and departments interested in inviting comments, with the warning, however, that such action was not to be construed as suggesting that the proposal was acceptable or would be recommended.

Conforming with the by-law

Section 6 of By-law 39-62 provides for six different residential density zones and prohibits the building or use of any building not erected in accordance with such provisions. Section 6:2 reads as follows:

RESIDENTIAL SECOND DENSITY ZONE R2

6:2:1 Permitted Uses:

A detached one family dwelling, a park, a home occupation, a day nursery, a church and uses accessory to the foregoing.

6:2:2 Zone Requirements Lot Area (Minimum) 6,500 Sq. ft. Lot Frontage (Minimum) 65 ft. Lot Coverage (Maximum) 30%. Height, Main Bldg. (Maximum) 35 ft. Height Acces. Bldg. (Maximum) 12 ft. Front Yard (Minimum) Sub. to Sect. 5:23 25 ft. Rear Yard (Minimum) 35 ft. Side Yard (Minimum) one side 8 ft. Side Yard (Minimum) other side 5 ft. Floor Area (Minimum) 1,150 Sq. ft.

6:2:3 Exception:

Notwithstanding the provisions of Section 6:2:1: where no storm sewer and paved roads with curbs are provided or will be provided within a period of one year, then the minimum Lot Area and the minimum Frontage for not less than 50% of the lots in any plan of subdivision lying within the R2 zone shall be 7,500 sq. ft. and 75 ft. respectively.

Mr. Citron's argument presented to me was condensed in a letter dated August 11, 1971, written by him to the Corporation of the Township of Nepean to support his opinion that the proposed plan conformed with the zoning. At that time the following considerations were put forward to the township, and the opinion being rejected the same arguments are now presented to this Court. I quote from the letter, ex. H to the affidavit of Robert McElligott, as follows:

The project Macval wishes to build consists of fifteen detached single family dwellings, including an existing farm house and fourteen new homes, on a lot on Carola Street having a frontage of 395.20 feet, a depth of 250 feet and an area of 2.26 acres. The lot is zoned R2 by By-law 39-62. The objection that has been raised is that the project infringes the by-law because it involves more than one building on a lot.

We submit the following for your consideration.

1. The proposed single family dwellings comply in all respects with the by-law. The permitted uses in an R2 zone include "a detached one family dwelling." Each proposed dwelling by itself falls within this permission and all the proposed dwellings comply with the zone requirements in Section 6:2:2 of By-law 39-62. The lot itself has an area and frontage which, of course, are well in excess of the by-law requirements. The total lot coverage of all buildings will be well under the 30% requirement. No building will be over thirty-five feet high. The front, rear and side yards will all be greater than the minimum required by the by-law. In each case the yard is a space between the "lot line and the nearest wall of any building or structure on the lot for which the yard is required."

2. The by-law expressly contemplates more than one building on a lot. Paragraph 62 of Section 2 of the by-law defines lot as follows:

"Lot' shall mean a parcel of land fronting on a street, whether or not occupied by a building or structure."

Paragraph 64 of Section 2 of the by-law is as follows:

"'Lot Coverage' shall mean the combined areas of all the buildings on the lot measured at the level of the lowest floor above grade."

Section 6:5 of the by-law contains the restrictions applicable to the Residential Fifth Density Zone R5. Paragraph 3 of this section contains under the heading "Spacing of Buildings" specific restrictions affecting "main buildings on the same lot."

We understand that in respect of the R2 zone it has been suggested that only one dwelling on a lot is permitted because the permitted uses in that zone are, by Paragraph 1 of Section 1 of Section 6:2, stated to be:

"A detached one family dwelling, a park, a home occupation, a day nursery, a church and uses accessory to the foregoing."

Apparently the use of the singular introduced by the indefinite article "a" is what gives concern. We draw to your attention that exactly similar wording is used to designate the permitted uses in the R5 zone by Paragraph 6:5:1 which is as follows:

"All uses permitted in the Residential R4 Zone subject to the requirements thereof and the following uses: A double duplex dwelling and an apartment dwelling and uses accessory to the foregoing."

We respectfully say to you that in the R5 zone where multiple dwellings are permitted it was thought necessary to enact minimum spacing requirements. In the R2 zone this was not considered necessary. In both cases more than one main building on a lot is permitted.

In fact the proposed plan contemplates a greater separation between buildings than is either required or practicable when houses are built on subdivision lots in an R2 zone.

3. The Condominium Act makes possible the development and sale of a lot without splitting it into smaller lots. Purchasers of residential condominium units acquire their dwelling units plus a shared common interest in the land and servicing facilities in the condominium. One of the purposes of the Act is to make possible development on a more economical basis than would otherwise be possible because of this feature of sharing the cost of land and services. The Condominium Act does not change the application of a zoning by-law to land which is brought under The Condominium Act. This has been recognized in many developments. We need only refer to the high-rise apartment condominiums already built in your Township. A development which is otherwise proper having regard to the Planning Act and the zoning by-law remains proper when it is developed under The Condominium Act.

4. We have pointed out that the zoning by-law contemplates more than one building on a lot. If it had been the intention to prohibit more than one building on a lot in the whole of the area covered by it or in any zone we respectfully submit that the by-law would have contained an express prohibition. We are very doubtful whether such a provision, even if it were contained in the by-law, would be valid under Section 30 of The Planning Act. Such a prohibition could be supported if at all, only under the power to regulate "spacing" contained in Paragraph 4 of Subsection 1 of Section 30 of The Planning Act which is quoted in part in the preamble to By-law 39-62. We draw to your attention a recent decision of the High Court of Ontario, *Re Anzil Construction Ltd. et al and Township of West Gwillimbury et al*, 1971 2 O.R. 713, and quote therefrom the following passages at pages 721 and 722 of the report:

"If a glance be given at s-s (1) of s. 30 of The Planning Act, it will be observed that the word 'area' is only to be found in para. 4 Paragraph 4 runs thus:

30(1) By-laws may be passed by the councils of municipalities:

4. For regulating the cost of type of construction and the height, bulk, location, size, floor area, spacing, external design, character and use of buildings or structures to be erected within ... any defined area or areas ... and the minimum frontage and depth of the parcel of land and the proportion of the area thereof that any building or structure may occupy. Upon a perusal of the words in para. 4, it is clear that the Municipal Council has power to set the minimum frontage and depth of the parcel of land on which a house may be erected. It is familiar law that municipal powers are limited by the precise words of the enabling legislation. It is argued that there is no authority in s. 30 for a by-law regulating areas and accordingly it must be held to be bad."

"It may be true that the word 'spacing' should be given a broad definition, but I find it difficult to conceive that the purport of the words 'no single family dwelling shall be erected or used on a parcel of land having an area of less than 50 acres' is really an exercise of a power to regulate spacing of buildings. I venture to suggest that 'spacing' is generally accomplished by a provision defining the minimum distance between the side walls and the lot lines."

While the by-law in that case, dealt, of course, with a different type of matter we believe that the reasoning applies and that a prohibition of more than one building on a lot could not be sustained if the buildings otherwise come within the zoning by-law.

The project has been designed by a planner with careful thought to its architectural and esthetic desirability. We respectfully ask that the Township reply in the affirmative to the Minister's inquiry as to whether the project complies with the zoning by-law.

Especial reliance is placed by the applicant on a statement made by McRuer, C.J.H.C., in *Re Bridgman and City of Toronto et al.*, [1951] O.R. 489 at p. 496, [1951] 3 D.L.R. 814 at p. 821, as follows:

There are certain cardinal principles that are never to be forgotten with respect to cases of this kind and with respect to all matters that the Courts have to deal with affecting property rights.

Everyone has a right to use his own property in any way that he may see fit, so long as he does nothing that will be a legal nuisance to his neighbours. That is a common law right. It is a question of liberty that is to jealously guarded by the Courts, and while one's rights may be affected by proper legislative action, until that is done one's personal common law rights are to be strictly guarded. In the construction of any Act, either of the Legislature or of a municipal government which is limited in its legislation to the authority conferred on it, one must place a strict construction on any statute or by-law which is restrictive in its nature of the liberty of the subject or the liberty with which he may exercise those rights that the common law gives to him over his property.

The above quotation represents the strict construction approach in dealing with the zoning by-laws, in contrast to the liberal interpretation which is generally adopted when dealing with remedial statutes, in accordance with s. 10 of the Interpretation Act, R.S.O. 1970, c. 225.

I have reached the conclusion that the plan put forward by the applicant, albeit meritorious from a planning point of view, represents a device to circumvent the intent and purpose of By-law 39-62 as well as the letter of the by-law. In the first place none of the units of the condominium complies with the minimum 65-foot lot frontage on a public street which is a distinct requirement of s. 6. If each unit could use the same frontage, then the 395 ft. would be sufficient to qualify all. It would seem to me to be a very strange interpretation of the by-law to hold that a piece of land which can only support six lots with the required frontage could be used to qualify 14 one-family dwellings in addition to the existing one. It may be that the proposed project, containing as it does 98,794 sq. ft., would permit a total of slightly more than 15 units on the basis of 6,500 sq. ft. block area per dwelling-house. Thus the question of density, as it is stressed by the applicant, may not be a problem.

The applicant must come within the only relevant permitted use under R2, i.e., "a detached one family dwelling". Such a detached dwelling must be separated, isolated and unattached; this can hardly be said of a unit which shares common elements with its neighboring units such as the terraces adjacent to each dwelling-house which, while assigned exclusively to the use of the owner of the unit, still remain part of the common elements.

Furthermore, in my opinion the proposed plan infringes the provisions of s. 5:6 of the by-law entitled "Frontage on a Street" which provides:

No person shall erect or use any building or structure on a lot which does not front on a street.

It would do violence to this section to hold that a building far removed from the Carola St. frontage, although artistically placed in semi-circular fashion around a parking lot rectangle with appropriate mound screen is a building fronting on Carola St. In the same vein residential lots in order to comply with s. 2.68 must have a lot frontage in accordance with the requirements of the particular residential zone.

In my opinion there is no ambiguity in the provisions of the by-law and it therefore becomes unnecessary to resort to the canon of construction recommended when dealing with remedial legislation; see *Wilson v. Jones*, [1968] S.C.R. 554 at p. 559, 68 D.L.R. (2d) 273 at p. 277, per Spence, J.:

These principles, however, need only be applied when upon the reading of the whole by-law there is an ambiguity or difficulty of construction. Reading the whole by-law, I have, for the reasons which I have outlined, come to the conclusion that there is no such ambiguity or difficulty in interpretation and therefore the two canons are not applicable. It was held in that case that the words "private residences" as used in a zoning by-law should be construed in a popular rather than a technical sense, and could not include 17 separate suites in a two and a half-storey building. Even if it can be said that the proposed units, in the popular sense, constitute detached one-family dwellings, the use made cannot derogate from the zone requirements spelled out in s. 6:2:2.

It should be noted at this time that considerable local opposition has been generated from owners of properties adjacent to the applicant's site. It was best summarized in a letter written by one Alan White and directed to the Director of the Planning Department of the township (ex. F to the affidavit of Derek Oliver Campfield) dated June 3, 1971, pointing out the by-law requirements, the previous restricted development in accordance therewith and the reliance on single-family dwellings according to R2 requirement by the purchasers of property who claim the protection of the by-law. This letter refers to the over-development involved in the proposed plan and, while expressing sympathy for the developers, suggests that a condominium concept would be more suitable in a new subdivision where people concerned would have advance knowledge or that type of development. The

local opposition was justified and it brings to mind the modern approach of Ontario Courts towards zoning legislation, well summarized in the judgement of Kelly, J.A., for the Ontario Court of Appeal in *Re Bruce and City of Toronto et al.*, [1971] 3 O.R. 62 at p. 67, 19 D.L.R. (3d) 386 at p. 391.

The underlying purpose of the implementing by-law, is accordingly, to establish and maintain for each of the areas or zones into which the municipality is divided for the purposes of the plan, standards which will enhance and preserve the quality of life in the municipality and the amenities considered conducive to the health, safety, convenience and welfare of the inhabitants. On this account, I consider the by-law to be remedial and one to be accorded a liberal interpretation to the end that it may afford to the people of the community protection against departures from or encroachment upon the standards adopted by the municipality as expressive of these purposes.

Such an approach is, I believe, compatible with the proven necessity for the employment of external controls for the preservation of a fair standard of housing and land use and the expressed will of the people for a universal application of orderly planning to that end. I am not unmindful that it has not been uncommon for by-laws dealing with the use of lands and the use and erection of buildings to be referred to as restrictive by-laws and to be accorded a strict interpretation due to the fact that they have been approached as infringements on the freedom of choice of the owner and the use to which he may put his land.

Notwithstanding this, it is my belief that Ontario Courts now accept that the obligation imposed on the municipal council to plan for the growth and development of the community demands recognition of the necessity for means to compel the observance of the rights of the community to determine and enforce the direction in which the community should be shaped, and that in this regard the rights of the community are paramount to the rights of the owner.

I rely also on the approach taken by the Ontario Court of Appeal in *Bayshore Shopping Centre Ltd. v. Corp. of the Township of Nepean et al.*, as well as *Oshawa Wholesale Ltd. et al. v. Canadia Niagara Falls Ltd. et al.*, two decisions delivered orally by Aylesworth, J.A., for the unanimous Court on December 15, 1971, as yet unreported [*Oshawa Wholesale Ltd. et al. v. Canadia Niagara Falls Ltd. et al.*, since reported [1972] 1 O.R. 481, 23 D.L.R. (3d) 401].

The extraordinary remedy represented by the prerogative writ of mandamus should not be used to compel the issuance of a building permit for a condominium plan clearly designed for the circumvention of the local zoning by-law: see *Re Forfar and Township of East Gwillimbury et al.*, [1971] 3 O.R. 337, 20 D.L.R. (3d) 377.

The application for mandamus will therefore be dismissed. In view of this disposition it is not necessary for me to deal with the application for a declaration. There is some doubt as to whether a municipal by-law is an instrument which can be construed under the provisions of Rule 611: see different views expressed in *Re W.J. Blainey Ltd. and City of Toronto*, [1935] O.R. 476, [1935] 4 D.L.R. 328, per Hope, J., in contrast to *Re Pane Niagara Enterprises Ltd. and City of Niagara Falls*, [1968] 1 O.R. 287, per Keith, J.

In the result the application will be dismissed with costs if demanded. Application dismissed.

CBR# 204

Brian David Mott and Nancy Krishna Mott, petitioners, and The Owners, Leasehold Strata Plan LMS2185 UBC Properties Inc., and The University of British Columbia, respondents

[1998] B.C.J. No. 2730

Vancouver Registry No. November 24, 1998.

British Columbia Supreme Court Vancouver, British Columbia Burnyeat J. (In Chambers) Heard: October 2, 1998. Judgment: filed November 24, 1998.

Counsel: K.B. Friesen, for the petitioners. P.A. Williams, for the respondents.

[para1] BURNYEAT J.:-- When Mr. and Mrs. Mott purchased their suite in The Bristol at Hampton Place in September, 1996, the Strata Plan registered in the Land Title Office indicated a balcony off their suite totaling 18.2741 square metres. However, when they viewed the property prior to purchase, it would have been clear to them that not all of the space had been developed as balcony and that they could only reach some of the balcony space by stepping over a partition and railing. The remaining balcony space (about 11.0911 square metres) was not developed, had a rough stone surface and was not surrounded by a railing. The Strata Plan filed in the Land Title Office did not accord with the original architectural drawings which do not show the 11.0911 square metres of space adjacent to Strata Lot 33 as balcony but showed it as "roof." Mr. and Mrs. Mott subsequently applied to the Strata Council and Strata Corporation to remove part of the existing railing, to install an identical balcony railing around the 11.0911 square metre portion so that they could have "safe access" to it, and to finish the balcony so it would be identical to all other balconies in The Bristol.

[para2] Permission to make those changes was denied by the Strata Council and the Strata Corporation. Mr. and Mrs. Mott apply pursuant to ss. 42 and 43 of the Condominium Act saying that the owners of Leasehold Strata Plan LMS2185 have acted in a manner oppressive or unfairly prejudicial to them and that the Strata Corporation should be directed to grant the permission requested.

BACKGROUND

[para3] The series of events leading up to this application can be summarized as follows:

(a) The Strata Plan for 5735 Hampton Place, Vancouver, was filed in the Land Title Office on October 26, 1995. All units in the Strata Plan have balconies and there is nothing on the Strata Plan to indicate that the balcony adjacent to the Strata Lot which is owned by Mr. and Mrs. Mott is anything other than contiguous balcony space.

(b) When Mr. and Mrs. Mott purchased Strata Lot 33 on September 21, 1996, there was developed balcony space of approximately 6.183 square metres. It was clear that the remainder of the balcony was not finished and was not surrounded by a balcony railing. As well, this area did not have the traditional flooring which would be expected for a balcony. Rather, it had a surface of small stones.

(c) Although it changed its name, I will refer to the owner throughout as being UBC Properties Inc. UBC Properties Inc. entered into a long term lease with the "Original Lessee", Millennium Estate Homes Ltd. Under this Ground Lease, Millennium agreed to prepare and file a Leasehold Strata Plan in the Land Title Office. It was agreed that the Ground Lease was to be converted into individual leases with respect to each strata lot and that the individual leases would be subject to the terms and conditions contained in the Ground Lease, a Model Strata Lot Lease which formed part of the Ground Lease and to the provisions of the Condominium Act. When Mr. and Mrs. Mott purchased Strata Lot 33, they did so by obtaining an assignment of the Ground Lease and by registering that assignment in the Land Title Office.

(d) Article 8.2(a) of the Model Strata Plan Lease provided that owners such as Mr. and Mrs. Mott are responsible to maintain and repair and keep in good order and condition their own unit "including windows and doors and areas allocated to [their] exclusive use." Under Article 8.2(b), the Strata Corporation was responsible to: "... maintain and repair the exterior of the Buildings (excluding windows, doors, balconies and patios included in a Strata Lot) including the decorating of the whole of the exterior of the Buildings" Both of these obligations were subject to the proviso that "reasonable wear and tear" was accepted so long as the reasonable wear and tear did not "unreasonably affect the exterior appearance of the Buildings or the foundation or structure of the Buildings." Article 9.1 provided that owners such as Mr. and Mrs. Mott and the Strata Corporation must obtain written approval of UBC Properties Inc. before making any "changes, alterations, replacements, substitutions or additions affecting the structure of the Buildings ... or the exterior decoration, design or appearance of the Buildings" That Article further provided that this approval is not to be "unreasonably withheld."

(e) Under the Strata Plan filed, all 18.2741 square metres of the balcony space adjacent to Strata Lot 33 was designated as "limited common property" attaching to that Strata Lot.

(f) On March 27, 1997, Mr. and Mrs. Mott requested permission of the Strata Council to make "modest improvements to the limited common property/balcony" of their suite. They requested permission to finish off the existing outer lip by putting up a railing in the identical design/manufacturer as the existing railings in all ... balconies. In addition, we would also like to remove the interior railing located on our existing balcony, in order to have safe access to this location.

(g) The April 21, 1997 reply to Mr. and Mrs. Mott indicated that the Strata Council had considered their request "to extend the limited common area property to the outer edges of the building" and advised Mr. and Mrs. Mott that it was the opinion of the Strata Council that it was "in the best interests of the other Owners to maintain the present integrity of the building and disallow any changes." The reasons given for the decision were that the area was common property and, therefore, the cost of repairing any future damage as a result of leakage would be borne by all Owners, the suite below would be subjected to more noise, the change would set a precedent for future requests from Owners for similar extensions and that, although "aesthetically ... the extension of the railings would not detract from the building, the sight of chairs, barbecues, plant pots, or any other items in that space would detract from the overall appearance of the building - all other suites are limited to spaces confined by their balcony railings."

(h) Mr. and Mrs. Mott replied by a May 2, 1997 letter and pointed out that the area was not "common property" but "our limited common property." They also advised that it was the opinion of their legal counsel that "we do not need the approval of the Strata Council, although it was recommended as a courtesy that the Council be notified."

(i) A number of bylaws were then added to the existing bylaws. By special resolution passed May 13, 1997 and filed in the Land Title Office on June 6, 1997, bylaws 139.6 and 139.8 of the Strata Plan were added dealing with the "exterior appearance" of the building:

(i) Bylaw 139.6 provided that no signs, fences, gates, billboards, placards, advertising or notices of any kind and no awnings, radio or television antennae, supplementary heating or air-conditioning devices, no laundry, clothing, bedding or other articles, visible balcony or patio storage was permissible without the prior written approval of the Strata Council. (ii) Further, bylaw 139.6 required owners to obtain the permission of UBC Properties Inc. before making any alterations "such as finishing unfinished areas ... that might affect the structure, mechanical or electrical systems." The consent of UBC Properties Inc. is conditional upon the Strata Corporation also consenting.

(iii) Under bylaw 139.8, owners were to submit proposals in writing for consideration by the Strata Council to "alter the finish or appearance of the fencing, railing, floors, walls or ceiling of the patios or balconies adjoining any strata lot."

(j) On May 16, 1997, Mr. and Mrs. Mott wrote to the Strata Council indicating that they had received the advice through the original developers that the proposed changes would not affect any structural, mechanical or electrical systems. They also pointed out that no other owners had the potential to forward a similar request to the Strata Council as the areas adjacent to two other suites in the building were recorded either as roof space or not shown on the Leasehold Strata Plan and, accordingly, were clearly common property and "not eligible for a similar request."

(k) On June 3, 1997, the Strata Council reconsidered the request of Mr. and Mrs. Mott and reaffirmed their decision not to permit the alteration. In a June 10, 1997 letter, Mr. and Mrs. Mott were advised that there had been a reconsideration of their request to extend "the limited common property adjacent to your suite" and that the Strata Council had reaffirmed their decision "not to permit the alteration to common property as requested" as it was the position of the Strata Council that: "... if they allow one change to the exterior of the building that they will be setting a precedent for any future requests for changes to the exterior appearance of the building."

[para31] (l) The Strata Council minutes for the meeting held June 17, 1997 indicate that Mr. Mott addressed the Strata Council requesting that they "reconsider his request to extend the limited common property" adjacent to his suite by installing a balcony railing in detail identical to existing railing details at the building. The minutes indicate that Mr. Mott presented a legal opinion and that, while the Strata Council "concurred that the legal opinion may be correct", the Strata Council still had a concern "with the exterior appearance of the building" which was under their jurisdiction. They also pointed out that UBC Properties Inc. "... by virtue of the Land Lease, also had control over the exterior appearance of all buildings in Hampton Place and in the past have been reluctant to approve an exterior design change unless the Strata Council had also approved the design change."

(m) There was an extraordinary general meeting of the Strata Corporation on August 5, 1997 to consider a special resolution that the Strata Council "be authorized to approve exterior alterations to the limited common property of Strata Lot 33 on the basis that all costs would be to the expense of Mr. and Mrs. Mott." In his affidavit, Mr. Mott indicates that the members of the Strata Council urged the owners attending the meeting to defeat the special resolution. The special resolution was defeated: 9 votes in favour, 27 votes against, and 2 abstentions.

CONDOMINIUM ACT PROVISIONS WHICH ARE APPLICABLE [para4] Section 1 of the Condominium Act defines "common property" as the remainder of the lands and buildings which are not included within the strata lots shown on the strata plan and "limited common property" as being common property which has been designated under s. 53(1) and (2) of the Act for the use of "one or more strata lot owners."

[para5] Under s. 53(1), a strata corporation by special resolution may designate an area as "limited common property for the use of one or more strata lot owners." Similarly, a strata corporation can remove the designation by special resolution. However, if an area was designated as limited common property on the original strata plan, that designation can only be removed by the unanimous resolution of all owners. (Section 58(1) of the Act.)

[para6] Pursuant to s. 115(d) of the Act, all owners including Mr. and Mrs. Mott must use and enjoy: "... the common property, common facilities or other assets of the Strata Corporation in a manner that will not unreasonably interfere with their use and enjoyment by other owners, their families or visitors;" Under s. 115(h) of the Act, the owners must: "... receive the written permission of the Strata Council before undertaking alterations to the exterior or structure of the strata lot, but permission must not be unreasonably withheld."

[para7] Under s. 26 of the Act, the Strata Corporation must have bylaws providing for the "control, management, administration, use and enjoyment of the strata lots and common property, common facilities and other assets of the strata corporation." Under s. 116(a) of the Act, the Strata Corporation must: "Control, manage and administer the common property, common facilities or other assets of the Corporation for the benefit of all owners;."

[para8] The powers of the Strata Corporation are set out under s. 117 of the Act. Those powers include the ability to "... make rules and regulations it considers necessary or desirable from time to time in relation to the enjoyment, safety and cleanliness of the common property, common facilities or other assets of the corporation." (Section 117(h) of the Act.)

[para9] Under s. 42 of the Act, an owner may apply to the court "to prevent or remedy a matter" if the owner alleges:

(a) that the affairs of the strata corporation are being conducted, or the powers of the corporation or strata council are being exercised, in a manner oppressive to one or more owners, including himself or herself, or (b) that some act of the strata corporation has been done or is threatened, or that some resolution of the owners or a class of owners has been passed or is proposed that is unfairly prejudicial to one or more owners, including himself or herself.

When such an application is being made pursuant to s. 42 of the Act, the court may make an interim or final order directing or prohibiting an act of the Corporation of varying a transaction or resolution and may "regulate the conduct of the corporation's future affairs."

POSITION OF THE PARTIES

[para10] The petitioners say that, subject to any bylaws which the Strata Council or the Strata Corporation may put into effect dealing with the use and enjoyment of all balconies, the petitioners should be entitled to use all of the limited common property which has been designated for their exclusive use. By denying the petitioners any use of part of their balcony, the Strata Corporation is purporting to use the power available to it to circumvent s. 58(1) of the Act or to circumvent Part 8 of the Land Title Act which allows the cancellation of an existing Strata Plan and the substitution of an amended plan only after a hearing of before the Registrar of Land Titles.

[para11] The respondents say that, while part of the common property of all of the owners of this Strata Plan has been designated as limited common property for the exclusive use of the petitioners, the Strata Corporation is still responsible for the control, management and administration of all common property and, generally, must administer for the benefit of all owners and not just the petitioners. They submit that the Strata Corporation has acted throughout in accordance with its duties and powers and that the Strata Corporation is now being asked to act other than in accordance with the overwhelming vote of the members of the Strata Corporation.

DISCUSSION

[para12] If the limited common property had been designated by the Strata Corporation for the benefit of the petitioners after the original Strata Plan had been filed in the Land Title Office, then the Strata Corporation could change the designation by special resolution. However, because the designation was made in the original Strata Plan filed in the Land Title Office, any removal of the designation must be by unanimous resolution. Because it can be assumed that Mr. and Mrs. Mott would not vote to remove the designation of part of what is shown as balcony on the Strata Plan filed in the Land Title Office, it is obviously the case that the designation will not be changed by a unanimous resolution of the Strata Corporation.

[para13] Alternatively, the Strata Corporation or one of the owners may apply to the Registrar of Land Titles pursuant the Part 8 of the Land Title Act for the cancellation of Strata Plan LMS2185 so that a different Strata Plan could be filed. Part 8 of the Land Title Act has also been used where the Registrar of Land Titles has been satisfied that there should be rectification of a title or a plan where a mis-description has taken place. However, counsel for the respondents was not in a position to provide any authority for the proposition that the Registrar of Land Titles could rectify a Strata Plan in these circumstances. In fact, the Registrar of Land Titles has apparently provided an informal opinion that rectification will not be available in this case. The Registrar of Land Titles is correct in the informal opinion already provided.

[para14] Accordingly, the only avenue that would be available is an application pursuant to Part 8 of the Land Title Act. Neither the Strata Corporation nor an owner have undertaken such an application. I anticipate that the reason that such an application has not been made is that such an application would not be successful before the Registrar of Land Titles.

[para15] Because neither of these avenues are available to the respondents, the petitioners say that the other owners are attempting to "expropriate" or improperly deny usage by the petitioners of the limited common property designated for their use.

[para16] When the petitioners first requested permission of the Strata Council on March 27, 1997, they were under no obligation to do so. Under Article 8.2(a) of their Lease, the petitioners were responsible for the maintenance and repair and for the condition of the areas which had been allocated to their exclusive use whereas, under Article 8.2(b) of the Lease, the Strata Corporation was responsible for the maintenance, repair and condition of the exterior but excluding balconies. Although the Strata Corporation was in a position to pass further bylaws providing for "control, management, administration, use and enjoyment" of common property including limited common property (pursuant to s. 26 of the Act) and was in a position to make rules and regulations regarding the "enjoyment, safety and cleanliness of the common property" (pursuant to s. 117(h) of the Act), the Strata Corporation had not passed any further bylaws or rules and regulations. That being the case, the provisions which govern are the Part 5 bylaws under the Act which include s. 115(c) and s. 116(f) which clearly provide that Mr. and Mrs. Mott are responsible to repair and keep in good repair and maintain the area. Those obligations were virtually identical to the obligations which were imposed on Mr. and Mrs. Mott and on the Strata Corporation pursuant to s. 8.2(a) and (b) of the Lease. The Part 5 bylaws also include ss. 115(d), 115(h) and 116(c) of the Act.

SECTION 115(d) OF THE CONDOMINIUM ACT

[para17] The respondents rely on s. 115(d) of the Act to say that the petitioners can only use the limited common property which has been designated to their exclusive use in a way which will not reasonably interfere with the use and enjoyment by other owners, their families or visitors in that limited common property. While it is clear that limited common property is designated out of all of the common property available to the Strata Corporation, it is clear that s. 115(d) of the Act does not apply to limited common property which has been so designated. It is obvious that a balcony adjacent to a Strata Lot is no longer "common property" which is available for the "use and enjoyment by other owners, their families or visitors."

[para18] The broad interpretation of s. 115(d) of the Act urged by the respondents would require all owners to allow other owners to move freely through their Strata Lot to gain access to the outside balconies which are adjacent to most strata units in the building. The refusal to allow such access would be an unreasonable interference with the ability of other owners to use and enjoy that part of the common property which had been designated as limited common property. This interpretation of s. 115(d) is untenable. Exclusive use means exactly that.

[para19] It is clear that the intent of s. 115(d) was that the activities of one owner on common property not designated as limited common property would not interfere with the use and enjoyment by other owners of that common property. By combining the words "use and enjoyment", the legislature has provided that an owner may not unreasonably interfere with the use and enjoyment by other owners of the common property within a Strata Corporation to which all owners within the Strata Corporation have access or the use and enjoyment by one or more owners where limited common property has been designated to the use of a limited number of owners. Once common property has been designated as limited common property, the other owners in the Strata Corporation no longer have the right of use and enjoyment of that space.

[para20] Even if s. 115(d) could be interpreted to deal with "use or enjoyment", it cannot be said that the enjoyment by other owners has been diminished by the use of that space for the purpose for which it was intended. It cannot be said that an owner is interfering with the enjoyment of other owners merely because that balcony is being used in a manner which is consistent with the use and enjoyment that is available to all other owners of their own balconies. Accordingly, s. 115(d) cannot be relied upon by the respondents to deny the full use and enjoyment by Mr. and Mrs. Mott of all of the limited common property which has been designated for the exclusive use of the strata lot they own, being Strata Lot 33.

SECTION 115(h) OF THE CONDOMINIUM ACT

[para21] The respondents submit that s. 115(h) of the Act requires that the petitioners as owners must receive the written permission of the Strata Council before undertaking the alterations they request.

[para22] The use of the word "exterior" as set out in this section has been held to refer only to the outer walls of the building: see, for instance, *Buchbinder v. Strata Plan VR2096* (1992), 65 B.C.L.R. (2d) 325 (B.C.C.A.) where the court concluded at p.329:

In my view, the patio is not incorporated within the definition of building exterior. It is not part of the outer walls. The building exterior could only refer to the walls as the word "exterior" modifies building and does not extend to cover a patio adjacent to that building.

It must also be noted that s. 115(h) of the Act refers to the exterior of the strata lot and not to the exterior of the building. What the petitioners seek to do is alter the exterior of the building to the extent that they wish to alter that part of the common property which has been designated as limited common property for their exclusive use. Accordingly, s. 115(h) does not apply to the request of the petitioners.

SECTIONS 115(c) AND 116(c) and (f) OF THE CONDOMINIUM ACT

[para23] The respondents say that, because the Strata Corporation must maintain "all common areas" (s. 116(c)), there is an obligation on it to maintain that part of the common area which has been designated as limited common property and that this obligation overrides the duties of the owners and the duties of the Strata Corporation as set out in ss. 115(c) and 116(f) of the Act.

[para24] While it is clear that a strata corporation can pass bylaws under s. 26 of the Act providing for the control, management, administration, use and enjoyment of common property and to make rules and regulations regarding the enjoyment, safety and cleanliness of common property, those bylaws, rules and regulations must not conflict with the obligations imposed on an owner pursuant to s. 115(c) to repair and maintain areas allocated to the owner's exclusive use and must not purport to expand the exceptions set out in s. 116(f) of the Act which require the strata corporation to maintain and repair the exterior of the building but not the patios or balconies of a building. It is clear that, once common property has been designated as limited common property, the Strata Corporation no longer retains all of the powers it previously had to make bylaws to provide for the control, management, administration, use and enjoyment of the Strata Corporation. Certain aspects of the control, management, administration, use and enjoyment of what is now limited common property has been delegated through the Act and through the bylaws to the strata owner to whom the former common property has been designated.

[para25] The obligations imposed on Mr. and Mrs. Mott and on the Strata Corporation under ss. 115(c) and 116(f) of the Act are consistent with the provisions of Articles 8.2(a) and 8.2(b) of the Lease. The effect of these provisions is that the ability of the Strata Corporation to "maintain" and "repair" and to keep in "good order" and "condition" has by the provisions of the Act and Lease been delegated to owners such as Mr. and Mrs. Mott.

[para26] I am satisfied that the words "maintain", "repair", "good order" and "condition" are broad enough to encompass the alteration of the finish or appearance of the railing, floors or ceiling of a balcony as requested by Mr. and Mrs. Mott. The use of these words in Article 8.2(a) of the Lease are broad enough to enable Mr. and Mrs. Mott to complete the balcony space designated for their exclusive use. Requiring them to maintain and repair the balcony space in "good order and condition" also requires them to put the balcony into "good order and condition" if they find it otherwise.

[para27] In *Manton v. York Condominium Corp. No. 461* (1984), 49 O.R. (2d) 83, the obligation to "maintain" was found to be broad enough to include the obligation of the owners to correct a structural defect. The court cited with approval the following passage of Cory J.A. (as he then was) in *York Condominium Corp. No. 59 v. York Condominium Corp. No. 87* (1983), 42 O.R. (2d) 337 at 341:

The concept of repair in such a situation should not be approached in a narrow legalistic manner. Rather, the court should take into account a number of considerations. They may include the relationship of the parties, the wording of their contractual obligations, the nature of the total development, the total replacement costs of the facility to be repaired, the nature of the work required to effect the repairs, the facility to be repaired and the benefit which may be acquired by all parties if the repairs are effected compared to the detriment which might be occasioned by the failure to undertake the repairs. All pertinent factors should be taken into account to achieve as fair and equitable a result as possible.

[para28] In support of this conclusion, Cory J.A. cited the decision in *Canadian Pacific R. Co. v. Grand Trunk R. Co.* (1914), 49 S.C.R. 525 (S.C.C.) where the word "maintained" was interpreted to be wide enough to include the reconstruction of a bridge so that it could service an increased flow of traffic.

[para29] The decision taken by the Strata Council as evidenced by its April 21, 1997 reply to the March 27, 1997 request of Mr. and Mrs. Mott cannot stand. Even though it made a decision at the request of Mr. and Mrs. Mott, the Strata Council was without jurisdiction to deal with that request and, in any event, was not in a position to refuse it. In matters dealing with the "good order" and "condition" of the balcony space, Mr. and Mrs. Mott had only to apply for the written approval of UBC Properties Inc. before making the changes requested. They had to seek the approval of UBC Properties Inc. under Article 9.1 of the Lease but that approval could not have been "unreasonably withheld." The fact that Article 9.1 provides that owners as well as the Strata Corporation must obtain approval of UBC Properties Inc. before making any "changes, alterations, replacements, substitutions or additions affecting the structure of the Buildings ... or the exterior decoration, design or appearance of the Buildings ..." is further evidence that it was contemplated under the Lease that owners as well as the Strata Corporation were empowered to make such "changes, alterations, replacements, substitutions or additions" and that these matters were not under the sole purview of the Strata Corporation. There is nothing under the Lease which would lead me to the conclusion that UBC Properties Inc. was in a

position to require the pre-approval of the Strata Corporation or the Strata Council when Mr. and Mrs. Mott sought its written approval for the changes they were contemplating.

[para30] However, the petitioners have been content to seek the approval of the Strata Council or the Strata Corporation in addition to expressing a willingness to follow any reasonable procedures established by the Strata Corporation regarding the design and implementation of the changes they request. Accordingly, while I am satisfied that the petitioners were under no obligation to apply to the Strata Council or to the Strata Corporation for the approval which was sought in their March 27, 1997 letter and while I am satisfied that the decision taken by the Strata Council regarding that request cannot stand, I will now deal with the petition as it relates to the decisions reached by the Strata Council as set out in its June 3, 1997 letter and by the Strata Corporation at its extraordinary general meeting held August 5, 1997.

EFFECT OF THE ADOPTION OF BYLAWS 139.6 and 139.8

[para31] The respondents submit that bylaws 139.6 and 139.8 were passed in accordance with ss. 26, 116(a) and 117(h) of Act. The respondents also submit that the requirement in s. 115(h) that permission is not to be "unreasonably withheld" have been replaced by bylaws 139.6 and 139.8 so that Strata Council is now in a position to withhold its approval "unreasonably." However, the respondents further submit that what has been done by the Strata Council and the Strata Corporation is both reasonable and for "the benefit of all owners."

[para32] Accordingly, it is necessary to review the provisions of bylaws 139.6 and 139.8 to see whether they did or can alter the situation which existed prior to June 6, 1997 when they became effective. It is also necessary to review these bylaws to confirm that they are consistent with the Part V bylaws which were in existence when Mr. and Mrs. Mott purchased their property and, in particular, ss. 115(c), 115(h), 116(c) and 116(f) of the Act.

[para33] Section 115(h) of the Act provides that permission from the Strata Council before undertaking alterations is not to be unreasonably withheld. While the Strata Corporation is authorized to pass further bylaws, rules and regulations, it does not follow that those provisions can be contrary to the provisions set out in the Act or the Lease. Bylaws must be consistent with the Act and with any Lease: see, for instance, *Carleton Condominium Corp. No. 279 v. Rochon* (1987), 38 D.L.R. (4th) 430 (Ont. C.A.). Accordingly, even assuming that bylaws 139.6 and 139.8 have been passed in substitution of the provisions of s. 115(h) of the Act, any permission by the Strata Council cannot be unreasonably withheld. This is the case even though bylaws 139.6 and 139.8 do not use the words "cannot be unreasonably withheld" which are contained in s. 115(h) of the Act.

[para34] As set out above, I am satisfied that s. 115(h) does not apply to the alterations to the exterior of the building which are being requested by Mr. and Mrs. Mott as what they request is not alterations to the exterior or structure of their strata lot. Even assuming that I am incorrect in this finding, it is clear that permission to alter "must not be unreasonably withheld" under s. 115(h) of the Act. Accordingly, I am satisfied that any written permission required of the Strata Council has been unreasonably withheld as it seeks to deny access to and the use and enjoyment of that which has been designated for the exclusive use and enjoyment of Mr. and Mrs. Mott as the present owners of Strata Lot 33. What they seek to do is eminently reasonable. They seek to alter the exterior of the building to add features which are in accordance with the features present on each and every balcony in the building. The refusal of the Strata Council as reflected in its June 10, 1997 letter and in the Strata Council minutes dated June 17, 1997 are unreasonable. As well, their continued consideration of the request of Mr. and Mrs. Mott as a request to extend "the limited common property adjacent to" the strata lot of Mr. and Mrs. Mott is an unreasonable consideration of the request received. To the extent that the Strata Council dealt with the request of Mr. and Mrs. Mott on the basis that it was a request to extend limited common property as opposed to a request to fully use limited common property, the Strata Council was acting unreasonably when it decided that it would not be possible for Mr. and Mrs. Mott to proceed as they wished.

EFFECT OF BYLAW 139.6

[para35] The first part of bylaw 139.6 deals only with items which cannot be placed on balcony or patio space. None of what the petitioners wish to do violate the first part of the bylaw. It is clear that the Strata Corporation had the ability to pass this part of bylaw 139.6 pursuant to ss. 26 and 116(a) of the Act or as a rule and regulation under s. 117(h) of the Act. The petitioners have indicated a willingness throughout to be bound by such bylaws, rules and regulations.

[para36] As to the remainder of bylaw, bylaw 139.6 only purports to require the prior written consent of the Strata Corporation before making "Any alterations such as finishing unfinished areas ... that might affect the structure, mechanical or electrical systems. There is nothing to suggest that the alterations requested by Mr. and Mrs. Mott would in any way affect the "structure, mechanical or electrical systems." In fact, the information requisitioned by Mr. and Mrs. Mott indicates otherwise.

[para37] While it might be said that the alterations requested would affect the "structure", the bylaw does not cover that prohibition. If it was intended that the bylaw cover that prohibition, the wording should have been: "might affect the structure or the mechanical or electrical systems." While it may have been the intention of the Strata Corporation to prohibit alterations that affect the structure, the failure of the drafters of the bylaw to make that intention clear will not result in a prohibition against the ability of Mr. and Mrs. Mott to complete the unfinished balcony or alter the finished balcony.

[para38] Even if I am wrong and what is requested by these petitioners would affect "the structure", it is clear that the requirement in bylaw 139.6 that the Strata Corporation also consent to any request being made to UBC Properties Inc. is contrary to the provision in Article 9.1 of the Lease which does not require the approval of the Strata Corporation before written approval is sought from UBC Properties Inc. Accordingly, the provisions in the Lease must prevail so that the prior written consent of the Strata Corporation as set out under the second part of bylaw 139.6 is not required.

EFFECT OF BYLAW 139.8

[para39] Bylaw 139.8 requires written approval from the Strata Council before an owner can "alter the finish or appearance of the fencing, railing, floors, walls or ceiling of the patios or balconies adjoining any Strata Lot." However, Articles 8.2(a) and 8.2(b) of the Lease and ss. 115(c) and 116(f) contain contrary provisions. By requiring Mr. and Mrs. Mott to maintain and repair "areas allocated to ... [their] exclusive use" in good order and condition and by specifically excluding the Strata Corporation from being responsible for the maintenance and repair of the balconies and patios, the Lease and ss. 115(c) and 116(f) clearly established the respective responsibilities of the Strata Corporation and the Strata Lot Owners.

[para40] No bylaw or rules or regulations subsequently passed by the Strata Corporation could purport to affect that division of responsibilities. Accordingly, to the extent that the respondents seek to rely on bylaw 139.8 to deny the ability of Mr. and Mrs. Mott or any other owner to maintain and repair the balconies adjoining their strata lot including altering the finish or appearance of the railings, floors, or walls or ceilings of the balconies, I find that the provisions of the Lease and ss. 115(2) and 116(f) of the Act must prevail. Unless the provisions of a Lease contravene the provisions of the Condominium Act, the provisions of a Lease will prevail as against any contradictory bylaws which may be subsequently passed by a Strata Corporation.

[para41] I am satisfied that the words "maintain", "repair", "good order", and "condition" are broad enough to include the alterations and changes requested by Mr. and Mrs. Mott. In the context of condominium living and in the context of the divided responsibilities between owners and the Strata Corporation, I am satisfied that these words should not be approached in a "narrow legalistic manner" but, rather, in the context of the Act, the Lease, and the specific responsibilities which have been given to the owners and which have been taken away from the Strata Corporation. I am satisfied that the changes requested by Mr. and Mrs. Mott are in accordance with the respective obligations imposed upon owners such as Mr. and Mrs. Mott and upon the Strata Corporation pursuant to ss. 115(c), 116(c) and 116(f) of the Act. Bylaws 139.6 and 139.8 are contrary to the provisions of both the Lease and the noted sections of the Act and, in the circumstances, cannot be relied upon by the Strata Corporation to disentitle the petitioners from doing that which they are responsible to do under Article 8.2(a) of the Lease.

[para42] The Lease and Strata Plan were registered in the Land Title office prior to the adoption of the Part V bylaws upon their registration in the Land Title Office. The Lease, Strata Plan and the Part V bylaws enable purchasers such as Mr. and Mrs. Mott to ascertain with certainty their rights and obligations. As well, all other owners must be taken to have been aware that the entire area adjacent to Strata Lot 33 had been designated as limited common property and was fully available for the balcony of Mr. and Mrs. Mott.

[para43] The Strata Council or the Strata Corporation was not in a position to deal with any part of the limited common property assigned to the exclusive use of Mr. and Mrs. Mott so as to defeat their equitable interest in the limited common property. See, for instance, *Hill v. Strata Plan NW2477* (1991), 57 B.C.L.R. (2d) 263 (B.C.C.A.) and *York Condominium Corp. No. 167 v. Newrey Holdings Ltd.* (1981), 122 D.L.R. (3rd) 280 (Ont. C.A.).

[para44] The designation of this limited common property by Millennium was a more secure form of tenure for Mr. and Mrs. Mott than a designation by special resolution would have been. The right to exclusive use may well be important to purchasers such as Mr. and Mrs. Mott and the designation by Millennium effectively made their exclusive use of this area permanent as it could only be removed by a 100% vote. Their equitable interest cannot be subsequently removed by the Strata Council or by the Strata Corporation unless by votes taken under ss. 53(1) or 58(1) of the Act. No authorities were provided which would indicate that the Strata Corporation can retroactively prohibit Mr. and Mrs. Mott from occupying all of the balcony space which was clearly designated as being for their exclusive use. I agree with the submission of Mr. and Mrs. Mott that the attempt by the Strata Corporation to prohibit them from occupying all of their balcony space is a form of expropriation or wrongful denial of equitable rights which should not be countenanced by the court. SECTION 117(h) OF THE CONDOMINIUM ACT

[para45] The respondents also rely on ss. 26 and 117(h) of the Act and the requirement of the Strata Corporation to have bylaws providing for the "control, management, administration, use and enjoyment of the strata lots and the common property" to justify the position taken by the Strata Council and Corporation. However it is clear that any bylaws passed must be "reasonable and consistent" with the Act: *Carleton Condominium Corp. No. 279 v. Rochon* (1987), 44 R.P.R. 228 (Ont. C.A.). Accordingly, this requirement cannot be used by it to create bylaws which are inconsistent with the remainder of the Act.

[para46] Section 117(h) of the Act requires the Strata Corporation to make rules and regulations in relation to the "enjoyment, safety and cleanliness" of the balcony space. This section of the Act could not be used by the Strata Corporation to enact a bylaw which would perpetuate unsafe conditions. Accordingly, it cannot be said that the Strata Corporation was acting pursuant to s. 117(h) of the Act when it purported to create bylaws which deny the petitioners the ability to add balcony railings. The lack of railing allows the potentially unsafe use of an area to which the owners of Strata Lot 33 have been granted the exclusive use: that part of their balcony which does not have a railing.

[para47] As well, the powers of the Strata Corporation set out under s. 117(h) could not be used to deny access to a particular limited common property. Rather, it only allows the Strata Corporation to make rules and regulations in relation to enjoyment, safety and cleanliness of all common property including limited common property only if the rules and regulations apply equally or unless it can be shown that a particular use of certain common property should be denied because the enjoyment, safety and cleanliness of other common property would be diminished as a result of the proposed use.

[para48] As the petitioners are prepared to be bound by any rules and regulations relating to enjoyment, safety and cleanliness which also bind other strata owners in their use of the limited common property specifically designated to them, s.117(h) cannot be used by the Strata Corporation to deny the petitioners the enjoyment of all parts of the limited common property which has been designated for their exclusive use.

DECISIONS RELIED UPON BY THE RESPONDENTS

[para49] The respondents rely on the decision of *Gray v. Strata Plan VR840* (1994), 41 R.P.R. (2d) 79 (B.C.S.C.) where an owner had also applied under s. 42 of the Act when their request to enclose a patio area with glass was refused. The patio was limited common property and it was clear that the patios of about one-half of the approximately 100 suites in the building had already been enclosed including a patio off another ground floor suite similar to the suite of the plaintiff. After discussion "expressing concerns about the visual impact to the south side of the building, overall height and the possible increased heating costs", a motion was passed at an Annual General Meeting that the request for a patio enclosure would not be approved "at this time", that the matter would be referred to the Strata Council "for further study" and that an extraordinary meeting of the strata corporation would be called so that all owners could review further materials that it was requested by the plaintiff to produce. The additional information from the plaintiff was to include a professional engineering study to determine "the base stability and the requirement for footings and/or concrete pad" and an "architectural rendering giving the owners a better prospective of the visual impact." The plaintiff refused to undertake those additional studies and, instead, applied to the court pursuant to s. 42 of the Act.

[para50] Mr. Justice Errico described the situation as follows: "... while the petitioners have not received the permission they have requested, there has as yet been no express refusal." (At p.82.) In line with a number of other decisions which have interpreted the words "oppressive" and "unfairly prejudicial" as contained within s. 42 of the Condominium Act in the same manner as those words appear in s. 224 of the Company Act, Errico J. concluded that there would be no oppression providing the

strata corporation acted "in good faith." Errico J. concluded that the activities of the strata corporation had been neither oppressive nor unfairly prejudicial.

[para51] It must be noted that Errico J. was not dealing with a final decision to deny the use requested by the petitioner. Rather, he was asked to determine whether the request for further information and the refusal of the Strata Corporation to consider the request was unreasonable or was "unfairly prejudicial." He concluded that the procedures adopted by the Strata Corporation were not unfairly prejudicial.

[para52] As well, the decision did not deal with the right of an owner to occupy all of the limited common property which had been designated to him. Rather, the decision related to the ability of an owner who already had full access to his limited common property to use it in a certain way. It is necessary to distinguish between the ability of a Strata Corporation to regulate use and enjoyment and the inability of a Strata Corporation to deny any use and enjoyment. Accordingly, while I adopt the definitions of "oppressive", "unfairly prejudicial", and "in good faith" as set out by Errico J., the decision does not otherwise deal with the situation which is faced by these parties.

[para53] The respondents also rely on the decision in *Sterloff v. Strata Plan VR2613* (1994), 38 R.P.R. (2d) 102 (B.C.S.C.) which dealt with the refusal of a Strata Council to reduce the use of a door to an underground parking facility which was below the strata unit of the plaintiff and which was operating in a manner which produced a "simply unacceptable" level of noise.

[para54] Firstly, this decision relates to common property and not to limited common property. Secondly, the decision revolves around the question of whether the court will interfere with the decision of a strata corporation when it has democratically decided to administer common property for the benefit of all owners. While it is clear that the Strata Corporation must control, manage and administer the common property for the benefit of all owners, it is also clear that common property which has designated as limited common property does not remain under the full control, management and administration of a Strata Corporation for all purposes and for all time.

[para55] Similarly, the decisions of *Metropolitan Toronto Condominium Corp. No. 702 v. Sonshine* (1989), 8 R.P.R. (2d) 183 (Ont. D.C.) which dealt with a canopy that had been erected by an owner and affixed to the exterior walls of the building and *Milacek v. The Owners Strata Plan LMS0018*, Unreported, Action No. S36466 (New Westminster Registry), February 4, 1997 (B.C.S.C. - In Chambers) which dealt with a decision reached by the strata council to allow radio transmitters to be installed on the roof of the building only deal with the ability of a strata corporation to regulate and manage what is done on common property not designated as limited common property.

DECISIONS RELIED UPON BY THE PETITIONERS

[para56] The petitioners rely upon two decisions to advance the proposition that they should be entitled to occupy their designated limited common property in accordance with the ability of all other owners to use similar space designated for their use and that they should be allowed to finish that space in accordance with all other balconies within the building.

[para57] In *Buchbinder v. Strata Plan VR2096* (1992), 65 B.C.L.R. (2d) 325 (B.C.C.A.), the court dealt with a situation where the appellant had erected an aluminium garden shed on a patio area outside her residence. It is clear that the shed was erected on limited common property and the question was whether the chambers judge had erred in finding that the garden shed did not breach the building exterior bylaw which provided in part:

"no visible changes to the building's exterior are permitted."

The trial judge held that the garden shed did not fall within the specific prohibitions of the bylaw and, accordingly, was not prohibited by the bylaw.

[para58] The respondent argued that the "principle of community" should be applied. In this regard, the court concluded:

The principle of community living has only been applied where there has been a clear infraction of a condominium by-law. The argument advanced is that when people join a condominium development they agree to abide by the declaration of community living. In the base at bar, a garden shed being placed on a patio was not specifically prohibited by the by-law. The intention may have been to maintain the integrity of the complex (the aesthetics), however, it would be unreasonable to conclude that, based on the principle of community living, condominium owners should assume they are not entitled to place any object on their patios. (at p. 328)

[para59] In this case, the principle of community living would result in the first portion bylaw 139.6 dealing with what can be placed or stored on balconies or patios being upheld. However, the principle of community living could not be relied upon to retroactively deny any use, enjoyment, and full access to designated limited common property. The designation of this limited common property for the exclusive benefit of the owners of Strata Lot 33 in the original strata plan was a vesting of the equitable interest to fully occupy, use and enjoy that space. The principle of community living would then apply after the equitable interest of full access had been assured. Even if I am wrong in that assumption, the principle of community living will apply only when there had been a "clear infraction of the condominium bylaw." Such a violation is not present in this case. What Mr. and Mrs. Mott wish to do does not clearly violate the second part of bylaw 139.6 as there is nothing to suggest that what they wish to do might affect the structure, mechanical or electrical systems. At the same time, the requirement under bylaw 139.8 that the owners are to submit proposals in writing for consideration by the Strata Council before they "alter the finish or appearance of the fencing, railing, floors, walls or ceilings of the patios or balconies adjoining any strata lot" is not broad enough to prohibit the addition of railings and floors as opposed to the alteration of the finish or appearance of them. As the additions have not been specifically prohibited, it cannot be said that there is a clear infraction of bylaws 139.6 and 139.8.

[para60] In *Re Peel Condominium Corp. No. 73 v. Rogers et al* (1978), 21 O.R. (2d) 521 (Ont. C.A.), the strata corporation appealed a decision dismissing their application seeking an order that Mr. Rogers take down four cedar trees which he planted on his limited common property. The strata corporation had argued that the prohibition against making "additions, alterations, improvements or renovations" to common property applied to limited common property as well. The learned trial judge had found that four trees had been planted within the limited common area and, accordingly, the provisions dealing with the common property did not apply.

[para61] On appeal, the strata corporation argued that the right to plant trees on all of the common and limited common property had been taken away by the clear language or necessary implication of Article XI(4) of the bylaws which provided:

No owner shall make any structural change in or to his unit or any change to an installation upon the common elements, maintain, decorate, alter or repair any part of the common elements ... without the prior written consent thereto of the Board.

[para62] The Court of Appeal dealt with the issue of whether, because limited common property was part of the common property, the prohibition contained within the article dealing with the common property should apply even though the limited common property had been designated to the exclusive use of Mr. Rogers. Speaking on behalf of the court, Brooke J.A. stated:

The principle cannot be doubted, but in my view it should not be used to reduce the grant of an exclusive use of the garden area to simple occupation of a piece of ground. This is, in my opinion, the effect of counsel's submission. The construction contended for is a strained one. I think that reasonable people would, as this man did, understand that if they were granted exclusive use of a garden area they could have a garden there. If it had been intended to restrict its exclusive use to a grassy area the declaration could have so provided. In my opinion, the prohibition ... against alterations without the consent of the board, contemplated some more far-reaching change than the normal planting of trees or shrubs in a garden area. (at pp.523-4)

[para63] The court also relied on s. 7(4) of the Ontario Act which provided: "Subject to this Act, the declaration and the bylaws, each owner may make reasonable use of the common elements." The court decided that the planting of the four cedar trees in question constituted a "reasonable use of the common elements" of which the respondents had been given exclusive use.

[para64] There is no equivalent in British Columbia to s. 7(4) of the Ontario Act. However, the effect of s. 115(d) has the same effect. In this case, there is no reasonable interpretation that the grant of an exclusive use of balcony space could be reduced to only the use and enjoyment of some of the space but no use and enjoyment of the rest. I am also satisfied that the occupation of all the space designated as balcony constitutes a reasonable use of the common elements or a reasonable use of the limited common property which could not be or which has not been restricted by the Strata Corporation. Accordingly, even assuming that it was necessary for the petitioners to seek the permission of the Strata Council or the Strata Corporation, I am satisfied that the decisions reached by the Strata Council and the Strata Corporation are unfairly prejudicial to these petitioners and cannot stand.

CONCLUSION

[para65] Accordingly, the Strata Corporation is ordered to provide through the Strata Council its written approval for the changes, alterations, replacements, substitutions or additions requested by Mr. and Mrs. Mott and the decision taken by the Strata Corporation at its extraordinary general meeting held August 5, 1997 is reversed. The Strata Council, acting on behalf of the Strata Corporation, is to advise UBC Properties Inc. of the approval of the Strata Corporation of the request of Mr. and Mrs. Mott so that, even though it is not required under Article 9.1 of the Lease, UBC Properties Inc. will have received the written approval of the Strata Corporation when considering any request to be forwarded by Mr. and Mrs. Mott.

[para66] The petitioners are entitled to their costs against the respondents, The Owners, Leasehold Strata Plan LMS2185 on a party and party (scale 4) basis. Those costs are to be paid by The Owners other than Mr. and Mrs. Mott. In this regard, see Strata Plan NW243 v. Hansen [1996] B.C.J. (Q.L.) No. 2201.

BURNYEAT J.

CBR# 311

The Owners, Strata Plan 1229, Plaintiffs, and Trivantor Investments International Ltd., Defendant

[1995] B.C.J. No. 557

Victoria Registry No. 91 2714 [912714]

British Columbia Supreme Court Victoria, British Columbia Owen-Flood J. Heard: January 30, 31, February 1, 2 & 23, 1995. Judgment: filed March 14, 1995.

Counsel for the Plaintiffs: R.C. Di Bella and Nicholas A. Mosky. Counsel for the Defendant: D.S. Milos.

[para1] 1 OWEN-FLOOD J.:-- At issue is whether or not the defendant, being an owner as opposed to an owner/developer of a strata plan, owes a duty to subsequent strata plan owners pursuant to the Condominium Act.

[para2] 2 If there is such a duty, has the defendant (hereinafter referred to as "Trivantor") violated that duty?

[para3] 3 If Trivantor has breached its duty to what extent, if at all, is Trivantor liable in damages? Facts:

[para4] 4 I make the following finds of fact:

[para5] 1. On or about August 26, 1983, Trivantor purchased Strata Plan 1229, located at 940 Inverness Road and 949 Cloverdale Avenue, Victoria, British Columbia. Trivantor purchased from Victoria & Grey Trust Company who, in turn, had obtained the property pursuant to foreclosure proceedings against the original owners of the strata title, namely, Laserena Inns Ltd. Strata Plan 1229 consists of two buildings each containing 15 condominium units. Trivantor took possession of both buildings on August 26, 1983, on the basis of a cursory inspection of the exteriors and interiors of the buildings, excluding the roofs. Trivantor did not receive any blueprints for either of the buildings.

[para6] 2. From August 26, 1983 until February, 1989, Trivantor rented out the 30 condominium units. During this time Trivantor failed to set up or function as a strata council as that term is defined in s.118 of the Condominium Act. Moreover, Trivantor failed, during this period, to perform any of the duties listed in s.122 of the Condominium Act. For example, Trivantor

(a) did not keep a copy of the Act or changes in the bylaws under Part V.

(b) did not keep a register of the members of the strata council.

(c) did not keep a register of the strata lot owners setting the strata lot number, the names of the owners, the unit entitlement, the name and address of the mortgagee who must notify the strata corporation, the name of any tenant or lessee and a notation of any assignment by the owner to the lessee.

(d) did not keep an annual general budget for each year.

(e) did not keep or cause to be kept minutes of its proceedings.

(g) did not prepare proper accounts relating to all money of the strata corporation and the income and expenditure of it of each annual general meeting.

[para7] Similarly, Trivantor did not:

... cause to be prepared an interim budget of anticipated common expenses for the first 9 month period following registration of the strata plan, ...

as required by s.128(4) of the Act.

[para8] Nor did Trivantor establish a fund as required by s.35(1)(a) of the Act:

... sufficient for the control, management and administration of the common property, for the payment of premiums on policies of insurance and for the discharge of other obligations of the corporation;

[para9] I further note that Trivantor did not take steps as required by s.35(1)(c) of the Act to determine the amounts to be raised in order to establish an administrative fund and contingency reserve fund. By the same token, it took no steps to raise the amounts required to be determined pursuant to s.35(1)(c) of the Act in order to establish an administrative fund and a contingency reserve fund as required by s.35(1)(d) of the Act. Likewise, Trivantor did not establish a contingency fund as required by s.35(1)(b) of the Act.

[para10] And, finally, I note that beyond carrying out minor repairs as requested by the tenants and performing the cosmetic painting and landscaping helpful in augmenting its sales campaign, Trivantor did not, as required by s.116 of the Act:

a) control, manage and administer the common property, common facilities or other assets of the corporation for the benefit of all owners;

b) keep in a state of good and serviceable repair and properly maintain the fixtures and fittings, including the elevators, ... and recreational facilities, if any, and other apparatus and equipment used in connection with the common property, common facilities, or other assets of the corporation; c) maintain all common areas, both internal and external, including lawns, gardens, parking and storage areas, public halls and lobbies;

d) maintain and repair, including renewal where reasonably necessary, pipes, wires, cables, chutes and ducts for the time being existing in the parcel and capable of being used in connection with the enjoyment of more than one strata lot or common property;

f) maintain and repair the exterior of the buildings, excluding windows, doors, balconies and patios included in a strata lot, including the decorating of the whole of the exterior of the buildings;

g) collect and receive all contributions toward the common expenses paid by the owners and deposit the same with a savings institution; and

h) pay all sums of money properly required to be paid on account of all services, supplies and assessments pertaining to, or for the benefit of, the corporation.

[para11] 3. Commencing February, 1989, Trivantor began selling the condominium units to third parties on an "as is" basis, with the vendor (Trivantor) agreeing to provide a contingency reserve fund to be turned over to the strata council for purposes the strata council deemed fit. Each interim agreement of purchase and sale further stipulated that "the purchasers have received and approved prospectus and disclosure statement on strata plan 1229". The disclosure statement issued by Trivantor on October 12, 1988, stipulated:

Construction and equipment warranty

There is no construction or other warranties provided by the owner.

[para12] The statement contained a further declaration by Trivantor to the effect that:

The foregoing declarations constitute full, true and plain (sic) disclosure of all facts relative to the Development referred to above, proposed to be sold or leased, as required by the Real Estate Act of the Province of British Columbia as of October 12, 1988.

[para 13] 4. The strata council was formally established at a meeting held on August 17, 1989. That meeting was attended by the owners of the six sold condominium units and Mr. William Knowles, representing Trivantor as owner of the remaining 24 units. The plaintiffs (hereinafter referred to, for convenience, as "the strata council") assumed responsibility for all the maintenance expenses as of January 1, 1990.

[para 14] 5. Upon sale of all 30 strata lots a special contingency fund of \$30,000 was created by Trivantor for the strata council, by allocation of \$1,000 from the sale of each strata lot. The strata council paid \$12,941 out of the contingency fund to Trivantor to reimburse it for certain maintenance work, carried out by Trivantor primarily for the purpose of expediting its sales of the remaining units. This work was carried out after control of the strata council had passed from Trivantor to the new owners of some of the strata lots.

[para15] 6. Mrs. Florence Walker took over as president of the strata council in January, 1990. Mrs. Walker became aware of numerous maintenance problems in the buildings but was unable to obtain blueprints or records from Trivantor which she requested for the purpose of making arrangements for maintenance of the buildings. On the evidence it is clear that these buildings were poorly designed and poorly constructed.

[para16] 7. Of particular concern was the flooding problem in the ground floor strata lots in both buildings. In one ground floor unit in the Inverness building, for example, leaks were so bad that the water used to run through the living and dining room across the cement floor underneath the carpet. Likewise, in one of the ground floor condominiums in the Cloverdale building, due to dampness from flooding, mushrooms were growing in the fireplace. I also find that in the Cloverdale building there was water running down the wall of the lobby and of the storage locker room.

[para17] In response to these problems, Mrs. Walker, acting on behalf of the strata council, commissioned a survey from Van Isle Waterproofing & Restoration Services Ltd. That survey, at an invoiced cost of \$300 was done by the general manager of Van Isle, Mr. Bill Okell. I accept his findings with respect to both buildings. Mr. Okell found as follows:

Item #1 - Deck drains, - The numerous suites I visited point towards this problem of poor drainage. It appears as this problem was created from inception. Existing structural settling has also assisted in this problem. The proper route to take would have been to provide sloped floor joists to the drains. As for the existing problem and how to rectify this, the lower balcony soffit should be removed to access the above underside of plywood. New drains should be cut into the surface with accompanying pipe to the existing rain water pipes. Costs should be in the neighbourhood of \$700 per deck.

Item # 2 - Leaks in glassed areas, - This problem is again exacerbated by its initial poor construction and poor engineering. All the sundeck windows are installed to the rough cedar sundeck supports. The problem here exists that as the cedar gets wet, the caulking refuses to adhere to the glass sheet metal/cedar support transition. As time has gone on, the cedar is warping, shrinking and cracking. The exiting caulking is cracked, shrunk and un-adhered. Costs to replace these enclosures would be horrendous. I would recommend remedial extensive caulking to each glassed in enclosure. Costs per deck would be in the neighbourhood of \$700 - \$800.

Item # 3 - Fireplace leaks, - This problem is attributed to two problems, the stucco cased roof top chimney enclosures and the sheet metal drip ledges. The stucco is a California based stucco that allows moisture to pass through very readily. I would recommend to apply two coats of an acrylic based product called Thorolastic to the stucco chimney boxes. This problem would be more of an engineering flaw. Costs would be in the neighbourhood of \$210 per chimney. The other problem here is the sheet metal drip ledges. The structural shrinkage of the building, in some places up to a 2" drop, has allowed gaps in the chimneys. The maintenance here would be to cut the existing caulking away from the chimneys, lower the sheet metal drip ledges to their new threshold and re-caulk. This problem here is more of a maintenance item and costs would be in the neighbourhood of \$100 per chimney box.

Item # 4 - Around window casings, - The internal seal breakages of sliding glass doors appears to be design problems. A proper window manufacturer could assess this problem more accurately but the main problem stems from a poor gasket join at the corners and a lack of caulking at the metal joints. Costs to rectify this problem could be in the neighbourhood of \$150 per door.

Item # 5 - Running water, - This problem, by far, is the most confusing and would of course be the most time consuming. The route to take to track down the problem would be to shut down the water supply in each suite and identify where the water is originating from. The running water is exiting out a copper pipe and appears to be clean potable tap water. The exit copper pipe observed in the downstairs parkade offers the impression that this installation was performed some time after initial construction.

The source would have to be tracked down in which case allow one person up to 8 hours to track the source down with access to all suites. Costs could be in the neighbourhood of \$250 - \$500 with the possibility of greater costs if metering devices [sic] were installed to each suite to track down the constant running water noise.

Item # 6 - Ground level perimeter, - The waterproofing to the exterior parkade slab roof/exterior structural wall is extremely poor. Our company returned once in 1985 to remedy an original building construction problem with the membrane as it was applied improperly. The structure has a tar and paper membrane trying to stand up as a below grade waterproof membrane. There are leaks in several suite balconies and upon my visit, I noticed excavation in one area to resolve additional broken membrane. There are too many deficiencies in these types of roofing membranes as contractors attempt to use an above ground roofing product for an obvious below grade membrane. The parkade walls as they meet the structural parkade roof lid are all leaking in various areas and the only way to resolve this problem would be to excavate out the perimeter soil to expose the joint and to seal the concrete crack and cold joint. Costs for this specific work would be in the area of \$5,000 - \$8,000. The concrete foundation wall tie rod holes are also weeping and to rectify these structural problems, excavation and sealing would have to take place. Costs could be another \$3,000 - \$4,000 for all this work. The front entrance slab drains to the front door and floods out quite often. Some-one has drilled holes into the underground parkade to relieve the pressure. This original design flaw should be re-worked to provide for adequate drainage and parkade hook-up to existing drains. Costs would be in the area of \$2,500

Major points:

(A) Proper below grade membranes should have been used in initial construction. (B) No building paper was used on the outside of the patio balconies.

(C) The entire siding is shrinking, chipping, cracking, blistering and knot holes are falling out. Remedial caulking is a necessity or siding replacement will be imminent [sic].

(D) Extremely poor detail work at glass enclosures, new caulking is needed throughout.

(E) The structure is moving so flexible based sealants are needed at the roof top level on all flashings, cast sewer pipes and chimney boxes.

(F) There is a lack of a proper below grade foundation wall membrane. The ingress of moisture will continue to corrode the re-bar until structural cracks will open up to a greater degree.

Conclusions - This structure appears to be suffering from not only poor design but also cheap materials used. Time and time again I am subject to observing the developers [sic] cheapest, fastest and easiest products used. This structure is a typical point of claim.

[para 18] 8. An additional expense was incurred in regard to a water problem in Unit 107 of 949 Cloverdale. In this unit the sound of running water was so loud at all times that the new owners had to keep the bathroom and closet doors in the master bedroom closed because of the noise. In the result, Highland Plumbing and Heating Ltd. were retained insofar as the problem in Unit 107 was concerned. They located the cause of the problem, namely a valve that even though it required servicing was built into the wall of the bathroom under the sink in the master bedroom and walled over. The function of the valve was to relieve the pressure of the running water as required. Highland Plumbing & Heating Ltd. installed a new valve in an appropriate position at a cost of \$406.35.

[para19] 9. A problem with the toilets in the ground floor suites "backing up" caused the strata council to incur the cost of employing Roto-Rooter Sewer Service (at a cost of \$288) to clear away the roots that over the years had grown into and were blocking the sewer pipes.

[para20] 10. Also of serious concern was the damage that had resulted from inadequate maintenance of the grounds. The strata council found that in the years prior to its taking over control of the buildings, ivy had been allowed to grow up and penetrate under the cedar siding at the 949 Cloverdale building, thus loosening the siding. The strata council employed Scotts Gardening & Landscaping at a cost of \$214.72 to remove the ivy and put in grass sod where the ivy had been, to prevent the ivy re-growing.

[para21] 11. There were, in addition to the problems enumerated above, further maintenance matters that required attention. For example, the fire protection equipment in the buildings had not been properly maintained and there was need for the installation of further fire extinguishers together with cabinets in the parking garages in both buildings. The cost incurred in this regard was \$257.32 paid by the strata council to Pacific Coast Fire Equipment. Similarly, the strata council found that one of the time clocks for the garage fans was broken and that the roof fans had seized due to lack of maintenance. Invoices were incurred with Nichol Electric Co. Ltd. in the amount of \$2,077.40 for repair of the fans. Finally, there was an invoice from Quadra Lamp & Heating in the amount of \$131.28. I am persuaded on the evidence that this amount was paid for by Trivantor.

[para22] 12. By early 1991 what had been minor problems for the strata council were now becoming major. Accordingly, the strata council commissioned a report from Thornley/White Associates Ltd., project management and construction cost consultants. The report was done by Mr. Chris Baker. His report, which I accept, is dated February 12, 1991. In it he observed:

OVERVIEW

There are five items which are presently causing concern, these are:

1. Water is entering into the ground floor units through the exterior wall. The exterior grade level is approximately 30" above the level of the ground floor slab. Three units are involved.

Some work to correct the ingress problems has been done in the past by Van Isle Waterproofing and another unknown company.

2. Water is entering into the glazed-in portions of the patio decks on the upper three floors. The deck is full length with only the bedroom door being open and the living room glazed in. In this regard, the owner of unit 308 has re-caulked his glazing and appears to have cured the problem to his satisfaction. As a result, unit 208 is also much better but units 106 and 108 still have a steady ingress of water.

The problem appears to lie in the poor construction of the timber frame and a constant need for caulking, which itself is generally in poor repair.

3. There have been leaks through the roof. These appears to have been due to problems with the flashings around the chimney penetrations. There are many penetrations for plumbing vents, roof vents, chimneys, etc.

The roof covering appears, from preliminary inspection, to be sound, as does the flashing. We believe that the roof is composed of three layers of built up felt, with gravel on top. The usual anticipated life of this type of roof is 12 years, of which 9 years have now passed.

4. There appears to be a problem with the domestic water distribution in the units, Unit 107 in the East building has a continuous water flow noise even though everything is off. Units 207 and 07 [sic] have the residual of the noise through the pipes but not so noticeably as 107. Suite 105, adjacent to 107, is also very noisy.

Units 307 and 305 have complained that their water froze during this last winter. From the hot water tank in 307 the line appears to rise towards the ceiling. The freezing may be occurring where it passes between the roof structure, above the insulation. However, from the descriptions given, it may be only a problem with the hot water tank malfunctioning.

In the store room in the underground car park area a copper pipe runs continuously, by gravity.

Further investigation of the plumbing is difficult without opening up the building fabric. However, the names of two plumbers have been given to Ms Walker with the recommendation that a full report be prepared.

5. The front entrance concrete slab on the west building slopes towards the front door allowing water to penetrate.

RECOMMENDATIONS

1. Dig out the perimeter of the building to the footing level, or 1'0" below the slab, check perimeter drain, install bituthene or similar material to the units which have not been waterproofed. Check those previously repaired. 2. Re-caulk every closed-in glazed deck, open up soffit of 206 deck, as staining indicates water in side, with the possibility of wet rot being present. Check glass fixing in the 42" balusters and correct.

3. Commission a roofing inspection report and review previous work on the flashings with Heritage Roofing (Roy Corbett).

4. Retain a plumber to investigate the running water noise, the flow in the underground area and the freezing question.

5. Install a grate drain across door entrance to connect to perimeter drain. Replace damaged carpet upon completion.

[para23] 13. I find the strata council did not have the financial wherewithal to implement immediately Mr. Baker's recommendations. On or about June 6, 1992, however, the strata council received an estimate from Home Pro Contractors in the amount of \$17,976 regarding the excavation and waterproofing of the parkade foundations of both buildings, the cleaning and inspection of the concrete construction joints, the installation of drain tile and rock, backfill and re-seeding, as well as site clean up. The work was carried out between June and August, 1992 for the estimated amount and there have been no further problems with water entering the ground floor suites. One further payment was made to Home Pro Contractors in the amount of \$803.55. Thus the strata council has carried out recommendation #1 of the Thornley/White report dated February 12, 1991.

[para24] Recommendation #2 of the Thornley/White report has been carried out in part by some of the owners but not by all of them. The strata council obtained an estimate for the necessary work remaining to be done to implement this recommendation from Paul Desautels Construction Ltd. The estimate, dated July 4, 1991, was for \$17,575.75. The strata council has submitted that the estimate of \$17,575.75 if given today, with judgment interest from July 4, 1991 to February 23, 1995, would be the sum of \$19,033.45.

[para25] With respect to Recommendation #3 of the Thornley/White report, the strata council employed Heritage Slate Works to perform some of the required roofing work. The total cost as indicated on an invoice dated June 17, 1991, was \$2,140, for doing the repairs to the chimneys of both buildings. Other necessary roofing work was done by Van Isle Waterproofing & Restoration Services as set out in its invoice dated November 30, 1991, in the amount of \$1,198.40. Heritage Slate Works, as their invoice dated November 15, 1990 reveals, also repaired a leak at unit 308, 949 Cloverdale, at a cost of \$100.

[para26] In the fall of 1992, the strata council commissioned a roof inspection report. The report, dated September 15, 1992, from Robert D. Tuff & Associates Ltd., notes the following observations of Mr. Tuff:

General:

Roof hatches on both buildings are poorly constructed and poorly flashed.

There is some minor debris on the roofs.

Plumbing vents have storm collars which have not been tightened or caulked.

Victorian i [1st Building]

Strainer missing from roof drain. It appears there may be some gravel inside.

There is evidence of a previous repair at the drainage trough. Workmanship not to industry standards.

Victorian ii [2nd Building]

Hall fan housing is rusted and requires painting. Also the housing does not overlap curb flashing. There is a split in the roof membrane at the trough area.

Flashings at elevator penthouse are what is referred to as a surface reglet (different from the other building and rely on caulking for waterproofing).

There is evidence of an extensive repair at the south side.

[para27] Mr. Tuff recommended the following be done:

Aside from attention to the above defects, the roofing appears to be in reasonable condition.

The built in drainage troughs can be a problem as it is difficult to adhere gravel to a vertical surface. I recommend that the gravel be removed in these areas and an SBS modified membrane be installed.

The roof hatches should be rebuilt, stripped in with membrane and reflashed. The Owners may wish to have factory metal hatches installed. they are insulated, spring loaded and cost less than \$500.00.

Flashings at elevator penthouse on Victorian ii should be brought up to standard.

All flashings should be checked for attachment and caulking at metal chimneys implemented into a regular maintenance program.

[para28] The strata council was invoiced \$235.40 by Robert D. Tuff & Associates Ltd. for this report. I am satisfied that the obtaining of this report was a necessity for the strata council even though it was obtained some three years after the council took over. It was rendered a necessity because of the substandard work done in the first place, coupled with the lack of maintenance during the period before the strata council came into existence.

[para29] 14. The work recommended by Mr. Tuff was carried out by Topline Industries Inc. in accordance with its tender dated October 13, 1992. The strata council paid Topline a total of \$12,570.36. Robert D. Tuff & Associates Ltd. inspected the roofing work of Topline Industries Inc. to check that it had been done according to tender. The strata council was invoiced \$377.11 for that inspection. On October 21, 1992 Robert D. Tuff & Associates Ltd. billed \$176.55 for further specifications for the repair work.

[para30] 15. In 1992 the strata council employed Cap's Cleaners to clean up the garage. On December 2, 1992 they received an invoice for \$428 and on December 3, 1992 an invoice for \$652.70. The cleaning service was necessary to the strata council because of the lack of proper cleaning during the years before the strata council took over.

[para31] 16. The strata council obtained certain signs necessary to comply with the Fire Marshall's regulations for the telephone room and locker rooms from Custom Rubber Stamp Ltd. at a cost of \$77.60. Those signs should have been in place before the strata council came into existence.

[para32] 17. On November 22, 1993, the strata council was invoiced by Highland Plumbing & Heating Ltd. for the work necessary to install new shut-off valves, hose bibbs and piping connections, to drain the building and cut into the laundry room wall of unit 201. The invoice was paid in respect of six of the units at \$233.72 for a total of \$1,522.60. A further 23 units remain to be done, for a total future expense of \$5,375.56.

[para33] 18. I accept the unchallenged opinion, dated March 30, 1990, of Mr. Chris Baker of Thornley/White Associates Ltd., the construction cost consultants, when he opined that the problems in the buildings were, in large part, caused by substandard work:

In my opinion, areas of substandard construction not obscured by other work would have been readily apparent on completion of the building. A prudent owner or building manager should have recognized that this would result in increased maintenance costs over time.

[para34] 19. I further accept the uncontested opinion of Eric Spurling, the management expert, dated March 30, 1994, that the standard of care which should be taken by a prudent owner and/or prudent strata council in the management of a strata corporation is, as he put it, as follows:

1. A regular inspection of common area building components should have been done in order to determine both existing and potential maintenance problems.

2. Where a report is received of water intrusion to a suite, effort should be made to identify the source of the problem and corrective measures taken to resolve the problem.

3. If there are insufficient funds to effect a proper and complete repair at the time a water problem occurs, a prudent manager will attempt minimal repairs and will budget funds to effect more complete repairs in a subsequent fiscal year.

...

5. In a building with a history of problems, after regular inspections of the building, a prudent manager would:

(a) budget for and rectify the serious problems as they occur, and set aside the minimum requirements for the contingency reserve account, or

(b) budget to effect minimal but effective repairs for serious problems as they occur and budget for increased contributions to the contingency reserve fund in anticipation of the greater costs that would be incurred as the result of deferring the maintenance issues.

6. In the case where many deferred maintenance items were accruing, a prudent manager would prepare a longer term plan to identify a time frame and estimated costs for both the deferred maintenance items, as well as regular required maintenance. This plan should consider the amount of funds in the contingency reserve fund to determine if more or less funds would be required.

[para35] 5 The total failure to have any prudent maintenance system over the years that Trivantor managed the buildings has resulted in the strata council incurring maintenance and repair expenses in the amount of \$41,802.06 with certain repairs not yet done but still outstanding in the amount of \$17,574.75 as per the July 4, 1991 estimate from Paul Desautels Construction Ltd. which, by agreement of counsel now has, in terms of 1995 dollars, a present value of \$19,033.45 plus the additional future expenses in the amount of \$5,375.56 as noted above, totalling \$66,211.07.

[para36] 6 Trivantor did give the strata council, at its inception, the sum of \$30,000. Of this sum the strata council paid \$12,941.00 to Trivantor for landscaping, painting and light fixtures, namely, for the cosmetic work already described as being done initially by Trivantor to augment sales. This means that the strata council was left with \$17,059.00 which sum is to be credited against its claims for past and future maintenance, leaving outstanding a balance of \$49,152.07.

ISSUES

[para37] 7 The issues are as follows:

1. Whether, at all material times, Trivantor owed an obligation pursuant to the Act to maintain a contingency reserve fund and maintain and repair common property belonging to the strata corporation for the protection of subsequent members of the strata corporation.

2. If the answer to that is yes, whether the defendant breached its obligations. 3. If the answer to that is yes, whether the defendant's breach of its obligations resulted in loss or damages being incurred by the plaintiff.

4. If the answer to that is yes, what is the measure of those damages?

Issue 1:

[para38] 8 Whether at all material times the defendant owed an obligation pursuant to the Act to maintain a contingency reserve fund and maintain and repair common property belonging to the strata corporation for the protection of subsequent members of the strata corporation?

[para39] 9 The plaintiffs submit that although Laserena Inns Ltd. was the owner/developer when the strata plans were filed in the Land Titles Office on November 17, 1982, the defendant became the sole owner of all strata units in Strata Plan 1229 upon purchasing each of the lots via the foreclosure proceedings on August 26, 1983. The plaintiffs submit that at that point the defendant became the de facto strata corporation for Strata Plan 1229. As such, pursuant to s.14 of the Act, Trivantor was responsible "for the enforcement of the bylaws and the control, management and administration of the common property facilities and assets of the strata corporation." The defendant, being the strata corporation, under the Act had an obligation to, amongst other things, form a strata council, maintain a contingency reserve fund and maintain and repair common property of the strata corporation for the protection of subsequent members of the strata corporation.

[para40] 10 The defendant, for its part, denies that the statute obligates an owner such as Trivantor as opposed to an owner/developer to carry out the duties and obligations of either a strata corporation or a strata council as set out in s.14 and s.116 of the Act which deal with the duties of strata corporations and section 188 pertaining the duties of a strata council.

[para41] 11 The defendant contends that the duties of an owner, such as Trivantor, are set out in s.115 of the Act. Subsections 118(1) and (2) are also relied upon. They stipulate: (1) The powers and duties of the strata corporation shall, ... be exercised and performed by the council of the strata corporation.

(2) The owner developer shall exercise the powers and duties of the strata council until a council is elected by the owners.

[para42] 12 It is contended that a strata corporation is separate and apart from its members.

[para43] 13 I find the defendant's argument is flawed. It ignores the express stipulations of s.13(1) of the Act:

Strata corporation

13(1) The owners of the strata lots included in a strata plan and their successors shall, on deposit of the strata plan in a land title office, constitute and be members of a corporation under the name "The Owners, Strata Plan No." (the registration number of the strata plan).

Therefore, the original sole owner of the strata lots, Laserena Inns Ltd., became as of the date of the deposit in the land title office, namely, November 17, 1992, constituted as a corporation under the name of "the owners, strata plan 1229".

[para44] 14 On purchasing each of the strata lots on August 26, 1983, Trivantor became the sole member of the strata corporation known as the owners, strata plan 1229. As the sole member it did not, until August 3, 1989, take any steps to have the strata corporation comply with its statutory obligations. It commenced belatedly to do so in August, 1989, but by then I find the damage had been done.

[para45] 15 During the period from February, 1989 to early 1990, the defendant proceeded to divest itself of each and every one of the strata lots so that by the Spring of 1990 it had ceased to be a member of the strata corporation.

[para46] 16 It is true that the strata corporation is a separate legal entity from its members but, nevertheless, its members have a duty to the strata corporation to take reasonable steps to see that it complies with its statutory obligations.

[para47] 17 This I find the defendant did not do. Therefore, the defendant is in breach of its fiduciary duty to the plaintiff strata corporation. This liability for breach of fiduciary duty is in no way lessened by the fact that the defendant was not an owner/developer within the meaning of the Act but was the sole member of the strata corporation by virtue of being the successor in title to the owner/developer.

[para48] 18 The fact situation at bar is analogous to that before the Alberta Court of Appeal in Condominium Plan No. 752-1207 Owners v. Terrace Corporation (Construction) Ltd. (1983), 43 A.R. 386. In that case the developer of the condominium project

owned all the units in the project. Acting in its capacity as a strata corporation it granted itself a long term lease in order to sub-let some of the condominium property to another party. In an action brought by the strata corporation to inter alia impugn the lease agreement the Alberta Court of Appeal held that the lease should be set aside. The Court found that there is an analogy between a strata corporation's obligations to the unit holders and a trustee's obligations to a beneficiary. At p.391, Stevenson J.A., as he then was, commented:

... The remedy of the common property owners is analogous to the proprietary remedy of the trust beneficiary, namely the restoration of the property. The beneficiaries' action is generally considered as giving rise to the right to restore the property to the trust: Waters, *The Law of Trusts in Canada*, at 834. I conclude therefore that the condominium corporation's action to recover the common property (with incidental relief) is a proper one.

[para49] 19 In interpreting the Condominium Act as I do I apply the dicta of the Saskatchewan Court of Appeal in *Condominium Plan No. 86-S-36901: The Owners v. Remai Construction (1981) Inc. et al* (1991), 93 Sask. R. 211. There, the Court had before it a case in which upon registration of the strata plan the developer, proceeding on the basis that it was the only person entitled to vote at a meeting of the strata corporation, had the corporation pass resolutions approving the purchase of the caretaker's suite by the corporation from the developer. Later, the strata corporation, now composed of different members, brought an action to set aside the sale of the caretaker's suite on the basis that the unit was part of the common property. The strata corporation succeeded and the transaction was set aside. Speaking for the Court, Sherstobitoff J.A., in setting aside the trial judge's decision, noted, at p.217:

The Common Law And Condominiums

[19] The judge took too narrow a view of the common law and the provisions of the Act. The common law developed by adapting to new situations as they arose, and the common law must adapt to accommodate condominium regimes. Similarly, the provisions of the Act must be interpreted in light of the realities of what actually happens in relationships between developers, purchasers, and condominium corporations.

In doing so, the Court adopted the reasoning of Wilson J.A., as she then was, in *York Condominium Corp. No. 167 et al v. Newrey Holdings Ltd. et al* (1981), 122 D.L.R. (3d) 280 (Ont. C.A.) to the effect that a developer has a fiduciary duty to protect the interests of all unit owners present and prospective as well as the interests of the strata corporation when it came into existence. The developer is not permitted to put its own interest in conflict with theirs.

Issue 2:

[para50] 20 Granted that the defendant had an obligation pursuant to the Act, to have the plaintiff maintain a contingency reserve fund and maintain and repair common property belonging to the strata corporation for the protection of subsequent members of the strata corporation, has the defendant breached that obligation?

[para51] 21 Because of the findings of fact already made I find that the evidence is clear that the defendant failed to have the strata corporation carry out its obligations under s.14, s.116 and s.118 of the Act. In the result, the strata corporation, during the time it was in the exclusive control of the defendant, failed to take any of the steps which were incumbent upon it for it to carry out its duty as a strata corporation under the Act.

Issue 3:

[para52] 22 Has the defendant's breach of its obligations to the plaintiff resulted in loss or damages being incurred by the plaintiff?

[para53] 23 Because of the findings of fact already set out, I am satisfied that the breach of the obligations has indeed resulted in damages being incurred by the plaintiff.

Issue 4:

[para54] 24 That being so, what is the measure of those damages?

[para55] 25 I find these buildings, due to no fault of the defendant, to have been poorly built. The original owner/developer incorporated design flaws which are the cause, together with the almost total lack of maintenance procedures on the defendant's part, of the damages suffered by the plaintiff. The defendant argues that defects in construction on the one hand caused by design flaws and maintenance required as a result of wear and tear should be treated as separate matters. The defendant urges that a liability to repair or maintain does not include a responsibility to correct structural defects.

[para56] 26 I am unable to accept that contention, in light of *York Condominium Corp. No. 59 v. York Condominium Corp. No. 87* (1983) 42 O.R. (2d) 337 (C.A.). There, Cory J.A., speaking for the court, said of this proposition, at p.341:

The concept of repair in such a situation should not be approached in a narrow legalistic manner. Rather, the court should take into account a number of considerations. They may include the relationships of the parties, the wording of their contractual obligations, the nature of the total development, the total replacement cost of the facility to be repaired, the nature of the work required to effect the repairs, the facility to be repaired and the benefit which may be acquired by all parties if the repairs are effected compared to the detriment which might be occasioned by the failure to undertake the repairs. All pertinent factors should be taken into account to achieve as fair and equitable a result as possible. ...

and, at p.342:

... The fact that the repairs are made necessary by structural defects should not and does not on the facts of this case vary this conclusion. Nor should the possibility of a claim against the builder be a factor.

[para57] 27 I am of the same view. I find that in a condominium setting nothing turns on the fact that the repairs and replacements due by way of maintenance have their root in part or in toto in an original design flaw. A design flaw is simply a circumstance that bears upon the amount of ongoing maintenance that will be necessary.

[para58] 28 I find the measure of damages is the amount of money that is necessary to put the building in the state in which it would have been had the defendant complied with its fiduciary duty to have the strata corporation carry out its obligations under the Act. That sum is \$66,211.07, less the amount that the defendant paid, which is \$17,059.00, leaving as damages the sum of \$49,152.07.

[para59] 29 I find additionnal support for my conclusion in *Re Manton and York Condominium Corp. No. 461* (1984), 49 O.R. (2d) 83 (Co. Ct.) where it was held that the statutory obligation to "maintain" is broad enough to include an obligation to correct a structural defect (see also *Proprietors of Strata Plan No. 6522 v. Furney*, [1976] 1 N.S.W.L.R. 412 (Eq. Div.)).

[para60] 30 In conclusion, I am of the view that the members of the strata corporation bear a fiduciary duty to protect the interests of all unit owners, present and prospective, as well as the interests of the strata corporation. That duty remains with them at all times. It matters not whether the members are owner/developers or simply owners.

[para61] 31 The plaintiffs shall have judgment in the amount of \$49,152.07 plus pre-judgment interest and costs on Scale 3.

OWEN-FLOOD J.

CBR# 281

Rockwhite Holdings Limited, and Frontwood Investment Management Limited, Petitioners, and Linda O'Shea, Registrar of the Land Title Office, New Westminster, Robert J. Hobart, Superintendent of Real Estate, City of White Rock, Respondents

[1995] B.C.J. No. 46

Vancouver Registry No. A943523

British Columbia Supreme Court Vancouver, British Columbia (In Chambers) Edwards J. Heard: December 29, 1994. Judgment: filed January 16, 1995.

Counsel for the Petitioners: Jonathan Baker. Counsel for the Respondents: Harvey Groberman.

[para1] EDWARDS J.:-- This is an application for a declaratory relief under s. 2(2)(b) of the Judicial Review Procedure Act. The declarations sought, as set out in the Petition to the Court are as follows:

The petitioner applies to this Court for the following orders:

1. A declaration that where

a. under s. 65(1) of the Condominium Act, the owners (the "Owners") of the strata lots comprised in a strata plan (the "Original Strata Plan") resolve by special resolution that the building (the "Building") delineated on the original Strata Plan shall be considered destroyed;

b. under s. 64(1) of the Condominium Act, the Strata Corporation (the "Strata Corporation") created by the deposit of the original Strata Plan lodges with the registrar a notice of the deemed destruction of the Building in the form prescribed by regulation;

c. under s. 64(3.2) of the Condominium Act, the registrar cancels the registrations of all Strata lots comprised in the Original Strata Plan, and registers a new indefeasible title to the land (the "land") included in the Original Strata Plan in the name of the Strata Council;

d. under s. 64(4) of the Condominium Act the Owners resolve by special resolution that the Strata council transfer the assets of the Strata council and all of the land, including the Strata lots, to the Owners, and the registrar registers a new indefeasible title to the land in the names of the Owners; and

e. the Owners submit to the Superintendent of Real Estate (the "Superintendent") for filing under the Real Estate Act a disclosure statement or a disclosure statement amendment (the "Disclosure Statement") relating to sales by or on behalf of the Owners of strata lots (the "New Strata Lots") intended to be created by the deposit in the Land Title Office of a new strata plan (the "New Strata Plan") for the Building and the Land, then

i. when submitting the Disclosure Statement to the Superintendent for filing, the Owners shall not be required to provide the Superintendent with evidence that the Owners have complied with:

(1) section 50(5) of the Real Estate Act; or

(2) any other provision of the Real Estate Act, the regulations under the Real Estate Act, or the policy statements issued by the Superintendent relating to the Real Estate Act which has the effect of providing that:

(a) the municipal council of the municipality in which the Building and the Land are located must approve the creation of the New Strata Lots; or

(b) the Owners must comply with the provisions of the Residential Tenancy Act respecting the conversion of residential premises to strata lots,

before the Owners may submit the Disclosure Statement to the Superintendent for filing; and

(ii) upon acceptance by the Superintendent of the Disclosure Statement for filing under the Real Estate Act, and notwithstanding section 50(5) of the Real Estate Act, the Owners, or persons on behalf of the Owners, shall be entitled to sell or lease, or offer for sale or lease, the New Strata Lots to prospective purchasers or tenants.

pursuant to ss. 1, 64 and 65 of the Condominium Act and ss. 1, 30, 50.1 and 56 of the Real Estate Act.

2. A declaration that where:

a. under s. 65(1) of the Condominium Act, the owners (the "Owners") of the strata lots comprised in a strata plan (the "Original Strata Plan") resolve by special resolution that the building (the "Building") delineated on the original Strata Plan shall be considered destroyed;

b. under s. 64(1) of the Condominium Act, the Strata Corporation (the "Strata Corporation") created by the deposit of the original Strata Plan lodges with the registrar a notice of the deemed destruction of the Building in the form prescribed by regulation;

c. under s. 64(3)(2) of the Condominium Act, the registrar cancels the registrations of all Strata lots comprised in the Original Strata Plan, and registers a new indefeasible title to the land (the "land") included in the Original Strata Plan in the name of the Strata Council;

d. under s. 64(4) of the Condominium Act the Owners resolve by special resolution that the Strata council transfer the assets of the Strata council and all of the land, including the Strata lots, to the Owners, and the registrar registers a new indefeasible title to the land in the names of the Owners; and the owners make application to deposit the New Strata Plan in the Land Title Office, then

i. The registrar shall be entitled to accept the New Strata Plan for deposit without the certificate of the approving authority referred to in section 9(5) of the Condominium Act; and

ii. the Owners shall not be required to file with the registrar the certificate of a British Columbia land surveyor referred to in section 8(1) of the Condominium Act concurrently with the new Strata Plan.

pursuant to ss. 1, 7, 8, 9, 64 and 65 of the Condominium Act.

[para2] The respondent Registrar of Titles and the respondent City of White Rock take no position on the application. [para3] The petitioners propose to reconfigure and add to an existing building which is the subject of a strata plan under the Condominium Act. It is at present used for commercial purposes and present tenants will be accommodated in the reconfigured building. Some of the reconfigured building will be for residential use.

[para4] The petitioners, having obtained all other necessary approvals from the City of White Rock, take the position they need not obtain the City's approval under s. 9 of the Condominium Act, the relevant parts of which provide:

9.(1) On the conversion into strata lots of a previously occupied building by an owner developer, the approving authority may approve the strata plan, refuse to approve the strata plan or refuse to approve the strata plan until terms and conditions imposed by the approving authority are met. The decision is final. (3) The approving authority shall consider, in making its decision, (a) the priority of rental accommodation over privately owned housing in the area;

(b) the proposals of the owner developer for the relocation of persons occupying the building;

(c) the life expectancy of the building; and

(d) projected major increases in maintenance costs due to the condition of the building.

It may consider any other matters that, in its opinion, are relevant.

(4) For the purposes of this section, "approving authority" means in a municipality, the municipal council, or outside a municipality, the regional board of the regional district in which the land is situated.

(5) The approving authority shall, at the time of approval, issue a certificate in the form prescribed and the certificate shall be filed with the registrar on deposit of the strata plan.

[para5] The City, I am told, accepts the petitioners position that it need not indicate its approval by issuing a certificate of approval under s. 9(5) because the building is already subject to a strata plan.

[para6] The Superintendent of Real Estate however takes the position that the City's approval is necessary and has indicated he will not accept the petitioners disclosure statement required under ss. 50(5) and 50.1 of the Real Estate Act until it is obtained. It is that proposed exercise of his statutory power of decision which is the basis for this application for declaratory relief.

[para7] Section 50(5) provides:

50.(5) No developer, and no person on behalf of a developer, shall sell, or lease, or offer for sale or lease, strata lots or cooperative units created or intended to be created by converting existing buildings into strata lots or cooperative units, as the case may be, unless

(a) approval of the conversion to strata lots or cooperative units is first obtained,

(i) where a building is situated in a municipality, from the municipal council; or

(ii) where a building is not situated in a municipality, from the regional board of the regional district,

in which the building is situated;

(b) the provisions of the Residential Tenancy Act respecting the conversion of residential premises to strata lots or cooperative units are complied with; and

(c) subsection (6) has been complied with.

[para8] The petitioners position is that since the building is presently subject to a strata plan and will be subject to another after the reconfiguration and addition it is not being converted into strata lots as contemplated by s. 9(1) of the Condominium Act but merely continuing as a building subject to a strata plan. The petitioners say the process of converting from one strata plan to another to accommodate the reconfiguration will constitute a single transaction in that all required documentation will be filed with the Registrar of Titles simultaneously.

[para9] Further, the petitioners say that the intention of s. 9(1) is to permit municipalities to review proposed conversions of occupied buildings to strata lots to protect the stock of rental accommodation and look out for the interests of present and future occupants of the building, issues which do not arise in this case, they say, because the present tenants have been accommodated in the reconfigured building.

[para10] The legislative intention behind s. 9(1) is broader than the petitioners contend in light of the final sentence in s. 9(3), It may consider any other matters that in its opinion are relevant. I need not determine the precise breadth of the s. 9 because in my view the section is intended to provide municipalities the means of reviewing creation of new strata plans in occupied buildings. That authority would be undermined by the petitioners interpretation of the section so as to preclude the municipality from doing what they concede the section intends, protect the stock of rental accommodation. The following hypothetical example illustrates the point. Suppose the owners of a building with 100 strata lots, all rented, propose to reconfigure it to 50 strata lots. The stock of rental accommodation would be reduced and there could be an issue about relocation of occupants. If the petitioners interpretation

is accepted the municipality would have no authority to approve the reconfiguration under s. 9, bearing in mind the very considerations the petitioners say the section is intended to embrace.

[para11] The petitioners principal point is that there is no conversion into strata lots in this case, so s. 9 does not apply. In response to this the Superintendent points to the provisions of the Condominium Act which apply and says following the necessary steps amounts to a conversion as contemplated by s. 9.

[para12] It is common ground that s. 57 of the Condominium Act, which permits amendment of strata plans in certain circumstances, does not apply because the proposed reconfiguration will add common property to strata lots. If s. 57 did apply s. 9 would not apply. The petitioners characterized the non-applicability of s. 57 as an "anomaly" resulting from a "drafting error".

[para13] In order to accomplish what is proposed, the petitioners as owners of strata lots in the building must by special resolution under s. 65(1) of the Condominium Act deem it destroyed and lodge a notice of destruction with the Registrar under s. 64(1). Then, pursuant to ss. 64(2), (3), (3.1) and (3.2) the owners of strata lots become tenants in common of the land in the strata plan and must surrender their duplicate certificates of title to strata lots whereupon the Registrar cancels all registrations of strata lots in the strata plan and registers a new certificate of indefeasible title to the land in the name of the strata corporation. At this point the building is not subject to a strata plan, so no strata title exists. It is owned by the strata corporation as a single parcel and the corporation, with the authorization of the owners, would then file a new strata plan reflecting the reconfiguration of the building.

[para14] Although the strata corporation continues in existence throughout this process the strata plan and lots do not. Therefore there is in my opinion a "conversion into strata lots of a previously occupied building" as contemplated by s. 9 which gives the approving authority, in this case the City, authority to approve or refuse to approve the strata plan. That being so, the Superintendent is correct in insisting that City approval of the new strata plan be certified under s. 9(5) before he accepts the petitioners disclosure statement under s. 50(5) of the Real Estate Act.

[para15] The application is dismissed. Since the authority of the respondents has been determined by this application, to their benefit, I order that the parties bear their own costs.

EDWARDS J.

CBR# 086

The Owners: Condominium Plan No. 931 0520 (Park Haven Villas), petitioner (counter-respondent), and Anthony Smith and Lesley Smith, respondents (counter-petitioners)

[1999] A.J. No. 149 Action No. 9801-11042

Alberta Court of Queen's Bench Judicial District of Calgary Hawco J. Judgment: filed February 17, 1999.

Counsel: Joan S. Saunders, for the petitioner (counter-respondent). John M. McDougall, for the respondents (counter-petitioner).

REASONS FOR JUDGMENT

[para1] HAWCO J.:-- The Petitioner is the condominium corporation for Park Haven Villas in the town of Okotoks ("the corporation"). The complex is comprised of 25 units and has been designated by the corporation as being restricted to being owned and occupied by people of at least 45 years of age. The Respondents are the owners of one of these units. While they themselves are over 45 years of age, they have a son living with them who is now 27 or 28 years old. At issue is whether the corporation may prohibit the Respondents' son from living with them. In my view it can.

[para2] When the condominium complex was developed in 1994, there was no restriction on age for either ownership or occupancy. In May of 1996 the owners of the units were advised through a newsletter that the Board of Managers intended to seek a resolution from the owners to place an age restriction on ownership and occupancy. At that time the Respondent Mr. Anthony Smith was a member of the Board. A special resolution was signed by a sufficient number of owners, including Mr. Smith, to permit a change in the by-laws. On June 28, 1996, a Notice of Change of By-laws was properly filed at Land Titles office changing the wording of the applicable by-laws such that the definition of "owner" was to mean: "an adult person not younger than forty-five (45) years who is registered as the owner of the fee simple estate in the unit...." The definition of "occupant" was changed to read, in part:

... a person present in a unit or in or upon the real or personal property of the Corporation or the common property with the permission of an owner and shall be a person or persons of adult years and in any event not younger than forty-five (45) years.

[para3] According to Mr. Smith, when he and his wife purchased their condominium unit from the developer, they discussed the possibility of having Mrs. Smith's son, then twenty-three years old, live with them, as he had a chronic disease. The developer indicated to Mr. Smith that he could. As a result, the Smiths' unit had its basement developed solely for the occupation of Mrs. Smith's son. Even though Mr. Smith was a member of the Board which made the recommendations for the change in the by-laws, his understanding of the amendments was that there would be circumstances where occupants could be under the age of forty-five. Mr. Smith stated that had he believed otherwise, he would not have been in favour of the amendments.

[para4] The Respondents argue:

1. the by-laws are discriminatory; 2. they are in breach of the Condominium Property Act; 3. they are void for uncertainty; 4. the corporation has breached the rules of natural justice.

1. DISCRIMINATION

[para5] Even though the by-laws do make a distinction against people under the age of forty-five years (and do therefore "discriminate"), the Canadian Charter of Rights and Freedoms ("the Charter") is not applicable. It was not "intended to cover activities by non-governmental entities created by government for legally facilitating private individuals to do things of their own choosing without engaging governmental responsibility.": *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at 266. The Respondent argued that the Board of Managers of the corporation was sufficiently influenced and controlled by the Lieutenant Governor and Municipal Affairs to qualify as a branch or arm of government. In my respectful view, the corporation's by-laws are a contract among the owners specifying a manner in which they wish to coexist. They are entitled to make such a contract, particularly when made in good faith for a reasonable purpose, which was to protect what they undoubtedly believe is their enjoyment of their property and their quality of life. See *York Condominium Corp. No. 216 v. Borsodi* (1983), 42 O.R. (2nd) 99.

[para6] I am also of the view that the Human Rights, Citizenship and Multiculturalism Act, R.S.A. 1980, c.H-11.7 ("the Human Rights Act") does not apply. That portion of the Human Rights Act which the Respondents sought to invoke is Section 3(b) which says:

3 No person shall

(b) discriminate against any person or class of persons with respect to any goods, services, accommodation or facilities that are customarily available to the public, (my emphasis)

because of the race, religious beliefs, colour, gender, physical disability, mental disability, ancestry, place of origin, marital status, source of income or family status of that person or class of persons or of any other person or class of persons.

[para7] I am satisfied that this section, insofar as it prohibits discrimination with respect to "accommodation," is not applicable in this case. Rather, it is applicable - as found in *Gay Alliance v. Vancouver Sun* (1979), 97 D.L.R. (3rd) 577 (S.C.C.) at 590, to such matters as accommodation in hotels, inns and motels. Even if "accommodation" can be read as including a condominium building or complex, it seems to me that Section 11.1 of the Human Rights Act covers this situation. As stated by Allen Co.Ct.J, in *Borsodi*: Further the declaration is in the nature of a private agreement among all of the owners of units in the condominium, including the defendants, for the joint and several benefit. The owners...are entitled to the protection of their contractual and property rights. If those rights are not protected they perceive, with cause, that their enjoyment of their property and thus their quality of life will be adversely affected.

[para8] This also appears to underlie the decision of Chief Justice Moore of this Court in *Condominium Plan No. 8810455 v. Spectral Capital Corp.* (1990), 14 R.P.R. (2nd) 305 at 312, where he stated:

In recent years condominium housing has been utilized to deliver specialized type of housing to seniors, handicapped and other members of society. The critical feature of all developments is a common interest and an agreement to bind themselves to by-laws acceptable to all.

2. BREACH OF CONDOMINIUM ACT [para9] The Respondents second argument was that the by-laws contravene Section 26 (4) of the Condominium Property Act, R.S.A. c-C-22, which states:

(4) No by-law operates to prohibit or restrict the devolution of units or any transfer, lease, mortgage or other dealing with them or to destroy or modify any easement implied or created by this Act.

[para10] The Respondents rely upon 453048 British Columbia Ltd. v. Strata Plan KAS 1079, [1994] B.C.J. No. 2741 wherein that Court held that a similar restriction on age did indeed operate to prevent an owner from selling, transferring, leasing or otherwise dealing with a condominium unit and was therefore void. That case was in turn considered by another judge of the B.C. Supreme Court in Marshall v. Strata Plan No. NW 2584, [1996], 3 R.P.R. 3rd 144. There, Henderson, J. considered whether an age restriction lessened the value of a condominium unit and thereby restricted the transfer of such unit. He came to the conclusion that simply placing an age restriction upon transfer does not mean that the demand for such a unit would be lessened. He concluded that issue could not be determined without there being expert evidence lead.

[para11] With due respect to the British Columbia authorities, I am of the view that the question is not whether the value is lessened and the transfer thereby restricted. The issue is whether the by-law itself restricts or limits the transfer of a unit. If an owner must be 45 years or older, there is a limiting condition placed on the transfer. It matters not that the value of the unit is increased or decreased. To that extent the by-law is in contravention of the Condominium Property Act. The difficulty I have with this is that it seems that this section would then have the effect of preventing a group of seniors from forming a condominium corporation and restricting ownership to a certain age. This flies in the face of a number of decisions, some of which have already been referred to, which have approved the concept of people making an agreement, in good faith and for proper reasons, to provide for and protect a certain quality of life. Having said that, while a by-law restricting ownership to any age may be contrary to the Condominium Property Act, the issue in this matter is not whether the transfer of the unit is prohibited or restricted; the issue is whether the by-laws may properly prohibit or restrict the occupancy. Section 26 (4) of the Condominium Property Act does not deal with occupancy. By-law 62(1)(a) is therefore not void.

3. UNCERTAINTY

[para12] The Respondents argue that the definition of occupant shown above would mean that any person who is not an owner but who ventures on the common property for any length of time is an occupant. If that were taken to its logical conclusion, it is argued, no one but owners or others over the age of 45 years are entitled to be on the property. With respect, "a person present" must be read in a common sense way. That would mean that it refers to a person normally residing in or occupying a unit as opposed to a visitor. The by-law is not void for uncertainty.

4. BREACH OF NATURAL JUSTICE

[para13] The Respondents' final argument is that the Petitioner has failed to enforce the disputed by-law uniformly. Specifically, there are three owners who are not forty-five years of age against whom no enforcement has been commenced. There have been other occupants under the age of 45 years in the past and no enforcement proceedings had been launched against them. The Respondents were advised by the original developer that Mrs. Smith's son could live with them, and he has done so for some time. It is argued that since the by-laws have not been strictly enforced in the past, the Petitioner should now be estopped from proceeding against the Respondents.

[para14] With respect to the agreement made between the Smiths and the developer, it is clear that private arrangements between a developer and an individual unit holder cannot be made binding against the subsequent owners of the Condominium Corporation: Carleton Condominium Corp. v. Rochon (1987), 44 R.P.R. 228.

[para15] With respect to the other three "transgressors," the Petitioner does admit that there are three owners under the age of 45 years. Two of them purchased their units before the current by-laws were changed. One of them had apparently acquired his or her unit in December of 1996 just prior to Mr. Smith becoming president of the Board. It is easy to see why it would be difficult, and perhaps somewhat unfair, to take action against the two owners who had acquired their units prior to the passing of the current by-laws. When they acquired their property, there was no restriction against age or occupancy. With respect to the owner who acquired a unit just prior to Mr. Smith becoming president of the Board, it would be unseemly for Mr. Smith to argue that because "his" Board had failed to enforce compliance, that this Board should now be estopped from doing so in this case.

[para16] I wish to stress that the issue before me is whether these by-laws are valid and whether the Petitioner is to be allowed to enforce them as against the Respondents. I am advised that since the current Board assumed responsibility for and control and management of the corporation in January, 1998, all new violations of age restrictions with respect to occupiers have been handled in the same manner. As stated by Carnwath, J. in Peel Condominium Corp. No. 449 v. Hogg (1997), 8 R.P.R. 3rd 145 at 148, "a condominium corporation has a duty to require compliance." That is what they are attempting to do here. I am not satisfied that in attempting to enforce compliance of by-laws which were passed in good faith and with the consent of the Respondents that it is unfair to now attempt to enforce them. There is no suggestion that there is a lack of good faith by the Board or that it is acting in an arbitrary or high-handed manner. There will therefore be an order that Mr. and Mrs. Smith are in breach of the by-laws and they will be directed to comply with those by-laws by having their son move out of their condominium. Mr. and Mrs. Smith shall therefore comply with the by-law on or before the 30th day of June, 1999. This should be sufficient time to allow Mrs. Smith's son to find alternate accommodation.

HAWCO J.

CBR# 294

Simcoe Condominium Corporation No. 67, plaintiff(s), and Ruth McDermott, defendant(s)

Court File No. 97-CV-132776

Ontario Court of Justice (General Division) Spiegel J. Heard: January 28, 1998. Judgment: April 29, 1998.

Counsel: Craig A. Lewis, for the plaintiff(s). Shamim Shivji, for the defendant(s).

[para1] SPIEGEL J:-- The applicant Simcoe Condominium Corporation No. 67 brings this application pursuant to s. 49 of the Condominium Act R.S.O. 1990 ch. C26 (the Act) for an order requiring the respondent to:

1. remove the double hung window erected in the attic level above unit 538 Cranberry Village Collingwood.
2. remove all finished materials from the attic space which is part of the common elements of S.C.C. No. 67, including all sub-flooring and finished floor, all drywall, insulation, vapour barrier, additional electric wiring and fixtures. Or, in the alternative, if the respondent fails to remove the window and restore the attic space to its original condition, the applicant seeks an order authorizing it to restore the space and recover any expense incurred by adding a lien to the common expenses on the unit.

[para2] I will refer to the subject matter of the relief sought under paragraph 1 as the double hung window and the relief sought under paragraph 2 as the alterations to the attic.

THE FACTS

[para3] The respondent is the registered owner of unit 538 of S.C.C. No. 67 in the Cranberry Village condominium complex in the Town of Collingwood. Cranberry Village consists of approximately 26 registered condominium corporations comprising about 800 condominium units. S.C.C. No. 67 comprises 34 condominium units.

[para4] The respondent is a 77 year old woman who purchased her condominium unit in September of 1986 and took occupancy in December 1987. She lives alone in the unit which is a one bedroom, one bathroom unit on a single level.

[para5] The unit is referred to as a Clarksburg in the sales brochure of the condominium developer. The livingroom of the unit has a fireplace which the applicant used on a regular basis in the winter months. While the sketch of the layout in the brochure of the Clarksburg model indicated that there was to be a window to the right of the fireplace, the unit was built without such window. The respondent found that when the fireplace was activated during the winter months her unit would often be engulfed in smoke. She determined that this was due to poor ventilation in the livingroom.

[para6] The respondent says that she made requests of various managers of the condominium corporation to install a window similar to that depicted in the brochure but without success. She says that at one point one manager informed her that a window next to the fireplace would not solve the smoke problem as it would not provide sufficient draft. He invited her to view another Clarksburg model at number 442. This unit had a similar problem which was resolved by installing a window in the unit's attic crawl space. She says that she and the manager inspected this unit and found that a staircase had been installed along the kitchen and bathroom wall leading to a platform from where one could enter through a vertical opening into the attic crawl space. A window had been installed in the attic wall opposite the fireplace. The crawl space was well insulated with drywall and had thick white carpeting on the floor. The respondent deposed that the manager advised her that the corporation would be prepared to do similar improvements for her at a price if she desired. The respondent stated that she did not have the necessary funds at the time and did not proceed with the alternations to the attic crawl space.

[para7] In early 1996 the condominium corporation permitted unit owners to install gas fireplaces in the units. The respondent attended a seminar at the Cranberry Inn respecting the installation of gas fireplaces where she heard of the importance of having proper ventilation in premises having gas fireplaces.

[para8] At this point I should mention that the applicant filed an affidavit by Williams Higgins, the applicant's property manager, which disputes many of the statements made by the respondent in her affidavit. He asserts that there is no other Clarksburg unit in S.C.C. No. 67 and that there are only four types of such units in the entire condominium complex which comprises in excess of 800 units and controlled by twenty-six different condominium corporations. The three other Clarksburg units are not part of S.C.C. No. 67 but are, in fact, in S.C.C. No. 45.

[para9] Mr. Higgins deposes that he was advised by one of the owners of unit 442 that the installation of the window and finishing the attic portion of the unit had nothing whatsoever to do with ventilation. He points out that the primary source of heating in the respondent's unit is by electrical heat and the fireplace was merely intended for aesthetic purposes and not as a primary heat source. At this point I should say that I do not feel that it is possible for me on a motion for this type to resolve the conflict between the evidence of Mr. Higgins and the respondent nor do I think that the resolution of such conflict is necessary to my decision.

[para10] Mr. Higgins does acknowledge however, that in June 1996, he received a letter from the respondent, which was addressed to Mr. Don Watson the owner of Upper Canada Management, the property manager of S.C.C. No. 67. The letter is in the handwriting of Mrs. McDermott and attached a sketch and floor plan of the unit which includes a window to the right of the fireplace on the ground floor.

[para11] Mrs. McDermott states that the intention of the letter of June 1996 was to request approval by the condominium corporation of a window of the type that she had seen in unit 442 which was in the attic crawlspace. The second last paragraph of the letter reads as follows:

If you could please spare a moment I can take you to another Clarksburg model around the corner in the Oxbow where a window is in a place I would like mine to be too

[para12] However, in the first paragraph of that letter she makes reference to the fact that the builders forgot to put a window in her unit which is clearly marked in the attached plan. Mr. Higgins' interpretation of the letter is that the respondent was asking the

S.C.C. No. 67 to consent to a window as was originally planned in the Clarksburg model, namely, a window to the right of the fireplace on the ground floor.

[para13] It is common ground however, that there was no response made by or on behalf of the applicant to the respondent's letter until December 1996. Nor is there any satisfactory evidence to explain the applicant's failure to respond more promptly. In or about November 1996 the respondent, having received no response to her request decided to proceed with the installation of the double hung window in her attic crawlspace. She also arranged to install insulation and drywall in this space because she was concerned that the open insulation would be detrimental to her health. The respondent uses this attic crawlspace for storage and it is not inhabited by the respondent or anyone else.

[para14] On December 14, 1996, Mr. Higgins made an inspection of the respondent's unit and discovered that the respondent had installed the double hung window and made the alterations to the attic space.

[para15] On or about the 18th of December Mr. Higgins sent a letter of the same date on behalf of the applicant advising the respondent that she could install a window in her unit on certain conditions. The respondent believed, with some justification I might add, that the letter was referring to the double hung window in the attic since Mr. Higgins, the writer of the letter, had inspected the unit a few days before and had seen the window in the attic. On January 7th, 1997 the respondent wrote to Mr. Higgins substantially agreeing with the conditions contained in the letter of December 18th, 1996. Mr. Higgins states that even though he was aware that Mrs. McDermott had performed alterations to the attic space including the window he had not so advised the Board of Directors and that when the Board instructed him to send the letter of December 18th, 1996 it was on the basis of their understanding that it was intended to set out the conditions under which the respondent could install a window near her fireplace. I must say that I have some difficulty with this explanation in view of the fact that the second sentence in the letter of December 18th, 1996 reads as follows: We understand that you wish to know the specific conditions under which you may keep the window in question. [emphasis mine] This language would not make much sense if it was referring to a window which had not yet been installed.

[para16] Suffice it to say that in my view the letter is at best confusing and certainly forms a reasonable basis for the respondent's belief that the conditions set out therein related to the double hung window which she had already installed in the attic.

[para17] The next communication between the applicant and respondent was on or about the 20th January 1997 when she received a "Urgent Notice" which was sent to all unit owners at their addresses registered in the corporation's records. The notice was sent to obtain feedback from the owners on the installation of the window in the attic, which by this time had obviously come to the attention of the Board of Directors. The letter stated that if a majority of the owners approved then a by-law would be proposed to change the common elements and notices would be sent for a special meeting to approve the by-law change.

[para18] Upon receipt of the notice the respondent made a request for the mailing list of all unit owners as most of the unit owners did not reside in their units on a year round basis. She stated that she made this request in order that she could apprise the unit owners of her concerns and enable the unit holders to have sufficient information and knowledge about her position. This request was denied by the applicant which took the position that they were not obliged to release that information to the respondent to allow her to contact the owners.

[para19] The notice of January 20th requested a written response from the unit owners by February 28th, 1997. The respondent deposes that she wrote letters dated January 23rd, 1997 and February 11th, 1997 to the president of the applicant seeking his cooperation without success. None the less she was able to personally speak with some of the unit holders who were present in the complex from time to time and provided them with a letter that she had drafted explaining her position. The respondent swears that she obtained support from seventeen of the thirty-four unit holders who did not object to the double hung window in the respondents unit.

[para20] The applicant advised the respondent that the responses then received to the January 20th, 1997 notice that only nine unit owners approved the window, and four expressly responded in the negative. Twenty-one owners did not respond at all. The applicant therefore took the position that a majority of the unit holders had not approved the window. On or about the 24th March 1997, the applicant delivered a letter to the respondent dealing with the unauthorized installation of the window and the attic room. This letter was signed by the president of the applicant and was written on behalf of the directors. It referred to the consultation with the membership through the recent mailing and stated that:

The owners in the corporation are largely not in favour of such unauthorized additions.

[para21] The letter demanded that the unit be restored to its original condition, and that failure to comply with the demand by February 15th, 1997 would result in proceedings being commenced under s. 49 of the Condominium Act. The respondent did not comply with the demand as set out in this letter or in subsequent correspondence from the solicitors for the applicant and this application was launched on or about the 26th September 1997.

POSITION OF THE PARTIES

[para22] The applicant's position is that the double hung window and alterations to the attic of the respondent's unit are in breach of the provisions of Article IX, paragraph 3 (paragraph 3) of the Declaration made pursuant to the Condominium Act for S.C.C. No. 67.

[para23] The respondent concedes that the alterations to the attic were in a common element of the condominium and further concedes that the installation of the double hung window is in contravention of paragraph 3. She contends, however, that the directors of the applicant failed to exercise their powers honestly and in good faith in dealing with the respondent and their conduct was so patently unreasonable as to disentitle the applicant to the relief that they seek.

[para24] With respect to the alterations to the attic the respondent takes the position that this was not in contravention of paragraph 3.

ARGUMENT AND ANALYSIS

The Alterations to the Attic

[para25] Paragraph 3 reads as follows:

3. EXTERIOR APPEARANCE OF COMMON ELEMENTS AND UNITS

In order to maintain the architectural integrity and beauty of the buildings, improvements and grounds of the total project, it is essential that the exterior appearance of the same be maintained in accordance with the architectural concepts in the planning of the total project. The owner may not leave any articles of any description in or about any exterior portion of any unit or common elements which shall contribute to any unsightly or untidy appearance. Each owner shall keep those portions of the common elements of which he has the exclusive use at all times in a neat, clean, and orderly condition and free of any rubbish, litter, debris or other unsightly material and the Corporation shall do likewise with respect to the remainder of the common elements. No owner shall harm, mutilate, destroy or litter any of the landscaping work on or in the common elements, including grass, trees, shrubs, hedges, flowers or flower beds or permit or allow any pet or other animal owned by or in the care or control of the said owner to do any of the foregoing or to run at large. Neither any owner nor the Corporation may attach or construct any fixture, awning, shade, deck or patio enclosure or cover, fence, air-conditioning device, fan, window guard, flag, bunting, storage structure, piece of equipment or thing of any nature whatsoever to any exterior portion of the unit or the common elements or erect, locate or place any building, structure, tent or trailer of any description on or in any portion of the common elements or let any aperture or recess into any exterior portion of a unit or the common elements or close up or fill in any presently existing aperture or recess in any exterior portion of any unit or the common elements or make any change or modification to, or plant any growing thing in or on, any landscaping feature, lawn, walk, patio or garden in the common elements or erect, affix, place, post, inscribe or paint any sign, advertisement or notice on, to or in any part of the common elements, the exterior of any unit or on, to or in the interior of any unit in such position that same would be visible to a passer-by outside the said unit or cause or permit any of the same to be done, without the prior express written consent of the Corporation and without complying with the provisions of the restrictive covenants registered against the real property, whether or not such owner has the exclusive use of any portion of such common elements. No owner may carry out, or cause to be carried out, any decorating, painting, staining, art work, or similar work upon any portion of the common elements, whether or not such owner has the exclusive use of such portion of the common elements, all such work being within the exclusive jurisdiction of the Corporation subject to the restrictive covenants registered against the real property. Neither any owner nor the Corporation may install, erect or maintain, or permit to be installed, erected or maintained, any drapes, covering or other materials over on, inside or outside any aperture, door, skylight or window, or balcony unless the same shall be of a buff colour only or the back thereof facing the exterior of any aperture, door, skylight or window or balcony shall be completely lined with a buff liner or covering sufficient to reflect or show only a buff exterior thereof. [underlining mine]

[para26] It is conceded that the applicant did not obtain the prior express written consent of the Corporation before making the alternations to the attic. Counsel for the applicant therefore submits that the respondent in making these alterations did "erect, locate or place" a "structure on any portion of the common elements" and thereby contravened the provisions of paragraph 3.

[para27] Respondent's counsel however, submits that the title of paragraph 3 and the first sentence thereof make it abundantly clear that the object and purpose of this paragraph is to protect the exterior appearance of the common elements and units and that all of the restrictions in this paragraph are directed to achieving that objective. She submits that all of the prohibitions relate to things being done to the "exterior portion of the unit or the common elements" and that where there is a prohibition against doing anything in the interior of any unit it is only when "same would be visible to a passer-by outside the said unit".

[para28] She submits that the words "erect or place any structure", read in the context of the object and purpose of the paragraph, should not be interpreted as prohibiting the alterations to the attic because they did not affect the exterior appearance of the common elements or units.

[para29] I have carefully read and reread the provisions of paragraph 3 and I am of the opinion that the submissions of the respondent's counsel must prevail. If one takes the literal meaning of the words "place any ... structure" they are arguably broad enough to encompass the alterations to the attic but these words are not so clear and unambiguous as to permit me to ignore the context of the paragraph in which they appear. If the intention of the drafter of the declaration was to prohibit the type of alteration done by the respondent it would have been a simple matter to have expressed that intention by such words as "no owner shall make any structural change or alteration or change any of the common elements".

[para30] In coming to this conclusion, I am guided by the words of Lord Greene in *Re Bide, Bide v. General Accident Fire and Life Assurance Corp.* [1948] 2 All ER 995 at 998 (C.A.):

The first thing one has to do ... in construing words in a section of an Act of Parliament is not to take those words in vacuo, so to speak, and attribute to them what is sometimes called their natural or ordinary meaning. Few words in the English language have a natural or ordinary meaning in the sense that they must be so read that their meaning is entirely independent of their context. The method of construing statutes that I prefer is not to take particular words and attribute to them a sort of prima facie meaning which you may have to displace or modify ... The real question which we have to decide is: What does the word mean in the context in which we find it here, both in the immediate context of the sub-section in which the word occurs and in the general context of the Act, having regard to the declared intention of the Act and the obvious evil that it is designed to remedy?

This approach to statutory interpretation with appropriate adaptations is equally applicable to contractual interpretation. See *Manulife Bank of Canada v. Conlin* 1996 3 SCR 415, per L'Heureux-Dubé J. page 438.

[para31] It follows therefore that the respondent's alterations to the interior of the attic does not contravene the provisions of paragraph 3 and the applicants are therefore not entitled to the relief sought with respect thereto.

The Double Hung Window

[para32] With respect to the double hung window, the respondent submits that the conduct of the Board of Directors was so patently unreasonable, arbitrary and unfair that the court ought to exercise its discretion in favour of the respondent and refuse to grant the applicant the relief it seeks.

[para33] She submits that the board acted unreasonably in failing to respond to her handwritten request, and refers to other instances where similar kinds of requests were granted in a prompt manner. The application has not provided me with any reasonable explanation for the failure to respond in one way or the other to the respondent's request of June 25, 1996.

[para34] Mr. Higgins in his affidavit says that the applicant understood the request to be for a window beside the fireplace. In paragraph 20 of his affidavit, sworn on the 18th November 1997 he asserts that the applicant "has been steadfast in its consent and approval of a window located on the ground floor of the unit to either side of the fireplace." If this is so I find it hard to understand why there was not a reasonably prompt and favourable response to the respondent's request.

[para35] The respondent says that if the applicant had responded negatively to her request she would not have gone to the expense of installing a gas fireplace and making the alterations to the attic as a result of which she incurred an expense of \$5,860.00.

[para36] The respondent says that she believed that she had complied with the conditions for keeping the window which were set out in the applicant's letter of December 18th, 1996. I have already indicated my view that the respondent's belief was reasonable in light of the events which preceded the letter and the wording of the letter.

[para37] The respondent also submits that the applicant having taken the position that it was prepared to abide by the wishes of the majority of the unit holders, acted unreasonably and unfairly in the following respects:

- a. they arbitrarily determined that the unit holders who did not respond to their letter would be deemed not to approve of the window.
- b. that the applicant, in breach of the provisions of the Act, failed to provide the respondent with the mailing addresses of the unit owners.

[para38] The respondent relies on s. 21 of the Act which provides as follows:

the corporation shall keep adequate records and any owner or agent of an owner duly authorized in writing may inspect the records on reasonable notice and at any reasonable time

[para39] In my view the refusal of the respondent's request for a mailing list of all unit holders was in contravention of this section, but even if I am wrong in that conclusion it was totally unfair to the respondent to hamper or obstruct her efforts to make her position known to the unit owners and to enlist their support for her position.

[para40] The respondent takes the position that she was quite prepared to have the issue determined on the basis of the wishes of a majority of the unit owners and in fact, she says that notwithstanding the failure of the applicant to provide her with the mailing addresses that she was able to contact a number of the unit holders and was advised by seventeen of them that they did not object to the window. The applicant, however, refused to accept the statement of the respondent and insisted that only the unit holders who responded favourably to the notice of January 20th would be considered to be in favour of the respondent's position. Those who did not respond would be considered as opposed. The vast majority of those who did respond were in support of the respondent's position.

[para41] The applicant submits that it is settled law that the declaration by-laws and rules govern the rights of the unit owners and are a vital to the integrity of the title acquired by the unit holder. It is quite clear that the courts have been zealous in enforcing compliance by owners to these terms and provisions. See *Carleton Condominium Corporation No. 279 v. Rochon* 44 R.P.R. 228 (C.A.).

[para42] The applicant further submits that even if the board of directors were unreasonably slow in responding to the respondent's request for consent, this did not justify the respondent in proceeding with the installation of the window prior to receiving the consent and indeed without any further notice to the Board. In like manner, the applicant argues that, even if the communication between Mr. Higgins and the respondent was confusing and led the respondent to believe that the Board had consented to the installation of the window on certain terms, the respondent cannot rely on this belief to justify the installation of the window which had been done prior to receiving the communication from Mr. Higgins. In my view, these are extremely important considerations in the determination of this issue.

[para43] S. 49(2) of the Act clearly gives the court a discretion as to whether or not to enforce compliance with the declaration but such discretion must of course be exercised judicially. I have read the very helpful decision of my brother Herold D.C.J., as he then was, in *Metropolitan Toronto Condominium No. 776 v. Gifford* 6 R.P.R. (2d) 218 in which is most helpful in that he sets out some of the relevant criteria to be considered in the exercise of the discretion available to the court in the application of s. 49(2) of the Act.

[para44] While I am of the view that the conduct of the Board after the respondent installed the window, was in some respects unfair and unreasonable and indeed in one respect, in breach of s. 21 of the Act, I have reluctantly concluded that in view of the clear breach of the declaration by the respondent before any of the impugned conduct of the respondent's Board of Directors, that I ought not to exercise my discretion to refuse to enforce compliance with the Declaration.

DISPOSITION

[para45] The applicant is therefore entitled to an order requiring the respondent to move the double hung window and to restore the exterior of the attic to its original condition, at her own expense and that in the alternative if the respondent fails to do so within 60 days of the date of this order, the applicant is entitled to remove the said window and restore the exterior of the unit to its original condition and add the reasonable expenses incurred in performing such work to the common expenses of the respondent's unit.

[para46] However, s. 49 also grants the court the discretion "to include in the order any provisions that the court considers appropriate in the circumstances". In the exercise of this discretion, I order that as a condition of the relief granted to the applicant, that the applicant grant consent to the respondent to install a window near her fireplace which was contemplated in the original design of her unit. I do not think that this is an unreasonable or onerous condition in view of the fact that the applicant took the position that they were prepared to allow the respondent to install a window beside her fireplace for ventilation purposes.

[para47] In view of the divided success of the parties, there will be no costs of this application.

SPIEGEL J.

CBR# 289

Jose Scaroni, plaintiff, and Rosepol Holdings Ltd., defendant

No. 93-CQ-46261 Ontario Court of Justice (General Division) Toronto, Ontario Hoilett J. Heard: March 15 and 16, 1995. Judgment: October 26, 1995.

Counsel: Juan F. Estable, counsel for the plaintiff. Brian P. Pilley, counsel for the defendant.

[1] HOILETT J.:-- This is an action by the plaintiff for the rescission of a contract of purchase and sale and for the refund of the sum of money credited to the transaction by the plaintiff together with interest. There are alternative remedies claimed which would lead to the same result. The relevant facts may be briefly summarized.

[2] The plaintiff, a 66-year-old, immigrated from Uruguay, South America, where he claims to have completed a grade VI education. Since his arrival in Canada he has worked at a variety of jobs requiring minimum skills, as he had in Uruguay. Over the years, seemingly by thrift, he was able to accumulate \$50,000.00, his life's saving. Sometime in 1983 the plaintiff met one Frank Polsinelli, and through him, one Sam Aguanno, a business partner of Polsinelli's brother. The defendant is the corporate alter ego of Frank Polsinelli. According to the plaintiff he first met Polsinelli in the sauna of a fitness club, frequented by them both. A friendship developed between the two, a friendship that later extended to the wives. The plaintiff ended up doing a number of odd jobs for Polsinelli. Visits by the plaintiffs were both frequent and casual. It was not unusual for the plaintiff to drop in as many as two or three times some weeks.

[3] On or about the 6th of October, 1989, the plaintiff loaned \$50,000 to Aguanno. Aguanno failed to repay the loan and the plaintiff ultimately recovered judgment against Aguanno for the amount of the loan in February, 1991. That judgment for \$52,191.25 was never satisfied by Aguanno. Between the date of the judgment and May 30, 1991, the plaintiff made several overtures to Polsinelli requesting him to use his good offices to persuade Aguanno to repay the amount of the judgment. Aguanno and Polsinelli were by this time partners through the defendant company, engaged in the development of a 14-unit condominium project in Cambridge, Ontario. According to the plaintiff, in the almost daily discussions that he had with Polsinelli about the plaintiff's anxiety to have Aguanno satisfy the judgment, they talked about Aguanno's (financial) position and Polsinelli told him that he was not going to be able to collect because Aguanno had no money and was going bankrupt. Polsinelli indicated further that the only asset Aguanno had with which to satisfy a judgment was in their joint business venture. Many of the conversations took place on trips to the Cambridge project when the plaintiff was invited to come along just for the ride or to do odd jobs for Polsinelli.

[4] Polsinelli, because of the plaintiff's importuning, agreed to speak to Aguanno in order to have Aguanno's debt to the plaintiff secured by some interest in the Cambridge project. Polsinelli later assured the plaintiff that the problem had been solved, the solution being that the amount of the judgment would go into the Cambridge project. The plaintiff was later called by Polsinelli and invited to his home re the draft of a document evidencing the plaintiff's interest and representing, what Polsinelli assured the plaintiff, was his only solution. The result was an agreement dated May 30, 1991, the circumstances of which agreement is hereafter further elaborated upon.

[5] The agreement, dated May 30, 1991, recites: i) that Aguanno presently owes the plaintiff \$53,960.00, ii) that Scaroni agreed to the application of the \$53,960.00 to the purchase price of a condominium unit being constructed by Rosepol and finally that Aguanno who holds an undivided 50 percent interest in Rosepol had directed Rosepol to enter into the agreement "on the terms and conditions set out". The agreement then goes on to provide, among other things, for the purchase by Scaroni from Rosepol of Unit 6 in the condominium development for a purchase price of \$100,000.00, the balance of the purchase price being subscribed by a mortgage back to the vendor Rosepol. Further that:

As soon as Scaroni is given written notice that a conveyance for the said Unit #6 is prepared and available, Scaroni must close the transaction as aforesaid within 30 days after receiving such written notice ... If Scaroni does not close the transaction within 3 months of receipt of the aforesaid notice, then this whole transaction shall be deemed to be terminated and Scaroni shall be deemed to have forfeited all his right, title and interest in the said \$53,960.00.

[6] Clause 4 of the agreement provides for voiding the agreement in the event of Aguanno (at his option) repaying the \$53,960.00 to Scaroni before the registration of the condominium; and, further that upon a conveyance of the condominium to Scaroni Aguanno's debt to him would be extinguished.

[7] Clause 5 then provided that "Rosepol may deduct from his (Aguanno's) percentage interest in the condominium project the money credited to Scaroni upon the conveyance of the unit to him." (Exhibit 1, Tab 4).

[8] There is conflict in the evidence concerning the circumstances surrounding the execution of the agreement. According to the plaintiff he received a call from Polsinelli concerning the document that was supposed to be the solution to the problem of the debt owed by Aguanno. On his arrival at Polsinelli's home shortly after, Polsinelli and his wife, Rosemary, were in the kitchen. Mrs. Polsinelli had the document in the typewriter. The plaintiff testified that after Mrs. Polsinelli finished with the document in the typewriter he was given the document to sign. It was not explained to him and he did not take it to a lawyer because he was told it was not necessary, everything was in order. Scaroni testified that he trusted Polsinelli as a friend who by then was almost like family. The plaintiff was told to take the agreement to his wife for signature, which he did, returning later that afternoon with the executed document. It is common ground that the plaintiff had no input into the preparation of the document and although Mrs. Polsinelli purports to have witnessed Mrs. Scaroni's signature, she did not in fact witness the execution of the document by Mrs. Scaroni.

[9] Polsinelli's version of events is that he recalls the plaintiff coming to pick up the agreement on the afternoon of May 30, 1991. According to Polsinelli, his wife told the plaintiff to take the agreement to his lawyer. The plaintiff left and returned later with the agreement, executed by the plaintiff and his wife. Polsinelli presumed that the plaintiff had taken the agreement to his lawyer. Polsinelli's recollection was that copies of the agreement were couriered to his home from the office of Jack Zaldin late that morning or early in the afternoon of May 30. He cannot recall if the document had already been executed by Aguanno. Polsinelli agreed that he had earlier testified that he had phoned the plaintiff when the agreement arrived and that the plaintiff was at his (Polsinelli's) home about five minutes later.

[10] Mrs. Polsinelli confirmed that the plaintiff was at the Polsinelli's home on the afternoon of May 30, 1991 concerning the agreement. According to Mrs. Polsinelli, however, she had a couple days earlier gone to Mr. Zaldin's office to pick up copies of the agreement; they were not delivered by courier earlier that day, as her husband claims. Mrs. Polsinelli's evidence also conflicted with her husband's concerning the time of the plaintiff's return with the executed agreement. Her recollection was that it was not on that afternoon that the plaintiff returned with the agreement. Mrs. Polsinelli, too, testified that the plaintiff was advised to take the agreement to his lawyer. In any event, she had explained the terms of the agreement to the plaintiff.

[11] Concerning the circumstances of the execution of the agreement, I find the plaintiff's evidence to be a lot more credible than that of Polsinelli and his wife. Polsinelli's evidence often tended to be more convenient than credible and there were a number of inconsistencies between evidence given at the trial and at his examination for discovery.

[12] Probably one of the most important aspects of Mrs. Polsinelli's evidence was her claim that she had explained the agreement. It is not necessary for me to make a finding of credibility on that issue because even if full credit were given to her evidence, it was quite clear from her cross-examination on that issue that she did not have the vocabulary necessary to explain to the plaintiff an agreement which, by all accounts, is a technical document.

[13] The following other circumstances bear upon the issues to be determined. The plaintiff testified that apart from relying on the friendship of Polsinelli, he was influenced by Polsinelli's representations to him that Aguanno's only assets to satisfy his judgment were tied up in Rosepol and that Rosepol was then involved in certain financial negotiations and an enforcement of the claim against Rosepol would compromise those negotiations. How explicitly that point was to the plaintiff is not perfectly clear but the implications were obvious. Polsinelli admitted that the practical effect of the transaction was to inject \$53,960.00 into Rosepol's offers. One may reasonably question the soundness of the plaintiff's decision not to pursue the enforcement of his judgment against Aguanno but I have no doubt, on the evidence, that his forbearance was at least in part based on representations made to him by Polsinelli, representations that were designed to enhance Rosepol's bargaining (financial) position.

[14] Scaroni testified that following the execution of the agreement he continued to discuss with Polsinelli the repayment of the \$53,960.00 and Polsinelli led him to believe that they were going to get money from the bank or some finance company or that they would sell one of the units in the condominium project to repay the money. The subject of the loan and its repayment as well as the defendant's registration of the condominiums continued to be the subject of discussion between the plaintiff and Polsinelli. Polsinelli represented to him that there were potential Chinese and Japanese buyers. Those discussions reached a watershed when in a letter, dated February 19, 1993, from the solicitors for the defendant, the plaintiff was informed that the condominium unit was registered on September 23, 1992 and that the plaintiff had 30 days to close the transaction, in accordance with the terms of the May 30, 1991 agreement. The letter suggested a closing date no later than March 23, 1993 (ref. Exhibit 1, Tab 10).

[15] Scaroni testified that he went to see Polsinelli on or about March 23, 1993 and asked him if the proposal to repay the \$53,690.00 was still in place and Polsinelli assured him that it was; that he should go and see his lawyer. The plaintiff did not go to see his lawyer but waited, as he put it, for Polsinelli to solve the situation. Nothing happened until on or about June 29, 1993, when the plaintiff received a letter from the defendant's solicitors informing him that because of his failure to close the transaction in the time prescribed, the deal was at an end and that the plaintiff was "... deemed to have forfeited all [his] right, title and interest in the monies owed to [him] by Aguanno". (See Exhibit 1, Tab 11). The plaintiff took the letter to his lawyer who explained to him its purport, namely, that he had lost his money. The plaintiff claims that he was betrayed by Polsinelli and that he does not wish to close the deal but wishes to hold Polsinelli to his promise to refund the money. [16] Counsel for the plaintiff argues that the transaction is governed by the Condominium Act, R.S.O. 1990, c. 26, which makes relevant the following undisputed facts:

1. It was not until in or about the month of April, 1994 that the remaining condominiums were marketed, for which delay there has been no reasonable explanation.
2. The plaintiff has never been supplied with a Disclosure Statement.

[17] Concerning that second fact, the agreement entered into between the plaintiff and the defendant, (Exhibit 1, Tab 4), may usefully be contrasted with the prototype Agreement of purchase and Sale employed in the sale of the remaining condominium units. (Tab 12, Exhibit 1). The latter bears the earmarks of professionalism which underscores the inelegance of the former. More to the point, however, is the inclusion in the more formal agreement of the following clause which does not appear in the agreement in issue:

Article 4.00 - General Terms 4.01 The purchaser acknowledges receipt of the Disclosure Statement and the proposed Declaration, By-laws, Rules, Management Agreement, if any, and Insurance Trust Agreement, if any, and budget statement for the one-year period immediately following the registration of the Declaration and description. (Exhibit 1, Tab 12)

[18] I shall later consider those provisions of the Condominium Act which is argued has application to the circumstances of the instant case.

[19] The following circumstance makes it difficult, in my view, not to question the integrity with which Polsinelli dealt with the plaintiff. I say this having regard to the fact that the plaintiff is obviously a man of modest sophistication whose mother tongue is Spanish. Polsinelli, on the other hand, is a businessman of some experience. The condominium project was not his first business venture. In an agreement dated March 26, 1992, Polsinelli and Aguanno entered into a share purchase agreement, the effect of which was to make Polsinelli the sole shareholder of Rosepol. That single fact is, in my view, significant. Probably more significant, however, is Clause 8 of that agreement. Clause 8 recites the May 30, 1991, agreement between the plaintiff and the defendant, and continues:

... The Corporation and the purchaser both agree to assume the obligations set out in the said agreement with Scaroni. If for any reason whatsoever, Scaroni does not close the condominium transaction in accordance with the terms of the agreement dated May 30, 1991 then the Corporation and the purchaser agree to save the Vendor harmless from any and all claims and debts which may be made upon him by Scaroni. If Scaroni does not close the condominium transaction, the Vendor shall also have the option of purchasing the condominium from the Corporation upon the same terms as are contained in the Scaroni agreement. (Exhibit 1, Tab 5)

[20] The terms of the share purchase agreement provided a consideration payable to Aguanno comprised of \$15,000.00 cash plus a registrable conveyance of 74 Grove Street East, Barrie, Ontario, appraised at \$145,000.00. Other terms of the agreement provide

for the Vendor, Aguanno, assuming the lease for an automobile formerly leased by the corporation; a vehicle of which Aguanno had the use, and for the assignment by Aguanno to the corporation of a shareholders loan from Aguanno to the Corporation. There was no indication of the money value associated with either of the foregoing two terms. There is no indication, however, that they significantly altered the amount of the consideration.

[21] Concerning the agreement, dated May 30, 1991, there is no Certificate of Independent Legal Advice as far as the plaintiff is concerned and, as I indicated earlier, I find as a fact that there was no such independent legal advice. That agreement, in my view, is flawed in one other respect. The purchase price of \$100,000.00 placed on the condominium was arbitrary, as indeed, it appears, was the whole agreement. There was no appraisal done for the purposes of fixing that purchase price. The best that can be said from the paucity of evidence on the subject is that Polsinelli picked a figure out of the air most favourable to the corporation.

[22] The following provisions of the Condominium Act bear upon the issues to be decided: 51.-(1) Every agreement of purchase and sale entered into by a proposed declarant for a proposed unit for residential purposes shall be deemed to contain,

(a) a covenant by the vendor to take all reasonable steps to register a declaration and description of the property in which the unit is included without delay;

(b) a covenant by the vendor to take all reasonable steps to sell the other residential units included in the property without delay other than any units mentioned in a statement under clause 54(1)(c); (not here applicable)

(c) a covenant by the vendor to take all reasonable steps to deliver to the purchaser a registrable deed or transfer of the unit without delay.

52.-(1) An agreement of purchase and sale entered into after the 1st day of June, 1979 by a declarant or proposed declarant of a unit or proposed unit for residential purposes is not binding on the purchaser until the declarant or proposed declarant has delivered to the purchaser a copy of the current disclosure statement and all material amendments thereto.

(2) The purchaser, before receiving delivery of a deed to or transfer of the unit, may rescind the agreement of purchase and sale within ten days after receiving the disclosure statement or, where there has been a material amendment thereto, within ten days after receiving the material amendment.

(3) A person may rescind an agreement of purchase and sale under subsection (2) by giving written notice of the rescission to the declarant or proposed declarant or to the solicitor of the declarant or the proposed declarant.

(4) Every declarant or proposed declarant who receives notice of rescission under subsection (3) from a person entitled to rescind the agreement of purchase and sale under subsection (2), shall forthwith refund, without penalty or charge, to the person giving notice, all money that the declarant or proposed declarant received from that person under the agreement that was credited as payment against purchase price.

[23] The letter of June 29, 1993 written on behalf of the defendant, purporting to forfeit the plaintiff's interest in the condominium unit was responded to on behalf of the plaintiff by Juan F. Estable of the law firm of Battiston & Associates in a letter dated July 15, 1993 (ref. Exhibit 2). The letter deals with the setting up of an appointment to examine Aguanno as a judgment debtor and goes on to disavow the May 30, 1991 agreement of purchase and sale. The reasons for disavowing the agreement, briefly summarized, were: (1) lack of independent legal advice, which the plaintiff was explicitly told not to seek, (2) the false representation to the plaintiff that Aguanno was, in effect, insolvent, (3) the plaintiff had a poor command of the English language and he did not fully understand the agreement. There was no reference in Mr. Estable's letter to the provisions of the Condominium Act, nor was it clear from the evidence whether he knew at the time of his letter that the transaction purported to be terminated was governed by the Act. There is no reason, however, why, in my view, the plaintiff's position ought to be prejudiced by virtue of the failure of the plaintiff's lawyer to recite in his letter of July 15, 1993 non-compliance with the Condominium Act as one reason for questioning the validity of the May 30, 1991 agreement.

[24] Having carefully considered all the circumstances in the instant case, I have reached the conclusion that the plaintiff should be relieved of his obligations under the impugned agreement for the following reasons:

1. I am satisfied that the plaintiff did not fully appreciate the document he was called upon to sign.
2. Polsinelli took advantage of the friendship that existed between him and the plaintiff in inducing him to sign a document that clearly advantaged the defendant company, and directly Polsinelli, and in so doing misrepresented the financial circumstances of Aguanno to the plaintiff.
3. The defendant acted in breach of both Sections 51 and 52 of the Condominium Act. He failed to take reasonable steps to register a declaration and description of the property as required by Section 51(1)(a), and failed to take all reasonable steps to sell the other residential units as required by Section 51(1)(b). The defendant failed as well to deliver a copy of the disclosure statement, as required by Section 52(1) of the Act.
4. The evidence indicates, as well, that at all material times Unit 6 was tenanted and no proper notice had been served on the tenant. The result being that the defendant in all probability would have been in no position to close the transaction.

[25] I have concluded, therefore, that the plaintiff should receive judgment for the amount claimed together with interest in accordance with the Courts of Justice Act. I am particularly fortified in that conclusion when regard is had to the indemnity clause (Clause 8) contained in the share purchase agreement entered into between the defendant and Aguanno, his erstwhile partner. In other words, the argument that the plaintiff's remedy is to seek to enforce his judgment against Aguanno is without merit, given that one obvious response would be to name the defendant a third party, reciting the above indemnity clause.

[26] The plaintiff shall have his costs of these proceedings, which costs I am prepared to fix, upon further submissions, if counsel cannot agree on what are reasonable costs.

HOILETT J.

CBR# 239

Phyllis Israel, plaintiff, and Townsgate 1 Limited and 652 Steeles Investments Inc., defendants

Court File 92-CQ- 13954 Ontario Court of Justice - General Division Toronto, Ontario Hill J. Heard: September 19, 20 and 21, 1994. Judgment: December 30, 1994.

P. Polster, for the plaintiff. A. Sternberg, for the defendants Townsgate 1 Limited and 652 Steeles Investments Inc.

HILL J.:-

NATURE OF THE PROCEEDINGS

[1] The litigation between the parties centres on a dispute regarding the dimensions of a solarium in a luxury condominium. The plaintiff repudiated the contract of purchase without taking possession of the condominium unit and without paying the remaining purchase price instalment.

[2] Apart from issues regarding costs and interest, the plaintiff seeks:

1. A declaration that the plaintiff is entitled at law to rescind the agreement of purchase and sale;
2. Judgment in the liquidated sum of \$95,100.00 in respect of deposits and upgrades paid to the defendant Townsgate 1 Limited;
3. In the alternative, damages for breach of contract and negligent misrepresentation in the amount of \$95,100.00.

[3] The defendant, apart from interest and costs, pleads, by way of counterclaim, the following:

1. That it is entitled either to apply the plaintiff's \$95,100.00 deposit to the damages incurred by the defendant, Townsgate, or to forfeit the said deposit;
2. The loss incurred by Townsgate 1 Limited on the resale of the condominium unit purchased by the plaintiff, an amount of \$63,804.75;
3. Damages relating to the transaction of purchase and sale including lost occupation charges and carrying charges, an amount of \$4,959.09.

OVERVIEW OF EVIDENCE**The Parties**

[4] In 1989, Phyllis Israel was a 63 year old semi-retired housewife. She resided, with her husband, in a luxury condominium townhouse in Willowdale. The Israels had three children, each of whom had two children of their own for a total of six grandchildren.

[5] The defendant, 652 Steeles Investments Inc. (652), was the registered owner of the property at the intersection of Steeles Avenue and Bathurst Street in the Town of Vaughn. The defendant, 652, subsequently conveyed to the defendant, Townsgate 1 Limited (Townsgate), the property in question. Townsgate was at all material times the developer of a 226 suite luxury condominium project primarily designed for "empty nesters" - couples whose children had grown up and had left the family home.

Purchase of the Condominium Unit

[6] Since the early to mid-1980's, the Israels had actively considered acquiring a single level retirement residence with less square footage than the townhouse in which they were residing. By 1985-86, Mrs. Israel began looking at some condominiums, at times, in the company of her daughter, Ms. Linda Wax. Mrs. Israel testified that it was generally known to her children that she and her husband were seeking retirement accommodation. On the testimony of the Israels, there was no immediate urgency to purchase their retirement residence nor was the purchase of a new residence dependent on the sale of their townhouse.

[7] Mrs. Israel testified that certain prerequisites were important in her search for a new residence. As a consequence of an operation of Mr. Israel, the Israels were interested in a single level residence. The condominium was to be a luxury condominium because it was in effect to be the retirement home of the Israels. Further, the couple considered it very important to have an eat-in kitchen, large enough to comfortably seat 6 persons. The intent was to have any family dinners, in the sense of a meal with the Israels, one of their children and spouse and two grandchildren, in a room other than the dining room. The Israels had three children each with children of their own. It appears from the evidence that the Israels had little or no contact with one of their children, his spouse and two children. However, the evidence of the Israels is that, when in Canada, they would otherwise see their other children and grandchildren with a frequency of one to three times per week. The Israels had a condominium in Florida and customarily resided there from mid-November in one year to near the end of April in the, next with the possible exception of a couple of weeks in February when they would come home to Canada.

[8] The Israels journeyed to Florida in mid-November of 1988 and, on their evidence, were unaware of the Townsgate development on leaving Canada. The couple talked to their children on the phone from Florida one or two times per week. At some point, according to Mrs. Israel's evidence, she learned in a telephone conversation, or conversations, with her daughter, Linda Wax, or her son-in-law, Mr. Stan Wax, about the Townsgate development. Believing that the development would potentially be of interest to the Israels, a 49 page document was transmitted by facsimile from Toronto to the Israels in Florida during the afternoon of February 23, 1989.

[9] It was Mrs. Israel's recollection at trial that she had the plans for a couple of weeks prior to the February 24, 1989 "grand opening" promotional event undertaken by Townsgate to commence marketing of the condominium units. Mrs. Israel testified that she and her husband spent a "considerable time" going over the floor plans faxed to Florida. She considered the purchase to be a big decision requiring careful review of the plans and the ultimate decision to purchase.

[10] Linda Wax obtained the condominium plans from her husband and, on her recollection, they had to work quickly in order to discern whether her parents were interested in the project. Mr. Ian Zagdansky, a representative of Townsgate, testified that the plans were printed several days before the February 24, 1989 opening and delivered to Townsgate immediately before the opening promotional event.

[11] Mrs. Israel testified that she and her husband quickly ignored the smaller square footage units and after giving some of the others quite a bit of careful study they decided upon the Ridgeway Suite 2M model. Mrs. Israel testified that the solarium size was a "big" prerequisite to the decision to offer to purchase the Ridgeway unit as the accompanying literature described the inclusion of an "over-sized solarium/family room". The Israels testified that they saw the dimensions on the Ridgeway floor plan for the solarium and, believing the dimensions to describe a rectangular solarium of 7'2" x 12'3", they were of the view that it would comfortably seat 6 persons. In the accompanying literature, the relationship of the solarium to the kitchen was described as a "kitchen with separate glass solarium and family room". Attached as Appendix A is a copy of the floor plan of the Ridgeway suite [please see paper copy for a copy of the exhibit]. Other features of the 2M suite met the needs of the Israels.

[12] The Israels instructed their daughter to make an offer to purchase, on their behalf, for a Ridgeway Suite 2M on the 11th floor of the Townsgate 1 Limited project with a northern exposure. The purchase price was known to be \$374,500.00. In the absence of the Israels from Canada, Ms. Wax was to purchase the unit in trust for her parents. On attending at the invitational promotional offering on February 24, 1989, Linda Wax observed large floor plans on the walls, including a depiction of the Ridgeway model. Mrs. Israel testified that she did not ask her daughter to confirm the dimensions of the 2M suite nor did she ever convey to Townsgate, through her daughter or otherwise, the specific purpose she had in mind for the solarium.

The Agreement of Purchase and Sale

[13] On February 24, 1989, Linda Wax purchased Unit 3 in trust for her parents, on level 11 of the condominium project. This was a Ridgeway Suite 2M unit. Ms. Wax provided deposit cheques totalling \$40,000.00 to the defendants which were ultimately cashed. In turn, once the Israels returned to Canada in 1989, she was reimbursed for the deposit cheques by her parents. Ms. Wax testified that she did not read the entirety of the Agreement of Purchase and Sale (the Agreement) before signing the document, in the main relying on the assurance of her husband that there was nothing detrimental or abnormal in the document.

[14] The Agreement provided for a targeted closing date of May 10, 1991. Attached as Schedule B to the Agreement was a depiction of the floor plan of Suite 2M without any floor dimensions described thereon. As with the floor plan faxed to the Israels in Florida, Schedule B included with the floor plan the following narrative:

Room Sizes and specifications are subject to change without notice. All square footages include balcony areas where applicable. All room sizes shown are approximate. Builder may substitute materials for those provided in the plans and specifications provided such materials are of a quality equal to or better than the materials provided for in the plans and specifications. Decorative and upgraded items displayed in the furnished model suites and sales office are for display purposes only and are not included in the purchase price. E. & O.E.

The Agreement itself, in clause 24, provided:

This offer when accepted shall constitute a binding contract of purchase and sale and time shall in all respects be of the essence hereof. It is agreed that there is no representation, warranty, collateral agreement or condition affecting this agreement or the real property or supported hereby other than as expressed herein in writing whether contained in any sales brochures or alleged to have been made by any sales representative or agents.

Clause 1(e), relating to the unit purchased, provided that:

"Unit" means dwelling Unit 3 Level 11 as shown on the Sketch attached hereto as Schedule "B", and the Parking Unit(s) and the Storage Unit(s) together with an undivided interest in the common elements and the exclusive use of those parts of the common elements attaching to such Unit(s) as set out in the declaration. The Vendor reserves the right to alter the design and/or layout of the Unit(s) and such parts of the common elements pertaining thereto as may be required to facilitate changes in the structural, mechanical or electrical components of the building, as the Vendor in its sole discretion, may deem necessary or appropriate.

Developments Up to July 31, 1991

[15] Mrs. Israel testified that on returning from Florida in late April or early May 1989, she received a copy of the Agreement of Purchase and Sale and read it over. She also went to the Townsgate sales office and saw, on the wall, plans for the Ridgeway model with dimensions specified in accordance with what she had observed in the promotional literature faxed to her in Florida. The plaintiff testified that she and her husband remained very excited about the pending completion of the condominium project as she liked the area and already shopped in the vicinity. In November of 1990, amendments were made to the agreement providing for a reduction from the purchase of two parking spaces to one space and a corresponding reduction in the purchase price to \$362,000.00. Further, the agreement was amended from the in-trust status to the plaintiff as purchaser.

[16] The plaintiff testified that she was anxious to get into the building, once constructed, in order to view the unit she had purchased. To this end, she visited the Townsgate sales office on a number of occasions but was informed that the building was in an incomplete state and too dangerous to be entered by purchasers. Mrs. Israel was particularly anxious to have certain measurements undertaken regarding built-in cabinets for two or three of the rooms in order to have them priced with a cabinetmaker.

[17] Largely because of a number of construction trade strikes, delays in the closing transpired with the closing being delayed until the spring of 1991, September 4, 1991 and, ultimately to October 11, 1991.

[18] In late April 1991, the plaintiff ordered and paid for a number of upgrades to be included in the purchased unit at a cost of \$4,601.00. These extras were paid for by a cheque dated April 28, 1991.

[19] Mrs. Israel testified that she was aware that, in 1990, there was a slump in the real estate market. Townsgate was offering purchase incentives including charging no GST. The Israels put their townhouse up for sale in 1990 or 1991. When they did so, they were aware that prices in the real estate market were lower than what they had been. Both Mr. and Mrs. Israel testified that

this however had no effect whatsoever on their decision to complete the deal to purchase the Ridgeway Suite and to move into that unit as their retirement home. Both denied that they were speculators involved in an investment purchase.

[20] In May and June of 1991, the Townsgate 1 building was still under construction. There existed no regular practice of taking people into the building itself. By the end of May 1991, air ducts had been installed and the plumbing for various appliances. On June 5, 1991, as a result of an offering by Townsgate, Mrs. Israel, as a purchaser of a condominium unit, was offered a 15% reduction in the purchase price in return for an immediate payment of \$50,500.00. Mrs. Israel agreed to the proposal and made the immediate payment thereby reducing the overall purchase price to \$307,700.00. Mr. Zagdansky testified that the condominium market had dropped significantly and it was the corporation's intention to help purchasers with financing. On his evidence, this was an entirely gratuitous offering by Townsgate. It would however serve to make the closings regarding the units more certain.

[21] In February, 1989, the residential condominium market was active and buoyant. By October of 1991, the market prices had dropped significantly with substantially less transactions. The Israels were unable to sell their townhouse even with a \$50,000.00 reduction in the original list price.

[22] Mr. and Mrs. Israel testified that it remained their intention, in June 1991, to complete the deal and to move into the Ridgeway Suite as their retirement home. Mrs. Israel testified that she was eager to move in and to enjoy the condominium as her retirement home. Mr. Israel testified that they were happy about the decision and committed to moving in as evidenced by their purchase of upgrades and the agreement to the payment in return for the purchase price discount. Linda Wax testified that it was her view that her parents certainly intended to move into the Townsgate project. She had 30 to 40 of her parents' boxes of possessions packed and in her basement during the summer of 1991.

The July 1991 Entry to the Unit

[23] By the end of July 1991, according to Mrs. Israel's testimony, she was informed by a representative of the Townsgate sales office that she could enter the building only on the condition that she did so after hours and on being prepared to walk up the stairs for 11 storeys. On July 31, 1991, the Israels, accompanied by a carpenter of their retaining, entered the building on the conditions enunciated by the developer's representatives. In their unit, all of the cabinets were standing in the living room uninstalled. In the kitchen, the plumbing nibs were installed. Mrs. Israel testified that she was generally pleased with the unit as it appeared to be very bright. The carpenter measured areas with which he was concerned in the living room and second bedroom and washer/dryer areas of the unit, noting measurements on a floor plan. He was not concerned with the solarium. Mrs. Israel testified that she probably walked through the solarium area but its overall size was not apparent to her. This was not the focus of the brief visit to the unit which lasted approximately 1/2 hour as the cabinetmaker was in a hurry.

[24] Following their initial entry to the unit, the Israels, on their evidence, remained intent on moving into the unit. On July 31, 1991, they requested that a television cable outlet in the second bedroom be moved into the centre of the closet area where they intended to install an entertainment unit in a custom-built cabinet to be built by the carpenter.

The Second Entry Into the Unit

[25] Mrs. Israel testified that she entered the purchased unit for the second time in late August or early September of 1991. Her intention was not only to see the unit but to take a measurement regarding a space for a piano. To this end, Mrs. Israel took some measurements in areas of concern regarding fitting in existing furniture which she and her husband owned. In her quite emotional testimony, Mrs. Israel testified that on seeing the solarium her "bubble burst" and she saw the hopes and plans of her husband as dashed because of the size of the solarium. She testified that she will never forget it and that the disappointment was overpowering. It was at once evident to her that there was no way to fit a table and six chairs into the solarium. For the purposes of this judgment, I have assumed that the main solarium window faces northward. Mrs. Israel measured the distance between the solarium window and the kitchen walls and found that on the west side of the solarium the distance was approximately 4'5" to 4'7" and on the east side of the solarium the distance was about 7'1". Mrs. Israel testified that this room was not what she had agreed to purchase. Mr. Israel testified that his wife was quite sick about what they saw regarding the size and shape of the solarium. He testified that it was not at all what they had anticipated from the plans - it was a very narrow room. He testified that it disturbed the two of them terribly.

[26] Mrs. Israel testified that she made an immediate complaint to a female agent while she was still visibly upset. According to her evidence, the agent said that she had heard this story before. Mrs. Israel testified that she telephoned her son-in-law and daughter regarding what she had observed of the solarium. Linda Wax testified that her mother had called very upset regarding the size of the eating area and its inability to accommodate a table and six chairs. Mrs. Israel testified that the matter affected her sleep and that she found the situation greatly upsetting, aggravating and stressful. Her recollection was that she reported the matter to the sales office within a day or two. Mr. Zagdansky, and Mr. Kerr, another representative of Townsgate, testified that they received no complaints whatsoever from Mrs. Israel or any other purchasers, prior to October 1991, regarding the size of the solarium constructed in the various units. Linda Wax testified that her mother was sufficiently upset regarding the solarium that she had spoken of not closing the condominium deal.

The October 1991 Developments

[27] Mrs. Israel, after speaking to her son-in-law, retained counsel who wrote a letter dated October 1, 1991 to the law firm representing Townsgate. The letter stated inter alia that:

As you are aware, Mrs. Israel, through her daughter as agent, purchased the unit after reviewing the plans prepared by the builder. The plans indicated the solarium dimensions of 7'2" x 12'3". These dimensions were material to Mrs. Israel's decision to purchase the unit and she relied on them in deciding to make the purchase.

In August, 1991, Mrs. Israel was given access to the unit for the first time and, much to her surprise, found that the width of the solarium was not 7'2" as indicated on the plans, but only 4'7". The dramatic narrowing of the solarium has rendered it useless for its intended function as an eating area. For all intents and purposes, Mrs. Israel has been deprived of one of the rooms that she had contracted to purchase. We view this as a fundamental breach of the contract.

If your client is able to provide Mrs. Israel with a unit that corresponds to the measurements indicated on the plans, she is prepared to close the transaction as scheduled. In the event that this cannot be done, kindly return Mrs. Israel's deposits, with accrued interest, forthwith.

[28] On October 9, 1991, the Israels met with Mr. Zagdansky in the condominium unit purchased by the Israels. Mr. Zagdansky explained that the walls couldn't be pushed out. While he was not prepared to discuss the room size issue, he, in his evidence, indicated that he wanted to see what he could do to help. The Israels were clearly distressed about the inability, on their view of the matter, to place a table and six chairs in the solarium. Mr. Zagdansky testified that he inquired as to whether Mrs. Israel knew a decorator who could help solve the problem. He expressed his hope that the matter could be resolved without resorting to the expense of lawyers. There was some discussion of moving the cabinet, in the northwest corner of the kitchen around the corner into the solarium. Mrs. Israel found this to be an unsatisfactory solution because as it was, the kitchen was a galley kitchen which needed what little counter space it had in order to be reasonably useable.

[29] Mr. Zagdansky testified that on this date Mrs. Israel related to him that she had been into the unit many times during the various stages of construction and she was very familiar with the unit. Mrs. Israel, and her husband, testified that they had only been in the unit on two occasions prior to the October 9, 1991 meeting.

[30] Mrs. Israel, on cross-examination, testified that she saw no use to "working with the room" by way of utilization of a designer or architect to maximize the space usage. Five-chair seating would neither be comfortable nor good looking. The use of benches was undesirable and moving the table in the solarium toward the family room would effectively block the family room entrance. Mrs. Israel testified that other features of the unit were fine, including the single level, the exposure, the two bedrooms with the second over-sized bedroom, the ability to build in the other desired cabinetry, and the security of the building.

[31] Mrs. Israel testified that she gave no consideration to closing with an abatement. It was evident to her that the solarium could not seat six persons given the width of the room on its west side. The plaintiff testified that she remained very upset at the October meeting as she had been looking forward to moving into the unit for three years and had utilized the retirement savings of her and her husband for the purchase. In effect, an important pre-requisite was said to be missing. She would not have purchased the unit if she had known the "true dimensions" of the solarium. The plaintiff testified that the occasion should have been a joyous one but it proved to simply be a period of great stress. It was the plaintiff's view that she had kept "her end of the bargain". Mr. Israel, in his evidence, agreed that there was no attempt to work with any professional in order to achieve any other resolution as to how the space might be utilized.

[32] Mr. Zagdansky testified that he remained of the view that the room was not useless. He formed the view that Mr. and Mrs. Israel were entirely inflexible. They appeared to have made their minds up and although he was anxious to settle, none of his suggestions met with acceptance by the purchaser.

Professor Gilbert's Evidence

[33] Professor Gilbert, an expert in the field of interior design, retained by the plaintiff, testified that the plan of the Ridgeway model is a typical developer's promotional drawing. The plan would indicate to a lay person that the kitchen ended at a line drawn west to east from the north end of the kitchen cabinet in the northwest corner of the kitchen. In other words, a purchaser, not sophisticated in reading plans, would be of the view that the solarium was in effect a rectangular room 7'2" x 12'3" with the distance between the solarium window and the west wall of the kitchen at 7'2". The witness' report (Exhibit #6) stated inter alia that:

The floor plan drawing shows approximate sizes, proportions and relationships of the various rooms and spaces and the fixtures in them.

Overall the drawing and the dimensions are probably accurate enough for the typical buyer. The Solarium/Kitchen/Family Room area is reasonably accurately drawn. However the Solarium dimensions are quite fanciful, as the drawing clearly shows it to be an L-shaped space, both arms of which are quite narrow.

A person who was not particularly good at reading and interpreting drawings could get a highly inflated impression of the size and usefulness of the Solarium from the dimensions.

[34] The Professor testified that the solarium could, in somewhat cramped quarters, accommodate a table of about 5' x 3' plus six chairs. It would not be generous space, but would certainly accommodate a small table of this size. The witness testified that beyond the table width one needs about 2' to accommodate the placing and movement of a chair. To this end, a 7' width would be required to accommodate a 3' wide table and two chairs along each side.

[35] Professor Gilbert testified that there is no scale on the planned drawing and it is not at all easy to formulate one's own scale using an ordinary ruler. There is in effect no recognizable scale. The plan does not describe how big the kitchen itself is. Study of the plan would lead a person, untrained in reading architectural drawings, to form a highly inflated belief in the size and usefulness of the solarium. Professor Gilbert was the view that a purchaser would be easily misled and that it is difficult for an untrained person to develop a visual sense of the proportionate relationship of the rooms themselves in order to determine actual shape and size.

[36] Professor Gilbert has had an opportunity to measure the actual solarium in unit 3 on the 11th floor of the Townsgate project and, on his measurement, the distance between the solarium window and the end of the west wall of the kitchen is about 4'6". Because of this narrowness, there is no way for a reasonably sized dining room table to fit in the allotted space with six chairs. It may be that a tiny table and three or four chairs could be placed comfortably in the solarium. The placement of a 3' x 5' table and six chairs would require that the table be moved toward the family room such that the southerly two chairs would be in the kitchen space and the far east chair, at the end of the table, would in effect be in the family room. The family room entrance would be obstructed.

[37] The Professor testified that the solarium is in effect "a cut up squiggly L". The Professor testified that the plan was reasonably accurately drawn and is otherwise a fair representation of what is being offered.

Exclusivity of the Agreement

[38] Mrs. Israel testified that she could not remember reading the fine print regarding the E. & O.E. clause on the plan faxed to her in Florida. If she had digested the text she would have been concerned. On her return, in April of 1989, she received and read a copy of the Agreement. At trial, she could not remember whether she had read Schedule B, the floor plan without dimensions,

which also contained the text of the E. & O.E. clause. In addition, she could not recollect having read paragraph 24 of the Agreement. Linda Wax testified that she didn't notice the E. & O.E. clause on the bottom of the plan as she paid no attention to the issue of dimensions. She did not recollect having read clause 24 of the Agreement nor was it discussed with her parents.

[39] Professor Gilbert testified that the E. & O.E. clause connotes that changes would be made as necessary having regard to the dictates of regulatory authorities and zoning. The Professor testified that ordinarily this involves deviations of a couple of inches. The witness further testified that because the purchaser is buying a product to be built in the sense that it is not real at the time of purchase such that it can be measured, necessarily the purchaser must believe what he or she is shown.

[40] Mr. Zagdansky testified that all dimensions were approximate as shown in the floor plans for the respective condominium units. The E. & O.E. disclaimer meant that measurements as shown were not to the millimetre or inch. He further testified however that once constructed, there should be no more than a 3 or 45 deviation. Mr. Zagdansky testified that Townsgate had no intent to state the dimensions in an inflated, false or misleading fashion. The witness was of the view that one could not reasonably read the plans as the Israels say they did. Mr. Zagdansky testified that simply by visually comparing the size of the solarium proportionally to the family room, with its dimensions, would lead to a view that the solarium was L-shaped. The Townsgate representative further testified that a table and four or five chairs could fit within the solarium area. If a sixth chair were required, the table could be shifted toward the family room when the meal was actually in progress. Mr. Zagdansky testified that no changes were made to the Israel's Ridgegate unit and that it was built as represented. The unit was 1528 square feet as represented. In effect, the solarium is not a separate room but a continuation of the kitchen itself.

[41] Mr. Zagdansky testified that all that was in the Agreement telling the purchaser what he or she was buying was the Schedule B floor plan which revealed size and shape. When pressed in cross-examination as to whether Townsgate would be free to build a suite of this layout, however diminutive in size, Mr. Zagdansky acknowledged that the dimensions of rooms are important to purchasers and that Townsgate was not free to build suites of any size it pleased once an agreement had been entered into. Purchasers could rely on the Townsgate brochures and the plans on the sales office walls with the suite layout dimensions. Mr. Zagdansky testified that, from Townsgate's perspective, a purchaser would have legal recourse in an instance of substantial discrepancy between the represented dimensions and the constructed layout. Mr. Zagdansky too agreed that the E. & O.E. clause would generally result in a deviation of only a few inches in the construction of a unit. Importantly, the import of Mr. Zagdansky's testimony was that a purchaser could rely on the agreement and the floor plan with the dimensions.

THE LEGAL FRAMEWORK

(1) Contract

[42] In assessing the rights and obligations of the parties, in circumstances where parties have executed a written agreement, it is essential to commence with an examination of the contract. This analysis is a matter of construction in order to discern the intentions of the parties which itself is essentially a question of fact: *British Columbia Hydro and Power Authority v. BG Checo International Ltd.* (1993), 99 D.L.R. (4th) 577 (S.C.C.) at 581 per La Forest and McLachlin, JJ.

[43] Where the parties have elected to commit themselves to a written document one may assume, as a general rule, that all terms material to the agreement are in writing: *Heard et al. v. Meltick et al.* (1984), 5 D.L.R. (4th) 740 (Ont. C.A.) at 748 per Weatherston, J.A.; *Andronyk v. Williams* (1985), 21 D.L.R. (4th) 557 (Man. C.A.) at 569, 570 per O'Sullivan, J.A. Otherwise, it has been said, the creation of a written document amounts to a meaningless exercise.

[44] Parties to a contract owe a duty to each other to honestly perform a contract honestly made: *LeMesurier et al. v. Andrus* (1986), 25 D.L.R. (4th) 424 (Ont. C.A.) at 430 per Grange, J.A. Further, parties are under a duty to act in good faith and to take all reasonable steps to complete the contract: *Abdool et al. v. Somerset Place Developments of Georgetown Ltd. et al.* (1992), 10 O.R. 120 (C.A.) at 136 per Robins, J.A.; *Leung v. Leung et al.* (1991), 75 O.R. (2d) 786 (Gen. Div.) at 797 per Yates, J.; *Victorian Homes (Ontario) Inc. v. DeFreitas et al.* (1991), 16 R.P.R. (2d) 55 (Ont. Ct. - Gen. Div.) at 57, 58 per Rosenberg, J.

[45] Not infrequently, disputes arise as to whether statements made in pre-contractual negotiations have become a part of the subsequent written agreement. Where a representation of existing fact is made at the pre-contract stage it may not be carried forward, expressly or by implication, into the written contract. Where such a representation was however intended by the parties to have promissory intent, as opposed to a mere representation or sales-talk, it may have the legal force of a collateral warranty or contract: *B.C. Hydro and Power Authority v. BG Checo International Ltd. et al.*, supra, at 617 per Iacobucci, J. (in dissent on other issues); *Richview Construction Co. Ltd. v. Raspa* (1976), 11 O.R. (2d) 377 (Ont. C.A.) at 385 per Arnup, I.A.; *Andronyk v. Williams*, supra, at 569; *Carman Construction Ltd. v. Canadian Pacific Railway Co. et al.* (1982), 136 D.L.R. (3d) 193 (S.C.C.) at 198 per Martland, J.; *Hayward et al. v. Mellick et al.*, supra, at 743. In effect, such a warranty enters into the bargain and must be read together with the written agreement in order to identify the entirety of the parties' intentions provided of course there exists no contradictory or limiting term or condition of the subsequent contract ousting or excluding the operation of the antecedent representation: *Carman Construction Ltd. v. CPR Co. et al.*, supra, at 199, 200. Such a collateral warranty will be rare and must be strictly proven: *Hawrish v. Bank of Montreal*, [1969] S.C.R. 515 at 519-521 per Judson, J. On occasion, a representation made prior to formation of the written contract, for example in a promotional brochure, will be incorporated by direct reference in the contract itself (see for example: *Jervis Court Developments Ltd. v. Ricci et al.* (1992), 23 R.P.R. (2d) 32 (B.C.S.C.) at 35,36 per Spencer, J.) while at times the prior oral representation maintains its status as a collateral warranty (see, for example: *Sodd Coloration Inc. v. Tessis* (1977), 17 O.R. (2d) 158 (C.A.) at 161 per Lacourciere, J.A.).

[46] A condition of a contract is a vital term going to the root of the agreement. Would the purchaser have gone ahead with the deal if the statement or representation turned out to be untrue or materially misleading? Suffice it to say, that a vendor can only enforce a contract where s/he substantially conveys what the terms, reflecting the parties' intentions, called for: *LeMesurier et al. v. Andrus*, supra, at 428. However, the measure of an alleged fundamental breach of a primary obligation under a contract, in considering the availability of a remedial response, is essentially an objective test addressing whether, from the perspective of a reasonable purchaser, it could be said that s/he has been deprived of substantially the whole benefit which it was the intention of the parties s/he should obtain from the contract: *Hunter Engineering Co; Inc. et al. v. Syncrude Canada Ltd. et al.* (1989), 57 D.L.R. (4th) 367 (S.C.C.) at 368, 369 per Wilson, J.; *LeMesurier v. Andrus*, supra, at 429; *Stefanovska et al. v. Kok et al.* (1990), 73 O.R. (2d) 368 (Gen. Div.) at 379, 381, 382 per Moldaver, J.

(2) The Tort of Misrepresentation

(a) Negligent Misrepresentation

[47] An action alleging the tortious conduct of negligent misrepresentation must establish the existence of the following:

- (1) There must be a duty of care or a "special relationship" between the representor and the representee.
- (2) The representation in question must be untrue, inaccurate, or misleading.
- (3) The representor must have acted negligently in making said misrepresentation.
- (4) The representee must have relied, in a reasonable manner, on said negligent misrepresentation.
- (5) The reliance must have been detrimental to the representee in the sense that damages resulted.

See, in this regard: *The Queen v. Cognos Inc.* (1993), 99 D.L.R. (4th) 626 (S.C.C.) at 643 per Iacobucci, J.; *Edgeworth Construction v. N.D. Lea & Associates* (1993), 17 C.C.L.T. (Sd) 101 (S.C.C.) at 107 per McLachlin, J. and at 113 per La Forest, J.; *Rainbow Caterers v. C.N. Railway Co.* (1991), 8 C.C.L.T. (2d) 225 (S.C.C.) at 238-9 per McLachlin, J.; *Kingu et al. v. Walmar Ventures Ltd. et al.* (1986), 38 C.C.L.T. 51 (B.C.C.A.) at 60 per McLachlin, J.A. (as she then was).

[48] The special relationship within which the duty of care exists is not limited to that of a contractual or fiduciary relationship in the narrow sense: *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.* (1978), 19 O.R. (2d) 380 (H.C.) at 395, 396 per Rutherford, J.; (1982), 1 S.C.R. 726 (appeal allowed on unrelated issues). Such a relationship has, depending on the circumstances of the case, included a purchaser and real estate agent: *Green Acre Estates v. Carcoran et al.*, Ontario Court of Appeal, Sept. 23, 1994; *Rotman et al. v. Spylo Realty Ltd. et al.*, Ontario Court of Appeal, Sept. 8, 1994; *Hayward v. Mellick*, supra. The standard of care required by a person making representations is an objective one - it is a duty to exercise such reasonable care as the circumstances require to ensure that the representations made are accurate and not misleading: *The Queen v. Cognos Inc.*, supra, at 651, 654, 655. This duty extends beyond a duty of common honesty. The representor's subjective belief in the truth and accuracy of his/her representations is essentially irrelevant to the applicable standard of care. It is fair to say that an "advisor" or representor in pre-contractual negotiations does not guarantee the accuracy of the statement but is only required to exercise reasonable care with respect to it. Can it be said that the vendor must, or should, have reasonably known that the purchaser would rely on his/her representation made from a position of special knowledge?

[49] The representation, said to be inaccurate or misleading, must relate to a matter of existing fact: *The Queen v. Cognos Inc.*, supra at 657. Would a reasonable person, in the purchaser's position, have drawn the same inference or understanding as the purchaser? Examples exist, in realty sale cases, of actionable pre-contract negligent misrepresentations relating to a sales brochure or artist's depiction of property: *Rotman et al v. Spylo Realty et al.*, supra; and, *Keen v. Alterra Developments Ltd.*, Ontario Court of Justice - General Division, Nov. 2, 1993 (Fedak, J.).

[50] The law of negligent misrepresentation is based on the premise that both parties are expected to act reasonably. It would not be reasonable for a purchaser, viewing the matter objectively, to rely on pre-contract statements which could be said to be no more than vague, offhand or incomplete information or a rough opinion or casual comment. It is fair to inquire in a given case whether a reasonable person, in the purchaser's position, given factors such as the nature of the transaction and the value of the investment involved, would have relied on the information at hand, as an inducement to enter into the contract, without making further inquiries: *Kingu et al. v. Walmar Ventures Ltd. et al*, supra, at 62, 64.

(b) Innocent Misrepresentation

[51] A pleading of innocent misrepresentation will generally be established where the following elements are proven:

- (1) A positive misrepresentation must have been made by the defendant.
- (2) The representation must have been of an existing fact.
- (3) The representation must have been made with the intention that the plaintiff should act on it.
- (4) The representation must have induced the plaintiff to enter into the contract.
- (5) The plaintiff must have acted promptly after learning of the misrepresentation to disaffirm the contract.

Kingu et al. v. Walmar Ventures Ltd. et at, supra, at 57, 58.

[52] This generic form of actionable misrepresentation shares many of the characteristics of a negligent misrepresentation. This misstatement in question must have been material to the making or inducement of a contract. The statement is in effect made by a party, often in the pre- contract period of discussion, without an awareness that what was stated was untrue - in other words, in circumstances not substantiating any fault in the sense of an allegation of negligence: *The Law of Contract in Canada*, G.H.L. Fridman (3rd ed.) (1994), Carswell Publishers, page 303; *Hayward et al. v. Mellick et al.*, supra, at 743.

[53] A court may consider evidence as to what was said and the manner in which the information was presented to a purchaser. At times, what is concealed or left unsaid may amount to an innocent misrepresentation in the sense that the representee could reasonably only reach an erroneous conclusion on a matter of fact: *Panzer v. Zeifman et al.* (1978), 20 O.R. (2d) 502 (C.A.) at 509 per Brooke, J.A.

(3) Concurrency Considerations

[54] A question may arise as to whether the existence of a contract precludes an individual from suing in tort. As a general rule, there exists concurrency between contract and tort: *The Queen v. Cognos Inc.*, supra, at 661, 662; *B.C. Hydro and Power Authority v. BG Checo International Ltd. et al.*, supra, at 584, 603. The law of contract contemplates that the parties may arrange rights and duties between themselves in a contract in such a fashion as to limit or contradict a tort duty which would otherwise exist: *B.C. Hydro and Power Authority v. BG Checo International Ltd. et al.*, supra, at 584. Insofar as the tort duty remains uncontradicted by the contract, it exists intact and co-extensive with obligations imposed by the contract, and may be sued upon:

Contract and Tort - Negligent Misstatement Inducing Contract - Concurrent Liability - Effect of Contractual Terms, J. Bloom (1994), 73 Can. B. Rev. 243 at 255-3.

[55] The most common means by which an intention is indicated regarding the subsistence of a tort duty obligation is the inclusion of a clause of exemption or exclusion of liability in a written contract. Such clauses are also variously described as disclaimer of liability or non-reliance clauses. In effect, such an exclusion of responsibility precludes the implication of a duty and any duty respecting a misstatement of fact which did exist, preceding the contract, does not survive the agreement. This serves in any particular case to afford a natural and true construction so that the parties' bargained agreement can be given effect.

[56] In reviewing an exclusionary term in a contract, in order to determine whether it supersedes pre-contractual conversations regarding the factual matter in issue, the clause must be strictly construed: *Hayward et al. v. Mellick et al*, supra, at 749. Generally, the duty imposed by the law of tort can be nullified only by clear terms: *B.C. Hydro and Power Authority v. BG Checo International Ltd. et al.*, supra, at 585.

[57] It is necessary to interpret the exclusionary clause in each case in the context of not only the clause itself but also the totality of the circumstances including the entire text of the contract. Authority exists to suggest that overarching the natural and true construction test of the contract term may be a substantive test of reasonableness bestowing on the court a judicial discretion, in an instance of an alleged fundamental breach, not to enforce an exclusionary clause where to do so would be unfair and unreasonable: *Hunter Engineering Co., Inc. et al v. Syncrude Canada Ltd. et al*, supra, at 374-377; *The Queen v. Cognos Inc.*, supra, at 665; *Keen v. Alterra Developments Ltd.*, supra, at para. 32, 48.

(4) Remedies

[58] Where the court identifies an innocent misrepresentation, which does not constitute a term of a contract, but which was sufficiently fundamental or substantial in nature to induce the plaintiff to enter a contract, the representee is limited to an action to avoid the contract: *The Law of Contract in Canada*, *Fridman*, supra, at 304; *Hayward et al. v. Mellick et al*, supra, at 743; *Panzer v. Zeifman et al.*, supra, at 508,509; *Ennis v. Klassen* (1990), 70 D.L.R. (4th) 321 (Man. C.A.) at 326, 327 per Huband, J.A.; *Keen v. Alterra Developments Ltd.*, supra, at para. 24, 31; *Kingu et al. v. Walmar Ventures Ltd. et al.*, supra, at 57, 59. The act of rescission is effectively that of the representee, not the court. In effect, the purchaser may rescind the contract thereby repudiating his/her original and apparent consent. The parties are returned to their original pre- contract positions because of the defect in the formation of the contract and a finding that the contract was void ab initio.

[59] A negligently made representation may result in tort liability for damages: *The Queen v. Cognos Inc.*, supra, at 641, 642; *The Law of Contract in Canada*, *Fridman*, at 303.

[60] Where there is a fundamental breach going to the root of the main or collateral contract there exists performance by a party totally different from what the parties had in contemplation. Deprivation of substantially the whole benefit which it was the intention of the parties should obtain under the agreement produces an obligation to pay damages with an additional remedy to an innocent party to elect to put to an end all primary obligations of both parties remaining unperformed under the contract: *Hunter Engineering Co; Inc. et al. v. Syncrude Canada Ltd. et al.*, supra, at 369; *Abdool et al. v. Somerset Place Developments of Georgetown Ltd.*, supra, at 149; *Andronyk v. Williams*, supra, at 563, 564. The purchaser, having proven a fundamental breach in the performance of the contract, may rescind for the breach and claim damages for the breach.

[61] The exercise of the power of rescission must not be arbitrary, capricious or unreasonable: *Leung v. Leung et al.*, supra at 797.

FINDINGS

[62] The Israels provided their evidence in a generally straight-forward and honest fashion. From my observations of their demeanour and on a consideration of their testimony in light of the totality of the evidence, I am satisfied that:

(1) The purchase of the Ridgegate suite was not a speculative investment venture. The couple was intent on buying a retirement residence.

(2) The Israels did not have to sell their townhouse in order to complete the sale of the Townsgate condominium unit.

(3) The plaintiff relied on the description by dimension of the solarium in deciding to enter into the Agreement. Mrs. Israel honestly believed, from her analysis of the layout of the Ridgegate 2M suite, in the promotional brochure, that the solarium was a rectangular room 7'2" x 12'3".

(4) Instrumental to the plaintiff's decision to purchase the unit was her understanding of the shape and dimension of the solarium. She had no eat-in kitchen in her townhouse. She desired an eat-in kitchen. Implicit in the evidence is that the risks attendant upon meals with young children were to be accommodated in the solarium not the formal dining room. Mrs. Israel contemplated that the solarium, as she saw it represented to her, would provide a setting for six members of her family to dine.

(5) The plaintiff made her decision to purchase the expensive condominium unit in a hurried fashion. The purchase was effected by long distance through a trustee. Mrs. Israel elected to make no further inquiries, herself or by agent, regarding the solarium shape and size. Nor did the plaintiff, prior to the signing of the Agreement, communicate to Townsgate her understanding of the size and shape of the solarium or her intended use for the room.

(6) The plaintiff first became aware of the discrepancy between the suite as constructed and her perceived view of the solarium shape and size in September, 1991. On the evidence, the plaintiff thereafter acted with sufficient dispatch to disaffirm the contract.

(7) I am not persuaded that the decline in the residential condominium market was the exclusive motive or operative cause for the plaintiffs act of repudiation. This factor has been considered in a number of similar cases: *Abdool et al v. Somerset Place Developments of Georgetown Ltd.*, supra, at 147, 148; *Stefanovska et al v. Kok et al.*, supra, at 378, 379; *Leung v. Leung et al.*, supra, at 794, 795, 799; *Victorian Homes (Ontario) Ltd. v. DeFreitas et al.*, supra, at 56. This factor however, in my view, contributed, in some measure, to the inflexible position of the purchaser regarding the materiality of the alleged defect and regarding acceptance of an abatement on account of the misrepresentation alleged. [63] Mr. Zagdansky, the principal witness for

the defendants, too testified in a generally forthright manner without argument or attempts to embellish his responses. Considering the evidence led on behalf of the defendants, in the context of the totality of the evidence, I am satisfied that:

(1) There was no intention on the part of Townsgate to deceive or mislead prospective purchasers in the manner in which the solarium in the Ridgeway unit was represented in its promotional brochure and blown-up floor plans.

(2) The information derived from the brochure and floor plan depictions of the dimensional size and shape of the solarium did not amount to mere sales-talk or informal dialogue. These constituted actionable representations regarding the solarium.

(3) A purchaser of the Ridgeway suite would be unable, by reference to the Agreement, to identify the size of the solarium therein which s/he had purchased. A purchaser would only know this fact from reference to the above-described representations.

(4) Townsgate did not believe that it was at liberty to construct a condominium unit, or any room therein, not substantially in conformity with the dimensioned rendition in the pre-contractual representations.

There are a number of other facts upon which there exists little contention:

(1) A 3' x 5' table and six (6) chairs could not be accommodated in the centre of the solarium of the Ridgeway 2M unit as constructed. Such a setting could however be effected were the table shifted to the east, with the two southerly chairs placed south of the south-west solarium wall and adjacent to the kitchen cabinet, and with the easterly chair at the end of the table in the entrance of the family room.

(2) The dimensioned plan in the promotional materials did not exhibit any distortions in terms of the visually represented proportions and scale of the rooms depicted.

[64] I start from a premise that the parties should be allowed to make their own bargain. The parties did not, in the Agreement, negotiate a sale by description that included the dimensions of the rooms. This feature was absent from Schedule B. Nor was this a contract subject to inspection. The Agreement did not so provide, and, of course, the condominium unit was yet to be constructed. There was no existing model suite for the Ridgeway 2M suite as a part of the Townsgate sales office. The plaintiff could have sought an amendment to the standard form of purchase and sale utilized by Townsgate to incorporate, as a term of the contract, a commitment regarding dimensions for a rectangular solarium. Mrs. Israel did not move for this protection and indeed she did nothing to bring to the attention of the developer her expectation of a particular use for the solarium.

[65] Nevertheless, the defendant, Townsgate, in pre-contractual representations, represented to purchasers, including the plaintiff, that the solarium to be constructed in the Ridgeway 2M model would contain a 7'2" x 12'3" solarium. I accept that, taken at face value, this connotes a rectangular room not an irregularly shaped space. Although, as of the date of the Agreement, the unit was unbuilt, this representation was related to an existing fact, in the sense that the item purchased was represented as being of a set dimension. The information in this regard was peculiarly within the knowledge of Townsgate. Townsgate, in my view, stood in a special relationship vis-a-vis the purchaser in regard to the communication of information regarding the room sizes of the luxury condominium unit. A purchaser might therefore be said to be justified in relying on the promotional pre-contract representation in deciding to enter into the contract. Such a representation would operate as a representation inducing the formation of the contract or as a collateral warranty to be read together with the Agreement.

[66] What is the juridical significance, if any, of clause 24, the exclusionary clause, in the Agreement? The defendants submit that, considering the total text of the Agreement, and the unambiguous and expansive narrative of the non-reliance clause itself, it exhaustively excludes reliance on any collateral warranty or pre-contractual representation inducing the agreement. In effect, this term of the contract extinguishes any duties, rights and obligations which might otherwise arise, outside the four corners of the Agreement. On the evidence, neither the plaintiff, nor her agent, paid any attention to the implications of the limiting effect of the clause. Ordinarily, the intentions of the parties may be discerned from the wording of the exclusionary clause in light of all of the terms of the contract. In some cases, of which this is one, a broader consideration of the totality of the circumstances of the relationship assists in a just determination of the true nature of the bargain. An unusual aspect of the testimony in the instant case is that the principal witness on behalf of Townsgate, while maintaining, in large measure, the exclusionary aspect of clause 24, nevertheless appeared prepared to recognize that, a reality of the bargain, was that a purchaser must rely on the Agreement and the sales brochure for the only complete description of the property purchased.

[67] Accordingly, identification of the legal effect to be afforded clause 24, as a reflection of the true intent of the parties, is complicated by the interpretation and expression of views by the witnesses who addressed the issue. On balance, I am not satisfied that the clause excludes pre-contractual negligent misrepresentations. [68] I have considered carefully the submission that the plaintiff did not rely, in an entirely reasonable manner, on the representation of the dimensioned drawing. Visually, one can see that the solarium space is not a perfect rectangle. The kitchen space is not dimensioned, has walls of different lengths, and, in an open-space format, adjoins the solarium. Proportional comparison of the solarium space with the family room would seem to raise a question regarding the existence of a 7'2" width for the entire length of the solarium. The living/dining room, despite its shape, is attributed only a single width and a single length dimension. One cannot reasonably attribute to the plaintiff in the instant case the acumen of the purchaser in the Rotman case, supra, to read a drawing. The plaintiff did not act prudently in failing to make further inquiry and investigation considering these factors, the value of the investment at hand and the proposed usage of the solarium space. Nevertheless, on balance, the plaintiff did detrimentally, and not unreasonably, rely on the defendants' negligent representation.

[69] The promotional, precontract representations regarding the solarium, as stated, are somewhat misleading. Professor Gilbert addressed this in his testimony. The defendants should have reasonably known that a purchaser would rely on the dimensioned information given as indicative of a rectangle-shaped solarium. This was not an instance of informal information gratuitously asked for as in *Shirlyn Fishing Co. v. Pumps and Power Ltd.* (1980), 3 C.C.L.T. (2d) 304 (B.C.C.A.) at 316 per MacDonald, J.A.

[70] There can be no doubt that the defendant fulfilled its obligations to provide substantially what was bargained for by the purchaser. By no measure could the dimensions or non-rectangular shape of the solarium be considered, objectively, to constitute a fundamental undermining of the bargain. Indeed, the import of the plaintiff's testimony was an agreement that the unit, as constructed, substantially provided for her expectations. The exception was the size and shape of the solarium.

[71] While the floor plan, with dimensions, is undoubtedly somewhat confusing or misleading regarding the actual size and shape of the solarium, I am unable to find that the deviation of the de facto measurements and shaping of the room from the

interpretation of the plan held by the plaintiff is sufficiently material or substantial to justify avoidance of the contract. The unit was purchased for a two- member family non-resident in Canada for at least five months per annum. Only where dinner was to be served to visiting children and young grandchildren would the need to set a table in the solarium arise. For the brief time corresponding to the dining period, the table could be shifted to accommodate six persons. Otherwise, a fold-down table, or table with insert leaves, would position comfortably in the solarium. Dining room space was available in the unit. The space was not "useless" as characterized by the plaintiff.

[72] However, the uncertainties promoted by the plans regarding the dimensions of each side of the solarium, or as to his actual shape, are not of a degree to allow the plaintiff to resile from the contract. Whether viewed in an objective or subjective context, it cannot be said that representations regarding the solarium shape and size were sufficiently material that the deal would not close on account of any deviation therefrom. In my view, the soft realty market provides context for the purchaser's misguided act of rescission. Certainly no reasonable purchaser would regard the somewhat misleading information to be sufficiently important to the decision to purchase that s/he would not proceed to close the deal. As noted by counsel for the defendant, in his submissions, the purchaser was minimally bound to close with an abatement or credit addressing the misrepresentation. This approach has been employed in somewhat similar instances: *Rotman et al. v. Spylo Realty Ltd. et al.*, supra, at 8; *Abdool et al v. Somerset Place Developments of Georgetown Ltd. et al.*, supra, at 154, 155; *LeMesurier et al. v. Andrus*, supra, at 428, 431, 432, 433; *Stefanovska et al. v. Kok et al.*, supra, at 372.

[73] The defendant, Townsgate, resold the unit in question thereby fulfilling its duty to mitigate: *LeMesurier et al v. Andrus*, supra, at 431. Unfortunately, for the plaintiff, the resale transpired in a depressed market.

[74] I am not prepared to find, on the evidence before the Court, that Townsgate, prior to the plaintiff's repudiation of the agreement, had installed the "extras" ordered, and paid for, by the plaintiff. Alternatively, I am unable to determine any reason as to why the features should have been installed once the contract was repudiated. The cost of the extras is \$4,601.00 which will, accordingly be backed out, or deducted from the damages due the defendant by way of its counterclaim.

[75] Considering the somewhat misleading or ambiguous nature of the planned drawing, the plaintiff would have been entitled to some credit on closing. While one must be careful not to tie any such abatement to some arbitrary standard (see *Abdool et al. v. Somerset Place Developments of Georgetown Ltd.*, supra, at 154, 155) other cases have tied the calculation of the value of the abatement to the proportion of the defect to the property as a whole (*LeMesurier et al. v. Andrus*, supra, at 433) or to a denial of costs (*Rotman et al. v. Spylo Realty Ltd. et al.* at 8).

[76] I am not prepared to assign the real loss to the defendants against an anticipated purchase price of \$362,000.00. While the plaintiff was only guaranteed the \$307,700.00 purchase price on completion of the agreement, a just result, considering the abatement or equivalent entitlement, dictates that the loss to the developer be measured on the basis of what the defendants would have received had Mrs. Israel not improperly repudiated the agreement. While, superficially, the dollar amount may appear excessive in terms of an assigned credit, the reality is that the developer expected to receive \$307,700.00 in a properly completed agreement with the plaintiff.

CONCLUSIONS

[77] The plaintiff's action is dismissed.

[78] The counterclaim of the defendant, Townsgate, is allowed to the following extent.

(1) Damages

[79]

purchase price reflecting \$307,700.00 credit to purchaser for abatement or equivalent

lost occupation and carrying 4,959.00 charges \$312,659.00 less resale price \$207,695.00 \$104,964.00

less plaintiff's deposits 95,101.00 including deposit for "extras"

damages owed by Mrs. Israel \$ 9,863.00

(2) Costs

[80] The defendants are to have their costs of the litigation. The court may, if necessary, be addressed further regarding any outstanding costs issue(s).

(3) Interest

[81] The defendant is entitled to prejudgment interest assessed in accordance with s. 128 of the Courts of Justice Act, R.S.O. 1990, Chap. C.43.

HILL J.

CBR# 184

Roberta McLean, Plaintiff, and Lieblein & Goldhar

Action No. C2774/91 Also reported at Action No. C2774/91 Also reported at: 18 R.P.R. (2d) 297 Ontario Court of Justice - General Division Brampton, Ontario Dunn J. June 7, 1991

Roberta McLean, appeared on her own behalf. Charlene Anderson, for the Defendant.

DUNN J.:-- These matters came before me on May 3, 1991, at which time I reserved my decision on them to better consider the law. What I have before me are two motions. The first motion is a motion by the Defendant for an order striking out the Statement of Claim on the grounds that it discloses no reasonable cause of action, and that it is frivolous or vexatious or otherwise an abuse of process. The second motion is a motion by the Plaintiff to amend her Statement of Claim as follows:

(a) by inserting in paragraph 12 the words, "negligent or wilful" failure of Defendants to perform their professional duties "as owed to the plaintiff", and (b) further in the paragraph to allege "and fraudulent" audited financial statements and that the plaintiff "through her reliance on the said statements".

The Facts The Plaintiff has issued a claim against the Defendant, an accounting firm, claiming specific and general damages. Apparently the Defendant, Lieblein & Goldhar, a firm of chartered accountants, was hired by the Board of Directors of Metropolitan Toronto Condominium Corporation No. 647 to prepare and audit financial statements for the Condominium Corporation. At the relevant time the Plaintiff was an owner of a unit in that Condominium Corporation. The accountants prepared their financial statements and presented them to the Condominium Corporation, who thereupon presented them in due course to the members of the Condominium Corporation.

The Plaintiff alleges that the chartered accountants failed to follow the standards set in the accounting and auditing guidelines for Ontario Condominium Corporations. In addition, apparently the chartered accountants refused to amend or withdraw their financial statements at the request of the Plaintiff.

The Issue

The issue before the court is whether or not the Plaintiff can maintain an action against the Defendant in their capacity as chartered accountants for the Condominium Corporation, and that issue includes whether or not the defendant owes a duty of care to the Plaintiff in her personal capacity.

Argument

The plaintiff argues that the Condominium Act R.S.O. 1980, chap. 84 provides among other things that the owners at their first meeting may appoint one or more auditors; that the owners at each annual meeting appoint one or more auditors; that the owners may remove auditors by resolution passed by a majority of votes cast; that the remuneration of an auditor shall be fixed by owners; that the auditor shall make a report to the owners on the financial statement, to be laid before the corporation at any annual meeting; and that the auditor, if present at any meeting, shall answer enquiries.

The Act goes on to provide further that the condominium board shall lay before each annual meeting of the owners, a financial statement etc. The Plaintiff would therefore lead us to the conclusion that there is an actual statutory duty and an actual common law duty between the Plaintiff and the Defendant, and further that an action by an individual owner against the accountants is not precluded.

The Law

I have reviewed the authorities as presented to me by the Plaintiff and by counsel for the Defendant. I find the law succinctly put in the case of Loader et al. v. Rosepark Wellesley Investments Ltd. et al., a decision of the Ontario Supreme Court (1980), 17 C.P.C. 150. In that case two unit owners of a condominium project brought an action on behalf of themselves and all other units owners against the builders of the project, alleging faulty construction of the common elements. The learned trial Judge concluded on pp 159 as follows:

"I am of the opinion that section 9(18) of the Condominium Act which permits the condominium corporation to bring an action in respect of the common elements, precludes the right of unit owners to bring a class action for themselves and all other unit owners in respect of the common elements".

In the matter before us, however, we have only one unit owner attempting to bring an action against the accountants of the Corporation. In the Loader case however, the trial Judge concludes that the Condominium Act takes precedence of the rules of practice which might allow class actions, and that the Condominium Corporation is the only proper party to bring an action with respect of the common elements.

With respect to the duty of care owed by the accountants to the individual condominium owner, I am referred to the case of McGauley et al in Regina in right of British Columbia, 1990 44 B.C.L.R. 2nd 217. There a depositor attempted to sue various defendants including the co-operative's auditors, solicitors, chief executive officer etc. The court held that the facts pleaded or proposed to be pleaded were not capable of establishing the existence of a sufficient relationship of proximity between the parties to give rise to a prima facie duty of care on the part of any of the defendants.

In the case before me, and notwithstanding the provisions of the Condominium Act cited by the Applicant, the duty of the Defendant is clearly to the Condominium Corporation, and it is to that Corporation that the Defendant must report, notwithstanding the special provisions as set out above. There may in fact be a further duty of care owed to the owners as a collective unit, but I do not find that there is one to the individual owner.

The Plaintiff here seeks to hold the Defendant responsible to her as a unit owner. Clearly she has taken the wrong road to redress any of her alleged complaints. If she wishes to complain about the financial statements and the obligation of the Defendant to the Condominium Corporation, then she must look to the Condominium Corporation, itself, to make that complaint, and if the

Condominium Corporation fails to do so, then she may very well have a right of action against the Condominium Corporation for its failure in its duty to her as a unit owner.

Clearly, then, on the basis of the law, I find that the Plaintiff's Statement of Claim discloses no cause of action against the Defendants. At the same time, if I were to allow the Plaintiff's motion and permit the amendment of the Statement of Claim to show 'wilful' or 'negligent failure' of the Defendants to account to the Plaintiff or the inclusion of the allegation of 'fraudulent audited financial statements' and the "reliance" of the Plaintiff on them, would bring the Plaintiff's claim into the realm of 'frivolous and vexatious proceedings'.

On the materials filed before me, I find no real evidence of any fraudulent intent, nor do I find any evidence that the Plaintiff relied to her detriment on the statements of which she has complained.

As a consequence, I will allow the motion of the Defendant and strike out the Statement of Claim of the Plaintiff as disclosing no cause of action against the Defendant. I disallow the Plaintiff's motion to amend her Statement of Claim, as to do so, in my opinion, would render the pleadings frivolous and vexatious.

In the circumstances, the Defendant will be entitled to its costs of the motion, which costs I set at the amount of \$350.00 against the Plaintiff.

DUNN J.

CBR# 185

Re Metropolitan Toronto Condominium Corporation No. 979 et al. and Camrost York Development Corporation et al.

26 O.R. (3d) 238

Court File No. RE-5181/95 Ontario Court (General Division), Sharpe J. October 3, 1995

APPLICATION to determine the entitlement to a fee for the use of an easement and right of way.

Robert Wright, for applicants.

Mark S. Hayes and Beth G. Beattie, for respondents.

SHARPE J.: -- This application is brought to determine the entitlement to a fee of \$25,000 a year for the use of an easement and right of way (the "easement"). The easement is over lands formerly owned and developed by the respondent Camrost York Development Corporation ("Camrost") but now owned as part of the common elements of the applicant condominium corporations. The transfer by which Camrost acquired title to the lands also created the easement and provided for the payment of the annual fee. The issue to be resolved on this application is whether the right to the fee is a personal right of Camrost and its assigns or whether the right to the fee runs with the land and hence passed to the applicants upon their acquisition of title to the lands.

Facts

In May 1988 Camrost acquired from the Toronto Harbour Commissioners certain lands for the purpose of developing two condominium highrise towers. The 1988 transfer to Camrost was preceded by negotiations and dealings involving Camrost, Copthorne Holdings Ltd. ("Copthorne") and the Toronto Harbour Commissioners with respect to the use and development of other adjacent lands then owned by the Toronto Harbour Commissioners. Copthorne required the construction of a passerelle and easement to serve the land immediately adjacent to that being acquired by Camrost. That easement is the subject of this application. The purpose of the easement was to permit loading and unloading and for garbage removal at the adjacent property. Camrost advised Copthorne that the construction cost of the easement would be approximately \$250,000. It was agreed that Copthorne would not pay a lump sum to Camrost but rather that Copthorne would pay Camrost an annual fee of \$25,000 for the use of the easement. An agreement to this effect was entered in July 1987. The 1988 transfer between the Toronto Harbour Commissioners and Camrost carried this arrangement forward by reserving the easement and providing for the payment of an annual fee. The provisions of the transfer which create the easement and provide for the annual payment are as follows (emphasis added to passages crucial to this application):

Reserving unto the Transferor, its servants, employees and assigns a non-exclusive easement and right-of-way in, over, along and upon the lands described as Part of Block D, Plan E-640 and designated as Part 1 on Plan 63R-4062 for the benefit of those lands described as Part of Blocks D, E and F, Plan E-640 and designated as Parts 3 and 4 on Plan 63R- 1166 (the "dominant tenement") for the use by the owners and occupants from time to time of the dominant tenement and that of their assigns, agents, employees and invitees including without limitation all persons requiring access from time to time to the buildings located on the dominant tenement and all vehicles necessary for all uses to which the said buildings are put, for the purpose of loading and unloading material at the adjacent loading docks and for access to garbage compactors for the purpose of removing garbage, the foregoing easement and right-of-way shall be subject to the following conditions:

1. There shall be payable to the Transferee an annual fee of Twenty-Five Thousand (\$25,000.00) Dollars for the use of the easement and right-of-way, such fee to commence upon the substantial completion of the easement area such that it is sufficiently complete for its permanent use (after construction of the parking garage) by the Transferor (it being understood that this will not require the top coat of paving material to be laid) and shall be payable quarterly in arrears. The said fee shall be increased at the end of each five (5) year period by an amount equal to the percentage increase during such five (5) year period in the Consumer Price Index for all items, as determined by Statistics Canada or successor index or agency. Upon written notice to the Transferor, the Transferee shall be entitled to assign and/or direct that the said fee by [sic] payable to any other person, whether or not such person has any rights in the lands herein transferred. Notwithstanding the foregoing, the said fee shall not be payable during any period of interruption of use, after substantial completion of the easement area, due to an exercise by the Transferor of its rights pursuant to paragraph 4 herein.

2. Parking on the right-of-way shall be prohibited and the enforcement of such prohibition shall be the responsibility of and under the sole jurisdiction and authority of the occupant of the dominant tenement. The occupant of the dominant tenement shall maintain the right-of-way at all times in good repair and free from ice, snow and other obstruction and agrees to indemnify and keep indemnified the Transferee, its servants, officers, employees, agents, successors and assigns of, from and against all manner of loss, damages, expense, suits, claims, liens and demands arising out of the use of the said right-of-way. The Transferee shall be responsible for the maintenance and repair of all reinforced concrete structural elements forming part of or supporting the right-of-way. If the Transferee disposes of its interest in the right-of-way or the structural elements supporting same then the foregoing responsibility shall be those of its successors in title and the Transferee shall be forever discharged from any further obligations or liability.

3. Failure to pay the fee required pursuant to paragraph 1 herein within fifteen (15) days after notice of non- payment is delivered by the Transferee to the owner and the occupant of the dominant tenement or persistent failure of the occupant to carry out its obligations pursuant to paragraph 2 herein shall give rise to a right of termination of the easement and right-of-way. In order for an event to constitute a failure to carry out an obligation under this paragraph, the owner and the occupant must have received notice in writing from the Transferee setting out the alleged failure and the owner or the occupant must have failed to correct the same within a reasonably practicable period dependent upon the type of obligation and external factors which may prevent immediate correct. Such termination shall not render the party enjoying the same liable for payment required to be made hereunder, except for the period concluding on the date of termination. Termination may be effected by registration on title of evidence of failure to comply with the provisions of this paragraph and of such notice of non-payment or persistent failure to carry out obligations. Upon written notice to the owner of the servient tenement and assignee of the fee payable, if any, by both the owner and occupant of the dominant tenement that the right-of-way is no longer required and the delivery of an appropriate release and abandonment thereof in registrable form and payment to the effective date of release of the right-of-way to the owner of the servient tenement, there shall be no further liability for any further payment.

4. The use of the easement and right-of-way may be interrupted from time to time:

(a) To permit the Transferee or its successors to fulfill the repair obligation contained in paragraph 2 herein. The Transferee shall give the owner and occupant of the dominant tenement, no less than thirty (30) days prior notice in writing of any such repairs unless such repairs constitute an emergency.

(b) To permit the construction or reconstruction, from time to time, of a parking garage or other structures on the lands herein transferred, provided that the Transferee uses its best efforts, subject to force majeure, to complete the construction of such structures in a timely fashion giving reasonable priority, having regard to normal construction practice, to completing construction in the easement area, in establishing its sequence of operation for such construction. The Transferee shall give the owner and occupant, no less than thirty (30) days notice in writing prior to commencing such construction.

5. The easement and right-of-way shall be subject to encroachment in an area extending not more than five hundred (500mm) millimeters south and west from the northerly and easterly boundaries respectively of the easement area to the extent necessary for the purpose of constructing and maintaining supporting columns or walls for an overhead passerelle connecting the structures located on the dominant and servient tenements.

RESTRICTIONS

AND THE SAID Transferee, its successors and assigns hereby covenants to and with the Transferor, its successors and assigns, to the intent that the burden of this covenant shall run with and bind the lands transferred to the Transferee herein, and every Part thereof, and shall run with and be for the benefit of the lands owned by the Transferor and hereunder described as the Dominant Tenement, that:

1. No building or other structures shall be erected upon the lands for use other than as residential premises and ancillary facilities thereto including a public square, general retail space and parking and that such residential premises and parking shall be governed by the provisions of the Condominium Act, R.S.O. 1980, Ch. 84, and amendments thereto, or any legislation passed in substitution therefor.

2. There shall be no change in the design or appearance of the exterior of any buildings erected on the lands, without the prior written approval of the Transferor or its successor in title to the Dominant Tenement, which may affect the aesthetics of such buildings.

The easement area was completed in October 1990. The condominiums were marketed by Camrost pursuant to the Condominium Act, R.S.O. 1990, c. C.26, in July and October 1991. Upon registration of the declarations required by the Condominium Act the land over which the easement is exercised became the property of the applicant condominium corporations.

In October 1994 Camrost assigned its right to the annual fee to Queen's Quay, a corporation within the Camrost corporate structure. Although invoices have been rendered, the fee has not been paid due to a dispute among the various prospective payors. That dispute is not the subject of nor is it relevant to the present application.

Position of the Parties

The applicants take the position that as the fee is described as being for the use of the easement, entitlement to the fee passed to them upon acquiring title to the lands over which the easement is enjoyed.

The respondents take the position that it was intended that Camrost would retain entitlement to the fee as the fee was the payment to Camrost for the construction of the easement. They submit that the language of the transfer makes it clear that the right to claim the fee was intended as a personal right to be enjoyed by Camrost or its assignee and, moreover, that in law such an interest does not run with the land and pass to the party who acquires title to the land.

Analysis

(1) Terms of the Transfer The applicants argue that as the transfer provides for the payment of a fee "for the use of the easement", the right to the fee passes with title to the land. It is their submission that the parties owning the lands which bear the burden of the easement are entitled to the fee for its use. It is further submitted that, at the very least, the language of the transfer is ambiguous and that any doubt should be resolved against the respondent Camrost which, as a party to the transfer, must bear, or at least share, responsibility for its drafting. The contra proferentem principle is relied on. The applicants further contend that the transfer gives rise to an obligation on them to maintain and repair the easement, and that as the party responsible for repairs, they should enjoy the benefit of the annual fee.

While the terms of the transfer creating the easement and the obligation to pay an annual fee for its use are not crystal clear, it is my view that, on balance, an interpretation favouring the respondents is the appropriate one.

The first point to note is that the instrument provides that the annual fee is to be paid to "the Transferee" without any reference to the "successors and assigns" of the transferee. The omission of the words "successors and assigns" supports the contention that the right to receive the fee is a personal right rather than one which passes with title to the land over which the easement is exercised. The omission of any reference to "successors and assigns" is to be contrasted not only with standard usage in such instruments with respect to interests attaching to title in land, but also with other parts of the transfer itself where reference is made to "successors and assigns". The point is fortified by the terms of para. 1 which expressly provides that the "Transferee shall be entitled to assign and/or direct that the said fee payable by [sic] payable to any other person, whether or not such person has any rights in the lands herein transferred". This provision, in my view, indicates that the right to the fee is a right personal to the transferee. As the transferee is given the right to assign to another party having no interest in the land, clear distinction is drawn between title to the land and entitlement to the fee. It is difficult to imagine how the transferee could retain the right to assign the fee to a party who had no interest in the land if the right to the fee were an entitlement passing with title to the land.

A second indication that there is a distinction to be drawn between ownership of the land and entitlement to the fee is to be found in para. 3. There, it is provided that if the owner of the adjacent land, described as the "owner of the dominant tenement", no longer requires the right of way, "upon written notice to the owner of the servient tenement and assignee of the fee payable, if

any" to that effect, the owner of the dominant tenement is discharged from further liability for the annual fee. Again, if entitlement to the fee were to pass to the owner of the land, it is difficult to see why notice to both the owner and the party entitled to receive the fee would be required.

A third point is that the concluding portion of the transfer dealing with the easement clearly provides "that the burden of this covenant shall run with and bind the lands transferred to the Transferee herein". However, nothing is said as to entitlement to the fee running with the lands and enuring to the benefit of the owner of those lands from time to time. This language is entirely consistent with the position of the respondents and, indeed, reinforces that position to the extent that it demonstrates a distinction in the minds of those drafting the instrument between the burden of the easement which does run with the land and the benefit of the annual fee which does not.

At first blush, it may seem that if a fee is to be paid for an easement, it should be paid to the owner of the lands which bears the burden of the easement. Upon analysis, however, it is apparent that there is nothing unusual in the subsequent owner of a property which is subject to an easement receiving nothing by way of compensation. Ordinarily where a previous owner sells an easement, the successor in title must bear the burden of the easement without compensation. The existence of the easement will be a factor affecting the price the successor in title pays for the property. The applicants would have no claim against Camrost if it had been paid a lump sum for the easement prior to transfer of title to the applicants. I fail to see how the fact that payment for the easement is to be made over time makes any difference.

As noted, the applicants submit that they are responsible for the maintenance and repair of the structural elements supporting the easement. This is disputed by Camrost which takes the position that it remains responsible for these matters. The language of the transfer with respect to maintenance and repair is anything but clear. Paragraph 2 provides that the owner of the dominant tenement is responsible for ordinary maintenance, including ice and snow removal, while the "transferee" is responsible "for the maintenance and repair of all reinforced concrete structural elements forming part of or supporting the right of way." Paragraph 2 goes on to deal with responsibility in the event the "transferee disposes of its interest in the right of way or the structural elements supporting same". Responsibility for maintenance and repairs shifts to the transferee's "successors in title". The language here is ambiguous. A distinction is drawn between the transferee's interest in the right of way and its interest in the structural elements. If by "interest in the right of way" it is intended to refer to the transferee's right to receive the fee, then Camrost's position is supported. On the other hand, the reference to the transferee's "successors in title" becoming responsible for repairs supports the position of the applicants. In the end, this provision is unclear and, in my view, difficult to understand. It is surely odd, however, that each party should so vigorously insist that it is responsible for what might well prove to be a significant liability. Taken alone, this element of the terms of the transfer would seem to favour the position of the applicants. However, it must be considered in light of the rest of the instrument as well as in the light of the dealings between Camrost and Copthorne, which strongly suggests that Camrost remains liable for these repairs so long as it receives the annual fee, and that if entitlement to the fee is assigned, liability for the repairs is to be assumed by the assignee. Moreover, the position taken by the respondents on this aspect of the matter would make it difficult, if not impossible, for the respondents later to insist that the applicants are responsible for repair and maintenance of the structures necessary for the right of way.

(2) Intention of the Parties

The history of dealings between Camrost and Copthorne leading up to the creation of the easement and the inclusion of the easement in the transfer from The Toronto Harbour Commissioners strongly supports the position taken by the respondents. The uncontradicted affidavit evidence filed by the respondents indicates that it was always the intention of Camrost and the other parties involved that Camrost and its assigns would retain their entitlement to the annual fee so long as the easement was used, whether or not Camrost or its assigns had any interest in the lands over which the easement was enjoyed. In effect, Camrost sold to Copthorne the right to an easement. The price for the easement was based largely on the fact that Camrost had to expend a considerable sum in structural work required for the easement. Rather than pay Camrost a lump sum for the easement, Copthorne agreed to pay Camrost an annual fee. That fee was tied to the use of the easement as a form of security to Camrost. If Copthorne, or its successor in title, did not pay the fee, the right to enjoy the easement could be denied.

Had Camrost simply sold the right of an easement to Copthorne for a lump sum payment, the applicants would clearly have no claim to that sum. In my view, it makes no difference that payment by Copthorne is structured as an annual fee rather than as a lump sum. In essence, the transaction is the same, and there is no reason in law or in equity to deny Camrost or its assigns the right to be paid for the right it sold, particularly as Camrost had to spend a considerable sum in constructing the structural elements necessary for the enjoyment of the easement.

Accordingly, it is my view that if one looks beyond the language of the transfer creating the easement to the intention of the parties, the evidence clearly supports the position of the respondents.

(3) Does the Right to an Annual Fee Run With the Land?

As there is no privity between the applicants and the owners of the dominant tenement, it is necessary to consider whether the benefit of the right to receive the annual fee for the use of the easement is an entitlement which, in law, is capable of passing with title to the successors in title of Camrost, the original "transferee" in the instrument creating the easement.

The applicants contend that the right to the fee does pass with title as it is expressly tied to the use of the easement. Counsel cites the Condominium Act, s. 2(4), which provides that "upon registration of a declaration and description, the land and the interests appurtenant to the land described in the description are governed by this Act". Reliance is also placed on the Conveyancing and Law of Property Act, R.S.O. 1990, c. C.34, s. 15(1), which provides as follows:

15(1) Every conveyance of land, unless an exception is specially made therein, includes all houses, outhouses, edifices, barns, stables, yards, gardens, orchards, commons, trees, woods, underwoods, mounds, fences, hedges, ditches, ways, waters, watercourses, lights, liberties, privileges, easements, profits, commodities, emoluments, hereditaments and appurtenances whatsoever to such land belonging or in anywise appertaining, or with such land demised, held, used, occupied and enjoyed or taken or known as part or parcel thereof, and, if the conveyance purports to convey an estate in fee simple, also the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits of the same land and of every part and parcel thereof, and all the estate, right, title, interest, inheritance, use, trust, property, profit, possession, claim and demand whatsoever of the grantor into, out of or upon the same land, and every part and parcel thereof, with their and every of their appurtenances.

These provisions beg the question of what interests are appurtenant to the land. The respondents argue that in law, an affirmative entitlement to future payments is not an interest which is capable of running with the land and passing to a successor in title. It is the respondents' position that as the right to the annual fee is not an interest which attaches to the land, the interest is not one to which the above-noted statutory provisions apply.

The requirements for establishing that a benefit of a covenant runs with the land are described as follows by Ziff, *Principles of Property Law* (1993), p. 307:

(i) the transferee obtains the same legal estate as the transferor; (ii) it was intended that the covenant would pass automatically; and, (iii) the covenant relates to the land transferred -- it must "touch and concern" the land.

The respondents contend that neither the second nor third requirements are met. The issue of the intent of the parties has already been canvassed at length, and as indicated above, it is my view that the intention of the parties was that the benefit of the covenant to pay the fee not pass with the title to the lands but only if expressly assigned by Camrost. That finding is, in my view, fatal to the claim that the applicants acquired the entitlement to the fee as it is clear there has been no assignment of that right to them by Camrost.

With respect to the third element, Prof. Ziff elaborates as follows (at p. 307):

The requirement that the covenant "touch and concern" the dominant land [here the lands of the applicants] is important throughout the law of covenants. This requirement limits the variety of restrictions that can pass from owner to owner. To touch and concern the land, the covenant must either (a) relate to the mode of occupation; or (b) directly, and not in some collateral manner, affect the value of the land. Restrictions on the use to which land is put is an example of a valid restriction.

It is to be noted that the discussion focuses on restrictions and it is clear that, in general, affirmative covenants requiring the expenditure of money or the doing of some act do not run with the land: *Parkinson v. Reid*, [1966] S.C.R. 162, 56 D.L.R. (2d) 315.

The proposition that covenants to pay a periodical sum do not run with the land is supported by a long line of authority. The principle was enunciated in *Milnes v. Branch* (1816), 5 M. & S. 411, 105 E.R. 1011 (Q.B.), and considered at length by the English Court of Appeal in *Grant v. Edmondson*, [1931] 1 Ch. 1, [1930] All E.R. Rep. 48. At issue in that case was an interest classified as a "rentcharge". There, it was held that the successors in title to the original beneficiary of a rentcharge were not entitled to sue for payments due unless the right to receive those payments had been specifically assigned to them. The trial judge, Clauson J., put the point as follows ([1930] 2 Ch. 245 at p. 254):

In technical language, the question is whether the benefit of the covenant runs with the rentcharge at law. For many years the general opinion of legal practitioners, as reflected in the ordinary text-books, has regarded as sound the doctrine that the benefit of a covenant (for example, for payment of the rentcharge) cannot run with a rentcharge at law, but the covenant must be treated as a covenant collateral or in gross.

(Citations omitted)

The Court of Appeal agreed after a very detailed review of the authorities. Lawrence L.J. stated (at pp. 20-21):

... it appears to me that Clauson J. was right in concluding that for many years past *Milnes v. Branch* has been accepted by the profession as having established the proposition that a covenant to pay a rentcharge does not run with the rent. Thus, in *Burton on Real Property*, 7th ed. (1850), p. 347: "In particular it seems that the covenant of the grantor runs neither with the land nor with the rent; but is merely a personal engagement between the parties. *Milnes v. Branch*"; in *Pollock on Contracts*, 8th ed. (1911), p. 249 (4): "An agreement to grant an annuity charged on land implies an agreement to give a personal covenant for payment; but by a somewhat curious distinction the burden of a covenant to pay a rentcharge does not run with the land charged, nor does the benefit of it run with the rent"; in *Halsbury's Laws of England*, vol. xxiv. (1912), p. 517, cl. 1021: "The due payment of a rentcharge is frequently secured by the covenant of the landowner who creates it. The burden of such a covenant does not run with the land so as to bind subsequent owners of the land; nor, it seems, does the benefit of the covenant run with the rentcharge so as to entitle subsequent owners of the rentcharge to sue," citing *Milnes v. Branch* and other cases; and in *1 Smith's Leading Cases*, 13th ed. (1929), p. 98, in the notes to *Spencer's Case*, *Milnes v. Branch* is cited at length for the proposition that a covenant to pay the rentcharge does not run with the rent.

Lawrence L.J. added (at p. 26):

Whatever may be the foundation of the rule, and whether it rests on the broader principle that (except as between lessor and lessee) no covenant can run with an incorporeal hereditament, or whether it rests on the narrower principle that a covenant to pay a rentcharge is a collateral covenant or a covenant in gross which does not touch or concern the rentcharge or whether it rests on no principle and is merely arbitrary, I am of opinion that it is too firmly established to be disturbed by this Court.

As noted, *Grant v. Edmondson* dealt with an interest known as a "rentcharge". The right to receive a periodic sum from land may be classified as either an annuity or a rentcharge. The distinction between the two is that a rentcharge includes the right of distress for non-payment: see *Halsbury's Laws of England*, 4th ed. (1982), vol. 39, p. 563. It is clear that the fee in the case at bar does not constitute a rentcharge, as it does not include the right of distress for non-payment. However, I see no reason why the broader principle of *Parkinson v. Reid*, *Grant v. Edmondson* and *Milnes v. Branch* should not apply to an interest of the type at issue in this case, particularly as no authority has been cited to me in support of the proposition that an interest of this nature is capable of running with the land.

I conclude, therefore, that even if the applicants had satisfied the requirement that there was an intention to create a covenant that would run with the land, an interest of the kind at issue in this case is not capable of running with the land and that, absent a specific assignment of the right from original party to the covenant, the applicants have no claim to the fee.

(4) Fiduciary Duty

The applicants rely on the principle established in *York Condominium Corp. No. 167 v. Newrey Holdings Ltd.* (1981), 32 O.R. (2d) 458, 122 D.L.R. (3d) 280 (C.A.), that the owner-developer of a condominium owes the unit purchasers a fiduciary duty with

respect to dealings in the interests appurtenant to the condominium. In my view, that case is clearly distinguishable from the case at bar. Here, the grant of the easement and agreement that the easement be paid for by way of annual fee was completed long before any units in the condominium had been marketed. The deal was struck at the same time Camrost itself acquired title to the lands on which the condominium was to be developed. At that point, Camrost was at liberty to dispose of its rights to those lands as it saw fit. The fiduciary duty enunciated in the York Condominium case arises after unit-holders have acquired an interest in the condominium to protect them from the developer dealing with the property to their detriment and for its own benefit. Here, the easement was created before any unit-holders had acquired any rights and its existence was disclosed in the required disclosure statement.

The applicants complain that the existence of the fee was not disclosed, but as the fee represented the price of the easement sold long before the condominium came into existence, I see no reason why it should have been disclosed. In any event, the fee was hardly something Camrost concealed as its existence is obvious from the title documents.

Conclusion

In my view, the claim of the applicants to entitlement to the fee for the easement fails, both in fact and in law. Although there is no cross-application by the respondents for a declaration of their entitlement, counsel submitted that as it necessarily follows from dismissal of the application that the respondents are entitled to the fee, a declaration to that effect would serve to clarify the issue in the future. I see no reason to refuse that request, and, accordingly, there shall be a declaration:

- (a) that the entitlement to the annual fee for the use of the easement does not run with the land and does not rest with the owner from time to time of the said land;
- (b) that Camrost or its assignee has all the right, title and interest to the annual fee for the use of the easement;
- (c) that the applicants have no interest in the annual fee for the use of the easement.

If the parties are unable to agree as to costs, I may be spoken to.

Order accordingly.

CBR# 385

York Region Condominium Corp. No. 771 v. Year Full Investment (Canada) Inc.

12 O.R. (3d) 641 Action No. C13211 Court of Appeal for Ontario, Goodman, Labrosse and Austin JJ.A. April 7, 1993

APPEAL from an order of the Ontario Court (General Division) (1992), 10 O.R. (3d) 670, 26 R.P.R. (2d) 164, 95 D.L.R. (4th) 327 (Rosenberg J.), requiring the owner of a commercial condominium unit to pay for excessive water consumption.

Howard W. Winkler, for appellant.

Jonathan H. Fine and Robert L. Riteman, for respondent in appeal.

BY THE COURT :-York Region Condominium Corporation No. 771, the respondent in the appeal (the "corporation"), applied to the Ontario Court (General Division) for an order declaring that Year Full Investment (Canada) Inc. (the appellant), who had purchased Unit 1 of the condominium complex from the developer for use as a restaurant, pay to the corporation all moneys on account of excess water usage in relation to the respondent's unit assessed as common expenses against the unit.

Rosenberg J., who heard the application, found that the corporation was entitled to be paid by the appellant the cost of water used by the appellant in excess of the costs for normal household requirements and for normal requirements for cooling and so ordered. The parties have apparently agreed on the amount of such excess costs but the appellant submits it should not be held responsible for the payment thereof. It is from this order that Year Full Investment (Canada) Inc. appeals.

The application was made

(1) Pursuant to the provisions of s. 49 of the Condominium Act, R.S.O. 1980, c. 84 (now R.S.O. 1990, c. C.26), which provides that the court may, by order, direct any unit owner to perform any duty imposed on it by the Act, declaration, the by-laws or the rules of a corporation created by the Act.

The trial judge did not find that the appellant had committed any breach of such duties. We are satisfied that on the basis of the material before the court, no such breach has been proven and accordingly the corporation cannot succeed on this ground. (2) Pursuant to rule 14.05 of the Rules of Civil Procedure, which authorizes an application under subrule (3)(d) to determine the rights that depend on the interpretation of, inter alia, a contract or other instrument, or on the interpretation of a statute or under subrule (3)(h), in respect of any matter where it is unlikely that there will be any material facts in dispute.

We are satisfied that Rosenberg J. was entitled to make the order in appeal pursuant to this rule and that he was correct in his conclusion for the following reasons.

Facts

(1) The corporation is a condominium corporation created by registration of its declaration and description under the Condominium Act on November 21, 1990.

(2) It is a mixed-use condominium consisting of 58 residential and 45 commercial units contained in two buildings.

(3) The appellant had purchased Unit 1 as a commercial unit to be used for the stated purpose of a Chinese food restaurant.

(4) During the period November 21, 1990 to November 30, 1991, the cost of water supplied to the corporation was \$73,607.02. The cost of the water that was used specifically by the appellant was \$57,293.70. This last amount was ascertained by supplying a separate meter for the restaurant for measuring purposes. The appellant's water use for its own purposes constituted 77 per cent of the total water charges incurred in respect of all 103 units and the common elements.

(5) Prior to the registration of the declaration and the closing of the purchasers' units by the eventual unit owners, the developer presented a disclosure statement containing a budget statement as required by s. 52 of the Act.

(6) The budget for a one-year period immediately following the registration of the declaration showed water usage as a common expense and budgeted the sum of \$30,000 for water usage for the entire 103 units and the common elements. The appellant, by itself, during the relevant one-year period, used 190 per cent of the amount budgeted for water for the entire corporation use. The actual water usage of the remaining owners and for common elements was \$34,711, an amount close to the budget estimate.

(7) The budget contained the following note in reference to the \$30,000 estimate for the first year water charges:

Water

Represents the cost of water for normal household requirements and for normal requirements for cooling Condominium Corporation. Any excessive consumption by any Retail Unit will result in a back-charge being effected by the Condominium Corporation to such Retail Unit.

We are of the view that this note in the budget was a clear indication by the declarant developer to all proposed unit purchasers that excess water usage in retail premises would not be a common expense as set forth in the proposed declaration but would be, instead, the responsibility of the user of the excess amount.

(8) The declaration executed by the corporation defined the meaning of common expenses by s. 2.01 as: . . . the expenses of the performance of the objects and duties of the Corporation, and without limiting the generality of the foregoing, shall include those expenses, costs and sums of money set forth in Schedule "E" attached hereto.

The declaration provided by s. 2.02 that:

Each owner shall pay to the Corporation his proportionate share of the common expenses.

(9) Schedule "E" of the declaration provides that:

Common expenses shall include the following:

(b) All sums of money levied or charged to the Condominium Corporation on account of any and all public and private supplies of insurance coverage, taxes, utilities, and services including, without limiting the generality of the foregoing, levies or charges for: (iii) water and sewage, unless separately metered for each unit.

It is to be noted that the declaration contemplated a situation or situations in which the expenses for water used by a unit owner or tenant would not be included in the common expenses.

(10) Schedule "D" of the declaration provided that the owner of Unit 1, level No. 1 (the subject unit) was responsible for the payment of 6.0501 per cent of the common expenses. That percentage was, of course, vastly less than the percentage of water actually used by the appellant.

(11) Rosenberg J., in reaching his conclusion, relied upon a decision of this court in the case of York Condominium Corp. No. 59 v. York Condominium Corp. No. 87 (1983), 42 O.R. (2d) 337, 29 R.P.R. 86, which involved a dispute between two corporations with respect to liability for sharing in the payment of common expense repairs. The issue in that case was somewhat different than the issues in the present case but we agree with the principle set forth by Cory J.A. in his reasons as set forth at pp. 340-41, and quoted by Rosenberg J. at p. 7 of his reasons [now reported (1992), 10 O.R. (3d) 670 at p. 674, 26 R.P.R. (2d) 164]. In particular, we deem it appropriate to adopt his statement, at p. 340:

As far as possible and with due regard for the particular mutual covenants of the individual owners the courts should bring a broad and equitable approach to the resolution of their problems.

And further at p. 341:

The concept of repair in such a situation should not be approached in a narrow legalistic manner. Rather, the court should take into account a number of considerations. They may include the relationship of the parties, the wording of their contractual obligations, the nature of the total development, the total replacement cost of the facility to be repaired, the nature of the work required to effect the repairs, the facility to be repaired and the benefit which may be acquired by all parties if the repairs are effected compared to the detriment which might be occasioned by the failure to undertake the repairs. All pertinent factors should be taken into account to achieve as fair and equitable a result as possible.

(Emphasis added)

(12) In our opinion, it is clear from the budget submitted to the appellant that it was the intention of the corporation in proposing its declaration that the expense for use of water in a retail unit in excess of normal household requirements for a unit would not be considered part of the common expenses. Furthermore, Schedule "E" of the declaration contemplates situations where water used by a unit owner will not form part of the common expenses. In most circumstances, the words in para. (b)(iii) of Schedule "E", "unless separately metered for each unit", would indicate that water use expenses would form part of the common expenses unless each and every unit was metered.

In the present case, the municipality has installed a master meter and the corporation is billed for all the water used for all of the units and common elements of the development. Unit 1 and some other retail units have had meters installed for measurement purposes only. The cost of installing a meter in each and every unit, even if the municipality were prepared to do so, would be high and would be of no advantage to the appellant. In fact, it would be a detriment because the percentage of common elements expense that it is required to pay is higher (although far below what it should be for water usage) than that of other unit owners and accordingly would be required to pay more than its proper share for meter installations.

In our view, applying the reasoning of Cory J.A., having regard to the fact that the development has substantial numbers of units of mixed uses, that the corporation contemplated that excess water use would be paid for separately by retail unit owners, that the intent of a declaration is to apportion common expenses amongst unit holders in percentages as close as possible to the percentage of use made and enjoyment received by each unit holder from the services and charges included in the common expenses, the words "unless separately metered for each unit" should be interpreted to mean "unless separately metered for any unit" rather than "unless separately metered for each and every unit". On this basis, the expense for excessive water usage by a unit owner does not form part of the common expenses.

In order to obtain a fair and equitable result, and having regard to the agreement for sale, the declaration including the proposed budget, the somewhat unusual nature of this condominium development with its mixed uses, we are of the opinion that the declaration should be interpreted to mean that excess water usage expense, to the extent involved in the present case, does not form part of the common expenses. In so finding, we are of the view that Rosenberg J. did not amend the declaration but rather interpreted it properly without amending it.

(13) Based on our conclusion, the appellant has obtained the benefit of the use of water, the expense for which does not form part of the common expenses. It has thus obtained a benefit for which it has not paid.

The corporation either has paid or will be obliged to pay to its detriment for that benefit received by the appellant.

In view of our conclusions, there is no juristic basis for the appellant to obtain such benefit without payment. We agree, therefore, with the conclusion arrived at by Rosenberg J. and the appeal is accordingly dismissed with costs.

Appeal dismissed.

CBR# 052

Brownstones East Limited Partnership, Brownstones East Properties Inc., Brownstones East II Limited Partnership, Brownstones East II Properties Ltd., Brownstones East III Limited Partnership, Brownstones East III Properties Ltd. and Brownstones Building Corp. v. Ontario New Home Warranty Program*

8 O.R. (3d) 545

Action No. C10924 Court of Appeal for Ontario, Dubin C.J.O., Houlden and Blair JJ.A. May 28, 1992

APPEAL from an order of the General Division (1992), 8 O.R. (3d) 547, post, 87 D.L.R. (4th) 609, dismissing an application for a declaration that the Ontario New Home Warranties Plan Act did not apply to three schemes to develop condominiums.

William G. Dingwall, Q.C., and Kenneth G. Hood, for appellants. Brian M. Campbell, for respondent.

The judgment of the court was delivered by

DUBIN C.J.O.:--We are all of the view that this appeal must be allowed, and the judgment below set aside.

In our view the facts of this case are quite indistinguishable in any meaningful way from those that were before this court in Ontario New Home Warranty Program v. Marchant Building Corp. (1991), 1 O.R. (3d) 513, 15 R.P.R. (2d) 113 [leave to appeal to S.C.C. refused October 17, 1991]. In that case, this court held that parties in like position to the appellants here were not subject to the Ontario New Home Warranties Plan Act, now R.S.O. 1990, c. O.31, which is the issue before us.

Although in that case the Court of Appeal approached the matter somewhat differently than was done by the trial judge in this case, the same issues were clearly before the court, and the judgment of the court below is inconsistent with the ratio underlying the meaning and effect which our court gave to the statute in the Marchant case. In our view, reading the Act as a whole, we do not think that the Ontario New Home Warranty Program is intended to apply to the circumstances which exist here.

Therefore, for those reasons the judgment of the court below will be set aside, and an order will go:

(1) declaring that the Ontario New Home Warranties Plan Act does not apply to the applicants and they are not required to register pursuant to the provisions of the Act with respect to the three real estate projects referred to in the application;

(2) directing the respondent to surrender for cancellation letters of credit amounting to \$2,760,000 posted with it and return the enrolment fees of \$30,702.88 with interest thereon;

(3) a reference to the master at Toronto to determine the amount of the costs to the appellants to obtain the letters of credit posted with the respondent, which amount will be awarded to the appellants.

The appellants are entitled to their costs here and below on a party-and-party basis.

Appeal allowed.

The judgment appealed from of the Ontario Court (General Division), Sheard J., February 7, 1992, is as follows.

William G. Dingwall, Q.C., and Kenneth G. Hood, for applicants. Philip P. Healey, for respondent.

SHEARD J.:--The applicants seek a declaration that the Ontario New Home Warranties Plan Act, R.S.O. 1980, c. 350 (now R.S.O. 1990, c. O.31) (the Act) does not apply to three real estate projects developed by them. They also seek an order directing the respondent to return for cancellation three letters of credit, totalling \$2,760,000, the refund of enrolment fees of \$30,702.88 paid to the respondent, and an order directing a reference to a master to determine the damages suffered by the applicants for having to provide the letters of credit and pay the enrolment fees.

The projects are three condominiums: a 32-unit townhouse condominium, a 55-unit apartment condominium and a 51-unit apartment condominium. They are what is called a tax-driven investment scheme. Each of the three projects is delineated in a lengthy and complex offering memorandum. The essentials of the projects in each case are that the limited partnership has title to the real property; it engages the Brownstones Building Corporation (BBC) to construct the building, to be registered as a condominium when qualified under the Condominium Act, R.S.O. 1980, c. 84 (now R.S.O. 1990, c. C.26), with the object of letting the units to tenants as a rental real estate investment to be managed by the general partners (who are the three applicants other than the BBC and the three limited partnerships).

The offering memorandum invites investors to purchase an interest in the limited partnership by entering into a subscription agreement. This agreement specifies one or more of the prospective condominium units, which vary in price, depending on their size and other aspects affecting their comparative quality or attractiveness. The subscriber thus makes a choice of the residential unit, which choice determines the amount subscribed for as an interest in the limited partnership, whose only asset consists of the condominium project for which it is the rais on d'etre.

Through the instrument of owning an interest in the limited partnership, the subscriber thus becomes a participant in a rental real estate investment and thereby [gains] access to certain income tax advantages. It is an arrangement which can be attractive to people with comparatively large incomes.

Although the projects are designed as rental property investments, the subscription agreement includes the right of the investor to elect to take title to the chosen condominium unit specified in the agreement. Taking title to the condominium unit would, of course, terminate the investor's participation in the limited partnership, and whatever tax advantages that might ensue therefrom.

Transfer of title of the condominium unit cannot be made, even if requested by the investor, until after the building has been constructed and registered pursuant to the requirements of the Condominium Act.

As its name implies, the Ontario New Home Warranties Plan Act applies to new homes. Its definition section, s. 1, includes the following:

(a) "builder" means a person who undertakes the performance of all the work and supply of all the materials necessary to construct a completed home whether for the purpose of sale by himself or under a contract with a vendor or owner;

(d) "home " means,

(i) a self-contained one-family dwelling . . .

(ii) a building composed of more than one and not more than two self-contained, one-family dwellings under one ownership,

(iii) a condominium dwelling unit, including the common elements, or

(iv) any other dwelling of a class prescribed by the regulations as a home to which this Act applies, and includes any structure or appurtenance used in conjunction therewith, but does not include a dwelling built and sold for occupancy for temporary periods or for seasonal purposes;

(g) "owner" means a person who first acquires a home from its vendor for occupancy, and his successors in title;

(l) "sell" includes entering into an agreement to sell;

(n) "vendor" means a person who sells on his own behalf a home not previously occupied to an owner and includes a builder who constructs a home under a contract with the owner . . .

Other provisions of the Act include:

6. No person shall act as a vendor or a builder unless he is registered by the Registrar under this Act.

12. A builder shall not commence to construct a home until he has notified the Corporation (administering the New Home Warranty Program) of the fact, has provided the Corporation with such particulars as the Corporation requires and has paid the prescribed fee to the Corporation.

13.(1) Every vendor of a home warrants to the owner,

(a) that the home,

(i) is constructed in a workmanlike manner and is free from defects in material,

(ii) is fit for habitation, and

(iii) is constructed in accordance with the Ontario Building Code;

(b) that the home is free of major structural defects as defined by the regulations; and

(c) such other warranties as are prescribed by the regulations.

(4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.

14.(1) Where,

(a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

(b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or

(c) the owner suffers damage because of a major structural defect as defined in the regulations for the purposes of section 13, and the claim is made within four years after the warranty expires or such longer time under such conditions as are prescribed,

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

15. For the purposes of sections 13 and 14, a condominium corporation shall be deemed to be the owner of the common elements of the condominium and the warranties take effect on the date of the registration of the declaration and description.

The general purposes of the Act were summarized by Judge Zalev (as he then was) in *Ontario New Home Warranty Program v. Crown Trust Co.* (1984), 50 O.R. (2d) 588, 32 R.P.R. 214 (Co. Ct.) [affd (1985), 50 O.R. (2d) 593 (note) (C.A.)], at p. 590 O.R., p. 217 R.P.R.:

In my view the object of the statute is to provide the warranties set out in s. 13 of the Act to persons who first acquire a home from its vendor for occupancy, and to protect such persons from any unscrupulous, financially irresponsible, or technically incompetent persons from whom they might purchase.

The question of whether the Act applies to tax-driven rental projects has been raised before. For instance, *Ontario New Home Warranty Program v. Meadows of White Oaks II Ltd.* (1988), 65 O.R. (2d) 362, F50 R.P.R. 186 (H.C.J.), was an application, heard by R.E. Holland J., to obtain a ruling as to whether the subject companies (operating projects designed as tax shelters) must register pursuant to the Act.

R.E. Holland J., in the course of his reasons, mentions [at pp. 363-64 O.R., p. 188 R.P.R.] that:

For some years the director of registration for the programme had interpreted the legislation as excluding coverage where units were sold to investors who are not intended to occupy the units themselves but rather rent the units out to tenants. There has been a change of policy and the programme has now taken the position that registration is required. The companies take the position that they are not covered by the Act because the agreements of purchase and sale under which the units are sold indicate the clear intention to provide the purchaser with a tax shelter investment and under no circumstances will a purchaser ever occupy a unit on closing. Units will be rented since should a purchaser occupy his or her unit then the tax benefit would be lost and the whole intent and purpose of the agreement of purchase and sale would be nullified.

Notwithstanding that the purchasers did not intend to occupy the units themselves, but to rent them, Holland J. concluded that the Act applied. The agreements did not preclude the purchasers from occupying the units themselves.

In May 1989, the question of the applicability of the Act was put before Steele J. in *Ontario New Home Warranty Program v. Marchant Building Corp.* (1989), 68 O.R. (2d) 577, 4 R.P.R. (2d) 164 (H.C.J.). This was an application by the Ontario New Home Warranty Program for a declaration that Marchant (and another, Platinum I Property Limited Partnership) is acting or has acted as a vendor or builder without being registered, contrary to s. 6 of the Act, and to direct them to comply with the Act.

Steele J., although agreeing with the conclusions reached in the White Oaks application, noted at p. 578 O.R., pp. 165-66 R.P.R., that in that case:

. . . the purchasers were directly buying an undivided interest of the beneficial ownership of the land with a clear statement that they were not to be deemed a limited partnership.

The present case involves an ingenious tax-driven investment scheme relating to the building of condominium units. This scheme provides for an investor to subscribe for one or more "interests" in a project and become a limited partner in the entire project in accordance with an offering memorandum prepared pursuant to the Securities Act, R.S.O. 1980, c. 466.

The focal point of the application was whether the subscription agreement involved a sale. The investment scheme included the following elements: the number of "interests" is equal to the number of condominium units; a specific unit is allocated to each interest at a price specified; the price varies according to the size or desirability of the unit; ownership of an "interest" entitles (but does not oblige) the investor to exchange his "interest" for actual title to his allotted unit after the condominium corporation has been rejected and after such unit has been leased to tenants.

Steele J. concluded that the limited partnership was a "vendor" (as defined in s. 1(n)) and the subscriber was the "owner" (as defined in s. 1(g)), at pp. 579-80 O.R., pp. 167-68 R.P.R.:

In the present case, Marchant Building Corporation is the builder under a contract with the limited partnership.

In my opinion the investor is an "owner" under the Act if the limited partnership is a "vendor". Whether or not the unit is occupied by a tenant before he acquires title is immaterial: see the White Oaks case. He has entered into an agreement that gives him the right to acquire title and therefore the agreement itself falls within the definition of "sell". He becomes the beneficial owner the moment he signs the subscription agreement to acquire his "interest".

The limited partnership has title to the project. When the subscriber paid for his "interest" he became one of the partners owning the project. However, the agreement also provides for the transfer to him of a specified unit. In my opinion, this was a sale by a vendor. The limited partner was the "vendor" and the subscriber was the "owner" within the meaning of the Act. A partnership can "sell" a home to one of its individual partners. That is what is provided for in this case.

For these reasons it is declared that each of the respondents in the O.N.H.W.P. application is acting as a "vendor" or "builder" without being registered, contrary to s. 6 of the Act, and they are ordered to comply with the provisions of the Act, including not building until they have so complied.

The judgment of Steele J. was set aside by the Ontario Court of Appeal by its judgment delivered for the court by Carthy J.A. on February 11, 1991: *Ontario New Home Warranty Program v. Marchant Building Corp.* (1991), 1 O.R. (3d) 513, 15 R.P.R. (2d) 113. Leave to appeal therefrom was refused by the Supreme Court of Canada, October 17, 1991.

As noted in the Ontario Reports headnote, the central issue concerned the definition of "sell" in s. 1(1) of the Act.

At pp. 519-20 O.R., p. 120 R.P.R., Carthy J.A. states his conclusions:

In my view, Steele J. was right to look to the essence of the transaction to determine if this was an agreement to sell, but was wrong in concluding that the investor "becomes the beneficial owner (of the unit) the moment he signs the subscription agreement".

The subscription is to an interest in a limited partnership. There is no unit of real estate to which the agreement could attach. It contemplates the creation of a unit at some date in the future and even the right to an interest in the unit is postponed by two conditions outside the control of the investor -- registration and rental. The option to obtain title to the unit only becomes an interest in land when the conditions are met. The interest of the investor after that time is irrelevant because, one of the conditions being previous occupancy, the Act, by its terms, would have no application.

In the application before me, one of the arguments of the respondent Program is that the facts in Marchant are significantly different in that it was a term of the subscription agreement in Marchant that transfer to an investor who exercised the right to take title to the condominium unit must be deferred until the unit had been let to a tenant, but that that constraint was not found in the Brownstones offering memoranda. Therefore, the respondent argues, the Court of Appeal judgment in Marchant does not apply.

The applicants take issue with the factual premise from which this argument proceeds, arguing that the arrangements programmed in the offering memoranda make it implicit that the tenant becomes involved in the physical completion of the unit before registration under the Condominium Act.

I think it is unnecessary for me to attempt to resolve this particular issue. It is clear that the arrangements in both Marchant and Brownstones have in common that the investor subscribes for, or agrees to buy, an interest in the limited partnership, before registration under the Condominium Act and, therefore, before the unit has come into existence as a transferable interest in land.

The judgment of the Court of Appeal, accordingly, is that signing the subscription agreement does not make the investor the beneficial owner of the subject unit. There is, therefore, not a sale, and the limited partnership is not a "vendor", until the investor has signified his intention to exercise the option to purchase which he gets as the holder of an interest in the limited partnership. In addition, the sale could not be accomplished until the two necessary conditions were met: registration of the unit and its rental.

The effect of the judgment would be no different if only one condition were required to be met, instead of two. Absence of registration is by itself sufficient to prevent a sale occurring.

On the facts in the Brownstones projects, and on the principle stated by the Court of Appeal, there was no sale resulting from the investor's acquisition of an interest in the limited partnership. The limited partnership did not thereby become a vendor.

Another argument put forward by the respondent Program is that the builder, the Brownstones Building Corporation, comes squarely within the Act, and is required to register.

In the course of his reasons for judgment, Steele J. observed that "Marchant Building Corporation is the builder under a contract with the limited partnership" (p. 579h O.R., p. 167 R.P.R. (H.C.J.)). In its factum on the appeal the respondent mentioned this as an additional issue, but the subject was not adverted to in the judgment of the Court of Appeal. This may be explained by the fact that in Marchant construction had not begun (see p. 515h O.R., p. 116 R.P.R. (C.A.)).

The subscription agreement not being a sale or an agreement to sell the unit, the limited partner was not a "vendor". Hence, Marchant Building Corporation, although a builder under a contract with the limited partnership, does not fit the Act's definition of "builder" in s. 1(a) unless, alternatively, the limited partnership fits the definition of "owner". The construction not having commenced, difficulty stands in the way of bringing the limited partnership into the s. 1(g) definition of owner: "a person who first acquires a home from its vendor". However, when the home is built, the limited partnership does fit the definition of "owner".

In each of the three Brownstones projects the respective limited partnership is the owner of the site on which the condominium building is built. The BBC, as its president, John M. Ryan confirmed on cross-examination on his affidavit, "builds . . . or contracts to build the building".

130.

Q. Right. And it makes a profit, I take it, when it builds these projects?

A. Hopes to. It's not always the case, as I'm sure you're aware.

131.

Q. But, essentially, that's why it's involved in this project? To build and make a profit, like any other builder?

A. That's correct.

As has been mentioned the definition of "vendor" in s. 1(n) of the Act "includes a builder who constructs a home under a contract with the owner".

The Act's definition of "home" under s. 1(d) includes "a condominium dwelling unit, including the common elements".

The definition of "owner" under the Act is narrower than the ordinary meaning of "owner", in consequence of the particular purposes of the Act, directed to "new homes". As mentioned above, therefore, "owner" means a person who first acquires a home from its vendor for occupancy (s. 1(g)).

It would follow, from those definitions, that under the Act the BBC is a vendor, being the builder who constructs the home for the owner, the limited partnership, who first acquires the home from the vendor/builder for occupancy.

The words "for occupancy" in s. 1(g) were the subject of comment by R.E. Holland J. in *White Oaks*, supra, at p. 365 O.R., p. 190 R.P.R.:

I do not understand why the words "for occupancy" were included in the definition of "owner" since it surely would be unusual for a person to acquire a home for anything other than occupancy. These particular homes will be occupied presumably by tenants. If the term "occupancy" was intended to be limited to occupancy by the owner, then the words "by the owner" could have been added.

I would adopt the reasoning of R.E. Holland J. on that point, and I am brought to the conclusion on the facts here that the BBC is a "vendor" under the Act and, under s. 6, required to register.

Registration of builder/vendors is a mechanism by which major objectives of the Act may be achieved: examining the builder's technical competence to consistently perform the warranties under s. 13 as well as its financial responsibility, integrity and honesty. The provisions of the Act relating to deposits would have little or no application on the facts here, but the security called for would be referable to warranty matters.

Here, where the buildings have apparently been completed and occupied for some time, there would appear to be no practical need to continue to hold the full security, providing, as seems likely, the buildings will be approved on inspection.

Indeed, the applicants' material includes a letter from Carol A. Street, counsel for the Program, to Mr. Hood, June 26, 1991, suggesting that arrangements be made for a Warranty Program Inspector to carry out an inspection of the projects "to determine whether we have any concerns with respect to our warranty liability. If there are no such concerns, the Warranty program may be

prepared to release a substantial portion if not all of the security". Ms. Street prefaced that suggestion with the statement: "It may be that we can deal with the release of security without finally determining, at this time at least, the question of the applicability of the Act to these projects".

Regrettably, Mr. Hood rejected Ms. Street's offer in his reply letter, July 8:

. . . our clients take the position that they are not part of the Program and are not subject to it. We will not allow any inspector to carry out an inspection. Allowing any inspection would be an acknowledgment that the Program applies and as this is clearly not the case, our client is not prepared to submit to any such inspection.

It is to be hoped that an inspection can now be made, which can reasonably be expected to have the beneficial result of freeing part or all of these security deposits from the limbo in which they have languished for so long.

The application is dismissed, with costs. In accordance with recent practice I fix the costs in the sum of \$4,000, but reserving to the parties the right, to be signified within three weeks from the date of release of these reasons, to have the costs assessed, instead of accepting the figure fixed by me. If the applicants wish to avail themselves of the assessment process they shall accompany their notice thereof with payment of the \$4,000 to the respondent who shall make the appropriate refund if costs are assessed at less than \$4,000.

Application dismissed.

CBR# 377

York Condominium Corporation Nos. 216 and 229 et al. and Metropolitan Toronto Condominium Corporation No. 624 et al. v. Dudnik, Likhterman et al., Cryderman et al., Ramdial and Salmon et al.

3 O.R. (3d) 360

Action No. 753/90 Ontario Court (General Division), Divisional Court Carruthers, Watt and Davidson JJ. April 26, 1991

APPEAL from a decision of a Board of Inquiry under the Human Rights Code, 1981.

Michael A. Spears, for York Condominium Corporation Nos. 216 and 229, appellants.

Howard W. Winkler, for York Condominium Corporation No. 624, appellant.

M.D. Lepofsky, for Attorney General of Ontario.

David C. Moore and John M. Rattray, for Ontario Human Rights Commission.

Charles M. Campbell, Mary S. Truemner and Sheena S. Scott, for Lana Salmon, respondent.

The judgment of the court was delivered by

CARRUTHERS J.:-- This is an appeal pursuant to the provisions of s. 41(1) of the Human Rights Code, 1981, S.O. 1981, c. 53, as amended (the Code). The decision appealed from is one of a Board of Inquiry (the Board) appointed under the Code. The decision is dated June 20, 1990 and it followed a hearing which took place over a period of one year, ending June 15, 1989.

The Board was appointed to deal with five complaints which had been filed with the Human Rights Commission (Commission) pursuant to the provisions of the Code. It is common ground between the parties to this appeal that all of the issues raised by each of the complaints are basically concerned with the enforceability of certain restrictions or policies of the appellants. Generally speaking, during argument, these restrictions or policies were referred to as "adult only restrictions". There is no dispute that their effect or object is to prevent persons of specified ages, all under 18 years, from residing in the building or buildings which the appellants owned at the relevant times.

With the exception of the appellant York Condominium Corporation No. 229 (229) the restrictions are all found in declarations registered on title to the lands and premises in question pursuant to the provisions of the Condominium Act, R.S.O. 1980, c. 84. Insofar as York Condominium No. 216 (216) and Metropolitan Toronto Condominium Corporation No. 624 (624) are concerned, their declarations set the age at 14 years and 16 years respectively. For 229 there was a policy in place which required all residents to sign a written declaration that no person under the age of 16 years would reside in a unit which had either been purchased or leased by the declarant. Condominium Corporation No. 551, in whose building the complainant Kogan resided, did not appeal from the Board's decision.

Prior to December 1986 the combination of s. 2 [am. 1986, c. 64, s. 18(2)] and s. 20(4) of the Code expressly permitted such restrictions or policies to be enforced without constituting, under the Code, an infringement by discrimination on the ground that accommodation in buildings of the type in question was restricted because of "family status". Section 20(4) was repealed in December 1986 [S.O. 1986, c. 64, s. 18(14)] after lengthy hearings before a committee of the legislature. This change has given rise to the events about which we are now concerned.

Of the five complaints which were before the Board, three were made by persons who, up to December 1986, had resided in one of the appellants' several buildings with children under the age designated in either the registered declaration or that executed by the adult resident. This appeal only concerns two of them, the respondent Constance Cryderman (Cryderman), and the respondent Flora Dudnik (Dudnik). The other two complaints concern two other respondents, Lana Salmon (Salmon) and George Ramdial (Ramdial).

On October 16, 1987 they entered into a written agreement of purchase and sale whereby Salmon agreed to pay Ramdial \$133,000 for his condominium unit in one of the buildings owned by 624. Shortly before that transaction was to close on December 1, 1987, a representative of 624 learned of Salmon's intention to reside in that unit with her 13-year-old son Kwame. Efforts were then made on behalf of 624 to have the enforceability of its restriction determined through an application under s. 49 of the Condominium Act and as well to discourage if not prevent Salmon from moving into Ramdial's unit with her son.

The end result of all that which was done on behalf of 624 was that Salmon refused to complete her transaction with Ramdial, preferring instead, to continue to live with her sister as she had done for some short period of time before entering into her agreement with Ramdial. She obtained a release from Ramdial discharging her from any obligation to complete her transaction and Ramdial then re-sold the unit two and one-half months later for \$143,000.

With respect to the other two complainants, Cryderman and Dudnik, efforts were also made to discourage them from continuing to reside in their respective buildings with their children who were under the age specified in the applicable restrictions or policy. Cryderman resisted these efforts and continued to live in her unit with her child beyond a time when the child had attained an age which did not violate the policy of 229. Dudnik eventually moved rather than to continue to resist the efforts of 216 to have her and her family leave the premises.

The Board concluded that the rights of all five complainants had been infringed by the appellants and as well certain of their respective directors, officers and employees. No appeal has been taken on behalf of these individuals. Accordingly, this appeal only concerns the finding of infringement on the part of 216, 229 and 624 and the remedies granted against them as a result. According to the written reasons, the decision of the Board that the rights of the complainants under the Code had been infringed was founded upon three different grounds. The first is that the conduct of the appellant corporations was in breach of the complainants' rights obtained under ss. 2(1) [am. 1986, c. 64, s. 18(2)], 3 [am. 1986, c. 64, s. 18(3)] and 8 of the Code. These sections read as follows:

2.(1) Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, handicap or the receipt of public assistance.

3. Every person having legal capacity has a right to contract on equal terms without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap.

8. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

The second ground is what is referred to in the Board's written reasons as "age discrimination". This is derived from the combination of the provisions of s. 9(1)(a) of the Code and ss. 1 and 15(1) of the Canadian Charter of Rights and Freedoms. Those sections read respectively as follows:

Human Rights Code, 1981

9.(1) In Part I and in this Part,

(a) "age" means an age that is eighteen years or more, except in subsection 4(1) where "age" means an age that is eighteen years or more and less than sixty-five years ...

Canadian Charter of Rights and Freedoms

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The Board concluded that the definition of "age" found in s. 9(1)(a) of the Code is unconstitutional as being contrary to s. 15(1) of the Charter and not saved by the provision of s. 1 thereof.

The third ground upon which the Board reached its conclusion that rights of the complainants had been infringed is found in s. 10 [rep. & sub. S.O. 1986, c. 64, s. 18(8)] of the Code. The provisions of this section are apparently considered to create "constructive discrimination". That section reads as follows:

10.(1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

(a) a requirement, qualification or factor is reasonable and bona fide in the circumstances; or,

(b) it is declared in this Act, other than in section 16, that to discriminate because of such ground is not an infringement of a right.

(2) The Commission, a board of inquiry or a court shall not find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

(3) The Commission, a board of inquiry or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship. As a result of its conclusion that there had been an infringement of rights provided under the Code, the Board, as remedies therefor, assessed what it called "damages" in favour of each of the complainants and their respective children named in the complaints. As well, the Board granted certain declaratory relief, including a requirement that the impugned restrictions be removed from those declarations registered on title.

The appellants dispute all aspects of the Board's decision but primarily the finding of infringement on any of the three grounds aforesaid. It is said on behalf of the appellants that the restrictions requiring "adult only" residents does not offend "family status" because they are only concerned with age. And while they agree that the provisions of s. 15(1) of the Charter are infringed on this basis because of age, the appellants maintain that their respective restrictions or policies are saved by the provisions of s. 1 of the Charter. It is also maintained on behalf of the appellants that the same reasoning applies to the provisions of s. 10 and therefore it is not violated by their restrictions or policies.

The term "family status" is defined s. 9(1)(d) of the Code as follows:

9.(1) In Part I and in this Part,

(d) "family status" means the status of being in a parent and child relationship ...

In denying that their restrictions or policies offend the prohibition against discrimination on the basis of family status, the appellants rely to a large extent upon the decision of the Divisional Court in *Royal Insurance Co. of Canada v. Ontario (Human Rights Commission)* (1985), 51 O.R. (2d) 797, 12 C.C.L.I. 297, 8 C.H.R.R. D/3908, 21 D.L.R. (4th) 764, [1985] I.L.R. Paragraph 1-1944, 12 O.A.C. 206. In that case the court was concerned with the application of ss. 3 and 8 of the Code to the manner in which the premiums payable for standard automobile policies of insurance had been set in situations where the insured motor vehicle was to be operated by an individual under the age of 25 years. The complaint which the court was there considering alleged that the insurer had violated ss. 3 and 8 of the Code by denying the complainant "the right to contract on equal terms without discrimination because of the sex and marital status of my son and because of our family status" [p. 799 O.R.]. The complainant had paid an additional premium because his 16-year-old son was intended to be an occasional driver of his motor vehicle.

The court there, in a judgment given by Montgomery J., was able to decide the appeal on the basis of a conclusion that the provisions of the Code could not be applied retroactively "to an event that occurred prior to its enactment, namely, the entering into of an automobile insurance contract" [p. 799 O.R.]. Having said that, Montgomery J. went on to deal with the second ground of appeal and in so doing, at p. 800 O.R., says:

Although my finding on the first issue is sufficient to dispose of the matter, I will briefly consider the second. Mr. Hope alleges an infringement of his right to contract on equal terms without discrimination because of his "family status". "Family status" is defined as "the status of being in a parent and child relationship". The Board found that "family status" as a ground of discrimination extends to the age, sex and marital status of a particular child. It is that portion of the judgment that the appellants in this case specifically rely upon in asking that the Board's decision be overturned insofar as it is based upon "family status" and not "age". In my view, that obiter dicta of Montgomery J. does not support this position of the appellants, particularly when the circumstances of that case are compared to those of the present.

The relationship of parent and child can be involved in a situation where a higher premium is charged for an insurance policy because of the age of a proposed driver of the insured motor vehicle. However, any discrimination which may arise from that situation is not because of that relationship. The family as a unit is not disturbed and, in fact, the motor vehicle itself remains available to be used by or on behalf of all its members. Those who are in the family and are under the specified age and who intend to operate the motor vehicle can affect the insurance coverage if the additional premium is not paid. That is the only effect of the practice.

In circumstances such as those which exist in the present case, while the restriction or policies in question can apply to individuals not in a parent/child relationship, because they are only concerned with accommodation it is bound to be otherwise in most instances. And the discrimination which follows their application, of necessity, in this situation, is directed at and does affect the "family status". Such restrictions and policies are aimed at preventing children under the specified age from residing with their parent or parents in the latter's choice of accommodation.

In my opinion, the right which Cryderman, Salmon and Dudnik each had to equal treatment with respect to the occupation of accommodation without discrimination because of "family status" as provided for in s. 2(1) of the Code was infringed. Accordingly, to the extent that it reaches this conclusion I agree with the decision of the Board. And I also agree with the position of counsel for the Ministry of the Attorney-General on this appeal. Having reached this conclusion, it is not necessary for me to deal with the position of the Board insofar as it found that the rights of the complainants had also been infringed because of either or both "age" or a violation of s. 10 of the Code.

I cannot agree with the Board that Ramdial had any right under the Code which was infringed on any of the three grounds which it found. Insofar as the Board purported to find Ramdial had been discriminated against because of family status, the Board had this to say at p. 76 of its reasons:

A common element of all the complaints is that the complainants are members of a family. (In the complainant Ramdial's case it is because the family of Ms Salmon, his prospective purchaser included a thirteen year old son that the sale was aborted). A parent and child relationship of residing together is intrinsic to the situation that triggers the differential treatment in each case. It is the fact of a child residing as a dependent with her or his parent that gives rise to the problem.

And at p. 78 the reasons continue as follows:

In our opinion, it is those people identified by "family status" who are treated unequally, being discriminated against by the "adult only" restriction and this is a prohibited ground of discrimination in contravention of the Code. Specifically, we find there is unlawful discrimination against both adult(s) and child in contravention of s. 2(1) and there is unlawful discrimination against adult(s) in contravention of s. 3.

The complaint filed on behalf of Ramdial alleges:

Discrimination because of an infringement of the right to contract on the basis of family status of another person, Lana Salmon, - without reprisal.

The Board rejected the complaint of Ramdial insofar as it concerns that allegation. It deals with a right provided by s. 7 of the Code, namely, "to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing". The Board found "no reprisal" within the meaning of s. 7. And while reaching that conclusion, the Board at p. 91 of its reasons says:

In our view, the unlawful discrimination against Ms Salmon and her son because of "family status" and "age" and the unlawful discrimination against her in respect of her right to contract because of "family status" and the "age" of her son, in breach of ss. 2(1), 3 and 8 of the Code were the source of the problem for Mr. Ramdial. Because of that unlawful discrimination, Mr. Ramdial has a complaint that is sustainable.

In my opinion the Board erred in finding an infringement of a right of Ramdial to contract because of "family status" whether that be with respect to s. 2(1) or s. 3 of the Code. There is nothing in the material or evidence adduced before the Board which warrants this conclusion. And I have the same view of the Board's conclusion that Ramdial's right to contract was infringed because of the age of Salmon's son.

I have noted above that portion of the Board's reasons found at p. 76 wherein it concludes that Ramdial's "sale was aborted" because Salmon's family included her 13-year-old son. I have some trouble with that conclusion. At least up to the time of their signing releases, it appears to me that there was an agreement which could be enforced at the insistence of either Salmon or Ramdial. As well, I think that at the time they entered into their contract, there was no restriction on the ability of either of them to do so. The fact that Ramdial may have been motivated to release Salmon from their agreement because of the difficulty she was experiencing with the representatives of 624, does not constitute a violation of any right afforded to Ramdial under ss. 2(1) or 3 of the Code.

Although the Board suggests that in upholding the complaint of Ramdial it did so on the basis of both ss. 2(1) and 3 of the Code, I think it could only have been the provisions of s. 3 that the Board had in mind. In my opinion, there is no evidence to support a conclusion that any right of Ramdial to contract on equal terms without discrimination because of "age" or "family status", as s. 3

provides, was infringed by 624 or its representatives. And it is also my view, that there is no evidence to support a conclusion that Ramdial's right to "equal treatment with respect to occupying of accommodation" because of any of the grounds specified in s. 2(1) was infringed.

As I have concluded, the right of Salmon which was infringed by 624 and its representatives is her right to have "equal treatment with respect to the occupying of accommodation". What she lost as a result of that infringement was the ability to have her son, aged 13, reside with her on the premises which she chose to purchase through her agreement with Ramdial. The decision which Hudson J. reached in the application brought by 624 under s. 49 of the Condominium Act was not in her favour and her effort to appeal that decision was quashed. I do not think she can be blamed for wanting to walk away from the situation given the attitude and outlook of 624 and its representatives. But her position does not create a right for Ramdial nor an infringement of any right of his.

In this respect, during the course of argument, and almost in passing, counsel for the Commission suggested that if Ramdial was found to have no right under either s. 2(1) or s. 3 which had been violated, perhaps one could be found in s. 11. This section reads as follows:

11. A right under Part I is infringed where the discrimination is because of relationship, association or dealings with a person or persons identified by a prohibited ground of discrimination.

This section was neither dealt with nor referred to by the Board in its reasons and, except as I have indicated above, was not raised by the parties on this appeal. Counsel for the appellants had no opportunity to deal with the suggestion of counsel for the Commission. At this time, given these circumstances, it will suffice if I simply say that in my view Ramdial's situation does not fall within the provisions of that section, because he was not the object or subject of discrimination. I have concluded that no right of his under the Code was infringed by reason of his entering into the agreement with Salmon. And I do not believe that there has been any discrimination against him by reason of that which has been found against Salmon and her son.

In my opinion then, the Board erred in finding that Ramdial had a right under the Code which had been infringed. On the other hand, as I have noted, I think that Board was correct in concluding that the rights afforded to the other complainants under s. 2(1) of the Code were violated. This leads me, then, to a consideration of the remedies which the Board granted to them as a result of this conclusion.

The Board's power to grant a remedy under the Code is found in s. 40(1)(a) and (b). It reads as follows:

40.(1) Where the board of inquiry, after a hearing, finds that a right of the complainant under Part I has been infringed and the infringement is a contravention of section 8 by a party to the proceeding, the board may, by order,

(a) direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices; and

(b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding \$10,000, for mental anguish.

At the outset of that portion of its reasons which deals with the matter of remedies, the Board says:

There is a presumption in favour of making an award of special and general damages in human rights cases. The principles to be applied in awarding damages under the Code have been set forth in *Nel-Gor v. Cameron* supra at D/2196, paras. 18525 to 18534, 18537 to 18541, and 18544 to 18561.

The Board is there referring to a previous decision of another board of inquiry, of which the chairman of the present one was involved, and in which the same statement is made. At a later point in its reasons, the board also states that it is able to grant punitive damages under the Code.

I am not at all certain that "monetary compensation, for loss arising out of the infringement" should either be characterized as special, general or punitive damages, or awarded as such. I know that Laskin C.J.C., in a decision of *Seneca College of Applied Arts & Technology v. Bhaduria*, [1981] 2 S.C.R. 181, 14 B.L.R. 157, 17 C.C.L.T. 106, 2 C.H.R.R. D/468, 81 C.L.L.C. Paragraph 14, 117, 22 C.P.C. 130, 124 D.L.R. (3d) 193, 37 N.R. 455, at p. 194 S.C.R., p. 203 D.L.R., parenthetically noted that compensation available as a remedy under an earlier version of the Code was "damages in effect". But in that case Laskin C.J.C. also recognized that an infringement under the Code does not give rise to a cause of action for damages in a civil proceeding. That being the law, then it seems to me only reasonable to conclude that an inquiry under the Code cannot take the place of a civil action for the purpose of obtaining an award of damages otherwise due under the common or civil law.

It has been said that in order to be proper, monetary compensation awarded under the Code must "flow directly from the denial or discriminatory act": see a decision of this court, *Scott v. Foster Wheeler Ltd.* (1987), 16 C.C.E.L. 251, at p. 255. As well, I think it can be said that a remedy granted under the Code must reflect its scope and intent. And I also believe that, in the event it is deemed necessary in order to arrive at a proper award under the Code to mirror an assessment of civil damages, regard should be had for all the relevant principles found in the common law.

If it is the intention of the Commission to have a board of inquiry approach the matter of remedy as an award of damages fashioned by common law principles, I think that position should be made known sufficiently far in advance of the hearing date that the parties at the hearing can govern themselves accordingly. Absent such notice or advice, it is most probable that relevant evidence will not be adduced or applicable principles not fully considered, if at all. With some reluctance I say that I think that may have happened in the present case, particularly with respect to the remedies granted in favour of both Ramdial and Salmon.

The Board purported to grant Ramdial "special damages" of \$4,000. While I have now indicated that I believe the Board erred in finding that any right of Ramdial was infringed, had I thought otherwise, I would not have agreed with such an award. It appears to me that in arriving at their conclusion with respect to that grant of "special damages" to Ramdial, the Board did so on the basis of damages being awarded for breach of contract. The chairman of the Board in the present case has correctly recognized in earlier decisions of his and which he quoted in the present case, that "principles governing assessment of damages in contract cases are not applicable in human rights cases".

But whether that amount of "special damages" was reached on the basis of breach of contract or tort, I am unable to agree that all which the Board took into account as "expenses" of Ramdial incurred as a result of "the abortive sale to Mrs. Salmon". These included the legal costs which Ramdial incurred in appearing before the Honourable Judge Hudson, as he then was. Considering the nature of that application, and its place in the sequence of events, in my view, they cannot properly fit into the picture whether one regards them as "special damages" arising in contract or tort or as a "loss arising out of the infringement" which the Board found had occurred. And in this respect it is to be noted that the Board also awarded to Ramdial "general damages" of \$1,000 "for loss of right of freedom of discrimination".

Ramdial's legal costs totalled some \$3,800 which basically represents the amount awarded to him as special damages. The Board specifically indicated that the sum of \$4,000 represented the difference between the profit he incurred as a result of re-listing the property and the expenses incurred by reason of his not completing his agreement with Salmon.

I have a similar concern for the remedy granted to Salmon. The Board's reasons in this respect are found at p. 93 of its decision and read as follows:

The Complainant, Ms. Lana Salmon, and her son, suffered considerably, because her abortive purchase came at a time of a rapidly rising market (she would have purchased her unit for \$133,000 which then sold for \$143,000 two and one-half months later) and she was unable to purchase another property, and continues to live with her sister. It is unfortunate that she did not pursue her position through the court proceedings initiated by the Respondent MTCC #624, but it was apparent from the evidence that she had very modest financial resources and was placed in a very difficult position of uncertainty of result and financial impact. The Respondent MTCC #624's actions toward Ms. Salmon had a severe economic impact upon her. The condominium corporation caused her a significant opportunity loss. Her intended purchase (see Exhibit #52) from Mr. Ramdial involved only a \$1,000 down payment and a total cash outlay of only \$13,000, the rest of the purchase price being met by a first mortgage of \$97,500 and by a second mortgage back to the vendor of \$22,500. This was an extremely opportune purchase for Ms. Salmon given her limited financial resources. Once the purchase was blocked she was effectively prohibited from getting another house. Ms. Salmon tried hard to purchase another house but was unable to do so.

The Board awarded Salmon "general damages" of \$25,000 and there is no dispute between the parties that this amount was intended to compensate her for "significant opportunity loss" due to her failure to purchase the Ramdial unit. While I accept that courts have granted damages for "loss of opportunity", I have some difficulty accepting that such a loss should be the subject of consideration by a board of inquiry appointed under the Code. But assuming that it is an appropriate subject to be dealt with by such a board, I still have difficulty accepting the result in the present case. In arriving at the amount awarded to Salmon the Board does not appear to have considered at all the effect of Salmon retaining what otherwise was to be paid to Ramdial, or the extent of the obligation to be incurred should she have completed the contract or, generally, the matters of foreseeability and remoteness. And while touched upon in evidence, there does not appear to me to have been a full consideration of matters relevant to the issues of mitigation, the alleged impecuniosity of Salmon and the crystallization date or dates to be determined in such claims.

But in my final analysis of the Board's decision insofar as Salmon is concerned, I do not think these concerns are important for my present purposes. I say this because I believe the Board erred in concluding that whatever was to be given to Salmon by way of monetary consideration under the Code flowed directly from her failure to purchase the Ramdial unit. In my opinion her loss, and I have noted this above, only arises out of s. 2(1), that is, "the right to equal treatment with respect to the occupancy of accommodation". Thus, her entitlement to monetary compensation under s. 40 is to represent her loss arising out of the infringement of that right, due to "family status". Essentially, the conduct of 624 barred her from living in the residence of her choice with her child and it is that loss which entitles her to an award of "monetary compensation" under the Code.

If her object was profit through her purchase of the unit and subsequent sale in a rising market, then she was free to complete the transaction with Ramdial. And if she had done that, then insofar as the provisions of s. 2(1) of the Code are concerned, her right would have remained. Then, if it was found to have been breached, the object of the exercise before the Board would have been to determine her loss, economic or otherwise due to her not residing in the premises she purchased with her son, or residing there but without him.

As I have noted she chose, and I have said it was reasonable for her to have done so, to walk away from her transaction with Ramdial and continue to live with her sister. Having reached that conclusion, then the question is what amount of monetary compensation should be given to Salmon for having been effectively denied the right to have her child live with her in the accommodation of her choice. Under s. 41(3) of the Code, this court is empowered to make such an award and I will do so later. I want to first, however, deal with the remedies which the Board granted to the other complainants involved in this appeal.

With one exception, with which I shall also deal later, the balance of the remedies awarded in favour of the complainants Cryderman and Dudnik, and their respective children, consist of monetary compensation to which the Board in its reasons refers as "general damages". The Board finds that because they "suffered the loss of the right to freedom from discrimination" they were entitled to an award of "general damages". I have already noted that the Board had awarded \$1,000 to Ramdial on this account.

Cryderman and Dudnik were also awarded general damages on another ground. With respect to Cryderman and her daughter, the Board in its reasons says because they "did suffer some stress for which they should be compensated by an award of general damages". And insofar as Dudnik is concerned, the Board concluded "the complainant Mrs. Dudnik moved under stress and pressure earlier than she and her husband might otherwise have done and she is entitled to an award of general damages". The amount given to Cryderman for "general damages" was \$1,000 and her daughter \$750. Dudnik received \$1,000 on this account and each of her children \$250.

To the extent that the Board purported to compensate Cryderman and Dudnik and the members of their respective families for stress, I have some concern. As can be seen from above, s. 40(1)(b) states: "where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding \$10,000, for mental anguish". The Board concluded that those words "provide for what is, in effect, punitive damages". As support for that proposition, the Board again turns to an earlier decision of its chairman.

Given the definition of punitive damages as found in the decision of the Supreme Court of Canada in *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085, 36 B.C.L.R. (2d) 273, 42 B.L.R. 111, 25 C.C.E.L. 81, 90 C.L.L.C. Paragraph 14,035, 58 D.L.R. (4th) 193, 94 N.R. 321, [1989] 4 W.W.R. 218, I cannot see how such an award is authorized by the provisions of s. 40(1)(b) of the Code. As can be seen from the judgment of McIntyre J. in *Vorvis*, punitive damages are not intended to be

compensatory in nature. Thus, to my mind, on that ground alone they cannot be awarded under that section of the Code. And contrary to what the chairman suggested in that earlier decision, I do not think there is any room in any part of s. 40 for an award of punitive damages.

That section does permit compensation for "mental anguish", provided that the infringement is found to have been "engaged in wilfully or recklessly". There is no issue in the present case that the conduct of any of the appellants cannot be found to be reckless. But there is an issue as to whether it was "wilful" within the meaning of that word as it is used in s. 40(1)(b) of the Code. In this respect the Board concluded, "the respondents all acted intentionally in enforcing the 'adult only' restriction so that, in our view, they acted wilfully within the meaning of s. 40(1)(b)". But, notwithstanding this conclusion, the Board decided "given all the circumstances we are of the opinion that we should not award punitive damages under s. 40(1)(b)".

Accordingly, while it purported to be able to award punitive damages on the basis that the concluding lines of 40(1)(b) "provided for what is, in effect, punitive damages", it did not do so. With respect to the complainants Cryderman and Dudnik, the Board determined that each of them, and certain of their children, were entitled to an award of general damages for "stress" or "stress and pressure", both, I assume, are mental in nature.

To my mind mental stress is a form of mental anguish or, perhaps more appropriately a condition that comes within or is covered by the term "mental anguish". Accordingly, if I am correct in this assumption, in order to grant compensation for "stress", there must be a conclusion that the conduct of the appellant was "wilful". Although the Board found this to be the case, I am not certain that it considered stress to be related to "mental anguish" as I have said it is. While it is the Board's view that the concluding lines of s. 40(1)(b) provide for what is "in effect punitive damages", they also specifically allow an award for "mental anguish". It is not clear to me, then, the basis upon which the Board decided to allow compensation to Cryderman or Dudnik for "stress".

At this point I should say that during the course of argument, Watt J. allowed that it would be reasonable to consider stress as being included in "mental anguish" for the purposes of s. 40(1)(b). Otherwise, as he suggested, there would be no limit to compensation for stress but a limit of \$10,000 for mental anguish. I agree with this observation. If the Board reached its decision on the basis that stress was something separate and apart from "mental anguish", then in this respect I think it erred.

Section 40(1)(b) does not allow an award of monetary compensation for mental anguish unless "the infringement has been engaged in wilfully or recklessly". The question then remains as to whether, on the basis of the material and evidence before it, the Board was able to correctly conclude that the infringement "has been engaged in wilfully" by the appellants.

For the purpose of its decision the Board concluded that "the phrase 'wilfully' as viewed in s. 40(1)(b) means 'intentionally', 'knowingly' or 'deliberately' ". And having said that, the Board went on to conclude, as I have already noted, that "the respondents all acted intentionally in enforcing the 'adult only' restrictions so that in our view they acted wilfully within the meaning of s. 40(1)(b)".

To the extent that the Board appears to treat "wilfully" and "intentionally" as being synonymous, I cannot agree. In my opinion, while the act upon which it is founded must be intentional, the infringement must be the purpose of that act in order to be wilful within the meaning of s. 40(1)(b). I do not think that the circumstances of this case permit that conclusion.

In declining to award "punitive damages" the Board said at p. 99 of its reasons:

In the instant situations, the respondents were dealing with an uncertain issue, involving new legislation, on the advice of counsel, and with some support for their position through the court applications taken. In all the circumstances, we are of the opinion that we should not award punitive damages under s. 40(1)(b).

I think what the Board said in that respect supports my conclusion that those responsible for conducting the affairs of the appellants did not have their minds directed towards discrimination against the complainants. Rather, they were completely caught up in the determination of the enforceability of their outstanding restrictions or policies. I think what the Board said above recognizes this as having been the case. And in doing so it failed to include in those circumstances the fact that the Honourable Judge Hudson, as he then was, upheld the position of the appellants.

In my opinion, therefore, none of the complainants are entitled to an award of monetary compensation on account of mental anguish or stress. But each of them is entitled to some award of monetary compensation for "loss arising out of the infringement" of their respective rights as found in s. 2(1) of the Code. Insofar as Cryderman and Dudnik and their respective children are concerned, I have outlined above what amounts the Board awarded to each of them. In that the Board appears to have allowed for an element of stress in arriving at those figures, and because I have now concluded it was not entitled to do so, strictly speaking, some reduction should be made on that account. However, given the size of the amounts in

Board made such an allowance for each of the complainants, and their respective children, I do not intend to change the amount of their respective awards.

The question and my inability to determine the extent to which Insofar as Salmon and her son are concerned I cannot conclude that their respective positions should be looked upon as being any different from the other complainants for the purpose of determining the amount of monetary compensation to which each of them is entitled by reason of their losses arising out of the infringement they suffered under s. 2(1) of the Code. Accordingly on this basis I award Salmon \$1,000 and her son \$500.

I have some concern as to the authority of the Board to have directed the amounts due to the children of the complainants be paid to the adults as "their respective guardians". I can see nothing from the material which warrants a different approach being taken from that which follows in civil actions where damages have been awarded to an infant. In those situations the monies which are due to an infant are paid into court pending the attainment of his or her majority, unless because of circumstances which have arisen in the interim, the court otherwise orders. Here there are no such special circumstances which have been brought to the attention of this court and in fact none of the counsel raised a concern about this matter of direct payment to the parents of the infant complainants.

The appellants challenge that part of the Board's decision which is as follows:

(1) The said Respondents shall cease and desist forthwith in discriminating because of family status and age in the occupancy of accommodation and in contracts made with adults in respect thereof pertaining to any building of the Respondent Metropolitan

Toronto Condominium Corporation No. 624 and shall cause the Respondent Metropolitan Toronto Condominium Corporation No. 624's corporate declaration, by- laws, rules and policies to conform, and shall administer them in conformance, with this Order ...

Counsel for the appellants suggest that the Board had either no jurisdiction to make that part of its order or, in any event, should not have done so in light of the provisions of the Condominium Act which relate to the matter of declarations. In my opinion the Board had the jurisdiction under s. 40(1)(a) to make that order and I see nothing wrong with their having done so keeping in mind the scope and intent of the Code.

Accordingly, this appeal is allowed insofar as it relates to the complaint of Ramdial, and the remedy granted to Salmon and her son. Otherwise it is dismissed. Success having been divided and because I am not able to determine whose result is more substantial, I think it appropriate that there be no order as to costs on this appeal. An order may issue accordingly.

Appeal allowed in part.

CBR# 022

Re Albrecht et al. and Opemoco Inc. et al.*

70 O.R. (2d) 151 [1989] Action No. RE770/89 [Supplementary reasons found at: 70 O.R. (2d) 221]

ONTARIO High Court of Justice Rosenberg J. September 25, 1989.

APPLICATION by purchasers of condominium units to recover overpayments of occupancy charges and interest on interest on deposits.

Jonathan H. Fine and J.J. Roy, for applicants.

Gary M. Caplan, for respondents.

ROSENBERG J.:--

NATURE OF APPLICATION

The applicants are purchasers of various units in a condominium project developed and sold by the respondents. The respondent McKeon was the solicitor for the developer and the claim against him has been settled, as have many of the other items in the original application. The remaining issues can be summarized as follows:

(1) The applicants, as purchasers, occupied the units prior to the registration of the project as a condominium. They were charged occupancy charges during the period until registration and until they closed the purchase by receiving a deed and paying the balance of the purchase moneys. They allege that the amount charged to them for occupancy was contrary to the Condominium Act, R.S.O. 1980, c. 84, and are asking for a rebate of the overcharge.

(2) As required by the Condominium Act, each purchaser received credit for interest on the amount that they paid as a deposit from time to time prior to occupancy of the unit. They did not receive the interest, however, until the statement of adjustments on closing. They allege that the interests either should have been paid at the time of taking occupancy or that this interest should be treated as a further deposit and interest should have been credited to them on account of this "further deposit" as the Condominium Act required during the interim occupancy period on all deposits held by the declarant.

(3) The applicants ask for a declaration that all moneys found to be owing to them are trust moneys. I discussed with counsel for the applicants the ramifications of such a finding and was satisfied that, as between the parties to this application, such a finding had no practical significance. The real issue would arise if any judgment obtained could not be collected because of the financial position of the respondents. In such a case, there might be an issue with regard to the directors and officers of the respondents or with regard to other creditors whether the moneys were trust moneys. I suggested to counsel for the applicants that this issue was better reserved for a time when the parties involved were known and when the circumstances could be disclosed to the court. The actual treatment of the funds whether they were deposited in a separate account or otherwise might be relevant, and there was no evidence in this regard before me. Also, it would be appropriate that the other parties involved, such as directors, officers and creditors, be notified of a proceeding on this issue and be entitled to make representations. Counsel for the applicants adopted my suggestion and that issue was not dealt with.

I Payment of a portion of the occupancy charges History

Since the first Condominium Act in Ontario, there has always been a provision that the project could not be registered until an architect certified that the project was substantially complete. This gave rise to a problem in that very often some or all of the units were fully completed and ready for occupancy for a considerable period of time prior to the registration of the declaration. The units could not be transferred until the declaration was registered. Therefore, the final closing could not take place until registration.

In order to offset some of the carrying charges of the developer for the finished units and also in order to allow the unit purchasers to move in, a practice developed whereby the unit owners were allowed to move in on payment of certain occupancy charges. Legislation was passed for the protection of the purchasers setting a limit on the amount that could be charged for this interim occupancy. Section 51(6) of the Condominium Act provides as follows:

51(6) Where an agreement of purchase and sale entered into by a proposed declarant for a proposed unit for residential purposes permits or requires the purchaser to take possession of or occupy the unit before a deed or transfer of the unit acceptable for registration is delivered to him, the money paid in respect of such right or obligation to the proposed declarant shall be not greater, on a monthly basis, than the total of the following amounts:

1. The amount of interest that the purchaser would have paid, monthly, in respect of any mortgage or mortgages he is obligated to assume or give under the agreement of purchase and sale on delivery of a deed or transfer of the unit.
2. An amount reasonably estimated on a monthly basis for municipal taxes attributable to the proposed unit.
3. The projected monthly common expense contribution for that unit.

The amounts attributable to municipal taxes or common expenses are not disputed and the issue is with regard to the interpretation of s. 51(6), para. 1 relating to the interest component of the occupancy fee. This section was discussed by DuPont J. in *Re Cadillac Fairview Corp. Ltd. and Allin* (1979), 25 O.R. (2d) 73, 100 D.L.R. (3d) 344, 7 R.P.R. 287 (H.C.J.). DuPont J. was asked to determine whether or not the section was retroactive and determined that it was not. However, in the discussion about the section DuPont J. said at pp. 76-7 O.R., pp. 347-8 D.L.R.:

Section 51 (6) of the Act was presumably enacted in light of a tendency on the part of some unscrupulous developers to charge occupation rent to purchasers before title had passed in excess of the actual costs associated with the condominium unit being sold. In the former Act, amended by 1974 (Ont.), c. 133, s. 14, which added s. 24a to the Act, s-s. (6) of s. 24a read as follows:

"24a(6) Where an agreement of purchase and sale entered into by a proposed declarant for a proposed unit for residential purposes permits or requires the purchaser to take possession of or occupy the unit before a deed or transfer of the unit acceptable for registration is delivered to him the money paid in respect of such right or obligation to the proposed declarant shall be credited as payments of the purchase price unless the agreement states that the money or any part of it will not be so credited."

Thus the former s. 24a(6) did not place any limit upon the amount of, or specify the manner of calculation of the occupation charge. The present s. 51(6) is remedial in the sense that it restricts the occupation charge to the total of three particular amounts, as set out above. However, through possible oversight on the part of the Legislature, para. 1 of s. 51(6) speaks of: "The amount of interest that the purchaser would have paid, monthly, in respect of any mortgage or mortgages he is obligated to assume or give ..." (emphasis added) and makes no mention of sales where no mortgage is to be assumed. In such a case, the purchaser cannot obtain title to the premises until registration of the declaration is made, and the developer-vendor must go on paying mortgage interest in respect of the borrowed funds associated with the subject unit. The end result in such a case is a windfall gain to the cash purchaser if he is allowed to take possession prior to closing, and a serious and unexpected loss to the developer.

This conclusion is highlighted to an even greater degree by the present case. The parties entered into the agreement when the former Act was in effect. Although no mortgage was to be taken back, the parties agreed to an occupation charge which clearly recognizes the presence of an interest element at least equal to the difference between \$836.25 and \$195.

(Emphasis added.)

The inequity referred to by DuPont J. can be demonstrated if one considers as examples purchasers A, B, C and D. Assume that all four are purchasing identical units for a price of \$250,000 each.

Purchaser A is paying \$50,000 down and giving back to the vendor a \$200,000 mortgage bearing interest at 12% per annum. He pays, and the developer receives, \$2,000 per month of occupancy as the interest component of his occupancy charges.

Purchaser B is assuming a mortgage which the developer puts on at the time of closing in favour of Sun Life for \$200,000 bearing interest at 12% per annum. The interest component of his occupancy charge is again \$2,000 per month.

Purchaser C has arranged his own mortgage with the Great West Life which is put on at the time of closing for \$200,000 at 12% per annum and he pays nothing as the interest component of his occupancy charge. The developer, who has supplied the identical unit and has the same carrying costs in connection with the unit, received nothing from this purchaser and the purchaser has a substantial windfall as a result of his being ingenious enough to arrange his own financing rather than relying on the developer.

Purchaser D is wealthy and does not wish to have a mortgage on the unit and arranges to purchase for all cash. He pays no interest component of the occupancy charge and the developer again suffers the loss of \$2,000 per month revenue.

In order to avoid this loss of revenue, developers have commonly relied on a scheme of requiring what has been known in the trade as a "phantom mortgage". A typical contract using the "phantom mortgage" would require the purchaser to give back to the vendor a first mortgage bearing interest at the rate of 12% per annum for \$200,000 running for a period of 60 days, during which time in order to pay off the mortgage the purchaser would have to arrange his own financing. Often the lending institution would have been arranged by the developer, but in order to comply with the wording of the section the "phantom mortgage" would cover some interim period before the lending institution mortgage went on the property.

The issue to be determined in this application is whether the particular provisions of the purchasers' contracts were such as to entitle the developer to charge the interest component of the occupation charge. Some of the facts with regard to this particular transaction are:

The respondent Opemoco prepared and used a standard form of agreement of purchase and sale in respect of all transactions. Opemoco's policy was that it would accept no amendments, nor negotiations, in respect of the terms of this standard form. Opemoco insisted that purchasers agree to give a vendor take-back (phantom) mortgage, "VTB phantom mortgage", on final closing. Purchasers who refused to give a "VTB phantom mortgage" or who challenged the validity of the "VTB phantom mortgage" were not accepted as purchasers.

The agreement of purchase and sale provided that at the final closing, as well as being required to give the "VTB phantom mortgage", all applicant/purchasers were required to deposit in escrow with the vendor's solicitor a certified cheque sufficient in amount to pay the entire principal of the "VTB phantom mortgage". In fact, at final closing, moneys in amount sufficient to pay the entire principal of the "VTB phantom mortgages" were not actually deposited in escrow with the vendor's solicitor, but were paid according to the direction of the vendor (i.e., part to Montreal Trust to discharge the construction financing loan, and the balance to Opemoco Inc. and James D. McKeon).

The provision in the agreement read as follows:

The Vendor shall be under no obligation to complete the sale of the Unit unless the Purchaser shall have first deposited in escrow with the Vendor's solicitor a certified cheque sufficient in amount to pay the entire principal balance of the VTB mortgage. It is understood that such certified cheque is to be applied by the Vendor's solicitor to discharge the VTB mortgage at any time after the closing date upon demand by the Vendor. If the Purchaser fails to deposit the certified cheque as aforesaid on or before the closing date, then he shall be deemed to be in default under this agreement.

(Emphasis added.)

The vendor's standard form of agreement was admittedly drafted specifically with s. 51(6) in mind with a view to attempt to come within the words of s. 51(6) in order to permit a mortgage interest component of the occupancy fee to be charged to purchasers. It was always the intention of both parties that the financing would not be under the agreement of purchase and sale, but from an outside source. One of the items on the check list required the sales agent at the time of selling the unit to obtain the name, address and contact of the purchaser's mortgage company. Such purchasers were told at the time of the signing of their agreement to arrange their own mortgage from a third party mortgagee prior to title closings so that the necessary funds would be available at title closing. In fact, the developer had one mortgage institution who was prepared to arrange mortgages on the units for purchasers who desired them. The standard agreement of purchase and sale also provided under the heading "VTB Mortgage":

If the Purchaser elects to give the VTB Mortgage pursuant to the Agreement then the provisions of this paragraph 2 apply.

(a) The VTB Mortgage shall be on the following terms and conditions:

(i) interest only;

(ii) the full amount of principal and accrued interest shall be payable by the Purchaser on the demand of the Vendor; ...

(Emphasis added.) This provision appears to allow the purchaser to elect whether or not to give back a mortgage, whereas s. 51(6) applies to mortgages that the purchaser is obligated to assume. Also, a mortgage that is payable on demand of the vendor is hardly a mortgage in the usual sense, and does not provide any financing for the purchaser even if it had not been necessary to deposit the certified cheque at the time of closing.

Prior to closing, the purchasers' solicitors in each case received a standard form letter from the vendor's solicitors which included the following statement:

On closing, I will be receiving payment of the mortgage in full as indicated on Statement of Adjustments from your client and accordingly will be giving back to you on closing a discharge of the above mortgage. In view of the fact that the mortgage will be paid off on the closing date, I will not be registering the mortgage and in turn there will be no necessity for you to register the discharge but merely to keep the same in your file. A discharge fee of \$100.00 is payable to this office covering the preparation and execution of the discharge.

The actual documentation of the mortgage and statement of adjustments were so carelessly prepared that it was obvious that the solicitors were not prepared to do the necessary work to give any appearance of validity to the "phantom mortgage" transaction. For example:

(1) The amount of the mortgage both on the draft and in the statement of adjustments was for the full purchase price without giving any credit for the substantial down payment already paid to the vendor. (2) None of the dates were filled out, except that the year 1988 had already been inserted in a number of places, notwithstanding that closing was in 1989. Neither the payment date, nor the amount of each payment were completed.

Decision

The term "phantom mortgage" may apply to a number of different types of mortgage transactions and it is not appropriate to define the term precisely in law. The so-called mortgage in this case was not really a mortgage, and therefore, the purchaser was not obligated to give a mortgage at closing as required by s. 51(6). There is no evidence that any purchaser paid any monthly interest under the mortgage and, accordingly, there is no amount of interest that the purchaser would have paid after receiving a deed or transfer of the unit as required by s. 51(6). Further, the transaction was obviously a sham that was so blatant that the section has not been complied with.

The applicants argued that this particular transaction did not comply with the section but that not all "phantom mortgages" are necessarily in breach of the section. I agree. It is not possible to lay down strict rules to determine whether or not a mortgage complies with s. 51(6). If this were done, developers would immediately try to design a transaction to come within these rules. On the other hand, it is possible to test this particular transaction even if it were fully and properly implemented, to determine whether or not the mortgage, however motivated, fell within the spirit of the section. To comply with s. 51(6) there would have to be some legitimate reason for the mortgage, not just an attempt to charge an occupancy fee at a higher rate. For example, a vendor who arranges the first mortgages to be assumed by the purchasers will not only have the expense and trouble of arranging the mortgage but may have to give a covenant to the mortgagee. A vendor who takes back a mortgage on closing will have to find the financial resources to carry such a mortgage. The Act does not appear to limit the time of the vendor take-back mortgage. If, for example, a vendor took back a mortgage for one year in order to allow the purchaser to make his own long-term financing arrangements, that would appear to comply with the section.

A vendor who by providing for a "phantom mortgage" does not perform any service for the purchaser, nor does anything that is required by the purchaser, takes no risk and does not give any real financing, should not receive the benefit of the section.

This reasoning is consistent with the reasoning in the Court of Appeal in *Re Brunott and Coolmur Properties Ltd.* (1983), 22 A.C.W.S. (2d) 509. In that case the developer had delivered a document entitled "disclosure statement", together with copies of the proposed condominium documentation, in apparent compliance with the disclosure provisions of the Condominium Act and the regulations thereto. The Court of Appeal determined that notwithstanding the fact that the document was entitled "disclosure statement", and copies of what purported to be the required documentation were delivered to the purchasers, the substance of the requirements of the Condominium Act had not been met and stated that:

The appellant contends that there was no binding agreement of purchase and sale because no disclosure statement was delivered which meets the requirements of s. 52. We agree without specifying its failure that the document was no more than a statement of intention -- a proposed statement that lacked information on specific matters the statute enumerated. Clearly the purpose of s. 52 is that the purchaser be given this information.

The authorities show a consistent determination by the court to strike down attempts to circumvent what has been found to be the clear meaning and intent of ss. 53 and 61 of the Condominium Act. It is evident that over a period of years, condominium developers have employed increasingly sophisticated means to avoid the purpose and meaning as subscribed by the court to the sections of the Act in question. It is also clear that over the years, the legislature has tightened the statutory provisions respecting interest on deposits in prepayment figures in favour of the purchasers: *Re Dunkelman and Neighbourhood Developments Ltd.*, unreported decision of Eberle J. dated August 2, 1985 [summarized 33 A.C.W.S. (2d) 288 (Ont. H.C.J.)].

Since the Condominium Act provides that the parties cannot contract out of the provisions of the Act, they similarly cannot be estopped by having closed the purchase from claiming any moneys paid in breach of the provisions of the Act.

Accordingly, there will be judgment in favour of each of the purchasers for the amounts shown at p. 65 of the applicants' factum amending the amount of the Finlay/Graham "phantom mortgage" interest to \$13,368.86 and deleting the reference to Pawlik, Unit 401. Each of the applicants shall also receive interest at the prescribed rate from January 25, 1989.

II Payment of interest charges

The second issue arises out of the following clause in the agreement of purchase and sale.

INTEREST: The Vendor agrees to pay the Purchaser interest on the deposits set out in paragraphs 2(a) and 2(b) above from the date the aggregate of said deposits equals at least 10% of the purchase price at a rate equal to the 30 day interest bearing deposit account for Montreal Trust.

Section 53(3) of the Condominium Act states:

53(3) Subject to subsection (2), where a purchaser of a proposed unit under an agreement of purchase and sale referred to in subsection (1) enters into possession or occupation of the unit before a deed or transfer of the unit acceptable for registration is delivered to him, the proposed declarant shall pay interest at the prescribed rate on all money received by him on account of the purchase price from the day the purchaser enters into possession or occupation until the day a deed or transfer acceptable for registration is delivered to him.

The applicants' argument is that the interest portion as provided in the contract payable on the deposit until possession is contractual and thereafter it becomes statutory. In effect, what the applicants are asking is that there be a stop and that the interest be calculated at the time of taking possession and that that amount be treated as a further deposit which in turn should bear interest.

In my view this argument fails for a number of reasons.

(1) The contract does not so provide.

(2) All of the purchasers have closed the purchase without objecting to this calculation and, since it is not statutory but contractual, estoppel is not ruled out by the Condominium Act and therefore the closings without objection or reservation of rights bar any claim.

(3) The practice of adjusting this interest as a closing adjustment at the time of conveyance of the property is practical and consistent with the custom of the trade.

Accordingly, this portion of the claim is dismissed.

At the request of the parties, I am making no determination of costs and if the costs cannot be settled, I may be spoken to. Costs are reserved if necessary.

Judgment accordingly.

CBR# 043

Benner et al. v. HLS York Developments Ltd.

52 O.R. (2d) 243

ONTARIO HIGH COURT OF JUSTICE CARRUTHERS J. 3RD OCTOBER 1985.

ACTION for a declaration that an agreement to purchase a condominium unit is not binding on the plaintiff and for the return of his deposit; COUNTERCLAIM for damages.

Barry A. Percival, Q.C., for plaintiff, M. Douglas Maynard.

Jeffrey S. Leon, for defendant.

CARRUTHERS J.:-- This action proceeded to trial as a contest between the plaintiff Maynard ("Maynard") and the defendant. The claims of the other plaintiffs have either been determined or deferred for determination pending the outcome of this trial.

Maynard, in this action, seeks a declaration that an agreement of purchase and sale concerning a residential condominium unit is not binding upon him. In addition, in the event that such a declaration is made, he asks that the \$35,000 deposit paid by him thereunder be returned to him by the defendant. The basis of Maynard's position is a simple one. The defendant, having failed to comply with the provisions of s. 52 of the Condominium Act, R.S.O. 1980, c. 84 ("s. 52"), in the preparation of a disclosure statement required thereunder with respect to the transaction of purchase and sale, cannot now enforce the agreement against Maynard. Maynard, notwithstanding his statement of claim to the contrary, does not rely upon any other basis for his claims. Specifically, his reliance upon s. 29 of the Planning Act, 1983 (Ont.), c. 1, was expressly abandoned at the outset of trial as being "so technical no court would likely relieve upon it". Likewise, he does not turn to the fact that several "closing dates" were set as providing any excuse for his non-performance of the agreement. His counsel, in argument, said that apart from the position which concerns s. 52 as aforesaid, the agreement of purchase and sale in question is enforceable against Maynard.

I conclude from the evidence that Maynard did not complete this transaction for any reason relevant to the issues raised in this action. The efforts on his part to suggest something different have had no effect upon me. The several statements he made in support of his claim I specifically reject. I find them all to have a strong ring of contrivance about them. To my mind, Maynard only turned to s. 52 for support because he was advised to after he became determined, for reasons which I can only suspect, to not go through with this deal. Needless to say, I do not suggest that he is not able to take the position he does. Late-blooming positions can be successfully available to either plaintiffs or defendants.

I have no hesitation in saying that it is my opinion that the defendant has not consciously intended to not comply with the provisions of s. 52, if any non-compliance is demonstrated. In my view of the evidence, the defendant has endeavoured to comply with s. 52. If it has not, its failure is not with respect to the spirit of those provisions of that Act, but only the letter. We are, therefore, involved here in an exercise to determine if the defendant unwittingly has not done all that which the letter of s. 52 demands of it.

We are specifically concerned with the manner in which the defendant prepared the disclosure statement. In the absence of the defendant delivering to Maynard a disclosure statement which in fact complies with the provisions of s. 52, Maynard is not bound by the terms of his agreement and it is not enforceable against him. Accordingly, any deposit paid thereunder, in those circumstances, must be returned: see *Re Brunott et al. and Coolmur Properties Ltd.* (1983), 22 A.C.W.S. (2d) 509, a decision of the Ontario Court of Appeal.

The Condominium Act provides that a person in the position of Maynard, that is, one who has agreed to purchase a residential condominium unit, may rescind such an agreement 10 days after receiving the disclosure statement. The effect of this provision of the Act is that the agreement is not firm until this 10-day period has elapsed. As well, and of greater significance here, is that this right to rescind remains outstanding until the vendor provides a disclosure statement which complies with the provisions of the Act. Accordingly, as I have noted above, in the absence of such a disclosure statement, Maynard can elect to rescind the agreement at any time. The fact that he did not purport to do so within 10 days of his receipt of a form of disclosure statement offered by the defendant, as is the case here, is of no moment. If a disclosure statement is found wanting so that, in effect, it is not a disclosure statement as required by the provisions of the Condominium Act, then a purchaser is at no time required to complete the transaction in connection with which it has been given.

In deciding whether a proffered disclosure statement complies with the provisions of s. 52, the court is to employ an objective standard. As counsel for Maynard said in argument, that standard is what a reasonable man in an Ontario community would think about its sufficiency. The person to whom it is given has to be able to determine what are the essential elements of what he has agreed to purchase, as the Condominium Act requires them to be given. The purpose of the relevant provisions of the Condominium Act is to permit the purchaser to be able to make an informed decision as to whether to elect to rescind or affirm the outstanding agreement of purchase and sale. In my opinion, the sufficiency or otherwise of a disclosure statement must, as well, be judged on the basis of the materiality of its content. The absence of something not material should not, in itself, in my opinion, permit a purchaser to avoid the completion of an otherwise enforceable agreement of purchase and sale. The Court of Appeal in *Brunott* did not touch upon the matter of materiality. I have read into the reasons of that court, which are handwritten and short, that the "failures" referred to therein, but not specified, were "information on specific matters" which were material to the purchaser's position allowed for under the Act. I cannot think that the Court of Appeal in *Brunott* intended that a purchaser be able to avoid an otherwise enforceable agreement only because immaterial information was not provided to the purchaser. To my mind, the provisions of s. 52(5) appear to support this position.

Counsel for the defendant relies, in part, upon s. 52(5). In my opinion, it seems to apply to a purchaser who has completed a transaction of purchase and sale of a residential condominium unit and later discovers that the disclosure statement received by him in connection therewith is wanting in some material matter required by the provisions of s. 52. I think that particular subsection intends that, after closing, a purchaser is able to obtain damages due to a failure of the disclosure statement to contain some material information or statement. The fact that that situation is recognized does not, in my opinion, permit an owner who has given a disclosure statement lacking in some material information or statement to compel a purchaser, who was aware of that fact, to close.

Before turning to an examination of the disclosure statement in question and comparing its content to that which is required under the Condominium Act, I should acknowledge my understanding that, in this respect, the provisions of the Act are remedial in nature. Accordingly, the relevant provisions of the Act must be given a "fair, large and liberal construction and interpretation as best ensures the attainment of its objects" [Interpretation Act, R.S.O. 1980, c. 219, s. 10]. The object, in so far as s. 52 is concerned, is, I think, that which counsel for Maynard said in argument: "a properly informed purchaser".

The disclosure statement in question has been drafted in such a way as to follow in order the provisions of s-ss. (6) and (7) of s. 52. In fact, it sets out headings which are made up of words or wording found in those subsections. I do not believe that it is necessary to do this in order to meet the requirements of the Act. Nor do I think that by doing so it is necessary to have contained in each paragraph all that which is required by the corresponding subsection. I think, in the final analysis, regard must be had for the whole disclosure statement. The manner in which it has, in fact, been formed in this case, if nothing else, facilitates a comparison with the provisions of the Act.

What counsel for Maynard suggests as deficiencies are found in two documents. One, dated March 7, 1983, is a letter in which particulars of the allegations are contained. It is by way of satisfaction of an order for particulars granted by Master Garfield. The second document is that which was used by counsel for Maynard in argument as an aide-memoire. I shall refer to both.

The first complaint concerns "parking". It is alleged generally that the disclosure statement fails to adequately describe and deal with the parking facilities at the condominium development in question. There are also three more specific complaints. They concern "visitors' parking", "additional parking spaces" and "public parking". There is nothing in any provision of the Condominium Act, including applicable regulations, which specifically requires "parking" to be dealt with in a disclosure statement. However, as the agreement of purchase and sale in question specifically states in its description of what is being purchased, "including the exclusive use of a parking space", s. 52(6)(b) would apply to require the disclosure statement to touch upon parking.

Section 52(6), in full, reads as follows:

52(6) The disclosure statement referred to in subsection (1) shall contain and fully and accurately disclose,

- (a) the name and municipal address of the declarant or proposed declarant and of the property or proposed property;
- (b) a general description of the property or proposed property including the types and number of buildings, units and recreational and other amenities together with any conditions that apply to the provision of amenities;
- (c) the portion of units or proposed units which the declarant or proposed declarant intends to market in blocks of units to investors;
- (d) a brief narrative description of the significant features of the existing or proposed declaration, by-laws and rules governing the use of common elements and units, and of any contracts or leases that may be subject to termination or expiration under section 39;
- (e) a budget statement for the one year period immediately following the registration of the declaration and the description;
- (f) where construction of amenities is not completed, a schedule of the proposed commencement and completion dates; and
- (g) any other matters required by the regulations to be disclosed.

Because counsel for the defendant raised the matter, it is perhaps appropriate that I interject here to deal with what he and, I am sure, others, perceive to be a conflict between certain wording contained in that subsection. I refer specifically to the words "shall contain and fully and accurately disclose", on the one hand, and either or both "a general description" and "a brief narrative description of the significant features" on the other. To my mind, a further consideration of the provisions of s. 52(5) can serve to resolve any conflict. In my opinion, so long as "the general description" or "... brief narrative description" does not include any material statement or information that is false, deceptive or misleading, or fail to contain any material statement or information, they are acceptable. They need not otherwise be detailed to the point where they become prolix or encyclopaedic in nature.

To return to the complaints about "parking", the disclosure statement here deals with that subject in several places, as follows:

Sufficient parking will be allocated to accommodate the requirements of the residential unit owners and the remainder will be for use by the public for a charge;

The parking spaces shall be used only for parking of motor vehicles provided such motor vehicles do not exceed the physical limitations of the access ramp or parking spaces;

Subject to certain restrictions each owner has the full use, occupancy and enjoyment of the common elements.

The disclosure statement indicates that "the owners of the residential units which are described in sch. 'G' will have the exclusive use of those portions of the common elements" set out therein, and this includes "a parking space". Schedule "G" is found in the declaration which is provided with the disclosure statement, and it designates parking space P-115 as being that allocated to unit six on level two. This is the unit which Maynard agreed to purchase.

To my mind, these provisions sufficiently constitute the general description required by s. 52(6)(b) with respect to parking. The requirement to deal with parking in accordance with that subsection arises, in my view, because "parking" is included in the "property", which includes "other amenities" offered by the defendant and which Maynard agreed to purchase. With respect to "public parking" about which Maynard complains, I am prepared to look upon it, for present purposes, as being included in "other amenities". Maynard specifically complains that the statement does not disclose who is to be the owner of the area in which "public parking" will be located. From what is contained in the statement, it is clear to me that, after allowing for the parking needs of the residential unit owners, the remainder "will be for use by the public for a charge". It is further stated that, "a portion of the underground parking ... will constitute the commercial component of the project and may be registered as a separate condominium". The statement continues, "the commercial portion of the underground parking ... will be for general use by the public for a charge". In my opinion, the name of the owner, from time to time, of the area in which public parking is to be located

is not material information for the purposes of s. 52(6)(b). Accordingly, assuming, as I have, that public parking must be dealt with in the disclosure statement, lack of identity of the owner of the area in which it will be located does not render the disclosure statement inadequate as it is claimed on behalf of Maynard. I say this notwithstanding that, in my view, the statement is not as clear as it might be in disclosing whether all the parking "not allocated to accommodate the requirements of the residential unit owners" is to be included in the commercial component of the development.

I can understand why Maynard or others may reasonably ask that second or third parking spaces be available for a residential unit, and if so, on what terms. However, I do not see that the defendant is required, by any provision of s. 52, to provide that information in the disclosure statement. Thus, any failing in this respect would not cause the statement to be not in conformity with that section.

With respect to "visitors' parking", I note that it is not mentioned anywhere in s. 52, or, for that matter, the agreement of purchase and sale or the disclosure statement. I am prepared to assume, again, for present purposes, that if so mentioned as being part of that which is offered to purchasers, it could be considered an "other amenity", to be dealt with as s. 52 requires. However, if what otherwise might be considered a usual or normal amenity to enhance one's ownership, use and occupation of a residential condominium unit is not specifically offered to purchasers, then, in my opinion, the fact of it not being offered is not required to be mentioned in the disclosure statement. And the failure to do so does not render the statement in contravention of that which is required by s. 52(6)(b).

The questions which counsel for Maynard raises with respect to visitors' parking are reasonably raised and might be material if visitors' parking was simply offered to purchasers without anything more being mentioned about it in the statement. However, here, as I have noted, there is no mention and, therefore, the absence of answers to those questions does not constitute a failure on the part of the defendant to provide material information in the disclosure statement. In any event, in my view, the circumstances with which we are dealing here are such as to suggest to a reasonable purchaser that visitors could park in the public parking area, and if one looked upon "visitors' parking" and "public parking" as being one and the same, the answers to most of the questions raised are contained in the statement.

I say "answers to most of the questions" because the amount of the charge for parking and the identity of the owner are not shown. I am not at all certain that it is reasonable to think that a specified charge should be contained in the material. That one year's expenses otherwise to be incurred are found in the material are there for different reasons and for different purposes. A parking charge cannot be reasonably thought to remain level indefinitely and, undoubtedly, would increase. In the absence of some workable formula, then, resort to express wording requiring that the fee be at all times reasonable in amount is all that is left. In the absence of any mention of what the charge is or is not to be, I think it would be implied that it should be reasonable. I do not think, in any event, that a purchaser should be entitled, beyond the period of 10 days from receipt of the disclosure statement, to avoid the enforcement of the agreement only on the basis of there being a lack of specific information as to proposed charges for visitors' parking contained in a disclosure statement. Subsequent unreasonable increases could be the subject of a claim for redress.

The failure of a disclosure statement to indicate the name of the owner of the area in which visitors' parking, or, for that matter, public parking, is proposed to be located, if not part of the common elements, does not, in itself, render the disclosure statement in contravention of the provisions of s. 52. The identity of the owner, under those circumstances, is not material, in my opinion. For these various reasons then, I conclude that Maynard is not entitled to the relief he claims by reason of the alleged defects in the disclosure statement relating to the subject of parking.

Maynard next raises a complaint about the sufficiency of the disclosure statement as it pertains to "recreational amenities and agreement". Section 52(6)(b), as can be seen from above, refers to "recreational and other amenities" as being included in the required general description of the property or proposed property. Section 52(6)(f) refers only to "amenities". Under the heading "General Description of Property", the disclosure statement itself contains the following:

The recreational and other amenities set out below will be located in or below the Market building but will be for the use and enjoyment of the residents of both buildings.;

The following is a list of the recreational and other amenities to be provided by the declarant in or below the Market building for the shared use, enjoyment and expense of the residents in both buildings:

1. One party room with kitchen including stove, refrigerator and dishwasher;
2. Two squash courts;
3. One exercise room -- not equipped;
4. Two change rooms for men;
5. Two change rooms for women;
6. One indoor swimming pool;
7. One whirlpool;
8. Three saunas;
9. Two roof-top sun decks.

The construction of amenities has commenced as part of the construction of the Market building. The proposed date for completion of recreational and other amenities is July, 1983.

To be noted is the fact that the disclosure statement refers only to recreational and other amenities to be provided by the defendant "in or below the Market building". The Market building is one of the two proposed buildings intended to comprise the condominium development in question. To be further noted is the fact that it is only with respect to recreational amenities in or below the Market building to which the complaints on behalf of Maynard are directed. These complaints are as follows:

(a) The said disclosure statements failed to set out the ownership of the recreational and other amenities in or below the market building. The disclosure statements all provide that after both buildings had been registered as condominiums, an agreement will be entered into dealing with the use and enjoyment of the recreational and other amenities and the expenses of operating same. The parties to the proposed agreement are not named, and involvement, if any, of the developer is not stated and no draft of the proposed agreement is provided;

(b) Schedule of Proposed Commencement and Completion Dates

-- what is the date of beginning of construction for each amenity?

-- what is the date of completion of each amenity?

(c) Ownership

-- who owns the amenities?

-- is "use and enjoyment" synonymous with ownership?

-- are the recreational amenities part of the common elements of the MARKET BUILDING?

-- is the Recreational Agreement different from the Reciprocal Building Agreement?

It seems to me, from a reading of the relevant provisions of the disclosure statement, that it relates only to amenities which can be properly described as recreational in nature and which need to be constructed as part of the building in which they are located. Both counsel appear to have approached this aspect of the case on this basis. I refer particularly to counsel for Maynard who, in his aide-memoire, specifically described these complaints in this manner. In view of this accord, it is only in passing that I suggest that a reading of s. 52 can indicate that it does not only concern itself with amenities which are recreational and to be constructed. I have already suggested that, under certain circumstances, visitors' parking or public parking may be considered an amenity for the purposes of that section. Another example, to my mind, is found in the disclosure statement here. The budget-statement portion includes, amongst the type of common expenses listed under "Staff ", one described as a "concierge". Keeping in mind the duties of such a person, I think that it is reasonable to regard a concierge as an amenity. However, needless to say, a concierge cannot be reasonably described as being recreational in nature or something to be constructed. Any question as to when, if at all, a concierge should be included in the description required by s. 52(6)(b) is something I need not decide here.

With respect to this complaint raised on behalf of Maynard concerning "the recreational amenities and agreement", I can see nothing in the Act which requires the disclosure statement to set out their ownership. However, notwithstanding, that which is in fact outlined in the proposed By-law 5, included with the disclosure statement, suggests clearly that the defendant, at least, for the purposes of the reciprocal building agreement, will be shown as the owner of the portion of the buildings in which recreational amenities will be located. There is no requirement that a draft of the proposed agreement covering "recreational and other amenities" be provided with the disclosure statement. Revised Regulations of Ontario 1980, Reg. 121, s. 32, passed under the Condominium Act, specifies the documents to be provided with the disclosure statement, and such a document is not included. Section 52(6) (d) requires "a brief narrative description of the significant features of ... any contracts ... that may be subject to termination or expiration under section 39". That does not apply to any recreational amenities agreement.

As noted above, the disclosure statement here discloses "the construction of amenities has commenced", and that "the proposed date for completion of recreational and other amenities is July 1983". In my opinion, those statements comply with the provisions of s. 52(6)(f). That section does not, in my view, require the date of commencement or completion of construction of each amenity to be shown. While I think the questions raised concerning ownership of the "recreational and other amenities" are not unreasonable, they seek information not required by the provisions of s. 52 to be contained in the disclosure statement. It might be that the agreement concerning the amenities can be combined with the reciprocal building agreement. By-law 5, attached to the disclosure agreement, as I have noted, provides for the latter agreement. That Maynard alleges that he cannot tell from the statement what is to happen in this respect does not now permit him to avoid completion of his agreement with the defendant.

With respect to the complaint concerning the reciprocal building agreement, I note again that the provisions of s. 52 do not require that anything other than "a brief narrative description of the significant features" of the proposed by-laws and agreements, caught up by s. 39, be contained in the disclosure statement. In addition, s. 32 does not require a copy of the proposed reciprocal building agreement to be provided with this statement, but only a copy of the proposed by-laws, as well as a brief narrative description of the significant features of the by-laws. In my opinion, this has been done in this case. Again, these complaints made on behalf of Maynard in this respect do not support the position he now maintains.

The next complaint made on behalf of Maynard is with respect to the budget statement. As can be seen from above, s. 52(6)(e) refers to a budget statement for the one-year period immediately following the registration of the declaration and the description, and s. 52(7) outlines the particulars to be included in the budget statement. Maynard's complaints in this respect are that the budget statement does not disclose the amount of each expense or the assumed inflation factor and, on his behalf, the following questions are raised, for which it is suggested the required answers cannot be obtained from the disclosure statement:

-- does it accurately and fully disclose a budget statement for the one year period?

-- does the "lumping together" of various payments satisfy the requirements of the Act?

-- does it accurately disclose the proposed amount of each expense?

-- are the "particulars of the type, frequency and level of services to be provided" fully and accurately set out?

-- how much of the lump sum expenses are referable to property that is owned, rented or shared with others?

-- does the statement set out an assumed inflation factor for all of the expenses quite apart from only three types of expenses?

-- how much of the budget expenses are allocated to the shared recreational amenities?

There seems to be no dispute between the parties that the budget statement here sets out common expenses and for the period of time required. Whether they are, in fact, "the common expenses" (emphasis added), I cannot say. In this respect, it appears to me that what is set out, and what is required to be set out, is what the owner thinks will be the common expenses incurred by the corporation. Furthermore, and of significance to me, the amounts which the owner is required to show in the budget statement are what he, again, thinks they are going to be. In other words, the expenses, or the nature of the expenses and the amounts thereof, are really the result of an estimate, the basis for which can differ in any given case. There is nothing in the Act which indicates or suggests what expenses are to be shown. However, there is one specific provision of the Act which, to my mind, has a bearing on how the owner fashions the budget statement. That provision is s. 52(8), and it reads as follows:

52(8) Where the total amount incurred for the common expenses provided for in the budget statement exceeds the total of the proposed amounts set out in the statement, for the period covered by the budget statement mentioned in clause (6)(e) the declarant shall forthwith pay to the corporation the amount of the excess except in respect of increased expenses attributable to the termination of an agreement under section 39.

I note that what is referred to in that subsection is, "... the total amount incurred for the common expenses provided for in the budget statement" and "... the total of the proposed amounts set out in the statement" (emphasis added). In my view, that section does not apply to the situation where a consideration is given to common expenses and the proposed amount thereof which are not set out in the budget statement. If there is a complaint in respect of them, perhaps the cause of action suggested in s. 52(5) might apply. Of interest to me at this point, as well, is the reference to "total amount" shown in that subsection. Here, there is no complaint about the description of the common expenses set out in the budget statement. Counsel for Maynard submits that the failure of the defendant to have an amount placed beside each expense shown or listed in the budget statement constitutes a contravention of s. 52(7)(b). To better understand this position, I think it is appropriate to set out here the portion of the budget statement relevant to this specific complaint:

SEE PAPER PART FOR ILLUSTRATION

It can be seen from that portion of the budget statement that it is not in every instance that the defendant has failed to do what, according to counsel for Maynard, it is required to do. It is only in certain instances, and these are where, within a heading, the defendant has given specific examples of the type of expense which it suggests can be met. In every instance, whether there be specific kinds shown under a heading or not, there is a total amount shown for the expense described by the heading. It is, therefore, this limited absence which gives rise to this aspect of the complaints raised on behalf of Maynard.

Here, if Maynard completed the purchase and, later, after one year, discovered that the total amount expended for "Service Contracts", for example, exceeded \$62,500, the amount shown in the statement, s. 52(8) would apply. And this would be the case whether, with respect to "Service Contracts", "pest control", for instance, one of the kinds set out, did or did not have a specific amount beside it. We know from the evidence here that, in fact, the total of the proposed expenses for the period in question fell short of its mark by some \$12,000, and that sum was paid by the owner to the condominium corporation pursuant to s. 52(8).

It is my opinion that the words "each expense", as used in s. 52(7)(b), mean "each type of expense". And this is so where, as here, some of what the owner suggests as being reasonably anticipated can as well be the subject of a more definite or specific proposed amount. I suppose, in order to comply with that which counsel for Maynard suggests the section requires, the defendant could, for example, take the figure of \$20,000, the total for "Miscellaneous" under the heading "Service Contracts", and split it up in any manner just so a figure would end up opposite each of the items. How this would advance the position of Maynard or, indeed, any purchaser of a residential condominium unit, is not clear to me. In my opinion, even following the kind of construction which I am asked to give s. 52, I do not think it leads to the result sought on behalf of Maynard. To be able to avoid an otherwise enforceable contract which the defendant has entered into in good faith, because of the lack of a proposed amount for several examples or types of a proposed expense, when a total for all is shown, is not reasonable, in my view. There would be something inherently wrong if a person, striving to avoid an otherwise enforceable agreement, were permitted to do so because no proposed amount was shown for "pest control". I think my position in this respect is supported by the fact that the defendant here did not have to mention, for instance, "pest control" or the other examples of "Service Contracts" or, indeed, examples of "Repairs & Maintenance" contracts, or of "Supplies", etc. Presumably, one could consider two budget statements at the same time, each one representing two identical buildings but with different owners. In one instance the owner, not possessed of a great imagination, or knowledge, or both, could put little down by way of description of the type of common expenses to be anticipated and only totals for what is shown. The other owner, because of greater experience and knowledge, could express more information by way of description of the proposed expenses but, like the other, also show only totals. If the totals in each instance were the same, to my mind, it would not be reasonable for the purchaser in the first instance, all other factors being equal, to be required to complete the transaction while the purchaser in the second instance would not. Perhaps, with respect to the extent of the particulars, in my example at least, it could be said that one owner is more closely following the requirements of s. 52(7)(c), and specifically, the words therein, "particulars of the type ... of services to be provided". Again, the Act does not provide a yardstick by which one can measure whether what is given, in fact, meets the requirements of the section.

As I have noted above, the section seems to leave it up to the owner to provide what he suggests are anticipated expenses and the extent of particulars covering them and, as well, the proposed amount to be incurred in the period in question by reason of them. Here, Maynard's counsel asks whether the budget statement "fully and accurately" sets out the particulars of the type, frequency and level of the services to be provided. He, apparently, has incorporated the words "fully and accurately" found in s. 52(6) into s. 52(7)(c). I am not at all certain that he is entitled to do this. As I have noted above, the latter section only requires the budget statement to "set out" the particulars of those things. However, I really do not think there is much difference, from a practical point of view, what words are resorted to in determining whether the requirements of the Act in this respect have been met. In either case, the owner is compelled to provide that which he can reasonably do in order to disclose to a purchaser what is to be expected by way of type, frequency and level of the services anticipated to be provided. I have already dealt with what is shown in the budget statement here as particulars of the "type" of service. It is what this owner has chosen, and I really do not think much, if any, complaint is raised on behalf of Maynard in this respect. From what was said in argument, it is really "frequency and level" about which there is concern. In my opinion, where it has been able to provide some meaningful information about frequency and level of the services, the owner here has done so. What can a reasonable owner, possessed of a bona fide intention to comply with the spirit and letter of the Act, say about the frequency and level of most of the expenses reasonably thought likely to be incurred in connection with a residential condominium development? In turning to "pest control" again, as an example, I suggest that it would not be unreasonable to consider that there be no frequency at all. And how does one comment on the level of the hydro service to be expected? I could make similar observations about other items mentioned.

Counsel for Maynard asks how much of the "lump sum" expenses set out in the budget statement are referable to property that is owned, rented or shared with others. He also asks how much of the budget expenses are allotted to the shared recreational amenities. I assume he suggests that in both instances, if the answer cannot be found in the budget statement, the statement does not comply with the statute. I am not at all sure that the answer to either of the questions he posed must be contained in the budget statement. I see no provision contained in s. 52(6) or s. 52(7) which touches on either question. In argument, counsel for Maynard did refer me to s. 52(7)(h) as being a subject of his complaint with respect to the budget statement. My reading of that subsection does not permit me to conclude that it relates to either of the two questions I am now considering. In fact, the budget statement is silent about what is referred to in that subsection. Presumably, no such fees or charges are to be paid by the unit owners.

I now deal with the last complaint about the budget statement. Maynard's counsel asks: "[D]oes the statement set out an assumed inflation factor for all of the expenses, quite apart from only the three types of expenses?" (emphasis his). Those three types are hydro, water and gas; and it is only in connection with those expenses about which there is any statement relating to an inflation factor. In evidence, the officer called on behalf of the defendant, Cary Herbert Solomon, was referred to this fact in his direct evidence. He spoke of those three items of expense as being "major components" of the expenses outlined in the budget statement and confirmed that that statement "gives an inflation factor" for them. According to my notes, the matter was not raised in cross-examination at all. I gather it is the suggestion of counsel for Maynard that the Act requires an assumed inflation factor to be the subject of a statement with respect to all of the expenses shown in any budget statement. I do not agree with this position. To begin with, there may be and, in fact, are reasonably anticipated expenses to which an inflation factor cannot be assumed or need not be assumed. Indeed, to my mind, all the expenses listed in the budget statement here, other than the three specifically mentioned, seem of the type which I think it is reasonable to say cannot be the subject of an assumed inflation rate. In any event, it seems to me that the Act again leaves it up to the owner to make a decision as to what is to be done -- to assume or not to assume an inflation factor. If none is assumed, then apparently, it is not to be mentioned. And that, apparently, is the case here, with the exception of the three items for which an inflation factor has been assumed.

Counsel for the defendant allowed in argument that with respect to the budget statement here, any shortcomings were of an extremely minor nature and not sufficient to make the budget statement not one required under the Act. In saying what he did, I do not believe that he was intending to touch upon a consideration of whether the defendant had substantially complied with the requirements of the statute. I believe he was suggesting, in saying what he did, that anything not in the statement, or not expressed or outlined completely, is not material to the decision to be made by Maynard. He may have been suggesting that it was not "so material", and in which event, perhaps he was intending to put forward that there had been a substantial compliance with the Act. I did not discuss this subject specifically in argument, nor was it raised by counsel for Maynard. It could be that in another case this matter will have to be dealt with. Someone may think that the absence of some particular material information from all that is required to be disclosed in the disclosure statement should not permit an otherwise enforceable agreement to be avoided by a purchaser. I note here that the Court of Appeal in *Re Brunott et al. and Coolmur Properties Ltd.* (1983), 22 A.C.W.S. (2d) 509, did not deal with this matter.

The last of all the complaints raised on behalf of Maynard concerning the disclosure statement itself relates to the management agreement provided with it. Section 52(6)(d) requires this to be done. Specifically, it is suggested by counsel for Maynard that the disclosure statement does not disclose the term of the management agreement, or when it starts and when it ends. The question is also asked as to why the length of the term is important under the Act. In my opinion, there is no basis for the complaints made with respect to the disclosure statement in so far as the management agreement is concerned. The term is specified to be two years, beginning from the date of registration of the declaration. The importance of the term is suggested, if indeed it need be at all, in the information which specifically deals with "proposed By-law No. 3 (Management Agreement)".

For these reasons then, I cannot agree with the position taken on behalf of the plaintiff and, accordingly, his action will be dismissed. The defendant's counterclaim will succeed in so far as it relates to the claim for damages by reason of the plaintiff's breach of contract. Specific performance is not sought. By agreement of counsel, the determination of the quantum of the defendant's damages, including any prejudgment interest thereon, is to be referred to the master at Toronto for inquiry and report. I can be spoken to by counsel, if necessary, as to whether any specific instruction is to be made with respect to the deposit money paid by the plaintiff and its relation, if any, to any award of damages granted in favour of the defendant. Costs of this action and the reference to the master will be to the defendant after their assessment on a party-and-party basis following completion of the reference.

Judgment for defendant.

CBR# 224

Ontario Mortgage Corp. v. Shoreham Apartments Ltd. et al.

48 O.R. (2d) 269

ONTARIO HIGH COURT OF JUSTICE EBERLE J. 22ND MARCH 1984.

ACTION by a mortgagee for a deficiency after sale under power of sale; COUNTERCLAIM for loss suffered by the mortgagors.

John M. M. Roland, Q.C., and Brian G. Morgan, for plaintiff.

Ronald E. Carr, for defendants.

EBERLE J. (orally):-- All right, gentlemen, thank you for your submissions which certainly helped to put the issues in focus.

In this case, the plaintiff, by whom I mean Ontario Mortgage Corporation, sues for a deficiency resulting after the exercise by it of power of sale with respect to certain mortgaged premises.

When I refer to the plaintiff, I mean Ontario Mortgage Corporation which is the plaintiff in one of the actions being tried together at this time. It is the defendant in the other action. The plaintiff is a corporation which has acted as the lending arm of the Ontario government.

The defendants, and where I use that term I refer to Shoreham Apartments Limited, Murray Goldman and Albert Melchior, are the defendants in one action and the plaintiffs in the other. The defendant Shoreham is a developer which was responsible for the development and construction of two condominium buildings in Ajax out of which premises this lawsuit arises. The defendants Goldman and Melchior are the principal persons behind the developer company and they are, as well, the guarantors of the mortgages to be referred to.

In the latter part of 1974, the plaintiff committed itself to lend something over \$15,000,000 to Shoreham for the construction of the two condominium buildings in Ajax. The arrangement between them included certain terms which will become important in these reasons later on.

Pursuant to the commitment, a mortgage was registered, the buildings were then constructed and sales of the condominium units began. For a while, sales of the units went well. Then, however, the market turned sour; sales dwindled to a trickle. A number of witnesses agreed that that is what happened to the market.

Mr. Goldman, whose evidence on this point I have no hesitation in accepting, said that the whole real estate market went bad in 1976, but it turned especially bad for condominiums in the Ajax area.

In the beginning, the mortgage given by the plaintiff on the condominium buildings was a blanket mortgage. It was later replaced at the appropriate time with individual mortgages on each condominium unit totalling the same amount as the blanket mortgage.

Shoreham and the guarantors, Goldman and Melchior, who were liable on the blanket mortgage were liable on each of the unit mortgages as well. The arrangement was that as Shoreham sold condominium units, Shoreham and Goldman and Melchior would be released from their covenants and at the same time, of course, the new owner of a condominium unit would become liable on the mortgage on that unit to the plaintiff. Some of those purchasers, after a fairly short span of time, defaulted on their mortgages and accordingly a number of those units landed back on the doorstep of Ontario Mortgage Corporation, the mortgagee, who had then to deal with them.

Although there are issues in this action concerning those units and the way they were handled by Ontario Mortgage Corporation, no claim is actually made in this action or these actions by Ontario Mortgage with respect to them.

During the period in which some of the sold condominium units were, as I have said, coming back into Ontario Mortgage Corporation's hands, Shoreham was still in the process of selling or trying to sell the other remaining units or as an alternative, as a result of a concession made to them by Ontario Mortgage Corporation, or O.M.C., renting them. From a certain point, Shoreham sought and received permission to rent units instead of selling them because of the slowness of the sales.

By late 1978, 93 units still remained unsold and on October 1st of that year Shoreham defaulted on the mortgage. With respect to them, O.M.C. took power of sale proceedings and took over those 93 units as of January 3, 1979. Those are the units with respect to which O.M.C. claims as plaintiff in these proceedings.

Unfortunately for everyone and especially for the parties to these proceedings, sales of the condominium units in the Ajax area remained poor. However, by 1982 or 1983, O.M.C. had succeeded in selling all of the 93 units and the deficiency claimed with respect to that operation consists of the following figures: \$1,379,013.86 for deficiency, together with interest on that amount, calculated to January 31, 1984, of \$292,699.03, together with further interest calculated on a daily basis which, I believe, calculated to today amounts to \$22,848.34, plus a relatively small miscellaneous item of \$10,800.99.

The defendants resist these claims vigorously on a number of grounds which I will come to shortly and in addition assert a counterclaim against O.M.C. for \$891,022 representing the cash loss suffered by them on this project, making it clear that in this figure there is no component for loss of profit.

I now turn to discuss the issues that were canvassed in the course of submissions. The first one I wish to deal with is this: the defendants allege and argue that O.M.C. competed with the mortgagors Shoreham, Goldman and Melchior in the period from early 1977 until the beginning of 1979, with respect to the sale and rental of units in the two buildings. This arises out of the fact, already alluded to, that during this period O.M.C., due to default by purchasers of some of the condominium units, repossessed those units and had them for disposition in some manner during the time while Shoreham was still in the process of selling or attempting to sell or to rent the remaining, unsold condominium units.

It is said that O.M.C. was selling units that had been repossessed by it at prices lower than those at which Shoreham was selling similar units, lower than the prices that Shoreham was required to sell its units at, for part of the agreement between Shoreham and O.M.C. in the beginning was that the units must be sold at prices that were established in the agreement and set by O.M.C. This is so because the lending by O.M.C. was as part of the government programme to assist low- and moderate-income housing. In light of that policy, ceiling prices were put upon the units. Those ceiling prices were known from the very beginning of the arrangement between the parties.

At the beginning, Shoreham was not permitted to rent units. They were being built for sale as condominiums. However, during the course, because of the slowness of the sales and at the request of Shoreham, O.M.C. permitted Shoreham to rent, but limited rental to a one-year period.

As well, during the period I am dealing with now, O.M.C. relaxed a great many of the other restrictions that had been imposed upon Shoreham in the original arrangement between the parties. I do not think it necessary to detail those relaxations, but there is no question but they were carried into effect in order to help to relieve the developer from the difficult situation in which it found itself.

The defendants argue that once O.M.C. had obtained the units in question by way of repossession from individual purchasers, that its efforts to market them resulted in a conflict of interest on the part of O.M.C. and was a breach of O.M.C.'s duty as a mortgagee to its mortgagor Shoreham.

It does appear from the evidence that O.M.C. was asking for its repossessed units, prices that were somewhat lower than those at which Shoreham was required to sell roughly comparable units.

By way of discussion, it must be remembered that all the units O.M.C. had for sale in this period were used ones, all having been owned and occupied for some period of time by the respective purchasers. Some, at least, of the units which Shoreham had for sale were, of course, new ones although there were others which it had for sale and which became used ones as well because of the concession given to Shoreham in allowing it to rent when sales were difficult or impossible to achieve.

As well, it appears that the interest rate on the mortgages in connection with any units that O.M.C. had for sale during this period was somewhat lower than the interest rates charged by Shoreham in connection with its sales, those interest rates being fixed in the contractual arrangement between O.M.C. and Shoreham.

As well, part of the contractual arrangement between O.M.C. and Shoreham was that O.M.C.'s approval was required of all purchasers. These approvals related particularly to the financial responsibility of the purchaser, and O.M.C. had established and in place certain guidelines which appeared to be familiar to all the parties. The principal one was that the mortgage payment including principal, interest and taxes should not exceed a certain percentage of the family income of the purchasers and there were other similar tests and, as well, O.M.C. obtained credit reports on proposed purchasers as a part of the material it obtained in order to determine whether or not the proposed purchaser should or should not be approved.

I think it is clear from the evidence, as I have already commented on, that all the parties were familiar with these arrangements and with O.M.C. practices.

The developers, I mean particularly Mr. Goldman and Mr. Melchior, were highly experienced, highly sophisticated developers, each of them with many years in the business, experienced in wide varieties of buildings and developments of all kinds and with considerable prior experience in government assisted and financed projects.

To return now to the issue in question. It is not suggested that the prices set by O.M.C. for sales by Shoreham were themselves unreasonable. The submission is that O.M.C. acted wrongly in attempting to market its repossessed units at prices somewhat lower than those. However, I think this matter is to be resolved on the evidence in this case and it is apparent from all of the evidence in this case that during the period in question there was no serious effort to sell units on the part of O.M.C. at all. True it is that units were made available by them but it really went very little further than that. Initially, when units came back on their hands the evidence of the witnesses from O.M.C. was that they wished to rent them and not to sell them. They were pressed by real estate agents, however, to put a sale price on them, agents naturally hoping to get a bigger commission on the sale than on a mere rental, and sale prices were supplied to the agents. Indeed, for a short period of time some units were listed with an agent for sale and undoubtedly if anyone made a specific inquiry of O.M.C. about a possible purchase, the units were available for sale, but I emphasize that in my consideration of all of the evidence it is perfectly clear that there was no serious attempt by O.M.C. to sell these units.

The witnesses from O.M.C., particularly Mrs. Peterson and Mrs. Henderson, made it clear in their evidence that they were quite aware of the somewhat difficult and delicate position they were in. They were well aware that it might be quite counter-productive for O.M.C. to engage in a serious sales attempt with respect to these repossessed units. They had to consider and did consider the interests of Shoreham in continuing to sell the remaining units, for if Shoreham could not sell the remaining units, it was all too evident that those units would likely end up on O.M.C.'s doorstep as well. Many units had already been sold to private purchasers who had invested some of their own money. If O.M.C. lowered prices substantially or made any serious sales attempts at lower prices, that, as they were well aware, could have the effect of eroding the equity of those purchasers who might be persuaded to abandon their units back to O.M.C. as well, and O.M.C.'s position would become even more difficult.

I have no hesitation in accepting the evidence of Mrs. Peterson and Mrs. Henderson as to their realization of the delicacy of the situation they were in and their appreciation of the factors and conflicting and different interests that were involved in the situation.

I suggest the single most important factor is that in the period of roughly two years, ending at the beginning of 1979, with which I am dealing, O.M.C. did not effect one single sale of a repossessed condominium unit, although during that time, I believe that Shoreham sold over 100 units.

On all the evidence, it is clear to me that the sales efforts of O.M.C. were so minor as to have had no effect upon sales by Shoreham.

As well as considering the interests of Shoreham and the interests of the previous condominium buyers, O.M.C. had as well to consider the interests of and their duty towards the mortgagors in the units repossessed by O.M.C. and they considered as well, in

my view, quite properly, the further interests represented by O.M.C. as a public body charged with the responsibility for public funds.

During the period I am dealing with, a number of units, not a large number, were listed by O.M.C. with the real estate firm of a Mr. Ross Martin. That firm was already acting as the sales agent on behalf of Shoreham and had been, I believe, since the beginning of the sales of the units in these two buildings.

Both Mrs. Henderson, I believe it was, who initially made the approach to Martin and Martin himself were concerned as to whether there would be a conflict of interest or other difficulty if Martin were to take on any sales or rentals responsibilities on behalf of O.M.C. while at the same time being the selling agent for Shoreham. Martin said he discussed this with Mr. Melchior and obtained his approval. In fact, Mr. Melchior preferred to have Martin in charge of the whole situation rather than different and obviously competing sales agents in the building but Martin said, and I accept his evidence on this, that he recognized that he had to down-play the interest of O.M.C. and he made this clear to Mrs. Henderson that his primary responsibility was to sell on behalf of Shoreham.

As I have said, no sales were effected either through him or in any other way, of the repossessed O.M.C. units. Not only during the period in question did Shoreham sell over 100 units while none of O.M.C. units were sold, but there is no evidence in this case that Shoreham sales efforts were in any way hampered by the availability for sale on the terms on which they were available of any of the repossessed O.M.C. units. There was not a word of evidence in the case about even one purchaser or potential purchaser from Shoreham who did not purchase from Shoreham or was hampered in any way or interfered with in any way in connection with the proposed purchase from Shoreham because of the fact that the repossessed units were also on the market.

I referred earlier to the fact that the O.M.C. units were available at lower interest rates than that required of Shoreham. Shoreham's interest rate was 10 $\frac{1}{4}$ %, and O.M.C. was asking or was prepared to give mortgages on its repossessed units at 9 $\frac{1}{2}$ %. There was in place as well from the summer of 1977 onwards, a provincial government interest-reduction plan which was applicable only to the sales by Shoreham and not applicable to the sales of the repossessed units by O.M.C. The interest-reduction plan was, in effect, a loan by the provincial government to potential purchasers which reduced the first year's interest from 10 $\frac{1}{4}$ % to 8%, but in the succeeding four years the interest rate gradually worked its way back up to 10 $\frac{1}{4}$ %.

Subsequent to this, the amount of the loan was to be repaid over the next period of years. There was evidence to show that in fact the purchaser might be a few dollars better off not to take the interest-reduction plan and the O.M.C. interest rate of 9 $\frac{1}{2}$ % was slightly more advantageous to a purchaser. The difference, in my view, was so small in the number of dollars that I cannot concede that it was a factor.

As well, the nature of the calculations necessary to make any comparison between the two was so sophisticated that I cannot believe that any purchaser could make that calculation or did make that calculation.

In any event, in spite of the fact that interest rates available on mortgages in connection with any possible O.M.C. sale of a repossessed unit were lower, that factor obviously had no effect on the purchasers because not one single repossessed unit was sold.

The net result is clear on all the evidence, that the minor efforts made by O.M.C. to sell the repossessed units had no effect on Shoreham's sales.

Shoreham also complains that they were being competed with by O.M.C. with respect to rentals of these units. It must be remembered that it was only because of a concession made to Shoreham by O.M.C. that Shoreham was enabled to rent the units at all, but there is another factor in this situation, that is, that commencing I believe in 1977, but certainly by 1978, Messrs. Goldman and Melchior, either personally or as principals (the evidence was not quite clear), had built another building right across the street from the two condominium buildings in question. The other building was an apartment building at 33 Falby Ct. in Ajax. Suites there were only for rent and not for sale. They came on-stream in 1977 or early in 1978. They were brand new. There may have been other advantages to them. No description of this building or the suites in it were given in evidence, but the evidence is clear that the availability of those apartment suites was an enormous competition for the renting by anybody of any suites in the two condominium buildings which were located respectively at 44 and 66 Falby Ct.

During the period in question, the plaintiff O.M.C. succeeded in renting 49 units while Shoreham succeeded in renting 105. I may not be doing justice to the argument on behalf of the defendants, but it seems to me it comes fairly close to saying that, upon the repossession by O.M.C. of the units on which the purchasers had defaulted (and it is conceded that O.M.C. had no alternative than to repossess those units), O.M.C.'s position was that they must either do nothing to market them or must market them, whether for sale or for rental, at prices or rates which would make the renting or selling impossible. What that substantially means is that the interest of the mortgagors of those repossessed units, the interest of other previous buyers of units who still retained their units, the interest of O.M.C. as mortgagee and perhaps the interest of the public in seeing good management of its money had to be subordinated to Shoreham's interests. I can see no legal ground for that proposition.

Furthermore, I do not think there is any evidence that during the time in question, there was any complaint made by Shoreham or by Messrs. Goldman or Melchior with respect to what I have found to be the minimal marketing activities of O.M.C.

The real problem seems to have been that in 1976 the market, or at least that part of it which related to condominiums in Ajax, turned extremely bad. That was certainly the evidence of Mrs. Peterson and Mrs. Henderson, and Mr. Martin and Mr. Goldman. In the result, I am unable to find that this issue has been established in the evidence and it fails for want of evidence.

On this point it was argued by way of principle that there was a special relationship between Ontario Mortgage Corporation and Shoreham arising out of the particular terms of the contractual relationship between them, including not only the mortgagor-and-mortgagee relationship but including also the power of O.M.C. to set the prices at which Shoreham could sell units, set the mortgage amounts, set the interest rates on the mortgages and approve or disapprove of buyers of the units. It seems to me that it must have been in the contemplation of all parties from the beginning that events could turn out in such a way that some, whether a small or a large number of units, might be turned back because of default to Ontario Mortgage Corporation and that in that event Ontario Mortgage Corporation would seek to market them in some way; not only would seek to but would be obliged to.

I have no doubt that Shoreham and Messrs. Goldman and Melchior with all their experience had turned their minds to this possibility in the beginning, and if they did, they would have recognized at once that that could happen and that if some units

were turned back to O.M.C. that it would seek to and would be obliged to market them. In other words, this should not have been in any way an unexpected situation. As I have said, I do not think there is any evidence that during the time in question they made any complaints about it.

The defendants rely also on a quotation from 5 C.E.D. (Ont. 3rd), p. 343, Section 568, an article on contracts by Mr. W. H. O. Mueller as follows:

A defendant may not rely on the plaintiff's failure to perform what would otherwise have been a condition precedent to the plaintiff's right of action if such performance by the plaintiff was prevented or impeded by the defendant. Equally, the plaintiff cannot complain of the defendant's failure to perform if the plaintiff's course of action prevented or rendered more difficult performance by the defendants.

The defendants rely especially upon the words "or rendered more difficult". The cases in support of this statement were not referred to me in detail. I suspect that the cases put the test on a somewhat higher basis than that.

However, as I have found, there is simply no evidence in this case that even as the test is given by Mr. Mueller that it was offended in any way by O.M.C.'s conduct in this case.

The other authority relied upon by the defendants was *Malahide Developments Ltd. v. Richard Bennett Developments (Sarnia) Ltd. et al.* (1982), 35 O.R. (2d) 373, 133 D.L.R. (3d) 384, 23 R.P.R. 250, and particularly a quotation from 59 C.J.S., Section 294b, at p. 376 O.R., p. 387 D.L.R. It was sought to employ that quotation in support of the proposition that the mortgagee cannot interfere with or impair the rights of the mortgagor but the quotation actually works both ways and is as follows:

"The relationship [between mortgagor and mortgagee] is such, however, that neither the mortgagor nor the mortgagee may do anything with respect to the mortgaged property which will impair the rights of the other or embarrass the enforcement of those rights."

If I am at all correct in my summation of the effect of the argument of the defendants, it would have, I think, exactly that effect on the rights of the mortgagee. It would in effect deny the mortgagee its right under the mortgage as a lender.

I turn now to the second principal submission that I want to deal with and that was the defence that the plaintiff failed to mitigate its loss. This submission arises in this way. The defendants say that in September of 1978, an oral proposal was made by Mr. Goldman on behalf of the defendants to an official at O.M.C., Mr. McAllister, to the effect that Mr. Goldman and Mr. Melchior be allowed to purchase the remaining unsold 93 units. This conversation took place, it will be seen, just before the defendants defaulted on the payments on the mortgage on those remaining 93 units.

The proposal ran further that, on such a sale to Mr. Melchior and Mr. Goldman, the interest rates on the mortgage financing further be reduced to 8% from 10 1/4%. They would then be able to rent them out or do what they wanted with them and it appears from the evidence that one of the things that may have been in their minds was the highly successful programme of renting the apartments that were then being rented across the street in their own building at 33 Falby.

A somewhat similar proposal had been made by Mr. Goldman about a year earlier and then withdrawn because of tax considerations.

In the September, 1978 proposal no more details were given nor discussed such as, for example, the terms of the mortgage with respect to the proposal that the interest rate be reduced to 8% from 10 1/4%. I believe Mr. Goldman first said that he and the other defendants were not to be released from their covenant as to the 10 1/4%. Subsequently, he said that they were to be released, and that in fact O.M.C. was to suffer the loss of two and a quarter points of interest. I think the latter evidence is correct and I accept that as the truth. Only that proposal makes any sense.

For one thing, Mr. Goldman compared the situation at 44 and 66 Falby, where the condominiums were, to the situation at 33 Falby, where he said they had obtained mortgage financing from the Ontario government, whether through O.M.C. itself or from some other source I am not clear, but it was government money and it was at 8% and at 8% financing they could break even on the rentals at 33 Falby.

It seems to me, accordingly, that it would be an essential part of his proposition to O.M.C. in September, 1978, that O.M.C. abandon the 10 1/4% interest rate and reduce it to 8% and give up the difference.

Mr. Goldman also went on to say that with respect to the 8% interest rate, he proposed that could be done by either discharging the existing mortgage on the 93 units and placing a new mortgage at 8% interest, or by an amendment to the existing mortgage, so I do find without any hesitation that reduction in the interest rate from 10 1/4% to 8% was part of the proposal made verbally by Mr. Goldman in the fall of 1978. There is no record of that proposal ever going to the board of O.M.C. and I find that it did not go to the board.

There was evidence that the board's policy is that proposals to be made to the corporation should be made in writing. It is clear from the evidence that this proposal was never made in writing but remained entirely oral and I conclude that it remained no more than the broaching by Mr. Goldman of a matter which was in the discussion stage only. It is not fleshed out with all the details and ramifications and I am confident that it was discouraged by the official to whom he spoke and that may well have been the reason why it was never put in writing.

It is, I think, significant that within a few days or at most a few weeks after the date of that discussion by Mr. Goldman with Mr. McAllister, the defendants defaulted on the remaining 93 mortgages.

However, the story continues. In February, 1979, just a few months later and about a month after O.M.C. had completed its take-over of the 93 units as a result of the default in payment by the defendants on the mortgage on those units, Mr. Goldman again spoke to an official of O.M.C., this time Mrs. Henderson, and this was by telephone although the previous discussion had, I believe, been face to face with Mr. McAllister. The point of the call was the same as the discussion with Mr. McAllister. It seems hardly likely that a man of Mr. Goldman's astuteness and familiarity with dealing with government bodies would have made the same proposal to Mrs. Henderson in February if he knew or believed that the similar proposal he had made earlier to Mr. McAllister had gone to and been turned down by the O.M.C. board.

Mrs. Henderson, in February, discouraged Mr. Goldman but as he acknowledged could not turn him down because she did not have, and he obviously knew she did not have, the authority to do that. Nevertheless, Mrs. Henderson says that a few days later on February 13, 1979, Mr. Goldman called her again and said that she should forget his previous proposal and that they, and I assume that meant Shoreham and himself and Mr. Melchior, had already invested \$2,000,000 in the project and did not want to put any more money into it and O.M.C. should get on as quickly as possible with the sales of the 93 units they have just taken over. As I say, evidence of that call came from Mrs. Henderson.

Mr. Goldman when asked about it, did not deny that conversation, but said that he could not remember it.

I have no hesitation in accepting Mrs. Henderson's evidence on this point. I find that such a call did take place and on the terms as she recounted it in her evidence.

So in the end, it is apparent that all that occurred was an oral, rather informal, only partly-worked-out suggestion made several times without encouragement from anyone at O.M.C. The suggestion was not pursued by Mr. Goldman and in February, 1979, was in fact withdrawn by him.

Accordingly, apart from anything else, on the facts of this case, the proof is woefully lacking of any offer made by the defendants such that a refusal could be treated as a failure by the plaintiff to mitigate. No real offer was made at all. There was no refusal. It was never put in a form in which it could be considered by Ontario Mortgage Corporation. There was simply a lack of pursuit of it by the defendants and the ultimate withdrawal of it. On such an evidentiary basis, it is probably unnecessary to canvass the legal arguments that were made but it may be useful to refer very briefly to one or two.

Reliance was placed in connection with this submission on para. 7B of an agreement that was entered as ex. 6. It was an agreement between Her Majesty the Queen in right of Ontario as represented by the Minister of Housing of the Province of Ontario and Satterthwaite Developments Limited. That is a new name in this story but it appears that for all practical purposes in this case Satterthwaite became and may be considered in exactly the same position as Shoreham Apartments Limited. The agreement had been made in November, 1974, shortly before the mortgage commitment earlier referred to was issued by O.M.C. to Shoreham and it was an agreement with respect to development of the property in question in Ajax.

The developer who owned the land was to proceed with getting things ready to build. The agreement created a condition that the units to be built should be sold to persons who met the 30% guideline, that is, a 30% maximum of the household income of the purchaser such that the principal, interest and taxes should not exceed 30% of that income, and the developer agreed to abide by resale restrictions to be imposed by Ontario Mortgage Corporation. The Minister covenanted to expedite the matter of the construction and necessary approvals so far as he could; and then we come to para. 7B by which it is agreed by the Minister that if there should be any significant or substantial change in or affecting the construction industry or a lowering of demand in the region for housing units of the nature contemplated for erection under this agreement, the Minister would, upon the application in good faith of the developer, review the obligations imposed on the developer and might make such readjustments in the minimum requirements as would be just and equitable in the circumstances.

That clause was relied upon by the defendants in connection with the issue with which I am now dealing.

First, that agreement is with the Minister and not Ontario Mortgage Corporation. Notwithstanding the fact that O.M.C. is a company which may be considered a lending arm of the Ministry of Housing for purposes of assisting certain kinds of housing, I think it is beyond question that the Minister and the corporation are different legal entities.

Secondly, it is to be observed that no application was made by the developer to the Minister. Even if the proposal made by Mr. Goldman in September, 1978, were to be considered an application within the meaning of para. 7B of the agreement, that paragraph does not impose any obligation on the Minister to accede to any proposal that might be made for an alteration by the developer. We know that O.M.C. had already made a number of concessions during the course of Shoreham's marketing efforts to make it easier for Shoreham to market their units and that in doing so, O.M.C. had relaxed many of the restrictions that had been contractually imposed upon Shoreham. The evidence does not establish that the proposal would necessarily have resulted in any mitigating or lessening of the amount of the claim of the plaintiff O.M.C. Finally, I think that in the rather vague terms in which it was made, it is very like an offer to settle a dispute. I do not think anyone is bound to accept any offer to settle.

It may be useful in this connection to refer to one of the cases mentioned in argument, *Strutt v. Whitnell et al.*, [1975] 1 W.L.R. 870, a decision of the English Court of Appeal dealing with a rather similar situation. I refer to the short judgment of Mr. Justice MacKenna and as well to the following quotation from Lord Justice Lawton at p. 874. Referring to the facts of the *Strutt* case where there had been a breach of a condition by the defendant, a dispute arose, and the defendant who was a tenant of the premises, wishing to behave in a friendly way, made an offer to the plaintiff:

He could have accepted that offer and had he done so he would have got his money back. On the other hand, the law gave him a remedy. He could keep the house and sue for damages. The problem seems to me to be this: if the law gives a man remedy can he be said to have acted unreasonably in relation to mitigation of damage if he elects to keep that remedy rather than accept another remedy offered to him by the party in default?

I can find no merit in the argument that because the Minister was lending money at 8% for the project at 33 Falby, that there was any obligation whatever upon him in order to mitigate his damage to accept the suggestion made by Mr. Goldman on behalf of the defendants.

I turn now to the third main submission. It arises from the period after default by Shoreham on October 1, 1978, and the taking over of the 93 units by the plaintiff as of January 3, 1979, and it relates to the reasonableness of the plaintiff's conduct in effecting the disposition of those 93 units.

The defendants say that the plaintiff, O.M.C., asked prices which were too high, that as a result sales were delayed, and that the defendants have suffered because of that delay.

As I have earlier said, all the witnesses agreed that the market for condominiums pretty well dried up in 1976 and I accept the evidence of Mr. Martin and, I believe, of Mrs. Henderson that there was no substantial improvement in the market until nearly 1981, although it appears that some time in 1980, a turn in the market was at least signalled. What the plaintiff did after obtaining

the 93 units was to hire a real estate agent to market the units and that listing was in effect, I believe, until September, 1979, but nothing could be sold, not one single unit.

In order to get some revenue, O.M.C. began to rent the units and, I believe, succeeded in renting many of them and getting some revenue in that way, but as far as sales were concerned in 1979 and throughout most of 1980, I am satisfied that there was simply no market whatever for condominium housing in that area. I accept Mrs. Henderson's evidence on this point.

A suggestion was made that prices should be lowered drastically from the \$40,000 range to \$35,000, for example. It is contained in a memorandum of a conversation, a memorandum made by Mrs. Henderson as a result of what was said by a real estate agent. That, of course, is nothing but hearsay. I would not be prepared to act on such a flimsy basis as that because there is no other suggestion to the same effect in the evidence.

It is significant that the same agent in the same conversation recorded in the same exhibit, which I think is ex. 8, goes on to say that he is not at all confident that sales would be effected at even \$35,000.

Mrs. Henderson said, and I accept this evidence, that it would have been wrong for O.M.C. to set an entirely new price in the market of \$35,000 or anything like it when sales on record for comparable properties were in the \$40,000 range and slightly up from there.

If O.M.C. had reduced its price to \$35,000, it would have made itself a market leader and would have changed the market. As it was, there were no comparable sales to justify such a low market price and that is so because nothing was selling. I am quite satisfied that O.M.C., through its officials, acted in an entirely reasonable and responsible way in its handling of this aspect of the matter and that the defendants have no ground of complaint.

The officials at Ontario Mortgage Corporation were concerned not to upset the market, that is, were concerned to try to get a good price. It was a difficult situation and an exceedingly difficult market. They were left in a very difficult position by the default of the mortgagors. They did not act unreasonably and in fact acted very reasonably in my opinion.

They had on their hands not just one property, but 93 separate properties to be marketed and obviously that presented a much more difficult task than simply the marketing of a single property.

I think one can readily anticipate the protests that might be raised by the defendants if the plaintiff had in January, 1979, or shortly thereafter, embarked on a programme of simply lowering prices on the 93 units until they reached a level at which someone would buy and had done so simply in order to get quick sales.

It was a situation, of course, where there were great difficulties. It would be easy to make mistakes but, in my view, it was handled in a way that cannot be criticized.

One thing that might well have happened if prices had been lowered substantially by O.M.C., would have been to undercut the equity in the units by the other owners of units in the condominiums and such an act might well have triggered further defaults from those owners, thus turning more units back on to O.M.C. hands. It seems to me that was a legitimate consideration in this situation.

Additionally, there is no evidence that lowering prices would have indeed effected any sales. In my view, on the evidence in this case, it is entirely speculative to say that if O.M.C. had lowered the prices drastically in order to achieve sales that they would have in any way reduced the claim of O.M.C. as asserted in this action.

I do not think that any useful purpose is served by referring in any detail to the numerous authorities as to the duty of a mortgagee. In my view, the evidence is perfectly clear that no complaint can be made of the conduct of O.M.C. and its officials in the considerations which they took into account in dealing with this difficult matter.

The next issue arises out of what has been referred to in the argument as the guarantee clause. In the commitment given to the defendants by O.M.C., the commitment which is to be found at Tab 3 of ex. 1 in the record, there is a provision as follows:

... the mortgagor shall pay the following (a) a fee of one percent of the mortgage amount to Ontario Housing Corporation in order that they might act as guarantor of the mortgage ...

So far as the facts are concerned, Ontario Mortgage Corporation deducted from its advance to the defendants 1%, representing that fee. That amount of money, something over \$152,000 was not in fact paid by Ontario Mortgage Corporation to Ontario Housing Corporation, for it appears that just about the time that this commitment was given, perhaps only shortly before it, the guarantee fund that had been maintained up to that time by O.H.C. was transferred and its administration handed over to O.M.C. I do not think that is a difference of any substance whatever.

The fund consisted of the 1% contribution from other projects as well as the 1% contribution from this one. It appears to be a form of self-insurance in case of insufficiency of the security taken for a particular transaction. On these facts, the defendants argue, I think, that there was no guarantee at all and that it should be taken -- I think the argument is this -- that there was no guarantee at all in accordance with the terms of that clause and that \$152,000 representing the 1% should be used to reduce the claim made by the plaintiff in this action against the defendants.

It seems to me that the real point in issue is this: is the 1% guarantee for the benefit of Ontario Mortgage Corporation or is it for the benefit of the defendants? It seems to me beyond argument that it is a guarantee for the benefit of Ontario Mortgage Corporation. It is a guarantee for their benefit paid for, no doubt, by the defendants without the payment of which there would simply have been no mortgage loan. The defendants, as I have already observed, were not inexperienced in dealing with a government-financed project, whether through the provincial government or the federal government, in which fees of this kind are, it appears from the evidence, not uncommon, but the real point is that that was not a guarantee for the benefit of the borrowers nor designed to relieve them of their liability in any way. It was an additional guarantee for the benefit of the lender.

That being so, it appears to me that the defendants have no ground of complaint about it at all.

It is, in my view, not at all like the example given in argument, namely, that if a person orders a blue coat from a store and the store sends him a red coat, the store is not giving him what he contracted for, and that he has not received what he paid for and is entitled to have his money back. I am afraid I am unable to see any parallel between that situation and the present one.

I turn now to the next argument. It is necessary to refer to certain additional facts. As we know, on the 93 units mortgaged between the defendants and O.M.C., the interest rate was 101/4%. After repossession of those 93 units and in the course of reselling those units in some instances, though not in all, O.M.C. took back mortgages at interest rates higher than 101/4%, ranging as high as 14%. The amount involved in the difference was calculated, although I think not accurately, as running as high as \$89,791.05. That is to be found in ex. 18. The amount of the interest differential between 101/4% and the particular interest rates obtained from purchasers of the 93 units, is there calculated as requested by the defence, on the basis that no principal payments are made or have been made on those mortgages at any time up to the present, and that, I think, is not in accord with the facts. Accordingly, the amount is not a correct one.

The defendants rely on this point on the case of *Sun Life Ass'ce Co. of Canada v. George Coles Ltd. et al.*, [1952] O.W.N. 677, in which the principle is stated that where a mortgagee has sold under a power of sale, the mortgagor is entitled to credit for what the mortgagee actually receives on the sale under the power of sale. It was applied in that case with the effect that the mortgagor was not entitled to credit for the full face value of the mortgage taken back on the sale under the power of sale but was entitled only to credit for so much of the mortgage as had in fact been paid, plus any cash paid.

In the present case, most of the sales of the 93 units involved substantial mortgages, for as much as 80% or 90% of the sale prices. If I understand the defendant's argument correctly, they only want a part of the principle laid down in the Sun Life case to be applied to this one. They wanted it applied so that they can get credit for the actual interest payments received at the higher rates than 101/4%, but they do not want to give up the credit they have been given in the plaintiff's calculation of its claim for the full face value of those substantial mortgages.

If the Sun Life case were to be applied, it seems to me it would have to be applied in whole. For example, assume on a sale of \$33,000 or \$34,000, and a \$31,500 mortgage. What has happened, and the way the plaintiff has calculated its claim in this case, is to give credit for the full face value of the \$31,500 as if it had been received by the plaintiff. If the Sun Life case were to be applied, in place of the credit of \$31,500, the plaintiff would be required only to give credit for the amount of the principal already received and bearing in mind that the mortgages in question are five-year mortgages but amortized at 35 years, one can expect that very, very little of the principal has been repaid up to this time. The result would be to increase the plaintiff's claim by something in the order of \$30,000 for each of the 93 units. I make that to work out to something like two and three-quarter million dollars, and that seems hardly a fair exchange for the defendants against a claim of \$89,000.

It seems to me that if there were a recalculation on that basis, any judgment that the plaintiff would be entitled to would be enormously larger and I think it would have to be paid by the defendants before they would be entitled to call for payment to them of any future mortgage payments of principal or interest made by the buyers of the units. I have some difficulty in understanding why this argument was ever made.

I think that disposes of all the arguments that were made and, in my view, all of them fail.

I should perhaps note that a couple of other issues that appeared to be raised during the trial were not addressed in argument and I treat them as abandoned. One related to whether there was or was not delay by O.M.C. in approving purchasers of the units from Shoreham, that is, that in dealing with those approvals, O.M.C. was overly technical. I take it to be abandoned.

The second point related to the government interest-reduction programme which I referred to earlier. This too was not mentioned in argument.

In the result, the plaintiff is entitled to judgment as asked, subject only to the counterclaim which I now turn to briefly.

As I said earlier, the counterclaim is for \$891,022. That figure is to be found in the auditor's statement which I believe was ex. 14. However, I think I need to observe that that document was put in evidence as a document received by the defendants from their auditors and, in my view, is a document that has not been proved in evidence so far as the correctness of it is concerned. No accountant was called as a witness to substantiate it.

It is true that the witness Mr. Goldman is obviously knowledgeable in financial matters, but it is quite apparent from his evidence that he could not explain how the figures were arrived at. Indeed, he thought the amount he and his co-defendants were claiming for in this action was in the order of \$1,300,000 and not merely \$891,000. At the end of his evidence I think it added up to this: he trusts his auditors and because the financial statement puts the figure at \$891,000 then he says that must be the right figure.

While there is no reason why he should not have faith in his auditors who are well known and reliable auditors, that does not prove the content of the financial statement.

In addition to that, he said the basis for the counterclaim was this: that the Ministry of Housing through its Ontario Housing Action Plan held the view in 1974 that in Ajax there was a demand for condominiums for low- and moderate-income people, that that belief on the part of the Ministry or O.H.A.P. induced him and his co-defendants into proceeding with the development of the condominiums at 44 and 66 Falby Ct.

The development, as we know, proceeded almost entirely on government money. It then turned out in 1976 and later that whatever forecasts the government had were wrong as to the market; that as a result of that error Mr. Goldman and his co-defendants lost money and ought to be reimbursed for that loss because of the negligence of the government in its view of the market for condominiums in Ajax.

To state that proposition, I think, is to reveal its flaws. Mr. Goldman and his co-defendants were not forced in any way to proceed with the development. They were the developers of the development, they did so willingly and are extremely experienced and I am sure they know full well the risks that a developer takes. A developer is the primary risk-taker. The lender in this case, Ontario Mortgage Corporation, while it also takes a risk as most lenders do, is not the primary risk-taker. The lender puts up money so that somebody else will take the risk. The lender requires security for its loan. If it is not satisfied with the security available, it does not make the loan but, nevertheless, it is not the primary risk-taker.

If the project were profitable I do not think anyone would suggest that the lender, in the absence of specific contractual provisions to this effect, should share in the benefit. That all goes to the developer. The lender only gets his money back.

It seems to me it follows as the night the day that where, in a situation such as this, the developer loses money, that does not impair the lender's right to get its money back. It is unfortunate the way things turned out in this Ajax matter, unfortunate for everyone, but I can see no ground for the counterclaim. The amount of it fails for want of proof. The claim fails for want of merit and must be dismissed.

I think, gentlemen, at long last I have come to the end of the road. The plaintiff is entitled to judgment as asked, as I indicated at the beginning of these reasons, and the counterclaim must be dismissed.

[Discussion re costs]

I have endorsed the record in the action by Ontario Mortgage Corporation against Shoreham et al., for oral reasons, judgment for the plaintiff for \$1,379,013.86 plus a further \$10,800.99 and prejudgment interest of \$292,699.03 and \$22,848.34 together with costs on a solicitor-and-client basis: and on the other record, action dismissed with costs on a solicitor-and-client basis.

Thank you very much, gentlemen.

Judgment for plaintiff.

CBR# 250

Re Canada Mortgage & Housing Corp. and York Condominium Corp. No. 46

31 O.R. (2d) 514 119 D.L.R. (3d) 423

ONTARIO COUNTY COURT JUDICIAL DISTRICT OF YORK BORINS CO. CT. J. 20TH JANUARY 1981.

APPLICATION to appoint a receiver and manager of a condominium.

W. R. Passi and J. R. Varley, for applicant.

D. A. Potts, for respondent.

BORINS CO. CT. J.:-- This is an application by Canada Mortgage & Housing Corporation (referred to subsequently as CMHC) pursuant to the Condominium Act, 1978 (Ont.), c. 84, s. 49(1), for an order appointing a receiver and manager of York Condominium Corporation No. 46 (referred to subsequently as the Condominium Corporation) and directing the receiver and manager to comply with certain outstanding work orders issued by the City of North York and to cause the implementation of security measures at the site of the condominium property.

The respondent has raised a preliminary objection directed to the power of the Court to grant the relief sought by the applicant. Objections have also been raised to the jurisdiction of the County Court to appoint a receiver and manager and to the procedure followed by the applicant. The application was not argued on its merits.

For the purpose of deciding the issues raised by the respondent I accept as accurate the following evidence disclosed by the affidavit material filed on behalf of CMHC, no material having been filed by the respondent. The Condominium Corporation is composed of 88 townhouses, 656 apartment units and a small commercial and recreational area. CMHC owns 92 units, holds first mortgages on approximately 600 units and has commenced foreclosure and sale proceedings with respect to 35 units. Since the summer of 1980, the board of directors of the Condominium Corporation has been deadlocked and has been unable to decide what course of action should be taken with respect to certain major difficulties and problems of the Condominium Corporation. A serious health and safety hazard to the unit holders of the Condominium Corporation exists, inter alia, as a result of many repairs required to the property and which are particularized in several work orders issued by the City of North York in September, 1980, the entry upon the property by trespassers and resulting vandalism, criminal behaviour taking place on the property and racial conflicts. Considerable difficulty exists in collecting payment from unit holders with respect to the common area expenses which has been a cause of the lack of repairs to the common areas and has also resulted in numerous foreclosure and sale proceedings being conducted by secured parties. The property manager of the Condominium Corporation, Montreal Trust Company, resigned as of December 31, 1980, because lack of direction from the board of directors and insufficient funds prevented it from carrying on any meaningful or constructive management of the Condominium Corporation. Because the board of directors has been unable or unwilling to institute appropriate means to make the necessary repairs to the common elements and to implement security measures, CMHC seeks the appointment of a receiver and manager to carry out the duties of the board.

Section 49(1) of the Condominium Act, 1978, pursuant to which this application is made, reads as follows:

49(1) Where a duty imposed by this Act, the declaration, the by-laws or the rules is not performed, the corporation, any owner, the bureau, or any person having a registered mortgage against a unit and common interest, may apply to the county or district court for an order directing the performance of the duty.

(2) The court may by order direct performance of the duty and may include in the order any provisions that the court considers appropriate in the circumstances.

It is the submission of counsel on behalf of CMHC that the language of s-s. (2) is sufficiently broad to empower the Court to appoint a receiver and manager. It is submitted that if the Court should find that the board of directors is in breach of a duty and order the board to perform the duty, the Court may, as ancillary to such an order and to ensure its compliance, appoint a receiver and manager who would assume the control and management of the Condominium Corporation and, in particular, see to the repairs required by the work orders and the implementation of the needed security measures.

In my view, this submission is incorrect. I base this conclusion on two related grounds. First, the procedure provided by s. 49(1) for the obtaining of an order that the appropriate person perform a duty imposed by the Act or the declaration, by-law or rules of a corporation is summary in nature and is not intended to encompass the usual full and complete inquiry that is required when proceedings are taken to appoint a receiver and manager. Second, s. 18, para. 1 of the Judicature Act, R.S.O. 1970, c. 228, which provides the remedy of the appointment of a receiver and manager, together with s. 19(1) of that Act which empowers the Court to appoint an interim receiver upon an interlocutory application, clearly contemplate a controversy between the parties which has become the subject-matter of an action between them.

Dealing with the first ground, the words "and may include in the order any provisions that the court considers appropriate in the circumstances" in s. 49(2) of the Condominium Act, 1978 are not to be interpreted as importing into the Act the power to appoint some person, in the capacity of a receiver and manager, to assume the duties of the corporation. As I will explain, the appointment of a receiver and manager is a serious step and will not be made unless well-established criteria have been met. The Act creates a corporation to manage the property and any assets of the corporation through a board of directors. By s. 12(2) and (3) the duties of the corporation are declared to be the control, management and administration of the common elements and assets of the condominium corporation and the responsibility to require the unit owners to comply with the declaration, by-laws and rules of the corporation. By s. 12(4) the declaration and by-laws may impose further duties upon the corporation. Section 31(1) provides that every unit owner is bound by and shall comply with the Act and the declaration, by-laws and rules of the corporation. Section 32(1) imposes a duty on every unit holder to contribute toward the common expenses of the corporation. It is in regard to the performance of the duties of the corporation and the unit owners that s. 49(1) is directed. This legislation is analogous to the procedure contained in Part IV of the Landlord and Tenant Act, R.S.O. 1970, c. 236, as amended, and is intended to provide a summary, expeditious and inexpensive procedure for the enforcement of the statutory and contractual duties of condominium corporations and unit holders. Were it the intention of the Legislature to empower the Court to appoint a receiver and manager to perform the duties of the board of directors, express legislation to that effect would have been enacted. Indeed, it would seem that

the Legislature did consider the appropriate remedy to be applied in the situation of an ineffective board of directors in s. 46 which empowers the Court to terminate the government of the property.

The analysis of my second ground provides further support for the conclusion that s. 49(2) is not to be interpreted to include the relief sought in this application. That the appointment of a receiver and manager requires that there be a lis between parties is clear when one considers what, in law, are the duties and responsibilities of a receiver which are succinctly described by Williston and Rolls, *The Law of Civil Procedure* (1970), vol. 2, p. 618:

A receiver is an impartial person appointed by the court to collect and receive, pending the proceedings, the rents, issues and profits of land, or personal estate or other things in question, which it does not seem reasonable to the court that either party should collect or receive, or where a party is incompetent to do so, as in the case of an infant. A receiver can only properly be granted for the purpose of getting in and holding or securing funds or other property which the court at the trial, or in the course of the action, will have the means of distributing amongst, or making over to, the persons or person entitled thereto. In essence, receivers are appointed on interlocutory application to preserve property until the rights of persons alleging an interest therein have been determined.

Where the powers of the person appointed extend to both that of receiver and manager, the appointee must carry on or superintend a trade, business or undertaking in addition to receiving rents and profits and has power to deal with the property and to appropriate the proceeds in a proper manner. "A receiver [and manager] is an officer of the court appointed to discharge the duties prescribed by the order appointing him, and thus represents neither the plaintiff nor the defendant": Williston and Rolls, *supra*, at p. 619. Since it is the role of a receiver to preserve property until the rights of those alleging an interest in it have been determined it follows that there is no jurisdiction to appoint a receiver upon an originating application: *Re Imperial Steel Corp. Ltd.; Watson v. Imperial Steel Corp. Ltd.* (1925), 28 O.W.N. 242; affirmed [1925] S.C.R. 703, [1925] 4 D.L.R. 1080. As the appointment of a receiver and manager is a special remedy with respect to which well-established procedure exists and which is available only in certain well-defined situations it was not the intention of the Legislature to empower the Court to make such an appointment pursuant to an application under s. 49(1) of the Condominium Act, 1978. I express no view, of course, whether on the materials before me the appointment of a receiver and manager would be justified.

Since I am of the view that no power exists to appoint a receiver and manager on an application brought pursuant to s. 49(1) of the Condominium Act, 1978 the respondent must succeed upon its preliminary objection. CMHC, of course, is not without a remedy. While it is prevented from seeking it by way of summary application, it may do so by commencing an appropriate action: cf. *National Trust Co. Ltd. v. Yellowvest Holdings Ltd. et al.* (1979), 24 O.R. (2d) 11, 98 D.L.R. (3d) 189; 80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd. et al., [1972] 2 O.R. 280, 25 D.L.R. (3d) 386.

Because of the conclusion I have reached it is unnecessary to deal with the other grounds relied upon by the respondent. However, in my opinion they merit some comment. Assuming that the Court could have appointed a receiver and manager under s. 49(1) of the Act, the respondent is incorrect in submitting that the County Court lacks jurisdiction to do so. It is clear, since the decision of the Court of Appeal in *Queensway Iron Works Ltd. v. Barlin Construction Ltd. et al.*, June 17, 1980, unreported [since reported 29 O.R. (2d) 586, 113 D.L.R. (3d) 748], that the County Court possesses jurisdiction to grant equitable relief where the subject-matter in regard to which the relief is claimed does not exceed the monetary limit of the Court and also in cases where it does and the defendant does not dispute the Court's jurisdiction. In any event, it is my view that where a statute expressly grants jurisdiction to the County Court in regard to a particular subject-matter, such jurisdiction is in addition to the subject-matter and monetary jurisdiction vested in the Court by s. 14(1) of the County Courts Act, R.S.O. 1970, c. 94: e.g., the Family Law Reform Act, 1978 (Ont.), c. 2, s. 1(c), and *Askin v. Askin*, December 9, 1980, per Walsh J., unreported [since reported 31 O.R. (2d) 252]. If a receiver and manager could have been appointed by the County Court pursuant to s. 49(1) of the Condominium Act, 1978 jurisdiction to do so would have been provided by the statute and not by s. 14(1) of the County Courts Act.

The third ground relied upon by the respondent is well taken. Once again assuming that the Court could have appointed a receiver and manager under s. 49(1) of the Act, the respondent is correct in its submission that the application should have been commenced by way of originating notice and not by way of an ordinary notice of motion. Since s. 49(1) in providing for an application to the Court does not specify the manner of bringing the application, it follows that it should be by originating notice: Rule 11.

In the result, therefore, the application is dismissed with costs to the respondent.

Application dismissed.

CBR# 096

Credit Valley Cable TV/FM Ltd. v. Peel Condominium Corp. #95 et al; Carbondale Holdings Ltd. et al., Third Parties

27 O.R. (2d) 433 107 D.L.R. (3d) 266

ONTARIO HIGH COURT OF JUSTICE GRANGE, J. 29TH FEBRUARY 1980.

ACTION for damages and for a declaration that the plaintiff is the owner of a television cable system.

I. T. Bern and P. Israel, for plaintiff.

I. G. Scott, Q.C., D. A. Potts and M. A. Spears, Q.C., for defendant, Peel Condominium Corporation #95.

D. K. Laidlaw, Q.C., and W. J. Cornwall, for defendant, All- View Interphase Systems Inc.

J. E. Markson, for third parties, Carbondale Holdings Limited and Southdown Builders Limited.

GRANGE, J.:-- The plaintiff is the successor of Terra Communications Limited (Terra) and is a supplier of cable television service which it describes as Community Antenna Cable Television Services (CATV). The defendant Peel Condominium Corporation #95 (Peel or the Condominium Corporation) is a company incorporated under the Condominium Act, R.S.O. 1970, c. 77, to manage an apartment building at 966 Inverhouse Dr. in Mississauga. The defendant All-View Interphase Systems Inc. (All-View) supplies in the City of Mississauga and elsewhere, Master Antenna Television Systems (MATV). This action is essentially one for trespass by the defendants upon the cable and auxiliary equipment installed by or for Terra upon the premises at 966 Inverhouse Dr.

I should first describe the difference in the two systems -- CATV and MATV -- of Terra and All-View respectively. They are both designed to transmit television signals not ordinarily received by a television set. The CATV system performs the task by picking up the signals at a central point in the area and conveying them by cable to dwellings or apartment houses in the area. There is only one CATV company licensed by the Canadian Radio-Television and Telecommunications Commission (CRTC) in any particular area and Terra was licensee for that area required by the terms of its licence to provide cable television to anyone in the area seeking it. The MATV system which is not controlled by CRTC operates by installing a large antenna capable of receiving high frequency signals on top of the particular building and then conveying those signals by cable through the roof to the individual units.

In April, 1974, before the Condominium Corporation came into existence, Terra entered into an agreement with the developer of the project in pursuance of which it installed cable in the building which cable was connected to its master receiving station all in preparation to connecting to the unit occupiers' television sets once those units were sold and their owners subscribed for the service. In April, 1976, the declaration was registered creating the Condominium Corporation. On March 17, 1977, Peel entered into an agreement with All-View for the supply of an MATV system to the building. On June 3, 1977, Peel gave authority to All-View to hook up its system to the system installed by Terra. Thereafter Terra's system was disconnected and All-View's connected with a part of Terra's and Terra forbidden access to the building. On June 10 and 14, 1977, ex parte and interlocutory injunctions respectively were obtained providing that Terra be permitted access to the building, requiring All-View to reconnect Terra's equipment and prohibiting All-View from using the Terra system. The interlocutory injunction remains in force.

There will of necessity be further reference to the facts but that recitation is sufficient to delineate the issue. The plaintiff claims that the action of All-View with the permission and encouragement of Peel amounted to a trespass to and a conversion of its property. The defendants say the cable system became a fixture upon its installation, that there was no registration of any reservation of title and that the unit owners being, under the Condominium Act, the owners as well of the common areas became the owners of the system and could do with it as they wished.

It seems to me that the factual areas that must be considered in greater detail to resolve the case can be divided into three questions as follows:

1. What is the nature of the cable and equipment and its installation?
2. What was the contractual position between or affecting the parties?
3. What were the circumstances leading up to the defendant All- View's use of the existing cable television equipment?

Dealing with these areas in turn the facts are these:

The cable and equipment

As I have stated in a CATV system the signal is received by the cable company at a point -- in this case there is a receiving station at the mouth of the Credit River -- is processed and then passes through trunk cable carried on the poles of Hydro or Bell Telephone (or in trenches if the utility wire is underground) with amplifiers to step up the power about three in every mile. As the cable passes each street a "distribution cable" is carried off the trunk cable and as the trunk or distribution cable passes the house or building of a subscriber, a "drop off" cable is carried in a house directly to the television set or in an apartment building to the telephone utility room with a further drop cable to the individual unit. The purpose of the system is to provide reception of the higher frequency signals which cannot be received unaided by a television set. The cable can be laid outside the building or inside along the walls but it is obviously desirable in an apartment building where possible to lay it during the course of construction when it can be incorporated into the walls of the building and that as we shall see was what was done here.

The actual installation was done for Terra by North Park Electronics Limited in April, 1974. Their installer went to the basement of the building and found the plaintiff's cable where it entered the building. He believed it had come in through a Bell Canada conduit. He attached it to a cable known as "412A" (for .412 diameter), attached that cable to the wall and then carried it to the seventh floor through an aluminum conduit built into the wall by the electrical contractor. At the seventh floor the conduit led into a closet. There the wire was led out of the conduit into a metal housing box and out again up to the 17th floor (the top floor) through another conduit also installed by the electrical contractor, again into an electrical closet, and again into a metal housing

box. Associated with each of these boxes were amplifiers, "splitters" and "multi-taps" and from the boxes wires known as "59 cable" again passing through conduits installed by the electrical contractor led to the different suites of the building. In the suites the wire led to a wall plate and from there to the television set. All the conduits were installed in the concrete wall, the metal housing boxes were bolted to the wall and had a door with a lock and the wall plates were attached by screws. The keys to the housing boxes were turned over to Terra and remained in its possession at all relevant times. All service of the system was effected by Terra.

As will be seen, it was not difficult to remove the wall plates, the amplifiers, multi-taps and splitters, but the removal of the cable is much more difficult, requiring much time and patience and with considerable potential damage to the cable. I think the evidence is clear that the plaintiff expected its equipment to remain in the building once installed, subject, of course, to replacement when necessary, and to service by Terra when necessary. I think it equally clear that the plaintiff would not of its own volition leave the cable and other equipment for a competitor but in actual fact it was never put to the test. This was the only time it has lost or been threatened with the loss of all the subscribers in an apartment building.

The contract

The actual owner of the building (prior to becoming a condominium) was a company known as Southdown Builders Limited, a third party in this action, but that company appeared to use another company, Carbondale Holdings Limited, also a third party, as its instrument in dealing with the trades. The two companies were interlinked both having as shareholders and directors the brothers Arthur and Albert Levman. The evidence as to the relationship of the two companies came only from the examination for discovery of the Messrs. Levman representing one or other of the companies, so I am not sure that it is binding upon the defendants, but that evidence clearly established to me that Carbondale was the alter ego or agent of Southdown. Indeed I doubt if either of the principals knew at any given time which company they were representing and both companies were represented at the trial by the same counsel.

In any event Terra was informed in April, 1974, when it first sought permission to introduce cable into the building, then in the first stages of construction, that Carbondale was the owner of the building and was not disabused by either Carbondale or Southdown. It therefore entered into a letter agreement with Carbondale. As it is the fundamental document governing this action, it is here reproduced in full.

Terra Communications Limited 2540 Hurontario St., Mississauga, L5B 1N5 Telephone 270-2424.

April 22, 1974 Carbondale Holdings Ltd. 412 Queen Street West, Toronto, Ontario.

Gentlemen:

It is our understanding that your Company has elected to make television service available to your Inverhouse Apartment Development, by way of providing us with an exclusive right to provide cable television service to the tenants or residents on a direct basis. That is you agree not to install an antenna or MATV system at any time within the development.

On the basis of this understanding our Company will proceed to wire the buildings for cable service at our cost. We will retain ownership in the television system within the buildings and will provide the service to the residents on a direct basis at our authorized service rates.

We would appreciate you signing this letter of agreement and returning one copy at your earliest convenience so that the wiring may be completed promptly.

Sincerely,

"D.L. Morrison",

D.L. Morrison, Marketing Supervisor.

"A. Levman" Carbondale Holdings Ltd.

I should here remark that the first paragraph seems to be in restraint of trade and no doubt for that reason the plaintiff did not seek to enforce its "exclusive right to provide CATV in the building" in this action. The ownership of the system is, however, stoutly maintained and is the basis of the action. I should also point out that the reference "on a direct basis" meant that each unit owner would be approached directly by Terra and would become or not a direct subscriber. Terra would have preferred a bulk agreement wherein the whole building became a subscriber with one bill monthly (at a lower rate per unit and permitting the switching on of the current for all suites at one time) but that agreement for this building was not forthcoming.

The circumstances leading to the action

Pursuant to the agreement with Carbondale, Terra proceeded to the installation of the cable and equipment in the manner I have described. As the agreement called for individual service rather than bulk service, it then proceeded to solicit custom from the occupants as they bought and moved into the units and by October, 1976, had signed up about 130 out of a possible 198. The forms of individual contract contained a clause as follows:

It is understood that the ownership of all cable and equipment for the transmission of the television signal, up to and including the matching device connection to the Subscriber's receiver, shall be and remain in the Company [Terra].

In the meantime, as I have said, Southdown in April, 1976, registered the condominium declaration. The first directors included the Messrs. Levman and their lawyers, but in July, 1976, they were replaced by a new board composed of unit owners. In the fall of that year the directors expressed an interest in replacing the CATV system with an MATV system and the management company asked for quotations from many potential suppliers including the defendant All-View. Apparently Terra was also asked because it submitted by letter dated October 19th, its own form of bulk agreement. In the letter also it made reference to its "exclusive right" and its retention of ownership of the cable. This was the first direct notice to the Condominium Corporation of the April, 1974 agreement. The agreement itself was apparently not turned over by either Carbondale or Southdown and did not

come into the hands of the Condominium Corporation until after solicitors had been consulted in May of 1977. The agreement has never been registered upon the title to the building.

In December, 1976, the management company recommended against the bulk agreement of Terra and in favour of the MATV system and in March, 1977, the shareholders by a vote of 106 to 8 approved entering into a contract with All-View and that agreement was executed the following day. Appendix A of that agreement contained, inter alia, the following clause:

It is understood that the Purchaser is engaged in resolving the ownership of the coaxial television distribution system presently installed at 966 Inverhouse Drive, Mississauga, Ontario.

All-View proceeded immediately to the installation. By letter of April 20, 1977, the management company wrote Terra terminating "the contract with your Company for cable television effective May 31, 1977". The last paragraph of the letter was as follows: "We would appreciate knowing from you at your earliest convenience, what you intend to do with your wiring on the Corporation's property."

Thereafter all parties took legal advice and I need not set out the correspondence in detail. It is sufficient to say that Terra maintained both to the Condominium Corporation and the individual subscribers its "exclusive right" and its ownership of the cable. The management company wrote to the solicitors for Terra on May 16th concluding:

It would also appear that there was never anything registered against the title of Peel Condominium Corporation No. 95 and after considering all of the above facts, it would be our opinion that if the Corporation wished [sic] to terminate your clients services and request that your client remove their apparatus and wiring from the building, then your client would have to comply with this request ...

On June 3, 1977, the President of Peel Condominium authorized All-View to hook up the MATV antenna to the existing cable television and on the same day (or perhaps the day before) Terra's service manager, Joe Bertoni, seeking to service its customers, was denied access to the building. At some time within a few days thereafter, Bertoni returned to the building, found the locks of the housing boxes removed, all the amplifiers, multi-taps and splitters on the floor and the MATV system connected to the existing cable and All-View using much of the equipment originally installed by North Park for Terra.

It appears that now as the result of the injunction and also as the result no doubt of bad feeling held by the Condominium Corporation and its individual unit owners towards Terra, the equipment of Terra is now all reconnected, Terra obtains entry to service its subscribers, but the number of its subscribers has fallen to 38. All-View's antenna is affixed to the roof of the building, but no signals are passed from it because it is not connected to any television sets in the building. It appears that All-View was willing to connect up the antenna by a wiring system external to the building but the Condominium Corporation would not permit it.

The plaintiff bases its claim upon many grounds but Mr. Bern concedes that the basic claim relates to the June, 1977 connection of the All-View antenna whether that gives rise to a claim in trespass or conversion and that the claim will fail if the cable and auxiliary equipment is found to be a fixture. The defence happily accepts this challenge. It is their position that upon the installation of the system the wire and equipment became fixtures. While there may have been an agreement between Carbondale and Terra that the latter could effect removal that right was lost with the passing of title to the unit holders combined with the failure of Terra to register the agreement against title.

I am not certain that the defendants can rely upon the failure of registration. There appears to be no doubt that the unit owners became the owners of the common elements of the building under s. 7 of the Condominium Act and certainly there was no registration on title, but there is equally no doubt that the unit holders' predecessors in title who were the first directors of the condominium were aware of Terra's title. Moreover, the unit holders themselves (or at least those who subscribed) contracted with Terra for its continued ownership of the system. I also think it clear that the defence is an afterthought. Everything up to June 3, 1977, indicates an acceptance of Terra's dominion over the cable and equipment; I note particularly the letters of the management company of April 20, 1977 and May 16, 1977. Of course, a defence can be an afterthought and still perfectly valid. I have come to the conclusion, however, that this defence is not valid because I have come to the conclusion that the cable and equipment never did become fixtures, i.e., they never did become part of the realty. The test for fixtures was set out in the judgment of Meredith, C.J.C.P., in the Divisional Court in *Stack v. T. Eaton Co. et al.* (1902), 4 O.L.R. 335. He formulated, at p. 338, five rules as follows:

(1) That articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as shew that they were intended to be part of the land.

(2) That articles affixed to the land even slightly are to be considered part of the land unless the circumstances are such as to shew that they were intended to continue chattels.

(3) That the circumstances necessary to be shewn to alter the prima facie character of the articles are circumstances which shew the degree of annexation and object of such annexation, which are patent to all to see.

(4) That the intention of the person affixing the article to the soil is material only so far as it can be presumed from the degree and object of the annexation. (5) That, even in the case of tenants' fixtures put in for the purposes of trade, they form part of the freehold, with the right, however, to the tenant, as between him and his landlord, to bring them back to the state of chattels again by severing them from the soil, and that they pass by a conveyance of the land as part of it, subject to this right of the tenant.

The last rule is, of course, not relevant to the case at bar. Rule (2) certainly applies at least to much of the equipment making it necessary to examine the circumstances to find out whether the articles were intended to be continued as chattels. Under rule (3) the only relevant circumstances are those which show the degree of annexation and object of such annexation "which are patent for all to see". Finally, under rule (4) the subjective intention of the affixer (which I suggest was manifestly to retain the articles as chattels) is immaterial.

Under the third rule in *Stack v. Eaton*, I must consider the degree of annexation. While it is clear that there was some affixing of the articles to the building, I think it is equally clear and more important that both equipment and cable could be readily removed with a minimum of injury to the building. Indeed that was precisely what Bertoni found to have been done by All-View to much of the equipment when he gained access to the building in early June. The removal of the cable might well cause damage to the

cable but there is no evidence that the removal would cause any damage whatever to the building. The presence or absence of likelihood of damage in removal is an important factor in the determination of whether or not the article has become a fixture -- see *Liscombe Falls Gold Mining Co. et al. v. James R. Bishop et al.* (1905), 35 S.C.R. 539. In my view there is not evidence of potential damage upon removal sufficient to affect the matter materially. As was said by Lord Macnaghten in *Leigh et al. v. Taylor et al.*, [1902] A.C. 157 at p. 162:

The mode of annexation is only one of the circumstances of the case and not always the most important--and its relative importance is probably not what it was in ruder or simpler times.

What is important to me is the resolution of the intention question. It has been said more than once that the determination is based upon the facts of the particular case -- see, for example, *Bing Kee et al. v. Yick Chong* (1910), 43 S.C.R. 334, per Davies, J., at p. 337, and *Milvain, J.*, in *Re Burtex Industries Ltd. (in Bankruptcy)*; *Elleker v. Farmers & Merchants Trust Co. Ltd. et al.* (1964), 47 W.W.R. 96 at p. 101, as follows:

I have reached the conclusion that great confusion is created by courts which slavishly follow cases rather than principles. As I understand the law it is a question of intent as to whether chattels become part of the realty, and such intent is to be found in the circumstances of each case as a finding of fact.

The test (or as *Milvain, J.*, would have it -- the principle) that has been accepted is that found in *Haggert v. Town of Brampton et al.* (1897), 28 S.C.R. 174, quoted by *Spence, J.*, in *Re Davis*, [1954] O.W.N. 187 at p. 190:

If the object of the affixing of chattels is to improve the freehold, then, even if the chattels are only slightly affixed to the realty, they may well become part of the realty. If, on the other hand, the object of the affixation of the chattels is the better enjoyment of the chattels, then the affixation does not make them part of the realty.

It is not an easy test to follow. In a sense every chattel affixed to a building could be said to improve the building or else it would not be affixed. The test has led to some apparently conflicting results -- see *La Salle Recreations Ltd. v. Canadian Camdex Investments Ltd.* (1969), 4 D.L.R. (3d) 549, 68 W.W.R. 339 (carpeting in a hotel held to be a fixture); *Lichty et al. v. Voigt et al.* (1977), 17 O.R. (2d) 552, 80 D.L.R. (3d) 757 (a mobile home cemented to the ground complete with septic tank and field bed held not to be a fixture). In any event, I think that applying the test here one must inevitably find the cable and equipment remained a chattel. Its installation in no way improved the building; all it did was make it possible for Terra to provide its subscribers with cable television. Its presence did not make the service cheaper; indeed the cost of service is prescribed by federal Regulation. In my view the situation is governed by such cases as *Re Davis*, *supra* (bowling alleys); *General Steel Wares Ltd. v. Ford & Ottawa Gas*, [1965] 2 O.R. 81, 49 D.L.R. (2d) 673 (gas dryers). In both cases although one might assume the articles were well affixed they were held to be chattels affixed for purposes of carrying on bowling or gas-drying and not for the benefit of the building.

The plaintiff alleges that Peel and All-View were engaged in a conspiracy to interfere with the plaintiff's contractual and economic relations with its subscribers. There is no direct evidence to support the allegation but I am asked to infer the conspiracy and the interference from the loss of custom. I am not prepared to do so. I suspect that the loss of business is a direct result of subscriber resentment at the frustration of their desire expressed in a vote of 106 to 8 to change to an MATV system; if so it is hardly actionable against the defendants.

The prayer for relief asks for an injunction prohibiting interference with the plaintiff's system, an injunction requiring the defendants to cease to operate an MATV system, a declaration that the agreement of April 22nd is in full force and effect and further asks damages for breach of contract, loss of goodwill, conspiracy and interference. As I see the matter, it is simply a trespass action by All-View with the encouragement and participation of Peel lasting for about seven days and terminating upon the granting of the interlocutory injunction. I have found that the system is the property of the plaintiff but I do not see why Peel should be required by injunction to respect the continued presence of the system in the building. The plaintiff is required to provide cable television to any subscriber who seeks it and obviously some of the subscribers do. It is a right, however, of the subscriber and not of the plaintiff; and the problem is one for resolution between the subscribers and the Condominium Corporation. It is no part of my judgment, but I should think Peel would hesitate to require the removal of the system until the consent of all subscribers had been obtained. While I would terminate the injunction, I do not, of course, mean that the plaintiff thereby forfeits the system.

The plaintiff will be entitled to a declaration that it is the owner of the cable system installed pursuant to the agreement of April 22, 1974, and to damages against both defendants for trespass to that system in the amount of \$1,000.

It was argued that the plaintiff unduly prolonged the trial and should be penalized in costs. I do not accept the submission. The plaintiff is entitled to its costs of the action.

There was a counterclaim delivered by Peel against the plaintiff, Carbondale and Southdown seeking a declaration that the agreement of April 22, 1974, was null and void and a declaration that the cable system formed part of the common elements of the property. That counterclaim should be dismissed but without costs.

There are third party proceedings brought by each defendant against the other and by Peel also against Carbondale and Southdown. By agreement no evidence and no argument was heard upon either proceeding. If some determination of those issues is now or at some later time required, I may, of course, be spoken to.

Judgment for plaintiff.

CBR# 254

York Condominium Corporation No. 329 v. Dazol Developments Ltd. et al.

24 O.R. (2d) 46

ONTARIO HIGH COURT OF JUSTICE CARRUTHERS, J. 23RD MARCH 1979.

APPLICATION to set aside a lien claim under s. 13 of the Condominium Act together with an application to stay an action.

W. A. Knights, for applicant. M. Spears, for respondent.

CARRUTHERS, J. (orally):-- There are two applications here. In the first, Dazol Developments Ltd. applies for an order declaring that York Condominium Corporation No. 329 has no interest in the lands and premises which are the subject-matter of the application, and that the notice of lien registered on title by York Condominium Corporation No. 329 is not a valid encumbrance against the title to the said lands and premises. In the second application, York Condominium Corporation No. 329 asks that the action which it has commenced against Dazol Developments Ltd. and Double Z Investments Limited to recover the admitted deficiency in its first year's common expenses be stayed pending the disposition of the first application.

From what information that has been made available to me on both of these applications, I find that Dazol Developments Ltd. was the developer of the condominium project and as required by the Condominium Act, R.S.O. 1970, c. 77, as amended, made a declaration as to what the common expenses were to be during the first year of operation of the condominium project. As it has turned out, its estimate fell short of the mark resulting in the deficiency to which I have referred.

Dazol Developments Ltd., it is agreed, has retained ownership of four of the 54 units in the condominium building. York Condominium Corporation No. 329 has registered the notice of lien in question on the basis that Dazol Developments Ltd. by remaining the owner of the four units is obliged by virtue of the provisions of s. 13 of the Condominium Act, to pay its share of the deficit and has failed to do so.

It seems to me that what is really involved here is an endeavour to join together the provisions of s. 13 in so far as it deals with the obligations of an owner to contribute its share, being a designated percentage, of common expenses within the provisions of s. 24b [enacted 1974, c. 133, s. 14] of the Act which requires the developer to make up the difference under certain circumstances between that which it declared to be the estimated common expenses and the actual amount when the latter is greater. No right of lien is provided to the condominium corporation in the event of there being a deficit under the provisions of s. 24b.

The sections in question read as follows: 13(1) The owners shall contribute towards the common expenses in the proportions specified in the declaration.

(2) The assessment and collection of contributions towards the common expenses may be regulated by the declaration or the by-laws.

(3) The obligation of an owner to contribute towards the common expenses shall not be avoided by waiver of the right to use the common elements or by abandonment.

(4) Where an owner defaults in his obligation to contribute to the corporation towards the common expenses, the corporation, upon registration of a notice of lien in the prescribed form, has a lien for the unpaid amount against the unit and common interest of that owner.

(5) The lien may be enforced in the same manner as a mortgage.

(6) Upon payment of the unpaid amount and upon demand, the corporation shall give the owner a discharge in the prescribed form.

24b(1) ...

(f) where the agreement for purchase and sale is entered into within the year immediately following the registration of the declaration and description, a budget statement prepared by the declarant for the year immediately following the registration of the declaration and description setting out the common expenses, the proposed amount of each expense, particulars of the service to be provided and the amount to be contributed by the purchaser for the year.

(4) Where the total amount incurred for the common expenses provided for in the statement mentioned in clause f of subsection 1 or clause f of subsection 2 exceeds the total of the proposed amounts set out in the statement, the declarant shall forthwith pay to the corporation the amount of the excess except in respect of increased expenses attributable to the termination of an agreement under section 15a.

At once I am struck by the fact that what York Condominium Corporation No. 329 is doing here is using the right of lien available under s. 13 to secure the cause of action which it is given under s. 24b so as to make the interest of Dazol Developments Ltd. subject to the whole amount of the deficit rather than its proportionate interest. There are some 54 units in this building. Dazol Developments Ltd. retains ownership of four, so I would think, at the most, Dazol Developments Ltd. is only obligated under s. 13 to pay 4/54ths of the amount in question. Under s. 24b, on the other hand, it is obligated or is liable to pay the total amount.

I have been advised by counsel that Dazol does not object to the amount of the deficit. In other words, it does not anticipate raising any defence that the deficit is due to mismanagement on the part of the condominium corporation as opposed to a straight failure on its part to estimate correctly.

Is then York Condominium Corporation No. 329 left only with a cause of action to recover the deficit under s. 24b, or is it entitled through the provisions of s. 13 to validly register a notice of lien against the four units owned by Dazol Developments Ltd. for the total amount of the deficit?

If the latter position is correct, I would have to think that the Legislature would have said so expressly. It has not. I cannot, therefore, come to the conclusion that the amount which is due under s. 24b can be secured through the provisions of s. 13. This may be an unanticipated gap in the Act, but it is a gap nevertheless and I do not think I can fill it by coming to a different conclusion than I have. As I have said above, in any event, if the notice of lien is valid it would be only reasonable that it would encumber the interest to the extent of 4/54ths of the deficiency and not the whole amount as York Condominium Corporation No. 329 has attempted to do.

In my opinion, therefore, the lien is not a valid lien and should be removed as an encumbrance from the title to the lands and premises in question. The costs of this application shall be to the applicant.

On the second application, an order is to go granting leave to the plaintiff to amend the endorsement on the writ of summons herein so as to set forth by way of general endorsement a claim for the amount of the deficiency due under s. 24. There shall be no costs of the second application.

Orders accordingly.

CBR# 020

Aita et al. v. Silverstone Towers Ltd.

19 O.R. (2d) 681 ONTARIO

ONTARIO COURT OF APPEAL ARNUP, MACKINNON AND LACOURCIERE, J.J.A. 2ND MAY 1978.

APPEAL from a judgment of Weatherston, J., awarding damages for breach of a contract to sell a condominium unit.

John Weingust, for appellant, defendant.

W.D. Martin, for respondents, plaintiffs.

The judgment of the Court was delivered by

ARNUP, J.A.:-- This is an appeal by the defendant, the builder of a condominium, from the judgment of the Honourable Mr. Justice Weatherston whereby the plaintiffs, the purchasers of a condominium unit, recovered from the defendant \$8,410 damages for breach of contract. In 1973 the defendant commenced the construction of a condominium building on Silverstone Dr. in the Borough of Etobicoke, and as construction progressed, the defendant proceeded to enter into agreements for the purchase and sale of units within the condominium. On October 13, 1973, the plaintiffs as purchasers entered into an agreement to purchase the unit numbered 808 on the eighth floor of the building under construction, for the price of \$35,990, payable \$500 as a deposit, the assumption of a first mortgage in the sum of \$23,230, the giving of a second mortgage for \$9,760, and the balance of the purchase price on closing, subject to adjustments.

The following provisions of the agreement are material:

3. This offer shall be null and void in the event the Purchaser is not approved by the first mortgagee lending institution ...

4. The Purchaser acknowledges that the declaration and the description and the by-laws of the Condominium Corporation to be created by the registration of the declaration and the description and the rules respecting the use of the common elements as required by The Condominium Act, R.S.O. 1970 and amendments thereto (hereinafter referred to as the "Act") have not as of the date of this Agreement been registered and that this Agreement is conditional upon compliance with Section 29 of The Planning Act of Ontario.

5. This Agreement and the transaction arising therefrom are conditional upon the following:

(a) the approval of the Purchaser by the first Mortgagee prior to the closing date;

(b) the registration by the Vendor of a Condominium Plan, description, and of the Declaration and By-law No. 1 on or before "to be designated". [The words in quotation marks are typed in; the balance of para. 5, and most of the agreement of purchase and sale, is on a printed form.]

In the event that either condition has not been complied with, this Agreement shall be null and void and all moneys paid by the Purchaser shall be returned without interest or deductions subject however to paragraph 7 hereof.

6. This transaction of purchase and sale is to be completed on the closing date which is to be on or before the 30 day of June 1974, except as otherwise herein provided or such other date as may be required in accordance with the provisions for postponement referred to in paragraph 7 hereof.

7. If the Unit is completed and fit for occupancy by the date fixed for closing hereunder but prior to the date of registration of the Condominium Plan, Description, Declaration and By-law Number 1 and the Purchaser has been approved by the First Mortgagee, then the Purchaser shall pay to the Vendor the balance of the purchase moneys and shall take occupancy of the Unit on the date fixed for closing hereunder on a rental basis at a rental of \$338.62 per month in advance commencing on the date of occupancy and payable on the same date of the next succeeding month during the term of such occupancy until the agreement of purchase and sale can be completed in accordance with the provisions hereof. Any prepaid rent shall be adjusted on completion of sale.

If the within agreement can not be completed, the Purchaser agrees to vacate the premises within thirty (30) days of the date he receives notice to vacate and the Vendor will forthwith return the moneys held by it less the rental for the term during which the premises were occupied by the Purchaser. The parties herein agree that acceptance of possession of the premises hereunder by the Purchaser shall not be deemed or considered in any way as a Release or abandonment of any of the Purchaser's rights under this agreement of purchase and sale.

The Purchaser in occupation under this clause further agrees to complete the agreement of purchase and sale within fifteen (15) days after written notice shall have been given by the Vendor to the Purchaser or to the Purchaser's Solicitor by ordinary mail that the Condominium Plan, Description, Declaration and By-law Number 1 has been registered in the Office of Land Titles.

16. The Purchaser shall be deemed to be in default under this Agreement if he fails to fulfill any of the provisions of this Agreement and if any lien, execution or encumbrance arising from any action or default whatsoever of the Purchaser is charged against or affects the unit or the building of which the unit forms a part so as to prevent advances on the first mortgage and shall include registration on title on behalf of the Purchaser of any documents prior to closing. In the event of such default on the part of the Purchaser, the Vendor may, in addition to any other remedies it may have, declare this Agreement to be cancelled and null and void and the deposit moneys paid by the Purchasers shall thereupon be forfeited to the Vendor as liquidated damages. In addition, upon default by the Purchaser in any of the provisions of this Agreement, the Purchaser waives tender by the Vendor and all further obligations of the Vendor to the Purchaser shall cease. In addition, upon default by the Purchaser in any of the provisions of this Agreement, the Purchaser waives tender by the Vendor and all further obligations of the Vendor to the Purchaser shall cease. In the event the transaction is not completed by reason of default on the part of the Vendor, the liability of the Vendor hereunder shall be limited to the return to the Purchaser of the deposit moneys herein.

22. Time shall be of the essence of this Agreement.

We were told by counsel that before the necessary approval required for registration of the declaration and description and the rules respecting use of the common elements can be obtained, at least 60% of the units must have been sold and be occupied. It is, therefore, obvious that para. 7 quoted above was going to come into operation with respect to at least 60% of the units, i.e., the "purchasers" were going to have to move in and pay the balance of the purchase moneys, plus rent, before registration of the condominium plan was effected.

The plaintiffs, who are husband and wife, went to the premises on a fairly regular basis to see how construction was coming along. In May, 1974, they were approved as purchasers by the mortgagee, so that the first expressed condition was satisfied. By the closing date of June 30, 1974, the unit purchased by the plaintiffs was not yet completed and fit for occupancy. It was on the eighth floor. There were to be 15 or 16 floors in the building. By June, 1974, the building was up to the sixth floor. By the end of 1974 it had reached nine or ten floors.

The plaintiffs, in purchasing the unit, had dealt with a salesman named Murray Swartz, and when they returned to the premises every two or three weeks to see what progress was being made, they spoke frequently to Swartz. In February, 1975, on one of their regular visits, the plaintiffs were told by a salesman other than Swartz that the building was going to be ready in May, 1975. In the meantime the plaintiffs had chosen the carpet, tiles, cabinets and the painting for their unit.

From the middle of 1973, when the plaintiffs had made their agreement, the sale price of condominium units steadily increased, and by early 1975, units comparable to that for which the plaintiffs had agreed to pay roughly \$36,000 had become worth \$47,000 or \$48,000.

By a letter dated February 14, 1975, without any previous warning, the defendant wrote to the plaintiffs as follows:

We notice that the closing date of the above transaction has expired some time ago and you have not since that time made any indication that you have any interest in completing the transaction.

We are therefore taking the position that that transaction is cancelled and the offer is null and void.

You will find a cheque enclosed herein in the amount of \$500 representing the return of the deposit.

The plaintiffs took this letter to their solicitor, who wrote to the solicitors for the defendant, stating that the plaintiffs wished to complete the transaction, that they had spoken to the sales agent from time to time asking when the apartment would be ready, that they had last done so in mid-February and had been told that the apartment would be ready for occupancy in the middle of April, 1975. The solicitor stated that his "clients had agreed to this extension". His letter referred also to the choosing of carpets, cabinets and tiles with the sales agent. The solicitor sent back to the solicitors for the vendor the \$500 cheque forwarded by them.

On April 15, 1975, the plaintiffs' present solicitors tendered upon the solicitors for the vendor a certified cheque for \$2,500, and a certified cheque for \$338.62, being one month's occupation rental for the unit. The letter confirming tender, written the following day by the plaintiffs' solicitors, states that the vendor's solicitors had said that they had no instructions to close, and had declined to accept the tender. On April 25, 1975, the plaintiffs issued a writ claiming specific performance or in the alternative, damages.

While the action was pending, the defendant sold the unit, and accordingly specific performance became impossible.

Weatherston, J., after quoting the foregoing facts, said that the defendant might have terminated the contract on June 30, 1974, but not having done so until the unit was ready for occupancy, the covenants in para. 7 came into force. He held that those covenants gave the plaintiffs some proprietary right in the unit pending registration of the condominium plan, description, declaration and by-law. He held it was the defendant's duty to notify the plaintiffs that the unit was ready for occupancy, and to be ready to perform its obligations under the contract; that the defendant was not entitled to arbitrarily terminate the contract, as it attempted to do, and that there continued to be a valid contract up to February 14, 1975, on which date, by its letter, the defendant wrongfully repudiated the contract.

The defendant took the position at trial that there had been no breach by it of the contract, and that in any event under para. 16 of the agreement its liability was limited to the return to the plaintiffs of the deposit money. Weatherston, J., said on this point:

On this point I refer by analogy to those cases where a defaulting party to a contract relies on an exemption clause. In those cases where there has been a fundamental breach of the contract, such clauses are not given effect to, for otherwise the seller's promises in the contract would be meaningless.

So in this case, if the defendant were able to rely on the clause which I have just read limiting its liability to the return of the deposit, its covenants and this agreement of purchase and sale would be meaningless. There is no fundamental breach of contract here but the defendant had repudiated the entire contract and with it the clause limiting its own liability.

At the date of breach specific performance was not possible because the building had not been registered in accordance with the Condominium Act, R.S.O. 1970, c. 77, and damages must, therefore, be assessed as of the date of the breach and not as of the date of this action.

The trial Judge then proceeded to fix the damages at \$7,910 plus the deposit of \$500, or a total of \$8,410.

Two points arise for determination on this appeal: 1. Are the provisions with respect to compliance with s. 29 of the Planning Act, R.S.O. 1970, c. 349, as amended, and registration of the requisite documents pursuant to the Condominium Act, R.S.O. 1970, c. 77, as amended, true conditions precedent, which had not been fulfilled at the date of the issue of the writ in this matter, and therefore the plaintiffs have no cause of action because the conditions precedent had to be fulfilled before the agreement of purchase and sale became effective? 2. If the plaintiffs succeed in the issues raised by the first point, is their remedy limited by the last sentence of para. 16 of the agreement to the return of their deposit?

The first point, in the form in which I have stated it, was really raised by the Court itself. We had in mind the line of cases beginning with *Turney et al. v. Zhilka*, [1959] S.C.R. 578, 18 D.L.R. (2d) 447, and including *Queensway Construction Ltd. v. Trusteel Corp. (Canada) Ltd.*, [1961] S.C.R. 528, 28 D.L.R. (2d) 480; *F.T. Developments Ltd. v. Sherman et al.*, [1969] S.C.R. 203, 70 D.L.R. (2d) 426; *Barnett v. Harrison et al.*, [1976] 2 S.C.R. 531, 57 D.L.R. (3d) 225, 5 N.R. 131; *George Wimpey Canada*

Ltd. v. Focal Properties Ltd., [1978] 1 S.C.R. 2, 78 D.L.R. (3d) 129, 16 N.R. 71; and Goetz et al. v. Whitehall Development Corp. Ltd., Court of Appeal, February 10, 1978, 19 O.R. (2d) 33, 84 D.L.R. (3d) 243.

On further consideration, I do not think the doctrine of "true condition precedent" applies to this case. It was necessary, in order to avoid the invalidity that s. 29 of the Planning Act might otherwise impose on the agreement, to make it conditional upon compliance with that Act: s. 29(7). The Planning Act is complied with by registration of the condominium and the Condominium Act, as amended by 1972 (Ont.), c. 7, s. 1; 1973, c. 121; 1974, c. 133, and 1977, c. 67, then takes over: see *Re Crossroads Apartments Ltd. and Phillips* (1974), 4 O.R. (2d) 72, 47 D.L.R. (3d) 172. (The important amendments made by the 1974 Act did not come into force until April 1, 1975. They were not the subject of any argument in this Court nor before Weatherston, J. I am not suggesting those amendments affected the agreement in this case. I simply do not propose to refer to the statute again.)

In this case, the parties themselves contemplated that the closing date might arrive before the requisite registrations of the condominium documents had been effected. They did not agree that in such event, the agreement was at an end. On the contrary, they agreed in para. 7 that if the unit was completed and fit for occupancy by the closing date, the plaintiffs would pay the balance of the purchase price, without getting title, and take occupancy of the unit on a rental basis, at the amount of rent stipulated in the agreement.

The draft agreement of purchase and sale, as an incomplete printed document, contemplated two true conditions precedent, non-compliance with either of which was to render the agreement automatically null and void, subject to para. 7 thereof. The first, approval of the purchasers by the first mortgagee, was complied with. The second, requiring registration of the condominium documents by a date to be filled in before the agreement was executed, was filled in "to be designated". It was no condition at all, with that language, let alone a "true condition precedent".

In my view, therefore, the defendant cannot rely on non-compliance with true conditions precedent as having put an end to the agreement.

It follows that I am in agreement with the trial Judge that when the closing date went by, with neither party doing anything about it, the agreement continued in force. It follows also that the defendant had no right to purport to terminate the agreement on the basis stated in its letter of February 14, 1975. The premises had just become fit for occupancy, and so para. 7 would be applicable. The defendant did not call upon the plaintiffs to pay the balance of the purchase moneys, or to pay rent, or to take occupancy. Instead, the defendant attempted to say the contract was at an end.

The plaintiffs did not accept this. They promptly sued for specific performance. Thus they relied on the contract. Did this entitle the defendant to rely on para. 16 of the agreement, which I repeat:

In the event the transaction is not completed by reason of default on the part of the Vendor, the liability of the Vendor hereunder shall be limited to the return to the Purchaser of the deposit moneys herein.

This is an extraordinary clause. On the defendant's interpretation, it can refuse, arbitrarily, capriciously, or wrongfully, to carry out the bargain it made, and the purchaser's only remedy is to get his money back. The reason for refusal may be only that property values have risen substantially, and the vendor can sell to another purchaser at a much higher price. (This is undoubtedly what happened here.)

The trial Judge held that there was "no fundamental breach of contract here but the defendant has repudiated the entire contract and with it the clause limiting its own liability". The distinction between repudiation and fundamental breach is discussed in *Cheshire and Fifoot's Law of Contracts*, 8th ed. (1972), at pp. 563-8, and the effect of each, at pp. 568-74. These passages make it clear that in the event of either repudiation or fundamental breach by one party, the innocent party may elect whether to treat the contract as discharged, or to treat it as still in force, and seek to enforce it. Here the plaintiffs have clearly chosen the second course. They claimed specific performance, and claimed damages only as an alternative to it. When specific performance became impossible, s. 21 of the Judicature Act, R.S.O. 1970, c. 228, enabled the Court to give damages in lieu thereof.

This election to treat the contract as continuing had the effect, in my view, of keeping all of its applicable terms effective, including para. 16. It then becomes a question of what construction is to be placed upon para. 16, in the circumstances of this particular case. I do not accept the defendant's construction of that paragraph as limiting its liability, even in the event of its arbitrary refusal to carry out the contract. In my view, the paragraph was intended to cover default by the defendant in carrying out a term of the contract that required it to do something. This is the ordinary meaning of the word "default". The paragraph was not intended to cover a complete and outright repudiation of the entire contract. As the trial Judge pointed out, the defendant's construction makes its promises meaningless. In my words, it makes the defendant's purported agreement a mere sham; it could perform or not, as it chose. This cannot have been the intention of the parties.

It is to be noted that the agreement of purchase and sale had a separate provision, in para. 18, reading:

18. If the Vendor is unable to fulfill the requirements of the Act, then the Vendor shall give written notice to the Purchaser or his solicitor and this Agreement, notwithstanding any intervening negotiations, shall be null and void and the purchase moneys paid by the Purchaser shall be returned without interest and without deductions. If para. 16 was as wide in its ambit as the defendant contends, para. 18 would be redundant. The defendant could simply repudiate the contract, in the event of its inability to fulfil the requirements of the Condominium Act, and return the deposit.

Since para. 16 does not, in my view, limit the defendant's liability on the facts of this case, the trial judgment is right, and the appeal should be dismissed with costs.

Appeal dismissed.

CBR# 325

Swan Lake Recreation Resort Ltd. v. Registrar (Kamloops Land Title Office)

Between Swan Lake Recreation Resort Ltd., appellant, and Registrar, Kamloops Land Title Office, respondent

[1999] B.C.J. No. 1384 Victoria Registry No. 99 1660

British Columbia Supreme Court Victoria, British Columbia Cowan J. Heard: April 16, 1999. Judgment: filed May 14, 1999.

Counsel: L. John Alexander and R.K. Gandhi, for the plaintiff. Lisa Mrozinski, for the defendant.

[para1] COWAN J.:-- This is an appeal pursuant to s. 309 of the Land Title Act R.S.B.C. 1996 c. 250 from the refusal of the respondent to register a strata plan in the Kamloops Land Title Office.

[para2] The appellant proposed the development of a recreational campground in Vernon, B.C. The development was to comprise 200 resort or residential strata lots and a single commercial strata lot in Vernon, B.C. In furtherance of the development, it caused a strata plan to be prepared by a land surveyor.

[para3] The scheme of the development was to create 200 strata lots and assign to each of the strata lots as limited common property under the Condominium Act R.S.B.C. 1996 c.4, one of 200 recreational vehicle sites for the exclusive use of the owner of the strata lot to which it was assigned.

[para4] The strata plan indicates that the several strata lots are 0.07 square metres each in area and stacked in rows to a height of seven levels. Each strata lot has a total space of 0.098 cubic metres.

[para5] In his "notice declining to register" issued pursuant to section 308 of the Land Title Act the registrar characterized what was purported to be a "building" for the purposes of the Condominium Act as a "mailbox". In my view, that is an apt description of the purported "building".

[para6] The ground for the respondent's refusal was that the mailbox shown in the plan was not a "building" pursuant to the Act: section 4(a), section 7(1)(a) and section 8 of the Act, and section 5(e) and (f) of the Regulation.

[para7] Specifically, the respondent held that a mailbox does not comply with section 6(1) and section 6(2) of the Act and sections 5(j), (k) and (m) of the Regulations as it has no floors, walls or ceilings. Pursuant to section 8, the respondent found that the mailboxes were not a "building that can be occupied" because mailboxes cannot be occupied by persons.

[para8] The notice of appeal asserts that the respondent erred in refusing to accept the strata plan by:

(a) failing to find that the building comprising the several strata lots complied with the definition of "building" in the Condominium Act; and

(b) failing to accept that the strata lots shown on the strata plan complied with sections 6.1 and 6.2(a) of the Condominium Act and regulations in that they had floors, walls and ceilings as required by those sections and the regulations.

[para9] In its submissions, the appellant admits that the strata lots themselves are not habitable. Rather, they "merely allow the strata titles to be created". More precisely, the lots purport to create "building strata" titles as opposed to "bare land strata" titles. The distinction is important because the development requirements and regulations that apply to "building strata" title projects are considerably less onerous than those that apply to "bare land strata" title projects.

LAW AND ANALYSIS:**1. Standard of Review****(a) General**

[para10] In *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, the Supreme Court of Canada instructed that, where the statute confers a right of appeal, the Court must have regard to the nature of the problem, the applicable law in light of its purpose, and the expertise of the tribunal.

(b) The Nature of the Problem before the Registrar

[para11] At paragraph 44, the Supreme Court of Canada stated that the application of the law to the facts is a matter of mixed law and fact. At paragraph 45, the Court stated that this indicates that some measure of deference is owed to the administrative decision maker.

[para12] The decision at issue in the present case similarly involved the interpretation and application of the statutory term "building" to the particular facts, i.e. the community mailbox structure. In my view, as in *Southam*, the nature of the problem was one of mixed law and fact.

(c) The Words of the Appeal Provision

[para13] Section 309(1) of the Land Title Act indicates that the review of the registrar's decision is in the nature of an appeal. No privative clause is present. As in *Southam*, this indicates that the approach may be less deferential than if a privative clause were present.

(d) The Purpose of the Statute and Expertise of the Decision maker

[para14] The following passages from *Cotterall v. Vancouver (City)* (1986), 3 B.C.L.R. (2d) 368 at 374 (C.A.), were applied in *Morgan v. Vancouver (City)* (1988), 32 B.C.L.R. (2d) 1 at 4 (C.A.):

The guiding principle for judges hearing an appeal from a decision of an approving officer was enunciated by Coady J. in 1954, when he was a judge of the Supreme Court of British Columbia, in *Re Proposed Subdivision* (1954), 15 W.W.R. 143. He said at p. 143:

"There are many reasons why municipal corporations should have and are given a measure of control over proposed subdivisions and the court should not on appeal lightly interfere with the decision of the approving officer."

In *Simpson v. Vancouver*, a chambers judge followed this principle in dismissing the appeal from the decision of the approving officer, stating:

"Where, as here, there is direct statutory foundation for the ground given for the decision to approve or disapprove, and where it is not shown that the decision, despite its impact on an individual, was made in bad faith, or with the intention of discriminating against that individual, or on a specious or totally inadequate factual basis, there should, in my opinion, be no interference by the court with municipal officers honestly endeavouring to comply with the duties imposed on them by the Legislature in planning the coherent and logical development of their areas."

This passage was also applied to appeals from the registrar under s. 291 of the Land Title Act, which accords with and incorporates s. 289, in *Mackay v. Acting Registrar of Title* (1989), 5 R.P.R. (2d) 113 (B.C.S.C.).

[para15] Section 13(2) of the Land Title Act provides as follows:

13(2) A person must not be appointed a registrar unless the person

(a) is a solicitor, or

(b) is employed in a land title office in British Columbia and has been so employed for at least 12 years.

[para16] While there is therefore a requirement that the registrar have some expertise, it is an expertise in relation to property law. In this respect, deference is not as strongly indicated as in *Southam*. In *Southam*, the purpose of the statute and the expertise of the tribunal was characterized as "economics and commerce." The Court held that this was an area in which judges are competent, but in which economic and statistical skill, as well as business experience, are "more desirable and important than legal acumen."

[para17] In my view, the factors of the purpose of the statute and the expertise of the registrar indicate some deference, but are not strong indicators of deference.

(e) Conclusions with Respect to Standard of Review

[para18] In my view, considering the factors set out above, the "reasonableness" standard applies to the present review. As the Supreme Court of Canada stated in *Southam* at paragraph 56:

An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it.

2. Principles Governing the Construction of Statutes

(a) The Ordinary Meaning Rule

[para19] In *Ruth Sullivan, Driedger on the Construction of Statutes* (Toronto: Butterworths 1994), at p. 7, the author states as follows:

As understood and applied by modern courts the ordinary meaning rule consists of the following propositions:

(1) It is presumed that the ordinary meaning of a legislative text is the intended or most appropriate meaning. In the absence of a reason to reject it, the ordinary meaning prevails.

(2) Even where the ordinary meaning of a legislative text appears to be clear, the courts must consider the purpose and scheme of the legislation, and the consequences of adopting this meaning. They must take into account all relevant indicators of legislative meaning.

(3) In light of these additional considerations, the court may adopt an interpretation in which the ordinary meaning is modified or rejected. That interpretation, however, must be plausible; that is, it must be one the words are reasonably capable of bearing.

(b) The Modern Rule of Statutory Interpretation

[para20] In *Driedger on the Construction of Statutes* (Toronto: Butterworths 1994), at p. 131, the author states as follows:

There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purposes; and (c) its acceptability, that is, the outcome is reasonable and just.

[para21] At pp. 194-5 of *Driedger*, the author sets out a number of aspects to the "context" in which a particular statutory provision ought to be interpreted:

- (1) The immediate context;
- (2) The other language version (where applicable);
- (3) The Act as a whole;
- (4) Related legislation;
- (5) The common law;
- (6) Common law rules for interpreting legislation;
- (7) The external context (historical and cultural setting);
- (8) Extrinsic aids.

3. The Merits of the Appeal

(a) Overview of the Act

[para22] The Condominium Act allows creation of two types of strata. A "bare land strata" is essentially a subdivision of land. In a "building strata", on the other hand, lots are defined by floors, walls, and ceilings of a building. In building strata, the rest of the land not covered by a building is designated either common property or limited common property, i.e. limited to the use of an individual strata lot owner. Limited common property could be, for example, a yard area associated with a specified residential strata lot.

[para23] It is important to note, as stated earlier, that the regulations governing registration of a "bare land strata" are much more onerous than those for the deposit of a strata plan having a building. An indirect consequence of this is that property developers have an incentive to characterize proposals as "building strata", even if they are functionally indistinguishable from "bare land strata".

(b) The Purpose of the Legislation

[para24] The Condominium Act was originally enacted in 1966 as the "Strata Titles Act", S.B.C. 1966, c. 46. In 1974, the Act was repealed and replaced by a new Strata Titles Act, though many of the provisions remained substantially the same: S.B.C. 1974, c. 89.

[para25] The first significant change, taken in 1977, was to extend the Act to cover "bare land strata": S.B.C. 1977, c. 64. Over time it also became clear that "building strata" could be residential, commercial, or a mixture of residential and commercial.

[para26] Notwithstanding these specific expansions to the scope of the Act, in my view the underlying purpose of those Parts of the Act engaged in the present proceeding remains very similar to that of the original Strata Titles Act. The purpose and intent of those sections of the Act is also very similar to that of the Ontario Condominium Act. In *Re Carleton Condominium Corp. No. 279 and Rochon* (1987), 59 O.R. (2d) 545 (C.A.), Finlayson J.A. described the original purpose and intent of the Ontario Act as follows at p. 549:

The Condominium Act was passed to permit individuals to be owners of the freehold estate in residential units in a building as opposed to tenants in an apartment building. This means that they have disposable real property which is an investment and not simply an expense. Its purchase can be financed by mortgage or lien in the same manner as any piece of real estate.

(c) The Immediate Context

[para27] Section 1(1) of the Act defines building as follows:

"building" means a building, or a group of buildings, shown on a strata plan.

[para28] The appellant argues that this definition means that anything shown on a strata plan as a "building" thereby becomes a building. This is an untenable argument. In my view, the definition of "building" set out above was intended merely to clarify that any "building" must be shown on the strata plan in order to qualify as a "building" under the Act, and that references to a "building" include the plural. It was not meant to mean that the only requirement to qualify as a "building" under the Act is that the structure appear on a strata plan.

[para29] That the meaning of "building" is further restricted becomes apparent upon review of the other sections of the Act.

(d) The Act as a Whole

(i) "Bare land" vs. "Building" Strata Plans

[para30] Section 1(1) of the Act defines "bare land strata plan" as follows:

"bare land strata plan" means a strata plan on which the boundaries of the strata lots are defined on a horizontal plane by reference to survey markers under section 6(2)(b), and not by reference to the floors, walls and ceilings of a building; [para31] The overall scheme of the Act is to separate all strata plans into one of two categories, "bare land strata plans" and building strata plans.

[para32] As noted above, the concept of "bare land strata plans" was added to the Act in 1977. When the Bill was given second reading, the Minister responsible stated as follows (British Columbia, Debates of the Legislative Assembly (August 23, 1977) at 4846-7):

... For approximately the past 12 months, this ministry has given considerable study to the Strata Titles Act with the primary objective of making it a more effective instrument not only for the production of multiple housing but to allow the kind of housing where occupants can live together harmoniously.

...

Last October, the B.C. Council of the Housing and Urban Development Association of Canada presented a comprehensive submission recommending legislation to allow what they called "automatic homeowners' associations," similar to the fairly common American concept of planned unit development. Basically, the concept is somewhat like a local improvement area, where a special tax or a levy is imposed on owners benefiting from a particular amenity.

I am happy to say that the amendments before us will permit this kind of land development without the technical problems created by the existing legislation. In effect, it allows for the subdivision of bare land so that a purchaser will own his parcel of land and a share of the common facilities and all strata owners will pay for the maintenance of such common facilities.

The Minister also expressly stated that the statute contemplated mixed developments, where residential and commercial uses would both occur within a single strata development.

[para33] In my view, then, the Act contemplates two types of strata developments. In each type of strata plan, the Legislature clearly intended that the areas designated as the "strata lots" would be the primary use areas, while common property or limited common property areas would be intended for uses ancillary to the primary use. This conclusion is supported by s. 5 of the Act, which provides as follows:

5. Garages, parking spaces, storage areas and other areas or spaces related to the use of a strata lot that are intended for residential use must not be designated as separate strata lots but must be included as part of the strata lot or as part of the common property.

[para34] It is unclear whether "intended for residential use" modifies "a strata lot" or "other areas or spaces". The use of the plural "are" before "intended for residential use" indicates that it refers to "other areas or spaces". "Garages, parking spaces, storage areas" are all areas "intended for residential use" as an ancillary function to a residence, namely the strata lot. Similarly, a mail box is an area intended for residential use as an ancillary function to a residence.

[para35] This is, in essence, a functional interpretation of the scheme of the Condominium Act. Whether the strata lot is contained within a building or is simply a measured area of bare land, the primary intended use area is to be designated the "strata lot", and areas with residential uses ancillary to the primary use "strata lot" must be either included in the strata lot or in the common property, and cannot be separate strata lots.

[para36] In the presently proposed development, the scheme contemplated by the Act is inverted. It would be absurd to suggest that owners' use of the individually designated R.V. sites will be ancillary to their primary use of the development, the mailbox. The primary use areas of the development are the R.V. sites. There are no buildings enclosing the R.V. sites. Therefore, viewed from a functional perspective, the proposed development is clearly a "bare land strata" rather than a "building strata". Consequently, the mailbox is not a "building" within the meaning of the Act.

(ii) "Buildings" vs. "Improvements"

[para37] Section 1(1) also provides as follows:

"improvements" means improvements defined in paragraph (a) of that definition in the Assessment Act

[para38] Before the definition in the Assessment Act was amended by S.B.C. 1990, c. 32, s. 1, the reference to "paragraph (a)" referred to the following, S.B.C. 1986, c. 2, s. 1:

"improvements" means

(a) buildings, fixtures, structures and similar things erected on or affixed to land or to anything referred to in paragraph (k),

[para39] The present definition of "Improvements" in the Assessment Act, R.S.B.C. 1996, c. 20, does not include a "paragraph (a)". It states in part as follows:

"improvements" means any building, fixture, structure or similar thing constructed or placed on or in land, or water over land, or on or in another improvement ...

[para40] In my view, it is this portion of the definition of "improvements" in the Assessment Act, substantially the same as the former paragraph "(a)", that is now referentially incorporated into the Condominium Act.

[para41] In *I.C.R.V. Holdings Ltd. v. Tri-Par Holdings Ltd.* (1996), 3 R.P.R. (3d) 49 (B.C.S.C.), Tysoe J. considered s. 32(1) of the Property Law Act, which authorizes the court to remedy situations where a "building" encroaches on adjoining land. At issue was whether serviced R.V. pads constituted "buildings" within the meaning of the section.

[para42] Tysoe J. contrasted the relevant section of the Property Law Act with the Builders Lien Act and the Assessment Act. He emphasized that both the Builders Lien Act and Assessment Act contain definitions of the word "improvement", a much broader term than "building". At p. 61 he stated as follows:

The r.v. pads and accompanying services in the present case would clearly fall within this definition [of improvement]. However, when it enacted s. 32 of the Property Law Act, the Legislature chose not to use the term "improvement" but decided to use the narrower terms "building" and "Fence". If the Legislature had intended s. 32 to have application to improvements to land such as the r.v. pads and accompanying services, it would have employed a definition of "improvements" similar to the definitions contained in the Builders Lien Act and the Assessment Act.

[para43] In my view, the analysis employed by Tysoe J. applies a fortiori to the definition of "building" in the Condominium Act, as the Condominium Act itself employs and defines the word "improvement". By distinguishing between "buildings" and the

broader category of "improvements", the legislature narrowed the concept of "buildings" to exclude constructions more accurately described as "fixtures" or "structures". In my view, a community mailbox would ordinarily be considered a "fixture", an item currently affixed to the ground but which would clearly otherwise be a chattel or personal property.

(iii) Floors, walls, and ceilings

[para44] Section 6 of the Act states as follows:

6. (1) Except in the case of a bare land strata plan and unless otherwise stated on the strata plan, the common boundary of a strata lot with any other strata lot or with common property is the centre of the floor, wall or ceiling, as the case may be.

(2) For the purposes of section 4(d), the boundaries of a strata lot must be defined,

(a) by reference to the floors, walls and ceilings,

(c) if the strata lot includes balconies, patios, private yard areas, garages, parking spaces, storage areas and other areas and spaces not enclosed by floors, walls or ceilings, in any manner approved by the registrar.

[emphasis added]

[para45] These provisions indicate that all "buildings" within the meaning of the Condominium Act have floors, walls, and ceilings. Section 6(2)(c) indicates that other spaces may be included in a strata lot, but it remains clear that a building strata lot is an area bounded by a floor, walls and ceiling.

[para46] One would ordinarily refer to the boundaries of a mailbox as its "bottom, sides, and top" rather than its "floor, walls and ceiling". For instance, "floor" is usually applied to surfaces upon which one can walk. This is particularly true of the word "ceiling", which does not appear in any other B.C. statute.

[para47] The Canadian Oxford Dictionary provides the following definition of "ceiling":

Ceiling. a. The upper interior surface of a room or other similar compartment.

Compartment. 1. A space within a larger space, separated from the rest by partitions.

[para48] A mailbox is a "compartment", but it is not, in my view, "similar to a room". A "room" is typically a place capable of entry, if not occupation, by human beings.

[para49] In my view, the use of the word "ceiling" is further evidence that a community mailbox is not a "building" within the meaning of the Condominium Act.

[para50] Section 5 of the Regulation states in part as follows:

5. Every strata plan tendered for deposit in a land title office and registration therein ... shall comply with the following requirements:

(1) (i) only the strata lots situate on the same floor of the building may be illustrated on a single sheet, and the name and number of such floor shall be shown at the top of the sheet ...

(s) the name (if any) of the building, together with its street address and the name of the municipality or assessment district in which such building is situate, shall be shown on the first sheet.

[emphasis added]

[para51] No more than limited use can be made of a Regulation in interpreting a Statute. However, in this case the registrar specifically referred to the Regulation in his reasons. As with the "floor, walls, and ceiling", the notion of "a floor of a building" is normally reserved for buildings into which humans or other animals may enter. Further, a "street address" is normally given only to lots or occupiable buildings, not a mailbox.

(iv) Capable of Occupation

[para52] Section 8 states as follows:

8. (1) If a strata plan is not a bare land strata plan, does not form part of a phased strata plan, and includes a building that has not been previously occupied, or a building to be constructed and developed, the owner developer must, on tendering a strata plan for deposit, file with the registrar a certificate of a British Columbia land surveyor, dated not more than 90 days before the date on which the strata plan is tendered for deposit, certifying that the building has not been occupied prior to the date of the certificate.

[para53] The appellants argue that this provision does not indicate that all buildings must be capable of occupation. They argue that a developer can produce a certificate certifying that a non-occupiable building has not been occupied prior to the date of the certificate. However, in my view, especially when considered in light of the scheme of the Act as a whole, section 8 clearly contemplates that all buildings will be capable of occupation, and distinguishes between those occupied prior to the date of application, and those to be occupied after the date of occupation.

[para54] In my view, this conclusion is supported by the following definition of "building", from Webster's Third New International Dictionary (Massachusetts: G & C Merriam, 1971):

Building: 1. A thing built. a: a constructed edifice designed to stand more or less permanently, covering a space of land, usu. covered by a roof and more or less completely enclosed by walls, and serving as a dwelling, storehouse, factory, shelter for animals, or other useful structure -- distinguished from structures not designed for occupancy (as fences or monuments) and from structures not intended for use in one place (as boats or trailers) even though subject to occupancy.

[emphasis added]

[para55] In my view, then, a "building" under the Condominium Act must be capable of occupancy.

(v) Postal Delivery Receptacle vs. Building

[para56] Finally, section 70(2) of the Act provides as follows: 70. (2) The strata corporation must, at a place convenient for postal delivery, have continually available a receptacle suitable for postal delivery, with the name of the corporation clearly marked on it.

[para57] The Canadian Oxford Dictionary (Toronto: Oxford University Press, 1998), provides the following definitions:

Mailbox. b. a private receptacle to which letters are delivered.

Receptacle. 1. A container or vessel in which something is stored or deposited.

This further indicates that the mailboxes are containers, not rooms, and that the structure is a cluster of receptacles, not a building.

(e) Ordinary Meaning: Dictionary Definitions

[para58] The Canadian Oxford Dictionary (Toronto: Oxford University Press, 1998), provides the following definition:

Building. 1. A permanent fixed structure forming an enclosure and providing protection from the elements etc. (e.g. an office building, school, house, etc.).

[para59] In *Stevens v. Gourley* (1859), [Vol. CXXI] 1859 C.P. 7 C.B.N.S. 99-100 p.397, in the absence of a definition in the statute, the Court considered whether a particular structure came within the term "building" in the statute. Erle, Ch. J. referred to the fact that the parties had stated in the building contract that the structure was to be a "house" or "shop". He found that the structure was permanent, and "reasonably calculated for the use of man" (p. 403). Crowder, J. gave weight to the "magnitude" of the structure, its intended purpose as a shop, and its permanence. At pp. 406-7, Byles, J. stated as follows:

... What is a "building?" Now, the verb "to build" is often used in a wider sense than the substantive "building." Thus, a ship or a barge builder is said to build a ship or a barge, a coach-builder to build a carriage; so birds are said to build nests: but neither of these when constructed can be called a "building." ... The imperfection of human language renders it not only difficult, but absolutely impossible, to define the word "building" with any approach to accuracy. One may say of this or that structure, this or that is not a building; but no general definition can be given; and our lexicographers do not attempt it. Without, therefore, presuming to do what others have failed to do, I may venture to suggest, that by "a building" is usually understood a structure of considerable size, and intended to be permanent, or at least to endure for a considerable time. ...On the other hand, it is equally clear that a bird-cage is not a building, neither is a wig-box, or a dog-kennel, or a hen-coop, the very value of these things being their portability.

[para60] In *Morrison v. Commissioners of Inland Revenue*, [1915] 1 K.B. 716, Rowlatt J. stated as follows with respect to the inquiry whether a structure is a "building" (p. 722):

The character of the erection and the nature of the property on which it is and its function on that property must all be looked at. And, as follows at p. 723:

I think that the word "buildings" in relation to a farm means in s. 25, sub-s. 2, of the Finance (1909-10) Act, 1910, what one would ordinarily call farm buildings. If one were to say "this farm has very excellent buildings upon it," nobody conversant with farming language would suppose that one was talking about the stone walls which we have to consider in the present case, which run over the country to divide the fields, and also to shelter the sheep. I therefore do not think they are buildings.

[para61] In interpreting the word "buildings" in the B.C. Assessment Act, in *B.C. Hydro & Power Authority v. British Columbia (Assessor of Area No. 05 - Port Alberni)* [Q.L. 1990 B.C.J. No. 2714] (B.C.S.C.), Hood J. held that the word "buildings" in that Act was an ordinary English word and did not have any technical meaning. He therefore sought to give it an ordinary meaning. He applied the approach set out in *Metals & Alloys Co. Ltd. v. Regional Assessment Commissioner Region No. 11* (1985), 49 O.R. (2d) 289 (C.A.). That approach had been approved of by Gow J. in *Galloway Lumber Co. v. Assessor of Area 22 - East Kootenay* (1988), 29 B.C.L.R. 52 (S.C.), affirmed (1989), 40 B.C.L.R. (2d) 353 (C.A.). Hood J. referred to the following passage from page 306 of the Ontario decision:

"Building", however, is an ordinary English word, and in this statute should be given the meaning an ordinary person would attribute to it. What we have in this case looks like a building. It is almost identical to its neighbouring structure, which is admittedly a building. It is built like a building. It is used like a building. ...The only reasonable conclusion, in my view, is that it is a building.

[para62] In *I.C.R.V. Holdings Ltd. (supra)* at pp. 60-1, Tysoe J. referred to the decision of the Saskatchewan Court of Appeal in *Dominion Fire Brick & Clay Products Ltd. v. Elmsthorpe (Rural Municipality)*, [1944] 2 W.W.R. 20 (Sask. C.A.). In that case, the question was whether certain assets were "buildings" or "machinery and equipment" under the Rural Municipality Act. Tysoe J. noted that the Court of Appeal had approved the following passage from the reasons of the Saskatchewan Assessment Commission: These definitions throughout suggest that a building is a structure which is designed for use as a habitation or other purposes of occupation, or for the storage of commodities. While the definition given in the Century Dictionary refers to user of the structure in general terms, it seems to the Commission that the author did not intend the scope of that definition to be extended to include machinery and equipment. In none of the judicial decisions affecting the word 'building' has it been suggested that the meaning of the word can be extended in this fashion.

Tysoe J. held that the above meaning of "building" was the same as that intended by the Legislature in s. 32 of the Property Law Act.

[para63] In my view, the word "building" ordinarily means a structure which is designed for use as a habitation or other purposes of occupation, or for the storage of commodities. Further, a "building" ordinarily is relatively permanent, and relatively large in size.

[para64] In the context of a residential or recreational subdivision or development, if one were to see a community mailbox standing next to an office building or a permanent dwelling, one would not ordinarily say that the community mailbox was "one of the buildings" in the development. Further, its function in the overall property would be an adjunct to the buildings or sites, rather than having an independent function.

(f) Related B.C. Legislation

(i) The Architects Act

[para65] The appellants refer to the Architects Act, R.S.B.C. 1996, c. 17, s. 1, which defines "building" as follows:

"building" means a structure consisting of foundations, walls or roof, with or without other parts.

The appellants did not refer to the way in which this definition is employed in the Architects Act.

Section 59 states in part as follows:

A person is deemed to practise the profession of architecture within the meaning of this Act if the person

(a) is engaged in the planning or supervision of the erection or alteration of buildings for the use or occupancy of persons other than himself or herself ...

Section 27(2) prohibits a person from practising the profession of architecture unless the person holds a current certificate of practice. Section 60 sets out a list of exceptions, activities that are not prevented by section 27(2). In particular, s. 60(h) limits the application of s. 27(2) to eight defined types of "building".

[para66] In the Condominium Act the scope of the application of the Act depends upon the definition of "building". In the Architects Act the scope of application of the Act depends upon not the definition of "building", but the specific terms of s. 60(h). In my view, the terms serve very different functions in the overall scheme of each Act, and the definition in the Architects Act is broader than that applicable to the Condominium Act.

(ii) The Personal Property Security Act

[para67] The plaintiff also referred to the Personal Property Security Act, R.S.B.C. 1996, c. 359, s. 1, which defines "building" as follows:

"building" means a structure, erection, mine or works built, constructed or opened on or in land.

However, the term "building" is only used in the definition of "building materials", which is itself only used to exclude "building materials" from the definition of "fixtures" for the purposes of the Act. Consequently, in my view it would be inappropriate to apply this definition to any other purpose.

(iii) The Building Safety Standards Act

[para68] The plaintiff did not refer to the Building Safety Standards Act, R.S.B.C. 1996, c. 42, s. 1, which defines "building" as follows:

"building" means a structure that is used or intended to be used for the purpose of supporting or sheltering persons or animals or storing property, but does not include

(a) a prescribed structure, prescribed equipment, or

(b) a prescribed portion of equipment in or attached to a structure. The structure at issue in the present proceedings would not fall within the terms of this definition.

(g) Effect of Different Meanings

[para69] I agree entirely with the Respondent's brief where, at paragraph 22, it is stated:

It is also useful to consider the impact of a finding that a community mailbox could constitute a building under the Condominium Act on the legislative scheme for the filing of bare land strata plans. Bare land strata plans are filed in cases where a strata plan does not include a building but which will ultimately be used for the creation of residential subdivisions, for example. The regulations for a bare land strata title are much more onerous than the regulations for the deposit of a strata plan having a building. If one were to accept the definition of building put forth by the Appellant, it would be entirely unnecessary for any builder to attempt to register a bare land strata plan. Such an interpretation would render the entire scheme for the registration of bare land strata plans of no force or effect. At the very least, it makes a mockery of this scheme.

CONCLUSION:

[para70] The appropriate standard of review is reasonableness. In my view, the registrar acted reasonably in determining that the community mailbox is not a "building" for the purposes of the Condominium Act, and in declining to approve the plans. Nothing in the statutory language, evidence, or authorities, indicates any reason to depart from the ordinary meaning of "building". It was reasonable for the registrar to conclude that a "building" under the Condominium Act must have floors, walls, and a ceiling, and must be capable of occupation. It was reasonable for the registrar to conclude that the compartments in the community mailbox do not have "floors" or "ceilings". Accepting the appellant's interpretation would defeat the intent and operation of the "bare land strata" scheme, and its more onerous requirements.

[para71] I would accordingly dismiss the appeal, with costs to the respondent.

COWAN J.

CBR# 180

James Marshall and Blanche May Marshall, petitioners, and The Owners, Strata Plan No. NW 2584, respondents

[1996] B.C.J. No. 1716

Vancouver Registry No. A961321

British Columbia Supreme Court Vancouver, British Columbia Henderson J. Heard: May 28 and 30, 1996. Judgment: July 30, 1996. Filed: August 1, 1996.

Counsel: G. Grunberg, for the petitioners. P.A. Williams, for the respondents.

[para1] HENDERSON J.:-- Mr. and Mrs. Marshall own a strata lot in a condominium development where the Strata Corporation has restricted occupancy to persons 55 years of age or older. The Strata Corporation has also prohibited the owners from leasing their strata lot to others. The Marshalls say these two provisions of the by-laws are unfairly prejudicial to them and should be set aside. Issues involving the rule of stare decisis also arise.

[para2] Mr. and Mrs. Marshall purchased a strata lot at 1400 - 164th Street in Surrey, British Columbia in February, 1990. The premises are part of a condominium development and are governed by Strata Plan NW 2584.

[para3] Mr. and Mrs. Marshall are 78 and 73 years of age, respectively. Their son, James Marshall, is 51 years of age and has lived with them in the premises continuously since the time of purchase. James Marshall contributed a substantial portion of the purchase price. He helps maintain the premises and provides a measure of security for his parents. It is a great comfort to the Marshalls to have their son living with them.

[para4] At the time of purchase, a disclosure statement was available to the Marshalls which warned that:

The development is designed for persons of advance (sic) years. Children are not permitted to live on a permanent basis in the development.

The disclosure statement proposed a set of by-laws for the Strata Corporation which made no reference to an age restriction. The phrase "advance (sic) years" and the word "children" were not defined.

[para5] The proposed by-laws in the disclosure statement contained a provision allowing owners to rent their units as long as "reasonable screening procedures" were used to find responsible tenants and the prospective tenant was given a copy of the by-laws.

[para6] The Marshalls did not receive a copy of the disclosure statement prior to buying their unit. They told their real estate agent they wanted their son to live with them permanently.

[para7] Section 26(1) of the Condominium Act, R.S.B.C. 1979, C. 61, permits a strata corporation comprising the owners of the strata lots included in a strata plan to pass by-laws providing for the "control, management, administration, use and enjoyment of the strata lots and common property, common facilities and other assets" of the corporation. In 1991, a year after the Marshall's purchase of their unit, the Strata Corporation passed by-laws containing the following:

1. OCCUPANCY

a. Each strata lot is designed for persons of advancing years, 55 years or older. Children are not permitted to live on a permanent basis in the development. b. All prospective buyers are to be made aware of the By-Law and Restrictions.

2. RENTING

a. Each Strata lot shall be occupied as a single family residence. No owner shall allow the whole or any part of a strata lot to be occupied under circumstances where rent is charged. The stated number of leases or rented strata lots permitted is Zero (0)., with the following exception. b. During owner absences for an extended vacation, illness, or other cause, a Caretaker may be permitted to lease, subject to the following conditions ...

[para8] By 1993, some of the residents had complained about James Marshall (who was 48 at the time) living in the development. It was suggested he leave, but the Marshalls resisted. In a letter dated October 13, 1993, the Strata Council invited the Marshalls to apply to the Council for an exemption to the age restriction for James Marshall, implying that such an exemption would be forthcoming. Mr. and Mrs. Marshall declined to do that, saying the Corporation had no right to prevent their son living in the premises. At that point, the Strata Council relented and told the Marshalls their son could continue to live with them.

[para9] On November 29, 1995, the Strata Corporation amended its by-laws to read as follows:

1. AGE RESTRICTION

a. Each strata lot is designed for individuals of advancing years, 55 years and older. Children (meaning natural or adopted sons, daughters, family members et al) are not allowed to live on a permanent basis in the development.

b. Every strata lot is reserved for the use of individual(s) 55 years of age and older.

c. Individual(s) under the age of 55 years (with the exception of a spouse) shall not reside at Gateway Gardens. d. This By-law shall not be construed to be operating (sic) or prohibiting or restricting devolution of a strata lot as per Section 29 of the Condominium Act.

e. Individual(s) 55 years of age or older residing in a strata lot may have visitors stay with them who are under the age of 55 years, for up to one month per visitor in any twelve-month period. Visits longer than one month by individual(s) under the age of 55 years may be approved by the Strata Council, such approval not to be unreasonably withheld.

f. Any owner who has individual(s) residing in their strata lot who are under the age of 55 years and are not visitors as defined in sub-paragraph 3. of this By-law shall be liable to a fine in the amount of \$250.00 per week for each week this By-law is being violated.

2. RENTING a. Each Strata lot shall be occupied as a single family residence. No Owner shall allow the whole or any part of a strata lot to be occupied under any circumstances where rent is charged. The stated number of leased or rented strata lots permitted is Zero (0), with the following exception:

b. (sic) During Owner absences for an extended vacation, illness, or other cause, a Caretaker (sic) be permitted to lease, subject to the following conditions ...

[para10] It is these two provisions of the current by-laws which Mr. and Mrs. Marshall seek to set aside. They rely upon Section 42 of the Condominium Act, which gives jurisdiction to this court to prevent or remedy acts of a strata corporation which are unfairly prejudicial to an owner. Section 43 of the Act allows this court to direct or prohibit an act of council, vary a resolution, or regulate the conduct of a corporation's future affairs.

[para11] On April 2, 1996, the Strata Council advised the Marshalls that it had rescinded its decision allowing James Marshall to live in the development because the Marshalls had declined to apply in 1993 (as they had been invited to do) for an exemption. Mr. and Mrs. Marshall responded by starting this action.

[para12] The owners have now consented to an order prohibiting the Council and the Corporation from seeking to evict James Marshall because of his age, and I make that order.

[para13] That does not dispose of this action. The Marshalls consider the continuing existence of the age restriction and the prohibition on renting to be unfairly prejudicial to them.

Age Restriction

[para14] The Marshalls say that the age restriction in the by-laws operates as a restriction on the devolution, transfer, lease or mortgage of the strata lot and is therefore contrary to Section 29 of the Condominium Act. The respondents say the age restriction was not intended to operate in that fashion and there is no evidence before the court that it does. They say the age restriction is a reasonable limit on the use and enjoyment of the strata lots which is justified by Section 26(1) of the Act.

[para15] Sections 29 and 30 of the Condominium Act provide:

Dealings in strata lots

29. Subject to section 30, the bylaws do not operate to prohibit or restrict (a) a devolution of a strata lot; or (b) a transfer, lease, mortgage or other dealing with a strata lot, or to destroy or modify an easement implied or created by this Act.

Restriction on leasing: general

30. (1) A strata corporation administering a strata plan that is wholly or partially residential may, by bylaw, limit the number of residential strata lots within the strata plan that may be leased by the owners. (2) A bylaw under subsection (1) shall set out the number of strata lots that may be leased and the manner in which the limitation will be enforced.

[para16] The word "by-laws" is defined in Section 1(1) of the Condominium Act to mean those by-laws set out in Part 5 of the Act itself together with any amendment to them passed by the strata corporation. By-laws prescribed by Part 5 of the Act provide a foundation upon which the corporation is invited to build its own set of by-laws suitable to its own unique situation. Section 29 contains a clear direction that nothing contained in Part 5 shall be viewed as restricting the right of alienation. A number of decisions of this court, referred to below, have confirmed that Section 29 also limits the jurisdiction conferred on a strata corporation by Section 26(1) to pass by-laws.

[para17] The Marshalls argue that the age restriction lessens the value of their strata lot because it reduces the pool of potential purchasers. Although someone under the age of 55 could buy their unit, that purchaser would not be allowed to occupy it. Since most purchasers wish to occupy what they buy, the age restriction serves to reduce demand for the unit and lower the price the Marshalls might obtain on the open market. This, they say, is an impermissible constraint on their right of alienation.

[para18] The truth of this assertion is not self-evident. It may well be that an age restriction limiting a condominium development to older people enhances its desirability amongst that age group. This may serve to increase demand for the strata unit within that age group and, therefore, add value. In my view, the question of whether a particular age restriction affects the value of a strata unit and, if so, how, can be demonstrated only through expert evidence. None was adduced here.

[para19] The Marshalls argue that the age restriction fetters their right to lease the strata lot. Only prospective tenants aged 55 or over could be considered by them. They also say that while Section 30 of the Act permits a quantitative restriction limiting the number of units that may be leased, it does not permit a restriction on any other basis. They rely upon *Cowe v. Strata Plan VR 1359 and Others* (1994), 92 B.C.L.R. (2d) 327 (B.C.S.C.), in which Saunders, J. set aside a by-law prohibiting an owner from renting unless he or she had first occupied the unit for 12 months. The combined operation of Sections 29 and 30 led to this result.

[para20] Discriminatory practices based upon age are dealt with expressly in the Human Rights Act, S.B.C. 1984, c. 22. The Act prohibits discrimination because of age in, for example, employment or trade union membership. Section 4 of the Act addresses directly the issue of discrimination in the purchase of dwellings or an interest in land but age is not one of the enumerated classes of protected persons. Section 5 addresses the issue of discrimination against tenants; here, age is one of the enumerated classes.

[para21] Section 5(1) contains a general prohibition on age discrimination with respect to tenants. It reads:

5.(1) No person shall

(a) deny to a person or class of persons the right to occupy, as a tenant, space that is represented as being available for occupancy by a tenant, or

(b) discriminate against a person or class of persons with respect to a term or condition of the tenancy of the space,

because of the ... age of that person or class of persons ...

[para22] Section 5(2) provides the following exception:

Sub-section (1) does not apply ...

(b) As it relates to family status or age,

(i) if the space is a rental unit in residential premises in which every rental unit is reserved for rental to a person 55 years of age or older or to two or more persons, at least one of whom is 55 years of age or older, or

(ii) a rental unit in a prescribed class of residential premises ...

[para23] As far as rental accommodation is concerned, the Legislature has prohibited discrimination against tenants on the basis of age, but has made an express exception for premises in which every rental unit is designed for people 55 years of age or older. Clearly, the legislation recognizes the legitimacy of retirement communities where people of advancing years may live together with other members of their own generation. The Legislature has made a policy choice to permit this differentiation, based upon age, to exclude younger tenants. The benefits resulting from permitting older people to band together in retirement communities must be taken to outweigh the adverse consequence of placing some rental accommodation beyond the reach of younger people.

[para24] The Human Rights Act contains no prohibition on age discrimination in the purchase of strata lots at all. The intent of the Legislature manifested in Sections 4 and 5 of the Human Rights Act is to permit the creation of retirement communities by means of age restrictions whether the occupants rent or own the premises.

[para25] The Petitioners acknowledge this but assert that Sections 29 and 30 of the Condominium Act take precedence and have the effect of prohibiting age restrictions in strata corporation by-laws.

[para26] Sections 29 and 30 of the Condominium Act were enacted in 1977; the references to age restrictions in Section 5 of the Human Rights Act were enacted in 1992. Moreover, since human rights legislation defines public policy regarding matters of general and fundamental concern, an apparent conflict between it and other legislation must be resolved in favour of the former: *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150; *R. v. Mercure*, [1988] 2 W.W.R. 577, 633 (S.C.C.). In *Winnipeg School Division No. 1*, the Supreme Court of Canada said (at page 156):

Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement. To adopt and apply any theory of implied repeal by later statutory enactment to legislation of this kind would be to rob it of its special nature and give scant protection to the rights it proclaims.

[para27] That was said in the course of giving effect to an express prohibition on age discrimination in the Human Rights Act, 1974 (Man.), c. 65 s. 6(1) in preference to other applicable Provincial legislation. The present case differs somewhat because the conclusion that an age restriction in strata corporation by-laws is permissible arises only by implication from the legislation and is not express. In my view, that difference does not render the principle in *Winnipeg School Division No. 1* inapplicable. The special nature of the Human Rights Act requires that its principles, even if merely implicit, must prevail (see *Hsuen v. Mah* (1986), 7 B.C.L.R. (2d) 21 (B.C.S.C.)).

[para28] I am satisfied that Sections 4 and 5 of the Human Rights Act must govern the situation. Not only is the Act subsequent legislation, so that no question of implied repeal can arise, but its special nature means an exception can be created only by clear legislative pronouncement. Section 29 of the Condominium Act does not accomplish that.

[para29] The Marshalls say this conclusion is not open to me as the age restriction issue has been decided conclusively in their favour by the decision of this court in *453048 British Columbia Ltd. v. The Owners, Strata Plan KAS 1079* (1994), 43 R.P.R. (2d) 293 (B.C.S.C.). There, Harvey, J. found a Strata Corporation by-law to be ultra vires which provided:

No owner shall permit any person (including himself) under the age of 50 years to occupy any strata lot by him (her) for a period in excess of 21 days aggregate in any calendar year. For the purpose of this sub-section 3, a person who uses his strata lot for overnight accommodation shall be deemed to have occupied the strata lot for one day for each occasion that he (she) uses the strata lot for his (her) overnight accommodation. Any variation is subject to approval in writing from the Strata Council.

[para30] Harvey, J. made two findings about this age restriction, both of which are equally binding upon me unless distinguishable or given per incuriam: see *Behrens v. Bertram Mills Circus Ltd.*, [1957] 2 Q.B. 1, 25. He considered section 5 of the Human Rights Act and found the by-law in violation of that provision because it prohibited rental to tenants under 50. He noted that the by-law would not violate Section 5 if the age limit had been set at 55. Since the by-law before me sets the age at 55, this branch of Harvey, J.'s decision presents no difficulty.

[para31] He also held that the application of the by-law "is in all practical senses intended to control who owns and lives on the property." This was found to be a restriction on devolution, transfer or lease of the sort prohibited by Section 29 of the Act.

[para32] While the by-law under attack here differs in its language from that considered in *453048 British Columbia Ltd.*, its intent and effect is the same - to prohibit people under a particular age from living in the development for more than a short period of time. The only difference of consequence between the two by-laws is the specified age, 55 in the present case and 50 in the case before Harvey, J. Does that provide a basis for distinguishing the prior decision? In my view, it does not. The essence of this branch of the decision in *453048 British Columbia Ltd.* is a finding that a by-law with an age restriction on occupancy does not merely provide for the use and enjoyment of a strata lot but amounts to a restriction on the right of alienation. Whether the age limit is set at 50 or 55 makes no difference to that finding.

[para33] I am free to depart from a prior decision of this court where binding authority or a relevant statutory provision has been overlooked: *Re Hansard Spruce Mills Limited (In Bankruptcy)* (1954), 13 W.W.R. (N.S.) 285. In reaching his conclusion that a by-law with an age restriction on occupancy offends Section 29, Harvey, J. makes no reference to the Human Rights Act or to the important principle in *Winnipeg School Division No. 1* concerning the special nature of such legislation. Had that principle been brought to his attention, the decision on this branch of the case would have been different. The finding that an age restriction on occupancy is ultra vires because of Section 29 was per incuriam. I am not bound by it.

[para34] While Section 29 of the Condominium Act forbids the prohibition or restriction of leasing in strata by-laws, both Section 30 of that Act and Section 5 of the Human Rights Act provide exceptions whereby the right of a strata lot owner to lease the property may be restricted. [para35] For the reasons given above, I find that Section 1 of the by-law enacted November 29, 1995 is within the jurisdiction of the Strata Corporation.

Restriction on Renting

[para36] Section 30 of the Condominium Act allows a strata corporation to limit the number of residential strata lots that may be leased by the owners. The Act also contains these exceptions:

31. (3) A bylaw passed by a strata corporation under section 30 does not restrict the right

...

(b) of an owner who has leased his strata lot to a tenant pursuant to a tenancy agreement entered into before the bylaw is passed to continue the lease pursuant to the agreement or renew or extend it.

32. (1) Where

(b) an owner is prevented from leasing by a bylaw under section 30; and (c) hardship results to the ... owner, he may appeal to the strata council for permission to lease his strata lot, and the council shall not unreasonably refuse the appeal.

(3) The strata council may on an appeal authorize the lease of one or more strata lots in contravention of the bylaw, or permit alteration of a rental disclosure statement without the consent of the owners.

[para37] The Marshalls say that the complete prohibition on renting is not authorized by Section 30 and is an unlawful restriction on the right to lease, contrary to Section 29. They argue that, although a strata corporation has the undoubted right to "limit" the number of lots that may be leased, it is not entitled to prohibit leasing entirely. Use of the word "limit" coupled with the direction in Section 30(2) to "set out the number" of lots that may be leased reflects, say the Marshalls, an intention on the part of the Legislature to allow at least one owner to rent out at least one unit. The "number" must be more than zero.

[para38] Unfortunately, there are conflicting judgments of this court on the question and the conflict has yet to be resolved by the Court of Appeal. In *Re The Condominium Act and Re Mattiazzo & Others* (21 March 1985), Vancouver A850287, Wood J. considered a by-law which limited the number of strata lots that could be rented to six and then went on to provide that any units sold after the date of the by-law could no longer be rented. Wood, J. found that in time the by-law could have led to a situation where no owner was entitled to rent. He held that this was a contravention of Section 30 of the Act because an absolute prohibition on leasing is not a "limit".

[para39] Another judgment of this court decided about one month after *Mattiazzo* comes to the opposite conclusion. In *Von Schottenstein v. Owners, Strata Plan 730* (1985), 64 B.C.L.R. 376 (S.C.), Hutchison, L.J.S.C., reviewed a strata corporation by-law which prohibited leasing without the express permission of the strata council. The decision in *Mattiazzo* was not brought to his attention. After conceding that "if one is to limit a number, there must be something more than zero remaining", Hutchison L.J.S.C. said "there is something more than zero in the sense that there is always a right of appeal." Because Section 32 of the Condominium Act permits an owner to appeal, in the case of hardship, to the Strata Council for permission to lease (a permission which shall not be unreasonably refused), the prohibition was something less than absolute - that is, a limitation.

[para40] In *453881 B.C. Ltd. and Others v. The Owners, Strata Plan LMS 508* (1994), 41 R.P.R. (2d) 318 (B.C.S.C.), Boyle J. of this court set aside a by-law containing an absolute prohibition on leasing. Both *Mattiazzo* and *Von Schottenstein* were cited to him. He decided to follow *Mattiazzo*, but gave no reasons for doing so.

[para41] The Respondents argue that this literal interpretation of Section 30 leads to an absurd result. No apparent legislative purpose is served by requiring a strata corporation which wishes to prohibit leasing entirely to, nevertheless, provide that the first owner (but only the first) who wishes to lease his or her unit may do so as of right.

[para42] The purchaser of a strata lot acquires an interest as a tenant in common in the common property, common facilities and other assets of the strata corporation: Section 12(1). These may be of considerable value. The continuing enjoyment by the owners of their strata lots is dependent upon the preservation and maintenance of these common assets. All owners have a clear and immediate interest in accomplishing that. Tenants, who may be living in the development for just a short time, do not necessarily share that goal. They have invested nothing. The Legislature has recognized this difference by providing that the owners, who have a real stake in the long term future of the condominium development, may limit the number of units that may be occupied by those without such an interest - tenants.

[para43] The three prior decisions of this court all recognize that a strata corporation is permitted to limit renting to the extent that only one owner in the entire development may have a tenant at any given time. Having made this policy choice, why would the Legislature nevertheless wish to prevent a strata corporation from prohibiting leasing entirely? The objective is achieved most effectively by a complete prohibition; less so, by allowing one owner to rent.

[para44] The decision in *Von Schottenstein* overlooks the judgment given shortly before in *Mattiazzo*. The former must be regarded as per incuriam. I am bound to follow *Mattiazzo* and the subsequent decision in *453881 B.C. Ltd.*, which follows it. Since Section 2 of the by-law of November 29, 1995 purports to prohibit leasing entirely, it is beyond the jurisdiction conferred by Section 30 and must be set aside.

[para45] The Marshalls also argue that the restriction on renting should be set aside as the by-law does not set out the manner in which the provision will be enforced as required by Section 30(2) of the Condominium Act. This point was not pressed. I am satisfied that Section 11 of the by-law, which provides for a letter of warning on the first infraction followed by fines in increasing amounts for subsequent infractions, satisfies the statutory requirement.

[para46] Since success in the action has been divided equally, the parties will bear their own costs.

HENDERSON J.

CBR# 046

IN THE MATTER OF Blue-Red Holdings Limited and Sections 42 and 43 of the Condominium Act, R.S.B.C. 1979, c.61. Between Blue-Red Holdings Limited, Petitioner, and The Owners, Strata Plan VR 857, Respondent [1994] B.C.J. No. 2293

Vancouver Registry No. A941905 British Columbia Supreme Court Vancouver, British Columbia (In Chambers) Dorgan J. Heard: August 4, 1994. Judgment: October 3, 1994. Filed: October 5, 1994.

resolutions passed at the second meeting were also unfairly prejudicial to the petitioner.

Counsel for the Petitioner: David L. Miachika. Counsel for the Respondent: Jamie A. Bleay.

[para1] DORGAN J.:-- This application is brought pursuant to sections 42 and 43 of the Condominium Act, and Rules 10 and 57 of the Rules of Court, for a declaration that certain special resolutions passed by the respondent Strata Corporation, and certain special assessments levied by it against the petitioner, are void and of no effect.

Background

[para2]X.-The petitioner Blue-Red Holdings Limited ["Blue- Red"] is the registered owner of a four-storey stand-alone commercial building located at 842 Thurlow Street, in the City of Vancouver. This building and a separate eight-storey residential building located at 1045 Thurlow Street, together form a mixed residential and commercial strata property commonly known as "City View". The residential building contains 160 residential strata units or lots numbered 1 to 160. The commercial building is comprised solely of strata lot 161.

[para3] The respondent is a Strata Corporation. The 1992 Disclosure Statement for the property shows the bylaws to be those contained in Part 5 of the Condominium Act.

[para4] On March 15, 1993, a special resolution repealing the bylaws contained in Part 5 of the Condominium Act and replacing them with a new set of bylaws was filed. Those bylaws, among other things, required the owners of the residential property to form a separate residential section within the strata corporation and the owners of the commercial property to form a separate commercial section within the strata corporation [see Section 1(1) and (2)]. The duties of the separate sections of the Strata Corporation are set out in Section 4. The apportionment of the expenditures for the strata property, as between the residential and commercial sections, is set out in Section 18. The March 15, 1993 bylaws require that not less than one-third of the total members of the Strata Council be representatives from the commercial section [see Section 7(4)].

[para5] The first Annual General Meeting of the Strata Corporation was held on April 19, 1993. At that meeting seven owners of residential strata lots were nominated and elected as strata council members. No representatives of the commercial property were elected to the strata council.

[para6] Effective November 1, 1993 Vancouver Condominium Services Ltd. [VCS"] became the manager for the Strata Corporation on behalf of the respondent. Mr. Gerry Fanaken, the president of VCS, was the primary contact.

[para7] Early in 1994 Francis and Tony Yip acquired the shares of Blue-Red which then owned the commercial property. On January 4, 1994 at an Extraordinary General Meeting, a special resolution was passed regarding an assessment to pay for hiring an engineer in regard to re-piping to the residential property. This assessment applied only to the residential strata lots 1 to 160, and not to the commercial strata lot 161. The commercial owner had already incurred the cost of an engineer's inspection and had borne that cost itself without contribution from the residential owners.

[para8] About the time the Yips acquired the Blue-Red shares, their solicitor wrote to Mr. Fanaken expressing concern about the composition of the strata council and the fact that it was without representation from the commercial section in contravention of the then bylaws. In his January 6, 1994 reply, Mr. Fanaken stated the strata council felt it impractical to try to restructure the council at that stage in the Corporation's operating year, and said it was the council's intention to address the issue of its composition at the 1994 Annual General Meeting. That meeting was held April 5, 1994.

[para9] On March 11, 1994 Mr. Francis Yip, as a director and shareholder of the petitioner, met with Mr. Fanaken to discuss various issues, including fee splits between the commercial and residential sections and the re-adjustment of maintenance fees. At that meeting Mr. Fanaken told Mr. Yip that an insurance surcharge of approximately \$3,800.00 would be assessed against the commercial property and not the residential property due to the increased risk from the commercial property tenants, which included two restaurants.

[para10] A notice was issued on March 18, 1994 advising the strata lot owners of the Annual General Meeting scheduled for April 5, 1994. Attached to the notice was the agenda for the meeting, the proposed budget for 1994/95, proposed bylaws to replace the existing bylaws, and a draft resolution adopting the new bylaws. The budget projected for the 1994/95 year showed the monthly maintenance fees of the commercial property would remain in the amount charged in the previous year, namely, \$364.87 per month.

[para11] On March 23, 1994, VCS wrote the petitioner's representative to advise that the maintenance fees payable by the petitioner would increase to \$1,027.45 per month.

[para12] Although Mr. Francis Yip, the director and representative of Blue-Red, received a copy of that notice prior to his leaving the country for a holiday, no representative of Blue-Red attended the April 5, 1994 Annual General Meeting.

[para13] Two special resolutions to amend the existing bylaws were approved by the respondent at the April 5, 1994 Annual General Meeting. A new strata council was then elected and, like its predecessor, was comprised of seven members, all owners of residential strata lots.

[para14] On May 13, 1994, VCS gave Ms. Moody of D.N.M. Management Corporation, a company managing the property for the petitioner, an account which showed the petitioner's arrears of maintenance fees and other charges then totalled \$12,464.43. Mr. Francis Yip met with Mr. Fanaken on May 17, 1994 with regard to that statement of account and other matters. Ms. Moody and Mr. Tony Yip also attended. There was some discussion about the 1994/95 Budget and the increased maintenance fees. Mr.

Francis Yip and Mr. Fanaken agreed that Blue-Red could pay the existing arrears in three equal monthly instalments commencing June, 1994. The first instalment was paid subsequent to that meeting, and prior to June 7, 1994.

[para15] At the same May 17, 1994 meeting, Mr. Fanaken gave Mr. Yip a copy of a notice dated May 17, 1994 announcing an Extraordinary General Meeting scheduled for June 7, 1994. The agenda attached to the notice referred to four special resolutions. The petitioner alleges that Mr. Fanaken agreed that the first three special resolutions relating to assessments totalling \$600,000 (in large part for the re-piping project) related solely to the residential property, and that any special assessments resulting from those resolutions would not be charged against Blue-Red. This was also Ms. Moody's understanding. Mr. Fanaken denies any such agreement.

[para16] Mr. Yip also says there was a further understanding reached that any costs of repair or replacement to the re-piping to the commercial property would be borne solely by Blue-Red. Mr. Yip says that Mr. Fanaken wanted this understanding to be reduced to writing, and Mr. Yip expected the Strata Corporation would prepare such an agreement.

[para17] On May 26, 1994, Mr. Fanaken wrote to Ms. Moody indicating that unless an agreement was reached between the parties, it was the strata council's position that the full amount of all special levies would be assessed against all lots, including the petitioner's strata lot 161. Mr. Yip alleges he understood an agreement had been reached and that Mr. Fanaken wanted it confirmed in writing and that he, Mr. Yip, expected the Strata Corporation would prepare the document. Mr. Fanaken and Mr. Burko (an employee of VCS with some involvement in this matter) say no agreement on these points was reached. They say this arrangement was proposed; Mr. Fanaken expected Mr. Yip, if he agreed, would reduce such an agreement to writing shortly after the May 17, 1994 meeting.

[para18] On June 6, 1994, Mr. Burko, an assistant to Mr. Fanaken at VCS, informed Ms. Moody that Blue-Red's maintenance account was still substantially in arrears and that until the arrears were fully paid the petitioner could not vote at the Extraordinary General Meeting.

[para19] Mr. Yip alleges that as a result of his understanding that the assessments arising from three of the four special resolutions would not be levied against the petitioner's strata lot, combined with the knowledge that Blue-Red was not entitled to vote, no representative of Blue-Red attended the June 7, 1994 Extraordinary General Meeting.

[para20] At the Extraordinary General Meeting, the respondent approved the four special resolutions set out in the May 19, 1994 notice, resulting in assessments being levied against all strata lots including that of the petitioner.

[para21] After the June 7, 1994 meeting, Mr. Burko told Mr. Yip that the petitioner's share of those assessments amounted to approximately \$92,000.00, payable in four monthly instalments commencing July 1, 1994.

[para22] On June 8, 1994, Ms. Moody was advised by Mr. Fanaken that, as no agreement had been reached between Blue-Red and the respondent prior to the June 7, 1994 meeting that the cost of re-piping or related expenses in respect of the commercial property be borne solely by Blue-Red, the four special resolutions regarding the re-piping project to the residential property was, by these resolutions, assessed against all strata lot owners including Blue-Red.

[para23] The respondent then filed a lien against the petitioner's lot for outstanding maintenance fees and arrears and the petitioner started this action.

Relief Sought

[para24] The petitioner seeks a declaration that the two special resolutions passed at the Annual General Meeting on April 5, 1994 and the four special resolutions passed at the Extraordinary General Meeting on June 7, 1994 are ultra vires, illegal and void, or alternatively, oppressive and unfairly prejudicial to the petitioner, and seeks to set them aside as void and of no effect.

Issue 1: Were the two special resolutions passed April 5, 1994 purporting to amend the Strata Corporation's bylaws

(a) ultra vires

Was the strata council properly constituted?

[para25] The strata council elected at the first Annual General Meeting on April 19, 1993 consisted only of residential unit owners. Thus, the petitioner submits, it was not duly elected in accordance with Section 7(4) of the March 15, 1993 bylaws. It is a mandatory, not a permissive, provision. The petitioner submits that the special resolutions to amend the bylaws, passed at the April 5, 1994 Annual General Meeting, are therefore ultra vires.

[para26] The respondent says the failure to elect representatives of the commercial section to the strata council does not invalidate the decisions rendered by that council between April 19, 1993 and April 5, 1994. The respondent submits that the petitioner, by its actions, acquiesced to the constitution of the strata council. Indeed, more than eight months elapsed between the time the council was elected and the petitioner, through its solicitor by letter dated January 3, 1994, voiced its concern about the make-up of the council.

[para27] There is no doubt, in my view, that the strata council elected April 19, 1993 was not properly constituted. It was not elected in accordance with Section 7(4) of the bylaws then in force. The question is whether the actions taken by that council are therefore invalid. In particular, does the fact that the resolutions to amend the bylaws were proposed by an improperly constituted council invalidate those resolutions?

[para28] Counsel have not provided any case law on this point. Nor has my search revealed any. In my opinion the improper make-up of the strata council elected on April 19, 1993 is not a fatal defect. I have reached this conclusion based on two considerations: the acquiescence of the respondent; and s.122(3) of the Condominium Act. That subsection provides that all acts done in good faith by the council are valid even if it is subsequently discovered that there was some defect in the appointment or continuance in office of a member of council. S.122(3) of the Act is echoed in By-law 12(4) of the March 15, 1993 bylaws.

[para29] Although the improper constitution of the council is not truly a defect in the appointment of a particular member of council, by analogy I conclude that the acts of the improperly constituted council in this case, if they were done in good faith, and

keeping in mind the acquiescence of the respondent for several months following this council's election, are valid. The question therefore is: were the actions of this strata council done "in good faith".

[para30] In *Nystad v. Harcrest Apartments Ltd.* (1986), 3 B.C.L.R. (2d) 39 (S.C.) McEachern C.J.S.C. (as he then was) stated that "good faith" is a term used to describe a state of mind denoting honesty of purpose, freedom from intention to defraud and being faithful to one's duty or obligation.

[para31] There is no evidence whatsoever before me that the strata council acted dishonestly or with intention to defraud or was unfaithful to its duty or obligation. I therefore conclude that the actions of the strata council elected on April 19, 1993 in proposing the two special resolutions to amend the corporation's bylaws were done in good faith and although the council was improperly constituted, its actions were valid.

Was the March 18, 1994 notice of the April 5, 1994 Annual General Meeting deficient?

[para32] The petitioner says the March 18, 1994 notice regarding the April 5, 1994 Annual General Meeting was deficient because it:

(i) failed to advise that the resolutions to amend the bylaws could not be passed except in accordance with s.26(4) of the Act, that is, by not less than 3/4 of the votes of the residential owners and 3/4 of the votes of the commercial owners who are present at the meeting;

(ii) referred to the proposed amended bylaws as "special resolutions", not "resolutions" contrary to s.26(4) of the Act;

(iii) did not adequately specify the purpose of the meeting;

(iv) gave the petitioner less than 14 days clear notice.

[para33] The respondent submits that the March 18, 1994 notice complies with bylaw 13(6) which requires that notice of the Annual General Meeting specify the place, date and hour of the meeting, and the general nature of special business.

[para34] In my view the March 18, 1994 notice of the April 5, 1994 Annual General Meeting was not deficient. First, neither the Act nor the bylaws require the notice to include notification of the applicable quorum.

[para35] Second, the use of the term "special resolutions" was not improper. Section 14(1) of the March 15, 1993 bylaws, a provision which echoes s.124(1) of the Condominium Act, provides that, with certain exceptions, all business transacted at an annual general meeting shall be deemed "special".

[para36] Further, the notice adequately described the "general nature of the business to be conducted at the meeting" by enclosing complete copies of the proposed bylaws. In my view the phrase "general nature of the business" establishes a relatively low threshold test for the giving of notice. The bylaws attached to the notice were unanimously passed at the meeting. This, in my view, constituted sufficient notice of the "general nature of the business".

[para37] The notice was dated March 18, 1994. That was 16 days prior to the April 5, 1994 meeting. The notice therefore met the requirement of notice of general meetings, set out in s.13(6) of the March 15, 1993 bylaws, a provision which echoes s.123(5) of the Condominium Act. However, the business to be conducted at the meeting was "special", and was indicated in the notice to be the passage of "special resolutions".

[para38] Although "special resolution" is not defined in the bylaws, s.1 of the Condominium Act states it is "a resolution passed at a properly convened General Meeting of the Strata Corporation, of which at least 14 days notice specifying the purpose of the Special Resolution has been given ...". The notice of the April 5, 1994 Annual General Meeting met this 14 day requirement.

(c) Was the quorum proper?

[para39] The petitioner submits that the bylaws were improperly passed as "special resolutions" rather than "resolutions" as required by s.26(4) of the Condominium Act. This is significant, the petitioner submits, because a resolution under s.26(4) of the Act requires a quorum of 3/4 of the votes of the owners of the residential lots and 3/4 of the votes of the owners of the non-residential or commercial lots, whereas "special resolutions", as defined in s.1 of the Act, require a quorum of not less than 3/4 of the votes of all persons entitled to vote.

[para40] In addition, the petitioner says that as a quorum of persons entitled to vote on the resolutions to amend the bylaws was not present at the Annual General Meeting, the meeting ought to have been adjourned for one week in accordance with sections 14(2) to (4) of the March 15, 1993 bylaws.

[para41] The respondent submits that bylaws 13, 14 and 15 of the March 15, 1993 bylaws, being the bylaws in effect immediately prior to the April 5, 1994 Annual General Meeting, specify the procedure to be complied with where special business is conducted at an Annual General Meeting.

[para42] Bylaw 14(2) provides that business shall not be transacted unless a quorum of persons entitled to vote is present.

[para43] Bylaw 14(3) provides that "1/3 of the persons entitled to vote present in person or by proxy constitutes a quorum".

[para44] The respondent submits that the quorum necessary for the meeting to proceed, as set out in bylaw 14(3), was complied with as 69 owners were present, in person or by proxy, being 43% of the persons entitled to vote. Further, the bylaw amendments, which were presented as special resolutions, were unanimously approved by the owners present at the Annual General Meeting.

[para45] S.1 of the Condominium Act states that a "special resolution" is:

... a resolution passed at a properly convened general meeting of the strata corporation, of which at least 14 days' notice specifying the purpose of the special resolution has been given, by not less than 3/4 of the votes of all persons entitled to vote thereon under this Act or the bylaws, present at the meeting in person or by proxy at the time the resolution is passed.

[para46] I conclude that the quorum requirement in bylaw 14(3) was met, and it was proper to proceed with the business transacted at that general meeting.

[para47] I also conclude that the special resolutions amending the bylaws were properly passed as they were unanimously approved by the owners present at the meeting. Unanimous approval more than met the requirements for special resolutions as set out in s.1 of the Act.

[para48] Further, even if these amendments ought to have been passed as resolutions under s.26(4) of the Condominium Act, rather than as special resolutions, I conclude that the requirements of that section were complied with.

S.26(4) reads as follows:

(4) In the case of a strata corporation administering a strata plan that is not exclusively residential but contains more than one residential strata lot, the bylaws shall not be amended unless the changes are made as specified in the bylaws, or a strata council has been elected and the changes have been approved by a resolution passed at a properly convened meeting of the strata corporation, of which at least 14 days' notice specifying the purpose of the meeting has been given in the same manner as notice is required to be given of a special resolution, by not less than 3/4 of the votes of the owners of the residential strata lots and not less than 3/4 of the votes of the other owners of strata lots entitled in each case to vote on it under this Act or the bylaws and who are present at the meeting in person or by proxy at the time the resolution is passed.

(Emphasis added.)

[para49] The petitioner submits that for the resolutions to be properly passed, not less than 3/4 of the votes of the owners of the commercial lot were required. I do not agree with that interpretation. The key words, on my reading of this subsection, are "and who are present at the meeting ... at the time the resolution is passed". The petitioner, being the only non-residential owner, was not present at the meeting, in person or by proxy. Thus it was only necessary for the resolutions to be approved by 3/4 of the votes of the owners of the residential strata lots. That requirement was met by the unanimous approval of all 69 residential owners present at the meeting, in person or by proxy, at the time the resolutions were passed.

(b) Are the resolutions oppressive or unfairly prejudicial?

[para50] Under s.42 of the Condominium Act application may be made to the court for a remedy where an owner alleges that the affairs of the strata corporation are being conducted in a manner which is oppressive or where some act of the strata corporation or some resolution it has passed is unfairly prejudicial to him. S.43 of the Act gives the court wide authority to make the order it considers appropriate, including to direct or prohibit an act of council or to vary a transaction or resolution.

[para51] The meaning of the terms "oppressive" and "unfairly prejudicial", as they are used in s.42 of the Condominium Act, was considered by Lander J. in *Esteem Investments Ltd. v. Owners, Strata Plan VR1513* (1987), 21 B.C.L.R. (2d) 352 at 355 (S.C.), appeal allowed on other grounds (1988), 32 B.C.L.R. (2d) 324 (C.A.). He referred to the case of *O'Connor v. Winchester Oil & Gas Inc.* (1986), 69 B.C.L.R. 330 at 336 where the learned judge defined oppressive conduct, within the meaning of s.224 of the Company Act, as conduct that is "burdensome, harsh or wrongful or which lacks probity or fair dealing" and the term "unfairly prejudicial" as acts that are unjust and inequitable. Lander J. also noted that in *Nystad v. Harcrest Apts. Ltd.* (1986), 3 B.C.L.R. (2d) 39 (S.C.) *McEachern C.J.S.C.* (as he then was) equated oppressive conduct with faith.

[para52] The petitioner submits that the special resolutions to amend the bylaws were passed in a manner that was procedurally unfair and oppressive to the interests of Blue-Red. In particular, the petitioner says that the resolutions were proposed by an improperly constituted strata council, the notice regarding those resolutions was deficient, and the resolutions were passed by an improper quorum of owners. Further, the amended bylaws completely replaced the scheme of segregating expenses and responsibilities between the residential units and the commercial units as contemplated by sections 51 and 52 of the Condominium Act, and as established by sections 1(1) and (2) of the March 15, 1993 bylaws.

[para53] The respondent submits that the two special resolutions amending the bylaws were not oppressive or unfairly prejudicial, nor was the conduct of the strata council in presenting the proposed by-law amendments burdensome, harsh or wrongful, or lacking in probity or fair dealing. The respondent submits that the new bylaws continued to recognize the distinction between the commercial and residential strata lots, and in no way restricted the petitioner's right to participate in the government of the strata corporation. The respondent submits that the petitioner ought to have attended the April 5, 1994 meeting and exercised its right to nominate a representative to stand for election to the strata council, and exercised its right to vote against the special resolutions.

[para54] I have already concluded that although the special resolutions to amend the bylaws were proposed by an improperly constituted strata council, that irregularity is not fatal. I have also concluded that, as both the notice and the quorum requirements were met, the meeting was properly convened.

[para55] However, regardless of the validity of the strata council proceedings on April 5, 1994, the question is whether the affairs or powers of the corporation have been exercised in an oppressive or unfairly prejudicial manner. As Melvin J. stated in *Vold v. The Owners, Strata Corporation 202* (1993), 31 R.P.R. (2d) 129 at 134 (B.C.S.C.), when considering whether the affairs or powers or acts of a strata corporation have been exercised in an oppressive or unfairly prejudicial manner the court should look at the cumulative effect of the conduct complained of.

[para56] The new bylaws impose a substantial change in the scheme of segregating expenses and responsibilities between the residential units and the commercial units as contemplated by sections 51 and 52 of the Condominium Act, and as set out in the March 15, 1993 bylaws. The new bylaws passed on April 5, 1994 deleted the requirement, under sections 1 and 8 of the March 15, 1993 bylaws, for the owners to establish separate commercial and residential sections and executive. Further, the requirement under section 7(4) that at least 1/3 of the members of the strata council be representatives from the commercial section was deleted. Although the latter change did not prevent the petitioner from participating in the government of the corporation, it is a significant change in the nature of the petitioner's rights under the bylaws. That is, the petitioner was no longer guaranteed representation on the strata council.

[para57] In my opinion, the change in the scheme of the bylaws was detrimental to the petitioner and significantly changed its rights. The amendments did not have a similar impact on the rights of other owners. In my view these amendments were "unfairly prejudicial" to the petitioner. Accordingly, they are void and of no effect.

Issue 2: Are the four special resolutions passed at the Extraordinary General Meeting on June 7, 1994

(a) ultra vires because

(i) the resolutions were contrary to the March 19, 1993 bylaws which, the petitioner submits, were improperly deleted and replaced on April 5, 1994, or

(ii) the strata council was not constituted in accordance with the March 19, 1993 bylaws, or

(iii) the resolutions were contrary to an agreement between the parties, or

(iv) the petitioner was improperly denied its right to vote,

or, alternatively,

(b) oppressive and unfairly prejudicial to the petitioner?

Were the resolutions contrary to the bylaws?

[para58] The March 15, 1993 bylaws are the applicable bylaws as I have found the two special resolutions passed on April 5, 1994, which purported to amend the March 15, 1993 bylaws, of no force and effect.

[para59] On the principle of ownership of common property, strata lot owners, as a group, are responsible for the cost of repairs to common property. However, where the strata property includes lots that are residential and non-residential, both the Condominium Act and the bylaws of this strata corporation contemplate that separate sections be formed. Indeed, section 1 of the March 15, 1993 bylaws states that the owners of all residential strata lots in this property shall form a separate "residential section", and that all owners of non-residential strata lots shall form a separate "commercial section".

[para60] S.128(2)(a) of the Condominium Act provides, in part, that where a strata plan consists of more than one type of strata lot, the common expenses attributable to one or more type of strata lot shall be allocated to that type of lot and shall be borne by the owners of that type of strata lot. "Type" is not defined in the Act, but in my view, "residential" and "commercial" are different "types" of strata lots. [para61] Section 18 of the March 15, 1993 bylaws clarifies the question of apportionment of common expenses between the residential and commercial sections. Section 18(1) defines "common expenses" as expenses incurred, among other things, in repairing, maintaining and replacing the common property, common facilities and other assets of the strata corporation. Section 18(4) sets out the manner in which common expenses are to be apportioned between the residential section and the commercial section. Subsection (4)(a) states that common expenses attributable to either separate section shall be allocated to that separate section and borne by the owners of the lots within that separate section. Section 18(8) states that an annual budget is to be prepared allocating common expenses as between the separate sections of the strata corporation.

[para62] The three special resolutions passed at the Extraordinary General Meeting on June 7, 1994, which relate solely to the residential property, and purport to levy assessments against the petitioner's non-residential lot, do not comply with Section 18 of the March 15, 1993 bylaws and are therefore of no force and effect.

[para63] In any event I am satisfied that the four special resolutions passed at the June 7, 1994 Extraordinary General Meeting were "unfairly prejudicial" to the petitioner.

[para64] The petitioner submits that the following acts of the respondent were oppressive or unfairly prejudicial to Blue-Red:

(1) Mr. Fanaken of VCS advised the petitioner on May 17, 1994 that the three special resolutions, totalling \$600,000, related solely to the residential property and would not be assessed against Blue-Red;

(2) The comments of Mr. Fanaken in (1), and the comments made by Mr. Burko to Ms. Moody to the effect that the petitioner would not be entitled to vote at the Extraordinary General Meeting scheduled for June 7, 1994, led the petitioner to believe that there was no reason for its representative to attend that meeting;

(3) Charging assessments against the petitioner for expenses related solely to the residential units is inconsistent with the previous conduct of the respondents for Special Resolution No. 1 passed on January 4, 1994. That resolution was for the costs of an engineer's report and legal advice related solely to deficiencies in the pipes in the residential property. That assessment was charged only against the owners of the residential property and not against the petitioner. The petitioner also gives the example of an insurance surcharge which was levied only against the petitioner's commercial property and not against the residential property because the strata council determined that the additional premium related solely to the commercial property.

[para65] The respondent denies that the four special resolutions were oppressive or unfairly prejudicial to the petitioner.

[para66] The respondent says that contrary to the claim made by the petitioner, no agreement was reached between Mr. Fanaken and Mr. Yip regarding the non-application of the first three resolutions to the commercial property. The respondent says that a written agreement was required to be entered into between the petitioner and the respondent whereby the petitioner would agree that it would be financially responsible for all future costs of repairing and replacing the water pipes in strata lot 161. The respondent submits that the petitioner was aware that if no such written agreement was entered into the special resolutions would be assessed against the owners of all strata lots, including lot 161.

[para67] The respondent further submits that Special Resolution No. 1, passed January 4, 1994, was not assessed against the petitioner because the parties had a special agreement with regard to that resolution. That is, the parties agreed that as the petitioner had previously incurred an expense for a similar inspection of the commercial building, Blue-Red would be exempted from that special resolution.

[para68] I am satisfied that at the May 17, 1994 meeting Mr. Fanaken led the petitioner to believe that the first three special resolutions, totalling some \$600,000 and relating solely to the residential property, would not be assessed against strata lot 161. He then notified Ms. Moody, on May 26, 1994, that a written agreement was required whereby the petitioner would agree that it would be financially responsible for all future costs of repairing and replacing the water pipes in strata lot 161. Otherwise the special resolutions would be assessed against the owners of all strata lots, including lot 161. This was a mere eleven days prior to the Extraordinary General Meeting.

[para69] Further, it was not until June 6, 1994 that Mr. Burko notified Ms. Moody that the petitioner would not be entitled to vote at the Extraordinary General Meeting because the petitioner's maintenance fee arrears were not fully paid. Although the May 17, 1994 notice of that meeting stated that "in order to vote an owner must be paid up in all arrears of maintenance, fines or other charges owing to the strata corporation", I am satisfied that, based on the May 17, 1994 agreement between the parties for the arrears owing by the petitioner to be paid in instalments, the petitioner may not have understood that it would not be entitled to vote at the meeting until the day before or the day of that meeting.

[para70] The petitioner's proportionate share of the assessments flowing from the special resolutions is approximately \$92,000. This is a significant amount and I accept the petitioner's evidence that it will create extreme financial hardship to its continued operation of the commercial property.

[para71] In light of the agreement reached on May 17, 1994 regarding the deferred payment of arrears, the resultant misunderstanding as to the impact of the arrears on the petitioner's right to vote, and the past conduct of the corporation in allocating expenses related to a particular section to that section, and the understanding reached that the plaintiff would be exempted from the special assessments levied to pay the costs of the re-piping project to the residential section, I conclude that the totality of the respondent's conduct was unfairly prejudicial to the petitioner. It was unjust and inequitable. Accordingly, the four special resolutions passed at the Extraordinary General Meeting June 7, 1994, and the special assessments flowing from those resolutions, are void and of no effect. Not only do they not comply with the March 15, 1993 bylaws, but they are unfairly prejudicial to the petitioner.

Conclusion

[para72] The petition is allowed. The two special resolutions passed at the Annual General Meeting on April 5, 1994 and the four special resolutions passed at the Extraordinary General Meeting on June 7, 1994 are void and of no effect.

[para73] As the special resolutions amending the bylaws are of no effect, the strata council now in place, comprised entirely of residential unit owners, is not constituted in accordance with the March 15, 1993 bylaws of the corporation. While the past decisions of an improperly constituted council may be valid and binding, it seems to me prudent for the strata council to now call an election so that by-law 7(4) is given its proper effect.

Costs

[para74] Although the conduct of the affairs of the strata corporation was not in accordance with the bylaws and was unfairly prejudicial to the petitioner, I find that Blue-Red was not nearly as attentive to its affairs, as an owner of a strata lot, as it ought to have been. By acquiescing to some extent to the composition of the improperly constituted strata council, by failing to attend and to exercise its right to vote at the Annual General Meeting, and by failing to attend the Extraordinary General Meeting, the petitioner was neglectful of its interests. It did not act prudently. In these circumstances I am of the view that each party should bear its own costs.

DORGAN J.

CASE REFERENCE NO. 135

Lawrence Sutherland Hill and Monica Katherine Hill, Petitioners, (Respondents), and The Owners, Strata Plan NW 2477

[1991] B.C.J. No. 2258

Vancouver Registry: CA012112 81 D.L.R. (4th) 720 2 B.C.A.C. 289 57 B.C.L.R. (2d) 263 81 D.L.R. (4th) 720 2 B.C.A.C. 289 57 B.C.L.R. (2d) 263

Counsel for the Appellants: J. Bleay. Counsel for the Respondents: A. Davis.

Proudfoot J. (for the Court, allowing the appeal):-- This is an appeal from a judgment dated February 6, 1990 granting relief with respect to the use of two parking stalls in a strata development. The appellant (owners) is a strata corporation established pursuant to the Condominium Act, R.S.B.C. 1979 c. 61. The respondents (Hills) owned strata lot 54, strata plan NW 2477. They purchased one of the larger, more expensive units in the complex by way of interim agreement dated February 23, 1987. At the time of the purchase the development was new and consisted of 55 strata lots (units) and 69 parking stalls.

The Hills were aware that each unit came with the exclusive use of just one parking stall. However, they negotiated with the owner developer to include in their purchase price the exclusive use of a second parking stall. The interim agreement executed on February 23, 1987, contained this clause:

Vendor guarantees two parking spots with unit.

The sale was to be completed by April 29, 1987 and the Hills would have possession of the unit on May 1, 1987. There is evidence from an appraisal filed which indicates that the value of the property was increased by \$21,000 as a result of the use of a second parking stall.

The minutes of the first meeting of the owners, held April 9, 1987, contain this reference to the parking stalls: Many owners were concerned with the parking issue. One parking stall is assigned to each strata lot owner. All other parking spaces (14 spaces) are common property and its use be decided by Council. For the time being, the stalls are assigned on a temporary basis.

Owners who feel they have a binding sales agreement which states that they are to receive two parking spaces are review this matter with John McKilligan.

An affidavit filed by Eric John Whaley who had purchased a unit in the development and who was elected to the strata council at the April 9, 1987 meeting, deposes to the following concerning parking stalls:

At the First Annual General Meeting of Strata Plan Nw 2477 held on April 9, 1987, at least one of the Petitioners was present, as were representatives of the Respondents, Brothers Development Corporation and S.R.C. Realty Corporation, a representative of Crosby Property Management Ltd. and other owners of NW 2477.

During this meeting, at which there was a discussion concerning the parking spaces, Mr. McKilligan, the representative of the Respondent, S.R.C. Realty Corporation, advised myself and those in attendance that one space had been assigned to each Strata Lot owner and that the remaining spaces were common property and would be dealt with by the Strata Council.

During this discussion concerning parking spaces, Mr. McKilligan advised that he would discuss this issue with any owners whose Interim Agreement stated that they were to receive two parking spaces. Attached hereto and marked Exhibit "C" to this my Affidavit is a true copy of the minutes recorded at the meeting held on April 9, 1987.

I was advised by Mrs. Hill at this meeting of April 9, 1987, and verily believe the same to be true, that the purchase of the Hills' condominium did not complete until April 29, 1987.

The sales brochure for the development also dealt with parking and it read:

One secured underground parking stall per unit, additional spaces on a rental basis if available.

One of the Hills certainly attended the April 9, 1987 meeting and had notice that any buyers of units who had bargained for two parking stalls were faced with an issue that was unresolved.

The council did not, as it could have done, grant the Hills exclusive use of the second stall or designate the second stall as limited common property for use with the Hills' unit. What the council did was call an extraordinary general meeting on September 24, 1987 and at that meeting several bylaws were passed. Bylaw 208 is important in this appeal. It's heading is "Parking". The relevant portions are (b) and (k):

(b) Assignment of parking spaces will be made only by the Strata Corporation and only vehicles in a) above will be allowed the use thereof. ...

(k) Those strata owners or their tenants as the case may be, desiring an additional parking stall shall provide a written request for same to the Strata Council and shall pay the fee set from time to time by the Strata Council for such parking stalls as are available.

The council fixed a fee of \$30 from May 1, 1987, which was increased to \$35 per month on May 1, 1988, for rental of an extra parking space. Payment of this rental fee was requested of the respondents. Initially the respondents refused to pay. However, in the face of a threat that the space would be reassigned, they paid all outstanding amounts on November 23, 1988.

The respondents petitioned for relief with respect to the use of the second parking stall in the strata development and an order quashing a bylaw restricting their right to lease their premises. This appeal is concerned only with the parking stall issue. As parties to the petition the Hills named the Owners, Strata Plan NW 2477, Brothers Development Corporation, J. J.R. Developments Ltd., S. Daniele Limited, Sussex Group - S.R.C. Realty Corporation and Syd Foster. Notice of discontinuance was filed discontinuing the action against Sussex Group - S.R.C. Realty Corporation and Syd Foster.

The chambers judge came to the following conclusion: The first strata council was elected on April 9, 1987. The rights to run the strata then passed from the developer to the council. I find that the council was told at this meeting that the petitioners had the use of two parking spots.

Owners of a lot could arrange with council for the use of a second parking spot for a specified monthly fee. Later, the strata council notified Mr. and Mrs. Hill they must pay for their use of the second parking spot: I find the strata council was not justified in doing so. When the purchase was made it included not only the apartment but the use of two parking spots. The parties to that contract -- the developer and the petitioners -- both agree on this. It is confirmed in the interim agreement. Presumably the agreement with the vast majority of other purchasers was for one apartment and one parking stall.

What has happened since to deprive Mr. and Mrs. Hill of the right to use the second parking spot for which they bargained and paid for? The answer is nothing has happened. The strata council took over the running of the complex from the developer on April 9. The council was not empowered to alter the terms of the agreements executed by the developer. This contract called for the Hills to pay \$210,000.00 for Strata Lot 54 and two parking stalls. The council could no more take away the use of the one parking spot than increase the purchase price.

Nothing was said about the parking stalls being limited common property nor have any of the parking spots been

There is no issue that the purchasers of strata lots here have the exclusive use of a parking spot -- in the case of the Hills, two parking spots. This, by definition, means those areas are not common property.

Further, it would be inequitable not to give the petitioners the right to use two stalls for the same reason as stated by Mr. Justice Wallace (as he then was) in *Carney v. Owners Strata Plan 634 30 B.C.L.R. 324*

%registered in the Land Registry Office as such. I find that Strata Lot 54 has the exclusive use of two parking stalls and that they are limited common property.

The appellant in its factum advances four errors in judgment but the issues as I propose to deal with them can be described as follows:

- i) did the owner developer have the authority to "guarantee" the Hills exclusive use of two parking stalls in the interim agreement;
- ii) were the parking stalls limited common property designated for the exclusive use of the Hills; and
- iii) would it be inequitable not to give the Hills the right to the exclusive use of two parking stalls?

I shall address the second issue first as it is most easily dealt with. The chambers judge concluded that the two parking stalls were not common property but were limited common property. There was no support for that finding, it is in error. Some definitions contained in the Condominium Act are useful: "common property" means so much of the land and buildings comprised in a strata plan that is not comprised in a strata lot shown on the strata plan, and includes pipes, wires, cables, chutes or other facilities for the passage or provision of water, sewage, drainage, gas, oil, electricity, telephone, radio, television services, garbage, heating and cooling systems and other services contained within a floor, wall or ceiling of a building shown on the strata plan, where the centre of the floor, wall or ceiling forms the common boundary of a strata lot with another strata lot or with common property.

"limited common property" means common property designated under section 53(1) and (2) for the use of one or more strata lot owners.

There is no evidence that any designation was made pursuant to s. 53 of the Act by the owner developer making any parking stalls limited common property for the use of the respondents or any other strata lot owners. The owner developer had the power under s. 53(2) to make such a designation. Section 53(2) reads as follows: (2) An owner developer may, when the strata plan is tendered for registration, designate areas on the plan as limited common property for the exclusive use of one or more strata lot owners.

The plan that was registered in the Land Titles office in November 1986 and the filings attached to that plan make it clear that the owner developer did not designate any parking stalls as limited common property. The plan that was attached to the sales material for inspection by prospective purchasers was equally clear in that respect. The parking stall in issue here was not limited common property designated for the exclusive use of the Hills.

In considering the first issue it must be borne in mind that pursuant to s. 118(2) of the Condominium Act the owner developer is required to exercise the powers and duties of the strata council until such time as a council is elected which in this case occurred April 9, 1987. Pursuant to the Condominium Act once the council of the owners (Strata Corporation) is elected at the first annual general meeting, s. 116 and s. 117 set out their powers and duties. Relevant to this appeal are s. 117(f) and (g):

The strata corporation may

- (f) grant an owner the right to exclusive use and enjoyment of common property, or special privileges for them, the grant to be determinable on reasonable notice, unless the strata corporation by unanimous resolution otherwise resolves;
- (g) designate an area as limited common property and specify the strata lots that are to have the use of the limited common property.

Did the owner developer act within the Condominium Act when he guaranteed the exclusive use of these parking stalls to the Hills? As I stated earlier it is clear from the material filed that all of the parking stalls remain common property. No designations were made to create any limited common property within the parking area. The owner developer could have made such designation at the time of the registration of his plan. If he desired to sell the more expensive units with additional parking stall use that was possible. Regrettably, he failed to do that.

Section 116(a) of the Condominium Act clearly states the common property, common facilities and other assets of the corporation shall be controlled, managed and administered by the corporation for the benefit of all owners. It was incumbent on

the owner developer to act in the best interests of all of the unit purchasers not just the Hills. Once the first unit was sold that unit owner became entitled to use a portion of the common property (parking stalls) based on a unit entitlement formula. The owner developer was in no position to make an arrangement with the Hills or any other purchaser dealing with the common property in a way which would affect the investment of the other unit purchasers. Clearly the owner developer did not have the authority to guarantee the Hills exclusive use of two parking stalls.

Finally, the chambers judge concluded it would be "inequitable not to give the petitioners the right to use two parking stalls" and he relied on the reasons of Wallace, J. (as he then was) in *Carney v. Owners Strata Plan VR 634 30 B.C.L.R. 324*. In that case there were 12 units and 7 parking stalls. The first seven purchasers were assigned parking spaces for their exclusive use. The plan was registered in the Land Titles office erroneously indicating the parking spaces as common property. But there was a conflict in evidence as to whether the purchasers of the remaining 5 units were notified there would be no parking spaces for them. Wallace, J. said at pp. 329-330:

Furthermore, I find that, at the time they purchased their suites, the petitioners were aware that the original suiteholders had a prior exclusive right to use the parking spaces and that there were none available for use. Only after it came to Mr. Lapp's attention - early in 1980 - that the registered strata plan designated the parking spaces "common property" did they decide to advance a claim for shared use of the parking spaces.

In my opinion it would be inequitable, in the circumstances, for the petitioners to be permitted to take advantage of the failure of the owner-developer to designate and register the parking spaces as "limited common property" in strata plan VR634. The petitioners had actual notice of the original suiteholders' unregistered right to exclusive use of the parking stalls prior to their purchasing their suites and while they may not have been aware of the exact extent of such rights, they could readily have ascertained it.

That is not the case before us. Of more assistance is *York Condominium Corporation No. 167 et al. v. Newrey Holdings Ltd. et al.* (1981), 32 O.R. (2d) 458, although in that case the extra parking stalls were sold prior to registration of the plan. Zuber, J.A. said at pp. 465- 466:

This building was constructed as a condominium under the Condominium Act and units were sold to the purchasers on the basis of the provisions of the Act. The Act contemplates two types of property in the condominium, "units" as defined in s. 1(1)(r) and "common elements" as defined in s. 1(1)(e). "Common elements" is stated to mean "all the property except the units". It is clear, therefore, that the additional parking spaces were part of the common elements. Schedule "F" to the declaration made pursuant to the Act is headed "Exclusive Common Elements". Paragraphs (c) and (d) provide:

(c) Each owner is entitled to the exclusive use and possession for the parking of a motor vehicle of one parking space in the underground parking garage to be designated by the Condominium Corporation from time to time;

(d) Individual unit owners shall also be entitled to the exclusive use and possession of such additional parking space as may be purchased by such owner, the location of which is to be designated by the Condominium Corporation from time to time;

The additional parking spaces in issue in the litigation are, of course, the spaces referred to in para. (d).

It seems to me implicit in the decision of Galligan J. that until the declaration was registered the purchasers of units had no interest in the additional parking spaces, that those remained in the ownership of the developer who was free to deal with them as it saw fit. I do not see how this can be so in face of the provisions of the Act and the declaration. Section 7 of the Act provides that the owners of units are tenants in common of the common elements (s-s. (1)) and that subject to the Act, the declaration and the by-laws each owner may make reasonable use of them (s- s. (4)). It seems to me that as soon as a unit purchaser enters into an agreement of purchase and sale of a unit he becomes the equitable owner of the unit and the interests appurtenant thereto even although the agreement cannot be closed until registration of the declaration. By signing an agreement of purchase and sale each unit purchaser acquires in equity:

(1) the unit described in his agreement of purchase and sale;

(2) the right to the exclusive use and possession of one parking space to be designated by the condominium corporation;

(3) the right to the exclusive use and possession of such additional parking space as may be purchased by him and designated by the condominium corporation.

In my view, the respondent developer could not, either before or after the registration of the declaration, deal with any part of the common elements so as to defeat the unit purchasers' equitable interests in them.

There is no evidence to indicate how many units were sold at the time the Hills completed their sale. It is known that the first annual general meeting of the strata council was called for April 9, 1987, some twenty days prior to the closing of the sale. Sub-section 123(1) of the Act, which governs when the first annual general meeting should be called, assists in determining how many units were sold at the time the Hills' completed their sale. The section reads:

123(1) The first annual general meeting shall be called by the owner developer and the meeting shall be held on the earlier of the date on which 60% of the strata lots have been conveyed by him, or a date 9 months after registration of the strata plan.

The strata plan was deposited and registered in the Land Titles office at New Westminster on November 14, 1986. Since the first annual general meeting was held less than five months from registration of the strata plan it is reasonable to draw the inference that 60% of the strata lots had been sold when that first meeting was held. All potential unit purchasers were aware they would have the use of just one parking stall, although not designated as limited property. That fact was in the knowledge of any purchaser. The development was sold on that basis.

The Hills cannot say that they had no notice prior to their completion date that they would not have exclusive use of the second parking stall. Nor can they say that other purchasers had notice that the Hills were to have exclusive use of a second parking stall. They had a solicitor who must have searched the Land Title office and been well aware of the plan that was filed, making no provision for any designated parking stalls. More important, at least one of the respondents attended the first annual meeting on April 9, 1987. That was, as I stated earlier, about three weeks prior to their purchase being completed. At that meeting they

certainly became aware that there was a problem. In my view, a prudent purchaser would have made an effort to clarify the situation and, if not successful, would be able to refuse to complete the purchase if they could not conclude it to their satisfaction.

While I have some sympathy for the Hills, particularly as the chambers judge dismissed the Petition against the owner developer and no cross appeal of that dismissal is before this Court, the Hills proceeded at their peril. In my view, to permit owner developers to make arrangements, such as those made in this case with the Hills, and not comply with the Condominium Act lends itself to no end of arrangements being made with potential purchasers. These types of arrangements could conceivably be extended to special or exclusive use by any one unit owner of other common facilities, such as a clubhouse or swimming pool, etc. The strata council, once in place, is bound to control and manage all common properties for the benefit of all owners. The owner developer is in precisely that same position until the first annual general meeting.

The Condominium Act was enacted to govern the conduct of owner developers and Strata Councils in a flourishing condominium market. With the thousands of units already built and sold and the potential of many more thousands being built some element of control is essential. The statute must be complied with so the interests of all owner developers and purchasers of units will be protected. In the case at bar the owner developer did not take advantage of the provisions of the Act. The respondents cannot now benefit at the expense of the other owners. They are not entitled to the exclusive use of both parking stalls unless they meet the requirements of the by-laws. I would allow the appeal.

PROUDFOOT J.A. TAGGART J.A.:-- I agree. TOY J.A.:-- I agree.

CBR# 121

Francis v. Condominium Plan No. 8222909

Between Brent Francis, Stan George Wong and Cynthia Ewanus, plaintiffs, and The Owners: Condominium Plan No. 8222909, defendant, [1999] A.J. No. 562 Action No. 9803-02960 Alberta Court of Queen's Bench Judicial District of Edmonton Master Funduk Judgment: filed May 12, 1999.

Counsel: C.L. Plante, for the plaintiffs. L.M.H. Belzil, for the defendant.

REASONS FOR DECISION [para1] MASTER FUNDUK:--

"By its nature legislation must, to some degree, cut across individual circumstances in order to establish general rules" -- Dickson C.J.C. in *Edward Books and Art Limited v. Her Majesty The Queen*, [1986] 2 S.C.R. 713 at 777.

This lawsuit is the product of a developer's decisions to (a) build a condominium project in a physical way which would likely cause dissension between two groups of people who would later become owners of the individual units, and (b) changing the Defendants by-laws to entice people to buy the townhouse units.

Pleadings and application

[para2] The Plaintiffs, who are owners of townhouse units, started this lawsuit by statement of claim. In their prayer for relief they ask for this among other relief:

(d) a declaration that the Current By-laws are valid and in accordance with the terms of the Act;

(e) a declaration that the Rebate Agreement is valid and enforceable as against the Water's Edge Condominium Corporation;

(f) an Order directing the Water's Edge Condominium corporation to comply with the Current By-laws and Rebate Agreement;

[para3] The Defendant delivered a statement of defence.

[para4] Ms. Plante, for the Plaintiffs, says that she proceeds under Rule 410(e). Mr. Belzil, for the Defendant, says that this is not an originating notice lawsuit. I told counsel that I would treat it as a summary judgment application and it was argued that way.

Basic facts

[para5] A developer built the condominium project. The project consists of (a) a highrise building with 211 individual units in it, (b) ground level townhouses which are 10 individual units, and (c) a four level parkade between the highrise and the townhouses.

[para6] The highrise is commonly metered for utilities, that is, units are not individually metered. So the total utility charges for the highrise are a common expense for the Defendant. Second, the units in the highrise do not have separate furnaces and hot water tanks. There is a common heating system and a common hot water heating system. Third, the parkade is used exclusively only by the unit owners in the highrise.

[para7] I turn now to the townhouses.

[para8] Each townhouse is separately metered for utilities, so each townhouse owner pays for the utilities that he uses. Second, each townhouse has its own furnace and hot water tank, which of course means that each townhouse also has its own self contained heating and water systems. Third, each townhouse has its own attached garage so the townhouse owners do not use the parkade.

[para9] The Plaintiff Francis owns eight of the townhouses. The Plaintiffs Wong and Ewanus each own one townhouse.

[para10] The statutory by-laws were replaced by by-laws passed by the Defendant. This was done when the developer owned all the units. Section 8.3(a) says that:

... Each year estimated Common Expenses shall be apportioned, levied and assessed upon the owners in proportion to the Unit Factors as shown on the Condominium Plan ...

[para11] To entice people to buy the townhouse units the developer amended the by-laws to add the following:

8.3(d) Notwithstanding any other provision of the By-laws, the Owners of Units 212 to 221 inclusive, (the "Townhouse Units") shall be entitled to a rebate of sixty-five (65%) percent of the monthly instalment or other assessments otherwise payable in accordance with 8.3(a) hereof so as to reflect the fact that the Owners of the Townhouse Units are separately metered and responsible for all utilities used therein (whereas for the other Units, certain utilities form a part of the condominium assessments) and that they do not receive a similar benefit in relation to the parking facilities as the Townhouse Units have their own parking garages, the area of which is included in their Unit Factors. The Condominium Corporation shall enter into an agreement in connection with each of the Townhouse Units to be binding upon the Condominium Corporation for an initial term of fifty (50) years and with automatic renewals of fifty (50) years each to ensure that the Owners of the Townhouse Units continue to receive the benefit of such rebate.

The developer did that when it was in the pilot's seat, so to speak.

[para12] When the developer sold a townhouse a rebate agreement was entered into between the purchaser and the Defendant. Again, in each case that was done when the developer was in the pilot's seat. Each townhouse owner would pay only 35% of monthly instalments or assessments made by the Defendant.

[para13] When the developer sold all the units in the project it bailed out of the pilot's seat, leaving the two groups of owners passengers in an airplane not of their unanimous choosing.

[para14] The Defendant sensibly decided to eliminate the sore spot about utility charges by paying them for the Townhouses, as it does for the highrise, and so treating them as part of its common expenses. But surprisingly the Plaintiff's objected to that because some of them have leased out their townhouses and the leases require the lessees to pay the utility charges. So at the end of the day the Plaintiffs complain that they must pay the utility charges for their townhouses but they also object to the Defendant paying them and treating them as common expenses.

[para15] When each Plaintiff bought their townhouse units they got an estoppel certificate as follows:

The Owners: Condominium Plan No. 822909 (the "Corporation") hereby confirms the following:

1. That the first common expense levy made against each of the above described units shall commence on October 1, 1994 for the month of October and are as set forth in Schedule "A" attached hereto.
2. That a true copy of the By-laws of the undersigned Corporation is hereto annexed as Schedule "B" and there have not been any further amendments or changes thereto, nor are there any present motions or proposals for further change thereto.
3. The Corporation has not been served with any action commenced against the Corporation.
4. There is no unsatisfied Judgment or Order for which the Corporation is liable.
5. There is no written demand made upon the Corporation for any amounts in excess of \$5,000.00 that, if not met, may result in an action being brought against the Corporation.
6. That attached hereto as Schedule "C" is a Certificate of the insurance maintained by the Corporation.
7. Attached hereto annexed as Schedule "D" is a true copy of the budget of the Corporation.
8. That hereto annexed as Schedule "E" is a true copy of the Management Contract, in force October 1, 1994.

[para16] The certificate is one issued pursuant to s. 36 Condominium Property Act. The Plaintiffs say that they relied on the certificates and the by-laws as they are when they bought their townhouse units. But the certificates do not and cannot freeze the facts for all time as they are at the time that the certificates are issued. Whether the certificates made intra vires something which could be ultra vires is a questionable proposition. Of course the by-law can be amended at any time by a special resolution: s. 26(2) Condominium Property Act. S. 8.3(d) could be deleted from the by-laws at any time by a special resolution. If s. 8.3(d) is ultra vires or if it is repealed the status of the rebate agreement is arguable, at least in the case where s. 8.3(d) is ultra vires.

Issues

[para17] Ms. Plante says that the issue is not the "rebate" but instead the issue is that the Plaintiff's are paying "a disproportionate share of the common expenses". I do not understand that submission. It is an argument over which end of the weiner is the end of the weiner. The rebate goes directly to what the Plaintiffs' share of the common expenses is to be. It is one factor in the formula to determine what the Plaintiffs must pay. If the Defendant applied the by-laws and the rebate agreements would this lawsuit even exist? I think not.

[para18] In any event, the issues are those defined in the pleadings. The Plaintiffs specifically raise the by-laws and the rebate agreements and ask for a declaratory judgment that they are "valid and enforceable", among other relief. The notice of motion for this application asks for an order "directing" the Defendant to "comply with" the by-laws and the rebate agreements, so the "rebate" is in issue. In its defence the Defendant says that the amendment to add in s. 8.3(d) and the rebate agreements are invalid for various reasons. One is that the amendment was not properly passed. The second is that the amendment is contrary to s. 31(1) Condominium Property Act. It says that the contributions by owners is to be "in proportion to the unit factor for their respective units". No one argues that 35% is a "unit factor" for the townhouse units.

[para19] If the by laws and rebate agreements are valid that will be the end of the lawsuit. All that will be left is the ancillary relief that flows from a finding that the by-laws and rebate agreement are valid.

[para20] If however, the by-laws and the rebate agreements are not valid the Plaintiffs fall back to their position that they are paying a disproportionate share of common costs and so their unit factor should be adjusted in some manner so that they pay only a "fair share" of the common costs.

[para21] At the present time the unit factors are based on the square footage of each unit in the complex. No one disagrees with that concept, which is commonly used as a measuring stick.

[para22] The Plaintiffs fall back position is that if they are required to make contributions based on their unit factors they are paying a disproportionately high contribution based on the reasons Ms. Plante sets out in paragraph 19 of her written submissions. The Defendant says in response, in its defence:

3. In answer to paragraphs 7, 8 and 9 of the Statement of Claim, the Defendant states and the facts are:

(a) the Board of Managers of the Defendant, in accordance with its powers pursuant to bylaw 8.2(a), agreed to assume all utility costs for the townhouses as of January 1, 1997 to equalize the services provided for the condominium fees paid by all owners. The Plaintiffs have declined payment of these utility fees on their behalf;

(b) occupants of the townhouse units have the right to enjoy all the same privileges and amenities in the condominium as the occupants of the high rise units, and in particular enjoy the right to full use of the whirlpool, saunas, steam room, indoor racquet courts, weight room, common area meeting and party room, and tennis courts (which are located on the parking structure). The maintenance costs for these amenities are included in the assessment of common area expenses;

(c) the Plaintiffs enjoy a disproportionate benefit of the landscaped common property in front of their units and in effect exclusive use of the common property comprising their driveways, the maintenance obligation for which falls on the Defendant, and therefore all owners of the condominium;

(d) the townhouse units are finished in cedar siding, asphalt shingled roofs and with gutters and downspouts all of which are common property of the Defendant and which require greatly disproportionate maintenance having regard to the unit factors of the Townhouse units;

(e) the townhouse units share a common wall with the parking structure, the maintenance of which is in the interest of the townhouse units;

(f) The Plaintiffs enjoy the benefit of insurance on the common property purchased by the corporation pursuant to its obligations under the Condominium Property Act and the bylaws.

[para23] I agree with Mr. Belzil's position that there are legal and factual issues to this lawsuit which cannot be dealt with summarily. This lawsuit must go to trial.

Decision

[para24] The application is dismissed. In the circumstances each party will bear their own costs of the application, including the cross-examinations.

MASTER FUNDUK

CBR# 080

The Owners: Condominium Plan 832 1384 (Grandview Ridge Condominium Corporation), plaintiff, and Wade McDonald and Marisa McDonald, defendants

[1998] A.J. No. 885

Action No. 980300937 Alberta Court of Queen's Bench Judicial District of Edmonton Master Funduk Judgment: July 31, 1998. Filed: August 4, 1998.

Counsel: C.R. Hilborn, for the plaintiff. W.N. McKay, for the defendant.

REASONS FOR DECISION

[para1] MASTER FUNDUK:-- This is an application by the Plaintiff for an order nisi in a defended lawsuit.

[para2] The lawsuit is to collect a special assessment made against the unit.

[para3] The plaintiff's witness was cross-examined. The Defendants have not given evidence.

Basic facts

[para4] The witness testifies that there are 47 owners in the corporation. There are substantially more units than that because one owner, Karenmax Investments Ltd., owns a substantial number of units which are presently the subject of an unrelated foreclosure lawsuit: Royal Trust Corporation v. Karenmax Investments Ltd., Q.B. 9603 12754. The Karenmax units are presently listed for sale with a court appointed real estate agent. Coincidentally, Mr. McKay, who acts for the Defendants in this lawsuit, also acts for the court appointed real estate agent in the Karenmax lawsuit so he is aware of the problems that exist in the corporation.

[para5] The unit which is the subject of the present lawsuit is a townhouse. There are four townhouses to a building. The unit is not one of the Karenmax units.

[para6] The Plaintiff's witness testifies that there are two engineers' reports about the state of the building, p. 6:

Q So there is a great deal of change occurring in the Board of Directors over a period of, let's say, five years?

A That's correct.

Q Is it apparent from all of those changes that occurred that, simply put, the job was not being done as far as looking after the common property was going?

A There was an engineering report done by the Court appointed administrator and there was also an engineering report done for the Karenmax Investments corporation. Both reports from Morrison Hirshfield stipulate that buildings were deteriorated to the point there was water damage caused by ice in the wintertime and there was a large claim paid out in 1994 to the tune of close to \$200,000. The engineering company found that these buildings were deteriorated to the point that the water damage had to be stopped and had to be totally renovated, the exterior.

[para7] I am told by Mr. Hilborn that the Plaintiff decided to first repair one of the buildings to get a better handle on the magnitude of the repairs required and the probable cost. It chose the building that the unit in question is in. The repairs were made to that building. At that time the Defendants were not the owners of the unit. The Plaintiff paid the cost for the repairs.

[para8] The Defendants bought the unit in late 1996. At that time they got a s. 36 Condominium Property Act certificate from the Plaintiff. Although Mr. McKay has not put the certificate in evidence it is quoted in the statement of defence and in the witness's cross-examination and Mr. Hilborn does not dispute what it supposedly says. This is what the Defendants rely on:

"C. The subject Unit is subject to the outstanding common expense levies, contribution or assessments due and payable to us in the amount of \$0.00 which includes accrued interest on the unpaid balance..." and 2. No special or extraordinary condominium assessments or contribution has been levied which has not been charged to the account of the subject Unit." and,

5. No work has been done on the subject Unit at the request of the Corporation that would give rise to a Builder's Lien against the title to the subject Unit pursuant to Section 70 of The Condominium Property Act of the Province of Alberta."

[para9] On February 4, 1997 the board of managers passed a resolution for a special assessment for the probable cost of repairs for all units. A copy of that resolution is attached to this decision. It speaks for itself. The witness's evidence is that the owners then approved that, pp. 4-5:

Q MR. MCKAY: Was there ever a meeting of the owners of the condominium corporation in or about February 1997 at which the decision was indicated to proceed with the special assessment shown in the Board of Managers Resolution to which we have earlier referred? A There was an extraordinary meeting called after the Board of Managers meeting.

Q So that owners meeting followed the Board of Managers meeting?

A That's correct.

Q Did that extraordinary meeting of the owners approve the Resolution of the Board of Managers?

A Yes, they did.

Q And in what numbers? In other words, what percentage approved?

A There was no negatives.

Q Was there a quorum present at that meeting?

A Yes, there was.

Q Was there any record kept of the vote at that meeting?

A Yes, there was.

Q And how was the vote conducted?

A Conducted by unit factors.

Q What I am here referring to, was it a vote by hand or by written ballot?

A It was by hand.

Q And the secretary of the meeting recorded that it had passed without dissent?

A That's right.

[para10] The Defendants have not paid the special assessment and that is what this lawsuit is about. Mr. Hilborn tells me that the other three unit owners in the building have paid. Defences

[para11] The Defendants plead three defences:

3. The Defendants further state, in answer to paragraph 4 of the Statement of claim that the Plaintiff did, on the 12th day of December, 1996, provide to the Defendants an Estoppel Certificate stating, in part, that:

"C. The subject Unit is subject to the outstanding common expense levies, contribution or assessments due and payable to us in the amount of \$0.00 which includes accrued interest on the unpaid balance..." and

"2. No special or extraordinary condominium assessments or contribution has been levied which has not be charged to the account of the subject Unit." and,

5. No work has been done on the subject Unit at the request of the Condominium that would give rise to a Builder's Lien against the title to the subject Unit pursuant to Section 70 of The Condominium Property Act of the Province of Alberta."

on the faith of which the Defendants completed their purchase of the subject Unit, and the Defendants now allege that the Plaintiff, is by its actions, estopped from claiming the subject Unit to be subject to a special assessment as alleged.

4. The Defendants also state in further answer to paragraph 4 of the Statement of Claim that the resolution referred to therein cannot apply to the subject Unit since such resolution, said to have been passed on February 4, 1997, is, on its face, said to be for repairs yet to be done. No such repairs were done to the subject Unit after February 4, 1997.

6. The Defendants further state that the Plaintiff by its actions has misrepresented to the Defendants the nature and extent of any liabilities with respect to the subject Unit, and cannot now be heard to claim any of the items ((a) throughout (h) inclusive), as set forth in the prayer for relief forming part of the Statement of Claim herein.

Issues

One

[para12] The certificate is one mandated by s. 36 if a purchaser requests it. The section says:

36. On the written request of an owner, purchaser or mortgagee of a unit the corporation shall, within 20 days of receiving that request, provide to the person making the request one or more of the following as requested by that person:

(a) a statement setting forth the amount of any contributions due and payable in respect of a unit;

(b) the particulars of

(i) any action commenced against the corporation and served on the corporation,

(ii) any unsatisfied judgment or order for which the corporation is liable, and

(iii) any written demand made on the corporation for an amount in excess of \$5000 that, if not met, may result in an action being brought against the corporation;

(c) the particulars of or a copy of any subsisting management agreement;

(d) the particulars of or a copy of any subsisting recreational agreement;

(e) a copy of the budget, if any, of the corporation;

(f) a copy of the financial statement, if any, of the corporation;

(g) a copy of the by-laws of the corporation; (h) a copy of any minutes of proceedings of a general meeting of the corporation or of the board.

[para13] Here the special assessment was not levied until two months after the certificate was issued, so it cannot be said that the certificate is inaccurate in that respect. Mr. McKay's position is found at pp. 11-12:

Q Can I borrow that back for a minute? Now, this one is dated December 12th, 1996 and it refers to unit 44 which is the unit that is the subject of our present problem?

A Right.

Q It shows that the unit is subject to outstanding common expense levies, contributions or assessments due and payable in the amount of zero dollars?

A That's correct.

Q So obviously at that time the February '97 levy hadn't come around?

A That's right.

Q Was there any knowledge that it was coming, this extraordinary levy in December '96?

A It definitely was.

Q And is it your philosophy or position that an Estoppel Certificate issued by the corporation shouldn't or wouldn't show the possibility of such a levy?

A No.

MR. HILBORN: That document is a statutory requirement -

MR. McKAY: Oh, I understand that.

MR. HILBORN: -- and it fulfills the requirement of the statute.

Q MR. McKAY: Do you feel that the corporation is under no obligation to advise a prospective purchaser of anything that might be coming down the road suddenly as far as extraordinary expense goes?

A Sir, you cannot put something on a Statutory Declaration that you are not sure of.

Q Well, we are not talking a Statutory Declaration here.

A But an estoppel is a Statutory Declaration to make it clear as of that date what has transpired. I can't forecast what is going to happen after that date.

[para14] But this defence misconceives the law. The Defendants admit that the Plaintiff has the authority to levy assessments. It is always possible, using that word in its correct English sense, that the Plaintiff might levy a special assessment at any time down the road. But s. 36 does not require the Plaintiff to identify that possibility merely because it is very probable in the foreseeable future. I agree with the witness's answer that the Plaintiff is to certify to what is at the time of certification, not what might be down the road.

[para15] The misconception goes even further. Here the whole condominium project is in need of repairs. The responsibility for exterior maintenance is the Plaintiffs, not individual unit owners. The cost for maintenance, regardless what maintenance, must be born by all unit owners. It would not matter whether the special assessment is two months, six months, 12 months, or whatever, down the road. All unit owners must bear their share of that special assessment regardless whose units are repaired and when the special assessment is made.

[para16] An owner cannot say that he is liable only for repairs to his unit. That is not the case for residential condominium projects. For example, if unit A only in a 50 unit complex is repaired the cost is borne by all 50 unit owners, not just the owner of unit A. A well managed project has an established reserve fund to cover all probable reasonable costs. Here extensive repairs are needed to all or at least a majority of the units and the reserve fund is insufficient. So the Plaintiff has to beef up the reserve fund in some way. Special assessments are one way of doing that.

[para17] The fundamental problem here is the lack of a sufficient reserve fund. I do not know if the Defendants had a lawyer when they bought the unit. People who buy a unit in a condominium project that does not have an adequate reserve fund must appreciate the probable consequences of that when they buy the unit. It is not the same as buying a detached single family residence in a non-condominium setting.

[para18] The problem is the lack of an adequate reserve fund which can only be overcome by sufficient assessments against units. What steps if any did the Defendants take to see if there was an adequate reserve fund?

[para19] I agree that s. 36 does not require the Plaintiff to forecast what may happen down the road, regardless of the likelihood of the happening or the shortness of the road.

[para20] Special assessments to beef up the reserve fund can be made at any time if necessary. That is a reality of owning a unit in a condominium project. If the Defendants did not know that it is unfortunate, but it is a reality.

Two

[para21] I turn now to the defence raised in para. 4 of the defence.

[para22] The building which houses the unit the Defendants own was repaired before the special assessment was made. The witness testifies that the repairs for the building were paid for before the special assessment was made.

[para23] This defence nit picks the language of the board's resolution. More important, it ignores the law that a special assessment must be borne by all unit owners regardless why the assessment is necessary. Here the board resolved to impose a special assessment of \$970,000, which then has to be borne by all unit owners on a "per unit factor", i.e. pro rata. Condominium ownership is a collective financial responsibility of all unit owners, not just those owners whose units are to be repaired. The fact that the Defendant's unit was already repaired is irrelevant.

[para24] Where do the Defendants think that the money came from to pay for the repairs to their unit? It had to come from the reserve fund which all owners had to contribute to.

[para25] Owning a unit in a condominium project entails collective financial responsibility for costs incurred by the corporation in carrying out its responsibilities. The operative word is "collective".

Three

[para26] The third defence, misrepresentation, is covered by what I said under headings One and Two. The Plaintiff does not have to tell the Defendants what the law is - that it may impose special assessments down the road to beef up the reserve fund to be able to perform its obligations to repair.

[para27] The Defendants fail to appreciate the collective financial responsibility that owning a unit in a residential condominium project entails.

Decision

[para28] There will be summary judgment (order nisi) as sought.

MASTER FUNDUK

CBR# 083

The Owners: Condominium Plan Number 7810477, plaintiff/defendant by counterclaim, and The Owners: Condominium Plan Number 7711723, defendant/plaintiff by counterclaim

[1997] A.J. No. 1121

Action No. 8901-14983 Alberta Court of Queen's Bench Judicial District of Calgary Paperny J. November 14, 1997.

Counsel: J.S. Saunders, for the plaintiff/defendant by counterclaim. T.W. Kathol, for the defendant/plaintiff by counterclaim.

REASONS FOR JUDGMENT PAPERNY J.:--**Introduction**

[para1] The parties to this action are condominium associations of industrial warehouse properties located in north-east Calgary. The plaintiff, defendant by counterclaim, Condominium Plan 7810477 ("Condo 78") is located at 1410-1420 - 40th Avenue N.E., Calgary and is situated directly to the west of the defendant, plaintiff by counterclaim, Condominium Plan 7711723 ("Condo 77") located at 1430 - 40th Avenue N.E., Calgary. This dispute revolves around the ownership and entitlement to the use of 62,000 square feet of land between the two properties, directly east of the building known as 1420 and to the west of the building known as 1430.

[para2] For many years, members of both Condominium Plans have used the area for parking, storage and vehicular access. However, the land in question is registered to Condo 77. The usage was and is ad hoc and often resulted in inconvenience for and complaint by the members of Condo 77. These ongoing difficulties between the parties eventually came to a head in 1989 shortly before this action was commenced.

[para3] The evidence is contradictory as to the circumstances leading up to the confrontation between the parties. It is clear, however, that in an effort to prevent further use of its property by Condo 78, and to facilitate the repair and paving of its yard, Condo 77 began the construction of a 3 foot wall approximately one foot from the property line. A trench was excavated approximately one foot from the property line in October 1989. On October 16, 1989, Condo 78 applied for and was granted an ex parte order from this Court directing Condo 77 to backfill the trench and prohibiting Condo 77 from constructing a wall. On October 24, 1989 that order was varied but continued to enjoin Condo 77 from trenching or constructing any wall, fence or barrier within 50 feet of building 1420 and prohibiting Condo 78 from parking or storing anything on the lands of Condo 77. That injunction has remained in place until this trial.

Relief Sought

[para4] Condo 77 seeks:

a. To have the injunction lifted to allow it to build a barrier wall; b. A declaration dismissing Condo 78's claim; c. Compensation for Condo 78's unauthorized use of the property since 1978; d. Actual costs of repair of the land between 1420 and 1430 since 1979 to date; and e. Future cost of paving the land to put it into a proper state of repair.

[para5] Condo 78 seeks:

a. A declaration that Condo 78 has acquired an interest in a portion of the land owned by Condo 77 by adverse possession; b. In the alternative, a declaration that it is entitled to an interest in land as a result of improvements made on it pursuant to s.60 of the Law of Property Act, R.S.A. 1980, c. L-8; c. In the further alternative, a declaration that Condo 78 has an easement of necessity or by implication over certain of the lands of Condo 77; d. In the further alternative, Condo 78 seeks the Court to invoke its equitable jurisdiction to impose a lasting solution to the present and future needs of these neighbours.

The Land

The land on which both condominium plans sit was originally one parcel having been subdivided in 1977. Condominium Plan 7711723 was registered on December 12, 1977. Its site is irregularly shaped, and has a combined frontage of 174.06 feet on 40th Avenue. The westerly boundary depth dimension is 524.15 feet and the easterly boundary is 538.44 feet. The site width at the rear is 312.78 feet. The total site contains 2.88 acres.

[para6] Condominium Plan 7810477 was registered on April 18, 1978 and is rectangular except for an angular cut at the south-east corner. The site has frontage of 318.09 feet on 40th Avenue, has a westerly dimension of 551.71 feet and an easterly dimension of 524.15 feet. The site width at the rear is 375.00 feet and the total site contains approximately 4.75 acres. [para7] Condo 77 has its own access to the east and as well a shared driveway with Condo 78 on the west side of 1430. Access to Condo 78 is by two driveways, one serving the westerly portion of the site and the other being the shared driveway with Condo 77.

[para8] The property line between the two buildings 1420 and 1430 is approximately 30 feet to the east of the building of 1420 and amounts to approximately 15,930 square feet. The property line is approximately 100 feet from the building on 1430 and is approximately 46,070 square feet.

[para9] On July 13, 1977, the application for subdivision approval was submitted for the construction of condominium warehouse units to be erected in two phases. Condo 77 purchased the units after the plan was registered. Individual unit holders began taking possession in December 1977 and into the early spring of 1978. It contains a single building with 15 bays.

[para10] After the majority of the units in Condo 77 were sold and occupied, construction began on Condo 78. The owners of Condo 78 purchased and took possession of units in building 1420 in or about summer or fall of 1978. The plan is composed of two buildings, 1410 and 1420, containing approximately 30 bays.

[para11] Since occupying its property, the owners of Condo 78 have had occasion to utilize the property of Condo 77 for vehicular access, parking and storage. The extent of this use and their legal entitlement to it is at the heart of this dispute.

History of Utilization

[para12] The land is zoned I-2, light industrial. Both condominium complexes are owned by individual businesses involved in a broad range of commercial ventures including light manufacturing and product distribution. The owners of Condo 77 use the yard for parking as well as shipping and receiving product, some using semi-trucks and trailers. Certain owners of Condo 77 use other portions of the yard for storage of materials and employee parking. Up until 1989, and to some extent thereafter, the owners of Condo 78 utilized the lands to the east of their property line for access to their bays by semi-trucks and trailers, for storage of equipment and materials as well as for parking. There is no written agreement between the parties for the use of the land by Condo 78 in this or any other way. There is nothing registered on title that grants an interest in Condo 77's land to Condo 78 nor reserves to it a right of use.

[para13] Mr. Dennis Dean testified that when he purchased his unit in Building 1430 in 1977, the land to the west was vacant. He was not certain as to where the property line was, but knew there was enough room for large trucks and estimated there was about 100 feet in the rear yard. He testified that Condo 77 started experiencing problems with Condo 78 parking vehicles on its property from the outset. Condo 78 members were parking vehicles on their property regularly. Condo 77 members would be obliged to go over to Condo 78 to ask that the vehicles be moved, as they were blocking traffic and access on Condo 77 property. In March 1980, efforts were made by Condo 77 to control the parking by circulating extracts of minutes of a Condo 77 Association meeting to Condo 78 members, advising that improperly parked vehicles would be moved and any expense associated therewith would be the owners' responsibility. [para14] According to Mr. Dean, the problem continued and in fact became progressively worse, prompting Condo 77 to consider putting up a fence somewhere in the yard. In November 1981, Condo 77 erected a chain link fence. This fence was not erected on the property line but approximately 20 feet east of the property line, on Condo 77's property. Mr. Dean stated that he thought the fence should be located 20 feet east of the grassed island, but his Association rejected this idea and suggested that the fence run down the centre of the yard, from the grassed island down to the middle of the lot. This fence was erected without discussion or consultation with Condo 78. The owners of Condo 77 continued to use the land to the west of the fence for storage and parking.

[para15] The erection of the chain link fence did not solve the problem. Owners of Condo 78 were still making use of the property on both sides of the fence, including loading product over the top of the fence. A member of Condo 78 continually backed into the fence and damaged it. There was further correspondence in November 1984 from Condo 77. Condo 78's response, although courteous, did not assist in dealing with the problem and shifted responsibility from the Condominium Association to the individual owner offenders. These ongoing problems were confirmed in testimony given by Mr. Greg Belanger, the production manager for Western Ventilation.

[para16] In the meantime the condition of the lot was deteriorating. The yard was accumulating ground water and gradually worsening. As well, the use of heavy vehicles was causing additional damage. This caused concern for safety. There was an incident where a forklift tipped over. Repair work was undertaken by patching, grading and gravelling but it was not a permanent solution.

[para17] In May 1989, in order to repair and maintain their yard, the owners of Condo 77 decided it would be necessary to pave the entire yard. To that end they entered into some discussions with Condo 78 for the joint repair of the yard. These discussions took place between Mr. Dean, the president of Condo 77, and Mr. Nick Novicki, the president of Condo 78 and Mr. Gregory Jorawsky, the vice-president of Condo 78. There was some suggestion that Condo 78 did not want to pave up to its property line at that time because of its heavy truck usage and a concern the paving would not last. Condo 77 wished to pave the whole area because if they only paved to a certain point, absent some type of barrier, ground water would seep in underneath and destroy the paving. There appears to have been some ongoing discussion about the extent and method of repair. Mr. Dean testified to a conversation he had with Mr. Novicki in which Mr. Novicki was advised that Condo 78 would not participate in the cost of repairing the lot beyond their property line which was only 30 feet from their building.

[para18] This position did not have the effect of improving the relationship between the parties. As a result, Condo 77, having been frustrated by the refusal or inability of Condo 78 to assume responsibility for their owners' use of the yard, compounded by their refusal to take some financial responsibility for its use by contributing to the costs of repair, met to consider what it ought to do in the circumstances.

[para19] On July 24, 1989, the representatives of both Condominium Associations met. As Condo 78 owned only 30 feet of the lot, it did not want to pay for half of the paving. Condo 77 resolved to seek compensation from Condo 78 for the past use of their land. Condo 78 made a number of proposals. Condo 77 rejected these, but agreed to consider their position, put together a different proposal and to reconvene. Another meeting took place later that day. Condo 77 proposed a different compensation arrangement for past and future use. A counterproposal was put forward by Condo 78. It was agreed a further meeting would take place, at which time Condo 77 would provide a response and/or counterproposal.

[para20] On the morning of July 25, 1989, the parties reconvened. The Condo 78 representatives did not arrive together. When Mr. Novicki arrived, he threatened to cut off electricity to Condo 77's property. This resulted in an abrupt end to the joint meeting and any further negotiations between the parties. The chain of events leading to the impasse between the parties was confirmed in the testimony of Mr. Jorawsky and is in keeping with the minutes of those meetings.

[para21] Thereafter, Condo 77 obtained a design and quotes as to the extent and cost of the work necessary to repair and pave the yard. It obtained a building permit from the City of Calgary to erect a 3 foot wall, approximately one foot from the property line. The property was surveyed on September 22, 1989 and the survey stakes were inserted. These stakes were removed over the weekend and had to be replaced. On October 13, 1989 a trench was dug to facilitate the building of the proposed wall. The barriers erected around the trench were located in part on Condo 78 property.

[para22] On the following business day, October 16th, Condo 78 obtained an ex parte injunction against Condo 77 requiring backfilling of the trench and prohibiting the erection of a wall. This Order was obtained on the affidavit evidence of Mr. Jorawsky wherein he deposed:

- a. That Condo 78 had always understood the property line to run approximately from the middle of the island along the fence line erected.
- b. That until July 1989 they did not know where the actual property line was.

c. That Condo 77 had demanded a back user fee and a fee for future use. d. That the trenching rendered access difficult and impossible for some, stating they only had 14 feet of access making it impossible for trucks of any size to enter into the bay. There was insufficient room for a tractor-trailer unit to safely drive between their building and the trench and as such would cause irreparable harm to the applicant and its members.

e. That the respondent's actions were calculated to cause the most difficulty possible to the applicant, to either drive it out of business or to exert economic hardship and duress against the applicant so as to force it to pay the respondent its asking price for access.

[para23] The order requested was granted and varied in a contested application on October 24th. I have already referred to the provisions of that Order.

[para24] The evidence establishes that Condo 78 continued to park vehicles and store materials on Condo 77's land contrary to the Court Order. Mr. Claus Seidel is an owner of Bays 1 and 2 in 1430. He (with Mr. Dean and Mr. Belanger) testified that since 1989, Condo 78 has stored vehicles and other items on their lands. Mr. Seidel produced a series of photographs all evidencing this. He also admitted that a vehicle owned by his company had parked on Condo 78's property but he stated that was an isolated occurrence. Mr. Jorawsky, vice-president of Condo 78 at the time the Order was granted, confirmed the breach of the Court Order and admitted that members of Condo 78 were the worst offenders. Mr. Phillip Hickey, owner of C&H Concrete Forming Systems Ltd. ("C&H Concrete") in Bay 7 of 1420 confirmed that Condo 78 did breach the Court Order but maintained that there were only a few owners who did not comply.

[para25] I am satisfied that there was no agreement for the common use of the property. From 1979 until 1989, Condo 78 used Condo 77's property for vehicle parking, storage and access in spite of the complaints received on a regular basis. I find that the fence was erected to eliminate the problem of Condo 78 parking and blocking access to Condo 77's property and was not done with the intention of delineating the property line. I find that while the fence was erected to prevent blocking of access and parking problems for Condo 77, it may have created the impression that some parking by Condo 78 on the west side of the fence would be tolerated. Witnesses for Condo 77 could not recall telling Condo 78 not to use the lot to the west of the fence for parking. However, witnesses for Condo 78 did not testify that they thought they had permission to park to the west of the fence either. In any event, I find that this effort to control parking and Condo 78's storage of vehicles and materials on the lot was not successful. Condo 78 continued to use the land on both sides of the fence. I find as well that there were incidents of Condo 77 utilizing Condo 78's property but that this was on a more isolated basis. I find that Condo 78's utilization of Condo 77's land to the east of the fence up to 1989 was not acquiesced in, but rather, Condo 77 was attempting continually to resolve their difficulties by discussion and consultation with their neighbouring Condominium Association. I find that while the Condo 78's Association responded in a polite fashion they took no effective measures to control their owners' use of Condo 77's property and that in fact they could not effectively control their owner's improper usage before or after the Court Order.

[para26] The incidents of 1989 must be viewed within that context. The condition of the driveway between the properties had deteriorated to the point of it being hazardous. Condo 77 had been advised that to remedy it would require deep excavation, fresh pit run and paving. They were further advised that if they left an edge, only paving to their property line, that ground water would likely seep in, rendering the entire effort potentially useless. They could not get co-operation from their neighbours to pave the entire yard on a basis that they considered fair and reasonable in light of their past usage. They could not get their neighbours' agreement to undertake paving of their own property. They were faced with a threat by the president of Condo 78 that they would have their power cut off. Accordingly, they devised a method to deal both with the ongoing parking difficulties and the paving problem - the erection of a 3 foot concrete wall. The result was the injunction.

[para27] With that backdrop the Court must consider the competing legal claims to the use of the land east of 1420's property line and once determined, what if any damages flow therefrom. Adverse Possession

[para28] Condo 78 claims an interest in the land on several bases. It asserts that it has legal title to a portion of the land (approximately an additional 20 feet east of their property line), having acquired it by adverse possession and relies on s.18 of the Limitation of Actions Act, R.S.A. 1980, c. L-15 which provides:

18 No person shall take proceedings to recover land except

(a) within 10 years next after the right to do so first accrued to that person (hereinafter called the "claimant"), or

(b) if the right to recover first accrued to a predecessor in title, then within 10 years next after the right accrued to that predecessor.

Condo 78 submits that it has been using the 50 feet west of 1420 since 1979 and that neither Condo 77 nor Condo 78 knew where the property line was. Condo 78 further submits that Condo 77 erected a fence on what it thought was the property line. It argues that it is entitled to an order of the court giving it title as they have occupied it since 1978 and that occupation was adverse.

[para29] In *Lutz v. Kawa* (1980), 15 R.P.R. 40, our Court of Appeal confirmed that title by adverse possession may be obtained against a registered owner under the Land Titles Act, R.S.A. 1970, c. 198 (now R.S.A. 1980, c. L-5) and that adverse possession may be obtained by an innocent trespasser who believes that he is occupying land to which only he has title. The Court stated at 54:

The essentials to be established in a case of adverse possession are that the claimant be in possession and that the true owner be out of possession.

[para30] I am not satisfied on the evidence before me that Condo 78 intended to possess the property, that is, that Condo 78 had the requisite animus possidendi to satisfy a claim of adverse possession. Some of the owners in Condo 78 testified that they knew where the property line was (namely 30 feet from the building) while others testified that they were unaware of it. Documents produced by Condo 78, such as the Hardy Engineering Report and documents from their paving file, suggest that the officers were aware of the property line. Further, the evidence that at least some members of Condo 77 did not know where the property line was, is equivocal. The evidence falls short of establishing that Condo 78 believed that they had title to the land which they now claim. In addition, the site plans for both Condos were duly registered and the property lines clearly delineated thereon. All who testified had counsel acting on their behalf on their purchases. Even if the court were to accept that Condo 78 established the requisite intent to possess (which they have not on the balance of probabilities), it is not ultimately determinative of the issue.

[para31] In her article "Something for Nothing: The Law of Adverse Possession in Alberta" (1992) 30 Alta. L. Rev. 1291, Sandra Petersson stated at 1306:

In addition to possession over time, adverse possession requires a certain quality of possession. The classic requirement is that possession be "an actual possession, an occupation exclusive, continuous, open or visible and notorious ... [which] must not be equivocal, occasional, or for a special or temporary purpose." (Citing from *Sherren v. Pearson* (1887), 14 S.C.R. 581 at 585.)

[para32] There is an abundance of evidence that demonstrated that owners of Condo 77 continued to use the west side of the fence for parking, vehicle storage and materials storage throughout the ten year period. The occupation by Condo 78 was not exclusive nor was it continuous, thus there was no dispossession by Condo 78. Accordingly, the claim for adverse possession fails.

Application of s. 60 of the Law of Property Act

[para33] The plaintiff submits that s. 60 of the Law of Property Act, supra dealing with improvements made on wrong land ought to apply in this case, so as to grant them, or allow them to retain, the land in question. Section 60 provides:

60(1) When a person at any time has made lasting improvements on land under the belief that the land was his own, he or his assigns

(a) are entitled to a lien on the land to the extent of the amount by which the value of the land is enhanced by the improvements, or

(b) are entitled to or may be required to retain the land if the Court is of the opinion or requires that this should be done having regard to what is just under all circumstances of the case.

(2) The person entitled or required to retain the land shall pay any compensation that the Court may direct.

[para34] This section was considered in *Sel-Rite Realty Ltd. v. Miller* (1994), 39 R.P.R. (2d) 177 (Alta Q.B.) In that case, the owner of two adjoining parcels mistakenly constructed a dwelling on the boundary line of the two parcels and remained in the dwelling as the tenant. Those parcels of land were eventually sold to separate owners. When the plaintiff discovered that the dwelling straddled the boundary line, they approached the defendant owners hoping to purchase a portion of the lands to accommodate the encroachment of the residence. This offer was refused. The plaintiff sued under s. 60 of the Law of Property Act for a lien over the defendant's land to the extent necessary to accommodate the dwelling. The Court found that the evidence indicated that both parties and their successors in title believed that the dwelling was located entirely within the plaintiff's lands. The Court held that under s. 60, a person who has made a lasting improvement to land, in the belief that he or she owns the land, is given the right to a lien on the land to the extent of the amount by which the value of the land is enhanced by the improvements. Alternatively, they may get the right to retain the land if the Court believes that should be done, having regard to what is just and equitable under the circumstances. (*Sel-Rite Realty*, supra, at 177.) The person entitled to retain the land is required to pay any compensation that the Court may direct.

[para35] I am not satisfied that s. 60 applies in this case. I am not satisfied on the evidence before me that the "improvement" made by Condo 78 to Condo 77's land, namely some excavation and patch work can be considered "lasting improvements". My view is that while they may have assisted in some maintenance of the yard, the value of the land was not enhanced within the meaning of s. 60 so as to entitle them to a lien.

[para36] Further, s. 60 requires that the persons making the lasting improvement believe that they own the land. The evidence does not satisfy me that Condo 78 had such belief. While certain members of the Condominium Association and the Board may have been under the mistaken belief as to the location of the property line, other members of the Board, including its president, were well aware of its location. In *Canada Permanent Trust Company v. Herron*, (16 December 1975), (Alta Q.B.) [unreported], Milvain, J. held that an honest but mistaken belief in where the property line was, was not sufficient for the purposes of s. 60 of the Law of Property Act. Rather, he stated at 4, "The honest belief must be a belief founded upon a reasonable and adequate inquiry into the circumstances upon which the belief is based ...". Applying this test to the facts before this Court, and considering that the President of the Board of Condo 78, as well as other members, knew where the property line was, it cannot be said that the belief was founded on a "reasonable and adequate inquiry."

[para37] On the facts before me, the plaintiffs are not entitled to a lien on Condo 77's land under s. 60 of the Law of Property Act.

Easements

[para38] The plaintiff claims, in the alternative, an entitlement to an easement over Condo 77's property, either an easement of necessity or by way of implied grant.

(a) The Creation of Easements

[para39] Section 50 of the Limitation of Actions Act, supra provides as follows:

50 No right to the access and use of light or any other easement, right in gross or profit a prendre shall be acquired by a person by prescription, and it shall be deemed that no such right has ever been so acquired.

Accordingly, in Alberta an easement cannot be acquired by prescription.

[para40] There are four basic characteristics of an easement:

1. there must be a dominant and a servient tenement; 2. an easement must accommodate the dominant tenement; 3. dominant and servient owners must be different persons; 4. a right over land cannot amount to an easement unless it is capable of forming the subject matter of a grant.

(See Bruce Ziff, *Principles of Property Law* 2nd ed., (Toronto, Carswell 1996) at 328-332). There is no express grant of an easement in this case. The issue is: is there an easement created by implied grant or by necessity?

(b) Implied Grant

[para41] The doctrine of implied grant stems from the equity in the cases. Generally speaking, when the owner of two adjoining lots conveys one of them, he impliedly grants to the grantee all those continuous and apparent easements that are necessary to the reasonable use of the property granted and which are, at the time of the grant, used by the owner of the entirety for the benefit of the parts granted. This doctrine is based in the principle that a person cannot derogate from his own grant. See *Wheeldon v. Burrows* (1879), 48 L.J. Ch. 853 at 856; *Hart v. McMullin* (1899), 32 N.S.R. 340, confirmed on appeal to the Supreme Court of Canada, 30 S.C.R. 245; *Fullerton v. Randall* (1918), 44 D.L.R. 356 (N.S.S.C.A.D.).

[para42] Upon the severance of a tenement by devise into several parts, not only do rights of way of strict necessity pass, but also rights of way which are necessary for the reasonable enjoyment of the part devised and which had been and were up to the time of the devise used by the owner of the entirety for the benefit of such parts [emphasis added]. See 11 Hals., 2nd ed., 287 cited in *DuVernet v. Eisener* [1951], 4 D.L.R. 406 (N.S.S.C.A.D.) at 412.

[para43] The plaintiff submits that the Court should consider the original design of the property to determine that there is an implied grant of easement over the lands in question. It relies on an architectural rendering, undated, of the property and a site drawing on which the last revision was dated 25 August 1977. The artist's rendering depicts a grass island between 1420 and 1430, large trucks backing into 1420 and a shared driveway between 1420 and 1430. The site plan pre-dates the actual condominium plan, which was registered on December 12, 1977, by several months.

[para44] There is a fire hydrant situated on the grass island which appears to be intended to service both Condo 78 and Condo 77. The electrical splitter box is located on Condo 78's property. Both parties agree that there is joint use of the driveway between the buildings and no issue is taken over this mutual use. The plaintiff submits that the early drawing and site plan, coupled with the design of certain utility features to be shared jointly, is evidence of the intention of the original owner of the entire parcel, Tomol Holdings Ltd. ("Tomol"), to create an easement, permitting Condo 78's use of the lands, to the west of the island, for access and storage.

[para45] Tomol purchased the entire parcel of land prior to June 1977. It registered both condominium plans in accordance with the approval for the plan of subdivision in December 1977 and April 1978. There is no reservation of easement on title. No evidence was called from Tomol, or anyone acting on its behalf in the design of the project, that speaks to the issue of intention. The lands to the west at the date of transfer to Condo 77 were not in use, but were vacant. At the time of transfer there were no "continuous and apparent" easements that were necessary for the reasonable use of the property granted. In fact, the property to the west was not in use at all.

[para46] I am not satisfied that an easement can be implied which was not enjoyed under the title of ownership during the unity of possession. While the island is visually located in the middle of the property, it is clear that it is situated entirely on Condo 77's property according to the site plan. Further, the fact that there may be a common hydrant or electrical splitter box does not lead to the conclusion that an easement exists over all properties to the west of the island for any purpose. The drawings themselves are not of assistance to the Court as to the owner's intention.

[para47] Absent clear evidence to the contrary, the Court should be loathe to imply easements, as such would derogate from the grant by impliedly foisting an easement on a parcel that has been sold. In *Barton v. Raine* (1980), 29 O.R. (2d) 685; 15 R.P.R. 287; 114 D.L.R. (3d) 702, the Court of Appeal stated that as a general rule an easement must be expressed in the clearest terms, but noted that there are a number of exceptions to the rule. They are:

1. easements of necessity; 2. reciprocal and mutual easements; 3. easements which arise by necessary inference.

In *Barton*, supra, the issue concerned a driveway which had been used to serve two adjoining properties over a great many years. The properties had at one time been owned by the same person. This person conveyed one of the properties to his son without reserving an easement over the property sold. Both properties later changed hands and when a dispute arose between the owners, many years later, one of the owners erected a fence and obstructed the right of way. The trial judge found that no easement by prescription had arisen and no easement of necessity had been established. He found, however, that an easement should be inferred by implication.

[para48] There is no evidence before this Court that the previous owner, Tomol, intended that the owner of Condo 78 have an easement over Condo 77. There is no evidence of an implied grant based on previous use. There is no evidence that reasonable inquiries were made to ascertain such rights. The question then remains, as asked in *Jones v. Lockhart* (1989), 4 R.P.R. (2d) 245 (N.B.C.A.) at 248:

If there was never a right of way, as in this case, how could one spring up after the owner clearly subdivided the property into separate lots and failed to grant an easement over any other lot?

I am unable on the evidence before me to imply a grant of easement.

(c) Easements of Necessity

[para49] Is there an easement of necessity? Counsel for the plaintiff submit that the requirements for finding an easement of necessity have become somewhat less stringent in recent years and in that regard relies on the decision of *MacKinnon v. MacDonald* (1988), 1 R.P.R. 185 (N.S.S.C.T.D.). She submits that the definition of an easement of necessity includes easements reasonably necessary for comfortable occupation by the party. I disagree.

[para50] The Court in *MacKinnon*, supra, relied on *B.O.J. Properties Ltd. v. Allen's Mobile Home Park Ltd.* (1979), 7 R.P.R. 236; 36 N.S.R. (2d) 362 at 380, 64 A.P.R. 362 at 380; 96 D.L.R. (3d) 431 (T.D.), aff'd (1979), 11 R.P.R. 260 (C.A.) which cited 11 Halsbury (2d) ed. at 326-329 for the following propositions:

A right of way may arise by implication of law where both dominant and servient tenements have been in a common ownership of one person and one or other of the tenements had been disposed of by him. Rights of way thus arising are either rights of way

reasonably necessary for the comfortable occupation of the dominant tenement, which only arise upon a grant of the dominant tenement by virtue of an implied grant or words implied in the grant by statute, or rights of way of necessity. The latter are easements without which it is impossible to make any use of the dominant tenement, and can arise in favour either of the grantee on a disposition of the dominant tenement or of the grantor on a disposition of the servient tenement. [emphasis added]

A way of necessity is a right of way which the law implies in favour of a grantee of land over the land of the grantor, where there is no other way by which the grantee can get to the land so granted him, or over the land of the grantee where the land retained by the grantor is landlocked. A right of way of necessity can only exist where the implied grantee of the easement has no other means whatsoever of reaching his land. The extent and nature of the right of way:

depends upon the nature of the necessity. The purposes for which it may be used depend upon the facts existing at the time of the grant which gave rise to the necessity, and are in general controlled by the obvious intention of the grant. [11 Halsbury (2d) ed. at 326-39 cited in MacKinnon, supra at 187.]

[para51] If a way of necessity arises upon a demise and the lease contemplates the carrying on of a particular business upon the demised premises, the way of necessity is confined to a way suitable for that business. But there can be no way of necessity unless the necessity existed at the time of the grant of the dominant tenement. It is noteworthy that in MacKinnon, supra at 188, an easement of necessity was granted on the strict test because "without a right of way, the plaintiff would have no way of egress or entry to their property."

[para52] In *Re Stone* (1982), 38 N.B.R. (2d) 492 (N.B.Q.B.), the Court discussed when an easement of necessity is implied. It stated at 506:

Generally speaking, an easement of necessity is implied by law where access is otherwise impossible as a right. Mere inconvenience is not a sufficient reason for creating an easement of necessity (*Fitchmarsh v. Royston* (1899), 81 L.T. 673, *Easements*, Gale (14th ed.), p. 118). The Ontario Court of Appeal in *St. Mary's Milling Company v. St. Mary's* (1916), 32 D.L.R. 105, held that an easement of necessity means an easement without which the property retained cannot be used at all, and not one merely necessary for the reasonable enjoyment of that property. The Nova Scotia Court of Appeal in *Fullerton v. Randall* (1918), 44 D.L.R. 356, stated that an easement of necessity is always a strict necessity and this necessity must not be created by the party claiming the right-of-way. Necessity does not exist where one can get to his property through his own land, or merely because a road through his neighbour's would be a better road, more convenient or less expensive. Furthermore, it would appear that the easement of necessity is limited in use to the purpose for which the quasi-dominant tenement was used at the time of severance, i.e. if the dominant tenement was used as a farm, then the easement of necessity would be for agricultural purposes only (*London Corporation v. Riggs* (1880), 13 Ch.D 798). [emphasis added]

[para53] The plaintiff submits that an easement of necessity has been created because certain owners in Condo 78 require that semi-trailers, 50 feet long or more, be backed into the bays for their proper carrying on of business. The evidence before me establishes that Chrisanti Brothers and Meyers Sheet Metal, former owners in 1420, utilized semi-trailers in their businesses. Mr. Hickey also testified that he utilizes such semi-trailers in his business, C&H Concrete, and has since the early 1980s. He indicated that any owner in unit 1420 who required tractor-trailer service would have difficulty if they were not granted an easement of at least an additional 20 feet on Condo 77's land. He testified that while the trench was in existence, it was difficult for him to carry on business because they were unable to receive their tractor-trailer loads. If a wall were to be built on the property line, his business would require dock service to come in and unload with a forklift. He testified that not being able to use semi-trailers would make his business extremely difficult and he was uncertain as to whether they could continue to operate, particularly because operating a forklift in winter could be hazardous. He further testified that the flow of traffic on the 30 foot strip would be horrible. In cross-examination Mr. Hickey indicated that when he and his partners purchased their unit, they felt they needed at least 50 feet for trucks and that it was important to back trucks into the bay, but did not investigate where the property line was at the time. He confirmed that he and his partners were "pretty careless" when investigating the property. He admitted that it would be difficult to carry on business but not impossible without an extra 20 feet.

[para54] In my view, the plaintiff cannot establish an easement of necessity over the 20 feet on the westerly side of the Condo 77 lands. The businesses are clearly accessible within their property line and while it is inconvenient and difficult to utilize semi-trailers, the only thing they cannot do is back into the bays. While their use may cause traffic problems for the other owners, this obstacle is insufficient to create the desired easement. An easement of necessity means an easement without which the property cannot be used at all. It is not one that arises as a matter of inconvenience. Accordingly I find no easement of necessity.

(d) Other Interests

[para55] The erection of the chain link fence in November 1981 might arguably have impliedly granted a licence to Condo 78 to utilize the lands to the west of the fence. However, no evidence was led to suggest that Condo 78 thought they had permission to park on that side of the fence as opposed to the other side and no submissions or claims of such a licence were asserted on their behalf at trial. However, any such licence would have terminated some time in 1989 when Condo 77 purported to assert its full legal rights over the land in any event. (e) Equitable Relief

[para56] Condo 78 asks in the further alternative that the Court invoke its equitable jurisdiction to impose a lasting solution to the present and future needs of these neighbours. Prior to trial, the Court offered to mediate the dispute in order to arrive at a viable commercial solution to the conflict between Condos 77 and 78. This alternative was rejected by the parties. They have come to the Court to determine their respective property rights to the land between their buildings. The Court has determined these rights and is loathe to interfere with them unless a compelling reason to do so exists.

[para57] Counsel for Condo 78 has failed to provide any authority to support a claim in equity that would allow the Court to order a practical commercial solution in abrogation of the strict property rights of Condo 77. Further, in reviewing where the equities lie as between the parties, and particularly keeping in mind the persistent breach of the prior Court Order by Condo 78, it is difficult to imagine what kind of order could be fashioned that would be equitable to Condo 77. Accordingly, I am unable to fashion a solution based in the Court's equitable jurisdiction and contrary to their determined property rights.

[para58] The defendant, plaintiff by counterclaim, is entitled to the declaration it seeks lifting the injunction, which land is not subject to any other interest in the nature of easements, save and except the necessary cross easement of ingress and egress on the lands directly off 40th Avenue N.E.

Damages

[para59] Condo 77 seeks monetary compensation as a result of improper use by Condo 78 of its land since 1979 for the following:

1. The actual cost of digging the trench and backfilling it;
2. The cost of the chain link fence erected in 1981;
3. The cost of repairing and maintaining the land between 1420 and 1430 to date; 4. The cost of future repair; and
5. Compensation for 20 years of use by the plaintiff.

[para60] The defendant seeks damages based in the tort of trespass. Its largest claim is for the wrongful use of the property during this time. It seeks damages for the monies actually expended by it in maintaining that land, (apparently attributing all of the use to Condo 78), and what it calls "ground rent" of some 15,000 square feet of its property over a 20 year period.

[para61] The starting point for the assessment of damages in tort, including the tort of trespass, is the principle of restitutio in integrum, where the court seeks to place the plaintiff in the position they would have enjoyed if the defendant had not committed the wrong. See *Costello v. Calgary (City)*, [1997] A.J. No. 888 (Q.L.) (C.A.) at para. 38 applying the principle set out in *Marsan v. Grand Trunk Pacific Ry. Co.* (1912), 1 W.W.R. 693 (Alta.S.C.A.D.).

(a) Diminution of Value as a Measure [para62] The usual measure of damages for trespass on real property is calculated by assessing the diminution of value of the land after the trespass. See *Harvey MacGregor, MacGregor on Damages*, 15th ed. (London: Sweet & Maxwell, 1988) at para. 1392; *S.M.Waddams, The Law of Damages*, looseleaf ed. (Aurora, Ont.: Canada Law Book, 1997) at 1.1785; *L.D. Rainaldi, ed., Remedies in Torts*, looseleaf, vol. 3 (Toronto: Carswell, 1997) at para. 40; principle applied in *Heddinger v. Calgary (City)* (1992), 129 A.R. 261 (Q.B.). There is no evidence led in the case before the Court as to what the diminution in value might have been, if any. Indeed, it would be virtually impossible to assess the diminution in value of the land in question since which part of the property was utilized by Condo 78 is not clearly delineated. Further, not all damage can be attributed to Condo 78 since Condo 77 also used the land in question, subjecting it to the traffic of heavy vehicles. There is also the intervening factor of the spring thaw. Therefore, based on specific facts of this case, damages are more properly assessed under loss of use or wrongful occupation, which is set out below.

(b) Expert Evidence [para63] Both the defendant and plaintiff called experts to deal with the quantum of damages due Condo 77. The defendant called Mr. Gary Thomasson, principal of Acquest Consulting Group Inc. who was qualified as a specialist in property valuation in industrial property in Calgary. His approach was to calculate the ground rental loss of the land used by Condo 78 since January 1, 1979. Mr. Thomasson's methodology was to assume a certain amount of land was used by Condo 78. He acknowledges in his report that it is unclear how much land has been consistently utilized. In an effort to quantify the loss he estimated that approximately 15,070 square feet of Condo 77's lands were being utilized by Condo 78. This represents approximately one third of the lands owned by Condo 77 to the west of their property. He then proceeded to calculate what the estimated ground rent loss would be; ground rent being the amount paid for the right to use and occupy the land according to the terms of a ground lease. In so doing, he calculated the owner value of the land as opposed to the market value of the land, applied an overall land capitalization rate of 9 percent which produced a ground rent loss income attributable to the land. He concluded that the estimated ground rent due per year was \$9,000. [para64] Mr. Thomasson chose to do an owner value calculation rather than a market value calculation because market value, in his view, presumed a competitive and open market transaction. In this case he noted the owner, Condo 77, has no interest whatsoever in disposing of or selling the property, and as such, the market value calculation would not be helpful.

[para65] The plaintiff called Mr. Alexander Navrady who was qualified to give expert evidence in the area of real estate appraisal and, in particular, industrial real estate in Calgary. His report was a rebuttal report to the Acquest report. He disagreed with the methodology adopted by Mr. Thomasson. Mr. Navrady opined that Mr. Thomasson failed to consider the highest and best use of the property which Mr. Thomasson felt would be inappropriate unless he was doing a market value analysis. In Mr. Navrady's opinion, highest and best use requires an examination as to the 15,070 square foot parcel Acquest selected, which according to him was not physically or legally developable as a separate entity. Accordingly, it formed part of the 2.88 acres of land comprising Condo 77's property and the most appropriate method to value it was to estimate "the mean market value of 2.88 acres on a unit rate basis and apply that unit rate to the 15,000 square foot segment of the 2.88 acres". In his view, considering highest and best use, a lower ground rent would result, which he calculated to be \$4,408 per annum.

[para66] The Court is of the view that assessing damages for trespass in this case purely on the basis of loss of ground rental is of limited use. The assessment of loss of ground rental presumes exclusive use of the property and not joint, intermittent or sporadic utilization. I do however find the respective analyses helpful to the extent that they set some parameters for the value of the land if used on an exclusive basis.

[para67] In order to assess the appropriate damages the Court must make some findings as to the nature of the use.

[para68] On the evidence I am satisfied that up until 1989, Condo 78, on a regular basis, parked their vehicles, stored vehicles and other materials including debris on Condo 77's property as well as using it for access to their bays by large trucks and semi-trailers. The Court is unable to ascertain how much of the property they utilized and the frequency. It is clear from the evidence that Condo 78, by its utilization, has contributed to the state of disrepair currently extant on the property, although it is but one contributory factor. The defendant by counterclaim seeks damages both for the occupation of the property and the cost of the repair.

(c) Loss of Use and Wrongful Occupation

[para69] *MacGregor, supra*, at para. 1391 states:

It is the form of injury and not the form of tort which gives the important division in relation to damages: wrongful damage to the land on the one hand and wrongful occupation and user of the land on the other.

[para70] In *Costello v. Calgary (City) (No. 2)* (1995), 163 A.R. 241 (Q.B.), Rooke, J. adopted this distinction at 282 stating that "Usually damages are separated between loss of use and loss of value." He stated further: "Double compensation is to be avoided. Often compensation for total lost value will disentitle compensation, in whole or part, for loss of use." The converse can be equally true, that is, compensation for loss of use may include compensation for any damage that is visited on the land as a result of that use as part of regular repair and maintenance. In my view, the quantum of damages calculated for the use and occupation rent in this case ought to include in it the cost of regular repair and maintenance of the property.

[para71] The normal measure of damages arising from the loss of use of land is the "market rental value of the property occupied or used for the period of wrongful occupation or user," MacGregor, *supra* at para. 1420. That damages in the nature of a rent charge is appropriate in a case of temporary loss of use is supported by Marsan, *supra* at 699 citing Halsbury's, Vol. 10, p. 13. See also Remedies in Tort, *supra* at para. 42.

[para72] The calculation of rent can be determined by market value if the land in question is susceptible to that kind of analysis. While the expert reports calculated damages based on ground rent and while it is usually reasonable to use market rent value to assess damages in trespass for loss of use, I find that the utilization to which Condo 78 put the land of Condo 77 is not susceptible to this kind of analysis. Rental of any kind suggests that a determined parcel of land is dedicated to the sole use of the "tenant". I find that the usage of Condo 78 is more akin to a license than a lease proper. Although the expert reports are useful to the extent that they establish some basis for assessing land values, they remain a theoretical solution to a problem that does not fit comfortably with the facts. Equally theoretical, but perhaps more in keeping with the actual usage Condo 78 made of the land, I adopt the reasoning in *Bracewell v. Appleby*, [1975] Ch. 408 at 419D-E, a case in which the Court tried to assess the appropriate compensation for a right-of-way acquired by an easement of necessity. Graham, J. stated that the appropriate measure is "the equivalent to a proper and fair price which would be payable for the acquisition of the right in question," cited in MacGregor, *supra* at para. 1422. On this point, MacGregor continues:

The figure to aim at was that which, in negotiation, the plaintiffs would have accepted as adequate to compensate them for the loss of amenity and the increased use of the road, but which at the same time would not be so high as to deter the defendant from building at all. See also the discussion in *Waddams*, *supra* at paras. 9.120-9.130.

[para73] The Court is unable to ascertain with any definitiveness the extent of the use throughout the time. I do find that the deterioration in the lot was largely due to its poor construction.

[para74] In 1989 an injunction was granted limiting Condo 78's entitlement to utilize Condo 77's land by enjoining it from parking or storing vehicles or materials anywhere on Condo 77's land. In contravention of that Court Order, numerous examples of its breach were brought to the Court's attention. The evidence from the witnesses of Condo 77 suggest that the trespass did not diminish after the granting of the injunction, and I so find. Accordingly I order damages for trespass in the amount of \$4,500.00 per year from 1989 to the date of trial. I find this figure represents the amount the defendant would likely have accepted as adequate compensation for the right to utilize the land and compensate for the partial loss of use and wear and tear.

[para75] The defendant would be entitled to damages for trespass from 1979 to 1981 in the amount of \$4,500.00 per year. From November of 1981 to October 1989, part of the yard was fenced. I have found that Condo 77 did not acquiesce in the use of the property east of the fence, however, there is some doubt as to whether or not they advised Condo 78 that there were not entitled to use lands to the west of the fence, or whether or not they took any action to prevent such use. Accordingly, I would reduce the damages of \$4,500 per year for that time period to \$2,000 per year.

[para76] However, neither party addressed the Court as to the application of s. 51(f) of the Limitation of Actions Act, R.S.A. 1980, c. L-15, if any, to the case at bar. Accordingly, I invite submissions from counsel as to its applicability prior to awarding damages as they relate to trespass before October 1989.

[para77] The claim for the cost of past repairs has been included in the yearly amount. However, it should be noted that the largest cause of the deterioration is as found above, poor construction and not wear and tear, and that Condo 77 is itself responsible in part for some wear and tear. [para78] The defendant by counterclaim is also entitled to damages in the amount of \$8,162.88 which represents the amount of monies expended in the design, the digging and the refilling of the trench in October 1989. Remedies in Tort, *supra* at para. 42 states:

Where special damages arising from the deprivation of use are pleaded and proved, and where the trespasser should have anticipated the damages as the likely result of the act, the measure of damages is not the mere rental of value of land, but rather the special damages resulting from the trespass.

[para79] Condo 78 can be held to have a reasonable means of knowing that Condo 77 would incur the cost of digging and refilling the trench when they filed their Undertaking As to Damages in support of their ex parte application for an injunction on October 16, 1989. I find that the cost of digging and backfilling the trench falls within the head of special damages in trespass. From that amount I would deduct the cost of the survey Exhibit 2 Tab 7 in the amount of \$450.00. [para80] The fence was erected to protect Condo 77's property rights and should be an expense they properly bear.

[para81] Damage for future repair is not applicable, in light of my findings regarding legal entitlement to the land in the future and counsel's submission on this point. Accordingly, I award damages for loss of use after October 16, 1989, in the amount of \$4,500.00 per annum and special damages in the amount of \$7,712.88. I await submissions from counsel insofar as damages are concerned before that date.

Pre-judgment Interest

[para82] This action was commenced by Condo 78 in 1989. On October 24, 1989, Mr. Justice Dixon ordered that the parties complete their document production and examination for discovery on or about the end of December 1989 and that either of them might thereafter seek special leave for the expeditious trial of this action. The evidence indicates that notwithstanding this provision, virtually nothing other than negotiation took place for approximately three and a half years after discoveries in 1989. Thereafter no steps were taken for a further two and a half years until the spring of 1996.

[para83] The relevant portions of the Judgment Interest Act, S.A. 1984, c. J-0.5 provide:

2(1) Where a person obtains a judgment for the payment of money or a judgment that money is owing, the court shall award interest in accordance with this Part from the date the cause of action arose to the date of the judgment.

2(3) If it considers that it is just to do so having regard to changes in market interest rates, the circumstances of the case or the conduct of the action, the court may

(a) refuse to award interest under this Part,

(c) award interest under this Part for a period other than the period provided for in this Part.

[para84] These provisions were considered by the Alberta Court of Appeal in *Aetna Insurance Co. v. Canadian Surety Co.* (1994), 23 Alta.L.R. (3d) 182 at 185 where the panel cited from an earlier decision of the Court:

This court has dealt with these sections in *216927 Alberta Ltd. v. Fox Creek (Town)* (1990), 72 Alta. L.R. 52 [[1990] 3 W.W.R. 321], where Foisey, J.A. stated at p. 68:

While s. 2(1) states that the court "shall" award interest, nonetheless there is an overriding discretion in subs. (3) to refuse to award any interest having regard to the "circumstances of the case". In my view before the court should exercise its discretion to refuse to award interest and thus deprive a litigant of what is prima facie entitlement to under subs. (1), the reason for doing so must be compelling.

[para85] In *Aetna Insurance Co.*, supra at 185, the Court denied Aetna 7 years of pre-judgment interest and allowed them only five. They felt this adequately addressed the concern over delay attributable to Aetna. See also *Begro Construction Ltd. v. St. Mary River Irrigation District et al* (1994), 154 A.R. 1 (Q.B.) at 41 where Power, J. allowed prejudgment interest for two years on an action where prejudgment interest was claimed for twelve years. The additional ten years were specifically denied because of the delay, the Court stating that the action could have reasonably been brought to trial and resolved within a two-year period.

[para86] While there is evidence to suggest that there was some correspondence between counsel, I do not consider these to be steps in the action. I have not had any satisfactory explanation as to the delay in the prosecution of the action, although raised at trial, particularly by the defendant whose land was subject to an injunction. I find this matter took 5 1/2 years longer than necessary to get to trial. Accordingly, I am denying pre-judgment interest for the years 1990, 1991, 1992 and the first half of 1993. I will allow pre-judgment interest for the second half of 1993 but not for the years 1994 and 1995. The defendant shall have pre-judgment interest on all amounts from 1989 to the date of judgment excepting the years or portions thereof mentioned.

[para87] The issue of pre-judgment interest before 1989 may be spoken to after damages for that time, if any, have been determined.

[para88] The parties are invited to make submissions to the Court on the matters raised, as well as to costs, within 30 days of the filing of these reasons.

PAPERNY J.

* * * * APPENDIX "A"

DAMAGES:

1. SPECIAL DAMAGES: \$8,162.88 (Less) (- 450.00) \$7,712.88 Total Special Damages: 7,712.88

2. LOSS OF USE:

1979 \$ 4,500.00 1980 4,500.00 1981 3,750.00 (4,500 x 10/12) 1982 334.00 (2,000 x 2/12) 1983 2,000.00 1984 2,000.00 1985 2,000.00 1986 2,000.00 1987 2,000.00 1988 2,000.00 1989 1,750.00 (2,000 x 10.5/12) 1989 562.50 (4,500 x 1.5/12) 1990 4,500.00 1991 4,500.00 1992 4,500.00 1993 4,500.00 1994 4,500.00 1995 4,500.00 1996 4,500.00 1997 4,500.00 \$65,396.50

Total Loss of Use: 65,396.50

TOTAL : \$73,109.38

CBR# 350

Wright v. Condominium Plan No. 7711582 (Alta Q.B.)

IN THE MATTER OF the Condominium Property Act, being Chapter C-22, Revised Statutes of Alberta, 1980, and amendments thereto; AND IN THE MATTER OF the Owners: Condominium Plan No. 7711582

Between Ann Margaret Wright, Kathleen Inness Morrison and Katherine Wolsky, Plaintiffs, and The Owners: Condominium Plan No. 7711582 (a.k.a. Varsity Villa, hereafter referred to as "the Corporation"), Defendants, and John E. Bruce, John Doe, John Doe I, John Doe II, John Doe III and John Doe IV (hereafter referred to as the "Defendant Owners"), Defendants, and John E. Bruce, Heather Murray, Thelma Vian, John Doe V, John Doe VI and John Doe VII (hereafter referred to as the "Defendant Board Members"), Defendants [1994] A.J. No. 568

Action No. 9201-01871 Alberta Court of Queen's Bench Judicial District of Calgary Dixon J. Heard July 18, 1994. Judgment: Filed July 18, 1994.

K. Richmond and M.A. Cowtan, for the Plaintiffs. J.S. Saunders, for the Defendants.

[para1] DIXON J.-- When the President of the Board of Managers of a Condominium Corporation tells a unit owner having a registered title to an undivided 115 one ten thousandth share in the common property of the Corporation, that such owner can never gain the use of an indoor parking stall, there has to be something seriously wrong with the way the common property of the Condominium Corporation is controlled, managed and administered.

[para2] This action for declaratory judgment came before me during the week of June 13, 1994 with final argument heard on Monday, June 20. At the commencement of this trial I was informed that the proceedings were stayed as against the Defendant Owners and the Defendant Board Members as listed in the style of cause.

[para3] The plaintiffs are unit owners in the Varsity Villa Condominium located in northwest Calgary near the Market Mall. The plaintiff, Ann Wright, made her unit purchase in September, 1990, the plaintiff Kathleen Morrison made her unit purchase in July, 1990 and the plaintiff, Katherine Wolsky, made her unit purchase in October, 1988. In each instance the purchaser assumed the use of the outside car parking stall occupied by her vendor. Each plaintiff was aware that her vendor did not have the use of an indoor parking stall. Varsity Villa has 93 residential units contained within three buildings, 80 indoor parking stalls within the basements of such buildings and 26 covered, outdoor parking stalls located between the buildings and along the south boundary of the development. The result of this structural configuration is that every owner of a residential unit cannot physically have the use of an indoor parking stall.

[para4] The parking stalls at Varsity Villa, whether indoor or outdoor, are clearly common property, the definition of this term in the Condominium Property Act of Alberta (the 'Act') being:

"so much of the parcel as is not comprised in a unit shown in a condominium plan..."

The term "common property" is similarly defined in the relevant by-laws of the Corporation. The Corporation was chartered in December, 1977, its initial by-laws were replaced in September, 1979 by the "second by-laws" and these in turn were replaced in May, 1991 by the "current by-laws". All the by-laws of the Corporation have been registered with the Registrar of Land Titles in Calgary as required by the Act.

[para5] Each of the purchases by the plaintiffs were concluded through the efforts of realtors and lawyers and without prior communication with, or attendances on, the Board of Management of the Corporation, or any member thereof, or on its property manager, Benchmark Management Ltd. ("Benchmark"). The Act prescribes that a corporation shall have a board of managers which shall be constituted as provided by the by-laws and prescribes that the powers and duties of the corporation shall be exercised and performed by the board (Section 23). The board is also required to convene an annual meeting of owners once a year.

[para6] Section 26(1) of the Act reads:

"The by-laws shall regulate the corporation and provide for the control, management and administration of the units, the real and personal property of the corporation and the common property."

Subsection (5) states:

"The by-laws bind the corporation and the owners to the same extent as if the by-laws had been signed and sealed by the corporation and by each owner and contained covenants on the part of each owner with every other owner and with the corporation to observe and perform all the provisions of the by-laws."

[para7] Section 40 of the Act contemplates a transfer or lease of the common property of a corporation, or any part of it, but only on the authority of a unanimous resolution of the unit owners. Section 41 contemplates an exception to the 100% rule as regards the leasing of common property by providing:

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

[para8] Section 60 of the Act deals with applications to the Court with subsection (4) providing that the Court may direct the trial of an issue, as was done in this instance through the Orders of Mr. Justice Montgomery dated October 28, 1992, April 23, 1993 and February 22, 1994.

[para9] I wish to now recite the provisions of the by-laws that are relevant to this adjudication. While the initial by-laws have long been supplanted, it is pertinent to understand their content in regard to common property and parking, as follows:

"9. Duties of the Corporation

The Corporation shall:

(a) control, manage and administer the common property for the benefit of all the owners and for the benefit of the entire project;

10. Powers of the Corporation

The Corporation may:

(f) grant to an owner the right to exclusive use and enjoyment of common property, or special privileges in respect thereof; but, except for the provisions hereof relating to parking privileges attached to each unit, any such grant shall be determinable on reasonable notice unless the Corporation by unanimous resolution otherwise resolves, and

(g) do all things reasonably necessary for the enforcement of the by-laws and the control, management and administration of the common property and any part of the units with which it may be concerned.

16. Powers of the Board

The Board may:

(b) employ or authorize the Manager to employ for and on behalf of the Corporation such other agents and servants as it thinks fit in connection with the control, management and administration of the common property, and the exercise and performance of the powers and duties of the Corporation;

67. Parking areas

The parking stall or stalls and parking plug-in facilities appurtenant thereto (if any) assigned to any unit by the Board are for the sole use of the owner of such unit. Each unit shall be assigned at least one parking stall by the Board, the location of which shall be selected by the Board in its sole discretion and shall be subject to change from time to time by the Board. If any parking plug-in facility is provided with or in connection with any parking stall, any person given the right to exclusive use of such stall shall be responsible for keeping such facility in good repair and condition at all times during the period of such owner's entitlement to exclusive use; and the Corporation may at its option require such owner to pay all electrical charges for and in connection with such facility and may cause such facility to be connected to such owner's electrical meters."

[para10] The second by-laws governed the affairs of the Corporation from September 18, 1979 to May 6, 1991 and were the by-laws in force at the time each of the plaintiffs purchased their respective unit. The relevant portions of these by-laws are as follows:

6. (Powers of Corporation)

The Corporation may:

(d) grant a lease to an owner under section 25.1 of the Act; (now Section 41)

(h) grant to any owner the right to exclusive use and enjoyment of common property, or special privileges attached to each unit, any such grant shall be determinable on reasonable notice unless the Corporation, by unanimous resolution, otherwise resolves;

(i) do all things reasonably necessary for the enforcement of the by-laws and the control, management and administration of the common property and any part of the units with which it may be concerned;

40. (Restrictions in Use)

(24) Parking Areas: The parking stall or stalls assigned to each unit by the Board are for the sole use of the owner of such unit. Each unit shall be assigned at least one parking stall which shall be secured in the form of a parking lease between the owner and Board for a period of time fixed by the Board. 41. (Provisions Governing the Use of the Common Property)

(1) Use and Enjoyment: Subject to by-law forty hereof the owner shall have the right to the exclusive use and enjoyment of such portions of the common property as may be designated by the Corporation.

(2) Exclusive Use: The owner of a unit has no right to use any portion of the common property designated by the Corporation for the exclusive use of the owner of any other unit."

[para11] I make the finding that the current by-laws were validly enacted and that they have governed the affairs of the Corporation as and from May 6, 1991 to present date. The relevant provisions thereof are as follows:

"3. (Duties of the Owners)

An owner shall:

(e) use and enjoy the common property in accordance with these by-laws and all rules and regulations prescribed by the Corporation and in such a manner as to not unreasonably interfere with the use and enjoyment thereof by other owners, their families or visitors;

4. (Duties of the Corporation)

In addition to the duties of the Corporation set forth in the Act, the Corporation, through its Board shall:

(a) control, manage, maintain, repair and administer the common property (except as hereinbefore and hereinafter set forth) and all real property, chattels, personal property or other property owned by the Corporation for the benefit of all of the owners and for the benefit of the entire condominium project;

5. (Powers of the Corporation)

In addition to the powers of the Corporation set forth in the Act, the Corporation through its Board, may and is hereby authorized to:

(g) grant to an owner the right to exclusive use and enjoyment of part of the common property (including extra parking space) or special privileges in respect thereof, and, except for the provisions of these ByLaws relating to parking privileges attached to each unit, any such grant to be determinable on reasonable notice, unless the Corporation by special resolution otherwise resolves;

(h) make such rules and regulations as it may deem necessary or desirable from time to time in relation to the use, enjoyment and safety of the common property and do all things reasonably necessary for the enforcement of these by-laws and for the control, management and administration of the common property generally including the commencement of an action under Section 29 of the Act and all subsequent proceedings relating thereto;

58. (Exclusive Use Areas and Parking Areas)

(a) The Board shall assign or grant a licence of use of an area of the common property in the underground or at grade parking area for exclusive use by the owner of a unit for the sole purpose of parking one private passenger automobile thereon;

(c) The Board may, in addition to other restrictions set out in these by-laws, specify and limit the nature and extent of the use or uses of any such exclusive use area assigned or designated by it hereunder;

(d) While any such parking area or exclusive use area is not included in the condominium plan as part of a condominium unit, and shall not be deemed to be an area leased pursuant to Section 41 of the Act, any such parking or exclusive use area shall be maintained at the sole expense of the owner to whom it has been assigned PROVIDED THAT the Board shall be responsible for removing ice, slush and snow from the driveway, common walkways and outside parking areas, sweeping the underground parkade and structurally maintaining parking areas and balconies to a standard considered reasonable by the Board;

[para12] No rules or regulations have been passed by any Board in regard to the use, enjoyment and safety of the common property nor has any lease of common property been granted by any Board either under Section 41 of the Act or Section 25.1 of the predecessor statute. Since the organization and functioning of the Corporation in 1977 the Boards of Managers have informally adopted and used a licence of use document which remains unchanged in content over the years and which is partly in the following language:

"LICENCE OF USE

WHEREAS _____ (hereinafter called the "Unit Owner") is registered as owner of Unit Number _____ in Condominium Plan Number 7711582 and ___ undivided one ten thousandth shares in the Common Property therein, in the City of Calgary, in the Province of Alberta, (Reserving thereout all mines and minerals);

AND WHEREAS there is available for each Unit a patio or balcony as well as a parking stall, the actual boundaries of each being defined as the inside boundary of their enclosing fencing or their actual perimeters; Parking _____

AND WHEREAS the unit owner has requested the right to exclusive use and occupancy of such parking stall and balcony or patio and The Owners: Condominium Plan Number 7711582 (hereinafter called "the corporation") has agreed to grant a licence of use.

NOTE THEREFORE the unit owner of the Corporation do hereby covenant and agree as follows:

1. The Corporation hereby grants to 'the unit owner the exclusive licence and right to use and enjoy the said areas as a parking stall number ___ and balcony for the unit owner and occupants of and visitors to the said unit such licence and right to continue until the occurrence of the earlier of the following events:

(a) the transfer or sale of the said unit by the unit owner or anyone on behalf of or through the title of the unit owner.

(b) the termination of the licence by the Corporation as hereinafter provided, or

(c) the 35th anniversary of the date hereof.

The right to use hereunder shall be a licence only, and shall not operate as a lease, easement or other legal interest in land, but the unit owner's right to use hereunder shall be exclusive of other owners of unit within the Condominium of which the said unit is part.

2. The unit owner covenants and agrees to use the said licensed areas solely as a balcony and a parking stall in conjunction with use and occupancy of the said unit and shall in all respects regarding the use and occupancy of such balcony and parking stall observe and perform all the requirements of the bylaws of the Corporation in force from time to time.

3. Without limiting the generality of Paragraph 2 hereof, the unit owner covenants and agrees to keep and maintain and on expiry or termination of this licence to deliver up the whole of the said licenced areas in good and substantial repair and condition

6. In the event of any default of the unit owner's covenants hereunder continuing for more than 10 days after notice of the default by the Corporation to the unit owners the Corporation may at its option immediately retake possession of the said licenced areas whereupon this licence and all rights of the said owners to exclusive use hereunder shall cease and terminate.

8. The corporation may notwithstanding anything herein contained, at any time terminate the within licence upon 650 days notice to the owner.

9. This agreement is not intended to create any interest in land, and the unit owner shall not caveat or otherwise howsoever encumber any part of the common property in respect of this agreement or any rights hereunder.

[para13] The Licence of Use forms appear to bear the signature of two members of the Board of Management and in some cases appear to bear the seal of the Condominium Corporation.

[para14] In December of 1987 a general mailing was made by the Board of Managers to all unit owners enclosing a copy of the Licence of Use then considered by the Board to apply in regard to parking. The distribution was achieved under the following sample letter as signed by Mr. H.W. Cox, the then President of the Board of Managers (the "Tab 24" letter):

"VARSITY VILLA 4001 - 49 Street, N.W.

December 17, 1987

Dear Mrs. Sutherland:

Please find attached, your copy of the Licence of Use for your unit at Varsity Villa. This document may be redundant to the original licence agreement provided in your purchase of your unit. In the event that you already have a licence, you may choose to retain either or both for your records. Please be aware that should you decide to sell your unit, the new purchaser will need to obtain new documentation in their name from the Board of Managers.

It should be noted that all parking spaces are part of the common property of Varsity Villa, and your elected Board of Managers retain control of all common property.

The Board have no intent to reassign any parking stalls, but are empowered to rescind any parking licence for breach of bylaws. Please be aware that you are responsible for the maintenance of your parking stall and balcony.

If you have any questions regarding this document, please contact Dennis Anderson at 247-1014.

Yours truly,

H.W. Cox PRESIDENT BOARD OF MANAGERS"

[para15] I see no need to recite or comment on the testimony of any of the plaintiffs or of Mr. G.E. Wright, the husband of the plaintiff Ann Wright, or on their respective knowledge or conduct in regard to their purchases. This proceeding is brought as a matter of principle and as a challenge to the way the Board has administered the indoor parking stall component of the common property of the Corporation. No superior title is claimed by any plaintiff - they seek the formulation of a policy of indoor parking stall allocation that is inclusive as opposed to exclusive.

[para16] Four witnesses testified on behalf of the defendants - Mr. Gordon Meades, first President of the Board of Managers and a current Board member, Mr. Dennis Anderson, President of Benchmark Management Ltd., the Manager of the Corporation, Mrs. Bonnie Nahornick, a member of the Board of Managers and Mr. John Bruce the present President of the Board of Managers.

[para17] Mr. Meades purchased his unit in 1978, was assigned indoor parking stall 11 and paid \$1,000 over the regular price for his unit for this parking privilege. Mr. Meades confirmed the early policy of the Board in issuing Licences of Use to purchasers from unit vendors with a continuation of the same parking entitlement as enjoyed by the vendor (the "policy") and that there had been no change to this policy.

[para18] Mr. Anderson testified as to his function as President of the management company selected by the Board, of his attendance at Board meetings and to his receipt of, and compliance with, instructions from the Board and Board members from time to time. Mr. Anderson alluded to a meeting with the Corporation's solicitor in regard to the Board's parking policy, to his involvement in the obtainment of the required 75% support for the adoption of the current by-laws and confirmed the mailing of new Licence of Use forms to all owners in 1987. In cross-examination Mr. Anderson confirmed that he was not aware of the existence of any written resolution of the Board establishing its policy, that he first learned of the policy at an early board meeting and that there had been no change in the administration of the policy from 1986 to present date. Mr. Anderson was directly involved in the drafting of the Tab 24 letter adopted by the Board for dissemination of the 1987 Licences of Use and confirmed his understanding that a Licence of Use, by its terms, ceased on the sale of a unit. Mr. Anderson also confirmed that there have been sales of units since the date of the Wright purchase.

[para19] Mrs. Nahornick testified as to her purchase of a unit from her mother in 1985 and to her assumption of the use of outside parking stall number 7. Mrs. Nahornick applied to the Board for an indoor stall and was informed that her attainment of same was not possible. Mrs. Nahornick accepted this position and as a present Board member confirmed that there has been no change in the policy.

[para20] Mr. John Bruce has been the President of the Board of Managers since 1990 and is the owner of two units and has the use of two parking stalls. He confirmed that the Wrights attended a Board meeting in February, 1991 requesting an indoor parking stall and he informed them that their chances were "slim or never and most likely never". Mr. Bruce joined Mr. Anderson on the visit to the Corporation's solicitor for advice as to the policy. Mr. Bruce confirmed Mrs. Wright's attendance at the October, 1991 board meeting and to her reading out an appeal for change in the policy and Mr. Bruce testified as to the making of an offer on behalf of the Board to obtain a temporary licence of use from the owner of an indoor parking stall terminable on the sale of the unit or on the owner acquiring a vehicle. This offer was rejected by the Wrights. Toward the conclusion of his examination in-chief, Mr. Bruce suggested that the cost of servicing an outdoor parking stall was close to being equal to the cost of servicing an indoor parking stall.

[para21] In cross-examination, Mr. Bruce confirmed that a duty of the Board of Managers was to administer the common property for the benefit of all of the owners. Mr. Bruce confirmed that the policy is not written, is not in the by-laws or in any resolution, is not recorded in the Land Titles Office nor posted anywhere. Mr. Bruce maintains that the policy is fair and particularly so where most owners have paid extra purchase price monies to their vendor for the expectation of indoor parking and that the policy has been followed from the outset. Mr. Bruce contends that an owner has full control of his or her parking stall as long as he or she has a Licence of Use and that it was immaterial whether or not that owner makes actual use of the parking stall.

[para22] Mr. Bruce confirmed that the Board of Managers has not considered any change to its policy, that it has not considered creating any kind of a waiting list for indoor parking stalls nor considered any requirement that a waiting owner should be

accorded precedence over a renter. Mr. Bruce advised that sixteen or seventeen indoor parking stalls are presently rented out by owners and that there are eight owners who do not have cars and do not rent out their indoor parking stalls.

[para23] The Court received the evidence of eight original unit owners through the receipt of the Tab 4 document entitled "Admission of Evidence Respecting Original Unit Owners Listed in Schedule "A"". Their evidence is as follows:

"ADMISSION OF EVIDENCE RESPECTING ORIGINAL UNIT OWNERS LISTED IN SCHEDULE "A"

This is the evidence of the unit owners of Varsity Villa listed in Schedule "A" attached hereto, all of whom have indoor parking. This document is an agreed statement of their evidence, entered for the purpose of this trial only, and is to be treated in the same manner as if it were presented as sworn viva voce evidence by these witnesses who may otherwise have been called as witnesses on behalf of the Defendant Corporation.

1. We are all current owners and original purchasers of units at Varsity Villa, the Defendant Corporation in this action.
2. We all purchased our units at Varsity Villa in 1988 or 1978.
3. When considering whether or not to purchase our units at Varsity Villa, indoor parking was a prime consideration. In some cases it was represented to us (by representatives of the developer or successors of the developer from whom we bought our units) that the same unit could be purchased either with or without indoor parking, but when purchased with indoor parking there would be an extra charge added to the purchase price of the unit.
4. When considering the prices we were prepared to pay for our units, the availability of indoor parking was a significant factor that caused us to pay more money for our units.
5. Upon concluding our purchases, we were further assured of receiving indoor parking; in some cases we selected and were promised a particular indoor parking stall; in all cases we did receive an indoor parking stall assignment as promised, which indoor parking stall we have since that time used, lent to others at no charge, or rented out to others, subject only to the Corporation's requirements as to general cleanliness and tidiness of the parking areas.
6. In some case we were given by representatives of the developer Licences of Use for our parking stalls in substantially the same form as that used today by the Corporation for our designated parking stalls; in other cases we do not recall a whether such a Licence of Use was delivered to us at the time of purchase.
7. As far as we know, upon the sale of a unit the Board of Managers of the Corporation has always allowed the incoming purchaser (or his designates) to use the same parking stall as had been occupied by the previous owner of his unit, and we have always believed that when we eventually sold our units we could represent to prospective purchasers that they also would receive indoor parking.
8. We state that the Plaintiffs should have known or should have been able to discover very easily which parking stalls they would receive and if they chose not to obtain such information before purchasing then they acted unwisely and the rest of the owners should not be forced to suffer.
9. Units with indoor parking have a higher market value than those with outdoor parking.
10. We would be prejudiced if there were any change in the parking system at this stage and any such change would adversely affect the market value of our units."

[para24] The Court received the evidence of 44 subsequent unit owners through the receipt of the Tab 5 document entitled "Admission of Evidence Respecting Subsequent Unit Owners Listed in Schedule "A"". Their evidence is as follows:

"ADMISSION OF EVIDENCE RESPECTING SUBSEQUENT UNIT OWNERS LISTED IN SCHEDULE "A"

This is the evidence of the unit owners of Varsity Villa listed in Schedule "A" attached hereto, all of whom have indoor parking. This document is an agreed statement of their evidence entered for the purpose of this trial only and is to be treated in the same manner as if it were presented as sworn viva voce evidence by these witnesses who may otherwise have been called as witnesses on behalf of the Defendant Corporation.

1. We are all current owners of units at Varsity Villa, the Defendant Corporation in this action.
2. We were advised by various people at the time of purchase that we would receive indoor parking.
3. When we purchased our respective units, we were advised by various people that the previous owners had Licences of Use for indoor parking stalls. In many cases, the real estate listing sheets indicated that the units had indoor parking.
4. In some cases we were not aware that there were insufficient indoor parking stalls for all owners.
5. When considering whether or not to purchase at Varsity Villa and when considering which unit to purchase, indoor parking was a prime consideration. In some cases both units with indoor parking and those with outdoor parking were available at the time when we purchased our respective units.
6. When considering the prices we were prepared to pay for our units, indoor parking was a significant factor that caused us to pay more money for our units.
7. When we took possession of our units at Varsity Villa we were given by the Corporation use of the same stalls as occupied by the previous owners of the units and understood from various people that when we eventually sold our units we could represent to the subsequent purchasers that they would also receive indoor parking.
8. As far as we know, to the best of our knowledge the system by which the Board of Mangers has allocated parking stalls has always been the same.

9. We state that the Plaintiffs should have known or should have been able to discover very easily which parking stalls they would receive and if they chose not to obtain such information before purchasing then they acted unwisely and the rest of the owners should not be forced to suffer.

10. Units with indoor parking have a higher market value than those with outdoor parking.

11. We would be prejudiced if there were any change in the parking system at this stage and any such change would adversely affect the market value of our units."

[para25] The evidence in this trial has accordingly been given by four witnesses on behalf of the plaintiffs and 56 witnesses on behalf of the defendants.

[para26] May I say at this point in these Reasons for Judgment that I accept that every owner at Varsity Villa is a good person and a good neighbour with a genuine concern for, and allegiance to, the best interests of the Corporation. It is truly regrettable that a shortfall of indoor parking stalls was part of the construction picture at Varsity Villa from the very beginning, indoor parking being an obvious major consideration in our climate conditions.

[para27] I will assume that everyone involved will understand that the wishes or desires of a majority in number cannot be determinative of an issue when registered property interests are created under a statute and these interests are clothed with the protection of the Torrens System of land registration. It must also be said in regard to equally identified rights that "first in" cannot become "forever in" when the result is that someone of equal ownership interest is "forever out".

[para28] It is clear from a review of the by-laws, whether initial, second or current, that whatever the parking rights granted thereunder, they are not permanent and they are terminable. The Tab 17 form of Licence of Use was adopted by the Board of Managers of this Corporation from its early inception and has consistently been considered to be operative and governing in regard to parking rights ever since. Current By-Law 58(a) requires that "the Board shall assign or grant a licence of use of an area of the common property in the underground or at grade parking area...". By its own terms, the right of use and enjoyment, as given under the Licence of Use, is to continue until the occurrence of the earlier of three named events with the most salient being the transfer or sale of a unit. If a right is expressed to continue until a transfer or sale, the only proper interpretation is that it ceases on that transfer or sale. In fact and practice, a transfer or sale of a unit at Varsity Villa has not operated as an extinguishment of parking rights, as called for under the Licence of Use, but rather as a preservation of precisely the same rights followed by their automatic allocation to the vendor's successor.

[para29] The implementation of the policy is a matter of procedure. This procedure counters the very language adopted by the Board and has resulted in the absence of the exercise of discretion on the part of the Board in dealing with parking rights. It clearly leads to a situation of unfairness that operates directly against the rights and interests of a number of the members of the Corporation, which number includes these plaintiffs. It is not a justifying factor that most of the unit owners with indoor parking privileges have paid additional monies to a vendor for the expectation of the continuation of those privileges. The payment of monies by a number of people cannot turn a bad policy into a correct or a sustainable policy. As Mr. Bruce quite properly conceded "It is not a function or duty of a Board to manage the personal investments of unit owners."

[para30] The first agreed statement of issue, filed as Exhibit 2, is answered in the negative and the second agreed statement of issue is answered in the affirmative.

[para31] In keeping with the directive set out in the Order of Mr. Justice Montgomery of October 28th, 1992, wherein the prayer for relief in this proceeding was limited as therein expressed, I HEREBY DECLARE that all unit owners in Varsity Villa Corporation have equal rights to the use and enjoyment of the indoor parking stalls of the common property. HEREBY ORDER AND DIRECT the Board of Managers of Varsity Villa Corporation to give consideration, within 60 days of the date of this Judgment, to the allocation of the indoor : parking stalls on a new, fair and equitable basis to all unit owners. A notice of the proposed allocation is to be given to all unit owners within a further 15 days. Such consideration by the Board should include consultation with the plaintiffs and/or their counsel. Counsel for the Corporation is to report to the Court within 90 days of the date of this Judgment regarding agreement by the unit owners on the allocation of indoor parking stalls proposed by the Board of Managers and advising the Court whether or not a Court-imposed solution to the indoor parking issue will be sought.

[para32] Costs may be spoken to at any convenient time within the said 90 day period.

DIXON J.

CBR# 331

Touche Ross Limited, Liquidator of Northland Bank, Plaintiff, and The owners: condominium plan No. 852 2452, No. 1 - 111th street, Edmonton, Alberta, T5K 1J8, Defendant

[1991] A.J. No. 303

No. 8803 21027

Also reported at: 79 Alta. L.R. (2d) 206, 118 A.R. 210

Alberta Court of Queen's Bench Judicial District of Edmonton Dea J. March 28, 1991

L.W. Hendrickson, for the Plaintiff. D.F. Pawlowski, for the Defendant.

REASONS FOR JUDGMENT

DEA J.:-- Two issues are raised for consideration in this foreclosure action. The first is whether the documentation evidencing the loan and security is complete and, if not, whether the parol evidence adduced completes what is incomplete or is merely an attempt to vary a written contract. The second issue considers an aspect of the relationship which exists between a condominium corporation and the owners of a condominium unit.

A statement of facts (but not the admissibility thereof) was tendered by the parties as were loan agreements, correspondence and security documents. Additionally, I heard testimony from some witnesses. Counsel requested that all evidence tendered be heard by the court with argument as to the admissibility thereof reserved to the end of the trial.

The evidence discloses that nine persons wanted to build a condominium for their personal use in Edmonton. Each was to have a unit and a tenth unit was to be constructed for the caretaker. They spoke to the plaintiff bank and indicated the funds needed for land acquisition and construction. The loan would be short term, perhaps a year or two. Each owner would be able to discharge his pro rata share of the bank loan upon payment of a pro rata amount to be computed by the bank based on square footage in the individual units compared to the square footage in the building. The owners were to be liable for their own pro rata only and were not to be jointly responsible for the liability of their fellow owners. The status of the caretaker's suite was not well considered. Some owners spoke of it as being common property, while another spoke of it as being jointly owned. The mechanics of the liability for the caretaker's suite equally lacked resolution.

The owners were much concerned to avoid joint liability between owners but only considered the various units in that context. No one thought how the "mechanics" of that concept would apply to the caretaker's suite if one of the owners were to default. A commitment letter was given with respect to the loan to the nine persons.

But later, in the summer or early fall of 1984, the bank required that the loan be reorganized.

A new commitment letter and subsequent amendments thereto were created and agreed upon. The earlier deal was cancelled. The new arrangement required that a limited company be incorporated by the nine. The bank was to lend the money to that company (Artnam Developments Ltd.). Artnam would own the land and building and would grant to the bank a debenture to be secured against the property. It would, as well, grant other documents of security. Artnam was to prepare and register a condominium plan to create the nine units desired by the individuals plus a suite for a caretaker. The nine individuals guaranteed - again pro rata and without joint liability - the bank indebtedness.

When the construction was almost complete, Artnam being by now the registered owner of the property and having registered the condominium plan, transferred the caretaker's suite to the condominium corporation created under the Condominium Property Act. That condominium corporation is, of course, the defendant in this action.

In and about this time, eight of the owners made their own arrangements to pay out their pro rata share of the bank loan. Each took title to his respective unit freed of the bank's claim. Each received partial discharges of the bank's claims restricted to his respective unit. The documents of discharge made no reference to the caretaker's suite.

One of the owners did not pay. In argument, counsel spoke of the bank foreclosing that unit. Counsel spoke as well of the bank loan not being fully paid off by a combination of the pro rate payments plus whatever was recovered from the foreclosure. That balance unpaid on the bank loan - the deficiency - is the quantum of the bank's claim in this lawsuit.

The bank's position is that the caretaker's suite was part of the security for the loan and was not protected by or included in the pro rata arrangement which applied to the individual units. The defendant's argument is that the caretaker's suite should have been discharged from the bank's charge either in whole, as common property of the condominium corporation, or at least in part as part of the total pro rata of those owners who did pay. The defendant argues that for the documents to fail to deal with the issue of the caretaker's suite is to disclose that the written agreements are not complete and that the true agreement between the parties is that it is partially in writing and partially parol.

I regret to say that I am not able to agree with that analysis. While the evidence of the loan which was set up prior to the summer of 1984 supports the idea of the caretaker's unit somehow being included in the references to unit liability that concept is not carried forward into the changed loan to Artnam. From the commitment letter of 13 November, 1984, and through subsequent amendments, it is clear that the old deal was gone and that a new arrangement had been made. It is true that many aspects of the old loan were brought forward i.e. the pro rata idea, the several but not joint liability, etc. But these ideas were brought forward and expressly provided for in the written agreement made between the bank and the proposed new corporation. Those arrangements, amendments, additions, etc., were all committed to writing and agreed upon as between the bank, Artnam and the individuals.

The parol evidence of the owners to the effect that the bank agreed that upon payment of each owner's pro rata share that the caretaker's suite would be released in like measure was denied by the bank. That applied before the use of Artnam as borrower but not after. After it is the written agreement which governs. The parol evidence does not show a separate agreement or the completion of an incomplete agreement. Instead it directs itself to a variation of the written contract. For that reason, it is

inadmissible and cannot be admitted under the exception argued. In like manner, when the defendant asks that extrinsic evidence of the cancelled loan be admitted to show that the caretaker's suite was to be treated as common property of the condominium corporation, it again asks for parol evidence to be admitted for the purpose of varying a written contract. Again, the admissibility of that evidence for that purpose must be rejected.

In pursuing its remedies in this action against the caretaker's suite, the plaintiff is doing no more than executing the security it acquired when the loan was made. To admit the discussions requested is not to complete the real agreement as is argued but is as aforesaid to allow a written contract to be varied by parol evidence.

A point made by the plaintiff is that the officer of the bank most relied upon by the owners left the bank in June of 1985. In September of 1985, a curator was appointed for the bank and the bank went into liquidation in January of 1986. If ever, the bank argues, there was a call for persons with liabilities or potential liabilities to the bank to re-examine their arrangement this was it. Additionally, the defendant in his cross-examination of the owner-witnesses adduced evidence that suggests strongly that the owners did not pay adequate attention to the written commitment, amendments and agreements they signed.

A subsidiary argument advanced by the defendant was that the foreclosure of the non-paying owner's unit acted as a discharge of that person's liability vis-à-vis the other owners and vis-à-vis the caretaker's suite. Again, I must reject that argument. The documentation is too clear that the pro rata payments relate to the individual owners' units. Those payments did not purport to discharge or release other bank securities on assets of the borrower Artnam nor its successor in title, the defendant.

The second main argument of the defendant was directed to the status of the condominium corporation. The argument was that as the owners of the unit own the condominium corporation that the assets of the condominium corporation (such as the caretaker's suite) would in law be owned jointly by the owners. I am unable to find any authority for this proposition nor does it find a basis in any applicable principle of law. Indeed, the status of a condominium corporation is sufficient to allow it to acquire and to hold title to real property as it has done here. It is true that a condominium corporation is different in many respects from corporations authorized under the Business Corporations Act but the differences do not provide assistance to this defendant. An asset owned by a condominium corporation is owned by a separate legal entity. The owners qua owners have certain rights to direct the affairs of the corporation but there it ends. There is no right to claim specific assets of the condominium corporation as the property of any particular owner or any group of owners jointly or severally.

It follows then that the security pursuant to which the plaintiff brings this foreclosure action is valid and enforceable and in default. Having concluded that, the parties have asked that I refer this matter to the Master to be dealt with as an ordinary foreclosure action. The Master will determine the balance outstanding on the debenture, compute the amount of interest and provide to the parties the normal rights and remedies available to them and which are referred to in their pleadings and in the general law.

The defence to counterclaim filed by the defendant is dismissed. In accordance with the terms of the debenture, the plaintiff will be entitled to costs on a solicitor and client basis here and before the Master.

DEA J.

CBR# 028

Apex Construction Ltd. and JLP Masonry Inc., applicants (plaintiffs), and Zelma Idelle Cairns, Earnshaw Enterprises Ltd., Parkland Flooring Ltd., Ultra Products Distributing Ltd., Glenco Building Products Ltd., Supreme Kitchens & Millworks Ltd., David Paisley, Bruce's Landscaping Services Ltd., P.J. White Hardwoods Ltd., Place-Crete (Southern) Inc., Walter Edward Mackin, Westwood Distributors (1990) Ltd., 589546 Saskatchewan Ltd., and William Kupiec, respondents (defendants), and Lily Ann Irving, Margaret Ann Carson, Louise Ann Patrick, Alvin George Keys, John Gottfried Fehrenbach, Janette Marion Fehrenbach, Ronald James Simmonds, Nellie Agnes Simmonds, Richard James Barton, Margaret Gertrude Jean Barton, John Benjamin Mitchell, (defendants)

[1995] S.J. No. 732

Q.B.G. No. 18 of 1995 J.C.M. Saskatchewan Court of Queen's Bench Judicial Centre of Melville MacLeod J. December 6, 1995.

Counsel: J.M. Williams, for the applicants hereinafter noted. N. Halford, for respondent registered owners of Condominium Plan No. 91R21990.

[para1] MacLEOD J.:-- The difficulty herein stems from a proposed consent order presented in the context of two court files arising from the construction of a condominium project in Fort Qu'Appelle, Saskatchewan.

ACTION Q.B. 115/92

[para2] The affidavit of Zelma Idelle Cairns ("Cairns") shows the following: She purchased Unit Number 10 and a 1025 ten-thousandths share in the common property of Condominium Plan No. 91R21990 in August, 1991, for \$110,000.00. She held back 10% of the purchase price, or \$11,000.00, and applied under s. 57 of The Builders' Lien Act, S.S. 1984-85-86, c. B-7.1 (the "Act") to pay the \$11,000.00 into court and for an order for the removal of (a) four liens registered against both Unit No. 10 and her 1025 ten-thousandths share in the common property, and (b) ten liens registered against Unit No. 10 only.

[para3] No certificates of title were filed on the application. The order was granted on September 17, 1992, with the addition of paragraph 4, which reads as follows:

4. It is further ordered and adjudged that the liens as listed herein, upon payment in the sum of \$11,000.00 shall cease to attach to the lands as described herein and all liens as listed herein shall become a charge against the sum of \$11,000.00 paid into court to this order.

[para4] The \$11,000.00 was paid into court on September 21, 1992. The liens to be discharged were:

(a) Unit 10 and 1025 ten-thousandths of common property:

Number Lien Claimant 91R52162 Walter Edward Mackin 91R56099 Westwood Distributors (1990) Ltd. 91R56659 Glenco Building Products Ltd. 91R59581 P.J. White Hardwoods Ltd.

(b) Condominium Unit 10 only:

Number Lien Claimant 91R50478 Earnshaw Enterprises Ltd. 91R52544 Parkland Flooring Ltd. 91R53487 Ultra Products Distributing Ltd. 91R56532 JLP Masonry Inc. 91R56661 Glenco Building Products Ltd. 91R56965 Supreme Kitchens & Millwork Ltd. 91R58176 Bruce's Landscaping Services Ltd. 91R59583 P.J. White Hardwoods Ltd. 92R01453 Place-Crete (Southern) Inc. 92R04235 Apex Construction Ltd.

ACTION Q.B.G. 18/95

[para5] Apex Construction Ltd. and JLP Masonry Inc. commenced action against:

(a) The persons who were registered owners of seven condominium units, each of whom also were the owners of a respective undivided share of the common property.

(b) Zelma Idelle Cairns, added pursuant to ss. 57(5) and ss. 88(2) of the Act.

(c) Nine lien claimants.

(d) Walter Edward Mackin and Westwood Distributors (1990) Ltd. whose liens were vacated by the order of Mr. Justice Osborn "and thereby became a charge on the moneys paid into the court" by Zelma Idelle Cairns.

(e) 589546 Saskatchewan Ltd., pursuant to ss. 88(2)(a).

(f) William Kupiec, a trustee under s. 84, pursuant to ss. 88(2)(d).

[para6] The plaintiffs assert specific claims against 589546 Saskatchewan Ltd. and against each unit owner. The plaintiffs say that they have no knowledge of liens filed by the lien claimants. The claim relating to Cairns is shown in paragraphs 29 and 31 of the statement of claim as follows:

29. On September 15, 1992, pursuant to the Order of Mr. Justice H.A. Osborne[sic], the Defendant Zelma Idelle Cairns paid into the Court of Queen's Bench, Judicial Centre of Melville, the sum of \$11,000.00. By virtue of the said Order, the claims of lien of the Plaintiffs was vacated in so far as they applied to Unit No. 10 and they were instead made a charge on the monies paid into Court pursuant to the said Order. By the terms of the said Order, the liens of the Defendants Walter Edward Mackin, Westwood Distributors (1990) Ltd., Glenco Building Products Ltd., P.J. White Hardwoods Ltd., Earnshaw Enterprises Ltd., Parkland Flooring Ltd., Ultra Products Distributing Ltd., Supreme Kitchens & Millworks Ltd., Bruce's Landscaping Services Ltd., P.J. White Hardwoods Ltd. and Place-Crete (Southern) Inc., became a charge against the monies paid into Court pursuant to the said Order.

31. The Plaintiffs therefore claim with respect to the Defendant, Zelma Idelle Cairns:

(a) An Order pursuant to s. 96(1)(b) of The Builders' Lien Act directing the Registrar of the Melville Judicial Centre to pay to the Plaintiffs the monies paid into Court by the Defendant, Zelma Idelle Cairns, to the credit of the file styled Q.B. No. 115 of 1992, Judicial Centre of Melville, and all interest that has accrued thereon or alternatively payment of such pro rata share of the said monies as may be appropriate based on claims of lien proved in the within action;

(b) Costs of and incidental to this action.

[para7] On March 15, 1995, \$5,000.00 was paid into court by Mr. Niel Halford via his letter of March 13, 1995, in these words:

I enclose my trust cheque in the amount of \$5,000.00, which I am paying into court to the credit of this action pursuant to Rule 177 of the Rules of Court.

[para8] On August 9, 1995, by application pursuant to ss. 96(1)(b) of the Act, the plaintiffs sought payment out of the monies paid into court in 1992 by Cairns.

[para9] The supporting memorandum contained these representations:

Claim Against the Monies/Zelma Idelle Cairns

Under s. 57(5) of The Builder's Lien Act, when an order is made directing payment into Court of a holdback and vacating the liens, the lien claimants are entitled to proceed with an action under s. 86 to enforce their claims against the money in Court. The Plaintiffs did so by including in the Statement of Claim in Q.B. action No. 18 of 1995, a claim against these monies. The combination of sections 57(5) and 86 require a Statement of Claim to enforce a claim against the monies in Court. However, s. 88 (which outlines who will be parties to the action) does not address who should be named in lieu of the owner who paid the money into Court. (In other words, who the lien claimants name as the Defendant when issuing a claim with respect to monies in Court?) Out of an abundance of caution, Mrs. Cairns (the party paying the money into Court) was named as a Defendant. However, it is clear that she has no interest in the monies having given that up in exchange for the lien claimants' consent to her payment into Court of \$11,000.00. As the Certified Copy of Title discloses, she is no longer an owner in the condominium. The Notice of Motion and Affidavit of Search was served on Mrs. Cairns by leaving it at the address for service she provided when the monies were paid into Court (the Halford Law Office). Based on discussions with Mr. Halford, we do not anticipate that Mrs. Cairns would make an appearance in this matter.

[para10] Cairns was personally served with a copy of the notice of motion and affidavit on July 28, 1995.

[para11] The consent order contained the signatures of all claimants whose liens were removed by Mr. Justice Osborn's order and, in addition, David Paisley, 589546 Saskatchewan Limited, and its trustee, William Kupiec.

[para12] The order was granted, although in light of later study and Mr. Halford's presentation, it should not have been.

SUBSEQUENT EVENTS

[para13] The Melville deputy local registrar noted that in the 1995 action \$5,000.00 had been paid into court, and in the exercise of suitable caution, called Mr. Halford to confirm that \$11,000.00 was to be paid out of the 1992 moneys paid into court and not those paid into court in the 1995 action.

[para14] Mr. Halford wrote on August 10, 1995, as follows:

In the 1992 action I represented the applicant, Mrs. Cairns, who paid \$11,000 into court in return for an order vacating the builders' liens against her condominium unit.

In that action I acted for Mrs. Cairns only. The people who purchased the other condominium units were not parties to that action as it did not concern their condominium units.

In the 1995 action I represent Irving, Carson, Patrick, Keys, Fehrenbach, Fehrenbach, Simmonds, Simmonds, Barton, and Barton. These are people who purchased other units in the same condominium project.

I have paid money into court on their behalf in this new, 1995 action.

On 24 July 1995 Mr. Williams, solicitor for Apex Construction Ltd. and JLP Masonry Inc. served me with notice of this application. His letter to me states as follows:

"Please find enclosed for service upon you, a Notice of Motion and Affidavit of Search with respect to the above captioned matter. This is an application for distribution to the lien claimants of the money you paid into Court in 1992. We are serving you at this address since it was the address you gave for service when you paid the money into Court."

In this application in the 1995 action I was not served with notice on behalf of the people I represent in this action, Irving, Carson, Patrick, Keys, Fehrenbach, Fehrenbach, Simmonds, Simmonds, Barton and Barton.

I do not know why Mr. Williams made an application in the 1995 action for payment out of court of money from the 1992 action.

I do not know why Mr. Williams made an application in the 1995 action but served notice of that application on the parties to the 1992 action.

I have not seen the draft order that is mentioned in the notice of motion in the 1995 action, nor the applicant's memorandum for the judge in the 1995 action. To the best of my knowledge there has been no notice of the application in the 1995 action served directly on any of my clients who are parties to the 1995 action.

[para15] This was referred to the court and the clerk was directed not to issue the order. On August 18, 1995, a telephone conference was held with Mr. Williams, acting for the plaintiffs and the lawyer having carriage of the consent application, and Mr. Halford.

[para16] Before getting to the gist of the matter, it may be appropriate to deal with an ancillary problem.

[para17] Mr. Halford said, essentially, that he was served as the solicitor for Cairns in the 1992 action and was not served as solicitor for his clients, condominium owners, in the 1995 action. Since the application for the consent order was made in the 1995 action, he did not respond to it. In the end he says he is not sure what is going on.

[para18] Williams takes the view that it is not correct for Mr. Halford to say he has never been served on behalf of his other clients; the documents served on Halford's office were served there personally as the address for service of Cairns in the 1992 action, but that is also the address for service of Mr. Halford's clients in the 1995 action and that he cannot take off those hats and put on Cairns's hat.

[para19] This may be a succinct and reasonable argument but not much can now be made of it. It is obvious that documents received by Mr. Halford were treated as documents received on behalf of Cairns, and, because he no longer acted for her and she had no further interest in the matter, I presume he did nothing further, and did not notice that the matter also involved his other clients.

CONSENT ORDER

[para20] The consent order was not signed by any of the defendant registered condominium owners. Mr. Williams takes the view that Cairns was the only other party who would potentially have any interest in the payment out process. Halford says the \$11,000.00 that was paid in in 1992 can be paid out to anyone, and Cairns does not care.

[para21] The problem develops from and with respect to the remaining owners. It is unclear to me whether the monies to be distributed pursuant to the consent order relate to the common property or individual condominiums, or both.

[para22] Halford represents all, or almost all, the registered owners. His view is that his clients are liable to the lienholders; there is an issue as to how much they have to pay but no doubt that they must pay something. Their position is:

(a) That some of the registered liens are invalid; the clearest example given is that of Glenco Building Products Ltd. ("Glenco"), whose lien is said to be invalid by reason that Glenco put carpets into the building, was not paid, registered a lien and then took the carpets out. Mr. Halford's clients would not consent to any money being paid to Glenco, and believe they can defeat Glenco's claim entirely, although they have less optimism about the other claimants.

(b) They would like any money that is paid to go to persons with valid liens so that the liability of his clients is reduced.

(c) If the \$11,000.00 goes to lien claimants other than Glenco, the amount of the lien claims in the 1995 action will be reduced by the amount received by such lien claimants.

[para23] Mr. Williams says that the lien claims exceed the holdbacks and that even if Glenco's lien was reduced to zero, the other lien claims would still be more than the holdback. The lien claims are \$88,755.86 and the holdbacks are said to be approximately \$56,000.00. Glenco's claim is said to be \$17,210.00.

[para24] Mr. Williams argues that even if Glenco gets payment from the Cairns unit, the liens against other units can be contested. However, it does not appear possible to subdivide the action into suitable subcomponents. The Glenco claim was with respect to both the Cairns unit and her undivided interest in the common property. The amount paid in was the holdback, not the amount of the liens, and no separate allotment was made for costs, if any, as contemplated by ss. 57(2)(d).

[para25] To protect their ownership in the condominiums the registered owners will very likely be obliged to pay the amount of the holdback, but probably not more, to the lien claimants with valid liens.

[para26] While the discussion with counsel related to the Glenco claim, that was said only to be an example. Apparently there may be others to which objection may be taken.

[para27] In short, Halford argues that the liens are not all on the condominium property, and the liability of each condominium owner is contested.

[para28] The monies were paid into court by Cairns pursuant to s. 57. Section 57(5) is as follows:

57(5) Where an order is made under subsection (2), the lien claimant whose registered claim of lien has been vacated may proceed with an action to enforce his claim against the amount paid into court or security posted in accordance with the procedures set out in Part VIII or the court may make any order to facilitate the resolution of all claims, but no certificate of action shall be registered against the land.

[para29] This section is designed to have the moneys deposited in court replace the registered owner's interest in land and so far as that owner is concerned, the lien becomes a charge against the money, not the land, but ss. 57(5) does not require an admission of the lien entitlement, it merely changes the lien security.

[para30] In the case of a condominium, at least so far as condominium property is concerned (as distinct from individual condominium units) any payment may reduce or retire a lien and, if so, the claim against all other owners with respect to that claim is reduced or discharged.

[para31] I conclude that it is not possible on the facts before me to subdivide the issues and arrange for payment in the manner set out by the proposed consent order. The proposed consent order is so closely intermingled with the issues in the 1995 action that it is not appropriate to attempt to make what amounts to interim rulings of law in that action.

[para32] The consent order shall not issue unless or until further ordered by the court.

MacLEOD J.

CBR# 188

Metropolitan Toronto Condominium Corporation No. 539 (plaintiff), and Chapters Inc. (defendant)

Docket No. 99-CV-163178 Ontario Superior Court of Justice Gans J. Heard: July 27, 1999. Judgment: July 30, 1999.

Counsel: Martin Sclisizzi, for the moving party. Timothy Pinos and Michele A. Wright, for the responding party. [para1] GANS J. (endorsement):-- The plaintiff condominium corporation ("Corporation") has commenced an action in nuisance against Chapters Inc. It seeks, among other things, an interlocutory and permanent injunction directing Chapters to remove certain signage it has erected over the portico to the entrance of the ground floor of the condominium complex located at 110 Bloor Street West in Toronto.

[para2] By agreement of the parties, consideration of the merits of the Corporation's motion for an order compelling Chapters to remove the signage is to be heard after the determination of a preliminary question on whether or not the Corporation has status to bring the action.

[para3] At the commencement of argument, counsel agreed that the sole issue for consideration was whether or not the Corporation has status to maintain the action at this moment in time or whether it was required to give prior written notice of its intention to commence suit to the building's unit holders. Putting the matter otherwise, Chapters argues that the subject matter of the action is governed by section 14(2) of the Condominium Act, and notice to the unit holders was a necessary precondition to the commencement of suit. Section 14(2) provides as follows:

(2) Idem - The corporation after giving written notice to all owners and mortgagees may sue on its own behalf and on behalf of any owner with respect to the common elements and any units, even if the corporation was not a party to the contract in respect of which the action is brought, and the legal and court costs in an action brought in whole or in part on behalf of any owners in respect of their units shall be borne by those owners in the proportion in which their interests are affected.

[para4] Section 14 has formed the subject matter of several judicial pronouncements, none of which is, regrettably, directly on point. The section in issue, as all agree, is not free of doubt and is confusing in the extreme. Would that it were written otherwise.

[para5] The starting point of the analysis is found in section 27(a) of the Interpretation Act, which provides as follows:

27. In every Act, unless the contrary intention appears, words making any association or number of persons a corporation or body politic and corporate,

(a) vest in the corporation power to sue and be sued, to contract and be contracted with its corporate name, to have a common seal, to alter or change the seal at its pleasure, to have perpetual succession, to acquire and hold personal property or movables for the purpose for which the corporation is constituted, and to alienate the same at pleasure;

[para6] Chapters argues that in order to understand the relationship of section 27(a) of the Interpretation Act and section 14 of the current Condominium Act, one must have regard to section 9(18) of the predecessor legislation which provides in part as follows: "Any action with respect to the common elements may be brought by the corporation ..." From this, it is argued that the Legislature now intends to permit condominium corporations to sue in respect to matters given to the unit holders. The only exception to this requirement arises when an action is commenced in the Small Claims Court (section 14(3)). In support of its position, Chapters relies on the decision of Griffiths J., as he then was, in *York Condominium Corp. No. 420 v. Deerhaven Properties Ltd. et al.* (1982), 40 O.R. (2d) 106 (H.C.J.) at 109. It further argues that any action commenced without the appropriate notice is a nullity (see *York Condominium Corp. No. 46 v. Medhurst, Hogg & Associates Ltd.* (1982), 39 O.R. (2d) 389 at 391, *aff'd.* 41 O.R. (2d) 800n (Ont. C.A.).

[para7] As I understand the argument, Chapters suggests that subsection 14(1) first mandates a condominium corporation to provide notice to the unit holders in respect to a claim for damages to the common elements. Subsection 14(2) further mandates a corporation to provide notice in all other actions "with respect to the common elements" and not merely actions founded in contract to which the corporation is not a party. In this respect, it argues that the decision of Southey J. in *Beckett Elevator Limited. v. York Condominium Corp. No. 42* (1984), 45 O.R. (2d) 699 (H.C.J.) was wrongly decided, or at least, Mr. Justice Southey misconstrued the decision of Griffiths J. in *Deerhaven Properties*. Again, putting the matter differently, Chapters argues that unless an action involving the common elements comes within the jurisdiction of the Small Claims Court, all actions, whether in contract or otherwise, require prior notice to the unit holders.

[para8] Counsel for the Corporation argues, in a manner consistent with the decision in *Beckett Elevators*, that section 14(2) does not permit such a broad prohibition, but is limited to actions in contract and only where the condominium corporation is not, itself, a party to the contract. In all other manner of action, therefore, save for an action in damages as prescribed by section 14(1), a condominium corporation is at liberty to commence suit without regard to the precondition of written notice. This interpretation, counsel suggests, is consistent with the decision of Griffiths J. in *Deerhaven Properties* and section 27(a) of the Interpretation Act.

[para9] While I have some difficulty reconciling the cases and the wording of the sections, in the final analysis I agree with counsel for the Corporation. Section 14(2) is a limitation to the general powers provided by section 27 of the Interpretation Act and only in respect to a contract to which the condominium corporation is not, itself, a party. (Indeed, it can be said that this section merely extends a cause of action to situations where there is no privity of contract between the condominium corporation and the other party to the contract.) In my view, to hold otherwise would deny the existence and distinction between subsections 14(1) and (2) of the Act and would call into question the rationale for the amendment to section 9(18). If Chapters were right in its interpretation, the Legislature could more easily have amended the Act by grafting the notice precondition to the end of the first phrase of section 9(18). Such was not done and therefore the court is obliged to give some meaning to what, in fact, was expressed in the Act.

[para10] In the final analysis, the decision of Griffiths J. at 108 et. seq. is most instructive:

The central issue then is whether s. 14(2) should reasonably be construed as restricting the broad right to sue conferred on the plaintiff corporation by s. 26(a) of the Interpretation Act (now s. 27(a)), to a right to maintain an action for breach of contract only with respect to the common elements. To put it another way, in the light of the broad power to sue conferred on a condominium

by the predecessor s. 9(18) of the Condominium Act, is it reasonable to construe the present s. 14 as expressing a legislative intention to sharply limit those powers?

In my view, s. 14(2) as remedial consumer legislation should not be rigidly or narrowly construed to the extent it confers on the condominium a right to sue. On that Principle, I conclude it is reasonable to interpret the section as conferring on the corporation an unlimited right to sue with respect to common elements, and further extending that right by providing that an action in contract may be maintained by the corporation even though it was not a party to the contract.

As I view s. 14 generally it seems to me that the obvious intention of the Legislature was not to restrict the broad power to sue previously held under s. 9(18) but rather to extend those powers by providing under s. 14(1) a right to sue and recover damages and costs in respect to not only the common elements but with respect to the assets and individual units of the corporation as well. By s. 14(2) as I have found the Legislature intended to confer a right to sue on contracts to which the corporation was a party.

[para11] The plaintiff is therefore entitled to an order that it may proceed with the action as currently constituted.

GANS J.

CBR# 342

Wellington Condominium Corporation No. 70, applicant/respondent in counter-application (respondent in appeal), and Mildred Isabel Wallace, Laurence Cazaly, Kenneth Sheldon Blow, Gordon Alexander McDonald, James Gary Bell, Lucienne Bell, Michael James Doyle, Sandra Joan Doyle, Karen Marie McKellar, Francis Roger George McKellar, Fraser Alexander Hale, Beverley Anne Hale, Carolyn Barckert, Glen Barckert, Larry McKenzie Leith, Nancy Louise Leith, Has Robert Gottscheu, Margaret Ann Gottscheu, Mary Christine Krusky, Donna Milne, Christopher Batch, Craig Edward Wonnell, Shirley Elizabeth Wonnell, Gerald Terence Squire and Brigitte Helene Squire, respondents/applicants on counter-application (appellants in appeal)

Docket No. C28512 Ontario Court of Appeal Toronto, Ontario Finlayson, Austin JJ.A. and Sharpe J. (ad hoc) Heard: November 17, 1998. Judgment: November 26, 1998.

Counsel: Franklin T. Richmond, for the appellants. Steven W. Pettipiere, for the respondent.

The judgment of the Court was delivered by

[para1] FINLAYSON J.A.:-- Mildred Isabel Wallace and Laurence Cazaly appeal the decision of Speyer J. of the Ontario Court (General Division) wherein he issued a declaration that the Wellington Condominium Corporation No. 70 ("condominium corporation") has the legal authority to designate three parking spaces on the west side of the manor house in the Manor Park development as visitor parking, to be used exclusively by visitors to the condominium development.

[para2] Manor Park is a luxury condominium development that includes a large manor house surrounded by ten acres of land. The developer converted the manor house into three condominium apartments, units 13, 14 and 15. Unit 14 is owned by the appellants, who purchased it in October of 1994. Twelve other units consist of stand-alone housing units and surround the manor house. All units, including number 14, have two covered parking spaces. In addition, those occupying units 1 to 12 can park cars in their driveways. Units 13 to 15 do not have separate driveways but there is a drive that permits cars to pull up along the west side of the manor house, and there is room for three cars to park there. The aforesaid drive, including the three parking spaces, is part of the common elements available to all unit holders. The dispute in this case involves these three parking spaces.

[para3] The appellants state that when they purchased their unit they were told by the agent of the developer that they could use two of the three parking spaces for their own use in addition to the two spaces that came with unit 14. Their offer of purchase was amended to interleaf a note that they were not to be charged for this privilege. It is important to note that the appellants have never asserted that they were promised the exclusive right to park in these two spaces, merely that they, in company with all unit holders, could use the spaces from time to time if they were available.

[para4] Apparently, the appellants have used the two spaces for overnight parking and, at one time at least, had four cars parked, two in their assigned parking area and two in the common element. This caused some tension with the other unit holders, who felt that the spaces were reserved for visitor parking and should be available to their guests, delivery persons and maintenance workers.

[para5] There is some dispute between the parties as to when, if ever, these three parking spots were properly designated as "visitor parking". In November of 1995 one sign was erected showing this designation and two further signs were posted in March of 1996.

Analysis

[para6] The appellants have portrayed this dispute as being a matter between them and the rest of the unit holders. They claim that equities favour their position over the unit holders situate outside the manor house. They submit that those unit holders can park four vehicles by utilizing their driveways whereas the appellants are restricted to their two covered parking spaces. However, the fact that units 1 to 12 have separate driveways and those who purchased the units in the manor house do not, is no argument for permitting the owners of units 13 to 15 to encroach on the common elements for additional parking. As to the claim of unequal treatment, it is important to remember that the applicant in these proceedings and the respondent in this appeal is the condominium corporation, acting on the instruction of its Board of Directors with respect to a problem relating to the designation of part of the common area as visitor parking. It seeks a declaration binding all unit holders, not just the appellants. The application was intended to resolve a problem that has been discussed and voted on in at least one general meeting of the unit owners.

[para7] The declaration of the condominium corporation defines visitor parking as follows:

Each space in the common elements to be used as visitors' parking shall be used only by visitors and guests of the unit owners for the purpose of parking thereon one vehicle and shall be individually so designated by means of clearly visible signs, and such spaces shall not be assigned, leased or sold to any unit owner or otherwise.

[para8] The rules of the condominium corporation provide that:

Residents shall not be permitted to park their vehicles in visitor parking under any circumstances.

[para9] The appellants acknowledge that the declaration and rule had been passed prior to their purchase of their condominium unit, but rely upon the fact that "clearly visible signs" had not been erected designating the three parking spaces as visitor parking. Accordingly, the three parking spaces remained part of the common elements and the appellants were entitled to use them in common with all unit holders for temporary parking. Despite the suggestion that they were in fact parking two cars outside the front door on a semi-permanent basis, their counsel stressed in this court that they wanted access to the common area for temporary parking as a matter of convenience only because their unit's two covered parking spaces were not as accessible.

[para10] However, whatever the motivation of the appellants, and despite any assurances by the developer's agent as to the status of this portion of the common area at the time of purchase, in my opinion there is nothing to prevent the condominium corporation from later designating the subject property as reserved for visitor parking at any time. If it has not been done now it can be done with particularity in the future.

[para11] The appellants argue that, apart from their reliance upon the assurance of the developer's agent that they could park on the common elements, they also rely on s. 29 of the Condominium Act, R.S.O. 1990, c. C-26. They claim that the condominium corporation cannot designate the parking spaces as visitor parking without demonstrating that the designation is reasonable within the meaning of that section. Section 29(1) provides that the Board of Directors may make rules respecting the use of common elements "to promote the safety, security or welfare of the owners and of the property or for the purpose of preventing unreasonable interference with the use and enjoyment of the common elements." Section 29(2) provides that the "rules shall be reasonable and consistent with this Act, the declaration and the by-laws". I do not think there is anything unreasonable about the visitor parking rule, or in its application to the three spaces in question in this case. Indeed, I agree with Speyer J.'s finding that it would be unreasonable to allow the appellants to occupy two of three visitor parking spaces in a 15-unit development. In addition, it is clear that the visitor parking rule complies with the Condominium Act, as well as the condominium corporation's declaration and by-laws. The appellant's suggestion that a rule such as this cannot be implemented without demonstrating that the implementation is reasonable may have some legitimacy in theory, but it has no application to the facts of this case.

[para12] Finally, I reject the appellants' further argument that the condominium corporation is estopped from now designating the spaces in question as visitor parking because of the aforesaid representations. I can find no case here for equitable estoppel. The representation that the common area in question had not been designated as visitor parking when the appellant bought the unit was true. There was no undertaking that they would never be so designated.

[para13] Accordingly, the appeal is dismissed with costs.

FINLAYSON J.A. AUSTIN J.A. -- I agree. SHARPE J. (ad hoc) -- I agree.

CBR# 037

Bank of America Canada, plaintiff, and The Mutual Trust Company, Mutual Trustco Inc., Mutual Life of Canada, Raymond Dore, Ian Sutherland, Robert A. Stuebing and S. Scott Cameron, defendants And between The Mutual Trust Company, plaintiff by counterclaim, and Bank of America Canada, Melton Bank of Canada and Societe General (Canada), defendants by counterclaim

Court File No. 92-CQ-21513 and Commercial List No. B307/93 Ontario Court of Justice (General Division) Commercial List Farley J. Heard: May 14 - June 17, 1997. Judgment: April 14, 1998.

Counsel: F.J.C. Newbould, Q.C. and Aaron Blumenfeld, for the plaintiff/defendant by counterclaim. P. David McCutcheon and Carlton D. Mathias, for the defendants/plaintiffs by counterclaim.

FARLEY J.:--

Definitions:

Bank of America Canada - "BAC"

Canada Trust Company - "Canada Trust"

Confederation Trust Company - "Confederation"

Fengar Investment Corporation - "Fengar"

Grilli Property Group Inc. - "Grilli"

Kingwell Securities Limited - "Kingwell", affiliate of Mutual Trust Company

Mellon Bank Canada - "Mellon"

Mutual Life of Canada - "Mutual Life"

The Mutual Trust Company - "MT"

Mutual Trustco Inc. - "Trustco"

Mutual Life, Trustco, MT and Kingwell as to two or more collectively - "Mutual Group"

Price Waterhouse Limited - "PWL"

Reemark Sterling I, a condominium project - "Project"

Reemark Sterling Club Limited Partnership - "Sterling LP"

Reemark Sterling Club Limited Partnership No. 2 - "Sterling LP2" Reemark Sterling I Limited - "Reemark"

Reemark (Toronto) Developments Limited - "Reemark Nominee"

Reemark group of corporations operating across Canada - "Reemark Group"

The Reemark condominium adjacent to the Project which was marketed to owner-occupiers (as opposed to the "absentee" investors who purchased units in the Project as tax shelters which were to be rented out to third parties) - "Sterling Two"

Regional Group of Companies Inc. - "Regional"

Royal Trust Corporation of Canada - "Royal Trust"

Societe General (Canada) - "SocGen"

Vanguard Trust Company - "Vanguard" (also by name change Prenor Trust Company - "Prenor")

BAC, Mellon and SocGen collectively - "Banks" or "BAC" (the latter when BAC was taking the lead on behalf of the Banks)

Au Bak Ling - "Au"

Baker, Pat - "Baker", principal of Baker Real Estate Corp.

Benay, George - "Benay", Accounts Manager of SocGen

Cameron S. Scott - "Cameron", Vice President of MT

Dore, Raymond - "Dore", President of MT

Doyle, William A. - "Doyle", inhouse solicitor for Reemark

Fenton, Shelly - "Fenton", President of Reemark

Gordon, Traub & Rotenberg - "Gordon Traub"

Graham, Ronald J. - "Graham", principal of Canadian Real Estate International Inc.

Lyons, Barry - "Lyons", a real estate consultant

McCullough, William - "McCullough", partner of McCarthy, Tetrault ("McCarthys")

McIntosh, David - "McIntosh", Executive Vice President of Mutual Life

Morassutti, Larry - "Morassutti", principal of The Morassutti Group

Morin, Daniel J. L. - "Morin", Vice President of BAC

Page, A. John - "Page", partner of PWL

Perry, R. Brent - "Perry", Vice President of Mellon Bank

Pearlstein, Steven - "Pearlstein", partner at Gordon Traub

Shapero, Arthur - "Shapero", partner at Macaulay, Chusid & Friedman ("Macaulay firm")

Sherkin, Kevin - "Sherkin", partner at Levine, Sherkin, Boussidan, Linden

Solmon, Melvyn - "Solmon", partner at Solmon, Rothbart, Goodman

Somers, Arnold - "Somers"

Stroud, Kenneth - "Stroud", principal of Kenneth Stroud & Company Ltd. ("Stroudco")

Steubing, Robert A. - "Steubing", Senior Vice President of MT

Sutherland, Ian - "Sutherland", Executive Vice President and Chief Operating Officer of MT

Yhap, Mark - "Yhap", executive of MT

Clark, Chris - "Clark", officer of Coopers & Lybrand Limited ("Coopers")

Cumming, R. - "Cumming", officer of KPMG Inc. ("KPMG")

Firestone, Paul - "Firestone"

Jones, Murray - "Jones", President of Jones McKittrick, Appraisers

Ladouceur, Glen J. - "Ladouceur", tax expert at KPMG Popofsky, Larry - "Popofsky", Chief Executive Officer of Greenwin Properties

Budevitch, Michael - "Budevitch", principal of Cityscape Real Estate Inc.

Takeout Mortgage Commitment Agreement between MT and Reemark dated November 12, 1987 - "TOC"

Assignment of Takeout Financing Commitment among MT, Reemark and BAC dated December 16, 1998 - "TOC Assignment"

Amended Takeout Mortgage Commitment Agreement among MT, Reemark and BAC dated December 1991 - "ATOC"

Subsequent Advance Security (pursuant to the ATOC, this was (a) an assumption agreement from direct investors as to the first and second mortgages and (b) in the case of a limited partner investor, a promissory note and a first and second assignment of the limited partnership interest of the limited partner) - "SAS"

Support Agreement among Reemark, Fengar, Grilli and Trustco dated November 25, 1987 - "Support Agreement"

Loan Agreement for \$33 million construction loan relating to Condominium Project ("Project") of 300 units entered among BAC, Reemark Nominee, Reemark and Reemark Group Inc. - "Construction Loan Agreement"

Investors in the Project, whether by way of participation as limited partners (in Sterling LP or Sterling LP2) or as individual purchasers - "investors"

Investor agreements of purchase and sale in the Project with Reemark - "Investor APSs"

Reemark as part of the Project arrangements - "Investor Notes"

Office of the Superintendent of Financial Institutions - "OSFI", Federal regulator of financial institutions (including MT)

Office of Ministry of Financial Institutions - "OMFI", Provincial regulator of financial institutions (including MT)

Frank Newbould - "Mr. Newbould", partner at Borden & Elliot, counsel for the plaintiff

David McCutcheon - "Mr. McCutcheon", partner at Fraser & Beatty, counsel for the defendants

Opening Arrangements and Expert Witnesses

[para1] At the opening of trial, the parties agreed that the plaintiff BAC withdraw its claims against all the defendants except MT and the counterclaim be also withdrawn, all without costs. In addition the defence took two issues off the table:

1. Did BAC hold a legally valid assignment of the take-out financing of MT?
2. Did BAC negligently make the misrepresentations to MT alleged in paragraph 18 of the statement of defence of MT, and would such action affect the claim of BAC?

It was further agreed that the remaining parties could use all transcripts for the purposes of the trial. I am releasing separately my ruling as to the number of expert witnesses (in total) permitted without leave of the Court; a copy is made an appendix to these reasons (Appendix A). I also note that well intentioned though it was, it was inappropriate for Mr. Newbould (and copied by Mr. McCutcheon) to advance an expert on Ontario law (such expert evidence is inadmissible); it is only foreign law which needs to be proved.

Facts and Background

[para2] In its simplest form, the case would seem to boil down to the following which I have found to be the facts. (Under the other headings I have also made various findings in my recitations of or conclusions as to the facts.) BAC lent \$33 million as to a construction loan pursuant to the Construction Loan Agreement to Reemark to facilitate the building of a condominium Project (legal title to which was held by Reemark Nominee as bare trustee) which was syndicated out to investors (i) in limited partnerships, the Sterling LP and the Sterling LP2 and (ii) otherwise. By the TOC Assignment BAC took an assignment of the TOC entered into by MT for \$36.5 million to be drawn down upon completion of the project. Mellon and SocGen then participated as to a third each with BAC. The condominium was registered on December 31, 1990 but MT never advanced funds pursuant to the TOC or the ATOC. In the period up to the end of 1991, MT's solicitors for this financing were the Gordon Traub firm which was named to act as the hold back funds trustee in the ATOC. However in late January 1992, MT changed solicitors to the Macaulay firm (and specifically to Shapero as the direct contact lawyer). Shapero submitted over fifty requisitions in his initial letter and reiterated them leading up to a proposed March 1, 1992 closing. A number of the requisitions were persisted in notwithstanding the acknowledgment by Cameron who was in charge of closing the transaction that they were not appropriate requisitions but (according to him) had been put forth as negotiation tools and positions. An example of this would be the \$5 million hold back under the ATOC not being recognized as replacing the similar trust fund obligation under the Support Agreement; Shapero on behalf of MT and on the instructions of Cameron continued to insist that both the \$5 million hold back and the \$5.6 million trust fund obligation had to be honoured. There was no financing or funding of the TOC or the ATOC by MT. BAC put in PWL as a receiver (and manager) of the Project and Reemark's interest therein which would encompass Investor APSs and Investor Notes regarding their commitments to purchase units in the Project through their participation in the limited partnerships (Sterling LP and Sterling LP2) or otherwise. The building was sold for \$22.5 million which left a significant shortfall of "excess" principal and accrued interest. The two major issues were (i) whether MT had the right to treat the ATOC as terminated without exposure to any liability and (ii) did BAC fail to act reasonably in mitigating its damages. In my view the answer to (i) is that MT did not have that right as it was in breach of its obligation to fund and to (ii) is that only a minor adjustment should be made for failure to mitigate (caused by allowing the vacancy rate to exceed 10% of the 300 units in the Project).

[para3] The Project had been sold by Reemark on a tax write off basis to investors in 1987-88 who were not owner occupiers. Reemark had sold a similar property (Sterling Two) adjacent to the Project financed by Confederation to owner occupiers on a non-tax driven basis.

[para4] In 1986 Mutual Life owned 75% of Trustco which in turn owned 100% of MT. As MT was experiencing asset growth, especially as to mortgage loans, it needed to increase its capital base. Dore, Steubing, Sutherland and Cameron through a holding company owned the balance of Trustco. However they were not able to participate in capital calls required to finance MT so that their position was diluted to 20%. In 1993, they sold out to Mutual Life which became the sole owner of Trustco (and directly MT). No evidence was led as to the terms in which they sold and whether or not there were any continuing warranties as to the financial condition and litigation; I draw no inference on this sale aspect. Before selling out, these individuals had a significant tangible indirect personal stake in the fortunes of MT. MT was regulated both federally and provincially pursuant to the financial institutions legislation; Trustco was not so regulated and thus did not directly have the same restrictions on it. For example, Trustco was able to take second mortgages whereas, subject to some non-applicable exceptions, MT was restricted to lending on the security of first mortgages on a 75% loan to value basis. Thus, before regulator crackdown, Trustco could loan on the security of a second mortgage for any excess to borrowers as to which MT was restricted to lending on a 75% value on a first mortgage. In addition MT could have loans out to any "connected" group of only 1% of its total assets.

[para5] The Project was conceived in the boom time of the latter 1980s. Reemark and MT entered into the TOC at the time when it seemed that financial institutions were having difficulty putting out loans fast enough. Unfortunately for many in the real estate market, this market softened especially with the recession and the uncertainties of the early 1990s. Prices dropped sharply.

[para6] Reemark approached MT in 1987 with various ideas including that Kingwell, an affiliate of MT, sell participation in the Project through limited partnerships. While it was originally contemplated that 200 units be sold by Kingwell, only 70 were. Additional units were sold through another broker (Ross Lloyd Martin). The basic deal was that the investors purchased a unit by paying a small deposit (\$1,000), giving promissory notes to Reemark for 28% (less \$1,000) of the price and agreeing to give a mortgage to MT on cft.). Thus the initial cash investment was minimal. MTq. entered into the TOC to provide this mortgage financing and closing; and there was no commitment by Trustco. However internally between MT and Trustco it was understood that MT would take a first mortgage for 75% of the value and Trustco would take the excess as a second mortgage (at the time of entering the Investor APSs the values then prevailing would have required there to be a reasonably small second mortgage). Investors were given a 3 year cash flow and rental guarantees by Reemark which were in turn guaranteed by Trustco. To obtain the Trustco guarantee Reemark had to give Trustco and MT certain covenants, namely (i) the Support Agreement whereby when the deals finally fully closed Reemark was to put the equivalent of \$20 per sq. ft into a trust fund (approximately \$5.6 million) to cover any claims against Trustco on the guarantees; and (ii) the covenants of Grilli, a Reemark partner in the deal, and of Fengar. There was in effect a contemplated two element step of closing -- the first (tax closing) when the investor executed the Investor APS and related documentation including a power of attorney granting Reemark the authority to complete the transaction (including the individual unit mortgage arrangements) and the second (transfer closing) when the investor went on the public register as the registered owner of the unit. The first element of closing would allow the investor to claim the benefit of losses (even prior to becoming the registered owner) for tax purposes. It would appear that investors would have treated themselves as tax owners from the first.

[para7] Reemark entered the TOC with MT on December 12, 1987 as to MT funding the closing mortgage commitments of approximately \$36.5 million. MT understood that this TOC would be utilized by Reemark to obtain construction loan financing on December 1, 1988. Reemark obtained a \$33 million construction loan from BAC pursuant to the Construction Loan Agreement. Two weeks later on December 16, 1988 Reemark, MT and BAC entered into the TOC Assignment being an assignment of the takeout financing under which MT agreed to direct the proceeds of the takeout financing made available pursuant to the TOC (as interim amended) to BAC. BAC also obtained at that time as assignment of some of the Investor Notes given Reemark.

[para8] As to the question of requisitions as to title, there would not appear to be any operative basis as to which MT could rely. The TOC merely provided that there be evidence satisfactory to MT's solicitor of each investor's legal or beneficial ownership of the individual unit; however even this condition was removed when the ATOC was executed.

[para9] With the General Agreement for individual investors and the Limited Partnership Agreements for limited partner investors being entered into (together with attendant documentation including a separate power of attorney in favour of Reemark) it was apparent that the intent of the investors and Reemark was that the transfer closing could take place without any further intervention by the investors. While various verbs may have been used in s. 7.01 of the General Agreement, it is clear that with the definition found in s. 12.01 of "Agreement", "Mortgage", "Permitted Encumbrances" and "Transfer Date" inter alia and the actions contemplated by s. 7.01(a), (b), (c) and (e) that it would not only be inappropriate but wrong to restrict s. 7.01(d) to "execute" in the sense of "sign" and not in the sense of making these unit transfers and unit mortgages available for use. To give the more restrictive meaning would be to strip the power of attorney of any real force and effect thereby rendering it redundant; it would also make a mockery out of s. 7.01(c):

cause the execution, delivery and registration of any documentation and the doing of any acts required pursuant to the Agreement ...

Under the Limited Partnership Offering Memorandum, the power of attorney was given a very expansive definition:

"Power of Attorney" means a power of attorney in the form set out in or accompanying the Subscription Form to be given by each subscriber authorizing the General Partner to execute the Limited Partnership Agreement, the Cash Flow Guarantee Agreement, the Rate Buy -- Down Agreement, Repurchase Commitment and notes evidencing the Primary Secured Loans on behalf of the Subscriber.

"Primary Secured Loan" means the loan to an investor on the security of his pledge of his unit and a charge against a Designated Suite following the Condominium Declaration Date and "Primary Secured Loans" means all such loans collectively.

The Limited Partner Investor Power of Attorney granted Reemark as General Partner the authority to execute, deliver and record inter alia. I am of the same view as to s. 7.01 of the Limited Partnership Purchase Agreement as I was as to s. 7.01 of the individual investor General Agreement.

[para10] See below as to my views as to parties being required to complete their agreements in good faith once they have entered into contractual arrangements: this would govern the relations between Reemark and the investors.

[para11] Thus it would appear to me that the transfer closing would be a purely administrative affair, not directly involving the investors, but rather allowing Reemark to act on their behalf pursuant to the powers of attorney. I note that the ATOC was careful to establish the circumstances under which the construction loan mortgage and the blanket mortgage would be discharged whenever there was a transfer closing completed on behalf of the investor. I note, but only in passing, that it was not advanced in evidence that any investor, anxious though that investor may have been to avoid a transfer closing, raised a lack of capacity of Reemark to utilize the power of attorney or the failure to transfer close within 15 days of notification of condominium registration. As to the latter aspect, it would not appear to me that anyone forced the issue as to closing within that time period; thus the result would be that the transfer closing could take place at a later time.

[para12] MT's position in this litigation was that the covenants and the side deal of the Support Agreement and the covenants of Grilli and Fengar were in essence breached and that as Reemark was not living up to its commitments then Reemark (and those claiming through it, here BAC pursuant to the assignment of the TOC) was estopped from claiming the benefit of the takeout financing commitment. However BAC's position is that it is not so bound or affected, further that the TOC was not conditioned in any way on any side deal and lastly that BAC was a lender for value without notice of any side deal when it took the assignment of the takeout financing. The same consideration prevailed as to the ATOC as well. I agree with BAC's contentions. In my view while the Mutual Group may have been able to rely on breaches of the Support Agreement to fend off any Reemark claim, the Mutual Group apparently overlooked incorporating the Support Agreement (of which BAC was unaware at the time of the Construction Loan Agreement and the TOC Assignment) into the terms of the TOC Assignment. This was a problem for the Mutual Group that it never overcame notwithstanding all the delays which must be characterized as stalling and the

CBR# 227

Pierre Pagé, applicant, and Jan Lafleche, Nadine Levin, Mike Mooers and Carleton Condominium Corporation No. 20, respondents

Court File No. 103836/96 Ontario Court of Justice (General Division) Ottawa, Ontario McKinnon J. January 6, 1997.

Counsel: James Davidson, for the applicant. William G. McCarthy, for the respondents.

[para1] McKINNON J.:-- At issue in this application is whether the decision of West, D.C.J., (as he then was) in *Reiners v. Mercer*, (1988) 66 O.R. (2d), 641, should continue to be the law of Ontario. In my opinion it should.

[para2] The facts in this case are essentially the same as those before West, J. Pursuant to the Condominium Act, at least 15% of the owners requisitioned the board to call a meeting of owners. The meeting was held on October 16, 1996. A motion was presented for the removal of three of the five directors from the condominium board. The Chair of the meetings was one of the respondents. The Chair advised the meeting that in order for the motion to carry, 115 "yes" votes would be required, being a majority of unit owners. The solicitor for the applicant was present and brought the decision of *Reiners v. Mercer* to the attention of the Chair. The effect of this decision would only require a majority vote of those who owned a majority of the units. The Chair chose to ignore the decision. A vote was held. 85 owners voted in favour of the motion and 74 owners voted against the motion. The Chair declared the motion defeated. Thus, the present application.

[para3] Section 15(8) of the Condominium Act provides as follows:

Any director may be removed before the expiration of his or her term by a vote of owners who together own a majority of the units and the owners may elect, in accordance with the by-laws dealing with the election of directors, any person qualified to be a member of the board for the remainder of the term of the director removed.

[para4] Mr. McCarthy argues on behalf of the respondents that section 15(8) should be interpreted as requiring that those voting in favour of removal must constitute a majority of the owners. Mr. Davidson argues that as long as the owners voting at the meeting represent a majority of owners, actions taken at the meeting should be determined by a simple majority of votes cast. The same arguments were advanced in *Reiners v. Mercer*, at which time West, J. determined that:

The requirement of majority representation contained in section 15(8) relates to the constitution of the meeting in question. Once the meeting is validly constituted actions taken thereat are to be determined by a majority of votes cast.

[para5] West, J. supported his decision by referring to the definition of "vote" in the *Shorter Oxford English Dictionary* and *Black's Law Dictionary*. He accepted the common dictionary definition of "vote" to mean 'a resolution or decision passed by, or carried in, an assembly as a result of voting'. In other words, a "vote" refers to the action taken and implies that an informed choice is made upon a specific proposal.

[para6] The respondents argue that "vote" for the purposes of section 15(8) means a vote in favour of the proposal, and not a choice as to the proposal presented. I disagree.

[para7] Other relevant sections of the Condominium Act which may be cited for guidance are the following:

S. 1(1) ... "special by-law" means a by-law that is not effective until it is,

(a) passed by the board, and (b) confirmed, with or without variation, by owners who own not less than two-thirds of the units at a meeting duly called for that purpose;

S.17(5) ... a director, if he or she was acting honestly and in good faith, is not accountable to the corporation or to the owners for any profit or gain realized from any such contract or transaction by reason only of holding the office of director, and the contract or transaction is not by reason only of the director's interest therein voidable,

(a) if the contract or transaction is confirmed or approved by at least two-thirds of the votes cast at a meeting of the owners duly called for that purpose;

S. 18(3) Unless otherwise provided in this Act, a quorum for the transaction of business at a meeting of owners is those owners present in person or represented by proxy owning 33 1/3 per cent of the units.

S. 22(1) All voting by owners shall be on the basis of one vote per unit and, where two or more persons entitled to vote in respect of one unit disagree on their vote, the vote in respect of that unit shall not be counted.

(2) On a show of hands or on a poll, votes may be given either personally or by proxy.

(3) An instrument appointing a proxy shall be in writing under the hand of the appointer or the appointer's attorney, and may be either general or for a particular meeting. (4) A proxy need not be an owner.

(5) Except where, under this Act or the by-laws of the corporation, a unanimous vote of all the owners is required, an owner is not entitled to vote at any meeting if any contributions payable in respect of the owner's unit are in arrears for more than thirty days prior to the meeting.

(6) Unless otherwise provided in this Act, all questions proposed for the consideration of the owners at a meeting of owners at a meeting of owners shall be determined by a majority of the votes cast.

S. 28(2) Subject to subsection (5), a by-law passed under subsection (1) is not effective until it is confirmed, with or without variation, by owners who own not less than 51 per cent of the units at a meeting duly called for that purpose.

S. 38(1) The corporation may by a vote of owners who own 80 per cent of the units make any substantial addition, alteration or improvement to or renovation of the common elements or may make any substantial change in the assets of the corporation, and

the corporation may by a vote of the owners make any other addition, alteration or improvement to or renovation of the common elements or may make any other change in the assets of the corporation.

(4) If any substantial addition, alteration or improvement to or renovation of the common elements is made, or if any substantial change in the assets of the corporation is made, the corporation must, on demand of any owner who dissented, made within ten days after the date of the vote referred to in subsection (1), purchase the owner's unit and common interest.

S. 42(2) Where there has been a determination that there has been substantial damage to 25 per cent of the buildings, the corporation shall repair within a reasonable time, unless, within sixty days after the determination made under subsection (1), by a vote of owners who own 80 per cent of the units, the owners vote for termination.

S. 44(1) Sale of the property or any part of the common elements may be authorized,

(a) by a vote of owners who own 80 per cent of the units.

S. 45(1) Termination of the government of the property by this Act may be authorized,

(a) by a vote of owners who own 80 per cent of the units.

[para8] In my view, the scheme of the Act is clear. Meetings may be called. Notice of specific business must be given. If one third of the owners show up at the meeting in person or by proxy, then a majority of those owners can make decisions affecting the condominium.

[para9] Important decisions require a greater quorum, such as passing and confirming special by-laws made by the board (s. 1), confirming contracts or by-laws made by the board (ss. 17 and 28), making substantial alterations (s. 38), dealing with damage to the condominium (s. 42), selling the property (s. 44), and terminating the government of the property (s. 45). These important acts require that a quorum be greater than one-third of the owners, and at times the quorum must be 80 per cent of the owners.

[para10] The respondents argue that those sections must mean that 80 per cent of the owners (as the case may be) must vote in favour of the proposal. In my opinion, if that were the intention of the legislature, it would have been clearly set out in the provisions of the Act by employing such words as "votes in favour of" or "the affirmative votes of". No such wording has been used in the Act.

[para11] The argument of the respondents may be crystallized in this way: Surely, if a substantial alteration is to be made to a condominium, 80 per cent of the owners should approve and not 51 per cent of 80 per cent of the owners. To allow 51 per cent of 80 per cent of the owners to determine a substantial alteration effectively means that a minority of the owners can effect a substantial alteration. In addition, a minority of owners could sell the corporation (s. 44) or terminate the government of the property (s. 45). Moreover, the effect of s. 38(4) (substantial alteration) would place the condominium in the ludicrous position of permitting a majority of owners to demand that their units be re-purchased by the corporation.

[para12] With respect, I do not agree with this argument. A condominium corporation is a democratic entity. All owners are given notice of business to be conducted. Owners may be present in person or by proxy. If owners are interested enough in the business at hand, they may be present and have their vote counted. That is the democratic right of all owners. To suggest, however, that 80 per cent of owners must vote in a particular way for important business to be transacted would, in my view, be contrary to the experience of democracy.

[para13] One need only consider the manner in which our country is governed. Municipal elections provide an interesting example. In the ordinary course, only 20 to 30 per cent of those entitled to vote actually do vote. Of those who do vote, a simple majority has the effect of electing our municipal officials. Similarly, provincial and federal elections, while generally commanding a higher turnout of voters than in municipal elections, almost invariably result in candidates and governments being elected by a decided minority of those entitled to vote. This may seem unfortunate to some, but it is a common reality not just in Canada, but throughout the democratic world. Momentous decisions are made by minorities in the normal course, which profoundly affect our lives and the relative amount of our take-home pay. Experience shows that the minority frequently determines important decisions. Democratic government cannot be said to have suffered because of this reality.

[para14] With respect to corporations other than condominiums, the general rule is that all business may be conducted by a majority vote of a quorum of those entitled to vote. In the case of a substantial undertaking, as, for example, the sale of the corporation, a two thirds majority of those forming a quorum is required. A quorum is 51% of shareholders. Thus, the most significant acts of the corporation, including its sale, may be accomplished by a minority of shareholders (two-thirds of 51 per cent). To suggest that a two thirds majority of all shareholders be required would no doubt cause the average corporate secretary to seek other employment. [para15] To read the sections of the Condominium Act as requiring an 80 per cent vote by all those entitled to vote in favour of a particular proposition would, in my view, be contrary to the reality of democratic experience and would cast a burden upon managing boards of condominiums that would make it almost impossible to make important decisions.

[para16] If the intention of the legislature was in fact different, then it should have been specifically provided for in the Act. By employing the word "vote" and specifically providing that "unless otherwise provided in this Act, all questions proposed for the consideration of the owners at a meeting of the owners shall be determined by a majority of the votes cast", I am convinced that the legislature intended "vote" to mean exactly what the average person understands a vote to be, which is the exercise of an informed choice on a proposition presented for consideration. What is "otherwise provided" in the Act, relates, in my view, to quorum requirements. To decide otherwise would bind condominiums in a straightjacket that would render their business more significant and difficult to accomplish than the business of our elected officials. While the governance of condominiums is important, it cannot be said to be more important than the management of our debt, the funding of our hospitals and schools, or the arrangements whereby we bind ourselves together as a nation.

[para17] In the result, there shall be an order confirming that the respondents were removed from the board of directors at the meeting of October 16th, 1996. A new meeting of the condominium owners shall be held no later than January 22nd, 1997 for the purpose of electing new directors. In the interim, each party shall nominate an interim director to assist the remaining director to effect the day to day operation of the condominium corporation, but such interim director shall not be one of those directors who has been removed. The meeting of the owners shall be chaired by the auditor of the condominium corporation. I find that this

motion was brought in the utmost good faith by both parties and as such, the solicitor/client costs for both parties shall be paid by the condominium corporation.

McKINNON J.

CBR# 293

Michael Simanic, Ray Dodge, and Tony Zapparoli, plaintiffs, and Royal St. Kitts Casino Ltd., Leo Tofoli and Alceo Zuliani, defendants Court File No. 90-CQ-050420 Ontario Court of Justice (General Division) Toronto, Ontario Gotlib J. January 19, 1996.

Counsel: M. Simanic on his own behalf. D.R. Wingfield for Dodge and Zapparoli. L.D. Roebuck for Royal St. Kitts Casino Ltd. and Alceo Zuliani. M.A. Davis for Leo Tofoli.

[para1] GOTLIB J. (orally):-- In the matter of Michael Simanic, Ray Dodge and Tony Zapparoli against Royal St. Kitts Casino Ltd., Leo Tofoli and Alceo zuliani, these are my reasons for judgment.

[para2] Evidence was heard in the year 1995 on January 3, 4, 5, 6, and 9, and part of the 10th of January. In 1996, the trial was continued and evidence was heard on January 8, 10, 11, 12, and submissions were made on the 15, 16 and 17 of January.

[para3] The statement of claim issued on June 8, 1990 concerns the development of a parcel of land involving construction of 20 condominium units adjacent to Royal St. Kitts Casino and to Jack Tar Village on the island of St. Kitts in the West Indies.

[para4] An amended trial record was filed at the beginning of this trial on January 3, 1995. The previous trial record was therefore obsolete. The parties agreed to proceed with the trial with Messrs. Simanic, Zapparoli and Dodge as plaintiffs and Royal St. Kitts Casino Ltd., Leo Tofoli and Alceo Zuliani as defendants, notwithstanding that the amended trial record set out the pleadings in an entirely different way. All parties agreed, however, and we proceeded on that basis.

[para5] In the process of sorting out how this action was to proceed, Mr. Simanic abandoned his claims against Messrs. Dodge and Zapparoli, and Messrs. Dodge and Zapparoli abandoned their counterclaims. The latter two gentlemen joined with Mr. Simanic in his claim via their pleading of October 14, 1994. Mr. Simanic's pleadings omitted Schedule A, but it is very well understood what parcel of land is in dispute, and is as Schedule A contained in the pleadings submitted by Messrs. Zapparoli and Dodge. In effect, the initial pleading by Mr. Simanic does not state a claim against Messrs. Dodge or Zapparoli, notwithstanding that they are named as defendants. In any event, the pleadings as submitted support the claims that have been heard by this Court. The claim by the plaintiffs is against Royal St. Kitts Casino Ltd. demanding a conveyance of the lands described in Schedule A to a certain agreement, and that Alceo Zuliani cause such a conveyance to be made to the plaintiffs.

[para6] It is asserted that Royal St. Kitts Casino Ltd. breached its obligations as trustee, both in 1989 and 1990. The Court is asked to make that finding. Damages of \$2 million are sought against Royal St. Kitts Casino Ltd., and damages are sought also against Messrs. Tofoli and Zuliani in the sum of \$2 million for conspiracy to defraud these plaintiffs and tortious interference with contractual relations.

[para7] The Court is also asked to award Mr. Simanic a power of attorney to convey the lands in question to the plaintiffs. The plaintiffs also request that Mr. Tofoli's share under the co-tenancy agreement, now held by either Royal St. Kitts Casino Ltd. or Mr. Alceo Zuliani personally, be awarded to the plaintiffs here in.

[para8] There is also a claim for insurance proceeds paid after a fire in a storage container on the premises, the amount as the evidence discloses being \$23,447.57 U.S. That amount is claimed by the plaintiffs.

[para9] There is also a prayer for prejudgment interest at prime plus 5 per cent or prejudgment interest under the Courts of Justice Acts and costs.

[para10] The defence lodged by Royal St. Kitts Casino Ltd. and Mr. Alceo Zuliani alleges that the plaintiffs have many unpaid accounts, including one to a company known as T.D.C., because of which a company controlled by Mr. Zuliani is being sued for \$167,318.60.

[para11] The defendants say that the three co-tenants have failed in their obligation to fund the project and claim setoff of insurance proceeds to pay T.D.C. and allege that construction was incomplete. A number of matters are stated as having been incomplete as of April 10, 1990: electrical services, screens for windows needed to be installed, electrical fixtures were missing, external lighting and walkways and landscaping were incomplete, only 10 out of 25 parking spaces had been constructed, and the furnishings of the units were not as per the agreement.

[para12] On April 10, 1990, the plaintiffs, or two of them, had requested a transfer to Cable Cove Limited, and the defence says that only the four co-tenants were entitled to a conveyance at that time if, indeed, construction were complete.

[para13] The defendants plead that extra land transfer tax would be payable by the imposition of an intermediary such as Cable Cove Limited between Royal St. Kitts Casino Ltd. and the four co-tenants and further plead that the lands were abandoned by the plaintiffs for four years, notwithstanding that their caveat is still on title.

[para14] Mr. Tofoli defends on the basis that he was not involved in a conspiracy, that Mr. Simanic diverted money for his personal use from the project and inflated costs, and that completion should be defined as financial completion as well, that is, payment of all debts owing arising out of construction on the project; and furthermore, that the plaintiffs breached the contract by assigning three per cent of it to the engineers who were involved in designing the project; that the obligation to fund the project is a condition precedent. His counterclaim was abandoned.

[para15] The first three exhibits that were filed were agreed exhibits, and Exhibit 1 contains the most important document in this trial, and that is the Cotenancy agreement dated July 27, 1989 that was signed by Messrs. Simanic, Dodge and Zapparoli. That, to my mind, is the controlling document in this lawsuit, and a number of facts arise out of it. I make those findings of fact now.

[para16] First of all, Schedule A and the document itself clearly contemplate that the whole parcel was the subject of the transaction. There is a component of 14,455 square feet that was argued to be not part of the understanding among the parties because it was intended for commercial development, and the condominium development was to be constructed on 44,603 square feet, which is part of Schedule A attached to the agreement. There were documents that are before the Court which strikes out the commercial land but that does not effect the parties to this co-tenancy agreement. The defendants must bear the good with the

bad, and Royal St. Kitts Casino Ltd. is committed under the agreement to deal as a bare trustee with all of the lands described in Schedule A, totalling something under 60,000 square feet.

[para17] The next thing that is clear from the agreement and its words is that Royal St. Kitts Casino Ltd. is a bearer trustee and has no beneficial interest in the contents of the agreement. The purpose of the agreement and the project is set out in paragraph 2.04:

"In particular, it is the intent of the parties to build and furnish approximately 20 residential condominiums, together with such commercial component as permitted by the local government."

[para18] The reference to the commercial component again supports the view that the commercial lands north of the development itself were considered part of the agreement.

[para19] Paragraph 3.01 sets out the understanding of how this was to be done. And that says:

"The initial funding required to purchase and deal with the lands shall be advanced by the co-tenants in the following manner: A) Leo Tofoli shall contribute as his share title to the lands free and clear of all liens and encumbrances. B) Ray Dodge, Michael Simanic and Tony Zapparoli shall each contribute equally to the balance of all funds required to service, including debt service, develop, construct and furnish the proposed development, the intention being that Leo's contribution of the land represents payment in full of his 25 per cent interest in the entire finished product."

[para20] The meaning of subparagraph B has been the subject of much argument in this Court. It is the Court's finding that debt service means payment of interest charges on any borrowed money and that is where it stops. Paragraph 3.02 goes on to say:

"All further funds required to complete the proposed development shall be borne equally by Mike, Ray and Tony. And paragraph 3.03 shall be construed accordingly."

[para21] As to management and operation of the lands, part of paragraph 5.01 sets out a formula for meetings of the executive committee; a quorum is three members of the executive committee and so on. And then it goes on to describe the following:

"No meeting of the co-tenants shall be held unless and until notice of the same has been sent by pre-paid registered mail or been delivered personally, etc. or waived in writing by any of the said members."

There was no argument before this Court to suggest that a certain meeting was not held on November 15, 1989. And while there was no evidence of any service ten days ahead or waiver in writing, the parties all attended and in fact acquiesced in being present. The failure to observe the letter of the agreement as to notice does not assist the defendants. A quorum of the co-tenants consists of at least three co-tenants.

[para22] Paragraph 6.02 goes on to say that:

"None of the co-tenants shall be entitled to mortgage, pledge or otherwise encumber their beneficial interest in the lands or in the project until such time as the project is completed and each has taken title to his share of the units in the project."

[para23] Again, there was much argument before this Court because after communications and negotiations had broken down among the parties, the plaintiff, Mr. Simanic, filed a caveat on the title, not title to all the lands but just the part of the lands that was being developed for condominium residences. The defence has taken the position that represents an encumbrance of the title and is contrary and in breach of section 6.02 of the agreement. The Court disagrees entirely. A caveat was filed to protect the substantial monies that were invested in the property by the plaintiffs, at that point about \$1.2 million, and nothing more. It was the only means that these plaintiffs had of protecting their investment and protecting against dealing with the lands once they had put improvements on to that value. There was no encumbrance in the sense that I understand it, that is generally understood, that is, a mortgage where the plaintiffs receive a benefit such as money, a sale where there is also money exchanging hands. And their interest is, in fact, not encumbered by the registration of the caveat in law. At worst, the caveat constitutes a cloud on the title, not an encumbrance.

[para24] Paragraph 6.03 discusses any co-tenant receiving an offer to purchase its entire interest in the lands from a third party dealing at arm's length. This is the buy-sell provision of the agreement so that if one party wanted to discontinue his participation, this was the mechanism for doing it. There were at least two exercises of the buy-sell agreement, but it cannot be said that any of the parties were dealing at arm's length. That Mr. Zuliani offered to buy Mr. Tofoli's interest, that Mr. Dodge offered to buy out his other partners at one point, does not answer the question. There were no dealings at arm's length and that was a considerable block to proceeding with this matter.

[para25] Paragraph 7.01 states:

"For the ease of conveyancing, the parties acknowledge that title to the lands will continue to be registered in the name of the trustee in the manner herein above referred. The trustee acknowledges that it has held and will continue to hold the lands and any and all other assets of the co-tenancy coming into its possession, together with any funds received by it as trustee in accordance with the terms of this agreement."

[para26] That paragraph begs the question of who the owner making the application under the condominium legislation of St. Kitts ought to be. That again was a matter of some dispute.

[para27] Paragraph 7.03 states:

"The trustee shall hold title to the lands as bare trustee for and on behalf of the co-tenancy as aforesaid and, upon completion of project, shall convey the lands with all necessary approvals and/or consents as directed by the co-tenants."

[para28] The defence has strenuously put the position that completion means financial completion, that is, payment of all debts. The Court does not accept that interpretation. That paragraph refers to physical completion. Physical completion of a construction project such as this can never be perfect, and in fact, the completion can never ever be perfect in any construction project. The evidence by the expert witness, Mr. Bentley, supports that interpretation. He referred to a definition of substantial completion

which is some 95 per cent complete. A useful comparison is with the question of having habitable condominiums. The defendants never inspected the property, and they are really not in a position to say whether the units were habitable. The plaintiffs say that they were. [para29] In any event, that there were debts owing to suppliers and tradespeople arising out of this project is without question. The fact is also that they could all lien this property no matter who was the owner if they chose to or sue the beneficiary of their services and deliveries. So far, at least two lawsuits have resulted, the first one being by Marsic and Ruszczak and their companies who did engineering plans even before the cotenancy agreement was entered into. That has been settled. The Court was not made aware of what the settlement is. It is not important for these reasons that it be known.

[para30] The other lawsuit is by a construction materials supplier, T.D.C., against Trans-Americainvest (St. Kitts) Ltd.. Initially, Trans-Americainvest was the nominal developer because it had permission to import construction materials duty free and made substantial acquisitions of goods in order to let the plaintiffs proceed with development of the project.

[para31] Paragraph 7.03 goes on to say:

"And upon completion of the project, the trustee shall convey the lands with all necessary approvals and/or consents as directed by the cotenants. "

[para32] Article 9 dealing with bankruptcy or other involuntary transfer or breach is worth considering because it also deals with the voluntary transfer, by any co-tenant, of his interest in breach of the agreement, either to any creditor, obligation, judgment or other liability or in the event that any co-tenant is in substantial breach of this agreement.

"The other co-tenants then have the right or option to purchase the interest in the lands of that vendor by giving written notice of their election to purchase the same within 90 days of the breach."

[para33] Paragraph 9.03 continues:

"If the purchasers elect to purchase the interest of the vendor, the purchase price shall be an amount equal to the greater of 80 per cent of the fair market value as set by the accountants of the co-tenancy and the amount advanced by the vendor to the co-tenancy and shall be satisfied in whole or in part by the assumption of the proportionate share of the liabilities in respect of lands."

[para34] Article 10.03 sets out that the agreement expresses the entire agreement and that no representations have been made that are material or warranties that are not incorporated into the agreement.

[para35] Paragraph 10.11 permits "any co-tenant may constitute and appoint any one of the other co-tenants as its true and lawful attorney to execute and do all deeds, etc., as shall be required as the attorney shall see fit."

[para36] The agreement which has just been considered at some length is attached as Schedule "A."

[para37] That Mr. Tofoli has breached his contract by assigning his interest to Mr. Zuliani, as he did in 1991, is evident because the plaintiffs did not even know anything about the transfer until much after the fact. There is a clause in the agreement, interestingly enough, that provides for arbitration, in Article 8, and that has been ignored by the all the parties.

[para38] A number of events have occurred and many exhibits have been filed. First of all, who are the parties in this matter?

[para39] The original plaintiff, and one of the plaintiffs now, is Michael Simanic. He has been a builder and developer for some 25 years. His principal residence is in Mississauga. He is presently age 56. He has been friendly with Mr. Dodge and Mr. Zapparoli for many years, possibly 20 each.

[para40] Mr. Zapparoli is a builder and contractor, and he has been in the concrete drilling and cutting business for some 20 years.

[para41] Mr. Ray Dodge is a real estate broker and has been so from 1973. He resides in Mississauga in Ontario. He tried to be the peacemaker in this matter and as every business group has a note-taker, Mr. Dodge was the note-taker and his minutes of some meetings are very much in evidence in this matter. [para42] Royal St. Kitts Casino Ltd. is a corporation incorporated under the laws of the government of Saint Christopher and Nevis in the West Indies and resides there and in the province of Ontario.

[para43] Mr. Alceo Zuliani is not a shareholder of that company, but he is a director. And it is clear from the evidence that he is also the controlling mind. It is basically an inactive company, he has told the Court, and held the lands in question for future development. Royal St. Kitts Casino Ltd. is wholly owned by, and is a subsidiary of, Trans-Americainvest (St. Kitts) Ltd..

[para44] Mr. Alceo Zuliani is a cousin to Mr. Leo Tofoli. He is a director of Trans-Americainvest (St. Kitts) Ltd. and is a director only and has no shareholding in that company. It is clear, however, that he is the directing mind also of that company whose shares are held by European investors, who, in effect, take his advice in every way when he suggests it. He is presently 56 years of age. He is in poor health and he is to be sympathized with; he has had some 6 heart attacks since 1980 and had a difficult arrhythmia attack in 1988. Notwithstanding those very serious problems, he has operated most effectively in St. Kitts and has made an important place for himself on that small island. He was a builder and developer in the Toronto area before going to St. Kitts in 1980 as a tourist.

[para45] Mr. Leo Tofoli, being a cousin of Mr. Zuliani, is a Toronto area resident now. He resided in the island of St. Kitts for about four-and-a-half years, from 1986 to 1991, and was certainly there at the relevant time. He was corporate secretary of Royal St. Kitts Casino Ltd., and it was he that Mr. Zuliani wished to benefit, in effect, to give him some reason for staying on St. Kitts, which is not an attractive island socially to a number of people, although it is exquisitely beautiful in every other way and that it has a prime golf course.

[para46] Mr. Tofoli was a very credible witness as indeed was Mr. Zapparoli, and it is very clear from the evidence of Mr. Tofoli that he did what he was told to do by Mr. Zuliani. The fact is that Mr. Zuliani was conferring a great boon on him by awarding him a 25 per cent interest in a very valuable condominium development had it gone forward further than it did. And he felt that it was important for him to defer to Mr. Zuliani in every way because of this valuable gift. He relied on, and he took Mr. Zuliani's advice, and indeed Mr. Zuliani made all of the decisions for Mr. Tofoli. All that Mr. Tofoli got out of this was a lawsuit commenced against him, among others, in 1991, and he assigned his interest in the project either to Royal St. Kitts Casino Ltd. or

Mr. Zuliani. That was not made clear to the Court, but in any event, Mr. Tofoli divested himself and left for Dallas. In effect, the Court finds that Mr. Tofoli's acts were all the acts of Mr. Zuliani. Mr. Zuliani controlled him, told him what to do, and Mr. Tofoli did it.

[para47] There are two other companies to be dealt with as far as the actors in these events are concerned that are not parties to the lawsuit. The first is Trans-Americainvest (St. Kitts) Ltd.. That company was the developer of the very successful Jack Tar Village Resort complex. Mr. Zuliani is a director and through that company could import construction materials on a duty-free basis and, at the beginning certainly, acted as a nominal developer in order to obtain duty-free construction materials.

[para48] Jack Tar Village leased everything from Trans-Americainvest, except the casino itself which was operated through Mr. Zuliani. That company wound up holding proceeds of insurance relating to this condominium project both for hurricane Hugo, which occurred in mid-September 1989, in the sum of \$34,780 U.S., and for a container fire that occurred in 1989 and damaged much construction material, the proceeds of that insurance settlement being \$23,447.57 U.S. So that Trans-Americainvest holds insurance proceeds which are properly the property of the condominium development totalling \$58,227.57 U.S.

[para49] The last company to deal with is Cable Cove Limited which was incorporated by the plaintiffs when they were considering dealing with the 15.5-acre site that had been made known to them. It was used by the three plaintiffs to import construction materials duty free from November, 1989.

[para50] As in all cases, much of the outcome of this case will turn on findings of fact. That there were high hopes at the beginning and dashed hopes at the end is perfectly clear.

[para51] The parties met first in 1987 when the plaintiffs went on a golfing trip to St. Kitts and stayed at Jack Tar Village, had a wonderful time, enjoyed the golf course, and were all very social and friendly. They liked it so much that they went back, by one account, 10 or 12 times and eventually got into discussions with Mr. Zuliani about development and indicated that they were interested in the 15.5-acre site that might be available for them to develop. In the course of golfing and other social associations with Mr. Zuliani, Mr. Zuliani offered this parcel of 44,000 square feet as a pilot project for the plaintiffs to get their feet wet in the business of development in St. Kitts. All of the parties understood that the lands offered by Mr. Zuliani were fully serviced.

[para52] The parties started out by envisioning a 20-unit condominium development that would be about 500 square feet each unit, and cost a total of \$600,000 in cash, the other \$200,000 being the land contribution by Mr. Tofoli as arranged by Mr. Zuliani. The plaintiffs, without consulting the defendants, decided, on the advice of Mr. Dodge, that bigger, better units would be better and so they made larger units which were proper condominium apartments with much larger floor area, and consequently, the price of the development virtually doubled. It turned out to be an unwise move, it was apparent, when Mr. Dodge ran out of money and could not keep up this share of the contributions.

[para53] There then arose disputes among the plaintiffs. Mr. Dodge said that Mr. Simanic agreed to carry his additional contributions and Mr. Simanic denied it. Mr. Zapparoli thought that the cash payments being made by Mike Simanic at the request of workers were not being properly recorded, that there was no proper accounting. The real issue, though, was the shortage of money, and there was a far amount of in-fighting among the plaintiffs.

[para54] Other things were going on. The problems really started when, after hurricane Hugo, Mr. Zuliani was very anxious to have the Jack Tar hotel repaired quickly. And first, Mr. Simanic requested a contract for repairs whereupon Mr. Zuliani took it personally and was extremely insulted. Everything went downhill from there. Mr. Simanic thought the cost would be about \$80,000. The work was completed; the Court has no idea what the cost was. But when the co-tenants' workers went on Mr. Zuliani's payroll and that work got completed. [para55] A further source of disagreement and concern was that it was a major disappointment to the three co-tenants who expected to have fully serviced lands. They discovered, when they went to make the sewer connection, after the engineering and architectural drawings had been done, that simple connection was not possible. There was some possibility that they would have to build a new sewer treatment plant, etc., etc. Without sewer systems, there was no project, and the potential cost in their minds was \$250,000. The problem was solved when Mr. Simanic got approval for a septic tank system which was installed at some extra cost because also sewer pipes had already been laid and were abandoned. The septic tank system was put on the golf course, as permitted by the government corporation which owned it, Frigate Bay Development Company. The cost was absorbed by the co-tenants, at relatively low cost, although it caused a lot of consternation at the time.

[para56] There was bickering about the promised hotel rate for the employees, that is, who would pay \$20 a day for room and board. The argument by the plaintiffs is that Mr. Zuliani changed his mind afterwards so that the cost to those employees was much more expensive when they had to go to another hotel and pay for the cost of food.

[para57] On the first request for a conveyance of title, on November 1989, the plaintiffs received what they believed was a high-handed refusal without any explanation. Mr. Zuliani says it was to protect Leo Tofoli's interest, and besides, construction was not complete. But the communication was incomplete and there was more hard feeling among the parties.

[para58] Over the period of all the difficulties, Mr. Zuliani was looking for a way to end the roadblock; he offered to buy out the plaintiffs at cost plus 20 per cent, and in so doing, would do very well himself financially. At the peak of the market, which is about the time all of these events were occurring, the profit per unit could have been \$100,000 each. That excludes and discounts the cost of construction. So that at the peak, the 20 units would provide \$2 million profit. The plaintiffs never agreed to that kind of a buy-out, and eventually the parties wound up at serious loggerheads. By this time, the partners had put in \$1.6 million and had also registered the caveat in November 1989 to protect their interest. In fact, Mr. Simanic was the one who registered it.

[para59] There was no question that in the course of all these dealings that Mr. Zuliani was "out to bury Mr. Simanic, in his pocket where it would hurt." He developed a dogged and determined attitude which was, in effect, "any way that I can stymie this project I will do."

[para60] There was no cost overrun as described by the defendants. The original plan called for one-bedroom units, 16 or 18 suites which, including the land, would have cost a total of \$800,000. That was changed to one-and two-bedroom apartments with two bathrooms and, of course, the cost doubled.

[para61] It is without doubt that there were \$223,000 owing to the trades, either for goods or services, and that amount has been reduced by the plaintiffs to \$100,000.

[para62] And then along the way, other things occurred. Mr. Zuliani wrote some unfortunate letters that fanned the flames of the dispute. He wrote a letter in March where Royal St. Kitts Casino Ltd. decided it was not trustee any longer and ordered all the plaintiffs off the island. He threatened to communicate with certain authorities if they did not leave, which in fact did not happen. Then certain monies paid out by Trans-Americainvest, on behalf of the condominium developers, remained unpaid. Also, in lieu of paying Marsic and Ruszczak, the engineers, the monies, there were some arrangement that they would have three per cent of either the net profit of the completed project or the project itself. Mr. Zuliani objected to that most vehemently and considered that a breach of the agreement. It is the Court's finding that whatever that arrangement was, which has now been settled, it was not an encumbrance on the property because there was nothing registered on title, and if there had been, then that would have been a different issue.

[para63] Also, while the parties were at war over how to deal with this, Mr. Zuliani said he was out to protect Mr. Tofoli's interest in the development and therefore would not consider giving a transfer to Cable Cove. There are ways to protect the interests of a person such as Mr. Tofoli. One of the things that could have been done is a conveyance of the land with a caveat. That apparently was not thought of or dealt with. [para64] In addition, it was Mr. Zapparoli's evidence that the plaintiffs paid all the expenses to connect the water to the Frigate Bay road water supply; the partners had expected fully serviced lands and this was also a surprise to them. They had a lot of trouble with it, but they did it, and last year when the plaintiffs were attempting to refurbish the property, they found that there was a problem when they tried to use the water.

[para65] Dealing now with the claims. It is clear from the evidence that Mr. Zuliani had a notion to develop the subject lands from 1988 and, in fact, had some scheme for the construction of 60 hotel units. Then, on meeting the plaintiffs, the arrangements that finally developed grew, and the plaintiffs took over the project.

[para66] Construction on this project began in August of 1989, and the co-tenants arranged with Mr. Zuliani for Trans-Americainvest to be used as nominal importer of construction goods duty free. That arrangement was quite separate from the co-tenancy agreement and Trans-Americainvest is, of course, a third party to all these events. The financial responsibility for building and funding was that of the plaintiffs. The tensions that have been described arose and they need not be repeated.

[para67] One of the main issues is whether a proper demand for title was made in November, 1989. At that point, the parties had something like \$1.2 million in the project, that is, \$900,000 already spent and \$300,000 in construction materials on the way. A meeting was held late in the evening of November 15, 1989. There was no proper notice given, but the parties acquiesced and cannot make of the failure of notice as set out in the agreement an issue. Initially Mr. Tofoli agreed that a request should be made for title to be conveyed by the trustee, Royal St. Kitts Casino Ltd.. Mr. Tofoli consulted with Mr. Zuliani and came back later and, in effect, changed his mind. Mr Tofoli got the minutes of the meeting amended. That fact does not alter the Court's view that, in fact, there was a consent by all the four parties to request title.

[para68] We then come to the issue of whether or not the development was sufficiently complete for the co-tenants and the plaintiffs, in particular, to make that request. The request was premature as the property was not sufficiently complete. The Court heard that it was some 60 or 65 per cent complete and that does not meet the test. It was necessary to have a substantially completed development, and that did happen in April, 1990 when a further request for title was made in the name of Cable Cove.

[para69] At this point, Mr. Dodge was not part of the plan because he is in default of contributing further monies and is in a dispute with his co-tenants. The request for title came from Mr. Zapparoli and from Mr. Simanic. Mr. Tofoli, being controlled by Mr. Zuliani, was not a party to the request, and Mr. Dodge was also not a party to the request. The question becomes notwithstanding that the property was substantially complete, were those two co-tenants entitled to a conveyance to Cable Cove Limited, which in effect was owned by the three co-tenants? The answer to that question is yes. There had been an agreement among the four co-tenants, one of which was revoked by Mr. Tofoli in November. The only reason that they were not entitled to a conveyance in November was that the property was not in a sufficient state of completion, and therefore the request in April was a proper request, the property now having been completed. [para70] It was also proper to have title taken in the name of Cable Cove Limited because the units could not be sold until one of the corporations proceeded to create the condominium by filing the description and the geodetic survey which is required showing construction of the main parts of building. The survey is required in the considered opinion of Mr. Inniss; the Condominium Act of St. Kitts is remarkably like the one in Ontario. The fact is that the property need not be habitable in order to have the survey that is required for registration of a condominium. The evidence was not clear as to whether it was in that state of completion in November of 1989. But certainly by April of 1990 it was, and the conveyance ought to have been given by Royal St. Kitts Casino Ltd. to Cable Cove Limited because it was properly directed. If Mr. Zuliani was concerned about the protection of the interest of Mr. Tofoli, he could have arranged for the registration of a caveat immediately following the transfer.

[para71] Mr. Zuliani also took the position that there would be a great waste of tax money if Royal St. Kitts Casino Ltd. were not, in effect, the condominium creator because there would be one tax payable at 8 per cent on the transfer from Royal St. Kitts Casino Ltd. to Cable Cove Limited then a further tax of 5 per cent when Cable Cove transferred to the individual unit owners. If the co-tenants were prepared to absorb that cost, and there was some suggestion that they had a way that they could escape that additional 8 per cent tax, it really was no concern of Mr. Zuliani's. If the co-tenants wanted to waste what might have been \$200,000 U.S., that is their problem. If the profits were so large and they wanted to get on with their development, then presumably it did not matter. But Mr. Zuliani took it upon himself to be the guardian of that tax money and improperly withheld the transfer of the lands in April, 1990. He did not turn his mind to the legal obligation to convey. He did not get legal advice. He was simply determined that he was not going to do it.

[para72] On November 17, 1989, the four co-tenants had even decided on unit selection. In the course of all this, Mr. Dodge, having run out of money, consulted with Mr. Zuliani and put in a buy-sell offer offering his share for sale at some \$446,000 or Mr. Dodge would be prepared to buy out the other two. There is no doubt that it was Mr. Zuliani who was going to fund Mr. Dodge should he proceed with a buy-out of Messrs. Simanic and Zapparoli. After some consultation in March, Mr. Dodge abandoned the buy-sell process and that was left in limbo.

[para73] Royal St. Kitts wrote a letter on March 12, 1990, which is shown at Tab 14 of Exhibit 1, that is, the famous letter where it is stated that Mr. Tofoli is in default under an option agreement and therefore he is no longer in a position to require title to the lands and that Royal St. Kitts Casino is no longer a trustee under the co-tenancy agreement. There is an order to vacate the project within 24 hours of delivery and an offer to pay for the costs of the improvements. Mr. Zuliani said that this was a way of trying to pressure the three plaintiffs to sell out and get moving. But Royal St. Kitts is, in effect, renouncing its trust.

[para74] That there was much bluffing and many outright lies being told, particularly by Mr. Zuliani and through Mr. Tofoli by him. There is a further letter dated March 30, 1990, signed by Mr. Zuliani on the letterhead of Trans-Americainvest, complaining that Trans-Americainvest's good name was suffering because the bills have not been paid. It is, in effect, a threatening letter and it was most unwise and improper of Mr. Zuliani to authorize it. There is a threat to have the plaintiffs deported or their work permits not renewed, indications of carbon copies to government offices which were indeed never sent, and threats to get police protection.

[para75] No work was done on the project after April 10, 1990. It is clear from the failure of evidence on behalf of defendants that Messrs. Zuliani and Tofoli never made any kind of an inspection of the project. The project, however, was sufficiently completed in April 10, 1990. Mr. Dodge said it was 95 per cent complete. Mr. Simanic said 100 per cent. In any event, it was substantially complete which is all that is required for the call of title.

[para76] That a bare trustee is required to convey on a request of all the persons beneficially entitled is trite law. That is the case of *Saunders v. Vautier*, a very old case, still the law in this jurisdiction. The fact is that on November 15, 1989, there was a meeting of either the executive committee or the co-tenants and it does not matter for the Court's purposes how it is designated. All four parties to the co-tenancy agreement were present and agreed on the agenda. It was a formal enough meeting that Mr. Dodge took notes and minutes were kept. Mr. Dodge explained the way that he handled the minutes is that he took brief notes at the meeting and then filled them out. Mr. Roebuck fairly submits that Mr. Dodge reported his sense of the meeting and that is appropriate because not every word could possibly be written down, and most of the tenor of the meeting was. So that there were present a majority of co-tenants and a majority of the executive committee.

[para77] In much of the evidence, there was some discussion about Mr. Zuliani being in breach of his duties as a trustee. That arises out of the fact that Mr. Zuliani is the controlling mind of both Royal St. Kitts Casino Ltd. and Trans-Americainvest, so that it becomes a blurred line as to who the parties are referring to when they talk about the trustee. In this particular case, most clearly, the corporate veil has to be lifted to reach Mr. Zuliani because he is the controlling mind. It appears from the evidence he was using his corporations in a most improper way and as if he were acting solely for himself. As the controlling mind of the trustee, he has an obligation to the co-tenants. With respect to the April 10, 1990 demand, he did nothing. If there was something incomplete, he should have told the co-tenants. Instead, he remained silent, ignored the issue, waited to be sued, and then defended appropriately, most vigorously.

[para78] He made some efforts to buy out the co-tenants, none of which met with any success. His interference with the co-tenants is virtually unpardonable. A trustee cannot buy trust assets from the beneficiary of the trust. The issue is whether Royal St. Kitts Ltd. took the conveyance from Mr. Tofoli or whether Mr. Zuliani did. In effect, they are equal in status legally. A beneficiary's remedy is to set aside a sale or complete it.

[para79] The Bentley report, Exhibit 4, is an important exhibit. Mr. Bentley himself was qualified as an expert witness and his evidence contains much valuable information. His opinion was, and there was no contrary evidence, that, as might be expected, the property had deteriorated badly from the time that the co-tenants left it until he inspected it which was in January, 1994, now some two years ago. He estimated that it would cost up to \$10,000 U.S. to refurbish the units and that the market value, because of the history of the development and the bad sense that surrounds it, would not be worth more than a \$110,000 each, after rehabilitation.

[para80] Mr. Dodge seeks interest expense of some \$255,000 Cdn. arising out of tying up his money in the project. And Mr. Zapparoli also asks for prejudgment interest from April 10, 1990.

[para81] It is clear on the facts that the breaches of trust by Royal St. Kitts Casino Ltd. are caused by Mr. Zuliani as controlling mind. The real issues in this case are, of course, the interpretation of the co-tenancy agreement. The defendants say that this Court cannot make an order for specific performance of the contract because, first of all, the request for conveyance continues to be premature, and because the land is outside of this jurisdiction. The parties have, however, attorned to this Court, and they will then be bound by this Court's order.

[para82] It is clear, as the defendants submit, that the plaintiffs were not put off by Mr. Zuliani's or Royal St. Kitts Ltd's order to leave the project and continued to complete it and put in more money. In fact, the plaintiffs had continued access to the property. When Mr. Dodge went to look at it in 1992 someone was there either as a caretaker or security guard.

[para83] The defendants, and particularly Mr. Zuliani, are concerned that the trades must be paid. It is a small community and Mr. Zuliani's and Trans-Americainvest's reputation has suffered. The fact that there are trade debts owing on the condominium may be morally reprehensible because workmen, are entitled to be paid after an honest day's work. That still is not Mr. Zuliani's concern, although he is certainly entitled to be concerned about the debts owed by Trans-Americainvest to the trades and workers.

[para84] The defendants have taken the position that the completion of the project involves condominium registration and legal paperwork and survey, etc. That creates a circular line of reasoning which is a Catch-22. The agreement is silent on who is to be the applicant for condominium registration and why it should be that Royal St. Kitts Casino Ltd., as a bare trustee, should be the applicant for condominium registration is something the Court does not accept.

[para85] Having put \$1.4 million into the property, the co-tenants were entitled to have the conveyance for them to make the application for condominium registration.

[para86] Dealing with the result of all this, Mr. Tofoli's sins, if any, are sins of omission. He did not actively participate in any agreement with Mr. Zuliani to do anything. He did what he was told. It may be that he should have taken a stand. He did not. If there was any conspiracy or any plan, it was Mr. Zuliani's plan. But you cannot have a conspiracy with one person; so that Mr. Tofoli is not a co-conspirator. He was an innocent dupe or puppet and was completely controlled by Mr. Zuliani. He is an agreeable fellow. He even agreed with the Cotenants at the meeting of March 15 to request title. The conspiracy has not been proved, and therefore, that ground of complaint must be dismissed. Accordingly, Mr. Zuliani, while he may have been responsible for threatening letters, and may have been indeed particularly malicious, he cannot said to have conspired with anybody to do that. So, neither person is a conspirator.

[para87] The question of fraud as put by the cotenants also must be dealt with. Civil fraud calls for a very high degree of proof and allegations of criminal fraud are even higher. I do not think that there is any fraud on the part of any of the defendants. The fact is that things went rather well until hurricane Hugo and Mr. Simanic's request for a contract to do the repairs on the Jack Tar

Village hotel. After that, it was all downhill. The Court finds that, as Mr. Tofoli said, everyone else was caught in the cross fire of the very vicious dispute between Mr. Simanic and Mr. Zuliani. Messrs. Tofoli, Dodge and Zapparoli are the most innocent. They did what they could, but the real dispute was between the two men, Simanic and Zuliani.

[para88] In the result, there will be judgment for the plaintiffs in the following manner. There will be an order that Royal St. Kitts Casino Ltd., convey the lands described in Schedule A in the co-tenancy agreement of 27 July, 1989, to the co-tenants or as they may direct; the co-tenants are the remaining co-tenants, Mr. Zapparoli, Mr. Simanic and Mr. Dodge.

[para89] There will be a further order that Mr. Zuliani cause Royal St. Kitts Casino Ltd. to so convey the lands. The Court declines to make a declaration that Royal St. Kitts Casino Ltd. breached its obligations as bare trustee in November, 1989, although it is clear, and the Court so declares, that Royal St. Kitts Casino Ltd. breached its obligations as bare trustee to the then Cotenants by failing to convey the lands in May, 1990.

[para90] The Court is not satisfied that damages against Royal St. Kitts Casino Ltd. for breach of trust is appropriate or for breach of its fiduciary duty. In effect, the co-tenants' loss was not caused by any of the letters written by Royal St. Kitts Ltd. because the letters were ignored and the plaintiffs proceeded with the project. The claim for damages against Royal St. Kitts, Alceo Zuliani and Leo Tofoli for conspiracy to defraud and tortious interference with contractual relations is dismissed in so far as a conspiracy to defraud.

[para91] There is, however, a finding that this Court makes that Mr. Alceo Zuliani and Royal St. Kitts Casino Ltd. did make a tortious interference with contractual relations by Mr. Zuliani's dealings, both with Mr. Tofoli and with Mr. Dodge. There will an order appointing Messrs. Simanic, Dodge and Zapparoli as agents with power of attorney for and of Royal St. Kitts Casino Ltd. with power to act on behalf of Royal St. Kitts Casino Ltd. to convey the lands described in Schedule A to the co-tenancy agreement or to take any other steps necessary to enforce compliance with the orders herein.

[para92] The evidence disclosed the amount of insurance monies held by Trans-Americainvest, and since those monies have now been established, the need of an accounting seems to have been obviated. The fact is though that Trans-Americainvest is responsible for payment of certain debts which are attributable to the condominium development and Trans-Americainvest (St. Kitts) Limited is entitled to set off the amount it is holding for insurance proceeds, \$58,227.57, against the debts owing by it to tradesmen and suppliers arising out of this project.

[para93] There will be an order for damages for tortious interference with contractual relations against Royal St. Kitts Casino Ltd. and Alceo Zuliani jointly and severally. The three plaintiff co-tenants are entitled to the units which Mr. Zuliani or Royal St. Kitts purported to receive from Mr. Tofoli in 1991. If those are valued at \$110,000 currently, that is a total value of \$550,000. If one divides that equally, that should be a credit of about \$183,300 to each of the three plaintiffs.

[para94] The Court finds that in the circumstances, Mr. Simanic should then have a total of eight units, Mr. Zapparoli, a total of six units, and Mr. Dodge, a total of six units. That finding is based on the monies which have been contributed by each of the plaintiffs to the development of the condominium. Mr. Dodge contributed \$357,000, Mr. Simanic put in \$541,500, and Mr. Zapparoli put in \$480,000.

[para95] The evidence discloses that Trans-Americainvest owes the trades approximately \$74,000 U.S. If the \$58,227.57 is set off against that amount and then Trans-Americainvest becomes responsible for payment of all those monies, the balance owing is about \$25,000 on the debts of condominium construction. Since Trans-Americainvest is not a part of this lawsuit in any way, there can be no order as to the balance with which it is left liable. There was another amount that Trans-Americainvest claimed it was being sued for by Marsic and Ruszczak, but that action has now been settled and does not enter into these calculations.

[para96] With respect to the balance of monies owed by the three co-tenant plaintiffs on the project, which they have stated is about \$100,000, that is not an issue that the Court should deal with simply because if they do not pay those debts, the property will be liened. So, it is up to them to deal with it.

[para97] The plaintiffs are also entitled to their loss arising out of the drop in the market value of the properties of about \$50,000 per unit. That is not ordinarily an award the Court would make. However, it is the Court's finding that Mr. Zuliani, by his actions, so delayed the project that, in fact, the market was lost. The plaintiffs were proceeding at a very quick pace and, apart from the fire in the construction material and hurricane Hugo which slowed them down, could have caught the market. As to the Toronto area market, the Court takes judicial notice of it, that by the spring of 1990, it was desperate. There is no information about the resort market. There is solely Mr. Bentley's opinion to rely on. There was no contrary evidence, he was a highly credible witness, and was not shaken in his testimony. In addition, it was Mr. Bentley's evidence that it would cost about \$10,000 per unit to refurbish and bring each unit up to standard by reason of the deterioration, both by vandalism and by lack of care over the now five-year period that the property has been left in effect as abandoned.

[para98] The plaintiffs were not all that quick to bring this action, and while the Court accepts Mr. Bentley's opinion that is the cost to bring the units up to standard, the defendants are required to pay the whole cost of that. The three plaintiffs are entitled to \$5,000 per unit towards the cost of refurbishing, and since each of them is involved in the number of units indicated, they are entitled to that award: Mr. Simanic, eight times \$5,000 is \$40,000; and Mr. Zapparoli, six units times \$5,000 is \$30,000; and Mr. Dodge for six units, also \$30,000.

[para99] It is not appropriate to deal with prejudgment interest or costs at this time. If counsel are unable to resolve those matters, the Court may be spoken to. The refurbishing award cannot bear interest, other than from today. The loss in market value at \$50,000 is not something which would bear interest. The only argument left in abeyance is Mr. Dodge's claim for interest on monies which he borrowed to take part in this project. That may not be a proper head of damages but would come under the interest which is claimed by all the parties.

[para100] Mr. Wingfield: One question, when dealing with the amounts, I assume it is U.S. dollars?

Discussion on currency of amounts

[para101] The Court: Yes. Mr. Bentley's report in evidence dealt with U.S. dollars, and the award of \$50,000 per unit for the drop in the market value and refurbishing is in U.S. dollars. The insurance proceeds are U.S. dollars, and the monies owing by Trans-Americainvest are U.S. dollars, as I understand it, although that wasn't clear to me either.

[para102] Mr. Wingfield: I believe it was translated into U.S. dollars for the purposes of submissions and the evidence.

[para103] The Court: Fine.

[para104] Mr. Roebuck: Your Honour, you have given what I will call generically the "Tofoli units." What I am not clear on is, my friend's submission was, give those to me, but credit any damage award that you make against them.

[para105] The Court: You are quite right, Mr. Roebuck. I meant to give Mr. Zuliani and St. Kitts a credit.

[para106] Mr. Roebuck: All right.

[para107] The Court: I had it worked out here, and I said something about it, but I didn't really finish it. Mr. Tofoli's units are worth \$110,000 U.S. a piece. And since Mr. Zuliani is giving up \$550,000 worth, that is 5 times \$110,000, that amount should be credited against the Judgments which I have awarded. Now, that is a terrible oversight. Thank you for pointing it out, Mr. Roebuck. It was in my mind.

Discussion regarding damage and credit calculations

[para108] The Court: I am going to make that 20 times \$50,000, which is \$1,000,000, and it is 20 times \$5,000, because all the units have to be refurbished, so that is \$1,100,000. And then we deduct \$550,000. So that leaves \$550,000 which has to be pro-rated in some way because of the allocation of units I have made. [para109] Okay. Thank you very much gentlemen. It was a hard fought case, and I can see why. Mr. Tofoli should be a happy man. I really cannot find against him. He is just caught in all of this.

[para110] The record will say trial continued January 8, 10, 11, 12, with submissions on January 15, 16 and 17, 1996, oral judgment today. Judgment for the plaintiffs Royal St. Kitts Casino Ltd. to convey all the lands as shown Schedule A of the agreement of July 27, 1989 to plaintiffs Simanic, Zapparoli, and Dodge or nominee. The three plaintiffs to receive the "Tofoli units," for a total of eight units to Simanic, six units to Zapparoli, and six units to Dodge.

[para111] Damages awarded against Royal St. Kitts Casino Ltd. and Zuliani jointly and severally as follows. Loss of market value, that is, 20 times \$50,000 U.S. equals \$1,000,000 U.S., and 20 times \$5,000 U.S. for refurbishing 20 units, \$100,000 U.S., for a total of \$1,100,000, less credit to the defendants of \$550,000 for "Tofoli units," for a balance of \$550,000. Court may be spoken to if counsel are unable to resolve questions of prejudgment interest, other interest, and costs. And I omitted to say that the action as against Leo Tofoli is dismissed.

[para112] Order to go as in paragraph 1-F of the statement of the claim, except that said power of attorney shall be granted to the three plaintiffs jointly.

[para113] We have come to the end of road, then, have we?

[para114] Mr. Wingfield: I think so, Your Honour.

[para115] The Court: All right. Thank you.

* * * * *

APPENDIX A

This Agreement made this 21th day of July, 1989,

Between:

Royal St. Kitts Casino Ltd. a corporation incorporated under the laws of the Government of St. Christopher/Nevis, (hereinafter called the "Trustee")

Of The First Part;

- and -

Leo Tofoli

of the Island of St. Kitts,

(hereinafter called "Leo")

Of The Second Part;

- and -

Ray Dodge

of the City of Mississauga, in the Regional Municipality of Peel, (hereinafter called "Ray")

Of The Third Part;

- and -

Mike Simanic

of the City of Mississauga, in the Regional Municipality of Peel,

(hereinafter called "Mike")

Of The Fourth Part;

- and -

Tony Zapparoli

of the City of Mississauga, in the Regional Municipality of Peel,

(hereinafter called "Tony")

Of The Fifth Part;

All Parties other than the Trustee, hereinafter collectively called the "Co-Tenants" and individually called a "Co-Tenant".

Recitals

WHEREAS the Trustee is a corporation incorporated under the laws of the Government of St. Christopher/Nevis;

AND WHEREAS the Trustee holds title to certain lands as set out in Schedule "A" (the "Lands");

AND WHEREAS the Trustee holds the Lands in trust as nominee and trustee for the Co-Tenants as to the undivided interest as set out in the body of this Agreement;

AND WHEREAS the Trustee does not have any beneficial interest in the Lands and agrees to be bound by the terms of this Agreement;

AND WHEREAS the Co-Tenants are desirous of setting forth herein the various covenants, terms and conditions of their tenancy in common and to provide for the management and operation of the Lands;

NOW THEREFORE THIS AGREEMENT WITNESSETH that in consideration of the premises and the mutual covenants and obligations herein contained, it is agreed by and between the parties hereto as follows:

Article 1.00 - Recitals Correct

The parties hereto acknowledge that the fore-going recitals are true and correct in substance and in fact

Article 2.00 - The Co-tenancy

2.01 The Co-Tenants hereby agree to hold their undivided interests in the lands upon the terms and conditions hereinafter set forth.

2.02 This Agreement shall commence as of the date hereof and shall continue and not be terminated except as hereinafter provided.

2.03 The Co-Tenants hereby agree that this Agreement shall hereafter govern and define their respective rights, powers and obligations as Co-Tenants of the Lands and their respective rights, titles, and interests as of the Lands and of all property hereafter jointly acquired and in all future leases and other agreements which may be entered into by them, in each Case, in their capacities as Co-Tenants of the lands and their respective obligations, rights and interests in and to all proceeds, profits and other benefits to be derived therefrom.

2.04 It is the intent of the Co-Tenants to cause the lands to be developed in such manner as to provide for the most efficient and economic use thereof, and to commence such development as soon as practicable having regard to prevailing and anticipated market conditions and the requirements of the governmental authorities and agencies having jurisdiction thereon. In particular, it is the intent of the parties to build and furnish approximately twenty (20) residential condominiums together with such commercial component as permitted by the local government. Each party covenants and agrees that such purposes shall only be pursued in the manner and subject to the restrictions provided for herein.

2.05 Title to all property, real and personal, including without limitation, all choses in action incident to the Co-Tenancy, now or hereafter owned by the Co-Tenants shall be held by the Co-Tenants as tenants-in-common, each to have an undivided interest in the Lands therein in the amount indicated opposite their name as follows:

Co-tenant Proportionate Share

Leo Tofoli 25%

Ray Dodge 25%

Mike Simanic 25%

Tony Zapparoli 25%

such proportionate interest, being hereinafter referred to as the "Proportionate Shares".

2.06 (a) This Agreement does not and shall not be construed to create any partnership or agency whatsoever. Nothing herein shall deem the lands to be partnership property, notwithstanding that the proceeds received from the lands are divisible among the parties hereto in their Proportionate Shares.

(b) No Co-Tenant shall be and shall not by reason of any provision herein contained be deemed to be the partner, agent or legal representative of the other Co-Tenants, whether for the purposes of this agreement or otherwise, nor shall any Co-Tenant have any authority or power to act for or to undertake any obligation or responsibility on behalf of the other Co-Tenants or otherwise except as herein provided.

(c) Each Co-Tenant Covenants and agrees to indemnify and save the other Co-Tenants harmless from any and all liabilities, obligations, claims or losses resulting from any representation by such Co-Tenant that it is the partner or agent of the other Co-Tenant, whether with respect to the Lands or otherwise, except with regard to such representations an are herein provided for.

Article 3.00 - Financing

3.01 The initial funding required to purchase and deal with the Lands shall be advanced by the Co-Tenants in the following manner:

A. Leo shall contribute as his share title to the Lands free and clear of all liens or encumbrances.

B. Ray, Mike and Tony shall each contribute equally the balance of all funds required to service, including debt service, develop, construct and furnish the proposed development, the intention being that Leo's contribution of the Land represents payment in full of his 25% interest in the entire finished project.

3.02 All further funds required to complete the proposed development shall be borne equally by Mike, Ray and Tony and paragraph 3.03 shall be construed accordingly.

3.03 In the event that a Co-Tenant shall default in providing any funds as required herein and shall continue in such default for a period of ten (10) days after notice in writing has been given to such Co-Tenant (which notice may be given by any one of the non-defaulting Co-Tenants) requiring such Co-Tenant to put an end to same, such Co-Tenant shall be deemed to be a delinquent party ("Delinquent Party") and the following provisions shall apply:

(a) The other Co-Tenant(s) who have complied with Sections 3.02 and 3.03 hereof (hereinafter referred to as the "Advancing Party") shall have the right but shall not be required, to advance all or any portion of the required funds. The amounts advanced by the Advancing Party are herein called the "Deficiency". The amount of the Deficiency shall constitute an obligation of the Delinquent Party, payable on demand, and shall bear interest from the date of the advance, at an annual rate equal to the prime lending rate charged by the Co-Tenancy's banker to its most favoured commercial borrowers plus 5%. The Delinquent Party hereby agrees to grant to the Advancing Party on assignment as security of its interest in the Lands and this Co-Tenancy Agreement to secure repayment of the Deficiency with interest and to that end agrees to execute and deliver any and all documentation deemed necessary by the Advancing Party in that behalf and, for the purpose of ensuing compliance with the foregoing, the Delinquent Party does hereby irrevocably constitute and appoint the Advancing Party (or any one of them, if more than one party comprises the Advancing Party), its true and lawful attorney to execute and deliver such assignment and other documents so required by the Advancing Party.

(b) If the full amount of the Deficiency, with interest, has not been paid to the Advancing Party prior to the expiration of sixty days from the date of the advance, the Advancing Party may either, (1) institute such legal actions or take such other steps as it may deem advisable in order to enforce the obligation of the Delinquent Party to repay the amount of the Deficiency, with interest, including without limitation, the institution of action to foreclose the Delinquent Party's interest in the lands in favour of the Advancing Party; or (2) purchase the interest of the Delinquent Party at an amount equal to the greater of: a) 80% of the fair market value of such interest as determined by the accountants of the Co-Tenancy: and, b) the amount advanced by the Delinquent Party to the Co-Tenancy, which shall be satisfied in whole or in part by the assumption of the Proportionate Share of the liabilities in respect of the Lands. The completion of the sale and purchase contemplated shall take place on the date fifteen (15) days after the later of the exercise of the option to purchase the Proportionate Share of the Advancing Party or the determination of the purchase price by the accountants.

Article 4.00 - Profits - Losses - Capital

4.01 The Co-Tenants agree that all profits derived by the Co-Tenants from the lands shall be shared pro rata to their Proportionate Shared and all losses sustained by the Co-Tenants in respect of the lands shall be borne by the Co-Tenants pro rata in accordance with their Proportionate Shares.

4.02 The parties hereto agree to indemnify each other and to save each other harmless from any losses, costs, damages or liabilities which may be incurred by the other Co-Tenant(s) through the gross negligence, recklessness, dishonesty or default of any Co-Tenant herein (the "Neglecting Co-Tenant"). Until repayment to the Co-Tenants of any loss so incurred, the Neglecting Co-tenant shall be deemed to be a Delinquent Party and the provisions of Section 4.07 shall apply as if the amount of the loss were a default pursuant to Section 3.03 hereof and shall be responsible to indemnify and save harmless the other Co-Tenants by reason of its negligence, gross negligence, recklessness, dishonesty or default.

4.03 Each year during the currency of this agreement on December 31st (or at more frequent intervals if the Executive Committee so determine), a statement shall be prepared by the regularly employed accountants of the Co-Tenants, which shall show all receipts and expenditures (ordinary and capital) for the lands during the period then ended.

4.04 As determined by the accountants, if it appears:

(a) That any Co-Tenant has withdrawn on amount which is in excess of its entitlement for such period, or that any Co-Tenant has withdrawn an amount which leaves insufficient funds on hand to pay all expenses of the lands, such excess shall be repaid by such party forthwith;

(b) That if during any period, a cash loss should be sustained by the Co-Tenants, such loss shall be made good by contributions from the Co-Tenants which contributions shall be made pro rata according to their Proportionate Shares.

4.05 Cash surpluses and cash losses of the Co-Tenants shall be determined by the regularly employed accountants of the Co-Tenants in accordance with generally accepted accounting principles and practices consistently applied. For clarification, in determining cash surpluses and cash losses, there shall be no deductions for depreciation of any of the buildings or improvements constructed upon the lands and owned by the Co-Tenants, or depreciation of their property, whether real, personal or intangible

property, and no reserve shall be provided for same. Each of the Co-Tenants may separately with respect to its interest in the lands take such deductions for capital cost allowance of the lands and other property, whether real or personal, tangible or intangible, as it may in its sole discretion deem advisable or by law be allowed so to do. 4.06 Subject to Section 4.07 hereof, any net excess insurance proceeds received by the Co-Tenants (over the amount thereof necessary to repair the damage compensated for or payable to any mortgagee having a mortgage on the lands or any part thereof) and any net proceeds received by the Co-Tenants jointly from any and all mortgage financing and refinancing as provided for in Article 3.00, partial or total expropriations of the lands, (over the amount thereof needed for restoration and less any amount thereof paid to any mortgagee or lessee having a mortgage or lease on all or part of the lands), sales of easements, rights-of-way or similar interests; sales of any interest in or to all or part of the lands by the Co-Tenants, and any other similar items, receipts and proceeds which, in accordance with generally accepted accounting principles, are attributable to surplus, to the extent thereof available for distribution shall be distributed to the Co-Tenants in their Proportionate Shares pursuant to the provisions of Section 4.07 hereof.

4.07 Cash, surpluses derived from the lands shall be distributed periodically when approved by all the Co-Tenants, in the priority and manner on follows: (a) First, in payment to each of the Co-Tenants pro rata in accordance with their Proportionate Shares of any amounts advanced by them pursuant to this agreement;

(b) Secondly, in payment to the Co-Tenants pro rata in accordance with their Proportionate Shares.

Provided however, if advances are made by any Co-Tenant on behalf of any Delinquent Party as set forth in Section 3.03 hereof, no distribution of surplus shall be made to such Delinquent Party but instead all monies which would otherwise have been paid to such party hereunder had it not been in default under Section 3.03, shall be paid or assigned to the Advancing Party in repayment of the sum so advanced by it on behalf of the Delinquent Party until the Advancing Party shall have been reimbursed in full for such sums together with all accrued interest to the date of such payment.

Article 5.00 - Management and Operation of the Lands

5.01 (a) To facilitate the administration and operation of the lands and the handling of all matters and questions in connection therewith, an Executive Committee shall be established consisting of four (4) members elected by the Co-Tenants from time to time.

The initial members of the Executive Committee shall be:

Leo Tofoli Ray Dodge Mike Simanic Tony Zapparoli

(b) No Meeting of the Executive Committee shall be held unless and until notice of the same has been sent by pro-paid registered mail, or delivered personally, to the members of the Executive Committee, at least seven (7) days (excluding Saturdays, Sundays and statutory Holidays) before the date set for the holding of such meeting, provided that the time for such notice may be abridged or waived in writing by any of the said members; provided that in the event that normal mail service is disrupted by reason of strikes, walk-outs or other irregularities, then so long as such disruption exists, any notice required to be given hereunder shall be delivered personally to the members of the Executive Committee or otherwise shall be deemed to be ineffective for the purposes hereof.

(c) A meeting of the Executive Committee may be called by any one (1) member thereof at any time. Such meetings may be held by conference telephone;

(d) A quorum for a meeting of the Executive Committee shall consist of three (3) members present.

(e) Any resolution to be approved by the Executive Committee shall require a majority of the votes cast at any meeting of the Executive Committee or by the Consent in writing of a majority of same;

(f) All cheques and documents of the Co-Tenancy shall be signed by any two Co-Tenants,

(g) The Rank of the Co-Tenancy shall be such bank or branch as may be decided upon by the Executive Committee, and all monies received from time to time on account of the lands shall be paid immediately into the bank account or accounts maintained by the co-tenancy in the some drafts, cheques, bills or cash in which they are received and all disbursements on account of the co-tenancy shall be by cheque drawn on such bank;

5.02 (a) Save as to the sale of all or any part of the Lands, capital expenditures, and mortgaging the Lands, all decisions, determinations, consents or approvals of the Co-tenants in respect of the Lands shall be made by the Executive Committee and any decision, determination, consent or approval so made or given shall be fully binding upon the Co-tenants for all purposes.

(b) No Meeting of the Co-Tenants shall be held unless and until notice of the same has been sent by pre-paid registered mail, or delivered personally, to the members, at least ten (10) days (excluding Saturdays, Sundays and statutory Holidays) before the date set for the holding of such meeting, provided that the time for such notice may be abridged or waived in writing by any of the said members; provided that in the event that normal mail service is disrupted by reason of strikes, walk-outs or other irregularities, then so long as such disruption exists, any notice required to be given hereunder shall be delivered personally to the members or otherwise shall be deemed to be ineffective for the purposes hereof.

(c) A meeting of the Co-Tenants may be called by Co-Tenants representing at least twenty-five percent (25%) of the Proportionate Shares thereof at any time.

(d) A quorum shall consist of at least three (3) Co-Tenants;

(e) Any resolution to be approved by the Co-Tenants in accordance with this agreement, shall require a majority of the votes cast at any meeting of the Co-Tenants, provided however, that:

(i) in the event that an event of default shall have occurred and be continuing with respect to a Co-Tenant pursuant to Article 3:00; or

(ii) in the event that a Co-Tenant's representative fails to attend on two (2) consecutive occasions at a meeting of the Co-Tenants duly called in accordance with Section 5.02 hereof and his authority has not been delegated as hereinbefore set forth to another nominee, in which event a further notice shall be given to the Co-Tenant whose representative failed to attend the meeting, again calling for a meeting four (4) days (excluding Saturdays, Sundays and statutory holidays) after delivery of the second notice and if such representative or the representative appointed by the said Co-Tenant fails to attend or his authority has not been delegated as aforesaid;

then the Ownership interest of such Co-Tenant shall be excluded in determining the required percentages for Sections 5.02(d) and 5.02(e) preceding and the ownership interests of each of the other Co-Tenants shall, for such purposes, be deemed to be the ratio that its interest in the lands as otherwise determined bears to the aggregate ownership interests of all Co-Tenants (as otherwise determined) other than the defaulting Co-Tenant; provided that notwithstanding the foregoing, in the event that any Co-Tenant has, directly or indirectly, any interest in any contract or transaction (other than its interest in the lands) to which the co-tenancy is to be a party, other than a contract or transaction relating to the sale of the lands or any part thereof, the member representing such Co-Tenant shall declare such interest at the meeting of the Co-Tenants and shall not vote and shall not in respect of such contract or transaction be counted in the quorum.

(f) In the event that a Proportionate Share shall be held by more than one person or jointly or in partnership with any other person, any vote in respect of that Proportionate Share may only be exercised by proxy by all of the owners of such Proportionate Share, or upon all owners of such Proportionate Share being present and voting unanimously for any such vote.

5.03 No Co-Tenant shall, without the concurrence of the Executive Committee:

(i) compromise or release any debt due to the co-tenancy, except upon receipt of full payment;

(ii) purchase or lease, or contract to purchase or lease, additional property on behalf of the Co-Tenants;

(iii) subject to the provisions of Article 6.00 hereof, sell, mortgage or otherwise encumber its interest in the Lands or any part thereof;

(iv) do any act which is detrimental to the best interest of the Co-tenants or which would make it difficult or impossible to carry out the purposes of the Co-Tenancy.

5.04 Each Co-Tenant shall have the absolute right to engage in other businesses and other ventures for its own account including, without limitation, the ownership, improvement and operation of real estate. No Co-Tenant shall be required to devote any particular amount of time or attention to the lands, save as the parties may otherwise agree, but each Co-Tenant shall devote such time and attention to the lands and shall have such duties in respect of the lands as shall be unanimously agreed upon. No Co-Tenant by reason of this agreement shall have any interest or liability in any other property owned by the other Co-Tenants or in any other business venture engaged in by the other Co-Tenants.

Article 6.00 - Restriction on Sale and Mortgage of the Undivided Interests of the Co-tenants

6.01 Except as hereinafter set forth in this Article 6.00 or as elsewhere explicitly set forth in this agreement, no Co-Tenant herein may either directly or indirectly, sell, assign, transfer, mortgage, pledge or otherwise encumber its interest in the lands or any part thereof or interest therein or in any other property of the Co-Tenants used in conjunction with the lands,

6.02 The Co-Tenants agree that none of them shall be entitled to mortgage, pledge or otherwise encumber their beneficial interest in the Lands or in the project until such time as the project is completed and each has taken title to his share of the units in the project.

6.03 If any of the Co-Tenants (the "Selling Co-Tenant") receives an offer to purchase its entire interest in the lands (the "Offer"), which Offer to purchase shall have been received from a third Party dealing at arm's length with the Selling Co-Tenant during the term of this agreement, the following provisions shall apply:

(a) The Selling Co-Tenant shall, before accepting the Offer, give to each of the other Co-Tenants (hereinafter referred to as the "Other Co-Tenants") a certified copy thereof and each of the Other Co-Tenants shall be allowed fifteen (15) clear days from the receipt by it of the said certified copy in which to give an offer to purchase the Selling Co-Tenant's interest in the lands at the same price and upon the same terms as the Offer (the "Counter Offer"). If the Other Co-Tenant or any of them submits to the Selling Co-Tenant a Counter Offer, then the Selling Co-Tenant shall accept the Counter Offer and convey its interest in the lands to the Other Co-Tenant(s) in accordance with the Counter Offer. Provided that if more than one of the Other Co-Tenants shall submit to the Selling Co-Tenant a Counter Offer then the Selling Co-Tenant shall accept their Counter Offers and convey its interest in the lands to such Co-Tenants in the ratio of their Proportionate Shares or in such other proportions as such Other Co-Tenants shall agree upon. If the Other Co-Tenants do not submit a Counter Offer as aforesaid, then the Selling Co-Tenant shall be free to accept the Offer and proceed to convey its interest in the lands to the said third party, provided that such sale is completed within the time period stated in the Offer or within sixty (60) days from the last day upon which the last Other Co-Tenant was entitled to submit a Counter Offer as aforesaid, whichever is the first to occur.

(b) If the Selling Co-Tenant shall not complete the sale to the third party within the time limit provided for in this Section 6.03, and if the Selling Co-Tenant again wishes to accept the Offer, or if the selling Co-Tenant shall receive a different offer from the third party or an offer from a different third party which he wishes to accept then the Selling Co-Tenant shall again submit the Offer to the Other Co-Tenants and the provisions of this Section 6.03 shall again apply mutatis mutandis and so on until one of the Other Co-Tenants submits a Counter Offer or the Selling Co-Tenant sells its interest to the third party, or the Offer of the third party is withdrawn, or the Selling Co-tenant gives a final refusal to the Offer.

6.04 Notwithstanding anything to the contrary in this agreement contained, no sale of the interest in the lands of any one or more of the Co-Tenants shall be effective unless and until the purchaser(s) of such interest shall have executed and delivered in favour of the Other Co-Tenants, an acknowledgment whereby the purchaser(s) agree to be bound by the terms of this agreement to the same extent and in the same manner as if it were an original party thereto. Notwithstanding anything herein to the contrary, no Co-Tenant shall be permitted to sell or otherwise transfer less than its entire interest in the co-tenancy or its entire interest in the lands.

6.05 (a) If, during, the term of this agreement, there shall be a disagreement between the Co-Tenants, any of the Co-Tenants may offer to sell to the others its entire interest in the lands, at a price and upon such terms and conditions as may be set by the said Co-Tenant (hereinafter called the "Dissatisfied Co-Tenant"). Upon receipt by the other Co-Tenants (hereinafter called the "Satisfied Co-Tenants") of the said Offer to sell, the Satisfied Co-Tenants may each within thirty (30) days after the receipt of the said Offer (the "Acceptance Period") accept the Offer to sell of the dissatisfied Co-Tenant. If none of the Satisfied Co-Tenants shall accept the Offer to sell of the Dissatisfied Co-Tenant, then the Satisfied Co-Tenants shall be obligated to sell their interests in the lands to the Dissatisfied Co-Tenant at the same price adjusted with respect to the interests held by each the Satisfied Co-Tenants, and upon the same terms and conditions as were contained in the Offer to sell received from the Dissatisfied Co-Tenant, and the Dissatisfied Co-Tenant shall be obligated to purchase such interests on the aforesaid terms, and the sale shall be completed in accordance with the provisions contained in the said Offer to sell. If any of the Satisfied Co-Tenants shall accept the Offer to sell of the Dissatisfied Co-Tenant, then the Dissatisfied Co-Tenant shall convey the whole of its interest in the lands to the Satisfied Co-Tenant. If more than one of the Satisfied Co-Tenants shall accept the Offer to sell of the Dissatisfied Co-Tenant then (except as hereinafter Provided for in this Section 6.05) the Satisfied Co-Tenants shall purchase the interest of the Dissatisfied Co-Tenant in the ratio of their Proportionate Shares unless they shall otherwise agree in writing.

(b) The closing of a sale pursuant to the foregoing provisions shall take place at a mutually convenient location on the island of St. Kitts/Nevis --- within thirty (30) days following the expiration of the Acceptance Period. If on the date of closing the Co-Tenant(s) who shall become the seller under the said Offer shall neglect or refuse to complete the transaction for the purchase of the other Co-Tenant's(s) interest in the lands, the lawyer of such Co-Tenant's interest shall have the right upon such default (without prejudice to ally other right it may have) upon payment by it of the amount payable on closing to the credit of the seller of such interest in any chartered bank on the island of St. Kitts/Nevis --- for and on behalf of and in the name of such seller, to complete the transaction and such seller does irrevocably constitute and appoint the buyer of such interest the true and lawful attorney of such seller to complete the said transaction and execute any and every document necessary in that behalf.

(c) At the closing of the purchase and sale, the Selling Co-Tenant(s) shall convey and assign to the purchasing party its interest in the lands free and clear of all claims, encumbrances and liens, except such mortgages, or other liens as may then affect one hundred per cent (100%) of the undivided interest in the lands as opposed to mortgages and liens affecting only the beneficial ownership of the Selling Co-Tenants, by a deed in customary form together with such evidence of due authorization, execution and delivery, and of the absence of any liens or competing claims as the purchasing party shall reasonably require. Subject to receipt of the foregoing and to all other terms hereof being complied with, the purchasing party shall make payment of the requisite purchase price by certified cheque or money order payable at par in St. Kitts to or to the order of the Selling Co-Tenant(s), or in such other manner as the Selling Co-Tenant(s) may in writing direct, and execute and deliver to the Selling Co-Tenant(s) all security documents, if any, in connection with the said purchase.

(d) Unless the Co-Tenants shall otherwise agree in writing, any projects and buildings then under construction shall be proceeded with until the closing of the transaction.

6.06 (a) In the event that a bona fide offer to purchase the lands or any part thereof shall be received from a person, firm or corporation dealing at arm's length with each of the Co-Tenants (herein called the "Original Offer"), a meeting of Co-Tenants shall be convened as soon as possible but in any event, not more than four (4) business days after receipt of the Original Offer. At such meeting, the Original Offer shall be tabled and discussed. In the event that the Co-Tenants shall unanimously decide to accept or reject such offer, then all acts and things shall be done and documents executed in order to proceed with such acceptance and the ensuing sale or with such rejection.

(b) In the event that the Co-Tenants representing at least sixty-five per cent (65%) of the ownership interest in the lands as set out in Section 2.05 hereof shall desire to accept such Original Offer, then the Co-Tenants shall each do all acts and things necessary and sign such documents in order to cause such Original Offer to be accepted unless any of the Co-Tenants (hereinafter called the "Substituted Purchasers") shall within four (4) business days after the close of such meeting submit to the Co-Tenants a similar offer (herein called a "Substituted Offer", and if more than one, "Substituted Offers"), to purchase the lands being the subject matter of the said Original Offer on the same terms and conditions as those contained in the Original Offer. In the event that one or more Substituted Offers shall be submitted, the Co-Tenants shall each do all Acts and things necessary and sign such documents in order to sell the lands being the subject matter of the said Original Offer and Substituted Offer or Substituted Offers, as the case may be, upon and subject to the terms and conditions of the Substituted offer or Substituted Offers, as the case may be, to the Substituted Purchasers in the proportions in which the respective ownership interests of the Substituted Purchasers in the lands as set out in Section 2.05 hereof shall bear to one another or as they shall otherwise agree upon and direct to the Co-Tenants in writing. (c) On the acceptance of either the Original Offer or any Substituted Offer or Substituted Offers, the Co-Tenants covenant and agree to do all acts and things necessary and sign any and all documents and give all assurances in order to ensure the completion of the purchase and sale contemplated thereby in accordance with the foregoing.

(d) In the event that only a part of the lands is disposed of the accordance with the provisions of this Section 6.06, then the provisions of this Section 6.06 shall continue to apply in respect of the balance of the lands remaining, or any part thereof, mutatis mutandis, and so on from time to time.

6.07 If any Co-Tenant becomes a buyer of another Co-Tenant's interest in the lands under and pursuant to the provisions of this Article 6.00, any claim or claims against such buyer relating to the lands being a liquidated demand acknowledged in writing shall be satisfied and discharged before or upon completion of the purchase of the said interest in the lands. For the purposes of this agreement, a liquidated demand shall include any amount verified by the accountants responsible for preparing statements relating to the winds, whether secured or unsecured and whether due at the time or payable sometime thereafter.

6.08 The right of any Co-Tenant to invoke the provisions of Sections 6.03, 6.05 or 6.06 hereof may not be exercised if the provisions of any such Sections have already been invoked by any of the other Co-Tenants.

Article 7.00 The Trustee

7.01 For ease of conveyancing, the parties acknowledge that title to the Lands will Continue to be registered in the name of the Trustee in the manner hereinabove referred. The Trustee acknowledges that it has held and will continue to hold the Lands and any and all other Assets of the Co-Tenancy coming into its possession, together with any funds received by it, as Trustee in accordance with the terms of this agreement.

7.02 The parties hereto hereby irrevocably authorize the Trustee to execute all deeds and other documents herein required to be executed by or on behalf of the Co-Tenancy as may from time to time be necessary or advisable and all such documents so executed shall be binding upon the parties hereto and the Co-Tenancy to the same extent and effect as if executed by them. All parties hereto acknowledge and agree that failure by the nominee signing officer of any Co-Tenant to execute whatever documents are required to be executed by the Trustee shall constitute default by the party whose nominee has failed to execute as aforesaid.

7.03 The Trustee shall hold title to the Lands as bare trustee for and on behalf of the Co-Tenancy as aforesaid, and upon completion of the project, shall convey the Lands with all necessary approvals and/or consents as directed by the Co-Tenants.

Article 8.00 - Arbitration

8.01 At any time while this Agreement and any of its provisions are in force, should any dispute, difference of opinion or question arise among the parties hereto touching on this Agreement or any part thereof, which cannot be resolved by the provisions hereof or by the agreement of the parties, then such dispute, difference of opinion or question shall be arrived at and settled by arbitration as herein provided.

Each party shall appoint one arbitrator within seven (7) days of notice by either party to the other requesting such appointment. The two arbitrators so appointed shall, within seven (7) days of the appointment of the last arbitrator so appointed, choose a third arbitrator.

The arbitrators shall proceed to arbitrate the dispute forthwith and shall within sixty (60) days render their decision to the Co-Tenants.

The cost of arbitration shall be borne by the parties equally.

Article 9.00 - Bankruptcy or Other Involuntary Transfer or Breach

9.01 In the event of the bankruptcy of any Co-Tenant or of the transfer, voluntary or involuntary, by any Co-Tenant of his interest in breach of this agreement or to any creditor in total or partial satisfaction of any debt, obligation, judgment or other liability or in the event that any Co-Tenant is in substantial breach of this agreement (other than Section 3.03 hereof) which breach continues ten (10) days after written notice of such breach is given to such Co-Tenant (such defaulting Co-Tenant being hereinafter called the "Vendor"), the other Co-Tenants (being hereinafter called the "Purchasers") shall have the option to purchase the interest in the lands of the Vendor by giving written notice of their election to purchase the same within ninety (90) days after such bankruptcy shall have been adjudicated or such transfer shall have occurred or such breach shall have occurred.

9.02 In the event that there shall be more than one Purchaser that elects to purchase the interest of the Vendor, the purchase price shall be paid by the Purchasers in the proportions which the Proportionate Shares of each of Purchasers electing to purchase the interest of the Vendor as set out in Section 2.05 hereof bears to the total Proportionate Shares of Purchasers electing to purchase the interest of the Vendor.

9.03 If the Purchasers shall elect to purchase the interest of the Vendor, the purchase price shall be an amount equal to the greater of: a) eighty per cent (80%) of the fair market value for such interest as set by the accountants of the Co-Tenancy; and, b) the amount advanced by the Vendor to the Co-Tenancy and shall be satisfied in whole or in part by the assumption of the Proportionate Share of the liabilities in respect of the Lands.

9.04 The completion of the sale and purchase contemplated herein shall take place on the date fifteen (15) days after the later of the exercise of the option to purchase the interest in question by the Purchasers or the determination of the purchase price by the accountants. At such time, the Vendor, shall, against receipt of the aforesaid consideration, execute and deliver whatever instruments of conveyance, assignment and release that shall be necessary or desirable to carry out such sale.

Article 10.00 - General Provisions

10.01 The parties hereto shall and will sign such further and other papers, cause such meetings to be held, resolutions passed, by-laws enacted, exercise their votes and influence and do and perform and cause to be done and performed such further and other acts and things as may be necessary or desirable to give full effect and force to this agreement and every part hereof.

10.02 Time shall be of the essence of this agreement and every part thereof.

10.03 This agreement expresses the entire agreement among the parties hereto with respect to all matters herein and its execution has not been induced by, nor do any of the parties rely upon or regard as material any representations or warranties whatsoever not incorporated herein and made part hereof and shall not be amended, altered or qualified except by a memorandum in writing signed by all parties hereto and any amendments, alterations or qualifications hereof shall be null and void and shall not be binding upon any party who has not given its consent as aforesaid.

10.04 All notices, demands, requests, acceptances and other communications required or permitted to be given hereunder shall be sufficiently given by one party to the other in writing by registered mail, postage prepaid, or personal service, addressed to such other party or delivered to such other party at the address shown in the records of the Trustee, or at such addresses as may be given by any of them to the other in writing from time to time, and such notices, demands, requests, acceptances and other communications shall be deemed to have been received when delivered, or if mailed, forty-eight (48) hours after mailing (excluding Saturdays, Sundays and legal holidays); provided that if regular mail service shall be interrupted by strikes or other irregularities, then such notice, demand, request, acceptance and other communication shall be deemed to have been received on the fourth business day following the resumption of normal mail service.

10.05 The solicitors for the Co-Tenancy shall be determined by the Executive Committee.

10.06 The accountants for the Co-Tenancy shall be such accountants as may be determined by the Executive Committee.

10.07 Subject to the restrictions on assignment herein contained, this agreement shall enure to the benefit of and be binding upon the parties hereto and their respective successors and assigns. 10.08 All words and personal pronouns relating thereto shall be read

and construed as the number and gender of the party or parties referred to in each case require, and the verb agreeing therewith shall be construed as agreeing with the required word or pronoun. Where the context so requires, the singular of any word shall import the plural and the plural shall import the singular.

10.09 No Co-Tenant shall have the right to partition nor shall any Co-Tenant make any application to or petition any court or authority having jurisdiction over the matter nor commence or prosecute any action for partition and sale; and upon any breach of the provisions of this section by a Co-Tenant, the other Co-Tenant shall, in addition to all rights and remedies in law and in equity, be entitled to a decree or order restraining and enjoining such application, petition, action or proceeding, and the offending Co-Tenant shall not plead in defence thereto that there would be an adequate remedy at law, it being recognized and agreed that the injury and damage resulting from such breach would be impossible to measure monetarily.

10.10 If any provisions of this agreement or the application thereof to my circumstances shall be held to be invalid or unenforceable, then the remaining provisions of this agreement or the application thereof to other circumstances shall not be affected thereby and shall be valid and enforceable to the fullest extent permitted by law.

10.11 Whenever in this Agreement any Co-Tenant has covenanted and agreed to execute any instrument or document or do any act to give effect to the provisions of this Agreement, such Co-Tenant does hereby irrevocably nominate, constitute and appoint any one of the other Co-Tenants as its true and lawful attorney for it and in its name and on its behalf to execute and do all such deeds, acts, assurances, conveyances, transfers, mortgages, charges, covenants, agreements, instruments, documents and things as shall be required as the said attorney shall see fit for all or any of the purposes aforesaid, and such Co-Tenant hereby covenants and agrees for its respective successor and assigns to allow, ratify and confirm whatsoever such attorney shall do or cause to be done by virtue of these presents.

IN WITNESS WHEREOF the parties hereto have duly executed these presents, the 28 day of July, 1989.

Witness: Royal St. Kitts Casino Ltd.

per: Name: Title:

I have authority to bind the corporation.

Leo Tofoli

Ray Dodge

Mike Simonic

Tony Zapparoli

CBR# 187

Metropolitan Toronto Condominium Corporation No. 1006, Metropolitan Toronto Condominium Corporation No. 1070, and Metropolitan Toronto Condominium No. 1088, plaintiffs, and Hollywood Plaza Developments Inc., Camrost Development Corporation, David Feldman, Martin Goldfarb, Marco Muzzo, The Toronto-Dominion Bank, The Mortgage Insurance Company of Canada and Her Majesty the Queen in Right of Ontario as represented by the Minister of Finance, defendants

Court File No. 95-CU-90972 Ontario Court of Justice (General Division) Motions Court Brockenshire J. Heard: November 2, 1995. Oral judgment: November 3, 1995.

Counsel: A.M. Habas, counsel for the plaintiffs. C.P. Stevenson, counsel for the defendant Hollywood plaza Developments Inc. M.R. Kaplan, counsel for The Toronto-Dominion Bank.

[para1] BROCKENSHIRE J. (orally):-- I have before me two motions to lift Certificates of Litigation. A motion to in some way deal with or remove a lien under the Condominium Act. A motion to strike out or not permit the use of some affidavit evidence in relation to these motions and a motion to permit an amendment to a Statement of Claim.

[para2] Happily, the motion concerning striking or not permitting the use of affidavits was abandoned during the course of argument and also during the course of argument consent was given to the proposed amendments to the Statement of Claim.

[para3] The motion concerning the lien under the Condominium Act relates to a very small amount, some \$348. The quibble is not over the amount, it is over the claim for some \$3,000 in costs. The ruling sought from me is what would be a reasonable amount of costs under the section. The proposal then being that the defendants would pay the claim perhaps under protest together with the reasonable costs to remove the lien.

[para4] In my view \$3,000 is a completely unreasonable amount to put forward. I am not given any guidance from decided cases by in my view the most you could regard as reasonable would be what you would find under the Construction Lien Act, namely 25 percent of the claim. My ruling on that part is that on payment of the amount of the lien plus 25 percent on account of costs a release of the lien be given.

[para5] The two motions regarding the Certificates of Litigation are brought by two of the defendants, a developer and the bank. The motion by the bank appeared in argument to have been brought with an abundance of caution on the basis that it might be possible for the court to find on the basis of equities and so on that the Certificate not be lifted in relation to the developer. But nevertheless it should be lifted in relation to the bank.

[para6] In view of my finding on the principal problem I do not think it is necessary to go further into the alleged separate position of the bank other than to note that the allegation as against the bank that in some way it would be taken to be deemed to have knowledge of inner workings between purchasers and the developers based only on the production of documents called for under the Loan Agreement seems to me to be horrendously tenuous.

[para7] On the main motion before me, the factual situation is that one developer set out to do a four-part development, putting up a high rise building, then a townhouse type development, then another high rise and also a commercial development, all on I am told what originally was one large parcel of land.

[para8] The residential developments are bit different from the usual in that the residential premises were to be described as units and parking places were also being described as units. It apparently had been open to purchasers who bought a residential unit to buy or not buy a parking unit.

[para9] The documentation relating to the two high rises and the townhouse development which in the end became the three separate condominium corporations was that parking provisions were going to be somewhat flexible with provision for instance for a purchaser of a unit in one of the buildings to acquire parking in another building.

[para10] While provision for parking for residents seems to be quite well taken care of, there was little thought or provision made for parking for visitors. The disclosure statements indicate simply that there will be approximately 7 outdoor parking spaces which will be part of the commercial component. The developer arranged to use these parking spaces as part of a sales program after which the Phase I corporation will be granted a 99 year lease subject to committee of adjustment consent for the use at a nominal yearly rent.

[para11] Although it does not specifically say so, it seems the 7 outdoor parking spaces in the commercial component of the development were intended to take care of eventual visitor parking needs. Despite what was testified to in an affidavit of Mr. Kilgore as a typical amenity, a provision of visitor parking, it seems that there is no evidence available that there was any representations being made by the developers or their sales people as to further and other visitor parking. Nor do I have any evidence before me of any specific reliance by any of the purchasers past or present on anything indicating there would be visitor parking other than what has been provided by the developers.

[para12] Probably because of the way the units and the parking units were separated and the way the development went ahead and perhaps also because the developers had retained for their own temporary use 10 parking units, there seems to have been little concern about parking arrangements here until some time after at least the first of the high rises was completed. It seems that at some time, I understand perhaps in 1994, some complaint was made to the municipality and that the municipality apparently made clear that its zoning requirements call for provision of visitor parking and that was at least temporarily satisfied by the developer marking some unused parking spaces with a vee of tape. [para13] This temporary arrangement eventually ran out. I understand there were further complaints or concerns involving the municipality and that has led the developer to enter into a further agreement for parking space in the adjacent commercial area. The adjacent commercial area has now been sold off by the developer. I do not know whether to a completely independent, or to some way related corporation but in any event there is a new corporation which has entered into an agreement calling for provision of some parking spaces in the commercial area for an apparently unlimited time but subject to this being treated as a temporary arrangement until further or better arrangements are made or until there are changes permitting a reduction in parking requirements with further upset provisions in favour of the commercial condominium corporation permitting it to cancel if it finds it has pressure relating to parking or other difficulties.

[para14] The three condominium corporations are admittedly before the court on the basis that there is no permanent solid guaranteed provision for visitor parking. The remedy taken has been to commence action against the developer and a number of other people claiming among other things a property interest in parking spaces within the three residential condominiums.

[para15] The certificate of action has been registered against I am told 22 of the remaining 25 unsold parking spaces within the three residential condominiums. Three were simply overlooked.

[para16] The moving parties come before the court with a two-branch argument. The first being that the plaintiffs simply have no claim against title to the parking areas within the three condominiums and second that the equities of the situation call for a removal of the certificate because perhaps most pressing there are six outstanding purchase agreements for residential units. There are only three freed parking spaces and a certificate of this kind is going to naturally cause some concern to all six purchasers.

[para17] Further as the bank points out, its Loan Agreement says simply any encumbrance is default and the bank can immediately demand payment. If that happened both the developer and the condominium corporations would presumably have difficulties. [para18] I am told by the developer's counsel that there is an interesting current dichotomy in the position of the municipality in that the municipal zoning requirements apparently call for visitor parking but the municipal planning calls for a reduction in vehicular traffic in the area to be supported indirectly by doing things like reducing parking spaces.

[para19] The developer has hopes that either the general bylaw will change or a minor variance will be permitted in relation to this development cutting down the municipal parking requirements.

[para20] Whether or not that might happen in the future is of course a problem for them. However, the possibility of it reduces in my view the argument of the condominium corporations that because of the bylaw situation it could be reasonably inferred by all purchasers, even though nothing was said, that substantial visitor parking be provided.

[para21] I have been referred to a great number of cases by both sides in support of the total claim by the condominium corporations. I have been referred to several of the superintendent type cases where a complaint was raised on a developer holding out there would be a superintendent suite and then later trying to sell it.

[para22] In those cases it has been made clear, perhaps most tellingly in this jurisdiction by the judgment of Zuber J. in *Frontenac Condominium Corp. No. 1 v. Macciocchi and Sons Ltd.* (1975), 11 O.R. (2d) 649 (Ont. C.A.) that before registration of all of the formalities and before all of the documentation and despite definitions which might be contained in legal documents, a purchaser is entitled to look to what he is being told, supported by what seems reasonable in the circumstances.

[para23] However, as was made quite clear by Flinn J. in *Middlesex Condominium Corp. No. 87 v. 600 Talbot Street London Ltd.* unreported other than [1993] there has to be two sides - a representation and a reliance, and to make out a sort of equitable title claim there has to be before the court evidence that there was representation at least to some of the unit purchasers and there has to be some evidence that at least some of them relied on. Here the only evidence of representation I have is what was said in the Disclosure Agreement about 7 parking spaces over in the commercial area and I have nothing indicating that any of the buyers put any reliance even in that.

[para24] On the title side I think the most that can be said for the plaintiffs is there is some documentary indication that there would be some parking areas provided in the commercial part of this development. There was for a time some admittedly temporary parking provision made within the units marked off with tape by a vee clearly intended as temporary. I do not see how the plaintiffs can transfer the reference to some parking space, in effect across the way, into an equitable title claim to units within the Condominium Corporations.

[para25] On the equitable side of whether even if there is some involvement of title, nevertheless the Certificate should be lifted, reference was made to *572383 Ontario Inc. v. Dhunna* (1987), 24 C.P.C. (2d) 287 which I am told is referred to in every one of these cases, a decision of Master Donkin. In that decision, the learned Master had simply gathered together a number of other decisions and has listed them as propositions. He makes a list of eight of them each supported by court decisions except for number 4 where there is an alternative claim for damages.

[para26] Argument has been advanced that the land here is unique because there are only some 25 parking places left. If these are not saved then the equitable right of the plaintiffs may be gone forever. In my view the plaintiffs have obvious difficulties in relation to those particular 25 parking spaces and I have no indication of any difficulty in securing alternate parking space in the commercial part of the development. In fact the real concern seems to be not title but the question of whose going to pay the rent.

[para27] The intent of the parties in acquiring the land is something I have already dealt with. Whether there is an alternative claim for damages certainly one here is being advanced the argument of the developer is that this should really be a damage claim the claim seeking money in some way. Ease or difficulty in calculating damages there may some great difficulties in doing a calculation of future value and future rentals. It may become very simply indeed but there is nothing to indicate that it is impossible or even out of the realm of ordinary calculation and estimate by a court or their damages to be satisfactory. Again it appears the big difficulty is the rent for parking spaces in the commercial area and the terms of a rental agreement.

[para28] The presence or absence of another willing purchaser in this case becomes important because there are third party purchasers who are being prevented from completing their purchases because certificates are outstanding against parking spaces they would like to acquire.

[para29] The principal thing in my view is a question of harm to the defendants if the certificate is allowed to remain or to the plaintiff if it is removed. In my view the harm to the defendant developer, perhaps to the bank, certainly to the third parties who are in the process of buying their homes, far outweighs any possible harm to the Condominium Corporations who would continue with their claims for damages payment or some alternate arrangement covering party. I am not unmindful that the Condominium Corporations presently have enlisted a most powerful ally in the municipality whose making orders likely has a more immediate effect on the position of the developer than the order this court could make. [para30] It is my view that the Certificate of Litigation should be removed both because of the very tenuous alleged title claim and because the equities of the situation clearly call for its removal.

BROCKENSHIRE J.

CBR# 152

Herb Kratz, plaintiff (respondent), and Parkside Hill Limited, defendant (appellant)

No. C13503 Ontario Court of Appeal Toronto, Ontario Osborne, Weiler and Austin JJ.A. Heard: September 12, 1995. Judgment: October 5, 1995.

Counsel: Ronald B. Moldaver, Q.C., counsel for the appellant. Francine C. Sherkin, counsel for the respondent.

The judgment of the Court was delivered by

[para1] AUSTIN J.A.:-- This is an appeal by the defendant from the decision of J. Macdonald J. dated October 1, 1992 granting summary judgment for the plaintiff and setting aside an agreement whereby the plaintiff (Kratz) purchased a condominium from Parkside Hill Limited (Parkside).

Facts

[para2] The agreement was made in the fall of 1988. The condominium was to be built in the Borough of East York and the price was \$169,200. The agreement provided for an occupancy or possession closing and for a title closing. The former was to be on May 1, 1990, or sooner or later depending upon substantial completion. The occupancy closing actually took place on February 25, 1991 and by a side agreement between Kratz and Parkside, possession was taken by a tenant.

[para3] On October 23, 1991, Parkside wrote to Kratz to the effect that it expected to register the condominium documents around November 8th-11th, 1991 with the title closing on December 11, 1991. Kratz's solicitors replied on November 7, 1991 to the effect that the agreement provided for an occupancy closing date of May 1, 1990 and for extensions of the time for title closing aggregating eighteen months which period had expired on November 1, 1991, so that Kratz was entitled to abort the transaction. Parkside's solicitors responded by letter dated November 13, 1991 stating that their client had eighteen months from the actual closing date of February 25, 1991 within which to convey title, a period which had not yet elapsed.

[para4] The sale was not closed, Parkside refused to refund Kratz's payments and on January 9, 1992 Kratz commenced this action for those payments and for a declaration that the agreement had been terminated. Parkside defended the action and counterclaimed for a declaration that Kratz had defaulted, that Parkside was entitled to keep his payments and for damages which it might suffer on a re-sale as well as for occupancy fees subsequent to November 1, 1991. The parties each moved for summary judgment, the motions being supported by affidavits and cross-examinations.

[para5] At the outset of his reasons, the motions judge noted that for the purposes of the motions the parties had agreed as follows:

- (a) the agreement of purchase and sale was prepared by the defendant's solicitors in a standard form which was then proffered to the plaintiff;
- (b) the intention of the parties was to be determined entirely from the written agreement;
- (c) what the parties sought in reality was an interpretation of the agreement such as might take place pursuant to Rule 14.05(d);
- (d) the issue of the plaintiff's occupation of the unit on and after November 1, 1991 was to be left aside, pending interpretation of the agreement.

[para6] The relevant parts of the agreement are as follows:

2.

(a) The Purchaser shall occupy the unit on the first day of May, 1990, or such extended or accelerated date pursuant to the terms hereof that the Unit is substantially completed by the Vendor for occupancy by the Purchaser (the "Closing Date");

(b) The transfer of title to the Unit shall be completed on the later of the Closing Date or a date established by the Vendor in accordance with Paragraph 21 (the "Unit Transfer Date").

Paragraphs 1 through 41 and Schedules A,B,C,D,E, and F of this Agreement are an integral part hereof and are contained on subsequent pages. Purchaser acknowledges that he has read all paragraphs and Schedules of this Agreement.

3. The meaning of words and phrases used in this Agreement, its Schedules and Appendices shall have the meaning ascribed to them in the Condominium Act, R.S.O. 1980, c. 84 and any amendments thereto (the "Act") unless otherwise provided for as follows:

(c) "Condominium Documents" shall mean the Declaration, Description and By-laws that the Vendor intends to register which will create the Corporation and other Documents more particularly described in Schedule "F";

(e) "Interim Occupancy Period" shall mean the period of time from the Closing Date to the Unit Transfer Date;

(f) "Occupancy Licence Fee" shall mean the sum of money payable monthly in advance by the Purchaser to the Vendor and calculated in accordance with Paragraph E.3 of Schedule "E" herein;

(g) "Unit Transfer Date" shall mean the day a Transfer of the Unit for registration is delivered to the Purchaser or the Purchaser's Solicitors.

Interest on Deposits

5. The Vendor shall pay to the Purchaser interest at the prescribed rate as provided in the Act on all money received by the Vendor on account of the Purchase Price from the Closing Date until the Unit Transfer Date as may be required under the Act.

Title

7. The Vendor or its Solicitor shall notify the Purchaser or its Solicitor following registration of the Condominium Documents when the Unit and other registers comprising the registered Condominium Plan have been organized so as to permit the Purchaser or his Solicitor to examine Title to the Unit (the "Notification Date"). The Purchaser shall be allowed ten (10) days from the Notification Date to examine the title at his own expense. If within that time ...

Accelerated Closing

13. The transaction of purchase and sale shall be completed on the Closing Date or any extension thereof as may be permitted under this Agreement, at which time vacant possession of the Unit will be given to the Purchaser. The Vendor shall be entitled upon giving at least 45 days written notice to the Purchaser or his Solicitor, to accelerate the Closing Date provided the Unit is substantially complete and fit for occupancy on such earlier date.

Upon registration of the Condominium, the Vendor's Solicitor shall designate a date not less than 21 days nor more than 60 days after registration of the Condominium Documents as the Unit Transfer Date by delivery of written notice of such date to the Purchaser or his Solicitor. Delays

21. In the event substantial completion of the Unit shall be delayed for any reason other than the wilful neglect of the Vendor, the Vendor shall be permitted reasonable extensions of time (not exceeding eighteen (18) months in the aggregate) to substantially complete the Unit and the Closing Date shall be extended accordingly. If the Vendor shall be unable to complete the Unit for occupancy within such reasonable extensions of time, all moneys to the extent provided for in paragraph 21, shall be returned to the Purchaser and this Agreement shall be null and void and the Vendor shall not be liable to the Purchaser for damages. If the Unit is substantially completed for occupancy by the Closing Date or any acceleration/extension thereof this transaction shall be completed on such date notwithstanding that the Vendor has not fully completed the Unit or the common elements and the Vendor shall complete such outstanding work required by this Agreement within a reasonable time after the Closing Date, having regard to weather conditions and the availability of labour and materials. The Unit shall be deemed to be substantially completed when the interior work has been finished to permit occupancy. The Purchaser acknowledges that failure to complete the common elements on or before the Closing Date shall not be deemed to be a failure to complete the Unit.

Occupancy

24. If the Unit is substantially complete and fit for occupancy on the Closing Date, but the condominium documents have not been registered, and the Purchaser has been approved by the Mortgagee (if required) (or in the event the Condominium is registered prior to the Closing Date and sale and mortgage documentation has yet to be prepared or registered), the Purchaser shall, pay to the Vendor the balance of the Purchase Price specified in Paragraph 1(f) without adjustment save for any prorated portion of the Occupancy Licence Fee described and calculated in Schedule "E", and the Purchaser shall occupy the Unit on the Closing Date pursuant to the Occupancy Licence attached hereto as Schedule "E".

Executions

28. The Purchaser agrees to provide to the Vendor's Solicitors on the Closing Date and Unit Transfer Date a clear Execution Certificate with respect to all owners of the Unit and further agrees to provide after closing such further clear Execution Certificates as required by the Vendor to obtain mortgage advances with respect to the Unit.

Risk

29. The Unit shall be and remain at the risk of the Vendor until the Unit Transfer Date. ...

General

37. The headings of this Agreement form no part hereof and are inserted for convenience of reference only.

38. Each of the provisions of this Agreement shall be deemed independent and severable, and the invalidity or unenforceability in whole or in part of any one or more of such provisions shall not be deemed to impair or affect in any manner the validity, enforceability or effect of the remainder of this Agreement, and in such event all the other provisions of this Agreement shall continue in full force and effect as if such invalid provision had never been included herein.

Schedule "E" of Agreement of Purchase and Sale

Terms of Occupancy Licence

E.1 The transfer of title to the Unit shall take place on the Unit Transfer Date upon which date, unless otherwise expressly provided for hereunder, the term of this licence shall be determined.

E.2 The Purchaser shall pay or have paid to the Vendor, on or before the Closing Date, by certified cheque drawn on a Canadian chartered bank the balance of the Purchase Price set forth in paragraph 1(f) of this Agreement without adjustment. Upon payment of such amount and the granting of the Vendor Take Back Mortgage, if applicable, on the Closing Date, the Vendor grants to the Purchaser a licence to occupy the Unit from the Closing Date.

E.3 The Purchaser shall pay to the Vendor an Occupancy Licence Fee calculated as follows:

E.4 The Purchaser shall be allowed to remain in occupancy of the Unit during the Interim Occupancy Period provided the terms of this Licence and the Agreement have been observed and performed by the Purchaser. In the event the Purchaser breaches the terms of occupancy the Vendor in its sole discretion and without limitation of any other rights or remedies provided for in this Agreement or at law may terminate this Agreement and revoke the Occupancy Licence of the purchaser pursuant to paragraph 25 of this Agreement whereupon the Purchaser shall be deemed a trespasser and shall give up vacant possession forthwith. The Vendor may take whatever steps it deems necessary to obtain vacant possession and the Purchaser shall reimburse the Vendor for all costs it may incur.

E.10 The Vendor covenants to proceed with all due diligence and dispatch to register the Condominium Documents. If the vendor for any reason whatsoever is unable to register the Condominium Documents and therefore is unable to deliver a registrable transfer to the Purchaser within eighteen (18) months after the Closing Date, the Purchaser or Vendor shall have the right after such eighteen (18) month period to declare, on giving sixty (60) days written notice to the other, that this Occupancy Licence and the Agreement, notwithstanding any intervening act or negotiations, will be at an end. The Purchaser shall give up vacant possession and pay the Occupancy Licence Fee to such date, after which the agreement and Occupancy Licence shall be terminated and all moneys paid to the Vendor on account of the Purchase Price shall be returned to the Purchaser subject to any repair and redecorating expenses of the Vendor necessary to restore the Unit to its original state of occupancy, reasonable wear and tear excepted. The Purchaser agrees to provide the Vendor with a release of this Agreement in the Vendor's standard form.

E.11 The Vendor and the Purchaser covenant and agree notwithstanding the taking of possession that all terms hereunder continue to be binding upon them and that the Vendor may enforce the provisions of the Occupancy Licence separate and apart from the purchase and sale provisions of this Agreement.

The Decision of the Motions Judge

[para7] The motions judge noted that para. 2(b) provided that the title closing was to be on the occupancy closing date or on a "date to be established by the vendor in accordance with Paragraph 21". Kratz's position was that s. 2(b) directed one to para. 21 and while on its face para. 21 dealt with occupancy closing delays, as it allowed delays aggregating not more than eighteen months, it must apply to delays respecting the title closing as well. If it did, then in order to make sense, the delays had to be measured from May 1, 1990, rather than from the actual occupancy closing which was on February 25, 1991. Eighteen months from May 1, 1990 brought one to October 31, 1991 and since the vendor was not ready to transfer title by that date, the agreement was at an end by virtue of para. 21.

[para8] Parkside's position was that para.21 was referable only to occupancy closing delays and that beyond that one had to look at para. E.10. That paragraph provided a further eighteen months within which to transfer title.

[para9] After considering the provisions of para. 21, the motions judge concluded that:

... nothing in paragraph 21 prevents any of those provisions from also being used to define or limit the defendant's discretion in determining when title closing will take place.

As to the word "aggregate" he said:

When imported into paragraph 2(b), it connotes collecting into one period the sum total of all delay by the vendor in setting the date of either occupancy closing or title closing.

Turning to para. E.10, the motions judge said:

To be understood correctly, paragraph E.10 must be read in context. Paragraph 24 gives rise to Schedule "E". It establishes an occupancy license if the title closing does not take place at the same time as the occupancy closing, and provides that such an occupancy license is governed by the provisions of Schedule "E", including paragraph E.10. Part of paragraph E.10 addresses occupancy issues but it goes on to address title closing issues as well. If the defendant is unable to deliver a registrable transfer to the plaintiff within eighteen months after the "closing date" (which is defined by paragraph 2(a) as the occupancy closing date, and which may be later than May 1, 1990) then a mechanism is established to end both the occupancy license and the agreement. To the extent that paragraph E.10 addresses the ending of an occupancy license, it is compatible with the rest of the agreement. However, in addressing termination of the agreement itself if the defendant is "unable to deliver a registrable transfer" within eighteen months of the occupancy closing, it appears to state that it is permissible for the defendant to delay the title closing for eighteen months after the occupancy closing. This is clearly inconsistent with the provisions of paragraphs 2 and 21. It is also inconsistent with paragraph 24, which describes Schedule "E" as containing the terms of the occupancy license, and nothing more. To the extent that ambiguity arises from this apparent dilution of the defendant's obligation to convey title within 18 months of May 1, 1990, these words must be interpreted against the interests of the defendant and in a manner favourable to the plaintiff, pursuant to the "contra proferentem" doctrine. I conclude therefore that the defendant was obliged to complete the title closing on or before October 31, 1991.

There is no inconsistency between the sixty day notice period for termination of the occupancy license in paragraph E.10 and the termination of the agreement of purchase and sale on another date. The agreement distinguishes between occupancy rights and ownership interests and in addressing occupancy rights, paragraph E.10 provides the time necessary for a person in occupation to re-establish a residence.

[para10] Accordingly the motions judge gave summary judgment in favour of the plaintiff declaring that the agreement of purchase and sale ended on November 10, 1991, the date of receipt of Kratz's lawyer's letter asserting Kratz's right to abort the agreement. Parkside was ordered to return the plaintiff's payments. Parkside's counterclaim was dismissed with the exception of its right to claim occupancy payments for the period on and after November 1, 1991. Kratz was awarded his costs of the action and counterclaim which were fixed at \$3,500. Parkside's motion for summary judgment was dismissed without costs.

Analysis

[para11] I agree with the motions judge that the "substance of the dispute arises" with the reference in para. 2(b) to para. 21. With respect, I disagree with his analysis of paras. 21, 24 and E.10.

[para12] Para. 21 does three things:

- (a) it limits delays up to the time of substantial completion to an aggregate of eighteen months from May 1, 1990;
- (b) in the event of such delays aggregating more than eighteen months, it terminates the agreement and provides for the repayment of the purchase money; and
- (c) in the event such delays do not exceed eighteen months, it provides for occupancy closing on substantial completion.

Although it is entitled "delays", para.21 deals only with delays in the period up to substantial completion. It does not contemplate delays of any kind beyond that stage and makes no provision for them. Para. 21 says nothing whatever about title closing and in my respectful opinion its language cannot be made to apply to title closing by placing a particular meaning on the word "aggregate". That word is referable only to "reasonable delays" (i.e. any reason other than the wilful neglect of the vendor) during the period up to substantial completion.

[para13] Unlike many agreements for the purchase and sale of condominiums, this one expressly contemplates the possibility of two closings (see inter alia paras. 2(a) and (b), 3(e),(f) and (g), 5, 7, 13, 24, 28 and 29). Para. 24 recognizes that substantial completion may occur before the condominium documents are registered. In that event, para. 24 requires the purchaser to pay the balance of the purchase price and to occupy the premises (in this case through a tenant). The occupation is to be in accordance with a licence as set out in Schedule "E" to the Agreement.

[para14] I do not agree with the finding of the motions judge that para. 24 "describes Schedule "E" as containing the terms of the occupancy licence, and nothing more". In my view, it does a good deal more than that. First, it contains a covenant by Parkside to register the Condominium Documents with all due diligence. Having regard to the other contents of para. E.10, this covenant is necessary. Without it, in a rising market, a builder could intentionally delay registration until the deadline for title closing had passed. He could then terminate the agreement and re-sell at a higher price.

[para15] The second thing para. E.10 does is to establish that deadline at a point eighteen months after the Closing Date. If Parkside is for any reason whatever unable to register the Condominium Documents within that eighteen months (and is therefore unable to transfer title to Kratz), either party may give notice terminating the agreement. Para. E.10 also provides that such notice would terminate the Occupancy Licence. It is not necessary to deal on this occasion with the question whether the notice must terminate both the Agreement and the Occupancy Licence.

[para16] Para. E.10 goes on to deal with giving up vacant possession and the accounting as between occupant and builder and with the purchaser's obligation to provide the vendor with a release from the agreement of purchase and sale.

[para17] It must be conceded that unlike para. 21, para.E.10 does not expressly grant an extension or extensions of time to Parkside. In my opinion, however, Parkside's right to such extension is a necessary implication of para. E.10. Without that implication, the second sentence of para. E.10 becomes meaningless. The length of the extension is limited to eighteen months. The commencement of any such extension is fixed by para. E.10 at "the Closing Date". "The Closing Date" is defined by para. 2 of the agreement as May 1, 1990 "or such extended or accelerated date pursuant to the terms hereof that the Unit is substantially completed by the Vendor for occupancy by the Purchaser". The premises were actually occupied on behalf of Kratz on February 25, 1991 and for the purposes of para. E.10 it would only make sense for February 25, 1991 to be "the Closing Date". If the eighteen month deadline set by para. E.10 began on February 25, 1991, it would not expire until August 25, 1992, almost ten months after Kratz's solicitor said that the agreement had been aborted.

[para18] The motions judge held that if para. E.10 purported to give the defendant another eighteen months after the occupancy closing within which to complete, this would be inconsistent with para. 2 and 21. In my opinion that is not so, provided para. 21 is read, as I think it must be, as applying only to the period up to substantial completion.

[para19] In my view, the agreement should be read and construed as counsel for Parkside suggests. I agree that the drafting of the agreement leaves a lot to be desired. Although the motions judge said that the parties agreed that it was "a standard form", counsel for the appellant said that that meant only that it was the form used by that builder for the whole building.

[para20] This is only one in a series of cases turning on the construction of particular forms for the purchase and sale of condominiums all of which have been inadequate and confusing to one degree or another. The standard agreements for the purchase and sale of houses are difficult enough for lay people to understand. Condominium purchase agreements such as these are virtually incomprehensible.

[para21] In coming to the conclusion I do, I note the following deficiencies, among many others, in the agreement:

- (1) The reference in para.2(b) to para.21 for the date for the transfer of title is wrong, misleading and unhelpful.
- (2) Despite its heading (Accelerated Closing), para. 13 deals with both accelerated and extended occupancy closing dates.
- (3) Despite its heading (Delays), para. 21 deals only with delays up to substantial completion.
- (4) Despite its heading (Terms of Occupancy Licence), Schedule "E" contains a great deal more than the terms of occupancy.
- (5) To use eighteen month periods for both pre-substantial completion delays and any post-substantial completion extension is to invite confusion.

[para22] In reaching his conclusion, the motions judge relied on the following statement of Estey J., speaking for the majority of the Supreme Court of Canada in Consolidated - Bathurst Export Limited v. Mutual Boiler and Machinery Insurance Company, [1980] 1 S.C.R. 888 at p. 901:

Even apart from the doctrine of contra proferentem as it may be applied in the construction of contracts, the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result.

[para23] In my view, it is not necessary to resort to contra proferentem in this case. Rather, it is a question of examining the language used with a view to making the most sense possible having regard to the intentions of the parties and the purpose of that agreement. Using that approach, it is my view that having regard to the actual occupancy closing on February 25, 1991, Parkside

had until August 25, 1992 to transfer the title to Kratz. The condominium documents were registered on November 21, 1991 and Parkside was in a position to transfer title to Kratz on December 17, 1991. In view of his position, Parkside re-sold the property and counterclaimed for its loss on the sale as well as for unpaid occupancy fees.

Disposition

[para24] I would allow the appeal and set aside the judgment below and in its place grant summary judgment on the counterclaim. If the parties are unable to agree on the quantum of summary judgment in favour of Parkside, that matter is referred to the Ontario Court, General Division, for assessment. As the reason for this litigation is almost certainly the poor drafting of the agreement, I would deny Parkside its costs below but award it its costs in this court. AUSTIN J.A. OSBORNE J.A. - I agree. WEILER J.A. - I agree.

CBR# 212

National Trust Company, applicant, and Grey Condominium Corporation No. 36, Roger Altobelli, Gino Alberelli, John Fehrenbach and G. Stone and Associates Inc., respondents And between Grey Condominium Corporation No. 36, applicant by counter-application, and National Trust Company, respondent by counter-application

95-14717 Court File RE-5161/95 Ontario Court of Justice (General Division) Greer J. Heard: May 10-12, 1995. Judgment: July 10, 1995.

Counsel: A.I. Schein and L. Natale, counsel for the applicant. J.A. Raimondo and W.P. Burych, for the respondents. John Fehrenbach and Roger Altobelli in person. Gino Alberelli, in person, as a Director.

[para1] GREER J.:-- National Trust Company ("National") has become the registered owner of 35 of the 44 condominium units of Grey Condominium Corporation No. 36 ("Grey") in Collingwood, not because it had sought ownership of these units, but due to the problems the condominium unit owners were left with as the result of a badly built building, for which National was the principal lender. Out of this ownership have come untold problems between National and the remaining unit owners who claim to control the Board of Directors of Grey.

[para2] National has brought on this Application for a Declaration that the members of the Board of Directors of Grey are Dhiren Pandya, Al Bond and Paul Pratt ("the New Board") as of February 3, 1995. In the alternative, it asks for a Declaration that the Respondents, Roger Altobelli ("Altobelli"), Gino Alberelli ("Alberelli") and John Fehrenbach ("Fehrenbach") ("the Old Board") be required to call a Special Meeting of the Unit Owners for Grey within 30 days of the date of this Declaration for the purposes of removing the members of the Old Board and electing new Directors. It further asks that in the event this relief is granted, that a Declaration that National, as a unit owner of Grey, be entitled to vote all of its unit votes for any purposes including the removal and election of Directors and that any funds paid by National for common expenses and special assessments may not be used by the Old Board for any purpose until after the Special Meeting is called and held.

[para3] National further asks that if the new Directors take over the Board, that the Old Board be ordered to provide the New Board with all of the records of Grey which are in their care, control or possession, or in the alternative that it be ordered to produce for inspection, all such records. In addition, National asked for an order that G. Stone and Associates Inc. provide to the New Board all of the records of Grey which are in its care, control and possession, or in the alternative that it make these available for inspection by the New Board. Finally, it asks that Altobelli, Alberelli and Fehrenbach and the Old Board provide a full and detailed accounting to all unit owners of Grey, including itself, of costs paid or incurred by Altobelli and the Old Board with respect to legal fees and professional services.

[para4] In the Counter-Application, Grey asks for a determination as to whether National is presently an "owner" and/or "declarant" as defined in the Condominium Act, R.S.O. 1990, c. C.26, as amended, a determination as to whether National has the right to vote as a unit owner and whether it owes any fiduciary or other duty in the exercise of such rights to vote, whether a vote by National to remove the Old Board would be a breach of duty to the owners, a determination as to the requirements for a "quorum" of owners pursuant to the Act and By-Law No.1 of Grey, a determination as to the number of votes required to remove the Old Board pursuant to the Act and the By-Law, a declaration that the February 3, 1994 held by the New Board is invalid, a declaration that the New Board was not properly elected, a determination of National's rights to inspect the records, a declaration that the special assessment passed by the Old Board on December 2, 1994 is valid and an order compelling National to pay forthwith the balance of its share together with its common monthly expenses and a determination of the appropriateness of the Board's use of the Reserve fund to pay for certain costs and repairs.

1. Background

[para5] In 1989, National provided B.M.P. Sierra Lane Inc. ("BMP") with a \$8.8 million loan for the construction of Grey. This loan was secured by a mortgage registered against the title to the land on which the project was to be constructed. BMP was the developer and subsequently, the declarant of Grey. National made various advances on this loan up to February 7, 1991 after which time the mortgage went into default.

[para6] In August, 1991, National reached an agreement with BMP and its principals wherein BMP transferred to National, by way of quit claim deed, the title to all units of Grey which had not been previously sold. This transfer was made in partial satisfaction of the debt owing to National under the mortgage. On August 7, 1991, National became the owner of 36 units. Prior to this, National also had gained title to 6 of the 8 units which had been sold. It currently holds mortgages on 5 of the original 6 it purchased and later sold.

[para7] Throughout 1991 and 1992, National sold and transferred title to 21 of its 36 units acquired from BMP to bona fide purchasers for fair market value. It had entered into 13 individual agreements of purchase and sale for those of the remaining 17 units when the Township of Collingwood issued a Stop Work Order in April, 1993 and all 13 proposed sales were aborted. In November, 1994, National began to repurchase the units it had previously sold, as the Township, in October of 1994, had issued an Order Prohibiting Use of Occupancy of Unsafe Building which prohibited the owners from occupying their units until certain repairs were made. At a unit owners' meeting, National offered to each owner who had purchased his or her unit from National, the option of having National purchase it back from each of them. Between November 4, 1994 and January 30, 1995, National repurchased 18 of the 21 units it had previously sold at prices not less than the owners had paid for them. In addition, it also purchased 1 unit from an owner who had bought from BMP.

2. The Board of Directors

[para8] There is an issue as to who constitutes the Board of Directors of Grey. From September, 1991 to and including February 18, 1993, 3 employees of National served as elected members of the 3 member Board. They resigned at the annual general meeting of the unit owners on February 18, 1993 and Albert C. Bond ("Bond"), an employee of National, and Roger Altobelli ("Altobelli") and Gino Alberelli ("Alberelli"), two of the individual owners were elected. In February of 1993, National only owned 17 of the 44 units.

[para9] Bond resigned as a Director on June 22, 1993 over differences with the other two Directors. Altobelli and Alberelli appointed John Fehrenbach ("Fehrenbach") in his place. Fehrenbach was not an owner of a unit but was the husband of a unit owner. These three constituted what I have referred to as the "Old Board" and they were in place until the controversial meeting

of February 3, 1995 where they were allegedly replaced by the "New Board" of 3 new National employees. On February 8, 1995, Fehrenbach provided his resignation as a Director. One of the issues therefore is whether the Old Board can replace Fehrenbach and remain in place or whether the February 3 meeting called by National was proper thereby putting the New Board in its place, or if not, whether National can call a meeting to nominate a new Board.

[para10] The February 3, 1995 meeting was called by the Old Board after National, as a unit owner of greater than 15% of the units in the building, sent a letter dated December 19, 1994 requesting that a special meeting of the unit owners be held within 30 days of the date of service of the Requisition Letter. The meeting was to address the issue of the removal of the Old Board and the election of new Board members, and to address the issue of the common element insurance of the building. National agreed to the Old Board's request for a delay of the meeting and it took place on February 3. It ought to have been called by January 18, 1995. It is Bond's evidence that Altobelli requested the additional time in order to get all the files together to prepare for a smooth transfer to the new Board.

[para11] At the time of the meeting, National owned 35 of the 44 units, thereby having a 79.5% interest in the building. This translated into 91% voting rights. The meeting was held at 2200 Lakeshore Blvd. West in Etobicoke. National delivered proxies to Altobelli authorizing Pandya, Natale and Bond to attend and vote on its behalf at the meeting. In addition, National notified the mortgagors of those units of which National was the registered mortgagee, that it intended to exercise its right under the mortgages to vote at the meeting. Bond was given a proxy in this regard.

[para12] Altobelli told the meeting that there was no quorum to hold the meeting in accordance with By-Law #1. It was the Old Board's counsel's opinion that Article IV, section 6 of the By-Law required 33 1/3% of the owners to be present in person or represented by proxy and who were entitled to vote. He had taken the position that National's proxy holders were not so entitled given that National had not paid all its fees in connection with a Special Assessment which had been levied against the owners to pay for professional fees and certain repairs. Bond, on National's behalf, while not agreeing with this interpretation, did agree to pay the amount required. Altobelli then informed Bond that the Old Board had decided not to go ahead with the meeting, a decision that had been made, on Bond's evidence, less than an hour before the meeting was scheduled to begin, on the grounds that the Old Board intended to bring an Application to the Court seeking directions regarding the calling of the meeting by National and to determine National's rights.

[para13] National took the position that the Old Board was motivated by its own self-interest and determined that its proxy holders would hold their own meeting that day and posted a notice to that effect so that the Old Board was aware of its location at the Old Mill Restaurant at 7:00 p.m. This meeting was held with only National proxy holders present. Bond delivered a cheque together with a letter of guaranty for \$70,000.00 payable to the condominium corporation for the special assessment to ensure that at least 50% of the units were in good standing to allow a vote to take place. The meeting elected Pratt, Pandya and Bond, all National employees, as the New Board with such election being recorded in Minutes prepared by the new Secretary of the Board.

[para14] Was the change of Board Directors legal? National takes the position that it is not a "declarant" or the successor or assignee of the declarant pursuant to s.1(1) of the Act which reads:

s.1(1) "declarant" means the owner or owners in fee simple of the land described in the description at the time of registration of a declaration and description of the land, and includes any successor or assignee of such owner or owners but does not include a purchaser in good faith of a unit who actually pays fair market value or any successor or assignee of such purchaser.

It is National's position that the transfer of the 36 units by BMP to it pursuant to their settlement respecting National's mortgage remedies and the partial forgiveness of the debt amounted to payment of fair market value for each unit. Paragraph 7 of the Agreement dated May 22, 1991, between BMP and National governs the delivery of the transfers. It reads in part:

Sierra Lane and National acknowledge and agree that the execution and delivery of the aforesaid transfer(s) is as further security for fulfilment of Sierra Lane's obligations to National in respect of its liabilities to National relating to the Project and the Property. Notwithstanding the foregoing, as long as Sierra Lane is in default of its obligations to National under this Agreement ..., National shall be entitled to realize upon such security by the registration of such transfer(s) ...

For greater certainty, the delivery of such transfer or transfers and/or the registration thereof by National shall not operate to reduce or diminish the liabilities and obligations of Sierra Lane to National relating to the Project, and the Property, including without limitation, under the Mortgage.

When the transfers were effected, National paid the appropriate Land Transfer Tax. An examination of the Affidavits so sworn under the Land Transfer Tax Act, R.S.O., c. L.6 shows the values ranging from \$179,500.00 to amounts less than that, depending on the particular unit. I am satisfied that this put National in the position of a purchaser in good faith who purchased the units at fair market value. National is therefore not a "declarant" within the meaning of the Act.

[para15] Our Court of Appeal examined this test in *Carleton Corporation No. 347 v. Trendsetter Developments*, (1992) 9 O.R. (3d) 481 at p. 488 where it held:

In my view, once the payment of fair market value is determined, s. 1(1) of the Act requires a further determination of whether the transaction was a true sale rather than merely a transfer to a nominee, and whether there was any underlying intent which would be inimical to the purposes of the Act.

In my view, the transfer was a true sale, as opposed to a transfer to a nominee. When the mortgage monies were advanced by National to the builder, its security, in the form of the mortgage, had value which could be realized in the event of a default under the mortgage. Rather than exercise its right of power of sale under the mortgage and sell the units to an outside purchaser, National chose to reach a settlement with the builder in order to protect its security. Given the deficiencies in the construction of the building, it appears National made a business decision to protect its security by transferring the units to itself personally under the terms of the settlement, presumably to correct the deficiencies and then resell the units. It, in fact, did re-sell some of the units prior to the Township placing the Orders against the property.

[para16] The Trendsetter case, *supra*, confirms the position of a mortgagee at p. 491 as follows:

Following default under the mortgage and subsequent foreclosure, it became owner, not, through its capacity as declarant, but as mortgagee; thus it would become a bona fide purchaser for value of the unit, and would have the same right to vote as any other unit owner.

Nor, in my view, are there any facts which indicate an underlying intent by National inimical to the purposes of the Act. Trendsetter, supra, also notes at p. 488, that there is nothing in the Act which prohibits any individual from owning sufficient units to put her or him or it in control of the Board.

[para17] Section 22(1) of the Act states that voting by owners shall be on the basis of one vote per unit. Therefore, National is entitled to one vote for each unit of which it is the registered owner or mortgagee, notwithstanding that it may have obtained ownership of the unit through the BMP settlement or may have purchased it back from owners to whom they were sold by National, or purchased by it from an original owner. With respect to its right to vote as a mortgagee, see: *Keyes v. Metropolitan Toronto Condominium Corp.* 876, (1990), 73 O.R. (2d) 586 at p. 575. and *Trendsetter, supra*, at p. 492.

3. The calling of a Meeting

[para18] Section 19 of the Act governs the calling of meetings. It reads in part:

19.(1) The Board shall, upon receipt of a requisition in writing made by owners who together own at least 15% of the units, call and hold a meeting of the owners and if the meeting is not called and held within thirty days of the receipt of the requisition, any of the requisitionists may call the meeting, and in such case, the meeting shall be held within sixty days of the receipt of the requisition.

(2) The requisition shall state the nature of the business to be presented at the meeting and shall be signed by the requisitionists and deposited at the address for service of the corporation.

When National sent the requisition to the Old Board, National owned at least 15% of the units. The Old Board was therefore obliged to call and hold the meeting within thirty days of the requisition, that is, by January 18, 1995. When Altobelli requested more time to get prepared for the meeting, National ought to have refused the request, and when the thirty day time period had lapsed, and if no meeting was held, National could have called the meeting and the meeting to be held within sixty days of the receipt of the requisition.

[para19] When the Old Board aborted the February 3, 1995 meeting, in my view, the members failed to exercise and discharge their duties honestly and in good faith. See: s. 24(1) of the Act and paragraph 11 of Article VI of By-Law #1. National, despite that it believed it did not have to pay any additional amounts, was prepared to pay sufficient monies under the special assessment to ensure that its ability to vote was not questioned. The Old Board was prepared to take the money but not to allow National's proxy holders to vote.

4. The Quorum

[para20] Section 18(3) of the Act governs the structure of a quorum at a business meeting. It reads:

18. (3) Unless otherwise provided in this Act, a quorum for the transaction of business at a meeting of owners is those owners present in person or represented by proxy owning 33 1/3 per cent of the units.

Audrey M. Loeb in *Condominium Law and Administration*, 2nd ed. points out at p. 40 that there are no other provisions in the Act which specify any other quorum requirement for a condominium meeting.

[para21] Section 3(5) of the Act states that the provisions of the Act prevail where there is an inconsistency between the Act or a declaration or a by-law of the condominium. Paragraph 6 of Article IV of Grey's By-Law governs what constitutes a quorum at a meeting. It reads:

QUORUM: At any meeting of owners, a quorum shall be constituted when persons entitled to vote and owning not less than thirty-three and one-third (33-1/3%) per cent of the units are present in person, or represented by proxy at the meeting.

The difference between the By-Law's definition and that of the Act is that the By-Law states that these persons must be "entitled to vote", a qualification not contemplated by the Act. Since this added qualification is not contemplated by the Act and is inconsistent with it, the Act applies. Altobelli should therefore not have taken the position that National's proxy holders could not vote at the February 3 meeting since they had not paid their proportion of the special assessment. It had paid, prior to the meeting, the proportionate share of the assessment for 6 units. Only 8 units, in total, had paid their proportionate shares. The meeting should therefore have gone ahead as requisitioned. If it had, the Old Board would have been replaced in an orderly fashion since s. 15(8) of the Act states:

Any director may be removed before the expiration of his or her term by a vote of owners who together own a majority of the units and the owners may elect, in accordance with the by-laws dealing with the election of directors, any person qualified to be a member of the board for the remainder of the term of the director removed.

Under this provision of the Act, had the meeting gone ahead, National, holding a majority of the votes, could have elected the New Board.

5. The new February 3, 1995 meeting

[para22] National takes the position that its election of the New Board at the 7:00 p.m. meeting at the Old Mill Restaurant is valid. That is not what the Act states. The Act contemplates the scheme which I have outlined in these Reasons. The posting of the notice on the door of the location where the original meeting was scheduled to be held, that another meeting was to be held at the Old Mill Restaurant, is not sufficient to meet the requirements of the Act or the By-Law. Section 19(1) of the Act states that if the meeting is not called and held within thirty days of the receipt of the requisition, any of the requisitionists may call the meeting, and in such case, the meeting shall be held within sixty days of receipt of the requisition. [emphasis added]

[para23] Section 19(2) states that the requisition shall state the nature of the business to be presented at the meeting and shall be signed by the requisitionists and deposited at the address for service of the corporation. [emphasis added]

[para24] The appropriate steps were therefore not followed even though technically National had more than 50% of the owners in the room. The proxy holders did not properly requisition the new meeting by following the appropriate steps in s. 19(1) and (2). It will now have to take such steps again, and if the Old Board does not call the meeting within the thirty days and hold the meeting, National may call it. In my view, it would serve the Old Board no purpose in trying to delay the inevitable transfer of Boards any longer and as soon as it is requisitioned by National, the meeting should be expeditiously called and the transfer take place.

5. Will the New Board owe a fiduciary duty to all unit owners?

[para25] One concern of the non-National unit owners, and of the Old Board, is how they will be treated if only National nominees form the Board. From listening to what Altobelli had to say on his own behalf when the Application and Counter-Application were heard, he, as, a purchaser from National, and current President of Grey, has concerns regarding a number of substantial overdue accounts for professional Services and repairs which were authorized by the Old Board. These were mainly performed before the Special Assessment of \$149,999.96 was passed in December, 1994. It is clear from the Affidavit evidence submitted on behalf of National, that it did not approve of many of these expenditures including the costs associated with the installation of the Monitoring System and the cost associated with the Visca Report. The Old Board had authorized Visca to prepare a technical audit of the condominium and it was paid an undisclosed amount for this. Altobelli has a minor interest in the company A. Visca Architects Ltd., and this National saw as a conflict of interest, and it appeared that Altobelli wanted Visca to effect certain of the deficiencies as were set out in the technical audit. Altobelli, however, did not vote when the Board authorized the hiring of Visca. There was also a differing of opinion about the 8 foot fence which was erected around the building at the request of the Old Board.

[para26] If National does not pay its proportionate share of this Assessment for each of its units, prior to the election of the New Board, where is the money going to come from?

[para27] Will National become a fiduciary? I adopt the reasoning in Trendsetter, supra, that it will not. There the Court of Appeal held at p. 490 the following:

However, even if Mr. Assaly were subject to a fiduciary duty, it would not preclude his voting at meetings of unit holders. It would merely require that, in so doing, he vote in the interest of all unit holders, since it would be to all that he owed the duty, and not to a few. It is quite possible in this case that Mr. Assaly's interests correspond to those of the unit holders as a whole. There is no evidence of the views or interests of the unit holders as a group; the evidence merely indicates the opinion of some of the directors that Mr. Assaly would not vote in the interests of all unit holders.

Two potentially conflicting considerations are of importance in dealing with condominiums - the first, that condominiums are creatures of statute, and courts should be cautious about reading into the statute rights and duties which the legislature did not see fit to include; and the second, that condominium corporations, unlike business corporations, are made up of individuals who make their homes in the premises operated by the corporation, or whose tenants do, and the fate of the corporation is of vital importance to them in their everyday lives. The efficient operation of the building is in Mr. Assaly's interests, as well as in the interests of the other owners.

Thus, it can be seen that Altobelli, Alberelli and the other individual unit owners have an interest in how National will operate the condominium and how it will correct the deficiencies to make the units, which were intended in the beginning to be luxury homes as noted in Schedule A to the promotional brochure, setting out the so-called luxury features. The building presently cannot even be occupied by the owners.

[para28] The fiduciary issue was also examined in *Ceolaro v. York Humber Ltd.* (1994) 37 R.P.R. (2d) 1 at p. 73 where Winkler J. states:

The amendments to the Condominium Act were introduced to address problems faced by purchasers because of the inequality of bargaining power, and to protect them from unscrupulous developers. The Act provides a comprehensive scheme designed to protect consumers. On the facts of this case, to go outside that scheme and impose a broad fiduciary duty is not justified. The courts have seen fit in limited, well defined situations, within the rights conferred by the Act, to impose such a duty. In those cases, the purchasers were seeking enforcement of rights provided by the Act. Here the purchasers seek to establish rights beyond those provided in the Act. No authority has been proffered by the purchasers to support this extension, and I decline to do so.

I adopt the wording of Trendsetter, supra, and Ceolaro, supra, and hold that no such fiduciary duty exists. I am aware of the findings in *Hodgkinson v. Simms* [1994] 117 D.L.R. (4th) 161 with respect to new findings of fiduciary relationships (see: p.p. 168 and 169 and 175 and 176). In my view these principles do not apply to the case at bar, given that there is a statute, namely, the Condominium Act which strictly governs the rights of the parties.

7. The right to inspect the records

[para29] Section 21 of the Act states that the corporation:

... shall keep adequate records, and any owner or agent of an owner duly authorized in writing may inspect the records on reasonable notice and at any reasonable time. National has certainly put the Old Board on notice that it wishes to inspect the records. One of the reasons for the delay of the meeting which was eventually held on February 3, 1995, was Altobelli's request for an extension to allow him time to put the records in order.

[para30] The issue has been dealt with in *McKay v. Waterloo North Condominium Corp. No. 23* (1992) 11 O.R. (3d) 341 at p. 351 where Cavarzan J. held:

Accordingly, it would not be within the powers of the board to cut down by by-law or resolution the scope of the rights conferred on owners by s. 21. The board cannot adopt a narrower definition of "records" than is provided by the Act, nor can it deny the right of an owner to make photocopies at his or her own expense. Access cannot be made subject to the board's approval.

There may be instances where someone's right to privacy and confidentiality overrides the right to freedom of information embodied in s. 21. No such concern is raised by the requests made by the McKays. It may well be that the board can properly limit access to the corporation's records in the case of privileged or confidential documents, but no such claim was advanced in this case.

In my view, in the case at bar, there is no question of privacy or confidentiality in any of the corporation's records. I therefore Order the Old Board and G. Stone and Associates Inc. to produce, within 10 days of the date of this Order, all such records in their care, control and possession for inspection by National at a location to be determined by National and they shall remain in the possession of National for not more than 15 days from the date of delivery so that they may inspect and copy whatever they so choose. These records shall include all invoices and accounts with respect to professional fees and all the corporation's banking documentation. If a member of the Old Board wishes to be present during the working hours when National's representatives are inspecting the records, they may make those arrangements with National. The records shall remain in the location so designated by National during the inspection period.

8. The Special Assessment [para31] I have made reference in these Reasons to the Special Assessment of approximately \$150,000.00 passed by the Old Board. It wants an Order compelling National to pay its proportionate share. I have no power under the Act or at common law to make such an Order. The Old Board has its statutory remedies and its By-Law remedies and these must be followed by it. It also has its statutory remedies with respect to the payment of the common elements fees. Nor is it within my power on a Counter-Application to comment on the appropriateness of the Board's use of the Reserve fund to pay for certain costs and repairs.

[para32] The parties are already involved in protracted litigation. Some of these issues may be dealt with during that litigation. They are not, in my view, the proper subject of the Counter-Application.

9. Costs

[para33] If the parties cannot otherwise agree on costs, I may be spoken to.

GREER J.

CBR# 159

Landmark of Thornhill Limited, plaintiff, and Elham Maleki-Yazdi, defendant

Court File No. 21196/91U Ontario Court of Justice (General Division) Flinn J. Heard: February 14-17 and 21, 1995. Judgment: March 20, 1995.

Counsel: Patricia M. Conway, for the plaintiff. Jeffrey D. Puritt and Hassan Fancy, for the defendant.

[para1] FLINN J.:-- On the 16th of October, 1988 the defendant agreed to purchase from the plaintiff a proposed condominium unit known as suite 806 in building C of The Landmark of Thornhill, a three building condominium development. The agreement contained a number of schedules and a disclosure statement as required by condominium legislation. [para2] Closing was to be on the 31st day of March, 1991 but earlier closing was provided for.

[para3] In September 1990 Landmark notified the defendant of a probability of accelerated closing date and subsequently gave notice for closing January 22, 1991. On that date the premises were by Landmark's admission not fit for occupancy and on January 28, 1991 Landmark purported to extend the closing date to January 31, 1991. Subsequently on January 29 Landmark again extended the time of closing until February 28, 1991. The defendant refused to close and subsequently Landmark sold the condominium at a substantial loss and now sues the defendant for damages.

[para4] Landmark's position is that it was entitled to extend the time of closing for a period up to 18 months without the specific agreement of the defendant and that at all events either party was entitled to set a time for closing after the parties were not ready on January 22, 1991.

[para5] The defendant's position is:

(a) there was a fundamental breach of the contract committed by landmark when it was not ready to close on the 22nd day of January, 1991;

(b) that landmark had no right to extend the closing without the agreement of the defendant;

(c) that at all events it was at least entitled to a further 30 days' notice to close in accordance with the agreement of purchase and sale;

(d) that landmark did not tender on the 22nd day of January, 1991 nor, indeed, on the original closing date of March 31st, 1991; and

(e) that the premises were not ready for occupancy on either the 31st day of January, 1991 or the 28th of February, 1991 and therefore the defendant was not required to complete;

(f) that there were material misrepresentations by the real estate agent giving the defendant the right to refuse to close;

(g) that the plaintiff had waived completion by not tendering on February 28th or March 1st, 1991.

[para6] The damages claimed are substantial and brought about to some degree by a very substantial downturn in the purchase price for condominium units in the vicinity of Toronto which commenced in 1990 and continued through 1991, 1992 and 1993. The court took it from the evidence that inflation had theretofore been part of the condominium market inasmuch as the first two buildings in this development of landmark were sold out in a matter of days even before any excavation. The defendant in purchasing a condominium having a value at the time of purchase of \$352,600 entered into the agreement of purchase of sale on the same day that she went to the sales office of Landmark on the site. The agreement of purchase and sale on page 1 in paragraph 2 is headed "Closing Date" and reads as follows:

2. a) The Purchaser shall occupy the Unit on the 31st day of March, 1991, or such date pursuant to the terms hereof that the Unit is substantially completed by the Vendor for occupancy by the Purchaser (the "Closing Date").

b) The transfer of title to the Unit shall be completed on the later of the Closing Date or a date established by the Vendor in accordance with paragraph 13 (the "Unit Transfer Date"). Title to the Unit shall be taken in the name of N/A.

[para7] Two other paragraphs are relevant to closing. Paragraphs 9 and 10 which are set forth as follows:

EARLIER CLOSING

9. This transaction of purchase and sale shall be completed on the Closing Date or any extension thereof as may be permitted under this Agreement, at which time vacant possession of the Unit will be given to the Purchaser.

The Vendor shall be entitled, upon giving at least thirty (30) days prior written notice to the Purchaser, to accelerate the Closing date specified in paragraph 2.a) hereof PROVIDED that the Unit is substantially complete and fit for occupancy on the earlier date specified in the Vendor's notice to the Purchaser.

DELAYS

10. In the event that the substantial completion of the Unit shall be delayed for any reason other than the wilful neglect of the Vendor, the Vendor shall be permitted reasonable extensions of time (or times) to substantially complete the Unit and the Closing Date shall be extended accordingly. If the Vendor shall be unable to substantially complete the Unit for occupancy within such reasonable extensions of time (or times) not exceeding eighteen (18) months in the aggregate, the deposit monies shall be returned to the Purchaser with interest as required by the Act and without deduction and this Agreement shall be at an end, and the Vendor shall not be liable to the Purchaser for any damages whatsoever. If the Unit is substantially completed for occupancy by the Closing Date or any extension thereof, the transaction shall be completed on that date and the Vendor shall complete any outstanding details of construction required by this Agreement within a reasonable time thereafter, having regard to weather conditions and the availability of labour and supplies. The Unit shall be deemed to be substantially completed when the interior

work has been finished to permit occupancy notwithstanding that there remains other work within the Unit to be completed. The Purchaser acknowledges that failure to complete the common elements before closing shall not be deemed to be failure to complete the Unit.

[para8] Paragraph 23 of the document provides that time should of the essence of the agreement and there is an acknowledgment clause in section 23 in which the purchaser acknowledges and agrees that there is no representation, warranty, guaranty, collateral agreement or condition precedent, etc. etc. other than expressed in the agreement.

[para9] The defendant was required to pay the sum of \$352,600: \$5,000 by deposit, \$30,260 within 60 days, \$17,630 within 180 days and \$17,630 within 365 days. The balance of \$264,450 was to be provided for "on the Closing Date" by virtue of a vendor take-back mortgage. [para10] As pointed out in paragraph 2 the transfer of title might not take place until some time after the time of occupancy which was anticipated by the agreement to be an earlier date.

[para11] The defendant is a student at the University of Toronto. She already has a Bachelor of Science in microbiology and is presently working on her Bachelor of Science in chemistry. Her husband is a medical doctor on the staff of Women's College Hospital in Toronto where he is in the Department of Medicine and is the Co-ordinator for the I.C.U. unit at that institution. He is on the staff at the University of Toronto Medical School. They have two children, one born May 1987 and one in July 1989. At the time they entered into the agreement of purchase and sale they were residing with the defendant's mother and father and her sister in a home which the defendant and her husband owned. As well, they had purchased an older home in Thor which was being used as the defendant said, for investment purposes but as her husband said as part of a 10 year plan by virtue of which it would keep itself until they were in a position to raze the home and build their own. There was a desire on their part to establish accommodation for themselves in a condominium unit. The defendant says she was attracted to this unit by advertising and information at the site.

[para12] In the spring of 1990 they sold their home and thus were looking for a place to move pending the completion of their condominium unit. They applied to Landmark who after some negotiation rented them a unit in building A of the development.

[para13] The defendant and her husband both testified to the effect that they relied on the representations made by the realtor who was on site at the development. They both testified that they did not read any of the documents which they received save the first page of the agreement of purchase and sale. They claimed that there was misrepresentation by the real estate agent with respect to the building in that:

a) there was no wall protecting the project from the railway tracks running along the south boundary of the project as promised by the real estate agent and therefore no attempt to reduce the noise of the trains; b) that a representation was made by the real estate agent and by a building located on the model of the development to the effect that there would be a fitness or recreation club on Bayview Avenue in a location subsequently turned into a firehall;

c) that there was no internal security for building C as represented by the real estate agent;

d) that it was represented that in building C the standards would be substantially upgraded and that the premises would generally be owner occupied and not tenant occupied;

[para14] The defendant and her husband both said these were material misrepresentations which were untrue and were grounds for them not completing.

[para15] The real estate agent who was called did not remember the defendant nor her husband but testified that the only representations that he would make in selling a project such as this would be found in the disclosure statement because under the Condominium Act the purchaser had 10 days to revoke the offer. Presuming that the real estate agent made representation contrary to those found in the disclosure statement, they would expect the person to cancel the agreement. At all events he stated that the project was selling itself and that there was no reason to make any representations that were not in the disclosure statement and that it certainly was his practice not to do so. I preferred his evidence to that of the defendant and her husband.

[para16] It seems to the court that it is just not sufficient for persons with the education of the defendant and her husband to say that they did not read the documents which they received and acknowledged. The noise abatement proceedings taken by the developer are well documented in the disclosure statement. So is the position of the firehall and the description of the recreational and other amenities. The security system may not have been fully effective on the date of occupancy but it was and is operational. The fact that the market turned against condominium purchases and the premises may have had a greater number of tenants than originally anticipated is not a misrepresentation on the part of the plaintiff at the time of occupancy. I dismiss the defendant's claim that they are entitled to walk away from this agreement on account of misrepresentations as I find that there was no material misrepresentation either by the agent, or the plaintiff nor in the disclosure statement.

[para17] From the time of the agreement of purchase and sale the matter progressed in that all of the deposits required were paid. On November 30, 1989 the defendant made her choices of colour and material selection and subsequently on the 9th of October, 1990 she purchased an additional parking space for the sum of \$12,000 upon which a deposit of \$3,000 was made. The defendant testified that as well in December 1990 she purchased a special refrigerator which was to be held by the dealer pending closing.

[para18] On the 4th of August, 1990 the defendant entered into the tenancy agreement by virtue of which she rented suite PH10 at 7805 Bayview Avenue which was building A of the development in which she was to reside and she moved into these rental premises sometime near the 27th of August, 1990.

[para19] On September 6th, 1990 Landmark advised the defendant that construction was ahead of schedule and that occupancies would take place in the fall and early winter. An update of that notice was given on the 25th of September, 1990 indicating that interim occupancy was to commence on November 15th, 1990 on a floor-by-floor basis. This notice encouraged parties to communicate with their lawyer in order that matters would proceed.

[para20] On November 12th, 1990 an interim certificate of occupancy was given by the Town of Markham indicating that floors 6 to 10 had been completed for occupancy. The defendant's condominium was on the 8th floor.

[para21] On December 14th, 1990 solicitors nominated by the defendant were notified of the accelerated closing date of January 22nd, 1991. The solicitors submitted a number of documents to be completed by the defendant as well as a statement of adjustments.

[para22] On December 17th Landmark advised the defendant that the suite was scheduled for inspection on January 4th, 1991 (subsequently postponed to January 10th, 1991) and on January 10th the defendant and her husband together with an inspector from the plaintiff completed what is referred to as an Ontario New Home Warranty Program inspection.

[para23] The defendant and her husband stated that the premises were not fit for occupancy and stated that some of the problems were not included in the Certificate completed by the inspector. The vice-president of Landmark, the inspector from Landmark, and the manager of Customer Service of Landmark all testified that the defects listed in the Certificate of the inspector together did not make the premises unfit for occupancy and that they were the usual minor defects which could be completed in short order. However, in two letters, one dated January 28th, 1991 and one dated January 30th, 1991 to the defendant, the Manager of Customer Service acknowledged that "your suite was not ready for occupancy on the scheduled interim closing date of January 22nd, 1991." Similarly, in the statement of claim the plaintiff acknowledged that it was not fit for occupancy on the 22nd. The plaintiff asked to amend the statement of claim as a result of the evidence and in the circumstances the amendment was disallowed on the grounds that neither of the people who claimed that the deficiencies did not make the premises uninhabitable remember having inspected the premises and that inasmuch as a senior person had on two occasions acknowledged the unfit condition, the amendment should not be allowed. Even if the amendment to the statement of claim had been allowed I would conclude on the evidence that the letter of January 28th repeated on January 30th was a virtual estoppel and acknowledgment of the condition of the premises.

[para24] The letter of January 28th purported to set a closing date of January 31st. The defendant's husband says that he refused this letter, that he was annoyed at such short notice as well as the condition of the premises and said that he was not going to close. The person who delivered the letter thought that there was nobody home on the date the letter was delivered and that she left it in the door. The defendant says that she found the letter in the door and it upset her that the closing date was so close. At all events, the second letter dated January 30th, 1991 was delivered on February 3rd, 1991 and there is noted on this letter, "delivered letter 6:30 p.m., accepted by Dr. Maleki." Dr. Maleki, that is the defendant's husband, testified that he took the letter, advised the person delivering the same that they needed 60 days notice to terminate their lease stated that this implied that they were not going to close.

[para25] Sometime between the inspection of January 10th and January 30th there was at least one conversation between the Customer Service Manager for Landmark and the defendant. The Customer Service Manager says that she does not remember the defendant but that she remembers this telephone call in which the woman screamed at her. The manager said that the defendant said terrible things about the condition of the building. The manager said that she advised her that she would see what she could do. As a result of that she says that she made sure that the premises were fit for occupancy and that such is the reason why she sent forth her letter of January 28th.

[para26] There is a memorandum dated January 29th, 1991 which was produced by the plaintiff which says:

Re: "Landmark phase III, Suite 806 extended closing"

and under that the following note:

"Please be advised that the above-mentioned suite has been extended to February 28, 1991 -- no fees or admin. as per Donna Cats." Donna Cats was the Customer Service Manager and one might assume from that memo that the problem with respect to short notice was being addressed as a result of some complaint. This memo was followed by the letter of January 30th extending the time to February 28th.

[para27] While the defendant's husband said he was insulted at the shortness of the time for extended closing, that is 2 to 3 days, it is difficult to see that such would be the cause of not closing the transaction. In fact the defendant says her concern was short notice and no opportunity to re-inspect.

[para28] The fact is that the defendant had not yet, on January 30th, given any instructions to their solicitors who were nominated by them to act for them on closing and it was not until the end of the first week in February that any contact was made with their solicitors.

[para29] The defendant and her husband were not neophytes to real estate transactions. The evidence indicated that they had purchased at least two other houses and sold one so that they would be aware of the necessity of being ready for closing. There is therefore some suspicion as to the motive of the defendant in refusing to close. However as I pointed out to counsel and it was acknowledged by counsel for the plaintiff that in these circumstances the motive for not closing was not material.

[para30] At all events under date February 11th, 1991 the solicitors for the defendants wrote to the solicitors for Landmark advising that the purchaser took the position that the agreement had been terminated because the vendor was unable to close on January 22nd, 1991 and had had no right to extend the closing date. Subsequently, the same solicitors wrote to the solicitors for the plaintiff in which they raised the question of misrepresentation by the real estate agent with which I have already dealt.

[para31] I am satisfied on the evidence that the premises were ready for occupancy at least on the 28th of January, 1991, that there were one or two minor defects left to complete which are referred to in a document found at Tab 24, the last of which was completed on the 4th of March, 1994 which was a cracked or chipped tile. While some evidence was given that the deficiencies were not corrected until February 6th, 1991 with one outstanding matter corrected on March 4th, it seems to me from looking at the documents particularly Tab 24 that in fact everything was completed and fit for occupancy before February 6th but that certain items were left for that date probably being done by subcontractors. I come to that conclusion because of the date of February 5th found on the reference to tile. That view is supported by the evidence of Donna Cats who described the defendant's conversation. I accept her evidence when she says she would have made sure that it was complete by the time she sent the letter of January 28th.

[para32] The issue, then, is whether the defendant had the right to refuse to complete the transaction on the grounds advanced. I come to the conclusion that the defendant did not and that she is liable to the plaintiff for breach of the agreement.

[para33] Put simply, the closing date was a flexible one. It was fixed by paragraph 2 as the 31st day of March, 1991 or such date pursuant to the terms. Paragraph 9 of the agreement of purchase and sale entitled the vendor to accelerate the closing date upon giving at least 30 days prior written notice provided that the unit was substantially complete and fit for occupancy on the accelerated or earlier date as specified in the notice. Notice of an accelerated date was given here in due time. The letter is dated December 14th from the solicitors requiring closing on January 22nd. That letter, therefore, set the closing date under the terms of the agreement of purchase and sale as January 22nd. At this stage then there is now no March 31st closing date but rather January 22nd. Paragraph 10 provides that if substantial completion of the unit which the court finds to be for all intents and purposes the same as finished to permit occupancy, is delayed for any reason other than the wilful neglect of the vendor, the vendor is permitted reasonable extensions of time or times to substantially complete the unit and the closing date is extended accordingly. In other words this new closing date of January 22nd is extended if the unit is not substantially complete and the vendor is entitled to that extension with a limitation that such extensions are not to exceed 18 months. That in the court's view is the only way that the agreement makes sense. As the closing date is stated to be flexible and is accelerated, then such date becomes the closing date from which the vendor or landmark is entitled to reasonable extensions. While the extension to January 31st may not have been reasonable, certainly the extension to February 28th was reasonable.

[para34] The fact that time was of the essence under the terms of the agreement and was reiterated in the letter of December 14th to the solicitors for the defendant is not offended in any way by a flexible closing date and the provisions of s. 10 of the agreement.

[para35] In *Scanlon v. Castlepoint Development Corp.* (1992), 29 R.P.R. (2d) 60 (Ont. C.A.) the court dealt with the interpretation of agreements of purchase and sale in condominium matters. The court said at p. 86:

Before considering the contractual provisions which are in dispute, I remind myself of certain well established rules of construction applicable to the issue at hand. The agreement with which we are concerned is a negotiated commercial document which should be construed in accordance with sound commercial principles and good business sense. To the extent that it is possible to do so, it should be construed as a whole and effect should be given to all of its provisions. The provisions should be read, not as standing alone, but in light of the agreement as a whole and the other provisions thereof ... the court should strive to give meaning to the agreement and "reject an interpretation that would render one of its terms ineffective."

The court is "to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract."

[para36] In *Scanlon* the court points out peculiarities of condominium agreements and the two stage closing, that is to say, the occupancy and the transfer of title. Dealing with the "closing date" in that case at p. 90 the court says this:

On a plain reading of this provision, the "Closing Date" may be extended when completion of the unit is delayed by reason of the circumstances referred to in the provision.

The term "Closing Date" is defined by para. 1(b) to mean "the 4th of November, 1991 or as extended by Paragraph 13(d)." In May 1991, when Bramalea invoked para. 22 and rescheduled the respondent's closing date to September 14, 1992, "the Closing Date" was manifestly the November 4, 1991 closing date. The transaction was to be completed on that date pursuant to para. 12. At that stage, there had been no extension of the closing date by para. 13(d), nor could there have been. Accordingly, to implement para. 22 and give effect to the extension mandated by it while, at the same time, allowing for the extension contemplated by para. 13(d), it is obviously necessary to read the definition of "Closing Date" (and "Closing") in para. 1(b) as meaning "the 14th of September, 1992 or as extended by Paragraph 23(d)."

and again at p. 93:

To construe para. 22 in so narrow and restrictive fashion, in my opinion, is to render the clause substantially, if not totally, ineffective. To demonstrate this by way of an example, let us suppose that a strike had occurred in, say, the plumbing or electrical industry, which upset Bramalea's timing for the scheduled completion of the respondent's unit on November 4, 1991, by one month, and this made it impossible to have an occupancy closing on that date. On this interpretation, para. 22 is inapplicable and Bramalea would not be entitled to extend the November 4th closing date for the extra month needed to enable it to close pursuant to either paras. 12 or 13(d); the transaction would be at an end. If, however, to change the facts, an occupancy closing pursuant to para. 13(d) did take place on November 4, 1991, then, on this interpretation, Bramalea would subsequently be entitled to invoke para. 22. Accordingly, "[i]f the completion of the Unit ... is delayed by reason of strikes [Bramalea] shall be permitted extensions of time ... for completion and the Closing Date shall be extended accordingly."? Until the project is registered and the vendor gives the 20-day notice called for in para. 13(d), there is no set closing date. Before a closing date is set, there is no reason for the vendor to invoke para. 22 and, moreover, there is no mechanism for putting the provision into operation. Once the closing date has been set, there is, I suppose, the far-fetched possibility that something may arise during the 20-day period following the vendor's notice to require the vendor to extend the closing date set by it less than 20 days earlier. Beyond that possibility, the clause would serve no practical purpose.

In my opinion, para. 22 cannot be meant to produce a result which, to all intents and purposes, is tantamount to striking the clause from the agreement. For the reasons I have already stated, in executing a contract containing this clause, a purchaser could not reasonably have expected that Bramalea was guaranteeing to deliver occupancy on November 4, 1991, without regard to any of the contingencies that might arise to delay construction.

[para37] In *Shoihet v. 110 Bloor Street West Development Coloration Ltd. et al* 32 R.P.R. 179 at p. 191, Trainor J. says:

In cases where neither party can be said to be ready, willing and able to close on a stipulated date each party is entitled to set a new closing date on reasonable notice to the other. Almost four years have gone by and this has not been done either as to interim or final closing. Both sides were aware of the rising market situation and they did nothing. The plaintiff had the legal right, as did the defendant, to set a new closing date provided that they did so within a reasonable time. Four years is unreasonable. As a consequence the plaintiff has lost any right to now stipulate a closing date. The agreements are null and void.

[para38] The position then after February 11th, 1991 was that:

a) Landmark was ready, willing and able to close on the 28th of February, 1991;

b) The defendant says that she was not going to close and that this had been communicated to Landmark by her husband on January 28th;

c) The letter of February 11th, 1991 from the solicitors for the defendant makes it abundantly clear that they are not going to close and the return of the deposit is demanded;

d) The vendor continued to be ready, willing and able to close as indicated in the letter of April 10th, 1991 and indeed when the statement of claim was served that same month;

e) The defendant's position was reinforced by the subsequent letter from the solicitors for the defendant indicating the further grounds for refusing to close, that is misrepresentation.

[para39] I find that as a fact the defendant was ready, willing and able to close indeed on the 31st of January, 1991 but with reasonable notice on the 28th of February, 1991. The defendant refused to close, communicated her refusal to the plaintiff, and therefore the plaintiff was not required to tender.

[para40] In *Bethco Ltd. et al v. Clareco Cab Ltd.* 52 O.R. (2d) 609 at 612 (Ont.C.A.) in the judgment of Grange J. says:

The trial judge, while finding that the vendor "was reluctant to complete the transaction and did everything possible to throw unnecessary hurdles in the path of the purchaser" was "not satisfied that there was an anticipatory breach." It was not the classic anticipatory breach where one party declines to close at all. Nevertheless the vendor was in breach of contract on the closing date and was unwilling or unable to close in accordance with the contract at that time. In these circumstances there was no need for the purchaser to tender at all. It had only to show that it would be able to close in the reasonable future and the trial judge has so found.

[para41] As stated, the plaintiff subsequently sold the premises and claims damages. The quantum of damages is as set forth in Exhibits.

[para42] The evidence was that the plaintiff had put the condominium on the market in April 1991, I presume at a time when they were certain the defendant was not going to close. It was not sold until the 1st of June, 1993 and was referred to as one of the "litigation suites". Presumably because of the adverse turn of the market, some proposed purchasers had decided not to close and to attempt to rescind their agreements and all in all, the evidence indicated that there were approximately 26 such suites. Evidence for the plaintiff indicated that with the upgrades which had been placed in the suite that they were surprised that it did not sell earlier. The vice-president of the plaintiff indicated that it was not dealt with in any special fashion although the Customer Service Manager was of the view that the litigation suites were pushed as a priority by the plaintiff. The defence argued that there had been no special attempt to sell this unit, that it was not specifically advertised or specifically dealt with by real estate agents but was included in the general advertising for the unsold suites and in whatever general arrangement there was in existence with realtors. The argument of the defence is that special efforts should have been made while the prices were still high. In the court's view this is speculation. At Tab A of Exhibit #1 there is an indication of the efforts made by landmark to sell its suites and I therefore come to the conclusion that there was no lack of mitigation on the part of the plaintiff but that the evidence is accurate that the total condominium market in the Toronto area collapsed.

[para43] There was no other attack on the quantum of damages by the defence and all of the figures set forth in Exhibit #5 were adequately demonstrated, the documents being found at Tabs 35 through 46 inclusive in Exhibit #1. After giving credit for the deposits, the plaintiff claims a total loss of \$117,674.28. As the deposits have been credited in the claim for damages they too belong to the plaintiff.

[para44] The plaintiff shall have judgment against the defendant in the amount of \$117,674.28 and its costs to be assessed on a party and party basis. The counterclaim be dismissed but in the circumstances without costs.

FLINN J.

CBR# 031

Ronald Atherley, Margaret Atherley, William Clark, Margaret Clark, Lloyd Dean, Janet Dean, Jose Domingos, Peter Elik, Marian Evason, Roy Fraser, Alan Good, Francis M. Good, Harold Hicks, Fran Hicks, Gerald Jones, Margaret Jones, Marvin Josaitis, Donna M. Josaitis, Lorrain Lemieux, Frances Martin, Kevin G. McCanna, Heather A. Graham, Glenna Minaker, Margaret Harper, Neil Pinheiro, Brenda Slater, Michael S. Weston and Carlton Wong, applicants (appellants), and Somerset Place Developments of Georgetown Limited and Peat Marwick Thorne Inc. and Prenor Equity Inc., respondents (respondents on appeal) And between Somerset Place Developments of Georgetown Limited and Peat Marwick Thorne Inc., counter-applicants, and Ronald Atherley, Margaret Atherley, Slade E. Brett, William Clark, Margaret Clark, Lloyd Dean, Janet Dean, Jose Domingos, Peter Elik, Marian Evason, Roy Fraser, Alan Good, Francis M. Good, Harold Hicks, Fran Hicks, Robert Hirst, George Johnston, Jack Evason, Gerald Jones, Margaret Jones, Sandor Jager, Marvin Josaitis, Donna M. Josaitis, Lorrain Lemieux, Frances Martin, Kevin G. McCanna, Heather A. Graham, Glenna Minaker, Margaret Harper, Darshan Ram, Savitri Ram, Neil Pinheiro, Antonio Rea, Brenda Slater, Michael S. Weston, Carlton Wong and Fine & Deo, counter-respondents

No. C18103

Ontario Court of Appeal Toronto, Ontario Finlayson, Catzman and Laskin JJ.A. Heard: December 20 and 21, 1994. Judgment: February 15, 1995.

Counsel: Eric R. Murray, Q.C., and Jonathon H. Fine, for the appellants. R.B. Moldaver, Q.C., and G. Benchetrit, for the respondents.

The judgment of the court was delivered by [para1] FINLAYSON J.A.:-- This is an appeal from the judgment of the Honourable Mr. Justice Wilkins wherein he dismissed an application under Rule 14 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, for a declaration that certain agreements of purchase and sale ceased to be binding on the appellants and for judgment for the amounts owing by the respondents to the appellants in respect of deposits, occupancy fees and interest thereon. Wilkins J. granted a counter-application, declared that each of the appellants was in breach of the said agreements of purchase and sale and awarded consequential monetary relief. I would allow the appeal, dismiss the counter-application and grant to the appellants the relief requested on the application.

Outline of the proceedings

[para2] In 1988 and 1989, the appellants entered into agreements of purchase and sale (the "Agreements") to buy condominium units in a project under construction known as The Royal Ascot Club from Somerset Developments of Georgetown Limited ("Somerset"). Pursuant to the terms of the Agreements, the majority of the appellants took occupancy of their units starting in January and February 1990, although there was still substantial remedial work to be done before completion of the condominium development. Prior to occupancy, each appellant paid 25 per cent of the purchase price as a deposit. On taking occupancy, each purchaser was required to pay a monthly occupancy fee for the individual unit. The occupancy fee was based on three components: taxes; common expenses; and the mortgage interest component ("MIC"), essentially, interest on the unpaid balance of the purchase price.

[para3] The controversy in the succession of legal proceedings which have culminated in this appeal arises out of the MIC or "phantom mortgage" as it is sometimes called. This is the largest component of the occupancy fee and has been described by Robins J.A. of this court in *Albrecht v. Opemoco Inc.* (1992), 5 O.R. (3d) 385 at 387 (Ont. C.A.) as follows:

These are mortgages designed specifically to satisfy the requirements of s. 51(6) para. 1 of the Condominium Act, R.S.O. 1980, c. 84 (the Act) and thus enable condominium developers to charge purchasers who take possession of proposed condominium units before title can be transferred or conveyed a monthly occupancy fee that includes a mortgage interest component. To achieve this purpose, purchasers who would not otherwise be assuming or giving back a mortgage on final closing are required by their agreements of purchase and sale to give back a mortgage for the balance of the purchase price. Typically, the mortgage is made payable on demand after final closing of the transaction or is for a term of very brief duration, generally not exceeding 30 days. On final closing, purchasers are also required to deposit a certified cheque for the full amount owing on the mortgage or provide other satisfactory assurances that funds will be available to discharge the mortgage upon maturity.

In the case on appeal, the agreed mortgage interest component of the occupancy fee was determined based on the balance of the purchase price payable on final closing, the mortgage rate having been fixed at 2.5 percent above the Toronto Dominion Bank's prime rate in effect on the closing date. The closing date was to be the day on which the unit was "substantially completed by the Vendor for occupancy by the Purchaser". The result was an MIC rate of 15.49 percent. [para4] Normally, the MIC compensates the developer for its borrowing costs during construction. It is intended to be a temporary measure. The problem in the case on appeal is that the developer, Somerset, was slow to complete the development, resulting in the unit holders being obliged to pay the occupancy fee for a longer period than the parties had anticipated. Because of the delay and dissatisfaction with what was perceived as shoddy workmanship in the incomplete development, a number of the unit holders formed a residents' association to deal with the developer about the deficiencies. On February 6, 1990, they signed a letter addressed to Hugh C. Hagen, president of Canterra Commercial Developments Inc. ("Canterra"), the parent of the developer Somerset, specifying deficiencies in the building and demanding that the problems be rectified. One complaint was about the phantom mortgage rate included in the occupancy fee. The letter stated:

When we purchased our units, we were advised that the "Phantom Mortgage" would be less than having a mortgage. This has proved to be untrue.

They closed the letter with a threat that if necessary they would: (i) seek publicity about the shoddy workmanship and unprofessional management associated with the development, and (ii) institute litigation.

[para5] Hagen sent a reply letter dated February 13, 1990, to "All Suite Owners" at the Royal Ascot Club address. He dealt with the complaints one by one and ended by giving "my company's commitment that your concerns will be addressed as best we can". Specifically, as to the MIC complaint, the letter provided:

15. Vendor Take Back Mortgage:

The Purchase and Sale Agreement clearly shows the Vendor Take Back Mortgage at Toronto Dominion Bank Prime Rate plus 2 1/2 percent. Current first mortgage rates are lower although this is an unusual phenomenon in the financial world. On the Unit Transfer Date (i.e. condominium registration), we will be refunding to you the difference between your Vendor Take Back Mortgage interest paid and interest rate on a first mortgage that is calculated 90 days prior to the Unit Transfer Date. Therefore, although the net effect will not be less than had you had a mortgage, it will be the same as if you had had one.

This undertaking is frequently referred to as the "Hagen promise". A letter, also dated February 13, 1990, was sent by Canterra, advising Prenor Equity Inc. ("Prenor"), the mortgagee of the condominium property, to hold all deposits greater than \$20,000 in an interest bearing account.

[para6] I will briefly recount what took place thereafter. In April, 1990, the general contractor abandoned the project and work ceased until late November, 1990, when Prenor appointed Retail Engineering as receiver/manager of Somerset. In March of 1991, the appellants sought a determination of their rights under the Agreements. They questioned, among other things, the sufficiency of Somerset's disclosure statements under s. 52 of the Condominium Act, R.S.O. 1980, c. 84, and the validity of the Vendor Take Back Mortgage. The application was heard by the Honourable Mr. Justice Blenus Wright who, by judgment dated July 24, 1991 (reported at 4 O.R. (3d) 280), issued a declaration that the Agreements were not binding on the appellants because the disclosure statement of the developer did not comply with s. 52 of the Condominium Act. He ordered that the appellants receive back all monies paid by way of deposit or otherwise, subject to the payment of a "reasonable rent" in replacement of the occupancy fees which had been paid under the Agreements. He assessed the "reasonable rent" to be the amount of the estimated realty taxes plus the common expenses, in short, the occupancy fee minus the MIC. Wright J. did not deal directly with the validity of phantom mortgages because the issue was before this court in *Albrecht v. Opemoco*, supra. However, by his determination of what amounted to a reasonable rent, he eliminated the MIC as a cost to the appellants of their occupancy of the condominium units.

[para7] Prenor appealed the judgment of Wright J. In the interim, certain arrangements were made:

a) the solicitors for the parties agreed that the appellants would continue to pay the full occupancy fee with an MIC rate of 15.49 percent, part of which would be held in trust;

b) Gordon, Traub, the solicitors for Somerset advised the solicitors for the appellants that no closing date would be fixed.

[para8] Prenor was represented on the appeal from the judgment of Wright J. by Mr. Moldaver from the firm Gordon, Traub. He noted in his factum that Wright J. had found Prenor to be a declarant pursuant to the provisions of the Condominium Act; appointing a private receiver had, in effect, made it a mortgagee in possession, with all corresponding obligations. The factum asserted:

The consequences of this were that Prenor was found to stand in the place of Somerset and assume all the liabilities of Somerset. These liabilities included honouring Somerset's agreements with the purchasers to reduce the mortgage interest component of the monthly occupation fees, provision for a courtesy van for the Condominium Corporation; and, supplying appropriate furniture for the lobby of the complex.

The factum went on to submit that Wright J. had erred in finding that Prenor was bound by the representations of Somerset.

[para9] The undesirable consequence to Prenor of this finding by Wright J. was that it remained vulnerable to a suit by the appellants based on the undertakings relating to the deficiencies in the condominium project. Nevertheless, during the course of argument on the appeal, Mr. Moldaver acknowledged to the court that Somerset's agreement with the purchasers to reduce the mortgage interest component was a liability of Somerset for which the receiver was liable on final closing. He made this concession despite the position in his factum that these undertakings were not binding on his client.

[para10] This court allowed Prenor's appeal, held that Prenor was not a mortgagee in possession, and found that the appellants were bound by the Agreements. However, in his reasons on behalf of the court, reported as *Abdool v. Somerset Place Developments of Georgetown Ltd.* (1992), 10 O.R. (3d) 120, Robins J.A. stated at p. 155:

I should perhaps note Prenor's concession to the effect that Somerset's agreement to reduce the mortgage interest component paid by each purchaser by the difference between the rate actually used in the calculation of the occupancy fee and the mortgage rate effective 90 days prior to the unit transfer date is a liability of Somerset for which the receiver is responsible on final closing.

Despite Mr. Moldaver's efforts to persuade us to the contrary, there can be no doubt on a plain reading of the judgment in the context of the issues raised in the notice of appeal and the factums filed, that Robins J.A. was here acknowledging counsel's concession, that adjustments would be made to the occupancy fees notwithstanding the submissions to the contrary in counsel's factum.

[para11] As a result of this decision, the appellants were obliged to close their individual Agreements, subject to the above noted MIC reduction. In a letter dated October 22, 1992, Robert A. Miller of Gordon, Traub, as solicitors for Somerset and Peat, Marwick Thorne Inc. ("Peat Marwick"), which had been appointed by Prenor on November 21, 1991 to replace Retail Engineering as receiver/manager, advised the solicitors for the appellants that he was setting a closing date of November 18, 1992 for these purchases. In that letter he stated: The statement of adjustments and all closing documentation will be prepared in accordance with the original terms of the agreement of purchase and sale between your clients and Somerset Place Developments of Georgetown Limited ("Somerset") subject to the following amendments:

1. all closing documentation will be executed by Somerset's receiver/manager; Peat, Marwick, Thorne Inc.
2. all "rental fees" paid by your client's will be credited against outstanding occupation fees payable by your clients pursuant to the provisions of the original agreements.

The appellants' solicitors replied, seeking to know the vendors' position with respect to, among other things, an "adjustment in purchase price/occupancy fee or other credit to the purchasers including reduction of the mortgage interest component". In a letter dated October 30, 1992, Miller responded in what is now sometimes known as the "Miller letter". As to the issue of the MIC, he wrote as follows:

There will be no adjustment to the purchase price or occupancy fee. However, in accordance with the Court of Appeal decision (page 61), there will be a reduction in the mortgage interest component to reflect the interest rate effective ninety days prior to closing.

The reference to page 61 is to the unreported reasons of Robins J.A. and corresponds to page 155 of the Ontario Reports citation above. Miller later took the position that this was a "gratuitous concession" that was "inadvertently made in my mistaken belief with respect to the reference to a concession being made by Prenor in the Appeal Reasons".

[para12] There was a falling out between the parties on this issue, and despite attempts to settle the amount of the rebate on the MIC, there was no closing. I will not set out the correspondence in detail. The crux of the disagreement had to do with which Toronto Dominion prime rate would form the basis of the reduction. The position of the vendors, as put forth by their solicitors, was that since the original closing date was to have been December 5, 1991, the rate in effect 90 days prior was to be used. The position of the appellants was that closing had been delayed and as a result, the appropriate rate was the one in effect 90 days prior to the delayed closing. Since residential mortgage rates declined steadily from the spring and summer of 1990, the difference between the two rates was significant.

[para13] I am satisfied on the record that ultimately the purchasers were prepared to settle the matter; they were ready, willing and able to close the various transactions on the basis of a reduction of the MIC rate to 10 percent. I am similarly satisfied that the solicitors for the vendors had no intention of closing these transactions in accordance with the Somerset undertaking, the Prenor concession, the Miller letter or any variation of the same. Communications continued between the solicitors to no avail. A new closing date of December 23, 1992 was set by counsel for the vendors. On December 24, 1992, the day following the intended closing, Gordon, Traub purported to terminate the Agreements, declared the deposits forfeit and demanded immediate vacant possession of the units. The appellants gave up possession and brought an application before Wilkins J.

Reasons of motions judge

[para14] The reasons of the learned motions judge are very detailed, but with respect, they indicate a complete misapprehension of the concept of the MIC or phantom mortgage, a misapprehension that was not shared by any of the parties to this litigation. The learned judge went over the documentation that I have referred to above and found himself unable to reconcile (a) "the interest rate on a first mortgage" referred to in what he called the Hagen promise; (b) the "mortgage rate" in the reasons of Wright J.; and (c) "... Somerset's agreement to reduce the mortgage interest component by the difference between the rate actually used in the calculation of the occupancy fee and the 'mortgage rate' effective ninety days prior to the unit transfer date" in the reasons of Robins J.A. Wilkins J. found that Miller was mistaken in his understanding of the effect of the decision of the Court of Appeal, but at the same time stated that his words were written with an intention to accord with the decision in the Court of Appeal. He said that Miller used the words he did because he "mistakenly believed that the Order of the Court of Appeal would somehow create that reduction".

[para15] All of these distinctions by the motions judge are artificial in the context of this dispute. It was never suggested in this court that these phrases had different meanings and I do not think that they have. Every party to this litigation was aware that the interest rate in the phantom mortgage or MIC was higher than prevailing interest rates. The purport of the Hagen promise was that if the unit holders would continue to pay the contracted rate of interest in the MIC, then on closing, Somerset would refund to each unit holder the difference between the agreed upon rate and the first mortgage interest rate in effect at the Toronto Dominion Bank 90 days prior to the closing date. The phantom mortgage rate was 15.49 percent as agreed upon in the interim arrangements pending the appeal from Wright J. The parties were never in any disagreement about this.

[para16] Miller's basis for resiling from his commitment was that he had made a gratuitous concession, not that he had failed to understand the court of appeal judgment. Mr. Moldaver attempted to minimize his concession in this court by referring to it as a "throw away". He tried to argue that it had been made with respect to a matter that had not been in issue in the appeal. He also said that it was Prenor's concession, and as such did not bind Somerset. Alternatively, he contended that it was gratuitous and non-binding because of lack of consideration. It appears to me, that Mr. Moldaver has reflected on his concession, and now feels that it was one that, as it turned out, he was not obliged to make in order to achieve success on Prenor's appeal.

[para17] In fact, as I believe I have demonstrated, the Somerset undertaking was very much in issue until Mr. Moldaver made it a non-issue by his concession that the MIC was to be reduced as stated by Robins J.A. The concession was relevant to Robins J.A.'s consideration of the quantum of the occupancy fees under his heading "Was there any basis upon which an abatement of the purchasers' interim occupancy fee or rent could be ordered?". From a reading of his reasons, I would conclude that because of counsel's concession Robins J.A. did not feel obliged to address the stated issue in Prenor's factum that Wright J. had effectively found that Prenor had assumed all the liabilities of Somerset including the Hagen promise. To suggest that Robins J.A.'s finding that Prenor was bound by the Hagen promise was inconsistent with the court's judgment overall, and that therefore the concession was irrelevant, is to argue the matter backwards. In my view, it is neither necessary nor profitable to speculate about what the court might have decided had the concession not been made. The fact is, the concession was clear and unequivocal and therefore binding on Prenor and its receiver, who in combination were effectively the vendors of the condominium units under the Agreements. This concession was re-asserted prior to closing by Gordon, Traub as solicitors for both Somerset and Prenor's replacement receiver.

[para18] I should add, parenthetically, that undertakings, concessions and statements of fact made by counsel during the course of argument are taken very seriously by the court and are accepted at face value. We were invited to look behind the Prenor concession in this court, but I decline to do so. In my judgment, Wilkins J. was in error in permitting evidence before him as to how this Prenor concession came about at the hearing of the first appeal. The same applies to evidence leading to the settlement of the formal judgment. Similarly, he should not have entertained evidence as to counsel's authority to make the concession nor concerned himself with whether it was supported by consideration at law. The concession of counsel speaks for itself and stands alone.

[para19] Returning to the motion judge's reasons, I should say that contrary to his perception, there is nothing in the record to indicate any difference between the parties as to the method of calculation of the MIC in the Hagen promise. The difference that later arose was with respect to the appropriate closing date. Miller asserted that the calculation should be made with reference to the prime rate that was in effect 90 days before December 5, 1991, the original scheduled closing date. This position makes no sense. The judgment of Robins J.A. was delivered on October 16, 1992. It is more than apparent that neither Robins J.A., nor later Miller, could have been referring to a date long gone by. The references to a closing date in both cases was prospective. I can only conclude that when Miller, on behalf of the vendor, set a new closing date of November 18, 1992, he did not realize that the

Toronto Dominion Bank rate 90 days prior thereto was 6.5 percent as opposed to the interim fixed rate of 15.49 percent, which the appellants had agreed to continue paying, pending the outcome of the appeal from the decision of Wright J. The record is then replete with protestations from Gordon, Traub which are entirely inconsistent with the letter and spirit of what had been agreed to. [para20] In my respectful view, this misconception of the significance of the Hagen promise or Somerset undertaking and its subsequent re-assertions permeated the motion judge's reasons and resulted in his misapprehension of what was in issue between the parties on the final closing. It led to his finding that the conduct of the appellants in refusing to close on the respondents' terms was unreasonable. To the extent that his analysis of the significance of the Hagen promise and the use that the respondents made of it amounted to findings of fact, they constituted palpable and overriding error, which ultimately affected the outcome of the case.

[para21] The motions judge dismissed the application of the appellants on the basis that the appellants had:

...unilaterally attempted to enforce their interpretation of the Hagen promise/Prenor concession/Miller letter, both as to liability and interest rate, and that they unilaterally attempted to enforce the extinction of rights by way of merger on those issues notwithstanding the provisions of paragraph 16 cited above.

Paragraph 16 of the agreements of purchase and sale stated that all covenants, warranties and the like would remain in full force and effect notwithstanding the transfer of title to the purchasers. The learned judge also relied upon paragraph 30, the standard clause wherein the parties agreed that there was no representation, warranty etc. "other than as expressed herein in writing".

[para22] These clauses related to the purchase and sale of the condominium units. As the respondents were quick to point out, the occupancy fees were not part of the purchase price under the Agreements. Neither of these clauses is any impediment to the appellants' position that the statement of adjustments on closing was to reflect the Hagen promise and its continued reaffirmations. Their conduct in holding out for a credit that had been promised them by Hagen was hardly unreasonable as was held by Wilkins J.

Analysis

[para23] I have dealt with a number of the issues in this appeal in the course of explaining the history of the litigation. In the last resort, the arguments advanced in favour of upholding the judgment of the motions judge were the following:

(a) Failure of the appellants to close on December 23, 1992

[para24] In this court, Mr. Moldaver commenced his argument by submitting that the appellants, as purchasers, had failed to close as required by law. He submitted that under the terms of the Agreements, the occupancy fees were not part of the purchase price and that the appellants should have closed the various deals under protest, with the option of litigating this issue yet again in a series of separate claims. As he put it in his factum:

The fundamental and threshold issue is whether the Appellants ought to have closed while paying whatever the Appellants determined was proper for the MIC of interim occupancy cost.

This was essentially the approach taken by the motions judge. He found it unreasonable for the appellants to have insisted on not closing unless and until the long standing dispute as to the appropriate adjustment was resolved. [para25] As I have indicated, the question of reasonableness has no application. There was only one issue outstanding between the parties pertaining to the MIC and that was the date on which the rate was to be calculated. If agreement could not be reached on this point, the parties were simply not ad idem. In my view, the refusal of the solicitors for Somerset and the receiver and manager to implement the Somerset undertaking justified the purchasers' refusal to close. The notion that they had to accept a deed, knowing that the vendor was not accepting as final the purchaser's view of what was due on closing and was intending to litigate for the balance, finds little support in the cases referred to by counsel: see for example *LeMesurier v. Andrus* (1986), 54 O.R. (2d) 1 (Ont. C.A.) and *Leung v. Leung* (1990), 75 O.R. (2d) 786 (Gen. Div.). *Lemesurier* dealt with relatively insignificant discrepancies in the description of the property, discrepancies which the vendors attempted to repair.

As Grange J.A. noted at p.7,

... certainly with the corrective measures taken by the vendors, the purchaser was obliged in the absence of some legitimate interest of hers being adversely affected to perform her part of the bargain ...". [Emphasis mine]

In *Leung*, the court held that the duty to act in good faith extended to cases involving minor omissions or defects and did not allow the vendor to repudiate an agreement where the purchaser's tender included minor but easily corrected errors. In contrast, in the case on appeal, the discrepancy between what was perceived by the purchasers to be the vendors' promise on one hand, and the position which the vendors were trying to force the purchasers to accept on the other was anything but minor or insignificant. Clearly, the legitimate interests of the purchasers were being adversely affected. *Taro Properties v. Henry Waks and Sons*, the unreported decision of this court dated December 22, 1993, so strongly relied upon by counsel, has nothing to do with the closing of a real estate transaction. The issue in *Taro* was whether a bank, by executing a cessation of a charge it had registered against a piece of real estate, had granted a discharge of the underlying debt. This court simply upheld the trial judge's finding that all parties were aware that the bank had executed the cessation of charge in order to permit the chargee to sell the encumbered property and had expressly reserved the right to claim the balance of the indebtedness covered by the charge from the chargee.

(b) The validity of the various undertakings relating to the MIC

[para26] The arguments on these issues are without substance. The first argument, failure of consideration, is the last refuge of the reluctant promisor. One would think that the threat of publicity and the potential for litigation must have been very real to a developer who was left with more than half his units unsold. Consequently, it is difficult to understand how it could be said that there was no consideration supporting the Hagen promise. In the motion judge's assessment, Hagen "was attempting to 'buy peace' and avoid the unpleasant consequences, including litigation, set out in the original correspondence". The argument is particularly weak in this case, the promise having been relied upon before this court by Mr. Moldaver in the appeal from the decision of Wright J., in order to defuse an issue that might have been determined adversely to the respondents in this appeal.

[para27] At the risk of appearing to restate the obvious, it is apparent that there was a mutuality of interest in the arrangement between the vendors and purchasers reflected in the Hagen promise. The unit purchasers were obliged to enter into occupancy

under the terms of their agreements of purchase and sale and were obliged to pay an occupancy fee over and above the down payment of 25 percent of the purchase price. This occupancy fee was to be an interim arrangement until the condominium complex was completed. At that time, the unit holders could finance their own purchases and their obligation to pay the developer an occupancy fee or rent would cease. The problem that arose here was that the building was far from complete when the unit holders were obliged by their agreements to accept occupancy. In the result, they found themselves in a building that was deficient in many respects and they were paying an occupancy fee based on a mortgage rate that was well above the prevailing rate on the market.

[para28] The quid pro quo of the Somerset promise was that the purchasers would refrain from making public their complaints and instituting legal action in return for the promise that the developer would remedy the deficiencies and make an adjustment to the MIC on final closing. In the meantime, the status quo was to be maintained by, on the one hand, the purchasers continuing to pay the agreed occupancy fee despite the inflated MIC and, on the other hand, by the developer completing the project. In fact, the developer did not complete the project and his contractor walked off the site leaving the project in the deplorable condition described by Wright J. in his reasons. The appellants did apply to the court for a determination of their rights under the Agreement but continued to pay the occupancy fee and the developer accepted it.

[para29] We were told that counsel for the respondents purported before Wright J. to unilaterally withdraw the Hagen promise. I am not sure that he was in a position to do so, but the point is now moot. Even if we assume that the developer was successful in withdrawing the undertaking, it was reinstated by the interim arrangements pending appeal and was permanently revived by Mr. Moldaver in his concession to this court on the appeal. The promise was restated by Miller on behalf of the vendors on closing. The appellants for their part, paid the inflated MIC as a condition of continuing to occupy the units up to the aborted closing. In my opinion, it is clear that consideration flowed from the purchasers to the developer for the undertaking.

[para30] I was similarly unpersuaded by the second argument under this heading, that the original Hagen promise was not an undertaking binding on the developer Somerset in favour of all the appellants. It clearly was. The letter containing the promise was addressed to all the unit holders by the president of the parent company of Somerset in response to a letter of grievance directed to him in that capacity. The letter purported to give undertakings that only the vendor under the Agreements could give, and was signed by Hagen, who as president, was in a position to cause the vendor to honour them.

[para31] The third argument was the least convincing. Mr. Moldaver argued that his concession, if it was one, was given on behalf of Prenor and not Somerset, which was not a party to the appeal. This, in my opinion is a technicality. The only reason Somerset was not a party to the appeal was that Prenor, as mortgagee, had appointed Retail Engineering as receiver/ manager and had taken over the operation of the project and carriage of the appeal. Members of Gordon, Traub have acted as solicitors and/or counsel for the developer and its successors from the outset and have been privy to all assertions and reassertions of the undertaking throughout these tangled proceedings. They have consistently acted for whichever party was in a position to deliver the deeds on closing under these Agreements. They cannot now split hairs about whose interests they were representing at a particular time.

[para32] Finally, the respondents also seek to raise the defence of estoppel. In their factum they state that the appellants are "estopped" from re-asserting the validity of the Hagen promise because the finding of Wright J. that the promise was made was reversed on appeal and cannot be re- argued. I think they intended to say that the issue is res judicata. No matter, the Prenor concession took the issue away from the Court of Appeal and it was never finally adjudicated. The Prenor concession kept the Hagen promise alive for all purposes.

[para33] I do not think that this is a case of the unit holders asserting a technical position. They continued in occupancy under the inflated rates until December of 1992, when they were evicted after being unwilling to close on their purchases. The consideration for the promised rebate was ongoing on the part of the unit holders. When one adds the concession to the Court of Appeal and the acknowledgment by Miller that such a concession was made, the position of the appellants seems to me to be unanswerable. They continued to occupy their units on the strength of the developer's commitment, later renewed by the receivers, that an adjustment would be made on closing in accordance with the formula set out in the Hagen promise. This promise was never honoured.

Relief sought

[para34] The factum of the appellants was filed with this court on July 25, 1994, containing a schedule (Schedule D) which summarizes each appellant's claims. These calculations were not disputed by the respondents in their factum or in argument. The schedule sets out the deposit forfeited by each of the appellants on the date of the aborted closing, December 23, 1992, and the interest due on those deposits as of that date. The schedule also shows the amount of the occupancy fee paid by each appellant with the MIC unadjusted, and the amount that would have been paid had the prime rate of September, 1992 been used. The difference between the two is shown as of December 23, 1992. I think that the total of the forfeited deposit with interest, plus the difference between the unadjusted and the adjusted MIC constitutes the correct measure of the relief to which the appellants are entitled. The final figures are set out in a chart below. They are taken from Schedule D. In addition, the appellants should receive pre-judgment interest on those sums until the initiation of these proceedings on July 12, 1993 and post judgment interest thereafter.

[para35] Accordingly, I am prepared to allow the appeal, set aside the judgement of Wilkins J. and substitute in its place a judgment containing the following:

- a) A declaration that the appellants were not obliged to close the Agreements on December 23, 1992 or at all, by reason of the breach by the respondents of Somerset's agreement to reduce the MIC;
- b) An order compelling the respondents to pay to the appellants the amounts set forth in the chart below;
- c) An order that the respondents pay pre-judgment interest on the aforesaid sums to July 12, 1993 and post judgment interest thereafter;
- d) An order that all money paid into court by the appellants, including interest accrued thereon, be forthwith paid out to the appellants to the credit of the amounts owing by the respondents to the appellants;
- e) An order dismissing the counter-application;

f) An order that the respondents pay to the appellants their costs of the application and counter- application before Wilkins J., including GST, forthwith after assessment thereof;

f) An order that the respondents pay to the appellants their costs of this appeal, including GST, forthwith after assessment thereof.

AMOUNTS TO BE PAID BY RESPONDENTS TO APPELLANTS

Ronald Atherley and Margaret Atherley \$70,620.84 Lloyd Dean and Janet Dean 80,302.19 Jose Domingos 49,035.30 Peter Elik 57,074.47 Roy Fraser 72,005.37 Harold Hicks and Fran Hicks 66,998.05 Gerald Jones and Margaret Jones 82,266.72 Marvin Josaitis and Donna M. Josaitis 52,749.96 Lorrain Lemieux 56,643.04 Michael S. Weston 49,533.20 Carlton Wong 59,185.94 Darshan Ram 84,926.52 Savitri Ram 24,632.14

FINLAYSON J.A. CATZMAN J.A. -- I agree. LASKIN J.A. -- I agree.

CBR# 304

Terry Stafford and Susan Stafford, Applicants, and Frontenac Condominium Corporation No. 11 and The Board of Directors of Frontenac condominium Corporation No. 11, Respondents

Action No. 7000/93 Ontario Court of Justice - General Division Ottawa, Ontario McWilliam J. September 21, 1994.

Kurt R. Pearson, for the Applicants. James Davidson, for the Respondents.

[para1] McWILLIAM J.:-- The applicants (purchasers hereinafter) bought the ground floor, retail/commercial space of the respondents' condominium (the condo hereinafter) on November 26, 1992. It is a 95-unit building on the Kingston waterfront called the Landmark Residences (94 are residences) at 165 Ontario Street. The transaction closed on February 4, 1993. On January 28, 1993 the condo gave an estoppel certificate to the purchaser pursuant to s. 32(8) of the Condominium Act (hereinafter the Act).

[para2] It provides:

Any person acquiring or proposing to acquire an interest in a unit from an owner may request the corporation to give a certificate in the prescribed form in respect of the common expenses of the owner and of default in payment thereof, if any, by the owner, together with such statements and information as are prescribed by the regulations, and the certificate binds the corporation as against the person requesting the certificate in respect of any default or otherwise shown in the certificate, as of the day it is given.

[para3] The certificate was completed to comply with Form 18 of Regulation 121 under the Act. It certified that an attached current budget was accurate (paragraph 4); the condo had no knowledge of circumstances which might increase common expenses, except for inflation, taxation, and "the results of present engineering tests on the balconies by J.L. Richards & Associates" (paragraph 6); and the condo "is not presently considering any substantial additions, alteration or improvement to or renovation of common elements or any substantial changes in the assets of the Corporation other than those normally financed by the reserve fund subject to the results of present engineering tests on the balconies by J.L. Richards & Associates." (hereinafter Richards)

[para4] Almost eight months after the February closing on August 31, 1993 the condo issued a notice of special assessment which indicated that the purchasers' share would be \$91,932 or 15.226 per cent of the total funds required of \$603,784.(Tab 23, documents brief). Balcony work (a neutral term for the moment) constituted \$597,408 of the total proposed work of \$882,927 or 66.66 per cent. Nine different items composed the remaining one third of the work.

[para5] The purchasers first learned of these projected costs on June 15, 1993 at the Spring meeting of the condo owners and of their share of the costs. Those owners present voted 44 to 36 to carry out the renovations. The purchasers have not paid their special assessment to the condo, but they have been paid into their solicitors' trust account.

[para6] In their application record the purchasers say:

The Board of Directors of the Condominium Corporation knew in 1992 that the Condominium was faced with the potential for major expenses in 1993, but did not disclose this information to the Applicants. Instead, the Corporation induced the applicants, by way of the estoppel certificate, to complete the purchase of the property to the Applicant's detriment.

[para7] The purchasers also state that the work proposed constituted a substantial alteration of the condo's assets and as such would require the concurrence of 80 per cent of the owners of the units, and no such support was obtained. In addition the purchasers said that contrary to the undertaking given in the estoppel certificate the condo did have knowledge of circumstances that might have resulted in an increase of common expenses that it failed to disclose. Such failures to disclose violated section 32(8) of the Act, and the statements made in the estoppel certificate were so inadequate as to amount to non-disclosure in the circumstances.

SUBSTANTIAL UNDERTAKING

[para8] When the vote was taken at the spring meeting, the majority (44-36) also approved that glass would be used to replace the brick wing walls on the cantilevered balconies. The material discloses that in cost terms there does not appear to be any major difference between the cost of glass and brick [Respondents' Record, Tab 1(b)]. It seems the consulting engineer Peter R.F. Morrin preferred glass for its lower, long-term maintenance costs.

[para9] The Board of Directors was advised by its solicitors in March, 1993 (Respondent's Record, Tab J) that such a vote would comply with section 38 of the Act, and that an 80 per cent approval by condo owners was not required.

[para10] Section 38(1) provides:

The corporation may by a vote of owners who own 80 per cent of the units make any substantial addition, alteration or improvement to or renovation of the common elements or may make any substantial change in the assets of the corporation, and the corporation may by a vote of the owners make any other addition, alteration or improvement to or renovation of the common elements or may make any other change in the assets of the corporation.

[para11] In my view the section envisages two kinds of additions: substantial additions, etc., and simply any other additions, etc. Substantial changes require a weighted vote of 80 per cent approval. Other changes simply require a vote, and I would courageously read in majoritarian and affirmative as necessary conditions of that other vote.

[para12] Essentially the work was undertaken to correct a problem with the brick wing walls which were in a dangerous condition due to spalling and cracking, and the concrete work on the cantilevered balconies was more obviously in the nature of replacement than the glass ends of the wing walls were. This is true notwithstanding that the original design had an aluminum and glass railing across the front of the balconies [Respondents' Record, Tab G]. Yet the glass essentially performs the same structural and safety purpose as the brick wing walls. Still it does change the appearance of the building. Nevertheless, in my view, such an apparent change does not represent a substantial addition, etc. as set out in s. 38. Courts must consider carefully in what circumstances they will declare an addition substantial. The remedy of immediate buy out available to a potential minimum of

20.1 per cent of owners who dissent under s. 38(4) requires sober, second thought before being unleashed. I note that the condo's declaration [Article IV 4 (a)] gives the Board of Directors the right to decide the substantial issue, but essentially the Board chose the "other addition" option and had the vote. Consequently I am not called upon to decide the efficacy of that article of the declaration. The steps the Board took complied with the requirements of section 38.

DISCLOSURE

[para13] The purchasers raised the general argument that the disclosure obligation implicit in section 32 of the Act was not complied with by the condo. The disclosure made in the estoppel certificate amounts, in effect, to non-disclosure, they claimed. Counsel sought to impress the condo with knowledge of budget, structural defects and other deficiencies prior to January 28, 1993 such that its statements in the estoppel certificate about budget (paragraph 4) and common expenses (paragraph 6) and substantial additions (paragraph 8) were improper inducements for the purchasers to close the purchase on February 4, 1993.

SHORT HISTORY OF PROJECTIONS

[para14] In a Technical Audit by Richards dated November, 1990 cantilevered balconies were listed as a deficiency item costing \$300,000 to repair, and it was to be paid off at \$75,000 a year from 1991 to 1994. The audit noted that the deterioration was not of "structural significance at the present time." It also recommended that \$40,000 a year be set aside for the following five years to repair tower masonry cladding caused by the same phenomena which affected the brick end walls, the freeze-thaw cycle [Tab 25]. The operating rule (1991) of the Reserve Fund Committee was that "only major expenditures for common property items will be included as Reserve Fund expenditures" (emphasis in text).

[para15] In May of 1992 the chairman of the board told the Spring meeting of the owners that he did not anticipate any special assessment made on account of the Reserve Fund in 1992. A Reserve Fund Committee report dated August 25, 1992 made refurbishing and repairing all masonry and flashing a first priority at an estimated cost of \$340,000. On October 2, 1992 owners were notified that "urgent preventative measures and tests relating to balconies...must be undertaken in the immediate future." Balcony deterioration was considered in the 1992 Reserve Fund and was put forward, in the light of other priorities, to be "undertaken" in 1993. On December 15, 1992 the owners had their annual meeting. [Tab 36] The chairman's report which was appended to the minutes reported on activities related to the Reserve Fund. It noted that during concrete work on the balconies carried over from 1991 serious deterioration was observed and test core samplings were ordered plus chain dragging. The report concluded:

Until these tests have been completed and analyzed, early in January 1993, a valid estimate of balcony repair costs cannot be made. However, we know that the costs will be significant. [Tab 36, p. 4]

[para16] Later the chairman specifically addressed the Reserve Fund budget. The Reserve Fund makes contributions to the regular monthly condominium fees. He noted as well:

During the fiscal year 1992, events have taken place which were unforeseen and un predictable i.e. unbudgeted emergency measures as reported above. Consequently, the Board believes that due to the uncertainty as to the magnitude of cost for ensuing major projects in 1993, in particular cantilevered balconies, any attempt to prepare a 1993 Reserve Fund Project List and a Reserve Fund Budget at this time would be fruitless. When estimates have been received early in 1993 following the balcony tests by J.L. Richards & Associates, we will be able to calculate the amount of money required to perform the necessary Reserve Fund work in 1993 and bring the contingency level up \$250,000. It should be noted that in order to keep our Condominium Fees at a reasonable level, it is proposed that a special assessment can be anticipated.

[para17] Counsel for the purchasers referred the court to the Minutes of the Owners' meeting of July 20, 1993 [Tab 22]. There, he said, the Board received four options to replace the brick end walls in January. It should be pointed out that immediately after the options were discussed the minutes record:

Since the initial presentation of alternatives on the 19th day of March, 1993 another material considered was of a concrete type appearance.

[para18] Essentially the possibility of these options was disclosed by the repair work mentioned in the exception in clause 8 of the Estoppel Certificate, i.e. that the condo was not considering any common element renovations other than those normally financed by the reserve fund subject to the results of present engineering tests on the balconies by J.L. Richards & Associates.

[para19] As far as other expenses are concerned, the president Leigh Cruess swore on December 9, 1993:

However, as of the end of 1992, we had no information that these expenses, or any other expenses not related to the balconies, might result in a special assessment. We thought that any special assessment would be the result of the required repairs to the balconies and that our reserve fund policy would otherwise meet our needs.

[para20] A breakdown of the figures in the notice of the special assessment justify Mr. Cruess' observations, and Mr. Davidson's submission that this special assessment was balcony-driven.

JURISPRUDENCE

[para21] Counsel agree, in general, that there is a paucity of precedent concerning section 32(8) of the Condominium Act. The applicant, however, maintains that analogy suggests the court ought to adopt tough disclosure standards in scrutinizing estoppel certificates. He cited with approval Mr. Davidson's article in 1991 on Estoppel Certificates. He wrote if circumstances could realistically result in costs or expenses that would not be covered by the corporation's short term (operating) budget or long term (reserve) budgeting, they must be disclosed.

[para22] Mr. Davidson also nodded toward commercial realism and noted that "unnecessary alarm" should be avoided by statements in estoppel certificates.

[para23] In *Rowntree v. Breakers East Inc.* (1992) 10 O.R. (3d) 120, Robins, J.A. opted for a broad interpretation of s. 52 of the Condominium Act regarding condominium declarations, and the need for developers to comply with the "consumer protection objectives" of the Act. His Lordship said at p. 136:

The purchaser is clearly entitled to the information called for by the Act in order to make an informed decision about his or her condominium purchase. At the same time, however, once the ten-day period has expired, the vendor is entitled to assume that it has a binding agreement of purchase and sale and to rely on the certainty of that agreement in developing the project and conducting its business affairs.

[para24] A disclosure statement, he said, must be "defective in a material respect." Once a purchaser goes through the cooling off period of ten days provided in the Act, Mr. Justice Robins said the onus is on the purchaser who seeks to resile from his agreement. Here the purchasers knew that a special assessment was at least possible after the engineering studies were completed. They made no inquiries. Since the onus is on the purchaser to show that a disclosure statement fails to satisfy the Act to the degree that it must be declared non-binding, it seems to me to be analogously fair that the purchasers here are under the same onus to show that the special assessment is not binding on them. I find that the onus here has not been discharged. The purchasers failed to make any inquiries even though the potential liability ignored was unknown as to quantum. How can the purchasers' case survive the "commercial" branch of the test adopted by Robins, J.A.? In my view it can not.

[para25] Costs are reserved at the request of counsel. If they are not agreed upon, then counsel can make concise submissions in writing on a timetable to be arranged between themselves with the respondent condo commencing the exchange and replying. If counsel think oral submission are necessary, then the court co-ordinator at Ottawa can be spoken to for a date suitable to everyone. If counsel want a date in Kingston, I will be there doing criminal work beginning on Monday, November 14, 1994 for the week. Perhaps we could do it from 9.15 to 10 a.m. some morning. November 16 is not available as I have a sentencing at that time.

McWILLIAM J.

CBR# 140

Sidney L. Jaffe and Ruth Jaffe, Plaintiffs, and Metropolitan Condominium Corporation No. 539, Defendant

Action No. 18222/87 Ontario Court of Justice - General Division Non-Jury Sittings - Toronto, Ontario Grossi J. August 27, 1993.

M. MacDonald, for the Plaintiffs. B. Thomas, Q.C. and D. Klukach, for the Defendant. [para1] GROSSI J. (orally):-- This is an action brought by Sidney Jaffe and Ruth Jaffe against Metropolitan Toronto Condominium Corporation No. 539 for damages for breach of contract and tortious conduct, i.e. negligence.

The Facts:

[para2] Mr. Jaffe was charged in Florida with offences concerning a fraudulent land transaction, and he did not appear for his trial in Florida in May of 1981. It appears that the bail bond company took umbrage with his failure to appear. Mr. Johnsen, a representative of the bail bond company, went to Toronto to fetch and escort Mr. Jaffe to Florida. On September the 23rd, 1981, Mr. Johnsen attended the condominium located at 110 Bloor Street West in Toronto. where the Jaffes maintained a suite. He gained access to the lobby from the mall area on the pretext that he wished to speak to the Manager. Once in the lobby, he encountered Christopher Ryan and enquired of him if he was security. Mr. Ryan replied in the affirmative. Mr. Johnsen enquired if Mr. Jaffe was a resident. He identified himself as Officer Timm Johnsen with the fraud squad and that he had a number of fraud warrants re Mr. Jaffe. He produced a police investigative type picture (front and profile) of Mr. Jaffe, commonly referred to as a mug shot. He was not dressed in a police uniform. He stated that he wanted to go up to the Jaffe's suite. Ryan replied that Jaffe was not home and that he could not go up anyway. Johnsen countered that he could. Ryan advised that Jaffe was out jogging.

[para3] As identification, Johnsen produced a wallet containing a yellow gold badge, a bluish green identification card, a badge number and picture with the name Timm Johnsen and Bureau of Investigations thereon.

[para4] Johnsen left to get his partner and advised they would park in the loading zone outside the lobby. Ryan observed an unmarked vehicle parked in the loading zone. Johnsen entered and remained in the lobby area. Ryan observed Jaffe enter the lobby, proceed to the elevator and Johnsen approach him. He heard Johnsen identify himself as a detective and requested Jaffe to "Please come with me." Jaffe gave no indication of being surprised nor did he call out to Ryan for assistance. Ryan observed that there was no physical contact by Johnsen toward Jaffe. There was no holding or laying on of hands.

[para5] He described the tone as being a normal talking voice. He observed Johnsen and Jaffe leave the lobby and proceed to the car and Jaffe enter the rear seat and the car drive away. Attempts were made to contact the Jaffe suite. Eventually Jaffe's daughter, Robin, arrived and she was advised of the occurrence. The police were called and an investigation into the incident commenced.

[para6] The plaintiffs contend that Mr. Ryan, the person on security duty at 110 Bloor Street West, was negligent in the manner in which he dealt with Mr. Johnsen and, as such, the defendant is responsible for the injuries suffered by the plaintiffs. They contend that the duty was of a higher standard as this was a luxury condominium and the advertising offered a state of the art security system. The inference that the plaintiff would ask me to draw is that the security personnel would possess a degree of competency above that of security personnel in buildings of lesser status and, as such, would be trained to detect false identification and readily see that Johnsen's identification was suspect.

[para7] I have reviewed the evidence and the actions of Mr. Ryan. I find that he was not negligent. He acted in a way that one would expect of security personnel in the circumstances. There was nothing that would cause him to be suspicious of Mr. Johnsen's status. He requested identity and he was given identity and photographs of the plaintiff that would not cause security personnel to be suspect.

[para8] The plaintiff contends that it was a duty of Mr. Ryan to obtain the address of anyone identifying himself or herself as a police officer. Mr. Mark, the head of the security retained by 110 Bloor Street, said the obligation was to obtain the name and badge number. In his opinion, this is the essential information that tells all. In my opinion, his evidence established that Mr. Ryan did not omit any of the essentials required of security personnel when confronted by persons identifying themselves as police officers.

[para9] Johnsen was dressed in plain clothes. His actions were in no way furtive, he was not excited. He left the lobby to move the automobile to the parking area. The vehicle being unmarked is of no importance. It is common knowledge that there are a number of police officers in operation and they are not necessarily in uniform and driving marked vehicles. The whole incident lasted no more than 20 minutes. The lobby of 110 Bloor Street West was glassed and readily observable by passers-by.

[para10] In his statement shortly after the incident, Ryan did not mention a telephone conversation with the security company Manager as to obtaining identification. In his evidence, he stated that he did not recall the conversation. In any event he had fulfilled his obligation with respect to establishing identification prior to the telephone conversation. The plaintiff contends that Ryan because of his emotional state and volunteering to Robin Jaffe that he screwed up was an admission of neglect of duty.

[para11] I do not draw that inference. Rather I draw the inference and, in my opinion, it is the proper inference that Ryan was upset and his behaviour was normal in the circumstances. It was that of a concerned person for the Jaffe family. Further, Ryan was not disciplined as a result of the incident.

[para12] The plaintiff further contends that Ryan should have asked for the production of the warrants. This may be valid if Ryan had allowed Johnsen access beyond the lobby. Johnsen was not allowed access beyond the lobby. In fact, he left the lobby and returned. Mr. Ryan may have attended during this time to other persons in the lobby.

[para13] Sidney Jaffe is not an unsophisticated person. He is a lawyer, businessman and traveller, at least to the United States. He was aware, or ought to have been aware, that due to his non-appearance for trial in the State of Florida, he may be in jeopardy. He had consulted counsel as to his status re extradition.

[para14] He had a duty to notify the defendant of his status and to provide them with instructions.

[para15] Ruth Jaffe was aware of his status or, if she was not, she should have been. She knew of his sports-related head injury. If there was any questions about Sidney Jaffe's capabilities as a result of the injury, she owed a duty to the defendants to advise them

of his condition and provide them with instructions. [para16] At the close of the plaintiff's case, the defendant moved for a nonsuit and on being put to its election, elected to call no evidence.

[para17] The plaintiff led no evidence with respect to the by-laws of the defendant corporation and the Condominium Act. With respect to the Occupier's Liability Act, there is no evidence of a failure on the part of the defendant corporation to maintain the building in a safe condition.

[para18] Therefore with respect to the claim in tortious conduct, the by-laws of the corporation, the Condominium Act, and the Occupier's Liability Act, I find that the plaintiffs have failed to establish a prima facie case and I dismiss the action based on these claims.

[para19] The plaintiffs contend that the defendants are in breach of contract. The breach consisted in not providing the level of security that was offered as a part of the agreement between them. In their opinion, the security was to be of a very high standard. The security offered, according to, the witness Mr. Tomislich, was the providing of concierge services and 24 hour electronic surveillance. These services were in place at the time and he had no knowledge or any complaints with respect to security. He stated that he had been a realtor since 1960 and a resident of the building since 1980 and had been active in the sale of suites in the building.

[para20] It was understood that the police have access to the building. He would not have been alarmed to learn that security personal allowed the police to wait in the lobby. Further, the lobby was accessible to the general public and visitors were allowed to remain in the lobby awaiting the return of residents. He was not aware of Jaffe requiring any special status. He stated that there are diplomats residing in the building.

[para21] I find that there is an implied contract, that the responsibility for security was assumed by the defendant corporation on taking over the management of the building and that it continued to offer security services of the quality described in the agreement between the developer and the suite owners. I find that the security in place at the time of the incident was of the standard offered. I find that, on a balance of probabilities, the plaintiffs have not established a breach of any contractual obligation that the defendant may have owed to the plaintiffs.

[para22] The plaintiff's case is dismissed on this ground along with those above with costs.

[para23] MR. THOMAS: Your lordship, I thank you for your consideration of the case. As of yesterday, Mr. Jaffe has communicated with his fellow condominium corporation owners and is expecting legal costs to be paid. And in that respect, I have a letter which was directed to the condominium Board of Directors that was sent to me yesterday, and it's clear that Mr. Jaffe is intent upon pursuing costs from the condominium corporation.

[para24] On the instructions of our client, we drew up a bill of costs that in the event that you came to the conclusion that you did, we'd propose, with your permission, to deliver the bill to my colleague today, provide you with a copy and request that within a fortnight or however time you could permit us to return before you and have you hear submissions with respect to costs so we can set the amount of costs within a very short timer say two weeks, at which point we can then have -- you can have submissions from both sides as to the amount of our claim for costs, if you'll permit us to do so.

[para25] THE COURT: Yes.

[para26] MR. THOMAS: Thank you, your lordship. In that respect, I will tender to you a draft bill which has been prepared on the basis of our time spent and hourly rates that we believe are fair and reasonable in all of the circumstances. And we would ask you to permit us to call evidence of time sheets or whatever else you require, if necessary. But I invite my friend to call us at our offices to come over and see our dockets to determine whether or not the time was, in fact, spent.

[para27] And if he wishes to, we can give him an opportunity to satisfy himself on any bills that we have had to pay for experts' fees. As you will recall, you made a ruling in the course of the trial that you were not going to allow people to give evidence as to security, but prior to that, we'd been served with reports by my friend, and as a result, we had to engage experts ourselves.

[para28] So we will have bills to show Mr. Jaffe's solicitors that will substantiate our disbursements, and we will produce dockets showing our time and hopefully we could come before you with some rather short submissions on where he feels that we -- because I don't think there will be much doubt about the preparation for the pleadings and the affidavit of documents and the discoveries. Those were all done and we have docketed times.

[para29] And I know my friend's firm and other firms -- Mr. Jaffe, I think, has had four firms in the course of this action. So we will give my friend an opportunity to review all this information with his predecessors to satisfy himself that we did, in fact, spend the time.

[para30] If your lordship will then set a date, say, three weeks in advance in the future when you might be available, say, at 9:30, we would be most grateful.

[para31] THE COURT: Let's say the 17th. How's that sound?

[para32] MR. THOMAS: The 17th of September?

[para33] MR. MACDONALD: It would be my submission that costs should be assessed in this action. Just looking at the bill of costs just now for the first time, the costs appear to be very high. Our firm's just been involved with this action since the first week in June, since the pre-trial conference. I understand that there's been several motions made over the years in this action. It's an '87 action and we're not privy at this point to everything that has occurred. To prepare for an assessment, I think we'll have to go and speak to the other solicitors who were involved in the file, get their information, their evidence, their dockets to see if they match the dockets that I understand will be provided by the condominium corporation. And I think three weeks would not be enough time. I would suggest there's a system in place that would probably be more effective to deal with the issue instead of taking more of Your Honour's time and I think the costs should be assessed.

[para34] MR. THOMAS: Your lordship, as I say, I can tender to you a letter written August the 23rd to the condominium corporation by Mr. Sidney Jaffe in which he said he wants the costs paid promptly. Now, I can show that to you so you will have

every reason to believe that I'm not misleading the court in any way. So if he wants his costs paid promptly, I see no reason why the condominium corporation shouldn't be treated in the same fashion. Just at the last paragraph of that letter he does bring to the condominium corporation. That's in addition, of course, to a proposition whereby he would be paid \$900,000 by the condominium corporation for his damages in this lawsuit.

[para35] MR. MACDONALD: Perhaps counsel could give me a copy of that letter because...

[para36] MR. THOMAS: It was written by your client, sir.

[para37] MR. MACDONALD: Thank you.

[para38] THE COURT: No. I feel that the three weeks is sufficient time to put this matter together, and I'll put it over till the 17th of September. I'll do it at 9:30 in the morning and we'll determine costs at that time.

CBR# 211

National Trust Company, Applicant, and Carleton Condominium Corporation No. 489, Tern Solution Group Corporation, Fred Ferguson and E.L. Bryenton & Associates Inc., Respondents

Action No. 76011/93 Ontario Court of Justice - General Division Ottawa, Ontario Charron J. September 14, 1993.

Robert Steinberg, for the Applicant. Norman Slover, for the Respondent, C.C.C. No. 489.

[para1] CHARRON J.:-- The sole remaining issue between the parties is whether the applicant, National Trust Company, is liable to pay to the respondent, Carleton Condominium Corporation No. 489, the common expenses payable with respect to certain commercial condominium units for which the applicant is in receipt of rent. The premises in question are owned by the Douglas MacDonald Development Corporation and are occupied by various tenants. The applicant holds a first charge on the premises and is an assignee of the leases both pursuant to standard charge terms and by separate instrument bearing the same date as the charge. MacDonald defaulted under the mortgage on December 1st, 1992 and the default still continues. National served the tenants with notice to pay rent on February 22nd, 1993. Prior to that time the tenants were paying rent directly to the respondent, Carleton Condominium Corporation 489. CCC 489 would deduct the common expenses due on the units and then pay the net rents directly to the owner MacDonald. After being served by National for the notice to pay rent, the tenants refused to pay their rent directly to National and indicated their intention to continue to pay rent to CCC 489. An agreement was reached between National and CCC 489 whereby the Condominium Corporation would continue to collect all rents and deduct common expenses and pay the net rental money to National. However, a dispute has now arisen between the parties and this matter was brought before the Court.

[para2] National takes the position that it is entitled to receive the rents in priority to any common expenses and that the Condominium Corporation is left with its lien remedy pursuant to the Condominium Act R.S.O. chap. 26 for any unpaid common expenses. According to the terms of the Act however, the mortgage would take priority over any subsequently registered lien since the provision in the Act establishing lien priority over mortgages is only applicable to residential units and not to commercial units. The Condominium Corporation takes the position that National is a mortgagee in possession and as such is an "owner" within the meaning of the Condominium Act who is obligated to pay common expenses. If the Court finds that the applicant is not a mortgagee in possession, the Condominium Corporation argues that the Court should exercise its equitable jurisdiction and order that National pay the common expenses since, it is argued, this would be the only just result. If the common expenses are not paid by these tenants, the burden is left to the remaining tenants to assume these obligations.

[para3] It is common ground between the parties that if indeed the applicant can be said to be a mortgagee in possession as contended by the respondent, it becomes an owner within the meaning of the Condominium Act and as owner is responsible to pay the common expenses. It appears to be well settled that a mortgagee will not be deemed to be a mortgagee in possession based on the mere fact that it is in receipt of the rents on behalf of the owner. The relevant principles are summarized in Marriott and Dunn's Practice In Mortgage Actions in Ontario, (Carswell 1982) at p. 123 as follows:

Generally a mortgagee goes into possession by entering into actual occupation of, or by obtaining the receipt of the rents of the mortgaged premises: Lord Trimleston v. Hamill (1810), 1 Ball & B. 377; Fisher and Lightwood, Law of Mortgages, 7th ed., p. 720. However where the mortgagee was in receipt of the rents under a direction given by the mortgagor to the tenant, it was held that the mortgagee was not a mortgagee in possession; it must be shown that the rents have been received by him as mortgagee: Thomson v. Stikeman (1913), O.L.R. 146 at 159, affirmed 30 O.L.R. 123 (C.A.); Joseph v. Newman (1927), 31 O.W.N. 400, affirmed at 429 (C.A.). In the last analysis the question depends upon whether the mortgagee has taken out of the mortgagor's hands the control and management of the mortgaged premises, and must be determined having regard to the peculiar circumstances of each case: Lord Advocate v. Lord Lovat (1880), 5 App. Cas. 273 at 288; Falconbridge, Law of Mortgages, 4th ed., p. 626. It has been stated another way: that a mortgagee becomes a mortgagee in possession only when he asserts his rights as mortgagee: Gaskell v. Gosling, [1896] 1 Q.B. 669 at 691 (C.A.).

[para4] The applicant relied in particular on the case of Beckstead v. Ball et al., [1961] O.R. 127 (H.C.) where the Court reviewed the applicable principles and emphasized the fact that there must be some exercise of control beyond the mere receipt of monies before a mortgagee will be found to be a mortgagee in possession. The mortgagee must receive the rents in such a way that it can be said that he has intercepted the power of the mortgagor to manage the property. In Beckstead, the rent was paid to the mortgagee by reason of an agreement to that effect between the owner and the tenant. In all other respects, the relationship between the landlord and the tenant remained unaffected. In these circumstances, the Court held that the mortgagee was not a mortgagee in possession since the rents were being collected by the mortgagee as agent for the owner. A like conclusion was reached in the of First City Developments Ltd. v. Central Mortgage and Housing Corporation (1981) 21 R.P.R. 251 (N.S.C.A.)

[para5] In this case, it is relevant to note that National did not collect the rents prior to default by the owner MacDonald. It started collecting the rent pursuant to the following notice to pay rent.

This notice is being sent to you in order to advise you of the following:

1. Your landlord, namely The Douglas MacDonald Development Corporation, granted a mortgage ("the Mortgage") to National Trust Company in respect of the condominium unit(s) of which you have an interest in as tenant;
2. The Mortgage was made subject to standard charge terms filed as number 892;
3. Pursuant to paragraph 47 of standard charge terms No. 892 (a copy of the relevant page is enclosed), your lease and the rents payable thereunder were assigned to National Trust Company;
4. Your landlord also granted a general assignment of rents to National Trust Company (a copy of which is also enclosed) whereby all rents payable by you to The Douglas MacDonald Development Corporation were assigned to National Trust Company; and
5. National Trust Company is entitled to exercise its rights in respect of the Mortgage and the general assignment of rents and collect rent from you due to default by The Douglas MacDonald Development Corporation.

You are hereby directed to pay any and all rental payments which are due pursuant to your lease accruing on and after the date of receipt by you of this notice to Stephos Management Services Ltd., Suite 402, 1525 Carling Avenue, Ottawa, Ontario, K1Z 8R9,

agents for National Trust Company. Please note that should you not honour this demand, you will be held fully responsible for the payment of the said rent to National Trust Company.

DATED AT OTTAWA, Ontario this 22nd day of February, 1993.

[para6] In this case, unlike the cases stated above, it is quite clear that National took it upon itself to collect rents not as agent for the owner, but as mortgagee of the property. After National sent the above notice, it entered into negotiations with the Carleton Condominium Corporation No. 489 with respect to the actual collection of rents and took control of the matter thereby intercepting the owner's right to manage its property. National commenced collecting rents not simply as agent for the owner but as mortgagee in the assertion of its rights against the defaulting mortgagor. In my view this is sufficient to constitute National Trust Company a mortgagee in possession within the meaning of the Condominium Act and as such it is responsible to pay the common expenses prior to applying the monies in payment of the owner's debt.

[para7] The application for a declaration is therefore dismissed. If the parties wish to make submissions with respect to costs, they may do so in writing within 10 days of the date of this order; if not, costs will follow the event on a party and party basis.

CHARRON J.

CBR# 055

Michael Buyanovsky and Anatoly Kacanovsky, Applicants, and Townsgate 1 Limited, Respondent; And Between Joyce Green and Herbert Green in trust for Moshe Kempinski, Applicants, and Townsgate 1 Limited, Respondent; And Between Judy Kumer, Erica Kumer and Jason A. Silverman, Applicants, and Townsgate 1 Limited, Respondent

Action Nos. M2257/91U, M2682/91U and M1502/91U Ontario Court of Justice - General Division Toronto, Ontario E.M. MacDonald J. Heard: January 28, 1993 Judgment: March 4, 1993

Jonathan Fine, for the Applicants. Allan Sternbert, for the Respondent.

E. MacDONALD J.:-- The applicants seek a declaration that their agreements of purchase and sale are not binding by reason of the failure of the respondent ("Townsgate") to comply with Section 52 of the Condominium Act, R.S.O., c. 84, s. 52, as amended ("the Act").

The applicants seek, in the event that the court finds that the agreement of purchase and sale is not binding upon them, a declaration to the effect that their deposits be returned to them with interest. There is no dispute as to the quantum of their deposits.

The applicants are purchasers of condominium units in a high rise building containing 226 units located in the City of Vaughan. Townsgate is the vendor and developer and in early 1989, it began to market and pre-sell the units.

All of the applicants signed agreements of purchase and sale in late February 1989 and at the time of signing, they received copies of Townsgate's Disclosure Statement. They also submitted their respective deposit cheques as required in the agreement of purchase and sale.

Later in the spring of 1989, Townsgate began construction of the condominium building. Townsgate updated the purchasers on the progress of construction and advised them of the dates scheduled for their respective occupancy closings. None of the applicants read his or her Disclosure Statement when received.

Without going into the details of the background of each purchaser and his or her motives for purchasing, it is clear that each purchaser does not want to complete the transaction because of the sharp decline in the value of their investment by reason of the decline in the real estate market in the area.

Nevertheless, the applications are rooted in issues that emerge from Section 52 of the Act. Section 52(1) provides that an agreement of purchase and sale with a developer is not binding on a purchaser until the purchaser receives a copy of a Disclosure Statement. Section 52(6)(d) requires that the Disclosure Statement "contain and fully and accurately disclose a brief narrative description of the significant features of the existing or proposed declaration, by-laws and rules governing the use of common elements and units, and of any contracts or leases that may be subject to termination or expiration under section 39".

While there is no specific requirement for the Disclosure Statement to include the Condominium Documents, s. 52(6)(g) requires (as was formerly required by s. 24b of the 1974 amendment) the inclusion of "any other matters required by the regulations to be disclosed". Section 32 of the Ontario Regulation 217/79 (now Regulation 121 R.R.O. 1980, s. 32), which became effective on April 5, 1979, requires the developer to provide to the purchaser, along with a Disclosure Statement, the majority of the Condominium Documents.

The statute does not set out the manner in which one should "fully and accurately disclose" by way of a "brief narrative description" the "significant features" of the Condominium Documents.

I am in agreement with Mr. Sternberg's submission, based on the opinion of a leading expert on condominium law, that the intention of the legislation is not "to have the developer regurgitate in the Disclosure Statement what was contained in the complete documents, but rather to cull from them only the prominent or distinctive features and to bring these to the attention of a purchaser."

Townsgate's Disclosure Statement, at page 5, alerts the reader to the fact that the Disclosure Statement is only a brief description of some of the provisions of the Condominium Documents. If the purchaser requires further details, reference can be made to the Condominium Documents themselves. The Disclosure Statement which the applicants now allege is deficient is virtually identical to the form initially used by Audrey Loeb, in her leading text on condominium law entitled, *Condominium Law and Administration*.

It is important to note that there were extensive cross-examinations of the various applicants and there is no evidence that any of the applicants was prejudiced by what are now alleged to be deficiencies in the Disclosure Statement. I agree with the submission that the applicants seek to rescind from their respective agreements for reasons other than those related to alleged lack of disclosure in the Disclosure Statement.

The legal issues respecting a Disclosure Statement has now been dealt with extensively by the Ontario Court of Appeal in two recent decisions. They are *Abdool v. Somerset Place Developments of Georgetown Limited* (1992), 10 O.R. (3d) 120 and *Scanlon v. Castlepoint Development Corporation Ont. C.A.* as yet unreported [1992]

Mr. Fine has advanced a creative and attractive argument on behalf of the applicants in the face of these decisions. As I understand it, his argument is that the test respecting the Disclosure Statement articulated by Robins J.A. in *Abdool* (supra) applies when there is a Disclosure Statement not something which purports to be a Disclosure Statement. I have carefully considered his comments about the Townsgate Disclosure Statements and I cannot agree that they are deficient in any material way with the result that the recent decisions of our Court of Appeal would be distinguishable from the facts before me on these applications.

In looking at the issues raised in this matter, I am guided by the comments of Robins J.A., at page 137 - 138:

In the absence of a standard form of disclosure statement or any legislative provisions prescribing its precise content, the answer to questions of this nature necessarily involves judgment calls by those responsible for drafting this document. The Act does not

contemplate or indeed, in my view, permit a disclosure statement which simply reproduces the accompanying documents or sizable proportions of them. Decisions have to be made as to what items should be included or omitted to satisfy the requirements of brevity, generality and significance imposed by s. 52. Given the absence of statutory guidelines on these matters, a broad and flexible approach must be taken in determining whether a particular statement is so incomplete in detail or lacking in content or, by the same token, so encyclopedic, as to defeat the aim of the section and render an agreement non-binding.

....P. 138

If no disclosure statement is delivered, the purchaser obviously cannot be bound to the agreement. The problem, which these cases exemplify, arises when a purchaser, before final closing, seeks to rescind an agreement of purchase and sale on the ground that a disclosure statement, which on its face purports to address the matters enumerated in s. 52(6) and (7), does not in fact comply with those provisions. If, as I have concluded, only material departures from these provisions warrant declaring an otherwise valid agreement non-binding, when is a defect to be considered material? To invoke a common dictionary meaning of "material", when is a defect so pertinent, germane or essential as to render a disclosure statement in contravention of the Act and entitle a purchaser to cancel the transaction?

I approach this question first by reference to the applicable burden of proof. In my opinion, when a purchaser who has had the opportunity afforded by the cooling off period to consider the disclosure statement and the accompanying documentation, and has decided to go through with the transaction, subsequently seeks to rescind from his or her otherwise binding agreement of purchase and sale on the basis of the deficiency of the disclosure statement, the onus is on the purchaser to show that the disclosure statement fails to satisfy the requirements of the Act to the degree that the agreement must be declared non-binding.

To discharge this onus and prove the materiality of the complaint, in my opinion, the purchaser is obliged to establish objectively that had the information that was not disclosed, or that was inaccurately or insufficiently disclosed, been properly disclosed in the disclosure statement at the time it was delivered to the purchaser, a reasonable purchaser would have regarded the information as sufficiently important to the decision to purchase that he or she would not likely have gone ahead with the transaction but would instead have rescinded the agreement before the expiration of the ten-day cooling off period.

....P. 145

The vagueness of the requirements and the absence of statutory guidelines mandate a broad and flexible approach -- not a rigid or stringent one -- in determining whether a given disclosure statement is adequate. As I indicated earlier, the disclosure statement cannot be viewed as separate from and unrelated to the other documents called for by s. 52(6) and (7); it must be seen in the context of the entire disclosure package. The narrative section of the disclosure statement can realistically be expected to do no more than highlight or summarize the most important features of the condominium documents and assist purchasers in comprehending those documents by directing them to the full text.

To require the inclusion of all of the details of the declaration, by-laws, rules and the like which the purchasers argue should be contained in the disclosure statement, and which the judgment of Wright J. [the decision appealed from reported at 4 O.R. (1991), (3d) 280] would indeed require, would be to ignore the overall criteria of brevity, generality and significance and turn what was intended to be a short and comprehensible statement into a lengthy and legalistic document no more comprehensible to lay persons than the underlying documents themselves. To satisfy the standard of disclosure contended for in these appeals would effectively compel drafters of disclosure statements to reproduce or make reference to virtually all of the items in the accompanying documents or face the risk of having their agreements of purchase and sale declared non-binding. Professional advisers would face the additional risk of professional liability if the agreements were invalidated by reason of these items not being included in the disclosure statement.

Few current disclosure statements, I venture to say, could withstand the scrutiny to which it is argued here they must be subject.

I also noted the observations of Robins J.A. about balancing consumer protection and "the commercial realities of the condominium industry".

The narrative section of the Disclosure Statement must therefore highlight and summarize the most important features of the condominium documents and guide purchasers in comprehending those documents by directing them to the full text. To satisfy the standard of disclosure suggested by Mr. Fine would mean that Disclosure Statements would have to make reference to virtually all of the items in the accompanying documents. Failure to do so could result in a declaration that an agreement of purchase and sale is non-binding. There were almost 50 disclosure deficiencies cited in the applications before me, and were I to accept Mr. Fine's position, I would create results which, in my view, would be contrary to the purpose of s. 52 of the Act in that it would avoid bringing the significant features of the Condominium Documents to the attention of a prospective purchaser.

The Disclosure Statement in these cases is a carefully drawn document, prepared with professional assistance, which on its face seeks to address the requirements of the Act. There is no suggestion that the Disclosure Statement is false or designed to mislead or deceive a purchaser. The Disclosure Statement provides a general description of the essential elements of the property, the proposed condominium and the recreational and other amenities. It also provides what is stated to be a brief narrative description of the significant features of the Condominium Documents. Purchasers are advised that the narrative is merely a brief description of the accompanying documents and are advised to have recourse to those documents for any additional information.

In this case, the Disclosure Statement is very similar to those approved by the Ontario Court of Appeal in Scanlon (*supra*). Furthermore, the matters complained of by the applicants in these applications are virtually identical to the complaints raised by the applicants in *Abdool* (*supra*). In *Abdool*, Robins J.A. stated at page 146:

I cannot accept that the cumulative effect of the deficiencies complained of, many of which are plainly picayune, can render these disclosure statements so lacking in information that they are not disclosure statements at all. In my opinion, the statements adequately tell the purchasers what they are getting.

CONCLUSION

I am in agreement with Mr. Sternberg's submission that the Disclosure Statement was of no importance to the applicants other than as a vehicle to attempt to escape a transaction for reasons that are entirely unrelated to the quality of the disclosure. There is no evidence to support a finding of materiality nor is there an issue on these facts of consumer protection.

The Townsgate Disclosure Statement, in my view, complies with the requirements of s. 52 of the Act. Accordingly, the within applications are dismissed.

Costs to the respondent to be fixed by me today at 4:30 p.m.

E. MacDONALD J.

* * * * *

Supplementary Reasons

Released March 12, 1993

MacDONALD J.:-- I released written reasons in this matter on March 4, 1993 and indicated that costs would be to the respondent. Mr. Sternberg, counsel for the successful party, asked that his client be awarded costs on a solicitor and client basis. He cites *Apotex Inc. v. Egis Pharmaceuticals and Novopharm Limited* (1991), 4 O.R. (3d) 321 as authority for his entitlement to full indemnification in accordance with a draft solicitor and client bill of costs submitted by him.

I do not agree that *Apotex* (supra) should be applied to the facts of this case. This is not a case for solicitor and client costs. The legal position taken by the plaintiffs and their overall conduct in the litigation falls far short of anything that gives rise to an entitlement by the successful party to solicitor and client costs.

Alternatively, Mr. Sternberg suggests that his client should be awarded costs on a party and party basis, subject to the proviso that, for all attendances after the release of the decisions of the Ontario Court of Appeal in *Abdool v. Somerset Place Developments of Georgetown Limited* (1992), 10 O.R. (3d) 120 and *Scanlon v. Castlepoint Development Corporation Ont. C.A.* as yet unreported [1992] his client should have costs on the solicitor and clients scale.

The rationale for this position is simple. This case involves claims by condominium purchasers which were based on facts and legal issues that were definitively decided by the Ontario Court of Appeal against the position taken by the applicants. Mr. Sternberg argues that the applicants should have elected not to proceed following the release of the decisions in the Ontario Court of Appeal, thereby saving the costs incurred thereafter.

Mr. Fine, who was counsel for the appellants/applicants in *Abdool* (supra) has applied for leave to appeal the decision in *Abdool* to the Supreme Court of Canada. The issues raised by Mr. Fine on this application, even in the face of the determination of the issues in the Ontario Court of Appeal, are not such that there is an entitlement to the respondent for costs on a solicitor and client scale.

Having determined that the appropriate scale for costs is party and party, I now look to the draft party and party bill submitted by Mr. Sternberg. On this draft bill, the total for fees and disbursements is \$33,149.08 including the purported allowances for costs on a solicitor and client scale after the release of the *Abdool* decision. This is for a one day plus one-half hour motion. On the second day, counsel appeared briefly, at which time I advised them that having regard to Mr. Fine's submissions (made on the first day), and the brief submissions of Mr. Sternberg, and the outcome of the relevant Ontario Court of Appeal decisions, I would be dismissing the applications. I endorsed the record "for written reasons to be released the application is dismissed together with applications under cover of applications No. M2682/91 and M15021/91U. Costs to the respondent to be fixed on March 3, 1993 at 9:30. a.m." (Subsequently changed to March 4th at 4:30 p.m.)

Mr. Fine has enumerated a series of objections to this draft bill which are summarized below:

1. Too much time spent in certain areas;
2. hourly rates too high;
3. block fees charged in situations where there is a duplication with other fees charged on the same date for preparation time;
4. charges for waiting time;
5. three sets of applicants were lumped into one bill of costs without any attempt to distinguish the actual costs incurred relative to the claim of each set of applicants;
6. the portion of the party and party bill that is calculated on the basis of solicitor and client indemnification (already dealt with above); the examination of the dockets reveals questionable charges;
7. mistakes in addition.

I have pointed out to counsel that my role is to fix costs, a function which is distinguished from an assessment of costs.

Without dealing specifically with the individual complaints raised by Mr. Fine, I would comment generally as follows. I agree that too much time is docketed in certain areas. In coming to this conclusion, I have examined the nature of the legal issues involved, the material contained in the motion records, and specifically, the contents of the affidavits which, according to the draft bill of costs, required preparation time of some 36 hours. The preparation of the affidavits of Messrs. Zagdanski and Leonard Fine should not, in my view, have taken 36 hours, and accordingly, I have reduced this item by one-half. It seems to me that 18 hours of time is more than sufficient having regard to the experience of the solicitors involved in the preparation of the affidavit material to support the response to the application. Preparation of affidavits of Zagdanski and Fine is therefore reduced by one-half with a fee allowed at \$3,085.00. The disbursement remains as suggested, i.e., \$120.00.

I agree as well with the next item of concern raised by Mr. Fine to the effect that too much time is reflected on the bill of costs for preparation for and attendance at cross-examinations. This also raises the issue about duplication of time spent in reference to block fees charged together with preparation time which is separated from the block fees.

The respondent is grasping to suggest that on a party and party scale, having regard to the issues in this case, the amounts should be allowed as suggested in the draft bill. I have arbitrarily reduced these amounts to reflect the actual attendances at the cross-examinations but I have not disallowed the preparation time.

Fee for Preparation Time \$ 500.00 Counsel Fee 6.3 x \$175.00 \$1,102.50 Counsel Fee 2.2 x \$175.00 \$ 385.00

I note in respect of the disbursements for the transcripts of the cross-examinations held of Judy Kumer, Jason Silverman and Erica Kumer, that the draft bill of costs may unfairly burden them with attendances in respect of the cross-examinations of two other persons whose cross-examinations were relevant to the issues raised by the other applicants. Counsel have agreed with me

that they will, between themselves, apportion the costs of the transcript for the cross-examination, indicated to be \$1,808.84, fairly amongst all three sets of applicants. I leave this to counsel.

To turn now to the preparation for the cross-examinations of the parties Buyanovsky and Kacanovsky, I have reduced the preparation time by one hour to reflect the fact that many of the issues germane to this cross-examination would be readily apparent as a result of the preparation in the previous cross-examination.

Preparation time for cross-examination of Messrs. Buyanovsky and Kacanovsky (1 hour at \$175.00) = \$175.00

Counsel Fee (2.2 hours x \$175.00) = \$385.00

There is no objection to the disbursement suggested for the transcript of this cross-examination.

To deal with the preparation for the cross-examinations of Herbert Green and Joyce Green, I was alerted by Mr. Sternberg to the unique aspects of certain facts pertaining to Mr. Green. Nevertheless, I disagree that 6.7 hours is appropriate preparation time for those cross-examinations, and I have arbitrarily reduced it to three hours.

Preparation time for cross-examination of Mr. Green (3 hours x \$175.00) = \$525.00

Counsel Fee (2.2 x \$175.00) = \$385.00

The transcripts for these cross-examinations is an appropriate disbursement.

Mr. Fine has objected to the quantum of time suggested for the preparation of the factum and the brief of authorities. I am in agreement with this objection, and I have arbitrarily reduced the amount of time alleged to have been spent in connection with this item by one-half.

I have allowed the item for counsel fee on the applications returnable February 6, 1992 at \$750.00. At that time the motion was originally returnable and was adjourned to a subsequent date. Again, I find Mr. Sternberg's preparation time suggested at 10.3 hours excessive, and I have reduced it to 6 hours having regard to his experience as counsel and having regard to the nature of the legal issues in dispute. I have allowed the student's time at 1.2 hours.

Preparation for hearing of applications returnable February 6 & 7, 1992

6 hours x \$175.00 = \$1,050.00 1.2 hours x \$150.00 = 180.00 Counsel Fee on applications = 750.00

I am not in agreement that the preparation of an amended factum in light of the outcome of the decisions in the Ontario Court of Appeal requires approximately 4.8 hours. I have noted the comments of Mr. Fine in respect of the content of the factum and its derivations, and I have reduced the amended factum time from 4.8 hours to 2 hours.

Preparation of amended factum (2 hours x \$175.00) = \$350.00

Preparation for hearing of applications returnable January 29 and 30, 1993. Mr. Sternberg asserts that he had to "start from scratch" on the basis that there was a great deal of re-preparation related to the factual issues and that all preparation time previously spent was distanced and ineffective by virtue of the passage of time. On the preparation for the January 29th and 30th appearances, I have allowed 6 hours.

Preparation time (6 hours x \$175.00) = \$1,050.00

With respect to counsel fee on the application, I have allowed it at 7 hours as suggested by the hourly rate of \$175.00.

7 hours x \$175.00 = \$1,225.00 2 hours x \$175.00 = \$ 350.00

Mr. Fine suggested that the applicable hourly rate for a lawyer of Mr. Sternberg's experience, as traditionally allowed by an Assessment Officer, is in the range of \$140.00 to \$150.00 an hour. Mr. Sternberg counters that this is unrealistic having regard to the internal hourly rate of Mr. Sternberg as charged to the clients of the firm, and having regard to the economic realities of the operation of law firms in today's economic climate. I am in agreement with Mr. Sternberg's submission that the rate suggested by Mr. Fine is too low, and I have allowed Mr. Sternberg an hourly rate of \$175.00 throughout this process.

In the result, the party and party costs are fixed at \$18,580.03, inclusive of disbursements. (See Appendix A). Applicable GST is to be paid 567 by the applicants.

The total amount allowable is to be divided in three equal shares with each share being paid by each set of the three sets of applicants. With respect to disbursements, I leave the matter of the apportionment of disbursements amongst the three sets of applicants to counsel, noting the comments that I made above about the costs for the transcripts of the cross-examinations which occurred on May 23, 1991 and June 15, 1991.

APPENDIX A

AMENDED BILL OF COSTS OF RESPONDENT TOWNSGATE 1 LIMITED - PARTY AND PARTY SCALE

FEE DISBURSEMENT

Paid to file Appearances \$ 120.00

Preparation of Affidavits of Barry Zagdanski and Leonard Fine \$3,085.00

Preparation for and cross-examinations of Judy Kumer, Jason Silverman, Erica Kumer, Barry Zagdanski and Leonard Fine 500.00

Counsel Fee 6.3 hrs. x 175.00 1,102.50 Counsel Fee 2.2 hrs. x 175.00 385.00

Paid for Transcripts of cross-examinations 1,808.84

Preparation for and cross-examinations of Michael Buyanovsky and Anatoly Kacanovsky - 1 hr. x \$175.00 175.00 Counsel Fee - 2.2 hrs. x \$175.00 385.00

Paid for Transcript of cross-examinations 629.42

Preparation for and cross-examinations of Herbert Green and Joyce Green 3 hrs. x \$175.00 525.00 Counsel Fee - 2.2 hrs. x \$175.00 385.00

Paid for Transcripts of cross-examinations 528.85

Preparation of Factum and Brief of Authorities 2,900.00

Preparation of hearing of Applications returnable February 6 and 7, 1992 6 hrs. x \$175.00 1,050.00 1.2 hrs. x \$ 150.00 180.00

Counsel Fee on Applications 750.00

Preparation of amended factum in light of recent decisions of Ontario Court of Appeal 2 hrs. x \$175.00 350.00

Preparation for hearing of Applications returnable January 29 and 30, 1993 6 hrs. x \$175.00 1,050.00

Counsel Fee on Applications 7 hrs. x \$175.00 1,225.00 2 hrs. x \$175.00 350.00

Photocopies, etc. 995.42

Judgment 100.00 ----- TOTAL \$14,497.50 \$4,082.53

TOTAL FEES AND DISBURSEMENTS \$18,580.03

CBR# 017

Ahuntsic Investments Incorporated and 755456 Ontario Limited, Plaintiffs, and Annie Cheng, Defendant

Action No. 48244/90 Ontario Court of Justice - General Division Toronto, Ontario Roberts J. December 5, 1992

Patricia M. Conway, for the Plaintiffs. Robert A.L. Shour, for the Defendant.

ROBERTS J.:-- This is an action arising out of an agreement of purchase and sale (condominium - resale) dated the 20th day of February, 1989. The defendant, Annie Cheng (Cheng) was the purchaser and the plaintiff, Ahuntsic Investments Incorporated (Ahuntsic) was the vendor. The property which was the subject matter of the agreement was a condominium unit located at 33 Harbour Square, known as Apartment No. 2803, together with a proportionate interest in the common areas of the condominium.

At the commencement of trial an order was made amending the name of the plaintiff Ahuntsic Investments Incorporated to Ahuntsic Investment Inc. and amending the statement of claim in the terms of the notice of motion filed as Exhibit "A" herein. A further order was made amending the statement of defence in the terms of the notice of motion filed herein as Exhibit "B".

The plaintiff 755456 Ontario Limited was at all material times the registered owner in trust of Unit No. 2803. Ahuntsic was the beneficial owner.

THE FACTS:

Ahuntsic and Cheng entered into the agreement of purchase and sale herein dated the 28th day of February, 1989. The said agreement called for a completion date for the purchase of Unit 2803 of the 30th day of June, 1989. The purchaser was to be permitted until the 18th day of April, 1989 to examine the title to the property and was given a further 30 days, until May 18, 1989, to satisfy herself that there were no outstanding municipal work orders or deficiency notices affecting the property.

Both the plaintiff Ahuntsic and the defendant Cheng were experienced real estate investors and they had purchased or were purchasing the subject property for the purpose of investing. Annie Cheng was a solicitor having been called to the bar of Ontario in 1983 and included in her practice the area of real estate law. Annie Cheng acted for herself in this transaction.

On March 14, 1989 Cheng, in her capacity as solicitor, sent a requisition letter to the solicitor for Ahuntsic. That requisition letter included the following pro forma requisition:

"4. REQUIRED: Evidence that the property complies with all existing building regulations and zoning by-laws and that its present use may be continued and that there are no outstanding work orders or deficiency notices under any Municipal By-Laws or Provincial legislation affecting the property.

No further relevant requisitions were received by the plaintiffs prior to May 18, 1989. By letter dated April 24, 1989 the solicitors for the plaintiff responded to requisition No. 4 of Cheng as follows:

"Satisfy yourself."

All parties to this action agree that the response "Satisfy yourself" to the pro forma requisition contained in the letter of March 14, 1989 was a proper response under the circumstances and I so find.

On May 16, 1989 the City of Toronto, Department of Buildings Inspections issued an "Order of Inspector" pertaining to 33 Harbour Square. The order stated, inter alia, that some 48 items "must be remedied within 120 days". The 48 items stemmed from the passing of a By-Law in late 1988 by the City of Toronto in the form of an amendment to By-Law 73-68. The amending By-Law may be generally described as "the anti-mugging By-Law" and required certain improvements to the parking garage area of 33 Harbour Square. The 48 items alluded to in the "Order of Inspector" in fact were 8 items per parking level there being 6 parking levels in the building.

On or about May 31, 1989 Cheng became aware of the specifics of the May 16 "Order of Inspector" and as a result thereof wrote a letter of requisition to the solicitors for the vendor as follows:

"REQUIRED: On or before closing evidence that all of the outstanding work orders have been complied with."

By letter dated June 5, 1989 the solicitors for the vendor, Ahuntsic, referred Cheng to paragraph 9 of the agreement of purchase and sale and took the position that the requisition by Cheng was out of time. The purchaser Cheng responded by taking the position that the work order was a defect in title which affected the marketability of the condominium unit and reiterated her insistence upon its clearance.

Cheng, on the closing date, June 30, 1989 refused to close the transaction. This action was commenced by the plaintiffs for damages for breach of contract.

THE CONTRACT OF PURCHASE AND SALE AND THE WORK ORDER

This case resolves itself around the question of whether or not the existence of the "Order of Inspector" dated May 16, 1989 is a "work order" which entitled the purchaser to treat the agreement of purchase and sale as being at an end. In order to answer that question it is necessary to look at the nature of the alleged work order in the context of the agreement of purchase and sale.

Throughout most of the trial it was argued by the plaintiffs that the "Order of Inspector" was not a work order "for the purposes of the contract of purchase and sale". The evidence of Mr. Donaghue a solicitor, called by the defendants, with undoubted expertise in the real estate field was that in the practice of real estate, orders of the nature of the one dated May 16, 1989 were considered, for the purposes of the words "work orders" contained in agreements of purchase and sale, to be "work orders". He stated that he came to that conclusion on the basis that the City of Toronto, Department of Buildings and Inspections order of May 16 ordered certain work to be done. Mr. Donaghue further stated that to his knowledge there was no formal definition of the words "work orders" as used in the standard form of agreement of purchase and sale, one version at least of which he had had a hand in drafting during his service on a committee of the Canadian Bar Association.

I have no hesitation in accepting the logic and evidence of Mr. Donaghue to the effect that the "Order of Inspector" dated May 16, 1989 in this case is, for the purposes of the agreement of purchase and sale herein, a "work order" and I so hold.

The next question therefore to be asked is what is the nature of the work order complained of by Cheng in this action?

The work order of May 16, 1989, requires work to be done to the lighting, painting and signage in the parking garage at 33 Harbour Square. The evidence was that the 33 Harbour Square parking garage was also used by the condominium owners at the neighbouring building 55 Harbour Square. The cost of repairs would be shared by those condominium unit holders with the unit holders of 33 Harbour Square. There are 539 condominium units in 33 Harbour Square. Although there was no evidence prior to the 30th of June as to the exact cost of the repairs required by the work order there was evidence to the effect that the painting cost would be in the neighbourhood of \$84,000.00 and that there would be additional cost for lighting. The exact amount of that cost was not known but it could be, in my opinion, put in perspective when one considers that the purchase price of unit No. 2803, the subject matter of this action, was \$500,000.00 and the evidence showed that the contribution to common area expenses by the owner of 2803 was .1713%. In hindsight the evidence was that the actual cost of complying with the work order was \$105,000.00 or \$181.65 referable to unit 2803.

The defendant Cheng was, until May, 1989, a member of the Board of Directors of the condominium corporation for 33 Harbour Square. She admitted in her evidence that she knew of the provisions of the amending City of Toronto By-Law referable to garages and the evidence indeed disclosed that prior to the issuance of the work order by the City of Toronto on May 16, 1989, the condominium corporation was already implementing, in anticipation, some of the provisions of the work order. The work order itself states that the various provisions need not be remedied for 120 days after May 16, 1989 which date would have fallen well beyond the June 30 closing date. In addition, the evidence was that the condominium corporation at all times intended to comply with the provisions of the work order and was working together with the inspector from the City of Toronto towards that end. The City at no time commenced any proceedings against 33 Harbour Square, never registered anything on title arising out of the work order of May 16 and in fact co-operated fully with the condominium corporation in extending on a reasonable basis the time for completion.

In light of all of this the defendant Cheng takes the position that the failure of the vendor to satisfy the work order by June 30, 1989, notwithstanding the fact that the date for completion of the work order did not mature until substantially later than June 30, 1989, gave her the right to treat the contract at an end. The facts also disclose, in the cross-examination of Cheng, that she had, placed another condominium at 33 Harbour Square owned by herself on the market in November, 1989. Cheng's evidence was that the solicitor for the purchaser did not requisition work orders in that transaction, that the question was not raised and that the work order problem did not occur to her at that time. She stated that in her opinion she had no obligation to disclose or give notice of such work order. She gave that evidence notwithstanding the fact that she had, at that very time, placed a lien on the title to Unit 2803 claiming a right to the return of her deposit based on the work order and was in the process of advancing her claim.

WHAT DOES THE CONTRACT SAY WITH RESPECT TO WORK ORDERS?

The agreement of purchase and sale contains three relevant sections. They are as follows:

"4. Except as otherwise provided herein, vendor shall discharge at his own expense all liens, charges and encumbrances affecting the real property on or before completion. . . .

9. . . . Purchaser shall be allowed until 11:59 p.m. on the 18 day of April, 1989 (requisition date) to examine the title of the real property at his own expense, and until the earlier of: (i) thirty (30) days from the later of the requisition date or the date on which the conditions to this transaction are fulfilled or otherwise waived or; (ii) five (5) days prior to the completion, to satisfy himself that there are no outstanding Municipal work orders or deficiency notices affecting the real property, . . . If within that time he shall furnish vendor in writing with any valid objection to title or to any outstanding work order which vendor shall be unable to remove, remedy or satisfy and which purchaser will not waive, this agreement, notwithstanding any intervening acts or negotiations in respect of such objections, shall be null and void and all deposit monies paid by purchaser hereunder shall be refunded

13. Purchaser agrees to accept title to real property . . . provided that title to the real property is otherwise good and free from all encumbrances except:

(a) As herein expressly provided. . . ."

In addition to paragraphs 4, 9 and 13 the agreement of purchase and sale includes in the definition of "real property" the common elements.

All parties have conceded that the work order of May 16, 1989 does not go to the root of title and I so find.

The solicitor for the plaintiffs argues that the requisition of May 31, 1989 pertaining to the work order was out of time with the result that the vendor was under no obligation to satisfy it. The plaintiffs' solicitor further argues that the facts of this case are such that the vendor can take the position that the work order has been "satisfied" in the sense that that word is used in paragraph 9 of the contract.

The solicitor for the defendant argues that the work order goes to the title and renders the title to the property unmarketable. The solicitor for the defendant further states that the work order represents an encumbrance affecting the real property which has not been removed by the vendor pursuant to either paragraph 4 or 13 of the agreement of purchase and sale. The defendant's solicitor further argues that the work order, not having come to the attention of the purchaser until after the 18th of May, 1989 is a latent defect and that the court ought to extend the right to requisition that latent defect to include May 31, 1989.

THE LAW

The agreement of purchase and sale dated February 28, 1989, the subject matter of this action, sets out in paragraph 9 the date for requisitions pertaining to work orders. The contractual agreement between the parties is that such requisitions will be made on or before the 18th of May, 1989. It is my opinion that work orders are not dealt with in paragraphs 4 or 13 or, if they do fall within

the general terms contained in those paragraphs, "all liens, charges and encumbrances" then they are "provided for otherwise" in paragraph 9. The result therefore is that paragraph 9 is the effective clause in this contract pertaining to work orders.

There is no dispute on the evidence that the requisition of May 31, 1989 made by the defendant, is outside the last day for requisitions pertaining to work orders being May 19, 1989. The question then which the court must address is what is the effect of that fact.

The case of Jackson v. Nicholson (1979) 25 O.R. (2d) 513 arose as a result of a late requisition made by purchasers with respect to a Zoning by-law. The Zoning by-law precluded the purchasers from using a sun room for residential purposes. The court held that the requisition was too late and therefore ineffective and gave no rights to the purchasers.

The court held at page 517 as follows:

"That case was discussed by Cromarty, J. in Jakmar Developments v. Smith et al. (1973) 1 O.R. (2d) 87 . . . another case of late requisition . . . Cromarty, J. went on to review other arguments and authorities referred to, including Innes v. Van de Weerdhof. He concluded that the requisition did not go to the root of title; and since it was made after the time limited for requisitions, it was of no effect.

In Majak Properties Ltd. v. Bloomberg (1976) 13 O.R. (2d) 447 . . . a number of requisitions were made after the time limited for doing so in the offer to purchase. The head note accurately summarizes the decision:

Whereby an agreement of purchase and sale of land, the time for making objections to title is limited, objections must be made within the period stated unless they are matters of conveyance or go to the root of title. Requisitions of a right-of-way, of consent of mortgagees to registration of a plan for subdivision, and a bar of dower, being neither matters of conveyance nor matters that go to the root of title must be made within the time limited by the agreement."

The court went on to hold in Jackson "that the more extensive clauses found in the offer to purchase in the case at bar appears to be an updating of the clause used in the Majak case, but they do not broaden the classes of requisitions which may be made out of time. Consequently, the purchaser's requisition in the case at bar was too late and of no effect."

I hold on the facts of this case that the requisition of May 31st, 1989 was made out of time.

In my opinion this work order does not represent a latent defect which extends the time for requisitions. The parties could have contracted for this eventuality but failed to do so.

Did the vendor "satisfy the outstanding work order" for the purposes of the provisions of paragraph 9 of the agreement of purchase and sale? Are the consequences of the work order so "de minimus" as to defeat the defendant's claim that the contract is at an end?

HAS THE WORK ORDER BEEN "SATISFIED"?

The evidence shows that the work order of May 16, 1989 did not require the completion of the work set out therein until 120 days after May 16 or considerably beyond the closing date of the agreement of purchase and sale. The condominium corporation had, prior to May 16, 1989 commenced the work required to meet the provisions of the City of Toronto Parking Garage By-Law. The condominium corporation at all times intended to comply with the work order of May 16 and was in constant contact with the representatives of the City of Toronto to effect that end.

The evidence at trial also established that there was an emergency fund in place whereby the condominium corporation had in excess of \$800,000.00 for the very purposes set out in work order. In addition the defendant Cheng had obtained a document from the condominium corporation called an "estoppel certificate" which certified that for the next year the condominium corporation did not contemplate any assessment of its members. The effect of that estoppel certificate would be that if an assessment was made during that year the purchaser would not be liable to pay it. The evidence at trial was able to show in hindsight, that the provisions of the work order were in fact carried out and that it was never necessary for the City of Toronto to take any steps beyond the work order to obtain its ends.

In my opinion on the peculiar facts of this case the vendor can bring itself within the terms of paragraph 9 establishing that it has "satisfied" the work order.

DE MINIMUS?

Does the fact that the amount of money involved referable to the purchaser of condominium unit No. 2803 was approximately \$181.65 bring into play the doctrine of "de minimus non curat lex".

The case of Shipp Corporation Ltd. v. Grove Park Investments Ltd. [1983] 26 R.P.R. 152, a decision of Mr. Justice Carruthers is an example of the application of the de minimus doctrine. The facts of the Shipp case were as follows: "The plaintiff agreed to sell an apartment building to the defendant. In the course of the routine inquiries before closing, the parties discovered that the fire department required improvements in the fire protection for the building. The fire department stated, however, that the building was habitable as it was. The purchaser refused to close on the grounds that there was an outstanding contravention of a by-law and that, therefore, the vendor was in breach of the agreement. The purchaser had, under the agreement, 17 days to object to any contravention of any by-laws. It failed to do so within the time limited by the agreement. In addition the amounts necessary to comply with the requirements of the fire department were \$26,000.00. The purchase price of the property was \$9,328,000.00. Mr. Justice Carruthers held at page 164 as follows:

"The agreement allows for no extension of the time during which the vendor is to satisfy the requirements of the work order, deficiency notice or direction as the case may be. As I have noted, the vendor is, at the time of entering into an agreement with similar provisions to that of the present, in the position of having to predetermine the amount of time it will require to work of unknown quantity and expense which it may be called upon to perform unless, of course, it is then aware of its nature and extent. The agreement allows for no extension of the period, should the vendor through no fault of its own find itself unable to do all that which it is required to do within the stipulated period. . . . Under the circumstances of this case it is difficult for me to think that a requirement to do \$26,000.00 worth of work, raised for the first time within one (1) week of the day of closing and which could

not be performed within that period, can allow the purchaser to set aside the agreement. There is over \$6,000,000.00 that could have been used as security for the performance of the work which was completed at a cost of \$26,000.00 or less than one-third of one percent of the total purchase price."

In my opinion the facts of this case are even more "de minimus" than those contained in the Shipp case. The figure of \$181.65 when compared to the purchase price of \$500,000.00 is not one-third of one percent like that contained in the Shipp case but is .036% or 10 times less significant than the amounts contained in the Shipp situation. It is my opinion that the de minimus doctrine applies in this case and I so hold.

CONCLUSION

I therefore hold that the defendant was not justified in treating this contract as at an end and was obliged to complete the transaction. The plaintiffs shall have their damages against the defendant.

DAMAGES

The plaintiffs called Mr. Ed Wery, a real estate agent, with Some 11 years experience in sales of condominium units at 33 Harbour Square. Mr. Wery's evidence was that he had been involved over those 11 years in some 630 unit sales, some of course on more than one occasion. He gave evidence of the efforts entered into by the plaintiff to mitigate its damages by placing unit 2803 immediately back on the market for sale. Mr. Wery stated that the market was falling from July, 1989 onwards and that the sale which finally ensued on January 31, 1990 for \$425,000.00 was, in his opinion, the highest reasonably available price to be had.

Some evidence was led by the defendants with respect to statistical figures indicating that, in general, condominium sales were not falling across Toronto in the relevant period. I prefer the evidence of Mr. Ed Wery who had first hand experience and in my opinion made a credible witness. I therefore hold that the plaintiffs have mitigated their damages by selling the subject property for the sum of \$425,000.00 which sale closed on January 31, 1990.

Mr. Rosszell, the owner of unit 2803, 33 Harbour Square then gave evidence with respect to his losses. He stated that he had lost the sum of \$75,000.00 representing the diminution in price. He further stated that he had to pay a 6% commission on the sale which closed on January 31, 1990 which was 3% greater than the 3% commission he had negotiated for the sale which was to have closed with Mrs. Cheng in June, 1989. The additional loss claimed is \$10,500.00. Mr. Rosszell stated that he had common expenses incurred for the additional 7 months he owned the property of \$2,393.02, insurance of \$81.28 and taxes of \$1,350.52. I hold that all of those figures have been proven by the plaintiffs.

In addition, Mr. Rosszell received the sum of \$14,000.00 in rental from a tenant of unit 2803 and that sum of \$14,000.00 should be subtracted from the above figures.

Mr. Rosszell also gave evidence to the effect that he would have retired two outstanding debts to the bank on the 30th of June with the funds he was to have received. The first debt was for \$115,000.00 at the rate of 14.5% and the remaining debt was for \$370,000.00 at 12%.

Counsel also submitted to me their analysis of this interest claim. The plaintiffs' net interest claim is \$37,000.31 and the defendants calculate interest at \$35,056.41. I have reviewed the submissions of both parties and I prefer the defendant's interest claim of \$35,056.41 and award interest in that amount.

In addition Mr. Rosszell incurred legal fees in the amount of \$2,610.38 pertaining to the initial aborted transaction. In my opinion these fees are high because they may reflect some dealings with the tenancy agreement which was entered into. I therefore award legal fees for that portion at \$1,600.00.

In addition, Mr. Rosszell incurred legal fees for 3,708.10 referable to the necessity to remove the lien placed on he property by the defendant pertaining to the \$10,000.00 deposit. I hold that amount has been proven and is recoverable.

Mr. Rosszell gave further evidence that he incurred a financing charge of \$1,500.00 necessitated as a result of the need to extend his line of credit from the 30th of June to the closing date of January 31, 1990. I hold that amount of \$1,500.00 is also proven as part of his claim.

I therefore hold that the plaintiffs shall have judgment against the defendant in the net amount of \$117,189.33.

The plaintiffs shall have prejudgment interest from the 30th of June to the date hereof on the legal fees of \$1,600.00 plus the legal fees pertaining to the purchaser's lien of \$3,708.10 plus the finder's fee of \$1,500.00. The usual post-judgment interest shall apply to the entire judgment. If the parties cannot agree as to the rate of pre-judgment interest I may be spoken to.

The plaintiffs shall have their costs on a party and party scale unless, within 30 days of the date hereof the parties have made an appointment with me to review the award of costs. At that point I would take into consideration any formal offers of settlement made under the Rules.

ROBERTS J.

CBR# 195

Metropolitan Toronto Condominium Corporation No. 949, Applicant, and Ross Irvine and Jackie Irvine, Respondents

24 R.P.R. (2d) 140

Action No. RE 1249/92 Ontario Court of Justice - General Division Toronto, Ontario Ferrier J. Heard: July 20, 1992 Judgment: July 29, 1992

Mark H. Arnold, for the Applicant. Lesli Bisgould, for the Respondents.

FERRIER J.:-- Ross and Jackie Irvine live with their little dog Mickey in a condominium apartment at Harbour Square on the Toronto waterfront. Mickey is a miniature poodle; he is sixteen years old, deaf and almost blind.

The Irvines are tenants, having leased the apartment from the owner, Lillian Robbins. The tenancy commenced November 1, 1990 and the written lease contains a "no pets" clause. The declaration of the condominium, made under the Condominium Act, also prohibits pets from living in the building (with some exceptions not applicable to this case).

The Condominium Corporation seeks an order requiring the Irvines to "comply with the provisions of article 6(1)(d) of the Declaration" of the condominium. The effect of such an order would be to evict Mickey.

The Declaration is dated October 9, 1990 and was registered January 25, 1991.

If s. 108 of the Landlord and Tenant Act applies to this case, the order sought would be prohibited, and Mickey could stay. This is so because the facts do not fall within any of the exceptions in s. 108 which would permit the order to be made. In short, Mickey is not causing a problem.

The issue is whether or not s. 108 applies.

Various provisions of the Condominium declaration, the Condominium Act, the Landlord and Tenant Act, and the Interpretation Act, were referred to in argument. The text of those provisions are attached as a schedule to these reasons. The Condominium Act clearly permits a prohibition of pets: s. 3(3)(b). The Condominium Act obliges the corporation to effect compliance by the owners with the declaration: s. 12(3). Each owner is bound by the declaration and has a right to compliance by the other owners with the declaration: s. 31. The corporation has a right to apply for an order directing the performance of a duty imposed by a declaration and the court may do so by order and include any provisions considered appropriate in the circumstances: s. 49(1) and (2). The lessee of a unit is subject to the duties imposed by the declaration: s. 49(4).

Under the provisions of the Landlord and Tenant Act, the apartment unit is within the definition of "residential premises". The Irvines are tenants within the meaning of the Landlord and Tenant Act: s. 1 and s. 79. Part IV of the Act, which includes s. 108, applies to the tenancy "despite any other act" and "despite any agreement or waiver to the contrary": s. 80(1).

No injunction, mandatory order, or other order shall be granted against a tenant based on provisions of an agreement respecting the presence of an animal in the premises unless certain facts exist: s. 108. As indicated above, such facts do not exist in the present case.

It is apparent from a reading of the above legislative provisions, that the Landlord and Tenant Act applies. It does not necessarily follow, however, that s. 108 prohibits the order sought. It does not necessarily follow that there is a conflict between the Condominium Act and the Landlord and Tenant Act. The Landlord and Tenant Act is remedial in nature and should be given a broad interpretation which gives effect to the objectives of the Act. The respondent argues this point and refers to s. 10 of the Interpretation Act and the decision of Potts J. in *Re Boyd and Earl and Jenny John Limited* (1984), 47 O.R. (2d) 11. Section 10 of the Interpretation Act requires such legislation to receive "such fair, large and liberal construction and interpretation as will best insure the attainment of the object of the act according to its true intent, meaning and spirit."

Such liberal construction and interpretation does not permit the court to ignore the plain meaning of words in the legislative provisions in question. Section 108 prohibits an order "based on the provisions of an agreement". The applicant corporation seeks its remedy, not on the basis of an agreement, but rather on the basis of the declaration legislatively authorized under the Condominium Act. If the legislature had intended that the prohibition would apply to a declaration under the Condominium Act, it could have readily so provided in s. 108. It did not do so.

Accordingly, I find that s. 108 does not prohibit the relief sought in this application and an order will go in the terms requested in the notice of motion.

The lease, in accordance with its terms, has apparently been renewed for the period November 1, 1991 to October 31, 1992. In the circumstances, in order to permit the Irvines to arrange alternative accommodation with Mickey, coincident with the end of the lease with Lillian Robbins, the execution of this order is stayed until November 1, 1992.

Unless either counsel indicate a wish to argue the question of costs, by contacting my secretary within 10 days, an order will issue that the costs of this application be to the applicant.

FERRIER J.

SCHEDULE "A"

Condominium Act, R.S.O. 1990, c. C. 26

Section 2(4)

Upon registration of a declaration and description, the land and the interests appurtenant to the land described in the description are governed by this Act.

Section 3(3)(b) and (c)

In addition to the matters mentioned in subsection (1), and in any other section in this Act, a declaration may contain,

(b) provisions respecting the occupation and use of the units and common elements;

(c) provisions restricting gifts, easements and sales of the units and common interests;

Section 10

(1) The registration of a declaration and description creates a corporation without share capital whose members are the owners from time to time.

...

(3) The Corporations Act and the Corporations Information Act do not apply to the corporation.

Section 12(3)

The corporation has a duty to effect compliance by the owners with this Act, the declaration, the by-laws and the rules.

Section 31

(1) Each owner is bound by and shall comply with this Act, the declaration, the by-laws and the rules.

(2) Each owner has a right to the compliance by the other owners with this Act the declaration, the by-laws and the rules.

Section 49 (1) Where a duty imposed by this act, the declaration, the by-laws or the rules is not performed, the corporation, any owner, the bureau, or any person having a registered mortgage against a unit and common interest, may apply to the Ontario Court (General Division) for an order directing the performance of the duty.

(2) The court may by order direct performance of the duty and may include in the order any provisions that the court considers appropriate in the circumstances.

(4) The lessee of a unit is subject to the duties imposed by this Act, the declaration, the by-laws and the rules on an owner, except those duties respecting common expenses, and this section applies in the same manner as to an owner and, where the lessee is in contravention of an order under this section or where the lessee fails to pay, pursuant to a notice given under subsection (3), the court may terminate the lease.

Landlord and Tenant Act, R.S.O. 1990. c. L.7

Section 1

"residential premises" means,

(a) any premises used or intended for use for residential purposes, including accommodation in a boarding house, rooming house or lodging house,

"Tenant" includes a person who is lessee, occupant, sub-tenant, under-tenant, and the person's assigns and legal representatives.

Section 79

"tenancy agreement" means an agreement between a tenant and a landlord for possession of residential premises, whether written, oral or implied, and includes a licence to occupy residential premises;

"tenant" means a tenant as defined in section 1 and in addition includes a boarder, a roomer and a lodger.

Section 80(1)

This Part applies to tenancies of residential premises and tenancy agreements despite any other Act or Parts I, II or III of this Act and despite any agreement or waiver to the contrary except as specifically provided in this Part.

Section 108

(1) No injunction, mandatory order or other order shall be granted against a tenant based on provisions of an agreement respecting the presence, control or behaviour of an animal in or about the rented premises unless the court is satisfied that the tenant is keeping an animal and that,

(a) the past behaviour of an animal of that species has substantially interfered with the reasonable enjoyment of the premises for all usual purposes by the landlord or the other tenants;

(b) the presence of an animal of that species has caused the landlord or another tenant to suffer serious allergic reaction; or

(c) the presence of an animal of that species or breed is inherently dangerous to the safety of the landlord or the other tenants.

(2) Even if satisfied that the tenant is keeping an animal and that the criterion set out in clause (1)(a) or the one set out in clause (1)(b) has been met, the judge shall not grant the injunction, mandatory order or other order if he or she is also satisfied,

(a) in the case of a finding under clause (1)(a), that the animal kept by the tenant did not cause or contribute to the substantial interference;

(b) in the case of a finding under clause (1)(b), that the animal kept by the tenant did not cause or contribute to the allergic reaction.

Interpretation Act, R.S.O. 1990, c. I.11

Section 10

Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

Declaration for Number One York Quay made pursuant to the Condominium Act 6. The following are provisions respecting the occupation and use of the units and restrict gifts, leases and sales of certain of the units:

(d) No owner of any residential unit shall maintain, keep or shelter in or about his residential unit (including any part of the common elements designated for his exclusive use) any animal. For the purposes of this provision, "animal" means any animal, whether four-legged or not, but does not include a fish or caged bird unless the same constitutes an unreasonable interference with the use and enjoyment by other owners of the other residential units and common elements as may be provided for in the rules.

V. General

(b) Each owner shall comply and shall require all members of his family, residents, tenants, employees, customers and visitors to his unit to comply with the Act, this declaration, the by-laws, rules and regulations from time to time, enacted by the Corporation.

CBR# 166

Liftall (Canada) Ltd., Plaintiff, and 596029 Ontario Limited, Julievale Developments Limited and Harry Valente, Defendants And Between Harpell Associates Inc. et al., Plaintiff, and 596029 Ontario Limited, Defendant And Between Frank Gosling, Plaintiff, and 596029 Ontario Ltd. and Julievale Developments Limited, Defendants

Action No. 3634/89 Ontario Court of Justice - General Division Milton, Ontario Clarke J. January 9, 1991

T.A. Culver, for Liftall Canada Ltd. F. Zambosco, for all Defendants. D.C. Bowker, for Gosling and Harpell.

CLARKE J.:-- In this trial three separate plaintiffs whose actions were consolidated by order of Justice Carnwath dated the 14th of February, 1990, claimed specific performance or in the alternative, damages, against the defendants alleging breach of contract in the sale of certain industrial commercial condominium units located at 1272 Speers Road in the Town of Oakville, more particularly described as parts 1, 2, and 3, plan 2OR-38.37. The defendants a counter-claim for possession and arrears of rent.

The first plaintiff, Harpell Associates Inc. (Harpell) sued 596029 Ontario Limited and Julievale Developments Limited, alleging a breach of offer to lease dated the 3rd of April, 1985, which contained an option of purchase unit 2 for \$66,870.00. The offer to lease ran from the 1st of May, 1985 to the 30th of April, 1987, and the option was to be exercised by the first of March 1986 (subsequently extended in writing to the 1st of September, 1986) provided that the condominium corporation had been registered.

The second plaintiff Frank Gosling (Gosling), carrying on business through his corporation GGOSCO Engineering Inc. sued 596029 Ontario Ltd. and Julievale Developments Ltd. alleging a breach of lease dated the 1st of March, 1985, which contained an option to purchase units 3 and 4 for \$127,864.00. The lease ran from the 1st of March, 1985, to the 28th of February, 1987, and the option was to be exercised by the 1st of March, 1986, (subsequently extended in writing to the 1st of September, 1986) provided the condominium corporation had been registered.

The third plaintiff Liftall (Canada) Ltd. (Liftall) sued 596029 Ontario, Julievale Developments Ltd. and Harry Valente alleging a breach of lease dated the 27th of June, 1985, which contained an option to purchase unit seven for \$66,870.00. This lease ran from the 1st of July, 1985 to the 30th of June, 1987, and the option was to be exercised by the 1st of March, 1986, (subsequently extended in writing to the 31 of December, 1986) provided that the condominium corporation had then registered.

Further, it is undisputed that defendant 596029 Ontario Ltd. was the landlord of all the subject units, that defendant Julievale Developments was the registered owner, and that defendant Harry Valente was the president and agent of both corporations. Moreover, the parties agree that the defendants were agents one of the other with power to bind each other in any dealings with the lands and premises. Throughout this judgment (unless otherwise indicated) I will refer to all the defendants collectively as the "defendants". Further, as the salient facts and central issues are common to all three plaintiffs I will refer to all the plaintiffs collectively (unless otherwise indicated) as the "plaintiffs".

Finally it is common ground that on the 13th of August, 1987, the defendants sent a registered letter to all plaintiffs alleging that their leases had expired, giving them notice to vacate by the 30th of September, 1987, and claiming double rent in the event of over holding.

The nub of the litigation was whether the defendants pursued their application to register the subject lands as a condominium in a bona fide manner so that the options could be exercised. Relying on this implied term in their contract the plaintiffs alleged that they made significant improvements to the premises and that the defendants acted in bad faith.

In reply, the defendants argued that all the extension times for the exercise of the options expired without the plaintiffs either exercising their options or tendering the requisite \$5,000.00 (certified cheque) deposit for each unit. The defendants also denied that they failed to act in a bona fide and reasonable manner to register the condominium and counter- claimed for possession and arrears of rent.

Succinctly I concluded:

1. That the lease and options of all plaintiffs had not expired and that their options were still enforceable by way of specific performance; and
2. That in any event the defendants' conduct raised the equitable doctrine of waiver which precluded the defendants from relying on any lapse of time in the contracts.

Let me give reasons.

CREDIBILITY

Credibility was an important issue in this case. Generally I was impressed with the testimony of the plaintiffs. Their evidence was factual, straight forward and believable. Their various versions were not only internally coherent but also mutually collaborative and in harmony with the balance of the evidence.

Mr. Valente, the chief witness for the defendant, on the other hand, was unconvincing. Frequently opaque and elusive, his testimony on key issues rang false. He struck me as experienced, shrewd and much more knowledgeable than he pretended. His attempt to shift responsibility for delay in processing the condominium application to his solicitor and surveyor and to project himself as an innocent neophyte in the business were particularly unconvincing. Far from being a hapless foot soldier in the proceedings, I concluded that he played the role of general. Consequently, where the testimonies of the plaintiffs and Valente clashed, I preferred the evidence of the former.

ADDITIONAL FINDINGS OF FACT

I find:

1. That the chief reason the plaintiffs entered the leases with the defendants was to obtain the benefit of the option to buy and that without the options they would not have leased. In addition, I find that the plaintiffs relied on the ongoing assurances of Valente

that the registration of the condominium was imminent and that on registration he would honour the options. Relying on these oral and written assurances, I find that the plaintiffs expended the following sums on improvements to their premises:

Harpell - \$14,830.50; Gosling - \$35,000.00; and Liffall - \$8,005.40.

2. That the appraisals of Larry Bedford Associates Ltd. (Exhibit two) with respect to the values of the various units as of the 4th of October, 1989; (subject to a 5% to 10% diminution to reflect current market value), namely:

Gosling - Unit 3 - \$119,500.00 - Unit 4 - \$126,000.00 Harpell - Unit 2 - \$132,000.00 Liffall - Unit 7 - \$119,000.00

are substantially accurate.

3. That it was the intention of all parties that the options in the lease (the offer to lease in the case of Harpell), be identical and that they would be exercisable only when the condominium was registered. I find that Valente not only failed to request the option deposit from each Plaintiff but in fact informed them the tender was unnecessary until the condominium was registered. The plaintiffs constantly enquired as to the status of the application. In light of Valente's stance I find that it was unnecessary for the plaintiffs to complete the offers to purchase as contemplated by the option rider. There is abundant authority for the proposition that when a party enters a contract that presupposes the fulfilment of a condition precedent on his part he must act in good faith and in the absence of good faith cannot rely on failure to fulfil the condition precedent to evade obligations under the contract. See *Dynamic Transport Ltd. v. O.K. Detailing Ltd.* 85 D.L.R. (3)(9). Moreover section 51(1)(a) & (c) R.S.O. 1960 Chapter 84 of the Condominium Act, imposes an obligation on the vendor to take all reasonable steps to register the declaration and description and to deliver a registerable transfer without delay. Throughout their dealings I find that the plaintiffs were willing, able and even anxious to exercise their options and to close the transactions. Further I find they were all in a position to pay cash.

4. That, until the options were exercised, I find that the parties intended the lease to continue in full force and effect. I find support for this position both in the specific wording of the options which read: "Until closing the lease shall continue in full force and effect" and also in the conduct of the parties.

I note that in his letter to the plaintiffs, of the 27th of February, 1986, extending the date for the exercise of the option, Valente not only reassured the plaintiffs that the registration of the condominium was being pursued with vigour, but also extended the option date to the 1st of September, 1986, (the 31st of December, 1986 in the case of Liffall), or "as soon as possible". I interpret the phrase "as soon as possible" to mean that the option would continue until the registration was complete.

Further on the 12th of January, 1987, Mr. King, the solicitor for the defendants sent a letter to all plaintiffs, which although wildly erroneous in its estimate as to when the condominium would be registered, implicitly confirmed the continued existence of the options despite the lapse of all extension dates.

In addition Valente appended a hand written note to the letter which read:

"Options are existing, lease remains unchanged"

Valente testified that he had the letter of the 12th of January, 1987, sent to mollify the plaintiffs who were badgering him about the options. He intended the letter both as a reassurance that he would honour the options and as a ploy to keep them 'off his back'.

According to his testimony, it was only some time in 1987 or 1988 that he unilaterally decided that he would not honour the options regardless whether the plaintiffs' paid the \$5,000.00 deposit. I draw a reasonable inference from the evidence that a personality conflict between Valente and the disgruntled plaintiffs along with a dramatic rise in the market value of the units influenced that decision.

In sum, until the 13th of August, 1987, when the defendant expressly repudiated the contract, I find that all parties behaved as though the options were still valid. Although the defendant officially repudiated the contract on the 13th of August, 1987, I note that Valente by his own admission requested a deposit from Harpell some time after the 18th of December 1987.

Additionally I reject the defendant's argument that there was no consideration for the extension of the options. First I hold that such consideration is legally unnecessary. Second, I find in any event that the plaintiffs relied on the defendant's representations to their detriment and that their expenditure of substantial sums in tenant's improvement - some beyond the expiry of the first extension date - constituted such consideration. In short, by their unequivocal conduct I find the defendants waived strict compliance with the terms of the option and forfeited the right to terminate.

Let me conclude by quoting Grange J. in *Re Tudale Explorations Ltd. and Bruce* (1978) 20 O.R. (2d) p. 593 at p. 596.

"The present rule is now expressed by Snell in his work *Snell's Principles of Equity*, 27th ed. (1973), p. 563, as follows:

"Where by his words or conduct one party to a transaction makes to the other an unambiguous promise or assurance which is intended to affect the legal relations between them (whether contractual or otherwise), and the other party acts upon it, altering his position to his detriment, the party making the promise or assurance will not be permitted to act inconsistently with it."

It will be seen that rule as so stated depends in no way upon consideration or formality and it matters not at all whether the effect of the promise is to create a variation of contract nor whether the original contract was within or without the Statute of Frauds, R.S.O. 1970, c. 444."

CONDOMINIUM APPLICATION

I found the expert testimony of the solicitor Neubauer called by the plaintiffs to be persuasive. I accept his analysis and conclusions as set out in his report, (see Exhibit nine). I find that the defendants failed to pursue the registration of the condominium in a professional, expeditious or timely manner. Further I find that Valente, the directing mind of the project, was chiefly responsible for the delay. Despite his disingenuous efforts to transfer the blame to his lawyer and to his surveyor, I find that he was in charge throughout. Given that I have found that it was an implied term contract that the defendants would proceed

with the condominium application in a reasonable and expeditious manner, I find that this behaviour was both negligent and reckless.

In particular I find:

1. That the planning approval process is virtually complete, the Town of Oakville having issued its recommendation to the Region in June 1985 (although inexplicably only received by the Region some 13 months later).

2. That the land titles application (a condition precedent to the technical approval process) is now essentially done and that the condominium application remains a formality which can be now completed within four to five months.

3. That there were inexcusable delays in the processing of the land title application directly attributable to the defendants and/or their agents. A falling out between Valente and his erstwhile partner Mr. Alto Belli also contributed to the delay. Further I also agree with Neubauer that the application was routine and fell into the "cookie cutter" category. The technical approval application (including the land titles application which itself takes up to nine months) should have been completed by the 1st of March, 1986 or by the latest the 1st of September, 1986, provided the defendants had proceeded with reasonable dispatch.

4. That the decision of Valente to bring into the land titles application and the condominium process adjacent lands to the southwest upon which two further condominiums were to be constructed, together with the redundant severance applications, and the inefficient management of the McSweeney objection needlessly and inevitable contributed to the delay in the technical approval process, making it impossible for the defendants to honour the options with the plaintiffs within the prescribed time periods. In particular I find that when Valente chose that course, he knew, or ought to have known that the exercise of the options would be frustrated. In short, a combination of bad faith and pure ineptitude caused the delay.

In summary, I find the defendants acted recklessly and negligently with respect to the condominium application and that by their conduct equitably waived the right to rely on the expiry of any time periods. While the plaintiffs grew increasingly exasperated and finally sceptical of Valente, I find that they acted correctly throughout, pressing their claims with persistence and good faith.

In his able defense, Mr. Zambosco raised several legal arguments including some that were not pleaded and others which were abandoned during argument.

Having found that both the leases and options continue to exist and that the registration of the condominium was a condition precedent to the exercise of the options, I will not consider those arguments which related to whether the options survived the lease term. In any case, I hold that the options were separate contracts independent of the leases.

In addition, I reject the defendant's argument based on the rule against perpetuities. Not only did the defendant fail to plead that defence, but I find that it is inapplicable in the circumstances of this case. On the execution of the contracts I find that the plaintiffs acquired an immediate equitable interest in the lands and therefore we are not concerned with any interest in land arising in the future. With respect to pre-existent conditions, I find that the standard of reasonableness should apply.

I find that the most substantial argument raised by the defendant was ambiguity. However, I reject that defence. I find that the options here were sufficiently certain with respect to the identity of the parties, the units being purchased, and the price to make them valid and exercisable. Although the date for the exercise of the option was left in limbo, so to speak, I find that the contracts were sufficiently certain, so that given the expectations of the parties, a reasonable time frame for closing could be inferred. In *Justein v. 3900 Yonge Street Ltd.* 29 R.P.R. p. 80, the court in comparable circumstances, proposed a reasonable time for the closing of the transaction. In the case at bar I find there is sufficient information to apply the test of reasonableness and to order a date for closing. The judgment of Krever J. in *Palmer v. Ampersand Investments Ltd. et al.*, 47 O.R. (2d) p.275, which considered an option to purchase in an original lease is also apposite.

With respect to the issue of consideration and tender, Mr. Justice Krever said at p. 283:

"These cases can be distinguished factually and, in my opinion, it would be sheer formalism to hold that, if the plaintiff is otherwise entitled to specific performance, he should be denied the remedy because, despite the certainty that tender would have been an entirely futile act in the light of the defendants' consistent position from the beginning, tender was not made."

With respect to the sufficiency of the option, he stated at p. 282:

"Is the language of the option clause sufficiently particular to make out the essential terms of the contract the plaintiff seeks to enforce? The plaintiff takes the position that the particulars which are missing are not of a kind that renders the contract unenforceable because the court will imply the missing terms to give the agreement business efficacy. These terms, it is submitted, relate to payment of the purchase price and time for completion of the transaction. The right of the plaintiff to pay cash to the existing mortgage, as opposed to the entire purchase price, and that the transaction was to be closed within a reasonable time after the giving of notice of the plaintiff's intention to exercise the option, will according to the plaintiff, be implied. Since the corporate defendant, as an intermediate purchaser contemplated by s. 19(2) of the Mortgages Act, R.S.O. 1980, c. 296, would cease to be liable to the mortgagee on the mortgage upon registration of the transfer to the plaintiff, no justification exists for requiring the plaintiff to pay the entire purchase price in cash only to have the corporate defendant use the greater part of it to discharge the mortgage. Moreover, the plaintiff's argument continues, if it should be held that the option clause is ambiguous, resort may be had to extrinsic evidence, including the schedule to the unexecuted draft lease prepared by the corporate defendant, containing a right in the plaintiff to assume the existing mortgage, to show the intention of the parties. Although it did not form part of the submission, perhaps it would be acceptable to add to it that if the option clause is not patently ambiguous, resort may be had to extrinsic evidence to demonstrate a latent ambiguity and to resolve it: see *Re Noranda Metal Industries Ltd., Fergus Division and International Brotherhood of Electrical Workers, Local 2345 et al.* (1983), 44 O.R. (2d) 529. Again if nothing more were involved in this case than this issue, I would accept the plaintiff's submission?"

Finally in the case at bar I cannot find any equitable reason why specific performance should be refused. Nor taking into account that all the plaintiffs had customised their premises to accommodate their businesses, do I find damages to be an appropriate remedy.

CONCLUSION

In the result I find:

1. That the options are binding contracts;
2. That all three plaintiffs are entitled to specific performance of their respective units;
3. That the defendants shall complete the land titles and condominium applications forthwith in order that the plaintiffs can exercise their options. The closing date shall be within six months of the date of this judgment;
4. That the counter-claim is dismissed;
5. That counsel may speak to me or make submissions in writing on the question of costs and prejudgment interest together with any other direction they require with respect to the terms of the agreement, closing date, adjustments, etc. relating to the purchase and sale of the units.

CLARKE J.

CBR# 051

Kenneth Bradfield, Plaintiff, and Cleason Martin, Olive Mary Martin, Richview Inc. and West View Inc., Defendants

File No. 317398/88 Ontario District Court - York Judicial District Toronto, Ontario Ferguson D.C.J. May 2, 1990

Robert Spence, for the Plaintiff. T. James Treloar, for the Defendants.

FERGUSON D.C.J.:-- This is an action by the plaintiff for judgment against the four named defendants for \$100,000 (U.S.) together with interest and costs. The Statement of Claim was issued on March 3, 1988. Richview Inc. did not enter any defence. The trial before me proceeded against the three remaining defendants. During the course of the trial settlement was reached regarding the claims of the plaintiff against the defendant Cleason Martin and the defendant Olive Mary Martin. Accordingly, this judgment deals only with the claim against West View.

Initially I must deal with two amendments, one sought by the plaintiff and one sought by the defendant. Each of these amendments is granted. Accordingly the style of cause is corrected by naming West View, Inc. as a defendant instead of Westview, Inc. and the defendant is permitted to amend the Statement of Defence to include the following:

In the alternative, the Defendants plead that the rate of interest claimed by the Plaintiff is an illegal rate of interest contrary to section 347 of the Criminal Code of Canada, R.S.C. 1985, c. 47, and as such the claim of the Plaintiff is void as an illegal contract. Following the trial, Counsel submitted written submissions which were filed in accordance with a time schedule agreed upon at the conclusion of the trial. In these submissions the subject of jurisdiction of the court to deal with the matter now before it has been addressed. It is appropriate to note that the question of jurisdiction of this Court was not pleaded by West View nor was any issue raised on that subject during the course of the trial. That subject was raised by me at the conclusion of the trial and as a result it has been dealt with in the written submissions.

It is my view that inasmuch as the parties have attorned to the jurisdiction of the court Ontario laws are to be applied to this case and that this court has jurisdiction to determine the monetary issue between the plaintiff and West View.

Counsel for West View submits that non-service on the Public Trustee under the Business Corporations Act, 1982 [Ontario] s. 241(3) is fatal to the plaintiff's claim.

It is clear that West View has no assets in Ontario and has never carried on business in Ontario. Therefore it is my view that the existence of any procedural irregularity in not effecting service on the Public Service is not fatal to the plaintiff's claim under the circumstances of this case.

The plaintiff's claim against West View Inc. is based on default by that corporation on a mortgage deed which is alleged to have been executed by West View Inc. and Richview Inc. in Florida on September 24, 1986 as collateral security to two promissory notes and covering two properties one of which was owned by Richview Inc., a Florida Corporation, and one of which was owned by West View Inc., a Florida Corporation. The latter property is a Condominium.

The mortgage deed cited above was recorded on October 30, 1986 in Official Records Book 13858 at Page 752 of the Public Records of Broward County, Florida.

The mortgage on the Richview Property was a second mortgage. The defendant Richview Inc. defaulted under the terms of the first mortgage on its property. Accordingly, the First Mortgagee obtained a Judgment for Foreclosure thereby defeating any security which the plaintiff had on the Richview Property. As a result the money owing on the promissory notes and the mortgage deed became due and payable. The promissory notes also dated September 24, 1986 are for the principal sum of \$100,000. The key issues to be determined by this court are first, whether West View Inc. signed the mortgage deed dated September 24, 1986 by the signature of Cleason Martin who is described on the mortgage as Vice-President of West View Inc. and second whether the condominium property owned by West View Inc. was included in the mortgage when it was signed by West View Inc.

The defendant West View Inc. denies that it executed any mortgage on any of its property and that the mortgage was only given by the defendant Richview Inc. against its own property which did not include the condominium referred to above and that the defendant Cleason Martin had no authority to execute the mortgage on behalf of West View Inc. inasmuch as the defendant Olive Mary Martin was the sole Officer, Director and Shareholder of that corporation.

In 1985 the plaintiff bought a residential house in Toronto from the Martin's following which event the Bradfield's and the Martin's became friends and visited each other in Toronto and in Fort Lauderdale, Florida where the Martin's lived in a condominium. In 1986 Mr. Bradfield made a loan to a company controlled by Mr. Martin which was developing land in Kitchener, Ontario and this loan was repaid by June 1986.

In July 1986 Mr. Martin was involved in assembling land in Fort Lauderdale, Florida. For this purpose his company Richview, Inc. a Florida corporation had agreed to purchase lands for \$192,500.00 of which \$142,500.00 would be paid by way of a mortgage given back to the Vendor. An amount of \$50,000.00 was to be paid in cash on closing scheduled for July 21, 1986. Mr. Bradfield agreed to supply this cash to Mr. Martin provided he was given security. The parties agreed that Mr. Bradfield's loan of \$50,000.00 U.S. funds would be repaid in two years' time in the amount of \$100,000 but that there would be a discount of \$25,000.00 U.S. if the loan was repaid within one year.

On July 18, 1986 Mr. Bradfield, at the request of Mr. Martin, immediately transferred \$50,000.00 U.S. to the trust account of Mr. Martin's lawyer Robert Frazier who practised law in the firm of Cooper, Shahady, Frazier and Pugatch in Fort Lauderdale, Florida. Mr. Bradfield then consulted Barry Smith his solicitor in Toronto and gave him appropriate instructions to complete matters about the loan and security on behalf of Mr. Bradfield.

Having to leave Canada for a trip to Australia, Mr. Bradfield left the entire situation in Barry Smith's hands. Mr. Smith contacted Mr. Martin's lawyer Frazier and this was followed by a letter from Smith to Frazier dated August 1, 1986 in which Smith referred to the amount of loan funds already sent, security for the loan through a second mortgage on the lands being purchased in Fort Lauderdale and collateral security through a mortgage on the Martin condominium in Florida. Smith also confirmed that the funds would not be released by Frazier until there was clarification on whether the mortgage on this condominium was to be a first mortgage. Smith also confirmed the amount and term of the mortgage being \$100,000.00 for two years.

While Smith wrote a follow up letter to Frazier on August 26th he did not pursue the matter expeditiously. The funds held in trust by Frazier were disbursed without Smith's consent to complete the land purchase in Florida on behalf of Martin's company Richview Inc. Smith then received a letter from Frazier's firm dated December 17, 1986 enclosing the two promissory notes for \$100,000.00 and the mortgage deed which had been recorded.

The mortgage deed contains a photocopy of a promissory note on which the signature of "Cleason Martin, President" appears. That photocopy corresponds to a promissory note on which Cleason Martin's original signature appears. The other note sent to Smith is also a photocopy of the note signed by Cleason Martin but this note is also signed by Olive M. Martin.

The mortgage deed shows Cleason Martin, as President of Richview Inc. and as Vice-President of Westview Inc. both Florida Corporations as the mortgagor, Mr. Bradfield as the mortgagee and two properties covered by the mortgage, one being the land owned by Richview through the deal for \$192,500.00 cited above and one being the condominium owned by West View where the Martin's lived. The document is signed under the typed name of both corporations by Cleason Martin, President and as Vice-President respectively.

The certificate of execution by a Notary Public on the document certifies that the mortgage was signed by Cleason Martin as President of Richview Inc., a Florida Corporation and as Vice-President of West View Inc., a Florida Corporation on September 24, 1986. The promissory note attached to the mortgage is a photocopy of an original note signed by Cleason Martin and this note has the same registration number that appears on the first page of the mortgage.

West View denies giving any mortgage on any property and that Olive Martin was the sole officer, director and shareholder and the only person who had authority to execute any document on behalf of West View.

Olive Martin testified at the trial and stated that she was the sole shareholder, officer and director of West View based on information provided her by her husband Cleason Martin who did not testify. It is my finding that Cleason Martin was the directing mind of this Corporation. This finding is based on the evidence of Mrs. Martin and that the corporation was incorporated with Cleason Martin as an officer, director and subscriber and that the 1986 annual report of the corporation, signed by Cleason Martin in December 1986 shows him as Vice- President, Secretary and Director. Accordingly I find that Cleason Martin had authority to sign a mortgage on behalf of West View on September 24, 1986. There is absolutely no doubt in my mind about the signature of Cleason Martin on the mortgage deed.

While it is difficult to understand why the plaintiff did not consult his lawyer prior to sending funds to Mr. Frazier's law firm in Florida, I am satisfied that Mr. and Mrs. Bradfield were led to believe that the Martin's owned their condominium in Florida I find that at no time were they informed about the existence of West View or the fact that the condominium was registered in the name of that Florida Corporation.

There is conflict about the status of Robert Frazier when acting to complete the documentation for the plaintiff's loan. While the substantial delay on the part of Frazier's firm to deal with those matters raised in Barry Smith's letter of August 1st was totally unjustified as was the disbursement of funds without Smith's consent, I reject the concept that Frazier or anyone else in his law firm was acting for the plaintiff to complete the loan transaction. Frazier may have been willing to act as an agent for Smith in holding funds, but that in my view was the extent of his obligations.

When testifying Olive Martin was extremely vague about her association with Frazier or any other member of his legal firm. Obviously she had practically no knowledge of the scope of the legal matters being completed on behalf of her husband to finalize the loan transaction. In any case there is no doubt that she signed the promissory note for \$100,000.00 on or before September 24, 1986.

While it may well be that the mortgage document was prepared in stages to the extent that any reference to West View, including the insertion of Parcel 2 owned by West View, was added at a different time, I find that all of the typing on the document had been completed prior to it being signed by Cleason Martin and that the photocopy of the promissory note signed by Cleason Martin for \$100,000 was attached to the mortgage when it was executed. I reject the submission that anything was added to this document after it was signed by Cleason Martin or that a different copy of the promissory note was attached to the mortgage after it was executed.

It is significant to comment on the fact that Cleason Martin did not testify at the trial. That is a factor which I have weighed in assessing the evidence of his wife about his alleged lack of authority to execute a mortgage on behalf of West View Inc. I am satisfied and find that from the very beginning of the discussions and negotiations for the \$50,000.00 loan between the plaintiff and Cleason Martin that the loan was to be secured by a second mortgage on the lands being purchased by Martin for \$192,500.00 and by a mortgage on the Martin's condominium residence in Fort Lauderdale. I also find that Mrs. Martin was aware of those conditions and had agreed on the condominium mortgage even though the condominium was registered in the name of a Florida Corporation.

An agreement or arrangement to receive interest at a criminal rate that is in excess of an effective annual rate of over 60 percent is an unlawful contract and is not enforceable.

The agreement here was to receive \$100,000.00 U.S. two years after a loan of \$50,000.00. That agreement does not meet the standards for receiving interest at a criminal rate. Here West View has taken the position that the date of advance of monies was September 24, 1986 when funds were released by Frazier's law firm and that the date for repayment was March 3, 1988 being the date in the Statement of Claim. The submission of Counsel for the plaintiff that both those dates were not incorporated in the original agreement of the parties is, in my view, quite correct. It is the terms of the original agreement or understanding that is vital. The submission of the defence that the agreement is void as an illegal contract is rejected.

Having satisfied myself that West View executed the mortgage then the court should grant to the plaintiff judgment for the contractual obligation which is clearly set out on the face of the mortgage. The owner of the condominium is clearly liable for repayment of the loan.

The plaintiff is awarded judgment against the defendant West View Inc. in the amount of \$100,000.00 U.S. together with interest in accordance with the provisions of the Courts of Justice Act from March 3, 1988. Counsel may address the matter of costs at a future date if that is their intention.

I express my gratitude to Counsel for the fair and thorough manner in which this case was presented to the court.

FERGUSON D.C.J.

CBR# 207

Re Metropolitan Toronto Condominium Corporation No. 699 and 1177 Yonge Street Inc.

39 O.R. (3d) 473

Docket No. C28073 Court of Appeal for Ontario Robins, McKinlay and Osborne JJ.A. May 15, 1998

APPEAL from an order interpreting an article in a condominium declaration.

Patricia M. Conway, for appellant. Jonathan H. Fine, for respondent. BY THE COURT: -- This is an appeal from an order declaring that the appellant is prohibited from leasing parking units forming part of Metropolitan Toronto Condominium Corporation No. 699 ("MTCC 699") except to an owner or a tenant of a dwelling or commercial unit in the building.

MTCC 699 is a mixed-use condominium consisting of dwelling units, commercial units, parking units and storage units, which was registered in 1986. The developer of the project (the "declarant") retained ownership of eight commercial units, ten storage units and 41 parking units until 1996. In that year the declarant became insolvent and those units were sold under power of sale to the appellant 1177 Yonge Street Inc. This appeal is concerned only with the parking units.

During 1996, the condominium corporation learned that the appellant intended to lease, and had commenced leasing, certain of its parking units to persons who were not owners of dwelling or commercial units. The corporation then took the position that such leasing was contrary to a provision of the declaration of the corporation ("Article III") which, it contended, prohibits the leasing of parking units to non-residents or non-owners.

Article III of the declaration reads as follows:

An owner, other than the Declarant, of a dwelling unit or commercial unit, shall not convey the unit owned without also conveying all accompanying parking units. An owner, other than the Declarant, shall not separately convey a parking unit(s) except to any owner of a dwelling or commercial unit.

Since the parties were unable to agree upon their respective rights under this provision, the condominium corporation brought this application seeking, in the main, a declaration prohibiting the appellant from leasing parking units except to owners or tenants of dwelling or commercial units. This is an appeal from an order granting relief to this effect.

It is common ground that the sale of parking units to non-residents or non-owners of condominium units is prohibited by Article III. The question to be decided is whether the leasing of parking units is similarly prohibited. The answer to this question obviously depends on the meaning to be attributed to the word "convey" in Article III.

In the context of this condominium corporation declaration, we are of the opinion the word must be given its plain and ordinary meaning and not, as the respondent argues, the extended or expanded meaning given to it by the statutory definitions contained in enactments such as the Conveyancing and Law of Property Act, R.S.O. 1990, c. C.34, s. 1; the Land Transfer Act, R.S.O. 1990, c. L.6, s. 1; and the Mortgages Act, R.S.O. 1990, c. M.40, s. 1, whereby the terms "convey" or "conveyance" include leases. These terms are not defined in the Condominium Act, R.S.O. 1990, c. C.26. A declaration made pursuant to the Act, governing as it does important aspects of the continuing operation of a condominium, should be read as reasonably well-informed unit holders would read it and not in a technical or specialized sense.

In common usage, as standard dictionary definitions confirm, "convey" means a "transfer of title or the instrument that effects that transfer". Likewise, the word "conveyance" means "the transfer of (esp. real) property from one person to another by deed or writing". In everyday speech, a prohibition against conveying a parking unit would be regarded as a prohibition against a sale, and not a lease, of a unit. The leasing of a unit does not involve a sale or transfer of title and would not ordinarily be referred to as a conveyance of the unit. In our opinion, the prohibition in Article III cannot properly be read as including such transactions.

Moreover, nothing in this declaration requires that the term "convey" be given anything other than its plain and ordinary meaning. Indeed, it is significant that Article IV (7) of the declaration specifically provides with respect to visitor and handicapped parking, that such spaces shall not be "leased or sold". The same verbiage could have been used in Article III and, indeed, presumably would have been used, if the intention was to prohibit both the sale and lease of parking units.

In the absence of clear language to the contrary, Article III should not be interpreted in such a way as to interfere with or take away property rights. The right to alienate property, which includes the right to lease, is a fundamental incident of ownership: *Peel Condominium3BCorp. No. 11 v. Caroe* (1974), 4 O.R. (2d) 543 (H.C.J.). A provision purporting to restrict this right should be strictly construed. If any ambiguity exists, it must be resolved in favour of protecting valid property interests. In the result, the appeal will be allowed, the order of the court below will be varied to the extent that paras. 2, 3 and 4 will be set aside, and in place thereof an order will go declaring that the appellant is entitled to lease parking units owned by it to non-residents of the building. The appellant is entitled to the costs of the appeal.

Appeal allowed.

CBR# 222

Re Ontario New Home Warranty Program and Commercial Registration Appeal Tribunal et al.

39 O.R. (3d) 119 Court File No. 191/97 Ontario Court (General Division) Divisional Court, Lane, Greer and Howden JJ. May 14, 1998

APPLICATION for judicial review.

Carol A. Street, for applicant. S. Harvey Starkman, Q.C., for respondent, Peel Condominium Corp. 338. Thomas R. Whitby, for respondent, Northgrave Architect Inc. T. Anthony Ball, for respondent, Tremco Ltd./Tremco Ltée. Roy Wise, for respondent, Alumiprime.

HOWDEN J.: -- The Ontario New Home Warranty Program (the "Program") has brought this application for judicial review of a decision of the Commercial Registration Appeals Tribunal (the "Tribunal"). The Tribunal decided it had no jurisdiction to add as parties certain contractors and subcontractors involved in building a 17-storey condominium building in Mississauga. The Tribunal further declined to order production of all relevant documents to the Program prior to the examination of the witnesses.

The following issues arise to be decided in this action:

1. Does the Tribunal have jurisdiction to add parties, other than the owner, builder and/or vendor of a new home, in an appeal before it?
2. How should its discretion have been exercised?
3. If the parties are not to be added as requested, should this court order the Tribunal to require production of certain documents prior to the examination of witnesses on the stand?

The New Home Warranty Program and the Commercial Registration Appeals Tribunal

The Program is a non-profit, self-funded corporation which has the responsibility of administering the Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31 (the "Act"). The Act requires that every vendor and/or builder ("vendor/builder") of new homes must be registered and must provide owners of new homes with certain specified warranties. An owner who claims that a vendor/builder has breached its warranty may make a claim against the Program, which in turn is empowered to decide whether there has been a breach of warranty and whether there should be any payment made out of a guarantee fund to cover the costs of remedial work. Owners who disagree with a decision of the Program are enabled by s. 16 of the Act to appeal to the Commercial Registration Appeals Tribunal.

If the Program accepts that a vendor/builder has breached its statutory warranties and pays out of the fund, it becomes subrogated to all rights of recovery of the claimant and may bring an action in its own name or in the name of the claimant (R.R.O. 1990, Reg. 892, s. 13).

The Facts

Peel Condominium Corporation No. 338 ("PCC 338") is the condominium corporation which, for the purposes of a common element claim against the Program, is deemed to be the owner of the 17-storey building located in Mississauga, known as "The Californian". Amsep Corporation filed its application for registration under the Plan in 1987 and was registered in 1989 with a personal guarantee from its principal, Moises Okseberg. The Californian was built by Amsep.

A technical audit prepared in 1990 identified a number of serious technical defects relating to materials and workmanship in the construction of The Californian. Among other issues, there were a number of complaints relating to the windows in the condominium building. Until 1993, Amsep and its subcontractor Alumiprime and supplier Tremco were involved in remedial work to repair the faulty windows under their contractual warranty. The Program became involved in 1993 when PCC 338 presented to it a more extensive technical report regarding the window complaint. After certain investigations, on May 17, 1994, the Program denied PCC 338's claim for payment out of the guarantee fund in respect of the window complaint. The condominium corporation appealed to the Tribunal. A hearing was scheduled in 1996, and was subsequently adjourned. During ongoing meetings prior to the hearing, the Program learned from Alumiprime that PCC 338 had filed a court action against Amsep, Alumiprime, Tremco and the architect Northgrave, claiming damages of \$1.5 million in relation to problems with workmanship in the condominium building. The Program acquired copies of the pleadings in the action. In the view of the Program administrators, the litigation will require findings of fact which are "identical" relating to the existence and results of defects in workmanship, materials and/or design.

Having learned of the litigation, the Program moved before the Tribunal to have Amsep, Okseberg and the subcontractors and supplier Alumiprime, Tremco and the architect Northgrave added as parties to the hearing. Counsel for Alumiprime, Tremco and Northgrave attended and made submissions, taking the position that they would prefer to have the Tribunal's proceedings stayed pending the litigation. Failing a stay, they sought to be added as parties with full rights of participation.

The Tribunal added Amsep as a party and declined to add the others as parties. In refusing their application, the Chair of the Tribunal gave oral reasons for its decision:

With respect to the New Home Warranty Act, it offers us the opportunity to join a party, but that party must be added within the bounds of the statute, which the statute refers to [as] the owner and vendor/builder. Liability goes to the Program because of indemnification. At this point, as there are no added parties, there is no onus because they are not parties. For these reasons, lets get on with it. The only party added is the builder.

(Proceedings before the Tribunal, March 3, 1997, p. 96)

The Tribunal also declined a request from the Program to order representatives of Alumiprime, Tremco, Northgrave and Okseberg to produce their documentary material forthwith, and to grant a short adjournment to allow the Program to review that material before they would testify as witnesses. The Tribunal refused, stating (again, orally):

With respect to the witnesses to be summonsed, they've been summonsed, and they've been summonsed to appear. Witnesses, in my experience, and the Tribunal's experience, and that of the panelists, witnesses will show up, they'll show up with their documents and they'll be examined, albeit it may take quite a long period of time. You have that right to do so, Ms. Street, but basically, for all the above reasons, the motion to adjourn is being denied -- or the request for an adjournment.

(Transcript of Proceedings before the Tribunal, March 3, 1997, p. 109)

The Tribunal later gave extended reasons in writing in which it reviewed not only jurisdictional but substantive factors for its decisions. Counsel for the Program sought and was granted a stay in order to seek judicial review of the Tribunal's decisions.

The litigation with respect to the construction problems with PCC 338 is at the pleadings stage. The New Home Warranty Program petitioned the Ontario Court (General Division), on June 4, 1997 at the time of the application for judicial review, to be added as a party in the litigation. The motion was refused, and has been appealed. Subsequently, on August 15, 1997 the court action was stayed by Justice Lederman pending a decision by the Tribunal.

Standard of Review

Decisions of the Commercial Registration Appeals Tribunal may be appealed to the Divisional Court under s. 11 of the Ministry of Consumer and Commercial Relations Act, R.S.O. 1990, c. M.21. The court's broad powers on appeal are set out in s. 11(5):

11(5) An appeal under this section may be made on questions of law or fact or both and the court may exercise all the powers of the Tribunal, and for such purpose the court may substitute its opinion for that of the Registrar or of the Tribunal, or the court may refer the matter back to the Tribunal for rehearing, in whole or in part, in accordance with such directions as the court considers proper.

No privative clause protects decisions of the Tribunal in proceedings under the Act. In this case, of course, the parties are not appealing a final decision of the Tribunal but are seeking judicial review of an interlocutory order. However, with regard to the absence of a privative clause, the court's broad powers on appeal, and the nature of this issue as one which does not involve the special expertise of the Tribunal and indeed, one which involves the Tribunal's jurisdiction, it appears clear that the appropriate standard of review for this case is correctness: *Carleton Condominium Corp. No. 441 v. Ontario New Home Warranty Program* (1996), 28 O.R. (3d) 394 (Div. Ct.).

I. Jurisdiction of the Tribunal

The applicant has argued that the Tribunal has jurisdiction to add parties to a proceedings before it pursuant to the provisions of the Act and to the Statutory Powers Procedure Act, R.S.O. 1990, c. S.22.

Section 16(4) of the Act explicitly allows the addition of parties in the discretion of the Tribunal:

16(4) The Corporation [Ontario New Homes Warranty Program], the person or owner who has required the hearing and such other persons as the Tribunal may specify are parties to proceedings before the Tribunal under this section.

(Emphasis added) A correct construction of this section leads inescapably to the conclusion that the Tribunal had an explicit grant of jurisdiction to add parties other than the owner and vendor/ builder. In my view, the power to specify parties, other than those statutorily designated, includes the power to add them.

In fact, the court was supplied with an earlier decision in which the Tribunal did in fact add a third party to a proceeding under this Act. The Tribunal held that it is able to "add a party at its discretion in accordance with s. 16(4)" where that party has an interest in the outcome: *Lorob Investments, CRAT Summaries of Decisions* (1994), Vol. 26, Part II, October 4, 1994, p. 947.

It is unnecessary to go beyond the section for this purpose. However, I do note s. 5 of the Statutory Powers Procedure Act which states that, unless otherwise specified under a particular Act, parties "shall be persons entitled by law to be parties to the proceeding". It has been held that "there is a genuinely entrenched principle of administrative law that where natural justice requires it, notice and an opportunity to respond must be given to persons who might be prejudiced by acts done under legislative authority notwithstanding that the legislation does not require it": *MacCosham Van Lines (Canada) Co. v. Ontario (Minister of Transportation & Communications)* (1988), 66 O.R. (2d) 198 at p. 211, 11 M.V.R. (2d) 230 (Div. Ct.).

In declining the motion to add parties on the stated basis that joining them was outside of the bounds of the statute, the Tribunal clearly was in error.

2. Exercise of Discretion by the Tribunal

It was the position of the Program that the subcontractors or suppliers should have been added as parties to the proceeding before the Tribunal. The respondents PC 338, Tremco, Alumiprime, and Northgrave take the position that the Tribunal did not err.

The applicant submits that the subcontractors should have been added because they are necessary and it is in the interests of the administration of justice to avoid a "multiplicity of proceedings". Since issue estoppel will affect the later litigation in some way, all of these entities should be added as parties and be able to respond and cross-examine effectively before the Tribunal. It was the applicant's submission that the factual issues which would be decided by the Tribunal in assessing the warranty claim are "identical" to those which are to be litigated in the court action. The respondents took the position that such an order would unnecessarily encumber the process under the Act, and that issue estoppel would not naturally follow particularly if they are not made parties but attend only as witnesses. One respondent sought an order declaring that in effect issue estoppel would not apply.

Clearly, it is in the interests of justice to avoid a multiplicity of proceedings and relitigation of the same issues. That rationale applies equally between a multiplicity of actions in the courts or concurrent proceedings which take place in both the courts and administrative tribunals. The same doctrinal tools are available at the appropriate time, as between the courts and specialized tribunals, to prevent relitigation. The reasoning of *Abella J.A. in Rasanen v. Rosemont Instruments Ltd.* (1994), 17 O.R. (3d) 267 at pp. 279-80, 112 D.L.R. (4th) 683 (C.A.), is persuasive: [Administrative tribunals] were expressly created as independent bodies for the purpose of being an alternative to the judicial process, including its procedural panoplies. Designed to be less

cumbersome, less expensive, less formal and less delayed, these impartial decision-making bodies were to resolve disputes in their area of specialization more expeditiously and more accessibly, but no less effectively or credibly. . . .

. . . I can see no principled basis for exempting issues adjudicated by tribunals from the operation of issue estoppel.

However, it does not detract in any way from these general principles of respect for administrative tribunals to note that administrative tribunals are constrained to act within their statutory mandate.

The Act is intended to be a consumer protection scheme for the benefit of people who buy new homes. It is intended to remove from the consumer the need to engage in expensive and time-consuming multi-party litigation to determine, on the basis of fault and breach of contract, who is responsible for the defect in question. This legislative objective would be wholly frustrated if the Tribunal had made the order requested by the Program. The Tribunal is intended to determine as between the consumer and the Program whether there is an entitlement to recovery. Through the subrogation provisions, responsibility for any court proceedings to finally determine liability among the various construction parties, with all their attendant cost, delay and procedural wrangling, is allocated to the Program. In the words of Southey J. in *Carleton Condominium No. 441*, supra, involving an issue of whether a CRAT hearing should not properly be stayed pending decision in concurrent court litigation (at p. 397):

That statutory duty (to hold a hearing), in my opinion, overrides the general rule against multiplicity of proceedings . . . one of the purposes of the Ontario New Home Warranties Plan Act is to provide a quick, summary procedure which can be pursued by the consumer at less expense than litigation in the courts.

In this case, the purpose of an appeal to the Tribunal is to determine whether there is merit to a claim for breach of the statutory warranty which was denied by the Program. The question before the tribunal requires an interpretation of the statute in order to determine whether conditions exist that would amount to a breach of that warranty. In this case, they have to determine whether the windows were constructed in a workmanlike manner free from defects in material and constructed in accordance with the Ontario Building Code and whether statutory limitation periods were exceeded. The only necessary parties at issue before the Tribunal are the Program, whose decision is in question, and the claimant, on the facts before us.

Finally, the question of whether issue estoppel would arise is extremely fact-specific; on the facts of this case it does not appear, as per Rasanen, that the question to be determined in the court proceedings will be the same as the ones necessary for a determination before the Tribunal (at p. 278). All issues of liability as between supplier, subcontractors and the contractor do not need to be resolved in order to determine the issue between the Program and the consumer in this case. Many of the factual issues that would be required to determine liability as between the parties to the civil action are outside of the jurisdiction of the tribunal; nor is a finding on these points necessary to a resolution of the warranty claim. For example, the question of any professional negligence on the part of the architects, or the question of who had responsibility to review the installation of the windows, or whether the supplier of the sealant or installer of the vapour barrier are responsible, are simply irrelevant to the decision the Tribunal has to make under the Act.

Furthermore, in order to make such determinations, significant additional complexity would be added to these proceedings, which would prejudice the consumer who is intended to be the beneficiary of the Program. Particularly in a case like this one, where the impetus to add parties comes from the Program and is resisted by all the other parties to this application, it appears questionable indeed that the most efficacious and just way to resolve these issues is to join the subcontractors, suppliers and the architect to the Tribunal appeal.

The Tribunal gave written reasons later which went well beyond the jurisdictional point referred to orally. It considered the merits of the adding of parties within this statute and declined to do so. In exercising its discretion as it ultimately did, I see no error in its conclusion.

I have had an opportunity to read the judgment of Greer J., dissenting on this point. With respect, I do not agree with her analysis. It should be pointed out that, before the Tribunal, it is not the Program which bears the onus but the appellant condominium corporation. It is also not the case that the Program has "no documentation". It has investigated the matter sufficiently to decline the application of PCC 338 for payment from the fund. It has the technical audits of the full construction job. And it received a detailed technical report from PCC 338 with which it was apparently not satisfied, hence the requirement of a hearing where the Program has full rights of cross-examination. My concern with the Program's rationale for adding these parties is that it invites the Tribunal to go beyond its defined statutory mandate rather than subordinating the goals of the administrator of the Plan to the aim of the Act -- i.e., to provide an expeditious procedure for the consumer to obtain a hearing and a decision free of lengthy and costly litigation between the several professionals and sub-trades as to which is responsible (if indeed primary liability is established). As well, there is no assumption in these reasons that the Program is an insurer or that the Plan is "straight insurance".

In summary, the Tribunal has the power to add parties beyond the Program and the purchaser in a proper case. It did not err in refusing to do so in this case, nor in declining to stay its hearing until the contract litigation was complete. The issues which the Program sought to litigate with the proposed parties were irrelevant to the Tribunal's task, which is confined to determining whether the terms of the warranty were breached. Any finding of fault for such a breach is beyond the jurisdiction of the Tribunal. Accordingly, the decision of the Tribunal will not normally give rise to issue estoppel as to issues not within its jurisdiction to decide and persons not parties before it.

3. The Tribunal's Decision Respecting Production of Documents

It is quite clearly not the role of this court to interfere with the decisions of a tribunal with respect to its own procedures, save and except a situation where there arises a question of procedural unfairness. No such issue has been raised in this case. Subject only to its duty of fairness, the Tribunal is entitled to make any decision which may assist in the just and expeditious conduct and disposition of the proceeding. The Tribunal was acting within its powers when it declined the Program's request for advance production of documents and an adjournment, and it would not be appropriate for the Divisional Court to consider the merits of that decision on judicial review.

It may be further noted that the applicant has asked the court, essentially standing in the shoes of the Tribunal, to order production of all documents relating to the window claim 20 days in advance of a hearing. Were the court to require the Tribunal to make such an order, it would amount to an order of mandamus, which could not be justified in the circumstances as there were a number of possible decisions open to the Tribunal acting within its powers. For this reason, as well, the court should decline to

make the order sought in the alternative. Generally, the bringing of proceedings to challenge interlocutory decisions of tribunals and boards is not a practice to be encouraged.

For these reasons I would dismiss the application. The parties may file written submissions on costs with the Registrar, the respondents within ten days and the applicant within a further ten days.

LANE J. (concurring): -- I have had the advantage of reading in draft the reasons prepared by my colleagues Greer J. and Howden J. With great respect, I cannot agree with Greer J. because I do not interpret the Act as contemplating a wholesale transfer of complex construction litigation from the court to the Tribunal. The statute does not set up the sort of framework that one would expect to find if that was the case. On the contrary, the whole scheme is to isolate the consumer from the litigation process and leave it to the Plan, once it has paid a claim, to undertake the cost of recouping itself from those whose breaches of contract occasioned the loss. Many of the problems which concern Greer J., relate to how the Tribunal will be able to conduct a fair hearing without the presence of the sub-trades, and the ability of the Plan to interview them and prepare. In my view, once the Tribunal embarks upon its hearing, it can alleviate these concerns by adjournments or other means. Unco-operative witnesses, who will not speak to counsel in advance, are not unusual and the Tribunal can be trusted to deal with the situation as appears best to it. This court should not second-guess it in matters of its own procedure.

There is a further point, not raised in the argument, but brought into focus by Greer J.'s reasons. If the Act is interpreted as authorizing the Tribunal in effect to try the entire construction case, may there not be some constitutional difficulties? See *Ontario (Attorney General) v. Victoria Medical Building Ltd.*, [1960] S.C.R. 32, 21 D.L.R. (2d) 97, and *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, 130 D.L.R. (4th) 385. This seems to me to be another good reason for a cautious approach to the interpretation of the Act.

I agree with the disposition proposed by Howden J. and with his reasons.

The application is dismissed. Costs to be dealt with as proposed by Howden J.

GREER J. (dissenting): -- The Ontario New Home Warranty Program ("ONHWP") has moved for judicial review of the interlocutory decision of the Commercial Registration Appeal Tribunal ("CRAT") released March 19, 1997 wherein it added the builder, Amsep, as a party before the CRAT hearing but refused to add the other respondents as parties. The Tribunal gave oral reasons for its decision and held that it had no jurisdiction to add anyone other than the builder as a party to the hearing, stating that the party must be added within the bounds of the statute. It held that the term "parties" refers to the owner and the vendor/builder only.

In its written reasons released subsequent to the hearing, the Tribunal again said that it did not have the jurisdiction to add a party to the hearing other than an owner or a vendor/ builder. It did, however, expand on its reasons. I am not satisfied, after reading the Tribunal's written reasons, that it did not change its decision in this regard. It again stressed that the claimant and the vendor/builder were the only "permissible parties". It did, however, review s. 5 of the SPPA and did make reference to the decision of the Divisional Court in *Carleton Condominium Corp. No. 441 v. Ontario New Home Warranty Program* (1996), 28 O.R. (3d) 394, noting that when the ONHWP was put into place, the legislature envisioned its operation as an expeditious method of resolving disputes between vendors/builders and owners. While this expanded finding of the Tribunal is not completely consistent with its finding as to who should be parties before the Tribunal, I am satisfied that on an overall reading of both the oral and written reasons, the Tribunal erred in deciding it had no jurisdiction to add other parties.

Under s. 16(1) and (4) of the Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31, as amended by S.O. 1994, c. 27 (the "Act"), the legislation stated that the parties are:

16(4) The Corporation, the person or owner who has required the hearing and such other persons as the Tribunal may specify are parties to proceedings before the Tribunal under this section.

The term "such other persons" clearly gives the Tribunal the jurisdiction to add parties other than the claimant and the vendor/builder. It is then up to the parties involved to convince the Tribunal which other person or persons should be added.

Section 16(1) and (4) of the Act uses the words "person or owner", as well as "other persons" which the Tribunal may add as "parties". Therefore, where a different form of expression is used by the legislature, a different meaning is intended: see *Ruth Sullivan, Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994), p. 163. The Tribunal is able to add a party at its discretion and it failed, in the case before us, to exercise that discretion: see *Lorob Investments* (1994), CRAT Summaries of Decisions; vol. 26, Part II, p. 945.

In my view, the case before us is not the ordinary claim under the Act. Firstly, it involves a large condominium, Peel Condominium Corporation No. 338 ("PCC 338"), the vendor/builder of which has disappeared or is no longer in existence. Secondly, the claims about the alleged breaches and defects respecting the windows and their installation in PCC 338 arose only after the builder and the contractor or subcontractors who dealt with the production and installation of the windows in the condominium project had spent five years, during the window warranty period, attempting to correct the defects. ONHWP was not brought into the picture until after the window warranty period ran out. Thirdly, it appears from the evidence before us that one of the subcontractors integrally involved in the window construction/installation aspect of the project, also cannot be located. All of this has left ONHWP in an extremely difficult position, and its attempts to obtain documentation and evidence from the respondents has been thwarted by them, and ONHWP is faced with a claim, the value of which we are told, is realistically between \$800,000 to \$1 million although the claim is for \$1,500,000.

Under s. 13(1) of the Act, the vendor warrants that the home is constructed in a workmanlike manner and is free from defects in material (emphasis added), fit for habitation, constructed in accordance with the Building Code, and free from major structural defects. ONHWP has denied the claim, as noted in its letter of May 1994 to PCC 338, for the reasons set out in the decision. Thus the Tribunal must adjudicate upon the matter. One of the issues before the Tribunal will be whether or not the materials and windows used were free from defects.

PCC 338 has also instigated a civil action regarding its claim but it is stayed by way of order of Mr. Justice Lederman made August 15, 1997, awaiting the outcome of the Tribunal's to discuss anything with ONHWP, it has moved to have them added as parties, as it has no materials before it to review in preparation for the Tribunal's hearing. If these respondents simply appear as

witnesses before the Tribunal, ONHWP will be unable to review any documentation prior to examining them as witnesses at the hearing, and will have no discovery process. This would, in my view, prolong the hearing before the Tribunal.

I have concluded that the Tribunal erred on p. 5 of its decision in saying that it would be an abuse of the process to add the respondents Northgrave Architect Inc. ("Northgrave"), Tremco Ltd./Tremco Ltee ("Tremco"), and Alumiprime Division of Indal Limited, also known as Indal Limited, carrying on business under the firm name and style of Alumiprime ("Alumiprime") as parties and thereby obtain indirect discovery of them. If they are not added as parties, they can only be witnesses.

In order to determine the claim, the Tribunal must determine whether there are defects in workmanship, material and/or design which have caused damage to the condominium. In my view, the only way it can do so, without involving a multiplicity of proceedings, is to have Northgrave, Tremco and Alumiprime before it as parties, with full rights to call evidence, cross-examine witnesses and make submissions, in order to have a full adjudication of the claim of PCC 338.

Even though witnesses representing some or all of the respondents have been subpoenaed to appear, it is clear from the Tribunal's decision and from the evidence presented to us that Alumiprime, Northgrave and Tremco will not co-operate with ONHWP at all in this regard. I am of the view that in order to avoid a multiplicity of proceedings, they are therefore necessary parties to the proceeding. There is no doubt that issue estoppel will, in all likelihood, become an aspect of the later litigation. On the other hand, the respondents cannot rely on their own refusal to participate. By trying to distance themselves from the Tribunal's proceeding, the respondents must recognize that there is a risk to that behaviour.

I did not find compelling the arguments of the respondents as to why they should not be added as parties to the proceeding before the Tribunal. PCC 338 appeared to simply want ONHWP to pay over to it all it was asking for, without allowing the Tribunal to have a proper hearing on the facts and the evidence. Alumiprime took the position that it should simply be called as a witness, but up until this point has failed to co-operate with ONHWP in any way. Tremco is concerned about the question of issue estoppel and the finding of facts before the Tribunal being binding in the civil proceeding which is before the court. It believes that the Tribunal can make a decision as to whether there has been a major structural defect without adding them as a party. Northgrave says that it had nothing to do with the windows and should not even be in the civil suit, let alone before the Tribunal. It agrees with the concerns of the other respondents that issue estoppel may apply. The respondents rely on Carleton Condominium Corp. No. 441, *supra*.

In *MacCosham Van Lines (Canada) Co. v. Ontario (Minister of Transportation & Communications)* (1988), 66 O.R. (2d) 198 at pp. 211-12, 11 M.V.R. (2d) 230, the Divisional Court held:

I accept that there is a genuinely entrenched principle of administrative law that where natural justice requires it, notice and an opportunity to respond must be given to persons who might be prejudiced by acts done under legislative authority notwithstanding that the legislation does not require it. Thus, it is said, "the common law will supply the omission of the legislature": *Cooper v. Wandsworth Board of Works* (1863), 14 C.B. (N.S.) 180, 143 E.R. 414. In that way persons may become parties on the basis that they are "entitled by law" and that principle is explicitly recognized in s. 5 of the S.P.P.A. But here there is no legislative omission or oversight. The legislature has not forgotten to provide for persons to be parties; it has stipulated who shall be in the clearest of terms.

Further, the Tribunal is set up to deal with the very issues, given their practice and expertise, so there is no policy reason why those issues of construction and installation of the windows should not be fully heard by the Tribunal. While the Act is consumer legislation, it is not straight insurance, and ONHWP can only make a payment when the applicant can prove its case by proving that the vendor/builder has breached the warranty. The applicant must prove that the damage was caused by something the vendor/builder did and it must be proven to have been at fault. The legislation itself is written as a warranty with certain limits placed on it. Tribunals were designed to be less cumbersome, less expensive, less formal and less delayed in order to resolve disputes in their areas of specialization: see *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 at p. 269, 112 D.L.R. (4th) 683 (C.A.). The Tribunal must, however, have proper evidence before it and it is appropriate that this hearing canvass all evidence.

The respondents are trying to distance themselves from the Tribunal proceeding, yet they recognize that there is a risk here. Therefore, the most direct and clear-cut way is to have them added as parties to the proceeding so that they have the right to put forth their arguments before the Tribunal, as they could otherwise be prejudiced by the findings of fact before the Tribunal.

There is no policy reason why the issues of construction of the building, and in particular, the manufacture and installation of the windows, should not be heard by the Tribunal. Adding these respondents as parties will not defeat the summary nature of the proceeding before the Tribunal. There will, in my view, be less formality and less delay in the proceeding, and it will be less cumbersome.

The prejudice to be suffered by ONHWP by not having them added as parties, is to leave ONHWP with no documentation to review before the hearing and no discovery process, which will make the hearing cumbersome and lengthier than necessary. Alumiprime and Tremco were on site for five years trying to correct problems before ONHWP was even notified of a claim. ONFIWP should therefore not have to be faced at the hearing of first learning what case it has to meet before the Tribunal. The Tribunal must first decide if there has been defective workmanship and defective materials used in the construction, and in order for ONHWP to properly present its case, it is necessary to have these three respondents added as parties. The Tribunal comes within the purview of the Statutory Powers Procedure Act, R.S.O. 1990, c. S.22, and it envisages how the Tribunal will operate, given that complex construction issues require a proper response.

The Tribunal's reasons are confusing as to whether or not it did exercise its discretion. It clearly erred in thinking it could not add these respondents as parties. These two positions are therefore inconsistent. Their decision is one which is not within the specialized expertise of this Tribunal and the Tribunal has no greater expertise than the court on this issue. The reviewing court may therefore substitute its opinion for that of the Tribunal: see *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at pp. 589-90, 114 D.L.R. (4th) 385 at pp. 404-05.

I would order that the Tribunal add as parties to the hearing, the respondents Alumiprime, Tremco and Northgrave.

Application dismissed.

CBR# 255

Re Gaudaur et al. and Corporation of the City of Etobicoke et al.

35 O.R. (3d) 551

DV 426/96 and Court File Nos. 815/95, 138/96 and RE632/96 Ontario Court (General Division), Divisional Court O'Driscoll, Trainor and Watt JJ. September 30, 1997

Ira T. Kagan and Lawrence H. Zucker, for applicants. Paul J. Green, for respondent, City of Etobicoke. Robert V. Wright and M. Bergman, for respondents, Park Lawn Cemetery Co. and Kening Properties Ltd. S. Scharbach and Yeta Herscher, for respondent, Minister of Municipal Affairs and Housing.

O'DRISCOLL J. (WATT J. concurring): --

I. Nature of the Proceedings The applicants bring:

(a) an application for leave to appeal (815/95), under s. 96 of the Ontario Municipal Board Act, R.S.O. 1990, c. O.28 ("OMBA"), from a decision of the Ontario Municipal Board ("OMB"), dated December 1, 1995. That decision dismissed an appeal to a site specific zoning by-law amendment No. 1994-118, passed by the City of Etobicoke on July 5, 1994. The zoning by-law amendment granted permission to Park Lawn/Kening to construct a stepped five- to eight-storey residential condominium apartment building on the subject land.

(b) an application for judicial review (138/96):

(i) to declare void or quash the adoption of amendment No. 7-93 to the Official Plan ("OPA") of the Etobicoke Planning Area. The OPA designated the subject property from "Open Space" to "High Density Residential" and, thereby, permitted residential development.

(ii) to declare void or quash the Minister's approval of the OPA.

(c) an application (RE6342/96) under s. 136 of the Municipal Act, R.S.O. 1990, c. M.45, and rule 14.05 of the Rules of Civil Procedure to quash Etobicoke's By-law No. 1993-139, dated August 20, 1993, adopting the OPA.

The respondents Park Lawn Cemetery Company Limited ("Park Lawn") and Kening Properties Ltd. ("Kening") bring a cross-motion for an order to quash the applicants' application to quash by-law No. 1993-139, passed on August 20, 1993, by the City of Etobicoke and adopting the OPA.

For the reasons that follow, the applicants' application for leave to appeal (815/95) and the application for judicial review (138/96) are dismissed.

The cross-motion of the respondents Park Lawn and Kening to quash the applicants' application under s. 136 of the Municipal Act is allowed.

II. The Location of the Property

Park Lawn is a commercial for profit cemetery owned by the respondent Park Lawn, a public company. The cemetery was originally some 76 acres in area. In 1990, the two-acre subject parcel was decertified from the cemetery; the two-acre parcel is located at the southeast corner of Bloor Street West and Prince Edward Drive in the City of Etobicoke. The subject parcel has been used for administration offices, as a works and service yard facility, for horticultural greenhouses and as an access road. The 74 acres of cemetery have been laid out for cemetery use. Over the last 100 years some 80,000 persons have been interred in the 30,000 burial sites.

Park Lawn/Kening wish to demolish the office building and erect a residential condominium.

III. The Chronology

1. On January 10, 1990, an article was published in the newspaper "Etobicoke Life" entitled "Cemetery owner wants to build luxury condominium". The article said, in part:

The new owner of Park Lawn Cemetery hopes to build a luxury condominium on a two-acre parcel of cemetery property. David Arcscott told Etobicoke Life he would like to build on the site currently occupied by the cemetery offices at the corner of Bloor Street and Prince Edward Drive. . . .

However, Ward 3 Councillor Ross Bissell isn't impressed.

"It's just incredible what these developers will come up with. It's absolutely outrageous."

2. On September 24, 1990, the Ministry of Consumer and Commercial Relations, under s. 9(3) of the Cemeteries Act, R.S.O. 1990, c. C.4, by certificate 90-1-26, gave an order revoking approval for the interment of the dead on the two-acre parcel under consideration.

3. On December 11, 1990, Keenan J. gave an order that the two-acre parcel "not to be a cemetery within the meaning of the Cemeteries Act, R.S.O. 1980 and may be sold, leased or otherwise disposed of and dealt with by the owner as if the lands had not been a cemetery".

4. In June 1992, Kening erected a large green sign (eight foot by eight foot) advertising the condominium development. The sign faces Bloor Street West and is visible to motorists and pedestrians passing on Bloor Street West. The sign is located near a pedestrian walkway leading to the cemetery offices and would be visible to any person using Park Lawn Lane to enter the cemetery. The photograph filed shows that the sign was still in place in June 1996. (Respondent Park Lawn Record: Tab 2-B.)

5. During the week of June 21, 1992, Kening held an "open house" at the two acres to explain the proposed development. A second sign was erected near the first sign; it announced the hours of the "open house" to be held during the week in a large white and blue striped tent positioned over the pedestrian walkway from Bloor Street West to the administrative building. Plans showing the proposed development were displayed on the inside walls of the tent. (See *ibid.*, Tabs 2-C and 2-D, affidavit of B.J. Morris on, sworn September 16, 1996.)

The "open house" sign and the tent were visible to motorists and pedestrians passing on Bloor Street West and to persons entering the cemetery by Park Lawn Lane. The tent was visible to any person visiting graves in the nearby areas of the cemetery.

Flyers were hand distributed to the nearby residents inviting them to attend the open house on June 22, 23 and 24, between 4 p.m. and 8 p.m. (*ibid.*: Tab 2-E -- Flyer and Tab 2-G -- Distribution List.)

6. Persons attending the "open house" were asked to sign a "guest book". The guest book shows that at least 65 persons attended the open house. Six of that number were plot holders in the cemetery. At least three of the persons who requested additional information about the proposed condominium project were plot holders (*ibid.*: paras. 13 & 14 and Tab 2-H).

7. On July 2, 1992, Kening submitted an application for an amendment of the Official Plan ("OPA") and zoning code to permit the construction of a residential condominium building containing 137 units on the site; the two acres were designated as "open space" under Etobicoke's OP.

8. In July 1992, the respondent Kening, in accord with the procedural requirements of the City of Etobicoke, erected a four-foot by four-foot sign at the property; it faced Bloor Street West. The sign was still in place on April 10, 1996. (Affidavit of Paul Zuliani, sworn September 16, 1996, Tab 1- B and Tab 1-C of Record of Park Lawn.)

In a column entitled "Toronto Live" in the *Globe & Mail* of Friday, July 17, 1992, this appeared:

Quiet neighbours A sign advertising condominiums has been posted on Bloor Street West and Park Lawn Road -- just outside the main entrance of Park Lawn Cemetery.

9. On February 17, 1993, at 7:30 p.m., the then Councillor Ross Bissell (see para. III:1 (above)) sponsored a community meeting at the Royal York United Church. Approximately 30 persons attended and discussed, *inter alia*, the status of the two acres and the status of the rights holders.

10. A notice, dated February 22, 1993, announcing a public meeting of the Etobicoke Planning and Development Committee, scheduled for the Etobicoke Council Chambers, City Hall, on March 30, 1993, was sent out by prepaid first class mail to every owner and tenant of land in the area to which the proposed amendments would apply and within 120 metres of the property as shown on the last revised assessment rolls. See:

(i) s. 17(2) of the Planning Act, R.S.O. 1990, c. P.13, and R.R.O. 1990, Reg. 918;

(ii) Tab 1-D: p. 22 and Tab 1-F to affidavit of P. Zuliani, *supra* -- Record of Park Lawn;

(iii) Supplementary affidavit of P. Zuliani, sworn September 20, 1996: para. 2; *ibid.*: Tab 1.1.

The notice, dated February 22, 1993, stated, in part:

DATE: TUESDAY, MARCH 30, 1993

TIME: 7:30 p.m.

APPLICANT: KENING PROPERTIES LTD., (PARK LAWN CEMETERY COMPANY LIMITED) -- file no. Z-2107

LOCATION: 2801 BLOOR STREET WEST

SUBJECT: Application has been made for an amendment to the Official Plan from Open Space to High Density Residential and an amendment to the Zoning Code from Private Open Space (POS) to Fourth Density Residential (R4) to permit the development of a stepped 5 to 8-storey, 137-unit condominium apartment building at the south-west corner of Bloor Street West, west of Old Mill Terrace.

A judge's certificate has been issued under Section 59(7) of the Cemeteries Act, by which provincial approval permitting burials on these lands has been eliminated, thereby making them available for other uses.

Anyone interested in this matter is invited to attend the public meeting to make their views known and to offer their comments.

11. The evidence discloses that the notice was sent to owners and tenants of land in excess of 120 metres from the two-acre parcel.

12. The evidence further discloses that the notice was sent to six other persons who had either asked that they receive notice of the public meeting or had objected to the proposed development from early in 1990. Two of the six or their relatives, were cemetery rights holders and had been corresponding with the Etobicoke Central District Area Planning Department office since January 1990 following the publication of the article in *Etobicoke Life* on January 10, 1990 (see: para. III:1 (above)) (*ibid.*: Tab 1-G, Tab 1-H and Tab 1-I).

13. Approximately 37 persons attended the public meeting on March 30, 1993. At least four gave verbal or written presentations objecting to the proposed development. Some of the submissions were made by rights holders and/or their relatives. Therefore, the Committee of Council was made aware of the cemetery rights holders' concerns about the proposed OPA and amendment to the zoning code. The applicant, J. Gaudaur, although not present at the public meeting, acknowledged on cross-examination on her affidavit filed in these proceedings that the applicants' concerns were raised and expressed to the Committee of Council at the public meeting.

At the public meeting on March 30, 1993, the report of the Etobicoke Planning staff was presented; it recommended approval of the OPA and zoning code amendments.

14. By way of a prepaid first class mail, a letter dated April 13, 1993, was sent by the City Clerk of Etobicoke advising all persons who:

- (i) made a presentation at the March 30, 1993 public meeting, or
- (ii) sent written correspondence to the Planning & Development Committee

that the City Council of Etobicoke adopted on April 5, 1993, without amendment, the Committee's report which recommended approval of the proposed amendment to the OP and zoning code and thus permit the proposed development on the two-acre parcel (ibid.: Tab 1-J and Tab 1-K).

15. On August 20, 1993, the Council for the City of Etobicoke passed By-law 1993-139 adopting amendment No. 7-93 to the OP (ibid.: Tab 1-L).

16. On September 1, 1993 (although not required to do so by the Planning Act because no one filed a written request to be notified if the amendment were adopted), Etobicoke's City Clerk gave written notice of the adoption of the OPA to those persons who made presentations at the March 30, 1993 public meeting or persons who sent written communications to the Planning and Development Committee. Attached to the written notice was a copy of By-law 1993-139 OPA No. 7-93 (ibid.: Tab 1-L).

The September 1, 1993 notice advised the recipients that they could request the Minister of Municipal Affairs and Housing to refer the matter to the OMB.

17. The Minister of Municipal Affairs and Housing received OPA No. 7-93 but did not receive any requests to refer the OPA to the OMB.

18. On December 23, 1993, the Minister approved OPA No. 7-93 pursuant to ss. 17 and 21 of the Planning Act (ibid.: Tab 1-M).

19. On March 11, 1994, Park Lawn filed an application with the Etobicoke Committee of Adjustment for permission to sever the two acres from the balance of the lands owned by Park Lawn so that the two-acre parcel could be conveyed to Kening. One of the conditions imposed in the OPA No. 7-93 as set out in by-law No. 1993-139 was "Approval from the Committee of Adjustment for the land severance".

20. In March 1994, the Committee of Adjustment mailed a notice of the public hearing, scheduled for April 14, 1994, to all owners within 60 metres of the Park Lawn Cemetery as per the last assessment roll (ibid.: Tab 1-N).

21. On April 14, 1994, the Etobicoke Committee of Adjustment approved the application to sever the two-acre parcel.

22. The decision of the Committee of Adjustment was appealed to the OMB by the owners of neighbouring apartment buildings on the north side of Bloor Street West (ibid.: para. 27).

23. On July 15, 1994, Council adopted By-law No. 1994-118 amending the Zoning Code. The adoption of the by-law was delayed because the initial resolution by Council required Kening to fulfil certain conditions prior to adoption of the by-law. When the Committee of Adjustment decision was appealed to the OMB, the City of Etobicoke Planning Department recommended to Council that the performance of certain obligations be deferred to the site plan approval stage and that the by-law be adopted so that if it were also appealed, the OMB could hear the two matters at the same time (ibid.: para. 28).

24. The approval of By-law No. 1994-118 was appealed to the OMB by Messrs. Ivan Kuchan, Lawrence Pointer, R.A. Rhodes and Mr. and Mrs. E. Dieters. None of those persons has filed an affidavit before the Divisional Court; none are appellants before this court. Two of that group had represented the interests of the rights holders and their relatives at the public meeting on March 30, 1993.

25. On May 5, 1995, the OMB gave directions to the City of Etobicoke regarding notice to be given for the OMB appeal hearing scheduled for July 20, 1995 (ibid.: Tab 1-O).

26. On May 30, 1995, the City of Etobicoke carried out the OMB directions and gave notice of the July 20, 1995 scheduled date to hear appeals:

(i) of the By-law No. 1994-118, and X7 (ii) the April 14, 1994 decision of the Committee of Adjustment granting severance of the two-acre parcel (ibid.: Tab 1-P).

27. On July 20, 1995, the OMB: (1) gave practice directions for supplementary notice, (2) set out the order of proceeding and (3) adjourned the hearing to October 30, 1995 (ibid.: Tab 1-Q).

The Board required signs to be posted at convenient locations at the entrances of the cemetery and to advertise the proposal in the newspapers, so that those that might have an interest could attend the hearing and make their views known to the Board.

(Reasons of OMB: December 1, 1995; Applicants' Record: p. 56A.)

28. The City of Etobicoke carried out the July 20, 1995 directions of the OMB and gave notice of the rescheduled hearing (ibid.: Tab 1-R).

29. On Monday, October 30, 1995, the OMB hearing began; it was a "week long hearing, which was often extended well into the evening".

IV. Status of the Applicants

1. Ruth Bergstrom

(a) In his affidavit, sworn September 16, 1996, Paul Zuliani, Etobicoke area planner, deposed:

35. One of the objectors who appeared at the Board hearing and gave evidence under oath was Ruth Bergstrom of 70 Cambridge Avenue, Toronto. With the assistance of my notes, I recall that Mrs. Bergstrom told the Board that she bought a plot for herself and her husband in January of 1993, that she was aware of the Open House regarding the proposed development, and that she knew that a residential condominium building was being proposed. This is in addition to the evidence regarding other rights holders and their relatives, some of whom knew about the proposed development and expressed their views as early as January 1990.

(b) In her affidavit, sworn June 19, 1996, filed before the Divisional Court, Ruth Bergstrom deposes: 8. I only became aware of the residential development proposed by Kening Properties Ltd. and the Ontario Municipal Board hearing in or about September, 1995, when Jacqueline Gaudaur called to tell me about it. I was shocked that a residential development had been approved by the Council of The Corporation of the City of Etobicoke within the Park Lawn Cemetery and so close to my family and other families burial plots.

(c) In their factum, counsel for Park Lawn/Kening state:

33. The applicant Ruth Bergstrom is a rights holder who has not, as yet, made herself available for cross-examination. She appears to have given contradictory evidence at the OMB hearing as to when, and how, she became aware of the proposed development.

2. Jacqueline Gaudaur

The factum of counsel for Park Lawn/Kening states:

32. The quarterback of these proceedings on behalf of the applicants is Jacqueline Gaudaur. Contrary to her affidavit, she does not live in Etobicoke, but in the Beaches area of Toronto. She is not a rights holder. She was not a party at the OMB hearing; she was a witness. Her maternal grandparents were buried in the cemetery in the 1950's. She visits the cemetery about two or three times a year. She learned about the development plan from Mr. Rhodes, a friend. Mr. Rhodes is not a party to these proceedings, although he made written submissions to, and attended, the statutory public meeting and the OMB hearing. Ms. Gaudaur admitted on her cross-examination that Mr. Rhodes and Mrs. Deiters had raised the same concerns that she would have raised at the statutory public meeting.

3. Other Affiants

The factum of counsel for Park Lawn/Kening states:

34. Some of the affiants cross-examined on behalf of the applicants did not know what it meant to "refer" the Official Plan Amendment to the Ontario Municipal Board, even though they state in their affidavits that they would have done so had they been given notice. 35. The affiant William Ballard had not even read the OMB decision which is being appealed.

36. Many of the affidavits filed on behalf of the applicants, are given by people who have an interest in grave sites that are located either on the far side of the cemetery from the proposed development, or a long way from it. Some of them are so little affected by what occurs on the Property that they have still not seen the signs that have been posted since 1992.

V. Decision of the OMB (24 pages) -- December 1, 1995

1. Unfortunately, no appeal in the form of a request for referral was made to the Minister, resulting in OPA #7-93 receiving approval. This approval redesignates the subject two-acre property from Open Space to High Density Residential thereby establishing the principle of High Density Residential development on the subject property. (Joint Application Record of Applicants: Tab 4E:p. 58)

. . . . While the Board acknowledges that a number of plot holders or their families may not have been aware of the development proposal prior to the approval of OPA #7-93, the Board nonetheless is satisfied that the appellants had sufficient time to request referral of the Official Plan amendment but chose not to avail themselves of their appeal rights accorded them under the Planning Act. The Board therefore has no jurisdiction to deal with the matter of the approval of OPA #7-93. The Board's ruling with respect to OPA #7-93 was communicated to the appellants and to those present at the hearing. (ibid: page 58A)

2. The second finding of the Board is that the subject lands are designated for High Density Residential purposes in the City's Official Plan. The Board is therefore satisfied that the principle of residential development in the form of the proposed condominium development conforms with the Official Plan. (ibid: page 61)

3. The fourth finding of the Board from the evidence is that the proposed residential condominium with certain design changes is suitable for the subject two-acre property. (ibid: page 62A)

4. The fifth finding of the Board therefore is that a plan of subdivision is not required for the orderly development of the municipality, that the tests set out in section 51 (4) of the Planning Act have been met. Further that the application conforms with the Official Plan and constitutes good land use planning. (ibid: page 65)

In the result, the OMB:

1. allowed, in part, the appeal against by-law 1994-118 made pursuant to s. 34(19) of the Planning Act and amended the by-law.
2. dismissed the appeal against the consent application made pursuant to s. 53(7) of the Planning Act whereby the Committee of Adjustment granted the severance of the two-acre parcel. However, the OMB attached conditions to the severance.

VI. The Issue

In the joint factum of the applicants, the following is found:

2. All three applications revolve around the issue of whether proper notice was given for:

a) The statutory public meeting held by the City of Etobicoke Planning and Development Committee on March 30, 1993, to consider the OPA; and

b) The adoption of the OPA by Council of The Corporation of the City of Etobicoke on August 20, 1993.

VII. Court File No. RE 6342/96: Motion to Quash By-law 1993-139, Passed August 20, 1993 adopting OPA 7-93

The relevant provisions of the Municipal Act: 136(1) The Ontario Court (General Division) upon application of a resident of the municipality or of a person interested in a by-law of its council may quash the by-law in whole or in part for illegality.

138. An application to quash, in whole or in part, a by-law, except a money by-law registered under section 153, shall not be entertained unless made within one year after the passing of the by-law, but, if the by-law required the assent of the electors and was not submitted for or did not receive such assent, the application may be made at any time.

Here, the impugned By-law 1993-139 was passed on August 20, 1993 and the application to quash was launched on March 6, 1996; the application is clearly statute-barred. It follows that the cross-motion of Park Lawn/Kening is well taken and succeeds.

VIII. Court File 138/96 -- Application for Judicial Review under s. 2 of the Judicial Review Procedure Act, R.S.O. 1990, c. J.1 of By-law 1993-139 and Court File 815/95 -- Application for Leave to Appeal from the OMB decision of December 1, 1995

(a) Is the holder of a plot in Park Lawn Cemetery an "owner"?

1. The "Indenture of Interment Rights" issued to a rights holder states that the "Grantor does hereby sell to the Grantee, burial rights in Lot . . .". (Application Record of the respondents Park Lawn and Kening, Tab 2-A).

2. The Rules and Regulations of Park Lawn Cemetery state:

(i) "Preface -- Rights holders purchase the right of burial or internment [sic] but not the ownership of the land."

The Legislative Assembly of the Province of Ontario, in granting a charter to Park Lawn Cemetery, provided that all lots sold in the cemetery would be subject to such Rules and Regulations as might, from time to time, be adopted, even though such Rules and Regulations were not passed until after the indenture was issued. (ibid.) (ii) the Sale and Transfer of cemetery lot provisions speak of "internment [sic] rights to burial lots", "burial rights holder", and "internment [sic] rights holder". (ibid.)

In my view, Park Lawn Cemetery "rights holders" are not owners of real property.

(b) The "Public Meeting Notice" required by statute and regulation regarding Official Plan and Official Plan Amendments

(i) Under Part III: Official Plans, the Planning Act, s. 17(2), provides:

17(2)The council shall ensure that in the course of the preparation of the plan adequate information is made available to the public, and for this purpose shall hold at least one public meeting, notice of which shall be given in the manner and to the persons prescribed.

Section 21(1) of the Planning Act provides that s. 17 also applies to official plan amendments. (ii) Regulation 918 made pursuant to the Planning Act states:

1(1) Notice under subsection 17(2) of the Act of a public meeting for the purpose of informing the public in respect of a proposed official plan, community improvement plan or plan amendment shall be given,

(a) by publication in a newspaper that is, in the clerk's opinion, of sufficiently general circulation in the area to which the proposed plan or plan amendment would apply that it would give the public reasonable notice of the meeting; or

(b) by personal service or prepaid first class mail, to every owner of land,

(i) in the area to which the proposed plan or plan amendment would apply, and

(ii) within 120 metres of the area to which the proposed plan or plan amendment would apply,

as shown on the last revised assessment roll of the municipality, at the address shown on the roll . . .

Section 1(2) of the Regulation provides that the Clerk shall give a similar notice to anyone who has lodged a written request with the Clerk asking for such a notice.

(iii) Section 11.6.4 of the City of Etobicoke's Official Plan stipulates the same notice requirements for public meetings as found in Reg. 918.

(c) Did the City of Etobicoke fulfil the requirements of s. 17(2) of the Planning Act and Reg. 918?

In his first affidavit, para. 13, Mr. Zuliani, an Etobicoke planner, stated that, in his opinion, Etobicoke gave notice of the public meeting in compliance with the requirements of the Planning Act and the regulation enacted thereunder.

In his affidavit of September 20, 1996, Vincent M. Fabiilli, Manager of the Provincial Planning Services Branch, deposed:

In my opinion, the Ministry complied with the requirements of the Planning Act in the processing of OPA No. 7 and followed all standard Ministry practices and procedures in approving the Amendment.

Conclusions

1. Section 17(2) of the Planning Act and s. 1(1) of Reg. 918 provided alternative methods of giving notice "to every owner of land". The City of Etobicoke chose to proceed under s. 1(1) (b) and not under s. 1(1)(a) of Reg. 918.

There is no evidence of bad faith or oblique motive on the part of any employee or elected official of the City of Etobicoke towards the applicants who, earlier in these reasons, I found "not to be owners of land". Nor is there any evidence of bad faith on the part of anyone in the Ministry.

2. In my view, there is no evidence that would justify quashing the Minister's approval on the ground that the Minister acted "unlawfully" as that word was articulated by Lord Morris in *Padfield v. Minister of Agriculture, Fisheries & Food*, [1968] 1 All E.R. 694 at pp. 706-07, [1968] A.C. 1016 (H.L.). 3. The City of Etobicoke fulfilled all its statutory and regulatory obligations as required by ss. 17(2), 17(8) and 34(18) of the Planning Act and Reg. 918 regarding notice for a public meeting and notice of the adoption by by-law of the OPA and rezoning.

4. Section 61 of the Planning Act states:

61. Where, in passing a by-law under this Act, a council is required by this Act, by the provisions of an official plan or otherwise by law, to afford any person an opportunity to make representation in respect of the subject-matter of the by-law, the council shall afford such person a fair opportunity to make representation but throughout the course of passing the by-law the council shall be deemed to be performing a legislative and not a judicial function.

Conclusion: In my view, the Council of Etobicoke was acting in a legislative capacity in passing the by-law adopting the OPA.

5. Were these applicants, under the common law principles of natural justice, entitled to notice even though the Planning Act and Reg. 918 did not demand it?

In *Collins v. Estevan Roman Catholic Separate School Division No. 27*, [1988] S.J. No. 476 (C.A.), *Sherstobitoff J.A.* (for the court) at pp. 14-15:

The inclusion of these procedural provisions in the statute does not, in our view, exclude the application of the principles of natural justice in respect of any lacunae in the statute.

Where the statute speaks, it must of course prevail. Where it is silent the common law rules of procedural fairness apply.

Conclusion: In my view, there is no lacuna or hiatus in s. 17(2) of the Planning Act or in Reg. 918 and they must prevail. In my view, the applicants were not entitled to any notice.

In my view, the following quotation is apropos the case at bar: *Telecommunications Workers Union v. Canadian Radio-television and Telecommunications Commission*, [1995] 2 S.C.R. 781 at pp. 797-98, 125 D.L.R. (4th) 471 at pp. 482-83, per L'Heureux-Dubé J.:

While the TWU may have been affected by the CRTC decision, the effect of this decision on the TWU was purely indirect. Accordingly, I conclude that *audi alteram partem* did not require that the TWU be provided with notice of the CRTC hearing. The TWU was not a party nor did it have a direct interest in the proceedings before the tribunal.

In this respect, it is important to note that a finding in the case at hand that the TWU was entitled to notice would have grave consequences that could paralyze regulatory agencies. Effectively, it would mean that all individuals with contractual relations with a regulatee would have to be given notice of regulatory proceedings concerning that regulatee if such proceedings were likely to affect, even indirectly, the person in question. Given the wide scope of many regulatory agencies, their decisions are likely to have an indirect effect on a large number of individuals in contractual relations with the regulatee. As a result, all such parties would have to be provided with notice of the regulatory proceedings. This is particularly problematic in light of the extreme difficulty of ascertaining exactly who these parties are in advance of the hearing and the possibility that, in the absence of notice, these parties would be able to challenge the legality of the regulatory decision. This could result in an endless series of challenges that would effectively paralyze regulatory agencies. Accordingly, the *audi alteram partem* rule should not be interpreted as requiring that notice be provided to parties indirectly affected by regulatory proceedings.

In my view, s. 17(2) of the Planning Act and Reg. 918 provide the standard for procedural fairness and natural justice. The City of Etobicoke has complied with those standards.

(d) Test for granting leave to appeal from a decision of the OMB

Section 96 of the Ontario Municipal Board Act:

96(1) Subject to the provisions of Part IV, an appeal lies from the Board to the Divisional Court, with leave of the Divisional Court, on a question of law.

In *Toronto Transit Commission v. Toronto (City)* (1990), 2 M.P.L.R. (2d) 42 at p. 45, 42 O.A.C. 20 (Div. Ct.), per O'Brien J.:

Counsel for the respondent urged that the more recent decisions should be followed, and raised the additional point that if there was no reason to doubt the correctness of the decision there would be no point in granting leave. I accept that argument, and conclude that not only must there be a question of legal importance, but there must be some question as to whether the Ontario Municipal Board correctly decided the legal issue before it.

For the reasons set out above, I am of the view that the OMB was correct. Therefore, the requirements for leave to appeal are not met: see *Dell Holdings Ltd. v. Toronto Area Transit Operating Authority*, [1997] 1 S.C.R. 32 at pp. 60-61, 142 D.L.R. (4th) 206, per Cory J. (for the majority).

(e) Granting of Judicial Review The evidence shows that some rights holders attended the February 17, 1993 community meeting sponsored by Councillor Bissell. Since January 1990, at least two cemetery rights holders have corresponded with the City of Etobicoke and objected to the proposed development. Some rights holders were at the public meeting and made known their concerns about the OPA and the amendment to the zoning code; they received notice of the acceptance by the City Council of the Committee's report to grant the OPA and amendment to the zoning code. In the notice, dated September 1, 1993, the City Clerk of Etobicoke advised that "any person or other body may request the Minister of Municipal Affairs to refer all or part of by-law 1993-139 OPA 7-93 to the Ontario Municipal Board". No one did. The OMB found that "the Board is nonetheless satisfied that the appellants had sufficient time to request referral of the OPA but chose not to avail themselves of their rights accorded to them under the Planning Act". If I am wrong and there were deficiencies in the giving of notice for the public meeting under s. 17(2) of the Planning Act and Reg. 918, and if a breach of natural justice occurred, I still would not grant judicial review, a discretionary remedy under s. 2 of the Judicial Review Procedure Act, because these applicants, for whatever reason, elected not to exercise their rights under s. 17(11) of the Planning Act and ask the Minister to refer the OPA to the OMB.

IX. Result

1. Leave to appeal under s. 36(1) of the OMBA from the December 1, 1995 decision of the OMB is refused.
2. The application for judicial review is dismissed.
3. The application under s. 136 of the Municipal Act is quashed.

X. Costs

Prior to reserving judgment, we asked counsel for submissions as to costs. The only counsel who asked for costs were counsel from the City of Etobicoke and counsel for the applicants. If successful, each asked for costs in the sum of \$3,700.

The applicants are to pay to the respondent City of Etobicoke its costs fixed at \$3,700.

TRAINOR J. (dissenting): -- This application consolidates three proceedings: (1) a motion for leave to appeal from a decision of the Ontario Municipal Board; (2) an application for judicial review; and (3) a motion to declare void or quash an Official Plan Amendment ("OPA") approved by the Minister of Municipal Affairs. The applicants are Park Lawn Cemetery plot owners, which is located on Bloor Street in Etobicoke, or have loved ones buried in the cemetery. They are supported in this proceeding by others in the same or similar positions.

The three proceedings arose from the same facts and have a common issue which can be stated as follows: Should the respondent, the Corporation of the City of Etobicoke have given notice of the public meeting (mandated by statute) dealing with the proposed Official Plan Amendment to the applicants and others affected by the amendment by publication in a newspaper?

The applicants argue that they will be adversely affected by the development of a high rise condominium on lands adjacent to the cemetery and were therefore entitled to notice of the statutorily mandated public meeting preceding the Etobicoke Official Plan amendment, adopted by Council by by-law passed on August 20, 1993.

The amending by-law, passed by Council, was subject to the approval of the Minister of Municipal Affairs and Housing. It changed the Official Plan designation, covering a two-acre parcel of the land owned by the respondent, Park Lawn Cemetery Company Limited, from Open Space to High Density Residential. The two acres were removed from the protection of the Cemeteries Act, R.S.O. 1980, c. 59, by ex parte order of Keenan J. dated December 11, 1990. It appears from the order that the Minister of Consumer and Commercial Relations, pursuant to s. 9(3) of the Cemeteries Act, had earlier revoked the approval for interment in the two-acre parcel. The record does not disclose if notice of the request for revocation was given. The legislation does not appear to require notice, unlike the situation where a cemetery is closed and bodies are to be removed to another cemetery. In the latter situation, extensive newspaper and other notice is required. The two-acre parcel had not been used for grave sites. However, a number of grave sites are adjacent to the proposed development. Park Lawn and Kening Properties Ltd., related companies, are obliged to pay \$1 million into trust for the care and maintenance of the cemetery.

The Minister approved the OPA without the necessity of Ontario Municipal Board consideration as a request for hearing or referral had not been made to the Minister. Upon such approval by the Minister, the proposed development became a permitted land use within Etobicoke's Official Plan.

The Ontario Municipal Board, at a hearing to consider an appeal of the zoning by-law passed by Etobicoke to implement development of the condominium and an appeal from a severance granted by the Committee of Adjustment of the City of Etobicoke, took the position that it did not have jurisdiction to consider the merits of the OPA as the amendment had not been referred to the Board by the Minister. It heard evidence and submissions from the applicant Jacqueline Gaudaur (who was granted standing) and others with a similar interest on issues related to the zoning by-law. In dealing with its jurisdiction, the Board acknowledged that a number of plot holders or their families may not have been aware of the proposed development prior to OPA approval but said: "the Board nonetheless is satisfied that the appellants had sufficient time to request referral of the Official Plan amendment but chose not to avail themselves of their appeal rights" (emphasis mine).

On July 20, 1995 the Board adjourned the appeals because of opposition to the condominium development: sufficient time had not been set aside for the appeals. The majority of the opposition came from those people with an interest in one or more of the 30,000 grave sites and/or 80,000 burials at Park Lawn. In granting the adjournment, the Board said:

The Board, driven by a concern for natural justice if not by the letter of the law, expressed concern that the owners of the cemetery plots may quite understandably have concerns about a significant development proposed to be located near those plots.

The Board went on to find that owners of cemetery plots and those with loved ones buried at Park Lawn have "some degree of property interest and are perhaps entitled to some notice". It ordered Etobicoke to post signs at the entrances to the cemetery and to advertise the proposed development in the local newspaper and a Metro-wide paper such as the Toronto Star. The Board adjourned the appeal to October 30, 1995. Three hundred and fifty people jammed the hearing room on the return date.

The Board's reference to "the appellants" failing to request the Minister to refer the OPA to the Board, is difficult to understand. The appellants are those persons appearing in the style of cause in the Board's decision of December 1, 1995. The applicants and

others supporting the applicants were not appellants. The evidence is that the applicants were unaware of the proposal prior to the approval of the OPA by the Minister. Several plot owners and persons with loved ones buried at Park Lawn, were aware of the proposal and early on indicated their opposition. They received notice of the public meeting and other proceedings, but did not ask the Minister to refer the OPA to the Ontario Municipal Board. It is not in issue that Etobicoke was aware of opposition from plot holders and others interested in the grave sites prior to the mandatory public meeting.

The Respondents' Position

Etobicoke and the other respondents argue that the OPA by-law was a legislative act and not a quasi-judicial matter, that may have required compliance with the rules of procedural fairness. Further, Etobicoke submits, it complied with the notice provisions of the Planning Act, R.S.O. 1990, c. P.13, and Etobicoke's Official Plan. For both reasons, it is argued, the rules of natural justice have no application.

In addition, it is argued that the Board considered the submissions of the applicants and their supporters during the zoning by-law hearing and made substantial changes to the proposed development addressing the concerns of the applicants and their supporters. It is submitted that further representations at a new hearing would be redundant. In any event, it is argued, the rights holders have the right to a public hearing by requesting Etobicoke to amend its Official Plan, pursuant to s. 22 of the Planning Act to redesignate the area as open space. It is also submitted that there was some newspaper coverage of the proposed development. In addition, two signs were erected on Bloor Street. One of the signs advertised the development and the other was erected in compliance with the policy requirements of Etobicoke. It set out the fact that a zoning application had been made by Kening to rezone the two acres from open space to residential so that 137 condominium units could be erected on the site. Lastly, it is submitted this application is out of time.

The Applicants' Position

Counsel for the applicants argue that notice by newspaper advertisement of a public meeting, mandated by statute, to consider the OPA, which is the initiating and fundamental document in a substantial zoning change from open space to high density residential, is a minimum requirement dictated by fairness and natural justice. Counsel submits that the distinction between legislative acts and quasi-judicial acts of council has little significance in current case-law. Etobicoke was charged with the responsibility of notifying members of the public affected by the amendment. Council knew that rights holders were opposed. It knew that the notices sent to those within the statutorily prescribed radius of the graveyard would not include the applicants and others affected. Natural justice, it is submitted, is not ousted by compliance with minimum statutory notice requirements where a lacuna exists in the legislation. It is abundantly clear from the record before us that the applicants and others in a similar position did not receive notice of the public meeting required by the Planning Act prior to adoption of the OPA by Etobicoke and the Minister.

The following facts, whether considered separately or cumulatively, do not provide an answer to the issue raised: the erection of signs on Bloor Street, the coverage of the condominium development in two newspaper articles, the protests from several persons with interests similar to the applicants heard by Etobicoke, the failure of persons aware of the development to appeal the OPA to the Minister by asking him to refer it to the Board, and/or the Board considering the concerns of the applicants and others at the zoning by-law hearing.

The legal issue is whether natural justice and fairness required Etobicoke in all of the surrounding circumstances, to do more than meet the minimum legislative requirements of the Planning Act and Etobicoke's Official Plan.

The Planning Act

Section 1 of the Planning Act defines official plan as "a document approved by the Minister, containing objectives and policies established primarily to provide guidance for the physical development of a municipality . . . while having regard to relevant social, economic and environmental matters".

Section 16(1)(b) of the Planning Act provides, in part, that an official plan may contain a description of the procedures for informing the public and securing their views in respect of a proposed official plan amendment.

Section 17(2) of the Planning Act states: "The council shall ensure that in the course of the preparation of the plan adequate information is made available to the public, and for this purpose shall hold at least one public meeting, notice of which shall be given in the manner and to the persons prescribed".

Section 17(4) of the Planning Act says that where an official plan makes provision for informing and securing the views of the public in respect of amendments, the provisions of s. 17(2) and (3) do not apply provided that the official plan requirements are followed.

Etobicoke's Official Plan provides for notice of the public meeting mandated by statute, in almost identical wording to that contained in R.R.O. 1990, Reg. 917 ("Notice Requirements -- Official Plans"). In addition, Etobicoke, under its Official Plan, may require a sign to be erected on the subject property clearly visible and briefly describing the proposal. A sign was required and posted in this instance. A submission was made as to its location and wording. However, no serious issue is raised even though the sign does not appear to have been effective in alerting those most interested in a high-rise development adjacent to the cemetery.

Etobicoke Official Plan

Section 11.6.3 of Etobicoke's Official Plan states: "In order to provide ample opportunity for the public to review and discuss the proposed plans or amendments and to prepare their comments, at least 21 days advance notice of the public meeting shall be given" (emphasis mine).

Section 11.6.4 of Etobicoke's Official Plan states:

Notice of the public meeting shall be given by the clerk:

a) by publication in a newspaper of sufficiently general circulation in the area to which the proposed plan, zoning code or amendment would apply: or,

(b) by personal service or prepaid first class mail to every person assessed in respect of land in the area to which the proposed plan . . . or amendment would apply and every person assessed in respect of land within 120 meters of the area which the . . . amendment would apply, as shown on the latest revised assessment roles [sic]: and,

c) to all persons and agencies who have requested in writing to be notified . . .

(Emphasis mine)

The following three questions remain to be considered: (1) Is the passage of the OPA by-law, including compliance with the notice requirements, a legislative or quasi-judicial act? Further, must legislative and quasi-judicial acts be distinguished? (2) Are the notice provisions a complete code leaving no room for procedural fairness and natural justice? and (3) Do the notice provisions call upon the clerk to exercise discretion in selecting the means of conveying notice and to act reasonably in the circumstances?

While the by-law may be said to be a legislative act, the sending of notice is not. The importance of notice cannot be overstated. Both the Planning Act and Etobicoke's Official Plan recognize the fundamental importance of notice to those who will potentially be affected by a major change in the constitution of planning for the municipality. The decision as to who should be notified and how implementation of the notice requirements of the Official Plan should be carried out, so the largest number of citizens likely to be affected by the amendment will be made aware of proposed changes, is more than an administrative act. It is a quasi-judicial decision requiring a reasoned analysis.

Any reasonably thinking municipal official, with knowledge of the OPA sought by the developer in respect of land adjacent to a graveyard, ought to have known that the majority of persons likely to be affected by the change were owners of grave plots and the loved ones of deceased persons buried in the cemetery. The municipal official ought to have known that such a group would likely oppose condominium development on this land. That person or official should have known (or knew) that the purpose of the notice provisions of Etobicoke's Official Plan was to inform the public and provide ample opportunity for the public to review and discuss the proposed plans or amendments for the public meeting. That official should have known that notice to persons on the assessment roll is not effective notice to the applicants and others similarly situated. That official should have known or ought to have known that publication in an appropriate newspaper would not only comply with the notice requirements in the Official Plan but would be an effective and cost-efficient way of bringing notice of this major change to rights holders and loved ones, a group potentially numbering in the thousands. The Municipal Board had no difficulty in deciding that notice to this group should be by newspaper. Etobicoke, in hindsight, has now made such notice mandatory. If the two acres had been used for burials could it be argued successfully that notice to ratepayers was all that was required?

However, it does not appear to assist their position. This section provides:

61. Where, in passing a by-law under this Act, a council is required by this Act, by the provisions of an official plan or otherwise by law, to afford any person an opportunity to make representation in respect of the subject-matter of the by-law, the council shall afford such person a fair opportunity to make representation but throughout the course of passing the by-law the council shall be deemed to be performing a legislative and not a judicial function.

This section does not deal with the question of notice which is the issue before us. It is specifically confined to the extent to which representations may be made about a by-law.

The Case-law

The respondents argue that Etobicoke acted solely in a legislative capacity. They rely on *Zadavec v. Brampton (Town)*, [1973] 3 O.R. 498, 37 D.L.R. (3d) 326 (C.A.). Here the Court of Appeal held that the intent of the legislature, in circumstances where there was no legislative requirement imposing a duty on Council to send notice or to require a public hearing before passing a by-law approving an official plan amendment and zoning change, was to relieve council from the obligation of deciding judicially as to the merits of the case in favour of or against the amendment and to transfer that jurisdiction to the Board. The important feature of the case, distinguishing it from the application before this court, is set out in the following passage from the reasons delivered by Kelly J.A:

In the instant case, Council in adopting amendment No. 57 [the Official Plan Amendment] elected to request the Minister to refer the amendment to the Board thereby ensuring that the amendment would not become effective until the Board, a body exercising a broad judicial jurisdiction in municipal matters, had approved the amendment.

(Emphasis mine)

In the case at bar, the applicants would have been heard had Etobicoke called on the Minister to refer the OPA to the Board.

In *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, 75 D.L.R. (4th) 385, the Supreme Court decided that the requirement of procedural fairness or the application of the rules of natural justice should not depend on the classification of functions of a tribunal or public body as legislative or quasi-judicial. Sopinka J. said [at p. 1191]:

The content of the rules of natural justice and procedural fairness were formerly determined according to the classification of the functions of the tribunal or other public body or official. This is no longer the case and the content of these rules is based on a number of factors including the terms of the statute pursuant to which the body operates, the nature of the particular function of which it is seized and the type of decision it is called upon to make.

I turn now to the most difficult issue in the application and that is whether compliance with the statute is all that is required of a municipal council, directed by statute to notify citizens of a pending official plan change. In other words, if the minimum statutory requirement is met, are rules of procedural fairness and natural justice redundant. I think not. Consideration of the nature of the function directed by statute to be performed by the municipal body and the type of decision required to be made dictate otherwise. In addition, there exists on the facts of this case a lacuna or hiatus in the statute. The purpose of the notice provision, by the express words of the statute and the Official Plan, is to provide ample opportunity for the public to review and discuss the

proposed amendment. In this case, where Etobicoke decided on its own notice provisions, the Planning Act provided that it was entitled to do so by setting out those measures for informing and securing the views of the public in its Official Plan. The notice provisions are minimal requirements. There is nothing in the statute to prevent Etobicoke from doing more. It appears to me that, on the facts of this case, a hiatus exists in the notice provision. Assuming the statute and Official Plan were complied with by sending notice to those on the assessment roll, the fact remains that a majority of those potentially affected by the amendment would not and did not receive notice. It was or should have been apparent, that in choosing to send written notice to those on the assessment roll, rather than providing notice by newspaper, or both, the majority of those potentially affected by the amendment would not receive notice.

The respondents rely on the following cases to support their assertion that where a statute sets out certain notice requirements, it is the statutory standard and not the common law principles of natural justice and procedural fairness that prevail: *Collins v. Estevan Roman Catholic Separate School Division No. 27*, [1988] S.J. No. 476 (C.A.); *Conception Bay South (Town) v. Newfoundland* (1991), 95 Nfld. & P.E.I.R. 106, 301 A.P.R. 106 (Nfld. S.C.); *Froehlich v. Vancouver (City) Board of Variance*, British Columbia Supreme Court, Huddart J., December 12, 1991 unreported.

In *Collins*, the issue was whether a school principal received adequate notice regarding the grounds of his demotion from principal to teacher. The court concluded that the notice he received contained reasons that were sufficient to let him know the case against him and the reasons for his demotion. The court held that the statutory requirement, that the notice set out the reasons for termination, coincides with the common law requirement of procedural fairness. The court said: "The inclusion of these procedural provisions in the statute does not, in our view, exclude the application of the principles of natural justice in respect of any lacunae in the statute." The court went on to say that there is nothing in the statute to exclude common law principles where the statute is silent. The court then said: "Where the statute speaks, it must of course prevail. Where it is silent the common law rules of procedural fairness apply."

This case correctly states the law of Ontario. However, in the case before us there is a deficiency in the statute and Official Plan. On the facts of this case the deficiency would not exist if the notice provisions were conjunctive rather than disjunctive. That deficiency has now been corrected in Etobicoke.

In *Conception* there was no statutory provision specifying the notice to be given. The court held that notice must be reasonable in the sense that it conveys the real intentions of the giver and enables the recipient to know what case he/she must meet. The court went on to say [p. 112]:

It is clear that aside from statutory requirements the content and method of service of notice and who is served is influenced by the type of hearing, the knowledge of the parties who might be affected by or opposed to a proposed course of action and the nature of the interest affected.

(Emphasis mine)

In *Froehlich* the statute stipulated that the Board shall give notice to such owners of real property as the Board may deem to be affected by the appeal and public notice of the hearing shall be given, if the matter is deemed by the Board to be of sufficient importance. The Board of Variance, after inspecting and viewing the neighbourhood to make its decision, directed notice to those most directly affected and in addition directed newspaper publication. Huddart J. held that the Board exercised its discretion reasonably. He was of the view that the statutory scheme did not offend the *audi alteram partem* rule.

The notice provisions of the Planning Act and the Etobicoke Official Plan require the clerk to exercise discretion. In exercising discretion the clerk should have asked the following questions: Who will be most affected by the OPA?; and What method of notifying the persons affected should be implemented to best meet the spirit of the statute and the Official Plan?

The mayor of Etobicoke expressed the spirit of the Official Plan in these words: "Etobicoke recognizes the importance of providing full and fair public notice of development applications." His words are contained in a resolution of Council wherein notice regarding official plan amendments to property adjacent to cemeteries must be given by newspaper and signs posted at each cemetery entrance.

The clerk, in this case, was required to exercise his or her discretion so that full and fair notice of the proposed OPA would be given to the rights holders and those having loved ones in the Parklawn Cemetery. That could only be achieved in this case by newspaper publication having a wide circulation in Metro Toronto.

The application is granted. The OPA is declared null and void. Costs to the applicant against Etobicoke fixed at \$3,700.

Order accordingly.

CBR# 298

Skyrise Developments Limited v. Abrahams

29 O.R. (3d) 451

Court File No. 93-CQ-35193 Ontario Court (General Division), Davidson J., July 16, 1996

ACTION for damages for breach of contract for the sale of land; COUNTERCLAIM for a declaration that the agreement was void and for repayment of the deposit.

Howard D. Gerson, for plaintiff. Alan Mostyn, for defendant.

DAVIDSON J.: -- The plaintiff's action is for damages for breach of an agreement of purchase and sale of a condominium unit dated September 16, 1988 as amended October 25, 1988. In addition to defending the claim the defendant counterclaims for a declaration that the agreement of purchase and sale is null and void and for the return of \$40,000 paid by way of deposit.

The plaintiff is developer and builder of the condominium project known as Skyrise on Yonge. The purchase price in the agreement of purchase and sale was \$354,500. The sum of \$10,000 was paid by initial deposit and subsequently as at March 14, 1989 a further \$30,000 had been paid by way of deposit.

The occupancy date was to be no later than September 30, 1991 or an earlier date specified after written notice was given that the unit was substantially completed. The closing date was to be the later of the occupancy date if the condominium plan was registered on the occupancy date or 20 days after written notice that the condominium plan was registered but in no case later than February 28, 1993. An occupancy fee calculated in accordance with the Condominium Act, R.S.O. 1990, c. C.26, was payable from the occupancy date to the closing date. The occupancy fee was determined at \$2,956.47 monthly and the occupancy date was ultimately scheduled for May 9, 1991 and the defendant notified.

The defendant did not occupy the unit on the occupancy date nor did she pay any monthly occupancy fee. The plaintiff alleges that it accepted the defendant's breach of the contract by letter dated March 25, 1992 and terminated the agreement and claimed forfeit of the deposits without loss of its right to claim further damages.

The corporation was registered December 31, 1991; the closing date for the unit absent default was February 4, 1992.

The plaintiff ultimately resold the unit by agreement dated August 11, 1992 which closed September 18, 1992 at a resale price of \$229,000.

Apart from the defence as to the calculation of the plaintiff's damages the defence is fourfold:

1. Failure to deliver a disclosure statement as required by s. 52(1) of the Condominium Act.
2. Failure of the plaintiff to have registered under the Ontario New Home Warranties Plan Act, R.S.O. 1980, c. 350, s. 6. 3. Uncertainties and contradictions in the agreement of purchase and sale so as to render it void.
4. Failure of the plaintiff to complete its obligations and an agreement of postponement of the occupation date to an uncertain time.

Issue No. 1 -- Failure to Deliver a Disclosure Statement

Section 52(1) of the Condominium Act provides:

52(1) An agreement of purchase and sale entered into after the 1st day of June, 1979 by a declarant or proposed declarant of a unit or proposed unit for residential purposes is not binding on the purchaser until the declarant or proposed declarant has delivered to the purchaser a copy of the current disclosure statement and all material amendments thereto.

Although initially the defendant, through counsel, amended the statement of defence at trial to allege defects in the disclosure statement, this was not pursued on submissions before me and indeed it was acknowledged by defendant's counsel that the only issue related to delivery or non-delivery of the said disclosure statement.

It was not until November 1995 that the statement of defence was amended to plead failure to deliver a disclosure statement or amended statement. The original statement of defence and counterclaim was delivered in June 1993.

Evidence was given by Peter Stripp, operations manager of Canada Post. He identified the registration receipt for bulk mail received from the plaintiff. A receipt showed 77 addressees including the defendant at 1 Vanwood Road, Thornhill, Ontario, L3T 2N1. The defendant testified at discovery she lived continuously at that address. Mr. Stripp's evidence was that procedure in accepting bulk mail would be that the document would be prepared by the mailer, given to Canada Post who would check off the items and addressees and endorse it as received, return it to the customer and it would become the customer's official receipt. This particular document was stamped by the Thornhill office of the post office September 28, 1988. Mr. Stripp verified the weight of the disclosure statement and calculated the cost of mailing at \$3.95 for each parcel, \$2.70 for each registration fee for a total of \$512.05.

On cross-examination Mr. Stripp acknowledged that he could not say if the letter was delivered and that although the post office would normally get a receipt signed by the addressee, such receipts were only kept for two years. He also identified the signature of the post office clerk on the registration receipt as one "Rose Budd" who had retired and whose whereabouts were unknown.

Evidence was also given by Kelly Cryer, an employee of the plaintiff in the capacity of site secretary. Her evidence was that on September 28, 1988 she mailed the 77 disclosure statements to 77 purchasers by registered mail including the one to the defendant. She prepared the postal registration receipt, checked the envelope to ensure that they were correctly addressed. She personally put the disclosure statements in envelopes, typed the addresses from the list of purchasers, attended at the post office and provided them to the clerk who checked and counted the items. She requisitioned the plaintiff's cheque for payment of the

registration costs in the sum of \$512.05 and paid the post office. She acknowledged on cross-examination that no letter had gone with the disclosure statement but identifies the disclosure statement filed in evidence as that which she mailed out. She did indicate that she had not compared that disclosure statement with any other.

Evidence was also given by Harvey Kauffman, the sales manager of the Skyrise condominium project confirming that Ms. Cryer was responsible for sending disclosure statements by registered mail. The procedure for any return of mail was to have it given to Mr. Kauffman at the weekly meetings and that he would arrange for re-delivery. He gave evidence that there were never any disclosure statements returned to the plaintiff. He said it was a bulky envelope and he would remember if any were returned. He too indicates that he did not look at the disclosure statement that Ms. Cryer had sent out. Indeed he had not read them and that his office was not responsible for preparing them simply for sending them out when received.

The evidence of the defendant, Ms. Abrahams, is that she never received a disclosure statement and it only came to her attention at the time of the examination for discovery in November 1995 (the disclosure statement having been given to the defendant's solicitor after a pretrial in April 1995). As to how she knows she did not receive it, she said it was a heavy parcel and she would have remembered it and that she did not receive any registered mail parcel nor did she know she was supposed to receive a disclosure statement.

In respect to Ms. Abrahams' ability to remember, it appears from the evidence that she swore an affidavit of documents in 1994. Only one document was listed pertaining to the litigation being a letter dated March 25, 1992 from the plaintiff's then solicitors to the defendant reciting the defendant's breach of the agreement of purchase and sale and advising as to termination and forfeit of deposits. In addition, while stating that she had no recollection of ever having seen or receiving two other documents she had to concede that indeed she had seen and received them. The first such document was dated October 23, 1988, a little more than a month after the agreement of purchase and sale was signed which was an amendment to said Agreement of Purchase and Sale. There had been a municipal description error which was corrected by the amending agreement and Ms. Abrahams acknowledged her signature appeared thereon. The other document is a letter dated March 1, 1991 from the plaintiff addressed to Ms. Abrahams setting the occupancy date as May 9, 1991 and advising as to certain steps she had to take in respect to it. She admitted at discovery and at trial that she had received and, indeed, that she had telephoned her then lawyers, Messrs. Goldstein and Grubner, to obtain legal advice in respect to it. Significantly she acknowledges that the writing on the said letter, the name "Goldstein" the telephone number "292-0414" is her handwriting.

It appears these latter two documents were obtained from her previous solicitor's file but that no disclosure statement was forthcoming from said file. It would also appear that the affidavit of documents was presumably drafted and executed by the defendant without any consultation with her previous solicitors or production from them of any documentation.

Counsel for the defendant submits that the plaintiff could have established receipt of the registered mail by the defendant if it had moved promptly and obtained from the post office the receipt signed by the addressee. While that may be so it may be difficult to criticize the plaintiff for failure to do that if the evidence is accepted that none of the registered pieces of mail sending out the disclosure statements was returned by the post office undelivered. If indeed there had been a receipt signed by Ms. Abrahams or someone at her residence that would have been the best evidence which, of course, is now lost if it ever existed.

In respect to posting of the letter, I refer to the text, Phipson on Evidence (1982), 13th ed., para. 9-26:

To prove the posting of a letter it is relevant to show that it was delivered to a clerk who, though he had no recollection of the particular letter, habitually took all letters delivered to him to the Post; or that the letter was put in a given place where all letters were regularly put for posting whence they were always carried to the Post by a servant.

On the evidence before me I find, on a balance of probabilities, that the disclosure statement was properly addressed and posted.

In *Watts v. Vickers Ltd.* (1916), 86 L.J.K.B. 177 at p. 180, 166 L.T. 172 (C.A.), Lord Cozens-Hardy M.R. stated:

No doubt a letter properly addressed and posted raises a presumption that it was received. It is only a presumption which may easily be rebutted.

In respect to the aforesaid evidence of Mr. Kauffman as to the procedure in place for dealing with returned mail, particularly a disclosure statement, and his awareness of the importance of it and it not having been returned, it seems to me that there is really no motive to be untruthful and to say that it was not returned if, indeed, it was returned. It would surely be a simple matter to see to the effective redelivery by one method or another if it had been returned. I accept Mr. Kauffman's evidence that the disclosure statement was not returned to the sender, that is, to the plaintiff.

The above recited evidence of Ms. Abrahams gives me real difficulty. This was a substantial transaction in which she was involved. She professed not to remember receiving two documents subsequently shown to have been received and to have been signed by her on one and containing her own handwriting on another. At her examination for discovery Ms. Abrahams acknowledged that she understood that there would be an occupancy date and that she would be notified by the developer of said date. I cannot go to the extent of saying that the defendant's evidence on this line of questioning was untruthful. I do find, however, I am unable to rely upon the evidence which she gives relating to receipt or non-receipt or non-recall of receipt of documents. I am not satisfied on a balance of probabilities that the defendant has rebutted the presumption of receipt of the disclosure statement.

I find, on a balance of probabilities, that the plaintiff delivered the disclosure statement in the manner described by the plaintiff's witnesses that it is presumed thereby to have been received and that presumption has not been rebutted.

Issue No. 2 -- Failure to Register under the Ontario New Home Warranties Plan Act

The relative chronology is as follows.

September 14, 1988 -- agreement of purchase and sale signed by defendant.

September 16, 1988 -- agreement of purchase and sale accepted by plaintiff. October 4, 1988 -- plaintiff applies for registration under the Act submitting an application form.

November 15, 1988 -- plaintiff furnishes bond in the sum of \$4,080,000 for security required for registration.

January 30, 1989 -- original bond received by warranty plan.

March 8, 1989 -- plaintiff is registered under the Act.

The relevant section of the Ontario New Home Warranties Plan Act is s. 6:

6. No person shall act as a vendor or a builder unless the person is registered by the Registrar under this Act.

It is acknowledged by both parties that this plaintiff is covered by this section.

Evidence was given on behalf of the plaintiff by Steven Martin, the vice-president and senior counsel to the Ontario New Home Warranties Plan. He testified that the statutory warranties protecting the purchaser apply fully to new homes or condominium units even if purchased from builders who fail to register altogether. He also indicated that the Act provided for prosecutions of vendors who sell without prior registration and that significant fines may be imposed on conviction. He indicates, as well, there is no written policy in respect to the laying of charges. It is investigators who do the decision-making in respect to laying informations against persons in breach of the Act.

The issue of illegality of contract in almost similar factual circumstances as the case before me came before Chapnik J. in *Beer v. Townsgate I Ltd.* (1995), 25 O.R. (3d) 785, 48 R.P.R. (2d) 27 (Gen. Div.). Chapnik J. held in effect that the prohibition in s. 6 of the Act was fundamental to the nature and purpose of the regulatory scheme under the Act and that the plaintiffs had a common law right to have their agreements of purchase and sale declared null and void.

In another decision, *Puri v. Sharynton Homes Ltd.* (1995), 48 R.P.R. (2d) 8 (Ont. Gen. Div.), Gotlib J. came to a different conclusion although in dissimilar circumstances. She determined at p. 16:

At least registration was complete prior to the proposed date of closing, and it makes no difference to the purchaser at all whether or not registration was complete at the time of the agreement of purchase and sale.

In *Beer* Chapnik J. stated at p. 800 O.R., p. 50 R.P.R.:

. . . however, in cases of illegality involving the breach of an express statutory prohibition, intention is clearly irrelevant. It is a matter of public policy, and the absence of a registration certificate is, by itself, sufficient to prevent a sale from occurring, or to render a transaction void. Although the result of insisting upon strict compliance may well on occasion lead to injustice, one can only assume that the legislature considered that when it passed the Act.

At p. 797 O.R., p. 47 R.P.R., Chapnik J. referred to *Trudeau Motors Ltd. v. Elliot* (1989), 70 O.R. (2d) 762 (Dist. Ct.), where the court "denied a claim for payment for repairs done to an automobile where the customer's prior authorization had not been obtained, as required by statute". In *Trudeau* there the court was dealing with the Motor Vehicle Repair Act, 1988, S.O. 1988, c. 38, which sets out the requirements for authorization for work or repairs and the requirement of recording certain information in respect to authorization. The evidence indicated the repairer had not kept the necessary record although repairs were done and the repairer sued for payment. By s. 11(1) of the Act, "No charge made in contravention of this Act is collectible or payable." It was held that the plain intention of the statute was that if the records described were not kept no charge was payable for the repairs and the effect, though harsh, was presumably intended by the legislature and it would be contrary to the policy of the statute to permit the result to be evaded by an action based on unjust enrichment.

With respect it appears to me that s. 11(1) of the Motor Vehicle Repair Act, 1988 in *Trudeau* goes further than any of the sections under the Ontario New Home Warranties Plan Act. In *Beer* at p. 799 O.R., p. 49 R.P.R., Chapnik J. states:

The registration requirement was described by the Court of Appeal in *Brownstones East Ltd. Partnership v. Ontario New Home Warranty Program* (1992), 8 O.R. (3d) 545 at p. 554 . . . as being "a mechanism by which the major objectives of the Act may be achieved" -- being the examination of the builder's technical competence to consistently perform the statutory warranties, as well as its financial responsibility, integrity and honesty. Accordingly, the general intent of the statute is to afford protection to the public against sales of homes by builders or vendors who have not satisfied the registrar as to their proper qualifications.

In fact, it appears that the quotation attributed to the Court of Appeal were the words of Sheard J., the judge of first instance, reported (1992), 8 O.R. (3d) 547 at p. 554, 23 R.P.R. (2d) 89 at p. 98 (Gen. Div.). The Court of Appeal allowed an appeal from Sheard J. holding that the Act was not intended to apply to the sale of an interest in a limited partnership condominium development and that the transaction did not constitute a sale under the Act.

There is a Court of Appeal for Ontario decision, *Maschinenfabrik Seydelmann K-G v. Presswood Brothers Ltd.*, [1966] 1 O.R. 316, 53 D.L.R. (2d) 224 (C.A.), which may have been before Chapnik J. but which I am told by counsel before me was not discussed by counsel nor does it appear to be referred to in her reasons. I quote the headnote:

In plaintiff's action for the price of electric sausage-making machinery, defendant relied as a ground of defence upon the alleged illegality of the sale, pleading the Power Commission Act, R.S.O. 1960, c. 300, s. 97(1) and Reg. 490 [R.R.O. 1960, vol. 3, p. 202], s. 4 which prohibit the sale and use of electrical equipment before it has been inspected and approved in accordance with the standards established by the Hydro-Electric Power Commission of Ontario. Section 8 of Reg. 490 provides for inspection without reference to a date of sale in certain cases, e.g., specially manufactured goods or other equipment which in the opinion of the Commission might not be conveniently examined and tested by the submission of manufacturer's samples. The sanction specified for non-compliance is a money penalty upon summary conviction.

Held, that in view of the fact that there is a tendency to regulate many activities in modern life not malum per se but malum prohibitum, due regard must be maintained for the distinction between those contracts inherently illegal because they cannot be performed without violating the law, and those which can be legally performed but are illegal and void because of the intention of the parties to perform them in an illegal manner. Since there is a presumption against illegality in the latter case, it is necessary for the party alleging illegality to show that there was an intention to break the law.

In the present case the parties had made it clear by their conduct that they did not intend to put the transaction into effect or consummate it without conforming with the Regulation. The requirements of s. 8 of the Regulation were in fact performed within the time allowed and the necessary alterations to the machine's electrical fittings completed at the plaintiff's expense. The contract was, therefore, valid and not illegal.

Further at pp. 320-22, Schroeder J.A. speaking for the court stated:

The test to be applied in determining whether a contract is impliedly prohibited by the terms of a statute was considered by this Court in *Kocotis v. D'Angelo*, 13 D.L.R. (2d) 69, [1958] O.R. 104. That case was concerned with the effect of a municipal by-law rather than a statutory provision, a point which led to a divergence of judicial opinion, and it is evident that the learned trial Judge was governed by that authority in coming to a decision adverse to the appellant. There is a significant point of distinction between that case and the case at bar in that the plaintiff *Kocotis* whose contract was ultimately held to be void had installed electric wiring and fixtures under his contract with the defendant at a time when he was not possessed of the class of licence prescribed by the provisions of the relevant municipal by-law; that he at no time sought to obtain such licence, and the question of illegality went to the performance of the contract rather than to its formation.

What is forbidden by the statute and the Regulations under review is not *malum per se* but *malum prohibitum*, and in every case it becomes a question whether the contract capable or incapable of lawful performance. In the latter case, e.g., if the parties should agree to commit a crime, or if they should clearly agree to commit an act prohibited by statute, such a contract is intrinsically illegal since it necessarily involves an offence or a violation of the law. With much deference to the opinion of the learned trial Judge who decided against the plaintiff with some reluctance, he has failed to take into account the well-settled presumption of law in favour of the legality of a contract; that if a contract can be reasonably susceptible of two meanings or modes of performance, one legal and the other not, that interpretation is to be put upon it which will support it and give it operation.

A like presumption was applied by the Supreme Court in *Paoli v. Vulcan Iron Works Ltd.*, [1950] 1 D.L.R. 593, [1950] S.C.R. 114, where it was held that as there was no evidence that the contract there under consideration was intended to be put into effect without the permission required by the Wartime Salaries Order, although the increase in salary, the subject-matter of the contract, was agreed upon between the parties before the official permission was sought, it must be assumed that the parties intended to comply with the law. I quote from the judgment of Rand, J., at p. 594:

It is said that because the consensus for an increase had been reached in June, 1942, and was to be retroactive to January 1st of that year, the contract was illegal, I must confess to great difficulty in appreciating the grounds for that view. It was illegal only on the assumption that it was intended to be put into effect and carried out without relation to approval. There is no evidence of this one way or another, and in its absence I assume that these parties intended to comply with the law of the country. That this is so is fully confirmed by the fact of the company's application. There was some delay, it is true, but no point is made of it and a sufficient explanation seems to appear by inference from matters which were mentioned in the evidence.

It is also well settled that the party setting up the illegality of a contract as a ground of action or defence is saddled with the onus of proving the illegality alleged: *Hire Purchase Furnishing Co., Ltd. v. Richens* (1887), 20 Q.B.D. 387.

It appears, as well, that *Paoli v. Vulcan Iron Works Ltd.*, [1950] S.C.R. 114, [1950] 1 D.L.R. 593, was not before Chapnik J. in *Beer*.

In respect to the intention of the parties and in particular of the plaintiff to legally perform the contract, there are two references to the Ontario New Home Warranties Plan Act in the agreement of purchase and sale. Paragraph 12.01A relates to selection of colour and material for which the purchaser is entitled to make selection pursuant to the agreement. From my review of the agreement, the only item in that category is in Schedule "C" para. 1 -- "Wall to wall broadloom throughout from vendor's samples, excepting areas designated for sheet goods, ceramics." Paragraph 12.01A goes on to state:

The purchaser agrees that in the event of any conflict between the provisions of this agreement and the provisions of the Ontario New Home Warranties Plan Act (including any Regulations thereunder) in respect of substitution of items of construction or finishing, except where specifically prohibited by law, the provisions of this agreement shall prevail and the provisions of the Ontario New Home Warranties Plan Act, including without limitation, the right to claim compensation for damages shall not apply . . .

That paragraph gave the right of selection to the purchaser failing which the vendor was entitled to complete same in its sole and absolute discretion. In my opinion the thrust of that paragraph was not to oust the Ontario New Home Warranties Plan Act. It related to a limited area of purchasers' selection.

In any event para. 12.01B goes on to provide for the purchaser to inspect the unit on certain notification and to submit to the vendor a written closing inspection report including any deficiencies and it goes on to say:

The vendor shall use its best efforts (having regard to weather conditions, the vendor's building schedules and availability of supplies and services) to complete or remedy all such items disclosed in the report in accordance with the Ontario New Home Warranties Plan Act.

Thereafter as has been noted previously, on March 1, 1991 the vendor wrote to the purchaser advising it would be necessary for her to conduct the New Home Warranty Program Inspection of the suite with one of the vendor's representatives and setting out a date and requesting the purchaser to arrange for a specific time for inspection. The evidence discloses that the purchaser did not make any arrangement for inspection. That letter also, of course, indicated that the suite was ready for occupancy on May 9, 1991. Thereafter, on April 18, 1991 the solicitors for the vendor wrote to the solicitors for the purchaser advising of the occupancy closing for May 9, 1991 and advised *inter alia*:

Please also note that in accordance with Article 12.01B of the agreement the purchaser should have arranged for a New Home Warranty Inspection of the unit prior to the occupancy date. The purchaser was earlier notified directly by the vendor of the closing of this interim transaction and the requirements to arrange for such an inspection.

In my view the facts which I have recited beginning with the chronology of application for and subsequent registration, the agreement of purchase and sale itself and the arrangements for inspection and report under the Act cause me to conclude that it was the intention of the plaintiff to legally perform its contract of purchase and sale with the purchaser and that it did so. If the

onus is upon the purchaser as indicated in *Maschinenfabrik*, supra, at p. 322, she has not satisfied that onus. Based upon the authorities that I have cited and the facts before me as indicated I have, with respect, come to the conclusion opposite to that of Chapnik J. and conclude that the agreement of purchase and sale is enforceable by the plaintiff.

Issue No. 3 -- Uncertainties and Contradictions in the Agreement of Purchase and Sale so as to Render it Void

The agreement of purchase and sale, clause 3.01, states:

The schedules hereinafter enumerated and annexed hereto form part of this agreement. Schedule "A" mortgage conditions, Schedule "B" sketch of units, Schedule "C" items included in purchase price.

There is no Schedule "B" to the agreement. The evidence of Mr. Libfeld on behalf of the plaintiff indicated that a sketch for Schedule "B" was not available at the time of purchase but was prepared later. There was also evidence on behalf of the plaintiff that the defendant had been supplied with the brochure showing the sketch of the proposed two condominium towers and the floor plan with room sizes and specifications of the subject suite being unit type E and its location in the tower. Mrs. Abrahams acknowledged in her cross-examination that when she attended at the sale office she was aware of the large floor plans that were on the wall and a scale model of the project and that it was the Wellington Suite that she was purchasing which was shown in ex. no. 6 which would be on the tenth floor looking easterly across Yonge Street.

The description of the subject matter of the sale is:

Unit 07, level 10 as shown on the sketch attached hereto as Schedule "B", known municipally as Suite 1007, being model type No. E . . . together with an undivided interest in the Common Elements and exclusive use of those parts of the common elements attached to such unit as set out in the Declaration, and one parking unit to be allocated . . .

The unit that the plaintiff resold after this purchaser failed to complete is described in the agreement of purchase and sale with one Sylvia Kahn as:

Unit 19, level 11, York Region Condominium Plan No. 818 known municipally as Suite 1007 together with an undivided interest in the Common Elements as set out in the Declaration, and one parking unit to be allocated . . .

It should be noted that the defence does not plead that a different unit would have been made available to the defendant had she gone through with the transaction nor is it pleaded that the defendant did not know what it was that she was purchasing.

The explanation of the difference in description of the units comes from the evidence of Debbie Fefferman who is the property manager for the plaintiff and in charge of this condominium development. She verifies that Mr. and Mrs. Kahn purchased and live in Suite 1007 on the tenth floor. She describes this suite as directly across from the elevator facing east onto Yonge Street, being the Wellington and it is her evidence this is shown as the Wellington in ex. 6.

The evidence of Mr. Libfeld was that as between Building A which contained this particular suite and Building B, there was to be consecutive numbering of units. He indicated that the units in Building B went from 1 to 12 and accordingly in Building A they would start with Unit 13 and adding seven units to the twelve in Building B would give Unit 19 which became the new description in the agreement of purchase and sale with Sylvia Kahn. In so far as the level change from 10 to 11, he indicated that because of grade levels from Yonge Street, the underground parking and level 1 were underground. Accordingly, level 2 became the first floor and so on until the 10th floor became described as level 11. He, too, testifies that Unit 1007 was always on the 10th floor in the position shown on ex. 6.

As to the reference to common elements it is Mr. Libfeld's evidence that the declaration makes it clear that in respect to the residential unit in this action, there were no undivided interest in common elements given.

In regard to this submission, counsel for the defendant makes reference to cl. 18.03 in the agreement of purchase and sale:

This Offer when accepted, shall constitute a binding contract of this purchase and sale and time shall in all respects be of the essence hereof. It is agreed that there is no representation, warranty, collateral agreement or condition affecting this agreement or the unit or supported hereby other than as expressed herein in writing. It is my view that the evidence given by Ms. Fefferman and Mr. Libfeld is not excluded by this clause. Rather, it is simply explanatory of the difference in the description of the unit purchased by the defendant.

As to the reference to the common elements in the declaration as set out in Sch. "F" and Sch. "F" being blank, Mr. Libfeld says it is blank because there were no exclusive common elements to the purchasers. The parking units were sold to purchasers rather than included as exclusive use common elements.

I conclude accordingly that this is not a defence available to the defendant as to uncertainties and contradictions.

Issue No. 4 -- Failure of the Plaintiff to Complete its Obligations and an Agreement of Postponement of the Occupation Date to an Uncertain Time

Essentially it is the position of the defendant that she was having difficulty obtaining the funds to close the purchase and sale as she and her husband had been looking to the proceeds from the sale of Mrs. Abrahams' mother's home in London, England. Mr. Kauffman suggested they should write to him setting out the position. Mr. Abrahams wrote April 3, 1991 to Mr. Kauffman advising as to the problem and closing:

As these circumstances are beyond our control we are therefore unable to furnish the funds needed at this time to complete the sale.

While it appeared to be Mrs. Abrahams' evidence that they had gone to England and had listed her mother's property for sale prior to the occupancy date for the Skyrise unit, the only documentation produced pursuant to an undertaking from Mrs. Abraham was a letter dated August 14, 1991 from an estate agent in England recounting an inspection, indicating a sale price for which it would be offered and requesting acceptance of the terms.

In so far as the defence alleging that the plaintiff had agreed to an open-ended extension of the occupancy date, it appears to be based solely upon Mrs. Abrahams' testimony that at the meeting with Mr. Libfeld he had told her to call him upon her return from England. She indicates she thought that this meant she would be given the opportunity to take occupation and tender the funds for closing some time after returning from England.

At her examination for discovery it is her evidence that she told Mr. Libfeld that we, being she and her husband, would get in touch with him when they came back from England and that she cannot remember whether she got in touch with him or not. Her evidence at trial when this discovery evidence was put to her was that she had said this after Mr. Libfeld had said "phone me when you get back".

Mr. Libfeld's evidence is that he met with Mr. and Mrs. Abrahams at his office and they discussed the purchaser not having funds to close. His evidence is that after the discussion he told them that the plaintiff was ready to provide occupancy and would have to have the money by May 9, the occupancy date, and if it was not forthcoming the plaintiff would sell at the best price and sue for the balance. He said it was left after the meeting that they said that they would get back to him but he never did hear from them. In this regard, I note that Mr. Abrahams did not testify at trial. I infer his evidence on this point would not be favourable to the defence.

Additionally, it is Mr. Libfeld's evidence that any amendment to occupancy date would have to have been confirmed in writing as required by the agreement and that it would be handled by the real estate solicitor. In this regard, I prefer the evidence of Mr. Libfeld to that of Mrs. Abrahams and I find that the plaintiff was at all times in a position to meet the occupancy date and close the transaction and that there was no agreement for postponement of the occupancy date.

Damages

It was Mr. Libfeld's evidence that the particular suite involved here was not put officially on the market until the end of March 1992 although if any prospective purchaser had indicated interest it would have been available for sale from May 1991 onwards. It was his evidence that the real estate market was flat all of 1991. Up to early 1989 the plaintiff had sold over 100 units in Building A and by the Spring of 1991 170 units. Of those numbers 120 purchasers defaulted on either occupancy date or closing. There were 204 suites in total in Building A and 208 in Building B. As at May of 1991 approximately 50 units had closed in Building A. Thirty units had not been sold so the inventory in Building A approximated 150 suites and as regards Building B 30 units had been sold but 15 purchasers had defaulted.

Mr. Libfeld testified that from May 1991 to August 1992 when this particular unit was resold the plaintiff had done extensive advertising in the Toronto Star almost weekly from July 1991 to the end of February 1992. Specifically no sale price was inserted in the advertisement and he agreed that this was not typical. He said the price was not put in as the plaintiff did not wish to "panic" the 60 occupants who had taken occupancy and run the risk of them refusing to close when they saw a drastic reduction in the value of the unit.

From March of 1992 the prices were published in the advertisements showing prices beginning at \$189,990. He pointed out the agreement of purchase and sale provision to the effect that the plaintiff would have up until January 30, 1990 to determine if the whole project was feasible with the right to terminate by written notice on or before February 28, 1990. It was Mr. Libfeld's evidence that if they had only sold 60 units in Building A and 15 units in Building B (those which closed by way of occupancy), the project would not have gone forward.

Evidence was also given on behalf of the plaintiff by Barry Lebow, qualified as an expert in real estate appraisal. His evidence was to the effect that the values of the unit would be as follows.

May 9, 1991 \$265,000

September 30, 1991 \$225,000

August 11, 1992 \$229,000

This latter date was the date of the agreement of purchase and sale with the new purchaser, Sylvia Kahn.

On all of this evidence I am persuaded that the plaintiff was faced with a very large inventory of units which it had contracted to sell but on which purchasers had defaulted. In my view it is reasonable for the plaintiff to have taken a global rather than specific approach to resale of the units to establish a best possible price which would be available in the marketplace.

The defendant called no evidence on damages.

I am of the view that the plaintiff on the evidence has established that it did the best it could to mitigate its loss and I find that the steps taken by it were reasonable in the circumstances. Conversely, I am not satisfied that the defendant has established that the plaintiff could reasonably have avoided part of the loss which is claimed.

In the final analysis the plaintiff will have judgment against the defendant as follows:

1. The difference between the original price \$354,500 and the resale price \$229,000 \$125,500.00
2. Defendant to be credited with the deposits 40,000.00 Balance \$ 85,500.00
3. The plaintiff is also entitled to occupancy fee in the sum of \$2,956.47 per month from the occupancy date May 9, 1991 to the proposed closing date February 4, 1992 \$ 26,131.38
4. Taxes from February 4, 1992, the proposed closing date to September 18, 1992, the date of the closing of the subsequent sale \$ 1,496.12
5. Common expenses of \$320.64 per month from May 9, 1991 to September 18, 1992 \$ 2,389.24
6. Interest at 10% on the unpaid balance due on closing of \$48,625 from May 9, 1991 to September 18, 1992 \$ 6,633.36

7. Interest at 10% on what would have been the first mortgage of \$265,875 from the closing date, February 4, 1992 to September 18, 1992 \$ 16,461.84 ----- Total judgment \$ 138,611.94

The plaintiff is also entitled to prejudgment interest at 10 per cent per annum on the amount of the judgment from September 18, 1992 to the date of judgment.

The counterclaim of the defendant will be dismissed.

With respect to costs if counsel cannot agree on disposition I would ask that counsel make submissions briefly in writing with a view to my being able to give my ruling by August 9, 1996.

Judgment accordingly.

CBR# 041

Beer et al. v. Townsgate I Limited et al.

25 O.R. (3d) 785 Court File No. 91-CQ-1655 Ontario Court (General Division), Chapnik J. October 10, 1995

Martin Teplitsky, Q.C., and Philip C. Polster, for plaintiffs. Allan Sternberg and Laurel C. Broten, for defendants, Townsgate I Ltd. and 652 Steeles Investments Inc.

J. Patrick Moore, for other defendants.

[Note: This case is reported only on the issue of the illegality of the contracts of sale on the grounds of a violation of the Ontario New Home Warranties Plan Act -- ed.]

CHAPNIK J.: --

Introduction

In early 1989, Townsgate I Limited ("Townsgate") initiated its promotional marketing of a luxury condominium project located at the intersection of Bathurst Street and Steeles Avenue in Vaughan Township. As part of its marketing efforts, invitations were sent to prospective purchasers to attend a special preview showing of the proposed development. The grand opening extended over a three-day weekend in February 1989, and a picture emerges of a scene on those three days which is not a pretty one. It is a picture of individuals swept up in a frenzy of opportunity where common sense was overtaken by avarice, and traditional attributes of propriety, professionalism and integrity disintegrated into a contest of financial wit.

Shortly thereafter, the bubble burst with the dramatic collapse of the real estate market and the sad realization that no pot of gold lay at the end of the rainbow.

Each party blames the other for this sorry state of affairs. The plaintiff purchasers malign the overzealous marketing techniques of the defendant vendor; the defendants characterize this dispute as an attempt by the plaintiffs to avoid their contractual obligations and the consequences of what they perceive to be a bad deal.

Overview

I do not mind saying at the outset that this decision has caused me considerable chagrin, not because of the magnitude of the case, comprising about 50 witnesses and more than 100 exhibits, and involving several millions of dollars, but because both parties stand fervently behind a strong position and the circumstances are somewhat unique.

In many situations involving aborted real estate transactions with their genesis in and around 1989, wherein purchasers of real property became caught in a downward spiralling market, the resulting litigation has not presented a great deal of difficulty for the trier of fact. Anxious purchasers assessed the market and knowingly took the risk when making their investments. With the dramatic decline in the market, panic reigned as they were unable to sell their own homes or finance the depreciated units. In such a situation where vendors have sought to enforce the contracts, purchasers have been tenacious in defending those claims, but the courts have upheld their "honestly made" bargains.

The decision is rendered more difficult, however, where in addition to anxious purchasers, one is confronted with an anxious vendor, one who acted precipitously and who perhaps also became caught up in the avid frenzy of the hot real estate market. If the vendor were disreputable or acting in bad faith, again, the decision would be facilitated. But that is not the case here. In this rather peculiar circumstance, we are dealing with a seasoned builder of good repute who had accumulated considerable experience in the land development business.

The starting point for this inquiry is based upon the premise that the purchasers' primary motivation in failing to close their transactions and in bringing this lawsuit is to rescind what has manifestly become, for them, a bad deal -- they want out. Indeed, some of their defences were raised at the zero hour. That does not preclude recovery, however, if the vendor, in its zeal, made material "mistakes" including, for example, the infringement of statutory provisions, misrepresentation of facts, and dissemination of misleading information, particularly when the effect of those errors had consequences of a serious nature for the purchasers.

Unfortunately, in attempting to embrace or advance the wonders of free enterprise, attributes of avarice and arrogance often underlie the issues; and that is what makes this so difficult.

Background Facts

The factual background underpinning this dispute may be summarized as follows:

1. Townsgate was the developer of a luxury, state-of-the-art residential condominium project consisting of two highrise buildings or towers located at the intersection of Bathurst Street and Steeles Avenue in the City of Vaughan. Townsgate commenced marketing the project near the end of 1988, and sent invitations to prospective purchasers to attend at the sales pavilion for the grand opening scheduled to be held in February 1989, providing them with an opportunity to take advantage of "special preview prices".

2. In February or March 1989, each of the plaintiffs entered into an agreement of purchase and sale with Townsgate to purchase a unit or part thereof in the complex.

3. The majority of units were purchased during the grand opening presentation to the public held on February 24, 25, and 26, 1989. Although 160 of the 220 available units were initially sold that weekend, approximately 70 purchasers cancelled their respective agreements within the ten-day cooling-off period provided for in the Condominium Act, R.S.O. 1980, c. 84 (now R.S.O. 1990, c. C.26). In the end, 90 agreements of purchase and sale signed on the initial opening weekend remained, of which 45 completed their transactions.

4. The agreements of purchase and sale consisted of standard form contracts with a purchase price in the range of \$284,000 to \$383,000, the majority being about \$340,000.

5. Norman Hill Realty Inc. ("Norman Hill") acted as the real estate agency retained by Townsgate to effect sales of the units. At or near the commencement of trial, the claims against Norman Hill and the individual named defendants, being Harvey Kauffman, Aggie Berk, Sylvia Gold, Jim Stodgill, and George Kerr, were withdrawn by the plaintiffs.

6. At the time of sale, the condominium market in the City of Vaughan reflected a generally inflated real estate market described as a "seller's market".

7. By the end of 1989, about ten months after the purchase, the real estate market was in rapid decline, and the recession continued into 1990 and following. Townsgate advertised drastic reductions in respect of units similar to those purchased by the plaintiffs.

8. In the early part of 1990, Townsgate issued a newsletter offering prospective purchasers a repurchase proposal involving what was termed as a risk-free guaranteed investment.

9. In or around February 1991, several of the purchasers formed an association to find ways to deal with the situation, in the main, to attempt to negotiate a better deal and/or to retain legal counsel.

10. In March 1991, Townsgate offered most, if not all, of the purchasers a 15 per cent reduction in the purchase price of their units in exchange for payment of a further deposit and an undertaking to close their transactions. Of the 90 purchasers who had bought units at or near the opening weekend, 45 accepted the offer.

11. The original projected closing dates of March to June 1991 were extended by the vendor to permit occupancy in the fall of 1991.

12. These proceedings were instituted on August 2, 1991.

13. Having repudiated the agreements, the remaining 35 plaintiffs (some have settled their disputes) bring this lawsuit involving 23 units, and seek the return of their deposits, each in the sum of \$40,000. Collectively, they contest the legality of the contracts on the basis of alleged deficiencies in ownership, non-compliance with the Ontario New Home Warranties Plan Act, R.S.O. 1980, c. 350 (now R.S.O. 1990, c. O.31), and the regulations thereunder (R.R.O. 1990, Reg. 892); the Ontario Building Code Act, R.S.O. 1980, c. 51; and the Securities Act, R.S.O. 1980, c. 466, as amended (now R.S.O. 1990, c. S.5, as amended). In addition, several of the plaintiffs assert claims of negligence, misrepresentation and breach of contract, and they rely upon the provisions of the Condominium Act.

In its counterclaim, Townsgate claims damages for breach of contract and, in the alternative, forfeiture of the deposits.

To the extent that any of the above factors prove to be a matter of dispute, they may be viewed as my findings of fact on the evidence.

[As this case is reported only on the issue of illegality, pages 9 to 18 inclusive of the original typescript of the reasons have been omitted.]

Illegality

The plaintiffs also contest the validity and enforceability of the purchase and sale agreements as a result of the builder's failure to comply with various legislative provisions contained in the Ontario New Home Warranties Plan Act ("O.N.H.W.P.A."), the Building Code Act, and the Condominium Act. The relevant provisions are listed below:

The Ontario New Home Warranties Plan Act

1. In this Act,

(a) "builder" means a person who undertakes the performance of all the work and supply of all the materials necessary to construct a completed home whether for the purpose of sale by himself or under a contract with a vendor or owner;

(l) "sell" includes entering into an agreement to sell;

(n) "vendor" means a person who sells on his own behalf a home not previously occupied to an owner and includes a builder who constructs a home under a contract with the owner.

6. No person shall act as a vendor or builder unless he is registered by the Registrar under this Act.

7(1) An applicant is entitled to registration by the Registrar except where,

(c) the applicant is a corporation and,

(i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its undertakings, or

(ii) the past conduct of its officers or directors affords reasonable grounds for belief that its undertakings will not be carried on in accordance with law and with integrity and honesty; or

(d) in the case of an application for registration as a builder, the applicant does not have sufficient technical competence to consistently perform the warranties.

(2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant or imposed by the Tribunal or prescribed by the regulations.

(3) A registration is not transferable.

11(1) The Ontario New Home Warranties Plan is continued under the name Ontario New Home Warranties Plan in English and Régime de garanties des logements neufs de l'Ontario in French and is comprised of the warranties and the guarantee fund and compensation provided for by this Act.

(2) When a vendor enters into a contract for the sale of a home to an owner or for the construction of a home for an owner, the vendor shall deliver to the owner such documentation and notices respecting the Plan as are prescribed in the regulations.

22(1) Every person who,

(b) contravenes section 6 or 12 or subsection 18(4),

and every director or officer of a corporation who knowingly concurs in such furnishing or contravention is guilty of an offence and on conviction is liable to a fine of not more than \$25,000 or to imprisonment for a term of not more than one year, or to both.

R.R.O. 1980, Reg. 726, s. 2(a):

2. In connection with the sale or construction of a home . . . the following documents . . . shall be delivered under the Plan

(a) at the time of execution by the vendor and purchaser of a purchase agreement, the vendor shall deliver to the purchaser a deposit receipt.

It is also noted that s. 3.3 of the Ontario New Home Warranty Program Vendor Builder Agreement signed by Townsgate requires the builder to post security prior to the commencement of construction, marketing or selling of units in a condominium project, whichever occurs first.

The Building Code Act:

5(1) No person shall construct or demolish or cause to be constructed or demolished a building in a municipality unless a permit has been issued therefor by the chief official.

6(1) The chief official shall issue a permit except where,

(b) the applicant is a builder as defined in the Ontario New Home Warranties Plan Act and is not registered under that Act.

24(1) Every person who (c) contravenes this Act or the regulations or any by-law passed under the authority of this Act,

and every director or officer of a corporation who knowingly concurs . . . is guilty of an offence . . .

The Condominium Act:

53(1) All money received by or on behalf of a proposed declarant from a purchaser on account of a sale or an agreement for the purchase and sale of a proposed unit for residential purposes before the registration of the declaration and description, other than money paid as rent or as an occupancy charge, shall, despite the registration of the declaration and description thereafter, be held in trust by the person receiving such money for the person entitled thereto in respect of the agreement and such money shall be held in a separate account designated as a trust account at a bank listed in Schedule I or II to the Bank Act (Canada) or trust corporation or a loan corporation or credit union authorized by law to receive money on deposit or a Province of Ontario Savings Office until, (a) its disposition to the person entitled thereto; or

(b) delivery of a prescribed security to the purchaser for repayment.

55. Every person who knowingly contravenes . . . subsection 53(1) . . . is guilty of an offence . . .

R.R.O. 1980, Reg. 121, s. 35(2), which reads:

35(2) A deposit receipt executed by the warranty corporation providing for compensation to a purchaser is prescribed security for the purposes of clause 53(1)(b) of the Act.

Violations of the above provisions undeniably occurred in the following manner:

1. Townsgate entered into the agreements of purchase and sale as vendor prior to being registered under the Ontario New Home Warranty Program (the "program") in contravention of s. 6 of the O.N.H.W.P.A.

2. Being a bare trustee, Townsgate did not sell the units "on its own behalf" as mandated by s. 1(n) of that Act.

3. No deposit receipt was provided to purchasers concurrent with the execution of the agreements of purchase and sale in accordance with Reg. 726.

4. Prior to the provision of the deposit receipts to purchasers, Townsgate transferred a portion of the purchasers' deposit cheques to a related company, thereby utilizing the moneys in contravention of s. 53(1) of the Condominium Act.

5. The application for a building permit was made in the name of 652 as builder, using Townsgate's registration number which was not transferable under the Act.

6. Construction of the project proceeded for a period of approximately ten months without a building permit, in contravention of s. 5(1) of the Building Code Act; nor was Townsgate registered under the O.N.H.W.P.A. at the time the permit application was submitted.

7. Townsgate commenced marketing the project in the fall of 1988, or early 1989, in advance of providing the prescribed security under the O.N.H.W.P.A., in contravention of the above-mentioned builder's agreement.

According to Mr. Teplitsky, the above infractions are determinative of this lawsuit. The contracts are void ab initio on grounds of illegality and the plaintiffs are entitled to the remedy of rescission, including the return of their deposits.

Townsgate does not deny the occurrence of the above transgressions, but views them as minor, inconsequential and not compromising of the parties' rights or obligations under the agreements. In his submissions, Mr. Sternberg emphasized the following:

1. In early February 1989, Townsgate applied to the program for registration under the Ontario New Home Warranty Plan. Carol Ann Street, counsel with the program, confirmed receipt from Townsgate on February 14, 1989, of a completed registration kit consisting of an application and project summary along with guarantees and fully paid enrolment fees; and further receipt on or before February 22, 1989, of a letter of credit from the vendor in the amount of \$4.5 million (based on \$20,000 per unit). Formal registration of the project endorsed by the Registrar on March 29, 1989, was confirmed by letter to Townsgate dated March 30, 1989. Although the units in question were sold in February and March 1989, whereas registration of the project was not given until March 29, 1989, no further actions or documentation were required of Townsgate in the interim.

2. The consumer protection aspect of the O.N.H.W.P.A. existed to protect purchasers' interests from the time of entry into the agreements of purchase and sale regardless of registration.

3. All four of the beneficial owners involved in the land development project were viable companies which supplied the necessary information and guarantees on behalf of Townsgate in advance of the sales.

4. Although H.U.D.A.C. deposit receipts were not provided upon execution of the agreement, they were delivered to the plaintiffs a few months later, in August and September 1989.

5. Prior to the provision of the deposit receipts, Townsgate did utilize part of the purchasers' deposit cheques for construction purposes since it had already provided the necessary security through the plan.

6. Townsgate paid a fine of \$100,000 to the Town of Vaughan as a penalty for commencing the construction without a building permit. Although the application for a permit was submitted August 22, 1989, and the construction commenced almost immediately thereafter, the issue date on the permit was October 24, 1990.

Admittedly, Mr. Zagdanski was actively involved in the decision to begin construction prior to the attaining of the building permit. At the same time, he professed to be unaware of the other statutory infringements and attested to the intention of the principals of the company to proceed with the construction of the project in a timely manner and in compliance with all relevant rules and regulations. The jurisprudence in cases of alleged illegality rests upon the general principle that a contract expressly or impliedly prohibited by statute is void: *Re Northwestern Trust Co.*, [1926] S.C.R. 412, [1926] 3 D.L.R. 612.

That principle was reiterated in *Meyers v. Freeholders Oil Ltd.*, [1960] S.C.R. 761, 25 D.L.R. (2d) 81, where a section in the then securities legislation which prohibited salespersons calling at a private residence to trade in securities was invoked in an attempt to nullify trades in shares of a mining lease. The court held that the prohibition against salespersons calling at investors' homes to sell securities did not constitute part of the fundamental scheme of protecting the public against unauthorized trading; the penalty prescribed was the only remedy and the sale was not void. The analysis of Martland J. at pp. 774-75 is instructive as to the proper approach the courts should take in such matters:

The determination of the effect of the breach of a statutory provision upon a contract is often a difficult one and must, of course, depend upon the terms and the intent of the provision under consideration. In some cases the statute clearly forbids the making of a certain kind of contract. In such a case the contract cannot be valid if it is in breach of the provision.

On the other hand, some statutes have been construed as only imposing a penalty, where the Act provides for one, although that is not necessarily the result of a penalty provision being incorporated in the Act. Lord Esher posed the question which must be determined in *Melliss v. Shirley Local Board* [(1885), 16 Q.B.D. 446 at 451] as follows:

Although a statute contains no express words making void a contract which it prohibits, yet, when it inflicts a penalty for the breach of the prohibition, you must consider the whole Act as well as the particular enactment in question, and come to a decision, either from the context or the subject-matter, whether the penalty is imposed with intent merely to deter persons from entering into the contract, or for the purposes of revenue, or whether it is intended that the contract shall not be entered into so as to be valid at law. (Emphasis added)

The combined effect of the decisions of the Supreme Court of Canada in the *Re Northwestern Trust* and *Meyers* cases is that a sale which is undertaken in the face of an express statutory prohibition is void; but where a penalty is provided, the court must determine the intention of the legislature in assessing the import of the particular provision: see also *One Hundred Simcoe Street Ltd. v. Frank Burger Contractors Ltd.*, [1968] 1 O.R. 452, 66 D.L.R. (2d) 602 (C.A.).

If the parties enter into a prohibited contract, it is unenforceable and the court is not concerned with the intention of the parties, which is irrelevant in the circumstances: see *St. John Shipping Corp. v. Joseph Rank Ltd.*, [1956] 3 All E.R. 683 at p. 687, [1957] 1 Q.B. 267, and *Cheshire, Fifoot and Furmston, Law of Contract*, 12th ed. (1991), at p. 353.

More recently, some judges have shed doubt upon the wisdom of applying a strict statutory interpretation without discrimination. In *Royal Bank of Canada v. Grobman* (1977), 18 O.R. (2d) 636 at p. 651, 83 D.L.R. (3d) 415 (H.C.J.), Krever J. (as he then was) denounced what he described as the "knee-jerk reflexive reaction to a plea of illegality". In refusing to invalidate a mortgage given to a bank as security for a loan where the institution was in technical breach of a section of the banking legislation, factors such as the serious consequences and social utility of invalidating the contract and a determination of the class of persons for whom the prohibition was enacted, were weighed by the court.

Our courts have consistently refused to entertain actions brought by persons seeking a remedy based upon an illegal contract where the party suing does not lie within the group of persons for whose protection the prohibiting statute was passed: see *Sidmay Ltd. v. Wehttam Investments Ltd.*, [1967] 1 O.R. 508, 61 D.L.R. (2d) 358 (C.A.), affirmed [1968] S.C.R. 828, 69 D.L.R. (2d)

336. In applying the reasoning expounded in *Sidmay, Grange J.* (as he then was) granted rescission of contracts to purchasers of securities from an unregistered trader: *Ontario Securities Commission v. British Canadian Commodity Options Ltd.* (1979), 22 O.R. (2d) 278, 93 D.L.R. (3d) 208 (S.C.). Similarly, in *Jones v. F.H. Deacon Hodgson Inc.* (1986), 56 O.R. (2d) 540, 31 D.L.R. (4th) 455 (H.C.J.), Henry J. held the sale of shares by a defendant who had not filed a securities prospectus to be void and not merely voidable; and the court in *Trudeau Motors Ltd. v. Elliot* (1989), 70 O.R. (2d) 762 (Dist. Ct.), denied a claim for payment for repairs done to an automobile where the customer's prior authorization had not been obtained, as required by statute.

In an earlier decision, the Ontario Court of Appeal refused to assist the lender of a loan alleging illegality in regard to approvals where the plaintiff did not fit within the group of persons the governing legislation was designed to protect: see *Central Mortgage & Housing Corp. v. Co-operative College Residences Inc.* (1975), 13 O.R. (2d) 394, 71 D.L.R. (3d) 183 (C.A.).

In *Sidmay, Laskin J.A.* (as he then was) endorsed the following principle expressed by the American Law Institute, *Restatement of the Law of Contracts*, para. 601, p. 1116:

If refusal to enforce or to rescind an illegal bargain would produce a harmful effect on the parties for whose protection the law making the bargain illegal exists, enforcement or rescission, whichever is appropriate, is allowed. In *Bognar v. Borg* (1989), 71 O.R. (2d) 264, 40 C.L.R. 286 (Dist. Ct.), the application of that proposition to a situation similar in nature to the one faced by this court led to a finding that an agreement to construct a new residence was illegal and void. The plaintiffs had made progress payments but the house was never completed. They subsequently brought an action for the return of their payments and the defendants counterclaimed for a deficiency in the sale of the residence to a third party. Since the defendants had never registered as builders under the O.N.H.W.P.A., the court found the original agreement to be illegal and unenforceable. In doing so, Fleury D.C.J. conducted an extensive review of the relevant legal principles and the purpose and intent of the legislation as a whole. At p. 270 O.R., p. 293 C.L.R., of the judgment, he states:

In the case at bar, we are faced with a statute enacted by the Ontario Legislature. It clearly stipulates that "no person shall act as a vendor or a builder unless he is registered by the Registrar under this Act" (s. 6). It comes within the second general principle identified by Lord Devlin [*St. John Shipping, supra*, at p. 687 All E.R.], "a contract which is expressly or impliedly prohibited by statute". In light of the definition of "builder" contained in s. 1(a) of the Act as "a person who undertakes the performance of all the work . . ." there appears to be a clear prohibition against the undertaking described in the contract which the parties signed. As such, it would appear to be an illegal contract. And there would be no need to look at the intent of the parties.

In his submissions, Mr. Sternberg distinguished the facts in the present case from those in *Bognar*. The distinguishing elements are exemplified at p. 266 O.R., p. 288 C.L.R., where the court observed:

It is clear that the defendants failed to comply with any of the applicable provisions of the Act until well after the plaintiffs had purported to consider the contract as at an end because of the defendants' breach.

Indeed, the illegality in that case continued until after the parties had parted company. In the case at bar, not only was the situation remedied during the life of the contracts and prior to the commencement of the construction, but all necessary disclosure, informational and practical requirements had been satisfied by the vendor in advance of the sales. The purchasers by the terms of the legislation were fully protected throughout and based upon past experience, the representatives of the program expressed no reservations as to the builder's competence or integrity.

I am also mindful of the short time span involved whereby the majority of the agreements of purchase and sale were signed on the weekend of February 24, 1989 and the registration of the project confirmed on March 29, 1989, a period of about one month. I take particular cognizance of the \$4.5 million security bond posted by the vendor in advance of the sales.

The O.N.H.W.P.A. was first enacted in 1976 in order to regulate the construction of residential dwellings in Ontario. It provides for the establishment of a registry of vendors and builders who pay fees to a designated corporation and a guarantee fund for compensation of owners who may assert a claim for breach of any of the warranties required by the Act. An applicant's entitlement to registration is subject to a determination that he will carry out the undertakings and warranties in a responsible fashion. Section 6 of the Act prohibits anyone from acting as a builder or vendor (selling or entering into an agreement to sell) without being registered. Section 7 provides the grounds for authorization and for a hearing before the commission when the registrar intends to refuse to issue it. Registration is non-transferable and may be subject to terms and conditions to give effect to the purposes of the Act. The registration requirement was described by the Court of Appeal in *Brownstones East Ltd. Partnership v. Ontario New Home Warranty Program* (1992), 8 O.R. (3d) 545 at p. 554, 93 D.L.R. (4th) 400, as being "a mechanism by which major objectives of the Act may be achieved" -- being the examination of the builder's technical competence to consistently perform the statutory warranties, as well as its financial responsibility, integrity and honesty. Accordingly, the general intent of the statute is to afford protection to the public against sales of homes by builders or vendors who have not satisfied the registrar as to their proper qualifications.

In this case, the builder was clearly not unscrupulous, financially irresponsible or technically incompetent, much to the contrary. The legislation does not discriminate, however, between levels of applicants prior to completion of the process of authorization. By its clear and unambiguous prohibition in s. 6, the Act leaves unimpaired the principle that a breach of its injunction results in a sale of a property that is void. An applicant cannot supersede the authority of the registrar by assuming registration in advance of a ruling. To apply the prohibition only in hindsight would, in my view, defeat the implied, if not express, intention of the legislature. After all, a builder's circumstances may change from one project to another; and if the courts were to allow lenience, where would the line be drawn? In this case, the relevant information was forwarded to the program just prior to the sales taking place; what if it had proved to be incomplete or inadequate in some respect; or it had been filed after the sales -- would a week suffice, a month, any time prior to closing?

The legislation provides that absent registration, no person shall sell to the public. Thus, not only must the documents be filed but the registrar must be satisfied that the application is not contrary to the public interest. There can be no question but that the filing and its acceptance by the registrar is fundamental to the protection of members of the public who are contemplating the purchase of a condominium. The effect of s. 6 is to prohibit the sale of condominiums to the public without prior acceptance by the registrar. In my view, the prohibition in s. 6 of the Act is fundamental to the nature and purpose of the regulatory scheme.

To be sure, the facts of this particular case make this finding difficult to accept; however, in cases of illegality involving the breach of an express statutory prohibition, intention is clearly irrelevant. It is a matter of public policy and the absence of a registration certificate is, by itself, sufficient to prevent a sale from occurring or to render a transaction void. Although the result

of insisting upon strict compliance may well on occasion lead to injustice, one can only assume that the legislature considered that when it passed the Act.

An examination of the penalty provisions of the Act (ss. 19 and 22(1)) discloses no reference to a civil remedy for a third party and no provision that expressly deprives a purchaser of his or her common law remedy resulting from a breach of s. 6.

If one were to review the three factors outlined by Mr. Justice Krever in *Royal Bank of Canada v. Grobman*, supra, as elements the court should weigh, the likely result would be the same. Serious consequences undoubtedly flow from the finding of invalidity in respect of an executed agreement of purchase and sale. Large amounts of money are at stake, particularly when several purchasers join their claims. However, negligent building of residential condominium units without proper warranty protection for purchasers, can also have serious consequences, and the program, through the use of the guarantee fund, makes the entire construction industry responsible for compensation of aggrieved purchasers of residential homes. The social utility of the prohibition is self-evident. It is imperative to have guidelines for builders of residential property in the public interest. This is by no means a trivial matter. The third aspect lies squarely in favour of the plaintiffs who clearly fall within the class of persons for whose benefit this section was enacted.

I have alluded to the hardship which I know this decision may place upon the vendor; no doubt there will be other illegality cases not quite so onerous on the facts; nevertheless, the intent of the legislature can only be abrogated in clear terms or by necessary intentment. That is the effect of the law, and I can find no ground for holding otherwise.

Mr. Sternberg made reference to the equitable principle of unjust enrichment and the possibility of a claim for relief in quantum meruit.

I adopt the reasoning of Byers D.C.J. in *Trudeau Motors Ltd. v. Elliot*, supra, at p. 765, that to allow this argument would permit the defendant to do indirectly that which it was specifically prohibited to do directly, and thereby "frustrate the obvious policy considerations which are the foundation of the Act itself".

The underlying rationale for this approach was aptly recognized in an early decision of the Supreme Court of Canada in *Bank of Toronto v. Perkins* (1883), 8 S.C.R. 603 at p. 610, per Ritchie C.J.C.:

It would be a curious state of the law if, after the Legislature had prohibited a transaction, parties could enter into it, and, in defiance of the law, compel courts to enforce and give effect to their illegal transactions.

(as noted by Professor S.M. Waddams in *The Law of Contracts*, 2nd ed. (1984), at p. 421; and cited with approval in *William E. Thomson Associates Inc. v. Carpenter* (1989), 69 O.R. (2d) 545 at p. 551, 61 D.L.R. (4th) 1 (C.A.)).

Finally, I take some comfort in the fact that but for the breach, the plaintiffs may well have never entered into the within agreements of purchase and sale; that is, the practical effect of the illegality in a rapidly changing market was crucial. A comment made by Elan Beer, purchaser of a condominium whose case was settled prior to trial and who appeared as a witness for the plaintiffs, is illustrative of this. Mr. Beer returned to the sales office a few days after signing his agreement on February 25, 1989. When asked why he did so, he included in his reasons the fact that "there was talk (at the time) in the media" regarding "the potential of the hot market subsiding and, of course, that worried me". Timing undoubtedly becomes a significant factor in a volatile market. The principals of Townsgate, as experienced, sophisticated builders and developers of real estate properties, knew or ought to have known the laws under which they were proceeding. Compliance with the express statutory prohibition contained in s. 6 of the O.N.H.W.P.A. must not be impaired by anxious builders who may wish to "jump the gun".

In conclusion, I find that the purchasers have a common law right to have their agreements declared a nullity. The effect, though harsh, expresses the intention of the legislature.

In light of that finding, it is unnecessary for me to discuss the other alleged and actual breaches of statute. Suffice to say that none of them involved the breach of an express statutory prohibition precedent to the formation of a contract; and that upon a rather cursory glance and, in general, they do not appear to constitute an integral part of the relevant legislation such as to bear fundamental effect. Moreover, in some instances such as the breaches of the Building Code Act provisions, the statutory penalties appear to be inherently comprehensive, and the prohibition imposed for purposes of revenue and deterrence, rather than with intent to render the impugned contracts invalid. I am reminded of the cautionary words of Professor Waddams that if every statutory illegality in the performance of a contract, however trivial, invalidated the agreement, the result would be "an unjust and haphazard allocation of law without regard to any rational principles": S.M. Waddams, *The Law of Contracts*, 3rd ed. (1993), at p. 381. The practical considerations in accordance with commercial reality would permit some level of infringement in these circumstances. The final issue revolves around the status of the purchasers' deposits. It has been said that where a contract is illegal because it is prohibited by statute, neither party may expect assistance from the court. In considering whether the plaintiff purchaser was entitled to the return of progress payments made pursuant to the illegal contract, the court in *Bognar*, supra, cited the following statement made by Lord Atkin in *Anderson Ltd. v. Daniel*, [1924] 1 K.B. 138 at p. 149, [1923] All E.R. Rep. Ext. 783 (C.A.):

The question of illegality in a contract generally arises in connection with its formation, but it may also arise, as it does here, in connection with its performance. In the former case, where the parties have agreed to something which is prohibited by Act of Parliament, it is indisputable that the contract is unenforceable by either party.

In *Bognar*, since the illegality was attributable to the defendants only, the plaintiffs as innocent parties, were held to be entitled to the return of their progress payments. Similarly, the plaintiff purchasers are entitled to the return of their deposits paid to the vendor pursuant to a contract which is void.

I shall proceed to discuss the other claims raised by the plaintiffs in the event that my conclusion on the issue of illegality should be proven incorrect.

[As this case is reported only on the issue of illegality, pages 40 to 90 inclusive of the original typescript of the reasons have been omitted.]

Conclusion

Townsgate proceeded to sell units in the within condominium project, commencing on February 24, 1989, in advance of registration under the O.N.H.W.P.A. and in contravention of the express statutory prohibition contained in s. 6 thereof. On the basis of illegality, therefore, the agreements of purchase and sale, all of which were entered into prior to formal registration, are a nullity; and the plaintiffs are entitled to have their deposits returned to them with accrued interest.

The plaintiffs have also rooted their claim, in the alternative, on grounds of misrepresentation, breach of securities legislation, lack of ownership, non-disclosure, and late acceptance of the agreements. Although unnecessary in light of my finding of illegality, I have considered the other claims raised by the plaintiffs on the merits. In doing so, I have found entitlement to rescission by reason of misrepresentation in respect of two purchasers, Elazar Astrug and Eugeny Privis. Isaak Nemirovsky is entitled to the return of his deposits based upon statutory breach of contract by the vendor, who should have accepted the return of his agreement properly proffered within the ten-day cooling-off period. Shoshana Agbariya has proven entitlement, on a balance of probabilities, to the remedy of rescission due to non-receipt of the disclosure binder; she also likely did not receive the accepted agreement of purchase and sale within the stipulated time period. Neither did Elazar Astrug, Moti Fishman, Morris Freedman, Boris and Natalia Galperin, or Isaak Nemirovsky. Each of them are, in any event, entitled to the return of his or her deposits with accrued interest. Yan Kosoi remains responsible for any damages in respect of Unit 1107; and Clara Groisman and Lubov Tiz, jointly with their sons Michael Groisman and Gary Tiz, are bound under the agreements pertaining to units 703 and 803, respectively. The damages claimed pursuant to the counterclaim were proven to my satisfaction. Nevertheless, in accordance with these reasons, judgment shall issue in favour of each of the plaintiffs, who are, therefore, entitled to the return of their deposits with accrued interest and costs. The counterclaim is dismissed as against each of the plaintiffs, with costs. Should the parties be unable to agree on the scale of costs, or should they wish me to fix them, I may be spoken to by prior arrangement within three weeks' time.

Judgment accordingly.

CBR# 016

Ackland et al. (being those individuals named on pages 3(a) (b), (c) and (d) in the Appeal Book) v. Yonge-Esplanade Enterprises Ltd. *

10 O.R. (3d) 97

Action No. C9372 Court of Appeal for Ontario, Morden A.C.J.O., Goodman and Robins J.J.A. October 16, 1992

* An application for leave to appeal from the following judgment to the Supreme Court of Canada was refused with costs May 6, 1993 (La Forest, Cory and Iacobucci JJ.).

APPEAL from a judgment of the Ontario Court (General Division) in an application for a declaration as to the proper rate of interest to be paid under R.R.O. 1980, Reg. 121, s. 33, enacted under the Condominium Act.

Michael A. Spears, for appellants.

Larry J. Levine, Q.C., for respondents. The judgment of the court was delivered by

MORDEN A.C.J.O.:--The appellants brought an application before Keenan J. for a declaration that the amounts paid to them by the respondent as interest on money paid to the respondent on account of the purchase price of condominium units were contrary to s. 53(3) of the Condominium Act, R.S.O. 1980, c. 84 and s. 33 of Reg. 121, R.R.O. 1980, made under the Act. They also sought consequential relief in the form of the payment by the respondent of the amount of interest owing to them and prejudgment and postjudgment interest.

Keenan J. agreed with the respondent's contention that the amount of interest paid by the respondent was in accordance with the legislative requirements and dismissed the application. The appellants appeal from this disposition.

The issue in this appeal is the proper application of the terms of s. 33 of Reg. 121 to the facts of this case. It is convenient to quote the legislation, in full, before setting forth the facts. Section 53 of the Act reads:

53(1) All money received by or on behalf of a proposed declarant from a purchaser on account of a sale or an agreement for the purchase and sale of a proposed unit for residential purposes before the registration of the declaration and description, other than money paid as rent or as an occupancy charge, shall, notwithstanding the registration of the declaration and description thereafter, be held in trust by the person receiving such money for the person entitled thereto in respect of the agreement and such money shall be held in a separate account designated as a trust account at a chartered bank or trust company or a loan company or credit union authorized by law to receive money on deposit or a Province of Ontario Savings Office until,

(a) its disposition to the person entitled thereto; or

(b) delivery of prescribed security to the purchaser for repayment.

(2) Where an agreement of purchase and sale referred to in subsection (1) is terminated and the purchaser is entitled to the return of any money paid under the agreement, the proposed declarant shall pay to the purchaser interest on such money at the prescribed rate.

(3) Subject to subsection (2), where a purchaser of a proposed unit under an agreement of purchase and sale referred to in subsection (1) enters into possession or occupation of the unit before a deed or transfer of the unit acceptable for registration is delivered to him, the proposed declarant shall pay interest at the prescribed rate on all money received by him on account of the purchase price from the day the purchaser enters into possession or occupation until the day a deed or transfer acceptable for registration is delivered to him .

(4) Subject to subsections (2) and (3), the proposed declarant is entitled to any interest earned on the money required to be held in trust under subsection (1).

(Emphasis added)

By virtue of s. 1(1)(r) of the Condominium Act "prescribed" means "prescribed by the regulations". Under s. 59(1)(n) of the Act the Lieutenant Governor in Council may make regulations "prescribing rates of interest that shall be paid on moneys required to be held in trust under this Act".

Section 33 of Reg. 121 provides:

33. The rate of interest under subsections 53(2) and (3) of the Act on money held in trust under subsection 53(1) of the Act shall,

(a) for the six months immediately following the last day of March of each year, be 1 per cent per annum below the rate paid on The Province of Ontario Savings Office savings accounts on the 1st day of April of that year; and

(b) for the six months immediately following the last day of September of each year, be 1 per cent per annum below the rate paid on The Province of Ontario Savings Office savings accounts on the 1st day of October of that year.

(Emphasis added)

In the affidavit filed in support of the application it was deposed that the applicants, as purchasers, entered into agreements of purchase and sale with the respondent, as vendor, for the purchase of 254 proposed condominium units to be located in a high-rise building in Toronto. The respondent was both the vendor of the units and the proposed declarant of the declaration to be made under the Condominium Act. The respondent, in its material filed in opposition to the application, disputed that all of the applicants were purchasers. I shall deal with the effect of this later in these reasons.

The sales office opened on August 8, 1986. The agreements began to be entered into in 1986. A copy of the type of agreement used, filed by the respondent, is dated September 5, 1986.

The initial sales program used an agreement of purchase and sale that required a first deposit of \$5,000 at the time of the initial offer, a second deposit of \$5,000 due 60 days after the date of the initial offer, a third deposit in the amount of \$10,000 due upon completion of the pouring of the concrete structure of the building, and a fourth deposit due at the occupancy closing of the unit in an amount sufficient to bring the total deposits to 25% of the purchase price of the unit.

A resale program was initiated in August 1987. The contracts used by the respondent were essentially the same as the original agreements. They included a similar deposit payment structure, except that the amounts of the deposits were changed so that each of the first three deposits was in the amount of \$10,000.

The pouring of the concrete was completed in February of 1988. The first occupancy began in November 1988 on the lower floors. Occupancy continued up the structure until March 1989. Registration of the condominium corporation was obtained on November 3, 1989 and the final closings commenced on November 27, 1989.

Before setting forth the appellants' complaints with respect to the amounts of interest with which they were credited on closing, I shall set forth the facts relating to interest rates paid by the Province of Ontario Savings Office. The following is quoted from a letter, dated May 8, 1991, from the Province of Ontario Savings Office (written by T. Luciani, Manager, Administrative Services) to an employee of the respondent and which forms part of the material upon which the respondent relies:

The Savings Office, as it is known in each community, offers three types of deposit vehicles: -- Guaranteed Investment Certificates with maturities from 12 to 60 months, the Gold Passbook Savings Account with interest calculated monthly and paid semi-annually and the Trillium Daily Interest Savings Account with interest calculated daily and paid monthly on the last day of the month. Both types of savings accounts have generous chequing privileges.

The original Gold Passbook Savings Account offers a rate of 5.25% per annum calculated on the minimum monthly balance and paid semi-annually on March 31st and September 30th. Funds may be withdrawn at any time without notice.

The Trillium Daily Interest Savings Account, introduced on January 13, 1986, offers rates of 7.50% when the daily balance exceeds \$5,000 and 5.75% when the daily balance is less than \$5,000. Interest is calculated daily and is paid on the last day of the month. There is no service charge on cheques processed when the minimum monthly balance is \$1,000 or more. Otherwise, there is a service charge of \$0.25 per cheque processed.

In a later letter, dated May 14, 1991, the Province of Ontario Savings Office advised the respondent that until the introduction of the Trillium account on January 13, 1986, the Gold Passbook account was the only type of account offered by the savings office.

While the rates on both accounts have fluctuated frequently, the evidence shows that the rates of interest on balances over \$5,000 on the Trillium account have always been higher than the rates on the Gold Passbook account. It is this fact that gives rise to the dispute in this proceeding because, on the closing of the transactions (except for two of them) the respondent used the lower Gold Passbook rate. The appellants have calculated the amounts which they submit should have been credited. Assuming that the basic amounts used and the calculations are correct, the total difference is a substantial amount.

At the time of closing, the respondent provided to each purchaser the vendor's undertaking to readjust all items on the statement of adjustment, if necessary.

The higher rate of interest was paid to two of the purchasers when it was requested by their solicitors before closing. This was the result of a business decision made by the respondent to facilitate the closings. I do not interpret its decisions in this regard as an admission that the higher rate was the correct one.

Keenan J. accepted the respondent's submission that the Gold Passbook rate was the correct one.

Three other decisions on this issue have been brought to our attention. In *Scanlon v. Castlepoint Development Corp.* (1991), 86 D.L.R. (4th) 573, 22 R.P.R. (2d) 215 (Ont. Gen. Div.), Austin J. agreed with Keenan J.

In *Kates v. Camrost York Development Corp.*, Cavarzan J., in reasons dated May 29, 1991, following upon his earlier decision dated April 22, 1991 on the main issues in the application before him, reported at 17 R.P.R. (2d) 113 (Ont. Gen. Div.), held that the higher rate applied if the amount of the deposit exceeded \$5,000. The parties to this proceeding subsequently settled their differences. On August 16, 1991, the Court of Appeal, on consent, made an order setting aside the order dated April 22, 1991. The court endorsed the following on the record:

This matter has been settled by the parties. An order of this court is required to remove the certificate of pending litigation. Accordingly order to go in accordance with the consent filed.

(No mention was made in the order which was set aside of the subsequent decision respecting the amount of interest dated May 29, 1991 but, obviously, it fell with the earlier order.)

In *Budinsky v. Breakers East Inc.* (1992), 6 O.R. (3d) 255, 87 D.L.R. (4th) 572 (Gen. Div.), at pp. 283-87 O.R., pp. 598-602 D.L.R., Borins J. disagreed with the decision of Keenan J. in the present case and held that the higher interest rate on balances over \$5,000 paid by the Province of Ontario Savings Office was the correct rate. We heard an appeal and a cross-appeal from Borins J.'s judgment in *Budinsky* at the same time as the present appeal was heard. The issue relating to the rate of interest was the subject matter of the cross-appeal.

In *Budinsky*, Borins J. said at p. 286 O.R., p. 601 D.L.R.:

The language of s. 33 speaks to future events. In this regard s. 4 of the Interpretation Act, R.S.O. 1980, c. 219, applies and provides that the "law shall be considered as always speaking and, where a matter or thing is expressed in the present tense, it is to be applied to circumstances as they arise, so that effect may be given to each Act and every part of it according to its true intent and meaning".

In the proceeding before us, Keenan J. said:

The meaning to be given is the clear meaning that would have been given the day after the statute was passed, unless some subsequent statute has declared that some other construction is to be adopted or has altered the previous statute: *Sharpe v. Wakefield* (1888), 22 Q.B.D. 239, 58 L.J.M.C. (per Lord Esher); see *Stamford (County) v. Welland (County)* (1916), 37 O.L.R. 155, 31 D.L.R. 206 (C.A.), at p. 182 O.L.R., p. 214 D.L.R.

In my opinion, the developer was entitled to rely on the absence of any amendment to the regulation as a confirmation that the previously existing measure of the interest rate was to continue. There is no statutory or other requirement that compels adoption of a new rate because it is more favourable to the purchaser.

These statements of Borins J. and Keenan J. indicate the basic issue which must be resolved, which is: was it the intent of s. 33 that it was to apply for all time (subject to amendment) only to the one Province of Ontario Savings Office savings account that was in existence at the time it was made -- or was the intent that it could apply to new Province of Ontario Savings Office savings accounts that came into existence in the future? In other words, is the correct presumptive approach an historical one or an updating or ambulatory one?

To the extent that general propositions are helpful in matters of statutory interpretation, I think that the more general presumption favours the latter approach and that the former one is an exception to it: see Cross, *Statutory Interpretation*, 2nd ed. (1987), at pp. 49-54; Bennion, *Statutory Interpretation*, 2nd ed. (1992), s. 288; and Coté, *The Interpretation of Legislation in Canada*, 2nd ed. (1991), at p. 226.

Cross, at p. 50, says:

But the proposition that an Act is always speaking is often taken to mean that a statutory provision has to be considered first and foremost as a norm of the current legal system, whence it takes its force, rather than just as a product of an historically defined Parliamentary assembly. It has a legal existence independently of the historical contingencies of its promulgation, and accordingly should be interpreted in the light of its place within the system of legal norms currently in force. Such an approach takes account of the viewpoint of the ordinary legal interpreter of today, who expects to apply ordinary current meanings to legal texts, rather than to embark on research into linguistic, cultural and political history, unless he is specifically put on notice that the latter approach is required.

At pp. 617 and 630 of Bennion, *op. cit.*, it is said:

It is presumed that Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wording to allow for changes since the Act was initially framed (an updating construction). [p. 617]

A fixed-time Act is one which, contrary to the usual rule, was intended to be applied in the same way whatever changes might occur after its passing. It has as it were a once for all operation. It is to such an Act that the oft-quoted words of Lord Esher chiefly apply: "the Act must be construed as if one were interpreting it the day after it was passed". [*The Longford* (1889), 14 P.D. 34, at p. 36] [p. 630]

The presumption however is that an Act is intended to be an ongoing Act, since this is the nature of statute law: an Act is always speaking. So there must be some reason adduced on account of which Parliament is taken to depart in a particular case from this principle. [p. 630]

Earlier, at p. 617, Bennion refers to the case of the Act that is to be of unchanging effect (a fixed-time Act) as "the comparatively rare case".

Coté, *op. cit.*, at p. 226 says:

But merely because the meaning of legislation at the time of its enactment must be respected in no way suggests that the statute's effect is confined to material or social facts or events then existing. It is necessary to distinguish the meaning of a term from the things that may be included in its ambit.

An enactment dated January 15, 1980 dealing with "automobiles" will obviously apply to cars built in 1981: the law "is ever commanding"; "and whatever be the sense of the verb or verbs contained in a provision, such provision shall be deemed to be in force at all times and under all circumstances to which it may apply". The guideline favouring the common meaning at the time of adoption does not mean ". . . that all terms in all statutes must always be confined to their original meanings. Broad statutory categories are often held to include things unknown when the statute was enacted."

Section 4 of the Interpretation Act, R.S.O. 1990, c. I.11, which provides, in part, that "[t]he law shall be considered as always speaking and, where a matter or thing is expressed in the present tense, it is to be applied to the circumstances as they arise" supports the use of this general presumption. In *Cash v. George Dundas Realty Ltd.* (1973), 1 O.R. (2d) 241, 40 D.L.R. (3d) 31 (C.A.), affirmed [1976] 2 S.C.R. 796, 59 D.L.R. (3d) 605, Estey J.A. said for this court at p. 248 O.R., p. 38 D.L.R.:

The Court in interpreting and applying a statute must of course attribute to its provisions their plain meaning according to the understanding and practices of the times. A statute speaks continuously as though freshly enacted at the time the issue in question arose : s. 4, Interpretation Act, being R.S.O. 1970; c. 225; *Craies on Statute Law*, 7th ed. (1971), pp. 81-2. Courts are no longer concerned with the bygone canons of equitable consideration [construction?], the mischief rule and the many other aids and procedures formerly invoked in the interpretation of legislation. We are now concerned only with applying the statute according to its plain meaning in the light of the current practices and standards of the community: *Campbell College, Belfast v. Com'r of Valuation for Northern Ireland*, [1964] 1 W.L.R. 912, per Lord Upjohn at p. 941; *Craies, supra*, p. 64.

(Emphasis added)

I think that the general presumption in favour of the updating or ambulatory approach is the correct one to apply to the interpretation of s. 33 of Reg. 121 and its application to the facts of this case, with the result that the Trillium account rate of interest is the applicable rate. With respect, I think that Keenan J., who appears to have regarded the historical approach as

reflecting a general rule of interpretation and not one that is applied comparatively rarely, erred in applying it in this case. In what follows, I set forth my reasons for this conclusion, which are concerned with the wording and purpose of s. 33.

As far as the wording is concerned, the Trillium account is clearly covered by the words of the section. It is a "Province of Ontario Savings Office savings account" just as much as is the Gold Passbook account.

Another feature of the wording is the use of the singular "the rate" in the phrase "the rate paid on The Province of Ontario Savings Office savings accounts". The respondent submits that this shows that the section means and applies to the Gold Passbook account and not to the Trillium account. What effect should the use of the singular "the rate" properly have?

In my view, the likely reason for the use of the singular is that it is in accord with the situation of only one savings account being in existence when the regulation was first made -- and not that it was intended to denote the Gold Passbook account for all time, even if a new savings account came into existence which more effectively carried out the purpose of the section.

For example, if a new savings account came into existence in replacement of the Gold Passbook account, an account with a different name and different terms respecting the calculation and payment of interest (the Trillium account itself would be a good example), I have no doubt that the regulation would apply to it without any need for an amendment in the regulation. Because the regulation cannot, in my view, be properly regarded as a "fixed-time" regulation, it cannot be said that when the Trillium account came into existence the regulation continued to apply to the Gold Passbook account simply because of the situation which was in existence when the regulation was first made. What arose at the time of the coming into existence of the Trillium account was a question of the proper application of the regulation's terms to the new facts, a question which did not exist before, but merely because the question had not arisen before does not mean that the regulation should be interpreted as denoting the Gold Passbook account.

In my view, the wording of the section does not indicate an intention to freeze its terms to the Gold Passbook account in a situation where another account, which comes within the wording of the section, carries out its purpose more effectively.

The new account, on the facts of this case, clearly comes within the purpose of the regulation -- which is to provide an incentive for the proposed declarant to register the condominium corporation and transfer title to the purchaser of the condominium unit as soon as possible after the purchaser has entered into occupation. In *Berman v. Karleton Co. Ltd.* (1982), 37 O.R. (2d) 176, 24 R.P.R. 8 (H.C.J.), Gray J. said at p. 184 O.R., pp. 19-20 R.P.R.:

The intent of the Act is clearly that the purchaser be paid interest on money paid to the vendor on account of purchase price during the interim occupancy period before a registrable deed or transfer is delivered. The reason for doing so is to protect purchasers of proposed condominium units from abuses by vendors who delay in registering declarations by providing an incentive to register quickly.

This statement has been quoted with approval in subsequent decisions: *Lamb v. Costain* (1985), 49 O.R. (2d) 657, 40 R.P.R. 83 (H.C.J.), at p. 661 O.R., p. 87 R.P.R., *Hashim v. Costain Ltd.* (1986), 54 O.R. (2d) 790 (H.C.J.), at pp. 796-97.

It should be noted that s. 53 does not require that the payments referred to in it be deposited in a Province of Ontario Savings Office savings account. They may be deposited in any of the financial institutions mentioned in s. 53(1), which include Province of Ontario Savings Offices. Further, under s. 53(4), the proposed declarant is, "[s]ubject to subsections (2) and (3) . . . entitled to any interest earned on the money required to be held in trust under subsection (1)". Accordingly, it is possible for a proposed declarant to earn more interest than would be payable on the Gold Passbook account and to pay the purchaser 1% less than the Gold Passbook account rate and, as a result, retain a larger amount of interest. Indeed, on the respondent's interpretation, the proposed declarant could deposit the money into the Trillium account and receive the higher rate of interest on this account but pay the purchaser on the basis of the lower Gold Passbook account rate. Interpreting the legislation this way would diminish the effect of the incentive against delay.

There is a further aspect of the provision's purpose, one related to a matter of legal context. The money for which the interest is paid is held by the proposed declarant as a trustee in a separate trust account. The money held in trust, belongs, beneficially, to the purchaser and not to the proposed declarant. It is the most fundamental duty of a trustee to administer the trust solely in the interest of the beneficiary and a trustee is not permitted to profit at the expense of the beneficiary: see *Scott on Trusts*, 3rd ed. (1967), Vol. I at p. 39, and Vol. II at pp. 1297-98. I think that the trust obligation clearly extends to the duty to pay interest based on the higher rate, particularly where the proposed declarant may enjoy an increased personal benefit from paying it on the basis of the lower rate. This legal consideration is an important part of the context for determining the proper application of s. 33.

This point is succinctly made by Cavarzan J. in *Kates v. Camrost York Development Corp.*, supra :

It seems to me to be consistent with the intent and purpose of the Condominium Act which protects trust moneys deposited by the applicant and which permits the respondent to earn and keep interest on those trust moneys [s. 53(4)] that the applicable rate, the higher or lower one, be determined by the amount held in trust.

With respect to the trust aspect point, Keenan J. said:

While the relationship of the developer declarant and the condominium purchasers gives rise to obligations of a fiduciary nature, such as holding deposits in trust, it is not per se a fiduciary relationship. It is primarily a contractual relationship and the rights and obligations are set out in the contract. A statutory obligation is separate and while it may impose a duty on the declarant for the protection of the purchaser, it does not impose a duty on the declarant to extend the scope of the duty beyond that which is clearly recited in the statute.

With respect, while the basic relationship between a purchaser and a proposed declarant may be contractual, s. 53(1) clearly imposes on the proposed declarant, with respect to the money we are concerned with in this appeal, the duty of a trustee and it is with this particular aspect of the relationship only that we are concerned. As I have said, this fiduciary relationship is of direct relevance in interpreting the scope of the obligation to pay interest on the money held in trust.

In the light of the foregoing, I am satisfied, on the facts of this case, that the application of s. 33 to the Trillium account effectively carries out the purpose of the section and, when all factors are taken into account, the selection of this account is more

consistent with the legislative intent that the Gold Passbook account. I adopt what was said by Borins J. in *Budinsky*, at p. 286 O.R., p. 602 D.L.R., with respect to the application of the provision:

Thus, s. 33 should be applied in the following manner to calculate the rate of interest which the purchasers will be entitled to receive on their deposits on the date of closing. First, one determines the amount of the deposit paid by the purchaser as of the date he or she assumes occupancy or possession of the unit. In each case, the amount exceeds \$5,000. Then one determines the savings account appropriate to the amount of the deposit. At the present time this would be the Trillium over \$5,000 savings account.

In arriving at my conclusion, I have taken into account two further submissions of the respondent.

First, the respondent submits that it is "not a coincidence" that the dates of payment of interest in the Gold Passbook account, March 31 and September 30, correspond with the terms of s. 33 of the regulation that require the interest rates to be fixed on the first days of April and October. With respect, I do not see how this feature assists us. The only function of the reference in the regulation to Province of Ontario Savings Office accounts is to provide for an interest rate to be used in the calculation of the amount of interest to be paid under s. 53(3) and there is no obligation to deposit the money in the Province of Ontario Savings Office account. Accordingly, I do not see significance in the dates to which reference is made. Specifically, I do not regard this feature of s. 33 as an indication of a legislative intent to prevent the regulation from being applicable to new accounts which might come into existence in the future.

The respondent also submits that the principle of certainty in the law favours an interpretation of the section in the regulation that the Gold Passbook account is "the prescribed rate". In this respect the respondent relies upon Keenan J.'s statement that "the developer was entitled to rely on the absence of any amendment to the regulation as confirmation that the previously existing measure of the interest rate was to continue".

With respect, this reasoning seems to me to be circular. It is based on the assumption that s. 33, when it was made, was intended to refer exclusively to the Gold Passbook savings account for all time and that it could not be applicable to future savings accounts. If this were the case, then, I agree, an amendment to the regulation would have been necessary. For the reasons I have given earlier, I do not think that it is the correct assumption.

The principle of certainty in the law does not support the view that the scope of "savings accounts" was frozen as of 1980 to the particular savings account in existence at that time. When the obligation to account for interest in this case commenced, the different rates of interest on Province of Ontario Savings Office savings accounts had been in existence for a considerable period of time. The determination of the "prescribed rate" was, no doubt, not as straight-forward as it had been before the new account came into existence, but this does not logically lead to the conclusion that the principle of certainty favoured the lower rate, particularly when the higher rate was obviously more applicable to the facts of the case.

I should also refer to further arguments, based on the same consideration, made by each side. In March of 1992, s. 33 was revoked by O. Reg. 148/92, s. 2, and a new provision was substituted for it. The new provision does not give rise to the issue under s. 33 which is addressed in these reasons. Although each side framed arguments based on the new provision with respect to the proper interpretation and application of the repealed provision, I am satisfied that it is of no assistance on this question: cf. Interpretation Act, ss. 17 and 18.

Accordingly, I have concluded that a declaration should be granted respecting the correct rate of interest to be applied under s. 53(3) of the Act. This should be expressed in positive terms. The rates of interest to be applied to the deposits should be based on the rates of interest paid on the Province of Ontario Savings Office Trillium accounts during the relevant period.

On the material before us, I do not think that an order can be made for the consequential relief sought in favour of all of the appellants. The respondent filed material to the effect that several of the applicants had no contractual relationship with the respondent, or that the matter of the contractual relationship was a matter of serious doubt. Some applicants were not purchasers but received title on directions from purchasers' solicitors at the time of closing. Some of the applicants are said to be not known to the respondent as either purchasers or individuals to whom the purchasers directed title. They may have acquired title as the result of "flips". Other applicants purchased from Condonetics Realty, a firm associated with the sales agent on a project.

I will not refer to further matters raised which may require some form of inquiry. It is sufficient to note that this evidence was neither challenged nor clarified. In the face of it we cannot grant the consequential relief sought to each and every applicant. The proceedings will have to be continued in the Ontario Court (General Division) for this purpose.

I would allow the appeal, with costs, set aside the order of Keenan J., and in its place grant the declaration which I have set forth earlier in these reasons. I would remit the application to the Ontario Court (General Division) to determine the amount that should be paid, including prejudgment interest, to each applicant who is entitled to payment. The costs of this part of the proceedings should be in the discretion of the presiding judge. I would grant the appellants the costs of the application before Keenan J. Order accordingly.

CBR# 223

Platinum I Property Ltd. Partnership et al. v. Ontario New Home Warranty Program; Ontario New Home Warranty Program v. Marchant Building Corp. et al.

(C.A.)

1 O.R. (3d) 513

Action No. 354/89 Court of Appeal for Ontario McKinlay, Griffiths and Carthy JJ.A. February 11, 1991

APPEALS from the judgment of the High Court of Justice (1989), 68 O.R. (2d) 577, 4 R.P.R. (2d) 164, that agreements for purchase and sale of interests in limited partnerships in condominium developments are subject to the Ontario New Home Warranties Plan Act.

L. David Roebuck, for appellants.

Brian M. Campbell, for respondent.

The judgment of the court was delivered by

CARTHY J.A.:-- On this appeal, we are asked to determine whether five large condominium developments are governed by the provisions of the Ontario New Home Warranties Plan Act, R.S.O. 1980, c. 350 (the Act). The Act applies to all new home units built for sale, as opposed to rental, and provides the purchaser with protection by assuring that the builder is registered by imposing construction warranties and by protecting deposits up to \$20,000.

The five condominium projects proposed or being built by the appellants are being developed pursuant to agreements between the two Marchant corporations as builder and developer and a number of limited partnerships on terms which will assure the individual limited partners (the investors) tax deductibility of losses against their other income. In essence, the agreements provide for the purchase of an interest in the partnership at a price which relates to the value of a chosen condominium unit in the building, for the rental of that unit in the marketplace, and for a right in favour of the investor to obtain a transfer of title to that unit at any time after the condominium is registered and the unit has been rented. Prior to the transfer of title, the investor is considered for tax purposes to have an investment in income-producing property and the profits or losses are included in calculating the taxpayer's income from other sources. This is what is known colloquially as a tax-driven investment scheme.

The first proceeding was launched by the appellants seeking a declaration that two projects were outside the reach of the Act. The second was commenced by the respondent (the warranty program) to embrace three other projects by the same developer in any declaratory judgment of the court. The applications were heard by Steele J. He concluded [now reported (1989), 68 O.R. (2d) 577, 4 R.P.R. (2d) 164 (H.C.J.)] that the agreement with the investor was in substance one to sell the unit and, therefore, that the Act applies as it does to all other new homes built for sale. The appellants say that the units were built for rental purposes and that the "option to purchase" is an appendage included only to give the investor a means of liquidating the investment should interest be lost in the original tax thrust of the investment. Since the Act does not apply to rental buildings, the appellants ask for a declaration that they are exempt.

The Act

The operation of the Act centres upon s. 6 which reads:

6. No person shall act as a vendor or a builder unless he is registered by the Registrar under this Act.

This leads to the definition of "builder" and "vendor" in s. 1:

(a) "builder" means a person who undertakes the performance of all the work and supply of all the materials necessary to construct a completed home whether for the purpose of sale by himself or under a contract with a vendor or owner;

(n) "vendor" means a person who sells on his own behalf a home not previously occupied to an owner and includes a builder who constructs a home under a contract with the owner

These in turn lead to the definitions of "owner" and "sell":

(g) "owner" means a person who first acquires a home from its vendor for occupancy, and his successors in title;

(l) "sell" includes entering into an agreement to sell ... On the analysis of Steele J., a sale occurred when the original subscription agreement between the limited partnership and an individual investor was signed. Since the construction had not yet begun, the condominium clearly was "not previously occupied". It followed that Marchant was both a builder within s. 1(a) and a vendor within s. 1(n), and thus required to register under s. 6.

Once registered, the vendor warrants under s. 13 that the home is constructed properly and is free from major structural defects. As a protection to the warranty program and its guarantee to the purchaser of deposit protection up to \$20,000, the program issued a requirement that builders and vendors of condominium units post security or cash equivalent to \$20,000 per unit, to be released upon receipt of evidence of condominium registration and transfer of the unit to the purchaser. "Deposits" is defined as all monies paid by a purchaser before the date of possession -- see R.R.O. 1980, Reg. 726, s. 1(l).

This deposit requirement is the practical collision point between the scheme of the Act and this investment scheme. In the case of each of the five buildings, approximately \$5 million in security would have to be posted in order to comply with the Act and this security would not be released until the units are transferred. This may never occur and, if it does, the timing is controlled by the unit holder. In the meantime, there is no deposit, in the traditional meaning, to protect.

The operative section of the Act derivatively depends on the definition in s. 1(l), "sell" includes entering into an agreement to sell" and, therefore, the next issue is whether these agreements, even if not traditional agreements of purchase and sale, do fall within that definition.

The agreements

All of the five agreements are said to be essentially the same and that for the Platinum I project has been chosen as a model.

In an offering memorandum prepared pursuant to securities legislation, the public is invited to subscribe to one or more "interests" in the development, defined as an undivided beneficial ownership interest in the limited partnership. There are 256 "interests", a specific unit is allocated to each "interest" and the subscription price is related to the value of the unit. In fact, the price undoubtedly is the value of the unit within the market for similar tax shelters. The subscription price is met by a minimum 25 per cent payment on signing and 100 per cent on closing, some three or four months later. At that point, construction has not begun and there is no registration of the condominium. The investor is thereafter entitled to share pro rata in the net income or losses of the limited partnership. Once the designated unit has been rented by the limited partnership and the condominium corporation has been registered, the investor has a right to exchange the interest in the partnership for title to the unit. The assumption is that this transfer of ownership will constitute a sale by the partnership for income tax purposes. Therefore, the unit holder must pay, on exercising the option, an amount sufficient to compensate the limited partnership for the recapture of capital cost allowance occasioned by the transfer.

It is apparent that this scheme for development of condominium units is directed at relatively high income earners who wish to take advantage of the opportunity to defer taxes through a structure that enables them to be seen as investors in a real estate business rather than as investors in the ownership of a residential unit. Once the transfer of ownership occurs, the tax advantage ends and the deferrals become payable to Revenue Canada. No one suggested that the scheme was devised to avoid the new home warranty program and, in these particular instances, contractual warranties similar to those under the warranty program and performance bonds are provided.

Analysis

The centre of the debate remains the definition of "sell" in s. 1(l) of the Act and the language "includes entering into an agreement to sell". Is this to be distinguished from an agreement of purchase and sale, thus feeding the argument that it is sufficient if the owner agrees to sell even if the other party does not undertake to buy? Is the granting of an option an agreement to sell the unit with or without the intervening complications of the limited partnership? Can it be called an option when the entire price has been paid at the outset? These are the questions which have been raised and come together to the ultimate issue of whether this transaction in its essence is such as falls within the Act.

In the judgment under appeal, Steele J. concluded at p. 7 of his reasons [p. 580 O.R.]:

(The investor) has entered into an agreement that gives him the right to acquire title and therefore the agreement itself falls within the definition of "sell". He becomes the beneficial owner the moment he signs the subscription agreement to acquire his "interest".

There is no clear pattern that can be found in the common law for separate usage of the terms "agreement to sell" and "agreement of purchase and sale". The subject was adverted to by the House of Lords in *Helby v. Matthews*, [1895] A.C. 471, 64 L.J.Q.B. 465, 43 W.R. 561, in dealing with whether a hire purchase agreement constituted an agreement to buy goods under the Factors Act, 1889 (U.K., 52 & 53 Vict.), c. 45. Lord Watson stated in his opinion at pp. 479-80 A.C.:

Apart from the arrangement for hire of the piano, the only right given to Brewster by the agreement in question was the option to become a purchaser. It is true that whilst he was under no obligation to buy, the appellant was legally bound to give him that option, and could not retract it, if the other stipulations of the contract were duly observed by the hirer. But the possession of such a right of option was, in no sense, an agreement by Brewster to buy the piano; and the appellant's obligation to give the option was not, in the sense of law, an agreement by him to sell. In order to constitute an agreement for sale and purchase, there must be two parties who are mutually bound by it. From a legal point of view the appellant was in exactly the same position as if he had made an offer to sell on certain terms, and had undertaken to keep it open for a definite period. Until acceptance by the person to whom the offer is made, there can be no contract to buy. So long as the agreement stood unaltered there could, in this case, be no contract to purchase by Brewster until he had complied with the terms of the option given him, and had duly made the thirty-six monthly payments which it prescribes as the condition of his becoming owner of the piano.

Whilst, in popular language, the appellant's obligation might be described as an agreement to sell, it is in law nothing more than a binding offer to sell. In *Treat v. White*, 181 U.S. 264 (1900), the United States Supreme Court dealt with the precise question of the meaning of the expression "agreement to sell" in the context of a statute requiring revenue stamps on all such agreements dealing with stock transfers. Mr. Justice Brewer, in his opinion at p. 266 U.S., said:

The question before us is simply one of statutory construction. Is a "call" (a copy of which is incorporated in the statement of facts) an agreement to sell, within the meaning of Schedule "A"? In reference to this the learned Circuit Judge, in delivering his opinion, said:

It is an agreement, and manifestly an "agreement to sell." It may be referred to as an "offer," or an "option," or a "call," or what not, but it is susceptible of no more exact definition than "an agreement to sell." Inasmuch, therefore, as the statute requires stamps to be affixed "on all sales, or agreements to sell," it would seem that these "calls" are within its provisions.

We fully agree with this definition. "Calls" are not distributed as mere advertisements of what the owner of the property described therein is willing to do. They are sold and in parting with them the vendor receives what to him is satisfactory consideration. Having parted for value received with that promise it is a contract binding on him, and such a contract is neither more nor less than an agreement to sell and deliver at the time named the property described in the instrument. It may be a unilateral contract. So are many contracts. On the face of this instrument there is an absolute promise on the part of the promisor and a promise to sell. We cannot doubt the conclusion of the Circuit Judge that this is in its terms, its essence and its nature an agreement to sell. Therefore it comes within the letter of the statute.

and at p. 268 U.S.:

That there is a difference between an agreement to sell and an agreement of sale is clear. The latter may imply not merely an obligation to sell but an obligation on the part of the other party to purchase, while an agreement to sell is simply an obligation on the part of the vendor or promisor to complete his promise of sale. It is tempting to reach out to the high authority of *Treat v. White* and conclude that no matter how you describe the agreement before us it is an agreement to sell. However, in the same opinion, Mr. Justice Brewer recognized that even the letter of a statute may not control if there is reason in the entire text to suggest that the legislature intended otherwise. There is also the added dimension here that the Act is referring to a sale of land and not a chattel or chose in action.

The Act in question here is intended to provide protection to the purchasers of new homes. It clearly has no application to a home that has been rented and it would clearly have no application to these buildings, which are to be rented, except for the existence of the right to acquire title. I have already mentioned that if the subscription amounts to a sale then the vendor would have to post security of up to \$20,000 per unit for deposit protection which would not be released until transfer of the unit to a purchaser. Since this transfer may never take place and would undoubtedly occur well after the purchaser was in need of protection of the original deposit, there is an apparent lack of harmony between the nature of these transactions and this protection afforded by the Act.

A further contextual element which suggests a different statutory intent arises out of s. 14 of the Act which provides that an owner can claim damages for breach of warranty from the guarantee fund. If the investor is treated as the owner, which Steele J. did, then the investor would receive the damages for defects to the unit and could pocket the money and never take title.

In my view, Steele J. was right to look to the essence of the transaction to determine if this was an agreement to sell, but was wrong in concluding that the investor "becomes the beneficial owner (of the unit) the moment he signs the subscription agreement".

The subscription is to an interest in a limited partnership. There is no unit of real estate to which the agreement could attach. It contemplates the creation of a unit at some date in the future and even the right to an interest in the unit is postponed by two conditions outside the control of the investor -- registration and rental. The option to obtain title to the unit only becomes an interest in land when the conditions are met. The interest of the investor after that time is irrelevant because, one of the conditions being previous occupancy, the Act, by its terms, would have no application.

It is my conclusion that the essence of the subscription agreement, and its prime thrust, is to avoid a transfer of beneficial ownership in order to enjoy the benefit of tax deferrals; it is to join with others in the business of renting housing units, an activity that is at the same time not the interest of the new home warranty program and encouraged by the benefits offered by Revenue Canada. The option, if it be called such, is an appendage to this central purpose and simply provides an escape in the event that circumstances render the original purpose no longer of economic benefit. The full purchase price has been paid at the beginning but the transfer of title cannot be coupled with that payment as if merely postponed for some artificial purpose. The investor must abandon the original motive for tax deferral and amounts must be paid to the limited partnership to meet the obligations to Revenue Canada for recaptured capital cost allowance. The fact that a developer would pursue such a complicated mode of development suggests that the original price of each "interest" is higher than the general market price of the units and there is no certainty as to when, if ever, market rentals will rise to the point of justifying an exercise of the right to transfer and resale in the market. The transaction is not comparable to the simple stock call in *Treat v. White* and is, what it says it is, a purchase of an interest in a limited partnership with a provision for potential trading of that interest for title to a unit, conditionally and at some uncertain time in the future. It is not an agreement to sell the unit within the meaning of the Act.

I would therefore allow the appeals, set aside the orders below, and in their place order that a declaration issue in the form requested by the appellants in their factum as applicable to the five projects which are the subject-matter of the two applications. The appellants should have the costs of the motions and the appeal.

Appeals allowed with costs.

CBR# 122

Gordon v. Lawrence Avenue Group Ltd. (H.C.J.)

65 O.R. (2d) 545

Action No. 22911/87 High Court of Justice Callaghan A.C.J.H.C. October 18, 1988.

discharging the certificate.

MOTION for an order dismissing the plaintiff's action for specific performance and vacating a certificate of pending litigation.

M. Jurjans, for plaintiff.

T.B. Rotenberg, for defendant.

CALLAGHAN A.C.J.H.C.:-- This is a motion by Lawrence Avenue Group Limited pursuant to Rule 20 for an order dismissing on a point of law the plaintiff's action and for an order discharging the certificate of pending litigation filed herein.

On August 15, 1986, the plaintiff executed a form entitled "Application to Reserve Unit" whereby the plaintiff paid a \$5,000 deposit to reserve unit 22 in the defendant's proposed townhouse condominium project. The defendant accepted the document as "vendor" on August 19, 1986. The document reads as follows:

APPLICATION to reserve Unit(s) in the Condominium Townhouse Project known as "BIRCHCLIFF BY THE LAKE", located at 1501 Kingston Road, Scarborough, Ontario. Application number: 017 Date: August 15th, 1986

I/We ... Rose Gordon hereby apply to have Unit(s) 22 in the abovementioned project, reserved for me/us, subject to the Vendor's -- LAWRENCE AVENUE GROUP LIMITED -- approval.

Said approval or disapproval shall be communicated to the Purchaser in writing within seven (7) days from the date of application.

Upon approval of the Application by the Vendor, the Applicant must proceed with an Offer to Purchase, which is subject to the Vendor's and Purchaser terms and conditions and the acceptance thereof by both parties, within 48 hours, in order for the Vendor to guarantee the chosen Unit(s).

All applications are treated on a first come, first serve basis and the Vendor and/or its exclusive agent U.S. MARCHAND REAL ESTATE shall not be held liable in any form by any applicant, for not being able to provide a Unit, once the project is sold out.

The applicant(s) is/are to submit an initial Deposit of FIVE THOUSAND DOLLARS (\$5,000.00) per Unit with this application, which Deposit shall be returned in full in the event that the application is not approved by the Vendor.

In the event, that the application is approved by the Vendor, this Deposit shall constitute the initial Deposit, called for in the Agreement of Purchase and Sale, and shall be dealt with in the manner provided for in the Agreement of Purchase and sale.

The Purchase Price for the Unit(s) 22 shall be \$157,400.00, subject to the terms and conditions outlined in the Agreement of Purchase and Sale, and any additional requirements by the Purchaser.

Purchaser requests that closet doors are hinged and colonial design.

In April of 1987, the defendant forwarded to the plaintiff a form of agreement of purchase and sale. The said agreement provided a purchase price in the sum of \$169,900 which the plaintiff signed back to the defendant changing the price to the sum mentioned in the application to reserve of \$157,400. It was agreed by counsel in the course of argument that the further amendments to the agreement and in particular those to sch. C thereof were not in substance relevant to this application. Upon receipt of the amended agreement, the defendant reamended the purchase price to \$169,900 and forwarded the same to the plaintiff. In subsequent correspondence between the parties, the plaintiff notified the defendant that the purchase price of \$157,400 was being insisted upon and the defendant's attempt to return the deposit of \$5,000 to the plaintiff was rejected. On October 2, 1987, the plaintiff's action was commenced and a certificate of pending litigation was registered on October 6, 1987, pursuant to an order of the master of that date. The plaintiff claims specific performance of the agreement of purchase and sale and damages for breach of the said agreement in the amount of \$150,000. The statement of claim was served on October 19, 1987, but as a result of inadvertence the order granting the certificate of pending litigation was not served until June of 1988, after the defendant's solicitor had effected a subsearch of title. The defendant sold the unit to third parties by an agreement dated January 7, 1988. The purchasers were given interim possession on March 18, 1988, and they are currently paying occupation rent to the defendant. As of this date, the defendant has not registered a declaration and description of the lands forming the project pursuant to the provisions of the Condominium Act, R.S.O. 1980, c. 84. The defendant however is obliged to and fully intends to effect such registration in the near future.

The defendant moving party takes the position that the reservation form contravened s. 49(3) and (21) of the Planning Act, 1983, S.O. 1983, c. 1, and accordingly was null and void ab initio and could not create an interest in land which would support a certificate of pending litigation. The defendant's position is that the reservation form was not intended to be a contract and lacks sufficient particulars as to the various terms and conditions necessary to make it a contract. The defendant's further position is that the agreement of purchase and sale did not constitute a contract as it was never signed by the parties because they were not ad idem on the price.

The defendant also moved pursuant to rule 42.02 for an order vacating the certificate of pending litigation on the ground that the plaintiff had not served the order "forthwith" as required by rule 42.01(4), as a result of which the defendant, without knowledge of the said certificate, sold the condominium unit to a third party who is currently in possession. The defendant also submitted that the plaintiff had failed to give disclosure of material facts in the affidavit filed in support of the motion for the certificate, namely, that the lack of a registerable description was related directly to whether the plaintiff had an interest in the land in the circumstances and that there in fact was a counter-offer to the plaintiff by the defendant. I am satisfied that the failure to serve the

order granting the certificate of litigation arose through the inadvertence of the plaintiff's solicitor. Furthermore, the moving party on this application has taken a further step in the proceedings after obtaining knowledge of the irregularity by delivering an amended statement of defence and counterclaim. The real matters in dispute herein relate to whether or not the plaintiff in fact has any interest in land which would support such a certificate of pending litigation and I, accordingly, dismiss the application to the extent that it is based on the plaintiff's failure to comply with rule 42.01(4).

Section 49(3) of the Planning Act, 1983 prohibits conveyance of land unless land is described in accordance with and is within a registered plan of subdivision. Subsection (21) of that section provides that any agreement or conveyance made in contravention of s. 49 does not convey any interest in land unless the agreement is subject to express conditions contained therein that such agreement is to be effective only if the provisions of s. 49 are complied with. The defendant's position is that s. 49(3) of the Planning Act, 1983 has been interpreted to apply to reservation forms created before a condominium is registered: see *Re Crossroads Apartments Ltd. and Phillips* (1974), 4 O.R. (2d) 72, 47 D.L.R. (3d) 172 (H.C.J.). While s. 50 of the Condominium Act, provides that s. 49 does not apply in respect of dealings "with whole units and common interests" that section does not exempt "proposed units" from the provisions of the Planning Act, 1983. The argument of the defendant proceeds that the "application to reserve" cannot create an interest in land unless it complies with the Planning Act, 1983 and that the form of agreement of purchase and sale that does comply cannot form a basis of an action for specific performance unless a written agreement is concluded. It is submitted that the reservation form lacked all essential terms except price and that the parties never agreed on price prior to the expiry of their various offers and counter-offers.

The plaintiff/respondent's position is that in all the circumstances there is a triable issue as to whether specific performance will be granted and accordingly the certificate of pending litigation should not be vacated. The plaintiff submits that from the start both parties herein knew and intended that there would be a conveyance of a condominium and that a declaration and description pursuant to the Condominium Act would be registered. The plaintiff's position is that the defendant was obliged to effect such registration and once that was done the Planning Act, 1983 was deemed never to have been violated by the agreement. Section 49(14) of the Planning Act, 1983 provides as follows:

49(14) Where land is within a registered plan of subdivision or within a registered description under the Condominium Act or where land is conveyed with a consent given under section 52 of a predecessor thereof, any contravention of this section or a predecessor thereof or of a by-law passed under a predecessor of this section or of an order made under clause 27(1)(b), as it existed on the 25th day of June, 1970, of The Planning Act, being chapter 296 of the Revised Statutes of Ontario, 1960, or a predecessor thereof, that occurred prior to the registration of the plan of subdivision or description or prior to the conveyance, as the case may be, does not and shall be deemed never to have had the effect of preventing the conveyance of or creation of any interest in the land, but this subsection does not affect the rights acquired by any person from a judgment or order of any court given or made on or before the 15th day of December, 1978.

Furthermore, it is submitted s. 51 of the Condominium Act is sufficient to imply a covenant adequate to meet the requirements of s. 49(21) of the Planning Act, 1983.

The respondent notes that s. 51(1) of the Condominium Act was not proclaimed in force until April 1, 1975, subsequent to the decision of the court in *Re Crossroads*. Furthermore, the definitions in the Condominium Act have been varied since that decision. The respondent notes that the definition of "unit" [s. 1(1)(z)] has been expanded to apply to the declaration and description whether registered or unregistered. The respondent also notes that the proposed agreement of purchase and sale in the *Crossroads* case was never executed by either party, although I do note that the learned trial judge therein indicated that such was not material to the ultimate disposition of that application. The respondent relies on the decision of the British Columbia Supreme Court in *Mark London Ltd. v. Granwest Industries Ltd.* (1981), 18 R.P.R. 61, wherein it was held that a reservation agreement differently worded than that in issue was enforceable by way of specific performance.

There are other facts relevant, in my view, to the disposition of this application. Those facts are that all of the units in the project apparently have been sold to other buyers. The reservation form as well as the form of agreement of purchase and sale were prepared by the defendant. The plaintiff received the reservation form initially from a broker of the defendant and it was the same broker which forwarded to the plaintiff the form of agreement of purchase and sale. The defendant now takes the position that the broker did not have the authority to type in the price of \$157,400. In these circumstances, the question of whether or not the reservation agreement can be read together with the agreement of purchase and sale for the purposes of determining the plaintiff's interest in the land is a question of fact for a trier of fact. The decision upon that threshold factual issue will impact upon the effect of the Planning Act, 1983, on the rights of the parties in this case. Furthermore, from the foregoing it appears that a substantial argument exists that amendments to both the Planning Act, 1983 and the Condominium Act may effect the current application of the decision in *Re Crossroads Apartments Ltd. and Phillips*, supra. Accordingly, this is not, in my view, a case where the issue of specific performance or the impact of the Planning Act, 1983 on the rights of the parties should be decided on a motion for summary judgment. Nor should the certificate of pending litigation be vacated. The property herein is no doubt unique to the plaintiff who is in a sound financial position. While I am prepared to accept for the purposes of these proceedings that the third party purchasers of the unit did effect that purchase in good faith, I am not satisfied in all the circumstances that the said certificate should be vacated. Motion dismissed with costs.

Motion dismissed.

CBR# 073

Chapman v. HLS York Development Ltd.; Markson, Third Party

64 O.R. (2d) 498 High Court of Justice Donnelly J. June 14, 1988.

ACTION for damages for negligent misrepresentation or breach of collateral warranty, and for breach of warranty, in the sale of a condominium unit.

Harry Underwood, for plaintiff.

D.R. Rothwell, for defendant.

W.A. Richardson, for third party.

DONNELLY J.:-- Introduction

The plaintiff purchaser claims damages for negligent misrepresentation or breach of collateral warranty in the sale of a condominium having a represented floor area of 2,688 sq. ft. and an actual area of 2,166.5 sq. ft. He further claims damages for breach of warranty that the premises were constructed in a good and workmanlike manner.

Facts

With a degree in mechanical engineering, a masters in business administration, a real estate brokers licence, training in accounting, employment experience with two stockbrokerage offices, 10 years with A.E. LePage, and operating his own business in real estate investment and promotion including the speculative purchase of about 12 condominiums, the plaintiff comes to the real estate market as a knowledgeable purchaser.

At age 56 he is married with a son and two daughters ages 26, 24, and 22, the elder two being away from home pursuing their education, the youngest still residing with her parents. Because of financial reverses, the family was unable to continue residence in their three-storey Rosedale Rd. home. Following sale of that house the plaintiff sketched and calculated the family's minimum space requirement for alternative accommodation at 2,684 sq. ft., thereby in effect replacing the first two floors of the Rosedale property and eliminating the attic and basement.

Being unable to locate a suitable house within his means, the plaintiff turned to consideration of condominiums with the dual purpose of providing family accommodation and achieving resale potential in two years. Three premises, generally in the Bloor-Rosedale area, were considered before the plaintiff was referred to the Market Square Development Phase II at Church and Front Streets. There, the plaintiff was shown small condominiums and, upon his inquiry, was informed that units were available to meet his space requirements. The sales staff advised that purchases could be financed by 25% cash deposit with 75% conventional mortgages through the Royal Bank or by special financing available through the vendor. The plaintiff was provided with sample floor plans for typical units and he noted that on a price-per-square foot comparison this project was \$7 to \$8 lower than the Rosedale condominiums which he had inspected. The prime determinant in his mind in all condominium deals was price per square foot. He calculated this as a means of comparison for all units that he inspected whether he was interested in purchasing or not. The plaintiff returned to Market Square to view and inquire about larger units on the 6th, 7th and 8th floors. In response to the plaintiff's inquiry the defendant's sales representative advised that unit 801 had a floor area of 2,688 sq. ft. and was priced for cash at \$400,000 or with the vendor's special financing, at \$475,000 which the plaintiff calculated to be \$148 per square foot and \$176 per square foot respectively.

Upon returning again, the plaintiff, for the first time, inspected unit 801 which was on the south-west corner of the eighth and top or penthouse floor. It was still under construction with walls erected and windows installed. This was a two-storey unit with a staircase, fireplace and ceilings one foot higher than on the lower floors. It was substantial in size with irregular configuration, an attractive view on three sides including the Toronto Harbour and an outside deck on the south and west sides on both floors. Because of work in progress, the second floor was not inspected. There was no flexibility in the stated price which the plaintiff considered high. In his view the true value was \$130 per square foot. He discussed the unit with his wife and concluded that the family's space requirements were met by that unit. The plaintiff saw unit 801 on a second occasion, again in its construction stage, when he had an opportunity to check all areas. The plaintiff felt he knew the unit size from the information given to him and it appeared sufficient for their needs. Thereafter the plaintiff, his wife and Hudson Milburn, the exclusive sales agent for the defendant, went through the unit for the purpose of upgrading the interior decorating. That decorating was not to exceed \$25,000 and was to be financed by a mortgage back to the vendor.

In April, 1983, the agreement of purchase and sale was prepared by Mr. Milburn's office for the purchase price of \$400,000 and \$25,000 for decorating. The erroneous representation as to the size of the unit was carried forward in the agreement by sch. B -- the architect's plan showing the floor area as 2,699 sq. ft. This was the first occasion on which the plaintiff was shown a floor plan for unit 801. The agreement was executed on that day by the plaintiff without examination by anyone on his behalf. He still believed the area was 2,688 sq. ft. and while examining the agreement at home that night, the plaintiff first noticed the 2,699 sq. ft. figure shown on sch. B. He concluded that he was getting an extra 11 sq. ft. There was no further discussion regarding the square footage prior to closing.

Conventional mortgage financing in excess of \$250,000 was not available. The plaintiff compared the present value of the vendor's financing and concluded that it was reasonably close to cost of conventional financing. He then accepted the defendant's financing package. The purchase price in the agreement was amended to \$510,000 being the basic price of \$400,000 plus financing at \$75,000 and redecorating (now increased) at \$35,000.

The plaintiff made occupation payments and occupied another unit while unit 801 was being finished. He took possession of unit 801 in November of 1983. The condominium documents were registered and the final closing was on February 10, 1984.

The plaintiff was unable to move all his furniture into the condominium and this was attributed to the irregular layout. He still had no suspicion that the measurements given to him were not correct. While in possession, the family had a consciousness of being cramped especially on the second floor where there was insufficient space for two rooms as planned. As the first anniversary of the possession date approached the plaintiff was aware that this represented his last opportunity under the HUDAC

warranty for redress for deficiencies. He therefore measured and calculated the area and a substantial shortage of about 500 sq. ft. was indicated. Both HUDAC and the developer were promptly informed. The developer indicated that he would look into the matter and this litigation resulted.

Area

The parties agree on the accuracy of the survey work establishing the floor area at 2,251.6 sq. ft. The defence reserved the right to disagree with the principle used to measure the stairwell space -- that is, including the area under the stairs in the first floor calculation and excluding, as not being liveable space, the area over the stairwell in the second floor calculation. This is the procedure (1) recommended in the practice guidelines prepared by the Canadian Real Estate Association; (2) generally used by surveyors, and (3) used by this architect on this project. I accept this principle as correct and I find the area is 2,251.6 sq. ft. Value

Hudson Milburn, an experienced Toronto real estate broker, was the exclusive listing broker for Market Square in Phases I and II. He confirmed that condominium prices must be competitive and accordingly pricing starts with a market survey. Price per square foot is an important factor because it is the purchaser's yardstick for comparison. As part of the sales campaign this property was prominently advertised as "priced lower per square foot than most downtown luxury condos".

Cory Solomon, the project manager for Market Square testified that Phase I on Church St. had been very successful. Phase II, seen as having advantages in location and other features, was expected to be priced slightly higher.

In 1982, a slump in the condominium market was experienced. There were two sales in 1982, both to Hong Kong purchasers -- unit 811 to Dr. Fung, unit 816 to his father, Sir Kenneth Fung. In consequence, until a market upturn about New Year's, 1983, the marketing campaign was stopped and prices were held (although this was contradicted by Mr. Milburn who recalled a 10% reduction for poor sales performance).

Mr. Solomon explained the pricing of unit 801. No marketing drawings were available, firstly, because he was planning to purchase it and secondly, since it was a unique unit, such plans would not be of general application. Being unique, unit 801 commanded a higher price and an asking price of \$400,000 was established as early as the fall of 1981. No documentation was produced to support this. Mr. Solomon did not know the number of square feet realizing only that it was more than 2,000 and less than 3,000. He concedes that the 2,688 sq. ft. figure originates with the architect and is the area shown on the plaintiff's records.

Barry Lebow, a Canadian residential appraiser qualified by the Appraisal Institute of Canada, is a licensed real estate broker with substantial experience in selling condominiums and was co-developer of one condominium building. He appraised the property for the plaintiff by relating it to actual sales of comparable properties. These comparable sales must be adjusted or normalized on some common basis before they can be analyzed. Most important of those adjustments is the time frame of the sale.

He inspected unit 801 in June of 1987 and derived information from registry office records and from TEELA, a private marketing survey. The best comparable properties were the eighth-floor penthouse units in Phase II which were sold in the relevant time frame which was determined by Mr. Lebow to be by the end of April, 1984. Phase I was not relevant because of the passage of time and changed market conditions.

The following eighth-floor units were ruled out:

- (1) Unit 818 because its title required explanation;
- (2) The three units under the swimming pool (units 814, 816 and 818) were one-storey and hence not typical and were useful only for establishing the low range for the eighth floor, and
- (3) Unit 811 (Dr. Fung) and unit 816 (Sir Kenneth Fung) because they had the appearance of bearing a premium price.

The remaining group otherwise fell into a consistent pattern in the \$170 to \$180 per-square-foot range.

Mr. Lebow concluded that the plaintiff paid a price comparable to others on the eighth floor -- in the high range, but reasonable on a square-foot basis -- based on the assumption of 2,688 sq. ft.

Warren Stewart, an accredited appraiser of the Canadian Institute, estimated that he had appraised 85% of the Market Square units for mortgage purposes. On behalf of the plaintiff, he examined units 801 and 811 on March 24, 1987. Looking for comparable sales, he checked the 101 units in the development and concluded the most relevant and truly comparable sales were the eighth-floor units in Phase II. Unit 811 sold for a cash equivalent of \$192 per square foot. He concluded that this was the best comparable sale and then concluded the market value on May 15, 1983, for unit 801 was \$190 per square foot for 2,251.6 sq. ft. or \$428,000.

There was some preening between the two appraisers, all on decorative rather than substantial issues, about the use of present value discount tables by Lebow, an electronic method of calculating floor space which was available to Mr. Stewart and Mr. Stewart's qualifications as a quantity surveyor (neither of which was relevant), criticism of definitions used for "fair market value" and "most probable selling price", and the sources of information used.

Following a skilful cross-examination, Mr. Stewart was less self-assured on departure from the witness-box than on arrival.

His basic premise was that the most important variable is time because the market is dynamic and conditions change. He therefore excluded transactions beyond a certain interval before and after the relevant transaction. He would likely exclude purchases negotiated in June, 1982, because high interest rates rendered significant changes in the market from mid-1982 to the spring of 1983.

In cross-examination, it was drawn to his attention that his "most comparable sale", upon which he based his opinion, was sold in June, 1982. Had he realized this, he would have excluded that sale because of the time lapse.

Units 814 and 816 are identical in size and conformation. Unit 814 sold for \$127 per square foot and unit 816 (Sir Kenneth Fung) sold for \$172 per square foot. If unit 814 was correctly priced, then a substantial premium was paid for unit 816.

Unit 811 sold for \$192 per square foot compared to the eighth-floor average of \$162. It had the same general features as the typical units on the eighth floor, except that Mr. Milburn had the impression that it may have had a slightly larger deck. It had no features exclusively in common with unit 801. There was accordingly no demonstrated foundation on objective features for concluding that unit 811 was the truest comparable to unit 801.

I am unable to accept Mr. Stewart's reliance on the Fung purchases of unit 811 and 816. The axiom quoted by Mr. Stewart bears the ring of reliability "one sale does not make a market".

The unauthorized incorporation in Mr. Lebow's report of Mr. Stewart's earlier work without acknowledgment was explained as being available information and data from friends with no restrictions placed on its use. This incorporation was wrong. However, that lesson now learned by Mr. Lebow, I expect, is well learned. This is simply back-up material and not integral to the analysis and conclusions. The integrity of the substance of the report remains intact for whatever weight Mr. Lebow's opinion should attract. The integrity of the form of the report is diminished by the unauthorized incorporation.

I conclude firstly that Mr. Lebow's analysis of value from truly comparable sales in the context of time and character is preferable to that of Mr. Stewart. Secondly that Mr. Lebow's analysis is adequately explained to warrant its acceptance by the court. It is demonstrated to be reliable and to be a basis on which the court can proceed. I accept his opinion that fair market value was paid March 15, 1983 for 2,688 sq. ft.

This is consistent with the best available evidence of unit value on May 15, 1983, being the \$400,000 price or \$475,000 financed price for which the plaintiff was willing to purchase and the defendant was willing to sell while both thought the area was 2,688 sq. ft. There must be a very cogent reason to depart from this as fair market value. That price negotiated by two knowledgeable and willing participants to the deal is a long way from Mr. Stewart's price of \$190 per square foot for what was thought by both parties to be 2,688 sq. ft. Origin of the error

The information that unit 801 contained 2,688 sq. ft. of floor space originated with the architect's calculations and is traceable into the defendant's records.

Mr. Solomon knew that the architect used a method of sizing the units from the drawings because the unit did not exist to be measured. This had created erroneous results and had a continuing capacity to produce error. Revisions had been made in the Phase I building to accommodate those errors.

In Phase II the architect recalculated unit sizes because of known errors. The architect confirmed this risk of error and advised the defendant that, (1) the plans should be revised to show that unit sizes were approximate; (2) the purchaser should be referred to the sales personnel for accurate information.

By letter of June 11, 1981, with reference to Phase I, Mr. Solomon wrote to the architects:

At the end of last week, I received some shocking news from your office stating that the roof garden deck rooms on the eighth floors of both the Church and Market Street buildings were improperly measured.

As you know, we have all but completed sales of the first building, and, therefore, we have misrepresented to each Purchaser the actual square footage of their apartments on the Penthouse level.

I find it hard to believe that this incompetent work is being produced by your office. I realize that at this point you have tried to extend and adjust some of these rooms to alleviate this problem. However, in the event that there are any legal actions on behalf of the Purchasers, or any extras in construction costs due to this lack of coordination, I will hold your firm directly responsible.

I hope to hear from you in the near future regarding this matter.

Negligent misrepresentation

The plaintiff relies on negligent misrepresentation on the principle of *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1964] A.C. 465, which establishes, where there is a duty of care, negligent misrepresentation does constitute a cause of action. That principle was considered in *Kingu v. Walmar Ventures Ltd.* (1986), 10 B.C.L.R. (2d) 15 at p. 23, 38 C.C.L.T. 51 at p. 60, by McLachlin J.A.:

The question then is whether the requirements of tort liability on the basis of *Hedley Byrne* are satisfied in the case at bar. Those requirements may be summarized as follows:

- (1) A false statement negligently made;
- (2) A duty of care on the person making the statement to the recipient. A duty of care does not arise unless
 - (a) the person making the statement is possessed of special skill or knowledge on the matter in question, and
 - (b) the circumstances establish that a reasonable person making that statement would know that the recipient is relying upon his skill or judgment;
- (3) Reasonable reliance on the statement by its recipient;
- (4) Loss suffered as a consequence of the reliance.

I find as follows:

(1) The plaintiff by virtue of his background did recognize and accept that price per square foot is the common denominator for comparison of condominiums.

(2) The square-foot size of the unit was fundamental to this deal and of crucial importance to the plaintiff who was economizing on space and cost while still providing calculated minimum family requirements and concurrently protecting value of the unit for the two-year resale position.

(3) That information regarding unit size was put in the hands of the defendant's duly authorized sales representative for the purpose of making representations to prospective purchasers.

(4) In the sales process, the defendant's agent represented to the plaintiff that unit 801 had an area of 2,688 sq. ft.

(5) The representation was made by and on behalf of the defendant who was in a position to know.

(6) The representation was bound to be relied upon by the plaintiff, who to the defendant's knowledge, had every reason to inquire as to the number of square feet.

(7) The plaintiff was entitled to rely on the representation of 2,688 sq. ft.

(8) The plaintiff did accept and relied and acted upon that representation.

(9) The plaintiff was not at fault in failing to detect the disparity in his examination and inspection of the premises. The exclusive sales agent Hudson Milburn did not observe the discrepancy although he knew of the figure 2,688 sq. ft. when he was showing the apartment. He explained that he was focusing on positive features. (It is no defence that by reasonable diligence the plaintiff could have discovered the truth: see *Redgrave v. Hurd* (1881), 20 Ch.D. 1).

(10) That the plaintiff would not have purchased had he known the actual size of the unit.

(11) That representation was incorporated in the sales agreement by sch. B (2,699 sq. ft.).

(12) The defendant had foreknowledge of the seriousness of the misrepresentation as to size as evidenced by the redesigning of Church St. Phase I and by the content of the June 11, 1981 letter.

The defendant had foreknowledge that the information could be in error

The plaintiff trusted the defendant and his agent to use due care in making the representation. The agent making the representation knew, or should have known, that reliance was being placed upon his statement.

The plaintiff was induced to enter into the agreement by the negligent representation of the defendant's agent Milburn. It makes no difference whether the representation was made by the principal or the agent: *Halsbury's Laws of England*, 4th ed, vol. 42, p. 54, para. 59. Notwithstanding the architects' warning to the defendant of the potential risk of error, the plans were not revised and the purchasers were not informed. The sales personnel were not instructed and the size of the units was not confirmed by survey. The difficulty could have been avoided by simply advising the plaintiff that the figures are unreliable. The defendant failed to take adequate care in providing the information.

Merger

There is no general presumption in favour of merger. The court should determine whether the facts disclose a common intention to merge the warranty in the deed and absent proof of such intention there is no merger: *Fraser-Reid v. Droumsekas*, [1980] 1 S.C.R. 720, 103 D.L.R. (3d) 385, 9 R.P.R. 121; *Hashman v. Anjulin Farms Ltd.*, [1973] S.C.R. 268, 31 D.L.R. (3d) 490, [1973] 2 W.W.R. 361.

There is no evidence in this case to support a finding of a common intent that the fundamental representation regarding the floor areas was to merge on closing. Disclaimer

The representation in issue is a part of the written contract and so is not subject to the disclaimer dealing with matters other than expressed in the contract: *Hayward v. Mellick* (1984), 45 O.R. (2d) 110, 5 D.L.R. (4th) 740, 26 B.L.R. 156.

As well, disclaimer has no application because this particular disclaimer was framed to deal with workmanship.

Breach of collateral warranty

The plaintiff makes an alternate submission seeking damages for breach of collateral warranty. This is a separate cause of action framed in contractual warranty as opposed to the tort of negligent misrepresentation both of which give rise to the remedy of damages after completion: *Hayward v. Mellick*, supra; *Gilmour v. Trustee Co. of Winnipeg*, [1923] 4 D.L.R. 344, [1923] 3 W.W.R. 177, 33 Man. R. 351.

Because of my findings on the issue of negligent misrepresentation, it is not necessary to deal with collateral warranty. Had it been necessary, I would have held that this representation was an affirmation made by the vendor's agent in the course of the deal and was substantial to the transaction and was intended to be a warranty with the intent and expectation that it would be acted upon.

Damages

Ellen Davis, B.A., B.Ed., has been a sales agent for Royal LePage for four and a half years. In 1986 she was their top agent in Ontario and second in Canada. The 1987 figures were not released at the date of the trial but were said to be comparable. Her specialty is downtown core-area luxury condominiums.

In 1987 she sold 50 to 60 homes and condominiums including about 45 condominiums -- principally resales. She estimates that she sold five or ten units in the Market Square. In her experience a typical purchaser comparison shops and many subjective elements contribute to value including individual preference for area, height, view and amenities. The foremost consideration is size and the basis of comparison is price per square foot. In her opinion if fair market value is paid and the purchaser receives 16% less than represented, the value is 16% less. This opinion was not seriously challenged and there was no contrary evidence.

I accept the evidence of Ellen Davis supported by Mr. Lebow that, all other things being equal, a larger condominium commands a proportionately higher price. Therefore the plaintiff did sustain a direct financial loss by overpaying for the unit.

The area purchased is 2,251.6 sq. ft. and not 2,688 -- a reduction of 16.25%. A similar reduction in the \$475,000 purchase price produces an overpayment of \$77,187.

The financed price should be used because that was the actual experience of the two parties acting in the market-place as it then existed.

Damages for the misrepresented floor area are accordingly assessed at \$77,187.

Reference was made to loss of amenities incidental to the curtailed space while the plaintiff lived in the property but the evidence does not support damages for such loss.

The claim for breach of implied construction warranty by the developer

(a) Exterior deck

The exterior cedar deck was twice painted by the developer's forces. Each time the paint peeled. The condominium association stained the deck in the summer of 1986 and the plaintiff although not the owner was entitled to exclusive use and was obliged to and did pay for the repairs at a cost of \$858.20

(b) The electrical deficiencies

Norman Taylor, a qualified electrician since 1956 and an electrical foreman at Black and MacDonald, a large national company whose business included residential and condominium electrical and plumbing installations and repairs, gave evidence that nine outlets for the electrical switches and receptacles were loose and 12 others should be secured otherwise there would be a violation of the hydro code. The risk of electrical shock existed. He recommended that the work be done. The estimated cost was \$3,500.

(c) Plumbing deficiencies

Eric Greer, a qualified plumbing foreman with 26 years' experience in the Black and MacDonald service department testified that the temperature and pressure relief valve for the hot water tank was located on the cold water line and constituted a breach of the plumbing code. It should be relocated on the hot water discharge line at an estimated cost of \$510.

None of the four wash basins have individual shut-off valves under the basins for hot and cold water pipes. It would therefore be necessary to turn off the entire suite to change a washer. In Mr. Greer's opinion this was not consistent with good workmanship. The estimated cost of installing those valves is \$780.

In the second-floor shower stall there was no access to the pipes or mixing valve for hot and cold water. The estimated cost of this repair was \$790.

The master bath tub was backed into a concrete wall and stairwell with no access to pipes. Cost of this repair was estimated at \$2,000.

There was no cold water shut-off for the condominium unit. This constituted a plumbing code violation and repairs were estimated at \$1,095.

The hot and cold water pipes in the master bath "hammered" when the taps were opened. There was the risk of "blowing a pipe" with the attendant damage. Repairs by an air chamber or shock stops were estimated at \$925.

The agreement of purchase and sale incorporates the HUDAC warranty which appears in s. 13 of the Ontario New Home Warranties Plan Act, R.S.O. 1980, c. 350. However the common law warranty applies since it is not specifically excluded and the plaintiff is not restricted to recovery for only those items listed in the HUDAC notices. The plaintiff purchased before construction was completed and is entitled to the protection of the common law warranty that the premises would be fit for habitation and completed in a workmanlike manner: *Carleton Condominium Corp. No. 11 v. Shenkman Corp. Ltd.* (1985), 49 O.R. (2d) 194, 14 D.L.R. (4th) 571, 10 C.L.R. 1.

Regarding construction deficiencies, I accept and find:

(1) The defendant deliberately represented and advertised Market Square so as to convey to prospective purchasers that the participants in the venture were of such stature and reputation that the project was built embodying the highest standards in design and construction as high-quality, luxury units.

(2) There was an implied warranty that construction, including plumbing and electrical installations, would be in accordance with proper workmanship and the relevant building codes.

(3) The plumbing and electrical evidence was not seriously challenged and I find these deficiencies do exist and that they are not the result of normal wear and tear.

(4) They constituted either or both breaches of the plumbing and electrical codes or the standards of good workmanship required for a high-class luxury residential condominium.

(5) It is irrelevant that the repairs have not been made. The plaintiff is entitled to have them completed and is not obliged to await an electrical or plumbing crisis.

(6) There is no element of betterment involved in such repairs.

The question of quantum is not so clearly laid to rest by the evidence. There are no second estimates produced by the plaintiff to help establish a competitive price. The point was made in cross-examination that Black and MacDonald may not be the cheapest source of repairs, but no other estimates were offered by the defence. Dealing with the evidence before me I find that the estimates in evidence are adequate to support a damage finding. In result the warranty claims are found to be \$858.20 for the deck, \$3,500 for plumbing and \$6,100 for electrical installations totalling \$10,458.20.

The plaintiff shall have judgment against the defendant for damages of \$77,187 plus \$10,458.20, in total, \$87,645.20 together with his costs.

Interest

The sum of \$77,187 shall bear prejudgment interest at the interest rate of the second mortgage on the premises. Otherwise the plaintiff would wrongfully be entitled to interest from the defendant for moneys not properly owing by the defendant. The amount of the judgment and interest shall be set off against the second and third mortgages. In the event that a balance remains to be paid on the judgment after set-off, this balance shall bear prejudgment interest not at the mortgage rate but at the rate indicated by the Courts of Justice Act, 1984, S.O. 1984, c. 11.

The deck repairs of \$858.20 will bear prejudgment interest at the rate prescribed by the Courts of Justice Act, 1984, from the date of the plaintiff's payment of that invoice. The sums of \$3,500 and \$6,100 for repairs not yet made will not bear prejudgment interest.

Third party claim

This claim relates only to the floor area shortage and not to the construction deficiencies.

Pursuant to its written retainer of January 28, 1980, the third party prepared floor area calculations and drawings for sales presentation which included the improper figures 2,688 and 2,699 sq. ft. Those figures were relied upon by the defendant for presentation purposes. Had the third party accurately represented the area of unit 801, the defendant, then being aware of the correct area, would not have priced that unit at \$400,000, or having done so, would not have been able to sell it to purchasers (who were fully informed as to the correct area) for more than fair market value.

Therefore, the defendant has failed to establish any damages caused by its reliance on the measurements provided by the third party. No basis has been established for indemnity against that third party.

As well, the third party made the defendant fully aware of the problem and its cause. The third party made suggestions to the defendant which would have effectively prevented the difficulty which did arise. That warning was ignored; thereby the defendant caused its own misfortune.

The third party claim is dismissed with costs against the defendant. Judgment for plaintiff.

CBR# 202

Morris et al. v. Cam-Nest Developments Ltd.

64 O.R. (2d) 475 High Court of Justice MacFarland J. June 13, 1988.

ACTION for the return of deposits paid under two agreements of purchase and sale of land.

Lawrence Zaldin, for plaintiffs.

Theodore Kerzner, Q.C., for defendant. MACFARLAND J.:-- This is an action for the return of moneys paid pursuant to the provisions of two agreements of purchase and sale both dated March 20, 1981.

The plaintiffs are husband and wife; Gerald Morris is a solicitor and admitted that throughout he acted as his wife's solicitor and agent. Mrs. Morris testified that in relation to these events she essentially signed where her husband told her to and I accept her evidence.

On September 19, 1980, the plaintiffs both signed reservation agreements between themselves and the defendant. Each plaintiff paid the defendant the sum of \$3,500 in consideration for which they each essentially received the opportunity to enter an agreement of purchase and sale in respect of the two units in which they were interested before anyone else did.

Each plaintiff executed an agreement of purchase and sale in respect of a condominium unit in a building located in north Toronto and known as Manhattan Place. The agreement executed by Gerald Morris (hereafter called the "Gerald Agreement") related to a "Rockefeller" model suite located on the eighteenth level of the building while the agreement executed by Gloria Morris (hereafter called the "Gloria Agreement") related to a "Plaza" model suite located on the nineteenth level of the building.

According to para. four of each of the agreements, the Gerald Agreement was to be completed "... on July 26, 1982, or any extended date as herein provided" and the Gloria Agreement was to be completed "... on July 30, 1982, or any extended date as herein provided".

With the agreement there was required to be paid by each plaintiff the sum of \$11,000 "by certified cheque to the vendor as a deposit ...". Credit was given for the \$3,500 earlier paid by each plaintiff with the reservation agreement, leaving a balance of \$7,500 which each plaintiff paid to the defendant on the signing of the agreement. Each plaintiff also paid as required by the agreement, an additional \$9,000 by April 15, 1981 -- again according to the terms of the agreements "... as a further deposit ...".

By letters dated April 6, 1982, the defendant wrote to each of the plaintiffs and advised them that the unusually severe winter which had just been experienced had caused a considerable delay in construction.

The plaintiffs were therefore notified that the closing dates referred to in para. 4 of the agreements were extended -- for the time being, respectively, for the Gerald Agreement to November 24, 1982, and for the Gloria Agreement to December 1, 1982.

It is important to note that in both letters the closing date was stated to be extended "for the time being" to the new dates.

It is also important to note that the defendant also in those letters, alerted the plaintiffs to the possibility of further delays by reason of "possible strikes amongst various sub- trades".

The plaintiffs made no response of any kind to the letters of April 6, 1982.

At this point it is pertinent to note that the luxury condominium market in Toronto went into very serious decline in the summer of 1981 when interest rates, it will be remembered, approached 22%. This market did not recover according to Mr. Feldman's evidence, which I accept, until 1984.

The defence position is that the acquisition of these two condominium units by the plaintiffs was "pure speculation from beginning to end" if I recall Mr. Kerzner's phraseology accurately. The position being that after the market's substantial decline in the summer of 1981 and following, the plaintiffs were looking for any excuse to get out of their agreements to acquire these units.

While Mr. Morris stated that speculation was only one of three purposes for which he, and when I say "he", I mean he on behalf of himself and on behalf of his wife acquired the units, I am satisfied on the evidence before me that it was the most probable reason he acquired these units and I so find.

Having said that, however, I am of the same view as Anderson J. in *Benedek v. Dorian Homes*, released November 3, 1986, unreported [summarized 3 A.C.W.S. (3d) 406], that it is of no relevance to the issues before me. If, on the interpretation of the agreement the plaintiffs are entitled to treat the contract as at an end, then what their intention may or may not have been in acquiring the units is of no concern.

The originally specified closing dates of July 26, 1982 and July 30, 1982, passed without either party doing anything.

By letter dated October 19, 1982, the plaintiff wrote to the solicitors for the defendant and expressed his concern about the market conditions over the past year and one-half and pointed out that to close the transaction would result in a definite loss. The letter ended with the suggestion that the pricing of these units -- that is the units the plaintiffs had agreed to acquire -- be reviewed with a view to adjusting same to the current conditions -- a request to the developer to lower the price earlier accepted by the plaintiffs.

Paul Merrick, to whom the letter of October 19, 1982, was directed, testified that he recalled a discussion with Mr. Morris after he had received the letter -- when he commented: "How can you discuss price reduction when you're dealing with a contract?"

In any event, by letter dated November 11, 1982, the solicitors for the defendant wrote to the plaintiff Gerald Morris in respect of the Gerald Agreement which was scheduled for completion November 24, 1982. They advised the plaintiff that the condominium registration would not be completed prior to the date scheduled for completion and that accordingly the plaintiff would be required to occupy the unit in accordance with the provisions of para. 19 of the agreement of purchase and sale.

By letter dated November 18, 1982, the plaintiff Gerald Morris responded to the defendant's letter of November 11, 1982. He advised the solicitors for the defendant that because the condominium registration would not be completed before the extended closing date of November 24, 1982, the vendors would therefore be unable to complete the transaction on that date and the agreement of purchase and sale was null and void as per the provisions of para. 15 of the agreement.

A letter dated November 17, 1982, was sent by the solicitors for the defendant to the plaintiff Gerald Morris in respect of the Gloria Agreement stating precisely what had been stated in their letter of November 11, 1982, relating to the Gerald Agreement -- that is that the condominium registration would not be completed prior to the date scheduled for completion, in this case December 1, 1982, and that accordingly the plaintiff Gloria would be required to occupy the unit in accordance with the provisions of para. 19 of the agreement of purchase and sale.

This letter was responded to by Gerald Morris, on behalf of his wife, by letter dated November 22, 1982, to the solicitor for the defendant taking the same position he had taken in his November 18, 1982 letter relating to the Gerald Agreement, that is, that if the condominium registration was not completed prior to the extended date for closing, the vendor is unable then to finally complete the transaction by the extended closing date and, accordingly, according to para. 15 of the agreement of purchase and sale it is null and void.

By letter dated November 23, 1982, to the plaintiff Gloria Morris, the solicitors for the defendant wrote to say that despite their letter of November 17, 1982, they were further extending the closing date -- in respect of the Gloria Agreement from December 1, 1982 to December 6, 1982.

The next event which occurred was the tender made by Hartley Levine, the partner of the plaintiff Gerald Morris, on the solicitors for the defendant on November 24, 1982, at about 1:00 p.m. Mr. Levine was not called to give evidence and I refused to let Gerald Morris testify as to either what Hartley Levine had told him about those events or what Hartley Levine meant by written notes he had made at the time of tender which are ex. 14.

The notes were admitted and I am satisfied on the evidence that they meet the definition of a business record as that term is defined in the Evidence Act, R.S.O. 1980, c. 145.

There were also two letters written November 24, 1982, from the solicitors for the defendant to the plaintiff Gerald Morris. Copies of both letters were marked as ex. 21 and while it is clear from the content that the longer letter was prepared after the Levine tender, it is not clear on the evidence whether the second and shorter letter came before or after the Levine tender. Fortunately, in my view, nothing turns on it. Both letters state that the November 24, 1982 date was to be an occupancy closing and the plaintiff not having completed same the defendant was treating the plaintiffs as being in default under the Gerald Agreement.

December 1, 1982, passed and neither party did anything on that date in relation to the Gloria Agreement.

On December 6, 1982, however, the plaintiff Gerald Morris attended on the solicitor for the defendant and tendered a certified cheque payable to the vendor for the full balance of the purchase price owing in respect of the Gloria Agreement and requested a transfer of title. The condominium registration had not been completed and the defendant was unable to provide the requested transfer.

The defendant's position is that December 6, 1982, was to be an occupancy closing only pursuant to para. 19 of the agreement of purchase and sale and the plaintiff, not having completed same, is in default under the Gloria Agreement.

The plaintiff, of course, takes the position that the defendant being unable to provide a transfer of title on December 6, 1982, the agreement of purchase and sale is null and void as provided in para. 15 of the agreement of purchase and sale.

The condominium was registered December 30, 1982, and the defendant set the date for closing of April 1, 1983. That date passed and neither party did anything.

This action was commenced by writ of summons issued December 7, 1982.

Additional facts pertinent to the issues are that by an agreement dated November 25, 1982, ex. 37, between the Beecroft Partnership and the defendant, the defendant sold to the Beecroft Partnership a number of units in Manhattan Place including the two the plaintiffs had contracted to purchase.

By separate agreement of the same date, Beecroft gave an option to the defendant to repurchase a number of suites, including the two before the court, at any time prior to June 30, 1983.

David Feldman testified that the units sold to the Beecroft partnership consisted of units not yet sold, units where default had already occurred and units where default was anticipated. The defendant was concerned because of the state of the market at the time and decided to sell to the Beecroft partnership to cut their losses if they could. Because this was a MURB deal the transaction had to close by year-end. The option agreement, ex. 39, was signed to enable the defendant, in the event of settlement of any of those units where default had occurred, to be in the position to provide title if, as and when settlement occurred. In the interim the units were murbed to avoid further losses.

I accept Mr. Feldman's evidence and find that both the MURB agreement and the option agreement, exs. 37 and 39, were signed on November 25, 1982, and were signed for the purposes stated by Mr. Feldman.

The main issue for determination is the interpretation of the agreements of purchase and sale, exs. 1 and 2, and in particular paras. 4, 15 and 19 thereof.

The terms of the two agreements are identical except that the originally specified closing date in the Gerald Agreement was July 26, 1982, and in the Gloria Agreement was July 30, 1982.

The paragraphs read as follows:

Gerald Agreement

4. This agreement shall be completed on July 26, 1982, or any extended date as herein provided.

Gloria Agreement

4. This agreement shall be completed on July 30, 1982, or any extended date as herein provided.

IN BOTH

15. If the completion of the Unit or the common elements is delayed by reason of strikes, lock-outs, fire, lightning, tempest, riot, war and unusual delay by common carriers or unavoidable casualties, or by any other cause of any kind whatsoever beyond the control of the Vendor, or if the registration of the Declaration, Description and By-Laws or the Mortgage to be assumed by the Purchaser is delayed by any cause whatsoever beyond the control of the Vendor, the Vendor shall be permitted a reasonable extension or extensions of time for completion or registration as designated by the Vendor, and the date of closing shall be extended accordingly. If the Vendor is unable to complete the Unit or common elements or the registration aforesaid and close this transaction within such extended time for closing, this Agreement shall be deemed null and void and all monies paid hereunder by the Purchaser shall be returned to the Purchaser with interest as required by the Act and the Vendor shall not be liable for any costs or damages.

19. If the Unit is completed as herein provided prior to registration of the Condominium the Purchaser agrees to occupy the Unit on the date fixed for closing set out in paragraph 4 hereof or any extended date of closing as herein provided (the "Occupancy Date"), under the following terms and conditions:

(a) the date fixed for closing set out in paragraph 4 hereof shall be extended in accordance with the provisions set out in paragraph 19(d) hereof:

(d) Upon registration of the Condominium, the Purchaser agrees to complete this Agreement on the first day of the month following the month in which the Purchaser or the Purchaser's solicitor has been given written notice by the Vendor or its solicitors of such registration for completion purposes, provided such notice is given not less than ten (10) days preceding such first day of the month. If the notice aforesaid is not given more than ten (10) days prior to the first day of such month, the transaction shall be completed on the first day of the second month following the date of giving such notice. If the first of the month shall fall on a non-judicial date, then the date of closing shall be extended to the next judicial date. Any Occupancy Fee payable shall be adjusted proportionately.

Issues

I accept Mr. Kerzner's submission that the first issue to be determined is what the closing date was.

The vendor purported to extend the originally scheduled closing dates of July 26, 1982 and July 30, 1982, to November 24, 1982 and December 1, 1982, respectively. This by letters dated April 6, 1982 -- which letters also forewarned of further delays which may arise in future. In respect of the Gloria Agreement, the vendor purported to extend on a second occasion by letter dated November 23, 1982, from December 1, 1982 to December 6, 1982. The extensions were stated to be made pursuant to para. 15 of the agreement of purchase and sale.

The plaintiff takes the position that the onus is on the defendant to show and to satisfy the court that it was entitled to exercise its rights pursuant to para. 15 to extend the date for closing. The plaintiff cites no authority for this proposition.

The defendant's position in this regard is that the onus is on the plaintiff -- he who alleges must prove. Mr. Kerzner in argument cited Sopinka and Lederman, *The Law of Evidence in Civil Cases* (1974), at p. 395 which states the two basic premises to be:

(1) That the onus is always on a person who asserts a proposition of fact which is not self evident; and (2) That where the subject matter of the allegation lies particularly within the knowledge of one of the parties, that party must prove it, whether it be of an affirmative or negative character.

The authority cited by the authors for the second premise is the Ontario Court of Appeal judgment in *Pleet v. Canadian Northern Quebec R. Co.* (1921), 50 O.L.R. 223, 64 D.L.R. 316. Reading from the judgment of Mr. Justice Ferguson for the court, at p. 227 O.L.R., p. 319 D.L.R., he said:

No doubt the general rule is that he who asserts must prove, and that the onus is generally upon the plaintiff, but there are two well-known exceptions:--

(1) That where the subject-matter of the allegation lies particularly within the knowledge of one of the parties, that party must prove it, whether it be of an affirmative or negative character: *Mahony v. Waterford Limerick and Western R.W. Co.*, [1900] 2 I.R. 273, at p. 280; *Kent v. Midland R.W. Co.* (1874), L.R. 10 Q.B. 1.

The judgment of Chief Baron Palles in the *Mahony* case, *supra*, at p. 280 states:

Although it is the general rule of law that it lies upon the plaintiff to prove affirmatively all the facts entitling him to relief, there is a well known exception to such rule in reference to matters which are peculiarly within the knowledge of the defendant.

The word used in *Sopinka* and *Lederman* is "particularly" while the word used in the authority upon which the learned authors rely is "peculiarly".

And I agree with Mr. Kerzner that in so far as the weather is concerned, that is not something which might be classified as "peculiarly" within the knowledge of the defendant.

I do not agree with him, however, that neither would information about strikes and the impact both factors, weather and strikes, would have on construction, also be matters not peculiarly within the knowledge of the defendant. In my view, they were and I so find.

The only evidence before the court relating to the winter weather of 1981-1982 was that it was a much colder than normal winter and I so find. The only evidence relating to the impact such cold weather had on construction came from the witness Stock. He testified as to the ripple effect the cold weather had on all trades and how a delay of 40-odd days in the pouring of concrete causes longer over-all delays when attempting to re-coordinate other trades. There was no evidence to the contrary and I accept Mr. Stock's evidence on these matters.

I find that the delays resulted from the unusually cold weather primarily and any delays after April 6, 1982, were contributed to by the three strikes which occurred at that time -- all causes in my view entirely beyond the reasonable control of the vendor.

In my view, para. 15 is inaccurately described as being merely a force majeure clause as the plaintiffs would have it described. Mr. Zaldin argues that the vendor is only entitled to rely on "any other cause" as provided in para. 15 so long as it is catastrophic, out of the ordinary or unusual and falling within the same genus as the events specifically set out, being -- strikes, lock-outs, fire, lightning, tempest, riot, war and unusual delay by common carriers or unavoidable casualties. He relies, of course, on the ejusdem generis rule and relies on the decision of the Supreme Court of Canada in *Atlantic Paper Stock Ltd. v. St. Anne-Nackawic Pulp & Paper Co. Ltd.*, [1976] 1 S.C.R. 580, 56 D.L.R. (3d) 409, 10 N.B.R. (2d) 513, in support of his argument.

The clause considered by the Supreme Court of Canada in the *Atlantic Paper Stock* case, supra, must be looked at in full and it is quoted at pp. 581-2 S.C.R., p. 410 D.L.R., as follows:

"St. Anne warrants and represents that its requirements under this contract shall be approximately 15,000 tons a year, and further warrants that in any one year its requirements for Secondary Fibre shall not be less than 10,000 tons, unless as a result of an act of God, the Queen's or public enemies, war, the authority of the law, labour unrest or strikes, the destruction of or damages to production facilities, or the nonavailability of markets for pulp or corrugating medium."

The issue was stated by Mr. Justice Dickson, as he then was, at p. 582 S.C.R., p. 410 D.L.R.: ... the sole question is whether non-availability of markets for pulp or corrugated medium discharged St. Anne from its obligations under the contract.

In considering the clause set out above Mr. Justice Dickson stated as follows at p. 583 S.C.R., pp. 411-12 D.L.R.:

An act of God clause or force majeure clause, and it is within such a clause that the words "non-availability of markets" are found, generally operates to discharge a contracting party when a supervening, sometimes supernatural, event, beyond control of either party, makes performance impossible. The common thread is that of the unexpected, something beyond reasonable human foresight and skill. If markets were unavailable to St. Anne, did they become so because of something unexpected happening after April 10, 1970? Was the change so radical as to strike at the root of the contract? Could the company, through the exercise of reasonable skill, have found markets in which to trade? Clause 2(a) contemplates the following frustrating events: an act of God, the Queen's or public enemies, war, the authority of the law, labour unrest or strikes, the destruction of or damage to production facilities. Reading the clause ejusdem generis, it seems to me that "non-availability of markets" as a discharging condition must be limited to an event over which the respondent exercises no control.

In my view, the clause considered by the Supreme Court of Canada in the *Atlantic Paper Stock* case, supra, was significantly different from para. 15 in exs. 1 and 2. The important words found in para. 15 that were lacking in the *Atlantic Paper Stock* case, supra, are "of any kind whatsoever beyond the control of the Vendor". In my respectful opinion the inclusion of these words excepts and excludes the doctrine or rule of ejusdem generis and in this regard reference might be had to the decision of the House of Lords in *Larsen v. Sylvester & Co.*, [1908] A.C. 295. The clause there considered was as follows [p. 295]:

"The parties hereto mutually exempt each other from all liability arising from frosts floods strikes lock-outs of workmen disputes between masters and men and any other unavoidable accidents or hindrances of what kind soever beyond their control either preventing or delaying the working loading or shipping of the said cargo occurring on or after the date of this charter until the actual completion of the loading."

Reading from the judgment of the Lord Chancellor, Lord Loreburn at p. 296, he said:

The language used is "any other unavoidable accidents or hindrances of what kind soever beyond their control." Those words follow certain particular specified hindrances which it is impossible to put into one and the same genus. In *Earl of Jersey v. Neath Poor Law Union* (1889), 22 Q.B.D. 555, 566, Fry L.J. referred to words of a similar kind, and indicated that you have to regard the intention of the parties as expressed in their language, and that words such as these, "hindrances of what kind soever," are often intended to mean, as I am sure they are in this case intended to mean, exactly what they say. It is impossible to lay down any exhaustive rules for the application of the doctrine of ejusdem generis, but I agree with Fry L.J. that there may be greater danger in loosely applying it. It may result, as he says, in "giving not the true effect to the contracts of parties but a narrower effect than they were intended to have."

The vendor was therefore, in my view, entitled to invoke the provisions of para. 15 of the agreement, as was done, to extend the date for closing set out in para. 4.

The suggestion that the vendor is entitled to only one extension of either the time for completion or for registration is to ignore the plain language of the clause. It clearly states, "the vendor shall be permitted a reasonable extension or extensions of time for completion or registration ...".

Admittedly the language of the agreements, exs. 1 and 2, is complex. The documents deal with a complex legal relationship and one cannot expect them to read like a primary school reader -- their very nature requires a degree of complexity.

On the contract itself, therefore, I find that the extended closing dates were November 24, 1982, for the Gerald Agreement and December 6, 1982, for the Gloria Agreement. These were the only dates, it will be remembered, upon which the plaintiff purported to tender. There was no attempt to tender at any other time by the plaintiffs.

While the language of the agreements requires careful reading, it is not necessarily ambiguous or confusing simply because it is complex.

One must look to the whole contract and give effect to it, if at all possible. A most helpful passage is found in Professor Fridman's book, *The Law of Contract in Canada*, 2nd ed. (1986), at p. 444:

Hence, the contract should be construed as a whole, giving effect to everything in it if at all possible. No word should be superfluous (unless of course, as happened in one instance, it is truly meaningless and can be ignored). In *Cooke (Barchak) & Revak v. Anderson*, one clause in a contract fixed the price of land at \$5,000. A later clause referred to payment not in cash but by the provision of a certain quantity of beets. It was held that these clauses must be read together so as to create harmony, and not dissension among the different terms of the contract. Thus, the later clause to the necessary extent modified or limited the earlier one. In such cases of repugnancy within the contract, therefore, as was stated in *Forbes v. Git*, if the dissonant clauses can be read harmoniously this must be done. If not, then the repugnant part must be rejected in order to give effect to the general intent of the parties, as evidenced by the contract as a whole, rather than any particular, and jarring language. If there is conflict between two parts of a document, the dominating purpose must prevail, as indicating the real intentions of the parties.

It seems that when paras. 15 and 19 are read together the meaning of the agreement is quite clear.

If there is delay in the completion of the units and/or common elements or in the registration for a cause beyond the vendor's control -- then the vendor is to be permitted a reasonable extension or extensions of time for completion or registration and the date of closing shall be extended accordingly.

If the unit is completed prior to registration then the vendor can require occupancy of the purchaser in accordance with para. 19.

In the event the unit and/or common elements are not complete or the registration is not complete by the extended date of closing, the vendor in that instance has two options. He can either further extend the date for closing or if he does not further extend the date for closing then in that event, the agreement shall be deemed null and void in accordance with the last sentence of para. 15 of the agreement.

Here, in the case of the Gerald Agreement, the vendor extended the date for closing from July 26 to November 24, 1982. On that latter date the unit was complete but the registration was not and accordingly the vendor invoked the provisions of para. 19 of the agreement as was his right. The purchaser refused to occupy the unit on that basis and insisted on a final closing on that extended date. In my view the purchaser was not entitled to a final closing at that time and was thereby in default under the terms of the agreement.

In respect of the Gloria Agreement, the same thing occurred with the exception that the vendor further extended the date as I find was his right.

Before leaving this issue, I should comment on the argument that no evidence was led relating to the second delay in respect of the Gloria Agreement from December 1, 1982 to December 6, 1982. To me it seems obvious, with the evidence from Mr. Stock, that units were completed from the ground up -- that the unit on the eighteenth level would be ready before the unit on the nineteenth level. The closing for the Gerald unit on the eighteenth level was November 24, 1982. It is only reasonable therefore that the closing for the Gloria unit would be some time later. There was no evidence led of new and different causes for this last six-day delay -- obviously the reasons were the same and I infer that the further delay was required by reason of the unusually cold winter and the strikes -- all beyond the reasonable control of the vendor.

Counsel for the defendant also argued that the closing dates were November 24, 1982 and December 6, 1982, by operation of law as stated by our Court of Appeal in *King v. Urban & Country Transport Ltd.* (1973), 1 O.R. (2d) 449, 40 D.L.R. (3d) 641. Reading from the headnote in that case the editor states:

Where a contract for the sale of land contains a stipulation that "time is of the essence", and where neither party is prepared to close the transaction on the stated day, the contract continues to exist after that day.

As Mr. Justice Arnup stated at p. 454 O.R., p. 646 D.L.R.:

If I am right in my assessment of the facts, then neither party was ready to close on the contractual date for closing. It has been uniformly held in this Province that that does not put an end to the contract.

And at p. 456 O.R., p. 648 D.L.R.:

Normally, in this situation, when both parties let the time go by, and one of the parties wishes to reinstate time as of the essence, it is necessary to serve a notice upon the other party, fixing a new date for closing, which must be reasonable and stating that time is to be of the essence with respect to the new date.

In the case at bar, neither the plaintiffs nor the defendant were ready to close on the originally stipulated dates, July 26, 1982 and July 30, 1982. The defendant had sent letters April 6, 1982, extending those dates to November 24, 1982 and December 1, 1982, respectively. July 26 and 30, 1982, passed with neither party doing anything. The contract, however, does not end there -- it continues, as Mr. Justice Arnup said in *King v. Urban Transport*, supra, and either party may send a notice setting a new date for closing. This the solicitors for the defendant did in April and again by letters dated November 11, 1982, in respect of the Gerald Agreement and dated November 17 and 23, 1982, in respect of the Gloria Agreement.

The fact that the date for closing of the Gloria Agreement was changed from December 1, 1982 to December 6, 1982, makes no difference in my view. The fact that December 1, 1982, passed with neither party doing anything is significant and indicates both viewed December 6, 1982, as the new closing date. The fact that the plaintiff Gloria Morris purported to tender on that date confirms this conclusion in my view. In this regard I rely on the decision of the Supreme Court of Canada in *Nepean Carleton Developments Ltd. v. Hope*, [1978] 1 S.C.R. 427, 71 D.L.R. (3d) 609, 13 N.R. 7, which approved the principle enunciated in *King v. Urban Transport*, supra.

The judgment of the court was delivered by Chief Justice Laskin who recited the following facts at pp. 433-4 S.C.R., p. 613 D.L.R.:

Prior to the date of closing, which was October 1, 1969, the purchaser sought an extension of time and agreement was reached to move the closing forward to October 3, 1969. Nothing was said as to time being of the essence. October 3rd came and went, with

no move being made either by the purchaser to close or by the vendor to give notice of intended termination. The solicitors for the respective parties continued to act on the footing that the agreement was still alive. The vendor's solicitor stated in a letter of October 8, 1969, to the purchaser's solicitor that he was ready for closing but no date was fixed. Copies of the statutory declarations of possession were enclosed with this letter.

And at pp. 437-8 S.C.R., pp. 615-16 D.L.R.:

... the main contention of the vendors ... was that the contract was properly terminated by the vendors by the notice of repudiation in their solicitor's letter of October 14th. The contention was founded on the fact that the purchaser had to that date done nothing to go forward with the contract. In my opinion, the point is not well taken in law. There were no requirements that the purchaser had to meet in relation to the Scott Hope agreement as a prerequisite that would be fatal if not met before the date of closing. Assuming that time continued to be of the essence in equity (although not so stated) when the date of closing was postponed to October 3, 1969, there was clearly a waiver of the essentiality of time when October 3rd passed without any steps towards completion being taken by either the purchaser or the vendors and when, in his letter of October 8, 1969, the vendors' solicitor stated that his clients were ready to close but fixed no date, and when negotiations continued thereafter directed to completion.

In the result, if there was to be another fixed date for completion, it was incumbent on either the vendors or the purchaser to give notice fixing a reasonable time. A notice, as in the vendors' letter of October 14th, calling off the contract without giving the purchaser any time to perform, could not put the purchaser in default. As a consequence of that letter, the vendors became the defaulting parties, and it was open to the purchaser to elect to insist on performance by the vendors, and that is what they did.

In respect of both agreements the solicitors for the defendant did respectively, by letters dated November 11, 1982 and November 17, 1982, write to advise the plaintiffs that the closings would be occupancy closings pursuant to para. 19 of the agreement.

The plaintiffs responded to the defendant's letters by letters respectively dated November 18, 1982 and November 22, 1982, both of which advised that he -- the plaintiff Gerald Morris -- was of the opinion:

... that if the condominium registration is not completed and you are unable to complete the transaction on November 24, 1982, then the Agreement of Purchase and Sale is null and void (see paragraph 15).

The evidence, to my mind, in this case is overwhelming that if the plaintiff did not know there would in all likelihood have been a two-stage closing, namely an occupancy closing followed by a title closing, he ought to have.

In coming to this conclusion I rely on the following evidence:

1. Gerald Morris had himself acted for a client purchasing a condominium unit where there was such a two-stage closing.
2. The agreements of purchase and sale themselves specifically refer to this type of two-stage closing -- see paras. 1(g), 15, 19.
3. The Condominium Act, R.S.O. 1980, c. 84, specifically contemplates this type of closing.
4. The HUDAC New Home Warranty, ex. 12, which he signed March 5, 1981, speaks in terms of "Estimated date of possession" and "Estimated date of transfer of title" as being two separate dates.
5. His own handwritten notes which are ex. 15, refer to "interim closing" and "occupancy file" in respect of both units.
6. His own handwritten notes which are ex. 16, can only be interpreted logically by the underlying assumption of a two-stage closing.
7. He reluctantly on cross-examination conceded that he knew that if a unit were completed before registration there would be an interim and a final closing; he knew this to be a common practice in condominium conveyancing.

In my view, the plaintiff Gerald Morris knew before he and his wife signed the agreements of purchase and sale on March 20, 1981, that there was very likely to be a two-stage closing -- an occupancy closing when the suite was finished, followed by a final closing after registration had taken place. His knowledge is that of his wife as well in these circumstances. Both, I find, signed the agreements of purchase and sale, exs. 1 and 2, knowing that fact and they raised no objection until Mr. Morris' letters of November 18 and 22, 1982, to the solicitors for the defendant. It was in those letters for the first time that Mr. Morris raised objection to the fact that there would not be a final closing on the scheduled closing dates (then) of November 24 and December 1, 1982. It should be noted even then he made no objection to the fact that the closing dates had been extended. I have no difficulty in finding that on the whole of the evidence he clearly acquiesced to the extensions when made.

At the very least, at this point, Mr. Morris owed the defendant a reasonable opportunity to attempt to comply with his objection on the basis of the principles enunciated in Nepean Carleton, supra. He did not give that opportunity and in my view was thereby in breach in respect of both agreements.

In my view the plaintiffs were not entitled to insist upon a title closing as distinct from an occupancy closing either under the terms of the agreements of purchase and sale or as a matter of law.

The last issue remaining is whether the plaintiffs have lost their deposits and, if so, whether in that event there are here circumstances in which the court should exercise its equitable jurisdiction and relieve against forfeiture.

There can in my view be little doubt that the \$20,000 paid in respect of each agreement was a deposit. The agreements themselves refer to these moneys as "a deposit" and "a further deposit". The statement of claim refers to these moneys as "a deposit" in paras. 4 and 6. The HUDAC certificate, ex. 12, refers to the moneys paid as "deposit" and in fact is called a "deposit receipt".

On the findings I have made, these agreements were not completed by reason of the purchasers default and in such circumstances a true deposit is lost. As Lord Justice Cotton said [quoting Lord St. Leonards] in *Howe v. Smith* (1884), 27 Ch.D. 89 at p. 94:

"Where a purchaser is in default and the seller has not parted with the subject of the contract, it is clear that the purchaser could not recover the deposit; for he cannot, by his own default, acquire a right to rescind the contract." Then he goes on and states his opinion that the mere re-sale of the estate after the purchaser's default cannot in any way affect the right of the vendor to retain the deposit.

Clearly the deposit in respect of the Gerald Agreement is lost. There remains a question in respect of the Gloria Agreement for that unit was one of the units which was the subject of exs. 37 and 39 relating to the MURB deal as it was called.

The Gloria deal was scheduled to close December 6, 1982, but by agreement made November 25, 1982, this unit was sold to the Beecroft partnership by the defendant with a view to mitigating its damages by reason of the almost certain default it expected in relation to the Gloria Agreement.

The fact that the defendant was technically withholding title to the Gloria unit on December 6, 1982, is no comfort to the plaintiff. Exhibit 39 which is the option agreement clearly gave the defendant the right to acquire this unit back and it therefore had I find, the ability to give title. In this regard I rely on the decision of the Court of Appeal in Orchard v. Fournie (1982), 38 O.R. (2d) 636 at p. 640, 139 D.L.R. (3d) 144 at p. 148, 25 R.P.R. 154 at p. 160, from the judgment of Mr. Justice Weatherston: "To be entitled to a decree of specific performance, a vendor need only show that he has the right and is in a position to call in the title, if outstanding."

There is no evidence of any reason why relief from forfeiture should be given in the circumstances of this case and accordingly the action is dismissed.

As counsel have requested, they may arrange a time to make submissions on the issue of costs.

Action dismissed.

CBR# 247

Re Assaly and Minister of Revenue

56 O.R. (2d) 30 Also reported at 30 D.L.R. (4th) 291

High Court of Justice McKinlay J. August 25, 1986

* An appeal from the following judgment of McKinlay J. to the Ontario Court of Appeal (Zuber, Goodman and Krever JJ.A.) was dismissed on March 28, 1988. See 63 O.R. (2d) 540n.

APPLICATION to determine a question of law in respect of liability for land transfer tax.

Christopher A. Moore, for appellant. G. W. Sholtack, for respondent.

MCKINLAY J.:-- The appellant, a developer, moves under rule 21.01(2) of the Rules of Civil Procedure for the determination of a question of law, which determination will dispose of the action between the parties. At issue is the amount of consideration for land on which the appellant must pay land transfer tax pursuant to the provisions of the Land Transfer Tax Act, R.S.O. 1980, c. 231, as amended. The facts are that on November 9, 1981, the appellant, Thomas C. Assaly (the "developer" or "purchaser"), agreed to purchase from Thomas C. Assaly Corporation Ltd. (the "builder" or "vendor") land described in the agreement of purchase and sale which, at that time, was vacant, undeveloped, or "raw" land.

The closing date of the purchase and sale transaction was the same as the date of execution of the agreement -- November 9, 1981. The agreement of purchase and sale was conditional upon the vendor and purchaser entering into a building contract under which the vendor was to construct condominium units on the land. That condition was satisfied on November 9, 1981.

Paragraph 1.01(i) of the agreement reads as follows:

"Purchase Price" for the purpose of this Agreement shall mean the price paid by the Purchaser to the Vendor to acquire a beneficial interest in the land and shall not include any monies paid by or on behalf of the Purchaser under the provisions of the Building Contract.

In order to facilitate the development and the financing, the vendor was to hold the land as a trustee for the purchaser/ developer from November 9, 1981. The purchase price of the land -- \$185,000 -- was satisfied on the same date in accordance with the agreement of purchase and sale.

The consideration for the building and development on the land was agreed to separately in the building contract.

The dispute between the developer and the Ministry of Revenue for Ontario arises from the fact that no transfer was registered on title until April 11, 1983, by which time the buildings on the land had been completed. The land transfer tax affidavit executed by the agent of the purchaser showed consideration for land and buildings amounting to a total of \$2,142,700, and land transfer tax was paid by the purchaser on that amount. The developer says that was an error, and that land transfer tax should have been paid only on the land cost -- \$185,000.

It is argued by the ministry that the appellant developer himself has acknowledged by the land transfer tax affidavit that the consideration for the conveyance to him was \$2,142,700, and that he cannot now say that his agent's statements in the affidavit were not true. I do not accept that position. The appeal procedure provided for under the Act was properly undertaken. That is not disputed. If a taxpayer considers that he has made an error in the materials presented for the purpose of determining tax liability, there is no reason why he cannot utilize the procedure provided by statute to rectify that error. There can be no suggestion in this case that false or misleading material was filed for the purpose of reducing tax liability.

The taxing provision in issue is s. 2(1)(a) of the Land Transfer Tax Act:

2(1) Every person who tenders for registration in Ontario,

(a) a conveyance whereby any land is conveyed to or in trust for any transferee who is not a non-resident person ... shall, before the conveyance is registered, pay a tax computed at the rate of two-fifths of 1 per cent of the value of the consideration for the conveyance up to and including \$45,000, and at the rate of four-fifths of 1 per cent upon the remainder of the value of the consideration.

The provision applicable to this case defining "value of the consideration" for determining the tax payable pursuant to s. 2(1), is s. 1(1)(p)(i), which reads:

(p) "value of the consideration" includes,

(i) the gross sale price or the amount expressed in money of any consideration given or to be given for the conveyance by or on behalf of the transferee and the value expressed in money of any liability assumed or undertaken by or on behalf of the transferee as part of the arrangement relating to the conveyance and the value expressed in money of any benefit of whatsoever kind conferred directly or indirectly by the transferee on any person as part of the arrangement relating to the conveyance ...

It is indisputable that land transfer tax is only levied at the time a conveyance is tendered for registration. In this case, that occurred on April 11, 1983, and the document tendered for registration was a transfer purporting to convey to the developer "units 1 to 37, Level 1, in the Register for Carleton Condominium Corporation Plan No. 215, and its appurtenant common interests", for a consideration stated in the transfer to be \$2,250,000, part of which was for chattels.

It is the position of the appellant developer that the only interest actually conveyed to the transferee by that conveyance was the beneficial ownership of raw land for which the developer had previously paid \$185,000. The balance of the stated consideration, he says, represents moneys paid to the builder for the work done and materials provided by it in completing the condominium project as builder under a building contract.

Because the transactions and documents involved in this case are complicated, I shall use a simple analogous transaction to assist in the analysis of the problem. You have agreed to purchase a lot of vacant land on which you plan to have a home built to your specifications. You pay \$X for the land, take and register a conveyance, and pay the appropriate amount of land transfer tax on \$X -- the consideration for the transfer of the land. You then hire a builder to build a home for you on that land, and during the course of the building you borrow funds from a bank to provide financing, and the bank takes and registers a mortgage over the land as security. No land transfer tax is exigible from the bank or from you upon registration of the mortgage or of any discharge (see s. 1(1) (b) of the Act). The house is completed, and you take possession at a time when the realty, which now includes the home built on the land, is worth \$Y -- four times the amount of \$X on which you paid land transfer tax. However, no additional land transfer tax is exigible. Of course, if you sell the property, and a conveyance is registered, land transfer tax will then be exigible on the full consideration paid; but that is a completely separate transaction, and may not take place for many years.

The vendor as trustee

Would the result be different if the person who sold the property to you held it in trust for you until after the building was completed? I think not.

If a conveyance were registered at the time of the sale from the vendor to himself in trust, land transfer tax would be exigible on registration. If at the time the building was completed a conveyance was then registered from the vendor as trustee to you, the beneficial owner, no tax would be exigible because there would be no consideration for the conveyance. On the other hand, if no conveyance was registered at the time of the sale, the agreement to sell the land to you and hold it in trust would constitute an unregistered conveyance within the terms of s. 1(1)(p)(v) of the Act, and the consideration on which tax would be exigible is the consideration "in respect of the unregistered conveyances". In either case land transfer tax would be paid only once and the consideration would be the sale price of the vacant land -- \$X. Section 1(1)(p)(v) reads as follows:

(p) "value of the consideration" includes,

(v) in the case of a conveyance of land from a trustee (whether or not the trustee is so described in the conveyance) to a person to whom or for whose benefit any equitable or beneficial interest in the land has been transferred by a conveyance or conveyances that have not been registered, the value of the consideration determined under subclauses (i) to (iv), whichever is applicable, in respect of the unregistered conveyances made to such person.

The vendor as builder

Would the result be different if, rather than having a stranger to the land sale transaction build your home, you arranged with the vendor to build it for you? I think not.

If you agree to purchase vacant land, land transfer tax is exigible on the consideration for that land when the conveyance is registered -- on nothing else. If you then have a building constructed on the land, the tax result should be the same regardless of whom you contract with for the construction. However, if what you agree to purchase is land with a building on it, then the land includes the buildings on it, and the "value of the consideration" for the conveyance, as defined in s. 1(1)(p)(i), is the gross sale price, which would include the amount agreed to be paid for the construction of the buildings. It is at this point that the simple analogy and the facts of this case diverge. Dealings between vendor and purchaser

When the vendor of the land and the builder are the same person or corporation, as in this case, any agreements between the vendor and purchaser relating to the property must be looked at carefully to ascertain the true nature of their dealings, and the "value of the consideration" as defined in s. 1(1)(p)(i) of the Act applied to those dealings.

It is the position of the developer that the dealings between the parties involved two basic transactions -- one for the purchase of vacant land, and one for the building and registration of a condominium development on that land.

In support of that position counsel for the developer stresses that:

(i) the agreement of purchase and sale of the land was one for the purchase of raw land only and the purchase price stated therein was \$185,000 -- the purchase price of raw land only;

(ii) Paragraph 1.01(i) specifically provides that the purchase price was for the purchase of beneficial interest in land only and does not include any moneys paid for building carried on pursuant to the building contract;

(iii) the agreement of purchase and sale provides for a closing date of November 9, 1981, and that transaction was in fact carried out;

(iv) the agreement of purchase and sale provided for the execution of a declaration of trust providing that the vendor hold the purchaser's interest in the land as a bare trustee. That declaration was in fact executed by the vendor on the closing date of November 9, 1981, as required by the agreement of purchase and sale;

(v) the agreement of purchase and sale defines the land, which is acknowledged by both parties to have been raw land at the time of that agreement;

(vi) Paragraph 2.03 of the agreement of purchase and sale, an extremely important provision in the agreement, acknowledges the fact that title may remain in the name of the vendor after the closing date, but that the vendor is to hold the land only as bare trustee for the purchaser, that the vendor will hold the full beneficial interest in the land for the account and benefit of the purchaser and that on the closing date of November 9, 1981, it shall be deemed to have transferred, signed and conveyed the land to the purchaser. The vendor is to have no powers with respect to dealing with the land other than those set out in the balance of the agreement of purchase and sale.

All of those points stressed are contained in or substantiated by the agreements between the builder and developer.

The position of the respondent ministry is that all of the dealings between the parties constituted one blanket transaction, and what the appellant in fact agreed to purchase was condominium units as described in the registered transfer for the consideration stated therein.

In support of that position counsel for the respondent ministry stresses a number of alleged facts. The difficulty I have with some of the facts alleged by the ministry is that they constitute the ministry's interpretation of the documentation rather than being a precise statement of the provisions which the ministry wishes to stress. These facts stressed by the ministry and some of my comments as to their accuracy are:

(i) The consideration to be paid to the vendor/builder for the condominium units consists of \$185,000 for raw land, \$1,286,750 for the cost of constructing a building, \$677,950 for other costs involved in constructing the units and \$107,300 for appliances. That is in fact the case, but it should be remembered that the \$185,000 was paid pursuant to the agreement to purchase raw land and all of the other items of consideration were paid pursuant to the building contract.

(ii) The ministry states that the appellant covenanted that he had no right to the conveyance prior to the registration of the project as a condominium corporation and agreed to accept the transfer of units after notice of such registration. That position is not completely accurate. Paragraph 4.01(b) of the agreement of purchase and sale states that no purchaser shall have the right to a conveyance to him by registrable instrument of his pro rata interest in the project prior to the registration of the project as a condominium corporation. That does not mean that the purchaser does not have in fact a conveyance at the time of entering into the agreement of purchase and sale. Section 1(1)(b) of the Act defines the word "convey" to include agreeing to sell land in Ontario, and "conveyance" to include any instrument or writing by which land is conveyed. Consequently, while the developer was not entitled to a conveyance in registrable form prior to the registration of the project as a condominium, he did in fact have a conveyance within the terms of the Land Transfer Tax Act when the parties executed the agreement of purchase and sale.

The ministry also relies on para. 4.02 of the building contract for its position that the developer had no right to a conveyance prior to the registration. That provision only states that the transfer of individual units "as a unit" to a developer shall take place after the declaration as a condominium corporation. It in no way deals with the developer's right to ownership of the raw land.

(iii) The developer agrees to assume mortgages to be arranged by the builder of not less than \$48,500 per unit. While it is true that para. 4.01 of the building contract requires that the developer assume such mortgages, that assumption agreement is obviously included in the building contract only because the developer, as trustee, is the registered owner of the land. The building contract requires that the builder arrange the mortgages, and also provides that the mortgage advances are to be made to it for the purpose of financing the construction. However, the building agreement also requires a direction to be executed by the developer directing the mortgagee to pay all advances to the builder. That reinforces the position of the developer that the developer is in fact the beneficial owner of the land and that the builder's dealings with the land are in its capacity as trustee.

(iv) The "completion date" is defined in the agreement of purchase and sale to be the date of conveyance of the condominium units to the purchaser, which date is to be designated by the vendor/builder. At first blush this provision causes some confusion since "closing date" is defined in the same agreement to mean the date of the execution of the agreement by the vendor. However, on further study of the two agreements it is clear that there is substantial overlapping between them. The agreement of purchase and sale clearly anticipates the building agreement between the parties; indeed, as stated above, the entering into the building agreement is a condition of the agreement of purchase and sale. I am satisfied that the definition of completion date was inserted in the agreement of purchase and sale not to indicate the time when the purchaser was entitled to the beneficial interest in the real property but to deal with matters involving the building contract.

(v) The transfer which was registered purported to transfer all 37 condominium units. It stated a consideration of \$2,250,000 (which includes chattels) and described condominium units rather than raw land. The land transfer tax affidavit showed a consideration of \$2,142,700 for the realty conveyed. All of those facts are accurate.

I am satisfied that what was conveyed to the developer by the agreement of purchase and sale was raw land and nothing else. The fact that entering into a building contract was a condition of that agreement does not alter its substance, nor does it affect the right of the purchaser to call for a conveyance of the raw land at any time. The agreements, of course, contemplate that he was not entitled to a registrable conveyance of an interest in the project (i.e., the land, building and chattels together) until registration of the project as a condominium corporation. But I am of the opinion that the purchaser was entitled, as between himself and the vendor, to call for a transfer of the raw land at any time.

But the further question is: "What was conveyed to the developer by the transfer which was registered on April 11, 1983?" Section 2 of the Act, the taxing section, requires the payment of tax by "every person who tenders for registration in Ontario a conveyance whereby any land is conveyed ...". When the developer took the beneficial interest in the land on November 9, 1981, the vendor retained only the registered title as trustee for the developer. When the condominium development was carried out, the buildings were constructed, at the developer's expense, on land already owned by the developer. All that was actually conveyed to the developer by the transfer registered on April 11, 1983, was the legal title to land which he had owned since November 9, 1981. The actual consideration for that conveyance was nil.

However, tax is payable not on the actual consideration, but on the "value of the consideration" as defined in the Act. This brings into play s. 1(1)(p)(v) quoted above. The registered transfer constituted, within the terms of that provision, a conveyance from a trustee (the vendor), to a person (the developer), to whom the beneficial interest in the land had been transferred by a conveyance that was not registered (the agreement of purchase and sale). In such a situation the tax is payable on the value of the consideration in respect of the unregistered conveyance (the agreement of purchase and sale), as determined under s. 1(1)(p)(i), quoted above.

There is no doubt that the gross sale price for that conveyance was \$185,000. But was there any "liability assumed or undertaken by ... the transferee as part of the arrangement relating to the conveyance" or "any benefit ... conferred ... by the transferee on any person as part of the arrangement relating to the conveyance"?

It is the words "arrangement relating to the conveyance" that causes substantial difficulty. Counsel for the developer takes the position that any "liability assumed" as part of the arrangement relating to the conveyance would be something akin to the assumption of a mortgage against the property or the assumption of any other liability of the vendor as part of the purchase price, apart from the actual cash paid. Similarly, any "benefit conferred" as part of the arrangement relating to the conveyance would be the transfer to the vendor of something akin to other realty or assets as part of the purchase price, apart from the actual cash paid. The problem I have with that position is that such assumption of liability or benefit conferred would constitute part of the gross sale price "for the conveyance", referred to in the first part of s. 1(1)(p) (i). Therefore, I am brought to the inescapable conclusion

that any "liability assumed" or "benefit conferred as part of the arrangement relating to the conveyance" must be something different from, and in addition, to any assumption of liability or benefit conferred "for the conveyance".

The Oxford English Dictionary defines "arrangement" as "a structure or combination of things for a purpose", and defines "relate" as "to connect, establish a relation between". Giving those words their ordinary meaning it seems to me that the building contract in this case constitutes "part of the arrangement relating to the conveyance". The agreement of purchase and sale is conditional upon the building contract being entered into. The obvious purpose of all of the dealings between the builder and the developer was to complete a condominium development, and the agreement of purchase and sale and the building contract was obviously planned in combination to effect a purpose. There was undoubtedly a strong connection between the two contracts in both form and substance.

I therefore conclude, reluctantly, that a liability was assumed by the transferee as part of the "arrangement relating to the conveyance", which was equal to the cost of the building contract. Consequently the total "value of the consideration" was that set out in the land transfer tax affidavit attached to the transfer registered on April 11, 1983. My reluctance stems from my conviction that the true transaction is not very different from the simple analogy of the purchase of land by an individual, and the subsequent building of a home on that land. I am also convinced that with appropriate tax planning such a result could be avoided.

As an alternative argument, the appellant says that although in this case all of the land was conveyed in one single transfer, the developer could have taken the property under 37 separate transfers, and the resultant tax would have been lower. He suggests, therefore, that he should pay only the lower amount. There are two fundamental defects in that position. First, I have held that tax was levied on the value of the consideration under the agreement of purchase and sale, and there were not 37 separate parcels in existence at the time of that agreement. Second, even if the tax were levied on the value of the consideration under the registered transfer, the law is quite clear that when a taxpayer orders his affairs in a manner that attracts a tax in one amount, he cannot subsequently claim that he should be taxed as if he had ordered his affairs in a different manner, which would have attracted less tax.

Because of the novelty of the main issue there will be no order as to costs.

Judgment accordingly.

CBR# 257

Re Hashim et al. and Costain Ltd.

54 O.R. (2d) 790

ONTARIO HIGH COURT OF JUSTICE CARRUTHERS J. 27TH MAY 1986.

APPLICATION for a declaration of the parties' rights under agreements to purchase certain condominium units.

William J. Burden, for applicants.

Allan Sternberg, for respondent.

CARRUTHERS J.:-- This application has been brought to have declared certain rights of the parties under two agreements of purchase and sale of residential condominium units. Both agreements are dated December 20, 1983, and relate to two units located in a building known municipally as 70 Rosehill Ave., in the City of Toronto. The applicant Jafar Jawad Hashim ("Hashim") agreed to purchase suite 801 and the applicant Salwa Ali Al-Rufaiee agreed to purchase suite 803.

The issues herein arise because both of the agreements contain a clause, hereinafter referred to as "clause 2(c)", which reads as follows:

If the Purchaser is required to occupy the Units as provided in Paragraph 11 of this Agreement, the Purchaser agrees to pay the Vendor on the Closing Date, as an increase in the Purchase Price, an amount equal to seven and one half percent (7 1/2%) per annum of the Purchase Price set out in Paragraph 2(a) of this Agreement, calculated from the Occupancy Date to the Closing Date.

Clause 2(c) was the subject of consideration in a previous application involving the respondent herein: *Re Lamb and Costain Ltd.* (1985), 49 O.R. (2d) 657. Counsel for the applicants argues that that decision of Barr J. is determinative of the issues raised in this present application. Counsel for the respondent does not agree, primarily because he is of the opinion that there is a significant difference in the facts and circumstances of each matter.

In the present application, I was told there are no material facts in dispute. Notwithstanding this advice, the respondent specifically acknowledges only certain of the facts set out in the applicants' factum as being correct. This situation is more than somewhat awkward and in my view should not exist, particularly on an application of this kind. The absence of agreement on material facts would ordinarily have the effect of prohibiting this application from being dealt with. From reading both factums, it appears that although the respondent cannot see its way clear to expressly admit certain portions of the applicants' factum as being correct, it has been able, in its own factum, to raise and rely upon them. While I am certain that counsel for the respondent had some purpose in mind in bringing about this state of affairs, I need not speculate here as to what it might have been. Notwithstanding the absence of express agreement on all material facts, I am prepared to proceed to determine the issue raised in this application by giving consideration to what I have gleaned from my reading of both factums as facts not in dispute.

The applicants are the son and wife, respectively, of Dr. Jawad Mahmoud Hashim ("Dr. Hashim"). He represented both applicants in the negotiations leading up to the execution of the two agreements in question. As well, he retained a member of the firm of solicitors who represented each of them on this application to assist both applicants in their purchases of the units in question. The purchase price for unit 801 was \$595,000, and the purchase price for unit 803 was \$975,000.

On behalf of the respondent there is no express acceptance of the paragraph contained in the applicants' factum, which alleges that in redrafting the form of agreement of purchase and sale proffered by the respondent to Dr. Hashim, the solicitor he retained specifically redrafted clause 2(c) so as to remove that which Barr J. later found offensive. The respondent does admit the correctness of the paragraph contained in the applicants' factum which states:

9. Costain Limited rejected any changes to the Costain offer and specifically the changes to sub-paragraph 2(c) proposed by McNeely.

McNeely, there is no dispute, is the solicitor retained by Dr. Hashim. It appears that after Costain rejected the proposed changes on behalf of the applicants, Dr. Hashim then attempted, but unsuccessfully, to locate other properties "satisfactory for his purposes". Dr. Hashim advised McNeely of this state of affairs and at the same time because he thought "it was clear Costain would not accept any amendment", instructed McNeely to "simply proceed with the contemplated purchases". Accordingly, the form of agreement in which clause 2(c) is found was executed by the parties hereto.

Both agreements in addition to clause 2(c) also provide that the applicants are to pay an occupancy fee for the time between the date occupation of each unit is taken and the date of final closing. Occupation was taken in each instance on either May 14 or 16, 1984, the parties apparently being unable to reach common ground in this respect. At the time of taking occupation of each unit, the applicants paid the balance due on the purchase price of their respective unit. Accordingly, the total purchase price of each unit, as shown above, was then paid in full. The respondent's declaration and description for each of the units was registered on August 13, 1984. The transfer documents for each unit were registered on the date which the parties ultimately set for the final closing, September 18, 1984. As of this latter date, the respondent's statements of adjustments were prepared. In each statement there is credited to the applicants, inter alia, the amounts due for interest pursuant to the provisions of s. 53(3) of the Condominium Act, R.S.O. 1980, c. 84 (the "Act"). There is also credited to the respondent the sum of \$21,977.46 for unit 801 and \$13,411.89 for unit 803. Each of these latter amounts represents the 7 1/2% "increase in the Purchase Price" referred to in clause 2(c). The net effect of the various amounts credited to either the applicants or the respondent is that for unit 801, \$99.33 was payable by the respondent on the final closing, while for unit 803, \$1,284.37 was payable to the respondent. I am not told whether either of these amounts was in fact paid.

There is no dispute between the parties that the object of this application is to have determined the right of the respondent to receive credit for the two amounts of \$13,411.89 and \$21,977.46. As well and, to me, of greater significance, there is no dispute between the parties that with respect to, and in consideration of, the final closing on September 18, 1984, the respondent, in writing, undertook "to readjust all items on the statement of adjustment, if necessary". Each of the two undertakings is dated August 17, 1984.

It is only from the reasons for the decision of Barr J. that I have learned anything of the facts and circumstances of the Lamb matter, *supra*. It appears that the purchaser there, prior to signing the agreement, unsuccessfully had her solicitor attempt to delete clause 2(c). The agreement was executed, then, in the same terms as the agreements before me in this application. In the Lamb matter occupation of the residential condominium unit was taken on March 22, 1984, when the balance of the stipulated purchase price was paid, subject to adjustments on final closing. The final closing in the Lamb purchase occurred on September 4, 1984. From the reasons for decision of Barr J. I quote the following [at p. 659]:

After taking possession, and shortly before the final closing date, Mrs. Lamb's solicitor advised the vendor's solicitor of his view that cl. 2(c) was in contravention of the provisions of the Condominium Act and was illegal. The vendor's solicitor disagreed. The parties subsequently agreed to close the transaction on terms that the agreement of purchase and sale would not merge with the conveyance of the condominium on closing. The additional amount required to be paid on closing by cl. 2(c) was \$20,239.75. It was agreed that the dispute between the parties as to the validity of this payment would be determined by the court and it is clear that the closing of the transaction was without prejudice to the rights of the parties with reference to this payment. This motion was brought by notice of motion served before the final closing but, of course, could not be heard at that time.

To my mind, the only difference between the facts and circumstances of the Lamb matter and the present one is that there the parties specifically agreed that the terms of the agreement of purchase and sale would not merge with the conveyance on closing, and that the closing would be without prejudice to the rights of the parties with reference to the amounts claimed under clause 2(c). In the present case, the respondent simply undertook to readjust, if necessary. These differences in themselves do not, in my view, prevent the decision of Barr J. from being applied to the present application. In fact, at the outset of the hearing of this application, I said to counsel that I had a sense of *deja vu* while reading the material beforehand.

Counsel for the respondent urges me to conclude that there are in fact material differences between the Lamb matter and the present one. Here, he maintains, there is a merger, and, as well, a payment made without protest, and therefore voluntary in nature. In addition, he submits that the Lamb decision does not consider the effect in law of clause 2(c) in the light of both s. 53(3) and s. 51(6) of the Act. For present purposes, he asks me to conclude that clause 2(c) does not contravene either of those sections. In this respect, his position is based upon a conclusion that clause 2(c) represents a "two stage" purchase price, no portion of which matches any of the items or amounts referred to in either s. 53(3) or s. 51(6).

I think it appropriate that I here set out in full s. 51(6) and s. 53(3) of the Act:

51(6) Where an agreement of purchase and sale entered into by a proposed declarant for a proposed unit for residential purposes permits or requires the purchaser to take possession of or occupy the unit before a deed or transfer of the unit acceptable for registration is delivered to him, the money paid in respect of such right or obligation to the proposed declarant shall be not greater, on a monthly basis, than the total of the following amounts:

1. The amount of interest that the purchaser would have paid, monthly, in respect of any mortgage or mortgages he is obligated to assume or give under the agreement of purchase and sale on delivery of a deed or transfer of the unit.
2. An amount reasonably estimated on a monthly basis for municipal taxes attributable to the proposed unit.
3. The projected monthly common expense contribution for that unit.

53(3) Subject to subsection (2), where a purchaser of a proposed unit under an agreement of purchase and sale referred to in subsection (1) enters into possession or occupation of the unit before a deed or transfer of the unit acceptable for registration is delivered to him, the proposed declarant shall pay interest at the prescribed rate on all money received by him on account of the purchase price from the day the purchaser enters into possession or occupation until the day a deed or transfer acceptable for registration is delivered to him.

These sections then specify the extent of the financial relationship that exists between the purchaser and the owner when, as in the present case, the purchaser goes into occupation before obtaining a deed acceptable for registration, but having paid the full purchase price. Only that which is allowed by s. 51(6) can be charged by the owner against the purchaser. By s. 53(3) the owner must credit the purchaser with interest on the full purchase price paid for the period between the taking of occupation to the date upon which deliverance of the deed is made. Section 61 of the Act provides:

61. This Act applies notwithstanding any agreement to the contrary.

Section 61 has been interpreted as meaning that the parties cannot contract out of the provisions of the Act: see *Re Grandby Investments Ltd. et al. and Wright et al.* (1981), 33 O.R. (2d) 341, 124 D.L.R. (3d) 313, 20 R.P.R. 30 sub nom. *Re Tridel Construction Ltd. and Wright, and Lamb v. Costain Ltd.*, *supra*.

As I have indicated above, it is the position of the respondent in this case that the increase in purchase price envisaged by clause 2(c) is totally unrelated to both ss. 51(6) and 53(3) of the Act. On behalf of the respondent, it is said that the intention of clause 2(c) is to "ensure equal treatment for all purchasers while at the same time ensuring a competitive price for the condominium units". I am also told that the respondent, by clause 2(c), wants to deter speculation and ensure that any increase in the purchase price following occupation accrues to its benefit. Whatever the object of the respondent, it is my opinion that clause 2(c) cannot be said to be totally unrelated to the provisions of ss. 51(6) and 53(3) of the Act. I agree with what Barr J. said, at p. 6 of his reasons [pp. 661-2 O.R.]:

The effect of cl. 2(c) is to require the purchaser to pay, in addition to the amounts permitted by s. 51(6), an amount which depends on the length of time the purchaser is in possession and which is based on the purchase price. In my view this is a payment in respect of a "right or obligation" to "take possession of or occupy the unit before a deed or transfer of the unit acceptable for registration is delivered" and contravenes the provision of s. 51(6). This is not a case of the vendor requiring additional money and the purchaser receiving matching additional services or facilities. The purchaser had paid a purchase price. If the vendor had been in a position to give a deed at that time the purchaser would have paid nothing more. She received nothing more by being required to wait five months for closing.

I am prepared to also conclude that if clause 2(c) cannot reasonably be said to constitute a charge not allowed by s. 51(6) of the Act, it is intended to offset the interest payable under s. 53(3). In either event, clause 2(c) contravenes the Act and is therefore an

illegal provision, not enforceable against the applicants, and for all intents and purposes, as Barr J. declared in the Lamb case, "null and void". Having reached this conclusion, it is not necessary for me to deal with the position of the respondent that "the party attacking the transaction must also establish that a fraud has been perpetrated upon the Condominium Act by deceit or an absence of good faith".

As an alternative position, allowing for the prospect of the conclusion which I have now reached as to the enforceability of clause 2(c), counsel for respondent asked me to then conclude, notwithstanding, that the applicants are not entitled to a return of the money. In this instance the money is the total of the two amounts credited in favour of the respondent as aforesaid. I am asked to characterize these amounts as being, in law, voluntary payments of money. As such, counsel for the respondent maintains, they are not recoverable. Bound up with this position is the fact, not disputed, that at all times the applicants were well represented either by a sophisticated informed agent, Dr. Hashim, or a lawyer. At all times, there is no contest, the applicants were fully aware of the relevant facts and law. In these circumstances, it is argued on behalf of the respondent, the fact the applicants paid the amounts due under clause 2(c) without compulsion or undue influence, prevents them from successfully obtaining a repayment. In my opinion, having reached the conclusion that clause 2(c) contravenes the Act, the knowledge of the applicants of either or both what they signed and the relevant law at that time, is irrelevant for present purposes. As I have said, s. 61 of the Act, in any event, prevents the parties' contracting out of its provisions. In this respect, I adopt what Gray J. said in *Berman et al. v. Karleton Co. Ltd.* (1982), 37 O.R. (2d) 176 at p. 184, 24 R.P.R. 8 at pp. 19-20, 28 C.P.C. 168:

The intent of the Act is clearly that the purchaser be paid interest on money paid to the vendor on account of purchase price during the interim occupancy period before a registrable deed or transfer is delivered. The reason for doing so is to protect purchasers of proposed condominium units from abuses by vendors who delay in registering declarations by providing an incentive to register quickly. The knowledge of the purchasers regarding what they were signing is irrelevant given the wording of s. 61 which prevents the parties from contracting out of the Act.

Barr J. reached a similar conclusion in *Lamb v. Costain Ltd.*, supra.

Counsel for the respondent, as support for his position on the issue of voluntary payment, relies heavily upon the decision of the Saskatchewan Court of Appeal in *Haubrich v. Keefner* (1922), 65 D.L.R. 50, [1922] 1 W.W.R. 1079, 15 S.L.R. 271. That case involved a provision of the Saskatchewan Farm Implement Act which required contracts concerning the sale of large implements to be in writing. The plaintiff in that case had, by verbal agreement, purchased from the defendant a large implement. His claim to have all the purchase money returned was dismissed. There was no element of fraud, compulsion, or undue influence, and the plaintiff was found to have paid the full purchase price with complete knowledge of all the material facts. This included an understanding of the requirements of the Act as aforesaid and that the agreement, being verbal, contravened those requirements. Specifically, the court found the plaintiff was assumed to know he did not have to pay the money or take delivery of the implement. The Court of Appeal concluded that the purchase money had been paid voluntarily and accordingly was not recoverable. Other subsequent decisions of that court seem to have restricted the effect of *Haubrich* to its facts, and in particular the indication that the full purchase price had been paid. The last decision of the Saskatchewan Court of Appeal which dealt with the same provision of the Farm Implement Act is *Eberle et al. v. Oliver Ltd.*, [1940] 3 D.L.R. 229, [1940] 2 W.W.R. 295. In that case, the Court of Appeal suggests that recovery can be made whether the purchase price was paid in full or not. Amendments to the Farm Implement Act of Saskatchewan largely have done away with the effect of the line of cases which include the *Haubrich* decision. In any event, I do not think that case or indeed the line of other cases are of much help to the respondent here.

The facts of the present case do not permit me to reach a conclusion that the applicants voluntarily paid money to the respondent. The money paid by the applicants to the respondent was pursuant to the agreements which they had entered into in order to purchase the condominium units in question. The respondent obtained the benefit of clause 2(c) by preparing statements of adjustments which credited it with the amounts in question. The respondent in each case, that is, for each statement of adjustment, as I have noted above, agreed in writing to readjust "if necessary". There is no doubt in my mind, given the history of the applicants' efforts to have clause 2(c) removed from the agreements, and the parallel situation in *Lamb*, supra, of which the parties here were mindful, the respondent understood that the need to readjust would follow a decision adverse to its interest.

In the absence of the undertaking to readjust, I would be inclined to find, for present purposes, that there is nothing "voluntary" about the position of either applicant relative to what moneys were paid pursuant to their agreements with the respondent. The support which the respondent thinks it gains from the position reached by the Court of Appeal for Saskatchewan in *Haubrich* must be measured against the fact that that case makes no reference to the purpose and objects of the legislation under consideration, and the ability of the parties to waive its provisions. This situation for me, dissipates any persuasive authority which otherwise might have been offered by that decision. In my view, both ss. 51(6) and 53(3) found their way into the Act in order to prevent owners from taking advantage of persons seeking housing accommodation of the type covered by the Act. The Act applies equally to all such accommodation regardless of differences in cost.

Here, the applicants' request to have the offence clause removed from the form of agreement offered by the respondent was refused by the respondent. The position of the respondent being that a person who wanted to purchase the accommodation it offered, had to agree to sign an agreement which contained a provision which contravened the provisions of the Act. An element of compulsion existed in the relationship of the parties sufficient, in my mind, to prevent the applicants from being found to have voluntarily agreed to pay the amounts in question. The form of protection offered by the provisions of the Act would be rendered illusory if the applicants, under these circumstances, were precluded from recovery, or more correctly speaking in this case, reversing the credits sought by the respondent. To my mind it would not be just and reasonable to permit an owner to take advantage of an illegal clause simply because the purchaser in order to get the accommodation offered was required to sign an agreement in which it was contained.

The respondent also relies on "merger" to support its position that even though clause 2(c) may be declared illegal, the applicants are bound by its provisions. I gather it is intended by this aspect of the argument raised by counsel for the respondent that again in any event of the conclusion as to the legality or otherwise of clause 2(c) the obligations of the respondent under it were extinguished upon the final closing when a deed was accepted by the applicants. From my understanding of "merger", as applied in the context of a conveyance of an interest in land, that is the only support which it could make available to the respondent. And I do not think it applies at all in the present case. The final closing of a transaction cannot, in my opinion, turn an illegal, unenforceable clause in the agreement upon which the transaction is based into one which is legal and enforceable. And we are not concerned here with the extinguishment of an obligation on the part of the respondent. As well, this submission on the part of the respondent seems to completely overlook the matter of intention which is so important in a consideration of what has or has not been merged. In this respect the undertaking of the respondent would, in my opinion, completely preclude any merger of the

applicants' right to have a readjustment made. That is really the only benefit the respondent could look for should merger otherwise apply to the facts of this case.

For these reasons, then, an order may issue that the respondent is not entitled to any credit of the amounts calculated in accordance with the provisions of clause 2(c) of the agreements in question. The order may also provide the respondent shall pay to each of the applicants the amounts due to them once the statements of adjustment are readjusted by reason of the conclusion which I have now reached. I can be spoken to by counsel, if they so desire, as to the form of order to be issued in accordance with my decision. I will have to hear from counsel in any event, with respect to the matter of prejudgment interest, if any, to be awarded in favour of the applicants and, as well, costs. I think it best that counsel for the parties reattend before me to deal with these matters. I suggest, if they intend to do so, that arrangements be made that such attendance take place within the next three weeks at Osgoode Hall.

Judgment accordingly.

CBR# 259

Re Lamb and Costain Ltd.

49 O.R. (2d) 657

ONTARIO HIGH COURT OF JUSTICE BARR J. 12TH FEBRUARY 1985.

APPLICATION for a declaration that a term of an agreement of purchase and sale of a condominium unit is void.

A. M. Robinson, for applicant.

A. Sternberg, for respondent.

BARR J.:— This application requires the determination of the validity of a clause in an agreement of purchase and sale of a condominium unit. By an agreement dated November 16, 1983, Mary Elizabeth Lamb agreed to purchase, and Costain Ltd. agreed to sell, a condominium unit at a price of \$595,000 with \$100,000 payable as a deposit and the balance payable on the taking of possession.

The clause giving rise to this litigation reads as follows:

2(c) If the purchaser is required to occupy the Units as provided in paragraph 11 of this Agreement, the purchaser agrees to pay the vendor on the closing date, as an increase in the purchase price, an amount equal to seven and one-half (7-1/2%) per cent per annum of this purchase price set out in paragraph 2(a) of this Agreement, calculated from the occupancy date to the closing date.

Mrs. Lamb retained a solicitor before signing the agreement. She objected to the provision in question and instructed her solicitor to negotiate with a view to deleting it. The vendor refused. Mrs. Lamb then signed the offer and it was accepted.

Mrs. Lamb took possession of the condominium on March 22, 1984, and at that time paid the balance of the price, \$495,000, subject to adjustments. The transaction could not be completed until the registrations required by the Condominium Act, R.S.O. 1980, c. 84, had been made. The agreement called for final closing within twenty (20) days of the making of these registrations. The closing finally occurred on September 4, 1984.

After taking possession, and shortly before the final closing date, Mrs. Lamb's solicitor advised the vendor's solicitor of his view that cl. 2(c) was in contravention of the provisions of the Condominium Act and was illegal. The vendor's solicitor disagreed. The parties subsequently agreed to close the transaction on terms that the agreement of purchase and sale would not merge with the conveyance of the condominium on closing. The additional amount required to be paid on closing by cl. 2(c) was \$20,239.75. It was agreed that the dispute between the parties as to the validity of this payment would be determined by the court and it is clear that the closing of the transaction was without prejudice to the rights of the parties with reference to this payment. This motion was brought by notice of motion served before the final closing but, of course, could not be heard at that time. Section 53(1) of the Condominium Act provides that all moneys received from a purchaser on account of a sale of a condominium unit before registration of the declaration and description must be held in trust and that the purchaser is entitled to interest until such time as a registrable transfer is delivered.

The position of the applicant is that the purchase price was \$595,000. Clause 2(c) purports to increase this price where the final closing date does not coincide with the date of possession. Clause 2(c) calls for a payment: (1) calculated as a percentage of the purchase price, (2) for the period after payment of the price and before final closing, and (3) designed approximately to equal the interest the vendor is required to pay by the terms of the Act. It is alleged that cl. 2(c) is intended to circumvent the provisions of s. 53(1) and, in effect, to deprive the purchaser of the interest to which she is entitled.

The vendor's position is that Mrs. Lamb was under no obligation to purchase the unit. She had legal advice and, being unsuccessful in getting rid of cl. 2(c) by negotiation, she seeks now to retain the benefit of the contract but to escape part of the obligation she assumed. He says that cl. 2(c) is not an attempt to escape payment of interest on the purchase money but is designed: (a) to prevent speculation, and (b) to ensure that the vendor gets the advantage of any inflation in price after possession and before closing.

In my view it is immaterial whether the motive behind the insertion of cl. 2(c) is to deprive the purchaser of her right to interest, on one hand, or that alleged by the vendor on the other hand. If the section is in contravention of the Act it cannot stand because s. 61 of the Act provides:

61. This Act applies notwithstanding any agreement to the contrary.

Consequently, if cl. 2(c) has a result which is in contravention of the Act, it is invalid.

It is to be observed that prior to 1978 the purchaser was entitled to interest on all moneys paid prior to final closing but in 1978 [c. 84] additional provisions were enacted by s. 51 which were the following effects: (a) the vendor was required to take all reasonable steps to register a declaration and description without delay (s. 51(1) (a));

(b) the vendor was required to take all reasonable steps to deliver to the purchaser a registrable deed or transfer of the unit without delay (s. 51(1)(c)), and

(c) in the meantime a purchaser who entered into possession of a unit could not be required to pay (in circumstances such as those of the present case) more than an amount to cover, on a monthly basis, municipal taxes attributable to the unit and the projected monthly common expense contribution for that unit (s. 51(6)).

At the same time s. 61 was added providing that the provision of the Act applied notwithstanding any agreement to the contrary.

In summary, after the 1978 amendments the vendor was required to move as swiftly as possible to the point where he could give a final deed or transfer, he was required to pay interest on money received in the mean time and was prohibited from charging anything in respect of occupancy except the basic carrying cost of the unit.

A brief review of the cases on this topic is instructive.

In *Re Grandby Investments Ltd. et al. and Wright et al.* (1981), 33 O.R. (2d) 341, 124 D.L.R. (3d) 313, 20 R.P.R. 30 sub nom. *Re Tridel Construction Ltd. and Wright, Callaghan J.* was dealing with a clause in an agreement of purchase and sale of a condominium unit which provided as follows [p. 342 O.R., p. 314 D.L.R.]:

"Dishwasher is included in the purchase price, Purchaser agrees to waiver interest on all monies held by the vendor until the actual closing after registration."

The court held that the waiver of interest contravened the Act and was illegal. It is to be noted that the contract between the parties in that case was prior to the 1980 amendment.

In *Berman et al. v. Karleton Co. Ltd.* (1982), 37 O.R. (2d) 176, 28 C.P.C. 168, 24 R.P.R. 8, there was a provision in the agreement of purchase and sale that the basic price would be increased by an amount equal to the interest payable to the purchaser on money paid prior to closing. The purchasers executed this agreement with full knowledge of the provision in question but later applied for a declaration that the requirement of the additional payment was illegal. There, as here, the parties closed subject to the determination of the point by a court. Gray J. held as follows [at p. 184]:

The intent of the Act is clearly that the purchaser be paid interest on money paid to the vendor on account of purchase price during the interim occupancy period before a registrable deed or transfer is delivered. The reason for doing so is to protect purchasers of proposed condominium units from abuses by vendors who delay in registering the declarations by providing an incentive to register quickly. The knowledge of the purchasers regarding what they were signing is irrelevant given the wording of s. 61 which prevents the parties from contracting out of the Act.

He concluded there had been a contravention of the Act and that the additional payment in question was illegal. In *Re Small and Smuszkowicz* (1982), 138 D.L.R. (3d) 766, Smith J. dealt with the following provision in a condominium agreement [p. 767]:

"3.06 In consideration of the Vendor not increasing the costs of the Unit by its costs in paying interest on the deposit as required by the Act, the Purchaser does hereby (but not irrevocably) assign to the Vendor all interest payable on the amount of the deposit and shall execute on the Closing Date such further assurances and documents to give effect to the foregoing; Provided that the purchaser may elect on closing to rescind the within assignment whereupon the Purchase Price shall be increased by an amount equal to \$5,958.33 X the number of months in the period between the Occupancy Date and the Closing Date with adjustment being made for a portion of any month in this period."

The court held that the provision in question was illegal and void.

The effect of cl. 2(c) is to require the purchaser to pay, in addition to the amounts permitted by s. 51(6), an amount which depends on the length of time the purchaser is in possession and which is based on the purchase price. In my view this is a payment in respect of a "right or obligation" to "take possession of or occupy the unit before a deed or transfer of the unit acceptable for registration is delivered" and contravenes the provision of s. 51(6). This is not a case of the vendor requiring additional money and the purchaser receiving matching additional services or facilities. The purchaser had paid a purchase price. If the vendor had been in a position to give a deed at that time the purchaser would have paid nothing more. She received nothing more by being required to wait five months for closing.

I appreciate that in this instance the purchaser was a sophisticated person who signed with full knowledge of the effect of the document she was signing. However, the statute is passed for the protection of all purchasers, not only those who are sophisticated or who have legal advice, and the provisions of s. 61 make it immaterial whether the purchaser knew the full effect of the document she was signing or not. The law did not permit her to contract out of the agreement even if she wished to do so.

Having said this I hold that the conduct of the purchaser is relevant to the issue of costs. The purchaser knew that she was agreeing to pay an amount in addition to \$595,000. She apparently wanted the condominium unit in question and signed promising to make this payment but apparently hoping that the court would relieve her of the obligation she had undertaken in this regard. In these circumstances I do not feel that there should be any award of costs in her favour.

The application is accordingly allowed without costs and it is declared that cl. 2(c) of the agreement of purchase and sale is null and void and that moneys paid pursuant to this clause under protest are the property of Mary Elizabeth Lamb.

Application granted.

CBR# 205

Metropolitan Toronto Condominium Corp. No. 539 et al. v. Priene Ltd. et al.

48 O.R. (2d) 313

ONTARIO SUPREME COURT OF ONTARIO MASTER'S CHAMBERS MASTER (SANDLER) 29TH OCTOBER 1984.

APPLICATION by some of the defendants for an order permitting them to examine certain persons for discovery.

G. M. Farrell, for applicants, 377806 Ontario Limited, Gary Matthew Andrew Sorichetti, William James Leask and Russell Sorichetti.

Michael W. Kerr, for defendants, Priene Limited, Gregory P. King and Kenneth Villiers.

Mary G. Critelli, for respondents.

MASTER (SANDLER):-- This is a motion whereby certain of the defendants seek to apply Rule 333 of the Rules of Practice so as to enable them to examine for discovery a large number of persons for whose immediate benefit they say this action is brought. The other defendants were served with these applications but did not appear.

Rule 333(1) [see now rule 31.03(2), (3)] reads as follows:

333(1) Where an action is prosecuted or defended for the immediate benefit of a person or a corporation, such person or any officer or servant of such corporation may without order be examined for discovery.

The question to be decided is whether some or all of the persons listed in the two notices of motion are persons for whose immediate benefit the action is being brought. It is to be noted that this rule does not confer a discretion on the court. Rather, once it is shown that the action is prosecuted or defended for the immediate benefit of a person or corporation, then such person or a representative of the corporation may be examined, as of right, without order: Ontario Securities Com'n v. Trustee of Re-Mor Investments Management Corp. (1982), 26 C.P.C. 202. Thus the question before me on this motion is whether, as a matter of right, the defendants have the right to examine the persons who are listed in the two notices of motion, and the degree of knowledge or lack of knowledge of the various persons put forward to be examined by the plaintiff is quite irrelevant for the purposes of this particular motion.

Under our rules of civil procedure, examination for discovery is the most important pre-trial procedure available to a litigant to ensure a fair trial by enabling him to know the case he has to meet and to procure admissions to facilitate his own case or destroy his opponent's case. Under Rule 326 [see now rule 31.03(1)-(3)], a party may be orally examined by the opposite party. It sometimes happens however that the "party" who may be examined under Rule 326 has very little direct knowledge of the issues in the action because the party is only a nominal party and the action is really being brought or defended for the immediate benefit of some other person. In this circumstance, in order to achieve procedural fairness and offer the opposite party an examination for discovery which will meet the above-noted goals, Rule 333 allows the opposite party to examine such person. I can see nothing in the rules which would prevent an opposite party from examining both the "party to an action" under Rule 326 and the person benefiting from the action under Rule 333. (Indeed, this is expressly allowed by rule 31.03(8) of the new Rules of Civil Procedure soon to be operative in this province.)

In the present action, the named plaintiffs are a condominium corporation and two individual unit owners in the condominium building, A. Ligetti and I. Himel, who sue "on behalf of themselves and all of the other unit owners in" the condominium corporation.

The defendants are the corporate developers and builders of the condominium building and some of their directors. Paragraph 13 of the statement of claim alleges that "[t]he units and common elements have not been constructed in accordance with the" terms, warranties and representations of the purchase and sale agreements between the defendants and the unit holders who originally bought the units. Paragraph 13 then particularizes the alleged defects in 85 subparagraphs. Many of the alleged defects in these subparagraphs concern only the common elements but some also concern the individual units themselves (14 out of 85). These latter are as follows: Defective fans (aa) Scratched bathtubs (bb) Badly installed plumbing (cc) and (ggg) Noisy air conditioners (dd) Improperly installed thermostats (ee) Doors to units are of inferior quality (ff) Inferior quality toilets (gg) Defective heating units (hh) and (bbbb) Inadequate ducting of kitchen fans (ii) Inferior finishing of units (jj) Leaking windows and doors (aaaa) and (cccc)

There are other allegations of breach of fiduciary duty and conspiracy, and the plaintiffs claim \$10,000,000 in damages.

The defendants seek an order allowing them to examine various categories of persons as follows:

(i) eight individuals who were the first purchasers of these units in 1978 and 1979. (It is not absolutely clear from the material that all of these persons are still unit holders.)

(ii) five other individuals, of whom three are still unit holders, 1 is not and 1 perhaps is not, who made up the "Purchaser's Committee" referred to in the statements of defence.

(iii) All present individual unit holders who say that there are deficiencies in their units.

(iv) All persons, whether presently unit holders or not, who purchased suites from the defendants and who say that representations or misrepresentations were made to them upon which they relied.

(v) All persons who are currently unit holders.

I note that there is an overlap between categories (i) and (iv). I also note that Ligeti and Himel, who are being put forward to be examined, fall within category (v) and possibly (iii). One Thomas Lutton is agreed upon by the parties as the proper officer to be examined on behalf of the plaintiff, the condominium corporation.

The total number of persons sought to be examined by the defendants will exceed 20 persons and might even reach as high as 50 to 80 persons.

Critical to these applications are s. 13 and parts of s. 14 of the Condominium Act, R.S.O. 1980, c. 84, which read as follows:

13(1) The corporation may own, acquire, encumber and dispose of real and personal property for the use and enjoyment of the property.

(2) The owners share the assets of the corporation in the same proportions as the proportions of their common interests in accordance with this Act, the declaration and the by-laws.

14(1) The corporation after giving written notice to all owners and mortgagees may, on its own behalf and on behalf of any owner, sue for and recover damages and costs in respect of any damage to common elements, the assets of the corporation or individual units, and the legal and court costs in any such actions brought in whole or in part on behalf of any owners in respect of their units shall be borne by those owners in the proportion in which their interests are affected.

(2) The corporation after giving written notice to all owners and mortgagees may sue on its own behalf and on behalf of any owner with respect to the common elements and any units, notwithstanding that the corporation was not a party to the contract in respect of which the action is brought, and the legal and court costs in an action brought in whole or in part on behalf of any owners in respect of their units shall be borne by those owners in the proportion in which their interests are affected.

(4) Any judgment for payment in favour of the corporation in an action brought on its own behalf is an asset of the corporation.

Under s. 14, the corporation may sue "on its own behalf" and it may also sue "on behalf of any owner". This section then goes on to specify three quite different classes of property, namely, the "common elements", "the assets of the corporation", and the "individual units". Of these three classes of property, only the first two belong to the corporation whereas the individual units belong to each individual unit holder. In my view, under s. 14, the corporation may sue on its own behalf for damage to its property, that is, the common elements and other corporation assets, and the individual unit holders cannot sue for this damage. However, for damage to the individual units, the action can be brought by the appropriate unit holder or holders concerned, themselves, or by the corporation "on behalf of any owner". In this latter type of action, the individual holders need not be named in the style of cause but it is still their action, and this is made clear by the concluding words of s. 14(1), which imposes an obligation to pay legal and court costs directly upon the owner or owners on whose behalf the action is commenced in respect of damage to their individual units, albeit in the proportion in which their interests are affected.

Further, s. 14(4) makes an implied distinction between "any judgment for payment in favour of the corporation in an action brought on its own behalf" (my emphasis), and any judgment for payment in favour of the corporation in an action brought on behalf of any unit owner. Only the former type of judgment is an asset of the corporation. It follows that the latter type of judgment is not, but rather is an asset of the unit owner.

Thus, each particular action must be looked at to see if the condominium corporation is suing for damages to the common elements or to the individual units or both, and if an action for damages is brought by the condominium corporation as plaintiff, in whole or in part, in respect of damage to one or more of the individual units, then such an action is, by the very wording of s. 14(1), brought "on behalf of" an owner. It follows that such an action is prosecuted, at least in part, "for the immediate benefit of" the unit holder(s) and the defendant(s) can examine the unit holder(s) under Rule 333 in addition to examining a representative of the nominal plaintiff, the condominium corporation.

Numerous authorities were cited to me in argument including *Trusts & Guarantee Co. v. Smith* (1915), 33 O.L.R. 155, 21 D.L.R. 711; *Canadian Credit Men's Trust Ass'n v. Morton et al.*, [1925] 1 W.W.R. 772 (Alta.); *Regalcrest Builders Inc. v. Somjan Investments Ltd. et al.* (1978), 6 C.P.C. 177; reversed on appeal 7 C.P.C. 168n; *Simpsons-Sears Ltd. v. Leeds Development Ltd.* (1981), 127 D.L.R. (3d) 54, 33 A.R. 286, 24 C.P.C. 27 (Alta.); and *Ontario Securities Com'n v. Trustee of Re-Mor Investments Management Corp.*, supra. I have also considered *Consumer's Glass Co. Ltd. et al. v. Farrell Lines Inc. et al.* (1982), 39 O.R. (2d) 696, 30 C.P.C. 293.

I found the most helpful case on this problem to be *Owners, Strata Plan No. VR368 v. Marathon Realty Co. Ltd. et al.; Skalbania Ltd. et al., Third Parties* (1982), 141 D.L.R. (3d) 540, 41 B.C.L.R. 155, 32 C.P.C. 63. This case is almost identical to the one before me. The British Columbia rule, Rule 27(8), is virtually the same as our Rule 333. On the facts of that case, only the condominium corporation was a plaintiff, having launched the action on its own behalf and on behalf of the owners of the 76 units or "lots". The defendant sought to examine 16 of the owners for discovery. There were numerous claims made against a number of defendants and some of these claims were made directly by the plaintiff on its own behalf and others on behalf of the owners. While it is true, as was pointed out by Seaton J.A., that the British Columbia answer to the problem of presenting condominium claims, as reflected in the British Columbia Condominium Act is different than the Ontario answer, as reflected in the Ontario Condominium Act, this does not lead to the conclusion that the result of such a motion will be different in the two provinces.

Counsel for the plaintiffs argue that the claim in the present action before me is not on behalf of any unnamed owner but only on behalf of the corporation and the two named plaintiffs, and that by s. 14(4), any judgment can be an asset only of the corporation and named plaintiffs. A very similar argument was made by the plaintiff's counsel in the *Marathon Realty* case and this argument was rejected by Seaton J.A., at p. 544 D.L.R., p. 68 C.P.C., in the following words:

Counsel for the respondent says that the fruits of an action on behalf of some only of the owners will be for the benefit of all owners. We were not directed to any section of the Act that makes that so. It seems to be inconsistent with the words "on behalf of". If you sue on behalf of someone, it seems to me, you sue for his benefit not your own. If the intention had been to assign the benefit of the action to the corporation or the owners as a whole, different language than "on behalf of" would have been employed. In this legislation "on behalf of" an owner means "for benefit of" that owner. Other legislation has been interpreted in this way: see *Re Millar* (1976), 71 D.L.R. (3d) 120 at p. 128, 12 Nfld. & P.E.I.R. 440, and *Lewis v. Nicholson* (1852), 18 Q.B. 503, 118 E.R. 190.

This action on behalf of these owners is, at least in part, an action for the benefit of the individual owners: the immediate benefit of the owners. It follows, in my view, that the appellant is entitled to examine the individual owners on whose behalf the corporation is suing. I do not find that result offensive.

It is those individual owners, who entered into their individual contracts, whose individual cause of action is being put forward. Only through discovering those individuals can the appellant properly defend itself.

I think that language and that result are equally applicable to the case before me.

I observe that in the judgment of Craig J.A., there is an observation at p. 69 [C.P.C.] that there is a section in the Ontario Act, being s. 9(18), which makes all the assets the assets of the corporation. The editors of Carswell's Practice Cases inserted a reference to the "[Corporations Act, R.S.O. 1980, c. 84]" which is quite wrong. There was no such reference in the original judgment as the report at 141 D.L.R. (3d) 540 at p. 545 makes clear. It seems clear to me that Craig J.A. was referring to the Ontario Condominium Act and not the Corporations Act. the provision to which Craig J.A. makes reference, namely, s. 9(18), which provides that a judgment in favour of the corporation is an asset of the corporation, was contained in the statute up until 1978 but in that year, the entire statute was substantially altered and in the present version of the Act, to be found in R.S.O. 1980, c. 84, there is no equivalent of s. 9(18). Section 14(4), above quoted, and quite differently worded, is the successor to old s. 9(18). There is no s. 9(18) at all in R.S.O. 1980, c. 84, and I can only assume that Craig J.A. was erroneously referred to the 1970 version of the statute.

I therefore conclude that this particular action is being brought, in part, for the immediate benefit of the unit holders whose units are referred to in para. 13(aa), (bb), (cc), (dd), (ee), (ff), (gg), (hh), (ii), (jj), (qqq), (aaaa), (bbbb) and (cccc) of the statement of claim, and the persons who own those units can be examined touching the matters in issue relating to such claims.

It is unclear on the existing material what the actual names of those unit holders are, and if the plaintiffs will not disclose the names voluntarily, this issue can be explored on the discovery of the representative of the plaintiff corporation and the appropriate motion brought. For the sake of clarity, I repeat that the defendant applicants are entitled to examine Thomas Lutton as a representative of the plaintiff condominium corporation, A. Ligeti and I. Himel as the named individual plaintiffs, and all other present unit holders on whose behalf the plaintiff corporation is suing for the damage to the individual units as alleged in the above-quoted portions of para. 13 of the statement of claim, with the examination of such unit holders being restricted to matters touching in is sue the claims contained in the said subparagraphs of para. 13. The balance of the application is dismissed.

Costs of this application in the cause. Order accordingly.

CBR# 286

Sanrose Construction (Dixie) Ltd. v. Don-Com Venture Capital Corp.

ONTARIO COUNTY COURT JUDICIAL DISTRICT OF PEEL WEST CO. CT. J. 8TH DECEMBER 1983.

ACTION for a declaration that the plaintiff holds a valid proxy from the defendant to vote at meetings of a condominium corporation and for ancillary relief.

H. G. Ker, Q.C., for plaintiff.

J. Bailey, for defendant.

WEST CO. CT. J.:-- In this action the plaintiff seeks a declaration that a proxy which it holds from the defendant is a valid and binding proxy and that the voting rights of the defendant to vote at meetings of owners of a condominium corporation have been validly assigned to it. In addition, it seeks an injunction restraining the defendant from exercising its voting rights at meetings of owners.

The plaintiff erected an apartment complex in the City of Mississauga and created a condominium corporation known as Peel Condominium No. 199 by filing a declaration and description in the land registry office. In due course, the plaintiff agreed to sell Unit No. 14, Level 5, within the complex to one C. S. Flenniken. As part of the consideration for the purchase of the unit the purchaser agreed to irrevocably grant to the plaintiff his right to vote at all meetings of owners of the condominium corporation and to deliver on closing a proxy to this effect. The agreement of purchase and sale was later assigned by Flenniken to Irving Ingber. The agreement between Flenniken and Ingber contained the following representation:

The Vendor represents and warrants to the Purchaser that to the best of his knowledge, information and belief, there are no special assessments contemplated by the Condominium Corporation, the voting rights have been assigned.

Title to the unit was transferred by the plaintiff to Ingber and his wife. In the transfer, the plaintiff reserved to itself the right of the purchasers and their successors to vote at all meetings of owners "on any matter required under the Condominium Act and its successors". On closing the purchasers executed and delivered a proxy appointing the plaintiff or its nominee as their proxy to vote at all such meetings. The proxy was expressed to be irrevocable without the prior written consent of the plaintiff. The purchasers also undertook to obtain a similar proxy from any successor in title.

The unit was subsequently sold by the Ingbers to the defendant. The agreement of purchase and sale between the Ingbers and the defendant also contained a representation that the voting rights had been assigned. On closing the defendant executed and delivered to the plaintiff a proxy in identical terms to that given by the Ingbers to the plaintiff. Later the defendant sought to revoke this proxy and to assert its own rights at meetings of owners. The plaintiff refused to give its consent to the revocation of the proxy and commenced this action. The writ and statement of claim were served and an appearance was entered on behalf of the defendant. The plaintiff, with the concurrence of the defendant, brought a motion for judgment pursuant to Rules 63 and 64. The parties agreed on a statement of facts to be used on this motion.

The motion could not properly be brought under Rule 63 as there was a serious question of law to be argued: see *Canadian Pest Control Operators Ass'n v. Brennan*, [1951] O.W.N. 838, 15 C.P.R. 96, 12 Fox Pat. C. 47. In addition, Rule 63 can be resorted to only if there are admissions of fact in the pleadings or in the examination of a party. It was apparent on the hearing of the motion that both parties wished the matter in issue to be finally adjudicated upon. It therefore appeared more appropriate that the matter be dealt with as the hearing of argument on points of law pursuant to Rule 124 which could result in the granting of judgment pursuant to Rule 125. Both counsel agreed to proceed on this basis. The points of law can be adapted from the first two items of the prayer for relief in the plaintiff's statement of claim.

1. Is a proxy granted by an owner of a unit within a condominium corporation and expressed to be irrevocable without the prior written consent of the holder of the proxy a valid proxy under the Condominium Act, R.S.O. 1980, c. 84?
2. If the first question is answered in the negative, does the reservation by the plaintiff of the voting rights of the purchaser constitute a valid representation of such voting rights?

Section 14(1)(i) of the County Courts Act, R.S.O. 1980, c. 100, as amended by 1981, c. 24, s. 1(9), provides that the court has jurisdiction in actions for equitable relief where the subject-matter involved does not exceed in value or amount \$15,000. The Court of Appeal has held in *Queensway Iron Works Ltd. v. Barlin Construction Ltd. et al.* (1980), 29 O.R. (2d) 586, 113 D.L.R. (3d) 748, 17 C.P.C. 213, that the court also has jurisdiction where the value does exceed the monetary limit if the defendant does not dispute jurisdiction. The effect of this judgment has not been diminished by a series of subsequent decisions of the Court of Appeal restricting the jurisdiction of this court in matters commenced by originating notice of motion. In this matter the action was begun by writ of summons.

The concept of exclusive ownership of defined space accompanied by shared ownership of common elements is of relatively recent origin. In Ontario the legal basis of this concept is found within the Condominium Act. Counsel for both parties acknowledged that the Act is a complete code of the rights and obligations of the condominium corporation and of the owners of units within it.

Counsel for the plaintiff contended that the granting of an irrevocable proxy is a matter of contract between the parties. It was a condition of the sale of the unit to the predecessor of the defendant that the voting rights should be reserved to the landlord and this condition was reinforced by the granting of the proxy which was expressed to be irrevocable without the plaintiff's consent. It was also contended that the subsequent sale to the defendant was subject to the same reservation and to the granting by the defendant to the plaintiff of its proxy in the same form.

On behalf of the defendant it was contended that the reservation of the voting rights and the insistence of the plaintiff upon a proxy in irrevocable form had the effect of vitiating the expressed purpose of the Legislature in enacting the Condominium Act and in providing for voting rights for owners within the condominium corporation. It was contended as a result that both the reservation and the proxy were void as being contrary to public policy.

The Act provides for voting by proxy at meetings of owners. Section 18(3) provides that a quorum for the transaction of business at a meeting of owners is those owners present in person or represented by proxy owning 33 1/3% of the units. Section 22(3) provides that an instrument appointing a proxy shall be in writing under the hand of the appointer or his attorney and may be either general or for a particular meeting. Section 22(4) provides that a proxy need not be an owner. The Act is silent as to whether a proxy can be irrevocable.

1. Is an irrevocable proxy a valid proxy under the Condominium Act?

The answer to this question involves a consideration of what a proxy is. The Shorter Oxford English Dictionary defines a proxy as:

A writing authorizing a person to vote instead of another.

The person to whom a proxy is given is also called a proxy and such person is defined in Black's Law Dictionary as:

Proxy. (Contracted from procuracy.) A person who is substituted or deputed by another to represent him and act for him, particularly in some meeting or public body. An agent representing and acting for principal. Also the instrument containing the appointment of such person.

This definition also finds support in two English cases. In *Re English, Scottish, & Australian Chartered Bank*, [1893] 3 Ch. 385, "proxy" is defined as meaning: "some agent properly appointed", and also as: "a lawfully constituted agent".

In *Cousins v. Int'l Brick Co., Ltd.*, [1931] 2 Ch. 90 at p. 95, Luxmoore J. said:

The proxy is merely the agent of the shareholder who appoints him. As between himself and the proxy he can determine the agency, and the agent is not entitled to vote if the agency is in fact determined. The shareholder, as between himself and the company, has the option of voting in person or by proxy. If he votes in person quite obviously he cannot also vote by proxy. As between himself and the company if he allows the proxy to vote, and the company accepts that vote, he cannot afterwards claim to vote personally.

As a result Luxmoore J. held that while the formalities of the charter of a company prevented a shareholder from revoking a proxy prior to a meeting they did not also prevent him from attending the meeting.

On appeal, in the same case at p. 102, Lawrence L.J. said:

Every proxy is subject to an implied condition that it should only be used if the shareholder is unable or finds it inconvenient to attend the meeting. The proxy is merely the agent of the shareholder and as between himself and his principal is not entitled to act contrary to the instructions of the latter.

On the basis of these authorities and on the premise that the appointment of a proxy is a matter of agency and that the proxy must do the principal's bidding, I seriously question whether there can be such a thing in law as an irrevocable proxy. There is some Canadian authority to this effect in *Nadeau v. Nadeau & Nadeau Ltd.* (1972), 6 N.B.R. (2d) 512. In that case the New Brunswick Supreme Court Queen's Bench Division dealt with a dispute between majority and minority shareholders. The minority shareholders held proxies from the majority shareholders. The company passed a by-law providing that any proxy given in respect of a share certificate should be "irrevocable for the period specified in the proxy". It was contended on behalf of the minority shareholders that the proxy had been given as a condition of a loan guarantee and that until the loan was repaid the proxy was irrevocable on the part of the majority shareholders.

Dickson J. considered a number of provisions of the New Brunswick Companies Act and concluded at p. 531:

It is inconceivable that it should ever have been the Province's intention, as now suggested by Mr. Ouellette, to deprive the Nadeau family members of their voting privileges.

He continued at p. 532:

Deprived of their voting rights, control of the company could be maintained by others in such a way, i.e., by failure to relieve the Province of its guarantee or by failure to pay dividends, that control of the company would never revert to the majority holders of the common stock. Even if, as contended by Ouellette, the preferred shares acquired by the plaintiff should be held in escrow as non-voting shares, the company could be controlled indefinitely by the holders of a minority of the total issued shares simply by failure to discharge down to the last dollar the guaranteed indebtedness.

As a result, the by-law purporting to make proxies irrevocable was declared to be null and void and voting proxies previously given were declared to be of no further effect.

The court in this matter, however, is not dealing with the issue at large. It is concerned solely with whether the proxy given to the plaintiff by the defendant is enforceable. The judgment in *Re Goldhar et al. and D'Aragon Mines Ltd.* (1977), 15 O.R. (2d) 80, 75 D.L.R. (3d) 16, 1 B.L.R. 204, is helpful in dealing with this issue. In that matter shareholders of a corporation requisitioned the directors to call a shareholders' meeting pursuant to s. 109(1) of the Business Corporations Act. The purpose of the meeting was to consider a resolution removing directors from office and electing new directors in their stead. The directors called the meeting and circulated a form of proxy to the shareholders. The form of proxy provided for the appointment of the president or a director of the corporation but also provided that a shareholder could nominate a proxy of his or her own choice. The form of proxy contained express provision for a shareholder to instruct the proxy named to vote for or against the resolution removing the directors but it contained no similar form of instruction with respect to the election of new directors. The form further provided that the proxy conferred discretionary authority and if the company nominee were named as proxy he would vote for the re-election of the existing directors.

The shareholders were free to name a proxy of their own choice. Notwithstanding this choice, R. E. Holland J. held the form was unfair and did not permit the shareholders to exercise their choice in connection with the transaction of business under s. 109(3) of the Business Corporations Act. As a result he granted a declaration that the proxy form was null and void.

There is a parallel between the present case and Goldhar. Section 26(1) of the Condominium Act provides as follows:

26(1) The board elected at a time when the declarant owns a majority of the units shall, not more than twenty-one days after the declarant ceases to be the registered owner of a majority of the units, call a meeting of the owners to elect a new board, and such meeting shall be held within twenty-one days after the calling of the meeting.

Both this section and s. 109(1) of the Business Corporations Act contemplate the unfettered right of the owner or shareholder to vote at meetings of owners or shareholders. In Goldhar this right was interfered with and the form of proxy was set aside. The form of proxy used in this case would completely nullify the right of the owners to have a new board of directors elected when the declarant no longer retains a majority of the units.

While that situation has not yet arisen the principles to be applied remain constant. As the basis of a proxy is one of agency the agent (in this case the plaintiff) must exercise that right as directed by the principal (in this case the defendant). The proxy granted to the plaintiff in this case might be valid in so far as it permits the plaintiff to exercise the voting rights of the defendant at a meeting of owners if the defendant is not otherwise represented at the meeting. If, however, the defendant chooses to attend the meeting and be represented by an officer or director the right of the plaintiff to act as its proxy is superseded. The proxy given to the plaintiff by the defendant and expressed to be irrevocable without the consent of the plaintiff is not enforceable against the defendant. The first question of law must therefore also be answered in the negative.

2. Is the reservation by the plaintiff of the voting rights of the purchaser a valid reservation?

The Act makes clear that ownership of a unit cannot be separated from ownership in the common elements. Section 7(5) of the Act reads as follows:

7(5) The ownership of a unit shall not be separated from the ownership of the common interest, and any instrument that purports to separate the ownership of a unit from a common interest is void.

While s. 48 provides that a mortgagee may exercise the voting rights of an owner it may do so only if it is so provided in the mortgage and presumably then only in the event of default. In that event the mortgagee would also be the legal owner of the unit so that no separation of interest would occur. The interest of owners in the common elements of the corporation can only be exercised through voting at meetings of owners. The reservation by the plaintiff in the transfer of title of the voting rights of the owners effectively frustrates the exercise of this right. The representations in the two agreements for sale that the voting rights had been assigned while not made by the plaintiff were certainly induced by the plaintiff and the plaintiff relied on them in its pleadings and in its submissions on this motion. These representations cast the nature of the condition imposed by the plaintiff on its purchasers in its true light. While in form the plaintiff may hold a proxy in substance it has reserved the voting rights. In doing so, it has attempted to separate the voting rights in respect of the common elements from the property rights of the owners contrary to s. 7(5) of the Act. As a result the second question of law must also be answered in the negative.

Having answered both questions of law contrary to the position of the plaintiff, it follows that the action must be dismissed. In keeping with the judgment in Goldhar the appropriate disposition would appear to be a declaration that the purported irrevocable proxy is null and void, and that the reservation of voting rights is invalid. As the defendant did not counterclaim for such a declaration, however, no order can issue in those terms. The defendant is entitled to its costs against the plaintiff.

Action dismissed.

CBR# 256

Re Gossner and Regional Assessment Commissioner et al.

42 O.R. (2d) 119 148 D.L.R. (3d) 643

ONTARIO HIGH COURT OF JUSTICE DIVISIONAL COURT GRIFFITHS, SAUNDERS AND TRAINOR JJ. 13TH JUNE 1983.

Carl B. Davis, for appellant, Regional Assessment Commissioner.

Andrew A. Weretelnik for appellant, Municipal Clerk of the City of Toronto.

I. A. Blue, for respondent.

The judgment of the court was delivered by

SAUNDERS J.:-- This is an appeal from the determination of a question by a judge of the county court pursuant to s. 50(1) of the Assessment Act, R.S.O. 1980, c. 31.

The question concerns the interpretation of s. 65(3) of that statute. Section 65 reads as follows:

65(1) The Assessment Review Board, Ontario Municipal Board or any court, in determining the value at which any real property shall be assessed in any complaint, appeal, proceeding or action, shall have reference to the value at which similar real property in the vicinity is assessed, and the amount of any assessment of real property shall not be altered unless the Assessment Review Board, Ontario Municipal Board or court is satisfied that the assessment is inequitable with respect to the assessment of similar real property in the vicinity, and in that event the assessment of the real property shall not be altered to any greater extent than is necessary to make the assessment equitable with the assessment of such similar real property.

(2) For the purposes of subsection (1) and of section 63, where a residential assessment is made with respect to a unit, as defined in the Condominium Act, a proposed unit, as defined in that Act, or a unit or suite in the building of a co-operative housing corporation, the value at which such unit, proposed unit or suite shall be assessed shall be based on the same proportion of the market value thereof as that at which owner-occupied single-family residences in the vicinity are assessed.

(3) Notwithstanding subsection (2), where a unit or proposed unit within the meaning of the Condominium Act was, before it became such unit or proposed unit, part of a building the suites or apartments in which were rented to a tenant or tenants for residential accommodation, subsection (2) ceases to apply to such unit or proposed unit until it is sold to an individual or individuals who acquire and occupy it as his or their residence or that of members of his or their families, and until so sold and occupied such unit or proposed unit shall be assessed at the level of assessment of similar rental property in the vicinity to which subsection (2) is not applicable.

A brief review of the factual background may assist in understanding the problem of interpretation. Number 33 Harbour Square in Toronto was completed in 1975 and consisted of 539 units on 35 floors. All of the units were offered for rent and at least 156 were rented by February, 1976. No other use was made of the units. The building was converted to a condominium by York Condominium Plan 288, registered in November, 1976. The applicant is the owner of three units in the condominium but has only resided in one of them.

Section 65(1) was enacted in 1971; s. 65(2) in 1975; and s. 65(3) in 1981. The evidence is that the level of assessment for the units is lower if based on the market value of owner-occupied single-family residences rather than on the market value of similar rental property.

The question which the learned judge was asked to consider was [18 M.P.L.R. 205 at p. 216]:

Does subsection 65(3) of the Assessment Act, R.S.O. 1980, c. 31, as amended, "the Act", apply to a condominium unit which is in a building in which not all of the suites or apartments were rented prior to the building being converted to a condominium complex?

The learned judge answered the question in the negative and gave the following reasons [at pp. 216-7]:

This question calls for an interpretation of the words "part of a building the suites or apartments in which were rented to a tenant or tenants for residential accommodation" as they now appear in s. 65(3) and requires me to determine whether the inclusion of the word "the" implies that all of the suites or apartments must have been previously rented in order for the condition of the subsection to be met. This is how counsel for the applicant [the respondent in this court] urged me to interpret it.

Counsel for the applicant submitted that this provision, being part of a taxing statute, should be construed strictly, and that it should be given its literal meaning whether or not such an interpretation accurately reflects any imputed intention of the Legislature.

Counsel for the respondents [the appellants in this court] urged me to find that the words were intended to be referable to the rental character of an apartment building and that there is no requirement that all of the suites or apartments had to be previously rented in order for a building to acquire such a character. In their submissions the words used do not require any specific portion of the apartments to have been rented.

I agree that the words may well have been intended to refer to the character of an apartment building but that is not how the provision was drafted. Given their plain literal meaning, the words clearly require that all of the suites or apartments must have been previously rented in order for the subsection to apply. If the word "the" were not included, it would be arguable that the condition requires that only some suites or apartments have been rented. But if the requirement is "some" rather than "all", how many is "some"? The draftsman of this provision, in my respectful opinion, did not come to grips with the problem that he was dealing with. Having failed to set out any criteria by which it could be determined whether or not an apartment building had the character of a rental building, he then set out an objective standard by which it could readily be determined whether or not a

particular building met the condition prescribed; that is, if all of the suites or apartments were previously rented, s. 65(3) would apply.

I agree with the applicant's submission as to how this provision ought to be interpreted.

(The emphasis is that of the learned judge.)

With respect, I am of the opinion that there is another interpretation that may reasonably be given to the words of the subsection. It seems to me that the plain meaning of the words in the section might describe the building in question. If a passing stranger were to ask with reference to 33 Harbour Square, "Before it became a condominium, was that a building in which the suites or apartments were rented to a tenant or tenants for residential purposes?" the answer might very well be "yes" rather than "no". The latter answer would at least require an explanation that it was given because not all of the suites or apartments had been rented.

The Assessment Act is a taxing statute. Both the applicant and the respondents used this circumstance to support their respective interpretations. Counsel for the applicant contended that any doubt as to the meaning should be resolved in favour of the applicant taxpayer. On the other hand, counsel for the respondents contended that a different approach should be taken as s. 65(2) and (3) together formed an exception to the general rule in s. 65(1) and thus a benefit to a taxpayer.

Dealing first with the argument of the respondents: In *Re Extencicare Ltd. and Borough of North York et al.* (1979), 27 O.R. (2d) 9, 105 D.L.R. (3d) 127, 9 M.P.L.R. 293, it was said that a person claiming the benefit of a provision exempting him from assessment for taxation must bring himself squarely within the exonerating clause to avoid throwing an additional burden on other taxpayers. In that case, the court was considering an exemption from business assessment. In the case we are considering, there were three distinct legislative actions. In 1971, by s. 65(1), it was provided, in effect, that tribunals should not alter assessments unless they were found inequitable with respect to similar real property in the vicinity. In 1975, by s. 65(2), a base for assessing condominiums was established. In 1981, by s. 65(3), certain condominium units were excepted from that base and it was provided that those units were to be assessed on a different base. Subsection (3) therefore imposes a new base on certain units rather than providing an exception. To apply the rule in *Extencicare* would impose an obligation on a taxpayer to bring himself outside what is in essence a taxing section. In my opinion, the principle of *Extencicare* does not extend that far. Subsection (3) should not, in my opinion, be construed as if it were a benefit or exemption to a taxing provision.

The respondent contends that because s. 65(3) is in a taxing statute, any doubt as to its meaning should be resolved in favour of the taxpayer. This principle was enunciated by Fitzgibbon L.J. in *Re Finance Act, 1894; Re Estate Duty on Property Passing on Death of Rev. George Studdert*, [1900] 2 I.R. 400 at p. 410, as follows:

If it be doubtful or difficult of interpretation, which I do not think it is, the Finance Act is subject to the rule that no tax can be imposed except by words which are clear, and the benefit of the doubt is the right of the subject.

That principle was quoted with approval by the Supreme Court of Canada in *R. v. Crabbs*, [1934] S.C.R. 523 at p. 526, [1934] 4 D.L.R. 324 at p. 327.

It has often been said that a tax must be imposed in clear and unambiguous language.

In *R. v. Budget Car Rentals (Toronto) Ltd.* (1981), 31 O.R. (2d) 161, 121 D.L.R. (3d) 111, 57 C.C.C. (2d) 201, the Court of Appeal was considering the interpretation of a municipal by-law which imposed a penalty on the respondent. The judgment of the court was given by the Chief Justice and, as will be seen from the paragraph that I am about to quote, his remarks apply to the interpretation of taxing statutes. At pp. 167-8 O.R., pp. 117-8 D.L.R., he said:

In the course of argument, counsel for the respondent has directed us to a number of principles governing the construction and interpretation of statutes which, he argued, supported his contention that the legislation in question ought not to be construed as creating an offence by the owner of a vehicle for which, upon proof that the vehicle has been parked in contravention of the by-law made pursuant to the legislation, the owner will be answerable subject, of course, to the statutory defence available to him.

Among these principles is the often-quoted principle that a penal statute must be construed "strictly". That this is so is surely beyond dispute, but it is important that it should be clear what the principle really means, and what it does not mean. What it does mean is that where a person is charged with an offence created by a statute, the conduct of that person which gives rise to the charge, or the conduct of someone for which that person may be held answerable, must be such as can be clearly and unmistakably demonstrated to fall within the kind of conduct which is proscribed by the statute. What the principle does not mean is that because a statute is "penal" or contains provisions to which penal consequences for breaches are attached, the meaning that is to be given to language used in the statute is to be determined in accordance with a rule of construction that is somehow "stricter" than, or is to be applied more stringently than, the ordinary rules which apply to determine the meaning to be given to language used in statutes.

A person who is charged with, or sought to be made answerable for, conduct to which penal consequences are attached by a statute is, therefore, entitled to insist that the impugned conduct be shown to the required degree of certainty to be conduct which, in fact and in law, renders him liable under the statute to be penalty prescribed therefor. In my view, however, he is not entitled to insist that, merely because the statute can, accordingly, be described as penal, its true meaning and intent must be ascertained by applying to it different (i.e., "stricter") principles of construction and interpretation than those which govern the construction and interpretation of statutes generally.

At one time, as remarked by E. A. Driedger in his recent work entitled *The Construction of Statutes* (1974), p. 148, statutes were regarded as falling into one of two broad classes, "penal" and "remedial". On this basis penal statutes (which were taken to include not only statutes imposing penalties for violations, but also revenue statutes and statutes interfering with the liberty or property of the subject) were to be construed strictly, and remedial statutes were to be construed liberally. Against this background the language used in s. 10 of the Interpretation Act of Ontario and in s. 11 of the Interpretation Act of Canada, R.S.C. 1970, c. I-23, as amended, deeming every Act or enactment to be remedial, takes on a special and obvious significance.

I think it is worth repeating here the words of Lord Russell in *Attorney-General v. Carlton Bank*, [1899] 2 Q.B. 158 at p. 164:

"I see no reason why special canons of construction should be applied to any Act of Parliament, and I know of no authority for saying that a taxing Act is to be construed differently from any other Act. The duty of the Court is, in my opinion, in all cases the

same, whether the Act to be construed relates to taxation or to any other subject, namely, to give effect to the intention of the Legislature as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed."

Where the Court is concerned with a penal statute, it has been said that the defendant in the proceedings will not be liable to a penalty if, upon one of two equally reasonable readings of the statute, the penalty is incurred, but on the other reading he is "let out". This has been expressed in another way by Wright J. in *London County Council v. Aylesbury Dairy Co., Ltd.*, [1898] 1 Q.B. 106 at p. 109, where he stated his understanding of the rule to be that: "... where there is an enactment which may entail penal consequences, you ought not to do violence to its language in order to bring people within it ...". Again, as Driedger stated at p. 154:

"One might ask whether one ought ever 'to do violence' to language, but in any case, 'doing violence' would be placing an unreasonable construction on language, and, clearly, a reasonable construction that does not impose a penalty is preferred to an unreasonable construction that does."

The Chief Justice went on to consider two possible interpretations of the by-law; decided that they were not equally reasonable; and found the respondent subject to the penalty on the basis of the more reasonable interpretation.

I respectfully conclude that it is no longer correct to simply say that any ambiguity must be resolved in favour of a taxpayer. If there are two interpretations, the more reasonable one must prevail even if it imposes a tax. When there are two interpretations and one cannot be said to be the more reasonable than the other, the choice should then be resolved in favour of the taxpayer.

Section 10 of the Interpretation Act, R.S.O. 1980, c. 219, and the "mischief rule" are not of assistance in dealing with this issue. Expressed in general terms, the intention of s. 65(3) would appear to be to deny assessment under s. 65(2) to certain condominium units which had been rented to tenants until such units have been sold to an owner-occupier. However, it is not clear from the language whether the subsection is directed not only to fully-rented buildings but also to buildings, such as 33 Harbour Square, which never were fully rented before they became a condominium. That is the very question which must be decided on this appeal and to apply the mischief rule would be to assume the answer to the question.

I confess that on a first reading the words of s. 65(3) seemed plain. After reading the reasons of the learned judge and hearing the argument on the appeal, I must conclude that there are two possible interpretations. The issue is whether they are equally reasonable. The interpretation given by the learned judge would lead to the result that if one of the 539 units had not been rented prior to conversion to a condominium, then s. 65(3) would not apply. Such a result approaches absurdity and facilitates avoidance of the rental tax base. The respondent contended that such a strict interpretation was not necessary and that the definite article "the" means "all or nearly all". With respect, that is not the question that was before the learned judge and is not what he found.

The adoption of the other interpretation would not lead towards absurdity. If all the units had been offered for rent but only one had been rented prior to conversion, the benefit of s. 65(2) would be available to an owner as soon as a unit was sold to and occupied by him.

While it is not conclusive of the issue, the adoption of the interpretation by the learned judge would create difficulties of administration. It would be necessary to determine before applying s. 65(3) if, in the history of the building, prior to its conversion to a condominium, any unit had never been rented.

In my opinion, the words in s. 65(3) without addition or explanation describe the building which is the subject-matter of this appeal as it was before it became a condominium. The interpretation advocated by the respondents is more reasonable and convenient and there is no injustice in adopting it. In my opinion, the learned judge should have answered the question in the affirmative. The appeal is, accordingly, allowed.

In the circumstances, there should be no order as to costs.

Appeal allowed.

CBR# 367

York Condominium Corp. No. 46 v. Medhurst, Hogg & Associates Ltd. et al.

(1982), 39 O.R. (2d) 389

ONTARIO High Court of Justice Gray J. September 13, 1982.

* An appeal from the following decision of Gray J. to the Ontario Court of Appeal (Jessup, Houlden and Zuber JJ.A.) was dismissed June 16, 1983. See (1983), 41 O.R. (2d) 800.

Application to dismiss an action for failure to observe a statutory notice requirement.

W.G. Horton, for applicants. C. Sefton, for respondent.

Gray J. (orally): This application was argued in conjunction with a similar application in No. 40622/79 York Condominium Corporation No. 46 v. Medhurst, Hogg & Associates Limited.

In the application the applicant seeks an order dismissing the action on the grounds that notice of the action was not given to owners and mortgagees prior to institution of the action pursuant to s. 14(1) of the Condominium Act, 1978 (Ont.), c. 84, as amended [now R.S.O. 1980, c. 84], or, in the alternative staying the action until such time as notice has been given to owners and mortgagees pursuant to s. 14(1) of the Condominium Act.

No statement of claim has been filed and no appearance has been entered by the applicant but I am given to understand that arrangements made between the applicant's counsel and the respondent's prior counsel were such that the matter could proceed before me in any event.

The facts in summary would appear to be as follows. The condominium was registered in 1972 and consists of 744 units. The first writ was issued July 5, 1979, in the other action and the writ in this action was issued apparently on July 27, 1979. It is common ground that the notices required by s. 14(1) of the Condominium Act were not given as that section requires. Section 14(1) of the Condominium Act reads as follows:

14(1) The corporation after giving written notice to all owners and mortgagees may, on its own behalf and on behalf of any owner, sue for and recover damages and costs in respect of any damage to common elements, the assets of the corporation or individual units, and the legal and court costs in any such actions brought in whole or in part on behalf of any owners in respect of their units shall be borne by those owners in the proportion in which their interests are affected.

Section 14(6) of the Condominium Act reads as follows:

14(6) Where an action is commenced on or after the first day of June, 1979, a judgment for the payment of money against the corporation is also a judgment against each owner at the time of judgment for a portion of the judgment determined by the proportions specified in the declaration for sharing the common interests.

Mr. Horton, on behalf of the applicants, traced the course of the condominium legislation in this province and at the outset, drew my attention to the fact that in his submission, s. 14 was the only thing in the Condominium Act that dealt with the right of the corporation itself to maintain an action.

My attention was drawn to the corporation's management function as set forth in s. 12(1) and to the fact that prior to 1978 the corporation had an unqualified right to sue with respect to the common elements. It was said that in 1978 the legislation was changed with the result that it is said that no longer is there an unqualified right in the corporation to sue.

In York Condominium Corp. No. 148 v. Singular Investments Ltd. (1977), 16 O.R. (2d) 31, 71 D.L.R. (3d) 61, 2 R.P.R. 24 Mr. Justice Henry held that the condominium corporation had only the right to maintain an action in accordance with the provisions of the statute. He concluded that the corporation was a creature of the statute and that its powers can only be exercised in accordance therewith. A further submission is made that the corporation acts in a representative capacity under the new section and that it only bears what is said to be a nominal risk since the real risk is borne by the owners. The question I have to decide on this application is: what is the effect if the corporation institutes an action without giving the notice? Am I confronted with a nullity situation or merely an irregularity which is capable of cure?

My attention was directed to two decisions, neither of which dealt with the precise problem involved in this application. The first being Stanishewski et al. v. Tkachuk et al., [1955] O.R. 667 at 683, [1955] 4 D.L.R. 517 and Pacific Coast Coal Mines Ltd. et al. v. Arbuthnot et al., [1917] A.C. 607, 36 D.L.R. 564 at 569, [1917] 3 W.W.R. 762. The point involved from both of these decisions is that if certain statutory conditions are not fulfilled one is faced with a nullity situation rather than a mere irregularity.

The concluding part of the applicant's submission rests on the fact that there is no alternative so far as I am concerned but to dismiss the action without prejudice to the right of the plaintiff to bring a new action after due compliance with the provisions of s. 14, it being said that if such a course is not followed there is bound to be a situation whereby risk will be involved so far as the defendant is concerned if sued by certain owners or possible mortgagees.

Mrs. Sefton, on the respondent's behalf, reminded me of the care which must be taken by a judge sitting in motions court when confronted with an application to dismiss an action or stay it and she forcefully brought to my attention that the apparent purpose of s. 14 would be to benefit condominium owners and not persons who stand in the position of this applicant defendant.

Mrs. Sefton urged me to find that s. 14 evidenced only a procedural requirement and that the notice requirement, in her view, did not validate an action taken where notice was not given. She sought to distinguish between the two decisions aforesaid and that situation with which I am now confronted and she concluded in that regard on the note that we are faced with a different case where a so-called "stranger to the benefit" sought to attack the procedural requirement. I was urged to stay the action rather than dismiss if I was going to grant any relief to the applicant.

I am obliged to counsel for their assistance. I am troubled to a certain degree by reason of the fact that no other decisions apparently have been handed down touching the matter in issue. Giving the matter the best consideration I can, I have come to the conclusion that the risk itself is present and that if the legislature had intended judges to have the power to stay the action, quite apart from any inherent power to stay itself, that such a staying procedure would have been set forth in the clear language of the Condominium Act which has engaged the attention of the legislature now for some time in the past few years.

In the result, I have reached the conclusion that the proceeding is a nullity by reason of the absence of notice and an order will therefore go dismissing the action without prejudice to the right of the plaintiff to launch a new action if so advised presumably with compliance with the procedural requirements. I cannot say whether or not there is a limitation problem involved because I agree with Mrs. Sefton that while the Condominium Act itself may contain no limitation provisions limitations may arise either by reason of contract or tort law in the litigation itself.

Application granted; action dismissed.

CBR# 044

Berman et al. Karleton Co. Ltd.

(1982), 37 O.R. (2d) 176

ONTARIO HIGH COURT OF JUSTICE GRAY J. JUNE 1, 1982

APPLICATION for a declaration of the rights of the parties to certain agreements of purchase and sale of condominium units.

B. Widman, for applicants.

A. Steinberg, for respondent.

GRAY J.:-- This is an application pursuant to Rule 612 of the Rules of Practice for a declaration of the rights of the parties to certain agreements of purchase and sale of condominium units. The parties have submitted a statement of agreed facts which can be summarized as follows. At the time of execution of the agreements, the purchasers (applicants) were aware that the purchase price consisted of two components, being the basic price plus the interest payable by the vendor (respondent) to the purchasers pursuant to s. 53(3) of the Condominium Act, R.S.O. 1980, c. 84. The agreements provided that the basic price would be increased by an amount equal to the s. 53(3) interest entitlement which would result in no actual payment of interest by the vendor or of the increase in purchase price by the purchasers.

The purchasers executed the agreements with full knowledge of their contents and proceeded to occupy their units. On February 17, 1982, the vendor gave notice that the final title closings would take place during March 1982. Prior to the scheduled title closings, the purchasers informed the vendor that they considered the purchase price in their agreements to be invalid, that the true purchase price was the basic price and that they were entitled to be paid interest as required by s. 53(3). This application was commenced prior to the title closings. The vendor filed an undertaking with the court that any possible rights of the purchasers would not merge upon closing and the transactions did close.

The applicants argue that purchasers of proposed condominium units are absolutely entitled to interest at a rate established by regulation on money paid on account of the purchase price to the unit and the date of delivery of a registrable deed or transfer pursuant to s. 53(3) of the Condominium Act. Section 61 prevents the vendor from contracting out of the statute. Secondly, it is submitted that the court has jurisdiction by virtue of s. 18 of the Judicature Act, R.S.O. 1980, c. 223 to order a party to pay money following an application of this type even though the application is brought by originating notice of motion for declaratory relief.

The respondent takes the initial position that the court has no authority on a Rule 612 application to order the relief sought by the applicants which is payment of the interest entitlement. It is submitted that Rule 612 is not available where questions of law arise other than through the construction of the agreement. Furthermore, it is said that an application under this rule should not be heard when the ruling would not end the litigation between the parties and finally determine their rights. With respect to the merits, the respondent submits that s. 53(3) has not been violated even though no interest was actually paid since the statement of adjustments credited the purchasers with their interest entitlement and then added the same amount to the purchase price. Furthermore, it is urged that a departure from the policy of the Act, which is alleged to be unclear in any event, is not sufficient to make a finding that the transaction is illegal. Fraud upon the Act or absence of good faith must be shown, neither of which exist in this case according to the respondent.

I propose to deal with the preliminary matter concerning my jurisdiction to deal with this application under three headings: (a) the power to order a payment of money; (b) the question of whether the application raises issues of law which go beyond the construction of the agreement; and, (c) the question of whether Rule 612 is applicable since the making of a declaration would not end the litigation.

(a) The power to order a payment of money

The threshold issue is whether the court has jurisdiction on an application under Rule 612 to hear this matter and to grant the relief sought. Rule 612(1) provides as follows:

612(1) Where the rights of the parties depend,

(a) upon the construction of a contract or agreement and there are no material facts in dispute; or

(b) upon undisputed facts and the proper inference from such facts

such rights may be determined upon originating notice.

The respondent submitted that there is no jurisdiction under Rule 612 to order a payment of money since the relief contemplated is only the construction of an agreement. The case of *Re Toronto General Trusts Corporation and McConkey* (1917), 41 O.L.R. 314 was relied upon for the proposition that Rule 612 does not confer a new jurisdiction, but rather provides a method by which the jurisdiction conferred by s. 18, para. 2 of the Judicature Act, R.S.O. 1980, c. 223 as set out below, can be exercised.

18. In every civil cause or matter, law and equity shall be administered according to the following rules:

2. No action or proceeding is open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right, whether or not any consequential relief is or could be claimed.

The applicant submits that the court can order consequential relief by virtue of s. 18, para. 8 of the Judicature Act which provides:

8. The court in the exercise of the jurisdiction vested in it by this Act in every cause or matter pending before it has power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as it deems just, all such remedies as any of the parties appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them in such

cause or matter, so that, as far as possible, all matters so in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided.

The applicants' further submission is that s. 18, para. 2 makes it clear that the fact that declaratory relief is being sought is not a valid ground for objecting to the hearing of this application. Whether or not a monetary award is or could be made, the court may make a binding declaration of rights which the successful party could then use as a basis for enforcement proceedings. It is said that para. 8 provides that in all claims properly before it, the court may grant all remedies to which the parties appear to be entitled. The stated objective is to avoid multiplicity of proceedings as would surely occur if only a binding declaration of rights was made and the parties then had to take further proceedings to enforce their rights. Therefore, it is claimed that a party can be ordered to pay money in an application pursuant to Rule 612 provided the claim is properly within the rule. This interpretation I am told is reinforced by Rule 613(1) which provides in part that:

613(1) The judge may summarily dispose of the questions arising on an originating notice and give such judgment as the nature of the case requires ...

A monetary judgment in favour of the applicants is said to be a remedy warranted by the nature of this case.

(b) The question of whether the application raises issues of law which go beyond the construction of the agreement

Rule 612 may not be utilized in cases where the affidavit material raises a number of disputed material facts nor where evidence must be weighed in order to determine the matters in issue. The authority for this legal proposition is *Re City of Burlington and Clairton Village* (1979), 24 O.R. (2d) 586, 99 D.L.R. (3d) 170. This decision also makes it clear that this type of application is inappropriate where matters of law are involved which go beyond the construction of an instrument.

Re Bitoff and Fran Restaurants Ltd. (1980), 28 O.R. (2d) 637 involved an agreement between the owner of premises formerly leased to successive restaurant businesses and the lessee of a nearby competitive restaurant in which the owner agreed not to lease his premises to anyone involved in handling or selling food. The owner applied to the court for a determination of the enforceability of the agreement saying that it was in restraint of trade. Callaghan J. dismissed the application saying at pp. 639-40:

... the determination of the enforceability of such a covenant in restraint of trade ... raises questions which are not in the main questions of construction at all. While incidentally some matters of construction might arise for consideration in determining the enforceability, the questions raised are question of law based on public policy depending to a large extent on the circumstances proved to exist at the time the covenant was entered.

The respondent in this application argued that if the agreements are found to have been in breach of the Condominium Act, the issues of law which arise are whether the contract is illegal and, if so, what are the rights of parties to an illegal contract. A number of cases were cited to demonstrate the principle of law that where a contract violates an implied prohibition in a statute, one must consider whether the sole purpose of the statute is protection of the public. If so, the contract is void and the parties to the contract have no rights unless they are not in *pari delicto*. Examples of cases of this type are: *Prince Albert Properties and Land Sales Ltd. v. Kushneryk*, [1955] 5 D.L.R. 458 and *Albert E. Daniels Ltd. v. Sangster* (1976), 12 O.R. (2d) 512.

If it is determined that the agreement is illegal, the respondent's further submission is that a further issue arises as to whether the parties are in *pari delicto* before their respective rights can be determined. It is said that various factors would have to be considered, one of which would be a determination concerning which party had the burden of proving under the statute that the law had been complied with. Examples of cases of this type are: *Kiriri Cotton Co. Ltd. v. Dewani*, [1960] A.C. 192, [1960] 1 All E.R. 177 in which it was held that a landlord and tenant were not in *pari delicto* in a situation where a rent control statute prohibited a landlord from charging a premium for subletting premises because the statute placed the primary responsibility on the landlord. A further example is *Hasiuk v. Oshanek*, [1936] 1 D.L.R. 232, [1935] 3 W.W.R. 385, 43 Man. R. 470.

On this preliminary argument, the respondent has a further argument that, in addition to the issues of statutory burden of responsibility and knowledge of the applicants, the question of the severability of the challenged clauses of the agreement must be dealt with. Put another way, it is that, although part of an agreement is unenforceable and all the promises in the agreement are supported by the same consideration, an independent provision which changes only the extent and not the kind of agreement may be enforceable.

The applicants' response, which is a complete answer to all of these submissions, is that the question of the legality of the agreements never arises. The Condominium Act simply provides in s. 61 that:

61. This Act applies notwithstanding any agreement to the contrary.

It is not necessary to decide whether the agreements are legal or not since any agreement which contravenes the Act shall not operate. None of the cases cited by the respondent involved a specific prohibition of enforcement of agreements made in violation of the statute. All involved statutes which required or prevented certain activities with sanctions of fines. A legal determination of the purpose of the statute and its effect on an agreement made without reference to the statute was required. Therefore, the respondent's contention that issues of law arise which go beyond the construction of an agreement and which, therefore, cannot be heard on a Rule 612 application must be rejected.

(c) The question of whether Rule 612 is applicable since the making of a declaration would not end the litigation

The respondent's final submission on the question of jurisdiction was that this application ought not to be heard since the order would not necessarily end the litigation between the parties. A number of cases were relied upon as establishing the principle that where a declaration would not end the dispute between the parties, Rule 612 is not the appropriate procedure.

The principle was well stated in *Lewis v. Green*, [1905] 2 Ch. 340 at 344: xD

It is only intended to enable the Court to decide questions of construction where the decision of those questions, whichever way it may go, will settle the litigation between the parties. It is not intended that questions of construction which, if they are decided in one way only will settle the dispute between the parties, should come up for decision on an originating summons.

This approach was adopted in *Anglo Canada Fire & General Insurance Co. v. Robert E. Cook Ltd.*, [1973] 2 O.R. 385 where an application was made for construction of the word "month" in a lease, the dispute being whether or not the required notice had been given in time. Van Camp J., at p. 386, accepted the proposition that "If the interpretation or construction of the document will not end litigation and finally determine the rights of the parties then this procedure should not be used". Since one interpretation of the word "month" would end the dispute, because the notice would have been given on time, but the other possible finding would have left open the question of sufficiency of notice, the application was not appropriate and was dismissed. Likewise, in *Re Halmos* (1979), 12 C.P.C. 16, it was held that an order ought not to be made under Rule 612 where it would not be a final determination of the real issue between the parties. The application had been brought by a land owner to challenge the validity of a zoning by-law which applied to his land. The real issue, as found by the court, was whether the municipality would be required to issue a building permit with respect to that land.

The applicants seek a declaration that the purchase price under the agreements is the basic price and that each of the purchasers is entitled to interest pursuant to s. 53(3) of the Condominium Act. If they are successful, the respondent's submission is that this will not finally determine the matters in issue because the respondent wishes to raise a defence of the applicants' knowledge and to argue that, if the applicants are entitled to relief, it should be on terms when parties are not in *pari delicto*. The effect of knowledge of the parties may be dealt with on this application since the issue is not whether this is an illegal contract but, rather, whether the terms of the contract regarding interest entitlement can operate given the wording of s. 53(3) and s. 61 of the Condominium Act. The matter of rights of parties not in *pari delicto* arises only with respect to illegal contracts. Accordingly, a declaration either way would constitute a final determination of rights of the parties and would end the litigation other than by way of appeal.

Section 53(3) and 61 of the Condominium Act provide as follows:

53(3) Subject to subsection (2), where a purchaser of a proposed unit under an agreement of purchase and sale referred to in subsection (1) enters into possession or occupation of the unit before a deed or transfer of the unit acceptable for registration is delivered to him, the proposed declarant shall pay interest at the prescribed rate on all money received by him on account of the purchase price from the day the purchaser enters into possession or occupation until the day a deed or transfer acceptable for registration is delivered to him.

61. This Act applies notwithstanding any agreement to the contrary.

As stated previously, the agreements in question provided that the purchase price was made up of the basic price plus the s. 53(3) interest entitlement. Upon closing, the applicants were provided with statements of adjustment which credited the purchasers with the interest entitlement and then added the same amount to the purchase price. The respondent submitted that a court cannot interfere with the agreements unless there has been either a contravention of the Act or fraud upon the Act. The respondent maintains that, since there is no requirement for payment of interest in cash, interest has been paid by virtue of the credit given in the statement of adjustments and the provisions of the Act have been fulfilled. It is claimed that there has been no fraud upon the Act since the applicants knew in advance what the purchase price was to be. The applicants allege that the scheme is a sham arranged for the purpose of circumventing the Act which is prohibited by s. 61 regardless of the knowledge of the purchasers.

In *Re Grandby Investments Ltd. et al. and Wright et al.* (1981), 33 O.R. (2d) 341, 124 D.L.R. (3d) 313, 20 R.P.R. 30, an agreement for the purchase and sale of a proposed condominium unit contained a clause by which the purchaser agreed to waive interest payable pursuant to s. 53(3). An application was made under Rule 612 to receive credit for the interest entitlement upon closing. After dealing with the preliminary issue of the effect of a condition in the agreement, the court examined the purpose and effect of the 1974 amendments to the Act which include what is now s. 53(3). Callaghan J. dealt with the matter at pp. 346-47 in the following terms:

These amendments are directed towards the conduct of a vendor and are clearly remedial, enacted with a view to protecting a prospective purchaser from what apparently were perceived to be abuses in the sale of condominium units. It is from this perspective, namely, the purposiveness of the legislation, that the interpretation of s. 24c(3) [now s. 53(3)] must be approached.

The Act contemplates registration of a declaration and delay attendant thereupon ... the legislative intention that the purchaser was entitled to interest on moneys paid on account of the purchase price, in my view, is manifest.

I conclude that 24c(3) was enacted to cover a situation such as that before the Court where the vendor while charging occupation rent holds the purchaser's moneys on account of pending registration of a deed ... I also note that if the provisions of s. 24c(3) are not mandatory, there is then no incentive whatsoever on the vendor to comply with the requirements of s. 24a in relation to avoiding delay.

The waiver was accordingly held to be inoperative.

The recent unreported decision of Provincial Judge Sigurdson in *Rudolph and Meller v. Priene Limited and 377806 Ontario Limited* also dealt with an attempt to avoid s. 53(3). In the agreement, the purchaser acknowledged the statutory interest entitlement and then assigned his right to the interest to the vendor. The vendor argued that an assignment for valuable consideration was distinguishable from waiver as in *Re Grandby*, supra. The court held that the agreement violated the mandatory requirements of s. 53(3) and was an attempt to contract out of the Act which is prohibited by s. 61. Regarding the intention of the Act, the following is said at pp. 6-7 of the unreported decision:

The clear intention of s. 53(3) as fortified by s. 61 was that the purchaser was entitled to interest and that the vendor is not entitled to keep that interest ... To countenance the assignment back to the vendor such as was done herein was to fly in the face of the legislative intention and to ignore the clear statement in *Re Grandby* ...

In light of these cases and the mandatory wording of s. 53(3) and s. 61 of the Condominium Act, the clauses of the agreement, which increase the purchase price by the amount of the interest to which the purchaser is entitled, cannot stand. The intent of the Act is clearly that the purchaser be paid interest on money paid to the vendor on account of purchase price during the interim occupancy period before a registrable deed or transfer is delivered. The reason for doing so is to protect purchasers of proposed condominium units from abuses by vendors who delay in registering declarations by providing an incentive to register quickly. The knowledge of the purchasers regarding what they were signing is irrelevant given the wording of s. 61 which prevents the parties from contracting out of the Act. Given the conclusion that there has been a contravention of the Act, it is not necessary to deal with the submission of the respondent regarding fraud upon the Act or absence of good faith.

In the result, an order will go:

- (1) amending the style of cause to name one of the applicants as Udo Bastian;
- (2) deleting the name of Ismail Turksen from the applicants listed in the style of cause;
- (3) abridging the time for service of the original notice of motion;
- (4) declaring that the full and true sale price with respect to each agreement is that shown in each agreement as "Basic Price" and that on the title closing of each transaction, no greater amount can be required by the respondent to be paid by each applicant by way of adjustment or otherwise, directly or indirectly; and
- (5) directing that the respondent will pay to the applicants their costs of this application on a party and party basis forthwith after taxation thereof.

Order accordingly.

CBR# 323

Stulberg v. York Condominium Corp. No. 60

(1982), 34 O.R. (2d) 92

ONTARIO COURT OF APPEAL ARNUP, WILSON and GOODMAN J.J.A. OCTOBER 22, 1981

APPEAL from the dismissal of an application to the County Court for certain relief based on s. 49 of the Condominium Act, 1978 (Ont.), c. 84.

D.J. Brown, Q.C., for applicant, appellant.

Alvin B. Rosenberg, Q.C., for respondent.

The judgment of the Court was delivered orally by

ARNUP J.A.:-- In July, 1980, the appellant made an application to the County Court in purported reliance upon s. 49 of the Condominium Act, 1978 (Ont.), c. 84 [now R.S.O. 1980, c. 84]. His application was dismissed by His Honour Judge Webb. In that application the following relief was sought:

(1) Directing the Condominium Corporation, through its Board of Directors, to make the records of the Corporation available for inspection by Sidney Stulberg, registered owner of Unit 24, Level 13, York Condominium Plan No. 60, 370 Dixon Road, Weston, Ontario, in accordance with Section 21 of The Condominium Act, 1978.

(2) Declaring invalid and contrary to The Condominium Act, 1978 the procedure adopted by the Board of Directors since 1977 of advance polling stations for the purpose of casting votes prior to the holding of the general meeting.

(3) Declaring invalid the election of the Board of Directors carried out under the advanced polling held in 1978 on April 17th, 18th, 19th, 20th, 21st, 24th, and 25th; in 1979 on April 9th, 10th, 11th, 12th, and 17th and in 1980 on April 23rd, 24th, 25th, and 28th.

(4) Declaring invalid the registration proxy form.

Section 12 of the Condominium Act, 1978 provides in s-s. (3):

(3) The corporation has a duty to effect compliance by the owners with this Act, the declaration, the by-laws and the rules.

Subsection (5) provides:

(5) Each owner and each person having a registered mortgage against a unit and common interest has the right to the performance of any duty of the corporation specified by this Act, the declaration, the by-laws and the rules.

Section 21 of the Act provides:

21. The corporation shall keep adequate records, and any owner or his agent duly authorized in writing may inspect the records on reasonable notice and at any reasonable time.

Section 49 provides in s-s. (1):

49. (1) Where a duty imposed by this Act, the declaration, the by-laws or the rules is not performed, the corporation, any owner, the bureau, or any person having a registered mortgage against a unit and common interest, may apply to the county or district court for an order directing the performance of the duty.

Subsection (2) provides:

(2) The court may by order direct performance of the duty and may include in the order any provisions that the court considers appropriate in the circumstances.

Despite the fact that the applicant, in his material, indicated that he was the owner of a unit in the condominium, it was revealed on cross-examination that at the time of the making of the application and of the events which led up to it the applicant was not the owner of a condominium unit; his wife was the registered beneficial owner. The applicant had made a demand to inspect certain records of the condominium corporation. On the hearing before His Honour Judge Webb, the applicant, through his cross-examination, had testified that he was the agent of his wife, but there was no evidence before the Court that the applicant was authorized in writing by his wife, the registered owner, to inspect the records or to do anything else.

Towards the conclusion of the argument before us it became obvious that the applicant had no right even to make the application under s. 49 of the Act. The application can be made only by "any owner"; there is no provision for an application by an agent or other representative of the owner. Accordingly, the application brought in the name of the applicant was misconceived from the beginning, and this is sufficient to dispose of this appeal.

However, we have had the benefit of reasonably full argument on the scope of s. 49 of the Condominium Act, 1978 and while it is not necessary for the disposition of this appeal we desire to express certain views upon that section.

There have been three relatively recent cases with respect to the jurisdiction of a County Court Judge to grant declaratory relief in a proceeding commenced by originating motion. They are *Queensway Iron Works Ltd. v. Barlin Construction Ltd. et al.* (1980), 29 O.R. (2d) 586, 113 D.L.R. (3d) 748, 17 C.P.C. 213; *Re Canada Mortgage & Housing Corp. and York Condominium Corp. No. 46* (1981), 31 O.R. (2d) 514, 119 D.L.R. (3d) 423 (a decision of His Honour Judge Borins in the County Court); and *Re Gallant and Veltrusy Enterprises Ltd.* (1981), 32 O.R. (2d) 716, 123 D.L.R. (3d) 391 (a judgment of this Court).

In our view there is no power conferred on the County Court by s. 49 of the Condominium Act, 1978 to make a declaratory order except in relation to an application for an order directing the performance of a duty imposed by the Act, the declaration, the by-laws or the rules. It would be undesirable, in our opinion, to attempt to elaborate in this case upon the circumstances in which such a declaration so related to an application for an order directing the performance of a duty, can be made. It is sufficient, in our view, to indicate that the mere fact that a condominium is involved does not confer upon the County Court jurisdiction to make a declaratory order but, as I have said, such a declaratory order must be related to an application permitted by s. 49 directing the performance of the duties of the kind stated. It follows that much of the relief sought by the appellant was not obtainable on a summary application under s. 49.

In the result, accordingly, the appeal is dismissed with costs.

Appeal dismissed.

CBR# 382

Young v. 253819 Developments Ltd. et al.

24 O.R. (2d) 73 97 D.L.R. (3d) 363

ONTARIO HIGH COURT OF JUSTICE GRANGE, J. 12TH MARCH 1979.

ACTION to enforce an agreement of purchase and sale against a defendant mortgagee and his purchaser.

D. Zimmer, for plaintiff.

A. S. Halpert, for defendants.

GRANGE, J.:-- This is an action by the purchaser of a condominium apartment to enforce his agreement of purchase against the defendants, who are the mortgagee of the building and the purchaser from him after default upon the mortgage.

The condominium building in which the plaintiff's apartment is contained was an enterprise of a company called May Establishment Limited (May) and was known as Harvard Place and situated in Waterloo. In May of 1974, the building was mortgaged to the defendant Maxwell S. Lewis (Lewis) for the sum of \$700,000 with interest at 16% payable monthly and the whole of the principal repayable on June 30, 1976. This mortgage was at the time a third mortgage and covered the apartment building and, although nothing hangs on this, it covered besides the apartment building another property as well.

In June of 1974, the plaintiff entered into a tenancy agreement to rent apartment No. 1701 at a rental of \$223 per month for a term of one year. The agreement gave the plaintiff the right to purchase the apartment as an individual condominium unit at a price of \$23,400 after registration of the necessary condominium documents.

In October of 1974, the plaintiff, pursuant to the term in his lease, entered into an agreement with May to purchase as a condominium unit the apartment he was already occupying as a tenant for the total sum of \$23,400 payable \$2,900 as a deposit, \$13,000 on the date of closing and the balance by a mortgage to be arranged. The agreement contained the following special terms:

(a) May was entitled to use all money paid for the construction of the building and was not required to hold any of it in trust. Section 24c of the Condominium Act, R.S.O. 1970, c. 77 [since repealed by s. 61 of and replaced by the Condominium Act, 1978 (Ont.), c. 84] which requires all such moneys to be held in trust until security can be provided to the purchaser was not then in force.

(b) The plaintiff was forbidden to register any encumbrance against the property which might jeopardize the receipt by May of all mortgage funds.

At the same time an occupation agreement was entered into between the plaintiff and May whereby the plaintiff was entitled to remain on the premises prior to closing at a rental of \$195 per month. Under this agreement all closing documents were to be held by the vendor until the plan of condominium had been registered.

The plaintiff complied with the terms of his bargain, paid the deposit on entering into the agreement, and the closing sum in March of 1975, all without security or registration of documents, even though at least upon the payment of the closing sum he was represented by solicitors. He could not arrange the mortgage until the condominium plans were approved. Unfortunately, May fell into financial difficulties; it was unable to complete the condominium arrangements and defaulted on the mortgage payments to Lewis. The difficulties apparently began in the fall of 1974, but did not become acute until the spring of 1975. On May 27, 1975, Lewis gave notice of sale under power. By agreement of sale dated August 14 and 29, 1975, the property was sold to the defendant, the numbered company, and by deed dated September 3rd and registered September 11, 1975, the transaction was closed. On September 12, 1975, one day later, a notice of the agreement between the plaintiff and May was registered. The sale proceeds failed even to meet the mortgage debt to Lewis. May is, of course, insolvent.

Much of the evidence at trial was devoted to the knowledge Lewis or the numbered company had or might have had of the plaintiff's interest at any time. First of all, it was notorious that May had intended to convert the building into a condominium. There were signs both on the balconies and in the lobby of the building from at least September, 1974. It is equally obvious that May was making sales of the contemplated condominiums from June of 1974 on. There is some doubt as to whether Lewis visited the premises in the spring of 1975 before the notice of sale was instituted and some doubt as to whether he was aware that some units had been sold. The principals of the numbered company visited the premises in July and August of 1975, prior to submitting the offer and must have known the condominium intention. I can find no evidence of precise knowledge in either defendant of the plaintiff's interest until the receipt by Lewis in August, 1975, of a list of tenants upon which some were designated either by May, or by Lewis as a result of information from May, as owner or purchaser. On August 25, 1975, Lewis wrote to the plaintiff, and the relevant portions of the letter are as follows:

A recent rent roll supplied to me by Mr. Klima of May Establishment Limited shows you as an "owner", from which I gather that you have allegedly purchased the apartment you occupy, subject to the building becoming a condominium. Unfortunately, I have no knowledge of the terms of any agreement entered into between yourself and May Establishment Limited, but as Mortgagee in possession I can only regard you as a resident, either at will or on a monthly basis and I must therefore ask that during your occupancy you pay the normal monthly rental that would be paid by any regular tenant for the apartment you occupy, which in your case amounts to \$250.00 and which I will accept as occupation rental until your status as an occupant is clarified. By payment of such monthly sums and acceptance of them by me, I do not in any way recognize or assume that you are actually the owner of the apartment you occupy.

There is a likelihood that the property will be sold under Power of Sale proceedings very shortly. In that event, the new owners of course will be advised of your alleged purchase and will no doubt meet with you regarding same.

Both Lewis and the principals of the numbered company testified that the latter was not supplied with any list of purchasers of units until after closing and I accept that evidence, but it is not really disputed that the officials of the numbered company

suspected some sales might have already been effected. No purchasers had registered a claim of any sort prior to the registration of the deed to the numbered company, although some, besides the plaintiff, registered shortly thereafter.

Some further proceedings should be mentioned. May brought action to set aside the sale to the numbered company but that action failed and was dismissed. Great difficulties arose in the collection of rents and it was necessary for the numbered company to take action against some of the tenants. A motion was brought against the plaintiff under the Landlord and Tenant Act, R.S.O. 1970, c. 236, for an order for a writ of possession for arrears of rent. The plaintiff filed a dispute to the effect that he was an equitable owner and not a tenant and that the numbered company was bound by the agreement between the plaintiff and May. The matter came on before His Honour Judge Mossop who rejected the defence but granted the plaintiff relief from forfeiture upon terms. One of the defences of the numbered company in this action is *res judicata*. Indeed, an application was brought in this action to dismiss it upon that ground. The application came on before Pennell, J., who dismissed it upon the ground that he was not certain from Judge Mossop's reasons that he had rejected the possibility that Lewis had knowledge of the plaintiff's interest before the power of sale notice and the sale might, therefore, be assailable.

The defence raises two other matters: first, on closing, Lewis turned over to the numbered company and deposited a declaration of default and service and the numbered company accordingly raises the defence provided in ss. 34 and 35 of the Mortgages Act, R.S.O. 1970, c. 279. Second, the plaintiff's agreement with May was for the purchase of a condominium unit and the provisions of the Planning Act, R.S.O. 1970, c. 349, must be considered. Although the Condominium Act, s. 24 [rep. & sub. 1972, c. 7, s. 1; am. 1973, c. 121, s. 1], excludes the operation of s. 29 of the Planning Act, so as to make compliance with the Planning Act unnecessary in the purchase of a condominium unit, there can be no unit until registration of the project. That registration did not take place until long after the agreement was entered into. Consequently, it is argued that the agreement could only be valid if it contained a clause making it subject to compliance with the Planning Act and such clause was not present: see *Re Crossroads Apartments Ltd. and Phillips* (1974), 4 O.R. (2d) 72, 47 D.L.R. (3d) 172.

One can have nothing but sympathy for the plaintiff but his position, in my view, is hopeless. The action against Lewis cannot succeed because the mortgage to Lewis was prior both in time and registration to the agreement between the plaintiff and May and Lewis had every right to sell upon default. It is suggested he might have been in default of s. 30(1), para. 4, of the Mortgages Act in failing to give notice to the plaintiff of the sale. But the facts are against the suggestion. The subsection requires notice to be given to any person about whose interest the mortgagee has had actual notice in writing prior to the giving of the notice of sale. No such notice had at the relevant time been received.

Entirely apart from the defences of the Planning Act, the Mortgages Act and *res judicata*, the action against the numbered company cannot, in my opinion, succeed. Counsel for the plaintiff argues that the numbered company had constructive notice or was put upon inquiry of the interest of the plaintiff by reason of its knowing that some condominium units had been sold. He refers me to s. 69 of the Registry Act, R.S.O. 1970, c. 409, which is as follows:

69(1) After the grant from the Crown of land, and letters patent issued therefor, every instrument affecting the land or any part thereof shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration without actual notice, unless the instrument is registered before the registration of the instrument under which the subsequent purchaser or mortgagee claims.

(2) This section does not extend to a lease for a term not exceeding seven years where the actual possession goes along with the lease, but it does extend to every lease for a longer term than seven years. First of all, he concedes that there is no actual notice brought home to the plaintiff of the plaintiff's interest -- actual notice has always been confined to something which would make the taking of the subsequent conveyance akin to fraud. See the comments of Strong, C.J., in *Rose v. Peterkin* (1885), 13 S.C.R. 677 at p. 694, who posed the test as follows:

What such actual and direct notice is may well be ascertained very shortly by defining constructive notice, and then taking actual notice to be knowledge, not presumed as in the case of constructive notice, but shown to be actually brought home to the party to be charged with it, either by proof of his own admission or by evidence of witnesses who are able to establish that the very fact, of which notice is to be established, not something which would have led to the discovery of the fact if an enquiry had been pursued, was brought to his knowledge.

Counsel then goes on, however, to argue that constructive not actual notice is the test here. He argues that the plaintiff was in occupation pursuant to a lease for a term not exceeding seven years with actual possession and s. 69(2) governs. He further relies on *Plant v. Woolfe et al.*, [1954] O.R. 726, [1954] 3 D.L.R. 700, where Barlow, J., held that where a lease for less than seven years with occupation is in effect a subsequent purchaser is bound not only by the lease term but also by a right of first refusal contained in the unregistered lease. I must confess I find some difficulty in understanding the principle upon which *Plant* was decided -- it is one thing to hold a subsequent purchaser without actual notice to a short lease term, it is quite another to bind him to a right to purchase in the tenant -- but, in any event, it would have no application here. The plaintiff was not in occupation pursuant to a lease but pursuant to an agreement of purchase and sale and an occupation agreement pending completion of the sale. The agreement does not precisely say so, but it must be taken to have supplanted the original lease of May, 1974.

More importantly, however, the argument ignores the real nature of the transaction entered into by the numbered company. It was not purchasing from May which had sold part of the property to the plaintiff by an unregistered conveyance. It was purchasing from Lewis under the power of sale given in the mortgage from May to Lewis, and that mortgage had undoubted priority to any interest of the plaintiff. There was no defect in the title of Lewis to sell and the numbered company could not, therefore, have any notice thereof whether actual or constructive.

It follows that the action must be dismissed against both defendants with costs if demanded.

Action dismissed.

CBR# 121

Goetz et al. v. Whitehall Development Corp. Ltd.

19 O.R. (2d) 33

ONTARIO COURT OF APPEAL ARNUP, ZUBER AND BLAIR, J.J.A. 10TH FEBRUARY 1978.

APPEAL from a judgment allowing an action for damages for breach of contract. R. G. Slaght, for appellant, defendant.

R. J. Rolls, Q.C., for respondents, plaintiffs.

The judgment of the Court was delivered by

ZUBER, J.A.:-- This is an appeal by the defendant against the judgment given against it in the total sum of \$17,300.

The material facts are as follows: On October 14, 1972, each of the plaintiffs agreed to purchase a condominium unit in a residential building to be constructed by the defendant. Each plaintiff gave a \$500 deposit and was obliged by the terms of the contract to pay a further \$500 deposit on February 28, 1973. For reasons which need not be detailed, the additional deposits were not given in time. On March 19th, two cheques for \$500 were given to an agent for the defendant who, in exchange for the cheques, issued receipts. On March 29, 1973, these two cheques for \$500, along with the defendant's cheques for the original deposits of \$500, were returned to the plaintiffs. A letter accompanied the return of each deposit which treated the agreement for sale as terminated on the ground that there had been default in paying the second deposit within the proper time. The contracts contained the usual term making time of the essence.

On May 24, 1973, the plaintiffs commenced action for specific performance and, alternatively, for damages. A *lis pendens* was not registered, no doubt due to technical difficulties arising from the fact that the condominium corporation had not yet been registered.

Progress on the condominium project was slow because of the problems encountered with municipal authorities and, as a result, compliance with the Planning Act, R.S.O. 1970, c. 349, and registration of the declaration, description and by-laws pursuant to the Condominium Act, R.S.O. 1970, c. 77, did not take place until February of 1974. The trial Judge noted that "it is not suggested by the plaintiffs that the delay in registration was due to any fault of the defendant". Subsequently, and in the normal course of business, the units which had been the subject of the sale contracts were sold to others.

At the opening of trial, the plaintiffs elected to pursue their remedy for damages, since specific performance was no longer available. The first defence raised was based upon the fact that the second deposits were not paid within the time prescribed by the contract. The learned trial Judge found that the defendant had waived compliance with the time requirements of the agreement respecting the second deposit. In my opinion, he was right in so concluding. There was abundant evidence to warrant this conclusion.

The next defence raised is more formidable and depends upon the premise that the agreement contains a condition precedent that neither party could waive. An appreciation of this defence requires an examination of the agreements (which are identical) signed by each plaintiff. The relevant parts are as follows:

3. In the event that the Declaration, Description and By-Law required by the Condominium Act, R.S.O. 1970, Chapter 77 and any amendments thereto (hereinafter called the "Act") have not as yet been registered, this Agreement and all the terms hereof are conditional upon the Vendor registering the necessary documents to have the project containing the Unit made subject to the Act. If the said project is not made subject to the Act within one year from the date hereof, this Agreement shall, notwithstanding any intervening negotiations, be null and void and the deposit shall be returned to the Purchaser without interest and neither party shall be liable to the other for any costs or damages.

9. This Agreement is subject to the express condition and will only become effective if the Vendor shall within one year from the date hereof have complied with the provisions of Section 29 of The Planning Act, R.S.O. 1970, Chapter 349 and any amendments thereto, and such compliance shall be deemed to have been made when the Declaration, Description and By-Law are registered in accordance with the Act.

12. In the event that the completion of the Unit shall be delayed by reason of delay on the part of the Vendor in arranging the mortgage to be assumed, strikes, lockouts, fire, lightning, tempest, riot, war, weather, delays by common carriers, unavoidable casualties or by any other cause of any kind whatsoever beyond the control of the Vendor, the Vendor shall be permitted an extension or extensions of time not exceeding a total of sixty (60) days to complete the premises comprising the Unit and the closing date shall be extended accordingly. If the Vendor shall be unable to substantially complete the Unit within such extension or extensions of time and the Purchaser shall be unwilling to further extend the time for closing, the deposit shall be returned to the Purchaser by the Vendor without interest and this Agreement shall be at an end and the Vendor shall not be liable to the Purchaser for any costs or damages. Provided that the Purchaser will be liable to pay for any extras ordered and completed in whole or in part even though this Agreement may otherwise be terminated. It is understood and agreed that failure to complete the common elements on or before closing shall not be deemed to be a failure to complete the Unit.

13. In the event that the Unit is substantially completed by the date for completion of the sale or the postponed date for completion of the sale as provided in this Agreement, the sale shall be completed on such date and the Vendor shall complete any outstanding items of construction required by this Agreement within a reasonable time thereafter, having regard to weather conditions and the availability of supplies. For the purposes of this Agreement, the Unit shall be deemed to be substantially completed when the interior work has been finished to permit occupancy notwithstanding that there remains grading or landscaping or other outside work to be completed. The Purchaser agrees to meet a representative of the Vendor 48 hours prior to the closing to verify that the premises comprising the Unit have been completed. In the event that items have not been completed at that time, they will be listed on an inspection sheet which will constitute the Vendor's only undertaking to complete the said incomplete items. The Purchaser further agrees that the Vendor shall have the right to enter upon the lands and premises comprising the Unit after closing in order to complete the aforesaid items or any of its other work.

14. Subject to the foregoing, the transaction of purchase and sale herein is to be completed on or before the 29th day of June, 1973, provided the unit is completed. In the event that the Declaration, Description and By-Law are not registered by such date, the closing date shall be postponed to a day ten (10) days after written notice shall have been given by the Vendor to the Purchaser or to the Purchaser's solicitor that the said Declaration, Description or By-Law have been registered in the Office of Land Titles at Toronto.

15. In the event that the Unit is substantially completed by the date for completion for the sale or the postponed date for the completion of the sale (as provided in this Agreement) and the said Declaration, Description and By-Law have not been registered, the Purchaser agrees to occupy the unit commencing on the date that the sale would have otherwise been completed if the said Declaration, Description and By-Law were then registered on the following terms and conditions:

(a) On the date such occupancy is to commence the Purchaser shall pay to the Vendor by certified cheque, the sum to be paid on the date of closing with adjustments to be drawn as of the date of closing first referred to in paragraph 14, above. Further adjustments shall be made at the time and as of the actual date of closing;

(b) The Purchaser shall pay to the Vendor a monthly occupation charge of \$270.90 each month in advance commencing on the date of such occupancy and payable on the same day of each succeeding month during the term of such occupancy until the date of closing, at which time any pre-paid occupancy charge shall be adjusted.

(c) Such occupancy by the Purchaser shall be governed insofar as applicable, by the provisions of the proposed Declaration and By-Law.

It is the position of the plaintiffs that paras. 3 and 9 must be read subject to paras. 12, 13, 14 and 15 and that the extensions of time contemplated by those latter sections carry the rights of the plaintiffs beyond the one-year period set out in paras. 3 and 9. If that view is accepted, it follows, of course, that paras. 3 and 9 mean very little. The trial Judge accepted this view of the contract and held that, despite the expiration of the one year from the time of the making of the contract, the rights of the plaintiffs were kept alive by the operation of the latter paragraphs.

With great respect, I have come to a different view. While all the terms in this contract must be read together, I think that paras. 3 and 9 are the controlling paragraphs. It is obvious that not every contemplated or projected condominium will achieve legal status by compliance with the Condominium Act and the Planning Act. Failure may be the result of any one of a variety of external causes, e.g., disapproval by the appropriate governmental authorities; lack of sales resulting in the withdrawal of consent to registration by the mortgagee. The frustration of the sale of units in a projected condominium is obviously a real and foreseeable event. Paragraphs 3 and 9 are directed toward this possibility and the parties in this case have agreed that, if the projected condominium has not been brought to fruition within a period of one year of the making of the agreement, the agreement is at an end.

What then is the effect of paras. 12 to 15? These paragraphs, in my view, are directed only to the solution of commonplace practical problems of closing dates, completion dates and occupancy on an interim basis and can only operate within the one-year maximum set out by paras. 3 and 9.

In my respectful view, compliance with the Planning Act and the Condominium Act was a true condition precedent, i.e., a future, uncertain event beyond the control of any of the parties and upon which the rights and obligations of the contracting parties depended: see *Turney et al. v. Zhilka*, [1959] S.C.R. 578, 18 D.L.R. (2d) 447; *Barnett v. Harrison et al.*, [1976] 2 S.C.R. 531, 57 D.L.R. (3d) 225, 5 N.R. 131; *George Wimpey Canada Ltd. v. Focal Properties Ltd.*, [1978] 1 S.C.R. 2, 78 D.L.R. (3d) 129, 16 N.R. 71 (S.C.C.).

Having reached this conclusion, it then follows that the plaintiffs must fail. The agreement between the plaintiffs and the defendant was made on October 14, 1972. One year later, the events contemplated by paras. 3 and 9 had not occurred, through no fault of the defendant, and were not to occur until February of 1974. When the agreement expired, the rights and obligations created by the agreement came to an end and the defendant acquired a good defence to this action.

In the result, this appeal must be allowed. The judgment below is set aside and the plaintiffs' action is dismissed.

Turning to the issue of costs, it is to be observed that the defendant repudiated the contracts herein on a basis that was not warranted. The defendant's success in this action rests on events which occurred after the action was commenced. Further, the defendant went on to sell the condominium units for prices much higher than those contained in the contracts in this action. In the circumstances, there will be no order as to costs of either the trial or this appeal.

Appeal allowed.

CBR# 353

York Condominium Corp. No. 104 v. Supreme Automatic Washing Machine Co.

18 O.R. (2d) 596

ONTARIO HIGH COURT OF JUSTICE REID, J. 7TH FEBRUARY 1978.

APPLICATION for an order declaring a renewal term of a lease invalid.

W. B. Drake, for applicant, plaintiff.

R. Wise, for respondent, defendant.

REID, J.:-- In respect of a lease, applicant moves:

... pursuant to Rule 64 for an order declaring that the renewal or option terms of the said lease are invalid and not binding on the members of the condominium corporation on the following grounds.:

(a) Firstly, that since the said lease was not registered on the Register in the Land Titles Office at Toronto, the registered interests of members of the corporation have priority over the renewal terms contained in the said lease as there was no actual occupation pursuant to the renewal terms until the original demise had expired; and,

(b) Secondly, it is not binding because it was ultra vires the condominium corporation to pass a by-law allowing the corporation to lease the common elements and such action cannot be ratified by the corporation members.

On March 15, 1973, the applicant, York Condominium Corporation No. 104 (York) was registered as a condominium pursuant to the provisions of the Condominium Act, R.S.O. 1970, c. 77, in the Land Titles Office in Toronto. On May 15, 1973, a certified copy of By-law 1 was filed in the Land Titles Office by the sole member of the condominium corporation, Halliwell Terrace Limited. Paragraph 2(j) of art. V of the by-law provides that the powers of the corporation include the power "to lease any part or parts of the common elements as agent of the owners".

York appointed Nicobar Holdings Limited (Nicobar) as property manager of the corporation pursuant to a management agreement dated April 30, 1973. Then, on June 1, 1973, Nicobar entered into a lease of the laundry room premises to the respondent Supreme Automatic Washing Machine Company (Supreme). The premises leased are among the common elements.

Nicobar ceased to act as property manager for York on April 1, 1974, and thereafter A. E. Lepage (Ontario) Limited (Lepage) assumed the role of property manager. On February 27, 1975, Lepage wrote to Supreme saying "Please be advised of our desire to terminate your services on May 31st. 1975."

On March 5, 1975, Supreme wrote to Lepage and said "Please be advised that we are accepting the option to lease the laundry room for a further three years, as provided in our lease agreement."

On April 23, 1975, solicitors acting on behalf of Supreme wrote to Lepage stating that the lease "automatically renewed itself" for a further term of five years and that the right of renewal was solely at the option of the lessee Supreme who was exercising it.

There is a difference between the parties about the period, or periods, covered by the lease.

The lease was on a pre-printed form apparently used customarily by respondent. The printed form provided for a tenure of five years which, unless notice was given by lessee to the contrary, extended automatically for a further tenure of five years.

However, alterations were made by hand to these provisions. What they amount to no one can say. On the face of the document, they are inscrutable. Among the possibilities are that the first five-year term remains or, alternatively, that it was reduced to two years, and that the term available on option remained at five years or was reduced to three years.

The parties cannot agree on the meaning of these provisions. They appear, however, to have agreed that the original tenure was reduced to two years from five. If that is not so, there is no basis for ground (a) of applicant's submission. These reasons proceed on the assumption that this was agreed.

Also, it is worth noting that no objection has been made to Nicobar appearing in the lease as lessor. Respondent appears to accept its agency.

1. THE POWER OF THE CORPORATION TO LEASE THE COMMON ELEMENTS.

I will deal with the ultra vires issue first because it could dispose of the application. Applicant submits that there is no power in the condominium corporation to lease the common elements and therefore the lease between York and Supreme is of no effect. Respondent submits that the Condominium Act should be given a broad and liberal interpretation so that a power to lease should be construed as ancillary to the other powers conferred on the corporation by the Act.

I have already observed that para. 2(j) of art. V of By-law 1 gives the corporation power to lease the common elements as agents of the owners. Although there may be no property interest in the corporation in the common elements to which the lease could attach, the owners of the property do have the requisite property interest. They have designated the corporation as their agent to lease their respective interests. If the corporation is the agent of the owners, then the concept of ultra vires is not applicable unless the agency itself is ultra vires the corporation. In *Bowstead on Agency*, 13th ed. (1968), p. 15, it is stated:

Presumably a corporation can act as an agent in respect of a transaction that would be ultra vires its memorandum of association: but where the very acting as an agent is ultra vires, the corporation plainly cannot so act.

The only issue thus is whether it is ultra vires York to act as agent for the unit owners in leasing the common elements. There is no provision in the Condominium Act preventing the corporation from acting as agent. The tenor of the Act is to the contrary. For

example, the corporation is made generally responsible for the performance of functions of common concern. In carrying out these functions it is, in essence, acting on behalf of all the unit holders. The corporation may bring actions with respect to the common elements. In doing so it is really acting as agent for the owners. The Act therefore contemplates the corporation acting as agent of the unit holders.

Section 9(13) of the Condominium Act provides that the declaration or the by-laws may specify duties of the corporation consistent with its objects. Section 9(4) states that the objects of the corporation are to manage the property and any assets of the corporation. While applicant submits that the property and assets of the corporation do not include the common elements because they are owned by the members and not the corporation, in my opinion, "property" in s. 9(4) is not confined to what is owned by the corporation. A primary function of the corporation is the management of the under- taking. It could hardly carry out this function if it were restricted to property owned by the corporation. It thus appears to me that "property" in s. 9(4) should be construed as the term is defined in the Act [s. 1(1)(n)], i.e.:

(n) "property" means the land and interests appurtenant to the land described in the description, and includes any land and interests appurtenant to land that are added to the common elements;

"Manage" is defined in Black's Law Dictionary to mean "to conduct; to carry on the concerns of a business or establishment". "Leasing" would fall within "management". Thus, leasing the common elements would be included in an authority to manage the property and consistent with the objects of the corporation.

2. PRIORITY OF OWNERS' INTERESTS OVER RENEWAL TERM.

After the making of the lease, individual units in the building were sold to various owners. Section 51(1), para. 4, of the Land Titles Act, R.S.O. 1970, c. 234, provides that all registered land, unless the contrary intention is expressed on the register, is subject to any lease or agreement for a lease, for a period yet to run that does not exceed three years, where there is actual occupation under it. There is no dispute over the binding effect of the original tenure of the lease. The challenge is to the renewal term. Applicant relies on *Davidson v. McKay* (1867), 26 U.C.Q.B. 306, and *Falconbridge*, *Law of Mortgages*, 3rd ed. (1942), pp. 123-4, for the proposition that there can be no occupation under the renewal term of a lease until the original term has expired. Thus, in order to protect a renewal term a lease must be registered or the original term must have expired and occupation commenced under the renewal term. In the present case, the lease was not registered. Unit owners, it is assumed, purchased their units prior to occupation under the renewal term. It is therefore submitted that they are not bound by the renewal term.

This would appear to be so. The trouble with such a conclusion is that it ignores the issue of notice. While some argument was directed to that issue, and I later requested counsel to see if agreement could be reached on it, or on the facts that would afford a basis for a decision, none was reached. Such decisions as *Re Jung and Montgomery*, [1955] O.W.N. 931, [1955] 5 D.L.R. 287, have not been considered.

The first ground taken by applicant would seem to be valid.

The parties seem to contemplate the trial of an issue. This makes it difficult to tell what order should issue. The parties may speak to me about this and the question of costs.

Order accordingly.

CBR# 352

York Condominium Corp. No. 104 et al. v. Halliwell Terrace Ltd. et al.

(1976), 12 O.R. (2d) 46

ONTARIO HIGH COURT OF JUSTICE OSLER, J. 13TH NOVEMBER 1975

MOTIONS for an order striking out a statement of claim.

William V. Sasso, for all defendants other than Ontario Housing Corporation and Ontario Mortgage Corporation, applicants.

Lynda C.E. Brown, for Ontario Housing Corporation and Ontario Mortgage Corporation, applicants.

A. Burke Doran and M.A. Richardson, for plaintiffs, respondents.

OSLER, J.:-- Three motions were argued before me with respect to this action. The action is brought by York Condominium Corporation No. 104 and by Robin K. Hall and Audley Warburton, owners of units within the condominium, on behalf of themselves and all other members of York Condominium Corporation No. 104. It is brought against Halliwell Terrace Limited, which is the corporate builder of the condominium project, Nicobar Holdings Limited, a corporation which entered into a management agreement with the condominium corporation, the individual defendants Kaiser, Tennenbaum and Bergman, each of whom is said to have entered into a joint venture or agreement to construct a condominium project, Ontario Housing Corporation which approved the plans and specifications under the provisions of the Home Ownership Made Easy (H.O.M.E) Plan and Ontario Mortgage Corporation which partly financed the project. The first motion was for an order requiring the plaintiffs to deliver certain particulars. Pending the hearing of the motion, a fresh as amended statement of claim was delivered and the defendants are now satisfied that the relief requested is no longer required.

The second motion was for an order striking out the statement of claim and dismissing the action in so far as it is brought by the plaintiffs Robin K. Hall and Audley Warburton on behalf of themselves and all other members.

The third motion is brought by the three individual defendants for an order striking out the statement of claim against them as disclosing no reasonable cause of action or as being frivolous or vexatious or, in the alternative, for an order requiring the plaintiffs to deliver particulars of the allegation of the breach of duty by these defendants or of their negligent conduct.

The condominium corporation is still a creature so new to the law of Ontario that many of the procedural matters arising in the course of an action have not yet been settled so far as they apply to this new type of corporation and its members. Section 9(3) of the Condominium Act, R.S.O. 1970, c. 77, provides that the Corporations Act, R.S.O. 1970, c. 89, does not apply to such a corporation. Section 9(18) provides that an action with respect to the common elements may be brought by the corporation and a judgment for the payment of money in favour of the corporation in such an action is an asset of the corporation. Section 9(16) provides that the members of the corporation share the assets of the corporation in the same proportions as the proportions of their common interests in accordance with the Act, the declaration and the by-laws.

Many of the considerations that must be taken into account in an action having to do with the construction of a condominium property, breaches of contract and negligence with respect to such construction, were considered by my brother Cromarty in *Frontenac Condominium Corp. No. 1 v. Joe Macciocchi & Sons Ltd.* (1974), 3 O.R. (2d) 331, 45 D.L.R. (3d) 347. In that action only the condominium corporation sued and the defendant objected that a claim for damages with respect to certain of the common elements should be brought, not by the corporation, by the unit owners as a class. Similarly, it was objected that damages suffered by unit owners as individuals should, in certain cases, be considered as damages to the common elements. Cromarty, J., did not agree that the right of action lay in the unit owners as a class and that a class action need be brought. Nevertheless, he granted leave to amend the statement of claim so as to permit two named individuals to be added as parties plaintiff suing on behalf of themselves and all other owners of units in the condominium, save and except the defendant. I am advised that an appeal is pending in that case, but has not yet been heard by the Court of Appeal. It would appear, however, that my brother Cromarty was concerned to see that what might be meritorious claims should not be permitted to fail because of procedural errors in an action dealing with rights and concepts new to our law.

In *Farnham et al. v. Fingold et al.*, [1973] 2 O.R. 132, 33 D.L.R. (3d) 156, Jessup, J.A., speaking for himself and Brooke and Arnup, J.J.A., the other members of the Court, draws attention to what was said by Lord Lindley in *Taff Vale R. Co. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426 at p. 443, about the English equivalent of our present Rule 75, dealing with class actions. The learned Law Lord there stated that:

The principle on which the rule is based forbids its restriction to cases for which an exact precedent can be found in the reports. The principle is as applicable to new cases as to old, and ought to be applied to the exigencies of modern life as occasion requires.

Jessup, J.A., also cast doubt upon what is sometimes said to be the rule that an action for damages cannot proceed as a class action, pointing out that in *Bowen v. MacMillan* (1921), 21 O.W.N. 23, Ferguson, J.A., permitted a class action to proceed although the claims made were for damages.

In *Farnham*, at p. 136, it is stated that the rule should be applied to particular cases to produce an expeditious but just result. In that case, it was stated that a class action was not appropriate when the members have damages that must be separately assessed because a defendant would be deprived of individual discoveries and, in the event of success, would have recourse for costs only against the named plaintiffs, although his costs were increased by multiple separate claims.

In the present case, the difficulty regarding discovery may be a very real one. It can, however, be at least partially cured by requiring the plaintiffs to deliver particulars with respect to the damages claimed with regard to each condominium unit. The difficulty about costs, however, would not exist by reason of the fact that the defendant has access in the event of success to the assets of all the members through the condominium corporation itself.

It is said that there may, in fact, be two classes of members of York Condominium, those who contracted originally with the corporation, or with the defendant, Halliwell Terrace Limited, and those who may subsequently have purchased either from original members or from Halliwell after the purported completion of the project.

I think that the final determination as to the propriety of permitting a class action in such a case as this should be left to the trial Judge and not prejudged at this early stage.

The motion to dismiss the action in so far as it is a class action will therefore succeed only to the extent that it will be granted unless the appropriate amendment, for which leave is hereby given, is made to determine with precision the members of the class.

So far as the third motion is concerned, it should be similarly dealt with. It is far from clear that the individual defendants were not personally responsible for some of the allegedly negligent acts. But, again, they are entitled to particulars so as to enable them to plead.

While the success of the defendants has been limited, it has, in my view, been sufficient to entitle them to their costs and costs of the day will therefore be to the defendants in the cause. Counsel fee will be as of one motion.

Order accordingly.

CBR# 277

Re York Condominium Corp. No. 42 and Melanson

(1976), 9 O.R. (2d) 116

ONTARIO COURT OF APPEAL KELLY, HOULDEN and HOWLAND, J.J.A. 14TH APRIL 1975

APPEAL from an order of Pennell, J., made pursuant to s. 23 of the Condominium Act, requiring the appellant to remove his dog from his condominium unit.

L.D. Pringle, for appellant.

Geoffrey G.R. Pacey, for respondent.

The judgment of the Court was delivered by

HOWLAND, J.A.:-- This is an appeal by Bruce Melanson (Melanson) from an order of Pennell, J., dated September 26, 1974, made pursuant to s. 23 of the Condominium Act, R.S.O. 1970, c. 77 (the Act), requiring Melanson to remove from his condominium unit the dog being kept therein within ninety (90) days of service of the order upon him.

York Condominium Corporation No. 42 (the Corporation) was created on August 18, 1971, by the registration of a declaration and description pursuant to s. 9 of the Act. Under s. 3(2) of the Act a declaration may contain:

(c) provisions respecting the occupation and use of the units and common elements;

Paragraph (a) of art. XII of the declaration provided:

No unit shall be occupied by more than a single family and shall be used only as a residence for such single family and for no other purpose.

On August 18, 1971, the Corporation enacted By-law Number One. Section 11(1) [since am. 1974, c. 133, s. 8] of the Act provides:

11(1) The by-laws may provide for the making of rules by the owners respecting the use of the common elements for the purpose of preventing unreasonable interference with the use and enjoyment of the units and common elements.

In accordance with this provision, para. (a) of art. III of this by-law made the following provision for the passing of rules respecting the use of the common elements:

The owners, by a vote of members who own fifty-one per cent (51%) of the common elements, may make rules respecting the use of the common elements for the purpose of preventing unreasonable interference with the use and enjoyment of the units and common elements.

By-law Number One was duly registered and became effective on August 18, 1971.

On August 19, 1971, By-law Number Two was enacted by the Corporation. It included the following provision:

The following rules and regulations shall be observed by the owners and the term owner shall include the owner or any other person occupying the unit with the owner's approval: ...

14. No animal shall be allowed upon or kept in or about the property.

Paragraph 14 is hereafter referred to as the "prohibitive paragraph".

By-law Number Two was duly registered and became effective on September 9, 1971. Both By-law Number One and Bylaw Number Two were enacted by Delzotto Enterprises Limited as the owner of all the units and the sole member of the Corporation.

Melanson is the owner of one of the units. By letter dated August 6, 1974, from the solicitors for the Corporation, Melanson was directed to remove his dog from the condominium complex on or before August 23, 1974. An application was then made by the Corporation to enforce compliance with By-law Number Two.

The issue in this appeal is whether the Corporation has exceeded its statutory powers in enacting the prohibitive paragraph, or if it did have the power, is the prohibitive paragraph enforceable? As the Corporation is a statutory creation, the relevant rights and duties of an owner and of the Corporation must be found in the Act. The following provisions are relevant:

2(6) Upon registration of a declaration and description, the land and the interests appurtenant to the land described in the description are governed by this Act.

6(2) Subject to this Act, the declaration and the by-laws, each owner is entitled to exclusive ownership and use of his unit.

7(4) Subject to this Act, the declaration and the by-laws, each owner may make reasonable use of the common elements.

9(12) The corporation has a duty to effect compliance by the owners with this Act, the declaration and the by-laws.

12(1) Each owner is bound by and shall comply with this Act, the declaration and the by-laws.

(3) The corporation ... has a right to the compliance by the owners with this Act, the declaration and the by-laws.

In creating a condominium corporation, a developer has to consider carefully what restrictions it is going to impose on the user of the units and common elements because such restrictions will affect the character of the condominium and the marketability of its units. The prohibitive paragraph could have been included in the declaration pursuant to s. 3(2) of the Act, just as the declaration provided that each unit should be used only as a single-family residence. However, the objection to so doing is that under s. 3(3) of the Act the declaration may be amended only with the consent of all owners and all persons having registered encumbrances against the units and common interests. In the case of a restriction such as the prohibitive paragraph this could be a formidable task.

Here the prohibitive paragraph was embodied in a by-law. This provides greater flexibility. Since no higher percentage was specified in the declaration, under s. 10(1) of the Act the making of such by-laws only required the vote of members owning 66 2/3% of the common elements. If the prohibitive paragraph in question falls within the Corporation's power to make by-laws, the fact that it is described in By-law Number Two as a rule or regulation does not, in my opinion, affect its validity as a by-law. It is true that the prohibitive paragraph, whilst embodied in By-law Number Two, is referred to as a rule or regulation. In pursuance of s. 11(1) of the Act, By-law Number One authorized the owners, by a vote of members owning 51% of the common elements, to make rules, but such power was limited to rules respecting the use of the common elements. By-law Number Two draws a distinction between the units, the common elements and the property. The by-law does not contain a provision that the word "property" shall have the same meaning in the by-law as in the definition of property in s. 1(1)(n) of the Act, i.e.: "the land and interests appurtenant to the land described in the description". In my view, however, this is the only proper interpretation to be given to the word in the prohibitive paragraph. Consequently, the attempt to impose restrictions respecting the units would go beyond the powers of the members under By-law Number One to make rules.

Under s. 10(1) the Corporation has power to make by-laws:

(b) governing the use of units or any of them for the purpose of preventing unreasonable interference with the use and enjoyment of the common elements and other units;

(c) governing the use of the common elements;

Under s. 10(2) such by-laws shall be reasonable and consistent with the Act and the declaration.

In order to fall within the Corporation's power to make by-laws under s. 10 of the Act, four matters have to be considered:

(i) are the words "governing the use" in s. 10(1)(b) and (c) of the Act broad enough to include the making of a by-law regulating the allowing of animals upon or the keeping of animals in or about the property?

(ii) are the words "no animal" in the prohibitive paragraph so broad as to be beyond the powers of the Corporation under s. 10(1)(b) of the Act?

(iii) is the prohibitive paragraph reasonable and consistent with the Act and the declaration as required by s. 10(2) of the Act?

(iv) is the word "animal" in the prohibitive paragraph so broad that even if the Corporation had power to enact the prohibitive paragraph it is incapable of enforcement? "Govern" is defined in *The Shorter Oxford English Dictionary*, 3rd ed., vol. I, at p. 816, to mean: "To rule with authority ... to regulate the affairs of (a body of men)."

A careful distinction has to be drawn between the power to regulate or govern and the power to prohibit. In *City of Toronto v. Virgo*, [1896] A.C. 88, the Judicial Committee of the Privy Council had to consider whether under a power to pass by-laws "for ... regulating and governing hawkers or petty chapmen, and other persons carrying on petty trades", the Council might prohibit hawkers from plying their trade at all in a substantial and important part of the city. Lord Davey stated, at pp. 93-4.

No doubt the regulation and governance of a trade may involve the imposition of restrictions on its exercise both as to time and to a certain extent as to place where such restrictions are in the opinion of the public authority necessary to prevent a nuisance or for the maintenance of order. But their Lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed.

Several cases in the English and Canadian reports were referred to in illustration of the respondent's argument ... through all these cases the general principle may be traced, that a municipal power of regulation or of making by-laws for good government, without express words of prohibition, does not authorize the making it unlawful to carry on a lawful trade in a lawful manner.

In *Re Karry and City of Chatham* (1910), 21 O.L.R. 566, the Court of Appeal had to consider whether a by-law of the City of Chatham, stipulating the hours when eating houses should be closed, was a "regulation" authorized by the Municipal Act which provided that the Council could pass by-laws "for limiting the number of and regulating such houses". Magee, J.A., pointed out at p. 573: "The partial prohibition, it has thus long been recognised, may well come within the powers of regulation."

In *Re R. v. Napier*, [1941] O.R. 30, [1941] 1 D.L.R. 528, 75 C.C.C. 191, the statute authorized the passing of by-laws "For licensing, regulating and governing bill posters ...". A by-law had been passed prohibiting the distributing of bills by leaving them in or on parked motor-cars or by handing them to persons on the street. Hogg, J., concluded at p. 34 O.R., pp. 531-2 D.L.R., that:

... the prevention of such activities in connection with this trade or calling is not of such a degree that it can be said to be practically a prohibition of the entire business or trade of bill distributors. There is still left to them the large field, which seems to constitute the greater part -- or at least as great a part -- of this business, namely, of leaving bills at the residences and other buildings in the municipality.

Here the power of the Corporation is to make by-laws "governing the use of units" and "governing the use of the common elements". In this appeal, the prohibitive paragraph as to allowing animals upon or keeping them in or about the units or common elements, is only a partial prohibition of the use of the units or the common elements. It would properly fall within the power to regulate the use of the units and common elements. In my view the word "governing" in s. 10(1)(b) is broad enough to include the restriction respecting animals in the prohibitive paragraph. It would be quite different if the power in s. 10(1)(b) and (c) of the Act had been to make by-laws governing the allowing or keeping of animals on the units or the common elements. In that event the prohibitive clause would have been ultra vires of the Corporation as it would have been a prohibition rather than a regulation.

It should be pointed out that the power to make by-laws under s. 10(1)(b) and under s. 10(1)(c) is with respect to "the use" of units and the common elements, whereas s. 3(2) (c) stipulates that the declaration may contain provisions respecting "the occupation and use" of the units and common elements.

As Lord Radcliffe pointed out in *Arbuckle Smith & Co., Ltd. v. Greenock Corp.*, [1960] 1 All E.R. 568 at p. 574:

"Use" is not a word of precise meaning, but in general it conveys the idea of enjoyment derived by the user from the corpus of the object enjoyed. *Robertson, C.J.O.*, in *R. v. Lou Hay Hung*, [1946] O.R. 187, stated at pp. 191-2:

The words "occupy" and "occupant" have a variety of shades of meaning. No doubt, we commonly speak of the "occupants" of a dwelling-house, meaning thereby all persons who, at the time, live there. We use the word in even a wider sense when we speak of the "occupants" of premises, meaning thereby all the persons who happen to be within them at the particular time. Primarily, however, "to occupy" means "to take possession" ... Possession is a primary element but occupation includes something more. As Lord Denning explained in *Newcastle City Council v. Royal Newcastle Hospital*, [1959] AC. 248 at p. 255: "Occupation is matter of fact and only exists where there is sufficient measure of control to prevent strangers from interfering ...".

Under s. 3(2)(c) of the Act, the right to include a provision in the declaration respecting occupation of the units would embrace such matters as restricting the use to single-family residences. On the other hand, the right to restrict the keeping of animals in such units as incidental to such single-family use would seem properly to fall within the power to make by-laws governing the use of units.

It will also be noted that the power to make by-laws is more restrictive under s. 10(1)(b) of the Act than it is under s. 10(1)(c). Under s. 10(1)(b) the power can only be exercised "for the purpose of preventing unreasonable interference with the use and enjoyment of the common elements and other units". This brings me to a consideration of the second question, whether the words "no animals" in the prohibitive paragraph are so broad as to be ultra vires of the Corporation.

The word "animal" is very comprehensive. The definition in *The Shorter Oxford English Dictionary*, 3rd ed., at p. 68, includes: "1. A living being, endowed with sensation and voluntary motion, but in the lowest forms distinguishable from vegetable forms ... 2. One of the lower animals; a brute or beast, as distinguished from man." *Black's Law Dictionary*, 4th ed., defines "animal" as "Any animate being which is endowed with the power of voluntary motion. An animate being, not human." In *The Shorter Oxford English Dictionary*, supra, at p. 181, it is noted that the word "bird" is defined as "any feathered vertebrate animal" and at p. 705, that "fish" is defined as "In pop. language, any animal living exclusively in the water ... In scientific language any vertebrate animal provided with gills throughout life, and cold-blooded; the limbs, if present, being modified into fins."

The words "no animal" in the prohibitive paragraph are wide enough to include not only cats and dogs but such animals as hamsters, canaries and goldfish. Can it be said that the broad prohibition against any animal being allowed upon or kept in or about the units is for the purpose of preventing unreasonable interference with the use and enjoyment of the common elements and other units? In my opinion it cannot. I am unable to conclude that goldfish, for example, would cause such unreasonable interference. Section 6(2) of the Act makes it clear that subject to the Act, the declaration, and the by-laws, each owner is entitled to exclusive ownership and use right to keep pets. The declaration does not contain any prohibition against the keeping of animals in the units. It is appreciated that it is important in a condominium development, particularly a condominium apartment building, to prevent the of his unit. One of the incidents of such ownership is the owner of a unit from unreasonably interfering with the use and enjoyment by others of their units and of the common elements. As *Driver, Assoc. J.*, stated in *Sterling Village Condominium, Inc. v. Breitenbach* (1971), Fla., 251 So. 2d 685 at p. 688:

Every man may justly consider his home his castle and himself as the king thereof; nonetheless his sovereign fiat to use his property as he pleases must yield, at least in degree, where ownership is in common or cooperation with others. The benefits of condominium living and ownership demand no less.

The owners of 66 2/3% or more of the common elements may wish to pass a by-law to protect themselves against unreasonable interference by way of vicious, malodorous, dirty or noisy animals, or pollution of the common elements. However, the prohibitive paragraph in question goes far beyond the limited powers in s. 10(1)(b) to govern the use of units and would have the effect of prohibiting animals in or about the units which could not be the cause of unreasonable interference.

In my view, the prohibitive paragraph in question, in so far as it governs the use of units, is beyond the powers of the Corporation. It should be observed that the powers of the Corporation under s. 10(1)(c) are to govern the use of the common elements and there is no limitation on the exercise of this power as in the case of s. 10(1)(b). It would seem that under s. 10 (1)(c) the Corporation could prohibit animals generally from being allowed upon the common elements.

If access to the units can only be obtained by passing through the common elements, then even if the portion of the prohibitive paragraph governing the use of the units were invalid, the owner of a unit might be prohibited from bringing animals into the units. The question arises whether the portion of the prohibitive paragraph which regulates the use of the units is severable from the portion which regulates the use of the common elements, or whether the entire prohibitive paragraph is ultra vires of the Corporation.

As Craies points out in his text on Statute Law, 6th ed. (1963), at p. 335, there is some difference of judicial opinion as to whether a by-law is severable or divisible. In *Strickland v. Hayes*, [1896] 1 Q.B. 290 at p. 292, Lindley, L.J., stated: There is plenty of authority for saying that if a by-law can be divided, one part may be rejected as bad while the rest may be held to be good.

On the question of severability, decisions respecting the exercise of the jurisdiction of the Supreme Court to quash a municipal by-law in whole or in part under s. 283(1) of the Municipal Act, R.S.O. 1970, c. 284, are of assistance. In *Re Morrison and City of Kingston*, [1938] O.R. 21 at p. 27, [1937] 4 D.L.R. 740 at p. 745, 69 C.C.C. 251, Middleton, J.A., said:

It is not, I think, competent to the Court to quash part of a by-law, unless it is clearly severable from the provisions that remain.

This statement was approved by the Court of Appeal in *Re Musty's Service Stations Ltd. and Ottawa*, [1959] O.R. 342, 22 D.L.R. (2d) 311, 124 C.C.C. 85, where Aylesworth, J.A., in delivering the judgment of the Court, concluded that the invalid provisions of the by-law were integral and indispensable parts of the by-law and were not severable from the rest of the by-law. In so far as the

prohibitive paragraph itself is concerned, in view of the fact that the prohibition is made applicable to the property which includes both the units and the common elements, I do not think it is possible to sever the portion of the paragraph which deals with the units from the portion which deals with the common elements even if s. 10(1)(c) was wide enough to permit the restriction so far as the common elements were concerned.

Having reached this conclusion it is not necessary to consider the third question which arises as a result of s. 10(2) of the Act which provides:

10(2) The by-laws shall be reasonable and consistent with this Act and the declaration.

Nor is it necessary to consider the fourth question, that the word "animal" in the prohibitive paragraph is so broad that even if the Corporation had power to enact the prohibitive paragraph it is incapable of enforcement.

Paragraph 14 of By-law Number Two is, in my view, beyond the powers of the Corporation in its entirety. It is not necessary to express any view as to the validity of the remaining provisions of By-law Number Two as para. 14 is severable from the remaining provisions of the by-law.

The appeal should be allowed, the order of Pennell, J., set aside and in its place there should be an order dismissing the application brought by the applicant by its notice of motion dated August 27, 1974. The appellant should have his costs of this appeal and of the application before Pennell, J.

Appeal allowed.

CBR# 117

Rosemarie Evertz, Appellant, and Her Majesty the Queen, Respondent And between Dieter Evertz, Appellant, and Her Majesty the Queen, Respondent

[1996] T.C.J. No. 1185, Court File Nos. 94-979(IT)G, 94-980(IT)G

Tax Court of Canada Toronto, Ontario Sobier T.C.J. Heard: August 22, 1996 Judgment: August 23, 1996

Robert R. Jason, for the Appellants. Marilyn Vardy, for the Respondent.

JUDGMENT:-- The appeals from the assessments made under the Income Tax Act for the 1990 and 1991 taxation year are dismissed, with costs.

REASONS FOR JUDGMENT

[para1] SOBIER T.C.J.:-- The Court is now prepared to give Reasons for Judgment in the appeal between Rosemarie Evertz and Her Majesty the Queen, 94-979(IT)G, and Dieter Evertz and Her Majesty the Queen, 94-980(IT)G. These appeals were heard on common evidence under the General Procedure of this court.

[para2] The Appellants appeal for the assessments by the Minister of National Revenue for their 1990 and 1991 taxation years whereby the Minister denied their claims for interest deductions in the amount of \$53,408.00 in 1990 and \$67,413.00 in 1991. These amounts with respect to both Appellants were in the aggregate.

[para3] In 1986 the Appellants agreed to purchase a condominium at 401 Queens Quay West Toronto, Ontario (the "condominium"). Although the Agreement of Purchase and Sale was executed in 1986, the closing did not take place until September 12, 1989. However, the Appellants occupied the condominium since June 30th, 1987 paying a monthly occupancy fee. The condominium was purchased for cash and was free from encumbrances at the time of closing. The purchase price was \$417,000.00 subject to adjustments. In 1989 the Appellants agreed to purchase a home at 115 Appleby Place, (the "home") in Burlington, Ontario. The purchase price was \$950,000.00 all cash. The purchase of the home was completed on March 30th, 1990.

[para4] On March 29, 1990, the Appellants borrowed \$600,000.00 from CIBC Mortgage Corporation, ("CIBC"), on the security of the condominium. The mortgage bore interest at 13.75% per annum and was for a term of one year. The mortgage appeared to have been renewed during the relevant periods and interest was payable at the a similar rate.

[para5] In examination of statements of adjustments and other documents shows that the proceeds of the mortgage loan went into a solicitor's particular account and those same proceeds came out of that account and were paid to the vendor of the home. From the evidence of Mrs. Evertz there is no doubt that the proceeds of the loan secured by the mortgage on the condominium were used as part of the purchase price of the home.

[para6] The Appellants moved out of the condominium in September 1990. At that time, they attempted to rent it. They were unsuccessful in 1990. Therefore, there was no rental income for 1990. However, in 1991 it was rented to a Swiss banker for a gross rental of \$21,285.00. Rental expenses in 1990 were claimed at about \$32,000.00 of which approximately \$27,000.00 was claimed to be interest expense. In 1991, rental expense of approximately \$84,000.00 was claimed of which approximately \$67,000.00 was claimed to be interest expense.

[para7] In the fullness of time, the Appellants were reassessed and the interest expenses were disallowed. The reason given for the disallowance was that the deduction was not one permitted under subparagraph 20(1)(c)(i) of The Income Tax Act. That subparagraph states as follows, and I quote:

"Notwithstanding paragraphs 18(1)(a), (b) and (h), in computing a taxpayer's income for a taxation year from a business or property, there may be deducted such of the following amounts as are wholly applicable to that source or such part of the following amounts as may reasonably be regarded as applicable thereto."

And paragraph (c) reads:

"An amount paid in the year or payable in respect of the year (depending on the method regularly followed by the Appellant in computing the taxpayer's income), pursuant to a legal obligation to pay interest on (i) money borrowed for the purpose of earning income from a business or a property."

[para8] The issue, therefore, simply stated is whether the \$600,000.00 borrowed by the Appellants from CIBC and secured by the mortgage on the condominium and used to aid in the purchase of the home was money borrowed for the purpose of earning income from a business or property and in particular the condominium.

[para9] The Appellants claim, among other things, that having converted the condominium to a rental property, they are entitled to deduct the mortgage interest payable on the loan secured by the mortgage of the condominium.

[para10] A leading case in the deductibility of interest is *The Queen v. Bronfman Trust*, 87 D.T.C. 5059 (S.C.C.), a decision of the Supreme Court of Canada. In analyzing the history of deductibility of interest, Chief Justice Dickson pointed out that without the existence of a provision such as paragraph 20(1)(c), no deduction for interest would be possible generally. He goes on to say at page 5064:

"The statutory deduction thus requires a characterization of the use of borrowed money as between the eligible use of earning non-exempt income from a business or property in a variety of possible ineligible uses. The onus is on the taxpayer to trace the borrowed funds to an identifiable use which triggers the deduction. Therefore, if the taxpayer commingles funds used for a variety of purposes only some of which are eligible, he or she may be unable to claim the deduction. See, for example, *Mills v. M.N.R.* 85 D.T.C. 632 (T.C.C.), No. 616 v. *M.N.R.* 59 D.T.C. 247 (T.A.B.). The interest deduction provisions requires not only a characterization of the used of borrowed funds, but also a characterization of purpose. Eligibility for deduction is contingent on the use of borrowed money for the purpose of earning income. It is well established in the jurisprudence, however, that it is not

the purpose of the borrowing itself which is relevant. What is relevant, rather, is the taxpayer's purpose in using the borrowed money in a particular manner. *Auld v. M.N.R.* 62 D.T.C. 27 (T.A.B.). Consequently, the focus of the inquiry must be centered on the use to which the taxpayer put the borrowed funds."

[para11] The Appellants here urged the Court to look at direct or indirect use of those monies. However, at page 5065 of *Bronfman Trust*, the Chief Justice goes on to say, and I quote:

"If in my view, neither The Income Tax Act or the weight of judicial authority permits the courts to ignore the direct use to which a taxpayer puts borrowed money. One need only contemplate the consequences of the interpretation sought by the Trust in order to reach the conclusion that it cannot have been intended by Parliament. In order for the Trust to succeed, subparagraph 20(1)(c)(i) would have to be interpreted so that a deduction would be permitted for borrowings by any taxpayer who owned income producing assets. Such a taxpayer could, on this view, apply the proceeds of a loan to purchase a life insurance policy, to take a vacation, to buy speculative properties, or to engage in any other non-income-earning or ineligible activity. Nevertheless, the interest would be deductible. A less wealthy taxpayer, with no income earning assets, would not be able to deduct interest payments on loans used in the identical fashion. Such an interpretation would be unfair as between taxpayers and would make a mockery of the statutory requirement that, for interest payments to be deductible, borrowed money must be used for circumscribed income-earning purposes."

And further on that page he says:

"It is not surprising, therefore, that cases interpreting 20(1)(c)(i) and its predecessor provisions have not favoured the view that a direct ineligible use of borrowed money ought to be overlooked whenever an indirect eligible use of funds can be found."

[para12] The actual use of the borrowed monies was to purchase the home, not to earn income from the condominium. The condominium was merely used as security given by the Appellants to secure a loan of \$600,000.00 which enabled them to purchase the home. Here we have an attempt to deduct interest on a loan for a principal residence in the guise of a business venture. Accordingly, I find that the interest paid on the \$600,000.00 borrowed and secured by the mortgage on the condominium was not interest paid for the purpose of earning income from that property. For these reasons, the appeals are dismissed with costs.

CBR# 033

Atriums at Willowells v. Canada

Between Atriums at Willowells Partnership, Appellant, and Her Majesty the Queen, Respondent

[1996] T.C.J. No. 66, Court File No. 95-750(GST) Tax Court of Canada Bonner T.C.J. Heard: August 17, 1995 Judgment: January 29, 1996

Robert W. McMechan, for the Appellant. Donald Gibson, for the Respondent.

JUDGMENT:-- The appeal from the assessment made under Part IX of the Excise Tax Act, notice of which is dated November 30, 1994 and bears number number 04BP-OTT0007903 is allowed with costs and the assessment is referred back to the Minister of National Revenue for reassessment in accordance with the attached Reasons for Judgment.

REASONS FOR JUDGMENT

[para1] BONNER T.C.J.:-- This is an appeal from an assessment of the special 4% tax imposed under subsection 336(3) of the Excise Tax Act ("Act") on the appellant as supplier of certain condominium units. The appellant developed a condominium project consisting of 130 residential units. The appeal relates to 39 [See Note 1 below] of them.

Note 1: Initially the appellant contended that 44 of the units were not subject to the tax but counsel abandoned the appeal with respect to a group of five of them.

[para2] Subsection 336(3) reads as follows:

336. (3) -- Where (a) a taxable supply by way of sale of a residential condominium unit in Canada is made to a person under an agreement in writing entered into before October 14, 1989 between the supplier and the person,

(b) ownership and possession of the unit are not transferred to the person under the agreement before 1991, and

(c) possession of the unit is transferred to the person under the agreement at any time after 1990,

the following rules apply:

(d) no tax is payable by the person in respect of the supply,

(e) subsection 191(1) does not apply in respect of the unit before possession thereof is transferred to the person,

(f) where the person is a builder of the unit, (i) if the person is a builder of the unit only because of paragraph (d) of the definition "builder" in subsection 123(1), (A) the person shall be deemed not to be a builder of the unit, and (B) for the purposes of determining whether any other person who, after that time, makes a supply of the unit or an interest therein is a builder of the unit, the condominium complex in which the unit is located shall be deemed to have been registered at that time as a condominium and the unit shall be deemed to have been occupied at that time by an individual as a place of residence, and (ii) in any other case, for the purposes of determining an input tax credit of the person, the person shall be deemed to have paid, at that time, tax in respect of the supply equal to 4% of the consideration for the supply, and

(g) the supplier shall be deemed to have collected, at that time, tax in respect of the supply equal to 4% of the consideration for the supply.

[para3] It will be noted that the tax in question is imposed by a transitional provision in circumstances where the recipient of the supply is not liable for tax in respect of the supply.

[para4] The units in question were developed for sale to investors who intended not to reside in them but rather to earn income by renting them. Construction of the building and sales of units in it commenced in 1989. Occupation of a unit in a building first took place in December of 1990. Registration of the declaration of the condominium took place on February 7, 1991. An Agreement of Purchase and Sale which the parties agreed was typical of those now in dispute was entered in evidence. It was made on April 11, 1989. The purchaser under that Agreement was an individual named Lawrence Roberts. That Agreement included the following provisions:

1. ...

The Purchaser hereby agrees with the Vendor to purchase Level 01 Unit 02 Residence Type A4 on the proposed Plan of Condominium (herein called the "Unit" which definition shall also include the channels listed herein) to be built on the lands described as Part of Block D. Plan 1467, City of Waterloo described as Parts 3, 4 and 5 on Registered Plan 58R-4608, City of Waterloo, in the Regional Municipality of Waterloo and together with the common elements appurtenant thereto. The parties acknowledge that, notwithstanding anything contained herein to the contrary, prior to registration of the Project as a condominium, "Unit" shall mean an undivided interest in the Project in accordance with the percentage interest of the Unit as set out in Schedule "D" of the declaration. (Emphasis added)

The Purchase Price herein will include a separate parking unit and a separate locker unit. The Vendor will have the arbitrary right to assign on or before the completion date a separate parking unit and a separate locker unit to which individual title will be given on the Transfer Date.

The Purchase Price of Two hundred and sixteen thousand, nine hundred and ninety-nine DOLLARS (\$216,999.00) shall be payable in lawful money of Canada in the manner set out in paragraph 4. Paragraph 3 and following of this Agreement are in Schedule "F", which together with Schedules "A", "B", "C", "D", "E", "G", "H", "I", "J" and "K" of this Agreement are an integral part hereof and are contained on subsequent pages. The Purchaser acknowledges that he has read all paragraphs and Schedules of this Agreement.

4. Payment of Purchase Price The Purchase Price of the Unit shall be payable (in lawful money of Canada) as follows:

(a) (1) as evidence of the Purchaser's indebtedness and obligation to pay an amount equal to twenty five percent (25%) of the Purchase Price not later than the Transfer Date, the Purchaser shall deliver to the Vendor Promissory Note #1, secured by an unconditional, irrevocable letter of credit (the "Letter of Credit") issued by a financial institution acceptable to the Vendor (herein called the "Bank"), due and payable on the earlier of the Transfer Date or March 1, 1991 bearing interest from April 1, 1989 at ten percent (10%) per annum calculated ...

(b) as evidence of the Purchaser's indebtedness and obligation to pay the balance of the Purchase Price, the Purchaser shall deliver to the Vendor upon execution of this Agreement the Mortgage Financing Promissory Note #2 in an amount equal to seventy-five percent (75%) of the Purchase Price as security for his obligation to complete the transaction contemplated herein. Promissory Note #2 shall be due on the Transfer Date, together with interest at the rate ... Interest calculated as aforesaid, as well after as before maturity and both before and after default and judgment, shall be computed from the Completion Date and shall become due and payable on the first day on the month next following the Completion Date and, thereafter, monthly, ...

5. Closing Date

From the Completion Date, the Purchaser shall be entitled to receipt of all revenues from the Unit and shall be responsible for payment of all expenses for the Unit, including payment of interest on all mortgages to be assumed by the Purchaser, whether advanced or not, subject to the Optional Services Agreement, the Optional Cash Flow Guarantee Agreement and Optional Rental Management Agreement as set out herein. The Transfer Date shall be the date designated by the Vendor or its solicitors which date shall not be less than fourteen (14) days after notice in writing is given by the Vendor's solicitors to the Purchaser or his solicitor that the Declaration and Description have been registered. If the Purchaser fails to complete the transaction on the Transfer Date, he shall be in default hereunder and the provisions of Paragraph 11 of this Agreement shall apply. (Emphasis added)

[para5] Completion date is a defined term under the Agreement. The definitions of completion date and closing date were:

(f) "Closing Date" means the Completion Date;

(g) "Completion Date" shall be the earlier of (i) the date when the architect certifies that the Building is substantially complete, and (ii) September 1, 1990;

The completion date was September 1, 1990. The architect's certificate regarding substantial completion of the building was delayed until the Spring of 1991 because landscaping was not completed until then. Completion date is not to be confused with transfer date. The definition of that term was:

(ab) "Transfer Date" shall be the date designated by the Vendor or its solicitors as the date for conveying registered title to the Unit to the Purchaser, notwithstanding that a Transfer/Deed of Land may not be registered on such designated date. The Transfer Date is currently projected to be March 1, 1991, but in no event shall it be later than March 1, 1992. ...

[para6] The Agreement contained a declaration of trust by the vendor in the following terms:

NOW THEREFORE THE UNDERSIGNED HEREBY DECLARES that from and after the Completion Date, it will hold beneficial title to the Unit solely as Trustee and Agent for and on behalf of the Purchaser in accordance with the Agreement of Purchase and Sale.

[para7] The Agreement contained a schedule which consisted of a Rental Management Agreement appointing Mastercraft Investments Corporation as agent of the "owner" Mr. Roberts to be sole and exclusive representative and managing agent to manage the unit on behalf of the owner. The appointment of the agent became effective on the completion date, September 1, 1990. It was the obligation of the agent to use best efforts to arrange for the rental of the unit at the highest possible rent and to do and perform all act necessary on behalf of the owner for the proper and efficient management of the unit including insuring it.

[para8] I note that in light of the definition of the term "unit" in paragraph 1 of the Agreement of Purchase and Sale to mean, prior to the registration of the project as a condominium, an undivided interest in the project in accordance with the percentage interest of the unit, it is a little difficult to envisage either Mr. Roberts or his agent, Mastercraft, renting an undivided interest in the project to a tenant who is seeking an apartment unit in which to reside.

[para9] Another feature of the Agreement of Purchase and Sale was schedule (g), a Cash Flow Guarantee Agreement between Mr. Roberts and Mastercraft Investments Corporation. The Agreement provided in part:

2.01 Provided that during the currency of this Agreement the Guarantor is also the agent for the Owner under the Rental Management Agreement, the Guarantor shall provide a Cash Flow Guarantee for and on behalf of the Owner as follows:

2.02 (a) Mastercraft shall be responsible to the Purchaser for the leasing of the Unit until an initial lease is executed by a tenant. Mastercraft shall develop, institute and supervise programs, policies and procedures with respect to marketing and tenant selection. Mastercraft shall investigate rental markets, prepare advertising brochures, signs, billboards, display materials or model suites, rental office and other information which Mastercraft deems necessary for the lease of the Project and Mastercraft shall pay out of the gross revenue on behalf of the owner the costs of such advertisements in such media and such other leasing costs, (including without limitation, commissions to rental agents) as Mastercraft deems appropriate during the period from the Completion Date to the earlier of the end of the Guarantee Period (as that term is defined in subparagraph (b) below) and the date on which the Unit is first rented. All of the above costs after such date shall be payable and shall be for the account of the Purchaser and are not included in any rental management fee payable to Mastercraft pursuant to the Rental Management Agreement;

(b) From the Completion Date to December 31, 1992 subject to earlier termination as set out in paragraph (d) below (the "Guarantee Period") Mastercraft shall provide a grant that will ensure that the Cash Flow actually received from the Unit owned by the Purchaser shall be equal to those amounts for those years indicated opposite the line "Guaranteed Cash Flow" on Schedule "1" hereto pertaining to the Purchase Price of the Unit. In the event that the actual Cash Flow received from the Unit is in excess of the Guaranteed Cash Flow, such excess shall accrue as to fifty percent (50%) to the owner and as to fifty percent (50%) to

Mastercraft, provided that any cash flow in excess of the Guaranteed Cash Flow in any year shall be firstly applied to any shortfall in any other year or years. Any remaining excess shall be retained by the Agent pursuant to the Rental Management Agreement until the expiry of the Guarantee Period, at which time any remaining excess shall be divided equally between the Purchaser and Mastercraft.

...

2.03 In consideration of the Guarantor providing the above guarantee, the Owner covenants and agrees to pay to the Guarantor the sum indicated on Schedule "A" of the Agreement of Purchase and Sale. ...

[para10] Counsel for the appellant stated that the question to be decided is whether ownership and possession of the unit were transferred to Mr. Roberts under the Agreement of Purchase and Sale before 1991. He pointed out that subsection 123(1) of the Act defines the term residential condominium unit for purposes of the Act as follows:

123.(1) Definitions -- In section 121, this Part and Schedules V, VI and VII, ...

"residential condominium unit" means a residential complex that is, or is intended to be, a bounded space in a building designated or described as a separate unit on a registered condominium or strata lot plan or description, or a similar plan or description registered under the laws of a province, and includes any interest in land pertaining to ownership of the unit;

That definition, he emphasized, includes both residential complexes that are registered as condominium units and that are intended to be so registered. His position was that Mr. Roberts' unit was a residential complex intended to be described as a separate unit within the definition, that both ownership and possession had been transferred to Mr. Roberts under the Agreement of Purchase and Sale before 1991 and that neither paragraphs (b) or (c) of subsection 336(3) was satisfied.

[para11] In this regard counsel argued that the ownership test does not require conveyance of title to the unit. It was, he said, sufficient if the recipient of the supply held the incidents of ownership and in this regard he relied on the decision of the Exchequer Court in *M.N.R. v. Wardean Drilling Ltd.*, 69 D.T.C. 5194. With regard to possession it was not suggested that Mr. Roberts and the other investors took possession of their respective units personally. Rather the position was that they took possession through their agent Mastercraft Investments Corporation acting under the Rental Management Agreement.

[para12] In my view ownership of what ultimately became the unit was not transferred to the appellant as a consequence of the creation of the trust. Until the project was registered as a condominium the subject matter of the trust was, according to the Agreement, an undivided interest in the project and not beneficial ownership of the unit.

[para13] The facts on which the appellant relied in support of the assertion that ownership and possession of the unit passed to the purchaser on September 1, 1990, the date variously described in the Agreement as the closing date or the completion date, tended to overlap. Those facts included: (1) the execution by the purchaser, Mr. Roberts, of a Power of Attorney authorizing Mastercraft to execute on his behalf transfers and mortgages of the unit in accordance with the Agreement of Purchase and Sale and to execute other documents necessary to effect the sale of the unit in accordance with the Agreement.

(2) The obligation from and after September 1, 1990 to pay municipal taxes, telephone, utility and other charges billed directly to the unit by the supplier of the services.

(3) The Cash Flow Guarantee Agreement which describes Mr. Roberts, the purchaser of the unit, as owner and in effect requires that Mastercraft Investments Corporation be responsible to the purchaser for the leasing of the unit and make up the difference between cash flow actually received from the unit and a specified guaranteed amount.

(4) A Management Agreement whereby the purchaser, described in the Management Agreement as owner, "... engages and appoints the Agent to be its sole and exclusive representative and managing agent to manage for and on behalf of the Owner ... the Unit ...". The appointment of the agent under the Management Agreement is to commence on a date which by virtue of definitions contained in the Agreement is the completion date under the Purchase Agreement that is to say, September 1, 1990.

[para14] Counsel for the respondent argued that both ownership and possession passed in 1991 and not before. He supported this position with reference to dictionary definitions of the word ownership none of which I found particularly helpful in arriving at a solution in this case.

[para15] In my view there is little room for doubt that ownership of a residential condominium unit as defined in section 123 of the Act did not pass before 1991. *Wardean Drilling Ltd.* is of little help. In that case the Court had to decide when property was "acquired" for purposes of capital cost allowance. When paragraph 336(3)(b) speaks of ownership, it speaks of it as of something distinct from possession. The statutory language suggests to me that the legislature envisaged ownership as involving either legal title or something very close to it. It did not envisage an approximation of ownership derived from inferences of the sort which might be drawn from the Agreement of Purchase and Sale in this case. It is impossible to infer that a purchaser under the Agreement of Purchase and Sale could have had ownership of a "bounded space" in the building at any time before 1991 because the unit as a thing capable of ownership did not then exist as an entity separate from the rest of the building. The unit as a thing capable of separate and distinct ownership could come into existence only upon the registration of the condominium.

[para16] The tax imposed by subsection 336(3) does not by virtue of paragraphs (b) and (c) apply in a case where possession of the unit is transferred to the purchaser under the Agreement before 1991. There are two branches to the question of possession, namely, the physical existence of a unit capable of possession and possession of that unit. As to the first, the April 1989 Agreement of Purchase and Sale assumed that the building and the units or the suites therein would be complete and ready for occupation by tenants on September 1, 1990. That expectation did materialize, if not precisely on time, at least some time before the end of November 1990. The evidence included photographs of the exterior of the completed building and of suites therein apparently ready for occupation by tenants. Those photographs were taken when the building was inspected in November of 1990.

[para17] Turning next to the question whether the appellant put the purchasers into possession of their suites before 1991 I note that, although the matter is not free from difficulty because of problems in the drafting of the Agreement of Purchase and Sale and its schedules, it is tolerably clear that Mr. Roberts and the purchasers of the other 38 units in question took possession before 1991. They did so under their respective agreements through the agency of Mastercraft acting under the Rental Management

Agreements. The drafting problem to which I refer is, of course, the definition of "unit" in paragraph (1) of the Agreement. When the Agreement is read as a whole and in particular when the Management Agreement, schedule (I) to the main Agreement, is taken into account it is evident that the definition cannot sensibly be applied throughout and that the parties contemplated that purchasers of the units would be entitled from and after the closing date to rent their respective "bounded spaces" to tenants. That they could not do in the absence of a right to possession of the units. As I read the Agreement, the appellant as vendor could not after September 1, 1990 or at least after physical completion assert against a purchaser a continued right to possession of the space intended to be that purchaser's unit.

[para18] For the foregoing reasons the appeal will be allowed with costs and the assessment is referred back to the Minister of National Revenue for reassessment consistent with these reasons.

CBR# 300

Smith v. Canada (Minister of National Revenue - M.N.R.)

William A. Smith, Appellant, v. The Minister of National Revenue, Respondent

Also reported at: 91 DTC 909

[1991] T.C.J. No. 403, Action No. 89-2390(IT), Tax Court of Canada Christie A.C.J.T.C. Heard: March 27, 1991 Judgment: May 7, 1991

CASES CITED: The Queen v. House, [1983] C.T.C. 406 (F.C.T.C.). Soper v. M.N.R., 87 DTC 522 (T.C.C.).

K. Hood, for the Appellant. C. Coderre, for the Respondent.

CHRISTIE A.C.J.T.C.:-- The years under review are 1982, 1983, 1984 and 1985. In reassessing the appellant's liability to income tax for those years the respondent assigned specified values to benefits received by the appellant in each year as a shareholder of Deroheath Investments Limited ("Deroheath"). The benefits pertain to the use by the appellant of a condominium and two yachts. It is the value of those benefits that is in dispute. What is in paragraph 15(1)(c) of the Income Tax Act ("the Act") that applies to this appeal provides that where, in a taxation year, a benefit has been conferred on a shareholder by a corporation, the value thereof shall be included in computing the income of the shareholder for the year. This table summarizes the value of the benefits according to the litigants and the amounts in dispute.

Condominium

Appellant's Respondent's Amount in Value Value Dispute

1983 \$1,336 \$22,490 \$21,154

1984 1,686 25,039 23,353

1985 1,233 26,994 25,761

Yachts

1982 \$2,581 \$11,981 \$ 9,400

1983 4,218 8,700 4,482

1984 8,303 14,218 5,915

1985 7,665 14,315 6,650

The appellant is president and owns 50% of the voting shares of Deroheath. The other 50% are held in trust for the benefit of the appellant's wife and three children. Deroheath owns 50% of the voting shares of SeeSee Holdings Limited ("SeeSee") and the other 50% are owned by another holding company. SeeSee in turn owns all of the shares of Seeburn Metal Products Ltd. ("Seeburn") which manufactures jacks for automobiles. The profits of Seeburn flow to the two holding companies and from SeeSee to Deroheath. This is the source of nearly all of funds received by Deroheath. Included in the other assets of Deroheath have been three condominiums in Florida and two yachts. Three questions require answers in respect of the yachts. They are:

- (i) Were they employed primarily for business or personal use?
- (ii) What amount of time is to be allocated for personal use?
- (iii) Were they purchased for a business purpose?

The first yacht was bought in 1981 for \$80,000 and the second for \$140,000 in 1984 as a replacement. While owned by Deroheath they were berthed at a marina located between Lakes Couchiching and Simcoe. The appellant's home is in Orillia and fronts on Lake Couchiching. Moored there were two other power boats and a sailboat owned by him.

Seeburn operates two plants: one in Beaverton overlooking Lake Simcoe, and the other in Tottenham, which is inland and about 100 kilometres by road to the southwest of Beaverton.

The original intention in purchasing the first yacht was primarily for the personal use of the appellant and some business use, but the reverse occurred in 1981 soon after the acquisition. The business use consisted of taking parties on cruises on Lake Simcoe, Lake Couchiching, Georgian Bay and the Trent canal system to promote the commercial interests of Seeburn. These groups consisted of individuals associated with customers, suppliers, banks, auditors and legal advisers who did business with Seeburn. Also included in the cruises were key employees of Seeburn.

During the years under appeal the appellant did not keep a log for the yachts. He began to maintain a log in 1989 on the advice of an official at Revenue Canada given at a meeting about the reassessments under appeal. The time of this advice is not precise, but the reassessments were made on June 10, 1987 and objected to by the appellant on September 1, 1987. Confirmation of the reassessments is dated July 4, 1989. Copies of pages from the log for the period May 21, 1989, to September 16, 1989, are in evidence. Among other things they indicate the date of use, point of origin, destination and length in time of each journey. They also specify whether the use was for "Pleasure" or "Business". This would be expanded upon. For example, the outing on May 21, 1989, is designated "Pleasure" and states: "Orillia Fire Works Display Family & Friends". The outing on June 7, 1989, is designated "Business" and states: "Stelco (followed by a number of names) seafood platter from John Dory's & drinks". Copies of similar pages for 1990 are in evidence. They relate to the period May 20, 1990, to September 16, 1990. These exhibits show the time spent on business in 1989 as 56.6 hours during 12 days and the time devoted to pleasure in that year as 32.55 hours during 11

days. The same figures in 1990 are: 47.2 hours - 10 days and 29.25 hours - 9 days. In percentages the hours of use in 1989 was business 63.5 and pleasure 36.5. The same percentages for 1990 are 62 and 38.

The appellant described these figures as "fairly representative" or "fairly typical" of the use of the yachts during the period 1982-1985. In fact in reporting the benefit the appellant went well beyond these figures and fixed 25 days in each of the years under review as personal use and at the hearing he continued with that number even though it was said by counsel for the appellant to be excessive.

My conclusion on the evidence is that during 1982, 1983, 1984 and 1985 the primary use of the yachts was for business purposes and that the personal use by the appellant is to be taken as 25 days. As I understand it, the parties agree that in such circumstances the amount by which 25 is to be multiplied to arrive at the value of these benefits is the figures in the reply to the notice of appeal referred to as "Per Day Rental" minus the amounts shown as "Expenses paid by Shareholder". They are: 1982 - \$235 and \$3,294; 1983 - \$249 and \$2,007; 1984 - \$455 and \$3,072 and 1985 - \$475 and \$4,210. The result of these calculations is that the value of the benefit is 1982 - \$2,581, 1983 - \$4,218, 1984 - \$8,303, 1985 - \$7,665 which are the values reported by the appellant.

With respect to the respondent's submission that because of the removed relationship of Diroheath to the operating company Seeburn, the former cannot be regarded as having acquired the yachts for a business purpose, I note that this same kind of argument was rejected in *The Queen v. Houle*, [1983] C.T.C. 406 (F.C.T.D.). In this case Joyce Management Limited ("Joyce") purchased a 37 foot Canoe Cove vessel called the "Sans Souci". The defendant Houle owned all of the shares of Joyce and it, in turn, owned all of the shares of Houle Electric Ltd. which was an operating company engaged in electrical contracting in a large way. Collier J. said at page 408:

In the years under review, the vessel was not technically used by Joyce for business promotion purposes. But it was used on behalf of Houle Electric, Joyce's source of income, to entertain, and to promote the obtaining of private, industrial and commercial electrical contracts by Houle Electric.

In rejecting the submission ". . . that the acquisition or ownership of the yacht by Joyce Management Limited had no business purpose" his Lordship said at page 410:

The evidence of the defendant satisfies me this vessel was acquired by Joyce, in 1970, for a business purpose. It was for use to promote business contacts and to assist in obtaining contracts for Joyce's wholly-owned subsidiary, Houle Electric.

Counsel for the respondent seeks to distinguish Houle from the case at hand on the basis that Seeburn is not a wholly-owned subsidiary of Diroheath. I do not believe that because the holding company SeeSee is interspersed between Seeburn and Diroheath this makes the conclusion in Houle inapplicable to the case at hand.

Turning now to the condominium. The essential disagreement regarding it pertains to the period of time during each of the years under review that the condominium constituted a benefit to the appellant. The appellant says that the actual use by him and his family did not exceed eight weeks per year spread over the period commencing typically during the long weekend of Canadian Thanksgiving in October to May and that eight weeks should be regarded as the benefit period. The respondent treats all of 1983, 1984 and 1985 as the benefit period. The appellant made personal use of the condominium after it was purchased in June of 1982, but the value of that benefit is not in issue. The rental value of the condominium in the other years under review consists of peak rates and other rates. These rates were supplied by the appellant to and accepted by Revenue Canada. The peak monthly rates and other rates in US currency are: 1983 - \$2,075 and \$1,500; 1984 - \$2,200 and \$1,575; 1985 - \$2,300 and \$1,653. Annual expenses about which there is no quarrel are, again in US currency: 1983 - \$3,057; 1984 - \$3,083; 1985 - \$3,685. There is a dispute about how much should be allocated to the peak rates and the other rates. The appellant says the peak rates should not apply to more than two or three months in a year. The respondent contends that in each year six months is applicable to the peak rates and the remainder to the other rates.

The appellant calculates the condominium benefit as 2 times the peak rate minus expenses or: 1983, $2 \times \$2,075 = \$4,150 - \$3,057 = \$1,093 \times \text{conversion factor } \$1.2228 = \$1,336 \text{ Cdn}$; 1984, $2 \times \$2,200 = \$4,400 - \$3,083 = \$1,317 \times \$1.2797 = \$1,686 \text{ Cdn}$; 1985, $2 \times \$2,300 = \$4,600 - \$3,685 = \$915 \times \$1.3475 = \$1,233 \text{ Cdn}$. The respondent uses the same approach only he assigns the peak rates to six months and the other rates to six months in each year and thereby calculates the benefit in each year in Canadian currency to be 1983 - \$22,490; 1984 - \$25,039; 1985 - \$26,994.

The condominium was acquired by Diroheath on June 9, 1982. It consists of three bedrooms, being unit 24 at 4695 Chandlers Ford, Sarasota, Florida ("the Chandlers condominium"). It is one of a cluster of 48 units called villas, about one-half of which have two bedrooms and the remainder three. The villas are attached in groups of two or three. The layout of the two bedroom villas is identical as is that of those with three bedrooms. There are a number of these 48 unit groups in a complex called Meadows which consists of 1,400 to 1,600 acres. In his notice of appeal the appellant states:

All costs of maintaining, insuring and operating the property have been paid by or charged to the personal account of the Taxpayer from the time of purchase to date. Diroheath has not claimed capital cost allowances on the property nor taken any deduction for mortgage interest and mortgage insurance. The property was not rented to third parties.

These facts are admitted in the reply to the notice of appeal

The appellant said that the Chandlers condominium was purchased primarily as an investment in respect of which capital appreciation was expected. It was not acquired for the purpose of deriving rental income. It has not been rented or offered for rent. It is still an asset of Diroheath and used by the appellant and his family.

At one time Diroheath also had a 50% interest in two other two bedroom units in the Meadows development called Chartwell Green and Villa Majorca. One was furnished and rented on a seasonal basis. The other was unfurnished and was rented on an annual basis. Chartwell Green was sold in 1989 and Villa Majorca in 1990.

While I am prepared to accept that the appellant and his family only used the Chandlers condominium in the order of two months in each year, it strikes me that simply multiplying this number by the agreed market value of monthly rent for the premises and deducting expenses does not produce the annual value of the benefit to the appellant. The conclusion to be drawn from the evidence is that Diroheath acquired the Chandlers condominium and made it exclusively available to the appellant for his personal use year round. The fact that he did not actually use the asset as a residence during the entire year does not suggest to me

that the respondent erred in calculating the benefit conferred on the basis of the use and availability for use by the appellant of the Chandlers condominium throughout the years 1983, 1984 and 1985. I believe this is entirely in harmony with what was said by Rip T.C.J. in *Soper v. M.N.R.*, 87 DTC 522.

On the other hand I think there was error in relating six months in each year to the peak rate. Three to four months is suggested by evidence. I will take 3.5 months as the period for the purposes of this appeal. On this basis the value of the benefits conferred on the appellant regarding the Chandlers condominium in Canadian currency are: 1983 - \$20,733; 1984 - \$23,040; 1985 - \$24,815.

The final matter is the appellant's argument that whatever the benefits are, a percentage [Footnote: It was said that the division should be 50% if calculated on the basis of the appellant having 50% of the shares of *Diroheath* or 20% if calculated on the basis that the appellant plus four members of his family were involved.] should be attributed to the appellant's wife and three children because of their relationship to *Diroheath*. This appears to have been raised for the first time at the hearing. At the time of the hearing the children were aged 20, 15 and 11. The short answer is that whatever benefits the wife and children derived there is nothing before me to indicate that they were conferred on them by *Diroheath* and received by them qua shareholders. They are the beneficiaries of a trust and the trust property, i.e. the shares, are held by the trustee.

In summary the appeal is allowed and the matters referred back to the respondent for reconsideration and reassessment on the basis that the value of the benefits conferred on the appellant by *Diroheath* in respect of:

- (a) the yachts are: 1982 - \$2,581; 1983 - \$4,218; 1984 - \$8,303; 1985 - \$7,665; and
- (b) the Chandlers condominium are: 1983 - \$20,733; 1984 - \$23,040; 1985 - \$24,815.

As stated at the commencement of these reasons, it is the value of the benefits conferred by *Diroheath* on the appellant that is in dispute in this appeal and the total amount involved has been reduced by about 30%. There being no other fact specially pertinent to costs the appellant has not "substantially succeeded in the appeal" within the meaning of subsection 5(1) of the Tax Court of Canada Rules of Practice and Procedure for the Award of Costs (Income Tax Act). This precludes awarding costs.

CBR# 090

Condominium Plan Number 752-1207 v. Terrace Corp.
(Construction)

Between
Condominium Plan Number 752-1207 Owners and McKinley
(Representing all past and present owners of Condominium Plan
Number 752-1207), and
Terrace Corporation (Construction) Ltd., Zeiter and Zeiter

[1983] A.J. No. 773
No. 13939

Alberta Court of Appeal
Moir, McClung and Stevenson JJ.A.

April 20, 1983.
(38 paras.)

Counsel:

R.D. Gillespie, for the appellants.
B.J. Willis, for the respondents.

Reasons for judgment were delivered by Stevenson J.A., concurred in by Moir J.A. Separate reasons, dissenting in part, were delivered by McClung J.A.

1 STEVENSON J.A.:— This is an appeal and a cross-appeal brought from a judgment in an action arising out of the development and construction of a condominium project. The condominium corporation sued Terrace Corporation (Construction) Ltd., the builder, and Erwin and Willi Zeiter, officers of Terrace, who also initially managed the condominium corporation. During the course of the trial McKinley was added as representative of present and previous condominium unit owners. The trial judgment is reported in (1980), 14 Alta. L.R. (2d) 24. We reserved judgment on the award of costs and on two substantive questions: firstly, was the trial judge correct in setting aside a lease of part of the common property made by the condominium corporation (when under the management of the Zeiters) to Terrace and; secondly, was the trial judge correct in the award of damages to be made to the condominium corporation against Terrace for deficiencies in the construction of the building.

2 On the appeal the condominium corporation also challenged the judgment below in dismissing a claim based on misrepresentations regarding the amount of common area, as Terrace made changes late in the course of the construction which had the effect of reducing the amount of common area. We dismissed the condominium corporation's appeal on this point at the hearing of the appeal. The learned trial judge found that the plaintiffs had failed to establish that anyone was influenced or misled by representations. That finding is fatal. Moreover, insofar as those representations were said to be contractual such terms were negated by the express provisions of the contract of sale. It was further, to all intents and purposes, conceded by counsel for the condominium corporation that such a contract would have merged in the conveyances. A claim for tortious misrepresentation also fails on the judge's finding. In addition, the representations relied upon before us were not representations of fact, but of intention, and liability for making false statements of intention was neither pleaded nor proved. Finally, all these claims were individual, not corporate. It is doubtful that they could properly be the subject of a class action and, in any event, the pleadings do not support claims by anyone other than the condominium corporation. The trial judge amended the pleadings to show McKinley as a representative party, but I am unable to find any amendment to the body of the pleadings showing the basis on which the persons he represented were entitled to any relief.

3 I now turn to the issues on which judgment was reserved.

I.

4 The development included a parking structure, the roof of which is also a parking facility. The parties agree that because of the provisions of the Condominium Property Act neither the roof nor any part of it could be made the subject of a condominium unit. They also agree that the roof, once the plan was registered, became common property. The use to which this roof parking was to be put was the subject of considerable evidence at trial. Mrs. Kennedy, whom Terrace engaged to sell the condominium units, gave evidence that she understood and represented to prospective purchasers that the roof would be available for visitor parking, but that Terrace was offering to sell some of the parking stalls to owners of condominium units who wished additional parking. Indeed some were sold. The evidence of the principals of Terrace was that the parking stalls on the roof were Terrace's property, like the condominium units themselves, until sold.

5 Once the condominium plan was registered, the roof of the parking structure, as common property, was held by the owners of units as tenants in common under s. 5(2) of the Act (then R.S.A. 1970, c. 62, s. 5):

5...

(2) The common property comprised in a registered condominium plan is held by the owners of all the units as tenants in common in shares proportional to the unit factors for their respective units.

Terrace says it did not intend that the roof of the parking structure form part of the common property. Moreover it had sold some of the stalls on the roof and had some plans for the development of an adjoining condominium unit which would use some of that parking. In order to effect the sales it had made, as well as to effect its intention of reserving the roof, Terrace took a lease of the roof from the condominium corporation. They had no difficulty in doing this. On September 10, 1975, the condominium plan was registered at the Land Titles Office and the condominium corporation was thereby established. Terrace was the registered owner

of all the condominium and it therefore appointed all of the managers of the condominium corporation. Its appointees were the Zeiters. On September 18, 1975, the condominium corporation granted Terrace a 99 year lease of the roof. The Zeiters executed the lease on behalf of both the lessor and the lessee. Subsequently Terrace conveyed titled to the individual condominium units to the purchasers of those units, and in each case the purchaser was furnished, inter alia, with a copy of the lease of the roof. The lease was also registered in the Land Titles Office. In delivering transfers of the condominium units to solicitors for the individual purchasers the solicitors for Terrace included in their covering letter two paragraphs:

In respect to the lease of the parking area forming the roof of the parkade, we would point out that it was necessary to leave these parking spaces as common area since the Condominium Act will not permit the creation of units which are not delineated by walls and roofs. Therefore, the only way in which the developer could have control over these units was to grant to himself a long term lease so that he could sublet particular spaces.

We would ask you to point out to your client that this particular building is quite famous in Edmonton legal circles in view of the considerable litigation which arose when it was started as a 125 suite apartment building and never completed due to the financial problems of construction allowed for the provision of parking for 125 apartments rather than 77 condominiums. Therefore substantial excess parking had to be completed by the developer and for this reason the developer has placed a caveat on the property regarding future development so as to permit the use of this parking area and other facilities in conjunction with a proposed addition to the condominium to be located across the lane immediately to the south west of the existing tower. The addition will have the effect of spreading the taxation of the land and the parkade amongst more units.

6 The lease provided for a rental of 4% of the total municipal tax on the property plus payment of costs relating to utilities provided to the roof. There appears to be some modest net income to the condominium corporation from this rental as the tax actually attributable to the roof is something less than 4%. Terrace did grant subleases to unit holders to whom it had sold parking stalls and was invoiced for and paid rent and utility charges from time to time. It has undertaken a plan of leasing the remaining parking stalls on a short term basis and they are not, therefore, available for visitor parking.

7 The learned trial judge held the lease to be impeachable at the suit of the condominium corporation as statutory manager of the common property. S. 19(1) of the Act provides:

19(1) A corporation is responsible for the enforcement of its by-laws and the control, management, and administration of the common property.

8 Terrace concedes that the Zeiters, when they entered into the lease on behalf of the condominium corporation, had a fiduciary duty to the persons who were purchasing condominium units under interim agreements. Moreover, Terrace did not argue that it could avoid identification with any breach by the Zeiters, if breach there were.

9 On the face of it the lease of common property by the Zeiters, nominees and principals of Terrace, to Terrace was a breach of their fiduciary duty. They were managers of the property in which the condominium unit buyers had an equitable interest and leased that property to the very corporation which appointed them managers. The fiduciary relationship of the developer could, perhaps, be found to exist even before the condominium plan was registered: *York Condominium Corporation 167 et al. v. Newrey Holdings Ltd. et al.* (1981), 32 O.R. (2d) 458, at 467. A fortiori the relationship existed after registration of the plan. The answer that Terrace and the Zeiters seek to make out is this: a fiduciary is not in breach of his duty if he does what he is authorized to do. All those who had agreed to buy units knew that stalls were being sold and any arrangement necessary to implement that transaction was authorized. The condominium corporation concedes this point and filed before us undertakings that all such transactions would be recognized and performed.

10 The disagreement arises about the authority to deal with those parking spaces that were not sold. There is a conflict in the evidence. Terrace's agent says that she represented that the parking stalls which were not sold would be available for visitor parking. She also represented that only some would be sold. Terrace says that such was not the intention; that their intent is reflected in the letters that were sent out with the conveyances after the lease was signed. Terrace says the fact that no one objected is evidence of the fact that the letter reflected the understanding. What is required, however, is proof that the unit holders agreed to Terrace's disposition of the roof. The contention that they had agreed is implicitly rejected by the trial judge. Terrace urged that since it had the right to sell stalls in the parkade, it could have sold all the stalls and the unit holders would have no legitimate grievance. The short answer to this contention is that the owners recognized that sales would be made but only to other unit holders. While the evidence establishes that the purchasing unit owners took that risk, it does not establish their agreement that the roof would be retained by the developer for other dispositions. The lease transaction violated the director's fiduciary duty and was voidable at the instance of the owners of the common property.

11 The individual purchasers soon learned about the disposition of the roof stalls for purposes other than visitor parking. They did nothing. What was the legal consequence of their inaction? Terrace faintly pleaded, and strenuously argued, waiver; waiver in taking title with knowledge of the lease. It says the waiver is clearly founded upon the failure of the owners to complain when they learned that the property had been leased to Terrace before they took legal title to their units. On this point Terrace cited *Crump v. McNeill*, [1919] 1 W.W.R. 52 (Alta. A.D.). What that case requires is an intentional relinquishment of a known right. It is distinguishable from other pleas not raised here: acquiescence amounting to estoppel, mere acquiescence which is no defence, and laches: *De Bussche v. Alt* (1878), 8 Ch. D. 286 (C.A.). Waiver is a question of fact: *Knight Sugar Co. Ltd. v. Webster*, [1929] 2 W.W.R. 505, at 509 (Alta. A.D.), rev'd. on other grounds [1930] S.C.R. 518.

12 In the form letter the purpose of this lease is said to be to enable the subletting of particular stalls (which the unit holders must have expected) to other unit holders. The letter also refers to the use of "this parking area and other common facilities" in connection with a proposed condominium. But this reference is not in the context of the reason for granting the lease. In any event the letter does not make it clear that the lease was intended to permit commercial exploitation of the parking facilities. The learned trial judge did not find waiver and on the facts I would not construe the taking of title as a waiver of the right to impeach the lease. There was no intentional relinquishment of a known right.

13 A further question must be answered - can the condominium corporation impeach the transaction? It does not own the common property; that is owned by the corporate members. S. 5 (3) of the Condominium Property Act provides:

5...

(3) Except as provided in this Act, a share in the common property shall not be disposed of or become subject to any charge except as appurtenant to the unit of an owner and any disposition of or charge upon a unit operates to dispose of or charge that share in the common property without express reference thereto.

Terrace objects that a class action purporting to represent the interests of present and past unit owners is of questionable validity. Past owners no longer have any interest in the common property and their economic interests would be different from that of present owners. I agree. Terrace also says the corporation is an inappropriate plaintiff, because it does not have a property interest. I am not prepared to accept that objection. It seems to me that the statutory manager of the property, which has the power of disposition and actually effected this disposition, is a proper party to an action to preserve the common property. While a trustee seeking to recover or preserve trust property has legal title, and the condominium corporation does not, the status of a trustee is analogous. The condominium corporation's obligation to the unit holders, like the trustees' obligation to the beneficiary, affords no defence to a claim to the property. Moreover, while the unit holders are owners of the common property, their power of disposition other than through the medium of the condominium corporation is significantly restricted by s. 5(3). Nor do I see any real danger of someone in Terrace's position being sued by each and every unit owner who had an interest in the common property. The remedy of the common property owners is analogous to the proprietary remedy of the trust beneficiary, namely the restoration of the property. The beneficiaries' action is generally considered as giving rise to the right to restore the property to the trust: *Waters, The Law of Trusts in Canada*, at 834. I conclude, therefore, that the condominium corporation's action to recover the common property (with incidental relief) is a proper one.

14 Terrace's appeal against the setting aside of the lease fails.

II.

15 We are obliged to deal with the question of the trial judge's treatment of the alleged construction deficiencies. Several complaints were raised at trial, not all successfully. Those that were successful included:

- (a) Lack of radiation equipment on the 17th floor for which the learned trial judge awarded \$2,000.00.
- (b) Venting of the intake on the hallway air pressurization unit to prevent entry of contaminated air, for which the learned trial judge awarded \$7,000.00.
- (c) Installation of flexible couplings on the pumping units - \$3,085.00.
- (d) Installation of valves on the hot water recirculating system - \$3,600.00.
- (e) Removal and replacement of the condominium's roof structure - \$34,000.00.

16 The total award was therefore \$49,685.00 based on the trial judge's finding that the deficiencies arose because of "failure to perform in a good and workmanlike manner or failure to supply adequate and proper materials insofar as the common property was concerned."

17 Nine other claims were dismissed because of failure "... to establish by any preponderance of evidence or any balance of probability that they are deficiencies of any kind." This appeal is taken from the rejection of seven of those claims.

18 Material to their present consideration is the finding of the trial judge "that there was no real question as to the credibility of the witnesses". Within this framework they will be considered in order.

1. Lack of insulation on pipes in boiler room.

19 Under the original engineering specifications the pipes were to be insulated. They are usually insulated. They were not, because Hans Zeiter concluded it was unnecessary. In so doing he relied on his own experience but was in conflict with the opinion of J.D. Whittaker, the expert called by Terrace.

20 The evidence indicates that Mr. Zeiter in rejecting the necessity of the insulation relied on his construction practice in his other buildings, the fact that his plumbing subtrades did not pursue it and the fact that a concrete ceiling will usually contain any escaping heat. He also relied on the fact that the Building Inspector raised no complaint. The evidence indicates, however, that he was unaware of the specifications which had been simply turned over to his plumber.

21 The result has been that the room overheats and with the heat loss resulting there is proven discomfort in the suite above. Estimates of cost varied. Mr. Whittaker spoke of 75 cents or a dollar per square foot. Chobat, the owner's expert, put the minimum cost at \$6,000.00. The difficulty in reconciling the estimates (if reconciliation is required) is that the evidence is silent on the square footage involved. The learned trial judge did not specifically address the complaint except to dismiss it with others under the observation that "The evidence is clear that in each case they met the standard, if any, set for them." But the sum of the evidence is clear that the reasonable standards were not met.

22 I would allow this claim and would refer its assessment to the Master at Edmonton as Referee.

2. Lack of proper walls and exit in emergency generator room.

23 The owners say that they are entitled to a proper wall around the emergency generator between the boiler room and the emergency generator room. They say this was brought to the Zeiters' attention in January 1976. Their fear was that the absence of a proper wall would contribute to negative pressure in the boiler room causing combustion gases to spill out of the boilers instead of being eliminated through the chimney. McKinley, one of the owners, said that Hans Zeiter verbally promised to correct the problem. The cost is estimated in the amount of \$1,200.00. Mr. Zeiter reiterated his agreement with the owners' demand during the course of his evidence, but now relies on the fact that the Building Inspectors have not complained to him. J.D. Whittaker indicated that in his experience a separate emergency generator room "had been done but that it was not a special requirement."

24 Again the dispute was not specifically addressed by the trial judge. In our view, however, it is not possible to ignore the promissory foundation for this claim as evidenced by Mr. Zeiter's agreement to have it installed at Terrace's expense. I allow it. We award the sum of \$1,200.00.

3. Installation of one pump and filter designed to service both the swimming pool and whirlpool bath.

25 The installation of the whirlpool bath came about on the evidence because Erwin Zeiter thought it would be "nice". It was feasible because the common area which included the swimming pool was enlarged. Contributing to Mr. Zeiter's decision, taken in the spring of 1975, was the possibility that Mr. Zeiter, as well as his son, planned to live in the "Horizon". Mr. Zeiter proceeded with a single circulating device serving both the swimming pool and the whirlpool. No thought was given to a dual system at the time. The single system was professionally designed and installed. Problems have arisen under the joint circulation system. Common water temperatures in the two conveniences are neither comfortable nor convenient with the result that they cannot be used at the same time.

26 The trial judge dismissed the owners claim for the cost of installation of a separate pump-filter on two grounds. Firstly that, as in the case of other "deficiencies", the existing system was not a deficiency of any kind and met "the standards, if any, set for them". He held that it was of medium quality of material and normal practice of workmanship. Although "desirable" they could not be expected to be part of a product of the kind the plaintiffs bargained for. Secondly, and specifically, he held that the whirlpool was a gratuitous extra - "neither bargained for nor expected with or without its own pump or filter."

27 There were no contractual obligations regarding the amenities of these areas and I agree with both conclusions.

4. Deficiencies between grade beam and walls.

28 Evidence was led that the mortar caulking introduced between the grade beam and the east wall of the building was so deficient that temperature problems have arisen in the two main floor units under adverse wind conditions. The problem arose, on the evidence, from the settling property of reinforced concrete. Caulking, on the evidence, is a maintenance problem after the first year following construction. There was evidence that the problem had not arisen the third winter of the building's operation.

29 In dismissing this claim, it seems to me that the trial judge must have regarded this problem as one pertaining to the maintenance of the building and not to be laid at the feet of the builders, respondents by cross-appeal. I therefore dismiss it.

5. Front door insulation.

30 The owners, in the fall of 1977, had to reinsulate the front door at a cost of \$150.00. The evidence of J.D. Whittaker again entitled the trial judge to consign this complaint to one of mere maintenance. It is therefore dismissed.

6. Positioning of thermostatic controls.

31 These controls should not have been located within a private unit. The cost of relocation is \$250.00 and that amount is awarded.

7. Addition, by the owners, of relief valves, site glass and blow-off valves.

32 This expenditure appears in the evidence of McKinley, to have been subsumed in the learned trial judge's award of \$3,085.00 for the installation of flexible couplings and must therefore be rejected.

III.

33 Terrace also appealed the trial judge's award of costs. There is no error of principle demonstrated and I would not interfere with the discretion exercised by the judge.

34 I would dismiss the appeal and allow the cross-appeal to include the amounts awarded in Part II of this judgment.

35 The respondents will have the costs of the appeal and the cross-appeal.

36 McCLUNG J.A. [dissenting in part]:-- I am in agreement with the reasons for judgment of Stevenson, J.A., with the exception of his dismissal of that portion of the cross-appeal pertaining to the cost of installing the separate pump and filter system. I would allow this claim and award the additional sum of \$15,000 to the cross-appeal appellants.

37 In my view it was wrong for the trial judge to dismiss the installation of the whirlpool bath as a gratuitous extra. The construction of the whirlpool came into being as a result of the complete redesign of the main floor of the complex in which benefit flowed to Terrace and the Zeiters. Something was taken from the owners and something, the whirlpool addition, was given in return.

38 That being so a reasonable standard of functional utility was imposed. That standard had to be based on its anticipated use. On the evidence the volume of usage of the swimming pool and whirlpool systems at "The Horizon" approached semi-public levels, whereas one pump one filter systems are normally found in private dwellings. In my view the single pump and filter could not reasonably serve the number of owners likely to use the system and this deficiency and the cost of its rectification must be borne by the respondents by cross-appeal.

Appeal dismissed; Cross-appeal allowed in part.

CBR# 314

Strata Plan LMS93 v. Neronovich

Between The Owners, Strata Plan LMS93, petitioner, and Caryle Irene Neronovich and Bank of Montreal, respondents

[1997] B.C.J. No. 606, New Westminster Registry No. S032767 British Columbia Supreme Court New Westminster, British Columbia Master Joyce Heard: January 15 and February 6, 1997. Judgment: filed March 11, 1997.

Counsel: G. Stephen Hamilton, for the plaintiff. No one appearing for the respondents.

MASTER JOYCE:--

NATURE OF THE APPLICATION

[para1] These are proceedings brought by the petitioner (the "strata corporation") under certain provisions of the Condominium Act, R.S.B.C. 1979, Ch. 61 (the "Act") to enforce claims which the strata corporation makes against the respondent Neronovich (the "owner") representing her share of common expenses, late payment charges, special assessments and legal costs. Initially I perceived the issue to be the "legal costs" which the strata corporation was entitled to recover in this proceeding but upon reflection the issues appear to be wider. At issue is the judgment amount to which the strata corporation is entitled in this proceeding and the amount for which the certificate which the strata corporation filed against the title to the owner's property stands as a charge against that property and the amount which the owner is required to pay to "redeem" the property.

FACTS

[para2] The strata corporation is incorporated pursuant to the provisions of the Act with respect to a condominium development situated in the City of Burnaby. The owner is the registered owner of one strata unit in the condominium complex. The respondent, Bank of Montreal, is the holder of a mortgage registered against the owner's property on September 9, 1993.

[para3] On July 7, 1994 the strata corporation registered a certificate against the title to the owner's unit pursuant to s. 37(1) of the Act by which it claimed that the owner was in default of her share of common expenses referred to in s. 37 of the Act in the amount of \$1,072.50. The strata corporation claimed a charge against the title to the owner's unit pursuant to s. 37 of the Act.

[para4] By letter dated January 26, 1995 the strata corporation's agent made demand against the owner for the sum of \$2,389.29 which it claimed was the amount then due and owing for "strata fees, bylaw fines, and associated costs of collection pursuant to the provisions of the by laws of the Strata Corporation and the Condominium Act". The strata corporation also claimed legal fees in the amount of \$250.00. The strata corporation further advised that "monthly assessments, late fines and legal expenses will continue to accrue and form part of the indebtedness until payment is received in full" and advised that unless payment was received by February 26, 1995 legal proceeding would be commenced under the Act.

[para5] By June 1, 1996, the strata corporation claimed the amount due and owing pursuant to the bylaws of the strata corporation to be \$6,010.40, comprised of the following amounts:

balance as at April 1, 1994 \$ 780.75 monthly assessments 2,928.54 fines 1,150.00 costs to register certificate under s. 37 294.25
adjustments 42.70 special assessments 814.16 ----- \$6,010.40

[para6] The material filed in support of the petition does not indicate the constitution of the balance claimed as at April 1, 1994 nor what the "adjustments" relate to nor what the "special assessments" or "fines" relate to. I note that the strata corporation has not filed any additional certificate since July 7, 1994.

[para7] This petition was issued on June 27, 1996 claiming, inter alia:

1. A declaration that the Certificate dated July 7, 1994 charges the owner's property in priority to the interests of the respondents;
2. A declaration that the respondent owner has made default in payment of her share of common expenses due the strata corporation and that all monies secured by the certificate are due and owing to the strata corporation;
3. A declaration that the amount due and owing to the strata corporation is \$6,010.40 as at June 1, 1994 "accruing by the sum of \$120.47 on the first day of each and every month thereafter, to the last day of redemption herein, together with a monthly late payment charge in the sum of \$50.00, a monthly special assessment in the sum of \$40.10, and the legal cost of the petitioner in these proceedings to be taxed on a solicitor and own client basis (collectively, the "Redemption Amount");
4. An order setting the last day for redemption at 30 days computed from the date of the order pronounced at the hearing of this petition;
5. A summary determination of what will be due to the petitioner under and by virtue of the certificate;
6. An order that following the last day of redemption the owner's property be sold, with the strata corporation to have conduct of sale;
7. Judgment against the owner for the amount determined summarily, together with the strata corporation's costs of the proceedings on a special cost basis.

The petitioner relies upon sections 14, 15, 28, 34 and 37 of the Act.

[para8] The petition came on for hearing on an uncontested basis on January 15, 1997, at which time I pronounced an order, essentially on the terms sought in the petition, including an order of special costs in favour of the petitioner. Subsequently, as a result of certain authorities having come to my attention I directed that the order which I had pronounced not be entered and that counsel for the petitioner make further submissions with respect to the issue of the costs to which the petitioner might be entitled. I have now had an opportunity to consider those submissions.

STATUTORY PROVISIONS

[para9] The relevant provisions of the Act are as follows:

14. Subject to this Act, the strata corporation is responsible for the enforcement of the bylaws, and the control, management and administration of the common property, common facilities and the assets of the strata corporation.

15. (7) The strata corporation may sue on its own behalf and

(a) on behalf of an owner about matters affecting the common property, common facilities and other assets of the strata corporation; and

(b) if authorized by special resolution of the strata corporation, on behalf of those owners who consent in writing to the strata corporation so doing, about matters affecting individual strata lots notwithstanding that the strata corporation, in the case of a contractual claim, was not a party to the contract about which the proceeding is brought.

(8) The legal or court costs in a proceeding brought in whole or in part on behalf of owners on a matter affecting their strata lots shall be borne by the individual owners in the proportion in which their interests are affected.

34. (2) The strata corporation may

(a) carry out repairs or work required by the notice or order of a competent public or local authority on a strata lot, whether authorized by the owner or not;

(b) obtain and maintain insurance in respect of any other perils, including liability, under section 54; and

(c) remove privileges or fix fines for breach of the bylaws, rules and regulations.

(3) Money spent under subsection (2) is due and payable to the strata corporation on demand, and shall be added to the levy on that owner under section 35 for the following month.

35. (1) The strata corporation shall

(a) establish a fund for administrative expenses sufficient for the control, management and administration of the common property, for the payment of premiums on policies of insurance and for the discharge of other obligations of the corporation;

(c) determine the amounts to be raised for the purposes set out in this section and notify the strata lot owners of those amounts; and

(d) raise the amounts so determined by levying contributions on the owners in proportion to the unit entitlement of their respective strata lots in the manner provided for in the bylaws.

(4) Unless otherwise provided in the bylaws, the contributions levied under subsection (1)(d) shall become due and payable on the first day of each month.

(5) Subject to section 36, a strata corporation may recover from an owner in a court of competent jurisdiction a sum of money owing to the strata corporation

(a) as the owner's monthly contribution under this section, or

(b) for money expended by the strata corporation under section 34.

(6) An action may be brought against the owner at the time the debt was due and against the owner of the same strata lot at the time the action is brought, jointly and severally.

37. (1) Where an owner defaults in the payment of his share of the common expenses, the strata corporation may register in the land title office a certificate in Form B showing the amount owing and the legal description of the strata lot of that owner.

(2) A certificate noted in the register is, except as provided in subsection (6), a charge for the amount owing in favour of the strata corporation, in priority to every other lien or charge of whatever kind except those under the Builders Lien Act, and those of the Crown, other than mortgages in favour of the Crown.

(3) On application by the strata corporation, the court may order that judgment be entered against the owner in favour of the strata corporation for the amount owing to the strata corporation on the charge by the owner. The order shall provide that, failing payment to the strata corporation of the amount owing within 30 days after the order is made, the strata corporation may sell the strata lot at a price and on terms to be approved by the court, taking into account the priority of the charge.

(4) The strata corporation shall, before seeking an order for sale under subsection (3), give not less than 4 days' notice of the application to the owner and the owners of all charges ranking in priority after the charge in favour of the strata corporation, by service of a written notice and copies of all documents filed with the court in support of the application.

(5) The strata corporation shall, on receipt of the amount owing, file with the registrar acknowledgment of payment in Form C.

(6) The priority of the strata corporation's charge under this section over a charge in favour of another person, as between them, and subject to a contrary intention appearing from the instrument creating them, is according to the date and time of the applications to register or file, to the extent that the amount owing to the strata corporation consists of the owner's share of common expenses incurred on satisfaction by the strata corporation of a judgment entered against the strata corporation.

(7) In this section "common expenses" includes the contribution levied under section 35, and the amounts, if any, added to the levy under section 34(3).

(8) A strata corporation may add the land title fee and the legal and administrative costs of filing under subsection (1) or (5) and the legal costs of a proceeding under subsection (3) to the amount owing by the owner to the strata corporation.

[para10] The following bylaw provisions of the Act, which form part of the bylaws of the strata corporation, are also relevant:

117. The strata corporation may . (i) do all things necessary for the enforcement of the bylaws and rules and regulations of the strata corporation, and for the control, management and administration of the common property, common facilities or other assets of the strata corporation, generally, including removing privileges in the use of certain facilities, or fixing and collecting fines for contravention of the bylaws, rules and regulations.

127 (1) An infraction or violation of these bylaws or any rules and regulations established under them on the part of an owner, his employees, agents, invitees or tenants may be corrected, remedied or cured by the strata corporation. Any costs or expense so incurred by the corporation shall be charged to that owner and shall be added to and become part of the assessment of that owner for the month next following the date on which the costs or expense are incurred, but not necessarily paid by the corporation, and shall become due and payable on the date of payment of the monthly assessment.

(2) The strata corporation may recover from an owner by an action for debts in a court of competent jurisdiction money which the strata corporation is required to expend as a result of an act or omission by the owner, his employees, agents, invitees or tenants, or an infraction or violation of these bylaws or any rules or regulations established under them.

128.(1) The strata lot owner's contribution to the common expense of the strata corporation shall be levied in accordance with this bylaw. . (10) At each annual general meeting subsequent to the first annual general meeting, the strata corporation shall prepare an annual budget for the following 12 month period and, after that, all owners shall, subject to subsections (2) and (3), pay a monthly assessment in accordance with their unit entitlement.

[para11] By section 28 of the Act the bylaws set out in sections 115-132 of the Act are made effective to every strata corporation until amended or repealed pursuant to the provisions of the Act. The bylaws set contained in sections 117, 127 and 128 as set out above are in effect with respect to this strata corporation.

DISCUSSION

[para12] Section 37 of the Act provides a statutory scheme whereby a strata corporation may obtain a charge against the lands of an individual strata unit owner for certain expenses. It also provides a priority for the charge over other charge holders even though those other charge holders may have registered their charges at an earlier date and it further provides a summary procedure for the recovery of the expenses.

[para13] I have been referred to a number of cases which have considered s. 37. The first case to which I will refer is Owners, Strata Corporation VR873 v. Crumley (1982), 40 B.C.L.R. 80 (S.C.) which considered the issue of legal costs in relation to s. 37 of the Act. In that case the owner had failed to pay a monthly assessment and the strata corporation had filed a certificate pursuant to s. 37(1) of the Act and subsequently filed an application under s. 37(3). The owner learned of the proceeding and tendered the amount shown in the certificate plus one additional month's assessment. The strata corporation demanded indemnity for its legal costs in connection with the proceeding, purporting to rely on s. 37(8). At p.81 Huddart L.J.S.C. (as she then was), said the issue was "whether the words 'the legal costs of a proceeding' contained in s. 37(8) of the Condominium Act mean the costs incurred by the strata corporation or the cost of the proceeding as determined pursuant to the Tariffs of Costs, App. B or C. of the Rules".

[para14] The strata corporation argued that it was entitled to indemnification for costs because of the provisions of s. 127(1). At p. 83 the learned judge dealt with the argument as follows:

When Mr. Crumley failed to pay a monthly assessment as required by s. 128(8) or (10) which form part of the by-laws of the strata corporation, he violated the by-laws and became liable to the additional charged provided in s. 127(1). The section provides the remedy and I do not think it requires any order of this court to permit the strata corporation to take advantage of it.

(emphasis added) [para15] The learned judge said further:

... I have concluded that this case is not analogous to a mortgage in which two parties contract for an indemnification for costs. The provision for indemnification for 'costs incurred' is included in the by-laws of the corporation. The owner purchased the condominium fully aware of the by-laws. There is no provision in them for an accounting or for an opportunity for the owner to challenge the reasonableness of the bill. The bill is rendered to the strata corporation. If the strata corporation considers it to be unreasonable, it can challenge the bill.

However, that conclusion does not mean that the strata corporation may add the amount of its costs incurred to the amount owing pursuant to s. 37. In my view, that section allows the strata corporation to add the land title fee, the amount of its legal bill and of any administrative expenses for the filing of Forms B and C - but it allows only the taxable costs on a party-and-party basis of the proceeding.

(emphasis added)

[para16] The next decision to which I will refer is National Life Assurance Company of Canada v. Vidalin Construction Ltd. (1985) 64 B.C.L.R. 319 (S.C.) which was a case dealing with the interpretation of "common expenses" and, more particularly, whether fines or penalties imposed by a strata corporation pursuant to the bylaw for non-payment of monthly assessments fell within the category of common expenses under s. 37(1). Starting at p.424, McKenzie J. said:

I find the language of s. 37 of the Condominium Act is clear and express. It may be 'brutal and piratical' but, since the language clearly expresses that intention, I am compelled to interpret it as giving an absolute priority to the strata corporation as far as the assessments of common expenses are concerned.

As for the penalties imposed by the strata corporation for successive non-payments of the common expenses, I do not find them to be in the same category. The fines started with \$25 for the first failure to pay, then rose through \$50, \$75 to \$100 for each successive default. The authority to impose the fines was given by the by-laws of the strata corporation. I hold that the only items that may be incorporated in the certificate, apart from common expenses, are those listed in s. 37(8), and that list does not include penalty charges or fines. That item is conspicuous by its absence from s. 37(8).

[para17] In *Royal Bank of Canada v. Holden*, Vancouver Reg. Nos. H950893, H960639, H960082 and H950766, November 27, 1996, the issue was "what are properly included as 'common expenses' of a strata corporation for the purposes of the statutory priority accorded by s. 37(2) of the Condominium Act". In that case the petitioner was foreclosing on mortgages registered against several strata lots against which the strata corporation had registered certificates under s. 37. The properties were sold in the foreclosure proceeding and the issue was the amount for which the strata corporation was entitled to priority over the foreclosing mortgagee. The certificates made claims in respect of a number of different charges which the learned judge classified as follows:

- (1) maintenance levies, including monthly maintenance fees and fees for filing the certificates;
- (2) fines, being late payment penalties;
- (3) legal levies, being legal fees incurred for proceedings brought either by or against (it is not clear which) the strata corporation, as authorized by s. 15 of the Act;
- (4) repair levies, being amounts expended to make various repairs to the property and authorized by special resolution of the corporation but not included in the annual budget;

[para18] It was conceded that the maintenance levies took priority under s. 37. The challenge was with respect to the other charges.

[para19] Bauman J. held, on the authority of *National Life Assurance Co. of Canada v. Vidalin Construction Ltd.*, supra, that the priority claimed for fine levies could not prevail. He held, further, that priority could not be claimed for the legal levies upon the reasoning of that decision.

[para20] With respect to the repair levies the learned judge held that these items fell within the definition of "common expenses". Beginning at paragraph 31 of his reasons, his Lordship said:

I will deal with the threshold point. In argument, counsel for the petitioner submitted that, properly construed, s. 37(7) restricts "common expenses" to only those levied under s. 35 and s. 34(3).

That would mean that "common expenses" for the purposes of priority only include:

- Levies for the Contingency Reserve Fund (s. 35(1)(b));
- Levies for the Administrative Expense Fund (s. 35(1)(a));
- Levies to carry out repairs by competent public authority on a strata lot (s. 34(2)(a));
- Levies to obtain and maintain insurance under s. 54 (s. 34(2)(b)).

I reject this submission. It overlooks, for one, common property maintenance expenses levied under s. 128(10) as part of the annual budget. There can be no doubt that these enjoy the s. 37(2) priority: *Chan*, supra and *National Life Assurance*, supra at 325.

I prefer the analysis of s. 37(7) advanced by the respondent strata corporation.

S. 37(7) provides an inclusive, not exclusive, definition of "common expenses". It expressly includes levies under s. 35 and s. 34(3) because these would not normally be considered "common expenses": the former because they are not expenses, but rather, reserves; the latter because they are, in the case of s. 34(2)(a), expenses referable to a strata lot, not to the common property, and in the case of s. 34(2)(b) expenses in respect of insurance.

[para21] With respect to the reference to s. 128(10) above, that section sets out the bylaw which provides for the fixing of the annual budget and which requires the owners to pay a monthly assessment based on that budget. It appears to me, with respect, that it creates the "administrative expense fund" which is referred to in s. 35(1)(a). It appears to me that the "contribution levied under section 35" which is referred to in s. 37(7) is the same as the "monthly assessment" referred to in s. 128(10).

[para22] In any event, the decision in *Royal Bank of Canada v. Holden* confirms that the "common expenses" for which priority is given by s. 37 does not include legal levies or legal costs other than those which may be added under s. 37(8) and does not include fines or penalties. It is authority for the proposition that the definition of "common expenses" in s. 37(7) is an inclusive, not exclusive, definition and that "common expenses" includes "repair levies" which have been properly authorized by the strata corporation in the discharge of its obligation under s. 34(1)(d) of the Act.

[para23] If I understood him correctly, counsel for the petitioner concedes, based upon the foregoing authorities, that the amount for which the strata corporation would have priority over other charge holders includes only the following:

- (a) "common expenses" as that term has been interpreted in *Royal Bank of Canada v. Holden*;
- (b) the land title fee and the legal and administrative costs of filing under subsection (1); and
- (c) the party/party legal costs of a proceeding under subsection (3).

[para24] Counsel for the petitioner concedes that the amount for which the strata corporation may claim priority over other charge holders does not include any fines, penalties, indemnity for actual legal expense of this proceeding or other proceedings or any special costs that might be awarded in this proceeding.

[para25] He argues, however, that the amount for which s. 37 gives priority over other charge holders does not limit the amount for which the certificate is a charge under s. 37(2), or the amount for which the strata corporation may obtain judgment under s. 37(3) or the amount failing the payment of which the court shall order the lands sold pursuant to s. 37(3). He argues, in the first place, that the strata corporation is entitled to make levies for such other amounts for which no priority is given pursuant to various sections of the Act, including sections 15(8), 34(2)(c), 34(3), 34(5), and 127(2). I agree with that submission. He goes on to argue that as the strata corporation has the authority to make these levies and as the owner is liable to pay these amounts the procedure for enforcement provided by s. 37 is available to the strata corporation in respect of them. It is that aspect of his submission which troubles me.

[para26] I have concluded that section 37 operates as follows.

(1) An owner must default in the payment of "common expenses" before the strata corporation is entitled to register a certificate under subsection (1);

(2) "Common expenses" are defined by ss. (7) and do not include fines, penalties or legal costs other than those expressly provided for by ss. (8);

(3) The certificate must show the "amount owing"[(ss. (1))];

(4) The "amount owing" is that amount which is due and payable for "common expenses";

(5) The certificate is a charge for the "amount owing" in priority to other charges except as specifically set out [ss. (2)];

(6) The strata corporation may add to the "amount owing" those costs set out in ss. (8);

(7) On application by the strata corporation the court may order that judgment be entered against the owner for "the amount owing to the strata corporation on the charge" and on granting judgment the court shall order that failing payment of the "amount owing" within 30 days after the order is made the strata corporation may sell the strata lot [ss. (3)];

(8) The "amount owing" referred to in each of subsections (1), (2) and (3) is the same amount, i.e. the amount for "common expenses" together with those amounts provided for in subsection (8).

[para27] Section 37 provides for a charge against the lands of the owner, that is to say an in rem remedy, for certain amounts, grants priority in respect of that charge and provides for a summary method of enforcing payment of the amount in respect of which the charge is created in a procedure similar to foreclosure with a "redemption period" which is fixed by the Act at 30 days.

[para28] There are other provisions of the Act which enable the strata corporation to impose other levies and where so imposed the owner is liable to pay them. If the owner does not pay them he is in breach of the bylaws and the strata corporation may have the power under s. 127(2) to recover those levies by "an action for debts". The fact that other amounts may be recoverable by the strata corporation under other sections of the Act does not mean that the summary procedures of s. 37 are available for them. I have concluded that s. 37 is not applicable to them. In my view, that is the very conclusion which Huddard J. came to in *Crumley* when she said:

When Mr. Crumley failed to pay a monthly assessment as required by s. 128(8) or (10) ... he violated the by-laws and became liable to the additional charges provided in s. 127(1). The section provides the remedy and I do not think it requires any order of this court to permit the strata corporation to advantage of it.

[para29] The additional charges which the learned judge referred to were the actual legal costs and the remedy to which she referred, in my view, was s. 127(2). The learned judge concluded that the owner was not obliged to pay the actual legal costs in order to "redeem", although he would be responsible for them and liable to an action in debt if they were levied by the strata corporation. Counsel for the petitioner suggests that this case is distinguishable in that here the strata corporation has "levied" the additional amounts which it seeks to recover. In my view, however, the ratio of *Crumley* is that in respect of legal costs s. 37 may be used only to recover party/party costs and that to recover any other legal costs the strata corporation must resort to s. 127(2).

[para30] In any event, there is no evidence that the strata corporation in this case has in fact made a levy in respect of the actual legal cost of this proceeding, nor for that matter has it filed any certificate setting out the amounts which it claims have accrued due since July 7, 1994. I gather the strata corporation relies on its right to file a certificate at any time and submits that it should not be required to file a new certificate each time a new charge is levied as that would needlessly increase costs. As to that, support may be found in *Royal Bank of Canada v. Holden*, supra, at p.325 where Bauman J. said:

I add that this strata corporation did not register in the land title office a certificate in Form B as required by s. 37(1). No time limit is imposed for the filing of that certificate so it could be done even now. The date for adjustments and completion of the sale of the strata lot is not until 15th July 1985. Counsel for the petitioning mortgagee does not make any point about the lack of filing of the certificate and, indeed, would discourage the strata corporation from doing so now as it would only increase the costs.

[para31] The strata corporation seeks to take the process a step further and include in the redemption amount an "amount owing" for legal expense which not only has not been levied but which is yet to be determined by assessment.

[para32] Counsel for the petitioner submits that the actual result in *Royal Bank of Canada v. Holden*, supra, supports his argument. Having concluded that the strata corporation did not enjoy priority with respect to the fines, penalties or legal levies the learned judge directed that the proceeds of sale be disbursed firstly to the strata corporation to in payment of the charges which had priority, secondly to the mortgagee and thirdly "to the strata corporation in respect of the Fine Levies and the Legal Levies". I have to agree that direction would seem to indicate that in the foreclosure proceeding the chambers judge provided for the recovery by the strata corporation of amounts for which it had no priority. There is no indication, however, that the court considered the particular question which I have addressed in this case. It seems to have simply been accepted that as the strata corporation was entitled to recover those additional amounts it should recover them from the proceeds of sale. I do not consider that decision is binding authority with respect to the very question which I have to consider in this case.

[para33] There is a further aspect to the matter of costs which has to be considered. While I have concluded that the amount for which the strata corporation has a charge against the owner's lands and the amount required to "redeem" includes the costs of this

proceeding on a party/party basis only it would be within the court's discretion to award special costs of the proceeding if appropriate. However, I do not consider that the circumstances would warrant such an order on the authorities. The strata corporation will have its costs of this proceeding at scale 3. That does not, of course, prevent the strata corporation from ultimately recovering its actual legal costs by an action as permitted by s. 127(2).

[para34] Counsel submits that when one considers the Act as a whole, and when one considers the scheme condominium living, it is reasonable to suppose that the Legislature intended that a strata corporation, which must operate for the good of the owners collectively, would have the ability to recover by way of this special statutory procedure charges of the type in question here, including special costs and fines. As McKenzie J. said in *National Life Assurance Company of Canada v. Vidalin Construction Ltd.*, supra, the language of s. 37 is "brutal and piratical". In my view clearer language would be needed to enable fines, penalties, and actual legal costs to constitute a charge against the title to the property.

[para35] In conclusion, I am of the opinion that the amount for which the petitioner has a charge against the owner's lands and the amount to which it is entitled to judgment under s. 37 and the amount which the respondent is required to pay to "redeem" the lands includes common expenses, including repair levies and those amounts enumerated in ss. (8) but excludes fines or penalties, other legal levies or actual legal costs of the strata corporation.

[para36] Unfortunately, the affidavit material filed in support of the petition does not enable me to determine whether some of the amounts which are claimed are included or excluded, i.e.:

Balance as at April 1, 1994 \$780.75 More information is required as to what this balance comprises

Monthly assessments \$2,928.54

Included provided it represents "common expenses"

Fines \$1,150.00

Excluded

Costs to register certificate \$294.25

Included

Adjustments \$42.70

More information required

Special assessments \$814.16

More information required [para37] The petitioner may file further affidavit material providing this additional material.

MASTER JOYCE

CBR# 209

IN THE MATTER OF Section 76(1) of the Condominium Act, R.S.B.C. 1979, Chapter 61 and amendments thereto and Rule 10(1)(F) of the Rules of Court Between Myles Enterprises Ltd. et al., petitioners, and Atlas Painting & Decorating Ltd. et. al., respondent

[1997] B.C.J. No. 446, Vancouver Registry No. A963747 British Columbia Supreme Court Vancouver, British Columbia Lowry J. (In Chambers) Heard: February 10, 1997. Judgment: filed February 21, 1997.

Counsel: J. Webster, for M.R.S. Trust Company and The Toronto-Dominion Bank. B.J. Ingram, for Community Living Society. L.J. Gwozd, for Axa Pacific Insurance Company and City Club Development (Middlegate) Corp. W.S. McLean, for the respondent and other lien claimants. B.F. Schreiber, for Progressive Air Products Ltd. (lien claimant).

[para1] LOWRY J.:-- Community Living Society, the second mortgagee of a condominium project, makes application with respect to certain holdback monies paid into court by purchasers of some of the strata lots to clear their titles of lien encumbrances. The application raises the narrow question of whether section 75 of the Condominium Act, R.S.B.C. 1979, c. 61, charges the purchasers' holdbacks with payment of project lien claimants other than those claimants who filed liens against the subject lots within the time permitted by that Act: not later than 31 days after the conveyance.

[para2] M.R.S. Trust Company and The Toronto-Dominion Bank hold the first mortgage. Axa Pacific Company and City Club Development (Middlegate) Corp., hold the third and fourth mortgages. As each lot in the project was sold, the mortgagee interest in that lot was surrendered. Each conveyance produced a payment that served to reduce the first mortgage debt and that in rem mortgage interest was transformed into a contractual interest in the sale proceeds as against the owner developer of the project.

[para3] When about half of the 160 strata lot units had been sold, financial difficulties arose and foreclosure proceedings were commenced. The titles to the sold and unsold lots, and the common property, were encumbered with a large number of liens that had been filed. The purchasers, who had all held back 7% of the purchase price as required, initiated this proceeding under s. 76 and obtained an order clearing the titles to their lots with about \$1.0 million in holdbacks being paid into court. However, with the exception of a lien filed against each lot by Fastgo Systems Inc., the liens filed against perhaps half of the conveyed lots were filed more than 31 days after the conveyance.

[para4] The Society maintains that there is in excess of \$400,000 now in court which is not charged with the payment of claimants who filed valid lien claims. It applies for an order adding all the mortgagees as respondents in this proceeding and directing that a payment out of all such funds be made to the first mortgagee to be applied against the amount owing under the first mortgage thereby improving the position of the subsequent mortgagees in the foreclosure proceedings. The other mortgagees support the Society's application.

[para5] The claimants, other than Fastgo, oppose the application on two grounds. They first say that the second, third, and fourth mortgagees can have no interest in the funds because only the first mortgagee holds a contractual interest in them. But I consider the subsequent mortgagees have a real, albeit indirect, interest in the funds and are properly joined as respondents in this proceeding. The claimants then say that, even though they did not file liens in compliance with the Act, the holdback monies are nonetheless charged with the payment of their claims. [para6] Section 75 of the Condominium Act provides:

75. (1) Notwithstanding any other Act, where an owner developer conveys a strata lot to a purchaser, no builders lien shall be filed against the strata lot, or against the purchaser's share in the common property, later than 31 days after the date the strata lot is conveyed to the purchaser.

(2) Notwithstanding any other Act, or any agreement to the contrary, a purchaser of a strata lot from an owner developer shall retain a holdback in the amount of 15% of the gross purchase price of the strata lot, or any smaller amount fixed by regulation, for a period of 40 days after the date the strata lot is conveyed to the purchaser.

(3) The holdback is subject to a lien under the Builders Lien Act and the holdback is charged with the payment of those persons employed under the person from whom the holdback is retained.

(4) Payment of a holdback required to be retained under subsection (2) shall be made after 40 days expire unless in the meantime a claim of lien has been filed, or proceedings have been commenced to enforce a claim of lien against the holdback.

(5) On payment of the holdback amount, all liens of the person to whom the holdback is paid, and of any person employed under him for the strata lot, are discharged.

[para7] The section is to be contrasted with the provisions of the Builders Lien Act, R.S.B.C. 1979, c. 40, in particular s. 22, which permits the filing of a lien within 31 days of the completion of the work that is the subject of the lien and provides that if a claim of lien is not filed within time the lien absolutely ceases to exist. The Condominium Act limits the time for filing a lien against a strata lot; it does not extend it beyond what the Builders Lien Act prescribes: *Mierau Construction Ltd. v. 1705 Nelson Holdings Ltd.* (1988), 25 B.C.L.R. (2d) 396 (Co.Ct.). Section 75 was enacted as a necessary protection for the purchaser of a strata lot in a condominium project and it compromises the protection builders lien legislation has long afforded to suppliers of labour and materials.

[para8] However, the claimants say in effect that ss. (3) and (4) serve to minimize, to some degree, the extent to which lien claimants would otherwise be disadvantaged. They say the legislative intent was to charge holdbacks established under ss. (2) with the payment of all who have lien claims in respect of the project as a whole which are filed and prosecuted in accordance with the Builders Lien Act. The fact that the holdbacks may have been retained and ultimately paid into court because of a single lien claim is said to be of no consequence.

[para9] The claimants' submission is put succinctly as follows:

[Under ss. (3),] the holdback is subject to a lien under the Builders Lien Act and the holdback is charged with the payment of those persons employed under the person from whom the holdback is retained.

The lien claimants supplied labour and material to the whole project, and not to individual strata lots, in the same way as joint tenants of property are owners of undivided half interests in the whole property. The lien claimants, collectively, are included among "those persons employed under the person from whom the holdback is retained" [the owner developer].

Subsection (3) is conjunctive. If the second clause were to refer only to lien claimants on the subject lot, it would be rendered redundant by the first clause.

[Under ss. (4),] "payment of a holdback required to be retained under ss. (2) shall be made after 40 days expire unless in the meantime a claim of lien has been filed, or proceedings have been commenced to enforce a claim of lien against the holdback."

Subsection (4) is disjunctive. If the second event ("proceedings have been commenced to enforce a claim of lien") were to refer only to liens filed against the strata lot, it would be unnecessary to include the first event ("a claim of lien has been filed"). Lien proceedings are not sustainable without a filed lien claim.

There is no redundancy in the statute, however, if ss. (4) is read in combination with ss. (3). The first event of ss.(4) ("a claim of lien has been filed") matches the first category of ss. (3) ("subject to a lien"). The second event of ss. (4) ("proceedings have been commenced to enforce a claim of lien") matches the second category of ss. (4) ("charged with the payment of those persons ...").

[para10] In my view, there is much force in the claimants' submission. Certainly, I am unable to explain the second clause in ss. (3) in particular in any other way. The mortgagees insist that, if the legislative intent was as the claimants contend, it would be much more clearly stated. They say that the wording employed is to be given a fair, large, and liberal interpretation and that "those persons" must be read as pertaining to only those persons who have complied with ss. 1 in filing a claim of lien not later than 31 days after the conveyance. But that is not what the subsection says.

[para11] To support their contention, the claimants cite provisions of the Builders Lien Act that afford suppliers of labour and materials a priority remedy where lien rights have been lost: s. 2 that gives them priority in the form of a trust to monies owed by an owner to a general contractor, and s. 20(2) which in *Metropolitan Trust Co. v. Abacus Cities Ltd.* (1979), 18 B.C.L.R. 317 (S.C.) at 319, was said to create a charge on holdback monies which a lien claimant could pursue in the same way as s. 2 trust monies could be pursued even though the claimant's lien was extinguished by sale.

[para12] Counsel say that the question to be decided here has not as yet been addressed in any case of which they are aware. However, while not referred to in the course of argument, what is described as a lien against a holdback is discussed by D.A. Coulson in his comprehensive *Guide to Builders Liens in British Columbia*, (Carswell: Toronto, 1994) at pp. 91-92. Although the learned author expresses the view that the existence of such as a separate remedy with respect to holdbacks under the Builders Lien Act is still an open question in this province, he states that ss. (3) and (4) of s. 75 of the Condominium Act apparently create a similar remedy. [para13] I agree. It does appear to me that the provisions of s. 75 of the Condominium Act, ss. (3) and (4) in particular, give rise to a charge on a holdback the benefit of which is not confined to only those who have filed a claim of lien in accordance with ss. (1). That is sufficient to dispose of this application.

[para14] There will, then, be an order adding the mortgagees as respondents but denying payment out of the holdback monies.

LOWRY J.

CBR# 163

Lau v. Strat Corp. No. LMS 463

Between Yuen Fong Lau, Sau Mei May Ma, and Suet Mui Leung, petitioners, and Strata Corporation No. LMS 463, Strata Council No. LMS 463, and PCI Realty Corp., respondents

[1996] B.C.J. No. 1728, Vancouver Registry No. A952935 British Columbia Supreme Court Vancouver, British Columbia Taylor J. Heard: April 4, 1996. Judgment: filed August 2, 1996.

Counsel: Douglas R. Eyford, for the petitioners. Patrick A. Williams, for the respondents.

[para1] TAYLOR J.:-- The petitioners are the registered owners of Strata Lot No. 5 (the Premises) which is one of 106 commercial units in a shopping mall (the Mall) owned by Strata Corporation No. LMS 463. The respondents are the Strata Corporation, its Council and the property manager engaged by the Strata Council.

[para2] The Premises are so located that one of its walls is also an exterior wall of the Mall. Prior to its purchase by the petitioners it was operated as an art shop. Access to the unit was gained from inside the Mall. The Mall operates daily until 9:00 p.m. Nineteen other units had direct access doors through the outside walls of the Mall. None of those units had businesses that operated beyond mall hours. [para3] The only unit in the Mall that operated beyond the normal Mall hours and whose patrons had access to the Mall interior was a restaurant. It was located so that while its patrons could access the Mall parkade without entering other areas. That restaurant had its own washrooms.

[para4] In January of 1994 the previous owner of the Premises, 428470 B.C. Ltd. entered into an arrangement to sell the Premises to the petitioners. A condition of that sale was that the Strata Corporation approve a change in use of the Premises to permit a video game arcade and entertainment centre. Pursuant to the by-laws of the Strata Corporation approval was necessary for any changes in use. As well, 428470 further requested that permission be granted to install a direct access door through an exterior wall because of the hours of operation contemplated for the arcade would be longer than those of the Mall's normal hours. This latter request was not a condition of the sale.

[para5] Those requests were considered by the Strata Council on January 21, 1994. Council did not approve the direct exit application. However, in a letter dated January 23, 1994, the property manager informed 428470 that the council had approved the change of use.

[para6] 428470 then wrote to the property manager, Ms. MacFarlane, that because the arcade would be operating beyond normal Mall hours, that either the Mall would have to be kept open to accommodate the arcade or an outside direct access would have to be allowed. By letter dated February 1, 1994, Ms. Macfarlane informed the vendor that the Strata Council:

Had reconsidered its decision regarding the direct access exit and Council would request, however, at Mall closing hour the common door between the Premises and the corridor is shut off and locked. They would also request that you install washrooms for your clientele to use after hours.

Please consider these requests and confirm back to us that you are in agreement with the above.

[para7] That letter was not responded to by 428470 and the transfer of ownership to the petitioners occurred on March 17, 1994. On May 10, 1994 Mr. Chan, the husband of one of the petitioners and the principal of 828 Enterprises Ltd. (828), the lessee of the Premises and operator of the arcade wrote to the Strata Council, requesting that the Council not demand the installation of a washroom.

[para8] Mr. Chan asked that the matter be put on the June 1st agenda of the Strata Council. When that meeting was adjourned due to a lack of a quorum, 828 somewhat precipitously installed a direct access door on June 2, 1994 rather than to wait for the Strata Council to meet again. On June 3, 1994 the property manager, Mr. Lee, wrote to Mr. Chan reiterating the terms upon which the permission to install the direct door was granted.

[para9] On the June 6, 1994 the Strata Council met and instructed the property manager to "seek legal advice from the lawyer on how and when the fines can be imposed in this case."

[para10] The position of Mr. Chan was that because the City of Richmond had issued a permit for 828 to operate beyond Mall hours, and at the same time had not imposed a requirement of washrooms, that the petitioner and 828 were relieved from complying with the Mall's by-laws and requirements. [para11] At its July 12, 1994 meeting the Strata Council received the advice of the solicitors respecting fines which was recorded in the Minutes of the meeting as follows:

Exterior Door for #1420

The agent had sought legal opinion from Mr. Mark Tindle regarding unit 1420 for installing an exterior door in their unit without installing a washroom. Mr. Tindle said the council can proceed as per the by-laws with a warning notice for the first occurrence, a \$50.00 find for the second occurrence and \$150 for each subsequent occurrence on a monthly basis.

[para12] By July 28, 1994 matters had reached the state that the solicitor for the Mall, Mr. Tindle, wrote 828 that either the direct exit door be removed or the washrooms be installed. He set a 15 day period for compliance.

[para13] Mr. Chan then attended a Strata Council meeting on August 16, 1994. The Minutes record that "the meeting resolved to further review and discussed the case and will get back to Mr. Chan as soon as possible."

[para14] The Strata Council did review the issue of the exit door and washrooms and conclude that its position would remain that which was set out in Mr. Tindle's letter.

[para15] On August 23, 1994, 828 was informed by letter from the property manager of the Council's position. Nothing was done by 828. At its September 20, 1994 meeting the Strata Council decided not to remove the exit door itself, but rather to seek legal advice as to the imposition of fines backdated to the "first violations" of the by-laws.

[para16] On September 28, 1994 the property manager informed 828 that the Strata Council had decided to impose fines under to By-law No. 2 "with retroactive effect from June 2, 1994 in accordance with the following schedule:

1. June 3 to June 12, 1994 - warning letter. No fines.
2. June 13 - October 5, 1994 - \$50.00 per day.
3. If you still have not removed the infraction by October 5, 1994 the fine will increase to \$150.00 per day from October 6, 1994 onwards."

[para17] Parker Place By-law No. 2 provides as follows:

Violation of By-laws (Ref. Condominium Act Sec. 127)

An infraction of violation of the By-laws of LMS 463 or any of the Rules and Regulations established pursuant to these By-laws on the part of an owner, his employees, his agents, invitees or tenants, may be corrected, remedied or cured by the Strata Corporation, as follows:

- First Violation - warning letter; - Second Violation - \$50.00 fine; - Further Violation - maximum \$150.00 fine per occurrence.

Any costs or expense so incurred by the Strata Corporation shall be charged to the owner. Such charges shall be immediately paid by owners.

[para18] From October 7 onwards Mr. Chan continued correspondence to the property manager remonstrating over the position of the Strata Council. The position of the respondents did not change.

[para19] Mr. Chan in his Affidavit of August 30, 1995 deposed to the fact that after the end of September 1994 the door was blocked off which he did in response to the September 28 letter.

[para20] On March 30, 1995 the exit door was removed. 828 had paid \$3,215.35 to install the door and \$2,600.10 to remove the door and restore the wall. Shortly thereafter the property manager informed the petitioners that the penalties for violation of the by-laws had ceased on March 30, 1995.

[para21] Strata Council thereafter took the position that as the petitioners had unpaid fines of \$28,754.28 that they could not vote at the annual general meetings of the Strata Corporation. As well, a Form B was filed against the petitioners' title which prevented the petitioners Lau and Leung from purchasing the petitioner Ma's interest.

[para22] On March 4, 1996 counsel for the petitioners wrote to the counsel for the respondents demanding that the respondent keep the Mall open to accommodate the new licensed hours of the arcade (i.e. past 9:00 p.m.) and that the respondent provide the direct access door. Neither was done.

[para23] The property manager, Mr. Yeun's, Affidavits date stamped February 29, 1996 and April 2, 1996 raise the issue of 828 obtaining a licence approval from the City of Richmond on the basis that the arcade had washroom facilities available to it during its operating hours and the fact that the Mall closed at 9:00 p.m. was not disclosed to the licencing authorities. It is clear from the correspondence from Richmond that it granted a licence on the basis of the washrooms would be available to patrons of the Premises during all operating hours. It is equally clear that neither the Petitioners nor Mr. Chan directed anyone's mind to the fact that the Arcade would operate outside normal Mall hours and that therefore Mall washrooms would not be available. Mr. Chan's position was that no washroom was needed during those additional hours.

[para24] By a letter dated May 10, 1994, the respondents however drew that concern to the attention of the City of Richmond:

"With the condition [referring to the change of use permission] that the owner install public washrooms within the Unit. This would ensure their patrons have proper facilities should the Mall be closed during the unit's hours of operations."

Mr. Nishi responded that Richmond could not be responsible for ensuring compliance with the Strata Corporation's by-laws.

[para25] The Permits and Licence Department of the City of Richmond by fax dated July 4, 1995 noted:

"This specific arcade does not require washrooms within their unit."

That fax does not address the issue of what would occur when the Mall is closed and its washrooms were not available to the arcade patrons.

[para26] Apart from the issue of the washrooms the Strata Council had no complaints with respect to the use of the Premises as an arcade and video entertainment centre.

[para27] The petitioners seek the following relief:

1. That the fines presently levied against the Premises be cancelled.
2. That the respondent Strata Corporation be prohibited from fixing and collecting fines against the petitioners for installing a direct access door.
3. That the respondent Strata Council be prohibited from interfering with the petitioners' use and enjoyment of the Premises as a video arcade or entertainment centre.
4. That the Strata Council be directed to permit the petitioners to vote at general meetings.

The determination of these issues in large part turns upon whether or not the exterior wall of the Premises is part of the Strata Lot or common property. If the former, the petitioners did not need permission to install a direct access door. If the latter they would and it would be in authority of the Strata Council to impose conditions for its installation.

[para28] The petitioners argue that because the Strata Council adopted its own by-laws as opposed to adopting those pro forma by-laws set out in the Condominium Act S.B.C. Ch.61, where the custom made by-laws do not require approval, an owner can move with impunity in that vacuum.

[para29] Section 115(h) of the Condominium Act supra provides:

An owner shall

(h) receive the written permission of the strata council before undertaking alterations to the exterior or structure of the strata lot, but permission shall not be unreasonably withheld.

Parker Place By-law I(u) provides:

An owner or an occupant of a strata lot shall:

(u) not paint the exterior of the strata lot without first obtaining the written consent of the Strata Corporation which consent may be arbitrarily withheld.

Parker Place By-law II(a) provides:

That exterior walls are specifically reserved to the Corporation. "The Strata Corporation shall:

(a) control, manage and administer the common property (and the exterior wall of each strata lot).

[para30] Parker Place By-law II(a), specifically adds "exterior walls of each strata lot" to that which would have otherwise been reserved to the Strata Corporation under Sec. 116(a) of the Condominium Act.

[para31] It was argued by the petitioners that the combined provisions of Parker Place By-law I(u) and II(a) implies a conscientious decision to delegate strata walls to individual owners by virtue of the exclusion of statutory by-law Section 115(h). The petitioner relies upon Proudfoot, J.A.'s comment in *Buchbinder v. Strata Plan VR2096*, reported 1992 22 R.P.R. (2d) 40 at page 43 when commenting on a garden shed being erected on a patio which was determined to be limited common property:

"It would seem to me that a more convincing argument can be made for the appellant's position that the by-law cannot be able to specifically forbid strata owners from assembling garden sheds on a patio in that there is no mention of a garden shed within the by-laws."

Proudfoot, J.A. later in her judgment, however, went on to note at page 44 that a patio is not incorporated within the definition of the building exterior. The petitioner, however, can gain little solace from Madam Justice Proudfoot's comments in view of the wording of By-law II(a) whereby the power to control, manage and administer ... "the exterior walls of each strata lot" is reserved to the Corporation specifically.

[para32] Counsel for the petitioner further argued that the owners of a strata lot had full control over the external wall so long as consistent with the owners duty to maintain the wall. If that were correct and quite apart from the wording of Parker Place By-Law II(a) that would mean each owner could alter the window configuration of his unit to be distinct from those of other external facing units so long as it complied with the provisions of Parker Place By-law I(u) in respect of painting.

[para33] The very purpose of the concept of common property is to maintain an integrity of the whole as opposed to individualization of each unit. That concept recognizes that for certain areas of a condominium the Corporation must concern itself with a greater good for the greatest number and thus reserve unto itself certain aspects of structure. This in my opinion it has done under By-law II(a). As well, under By-law IV(q) the Strata Council has a power to grant an owner the right to exclusive use and enjoyment on the common property.

[para34] It is of some significance as well that the former owners writing on behalf of the petitioners sought the approval of the Strata Council before making any moves to install a door. I am, therefore, satisfied that the Strata Corporation has the power to authorize, whether on conditions or not, alterations to the exterior wall. The exterior walls are common property. Without that authority an owner does not have the power to make such alterations.

[para35] Having concluded the Strata Council has the power to authorize alteration to the exterior wall I turn to the question of whether the installation of the washrooms was a condition upon which the direct access door's installation depended.

[para36] The position of the petitioners is that because the term "request" was used in Ms. Macfarlane's letter of February 1, 1994 the installation of washrooms was not a condition. Yet, in the final sentence of her letter it is made abundantly clear that the approval of a direct access door requires agreement to the requests when she wrote:

"Please consider these requests and confirm back to us if you are in agreement with both of the above."

[para37] Mr. Chan's response by his letter of May 10, 1994 was merely to argue his point again. His comments can be viewed as a refusal to accept the condition. I am satisfied that the installation of washrooms was a condition to the approval of the alteration of the exterior wall by construction of a direct access door.

[para38] By-law IV(a) gives to the Strata Council the authority to exercise and perform the powers and the duties of the Strata Corporation. In the exercise of these powers the Council was obliged to function with the perception of the greatest good for the greater number of owners. See *Sterloff v. Strata Plan VR2613* (1994), 38 R.P.R. (2d) 102 at 108.

[para39] Thus in approving the direct access door knowing that the arcade would be operating beyond normal hours the Council had to weigh the need for washrooms for patrons, the aspect of security and the cost of such security and maintenance for the

other 105 units in the Mall. It had to consider what would occur if no internal Mall washrooms were to be available after the Mall was closed.

[para40] In so weighing these considerations the Strata Council imposed the condition for washrooms on the Premises, if the arcade was to operate, as it was licensed to do beyond the hours that the Mall would be open. [para41] Thus, the Strata Council was entitled to impose as a condition of the installation of the direct access door, the installation of washrooms.

[para42] 828 having installed the doors but not installed a washroom, the issue that now arises is whether the petitioners have breached the by-laws by failing to comply with the condition imposed.

[para43] The petitioners argue that the failure to install the washrooms does not constitute a breach of the by-laws because there is no authority in the by-laws by which the strata corporation would require the installation of the washroom. Section 14 of the Condominium Act provides that the Strata Corporation is responsible for the enforcement of the by-laws. The by-laws here are those of the specific Strata Corporation and those dealing with the common property are contained within the Parker Place By-Law II(a):

The Strata Corporation shall:

(a) control manage and administer the common property (and the exterior wall of each strata lot), common facilities or other assets of the Strata Corporation to facilitate the operations of the shopping centre;

(b) maintain and repair and if appropriate, decorate the common property, common facilities and other assets of the Strata Corporation and the exterior walls of the strata lots, excluding windows and store front which form part of a strata lot.

[para44] The Strata Corporation cannot exercise powers where it is not given them pursuant to its by-laws. Where power is reserved to itself, that power can be exercised and in so doing conditions can be imposed. It would make no sense if under By-law IV(a) and (9) a Strata Corporation in permitting an owner to do something that would otherwise be a breach of the by-laws could not impose a condition the breach of which would be a breach of the by-law itself.

[para45] Whether the condition had to do with something as simple as the size of a door or as complex as the installation of a washroom, a failure to comply with the condition is, in my opinion, a failure to comply with the by-law. [para46] It is to be noted that when the respondent adopted its by-laws in by-law II(a) it replaced the words "for the benefit of all owners" found in section 116(a) of the Act with the words "to facilitate the operations of shopping centre."

[para47] The imposition of conditions in the course of the exercise of its power under By-law IV and (9) that therefore would facilitate the operations of the shopping Mall can only be regarded an aspect of the by-law themselves.

[para48] To not have imposed such a condition, therefore, would have been to invite the owners to demand that the Strata Corporation look to the interests of the other owners and open the door for a Section 40 application, bearing in mind the sanitary requirements of the Mall. Certainly the City of Richmond required that patrons of the arcade have access to washrooms as evidenced by the permit that was issued on April 11, 1994 under remarks:

"Remarks: Int. Finish to provide arcade note washrooms within the unit not req'd, see letters on file. This unit using washrooms in the bldg. Applicant states no change to sprinklers."

Thus, the plaintiff's failure to install the washrooms having installed the door was a breach of the by-laws of the Strata Corporation.

[para49] The petitioners further submit that the conduct of the respondent surrounding the issue of the door was oppressive and seek relief pursuant to the provisions of Sections 42 and 43 of the Condominium Act. The acts relied upon are set forth in the petitioner's brief at paragraph 35:

- (a) interpreting the approval for installing the direct exit door as being conditional on the installation of washrooms;
- (b) insisting that washrooms be installed in the Premises without having the power under the by-laws to do so;
- (c) taking the position that the petitioners are in breach of the by-laws because they did not install washrooms in the Premises;
- (d) failing to respond to the Petitioners' letter dated May 10, 1994;
- (e) instructing legal counsel to threaten legal proceedings if the Petitioners did not remedy the alleged breach of by-laws;
- (f) purporting to fix a fine that the respondents do not have power to assess;
- (g) assessing the fine in the period preceding the August 16, 1994 meeting;
- (h) continuing to assess a daily fine after the petitioners stopped using the direct exit door;
- (i) filing the Form B Certificate of Default in Payment against title to the Premises thereby interfering with the purchase and sale of the petitioner Ma's interests in the Premises;
- (j) forcing the petitioners to reinstate the storefront wall at their own cost when the respondents were aware that the City of Richmond required that the petitioners maintain two exits to the premises;
- (k) advising the petitioners that they are not entitled to vote at a general meeting of the Strata Corporation; and
- (l) advising the petitioners counsel that a proposal to resolve the impasse would be made to the petitioners in July, 1995 and not making any such proposal.

I have concluded that the respondent had the authority to require the washroom installation as a condition of the alteration of the exterior wall. Therefore, I conclude that the complaints in sub-paragraphs (a), (b), (c) and (f) are without merit. Insofar as sub-paragraph (d) is concerned, the respondents sought to deal with these concerns at the June 1, 1994 meeting which reconvened on June 6 by which time the door had been installed. This complaint is without merit.

[para50] Having concluded that a breach of condition for permission to alter the exterior wall was a breach of the by-laws I find no basis to the assertion that the assessment of a fine was oppressive although I shall subsequently deal with the manner in which that fine was imposed and its amount. I conclude (f), (g) (h) do not constitute oppressive Acts cumulatively or otherwise.

[para51] Counsel for the respondent agrees that it was improper for the Strata Council to file a Form B and informed me at the commencement of this hearing that, in fact, he had advised his clients to remove the Form B from title once he had been retained. I find that the filing of a Form B was more an incorrect assessment of procedure rather than oppression.

[para52] The restoration of the exterior wall was done by the petitioners at their expense. Since September 30 the door was blocked. While the respondent had the right under its by-laws under Parker Place By-Law XIII(a) to effect the restoration and then charge that expense back to the petitioner, it was done directly by the petitioners or 828. I do not regard that as oppressive as it is clearly a recognition by the petitioners that as they were not prepared to fulfil the condition, they had no use of the door.

[para53] I do not view the denial of the petitioners right to vote at the General Meetings as oppressive given my views is the mistaken approach taken in terms of the filing of Form B.

[para54] Finally it was argued that the Strata Corporation acted in an oppressive manner by interfering in the transfer of the petitioner Ma's interest to the other two petitioners. There is no evidence that a Form A was requested under Section 38 of the Condominium Act before the Form B was released other than Mr. Chan's assertion that "the petitioners have not been able to complete the transaction because of the charge filed against the property" and for which assertion he proffers no basis.

[para55] In summary, I do not find the conduct of the respondents oppressive in the context in the meaning of Section 42.

[para56] It is clear from the correspondence that certain mis - understandings developed as a consequence of the written linguistic difficulties apparent on the part of the authors on some of the correspondence. The consequence of this is that Mr. Chan appears to have taken on a more strident position than he may have intended resulting in a less friendly reception being expressed by the respondents.

[para57] Section 125(6) of the Condominium Act provides that:

(6) Except in cases where, under this Act, a unanimous resolution is required, an owner is not entitled to vote at a general meeting unless all contributions payable for his strata lot have been paid

That Section refers to "all contributions payable". Parker Place By-law XI(f) is similar to the provisions of Section 125(6). It provides:

(f) Except in cases where, a unanimous resolution is required, an owner is not entitled to vote at a general meeting unless all contributions payable to the Strata Corporation relating to his strata lot have been paid. [para58] It will be noted there is a subtle difference in that the respondent's By-law refers to "all contributions payable to the Strata Corporation relating to his Strata Lot have been paid." The issue arises then of whether fines imposed can come under the rubric of "all contributions payable to the Strata Corporation." Counsel were unable to direct me to any authorities and I have likewise found none that shed light upon this term. The term "contribution" must perforce go beyond giving of a voluntary nature.

[para59] Section 37(1) of the Condominium Act refers to "payment of his share of common expenses." Section 38(1) refers to "no money is owing to it".

[para60] Within the by-laws themselves Parker Place By-law II(e) refers to "collect and receive all contributions towards common expenses levied by the Strata Corporation." When referring to fines under By-law III(f) references made to "imposing fines, penalties or charges" and that such "fines shall be used to award common expenses." By-law XIII provides that where the Corporation expends funds to remedy a breach such costs were to be added to the next monthly assessment. Likewise, By-law XIV(g) provides a prioritization on the application of monies received from an owner the second of which is payment of fines and the fourth of which is payment of the balance of outstanding common area expenses.

[para61] While superficially attractive this dichotomy of expression is used in Section 38(2) loses its appeal when reviewed in the context of By-law XIV(g) which does not refer to "contributions", when applying funds received from an owner in the particular priority set out in that By-law. Taken in its totality I am of the opinion that the By-laws of Parker Place provide that unpaid fines shall be added to that which is owed by an owner and applied in the manner prioritized by By-law XIV(g). Therefore, unpaid fines will have the same consequences as unpaid contributions towards expenses resulting in the denial of an owner of the right to vote at general meetings under By-law XI(j).????

[para62] The respondent Strata Corporation imposed fines of \$28,754.28 for breach of these by-laws in respect of the failure to fulfill the condition imposed upon the right to alter the external wall. Having concluded the Strata Corporation had the authority to impose those fines the issue arises as to the reasonableness or fairness of those fines given the circumstances of this particular matter. The petitioners were informed of the fines by letter dated September 28, 1994. On March 22, 1995 the respondent filed in the Land Title Office a Form B for fines in the total amount of \$28,754.28. No fines were claimed after that date.

[para63] It is clear on the evidence that the petitioners or their tenant blocked the door after receipt of the September 28 letter. Quite apart from that the respondent pursuant to its by-law XIII(a) had the authority to remedy the violation and then charge that cost back to the owners. They chose not to do that. Had it done so whatever cost it incurred would have been added to the monthly assessment and a Form B could have then been properly registered for unpaid restorative costs.

[para64] Counsel for the respondent concedes the total amount of the fine is unreasonable. Pursuant to the provisions of Section 21 of the Law and Equity Act the Court has the power to relieve against penalties such as those imposed upon the petitioners.

[para65] The petitioners by the letter of June 3, 1994 (two days after the installation of the door) were informed that a failure to install washrooms would be viewed as a breach of the by-laws and that the Strata Corporation reserved the right to impose fines for contravening the by-laws and/or reinstate the store front. This refrain is repeated by its solicitor, Mr. Tindle, on July 28, 1994 and the property manager on August 23, 1994 after Mr. Chan had met with the Strata Council. Yet, it was only after September 20, 1994 the Strata Council decided to take enforcement action. It decided not to reinstate the wall but rather to seek legal advice as to imposition of fines.

[para66] There are no Minutes or any decision to impose fines, but the property manager, Mr. Lee, by letter dated September 28, 1994 set forth the Council's decision that was made sometime between September 20 - 28, 1994.

[para67] On October 7, 1994 Mr. Chan responded professing:

"Up until now we still do not have an explanation from Councils. What is the relation between the exit door and the washroom", not withstanding Mr. Chan's attendance at the August 16, 1994 Strata Council meeting.

[para68] Despite that it was only after the receipt of the September 28 letter that 828 blocked the door. The door was never used and thereafter was removed on March 30, 1995.

[para69] Both counsel suggested various starting points for the fine. Given its knowledge that the petitioners and/or 828 did not want to install the washroom and its ability to remove the door when it knew the condition of its installation would not be fulfilled, the Strata Council declined to do so and decided to follow the route of a breach of its by-laws. Aware of its ability to impose fines as set forth in its July 12, 1994 Minutes it declined to do so until September 20, 1994, when at a Strata Council meeting then instructed its property manager to inform the petitioners of the fine schedule as set forth in the September 28, 1994 letter of Mr. Lee then property manager. In that letter it imposed fines on a daily basis as opposed to an occurrence basis.

[para70] Parker Place By-Law No. 2 under which the fines were imposed, refers to "occurrences" whereas By-law No. 3 refers to a "per diem" rate of \$50.00. Counsel are unable to provide any authority on what "per occurrence" meant and the by-laws do not provide any assistance in defining what that expression should mean in the context of the Parker Place By-laws. Likewise, Section 50 of the Condominium Act speaks of fines "for a breach" and is silent as to the breach that continues on a daily as opposed to isolated basis.

[para71] Somewhat arbitrarily I am asked to fix what fine would have been reasonable to impose. The purpose of a fine is in part to encourage compliance with the By-laws of the Strata Corporation. The fine is an option open to the Strata Council to be used, more often than not, in circumstances where it may be impossible or beyond the means of the Strata Council to effect remedial measures. Accordingly, By-law No. 2 is to be viewed in the context of a continuing violation providing for occurrences to be daily in concept.

[para72] Mr. Chan met with the Strata Council at its August 16, 1994 meeting and the minutes of that meeting make it clear, in the event it can be said that if it was not clear before to Mr. Chan, the position and reasons for that position taken by the Strata Council were explained to Mr. Chan. The letter of Mr. Lee, the manager, of August 23, 1994 informed Mr. Chan that the Strata Council, "after reviewing all the facts and your position concluded there was not appeal on the approval condition ... The Council therefore decided that you should either reinstate the exit door or install the washroom as required immediately as the 15 days period allowed in Mr. Tindle's letter has already expired." By that date Mr. Chan had both the position of the respondents and an explanation following upon an opportunity to put forward his position.

[para73] Despite that the door remained functional and was not blocked until the end of September when finally Mr. Chan abandoned any use of or intention to use the door. This was as a consequence of his being informed of the fines September 28.

[para74] Although I have concluded that under the by-laws, each successive day is an infraction, by-law #2 refers to fines imposed for further violations to be to a "maximum" of 150 per day.

[para75] In the circumstances of this case, I am of the opinion the fines imposed should be relieved against; and that there should be fines imposed on the following basis:

August 23 - warning letter and August 31 period to comply

September 1 to - \$50.00 per day September 14

September 15 to - \$100.00 per day September 21

September 22 to - \$150.00 per day September 28

The total of fines, therefore, to be imposed will be \$2,500.00. The balance of the fines imposed are relieved against pursuant to the provisions of the Law and Equity Act.

[para76] I am further satisfied the Strata Council and its property manager acted in good faith in its dealings with the Petitioner the City of Richmond and the petition is dismissed as against them. COSTS

[para77] The issue of costs is a troublesome one. There has been a division of success in terms of the relief sought. At the commencement of these proceedings the respondents sought the advice of counsel different from the solicitor who had originally advised them. I do not know what advice was given other than references to it in Minutes of the Strata Council. In any event the Form B was withdrawn upon Mr. Williams becoming involved. I have concluded that the Strata Council was correct in its view that it could regard a failure to fulfill the conditions of altering the exterior walls as a breach of the by-laws and that it could properly impose fines although I have given relief against most of those imposed.

[para78] Likewise, I have concluded that the Strata Corporation was correct in its position that the petitioner could not vote so long as the outstanding fines remained unpaid. In view of the fact that the actions of the Strata Council were in the interests of the operation of the shopping Mall as a whole, I am of the view that it would be inappropriate to make any order exempting the petitioners in respect of any unit entitlement cost in respect of the respondents' legal fees.

[para79] There will be no order for costs of this application.

TAYLOR J.

CBR# 312

Strata Plan 1261 v. 360204 B.C. Ltd.

Between The owners, Strata Plan 1261, plaintiff, and 360204 B.C. Ltd. and Alan Wilson, defendants, and Peter Driessen, Nadine Boyd, John Curry, Rod Todd, James Hall, Romelda Heard, Joe Lyons, Lana Robertson, Don Newton and Ken Slack, defendants by counterclaim

[1996] B.C.J. No. 955, Vancouver Registry No. C953575 British Columbia Supreme Court Thackray J. Heard: February 27, 1996. Judgment: filed May 1, 1996.

Counsel: F.E. Verhoeven and E.G. Wong, for the plaintiff. B.A. Meckling, for the defendant 360204 B.C. Ltd.

[para1] THACKRAY J.:-- In reasons released December 22, 1995 it was held that the contract between the plaintiff Strata Corporation and the numbered defendant was void ab initio as it was never properly executed and because it was obtained in violation of fiduciary duties.

[para2] I will take this opportunity to correct some errors which appear in paragraph 100 on page 32 of those reasons. The word "not" should appear in the sixth line before the word "free". The name "Proudfoot J.A." should be replaced by the name "Wilson J." and the page number changed to 288.

[para3] The plaintiff now seeks: 1. An order for an accounting by the numbered defendant and that all rental proceeds from the parking stalls be paid to the plaintiff;

2. In the alternative occupational rent pursuant to R. 32(3) for the period from July, 1989 to December, 1995;

3. Interest on all amounts pursuant to the Court Order Interest Act; and

4. Double increased costs.

[para4] The defendant suggests that the appropriate relief would be repayment of all rents obtained from non-residents for the use of vacant parking stalls and ordinary costs at scale 4.

[para5] On July 14, 1989 a contract for exclusive use of all the parking stalls in the "Ocean Terrace Landmark" building in Sidney, British Columbia was executed between the named defendant, on behalf of the plaintiff Strata Corporation, and the numbered defendant, a subsidiary of the owner/developer of the condominium building, Mastercraft. The contract purported to be a license. It granted the numbered defendant exclusive use and enjoyment of all 101 parking stalls in the building for 99 years in exchange for a one-time payment of \$10. These parking stalls were designated in the strata plan as "limited common property" for the benefit of the owners of strata lots 15 to 97.

[para6] The named defendant signed on behalf of the plaintiff in his capacity as its agent. This agency relationship was said to arise from his position as the representative of the company hired as the "Property Manager". This company was another subsidiary of Mastercraft, the developer. The named defendant was an employee of that company. A director of the numbered defendant signed on its behalf.

[para7] In summary I held that the parking agreement to be invalid for the following reasons:

The named Defendant lacked the capacity to sign the contract for the plaintiff Strata Corporation;

The contract was, in substance, a lease and as a lease it was invalid as it was not registered with the Land Titles Office as required by the Land Titles Act;

Since the contract was a disposition of common property, it was ineffective as the requisite authorizations called for in ss. 20(1) and 58 of the Condominium Act were not in place;

The contract was rendered ineffective at the request of the plaintiff as the named defendant had executed it in violation of his fiduciary duty as representative of the Strata Corporation, as his duty to the plaintiff conflicted with his duty to the corporate entity which nominated him, and in violation of his duty to act in the best interests of all the strata owners pursuant to s. 116(a) of the Act; and

The execution of the contract was the result of a request by the developer, and this request was a violation of the developer's fiduciary duty to the present and future owners of the strata units. **GENERAL PRINCIPLES OF DAMAGES FOR BREACH OF FIDUCIARY DUTY**

[para8] The plaintiff Strata Corporation seeks a remedy solely on the basis of the two fiduciary breaches: one on the part of the named defendant when he executed the contract while in a conflict of interest, the other that the developer (who can be effectively treated as the numbered defendant) was in conflict of interest when it requested the contract be executed.

[para9] Breaches of fiduciary duty command an equitable relief. In *Baillie v. Charman* (1992), 70 B.C.L.R. (2d) 388 (C.A.) p. 397 the following is said:

Historically, in equity, there was no jurisdiction to award damages. Depending on the nature of the equitable claim, the recognized remedies include injunctions, rescission or restitution, declarations of constructive trust for breaches of fiduciary duty and compensation where an in specie remedy was no longer available. In addition, there is an independent claim and remedy for an accounting of profits that a fiduciary makes as a result of his conduct in relation to his principal's property or his confidences.

[para10] In *Hodgkinson v. Simms* (1994), 97 B.C.L.R. (2d) 1 (S.C.C.) the appropriate remedy for fiduciary breach was discussed. At page 44 the Court said:

It is well established that the proper approach to damages for breach of fiduciary duty is restitutionary. On this approach, the appellant is entitled to be put in as good a position as he would have been in had the breach not occurred.

[para11] The Terrace decisions [See Note 1 below] are helpful because their facts are almost indistinguishable from the facts in the case at bar. There was a lease for the use of parking stalls between the plaintiff Strata Corporation and the defendant developer. The lease was signed by two employees of the developer on behalf of the plaintiff. The yearly payments made by the developer as consideration for the contractual "license" were far below what it obtained from the rental of the individual stalls. The plaintiff also continued to pay taxes and upkeep for the stalls, which its members could not use.

Note 1: The Owners : Condominium Plan No. 752-1207 v. Terrace Corp. et al (1980), 14 Alta.L.R.(2d) 24 (Alta. Q.B.); and Terrace Corp. et al v. Owners Condominium Plan No. 752-1207 (1983), 146 D.L.R. (3d) 324 (Alta. C.A.) affirming.

[para12] The lease was signed on the same day the Strata Corporation was created. Its two officers were nominated by the developer, the sole owner of the strata units at that time.

[para13] In those decisions there are some additional facts which might have vindicated the developer. There were 125 parking stalls, including the ones on the roof which were the subject of the lease, and only 77 condominiums. The excess parking arose from construction and legal problems which decreased the size of the building without affecting the amount of parking. Every prospective purchaser of a strata unit was given a copy of the lease and an explanation of the circumstances surrounding the lease. The position taken by the developer was that the excess stalls belonged to it, even though it was listed on the strata plan as "limited common property" belonging to the owners.

[para14] Both at trial and appeal the courts declined to find that the owners had consented to the fiduciary breach on the part of both the developer and its nominees on the Strata Corporation who executed the lease simply by purchasing these units with notice of the lease to the developer of the excess parking stalls. MacLean J., at trial, voided the lease and stated (p.34 Alta. L.R.):

The plaintiff corporation will be entitled to an order setting aside the lease and requiring the defendant corporation to account for the rent and profits thereof and pay the same to the plaintiff corporation.

[para15] This remedy was upheld on appeal. Stevenson J.A. discussed the nature and basis of this order (p. 331 D.L.R.):

The remedy of the common property owners is analogous to the proprietary remedy of the trust beneficiary, namely, the restoration of the property. The beneficiaries' action is generally considered as giving rise to the right to restore the property to the trust...I conclude, therefore, that the condominium corporation's action to recover the common property (with incidental relief) is a proper one.

[para16] The judgments in Terrace suggest that the appropriate remedy in the case at bar would be to order the return of all rents received by the numbered defendant to the plaintiff Strata Corporation.

[para17] In York Condominium Corp. No. 167 v. Newrey Holdings (1981), 32 O.R. (2d) 458, 122 D.L.R. (3d) 280 (Ont.C.A.) the Court ordered that all the proceeds received by the developer from the sale of excess parking stalls were to be returned to the plaintiff Strata Council. The Court specified that the plaintiff was to hold the proceeds "to be used in the discharge of its obligations under the declaration, including its obligation to maintain the common elements".

[para18] The position adopted by both the Ontario and Alberta courts seems to be the correct approach. The question remaining is whether the facts of the case at bar present any justification for varying the remedy: i.e., is there anything which would justify allowing the defendant to retain any of the rental proceeds?

[para19] The numbered defendant, in its chambers brief, split the sources of rental revenue into three categories:

- a. Rental payments for parking stalls used by residents of the strata units owned by the original investor owners;
- b. Rental payments made by residents of strata units owned by the subsequent owners of the strata units;
- c. Rental payments made by persons who were not residents of the condominium tower at the time of payment.

[para20] As the defendant conceded that it must return the rental revenues from non-residents (c), nothing more need be said with respect to that category.

- a. The Original Investor Owners

[para21] The defendant submits that it should be allowed to retain the rental proceeds that flowed from residents of the strata units owned by the original investors as these payments were the "pre-ordained profit" that these particular beneficiaries allowed the developer to take in the agreements between the parties. The "original owner investors" are those individuals who purchased their strata units from the original vendor at the time Mastercraft converted the building into a condominium project.

[para22] The defendant relies on *China Software Corp. v. Leimbiger* (1989), 27 C.P.R. (3d) 215 (B.C.S.C.) and *Olson v. Gullo* (1994), 17 O.R. (3d) 790 (Ont. C.A.).

[para23] However, the first question to be asked is whether or not the original investor owners consented to both the developer and its nominees on the strata council's breaches of fiduciary duty? The authors of *Hanbury & Martin's Modern Equity* 14th ed. at p. 629 state: A beneficiary who has participated in, or consented to, a breach of trust may not proceed against the trustees.

[para24] To a similar effect is the following quote from *Halsbury's*, 4th ed. explaining the rationale for allowing the beneficiary to consent to a fiduciary breaching the conflict of interest rule:

It is essentially a rule for the protection of the person to whom the duty is owed, who may relax it if he is sui juris and understands what his legal rights are and that he is surrendering them.

[para25] It can be argued that this is exactly what transpired in the case at bar - the original owners consented to the strata corporation leasing away their right to use the parking stalls. This issue was also raised in the appeal in Terrace. The developer attempted to rely on the doctrine of waiver. The Court held there was not "an intentional relinquishment of a known right". However, there are key factual differences between the disclosure made by the developer in that case and the disclosure made in the case at bar to the original owner investors.

[para26] In Terrace the form letter which was sent to the solicitors of all prospective strata unit purchasers stated that the lease was for the purpose of rental to owners in the building who desired more than the one allotted parking stall. It also made a vague reference to the possibility that these stalls might be used by the residents of a nearby condominium tower which the developer was considering building. However the letter did not make it clear that the lease was intended to permit commercial exploitation of the parking facilities.

[para27] In the case at bar the developer clearly disclosed to the original investor owners that it intended to exploit the parking stalls for commercial purposes. The offering memorandum sent to the original owners included a clause giving notice that "the purchase of Condominium Units offered ... does not include title to a parking space". It went on to provide that the Condominium Corporation would lease the stalls to the developer's subsidiary at a nominal rent for 3 years.

[para28] All the purchase agreements signed by the original investors included a clause detailing the three year lease of the parking stalls by the Strata Corporation to the developer. This clause specified that the developer could then commercially sublease these stalls. It further provided that the developer could apply at the end of the lease for the right to designate the parking stalls as separate strata units and that the purchaser was obligated to assist in the transfer of title by the Strata Corporation.

[para29] These notice provisions suggest that the purchasers would receive no interest in the parking stalls. This might have been the practical effect of the lease, but it did not have that effect legally as the purchasers were still the registered owners of the stalls. Also, the Act prevents the developer from making the parking stalls into separate strata units.

[para30] By agreeing to purchase strata units on this footing the original investors must be seen as having consented to the developer and its nominees doing what they did. They were aware that they had some rights to use the stalls and that the Strata Corporation would be trading those rights away for nominal consideration. They were aware that the parking stalls would be exploited commercially by the developer and its subsidiaries.

[para31] The numbered defendant still submits that the strata unit owners did not "own" the parking stalls. It does this in spite of the fact that the stalls were listed as limited common property and hence collectively owned by the strata unit owners. This is important because it means that it cannot be said with any certainty that the strata unit owners were aware of their legal rights yet acquiesced to the impugned dealings.

[para32] At best, it can be said they were aware of their practical rights. The fact that the strata owners paid for parking when they were wrongly told it was necessary cannot be equated with a situation where the strata owners paid for parking knowing that they were the registered owners of the parking stalls and still paying for the maintenance and upkeep.

[para33] While the disclosure by the developer Mastercraft was far from ideal, the original investors were made aware that they had some rights to parking and that these rights would be traded away by the Strata Corporation to the developer for commercial exploitation. The consent, however, was only for three years. While the 3 year term provided for in the agreement of purchase was renewable, any confusion concerning the extent of the consent must be resolved in favour of the party whom the law is protecting: the beneficiary.

[para34] In the result, I order the payback of only those rents obtained from the residents of strata units owned by the original investor owners which were received after July 14th, 1992.

b. Subsequent Purchasers

[para35] The consent on the part of the original owner investors does not clear the developer Mastercraft. It was still in breach of its fiduciary duty when it caused the parking contract to be executed. Hence, I must go on to consider what is to be done with the rental revenues received from residents who were subsequent purchasers.

[para36] The Supreme Court of Canada commented upon equitable remedies in *Hodgkinson v. Simms*, supra, at page 47:

Canson held that a court exercising equitable jurisdiction is not precluded from considering the principles of remoteness, causation, and intervening act where necessary to achieve a just and fair result. Canson does not, however, signal a retreat from the principle of full restitution; rather it recognizes the fact that a breach of fiduciary duty can take a variety of forms, and as such a variety of remedial considerations may be appropriate...

Put another way, equity is not so rigid as to be susceptible to being used as a vehicle for punishing defendants with harsh damage awards out of all proportion to their actual behaviour.

[para37] This suggests that in actions for breach of fiduciary duty the "extent of recovery should be commensurate with the seriousness of the breach of fiduciary duty in issue". (Case comment on *Hodgkinson* in *U.B.C. Law Review*, 1996, Vol. 29:2, p. 385 at 392).

[para38] The problem which presents itself is that the subsequent purchasers might be seen to be the beneficiaries of a windfall. They purchased the strata units on the basis that they would have no rights to parking. As a result of the voiding of the lease, they have full use of at least one parking stall. Now they seek to recover all rents paid under the lease. The developer complains that it sold the units on the footing that it would retain the parking and in doing so accepted less as a purchase price. It did this thinking it would receive a stream of revenue from rental of the parking stalls.

[para39] Now it has no rental revenue to look forward to in the future and no compensation for the transfer of the use of the parking stalls back to the unit owners. If the rent is returned, and if the owners paid less because of the parking agreement, the owners are put in a better position than they would have been had the developer not breached its fiduciary duty.

[para40] The public policy grounds for ordering just such a result are to be found in *Olson v. Gullo*, supra at page 802:

I have no doubt that stripping the wrongdoing partner of the whole of the profit, including his or her own share in it, is a strong disincentive to conduct which breaches the fiduciary obligation. Further, as a host of equity decisions have shown for at least two centuries, the fact that this would result in a windfall gain to the plaintiff cannot, in itself, be a valid objection.

[para41] In other words, the additional windfall profit to the beneficiary is justified as an additional deterrent to breaching fiduciaries. In the words of Mr. Justice LaForest in Hodgkinson, supra, at 54:

The law of fiduciary duties has always contained within it an element of deterrence.

[para42] On the other hand, there are decisions, such as China Software, supra, wherein the defaulting fiduciary has been allowed to retain the pre-ordained share of the profit. The concept is that if the beneficiary has consented to the fiduciary making a certain amount of profit from a transaction, then to that extent the fiduciary's self-interest is allowed to enter into the transaction. No fiduciary duty attaches to this portion of the transaction in that the individual is a self-interested actor and not a fiduciary.

[para43] In light of the analysis contained in Hodgkinson with regard to the necessary correlation between the seriousness of the fiduciary breach and the extent of the remedy, and given the views of the Supreme Court about the flexibility of equitable remedies, an analogy can be drawn to the case at bar.

[para44] The beneficiary is entitled to be put in the place it would have been in had the fiduciary breach never occurred. In this case, that means putting the strata owners in the same position they would have been in had they had full use of the parking stalls from the date of purchase. This would require a set-off against the rents for the "loss" suffered by the developer as a result of the decreased price of the units and the corresponding "gain" to the purchaser.

[para45] However, I do not have satisfactory evidence that the units were acquired by subsequent purchasers for a reduced price due to the parking agreement, nor do I have any figures allowing an accounting. While the case law appears to be somewhat contradictory, I am of the opinion that one principle is clear: if possible, the beneficiary is to be preferred over the defaulting fiduciary. In the result there is no option but to order the numbered defendant to return all rental payments made by residents of strata units owned by subsequent purchasers.

[para46] The defendants are ordered to return to the plaintiff, to be used in the discharge of its obligations under the Condominium Act, all rental proceeds received from:

- a) residents of strata units which were owned by the original purchasers which rents were received after July 14th;
- b) residents of strata units once the original investor/owners had sold them and
- c) non-residents at Ocean Terrace Landmark.

[para47] The plaintiff will receive interest under the Court Order Interest Act on these amounts.

COSTS

[para48] Costs will be payable to the plaintiff on scale 4

THACKRAY J.

CBR# 161

Lau v. 1755 Holdings Ltd.

Between Chris Lau, Mei Chih Chen Tseng, Cecilia Lee, Kim Wang Chan, Lai Kam Chan, Peter Eng, Jason Shen, and Michael Lee, Plaintiffs, and 1755 Holdings Ltd., Defendant And between Ralph Harris, Plaintiff, and 1755 Holdings Ltd., Defendants

[1995] B.C.J. No. 1663

Vancouver Registry Nos. C934913 and C935586. British Columbia Supreme Court Vancouver, British Columbia Warren J. Heard: October 26, December 15, 1994, February 16 and March 3, 1995. Judgment: June 30, 1995. Filed: July 4, 1995.

Counsel for the Plaintiff: J.R. Singleton and C.R. Thompson. Counsel for the Defendant: R.J. Olson and W.S. McLean.

WARREN J.:--

ISSUES

[para1] The plaintiffs in these two actions apply pursuant to Rule 18A for an order for judgment against the defendant. The critical issue to be decided on the application is whether the defendant breached a fundamental term of the purchase agreements executed by the plaintiffs and the defendant at various dates, all concerning the sale and purchase of condominium units in a project developed by the defendant in Vancouver, British Columbia. The plaintiffs say the defendant is in breach and they are not prepared to complete the purchase of the individual units and seek recovery of the deposits made by them and costs.

BACKGROUND

[para2] The defendant is a developer and constructed a twelve storey, twenty-four unit condominium at 2121 West 38th Avenue in Vancouver. The development was known as Ashleigh Court. [para3] Prior to the commencement of construction, the defendant and its agent held a sales presentation at the Ramada Renaissance Hotel which had been advertised in the local newspapers. At the presentation there was a model of the condominium building prepared by a Vancouver model maker, based upon the plans of the designers of the project at that time. Also in the presentation room there were enlarged photographs showing the possible views from different locations in the project as well as floor plans of the various levels of the building and a list of features which would be included in each suite. Also on view were samples of carpet, ceramic tiles and granite which would be included in the finishing of the lobby of the building and the suites. Also available was a sales brochure which contained among other things, floor plans of the first and second floor suites, typical floor suites, the penthouse suite and a list of features as well as a price list of the suites. The drawings in the brochure were prepared by a commercial artist, again based upon drawings prepared by the designers of the project. The brochure is a sophisticated and seductive invitation to purchase complete with descriptions of the advantages to be enjoyed by purchasers. The first page is a colour photograph of the model of the project superimposed on a photograph of the North Shore Mountains with the following words printed underneath:

Enjoy unobstructed and panoramic views of the city, ocean and North Shore Mountains while dining or sipping a hot cup of tea with a friend in the living room, admiring the tree lined exclusive residences in prestigious Kerrisdale on the west side of the beautiful city of Vancouver.

[para4] The next two pages include photographs of the neighbourhood and very brief descriptions of the lifestyle Kerrisdale offers. The two pages following are colour photographs of various interior scenes with the following words:

Great care is demanded in the design of each floor plan for Ashleigh Court to offer you a handsome home. Interior features and finishes are carefully appointed for your comfort and enjoyment.

[para5] The next five pages are of the landscaping plan, and floor plans of the first and second floors, a typical floor and the penthouse. The penultimate page provides a list of features of the building; of suites; of kitchens; of bathrooms; and of the penthouse. The building features include:

Grand Glass Lobby with Granit Floor Tiles

Exquisitely Designed Fountain and Reflecting Pool

Luxurious and Private Landscaped Gardens and Walkways

[para6] The suite features include:

Unobstructed City, Ocean and Mountain views in most suites

Second Southern Exposure Open Balcony in Most Suites

Large and Double Glazed Windows for views and comfort

Tiled entrance foyer

Built-in Book Shelves in Living Room

Hot Water Heating System

Recessed and Track Lighting

Quality plush Carpet, and so on.

[para7] The kitchen features include:

European Style Cabinets

Breakfast counter

Double Sink with Garborator

High Performance Hood Fan

Ceramic Tiled Floor

[para8] At the bottom of the page, and in somewhat smaller print, are the words "Illustrations and descriptions are approximate representations of features described. In a continuing effort to improve standards [sic] of development, the developer reserves the right to make modifications and changes to building design, specifications, features and floor plans, without notice".

[para9] The model showed the south facing balconies with glass walls. The drawings showed each kitchen with a window. There were windows facing east or west (depending on the suite) as well as to the south in each master bedroom. Further, the drawings show a window in the master bedroom ensuite bathroom for the units on the east side of the building.

[para10] Each of the plaintiffs depose that they relied on the brochure, the plans and the other materials presented at the presentation and each entered into a contract to purchase, the Purchase Agreement.

[para11] The purchase agreement, in addition to setting out the purchase price and the times for payment, also contained the following clause:

4.0 Construction 4.1 Construction. The vendor will construct and complete the development and the Strata Lot in a good and workmanlike manner substantially in accordance with the plans subject to any changes required by the City of Vancouver or any other approving authorities. Notwithstanding the foregoing, the vendor may:

(a) make minor modifications and as, in the sole opinion of the vendor and/or the architect retained by the vendor or the project manager (the "architect"), are desirable and reasonable; and

(b) use materials other than as prescribed in the plans provided that alternative materials are, in the sole opinion of the architect, of a quality comparable to those prescribed in the plans.

[emphasis added]

THE PLAINTIFFS' POSITION

[para12] The plaintiffs say that the defendant is in fundamental breach of its contracts with each of the plaintiffs in part because the building did not feature a grand glass lobby with granite floor, a tiled entrance foyer, built-in book shelves in the living rooms, a hot water heating system, a window in the kitchen, a window in the east wall of the master bedroom on the east side of the building or the west wall of the master bedroom on the west side of the building, windows in the ensuite bathroom on the east side of the building, recessed lighting or quality plush carpeting. Further, although not pleaded, the evidence would indicate that the fountain and reflecting pool were not as described in the brochure nor were the luxurious and private landscaped gardens and walkways provided. As well, the south facing balconies, shown in the plans with glass guardrails, are in fact, constructed of concrete.

[para13] In summary, the plaintiffs say that they agreed to purchase their respective units on the basis that the building would be constructed in accordance with the plans and as reflected and described in the brochures provided to the plaintiffs through the defendant or its agent. The plaintiffs say that the building was not constructed in accordance with the plans and some portions were not constructed or were constructed with significant modifications such that the changes substantially altered the quality and value of the property and entitles the plaintiffs to rescind the agreement and a corresponding repayment of the deposits paid with costs.

THE DEFENDANT'S POSITION

[para14] On this application the defendant submits that the plaintiffs' action should be dismissed with costs or alternatively, the application under Rule 18A be dismissed. The defendant says that the plaintiffs received essentially what was bargained for under the terms of the contract and the disclosure statement, contracts contemplating changes could be made to the design of the building and the plaintiffs were aware that such changes were a possibility. In any event, the defendant says that the plaintiffs have not demonstrated that the changes in design of which they complain are breaches of contract and the plaintiffs have failed to demonstrate that the changes were fundamental.

[para15] The parties agree that the test whether there has been a fundamental breach of contract (as the plaintiffs term it) or that the breaches were material (as the defendant terms it) is objective and that the subjective considerations of an individual plaintiff is not relevant.

[para16] The defendant, in its argument, refers to the affidavits filed on its behalf and offers an explanation for each one of the changes complained of by the plaintiffs. The defendants were extremely concerned about keeping construction costs down while maintaining the competitive quality of the design but no design adjustment was made solely on the basis of its effect on costs. "In many cases, minor revisions were made to the preliminary scheme to improve appearance, function or durability. In other cases, substitutions of materials or systems were made where the defendant and its consultants judged that cost saving was possible without a detrimental affect on appearance, function or durability". The defendant through the affidavit of Tom Ip then deals with each change complained of by the plaintiffs. With respect to the south facing balconies, the defendant says that their primary purpose was to give access to the second exit stairwell, they do not extend in front of the large master bedroom window so as to block or diminish the view, for privacy reasons the defendant considered glass guardrails inappropriate and safety militated in a concrete material to avoid occupant's confusion in the event of a forced evacuation.

[para17] With respect to the reflecting pool, the defendant says that it was changed in part for costs but also to discourage littering.

[para18] With respect to the changes in the landscape design, the defendant says that a number of landscape elements were proposed by the architects early in the design development stage "but not all received the defendant's approval and were incorporated into the final design".

[para19] With respect to the material substitutions, the floor of the lobby was changed to slate, providing a much safer surface when wet; the entrance foyer described in the brochure as "tile entrance foyer" was changed to carpet for consistency with the general floor finish of the elevator cars; and lighting, described in the marketing brochure as recessed, in fact were only surface mounted because "the construction technique used in the project (concrete frame and slab, and no suspended ceilings) did not readily permit fixtures to be recessed". [para20] As for the bookshelves, no built-in bookshelves were provided in part because a layout change was made necessary by building code considerations. Further, the built-in bookshelves "may have unduly restricted opportunities for furnishing the living room, which are modest in size, and may also have restricted available locations for electrical outlets".

[para21] With reference to the plaintiffs' complaints about the missing window in the kitchen, the defendant replies that it felt it would interfere with the most efficient layout of the kitchen as the refrigerator and cupboard doors open against the only length of exterior wall where a window would have been possible. With reference to the bathroom in the master bedroom on the east side of the building, the defendant felt the window's location directly above the bathtub "was considered to be inappropriate and undesirable". Apparently the defendant was concerned about privacy, the draft factor and the maintenance problems of a window frame wetted during the use of showers. With respect to the additional window in the master bedroom on the sidewall, both east and west, the defendant decided not to include the window as its placement "may have unduly limited possibilities for efficient furniture layout as the southern wall has a door to the balcony and a large window and the interior walls closets or doorways opening into the bedroom". There was also an additional reason for omitting these windows and that was "for the improvement of appearance of the east and west facades of the building".

[para22] With respect to the change in the heating system from hot water to electric baseboard type, this change was not cost driven apparently but rather to increase individual temperature controls, reduce the pro-rata cost to the owners, some of whom would be frequently absent from Vancouver, reduce the ongoing maintenance and servicing costs and, reduce the size of the baseboard providing less interference with usable floor area.

THE SUBMISSIONS

[para23] In its argument, the defendant says that each of the contracts provide for the same; the construction would be in a good and workmanlike manner substantially in accordance with the plan but that the vendor may make "minor modifications . . . as are desirable and reasonable" and the plans were subject to such modifications as may be determined by the architect or required by the city. The defendant says that the units built by the defendant were substantially the same as those proposed at the time of the original offering and the plaintiffs have focused on a number of changes as being fundamental and inconsistent with the sales brochure but the sales brochure does not form part of the contract between the parties (See *Abramowich v. Azima Developments Ltd.* (1993), 86 B.C.L.R. (2d) 129, Court of Appeal). In *Abramowich* the plaintiff purchaser failed to complete on its transaction and sued for damages alleging the unit was not completed in accordance with the representations contained in a brochure which had described the unit as "luxurious" or, "exceptional quality" or, "architect designed interiors" or, "first class finishings" while the written contract made no reference to the standards to which the condominium would be built. The trial judge in *Abramowich* rejected the argument that the brochure terms should be implied as terms of the contract.

[para24] Ryan, J. in *Abramowich* considered the role promotional brochures played in the action between *Abramowich* and *Azima Developments*. At p. 176-77 of her reasons reported at 19 R.P.R. (2d) 172, but more conveniently found in the reasons for judgment of Toy, J.A. in the Court of Appeal (1993), 86 B.C.L.R. (2d) 129 at 131:

The written contract made no reference to the standards to which the condominium would be built. It is the plaintiff's position that he relied upon the promotional brochure to the knowledge of the vendor. He submits that the court ought to imply as a term of the contract that the unit was to be built to the standards set out in the brochure. Aside from the problem in determining an exact standard from the promotional material, the plaintiff's next difficulty is the limited circumstances in which a court will impose a contractual term.

Lord Pearson said in *Trollope and Colls Ltd. v. Northwest Metropolitan Regional Hospital Board* (1973), 2 All E.R. 260:

An unexpressed term can be implied if, and only if, the court finds that the parties must have intended that term to form part of their contract; it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them; it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties made for themselves.

On any view of the evidence, the plaintiff has failed to meet this test. I am not convinced that the promotional literature was intended by the parties to form a part of the contract.

[Emphasis original]

[para25] Toy, J.A., for the court, examined the underlying agreement in *Abramowich* as well as the correspondence which passed between the parties and the plaintiff's attempt to obtain the vendor's consent to amend the agreement. The proposed amendment acknowledging the purchaser's claim concerning defects, deficiencies or repairs, was never assented to by the vendor and, under those circumstances, Toy, J.A. agreed with the trial judge in these words:

I agree with the trial judge that in interpreting an assigned agreement between the parties it is not necessary to give business efficacy to the agreement by implying the terms of the printed brochure into the agreement for the reasons she has stated. In my opinion, all that was required to give business efficacy to the parties' agreement was for the vendor to complete the condominium unit in accordance with the plans and specifications which, apparently, met with the architects approval on February 14, 1990 shortly before the City of Vancouver occupancy certificate was issued on that date.

[para26] In reply to this submission the plaintiffs say that an officer of the defendant conceded that the brochure reflected what was in the plans at the time the purchase and sale contracts were entered into. This is borne out by extracts from the examination-for-discovery of Mr. Ip to the effect that the drawings in the brochure were prepared by a commercial artist from the drawings

prepared by the architect and that whatever was in the brochure at the time the sales contracts were entered into reflected what was in the plans at that time. Accordingly, the plaintiffs submit that the brochure is explanatory and reflective of what was in the plans at the time the various plaintiff's purchased their units. The brochure is informative evidence of what the plaintiffs saw at the time they entered into the purchase and sale agreement and in determining what the defendant's intended to represent to the plaintiffs and what they intended to build.

[para27] Accordingly, the Abramowich case is irrelevant as the plaintiff is not asking that the brochure be read as part of the purchase and sale agreement but rather to demonstrate by excellent description what the plans and specifications reflect and the plans and specifications were made part of the purchase and sale agreement.

[para28] In the plaintiff's affidavit material was the affidavit of one John Davidson, an architect with the firm of Davidson, Ewan, Simpson. He was retained by the plaintiff's solicitors to review the changes made between the time of the sales representations and the final construction. He prepared a report which, in summary, expressed the opinion that the changes made between the date of purchase and the completion of the construction "are more extensive and significant than would typically be expected in a project of this calibre". The report expresses many opinions of artistic or aesthetic and personal views and the defendant objected most strongly to the court considering the report of Mr. Davidson as being outside the scope of expertise of an architect and going to the ultimate question (*Hay and Hay Construction Co. Ltd. v. Sloan* (1957), 27 C.P.R. B2 (Ont. H.C.); *Emil Anderson Construction Co. Ltd. v. B.C. Rail Company* (1987), 17 B.C.L.R. (2d) 357 and *Emil Anderson Construction Co. Ltd. v. B.C. Rail Company* (1987), 15 B.C.L.R. (2d) 28 (S.C.B.C.).)

[para29] In response to this the plaintiff argues that the defendant has not introduced any evidence from any source, let alone from the architects who designed the project, that the modifications were minor. Evidence in other words, disagreeing with the conclusion or opinion of John Davidson. This argument, while it does not deal directly with the defendant's objections, does leave unanswered the opinion expressed by John Davidson, which, after I strip away the opinions of artistic merit or aesthetic values, goes to the extent of changes. The affidavit of G. Gerald Kennedy, architect, filed by the defendant, deals with his opinion of the general areas of expertise or qualification of architects which do not include, in his opinion, any general ability to predict how "appealing their client's projects will be, from a marketing prospective, to the target buyer". He had familiarity with terms such as "luxurious", "exclusive", "generous", "spacious" and "grand" to mention some of the terms he used, but it was his opinion that such terms, while frequently used in marketing are all equally meaningless. In response to the affidavit of Mr. Kennedy the plaintiff argued compellingly that there was no indication that Mr. Kennedy saw any of the materials which are the subject of controversy before me and he makes no comment upon whether the modifications were minor or substantial or, in the words of Mr. Davidson "more extensive and significant". That opinion, in my view, stripped of those areas which offend the ultimate issue rule (*Emil Anderson*) and are clearly within the area of expertise of an architect.

[para30] The defendants further submit that the changes made to the building and to each of the units reflect only the natural evolution of the design and each change was made by the developer on a reasonable basis. As the contract expressly permits change the defendant says that the changes were merely evolutionary and were not material amounting to a breach of a fundamental term of an obligation under the contracts. In this regard the defendant relies on *Milgram v. York Humber Ltd* (1992), 22 R.P.R. (2d) 102 (Ont. C. of J. Div) and *Abdool v. Sommerset Place Developments of Georgetown Ltd.* (1992) 10 O.R. (3d) 120 (Ont. C.A.). Both cases deal with situations which arose under and were bound by the provisions of the Ontario Condominium Act. But the defendant says that both cases provide assistance on the issue of materiality. The test in *Abdool* of materiality is whether a change would provide a purchaser reasonable cause to reconsider or if a change is likely to influence a decision of a purchaser to purchase. The description of the test in *Milgram* is more helpful. At p. 105 *McRae, J.* of the Ontario Court of Justice (General Division) said the test is that adopted by *Borins, J.* in *Budinsky v. Breakers East Inc.* (1992), 6 O.R. (3d) 255:

Therefore . . . where the amendment is of such significance as to be likely to influence the decision of a reasonable purchaser to purchase the condominium unit or to alter the character of the disclosure statement.

[para31] *McRae, J.* adopted that definition and noted that the test is an objective test. He in turn looked at the changes in the building which was the subject of the litigation before him and concluded that the changes were not material, that "a reasonable person would quickly conclude that this change was minor and was clearly beneficial to the purchaser". The two changes considered by *McRae, J.* were the deletion of a public activity centre in the condominium complex which he concluded was a benefit to the plaintiff as the public would no longer have access to the complex; the second was an increase in the number of units from 408 to 413 thereby decreasing the plaintiff's percentage interest in the building. *McRae, J.* found that there was an express disclosure in the disclosure statement allowing the owner to increase the number of units to as many as 416 and that the actual decrease of percentage interest amounted to three parts per one hundred thousand and was so trivial as to not constitute a material change.

[para32] In the *Abdool* case the issue was the application again of s.52 of the Condominium Act of Ontario which provides that an agreement to purchase a new condominium would not be binding on a purchaser until the developer delivered a current disclosure statement with all material amendments thereto. The disclosure statement advised the purchasers that the condominium would have as amenities a recreational unit which included an indoor swimming pool, an exercise room and an outdoor play area which included children's play facilities. The statement further provided that construction would begin in October 1988 and would be completed by December 1990. In fact the occupancy permits for the swimming pool and the children's play area were substantially delayed.

[para33] The defendants before me rely upon the following passage from *Abdool* found at p. 138:

To invoke a common dictionary meaning of "material", when is a defect so pertinent, germane or essential as to render a disclosure statement in contravention of the Act and entitle a purchaser to cancel the transaction?

I approach this question first by reference to the applicable burden of proof. In my opinion, when a purchaser who has had the opportunity afforded by the cooling off period to consider the disclosure statement and the accompanying documentation, and has decided to go through with the transaction, subsequently seeks to resign from his or her otherwise binding agreement of purchase and sale on the basis of the deficiency of the disclosure statement, the onus is on the purchaser to show that the disclosure statement fails to satisfy the requirements of the Act to the degree that the agreement must be declared non-binding.

To discharge this onus and prove the materiality of the complaint, in my opinion, the purchaser is obliged to establish objectively that had the information that was not disclosed, or that was inaccurately or insufficiently disclosed, been properly disclosed in the disclosure statement at the time it was delivered to the purchaser, a reasonable purchaser would have regarded the information as

sufficiently important to the decision to purchase that he or she would not likely have gone ahead with the transaction but would instead have rescinded the agreement before the expiration of the ten day cooling off period.

[para34] The Ontario Court of Appeal concluded that the purchaser's decision in *Abdool* to seek rescission was prompted by declining real estate values, dissatisfaction with their purchases or a change in personal circumstances, and that the disclosure statements were in no way material to this decision.

[para35] While both *Abdool* and *Milgram* may be useful for providing a definition for the term materiality, their particular fact situations are materially different from the facts in the case at bar.

[para36] The plaintiffs rely upon the summary by G.H.L. Fridman, Q.C. in *The Law of Contract in Canada*, Second Ed., Carswell 1986, where, at p. 531, Fridman considers the nature of fundamental breach:

Perhaps the idea which most satisfactorily enshrines the idea of fundamental breach is that which appealed to Lord Diplock in the *Photo Production* case, as differentiating such a breach from breach of condition. This is the notion of some act which substantially deprives the innocent party of the intended benefit such party was to obtain under the contract. However defined, a fundamental breach is one which is more significant in factual terms, and more effective in respect of the rights and liabilities of the parties than the continued existence of the contract and their "primary obligations", in Lord Diplock's phrase, than any other kind of breach.

In every instance, it is a question of fact whether the breach complained of by the innocent party amounts to a fundamental breach or some other kind. That question, in turn, depends upon: the terms of the contract; intended benefit to the innocent party; the purpose of the contract; the material consequences of the breach; and, perhaps, though this has never been discussed in the cases, the extent to which the loss incurred by the innocent party can be remedied adequately by an award of damages. One point is clear. Whether a breach is fundamental does not appear to depend upon any express terms of the contract.

[para37] As Lord Upjohn observed in *Suisse Atlantique Societe D'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale*, [1967] 1 A.C. 361:

Whether such breach or breaches do constitute a fundamental breach depends on the construction of the contract and on all the facts and circumstances of the case.

DECISION

[para38] Viewing all of the facts and circumstances of this case, including clause 4.0 of the contract, I conclude that the multitude of changes and omissions were not so trivial or inconsequential as the defendant argues are within the ambit of the contractual terms permitting modification. The units were not "substantially in accordance with the plans" and none of the modifications were "minor". Rather, they were and are "so pertinent, germane or essential" as to amount to a fundamental breach entitling the plaintiffs and each of them to rescission.

[para39] The plaintiffs are entitled to the return of their deposits and costs.

WARREN J.

CBR# 162

Lau v. 1755 Holdings Ltd.

Between

Chris Lau, Mei Chih Chen Tseng, Cecilia Lee, Kim Wang Chan,
Lai Kam Chan, Peter Eng, Jason Shen and Michelle Lee

Plaintiffs, (respondents), and

1755 Holdings Ltd., defendant (appellant)

And between

Ralph Harris, plaintiff, (respondents), and

1755 Holdings Ltd., defendant (appellant)

Vancouver Registry No. CA020760

British Columbia Court of Appeal

Vancouver, British Columbia

McEachern C.J.B.C., Rowles, and Ryan J.J.A.

Oral judgment: November 8, 1996.

(8 pp.)

This was an appeal of an award of damages for breach of contract. The respondents purchased units in a condominium building. They were shown detailed brochures and unit plans which they relied on in making their purchase decisions. They paid deposits. Upon occupation, they discovered that significant changes had been made to the plans. Windows were smaller or missing and heating equipment was different. The respondents were granted damages for breach of contract. The trial judge found that the appellant holding company committed a fundamental breach when it altered the unit plans during construction. The holding company appealed the award on the basis that the trial judge erred in applying the test for fundamental breach.

Counsel:

M. Azevedo and K.J. MacDonald, appearing for the appellant.

D. Brindle and R.A. Hodgins, appearing for the respondent.

The judgment of the Court was delivered by McEachern C.J.B.C.

1 McEACHERN C.J.B.C. (orally):— Mr. Azevedo has struggled to persuade us that we should allow this appeal and set aside the judgment in the court below but we are not persuaded that the judge erred and we are not able to accede to appellant's submissions.

2 The action was brought by a number of purchasers of pre-sold condominiums in a proposed condominium tower in Kerrisdale. The description and the plans that they were shown, and upon which they based their decision, were not adduced in evidence but by reference we were told and counsel seem agreed that that the plans upon which the transactions were based on were the same as those shown in a brochure which was produced at trial and which has been placed before us.

3 What happened was that in a demonstration or presentation at a Vancouver hotel the purchasers had an opportunity to examine this brochure and to see a model or mock up of these condominium units.

4 The building was an attractive one in concept being 24 condominium suites in a 12 story building with north and south views as well, of course, as east and west. The units on the west side had two bedrooms and the ones on the east side had one bedroom. Considerable detail was shown in the brochure. The units were very small being less than 1000 square feet each.

5 The purchasers were asked to pay a ten percent deposit on entering into this transaction and a further ten percent later and those amounts were paid. The contract which was entered into provided as follows:

I/We hereby offers to purchase Strata Lot No (the "Strata Lot") described below, free and clear of all liens, charges and encumbrances except the encumbrances described in Sections 3.3 and 3.4 of the disclosure statement dated October 30, 1991 (the "Permitted Encumbrances" and the "Disclosure Statement", respectively), for the purchase price of Three Hundred Thousand Three Hundred Canadian dollars (\$300,300) (the "Purchase Price" subject to and upon the following terms and conditions.

* * *

4.1 Construction. The Vendor will construct and complete the Development and the Strata Lot in a good and workmanlike manner substantially in accordance with the Plans subject to any changes required by the City of Vancouver or other approving authorities. Notwithstanding the foregoing, the Vendor may:

(a) make minor modifications as, in the sole opinion of the Vendor and/or the architect retained by the Vendor or the project manager (the "Architect"), are desirable and reasonable; and

(b) use materials other than as prescribed in the Plans provided that alternative materials are, in the sole opinion of the Architect, of a quality comparable to those prescribed in the Plans.

(emphasis added)

6 The plans that are referred in the agreement are not before us but Schedule A provides as follows:

The Plans for the Strata Lot are the plans prepared by Hancock Nicholson Tamaki Architects Inc., subject to such modifications as may be determined by the Architect from time to time, changes required by the City of Vancouver or other approving authorities or as otherwise permitted herein or accepted by the Architect, which plans and specifications the Vendor acknowledges will include a stove, refrigerator, dishwasher and garborator.

(emphasis added)

7 When the building was finally constructed these plaintiffs, who are six or seven in number, found what they regarded as substantial changes in the condominiums as built and they refused to proceed with the transaction or to take occupation of the premises and they brought this action for the recovery of their deposits. The builder counter-claimed for the balance owing on the contract price.

8 The changes that had taken place in the construction between the time of the contract and completion are described in the reasons for judgment of the trial judge and I do not think that I need to quote extensively from his reasons for judgment. It will be sufficient to say that in nine or ten separate particulars actual construction did not accord with the brochure that the purchasers examined and upon which they based their decision to purchaser.

9 The contract as I have mentioned provided for minor changes, that is the builder could make minor changes or modifications which were considered by the architect to be desirable and reasonable and the main issue at the trial of course was whether or not these changes could be described as minor modifications. The trial judge in a very clear passage in his reasons found that they were not. He said this:

Viewing all of the facts and circumstances of this case, including clause 4.0 of the contract, I conclude that the multitude of changes and omissions were not so trivial or inconsequential as the defendant argues are within the ambit of the contractual terms permitting modification. The units were not "substantially in accordance with the plans" and none of the modifications were "minor". Rather, they were and are "so pertinent, germane or essential" as to amount to a fundamental breach entitling the plaintiffs and each of them to rescision.

10 The basic change that I think is sufficient to support the judgment below is the deletion in the one bedroom suites of three windows, one in the kitchen, one in the en suite bathroom and one in the master bedroom on the east side, and the deletion of two windows on the west side being one window deleted in the kitchen and one window deleted in the master bedroom.

11 It is true that these are small suites and there were other substantial windows in some of the other rooms but speaking for myself I can well understand the disappointment that the purchasers must have felt when they found for example that they did not have a window in the kitchen on both kinds of these suites apart altogether of the lack of the other windows.

12 I do not wish to minimize the other changes by not dealing with them specifically. The change in the heating plan seems to me also to be a substantial change and there were other changes and I need not go into them because I think there was ample evidence to support the decision of the trial judge that these units were not substantially in accordance with the plans and that the modifications were not minor. I think the trial judge was right when he said that they were pertinent, germane, or essential to the bargain that these parties struck.

13 Mr. Azevedo in his very carefully prepared and thoughtful argument sought to persuade us that, accepting those findings the trial judge had applied the wrong test. Counsel relied of course on the leading case of Hunter Engineering Co. v. Syncrude Canada Ltd. et al. [1989] 1 S.C.R. 426 particularly the passages of Madam Justice Wilson which are most often quoted from this case at p.499, 500 and 501. That, of course, was a case where the contract was for the supply of a conveyer belt and machinery at a cost of about \$4,000,000 and the gear boxes did not work adequately after about a year and had to be replaced at a cost of about \$400,000.

14 In giving her judgment Madam Justice Wilson was careful to point out that the test for fundamental breach was whether or not the plaintiff has been deprived of substantially the whole benefit which was the intention of the parties that he should obtain from the contract, but she was also careful to point out, by quoting passages from the trial judgment, that this conveyer belt was one that, defective as it was, it could be repaired and could continue to function as the conveyer belt for which it had been purchased. That is not the case here. The windows and the heating system cannot be repaired or replaced in the form that was expected and I think that while we must be very cautious before we find fundamental breach and we have been carefully warned by cases such as Hunter Engineering Co. v. Syncrude Canada Ltd. et al not to find fundamental breach except in the very special kinds of cases that are described there.

15 I think there is a substantial difference between a piece of machinery that can be repaired or some other item of commerce and a residence where someone is going to move in and live and hopefully to enjoy it. We are all entitled to some preferences in the ambiance in which we live and I think windows and heating are of particular importance.

16 I do not think with respect that the learned trial judge misdirected himself in concluding that these changes were a fundamental breach. He referred to the text of Professor Fridman on The Law of Contract in Canada, Second Ed., Carswell 1986, at p.531 where the test is stated in slightly different language from what later found its way into the judgment of Madam Justice Wilson, but I note that both Professor Fridman and Madam Justice Wilson referred to what Professor Fridman calls the Photo Production case which is also the source authority upon which Madam Justice Wilson seems to have most heavily relied. That being so, and accepting the findings of fact of the trial judge, it is my view that he did not instruct himself other than correctly and in accordance with the principles of fundamental breach particularly keeping in mind this was a residence which is very different from a piece of machinery or some other item of commerce. It is my view that the trial judge was entitled to reach the conclusion he reached. In fact I agree with the conclusion he reached. For those reasons, the appeal must fail and I would dismiss it.

McEachern C.J.B.C.

- 17 ROWLES J.A.:— I agree.
- 18 RYAN J.A.:— I agree.
- 19 McEACHERN C.J.B.C.:— The appeal is dismissed.

CBR# 005

453048 British Columbia Ltd. v. Strata Plan KAS 1079

Between 453048 British Columbia Ltd., Petitioner, and The Owners, Strata Plan KAS 1079, Respondents

[1994] B.C.J. No. 2741

Vernon Registry No. 13016 British Columbia Supreme Court Vernon, British Columbia (In Chambers) Harvey J. Heard: November 21, 1994. Judgment: filed December 5, 1994.

Counsel for the Petitioner: R.G. Kuhn. Counsel for the Respondents: D.L. Schaefer.

[para1] HARVEY J.:-- The petitioner applies for the following orders:

(a) an Order that Bylaw 131(3) of the Strata Corporation comprised of the owners, Strata Plan KAS 1079 (the "Strata Corporation"), which was added to the Bylaws of the Strata Corporation by special resolution passed on April 15, 1993, is void and of no force and effect;

(b) in the alternative, a declaration that Bylaw 131(3) of the Strata Corporation will not bind the owners of Strata Lots in phases 2 through 6, inclusive, of the residential development known as "Skyway Village" located on land described as:

PID 017-691-141 Lot B Section 2 Township 8 Osoyoos Division Yale District Plan KAP46743, except Plan KAP47687 and KAS1079 (Phase 1); and,

(c) an Order that the Petitioner recover from the respondents the costs of this proceeding.

[para2] In bringing this petition, the petitioner relies upon ss. 27, 29 and 30 of the Condominium Act, R.S.B.C. 1979, c. 61 and s. 5 of the Human Rights Act, S.B.C. 1984, c. 22, as amended.

ISSUES

[para3]

1. Is Bylaw 131(3) ultra vires as contravening s. 29 of the Condominium Act?
2. Is Bylaw 131(3) as adopted by the strata council ultra vires as being discriminatory?
3. Does s. 27 of the Condominium Act prevent application of Bylaw 131(3) to the owners of strata lots in phases 2 through 6?

FACTS

[para4] The Petitioner is a developer and the registered owner of lands in the City of Vernon upon which Skyway Village, a strata titled residential development, is to be constructed. The design and development of Skyway Village is by way of a phased residential development in six phases. The respondent strata corporation is currently comprised of the owners of the 24 strata lots in the first of the six phases. When completed the development will be comprised of a total of 106 strata lots in the six phases.

[para5] The original developers of Skyway Village were 415731 British Columbia Ltd. and Western Rim Projects Ltd. Following the completion of phase 1, the original developers encountered difficulties and were unable to proceed with phases 2 through 6. The petitioner purchased the lands comprising Skyway Village (not including phase 1) from the original developers on November 5, 1993, after the original developers ran into financial difficulty. [para6] The respondents rely upon a disclosure statement dated February 20, 1992 which referred to the complex as an adult only building, with no one under the age of 19 and at least one resident over the age of fifty. On June 23, 1992 an amended disclosure statement primarily dealing with phases 1, 2 and 3 of Skyway Village was filed by the original developers with the superintendent of real estate. This disclosure statement did not contain any reference restricting the use of the property to those over 50. I find as a fact that the purchasers of the units in phase 1 were aware of this change prior to closing on their strata lots.

[para7] Once the strata council was duly convened pursuant to the Condominium Act the strata council passed Bylaw 131(3) which states:

(3) No owner shall permit any person (including himself) under the age of fifty (50) years to occupy any strata lot by him (her) for a period in excess of 21 days aggregate in any calendar year. For the purpose of this sub-section 3, a person who uses his strata lot for overnight accommodation shall be deemed to have occupied the strata lot for one day for each occasion that he (she) uses the strata lot for his (her) overnight accommodation. Any variation is subject to approval in writing from the strata council.

[para8] The respondents submit that the Bylaw was passed in order to preserve their community as an "adult only" community as was originally marketed. The petitioner claims that the respondents are trying to change the nature of the development into a seniors only complex despite purchasing strata lots in a development that at that time had no such restriction.

ANALYSIS**Contravention of the Condominium Act**

[para9] The petitioner submits that the Bylaw as passed by the strata council contravenes the Condominium Act, R.S.B.C. 1979, c. 61 (the "Act") on the basis that the Bylaw restricts the devolution, transfer, lease, mortgage or other dealing in land. Sections 29 and 30 state:

Dealings in Strata Lots

29. Subject to section 30, the bylaws do not operate to prohibit or restrict

(a) a devolution of a strata lot; or (b) a transfer, lease, mortgage or other dealing with a strata lot,
or to destroy or modify an easement implied or created by this Act.

Restriction on Leasing: General

30. (1) A strata corporation administering a strata plan that is wholly or partially residential may, by bylaw, limit the number of residential strata lots within the strata plan that may be leased by the owners.

(2) A bylaw under subsection (1) shall set out the number of strata lots that may be leased and the manner in which the limitation will be enforced. [para10] In the decision of this court in *Cowe v. Strata Plan (1994)*, 92 B.C.L.R. (2d) 327, Madame Justice Saunders, in determining that a strata council did not have the ability to limit the rental of units to those owners who had personally occupied the unit for at least twelve months stated at page 330:

The starting and ending point on this issue is the statute itself. Sections 29 and 30 of the Act are a pair of statutory provisions that work together. Section 29 of the Act ensures there are no prohibitions or restrictions on leasing a strata lot covered by the bylaw except a bylaw passed under s. 30 of the Act. In the absence of s. 30, the Rental Limitation Bylaw in this case would be ultra vires the legislation. The bylaw relied upon by the Strata Council to refuse Ms. Cowe the opportunity to rent her strata lot must be within the parameters of s. 30.

Section 30(1) permits a strata corporation to "limit the number of residential strata lots within the strata plan that may be leased." Section 30(2) says that such a bylaw "shall set out the number of strata lots that may be leased and the manner in which the limitation will be enforced." The respondents contend s. 30(2) is not a comprehensive provision, and that the word "shall" should be read to mean the two requirements that follow, the number of rentable strata lots and the manner in which the limitation is enforced, are minimum requirements. They contend s. 30 permits other restrictions to be inserted into the s. 30 bylaw such as that found in the bylaw impugned in this action. I do not agree.

In my view, s. 30 only permits a quantitative restriction or prohibition on the leasing of residential strata lots by owners. The permissive subsection, s. 30(1), refers only to a limitation of the number of rentable strata lots. The mandatory subsection s. 30(2), then requires not only the number of strata lots that may be leased to be established, it also requires the manner of enforcement to be established. In my view, s. 30(2) does not go further to permit the Strata Council to discriminate between owners that may rent their strata lot.

[para11] I accept the submission of the petitioner that as a result of Bylaw 131(3), the petitioner would be prevented from selling, transferring, leasing or otherwise dealing with any strata lots in any manner that would result in occupancy of any strata lot by any person less than the age of fifty years for more than 21 days per year. This effectively restricts the devolution of the strata lots by the petitioner, or the transfer, leasing or otherwise dealing with the strata lots by the petitioner. I do not find that the Bylaw falls within the ability of strata councils to enact bylaws pertaining to the use of the land, because its application is in all practical senses intended to control who owns and lives on the property.

HUMAN RIGHTS ACT

[para12] While I find that Bylaw 131(3) is contrary to sections 29 and 30 of the Condominium Act, I propose to consider as well the other substantive argument of the petitioner, that the Bylaw is in violation of the Human Rights Act, S.B.C. 1984, c. 22 in that it discriminates on potential tenants on the basis of age. The Human Rights Act does not explicitly exclude the possibility of discrimination on the basis of age. For example, s. 4 deals with the sale of property, and age is not one of the enumerated grounds on which discrimination is prohibited. Thus, a provision dealing with a sale of property which had restrictions based on age, would not contravene the Human Rights Act.

[para13] In contrast, s. 5 deals with the rental of property. The relevant portion is as follows:

5.(1) No person shall

(a) deny to a person or class of persons the right to occupy, as a tenant, space that is represented as being available for occupancy by a tenant...

because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or class of persons, or of any other person or class of persons.

(2) Subsection (1) does not apply... (b) as it relates to family status or age,

(i) if the space is a rental unit in residential premises in which every rental unit is reserved for rental to a person 55 years of age or older or to 2 or more persons, at least one of whom is 55 years of age or older, or

(ii) a rental unit in a prescribed class of residential premises...

[para14] While section 4 does not include age as one of the enumerated grounds upon which the sale of property can be limited, it is included in section 5. The only exception is for restrictions for people over the age of 55, which is not the case here. The strata council would likely not have been in violation of the Human Rights Act if the Bylaw had stated "55 years of age" instead of 50 years of age, or if Skyway Village was "a prescribed class of residential premises", in other words, a designated senior complex.

[para15] For the reasons stated supra I find:

1. The Bylaw is ultra vires as contravening section 29 of the Condominium Act and it does not fall into the exception provided in Section 30.

2. The Bylaw is ultra vires in that it is contrary to section 5 of the British Columbia Human Rights Act and does not fall into the exception in section 5(2).

[para16] In keeping with the answers to the first and second issues, it is not necessary to consider whether Bylaw 131(3) would bind the owners of strata lots in phases 2 through 6 of Skyway Village.

[para17] The petitioner is entitled to costs of the petition on scale 3.

HARVEY J.

CBR# 310

Strata Corp. 830 v. Rhodo Holdings Ltd.

Between Strata Corporation 830 and Strata Corporation 762, Plaintiffs, and Rhodo Holdings Ltd., Hansbraun Investments Ltd., Siegfried Marquardt and Beacon Hill Plaza Ltd., Defendants, and Ronald Ebbs Canavan, Siegfried Marquardt, Hansbraun Investments Ltd., Saunders, Fabris and Murphy, Barrister and Solicitors, Nicolai Fabris, Clay & Company, Barristers and Solicitors, Edwin A. Popham and Allan Achtem, Third Parties

[1994] B.C.J. No. 802

Nanaimo Registry No. 12783 British Columbia Supreme Court Nanaimo, British Columbia Holmes J. Heard: April 6, 1994. Judgment: filed April 12, 1994.

Counsel on behalf of the Plaintiffs: John R. Jordon. Counsel on behalf of the Defendant, Rhodo Holdings Ltd.: E. Jane Milton.

[para1] HOLMES J.-- The defendant, Rhodo Holdings Ltd. ("Rhodo"), applies under Rule 18A for a declaration that an easement in its favour granted over the common property of the plaintiffs, Strata Corporation 830 and Strata Corporation 762 ("plaintiff corporations"), is valid.

[para2] The original developer of the bare land strata plans of the plaintiff corporations was Long Lake Heights Estates Inc. ("Long Lake"). In 1984 or 1985 the defendant, Beacon Hill Plaza Limited ("Beacon Hill"), had the unsold lots in the plaintiff corporations transferred to it and the defendant, Siegfried Marquardt ("Marquardt") became manager of the plaintiff corporations. He assumed administrative responsibility for them until 1989. It appears title to unsold lots later passed to another company controlled by Marquardt.

[para3] In early 1989, the defendant Rhodo purchased 102 of the original 229 strata lots of the plaintiff strata corporation 830. They assumed the position of Boyd Development Corporation ("Boyd") who held under an interim agreement for purchase of the lots from the defendant, Hansbraun Investments Ltd. ("Hansbraun"). Rhodo also purchased Lot 2, a piece of land contiguous to the properties of the plaintiff corporations, from the defendant Hansbraun. This was also done by taking over Boyd's position as purchaser under an interim agreement.

[para4] The defendant Marquardt was a principal of the defendants Hansbraun, Beacon Hill, and Long Lake. There was no connection between Hansbraun and Boyd; Hansbraun and Rhodo; nor Rhodo and Boyd. Both Boyd and Rhodo were arms length purchasers for value. Rhodo inquired as to existence of an easement over the plaintiffs' common property to access Lot 2 which they were buying. They received assurances there was an easement and would not have purchased without it. The defendant Marquardt likely gave that assurance. Marquardt believed there was such an easement and that one had always been intended. A land title search prior to completion of purchase confirmed the existence of a registered easement to Rhodo.

[para5] On January 5, 1989 Marquardt signed an agreement whereby the owners of the plaintiff corporations granted an easement over their common property in favour of Hansbraun. Marquardt signed the document three times on the basis he was the "authorized signatory" of each plaintiff corporation and of Hansbraun. The registrar of Land Titles rejected the application to register the easement as it required filing a Form 6 under the Condominium Act. In order to register the easement in the Land Title Office the defendant Marquardt signed the required Form 6 as "President" of the strata councils of the plaintiff corporations. He certified a special resolution of the plaintiff corporations authorizing the easement had been passed at a council meeting. In fact, there was no meeting, no vote, no special resolution, and Marquardt was not President. Marquardt's evidence on examination for discovery appears very vague as to the easement but he admits he did sign it. He said he thought he was authorized to do so.

[para6] In the event the easement in question is valid, a proposal of the plaintiff corporations to build an office building on part of the common property would be frustrated. The defendant Rhodo through its solicitors warned the plaintiffs by letter of March 11, 1992 that proceeding with the proposed office building project would violate the easement. It was only at this time Rhodo became aware that the plaintiffs questioned the validity of the easement.

[para7] The plaintiffs' position is the easement was fraudulently created by Marquardt. There was never a special resolution passed, and no authority from the owners to grant the easement was given. The plaintiffs say the Form 6 was not signed by two council members as required and ought never to have been accepted for registration.

[para8] I make no finding as to whether the defendant Marquardt acted fraudulently in this matter. That is not a matter that should be decided upon affidavit evidence, at least I do not consider the evidence before me on this motion sufficient to make that determination. I accept, however, that the plaintiffs may well be able to prove the fraud they allege at trial, and that is the proper forum for such an adjudication to occur.

[para9] The position advanced by the defendant Rhodo, however, is that the easement which was registered and it relied upon remains valid even if it was originally the product of fraud by Marquardt. Rhodo's position is that if Marquardt was fraudulent the plaintiffs' remedy is against him for damages but Rhodo as an innocent third party purchaser for value without notice of the fraud is entitled to the benefit of the registered easement. I accept that consideration of argument restricted to the question of the validity of the easement on the assumption it was the product of fraud upon the plaintiffs is appropriate for hearing on this Rule 18A application.

[para10] The evidence supports the conclusion that Rhodo was a bona fide purchaser for value without notice of any impropriety respecting the easement. There is no evidence to the contrary.

[para11] In support of the contention the easement remains a validly registered charge even if Marquardt created it fraudulently, counsel for Rhodo draws a parallel to language used in the Land Title Act and relevant wording contained in the Condominium Act. Section 26 of the Land Title Act reads that a registered owner of a charge is "deemed to be" entitled to an estate, interest, or claim created or evidenced by the instrument in question. Section 23 of the Land Title Act states every indefeasible title shall be "conclusive evidence" at law and in equity that the person named owner is indefeasibly entitled to an estate in fee simple, subject only to specific statutory exceptions, one of which is fraud.

[para12] It may therefore be said registration of a certificate is "conclusive evidence" of title (subject to specified statutory exception); registration of a charge, however, is "deemed" to create the registered interest. In considering the difference in

interpretation of those phrases in the Land Title Act context the phrase "deemed to be" has been held by the Court of Appeal to imply "... that the legislature intended such omission to be observed by assigning a meaning not 'conclusive' and raising only a rebuttable presumption." [See *Credit Foncier Franco-Canadian v. Bennett et al* (1963), 43 W.W.R. 545 at p.548].

[para13] The Land Title Act applies to the Condominium Act, unless it is inconsistent with it. [See Land Title Act, Section 3].

[para14] Section 20 of the Condominium Act provides that the owners of a strata corporation may, by special resolution, direct the strata corporation grant an easement on its common property. To register an easement created by a strata corporation there must be a certificate [Form 6] under seal. Section 130 of the Condominium Act provides the seal of a strata corporation is to be used only "... by authority of council previously given and in the presence of ... at least two members of it, who shall sign every instrument to which the seal is affixed". If there is only one member of the strata corporation "... his signature is sufficient for the purpose of this section", or should the only member be a corporation "... the signature of the appointed representative on the strata council shall be sufficient for the purpose of this section."

[para15] Section 20(7) of the Condominium Act provides: "The certificate is, so far as the purchasers of the asset and the registrar are concerned, conclusive evidence of the facts stated."

[para16] I do not accept that the certificate filed in support of the easement in question here complies with the requirements of Section 130 of the Condominium Act. The certificate wording appears to be that of Form 6 to the Act for a filing under Section 20(5). The form has, however, been altered as to execution, and as filed reads:

THE COMMON SEAL OF THE OWNERS STRATA PLAN NO. 830 (762) was hereunto affixed on the day of , 19 in the presence of:

(S. Marquardt) President of the Council

[para17] The original document no longer remains in Land Title Office records so it is not possible to tell if the plaintiff strata corporations' seals were in fact affixed. I will assume for present purposes they were. The wording of the certificate indicates "... the owners of the strata lots ... by special resolution" directed the execution of the easement. The use of the plural indicates more than one owner. Compliance with the Condominium Act therefore requires the seal be affixed in the presence of two members of council who sign any document to which the seal is affixed. That obviously did not occur. For the certificate to have validity on its face with only one signature, the wording of the body of the certificate would have to indicate the strata corporation had but one member. There is no indication of that nature.

[para18] As the attestation date was left blank it is not possible to know when the certificate was signed in relation to the resolution it purports to certify. I do not consider an undated certificate sufficient compliance.

[para19] I do not find there is any inconsistency between the provisions of Section 26 of the Land Title Act and Section 20(7) of the Condominium Act. Section 20(7) of the Condominium Act is not in my view intended to give easements created by a strata corporation any different status as a charge under the Land Title Act than are easements created by an ordinary corporation or an individual. The use of the words "... conclusive evidence ..." in the context of this section does not make the easement an "indefeasible" charge akin to the effect of a certificate of Indefeasible Title. A Certificate of Title is a document that is created by operation of statute; an easement is created between parties.

[para20] Section 20(7) of the Condominium Act is intended only to relieve the registrar of the necessity of seeking evidence beyond the certification contained in a Form 6 that the requirements of the Condominium Act as to a proper special resolution being passed and that appropriate creation and execution of the easement occurred.

[para21] Section 20(7) provides requirements entitling an easement to be registered under the Land Title Act; Section 26 of the Land Title Act provides the legal effect to be given the easement following its registration.

[para22] In 1989 the Land Title Act was amended and the following added as Section 26(2):

Registration of a charge does not constitute a determination by the registrar that the instrument in respect of which the charge is registered creates or evidences an estate or interest in the land or that the charge is enforceable.

[para23] The Honourable Attorney General in speaking to the amendment said:

The bill also proposes other reforms of a more technical and housekeeping nature. They are as follows: the effect of a registered charge is clarified and will be consistent with the prevailing jurisprudence; essentially ownership will continue to be guaranteed under the Land Title Act; as to the nature of the rights owned by a chargeholder, the bill clarifies that they are rights created by the registered instrument supporting the charge. Finally, the bill clarifies that the registration of itself does not create an interest in the land where the instrument was not, prior to registration, sufficient to create one. [para24] The amendment is consistent with the "rebuttable presumption" finding in *Credit Foncier*, supra.

[para25] The defendant Rhodo has not shown that the easement in question is valid if in fact it was originally created by fraud. The application is dismissed.

[para26] The plaintiffs are entitled to the costs of the application on Scale 3.

HOLMES J.

CBR# 176

Marbel Developments Ltd. v. Pirani

Between Marbel Developments Ltd., Plaintiff, and Mehboob Pirani and Beck, Robinson & Co., Defendants

[1994] B.C.J. No. 135

Vancouver Registry No. C925970 British Columbia Supreme Court Vancouver, British Columbia Newbury J. Heard: December 13 - 17, 1993. Judgment: filed January 24, 1994.

Counsel for the Plaintiff: Stephen Antle. Counsel for the Defendants: Patrice Abrioux.

[para1] NEWBURY J.:-- The plaintiff ("Marbel") claims damages for negligence and breach of contract against a lawyer, Mr. Pirani, and the firm by which he is employed, in connection with the aborted stratification of an apartment building in Vancouver. At least initially, the defendants' retainer by Marbel was a limited one to prepare a disclosure statement required under the Real Estate Act, R.S.B.C. 1979, c. 356, and attend to certain filings required under that statute and the Condominium Act, R.S.B.C. 1979, c. 61. Marbel selected Mr. Pirani on the basis of the low fee he was willing to charge for the service, but he was an experienced practitioner who had stratified several new buildings in the past. The client itself had not done a stratification before, although its principals (and here I refer to Mr. Mand and Mr. Randhawa, notwithstanding that they purport not to be directors or officers of Marbel themselves), had bought and sold a few pieces of residential property, and Mr. Mand was a licensed real estate salesman. The company had purchased the subject property, a bare lot on East Broadway Street, Vancouver, in 1988, together with architectural plans for a 16-unit apartment building. Under the principal direction of Mr. Mand, it had constructed the building in accordance with the plans, acting as its own contractor, administering the payment of subcontractors and suppliers, and obtaining the required permits and approvals directly from municipal authorities. On completion of construction in 1990, Marbel intended to stratify the building and sell the lots thus created to individual purchasers on a 'retail' basis. The Condominium Act

[para2] Speaking in very broad terms, the owner of property that is to be stratified and offered for sale must carry out filings with the Superintendent of Real Estate and the Registrar of Titles in the relevant Land Title Office ("LTO"). The developer begins by filing a strata plan in the office of the Superintendent, together with a disclosure statement prepared in accordance with the Real Estate Act and the Superintendent's policy statements. This document must be provided to all purchasers of strata lots, effectively serving the function of a prospectus. It states the rescission rights available to purchasers under s. 63 of the Real Estate Act and must contain a certificate signed by a solicitor, stating that he or she has reviewed the document with the developer. It must also have attached to it, inter alia, a 'Rental Disclosure Statement' in which the developer discloses any lease of strata lots in force or intended at the time a purchaser agrees to buy a strata lot. Evidently, once the disclosure statement has been received by the Superintendent, the developer may "market" the lots, although it may not complete a sale until the Registrar of Titles has accepted the strata plan for filing in the LTO.

[para3] If the building is a new one, section 8 of the Condominium Act requires that when the plan is filed in the LTO, it be accompanied by a certificate signed by a B.C. land surveyor. The certificate must state that the building "has not been occupied prior to the date of the certificate". Provided it is filed within 90 days of its date and the plan is otherwise in order, the Registrar accepts it for filing and proceeds to issue individual certificates of title representing the new strata lots, which may then be conveyed to individual purchasers. Given the language of section 8, it is not fatal to an application that a building becomes occupied during the 90-day period as long as it was not occupied prior to the date of the certificate, the stratification can proceed. I was advised that "occupied" may be interpreted broadly, such that even a transient stay by a night watchman or construction worker may preclude a surveyor from signing a certificate for purposes of section 8.

[para4] If on the other hand the building is being 'converted' i.e., if it was "occupied" at any time in the past section 9 of the Condominium Act requires that the approval of an "approving authority" also be obtained. In respect of property located in the City of Vancouver, the approving authority is the City Council. In deciding whether to approve a conversion, it must consider a host of factors, including the availability of rental accommodation in the area, the proposals of the owner for relocating persons occupying the building, and any other matters the authority considers relevant. It may approve the strata plan, refuse to approve it, or refuse to approve it until terms and conditions are met, and its decision is final. Once a plan has been approved, it is endorsed by the approving authority and may then be filed in the LTO.

[para5] Obviously, the fact that a building has been occupied entails much more uncertainty, and potentially more difficulty, for an owner who wishes to stratify than does a building that has not been occupied. Thus it is in the interest of the developer of a new building to proceed under section 8 if possible i.e., to obtain a certificate of non-occupation and file the strata plan in the LTO within 90 days. If the 90-day period expires before the filing is carried out, the certificate may be re-prepared and re-submitted, but as of the date of the surveyor's re-certification he or she must be satisfied that the building has remained unoccupied.

Dealings Between Marbel and the Defendants

[para6] In early 1990, Marbel's building on East Broadway was nearing completion. Without any legal advice, Mr. Mand retained a surveyor, Mr. James, to prepare the plan required for stratification. After inspecting the property, Mr. James certified on the second page of the plan that as at April 30, 1990 the building had not been previously occupied. There was no evidence that he had any particular discussion with Mr. Mand as to the significance of the certificate, or that he warned Mr. Mand that it would expire in 90 days' time. Mr. Mand knew, however, that a disclosure statement had to be filed with the Superintendent before strata lots could be marketed; that copies of the statement had to be provided to purchasers of the lots; and that the strata plan had to be accepted for filing in the LTO before Marbel could effect a sale. He wanted the filings in both the office of the Superintendent and the LTO to be done immediately, and began casting about for a lawyer for this purpose.

[para7] Mr. Mand first contacted Mr. Baria, the lawyer who had incorporated Marbel, but he advised that he had no experience in doing stratifications. Mr. Mand then referred to the 'Yellow Pages' and called a few lawyers for quotes as to their fees for the task at hand. Mr. Pirani's quote was the lowest \$650 in fees plus disbursements, which were initially calculated (incorrectly) at \$527 and Mr. Mand met with him on or about May 15. Mr. Pirani agreed to accept Marbel's retainer on the understanding that his firm would receive its disbursements in trust before expending them. Mr. Mand in turn made it clear that he wanted the filings done at the earliest possible time, since he was anxious to start marketing the strata lots right away.

[para8] At some point, either on May 15 or 16, Mr. Mand provided Mr. Pirani with the information needed for the disclosure statement and delivered the strata plan, complete with the surveyor's certificate and the required consent of the mortgagee of the property, to Mr. Pirani's office. Also on May 15 or 16 he delivered Marbel's cheque for \$350, covering the Superintendent's filing fees, to the law firm in trust.

[para9] Because Mr. Pirani was preparing to leave on vacation on May 17, he instructed his secretary, Ms. Naidu, to prepare the draft disclosure statement and to arrange on a rush basis for Marbel's directors Mr. Mand's mother and Mr. Randhawa's wife to sign the final version. Ms. Naidu prepared the document as instructed, using a precedent to which she was referred by Mr. Pirani. Mr. Mand accompanied Mrs. Randhawa to the law office to sign the document in the presence of a lawyer. Mr. Mohammedali, a partner of the defendant law firm, notarized Mrs. Randhawa's signature as secretary of Marbel and certified on the final page of the text that he had reviewed the statement with the "Developer" and that sections 1 and 3 were true and correct. Attached as a schedule to the disclosure statement was the Rental Disclosure Statement, which indicated, in terms that are obscure indeed, that none of the strata lots was under lease. Mr. Mand acknowledged in cross-examination that Mr. Mohammedali asked him in the course of the meeting to ensure that the "information part" of the statement was correct, although Mr. Mand deposed that he had not "paid attention" to the schedule. All the documents were signed on May 17.

[para10] As instructed by Mr. Pirani, Ms. Naidu proceeded immediately with the filing of the plan and the disclosure statement in the office of the Superintendent. She encountered an unexpected problem when a builder's lien was found registered against the property, but Marbel quickly provided the \$630 required to discharge it. The Superintendent issued his receipt on May 25 and returned the approved plans to the defendant law firm on May 31.

[para11] On June 4, Ms. Naidu telephoned Mr. Mand to confirm the first filing and to request another \$360 for the LTO disbursements. (In fact her earlier calculation of disbursements had understated the total by approximately this amount.) Mr. Mand, however, responded that there was now "no rush" to carry out the LTO filing, and that he would wait until Mr. Pirani's return from vacation to bring in the cheque. He assumed that once he had a purchaser, he could simply pay the LTO fees and that the certificates of strata title would be issued almost immediately an assumption that was incorrect, since six weeks normally elapses between the filing of the plan and the issuance of certificates of title. In accordance with his instructions, Ms. Naidu set the file aside to await Mr. Pirani's return in mid-June.

[para12] From this point on, the evidence of Mr. Mand and Mr. Pirani is seriously in conflict. Mr. Pirani testified that on his return to the office, he was surprised to hear that Mr. Mand had decided to delay the LTO filing. He says he instructed Ms. Naidu to make an appointment with Mr. Mand on his behalf and that Ms. Naidu made two or three appointments in July that Mr. Mand did not keep. There was no written record of such appointments or of the lawyer's instructions in this regard. Ms. Naidu, whose recollection of the events was generally poor, was quite certain that she had reached the client two or three times by telephone and that he told her he would bring in the funds "shortly". He did not do so. She then recalled complaining about Mr. Mand's unavailability to Mr. Pirani, who she deposed was "harassing" her about the file. Mr. Pirani instructed her to phone and arrange a lunch with Mr. Mand, by which he hoped to "tempt" the client into appearing and giving instructions to proceed. Ms. Naidu recalled setting up the appointment in late July as she was preparing to begin her pregnancy leave.

[para13] Mr. Mand for his part denied that anyone from the firm contacted him in June or July. He did recall that a luncheon date was arranged for August 8, but that due to other business pressures he had cancelled it. The evidence then again diverges: Mr. Mand testified that Mr. Pirani phoned him in the display suite of the building in late August and asked what Marbel was doing with the property. He deposed that he told the lawyer that since the market was "sour" and no offers whatsoever had been received on the apartment units, Marbel was considering renting the building, although it still wished to proceed with the stratification. He recalled Mr. Pirani's requesting that Mr. Mand bring him in the required funds, whereupon he would proceed with the LTO filing.

[para14] Mr. Pirani on the other hand testified that after the cancellation of the August 8 luncheon appointment, he became rather frustrated and ceased trying to contact Mr. Mand, knowing that the client would have to call once a sale was imminent. The lawyer categorically denied any conversation in late August or at any other time prior to December 1990 which would have alerted him to Marbel's change in plans with respect to the property. In his testimony, it was not until Mr. Mand turned up in his office without an appointment in late December, that Mr. Pirani was told Marbel had been obliged to rent suites in the building beginning October 1, due to a "financial crisis". Mr. Pirani sympathised with his client's problems, but even at this point did not "twig" to the fact that the occupation of the building by tenants had effectively precluded stratification under section 8 of the Condominium Act. He recalled that the purpose of Mr. Mand's visit had been to request the return of the strata plan, since (he said) Marbel had decided not to stratify after all. Mr. Pirani had never encountered this situation before, and told Mr. Mand he wished to clear the release of the plan with the Superintendent's office, which still had an open file on the property. Mr. Pirani suggested Mr. Mand return in a few days to pick up the plan. Upon Ms. Naidu's return to the office in January, 1991 he instructed her to check with the Superintendent's office and to prepare an amended bill for Marbel, to be handed to Mr. Mand with the plan. A note to file by Ms. Naidu to this effect was entered into evidence. Mr. Pirani himself did not make or keep any notes of his conversations with Mr. Mand or follow up with his secretary to see that his instructions were carried out.

[para15] Mr. Pirani deposed that he heard nothing further about the file until Ms. Naidu came to him in February, complaining that Mr. Mand was "hassling" her as to why the strata plan had not been filed. The lawyer said he "dropped everything" because she was upset, and telephoned Mr. Mand to remind him that a few weeks earlier, he had instructed the firm not to proceed with the stratification and to return the plan. This conversation was recorded in a note to file by Ms. Naidu dated February 19, which she testified was taken from what Mr. Pirani had told her. The note indicates Mr. Mand's instructions to proceed immediately with the LTO filing. For this purpose he delivered Marbel's cheque for \$650, dated March 1, to the firm.

[para16] There then followed in quick succession the attempted filing of the strata plan in the LTO, the LTO's rejection of the document because of the expiry of the 90-day period, and Mr. Pirani's realization that it was now impossible to proceed under section 8. Again, the lawyer's testimony diverges from that of the client. Mr. Pirani stated that upon being advised of the rejection, either he or Ms. Naidu telephoned Mr. Mand to advise of the problem, and that he (Mr. Pirani) contacted both Mr. James and City Hall to determine if there was any other way to proceed short of a conversion under section 9. (Mr. Pirani had never carried out a conversion.) The lawyer was told that section 9 was the only other route available but that since the building was new, the approval process should not be too difficult. On March 14, Mr. Pirani wrote to Marbel as follows:

"We have now discovered that the Plans cannot be filed as the surveyor's certificate has expired and the Surveyor indicates that a new certificate cannot be given as the apartments are now occupied. He indicates that you would now have to apply to the City of

Vancouver's approving officer who will wish to know what arrangements you will be making for the existing tenants on [sic] your building and you may have to pay the moving costs, etc. before the approving officer may grant his permission.

We suggest that you deal with this matter and if we can be of any assistance we will be happy to help you. In the meantime, we enclose your Strata Plans herewith which we understand from the Superintendent of Real Estate may be returned to you."

[para17] Mr. Mand's evidence was that Mr. Pirani phoned him in early March to say that the surveyor's certificate had to be re-done, and that he (Mr. Mand) then was told by Mr. James that this was impossible in light of the occupation of the building. Mr. Mand says that he then phoned Mr. Pirani and asked why he had not been advised about the expiry of the certificate, and that Mr. Pirani replied "I didn't know" and suggested he investigate the alternate route by enquiring at City Hall. This version does seem more consistent with the wording of the lawyer's letter, which may be read as implying Mr. Pirani had been unaware of the 90-day time limit and had just "discovered" that the occupation of the building precluded a fresh certification. On the stand, however, Mr. Pirani strongly denied that he had been unfamiliar with sections 8 and 9 and said the letter was simply badly worded.

[para18] Mr. Mand did proceed to make enquiries at City Hall as suggested by the letter. He testified that Ms. Higginson of the Planning Department advised him in late March that the vacancy rate in the area of Marbel's building was very low, that the consent of all tenants to the conversion would be required, and that the process would be very difficult. Ms. Higginson, who was called as a witness by the defendants, did not recall speaking with Mr. Mand specifically. She said that it was and is not her practise to give any opinion to members of the public concerning the likelihood of success of conversion applications. She might have indicated that it is helpful for a developer to have more than two-thirds of tenants' approvals, but said she would not have advised that the consent of all tenants was required. There was also evidence that vacancy rates in the area were not particularly low in early 1991, and that of 14 conversion applications received by the City in that year, all but one were ultimately approved.

[para19] By February 1991, Marbel had begun advertising the building as a whole for sale. Mr. Marbel said that initially, the building was marketed as stratified (on the assumption that only a quick LTO filing remained to be done) but that on finding it could not be stratified under section 8, the company had to change its approach and attempt to sell it as non-stratified rental property. I will deal below with Mr. Mand's testimony regarding the reduction in market value alleged by Marbel, but for purposes of this narrative I note here that on March 23, it entered an interim agreement for the sale of the property for \$1,300,000. The purchasers, who were at arm's length with Marbel, completed the transaction on April 29, 1992. A few months later, they applied to City Council for the conversion of the building into strata lots under section 9. The application proceeded fairly smoothly and final approval was obtained in early 1993.

[para20] The plaintiff, however, having sold the East Broadway property at what it alleges was a lower price than it would have obtained for a stratified building, claims the difference in value from the defendants. It contends that Mr. Pirani was negligent in failing to advise Mr. Mand of the 90-day time limit imposed by section 8 and to warn of the consequences of allowing the building to become occupied before the surveyor's certificate was accepted for filing in the LTO.

Credibility

[para21] I have recounted the discrepancies in the evidence of Mr. Pirani and Mr. Mand at some length because I have frankly found them difficult to resolve and am left with the conclusion that neither witness gave evidence that was totally reliable. Mr. Pirani's ability to recall was severely hampered by his failure to keep records of appointments, meetings or telephone conversations. He testified that he does not keep notes because his handwriting is very poor and that if something significant requires a note, he normally dictates one to be typed. Unfortunately, Mr. Pirani did not regard his instructions from or conversations with Mr. Mand as sufficiently important to record in that way. Assuming that if he had thought about the matter, he would have realized in February that the surveyor's certificate did not comply with section 8, the fact that this did not dawn on him until the plan was actually rejected by the LTO, supports the inference that Mr. Pirani was overly busy and poorly organized. Nevertheless, my overall impression of Mr. Pirani was that he was basically honest and that he did his best to testify forthrightly as to what he could recall of his dealings with Mr. Mand.

[para22] I have a different view of Mr. Mand's evidence. His memory was remarkably selective and, under able cross-examination by Mr. Abrioux, he prevaricated on many points. Many aspects of his testimony did not ring true. One example is his testimony that he received a call from Mr. Pirani "out of the blue" in late August, 1990 at which time he took the opportunity to advise that Marbel was considering renting the units. If as Mr. Mand deposed, Mr. Pirani told him in the course of this conversation to "bring in the money", and if as Mr. Mand testified Marbel was not in financial difficulty, it seems strange that he did not do so until the following February. Mr. Mand's testimony concerning the call in August was not strengthened by the evidence of Mr. Grewall, an employee of Marbel, who testified that he overheard one side of a telephone conversation between Mr. Mand and another party that may or may not have been Mr. Pirani.

[para23] The most telling indication of Mr. Mand's credibility came in the course of his evidence concerning the diminution in value of the building as a result of the inability to stratify under section 8. He testified in chief that having failed to obtain any offers for individual strata lots, Marbel put the whole building on the market in late January or early February, 1991 as a stratified rental property for a price of \$1,488,000. It received no offers. Mr. Mand said that in March, after he had learned of the problem with the surveyor's certificate and consulted with the planning department at City Hall, he dropped the price to \$1,448,800, a reduction of \$40,000. Again no offers were received, and again he dropped the price to \$1,398,000, ultimately accepting \$1,300,000. In cross-examination, Mr. Mand was adamant that these figures were correct and in particular that the property had not been offered for sale in January, 1991 for less than \$1,448,800.

[para24] However, Mr. Abrioux produced two newspaper advertisements dated January 19 and 26, 1991 (i.e., prior to Marbel's becoming aware that it could not stratify under section 8), asking \$1,398,000 for the property. Mr. Mand then acknowledged that Marbel had placed these advertisements, but denied having intended to deceive the Court because he had known they were a matter of public record and could be easily located by the defendants' counsel. I find protestations of this kind very lame indeed and must say that on this point and overall, I was left with serious reservations as to Mr. Mand's credibility. In particular, I am not persuaded that he spoke with Mr. Pirani in August as alleged, or that his conversation with Ms. Higginson was as he testified.

Scope of Retainer

[para25] These findings, however, do not answer the plaintiff's allegation that Mr. Pirani was under a duty to inform Marbel, prior to the expiration of the 90-day period, of the fact that the surveyor's certificate should be filed by that date, or of the consequences of allowing the building to become occupied. The existence of a duty on Mr. Pirani's part to give such advice

depends at least in part on the nature and extent of his retainer. As was noted in a leading English case, *Midland Bank Trust Co. Ltd. v. Hett, Stubbs and Kemp* [1978] 3 All E.R. 571 (Ch. Div.):

"There is no such thing as a general retainer in that sense. The expression 'my solicitor' is as meaningless as the expression 'my tailor' or 'my bookmaker' as establishing any general duty apart from that arising out of a particular matter in which his services are retained. The extent of his duties depends on the terms and limits of that retainer and any duty of care to be implied must be related to what he is instructed to do." [at 583]

Thus it has been held in England that a solicitor retained to draft a will was not under a duty to advise that it would be invalidated by marriage unless he knew that marriage was a possibility (*Hall v. Meyrick* [1957] 2 Q.B. 455); and that a solicitor retained to advise on the tax implications of exercising an option was not bound to consider the validity of the option (*Midland Bank, supra.*) [para26] At the same time, the fact that the solicitor's skill and knowledge are being sought by a client means that the solicitor must not allow his client to define the retainer unilaterally, in ignorance of material risks of which the solicitor is or should be aware. This is particularly so when the client is unsophisticated. To quote from another English case, *County Personnel Ltd. v. Pulver & Co.* [1987] 1 All E.R. 289 (C.A.):

"The client is entitled to expect the exercise of a reasonable professional judgment. That is why the client seeks advice from the professional man in the first place. If in the exercise of a reasonable professional judgment a solicitor is or should be alerted to risks which might elude even an intelligent layman, then plainly it is his duty to advise the client of these risks or explore the matter further." [at 295]

(See generally the discussion at pp. 22-29 in *Dugdale and Stanton, Professional Negligence* (2nd ed., 1989)).

[para27] Mr. Pirani clearly regarded his retainer as a restricted one. In discovery he acknowledged that he considered that his obligation to Marbel had been only to draft the disclosure statement and carry out the filings, and that advising on the "risks of the procedure that Marbel had chosen to follow" was not part of his retainer. This may well be all that Mr. Pirani intended to undertake as his retainer after all, the fee of \$650 likely left little room for anything else and from Mr. Mand's testimony I think it likely that when he first contacted the lawyer, he framed the task to be done in very limited terms. Indeed I suspect that had Mr. Pirani sat down with him at their first or second meeting and begun to describe the nuances of the stratification process and the implications of Mr. James' certificate, Mr. Mand would have waved such advice aside as unnecessary and unwanted. From the viewpoint of both solicitor and client, there was no reason to foresee that the property was likely to become occupied before the filings would be done or even to expect that the 90-day time limit would become relevant. Marbel was already preparing its 'display suite' for marketing in the building, and Mr. Pirani had instructions to proceed on a rush basis.

[para28] However, when Mr. Mand decided in May that there was "no rush" to complete the filings, and several weeks dragged on without Mr. Pirani's being able to contact Mr. Mand, the situation changed. The expiry date began to become relevant and there arose the risk that at the very least, the certificate would become unusable. The client was unaware of that risk or any other risk it was running by delaying matters; and the lawyer, having the greater skill and knowledge, became bound to make reasonable efforts to avoid damage to his client resulting from those risks. As Mr. Pirani acknowledged on the stand, a simple letter in July or August of 1990 would have sufficed for this purpose.

Standard of Care

[para29] I regard a finding of negligence on Mr. Pirani's part, then, as one that follows from an application of the normal principles of negligence law i.e., the existence of a duty of care, the foreseeability of injury, and the failure of the defendant to take reasonable care to avoid such injury rather than from a finding of accepted practise procedures or standards as such. For this reason, I do not place a great deal of reliance on the expert evidence that was tendered by Mr. Antle on the plaintiff's behalf in the form of an opinion letter prepared by Ms. Vogt, a solicitor who practices with a large firm in Vancouver and specializes in condominium development. Ms. Vogt opined that a competent and diligent solicitor accepting the instructions provided to the defendants would have checked and diarized the expiry date of the surveyor's certificate before forwarding the plan to the Superintendent's office; that before "accepting instructions" not to proceed with the LTO filing, such a solicitor would have discussed the consequences of the time limit with the client and for that purpose would have continued efforts to contact the client by telephone; and that if such efforts were not successful, the competent solicitor would have set out his or her advice to the client in writing concerning the consequences of expiry and the risk of the building becoming occupied after the expiry date. She also testified that had she been consulted by the plaintiff in the general circumstances of this case, she would have quoted a fee of about \$2,000.

[para30] With all due respect to Ms. Vogt, I must say that her testimony reminded me of the comments of Oliver, J. in *Midland Bank, supra*:

"I must say that I doubt the value, or even the admissibility, of this sort of evidence, which seems to be becoming customary in cases of this type. The extent of the legal duty in any given situation must, I think, be a question of law for the court. Clearly, if there is some practice in a particular profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage, evidence of that can and ought to be received. But evidence which really amounts to no more than an expression of opinion by a particular practitioner of what he thinks he would have done had he been placed, hypothetically and without the benefit of hindsight, in the position of the defendants is of little assistance to the court, whilst evidence of the witnesses' view of what, as a matter of law, the solicitor's duty was in the particular circumstances of the case is, I should have thought, inadmissible, for that is the very question which it is the court's function to decide." [at 582]

I do not go so far as to conclude that Ms. Vogt's opinion was inadmissible in this case, but like Oliver, J. I suggest that a publication or checklist widely circulated in the legal profession, indicating a standard "sanctioned by common usage", would have been more useful.

[para31] I do wish to deal, however, with the suggestion made by the defendants' counsel that the applicable standard of care in a case of alleged negligence on the part of a solicitor involves at least an element of subjectivity i.e., that a court must take into account the geographical location and type of practice of the particular solicitor and by implication, that the opinion of a lawyer practising in a large downtown firm is irrelevant to the formulation of a standard applicable to a lawyer practising in a small firm not located in the downtown area. Mr. Abrioux noted, for example, *Stronghold Investments Ltd. v. Renkema* (1984) 51 B.C.L.R. 189 (B.C.S.C.), in which Hinds, J. (as he then was) applied to the defendant solicitor the standard of care of "an ordinarily competent lawyer practising in Kamloops, British Columbia, in 1980"; and *Terra Vista Contractors Ltd. et al. v. Regan et al.*

(Courtenay Registry No. 82/82, dated June 22, 1984), in which Millward, J. found that the defendant solicitor had exercised the degree of skill and care required of a "reasonably competent solicitor in a small town in British Columbia" and had therefore not been negligent.

[para32] At first blush, this approach may have some appeal. Many might argue that it is unfair to judge a general practitioner, working in a small firm and undertaking Marbel's retainer for \$650, by the standard of a "condominium specialist" in a large firm who would have charged the client \$2,000 for the work. But the logical extension of such reasoning would be to adjust the standard of care in every case according to the particular defendant (and perhaps the particular fee) in question. That approach has been clearly rejected in England (see Dugdale and Stanton, *supra*, at 236-7) and by the Supreme Court of Canada in the leading Canadian decision, *Central Trust Co. v. Rafuse* (1986) 31 D.L.R. (4th) 481. In that case, a "general practitioner" in Nova Scotia had been retained by a lending institution to secure a loan to a corporate borrower that was to be used in connection with the purchase of shares in the capital of the borrower. The solicitor was unaware of legislation in that province prohibiting a company from giving financial assistance in connection with the purchase of shares in its capital. (In British Columbia, see s. 127 of the *Company Act*, R.S.B.C. 1979, c. 59.) As a result of the legislation, a mortgage prepared by the solicitor as security for his client's loan was found to be void. At the trial of the lender's claim against the solicitor, the judge drew a distinction between specialists and non-specialists, and declined to consider the evidence of one of the plaintiff's expert witnesses who was a "specialist in commercial real estate matters". It was held that because a non-specialist could not be expected to know of the statutory restriction in question, and the transaction in question had been an unusual one, the solicitor had not been negligent.

[para33] The Supreme Court of Canada disagreed. LeDain, J. for the Court formulated the applicable standard as follows:

"An attorney is expected to possess knowledge of those plain and elementary principles of law which are commonly known by well-informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques. See *Charlesworth and Percy on Negligence*, 7th ed, (1983), pp. 577-8 to similar effect, where it is said: 'Although a solicitor is not bound to know the contents of every statute of the realm, there are some statutes, about which it is his duty to know. The test for deciding what he ought to know is to apply the standard of knowledge of a reasonably competent solicitor.' The duty or requirement of professional competence in respect of knowledge is put by Jackson and Powell, *Professional Negligence* (1982), at pp. 145-6, as follows: 'Although a solicitor is not bound to know all the law, he ought generally to know where and how to find out the law in so far as it affects matters within his field of practise. However, before the solicitor is held liable for failing to look a point up, circumstances must be shown which would have alerted the reasonably prudent solicitor to the point which ought to be researched'..." [at 524; emphasis added].

The Court held that although a solicitor of reasonable competence might not have known of the restriction on corporate borrowing, such a solicitor would have checked the legislation to see if the proposed transaction was restricted in any way. The fact that a company's capacity to borrow could be limited by the statute was said to be "such basic knowledge that a reasonably competent solicitor must be held to possess it, whether he is a general practitioner or a specialist." (at 526). Having undertaken to protect his client's interest in connection with an unusual transaction, the solicitor was held to an objective standard of reasonable competence which was said to be the same whether it arose "as an implied term of the contract or retainer" or "as a matter of common law from the relationship of proximity created by the retainer." (at 525).

[para34] From this I take it that any solicitor taking on a task for a client must bring reasonable care and skill to that task, regardless of his geographical location and practising environment. In other words, the extent of the solicitor's duty is determined by the work undertaken, rather than by his or her particular circumstances. Further, and subject to any different standard of care imposed by the terms of the retainer, the standard is only one of reasonable competence: it is not a standard of perfection - which usually seems eminently reasonable in hindsight - or of strict liability. To quote yet again from *Midland Bank*, *supra*:

"Now no doubt the duties owed by a solicitor to his client are high, in the sense that he holds himself out as practising a highly skilled and exacting profession, but I think that the court must beware of imposing on solicitors, or on professional men in other spheres, duties which go beyond the scope of what they are requested and undertake to do. It may be that a particularly meticulous and conscientious practitioner would, in his client's general interests, take it on himself to pursue a line of enquiry beyond the strict limits comprehended by his instructions. But that is not the test. The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession, and cases such as *Duchess of Argyll v. Beuselinck*, *Griffiths v. Evans* and *Hall v. Meyrick* demonstrate that the duty is directly related to the confines of the retainer." [at 583]

In this regard, I do agree with Mr. Abrioux that insofar as Ms. Vogt may be regarded as a "particularly meticulous" practitioner, her normal practice is again of limited assistance in formulating the standard of reasonable competence.

[para35] Applying that standard, however, I find that when Mr. Mand decided there was "no rush" to proceed with the LTO filings, a reasonably competent solicitor would have considered the date of expiry of the surveyor's certificate and, when he was unable to contact his client, would have written to advise him of it and the significance of proceeding under section 8 if possible. It was certain that the certificate would 'expire' in late July and since Mr. Pirani knew or should have known that none of the strata lots had sold, the decision to rent was a foreseeable possibility. Unfortunately, when his efforts to contact Mr. Mand by phone failed in June and July, 1990, Mr. Pirani simply set the file aside and turned to other matters. Even in February, 1991 when he finally did receive instructions to proceed with the LTO filing, he failed to turn his mind to the validity of the certificate, which had long since expired. By that time, of course, the realization would have come too late.

Contributory Negligence

[para36] I must also consider whether warning bells should have sounded in Mr. Mand's mind in May, 1990 when Marbel decided to delay the stratification, or in October when Marbel began to rent strata lots. As indicated above, Mr. Mand had at least some knowledge of and experience in the real estate field. In order to obtain his salesman's license in 1988, he had taken a correspondence course administered by the Faculty of Commerce and Business Administration of the University of British Columbia, in cooperation with the Real Estate Council of British Columbia, which reviewed various aspects of real estate development and transactions. Chapter 7 of that course, entitled "Condominiums and Cooperatives in British Columbia" informed students as to the concept of stratification and the general rules applicable to new condominium developments and the conversion of existing buildings to strata title. The chapter contained the warning that conversions must be approved by the appropriate "approving authority" and listed the factors that such authorities may consider under section 9 of the *Condominium Act*. It noted that an owner who obtains the necessary approvals for a conversion must comply with the provisions of the *Residential Tenancy*

Act, R.S.B.C. 1984, c. 15, and with the prospectus and disclosure requirements of the Real Estate Act outlined in Chapter 2 of the course. Chapter 7 also referred to the rental disclosure requirements applicable to owner-developers who lease strata lots.

[para37] Mr. Mand acknowledged at trial that he had been aware of the existence of the Superintendent of Real Estate and the LTO, the requirement for a disclosure statement to be accepted by the Superintendent before Marbel could market the units, and requirements for disclosure to prospective purchasers of the units. Although he purported to have been unaware of the contents of the surveyor's certificate, he had attended to obtaining it and the strata plan without any assistance from Mr. Pirani; and although he said he had "no idea" of the Rental Disclosure Statement attached to the disclosure statement, he was with Mrs. Randhawa when she executed the documents and confirmed to Mr. Mohammedali that the information contained therein was correct.

[para38] Armed with the knowledge he did have, I find that even if Mr. Mand had not been specifically aware of the 90-day expiration provision in section 8 of the Act, some question should have arisen in his mind when Marbel began to consider renting out apartment suites rather than selling them. A plaintiff is required to take reasonable steps to protect its interest. In this case Marbel should have done so by seeking legal advice. Had Mr. Mand made a simple phone call to Mr. Pirani anytime prior to October 1990, I expect the lawyer's attention would have focussed on the section 8 problem and the correct advice would have been given. The surveyor's certificate could have been redone and filed. Just as Mr. Pirani acted negligently in setting aside Marbel's file and waiting for Mr. Mand to contact him, the plaintiff through Mr. Mand was negligent in failing to consult its solicitor about a change in plans running contrary to its initial instructions. I apportion the plaintiff's contribution to its own damages at 50%.

Measure of Damages

[para39] The plaintiff filed two valuations of the East Broadway property prepared by Mr. Anderson, a qualified appraiser, as of March 31, 1991 one on the basis of its sale as 16 individual stratified lots, at \$1,492,700; and the other on the basis of its sale as a stratified rental property, at \$1,407,000. (I understand that March 31 was chosen because it approximates the date on which the plaintiff first became aware that it could not subdivide the property under section 8 and was therefore the earliest date at which it could have mitigated its loss (see *Beiser v. A Law Firm* (1984) 53 B.C.L.R. 305 (B.C.S.C.)), and counsel for the defendants agreed that this was the appropriate date for the assessment of damages.) The plaintiff claims damages of \$107,000, being the difference between its actual sale price of \$1,300,000 and the \$1,407,000, on the theory that the value of the unstratified building must have been somewhere between the actual sale price and \$1,492,700.

[para40] There are some problems with the application of this logic. First, Mr. Mand testified in chief that having failed to obtain any offers for suites in the building, Marbel decided to sell the whole as a (stratified) rental property for a price of \$1,488,000. It received no offers. He testified that in March, after becoming aware that the building could not be stratified under section 8, Marbel then reduced its price to \$1,448,800 a drop of \$40,000. Again, Marbel received no offers and reduced the price further. Mr. Abrioux contended that even if one accepted this testimony (which as earlier noted was substantially weakened by the later evidence of the January advertisements), the plaintiff's loss was at most \$40,000, because that was Mr. Mand's own estimate of the drop in value resulting from the inability to stratify easily. I am not convinced that these figures should be given the weight contended for by Mr. Abrioux after all, Marbel's estimates of the market value of the property were hardly infallible. However, Mr. Anderson did acknowledge at trial that he had not been aware of the \$1,398,000 price actually asked by Marbel in January, and that the best evidence of market value is what a willing vendor will accept from a willing purchaser.

[para41] When cross-examined concerning the January advertisements, Mr. Mand said that even though Marbel received no offers at that price, it would not have accepted \$1,300,000 for the stratified building. In his words, "We may have gotten closer to our asking price". Of course, how much the plaintiff would have obtained is a matter of speculation, since no other offers were ever received. Mr. Mand indicated elsewhere in his evidence that a 5 to 10 per cent difference between an asking and selling price is not unusual.

[para42] Further doubt was cast on the plaintiff's calculation of its damages by a critique of Mr. Anderson's appraisals prepared for the defendants by Mr. Whiteley, also a qualified appraiser. In his opinion, the expenses assumed in Mr. Anderson's appraisal of the building as a rental property obviously an important factor where the "income approach" has been used, as it was by Mr. Anderson may have been understated. In addition, the capitalization rate of seven per cent used by Mr. Anderson was at least at the low end of the comparable range, and a rate between 7.2 and 7.5 percent would appear more reasonable, based on Mr. Whiteley's "comparables". If all other factors remained unchanged, these rates would result in a value between \$1,313,000 and \$1,368,000, the mid-point of which is approximately \$1,340,000.

[para43] Further, while not disputing the primacy of the income approach in an appraisal of a rental building, Mr. Whiteley noted that the use of the direct comparison approach to value is also useful; as he stated, "a prudent purchaser will not typically pay more for the property than the price required to purchase an equally desirable property available under similar circumstances." On a review of Mr. Anderson's comparables, at least one of which he found not to be appropriate, Mr. Whiteley calculated that solely on a direct comparison approach, the value of the building in March 1991 would have been between \$1,280,000 and \$1,320,800, the mid-point of which is \$1,300,000. Then, using a combination of the two approaches, Mr. Whiteley concluded in summary that a range of between \$1,300,000 and \$1,361,000 would have been more appropriate than the \$1,407,000 stated by Mr. Anderson.

[para44] The defendants contend that the plaintiff's claim should be dismissed because there is no evidence of a loss at all, or that at best, the evidence adduced by the plaintiff does not establish a loss on the balance of probabilities. I agree that in the absence of evidence from the actual purchasers of the property as to the value (if any) they placed on stratification, the determination of the plaintiff's damages is to a large degree speculative. However, the difficulty of selecting a figure should not deprive the plaintiff of its remedy altogether. I find that the range of values suggested by Mr. Whiteley is clearly preferable to the figures reached by Mr. Anderson, and since one figure must be chosen as representing the value of the entire building, stratified and rented, the mid-point of Mr. Whiteley's range, or \$1,330,500, seems appropriate. Accordingly, I fix the diminution in value suffered by Marbel as a result of the inability to stratify under section 8 of the Condominium Act, at \$30,500.

Mitigation of Damages

[para45] I have already described the difficulties in Mr. Mand's evidence as to what he was told at City Hall regarding the likely outcome of an application under section 9. But although he exaggerated the impression of difficulty he was given by Ms. Higginson, the fact remains that proceeding under section 9 presented considerably more uncertainty and delay than proceeding under section 8. Had Marbel been in a better financial position, it might have accepted the cost of that delay and uncertainty and

applied to convert the property. But the company was obliged to do only what was reasonably necessary to mitigate its loss it was not bound to put itself in financial jeopardy. I am not persuaded that the defendants have discharged their onus of proving that Marbel acted unreasonably in proceeding with the sale of the property as unstratified and letting the purchasers take the risk that an application under section 9 would fail or would involve unacceptable expense and delay.

[para46] In the result, the defendants are jointly and severally liable for one-half of the plaintiff's loss of \$30,500, together with court order interest from March 31, 1991 at the Registrar's rates. Marbel will also have one-half of its costs calculated at Scale 3.

[para47] Before closing, I wish to compliment both Mr. Antle and Ms. Abrioux on their able presentation of the evidence and in particular on their cross-examinations. Each did a highly competent job of representing his client in what I, at least, found to be a difficult case.

NEWBURY J.

CBR# 165

Suzanne Legault, Claimant, and John Torcan and Victoria Torcan, Defendants, and Strata Corporation K-418, Third Party

[1993] B.C.J. No. 2647 Kamloops Registry No. 24364 British Columbia Provincial Court Kamloops, British Columbia Gordon Prov. Ct. J. Heard: October 15, 1993. Judgment: filed November 17, 1993.

D. Stratmoen, on behalf of the Claimant. S. Donegan, on behalf of the Defendant. P. Sandhu, on behalf of the Third Party.

[para1] GORDON PROV. CT. J.:-- In this action, Ms. Legault claims against the Torcans, in the alternative, for either fraudulent misrepresentation or negligent misrepresentation. While there is some evidence before the Court (most noticeably the opinions of Mr. Aubrey and Mr. Halliday, and the fact the defendants placed stockings over certain of the heating/air conditioning outlets) which supports the claim in fraud, the defendants have each taken the stand and sworn that prior to the sale they had no knowledge of the actual problem which we now know to exist in the ducts within this unit. It is well established law that where a claim of fraud is advanced, considerable evidence in support of it must be adduced if it is to succeed. In this case I have no reason to disbelieve what the defendants have said and the claim under this heading must fail.

[para2] Next, it is argued that the defendants were aware of problems with the ducts such that a reasonable person would have known the system was faulty, and that, as a result, the defendants are guilty of "constructive fraud". In this regard it was argued that in placing stockings over certain of the outlets and doing no more, the defendants were being wilfully blind to the dust and dirt problem that is the subject of this action. The use of the stockings, however, has been accounted for in the defence case. It turns out they were set in place to keep flying ants from entering the residence. Again, I am not satisfied that "constructive fraud" has been established to the necessary extent.

[para3] This leaves for consideration whether or not the defendants are guilty of negligent misrepresentation and, as a result, liable to the claimants in damages.

[para4] The essential facts in this matter are these:

a) Even before they attended at the property, Ms. Boswell, the realtor, knew that Ms. Legault was concerned to know the state of the heating/air conditioning system and its ductwork;

b) that after Ms. Boswell and Ms. Legault had inspected the unit, Ms. Legault asked Vicky Torcan as to the state of the heating/air conditioning system and its "pipes" and in reply received the unequivocal response, it's fine" or "everything's fine". This was in July of 1992;

c) the claimant took possession August 1, 1992. She was on sabbatical and largely out of town for the following month. On or about September 7th she turned on the heating/air conditioning unit for the first time and discovered that great quantities of dust and dirt were emitted from most of the ducts. The Court has viewed a video showing just how much debris is deposited in the livingroom and bathroom when the heating system is in operation and it can be said the situation is one that no reasonable person should have to tolerate;

d) Ms. Legault acted promptly in having the source of this problem investigated and identified. It turns out that the bottom of the ducts, to about three out of the eight outlets in her single-floor condominium unit, have been eaten away by rust. This condition applies at least for as far back as an arm can extend by reaching down and through the duct in question. How much further it goes is open to question. The result is that when the furnace or air conditioning unit is activated, the sand and clay, which now constitutes the bottom of the air duct, is stirred up and blown into the unit.

e) Mr. and Mrs. Torcan took the stand in their own defence. They bought the unit in December of 1989 and said that they were generally happy with the unit while they lived there. Certain incidents or observations were, however, admitted to by them:

i) after the furnace had been working on an off- and-on basis for about one week, a "light layer of silt" would have formed around the air vents. This was noticed in the winter of 1989/90. Obviously, the condition persisted and, if anything, got a little worse over the following months and years;

ii) in approximately November of 1990, Mrs. Torcan had the heating ducts professionally examined at the end where they connect into the furnace and was advised that they were dirty and in need of cleaning;

iii) in October of 1991, flying cornfield ants began escaping in large numbers from the heating vents into the unit. The situation was examined by Jake Driedger who was familiar with the situation and who explained that while the ants could not be eliminated, stockings placed over the inside of the vents would prevent them from entering into the residence. The defendants did make mention of an "ant problem", which had been remedied, on the written disclosure form filed with their real estate agents; but the "problem" was not related on the form to the ductwork as it should have been;

iv) at some point, Mrs. Torcan noticed the heat coming from the vent under the kitchen sink was much hotter than the air coming from other vents throughout the unit.

[para5] Each of the aforementioned matters relate to the state and performance of the heating/air conditioning unit and its associated ductwork. I am satisfied that, at least in total, these matters ought to have put Mrs. Torcan on notice that everything to do with the heating/air conditioning unit and its ductwork was not "fine". Her statement to this effect did not correspond with the truth of the matter and I am satisfied that her statement was made recklessly and without regard to the truth.

[para6] Knowing as she did about these features to the heating/air conditioning system, Mrs. Torcan was under a duty at least to use more cautious wording in her response to Ms. Legault's inquiry. For instance, she might have mentioned these facts or certain of them and then said, "but other than that, it's fine" -- or she might have said, "As far as we know, it's okay."

[para7] But in stating categorically "it's fine", the defendant must have understood the claimants would rely on her assertion in this regard and undertake no further investigation into the matter.

[para8] I am satisfied the defendants' statement amounted to a negligent misstatement which the claimant relied on and which prompted them to enter into the contract to purchase the condominium unit.

[para9] As a result, the claimants are entitled to succeed against the defendants.

[para10] The claimant is of course entitled to get what she bargained for when she agreed to buy this unit. That included a heating and air conditioning system. There are only two ways of dealing with the aforementioned situation and still leave the unit with air conditioning. The first of these is to jackhammer out the cement floor to her unit where it lies over the underground ductwork, to remove the old corroded ductwork and install new in its place. It is estimated this will cost \$8,000. Undoubtedly, Ms. Legault will have to vacate her unit for about one week while work is in progress.

[para11] The other method is to shut off the existing ducts and to install ducts in the walls, beams and ceiling space associated with the unit. As mentioned in Mr. Owen's letter to Mr. Aubrey of October 8, 1992, however, there are certain problems with this approach and the claimant's unit would be substantially altered as a result. The estimate for this work is \$5,000.

[para12] With the aforementioned in mind, I am satisfied the claimant's damages here are \$8,500.

THIRD PARTY CLAIM:

[para13] The defendants have filed a third party notice in these proceedings claiming that responsibility for condition of the ductwork rests with Strata Corporation K-418. In this regard the defendants rely on the definition of common property as set out in s.1, the interpretation section, of the Condominium Act R.S.B.C. 1979, Chap. 61:

"Common property" means so much of the land and buildings comprised in a strata plan that is not comprised in a strata lot shown on the strata plan, and includes pipes, wires, cables, chutes, ducts or other facilities for the passage or provision of water, sewage, drainage, gas, oil, electricity, telephone, radio, television services, garbage, heating and cooling systems and other services contained within a floor, wall or ceiling of a building shown on the strata plan, where the centre of the floor, wall or ceiling forms the common boundary of a strata lot with another strata lot or with common property;"

[para14] Basically, there are two arguments. The first is that as in this particular case, the heating/air conditioning ducts are not within the particular strata lot; they qualify as common property and secondly, that the ducts are "... contained within a floor ... where the centre of the floor ... forms the common boundary of a strata lot ... with common property."

[para15] In this case, the heating/air conditioning ducts run from the heating/air conditioning unit, which is located within the claimant's strata lot to the outlets or registers - - all of which are located within the unit. This strata unit is located on the ground level with two similar units above it. The ducts for the claimant's unit run in the ground and below the cement slab which constitutes the sub-floor to the unit. Section 34(1)(d) of the Condominium Act reads as follows:

"34. (1) The strata corporation shall (d) keep in a state of good and serviceable repair and properly maintain common property, common facilities and assets of the strata corporation..."

[para16] With respect, it seems a moot point as to whether or not the land beneath the claimant's unit constitutes common property. Mr. Paul Sandhu, an articulated student, has however appeared in this case on behalf of the Strata Corporation and conceded that the ductwork does fall within the definition of common property as set out above. On the face of it then, it would seem the Strata Corporation is liable to maintain these pipes and that, not having done so, it ought to indemnify the defendants in this case.

[para17] Mr. Sandhu, however, argues that considering the general scheme of the Condominium Act and applying both common sense and the rule of interpretation that the general must be read as subject to the particular, the ductwork servicing this unit should not be found by the Court to be common property on the facts in this case.

[para18] Section 26 of the Act stipulates that every condominium development shall be governed by a set of By-Laws; and that, where no different By-Laws are adopted, then by sections 26 and 28, those By-Laws set out in Part 5 of the Act shall apply.

[para19] Part 5 of the Act, s.115, provides that:

"An owner shall

(a) permit the strata corporation and its agents, at all reasonable times on notice, except in case of emergency, when no notice is required, to enter his strata lot for the purpose of inspecting the same and maintaining, repairing or renewing pipes, wires, cables and ducts for the time being existing in the strata lot and capable of being used in connection with the enjoyment of any other strata lot or common property, or for the purpose of maintaining, repairing or renewing common property, common facilities or other assets of the strata corporation, or for the purpose of ensuring that the bylaws are being observed;...

(c) repair and maintain his strata lot, including windows and doors, and areas allocated to his exclusive use, and keep them in a state of good repair, reasonable wear and tear and damage by fire, storm, tempest or act of God excepted; ...

(g) comply strictly with these bylaws, and all other bylaws of the strata corporation, and with rules and regulations adopted from time to time; ..."

Section 116 of the Act provides that:

"The strata corporation shall ...

(c) maintain all common areas, ...

(d) maintain and repair, including renewal where reasonably necessary, pipes, wires, cables, chutes and ducts for the time being existing in the parcel and capable of being used in connection with the enjoyment of more than one strata lot or common property;"

[para20] Strata Corporation K-418 has not adopted any different set of by-laws and as a result it and the strata unit owners within this development are bound by the above.

[para21] I find the approach to interpretation of the Condominium Act as urged upon the Court by Mr. Sandhu to be most appropriate. The By-Laws clearly are the means whereby flexibility is incorporated into the statutory scheme. They are the means through which those who own units within a condominium development have the opportunity to devise rules and assign responsibilities particularly suited to their needs and circumstances. It is logical then to read the By-Laws as specifically defining what is and is not common property in a particular situation.

[para22] In this case, the ducts run from the heating/air conditioning unit located within the claimant's strata lot to the outlets in that lot. They do not pass over any other strata lot and are and were intended to be of exclusive benefit to the claimant's strata unit. These ducts are not "capable of being used in connection with the enjoyment of more than one strata lot or common property".

[para23] As a result, they do not fall under s.116(d) of the Corporation's By-Laws.

[para24] With respect to the suggestion that the ducts nonetheless constitute common property as referred to in s.34(1)(d), the Court has been referred to the case of *Okrainetz v. Condominium Plan No. 82R42988* (1992), 24 R.P.R. (2d) 293, a decision of the Saskatchewan Court of Queen's Bench on appeal. In that case the heating/air conditioning units which serviced an apartment-style condominium complex were located on the balconies associated with each particular unit. The strata plan, however, specified that such balconies were to be considered as "common property". In deciding who was responsible for repair of the air conditioners, the Provincial Court Judge decided they were common property and, as such, the responsibility of the strata corporation. However, on appeal, Justice Armstrong speaking for the court referred to a number of decisions which had not been brought to the attention of the trial court and which were "... to the affect that the provisions of the Condominium Property Act must be " ... in light of the realities of what actually happens between developers, purchasers, and condominium corporations". Reference was made to *Frontenac Condominium Corp. No. 1 v. Macciocchi & Sons Ltd.* (1975), 11 O.R. (2d) 649, where, at page 663, the Court stated:

"The Condominium Act itself does not extend its definition of common elements beyond its own limits. This so-called definition should not therefore furnish the meaning of the term for all purposes, especially when to do so could produce absurd results."

In *Okrainetz*, Justice Armstrong went on to say at page 296:

"It seems to me the only reasonable inference to draw, and, accordingly, the only way to interpret the condominium plan, is that while the furnace and air conditioner are located on common property, they were never Intended to be part of that common property. When the respondents acquired an apartment, they acquired with it the furnace and air conditioner for that apartment, and have exclusive use of a balcony on which to locate the furnace and air conditioner. They are responsible for the maintenance of those items. And there is no suggestion from the respondents that they were given the idea when purchasing that the apartment furnace and air conditioner would be maintained as common property."

[para25] I am satisfied these cases from Ontario and Saskatchewan are sound law and that they should be applied in British Columbia. It follows that the ductwork in this case, being associated with and available exclusively for the benefit of the claimant's strata unit, are not common property. As a result, the defendants' claim against the third party under s.34 of the Act, must also fail. The third party claim is dismissed.

[para26] As a result, there will be judgment for Ms. Legault as against the defendants for \$8,500. This amount takes into account any increase in the cost of materials and labour since the original estimate from Interior Plumbing & Heating Ltd. was supplied. It also includes an allowance for living-out expenses that will likely be incurred by Ms. Legault.

[para27] The claimant is as well entitled to recover the \$30 she has spent in filing fees and \$12 as witness fees for attending both the settlement conference and trial.

[para28] Any party sufficiently unhappy with this decision has 40 days from November 17, 1993 in which to appeal.

GORDON PROV. CT. J.

CBR# 301

Herbert Raymond Smith and James Clifford Sheffield, Petitioners, and G.C. (Goldie) Read and The Owners of Strata Corporation NW 3172, Respondents

[1993] B.C.J. No. 1348

Chilliwack Registry No. S 2004 British Columbia Supreme Court Chilliwack, British Columbia Davies J. Heard: March 22, 1993. Judgment: filed May 10, 1993.

Counsel for the Petitioners: D.R. Lester. Counsel for the Respondents: R. Kelly.

[para1] DAVIES J.:-- The Petitioners apply under the Judicial Review Procedure Act, R.S.B.C., chapter 206 and the Condominium Act, R.S.B.C., chapter 61, to set aside the Arbitration Ruling of the Defendant C.C. (Goldie) Read, filed December 15, 1992.

[para2] The facts set out in the Petition filed March 10, 1993 are as follows:

1. On or about October 27, 1992, an Arbitration Hearing was held at 7500 Columbia Street, Mission, B.C., to resolve an alleged dispute between some of the owners of Strata Corporation NW 3172, concerning common area expenses of the two different "types" of owner, namely "Garden Apartment Owners" and "Apartment Condominium Owners", both being members of the said Strata Corporation.

2. The Arbitrator heard arguments and rebuttals from two opposing perspectives and reached a decision in writing which was entered in the Supreme Court of British Columbia, New Westminster, Civil Registry on December 15, 1992.

3. The Arbitrator held, inter alia, "that the Condominium Act does not appear to make any differentiation whatever between types, kinds or styles of residential strata lots, Section 128(2)(b)" of the Condominium Act;

4. The Arbitrator also ruled that all common area expenses shall be apportioned equally under the unit entitlement formula contained in the Condominium Act and that the Council shall cause a budget to be presented at the next Annual General Meeting by "which the common area necessities are to be maintained for the following year;

5. The costs associated with maintaining the "Condominium Apartments" are not the same as the costs associated with maintaining the "Garden Apartments."

6. Several of the owners of Strata Corporation NW 3172, and in particular, the Petitioners, were not notified of the hearing of October 27, 1992 and were adversely affected by the said Ruling. [para3] Counsel for the Respondents did not take issue with the facts set out in the Petition. He explained that he appeared on this application to ascertain that the facts were presented fairly and that should the Arbitrator's Ruling be set aside that guidelines be given to assist at any new Arbitration hearing.

[para4] The Petitioners argue that the Arbitrator's award should be set aside on any one of three grounds, which are:

1. That all Petitioners were not notified of the Arbitration hearing as required by the Condominium Act or by the principles of natural justice;

2. That there is a reasonable apprehension of bias on the part of the Arbitrator;

3. That there is an error on the face of the record as the ruling denies that Section 128 of the Condominium Act provides for different types of strata lots in a Strata Corporation. [para5] The development known as Edwards' Estates consists of sixty strata lots, thirty-two of which are located in a Condominium Apartment style building, (hereinafter called the "Apartment Units") and twenty-eight of which are located in eight four-plex buildings containing Garden Townhouse Units, (hereinafter called the "Townhouse Units"). The Apartment Units are contained in a three storey building with each unit having access to internal hallways but no direct access to the outdoors. On the other hand, each Townhouse Unit has direct access to the outdoors. The Apartment Block has property which is common to all strata lot owners which includes a lobby area, activity room, meeting room, staircases, electrical rooms, hallways, mechanical rooms, an elevator, storage areas and a lounge area now apparently being used as a guest suite.

[para6] A dispute has arisen amongst the owners in the Edwards' Estates as to whether Section 128 of the Condominium Act provides for differing maintenance fees to be charged to particular types of units where different types of units exist in a strata complex. This dispute became the subject of arbitration under Section 44 of the Condominium Act which provides in part as follows:

"44(1) the Strata Corporation or an owner may, prior to the commencement of a court proceeding about a dispute, refer to arbitration, the dispute between the Strata Corporation and an owner or between two or more owners about any matter, including, without limiting that statement, a dispute about

(a) contributions to common expenses or money paid under Section 34(2);

(b) . . .

(c) . . .

(d) . . .

(2) notice shall be given to the Strata Council, the Strata Corporation or the owner affected, as the case may be. Within two weeks after the notice is received, the parties to the reference shall agree on and appoint a single Arbitrator.

[para7] I will deal firstly with the Petitioners' argument that they were not given notice of the Arbitration hearing required by the Act and by the rules of natural justice. It is clear that the Petitioners and approximately twenty other Townhouse Unit Owners did

not receive notice of the Arbitration hearing. In my mind, that is fatal to a fair Arbitration hearing. The hearing dealt with common expenses and how they are to be shared by all strata owners in Edwards' Estates. I believe that the wording of Section 44(2) requires notice to be given to all those who may be affected by the issues under consideration at an Arbitration hearing. Notice was not given to a substantial number of owners who would be affected by the Arbitrator's ruling and therefore a fair hearing could not be held. I am therefore setting aside the Arbitrator's Ruling and directing that a new hearing be held after proper notice has been given to all strata owners.

[para8] In view of my finding with respect to the matter of notice, it is not necessary that I deal with the other grounds argued by the Petitioners. [para9] Counsel asked that I give direction as to the interpretation to be placed on Section 128 of the Condominium Act. Section 128(2)(a) and (b) apply to the question which was before the Arbitrator:

Section 128

(2) Where a Strata Plan consists of more than one type of strata lot, the common expenses shall be apportioned in the following manner:

(a) common expenses attributable to one or more type of strata lot shall be allocated to that type of strata lot and shall be borne by the Owners of that type of strata lot in the proportion that the unit entitlement of that strata lot bears to the aggregate unit entitlement of all types of strata lots concerned;

(b) common expenses not attributable to a particular type of strata lot shall be allocated to all strata lots and shall be borne by the Owners in proportion to the unit entitlement of their strata lots.

[para10] The Act does not define the word "type". In the sense that it is used in this section, "type" should be taken to denote the character or form of structure. Therefore, where as in the case of Edwards' Estates, units of a different character or form exist, the common expenses of the Strata Corporation should be levied as follows:

(a) common expenses attributable or related to a particular type of strata lot should be allocated to that type of strata lot and should be borne by the Owners of that type of strata lot;

(b) common expenses not attributable to a particular type of strata lot, that is to say, expenses which relate to all types of strata lots should be borne by the Owners of all strata lots in proportion to the unit entitlement of their strata lots.

[para11] The Petitioners are entitled to their costs on scale 3.

DAVIES J.

CBR# 144

Jervis Court Development Limited (formerly known as 3339 Investments Ltd.), Plaintiff, and Arlette Ricci and Deborah Ricci, Defendants, and Richards Buell Sutton and Klaus H.E. Priebe, Third Parties, and Goddard & Smith International Realty Inc. and Patricia Tang Lund agent of Goddard & Smith, Third Parties

Reported at: 23 R.P.R. (2d) 32

[1992] B.C.J. No. 502

Vancouver Registry No. C913115 British Columbia Supreme Court Vancouver, British Columbia Spencer J. Heard: March 2 - 5, 1992 Judgment: March 10, 1992

Counsel for the Plaintiff: G.E.H. Codman, Q.C. and S. Frame. A. Ricci appearing in person.

SPENCER J.:-- On this Rule 18A application the plaintiff seeks specific performance, or alternatively damages for breach of an alleged contract by which the plaintiff should sell and the defendants buy a strata lot in a condominium complex at Robson and Jervis Streets in Vancouver. The lot in question is the eleventh floor penthouse in a twelve story mixed commercial and residential condominium. The purchase price was agreed at \$800,000. The plaintiff seeks specific performance and not damages, contenting itself with the ability to pursue damages later under the rule in *Johnson vs. Agnew* [1979] 1 A.E.R. 883 (H.L.) if for any reason the defendants fail to perform. I heard a great deal of evidence and submissions, not all of which were relevant, over four days of hearing. Chiefly, the irrelevant material came from the defendants, represented by Mrs. Ricci herself. It is understandable that without legal training she does not always appreciate what is and what is not relevant. I am satisfied however that she was able to present her position most articulately.

Much of the defendants' complaint is directed not at the plaintiff vendor but at the solicitor who was representing their own interests in the transaction. Since there are third party proceedings against that gentleman that were not joined in the plaintiff's Rule 18A application, he had no opportunity to defend himself from Mrs. Ricci's criticisms. It would be wrong therefore to make any findings as between them and I expressly do not do so. I simply observe that where her complaint is against him, the result cannot be attributed to the plaintiff. That is so in spite of Mrs. Ricci's suspicion that she was, and is, confronted by a conspiracy between the plaintiff and its solicitors, and her own former solicitor. She has alleged that but she has not pleaded it. There was no evidence put before me on this hearing that would support such a finding in any way. I have considered the many points raised by Mrs. Ricci to oppose summary judgment for specific performance. Briefly her complaints levelled at the plaintiff fall under four heads, that the plaintiffs failed to deliver a luxury condominium as they contracted to do by reason of the standard of construction, that the plaintiffs deceived her by misrepresenting the nature of an amendment to the strata by-laws passed after she had entered the contract to buy the penthouse but before completion of the sale, that the plaintiffs have materially depreciated the nature and value of the condominium since the completion date by letting out commercial units to tenants for use as restaurants which are incompatible with the intended luxurious nature of the residential units in the condominium and that she was deceived by fraudulent misrepresentations about the surrounding commercial uses. Since I do not intend to grant an order for specific performance and because there are matters which in my opinion require a full trial, I shall not comment on all the arguments advanced by the parties. I shall deal only with those necessary to this judgment and those which were extensively argued before me and which can be separated as discrete issues to be answered pursuant to Rule 18A(5) which permits judgment to be given upon an individual issue within a case. 1. WAS THIS A LUXURY CONDOMINIUM?

Luxury is a subjective matter. While there are undoubtedly some standards that all Canadians would regard as luxurious and some which all would deem common, there is a wide ground between them which would attract different opinions depending upon the background of the observer. Here, there is evidence from Mr. Hart and Mr. de Grey, architects retained by the defendants, of serious shortcomings in the construction and appointments of this penthouse suite. Mr. Hart in particular gives the opinion that in some, but not all respects, it is not a luxury suite.

The plaintiff relies upon the contract terms that require it to repair any deficiencies listed by the purchasers and the extended repair warranty requiring it to repair deficiencies that occur within one year of completion. A deficiency list was furnished by the defendants' solicitor, although whether it was a final or only an interim list remains to be decided. In any event, I find it significant that the defendants did not, when Mrs. Ricci saw the unit for the first time, immediately reject it as not being within the description luxurious. That failure persuades me on the balance of probabilities that it was to all appearances within a reasonable range of acceptance as luxurious, subject to the correction of whatever deficiencies might be found on a careful inspection. It will be for the trial judge eventually to decide whether a relatively brief walk-through, accompanied only by her solicitor and not by anyone versed in building standards constituted such a deficiency inspection as was contemplated by a contract valued at \$800,000. I am able to, and do decide that this suite met the descriptions of luxury that were incorporated into the contract by reference to the brochure handed to the defendant Deborah Ricci.

1.(a) WAS THE UNIT HABITABLE AT THE REQUIRED TIME OF COMPLETION?

This is a subsidiary part of question one. It arises because although an occupancy permit had been issued by the City of Vancouver when the defendants were called upon to complete, the defendants had subsequently removed a portion of the protective glass insert on the penthouse balcony and had installed a small construction hoist over the balcony to facilitate completion of other parts of the building. The defendants say that made the suite unsafe and uninhabitable. There is a photograph of the balcony with the hoist in place, Exhibit B to Mrs. Ricci's affidavit filed September 11th 1991. In my judgment the removal of the glass insert did not render the suite unsafe or uninhabitable. That is because the metal railing in which the glass was inserted remained in place. It did not present the risk of an occupier falling from the balcony. There is no evidence of the frequency with which the hoist was used on or after the completion date. That use may have interfered with the occupant's privacy and the occupant may have been able to prevent the use, but it did not make the suite uninhabitable.

Part of the defendants' argument on this branch of the case depended upon the suggestion that had the Vancouver City Permits and Licenses department known of the removal of the safety glass and the installation of the hoist it would have revoked the occupancy permit it had given on March 11th 1991. In my judgment that speculative suggestion is not relevant to these proceedings. The fact is that there was a permit and the premises were habitable. Whether or not the permit would have been withdrawn is a question that does not arise under the circumstances of the case.

2. DID THE PLAINTIFF DECEIVE THE DEFENDANTS BY MISREPRESENTING THE NATURE OF AN AMENDMENT TO THE STRATA BY-LAWS PRIOR TO COMPLETION?

This defence turns upon what was said in a letter dated 31 January 1991 by which the plaintiff's solicitor sent the executed transfer documents to the defendants' solicitor. By that letter the plaintiff told the defendants that it had amended the strata by-laws and asked the defendants to delay registration until the amendment was filed in the Land Title Office. Nothing turns on when that filing occurred but the solicitor's letter specifically represented the amendment as dealing only with the allocation of storage lockers. In fact it went much further. It introduced for the first time a right in the strata corporation, by its servants or agents to enter upon, pass and re-pass over and temporarily occupy each owner's separate property for the purpose of performing the corporation's functions. In effect it gave the corporation the right to have its staff walk into the defendants' suite, out on to the balcony and hang window washing and other maintenance equipment over the balcony to clean and maintain the whole building. That function appears to be performed exclusively from the defendants' suite for the whole building. When the defendants agreed to buy the suite there was no such right. I reject the argument that by-law 3.1(a) as it existed in the original disclosure statement already gave that right. It gave the right only to enter upon each owner's suite for the purpose of repairing whatever common property lay within the suite. That the plaintiff held the same view is evidenced by the passage of the amendment itself.

In my judgment the amendment made a material change to the nature of the rights to be purchased by the defendants. The suite was advertised by the brochure which was incorporated by reference into the sales contract, as "an array of luxury residences crafted with your privacy in mind". Even without that representation, to give a right of access through the suite is a material encroachment upon the owner's property right. It is in my judgment a material change to the contract. Although it theoretically applies to all the residential units in the condominium, in practice it has its greatest affect on suite 1101 because that is the level from which the maintenance is proposed to be done to the outside of the residential tower as a whole.

The question remains, whether the defendants accepted it through their solicitor who received the letter and a copy of the amendment. There is also a question whether he had authority, ostensible or otherwise, to accept the variation on the defendants' behalf and whether the defendants are estopped from denying it. It is possible that the solicitor read the amendment and was not misled by the limited reference to it in the plaintiff's solicitor's letter. That must be tested by evidence at trial. If he did not read the amendment, and if, as he was entitled at law to do, he relied upon what the plaintiff's solicitor wrote, that the amendment only affected the provision of storage lockers, then that would amount to a misrepresentation after the execution of the contract of a fact that would have entitled to defendants to refuse to complete. Only if he accepted it in such a way as to bind the defendants to accept the change, would they be compelled at law to complete. I do not think it avails the plaintiff to say that it could, as majority owner in the strata corporation, have introduced the change after the defendants completed the purchase in any event because such a step would be met by an application or arbitration under Section 42 of the Condominium Act.

3. HAS THE PLAINTIFF DONE ANYTHING SINCE THE PROPOSED COMPLETION DATE OF THE SALE TO DISENTITLE IT TO SPECIFIC PERFORMANCE?

The defendants say that since the intended completion date the plaintiffs have de-valued the whole strata lot by leasing the commercial section to a number of restaurants, one of which is in the nature of a beer garden. They say the presence of the restaurants has detracted from what was to have been a luxurious ambience at the entrance to the suites and that various fans, vents and motors have been installed on the roof of the first floor to exhaust stale air and cooking odours. Most of the influence of that equipment is felt by lower floors but the defendants say noxious smells reach the eleventh floor penthouse balcony.

Whatever was said about the intended occupancy of the commercial section before the defendants agreed to buy the penthouse is excluded from consideration as a representation, warranty, condition or collateral contract by clause 5.2(d) of the contract unless it was said fraudulently. For the time being I deal only with the allegation of innocent misrepresentation. This part of the defendants' case depends upon whether, by leasing to these particular restaurants the plaintiff has de-valued the residential property. There is evidence from an appraiser, Mr. Eschner, that it has. He does not give any values but makes the general statement. The defendant complains particularly of an establishment called The Fogg and Suds. Without being in any way critical of that business for what it is, she says it has no place at the foot of a luxury residential tower.

I doubt whether the defendants could, as a matter of law, restrain the plaintiff from leasing to such a use. Bearing in mind the exclusionary clause in the contract, I do not think they can succeed in resisting the plaintiff's case for damages on that ground alone. But when it comes to a question of specific performance I think equity will hear the defendants and decline to compel specific performance of something that has become materially different from what was represented to them in fact. Equity may look beyond the exclusionary clause and decide for itself whether it will lend its aid to the plaintiff on the basis of all the facts.

4. WERE THE DEFENDANTS DECEIVED BY FRAUDULENT MISREPRESENTATION ABOUT THE SURROUNDING COMMERCIAL USES?

I return now to the question of fraudulent misrepresentation. The defendants allege it in relation to statements said to have been made by the sales agent, Lund, about what the plaintiff planned by way of commercial tenants in the ground and second floor commercial section. They say they were assured the plaintiff would install only two restaurants of high class and that there would be high class boutiques. They say that the seven restaurants now operating there are out of keeping with the concept of a luxury condominium and they were deliberately misled by the plaintiff's agent when the plaintiff already had plans for the seven restaurants. Much of the impact of this allegation, if true, affects suite 301 which the defendants also bought but there is no claim for rescission of that contract. I note the counterclaims for damages do not incorporate the allegations in paragraphs 27 to 61 of the defences and so, as presently pleaded, no loss is claimed for the effect alleged on suite 301. That appears to be an oversight by the pleader.

I cannot resolve the issue of fraud on this application. It will require evidence of when the plaintiff first planned the seven restaurants and there associated fans, vents and motors to exhaust the stale air and cooking fumes and what was its state of knowledge at the time the representations, if any, were made to Deborah Ricci. The exclusionary clause 5.2(d) will not avail the plaintiffs if fraud is proved. That matter must go to trial.

THE GRANT OF SPECIFIC PERFORMANCE:

Specific performance as a contract remedy lies in the discretion of the court, to be exercised on sound equitable principles. Those principles do not apply equally to a vendor as to a purchaser. From a purchaser's point of view a parcel of real property may have

a unique characteristic that cannot be replaced by any other. From a vendor's point of view that is not so. Nevertheless specific performance is often granted to vendors.

In the case at bar three factors militate against an order for specific performance at this stage. The first is that absent the evidence of whether the defendants' solicitor knowingly accepted the change of by-laws without objection and what authority he had from the defendants, it appears they were misled on a material change of the terms under which they were to own suite 1101. The second is that the plaintiff has leased the surrounding commercial premises in a way that was not revealed to the defendants at the time of negotiations and which may have materially altered the character and therefore the value of suite 1101. In view of that it is inequitable to compel the defendants to complete the purchase by a summary judgment. The third ground is that there is an outstanding allegation of fraudulent concealment of the plaintiff's intent to lease part of the commercial space to restaurant uses incompatible with a luxury condominium. In my view the first ground may, depending upon the evidence of their solicitor at trial, go so far as to give them a ground for refusing to complete the purchase at all. So would the third ground. Those decisions should be left to whoever hears the trial eventually.

There were other issues extensively argued before me that can be disposed of as discrete issues under Rule 18A(5) whose disposition now will save the parties time and expense at trial. They are as follows.

5. WAS THERE A MATERIAL MISREPRESENTATION OF THE FLOOR AREA OF THE PENTHOUSE SUCH AS WILL EXCUSE THE DEFENDANTS FROM PERFORMANCE OF THE CONTRACT?

In my judgment there was not. The defendants rely upon what was said by the plaintiff's sales agent, Ms. Lund, that the interior area of the penthouse would be 2588 square feet. That representation is excluded by clause 5.2(d) of the contract. Moreover, the plaintiffs are protected by the statements in the brochure that all interior measurements are approximate, that they may vary on final survey and that no guarantee or responsibility was accepted for any of the information in the brochure. Further, clause 5.2(c) of the contract specifies that all measurements are approximate. The defendants' surveyor says the unit is less than the intended size by some 200 square feet. It may be argued that the word approximate does not cover a discrepancy of 7.7%. In my judgment that is completely answered by the evidence that the defendant Deborah Ricci, for herself and as agent for her mother A. Ricci, viewed the strata lot before entering the contract to buy it. Although at that stage of construction it was impossible to judge by untrained eye how the unit would finish out, she, and through her Mrs. Ricci were aware of the specific thing they were contracting to buy. This is not a case where there was any misrepresentation through concealment.

6. WAS THE PLAINTIFF READY, WILLING AND ABLE TO PERFORM ITS SIDE OF THE CONTRACT ON THE DUE DATE FOR PERFORMANCE? In my judgment it was. There is some factual dispute about who asked for the extension of the time to complete from March 26th 1991 to April 5th. The letters exchanged between the solicitors for both sides show a common agreement to the extended date no matter who asked for it first. I am satisfied on all the evidence that the plaintiff was ready willing and able to transfer title to the strata lot. The correspondence between solicitors shows that the plaintiff had caused an executed transfer of title to be delivered and had removed the mortgage and those builders liens that had encumbered the title. With respect to a statutory declaration that there were no builders liens upon the title, the defendants by their solicitor's letter of 19th March 1991 permitted the plaintiff to undertake in writing to discharge liens after completion of the sale and to provide copies of the discharges in due course. Whether the defendants gave those specific instructions to their solicitor is beside the point. They fall within the limits of ostensible authority which the plaintiffs might expect of a solicitor and they excuse the plaintiff from removal of liens. In fact, the only lien referred to in Schedule C to the contract was removed by 5th April as appears from the plaintiff's solicitor's letter of that date. I find the plaintiff was ready, willing and able to perform its side of the contract on the extended date for completion.

7. WAS THE CONTRACT AS A WHOLE VOID FOR UNCERTAINTY?

This argument turns upon the absence of detail from the contract documents. They are surprisingly sparse in any specifications of what was to be built, particularly with respect to finishing materials. The description referenced by the contract is set out in the brochure and the preliminary strata plans attached as Schedule A to the disclosure statement. Subject to them, what the plaintiff undertook to build and deliver was a luxury condominium. For the reasons set out under heading 1. above I have already decided that, subject to the correct deficiency list to be decided at trial, the plaintiff did construct what falls within the broad description of a luxury condominium. It is within the strata lot described by the contract and at the agreed price. The court should not be astute to avoid a contract that contains within it the main completion, or sets out a mechanism for establishing them, see *G.S.B. Developments Ltd. vs. Chiulli* [1979] 15 B.C.L.R. 381 (B.C.S.C.) affirmed [1981] 28 B.C.L.R. 157 (C.A.). All those details are present here.

THE DEFENDANTS' CLAIM FOR AN INJUNCTION:

The defendants claim for an interim injunction to restrain the plaintiff from installing more vents, motors and fans on the roof of the commercial section of the property. They also claim a mandatory injunction to compel removal of those that have already been installed. They are the systems by which stale air is exhausted from the restaurants that have been installed in strata lots owned by the plaintiff on the first and second floors of the commercial section of the strata development. The defendants say they were not told there would be seven restaurants in the premises or that they would exhaust their stale air, including cooking odours, into the air adjacent to suite 301 which they have also purchased. They say the smells and noise from the fans have made the feature patio of suite 301 unusable and diminished its value. They say that has happened to a lesser but still significant extent to the penthouse suite 1101. Mrs. Ricci said further installations are planned and she wants them prevented until the action can be tried. At the trial she will seek a permanent injunction to restrain further installations and a mandatory injunction to have the existing ones removed.

Mr. Cadman objected that the wrong defendant is sued in this respect. He argued that it is the strata corporation itself that has and will install the vents motors and fans on what is common property. It seems to me that is probably unlikely. If the defendant is the owner of the leased restaurant space and the remaining space that may be leased to restaurant use, it seems probable that the plaintiff is the entity that is involved in the past and future installation of the systems that will make restaurant use possible. I do not pursue this enquiry further at this time however because whatever the merits of the situation are, the defendant told me clearly that she declines to give the usual undertaking in support of an interlocutory injunction that she will pay whatever damages may be assessed in the event it should be shown at trial that it should not have been granted. It is true the court may dispense with an undertaking under Rule 45(6) but I can see no reason why that should be the case here. In the absence of an undertaking I dismiss the defendants' cross motion for an interlocutory injunction. That will not resolve the question of whether a permanent injunction will be granted at trial.

COSTS:

The plaintiff is entitled to the costs of the defendants' cross motion in any event of the cause because the defendants were not prepared to give the necessary undertakings in support of their own motion. The costs of the plaintiff's motion for judgment which has failed would ordinarily go to the defendant. Although they were represented by the defendant A. Ricci in person, they would be entitled to their disbursements and to costs under the tariff to the extent that they incurred them by engaging solicitor's assistance in advising them in British Columbia on the preparation of their defence to the motion. However, Mr. Cadman expressly asked to reserve argument on costs until the outcome of his motion was known and I stopped Mrs. Ricci from argument on costs on the same basis. Accordingly, to the extent the parties are not prepared to accept this indication of how costs should be awarded, they have leave to set the matter down on some convenient date for hearing on the issue of costs.

I summarize these reasons for judgment for the assistance of the parties because some issues are decided and some are left outstanding.

1. I find there should be no order for specific performance without a full trial. 2. I find the defendants' claim for an interim injunction cannot be granted but may perhaps be granted after trial. 3. I find suite 1101 met the description of a luxury condominium with reference to its construction and finishing. 4. I find suite 1101 was habitable on April 5, 1991, the extended completion date. 5. I find the amendment to the by-law materially changed the nature of the rights attached to suite 1101. 6. I find the floor area of suite 1101 was not materially misrepresented. 7. I find the plaintiff was ready, willing and able to complete the sale on April 5, 1991. 8. I find the contract as a whole was not void for uncertainty.

The following issues are left to be resolved at trial.

1. Did Mr. Priebe have actual or implied authority to and did he bind the defendants by accepting the by-law amendment? 2. Have the seven restaurant leases materially changed the nature of suite 1101 as a luxury condominium? 3. Was there a fraudulent material representation about the intended surrounding commercial tenancies that induced the defendants to agree to buy suite 1101? 4. Was the deficiency list sent by Mr. Priebe to the plaintiff's solicitor but without Mrs. Ricci's signature, the final binding deficiency list for the purposes of this contract? If not, what other deficiencies then remained to be made good by the plaintiff at its cost?

There may be other outstanding issues which the parties may wish to raise at the trial but they may not, of course, include those issues which I have finally determined by this summary judgment.

Before leaving this case, and because the defendants represent themselves, I point out to them that these reasons give final judgment on some, but not all of the issues in this action. They should carefully consider them and probably take legal advice about where the case now stands both from the point of view of what matters will remain relevant at the eventual trial, and what their appeal options may be both now and after the eventual trial.

SPENCER J.

Supplementary Reasons for Judgment

Released: April 1, 1992

SPENCER J.:-- Since filing my reasons for judgment herein on March 10, 1991 I have received a further submission from counsel for the plaintiff with respect to the meaning and effect of clause 3 of the amended by-laws of the strata corporation as enacted January 30, 1991 and referred at p. 6 of my reasons for judgment.

I am not persuaded that I misunderstood the effect of the amendment to the by-law. At the least it introduced a compulsory right of access to the defendants' exclusive use areas which did not exist before. At worst it carries an implied grant of an easement over the defendants' strata lot for the purpose of exercising the right given by the amendment to the by-law, see for example the cases cited in Anger and Honsberger (1959) Canadian Law Real property at 988.

Counsel may speak to the matter of costs if they wish, by arrangements to be made through the registry.

Corrigendum

Released July 8, 1992

My attention has been drawn to a typographical error which appears at p.9 line 7 of my reasons for judgment filed herein on March 10, 1992. The reference to "the plaintiff complains" should be amended to read "the defendant complains".

SPENCER J.

CBR# 084

Condominium Plan No. 8711306 v. Yamashita

Between The Owners: Condominium Plan No. 8711306, plaintiff, and Gregory Keith Yamashita, defendant

[1999] A.J. No. 407 Docket: 9802600540 Alberta Provincial Court Civil Division Lethbridge, Alberta LeGrandeur Prov. Ct. J. April 12, 1999.

Counsel: W. Lowry, for the plaintiff.

JUDGMENT

LeGRANDEUR PROV. CT. J.:-- Nature of Proceedings

[para1] In this case the Plaintiff Condominium Corporation claims judgment in the sum of \$3,315.85, plus interest and costs from the Defendant. The Plaintiff's claim is founded upon the provisions of The Condominium Property Act, RSA 1980, Chap.C-23 and Appendix 1 thereof which sets out the statutory bylaws of such corporation. The sum claimed is made up of claims for unpaid contributions levied by the corporation against the Defendant, interest thereon, legal fees and penalties, all of which the Plaintiff corporation argues are provided for by the aforementioned legislation and bylaws.

[para2] For the most part it would appear that the Plaintiff corporation's claim is made up of various liquidated demands. That is, it is made up of definite sums of money which are recoverable by an express or implied agreement. In this case the bylaws represent a form of statutory contract amongst the condominium owners which is enforceable against each one thereof. The pleadings themselves do not specify the amounts claimed under each heading of demand and accordingly the claim provides little assistance to the Court as to the quantum demanded under each item as claimed. It would have been preferable, both with regard to the notice of claim given the Defendant and for the Court's benefit, that the claim itself itemize the quantum of the various demands made that in total make up the claim for \$3,313.85.

[para3] It is my view that the portion of the Plaintiff's claim that relates to penalties and legal costs are not liquidated demands in this case, but rather must be assessed in the context of the proven circumstances.

Claims for Sums Levied and Interest Thereon

[para4] Exhibit "1" filed in these proceedings represents a statement of the outstanding levies of the corporation against the Defendant and the interest that has been charged by the corporation thereon. The levy of \$90.00 per month is authorized by the statute and bylaws which bind the Defendant owner. (See s.25(5) of the Condominium Properties Act, supra) Section 3(c) of the bylaws of the corporation give the Plaintiff the power to charge interest on any contribution owing to it by an owner. Clearly the \$90.00 per month is a contribution contemplated by s.31(1) of the Act. [para5] There is no evidence of any corporate resolution authorizing the charging of interest on unpaid contributions. Neither is there any evidence as to what the amount of interest being charged by the corporation is. The practice of the corporation appears to have been to charge interest with or without the passing of an internal resolution. Given the fact that the corporation does have the power to charge interest, and given the fact that the claim for interest is clearly a claim in the nature of a liquidated demand and given the fact that no dispute is raised as to the right to claim interest or the rate being charged, the Plaintiff corporation is entitled, in my view, to receive judgment for the unpaid monthly levies, plus interest thereon as set out in Exhibit "1". This amount however shall not include the sum of \$591.40 described in Exhibit "1" as legal fees. This sum is not a levy or contribution that attracts interest in my view. The question of whether the \$591.40 in legal fees is payable by the Defendant will be discussed later herein. The fact that the \$591.40 is not part of the outstanding sum which attracts interest means that the interest calculation set out in Exhibit "1" is incorrect for the months of April, May and June, 1998. Without the specific interest figure being calculated and provided to me, I intend on adjusting the interest for those three months by rounding it off at \$20.00 per month for each of the said months and I specify that interest for the eight days of interest calculable in July of 1998 will be the sum of \$6.00.

Date to Which Plaintiff is Entitled to Judgment

[para6] The Plaintiff's claim was filed on the 8th of July, 1998 and accordingly the Plaintiff is entitled to judgment for the outstanding monthly levies and contributions and interest thereon up to that date. The Pleadings are not framed in such a way that judgment for future accruing indebtedness can be given, nor is there any form of acceleration clause available to the Plaintiff to make the Defendant liable in these proceedings for any indebtedness accruing due after the date of filing of the claim. The Plaintiff corporation will have to bring further suit for any indebtedness of this nature accruing after July 8th, 1998.

[para7] The Plaintiff corporation shall accordingly have judgment for condominium fees and interest thereon as per Exhibit "1" subject to the adjustments mentioned hereinbefore. I calculate the sum outstanding in this regard as follows:

- (a) Outstanding fees as at March 31st, 1998 \$ 1,469.67
 - (b) Condominium fees for April, May, June and July, 1998 (4 x \$90.00) \$ 360.00
 - (c) Interest for the months of April, May and June (3 x \$20.00) \$ 60.00
 - (d) Interest for 8 days of July \$ 6.00 ----- TOTAL: \$ 1,595.67
- LESS: Payment by Defendant \$ 1,200.00 ----- TOTAL AMOUNT DUE as of July 8th, 1998: \$ 395.67

Legal Fees on Filing of Caveat

[para8] The Plaintiff's claim in this regard is \$791.40. This sum is made up of the \$591.40 referred to in Exhibit "1" legal fees may be found in the statement of account of Andreachuk, Harvie MacLennan Law Offices dated the 19th day of March, 1998, which account makes up part of Exhibit "1" filed herein. This account appears to relate to a number of the Plaintiff's claims against the Defendant, not just the preparation and filing of a Caveat pursuant to s.31 of the Act. The Plaintiff seeks payment of

its legal costs incurred with respect to the preparation and filing of the Caveat. In claiming the same, the Plaintiff relies upon s.34 of the Act which states:

"If a corporation registers a Caveat against the title to a unit under s.31, it may recover from the owner of the unit the cost incurred in preparing and registering the Caveat and in discharging the Caveat."

[para9] Section 34 refers only to the costs incurred in preparing and registering the Caveat and in discharging the Caveat. It says nothing about the cost of legal advice or

s.34 does not authorize payment of solicitor and client costs. It is not precise enough for the Court to conclude that to be 4 legal expenses incurred in filing the Caveat. On its face, its intended meaning. (See *Canada Deposit Insurance Co. v. Canadian Commercial Bank*, (1989) 95 A.R. 1, Alta.Q.B.) Nonetheless, the Plaintiff has proven that it has incurred a loss related to the action or inaction of the Defendant given the obligation of the Defendant to pay levies and interest. Given the right of the Plaintiff to take steps to protect its interests by way of Caveat. I am prepared to award as damages some of the legal expenses incurred with respect to the Caveat. (See: *re Hancock, ex p. and Spraggett*, (1953) 1 DLR 137, Ontario High Court) As I have indicated previously herein, the amount claimed in the account includes other things than the preparation and filing of a Caveat. The specific time and effort in that regard is not broken down in the account. That leaves the Court in the position of having to do its own assessment, given the account and the nature of that which was done. In that regard, I assess the Plaintiff corporation's damages relative to expenses incurred with respect to the Caveat in the sum of \$241.82, calculated as follows:

(a) Legal fees \$ 200.00 (b) GST on legal fees \$ 14.00

(c) Disbursements \$ 26.00 (d) GST on Disbursements \$ 1.82 ----- TOTAL: \$ 241.82

Claim for Penalties Pursuant to s.29 for Breach of Bylaw 37(2)(i)

[para10] The Plaintiff corporation claims a penalty in the amount of \$200.00 in respect of each of two alleged contraventions of Bylaw 37(2)(i). Section 29 of the Act authorizes such an action and I am satisfied that a proper bylaw, specifically 37(2)(i) was lawfully in effect at all relevant times to these proceedings. The bylaw provides:

37(2) An owner shall not

(i) hang or place on the real property of the corporation or the common property, or within or on a unit anything that is, in the opinion of the Board, aesthetically unpleasing when viewed from outside the units;

[para11] The Plaintiff corporation, through Mr. Yanke's testimony, has proven that the Defendant fixed a satellite dish to a fence on condominium property and that he hung an airconditioning unit from a back window of his unit such that it faced into the common property of the condominium complex. These were so affixed or hung without the permission of the Board and ultimately the Board apparently took the position, after complaints were filed, that these items were aesthetically unpleasing when viewed from outside the condominium units. These items were ultimately removed by the Defendant, although it would appear it took some time for the removal to occur. The items had been removed by the time that this action commenced in July of 1998.

[para12] The evidence does not satisfy me that the Defendant has breached the bylaw in question. There is no requirement that the owner obtain the permission of the Board before placing or hanging anything. An issue only develops once the Board determines that the item placed or hung is aesthetically unpleasing. Given the wording of the section (29) and the wording of the bylaw (37(2)(i)) I conclude that the Defendant cannot be in breach of the said bylaw unless he refuses to remove the property once told by the Board to do so. In my view, it is an absurdity to interpret the section in question such that an owner could be in breach of a bylaw before the Board subjectively determines that the ingredients of a breach, that is "aesthetically unpleasing" are present. A breach can only occur once the Board determines the items are aesthetically unpleasing and gives notice thereof, in which case the owner must be given a reasonable time to remove the item or items. The only way, in the circumstances, that it could be a breach otherwise, would be if the bylaw provided that nothing may be hung without the prior permission of the Board.

[para13] With respect to the issue of removal, although there is some evidence that the removal was delayed, it is not satisfactory evidence upon which I could conclude that a breach in that regard has occurred.

[para14] In any event, had I concluded a breach or breaches had occurred with respect to Bylaw 37(2)(i), I would have issued at most, only a nominal penalty.

Penalty Claim for Failure to Pay Levy (Monthly Contributions)

[para15] The Plaintiff also seeks imposition of a penalty pursuant to s.29 for the failure of the Defendant to pay the mandated monthly levy as described and dealt with hereinbefore. (Paragraphs 4 and 5, supra). Again, the assertion is that the Defendant has contravened a bylaw by not making the monthly payments as required. Section 2(b)(ii) of the Bylaws of the Plaintiff corporation provide:

2(b) An owner shall forthwith

(ii) pay all rates, taxes, charges and assessments that may be payable in respect of his unit.

[para16] The levy that the Plaintiff corporation seeks payment of is made pursuant to s.31(1) of the Act and s.31(2) authorizes the Plaintiff corporation, on the passing of a resolution, to commence an action in debt for payment of the said contributions.

[para17] At the hearing of this matter the Plaintiff presented no evidence of any resolution requiring payment of the monthly levy in the amount claimed. In any event of that finding I gave judgment to the Plaintiff for the amount claimed as contribution arrears because such a claim was in the nature of a liquidated demand and in the absence of any denial or defence to the claim, the Plaintiff is entitled to judgment therefore.

[para18] However, the same approach is not applicable in my view to a claim for a penalty pursuant to s.29 of the Act for failing to pay the levy. The Plaintiff is seeking penal consequences for the breach of the bylaw and accordingly the Court must be satisfied that the Defendant was obligated to do that which the Plaintiff is asking the Court to penalize him for not doing. In such

circumstances the Plaintiff must prove that in fact the Plaintiff condominium corporation had passed a resolution requiring payment of the levy. At the hearing of the matter, the Plaintiff did not provide such proof, however, upon reviewing the tape of the proceedings, I concluded that some comments that I made on this issue during the course of the proceeding, may have misled counsel for the Plaintiff into believing that he need not present such evidence. Given that fact I have given the Plaintiff, through counsel, the opportunity to provide the Court with proof of such a resolution and he has done so. The Clerk is instructed to mark the same as the next exhibit in the proceedings. [para19] Given that evidence and the evidence presented at hearing, I am satisfied that the bylaw with respect to payment of the contribution lawfully required of the Defendant pursuant to the bylaws of the condominium corporation has been contravened by the Defendant. Given all the circumstances, the Plaintiff shall have judgment in this regard, pursuant to s.29(3) of the Act for the sum of \$100.00.

Costs re s.29 proceedings

[para20] Section 29(3) provides that the Court may make such award as to costs as appears proper in the circumstances with respect to proceedings initiated pursuant to s.29. In this case, the Plaintiff corporation has sued for three penalties and been successful in only one of their claims. Given all of the circumstances, including the fact that the Plaintiff was unsuccessful on two claims and successful only on one, I conclude that no costs will be awarded with respect to this portion of the proceedings.

Solicitor/Client Costs

[para21] The Plaintiff seeks to have the legal costs incurred by it with respect to the bringing of these proceedings paid for by the Defendant. The Plaintiff advances a claim in that regard of \$1,080.00 as set out in the Statement of Account dated December 21st, 1998 which was filed by Plaintiff's counsel at the direction of the Court. The Plaintiff seeks judgment for this sum as a debt owing by the Defendant to the Plaintiff and relies upon the provisions of s.31(1)(d) of the Act as authority for its claim. Section 31(1)(d) states:

31(1) In addition to its other powers under this Act, the powers of a corporation include the following:

(d) to recover from an owner by an action in debt, any sum of money spent by the corporation

(i) pursuant to a bylaw, or

(ii) as required by a local authority or other public authority, in respect of the authority,

in respect of the unit or common property that is leased to that owner under s.41.

[para22] It is my view that in any event of the applicability of this section, it cannot found the basis for judgment for any of the costs that I have hereinbefore already dealt with. Any costs associated with the Caveat cannot be advanced once again under this provision, given my determination with respect to that issue. Those costs are specifically spoken to by the Act and I have already awarded legal fees in that regard. Likewise, with respect to the costs associated with advancing claims under s.29 of the Act. That section specifically deals with the issue of costs in s.29 proceedings and s.31(1)(d) cannot be seen as over-riding that provision, or even supplementing the power to award costs. Given that no costs were awarded under s.29, no costs can now be awarded under the guise of s.31(1)(d). That leaves the issue of the costs relative to the commencement of the proceedings and the conduct of the proceedings with respect to the unpaid levy or contributions and the interest claims thereon which I have already dealt with and granted judgment upon. It is my view that s.31(1)(d) was never intended as a basis for awarding a judgment in debt for legal costs incurred in collecting unpaid contributions or levies. Such is not a sum of money spent pursuant to a bylaw in respect of a specific unit or common property. Subsection 2 of s.31 authorizes the commencement of an action by the corporation for unpaid contributions as contemplated in s.31(1). That is the action commenced by the Plaintiff in these proceedings. There is no suggestion in the authorizing section (31(2)), that the costs of such an action become a debt owing the Plaintiff by the debtor/owner. The Act elsewhere, specifically s.29 speaks to the issue of the costs in proceedings under that specific process. I would expect that the Act would speak specifically to the costs of advancing a claim in debt pursuant to s.31(2), if in fact it intended that legal costs be paid other than costs which the Court might in its discretion, award. If legal costs are to be collectible, authorizing the same or a clause in an agreement authorizing the same, needs to be specific and clear. That is not the case with respect to s.31(1)(d) and I cannot conclude by looking at the Act overall and the section in particular that it was ever intended to cover the legal costs of collecting unpaid contributions. Such costs are not money expended pursuant to a bylaw in respect of a condominium unit or common property of a condominium corporation, but rather they are costs incurred in collecting a debt. The Plaintiff's claim in this regard is dismissed.

Costs

[para23] In any event of my determination of the issue of solicitor/client costs with respect to the commencing and prosecuting the within proceedings for collection of unpaid levies, the Plaintiff has been successful in that regard and is entitled to some costs. Having regard to the nature of claim, the difficulty of its prosecution, which is minimal, the amount awarded in judgment and the amount of legal fees claimed and disbursements incurred as set out in the Statement of Costs dated December 21st, 1998, I award costs to the Plaintiff in the amount of \$400.00, inclusive of disbursements.

Summary of Judgment

[para24] The Plaintiff shall have judgment as follows: 1. Judgment for arrears in contributions and interest thereon to July 8, 1998 \$ 395.67

2. Judgment for costs incurred on filing of a Caveat \$ 241.82

3. Judgment for breach of requirement to pay contributions \$ 100.00

4. Costs with respect to collection of unpaid contributions and interest thereon \$ 400.00 TOTAL JUDGMENT: \$1,137.49

LeGRANDEUR PROV. CT. J.

CBR# 329

The Owners: Condominium Plan No. 932 2887, petitioner, and Hans H. Redweik, Otilie Redweik (unit 20), Marek Car, Zbigniwe Car. Ewa Car (unit 30), Janusz Zubrowski, Elzbieta Zubrowski (unit 29) and Marcel L. Lambert, Jeanette M. Lambert (unit 6), respondents

[1994] A.J. No. 1020

Action No. 9403 15554 Alberta Court of Queen's Bench Judicial District of Edmonton Master Quinn Judgment: filed December 22, 1994.

Counsel: S. Parker, and Stuffco Olsen, for the owners. B.A. Murray, Murray Chilibeck and Horne, for the respondents.

REASONS FOR DECISION

[1] MASTER QUINN:-- This matter comes before me on the petition of the Board of Managers of The Owners: Condominium Plan No. 932 2887 who seek an order pursuant to By-laws No. 47 and No. 77 of the Condominium Corporation directing the removal of unauthorized structures on common property created by the owners of certain condominium units.

[2] The said By-laws are as follows:

STRUCTURAL ALTERATIONS An Owner shall ensure that:

(a) no alterations, additions, decoration, redecoration, changes or installations be made on or adjoining the outside of any Unit by any Owner without the prior consent in writing of the Board;

(b) no structural alteration be made to the outer boundary of any Unit including walls (whether partition walls, party walls, bearing walls, or otherwise), ceiling and floor or to any bearing walls or structures within the Unit or to any exterior door or window, without the prior written consent of the Board;

(c) no changes be made in the plumbing, drainage, electrical or gas system within or outside any Unit without the prior written consent of the Board; (d) any changes to a Unit comply with all Municipal, Provincial and Federal laws.

Failure to comply with this By-law will result in the responsible Owner being liable for all costs incurred by the Corporation including indemnification of its legal costs, for restoring any alterations or changes made by the Owner.

[3] Affidavits opposing the petition have been filed by three condominium owners.

[4] The affidavit of Connie Madill, a member of the Condominium Board indicates that in some cases certain fences extend beyond where they should terminate; in some cases fencing has been put up where no fencing is permitted; in some cases vegetation has been improperly planted on common property; in one instance a safety gate has been placed on a patio deck without the approval of the Board.

[5] Certain other breaches were remedied when the Board brought the matter to the attention of those owners. [6] None of the objecting owners attack the legal validity of the By-laws. Rather they complain the Board is unreasonable in the way it interprets the By-laws and that the By-laws are unfair. They also complain that the Board applies the By-laws unevenly by allowing some owners to do certain things but refusing similar indulgence to other owners.

[7] Section 26(1) of Condominium Property Act, ch. C-22 R.S.A. 1980 provides that the By-laws of a condominium Corporation shall regulate the corporation and provide for the control management and administration of the units, the real and personal property of the corporation and the common property.

[8] Section 26(2) provides that any By-law may be amended, repealed or replaced by a special resolution.

[9] Section 30(1) provides that a corporation is responsible for the enforcement of its By-laws and the control, management and administration of its real and personal property and the common property.

[10] Section 60 of the said Act provides that an application to this court shall be made by way of petition, but I can find nothing in the Act indicating that this court should become involved in adjudicating on the reasonableness or otherwise of the By-laws of a condominium, nor in questions of how the Board enforces the By-laws.

[11] Section 29(1) of the said Act provides for the possibility of a condominium corporation taking proceedings against an owner under Part 4 of the Provincial Court Act for a penalty of not more than \$200.00 for a contravention of a By-law. Section 29(3) provides that a provincial judge may give a judgment in an amount being sued for or any lesser amount. That would appear to cover a situation where a condominium corporation has had to expend funds to remedy a breach of a By-law.

[12] I am not prepared to make an order which involves a decision as to the reasonableness of any of the By-law or the interpretation of the By-laws or the fairness with which the By-laws have been applied.

[13] If a sufficient number of the unit owners are unsatisfied with the By-laws in their present form, they should pass a special resolution to change them. If they are unsatisfied with the manner in which the present Board of managers is interpreting the By-laws, they should elect a different Board.

[14] I hereby make a declaration that the By-laws as presently existing are valid and that the Board may make reasonable efforts to enforce them. As the work required to rectify existing situations is outside work, owners should be given until May 15, 1995 to do the necessary rectification work themselves.

[15] Paragraph 3 (a) of the said petition is a request for an order directing the removal of a gate on the patio deck of unit 20 because it is an unauthorized structure.

[16] Affidavits of Otilie Redweik, one of the owners of unit 20, are filed in opposition to the petition. In her affidavit Mrs. Redweik deposes that the gate was installed for safety reasons, and that she had been advised the gate would likely be approved if it was removable and not a permanent fixture. She says it can be removed simply by lifting it out of its hinges.

[17] There is no affidavit from the petitioner addressing the question of whether or not the gate is a permanent fixture. Counsel for the petitioner submits the gate is a permanent fixture because the frame upon which it stands is firmly affixed to the patio deck. What counsel submits is not evidence. The only evidence before me is that the gate is not a permanent fixture.

[18] I would therefore find as a matter of fact that the gate is not a permanent fixture, and that no order should be made requiring its removal.

[19] I would like to make it very clear that this decision applies only to the gate on unit 20, and that this decision is not to be treated as a precedent by any other unit owners.

[20] All parties shall bear their own costs.

MASTER QUINN

CBR# 199

James Lem Moore, Plaintiff, and The Owners: Condominium Corporation Plan 7910571 also known as Renfrew House, Defendant

[1994] A.J. No. 610

Docket No. P9390107223 Alberta Provincial Court Civil Division - Calgary, Alberta Scott Prov. Ct. J. Heard: July 18, 1994. Judgment: filed July 26, 1994.

Plaintiff appeared in person. K.W. Sparks, for the Defendant.

[para1] SCOTT PROV. CT. J.:-- The plaintiff brings this action against the defendant Condominium Corporation Plan 7910571 ("Renfrew House") located in the City of Calgary for damages in the sum of \$1,578.71 sustained by him resulting from, among other things, the eviction of the tenant of Unit No. 18, Suite 301 in Renfrew House (hereafter refer to as "Unit 301"), owned by the plaintiff.

[para2] In addition, the plaintiff claims reimbursement from the defendant in the sum of \$427.95 paid by the plaintiff to the defendant under protest on or about November 15, 1993.

[para3] The plaintiff had, jointly with one Sean Park, purchased Unit 301 as at August 31, 1990 and had rented same to a tenant for some 15 months without incident. That unit was vacated in the latter part of 1991. The plaintiff had arranged to purchase Mr. Park's interest in the unit with title issuing in the plaintiff's name, on or about February 5, 1993. The plaintiff, in January 1993, through his agent Angela Johnson, re-let the premises pursuant to a written lease to one Debbie Hannah for a period of one year from January 31, 1992 through to January 31, 1993 for \$550.00 per month. The evidence indicates that Ms. Hannah had a young infant and may or may not have been cohabiting in the unit with one Oliver Lee Harris.

[para4] On March 11, 1992, a letter was directed to Sean Park, who was still presumed to be a co-owner of Unit 301, by Harlen Management Ltd., the then managers of Renfrew House, indicating concerns had been received as to the "character" of the tenants of Unit 301 and that a baby was residing in an "adult" building. No mention is made of any other complaints regarding the then tenants and, in fact, paragraph 62(a)(v) of the Bylaws of the Corporation recognizes that a unit may be occupied by up to five persons whether adult or minor.

[para5] On March 19, 1992, a neighbour to Unit 301 made a complaint to the then president of the Condominium Corporation, Carol Boswell, of loud noise emanating from that unit as the result of what appeared to be a domestic dispute. As a result of further noise on March 20, the City Police Service was summoned and attended at the premises taking into custody Oliver Lee Harris allegedly on an outstanding warrant. Although there was no further disturbances up to and including March 26, 1992, the defendant corporation issued to the tenant and to the plaintiff an eviction notice requiring the tenant to vacate the unit on or about April 30, 1992 on the grounds that the tenant and the owner were in breach of paragraph 62(a)(ii) of the Corporation Bylaws, filed in these proceedings, which provide as follows:

[para6] "62. (a) An owner shall not:

(ii) make or permit noise in or about any unit or the common property which in the opinion of the Board is a nuisance or unreasonably interferes with the use and enjoyment of a unit or the common property by any other owner or occupant..."

If in breach of this section, the owner would also be in breach of paragraph 3(f) of the Bylaws which is not referred to in the eviction notice.

[para7] As a result of the eviction notice, the tenant vacated the premises on or about April 8, 1992.

[para8] The plaintiff then retained the services of Harlen Management Ltd., who had ceased to be the managers of Renfrew House at the end of March 1992, to lease the premises which that company did effective June 10, 1992 for the sum of \$270.00 for the balance of the month of June and \$540.00 per month thereafter.

[para9] Sometime after this date the defendant changed the locks on all units in Renfrew House because of general security concerns and not related to the matters referred to above. However, the first notice the plaintiff received of such change was the receipt of a copy of an invoice dated August 4, 1992 which Parry Bros. Lock & Safe (Calgary) Ltd. addressed to Carol Boswell, the then president of the Condominium Corporation, in the sum of \$64.20 in order to gain access to Unit 301 for a plumbing inspection, the Condominium Corporation not having retained a key to same and the tenant not being available. The plaintiff was not given notice of the intended inspection, although a copy of the notice was placed under the door to Unit 301 for the tenant.

[para10] The Bylaws governing the operation of Renfrew House at the times in question, in respect to leasing of units, provides in paragraph 51(a):

"51(a) In the event that any owner desires to lease or rent his unit, he shall furnish to the Corporation an undertaking, in the form satisfactory to the Corporation, signed by the proposed lessee or occupant, that the proposed lessee or occupant of the unit will comply with the provisions of the Act and of the by-laws of the Corporation . . ."

[para11] The plaintiff does not appear to have provided such an undertaking either with regard to the original tenant of the unit or from Ms. Hannah, but no objection was made by the Condominium Corporation to the plaintiff's failure to do so. Further, this failure was not raised at the time as a reason for eviction. In any event, s. 44(2) of the Condominium Proprietorship Act, R.S.A. 1980, Ch. C-22 ("Act") makes it clear that it is a condition of any tenancy that the tenants, among other things, shall not contravene the bylaws. Accordingly, in my view, nothing turns on the failure of the plaintiff to provide such tenants undertaking.

[para12] As to the termination of the Hannah tenancy by the defendant, s. 45 of the Act gives a Condominium Corporation the authority to issue eviction notices to tenants for contravention of any bylaws. Although the Bylaws for Renfrew House authorize the Board thereof to carry out the day-to-day operations of the Corporation, no Board resolution was filed authorizing the eviction notice, but the plaintiff did not challenge the notice on that ground and, accordingly, I will not deal with that issue.

[para13] As to the eviction notice itself, the grounds for issuing same related to a breach of paragraph 62(a)(ii) of the Bylaws referred to above, alleging a nuisance created by the tenant as a result of excessive noise. Although a discretion is left to the Board to determine what constitutes a nuisance, in my opinion, that discretion cannot be exercised arbitrarily.

[para14] Private nuisance, in law, has been defined in Salmond on the Law of Torts, 16th ed. (1973) at p. 51 as follows:

"Private nuisances, at least in the vast majority of cases, are interferences for a substantial length of time by owners or occupiers of property with the use or enjoyment of the neighbouring property. *Cunard v. Antifyre* [1933] 1 K.B. 551 at 557."

[para15] Although this is not an action grounded in nuisance, I see no reason why the above definition cannot be applied in determining what constitutes a nuisance justifying the Board of the Condominium Corporation in claiming that a nuisance existed in the present situation. That is not to say that a single act cannot constitute a nuisance but in such event the single act must be a continuing one.

[para16] In the present instance, the allegation of nuisance results from loud shouting and arguments apparently resulting from a domestic dispute. No other reason was given for the eviction. No complaints were received by the defendant corporation prior to March 19, 1993 when a female occupant of a neighbouring suite complained to the president of the Corporation of loud noise from Unit 301 which was confirmed by the president on her attendance. Although there were apparently allegations by this occupant of other incidents, no evidence was presented to the Court to confirm such incidents. Mr. Fabrisi, the occupant of Suite 302 did confirm a "couple" of incidents but these appear to relate to incidents on or about the dates in question being March 19 and 20, 1992. He also added that it was only really bad on one occasion when the door to Unit 301 was open and the argument carried out into the hallway and he had to request that Mr. Harris take this argument with Ms. Hannah back into their own suite. There was no suggestion from the evidence that there was or had been an immediate likelihood of harm or damage to others.

[para17] When Mr. Harris was removed by the police on March 20, the evidence indicates that no further noise was experienced from Unit 301. As a result, I am not satisfied that a nuisance had been established entitling the Board to issue the eviction notice in this instance.

[para18] However, even if the events of March 19 and 20, 1992 did constitute a nuisance, or, at least, the Board had the absolute discretion under paragraph 62(a)(ii) of the Bylaws to determine that such events did constitute a nuisance, I am also satisfied that the Corporation did not comply with the Bylaws in respect of the alleged breach which would justify the issuance of the eviction notice. Paragraph 43(a) of the Bylaws provide as follows: "43(a) Any infraction or violation of or default under these by-laws or any rules and regulations established pursuant to these by-laws on the part of an owner, his servants, agents, licensees, invitees or tenants that has not been corrected, remedied or cured within ten (10) days of his having received written notification from the Corporation to do so may be corrected, remedied or cured by the Corporation and any costs or expenses incurred or expended by the Corporation, including costs as between solicitor-and-his-own-client, in correcting, remedying or curing such infraction, violation or default shall be charged to such owner and shall be added to and become part of the assessment of such owner for the month next following the date when such costs or expenses are expended or incurred (but not necessarily paid) by the Corporation and shall become due and payable on the date of payment of such monthly assessment and shall bear interest both before and after judgment at the interest rate until paid."

[para19] In my view, the Corporation was required to give the owner and his tenant notice to correct the alleged default within 10 days of receipt of such notice thereof before taking action to remedy the default, i.e. issuing an eviction notice. As shown in the eviction notice the Corporation had the proper address for the plaintiff in Vancouver. However, on March 20, the former president of the Condominium Corporation, Ms. Boswell spent her time attempting to obtain a telephone number for the plaintiff in Vancouver. Had written notice been sent on that date to the defendant, it would have been deemed to have been received by the plaintiff within 48 hours of its posting pursuant to paragraph 53 of the Bylaws. For whatever reason the Condominium Corporation chose not to do so. In my view, this denied to the plaintiff the opportunity of dealing with his tenant in an attempt to ensure that no further breach or potential breach would occur and the Corporation is therefore liable for any provable damages resulting directly therefrom and is not entitled, therefore, to recover the costs incurred by the Corporation in respect of the eviction notice.

[para20] As to the claim for reimbursement of the locksmith charges incurred by the Corporation for gaining entry to Unit 301 in August 1993 which charges were paid by the plaintiff to the defendant under protest as previously indicated, the Corporation decided out of general security concerns to have the locks changed on all units of which the plaintiff received no notice. The Corporation had at that time a key to the existing lock to Unit 301 for the purposes of entry when necessary for inspections or repairs. Having changed the locks, the Corporation presumably gave the keys to the new lock to the then tenant of the Unit 301 without retaining a duplicate key. As to the entry itself notice of entry was, according to Ms. Boswell, the then president of the Condominium Corporation, placed under the door to Unit 301 and the tenant failed to provide a key to the Corporation or to be present to allow entry on apparently two occasions. Again, no attempt was made to contact the owner. In my view, to change the locks and not retain a key when the Corporation had a key to the original lock and thereafter, to fail to notify the owner of the work required to be done so that the owner could have at least instructed his tenant to release a key is, in my opinion, unacceptable. The Condominium Corporation had the plaintiff's proper postal address and this was not emergent work.

[para21] Accordingly, I would award the plaintiff damages as follows:

(A) Loss of rent

May \$ 550.00 June 280.00 July 1992 to January 1993 70.00

900.00 (B) Expenses incurred in re-renting unit 678.71

(C) Reimbursement of legal fees and AGT phone charges and locksmith costs

Legal fees and AGT phone call 315.25 Parry Bros. Lock & Safe (Calgary) Ltd. 64.20 Interest charges by the Condominium Corporation on the above 48.50

427.95

Grand Total \$2,006.96

[para22] In addition, I would award the plaintiff party- party costs of \$325.00 which includes the filing fee in these proceedings.

SCOTT PROV. CT. J.

CBR# 113

Sheila Eberts, applicant, and Carleton Condominium Corporation No. 396 and Claude-Alain Burdet in Trust, respondents

Court File No. 98-CV-7915 Ontario Superior Court of Justice Kealey J. November 19, 1999.

Counsel: Kenneth Radnoff, Q.C. for the applicant. P. Donald Rasmussen, for the respondents.

[para1] KEALEY J.:-- Carleton Condominium Corporation No. 396 is a commercial condominium located at 112 Nelson Street in Ottawa. It was developed by 648578 Ontario Inc. which originally contemplated 15 units, 10 on the first floor, 5 on the second floor with the basement to be divided into 6 parts and to be used for storage only. The original application of February 2, 1987 described the project as "15 industrial commercial units and 18 storage units". It was on this representation that the applicant and others entered into agreements to purchase units and took possession of these in advance of formal conveyances, most of which were completed in mid-December of 1997.

Sometime between November 18, 1997, the date of the original declaration, and December 10, 1997, the initial basement usage was redefined and this space became "units" with "voting" rights. This change was described in By-law No. 3 where storage units were eliminated and the original description amended to read as follows:

Whereas there is situated on the lands described in Schedule A, a building containing 33 industrial commercial units.

It is worthwhile noting that on December 10, 1997 when the aforesaid change was made, the developer was the sole owner of all units although a number of agreements of purchase and sale did exist. The closing dates for these transactions occurred between December 11th and 15th, 1987. As well, pursuant to a deed dated December 4, 1987 and registered December 11, 1987, the 18 basement units were sold to 685310 Ontario Inc. It was explained during argument and is undisputed that the Soloway, Wright law firm was the owner of the aforesaid numbered company and utilized the basement area for the storage of their files and records. [para2] An application which sought to have the basement units reclassified as storage units was dismissed on June 14, 1988. An appeal taken from this decision was not pursued, nor were other legal remedies sought because apparently a settlement was reached whereby the owner of the basement units agreed to a permanent reduction of the votes to which these units would be entitled reducing the number from 18 to 3.

[para3] On January 23, 1989, the Soloway, Wright law firm obviously speaking on behalf of their numbered company, wrote to the Condominium Corporation No.396 and confirmed that they would be prepared to accept the proposal made by the Condominium Corporation, that the voting rights attributable to the basement space be permanently reduced to 3 votes. The letter further indicated that the compromise "constitutes a fair and final resolution of the voting rights issue and all related issues" and further indicated that they look forward to the proposal being ratified by the unit owners at the meeting to be held on January 27th. The letter was read and the terms accepted at the annual general meeting of the Condominium Corporation on January 27th. The settlement letter also proposed the Soloway firm would undertake to achieve the change by way of an amendment to the declaration and they would prepare all documentation necessary to accomplish this and perform the legal work involved without further expense to the Condominium Corporation. Pursuant to the aforesaid compromise By-law No.4 of the Corporation was passed June 30, 1989 and registered July 18th to reflect the agreed to change.

[para4] Unfortunately, the formal amendment to the declaration was never completed notwithstanding the content of a document general to amend the declaration apparently prepared in May of 1989 and sworn to January 19, 1990. The respondent, Claude-Alain Burdet, became the owner of 2 units during 1990 and it is clear he was present at the annual general meeting held April 18, 1991 when the owners were advised that because of the lost consent documents, these would have to be resigned in order to complete the amendment to the declaration pursuant to the earlier agreement. He was also present at the annual meeting August 7, 1992 when it was reported the requirement of owners' signatures had apparently been satisfied to enable the declaration to be amended. A status report was sought from the Soloway, Wright law firm at that time. Notwithstanding the aforesaid, no formal change was completed and this state of affairs prevailed through to the September 13, 1995 annual meeting where the following is noted under item g) in the minutes:

Formal amendment to Declaration regarding voting shares of 16 basement units (to be reduced to 3 total voting shares).

M. Faulkner to provide C. Burdet with documentation on file, to enable the re-activation of necessary paper work, in order to ensure the proper registration of a previously agreed amendment to the declaration, and to finally conclude this matter. This matter impacts on the total number of voting shares for C.C.C. #396, and determine issues such as reaching quorum for meetings, etc.

[para5] Mr. Burdet received the Corporation's file in regard to the aforesaid and admits he did little, if anything, to formalize the amendment. In the meantime he acquired the basement units 1 to 18 on January 31, 1997 and at the annual general meeting on February 26th of that year, took the position that he held 18 votes for the units and became the president.

[para6] The grounds upon which I am asked to make an order herein are Section 3 (8) of the Condominium Act; the doctrine of proprietary estoppel; or the equitable maxim which looks on that as done, which ought to be done. These grounds overlap somewhat but they require a consideration of the January 23, 1989 settlement agreement from two perspectives:

(a) was it binding on all unit owners', present and future, from its date onward, notwithstanding that formal completion by way of amendment to the declaration had not yet been achieved; (b) did the respondent Burdet know, or ought he to have known, of the agreement reducing to 3 the number of votes for the Level A units when he acquired these in trust.

[para7] Whatever may have been the legal rights and status of the parties when the original application was dismissed in 1988, including other legal remedies which might have been sought, these were resolved and compromised by the settlement set out in the letter of January 23, 1989 and its acceptance and ratification of terms by the respondent Carleton Condominium Corporation No. 396 at its annual meeting January 27 of the same year. Obviously, the numbered company had contracted out of its original voting rights pursuant to the Act and the amended declaration thereunder. In return, the Carleton Condominium Corporation No. 396 had agreed to forego its appeal or the pursuit of any other remedies in regard to the issue.

[para8] It seems to me thenceforth there existed an inconsistency in the declaration as to the Level A voting rights which was amendable pursuant to Section 3 (8) of the Condominium Act. Just because the proposed method of formalizing the agreement

became problematic due to the loss or misplacement of owners' consents, didn't and doesn't prevent it being achieved by an order. Surely from January 23, 1989 onward the numbered company could not purport to convey the 18 Level A units with entitlement to more than 3 votes, which they had agreed to permanently. Not only did Soloway, Wright fail to formalize the agreement over the years, but as well their representative, Lyon Lightstone, remained on the board of directors of the Corporation until his resignation at the September 13, 1995 meeting. At this same meeting the respondent Burdet took on the task of re-activating this long-delayed process "to ensure the proper registration of a previously agreed amendment to the declaration".

[para9] In my view, there is nothing in law to prevent the application standing on its own under Section 3 (8) of the Condominium Act since to me it is obvious in these circumstances that it is both necessary and desirable to correct the inconsistency in the Corporation's declaration from that which emerged as a result of the January 23rd settlement agreement. This view of the matter is also in accord with the equitable maxim which treats as done that which ought to have been done. Equity views the subject matter of a contract, (its consequences and effects) as if the "Act" which the contract envisages has been completely executed. Therefore, equity calls for a determination in favour of those persons entitled to the performance of a contract so they not suffer from the delay or laches of the defaulter. I find this principle is applicable to these parties who made the settlement contract and their successors in title.

[para9a] In considering the second question posed, I am of the view that the respondent Burdet was aware of the following facts before his acquisition in 1997.

1. That the numbered company from whom he acquired the basement units had undertaken to exercise only three votes in relation to these. He acknowledged he was aware of the undertaking which was given in 1989 to this effect and also as part of the documentation received in 1995, he had occasion to read the consent to the change in the declaration by the numbered company.
2. He was present at the April 1991 and August 1992 annual general meetings when discussions in regard to the agreements to modify the Constitution and the necessary signatures occurred.

3. He was also present at the 1995 meeting held in September when this matter was again discussed and indeed was referred to him, as a then elected director, to formalize.

4. He would have been aware at the 1995 meeting (if not before) that the Condominium Corporation, in achieving a quorum, treated the number of voting units as 19. Although this was an error (there being only 18 votes) nonetheless it would confirm the reduction in the number eligible votes and the agreement which effected same.

5. He was aware, of course, that By-law No. 4 was registered July 18, 1990 as well as the document general dated January 19, 1990, though prepared in May of 1989. [para10] It seems to me a reasonable inference from the aforesaid that Burdet knew some agreement affected the Level A voting rights. It is logical therefore as an owner, as a member of the board of directors and, more importantly, as a prospective purchaser of the Level A units, he was not entitled to remain willfully blind in this regard but was obligated to make reasonable efforts to become familiar with the details of whatever agreement existed. The cases to which I have been referred would prevent avoidable ignorance, such as present in these circumstances, prevailing to enable one to establish a proprietary advantage. In my view, such a principle flows from the doctrine of proprietary estoppel as discussed in the cases cited by counsel for the applicant.

[para11] The respondent, Burdet, says he never saw the letter of agreement (January 23, 1989) and although he was aware of the By-law No. 4 when he first became a unit owner and later knew of the undertaking which reduced the Level A voting rights, he denies the suggestion that he was to complete the process formalizing the agreement in 1995 despite the fact that he received all of the consents to do this except his own and one other. Further, in his cross-examination he says he made no inquiries as to the existence or details of an agreement from anyone including the vendors' solicitors or Lyon Lightstone who was a co-director of the Condominium Corporation up until September 1995 when Mr. Burdet undertook to reactivate the formalization process.

[para12] Given what he did know, I cannot believe Burdet did not ask the threshold question. In any event as I have found, failure to do so would too conveniently create ignorance, which would be unconscionable to permit as the basis for denying the applicant and other unit owners the benefit of their settlement agreement.

[para13] On the facts before me I find Burdet knew of the January 23rd agreement and the details of same or he purposely denied himself this information by neglecting to inquire when the circumstances would lead any sensible person to have done so.

[para14] The respondent submits because the applicant was not induced to act in a way detrimental to her interest proprietary estoppel is unavailable in support of her position. [para15] The history of the applicant's plight can't be forgotten and it demonstrates to me that she has been induced to act to her detriment. She took possession of her unit and closed the transaction with the belief that there were 15 units and that the basement Level A was storage space only with no votes. When the aforesaid representations proved untrue because of the last minute amendment to the declaration by the developer owner, the Corporation launched an application against the developer to restore the number of units and voting entitlement as had been described in the initial declaration. When this application was dismissed an appeal was undertaken and apparently other judicial remedies were considered. In the meantime a resolution was achieved which satisfied the Condominium Corporation and the purchasers of the basement units which compromise was detailed in the aforesaid January 23rd correspondence and ratified by the Condominium Corporation at its Annual General Meeting four days later. Had this agreement been formally completed by an order of the court on the consent of the litigants, once registered it would have effected the change. When the manner of formalization went askew - the situation was compounded by the respondent's acquisition of the basement and his position as to voting rights which give him control of the Corporation.

[para16] It was represented to the applicant and all unit holders as set out in the original declaration that they were one of fifteen shareholder-voters, rather than one of thirty-three as per the late amendment. This dramatically changed their property interest which became dominated and subject to the Level A unit holders who then controlled the vote of the Corporation as a result of the surreptitious last minute amendment to the declaration as aforesaid.

[para17] The remedy to this detriment required the formalization of the agreement which resolved all issues surrounding the voting rights. Burdet's action or inaction which thwarted the amendment to the declaration repeats the initial wrongfulness by the developer and re-activates the detriment to the applicant insofar as her proprietary interest is concerned. The applicant and other unit holders ceded their right to fully litigate the developer-owners December 1987 conduct in exchange for the agreement of limited voting rights for Level A. Burdet, as an owner director of the Corporation, further lulled the applicant and others by apparently accepting the responsibility of completing the formalization of the January 1989 agreement, while he did nothing for a

year. Then, in direct conflict with such a commitment, he with the express intent of controlling the Corporation, purchased the 18 basement units and voted himself in as president.

Generally, equity is available to avoid injustice and protect the interests (property or otherwise) of society and individuals especially where such injustice arises as a result of unfair, unscrupulous and opportunistic conduct which accords advantage to the actor over the reasonable, fair and lawful expectancy of another when all is taken into account. Here, in my view the doctrine of proprietary estoppel applies to the facts. In the same way that Soloway, Wright or its numbered company could not ever exercise more than three votes for the basement units in view of their agreement, neither can the respondent Claude-Alain Burdet In Trust or personally, have greater rights. As hereinbefore stated I find Burdet actually knew of the details of the agreement or had sufficient information as would cause a reasonable person to ascertain the full terms and legal implications of the earlier settlement. [

[para18] For the aforesaid reasons, an order such as that sought by the applicant shall go and in the event the parties cannot agree as to the specific terms of same, then I remain available to resolve these. As well, the applicant shall have her costs of the application which, if the parties cannot agree, I will fix if they so request after receiving written submissions in this regard within thirty days.

KEALEY J.

CBR# 354

York Condominium Corporation No. 12, applicant, and Ilya Trest, respondent And between Ilya Trest, applicant by counterclaim, and York Condominium Corporation No. 12, respondent in counterclaim

Court File No. 98-CV-146123 Ontario Court of Justice (General Division) Motions Court Somers J. Heard: November 23, 1998. Oral judgment: December 1, 1998.

Counsel: Ellen Montizambert, for the applicant and for the respondent in the counterclaim Ilya Trest, in person.

[para1] SOMERS J. (orally):-- There are two motions before me today arising out of this matter and their history is such that both motions follow upon earlier motions that have been made by both sides. One motion has been brought by Mr. Trest who is the owner of a condominium unit located at 3-76 Castlebury Crescent in North York and the unit is known as Unit 46, Level 1, York 12, a place he has owned since December of 1984. In order to understand the motions before me today, it is necessary to review what has gone before.

[para2] An earlier motion was brought in this court by York Condominium Corporation No. 12 seeking an order permitting it to cap the respondent's white window frames with brown capping at the respondent's expense. This, it was alleged, was being done pursuant to the provisions of the rules and regulations of York Condominium Corporation No. 12 and of its declaration and by-laws. This was initially resisted but, when it came on before Justice Wilkins on May 25, 1998, Mr. Trest relented and Justice Wilkins made the following endorsement:

May 25, 98. Order to go on consent. The moving party may place brown capping where required to comply as per notice of motion. The cost will be at the expense of the YCC & the YCC will do the work as best as can be done to cap - it is understood there might be technical problems as to sliders.

He then added this further note with respect to costs:

No costs if this terminates the matter - if the matter comes back to court the next judge may give to-day's costs as seems just. I fix those costs at \$4,600.

[para3] Apparently, some disagreement arose between the Condominium Corporation and Mr. Trest as to the interpretation of this and, on June 15, 1998, counsel for the Condominium Corporation wrote to Justice Wilkins advising him of this difficulty. Its counsel sent him a copy of the endorsement, the draft order and copies of three letters received from Mr. Trest which highlighted the areas of disagreement that he had with the draft order that was proposed by the Condominium Corporation. The letter went on to itemize the basis of Mr. Trest's disagreement. Mr. Justice Wilkins issued a judgment which was registered on June 22, 1998 and which reads as follows:

THIS APPLICATION was heard this day at Toronto, in the presence of counsel for the Applicant and the Respondent, appearing in person.

ON READING THE APPLICATION RECORD and the Factum of the Applicant, filed, and upon hearing the submissions of counsel for the Applicant and upon reading the Application Record and Factum of the Respondent, filed, and upon hearing submissions of the Respondent;

1. THIS COURT ORDERS that the Applicant may place brown capping on the exterior in the vicinity of the windows and window frames and without limiting the generality of the foregoing where, in the opinion of the Applicant it is required to comply as per its notice of Application. The cost will be at the expense of the Applicant and it will do the work as best as can be done to cap.

2. THIS COURT ORDERS that the method, extent and party installing the capping shall be at the discretion of the Applicant and that the Applicant or its Agent is not required to consult with or obtain the approval of the Respondent prior to the performance of the work and without limiting the generality of the foregoing, this court orders that the Respondent shall not interfere with the installation of the capping by the corporation and/or its agents.

3. THIS COURT ORDERS no costs if this terminates the matter. If the matter comes back to Court the next Judge may give todays costs as seem just. I fix the costs at \$4,600.00.

"J.C. Wilkins J."

[para4] One of the motions before me today is brought by Mr. Trest, who takes exception to the wording of the judgment as signed by Justice Wilkins, claiming that it goes too far and was not what he had agreed to. Indeed, as he points out in his material, the words "Order to go on consent" are removed from the order. Mr. Trest takes the position that what the Condominium Corporation now proposes to do is not acceptable and lies outside the purview of Justice Wilkins' order. He seeks to have the order set aside or varied.

[para5] For its part, the Condominium Corporation has filed a cross-motion in which it seeks a dismissal of Mr. Trest's motion and an injunction to restrain him from interfering in any way with it or its agents from placing the brown capping on the exterior of his unit in the vicinity of the windows and window frames. It also asks that the costs of \$4,600 fixed by Justice Wilkins but not ordered to be paid now be ordered to be paid by Mr. Trest and a further declaration that he is not entitled to any reimbursement of costs relating to the replacement of the windows by him. It also seeks the costs of today's motion.

[para6] In my view, the letter written by the solicitors for the Condominium Corporation quite properly drew to the attention of Justice Wilkins the objections taken to the wording of the draft order by Mr. Trest. It also drew to his attention that the draft judgment does not specifically match up with the endorsement and left it to him to determine whether he felt it was appropriate to sign the order in the form he did. I have to assume that Mr. Justice Wilkins took all of these matters into consideration when signing the order of May 25, 1998, which was registered on June 22, 1998. What Mr. Trest is asking me to do, in my view, is no more than vary the order of Justice Wilkins or take some steps to alter its terms. I have no authority to do that. It may be that it would be appropriate for this matter to proceed to some appellate court but, in my view, I cannot grant the relief he is seeking.

[para7] In reviewing the material in the cross-motion record, I am satisfied that Mr. Trest has taken steps to prevent the capping from being carried out in accordance with the terms of the order and it seems appropriate to me that steps will have to be taken to restrain him from continuing to do so. Accordingly, on the cross-motion, I allow the relief claimed in paragraphs 1(a), (b), (c), (d) and (e) of the Notice of Cross-Motion.

[para8] This brings me to the question of costs as disposed of by Justice Wilkins in his earlier endorsement. I read the endorsement as meaning that he was concerned that this matter could continue on and that the finality which should have accompanied his order might not be achieved. In other words, he said to Mr. Trest "I have assessed the costs of \$4,600 but I will not order you to pay them so long as this matter does not come back into court." Unfortunately, it has come back into court and it has come back at the specific insistence of Mr. Trest and also because he, in my view, has taken steps to thwart the earlier order. I, therefore, feel it appropriate to give effect to that portion of Justice Wilkins' order that the costs of the May 25, 1998 application in the amount of \$4,600 should now be ordered to be paid by Mr. Trest. I should point out that the material discloses that this is not the first time Mr. Trest has indulged in litigation with the Condominium Corporation and I very much fear it will not be the last. In the past, the courts have tried to reason with him and to give him a reasonable chance to put an end to this matter. That did not work. Accordingly, I will order that the costs of the May 25, 1998 hearing in the amount fixed by Justice Wilkins at \$4,600 be payable forthwith.

[para9] Costs of today's motion hereby fixed at \$750 shall be paid by Mr. Trest to the Condominium Corporation forthwith. Approval of the form of this order dispensed with. Draft order is to be submitted to me.

SOMERS J.

CBR# 347

Winfair Holdings (Lagoon City) Limited (applicant (appellant)), and Simcoe Condominium Corporation No. 46, Royal Trust Corporation of Canada, trustee for the Standard Life Assurance Company and Winfair Investments Limited (respondents (respondents)) And between Simcoe Condominium Corporation No. 46 (applicant by counter-application (respondent)), and Winfair Holdings (Lagoon City) Limited (respondent by counter-application (appellant))

Docket No. C28050 Ontario Court of Appeal Toronto, Ontario Catzman, Laskin and Feldman J.J.A. Heard: November 18-19, 1998. Judgment: December 1, 1998.

Counsel: Benjamin Salsberg, for the appellant. Allan D.J. Dick, for the respondent.

The following judgment was delivered by

[para1] THE COURT (endorsement):-- The appellant Winfair appeals the order of Kitley J. dated July 29, 1997, in which, on an application under r. 14.05(3)(e) of the Rules of Civil Procedure, she declared that the licence agreement between Inducon and the respondent Simcoe was valid and in effect. This appeal raises three issues:

(1) Did the motion judge err in finding that the Board ratified the licence agreement, as required by s. 39(2) of the Condominium Act? (2) Did the motion judge err in holding that the Board did not repudiate or otherwise terminate the agreement in September 1995?

(3) If the Board did repudiate the agreement, was the repudiation effective in the light of s. 38(1) of the Condominium Act?

1. The Ratification Issue

[para2] In this court the appellant did not seriously contest the motion judge's finding that the Board had ratified the agreement by its conduct. Section 39(2) of the Act does not prescribe any form of ratification. Although the Board did not ratify the licence agreement by a formal resolution, we agree with the motion judge that the Board did ratify the agreement by its conduct, that is by paying the amount due under the agreement during the first 12 months of the agreement's existence. Indeed, the Board paid the amounts owing under the agreement until 1995 when it sought to renegotiate the payment terms. It is now too late for Winfair to complain about the lack of formal ratification. 2. The Repudiation Issue

[para3] In September 1995, Simcoe's Board, both through its solicitor and through its property manager, sought to renegotiate what it considered were now onerous terms of the licence agreement. In correspondence, the Board indicated to Winfair that it no longer considered itself bound by the original agreement. Winfair, in turn, accepted what it considered to be either the Board's repudiation of the licence agreement or the Board's assertion that it would no longer be bound by the 1984 terms. Winfair submits that having taken this position, the Board and therefore Simcoe itself, can no longer resile from it. Winfair makes this submission although it did not change its own position because of the Board's correspondence, and although it knew full well that the Board's professed termination of the licence agreement was strongly opposed by many unit owners.

[para4] The motion judge concluded that the Board's correspondence did not amount to a repudiation of the licence agreement. In her view, "It is clear that Simcoe intended to maintain the relationship. Simcoe simply sought to change the terms of the licence agreement to reduce its outlay of expenses for the use of the Facility." The appellant has not persuaded us that the motion judge's conclusion was unreasonable. We think that her conclusion is supportable, not only because of the correspondence itself, but because of the surrounding circumstances, which included Winfair's knowledge and the absence of any prejudice suffered by it.

[para5] However, even if the motion judge was wrong on the repudiation issue, the appellant must still contend with s.38 of the Condominium Act, to which we now turn.

3. Section 38 of the Condominium Act

[para6] The motion judge did not deal with s.38. But we agree with the respondent that s. 38 is fatal to Winfair's case, even if the Simcoe Board intended to repudiate the licence agreement. Section 38(1) provides:

38(1) The corporation may by a vote of owners who own 80 per cent of the units make any substantial addition, alteration or improvement to or renovation of other common elements or may make any substantial change in the assets of the corporation, and the corporation may by a vote of the owners make any other addition, alteration or improvement to or renovation of the common elements or may make any other change in the assets of the corporation.

[para7] The appellant concedes that the licence agreement is an asset of Simcoe and that the termination of the agreement would be a "substantial change in the assets of the corporation" under s. 38(1) of the Act. Thus, terminating the licence agreement required an affirmative vote by owners owning 80% of the units. Although a vote was apparently held, the 80% majority was not achieved. Absent an 80% vote, any repudiation of the agreement by the Board was ineffective.

[para8] Winfair cannot avoid the application of s. 38 by invoking the "indoor management rule", and by relying on the Board's apparent authority. As this court's judgment in *Carleton Condominium Corporation No. 279 v. Rochon* (1987), 44 R.P.R. 228 demonstrates, the indoor management rule, applicable to ordinary corporations, has no application to a condominium corporation. Because the requirements of s. 38 were not met, Winfair could not succeed on its application. [para9] The appeal is therefore dismissed with costs.

CATZMAN J.A. LASKIN J.A. FELDMAN J.A.

CBR# 194

Metropolitan Toronto Condominium Corp. No. 858 v. Simmelsgaard

Metropolitan Toronto Condominium Corporation No. 858, applicant (responding party), and Hanne Simmelsgaard, Kamla Ali and Thelma Clarke on behalf of all petitioners of a homeowners' petition dated December 14, 1996 and on behalf of all owners and mortgagees of units of Metropolitan Toronto Condominium Corporation No. 858, respondents (moving party)

Court File No: RE7393/97 Ontario Court of Justice (General Division) Motions Court Adams J. Heard: February 12, 1997. Oral judgment: February 21, 1997.

Counsel: Armand G.R. Conant for the applicant. David W. Dolson for the respondents, Hanne Simmelsgaard, Kamla Ali and Thelma Clarke.

[para1] ADAMS J. (orally):-- The application was issued on February 3, 1997 and served on the respondents/moving party in the afternoon or evening of February 3, 1997 to be returnable February 5, 1997.

[para2] The application sought various relief, including a declaration that a petition of homeowners dated December 14, 1996 for a special general meeting of owners for the purposes of removing the current board of directors of the applicant was invalid; declaring that the notice of special general meeting of owners dated January 15, 1997 was invalid; declaring that the meeting was invalid and any motions or resolutions made or passed were invalid; a permanent injunction restraining any and all unit owners and mortgagees from meeting pursuant to the petition; and an interim and interlocutory injunction restraining the owners and mortgagees from meeting.

[para3] The application came on before Wilkins J. on February 5, 1997. He ruled that the application was late and that there was no good reason to prevent a meeting proceeding. He adjourned the application to a date to be fixed by the Motions Office when the results of the meeting were known and the court would be in a better position to rule appropriately.

[para4] The meeting proceeded on February 6, 1997 and was attended by thirty-six units represented in person and fifty-six units represented by proxy. The unit owners passed resolutions by secret ballot for the removal of the four incumbent members of the board of directors. The results were as follows:

Astraf Ali

43 Yes, for removal 39 No, do not remove

Amaro Bolarinho

47 Yes, for removal 35 No, do not remove

Maria DiPrizio

46 Yes, for removal 34 No, do not remove 1 Spoiled ballot

Cathy Pittini

45 Yes, for removal 35 No, do not remove 1 Spoiled Ballot At the meeting, individuals who had signed the petition of December 14, 1996 were elected to the five vacancies on the board of directors. These individuals are Thelma Clarke, Hanne Simmelsgaard, Astraf Ali, John Pizzicarola and Lorella Zanetti. This is a motion brought by the respondents/moving party pending the return of the application on the long motion, for final determination for the following relief among the other relief set out in the Notice of Motion:

a. to determine, as a preliminary issue of law, whether the number of votes required to remove a director was the majority of the owners, in the case of this condominium plan of 126 residential units, a total of 64 votes voting in favour of removal; or whether the number of votes require was a simple majority of the units represented in person or by proxy at the meeting, so long as a majority of the units were represented in person or by proxy at the meeting, which is the test adopted in *Reiners v. Mercer* (1988), 2 R.P.R. (2d) 188;

b. a direction as to the manner in which the business and affairs of the condominium corporation should be managed, and this litigation should be conducted, pending the return of the Applicant's Application, and in particular:

- i. whether the "removed" directors should be added as parties to this application if they wish to continue it;
- ii. whether either or both of the "removed" directors and the newly elected directors should have access to the assets of the Corporation for the purpose of conducting this litigation; and
- iii. if the "removed" directors should be restrained from purporting to act as members of the board of directors or officers of the Corporation, pending any determination as to the legality of the petition and meeting.

[para5] Metropolitan Toronto Condominium Plan 858 consists of a high-rise building with 126 residential condominium units. Condominium Corporation 858 was formed under the Condominium Act to administer the common elements of the Condominium Plan. A petition was given to the Corporation by hand delivery of a copy to the units owned by the directors as well as the management office. The petition was signed by 20 individual owners. The petition set out that it was requisitioning a meeting for the purpose of removing the board of directors. Simmelsgaard has sworn that she explained that, as the preamble clearly indicated, it was to request a meeting to remove the existing board of directors and to elect a new board in its place. In particular, she has deposed that Mrs. Lilhein's daughter and son-in-law had attended at an information meeting held by Astraf Ali on November 14, 1996 regarding problems with the then directors and that she had been requested by Mrs. Lilhein to speak to her daughter who was fluent in English prior to Mrs. Lilhein signing the petition, which Simmelsgaard did. Both Mrs. Lilhein and Mr. Singh who provided the "removed board" with purported revocations of their signatures on the petition have subsequently told the

respondents that they were aware that the petition was to remove the directors but subsequently had changed their minds. Apparently both have since that time changed their minds again.

[para6] All of this concern about the underlying "validity" of the petition arises because members of the removed board made face to face inquiries of petitioners requesting that they explain their intent in signing the petition and the circumstances surrounding the presentation of the petition to them. However, no officer, director, manager or solicitor of 858 requested to see the original executed copy of the petition for the meeting of unit owners and there was no meeting of the removed board of directors to consider the petition until January 18, 1997. Notice of the special meeting of owners was mailed to all owners on January 15, 1997.

[para7] With the cooperation of the previous property manager providing an arrears list to November 19, 1996 and the current property manager providing a list of owners more than thirty days in arrears, on February 6, 1997 a vote of unit owners was administered. "Approximately twelve to fourteen owners or their proxies" were prevented from voting based upon these arrears lists. Approximately ten of these owners were in favour of the respondents. The court was advised the original proxies and arrears lists are in envelopes held by Mr. Conant. Proxies that were drafted subsequent to any other proxy and signed by persons shown on the registry as owners, including those presented by the removed board and their supporters, were recognized for the purposes of the meeting, notwithstanding that they were not in the form provided with the notice of meeting.

[para8] The court notes that Simmelsgaard had been removed as a director in a meeting held in June 1996, based upon a vote of less than sixty-four unit owners relying on the decision of the District Court in *Reiners v. Mercer*, supra. The newly elected board of directors passed a resolution removing Forbes, Conant as solicitors for the Corporation. No meeting of the removed directors was held to consider whether this application should be brought or, at least no notice of such a meeting was received by one of the directors, Astraf Ali, prior to the owners' meeting of February 6, 1997.

[para9] The Condominium Act provides that:

15(8) Any director may be removed before the expiration of his or her term by a vote of owners who together own a majority of the units and the owners may elect in accordance with the bylaws dealing with the election of directors, any person qualified to be a member of the board for the remainder of the term of the director removed.

19. The board shall upon receipt of a requisition in writing, made by owners who together own at least 15 per cent of the units call and hold a meeting of the owners and if the meeting is not called and held within 30 days of the receipt of the requisition, any of the requisitionists may call the meeting, and in such case the meeting shall be held within sixty days of receipt of the requisition.

The parties dispute precisely what the requirements of a vote for the removal of a director entails where Section 15(8) of the Act provides:

... by a vote of owners who together own a majority of the units ...

[para10] In *Reiners v. Mercer*, supra it was held that this section intends that the vote be governed by the majority of ballots cast provided a threshold quorum requirement is met of at least 50 per cent of unit owners participating in the voting process.

[para11] The issue before the court is whether that interpretation of s. 15(8) is correct. Despite its earlier approval in relation to Simmelsgaard, the applicant/responding party takes the position that it is not correct. It is argued on behalf of the responding party that the legislation intends that the removal of a member of the board of directors during his or her term is an exceptional process that ought to be and is intended to be regulated by requiring that a majority of unit owners cast votes in favour of removal. I disagree. I have had the benefit of reviewing both the reasons of *Reiners v. Mercer* and those of *McKinnon J. in Page v. La Fleche*, in light of counsel's representations and have concluded that both cases are correctly decided. In my view, if something other than a quorum requirement was intended, express provision for voting to be governed by other than a majority of ballots cast would have been provided for. The position of the applicant/responding party would provide more than stability. It would provide an undue barrier to democratic responsiveness in light of *McKinnon J.*'s analysis of the statute which cannot improve upon.

[para12] Accordingly the motion before this court is successful on that legal issue.

[para13] I now turn to the consequence of this ruling in light of the outstanding application which purports to challenge the very conduct of the vote on the basis of "the origination and circulation" of the petition leading to the calling of the meeting. The likely success of this application is far from obvious. The submissions that the Act contemplates the possible revocation of petition signatures and a detailed judicial examination of the origination and circulation of a petition other than where fraud is alleged have profound implications for the effective administration of condominiums. The new board shall therefore govern 858 pending the return of this application, which application the new board will not impede. Mr. Conant is no longer counsel of 858 save only for the pursuit of this application in the name of 858. After February 6th, 1997, 858 shall bear only one-half of the fees of each of Mr. Conant and Mr. Dolson in respect of this application with Mr. Dolson now counsel to the new board and 858. Legal services of Mr. Dolson rendered to 858 in respect of matters other than in defending this application shall be on a 100% basis. 858 is directed to pay Mr. Dolson \$1,000.00 for the respondents' costs before *Wilkins J.* Mr. Conant's accounts up to February 6, 1997 shall be honoured by 858 on a 100 per cent basis. Costs for today shall be fixed at \$2,000.00 payable by 858 to the respondent/moving party. The application will have a fixed date established before March 31, 1997, failing which application can be made to *Adams J.* to strike the application. *Adams J.* will remain seized to resolve all interim difficulties in the administration of this order pending the hearing of the underlying application.

ADAMS J.

CBR# 363

York Condominium #382, of the City of Toronto, in the Municipality of Metropolitan Toronto, applicant (appellant), and David Dvorchik and Frances Dvorchik, respondents (respondents in appeal)

No. C12466 Ontario Court of Appeal Toronto, Ontario Morden A.C.J.O., Finlayson and Abella J.J.A. Heard: January 17, 1997. Judgment: February 6, 1997.

Counsel: Stephen Schwartz for the appellant. Lesli Bisgould for the respondents.

The following judgment was delivered by

[para1] THE COURT (endorsement):-- The appellant applied under s. 49(1) of the Condominium Act, R.S.O. 1990, c. C.26 for an order directing the respondents to comply with, among others, Rule 3(F) of the appellant's rules, which requires that no pet weigh more than 25 pounds. The respondents' dog weighed more than the permitted weight, and compliance with Rule 3(F) would have resulted in the removal of the dog from the condominium.

[para2] The reasons are reported at [1992] 24 R.P.R. (2d) 19. The facts are set out in those reasons.

[para3] The issue in this appeal is whether Keenan J. was correct when he concluded that the appellant's "25 pound rule" was invalid and unenforceable in the absence of evidence that: a) "large dogs are any more of a threat to the safety, security or welfare of the owners than are smaller dogs"; or b) "large dogs unreasonably interfere with the use and enjoyment of the common elements and of other units, any more so than smaller dogs."

[para4] A board of directors of a condominium corporation derives its authority to make rules under s. 29 of the Condominium Act. Section 29(1) entitles the board to make rules for "the safety, security or welfare of the owners and of the property" or "for the purpose of preventing unreasonable interference with the use and enjoyment of the common elements and of the other units." The only limitation on the nature of these rules, is set out in s. 29(2) which states that the rules be "reasonable" and "consistent" with the Condominium Act.

[para5] The condominium board was not obliged to hear evidence in reaching its conclusion that larger pets be prohibited. In making its rules, the board is not performing a judicial role, and no judicialization should be attributed either to its function or its process. In an application brought under s. 49(1), a court should not substitute its own opinion about the propriety of a rule enacted by a condominium board unless the rule is clearly unreasonable or contrary to the legislative scheme. In the absence of such unreasonableness, deference should be paid to rules deemed appropriate by a board charged with responsibility for balancing the private and communal interests of the unit owners.

[para6] With respect, we do not agree that the rule restricting the size of pets is either unreasonable or inconsistent with the Condominium Act. This is a condominium with several hundred units and over a thousand residents. On its face, it is both reasonable and consistent with the legislation that there be a limit on the size - or for that matter the number - of pets to prevent the possibility of "unreasonable interference with the use and enjoyment of the common elements and of the other units." There are, undoubtedly, different approaches the board could have taken to regulate the keeping of pets owned by residents, and it may be that the "25 pound rule" is not the best rule or the least arbitrary. But this does not make it an unreasonable one. The threshold for overturning a board's rules reasonably made in the interests of unit owners is a high one, and it has not been met in this case.

[para7] Accordingly, we allow the appeal, with costs at both levels, set aside the order of Keenan J., and grant the relief requested in the application.

MORDEN A.C.J.O. FINLAYSON J.A. ABELLA J.A.

CBR# 309

Stockey v. Peel Condominium Corp. No. 174

Between Robert Charles Stockey, plaintiff (respondent), and Peel Condominium Corporation No. 174, defendant (appellant)

Court File No. V627/95 Ontario Court of Justice (General Division) Brampton, Ontario Webber J. October 23, 1996.

Counsel: Mark H. Arnold, for the appellant. Robert Charles Stockey, on his own behalf.

[para1] WEBBER J.:-- On September 18, 1996, I released reasons dealing with the first issue raised by this appeal. That issue involved the jurisdiction of the Small Claims Courts. As stated in those reasons, the second issue would be decided at a later date. I have now received submissions on the second issue.

[para2] The second issue is set out in the appellant's factum as follows: "Does the declaration of Peel Condominium Corporation No. 174 require the condominium corporation to repair and maintain garage doors for the respective units?"

[para3] The deputy judge, for oral reasons given at trial, decided that the plaintiff/respondent was entitled to judgment for \$511.91, representing the cost of a replacement garage door. The deputy judge concluded the said garage door was not part of the unit but part of the common elements, which must be repaired by the condominium corporation. His decision involved the consideration of certain parts of the condominium declaration. The declaration provides, in paragraph VII(2), as follows:

(2) Repairs and Maintenance of Common Elements by the Corporation

The Corporation shall repair and maintain the common elements which includes repair and maintenance to all doors which provide the means of ingress to and egress from a unit and to all windows, save and except maintenance of interior surfaces of windows, all at its own expenses. (Emphasis added)

[para4] In addition, he considered Schedule C to that declaration:

VERTICAL BOUNDARIES

(a) Basement and garage (or in those units without basement the lower floor - The interior face of the exterior concrete or concrete block walls and interior face and plane of 2" x 4" wooden studs and the projection of such surfaces across openings for doors and windows except: (in the vicinity of garage doors, the unit shall extend to the unfinished exterior face of garage doors (in closed position). (Emphasis added)

(b) All other floors - The interior face and plane of 2" x 2" wooden studs, and the project of the above surface across all openings for doors and windows, except at bay windows, the unit shall extend to the exterior face of bay window.

HORIZONTAL BOUNDARIES

(a) The upperside of the concrete floor slab of the basement garage, (or in those units without basements) the lower floor.

(b) The underside face and plane of ceiling joists in the uppermost floor and/or first floor extending beyond second floor.

(c) In the vicinity of the bay window extending beyond the ground floor, the unit is bounded by the upper face of subfloor as illustrated on Part 1, Sheet 1, of the description filed concurrently herewith.

(d) In the vicinity of bay window at ground level, the unit is bounded by the backside face of drywall as illustrated on Part 1, Sheet 1, of the description filed concurrently herewith.

[para5] Notwithstanding the foregoing, the unit shall not include:

(a) All doors and windows leading out of such units.

[para6] In his reasons, the deputy judge applied the contra preferendum rule. Both counsel agree this issue was not put to the deputy judge. His ruling is obiter. In any event, the contra preferendum rule does not apply. Contra preferendum applies to an agreement and not to a declaration (Metropolitan Toronto Condominium Corporation No. 949 v. Erwin, Court of Appeal for Ontario, unreported, released 16 December 1994). Both counsel agree the provisions of the declaration are ambiguous. Further, they both agree that there are no authorities on point. They suggest the clauses in issue should be interpreted on a good common sense basis.

[para7] Paragraph VII(2) uses the words "to all doors which provide the means of ingress to and egress from a unit." Garage doors are not mentioned in this paragraph.

[para8] Schedule C is a definition of vertical and horizontal boundaries of the unit. No reference is made to garage doors in the definition of the horizontal boundaries. In the definition of vertical boundaries, reference is made to garage doors but simply in brackets, "in the vicinity of garage doors, the unit shall extend to the unfinished exterior face of garage doors (in closed position)." Schedule C, as is noted, goes on to state: "Notwithstanding the foregoing, the unit shall not include: (a) all doors and windows leading out of such units."

[para9] I can only conclude clause (a) is directed to and specifically exempts doors and windows within the boundaries as defined to confirm with paragraph VII(2). It does not mention garage doors.

[para10] The garage door, in my view, is not a common element as defined by Section 2 for three reasons:

(1) The garage door is not mentioned in Section 2 of paragraph VII;

(2) The notwithstanding clause (a) modifies or requires the doors and windows to be the responsibility of the corporation, as is specified in paragraph 2.

(3) The reference to the words "garage door" in the vertical boundary definition clearly indicates that the unit "extends to the unfinished exterior face of garage doors."

[para11] I cannot conceive that the garage door can be considered to be part of the common elements. While it may be that the finish of the exterior of the garage doors is the responsibility of the condominium corporation, each garage, including its doors, is for the individual use of the unit owner in question for whatever use he/she may wish to make of the same. The door to each garage comprises part of the unit and, therefore, is not part of the common elements.

[para12] For these reasons, the appeal is allowed, the judgment of the deputy judge is set aside and judgment will go dismissing the action as against Peel Condominium Corporation No. 174. As both issues are novel, I am of the view that no costs should be awarded. If counsel have some reason to make other submissions as to costs, they may do so within 15 days of the date of these reasons by fax to my office.

WEBBER J.

CBR# 198

Miluzzi v. York Condominium Corp. No. 60

Between Iole Miluzzi and Loretta Miluzzi, plaintiffs, and York Condominium Corporation No. 60, defendant

Court File No. E7328/95 Ontario Court of Justice (General Division) Small Claims Court - Etobicoke, Ontario Godfrey Prov. J. June 6, 1996.

Counsel: I. Lavrence, for the plaintiffs. B. Fedson, for the defendant.

[para1] GODFREY PROV. J.:-- The Plaintiffs in this action are the owner and occupant of condominium unit 1407 at 300 Dixon Road in Toronto. The plaintiffs' unit was flooded on February 19th, 1993 along with other units as a result of water leakage occurring in unit 1807 due to the negligence of the owner or occupant of that unit. State Farm, being the insurer of the plaintiffs repaired the water damage which consisted of damage to the ceilings, walls and carpeting. The plaintiffs now seek the sum of \$5394.49 from the defendant Condominium Corporation on the basis of breach of contract by the said defendant in not having the repairs effected at its expense, and on the basis of subsection 27(1) of the Condominium Act. As to subsection 27(1), the plaintiffs allege that the defendant Corporation failed to properly place zero deductible insurance as required by that subsection.

[para2] The defendant alleges that the plaintiffs are not entitled to succeed because -

(1) there has been no breach of contract by the defendant;

(2) the policy of insurance under subsection 27(1) of the Condominium Act has a \$5000.00 deductible, and the damage to the unit of the plaintiffs was less than this \$5000.00 figure;

(3) subsection 27(4) of the Condominium Act prevents the plaintiffs from claiming contribution against the defendant; and

(4) the defendant has been prejudiced by the delay of the plaintiffs in bringing this action. Specifically, the defendant claims it is barred from bringing a claim against its own insurer due to the passage of time (see Exhibit 2, Tab 2, page 25), and that its rights to adjust any loss with its insurer pursuant to the declaration and its insurance policy have been lost.

[para3] I am satisfied on the evidence that most of the repairs performed by State Farm were reasonable. None of the witnesses for the defendant saw the condition of the unit of the plaintiffs after the flooding, save and except, for the possibility of Charles Caron, the site property manager. Mr. Caron, however, could not say with any certainty that he was in unit 1407 prior to the repairs. On the other hand, Loretta Miluzzi and Shawn Brown, the insurance adjuster, saw the damage first hand. Both commented on the rust in the water. I accept the evidence of Mr. Brown that it was unlikely that the carpeting and padding would respond to cleaning due to the rust, and the staining that had occurred. I also accept Mr. Brown's evidence that continuous painting of all walls is normal and necessary to provide a proper finished product. I accept the quotation of Paul Davis as being reasonable, as it was consistent with the computer quotation generated by State Farm. I do not accept the evidence of Mr. Krok for the defendant that it was unnecessary to repaint or re-stucco much of the unit. Common sense suggests that Mr. Krok would not have been able to sufficiently match existing colouring on the walls or ceilings so as to avoid significant repainting and re-stuccoing. I do find, however, that it was unnecessary to repair the sheetrock on the ceiling of the entryway, living room and bedroom. I am satisfied on the evidence of Mr. Krok that no sheetrock existed on the ceiling in those rooms. As a result, those expenses numbered 2, 4, 5, 11, 13, 14, 22, 24 and 25 shown on the estimate of Paul Davis (Exhibit 2, Tab 2) ought to be deducted from the claim of the plaintiffs. These expenses total \$897.40. I recognize that some plastering would have been necessary in lieu of the sheetrock, and I estimate the cost of that plastering to be \$300.00. Accordingly I find the plaintiffs' damages to be \$4797.09.

[para4] I further find that the defendant Corporation placed insurance in accordance with subsection 27(1) of the Condominium Act. The insurance policy with Royal Insurance provided for replacement cost insurance. The insurance also had a \$5000.00 deductible. For the purpose of subsection 27(1) of the Condominium Act, I find that replacement cost insurance can exist with a deductible provided the deductible is reasonable in the circumstances. A reasonable deductible ought to be expected by the unit owners. In the case at hand, the deductible was reasonable in light of the Corporation's prior history of claims made under the policy. It was also the only way the defendant could get someone to underwrite the policy. The Corporation in placing the insurance acted on its own behalf and on behalf of the owners of the units and common elements. The unit owners cannot object unless the Corporation has acted in an arbitrary or capricious manner. In the circumstances, I am satisfied the defendant Corporation acted reasonably and that the plaintiffs' damages fell within the deductible limit. I also find that there is no basis for the plaintiffs to be successful on the issue of breach of contract.

[para5] Based on the foregoing, the claim of the plaintiffs will be dismissed. It is unnecessary for me to make findings in relation to subsection 27(4) of the Condominium Act, or the alleged prejudice experienced by the defendant, and I decline to do so. If necessary, the parties may speak to me further regarding the issue of costs.

GODFREY PROV. J.

CBR# 199

Ico gu' Ngo " O qqtg." Rncpwhh" cpf " Vj g" Qy pgtu< Eqpf qo lpkwo " Eqtr qtcvqp" Rncp" 9; 32793" cnuq" npqy p" cu" Tgphggy " J qwug." F ghgpf cpv"

"J3; ; 6_C10P q0832"

"F qengv' P q0'R; 5; 2329445" Cndgtv" Rtqxlpckri' Eqwt' Ekxli' F kxkukqp" /" Ecri ct { " Cndgtv" Ueqw' Rtqx0' Ev0' L0' J gctf < Lwn { " 3; ; 60' Lxf i o gpv' hkgf ' Lwn { " 48. ' 3; ; 60"

"Rncpwhh' cr r gctgf 'kp' t' gtuq0M0Y 0Ur etmu. 'hqt' 'vj g' F ghgpf cpv0"

"Jr ctc3_ "UEQVV"RTQX0'EV0' L0' /" Vj g' r ncpwhh' dtlpi u' vj ku' cevqp' ci ckpu' vj g' f ghgpf cpv' Eqpf qo lpkwo " Eqtr qtcvqp" Rncp" 9; 32793" *\$Tgphggy " J qwug\$+ " nqecvgf ' kp' vj g' Ekv' qh' Ecri ct { " hqt' f co ci gu' kp' vj g' uwo " qh' & 8. 79: 03" uwvckpgf ' d { " j ko " tguwvki " ht qo . " co qpi " qvj gt' vj kpi u. " vj g' gxkcvqp' qh' vj g' vgpv' qh' Wpk' P q03: . " Uwkxg' 523' kp' Tgphggy " J qwug' vj g' gchgt' t' ghg' vj g' cu' \$Wpk' 523\$+ " qy pgf ' d { " vj g' r ncpwhh0"

"Jr ctc4_ "kp' cf f kxkqp. " vj g' r ncpwhh' encko u' t' gko dwtugo gpv' hnj g' f ghgpf cpv' kp' vj g' uwo " qh' & 6490 7' r ckf ' d { " vj g' r ncpwhh' vj g' f ghgpf cpv' wpf gt' r' tqvguv' qp' qt' 'cdqw' P qxgo dgt' 37. ' 3; ; 50"

"Jr ctc5_ " Vj g' r ncpwhh' j cf . " lqkwn { " y kj " qp' g' Ugep' Rctm' r wtej cugf " Wpk' 523' cu' cv' Cwi wuv' 53. ' 3; ; 2' cpf' j cf " t' g' v' g' uco g' v' c' v' g' p' v' hqt' u' qo g' 37' o qpv' u' y kj qw' l' p' k' f' g' p' v' 0' Vj cv' w' p' k' v' y cu' x' c' e' c' v' g' f' " kp' vj g' r' n' w' g' t' r' ctv' qh' 3; ; 30' Vj g' r' ncpwhh' j cf " cttcpi gf " vj g' r' w' e' j' cug' O' t' 0' Rctm' l' p' v' g' t' u' v' l' p' v' j' g' v' p' k' v' y kj " v' k' v' g' k' u' w' v' k' i " kp' vj g' r' ncpwhh' u' p' c' o' g' " qp' q' t' " cdqw' H' g' d' t' w' e' t' { " 7. ' 3; ; 50' Vj g' r' ncpwhh' " kp' l' e' p' w' e' t' { " 3; ; 5. " vj t' q' w' i' j' " j' k' u' c' i' g' p' v' C' p' i' g' r' e' " L' a' j' p' u' q' p' . " t' g' r' e' v' v' j' g' r' t' g' o' k' u' g' u' r' w' t' u' w' e' p' v' v' q' c' y' t' k' v' e' p' r' e' g' u' g' v' q' " a' p' g' F' g' d' d' k' e' J' c' p' p' c' j' " h' q' t' c' r' g' t' k' f' " q' h' q' p' g' " f' g' e' t' " h' q' o' " l' e' p' w' e' t' { " 53. ' 3; ; 4' vj t' q' w' i' j' " v' q' l' e' p' w' e' t' { " 53. ' 3; ; 5' h' q' t' & 77202' r' g' t' o' q' p' v' j' 0' Vj g' g' x' k' f' g' p' e' g' k' p' f' l' e' c' v' g' u' v' j' c' v' O' u' 0' J' c' p' p' c' j' " j' c' f' " c' " { " q' w' i' " k' p' h' c' p' v' c' p' f' o' c' l' " q' t' o' c' l' " p' q' v' j' c' x' g' d' g' g' p' e' a' j' c' d' k' k' p' i' " kp' vj g' v' p' k' v' y' k' j' " q' p' g' Q' r' k' x' g' t' " N' e' g' g' J' c' t' t' k' u' 0"

"Jr ctc6_ " Qp' O' ctej " 33. ' 3; ; 4. " c' r' e' v' g' t' y' c' u' f' k' t' e' v' g' f' " v' q' Ugep' Rctm' y' j' q' y' c' u' u' k' m' r' t' g' u' o' g' f' " v' q' d' g' c' e' a' q' y' p' g' t' " q' h' Wpk' 523. " d { " J' c' t' r' e' p' O' c' p' c' i' g' o' g' p' v' N' f' 0' v' j' g' v' j' g' p' o' c' p' c' i' g' t' u' q' h' T' g' p' h' t' y' " J' q' w' u' g' . " k' p' f' l' e' c' v' k' p' i' " e' a' p' e' g' t' p' u' j' c' f' " d' g' g' t' e' g' e' k' x' g' f' " c' u' v' j' v' j' g' S' e' j' c' t' c' e' v' g' t' \$ " q' h' v' j' g' v' g' p' c' p' w' u' " q' h' Wpk' 523' c' p' f' " v' j' c' v' c' d' e' d' { " y' c' u' t' g' u' k' f' k' p' i' " kp' c' p' S' c' f' w' a' s' d' w' k' f' k' p' i' 0' P' q' o' g' p' v' k' p' k' u' o' c' f' g' g' q' h' c' p' { " q' v' j' g' t' " e' q' o' r' n' c' k' p' u' t' g' i' c' t' f' k' p' i' " v' j' g' v' j' g' p' v' g' p' c' p' w' u' c' p' f' . " kp' h' c' e' v' . " r' c' t' e' i' t' e' r' j' " 84* c' + * x + " q' h' v' j' g' D { " r' e' y' u' q' h' v' j' g' " E' q' t' r' q' t' c' v' k' p' " t' e' e' q' i' p' k' g' u' v' j' c' v' c' " w' p' k' v' o' c' { " d' g' q' e' e' w' k' g' f' " d { " w' r' " v' q' " h' k' x' g' " r' g' t' u' q' p' u' y' j' g' v' j' g' t' c' f' w' n' q' t' o' k' p' q' t' 0"

"Jr ctc7_ " Qp' O' ctej " 3; . ' 3; ; 4. " c' p' g' k' i' j' d' q' w' t' v' q' Wpk' 523' o' c' f' g' c' e' q' o' r' n' c' k' p' v' v' j' g' v' j' g' p' r' t' g' u' k' f' g' p' v' q' h' v' j' g' " E' a' p' f' q' o' l' p' k' w' o' " E' q' t' r' q' t' c' v' k' p' . " E' c' t' q' i' D' q' u' y' g' m' " q' h' n' q' w' f' " p' q' k' u' g' " g' o' c' p' c' v' k' p' i' " h' t' q' o' " v' j' c' v' w' p' k' v' c' u' v' j' g' t' g' u' w' n' q' h' y' j' c' v' c' r' r' g' e' t' g' f' " v' q' d' g' c' f' f' q' o' g' u' v' k' e' f' k' u' r' w' g' 0' C' u' c' t' g' u' w' n' q' h' h' w' v' j' g' t' " p' q' k' u' g' " q' p' O' c' t' e' j' " 42. " v' j' g' E' k' v' { " R' q' r' e' g' U' g' t' x' l' e' g' y' c' u' u' w' o' o' q' p' g' f' " c' p' f' " c' w' g' p' f' g' f' " c' v' v' j' g' r' t' g' o' k' u' g' u' v' c' n' k' p' i' " k' p' v' q' e' w' u' q' f' { " Q' r' k' x' g' t' " r' e' g' g' J' c' t' t' k' u' c' n' g' i' g' f' n' q' " p' c' p' q' w' u' c' p' f' k' p' i' " y' c' t' t' e' p' 0' C' n' j' q' w' i' j' " v' j' g' t' g' y' c' u' p' q' h' w' v' j' g' t' f' k' u' w' t' d' e' p' e' g' u' v' r' " v' q' c' p' f' " k' p' e' n' f' k' p' i' " O' c' t' e' j' " 48. ' 3; ; 4. " v' j' g' f' g' h' g' p' f' c' p' v' e' q' t' r' q' t' c' v' k' p' k' u' w' g' f' " v' q' v' j' g' v' g' p' c' p' v' c' p' f' " v' q' v' j' g' r' n' c' p' w' h' h' c' p' " g' x' l' e' v' k' p' i' p' q' v' e' g' t' g' s' w' k' k' p' i' " v' j' g' v' g' p' c' p' v' v' q' x' c' e' c' v' g' j' g' v' p' k' v' q' p' q' t' ' c' d' q' w' C' r' t' k' l' 52. ' 3; ; 4' q' p' v' j' g' i' t' q' w' p' f' u' v' j' c' v' v' j' g' v' g' p' c' p' v' c' p' f' " v' j' g' q' y' p' g' t' y' g' t' g' p' " d' t' g' c' e' j' " q' h' r' c' t' e' i' t' e' r' j' " 84* c' + * k + " q' h' v' j' g' " E' q' t' r' q' t' c' v' k' p' " D { " r' e' y' u' h' k' g' f' " kp' v' j' g' u' g' r' t' q' e' g' g' f' k' p' i' u. " y' j' k' e' j' " r' t' q' x' k' f' g' c' u' h' q' m' y' u"

"Jr ctc8_ " \$840* c' + C' p' q' y' p' g' t' l' j' c' m' i' p' q' v"

"*k' e' o' c' m' g' q' t' " r' g' t' o' k' v' p' q' k' u' g' " k' p' q' t' " c' d' q' w' c' p' { " w' p' k' v' q' t' " v' j' g' e' q' o' o' q' p' r' t' q' r' g' t' v' { " y' j' k' e' j' " k' p' v' j' g' q' r' k' p' k' p' q' h' v' j' g' " D' q' c' t' f' " k' u' c' " p' w' k' u' c' p' e' g' " q' t' " w' p' t' g' c' u' p' c' d' n' f' " k' p' v' g' t' h' e' t' g' u' y' k' j' " v' j' g' w' u' g' c' p' f' " g' p' l' q' o' g' p' v' q' h' c' v' p' k' v' q' t' " v' j' g' e' q' o' o' q' p' r' t' q' r' g' t' v' { " d { " c' p' { " q' v' j' g' t' q' y' p' g' t' q' t' " q' e' e' w' c' p' v' 00\$"

"K' i' k' p' " d' t' g' c' e' j' " q' h' v' j' k' u' u' g' e' v' k' p' . " v' j' g' q' y' p' g' t' y' q' w' f' " c' n' u' q' d' g' " k' p' " d' t' g' c' e' j' " q' h' r' c' t' e' i' t' e' r' j' " 5* h' + " q' h' v' j' g' D { " r' e' y' u' y' j' k' e' j' " k' u' p' q' v' t' g' h' g' t' t' g' f' " v' q' " k' p' v' j' g' " g' x' l' e' v' k' p' i' p' q' v' e' g' 0"

"Jr ctc9_ " C' u' c' t' g' u' w' n' q' h' v' j' g' g' x' l' e' v' k' p' i' p' q' v' e' g' . " v' j' g' v' g' p' c' p' v' x' c' e' c' v' g' f' " v' j' g' r' t' g' o' k' u' g' u' q' p' q' t' " c' d' q' w' C' r' t' k' l' : . ' 3; ; 40"

"Jr ctc: _ " Vj g' r' ncpwhh' vj gp' t' g' v' c' l' p' g' f' " vj g' u' g' t' x' l' e' g' u' q' h' J' c' t' r' e' p' O' c' p' c' i' g' o' g' p' v' N' f' 0' y' j' q' j' c' f' " e' g' c' u' g' f' " v' q' d' g' v' j' g' o' c' p' c' i' g' t' u' q' h' T' g' p' h' t' y' " J' q' w' u' g' c' v' v' j' g' g' p' f' " q' h' O' c' t' e' j' " 3; ; 4. " v' q' r' e' c' u' g' v' j' g' r' t' g' o' k' u' g' u' y' j' k' e' j' " v' j' c' v' e' q' o' r' c' p' { " f' k' f' " g' h' g' e' v' x' g' " L' w' p' g' 32. ' 3; ; 4' h' q' t' v' j' g' u' w' o' " q' h' & 49202' h' q' t' " v' j' g' d' e' m' p' e' g' q' h' v' j' g' o' q' p' v' j' " q' h' L' w' p' g' c' p' f' " & 76202' r' g' t' o' q' p' v' j' " v' j' g' t' g' c' h' g' t' 0"

"Jr ctc: _ " Uqo g' v' k' o' g' c' h' v' g' t' v' j' k' u' f' c' v' g' v' j' g' f' g' h' g' p' f' c' p' v' e' j' c' p' i' g' f' " v' j' g' m' e' m' u' q' p' " c' m' i' w' p' k' u' " k' p' " T' g' p' h' t' y' " J' q' w' u' g' " d' g' e' c' w' u' g' " q' h' i' g' p' g' t' c' n' i' u' g' e' w' k' v' { " e' a' p' e' g' t' p' u' c' p' f' " p' q' v' t' g' r' e' v' g' f' " v' q' v' j' g' o' c' w' e' t' u' t' g' h' g' t' t' g' f' " v' q' c' d' q' x' g' 0' J' q' y' g' x' g' t' . " v' j' g' h' t' u' v' p' q' v' e' g' v' j' g' r' n' c' p' w' h' h' t' e' g' e' k' x' g' f' " q' h' u' w' e' j' " e' j' c' p' i' g' y' c' u' v' j' g' " t' e' g' e' k' r' v' q' h' c' e' a' r' { " q' h' c' p' l' p' x' q' l' e' g' f' c' v' e' g' f' " C' w' i' w' u' v' 6. ' 3; ; 4' y' j' k' e' j' " R' e' c' t' { " D' t' q' u' 0' N' q' e' m' i' (" U' c' h' e' " E' c' r' i' c' t' { " + " N' f' 0' c' f' f' t' g' u' e' g' f' " v' q' " E' c' t' q' i' D' q' u' y' g' m' " v' j' g' v' j' g' p' r' t' g' u' k' f' g' p' v' q' h' v' j' g' " E' a' p' f' q' o' l' p' k' w' o' " E' q' t' r' q' t' c' v' k' p' . " k' p' v' j' g' u' w' o' " q' h' & 86042' " k' p' " q' t' f' g' t' " v' q' i' c' k' p' " c' e' e' g' u' u' " v' q' Wpk' 523' h' q' t' c' r' n' o' d' k' p' i' " k' p' u' r' g' e' v' k' p' . " v' j' g' E' a' p' f' q' o' l' p' k' w' o' " E' q' t' r' q' t' c' v' k' p' p' q' v' j' c' x' k' p' i' " t' g' v' c' l' p' g' f' " c' n' g' f' " v' q' u' c' o' g' c' p' f' " v' j' g' v' g' p' c' p' v' p' q' v' d' g' k' p' i' " c' x' c' k' e' d' n' g' 0' Vj g' r' n' c' p' w' h' h' y' c' u' p' q' v' i' k' x' g' p' q' v' e' g' q' h' v' j' g' k' p' v' g' p' f' g' f' " k' p' u' r' g' e' v' k' p' . " c' n' j' q' w' i' j' " c' e' a' r' { " q' h' v' j' g' p' q' v' e' g' y' c' u' r' n' e' g' f' " w' p' f' g' t' v' j' g' f' q' a' t' " v' q' Wpk' 523' h' q' t' v' j' g' v' g' p' c' p' v' 0"

"Jr ctc32_ " Vj g' D { " r' e' y' u' i' q' x' g' t' p' k' p' i' " v' j' g' q' r' g' t' c' v' k' p' i' q' h' T' g' p' h' t' y' " J' q' w' u' g' c' v' v' j' g' v' k' o' g' u' k' p' s' w' g' u' v' k' p' . " k' p' t' g' u' r' g' e' v' v' q' h' g' c' u' k' p' i' " q' h' w' p' k' u' . " r' t' q' x' k' f' g' u' k' p' r' c' t' e' i' t' e' r' j' " 73* c' + "

"\$73* c' + k' p' v' j' g' g' x' g' p' v' v' j' c' v' c' p' { " q' y' p' g' t' f' g' u' k' t' g' u' v' q' r' e' c' u' g' q' t' t' g' p' v' j' k' u' w' p' k' v' . " j' g' u' j' c' m' i' h' w' t' p' k' u' j' " v' j' g' E' q' t' r' q' t' c' v' k' p' i' c' p' w' p' f' g' t' v' e' n' k' p' i' . " k' p' v' j' g' h' q' t' o' " u' c' v' k' u' c' e' v' q' t' { " v' q' v' j' g' E' q' t' r' q' t' c' v' k' p' . " u' k' i' p' g' f' " d { " v' j' g' r' t' q' r' q' u' g' f' " r' e' u' g' g' q' t' " q' e' e' w' c' p' v' . " v' j' c' v' v' j' g' r' t' q' r' q' u' g' f' " r' e' u' g' g' q' t' " q' e' e' w' c' p' v' q' h' v' j' g' v' p' k' v' y' k' n' i' e' q' o' r' n' f' " y' k' j' " v' j' g' r' t' q' x' k' u' k' u' p' u' q' h' v' j' g' C' e' v' c' p' f' " q' h' v' j' g' d { " r' e' y' u' q' h' v' j' g' E' q' t' r' q' t' c' v' k' p' i' 000\$"

"Jr ctc33_ " Vj g' r' ncpwhh' f' q' u' p' p' q' v' c' r' r' g' e' t' " v' q' j' c' x' g' r' t' q' x' k' f' g' f' " u' e' j' " c' p' w' p' f' g' t' v' e' n' k' p' i' " g' k' j' g' t' y' k' j' " t' e' i' c' t' f' " v' q' v' j' g' q' t' k' i' k' p' e' n' v' g' p' c' p' v' q' h' v' j' g' v' p' k' v' q' t' " h' t' q' o' " O' u' 0' J' c' p' p' c' j' . " d' w' w' p' q' q' d' l' g' e' v' k' p' y' c' u' o' c' f' g' d { " v' j' g' E' a' p' f' q' o' l' p' k' w' o' " E' q' t' r' q' t' c' v' k' p' i' v' q' v' j' g' r' n' c' p' w' h' h' u' h' c' k' n' w' g' v' q' f' q' u' 0' H' w' v' j' g' t' . " v' j' k' u' h' c' k' n' w' g' y' c' u' p' q' v' t' c' k' u' g' f' " c' v' v' j' g' v' k' o' g' c' u' c' t' g' e' c' u' p' p' h' q' t' " g' x' l' e' v' k' p' 0' k' p' c' p' { " g' x' g' p' v' u' 0' 66* 4- " q' h' v' j' g' E' a' p' f' q' o' l' p' k' w' o' " R' t' q' r' g' i' C' e' v' T' U' C' 03; . 2. " E' j' 0' E/ 44" * \$ C' e' v' \$- " o' c' n' g' u' k' v' e' n' g' t' " v' j' c' v' k' k' u' c' i' " e' a' p' f' k' k' p' i' q' h' c' p' { " v' g' p' c' e' i' { " v' j' c' v' v' j' g' v' g' p' c' p' w' u' . " c' o' q' p' i' " q' v' j' g' t' v' j' k' p' i' u. " u' j' c' m' i' p' q' v' e' a' p' v' t' c' x' g' p' g' v' j' g' d { " r' e' y' u' 0' C' e' e' q' t' f' k' p' i' n' f' . " k' p' o' { " x' l' e' g' y' . " p' q' v' j' k' p' i' " w' t' p' u' q' p' v' j' g' h' c' k' n' w' g' q' h' v' j' g' r' n' c' p' w' h' h' v' q' r' t' q' x' k' f' g' u' e' j' " v' g' p' c' p' w' u' w' p' f' g' t' v' e' n' k' p' i' 0"

"Jr ctc34_ " C' u' v' q' v' j' g' v' g' t' o' k' p' e' v' k' p' i' q' h' v' j' g' J' c' p' p' c' j' " v' g' p' c' e' i' { " d { " v' j' g' f' g' h' g' p' f' c' p' v' . " u' 0' 67' " q' h' v' j' g' C' e' v' i' k' x' g' u' c' " E' a' p' f' q' o' l' p' k' w' o' " E' q' t' r' q' t' c' v' k' p' i' v' j' g' c' w' j' q' t' k' v' { " v' q' k' u' w' g' g' x' l' e' v' k' p' i' p' q' v' e' g' u' v' q' v' g' p' c' p' w' u' h' q' t' " e' a' p' v' t' c' x' g' p' v' k' p' i' q' h' c' p' { " d { " r' e' y' u' 0' C' n' j' q' w' i' j' " v' j' g' D { " r' e' y' u' h' q' t' T' g' p' h' t' y' " J' q' w' u' g' c' w' j' q' t' k' g' " v' j' g' D' q' c' t' f' " v' j' g' t' g' q' h' v' q' e' c' t' t' { " q' w' v' j' g' f' c' / " v' q' / f' c' { " q' r' g' t' c' v' k' p' u' q' h' v' j' g' E' q' t' r' q' t' c' v' k' p' i' . " p' q' D' q' c' t' f' t' g' u' q' n' w' k' p' y' c' u' h' k' g' f' " c' w' j' q' t' k' k' p' i' " v' j' g' g' x' l' e' v' k' p' i' p' q' v' e' g' . " d' w' v' j' g' r' n' c' p' w' h' h' f' k' f' " p' q' v' e' j' c' n' e' p' i' g' v' j' g' p' q' v' e' g' q' p' v' j' c' v' i' t' q' w' p' f' " c' p' f' . " c' e' e' q' t' f' k' p' i' n' f' . " K' y' k' n' i' p' q' v' f' g' e' n' v' k' j' " v' j' c' v' k' u' w' g' 0"

"
"Jr ctc44_kp'cf f kkp. Ky qwf 'cy ctf 'y g'r n:kp'hh'r ctv{/r ctv{ 'equu'qh'&547022'y j lej 'kpenwf gu'yj g'hk'kpi 'hgg'kp'y gug'r tqeggf kpi u0"
"
"UEQVVRTQX0EV0L0"
"
"

CBR# 356

York Condominium Corp. No. 128 v. McKenzie

Between York Condominium Corporation No. 128, applicant, and Mavis J. McKenzie and Mavis J. McKenzie on behalf of all Owners and Mortgagees of units of York Condominium Corporation No. 128, respondents

Court File No. RE: 6862/96 Ontario Court of Justice (General Division) Motions Court Dambrot J. Heard: August 28, 1996. Oral judgment: September 6, 1996.

Counsel: Armand G.R. Conant, for the applicant. Paul Bottos, for the respondents.

[para1] DAMBROT J. (orally):-- This is an application brought by York Condominium Corporation No. 128 for a determination of whether By-law No. 4, By-law No. 5 and paragraph 4, Article VI of By-law No. 1 of York Condominium Corporation No. 128 comply with the provisions of the Condominium Act.

[para2] York Condominium Corporation No. 128 is a residential condominium corporation created in 1974, which administers 496 residential units and appurtenant common elements, along with parking units and storage lockers. The units of the corporation are spread out among three buildings and a number of townhouses.

[para3] The effect of the By-laws in question is that the owners of units in the buildings and the townhouse complex vote for directors representing their respective building or townhouse complex, as the case may be, but they cannot, and do not vote for directors representing other buildings. In addition, the election of directors is staggered by means of having annual meetings for a respective building on a different year than that for another building. In respect of each of the elections, however, the principle of one unit, one vote is respected.

[para4] This application was brought because of a concern that the By-law may be invalid by reason of the Judgment of Justice McRae in York Condominium Corporation No. 76 v. Owners of Units of York Condominium Corporation No. 76, an unreported decision dated October 17, 1985, where the validity of a similar By-law was in issue. That By-law also provided for election of directors on a building by building basis. Justice McRae found that By-law to be inconsistent with s. 22(1) of the Condominium Act, which provides as follows: All voting by owners shall be on the basis of one vote per unit, and where two or more persons entitled to vote in respect of one unit disagree on their vote, the vote in respect of that unit shall not be counted.

[para5] Mr. Justice McRae noted that the effect of the By-law was that Building No. 1 with 37% of the units would elect 33% of the directors, Building No. 3 with 20% of the units would elect 16% of the directors, and Building No. 5 with 36% of the units would elect 25% of the directors, while the townhouses, which constituted 5.6% of the units, would elect 25% of the directors. He concluded that this method of electing directors was contrary to the Act, and he noted in particular, that "giving some unit owners a far greater say in the selection of the directors than others is contrary to the letter and the spirit" of s. 22.

[para6] It is argued here that the fact of staggering elections, so that one building votes one year, another building another, and the fact that all unit holders do not get to vote for all directors, violate s. 22(1), because they are inconsistent with the concept of one vote per unit. In my view, this is not correct. I do not read s. 22(1) as precluding what I will refer to as representational elections of directors, nor do I see it as a bar to the election of directors on a staggered basis. The section was meant to make clear that whether one person owns a particular unit, or several persons own that unit, the unit is the voting entity, and that multiple ownership of the unit does not result in greater voting power for the owners of that particular unit than of a single owner of a unit. I think that this is clear from the second part of s. 22(1), which explains what happens when multiple unit holders are not in agreement. Provided that voting, albeit representational and staggered, respects the principle of one vote per unit in the election of directors in a general sense, in my view, there is no violation of the provision.

[para7] It seems to me that what bothered Justice McRae about the By-law that he was considering was that the general concept of one vote per unit was violated by the substantially disproportionate power, that for example, townhouse owners had over other unit holders in terms of the number of directors they had the right to elect. That is not a problem with this By-law. In this case, each of the three buildings represent 27.6% of the units in the entire corporation, and elect 27.2% of the directors, while the townhouses represent 17.1% of the units and elect 18% of the directors. I view this as a very substantial respect for the principle of one unit, one vote.

[para8] Accordingly, I conclude that this By-law is not inconsistent with the provisions of the Condominium Act, and for these reasons I would not declare any invalidity.

DAMBROT J.

CBR# 338

Village Grove Corporation, plaintiff, and Jerome J. Collins, Sr., defendant

Court File No. 94-GD-29999 Ontario Court of Justice (General Division) Windsor, Ontario McMahon J. February 15, 1996.

Counsel: Gregory Campbell, for the applicant (defendant). R. Giannotti, for the respondent (plaintiff).

[para1] McMAHON J.:-- This is a motion by the defendant for the following relief:

- a) A declaration that the Agreement of Purchase and Sale between the parties is not binding for failure to deliver a Disclosure Statement that complied with s. 52 of the Condominium Act;
- b) An order striking out the plaintiff's claim, reply and defence to counter-claim on the grounds that they disclose no reasonable cause of action or defence, together with judgment in favour of the defendant.
- c) Such further and other relief as this honourable court may deem just;
- d) Costs of this motion payable on a solicitor and client scale.

[para2] Rule 21.01 of the Rules of Practice reads as follows:

"(1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs, or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence."

[para3] The facts in this matter which are not in dispute are set out in the applicant's factum:

"The plaintiff corporation was at all material times the developer and declarant of Townhouse Residential Condominium Property in the Village of St. Clair Beach, said property located on Parcel Gore Lot 5-1, Section St. Clair Beach - W.P.C., being Part of Gore Lot, West of Pike Creek, of the geographic Township of Maidstone, designated as Parts 5 and 6, on Reference Plan 12R-11702, save and except for Part 1 12 R-1226 4, Village of St. Clair Beach, County of Essex.

The parties formalized an Agreement of Purchase and Sale dated October 19, 1993, on October 29, 1993, for the sale of Residential Condominium Unit No. 38. The plaintiff delivered and the defendant received a document purporting to be a Disclosure Statement on October 1, 1993, including in and as part of the Disclosure Statement was the Agreement of Purchase and Sale. The amenities described in the Disclosure Statement-Agreement of Purchase and Sale had not been constructed as of October 29, 1993.

The Disclosure Statement Agreement of Purchase and Sale, described and included as part of the purchase, the features and amenities described in Schedule "C", as identified in paragraph 1(a) of the Agreement of Purchase and Sale. Those features and amenities are described as follows:

- Tennis Court - Swimming Pool - Roadways and Pedestrian Paths - Landscaping area

The Agreement of Purchase and Sale provided for occupancy by July 31, 1994. At a time when the defendant had not yet received a Transfer/Deed to the unit, the defendant gave notice on July 27, 1994, of his rescission of the Agreement of Purchase and Sale on the basis that he did not receive a Disclosure Statement within the meaning of the Condominium Act containing a schedule of proposed commencement or completion dates for the amenities included as part of the purchase price for the Condominium Unit as was required by the Condominium Act, R.S.O. 1990 sub. s. 52(1) and (6)."

[para4] The plaintiff does not dispute that the Disclosure Statement failed to specify proposed dates by which the amenities described in the Disclosure Statement as included in the purchase price were to be commenced and completed. It is the position of the plaintiff that the failure to include this information was not a material defect. The plaintiff submits that the dates of commencement and completion are to be implied to be within a reasonable period of time and that the defendant waived his ability to rely on the disclosure provisions contained in the Condominium Act by failing to rescind the contract within 10 days.

[para5] This requires the interpretation to be placed on s. 52 of the Condominium Act, R.S.O. 1990, c. 26. The section which was enacted in 1978 and reads as follows:

"52.- (1) An agreement of purchase and sale entered into after the 1st day of June, 1979 by a declarant or proposed declarant of a unit or proposed unit for residential purposes, is not binding on the purchaser until the declarant or proposed declarant has delivered to the purchaser a copy of the current disclosure statement and all material amendments thereto.

(2) The purchase, before receiving delivery of a deed to or transfer of the unit, may rescind the agreement of purchase and sale within ten days after receiving the disclosure statement or, where there has been a material amendment thereto, within ten days after receiving the material amendment.

(3) A person may rescind an agreement of purchase and sale under subsection (2) by giving written notice of the rescission to the declarant or proposed declarant or to the solicitor of the declarant or proposed declarant.

(4) Every declarant or proposed declarant who receives notice of rescission under subsection (3) from a person entitled to rescind the agreement of purchase and sale under subsection (2), shall forthwith refund, without penalty or charge, to the person giving notice, all money that the declarant or proposed declarant received from that person under the agreement that was credited as payment against purchase price.

(5) Where any statement or material required under this Act to be provided by a declarant or proposed declarant to a purchaser of a unit or proposed unit for residential purposes contains any material statement or information that is false, deceptive or misleading or fails to contain any material statement or information, the corporation or any unit owner who relied on such statement or material is entitled, as against the declarant or the proposed declarant to damages for any loss sustained as a result of such reliance.

(6) The disclosure statement referred to in subsection (1) shall contain and fully and accurately disclose,

(a) the name and municipal address of the declarant or proposed declarant and of the property or proposed property;

(b) a general description of the property or proposed property including the types and number of buildings, units and recreational and other amenities together with any conditions that apply to the provision of amenities;

(c) the portion of units or proposed units which the declarant or proposed declarant intends to market in blocks of units to investors;

(d) a brief narrative description of the significant features of the existing or proposed declaration, by-laws and rules governing the use of common elements and units, and of any contracts or leases that may be subject to termination or expiration under section 39;

(e) a budget statement for the one year period immediately following the registration of the declaration and the description;

(f) where construction of amenities is not completed, a schedule of the proposed commencement and completion days; and

(g) any other matters required by the regulations to be disclosed."

[para6] The leading case on this section is *Abdool v. Sommerset Place Developments of Georgetown Ltd.* (1992) 10 O.R. (3d) 120. This is a decision of the Court of Appeal in which Robins, J.A. sets out the history of the Act culminating in the enactment of s. 52 in its present form. [para7] In this case the amenities in question referred to in the purported declarations statement were not completed on October 19, 1993 nor were they completed on the 27th day of July 1994. On the latter date the solicitor for the defendant by letter rescinded the Agreement of Purchase and Sale. The actual purchase of course had not been closed.

[para8] At page 135 of the *Abdool* decision Robins J.A. stated as follows:

"While I am mindful of the potential consequences to developers if the section is construed so as to entitle purchasers to have their agreements declared non-binding at any time before final closing. I am respectfully unable to accept Borins J.'s interpretation of s. 52 or to agree that s. 52(5) was intended to have the governing effect he attributes to it. Section 52 must be viewed in the light of its underlying full disclosure philosophy. The consumer protection afforded to purchasers by giving them ten days within which to consider the required information is predicated on the assumption that the disclosure requirements have been satisfied. I cannot accept that no matter how manifestly devoid of content a document purporting to be a "disclosure statement" may be, or no matter how false, misleading or deceptive the document may be, once the cooling off period has expired, a purchaser's only recourse under the Act is damages under s. 52(5).

In my opinion, s. 52(5) whether read alone or in the context of s. 52, cannot be interpreted as intended to deprive purchasers of the protections conferred by s. 52(1) and (2), nor can it be intended to provide the sole remedy available to purchasers for a breach of s. 52. This subsection is for the benefit of "the corporation or any unit owner" who relied on a false, deceptive or misleading statement or a statement that omitted any material statement or information. By giving purchasers who have sustained a loss in these circumstances (and their condominium corporation) a cause of action in damages after final closing, that is, after they become "unit owners", without regard to whether they knew of the disclosure defects before closing, s. 52(5) eliminates any question of merger on closing and provides purchasers with protection in addition to that provided by other subsections of s. 52.

As s. 52 is framed, a disclosure statement which fails to meet the requirements of s. 52(6) and (7) cannot be a disclosure statement within the meaning of s. 52(1).

Section 52, by its express language, creates an interdependence between s. 52(1) and s. 52(6) and (7). Section 52(6) requires the disclosure statement referred to in s-s (1) to fully and accurately disclose the information called for in cls. (a) to (g) and, by reference, the budget information specified in s. 52(7). Delivery of a disclosure statement which fails to adequately provide this information cannot start the ten-day period for rescission running under s. 52(2).

In answering this question there are a number of factors to be kept in mind. These disclosures must, of course, be given a construction consistent with their consumer protection objectives. However, in judging the adequacy of the disclosure for the purposes of deciding whether an agreement is binding the rights of both parties to the agreement must be taken into consideration. The purchaser is clearly entitled to the information called for by the Act in order to make an informed decision about his or her condominium purchase. At the same time, however, once the ten-day period has expired, the vendor is entitled to assume that it has a binding agreement of purchase and sale and to rely on the certainty of that agreement in developing the project and conducting its business affairs."

[para9] It is in the view of the court quite clear that when considering paragraphs (a), (b) and (c), (d) and (e) of s. 52(6) the court would be required to determine whether any lack of information was in fact material to the rights of both parties.

[para10] Paragraph (f) however, is not open to a determination of its materiality. This is a statutory requirement in clear terms. The statute requires that there be attached to the disclosure statement where the amenities are not completed a schedule of the proposed commencement and completion dates. As I have indicated this is a mandatory statutory requirement and it is not open to the court to set such a requirement aside on the basis that it is not a material requirement.

[para11] It is therefore the finding of the court that subsection (2) of 52 in this case has no application.

[para12] A lawful disclosure statement has in fact never been delivered in accordance with the statutory requirements set forth in subsection (6). It was therefore open to the defendant to rescind the contract on the 27th of July, 1994. The court therefore issues judgment as follows:

- a) A declaration that the Agreement of Purchase and Sale between the parties is not binding for failure to deliver a disclosure statement that complied with s. 52 of the Condominium Act;
- b) The plaintiff's claim is dismissed;
- c) There shall be judgment for the defendant in the sum of \$20,592.92, being the deposit made by the defendant to be repaid to the defendant forthwith. There shall be no pre-judgment interest awarded on this amount in view of the circumstances; d) The defendant is awarded costs of the action.

McMAHON J.

CASE REFERENCE NO. 109

Durham Condominium Corporation No. 76, plaintiff, and H. Kassinger Construction Limited, defendant

Court File No: 92-CQ-30464 Ontario Court of Justice (General Division) Sheard J. Heard: June 6-9, 12 and 13, 1995.

Counsel: Barbara J. Murchie and Gary H. Luftspring, counsel for the plaintiff.

[para1] SHEARD J.:-- The subject of this lawsuit is the parking garage of a residential condominium building in Oshawa built by the defendant in 1987. The plaintiff is the condominium corporation that manages and administers the common elements on behalf of the owners of the units in the condominium.

[para2] The plaintiff alleges that the defendant was required by the plans and specifications to provide a waterproof asphalt traffic topping on the surface of the upper parking level floor slab of the underground parking garage and on the ramp, but instead applied a sealant. The plaintiff says the sealant was an inferior waterproofing treatment to what the plans and specifications called for.

[para3] The defendant, in its statement of defence, acknowledges that the original architectural plans "which were considered as conceptual only, proposed a re-enforced slab with a membrane" but that the structural engineer decided to change to another, improved, form of slab, known as post-tensioned slab, for which a sealant, linseed oil, provided a form of protection superior to that set out in the original plans, resulting in lower maintenance in future years.

[para4] On January 25, 1990, at the request of the condominium corporation, A.D. Alexander, an engineer and the president of Construction Control Group, a firm of consulting engineers founded by him, inspected both levels of the parking garage in the condominium building. He found these to be in generally good condition, as would be expected in a building just three years old. However, Mr. Alexander did report that as a result of his inspection he had concerns with six areas:

1. Water penetration through the expansion joints in the floor slab to the upper parking level;
2. Deterioration of reinforcement;
3. The absence of a trench drain at the access ramps to prevent water penetration into the garage from the ramp;
4. Extent of compliance with the construction drawings and specifications;
5. Type of reinforcement in the floor slab to the upper parking level with regard to the presence, or otherwise, of an epoxy coating on the bars;
6. Spalling and delamination of the concrete forming the ledge beams supporting the floor slab to the upper parking level.

[para5] Mr. Alexander's recommendations included that tests be conducted to determine the presence of actively corroding steel and to determine the extent of spalling and delamination of concrete from the top surface of ten per cent of the upper parking level floor slab and a visual inspection of the condition of the parking structures, with photographs.

[para6] Accordingly, in March and April 1990, a limited investigation of the parking garage was carried out, under the direction of Edward Brencis, an engineer employed by Construction Control Group.

[para7] Both Mr. Alexander and Mr. Brencis gave evidence at the trial.

[para8] Mr. Alexander referred to various photographs taken in the course of the inspection, showing what he described as evidence of water penetration into the structure. These photographs were appended to the report of Construction Control Group, filed as part of Exhibit 3.

[para9] Photograph 13 shows brown stains on the soffit [underside] of the upper parking level floor slab which Mr. Alexander described as rust stains showing evidence of water penetration.

[para10] Photograph 14 shows black streaks on another part of the soffit of the upper parking level floor slab which Mr. Alexander also describes as evidence of water penetration.

[para11] In photograph 13, there are light brown stains which Mr. Alexander said were indicative of water penetration.

[para12] Mr. Alexander noted that the architect's plans contained references to surfacing of the parking areas. For example, drawing A14, dated June 27, 1985, included "Asphalt Waterproof Traffic Topping on 160 Conc. slab. Fin. first bsmt floor. Fin. first garage fl." The 160 is 160 millimetres.

[para13] Drawing A7, also dated June 27, 1985, includes "Asphalt waterproof traffic topping on first ramp level."

[para14] Drawing A3 also dated June 27, 1985, with revisions July 26, 1985, includes a boxed note: "Apply asphalt topping to first floor ramp." and "Apply asphalt traffic topping to first floor parking garage slab." [para15] Drawing A15 includes: "Parking garage. Asphalt waterproof traffic topping on first basement floor only."

[para16] Mr. Alexander's firm recommended that a membrane and traffic bearing covering be installed on the upper floor of the parking garage on the ramp.

[para17] He said that salt is brought in on the tires of the cars and drains into the concrete and that the salt finds its way into contact with the steel re-enforcing rods. On cross-examination, he agreed that perforation of a membrane can occur but that "more often than not a membrane provides a perfect shield ... the purpose of the membrane is to keep the chlorides away from the steel."

[para18] Mr. Alexander expressed the opinion that a properly built and properly maintained parking garage should last as long as the building "perhaps 100 years."

[para19] He made it clear that in his opinion a sealer could not provide adequate protection: "There is a tendency for the [re-enforcing] tendons to 'explode' out of the concrete. I believe that if reliance is placed on a sealer to keep salty water out of the concrete that is exactly what would happen."

[para20] He concedes that the tests conducted by Mr. Brencis showed only a small area -- about 2.2 per cent of the total area -- of delamination (separation of the concrete) but "this garage was only three years old. There should have been no corrosion."

[para21] The architect's drawings used the word "membrane" in reference to the roof of the building, but not as to the parking garage or ramp. Mr. Alexander agreed, on cross-examination, that he would have had to ask the architect as to just what kind of waterproofing was to be used. "I would have asked for clarification."

[para22] His opinion was that a membrane was required. "My understanding is that 'asphalt waterproof traffic topping' refers to sealing of the slab in a waterproof fashion. ... It requires whatever is needed to waterproof, plus traffic topping." He pointed out that no drawings specified the use of a linseed oil sealer, which was in fact used.

[para23] The general manager for the defendant company was Alex Hillebrand. He was the overseer of the construction of the subject condominium building. He was not called as a witness. At the close of the plaintiff's evidence, extracts from Mr. Hillebrand's examination for discovery were read in, including the following:

82. Q. Well, I am going to look at, I think it is A-13 and A-15 are the two spots that I found information that was useful.

I am looking at A-14 and perhaps you can tell me if I am noting the right thing.

It is on the left hand side of A-14, and it is the second drawing up and actually it is the first drawing up from the bottom and it is a comment that says: Asphalt waterproof traffic topping on 160 concrete slab; does that refer to the garage floor?

A. Yes, it would have referred to the garage floor.

86. Q. And I think you see it again on A-15. I've got a little yellow sticky at the very bottom right-hand corner under "parking garage" in the extreme right it says "asphalt waterproof traffic topping on first basement floor only."

Is that the membrane on the garage floor that we've been discussing?

A. That's what it would indicate to me, yes.

87. Q. Okay. So the architectural drawings do contemplate a membrane; is that correct?

A. Yes.

92. Q. Yes. So is it fair then to say, Mr. Hillebrand, that the use of the sealant did not conform with the drawings that we've looked at in Exhibit 1?

Mr. Casey: All drawings?

93. Ms. Murchie: Well, with A-14 and A-15. Mr. Casey: There is a difference, yes. Make sure that you clarify that.

The Witness: Yes.

[para24] At a later stage in the trial, the following further extracts were read in:

94. Q. Now, I need to understand the difference between a membrane and a sealant. Is it fair to say that a sealant is somewhat porous, whereas a membrane is not porous, is that correct, and I understand this is within your experience.

A. A sealant

95. Q. Yes.

A. ... seals the concrete that it becomes non-receptable (sic) for salt and water, water repellent.

96. Q. Yes. And what about a membrane? A. A membrane is a waterproofing.

97. Q. Yes.

A. It is waterproofing, that's all I can say. You need a waterproofing when you have reinforced concrete to protect the cracks you will have.

As I said before, reinforced concrete will crack; that's the nature of things.

98. Q. So, it is your understanding that the membrane is required when you use reinforced concrete, but is not required when you use post-tensioned concrete?

A. That's correct.

99. Q. Okay. And that's because you require the waterproofing to protect the cracks, the sealant ...

A. Any shrinkage cracks you have, yes.

100. Q. But your position is that a water repellent, which is the sealant, is sufficient to protect the post-tensioned concrete because there are no cracks?

A. That's basically right.

101. Q. Is it true that the sealant is porous to some extent, in that some water and some salt will be able to penetrate the sealant; do you know?

A. I don't know. I don't know. I can't answer that one.

[para25] Edward Brencis, describing the field work he had done at the parking garage said he had not expected so many evidences of deterioration in a garage only three years old, although the deterioration he described was not extensive. For instance, he said he had detected an area of delamination of approximately one third of a square metre. This was found by means of dragging a chain across the surface of the garage floor and listening for a resonance that indicated a breaking away of concrete below the surface. That was the 2.2 per cent mentioned by Mr. Alexander. [para26] Brencis also took samples of concrete, using an electric chipping hammer and a vacuum cleaner. The samples were later tested for salt "concentration" or content. He also performed "half cell" tests, using a copper/copper sulphate instrument to electrically investigate the corrosion activity of the reinforcing steel in the top of the upper parking level.

[para27] Photographs showed scaling (flaking of surface concrete), spalling (separation of small pieces of concrete from the surface of the underlying concrete) and deterioration of concrete above and adjacent to expansion joints in the top surface of the floor slab.

[para28] Mr. Brencis said that in his opinion "the presence of a membrane would mean no further migration of water into the slab and therefore salt would not be carried further into the slab."

[para29] In cross-examination, Mr. Brencis acknowledged that scaling is not necessarily indicative of rusting; that it could be due to an air void in the structure, or freezing or thawing, and that the scaling was mild.

[para30] He also conceded that he had not tested the rust stains to determine if they were in fact rust, but assumed from the colour that it was rust. He appeared to be disinclined to accept Mr. Casey's suggestion that what appeared to be rust may have been linseed oil since, he said, linseed oil has a yellowish brown colour compared to the reddish brown of rust.

[para31] A report to the plaintiff corporation [Exhibit 3, tab 1] was prepared by Mr. Brencis concluding with the recommendation that the following program of restoration work be carried out to the upper parking level floor slab:

1. Repair of all areas of delaminated and/or scaled concrete including all concrete with an unacceptable salt content.
2. Elimination of all areas at which water ponds.
3. Installation of the specified waterproofing membrane and traffic topping material. [para32] The report also recommended that at the time the work on the upper parking level floor slab is carried out, a trench drain should be installed at the bottom of the access ramp and a waterproofing membrane and traffic topping system should be installed to seal the ramp leading to the upper parking level.

[para33] The recommended work was performed by R.A.M. Restoration Inc. in August 1992 at a cost of \$71,064.06.

[para34] John Aubrey Bickley, an engineer with extensive experience in concrete materials and structures, and as a member of professional committees dealing with parking structures, was called as a witness for the plaintiff.

[para35] He had not visited the site, but he had examined the architect's drawings, including in particular drawings A14 and A15. He concluded that the intent was to use "some form of membrane covered with some form of traffic topping."

[para36] Mr. Bickley supported the finding in a 1980 study paper, by Wiss, Janney and Elstner that sealers do not stop the entry of water but merely delay it and that sealers are regarded as an inexpensive alternative to membranes, although he said that he had done a study in 1981 that showed that in the long run it was cheaper to use a membrane.

[para37] In a letter to Mr. Luftspring [Exhibit 14], Mr. Bickley summarized his views, which included that a waterproofing membrane can be expected to have a service life of 15 years with minor maintenance, whereas sealers require replenishment periodically, generally every three to five years and that linseed oil should be re-applied annually. He noted that each replenishment would involve significant cost, plus loss of use of the garage each time the floor is prepared and re-sealed.

[para38] Mr. Bickley agreed with Mr. Casey on cross-examination that there was nothing in the written specifications to give an explanation of what the words "waterproof asphalt traffic topping" mean. However, at the end of his evidence he said that "my reading of the intent would be that it would be a traffic topping on top of a membrane. ... A sealer is not a waterproof asphalt traffic topping..."

[para39] The structural engineer on the construction of the building was Francis Chien-hai Chen, who graduated in 1953. Mr. Chen said that he had done over 30 buildings with underground garages.

[para40] Mr. Chen said that, as a result of the suggestion of the client, post-tension reinforcement of the parking slabs was used instead of the older form of reinforced rods. The effect of using post-tensioned "tendons" was to put the concrete slabs under pressure, which held them together and less likely to leak or crack.

[para41] On August 16, 1991, Mr. Chen wrote to Mr. Kassinger to summarize the decision to use a sealant instead of a membrane:

We met with you prior to the design of the above-mentioned parking deck in 1985, to discuss the system of construction. It was our opinion that a post-tensioned concrete slab would be more waterproof, as the concrete slab would be under permanent compression. You accepted our advice in spite of the extra cost required for this system, and instructed us to go ahead with that design.

In addition to the applicable building codes of that date, the Technical Builders Bulletin T-7 which was accepted by C.M.H.C. was also followed, and a sealant was therefore used instead of a membrane.

For some reason, due to an oversight in communications, the Architectural Drawings had not been revised to reflect the change, and the construction was carried on as per the structural drawings. This was the sequence of events that happened.

[para42] There are three parts of Mr. Chen's letter that should be noted. First, he refers to using a sealant "instead of a membrane." The implication of that way of putting is that the originally prescribed form of waterproofing was by a membrane. That is consistent with the evidence of the general manager of the defendant, Mr. Hillebrand, on his examination for discovery. It is also consistent with what Mr. Bickley said was his "reading of the intent" of the written specifications. It also accords with the opinions of Mr. Alexander and Mr. Brencis.

[para43] Second, when Mr. Chen refers to the architectural drawings not having been revised to reflect the change, due to an oversight in communications, the implication, once again, is that the architectural drawings called for a membrane rather than a sealant.

[para44] Finally, Mr. Chen, in justification of using a sealant instead of a membrane, says that Technical Builders' Bulletin T-7, which was accepted by C.M.H.C., was also followed.

[para45] In the course of his evidence, Mr. Bickley said that, "Mr. Chen had misread that document."

[para46] The T-7 Bulletin (Exhibit 2, Tab 1) was published in 1984 by Canada Mortgage and Housing Corporation, as a service to builders. Its stated purpose was to introduce new requirements for the construction of parking garages. These were not requirements that had to be complied with in the construction of the condominium here, but the Bulletin was a respected reference. In the Bulletin's Table 42A, under the heading of "Minimum Protection System", cast-in-place post-tensioned structures were divided into those with (a) grouted tendons, for which either sealant or waterproofing membrane were prescribed, or (b) unbonded tendons, for which only waterproofing membrane was prescribed.

[para47] Mr. Chen's evidence was that the tendons used on the parking garage slab were extruded tendons in which the surrounding space was filled with grease and that although they were not grouted they were the equivalent of grouted. "Based on that, we determined to use the sealant, not the waterproof membrane."

[para48] Mr. Chen said that the architect, Henry Fliess, told him he originally intended a membrane but that Mr. Chen told him a membrane was not needed; that a sealant was sufficient and that he recommended linseed oil.

[para49] The opinion of Mr. Bickley, as I understand it, is that Mr. Chen was wrong to equate the tendons here with grouted tendons, and therefore wrong in recommending a sealant in place of the originally prescribed membrane.

[para50] The final witness was Herman Kassinger, the chairman of the board of the defendant corporation. Mr. Kassinger has had a long and successful career in the development and construction industry. This is the 40th anniversary of the company he founded; his son is now the president. Mr. Kassinger has built three highrise condominiums and five high-rise rental residential buildings, owned by his company. His company has built 10 parking garages, five reinforced concrete and five post-tensioned concrete.

[para51] Mr. Kassinger, with the aid of minutes recording the meeting, recalled meetings with him and the architects on May 2, 1985 [Exhibit 19] and thereafter in May 1985 and July 1986. These meetings led to the decision to use linseed oil, which Mr. Kassinger said he was advised by Mr. Hillebrand was better than traffic topping.

[para52] Mr. Kassinger said that when he was notified of the complaints of the condominium corporation he offered a 25-year warranty "because I was 100 per cent sure we did the right construction." This offer was not replied to.

[para53] Mr. Kassinger said he felt the tendons were grouted tendons. "They weren't grouted in cement but in the trade they're regarded as grouted."

[para54] The agreement of purchase and sale between the defendant as vendor and the various individual purchasers of condominium units contained the following, in paragraph 5:

5. The vendor agrees that it will complete the construction of the building in a good and workmanlike manner according to the proposed Description to be registered, and according to the plans and specifications filed with the municipality and the Unit specifications attached hereto. The Vendor shall have the right to substitute other materials for those provided for in the plans and specifications provided that such alternative materials are of equal quality to or better than the materials in the specifications. [My emphasis.]

[para55] On the evidence, including that of Mr. Chen and Mr. Kassinger, and the extracts from the examination for discovery of Mr. Hillebrand, it is clear that the plans and specifications originally required an asphalt waterproof traffic topping for the parking level floor slab and for the ramp leading to it.

[para56] The evidence is equally clear that the form of the waterproofing originally intended by the architects and understood by Mr. Chen, as the structural engineer, was to have been a waterproof membrane.

[para57] There is no argument as to the fact that the defendant, with the supportive advice of Mr. Chen, decided to substitute a linseed oil sealant in place of a membrane with an asphalt traffic topping.

[para58] The Architectural Drawings, as Mr. Chen said in his letter of August 16, 1991, were not revised to reflect the change, due to an oversight.

[para59] Thus, the vendor had substituted other materials for those provided in the plans and specifications filed with the municipality, the City of Oshawa.

[para60] Paragraph 5 of the agreement of purchase and sale empowered the defendant, as vendor, to make these changes, "provided that such alternative materials are of equal quality to or better than the materials in the specifications."

[para61] In my opinion, on all the evidence, it cannot be concluded that the linseed oil seal ant was of equal quality to a membrane with an asphalt topping.

[para62] In reading the conclusion, I find the professional opinions of Mr. Alexander, Mr. Brencis, and Mr. Bickley are more persuasive than the opinions of Mr. Chen and Mr. Kassinger.

[para63] Mr. Alexander and Mr. Brencis I found to be eminently fair and even-handed in giving their evidence, giving careful answers to all questions. It could be said that they were not disinterested witnesses since it was on their recommendations that the plaintiff corporation had had work done costing many thousands of dollars, not to mention the substantial fees of their consulting firm. I was nevertheless impressed with the professionalism and objectivity with which both Mr. Alexander and Mr. Brencis gave their evidence.

[para64] The results of their inspections of the parking area, and of the tests conducted by Mr. Brencis, and the photographs, contribute to their conclusion that the linseed oil sealant was not an effective waterproofing, notwithstanding that the parking slabs were part of post-tensioned construction. The ramp was not post-tensioned, but I do not think that distinction matters since in my opinion all of the work the plaintiff has had done by R.A.M. Restoration Inc. was justified.

[para65] Mr. Bickley's evidence, given in a most fair and objective way, I also found to be persuasive, including his contention that Mr. Chen had misinterpreted the directive of the C.M.H.C. Bulletin T-7.

[para66] I have no doubt that both Mr. Chen and Mr. Kassinger were convinced that the linseed oil sealant, on post-tensioned slabs, was at least as good as, and from a maintenance standpoint, better than a membrane with an asphalt topping. However, on the evidence, I think they were mistaken.

[para67] The damages I find to be the amount of the R.A.M. Restoration Inc. invoices of \$71,064.06, plus consultant's fees of \$19,459.76, for a total of \$90,523.82. The invoices for the consultant's fees are 12 invoices filed as Tab 8 of Exhibit 3. They total \$19,459.76, which is \$240.77 less than the amount of \$19,700.53, which Mr. Luftspring asked for at the end of his submissions. If an invoice was omitted by mistake, that is something counsel may be able to agree on. Mr. Casey had submitted that the whole of the first two invoices [totalling \$2,000] should not be allowed and suggested \$750 as the topside figure for these. He also submitted that the third of the Tab 8 invoices, for \$1,439.60, should not be allowed in any event. This was the invoice for Mr. Belanger and an "inspector" to carry out inspection in December 1990 of garage repairs done by the defendant. I am unable to see any reason why those charges should not be allowed as part of the plaintiff's damages.

[para68] There will accordingly be judgment for the plaintiff in the sum of \$90,523.82. Costs, to be assessed, will be allowed in addition. If, because of an offer to settle it is necessary to make submissions as to costs, arrangements may be made through my secretary.

[para69] I appreciate that interest was included in the plaintiff's claim, although it was not alluded to in the course of submissions. I would not be prepared to allow prejudgment interest, considering that the work done by R.A.M. puts the parking area virtually in the new condition of some three to four years earlier, without the effects of the passage of time for that period, which would have led to normal maintenance.

[para70] The standing of the plaintiff to bring this action was not challenged in argument and no authorities were filed by the defendant. The plaintiff did file a slim binder of authorities, including Carleton Condominium Corp. No. 11 v. Shenkman Corp. Ltd. (1985), 49 O.R. (2d) 194, Waterloo North Condominium Corp. No. 64 v. Domlife Realty Ltd. (1989), 70 O.R. (2d) 210.

[para71] On the principles stated in those cases, the condominium corporation has status to bring the action by reason of section 9(18) (now section 14) of the Condominium Act and the damages that may be recovered are not limited to the number of unit owners who were originally contracting parties. With respect, I agree with that statement of the law.

SHEARD J.

CBR# 047

Andrew Bodnar and Edith Bodnar, plaintiffs, and 679520 Ontario Limited, defendants

Court File No. DC 3982/89 Ontario Court of Justice (General Division) Brampton, Ontario Walters J. June 27, 1995.

Counsel: David R. Wands, for the plaintiffs. M. Michael Title, for the defendant.

[para1] WALTERS J.:-- This is a claim for damages for a breach of a agreement of purchase ad sale of a condominium unit. The plaintiff, Andrew Bodnar, entered into a agreement of purchase and sale with the defendant company to purchase suite 501B, Pinedale Estates, Burlington, Ontario, on October 5, 1987. The transaction was scheduled to be completed on September 30, 1988. The contract was extended 60 days from September 30, 1988 to November 30, 1988, in accordance with paragraph 14 of Schedule "A" to the said agreement.

[para2] The agreement was then purportedly extended to December 30, 1988. This was only a 30 day extension ad not in accordance with the provisions of paragraph 14 referred to above.

[para3] By letter dated December 7, 1988, the defendant's solicitor advised the plaintiff that the unit was substantially complete ad the interim closing dated would be December 30, 1988. This letter was not in compliance with paragraph 16 of the aforementioned Schedule "A" which indicates that:

If at anytime after the closing date or the extended closing date the residential unit is substantially completed and this transaction has not come to a end by mutual agreement or otherwise, the vendor may give notice to the purchaser on or before the first day of any month ad the purchaser shall take possession of the unit on the last day of such month pursuant to the provisions of Schedule "C" hereto or: shall complete the purchase if the condominium is registered.

[para4] In any event, the plaintiff attended the premises on December 30, 1988 to inspect the property and complete the certificate of completion as required under the contract.

[para5] The plaintiff contends that on this date the unit was not fit for occupancy since painting was not completed ad carpeting was not installed. The plaintiff sent a letter to the defendant dated December 30, 1988 setting out his complaints ad also disputing the notice he received from the defendant's solicitor dated December 7, 1988.

[para6] By letter from the defendant's solicitor dated January 11, 1989, the plaintiff was advised that the unit was substantially complete ad was scheduled to close on December 30, 1988. The letter went on to indicate that:

If within 6 days we do not receive closing documentation in our office, we will advise our client to exercise his option to proceed under the default sections of the agreement.

[para7] The defendant's position is that once the plaintiff took no further steps to close the transaction after receiving this letter, then in accordance with the provisions of the agreement of purchase and sale the plaintiff was in default and further that this letter was the written notice contemplated by the agreement as set out in paragraph 16 of the aforementioned Schedule "A":

If the purchaser fails to close at anytime as aforesaid after 6 day's written notice (notwithstanding non-completion of outside work or non-substantial interior work), he shall be deemed to be in default without further notice and without tender by the vendor.

[para8] Paragraph 5 of Schedule "A" further states that:

If prior to the transfer of title, any default of the purchaser whatsoever occurs hereunder, including default in payments of any deposit, or additional deposit monies, and continues for a period of 7 days after written notification to the purchaser of such default, the vendor shall have the right to declare this agreement terminated without further notice, and in addition all deposit monies paid hereunder shall be forfeited to the vendor as liquidated damages.

[para9] The plaintiff responded by letter to Mr. Bridle dated January 15, 1989, and again set out his disagreement with the closing date and reiterated that the unit was not yet painted. He indicated that he would close the transaction on January 31, 1989. After receiving no response, the plaintiff wrote a second letter to Mr. Bridle dated January 26, 1989, ad again stipulated that if the unit was finished he would close the transaction on January 31, 1989. Mr. Bodnar sent a similar letter to Mr. Zupet, an officer of the defendant company. A third letter was sent to Mr. Zupet, on the same day, setting out that the walls ad baseboards were still not painted.

[para10] On January 26, 1989, Mr. Zupet sent a letter to Mr. Bodnar by ordinary mail which stated:

If you wish to own this suite you must close immediately, with the statement of adjustment date as of December 30/88.

[para11] Mr. Bodnar testified that he did not receive this letter until February 1, 1989. The letter was dated January 26, 1989 and the post-mark on the envelope shows a date of January 30, 1989. The letter from Mr. Bodnar's lawyer dated February 3, 1989, indicated that the letter was received on January 30, 1989. In this regard, I accept the evidence of Mr. Bodnar that he did not receive this letter until February 1, 1989. It is clear from the wording of the letter that Mr. Zupet, on behalf of the corporation, still thought that the deal was alive.

[para12] Immediately upon receipt of this letter, Mr. Bodnar made every reasonable attempt to close the deal "immediately". He attended at the site in order to inspect the unit and complete the certificate of completion in accordance with the terms of the contract. At this time, he was advised by Mr. Zupet that the deal was cancelled. I accept Mr. Bodnar's evidence that he attended at Mr. Bridle's office with all of the documentation necessary to complete the interim closing along with the necessary funds. Mr. Bodnar was ready, willing ad able to complete the transaction. The defendant refused to close the transaction, cancelled it unilaterally and in fact, on February 3, 1989, entered into a agreement of purchase ad sale to sell the unit to another individual. Therefore, in the circumstances, I am satisfied that the defendant did not comply with the termination provisions of the agreement of purchase ad sale ad improperly terminated the contract.

[para13] I now turn to the measure of damages. The plaintiff's original claim was one for specific performance, however, the pleadings were amended to include a claim for damages once it became apparent that the condominium unit had been re-sold ad specific performance was no longer available. The plaintiff has put forth two methods of calculating the damages he says he suffered as a result of the defendant's breach of the agreement of purchase and sale. The defendant's second method of calculation includes a claim for the loss of value on the plaintiff's home located at 3134 Bentworth Drive, Burlington, Ontario. It is the plaintiff's evidence that he and his wife planned to sell this home once they purchased the condominium unit. However, the plaintiff also testified that he did not make this intention known to the defendant and in fact did not require the sale proceeds of this home in order to complete the purchase of the condominium unit. For the plaintiffs to succeed, under this heading of damages, they must satisfy the court that this subsequent or secondary transaction was within the reasonable contemplation of the parties at the time of entering into the agreement. See *Godin v. Jenovac* (1993), 35 R.P.R. (2d) 288 and *Kasekas et al. v. Tessler* (1989), 4 R.P.R. (2d) at 110.

[para14] Here, the defendant could not possibly have known that Mr. Bodnar intended to sell his home. Mr. Bodnar further testified that he never formally listed his home for sale. In the circumstances, I conclude that it was not within the reasonable contemplation of the parties that the Bodnars would need the funds from the sale of the Bentworth Drive property in order to complete the condominium purchase and further, the defendant was not in a position to know that the Bodnars planned to sell the home in any event. I am not satisfied on the evidence that the losses as calculated by the plaintiff in this regard are reasonable or foreseeable and therefore I reject the second calculation of damages as presented by the plaintiff.

[para15] In the plaintiff's first calculation of damages, damages are measured from February 1, 1989, (the day the defendant breached the terms of the contract). Uncontradicted evidence by Peter Abbott, a appraiser called on behalf of the plaintiff indicated that the value of the condominium on February 1, 1989, was \$172,000.00. The plaintiff's counsel argues therefore that the loss suffered by the plaintiff is the difference between the purchase price (\$135,000.00) and the appraised value of the property on February 1, 1989, (\$172,000.00) or \$37,000.00. Counsel on behalf of the defendant indicate that if damages are assessed at this amount, it will represent a windfall to the plaintiff since the defendant, when the property was re-sold on February 3, 1989, was re-sold for the same contract price of \$135,000.00. The defendant did not make any additional profit on the sale of this property. Further, the defendant submits that the plaintiff has an obligation to mitigate his loss and cannot just sit back and do nothing for six years and rely on an arbitrary and notional increase in value of the condominium unit. Mr. Abbott further testified that the value of that same condominium unit on January 5, 1995 is only \$138,000.00. Counsel for the defendant argues that if in fact the sale had been completed, and Mr. Bodnar, as the evidence indicated, would have continued to live in the condominium, his unit today would be worth almost exactly what it was worth in 1988 when he signed the agreement of purchase and sale. Considering the carrying costs, the plaintiff would have had over the past several years, the defendant urges that there are no damages owing to the plaintiff.

[para16] In *Garbens et al. v. Khayami* (1994), 17 O.R. (3d) 162, at page 164, the court clearly set out the principle of damages:

The first principle of damages is to put the innocent party in the position he or she would have been had the contract not been breached. In a contract of sale, this principle normally leads to assessment as at the date of the breach. However, in *Johnson v. Agnew* [1979] 1 All E.R. 883 at p. 896, [1979] 2 W.L.R. 487 (H.L.), Lord Wilberforce added that this rule was not an absolute one:

If to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances.

In *Rice v. Rawluk* (1992), 8 O.R. (3d) 696 (Gen. Div.), the purchasers refused to close, alleging that the vendor had refused to remove certain work orders. The court found for the vendor/defendant by counterclaim. In setting out the assessment of the damages, O'Brien, J., at page 717, quoted from the case *Bitton v. Jakovljevic* (1990), 75 O.R. (2d) 143, 13 R.P.R. (2d) 48 (H.C.J.):

Since the decision in *Johnson v. Agnew*, case law indicates that there is no consistent rule for the date of assessment of damages. Each case is decided on its own facts based on a fairness test.

[para17] On the facts of this case, I find it was reasonable for the plaintiff to pursue a claim for specific performance. However, once it became apparent that the property had been sold, and the plaintiffs amended their claim for damages, then the plaintiff should have attempted to mitigate their damages by purchasing another condominium or selling their home. It is unreasonable for the plaintiff to have taken no action and yet expect to be compensated for any losses incurred up to the time of trial.

[para18] The evidence before the court is that this same condominium unit 501 was re-sold on December 20, 1991 for a sale price of \$148,000.00. The plaintiff, could have purchased the unit at that time and crystallized his loss at \$13,000.00.

[para19] In my view, a reasonable date for assessment of damages in this case is the date when this property was re-sold, namely December, 1991. This would have allowed the plaintiffs more than a reasonable time to re-evaluate their position after realizing that specific performance was no longer possible. Therefore, I fix the plaintiff's damages at \$13,000.00, being the difference between the contract price of \$135,000.00 and the price they could have bought the same unit in December, 1991.

[para20] The defendants have relied on the decision of the Court of Appeal in *Semelhago v. Paramadevan et al.* (1994), 19 O.R. (3d) 479 and have urged me to deduct the carrying cost the plaintiff would have incurred if the transaction had been completed on February 1, 1993, as well as any notional interest earned on the \$42,000.00 Mr. Bodnar retained in the bank, when the purchase was not completed. In this particular case, the evidence by Mr. Bodnar was in fact that the expenses on the condominium unit were less than the expenses at his home on Bentworth Drive. Further, there were certain amenities at the condominium corporation which Mr. Bodnar lost the use of when the defendants breached the terms of the agreement of purchase and sale. In the circumstances, I am not prepared to make any deduction for carrying charges or notional interest.

[para21] All parties agree that the plaintiff paid an initial deposit on October 5, 1987, in the amount of \$3,000.00 and a further deposit on October 29, 1987, in the amount of \$9,000.00.

[para22] Further, Mr. Bodnar purchased a locker on June 16, 1988, in the amount of \$1,600.00. Mr. Bodnar paid to have carpet upgrade in Unit 501, which upgrade was paid for on August 2, 1988 for \$4,100.00 on four units. There is no evidence as to how that \$4,100.00 was distributed between the four units and in the circumstances, I find that there was \$1,025.00 of additional monies spent on carpet upgrade. Therefore, there will be judgment for the plaintiffs in the amount of \$27,625.00 plus prejudgment

interest at 13% from February 2, 1989 (date of breach) to date of judgment. Counsel may make written submissions to me regarding the issue of costs. Such submissions to be submitted for July 15, 1995.

WALTERS J.

CBR# 136

Mary Alice Hoffer, Plaintiff, and John A. Verdone and VHL Construction Limited, Defendants

Action No. 2458/89 Ontario Court of Justice - General Division Kitchener, Ontario Salhany J. August 12, 1994.

W.H.P. Madorin, Q.C., for the Plaintiff. R. Thomson, for the Defendants.

[para1] SALHANY J.:-- Over two centuries ago Mr. Justice Wilmot decried that "Had the Statute of Frauds been always carried into execution according to the letter, it would have done ten times more mischief than it has done good, by protecting, rather than preventing fraud": *Simon v. Motivos* (1766) 97 E.R. 1170. In this action the plaintiff claims that the defendant John Verdone promised to convey to her a condominium unit in exchange for marketing services rendered on behalf of the defendants. The defendant denies that there was any such agreement. But he also says that if he did agree to do so, that agreement is barred by the Statute of Frauds because it was an oral agreement with respect to an interest in land. At issue in this action is whether the invocation of the Statute of Frauds by the defendant will protect or prevent fraud.

FACTUAL BACKGROUND

[para2] The plaintiff is a 52 year old divorcee and a former real estate agent. In 1980, through her occupation as a real estate agent, she met the defendant John Verdone who was a one half owner with his brother Angelo of a construction company known as VHL Construction Limited. The Verdone brothers were interested in developing and building single family homes and condominiums in Guelph, Cambridge and Waterloo. The plaintiff impressed John Verdone as an agent who would successfully promote and sell his company's housing units and hired her as their exclusive selling agent. Not long after, the business relationship between the plaintiff and Mr. Verdone developed into a personal relationship and they became lovers.

[para3] Over the next five years, the plaintiff worked closely with Mr. Verdone in promoting and marketing the housing units that he and his brother were planning to construct. The promotion and sale of a condominium project is different from that of the sale of single family homes. Although the construction and sale of a single family unit can be done on a house by house basis, the promotion and sale of a condominium complex is different. Before the first shovel can be put into the ground, the developer must obtain provincial and municipal government approval and financial backing for the project. Financial backing and the decision to go ahead with the project will necessarily depend upon the developer obtaining prior commitment from prospective purchasers of the units. This is done by obtaining a prospective purchaser's signature on a reservation agreement. Although the reservation agreement is not binding on the purchaser, it demonstrates an interest by the prospective purchaser in buying a condominium and influences the size of the project and the number of units to be constructed by the developer. Of necessity, success of the project will depend in large measure on the skills of the agent retained to promote the sale of the condominium units.

[para4] Between 1980 and 1985, the plaintiff was involved in the sale of single family and condominium units for the defendants in Guelph and Cambridge. Her arrangement with the defendants was that she would be paid \$1,000.00 upon the closing of a sale transaction for a single family dwelling and \$1,000.00 upon the occupancy of a purchaser of a condominium unit. This agreement was changed in July of 1987 and she agreed to accept a flat monthly fee of \$5000.00. Not only did the business relationship between the plaintiff and the defendants prosper during those years, the personal relationship between the plaintiff and John Verdone flourished. He eventually left his wife in 1985. The plaintiff and Mr. Verdone discussed marriage but continued to maintain separate residences. Nevertheless, I am satisfied that the plaintiff was led to believe that Mr. Verdone was serious in his intentions to marry her.

[para5] In the mid '80's, the plaintiff and Mr. Verdone had discussed the development of a condominium project based on a housing style which the plaintiff had seen in Cape Cod called "Treetops". The plaintiff had, in fact, taken her sons on a vacation trip to Cape Cod and had spent a good deal of the time travelling around the area and taking pictures of the various housing projects. She and Mr. Verdone had set their eye on a site on Fischer-Hallman Road in Waterloo to develop a condominium project. They hoped to attract home owners who wished to purchase condominiums that would have all the amenities of a large home and yet none of the burdens of outdoor maintenance such as cutting grass, gardening, etc. They proposed calling it Crabtree Keys.

[para6] The plaintiff testified that when her own marriage fell apart in the early '80's and a legal dispute loomed, Mr. Verdone had encouraged her not to litigate and promised that he would "build her something better than she had". Based on that assurance, she had moved into a town house with her children on Keats Way in Waterloo. She said that when she and John Verdone discussed developing the Crabtree Keys, he promised her a unit in the condominium project. It was her understanding that she would receive this unit in exchange for her services in marketing the project.

[para7] Unfortunately, the plaintiff and the defendant ran into problems in developing the site. A Toronto consulting firm was then hired to determine whether the project was viable and reported that the name "Crabtree Keys" had a negative connotation and should be changed. Other considerations, such as the requirement of lower density and the fact that the project would back out onto a four lane highway led the defendants to shelve the project.

[para8] A short time later, Mr. Verdone advised the plaintiff that he found a more suitable site and they decided to call it Treetops, similar to the name used in the Cape Cod project. In 1983, Mr. Verdone had incorporated a company called Winter White Marketing Inc. which he had transferred to the plaintiff. Through this corporate vehicle, she began to promote the condominium development by meeting with various designers and architects, selecting an appropriate rental sales trailer, overseeing the advertising, etc.

[para9] The project was to proceed in two phases. The first phase was to consist of 21 units, from 1 through 16 and from 80 through 84. The plaintiff proceeded to promote the sale of the condominium units and obtained a number of reservation agreements from prospective purchasers. It was expected that the first phase would be completed by the summer of 1988. The second phase was scheduled to start and did start in the fall of 1988 and was completed the following summer. The plaintiff said that she and John Verdone reserved units 12 and 13, which were corner units on the building, and she was to receive unit 13 free and clear in exchange for the four years she had spent on the Treetops project. Later, they decided to exchange those units for units 36 and 37, also corner units, and arrangements were made with the prospective purchaser's of those latter units to make the exchange. Mr. Verdone agreed that they did discuss acquiring condominium units side by side at the Crabtree Keys project but said that both he and the plaintiff were to pay for their units.

[para10] Some time in early August, 1987, the plaintiff discovered that John Verdone had returned to live with his wife. She was, understandably, devastated by the news because he had not informed her of his decision and she understood that they were going to get married. She said that she found it to be very difficult to work in the Guelph office of the defendant corporation. She recounted an incident at that office when Mr. Verdone's father had made a signal with his hand and by spitting on her that led her to believe that her life was in danger. On August 13th, 1987, she wrote John Verdone a note in which she said "Dear John, please accept my resignation as manager of marketing and sales Effective September 11th, 1987." She said that she wrote the letter because she could no longer work out of the Guelph office out concern for her personal safety and because of her feelings toward John Verdone. She said that the stress of discovering that he had reconciled with his wife resulted in her hospitalization. He visited her at the hospital and suggested that she could have the main office in a building on Victoria Street where his solicitors carried on the practice of law. She said that he then changed his mind and told her that he wanted her to work in Guelph. However, she refused to do so and their business relationship drew to a close. On November 27th, 1987 the she wrote him a letter outlining her position and requesting payment until the end of the year and for help in some other way to find a new position: Mr. Verdone did not respond and the plaintiff consulted a solicitor. On December 1, 1989 a statement of claim was issued claiming specific performance of an oral agreement made between the plaintiff and John Verdone on or about the month of June, 1987, "wherebyVerdone agreed to cause the Defendant VHL Construction Ltd. to give to the Plaintiff Unit No. 37 of the Treetops Condominium Project" or, alternatively damages for failure to perform the said agreement. I turn now to a consideration of this claim.

FINDINGS

[para11] The first issue that has to be determined is whether there was an agreement between the plaintiff and John Verdone that the plaintiff be given unit 37 of the Treetops Project in exchange for marketing services rendered by her to the project. As I have already said, it was conceded by the defence that the plaintiff and Mr. Verdone contemplated moving into two units side by side at Crabtree Keys Project. I am satisfied that Mr. Verdone led the plaintiff to believe that she would get one of the units in exchange for her marketing services and that they discussed how this could be done in view of the fact that the condominiums were legally owned by VHL Construction Ltd. and that Angelo Verdone was a one half owner of the company. It would seem natural to me that he, planning to marry the plaintiff, or at least giving her the impression that he intended to do so, would lead her to believe that they would set up living arrangements side by side and that he would find a way to ensure that she would have a unit in exchange for her marketing services. The defendant conceded that they discussed putting a door between the units so that they could go back and forth. Moreover, I am also satisfied that after the Crabtree Keys project was abandoned and the Treetops initiated, John Verdone continued to make the same promises to the plaintiff with respect to unit 13 and later unit 37.

[para12] However, by the summer of 1987, Mr. Verdone's affection towards the plaintiff was waning. One of the reasons may be due to the fact that he would eventually be expected to carry out his promises to the plaintiff and this would be difficult to do since he was not sole owner of VHL Construction Ltd. Although he and the plaintiff discussed the exchange of units 12 and 13 for units 37 and 38, I suspect that this was another delaying tactic on his part because units 37 and 38 were part of the second phase and would not be started until the following year.

DECISION

[para13] Mr. Thomson, relying on the Statue of Frauds, argued that if there was any agreement, it was unenforceable for three reasons: firstly, the services were rendered to the defendants by the plaintiff's corporate vehicle, Winter White Marketing Inc. and not her personally; secondly, that the agreement was between the plaintiff and John Verdone, who was not the legal owner of the condominium units; and, finally, the services rendered by the plaintiff were not directly referable to the agreement and therefore there was not part performance which would take the agreement out of the shadow of the Statute.

[para14] The agreement between the plaintiff and Mr. Verdone was, understandably, not reduced to writing because of their relationship and because of the difficulties that Mr. Verdone would have to eventually face in transferring title from the corporate defendant to the plaintiff. There is no memorandum relied upon by the plaintiff that would satisfy the requirements of the Statute of Frauds.

[para15] The plaintiff relied upon the doctrine of part performance. The theory of part performance is that it tends to show that the contract really was made and is thus within the spirit of the Statute: See Waddams, *The Law of Contract*, 2nd ed. at p. 173. However, the law is clear that the acts relied upon as part performance must tend to corroborate proof of the agreement. To corroborate proof of the agreement, Canadian authorities have insisted that the acts of performance must not merely show, on balance, that there is an underlying contract between the parties but that "the acts are unequivocally or necessarily referable to some dealing with the land in question: *Dealman v. Guaranty Trust Co. of Canada* [1954], 3 D.L.R. 785 (S.C.C.).

[para16] The plaintiff relied, as part performance, upon the fact that the potential purchasers of unit 37, Mr. and Mrs. Sprung, agreed to accept \$10,000.00 to exchange their unit from No. 37 to No. 12 and that the defendant assisted the plaintiff in choosing appropriate colours, tiles and wall coverings. I am not convinced that this was the reason that the Sprungs why they did so. The evidence convinces me that \$10,000.00 was offered to those prospective purchasers who had signed a reservation agreement as marketing tool to firm up their commitment to the project. I am not satisfied that any of these acts relied upon by the plaintiff were necessarily referable to a contract between her and John Verdone. Moreover, the marketing services which she performed on behalf of VHL Construction Ltd. were for the purpose of selling condominiums for which she received \$1000 per unit upon occupancy and later in July, 1987, an agreed monthly fee of \$5000. They were not necessarily referable to their agreement. Thus in my view; the Statute of Frauds bars the plaintiff from recovery on her agreement with the plaintiff.

[para17] On the eve of trial, the plaintiff abandoned her claim for specific performance because unit 37 had been already sold and sought damages alternatively for failure to perform the agreement. Counsel for the plaintiff indicated that this damage claim was for the work which she had performed on behalf of the defendants on a quantum meruit basis. Mr. Thomson's position was that if the enforcement of the contract was statute barred, there could be no alternative recovery of damages. He also said that a quantum meruit should not be entertained because it was not specifically pleaded. Although, the statement of claim did not specifically claim recovery on a quantum meruit basis, the general claim for damages did alert the defendant to the fact that this was an issue to be pursued. I am not convinced that the defendant has been prejudiced by this claim.

[para18] I am satisfied that the plaintiff is entitled to recover on a quantum meruit basis for all of her preparatory work to make the project a successful one and for obtaining of a number of reservation agreements. Indeed, Mr. Verdone admitted that it was one of their more successful projects. The work which she performed for the defendants was set out in her letter of November 27,

1987 which was marked as exhibit 1 in this action. I assess the value of her work and services on a quantum meruit basis at \$25,000.00.

[para19] Mr. Thomson pointed out, however, that this work had been performed by the plaintiff's corporate vehicle, Winter White Marketing Ltd., not the plaintiff, and only that corporate entity is entitled to recover. The evidence is clear, however, that the plaintiff was the sole owner and employee of the company and had used the corporate entity at the suggestion of John Verdone who had incorporated it for her. In my view, she is entitled to be awarded the amount which I have assessed as the value of the work performed. Accordingly, the plaintiff will have judgment against the defendants for the sum of \$25,000.00 with interest pursuant to the Courts of Justice Act from December 1, 1989.

[para20] Counsel may make written submissions on the question of costs within 15 days.

SALHANY J.

CBR# 099

Gordon Cummins and Catherine Cummins, Applicants, and Napev Construction Limited, Respondent

Action No. A2651/94 Ontario Court of Justice - General Division Brampton, Ontario Dunn J. April 13, 1994.

N. Grether, for the Applicants. James E. Lewis, for the Respondent.

[para1] DUNN J.:-- This matter came before me as an Application on March 29, 1994. The parties presented to me a very interesting revisitation of the Condominium Act, R.S.O. 1990, Ch.26 applicable to a set of facts that can be described as follows:

[para2] The applicant agreed to purchase a residential condominium unit from the respondent and the agreement of purchase and sale provided for a "phantom mortgage" as part of the purchase price. A full discussion of phantom mortgages and their effect is contained in the decision of the Ontario Court of Appeal in *Ackland v. Yonge-Esplanade Enter. Ltd.* (1992), 10 O.R. (3d) 97.

[para3] The phantom mortgage in question was given, as in the usual case, to allow the vendor to take advantage of the provisions of s. 51(6) of the Condominium Act. This section allows the vendor to charge a purchaser in occupation a monthly amount or occupancy fee that includes a component for "the amount of interest that the purchaser would have paid monthly in respect of any mortgage or mortgages he is obligated to assume or give under the agreement of purchase and sale on delivery of a deed or transfer of the unit".

[para4] The rationale of allowing the vendor to charge such a component on the purchaser taking occupancy of the premises and prior to the registration of the condominium and the ability of the vendor to convey title is, of course, founded in economics and, as discussed in the *Ackland* case, is probably fair to all concerned.

[para5] In the case before me, however, after the parties agreed to the terms, inclusive of a phantom mortgage, and after the occupancy closing had taken place, they entered into a "new" agreement, which is evidenced by the letter of the vendor dated February 29, 1989 signed for acceptance purposes by the applicant. This letter reflects the proposal of the purchaser in paying off the balance of first mortgage principal prior to final closing in order to reduce the purchaser's monthly occupancy fee.

[para6] The vendor responded, allowed the purchaser to pay the sum of \$129,000, which "will be applied to the amount of your unit. As agreed by both parties, no interest is to be paid on this amount from receipt to date of final closing".

[para7] The intention of the parties was that the vendor/respondent was able to utilize this money by depositing it and earning interest or by paying trades, etc. This worked to the advantage of the purchaser because his occupancy rent was substantially reduced, roughly, by the amount of interest that he would otherwise be paying on \$129,000. This makes eminent sense to both parties.

[para8] They did not, however, count on the operation of the Condominium Act. The Act, as it now exists, provides, in part, the following:

s. 53.(1) All money received by or on behalf of a proposed declarant from a purchaser on account of a sale or an agreement for the purchase and sale of a proposed unit for residential purposes before the registration of the declaration and description, other than money paid as rent or as an occupancy charge, shall, despite the registration of the declaration and description thereafter, be held in trust by the person receiving such money for the person entitled thereto in respect of the agreement and such money shall be held in a separate account designated as a trust account at a bank listed in Schedule I or II to the Bank Act (Canada) or trust corporation or a loan corporation or credit union authorized by law to receive money on deposit or a Province of Ontario Savings Office, until, (a) its disposition to the person entitled thereto; or

(b) delivery of prescribed security to the purchaser for repayment.

(3) Subject to subsection (2) [early termination], where a purchaser of a proposed unit under an agreement of purchase and sale referred to in subsection (1) enters into possession or occupation of the unit before a deed or transfer of the unit acceptable for registration is delivered to the purchaser, the proposed declarant shall pay interest at the prescribed rate on all money received by the proposed declarant on account of the purchase price from the day the purchaser enters into possession or occupation until the day a deed or transfer acceptable for registration is delivered to the purchaser.

[para9] These sections of the Act clearly require that any monies received by the vendor be held in trust and that the prescribed interest must be paid on those monies to the purchaser.

[para10] Counsel for the respondent made the argument that the agreement evidenced by the aforementioned letter was a completely "separate agreement" and not an amendment to the existing agreement of purchase and sale. It was, therefore, he argued, entitled to stand on its own and the parties were not obliged to characterize the payment of the \$129,000 as further deposit; the agreement of early payment of the "phantom mortgage" was a separate matter from the contract or original agreement of purchase and sale and not governed by the Condominium Act.

[para11] I cannot agree. The letter and its acceptance is clearly an amendment of a major term of the original agreement of purchase and sale. As a result, the further monies paid by the applicant fall within the description of trust monies in s. 53.(1) and 53.(3) of the Condominium Act.

[para12] Can the applicant and the respondent contract out of the provisions of the Condominium Act? It would appear not.

[para13] Section 60 of the Act reads as follows:

s. 60 This Act applies despite any agreement to the contrary.

[para14] With these words, the Legislature obviously intends that the provisions of the Act are to prevail notwithstanding the wishes of the parties, as evidenced by their agreement. This interference with otherwise free contractual relations has, in my opinion, worked a peculiar injustice on the respondent. He has received the principal amount of the "phantom mortgage" and is

obliged by the Act to deposit it in trust but is entitled to interest earned on it. At the same time, he is obliged by the Act to pay interest to the applicant at the prescribed rate under the Act.

[para15] The simple result of this is that, interest rates aside, the respondent is out the amount he would have otherwise received for the mortgage component of expenses during interim occupancy.

[para16] An order should go requiring the respondent to pay to the applicant interest on the sum of \$129,000 from the date of payment to the date of final closing.

[para17] While, in the circumstances, I feel that the applicant should be entitled to interest on this sum from the date of closing to date of judgment at the rate set out in the Courts of Justice Act, this is not a matter in which I could, in good conscience, allow the applicant his costs. Each party is to pay its own.

[para18] Counsel were good enough to inform me at the opening of their arguments that, between themselves, they had settled the issue as to the discrepancy in the amount of interest originally claimed by the applicant. The order, when drafted by counsel should reflect this agreement as well.

DUNN J.

CBR# 186

Metropolitan Toronto Condominium Corporation No. 858, Plaintiff, and Tornat Construction Inc., York Square Developments Inc., Allan Windows Systems Ltd., The Corporation of the City of York, Ontario New Home Warranty Program, Tornat Property Management Limited, Defendants

Action No. 93-CQ-42907 Ontario Court of Justice - General Division Toronto, Ontario Matlow J. Heard: March 4, 1994. Judgment: March 10, 1994.

[para1] MATLOW J.:-- The following are my reasons for ordering that paragraphs 13 and 14 of the statement of claim be struck out.

[para2] The plaintiff, which is a condominium corporation, asserts a claim in those paragraphs pursuant to section 14(1) of the Condominium Act, R.S.O. 1990, chapter 26 on behalf of certain purchasers of units in the subject condominium complex who purchased those units from the defendant, York Square Developments Inc. Section 14(1) reads as follows:

"14-(1) The corporation after giving written notice to all owners and mortgagees may, on its own behalf and on behalf of any owner, sue for and recover damages and costs in respect of any damage to common elements, the assets of the corporation or individual units, and the legal and court costs in any such actions brought in whole or in part on behalf of any owners in respect of their units shall be borne by those owners in the proportion in which their interests are affected."

[para3] The essence of the claim asserted, albeit less than clearly, is that the said defendant deliberately or negligently misled certain purchasers of units in the subject condominium complex by failing to disclose to them that subsidized public housing was going to be built immediately adjacent to the condominium complex. As a result, the defendant was able to charge more for the units than it could have had proper disclosure been made. Implicit in this allegation is the notion that the public housing adversely affected the value of the condominium units.

[para4] Although the plaintiff alleges that not only the purchasers but it too was misled, counsel for the plaintiff made it clear in his submissions that the claim was being asserted only on behalf of the purchasers.

[para5] Section 14(1), in the context of this case, would permit the plaintiff to bring this action only if it were alleged that there had been "any damage to common elements, the assets of the corporation or individual units". In my view, no such damage is alleged here or could reasonably be alleged if leave to amend were granted.

[para6] Rather, the plaintiff alleges deception on the part of the defendant which caused the purchasers to pay more for their units than they would otherwise have paid. The damage alleged is a notional one rather than a real one and the only damage or harm that could have resulted was to the purchasers' respective economic worth.

[para7] It would be stretching the clear intention of section 14(1) if I were to characterize the damage alleged as a diminution in the value of the units and, therefore, as "damage to...individual units". It is not alleged, for example, that the defendant was in any way responsible for the construction of the public housing complained of or that its conduct, in any way, caused the kind of damage contemplated by the statute.

[para8] Accordingly, the plaintiff is not entitled to sue on behalf of the purchasers and the paragraphs attacked ought to be struck out. The purchasers, if so inclined, may institute other proceedings in their own names if they wish to pursue their individual claims.

MATLOW J.

CBR# 032

Ronald Atherley, Margaret Atherley, William Clark, Margaret Clark, Lloyd Dean, Janet Dean, Jose Domingos, Peter Elik, Marian Evason, Roy Fraser, Alan Good, Francis M. Good, Harold Hicks, Fran Hicks, Gerald Jones, Margaret Jones, Marvin Josaitis, Donna M. Josaitis, Lorraine Lemieux, Frances Martin, Kevin G. McCanna, Heather A. Graham, Glenna Minaker, Margaret Harper, Neil Pinheiro, Brenda Slater, Michael S. Weston and Carlton Wong, and Somerset Place Developments of Georgetown Limited and Peat Marwick Thorne Inc. and Prenor Equity Inc. And Between Somerset Place Developments of Georgetown Limited and Peat Marwick Thorne Inc., and Ronald Atherley, Margaret Atherley, Slade E. Brett, William Clark, Margaret Clark, Lloyd Dean, Janet Dean, Jose Domingos, Peter Elik, Marian Evason, Roy Fraser, Alan Good, Francis M. Good, Harold Hicks, Fran Hicks, Robert Hirst, George Johnston, Jack Evason, Gerald Jones, Margaret Jones, Sandor Jager, Marvin Josaitis, Donna M. Josaitis, Lorraine Lemieux, Frances Martin, Kevin G. McCanna, Heather A. Graham, Glenna Minaker, Margaret Harper, Darshan Ram, Savitri Ram, Neil Pinheiro, Antonio Rea, Brenda Slater, Michael S. Weston, Carlton Wong and Fine & Deo

Action No. RE2243/93 Ontario Court of Justice - Provincial Division Toronto, Ontario Wilkins Prov. Div. J. July 12, 1993.

Jonathan H. Fine and Robert L. Riteman, for the applicants and respondents to the counter-application. Ronald B. Moldaver, Q.C., for the respondents and counterapplicant.

[para1] WILKINS J.:-- This matter came on before me by way of a Notice of Application under Rule 14. The Notice of Application reads in part as follows;

1. The applicants make application for

a) A determination as to the amount of the reduction of the occupancy fees to which the applicants are entitled pursuant to:

i) an agreement (the "Hagen" agreement) to reduce the mortgage interest component of the occupancy fees, contained in a letter dated February 13, 1990; and,

ii) a concession made to and acknowledged by the Court of Appeal in proceedings between the applicants and others, and the respondents and others, that the respondent Somerset would be bound by and would honour the "Hagen" agreement.

b) A declaration that:

i) the respondent Somerset breached the "Hagen" agreement and each of the applicant's Agreements of Purchase and Sale with the respondent Somerset (the "applicants' agreements"); and that,

ii) the applicants' agreements are not binding as a result thereof.

c) An Order that the respondent Somerset return to the applicants forthwith:

i) all monies paid by each of the applicants on account of each of the applicant's respective purchases;

ii) interest thereon in accordance with ss. 53 (2) and 53 (3) of the Condominium Act, and in the cases of the applicants Pinheiro and Slater, Elik and Josaitis in accordance with their respective agreements; and,

iii) an overpayment of occupancy fees as a result of this court's determination of 1. above.

d) An Order requiring the respondents to pay into court all monies at any time held in trust by any of them on account of the applicants' deposits and interest thereon, pending the final resolution of these proceedings.

e) Judgment for any amounts found owing to any of the applicants.

[para2] Paragraph c...d is a matter that has been placed before Mr. Justice Gibson of this court and as such I will not deal with that aspect of the application. Counsel assures me that I can deal with the application without being in conflict with Mr. Justice Gibson. Although I have some reservations in that respect, I think the matter can be dealt with without having to await the decision of Gibson J. as his Order, of necessity, placed at its highest in favour of the applicant, would be to pay the monies into court awaiting the resolution of the final application.

[para3] At the outset of this application and during the course of the hearing, it was brought to the attention of counsel that the volume of factual evidence put before me was substantial and, on the face of the Record, there were certain apparent conflicts.

[para4] Counsel repeatedly assured me that the facts were not in dispute and that in the final analysis, the only matter that had to be decided would be whether or not the applicants were justified in refusing to close various final unit transfers with the respondent Somerset Place Developments of Georgetown Limited through its receiver, Peat Marwick Thorne Inc. Upon review of the material and during the course of the hearing, issues and conflicts were raised which led me to believe that a full and proper determination of justice for the parties should probably have involved a trial of all the issues. However, counsel demonstrated no inclination to proceed in that manner. Counsel for the applicant made it apparent that he wanted to proceed on the material before the court, and counsel for the respondent took the position that the applicants, having chosen this forum, should live or die by their own decision.

[para5] After hearing counsel and reviewing the material, it is my view that my determination of the issues does not require me to touch upon those highly-contentious matters which, had I been obliged to rule upon them, would have necessitated witnesses. I turn to the documents themselves, the conduct of the parties surrounding those documents and the principles of interpretation espoused by Robins J.A. in the majority decision of Scanlon v. Castlepoint Development Corporation et al. (1992), 11 O.R. (3d) 744 (C.A.) at p. 770 and following, where the learned Justice dealt with the applicable rules of construction for an agreement involving the purchase and sale of a condominium unit similar to the ones involved in this matter.

[para6] In the course of dealing with this application, I am mindful of the rules of construction set out in Hillis Oil & Sales Ltd. v. Wynn's Canada Ltd., [1986] 1 S.C.R. 57 at p. 66, that the provisions should be read not as standing alone but in light of the

agreement as a whole and the other provisions therein. I am further mindful that the court should strive to give meaning to the agreement and "reject an interpretation that would render one of its terms ineffective": *National Trust Co. v. Mead*, [1990] 2 S.C.R. 410 at p. 425. [para7] I am further mindful that the court is "to search for an interpretation which from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract": *Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.*, [1980] 1 S.C.R. 888 at p. 901 and also *McLelland & Stewart Ltd. v. Mutual Life Assurance Co. of Canada*, [1981] 2 S.C.R. 6 at p. 19. In searching for the intention of the parties, the court should give particular consideration "to the terms used by the parties, the context in which they are used and ... the purpose sought by the parties in using these terms": *Fernetta v. Metropolitan Life Insurance Co.*, [1992] 1 S.C.R. 647 at p. 667.

[para8] In the event that the court is unable to resolve a contradiction or ambiguity in the terms of a contract, the language of the contract will be construed against its author in accordance with the contra preferentem rule: *Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.*, supra, at p. 901; "[T]he rule is ... one of general application whenever ... there is an ambiguity in the meaning of a contract which one of the parties is the author of the document offers to the other with no opportunity to modify its wording": *Hillis Oil & Sales v. Wynn's Canada*, supra, at pp. 68-69. However, resort is to be had to the contra preferentem rule "only when all other rules of construction fail to enable to court of construction to ascertain the meaning of the document": *Reliance Petroleum Ltd. v. Stevenson*, [1956] S.C.R. 936 at p. 953, *Consolidated Bathurst*, supra, at p. 901.

[para9] Exhibit A to the affidavit of Marrio D. Deo, sworn January 11, 1993 is the Royal Ascott Club Agreement of Purchase and Sale. The applicants and the respondents agree that, although this is a sample agreement of purchase and sale, it is representative of the agreements of purchase and sale entered into by all of the applicants with the exception of Pinheiro and Slater, Elik and Josaitis whose agreements had a different formula for calculating interest.

[para10] The provisions of this Agreement of Purchase and Sale which I find significant are set out below:

1. The purchase price of the unit is _____ () dollars in lawful money of Canada, being payable as follows:

d) The purchaser shall give and the vendor shall take back on closing a first vendor take-back mortgage to be secured against the unit in the amount of \$_____ () dollars _____ cents on the terms and conditions as provided for in Schedule "E" ("the vendor take-back mortgage").

e) The balance of the purchase price by certified cheque on the closing date, subject to the adjustments hereinafter set forth,

2. (b) the transfer of title to the unit shall be completed on the later of the occupancy date or a date fixed by the vendor in accordance with paragraph C. 6, Schedule "C" (the "unit transfer date")

3. (f) "unit transfer date" shall mean the day a transfer of unit for registration is tendered to the purchaser or the purchasers' solicitors.

6. Realty taxes (including local improvement charges, if any, and including any amount required by the mortgagee to establish a tax account), interest payable in accordance with the Act, insurance premiums, electric, water and gas rates, (except insofar as same are included in common expenses and paid for by the purchaser as part of the occupancy) and estimated common expenses shall be apportioned and allowed to the unit transfer date. With respect to realty taxes (including local improvement charges and sewer impost charges), the same shall be estimated as if the unit had been assessed as fully completed by the relevant taxing authority for the calendar year in which the transaction is completed, and shall be adjusted as if such taxes had been paid by the vendor, notwithstanding the same may not have been levied or paid by the unit transfer date, subject however, to readjustment upon the actual amount of such taxes being ascertained ... [my emphasis]

8. Provided that the title is good and free from all encumbrances, save as herein set out, the purchaser agrees to accept title subject to all restrictions, easements, conditions or covenants that run with the land and subject to all rights, licenses and easements now registered or to be registered for the supply and installation of telephone services, electricity, gas, sewers, water, television and/or cable facilities and the other usual services and further subject to any registered agreements, and the terms of the condominium documents in their final registered form. The purchaser is not to call for the production of any title date or abstract or other evidence of title except such as are in the possession of the vendor. The purchaser is to be allowed until ten (10) days prior to the unit transfer date to examine the title at his own expense. If within that time any valid objection to title is made in writing to the vendor which the vendor shall be unable or unwilling to remove and which the purchaser will not waive, this agreement shall, notwithstanding any intermediate negotiations in respect of such objections, be null and void and the deposit monies together with the interest by required law to be paid after deducting any payments due to the vendor by the purchaser as provided for in paragraph 17 shall be returned to the purchaser and the vendor shall not be liable for any costs or damages. Save as to any valid objection so made within such time, the purchaser shall be conclusively deemed to have accepted the title of the vendor.

10. The purchaser acknowledges that the unit may be encumbered by mortgages which are not intended to be assumed by the purchaser and that the vendor shall not be obliged to obtain and register partial discharges of such mortgages insofar as they affect the unit on the unit transfer date. The purchase agrees to accept the vendor's undertaking to obtain and register partial discharges of such mortgages and as soon as reasonably possible after the unit transfer date in accordance with the following terms: A mortgage statement or letter from the mortgagee(s) with respect to the unit; direction to pay any necessary funds to the mortgagee(s) on the unit transfer date to obtain partial discharge(s) of the mortgage(s); and the vendor's solicitor's undertaking to deliver said funds to the mortgagee(s) and to register the partial discharge(s) upon receipt and advise concerning registration particulars.

16. All of the covenants, warranties and obligations contained in this agreement shall survive the closing of this transaction, and shall remain in full force and effect notwithstanding the transfer of title of the units to the purchaser. [my emphasis]

20. Notwithstanding the purchaser occupying the unit or the closing of this transaction and the delivery of title to the unit to the purchaser, the vendor or any person authorized by it shall be entitled at all reasonable times and upon reasonable prior notice to the purchaser to enter the unit and the common elements in order to make inspections ... [my emphasis]

24. Upon default of the purchaser of any of the covenants, warranties, acknowledgements and obligations to be performed under this agreement, and without limiting the generality of the foregoing, any and all covenants relating to the period of occupancy, if any, and such defaults continuing for seven (7) days after written notice thereof has been given to the purchaser or the purchaser's

solicitor by the vendor, then in addition to any other rights or remedies which the vendor may have, the vendor, at its option, shall have the right to declare this agreement null and void and in such event all deposit monies paid hereunder shall be forfeited to the vendor and the vendor may also claim for damages in excess of the deposit. If the purchaser has taken possession of the unit, the purchaser shall immediately vacate the unit and the vendor shall be at liberty to sell the unit with or without re-entry.

30. This offer when accepted shall constitute a binding contract of purchase and sale and time shall in all respects be of the essence hereof.

It is agreed that there is no representation, warranty, collateral agreement or condition affecting this agreement or the real property or supported hereby other than as expressed herein in writing. [my emphasis]

[para11] Schedule "C" forms part of the Agreement of Purchase and Sale. It further provides on the first page as follows

C.6 Upon registration of the condominium, the vendor's solicitor shall designate a date not less than twenty-one, not more than sixty after the registration of the condominium documents as the unit transfer date by delivery of written notice of such date to the purchaser or his solicitor.

[para12] Schedule "E" forms part of the Agreement of Purchase and Sale as follows:

E.1 The purchaser covenants and agrees to give on the closing date a vendor take-back mortgage to be taken back by the vendor for the principal sum in Canadian dollars, in the amounts set out in paragraph 1 (d) of the Agreement ...

E.2 The terms of the vendor take-back mortgage shall be as follows: (a) interest only; (b) the full amount of principle and accrued interest shall be payable by the purchaser on demand of the vendor; (c) installments of interest shall be paid monthly;

(d) the interest rate shall be a fixed rate of interest equal to the prime rate per annum charged by the Toronto Dominion Bank plus 2.5% per annum in effect on the closing date calculated monthly not in advance. "PRIME RATE" means the floating annual rate of interest established from time to time for loans made by the bank to its most credit-worthy customers; [my emphasis] (k) all legal costs related to the vendor take-back mortgage including the discharge shall be the obligation of the purchaser. [my emphasis]

[para13] Notice of Appointment of a Receiver, in the form of 379059 Ontario Ltd. C.O.B. Retail Engineering, was given by Prenor Equity Inc. in a Notice dated the 22nd day of November, 1990 by virtue of Somerset's default on a debenture. Following that notice, in the subsequent proceedings that took place prior to these proceedings, Prenor Equity Inc. and Retail Engineering were named as respondents.

[para14] Effective the 20th day of November, 1991, Prenor Equity Inc. appointed Peat Marwick Thorne Inc. in the stead of Retail Engineering and it is from that appointment that Peat Marwick Thorne Inc. appears along with Prenor as respondents in this application.

[para15] This story had its commencement in a piece of correspondence dated February 6, 1990, where seven persons wrote a strong and complaining letter to one Hugh C. Hagen, President, Canterra Commercial Developments Limited, in which they expressed very serious complaints. I describe these persons as unit holders, although some may have been in possession and some may not have been in possession at the time. One complaint, listed as item 10 on page 2 of that letter, appears as Exhibit F to the affidavit of Deo. It states, "When we purchased our units, we were advised that the 'phantom mortgage' would be less than having a mortgage. This has proved to be untrue."

[para16] The same letter also makes reference to complaints about "a built-in coffee maker" and "a courtesy van".

[para17] This letter goes on to say, and I quote for emphasis, "If we feel we have to, we will seek publicity through the local papers and the three national dailies, as well as the television media. We will also seek litigation against Canterra Developments, if so required." The letter then goes on to show copies sent to Mr. G. Turner, Member of Parliament, R.T. Miller, Mayor, and Mr. R.W. Shettell, Director of Building Department, Ontario New Home Warranty Program.

[para18] In what I find to be an obvious and direct response to the February 6th correspondence, Mr. Hugh C. Hagen, President of Canterra Developments Inc., directed a letter dated February 13, 1990 to all suite owners. It appears from the information that not all suite owners received this correspondence and from the cross-examination of M. Harper, it would appear that at least she did not rely on the correspondence.

[para19] The correspondence from Mr. Hagen, hereinafter referred to as the "Hagen letter", asserted in Item 5, that the coffee makers were on order and would be installed shortly, and in Item 6, that the courtesy van would be provided at registration of the condominium.

[para20] It is Item 15 that has proven to be the root of the litigation before me. It reads as follows;

VENDOR TAKE-BACK MORTGAGE The Purchase and Sale Agreement clearly shows the vendor take-back mortgage at Toronto Dominion Bank prime rate plus 2%. Current first mortgage rates are lower although this is an unusual phenomenon in the financial world. On the unit transfer date (i.e. condominium registration), we will be refunding to you the difference between your vendor take-back mortgage interest paid and the interest rate on a first mortgage that is calculated ninety days prior to the unit transfer date. Therefore, although the net effect will not be less than had you had a mortgage, it will be the same as if you had had one.

[my emphasis]

[para21] The Hagen letter was written on behalf of Canterra Developments Inc. The complaining purchasers had directed the correspondence to Canterra and it is clear from looking at the Hagen letter as a whole, that Mr. Hagen was attempting to "buy peace" and avoid the unpleasant consequences, including litigation, set out in the original correspondence. Copies of the Hagen letter are shown to have been directed to the same persons as were copies of the original letter of complaint.

[para22] Peace was not to be had. A Notice of Application was issued in March, 1991. I reproduce the relevant terms of that Notice of Application below:

1. The applicant makes application for:

a. The determination of the applicants' rights pursuant to: i. Agreements of Purchase and Sale (hereinafter referred to as the "Agreements"), with the respondent, as vendor, with respect to residential condominium units (referred to herein as the "units"), in a proposed residential condominium project located in Georgetown, Ontario known as the Royal Ascott Club

b. More particularly, a determination: ii. Contractual Interpretation Issues: (1) Is the respondent Prenor bound to complete each transaction of Purchase and Sale in accordance with and by the terms and conditions of each Agreement?

iii. Phantom Mortgage Issues: (2) How much is the monthly occupancy fee legally chargeable to each applicant? (4) Are the applicants entitled to the return of all monies paid on account of the mortgage interest component of the occupancy fee from their respective occupancy dates?

... c. If this court determines that the Agreements are not binding on the applicant for any reason, then the applicant requests: i. A declaration that the Agreements are not binding on the applicants/purchasers; iii. an order for the return of any or all of the applicants/purchasers' deposits, if so demanded by any such applicant/purchaser, together with interest thereon in accordance with their respective Agreements and s. 53 of the Condominium Act. d. In any event, the applicants request: i. an order requiring the respondents to pay into court pending the final disposition of these proceedings: 1. all amounts paid to date on account of the occupancy fees by the applicants, or such part thereof as this court deems just; 2. all amounts paid to date on account of the deposits paid by the applicants. iii. an order for the return of any other monies found owing to the applicants/purchasers, including if so found: 1. all monies paid on account of the mortgage interest component of the occupancy fee together with interest thereon from the date of payment; 2. the full amount of all occupancy fees paid together with interest thereon from the date of payment; 3. any amounts found owing on account of a reduction and/or rebate of the monthly occupancy fees as a result of a breach of statutory duty or otherwise, together with interest thereon from the date of payment.

[para23] It is clear from the affidavits filed, the excerpts from earlier cross-examinations as well as the cross-examinations of Miller and Deo, that paragraph 15 in the Hagen letter was clearly put before the Judge in the Motions Court hearing the return of that application.

[para24] Each of the applicants in this application was an applicant in the earlier application heard by Mr. Justice Wright. Somerset and Prenor were party respondents to that application and, at that time, Retail Engineering was the receiver. In this application, the respondents remain the same, save and except Peat Marwick Thorne Inc. who is now the receiver. Given the role of a receiver, I find it is not relevant that the receivers had changed. Therefore, for all intents and purposes, the parties before me are the identical parties who appeared before Wright J.

[para25] The judgment of Mr. Justice Wright, delivered Wednesday, the 24th day of July, 1991, is reproduced in part as follows;

5. THIS COURT DECLARES that the respondent Prenor Equity Inc. is a declarant under the provisions of the Condominium Act, R.S.O. ch. S 4 as amended in respect of the Royal Ascott Condominium Project located in Georgetown, Ontario, and as such, assumes all of the rights and liabilities of the respondent Somerset Place Developments of Georgetown Limited as of November 22, 1990 including honouring the Agreements with the applicants which includes: a) Reducing any part of the mortgage interest component of the occupancy fee paid by each applicant from time to time and not repaid to any of the applicants pursuant to the terms of this judgment based upon the difference between the rate actually used in the calculation of the occupancy fee being 15.49% and the mortgage rate effective ninety days prior to the unit transfer date; b) A provision of a courtesy van for the condominium corporation; and c) Supplying appropriate furniture for the lobby of the building located at 26 Hall Road South, Georgetown, Ontario. [my emphasis]

[para26] On the basis of the above, I conclude that the "Hagen letter" as set out in paragraph 15, was placed before the court for a determination of its force and effect. For reasons unknown, Wright J. was not asked to interpret the meaning or to establish the "mortgage rate".

[para27] The matter was appealed to the Ontario Court of Appeal by Prenor Equity Inc. It was not necessary under the terms of the judgment of Mr. Justice Wright for the other respondents to appeal.

[para28] The Notice of Appeal of Prenor Equity Inc. dated August 9, 1991 included the following grounds of appeal.

h) the learned trial Judge erred in finding that Prenor Equity Inc. was bound by the representations made by Somerset with respect to a reduction of the mortgage interest component, the provision of a courtesy van for the condominium corporation and the supplying of appropriate furniture for the lobby of the complex; in any event, the latter two promises are vague and unenforceable.

[para29] The Order of the Court of Appeal dated Tuesday, the 13th day of October, 1992, reads as follows:

1. THIS COURT ORDERS that the appeal be and is hereby allowed with costs and that the application be and is hereby dismissed with costs.

2. THIS COURT ORDERS that the judgment of The Honourable Mr. Justice Wright dated July 24, 1991 be and is hereby set aside.

[para30] The reasons given in the Court of Appeal were delivered by Mr. Justice Robins J.A. and are reported under the name of Abdool, et al. v. Somerset Place Developments of Georgetown Ltd., et al. (1992), 10 O.R. (3d) 120. Under the heading "Was there any basis upon which an abatement of the purchasers' interim occupancy fee or rent could be ordered?", the learned Justice, speaking on behalf of the whole panel, stated at p. 155,

I should perhaps note Prenor's concession to the effect that Somerset's agreement to reduce the mortgage interest component paid by each purchaser by the difference between the rate actually used in the calculation of the occupancy fee and the mortgage rate

effective ninety days prior to the unit transfer date is a liability of Somerset for which the receiver is responsible on final closing. [my emphasis]

[para31] By correspondence dated October 28, 1992, Mr. Fine wrote to solicitor Robert Miller, the letter which appears as Exhibit M2 to the affidavit of Marrio D. Deo. The letter reads as follows:

In order to properly advise our client and perhaps avoid an appeal to the Supreme Court of Canada, we need to know your position with respect to the terms of closing, including:

- a) Closing date;
- b) Adjustment in purchase price/occupancy fee or other credit to the purchasers including reduction of mortgage interest component;
- c) Availability of mortgage financing;
- d) Your position with respect to the costs of both the application and the appeal.

We would appreciate receiving your advice as soon as possible as we are meeting with our clients on November 2, 1992. [my emphasis]

[para32] The above correspondence gave rise to a response from Robert Miller dated October 30, 1992 which appears as Exhibit N to the Deo affidavit. I reproduce that correspondence below:

Further to your letter of October 28, 1992, we respond as follows (numbering our paragraphs to correspond to those in your letter aforesaid):

- a) As set out in our letter to you of October 22, 1992, final closings have been scheduled for November 18, 1992.
- b) There will be no adjustment in the purchase price or occupancy fee. However, in accordance with the Court of Appeal decision (page 61) there will be a reduction in the mortgage interest component to reflect the interest rate effective ninety days prior to closing.
- c) As set out in our letter to you of October 22, 1992, our client is prepared to review applications from your clients with respect to mortgage financing.
- d) It appears quite clear that the Court of Appeal awarded costs to our client both in the appeal and on the original application and as a result, our client will be expecting payment accordingly. Mr. Schwartz is in the process of completing our client's bill of costs and will forward same to you in due course. However, our client is prepared to attempt to settle the issue of costs ... same as vendor's credit in the Statement of Adjustments in order to avoid further costs and accrued interest payable by your clients.
- e) We confirm that the foregoing information is given in order to assist you in advising your client, however, we fail to understand what this information has to do with the merits of an appeal to the Supreme Court of Canada. [my emphasis]

[para33] It is paragraph 15 of the Hagen letter and the notation of Robins J.A., now described as the Prenor concession, combined with the Fine correspondence of October 28, 1992, Item b, and the Miller correspondence of October 30, 1992, Item b, that have given rise to the application before me.

[para34] It is quite significant to note that by correspondence dated October 22, 1992, Miller had written to Fine. I reproduce the significant portions below:

We therefore wish to advise that the final closings shall occur on November 18, 1992.

The Statement of Adjustments on all closing documentation will be prepared in accordance with the original terms of the Agreement of Purchase and Sale between your clients and Somerset Place Developments of Georgetown Limited ("Somerse") subject to the following amendments:

1. All closing documentation will be executed by Somerset's receiver/manager; Peat, Marwick, Thorne Inc.
2. All "rental fees" paid by your clients will be credited against outstanding occupancy fees payable by your clients pursuant to the provisions of the original Agreements.

We will be forwarding to you the draft transfer statements of adjustments, draft estoppel certificates and the remainder of the closing documents under separate cover. [my emphasis]

[para35] In the application before me, the applicants seek to enforce the Hagen letter to reduce the mortgage interest component of the occupancy fees. They also seek to enforce the Prenor concession made by counsel for Prenor in the Court of Appeal. They also assert that the Miller letter of October 30th was a re-affirmation of the Hagen letter and a confirmation of the Prenor concession. Counsel argued that all three were connected and had to be read together. They argue that the Miller letter does not stand alone.

[para36] Taken out of context, the Miller letter could arguably be looked upon as a re-affirmation of the Hagen letter and a confirmation of the Prenor concession. However, read in conjunction with the Fine letter of October 28th and having regard to the different wording respecting the rate of interest to be used, I find that approach to be flawed. The Hagen letter used the phrase "the interest rate on a first mortgage". Mr. Justice Wright in his decision used the phrase "the mortgage rate". Robins J.A. in reciting the Prenor concession described it as Somerset's agreement to reduce the mortgage interest component by the difference between the rate actually used in the calculation of the occupancy fee and the "mortgage rate" effective ninety days prior to the unit transfer date. The Miller letter does not say this. The Miller letter says "There will be a reduction in the mortgage interest component to reflect the interest rate effective ninety days prior to closing" [my emphasis]. The first mortgage rate, effective

ninety days prior to the unit transfer date, is clearly not the same as the mortgage rate. Further, the interest rate, effective ninety days prior to closing, is different from both of them.

[para37] The Miller letter has to be read in conjunction with the Fine letter of October 28th. The Fine letter very carefully distinguished between adjustments in purchase price/occupancy fee and other credit of the purchasers, including reduction of mortgage interest component. That distinction was picked up on by Miller who replied that there would be no adjustment in the purchase price or occupancy fee, hence adopting Fine's separation of these items. In dealing specifically with the issue of other credit to the purchasers, including reduction of mortgage interest component, Miller responded:

However, in accordance with the Court of Appeal decision (page 61), there will be a reduction in the mortgage interest component to reflect the interest rate effective ninety days prior to closing.

[para38] From the Miller letter of October 30th, down to the date fixed for unit transfer at the Milton Registry Office, the 23rd of December, 1992, the parties negotiated and renegotiated the issue of the adjustment, if any, to be given by Somerset to the purchasers in the mortgage interest component. Draft Statements of Adjustments were prepared demonstrating a credit. Then they were withdrawn and Statements of Adjustments were delivered demonstrating no credit. In effect, the parties entered into a series of negotiations to attempt to work out whether or not an adjustment on unit transfer would be given for the mortgage interest component and, if such an adjustment was to be given on unit transfer, what interest rate would be used and what formula would be followed in order to calculate that adjustment.

[para39] From the correspondence of the parties and their conduct, it is more than apparent that they intended to treat any reduction of the mortgage interest component as a matter for adjustment on unit transfer and not as a matter of purchase price or occupancy fee. This was their intention, notwithstanding the fact that the financial net effect of varying the mortgage interest component would substantially vary the monies payable upon unit transfer. Though the amounts of money involved would be substantial for each unit purchaser, the issue became one of adjustments, and adjustments only.

[para40] Miller, in the correspondence of October 30, 1992, asserted that there would be a reduction of the mortgage interest component to reflect the interest rate, effective ninety days prior to closing, which he stated was in accordance with the appeal decision, citing page 61 of the Reasons.

[para41] The Order in the Court of Appeal did not deal directly with paragraph 15 of the Hagen letter. It overturned the decision of Wright J. whose judgment gave effect to the provisions of that letter to the benefit of the purchasers. Therefore, the issue of the Hagen promise was only indirectly before the Court of Appeal.

[para42] Notwithstanding the Prenor concession, as it was described in the reasons for the Court of Appeal, I find that, if the court had intended to preserve a form of rebate as contemplated in the Hagen letter for the benefit of the respondents before them, it would have appeared in the court's Order, which it does not. The issue of the force and effect of the Hagen promise was dealt with and disposed of by the Court of Appeal by setting aside the judgment of Wright J.

[para43] Counsel for the applicants urged that I should treat the Prenor concession as an undertaking by counsel for Prenor to the Court of Appeal and, as such, it should be given force and effect regardless of the result in the Court of Appeal.

[para44] I cannot agree with that position. At the time of the making of the so-called Prenor concession, the appeal was in progress with no knowledge as to the outcome. Subsequent to the making of the concession, the Court of Appeal unanimously struck down Wright J.'s finding that the Hagen promise had force and effect. If the Court of Appeal had intended to substitute the Prenor concession and to order that the purchasers be given the benefit of the Hagen promise or the Prenor concession, I find that it would have done so in the Order. It would not have left the matter in the hands of the parties to be subject to some further interpretation by this court without so directing.

[para45] It is my view that, notwithstanding the comments by Mr. Justice Robins at p. 155 of the decision set out above, it was the intent of the Court of Appeal to achieve the result in the order given, which was to strike down the judgment of Wright J., including paragraph 5 (a) which, of necessity, includes the Hagen promise. [para46] Having said that, I must now turn to Robert Miller's letter.

[para47] It is clear from his letter that Mr. Miller was acting under the belief that the decision in the Court of Appeal was in some way granted a reduction in the mortgage interest component to reflect the interest rate effective ninety days prior to closing. His letter referred to page 61 of the decision of the Court of Appeal which obviously meant the Prenor concession. Having regard to my comments above, it is clear that Miller is mistaken in his understanding of the effect of the decision in the Court of Appeal. It is equally apparent from Miller's letter that his words were written with an intention to accord with the decision in the Court of Appeal. I strongly doubt that Miller would have written those words if he had not mistakenly believed that the Order of the Court of Appeal would somehow create that reduction. As I have indicated, Miller is clearly in error. I also believe that as an experienced solicitor he would not have used the words "interest rate" if he had intended to say the "mortgage rate".

[para48] If Miller had intended to offer the return of a benefit which had been taken away by the Court of Appeal, he would surely have referred to the concession in the Court of Appeal's decision or the undertaking of counsel in the Court of Appeal, or at least used the same words for describing the interest rate. I do not believe that, by using the words that appear in paragraph b of this correspondence, Miller was intending to reopen the Hagen promise which had just been struck down or the Prenor concession which was not enforced or interpreted by the Court of Appeal.

[para49] I am supported in this belief by the Miller letter of October 22, 1992, referred to above, where Miller stated:

The Statement of Adjustments and all closing documentation will be prepared in accordance with the original terms of the Agreement of Purchase and Sale between your clients and Somerset Place Developments of Georgetown Limited ...

[para50] I am reinforced in that belief by noting that the decision of the Court of Appeal was released October 13, 1992, nine days prior to Miller's letter of October 22, 1992. The disposition would by then have been known to him.

[para51] The Miller letter was put forward on the basis that it was a reaffirmation and/or confirmation of the Hagen promise and the Prenor concession. The changes in wording between the three of these demonstrates, in my view, that at its highest, the Miller letter might be treated as a different proposal. As I have already indicated, Miller was clearly mistaken in his interpretation of the

result in the Court of Appeal. Having regard to this and to the changes in the wording, and placing this in the context of Miller's letter of October 22nd, I conclude that Miller was attempting to negotiate in a manner designed to foster the closing of the transactions. Having concluded this, I direct my attention to the case of *Gilbert Steel v. University Construction Limited* (1976), 12 O.R. (2d) 19. In my view, the Miller letter, looked on at its highest, is an attempt to induce closing and not a reaffirmation of the Hagen promise or a confirmation of the Prenor concession. The applicants contributed nothing to obtain the words set out in the Miller letter. Once the decision in the Court of Appeal had been rendered, the applicants were returned to a position of being bound to close the transactions in accordance with the original Agreements of Purchase and Sale. It is apparent from the negotiations of the parties that the applicants had been raising the spectre of their refusal to close as a negotiation technique which they combined with the concept of an appeal to the Supreme Court of Canada in the *Abdool* case, as well as a resolution of the costs in that case. Included in those negotiations as well was a reduction in the mortgage interest component.

[para52] I find that the Miller letter was a response designed to foster closing and that the only consideration which the applicants could have advanced for that term of the Miller letter would be to close the transactions. Since the applicants were already under a legal obligation to close at the time the Miller letter was delivered, and since the applicants could not have done less without being guilty of a breach, I find that the Miller letter has no greater force and effect than the promise referred to in the case of *Gilbert Steel* cited above and, as such, it is not enforceable.

[para53] Looking to the concept of detrimental reliance, I would point out that there was no evidence before this court that any of the applicants relied upon the Miller letter to their detriment or, in fact, relied upon the Miller letter at all. This application can only be decided on the basis of the documentary evidence submitted. I find that the evidence before me is not sufficient to support an allegation of a detrimental reliance.

[para54] In any event, the so-called issue of the Prenor concession, the Miller correspondence, the issues of an appeal by some of the applicants in the *Abdool* case and the subject of costs of the Ontario appeal in the *Abdool* case, all became mixed together and the subject matter of a series of negotiations. Counsel returned before Justice Robins to settle the Order and to try and deal with the Prenor concession. All of those negotiations, including the negotiations on whether or not there would be a reduction of the mortgage interest component, and if so, at what possible rate of interest might it be, continued unabated up to the 23rd of December, 1992. It is clear from the documents and the evidence of the witnesses that no agreement was ever reached by the parties as to whether or not the purchasers were entitled to a mortgage interest component reduction. Even if they were so entitled, no agreement was ever reached as to what the appropriate rate of interest should be in order to ascertain the calculation for such a deduction.

[para55] The correspondence makes it clear that, eventually, the solicitors for the vendor asserted that they would rely on the original terms of the Agreement of Purchase and Sale. The parties agreed to a closing date in the Milton Registry Office on the 23rd of December, 1992. Prior to the attendance on closing, the vendors had delivered what they declared to be the Statements of Adjustments. These Statements of Adjustments did not make any allowance for a reduction in the mortgage interest component, making it clear that the vendor was no longer negotiating on that subject.

[para56] By correspondence dated the 23rd of December, 1992, being Exhibit Z to the affidavit of Deo, solicitor Deo stated the following:

This letter is hereby delivered to you prior to the closing appointments, scheduled for this day, at the Registry Office in Milton.

We have expressed our client's position to you many times that the proper interest rate to be applied to reduce the mortgage interest component of the occupancy fees throughout the occupancy period is 6.25%, which was the one-year Toronto Dominion Bank closed mortgage rate in effect ninety days prior to today.

As a compromise of the dispute as to the proper rate to be applied, we have prepared the Statement of Adjustment and we are hereby tendering on you the balances due on closing, calculated using an interest rate of 10% in respect of the mortgage interest component of the occupancy fees.

Our client's tender is made on the basis that if the tender is accepted by you, the mortgage interest component reduction issue will be settled between our respective clients.

If your clients are not willing to accept the funds and documents tendered, and close the transaction on that basis, please advise us accordingly and immediately. If you do not so advise us, we will take anything other than your express written rejection, as your clients' acceptance of same. Under no circumstances will we complete the applicable transactions unless it puts an end to this dispute.

In order to avoid any situation where the minor miscalculations will result in a need to readjust any of the transactions, we hereby advise you that we are holding, on behalf of each client, the sum of \$1,000.00 which we have been given authority to utilize in case there is a need for readjustment. Accordingly, if any error is made in our tender to you, we are in a position to personally undertake to readjust any error or omission in the Statement of Adjustments up to a maximum of \$1,000.00 per closing. Hence, you will not be able to take the position that a tender is short a few dollars.

[para57] It is clear from the documents filed and the evidence of Deo that the purchasers were prepared to adjust any of the other aspects of the Statement of Adjustments after closing, with the exception of the mortgage interest component which they then insisted had to be adjusted in the terms provided by themselves and none other.

[para58] From the earlier correspondence recited above, it is apparent that the parties had agreed to treat the mortgage interest component as an entirely separate adjustment to be negotiated. The mortgage interest component was not to be treated as part of the purchase price or part of the occupancy fees but was to be a separate item for which credit would or would not be given depending upon whether any agreement could be reached by the parties during the intervening negotiations.

No such agreement was reached.

[para59] It is undisputed in this application that the purchasers attended at the Milton Registry Office and refused to close the transactions unless the vendors would comply with the terms and conditions set out in the Deo letter of December 23, 1992 set out above. Those terms and conditions presupposed that the Hagen promise and/or the Prenor concession and/or the Miller letter of October 30th were in force and effect, that the terms of those three items relied upon by the purchasers were capable of a

meaningful interpretation and that the most unfavourable interpretation to the purchasers was the compromise rate of 10%. Counsel for the applicant has taken the position before me that he was either entirely right or entirely wrong in that position.

[para60] More significantly, the purchasers took the position "under no circumstances will we complete the applicable transactions unless it puts an end to this dispute." In effect, the purchasers made it a condition of closing that the issues were required to merge on closing including not only whether or not a mortgage interest component reduction was required to be given by the vendors but also the rate at which that mortgage interest component reduction had to be calculated.

[para61] The vendor refused to accept the purchasers' terms. Mr. Miller attended at the Registry Office in Milton in a position to complete each of the applicant's transactions of purchase and sale under protest. The vendor was prepared to accept payments in the amounts calculated by the purchasers in exchange for which they would deliver to each purchaser their unit transfer conveying title for each respective unit to each respective purchaser. However, the vendor insisted on a reservation of all of the parties' rights to dispute the amounts of money properly due on closing to be brought in the appropriate court proceedings by either party after final closing of all of the transactions.

[para62] As it was so colourfully put to me by counsel for the respondents, the vendors attended prepared to accept anything the purchasers would give them ("including a baseball bat and my brother") in exchange for which they would hand over the unit transfers and convey title of each unit to each purchaser. All they required in return was the right to litigate if the vendors felt they were entitled to a mortgage interest component rate of 15.49%. Alternatively, if the purchasers felt they were entitled to a mortgage interest component rate of 6.25%, they could litigate for that or have a vendor and purchaser motion to settle the adjustments.

[para63] It was conceded by counsel for the applicant that the Agreement of Purchase and Sale does not provide for merger. Quite to the contrary, the Agreement as cited above provides for some readjustments which, of necessity, have to be ascertained after the date of the final closing or unit transfer date. The parties agree that the purchasers were prepared to adjust and resolve any or all of the smaller items of adjustment at a date subsequent to the unit transfer date (final closing) (Deo cross-examination P69Q441). Most significantly, the agreement at page 5, paragraph 16, provides that the "covenants, warranties and obligations contained in this agreement shall survive the closing of this transaction and shall remain in full force and effect notwithstanding the transfer of title of the units to the purchaser."

[para64] I find that, at the closing in Milton, the purchasers unilaterally attempted to enforce their interpretation of the Hagen promise/ Prenor concession/Miller letter, both as to liability and interest rate, and that they unilaterally attempted to enforce the extinction of rights by way of merger on those issues notwithstanding the provisions of paragraph 16 cited above. This conduct by the purchasers was in contravention of page 8, paragraph 30 of the Agreement of Purchase and Sale cited above, wherein the parties agreed:

... That there is no representation, warranty, collateral agreement or condition affecting this Agreement or the real property or supported hereby other than as expressed herein in writing.

[para65] In all of the circumstances, I find that the purchasers were not justified in refusing to close the transactions and that they took an unreasonable position prior to closing by attempting to force amendments to the Agreement of Purchase and Sale that would materially alter the terms of that Agreement to the detriment of the vendors. This, in my view, was an anticipatory breach of a fundamental term of that contract which matured into an actual breach at the Milton Registry Office when they refused to close.

[para66] I find that the vendors acted reasonably and within the terms of the original Agreement of Purchase and Sale in offering to close the transactions under protest with each of the parties having the right to determine their position by subsequent litigation, as clearly contemplated by the original Agreement of Purchase and Sale. This is not a case where the purchasers were being asked to purchase litigation.

[para67] Having made these findings, it is not necessary to interpret the meaning of the Hagen promise, the Prenor concession or the Miller letter. Nor is it necessary to calculate the interest rate that may have been contemplated in any of the three of them. Had I been obliged to attempt that calculation, I would not have been able to do so on the basis of the information in front of me. The wording of all three is vague and uncertain and would require me to arbitrarily select an interest rate from the information put before me when the parties in their negotiations and in their documentation had been dealing with various different interest rates calculated to two points of decimals. Of the three, I find the wording of the Miller letter to be the most uncertain and the least capable of being given a meaningful interpretation.

[para68] I find myself unable to reconcile the difference between the phrase contained in the Hagen letter and the Prenor concession with the phrase in the Miller letter, being "the first mortgage rate", "the mortgage rate" and "the interest rate" respectively. Aside from the impossibility of calculation, these differences make it impossible for me to determine which of a multitude of interest rates could have been intended.

[para69] In the final result, I conclude that the provisions of the original Agreement of Purchase and Sale were in force and effect and that the applicants were each in breach of that agreement when they refused to proceed with the closing at the Milton Registry Office. As a consequence of the applicants' breaches of the obligations under the contracts of Purchase and Sale, their application is dismissed.

[para70] Having regard to the findings above, the counterapplication is successful. The terms of the judgment in the counter-application cannot be appropriately determined at this time because of the changes that have taken place in occupancy and also because of the arrangements that were made for the collection of monies by the purchasers' solicitors, monies which are currently being held in trust.

[para71] It will be necessary for there to be a reference to the Master in Toronto. In order to properly structure the form of order to be made covering the relief claimed in the counter-application and to prepare the proper directions of the issues to be put before the Master in Toronto, I direct counsel to re-attend before me to settle those issues and allow the appropriate Order and directions to be prepared.

[para72] On the subject of costs, it would, perhaps, be usual for costs to follow the event. The applicants have been found in breach of their Agreements of Purchase and Sale. However, it seems to me that some of the motivation behind the conduct of the

applicants arose directly as a consequence of the conduct of the respondents. Though I have found that the conduct of the respondents was not sufficient to found the basis for granting the application, it is still my view that the respondents did, in part, contribute to the problems between the parties. On that basis, there will be no costs to the respondents in the application.

[para73] With respect to the issues of costs in the counter-application, the applicants to the counter-application shall have their costs of re-attendance before me to settle the terms of the judgment to be given and shall further have their costs of the reference before the Master in Toronto and any other attendances that might be necessitated before me thereafter on the party and party scale.

WILKINS Prov. Ct. J.

CBR# 215

Nipissing Condominium Corp. No. 24, Applicant, and Graeme Ferris and Agathe Ferris, Respondents

Action No. 1874-93 Ontario Court of Justice - General Division Toronto, Ontario Hogg J. June 23, 1993.

Donald M.W. Wood, Counsel for the Applicant. Graeme Ferris, in person and for Agathe Ferris.

[para1] HOGG J.:-- BIJOU, a ten-pound Maltese dog, is the subject matter of this application. The respondent, Graeme Ferris, is a middle-aged man who lives with his mother, Agathe, (who is over 80 years of age and in poor health), at 155 Timmins Street, Unit 115, which is part of the applicant, NIPISSING CONDOMINIUM CORPORATION #24.

[para2] This condominium complex is a luxury one and is situated in the city of North Bay on the shores of Lake Nipissing, surrounded by a considerable area of landscaped property. The declaration of the applicant condominium, contains the following, "no animal, livestock, fowl, insect, reptile or pet of any kind shall be kept in any unit." The applicants are obliged to bring the proceedings to this court.

[para3] The issue before me is whether I should order the removal of BIJOU. The facts are not in dispute. The dog lives in the condominium with the respondents. This is not a "bad dog case" and there is no allegation that the animal is misbehaving or causing any problem, so far as the other residents are concerned. It appears that a discovery was made that some five dogs were resident in the condominium. Notices were issued and all but BIJOU have left.

[para4] Section 12(3) of The Condominium Act, R.S.O. 1990 c. 26 provides subsection (3).

"The corporation has a duty to effect compliance by the owners with this Act, the declaration, the by-law and the rules."

[para5] Section 49 of The Condominium Act, provides that the condominium may apply to the Ontario Court (General Division) for an order directing the performance of the duty.

[para6] Subsection (2) provides:

"The court may by order, direct performance of the duty and may include in the order any provisions that the court considers appropriate in the circumstances." (emphasis mine)

[para7] The respondents submit that the application should be dismissed on the grounds that the dog is a therapy, utility animal and more particularly, it is a hearing assist dog.

[para8] Evidence concerning hearing assist dogs is before me as is the qualification of BIJOU to fall into that category. There is no evidence to the contrary. It is submitted to me that there is a parallel or a similarity between a guide dog who assists the vision deprived and a hearing assist dog. There is provincial legislation, a Guide Dog Act, for the visually impaired. There is no such legislation for those with hearing disabilities.

[para9] Hearing Ear Dogs are a recognized category. The Hearing Ear Dogs of Canada Program trains these animals and the cost is some \$4000.00. There is apparently a waiting list of up to 3 years to acquire such dog. The respondent's evidence is that a dog will not be certified if it is over 1 year of age and therefore BIJOU does not qualify.

[para10] The affidavit material before me indicates that the dog in question can distinguish between different noises and different telephones and is able to assist this elderly lady. There is sufficient material for me to come to the conclusion that it should be regarded as a hearing assist dog.

[para11] A case involving the handicapped, a dog and a condominium with prohibitions is Metropolitan Toronto Condominium v. Gifford, 6 R.P.R. (2nd) 217. In that case Gifford was confined to a wheelchair and relied on his 15 pound poodle for companionship and therapeutic and emotional support. As is the case here, there had been no complaint as to the behaviour of the dog for cleanliness or nuisance. Herold J. dealt with the criteria that the court should consider in applying s. 49 of The Condominium Act. Page 224 stated:

"Obviously, the major advantage of permitting non-compliance in this case would be that Mr. Gifford would be permitted to retain a dog of which he is very fond and upon which he may even be to some extent dependent. Another advantage is that he will be able to remain in this building which appears to be a very desirable one with very likable neighbours rather than having to move out as he has indicated he might do if he is not permitted to keep his dog there. The major advantage of requiring compliance, on the other hand, appears to me to be that a message will be sent out by the board to the unit owners that the declaration and by-laws are in place for a good reason and they will be enforced, and a message will also be sent by the Court that where the board acts reasonably in carrying out its duty to enforce the by-laws and declaration the board will be supported by the Court. To permit non-compliance in this case would clearly open the door to numerous, possibly very legitimate, requests by other unit owners to exempt them from certain other requirements in the declaration and by-laws on the basis that each case should be decided on its own merits. While I do not disagree that each case must be decided on its own merits, at least by the Court if not by the board who appears to have no discretion, the general message surely must be that enforcement will be expected and exceptions will be rare and will require a court application in any event. A longer-term result of this position surely will be that people will only move into the building if they are prepared to live by the rules of the community which they are joining - if they are not they are perfectly free to join another community whose rules and regulations may be more in keeping with their particular individual needs, wishes or preferences.

Considering all of the factors which I think should be considered in exercising discretion, I have come to the conclusion that my discretion should be exercised in favour of enforcing the declaration and granting the relief requested by the Condominium Corp."

[para12] The case is similar to the one before me, but in my opinion can be distinguished on its own facts. As my Brother Herold said, "Each case should be decided on its own merits." "Exceptions will be rare and will require a court application in any event." I agree with Herold J., that the "exceptions will be rare." In my view they will be far and few between. The legislature has specifically given to the court a discretion. In my view on the facts of this case, it should be exercised in the favour of the respondent and therefore, the application will be dismissed.

[para13] I now deal with costs. There was an apparent and prima facie breach of the declaration. The board of directors had no alternative but to bring this application. The facts of the case were unique. In referring to the evidence, as to the cost and as to the time required to obtain a Hearing Ear Dog, the inference was that a Hearing Ear Dog could be acquired but due to the age of the mother and the situation it would not be practicable. It is obvious that the mother is fond and attached to BIJOU but for the purposes of this application that is irrelevant. In my opinion, this is an exceptional matter and in my view the proper disposition of costs would be to order that the sum of \$1000.00 be paid by the successful respondent to the applicant toward their costs.

HOGG J.

CBR# 370

York Condominium Corporation No. 63, and The Barrington-Rockwood Investment Corporation, Her Majesty the Queen in Right of Ontario as represented by the Minister of Correctional Services and the Minister of Government Services Action No. 466/91 Ontario Court of Justice - General Division Non-Jury Sitings - Toronto, Ontario Dunnet J. April 10, 1991.

H.W. Winkler, for the Applicant. T. Bell, for the Respondent, The Barrington Rockwood Investment Corporation. R. Lewis, for Her Majesty the Queen in Right of Ontario as represented by the Minister of Correctional Services and the Minister of Government Services.

DUNNET J. (orally):-- The applicant brings this application for a final and permanent injunction prohibiting the respondent, The Barrington-Rockwood Investment Corporation, from allowing a unit owned by the Corporation to be used by any parole or probation reporting office or permitting any other use which would violate the Building Code Act, the Condominium Act, or the Declaration and Rules.

The applicant also brings this application for a declaration that it is contrary to the Building Code Act, the Condominium Act, the Declaration and Rules of the Corporation for the Minister of Correctional Services or the Minister of Government Services to locate any parole or probation reporting office in the Corporation or to locate any other office in the Corporation which would violate the Building Code Act, the Condominium Act, or the Declaration or Rules of the Corporation; and for a final and permanent injunction prohibiting the respondent Corporation, or anyone on its behalf, from dealing with any of the common elements of the Corporation other than as permitted by the Building Code Act, or Condominium Act, or the Declaration or Rules of the Corporation.

The relevant grounds for the application are: The Barrington-Rockwood Investment Corporation is the registered owner of Unit 1, Level 9 in the Corporation, municipally known as Suite 900, 920 Yonge Street, Toronto. The Corporation has entered into a lease with the Minister of Government Services on behalf of the Minister of Correctional Services whereby the Minister will occupy the Unit on March 15, 1991 for the purposes of using it as a parole and probation reporting office; in order for the Minister to comply with the Building Code Act, it would be necessary, pursuant to the Condominium Act, for one or more of the respondents to obtain from the Corporation a licence with respect to certain common elements, which licence has not been granted. The use of the Unit for the purposes of a parole or probation reporting office constitutes the creation of a nuisance which will disturb the quiet enjoyment of the property by, among others, the owners contrary to the Rules and Regulations of the Corporation. Finally, the use of the Unit for the purposes of a parole or probation reporting office is contrary to the public interest in that it is estimated that approximately 800 to 1,000 visits by parolees or probationers will be made each month to the Unit. The Corporation is a mixed commercial and residential building containing a number of elderly individuals and single women and the buildings surrounding the Corporation are also residential in nature, including two senior citizens' residences.

The respondents have raised a preliminary objection directed to the power of the Court to grant the relief sought by the applicant.

This application originally came on before Mr. Justice Mandel, who adjourned the application at the request of the respondents. As a term of the adjournment he ordered that the premises in question not be resorted to by parolees or probationers until the matter is determined.

Following the adjournment, further material was filed including a supplementary affidavit of the property manager of the applicant.

The application came on before me. A number of preliminary objections were raised, one of which was the jurisdiction of the Court to hear the application. I ordered that I was not in a position to determine the issue until all of the evidence was heard by the Court on the application.

In response to further objections by the respondents I ordered that certain paragraphs in the affidavits filed on behalf of the property manager of the applicant be struck in that they were based on hearsay, and the source of the information and belief was not specified, pursuant to Rule 39.01(5). I stated that the onus is on the applicant to provide to the Court the best evidence available. I granted leave to the applicant to file a further and better affidavit of the property manager.

The applicant and respondents raised further objections to certain paragraphs in the factum arguing that they contained false inferences from the facts. I agreed to take those objections into consideration when deciding the main issue. Pursuant to my order, a further and better affidavit of the property manager was filed to which was attached as exhibit 31, the affidavits of residents of the applicant corporation expressing their concerns with respect to safety and security should a parole and probation office be located in the building, as well as their fear of the prospect of such a thing occurring.

The respondents argue that the concerns as to safety and security and the fears of the residents go to the very root of the issue in this matter.

They object to the admission of the 31 affidavits merely as exhibits to the affidavit of the property manager in that they would have no opportunity to cross-examine the residents on their affidavits. Moreover, they submit that the applicant has in effect sought to file these affidavits without leave of the Court. They argue that the facts contained in the affidavits are contentious and bear upon a material fact in dispute. Their evidence is that they are unaware of any reported incident involving threatening behaviour or any minor assaults involving a client of the office and a tenant during the 18 year period the office operated out of a prior location.

In *MENSAH v. ROBINSON*, [1989], a decision of Mr. Justice Watt, released February 22, 1989, he held at page 33:

"In practical terms, the sufficiency of proof upon a particular issue by a party bearing the onus in respect of that issue can be but rarely adjudged on the basis of controverted affidavit material even with cross-examination. Indeed, it has been elsewhere said that when there are controverted facts relating to matters essential to a decision, such facts cannot be found by an assessment of the credibility of deponents who have been neither seen nor heard by the trier of fact."

Although he was dealing with motions for summary judgment, I find his words equally applicable to the case at bar.

I have been referred to the case of *In Re: Canada Mortgage & Housing Corporation v. York Condominium Corporation No. 46*, a decision of Borins, J. (1981), 31 O.R. (2d) 514: That case involved an application pursuant to the Condominium Act for an order appointing a receiver and manager of York Condominium Corporation, and directing him to comply with certain outstanding work orders issued by the City of North York and to cause the implementation of security measures at the site of the condominium property. The respondent raised a preliminary objection directed to the power of the Court to grant the relief sought by the applicant.

Borins, J. held at page 517: "It is in regard to the performance of the duties of the corporation and the unit owners that s. 49(1) is directed. This legislation is analogous to the procedure contained in Part IV of the Landlord and Tenant Act, R.S.O., 1970, c. 236, as amended, and is intended to provide a summary, expeditious and inexpensive procedure for the enforcement of the statutory and contractual duties of condominium corporations and unit holders."

He further held that at p. 518:

"Since it is the role of a receiver to preserve property until the rights of those alleging an interest in it have been determined, it follows that there is no jurisdiction to appoint a receiver upon an originating application. And further, as the appointment of a receiver and manager is a special remedy with respect to which well-established procedure exists and which is available only in certain well-defined situations it was not the intention of the Legislature to empower the Court to make such an appointment pursuant to an application under s. 49(1) of the Condominium Act, 1978. I express no view whether on the materials before me the appointment of a receiver and manager would be justified. Since I am of the view that no power exists to appoint a receiver and manager on an application brought pursuant to s. 49(1) of the Condominium Act, 1978, the respondent must succeed upon its Preliminary objection. CMHC is not without a remedy. While it is prevented from seeking it by way of summary application, it may do so by commencing an appropriate action."

Here, the applicant submits that if I dismiss the application, he is without a remedy. I am of the view that he is not. He may commence an appropriate action. The relief sought by way of an injunction is in the nature of extraordinary relief. The applicant must show a strong case of probability that the apprehended mischief will arise. Moreover, the injunction sought is a discretionary remedy and sufficient grounds must be established to warrant the exercise by the Court of its discretion.

Based on the numerous objections and attendances before this Court on the application as well as the material before me, I find that it is not possible for a motions judge to resolve the conflicts in the evidence. The application as constituted and the supporting material are outside the ambit of what was surely contemplated by Rule 14. Therefore the application is dismissed.

SUBMISSIONS REGARDING COSTS NOT TRANSCRIBED

In view of what I have heard with respect to the adjournment sought before Mr. Justice Mandel, and in view of the fact that no undertaking was given at that time in the circumstances surrounding his order, I am not prepared to grant damages to the respondents.

I see no reason in this case to depart from the usual rule of awarding party and party costs to the respondents.

I have endorsed the record: For oral reasons delivered today, the application is dismissed. Costs of the application to the respondents.

CBR# 019

Miriam Aiken and Sheila Reisman, and Dockside Village Inc., And Between Michael Woodman, and Dockside Village Inc.

Action Nos. RE 1642/90, RE 1640/90 Ontario Court of Justice - General Division Toronto, Ontario Wilson J. Heard: February 9, 1993. Judgment: February 18, 1993.

No counsel mentioned.

[para1] WILSON J. (endorsement):-- The applicants seek a declaration that they are entitled to rescind the agreements of purchase and sale they entered into in connection with the purchase of the condominium units from Dockside Village Inc. ("Dockside") in the Town of Collingwood. The respondent seeks a declaration that the agreements of purchase and sale have been breached and that they are entitled to damages. In the case of Miriam Aiken ("Aiken") and Sheila Reisman ("Reisman") these damages have been quantified. In the case of Michael Woodman ("Woodman"), they seek a reference to assess damages.

[para2] The issues raised by the applicants are:

1. The building permit for Dockside was not obtained by November 30, 1988 as required, but, rather, it was obtained by December 30, 1988. It is the position of the applicants that this was a true condition precedent which could not be waived by their clients except in writing.

2. The applicants state that they are entitled to rescind the agreements of purchase and sale pursuant to s. 52(6) of the Condominium Act, R.S.O. 1980, c. 84, as amended, for the following reasons:

(a) Full disclosure was not made in the disclosure statement initially provided to the applicants in 1988. The undisclosed items included By-Laws 3 and 4 of the Condominium Corporation and the Shared Facilities Agreement.

(b) The revised disclosure statement provided to the applicants in June 1990 contained material amendments from the original disclosure statement provided in 1988. The applicants state that the material amendments gave rise to the right of the applicants to rescind the agreements of purchase and sale within the ten-day period provided by s. 52(6) of the Act. The material amendments were that the "beach and boardwalk" area, as originally described as an amenity in the first disclosure statement, were described as the "shore area" in the second disclosure statement. Further, the provisions of the Recreational Facility Agreement constituted a material amendment due to certain governance issues, and due to the rights of the Committee to suspend use of the recreational facilities in case of breach.

3. Interest on the deposit should be from the date of receipt rather than, as calculated by the respondent, from the date of rescission if, in fact, the applicants are entitled to rescind the agreements of purchase and sale.

Issue 1 - The Building Permit

[para3] I find that, although a true condition of precedent may not be waived by one party unilaterally, it may be waived by both parties. This is a unilateral waiver by one party accepted by the other (see *Giaouris v. Pritouris* (1976), 2 R.P.R. 81 (Ont.C.A.) and *Smale v. Van Der Weer* (1977), 80 D.L.R. (3d) 704 (Ont.H.C.J.)) The conduct of the parties, including the applicants, were consistent only with the existence of the contract and must be taken as waiver of the option available in November 1988 to terminate it. The applicants cannot both affirm and disavow the agreements of purchase and sale. They accepted benefits under agreements of purchase and sale, including going into interim possession and, in the case of Aiken and Reisman, collecting rent. They must be taken to have affirmed the contract, even in the absence of expressed election in writing. (See *Electric Power Equipment Ltd. v. RCA Victor Co. Ltd.* (1963), 41 D.L.R. (2d) 727 (B.C.S.C.), *Hanson v. Cameron*, [1949] 1 D.L.R. 16 (S.C.C.), *Halsbury's Laws of England*, (4th Ed), London: Butterworths, 1976), Vol. 16, p. 1012 and *Saskatchewan Co-Op Wheat Producers Ltd. v. Lucuik* [1931] 2 D.L.R. 981 (Sask.C.A.).

[para4] Alternatively, I find that paragraph 18 of the agreement of purchase and sale must be read in conjunction with Schedule "E" to that document which states that the building permit must be "available" by November 30, 1988. It is clear that the building permit was going to be granted prior to November 30, 1988 and the issuance of the permit was only a procedural step. The Township of Collingwood allowed the footings to be poured and construction to begin prior to November 30, 1988 and the formal issuance of the building permit.

Issue Two - Does s. 52(6) of the Condominium Act Allow the Applicants to Rescind the Agreements of Purchase and Sale?

Was There Failure to Make Initial Disclosure?

[para5] I find that full disclosure was made as soon as reasonably possible in connection with By-law Nos. 3 and 4 and in connection with the Shared Facilities Agreement. By-law Nos. 3 and 4 were not provided to the plaintiffs at the time they signed the agreements of purchase and sale as they were not in existence at that date. They were provided to the applicants once they were created. By-law No. 3 allows the Condominium Corporation to enter into a Management Agreement. By-Law No. 4 authorizes the Condominium Corporation to enter into the Shared Facilities Agreement.

[para6] Providing these by-laws at a later date after the initial disclosure statement, and providing the Shared Facilities Agreement at a later date does not, after it was created, in my view, conflict with the obligations to provide initial disclosure enunciated in s. 52 of the Condominium Act.

[para7] I find that the ambit of s. 52 of the Condominium Act does not require the Shared Facility Agreement to be provided. What is required by s. 52(b) is the "general description of the property or proposed property including the types and number of buildings, units and recreational and other amenities together with any conditions that apply to the provision of amenities." (emphasis added)

[para8] *Brenner et al. v. H.L.S. York Developments Ltd.* (1985), 37 R.P.R. 220 deals with this issue at p. 231, as follows:

There is no requirement that a draft of the proposed agreement covering "recreational and other amenities" be provided with the disclosure statement. Revised Regulations of Ontario 1980, Reg. 121, s. 52, passed under the Condominium Act, specifies the documents to be provided with the disclosure statement, and such a document is not included.

Was there a material amendment in the revised disclosure statement provided to the applicants in June of 1990?

[para9] Having regard to the test outlined by Robins J. in *Re Abdool et al. v. Somerset Developments et al* (1992), 10 O.R. (3d) 120 (Ont.C.A.), I do not find that the provisions of the Recreational Facilities Agreement constitutes a material amendment giving rise to the right of rescission. Two matters give rise to complaint. First is the ability of the Chairman of the Recreational Facility Committee to cast a deciding vote in case of a tie with the other four Committee members; the second concern is the right of the Committee to suspend the use of the facilities for breach of the rules enunciated in the Shared Facility Agreement.

[para10] I find therefore that the applicants' concern with the Recreational Facility Agreement is not material non-disclosure as previously outlined, nor is it a material change giving rise to a right to rescission. I further reiterate the conclusion of Carruthers J. in *Brenner* that terms of a recreational agreement are not contemplated as giving rights of rescission for non-disclosure or material change.

Beach and Boardwalk versus Shore Area

[para11] The original disclosure statement described in the amenities section includes the "beach and boardwalk". The revised disclosure statement described as an amenity the "shore area". It is important to note that in the original disclosure statement, where the rules are outlined, that the preamble is as follows:

10. Shore Area (Boardwalk, Beach and Boat Ramp)

The applicants expressed disappointment that the shore area was not improved to the degree that had been represented to them. The promotional literature for Dockside states that the complex will have its "own sandy beach". Clearly, this representation has been met. The issue then relates to the representations as to the extent of the beach, and the absence of a boardwalk.

[para12] The evidence of Dockside is that, due to accretion of the land which occurred after the first disclosure statement, that the area which was originally intended to be a boardwalk was able to be replaced by grass with a deck in the centre of the project adjacent to the beach. The accretion of land, in fact, added substantially to the beach and shore area due to the changed water levels in Georgian Bay. The replacement of the boardwalk in the original disclosure statement by level green grass was possible due to the accretion of land.

[para13] A replacement of grass in lieu of a boardwalk due to a change in the water levels of Georgian Bay is not, in my view, a material amendment to the disclosure statement giving rise to right of rescission. The issue relating to the beach must next be considered.

[para14] The applicants thought there was going to be a beach area within reasonably close proximity to their unit. It is clear that the Condominium Corporation cannot alter the shoreline itself as that is within the exclusive jurisdiction of the province. They may improve the area up to the shoreline. There is a sandy beach in the centre aspect of the Dockside project. Given the low level of the water in Georgian Bay in last year, in fact there was a sandy beach for the stretch of the entire project. If the water level in Georgian Bay rises, the sandy beach may be in the central portion of the project only. I concur with the submission by counsel for Dockside that the applicants' problems may be with the ebb and flow of water in Georgian Bay, but the developer, Dockside, cannot be criticized. I, therefore, conclude that there is no material amendment in the Revised Disclosure Statement. What was originally contemplated being a "boardwalk, beach and boat ramp", is now a grassy area, deck, beach and boat ramp. This change, due to accretion of land is not a material amendment giving rise to the right of rescission.

[para15] The respondents urged me to consider the subjective aspects of the changes. It is clear that the applicants Aiken and Reisman were not intending to live in the condominium unit, but were purchasing the unit as speculation for investment. Any subjective aspects of these applicants is greatly diminished by their intention to hold the Dockside unit for investment. The applicant Woodside raised concerns about the inability to windsurf based on the changes to the shore area. That does not appear to be borne out in any way by the evidence. There is a windsurfer rack, and windsurfing is a regular activity on the shores of Dockside.

The Conclusion

[para16] The application is, therefore, dismissed. I will accept written submissions in connection with costs within 30 days of the release of this endorsement.

[para17] In connection with Dockside's cross-application, firstly I find that it was properly brought and within the ambit of what may be claimed by way of application. Secondly, in my view it would be wholly inappropriate and contrary to the interests of the parties to require a trial of an issue relating issues of mitigation.

[para18] Damages in the case of Aiken and Reisman are clear, with the exception that both counsel agree that the payment for June 1990 was, in fact, received and, therefore, should not be calculated as part of the damages claimed. Judgment therefore shall go in the amount \$34,659.87. This figure is calculated as \$37,417.65 minus \$2,757.78 for the June 1990 payment.

[para19] In connection with Woodman, once the damages may be quantified, the parties are to file affidavit material substantiating their damages to be brought by motion before a judge. The affidavit material will, if necessary, form the pleadings. The judge reviewing the affidavit material will determine whether a reference to assess damages before the Master is necessary. In my view, the assessment can probably be accomplished based upon affidavit material, but I do not want to prejudge the matter and I, therefore, leave it to the discretion of the judge hearing the matter.

WILSON J.

CBR# 364

York Condominium Corporation No. 382, Applicant, and David Dvorchik and Frances Dvorchik, Respondents And Between York Condominium Corporation No. 382, Applicant, and Elizabeth Kaplan, Respondent

Also reported at: 24 R.P.R. (2d) 19

Action Nos. RE 495/92 and RE 494/92 Ontario Court of Justice - General Division Brampton, Ontario Keenan J. Heard: May 22, 1992 Judgment: June 3, 1992

S. Schwartz, for the Applicant, York Condominium Corporation No. 382 in both actions. L. Bisgould, for the Respondents, David Dvorchik and Frances Dvorchik. Elizabeth Kaplan in person.

KEENAN J.:-- The applicant is a condominium corporation which holds the common elements and operates the Palace Pier on Lakeshore Blvd. in west Toronto. The building consists of 433 units.

Dogs are allowed in the Palace Pier, unless they weigh more than 25 pounds. A rule passed by the directors states "Pet must not exceed twenty-five (25) pounds at maturity."

The sole issue in these two applications is the enforceability of that rule against "Portia", a Wheaten Terrier who belongs to the Dvorchiks, and "LuLu", an Afghan who lives in Ms. Kaplan's apartment. Both dogs weigh more than 25 pounds. Although there is evidence that the normal weight of a mature Wheaten is 25 pounds, it is conceded that Portia is overweight.

Both owners were aware of the 25 pound rule when they brought the dogs into the building. There is no basis for any finding that either owner misunderstood or was in any way misled or misinformed about the rule. Even if that were so, there is no relief from compliance on that ground. Nor is the fact that Ms. Kaplan's emotional problems are relieved by the interaction with LuLu a justification for violating the rule, if it is a valid rule.

Condominium living is a form of community living which combines the concept of private property ownership with shared common facilities. If it is to succeed, each owner/resident must recognize and accept that:

- 1) So far as possible, the individual's right to the free enjoyment of her property is to be respected.
- 2) The individual's freedom is subject to an equal degree of freedom for every other owner occupant, and is not to interfere with that freedom.
- 3) To ensure a proper balance it is essential that rules reflecting those rights and freedoms be formed and respected by all.

Regulation of a condominium can be done in three ways:

- 1) By an article in the Declaration or "constitution" of the condominium itself.
- 2) By by-law of the Corporation enacted by the shareholders.
- 3) By rules made by the directors under the authority of section 29(1) of the Condominium Act R.S.O. (1990) c. 26.

Section 12(3) provides:

"The Corporation has a duty to effect compliance by the owners with this Act, the declaration, the by- laws and the rules."

Section 29 includes these subsections:

"29(1) The board may make rules respecting the use of the common elements and units or any of them for the safety, security or welfare of the owners and of the property, or for the purpose of preventing unreasonable interference with the use and enjoyment of the common elements and of other units.

(2) The rules shall be reasonable and consistent with this Act, the declaration and the by-laws.

(3) The rules shall be complied with and enforced in the same manner as the by-laws."

The power of the board to enact rules is not unlimited. To be valid, a rule must meet one of the criteria in 29(1) ie; "for the safety, security or welfare of the owners and of the property" or "for the purpose of preventing unreasonable interference with the use and enjoyment of the common elements and of other units."

Under 29(2) the rule must be "reasonable" and "consistent with this Act". In other words, the rule must not be arbitrary or capricious and must not go beyond what is necessary to satisfy the criteria in subsection (1).

There is almost no hard evidence of the reason for the 25 pound rule. There is some suggestion that the rule is directed to: 1) "Bigger dogs make bigger messes".

2) "Big dogs cannot be carried in the front lobby as required".

3) "Big dogs intimidate people and small dogs".

The Rules respecting pets contain 19 paragraphs. They include requirements that pet owners clean up excreta and impose penalties for failure to comply, including expulsion of the pet. They require that pets be carried through the front lobby. They provide that pets are not allowed in the common elements except for ingress and egress and must be kept on leash with a choke collar. There is a prohibition against dogs which have been trained as an attack dog or security dog.

Pets who make disturbing noises or behave objectionably are liable to be removed. No pet is allowed to create a disturbance. There is also a rule which prohibits keeping a pet which has been deemed by the Board, in its absolute discretion, to be a nuisance.

All the above recited rules have general application to all pets, regardless of size. They apply equally to 10 pound dogs and 25 pound dogs, and clearly would apply to larger dogs. Failure to comply may result in expulsion.

All the above rules are to be promulgated for a purpose under one of the criteria in section 29(1). The board may wish to consider whether the "front lobby" rule has a rational underpinning which satisfies the criteria of section 29(1). As well, the rule which gives to the board an "absolute discretion" to declare a pet a nuisance must be invoked with caution. A "discretion" is to be exercised judicially and even-handedly in pursuit of the common good. It must not be exercised arbitrarily or capriciously. However, these rules are not before me and I am not to be taken as expressing any opinion about their validity.

There is no evidence that dogs who weigh more than 25 pounds are prone to anything not already covered by the rules of general application to all pets. Any dog that is not controlled by its owner, or creates a nuisance by barking or other behaviour is liable to be removed. It is unreasonable to condemn a dog who is not guilty of misconduct, simply because of its size.

I have been referred to one other case concerning a dog at the Palace Pier. On May 31, 1988 Lissaman J. ordered the removal of a dog which belonged to one Tom Ponrick. No reasons were given. The record of the proceedings shows that the owner was not represented by counsel. There is no indication that the validity of the 25 pound rule was challenged or considered. The application alleged specific violations of other rules including failure to keep the dog under personal supervision which resulted in an attack by the dog on another resident and her dog. The order of the court refers to that complaint and the board discretion to deem a pet a nuisance, as well as the 25 pound rule. Accordingly, I find that the Ponrick case was decided, at least in part, on other grounds and not on the issue which is before me.

I have been referred to other cases which interpret the rule making authority of the board under section 29. They include *Sudbury Condominium Corp. No. 3 v. Lebel* (July 24, 1985) Bolan D.C.J. *Re Waterloo North Condominium Corp. No. 31* and *Indico Ltd. [1984] 23 A.C.W.S. (2d) 545* Mossop D.C.J. *Metro Toronto Condominium Corp. No. 650 v. Klein* (1988) 49 R.P.R. 205.

In each case a rule which was sought to be enforced by the corporation failed to meet the tests in section 29(1) or the standard of reasonableness in section 29(2).

In the case at bar the rules of general application to all pets meet the criteria in section 29(1) and the test of reasonableness in section 29(2). However, the 25 pound rule fails to meet the criteria in section 29(1) because there is no evidence that large dogs are any more a threat to the safety, security or welfare of the owners than are smaller dogs. There is no evidence that large dogs unreasonably interfere with the use and enjoyment of the common elements and of other units, any more so than smaller dogs.

Accordingly, I find that the 25 pound rule is invalid and unenforceable. As this is the sole issue before me in these two cases, the applications are dismissed.

Each party shall bear its own costs. The owners have succeeded because the rule passed by a well intentioned board exceeded its statutory authority. However, the owners will not be rewarded in costs for their successful defiance of the wishes of their neighbours.

KEENAN J.

CBR# 230

Peel Condominium Corporation No. 117, Peel Condominium Corporation No. 140, Kipling Management Inc., Plaintiffs, and Peel Condominium Corporation No. 82, Defendant

Action No. 32749/88 Ontario Court of Justice - General Division Non-Jury Sittings - Toronto, Ontario Klowak J. November 8, 1991

F. Felkai, Q.C., for the Plaintiffs. C. Smith, Q.C. and B. Morgan, for the Defendant.

KLOWAK J. (orally):-- On August 30, 1982, the three condominium corporations, 82, 117, and 140, and San Tropes Recreation Centre, which was run by the three corporations, entered into an agreement with Mr. Robert Ness to have Mr. Ness manage various buildings of this townhouse development.

On the face of the Management Agreement, which appears at tab 3 in Exhibit Number 1, the agreement was between two parties, one of the first part and one of the second part, as is usual in agreements. Corporations 82, 117, 140, and San Tropez Recreation Centre appear on the face of it acting in unison and referred to as "'San Tropez' of the first part." Robert Ness is referred to as the 'Manager' of the second part." The evidence on that issue is clear. Not only does it appear on the face of the document that there are only two parties, but it is consistent with the viva voce evidence of the condominium presidents of 117 and 140, those who were directors at the time and one of whom drafted the document.

On May 10th of 1983, effective May 1st of 1983, Mr. Ness having proved his worth and ability, the parties amended the agreement to show Mr. Ness's management corporation, Kipling Management Inc., instead of Mr. Ness personally as the party of the second part. Kipling was to be paid a management fee, a fixed amount for expenses, and an additional amount equivalent to Mr. Ness' previous vacation pay to reflect some of the parties of the first part's savings in contributions to benefits it had previously paid to Mr. Ness. The agreement could be terminated by either party for just cause but otherwise had no fixed term. All of the corporations, in fact, contributed to the payments in proportion to their size, and by size they meant number of units in each building.

The witnesses called by the plaintiffs, being directors of 117 and 140 at relevant times, were unanimous that problems they had previously had with other management companies and with self-management changed dramatically after Mr. Ness came aboard. Directors suddenly had some personal time; meetings were run with agendas and proper reports; appropriate financial records were now kept; invoices paid; contracts for repair and maintenance arranged and deficiency lists organized to enable the condominium corporations to sue the developer for construction deficiencies. It was a particularly difficult time because of the recession. There was a high percentage of landlord absenteeism and a high percentage of unsold units resulting in a high number of tenants on the property. Rents went unpaid, and there were problems with what Mr. Ness described as people, pets, and parking. Again, praise of Mr. Ness' handling of these problems by the other condominium directors at the time has been unanimous. I note that even to this day Mr. Ness manages the property for 117, 140 and the recreation centre.

Suddenly in 1986 Condominium Corporation No. 82 decided it wanted out of the agreement and attempted to unilaterally terminate the services of Kipling without the knowledge, consent or approval of the other corporations or of Kipling. No. 82 had been holding secret meetings to the exclusion of Mr. Ness who was also a unit that No. 82 acted as it did because one of the directors, Janice LeCouffe, who spearheaded the move, wished to perform the management services herself. I would have considered that probably irrelevant except for the evidence of the defence witness, Mr. Paron, from whose evidence I could almost infer that Miss LeCouffe went to the extent of falsifying minutes of board meetings involving Mr. Ness. I am not specifically making that finding, however, since I was not completely satisfied with the accuracy of Mr. Paron's general recollection. I am, however, satisfied on the evidence that there was no just cause to terminate the agreement with Kipling. I will specifically refer to what evidence I was able to pick out with respect to Kipling that would be under the general area, I assume, which could be covered under just cause. However, in addition to that being insufficient evidence, I was also struck that at least a year later 82 was still negotiating and considering rehiring Mr. Ness and his company, Kipling. In fact, the negotiations and rumblings about rehiring Kipling went on until sometime in March of 1988 at least. That is certainly not consistent with the present allegation before me that there was just cause for dismissing Kipling and Mr. Ness' services.

Various allegations were made in the termination letter to Kipling dated August 13, 1986, but there has been little, if any, evidence before me to support them. The defence called some witnesses who were around at the time. One was Mr. King, the accountant, whose evidence I view as being generally supportive of Kipling's performance. Mr. Richardson, who was a unit owner, was critical that Mr. Ness did nothing to repair Mr. Richardson's unit of damage due to water leakage from construction defects. I found his evidence not really helpful because he had little knowledge of the money available for repairs to the condominium corporations, and he did not seem to have any knowledge or understanding that Mr. Ness and Kipling did not have unilateral control over the spending of that money. Mrs. Yanchus, another unit owner, gave evidence, and although I can sympathize with what appear to be hurt feelings that she had, her unhappiness with Mr. Ness' attitude to her ripped screen and her swimming pool permit are simply not sufficient to establish just cause for termination of a contract.

Mr. Paron, whom I've already mentioned, was a non-resident director of 82 from April of 1986 to April of 1989. He considered Mr. Ness a good office manager but said he felt Mr. Ness had some greater duty. As an example, he stated that No. 82 did not discover that the original builder had created a drain plug problem until sometime in 1988. I fail to see how that is Mr. Ness' or Kipling's responsibility under the contracts. Mr. Ezra Simms, a unit owner, did not have a good feeling about Mr. Ness but could only give what I consider was unintelligible evidence of some person crying at a meeting. His only other evidence was that Mr. Ness complained to him once that he hadn't cleaned up the recreation room after a wedding reception and that once Mr. Ness shrugged off Mr. Simms' comment that the grass was long. Again, these are hardly matters giving rise to a right to terminate a contract.

Any evidence of feelings by unit owners of No. 82 that things were suddenly better after Killing and Mr. Ness left is simply inconsistent with the fact that 82 hired another management firm, Durand/Russell, after Kipling left, and it terminated Durand/Russell's contract before its two-year term because of poor performance. In addition, from 1988 on there was some evidence from some of the de fence witnesses that more repairs were effected on more of the units, but that is easily explained by the receipt of 82 of approximately \$150,000 in 1988 from its suit against the developer for original construction deficiencies.

With respect to credibility, I had the opportunity of observing the manner and demeanour of Mr. Ness and the various witnesses for the plaintiff, and I have no hesitation in accepting their evidence as credible. All of them appeared to be calm, reasonable,

sensible, candid, straightforward, and appeared to me to attempt to look at this matter from a detached point of view and not from some personal, emotional involvement.

On the other hand, the defence witnesses had either very little knowledge of the events that actually took place in 1986 and before or immediately after, and their evidence was constantly coloured by feelings of emotion and emotional overlay. Although I would not normally hold that against any particular witness, it appears to me that in this matter it has coloured their ability to look at this matter calmly and clearly and come to a rational decision on it. In fact, it seems to me that the whole problem here is highlighted in the evidence of most, if not all, of the defence witnesses in their constant references to their feelings as opposed to what they know or knew or what is fact, and this includes the evidence of Mr. Shebec who is a previous director of 82 and who is now the property manager for it through his company, Future. He had no involvement with these corporations or with the corporation prior to 1988. He again appeared to me to be emotionally preoccupied with Mr. Ness to a degree which seems to cloud reason and common sense. For example, even after he apparently withdrew criminal proceedings touching this matter against Mr. Ness, which he had laid, he continued before me to make wholly unsupported allegations that Mr. Ness was somehow sabotaging or had sabotaged door locks, stating that he knew of no one who saw it but, as I recall, saying something about people on Mr. Ness' side would have seen it.

It is this type of almost paranoid attitude that serves no purpose but to continue to incite emotions and encourage feelings of ill will amongst people who probably do not know or do not really remember what actually happened at the relevant times. It is simply time that the owners and/or directors of PCC No. 82 sat down, and with calm and with common sense and apart from their emotions and feelings, came to terms with the fact that FCC No. 82 could not do what it did on August 13th of 1986 and will finally have to pay the cost for it.

I have come to the conclusion that there was no just cause, and I also find that FCC No. 82 did not have the authority or legal right to unilaterally terminate the agreement with Kipling on August 13, 1986. The condominium corporations had obligated themselves to each other and to Mr. Ness and then Kipling to act as a unit. No. 82 had no more right to act otherwise than one of its own directors, at this time, for example, can act unilaterally to terminate No. 82's current management contract with Mr. Shebec's current management company, Future. Whether it is called breach of contract or wrongful dismissal, I find it is unimportant. It could not be done, and Condominium Corporation 82 must be responsible for the damages which flow from it.

The plaintiffs have calculated their damages in Exhibit Numbers 9, 10 and 11. Briefly, the evidence was that PCCs 117, 140 and Kipling Management entered into an emergency interim agreement after the breach by 82 in order to protect their unit owners. Mr. Ness agreed to reduce Kipling's management fee from \$40,000 per year to \$34,000 per year, and 117 and 140 agreed to between them pick up 82's share of it. In passing, I have to add that I am satisfied from the evidence of the directors who were there and voted on it that Kipling's management fee was increased to \$40,000 per year for the year 1986 but that due to the breach of No. 82, that increase was never paid.

It was reasonable, in my opinion, for the plaintiffs to enter into their interim or emergency agreement as they did. 117 and 140 were happy with Kipling and did not want to incur unnecessary trouble and potentially greater expense in hiring someone else who, although perhaps marginally cheaper, might not work out. I find there is 'no onus upon them to fire everybody and try to find somebody cheaper. It would be unreasonable to expect them to do so. There was no onus upon them to take every conceivable step which might or might not mitigate, such as firing Kipling and the secretary and bookkeeper and try to find new personnel who might in the end cost them as much or more.

As I understand the defence's argument with respect to the amounts paid under the emergency agreement, as I will call it, it is that Kipling's fee and a secretary and bookkeeper's salary should have all been reduced by approximately one-third because 82 comprised approximately one-third of the total number of units. As one of the directors of, I believe it was Corporation No. 140, said in his evidence, you may have one-third less people, but that does not translate into one-third less time spent. In my opinion, it would be rather ridiculous, as I believe it was mentioned by some of the witnesses for the plaintiff, also to try to pay a secretary one-third less because she had to spend a bit less time typing.

The buildings of 117, 140 and 82 are all in the same complex, and time still had to be spent on things such as preparing reports, financial statements, and negotiating contracts. Mr. Shebec gave evidence that his company, Future, is currently managing No. 82 for, as I recall, something like \$33,000, more or less, per year without using the services of a secretary and with only a part-time bookkeeper. The current superintendent of 82 apparently does almost everything by way of day-to-day repairs including electrical and plumbing, though, of course, I have no idea if he is so qualified. Future is, as I understand, Mr. Shebec's first management company, and he has now completed courses on property management at, I believe, Humber College. His company took over the management of 82 in 1990, and although I wish him well and indeed 82 well in the endeavour, I do not see that I can use the scanty details of his as yet short-lived endeavour to say that in 1986 Kipling charged too much.

The main issue in damages, as I see it, is for how long the plaintiffs should be compensated for 82's breach on August 13 of 1986. Although I would probably, in considering all of the circumstances, have looked at about a year as a reasonable period for the plaintiffs to reorganize their affairs and try to somehow make up for their losses, I accept the position of the plaintiffs' witnesses that 82 kept leading them on and stalling them with promises that 82 was coming back into the fold and that they would all work together again and obviously 82 would consequently share in the expenses again. I will not go over and refer to all of the documentary evidence, minutes of meetings, et cetera, supporting this evidence. As I recall, none of that supporting documentary evidence was challenged.

This situation of leading the other companies on continued to at least March of 1988, about nineteen months after the termination. In all the circumstances, I am prepared to award the plaintiffs their damages up to twenty months after the date of the breach; that is, up to April 30th of 1988. In reaching that conclusion, I have taken into account that although the defendant kept the plaintiffs hanging for a considerable period of that time, it was reasonable also to expect the plaintiffs to have considered and decided what measures they would take when it became clear that 82 was not coming back.

The damages of Kipling are outlined in Exhibit No. 9 and flow from May 1st of 1986, from which time its management fee, as I have already found, was increased to \$40,000, but the increase was not paid due to 82's own actions. With respect to anticipated salary increases, I have considered that, and I am satisfied that Kipling could have reasonably anticipated such increases since they had consistently been given to Kipling, and to Mr. Ness before Kipling, from the beginning in 1982. In calculating the loss to Kipling Management Inc., I have used basically the information contained in Exhibit No. 9 from May 1 of 1986 to April 30 of 1987. As outlined in Exhibit No. 9, the loss to Kipling was \$6,629.68. From May 1 of 1987 to April 30 of 1988, the loss was

\$8,400.00. The total is \$15,029.68. I do not have any evidence before me from either party that there are any expenses which are attributable to and should be deducted from that amount.

As I have already mentioned, with respect to the other condominium corporations, No. 82 on the face of the original agreement with Ness, and then Kipling, agreed to act as one with the other corporations. There is no evidence to the contrary. When it failed to do so, I fail to see how it can be said that it did other than breach its agreement with 117 and 140. It is consequently responsible for the resulting damages to 117 and 140. Those damages are outlined for 117 in Exhibit No. 10. I am prepared to limit the damages of 117 and 140 to the twenty-month period also.

With respect to 117, using the information outlined in Exhibit Number 10, those extra costs can be divided into three parts; the extra cost with respect to the management contract, the extra cost with respect to the secretary, and the extra cost with respect to the bookkeeper. With respect to the extra costs on the management fee, those costs were \$424.27 per month for twenty months. That totals \$8,485.40.

With respect to the secretarial costs, that is the extra secretarial costs borne by 117, from the information contained in Exhibit 10, there appear to be three time frames. From August of 1986 to April of 1987 they total \$1,263.60. For the next period up to November of 1987 they total \$1,500.38, and for the next period to April 30th, 1988, they total \$1,146.70. The total of those three periods is \$3,910.68.

With respect to bookkeeping, that is extra bookkeeping costs, again, according to Exhibit No. 10, there are two time frames; one, September 1 of 1986 to December 31 of 1987, which is \$1,862.72; secondly, from January 1 of 1988 to April 30 of 1988, \$146.42 a month times four months amounts to \$565.68 (sic). The total of \$1,862.72 and 565.68 is \$2,428.40, and that is for extra bookkeeping.

The extra management of \$8,485.40, the extra secretarial of \$3,910.65 and the extra bookkeeping of \$2,428.40 total by my arithmetic, which I invite the parties to take a closer look at because I may be simply wrong in addition or subtraction, the total of the three figures I have at \$14,824.45.

With respect to Condominium No. 140, the calculations of its costs are dealt with in Exhibit No. 11. Its extra management at \$424.27 per month times twenty is \$8,485.40. Its extra secretarial costs for the three time frames I referred to for 117 are \$2,246.32, \$2,667.35 and \$2,038.55 respectively. That is for extra secretarial, and that totals \$6,952.22. The monthly figures used in arriving at those amounts are, for the first period \$280.79 a month, for the second period \$381.05 a month, and for the third period \$407.71 a month.

With respect to extra bookkeeping for the two time frames that I referred to in 117 or with respect to 117, the figures are \$3,311.36 a month for the first period and \$1,045.16 a month for the second period totalling \$4,356.52. The first period was \$206.96 a month, and the second period was \$260.29 per month.

With respect to punitive damages, this is a case where I have seriously considered awarding punitive damages for breach of contract in order to deter other such corporations from adopting the same cavalier, "I'll do what I want" approach and attitude. In examining the situation closely, however, I am satisfied that the defendant's conduct falls just short of the high-handedness usually required. To a great extent I make that decision substantially because all the parties, including Mr. Ness as a unit owner, appear to have been vying with each other for control of the companies over the years. I look at that as creating a possibility that may have contributed to some degree to the sometimes bizarre actions of 82, but I am prepared to look at that from time-to-time struggle for control amongst various people as affecting only the question of punitive damages. In the result, I am not prepared to award punitive damages.

In conclusion, the plaintiff Kipling Management Inc. will have judgment against the defendant in the amount of \$15,029.68. The plaintiff 117 will have judgment against the defendant in the amount of \$14,824.48, and the plaintiff 140 shall have judgment against the defendant in the amount of \$19,794.14.

THE COURT: Mr. Felkai, I'll hear submissions with respect to costs and interest at this point. I don't propose to have a lunch break and then come back.

MR. FELKAI: Thank you, My Lady.

-- Reporter's Note: Submissions to the Court by counsel re costs and interest, reported but not transcribed.

THE COURT: With respect to interest, I am satisfied that there was enough going on between the parties and negotiations and machinations on many things between September of 1986 and when the claim was issued in November of 1988, and consequently, interest will be awarded at the rate of 11 percent from November 1 of 1988.

With respect to costs, I have heard submissions from Mr. Felkai for the plaintiffs with respect to both the awarding of costs and quantum. I have given him very little time to prepare those submissions. I certainly had hoped that both counsel would be in a position of being able to make submissions on costs so that the quantum could be fixed today instead of putting the parties to the additional expense and time involved in having to have those costs assessed. Mr. Smith has indicated that he cannot get his client's instructions with respect to costs and is reluctant to make submissions without such instructions. I can understand that position. I am not prepared to give the parties yet another day to come back to argue costs.

In those circumstances, I regard the not only was it at my instance and urging, but it was really without a great deal of time in which Mr. Felkai could delve into that issue. As I have attempted to state, I do not regard his submissions as in any way, shape or form binding upon Mr. Felkai or his clients.

I will therefore order costs to be assessed to the plaintiffs, and I see no reason that the offers to settle by the plaintiffs should not be taken into account and be dealt with pursuant to the rules. Consequently, costs are on a party and party scale, but with respect to 117 and Kipling, they will be solicitor-client from May 22 of 1991, and with respect to 140, they will be solicitor-client from August 12, 1991. I will endorse the record, wherever the record is.

THE REGISTRAR: I think it's down here, My Lady.

THE COURT: Do you think you can find that?

THE REGISTRAR: Yes, here.

THE COURT: I have endorsed the record as follows:

For oral reasons given, judgment in favour of Kipling Management Inc. against the defendant \$15,029.68, for FCC 117 against the defendant in the amount of \$14,824.48, and in favour of FCC 140 against the defendant in the amount of \$19,794.14. Prejudgment interest to run at the rate of 11 percent from November 1 of 1988. Costs to the plaintiffs to be assessed on a party and party scale and to Kipling and FCC 117 on a solicitor and client scale from May 22 of 1991 and to FCC 140 on a solicitor and client scale from August 12 of 1991.

I'd like to thank both counsel for their time and attention in this matter, and, Mr. Smith, thank you for your assistance. I'm sure it's been a very difficult matter for you to handle, and I appreciate your time spent.

MR. SMITH: That's correct. Thank you very much.

MR. FELKAI: My Lady, could I just seek one clarification if I could. To avoid further misunderstanding, could I invite Your Ladyship to deal with the issue of the costs of the counterclaim?

THE COURT: Oh, yes, of course.

MR. FELKAI: It will just be confusing, and it will cause further uncertainty.

THE COURT: Well, you didn't actually withdraw it, did you, Mr. Smith?

MR. SMITH: I did, yes.

THE COURT: You just elected not ---

MR. SMITH: I did.

THE COURT: You did withdraw it, or you elected not to proceed on it?

MR. SMITH: I think at the time my concern was --

THE COURT: I see.

MR. SMITH: -- that I wanted to, but I did withdraw it. I think I told Mr. Felkai in a letter that that was being withdrawn and that my only concern is that it may affect other issues, and this is how we left it, but the actual counterclaim was withdrawn.

MR. FELKAI: At that time Your Ladyship remarked that it would be up to me to speak to costs. THE COURT: Yes, I recall that.

Counterclaim was withdrawn at the outset of trial. Costs to the plaintiffs, being defendants by counterclaim, in defending the counterclaim on the same scales and bases as costs in the claim.

MR. FELKAI: Thank you, My Lady.

CBR# 302

Somerset Ridge Development Corporation, Plaintiff, and Middlesex Condominium Corporation No. 134, Defendant

Reported at: 21 R.P.R. (2d) 246, 87 D.L.R. (4th) 708

Action No. 2569/91 Ontario Court of Justice - General Division Windsor, Ontario Brockenshire J. December 10, 1991

P. Daryl Wilson, for the Plaintiff. James R. Caskey and Barry Scott, for the Defendant.

BROCKENSHIRE J.:-- The principal point at issue in this litigation is the validity of "special assessments" purportedly imposed by the directors of a condominium corporation upon its unit holders. The dispute has been hotly contested and coloured by allegations as to the relationship of the Plaintiff with other corporations, and of perverse actions by the Defendant's Board.

The matter came before me on cross motions to dismiss the action and to give judgment thereon. The materials on these motions, and earlier motions for interlocutory relief, filled a packing case, and argument took a full day, extending into the evening, after which I reserved.

These reasons respond to the issues raised and to the hope of the parties to finalize this litigation, the expense of which is becoming prohibitive.

BACKGROUND:

The Defendant, Middlesex Condominium Corporation No. 134 (Middlesex) is the statutory manager of an eighteen storey apartment building containing 204 residential condominium units, located at 695 Richmond Street, London, Ontario.

The building was constructed by Richmond Square Development Corporation, which as declarant, registered a declaration on March 1, 1989, bringing the Defendant into existence. As is common, the declarant, as owner of all of the units, picked the original directors, who on March 2, 1989 passed By-law No. 1 of Middlesex, and entered into a management agreement with Key Property Management (1986) Inc., (Hey). The declarant then proceeded to sell off units, and on August 21, 1989, when the declarant had sold over half of the units, per s. 26 of the Condominium Act, R.S.O. 1980, c. 84 as amended (the Act), a new board of directors (the Board) was elected. The Board had disputes with Key, and allegedly stopped using its services in March of 1990, and finally terminated Hey under the provisions of the Act in July of 1990. There is separate ongoing litigation between Middlesex and Key.

Somerset Ridge Development Corporation, (Somerset) is the registered chargor of 48 units in the building. These units had not been sold by the declarant to individual owner occupiers, but to Trenlon Corporation, Junsen Limited, and 880064 Ontario Limited, which again transferred all but two of the units, still held by Trenlon Corporation, to Rockway Corporation. These corporations assigned their voting rights to Somerset. Middlesex alleges that all of the declarant, Hey, Somerset, and the corporate owners of the 48 units, are controlled and directed by Anthony H. Graat, Jr., and questions the motivation and bona fides of Somerset in this litigation.

Somerset points out that it holds a second charge security on 48 units, behind first charges held by Canada Trust, in a declining market, that condominium fees can, by a virtue of the act, end up with priority over its charge, and states that it is merely protecting its interests against improper charges and what it argues was improvident management by the previous board. A new board was elected a few days before this matter was heard.

Middlesex argues that the withholding of payment by Somerset and the corporate owners of the 48 units, plus the cost of litigation, is causing severe financial difficulty to Middlesex, and that Somerset is attempting to gain an unfair financial advantage over the individuals who bought units in the building.

THE EVIDENCE:

While the materials filed were certainly extensive, they were not exhaustive. Mr. Graat had not been cross-examined by Middlesex, and Somerset has not had full production from Middlesex, nor the opportunity to examine a Mr. McGregor, a former board member, and a principal of the present manager of Middlesex. Nevertheless, both sides were prepared to see the motions dealt with on the materials available.

AVAILABILITY OF SUMMARY JUDGMENT:

I have considered the provisions of Rule 20, and the considerable case law that has developed under it. I adopt as the applicable guidelines or criteria, in deciding whether the Rule is available in any particular case, those set out by Henry J. in *Pizza Pizza Ltd. v. Gillespie* (1990) 75 O.R. (2d) 225 at 238, which guidelines were most recently adopted by Chilcott J. in *Ron Miller Realty Ltd. v. Honeywell, Wutherspoon* (1991) 4 O.R. (3d) 492. In my view the parties cannot simply agree to vest jurisdiction in the motions Judge, because the Rule requires the Court to be "satisfied that there is no genuine issue for trial". In this case, although the parties could have undoubtedly produced still more evidence, the essential elements of the disputes were set out, and it was clear that there were no matters of credibility requiring resolution in relation to those essential elements. I therefore concluded that the issues could be dealt with at this stage, and the expense and delays of a trial could, and should, be avoided.

PARTICULAR ISSUES:

The statement of claim seeks declarations that three alleged special assessments are not valid, that an increase in monthly common fees was not validly imposed, that notices of liens filed on units charged to Somerset are invalid and that the increase in common fees resulting from the 1991-92 budget be spread over the remaining seven months of the fiscal year. The motion before me seeks judgment for those claims, and further seeks repayment of \$90,000.00 put up by Somerset to lift the liens, and an assessment of the \$16,300.00 in legal and late charges imposed re such liens. Middlesex denies all of these claims, and seeks dismissal of the action.

THE SPECIAL ASSESSMENTS:

The board purported to levy a special assessment on April 4, 1990 for \$25,000.00 and sent out notices requesting payment. Somerset immediately protested that the board had no authority to make such an assessment. The board registered liens on the units charged to Somerset, to secure the assessment, and attempted to regularize the situation by amendments to its By-law, and by bringing the special assessment before a meeting of unit holders on August 15, 1990.

At the same August 15, 1990 meeting, a further special assessment of \$110,000.00 was put forward. The unit holders defeated the amending Bylaw, but the majority present in person or proxy voted for the special assessments.

At a July 10th, 1991 general meeting the board put forth a motion for a special assessment of \$78,822.00 to cover accumulated operating deficits. A majority of the unit holders present in person or proxy voted for this special assessment.

None of the votes for the three special assessments carried by 51 percent of the total number of units.

The position of Somerset is that despite the majority votes for the special assessments, they are invalid for lack of compliance with the Act and the By-laws of Middlesex. The position of Middlesex is that the approval votes are, or are akin to, approval of budgets, that the money is needed for the operations of Middlesex, that unit holders have to contribute proportionately to the expenses of Middlesex, and the directors have to operate the building.

Further, Middlesex argues that other unit holders have not only approved, but have paid the assessments. If Somerset avoids payment, a deficit will result, to be brought into the next budget, but Somerset could only be assessed for 48/204ths of the deficit to the prejudice of the others.

THE LAW:

Condominiums, and Condominium Corporations, are creatures of statute, brought into being by the Act. The rights and obligations of the unit holders and the board are governed by the Act. By s. 10(3), the Corporations Act does not apply to a condominium corporation. In the leading case on condominiums in Ontario, *Carlton Condominium Corporation, No. 279 v. Rochon et al.*, (1987) 44 R.P.R., 228, Finlayson, J.A. stated;

"The Respondent relies on the in-house management rules and presumptions of regularity that apply to ordinary corporations, but as I have pointed out, the Corporations Act has been expressly excluded by the Act (s. 10(3)). A Condominium Corporation is a creature of statute and has no greater authority than as set out in the Condominium Act."

The Act, by s. 11(5) gives "each owner and each person having a registered mortgage against a unit... the right to the performance of any duty of the corporation specified by this Act, the declaration, the By-laws and the Rules." This gives Somerset as a mortgage or charge holder, a direct statutory right to seek the declarations sought in this action.

Section 15(1) of the Act provides that "the affairs of the corporation shall be managed by a Board of Directors."

Section 28(1) of the Act authorizes the Board to pass By-law disclosure of a "budget statement" which by subsection (7) is to other things, "(H) to govern the assessment and collection of contributions towards the common expenses."

Section 28 further provides that the By-laws shall be reasonable and consistent with the Act and the declaration, and specifically provides "(2) subject to subsection (5) a By-law passed under subsection (1), is not effective until it is confirmed, with or without variation, by owners who own not less than 51 percent of the units at a meeting duly called for that purpose" and still further by subsection (5), that despite such confirmation, the By-law remains ineffective until it, and a certificate as to its passage is registered.

The Act provides generally, in s. 32(1) that "the owners shall contribute towards the common expenses in the proportions as specified in the declaration", but gives no further direct guidance as to how this is to be accomplished. Section 52 however, in requiring disclosure to purchasers, include contain details of expenses, charges and other matters. Section 61 of the Act makes it clear that one cannot contract out of, or avoid the Act. Significantly, the Act does not contain any general curative provision for defects, although there is one in s. 24(2) covering defects in elections.

THE DECLARATION AND BY-LAW:

Counsel could not direct me to any provision in the declaration or in By-law No. 1, giving the Board authority to levy special assessments, and I have been unable to find any. The declaration is silent on funding, other than providing that unit holders are to pay their share of common expenses as set out in notices or suffer the consequences. By-law No. 1 provides the detail of how such a valid "notice" is to come about by providing that the board is to prepare annually, before November 30, a budget, present it to a meeting of the corporate members before December 31, and then if approved, is to notify each unit holder of his share. By-law No. 1 further provides that:

"If at any time during the course of any fiscal year, the Board of Directors shall deem that the annual assessments of contributions are inadequate by reason of a revision in the estimate of either expenses or other income, the Board of Directors shall present to a meeting of members of the Corporation duly called a revised budget and if the members approve the revised budget, the Corporation shall prepare and cause to be delivered to the members a revised annual budget for the balance of such fiscal year and thereafter monthly assessments shall be determined and paid on the basis of such revision."

Counsel for Middlesex argues that the special assessments were really "revised budgets" and that although misnamed, were effectively reviewed and passed by a majority of the members present at duly called meetings, so that the charges levied thereunder were valid.

THE SPECIAL ASSESSMENTS:

A review of the notices of meetings, Board Minutes and Minutes of members meetings reveal that the \$25,000.00 was intended to cover the estimated fees of engineers to carry out a "technical audit" of the building, the \$110,000.00 was intended to cover uncollected fees from the building developer, legal costs, parking rentals, extra engineering consulting fees, and the cost of a roof repair, and the \$78,822.00 was an accumulated deficit. None of these special items were of an emergency nature. None of the notices or discussions dealt with these expenditures in relation to all of the other expenditures of Middlesex, nor were the

resulting charges related to the general common fee charges to the unit holders. Indeed the discussion of, and votes on, the \$25,000.00 and \$110,000.00 special assessments took place after the discussion and vote on the general budget at the August 15, 1990 meeting of members, and the discussion of, and votes on the \$25,000.00 and \$78,822.00 special assessments at the July 10, 1991 meeting of members took place immediately before and immediately after discussion of the general budget for the year.

All of the Oxfords, Websters, and Funk and Wagnalls dictionaries speak of a "budget" in terms of statements of estimated incomes and expenditures. So does the act, in its reference to a "budget statement".

Counsel for Somerset forcefully argued that the reason for requiring the Board to put forth a revised budget, if changes in assessments were contemplated during the year, was to give the unit holders the complete picture, so that they could intelligently, at their meeting discuss priorities and whether, if some expenses were higher than contemplated, others should be reduced or deferred. The notices put forth by the Board relating to these special assessments were limited to the specific expenses intended to be covered, and the justification for them, and not surprisingly, the discussions at the general meetings were similarly limited.

It is true that the formal resolutions arising from the July 10, 1991 meeting reflected the objections raised by Somerset, and purport to say that the Middlesex budget will be taken as amended to include these special assessments, but in my view this was after the fact.

The approvals granted at the meeting were of special assessments, not of a revised budget, and in fact no revised budget was ever prepared and presented for a consideration by the unit holders.

In my view, the three special assessments were just that special levies on account of special expenditures not included in the general budgets. By no stretch of the imagination can the notices relating to these special assessments be regarded as revised budgets. There is absolutely no authority under the By-law, the declaration, or the Act for the Board to make these special levies or assessments, with or without the approval of the unit holders, and no provision in the By-law, the declaration, or the Act for correcting the errors, short of amending the Bylaw. The Board attempted that, and did not obtain the needed votes.

It was clearly pointed out in *Re Carlton Condominium Corp. 279* and *Rochon* (supra) "the declaration, description, and By-laws, including the rules are therefore vital to the integrity of the title acquired by the unit holder. He is not only bound by their terms and provisions, but he is entitled to insist that the other unit holders are similarly bound".

The scheme of the Act is one of self-government, and I find the Board composed of unit holders, is no less bound by the By-law than the other unit holders.

I therefore find that Somerset is entitled to a declaration that the alleged special assessments reportedly imposed by Middlesex in April of 1990, September of 1990 and July of 1991 are not valid assessments, either directly or indirectly through the purported "revised budgets".

Concern was expressed at the hearing as to the position of unit holders who have already paid the special assessments now declared invalid. The expenses for which the assessments were being made will not now simply go away, and I would expect that the Board will now proceed as provided in the By-law, to prepare and give notice of a revised budget including those expenses. I see no merit in the suggestion that previous deficits be dealt with separately from other expenses. The deficits have to be paid and should be included in such a budget. Such a revised budget, to comply with s. 32(1) of the Act, which mandates that the owners shall contribute towards the common expenses in the proportions specified in the declaration, should note that some unit holders have prepaid on account of the proposed new assessment, and if a revised budget is passed by a majority of unit holders at a duly constituted meeting, new monthly assessments should issue on which unit holders who have prepaid can be given credit for such prepayment.

Middlesex liened the units charged to Somerset, partly for non-payment of special assessments, but also partly because the unit holders did not pay their monthly charges as directed by Middlesex for some months. Somerset says the assessments were paid for those months, but paid to Key, as Key was a duly appointed agent of Middlesex and had not been formally and properly discharged by Middlesex. The liens were discharged on Somerset paying \$90,000.00 into Court, pursuant to an order of Mr. Justice F. G. Carter, made February 5, 1991. There is ongoing litigation between Middlesex and Key, in which a claim has been made for payment to Middlesex of the money paid to Key by the unit holders of the units charged to Somerset. In this action, a declaration was sought that the liens were invalid, and in the motion by Somerset an order was sought for payment out to it of the money in Court. It appears to me that the appropriate remedy at this point in this action is to stay the claim for a declaration that the liens are invalid until the trial of the action between Middlesex and Key, where the question of what money was paid to Key can be determined. The money in Court will remain, pending a final determination in that action and in this.

A sub issue was the legal fees and late charges, totalling some \$16,300.00, charged on registration of the liens. I cannot fault Middlesex for protecting its interest by registering the liens, especially in the face of possible conflicts as to who was holding the money, and the three month limitation under s. 31(5) of the Act to get the liens registered. However, the charges therefore must be reasonable. I direct that the legal charges for preparation and registration of those liens be referred to an assessment officer for assessment. Whether or not late charges are applicable and if so are reasonable, can be determined in the action between Middlesex and Key, or in the stayed portion of this action.

The final item was a claim by Somerset for a declaration that the 1991-92 fee increase be spread proportionately over the remaining seven months of the budget year. Middlesex, in part because of distractions arising from this and other litigation was late in approving its regular 1991-92 budget. On assessment notices finally issued, they claimed immediate payment for the five months that had passed with the remainder to be paid monthly. Somerset argues, in my view correctly, that the scheme of s. 19 of By-law 1, is to go through the budgetary process, resulting in charges to be paid in monthly instalments. There is no provision for retroactive charges. In my view the charges resulting from the 1991-92 budgetary process should have been spread out in equal monthly charges for the remaining months of the budget period.

The result therefore, is that a declaration will issue, that the special assessments are invalid, as are the charges resulting therefrom, the claim for a declaration that the liens are invalid is stayed, pending the outcome of the action between Key and Middlesex, but with the legal charges relating to the liens to be assessed in the meantime, and a declaration will issue that the proper way for charging the increase in condominium fees resulting from the 1991-92 budget as by seven monthly instalments covering a portion of the budget year remaining after approval of the budget. The motion for judgment by Middlesex shall be dismissed. Somerset shall have its costs of these motions.

BROCKENSHIRE J.

CBR# 243

Thomas A. Rassos and Thomas James Alexiou, Applicants, and Greystone Walk Limited, Respondent Action No. RE 1541/91 Ontario Court of Justice - General Division Toronto, Ontario B. Wright J. Heard: November 15, 1991 Judgment: November 27, 1991

Robert W. Staley, for the Applicants. Howard E. Kerbel and Natalie Marconi, for the Respondent.

B. WRIGHT J.:-- Thomas Rassos and Thomas Alexiou entered into an agreement with Greystone Walk Limited to purchase an adult lifestyle condominium. The purchasers acknowledged that the adult lifestyle was for their benefit and that the condominium would not have facilities or amenities intended or appropriate for the use of children. The purchasers agreed not to permit any person under the age of 16 years to reside in the condominium.

It was expressly understood and agreed by the parties that in the event a superior or appellate court in Ontario determined that age restrictions with respect to the occupancy of the condominium were prohibited by law, the adult lifestyle provisions of the agreement would be deemed to be severed and deleted from the agreement, and the balance of the agreement would continue to remain in full force and effect.

The Divisional Court, in *York Condominium Corporation No. 216 et al. v. Dudnik et al.* (1991), 3 O.R. (3d) 360, decided that restrictions on children residing in adult lifestyle condominiums are contrary to law.

Section 52 of the Condominium Act provides that an agreement of purchase and sale is not binding on the purchaser until the declarant has delivered to the purchaser a copy of the current disclosure statement and all material amendments thereto. A purchaser, before receiving delivery of a deed to or transfer of the condominium unit, may rescind the agreement within ten days after receiving the disclosure statement or within ten days after receiving a material amendment to the disclosure statement.

The purchasers received a disclosure statement which outlined the intentions of the vendor to provide an adult lifestyle condominium. The purchasers complain that the disclosure statement does not comply with the requirements of s. 52. The purchasers maintain that the disclosure statement should have repeated the provision contained in the agreement of purchase and sale concerning the severance of the adult lifestyle components in the event a court found them to be unlawful.

The purchasers also maintain that the substance of the court decision constituted a material amendment to the disclosure statement requiring the vendor to provide the purchasers with an amendment to the disclosure statement. The purchasers claim they would then have ten days to determine if they wished to continue with the agreement to purchase or to rescind because the condominium was not to be adult lifestyle.

The vendor takes the position that the purchasers have no right to rescind the agreement since they expressly agreed to purchase, even if the adult lifestyle component could not be provided. The vendor argues that it was not required to provide the purchasers with an amended disclosure statement because the possibility that the court would find adult lifestyle restrictions illegal was disclosed to the purchasers in the agreement.

The vendor's position is that the result of the court's decision is not "material" to these purchasers. The vendor says that the purchasers were well aware that the vendor may not be able to provide adult lifestyle; they took that risk and were prepared to, and agreed to purchase without the adult lifestyle concept.

The purchasers' application must fail. In *Abdool v. Somerset Place Developments of Georgetown Ltd.* (1991), 4 O.R. (3d) 280, I said, at p. 284:

The purpose of a disclosure statement is to summarize and highlight for a purchaser the important matters ... so that a purchaser receives the pertinent information upon which to make an informed decision whether to purchase.

The disclosure statement provided to the purchasers disclosed the intention of the vendor to provide an adult lifestyle condominium. It was not necessary to repeat the caveat concerning the possibility that a court might decide that adult lifestyle condominiums were illegal. The purchasers had already signed the agreement of purchase and sale which disclosed to them the possibility that a court would make a decision which would result in the unavailability of adult lifestyle condominiums. The purchasers cannot claim that there was no disclosure to them: i.e., that what they were purchasing may not be an adult lifestyle condominium. They signed an agreement knowing that adult lifestyle condominiums could become illegal and expressly agreed to complete their purchase even if adult lifestyle condominiums became illegal.

In *Abdool*, supra, at p. 293, I stated:

A "material" amendment is an amendment containing information which would provide a purchaser with a reasonable cause to reconsider whether to confirm the agreement of purchase and sale or to rescind.

The court decision declaring adult lifestyle condominiums illegal was not "material" to these purchasers. It provided them with no new information which would give them reasonable cause whether to confirm the agreement of purchase and sale or to rescind. The purchasers had the information that adult lifestyle condominiums could possibly be found to be illegal and with that information, they expressly confirmed their intention to purchase even if the vendor was not able to provide an adult lifestyle condominium. The purchasers have no right to rescind the agreement of purchase and sale by reason of the condominium not being adult lifestyle. They are bound by the agreement to purchase the condominium without adult lifestyle.

The application is dismissed with costs to the respondent. The respondent's cross-application is dismissed without costs.

B. WRIGHT J.

CBR# 116

David Kenneth Epp, on behalf of himself and other condominium owners of York Condominium Corporation No. 46, Applicants, and Ian Hood, Sr., Ian Hood, Jr., Ursula Shelton, Juliette Cohen, Alphonso Lewis, Mr. M. Ng, and York Condominium Corporation No. 46, Respondents

Action No. M167516/88 Ontario District Court - York Judicial District Toronto, Ontario Gibson D.C.J. April 12, 1990

G.J. Epstein and T. Sher Singh, for the Applicants. W.G. Scott, for Ursula Shelton. S. Laufer, for Juliette Cohen. M. Kurz, for Ian Hood, Sr., Ian Hood, Jr., and Alphonso Lewis. R.T. Craigen, for Ng. P.E. DuVernet, for York Condominium Corporation No. 46.

GIBSON D.C.J.:-- David Kenneth Epp, one of the applicants, is a co-owner of a condominium unit in York Condominium Corporation No. 46 (hereafter YCC 46), a condominium complex comprised of inter alia 688 townhouses and 656 apartment units and Co-President of the Home Owners and Tenants Action Group (HTAG) which represents interest of at least 70% of the unit owners in YCC 46. The Application, brought without notice, returnable July 13, 1988, sought, inter alia, production of corporate and financial records of YCC 46, an order that an annual general meeting be held, that elections to the Board of Directors of YCC 46 be held and an order enjoining YCC 46 from taking any steps to enforce a special assessment qua the unit owners of YCC 46 and that the status quo be maintained until the disposition of the Application.

The evidence filed on behalf of the applicants indicated that the last Annual General Meeting and elections of Board of Directors of YCC 46 were held on April 1, 1986 and on that date Ian Hood, Sr. was purportedly elected as a Director. It was the evidence of the applicant that at the time of his purported election, Hood, Sr. was an undischarged bankrupt, which fact was not disclosed to the home owners and, therefore, under the Condominium Act and By-laws his election was not valid. It was the further evidence of the applicant that shortly after the above election, demands were made by HTAG to examine the proxies and ballots purportedly evidencing the election of Hood, Sr. and others. However, Hood, Sr. in whose possession the election documents last were, stated that the documents had inexplicably disappeared.

Prior to October 1988, YCC 46 was being run by a purported Board of Directors consisting of Ian Hood, Sr., Ian Hood, Jr., Ursula Shelton, Juliette Cohen, Alphonso Lewis, Max Ng and Bhailall Sookram. The majority of this group purportedly obtained office through self-appointment on July 1, 1987, being appointed by the purported Board of Directors on that date.

The Condominium Act requires that an Annual General Meeting be held not more than 15 months after the last preceding annual meeting and that all positions on the Board of Directors are to be filled through an election to be held at each Annual General Meeting. Hood, Sr. and his colleagues claimed to have called a meeting on July 1, 1987 (a statutory holiday) but maintained that it was not held due to lack of a quorum, but it was the evidence of the applicant that no proper steps were taken to call such a meeting or hold a valid election.

As of April 1, 1986, when Hood, Sr. took over the affairs of YCC 46, it was a financially sound and stable corporation, with over \$400,000 in its reserve fund. However, at the beginning of 1987 an examination of the YCC 46 reserve fund by Central Mortgage and Housing Corporation revealed that the reserve funds of YCC 46 had been depleted, that the daily operational cash had been reduced to nil and that current liabilities exceeded current assets by over \$100,000.

While there is an obligation under the Condominium Act that the directors keep proper financial records, make same available to the home owners on demand and that proper financial statements be provided to the home owners, the only financial statement up until the time of this application that was made available to the home owners was for 1986. No resolutions or minutes of meetings of the Board of Directors have been provided for the two and a half year period during which Hood, Sr. and his colleagues exercised control over YCC 46. It was the evidence of the applicant that the records available indicated serious discrepancies and overspending, that the reserve fund was completely depleted, that no reserve fund was maintained as required by the Act and that at least four members of the Board (Hood, Sr., Lewis, Sookran and Shelton) derived personal benefit or received monies in questionable circumstances and that there was serious personal misconduct and threats by at least one director.

Prior to my becoming involved in this application on September 19, 1988 and thereafter, the application was vigorously and capably opposed by a procession of solicitors as can be seen in the recital of counsel at the commencement of these Reasons. One of the most critical changes in counsel on behalf of YCC 46 was the termination of Mr. Pape's retainer at 8.00 o'clock on the morning of September 23rd, just prior to the final hearing of submissions with respect to the date of the Annual General Meeting and the issue of who should chair the meeting, and run the election for Board of Directors.

The final event that appears to have precipitated this application was that although a letter dated December 21, 1987 from the Board of Directors stated that at that point no "special assessment" was anticipated for 1988, a notice from the Board dated June 30, 1988 stated that a special assessment had been passed as a result of which each owner would be required to pay a sum of money (ranging from approximately \$2,800 to \$4,700) within ten days. Subsequent telephone advices to the home owners indicated that the failure to pay the special assessment by July 11, 1988 would result in a lien being placed against the title of the unit or units after the expiry of the above deadline.

After the current litigation was commenced, it was revealed that the Board has passed a special assessment of \$2,802,851 on May 5, 1988, on the basis of oral advice (despite some \$7,000,000 collected over a period of two and half years), without the knowledge of or notice to the home owners and a month prior to a survey dated June 1988 being produced and tabled by the Board.

The applicants immediately brought this application and launched a motion for an injunction restraining the Board from placing liens against the units for a refusal to pay the special assessment. Judges Webb (ex parte), Gilbert (on consent), Matlow, Whealy (on consent) and I, all continued the injunction as the application was adjourned to a special date (ultimately September 19, 1988). On that date I also continued the injunction as it became necessary to adjourn the merits of the application from time to time, frequently due to the failure of the YCC 46 to make proper production of the corporate and financial records and legal positions taken on its behalf by its solicitors.

While the YCC 46 continued at all times to uphold the validity of the special assessment, and the report that was produced to support same, no evidence by affidavit or viva voce testimony at trial, was given by Ian Hood, Sr. (who was frequently present at the hearing) and who, on one occasion, appeared on behalf of the Board to seek an adjournment since the solicitor for YCC 46 had been discharged at 8.00 a.m. on September 23rd, to justify the propriety of the special assessment.

The actual hearing of the application commenced on September 19, 1988. On September 20th I granted an application (despite the objection on behalf of the respondents) to permit the applicants to adduce the evidence of Hazel deBurgh (a Forensic Accountant), as to her investigation of the financial records of YCC 46. Following a meeting back in July between counsel for the various parties at that time, it being agreed that the applicants be entitled to full access to the financial and corporate records of YCC 46, Ms. deBurgh was appointed to examine the records. While she spent some time attempting to do so, her evidence was that all of the proper records were not available and that it was only on September 16th that Ian Hood, Sr. advised her that the balance of the necessary records were available but there was insufficient time for her to re-attend, examine the records and give an opinion with respect to the propriety of the financial affairs. Her evidence was that while she could not make any final opinion, there were certain entries that warranted further investigation to determine whether financial improprieties had taken place. The application was adjourned to September 23rd to permit Miss deBurgh to have further access to the financial records of YCC 46.

At this time (September 20th), by agreement of counsel, I ordered that the Annual General Meeting of YCC 46 be held on October 5, 1988 although the final arguments had not been made upon who was to chair the meeting or who was to supervise the election. It was still the position of YCC 46 that I deal with the issue of the status quo remaining the same and that I should immediately deal with the issue of the validity of the special assessment. Late in the day, Mr. Pape proposed that the injunction with respect to the status quo remain until Ms. deBurgh completed her investigation, that she provide an opinion as soon as possible but that the Annual General Meeting still be held on October 5th and I adjourned the matter on September 20th on that basis.

When the application resumed at 10.00 a.m. on September 23rd, I was advised by Mr. Pape that YCC 46 had terminated his retainer at 8.00 a.m. that day. Ian Hood, Sr., on behalf of the corporation, requested an adjournment on the basis that he had an appointment later in the day with Colin Campbell, Q.C., whom he had provisionally retained on behalf of YCC 46, and that the corporation wanted to submit expert evidence. As a term of the adjournment he stipulated that the status quo would be maintained. With some reluctance I granted an adjournment until 8.30 a.m. on September 27th (and then to September 28th) with respect to the issue as to who was to chair the Annual General Meeting, and supervise the election, and adjourned sine die any hearing with respect to the issue of the validity of the special assessment, as clearly neither the applicants nor the respondents had all of the evidence they wished to put before me on this issue.

As I recall it, on September 27th, William Scott (who had previously represented YCC 46 in July) appeared on behalf of YCC 46 and requested an adjournment which I granted until September 28th in view of the imminence of the Annual General Meeting.

On September 28th, I heard final submissions from all counsel for the respondents, as well as the applicants, with respect to the issue as to who would chair the Annual General Meeting on October 5th and supervise the elections to be held during the Annual General Meeting. I was to be out of town for a couple of days on personal matters and reserved my decision because I wished to consider the matter more carefully.

On September 30th I released my oral reasons which provided, briefly, --

1. The Annual General Meeting (to be held October 5th) was to be chaired by Sheldon Kirsh, a barrister and solicitor, who was also to establish an agenda for the said meeting which was to cover the period from April 1, 1986 to October 5, 1988.

2. Touche, Ross, a firm of chartered accountants, was appointed to supervise and run the election of Board of Directors at the said Annual General Meeting. The status quo was to be maintained as had been originally ordered by Judge Matlow on August 11, 1988 and by me on September 23rd and as agreed to by Hood, Sr. on behalf of the corporation on September 23rd.

The cost of items 1 and 2 were to be paid by YCC 46. 3. The question of the propriety of the special assessment and whether liens could be imposed against the home owners who had not paid the levy would be adjourned to October 31st.

4. I made a further order with respect to various terms such as production of affidavit evidence, provision for cross-examination, further access by Ms. deBurgh with respect to the YCC 46 books and records and such evidence, if any, to be adduced on behalf of YCC 46.

I was subsequently advised by counsel that on October 5th Marvin Kurz, on behalf of YCC 46, sought to appeal my order of September 30th but the application was refused by Mr. Justice White of the Divisional Court.

The Annual General Meeting and elections took place on October 5, 1988. None of the respondents, Ian Hood, Senior or Junior, Shelton, Cohen or Ng stood for re-election or were nominated. The applicant, David Epp, was one of the six persons elected as a director. Lewis was not formally re-elected.

As I recall it, counsel for the applicants thereafter requested that this application be spoken to on October 21st (rather than October 31st) which request I granted. On that date, P.E. DuVernet appeared on behalf of YCC 46 and W.G. Scott for Ursula Shelton and R.T. Craigen for the balance of the respondents.

Ms. Epstein advised that by virtue of the October 5th election, the present directors are all member of HTAG (except Lewis) and that her instructions, since the Board did not feel that the expense of having Ms. deBurgh complete her inspection of the corporate records was justified, were to request that I waive that portion of my order of September 30, 1988 with respect to the tendering of her evidence. Mr. Craigen stated that he had no instructions with respect to this request while Mr. Scott took the position that since the order had been made, the request should have been made by way of formal motion, on proper affidavit evidence and not in such an informal basis. However, both counsel subsequently stated that they did not oppose, and I made the order.

At that time all counsel, except Craigen, agreed that as a matter of law the burden of proof that the special assessment was proper was upon YCC 46, which view I shared. Ms. Epstein took the position that, considering the recent circumstances, her client felt that it was not necessary to have the propriety of the special assessment determined by the court. However, Mr. Scott stated that it was Ms. Shelton's position that this issue should be dealt with by the court as such a decision was crucial to the issue of costs if nothing else. Mr. Craigen supported Mr. Scott's position. Mr. DuVernet who was not opposed to the waiving of Ms. deBurgh's evidence being adduced, advised the court that in his view it was open to YCC 46 to consent to the relief the applicants were seeking and that if the respondents contested this matter, costs would be their obligation. It was the general consensus that the costs would basically follow a determination of whether the special assessment was valid or not.

At this time there was discussion about what evidence would be adduced on at the balance of the hearing. Mr. Scott stated that he would rely on an updated affidavit of Mr. Everitt, but did not intend to call him to give evidence viva voce and wondered if whether Ms. Epstein still wished to cross-examine Everitt and Colangelo as she originally stated she so desired. Ms. Epstein advised that she would have to obtain instructions, as did Mr. DuVernet, who advised that the corporation would probably take no position at the hearing. The hearing was scheduled to be concluded on November 2nd (and, if necessary, November 3rd).

On November 2nd, Ms. Epstein tendered an affidavit of Epp, sworn October 25, 1988, the filing of which was not objected to by counsel for the respondents since everyone seemed to feel that the affidavit largely dealt with the issue of costs. The affidavit provided evidence that on the last day they held office, Hood, Sr. and his fellow directors issued various certified cheques for past and "future" services (including legal services) which effectively depleted YCC 46's current account. No written record was found evidencing the passing of any resolution with respect to the special assessment as originally imposed or amended on August 4, 1988. The only Minutes found were of a Board Meeting held on September 30, 1988 retaining James Lockyear to act for YCC 46 to appeal my Order of September 30th, that he receive a retainer of \$10,000, that all legal costs incurred in all financial purchases from April 1, 1986 to September 30, 1988 and that all contracts be approved by the Board (to cover missing Minutes), and that all directors be indemnified for past actions. Further, a library was to be leased to Caledon Village Action Committee (for 15 years), including equipment, at a rate of \$2.00 per year, the executives of such Committee being Ian Hood, Sr. and Jr., Sookran, Shelton and Lewis.

The applicants also moved to file a factum which was received despite the objection of Mr. Craigen and I reserved the issue of costs with respect to the factum since it was only delivered on November 1st.

Mr. Scott, supported by Mr. Craigen, argued that the applicants' main application be dismissed because the applicants never supplied the respondents with a list of which unit owners were applicants and because Mr. Singh took an incorrect position in law on the cross-examination of Epp on October 31st with respect to the evidence in his October 25, 1988 affidavit. The respondents argued that they were deprived of a fair and full cross-examination on the affidavit.

Ms. Epstein advised that a list, supported by enclosures, was sent to me on September 30th. Mr. DuVernet stated that while he had never been given notice of the cross-examination, so that the matter could be continued with as scheduled, suggested that Epp be cross-examined today. Ms. Epstein further stated that she felt it was not necessary to deal with the special assessment issue except in respect of costs. However, Messrs. Scott and Craigen had always stated that in their view, such was necessary.

Mr. Scott stated that once he received the October 25th Epp affidavit and thereafter reviewed the applicants' Notice of Application, he re-evaluated the situation and realized that the applicants had never attacked the validity of the special assessment but only sought to enjoin the enforcement of the special assessment. He thereupon got instructions from his client not to require that I rule upon the propriety of the special assessment since it was not necessary and so advised Ms. Epstein by letter a couple of days previously. However, because in some respects particularly on the issue of costs, the issue of the propriety of the special assessment was perhaps still before the court, it was his view that he should be entitled to cross-examine Epp on the evidence in the affidavit and the issues raised in the factum.

Mr. Craigen's view was that once the applicants withdrew the last two items in the Notice of Application, it was not necessary for the court to consider the validity of the special assessment.

Mr. DuVernet stated that previously Messrs. Scott and Craigen had undertaken to prove the validity of the special assessment, and that the burden of same was upon YCC 46 and the respondents although the corporation was probably now unable to prove the validity of the special assessment.

Since counsel were unable to agree, I refused Mr. Scott's motion on the basis that I was content that reasonable efforts had been made to satisfy my order with respect to the list, and that any non-compliance was not sufficient to justify the dismissal of the Application. Since the applicants were still relying on the October 25th Epp affidavit, and Mr. DuVernet had not been present on the cross-examination, I would allow full and proper cross-examination by all parties that afternoon on such issues as were still before the court, which were basically costs, but also with respect to the special assessment and other activities which the applicants might allege would be relevant on the issue of costs. In addition, there could be cross-examination on portions of other affidavits by Epp not previously cross-examined upon which were relevant to the issue of costs. Any party would be entitled to call any witness to give viva voce evidence with respect to the special assessment, if desired, if such evidence was not presently before the court.

I pointed out to counsel that I had not realized that the list of owners supplied to me in the letter of September 30th had not been given to counsel for the respondents. I had thought that counsel had worked out this matter and overlooked dealing with a point raised in the letter. I did not hear any complaint from counsel for the respondents with respect to their not having received the list and I specifically asked at our meeting on October 21st if there were any problems and this point was not raised by counsel for the respondents at that time.

I ruled that by November 22nd the applicants would deliver a list -- (a) of the unit owners who do not object to their names being divulged, and (b) a list of those who did refuse. I stated that I would deal with (b) when I dealt with the merits of the application and the issue of costs.

The cross-examination of Epp continued at 2.20 p.m. and concluded on November 3rd.

Epp testified that he felt, on the basis of the documents that he had been able to review after the October 5th election, that there were specific discrepancies in the cheques which were exhibits to his affidavit of October 25th in respect to salary payments to one, Vicky Chamberlain. He also had concerns with respect to the propriety of the special assessment and the demand for early payment of same, as he felt that the Board should have called a special meeting to discuss any problems with respect to finances. He was concerned with the conduct of and payments to Sookram who, at the October 22, 1988 Board Meeting, was evasive and refused to answer certain questions put to him by the Board with respect to various acts of the previous Board (since that time the management company has apparently terminated his employment).

A letter from Sheldon Kirsh was filed, together with his report and an account and I ordered that the report be formally released to the Board to take such steps as the Board deemed appropriate.

Epp also expressed his real concern about the propriety of certain payments in Exhibits A and D to his affidavit, as well as the priority of some of the payments. As a matter of law, I do not feel that I should deal with the propriety of these payments although the nature of same and the manner of payment and the fact that they were apparently made after the appeal from my Order was dismissed and just prior to the Annual General Meeting, seem highly unusual to say the least.

With respect to alleged misconduct by any of the respondents, Epp conceded that he had no evidence of any personal misconduct by Juliette Cohen and Max Ng. It was his position that they were members of the Board (having been appointed), had accepted the obligation of being on the Board and the responsibility, along with other directors, for acts of the Board and that each had an obligation to put the owners on notice when he or she became aware of any improper act by the Board or its members.

With respect to Lewis, he was involved in contracts with the corporation in 1988 in the amount of \$12,551 which was specifically prohibited by the Act and by the YCC 46 by-laws. He testified that Ian Hood, Jr. had directly threatened him while he was a Board Member and had accepted an appointment to the Board by Ian Hood, Sr.

As regards Ian Hood, Sr. it was Epp's view that his original election was improper as he had failed to reveal that he was an undischarged bankrupt. He was paid \$59,000 with respect to lumber from his company, the lumber having disappeared one night. Epp stated that Hood, Sr. mostly ran the day to day operation of YCC 46. While it was stated in an affidavit that Hood, Sr. had resigned and was reappointed to the board, in his view the Board had no authority to do so. Epp conceded that he had no personal knowledge whether Hood, Sr. personally took monies but collectively the whole picture was a bad one.

The financial statement (Exhibit 5) prepared by Bailey for the period up to June 30, 1988 was not approved at the October 5th Annual General Meeting. Further, Hood had stated in the press that he had spent \$7,500 on a security system for his office, which violated the by-laws as the expenditure was out of the reserve fund, which was only to cover extraordinary repairs except in extreme emergency.

Epp stated that there was not sufficient time to serve the ex parte application for an injunction on YCC 46 as the letter received in early July stated that the special assessment had to be paid by July 11th and Hood, Sr. had told him that if the specific assessment was not paid, a lien would be put on an owner's property. He conceded that the corporation retained a management office during normal business hours. He also appeared to concede that the injunction, as obtained, dealt with all levies, was probably too wide and should have been in respect of any liens levied in respect of the special assessment. Epp was concerned that the Board's expenditures were outside the jurisdiction of the reserve fund so he demanded proper accounting but was never able to get same.

On April 1986 the reserve fund balance was in excess of \$400,000 but as of October 5, 1988, the balance was zero and the current account was less than \$5,000.

Epp testified that Hood, Sr. occupied unit 100, which was previously designated as the superintendent's unit. All his windows have bars and there is an internal security system. Hood is not a superintendent and the superintendent for the building has to reside in an activity room, which use is lost to the condominium unit owners.

The hearing was then adjourned with the balance of evidence and argument to be heard on November 30th and December 1st (subject to availability) which was subsequently changed to December 1st and the 2nd.

There was a brief attendance on November 22nd by Mr. Singh, no one opposing or even attending, for an order to permit the corporation to deal with the special assessment in respect of units which have been or may be sold before the ultimate disposition of the hearing.

On December 1st, Marvin Kurz, having filed a Notice of Change of Solicitors dated November 30, 1988 in respect of Hood, Sr., Cohen and Lewis, appeared as did Mr. Craigen for Hood, Jr., W.G. Scott for Shelton but no one appeared for the respondent Ng. Mr. DuVernet, of course, appeared for YCC 46, and Mr. Singh for the applicants.

Mr. Kurz requested an adjournment until December 2nd on the basis that he had just been consulted by the respondents on November 25th. He advised me that although he had argued the appeal from my Order on October 5th, he had not been involved with the matter until the 25th and had not had sufficient time to familiarize himself with the file so as to properly conduct the matter. He stated that he wanted to cross-examine Epp on the issue of the list and such other areas as he felt appropriate but probably would not be calling any evidence.

Mr. Scott advised that he would not be calling any evidence.

The request for an adjournment was vigorously opposed by counsel for the applicants which was understandable under the circumstances. Hood, Sr. supported the request and stated that his son had insufficient funds to retain counsel.

I ruled that, since some weeks previously two days had been set aside to complete the matter, and the respondents were told that they were to advise the court by a certain date if evidence was to be called on their behalf, no such response having been made, I advised Mr. Kurz that I was reluctant to adjourn the matter until the 2nd as I had grave concern that the matter would be completed in a day. However, I did adjourn the matter until after lunch to give Mr. Kurz further time to review the file. I directed that the whole file be made available to him and that counsel for the applicants assist him with any of the documents. I ruled that both Kurz and Scott could cross-examine on the issue of the list.

When we resumed in the afternoon, Mr. Scott cross-examined Epp on the issue of the list and which owners were, in fact, applicants. Epp advised that he never explained to the other owners that they would be responsible for the costs of the application and stated that he was the applicant, although there was widespread financial contribution to fund the application. The executive of HTAG had instructed him to give an undertaking with respect to the damages if the application was unsuccessful, and the executive had agreed to abide by any order of the court. He conceded that the executive may well be the applicants, but he reiterated that he had the support of many other unit owners. Mr. Kurz did not ask any questions. This was the end of the applicant's evidence on the hearing. Messrs. Kurz, Scott and DuVernet all advised that no evidence was going to be called on behalf of the clients that they represented.

During the afternoon of December 1st and most of December 2nd I heard what I thought were the concluding submissions of counsel in this matter on the issue of costs, following which I reserved judgment. However, approximately a week or two later my secretary received a request from Sam Laufer who wished to bring a motion before me on behalf of the respondent, Juliette

Cohen, and I gave a special appointment returnable December 23rd. On that date Mr. Laufer, who had served a Notice of Change of Solicitors from Marven Kurz to himself, appeared with counsel for the applicants.

By Notice of Motion dated December 12, 1988, leave was asked to file an affidavit of Juliette Cohen (which apparently was sworn on December 9th) and submissions were sought to be made to the effect that Juliette Cohen was not a director of YCC 46 and ought not to be responsible for any Orders to costs in this hearing. Although I considered the application to be very late, considering all of the circumstances, with some reluctance and over the objection of counsel for the applicants, I granted leave for the filing of the affidavit and afforded Mr. Laufer the opportunity to make submissions based on the affidavit.

Mrs. Cohen, in her affidavit, stated that she was a housewife, aged 58, married to a dentist, and in January of 1986 purchased three units in YCC 46. In the Spring of 1988 she was asked by Hood, Sr. to become a director and although initially she declined, she testified that subsequently "she agreed to join the Board of Directors", for the purpose of locating tenants with specific occupations. Her evidence was that she was never elected and was simply asked to sit on the Board to look after rentals but she conceded that she attended three meetings "after she became a Member of the Board". The Minutes of the Meeting of September 30, 1988 (which was the only Minute that has ever been produced in this hearing, Hood having alleged that all other Minutes were stolen), indicated that she was present. However, she maintained that she did not attend, had no knowledge of what occurred at the meeting, had not signed the Minutes and took no part in the various resolutions. Mrs. Cohen further deposed that she was served with the Record in September 1988 and relied on the corporation's solicitor to protect her interests and although Hood advised her that Scott was acting for the corporation, she never spoke to Scott and was never asked to provide any affidavit. She also deposed that she was never told what was going on in the proceedings.

She further testified that she heard a short time ago from Hood, Sr. that a new solicitor was acting for the corporation, Marvin Kurz, and all the respondents attended at his office. At that meeting her personal defences or positions were not canvassed. She attended at Kurz' office a second time to deliver a cheque to him, the case was discussed in a quick and very general manner and she did not discuss her relationship with the corporation or the other respondents.

Mrs. Cohen further testified that around December 1st or 2nd she spoke with Kurz who advised her that he really had very little understanding of what was going on in the matter since he had just been retained (he apparently did not tell her that he argued an appeal from my order of September 30, 1988 before the Division Court on October 5th). Because she knew nothing about the various proceedings, except in the most general manner, until she spoke to her personal solicitor, Mr. Fishman, a short time ago, she was unable to properly present her position to the court. Mr. Fishman referred her to Mr. Laufer and it was only around early December that she suddenly realized what was going on and the possible consequences to her. It was her position that she was not really a director and, in the circumstances, should not be responsible for costs, since she was not responsible for directing or instructing counsel or the incurring of costs. She further deposed that she had recently heard that Hood, Sr. was probably judgment proof and so she would be prejudiced if there was an order that she be required to pay costs.

Needless to say counsel for the applicants vigorously opposed the application.

During submissions, Mr. Singh, for the applicants, advised me that Juliette Cohen was served with the Notice of Application in July 1988 and my notes indicate that Mr. Laufer did not contest that statement or require any proof.

I note that in the original Motion Record, there is an affidavit of service by Neil Gilbert, a process server, that on July 13, 1988 he personally served Juliette Cohen at 4 Geddes Court, Downsview, with the Notice of Motion returnable July 21, 1988, the affidavit of Epp, dated July 12, 1988, the amended Notice of Application, dated July 12, 1988, and the Order of Judge Webb dated July 12, 1988.

Paragraph 5 of the said affidavit recites that YCC 46 is currently being run by a Board of Directors consisting of certain persons which list included "Juliette Cohen". Clearly the title of proceedings in all of these documents includes the name of Juliette Cohen. Juliette Cohen conceded that she was served with the application Record some time in September 1988 which indicates that the personal respondents were being represented by Ronald Craigen, with his firm name and business address. This application Record also includes the affidavit of Epp sworn July 12, 1988 and the amended Notice of Application.

Item xiii of the amended Notice of Application clearly states that the applicants claim costs of the application on a solicitor and client scale against the individual respondents personally, or in the alternative against YCC 46, or "for such further or other relief as seems just and proper to this honourable court".

The affidavit of Ursula Shelton dated July 19, 1988, filed by Mr. Scott on behalf of YCC 46, stated that Juliette Cohen was appointed to the Board of Directors at a point of time after the resignation of one Albert Lai. The Condominium Act authorizes the Board of Director to appoint persons as directors (Section 15(a)).

In my view the application by Juliette Cohen to be declared not to be a director of YCC 46, and not to be responsible for the court costs of this hearing, must be dismissed on the following grounds --

(a) On her own evidence, in her affidavit of December 9, 1988, at the request of Hood, Sr. she agreed to join the Board of Directors. She attended three Board Meetings and her motive, purpose or duties assigned to her I feel are irrelevant in law.

(b) On the evidence of Ursula Shelton, which I accept, Juliette Cohen was appointed to the Board of Directors, which as I previously stated is within the authority of the Board under the Condominium Act.

There has been no position taken by YCC 46 or any other respondents that the Board had no authority to appoint her as a Director. On the above evidence I find that she was a Director of YCC 46 at the time that these proceedings were commenced.

(c) In my view, it is simply too late in the day for this application to be successfully brought. There is no evidence that she had insufficient education or any inability to understand the English language. She was served with the Motion Record on July 13, 1988 which, if she had read, (or consulted her personal solicitor then instead of in December), she would have realized that she was being sued as a director of YCC 46 and that the applicants, if successful, would be seeking costs against her on a solicitor and client basis.

I quite frankly can not understand how a mature person would not have appreciated the situation and either have discussed the question of whether she was, in law, a director with her personal solicitor, or with W.G. Scott, who Hood, Sr. had told her was

acting for the corporation, or with Craigen whose name appeared on the Application Record (which she received in September and indicated that he was acting for her), or took some other appropriate step to assert her alleged position.

Ms. Cohen does not mention why she never discussed her position with Craigen and I frankly do not accept her evidence that she was unaware of the lengthy court proceedings which commenced in July of 1988. If, in fact, she was not, having known that she was being sued, she saw fit to take little apparent interest in the proceedings until they were all over and then found out that Hood, Sr. was probably judgment proof.

In my view, having found that she was a director, she has the same obligations and responsibility as her co-directors under the applicable law.

The motion on behalf of Juliette Cohen will, therefore, be dismissed with costs payable forthwith after assessment thereof on a party and party scale.

On the issue of entitlement to costs, even though the applicants attacked the validity of the special assessment, they abandoned that claim within a day or so and, thereafter, only sought to enjoin the corporation from enforcing non-payment of special assessment by imposition of a lien. They also either abandoned or did not pursue a few other items on "the shopping list" in the amended Notice of Application. I am satisfied that the applicants have achieved a substantial degree of success in these proceedings when one considers what were the real issues which gave rise to the Application and circumstances existing at that time.

In considering costs, it must be kept in mind the position being taken by the Board in early July 1988 in respect of the special assessment (in excess of \$2,000,000) which had to be paid within a very short period of time, the evidence being that the Board was unwilling or unable to provide proper financial records to the unit owners (to which they were clearly entitled to under Section 21 of the Act) had not provided recent audited financial statements and had not held a valid annual meeting or election of officers since April 1986. The Applicants obtained from the court an Order enjoining the Board from enforcing non-payment of special assessment by the imposition of a lien, and finally obtained from solicitors for the Board an agreement that applicants' accountant could review all the financial books and records of the corporation (Hood, Sr. never having given evidence to explain reason for such delay and clearly dragged his feet in producing some documents at the last moment). This status quo was maintained by His Honour Judge Matlow and by myself over objections of then counsel for the respondents until the actual hearing commenced. The Applicants subsequently obtained from me an Order that the annual meeting be held on October 5th to be chaired by Sheldon Kirsh, the election to be run by Touche, Ross. (It is true that Paul Pape, acting for YCC 46 had agreed to a meeting to be held in early October but all the respondents still maintained that a YCC 46 appointee should chair the meeting and supervise the election of officers and these were clearly critical issues between the parties). It was quite obvious that the Corporation and individual respondents (comprising the Board) were acting in concert and until after the annual meeting of October 5th, and election of new officers, I cannot recall counsel for the Corporation and for individual respondents respectively taking any inconsistent or contradictory position on any issue of any substance).

In my view, having achieved such substantial success (the Board has retreated from its position on the issue of special assessment) which is one of the major factors (if not the major one) which ought to be considered by me in the exercise of my discretion in dealing with costs, the applicants are, therefore, entitled to their costs of this application and ancillary proceedings.

The remaining issues are against whom and on what scale should costs be assessed and what order, if any, I should make in respect of costs of YCC 46 both on the defence of this application and such costs as it may have paid for the defence of the individual respondents (clearly some monies have been paid according to schedules A and D in the Epp affidavit sworn October 25, 1988).

The applicants seek costs on a solicitor and their own client basis from all the respondents and that the Board should be entitled to recover such costs as well as its solicitor and client costs of defence of the application from individual respondents as well as any costs or legal fees paid to defend the individual respondents. Not surprisingly, present counsel for the Board supports the above position while counsel for various individual respondents vigorously oppose same.

On the evidence before me, in my view, there were no circumstances which clearly made provisions of Rule 49.10 applicable.

However, I do agree with submissions of counsel for the applicants, that, having regard to the unusual circumstances herein, this is an appropriate case to award costs on a solicitor and client basis (to be assessed) against all the respondents. I do not want to repeat all the evidence of Epp which I basically accept. However, there was no viva voce evidence from any of the respondents, particularly Hood Sr. (who appears to have been the power behind the group's actions) to explain the failure to hold annual meetings, proper election of officers, failure to provide or keep proper financial books and records, the precipitous passage of special assessment and autocratic efforts to enforce it by threats of imposition of liens and, in some ways just as important, the failure to produce in a timely fashion, financial documents during litigation, or properly cooperate with legitimate effort by accountant to review what documents were available, delaying tactics in the litigation, including changing counsel on several occasions, denial of applicants' hopes to have an independent person chair the annual meeting and supervise election of directors, insistence on validity of special assessment be considered by the Court and opposed applicants' position of maintaining status quo until hearing was concluded.

In the circumstances of this case, considering the relative position of all the parties and YCC 46 (and the owners of other units) and again unexplained conduct of individual respondents, this is an appropriate case in which to order that upon payment to the applicants of their assessed costs (or such portion as may be paid), YCC 46 shall be entitled to recover such costs from individual respondents.

In my view, again considering all of the circumstances, the unexplained conduct of the individual respondents was completely contrary to their obligations under the Act, not only to the applicants but to the other unit owners during this time and I expressly hold that the individual respondents are not to indemnify under Section 25 of the Act for any of the aforesaid costs.

With respect to the costs of YCC 46 in the defence of this Application, or the costs of legal fees paid on behalf of the individual respondents, while I am certainly not anxious to see any further legal battles between any of the parties to these proceedings, I do not feel, in the circumstances here, that I can fairly or properly deal with these costs. Up until October 5, 1988, when the annual meeting and election of new officers took place, there was no lis between YCC 46 and the individual respondents for obvious

reasons. I do not feel that I have heard sufficient evidence on which I could make proper findings and thereby fairly deal with these costs so I, therefore, decline to do so.

I agree with submissions of counsel for the individual respondents (chiefly Mr. Scott) that the applicants should not be entitled to costs in respect of certain specific attendances or steps in proceedings and I make the following specific directions --

1. Ex parte hearing before Judge Webb on July 12, 1988. While I am satisfied that the applicants might well have had some practical problems in achieving expeditious service of material upon all of the individual respondents, because of the urgent nature of the Application, I do feel that notice could have been delivered to YCC 46 since it had a business office in the building where Epp resided.

I, therefore, direct that the applicants be entitled to costs for preparation of the Application, amended Notice of Application and supporting affidavit material but not actual appearance in court.

2. Attendance before Judge Gilbert on July 21, 1988. The Application was adjourned on consent, no Order being given as to costs. I do not feel it appropriate that I should, at this stage, make any order as to costs of this attendance.

3. I feel applicants are entitled to costs of attendances (and so order) before Judge Matlow on August 11, 1988 and Judge Whealy on August 24, 1988 since both judges reserved costs for disposition by Trial Judge.

4. Applicants entitled to costs of attendances (and proper preparation for same) on September 19, 20, 23, 27, 28, October 21, November 2, 3, December 1 and 2. (I'll make further comment on these attendances later in my reasons).

5. I have no authority to make any order as to the costs of the appeal brought by YCC 46 before Mr. Justice White on October 5, 1988 (as requested by applicants).

6. Applicants not entitled to costs of cross-examination of Epp on October 28 in view of incorrect position taken by their counsel. Respondents for same reason, are entitled to costs of such attendance (not preparation) on party and party scale (as of one attendance) to be set off against costs awarded to applicants.

7. Applicants not entitled to costs of factum dated November 1, 1988 (filed on hearing before me on November 2) as it was delivered late and no reasons given for the delay.

Mr. Kurz raised an interesting issue that after September 30, 1988, the only matter in issue was costs and on the basis of decision of *McClellan v. Powassan Lumber Co.* (1914) O.W.N. 302, there should be no order as to costs after said date.

In response to that submission, I make the following comments.

(a) the October 21, 1988 attendance was necessary in view of result of October 5, 1988 meeting and for court to give directions with respect to balance of hearing scheduled for end of October. (b) the November 2, 1988 affidavit of Epp dealt with as to issues, costs and Mr. Scott submitted that he was entitled to cross-examine on it (after having unsuccessfully moved to dismiss application a good part of the morning was spent on the argument). Scott and Craigen cross-examined Epp in the afternoon and also on the morning of November 3. Submissions were made but not completed and the balance of the hearing scheduled for December 1 and 2.

(c) On December 1, Mr. Kurz appeared as counsel for the first time before me (had argued appeal before White, J. on January 5th). Scott completed his cross-examination and Kurz on the basis of his submissions, as above, did not cross-examine. Submissions on costs took place on the balance of December 1 and on December 2.

Even if the *McClellan* decision is still a binding authority in Ontario (a decision of the late Mr. Justice Middleton should always be carefully considered) which I gravely doubt, since it does not appear to have been followed in any judgment in Ontario since, or even considered or discussed, in the circumstances of this case and the issues between parties and position taken by respondent YCC 46 and individual respondents in my view decision is distinguishable. Considering the uncompromising position of the respondents as expressed by the parade of counsel who appeared, I do not feel that it lies in the mouth of any of the respondents at such a late juncture to take such a position on costs.

My apologies to the parties and their counsel for the lengthy delay in delivery of my final reasons.

GIBSON D.C.J.

Supplementary Reasons for Judgment

Released: December 18, 1990

GIBSON J.:-- A difference of opinion having arisen between counsel as to the appropriate form of the judgment that should issue so as to reflect my Reasons dated April 12, 1990, on December 11, 1990 I was attended by Ms. Epstein, Mr. W.G. Scott, and Mr. R.T. Craigen who had formerly acted for the Respondent, Shelton, Ian Hood, Sr., and Ian Hood, Jr., and Alphonso Lewis. However, at the present time he has no instructions from the last named respondents.

After having considered their submissions, I felt that the more appropriate decision, considering the fact that this Application proceeded in various stages, is that one judgment be drafted, to reflect all of the various orders that I made in the proceedings. I, therefore, approved the draft judgment submitted by counsel for the applicants, making several changes to reflect the precise date upon which I made certain specific orders (subject to one variation which I will deal with later on in my Supplementary Reasons).

With respect to the quantification of legal costs awarded in my Reasons of April 12, 1990, in view of the present unfortunate situation in the judicial system in Toronto whereby appointments to assess costs in lengthy or complex matters (such as this) being at least one to two years in the future, Ms. Epstein (since I am not functus), requests that I fix the costs of the Applicants (the various Bills have been drafted) at an early date, as the Applicants have grave concern that some of the respondents will liquidate any assets that they have in the interval, such as condominiums in the building in question.

While Messrs. Scott and Craigen submitted that I ought not to embark on such a course of conduct (Mr. Scott also took the position that I had no jurisdiction to assess costs) in the special circumstances of this case, I feel that it is not only appropriate but preferable that I determine the quantum of costs of the applicants in as timely, and hopefully, a fair fashion, as is possible.

Under Section 141 of the Courts of Justice Act, costs are in the discretion of the court which may determine to what extent costs shall be paid by any party.

By virtue of Rule 57.01(3), the court may fix all or part of costs.

Rule 1.04(1) provides that the Rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceedings on merits.

I, therefore, vary my reasons of April 12, 1990 so as provide that where there is any reference to "assessed" costs, my judgment (I have amended the draft judgment) shall read "To be determined and fixed by me".

In view of the complexity and length of the proceedings before me, I feel it only appropriate to set aside as a special appointment one-half day to afford the parties to make appropriate submissions as to the proper quantum of costs.

The order that I have made with respect to costs of the application is in the nature of a party and party order on a solicitor and his own client's scale. Considering this fact, I do not feel it necessary that I hear evidence. However, I do expect that any party seeking costs shall put before me appropriate documents (and make appropriate submissions) to substantiate the proposed quantum of costs. Either reasonable particulars of the steps or services involved in or part of the Bill of Costs on behalf of any party, or the same result can be achieved by docket entries, shall be supplied to the opposite party, and the court at least seven days prior to the date of the special appointment.

I will be available during the weeks of January 7, 21, 28th and February 11th to determine costs. Counsel, hopefully, can agree on a mutually convenient date, preferably before December 28th or failing any agreement, I will grant a special appointment in the above timeframe at the request of counsel for the Applicants.

If any other parties who recover costs by virtue of my Reasons wish to have me fix their costs on the same special appointment, I will be pleased to do so.

The costs of the appearance before me on December 11th are to the Applicants, in any event, to be fixed by me.

GIBSON J.

CBR# 190

Metropolitan Toronto Condominium Corporation No. 702, Applicant, and Rosaline Sonshine and Bernard C. Rothbart, Respondents

Reported at: 8 R.P.R. (2d) 183

Action No. M178992/89 Ontario District Court - York Judicial District Toronto, Ontario Haley D.C.J. June 28, 1989

John R. Carruthers, for the Applicant. Irvin Schein, for the Respondents.

HALEY D.C.J.:-- This is an application by Metropolitan Toronto Condominium Corporation No. 702, the owner of a 345 unit luxury complex, for an order of this court under section 49(1) of the Condominium Act, R.S.O. 1980, c. 84.

Section 49 provides in part:

49.-(1) Where a duty imposed by this Act, the declaration, the by-laws or the rules is not performed, the corporation, any owner, the bureau, or any person having a registered mortgage against a unit and common interest, may apply to the county or district court for an order directing the performance of the duty.

(2) The court may by order direct performance of the duty and may include in the order any provisions that the court considers appropriate in the circumstances.

The Corporation seeks an order directing the respondents to remove the canopy erected by them over the front entrance door to condominium unit No. 159, which is owned and occupied by them.

The exterior walls of the condominium unit form part of the common elements of the Corporation. The canopy erected by the respondents in September 1988 is affixed to the exterior wall of the unit. The walls are governed by rules respecting the use of the common elements as authorized by section 29 of the Condominium Act.

Section 29(1) and (2) of that Act provide as follows:

29.-(1) The board may make rules respecting the use of common elements and units or any of them to promote the safety, security or welfare of the owners and of the property or for the purpose of preventing unreasonable interference with the use and enjoyment of the common elements and of the other units.

(2) The rules shall be reasonable and consistent with this Act, the declaration and the by-laws.

There is no issue that the respondents are bound by the Condominium Act, the declaration, the by-laws of the Corporation and its rules, including those passed under section 29(1). See section 31(1) of the Act which provides:

31.-(1) Each owner is bound by and shall comply with this Act, the declaration, the by-laws and the rules.

A number of rules governing the use of the common elements were duly passed by the Board of Directors of the Corporation in May 1986. No issue was raised as to their validity. Rule 19 of those rules states:

19. Exterior surfaces of the unit shall not be painted or decorated except in accordance with guidelines published by the board from time to time.

The parties are agreed that the erection of a canopy falls within the word "decorated" in Rule 19. As I read Rule 19 it provides for a prohibition of all decoration except in accordance with guidelines published by the Board.

In December 1988 the Board purported to publish such guidelines. The validity of these guidelines was raised peripherally but that issue does not make any difference in the result. The guideline for canopies published under the heading "Bayview Mills - Guidelines For External Home Improvements" reads as follows: No canopies are allowed.

The question of canopies was very carefully considered and the Board decided that the legal, structural and aesthetic problems that would be created by the construction of canopies on buildings that were not designed for this purpose would not justify the construction.

Clearly this statement, by way of guideline, provides for no relaxation of the prohibition against canopies declared in Rule 19. Therefore, Rule 19 as it stands was in full force and effect and was binding on the respondents in September 1988 when they went ahead with the installation of a canopy over their front entrance door.

In late 1987 the respondents had first requested permission to erect a canopy. In August 1988 they furnished the property manager of the Corporation, probably at his request, with a sketch of the proposed canopy together with samples of the canvas to be used. On August 23, 1988 the Board decided to refuse permission to erect the canopy. This decision was communicated to the female respondent on August 24th. On September 29, 1988 the respondents erected the canopy. The male respondent candidly admitted that he intended to do so with or without the approval of the Board.

I do not think the Board's conduct in this period makes any difference to the outcome. I have serious doubt that the Board without specific authority could have consented to an act which was in direct contravention of the rules of the Corporation, enacted on behalf of all the owners for the benefit of all owners. See *Re Carleton Condominium Corporation No. 279 and Rochon et al.* (1987), 59 O.R. (2d) 545 (Ontario Court of Appeal).

The balance of the subsections of section 29 referred to earlier bear out the weight of control as vested in the owners and not in the Board:

(3) The rules shall be complied with and enforced in the same manner as the by-laws.

(4) Subject to subsection (5), any rule made under subsection (1) shall be effective thirty days after notice thereof has been given to each owner unless the board is in receipt of a requisition in writing made under section 19 requiring a meeting of owners to consider the rules.

(5) If a meeting of owners is required, the rule made under subsection (1) shall become effective only upon approval at such meeting of owners.

(6) The owners may at any time after a rule becomes effective amend or repeal a rule at a meeting of owners duly called for that purpose.

The last quoted subsection provides a method for the respondents to obtain their canopy if a sufficient number of owners can be convinced that canopies are an acceptable amenity. One has to keep in mind that condominium living works on a principle of community and that such decisions affecting the common elements must reflect community concerns and not the wishes of particular unit owners. I do not think this is a question of whether the rule is reasonable. The argument that the canopy is required to protect against ice and snow is considerably weakened when one considers that the respondents have occupied the premises since 1975 and have never made a complaint to the Corporation's management about deficiencies in the snow and ice removal service provided by the Corporation. I would distinguish the case of *Re Peel Condominium Corporation No. 73 and Rogers et al.* (1978) 21 O.R. (2d) 521, where the issue was one of what was reasonable in the use of common elements designated for exclusive use. Here, there is a complete prohibition against use of the common elements, namely, the exterior walls of the unit, in a specific way, in a bid to provide a uniform aspect for the complex.

Section 49 of the Condominium Act quoted earlier allows discretion in the court in making an order directing performance of a duty. The respondents have brought a separate motion requiring the Corporation to enforce the by-laws and rules against other allegedly offending unit owners. For example, reference is made in the material, inter alia, to three existing awnings or canopies.

Section 31(2) of the Condominium Act provides:

Each owner has a right to the compliance by the other owners with this Act, the declaration, the by-laws and the rules.

The respondents therefore in their application seek an order directing the Corporation to perform its duty and to enforce the Corporation rules respecting the common elements for a number of alleged non-compliances.

The affidavit of Gordon Parrott, property manager, sworn June 1, 1989 states in paragraph 8 through 13 that the Board of Directors of the Corporation is currently in the course of having infractions of the rules and the guidelines remedied.

In my view it would be reasonable to allow the Corporation time to complete the steps outlined in the affidavit before the court makes any order in response to the respondents' application. Accordingly, this latter application (M180844/89) is adjourned sine die, not to be brought back on until after October 31, 1989 and then on seven days' notice to the responding party.

I am sure that in its efforts to effect compliance the Board will have regard to the Rochon case mentioned above and to my doubts that the Board has any power to consent to acts of non-compliance with the by-laws and rules, unless there is something in the declaration or by-laws of the Corporation which has not been brought to my attention.

There will be an order directing the respondents to remove the canopy over the front entrance door of their condominium unit 159, such removal to take place within 30 days of the making of this order.

Costs of this application (M178992/89) may be spoken to by the parties.

HALEY D.C.J.

CBR# 042

Beer et al. v. Townsgate I Limited et al.

36 O.R. (3d) 136

Docket No. C23123 Court of Appeal for Ontario Brooke, Osborne and Austin JJ.A. October 23, 1997

*Application for leave to appeal to the Supreme Court of Canada dismissed with costs April 30, 1998 (Cory, Major and Binnie JJ.).

APPEAL from a judgment of Chapnik J. (1995), 25 O.R. (3d) 785, 48 R.P.R. (2d) 27, declaring agreements of purchase and sale void and ordering the return of deposits.

Allan Sternberg and Laurel C. Broten, for appellants. Martin Teplitsky, Q.C., and Barbara C. Bedont, for respondents.

The judgment of the court was delivered by

BROOKE J.A.: -- This is an appeal by Townsgate I Limited from the judgment of Chapnik J., delivered on October 13, 1995 [reported 25 O.R. (3d) 785, 48 R.P.R. (2d) 27]. By that judgment, she held that agreements of purchase and sale for condominium units between the appellant and the respondent purchasers were void because at the time the appellant entered into the agreements, it was not registered under the Ontario New Home Warranties Plan Act, R.S.O. 1980, c. 350 (now R.S.O. 1990, c. O.31) ("ONHWPA"), s. 6. The trial judge also found that the respondents, Elazar Astrug and Eugeny Privis, were entitled to rescind their agreements by reason of negligent misrepresentation made to induce them to sign, that agreements made by the respondents Shohana Agbariya and Isaak Nimerovsky were not binding due to non-receipt of the disclosure statements, and that in the case of Elazar Astrug and Shoshana Agbariya, Moti Fishman, Morris Freedman, Boris and Natalia Galperin and Isaak Nemirovsky, were not binding due to late acceptance.

Factual Background

The appellant is a developer. In early 1989, it proposed to develop a site as a luxury condominium building and offer condominium units for sale at that time. It contracted with Norman Hill Realty Inc. ("Norman Hill") to sell the condominium units. At that time, the market for condominiums was generally inflated. The units offered for sale were described as luxury condominiums and were priced at the high end of the market at an average price of about \$340,000.

At trial, a good deal of the evidence focused on the techniques used by Norman Hill to deliver a "sold building" through the use of special invitations and a grand opening. Essentially, the trial judge agreed with the respondents' submission that they signed their agreements in an atmosphere of extreme "hype" created by Norman Hill. The trial judge said:

A picture emerges of anxious purchasers waiting in long lines for up to seven hours in the frigid cold; and then, for up to three hours in the hot, crowded sales pavilion, before seeing an agent; and of harried realtors, unable to handle the crowds, affecting a demeanour sadly lacking in courtesy or candour.

The majority of the purchasers signed their agreements of purchase and sale during the three-day grand opening held from February 24 through to February 26, 1989. The agreements provided for closing on May 21, 1991 or as that date might be advanced or extended. The agreement was a complex document of several pages in length with some 32 sections in small type.

About ten months after the grand opening, when 160 of the 220 units had been sold, the market was in rapid decline. The appellants advertised the sale of the unsold units at much lower prices than the respondents had agreed to pay and guaranteed prospective purchasers the value of their investments. By March of 1991, a number of the purchasers from February and March 1989 were unwilling to complete their transactions because of the recession and their personal positions. Each had made a bad deal and wanted out. Many purchasers tried to cancel their agreements, but the appellants refused to accept such cancellations. In May of 1991, the appellants attempted to negotiate with the purchasers by offering a 15 per cent reduction in exchange for the payment by the purchasers of an additional deposit and an undertaking to close their transactions. Of the 160 sold at the grand opening, 70 had cancelled within the ten-day cooling off period provided by the Condominium Act, R.S.O. 1990, c. C-26. Of the remaining 90 purchasers, 45 took advantage of the 15 per cent reduction in price and completed their transactions. The respondents, who are 39 of those remaining, commenced this action on August 21, 1991.

They claimed a declaration that they were entitled to rescind their agreements and the return of the \$40,000 deposits. The appellants counterclaimed. They sought damages for breach of contract and, in the alternative, forfeiture of the deposit.

Statutory Illegality

The trial judge held that each of the respondents should succeed as each of the agreements was void since the appellant had entered into the agreement prior to being registered under the Ontario New Home Warranty Program (the "Warranty Program"). There is no doubt that when it entered into the agreements, the appellant was not registered and that this contravened s. 6 of the ONHWPA.

Section 6 provides:

6. No person shall act as a vendor or builder unless he is registered by the Registrar under this Act.

It is clear that while the appellant was not registered at the time it entered into the agreements, it had complied with all of the requirements for registration. By February 14, 1989, the appellant had made the required application to the Registrar, paid the enrollment fees which amounted to more than \$140,000, completed disclosures as to ownership and guarantees of the obligations under the ONHWPA and provided an irrevocable letter of credit in the sum of \$4,500,000. The evidence of counsel for ONHWP was that, by February 23, 1989, there was no reason why the Registrar would not proceed with the registration "as a matter of course". She also said that the purchasers, the respondents, were not prejudiced by the sale before registration and were fully protected by the warranty under the Act. She testified that a claim on the warranty for return of deposit for proceeding in breach of s. 6 would, in the circumstances, have been refused.

It was only after four weeks at trial, on February 27, 1995, that the respondents raised this issue and they were allowed to amend their statement of claim to plead that the agreements were void for illegality. In lengthy reasons, after considering the history of the legislation and a number of authorities, the trial judge concluded that a breach of s. 6 by the vendor, the appellant, rendered the agreements of purchase and sale a nullity. She held that the agreements had been undertaken in the face of the "clear and unambiguous prohibition" against sale prior to registration. It was her opinion that the "prohibition in s. 6 of the Act is fundamental to the nature and purpose of the regulatory scheme". The object of the Act and general intent was to protect the public until registration was satisfied and that failure to register before sales made sales a nullity.

With respect, I think the trial judge reached the wrong conclusion and erred both with respect to her analysis of the Act and the authorities that she referred to, each of which is distinguishable from either the facts or the legislation in issue here. As stated above, the appellant had fully complied with all of the onerous registration requirements and there was no further action or documentation required of it. The agreements of purchase and sale contained reference to the ONHWPA and made clear that the appellant was providing the statutory warranty. The registration was granted shortly after the contracts were entered into and long before closing. Perhaps the most important thing is that the purchasers were fully protected; the fact that registration had not been issued was of no moment in this regard.

If the parties intended to make a contract which was legally binding and the protection of the public sought by the statute assured, then notwithstanding the breach of s. 6, the agreement could be legally performed. I think the trial judge failed to appreciate that illegality as to contractual formation must be distinguished from illegality as to the performance of the contract. From the reasons for judgment, it does not appear that this submission was made to her, nor was she referred to the judgment of this court in *Maschinenfabrik Seydelmann K.-G. v. Presswood Brothers Ltd.*, [1966] 1 O.R. 316 at pp. 321-22, 53 D.L.R. (2d) 224 (C.A.) where Schroeder J.A. said:

What is forbidden by the statute and the Regulations under review is not *malum per se* but *malum prohibitum*, and in every case it becomes a crucial question whether the contract is capable or incapable of lawful performance. In the latter case, e.g., if the parties should agree to commit a crime, or if they should clearly agree to commit an act prohibited by statute, such a contract is intrinsically illegal since it necessarily involves an offence or a violation of the law. With much deference to the opinion of the learned trial Judge who decided against the plaintiff with some reluctance, he has failed to take into account the well-settled presumption of law in favour of the legality of a contract; that if a contract can be reasonably susceptible of two meanings or modes of performance, one legal and the other not, that interpretation is to be put upon it which will support it and give it operation.

A like presumption was applied by the Supreme Court in *Paoli v. Vulcan Iron Works Ltd.*, [1950] 1 D.L.R. 593, [1950] S.C.R. 114, where it was held that as there was no evidence that the contract there under consideration was intended to be put into effect without the permission required by the Wartime Salaries Order, although the increase in salary, the subject-matter of the contract, was agreed upon between the parties before the official permission was sought, it must be assumed that the parties intended to comply with the law. I quote from the judgment of Rand, J., at p. 594:

It is said that because the consensus for an increase had been reached in June, 1942, and was to be retroactive to January 1st of that year, the contract was illegal. I must confess to great difficulty in appreciating the grounds for that view. It was illegal only on the assumption that it was intended to be put into effect and carried out without relation to approval. There is no evidence of this one way or another, and in its absence I assume that these parties intended to comply with the law of the country. That this is so is fully confirmed by the fact of the company's application.

There is at present a tendency to regulate many activities in modern life by statutes or by Regulations authorized by statutory enactments, and the distinction between a contract inherently illegal because it cannot be performed without violating the law and one which can be legally performed but is void on the ground that there was an intention to perform it in an illegal manner cannot be disregarded. Since there is a presumption against illegality in the latter case, it is necessary for the defendant alleging illegality in the contract to show that there was an intention to break the law.

The contracts in this case were not "inherently illegal" in that, by their terms, they were incapable of being legally carried out. It was the intention of each of the parties to make a legal contract and to carry it out.

While this appeal was pending, two other cases were tried, in which the effect of a breach of s. 6 was considered. In neither did the trial judge reach the same conclusion as that reached by the trial judge in this case. In *Skyrise Developments Ltd. v. Abrahams*, a decision of the Ontario Court (General Division), released July 16, 1996 [now reported 29 O.R. (3d) 451, 3 R.P.R. (3d) 125], on similar facts, Davidson J., applying the principles as stated by Schroeder J.A., held that the agreements of purchase and sale were enforceable. He expressly disagreed with the conclusions of the trial judge in the case at bar and referred to the decision of Gotlib J. in *Puri v. Sharynton Homes Ltd.* (1994), 48 R.P.R. (2d) 8 at p. 16 (Ont. Gen. Div.). She said:

I do not think it matters to this lawsuit, and it is not a satisfactory ground on which to proceed. . . . At least registration was complete prior to the proposed date of closing, and it makes no difference to the purchaser at all whether or not registration was complete at the time of the agreement of purchase and sale.

In my view, Davidson and Gotlib JJ. were right. See also the annotation by Howard D. Gerson and Theodore B. Rotenberg at 48 R.P.R. (2d) 9.

I think it is significant that while the Act provides for a financial penalty for a breach of s. 6 it does not expressly provide that the contract so made is unenforceable. If a statute does not expressly deprive a party of his or her rights under the contract, the question is whether, having regard to the purpose of the Act, and the circumstances under which the contract was made, and to be performed, it would be contrary to public policy to enforce it because of illegality: see the judgment of Devlin L.J. in *St. John Shipping Corp. v. Joseph Rank Ltd.*, [1956] 3 All E.R. 683 at p. 690, [1957] 1 Q.B. 267 (Q.B.).

The purpose of the ONHWPA was described when it was introduced in the Ontario legislature as follows: "to provide major protection for purchasers against the added cost and inconvenience caused by poor workmanship in home construction": *Legislature of Ontario Debates* (31 May 1976) at p. 2736. I think, contrary to the trial judge's finding, that the registration requirements, per se, are not fundamental to the regulatory scheme. The protection which the Act sought for purchasers was not affected. The purchasers were not alleging an evil at which the Act is aimed. Indeed, as the trial judge noted, "the builder was clearly not unscrupulous, financially irresponsible or technically incompetent, much to the contrary".

As to public policy, the court must exercise its discretion guided by principles that command general acceptance: see *William E. Thomson Associates Inc. v. Carpenter* (1989), 69 O.R. (2d) 545 at p. 554, 61 D.L.R. (4th) 1 (C.A.). In this case, the purchaser's argument was highly technical. As Waddams notes in *The Law of Contracts*, 3rd ed. (1993), at p. 381:

If every statutory illegality, however trivial, in the course of performance of a contract, invalidated the agreement, the result would be an unjust and haphazard allocation of loss without regard to any rational principles.

I think public policy favours that contracts should not be rendered unenforceable merely because of technical deficiencies. That is this case. The appeal on this ground is therefore allowed.

Negligent Misrepresentation

The trial judge held that two of the purchasers, Elazar Astrug and Eugeny Privis, were entitled to rescind their respective agreements due to misrepresentations by Townsgate and representatives of Norman Hill. She found that the misrepresentations concerned a material matter affecting the subject-matter of the contract and that such representations induced these two unsophisticated purchasers to enter into the agreement.

The trial judge relied on her overall findings that, from the time the invitation to the grand opening was sent out setting out a specific time and date to attend for a "special preview price", Townsgate's marketing was misleading. She found an atmosphere of extreme "hype" and "frenzy" at the grand opening, with purchasers being rushed into signing. The Norman Hill sales agents repeatedly fabricated a false sense of scarcity, and told purchasers that the purchases were "risk-free" and a "guaranteed investment".

Elazar Astrug was a 45-year-old taxi driver who came to Canada in October 1982, having completed 11 years of schooling in Israel. He is able to read but could not write English. The trial judge's findings regarding Elazar Astrug are as follows:

Elazar Astrug was told more than once that this was a risk-free investment which was guaranteed, and that the price would not go down.

When asked why he decided to buy, he responded, "Because as I told you, I didn't see that there was nothing to lose here; only to gain".

His efforts to return his unit based upon the representations to him were prodigious. I find that as a rather unsophisticated purchaser, Mr. Astrug reasonably interpreted and relied upon what he was told, to his detriment. Had the risks inherent in the impugned transaction been fully and fairly explained to him, or had the representations not been made at all, I am persuaded that he would not have entered into the contract. His claim on that basis is allowed.

Eugeny Privis was a 59-year-old cobbler whose only previous experience with real estate was the purchase of a condominium as a residence in 1980. The trial judge found as follows: The representations allegedly made to Eugeny Privis were that his investment was guaranteed and risk-free and that the builder would buy back his unit at any time.

When reviewing this within the entire context of Mr. Privis's testimony and his relatively low level of sophistication, both in respect of the market and educationally, I find his actions to have been consistent with reliance. His stated reason for the purchase was "I think I don't lose nothing". Moreover, he recognized George Kerr from his shoe repair shop and clearly relied upon his judgment. "He was a professional. He said prices would never come down; it was risk-free and I believed him." When attending at the sales office a few days later to return his unit, at which time he was induced to purchase another one, it was Mr. Kerr's representation that the builder would buy it back if he changed his mind, that made the difference.

The trial judge believed the evidence of these respondents that, at an early stage -- in one case in early February, 1989 and in the other, that April -- they were still relying on the representations made to them and determined to get out of the contract. The trial judge also found that their efforts to do so were "constantly ignored and rebuffed". The trial judge further found that there was no conduct on the part of the respondents or either of them that would constitute acquiescence, waiver or estoppel in law to disentitle them from the relief in the circumstances.

Entire agreement clause

The appellant makes several arguments regarding this ground of appeal. A principal one is based on para. 24 of the agreement, which reads:

24. This offer when accepted shall constitute a binding contract of purchase and sale and time shall in all respects be of the essence hereof. It is agreed that there is no representation, warranty, collateral agreement or condition affecting this agreement or the real property or supported hereby other than as expressed herein in writing whether contained in any sales brochures or alleged to have been made by any sales representatives or agents.

The appellant argues that the existence of this "entire agreement" clause precludes any finding of liability from a representation. It argues further that, as the language of this clause is clear and unambiguous, the allegations of Astrug and Privis are inadmissible due to the parol evidence rule.

The existence of a contractual relationship between the parties does not preclude a claim in tort: see *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, 31 D.L.R. (4th) 481. In *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12, [1993] 2 W.W.R. 321, the Supreme Court of Canada addressed the issue of concurrent liability in tort where a clause in the contract may exclude or limit such liability. In that case, the court held that the contract did not negate or limit the defendant's common law duty not to negligently misrepresent certain facts, nor did it negate or limit the plaintiff's right to sue in tort. As to whether the right to sue in tort was precluded, the court said at p. 27 S.C.R., p. 331 W.W.R.:

The rule is not that one cannot sue concurrently in contract and tort where the contract limits or contradicts the tort duty. It is rather that the tort duty, a general duty imputed by the law in all the relevant circumstances, must yield to the parties' superior right to arrange their rights and duties in a different way. In so far as the tort duty is not contradicted by the contract, it remains intact and may be sued upon.

In the case at bar, the trial judge assumed that para. 24 would preclude an action in tort. However, she relied on her finding that the purchasers did not assent to the clause and concluded that they could sue in tort. She stated as follows:

Not only was the clause buried in the fine print of the contract, but purchasers were not provided with an opportunity to read the agreement or to negotiate its terms before signing. They cannot, therefore, be taken to have assented to be bound by the disclaimer.

I am not convinced that the wording of para. 24 precludes a claim in tort. However, I agree with the trial judge that, in the circumstances, these respondents cannot be taken to have assented to such a clause in the contract. As Waddams, *supra*, states, at p. 98:

Thus, if the promisee actually knows of the promisor's intention, or has herself misled him, she will not be able to rely on a different "objective" meaning [I]f a promisee knows that a signed writing does not represent the true intention of the promisor, he will not be able to take advantage of the writing. The same result should follow even if the promisee does not actually know but ought reasonably to know of the promisor's mistake, for the objective theory cuts both ways. It protects reasonable expectations but not unreasonable ones.

As this was a standard form contract and the clause was in fine print, in the frenzied atmosphere described above, it was not drawn to the attention of these respondents, the contract was signed in haste with no opportunity for them to read it, there can be no reasonable expectation they were assenting to the clause: see *Tilden Rent-A-Car Co. v. Clendenning* (1978), 18 O.R. (2d) 601, 83 D.L.R. (3d) 400 (C.A.); *Zippy Print Enterprises Ltd. v. Pawliuk*, [1995] 3 W.W.R. 324, 100 B.C.L.R. (2d) 55 (C.A.).

The appellant argues that the parol evidence rule renders the allegations of Astrug and Privis inadmissible. They argue that, since the language of the contract is clear and unambiguous, parol evidence may not be admitted to alter the meaning, especially where it would contradict the agreement. In my opinion, the parol evidence rule cannot operate to exclude evidence of a misrepresentation that induced the making of the contract and thus be used to allow the defendant to rely on a clause in the face of the misrepresentation: see *Canadian Indemnity Co. v. Okanagan Mainline Real Estate Board*, [1971] S.C.R. 493 at p. 500, 16 D.L.R. (3d) 715 at p. 720.

There are five elements of the tort of negligent misrepresentation set out in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at p. 110, 99 D.L.R. (4th) 626, as follows:

(1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said representation; (4) the representee must have relied, in a reasonable manner, on said negligent representation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

The representation must be material and must have served as an inducement to enter into the contract. In making the determination as to materiality, the court may consider evidence as to what was said and the manner in which the information was presented to the purchaser: *Panzer v. Zeifman* (1978), 20 O.R. (2d) 502 at pp. 508-09, 88 D.L.R. (3d) 131 (C.A.).

Reasonable reliance

The trial judge concluded that, if the misrepresentations had not been made to Astrug and Privis by the sales agents, they would not have entered into the agreements. Townsgate submits nonetheless that these two purchasers did not rely, in a reasonable manner, on the misrepresentations. The appellant relies on the following statement by Schroeder J. in *Hinchey v. Gonda*, [1955] O.W.N. 125 at p. 128 (H.C.J.):

It is, of course, well settled that a representation, to be of effect in law, should be in respect of an ascertainable fact as distinguished from a mere matter of opinion. A representation which amounts merely to a statement of opinion, judgment, probability or expectation, or is vague and indefinite in its nature and terms, or is merely a loose, conjectural or exaggerated statement, goes for nothing, though it may not be true, for a man is not justified in placing reliance on it . . .

I think it is significant that the trial judge rejected the claims of other purchasers based on misrepresentation on the ground that they failed to prove reliance. She found their ultimate decision to purchase was grounded on their own judgment, and was not persuaded that they had relied on the representation complained of. She then reviewed certain purchasers' claims in more detail, considering their relative level of sophistication, their vulnerability and the particular situation at the time of purchase. She concluded that Astrug and Privis had proved this aspect of the claim. The others did not.

In my opinion, there is no basis on which we should interfere with this finding. It was founded in a careful review of the evidence and findings of credibility. The sales agents' repeated statements to both purchasers that the investment was "risk-free" and "guaranteed", and to Privis that the vendor would buy back the unit at any time, are in the category of fact. That Astrug and Privis were unsophisticated purchasers further supports the conclusion that their reliance, in the circumstances, was reasonable.

Affirmation by conduct

The appellant contends that Astrug and Privis are disentitled to rescission on the ground of misrepresentation because their conduct during the approximately two years following the execution of the agreements affirmed the contracts. The appellant relies on the fact that they allowed their deposit cheques to be cleared and that they received correspondence without objection. The appellant further contends that a party must act promptly after learning of the misrepresentation to disaffirm the contract. In rejecting these arguments, the trial judge said:

The purchasers' individual and joint efforts to rescind their agreements at an early state were consistently ignored or rebuffed by the vendor. To now state that the purchasers were "keeping their options open" does not accord with the plaintiffs' evidence, which I accept. Their passive receipt of documents or correspondence cannot constitute a waiver of their strict legal rights. I find that any dealings with the vendor were undertaken without prejudice to the plaintiffs' right to treat their contracts at an end. If anything, Townsgate kept the plaintiffs at bay with promises to renegotiate their agreements prior to closing, as they indeed did in the spring of 1991. The failure of the purchasers to retain or provide written documentation of their ongoing complaints only serves to underline their relative lack of sophistication.

I think the trial judge found that these two unsophisticated purchasers relied on the misrepresentations made to induce them to enter into the agreements and when, relying on the misrepresentation, they determined to have the appellant honour them, the appellant simply took advantage of them again with assurances and promises of renegotiation. In the circumstances, the finding that neither of the two respondents intended to affirm the contract, is quite reasonable and their acts regarded accordingly. The appellant relied on *Panzer v. Zeifman*, supra. That case is distinguishable on its facts.

This ground of appeal fails.

Vicarious Liability

The appellant argues that even if this court upholds the trial judge's finding that the Norman Hill sales agents committed the tort of negligent misrepresentation, the appellant is not vicariously liable for those misrepresentations as Norman Hill and its employees are independent contractors. As such, the appellant is not liable unless a reasonable person could have foreseen potential damage as a result of the agent's acts.

The purchasers contend that the appellant is vicariously liable for the sales agents since there was a relationship of principal and agent. The appellant held out the sales agents as acting on its behalf, the misrepresentations were in the scope of their authority, and the appellant knew of and accepted the conduct.

The trial judge appears to have addressed every issue which was raised. However, there is no suggestion in her reasons that the appellant made such submissions to her at trial.

In my opinion, the findings of the trial judge on this issue are unassailable. In the circumstances, it is not open for the appellant to seek to avoid liability on this ground. The trial judge found that a relationship of principal and agent existed:

Mr. Kauffman and his employee realtors manned Townsgate's sales office. They held themselves out to the public as agents for the vendor and acted under its direction and control. Their work was incidental to the overall project. Townsgate's principals permitted the agents, acting within the scope of their authority, to make representations which they knew or ought to have known were not accurate; and it is vicariously liable for their conduct.

The evidence amply supports these findings. Mr. Kauffman, an officer of Norman Hill, and his employees staffed the appellant's sales office as its sales manager and sales agents. The invitation to purchase and the letter of congratulations to purchasers was printed on Townsgate's letterhead and signed by Mr. Kauffman as the appellant's "sales manager/director of sales and marketing". Indeed, all of the evidence on this issue is consistent only with the conclusion that the appellant calculated that it would be clear to the public that Norman Hill, Mr. Kauffman and their sales agents had the authority to make representations which they knew or ought to have known were not accurate.

Nowhere in its statement of defence does the appellant suggest that Norman Hill was an independent contractor for whose acts it is not responsible.

I am not satisfied that there is any basis on which we should interfere with the judgment on this issue.

I should add that, in my opinion, even if the relationship of Norman Hill to the appellant was that of independent contractor, the result should be the same. It was, after all, employed by the appellant to deliver a sold building by inducing prospective purchasers to make offers to purchase the units. If, in the course of doing so, persons were induced to make offers by negligent misrepresentations of the sales agents, such persons should not be without the remedy of rescission of their contract with the appellant, the only effective remedy, because of the fictional difference of the appellant's relationship with the sales agency.

On the facts of this case, the appellant held Norman Hill out as its agent and it is not open to it to defend on this basis.

Non-receipt of Disclosure Statement

The trial judge found that the respondent, Shoshana Agbariya, never received the disclosure statement as required by s. 52(1) of the Condominium Act. Further, the respondent, Isaak Nemirovsky, should have been allowed to rescind the agreement as the disclosure statement was not received within the 10-day period provided for in s. 52(2) of the Act and therefore the agreement had no point of commencement. These sections provide as follows:

52(1) An agreement of purchase and sale entered into after the 1st day of June, 1979 by a declarant or proposed declarant of a unit or proposed unit for residential purposes is not binding on the purchaser until the declarant or proposed declarant has delivered to the purchaser a copy of the current disclosure statement and all material amendments thereto.

(2) The purchaser, before receiving delivery of a deed to or transfer of the unit, may rescind the agreement of purchase and sale within ten days after receiving the disclosure statement or, where there has been a material amendment thereto, within ten days after receiving the material amendment.

In this case, the disclosure statement consisted of a large black binder detailing the proposed by-laws and regulations, maintenance costs, amenities and other factors relating to the condominium. At trial, the sales agents uniformly attested to having distributed the binders to the purchasers as a matter of practice upon execution of the agreements. However, the sales agents had no confirming documentation nor any specific recall of the distribution to any particular client. The agreement contained an acknowledgement by the purchasers of receipt of the disclosure statement, but this clause was neither initialled nor brought to the purchasers' attention.

Ms. Agbariya initially purchased a unit on February 25, 1989, but on March 7, 1989, replaced it with a second unit. At the time of this change, she signed a document saying that she was returning the disclosure binder. She stated on examination for discovery that she could not remember whether she had received the disclosure binder. At trial, she testified that she was sure she had not received it. After noting that Ms. Agbariya was an unsophisticated purchaser, had a grade 10 education, and presented as an honest witness, the trial judge found, on a balance of probabilities, that she had never received the binder, despite the acknowledgement both in the agreement of purchase and sale and in the cancellation document.

Isaak Nemirovsky's wife testified that her husband had received the disclosure statement by registered mail some time after March 22, 1989, and that, in April 1989, they returned to the sales office to get out of the deal. On the basis of Mrs. Nemirovsky's evidence, the trial judge concluded that the Nemirovskys should have been entitled to rescind the agreement.

An appellate court should not reverse findings of facts of a trial judge in the absence of palpable and overriding error: *Lapointe v. Chevrette*, [1992] 1 S.C.R. 351, 90 D.L.R. (4th) 7. The court should be especially cautious where the findings are based on the credibility of the witnesses. I will not interfere with the trial judge's finding that Ms. Agbariya had not received a disclosure statement, as it was essentially one of credibility. It was not clearly wrong. The appeal with respect to Ms. Agbariya on this ground therefore fails. I have more difficulty, however, with the finding regarding Mr. Nemirovsky. Section 52(3) of the Condominium Act requires that the notice of rescission be in writing. There is no evidence that this was done. Further, by letter dated October 9, 1990, Mr. Nemirovsky's solicitor requested that Townsgate's solicitors advise him when interim occupancy and final closing would be taking place. While not determinative, this constitutes an affirmation that the deal had not been cancelled. In my view, the appeal with respect to this respondent should succeed.

Late Acceptance of Agreement of Purchase and Sale

The agreements of purchase and sale stated:

This offer shall be irrevocable by the Purchaser until one minute before midnight on the fifteenth day after its date, after which time if not accepted, this offer shall be null and void and the deposit returned to the Purchaser without interest. The undersigned accepts the above offer and agrees to complete this transaction in accordance with the terms thereof.

Paragraph 24 of the agreements provides: "This offer when accepted shall constitute a binding contract of purchase and sale."

Marmi Horowitz, the on-site representative employed by Norman Hill, testified that a representative of the appellant attended at the sales office "within a week" of the grand opening to sign the agreements on its behalf. Ms. Horowitz testified that she then attempted to contact each of the purchasers to let them know that their agreement had been accepted. If she was unable to reach someone or a message was not returned within a couple of days, she sent the accepted agreements to the purchasers by registered mail. No records were kept of the telephone calls, the mailings, or the acceptance dates.

The trial judge found that six of the respondents, Shoshana Agbariya, Elazar Astrug, Moti Fishman, Morris Freedman, Boris and Natalia Galperin, and Isaak Nemirovsky, did not receive their accepted agreements within the 15-day time period stipulated in the agreements, thus rendering the agreements null and void.

Communication of Acceptance

The appellant submits that, in accordance with the wording in the agreements, communication of the acceptance was not required. It argues that a binding agreement was created when the offer was signed by the appellant's representative within the 15-day period.

As a general rule, acceptance of an offer must be communicated to have a binding contract. Depending on the language of the contract, there are exceptions to this general rule. The appellant relies on the decision in *Principal Investments Ltd. v. Trevett*, [1956] O.W.N. 353, 3 D.L.R. (2d) 311 (H.C.J.). In that case, the court considered a clause parallel to para. 24 in this case. It stated: "This offer, when accepted, shall constitute a binding contract of purchase and sale." Barlow J. held that this clause waived the necessity of communication. Once the offer was signed, it became a binding contract. However, I do not agree with that conclusion. Nothing in the language of the contract waives the necessity for communication of the acceptance. Moreover, a majority of this court expressly disagreed with this reasoning in *Schiller v. Fisher* (1979), 25 O.R. (2d) 56, 100 D.L.R. (3d) 186, reversed on other grounds, [1981] 1 S.C.R. 593, 124 D.L.R. (3d) 577.

The appellant also referred to *Shelson Investments Ltd. v. Durkovich* (1984), 34 Alta. L.R. (2d) 319 at p. 331 (Q.B.). In that case, the court held that a document stating that it was to "constitute an agreement of purchase and sale forthwith upon being signed by both parties" made communication of acceptance unnecessary. There is no analogous language in this case. On the wording of these agreements, in my opinion, it is not sufficient that the acceptance is merely signed.

The appellant also submits that the acceptance of the agreements was properly communicated by way of telephone contact by Ms. Horowitz within the 15-day period. As the trial judge found that this communication did not take place, we give no effect to this submission.

Acquiescence to Late Acceptance

The appellant submits that, although there was no express agreement between the parties to extend the time limit for acceptance, the respondents, through their conduct, acquiesced to the late acceptance. The appellant relies on the fact that the respondents allowed their initial deposit cheques of \$20,000 to be cashed in March 1989 and their two subsequent deposit cheques of \$10,000 to be cashed shortly after their due dates. Each respondent also received correspondence from the appellant that clearly indicated that a binding agreement existed and took no objection. One of the respondents, Elazar Astrug, moved in December 1990 and thus did not receive correspondence from the appellant after that date. However, the evidence establishes that there was substantial correspondence before that date.

In addition, the appellant argues that a number of the respondents acted in a positive manner consistent with their intention to close. They rely on the following evidence. Natalia Galperin said that it was possible that, in April 1991, she told one of the sales office staff to call her back to select unit finishes as her husband was out of town. Morris Freedman admitted to making two appointments to select unit finishes in April 1991 and cancelling both. Moti Fishman met with the builder about the end of May 1991 to discuss the appellant's 15 per cent reduction proposal. Gitya Nemirovsky recalled having gone with her husband to discuss the 15 per cent reduction.

The trial judge did not consider this evidence of positive conduct in her reasons. She found that the actions of these respondents "in the particular circumstances" could not be taken as affirmation of their contracts.

In *Imperial Oil Ltd. v. C & G Holdings Ltd.* (1986), 58 Nfld. & P.E.I.R. 326, 174 A.P.R. 326 (Nfld. T.D.), affirmed (1989), 78 Nfld. & P.E.I.R. 1, 62 D.L.R. (4th) 261 (Nfld. C.A.), Imperial Oil sued for specific performance of a contract relating to operation

of a service station. The owners had signed an agreement to become dealers upon the advance of funds by Imperial Oil. Goodridge J. held that, although the time for acceptance by Imperial Oil had expired, the owners had impliedly agreed to extend the time for acceptance through their conduct. First, the owners had never repudiated the acceptance. The court acknowledged that there would normally be no reason to do so once the offer had expired. But in this case, there was ongoing discussion between the parties that made repudiation appropriate. Second, the owners repeatedly asserted the terms of the contract after the expiry by asking for the funds due under the contract. Goodridge J. concluded at p. 341, "By their conduct, they must be deemed to have acquiesced in the late acceptance. By virtue of the acquiesced acceptance, a contract came into existence."

I think that something more than passive acceptance of documents may be required. Basing acquiescence or affirmation on passive conduct would place an unfair burden on purchasers to actually repudiate the contract when, as Goodridge J. acknowledged, there would seem to be no reason for them to do so. However, when purchasers actively continue to "assert their rights" under the contract, it is evident that they have affirmed its existence. In addition, permitting the deposit cheques to be cashed is compelling evidence. This accords with common sense and reasonable commercial expectations. Accordingly, in my view, the trial judge erred in failing to find that all six of the respondents affirmed the contract.

Estoppel and Waiver

The appellant submits that the failure of the six respondents to indicate by word or conduct that the agreement was not waived on account of late acceptance rendered them estopped from doing so.

The principle of estoppel was outlined in *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50, 80 D.L.R. (4th) 652. The concept is that a person is precluded from retracting a promise, by words or conduct, upon which another has relied. *Shelson Investments Ltd. v. Durkovich*, supra, involved the defendant's late communication of acceptance of the plaintiff's counter-offer to buy an apartment building. O'Leary J. held that the wording of the counter-offer made communication of acceptance unnecessary, but that, in any event, the plaintiff's silence and accompanying conduct estopped him from denying a binding contract on the ground of lack of communication. He said, at p. 332:

The plaintiff at no time during the period following execution of the interim agreement to the date litigation was commenced indicated to the defendant that it was taking the position that no contract existed due to failure on the part of the defendant to communicate his acceptance of the counter-offer. In *Waddams, The Law of Contracts*, the author says at p. 60:

... if one party is aware of the other's belief in the existence of a contract, and does nothing to deny it, but acts himself as though there were a contract, he may be estopped from later denying that a contract exists.

There is nothing in the correspondence from the plaintiff's solicitor or otherwise which suggests that the plaintiff was taking the position that no contract existed because acceptance of the counter-offer had not been communicated to the plaintiff. The plaintiff in fact filed a caveat to protect its interest under the interim agreement. At the same time, the correspondence from the defendant's solicitors made it quite clear that the defendant believed a binding contract existed. The issue of lack of communication of acceptance was not raised at any time prior to the commencement of litigation. In my view the plaintiff is estopped from now denying the existence of a valid contract on the basis that acceptance of the counter-offer was not communicated to it.

The facts in this case are similar. The respondents argue that, in light of the trial judge's finding that they took steps to cancel their deals and that the appellant was aware at an early stage of their dissatisfaction, there was no unambiguous promise by them not to rely on their legal rights and no detrimental reliance by the appellant. I do not agree. There is a difference between the respondents wanting to get out of the deal on the one hand, and claiming that the deal is not binding on the other. The appellant was entitled to rely on the existence of a binding agreement. The desire of the respondents to get out of what they considered to be a bad deal is really not relevant. In my opinion, they are estopped from claiming late acceptance.

In the circumstances, the evidence does not support a finding of waiver.

In the result then, I agree with the appellant's submission that the trial judge erred in holding that the agreements entered into by the respondents, Shoshana Agbariya, Elazar Astrug, Moti Fishman, Morris Freedman, Boris and Natalia Galperin, and Isaak Nemirovsky, were null and void because of late acceptance by the appellant.

Disposition In the result, I would allow the appeal except with respect to the respondents, Elazar Astrug, Eugeny Privis and Shoshana Agbariya. The judgment below is set aside and in its place judgment will go for the appellants for payment of the balance due by the respondents, other than the three referred to, of the purchase price for their units (see Appendix B of the appellants' factum). We were informed that there was no dispute with respect to these amounts. In addition, the appellants will have judgment for pre-judgment and post-judgment interest.

The respondents, Elazar Astrug, Eugeny Privis and Shoshana Agbariya, will have judgment declaring that they are not bound by the agreements which they entered into with the appellants and for the return of their deposits and any moneys paid under the agreements, together with pre-judgment and post-judgment interest.

Order accordingly.

CBR# 158

Landmark of Thornhill Limited v. Jacobson et al.

25 O.R. (3d) 628

Court File No. C13148 Court of Appeal for Ontario, McKinlay, Griffiths and Doherty JJ.A. September 25, 1995

APPEAL from a judgment of the General Division (Day J.), dismissing a claim for specific performance.

Christopher E. Reed, for appellant.

Gerald J. Morris, for respondents.

The judgment of the court was delivered by

MCKINLAY J.A.: -- This is an appeal from a judgment of the Honourable Mr. Justice Day, dated August 27, 1992, declaring an agreement of purchase and sale between the appellant and the respondents to have been terminated, and ordering the deposit moneys paid pursuant to that agreement be returned to the respondent, Michael Barry Jacobson.

FACTS**The Agreement of Purchase and Sale**

The appellant (vendor) Landmark, and the respondents (purchasers) Jacobson and La Plante entered into an agreement of purchase and sale in respect of a condominium unit in Thornhill, Ontario. The purchase price was \$315,300 for the unit and \$15,000 for an additional parking space. The purchasers paid an initial deposit of \$5,000 as well as further deposits required by the contract both prior to and upon interim closing. To the point of the motion before Day J., the purchasers had paid a total of \$82,575 toward the purchase price.

The agreement of purchase and sale, dated October 26, 1988, stipulated that the purchasers would be required to give a unit mortgage to be taken back by the vendor on the closing date in the amount of \$236,475. The terms of the vendor take-back mortgage (the mortgage) were to be as set out in Schedule B to the agreement. The closing date was specified in the agreement as March 31, 1991, or whenever the unit was substantially completed for occupancy. The unit transfer date or final closing date was the date on which title to the unit would be transferred to the purchasers, and was to occur on a date to be established by the vendor.

In the interim period between the closing date and the unit transfer date, the purchasers agreed, pursuant to para. 11 of the agreement, to make interim occupancy payments which included a mortgage interest component. The interest component was described in para. 11(a) of the agreement as the amount of interest payable in respect of the Vendor. Take Back Mortgage or the Unit Mortgage, as the case may be, during the Interim Occupancy Period for the principal amount described in either paragraph 1.e) or paragraph 1.f) hereof . . .

Events between the Signing of the Agreement and Interim Closing

On November 2, 1990, the vendor's solicitor wrote to the purchasers' solicitor advising them of an acceleration of the closing date from March 31, 1991 to December 21, 1990. Documents and moneys due on interim closing were set out in the letter. Also set out was an alternative to the mortgage which the purchasers had agreed to assume.

This alternative was comprised of conventional unit mortgage financing arranged with Canada Trust by the vendor on behalf of the purchasers. This alternative had no effect on the obligation of the purchasers to assume the mortgage. By virtue of the alternative, Canada Trust would pay the amount due under the mortgage to the vendor on behalf of the purchasers. The purchasers would then discharge the mortgage upon payment to Canada Trust. Without the amendment, the purchasers would arrange for financing of the mortgage through some other financial institution.

Although this letter was dated November 2, 1990, the purchasers had in fact already executed an amendment to the agreement on October 11, 1990, which amendment provided that the purchasers would assume a unit mortgage to be arranged by the vendor in the amount of \$236,475.

Following other correspondence, on November 30, 1990, the purchasers' solicitor advised the vendor that the purchasers

. . . at all times understood and was aware that he had to arrange for payment of the purchase price of a unit from his own resources or mortgage arrangements. My client advises that he never agreed to assume a unit mortgage to be arranged by the vendor.

This, of course, was inaccurate. The original agreement, signed by the purchasers, included the obligation to assume a mortgage. This provision was subsequently amended to the extent that the purchasers obligated themselves to a conventional first mortgage arranged by the vendor through Canada Trust. The purchasers were, of course, obligated to arrange their own financing or pay from their own resources, because the agreement states that the mortgage is not intended to be permanent financing.

The vendor's next move was to offer to the purchasers four options in view of alleged uncertainty surrounding the enforceability of the mortgage as a result of a decision of Rosenberg J. in *Albrecht v. Opemoco* (1989), 70 O.R. (2d) 151, 61 D.L.R. (4th) 594 (H.C.J.), which held that vendor take-back mortgages similar to that involved in this case were in contravention of s. 51(6) of the Condominium Act, R.S.O. 1980, c. 84 provision. The purchasers declined to exercise any of the proposed options, insisting that no mortgage component would be payable in respect of occupancy. The purchasers advised on December 13, 1990 that they were prepared to close, making interim occupancy payments with no mortgage component, and reserving to the vendor its right to claim the interest component of the occupancy fees if the Court of Appeal reversed the decision of Rosenberg J. in *Albrecht*. On December 20, 1990, counsel for the purchasers delivered to counsel for the vendor a series of documents required for interim closing. On December 21, 1990, the vendor acknowledged receipt of those materials, and further confirmed the purchasers' statement in the December 13, 1990 letter stating:

In the event that the Albrecht decision upon which your client relies is reversed on appeal and removes, in our view, any doubt as to the enforceability of our client's mortgage back to your client . . . the Vendor reserves its rights at law and pursuant to the Agreement to claim and recover from your client the monthly amount in dispute. The purchasers moved into the condominium as required by the agreement.

Events Subsequent to Interim Closing

In an undated letter (subsequently referred to as the letter of August 23, 1991), the vendor notified the purchasers that the date for final closing would be September 11, 1991. The vendor also sought to confirm certain information with respect to the financing of the mortgage.

The purchasers responded on August 26, 1991, reiterating their stance that:

In connection with your request with respect to financing arrangements, the purchaser did not agree to assume a mortgage arranged by your client and in connection with same . . .

Of course, the purchasers did agree to assume a mortgage, the financing of which was to be arranged by the vendor; this was the substance of the amendment to the agreement executed by the purchasers on October 11, 1990.

On September 23, 1991, the vendor delivered a letter to the purchasers enclosing a draft transfer of land for the condominium and a variety of other documents. The letter also included a paragraph regarding the mortgage, with reference to the amount of the mortgage and the fact that the mortgage was due seven days after the unit transfer date.

The vendor, in a letter dated September 24, 1991, reiterated its position (originally set out in its letter of December 21, 1990) that, although it did "not accept or specifically deny [the purchasers'] stated position . . . that the vendor is not entitled to receive the 'interest portion' of the occupancy fee" the vendor was prepared to close on the following terms:

To facilitate the closing of this transaction, without prejudice to our clients rights under the Agreement and under the Condominium Act and in the event the Albrecht decision, upon which your client relies, is reversed on appeal and removes, in our view, any doubt as to the enforceability of our client's mortgage back to your client (including its rights to collect the interest portion of the monthly occupancy fee), the Vendor reserves its rights at law pursuant to the Agreement to claim and recover from your client the monthly amount in dispute.

The purchasers responded on September 25, 1991, stating that:

[The purchasers'] position has always been that this was to be a cash transaction and since the VTB Mortgage is not enforceable and my client has made first mortgage arrangements with CIBC Mortgage Corporation, no VTB mortgage will be delivered on closing.

The purchasers here would appear to be saying that no mortgage was due on closing solely on account of the Albrecht decision, and not on account of any undertaking by the vendor or understanding between the parties that a mortgage would not be required in light of that decision.

In a letter dated September 25, 1991, the vendor agreed to extend the closing date to September 30, 1991. The vendor also sought a clarification of the position being taken by the purchasers with respect to the mortgage:

[Y]our client had amended the Agreement of Purchase and Sale, which original Agreement of Purchase and Sale provided for the giving back to the vendor of a vendor take back mortgage which has a term of 7 days. Your client subsequently amended the Agreement of Purchase and Sale to provide for the giving or assuming of a unit mortgage in accordance with Schedule "C" of the Agreement of Purchase and Sale. You took the position that since your client did not have counsel at the time that he executed this amendment that the amendment was not valid. We did and do not agree with your stated position. If your position is as you maintained prior to the interim occupancy that the amendment to the Agreement of Purchase and Sale is not valid then obviously I must look back to the original Agreement of Purchase and Sale which provides for the giving of a 7 day vendor take back. If your position is now that the Agreement of Purchase and Sale provides for a 7 day vendor take back mortgage does not exist either, then I must look to the amendment to the Agreement of Purchase and Sale which is a unit mortgage, in which case your client has been in default by not making any application to the Vendor's Lender as he is obliged to do so. Please confirm as to what your position now is.

The purchasers responded by letter dated September 26, 1991:

As previously indicated, I am of the opinion that the VTB provisions of the Agreement of Purchase and Sale are not enforceable. My position remains the same in that my client advises that he did not agree to assume a mortgage to be arranged by your client with Canada Trust. I am instructed to advise that no VTB mortgage will be delivered. The reservation of rights to claim occupancy fees remain.

The vendor, by letter dated September 26, 1991, maintained that a mortgage was required.

On September 30, 1991, the purchasers advised the vendor that they had tendered the purchase money on the vendor's representative, who had refused to accept it and had also refused to deliver the transfer of the condominium unit. The purchasers viewed the refusal as a fundamental breach of the agreement. The purchasers reiterated their view that the vendor was not entitled to the mortgage and, in the event that they were wrong, stated that the vendor could be adequately compensated in damages. The purchasers also make mention of a letter from the vendor dated September 30, 1991 and inquired as follows:

In connection with your letter of September 30, 1991 delivered by your representative, I would appreciate you advising as to whether same is intended merely to restate your prior position of reserving any rights you have in the event the Albrecht decision is reversed on appeal or whether your letter was to indicate that you are prepared to complete the transaction while reserving your rights?

By letter dated October 9, 1991, the purchasers notified the vendor that the agreement was terminated as a result of the fundamental breach of the vendor. They demanded that the deposit money be returned with interest.

THE ACTION

On October 29, 1991, the vendor issued a statement of claim seeking specific performance of the agreement and damages in addition to specific performance and, in the alternative, common law damages for breach of contract.

The purchasers vacated the condominium unit on November 17, 1991. They issued a statement of defence and counterclaim on November 20, 1991.

Both purchasers and vendor moved for summary judgment. The motions judge found that:

At the time of the occupancy closing in December 1990 the enforceability of the vendor take back mortgage was in doubt by reason of the decision of Rosenberg J. in *Albrecht v. Opemoco . . . Landmark and Jacobson* agreed that the mortgage component of the occupancy fee would not be payable during the occupancy license and reserving to Landmark the right to claim same if the decision was reversed on appeal. The occupancy closing was completed on that basis.

In view of Landmark's refusal to transfer title in face of the purchasers' refusal to assume the vendor take-back mortgage, Day J., in awarding damages to the purchasers, held that:

[The purchaser] did what was reasonable for him to do given the state of the law at both closings. He offered Landmark the full purchase price at closing with an acknowledgement to Landmark of having to pay the mortgage interest component of the occupancy fee if the Court of Appeal reverses the decision of Rosenberg J. He put Landmark in a position where, despite the technical requirements of the contract, Landmark could not lose. I find Jacobson acted in best faith, given the law facing him at the time.

The "acknowledgement" referred to by the motions judge can only refer to the original agreement between the parties that the purchaser would not pay the mortgage interest component during interim occupancy, but would reserve its rights to claim those moneys should the Albrecht decision be reversed on appeal. This was certainly not an undertaking to pay the moneys involved should the Albrecht decision be reversed.

Although his reasons are not completely clear on the matter, Day J. appears to have found that the terms of closing had been amended by agreement to exclude a vendor take-back mortgage. If so, he made a finding of fact for which there is no evidence. There is nothing in the record to suggest that the vendor had agreed to close without the mortgage. The evidence indicates that the vendor, with the knowledge of the purchasers, continued to insist on a mortgage both up to final closing and afterward.

Given no evidence of an agreement to exclude the mortgage, the parties were bound to complete the contract on the terms to which they had agreed, not on "reasonable" terms, as concluded by the trial judge. To tender without assuming the mortgage was not in compliance with the terms of the agreement and went far beyond any understanding the parties may have had as to how the interest component would be dealt with. The vendor take-back mortgage constituted the basis of a future possible claim by the vendor for the interest component of the occupancy fee in the event of a reversal of Rosenberg J.'s decision in *Albrecht*.

The purchasers failed to complete the purchase as agreed.

Given the purchasers' breach, the vendor was entitled to elect to keep the contract alive and sue for damages or specific performance, which it did.

In addition, the fact of the purchasers' breach gave the vendor the right to refuse to transfer title: see *Bethco Ltd. v. Clareco Canada Ltd.* (1985), 52 O.R. (2d) 609, 22 D.L.R. (4th) 481 (C.A.). There can be no suggestion in this case that the vendor repudiated the contract by refusing to transfer title to the condominium unit. The evidence is that the vendor was at all relevant times ready, willing and able to close the transaction in accordance with its terms.

SPECIFIC PERFORMANCE

As stated above, the vendor requests an order for specific performance of the agreement.

Contracts for the purchase (and usually the sale) of real property traditionally have been specifically enforced. The original rationale for specific enforcement of any contract was the unique nature of the property involved, and real property has historically been treated by courts as unique in nature. Therefore, it was considered that damages could not compensate a purchaser for the loss of the particular property contracted for if it were realty.

In spite of the fact that a vendor of real property is getting nothing unique from his side of the bargain, specific performance has traditionally been awarded to vendors of real property as well as to purchasers, on the basis of mutuality of remedies.

It was argued by counsel for the purchasers that condominium apartments in modern multi-unit buildings are in no way unique, and should not, therefore, be subject to specific performance decrees at the plea of either vendor or purchaser. However, while many condominium units are of the mass-produced carbon copy variety, there are many which are truly unique. It is clear that uniqueness is an important factor for the court to consider in the exercise of its discretion to grant specific performance. However, the non-defaulting party should not be put in the position of having to prove the uniqueness of realty in order to succeed. On the other hand, a defaulting party should be required to prove any lack of uniqueness on which it wishes to rely.

In determining whether or not to exercise discretion in favour of specific performance, the court should look not only at the nature of the property involved, but also the related question of the inadequacy of damages as a remedy. In addition, because of the equitable nature of the remedy, the court should take into account the behaviour of the parties. In this case, the purchasers had nothing to lose by giving the vendor take-back mortgage which was agreed to in the agreement of purchase and sale. The vendor had agreed that, if the Albrecht decision were ultimately upheld on appeal, the interest portion of the occupancy fee would not be payable to it under the mortgage. However, had the vendor not had the mortgage, and the Albrecht decision been reversed on appeal (as it was [(1991), 5 O.R. (3d) 385, 85 D.L.R. (4th) 289]), then the vendor would have had nothing on which to sue. There

is no indication that the purchasers presented a written undertaking at the time set for final closing to pay the interest portion of the occupancy fee if the Albrecht decision were reversed on appeal.

The vendor's behaviour was impeccable throughout. The purchasers were in possession of the property from December of 1990 to November of 1991. By that time the condominium market in Toronto was in considerable difficulty, to the extent that the vendors, even up to the time of the appeal hearing, had been unable to resell the unit. Had the purchasers closed the transaction in accordance with the agreement they made, they might still be living in the unit. In any event, from the point of view of the vendor, its sale would have been concluded, and it would not have had a vacant unit on its hands for an indefinite period of time. Given all of the circumstances, I am of the view that this is an appropriate case in which to award the remedy of specific performance in favour of the vendor.

RESULT

I would set aside the judgment below, and replace it with an order for specific performance of the agreement of purchase and sale, including the vendor take-back mortgage. The appellant is entitled to its costs here and below.

Appeal allowed.

CBR# 272

Re Ryan and Cam-Valley Developments Ltd.

15 O.R. (3d) 24

Action No. RE2025/92 Ontario Court (General Division), Somers J. July 29, 1993

APPLICATIONS about the return of a deposit paid under an agreement for the sale of a condominium unit.

Angela M. Costigan, for applicant (respondent in counter- application).

Jerry Herszkopf, for respondent (applicant in counter- application).

SOMERS J.: -- There are two applications before the court in this matter -- one by the applicant/purchaser and one by the respondent/vendor. Essentially the two applications are the reverse sides of the same issue. The applicant/purchaser seeks to have the agreement of purchase and sale into which he entered with the vendor/respondent on February 14, 1989 declared null and void and to have his deposit of \$59,010 returned to him. The vendor/respondent by way of cross- application seeks to have the same agreement declared valid, thereby entitling it to retain possession of the deposit moneys.

The arguments raised by the applicant are two-fold: Firstly, it takes the position that there is no clear or any description in writing of the land purported to be sold by the vendor to the applicant and that the agreement therefore offends the provisions of the Statute of Frauds, R.S.O. 1990, c. S.19.

On the facts the applicant, Dr. Edward Ryan, and Caroline M. Gilligan, then an employee of the respondent, executed a document entitled "Granite Gates I Agreement of Purchase and Sale". Because the question that is raised by the applicant concerns the adequacy or otherwise of the description of the land as set out in this agreement (the "agreement") I set out hereafter in some detail its contents.

Immediately under the title of the document on two lines there appear the following words:

Unit No. -- 06 Suite 506

Level No. -- 05

The next five lines which appear before any of the numbered paragraphs in the agreement read as follows:

The undersigned, EDWARD A.J. RYAN and CAROLINE M. GILLIGAN (the "purchaser") hereby agrees with CAM-VALLEY DEVELOPMENTS LIMITED (the "vendor"), on the terms conditions and provisions set out below and in the Agreement and Schedules attached hereto to purchase the above referenced Unit in the Phase, finished in accordance with the specifications and conditions listed in the Agreement and Schedules together with an undivided interest in the common elements and the exclusive use of those parts of the common elements attaching to such Unit as set out in the Declaration (hereinafter collectively called the "Unit"). There follows the first numbered paragraph under the heading "purchase price" which determines that the total purchase price was \$393,400 and thereafter sets out the schedule pursuant to which the payments plus the mortgage taken back by the vendor will make up the total purchase price.

The next significant paragraph under this heading is para. 3 which reads as follows:

3. Paragraphs 1-47 and Schedules A-F attached hereto form part of and are an integral part of this Agreement. The Purchaser acknowledges that he has read all paragraphs, and schedules of this Agreement.

The next numbered paragraph appears under the heading "Definitions". Among the words which appear in this section and which are specifically defined, are the following:

(b) "Condominium" means the lands and buildings constructed or to be constructed by the Vendor on the Lands.

(e) "Lands", means that certain parcel or tract of lands and premises in the city of Mississauga, in the Regional Municipality of Peel described as Block KK, part of Block JJ and II, Plan M-199 Mississauga.

(i) "Phase" means Phase One approximately situated as shown in the area plan attached to Schedule "F".

Under the heading "Title" the following appears:

19. "The Purchaser agrees to accept title subject to and be bound by the following:

(a) the Declaration, Description, and the By-Laws (subject to any amendments that may be required by any mortgagee, any governmental authority, or the Land Registry Office, or pursuant to the Act to permit registration thereof, or any other charges including reduction or increase in the number of units that does not materially and detrimentally affect the value of the Unit) substantially in the form delivered to the Purchaser upon entering into this Agreement.

Under the same heading para. 21 reads as follows:

21. The Purchaser covenants and agrees not to register or permit to be registered the Agreement or a notice of this Agreement or assignment or transfer thereof, or a caution, purchasers' lien, or a certificate of pending litigation or any incumbrance whatsoever against title to the lands herein or the unit. The Purchaser shall register the transfer title forthwith upon its delivery and shall pay the costs of registration and taxes relating thereto. In the event that the Purchaser is in breach of this paragraph, the Purchaser hereby irrevocably appoints the Vendor as the Purchaser's lawful attorney with the power to execute any document or consent that may be necessary to remove any title encumbrance or registration. In the event the Vendor is required to pay any money to remove such title encumbrance or registration, the Purchaser shall reimburse the Vendor for such money together with interest at

2% per month and legal fees on a solicitor and his own client basis. Further on in the same agreement under the heading "Construction" two paragraphs are of interest. They read as follows:

24. The Purchaser acknowledges that the Vendor and/or its successors and assigns and/or any related companies may in the future construct another building or buildings on parts of the Lands (for residential, recreational, commercial and/or retail uses) and the Purchaser agrees not to object to such construction nor deem such construction as an inconvenience or nuisance, or make a claim for damages or injuries or otherwise. The Purchaser hereby consents to any rezoning required for the lands in order for the Vendor to proceed with its plans and hereby agrees not to object to any rezoning and Committee of Adjustment applications brought by the Vendor.

25. The Purchaser hereby agrees to accept the Vendor's Covenant of Indemnity regarding any lien claims which are the responsibility of the Vendor in full satisfaction of the Purchaser's rights under the Construction Lien Act, 1983 and will not claim any lien hold back on closing. The Vendor should complete the remainder of the condominium according to its schedule of completion and neither the closing date nor the unit transfer date shall be delayed on that account.

On the face of the document it is clear that the description of the land upon which the building containing the subject unit was to be built does not appear. For some reason the drafter omitted a reference to the land sufficient to make clear precisely where the building was to stand. The applicant argues that unless the document containing the agreement between the parties is sufficient in its particulars to identify the land properly and precisely, the contract is a nullity and thus in breach of the provisions of s. 1(1) of the Statute of Frauds. This section reads as follows:

1(1) Every estate or interest or interest of freehold and every uncertain interest of, in, to or out of any messuages, lands, tenements, or hereditaments shall be made or created by a writing signed by the parties making or creating the same, or their agents thereunto lawfully authorized in writing, and, if not so made or created, has the force and the effect of an estate at will only, and shall not be deemed or taken to have any other greater force or effect.

I accept as a general principle of law that in any transaction involving the sale of land, the agreement must be committed to writing and the land must be so identified that there can be no mistake between the parties as to its location.

In her argument, counsel for the applicant referred me to the case of *Turney v. Zhilka*, [1959] S.C.R. 578, 18 D.L.R. (2d) 447. I have doubts as to the applicability of that case. In it the description of the land purportedly being sold referred to a block of land and went on to say in part, "and not buildings situated on the east side of 5th line West in the Township of Toronto". The parties were apparently agreed that the description did not mean that the buildings were to be removed but that certain lands around the buildings were to be retained by the vendor. It was for that reason that the court held the contract to be unenforceable under the provisions of the Statute of Frauds, because no clear agreement was ever reached. That is not the case here. Obviously the parties did reach an agreement. The purchaser knew precisely what was being bought. He takes the position he does in his application, not because of any uncertainty as to the location of the unit he has purchased, but because he seeks, through a technicality, to avoid the contract.

In my view, on the facts and on the wording of the agreement, the land is properly described. To begin with, there is mention in the conditions, particularly ss. 21 and 24 of "the lands". Since para. 3 of the agreement specifically incorporates these two paragraphs into the contract, the definition section under para. 5(e) which provides a specific definition of the land upon which the condominium building is to be erected is triggered. Another reference to "Lands" is found in the definition of condominium, which includes the lands and buildings constructed or to be constructed by the vendor on the lands. Applicant's counsel suggested that because the word "lands" appears in some instances with its first letter capitalized and in others not, the drafter intended there to be a different meaning or usage to be applied. In this regard counsel for the respondent referred me to the unreported decision of the Court of Appeal dated April 20, 1993, of *Cheung v. The Greens at Tam O'Shanter Inc.* [now reported at 31 R.P.R. (2d) 52.] In dealing with a similar complaint Morden A.C.J.O. says at p. 3 of the reasons [at p. 55]: The complaint is that the declaration defines terms and capitalizes them and then, in some places in the text of the declaration, the defined terms are not capitalized. This slight lack of formal consistency causes no difficulty in understanding the declaration.

In addition to this, Schedule F is, by virtue of the wording of para. 3 of the agreement, included into and forms part of the agreement. Schedule F is a site plan showing the precise location of the building which contains the condominium unit. Again, it is not a metes and bounds description and regrettably it contains no reference to its geographic location beyond the names of the street and cross-street where it can be located.

On the back of the agreement, the applicant and Ms. Gilligan signed an acknowledgement confirming that they received the agreement of purchase and sale and certain other documents. These documents were delivered pursuant to the provisions of s. 52 of the Condominium Act, R.S.O. 1980, c. 84, and s. 32 of R.R.O. 1980, Reg. 121 under that Act. Included in these documents is the declaration made pursuant to the Condominium Act and the disclosure statement. Counsel for the applicant points out that the declaration contains the following words:

WHEREAS the Declarant is the owner in fee simple of lands and premises situate in the City of Mississauga in the Regional Municipality of Peel and be more particularly described in Schedule "A" attached hereto.

There is no Schedule A attached to the declaration. However, the disclosure statement, another one of the documents whose receipt was specifically acknowledged by the applicant, does contain a description of the lands. It is the same as that found in the definition section of the agreement of purchase and sale itself. In *Abdool v. Somerset Place Developments of Georgetown Ltd.* (1992), 10 O.R. (3d) 120 at p. 138, 96 D.L.R. (4th) 449 (C.A.), Robins J.A. said:

. . . I am of the opinion that regard can be had to all of the information provided to the purchaser. The disclosure statement cannot be viewed in isolation from the other documents mandated by s. 52(6) and (7), but must instead be seen in the context of those documents. They form part of the disclosure material and are intended, along with all of the information required by s. 52(6) and (7) to assist a purchaser in making an informed decision on whether to go ahead with the outstanding agreement. It may be noted that cl. (g) of s. 52(6) requires that the disclosure statement "fully and accurately disclose . . . any other matters required by the regulation to be disclosed. . . ." The disclosure statement contemplated by the Act cannot possibly provide full details of these documents or make reference to all of their provisions. It can, however, assist purchasers in comprehending them by directing attention to certain of their provisions for a more comprehensive statement of their content.

For all of these reasons I am of the view that the agreement does contain sufficient particulars of the land which was the subject matter of the agreement between the applicant and the respondent that it satisfies the requirements of the Statute of Frauds. On this branch of the applicant's submissions, therefore, the application must fail.

The second branch of the applicant's argument is entirely independent of the first. It relates entirely to the question of default by the purchaser, Dr. Ryan, and the procedures required of the vendor to terminate the agreement properly. This discussion has as its starting point the wording of para. 28 of the agreement of purchase and sale which reads as follows:

28. Upon default of the Purchaser of any of the covenants, warranties, acknowledgments and obligations to be performed under this Agreement and without limiting the generality of the foregoing, any and all covenants relating to the period of occupancy, if any, and such default is continuing for seven (7) days after written notice thereof has been given to the Purchaser or the Purchaser's solicitor by the Vendor, then in addition to any other rights or remedies which the Vendor may have, the Vendor at its option shall have the right to declare this Agreement null and void and in such event all deposit moneys paid hereunder shall be forfeited to the Vendor and the Vendor may also claim for damages in excess of the deposit. If the Purchaser has taken possession of the unit, the purchaser shall immediately vacate the unit and the Vendor shall be at liberty to sell the Unit with or without re-entry.

The events giving rise to this line of attack are, in chronological order, as follows:

October 19, 1990 -- the vendor wrote to Dr. Ryan and Ms. Gilligan as follows:

Re Granite Gates (Phase 1) Suite No. 506

Congratulations! We are pleased to inform you that your new home is almost ready for occupancy. We wish to advise you that, pursuant to paragraph 17 of the Agreement of Purchase of Sale, the Occupancy Closing date of your suite will be January 10, 1991, and, accordingly, an inspection of your residence has been arranged for you on December 5, 1990.

Please contact us at 828-1774 to set a convenient time for the inspection. We will notify you in advance should these dates change because of matters that are beyond our control.

This will be your first opportunity to view your new home, and also to meet Camrost's Customer Relations Representative, who will walk through your suite with you and address any questions that you may have.

We look forward to hearing from you in the future.

Sincerely.

There does not appear to be any issue between the parties that the defendant was entitled to set the occupancy closing date for January 10, 1991 as it did. Dr. Ryan took the position that he did not receive this letter. He was, at the time the agreement was entered into, living with Ms. Gilligan who, in fact, was an employee of the vendors. By the time the October 19, 1990 letter went out, however, relations between them were strained and it was his unsubstantiated view that Ms. Gilligan had been intercepting his mail.

December 10, 1990 (approximately)

Dr. Ryan's evidence was that it was not until about four weeks prior to the closing date that he became aware of the date proposed for the transaction to be completed. He claimed that it was always his intention when he entered into the transaction that upon being notified of the closing date he would place his own property on the market in the reasonable expectation that the proceeds from that sale would provide him with sufficient funds to close the condominium purchase. The short notice, however, made that unlikely. In any event, he became aware that he would not have sufficient funds to close the transaction and probably would not have even if he had been aware of the proposed closing date on October 19. He took no steps to try and sell his home at this time. There is some question about the accuracy of his evidence about when he first became aware of the proposed closing date. During the course of cross-examination, testimony was elicited to the effect that Dr. Ryan's solicitor received the agreement of purchase and sale in November 1990 and that shortly thereafter he called the solicitors for the vendor and confirmed that the closing date would be January 10, 1991.

January 10, 1991

The transaction did not close. Apparently Dr. Ryan was not aware that this was not a final closing but only the occupancy closing date. He would not have been required on that date to provide the balance of the purchase price, but only a further deposit in the sum of \$39,340. Indeed he admitted on cross-examination that if he had been aware that that was the total amount required of him he would have been able to complete the occupancy closing on January 10, 1991. It was his view that he wanted to negotiate a later closing date with the vendor and indeed hoped to renegotiate the price to reflect more accurately the change in the real estate market and the recessionary times generally.

January 16, 1991

The solicitors for Cam-Valley wrote to the solicitor for Dr. Ryan as follows:

Re: CAM-VALLEY DEVELOPMENTS LIMITED SALE TO RYAN, Unit 6, Level Suite 506, GRANITE GATES, PHASE I

This will confirm that the occupancy closing for the above-captioned unit was scheduled to take place on January 10, 1991. To date, however, we have not received the requisite funds or documentation required to affect the above-captioned occupancy closing.

As we have received no correspondence from you with respect to this matter, we wish to advise that we regard your clients as being in breach of the Agreement of Purchase and Sale herein.

Without waiving any of our client's rights with respect to your client's default, and without prejudice to our client, our client is prepared to close the transaction with your client by no later than January 18, 1991, provided that adjustments remain as at January 10, 1991.

We would suggest that you advise your clients to conduct themselves accordingly.

Yours very truly.

February 5, 1991

The vendor's solicitor wrote Dr. Ryan's solicitors as follows:

Dear Sirs:

We are in receipt of your letter to us dated the 28th day of January, 1991.

A copy of your letter was forwarded to our client. The Vendor has asked us to advise you that although Caroline Gilligan did work for Camrost at one time, she was not authorized to make any representations with respect to the above-captioned project, on behalf of the Vendor, as she did not even work on the above project. Any representation made by Caroline Gilligan to Dr. Ryan was clearly made as Dr. Ryan's partner in purchasing the unit and not as a representative of Camrost.

Under the terms of the Agreement of Purchase and Sale, if necessary our client is entitled to extend the occupancy closing date. Your client had the opportunity to review the Agreement prior to execution and 10 days rescission period thereafter. If any of the terms were not satisfactory, he could have terminated the Agreement then. At no time did our client make any representation as to the resale value of the unit.

Please advise your client that our client expects both purchasers to honour their obligations under the Agreement of purchase herein, and to complete the within occupancy closing on or before February 8, 1991, or our client will have no alternative but consider your client in default of the Agreement of Purchase and Sale herein. Our client is prepared to exercise its remedies on default to the full extent permitted by law and in equity. Please advise your client to govern himself accordingly.

February 8, 1991

The transaction did not close, nor was the sum of \$39,340 payable on the occupancy closing turned over by Dr. Ryan to the vendors.

There were some conversations and negotiations between Dr. Ryan and representatives of Cam-Valley after February 8. As mentioned earlier, Dr. Ryan apparently viewed these as an opportunity to negotiate the price of the unit downwards, but this was unsuccessful. Particulars of the discussions were not revealed to the court because they were carried out on a without prejudice basis.

January 22, 1992

Dr. Ryan wrote to Cam-Valley as follows: Re: Suite 506 Granite Gates Phase I

Dear Mr. Usher:

As you are aware, the above unit was to have closed as per the initial agreement of purchase and sale, on March 1, 1990. Since our last meeting at your office on October, 23, 1990 at 2.30 p.m. I have heard nothing from you or your company in spite of the fact that you would get back to me within a few days. This is in spite of having telephoned your secretary, several times, to find out what you wished to do. Four months have now gone by and still no word. This is the exact type of non-communication I have had from Camrost in the past 3 years.

At this point in time I am left with no other alternative than to ask you to sign the enclosed Mutual Release form and return it to me with the deposit monies of approx \$59,010 plus interest (which interest you had said your company would credit me anyway).

Thanking you for your prompt attention to this long drawn out matter.

Yours sincerely.

There was enclosed in this letter a form of mutual release apparently prepared by Dr. Ryan which envisaged the return to him of his deposit in the approximate sum of \$59,010 and he and Cam-Valley mutually releasing one another from any claims they may have arising out of this agreement. This letter was apparently unanswered and the release was not executed by Cam-Valley.

February 18, 1992

Dr. Ryan wrote again to the vendor as follows:

Dear Mr. Usher:

Further to my letter dated Jan. 19, 1992, I have as yet heard nothing from you. I find this lack of communication from you to be most unfair and distressing but in total harmony with the disdain your company has treated me during the last few years. I must once again ask you to sign the Mutual Release form that I sent you, and to return my deposit monies with Interest as soon as possible.

In anticipation of an early reply, I remain

Yours sincerely.

February 25, 1992

Cam-Valley Developments wrote a letter to Dr. Ryan as follows:

Dear Dr. Ryan:

RE: CAM-VALLEY DEVELOPMENTS LTD. UNIT 6, LEVEL 5, SUITE 506

As you recall, you were advised by letter dated February 5, 1991 by our solicitors Bratty and Partners that if you did not complete occupancy closing on or before February 8, 1991 you would be in default of the agreement of Purchase and Sale. Unfortunately our without prejudice discussions in connection with regard to a satisfactory closing agreement have not come to any successful conclusion.

We are not prepared to sign a mutual release nor return the deposit monies to you.

Please be advised that we have now terminated the Agreement of Purchase and Sale and are treating all monies as forfeited and will hold you responsible for any damages and interest resulting from your default.

Please govern yourself accordingly.

Yours truly.

March 29, 1992

Dr. Ryan wrote a letter to the vendor in response to their last letter as follows:

Dear Mr. Swedlove,

It was so nice to hear from you and your company after such a long period of absolute silence. I thought you had left town. I hope you don't treat the rest of your clients as silently as you treated me. You should give lessons in how to bargain in bad faith. I suppose I should not be surprised as this is the kind of treatment I have had at your hands in the past 3 years.

To bargain requires a dialogue, your side of the dialogue has been very silent now for 4 and a half months, in spite of several phone calls to Comrost's office, that is not very nice or fair.

I had to send you 2 requests for a mutual release to get you to respond.

You have decided to terminate our agreement of purchase and sale, just like that. Well I would not do anything brash if I was you, the Law works both ways, and not always in the pathway of the Vendor.

You will be hearing from my council shortly, I had hoped that it would not come to this.

Please govern your self accordingly.

Yours truly.

There does not appear to be any issue between the parties that in fact from and after, January 10, 1991, Dr. Ryan and Ms. Gilligan were in default under the agreement of purchase and sale. There is some question about when Dr. Ryan became aware of the date fixed for the occupancy closing, but on the material before me it seems clear that the vendor took all steps required of it to give proper notice to the purchasers.

In my opinion, a careful reading of the default provisions of the agreement as set out in para. 28 requires that the following events must take place and in the following sequence:

1. There must be a default of the purchaser of any covenants, warranties, acknowledgments, or obligations to be performed under the agreement. As I have said there is no issue between the parties that this was so.
2. Written notice of the default must be given by the vendor to the purchaser or the purchaser's solicitors.
3. The default must continue for a period of seven days after such written notice has been given.

In my opinion the letter of January 16, 1991 from the vendor's solicitors to the solicitor for the purchasers satisfies this obligation. There was, in my view, no duty on the part of the vendors to offer to extend the closing date as they did in this letter, but it can be safely stated that if the occupation deadline as extended was not met and the transaction did not close on January 18, 1991, this letter would serve as adequate proof that the breach had continued for seven days after notification of the breach. Counsel for the applicant urges upon me that notice of the default should have been given after the failure to close the transaction on January 18, 1991. I do not agree with that. On my reading of the agreement, the operative date was January 23, 1991. That is seven days after the date upon which notice of the default was given by the vendor to the purchaser. After that date, the vendor was, in my opinion, entitled to terminate the contract.

Rather than do so, however, the vendor, through its solicitor, and in response to a letter received by their solicitors alleging certain representations made by Ms. Gilligan as their employee to Dr. Ryan, extended the closing date even further. In the fourth paragraph on the first page of that letter the solicitors for the vendor said "please advise your client that our client expects both purchasers to honour their obligations under the agreement of purchase and sale herein and to complete the within occupancy closing on or before February 8, 1991, or our client will have no alternative but consider your client in default in the Agreement of Purchase and Sale herein". Counsel for the applicant argued that the first extension of the closing date constituted a waiver of the vendor's right to rely upon the breach complained of. She further argued that the second extension of the closing date as set out in the letter of February 5, 1991 constituted a further such waiver. As to the first closing date, I have indicated that I do not agree with that suggestion. The letter of January 16, 1991 extending it indicated that the offer was made "without waiving any of our client's rights with respect to your client's default and without prejudice to our client". Counsel for the respondent argued that this constituted a reservation of rights permitting the vendors to rely on the breach at the time it wrote its letter of February 25,

1992, eleven months later. I do not agree with that suggestion. Based on the wording of the January 16, 1991 letter the vendor was only claiming that its right to rely on the breach would be preserved to permit it to propose the first extension of the closing date. Nothing is said in that letter about continuing such reservation beyond that date.

As to the suggestion that the letter of February 5, 1991 constitutes a waiver of the vendor's right to rely on the January 10, 1991 breach, the wording of the fourth paragraph would appear to bear this out. The letter is stated to be written "without prejudice", but since there is no specific offer or proposal of settlement of existing litigation, it does not appear that those words should be given any effect. There is no reservation of the vendor's right to rely on the January 10 breach expressed in the letter. Rather, it declares a new closing date of February 8 and states that if the occupancy closing does not take place on or before that date the vendor will have no alternative but to consider the purchaser in default. If, as counsel for the vendor suggests, the vendor could still as of February 5, 1991, rely on the January 10 breach, why would it think it necessary or appropriate to notify the purchasers that if they do not close on the new date their client will "consider your client in default of the Agreement of Purchase and Sale herein". In my view this wording indicates a clear intention on the part of the vendor that a new date for the occupancy closing was established, that the agreement was in effect, rewritten, and that the earlier breach was waived.

It would follow from that that the strict provisions governing notification of default would have to be repeated. That is, notice of the default would have to be given after the default and if the default should continue seven days thereafter, notice could then be given notifying the purchaser that the agreement was at an end. No notice of the breach of February 8 was ever given by the vendor to the purchaser as required by the provisions of para. 28 of the agreement. It follows that the February 25, 1992 letter is of no force and effect since by the provisions of the same agreement it can only have been sent after notice of the February 8, 1991 breach had been provided.

What counsel for the applicant submits is that by virtue of having so worded the letter offering a new closing date suggesting that default will arise if that new date is not met and also by virtue of their entering into negotiations with the purchaser in an attempt to settle this dispute the vendor is now estopped from attempting to rely on the breach of the agreement which occurred on January 10, 1991, which occurred some 13 months before the date on which the vendor purported to terminate the agreement. It is my view that an estoppel has been created similar to that referred to in the case of *M.L. Baxter Equipment Ltd. v. Geac Canada Ltd.* (1982), 36 O.R. (2d) 150, 16 B.L.R. 98 (H.C.J.). On the authority of the same case it would follow that the purported repudiation of the contract was wrongful and the vendor is liable to the purchaser as a result of this breach.

In my opinion, and for these reasons, the deposit moneys are not forfeit and the vendor is not entitled to retain them. The deposit moneys must therefore be returned by it to the applicant, Edward A.J. Ryan.

There appears to be no dispute between the parties that the sum of \$59,010 has been paid by Dr. Ryan to Cam-Valley. This was paid in four instalments, in different amounts and on different days. Counsel for the applicant has provided a calculation of the interest payable on the various amounts as they were paid and counsel for the respondent indicated no objection to the manner in which this was dealt with nor the calculations themselves. These are made pursuant to s. 33 of Reg. 121 under the Condominium Act. In the result, therefore, there will be judgment for the applicant:

1. Declaring that the agreement of purchase and sale between Edward A.J. Ryan as purchaser and Cam-Valley Developments Limited as vendor dated February 14, 1989 is null and void.
2. Directing the respondent to pay to the plaintiff the sum of \$59,010 together with interest calculated in the amount of \$17,737.75 for a total of \$76,747.75.
3. Declaring that the applicant has an interest in the lands, more particularly described as that certain parcel or tract of lands and premises in the City of Mississauga in the Regional Municipality of Peel, described as Block KK, part of Block JJ and II, Plan M-199 Mississauga ("the lands") to the extent of \$76,747.75.
4. Granting the applicant leave to issue a certificate of

CBR# 170

Lucyk on his own behalf and on behalf of all unit owners of Metropolitan Condominium Corp. No. 875 v. Shipp Corp.

(Gen. Div.)

4 O.R. (3d) 684 Action No. RE 86/91 Ontario Court (General Division) Somers J. September 4, 1991

APPLICATION to dismiss a representative action.

Patricia M. Conway, for applicant (respondent).

Robert D. Malen, for respondent (moving party).

SOMERS J.:-- This is a motion brought by Shipp Corporation Limited (Shipp) for an order dismissing an application brought earlier by Michael Lucyk. Lucyk has brought an application both in his personal capacity and in a representative capacity on behalf of all those registered condominium owners of residential units in the Kingsway-on-The-Park who purchased their units directly from the respondent, Shipp. In that application Lucyk seeks an order that Shipp be directed to do the following:

(i) pay each unit purchaser, by way of interest on deposits, the difference between the prescribed rate (as required by the Condominium Act, R.S.O. 1980, c. 84, s. 53(3)) and the rate actually paid by Shipp; and

(ii) pay each unit purchaser the difference between the amounts paid by them (as a portion of the occupancy fees) for realty taxes before closing and the amount Shipp actually had to pay in realty taxes until closing, pursuant to an undertaking contained in the standard agreement of purchase and sale signed by all unit purchasers to readjust for realty taxes.

The merits of that application are not before me on this motion. On this motion, brought under Rule 21 of the Rules of Civil Procedure, O. Reg. 560/84, Shipp seeks an order dismissing the application, on the grounds that it is not properly the subject-matter of a representative action and therefore ought not to proceed.

In order to understand better the nature and merits of this motion it is important that the background of the application be set out. In 1987 Shipp and the Mutual Life Assurance Company of Canada entered into a joint venture to build a condominium project consisting of two towers in the City of Etobicoke. This development became known as the Kingsway-on-The-Park and consists of some 289 units. Interim closings on these units occurred over the course of the spring of 1989, but final closings did not take place until approximately March 1990.

Michael Lucyk (Lucyk), and each member of the class which he purports to represent, purchased these units by entering into a standard form of agreement of purchase and sale drawn up and provided by Shipp. This agreement requires that a deposit on acceptance of the offer and further deposits at stipulated times and in stipulated amounts be paid. For example, the agreement by which Lucyk acquired his unit required that \$10,000 be deposited on acceptance of the agreement plus a further \$2,000 as a deposit for an extra parking space. An additional \$10,000 was required to be paid within ten days after Shipp notified him that the City of Etobicoke had issued a permit for the excavation and construction of the project. A further deposit was required within ten days after Shipp notified Lucyk that the floor slab directly above his dwelling unit had been poured. This was to be in an amount sufficient to bring the total deposit up to 25 per cent of the purchase price or a minimum of a further \$10,000, whichever was greater. The balance of the purchase price was to be paid by Lucyk when Shipp gave him a charge on the closing date upon the terms provided for in the agreement.

It should be stressed that the amounts required to be paid by each of the unit holders were not necessarily the same. These would, of course, vary depending on the amount of the purchase price of each unit, the size of the condominium unit and so forth. However, regardless of the amounts paid in accordance with the schedule of payments each agreement provided that interest would be paid on these deposits. Clause 2.01(f) reads as follows:

Interest at the Prescribed Rate on the deposits under 2.01(a), (b) and (c) (the schedule of deposit payment referred to above) shall be paid by the Vendor (Shipp) crediting the purchaser on the Closing Date for interest from the date of acceptance of this agreement by the Vendor for the initial deposit and from the respective dates the other deposits were received.

The agreement does not specify what is meant by "the prescribed rate". It perhaps relates to s. 53(3) of the Condominium Act which reads as follows:

(3) Subject to subsection (2), where a purchaser of a proposed unit under an agreement of purchase and sale referred to in subsection (1) enters into possession or occupation of the unit before a deed or transfer of the unit acceptable for registration as delivered to him, the proposed declarant shall pay interest at the prescribed rate on all money received by him on account of the purchase price from the day the purchaser enters into possession or occupation until the day a deed or a transfer acceptable for registration is delivered to him.

Further reference to interest payable under this Act is to be found in the regulations at R.R.O. 1980, Reg. 121 (Condominium Act), s. 33, which reads:

The rate of interest under subsections 53(2) and (3) of the Act on money held in trust under subsection 53(1) of the Act shall,

(a) for the six months immediately following the last day of March of each year, be 1 per cent per annum below the rate paid on The Province of Ontario Savings Office savings accounts on the 1st day of April of that year; and

(b) for the six months immediately following the last day of September of each year, be 1 per cent per annum below the rate paid on The Province of Ontario Savings Office savings accounts on the 1st day of October of that year.

It is not disputed that Shipp has paid interest on the deposits from the date they were received by it. At issue between the Lucyk group of purchasers and Shipp is the proper rate of interest that should have been paid. Without getting into the respective positions of the two parties it is sufficient for the purposes of this motion to say that evidence filed by the applicants in the main motion supports their contention that the rate of interest they should have received from Shipp is greater than that actually paid.

As part of the material filed there is a questionnaire completed by or on behalf of each unit holder who supports the application setting out, firstly, the payments he or she has made, secondly the interest paid on those payments by Shipp and thirdly, a calculation setting out what payments should have been received had the "correct" rate of interest been paid. It is worth noting at this point that not all of the unit purchasers have joined in the application, although it should also be noted that there are no unit purchasers or owners opposing it. Some 249 of the 289 unit owners have indicated a desire to be represented by the class.

The second area of dispute between the Lucyk group and Shipp was referred to by the parties in the course of argument as the "realty tax issue". This stems from the method of calculating the estimated property tax portion of the occupancy fee that all purchasers were required to pay Shipp prior to the final registration of the Condominium Corporation.

Paragraph 2.02 of the standard agreement of purchase and sale between Shipp and all of the unit purchasers provided for the payment of an occupancy fee which was not to be credited as part of the purchase price. Section 51(6) of the Condominium Act specifies that for residential condominiums the occupancy fee cannot be greater, on a monthly basis, than the total of:

(a) The amount of interest that the purchaser would have paid, monthly, in respect of any mortgage or mortgages he is obligated to assume or give under the agreement of purchase and sale (the "monthly mortgage fee")

(b) an amount reasonably estimated on a monthly basis for municipal taxes attributable to the unit (the "monthly estimated taxes")

(c) the projected monthly common expense contribution for that unit (the "monthly maintenance expense").

It is the "monthly estimated taxes" portion of the occupancy fee that is at issue between the Lucyk group and Shipp. The unit owners allege that there was an overcharge for this tax portion in 1989. It is claimed that the amount "reasonably estimated" by Shipp on a monthly basis actually exceeded the amount payable for each unit and that there should be a refund. As with the interest on deposit issue the amounts attributable to each unit differ but can be determined using the same method of calculation in each instance.

It can be seen that the alleged "wrongs" done by Shipp to each of the subscribing unit holders are identical. It is alleged that too low a rate of interest has been paid by Shipp to the unit holders on deposits and too high a figure representing the realty tax component of the occupation fee has been charged by it to the same unit holders. In each case the method of calculating the under-payment for interest and the over-payment for the realty tax component utilizes the identical mathematical calculation. In each instance the calculations produce different results because of differences in such things as purchase price, amount of deposit, date of occupation and so forth. There appears to be no dispute, however, on the basic facts and dates which underlie the calculations in all of the individual cases.

In bringing this motion the moving party points out that the class is not complete in that some 39 unit owners of the 289 suites have not joined in the proceedings and may well be opposed to them. It has been noted, however, that there is no evidence before the court to suggest any such antagonism nor, in my view, can one be inferred. Success in the overall proceedings would necessarily entail payment of a rebate in tax and interest payments to each of the unit owners. I believe that I can conclude no more than that for reasons of their own some of the unit owners in these proceedings have declined to enlist. It does not seem realistic to me that any of the unit owners, whether actively supporting the application or not, would be in opposition to a ruling which would see them paid a sum of money between \$5,000 and \$10,000 each.

It is also suggested that because a separate calculation is required in order to determine (a) the amount allegedly due to each of the unit holders and (b) the overall figure claimed from Shipp, separate examinations for discovery of each such unit holder should be held. This strikes me as a somewhat hollow argument since there is no dispute about the amounts paid by each such unit holder, both by way of deposit and of occupation fee. The method of converting these to an individual unit holder's claim is common to all unit holders by the application of the same arithmetical formula.

Finally it is urged on behalf of Shipp that on a closing of some sales, solicitors representing the new purchasers raised with Shipp the issues of the interest shortfall or tax over-payment. This appears in examples taken from correspondence filed as exhibits. Many others apparently did not. It is argued that the rights of any purchasers who did not specifically reserve their rights had merged on closing. This would create a situation where some members of the class may well have different rights than some others because their solicitors had the foresight to specifically reserve their rights on these points. However, Schedule B to the standard agreement of purchase and sale appears to deal specifically with this question. It reads in part,

B.1 The purchase price shall be adjusted as of the closing date for the following charges ...

b. realty taxes shall be adjusted as if they had been paid in full by the Vendor and shall be estimated by the Vendor for the calendar year in which the closing date falls as if the unit had been fully completed and separately assessed. Subject to readjustment when the actual assessment for the Unit is available ...

B.2 ...

b. subject to the Purchaser complying with all of his obligations under this agreement a readjustment of the monies held pursuant to paragraph B.1 (b) will be made by the Vendor within 30 days following the receipt of the final assessment for realty taxes applicable to the unit.

It does not automatically follow on the completion of a transaction that obligations between the parties merge on the closing. This is to be determined by the intention of the parties and if on the face of the written agreements the parties intended an obligation to survive closing there is no merger: *Fraser-Reid v. Droumtsekas*, [1980] 1 S.C.R. 720, 103 D.L.R. (3d) 385. In my view the intention of the parties to the various sale agreements was that the obligation to readjust realty taxes should survive closing and should not merge. I conclude, therefore, that this suggestion urged upon me by the applicant as a ground for holding that this is not a proper case for a class action is without merit.

The case from which much of our jurisprudence concerning representative actions stems is *Bedford (Duke) v. Ellis*, [1901] A.C. 1, [1900-3] All E.R. Rep. 694 (H.L.). This was an action in which Ellis and certain other plaintiffs sued on their own behalf and on behalf of other growers of fruit, flowers, and vegetables within the area of the Covent Garden of which the Duke of Bedford was the owner, to enforce various preferential rights to stands in the markets which they alleged had been given to them by the

Covent Garden Market Act (9 Geo. 4, U.K.) of 1828, c. 113. In allowing a representative action to stand the House of Lords placed substantial emphasis on the convenience of an action being brought in this way where there was a common interest among the plaintiffs. Lord Macnaghten said at p. 8 A.C., p. 697 All E.R.:

But when the parties were so numerous that you never could "come at justice," to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience: for the sake of convenience it was relaxed. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.

Cases in Ontario have sought to lay down some points of identification or guidelines which must be present before a representative action is properly constituted. In *York Condominium Corp. No. 148 v. Singular Investments Ltd.* (1977), 16 O.R. (2d) 31, 77 D.L.R. (3d) 61 (H.C.J.), Henry J. identified some of these at pp. 34-35 O.R., p. 65 D.L.R.:

Firstly, the class must be properly defined; secondly, all members must have a common interest; thirdly, the breach of the obligation is a wrong common to all; fourthly, the damage suffered is the same to all except in amount; fifthly, the relief sought is beneficial to all; and finally none of the members of the class has an interest antagonistic to any other members.

Steele J. in *Butler v. Ontario Regional Assessment Commissioner, Region No. 9* (1982), 39 O.R. (2d) 365, 139 D.L.R. (3d) 158 (H.C.J.) [affd (1983), 143 D.L.R. (3d) 573 (Div. Ct.)], applied these criteria in considering a case brought by a rate payer purportedly on his own behalf and all other rate payers of the City of Toronto claiming that the assessment roll for the city was discriminatory, arbitrary and capricious because certain geographic regions of the city were the subject of higher concentration of increased assessment. Mr. Justice Steele felt that what might otherwise be considered a properly constituted class action failed because, if the purported plaintiff was correct and was able to secure reassessments of all properties within the City of Toronto, there could well be property owners whose reassessments would not be to their liking and who would be antagonistic to the result.

It is urged upon me that in order for there to be a properly constituted representative action there must be a global fund or amount of damages available for distribution among the members of the class represented by the plaintiff, and that it is inappropriate in a class action for individual amounts of damages suffered by members of the class to be added together to arrive at this amount. Further it is urged upon me that a claim framed in damages is equally inappropriate in a class action. This would appear to me to be unnecessarily restrictive. I am more inclined to accept the view of Dea J. in *Alberta (Pork Producers Marketing Board) v. Swift Canadian Co.* (1981), 16 Alta. L.R. (2d) 313, 129 D.L.R. (3d) 411 (Q.B.) [affd (1984), 34 Alta. L.R. (2d) 274, 9 D.L.R. (4th) 71 (C.A.), leave to appeal to S.C.C. refused (1984), 57 N.R. 157]. In summarizing a number of the more recent authorities he concluded at p. 317 Alta. L.R., p. 415 D.L.R., that the following principles can be deduced from them:

A representative action will not be rejected simply because part of the relief claimed is damages; such an action may be framed in contract or tort provided there is a common interest and a common grievance; the fact that a detailed accounting or reference may be required will not cause the Court to reject a representative action if, in the circumstances, it is the best method of proceeding; the primary concern of the Court with respect to a representative action for damages is to ensure that the defendant is not prejudiced; in circumstances in which damages are ascertainable without the need for individual examinations for discovery, a representative action may proceed; the proper approach is to examine each case to determine if, in the circumstances, a representative action is the appropriate action.

At p. 319 Alta. L.R., p. 417 D.L.R., he went on to say:

To say that the claim of each member of the class is exactly the same in the sense that each want the declaratory relief and each wants the class damages is correct. But to say that the claim of each member is the same in the sense that the quantum of damages of each is the same is clearly not correct. That difference is a factor to be considered as it affects commonality. However, the nature of that factor when considered with all the other factors and circumstances of the case does not, in my view, detract from the commonality of interest otherwise evidenced sufficient to deny the members of the class the obvious benefits of a representative action in these circumstances.

In this case it would, in my view, be an unnecessary hardship on the individual unit holders if each one was forced to bring a separate action for what would amount to exactly the same relief. While there is not a common "fund", the exact amount of the claim being made against Shipp is known, and the calculation of its component parts as represented by the individual claims of each unit holder is easily calculated and, what is more important, is to be determined by using the same mathematical formula. In my view the facts of this application lead to the conclusion that it meets all of the necessary criteria of a class or representative action and ought to be permitted to proceed in the manner and form in which it has been constituted. To do otherwise would force an unnecessary hardship on the plaintiffs and would create a multiplicity of proceedings, a situation which the court should at all times strive to avoid.

It follows that the motion brought by Shipp to dismiss the application brought by Michael Lucyk is dismissed. The costs of this motion are reserved to be disposed of by the judge hearing the main application.

Application dismissed.

CBR# 355

York Condominium Corp. No. 122 v. Sibblis

72 O.R. (2d) 12

Action No. M188193/89 District Court of Ontario Locke D.C.J. November 1, 1989

APPLICATION by a condominium corporation requiring a unit owner to remove a satellite television dish from a common element.

Ellen Montizambert, for applicant.

Stevan G. Ellis, for respondent.

LOCKE D.C.J.:-- The applicant manages 28 dwelling units and their common interests located on Bur Oakway, Downsview, Ontario. Since June, 1980, the respondent has owned and occupied a unit in this corporation. That unit is located, I am told, at the end of the row of dwellings.

On or about May, 1989, the respondent erected a satellite television dish at the side of his unit within the fenced area of that unit. That area is commonly known as his backyard, and a place constituting a common element in law, is nevertheless for his sole use as an owner.

He installed the dish without having first either notified the corporation or having obtained the permission of its directors.

After the dish was installed, Mr. Sibblis was notified by the corporation's manager that he was in breach of art. IV of the Capital Deed Declaration of York 122. He was requested to remove the dish. He refused. This application is the result.

There is no contest that it was not until July 19, 1989, or soon thereafter, that all owners of units in the corporation were notified at the order of the directors that no owner would be permitted to install or erect a satellite dish on any common element without compliance with the corporation's by-laws. It is a fair inference that until then, no by-law or other specific prohibition existed concerning the installation of television satellite dishes on the corporation's common elements. There is a further fair inference that Mr. Sibblis' dish was installed on the ground within the confines of his fenced backyard. The photographs of it clearly show a large television dish appearing over the top of Mr. Sibblis' fence. The issue in this application is whether the applicant is entitled to rely upon art. IV(1)(d) of the Declaration of York 122 in order to oblige the respondent to remove the dish and compensate the corporation in repairs (if any) to the common element and costs on either a solicitor-and-his-own-client basis or something less Draconian.

The article in question reads as follows:

No owner shall make any structural change or alteration in or to his unit or make any change to an installation upon the common elements, or maintain, decorate, alter or repair any part of the common elements, except for maintenance of those parts of the common elements which he has the duty to maintain, without the consent of the Board.

Rule 21 of the Rules of York 122 read as follows:

21. No building or structure or tent shall be erected and no trailer either with or without living, sleeping or eating accommodation shall be placed, located, kept or maintained on the common elements. Without question, the respondent Mr. Sibblis as an owner, is bound by and shall comply with the Condominium Act, R.S.O. 1980, c. 84, the Declaration of York 122 and its by-laws and rules.

I find on the material placed before me, that the board of directors of York 122, as far back as 1980, had permitted the specific installation in the backyard common elements of the various owners, metal storage sheds and the like in connection with the maintenance and cultivation of gardens. There is little material evidence that any of the other owners in the corporation have objected in any specific manner to the appearance of this satellite dish. There is some clear evidence that at least the owner immediately adjacent to the respondent's unit has apparently, by implication, consented to the existence of the dish by saying that he did not object to its being there. The respondent in his affidavit, states that he lives in a unit at the end of the structure. The only person to be affected would be his immediate neighbour, Mr. Ferguson, who does not object.

It is a further fair inference which I draw, that the respondent received no notice either before or during the installation of the dish, that the board of directors had objection to it. Nor was he requested to appear before the board either in person or in writing, in order to make his position known.

I therefore conclude, that pursuant to s. 29 of the Condominium Act, the board made a ruling on the subject of the installation of condominium satellite dishes on common elements well subsequent to this installation. It would appear that no rule existed prohibiting such installation at the time the dish was erected.

Counsel for the applicant relies to some extent upon the decision of the Honourable Mr. Justice Finlayson of the Ontario Court of Appeal in the case of *Re Carleton Condominium Corp. No. 279 and Rochon* (1987), 59 O.R. (2d) 545, 38 D.L.R. (4th) 430, 44 R.P.R. 228.

In that case, a condominium unit owner sold his unit to a purchaser with an agreed condition of the contract, that the purchaser for his exclusive use could install a satellite dish on the roof of the building. The declaration and description were registered and the condominium board then consisting of representatives of the declarant, passed a resolution granting consent to the installation of the dish. The dish was then installed on a common element. Subsequently, a new board of directors was elected consisting of representatives of the unit owners. It requested that the dish be removed. When this was refused, an application for an order was brought to the District Court. That application was dismissed. On appeal, the order was reversed and the dish was ordered removed.

Mr. Justice Finlayson at p. 554, in part, said the following:

As I interpret s. 38, it provides that substantial additions, alterations, improvements or renovations to the common elements require the affirmative vote of 80% of the unit owners, while other additions, alterations, improvements or renovations require only a simple majority vote, again of the unit owners. If the changes are substantial, any dissenting unit owner can compel the corporation to purchase his or her unit and common interest (s. 38(4)).

The learned appeal justice then observed:

I would have thought that the installation of a satellite dish was a substantial addition, but whether I am right or wrong in this is irrelevant. In the first instance this decision must be made by the board of directors (4.7.1), but in any event, the "consent" referred to in 4.7.2 of the declaration must be a consent obtained through a vote conducted under s. 38(1) of the Act by unit owners.

Section 38 of the Act provides that:

38(1) The corporation may by a vote of owners who own 80 per cent of the units make any substantial addition, alteration or improvement to or renovation of the common elements or may make any substantial change in the assets of the corporation, and the corporation may by a vote of the owners make any other addition, alteration or improvement to or renovation of the common elements or may make any other change in the assets of the corporation.

To a substantial extent, in my respectful view, the facts before the Court of Appeal in the Carleton Condominium case differ from those of the case at bar. Here I do not deal with a unit owner selling to a purchaser. Nor do I deal with a situation in which there is any evidence that 80% or more of the owners of the other units, at the time this installation was put in, objected to it. Further, there is evidence that no such by-law of the corporation or even a rule of the corporation relating to satellite dishes existed when the respondent installed his dish.

While counsel for the applicant has made it clear that she views this visible dish as somewhat of a blot on the landscape, there is nothing before me that other owners are of the same view. My own views as to whether the dish is an eyesore or a thing of beauty are totally irrelevant. The other cases presented for consideration deal mainly with whether or not dogs and other pets violate the rules of their respective condominium homes. Satellite dishes and dogs should not be considered as allied subjects for comparison purposes.

Exercising my judicial discretion as best I can, and solely in the light of the evidence before me, untested as it all is on both sides by cross-examination, the applicant has not established that really any of the other owners of the other condominium units take objection to this dish. Those owners by this time have all been notified that their directors object to satellite television dish installation without permission of the board to be obtained in advance. The respondent here had received no such notice. His professed desire to enhance his musical creativity in order to make a living by listening to music around the world, is quite unconvincing. I am satisfied that this installation is akin to a pre-existing non-conforming use, on a common element to which no objection by other owners has been taken.

I regard Mr. Justice Finlayson's reference to a dish being a substantial addition in the context of his judgment as obiter. In the result, in the light of these particular circumstances and these only, this application is dismissed. This is not an appropriate case for costs.

Application dismissed.

CBR# 263

Re Peel Condominium Corp. No. 199 and Ontario New Home Warranties Plan et al.

69 O.R. (2d) 438

Action No. 762/87 High Court of Justice, Divisional Court Boland, Chadwick and Isaac JJ. July 28, 1989.

APPLICATION for judicial review of a decision of the Ontario New Home Warranty Program denying coverage to the applicant.

P.M. Conway, for applicant.

Brian Campbell, for respondent, Ontario New Home Warranties Plan.

J.I. Laskin, for respondent, Sanrose Construction (Dixie) Limited.

The judgment of the court was delivered by

CHADWICK J.:-- This is an application under the Judicial Review Procedure Act, R.S.O. 1980, c. 224, for review of a decision of Robert Maling, Manager, Technical Services, Ontario New Home Warranty Program dated July 23, 1986. Maling refused the applicant coverage under the Ontario New Home Warranties Plan Act, R.S.O. 1980, c. 350, in connection with certain major structural defects, on the grounds that buildings which comprise the condominium project were built as a rental project and subsequently converted. Converted condominiums are not available for coverage under the provisions of the Ontario New Home Warranties Plan Act.

Facts

Although there is an issue between the parties as to the facts surrounding whether this project was intended as a rental project or a condominium unit from its first construction, there are a number of facts which are not in dispute.

Construction of the project began sometime in 1973 and was substantially completed in the early part of 1976. The project itself consisted of twin towers containing 270 suites and is located at 1400 Dixie Rd., in the City of Mississauga, in the Province of Ontario, and is known as "The Fairways". The project was constructed by the respondent, Sanrose Construction (Dixie) Limited which is owned and operated by two brothers, Jerry and Roman Humeniuk. The project was registered as a condominium corporation on March 28, 1979. The factual dispute between the parties relates to whether this project was a rental project in its initial stages which was subsequently converted to condominiums or whether, in fact, it was always intended to be a condominium project. The original occupants of the building obtained their interest by way of either a month- to-month lease, a fixed-term lease, or a capitalized lease.

The respondent, Sanrose, applied to HUDAC for registration under the Ontario New Home Warranty Program and on February 22, 1978, received a registration number.

On January 27, 1982, the applicants gave notice to the respondent, Ontario New Home Warranties Plan (Warranty Plan) of problems with two common elements, namely the roof and the exterior masonry wall. At that time, the Warranty Plan was not aware of the history relating to the occupation and ownership of the suites. The Warranty Plan carried out inspections of the premises and on September 24, 1982, rejected the roofing claim on the basis it was not a major structural defect within the meaning of the Ontario New Home Warranties Plan Act and regulation. The applicant appealed this decision to the Commercial Registration Appeal Tribunal and subsequently abandoned the appeal. At that time the Warranty Plan did not make a finding with reference to the exterior masonry claim and the matter was held in abeyance. Between October, 1982 and December, 1985, there was no further communication between the applicant and the Warranty Plan regarding the masonry wall. During this period of time the applicant was involved in litigation with the respondent, Sanrose.

In December, 1985, the applicant requested the Warranty Plan to review the professional opinions received by them regarding the exterior masonry wall and the proposed correction. The initial opinion given by Robert Maling was to the effect that he doubted whether the problem constituted a major structural defect. A number of meetings took place between the parties for the purpose of determining the type of rectification which would be required to correct the exterior masonry wall problem. A recommendation was made by the Warranty Program with reference to the rectification. The Warranty Plan at this point in time was complying with its statutory requirements of attempting to conciliate disputes between the parties. Up until then, the Warranty Plan had been acting on a without prejudice basis attempting to find the most economical solution to the problem and had not rendered a decision as to whether the exterior masonry problem was covered under the Warranty Plan.

In an effort to determine the construction history and background relating to the exterior wall, Robert Maling met with the respondent builder, Sanrose, on June 12 and 18, 1986. It was at this time that the Warranty Plan first learned of the background and history of this project as related to them by the respondent, Sanrose. In view of the information learned from the respondent, Sanrose, the respondent, Warranty Plan, advised the applicant on June 18, 1986, that they were considering the matter and that they would be in touch with them in due course.

On July 23, 1986, Robert Maling wrote a letter to the applicant, reviewing the history of the project which had been gleaned from the respondent, Sanrose. Mr. Maling wrote in part as follows:

Recently the Warranty Program has met with the developer in the presence of the developer's solicitors and it has asked its own solicitor to become involved in the assessment of the claim.

The Warranty Program's assessment and evaluation of the information at its disposal has been concluded and it regrets that no warranty coverage is available to the Condominium Corporation in respect of the masonry wall claim. The buildings which comprise the condominium project were built as a rental project with construction commencing in 1973, and with substantial completion in the early part of 1976. Subsequently, the units were either rented to individual tenants or a leasehold interest was sold in certain units to a numbered company who subsequently sold capitalized leasehold interests in those units to individual tenants. Not until 1979 was application made to convert the rental project into a condominium and after that point in time it is the

understanding of the Warranty Program that certain units have been sold to individual purchasers on a freehold basis. Unfortunately, projects that were built before the Act came into effect or even subsequent thereto, that were built and used as rental projects, which have subsequently been converted to condominiums are not available for coverage under the provisions of the Ontario New Home Warranties Plan Act.

A building purchased before the effective date of the Act and occupied as a rental building is not subject to the provisions of the Act. I believe the foregoing fully explains the Warranty Program's position with respect to this matter.

The Warranty Plan's position is that this letter constituted a decision made pursuant to s. 14 of the Ontario New Home Warranties Plan Act, R.S.O. 1980, c. 350, and that the applicant in this case should have proceeded by way of appeal pursuant to s. 16 of the Act.

The respondent, Sanrose, agrees with the Warranty Plan's position.

The applicant argued that this was not a decision under s. 14 and if it was a decision under s. 14, the respondent Warranty Plan had failed to comply with s. 16 in giving to the applicant notice of the entitlement to a hearing. Section 16 reads as follows:

16(1) Where the Corporation makes a decision under section 14, it shall serve notice of the decision, together with written reasons therefor, on the person or owner affected.

(2) A notice under subsection (1) shall inform the person served that he is entitled to a hearing by the Tribunal if he mails or delivers, within fifteen days after the notice under subsection (1) is served on him, notice in writing requiring a hearing to the Corporation and the Tribunal, and he may so require such a hearing.

(3) Where a person served requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and may by order direct the Corporation to take such action as the Tribunal considers the Corporation ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Corporation.

(4) The Corporation, the person or owner who has required the hearing and such other persons as the Tribunal may specify are parties to proceedings before the Tribunal under this section.

Decision of the Warranty Plan

Mr. Maling in giving his decision of July 23, 1987, did not include a notice of entitlement to a hearing for the commercial registration appeal tribunal as required by s. 16(2) of the Ontario New Home Warranties Plan Act. The applicant's position is, that as a result of the failure to provide proper notice and to adhere to the procedural requirements set forth in the Act, the decision is invalidated.

Further, the applicant argues that Maling, in reaching his decision of July 23, 1986, failed to give notice to the applicant, did not allow them to make representations and failed to treat them fairly before arriving at his decision.

It is clear from the evidence Maling was involved with all of the parties from the time of the revival of the notice in December, 1985, up until June 10, 1986. All of these meetings dealt with the exterior masonry problem and the method of correcting or resolving that problem. It was only on June 12th and 18th when he met with the respondent, Sanrose, that he embarked upon the inquiry relating to the question of coverage and whether in fact the project would be covered under the Act. There is no issue that he did not advise the applicant that this was what he was considering. When he finally wrote the letter of July 23, 1986, he had had no input whatsoever from the applicant relating to the question of coverage. With these facts, we would have no difficulty in finding that the Warranty Plan had not treated the applicant fairly; they did not give the applicant proper notice that they were going to deal with the coverage issue; and they did not allow the applicant to make representations and be heard before arriving at the July 23, 1986 decision.

It is clear from the principles enunciated in *Re Nicholson and Haldimand-Norfolk Regional Board of Com'rs of Police* (1978), 88 D.L.R. (3d) 671, [1979] 1 S.C.R. 311, 78 C.L.L.C. Paragraph 14, 181 (S.C.C.), that the respondents have a duty to treat the applicants fairly. If there had not been any other avenue open to the applicant, and this decision of July 23, 1986, would have disposed of its claim, then we would have allowed this application and remitted it back for a proper hearing.

However, s. 16 of the Ontario New Home Warranties Plan Act provides for a trial de novo hearing before the commercial registration appeal tribunal. The applicant's position is that Maling's decision of July 23, 1986, was not a decision within the meaning of s. 14 and therefore the applicant has no right to a trial de novo hearing. In the alternative, the applicant argues that the Warranty Plan has deprived the applicant of its entitlement to a hearing by not giving the applicant proper notice of that right.

The Warranty Plan's position is that this application is premature and that, though they have erred in not providing the proper notice, the applicant still has a right to proceed with an application to the tribunal to have this matter heard trial de novo, notwithstanding the time limitation set forth in s. 16. The applicant relies upon s. 10(7) of the Ministry of Consumer and Commercial Relations Act R.S.O. 1980, c. 274, which reads as follows:

10(7) Notwithstanding any limitation of time for the giving of any notice requiring a hearing by the Tribunal fixed by or under any Act, and where it is satisfied that there are prima facie grounds for granting relief and there are reasonable grounds for applying for the extension, the Tribunal may extend the time for giving the notice either before or after expiration of the time so limited, and may give such directions as it considers proper consequent upon such extension.

Although this section provides some relief to the applicant, it does require the applicant to satisfy the test under this section. We asked both respondents whether they would consider allowing the applicant to satisfy the test set forth in s. 10(7). We are hopeful that the tribunal will look with favour on an application by the applicant, especially in view of the fact that the applicant has been put in this procedural difficulty as a result of the respondent Warranty Plan's failure to comply with its statutory requirements regarding notice under s. 16(2). In the previous decision made by Mr. Maling with reference to the roof in 1982, this right was quite clearly set forth in the body of the decision.

In view of the fact that the applicant does have a right to proceed by way of a trial de novo application, the question becomes whether this application is premature. Thurlow C.J. in *Canadian Pacific Airlines Ltd. v. Williams*, [1982] 1 F.C. 214 (F.C.A.), dealt with a similar problem relating to the Canadian Human Rights Act, S.C. 1976-77, c. 33, and at p. 215 stated:

Moreover, it is to the Tribunal that Parliament has given the duty to decide such questions and even if some of them could be regarded as going to the Tribunal's jurisdiction, the Court should be slow to interfere when there is no good reason to think that the question will not be correctly decided by the Tribunal, where there is an appeal procedure provided by the statute and a further review open in this Court under the Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, and where there is no reason to think that the defence of its position before the Tribunal would be more onerous or costly for the person against whom the complaint is made than by bringing prohibition proceedings.

We are therefore of the opinion that the lack of notice and hearing before Maling and the failure to set out the proper notices required under s. 16(2) can be cured in the trial de novo hearing before the tribunal.

The alternative position advanced by the applicant was that this decision of July 23, 1986, was not a decision within the meaning of s. 14 of the Act and as such there was no right to a hearing. Section 14 reads as follows:

14(1) Where,

(a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

(b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or

(c) the owner suffers damage because of a major structural defect as defined in the regulations for the purposes of section 13, and the claim is made within four years after the warranty expires or such longer time under such conditions as are prescribed,

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

(2) In assessing damages, the Corporation shall take into consideration any benefit, compensation or indemnity payable to the person or owner from any source.

(3) The Corporation may perform or arrange for the performance of any work in lieu of or in mitigation of damages claimed under subsection (1).

The decision by Maling dealt only with the issue of coverage and did not go on to determine whether the exterior masonry problem was a major structural defect and to assess the damages. The applicant's position is that this section is very restricted and that the decision made by Maling relating to coverage was outside of s. 14 and the effect of it was to prevent the applicant from proceeding any further.

We are of the opinion that in order for Maling or any other officer of the Warranty Plan to make a decision under s. 16 they must first determine whether the applicant qualifies within the meaning of the Act, otherwise applications under s. 14 would be conducted in a vacuum. We are satisfied that the decision made on July 23, 1986, falls within s. 14 and was required to be made by Maling before he could proceed to determine whether the owner suffered damages because of a major structural defect and to make an assessment of these damages. The decision having been made under s. 14 of the Act, the applicant would then have its right to a trial de novo hearing pursuant to s. 16.

Review of the decision

The applicant's position is that the Warranty Plan, in coming to the conclusion that the applicant was not covered under the Act, made an error in law going to its jurisdiction. The applicant has suggested that we review the record and additional affidavit material to make a determination that the Warranty Plan was wrong in their interpretation, substitute our finding for that of the Warranty Plan, and remit the matter back for a determination of the major structural defect issue and on assessment of damages.

The record in this case is rather sparse and does not contain the material on which Mr. Maling made his decision. The applicant spent a great deal of time in reviewing affidavit evidence of original occupiers of these units to support its position that these units were condominiums, not previously occupied rental units within the meaning of the Act. In response to this material, the respondent, Sanrose, also filed affidavit evidence which directly contradicted the evidence contained in the applicant's material. It is impossible at this stage to choose one affidavit over the other. It is obvious that the tribunal, when it hears this matter, is going to have to hear all of this evidence viva voce and make a determination as to the reliability of that evidence. In our view, the applicant is not in a position before us to supplement the record with additional material in order that we can then substitute our opinion for that of Mr. Maling. We would adopt the reasoning of *Morden J.A. in Re Keeprite Workers' Independent Union and Keeprite Products Ltd.* (1981), 29 O.R. (2d) 513 at p. 521, 114 D.L.R. (3d) 162 at p. 170 (Ont. C.A.), where he stated:

Having just completed the exercise of examining, in this fashion, the evidence that was before the arbitrator I would express the view, which is in agreement with that of Pennell, J., that the practice of admitting affidavits of this kind should be very exceptional, it being emphasized that they are admissible only to the extent that they show jurisdictional error. I would think that the occasions for the legitimate use of affidavit evidence to demonstrate the exacting jurisdictional test of a complete absence of evidence on an essential point would, indeed, be rare.

Therefore, excluding the affidavit evidence which was before us and looking at the record itself, we must then determine whether in fact Maling asked himself the wrong question and therefore committed an error which placed his decision outside of his jurisdiction. The applicant relies upon *Metropolitan Life Ins. Co. v. Int'l Union of Operating Engineers, Local 796* (1970), 11 D.L.R. (3d) 336 at p. 344, [1970] S.C.R. 425, 70 C.L.L.C. 33 (S.C.C.).

This is not a case of a privity clause in an agreement but a question of statute and whether Maling exceeded his jurisdiction under the statute by asking himself the wrong question in dealing with the issue of coverage. We are of the opinion that the issue of coverage is an integral part of s. 14 of the Ontario Home Warranties Plan Act. It must be determined before a conclusion can be reached under the provision of that Act. We are not sitting as an appeal tribunal from that decision but on judicial review. We are

of the opinion that the decision is one that the statute can reasonably bear: see *Re City of Ottawa and Ottawa Professional Firefighters' Ass'n, Local 162, Int'l Ass'n of Firefighters* (1987), 58 O.R. (2d) 685, 36 D.L.R. (4th) 609 (Ont. C.A.). We are therefore of the opinion that this is not a case which warrants judicial interference with Maling's decision and that there is no error of law on the face of the record.

We would therefore dismiss the applicant's application with costs to the respondent, Sanrose. In view of the procedural error committed by the Warranty Plan in failing to provide the proper notices required under s. 16(2) of the Ontario Home Warranties Plan Act, we would not allow that respondent costs of this application.

Application dismissed.

CBR# 268

Re Peel Condominium Corporation No. 78 and Harthen et al.

20 O.R. (2d) 225 ONTARIO COUNTY COURT JUDICIAL DISTRICT OF PEEL MISENER, CO. CT. J. 16TH MARCH 1978.

APPLICATION to enforce a condominium declaration.

W. A. Harrison, for applicant. L. D. Pringle, for respondents.

MISENER, CO. CT. J.:-- This is an application brought by Peel Condominium Corporation No. 78. The declaration that by statute creates that corporation prohibits all owners, tenants and residents of units from keeping dogs, cats, reptiles or rodents in their units or on any part of the common elements. The condominium itself consists of 204 units. Some 22 of the owners have ignored that prohibition and continue to resist the attempts of the corporation to persuade them otherwise. The corporation seeks the assistance of this Court.

The facts essential to a determination of this matter are straightforward enough. The lands and premises in question were, prior to August 28, 1975, owned by Bramalea Consolidated Developments Limited. I shall refer to that company hereafter as "Bramalea". On that date, August 28, 1975, Bramalea registered the declaration that I have referred to above in the Land Titles Office in Brampton. However, prior to August 28, 1975, Bramalea entered into written agreements of purchase and sale with most, if not all, of the respondents. According to those respondents who filed affidavits opposing this motion, they were severely misled by the agents of Bramalea. None of them were told that pets were or would be prohibited. Some of them were actually assured that pets would be permitted. Some were not only so assured but as well shown a copy of a proposed declaration that contained no prohibition against the keeping of pets. None of the respondents actually completed his purchase prior to October 7, 1975, but most are firm that neither they nor their solicitors were ever aware of the terms of the declaration that, as I have said, was in fact registered on August 28, 1975, until some time after completion. From that I assume that none of the solicitors who acted for these purchasers took the trouble to peruse the declaration at the Land Titles Office.

Needless to say, some of the respondents swear that, had they known of this prohibition, they would never have made their purchases.

In support of the motion, Mr. Harrison relies upon some four sections of the Condominium Act, R.S.O. 1970, c. 77, as amended. Firstly, s. 3(2)(c) provides that a declaration may contain provisions respecting the occupation and use of the units and common elements. Section 9(1) provides that the registration of a declaration creates a corporation without share capital whose members are the owners from time to time. By virtue of s. 12, each owner is bound by the declaration and each owner has a right to the compliance by the other owners with the declaration. Since each owner has a right to compliance by other owners with the declaration, the latter by necessary implication are under a duty to comply. Section 23(1) [am. 1974, c. 133, s. 13(1)] gives the corporation status to apply to the County Court for an order directing the performance of any duty imposed by the declaration or by the Act, and s. 23(2) expressly grants to that Court the right to direct performance of that duty. On the facts of this case, Mr. Harrison says that there is no reason why the Court should not exercise its discretion to compel compliance with the declaration since it is clear on the material filed, that that is the wish of the board of directors of the corporation.

Mr. Pringle, on behalf of the respondents, resists the motion on three grounds. In spite of his most able submissions, I think that the applicant is entitled to the relief it requests and I think I can best give my reasons for that conclusion by dealing with Mr. Pringle's grounds one by one.

Firstly, he says that the prohibition in question is simply ultra vires the corporation. The Act that creates the corporation sets the limits of its powers. Section 3(2) permits the inclusion of "provisions respecting the occupation and use of the units and common elements". Section 18 of the declaration here in question reads as follows:

All present and future owners, tenants, and residents of units ... shall not keep dogs, cats, reptiles or rodents in their units or on any part of the common elements.

Mr. Pringle says that that provision is not one "respecting the occupation and use" but rather is one that seeks to regulate the conduct of the owner. Regulation of conduct is not permitted by the Act, and so s. 18 of the declaration is beyond the power of the corporation and therefore void.

I do not agree. It may be that s. 18 of the declaration regulates conduct, but it surely is as well a provision respecting the use of the units and common elements. The word "respecting" surely means "relating to" or "concerned with" or "with reference to". I cannot think that the word "occupation" restricts the ordinary meaning of the word "use" although I readily acknowledge that certain observations made by Howland, J.A. (as he then was), in *Re York Condominium Corp. No. 42 and Melanson* (1975), 9 O.R. (2d) 116 at p. 122, 59 D.L.R. (3d) 524, might appear to give support to the opposite conclusion. But in my view "occupation" refers to the manner or nature of the physical possession in itself whereas "use" refers to the enjoyment of the premises once physical possession has been acquired. In my view, they are concepts essentially so different that a conjunctive interpretation in the sense that the regulation must relate both to occupation and to use before it is intra vires has the effect of making the phrase meaningless, and I have the gravest difficulty in contemplating how any provision could, strictly speaking, relate to both occupation and to use.

The second ground raised by Mr. Pringle is this. He says that s. 7 of the declaration provides in clear terms that each unit shall be occupied and used only as a residence for a single family and for no other purpose. That section, he says, is in its very terms free from restriction of any kind and it follows therefore that such occupation must carry with it all the incidents that the law confers upon the family. One of those incidents is the right to keep pets. Section 18 of the declaration then purports to derogate from that right and this it cannot do.

My difficulty is in understanding the logic of this argument. Mr. Pringle says that the main reason preventing a derogation from the apparent common law right of the "single family" to keep pets is the York Condominium case, supra, but I have not been able to find such a declaration in that judgment. Moreover I see no "blatant inconsistency" (to use Mr. Pringle's phrase) between ss. 7 and 18 for the reasons I have attempted to give earlier. Section 7, in my view, relates to occupation. Section 18 relates to use. I see nothing inconsistent in a section restricting the nature of the occupation and then further restricting the use to which those in proper occupation may put to the premises.

Finally, he says that there is here a manifest error in the declaration itself, and that this manifest error should be corrected by expunging s. 18 of the declaration altogether. That argument takes these lines. Firstly, he says that, as a matter of fact, the respondents were grossly misled by Bramalea, the developer. Section 24b [enacted 1974, c. 133, s. 14] imposes on the proposed declarant (i.e., the developer) the obligation to deliver over to the proposed purchaser, upon the execution of the agreement of sale, a copy, inter alia, of the proposed declaration, and, at least 10 days before delivery of the deed, to deliver over a copy of the declaration or confirmation that the declaration is identical in all substantial or material respects to the proposed declaration previously delivered. Bramalea certainly did not comply with that section, and indeed actively misled whether innocently or otherwise, some of the respondents by delivering over a proposed declaration without any restriction on the keeping of pets at the same time verbally assuring them that pets were in fact permitted. Mr. Pringle says that the difference between the proposed declaration and the declaration actually registered constitutes a "manifest error or inconsistency in the declaration" as those words are used in s. 3(6) [enacted *ibid.*, s. 2(2)] of the Condominium Act, and by virtue of the same section, may be corrected by a Judge of the County Court.

Again I find myself unable to agree with that submission. I do agree that in determining whether or not there is a manifest error or inconsistency, the contents of any proposed declaration may well be relevant, but in a factual sense I cannot think that there is here "error or inconsistency". There is nothing to suggest that Bramalea made an error or that the vast majority of the ultimate purchasers thought so at any time, let alone at this stage. Rather, the developer consciously chose to change the proposed declaration, deliberately inserting the impugned s. 18 into the declaration that represented the final draft and which, as I have said, was duly registered. On any ordinary understanding of the words, I do not think that anyone would say that as a result of that "a manifest error or inconsistency in the declaration" arose. It may be unfair or unjust. It may even be manifestly unfair or unjust. But it is not an error.

Mr. Harrison seeks to answer this last objection of Mr. Pringle by invoking a host of concepts ranging from a submission that the statutory remedy of rescission provided by s. 24b exhausts the remedies available to those alleged to have been misled to a submission that any remedy that might have been available is extinguished by the doctrine of merger upon the delivery of the deed. In the view that I have taken, it is happily unnecessary for me to consider any of these concepts. I would point out, however, that, whatever the remedies, they are surely remedies against Bramalea, not against the condominium corporation, and to seek relief by way of an amendment to the declaration would result in the imposition of something akin to vicarious liability to the serious detriment of the majority of the shareholders of the condominium corporation.

Section 23(2) of the Condominium Act provides as follows:

23(2) The court may by order direct performance of the duty, and may include in the order any provisions that the court considers appropriate in the circumstances.

I think that the relief provided by that section is a discretionary one. The relief is sought by the corporation itself. By the very terms of the statute, the corporation has the duty to effect compliance by the owners of units with the Act, and the declaration. Moreover, s. 12 specifically gives the corporation a right to the compliance by the owners with the Act and the declaration. When I add to that statutory duty and statutory right the fact that, on the material filed, the great majority of the owners have adhered to the prohibition set out in s. 18 of the declaration, then it seems to me that I am duty bound, in the judicial exercise of that discretion, to give the corporation the assistance of the Court.

Accordingly, there will be an order directing the respondents to comply with s. 18 of the declaration as registered, and specifically directing them to remove any dog, cat, reptile or rodent from any unit occupied by them and from any part of the common elements within 30 days of the date of service upon them of a true copy of this order as issued and entered.

I do not think that this is a proper case for costs.

Order accordingly.

CBR# 378

York Condominium v. Bramalea Consolidated Developments Ltd. et al.

(1976), 10 O.R. (2d) 459

ONTARIO SUPREME COURT OF ONTARIO MASTER'S CHAMBERS MASTER (FERRON) 12TH JUNE 1975

APPLICATION by the defendant, Bramalea Consolidated Developments Limited, for an order requiring the plaintiff to give security for costs.

W. Somers, for plaintiff.

J. Harris, for defendant, Bramalea Consolidated Developments Limited.

MASTER (FERRON):-- This is an application brought by the defendant, Bramalea Consolidated Developments Limited (Bramalea Consolidated) for an order that the plaintiff be required to give security for costs.

The action is brought by the plaintiff for damages with respect to the common elements of the condominium. The owners by s. 7(1) of the Condominium Act, R.S.O. 1970, c. 77, are tenants in common of the common elements of the condominium. "Owner" is described in the Act as the owner or owners of the freehold estate or estates in a unit and common interest. "Common interest" is the interest in the common elements appurtenant to a unit.

The ownership of a unit cannot be separated from the ownership of the common interest and it accordingly appears that the plaintiff is suing in a representative capacity on behalf of the owners of the common elements. The applicant submits that by reason of the provisions of s-s. (16) and (18) of s. 9 of the Condominium Act, the plaintiff is a nominal plaintiff within the meaning of Rule 373(1)(f) and as a nominal plaintiff may be ordered to give security for costs.

Section 9(18) of the Condominium Act provides that any action with respect to the common elements may be brought by the corporation. "Corporation" is defined as a corporation incorporated pursuant to the Condominium Act. The plaintiff is so incorporated. The subsection to which I have referred further provides that any judgment for payment of money given in favour of the corporation in any such action brought is an asset of the corporation. Section 9(16), however, expressly provides that the members of the corporation share the assets of the corporation in the same proportions as the proportions of their common interests.

The members of the corporation cannot be different from the individual unit owners and the resulting proposition which seems to flow from the subsection which I have mentioned is that the corporation owns nothing. In *Frontenac Condominium Corp. No. 1 v. Joe Macciocchi & Sons Ltd.* (1974), 3 O.R. (2d) 331, 45 D.L.R. (3d) 347, the Honourable Mr. Justice Cromarty said, at p. 339, after he had quoted the provisions of s. 9(16) and (18):

The result is that the corporation as such owns nothing, except in the sense of a conduit, because s. 9(16) has said the members share the assets.

Accordingly, since the assets of the corporation are owned by its members, any judgment obtained by it in any action accrues to the benefit of the members and not to the corporation. It appears, accordingly, from a reading of s. 9(16) that the corporation has no interest in any action brought in its name, but simply sues under the Act in a representative capacity to obviate a procedural difficulty which appears to arise from the definition of owner in the Act. In this sense, the plaintiff can be said to be nominal.

Under the Rules, a nominal plaintiff may be ordered to give security for costs. The necessity for the Rule is obvious since the real plaintiff suing through a nominee would not be answerable for costs in an unsuccessful action because the name of a nominee is used. In *Elia v. Spring*, [1941] O.W.N. 407, it was said, at p. 408:

Rule 373(f), quoted above, is for the express purpose of preventing a real plaintiff putting forward a "man of straw" as a nominal plaintiff and thus enable the real plaintiff to escape liability for costs in the event of the action not succeeding.

See also *Hathway v. Doig* (1881), 9 P.R. 91 at p. 92. When one considers the reason for the Rule as it applies to actions brought by nominal plaintiffs and considers the provisions of the Condominium Act and, in particular, s. 9(17), it seems clear that the Rule was not meant to apply to actions brought by condominium corporations in the circumstances as disclosed in this application. Section 9(17) of the Condominium Act provides that a money judgment obtained against the corporation is also a judgment against each owner at the time the cause of action arose. Accordingly, the individual members of the corporation are by virtue of that section personally liable for any judgment obtained against the corporation and that would include a judgment for costs in an unsuccessful action. The provisions of cl. (c) of s. 26 of the Interpretation Act, R.S.O. 1970, c. 225, appear to have no application where a judgment is obtained for the payment of money against the corporation because of the provisions of s. 9(17) of the Condominium Act. It appears to me that the very reason for the necessity of Rule 373(1)(f) disappeared by reason of the provisions of s-s. (17) of s. 9 of the Act. Since, as I have said, the individual members are liable for judgment rendered against the corporation, the plaintiff corporation does not, as was quoted in *Sharp v. Grand Trunk R.W. Co.* (1901), 1 O.L.R. 200 at p. 202: "come within the mischief against which the exception is intended to guard ...".

Counsel for the applicants submits that s. 9(17) is not a good answer to the application. It is submitted that this action may end prior to judgment by reason of, for example, a successful application brought to dismiss for want of prosecution. In that event, the subsection would appear to have no application inasmuch as there would be no judgment given against the plaintiff, but merely an order dismissing the action with costs. Counsel for the applicant also submits that in any event there is no procedure to enforce a judgment apparent in the Act. The Judicature Act, R.S.O. 1970, c. 228, says that a judgment includes an order so that it would seem to me that in the event that the defendant were successful in having the action dismissed prior to judgment, the order for costs would have the force of a judgment. The other argument, however, is valid because there appears to be nothing in the Act dealing with the enforcement of a judgment. This, however, is a matter of the mechanics of enforcement and this shortcoming in the Act, if I can call it such, does not subtract from the plain provision that a judgment against the corporation is a judgment against the individual members, whether enforceable or not.

In considering this application further, I am, in any event, of the opinion that where a statute permits or provides, as here, for action to be brought on behalf of the owners of the common elements, the plaintiff proceeding as permitted by the statute cannot be said to be nominal. There appear to be no authorities on this point. It is clear, however, that a trustee in bankruptcy suing as plaintiff on behalf of all creditors is not considered to be a nominal plaintiff in spite of the fact that he has no interest in the litigation, but proceeds in the hopes of recovering something for the creditors. Similarly, an executor or an administrator suing on behalf of beneficiaries can be said, in many cases, to be nominal since that plaintiff, as the personal representative of the deceased, might have no interest in the litigation but proceeds only to recover on behalf of beneficiaries. In *Sharp v. Grand Trunk R.W. Co.*, these problems were considered. In that case, the Court was considering an application by a defendant for an order requiring an administrator to give security for costs. It appears that the plaintiff in that case had been appointed administrator of an estate and had brought an action against the defendant under the Fatal Accident Act. The action was brought for the benefit of the father of the deceased and it was argued that since the plaintiff had no interest in the outcome of the litigation, he was nominal only and according to the practice, should be required to give security for costs. The Court pointed out that it was clear that if the father of the deceased had assigned his cause of action to the plaintiff the plaintiff could, under those circumstances, have been ordered to give security. However, since the administrator had been duly appointed by the Court under the provisions of the Surrogate Court Act, and was the person properly in law permitted to institute action on behalf of the estate, it was held that such an administrator, even in the circumstances described in the case, could not be said to be nominal. Chief Justice Meredith, at pp. 205-6 said:

Notwithstanding these, to my mind, somewhat cogent reasons for arriving at a different result, I have come to the conclusion that I must, on the authorities, hold that the appellants have failed to establish their right to security. Technically, at all events, the respondent is not a nominal plaintiff; because by the statute which gives the right of action it is vested in him and him alone; he is the person appointed by the proper surrogate court to represent the estate of the deceased, and who alone represents it, and technically, at all events, he is bringing the action in the performance of his sworn duty as administrator; and, according to the authorities, these are reasons sufficient to prevent this case falling within the exception to the general rule on which the appellants rely ...

Similarly, under the Condominium Act, the corporation is given the right to sue on behalf of its members and if this right is to be in any way qualified, for example, by allowing such right to be exercised only upon giving security for costs, I think the Legislature should have clearly said so. They did not so state and I conclude that the plaintiff is not a nominal plaintiff within the meaning of the Rule and the application must be dismissed.

I should mention that a draft bill of costs was filed on this application and it was conceded by counsel for the plaintiff that the trial could very well take the four days estimated by the applicant in the bill. The other items in the bill were not objected to and seem as realistic as can be determined at this point in the proceedings. Accordingly, if I had allowed the application, I would have ordered security in an amount of \$4,000.

The costs of this application shall be in the cause.

Application dismissed.

CBR# 266

Re Peel Condominium Corporation No. 11 and Caroe et al.

(1974), 4 O.R. (2d) 543

ONTARIO HIGH COURT OF JUSTICE GALLIGAN, J. 14TH JUNE 1974

APPLICATION by a condominium corporation pursuant to s. 23(1) of the Condominium Act for an order directing the respondents to perform certain duties.

B. Widman, for applicant.

G.W. Cooper, for respondents, Lawrence Charles Caroe, and Marina M. Hamade.

Johan Delongte, respondent, appearing personally.

No one appearing for other respondents.

GALLIGAN, J.:-- This is an application by the corporation pursuant to s. 23(1) of the Condominium Act, R.S.O. 1970, c. 77, for an order directing the respondents to perform a duty imposed by the declaration, which has been duly registered relating to the subject condominium located in the City of Mississauga. The circumstances are simple, and the point of law is a novel one, which so far as I know, has not been the subject of judicial determination. The respondent Caroe is the owner of unit No. 27 and has rented it to the respondent Delongte, who resides in it with his, the tenant's family. The respondent Ereneos is the owner of unit No. 42, and has rented it to the respondent Saunders, who resides in it with his, the tenant's, family. The respondent Hamade is the owner of unit No. 74 and has rented it to the respondent Woodward, who resides in it with his, the tenant's family. The legal issue is simply whether the owner of a unit in this condominium is entitled to rent that unit to a third person so that such person, as a tenant, may occupy the unit with his family. The main relief sought by the applicant on this motion is an order directing the respondent tenants to vacate the units occupied by them, and restraining the respondent owners from renting the units.

The contention of the applicant is that a fair interpretation of s. 9(a)(1) of the declaration, by necessary implication, prohibits the renting of a unit by the owner because the unit may only be occupied by the owner, his family and guests. The relevant provision of the declaration reads as follows:

9(a)(1). Each unit shall be occupied only as a one-family residence by the owner of the unit(s), his family and guests. For the purpose of these restrictions, "one-family residence" means a building occupied or intended to be occupied as a residence by one family alone and containing one kitchen, provided that no roomers or boarders are allowed. A "boarder" for the purpose of these restrictions is a person to whom room and board are regularly supplied for consideration and a "roomer" is a person to whom room is regularly supplied for consideration.

If the declaration is given the meaning which the applicant contends it ought to be given, then as a practical matter there would be a substantial restriction imposed upon the very nature of the ownership that rests in the owner. One of the fundamental incidents of ownership is the right to alienate the property that one owns. With respect to real property the right to freely alienate dates to 1290, when the Imperial Statute of Quia Emptores, 18 Edw. I, was enacted. The provisions of that statute were made part of the law of Ontario in 1897 [R.S.O. 1897, c. 330]. (See Anger and Honsberger, Canadian Law of Real Property (1959), p. 21.)

Earl Jowitt, in the Dictionary of English Law, at p. 1284, considered the nature of ownership in the following terms:

Ownership is essentially indefinite in its nature, but in its most absolute form, it involves the right to possess and use or enjoy the thing, the right to its produce and accessions, and the right to destroy, encumber, or alienate it;

(The emphasis is mine.)

One of the important forms which alienation of one's property takes is leasing or renting of the property. As was said by Pearson, J., in *Re Rosher* (1884), 26 Ch. D. 801 at p. 818: "There are various modes of alienation besides sale; a person may lease, or he may mortgage, or he may settle." The right to lease one's property is therefore one of the important ingredients of absolute ownership.

A declaration under the Condominium Act is a creature of that statute and is therefore prescribed by it. In my view, a declaration may only restrict rights and impose duties if the statute authorizes it to do so. Section 3 of the Condominium Act provides for the contents of a declaration. The only part of that section which I think is relevant to the issue before me is s. 3(2)(c), which reads as follows:

3(2) In addition to the matters mentioned in subsection 1, a declaration may contain,

(c) provisions respecting the occupation and use of the units and common elements;

It is necessary to consider whether that section authorizes a declaration to impose a serious restriction upon the fundamental and long established right of an owner to alienate his real property. Statutes which themselves encroach upon the rights of a subject are subject to strict construction. I think it also appropriate to strictly construe a statutory provision which may permit the encroachment on or restriction of the rights of the individual. The tenet of interpretation has been admirably expressed in *Re Stronach* (1928), 61 O.L.R. 636 at p. 641, [1928] 3 D.L.R. 216 at pp. 219-20, 49 C.C.C. 336, as follows:

"Statutes which encroach on the rights of the subject, whether as regards person or property, are similarly subject to a strict construction in the sense before explained. It is a recognised rule that they should be interpreted, if possible, so as to respect such rights. It is presumed, where the objects of the Act do not obviously imply such an intention, that the Legislature does not desire to confiscate the property, or to encroach upon the right of persons; and it is therefore expected that if such be its intention, it will manifest it plainly, if not in express words, at least by clear implication, and beyond reasonable doubt:" [Maxwell on the Interpretation of Statutes, 6th ed., p. 501.]

Considering s. 3(2)(c) of the Condominium Act in that light, it is obvious that the intention of the Legislature was to authorize a declaration to make certain reasonable restrictions on the occupation and use of the units. That section would obviously authorize the declaration to provide for single family occupancy, to prohibit the use of a unit as a business premises and the like.

What I cannot see in that section is any clear indication of legislative intention to restrict that fundamental right of an owner to alienate his property. I do not think that the Legislature had any intention to restrict the owner's right of alienation and had it intended to prohibit an owner from renting his property I would have expected it to have said so in clear, unambiguous language. It is my opinion that the definition of "owner" contained in s. 1(1)(L) of the Act clearly indicates that the Legislature did not have any intention of permitting the restriction of the right of the owner to rent a unit. That section defines "owner" as follows:

(1) "owner" means the owner or owners of the freehold estate or estates in a unit and common interest, but does not include a mortgagee unless in possession;

It immediately becomes clear that the term "owner" by statute includes a mortgagee in possession. I think in enacting this legislation the Legislature of Ontario would have known that most mortgagees, particularly those financing substantial multi-unit dwelling complexes are large corporations. It is of course impossible for such an owner to occupy a unit with its family and guests. I certainly do not think it was the intention of the Legislature to require that a corporate mortgagee in possession of a unit would be required to let its unit stand vacant. It is my opinion that the Legislature of Ontario in enacting s. 3(2)(c) of the Condominium Act had no intention to permit a declaration to restrict the right of an owner of a unit to alienate his property to such an extent that he could not rent it for residential use. In my opinion, there is nothing in the Condominium Act which permits a declaration to prevent an owner from renting his unit. Accordingly, if the provisions of the declaration can be interpreted as suggested by the applicant, it is my opinion that such provision of the declaration is not authorized by the Act, and is invalid, and may not be enforced by an application under s. 23 of the Act.

Accordingly, the application must be dismissed.

Mr. Cooper stated that upon the instructions of his clients he would make no submissions. He stated that his clients instructed him to leave their rights to be determined by the Court without submissions being made on their behalf one way or the other. In view of these circumstances I do not feel it appropriate to award them any costs. I would have found it most helpful to have Mr. Cooper's submissions on this very novel point. In view of the fact that his clients by their instructions prevented the Court from having the benefit of Mr. Cooper's submissions, I do not feel it appropriate to award them any costs on the application. Seeing Mr. Delongte was not represented by counsel there are no costs that I can award in his favour. Accordingly, the application is dismissed without costs.

Application dismissed.

CBR# 305

Stafford, Stafford & Jakeman, Appellant, and Her Majesty the Queen, Respondent

[1995] T.C.J. No. 89

Action No. 94-582(GST)I Tax Court of Canada Kelowna, British Columbia Bowman T.C.J. Heard: January 10, 1995 Judgment: February 13, 1995

Kenneth R. Hauser, for the Appellant. Linda Bell, for the Respondent.

JUDGMENT:-- The appeal from the assessment made under the Excise Tax Act, notice of which is dated August 25, 1993, and bears number 11EU0100004 is allowed and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment solely for the purpose of adjusting the tax, interest and penalties to reflect the reduction, as of December 1, 1991, of the fair market value of 1041 Middleton Way, Vernon, British Columbia, to \$1,002,000.

There will be no order as to costs.

REASONS FOR JUDGMENT

[para1] BOWMAN T.C.J.:-- This appeal is from an assessment of tax, interest and penalties made under the Goods and Services Tax provisions of the Excise Tax Act.

[para2] The appellant is a partnership and is therefore a person for the purposes of Part IX of the Excise Tax Act. During 1991 it constructed two residential apartment complexes at 1047 Middleton Way, Vernon, B.C. ("1047") and 1041 Middleton Way, Vernon, B.C. ("1041").

[para3] 1041 was substantially completed in late 1991. The first units in 1047 were rented out on August 1, 1991 and the first units in 1041 were rented out on December 1, 1991.

[para4] The assessment was based upon subsection 191(3) of the Excise Tax Act which reads as follows:

(3) For the purposes of this Part, where (a) the construction or substantial renovation of a multiple unit residential complex is substantially completed, (b) the builder of the complex (i) gives possession of any residential unit in the complex to a particular person under a lease, licence or similar arrangement entered into for the purpose of its occupancy by an individual as a place of residence and the particular person is not a purchaser under an agreement of purchase and sale of the complex, or (ii) where the builder is an individual, occupies any residential unit in the complex as a place of residence, and (c) the builder, the particular person or an individual who is a tenant or licensee of the particular person is the first individual to occupy a residential unit in the complex as a place of residence after substantial completion of the construction or renovation, the builder shall be deemed (d) to have made and received, at the later of the time the construction or substantial renovation is substantially completed and the time possession of the unit is so given to the particular person or the unit is so occupied by the builder, a taxable supply by way of sale of the complex, and (e) to have paid as a recipient and to have collected as a supplier, at the later of those times, tax in respect of the supply calculated on the fair market value of the complex at the later of those times.

[para5] Essentially that section deems the builder to have made and received a taxable supply at the later of the dates when a multiple unit residential complex is substantially completed or when it is rented out, and an obligation to pay tax arises out that time. The tax is based upon the fair market value of the complex at the later date.

[para6] Three contentions were advanced by the appellant:

(a) that subsection 191(3) was inapplicable on the basis the two buildings were not a multiple unit residential complex because the definition of that expression in subsection 123(1) excludes a condominium complex. "Condominium complex" is defined in subsection 123(1) as a "residential complex that contains more than one residential condominium unit". "Residential condominium unit" is defined in subsection 123(1) as follows:

"residential condominium unit" means a residential complex that is, or is intended to be, a bounded space in a building designated or described as a separate unit on a registered condominium or strata lot plan or description, or a similar plan or description registered under the laws of a province, and includes any interest in land pertaining to ownership of the unit.

(b) that the fair market value of 1041 and 1047 as assumed by the Minister on assessing was too high; and

(c) that the imposition of penalties was inappropriate for two reasons: (i) since the Minister had assessed under the wrong subsection he ought not to have assessed penalties; and

(ii) the appellant had in any event exercised due diligence and that on the basis of *Pillar Oilfield Projects Ltd. v. The Queen* [1993] G.S.T.C. 49, the penalties ought not to have been imposed.

[para7] With respect to the first contention, at the relevant time (i.e. August 1, 1991 in the case of 1047 and December 1, 1991 in the case of 1041) the units in the two buildings were not "described as a separate unit on a registered condominium or strata lot plan or description, or a similar plan or description registered under the laws of a province". Clearly they were intended to be so registered. Both were subsequently registered on a strata lot plan and, when the units were sold on April 1, 1992 and April 9, 1992 the registration as condominium complexes was complete. [para8] The following statements from the expert appraisal reports submitted on behalf of the respondent by Mr. George Ward are accepted as accurate.

Re 1041: As of the effective date, December 1, 1991, the subject property was one fee simple site. However, Strata Plans had been prepared by Richard Shoesmith, B.C.L.S. on November 25, 1991. The owners signed the strata plans on December 2, 1991. The various other steps in the procedure were followed, leading to final registration of Strata Plan KAS 1021 on March 4, 1992. Further, the two subject 8plexes (Buildings B&C) were listed for sale commencing on October 18, 1991 as "strata-titled units". It is clear from the above that the intentions for the project were for strata title use as of December 1, 1991.

Re 1047: As of the effective date, August 1, 1991, the subject property was one fee simple site. However, Strata Plans had been prepared by Richard Shoesmith, B.C.L.S. on July 9, 1991 and were approved under The Condominium Act on July 27, 1991 by The Approving Officer for The City of Vernon. The various other steps in the procedure were followed, leading to final registration of Strata Plan KAS 983 on December 13, 1991. It is clear from the above that the intentions for the project were for strata title use as of August 1, 1991.

[para9] I think that the better view is that, notwithstanding the fact that the registration of strata plans had not been completed at the effective date, the units fell within the definition of "residential condominium unit" in subsection 123(1) of the Act. The words "or is intended to be" in that definition are, in my view, apt to describe an apartment complex for which strata plans have been prepared and have been submitted for registration. I think that those words are intended to qualify all of the words that follow them in the definition.

[para10] In the final analysis it does not affect the amount of tax exigible. The only difference is that the tax should have been imposed under subsection 191(1) rather than subsection 191(3). The fact that the Minister may have assessed under the wrong subsection of section 191 does not affect the validity of the assessment.

[para11] The second question is the fair market value of the properties. The assessment is based upon appraisals made by Mr. George A. Ward who concluded that 1041 had a value as of December 1, 1991 of \$1,084,000 and that 1047 had a value as of August 1, 1991 of \$1,595,000. No expert testimony contrary to this opinion was submitted by the appellant although the municipal assessment for 1041 as of July 1, 1992 was \$891,700 and for 1047 was \$1,302,500.

[para12] Municipal assessments, particularly if the appraiser who made them is not called, are of doubtful probative value and I do not think that they can prevail in the face of the very thorough and careful appraisal prepared by Mr. Ward, whom I found to be an impressive witness. I do not think that one can ignore the fact that 1041 was sold on April 9, 1992 for \$1,002,000 and 1047 was sold on April 1, 1992 for \$1,856,000.

[para13] The only adjustment that I would make to Mr. Ward's determination of value would be to reduce the fair market value of 1041 as of December 1, 1991 to \$1,002,000. I do not think that as a matter of common sense it could have had a value on December 1, 1991 that exceeded the price at which it actually sold on April 9, 1992.

[para14] So far as penalties are concerned, I do not accept the argument of counsel for the respondent that the penalties imposed under subsection 280(1) are automatically exigible, or that they are absolute in the sense in which that expression is used in *The Queen v. Sault Ste. Marie* [1978] 2 S.C.R. 1299 or in *Pillar Oilfield Projects Ltd.* (supra). Their imposition is susceptible of a defence of due diligence. Counsel argued that the penalties were absolute rather than strict because subsection 281.1(2) gives the Minister a discretionary power to waive penalties. The existence of a discretionary power to waive penalties that are otherwise properly imposed does not relieve the court of the power and the obligation to determine whether the penalties were properly imposed in the first place. [para15] I do not however think that the defence of due diligence has been made out here. It is true a representative of the appellant spoke to an assessor with the Department of National Revenue who evidently told that person that no further tax was payable at that time. The appellant is not unsophisticated in these matters and I think that, given the magnitude of the projects involved here it ought to have consulted lawyers or accountants who were knowledgeable in the matter of the goods and services tax. Due diligence involves more than merely accepting, without more, some oral advice that an assessor with the Department of National Revenue may have given them. The GST implications of building large apartment complexes form an important part of Part IX of the Excise Tax Act. It is not clear what the context was in which the question was put to the assessor. The tax under section 191 arose upon substantial completion of the building or upon units first being rented out. The question appears to have been asked at the time at which the appellant was contemplating sale.

[para16] The appeal is allowed and the assessment referred back to the Minister of National Revenue for reconsideration and reassessment solely for the purpose of adjusting the tax, interest and penalties to reflect the reduction, as of December 1, 1991, of the fair market value of 1041 to \$1,002,000. [para17] In light of the limited success achieved by the appellant this is not a case for costs.

CBR# 182

Thomas R. McGovern, Appellant, v. The Minister of National Revenue, Respondent, and Carol F. McGovern, Appellant, v. The Minister of National Revenue, Respondent

[1990] T.C.J. No. 629

Action Nos. 89-310(IT), 89-311(IT) Tax Court of Canada Calgary, Alberta Rip T.C.J. Heard: July 19, 1990 Oral judgment: July 19, 1990

D. Mock, for the Appellants. U. Tauscher, for the Respondent.

[para1] RIP T.C.J. (Orally):-- I've prepared the notes for Reasons for Judgment, and I do reserve the right of course, if necessary, to polish these notes up.

[para2] In assessing Thomas R. McGovern and Carol F. McGovern (the "McGoverns") for 1984, the Minister of National Revenue, (the "Respondent"), disallowed expenses claimed by the McGoverns with respect to a condominium unit they jointly owned at Paul Lake near Kamloops, British Columbia, which I'll refer to as the unit, on the basis that there was no reasonable expectation of profit in that year in respect of the unit. The assessments were issued in accordance with subsection 248(1) of the Income Tax Act ("Act"), which defines personal property, and the expenses which were not allowed were not allowed in accordance with paragraphs 18(1)(a) and 18(1)(h) of the Act.

[para3] The McGoverns have appealed their assessments arguing there was a reasonable expectation of profit from the property. The appeals were heard on common evidence and Mr. McGovern, (referred as "McGovern"), was the sole witness.

[para4] The Appellants acquired the property in December, 1980, during its construction. The unit, one of 30 in the condominium, was approximately 1,500 square feet in area on lakefront property and within walking distance to a modest ski resort. The purchase price of \$87,659 was financed by way of a first mortgage of \$76,000, having an annual interest rate of 14 and 3/4 per cent during its four year term. The monthly mortgage payment on account of principal and interest was \$933.29. The McGoverns owned a furniture business in Calgary at the time, but had no experience in real estate rentals.

[para5] McGovern testified that in 1980, he and his wife were looking for rental property in Calgary when the unit was brought to his attention through a real estate agent, who also eventually purchased another unit in the condominium. Because of the property's proximity to leisure activities, the McGoverns considered the condominium property ideal for year round vacations and purchased the unit to earn an income by renting it out to families for periods of from one to two weeks during the winter and summer seasons. The unit qualified as a multiple unit residential building, a MURB, for capital cost allowance purposes in accordance with class 31 in the Schedule 2 of the Regulations to the Act. McGovern testified that the MURB quality of the unit was an attraction which influenced its purchase by him.

[para6] The unit contained three bedrooms and was completely furnished with beds, refrigerator, stove, washer, dryer, sofa, tables, television, et cetera. This was furnishings undertaken by the McGoverns. McGovern estimated six people could stay comfortably in the unit.

[para7] McGovern produced a schedule of projected rentals and expenses that he prepared in 1981. He was looking to the Calgary market and geared rates, for example, to holidays on Calgary schools' calendar. He testified he set the rates by verifying what was available to Calgary families, rates of hotels in the area and considered the facilities he was offering. He did not go into detail. He calculated a revenue potential based on a rental of 365 nights per year, but to be realistic, considered a 50 per cent occupancy rate at \$750 per week. He considered gross monthly rentals would thus total \$1,950 and expenses for the year would aggregate \$14,426. Thus, in the first year he would have a profit. These projections do not provide for capital cost allowance or costs of repair and maintenance.

[para8] When he acquired the unit in 1980, there were no restrictions on the use of the unit by the owners. However, in the spring of 1981, a condominium association was formed and proposed by-laws for the condominium were drafted. The proposed by-laws restricted the owners to use their units only as a private dwelling house for one family and did not permit children under the age of 12 to be resident in the unit. The McGoverns and the agent who introduced them to the project lobbied against these proposals, but were not successful. The plans of the McGoverns to rent on a short-term basis was scuttled. They thus revised their plan and sought long-term tenants.

[para9] In 1981, McGovern says he prepared a summary of projected revenue and expenses on monthly leases, based on monthly rentals of \$800, \$1,000 and \$1,200 respectively. He included expenses only of mortgage interest and property taxes. The schedule also appears to include payments of principal on their mortgage as an expense as well. I note that the payment on principal would have been an extremely small amount, and I do not place any great significance on this.

[para10] McGovern made provision for capital cost allowance to show a monthly loss of \$508.57, \$308.57 and \$91.43 respectively on rentals of \$800, \$1,000 and \$1,200 respectively. There is no provision in the expenses for repair and maintenance, condominium fees, hydro, although the latter may have been paid by the tenant. The documents, McGovern acknowledged, was a "very rough document" and was more for his own thinking than anything else. In any event, McGovern was of the view that he could earn profit from the unit with a long-term tenant.

[para11] Now, according to the evidence, it appears that McGovern considered profit to include the tax advantage he would have gained from the MURB quality of the unit. In 1981, a long-term tenant was obtained at a monthly rental of \$800.

[para12] McGovern stressed that there were factors beyond his control that affected the profitability of the unit. They were (a) the pool and the tennis court of the condominium were not available for the summer of 1981; (b) high interest rates were prevalent commencing in 1981; (c) Kamloops had a high vacancy rate in 1981; and (d) his first tenants vacated the unit after six months.

[para13] After the tenants vacated the unit, McGovern tried to rent the unit through a real estate agent in Kamloops. A second tenant was found in 1982, and the unit was leased on a month-to-month basis. Furniture was removed from the unit by McGovern on the advice of a real estate agent, since prospective tenants already residing in Kamloops would tend to want their own furniture. The monthly rental to the second tenant was \$500.

[para14] McGovern claimed expenses and capital cost allowance in preparing his income tax returns for 1981, 1982 and 1983, and they were accepted by the Respondent. In 1984, their claims were not allowed. Now, this also applies to Mrs. McGovern.

[para15] McGovern ceased to make any payments on account of the mortgage or to the condominium with respect to condominium charges in 1982. The mortgagee initiated foreclosure proceedings against the McGoverns in 1982. During 1984 and 1985, the McGoverns received no rent from the unit. It was vacant. The total rents they received were \$3,200 in 1981, \$1,500 in 1982, \$3,300 in 1983. Expenses claimed in 1982 were \$12,100 without capital cost allowance, \$11,410.64 plus \$3,546.51 as capital cost allowance in 1983 and \$10,531.52 plus \$3,363 of capital cost allowance in 1984.

[para16] As I previously stated, the unit was not rented during 1984 and 1985. Since 1982, the McGoverns have relied upon a real estate agent in Kamloops to find tenants, although advertisements were placed in Calgary newspapers to rent the unit at \$1,200 a month. There were three or four inquiries, according to McGovern, but no tenant was found for that amount.

[para17] On May 4th, 1983, the Supreme Court of British Columbia issued an order nisi, declaring the McGoverns in default on the mortgage and that all monies so secured was due and owing to the mortgagee. The last date of redemption was November 3rd, 1983, and the amount due was \$92,562.04. The Court also foreclosed the McGoverns from all rights, title, interest claim, estate and equity in the unit if the money was not paid prior to November 3rd, 1983, and the mortgagee received vacant possession.

[para18] The order absolute was issued in August 1985, but according to McGovern was never served on him. I assume that neither was it served on his wife. McGovern testified that his solicitors were negotiating during this time with the mortgagee until 1985, and the matter was settled and the unit was disposed of.

[para19] At the time in 1982, the McGovern's business in Calgary also went in receivership. This is one of the reasons, McGovern stated, they ceased making payments on the condominium unit.

[para20] Some time in 1982, McGovern made efforts and engaged a real estate agent to sell the unit. The agent was seeking tenants, notwithstanding the Court's order nisi. With a lease in hand, McGovern said, he thought he could convince the mortgagee of the bona fides of the unit as an investment.

[para21] According to their accountant, in a letter to Revenue Canada, the property was offered for sale in 1982 in an attempt to stop further losses. McGovern testified his accountant erred in giving this information to Revenue Canada. The property was available for sale or rent, he said.

[para22] According to McGovern, "things were picking up" in Kamloops in 1984, and the local economy was improving. On a monthly rental of \$800 he affirmed, he could have turned a profit on the unit. He was prepared to re-furnish and rent the unit at \$800. He did not adduce any evidence as to how he could then turn a profit at \$800 a month in 1984, bearing in mind, for example, his interest burden would have increased, due to the non-payment of principal since 1982.

[para23] McGovern calculated monthly rent of \$1,200 based on \$60 per square foot of living space, plus a nominal amount for furniture times one per cent. To my calculations, \$60 times 1,500 square feet times one per cent equals \$900 per month, not \$1,200.

[para24] No evidence was adduced at trial to show firstly, in 1981, who would manage and how the amount and how the unit would be supervised, as it was rented to tourists on a weekly basis. There was obviously no arrangement for the condominium corporation to perform these tasks. The person performing this work would require a fee. There was no the rental of the single unit or from persons experienced in the business that it was capable of success, even with an absentee owner.

[para25] There was no evidence, except for McGovern's testimony, of the general rental market in Kamloops from 1981 to 1984, and his evidence was rather general in nature.

[para26] The evidence I would have preferred would be the type of accommodations that were prevalent in the Kamloops region, the low and high ends of the market and how this particularly unit fit in. I think that such evidence would be evidence of the actual marketing program to be undertaken or have been of assistance to the Court. The testimony of the agent who purchased the unit at the same time as the McGoverns, who introduced them to his property, may have been helpful as well. How did he fare, and what, if anything, did he do differently than the McGoverns?

[para27] The McGoverns were not experienced in the real estate market in general and in Kamloops in particular. When they looked at properties and spoke to friends in Kamloops, were they asking the right questions? Were they getting the right answers that would assist them? Could Mrs. Hickey, for example, a real estate agent who lived in another unit in the condominium property, have added to the evidence?

[para28] Counsel for the Appellants referred the Court to the decision of *Moldowan v. The Queen*, 77 D.T.C. 5213, a decision of the Supreme Court of Canada. In his Reasons for Judgment, Dickson, J., as he then was, set out at page 5215 a partial list of what criteria to use to determine the existence or not of a reasonable expectation of profit.

[para29] In the appeal at bar, the profit and loss experience in years prior to 1984 does not aid the Appellants. The training of the Appellants in renting real estate is absent, although they did carry on a business in previous years. The capitalization for the purchase of the venture relied on a mortgage of approximately 85 per cent of the purchase price and the funds to pay the interest on the mortgage were to be generated from the unit itself. Once CCA was taken while the unit was owned by the McGoverns, the loss was exacerbated.

[para30] The decisions of *McNeill v. The Queen*, 89 D.T.C. 5516, *Ahluwalia, et al. v. M.N.R.*, 87 D.T.C. 592, *Baker v. M.N.R.*, 87 D.T.C. 567, and *The Queen v. Dorchester Drummond Corporation Ltd.*, 79 D.T.C. 5163, do not, in my view, aid the Appellants. It is trite law that each case is determined on its own set of facts.

[para31] Counsel for the Appellants submitted the facts in *McNeill*, supra, are on all fours with the present case. In the case at bar, I cannot find the so-called projections prepared by McGovern to be reasonable, for reasons already mentioned, and that in 1984, faced with an increasing liability to the mortgagee, the McGoverns could have rented the unit at a profit in that year, or even within a reasonable time thereafter.

[para32] I think their accountant was right when he advised Revenue Canada the property was for sale in order to cut the losses. Unlike the facts in Ahluwalia, supra, there was not on-site manager of the condominium nor were there rental operations to be handled on-site as well.

[para33] In my view, in 1984, the McGoverns had no reasonable expectation of profit from their unit. The expenses were not laid out to earn income from a property or business. The unit was their personal property. Thus, the deduction of expenses is prohibited by paragraph 18(1)(a) as well as paragraph 18(1)(h) of the Act. The appeals are, therefore dismissed.

CBR# 067

Carleton Condominium Corp. No. 109 v. Tartan Development Corp.

Court File Nos. 16389/90 and 71229/93 Ontario Court of Justice (General Division) Sedgwick J. March 8, 1995.

Real property -- Condominiums -- Actions by corporation -- New home warranty statutes -- Whether abrogating application of common law implied warranty of fitness.

This was a determination of questions with regard to a condominium. The issues were whether the Ontario New Warranties Plan Act terminated the common law implied warranties of fitness for new homes in Ontario; whether, to assert a claim based upon these implied warranties, the corporation had to establish that at the time of issuance of the claim, at least one unit owner was an original purchaser; whether a condominium corporation could pursue a claim in tort as against the developer/declarant, its employees, builder, architect or others involved in the original construction; and what was the limitation period applicable to a claim in tort or for breach of warranty brought by a condominium corporation. The plaintiff was a residential condominium corporation and the defendants were the vendor, the architect and the builder.

HELD: The common law implied warranty of new homes was not terminated by the statutorily imposed warranty. The right to rely on the implied common law warranty was expressly preserved in section 13(6) of the Act. The corporation was required to establish that at least one unit owner was an original purchaser to assert a claim based on the implied warranty of fitness. The condominium corporation had the status to pursue a claim against the persons involved in the original construction of the condominium. The limitation period was six years from the time the cause of action arose and the cause of action was complete when damages occurred as a result of the alleged breach of contract or duty.

Statutes, Regulations and Rules Cited: Condominium Act, ss. 1(1), 7(1), 7(2), 7(5), 14(1), 41(8). Limitations Act, s. 45(1)(g). Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O-3, s. 13. Ontario Rules of Civil Procedure, Rule 21.

CBR# 146

Kenny v. Schuster Real Estate Co.

Between

Sharon Kenny and Acme Protective Systems Limited, Plaintiffs,
and

Schuster Real Estate Co. Ltd., Peter D. Schuster and 321024
B.C. Ltd., carrying on business as Cafe Zen and the said Cafe
Zen, Defendants, and
321024 B.C. Ltd., carrying on business as Cafe Zen and the
said Cafe Zen, Third Party

Vancouver Registry No. C874184

[1990] B.C.J. No. 1420

British Columbia Supreme Court
Vancouver, British Columbia
Cohen J.

Heard: April 9, 10, 25 - 27 and June 12, 1990

Judgment: June 19, 1990

Counsel for the Plaintiff, Sharon Kenny: R.V. Burns.

Counsel for the Defendants, Schuster Real Estate Co. Ltd. and Peter D. Schuster: K.R. Nichols.

Counsel for the Third Party, 321024 B.C. Ltd. (Cafe Zen):

R.J. Wilinofsky.

COHEN J.:—

I. Background

In January 1983, the plaintiff, Sharon Kenny, purchased a condominium at 102-1633 Yew Street, in the City of Vancouver, Province of British Columbia. Ms. Kenny was attracted to this area of the city because of its close proximity to the beach, the fact that there was convenience shopping and restaurants nearby and mostly the unique and colourful character of this section of Yew Street.

The building which housed Ms. Kenny's condominium contained four residential and two commercial strata lots. Ms. Kenny's condominium was located directly above the commercial strata lots, owned by the defendant, Schuster Real Estate Co. Ltd. (Schuster).

At the time Ms. Kenny purchased her condominium, the commercial strata lots contained two restaurant operations. Before purchasing, Ms. Kenny made inquiries about the restaurant operations and satisfied herself that no foods were deep fried or cooked on their premises and that they served only light meals.

In May 1987 Ms. Kenny's enjoyment of her condominium ended with the installation of an exhaust fan by the defendant Cafe Zen, the tenant in one of the commercial strata lots. Normally restaurant exhaust fans are placed on the roof of the building. Apparently this was not possible in the case of Cafe Zen and the fan was installed directly below Ms. Kenny's patio deck underneath her dining and living room windows. Ms. Kenny found the operation of the fan to be noisy as well as creating unpleasant odours inside her condominium in the building's stairways, hallways and underground parking.

Because she felt she could no longer enjoy her condominium, Ms. Kenny listed it for sale in September 1987. It sold in May 1988. She brought this action claiming reimbursement of the real estate commission she paid on the sale of her condominium, damages alleging that the value of her condominium decreased by \$10,000 because of the fan, reimbursement of moving costs as well as her legal costs incurred in connection with an application for an interlocutory injunction made on her behalf in September 1987. Finally, Ms. Kenny claims general damages for the annoyance, inconvenience and discomfort which she says she suffered as a result of the fan.

Ms. Kenny took default judgment against the defendant, Schuster in September 1987. In April 1988 Ms. Kenny discontinued her action against the defendant, Cafe Zen.

In September 1988 an application to set aside the default judgment was dismissed and Schuster's statement of defence was struck out. An appeal against this finding was dismissed.

By third party notice dated December 13, 1988, Schuster and the defendant, Peter D. Schuster, the principal of Schuster, gave notice to Cafe Zen claiming a right of contribution and indemnity in respect of any damages for which they might be found liable to Ms. Kenny.

Essentially then this is a case of assessment of damages on a default judgment. However, in rendering my judgment I will deal with the facts and law relating to the liability of the defendant Schuster for damages. By agreement between counsel for Schuster and the third party, I will not deal with the third party issues.

II. Ms. Kenny's Claim

Ms. Kenny, aged 38, is a lawyer. She was called to the bar of this province in 1981 and since then has served as a prosecutor with the Department of the Attorney General, Crown Counsel Office until February of 1990 when she accepted a position as Crown Counsel in Bermuda.

Ms. Kenny purchased her condominium in January 1983 for \$85,000, it was her first real estate purchase. Prior to this she had lived in various residential areas in the city and accordingly, when she went looking for real estate, she knew Vancouver and knew she wanted to live in Kitsilano.

Ms. Kenny testified that in the summer months there is a fair amount of activity on Yew Street and that during the evenings the level of noise is higher. Nonetheless, she insisted that she had no concerns about the level of noise or activity and that if she did she would never have purchased her condominium in the first place.

She said that one of the big features of her condominium was the size of its wrap-around patio deck, some 656 square feet. Her condominium had a wood burning fireplace, two bedrooms, two bathrooms, ensuite laundry and all in all she considered it a very pleasant place to live. In May 1987 she had no plans to move. Her long range plans were to resurface the patio deck and glass-in an area off her master bedroom.

When she purchased her condominium Ms. Kenny made inquiries about the restaurants that were operating in the commercial strata lots. She was informed that there was no cooking taking place in the restaurants and that they served only light meals. In her words, had the restaurants involved cooking, she would not have purchased her condominium.

On May 1st, 1987 when Ms. Kenny was leaving her building for work, as she was driving out of the underground parking lot, she discovered the driveway ramp blocked by a large truck with a crane. The truck was lowering into place what Ms. Kenny described as a piece of equipment looking like the back-end of a jet airplane. This piece of equipment was being installed underneath her patio deck. The installers told her that it was an exhaust fan for the Cafe Zen.

When she arrived at work, Ms. Kenny telephoned various people to find out about the installation of the fan. She was unable to reach Mr. Schuster by telephone and left a message for him to call her back. She found out from City Hall that a permit had been granted for the installation of the fan.

At the end of the day, when she arrived home, Ms. Kenny went to the Cafe Zen and spoke to the owner, Mr. Seto. An employee of the firm installing the fan was present as well. She was extremely upset. She was assured by the installer that the fan would not be a problem. Mr. Seto told her that the fan would be in operation during the hours that the Cafe Zen was open. She was so distraught at this news that she left the restaurant in tears.

Mr. Schuster returned Ms. Kenny's call. Before she had chance to say anything he said "is it about the fan" and she said "you're damn right it is". She was very angry at the time he called. They arranged to meet in Ms. Kenny's condominium to discuss the matter. They met on May 4, 1987. During their meeting, Ms. Kenny told Mr. Schuster that she wanted the fan removed because it was an eyesore and because of the noise and smell that it might cause. She was very annoyed with Mr. Schuster for permitting the fan to be installed without consulting her. Mr. Schuster told her that he could not take it down because Mr. Seto had a three year lease. He said he did not want to fight with Ms. Kenny about it and if necessary he would purchase her condominium.

Following their meeting, but before the Cafe Zen officially opened, arrangements were made for the fan to be started so that Mr. Schuster and Ms. Kenny could listen to it. During the demonstration run of the fan, Ms. Kenny said that when the fan started up there was a kick-in noise. She described the noise from the fan as a constant whirring or humming sound. She told Mr. Schuster that the fan was not acceptable, that there was no way she could live with it underneath her condominium and that she wanted it taken down or stopped.

The Cafe Zen opened about May 20, 1987. Ms. Kenny did not hear directly from Mr. Schuster again.

As to noise from the fan, she said that she could hear it turn on "when it sort of kicked in. It did not seem to matter where she was in her condominium she could hear it. It seemed to her that the fan usually started up between 8 and 8:30 a.m. and she described it as a constant whirring or humming noise. She said that when the fan was switched off it was as if an air of peace cloaked her condominium. It was often not turned off until between 1:00 and 2:00 a.m.

Ms. Kenny said that when she went out on her patio deck, the noise was more noticeable. If she stood in the area just above the fan it was extremely loud. In fact, she said that if she was talking with someone she would have to elevate her voice to be heard. Even with the doors and windows of her condominium shut she could hear the fan. She said that the noise from the fan was most pronounced in the areas closest to the fan, the kitchen, dining room, living room and on the patio deck.

As to the smell from the fan, she described it as a general oppressive type of almost a heavy type of oily smell that permeated the hallways not only on her floor but on the floor above. "Like a greasy smell, the closest I could come would be a deep fat frying type of odour". She said that the odour increased as she headed out of her hallway down the stairs to go into the underground parking lot. It was in the stairwell leading from the outside of the building and it seemed to increase as she would head down to the parking lot. She said that the smell of the entire building changed after the fan was installed.

Inside her condominium, she said that if something was being cooked she could often tell what it was by the smell. For example, onions were noticeable. She said that other than the oily smell she could also smell food odours. The smells were strongest in the dining room and living room areas. If she was out on her patio deck she could smell it, particularly if she was standing in the area immediately adjacent to the fan. Even around the corner of the patio deck in front of her sliding glass doors she could sometimes catch a whiff of the smell of food. She said that prior to the installation of the fan she had never detected any of these oppressive smells or odours.

In terms of how the noise and smell affected her general living from day to day, she said that the whole experience was an extremely upsetting one. It was her first home purchase and the noise was a source of constant aggravation to her. The smell was particularly offensive and she found the musty, heavy odour that was in the hallways, the greasy smell, really offensive. She said that the whole character of the condominium changed and it was just not a place that she wanted to be. For example, she did not sit and read a book in her living room when the fan was on and it was upsetting for her to be in her condominium when the fan was on unless there was something to mask the noise such as the sound from the television or stereo.

After the fan was installed, Ms. Kenny spent less time on her patio deck in the summer months. When she was on her patio deck, if the fan went on, she found it a "jangling" kind of experience. The noise and smell were extremely disturbing to her.

Although Ms. Kenny's lawyer had negotiations with Mr. Schuster regarding Mr. Schuster's offer to purchase her condominium, Mr. Schuster could not raise the funds to buy her out and after her attempt to secure an injunction to restrain the continuing operation of the fan did not succeed, she listed her condominium for sale in September 1987 at a price of \$119,000. There were open houses on weekends and prospective purchasers viewed her condominium by appointment. After three months the price was dropped, finally after eight months she received an offer of \$105,000 and decided to accept it.

III. Issues

The issue for me to decide is whether the noise and smell from the fan constitute an actionable nuisance and if so, the amount of Ms. Kenny's damages.

IV. Decision

I am satisfied that the noise and smell from the fan constitute an actionable nuisance, that Ms. Kenny sold her condominium in direct response to the nuisance and that her sale of the condominium was a justifiable response in all of the circumstances. In addition, I am satisfied that the defendant Schuster is responsible to Ms. Kenny for damages.

V. Reasons

The leading authority in this province on the test of what constitutes a nuisance is *Royal Anne Hotel Co. Ltd. v. Ashcroft et al* (1979), 8 C.C.L.T. 179 (B.C.C.A.). In that case the Royal Anne and one Saito were landowners and occupiers in the Village of Ashcroft. On December 14, 1974 their premises were damaged as a result of a backing-up of a municipal sewer constructed and maintained by Ashcroft. As a result of the blockage raw sewage escaped from the sewer and entered the two premises from plumbing outlets. Both parties sued Ashcroft alleging negligence and claiming also in nuisance.

The trial judge found that the back-up in the sewer was caused by a "random blockage" in the main sewer not far from the respondents' premises. He held that this blockage did not result from negligence on the part of Ashcroft, its agents or servants, in the design, installation or maintenance of the sewer or in any of the steps taken by Ashcroft and its servants to deal with the blockage when it was discovered. He dismissed any claim based upon negligence, but found Ashcroft responsible on the nuisance claim.

Ashcroft appealed against the attribution of liability for nuisance. The Court of Appeal held that the trial judge made no error, finding that the trial judge was correct and that an actionable nuisance had been shown. At pp. 184-186, McIntyre J.A., (as he then was), had the following to say about the test of nuisance:

The cases on this subject are many and often difficult to reconcile. Text writers have striven to bring some order into this field, and I have found assistance in *Street on Torts* (5th ed., 1972); *Fleming on Torts* (4th ed., 1971); and in a helpful article by J.P.S. McLaren, *Nuisance in Canada*, *Linden's Studies in Canadian Tort Law* (1968), p. 320. From a study of the cases referred to by counsel and cited in the above sources, the following principles emerge:

As has been said in *Street on Torts*, at p. 212: 'The essence of the tort of nuisance is interference with the enjoyment of land.' That interference need not be accompanied by negligence. In nuisance one is concerned with the invasion of the interest in the land; in negligence one must consider the nature of the conduct complained of. Nuisances result frequently from intentional acts undertaken for lawful purposes. The most carefully designed industrial plant operated with the greatest care may well be or cause a nuisance, if, for example, effluent, smoke, fumes or noise invade the right of enjoyment of neighbouring land owners to an unreasonable degree; see *Manchester v. Farnworth*, *supra*, and *Walker v. McKinnon Indust. Ltd.*, *supra*, as examples.

When then can it be said that the tort of nuisance has been committed? A helpful proposition is advanced by the learned author of *Street on Torts*, at p. 215, in these terms:

A person then may be said to have committed the tort of private nuisance when he is held to be responsible for an act indirectly causing physical injury to land or substantially interfering with the use or enjoyment of land or an interest in land, where in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable.

This proposition, stated in a variety of ways, has been accepted generally in the authorities.

The test then is, has the defendant's use of this land interfered with the use and enjoyment of the plaintiffs' land and is that interference unreasonable? Where, as in the case at Bar, actual physical damage occurs it is not difficult to decide that the interference is in fact unreasonable. Greater difficulty will be found where the interference results in lesser or no physical injury but may give offence by reason of smells', noise, vibration or other intangible causes. No finding is required regarding the exercise of care by the defendant and, while its conduct may frequently be such that a finding of negligence could be made, it is not necessary and the existence of due care will afford no defence if the other ingredients are present. Again this is well rooted in authority: for example, see the words of Lord Simonds in *Read v. J. Lyons & Co.*, [1947] A.C. 156, [1946] 2 All E.R. 471 at 482 (H.L.), where the principles laid down in *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330 (H.L.), were under discussion:

It was urged by counsel for the appellant that a decision against her when the plaintiff in the *Rainham* case [*Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co. Ltd.*], [1921] 2 A.C. 465 (H.L.), succeeded would show a strange lack of symmetry in the law. There is some force in the observation, but your Lordships will not fail to observe that such a decision is in harmony with the development of a strictly analogous branch of the law, the law of nuisance, in which also negligence is not a necessary ingredient in the case. For, if a man commits a legal nuisance, it is no answer to his injured neighbour that he took the utmost care not to commit it. There the liability is strict, and there only he has a lawful claim who has suffered an invasion of some proprietary or other interest in land.

In my opinion, the rationale for the law of nuisance in modern times, whatever its historical origins may have been, is the provision of a means of reconciling certain conflicting interests in connection with the use of land, even where the conflict does not result from negligent conduct. It protects against the unreasonable invasion of interests in land.

What is an unreasonable invasion of an interest in land? All circumstances must, of course, be considered in answering this question. What may be reasonable at one time or place may be completely unreasonable at another. It is certainly not every smell, whiff of smoke, sound of machinery or music which will entitle the indignant plaintiff to recover. It is impossible to lay down precise and detailed standards but the invasion must be substantial and serious and of such a nature that it is clear according to the accepted concepts of the day that it should be an actionable wrong. It has been said (see McLaren, Nuisance in Canada) that Canadian Judges have adopted the words of Knight Bruce V.C. in *Walter v. Selfe* (1851), 4 De G. & Sm. 315, 64 E.R. 849 at 852, affirmed on other grounds 19 L.T.O.S. 308, to the effect that actionability will result from an interference with:

... the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober ... notions.

These words were approved by Middleton J.A. in the Ontario High Court in *Appleby v. Erie Tobacco Co.* (1910), 22 O.L.R. 533 at 535-36.

In reaching a conclusion, the Court must consider the nature of the act complained of and the nature of the injury suffered. Consideration must also be given to the character of the neighbourhood where the nuisance is alleged, the frequency of the occurrence of the nuisance, its duration and many other factors which could be of significance in special circumstances. While an owner of land in a quiet residential district may well expect to be protected from the operation of a boiler factory on his neighbour's land, he may not be entitled to expect to prevent the boilermaker from pursuing his lawful calling when he seeks to put his residence in an industrial area next to the factory. The conflicting interests must be circumstances. The social utility of the conduct complained of must be weighed against the significance of the injury caused and the value of the interest sought to be protected. But where the conduct of the defendant has caused actual physical injury to the plaintiffs' land, the mere fact that such conduct may be of great social utility, for example, construction and maintenance of a sewer, will not attract greater licence or immunity. There is no reason why a disproportionate share of the cost of such a beneficial service should be visited upon one member of the community by leaving him uncompensated for damage caused by the existence of that which benefits the community at large. The weighing of conflicting interests in the case at Bar, therefore, causes little difficulty. The interference with the plaintiffs' right of enjoyment of their land and the damage caused to their land is clearly such that the action for nuisance lies in the absence of any defence of statutory authorization.

(emphasis mine)

In *Appleby v. Erie Tobacco Co.* (1910), 22 O.L.R. 533 (Divisional Court), the nuisance complained of was odour arising from the manufacture of tobacco on the defendant's premises. The plaintiff complained of noxious odours coming from the defendant's tobacco factory and interfering with the plaintiff's enjoyment of his premises in the vicinity of the factory. The plaintiff sought an injunction in respect of the odours. The trial judge dismissed the action in respect of the claim for an injunction and the plaintiff appealed. In holding for the plaintiff, Middleton J. said at pp. 536-538:

In *Fleming v. Hislop*, 11 App. Cas. at p. 691, the Earl of Selborne states his view of the law thus: 'What causes material discomfort and annoyance for the ordinary purposes of life to a man's house or to his property, is to be restrained ... although the evidence does not go to the length of proving that health is in danger.' Lord Halsbury, at p. 697, states what is substantially the same thing. 'What makes life less comfortable and causes sensible discomfort and annoyance is a proper subject of injunction.'

Now, it is to be borne in mind that an arbitrary standard cannot be set up which is applicable to all localities. There is a local standard applicable in each particular district, but, though the local standard may be higher in some districts than in others, yet the question in each case ultimately reduces itself to the fact of nuisance or no nuisance, having regard to all the surrounding circumstances. This is shewn by the oftenquoted passage in Lord Halsbury's judgment in *Colls v. Home and Colonial Stores Limited*, [1904] A.C. 179, at p. 185: 'A dweller in towns cannot expect to have as pure air, as free from smoke, smell, and noise as if he lived in the country, and distant from other dwellings, and yet an excess of smoke, smell and noise may give a cause of action, but in each of such cases it becomes a question of degree, and the question is in each case whether it is a nuisance which will give a right of action.'

In *Rushmer v. Polsue and Alfieri Limited*, [1906] 1 Ch. 234, (1907) A.C. 121, this principle is applied to the case of a printing office established in a neighbourhood devoted to printing, next door to the plaintiff's residence, and which rendered sleep impossible. Cozens Hardy, L.J., [1906] 1 Ch. at p. 250, sums up the situation in a way that commended itself to the Lords. It was, he says, contended 'that a person living in a district specially devoted to a particular trade cannot complain of any nuisance by noise caused by the carrying on of any branch of that trade without carelessness and in a reasonable manner. I cannot assent to this argument. A resident in such a neighbourhood must put up with a certain amount of noise. The standard of comfort differs according to the situation of the property and the class of people who inhabit it ... But whatever the standard of comfort in a particular district may be, I think the addition of a fresh noise caused by the defendant's works may be so substantial as to cause a legal nuisance. It does not follow that because I live, say, in the manufacturing part of Sheffield, I cannot complain if a steam-hammer is introduced next door, and so worked as to render sleep at night almost impossible, although previous to its introduction my house was a reasonably comfortable abode, having regard to the local standard; and it would be no answer to say that the steam-hammer is of the most modern approved pattern and is reasonably worked. In short ... it is no answer to say that the neighbourhood is noisy, and that the defendant's machinery is of first-class character.'

This case, as is shewn by this extract, puts an end to the controversy upon the question whether the reasonableness of the defendants' user of their own premises affects the plaintiff's rights. Kekewich, J., in *Remhardt v. Mentasti* (1889), 42 Ch. D. 685, carefully reviews the cases and concludes that it does not. Buckley, J., in *Sanders-Clark v. Grosvenor Mansions Co.*, [1900] 2 Ch. 373, declined to accept this view, apparently confusing the question of nuisance having regard to the local standard with reasonable use of the defendant's premises.

In *Attorney-General v. Cole & Son*, [1901] 1 Ch. 205, Kekewich, J., discusses the apparent conflict and seeks to reconcile the two views.

In *Drysdale v. Dugas*, 26 S.C.R. 20, the majority of the Supreme Court review the earlier cases, and come to the same conclusion as that now accepted in England.

It is plain, in this case, that the defendants' manufactory does constitute a nuisance. The odours do cause material discomfort and annoyance and render the plaintiff's premises less fit for the ordinary purposes of life, even making all possible allowances for the local standard of the neighbourhood.

In *Maker v. Davanne Holdings Limited et al*, [1954] O.R. 935, the plaintiff sought an injunction restraining the defendant from using or causing to be used lands and premises for warehouse or storage purposes and for the purpose of a parking lot. In granting the injunction, Spence J. at p. 939-940 said:

The plaintiff, however, is not complaining of the ordinary noise consistent with the alteration of the character of the neighbourhood from a strictly residential character to a mixed residential and commercial character, but rather of the special noise resulting from the shifting about of goods in what was a semi-detached residence separated from his own only by a party wall.

Appleby v. Erie Tobacco Co. (1920), 22 O.L.R. 533, is a decision in reference to an alleged nuisance arising from noxious odours. Middleton J., as he then was, at pp. 536-7 quoted from English cases where the alleged nuisance was noise, particularly at p. 537, where he cited *Rushmer v. Polsue & Alfieri, Limited*, [1906] 1 Ch. 234, affirmed [1907] A.C. 121. He quoted as follows from *Cozens Hardy L.J.* (whose words were approved by the law lords) in that case at p. 250:

...

So it is no answer here for the defendants to say that the neighbourhood is noisy, containing stores, furniture-shops, etc. What the plaintiff complains of is this incessant racket right through the party wall from his bedroom. I am of the opinion that he has established a case for an injunction until trial upon the ordinary law of nuisance.

In general, a landlord is not liable for a nuisance on the premises; but the landlord is liable if he has authorized nuisance or if he knew, or ought to have known, of nuisance before letting (see *Winfield on Tort*, 9th Ed, (1971) p. 347). The discussed in *Banfal et al. v. Formula Fun Centre Inc. et al.* (1984), 34 C.C.L.T. 171 (Ont. H.C.). In that case, the defendant, took a lease from Ontario Hydro of vacant urban land, bounded upon three sides by motel properties. Their aim, which was made clear to Hydro, was to operate an automobile racing amusement ride; a proposal vigorously opposed by neighbouring property owners who feared noise pollution. A conditional certificate was eventually granted by the Provincial Environment Ministry and the City of Niagara Falls passed a bylaw, approved by the Municipal Board, allowing the track to operate.

The miniature racing cars produced a very high noise level from whining engines and screeching tires, a noise which was more or less persistent for 12 hours a day during the summer operating season and which was irritating and obtrusive. The plaintiff, the owner of one of the adjacent motels, brought the action in nuisance seeking damages and an injunction. The court found that the conduct of the racetrack was such as to create a material interference with the ordinary comfort and convenience which the plaintiffs were entitled to expect while enjoying their property. It was in law a nuisance. It found the noise was intrusive and abrasive, out of keeping with other noises in the vicinity and that it was unreasonable in all of the circumstances of the case. It also found that Ontario Hydro, as landlord of the property, had been fully aware of its tenant's intention and of the inevitable noise which the proposed use would have upon nearby properties. At p. 188 of the case, O'Leary J. discusses the liability of an owner for the nuisance created by its tenant as follows:

Is Hydro, the owner, liable for the nuisance by the tenant, Formula? In general, an owner is not liable for the nuisance committed by his tenant. To this rule there is one exception. Where the nuisance arises 'from the natural and necessary result of what the landlord authorized' the tenant to do, then the owner-landlord is liable: *Harris v. James*, [1874-80] All E.R. Rep. 1142. This exception to the general rule has been expressed in different terms. In *Earl v. Reid* (1911), 23 O.L.R. 453 at 466, 2 O.W.N. 873, 18 O.W.R. 562, Riddell J. said the landlord was not liable unless 'the use from which the damage or nuisance necessarily arises was plainly contemplated by the lease'. In *Aldridge v. Van Patter*, [1952] O.R. 595, [1952] 4 D.L.R. 93, Spence J. held the owner liable because the possibility of an automobile, during the course of a race, plunging through the fence around the track and injuring someone in the park (the nuisance that actually occurred) was in the immediate contemplation of the owner when the lease was executed. In *Smith v. Scott*, [1973] Ch. 314, [1972] 3 All E.R. 645, [1972] 3 W.L.R. 783, it was suggested that the owner will be held liable if there is 'a very high degree of probability' that a nuisance will result from the purposes for which the property is let.

In my view, no matter what the correct wording of the exception, Hydro is liable for the nuisance on the evidence in this case. As already indicated, Hydro knew exactly the use Formula intended for the property before it entered into the lease. Hydro not only knew that Formula intended to use the land for an amusement ride, it knew and approved of the layout of the track. It knew the size, power and make of the cars to be raced thereon and the hours of the day the track would be in operation.

Hydro understood two cars might be racing on the track at any one time, and as I indicated earlier, Formula had frequently three and four cars on the track at once. Nevertheless, I am satisfied on the evidence that one or two cars racing on the track at one time are a nuisance. Therefore, the nuisance resulted from Formula operating the track, that is to say, using the land exactly as Hydro knew it intended to use it. By entering into the lease, Hydro authorized Formula to use the land in the manner that caused a nuisance. It follows that the nuisance was 'the natural and necessary result of what the landlord authorized the tenant to do'. Hydro was aware and concerned long before the lease was entered into that the track might cause noise unacceptable to its neighbours and several clauses in the lease purported to deal with how excessive noise was to be dealt with. Therefore, 'the nuisance was plainly contemplated by the lease' and the possibility of the track causing a noise nuisance 'was in the immediate contemplation of the owner'. Subsequent events have shown that there was not only 'a very high degree of probability that a nuisance would result from the purpose for which the property was let' but there was "a certainty" that such would occur.

(emphasis mine)

Perhaps it is trite to say that a person who purchases a residence in a mixed residential/commercial neighbourhood must therefore accept the noise and smells that come with the neighbourhood. A succinct statement of the general principle is found in *Halsey v. Esso Petroleum Co. Ltd.*, [1961] 2 All E.R. 145 (Q.B.D.) where Veale, J. at pp. 151-152 said:

So far as the present case is concerned, liability for nuisance by harmful deposits could be established by proving damage by the deposits to the property in question, provided, of course, that the injury was not merely trivial. Negligence is not an ingredient of the cause of action, and the character of the neighbourhood is not a matter to be taken into consideration. On the other hand nuisance by smell or noise is something to which no absolute standard can be applied.

It is always a question of degree whether the interference with comfort or convenience is sufficiently serious to constitute a nuisance. The character of the neighbourhood is very relevant and all the relevant circumstances have to be taken into account. What might be a nuisance in one area is by no means necessarily so in another. In an urban area, everyone must put up with a certain amount of discomfort and annoyance from the activities of neighbours, and the law must strike a fair and reasonable balance between the right of the plaintiff on the one hand to the undisturbed enjoyment of his property, and the right of the defendant on the other hand to use his property for his own lawful enjoyment. That is how I approach this case.

It may be possible in some cases to prove that noise or smell have in fact diminished the value of the plaintiff's property in the market. That consideration does not arise in this case, and no evidence has been called in regard to it. The standard in respect of discomfort and inconvenience from noise and smell that I have to apply is that of the ordinary reasonable and responsible person who lives in this particular area of Fulham. This is not necessarily the same as the standard which the plaintiff chooses to set up for himself. It is the standard of the ordinary man, and the ordinary man, who may well like peace and quiet, will not complain for instance of the noise of traffic if he chooses to live on a main street in an urban centre, nor of the reasonable noises of industry, if he chooses to live alongside a factory.

(emphasis mine)

Sharon Kenny did accept the noise and smells that came with her part of Yew Street, but, on the evidence, the installation of the fan directly below her condominium, effected her lifestyle and caused Ms. Kenny substantial discomfort. I am satisfied that the installation of the fan interfered with her enjoyment of her condominium to such a degree that it was an unreasonable invasion of her interest in land and that, on the principles set out in the cases, constitutes an actionable nuisance.

Before purchasing her condominium Ms. Kenny made reasonable inquiries about the restaurant operations carried on in the commercial strata lots. She was satisfied that the restaurants would not be cooking foods that would create offensive odours. Her inquiries were borne out because for four years she lived in her condominium without interference in the enjoyment of her condominium from the restaurant operations. However, after the fan was installed by the Cafe Zen, Ms. Kenny's enjoyment of her condominium was substantially and unreasonably interfered with by the constant noise, disturbance and unpleasant odours created by the fan. I accept Ms. Kenny's evidence that the noise and smell was a substantial interference. She did not strike me as being an overly sensitive person or someone who would be unreasonable in assessing the degree of interference caused by the fan. She impressed me as a normal person of ordinary habits and sensibilities who suffered substantial personal discomfort from the noise and smell created by the fan. Mr. Schuster testified that until the fan was installed he got along very well with Ms. Schuster, liked her and that she made no complaints to him.

There is other evidence of the degree of interference caused by the fan. Mrs. Irene Hollo, a tenant in the condominium above Ms. Kenny, moved into her condominium in February 1987. She testified that when she entered her condominium on May 20, 1987 she heard a noise and thought that she had left an appliance running. After searching her condominium, she realized that the sound was coming from the dining room area. She looked out her dining room window and discovered that the noise she heard was coming from the fan. She described the noise like a car constantly idling. As to odours, she described the smell as greasy, a cooking odour. She said it had a smell like old grease that had been used over and over again. Like Ms. Kenny, Mrs. Hollo could smell the odours in the common areas and throughout her condominium. Mrs. Hollo said that she moved out of the rented condominium in May 1988 because of the horrible smells.

John Boyer, who purchased Ms. Kenny's condominium in May 1988, moved into the condominium in June 1988. He testified that with his condominium windows closed, he could not tell if the fan was in operation. However, when he opens his dining room window he can smell kitchen odours without any problem and he can hear the fan. In cross-examination he testified that he kept his dining room window closed because of the noise from the fan which he described as a bother. When the dining room window is left open, he can detect odours, particularly the smell of bacon cooking. He described the odours from the fan as being associated with the frying or deep frying of food.

As to Schuster's responsibility to Ms. Kenny for the nuisance caused by the fan, there is no doubt that Mr. Schuster realized when he assigned the lease to Cafe Zen and approved the installation of the fan that it would change the character of the building. First, in the lease that was assigned to Cafe Zen, he had inserted a provision that there would be no baking of pizza or food preparation with a penetrating smell. He testified that this provision was inserted because he wanted to make sure that the building was as pleasant as possible for all the occupants. He explained that he had had an experience with a pizza parlour in another building owned by him where the smell from the baking of pizza had permeated the entire building.

Second, Mr. Schuster's decision to assign the lease and approve the installation of the fan was a purely economic one without regard to the impact of the fan on Ms. Kenny's condominium. The prior owner to the Cafe Zen was in financial difficulty. A restaurant in that neighbourhood was not economic without the ability to serve cooked foods. Mr. Seto testified that he had no intention of purchasing the restaurant unless he could have a menu serving cooked foods which meant the installation of a restaurant exhaust fan. Mr. Schuster's position was that he would approve the installation of the fan as long as it was permitted by City Hall. So, at the time of the assignment of the lease to Mr. Seto, Mr. Schuster knew full well that Mr. Seto intended to serve a menu with cooked foods. I am also satisfied that Mr. Schuster knew the details regarding installation of the fan and that it would exhaust fumes from cooked foods directly below Ms. Kenny's condominium.

Third, Mr. Schuster immediately acknowledged his responsibility when Ms. Kenny first complained about the installation of the fan. His initial response was to buy her out if he could not find an amicable solution to her complaint. The only reason he did not purchase her condominium was because he could not raise the cash.

In my opinion, it is conclusive in this case, that the noise and smell from the fan constitute a nuisance and that the nuisance arose as the natural and necessary result of what the defendant Schuster authorized the Cafe Zen to do. Therefore, the defendant Schuster is liable for damages. (see *Banfai v. Formula Fun Centre*, supra.) It is no answer for the defendant Schuster to say that Ms. Kenny chose to live in a mixed commercial/residential neighbourhood and therefore she cannot complain of the noise and smell from the fan. Ms. Kenny did not choose to live in a building where there would be a restaurant creating offensive odours. When Mr. Schuster allowed the installation of the fan he knew the potential problems that the fan would create. What Ms. Kenny complained to Mr. Schuster about was not the noise and smells ordinarily consistent with the character of the neighbourhood but rather the extremely disturbing noise and smell coming from an exhaust fan installed, with Mr. Schuster's permission, in a location which created a substantial interference with the enjoyment of her condominium.

Mr. Schuster relied heavily on the fact that the city permitted the installation of the fan and that city inspectors approved it before and after its installation. A noise control supervisor from the City of Vancouver Department of Health was called to testify. While his file contained complaints regarding noise from the fan, at no time did anyone from his department take a reliable noise level reading from the street level or any reading from Ms. Kenny's condominium. Further, by letter dated September 8, 1987, the city wrote to the Cafe Zen confirming their inspection of the restaurant in regard to noise from the fan and stating "however, given that your system is operating at 65 dba, and the exhaust fan is located near residential accommodations, we would encourage your co-operation with your residential neighbours towards finding a compromise for their problems". Mr. Joe Rittberg, the owner of the firm that installed the fan, after looking at the letter, said that he would not have liked the fan operating at 65 dba which was at the top end of the permitted reading levels in the noise bylaw.

VI. Damages

On the subject of damages for nuisance, G.H.L. Fridman, Q.C., *The Law of Torts in Canada*, Vol. 1 (Toronto: Carswell, 1989) at pp. 161-162 states:

If the the nuisance has caused physical damage to the plaintiff's property, damages will be recoverable. Damages may also be an appropriate remedy where the plaintiff has suffered personal physical injury in consequence of the defendant's conduct. In this respect, it must be shown that the damage in question was not the result of any idiosyncratic condition of the plaintiff, some special weakness that rendered him susceptible when the average person would not have been harmed. 237 However, whether personal or proprietary damages involved, it would seem that once the defendant's conduct amounts to an actionable nuisance vis-a-vis the ordinary reasonable man, the fact that the plaintiff suffers extra damage because of his sensitive nature (or the special use he is making of his property, such as the cultivation of orchids, a delicate plant) will not preclude the recovery of such extra loss.

Once damage to the plaintiff's property is established, the defendant can be held liable for consequential loss, such as loss of business, and the expenses incurred in repairing and protecting property. 239 one such consequential loss that has caused problems is the diminution in value of the plaintiff's property by reason of the interference resulting from the defendant's conduct. It has been said that no proof of damage is required where the nuisance consists of the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, or anything that discomposes or injuriously affects the senses or the nerves.

No actual financial or physical damage need be proved as the damage in such cases consists in the annoyance and discomfort caused to the occupier of the premises. However, a number of decisions have concerned the possibility of a claim for financial loss resulting from such interference. Plaintiffs have argued that their property has lessened in value, in terms of saleability on the market, because the smoke, noise, dust, fumes, etc., made the plaintiff's property not as desirable as it might have been without such interference.

If the plaintiff is to seek a remedy, it must be shown, in the first instance, that the plaintiff believed that what the defendant was doing would result in such diminution of the value of the plaintiff's property. In other words, there must be a causal connection between the defendant's conduct and the alleged drop in value. Second, it must be proved that there was some diminution in value. One way to establish this, perhaps the best or truest way, is to show that attempts were made to sell the property and failed, or could only succeed if the price were significantly reduced from what would otherwise be a reasonable market price.

I am satisfied that the value of Ms. Kenny's condominium decreased due to the installation of the fan. Mr. Peter Mason, the real estate agent who listed Ms. Kenny's condominium, testified that it took seven months to sell it. He pointed out the fan to prospective purchasers because he was concerned to ensure that they knew about its existence. However, he kept the dining room window shut when he was showing the condominium because he did not want to emphasize the negative aspect of the fan. When he received Mr. Boyer's offer of \$105,000 he encouraged Ms. Kenny to accept the offer because it was the only one received.

In my view, the extent of the diminished value of Ms. Kenny's condominium is settled by the evidence of Mr. Leslie Parton, a certified appraiser. Mr. Parton completed an appraisal of Ms. Kenny's condominium dated June 9, 1987. He concluded that "marketability may be impaired due to the nuisance of the restaurant's exhaust fan" and he estimated the value of her condominium at \$105,000. In a letter dated July 21, 1988 Mr. Parton stated "the estimated loss due to noise and odours from the restaurant's exhaust fan located on and/or adjacent to the subject is \$10,000. Therefore the net current market value is \$105,000".

Mr. Parton based his conclusion of the loss of value of Ms. Kenny's condominium based upon his experience, expertise and common sense. I am satisfied, on the whole of the evidence, that his conclusion is a reasonable one and I therefore award Ms. Kenny damages under this head of \$10,000.

With respect to Ms. Kenny's claim for non-pecuniary damages, ges 15th ed. (London:Sweet & Maxwell Limited, 1988) at p. 869, paragraph 1401 states:

Beyond physical damage to the land however, a nuisance may cause annoyance, inconvenience, discomfort, or even illness to the plaintiff occupier. Recovery in respect of these principally non-pecuniary losses is allowable and may be regarded as part of the normal measure of damages.

Stephenson L.J. in *Bone & Another v. Seale* [1975] 1 All E.R. 787 (C.A.C.D.) considered the measure 'of damages for interference with the enjoyment of property and at pp. 792-794 said:

On the third ground, that the damages awarded by the judge were far too high, it seems to me that this court has a very difficult task to perform. It has to ask itself: what is the measure of damages for a nuisance of this kind? I start by considering whether there is really any authority which gives us, or which would have given the learned judge, any guidance. The only authority which has been cited in this court is the decision of Veale J. in *Halsey v. Esso Petroleum Co. Ltd.* That was a very different case of an unfortunate plaintiff living in Fulham who had to put up with smells, vibration and noise, by day and night, to an extent which very seriously interfered with his comfort and convenience over a period of something like five years. In 1961 the learned judge gave him, for all that, damages of 200. I do not think it could be suggested that that was a high figure, even in those days; if it had not been coupled with an injunction, it might well have been higher.

Is there any other guide to which we can turn in considering whether the judge's figure of over 6,000 for each of these plaintiffs is the right sort of figure? It is a figure which I think struck each member of this court rather as the figure in *McCarthy v. Coldair Ltd* struck Denning LJ, and led us to say to ourselves something like 'Good gracious me - as high as that!'

That figure of over 6,000 for what is a nuisance and is offensive but no more something which is rightly described as a nuisance - does seem at first blush to be a very high figure, and counsel for the defendant has asked us to say that it is a figure which is so high that this court cannot uphold it. We accept the test long ago laid down by Greer

LJ in *Flint v. Lovell*. In that case Greer LJ said:

I think it right to say that this court would be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damage [sic] to which the plaintiff is entitled.

That test was repeated by Lord Pearson, with the agreement of Lord Denning MR and Sir Gordon Willmer, in *Hinz v. Berry*, to which counsel for the plaintiffs also referred.

It is difficult to find an analogy to damages for interference with the enjoyment of property. In this case, efforts to prove diminution in the value of the property as a result of this persistent smell over the years failed. The damages awarded by the learned judge were damages simply for loss of amenity living on their property; and of course their enjoyment of their own property was indirectly affected by these smells inasmuch, as it affected their visitors and members of their families. The nearest analogy would seem to be the damages which are awarded almost daily for loss of amenity in personal injury cases; it does seem to me that there is perhaps a closer analogy than at first sight appears between losing the enjoyment of your property as a result of some interference by smell or by noise caused by a next door neighbour, and losing an amenity as a result of a personal injury. Is it possible to equate loss of sense of smell as a result of the negligence of a defendant motor driver with having to put up with positive smells as a result of a nuisance created by a negligent neighbour? There is, as it seems to me, some parallel between the loss of amenity which is caused by personal injury and the loss of amenity which is caused by a nuisance of this kind. If a parallel is drawn between those two losses, it is at once confirmed that this figure is much too high. It is the kind of figure that would only be given for a serious and permanent loss of amenity as the result of a very serious injury, perhaps in the case of a young person. Here we have to remember that the loss of amenity which has to be quantified in pounds and pence extends over a long period - a period of 12 1/2 years - but it must not take account of any future loss.

Scarman L.J. in the same case, at pp. 794-795 stated:

Nuisance is a wrong to property, but it is well recognised that even when there is no physical damage to property it may cause annoyance, inconvenience and discomfort to the occupier of the property in his enjoyment of it. As Mr. McGregor says in his work on Damages:

When there is a claim for damages in respect of non-pecuniary loss caused by nuisance, recovery of damages is allowable and may be regarded as part of the normal measure of damages.

In such a case as this, therefore, we are thrown back to general principles.

What is the relevant general principle? I think it is that to which Lord Morris of Borth-y-Gest referred in the course of his speech in *H. West & Son Ltd. v. Shephard*. That was a case of very severe personal injury, but, speaking of the difficulty of awarding damages where there is no financial yardstick, he said simply: 'All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation'.

Such is the principle, but the difficulty remains: what is reasonable? As Stephenson L.J. has mentioned there is very little guidance in the case law. In *Halsey v. Esso Petroleum Co. Ltd.*, to which Stephenson L.J. has referred, Veale J. considered 200 appropriate damages for what, on reading the case, one would think was a gross interference with comfort and enjoyment of property over a period of five years or thereabouts. Nevertheless, there is in that case an indication of what one learned judge thought appropriate in a case of nuisance by noise and smell in 1961, and, unless it can be said that his estimate was itself wholly erroneous, it is something we must bear in mind when attempting to adopt a consistent legal pattern in the assessment of damages at large.

Where else can one go to for assistance as to what is reasonable? As Stephenson L.J. has indicated, it is appropriate to go to personal injury litigation and to note the sort of figure that judges award for the element of loss of amenity. It is difficult to be

precise in such matters, and I think not helpful to refer to specific cases. But the indications, both from one's own experience and from such works as have collated damages in these cases, are that 6,000 for 12 years' discomfort in a matter of smell is out of all proportion to awards for comparable loss of amenity in that class of case.

It is not, I think, possible to say that we must adopt, or seek to adopt, any rigid standard of comparison between a nuisance case and personal injury litigation. Nevertheless, overall the law ought to remain consistent when it is dealing with analogous situations.

I find, therefore, both in Veale J.'s decision and in the general approach of judges to the loss of amenity element in damages in personal injury litigation, some indication that the damages awarded in this case were unreasonable.

But that in itself cannot be enough to entitle this court to disturb the award of the trial judge. We have to go as far as Stephenson L.J. has mentioned when he quoted the well-known passage from the judgment of Greer L.J. in *Flint v. Lovell*. Was there here an entirely erroneous estimate of the damage sustained by the two plaintiffs? This must be a matter of impression - impression derived from experience and a general knowledge of the way in which the law handles analogous claims.

One must bear in mind also a further general principle, that, when one is removed from the world of pecuniary loss and is attempting to measure damages for non-pecuniary loss, an element in reasonableness is the fairness of the compensation to be awarded. There must be moderation; some attention must be paid to the rights of the offending defendant as well as to the rights of the injured plaintiff.

Ms. Kenny says, and I believe, that she did not bring this action out of spite for Mr. Schuster or based on principle but because she lost the enjoyment of her condominium. Until the installation of the fan, she enjoyed living in her condominium. Ms. Kenny's condominium was unique because of its very large patio deck. Mr. Boyer testified that the patio deck is one of the big features of the condominium which adds value to it. But for the installation of the fan, Ms. Kenny planned to stay in her condominium and make improvements to it.

Ms. Kenny concluded, and I find reasonably so, that she had no alternative but to sell her condominium. There is no evidence of anything more she could reasonably have done to minimize the negative impact of the noise and smell from the fan. She asked for the fan to be taken down. She was prepared to sell to Mr. Schuster. She sought an injunction. She listed her condominium for sale. The installation of the fan was a gross interference with the comfort and enjoyment of her condominium over a period of approximately one year and I consider a fair and reasonable award to her for non-pecuniary damages to be \$7,500.

In addition, Ms. Kenny is entitled to repayment of the commission which she was forced to pay by reason of her having to sell her condominium (see *Horton and Horton v. Zirul* (1982), 34 B.C.L.R. 234, *Danish v. Danish* (1981), 33 B.C.L.R. 176 and *Murchie v. Murchie* (1984), 39 R.F.L. (2d) 385). As well, she is entitled to reimbursement for her moving costs as well as her legal costs incurred in connection with the injunction application.

VII. Conclusion

In the result, Ms. Kenny will have judgment against the defendant Schuster in the amount of \$25,557.45 plus her costs of this trial including her costs of the application before Paris J. on Monday, November 28, 1988. She is entitled to interest pursuant to the Court Order Interest Act.

COHEN J.

CBR# 365

York Condominium Corp. No. 400 v. Comcraft Services Ltd.

Between

York Condominium Corporation No. 400, Applicant, and
Comcraft Services Limited and B.K. Prasad, Respondents

Ontario Judgments: [1988] O.J. No. 2364
Action Nos. M163490/88, M166872/88

Ontario District Court - York Judicial District
Toronto, Ontario
Davidson D.C.J.

June 30, 1988

M. Spears, for the Applicant.

R.M.S. Lambert, Q.C., for the Respondents.

DAVIDSON D.C.J. (orally):— This is an application by York Condominium Corporation No. 400 for an order requiring the respondents 10 to comply with By-law No. 3 of York Condominium Corporation No. 400, and for an injunction prohibiting the respondents, or either of them, from ordinarily residing in any unit in York Condominium Corporation No. 400 with anyone under the age of 18 years and, in the alternative, for an interim injunction prohibiting the respondents, or either of them, from ordinarily residing in any unit in York Condominium Corporation No. 400 with anyone under the age of 18 years.

York Condominium Corporation No. 400 was created by the registration of a Declaration and Description at the Office of Land Titles in Toronto on July 14, 1978. By-law No. 3 of York 400 provides as follows, under the heading, "Sales, Resales and Leases of Units":

"All sales, resales or leases of units shall be restricted to purchasers or lessees with no dependents under 18 years of age. A binding disclosure form confirming that fact shall be signed by the potential purchaser or lessee and be attached to and form part of the offer to purchase or lease."

By-law No. 3 was confirmed by a vote of owners at a meeting held November 26, 1979, and was registered in the Office of Land Titles at Toronto on December 10, 1979. The by-law was passed or confirmed or voted for by the necessary majority owners of units of York 400.

The respondent, Comcraft Services Limited, has been the owner of two units in York 400 since August of 1979 and, accordingly, notice of the owners' meeting held on November 26, 1979 to consider By-law No. 3 would have been forwarded to said Comcraft.

In January of 1988, the respondent, B.K. Prasad, advised York 400 that he intended to purchase from Comcraft the two units owned by it in the Condominium Corporation and requested an estoppel certificate from York 400. The Condominium Corporation, in turn, required that Mr. Prasad execute a disclosure form as required by By-law No. 3 confirming that he would not be occupying the units to be purchased with any dependents under 18 years of age.

Both Prasad and Comcraft subsequently advised York 400 that the said disclosure form would not be provided and, by a letter dated March 16, 1988, Comcraft formally advised York 400 that Prasad would be proceeding ahead with the completion of the formalities for the purchase of the two suites ignoring the by-laws.

Prasad had already verbally confirmed to the solicitors for York 400 that he would be proceeding to complete the purchase of the said units in York 400 and that, as he proposes to occupy these units with two dependents under the age of 18 years, he will not be providing the disclosure form required by By-law No. 3.

With the exception of the respondent Mr. Prasad, it is apparent that every prospective purchaser of a unit in York 400 has provided this disclosure form to the Corporation pursuant to By-law No. 3 since its passage in 1979.

The By-law is purportedly passed under section 28 of The Condominium Act and, in particular, said to be under subsection (d), which reads:

s. 28(d) "to govern the management of the property;

(g) specifying duties of the corporation;"

and:

"(j) respecting the conduct generally of the affairs of the corporation.",

and the heading of the section, of course, is:

"The board may pass by-laws, not contrary to this Act or to the declaration..."

in respect to those three matters I have quoted.

Section 3 of The Condominium Act sets out what the declaration under The Condominium Act must contain, that is, in section 3(1) and in section 3(3), it sets out what the declaration may contain. The important subsections for consideration are section 3(3)(b), (c), and I read:

3(3) "In addition to the matters mentioned in subsection (1), and in any other section in this Act, a declaration may contain,

(b) provisions respecting the occupation and use of the units and common elements;

(c) provisions restricting gifts, leases and sales of the units and common interests;"

It is of considerable note, in my view, that the wording of the first sentence of the By-law comes squarely within the wording in section 3(3)(c). The validity of similar or analogous restricting provisions contained in a declaration as opposed to a by-law has been upheld in at least two decisions.

In *York Condominium Corporation No. 216 v. Borsodi* (1983), 42 O.R. (2d), my brother Allen had occasion to deal with the Declaration of the Condominium in which inter alia there was at issue a provision proclaiming:

"...no owner or occupant of such units shall use them or permit them to be used or shall sell or permit them to be sold except for residential purposes for adults and persons 14 years of age and older, and no children under the age of 14 years shall be permitted by the owners and occupants of the said units to occupy or reside in the said units."

The provision was purportedly included in the Declaration under section 3(3)(b) of The Condominium Act.

The result of that decision was that a mandatory injunction was granted pursuant to section 49 of The Condominium Act requiring the defendants to comply with the Act and, particularly, with that provision of the Declaration which included the words that I have read.

In the recent decision of *Metropolitan Toronto Condominium Corporation No. 624, and Ramdial et al.*, my brother Hudson gave oral reasons for judgment, unreported, dated January 29, 1988. The Declaration of the Condominium Corporation which was under discussion there provided in section 35 under the heading "Adult Occupancy":

35. "No unit owner or lessee of a unit shall permit anyone under the age of 16 years to ordinarily reside in such unit. Any unit resale or lease by anyone other than the declarant must be consented to by the Board of Directors within 15 days of their receipt of the Agreement of Purchase and Sale or lease, or alternatively, the Corporation may purchase or lease such unit on the same terms and conditions as set out in the said Agreement of Purchase and Sale or Lease."

It is recited in that decision that section 35 of the Declaration was passed pursuant to section 3(3)(b) of The Condominium Act and also subsection (c) of that section, those, of course, being the two subsections to which I have already referred.

In *Metropolitan Toronto Condominium 624*, the Corporation sought an injunction to prevent the sale of the unit under discussion when it learned that the proposed purchaser had a 13-year-old child and that it was intended that the proposed purchaser and the 13-year-old child would occupy the unit after the purchase was completed. The result of that case was that the order was made requiring the respondents to comply with section 35 of the Declaration and an injunction was granted.

I note that an appeal was taken from that decision and a motion to quash the appeal was successful on June 6, 1988. That is, the appeal was not heard on its merits.

Reference was had by both counsel before me to the decision in *Basmadjian v. York Condominium Corporation No. 52*, (1981), 21 R.P.R. 11, a decision of Mr. Justice Maloney of the Supreme Court of Ontario.

The by-law under discussion there dealt with requirements for leasing. Of note in that case at page 114 there appears the quote:

"A condominium corporation is entirely a creature of statute. Any provision of its declaration, by-laws or rules must be authorized by The Condominium Act, 1978."

Continuing on that page, and I quote:

"In all cases the Act has priority over the declaration and the by-laws.... In addition, s. 60 provides that the provisions of the Act will apply notwithstanding any agreement to the contrary. Next to the provisions of the Act the declaration is to have priority. The declaration is subject to the Act and s. 3(5) provides that where any provisions in a declaration or by-law is inconsistent with the provisions of the Act, the Act prevails and the declaration or by-law is deemed to be amended accordingly."

And then, continuing on page 115, I quote:

"Counsel for the applicant likened the priority given to the declaration in The Condominium Act, 1978 to a constitution, amendment of which is subject to stringent safeguards. I accept this submission and it is clear that the declaration has priority over the by-laws."

The Court then goes on further at page 115, and I quote:

"The validity of any by-law, therefore, must be examined in the light of the priority given to the provisions of the Act and the declaration. A by-law may be upheld only if it falls within the matters contained in s. 28(1) and if it is reasonable and consistent with both The Condominium Act, 1978, and the declaration."

Counsel for the applicant before me places emphasis upon Mr. Justice Maloney's statement at page 120 of the Basmadjian decision, and I quote:

"In my opinion, By law No. 7 would properly fall within the matters which may be included in the declaration under s. 3(3)(a) of the Act which provides for 'a specification of common expenses' and/or s. 3(3)(c) of the Act which provides for 'provisions restricting gifts, leases and sales of the units and common interests.' The wording of s. 4 of para. 1 of BY-law No. 7 clearly does not anticipate that the rental administration charge is being specified as a common expense. Accordingly, the true characterization of this by-law falls within s. 3(3)(c)."

And then Mr. Justice Maloney goes on:

"Section 3(3)(c) is permissive and not exclusive as to what may be contained in the declaration. To the extent that the leasing provisions of By-law No. 7 are consistent with art. XVII of the declaration, they are valid."

In my view, that quotation on page 120 still must be looked at in light of what his lordship said at page 115:

"A by-law may be upheld only if it falls within the matters contained in s. 28(1)...."

I have already read sections (d), (g) and (j) of section 28(1). In my opinion, it would of the wording used in those subsections to say that they would permit the restriction on the sale and lease which is sought to be upheld here pursuant to By-law No. 3. Even accepting that The Condominium Act is remedial legislation requiring such large and liberal interpretation as would best attain the object of the Act according to its true intent, meaning and spirit, I do not feel that the interpretation proposed under section 28(1) is justified and, in particular, I feel such possible interpretation is eroded away by the existence of the specific powers available under the permissive portion of section 3 which dealt with provisions which may go into the declaration.

I do not lose sight of the fact that prior to the registration of the Declaration, the project was being marketed in sales material and in advertising as "adults-only" and "adult residence". The fact remains that the declarant did not incorporate that feature or restriction in the Declaration.

Reference was also had on behalf of the applicant to a portion of Hansard of the Legislative Assembly of Ontario on December the 9th, 1986, wherein The Honourable Mr. Scott, the Attorney General, is quoted at page 4069 as follows:

"First, many of the condominium owners in Ontario who think they are living in adults-only buildings are not living in adults-only buildings. There is more than one recorded example of buildings that are advertised as adults-only buildings in which there is not and never has been the requisite by-law and where at the end of the day the remaining units are sold to families with children to complete the condominiumization of the exercise. Many of the people out there who with the best faith in the world believe they are living in adults-only buildings are not in fact so living.... It is possible a building that is not now an adults-only building could become one by the passage of the by-law, but the reality is that it is highly unlikely because of the by-law passage requirements."

I note that that was not a debate on The Condominium Act. It, apparently, was a debate considering the Equality Rights Statute Law Amendment Act. It is of interest but not more than that, in my opinion, in regard to the issue that I have to face.

In the result, I find that the restriction sought to be imposed cannot be imposed by by-law under the statutory powers contained in section 28 of The Condominium Act, and accordingly the application of the Condominium Corporation is dismissed.

There were differences of opinion between counsel as to the Court's jurisdiction to declare ultra vires By-law No. 3 and for an order that the respondent be permitted to occupy the units together with his family. Given the dismissal of the application of the Condominium Corporation for reasons that I have given, I do not feel that it is necessary for me to make any ruling in respect to the proposed cross-application.

CBR# 169

Lucas v. Duro & Shea

Between

Lucas et al., plaintiffs, and

Durno & Shea, defendant, and

Hugh McLeod and Gloria McLeod, third party

[1985] O.J. No. 1833

Action No. 12373/84

Ontario Provincial Court - Civil Division

Caswell Prov. Ct. J.

December 10, 1985.

Counsel:

R. Bradburn, for the plaintiff.

M. Shea, for the defendant.

1 CASWELL PROV. CT. J.— The plaintiffs retained the law firm of Durno and Shea to act on their behalf as purchasers of Unit 1, York Condominium No. 88, from Hugh McLeod and Gloria McLeod, the vendors. They were represented throughout by Michael Shea, a partner in the firm. The agreement of purchase and sale on the Toronto Real Estate Board standard form for resales of condominium units was executed on August 18, 1982. The transaction closed November 24, 1982. York Condominium Corporation No. 88 issued an estoppel certificate dated September 27, 1982, to the vendors pursuant to s. 32(8) of the Condominium Act, R.S.O. 1980, c. 84 and Reg. 121, Form 18, R.R.O. 1980. The certificate contained the following clauses:

"6. The Corporation has no knowledge of any circumstances that may result in an increase in the common expenses for the said unit; except as detailed in the current budget and the explanatory notes attached thereto.

8. The Corporation is not presently considering any substantial addition, alteration or improvement to or renovation of the common elements or any or any substantial change in the assets of the corporation except as detailed in the current budget."

2 Mr. Shea testified that he did not request that the corporation issue an estoppel certificate to the purchasers and he did not pay the requisite \$25 fee for one. He did, however, instruct his secretary to telephone the corporation offices shortly before closing to ensure that the estoppel certificate was current and that there had been no significant changes between the date of the certificate and the date of closing.

3 After closing, sometime in the late winter, the plaintiffs were notified by the corporation that they were required to pay an additional sum of \$2,210 as their share of a special assessment that had been levied to cover the cost of repairs to the condominium roof.

¶ 4 I find, based on the evidence before me, that the corporation's board of directors had been aware of the deteriorating condition of the roof and the necessity for repairs since at least the previous January. Mr. Shea wrote to the corporation by letter dated March 18, 1983 and set out the plaintiffs' complaint. In that letter, he stated as follows:

"We have in our possession various documentation, newsletters etc. from the Condominium Corporation indicating that this problem has been a major source of concern since early 1982."

5 Mr. Shea's associate, Brian McMurter, had been solicitor for the corporation at that time. When the corporation responded to Mr. Shea by letter dated March 22, 1983, Mr. Shea then wrote to the plaintiffs to advise them that there was a conflict and stated:

"I am enclosing a copy of a letter from York Condominium Corporation No. 88. The letter is quite correct in that our firm does in fact act for the Condominium through Mr. McMurter. Unfortunately, I was not aware of this fact as the services were always performed by Mr. McMurter. Obviously, our firm must withdraw from the case for both sides. . . ."

6 Mr. Shea produced from the files of the defendant law firm a letter from the Property Maintenance Occupancy Standards Department of the Borough of Scarborough to the corporation, outlining the problems with respect to the roof. This letter, dated September 16, 1982, predates the estoppel certificate.

7 The plaintiffs refused to pay the levy. The corporation placed a lien on the unit and power of sale proceedings were commenced in September 1983. The plaintiffs paid the outstanding levy including interest, costs and expenses in the amount of \$2,850.44. The plaintiffs then sued in two separate actions, which were ordered to be tried together, the corporation, Gurnos Reid (treasurer of the corporation) and Durno and Shea. At trial, the plaintiffs were non-suited as against the corporation and Reid. The claim against the law firm of Durno and Shea is for the damages occasioned to the plaintiffs by the failure of that firm to obtain an estoppel certificate; the firm, it is alleged, is in breach of its contract with the plaintiffs.

8 The issues are as follows:

(1) Did the plaintiffs suffer any damages for which the plaintiffs could be responsible at law?

(2) Did the law firm breach the requisite standard of care in failing to obtain an estoppel certificate from the corporation?

(3) What is the proper measure of damages?

9 The plaintiffs alleged that they would not have had to pay the special levy had the estoppel certificate been issued to them as purchasers. It is agreed that the condominium roof is a common element. The estoppel certificate sets out that the corporation is not contemplating any major repairs. The purchasers rely on s. 32(8) of the Condominium Act, which states as follows:

"8. Any person acquiring or proposing to acquire an interest in a unit from an owner may request the corporation to give a certificate in the prescribed form in respect of the common expenses of the owner and of default in payment thereof, if any, by the owner, together with such statements and information as are prescribed by the regulations, and the certificate binds the corporation as against the person requesting the certificate in respect of any default or otherwise shown in the certificate, as of the day it is given." (Emphasis added.)

10 It is my view that this section and the regulations required that the corporation disclose the particulars of any potential increase in common expenses or any potential special assessments. I base this opinion on the wording of cls. 6 and 8 of Form 18 previously quoted. This is particularly relevant in view of s. 38(3) of the Condominium Act wherein the cost of additional alterations or improvements to the common elements are considered common expenses and accordingly may be charged against the condominium unit.

11 The statute and the regulations make it clear that the estoppel certificate only binds the corporation with respect to "any default or otherwise shown in the certificate" as against the person requesting the certificate. The grammar may be faulty, but the intent is manifest. According to the principles of statutory interpretation, I am obliged to give effect to the clear unambiguous wording of the statute and the regulations passed thereunder.

12 In the case of Halifax County Condo. Corp. No. 5 Cowie Hill v. McDermaid (1982), 55 N.S.R. (2d) 414, a decision of Madame Justice C. Glube of the Nova Scotia Supreme Court Trial Division, the condominium was not successful in obtaining a declaration ordering the unit owner to pay the special levy. In that case, the corporation had approved a motion to borrow funds to finance repairs and a borrowing resolution had been executed prior to the issuance of the estoppel certificate. The estoppel certificate did not contain any reference to any special assessment which would be levied against the unit owners. The Ontario Act and regulations appear to be much broader in scope than the Nova Scotia Condominium Act, S.N.S. 1970-71, c. 12. Madame Justice Glube held that since the amount claimed was not referred to in the estoppel certificate, then the plaintiff corporation's claim was estopped.

13 In the instant case, I find that the purchasers were unable to rely on the estoppel certificate and on the protection set out in s. 32(8) of the Condominium Act when the special levy was assessed against them.

14 Mr. Donald Lamont, Q.C., whose qualifications as an expert in the practice of real estate law are well known in this province, stated that the practice in the profession is that an estoppel certificate be provided to the purchaser on closing. The Act formerly provided that only a vendor had status to obtain a certificate. It did not seem to me that it was Mr. Lamont's evidence that it is the custom of the profession that the vendor obtain the estoppel certificate in every situation, only that this is occasionally the situation.

15 In the Bar Admission Course material published by the Law Society of Upper Canada, Real Estate and Landlord and Tenant Section, the authors, David Millman, Q.C. and Paul Neubauer, at p. 256 state as follows regarding the practice of the vendor obtaining the estoppel certificate:

"This would appear to be a dangerous practice and would not adequately protect the purchaser since it would not bind the corporation against the purchaser but rather to the vendor who presumably requested the certificate, in respect of any common expenses defaults or other statements shown on the certificate and it is well worth the added expense of the \$25.00 fee that the purchaser's solicitor request his own certificate."

16 A solicitor's duty to his client to exercise reasonable care and skill in the performance of his duties has been examined many times by the Court. The client is entitled to expect that his solicitor will act on his behalf as an ordinary and prudent solicitor: *Tabata v. McWilliams* (1981), 33 O.R. (2d) 32, a decision of Mr. Justice Lerner of the Ontario High Court and affirmed on appeal (1982), 40 O.R. (2d) 158. A solicitor will only be liable if his mistake is a negligent one. A solicitor makes a negligent mistake if it is shown that his "error or ignorance was such that an ordinarily competent solicitor would not have made . . ." (*Aaroe v. Seymour*, [1956] O.R. 736 at p. 737, affirmed on other grounds, 7 D.L.R. (2d) 676) In the case of *Hauck v. Dixon* (1975), 10 O.R. (2d) 605, 64 D.L.R. (3d) 201, a solicitor was excused from liability on the basis that he had acted in accordance with the customary practice of the solicitors in the community. However, it is now clearly established that compliance with custom is not conclusive of reasonable care, that is, the practice itself may be deemed unreasonable, unsafe or negligent.

17 In the case of *Polischuk v. Hagarty* (1983), 42 O.R. (2d) 417, a decision of Mr. Justice Henry, (varied on appeal (1984), 49 O.R. (2d) 71), it was found that the custom of the profession was not a viable defence for a solicitor who was retained to carry out the terms of the clients' agreement of purchase and sale. In this case, the solicitor accepted an undertaking from the vendor's solicitor that he would obtain a discharge of a mortgage and paid the moneys to the solicitor in trust. The vendor's solicitor subsequently did not pay the moneys to the mortgagee and the funds were not recovered. Mr. Justice Henry stated (at p. 425):

"Accepting that the defendant solicitor acted on the closing of the transaction in accordance with the general practice of ordinarily competent solicitors, that does not end the matter. He was retained to carry out the terms of the clients' agreement of purchase and sale and not to substitute other terms for it. In my opinion, there is no principle of law or professional dealing that justified him in failing to enforce the contract, as written by his clients, unless he received instructions to do so, or the matter was clearly left to this discretion, after he had given advice on it.

While solicitors in London had adopted the practice followed by the defendant, as a practical way of closing transactions, where a discharge of mortgage was not readily available to carry out a vendor's obligation, I cannot accept that the profession was justified in imposing such a practice upon the lay public, their clients, without their knowledge and consent. The plaintiffs in this case were not at any time before closing made aware of the general practice and not only did not authorize the defendant to depart

from the terms of their bargain in this way, but had no opportunity to receive advice about it or even to authorize the defendant to use his own discretion and judgment, in overcoming practical problems, by accepting other than the discharge, to which they were entitled, upon payment of their money to the vendor's solicitor."

18 In the case of *Campbell v. Delrue*, released February 15, 1985, a decision of Mr. Justice Osborne of the Ontario High Court, a solicitor in London was found negligent for failure to search for work orders. There was uncontradicted expert evidence at trial that the local practice in the London area was that solicitors did not search for work orders in residential transactions. Mr. Justice Osborne stated at pp. 5 - 6:

"Even if local practice suggested that no work order search was necessary, given the circumstances including the provisions of the offer, the minimal effort required for a work order search and the obvious risk involved were there to be a work order outstanding or something resembling a work order outstanding, I conclude that the defendant was negligent and in breach of his contractual obligations to the plaintiffs as a result of his failure to check or search for work orders."

19 It is my view that the defendant has been unable to sustain the argument that the customary practice is for the vendor's solicitor to obtain an estoppel certificate. That it is a practice of some solicitors may be true, but I find that it is not the customary practice of all solicitors who practise in the area of real estate law.

20 The provisions of s. 32(8) of the Condominium Act are not uncertain. Indeed, they are very clear. The consequences of the failure of the purchaser's solicitor to obtain the estoppel certificate are also very clear. Simply put, the failure of the purchaser's solicitor to obtain the estoppel certificate means that the corporation is not bound by the certificate. In this case, of course, this means that the purchasers were bound to pay the special levy. The purchaser's solicitor who ignores these clear statutory provisions does so at his peril.

21 It is my conclusion then that the defendants in this case were negligent and in breach of their contractual obligations to the plaintiffs as a result of the failure to obtain an estoppel certificate in the name of the purchasers or the law firm as solicitors for the purchasers. The loss in this case was reasonably contemplated and reasonably foreseeable.

22 The proper measure of damages is the amount that the plaintiffs were required to pay as their share of the special levy to repair the roof, that is, \$2,210. It does not seem reasonable to me that the plaintiffs should be entitled in addition, to the interest, costs and penalties that were imposed on them for their failure to pay. Quite properly, Mr. Shea told the plaintiffs he could no longer act for them and their file was turned over to another solicitor. Presumably, it was these solicitors who advised the plaintiffs to refrain from paying from June until September 1983 when the costs and interest had accumulated. It is Mr. Shea's evidence that he believes that he advised the plaintiffs to make the payment in March or April 1983, under protest, and I accept his evidence.

23 There will be prejudgment interest awarded from the date of the service of the claim on the defendant law firm and costs.

24 I did not award counsel fees in the non-suited actions of the plaintiffs against the defendant corporation and defendant Reid, on the basis that the issues were novel. The plaintiffs have not been entirely successful, nonetheless, it is my view that costs should follow the cause. There will, therefore, be counsel fee awarded to counsel for the plaintiffs in the amount of \$300 and \$30 for preparation.

25 If there are any matters with respect to R. 15 that I should deal with, then I may be spoken to in the morning at 9:45 a.m. at the convenience of counsel who should advise the trial coordinator accordingly.

CASWELL PROV. CT. J.

CBR# 246

Confederation Life Insurance Co. v. 511666 Ontario Ltd.

Between

Confederation Life Insurance Company, Plaintiff, and
511666 Ontario Limited and Charles Khoury, Defendants

[1985] O.J. No. 362
Action No. 19375/84

Ontario Supreme Court - High Court of Justice
Van Camp J.

Heard: December 20, 1984
Judgment: April 3, 1985
(4 pp.)

Counsel:

J.W. Adams and Peter Cavanaugh, for the Plaintiff/Applicant.
H. Underwood, for the Defendants/Respondents.

1 VAN CAMP J.:— This is a motion for leave to appeal from the decision of Smith J. refusing to appoint an interim receiver under s. 19 of the Judicature Act, R.S.O. 1980, c. 223 for the rents from an apartment complex.

2 The plaintiff mortgagee to whom the rents had been assigned as part of the security for the mortgage asked for the appointment of a receiver to get in and receive the rents and to authorize the payments therefrom by the defendant corporation or, alternatively, to make the payments therefrom in respect of all usual and necessary outgoings and expenses in connection with the operation, maintenance and management of the mortgaged premises, including payment of mortgages, taxes, repairs, insurance and water rates.

3 The background facts are stated in the reasons of Smith J. and also in the reasons given by Griffiths J. on February 22, 1985 in an application wherein one of the matters between the parties hereto was decided. I do not conclude that the order of Smith J. is incorrect, but, in my opinion, there is good reason to doubt its correctness for the reasons that I set out herein and the test that should be applied for the appointment of a receiver for a creditor such as the plaintiff is one that deserves definition.

4 In *Bank of Montreal v. Appcon Ltd.*, 37 C.B.R. 281, Anderson J. noted that dearth of authority and was prepared, on the facts before him, to appoint a receiver and manager. Here, the plaintiff does not ask for the right of management, only of supervision of payments.

5 The monthly payments under the mortgage have not been made since August last. The taxes were in arrears. The amount owing on the mortgage exceeded the purchase price. The mortgagor has not accounted for the rents from the properties that it has received during the period of default. I disagree that this is execution before judgment. Rather, the defendants would be required to pay only what they had covenanted to pay. The action in which this motion is brought is for payment of the arrears on the covenant.

6 The action brought by the defendants is for a declaration that the plaintiff is in breach of a commitment letter and the mortgage by failing to execute consents for the registration of the subject lands as a condominium. It raises the issue of whether the agreement between the parties permitted sales of condominium units by the defendants. If such sales are permitted, the decision of Griffiths J. is that the purchasers thereunder would have the right to partial discharges of the mortgage notwithstanding that it was a mortgage for a closed term of 20 years. He emphasized that his decision was restricted and that there remained the issues to be determined at trial of what was the agreement between the parties and the effect thereof as to whether there could be any sale of the condominium units. Until that is determined, the defendants have the use of the mortgage funds. It seems to me that until that is determined, the mortgagees should be entitled to receive the monthly payments. When the defendant mortgagor has the use of the monies, it seems to me that the balance of convenience pending the outcome of their action is that they should be making the payments under the mortgage to which they had agreed. If the court in that action were to hold that, not only the purchasers of the condominium units had the right to partial discharges at the time of purchase, but that also the defendant mortgagor herein had the right to discharge the mortgage at any time because of the plaintiff's refusal to execute the consent to the condominium declaration, it would still be possible for the court to rule that any payments on the mortgage in the interim should be allocated to principal rather than to interest.

7 Smith J. was of the opinion that when the plaintiff had other means of enforcing its security, it should not ask the court to exercise its equitable jurisdiction in the appointment of a receiver. He ignored the fact that the taking of those measures would give to the defendant success in the very issue that was before the court, namely the right to pre-pay a closed mortgage whatever might have been the agreement between the parties.

8 I recognize that one is slow to grant relief from the exercise of discretion, especially when the judge who has ever that discretion has considered all the matters incised detail. However, it seems to me he erred in applying the stringent test of a Mareva injunction in the circumstances herein. There will be an order granting leave to appeal to the Divisional Court. The costs of this motion will be costs in the appeal.

VAN CAMP J.

CBR# 262

Re Manton and York Condominium Corp. No. 461

49 O.R. (2d) 83

ONTARIO
 COUNTY COURT
 JUDICIAL DISTRICT OF YORK
 HOILETT CO. CT. J.

11TH DECEMBER 1984.

The applicant acquired title to a condominium unit in the respondent's condominium building in 1979. After she obtained possession, water penetrated her unit from the common elements as a result of a structural defect. This caused damage to the applicant's property. Upon failure of the respondent to repair, the applicant brought an application for an order directing the respondent to repair and claiming damages.

(1) The respondent had no duty to repair since s. 41(2) of the Condominium Act, R.S.O. 1980, c. 84, imposes an obligation to repair after damage only and no damage had occurred to the building. However, under the obligation to maintain prescribed by s. 41(3), the respondent was liable to correct a structural defect to the common elements. Moreover, an affirmative vote of the owners of 80% of the units provided for under s. 38 in respect of substantial additions, alterations, improvements and renovations, was not required in respect of such maintenance.

(2) A claim for damages should not be entertained on a summary application.

York Condominium Corp. No. 59 v. York Condominium Corp. No. 87 (1983), 42 O.R. (2d) 337, 148 D.L.R. (3d) 660, 29 R.P.R. 86, apld

Dyer v. York Condominium Corp. No. 274 (1980), 14 R.P.R. 154, consd

Other cases referred to

Canadian Pacific R. Co. v. Grand Truck R. Co. (1914), 49 S.C.R. 525, 20 D.L.R. 56, 17 C.R.C. 300; Re Ronita Properties Ltd. and York Condominium Corp. No. 320 (1981), 9 A.C.W.S. (2d) 98

Statutes referred to

Condominium Act, R.S.O. 1980, c. 84, ss. 12, 36(1) to (6), 38(1), 41(1) to (6), 42, 49(1), (2)

APPLICATION for an order directing the respondent condominium corporation to carry out its duty to repair and maintain the common elements and a claim for compensation.

Jonathan H. Fine, for applicant.

K. Michael McLoughlin, for respondent.

HOILETT CO. CT. J.:— This is an application for an order directing the respondent condominium corporation to discharge its alleged responsibility to maintain and repair the common elements in order to stem the flow of water penetrating into the applicant's unit. Further, there is a claim for compensation arising from the loss suffered by the applicant as a result of water damage to her belongings.

The essential facts are not in dispute but for a better appreciation of the issues raised the following brief summary is in order.

The applicant is the owner of Unit 8, Level 1, York Condominium No. 461. Although the applicant formally acquired title to the unit in June, 1979, she has been in occupation since September, 1978. During the winter of 1978-79 and during every subsequent winter, water has penetrated into the applicant's condominium unit. The degree of water penetration has been more than a matter of inconvenience. It has been a source of embarrassment to the applicant and her guests. Christmas presents have been damaged, walls and carpets, among other things, have been damaged; indeed, carpets have been replaced on at least two occasions.

There is little, if anything, to be gained from chronicling in ponderous detail all the overtures the applicant has made in her efforts to have the problem resolved. It is sufficient to say that from the fall of 1978 up to the time that these proceedings were commenced the applicant has been diligent in her efforts to have the problem resolved. During that period of time she has communicated with, among others, George Wimpey Canada Ltd., the original builders; the respondent; the New Home Warranty Program. Exhibit 4 on this application is a five-page record of the correspondence undertaken by the applicant with various parties and related correspondence between the interested parties.

Pursuant to the provisions of the Condominium Act, R.S.O. 1980, c. 84, York Condominium Corporation No. 461 was created on February 23, 1979, upon the registration in the Land Registry Office for the Land Titles Division of Metropolitan Toronto (No. 66) of the declaration, made pursuant to the Condominium Act, and upon the registration of the description: see exs. 1 and 2 on this application.

Article 8 of the declaration provides that:

The Corporation shall repair the common elements after damage and maintain all the common elements except for certain maintenance of exclusive use portions as set out in Schedule "F". Each owner shall repair his unit after damage and maintain his unit.

(Exhibit 1)

Schedule "C" to the declaration, the full text of which schedule is reproduced following, defines the vertical and horizontal boundaries of a unit.

SCHEDULE "C"

BOUNDARIES OF UNITS

The Vertical Boundaries of a Unit are:

The unit-side face of drywall of all exterior walls and walls dividing one unit from another, or units from corridors, elevator shafts, stairways or mechanical equipment spaces and the plane thereof across openings for windows and doors.

The Horizontal Boundaries of a Unit are:

The upper face of concrete floor slab to the upper face of plaster coating in the ceiling, or upper face of plaster coating of suspended ceiling on Levels 1 and 15. In the vicinity of the bulkhead, the unit boundary is the backside face of drywall furring.

Notwithstanding the foregoing,

(i) all exterior doors, door frames and window frames (except for the exterior finished surfaces thereof) and all windows (except for the exterior surfaces thereof) and, notwithstanding that they may be located exterior of the unit-side face of drywall, all bathroom, washroom, kitchen and laundry fans and venting and all floor level filters form part of the Unit; and

(ii) the main entry electrical distribution panel, excepting domestic line fuses and/or circuit breakers, all columns, mechanical shafts and vertical fan coils are excluded from the Unit.

The vertical and horizontal boundaries are shown on Part 1 and Part 2 of the Description.

It is common ground that that which does not fall within the definition of a "unit" forms part of the "common elements". It has not been argued before me that the source of the problem is other than in the common elements and the material filed does not, in my view, warrant any conclusion other than that the problem is one originating in the common elements. Although the source of the problem has not been precisely isolated, it appears from all the circumstances (and submissions have been predicated on that assumption) that the cause of the water penetration problem is a structural defect. In any event, that fact is presumed for the purposes of my reasons.

The cardinal issue, simply put, is: who, if anyone, as between the applicant and the respondent is responsible for rectifying the problem?

The following provisions of the Condominium Act bear on the issue.

Section 49, pursuant to which this application is brought provides:

49(1) Where a duty imposed by this Act, the declaration, the by-laws or the rules is not performed, the corporation, any owner, the bureau, or any person having a registered mortgage against a unit and common interest, may apply to the county or district court for an order directing the performance of the duty.

(2) The court may by order direct performance of the duty and may include in the order any provisions that the court considers appropriate in the circumstances.

The following are some of the relevant provisions dealing directly with rights and duties:

Section 12(1) sets out the objects of the corporation as being "to manage the property and any assets of the corporation", and s. 12(2) provides that:

12(2) The corporation has a duty to control, manage and administer the common elements and the assets of the condominium corporation.

Subsections (3), (4) and (5) provide as follows:

12(3) The corporation has a duty to effect compliance by the owners with this Act, the declaration, the by-laws and the rules.

(4) The declaration or the by-laws may specify duties of the corporation consistent with its objects, responsibilities and duties.

(5) Each owner and each person having a registered mortgage against a unit and common interest has the right to the performance of any duty of the corporation specified by this Act, the declaration, the by-laws and the rules.

Section 36 of the Act defines and provides for a reserve fund:

36(1) In this Act and the regulations, the declaration, by-laws and financial statements prepared in accordance with this Act, the declaration or by-laws, "reserve fund" means a fund set up by the corporation in a special account for major repair and replacement of common elements and assets of the corporation including where applicable without limiting the generality of the foregoing, roofs, exteriors of buildings, roads, sidewalks, sewers, heating, electrical and plumbing systems, elevators, laundry, recreational and parking facilities.

(2) The corporation shall establish and maintain one or more reserve funds and shall collect from the owners, as part of their contribution towards common expenses, amounts that, calculated on the basis of expected repair and replacement costs and life expectancy of things comprising the common elements and the assets of the corporation, are reasonably expected to provide sufficient funds for major repair and replacement of common elements and assets of the corporation, but in no event shall the contribution to the reserve funds be less than 5 per cent of the amount required for contributions to the common expenses exclusive of the reserve fund.

Subsection (3) provides that as of June 1, 1982, the amount of contribution to the reserve fund provided for in s-s. (2) shall be no less than 10%. Subsection (4) provides that any fund used for the purposes set out in s-s. (1) shall be deemed to be a "reserve fund" whether or not it is so designated. Subsection (5) prohibits the use of the reserve fund for any purpose other than that provided for in s-s. (1), and s-s. (6) provides that the reserve fund shall constitute an asset of the corporation and shall not be distributed to any owner except on termination of the corporation.

Section 41 of the Act imposes a positive obligation on the corporation to repair and maintain. Subsections (1) through (6) provide:

41(1) For the purposes of this Act, the obligation to repair after damage and to maintain are mutually exclusive, and the obligation to repair after damage does not include the repair of improvements made to units after registration of the declaration and description.

(2) Subject to section 42, the corporation shall repair the units and common elements after damage.

[Section 42 sets out the procedure to be followed by the corporation where damage to the building occurs.]

(3) The corporation shall maintain the common elements.

(4) Each owner shall maintain his unit.

Subsection (5) provides that the declaration may make provisions other than those provided for in s-ss. (2), (3) and (4), and s-s. (6) provides that:

41(6) The corporation shall make any repairs that an owner is obligated to make and that he does not make within a reasonable time.

Stated briefly, it is the applicant's position that the respondent is obliged under the provisions of the Condominium Act to effect the repairs necessary to stop the water penetration into the applicant's unit. Granted that the defect in question is, or may be, a structural one, the obligation of the respondent is no less clear inasmuch as the terms "repair" and "maintenance" are wide enough to encompass the circumstances of the instant application. It is further argued that the language of s. 49 of the Act is broad enough to clothe the court with sufficient authority to make an award of pecuniary damages to the applicant for the loss she has suffered.

Briefly summarized, the respondent has argued that there is no "damage" within the meaning of the Act; accordingly, there is no obligation on the respondent to "repair after damage" pursuant to either the Act or the declaration. Further, the obligation to maintain can only arise where there has been a deterioration from an original state of good repair. In other words the obligation to "maintain" does not import a duty to correct an inherent structural defect as appears in the present set of circumstances. As far as the question of damages is concerned for the loss suffered by the applicant it has been argued that the language of s. 49 of the Act does not vest such an authority in the court; in any event, to make such an award would be to prejudice rights that would be available to the respondent in a regular civil suit for damages.

I turn first to the question of what, if any, is the obligation of the respondent in the present set of circumstances. As I have intimated earlier the only reasonable conclusion based on all the material filed and the submissions made, is that the problem in question relates to the "common elements" and as between the applicant and the respondent, the obligation to repair or maintain, if any, must be the respondent's. I have no difficulty in concluding that in the present set of circumstances it cannot be said that there is any obligation falling on the respondent by virtue of its duty to "repair after damage". I find support for that conclusion in the judgment of Hollingworth J. in *Dyer v. York Condominium Corp. No. 274* (1980), 14 R.P.R. 154 at p. 157, where it was held that "repair after damage" contemplated damage from some act of God, for example, some storm or tempest. I have no reason to believe that Hollingworth J. intended to exclude damage from other causes and it is not my intent so to do.

It remains to be determined therefore whether the obligation to "maintain" is broad enough to include the obligation to correct a structural defect.

It is my opinion that it does. I find support for that conclusion in the recent decision of the Ontario Court of Appeal reported as *York Condominium Corp. No. 59 v. York Condominium Corp. No. 87* (1983), 42 O.R. (2d) 337, 148 D.L.R. (3d) 660, 29 R.P.R. 86. The issue raised in that case was, if not identical to the one raised in the present case, quite similar. The relevant facts were that the applicant and respondent occupied adjacent buildings and shared a number of joint facilities -- the one of particular interest being a swimming-pool. The declarations of both the applicant and respondent corporations were the same. Paragraph 14(a) of the declaration provided for, among other things, the sharing of certain costs of "maintenance and repair" in proportion provided for in a prescribed formula. The respondent effected certain repairs to the swimming-pool and at trial recovered judgment against the appellant for one-half the costs of repairs which the Court of Appeal held to be a structural defect. In rejecting the appellant's argument that the obligation to "repair" and "maintain" did not extend to structural defects the Court made the following observation at p. 340:

I cannot accept this contention. It seeks to impose on the newly-created concept of condominium ownership obligations for repairs that evolved over many years from a completely different relationship. Condominium ownership contemplates a continuous relationship whereas the landlord-and-tenant relationship exists only for the term of the lease. The relationship between condominium owners in a condominium building is a relatively new creation of statute whereas, to a great extent, landlord-and-tenant relations have been defined by the common law.

Cory J.A., speaking for the Court, commented on the quality of mutuality, characteristic of the condominium concept and continued at p. 341:

The concept of repair in such a situation should not be approached in a narrow legalistic manner. Rather, the court should take into account a number of considerations. They may include the relationship of the parties, the wording of their contractual obligations, the nature of the total development, the total replacement cost of the facility to be repaired, the nature of the work required to effect the repairs, the facility to be repaired and the benefit which may be acquired by all parties if the repairs are effected compared to the detriment which might be occasioned by the failure to undertake the repairs. All pertinent factors should be taken into account to achieve as fair and equitable a result as possible.

Referring to The Shorter Oxford English Dictionary's definitions of "repair" and "maintain" which follow:

"repair" -- to restore to good condition renewal or replacement of decayed or damaged parts or by refixing what has given way; to mend;

"maintain" -- to keep in repair;

Cory J.A. continued:

There is nothing in these definitions that would restrict or narrow their meaning as contended by the appellant.

In support of its conclusion the Court cited the decision of the Supreme Court of Canada in *Canadian Pacific R. Co. v. Grand Trunk R. Co.* (1914), 49 S.C.R. 525, 20 D.L.R. 56, 17 C.R.C. 300, in which the word "maintain" was interpreted to be wide enough to include the reconstruction of a bridge so that it could service an increased flow of traffic. The Court expressly rejects the argument that a structural defect was beyond the scope of maintenance. Similarly it rejected the view that the obligation was altered simply because there may be remedies available against the builder. The Court stated its conclusions in the following terms [at p. 342]:

The fact that the repairs are made necessary by structural defects should not and does not on the facts of this case vary this conclusion. Nor should the possibility of a claim against the builder be a factor.

It is clear from a reading of the relevant provisions of the Condominium Act that the condominium corporation is vested with considerable authority and fixed with certain responsibilities. Correspondingly, it is provided with the wherewithal to discharge those responsibilities. By way of example only is the s. 36 provision for a "reserve fund" which clearly contemplates substantial undertakings when necessary. That the provisions of the Act should be liberally construed is clear from *York Condominium No. 59 v. York Condominium No. 87*, supra. It is my view that the principles enunciated and the approach adopted in that case should be applied to the instant application. Accordingly, the relief sought in the first paragraph of the notice of motion will be granted. I have considered also the following unreported case: *Re Ronita Properties Ltd. and York Condominium Corp. No. 320*, January 28, 1981, Cornish Co. Ct. J. [summarized 9 A.C.W.S. (2d) 98].

In order to make my order as practicable of enforcement as possible I am prepared to meet with counsel to work out the particular form of the order. At the same time I will hear representations on costs in the event that there is any view that costs should not follow the event.

Given the summary nature of these proceedings, I am not satisfied that this has been the most appropriate forum for dealing with the question of damages sustained by the applicant with respect to her property. I, therefore, without commenting on its merits, dismiss that aspect of the motion without prejudice to the applicant's rights in that regard.

Inasmuch as the issue was raised in argument concerning the applicability of ss. 38 and 42 to these proceedings, I feel constrained to comment upon the point. For ease of understanding I reproduce, following, the relevant sections:

38(1) The corporation may by a vote of owners who own 80 per cent of the units make any substantial addition, alteration or improvement to or renovation of the common elements or may make any substantial change in the assets of the corporation, and the corporation may by a vote of the owners make any other addition, alteration or improvement to or renovation of the common elements or may make any other change in the assets of the corporation.

.....

42(1) Where damage to the building occurs, the board shall determine within thirty days of the occurrence whether there has been substantial damage to 25 per cent of the buildings.

(2) Where there has been a determination that there has been substantial damage to 25 per cent of the buildings, the corporation shall repair within a reasonable time, unless, within sixty days after the determination made under subsection (1), by a vote of owners who own 80 per cent of the units, the owners vote for termination.

Dealing with the sections in reverse order, I find that s. 42 has application "where damage occurs", which is not the case before me.

Section 38 deals with "modifications of common elements and assets" and speaks of "substantial addition, alteration or improvement to or renovation of ... ". In my view, it would be straining the language of the section to apply it to the instant set of circumstances particularly given the structure of the Act which makes clear distinctions between "repair after damage", "maintenance" and "substantial alterations", etc.

Application granted in part

CBR# 373

York Condominium Corp. No. 59 v. York Condominium Corp. No. 87

42 O.R. (2d) 337
148 D.L.R. (3d) 660

ONTARIO
COURT OF APPEAL
BROOKE, LACOURCIERE
AND CORY J.J.A.

28TH JUNE 1983.

The appellant and respondent were two condominium corporations which were part of a total development scheme. They shared certain common elements and were obligated by their respective declarations to repair them as necessary. The roof of the swimming-pool, a common element, developed a leak as a result of a structural defect. When the appellant refused to have it repaired, the respondent did so and recovered judgment from the appellant for half of the costs. On appeal, held, the appeal should be dismissed.

The obligation to repair under the declarations should not be construed in a narrow legalistic manner. Rather, a number of matters should be taken into consideration, including the parties' relationship, their contractual obligations, the nature of the development, the nature of the repairs and the benefit of all parties. In the circumstances, the fact that the repairs were necessitated by structural defects and that there was a possibility of a claim against the builder did not exonerate the appellant from contributing to the cost of the repairs.

Canadian Pacific R. Co. v. Grand Trunk R. Co. (1914), 49 S.C.R. 525, 20 D.L.R. 56, 17 C.R.C. 300, *fold*

Other cases referred to

Sevenoaks, Maidstone, & Tunbridge R. Co. v. London, Chatham, & Dover R. Co. (1879), 11 Ch. D. 625; Proudfoot v. Hart (1890), 25 Q.B.D. 42; Ravensft Properties Ltd. v. Davstone (Holdings) Ltd., [1979] 1 All E.R. 929

APPEAL from a judgment requiring the appellant to pay one-half the costs of certain repairs to common elements of the parties' condominiums.

Charles B. Cohen, Q.C., for appellant.

John S. McKeown, for respondent.

The judgment of the court was delivered by

CORY J.A.:— The parties to this action are condominium corporations. The respondent recovered from the appellant a judgment requiring the appellant to pay one-half the costs of the repairs of the roof of a pool used by the members of both condominiums.

Factual background

Both the condominium buildings were originally owned by Bramalea Consolidated Developments Limited. The two structures are part of a total development scheme. The respondent York Condominium Corporation No. 59 was established by registration of its declaration and description on November 30, 1971, pursuant to the provisions of the Condominium Act, R.S.O. 1970, c. 77. The declaration and description for the appellant York Condominium Corporation No. 87 were registered eight months later on August 3, 1972.

The two condominium complexes are adjacent to each other. They share a common driveway and the use of certain common elements. In para. 14(a) of the declarations for each of the corporations a reference is made to a swimming-pool and a swimming-pool area. The pool is constructed underground and abuts the building of Corporation No. 59. There is a joint committee composed of the boards of directors of both corporations which determines the rules and regulations and the financial matters including the contributions to be made for the joint use of the pool and adjacent recreational facilities.

The declarations of both corporations are the same. The pertinent paragraph in the declaration of the appellant corporation reads as follows:

14(a) The occupants from time to time of this Condominium shall have the right of access and shall have the right to pass over, use and traverse those portions of the common elements of the York Condominium Corporation No. 59 which will be described in the transfers to each of the members of this Condominium in order to allow the occupants of this Condominium to have the full use and enjoyment of the swimming pool, swimming pool area and adjoining patio, the respective male or female changing rooms, Japanese garden and putting green and surrounding area all located on the property of York Condominium Corporation No. 59 ... The occupants of this Condominium and of York Condominium Corporation No. 59 shall be responsible for the maintenance and repair of the access routes and recreational facilities mentioned herein including the pumps and pipes and other equipments serving the swimming pool and changing rooms. Decisions for the maintenance and repair of the above access routes and recreational facilities shall be determined by the joint committee of the Board of Directors of this Condominium and of York Condominium Corporation No. 59. The cost of such maintenance and repair shall be borne by each Condominium in the same ratio as the number of units in this Condominium or York Condominium Corporation No. 59 bears to the total number of units in both this Condominium and York Condominium Corporation No. 59.

The description of the appellant corporation also provided a right of access to the recreational area of the lands, including the pool, located on the respondent's property. As well, the description of the respondent corporation was made subject to the right of the use and enjoyment of these areas by the owners in the appellant corporation.

In 1971, the pool was in good condition and remained problem-free until the fall of 1975. At that time, the roof above the pool began to leak.

For the purposes of this appeal, it will be assumed that the leak was caused by a structural defect. When the respondent's building was constructed there were certain omissions made by the contractor which led to the roof leaking in 1975. The parties could not agree as to how the repairs would be paid for. Eventually, the respondent proceeded with the repairs and brought action against the appellant to recover half of the costs. By judgment dated December 2, 1981, the respondent recovered the amount it claimed for one-half of the repairs.

The appellant's position

The appellant takes the position that it should not be required to contribute to the cost of these repairs for they were caused by a structural defect and not by wear and tear. It was very ably argued that the terms "maintenance" and "repair" should be interpreted in the same manner as they had been in some landlord-and-tenant cases. It was said that defects in construction on the one hand and maintenance required as a result of wear and tear on the other should be treated as separate matters. It was argued that a liability to repair or maintain does not include a responsibility to correct structural defects. Reliance was placed on *Sevenoaks, Maidstone, & Tunbridge R. Co. v. London, Chatham, & Dover R. Co.* (1879), 11 Ch. D. 625, and *Proudfoot v. Hart* (1890), 25 Q.B.D. 42.

I cannot accept this contention. It seeks to impose on the newly-created concept of condominium ownership obligations for repairs that evolved over many years from a completely different relationship. Condominium ownership contemplates a continuous relationship whereas the landlord-and-tenant relationship exists only for the term of the lease. The relationship between condominium owners in a condominium building is a relatively new creation of statute whereas, to a great extent, landlord-and-tenant relations have been defined by the common law. In any event, it is interesting to observe that recent English decisions have indicated that the question of liability to repair in landlord-and-tenant cases should be approached on a broad basis taking into account many factors pertaining to the relationship of the parties: see *Ravenseft Properties Ltd. v. Davstone (Holdings) Ltd.*, [1979] 1 All E.R. 929.

The Condominium Act, R.S.O. 1980, c. 84, in s. 1(1)(h) defines "common expenses" as meaning:

(h) ... the expenses of the performance of the objects and duties of a corporation and any expenses specified as common expenses in this Act or in a declaration;

By s. 3(1)(d) of the same Act, a declaration must contain:

(d) a statement, expressed in percentages allocated to the units, of the proportions in which the owners are to contribute to the common expenses;

By s. 3(3), a declaration may contain:

- (a) a specification of common expenses;
- (b) provisions respecting the occupation and use of ... common elements;

.....

(e) a specification of any allocation of the obligations to repair and to maintain the ... common elements.

There is thus now, as there was in 1972, a statutory basis for the declaration to provide what are the common expenses, the occupation of common elements and an allocation of the obligation to repair them. This is just what the declarations in question did in this case. As well, s. 41 of the Act imposes upon corporations an obligation to repair after damage and to maintain common elements.

As far as possible and with due regard for the particular mutual covenants of the individual owners the courts should bring a broad and equitable approach to the resolution of their problems.

Although this case does not deal with individual condominium owners within a single condominium, it is concerned with the relationship between two condominium corporations which form integral parts of a composite plan for condominium living. The development plan contemplated the mutual enjoyment and use of the pool by the occupants of both condominium corporations. The mutual enjoyment of a facility calls for a mutual obligation of repair.

The concept of repair in such a situation should not be approached in a narrow legalistic manner. Rather, the court should take into account a number of considerations. They may include the relationship of the parties, the wording of their contractual obligations, the nature of the total development, the total replacement cost of the facility to be repaired, the nature of the work required to effect the repairs, the facility to be repaired and the benefit which may be acquired by all parties if the repairs are effected compared to the detriment which might be occasioned by the failure to undertake the repairs. All pertinent factors should be taken into account to achieve as fair and equitable a result as possible.

The declarations of the parties make reference to the "maintenance" and "repair" of the recreational facility. The Shorter Oxford English Dictionary defines these words in part as follows:

"repair" -- to restore to good condition renewal or replacement of decayed or damaged parts or by refixing what has given way; to mend;

"maintain" -- to keep in repair;

There is nothing in these definitions that would restrict or narrow their meaning as contended by the appellant. Rather, giving these words their ordinary meaning, they are quite sufficient to encompass the repairs required to the roof of the pool. There is no reason why the appellant should not be obligated to pay its share for the "renewal or replacement of the decayed or damaged parts".

I am strengthened in this position by the decision of the Supreme Court of Canada in *Canadian Pacific R. Co. v. Grand Trunk R. Co.* (1914), 49 S.C.R. 525, 20 D.L.R. 56, 17 C.R.C. 300. In that case consideration was given to the word "maintain" which appeared in a contract between the parties. It was decided that in construing the word regard should be had to the relationship between the parties and the scope and nature of their agreement. As a result, the word was held to be extensive enough to include the reconstruction of a bridge so that it could service an increased flow of traffic.

In this case, the plain meaning of the words used in the clause, the relationship of the parties and the nature of the facility in question all lead to the conclusion that the appellants should pay their proportionate share of the cost of the repairs to the roof. The fact that the repairs are made necessary by structural defects should not and does not on the facts of this case vary this conclusion. Nor should the possibility of a claim against the builder be a factor. The liability of the appellant to contribute to the repairs arises from its contractual obligation to the respondent. If an action is to be brought against the builder, it should be as a result of a decision of the joint board of directors. If such an action is launched and brought to a successful conclusion, any recovery would benefit both these parties.

In the result I would dismiss the appeal with costs.

Appeal dismissed.

CBR# 269

RE PINETREE DEVELOPMENT CO. LTD. AND MINISTER OF HOUSING FOR THE PROVINCE OF ONTARIO ET AL.,

(1976) 14 O.R. (2d) 687 ONTARIO (Div. Ct.) 1976 Condominium -- Regional development charge levies as condition of condominium approval -- Regional municipalities empowered to enter into agreements relating to condominiums -- Minister may impose condition requiring owner to agree in writing to satisfy all financial requirements of municipality with respect to provision of roads, services and drainage -- Developer already entering into subdivision agreement and paying levies for external services -- No justification for additional financial levies -- Condominium Act, R.S.O. 1970, c. 77, s. 24(2) -- Planning Act, R.S.O. 1970, c. 349, s. 33. This was an application for an order that the respondents were not lawfully entitled to require the applicant to pay regional development charge levies of the municipality as a condition of condominium approval. It was conceded by all parties that the application related to the powers of the Minister under s. 24(2) of the Condominium Act and that for the purpose of the argument it was accepted that the Minister had power under s. 33 of the Planning Act to impose proper financial conditions of the region relating to plans of subdivision. The developer had developed a plan and entered into a subdivision agreement with the former Township of Pickering under which all the municipal services required by that municipality had been paid for. Thereafter, he wished to convert the development into a condominium development. The regional municipality, the successor of the Township of Pickering, required the payment of further levies for external services. HELD: A declaration was issued that (1) the Minister had general power to require the payment of proper regional development charge levies of the Regional Municipality as a condition of condominium approval; (2) in the present case the applicant was not obligated to pay the levies proposed by the Regional Municipality relating to this condominium proposal. The application was remitted to the Minister of Housing for further consideration in the light of these declarations.

CBR# 284

Royal Bank of Canada, petitioner, and Leslie Ann Holden, Standard Mortgage Investment Corporation, Sea Breeze Development Ltd., Bonie Baxter and Patrick Louvezio, respondents And between Royal Bank of Canada, petitioner, and Marie Barbara Ann Paterson and The Owners, Strata Plan VR2690, respondents And between Royal Bank of Canada, petitioner, and Carolyn Lee Zerr, Standard Mortgage Investment Corporation, Sea Breeze Developments Ltd. and The Owners, Strata Plan VR2690, respondents And between Royal Bank of Canada, petitioner, and Manfred Willie Juert, Evelyn Trinicat Juert, Standard Mortgage Investment Corporation, Sea Breeze Development Ltd. and The Owners, Strata Plan VR2690, respondents

[1996] B.C.J. No. 2360, Vancouver Registry Nos. H950893, H960639, H960082 and H950766

British Columbia Supreme Court Vancouver, British Columbia Bauman J. (In Chambers) Heard: October 28, 1996. Judgment: filed November 27, 1996.

Counsel: Peter J. Reardon, for the petitioner. Patrick A. Williams and Ms. P. Taylor, for the respondents.

BAUMAN J.:--

I. Introduction

[para1] These applications raise a neat point: what are properly included as "common expenses" of a strata corporation for the purposes of the statutory priority accorded by s. 37(2) of the Condominium Act, R.S.B.C. 1979, c. 61?

[para2] In answering this question, the court is called upon to apply one binding authority and to distinguish, if intellectually possible, another. Alternatively, in respect of the latter, I am invited to decline to follow it on the basis set out by Wilson J. in *Re Hansard Spruce Mills Ltd.*, (1954), 13 W.W.R. (N.S.) 285 (B.C.S.C.).

II. The Facts

[para3] The applications involve four strata lots in Strata Plan VR2690. The petitioning bank is foreclosing on mortgages against each. The strata corporation has purported to levy various charges against each of the strata lots under s. 37(1) of the Condominium Act, which provides:

37.(1) Where an owner defaults in the payment of his share of the common expenses, the strata corporation may register in the land title office a certificate in Form B showing the amount owing and the legal description of the strata lot of that owner.

[para4] The charges are similar for each lot and I will, therefore, only reproduce those levied against Strata Lot 66:

Juert (Strata Lot 66):

Maintenance Fees \$ 1,633.87 Late Payment Penalties 1,525.00 Plumbing Levy 3,486.47 Deficit Levy 259.89 Structural Repairs Levy 445.08 Legal Fees Levy 74.18 Roof Levy 3,434.53 Sump Pump Levy 482.17 Second Legal Fees Levy 148.36 Filing Lien 129.27 Total \$11,619.32

[para5] The levies may be classified for the purposes of analysis, in this way:

Maintenance Levies: maintenance fees and filing lien fees

Fine Levies: late payment penalties

Legal Levies: legal fees

Repair Levies: plumbing levy, deficit levy, structural repairs levy, roof levy, sump pump levy

[para6] The building within Strata Plan VR2690 is relatively old. It was recently converted to strata lots under the Condominium Act. The developer allegedly did a poor job of upgrading it for conversion and this has led to litigation at the suit of the strata corporation under s. 15 of the Condominium Act. This, in turn, has led to the incurrence of legal fees and the resultant Legal Levies.

[para7] The Repair Levies arise because of the need to repair critical portions of the common property.

[para8] The Fine Levies have been imposed under s. 34(2)(c) of the Condominium Act.

[para9] The Maintenance Levies have been authorized under s. 128(10) of the legislation. It provides:

128.(10) At each annual general meeting subsequent to the first annual general meeting, the strata corporation shall prepare an annual budget for the following 12 month period and, after that, all owners shall, subject to subsections (2) and (3), pay a monthly assessment in accordance with their unit entitlement.

[para10] The petitioner does not take issue with the priority given to the Maintenance Levies. It is acknowledged that these enjoy priority under s. 37. [para11] The petitioner, however, challenges the priority claimed in respect of the Fine Levies, Legal Levies and Repair Levies.

III. The Law

[para12] S. 37 of the Condominium Act should be set out more fully:

37.(1) Where an owner defaults in the payment of his share of the common expenses, the strata corporation may register in the land title office a certificate in Form B showing the amount owing and the legal description of the strata lot of that owner.

(2) A certificate noted in the register is, except as provided in subsection (6), a charge for the amount owing in favour of the strata corporation, in priority to every other lien or charge of whatever kind except those under the Builders Lien Act, and those of the Crown, other than mortgages in favour of the Crown.

(7) In this section "common expenses" includes the contribution levied under section 35, and the amounts, if any, added to the levy under section 34(3).

(8) A strata corporation may add the land title fee and the legal and administrative costs of filing under subsection (1) or (5) and the legal costs of a proceeding under subsection (3) to the amount owing by the owner to the strata corporation.

[para13] I can deal quickly with the priority claimed for the Fine Levies. It cannot prevail. This very issue was before the court in *National Life Assurance Co. of Canada v. Vidalin Construction Ltd.* (1985), 64 B.C.L.R. 319 (S.C.).

[para14] There, McKenzie J. (as he then was) held at p. 325:

As for the penalties imposed by the strata corporation for successive non-payments of the common expenses, I do not find them to be in the same category. The fines started with \$25 for the first failure to pay, then rose through \$50, \$75 to \$100 for each successive default. The authority to impose the fines was given by the by-laws of the strata corporation. I hold that the only items that may be incorporated in the certificate, apart from common expenses, are those listed in s. 37(8), and that list does not include penalty charges or fines. That item is conspicuous by its absence from s. 37(8).

[para15] The same fate befalls the Legal Levies. The litigation is authorized by s. 15 of the legislation. In my opinion, the reasoning of the court in *National Life Assurance* applies to these levies, although I note, of course, that MacKenzie J. was not there actually dealing with levies of this sort.

[para16] That brings us to the Repair Levies. They present a more difficult issue. I will begin by setting out the legislative scheme more fully.

[para17] The strata corporation has certain essential duties under the Act to maintain common property, common facilities and assets of the strata corporation. These are fundamental duties, and, I perceive, their execution by the strata corporation is critical to the realization of the condominium concept - that is people living together in individually owned units within a common shell. The mix of personal fee simple title and co-operative living necessitates a vehicle by which maintenance and repairs of the common property will be undertaken and payment shared and forthcoming from the individual owners. The vehicle created by the Act is, of course, the strata corporation.

[para18] S. 34(1)(d) of the Act imposes this imperative duty on the strata corporation:

34.(1) The strata corporation shall (d) keep in a state of good and serviceable repair and properly maintain common property, common facilities and assets of the strata corporation.

[para19] Similarly, s. 116 is a statutory by-law for the strata corporation. It provides in part:

116. The strata corporation shall (b) keep in a state of good and serviceable repair and properly maintain the fixtures and fittings, including the elevators, swimming pool and recreational facilities, if any, and other apparatus and equipment used in connection with the common property, common facilities or other assets of the corporation; (c) maintain all common areas, both internal and external, including lawns, gardens, parking and storage areas, public halls and lobbies; (d) maintain and repair, including renewal where reasonably necessary, pipes, wires, cables, chutes and ducts for the time being existing in the parcel and capable of being used in connection with the enjoyment of more than one strata lot or common property;

(f) maintain and repair the exterior of the buildings, excluding windows, doors, balconies and patios included in a strata lot, including the decorating of the whole of the exterior of the buildings.

[para20] The strata corporation in the case before me has recognized its statutory and by-law duties to repair the common property. It has undertaken necessary repairs after first being authorized to do so by special resolution. In doing so, it has obviously preserved and enhanced the bank's security.

[para21] In my view, it would not be conducive to the realization of the objects of the legislation if the strata corporation did not enjoy a privileged position with respect to expenditures it has made in meeting its duties to repair and maintain the common property. It is similarly important that the strata corporation be able to recover unpaid assessments from strata lot owners. *Carrothers J.A., in Strata Corp. VR149 v. Berezowsky* (1986), 5 B.C.L.R. (2d) 316 (C.A.) stated:

The remedial provisions in the Act for recovery of unpaid assessments are essential and indispensable to the effective maintenance and operation of the entire strata plan ...

[para22] I say this assuming that any such expenditures are lawfully made for a proper purpose and are authorized in accordance with the Act.

[para23] The petitioner, however, resists the strata corporation's claim to priority in respect of the Repair Levies. It does so on this basis: the Repair Levies were not contemplated by the annual budget under s. 128(10), nor were they created to top up the contingency reserve fund under s. 35(1)(b) and (d) of the Act. Accordingly, they do not come within a definition of "common expenses" in s. 37(7) and priority in respect thereof may not be maintained.

[para24] This submission requires the statement of a few more facts. First, the Repair Levies, indeed, were not contemplated by the strata corporation's annual budget under s. 128(10). I presume that this is so because they arose unexpectedly during the year, between budgets. Second, these levies were not intended to top up the contingency reserve fund. Subsections 35(1)(b) and (d) provide:

35.(1) The strata corporation shall (b) establish a contingency reserve fund not exceeding an amount calculated in the manner fixed by regulation and determine the annual levy for the contingency reserve fund; and the levy shall, if the amount of the

reserve is less than 25% of the total annual budget of the strata corporation, be not less than 5% of that budget; and the strata corporation shall hold the fund as a reserve fund to pay unusual or extraordinary future expenses;

(d) raise the amounts so determined by levying contributions on the owners in proportion to the unit entitlement of their respective strata lots in the manner provided for in the bylaws.

[para25] The legislation therefore contemplates a reserve fund being established for extraordinary future expenses and it permits the levying of contributions on the individual owners. S. 35(2) then permits the strata corporation to make expenditures out of the contingency reserve when necessary to meet extraordinary expenses, as they are realized.

[para26] This leads to the final fact. The expenditures represented by the Repair Levies were not made out of the contingency reserve fund. I assume, in the circumstances, that there was simply not sufficient monies for the needed repairs.

[para27] It should be noted that the bank does not question the validity of the Repair Levies. While not contemplated by the annual budget and not apparently paid out of the contingency reserve fund, they were authorized by special resolution under s. 49 of the Act, which provides:

49. Unless otherwise provided by a bylaw added to Part 5, a strata council shall not, except in emergencies, authorize, without authorization by a special resolution of the strata corporation, an expenditure exceeding \$500 which was not set out in the annual budget of the corporation and approved by the owners at a general meeting.

[para28] An expenditure for repairs and maintenance in this manner has been implicitly approved in *Vold v. Strata Corp.* No. 202 (1993), 31 R.P.R. (2d) 129 (B.C.S.C.) at 136.

[para29] This brings us to the principal obstacle facing the strata corporation in its claim to priority in respect of the Repair Levies -- it is the decision of Master Donaldson in *Royal Bank of Canada v. Chan*, [1995] B.C.J. No. 2786 (5 June 1995), Vancouver H940572, (B.C.S.C.). There the court was considering (inter alia) priority under s. 37(2) for special levies made by the strata corporation. Only one of the special levies is identified in the reasons, that levied to retire a second mortgage.

[para30] The levies arose, like here, by special resolution and not out of the annual budget. Master Donaldson held:

While it may be that had these amounts been determined at the time of the making of the fund as is contemplated by s. 35(1)(a) and (b), then it may well be that those particular amounts, that is to say for the special levies and for the payment out of the second mortgage, might well have been payable to the strata corporation in priority to the mortgage. It is my understanding, however, that they were not and that these special levies, although by special resolution were made throughout the year and not at the time of the annual budget. So I am satisfied that they are not in priority to the claim of the bank and so the only sums which are in priority are for the monthly maintenance fees and has been agreed by counsel -- is it the \$248.82 or is it the \$200 legal fee? (3-4, para 8)

[para31] I will deal with the threshold point. In argument, counsel for the petitioner submitted that, properly construed, s. 37(7) restricts "common expenses" to only those levied under s. 35 and s. 34(3).

[para32] That would mean that "common expenses" for the purposes of the priority only include:

- Levies for the Contingency Reserve Fund (s. 35(1)(b)); - Levies for the Administrative Expense Fund (s. 35(1)(a)); - Levies to carry out repairs required by competent public authority on a strata lot (s. 34(2)(a)); - Levies to obtain and maintain insurance under s. 54 (s. 34(2)(b)).

[para33] I reject this submission. It overlooks, for one, common property maintenance expenses levied under s. 128(10) as part of the annual budget. There is no doubt that these enjoy the s. 37(2) priority: *Chan*, supra and *National Life Assurance*, supra at 325.

[para34] I prefer the analysis of s. 37(7) advanced by the respondent strata corporation.

[para35] S. 37(7) provides an inclusive, not exclusive, definition of "common expenses". It expressly includes levies under s. 35 and s. 34(3) because these would not normally be considered "common expenses": the former because they are not expenses, but rather, reserves; the latter because they are, in the case of s. 34(2)(a), expenses referable to a strata lot, not to the common property, and in the case of s. 34(2)(b) expenses in respect of insurance.

[para36] Does *Chan* preclude me from finding that the Repair Levies, having been properly authorized and expended pursuant to a statutory duty imposed on the strata corporation, enjoy the s. 37(2) priority?

[para37] *Chan*, in part, concerned a special levy to retire a second mortgage. The learned Master suggested that such an expenditure might be authorized by s. 35(1)(a) or (b). In *Chan* it was not so authorized and the claim to priority failed. All *Chan* is saying with respect to that particular levy is that it could only qualify as a "common expense" under s. 37 if it could be characterized as arising within the extended definition of that phrase in s. 37(7).

[para38] One can appreciate the likely concern of the court in *Chan*, that to accord priority for this particular levy would have the curious result of effectively granting priority for the second mortgage over a prior first. That concern does not arise here. These expenditures have preserved and enhanced the bank's security; by enjoying priority they do not steal a march on the bank's mortgage. These expenses have been authorized by special resolution of the strata council. The bank enjoyed the ability to exercise voting rights in respect thereto: *Condominium Act*, s. 18. These are so-called "democratically" incurred expenses: *Strata Corporation VR149 v. Berezowsky* (1986), 5 B.C.L.R. (2d) 316 (C.A.).

[para39] If *Chan* was only concerned with the mortgage retirement levy I could readily distinguish it from the case at bar.

[para40] However, the reasons also refer to other special levies which are not identified. I have reviewed the pleadings in *Chan* and it is clear that certain of these unidentified levies covered repairs to the common property.

[para41] In the circumstances am I free to depart from *Chan* in respect of the decision not to accord the repair levies there priority under s. 37?

[para42] Wilson J. in *Hansard Spruce Mills* stated the principle in frequently quoted words:

Therefore, to epitomize what I have already written in the *Cairney* case, I say this: I will only go against a judgment of another judge of this court if:

- (a) Subsequent decisions have affected the validity of the impugned judgment;
- (b) It is demonstrated that some binding authority in case law or some relevant statute was not considered;
- (c) The judgment was unconsidered, a *nisi prius* judgment given in circumstances familiar to all trial judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.

If none of these situations exists I think a trial judge should follow the decisions of his brother judges.

[para43] In my opinion I am free to make a principled departure from *Chan* on the issue of the Repair Levies. It is clear that the learned Master in *Chan* was primarily concerned with the levy he expressly identified - that to retire the mortgage. He did not identify the other special levies (I ignore his treatment of the levy for fines and penalties in this discussion).

[para44] Clearly in *Chan* the Master did not consider the levies for repairs to the common property in the general context of the legislative scheme I have highlighted here and in the particular context of the strata corporation's duty to repair and maintain the common property.

[para45] The judgment in *Chan* was an oral one and I do not mean in any way to suggest that it was therefore "unconsidered". It remains, however, that the learned Master, in the exigencies of delivering oral reasons, did not have the luxury that I have enjoyed of considering the Repair Levies at length in the detailed context of the statutory scheme.

IV. Conclusion

[para46] In the result, I make an order under Rule 50(9) directing that the proceeds of the sale, still retained in trust by Lang, Michener, Lawrence & Shaw, be disbursed as follows:

- (1) An amount equivalent to the Repair Levies and the Maintenance Levies, to the strata corporation;
- (2) The surplus, if any, to the Royal Bank of Canada in satisfaction of any sums still due under its mortgages;
- (3) The surplus then remaining, if any, to the strata corporation in respect of the Fine Levies and the Legal Levies.

[para47] As the respondent strata corporation has been substantially successful, it shall have its costs on Scale 3.

BAUMAN J.

CBR# 048

IN THE MATTER OF the Condominium Act, R.S.B.C. 1979, c. 61 Between Janine Bond, petitioner, and The Owners, Strata Plan VR2538

[1996] B.C.J. No. 2137, Vancouver Registry No. A933007

British Columbia Supreme Court Vancouver, British Columbia Spencer J. (In Chambers) Heard: October 17, 1996. Judgment: filed November 4, 1996. Real property -- Condominiums -- Corporation -- Oppression or unfair prejudice to owners -- Common property -- Actions respecting.

Counsel: G. Eric Alekseyev, for the petitioner. Jamie A. Bleay, for the respondents.

[para1] SPENCER J.:-- The petitioner renews her application under ss. 40, 42 and 43 of the Condominium Act, R.S.B.C. 1979, c.61, for mandatory injunctions to compel the respondents to enforce the Act and its by-laws pertaining to the creation and release of noise, to prevent it from conducting its affairs in a manner oppressive to her and to restrain it from operating a whirlpool. I was not provided with the by-laws so I proceed only under the Act.

[para2] The petitioner owns a suite above the condominium's exercise room and the jacuzzi. She complains about the noise of the jacuzzi equipment and the voice levels associated with its use, and the smell of chlorine or chloramines which emanate from it. When she bought her suite, the jacuzzi had not been operated for some time but the Strata Council decided to reactivate it after she moved in.

[para3] This petition was dealt with on an interim basis by my brother Braidwood J. on February 23, 1994. He made findings of fact that the noise created by the jacuzzi exceeded the criteria for noise in excess of the background noise level, that the noise together with the noise of the voices of people in the jacuzzi exceeded the maximum acceptable noise level and that there was an offensive odour of chlorine present at some times, although not at others. I understand him to have made the latter finding because he pointed to the difficulty of exhausting the chlorine smell by fans without in turn increasing the noise level. The learned judge declined to make any order and adjourned the matter with recommendations that the respondents take certain steps to try to remedy the causes of the petitioner's complaints. Unfortunately, it has not been possible to bring the matter back to him for a continuation.

[para4] The respondents have taken steps and expended money to try and remedy the problem of noise. The report of Brown Strachan Associates, Acoustic Engineers, dated April 19, 1996, satisfies me that the petitioner's complaints have not been successfully addressed by the remedial measures. That report suggests it is impossible to predict beforehand whether the installation of a sound isolation membrane will solve the problem. The respondents do not offer to do that in any event, but simply propose time locks to restrict the hours of operation of the jacuzzi. No solution has been proposed for the problem of chlorine smell. Restricting the hours of operation will not affect the smell.

[para5] The petitioner's remedy under s. 42 the Condominium Act is limited to s. 42(b). To find oppression under s-s.(a) requires a finding of bad faith: see *Esteem Investments Ltd. v. The Owners, Strata Plan No. VR1513*, [1987] B.C.J. No. 2505, Vancouver Registry No. A872259, December 22, 1987. I find no bad faith here. Under s-s.(b) the court may prevent "some act of the strata corporation that is unfairly prejudicial to one or more of the owners". In my judgement, an act, as that word is used in the subsection, may include a continuing series of acts by which the corporation operates any of its facilities. It would include the operation of this jacuzzi in a way which is singularly detrimental to one owner's enjoyment of her separate property in the condominium. The provision of s. 116(a) of the Act which empowers the strata corporation to control, manage and administer the common property, common facilities or other assets of the corporation for the benefit of all the owners does not, in my opinion, give a licence to the corporation to permit one part of its common assets to be operated in a way which unreasonably interferes with the enjoyment of one member's separate property. I emphasize "unreasonably". The finding of Braidwood J. and the evidence of the continuing problem today shows that the interference here is beyond what an individual owner should be required to accept. While time locks on the jacuzzi may limit the problem noises to hours when they are less noticeable, they would leave the chlorine or chloramine smell unaddressed.

[para6] *Sterloff v. The Owners and Strata Corporation of Strata Plan No. VR2613*, [1994] B.C.J. No. 445, Vancouver Registry No. A934852, March 1, 1994, cited by the respondents, is authority for the proposition that s. 40 of the Act is limited to compelling the corporation to take action to fulfil an obligation, but that it does not extend to directions how that obligation is to be performed. I may not therefore impose directions about further specific sound-proofing of chlorine exhausting measures. Those which have been tried on a voluntary basis have failed to remedy the problem. My option is either to dismiss the petition or to enjoin the use of the jacuzzi under s. 43(a). The evidence shows the petition ought not to be dismissed. I therefore make the mandatory order requested. With some reluctance, because some at least of the other owners, will have bought their condominiums with the prospect of using the jacuzzi and all will have contributed through their assessments to the cost of trying to bring it within acceptable limits, I make the order sought by the petitioner. The respondents are hereby enjoined from operating the jacuzzi in question.

[para7] The petitioner is entitled to her costs.

SPENCER J.

CBR# 351

Barbara Wright, plaintiff, and The Owners, Strata Plan No. 205 A Strata Corporation pursuant to the Condominium Act 1979, c. 61, defendants

[1996] B.C.J. No. 381, Victoria Registry No. 4165/93

British Columbia Supreme Court Victoria, British Columbia Drake J. Heard: January 29, February 1, 1996. Judgment: filed February 15, 1996. Real property -- Condominiums -- Liability of unit holders -- For common errors -- Repair and maintenance.

Counsel: J. M. Hutchison, Q.C., for the plaintiff. W.M.R. Lambert and G. R. Jackson, for the defendants.

[para1] DRAKE J.:-- This is an action for damages arising out of what is said to be negligent performance by the defendants of their statutory duty to repair and maintain the condominium building in which they live and in which the plaintiff once lived and was the owner of a strata lot.

[para2] The building in question is known as Yorkshire House: it is situated at 935 Fairfield Road in the City of Victoria, and at all material times was managed by Brown Bros. Agencies Ltd.

[para3] In the fall of 1988 the plaintiff purchased her strata lot, Apartment 103 of Yorkshire House, a ground floor apartment on the southeasterly corner of the building. She took possession and moved into her apartment early in November. She had not been there long before she discovered signs that water was seeping in and soaking the carpet in the vicinity of the dining room bay window on the easterly side. This discovery was made about mid-December, and the plaintiff reported it to Mrs. Thomas, a member of the Strata Council which represented the various owners of lots in the building. This was followed up by a letter from her solicitor, dated 14 December 1988, to the Council, making a formal complaint of the leakage and hinting at legal proceedings unless this was remedied by the strata corporation. This letter mentions water damage and even the growth of mushrooms inside Apartment 103.

[para4] Thereafter there was water entry in one location or another during the rainy months of the years 1989, 1990 and 1991, when the plaintiff moved out of her apartment: she eventually sold it, as is, with full disclosure of the water entry, in December of 1992.

[para5] The defence to this claim is that the Council of the defendants took all reasonable steps, in timely fashion, to remedy the defects in the exterior walls and make them watertight. Certainly the Council had a lot of work done: the question is whether or not its efforts were such as would absolve the defendants from liability. This question requires detailed examination.

[para6] The duty of the defendants to maintain the exterior walls of the building is not questioned. It is found in s. 34 and s. 116 of the Condominium Act, R.S. 1979, c. 61; s. 34 imposes a duty on a strata corporation to:

... keep in a state of good and serviceable repair and properly maintain the common property, common facilities and assets of the strata corporation. Section 116 imposes a duty, by way of by-law, to:

... maintain and repair the exterior of buildings ...

In my opinion, the outer boundary of a strata lot is the centre line of its exterior walls: see *Allen v. Proprietors Strata Plan No. 2110* (1970), 2 N.S.W.R. 339. This is a case interpreting the definition of the term "common property" which is found, almost word for word with that in our statute, in the New South Wales condominium legislation.

[para7] This being so, the exterior or outer half of an outside wall is "common property" as contemplated by s. 34 op. cit. The definition of this term in the Condominium Act, set out here for convenience, is found in s. 1 as follows:

"common property" means so much of the land and buildings comprised in a strata plan that is not comprised in a strata lot shown on the strata plan, and includes [here follows a lengthy list of such items as wire, cables, ducts, etc.] where the centre of the ... wall ... forms the common boundary of a strata lot with another strata lot or with common property. (my emphasis)

[para8] The efforts of the defendants to prevent the ingress of water to the plaintiff's apartment are set out in the minutes of Council meetings throughout the years 1988 to 1992 and in a series of estimates and bills from a number of contractors and others who dealt with the problem. The minutes are found in the defendants' book of documents (Exhibit 8) and were acknowledged by Mr. Hutchison to be authentic records of the strata corporation's Council. They were, in addition, identified by the witness Beatrice Marshall, owner of a strata lot in Yorkshire House, who was authorized to give evidence on behalf of the strata corporation. She is a long-time owner of one of its strata lots, and has served on the Council at various times.

[para9] It is of interest to note that water had been coming into Apartment 103 before the plaintiff bought it: as far back as 1984 various curative measures had been taken. Apparently these were thought to have been successful, though it is obvious they were not, at least as a permanent solution to the problem.

[para10] On 1 December 1988 Van-Isle Waterproofing & Restoration Services Ltd. gave an estimate for necessary repairs to the outside walls of the ground floor apartments, 103 and 104, to the managers of the building, Brown Bros. Agencies Ltd. This estimate was before the Council at its meeting on 15 December 1988, and there was a motion "to approve waterproofing the two patios" -- that is, those being parts of Apartments 103 and 104. The minutes have nothing to say as to whether this motion was carried or defeated. However, Van-Isle Waterproofing & Restoration Services Ltd. submitted an account for this work on 28 December 1988, so presumably it was done.

[para11] On 30 December 1988, the plaintiff reported the penetration of water through her eastern exterior wall. She acknowledged that "repairs along the southern wall were initiated", an evident reference to the repair work done on the patio sides of Apartments 103 and 104 to which I have just referred.

[para12] On 5 and 6 January 1989, within a week of the plaintiff's letter reporting penetration of water through her eastern wall, the same contractor removed some siding, investigated the cause of the leakage, and did some caulking and restoration of existing sheeting and flashing.

[para13] All this work was recorded in the minutes of the Council meeting of 19 January 1989, in great detail, thus:

Work on the two patios, Apartment 103 [the plaintiff's] and Apartment 104 has been completed to the satisfaction of the owners. Bills covering the work amounted to \$1280.00 for Apt. 103 ...

... During this period [December 1988], as well as the problem with the patio leaking, there was water pouring in through the dining room window and the East wall also proved to be damp from a water problem. Van Isle Waterproofing looked into these trouble areas at the same time as the patio work was being completed. It was recommended that one board be removed from the siding of the East wall and the side of the bay window be caulked. As the work progressed we insisted that more boards be removed and it was found that a metal facing had been put on and the boards removed previously as there were nail holes which had not been caulked and were causing seepage and the building paper was in behind the facing. Van Isle Waterproofing removed all the boards to above the metal facing, recaulked the whole wall and replaced the boards and also caulked the bay window. Since this work has been completed there have been no more problems with water in the apartment [103]. ... All of these problems must have been present before Mrs. Wright bought the apartment but as Council had never been notified we were unaware of any problems. ... (my emphasis) [para14] Thereafter all was well for a time. The minutes of meetings in March and April referred to the work which had been done, and mentioned the carpet "problem" in Apartment 103 -- about which the Council recorded that it had heard no more, so regarded the issue as dead. The plaintiff herself said she did not pursue this matter of water damage to carpet in Apartment 103.

[para15] Further work was done by Van-Isle Waterproofing & Restoration Services Ltd. on the ground floor patio decks of the building in the fall of 1989 and inspected by Mr. Rushforth, P. Eng., of Graeme & Murray Consultants Ltd., civil engineers. Mr. Rushforth in his report of 6 December 1989, made an interesting observation, apparently of general application, when he said:

... Correcting a leak, such as the one found in your building [from a patio], is a difficult problem. The water can appear yards away from where the leak point is. (my emphasis)

[para16] The minutes of the Council meeting of 13 December 1989 record that:

There does not seem to be any water seepage in Apartment 103.

[para17] Work, however, continued, to correct leakage at ground level at Apartments 103 and 104; at a total cost of \$2,350.00. By 10 January 1990 it was still ongoing, and Graeme & Murray Consultants Ltd. were still involved. Further expense was incurred, \$1,266.50 for engineering fees and \$3,065.63 to Van-Isle Waterproofing & Restoration Services Ltd. for its work. These amounts were not final billings.

[para18] The plaintiff says she had no leakage into her apartment in the summer or winter of 1989.

[para19] At the annual general meeting of the strata corporation held on 14 March 1990 a special resolution was passed authorizing Council to spend up to \$10,000.00 for waterproofing the exterior of the building; and this work was done by Van-Isle Waterproofing & Restoration Services Ltd.

[para20] However, the plaintiff experienced extensive leaking of water in the winter months of this year, 1990. It started in November, and she notified the Council. She also consulted a friend, Mr. John Rose, who was in charge of maintenance of the buildings of Camosun College. I found him to be experienced and capable in this field. Mr. Rose cut out a portion of the wallboard low on the easterly wall of Apartment 103, thereby exposing much dampness and mould. He conducted tests with a hose which showed that water passed freely through the outside of the wall at or near this point. Mr. Rose and Mr. Thomson, of Brown Bros. Agencies Ltd. met the plaintiff in her apartment on 29 November 1990 and discussed these findings. Mr. Thomson, throughout the plaintiff's residence in her strata lot, was the official of Brown Bros. Agencies Ltd. who effectively managed the building. [para21] Messrs. Thomson and Rose had various discussions and correspondence as to what was required to remedy the evident defect in the building's easterly wall. Mr. Rose consulted a builder he knew, and made further inspections and evaluations. This is all summarized in Mr. Rose's letter of 24 January 1991 to Mr. Thomson. He concluded this report with the observation:

... it has been my experience that remedial action, such as caulking suspect joints, is typically unsuccessful and usually a short-term solution.

He made certain recommendations, and said he did not think the cost of these would exceed \$3,000.00.

[para22] Mr. Rose also cut out samples of dampened carpet and had them analyzed by John MacRae & Associates Inc., Environmental Health Services. These revealed the presence of various fungi and concentrations of a number of different bacteria. The plaintiff paid Mr. MacRae's bill.

[para23] At a special meeting of the Council on 28 May 1991 Mr. Rose was present by invitation. The Council already had Mr. Rose's suggestions as to making the east wall of the building weathertight, previously submitted to Mr. Thomson. There was evidently a lengthy discussion of this matter. On 28 June 1991, Mr. Rose gave an estimate to Mr. Thomson that the work would cost some \$24,000.00.

[para24] The Council then obtained a number of estimates from various contractors, and finally settled on Caporale Construction Ltd. to do the work at a cost of \$13,886.46. The work would start in mid-August and go on for about two weeks. Mr. Thomson reported to the plaintiff on 1 October 1991 that this work had been completed, and reminded her that repairs to the inside of her east wall were her responsibility.

[para25] Meanwhile, in May the plaintiff had begun to feel unwell. This she attributes to the presence of fungi and bacteria in her apartment. Her doctor could find nothing to which he could attribute a specific cause: but did find that she had developed an asthma-like respiratory condition. It is not unreasonable to suppose that this condition had its origin in the bacteria and fungi among which she was living, for it cleared up after she moved out in June of 1991. [para26] Thereafter for a year or so she visited the apartment from time to time and found work in progress; and, on occasion, damp carpets.

[para27] As I have said, she sold her strata lot in December 1992, on an "as is" basis, without having closed the openings in the wall made by Mr. Rose.

[para28] It was evident that, as time passed in the years 1989, 1990 and 1991, and the plaintiff continued to complain to the Council about the entry of water into her strata lot, that she came to be regarded by some, at least, of its members from time to time as something of a nuisance: she disturbed the peace and repose of the condominium community. But I cannot find that the defendants' conception of their duty to repair under the Condominium Act was affected by this state of affairs, unfortunate and understandable as it was.

[para29] As appears from the record of its proceedings the Council was at all times alive to its repair and maintenance responsibilities; and throughout the period of the plaintiff's ownership of her strata lot took steps to remedy the defects which she drew to its attention. The Council even went so far as to interview and take advice from the plaintiff's friend Mr. Rose as to what should be done. In the end, the work of Van-Isle Waterproofing & Restoration Services Ltd. evidently having been found wanting, the Council sought estimates and had more extensive work done by Caporale Construction Ltd. As I have indicated, much expense was incurred.

[para30] The defendants are not insurers. Their business, through the Strata Council, is to do all that can reasonably be done in the way of carrying out their statutory duty: and therein lies the test to be applied to their actions. Should it turn out that those they hire to carry out work fail to do so effectively, the defendants cannot be held responsible for such as long as they acted reasonably in the circumstances: and in this instance I have to say that the defendants did just that. They cannot be found to have been negligent.

[para31] The action must accordingly be dismissed with costs, Scale 3.

DRAKE J.

CBR# 138

I.R. Capital Corporation, Petitioner (Respondent), and The Owners, Strata Plan NWS 3459, Respondent (Appellant)

[1995] B.C.J. No. 430, Vancouver Registry No. CA019865

British Columbia Court of Appeal Vancouver, British Columbia (In Chambers) Legg J.A. Oral judgment: January 26, 1995.

Counsel for the Appellant: J.P. Mancuso. Counsel for the Respondent: E.E. Bowes.

[para1] LEGG J.A. (orally):-- These reasons for judgment have been put together under pressures of time and I shall therefore take the liberty of editing what I am recorded as saying later.

[para2] The appellant, the Owners of Strata Plan NWS 3459, are constituted as members of a corporation under the name of the appellant stated in style of cause. The appellant applies for an order pursuant to s.10(2), s.18, and s.30 of the Court of Appeal Act, R.S.B.C. 1979, c.7, that the Annual General Meeting of the appellant be adjourned pending the hearing of an appeal from an order of Madam Justice Baker pronounced on January 19, 1995. The learned trial judge ordered that the petitioner, I.R. Capital Corporation, which I shall refer to as Capital Corporation, which controls approximately 60 percent of the eligible votes which may be cast at the Annual General Meeting of the appellant, was entitled to vote at that meeting.

[para3] The Annual General Meeting is scheduled to take place this evening at 7:00 p.m. It is now 4:35 p.m. and I have therefore only a limited time to consider and weigh the submissions of counsel.

[para4] The material discloses:

1. The Capital Corporation is the owner developer of Strata Plan NWS 3459;
2. The Capital Corporation owns 234 units in the second phase of the strata development of the Capital Corporation;
3. The second phase was filed in the Land Title Office on December 23, 1994 and was registered in that office on or about January 19, 1994;
4. There is ongoing litigation between the Capital Corporation and the appellant in respect of an alleged short fall in the contingency reserve fund for phase one of Strata Plan NWS 3459.

As well, there are ongoing disputes as to the construction and disputes over financial documents which the appellant alleges the Capital Corporation has failed to produce to the appellant.

[para5] After notice of the Annual General Meeting was sent out by the appellant on December 22, 1994, the Capital Corporation completed a proxy form on January 6, 1995 and submitted it to the appellant. By letter dated January 9, 1995, the Capital Corporation was informed that the appellant was disputing the right of the Capital Corporation to vote its 234 units and would be taking that position at the Annual General Meeting. The Capital Corporation then brought a petition which was heard by Madam Justice Baker for a declaration that it was the owner of the 234 units and therefore entitled to vote those units at the Annual General Meeting.

[para6] I do not have a copy of the reasons for judgment of Madam Justice Baker ordering that the Capital Corporation was allowed to vote. However, I am advised by counsel on the hearing before me that she interpreted the definition of "owner" in the Condominium Act R.S.B.C. 1979 c.61, to conclude that because the Capital Corporation was the registered owner in fee simple of all strata lots in phase two, it was entitled to vote at the Annual General Meeting.

[para7] Counsel for the appellant in support of his submission, which was essentially for a stay application, submitted that where the appellant has a reasonable prospect of success, a stay should be granted on terms that will protect the respondent. Counsel for the appellant further submitted that the appeal has merit and that no practical prejudice will be suffered by the Capital Corporation if the Annual General Meeting is adjourned pending the hearing of the appeal.

[para8] In support of his argument on the merits of the appeal counsel submitted that s. 89 of the Condominium Act provides a specific code as to the voting entitlement of the phase 2 owners. He submitted that this section was drafted in this sense as it opens "Notwithstanding this Act or bylaws". Counsel argued that pursuant to s. 89 the owners of phase 2 are granted two exclusive council members at a general meeting which is to be called, either when 60 percent of the units in phase 2 are owned by individual owners or if nine months have elapsed without reaching this threshold of individual ownership.

[para9] Counsel submitted that s. 89 must override any general voting rights in the Act and he argued that the principle of *expressio unius est exclusio alterius* applied and that in specifically providing how and when phase 2 owners are to vote for council, it was the intention of the legislature to either deny the phase two general voting rights or at the very least to deny phase 2 owners rights to elect council members at an Annual General Meeting.

[para10] Section 89 of the Condominium Act provides as follows:

Phased strata council members

89. (1) Notwithstanding this Act or bylaws, where a phase other than the first phase of a strata plan is deposited, the strata council shall call a general meeting of the strata corporation by the earlier of

- (a) the date that 60 percent of the strata lots in the new phase have been conveyed by the owner developer; or
- (b) 9 months after the deposit of the strata plan for the new phase.

(2) At the meeting called under subsection (1), 2 additional members of the strata council shall be elected from the purchasers of strata lots in the new phase to hold office until the next annual general meeting of the strata corporation.

[para11] Counsel for the appellant submitted that this section provides that if 60 percent of the units in phase 2 are sold or nine months elapses without 60 percent of the units in phase 2 being sold then the owners of phase 2 are entitled to elect two council members. Counsel argued that if Madam Justice Baker's interpretation was upheld then phase 2 owners would gain a statutory preference on the council because in addition to a general right to elect council members at an Annual General Meeting there would be added an exclusive right to elect two council members.

[para12] Appellant's counsel argued that the Condominium Act contemplates that the "true owners", (by that he meant resident or individual owners as opposed to an owner developer) are to have the conduct of the affairs of the strata corporation. He referred to s. 1 of the Act which defines "owner" and "owner developer" differently and submitted that an owner is a true owner of a strata lot and an owner developer is the owner of a strata plan. He argued that the Act was designed to protect true owners and not owner developers. He relied upon the authority of *Re Carleton Condominium Corp. No. 279* and *Rochon et al (1987)*, 59 O.R. (2d) 545 at pp.553-554. He submitted that an expression of this general principle is found in s. 72(6) of the Condominium Act which placed a limitation inter alia on the owner developer's ability to vote.

[para13] Notwithstanding the arguments of counsel for the appellant I am not persuaded that the appellant has shown that there is a reasonable prospect of succeeding on this appeal. The definition of owner in the Condominium Act reads as follows:

"owner" means the person registered in the register of land title office as owner in fee simple of a strata lot, whether entitled to it in his own right or in a representative capacity or otherwise, ...

[para14] In my opinion that definition clearly applies to the respondent because it is the registered owner in the Land Title Office and registered as the owner in fee simple of the strata lots. In my opinion, under the terms of the Act and in particular the definition of "owner", the Capital Corporation is the registered owner of the 234 units that have been created by phase two of the development and became the registered owner upon the deposit in the Land Title Office of the plans for phase two, that is on December 23, 1994.

[para15] It is my further conclusion that the declared refusal by the appellant to allow the Capital Corporation to vote its 234 shares would result in oppression or unfair prejudice to the petitioner, that is to the Capital Corporation under s. 42. That section of the Condominium Act reads as follows:

Oppressive Acts

42. An owner may refer to arbitration or may apply to the court to prevent or remedy a matter where he alleged

(a) the affairs of the strata corporation are being conducted, or the powers of the corporation or strata council are being exercised, in a manner oppressive to one or more owners, including himself; or

(b) that some act of the strata corporation has been done or is threatened, or that some resolution of the owners or a class of owners has been passed or is proposed that is unfairly prejudicial to one or more owners, including himself.

[para16] At the hearing before Madam Justice Baker the appellant relied upon s. 89 to support the same submission that he has made to me.

[para17] In my opinion, that section does not exhaustively set out the rights of the owners of the lots in the new phase. It does outline the procedure for increasing the number of representatives on the strata council once a certain number of purchasers have been found for the new phase of the development and before nine months have past since the deposit of the strata plan. Specifically, it envisages the increasing of the strata council by adding two representatives from the purchasers of the lots.

[para18] I am unable to accept the submission that this section derogates from the voting rights given an owner under s. 72 of the Act. That section states that at every meeting an owner will have one vote. There is no provision in the Act which prevents an owner from voting at any Annual General Meeting of the strata corporation, which occurs before an Extraordinary General Meeting (not the General Annual Meeting) is called under s. 89.

[para19] I have already referred to s. 42 of the Condominium Act and I have noted that the Capital Corporation applied before Madam Justice Baker under the provisions of that section. That section gives an owner the right to apply to this Court to prevent a threatened act of the strata corporation which would be unfairly prejudicial to one or more of the owners including that owner.

[para20] In my opinion, the statement of the appellant made in writing on January 9, 1995, that it would oppose the right of Capital Corporation to vote its 234 votes at the Annual General Meeting was an act of unfair prejudice. I refer to the well-known decision of *Diligenti v. RWMD Kelowna Ltd.* (1976), 1 B.C.L.R. 36, as support for that proposition. Although that decision dealt with unfair prejudice within the meaning of s.221 of the British Columbia Company Act, the principles which are expressed there are applicable here.

[para21] In support of the application for a stay of execution appellant's counsel submitted that the Capital Corporation will use its voting power to elect a strata council at the Annual General Meeting this evening and that that was the appellants' main concern. Indeed, counsel invited me to allow the annual general meeting to proceed but to prohibit the Capital Corporation from exercising its right to elect the members of council at the meeting this evening.

[para22] I have given anxious consideration to that submission but I am not satisfied on the material before me that the Capital Corporation will proceed unfairly if it exercises its votes at the Annual General Meeting this evening. I am asked to infer that this will be an unfair exercise of those voting rights because of the ongoing litigation between the Capital Corporation and the appellant. I have no doubt that the litigation leads to an atmosphere which is undesirable but I am not persuaded on the material that the Corporation will proceed in a manner that is either illegal or unfairly prejudicial to the appellant just by reason of the existence of those disputes in that litigation. If the Capital Corporation does proceed in an unfairly prejudicial manner the appellant may have remedies to prohibit such conduct. I emphasize there is no evidence before me to show that that is the situation at present.

[para23] In exercising my discretion in dismissing this application I have considered that the Annual General Meeting is overdue and that it is in the interests of all strata unit holders that the meeting should proceed without delay. Because I have concluded that

the appellant is unlikely to succeed on its appeal, I am unable to find that the appellant would be prejudiced by my refusal to adjourn the Annual General Meeting.

[para24] For those reasons the application before me is dismissed.

LEGG J.A.

CBR# 001

227213 B.C. Ltd., Petitioner, and Strata Corporation No. VR 1656

[1995] B.C.J. No. 165 Vancouver Registry No. A934450

British Columbia Supreme Court Vancouver, British Columbia (In Chambers) Huddart J. Heard: January 17, 1995. Judgment: filed January 27, 1995. Practice -- Summary proceedings -- Real property -- Condominiums -- Liability of unit holders -- For common expenses -- Apportionment.

Counsel for the Petitioner: R.S. Anderson. Counsel for the Respondent: K.A. Bowman.

[para1] HUDDART J.:-- The petitioner is the owner of the only two commercial strata lots in Strata Plan VR 1656. A dispute has arisen between it and the Strata Council about the apportionment of common expenses under section 128 of the Condominium Act.

[para2] The relevant portion of section 128 provides:

(2) Where a strata plan consists of more than one type of strata lot, the common expenses shall be apportioned in the following manner:

(a) common expenses attributable to one or more type of strata lot shall be allocated to that type of strata lot and shall be borne by the owners of that type of strata lot in the proportion that the unit entitlement of that strata lot bears to the aggregate unit entitlement of all types of strata lots concerned;

(b) common expenses not attributable to a particular type or types of strata lot shall be allocated to all strata lots and shall be borne by the owners in proportion to the unit entitlement of their strata lots.

(10) At each annual general meeting subsequent to the first annual general meeting, the strata corporation shall prepare an annual budget for the following 12 month period and, after that, all owners shall, subject to subsections (2) and (3), pay a monthly assessment in accordance with their unit entitlement.

[para3] Clearly, the petitioner must pay from year to year its share of the budgeted common expenses. Equally clearly, the Strata Council must apportion those expenses between the owners of the residential and commercial lots annually.

[para4] Under section 37 of the Condominium Act the strata corporation may charge the strata lot of a defaulting owner with the arrears by registering a certificate in Form B against that owner's lot. The owner may obtain a discharge in Form C by paying the arrears. Section 35(5) authorizes the strata corporation to sue owners for money they owe. The respondent says that the petitioner owes arrears of monthly maintenance payments totalling \$18,386.30 as of January 1995.

[para5] Where a strata corporation fails to fulfil an obligation, including the apportionment of common expenses under section 128(2), section 40 authorizes the owner to apply to court for a mandatory injunction requiring the strata corporation to perform the obligation. Additionally, an owner may apply to court under section 42 "to prevent or remedy a matter where he alleges" that "the powers of the corporation or strata council are being exercised in a manner oppressive to one or more owners, including himself." Under such an application the court has the power under section 43 to "make the interim or final order it considers appropriate", including the power to "(a) direct or prohibit an act of council or vary a transaction or resolution; and (b) regulate the conduct of the corporation's future affairs." [para6] The petitioner asks this court to use its power under section 43(b) to direct the respondent to apportion its common expenses for repairs and maintenance for the 1991-1992 year and all subsequent years in accordance with an agreement it alleges was made on September 4, 1991. It accepts that common expense repair and maintenance items arising for the first time after that year must be apportioned independently of the agreement. If there is no agreement, the petitioner asks for an order apportioning the common repair and maintenance expenses in the manner Mr. Skinner apportioned them in his proposal of July 24, 1991, for the years 1990-1991 and following.

[para7] The dispute began on September 13, 1990 when the petitioner received a memorandum from the property manager, Vancouver Condominium Services Ltd. dealing with the apportionment of common expenses in the 1990-1991 budget. The petitioner, which had developed the condominium, disagreed with the fixing of the joint residential and commercial common expenses for "repairs and maintenance" at \$14,000.00. The petitioner's share of that expense was to be \$4,007.00. It considered that most of the items included in that category were attributable only to the residential section. During the two previous years, all repairs and maintenance expenses had been allocated to the owners of residential lots.

[para8] Discussions were held and correspondence and documents were exchanged between Mr. Skinner on behalf of the petitioner and various people on behalf of the Strata Council in an attempt to arrive at an agreement as to the categories of expenses to be shared. On July 24, 1991, Mr. Skinner proposed that the petitioner share common expenses in three categories totalling \$4,250.00. It was implicit in his proposal, consistent with earlier correspondence from the petitioner, that the balance of the repairs and maintenance expenses were to be the responsibility of the residential owners.

[para9] On September 4, 1991, Mr. Skinner met for between 10 and 20 minutes with Mr. Lee, the president of the Strata Council, and Ms. Brownrigg, representing the property manager. He says they accepted his proposal for apportionment subject to his paying the arrears for the 1990-1991 fiscal year so that the Strata Council would not have to collect additional maintenance fees from the owners of residential lots and to "insurance deductibles" being added to the three categories he had proposed as joint common expenses (roof and deck leaks, snow cleaning, and fire alarm maintenance).

[para10] Mr. Lee and Ms. Brownrigg say they understood that they accepted a proposal from Mr. Skinner that he would contribute \$4,250 toward common expenses. On September 10, 1991, Ms. Brownrigg wrote to the petitioner to say "... this letter confirms that council has accepted your proposal of \$4,250 in the repairs and maintenance category of the 1991- 1992 budget for Strata Plan VR-1656. Deductibles for all leak repairs will be in this category as well." (The addition of this item would have added \$787 to the proposed joint expenses in 1991-1992.)

[para11] The evidence does not permit me to find what was more likely than not to have been in the mind of Ms. Brownrigg on September 4. However, I am satisfied that Mr. Lee clearly understood that Mr. Skinner had offered to contribute \$4,250.00

toward the common repair and maintenance expenses for the year 1991-1992. He also understood that the apportionment of categories had been resolved for the future. In these circumstances it is difficult to know what apportionment the Strata Council may have thought it was approving.

[para12] Mr. Skinner had no doubts about what had been agreed. He wrote a note on his copy of his letter of July 24, 1991, confirming his understanding of the agreement he had reached with Mr. Lee and Ms. Brownrigg. Not unreasonably, he read the letter of Ms. Brownrigg as confirming his understanding. Then he caused the petitioner to pay the arrears for 1990-1991.

[para13] On December 10, 1991, Ms. Brownrigg wrote to Mr. Skinner, apparently setting out the view that the agreement was that the petitioner would pay \$4,250 toward the 1991-1992 repair and maintenance expenses. (I say "apparently" because I could not find a copy of that letter in the materials.) Mr. Skinner replied promptly with his view of the agreement. Since that date he has paid fees calculated on the basis of the agreement he believes he reached with the Strata Council. The Strata Council has acted on Mr. Lee's understanding of the agreement made that day.

[para14] Mr. Skinner accepts that the amount of the repairs and maintenance expenses in the four agreed categories may have changed and that an adjustment may be necessary, but he says that only new categories should be added because to do other than honour the agreement of September 4, 1991, is to act in a manner oppressive to him.

[para15] On January 25, 1992, and January 26, 1993, the Strata Council registered a Form B Certificate in Default of Payment against the petitioner's two lots and prevented it from voting at the 1993 Annual General Meeting where those present voted to approve a budget including \$6,000.00 as a joint common expense to obtain legal advice with regard to its claims against the petitioner for money allegedly owing to it. Mr. Skinner says his negative vote would have prevented the approval of that resolution because he owns 28.62 percent of the total unit entitlement.

Discussion

[para16] The respondent says that this matter must be converted to an action for a declaration that an agreement was made on September 4, 1991, that pleadings must be ordered so that the petitioner is required to specify the terms of the alleged agreement, and that a trial must be held to determine whether or not an agreement was reached.

[para17] The petitioner is content to have the existence and effect of the alleged agreement decided on this summary hearing as to whether or not the respondent has behaved oppressively toward it. It adds that if this court considers that it cannot decide the issues dividing the parties fairly on this hearing, it can give directions under section 73 of the Condominium Act for the fair hearing of this matter.

[para18] Because of the view I reached on reviewing all the admissible evidence, I have concluded that I can dispose of this dispute fairly on this application, without putting the parties to the expense of a trial or other proceedings. It is implicit in the position taken by the petitioner that this application is not brought to seek specific enforcement of an agreement. It is brought to determine the amount the only owner of commercial strata lots in a mixed condominium owes to the strata corporation, and to resolve the underlying dispute as to the method of determining the annual maintenance fees.

[para19] The petitioner and the respondent have each behaved for over three years as if they have reached an agreement for the permanent resolution of that dispute. Each has followed its preferred route. The time has come for the matter to be resolved as efficiently as is consistent with fairness to both parties. Counsel for the parties had agreed upon a procedure to be followed to resolve the dispute: commence with a petition under Rule 10, file affidavits, cross-examine the deponents, apply to the court for summary determination. Then the respondent changed counsel.

After reviewing the evidence I am persuaded that pleadings and oral evidence are not required for a fair and efficient resolution of this dispute.

[para20] The evidence of Mr. Skinner and Mr. Lee persuade me that there had been no meeting of their minds when they left the brief meeting on September 4. I accept that Mr. Skinner and Mr. Lee believed that they had resolved the dispute, but each left with his own view as to what they had agreed. After reading the transcript of the cross-examination of Mr. Lee on his affidavit, I am convinced that there is no need to hear him to accept his evidence as truthful. The careless attitude of Ms. Brownrigg toward her affidavit and inconsistencies in her evidence make it unhelpful. Hearing her oral testimony is unlikely to change that conclusion.

[para21] The allocation of common expenses for repairs and maintenance must be determined for the years 1990-1991 and the four subsequent years. It would be unfair to make that allocation on the evidence before me. There will be a reference to the Registrar to determine the allocation of those expenses and the adjustments in the account of the petitioner with the Strata Corporation that flows from that allocation.

[para22] Counsel may speak to the precise orders they seek when they address the issue of costs which they asked me to reserve for further submissions.

HUDDART J.

CBR# 094

Judy Cowe, Petitioner, and The Owners, Strata Plan VR1349, The Strata Council of Strata Plan VR1349, and William Edward Thompson, Respondents

[1994] B.C.J. No. 537 Vancouver Registry No. A940307

British Columbia Supreme Court Vancouver, British Columbia (In Chambers) Saunders J. Heard: February 28, 1994. Judgment: filed March 8, 1994.

Appearing for the Petitioner: Patrick A. Williams. Appearing for the Respondent: John D. Whyte.

[para1] SAUNDERS J.:-- The Strata Council of Plan VR1349 refused Judy Cowe, an owner, permission to rent her unit because she had not personally occupied her lot for twelve months before her request. Judy Cowe applies for a declaration the bylaw on which the refusal was grounded, is void and unenforceable as it contravenes the Condominium Act, R.S.B.C. 1979, c. 61. Although she also seeks other relief, the primary dispute before me centers on enforceability of the Strata Corporations's bylaw restricting rental of units by owners.

[para2] The issues posed by the petition, winnowed by the oral submissions, are:

1. is the rental restriction bylaw of Strata Corporation VR1349 ultra vires as contravening ss. 29 and 30 of the Condominium Act?; 2. did the Strata Council breach the rules of natural justice in denying Ms Cowe permission to lease her unit?; 3. has Ms Cowe been oppressed and unfairly prejudiced by the respondents?; and 4. did the respondents Mr. Thompson and the owners of the Strata Council fail to act in good faith in fulfilling their duties of the Strata Council.

The Facts

[para3] In my view, this petition can be answered by dealing only with the first issue, and to that end I set out only those facts which relate to that issue.

[para4] On December 15, 1993, Judy Cowe completed purchase of a strata lot of Strata Plan VR1349, in North Vancouver, British Columbia.

[para5] Both before and after the purchase closed on December 15, 1993, Ms Cowe sought permission from the Strata Council to rent her strata lot. The Strata Council steadfastly refused permission on the basis the bylaws prohibit an owner from renting a unit unless the owner has first personally occupied the unit for the requisite twelve months. The bylaws provide:

RENTAL LIMITATION BY-LAW

(1) Subject to Section 30, 31 and 32 of the Condominium Act of British Columbia, the number of units within Strata Plan VR-1349 that may be leased or rented by the owners shall be five (5).

(2) An owner after twelve (12) months of personal occupancy who wishes to lease or rent his strata lot shall apply in writing to the strata corporation for permission to lease within the prescribed limit.

(4) Where the limit of leased units established in Section (1) of this by-law is reached, no further rentals shall be permitted except as allowed by Section 31 and 32 of the Condominium Act.

[para6] At all times material to this case the number of strata lots rented was two. The refusal to permit Ms Cowe to rent her unit has always been based upon clause 2 of the bylaw (above) and the fact Ms Cowe has not personally occupied her strata lot for at least twelve months prior to renting it.

[para7] In January 1994 Ms Cowe rented the strata lot to tenants commencing February 1, 1994 and on February 1, 1994 she commenced this action. In mid-February 1994 the Strata Council fined Ms Cowe \$500 for renting the unit without permission in violation of the bylaws. Is the Rental Limitation Bylaw Ultra Vires the Condominium Act?

[para8] Ms Cowe contends clause 2 of the Rental Limitation Bylaw exceeds the statutory authority for limitations on rental found in ss. 29 and 30 of the Condominium Act. Those sections provide:

29. Subject to section 30, the bylaws do not operate to prohibit or restrict (a) a devolution of a strata lot; or (b) a transfer, lease, mortgage or other dealing with a strata lot, or to destroy or modify an easement implied or created by this Act.

30. (1) A strata corporation administering a strata plan that is wholly or partially residential may, by bylaw, limit the number of residential strata lots within the strata plan that may be leased by the owners. (2) A bylaw under subsection (1) shall set out the number of strata lots that may be leased and the manner in which the limitation will be enforced.

[para9] There is little law on the Condominium Act, and none on the point raised by Ms Cowe, although in the case *Mattiazzo v. The Owners, Strata Plan No. V4 1144* (March 21, 1985), Vancouver A850287 (B.C.S.C.) the court struck down a similar bylaw restricting owners who had not occupied their strata lot for at least twelve months from applying to the strata council to lease a lot, on other grounds than advocated in this case. *McEville Holdings Inc. v. The Owners, Strata Plan No. VR 314* (October 29, 1984), Vancouver A841861 (B.C.S.C.), dealt with a bylaw with a provision similar to the one in issue in this case, but the attack on the bylaw (which was successful) did not address the twelve month residency requirement.

[para10] The starting, and ending, point on this issue is the statute itself. Sections 29 and 30 of the Act are a pair of statutory provisions that work together. Section 29 of the Act ensures there are no prohibitions or restrictions on leasing a strata lot covered by the bylaw except a bylaw passed under s. 30 of the Act. In the absence of s. 30, the Rental Limitation Bylaw in this case would be ultra vires the legislation. The bylaw relied upon by the Strata Council to refuse Ms Cowe the opportunity to rent her strata lot must be within the parameters of s. 30.

[para11] Section 30 (1) permits a strata corporation to "limit the number of residential strata lots within the strata plan that may be leased." Section 30 (2) says such a bylaw "shall set out the number of strata lots that may be leased and the manner in which the limitation will be enforced." The respondents contend s. 30 (2) is not a comprehensive provision, and that the word "shall" should be read to mean the two requirements that follow, the number of rentable strata lots and the manner in which the limitation is enforced, are minimum requirements. They contend s. 30 permits other restrictions to be inserted into the s. 30 bylaw such as that found in the bylaw impugned in this action. I do not agree.

[para12] In my view, s. 30 only permits a quantitative restriction or prohibition on the leasing of residential strata lots by owners. The permissive subsection, s. 30 (1), refers only to a limitation of the number of rentable strata lots. The mandatory subsection, s. 30 (2), then requires not only the number of strata lots that may be leased to be established, it also requires the manner of enforcement to be established. In my view, s. 30 (2) does not go further to permit the Strata Council to discriminate between owners that may rent their strata lot.

[para13] I am reinforced in this decision by *Mattiazzo* (supra), in which Mr. Justice Wood held the provision:

Owners must occupy said premises for one year prior to making written application to Council to rent.

was ultra vires the Strata Corporation because it would bar the owner from applying for relief under s. 32 of the Act. While this point has not been taken in the case at bar, in my view the *Mattiazzo* case illustrates the many difficulties encountered by bylaws which step beyond the narrow area permitted to be restricted by s. 30 of the Act.

[para14] I therefore conclude that clause 2 of the Rental Limitation Bylaw is ultra vires the Strata Corporation and unenforceable. Ms Cowe is entitled to a declaration to that effect. It follows, and counsel agree, that any fine imposed under clause 6 of the bylaw arising from Ms Cowe's breach of clause 2 cannot be maintained. I have authority under s. 21 of the Law and Equity Act, R.S.B.C. 1979, c. 224, to relieve against penalties as I think fit, and I do so.

[para15] Ms Cowe also sought other relief against the respondents, and costs on a special basis. As I have found the bylaw on which the Strata Council relied is ultra vires, there is no need to address the other requests for substantive relief.

[para16] However, Ms Cowe's claim for special costs is related to her claim that the respondents did not act in good faith in carrying out their duties. I do not think the actions of any of the respondents should be criticized for bad faith. The respondents were clear throughout the events that their refusal to permit Ms Cowe to rent her strata lot was based solely upon the existing Rental Limitation Bylaw and that they simply were performing their duty on behalf of all owners to enforce the bylaw. Although I have found the bylaw itself is beyond the permissible scope of a rental bylaw under the Act, I do not think the opprobrium of a finding of bad faith can or should be cast upon the respondents. In my view, they were entitled to rely upon the bylaw as it was drafted and registered, until it was declared invalid.

[para17] For these reasons, I award costs to Ms Cowe on scale 3.

SAUNDERS J.

CBR# 307

Wayne Sterloff, Petitioner, and The Owners and Strata Corporation of Strata Plan No. VR 2613, Respondents

[1994] B.C.J. No. 445

Vancouver Registry No. A934852

British Columbia Supreme Court Vancouver, British Columbia Wilson J. (In Chambers) Heard: February 4, 1994. Judgment: February 23, 1994. Filed: March 1, 1994.

Counsel for the Petitioner: Michael A. Skene. Counsel for the Respondents: M. A. MacKenzie.

WILSON J.:--

I INTRODUCTION

[para1] Mr. Sterloff seeks an order compelling the respondents to take action in connection with a garage door. The door is part of the common property, of the Strata Corporation, of which Mr. Sterloff is a member.

[para2] His petition is founded upon Section 40 the Condominium Act, 1979, R.S.B.C. Ch.61:

"Where a strata corporation fails to fulfil an obligation under this Act or bylaws, the owner of a strata lot, or a registered mortgagee, may apply to the court for a mandatory injunction requiring the strata corporation to perform the obligation."

[para3] The "obligation" sought to be enforced, is:

"34(1) The strata corporation shall . . .

(d) keep in a state of good and serviceable repair and properly maintain common property, common facilities and assets of the strata corporation . . ."

[para4] Specifically, Mr. Sterloff seeks relief in the following terms:

(a) replacement of the garage door with a replacement door that generates noise only within acceptable levels;

(b) repair to the door, as may be required, to cause the operating mechanism to generate no more than acceptable levels of noise; or

(c) prescription of a schedule for non- emergency use of the door, so that noise results only between the hours of 7 a.m. and 11 p.m. daily.

[para5] The respondents say that they have performed their obligations, under the Act and bylaws, and, accordingly, the injunctive relief sought by Mr. Sterloff is not available to him. II BACKGROUND

[para6] Mr. Sterloff is the owner/occupier of one of 252 strata lots, in a condominium complex on Beach Drive. The complex contains a residential section and a commercial section. It has an underground parking facility, allocating over 400 individual parking spaces by lane markings.

[para7] The parking area is secured by 2 overhead doors. Both doors are power operated. They are identified as the "east door" and the "west door".

[para8] The east door is the door in issue on this petition.

[para9] The opening and closing of each door may be activated by a remote triggering device.

[para10] The dimensions of the west door are 20' by 9'. It is of lattice work construction. It is described as lightweight and flexible. The strata units immediately above the west door, are in the "commercial section". There are residential units on the 5 floors above those commercial units.

[para11] The dimensions of the east door are 20' by 14'. It is constructed of solid panels. It is described as "heavy".

[para12] The hardware, connected with the opening and closing mechanisms of the east door, is bolted into the reinforced concrete walls and floor of the building. This method of attachment serves to compound the noise level during the opening and closing movements of the door.

[para13] Mr. Agnew, a representative of the management firm engaged by the strata corporation, said that the east door was made larger than the west door, to accommodate access, by moving trucks and garbage trucks, to the complex.

[para14] The units immediately above the east door, including Mr. Sterloff's unit, are "residential".

[para15] At the time Mr. Sterloff acquired his unit, the east door was unserviceable. Replacement was being effected. The prior door was apparently heavier than the present door, and served to shorten the life of the operating mechanisms.

[para16] Shortly after Mr. Sterloff occupied his unit, the east door was placed into operation. The noise generated by the opening and closing of that door distressed Mr. Sterloff. He placed his concerns before the strata council on 13 July 1993. A representative of the council attended Mr. Sterloff's unit. That representative reported to council, by memo dated 15 July 1993:

" I have responded to a Mr. Wayne Sterloff's noise complaint in 990 Beach. The level of noise I validated is simply unacceptable. The cost to redesign the east garage door is probably at least \$13,000.00. I recommend the interim solution proposed at our last

meeting - leave the east door closed between 2300 and 0700 hours. The benefits are three- fold: firstly we accommodate the residents of at least three affected suites; secondly, we reduce maintenance costs of the door; and thirdly, we greatly increase our night time security. (Guissepe reportedly prefers the door closed at night.) The objection to this proposal - that we are simply shifting the noise to the west side - is questionable. The west door is much smaller, lighter, and quieter plus it is underneath commercial property anyway! The east door is directly below residents (sic) bedrooms."

[para17] The matter was pursued between the parties for the balance of 1993, and into January 1994.

[para18] In response to Mr. Sterloff's complaint, the strata council has:

(a) restricted the ingress hours of operation, of the east door, between the hours of 11 o'clock p.m. and 7 o'clock a.m. There is no restriction on egress from the parking facility, during those hours;

(b) reduced the distance of travel, of the east door movement, to 7 feet;

(c) commissioned the plugging of fire stop holes, (which would transmit sound into Mr. Sterloff's unit); and

(d) effected modifications to the east door, through Overhead Door Company, as follows i. replacement of all steel rollers with sound deadening plastic wheels; ii. isolate right hand horizontal door track from wall with "waffle" type rubber pads; iii. isolate left hand horizontal door track from ceiling with "vibrasonic" sound dampener; iv. isolate electric opener from wall using "waffle" type rubber pads; and v. lube and service torsion spring assembly.

[para19] The parties appear to agree that, the probable cost of replacement of the east door, (with a swing-type gate), will be not less than \$12,475.00. Expenditure of this sum will require a special resolution pursuant to Section 35 of the Act. [para20] In his affidavit filed 4 February 1994, Mr. Agnew described the council's position as follows.

"28. For Mr. Sterloff to insist that the east garage door never be permitted to open during the restricted hours is unreasonable. If traffic is not permitted to use the east garage door during the restricted hours whatsoever, the inconvenience caused the owners over the west garage door will only be increased. Although only commercial units are directly above the west garage door, there are residential dwellings on the next 5 floors above that.

29. If all traffic exiting the garage is routed through the west garage door only, the residents above that door will also be further inconvenienced by the noise of the vehicles on the driveway approaching that door. The driveway leading up to the east garage door is smooth and vehicles using it do not produce any significant sound other than the usual vehicles sounds. However, the driveway leading up to the west garage door is concrete with ridged bumps running across it. Vehicles using this approach create an increased noise level from their tires on this uneven surface.

30. A complaint about the noise from the west garage door has already been made by Shera Delain, who lives over the west garage door in number 301 at 1008 Beach Avenue. This complaint is based on the increased traffic and noise caused by the west garage door being the only door operating to permit entry into the garage during the restricted hours."

III DISCUSSION

[para21] In Mr. Skene's submission, there is no evidence contradicting Mr. Sterloff's contention that the noise generated by the east garage door is "intolerable". He said that this door was not designed for residential use. It is a commercial door, and should be used accordingly. It is not necessary, argued Mr. Skene, that two access doors be operational throughout the restricted hours. And, in any event, the operation of the east door may be engaged by a manual switch, in the event of emergency.

[para22] On behalf of the respondents, Ms. MacKenzie asserted that there is no duty, pursuant to the Act, upon the strata corporation to carry out the remedies sought by Mr. Sterloff. This is so, she said, by reason of the meaning of the words "maintenance" and "repair".

[para23] In the event there is such a duty, argued Ms. MacKenzie, the strata corporation has reasonably performed that duty, and is not required, under the Act, to do more.

[para24] Mr. Skene referred me to extracts from Pavlich, Condominium Law In British Columbia, Butterworths 1983. In that work, reference is made to Proprietors of Strata Plan Number 6522 v. Furney [1976] 1 N.S.W.L.R. 412. The Australian legislation, under consideration in that decision, imposed an obligation, on the strata corporation - "to keep in a state of good repair . . ." The legislation is silent on whether the obligation extended to putting in a state of good and serviceable repair.

[para25] In Furney, the court adopted this extract from Burns v. National Coal Board [1957] S.C. 239 (Scot.):

"It is true that the primary meaning of the word "repair" is to restore to sound condition that which has previously been sound, but the word is also properly used in a sense of to make good. Moreover, the word is commonly used to describe the operation of making an article good or sound, irrespective of whether the article has been good or sound before."

[para26] That extract, I think, succinctly describes Mr. Skene's position on the extent of the respondents' obligations imposed by Section 34(1) of the Act, and paragraph 3 of the corporation's bylaws. [para27] Reference is also made by Mr. Pavlich to Re Blunt and Strata Corporation V.R.45 (1977) 2 B.C.L.R. 248 (B.C.S.C.), a decision referred to me by Mr. Skene.

[para28] In Blunt, the strata corporation incurred an expenditure in excess of \$500.00 to cover the cost of painting the exterior of the building. The expenditure had not been approved by the owners at a general meeting, and the item had not been reflected in the annual budget.

[para29] Mr. Blunt sought a mandatory injunction enjoining the council to call a general meeting to approve, or disapprove, of this expenditure.

[para30] The strata corporation's resistance, to the application for a mandatory injunction, was founded upon the contention that the obligations in Section 34 of the Act, superseded the limitations in Section 35.

[para31] The court held, at page 250 - 251:

"The obligation placed on the strata corporation to keep the common property in a state of good repair is of a different nature to the other obligations imposed by Section 19(1) [now Section 34(1)]. There is no reason for debate among the owners in respect to compliance with the orders of a public authority and very little reasons for debate on the question of insurance. Whether that is so or not the Act makes special provision in Section 19 for the payment of the expense of those items. There is no similar provision for the payment of the expense of repairs. This would appear to be sensible in that there are numerous questions relating to repair and maintenance which ought to be settled by the owners. Except for emergency repairs, which are an exception to the requirements of Section 27, the repair or replacement of the common property may be delayed or advanced and the quality of material may vary widely." (the underlining is mine) [para32] Mr. Pavlich observes at page 122:

"It seems that the effect of the Blunt and Jacklin decisions is to impose an obligation to repair on the corporation. However, the manner in which that obligation is to be discharged is, so far as this relates to costs in excess of \$500.00, a matter to be decided by the owners." (emphasis in the original)

[para33] It seems to me, in this case, Mr. Sterloff's complaints are not being ignored by the corporation. It appears to me to have accepted the obligation to maintain, or keep in a state of good repair, the east garage door. The quarrel is over the method adopted by the corporation to meet that obligation.

[para34] I think Mr. Sterloff is being inconvenienced for the convenience of other members of the corporation. The council's position appears to be, in part, that to convenience Mr. Sterloff would perforce require inconvenience to other members of the corporation.

[para35] Pursuant to its bylaws, the strata corporation must control, manage and administer the common property for the benefit of all owners. It seems to me that in carrying out that mandate, the corporation, among other things, must endeavour to accomplish the greatest good for the greatest number.

[para36] In my opinion, the remedy provided to Mr. Sterloff, by Section 40 of the Act is limited to compelling the corporation to take action to fulfil an obligation; it does not extend to directions on how that obligation is to be performed.

[para37] It seems to me that if the court is to become involved in the particulars of how that obligation is to be fulfilled, then rights and privileges of other members of the corporation may be affected, and accordingly, each member of the corporation should be a party to the proceeding. In my view, the particulars of the method of performance of the obligation are more appropriately defined in a meeting of the corporation, not on an application for a mandatory injunction.

[para38] In the result, the petition is dismissed with costs.

WILSON J.

CBR# 315

Between The Owners, Strata Plan No. LMS44, Plaintiff and RBY Holdings Ltd., Pacific Crematorium Limited and Personal Alternatives Cremation and Memorial Services Ltd., Defendants

[1993] B.C.J. No. 2251

Vancouver Registry No. A923876 British Columbia Supreme Court Vancouver, British Columbia Newbury J. Judgment: filed July 30, 1993.

J.E. Rogers, appearing for the Plaintiff. K.R. Doyle, appearing for the Defendants.

NEWBURY J.:--

[para1] I heard two contested motions in this matter on June 25 -- first, the plaintiff's application for a determination under Rule 18A or the resolution of a "point of law" under Rule 34 relating to the interpretation of a statutory building scheme which is registered against the subject strata plan; and second, a motion for an order permanently enjoining the defendants from operating a mortuary or crematorium in and about unit 102 of the property. The property, located in Delta, is known as "Tilbury Corporate Centre". I understand it is of a type similar to many industrial parks in the Delta area -- that is, it is used for industrial/commercial purposes such as warehousing and food preparation and is fairly removed from the retail or downtown part of Delta.

[para2] Since counsel addressed themselves mainly to the substantive issues regarding the use of the unit, I propose to deal first with the point of law. I will assume, for purposes of this part of the discussion, that the plaintiff has standing to sue as it has. I will return later to that question, however, which will technically make my determination of the point of law dicta for purposes of the present application.

[para3] The facts of this case are simple: on June 19, 1992, RBY Holdings Ltd. purchased Unit 102 of Strata Plan LMS44. The Unit was then, and is now, subject to a Statutory building scheme registered in the Land Title Office which provides that none of the units (or "lots") may be used for any purpose whatsoever other than "manufacturing, processing, storage, wholesale, office, laboratory, profession or research and development purposes permitted by the municipality" and that "No lot will be used for any junk or salvage business or any other purpose which could or would be offensive to other occupants of the lands or the public by reason of odour, fumes, dust, smoke, noise or other pollution being generated as a result thereof or which could be hazardous by reason of danger of fire or explosion".

[para4] I am advised that at the time of the purchase, the municipal zoning by-law did permit the use of the premises for crematorium purposes, although it was later changed to do so. It seemed to be common ground that the defendant would be permitted to operate, despite the by-law amendment, as a nonconforming use.

[para5] Subsequent to their purchase, RBY Holdings Ltd. indicated that it wished to carry on business as a mortuary and crematorium in Unit 102 through two corporations (apparently related) --Pacific Crematorium Limited and Personal Alternatives Cremation and Memorial Services Ltd. The last-mentioned company has obtained a business license from the municipality to operate a mortuary in Unit 102. (I note, parenthetically, that Mr. Rogers on the plaintiff's behalf did not raise before me any question arising under section 46 of the Condominium Act in this regard.) In furtherance of its wish to carry on the business of a crematorium as well, the defendants sought permission from the strata corporation for the right to install the necessary gas line over the common property to Unit 102. Mr. Justice Scarth of this Court granted a mandatory injunction to RBY in action number A923494 to permit such installation, although his Lordship was careful to state that in granting the injunction he had not dealt with the intended use of the premises and that the question of whether that use was permitted under the zoning by-law (or, presumably, under the statutory building scheme) should be the subject of a separate application.

[para6] I understand that the necessary installations or servicing were carried out even before this judgment was rendered and that since approximately August, 1992, Personal Alternatives has been carrying on business from Unit 102, i.e., administering the provision of funeral arrangements for the disposition of the remains of deceased persons. Prior to receiving the mortuary license, Mr. Little's affidavit states that human remains were on the site only transitorily for the purpose of being transferred into cremation caskets and were then transported off-site to crematoria. Since that time, the company has been able to store human remains in a "cool room" for periods generally not exceeding 48 hours, and the "occasional" embalming of human remains has been undertaken in a "preparation room". Mr. Little states that funeral and memorial services are not conducted on-site.

[para7] The affidavit material also discloses that all the necessary approvals have been received for the crematorium company to begin operations other than those that were specifically dependent upon completion of the required installations, which may now have been completed. However, cremation activities have not begun as yet.

[para8] In its Statement of Claim, the plaintiff seeks a declaration that the proposed use of Unit 102 as a crematorium or mortuary by any of the defendants contravenes the strata corporation's by-laws and the provisions of the building scheme registered against the property. The by-laws state that an owner shall not use his lot in a manner or for a purpose that will "cause a nuisance or hazard to any occupier of a lot". Because the question of whether the proposed uses of the property would constitute a nuisance or otherwise offend the by-laws is a question of fact which I would be reluctant to decide upon without the benefit of a trial, I propose to limit my consideration to the question of law posed under Rule 34, i.e., to whether the operation of a crematorium and/or mortuary violates the first part of paragraph 7(b) of the building scheme, assuming (as I must do under Rule 34) for purposes of this judgment that these activities will not result in the emission of odour, fumes, dust, smoke, or other pollution which could be hazardous. If this latter factual issue becomes relevant, it seems doubtful it would be appropriate for a determination under Rule 18A.

[para9] I am left, then, with the question, which I agree is one of law, of whether the building scheme permits the uses proposed by the defendants for Unit 102 of the Tilbury Corporate Centre. A great deal of argument was addressed to me on the questions of nuisance, offensiveness, injurious affection, community standards, and the "not in my backyard" syndrome, which the defendants say is operating here. All of these are irrelevant to the legal question of the construction of the first part of paragraph 7 (b). The question is whether the use of the lot for crematorium or mortuary purposes will be a use for a purpose other than "manufacturing, processing or storage". (None of the other permitted uses was seriously pursued by counsel, and rightly so, in my view).

[para10] The defendants argue that the storing of human remains on the premises for embalming and/or subsequent transportation out, is "storage" within the meaning of this paragraph and that cremation is a "process". In this regard, counsel for the defendants notes the use of the word "process" in the Cemetery and Funeral Services Act and in the "Guidelines for an Application of a Certificate of Operation to Establish a Crematorium" issued by the Registrar thereunder. He also cites cases that stand for the proposition that restrictive covenants must be construed restrictively and that documents must be given their "true meaning", i.e., the meaning that would be ascribed by "an ordinary intelligent person in construing the words in a proper way in light of the relevant circumstances".

[para11] On the question of "storage", he cites *Capital Regional District v. Mattison*, a decision of Mr. Justice Drake, suggesting that storage "implies a certain degree of permanence" and cannot be used to describe the display of perishable merchandise outside a shop in portable form. As far as "processing" is concerned, he points out that the OED definition includes "something that goes on or is carried on", "a continuous and regular action or succession of actions taking place or carried on in a definite manner", a particular method of operation in any manufacture", and that "process" is defined to mean "treating by a special process". Applying this to the facts, Mr. Doyle argues that cremation subjects the human body to a "process" by which its state is changed to what the layman would call ashes and bone fragments. Further, he says that the normal intelligent person reading the statutory building scheme would conclude that a mortuary business is "storing" human remains and that, accordingly, Mr. Little properly concluded that his proposed uses would be permitted.

[para12] Neither counsel cited the case of *Bourne v. Norwich Crematorium Ltd.* [1967] 2 All E.R. 576, a decision of the Chancery Division, which I brought to counsels' attention and on which I received written argument. In *Bourne*, the defendant was appealing to the General Commissioners of Income Tax against an assessment for the profits of its crematorium. The issue was whether the furnace chamber and chimney tower of the crematorium were "industrial buildings or structures" under the Income Tax Act, which defined an industrial building or structure as one in use "for the purposes of a trade which consists in the manufacture of goods or material or the subjection of goods or materials to any process". Mr. Justice Stamp found that the furnace chamber and chimney tower were not so qualified and stated as follows:

[para13] "I would say at once that my mind recoils as much by the description of the bodies of the dead as "goods or materials" as it does from the idea that what is done in that crematorium can be described as "the subjection of" the human corpse to a "process" ...

... In my judgment it would be a distortion of the English language to describe the living or the dead as goods or materials. The argument, of course, goes on inevitably to this: that just as "goods and materials" is wide enough to embrace, and does embrace, all things animate and inanimate, and so includes the dead human body, so the other words to which a meaning must be given, namely "subjection" and "process", are words of the widest import. Parliament cannot, so the argument as I understood it runs, have intended to exclude from the definition a process whereby refuse or waste material is destroyed or consumed by fire and, putting it crudely, for it can only be put crudely, the consumption by fire of the human body is a process. I protest against subjecting the English language, and more particularly a simple English phrase, to this kind of process of philology and semasiology. English words derive colour from those which surround them. Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back again into the sentence with the meaning which you have assigned to them as separate words, so as to give the sentence or phrase a meaning which as a sentence or phrase it cannot bear without distortion of the English language."

And further:

"I conclude that the consumption by fire of the mortal remains of homo sapiens is not the subjection of goods or materials to a process within the definition of "industrial building or structure"

This judgment has been cited on numerous occasions by numerous courts for the general rule of construction that "one must not at the end of the day distort that which has to be construed and give it a meaning which in its context one does not think it can possibly bear".

[para14] In my view, both this general principle and the specific holding of the Court in *Bourne* are applicable here. If one considers the context of the statutory building scheme and the particular development in question here, it is clear that what the draughtsman had in mind was a building to be used for commercial purposes and that the manufacturing, processing and storage in question would have referred to raw or semi-processed materials or goods to be processed for resale or other commercial use.

[para15] I cannot agree that "processing" in this context can be distorted and expanded so as to include, in Mr. Justice Stamp's words, "the consumption by fire of the human body". The body is not being "processed", it is being consumed or destroyed by fire. Further, no commercial goods or materials result. The residue of ashes is obviously not a commercial product which I infer is contemplated by paragraph 7. (For the same reason, I would not regard an incinerator used to burn garbage as "processing" garbage.) As the Court held in *Tenneco Canada Inc. v. The Queen*, the normal meaning of "processing" requires that goods be made more marketable. Here we do not have "goods", we do not have "marketable goods", and, in my view, we do not have "processing" -- we have consumption or destruction of the human body. I would respectfully concur with Mr. Justice Stamp in concluding that it would be a distortion of the wording used in the scheme to conclude that cremation is within the ambit of "processing".

[para16] As far as "storage" is concerned, the same reasoning applies. First, since I read paragraph 7 to be referring to the storage, manufacture or processing of commercial goods or products of some kind, the word is not applicable. Second, I infer that the word in this context is intended to refer to longer-term storage than the temporary moving of a human body into the premises for embalming and shipment out. The purpose of bringing the bodies onto the premises is not to "store" them but to prepare them for burial or cremation. I have already noted Mr. Justice Drake's comments to the effect that "storage" generally implies something less transient or fleeting and suggest that this is not storage in the sense that a commercial parking lot, with cars going in and out, is not normally described as a place for the "storage" of cars. In the result, I would conclude that the operation of a mortuary does, and the operation of a crematorium would, contravene the terms of the building scheme registered against Unit 102. Subject to the issue of standing, I would have granted a declaration under Rule 34 to that effect and likely granted the prayer for a permanent injunction on that basis.

[para17] Another issue raised by counsel for the defendants concerned the applicability of paragraph 7 as a whole. Mr. Doyle notes that paragraph 7 refers to the use of any "Lot" and that "Lot" is defined to mean "any portion of the Lands constituting a

single legally subdivided area in accordance with the requirements of the Land Title Act". He argued that the deposit of a strata plan to subdivide land into strata lots under the Condominium Act takes place under that statute and not under the Land Title Act.

[para18] However, this ignores section 2 of the Condominium Act, which states that "land may be subdivided into strata lots by the deposit of a strata plan, and the strata lots so created-...may subject to this Act evolve or be disposed of in the same manner and form as any land the title to which is registered in a land title office."; and section 3 of the Act which states that "this Act, except Parts 7 and 8, applies to the Condominium Act unless inconsistent therewith." The two statutes interlock with the effect that a strata lot is treated to all intents and purposes like any other lot under the Land Title Act, subject to the additional restrictions and obligations contained in the Condominium Act.

[para19] Further, the statutory building scheme is registered under section 216 of the Land Title Act and from that date on, subsection 3 provides that the restrictions contained therein run with and bind all the land affected and every part of it without further registration. To suggest, then, that this building scheme does not apply to the strata units of Strata Plan LMS44 would effect a ridiculous result in contravention of this provision. I would therefore have not acceded to this objection.

[para20] I turn then to the more difficult question of the plaintiff's standing to sue as it has in this case to enforce the provisions of the building scheme relating to the use of Unit 102.

[para21] The question of in what capacity the corporation has sued to enjoin the breach of the building scheme -- whether on a matter relating to the common property or about matters "affecting individual strata lots" -- is not expressly addressed in the plaintiff's pleadings. Paragraph 21 of the Statement of Claim states that the proposed use of the premises by the defendants "contravenes the restrictions contained in the building scheme" and paragraph 22 states that the members of the plaintiff (not the strata corporation itself) have suffered damages as a result. (Paragraph 20(a) refers to "unreasonable interference" to the common property but this is framed to refer to an alleged breach of the by-law which I am not concerned with here.) Neither the pleadings nor the affidavit evidence indicate that the strata corporation is here concerned about damage it has suffered or will suffer as a result of the breach of the building scheme in its capacity as the owner of the common property or common facilities of the strata corporation. For example, there is no allegation that hallways or the parking lot of the building have been adversely affected or would be adversely affected by the proposed uses, or that other owners will be interfered with in their enjoyment of the hallways or parking lot. Thus I have no choice but to proceed on the basis that the claim is one made by the strata corporation on behalf of the other unitholders, and therefore falls under section 15(7)(b) of the Condominium Act.

[para22] That section enables the strata corporation to sue on their behalf if it has been authorized by special resolution of the owners and consents in writing signed by the owners who are affected have been obtained. Presumably, the purpose of this provision is to ensure that the strata corporation's funds are not used to benefit individual owners or pursue individual causes not concurred in by most unitholders.

[para23] Mr. Doyle argues that on the affidavit evidence before me, it is not clear that a special resolution was, in fact, passed at the meeting of the unitholders held on March 31 of this year. The minutes which were attached to the affidavit of Mr. Schuss, however, refer to the approval and continuation of legal proceedings against the owners of Unit 102 and to the approval and acceptance of the "lawyer's report... including approval for the continuation or approval of legal proceedings" against them, which was affirmed by a vote of 13 to 2. From this, it is reasonable to infer that the required special resolution was passed. I do not think it is fatal to the resolution that the phrase "special resolution" does not appear in the minutes. There is no allegation of which I am aware that proper notice of the meeting was not given, and indeed Mr. Doyle was present as proxy for his client.

[para24] I have not been provided, however, with the written consents referred to in subparagraph 15(7)(b) of the Act. When I asked Mr. Rogers about this, he replied that these could easily be prepared and filed, but evidently none existed at the time of the hearing and likely none have been prepared as yet. Mr. Rogers fell back on the argument that the strata corporation may under section 15 sue to enforce the building scheme insofar as the common facilities are affected. But again there is no allegation in the pleadings that the breach of the building scheme (as opposed to a breach of the by-laws) affects the common property. The damage claim is that members of the plaintiff have suffered damage in the form of loss of property value, problems with their employees and problems with customers visiting the premises.

[para25] In my view, it is not for the Court to remedy the deficiency in the pleadings or in the evidence, or to "wink" at the plaintiff's failure to comply with this procedural requirement. If it is an easy matter for the plaintiff to obtain the written consents required by this Act, then the plaintiff should do so and should have done so before the action was commenced.

[para26] Without argument, I would not want to reach any conclusion as to whether the action, insofar as it is concerned with matters affecting the individual strata lots, may be voidable or struck out because of this deficiency. But given that there is doubt on this point, and given that the pleadings are deficient insofar as an action in connection with the common property is concerned, it is clearly not appropriate for me to proceed further and consider the granting of injunctive relief before that question is addressed.

[para27] Quite apart from the questions of a prima facie case and the balance of convenience, the plaintiff as a creature of statute must have satisfied the statutory conditions to pursue this aspect of its claim and, I would have thought, does not otherwise have the capacity to do so. It would be inappropriate, to say the least, for this Court to grant an injunction, permanent or otherwise, or even a ruling under Rule 34 when the plaintiff's capacity to advance its claim is questionable.

[para28] With some reluctance, then, I conclude that the plaintiff's present application for injunctive relief and for the Rule 34 determination must be dismissed at this time. The defendants will have their costs of this application.

[para29] So that this is no doubt, however, I do wish to make it clear that if the plaintiff should at some point in the future dot its 'i's' and cross its 't's', both in terms of the pleadings and meeting the requirements of the Act, it will be at liberty to apply to me or any other Judge of this Court for a declaration under Rule 34 and/or a permanent injunction enjoining breach of the building scheme. I will not be seized of this matter, but will try to make myself available if possible. Counsel should communicate with the Registry in this regard. Obviously, such an application would eliminate the necessity of the seven-day trial which I understand is scheduled in this matter.

[para30] Anything further, counsel?

MR. ROGERS: My Lady, if we can arrange it through the Registry and get our 'is' dotted and our 't's' crossed, is Your Ladyship available in the month of August?

THE COURT: I am here until about 24 August.

MR. ROGERS: Thank you.

MR. DOYLE: I think based on your reasons, my friend and I should be able to agree on what orders flow from this. If not, we may be able to get before you again.

CBR# 316

RBY Holdings Ltd., Pacific Crematorium Limited and Personal Alternatives Cremation and Memorial Services Ltd., Petitioners, and Owners, Strata Plan No. LMS44, Respondents

[1993] B.C.J. No. 485 Vancouver Registry No. A923494

British Columbia Supreme Court Vancouver, British Columbia Scarth J. Heard: October 7 and 8, 1992. Judgment: filed March 8, 1993.

Counsel for the Petitioners: Kelly R. Doyle. Counsel for the Respondent: John E. Rogers.

SCARTH J.:-- The petitioner RBY Holdings Ltd. owns a strata lot in the Tilbury Corporate Centre, which is located in the Tilbury Industrial Park in Delta. It has applied to the council of the respondent strata corporation for permission to instal a stack and exhaust fan in the roof of the building above its unit, to hook up to the sanitary sewer which runs beneath the concrete floor of its unit, and to connect into the gas line which is located about 42 feet north of its unit. The strata council refuses to allow this work to be done. So too does the strata corporation. Their reason for refusing is that RBY intends to operate a mortuary and crematorium in its unit. RBY now brings this application for a mandatory injunction requiring the strata corporation, through the strata council, to grant written permission for the servicing and completion of its premises; alternatively, for an interim interlocutory or final order directing the strata corporation to grant written permission for such work.

By memorandum dated March 1, 1993, I informed counsel for the parties that I had concluded the petitioner RBY Holdings Ltd. is entitled to a mandatory injunction requiring the respondent Owners, Strata Plan No. LMS44, to grant written permission to said petitioner to carry out the following items of work as described in the Schedule of Work marked as exhibit "kk" to the affidavit of Ronald Young filed in this proceeding on October 1, 1992:

3. Sanitary Sewer Hook up. 4. Installation of Exhaust Fan in the Roof.

I also stated reasons for my decision would follow. These are my reasons:

Apart from its power to grant injunctions in appropriate circumstances pursuant to Rule 45 of the Rules of Court, this Court has the authority, by virtue of ss. 40, 42 and 43 of the Condominium Act, R.S.B.C. 1979, c. 61, to grant a mandatory or prohibitory injunction in the circumstances contemplated by those sections. They provide as follows:

40. Where a strata corporation fails to fulfil an obligation under this Act or bylaws, the owner of a strata lot, or a registered mortgagee, may apply to the court for a mandatory injunction requiring the strata corporation to perform the obligation.

42. An owner may refer to arbitration or may apply to the court to prevent or remedy a matter where he alleges (a) the affairs of the strata corporation are being conducted, or the powers of the corporation or strata council are being exercised, in a manner oppressive to one or more owners, including himself; or

(b) that some act of the strata corporation has been done or is threatened, or that some resolution of the owners or a class of owners has been passed or is proposed that is unfairly prejudicial to one or more owners, including himself.

43. On an application to court under section 42, the court may make the interim or final order it considers appropriate, and, without limiting the generality of that power, may

(a) direct or prohibit an act of council or vary a transaction or resolution; and (b) regulate the conduct of the corporation's future affairs.

In using its general power to grant an interlocutory mandatory injunction, the Court must be satisfied there is a serious question to be tried, and that the balance of convenience lies "strongly in favour of the injunction on the particular facts of the case." *Thor's Services Ltd. v. Park Georgia Properties Ltd.* (1983), 42 B.c.L.R. 227 (S.C.), at p. 230. The rationale for this principle is that the purpose of granting an interlocutory mandatory injunction is not to afford the applicant the whole of the relief to which he would be entitled at trial if he succeeded, but to preserve the rights of the parties until they can be determined by a trial. In my view the principle is equally applicable where the Court is deciding whether to grant an interlocutory mandatory injunction, or relief in the nature thereof, under ss. 40, 42 and 43 of the Condominium Act.

A fortiori, where the relief granted is in the nature of a final order, which I consider to be the case here, the Court must be satisfied not only that it is appropriate to grant the relief sought on an application determined in a summary way prior to trial, but also that the circumstances indicate a trial of the action would not affect the outcome of the application: *Douglas Lake Cattle Co. v. Smith* (1991), 54 B.C.L.R. (2d) 52 (C.A.), at pp. 59 at seq. (per Cumming J.A.).

RBY Holdings Ltd. ("RBY") entered into a contract for the purchase by RBY of the strata lot in question in April, 1992 with Prudential Development Corp. ("Prudential"), the owner developer of Tilbury Corporate Centre. The sale closed on June 19, 1992, on which date RBY filed an application in the Land Title Office for registration of its interest as owner in fee simple of the strata lot. Title to the lot was subsequently issued to RBY.

On June 22nd RBY wrote Prudential:

...to inform you that the purchaser of the above described strata lot, RBY Holdings Ltd., intends to use the strata lot for the purpose of operating a crematorium and mortuary and to allay any concerns that you or the other owners of the strata corporation might have concerning this use.

The letter also states that:

Our business will be conducted by a subsidiary company called Personal Alternative Cremation and Memorial Services Ltd....

RBY's letter did not achieve its stated purpose of allaying the concerns of the developer. The managers of the development wrote in reply on July 8th on behalf of the developer:

...to strongly indicate that we do not approve of the use of the above noted strata lot for this type of business use.

The property managers went on to say in effect that they felt it would be appropriate to call a general meeting of all strata lot owners in order to discuss the matter and set forth a set of rules and regulations (by-laws) pertaining to the use of all strata lots.

Three further paragraphs from the property managers' letter of July 8, 1992, sum up their feelings at the time:

By permitting the use of this type of business within this prestigious and strategic industrial/retail business park; (sic) we would probably invite the unwanted 'cynical' disrespect from other business operators, property owners or their visitors and customers.

We cannot imagine that the other business operators and or the unit owners would have purchased the other units within this complex if they knew in advance that your firm would be operating this type of business within these premises. It is not fair for these and other neighbouring owners to accept your type of business after the fact. It will have a detrimental affect upon future re-sales. It is therefore our opinion that a majority of the other strata lot Owners, as well as the 12 strata lot owners that we represent directly; (sic) will NOT support or approve of this type of 'proposed' business use.

The property managers correctly predicted that the reaction of the other unit owners would not be favourable to RBY. Norman Sheren, the vice-president of Prudential, in his affidavit filed September 25, 1992, in a separate action in this Court, brought by Prudential against RBY to have the contract of sale between it and RBY rescinded and the strata lot reconveyed to Prudential, amongst other relief, on the ground RBY, at the time of purchase, falsely represented it intended to carry on a financial and investment business, deposes as follows:

During the next week, I was in contact with the other owners in the complex, and (Prudential's) tenants in the complex concerning (RBY's) intentions. The reaction of the other owners and tenants in the complex can only be described as one of horror and shock.

On a less emotional note, certain strata lot owners have filed affidavits in this proceeding in which they express concern that their businesses will suffer as the result of the reluctance of customers to attend their premises and of their employees to work there, and that their units will suffer a devaluation on re-sale, if the petitioners carry on a crematorium and mortuary business within the strata complex.

On August 6, 1992, the first annual general meeting of the strata corporation was held. Members of the strata council were elected at that meeting. A draft resolution, which proposed an amendment to the existing by-laws of the strata corporation by prohibiting an owner from, amongst other things, using "his strata lot for any purpose in connection with a mortuary or crematorium or the handling, disposal or burial of human remains", was distributed to the owners of strata lots in attendance at the meeting and "discussed". No vote on the resolution appears to have been taken.

Under date of August 12, 1992, the petitioner's solicitors wrote the property managers requesting permission pursuant to s. 115(h) of the Condominium Act to undertake the following work:

1. Installation of Stack - The stack will extend approximately 3' above the roof line. The opening in the roof to accommodate the stack will be approximately 42" in diameter.
2. B.C. Gas Installation - B.C. Gas has previously provided Dorset with specifications regarding this work. The gas line will be installed underground from the existing stub to the connection on the north side of Unit 102.
3. Sanitary Sewer hookup - This work will be done entirely within Unit 102.
4. Installation of Exhaust Fan in the Roof - The vent will require an opening of approximately 18" in diameter.

By memorandum dated the following day (August 13th) RBY wrote, with respect to item 2, that:

B.C. Gas will tie into existing gas line at the stub - run a new line underground to connect to the meter which will be installed on the back wall of our unit (on the north side of the rear exit door). All work will be completed by B.C. Gas. The Mechanical Contractor will install the internal gas line to the meter.

and, with respect to item 4, that:

The opening required is approximately 8 inches in diameter to accommodate at (sic) 100 CFM exhaust fan.

Section 115(h) of the Act provides: 115 An owner shall

(h) receive the written permission of the strata council before under- taking alterations to the exterior or structure of the strata lot, but permission shall not be unreasonably withheld.

I pause here to note that during his submissions in reply, counsel for the petitioner, Mr. Doyle, invited the Court to deal with the applications before it on the basis only items 3 and 4 were in is sue. This is not to suggest the petitioner abandons its claim with regard to the installation of the stack and 42 foot gas line. However, it became clear during the course of argument that they, especially the gas line, involve difficult questions relating to the use of the common property of the corporation and whether there exists an implied easement in favour of the petitioner to use the common property for the purpose of installing services essential to the enjoyment of its strata lot, which must necessarily be resolved upon a trial of the action. The strata council met on August 18th. The minutes of the meeting record that:

Application and letters were received from the Owners of Units #102, (viz; the petitioner) these were presented to the Council membership. The two Gas installation options were described. (#1; pipe run through #103 or #2; dig trench along back of building 'A' for new supply pipe.)

The Council was concerned about the representation and number of Council Members for this Meeting; and also felt that this matter and application would be best discussed and reviewed at a General meeting of all Owners/Representatives. Council was

concerned about making such decisions regarding common property alterations on behalf of the whole complex Ownership without the balance of Owners being represented.

The minutes also record council agreed to hold a general meeting of all owners on September 3rd to discuss the petitioner's application and a proposed set of by-laws.

Notice of the September 3rd meeting was given by notice dated August 18th. However, under date of August (sic) 1st, 1992, the property managers wrote the strata lot owners expressing concern that the requirements of the Act regarding the amount of notice time and provision of certain documents for the passing of a special resolution amending the by-laws had not been met. They set September 17th as the new date for the meeting of the owners.

On September 17th, the meeting was adjourned to September 24th on the ground "the required quorum as per the Condominium Act was NOT achieved within one-half hour of the meeting start time." A meeting of strata council was set for September 23rd.

What, if anything, took place at the meeting of the strata corporation scheduled for September 24th is not apparent from the evidence before the Court. However, on September 24th, RBY received an unsigned letter dated September 23, 1992, purportedly from strata council, and reading as follows:

In reference to your request to council for alterations to your strata lot and common property, the council has taken the position that your proposed use of Strata Lot 102 is in breach of the bylaws. In the event that a court should determine that this is not the case, your application for alterations to your unit and work on the common property still requires substantial amendments as per the attached architects requirements. (Reference Sanford Letter September 22, 1992) In addition, the application for work on the common property requires specific permission of the Strata Corporation pursuant to the Condominium Act.

By letter dated September 25, 1992, RBY's solicitors sought "particulars of the breaches of the by-laws" alleged by strata council from the respondents' solicitors. None has been provided.

In his affidavit filed September 25, 1992, Neil Crofton, president of the strata council, deposes:

4. The intended use the Petitioners proposed for their Strata Lot will contravene Sections 115 and 131 of the Condominium Act in that the conducting of the business of a crematorium and mortuary on Strata Lot 102 will:

(a) Unreasonably interfere with the use and enjoyment by other owners and visitors of the common property, common facilities or other assets of the Strata Corporation;

(b) Will cause a nuisance or hazard;

(c) Will not comply strictly with the By-Laws of the Strata Corporation which were in effect at the time of the purchase; and

(d) Will be injurious to the reputation of the building.

In my judgment, Mr. Crofton, in this paragraph, neatly focuses upon the error into which the strata council has fallen in refusing the petitioner permission to hook up to the sanitary sewer and instal the exhaust fan. Council has, in effect, failed to distinguish between the petitioner's entitlement in common with other strata lot owners to obtain certain services, such as sewer, water and gas, and to instal an exhaust fan, in order to make its unit functional, and the petitioner's actual use of its unit. Neither the strata council nor the corporation has advanced any valid reason for refusing permission for the items of work requested. The decision is based solely upon a determination to prevent the petitioner from using its premises for the purposes of a mortuary and crematorium. In so acting, I think permission has been "unreasonably withheld", contrary to s. 115(h) of the Condominium Act, and that "the affairs of the strata corporation are being conducted, or the powers of the corporation or strata council are being exercised, in a manner oppressive to ..."the petitioner as an owner of a strata lot, contrary to s. 42(a) of the Act.

An order will therefore go in the terms referred to on page 2 of these reasons.

I stress, however, that in reaching this conclusion I have not dealt with the petitioner's intended use of its premises.

The property is zoned by the Municipality of Delta as "I-2 Heavy Industrial". Permitted uses include crematoriums and mortuaries. The petitioner, according to Lawrence Little, a director of the respondents Pacific Crematorium Limited and Personal Alternatives Cremation and Memorial Services Ltd., has obtained all regulatory approvals necessary to commence operations "other than those which are specifically dependant upon completion of the services and subsequent completion of the improvements and installation of equipment". This does not, however, address the respondent's fundamental concern: does the intended use of the strata lot by the petitioners constitute a use which "may be illegal or injurious to the reputation of the building", contrary to s. 131 of the Condominium Act, or which will "unreasonably interfere with (the) use and enjoyment by other owners, their families or visitors" of the common property, common facilities or other assets of the corporation, or "cause a nuisance or hazard to any occupier of a lot, whether an owner or not, or his family", contrary to s. 115(d) and s. 115(e) of the Act.

It is, as I understand the arguments of counsel, common ground between the parties that it is not appropriate to resolve these questions on this application.

The petitioner seeks narrow relief, that is, the granting of an interim mandatory injunction or a final order requiring the strata council or strata corporation to grant written permission for the work requested. Whilst upon first impression the issue of the intended use of the premises might be thought to be intertwined with the question before me, I agree, in light of the reasoning which has led me to the conclusion I have reached with respect to the petitioner's application, that the two issues are quite separate. Moreover, the petitioner argues an application to enjoin the petitioner's use of the premises ought to be made upon a specific application by the respondent so that the respondent will be required to give an undertaking as to damages.

For its part, the respondent argues the question of whether the petitioner's use of the premises might constitute a nuisance or be harmful to the building should be the subject of a separate application.

The petitioner is entitled to its costs on Scale 3.

CBR# 339

Shane Vold, Dawn Vold and Valerie Jean Cadillac-Manson, Petitioners, and The Owners, Strata Corporation 202, Respondent

[1993] B.C.J. No. 344

Victoria Registry No. 3441/92

British Columbia Supreme Court Victoria, British Columbia Melvin J. Heard: December 8, 1992 and January 18, 1993. Judgment: February 15, 1993. Filed: February 16, 1993.

Counsel for the Petitioners: F. Hunter. Counsel for the Respondent: W. R. Lambert.

MELVIN J.:-- By petition issued October 15, 1992, the petitioners seek the following, inter alia, relief:

1. An order prohibiting the Strata Corporation 202 from levying a special assessment of \$12,139.95 against the petitioners or alternatively, an order exempting the petitioners from that special assessment;
2. Alternatively, an order limiting the expenditures of the Strata Council to \$500.00.

The petitioners also seek further relief relating to membership of the Strata Council, accounting and special costs.

The petitioners allege that the respondent's conduct from December 19, 1991 violates s. 42 of the Condominium Act based on an allegation that the affairs of the Strata Corporation were exercised in a manner oppressive to the petitioners or that certain acts or resolutions of the Corporation were unfairly prejudicial to them.

Of necessity some background is necessary. The petitioners are owners of Strata Lots 2 and 1 respectively of Strata Corporation 202. The Corporation comprises 28 strata lots, the majority of which are presently owned by 3840 Holdings Corp. (hereafter called "3840"). 3840 initially acquired 15 lots in December of 1991 and acquired the balance of its lots thereafter.

In January of 1992 the petitioner Shane Vold was advised by one Les Bjola, a director of 3840, that 3840 had purchased a number of strata lots and wanted to buy them all including Strata Lot 2 which was owned by Mr. and Mrs. Vold. Mr. Vold advised Mr. Bjola that he and his wife were not interested in selling. Shortly thereafter, according to Mr. Vold, certain work was carried out on the strata property. Mr. Vold inquired of Mr. Bjola as to the timing of a meeting of the Strata Corporation to determine what was occurring and he was advised by Mr. Bjola that a meeting would be held in "approximately 2 weeks' time".

Contrary to Mr. Vold's expectation no meeting was held of the strata owners or Strata Council. Work proceeded at the complex without a meeting of the Council or the owners; consequently, Mr. Vold instructed his solicitor to write Mr. Bjola on April 24, 1992. The following paragraph appears in that letter:

No annual general meeting of the owners of Strata Plan 202 has been held since May 25, 1991. Insofar as no new election of a Strata Council has taken place and no new resolutions have been authorized by either the owners or the Strata Council authorizing the expenditures taking place on the common property at your direction, we wish to make clear that any expenditures are for your personal account and not the responsibility of the owners of the strata plan. In the event there has been an annual or extraordinary general meeting which our clients have not received notice of, we would appreciate your providing us with copies of the notice of meeting and the minutes.

This letter apparently resulted in notice of an Annual General Meeting being issued which was received by Mr. Vold on May 4, 1992 setting May 19, 1992 at 7:30 p.m. for the Annual General Meeting which was to consider:

1. Approve a Budget for the next year of operation of the Strata Corporation (sic); a draft budget is attached.
2. Election of Strata Council.
3. Approve special resolution to levy a special assessment to pay for the costs of the renovations as itemised on the attached list.
4. Approve by laws amending and adding to the statutory by laws (Part 5 of the Condominium Act); copies of the draft bylaws are attached as Schedule A.

The minutes of the May 19th Annual General Meeting disclosed the following were present or were represented by proxy (pursuant to s. 124(3) of the Condominium Act):

1. 3840 Holdings Corp., owner of 19 lots represented by Mr. Bjola and Mr. Fowler.
2. The petitioners Mr. and Mrs. Vold, owner of Lot 2.
3. The petitioner Manson, owner of Lot 1, by proxy held by her husband.
4. Mrs. Stones, owner of Lot 19, by proxy held by Mr. Bjola.
5. Mr. and Mrs. Melvin, owners of 5 lots, by proxy held by Mr. Bjola. At the meeting an operating budget for 1992 was approved, a motion to set the number of Strata Council at 3 was carried with the petitioners opposed, and a motion to elect Mr. and Mrs. Melvin and Mr. Bjola as Strata Council members was passed with the petitioners opposed.

As a result of the foregoing Mr. Bjola and Mr. and Mrs. Melvin effectively controlled the Strata Council. New business at the Annual General Meeting resulted in the special assessment at issue in these proceedings, being approved with the petitioners opposed. The foregoing resolutions were easily passed as Mr. Bjola, representing 3840 Holdings Corp. and others by proxy, effectively controlled the proceedings.

It is of interest to note that in March of 1992, Mr. and Mrs. Melvin entered into a contract of purchase and sale of their 5 strata corporation lots with 3840, which sale was to complete on June 30, 1992. It is not surprising then that Mr. Melvin deposed in his affidavit sworn January 12, 1993 that he was informed on his return to Canada "sometime in June of 1992" by Mr. Bjola of the election of himself and his wife as members of the Strata Council. The newly created Strata Council met immediately following the Annual General Meeting at 9:30 p.m. on May 19, 1992 with the following present pursuant to the minutes of that meeting: (1) Mr. Les Bjola and (2) by proxy, Michael Melvin and Ethel Melvin. At that meeting Mr. Bjola was elected chairman with sole bank signing authority, Michael Melvin and Ethel Melvin were elected vice-chairman and secretary/treasurer respectively.

The meeting authorized 3840 to carry out renovations approved by the special assessment and to be the project manager. Consequently, work continued and ultimately this litigation ensued.

There is no doubt that the Strata Corporation's premises needed some repair and that the repairs carried out enhanced the value of the units. However, the mere fact of prospective enhancement of value does not, in my view, determine the issue of alleged oppression or unfairly prejudicial acts.

One issue that is to be resolved is the validity of the meeting of the Strata Council and the resolutions passed thereat on May 19, 1992. It is to be noted that pursuant to s. 124(3) of the Condominium Act persons entitled to vote at annual general meetings of the strata corporations may do so by proxy:

124. (3) One third of the persons entitled to vote present in person or by proxy constitutes a quorum.

There is no comparable provision for strata council proceedings. In my opinion, when considering the legislative scheme and the quorum requirements for strata council meetings as set forth in s. 119, the "proxy vote" omission relating to strata council meetings was intentional. Consequently, I am satisfied that the resolutions of the Strata Council on May 19, 1992 are invalid. The resolutions effectively allowed 3840 to contract with itself.

Regardless of the validity of the Strata Council proceedings on that date, the overall series of events must be considered to determine whether or not the affairs of the Strata Corporation were being conducted in an oppressive manner.

Section 42 of the Condominium Act provides as follows:

42. An owner may refer to arbitration or may apply to the court to prevent or remedy a matter where he alleges

(a) the affairs of the strata corporation are being conducted, or the powers of the corporation or strata council are being exercised, in a manner oppressive to one or more owners, including himself; or

(b) that some act of the strata corporation has been done or is threatened, or that some resolution of the owners or a class of owners has been passed or is proposed that is unfairly prejudicial to one or more owners, including himself.

Section 43 of the Condominium Act clothes the court with the authority to make the interim or final orders it considers appropriate and without limiting the generality of that the court may direct or prohibit an act of council or vary a transaction or resolution.

Oppression has been the subject of a number of judicial comments, mainly in the context of litigation between shareholders in a corporation. In my view, the analogy between the strata corporation owner and shareholders of a corporation is appropriate (see s. 224 of the Company Act).

In *Elder v. Elder & Watson, Limited*, [1952] S.C. 49 at p. 60, Lord Keith stated:

Oppression involves, I think, at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder.

In *Nystad v. Harcrest Apartments Limited* (1986), 3 B.C.L.R. (2d) 39 (B.C.S.C.), McEachern C.J.S.C. (as he then was) stated:

... as pointed out by Lord Keith in *Scottish Co-op*. "oppression ... may take various forms", implying that the concept is fairly open-ended. At a minimum, however, it seems there must be an element of lack of probity (adherence to the highest principles and ideals) or fair dealing to a shareholder in the matter of his proprietary rights as a shareholder: per Lord Keith in *Scottish Co-op*. [[1958] 3 All E.R. 66 (H.L.)]

"Good faith" according to *Black's Law Dictionary*, 5th ed. (1979), has no technical meaning but is a term used "to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation", or "An honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with absence of all information, notice, or benefit or belief of facts which render a transaction unconscientious". This definition leaves little room for a lack of probity or fair dealing and it therefore appears that there may be no "oppression" remedy open to the injured minority shareholder when the directors have acted in good faith.

The minutes of the Annual General Meeting of May 19, 1992 indicate that the meeting was properly convened and the Strata Council was elected. However, when considering the application of the foregoing principles to the facts in the case at bar, one should look at the cumulative effect of the conduct complained of. In that respect, the evidence discloses the following:

1. A pattern of strata lot acquisition by 3840.
2. The expenditure of money without budget or authority by 3840.
3. A delay until May 19, 1992 of a meeting.
4. The continued expenditure of funds relating to repairs and maintenance without authority prior to the May 19, 1992 meeting.
5. A request by the petitioner Shane Vold for a meeting.

6. The only response by 3840 to a meeting occurs when Mr. Vold's solicitor writes advising Mr. Bjola that he or his company proceed at its peril.

7. That there is no reason why a meeting could not have been held before any work was done or any money expended on the premises.

8. The Annual General Meeting of May 19, 1992 was controlled by 3840 by virtue of its ownership of a number of lots and its proxy votes.

9. The Melvin proxies were obtained by Mr. Bjola when it was known to Mr. Bjola and 3840 that the Melvins had entered into a contract to sell their interest to 3840. Consequently, the Melvins had no real or substantial interest in the meetings of the Corporation or of the Council.

10. The Strata Council meeting was a sham by reason of the defect created by using proxy votes and, in addition, by virtue of the Melvins having sold their interest in the Strata Corporation. There is no evidence that the special assessment would affect them.

11. After the Melvins' sale of June 30, 1992 was complete, 2 vacancies on the Strata Council were not filled until 1993.

In my opinion, what emerges is a course of conduct on behalf of 3840 through Mr. Bjola which was designed to ensure that the exclusive control of the Corporation remained in the hands of Mr. Bjola and 3840. The totality of the conduct, in my view, demonstrates bad faith and oppressive conduct. The petitioners were effectively prevented from participating in the government of the Strata Corporation through participation in the Strata Council. It is clear that Mr. Bjola through 3840 wished to acquire all of the strata units and embarked upon a course with that objective in end. In the course of doing so, he was prepared to expend monies directly or through 3840 without seeking authority of the Strata Corporation or its Council.

With reference to the relief claimed by the petitioners, I am satisfied that none of the expenditures forming part of the special assessment should be considered as emergencies. Section 49 of the Condominium Act provides:

49. Unless otherwise provided by a bylaw added to Part 5, a strata council shall not, except in emergencies, authorize, without authorization by a special resolution of the strata corporation, an expenditure exceeding \$500 which was not set out in the annual budget of the corporation and approved by the owners at a general meeting.

It should be noted that prior to the May 19, 1992 Annual General Meeting no Strata Council meeting was held to deal with the expenditures at issue. However, more importantly, none of the expenditures can be considered as emergency expenditures. All items could easily have formed the subject of a meeting if 3840 or Mr. Bjola desired prior to embarking upon the work or incurring expenses.

The duties and powers of a strata corporation are relevant on the issue of the relief claimed by the petitioners. Certain expenses incurred which are reflected in the special assessment reflect accounts outstanding with public or local authorities. The Condominium Act provides in s. 34(2)(a) and 34(3) as follows:

34. (2) The strata corporation may

(a) carry out repairs or work required by the notice or order of a competent public or local authority on a strata lot, whether authorized by the owner or not; (my underlining)

(3) Money spent under subsection (2) is due and payable to the strata corporation on demand, and shall be added to the levy on that owner under section 35 for the following month.

Consequently, the accounts of the Greater Victoria Water Board, British Columbia Hydro, and funds paid to carry out work as required by the Capital Regional District are properly the subject of the assessment as the owners are obligated regardless of authorization.

Consequently, I am satisfied that the course of conduct of 3840 and Mr. Bjola amounts to an exercise of the affairs of Strata Corporation 202 and the Strata Council of that Corporation in a manner oppressive to the petitioners. The petitioners are declared exempt from the special assessment created by the May 19, 1992 meeting except for their proportion of the outstanding accounts and the funds paid for work required by the Capital Regional District as aforesaid.

The petitioners seek further relief with reference to their participation as members of the Strata Council of the respondent Corporation. In that respect, s. 118(4) provides where there are less than 4 owners the council shall consist of all owners. In that respect, it would appear that as 26 of the strata lots are now owned by 3840 and the remaining are owned by the petitioners, that all of the owners are entitled to be members of the Strata Council. Section 119(3) provides that where the council consists of 4 or less members a quorum of the council is 2. Insofar as the petitioners require a court order to give effect to the terms of the statutory provision a declaration shall be made that all the owners (which includes the petitioners) are entitled to be and shall be members of the Strata Corporation's Council (on the assumption that at this date there are 4 or less owners).

The petitioners seek a special order as to costs on the basis that if an order for costs is obtained against the Strata Corporation it, in effect, is proportionally passed on to them and would form part of an assessment that they would have to pay to the Strata Corporation which, in turn, would result in them, in effect, paying a portion of their own costs. When one considers the conduct of 3840 and Mr. Bjola, I am satisfied that the petitioners should recover their costs and that they should be exempt from any assessment with reference to those costs. As neither Mr. Bjola or 3840 are parties to this litigation an award of costs against either of them would be inappropriate. However, an order of costs in the foregoing fashion will ensure that the costs of the petitioners will be recoverable from the Corporation without exposing themselves to liability.

MELVIN J.

CBR# 057

Can-Pac Energy Consultants Ltd., Plaintiff, and Carriage Management Inc. and The Owners, Strata Plan VR. 201, Defendants

[1990] B.C.J. No. 1627

49 B.C.L.R. (2d) 139

British Columbia Supreme Court Vancouver, British Columbia Leggatt J. Heard: January 10, 11 and March 23, 1990 Judgment: July 10, 1990

Counsel for the plaintiff: A.R.S. Gangji. Counsel for the defendant, Strata Plan VR. 201: R.N. Crockford. G.R. Clark, acting on behalf of Carriage Management Inc.

LEGGATT J.:-- This matter was heard prior to the coming into force of the Supreme Court Act, S.B.C. 1989, c. 40, on July 1st, 1990, in my then capacity as a County Court Judge.

The plaintiff company is engaged in the sale and servicing of a patented heat saving device, using micro-chip technology. Carriage Management Inc. were the building managers operating under a written contract for the Strata owners at the time the contract was entered into for the heat saving device. The defendant, Strata Plan VR. 201 own and operate an apartment block called "TreeLynn" in North Vancouver, B.C.

On November 24, 1983 following a telephone conversation between a representative of the plaintiff and Gary Clark, principal of Carriage, the plaintiff forwarded a proposal concerning the installation of an energy management system on a 90 day trial. This proposal was the Agreement later signed by Mr. Clark on December 19, 1983. On November 25, 1983, Mr. Clark forwarded this proposal to Mr. Naylor, a member of the Strata Council giving "our strongest recommendation that this proposal be authorized by your strata council". No reference exists of a December 19, 1983 meeting wherein Carriage says the proposal was formerly approved by Council, however, the Agreement was signed by Carriage on December 19, 1983.

The agreement contained the following provisions:

Purchaser hereby represents and warrants to Seller as follows:

1. That they agree to pay for said E.M. System the purchase price of 2 systems x \$1600.00 = \$3200.00 for two apt. blocks on Frome Avenue, Lynn Valley payable as follows:

- a) by cash payment in full on complete installation of the System. (struck out and initialled)
- b) or by Lease agreement through any financial institution subject to credit approval. (struck out and initialled)
- c) additional Energy Management Sales Agreement. The additional sales agreement provided under clause 4 the following:

Until the E.M. System is purchased, the Purchaser agrees to pay 75% of the savings to Can-Pac created through the installation of the E.M. System as "Service Fees." The calculation of the savings will be based as per historical data and as set out in Clause 11 of the contract "Calculation of Energy Savings."

Sometime after the system was installed at Tree Lynn but before the expiry of the 90 day trial period, Carriage was replaced as building manager. Upon reviewing Carriage's 1983 financial report at a March 1, 1984 meeting, the Council directed their new managers, Bayside Properties Services Ltd. to obtain an explanation for the \$400.00 deposit paid to the plaintiff (at this point, the 90 day approval provision was still in operation). Accordingly, in early March 1984, Lyn Creamer, on behalf of Bayside, contacted the plaintiff requesting a copy of the Agreement. A copy was forwarded to her on March 7, 1984, at which time the plaintiff requested that copies of hydro bills be forwarded to them for the purpose of calculating the service fees due under the Addendum Agreement. On March 8, 1984, Lyn Creamer signed a form releasing utility bills for Tree Lynn to the plaintiff for the purpose of calculating the energy savings. Later, on April 9, 1984, she also forwarded past hydro bills to January 1, 1984 to the plaintiff. Thereafter, the plaintiff regularly invoiced the Strata Corporation for the calculated savings.

On June 7, 1984 the Council instructed Bayside to notify the plaintiff to remove the system on the stated ground that any savings realized did not justify the purchase or lease of the equipment. In response to the Council's demand, the plaintiff simply refused to remove the equipment until they were paid in accordance with the terms of the Agreement.

Thereafter, the parties agreed to disagree. The council refused to send further hydro accounts or to authorize B.C. Hydro to turn over their accounts. Accordingly, the plaintiff invoiced on the basis of the average savings it calculated on the initial hydro accounts. The council simply ignored the matter for a very long time while the plaintiff continued to claim a percentage of the calculated savings pursuant to the terms of the agreement. The calculations of savings is complicated. Having reviewed the formula under the terms of the written contract, or using the standard formula outlined by Environment Canada, I find that there were measurable savings with respect to the installation of the device.

The defendant, Strata Corporation denies that Carriage had the authority to bind it to the contract. I disagree. There is little doubt that Carriage was the corporation's agent, with actual authority to manage and administer the common property at Tree Lynn and with authority to perform all acts usually performed by property managers.

An agent who is hired to conduct a particular type of business has implied authority to do whatever is incidental to the conduct of that business. While the management agreement did not give specific authority to enter into this agreement, in my opinion, this type of agreement falls within the category of things that a property manager would usually do in the execution of its duties. That is, a prudent property manager would seek out ways of making the owners' property more efficient and cost effective. In the agreement Carriage had with the defendant, Strata, Carriage agrees it will not make expenditures in excess of \$100.00 except for recurring operating expenses and emergency repairs, without obtaining the council's approval. This stipulation was complied with by the November 25, 1983 letter from Carriage to Mr. Naylor enclosing the proposal and urging Council to approve installation of the system. Clearly, neither Carriage nor the Corporation questioned Carriage's authority to deal with the plaintiff. Carriage seems simply to have been performing its duties as manager in compliance with the terms of the management agreement.

Accordingly, Carriage was the corporation's agent with implied authority to enter into the Agreement on its behalf. This Agreement therefore was binding and created contractual rights between the plaintiff and the Strata Corporation.

Although not pleaded the Strata Corporation has raised as a defence, s. 49 of the Condominium Act which reads as follows:

Maximum expenditure by strata corporation

49. Unless otherwise provided by a bylaw added to Part V, a strata council shall not, except in emergencies, authorize, without authorization by a special resolution of the strata corporation an expenditure exceeding \$500.00 which was not set out in the annual budget of the corporation and approved by the owners at a general meeting.

(emphasis mine) I granted leave to the defendant Strata Council to amend and argue this issue.

At no time did the defendant Carriage Management attempt to obtain any authorization by special resolution for this expenditure pursuant to s. 49. Counsel for the plaintiff argue that this is a heat savings device and therefore does not constitute an expenditure exceeding \$500.00. I disagree. Clearly, the use of the word expenditure in s. 49 means a budgetary expenditure. This section of the Condominium Act as far as I can discover from the reports, has not previously been the subject of litigation in British Columbia. The main issue with respect to s. 49 is whether it renders the agreement void or merely voidable. Chitty on Contracts, Vo. 25 at p. 22-23 sets out the law in respect of void and voidable contracts. A void contract is really no contract at all since it creates no legal rights between the parties. Accordingly, neither party can sue or be sued on the contract. However, a voidable contract is one which creates legal rights as between the parties but which may be avoided by either party. Examples of voidable contracts are those created under misrepresentation, duress, undue influence, minority, unsoundness of mind, drunkenness or by statute. Until the right to avoid has been exercised, "a voidable contract is valid and binding as between the parties."

Hely-Hutchinson v. Brayhead Ltd. [1968] 1 Q.B. 549 is an English case where one Richards, the defacto managing director of the defendant company, purported to commit the defendant to guaranteeing the indebtedness of the plaintiff, another of the defendant's directors, in the circumstances where the plaintiff was required to infuse money into a second company. In the end, the plaintiff was called upon to make good his guarantee and sought indemnification from the defendant pursuant to the commitment given by Richards. Article 99 of the defendant's memorandum and articles and s. 199 of the British Company Act required that a director disclose his interest in any contract or proposed contract which the company was intending to make. The plaintiff and Richards had failed to disclose to the remaining board members that the plaintiff had an interest in the second company as president and director. When the defendant was called upon to make good its commitment its defence was that the guarantee was invalid since it was not in compliance with s. 199 and art. 99. Lord Denning held that the non-disclosure rendered the contract of guarantee voidable but not void. Lord Wilberforce held that since s. 199 did not attach any consequence to the failure to disclose the contract was merely voidable at the company's option.

I have come to the conclusion that failure to comply with s. 49 renders the agreement voidable at the option of the Strata Corporation.

I have concluded therefore, that Carriage had authority to act as the Strata Corporation's agent and to bind it to this contract. I find the agreement is a legally binding contract for the supply of the system. On June 7, 1984, council instructed their manager to advise the plaintiff to remove his equipment. The letter reads as follows:

As Management Agents for the above-referenced Strata Corporation we advise that your various communications regarding the energy management systems installed at the above-referenced property were discussed at length at the recent Strata Council meeting.

We further advise that the Council of Owners has requested that you take immediate steps to remove the two micro processor computers from this development. Council is of the opinion that the savings realized do not justify the purchase or lease of this equipment.

We are advising the Building Manager, Mr. Herb Eultgen of Suite 112, Telephone 986-1056, to permit access and removal of this equipment.

I have come to the conclusion that council had exercised its option under law on a voidable contract. Its legal obligation for payment thereunder ended on June 7, 1984. I will leave it to counsel to work out the exact amount owing as of that date. If they are not able to do so, they may appear before me and I will set a figure. The plaintiffs are entitled to prejudgment interest from June 7, 1984. As to costs I would estimate the amount owing on the contract as of June 7, 1984 to be in a nominal range but the defendant Strata Council failed to plead the provisions of the Condominium Act and it is upon this issue that I have based my decision.

I have come to the conclusion that the only fair result is that each party bear their own costs and accordingly I make no award as to costs.

LEGGATT J.

CBR# 009

681841 Alberta Ltd. and Prominence Management Company Ltd., applicants (respondents), and Ron Wise, respondent (appellant)

[1998] A.J. No. 329 Action No. 9801-01470

Alberta Court of Queen's Bench Judicial District of Calgary Fruman J. March 24, 1998. Counsel: Ron Wise, appellant, unrepresented. Eva Freitag, for the respondents.

REASONS FOR JUDGMENT [para1] FRUMAN J.:-- Ron Wise was employed as resident manager of the Anderson Place condominium complex. Unhappy with the abrupt termination of his services, he filed a builders' lien against several units in the complex. Master Alberstat found the lien to be invalid and ordered its discharge. Wise appeals from Master Alberstat's order.

FACTS

[para2] 681841 Alberta Ltd. is the owner of a number of condominium units in the Anderson Place complex, located in southwest Calgary. Prominence Management Company Ltd. is 681841's agent. Wise was hired by Prominence to act as a resident manager to perform various cleaning and maintenance services for Anderson Place. He received a salary and was permitted to live rent-free in a unit located in the complex. In addition, Wise performed various services in connection with the renovation, rent collection, marketing and sale of units Prominence owned in the complex. He received additional compensation for these services.

[para3] While neither Wise nor Prominence dispute that Wise provided services in two capacities, the contractual picture is blurry. No written agreement between Wise and Prominence was submitted in evidence. A list of responsibilities contained in a document entitled "Resident Manager Duties" does not include such items as showing suites. Even the condominium board seemed unclear about Wise's responsibilities. In minutes of the October 21, 1997 board meeting, for example, Wise was asked to provide a description of his services.

[para4] On November 4, 1997 Prominence wrote Wise to notify him that his services in connection with the renovation and sale of their condominium units would no longer be required and were terminated with immediate effect. On December 6, 1997 Wise was terminated as resident manager. On January 16, 1998 Wise filed a builders' lien for \$17,393 against 12 units in the Anderson Place complex. Prominence and 681841 applied for an order cancelling the registration of the lien. On February 12, 1998 Master Alberstat granted the order, which is the subject of the present appeal.

DETAILS OF THE LIEN AMOUNT

[para5] Wise provided services in two capacities: as resident manager of the Anderson Place complex and in connection with the sale and renovation of specific units owned by Prominence and 681841. Wise indicated that he was fully paid for his resident manager services and claimed no builders' lien. The lien relates to services provided in connection with the sale and renovation of units owned by Prominence and 681841.

[para6] The total amount claimed in the lien is \$17,393. The amount is derived from the following items:

- * \$8557 outstanding as at November 4, 1997, the date of the first termination letter. Wise did not provide detailed invoices, a description of the services or a calculation of the basis on which the fee was calculated. It appears that the services relate primarily to "removal of hazards" from landings, steps and the main driveway, which I take to mean cleaning and snow and ice removal;

- * \$800 representing a damage deposit Wise alleges is owing to him; * \$576 representing "on call service" costs relating to inspections made at night to prevent vandalism;

- * \$1769 for unspecified parts, vendors and rentals incurred between November 4, 1997 and November 30, 1997;

- * \$500 for consulting services for "roofing and troughing";

- * \$1000 for Wise's costs to defend an action to force him to vacate his suite in the Anderson complex. Wise did not retain counsel and this amount represents an estimate of the value of his time;

- * \$1200 for expected costs to file a lien. This amount represents an estimate of the value of the time Wise expected to spend.

- * \$3000 representing the estimated value of equipment left on the premises. Neither a list of equipment nor individual values was provided. BUILDERS' LIENS: WORK AND SERVICES

[para7] Builders' liens are created by statute. They are extraordinary because they create a charge upon land and grant one class of creditors a preference not enjoyed by others. A statute creating a lien "must be given a strict interpretation in determining whether any lien-claimant is a person to whom a lien is given by it": *Clarkson Co. v. Ace Lumber Ltd.* (1963), 4 C.B.R. (N.S.) 116 at 120 (S.C.C.). For a lien to be valid the lienholder must prove that the lien fits squarely within the Act.

[para8] Section 4(1) of the Builders' Lien Act, R.S.A. 1980, c. B-12 provides that a lien may be registered on the estate or interest of the owner of the land in respect of which an improvement is being made, by a person who:

(a) does or causes to be done any work on or in respect of an improvement, or

(b) furnishes any material to be used in or in respect of an improvement. The lien may be claimed for so much of the price of work or materials as remains due.

[para9] A builders' lien can only be registered in respect of an improvement. That term is defined in s. 2 of the Act as "anything constructed, erected, built, placed, dug or drilled ... on or in land, except a thing that is neither affixed to the land nor intended to

become part of the land". Many people provide goods and services which improve or enhance property. That alone will not form the basis for a valid builders' lien.

[para10] Work or services will support a builders' lien under s. 4(1) (a) of the Act if they are directly related to the process of construction: *Leduc Estates Ltd. v. IBI Group* (1992), 1 Alta. L.R. (3d) 369 (Q.B.), affirmed (1994), 15 Alta. L.R. (3d) 368 (C.A.); *Hett v. Samoth Realty Projects Ltd.* (1977), 76 D.L.R. (3d) 362 (C.A.). In *Hett*, the Alberta Court of Appeal held that a real estate developer retained as agent to initiate a development, assemble the necessary land, obtain municipal permits, arrange financing and oversee the construction of a real estate development did not provide work that would support a lien. Even though the services contributed to the total project, they were not directly related to the construction process.

[para11] In *G. Newman Aluminum Sales Ltd. v. Snowking Enterprises Inc.* (1980), 13 R.P.R. 275 (H.C.J.), the Ontario High Court held that maintenance services such as snow removal did not give rise to a lien. The right to a builders' lien does "not [extend] to everyone who does work connected with land": *Calgary Landscaping Ltd. v. Hourly Real Estate Services Ltd.* (1993), 11 Alta. L.R. (3d) 431 at 435 (Q.B.)

[para12] I have examined the items claimed by Wise. They are stated in vague terms and lack sufficient detail to support a claim. Even the broad categories of expenses do not show a direct contribution to the construction of any condominium units, or to any improvements upon them. This is borne out in the description of the work and services contained in the statement of lien filed by Wise. He describes them as "general repairs", "grooming and clean up servicing", "specialty consulting services" and "showings of suites".

[para13] The expenses Wise claims for the alleged damage deposit and legal costs are not in any way connected to work or services provided in respect of the condominium. The remaining costs, at best, relate to cleaning, maintenance and supervision. Wise fails to bring himself within the scope of s. 4(1) (a) of the Act. The work Wise provided to Prominence and 681841 does not relate to an improvement, as defined in the Act, and is not the type of work that can support a builders' lien.

[para14] Wise is equally unsuccessful under s.4(1) (b) of the Act, which deals with materials. In *McDonald Supply Ltd. v. Abacus Cities Ltd.* (1980), 75 Alta. L.R. (2d) 289 (C.A.), the Alberta Court of Appeal, citing the Supreme Court of Canada decision in *Clarkson*, found that material that is to be the subject of a lien must be incorporated into the finished structure or consumed in the process of construction. No lien is provided for chattels used in the premises after construction has been completed: *McDonald Supply* at 290.

[para15] Wise's supporting materials for his claim, while copious, are incomplete, disorganized and confusing. There is little independent back up documentation, although there are copies of receipts for \$187.55 claimed as "parts". Wise has failed to prove that the parts were furnished for use in the process of construction or improvement of any of the Anderson Place condominium units. He speaks of equipment that has been left at the premises but does not delineate it. Equipment which remains on the site does not support a builders' lien, although its rental might. Section 4(4) of the Act contemplates rental of equipment to an owner and provides a lien for rental payments while the equipment is on a contract site. Wise did not prove any rental. The lien cannot be upheld under s. 4(1) (b) or s. 4(4) of the Act.

TIMING FOR FILING LIEN

[para16] My finding that the type of expenses claimed do not support a builders' lien disposes of this appeal in Prominence's and 681841's favour. I wish to comment, however, upon their contention that Wise's lien is invalid because it was not filed within the time limits prescribed by the Act.

[para17] Section 30(b)(ii) provides that a lien may be registered at any time within a period commencing when the lien arises and terminating 45 days from the day that the performance of services is completed or the contract to provide services is abandoned. Section 31 goes on to state that if the lien is not registered within that time limit, it ceases to exist.

[para18] Wise's services in connection with the renovation and sale of Prominence's units were terminated on November 4, 1997 in a letter on Prominence Realty Limited letterhead signed by Andrew S. Lau. A further letter, also dated November 4, confirms the termination. It is written on Prominence Management Company Ltd. letterhead and is signed by Daniel T. Green, residential property manager. Wise's services as resident manager were terminated on December 6, 1997 in a letter on Prominence Management Company Ltd. letterhead signed by Mr. Green.

[para19] The November 4 letters are clear and unequivocal. On the same day, Wise sent a letter of confirmation to Prominence, in which he acknowledged that his "rental manager" services had been terminated. Still on November 4, Wise sent a letter to the tenants of Anderson Place, in which he stated: "Effective today, I have been asked not to provide further services to the Rentals Division of Prominence Management" and "I have agreed not to represent their interests any longer ... ". Wise now contends that he was not effectively terminated from these responsibilities until December 6, 1997, and that he continued to supply partial services up to December 17, 1997. His lien relates to services in connection with the renovation and sale of units and not to his services as resident manager.

[para20] The evidence is conclusive that the effective date of Wise's termination in connection with renovations and sales was November 4, 1997. If these services were severable from his other duties, or were the subject of a separate contract, he would have 45 days from November 4, 1997 in which to file a lien. The deadline would be December 19, 1997. After that date the lien would cease to exist and a lien filed on January 16, 1998 would be beyond the time limit and invalid.

[para21] There are no doubt many situations in which a person is employed by the same entity to provide service in two distinct and severable capacities or under two separate contracts. Here, the arrangements were loose - unsupported by separate or, it appears, any written contracts or even a comprehensive description of duties. In these circumstances, it seems artificial to sever Wise's responsibilities and impose a deadline upon him to file a builders' lien from the date of termination of one set of duties, though he continued to provide and be compensated for the second set of duties. I have examined the submissions and evidence and cannot locate the factual or contractual barbed wire marking the end of one set of responsibilities and the beginning of the next. I am not alone in my difficulties. Even the condominium board did not have a clear understanding of Wise's duties.

[para22] The 45 day lien period would, therefore, commence on December 6, 1997 and a lien filed on January 16, 1998 would be within the time limit. I note that approximately \$7,000 of the amount claimed in the lien relates to the period after November 4,

1997. Although the deadline for filing a lien is extended, I make no ruling that Wise has any legal entitlement to claim fees for the renovation and sale of units incurred after November 4, 1997, the acknowledged date of termination of those duties.

SUMMARY

[para23] Wise has failed to prove his lien, and it is therefore invalid. I uphold the order of Master Alberstat directing that the lien filed by Wise be removed and discharged. The appeal is dismissed. Prominence and 681841 are entitled to their costs in this appeal.

FRUMAN J.

CBR# 126

Bruce Greenberg, 477 Richmond Street West Limited, et al., plaintiffs, and Brian Thom, MTCC No. 1046, et al., defendants

Court File No. 99-CV-174950

Ontario Superior Court of Justice Lane J. September 14, 1999.

Counsel: Patricia Conway, for the defendants, moving parties. Nigel Campbell and Robert Brush, for the plaintiffs, responding on the motion.

[para1] LANE J. (endorsement):-- This action began life as an Application dated May 18, 1999, (99-CV-169705) in which the corporate plaintiffs, as owners of certain units in the defendant condominium corporation (MTCC), sought to annul resolutions of a general meeting whereby the plaintiff, Bruce Greenberg, was removed as a director of MTCC and the defendant, Michel Dorais, was elected in his place. Declarations were sought as to the invalidity of the resulting Board.

[para2] A Counter-Application was begun by MTCC claiming an order voiding certain contracts entered into by MTCC at times when Mr. Greenberg was on the Board, on grounds of alleged conflict of interest. In short, the allegations were that Mr. Greenberg caused MTCC to contract with other companies controlled by him on worse than market terms.

[para3] On the first return of these applications, on May 31, 1999, Ferrier J. made an interim order directing, inter alia, that, until the return of the applications, the affairs of MTCC were to be run by a Board consisting of Brian Thom and Kawlin Lee; that Messrs. Greenberg and Dorais were entitled to attend and participate in Board meetings, but not vote; and that the Board should restrict its activities to the ordinary course of business. He directed that the disputed contracts remain in place and payments be made in the ordinary course. He expressly directed that the parties were free to return to the Court for further assistance. The parties then agreed upon a return date for the applications of August 18, 1999.

[para4] The plaintiffs, then applicants, moved to convert the applications into an action, which the defendants, then respondents and counter-applicants, opposed. On August 18, 1999, Low J. made the order requested. In her endorsement Low J. wrote that the material before her indicated that MTCC might need to take actions beyond the ambit of day to day operations. She directed that the parties were free to apply to the court for a variation of the order of Ferrier J. if circumstances arise such that a variation was necessary in the interests of MTCC.

[para5] The defendants now move to vary the interim order. Speaking generally, they say that the interim order was made at a time when the outlook was for a speedy resolution of the dispute at a hearing in August of this year, some two and a half months after the interim order. It was thus designed as a short-term holding order. The reality of the present situation, they say, is that it will likely be next year at best and possibly 2001 by the time a trial can be held. At the least, the solution designed for three months should be revisited to test its validity for the much longer period now envisaged.

[para6] More specifically, the defendants say that the affairs of MTCC cannot be managed within the limited mandate of the interim Board. It has become apparent that in the past financial matters have been seriously mismanaged. Although certificates were issued by MTCC to purchasers of units certifying that there were substantial reserve funds, there is no money in the Reserve Fund. The corporation is running at a deficit of \$70,000 and is struggling to meet its obligations. Some 55% of those obligations are to companies owned by Mr. Greenberg which must be paid under the current order. One such payment is to Mega Landmark, the property manager. An alternative contract is available with a competitor which would save MTCC \$40,000 annually, including eliminating the expense of a superintendent. Another contract is with the plaintiff 477 Richmond Street West Limited ("477") whereby MTCC leases the rooftop from 477, even though the rooftop is part of the common elements of the condominium. The defendants say that MTCC must be set at liberty to address these and other financial issues, even if it means terminating the disputed contracts and, if so held, ultimately paying damages for so doing.

[para7] The defendants point out that parties to contracts are generally at liberty to break them and suffer the consequences in damages, except where the contract is one of the class that the court will order to be specifically performed or will grant an interlocutory injunction to restrain the breach. They say that a management contract is like a personal services contract and would not be specifically enforced or the subject of an injunction. Damages are clearly an adequate remedy if the Board terminates Mega wrongfully.

[para8] The plaintiffs say that no change can or should be made in the Order of Ferrier J. No change can be made because the same issues were before Low J. and she held that the defendants could apply "... if circumstances arise ..." which they submit means in the future, an implicit finding that the right circumstances did not exist before her. The issue of a change based upon the material before her is thus *res judicata*. I cannot read her decision this way. She explicitly stated that the material before her indicated that MTCC might need to take action. The phrase seized upon by the plaintiffs must be seen in this context. I think she opened the door for a motion based upon that material if the Board thought it necessary. Whether any change should be made is, of course, a different issue, but in approaching it I find I am not bound to consider only matter that has arisen since Low J.'s order.

[para9] I accept entirely the plaintiffs' submission that this is not an appeal from Ferrier J. Parenthetically, I say that if it was, it would fail for the Order which he made seems admirably constructed for the short-term situation which he faced. The issue is whether in the changed circumstances, particularly the longer delay until the issues can be resolved, the order should be amended.

[para10] The plaintiffs urge that no change should be made. They attack the *bona fides* of the defendants and of the present Board which is acting in a self-interested manner with the aim of damaging Mr. Greenberg. This is a new group of people who want to come in and change the whole landscape, the very situation that they found attractive when they bought. There is in these submissions an echo of a kind of divine right of Mr. Greenberg to keep the role he was able to play when he owned most of the units. But democracy is the rule in condominiums albeit tempered by procedural requirements.

[para11] The plaintiffs also urged that there would be doubt about the legitimacy of acts of the present Board beyond the ordinary course. However, counsel for the defendants noted that the Act covered the situation in s. 24(2) by virtue of which the Board's acts would be valid even though one or more members were improperly elected or not qualified under the Act.

[para12] It is important to recognize that the authority to govern the condominium is vested in the Board by the Act, not by the Court. The Court has imposed restrictions on the Board in the exercise of its authority and if those are removed, it will not constitute an approval of any particular act done thereafter by the Board.

[para13] Counsel for the plaintiffs agreed during argument that the change in time frame was significant, but submitted that, even so, there was no case for altering the Order. If there was to be any alteration, it should not be a blanket authorization to the Board to govern without limitation. There should be instead a concrete order containing limits to protect the plaintiffs until the hearing. The affidavit material, he said, disclosed that the Board did not have a concrete plan to place before the owners. That should be required of them.

[para14] Speaking of the management contract issue, counsel for the plaintiffs submitted that the purpose of terminating it could only be to cut off the revenue flow to Mr. Greenberg. This was a matter of controversy among the owners and termination would upset the balance of the Order. In addition, the Board should not be allowed to terminate the assessment appeals that the condominium has been financing for a number of owners (primarily Mr. Greenberg); should not be allowed to terminate the rooftop lease; should not be allowed to use condominium funds to finance this litigation; and the Board should be required to present to the Court a comprehensive plan to deal with the deficit, including consideration of a levy.

[para15] In my view, the governance of the condominium should be returned to the Board as the statutory holder of that authority, subject only to restrictions designed to preserve the rights of the parties during the litigation. The Court cannot and ought not to manage the building. What was practical for a three-month period is no longer practical under the new time frame, bearing in mind the evidence that the corporation is under great financial pressure. A restriction on the management powers of the Board is the equivalent of an interlocutory injunction and the principles which ought to be applied must be similar. Thus, to restrain the termination of the management contract, there would have to be evidence of irreparable harm such that damages were not an adequate remedy. It is a contract for the payment of money in return for services: damages would be the appropriate remedy. As well, it is a contract to perform services requiring the existence of trust and confidence between the parties: as such it would be most unlikely that an order would be made for specific performance. Similarly, the rooftop lease is at heart a monetary transaction and not a lease such as of business or residential premises the occupancy of which ought to be protected. If the Board chooses to stop paying rent for an area it says the condominium already owns, and the Board turns out to be wrong, that can be sorted out by money payments.

[para16] In their Factum, the plaintiffs suggest that their claim for damages after the possible termination of the management contract or other arrangements, would be met by the allegation that the Court had authorized the terminations. That is simply not the case. The defendants have not asked for, and are not receiving, the approval of the Court for any such action.

[para17] The evidence satisfies me that the Board must be free to take such steps as may be required, in its opinion, to set the finances of the condominium on a sounder basis. Accordingly, the Order of Ferrier J. will be varied to delete the requirement that the Board restrict its activities to the ordinary course of business and the requirement that all payments under the contracts with the plaintiffs be made. The Board will be free to manage the affairs of the condominium corporation subject to the following limitations, which shall apply until final disposition of this litigation:

(a) the Board will not terminate the Assessment appeals without the written consent of the unit owners on whose behalf the corporation has been conducting them, but the Board is not bound by this Order to continue to fund those appeals;

(b) if the by-law authorizing the payment of the costs of the Assessment appeals is altered, the Board will not demand reimbursement of payments previously made on behalf of the owners appealing their assessments until those appeals have been finally decided or this litigation has been finally decided, whichever is the later;

(c) the Board will not fund the legal expenses of any party, including the corporation (which is merely a nominal party), for this present litigation.

[para18] All other terms of the Order of Ferrier J. will remain in force.

[para19] The defendants applied to have the Court name an auditor. As the material reveals that a general meeting of owners will have to be held to consider the proposed by-law permitting the holding of meetings of Directors by conference telephone, it seems preferable that the meeting decide whether it has confidence in the present auditor or not.

[para20] Costs reserved to the Trial Judge.

LANE J.

CBR# 130

Grossman Holdings Limited, J. Silver Holdings Limited, Bleeman Holdings Limited, Rose Park Howard Investments Limited, J. McCallum, Brownstone Developments Limited, Gerald Goldenberg and Mark Hanson, Executor of the Estate of Jues Hanson, (appellants), and York Condominium Corporation No. 75, Savoy & Associates Limited, Kathryn Hild, Ivan Cody, Larry Wert, Ron Browne, Margaret Osmond and Joanna Qureshi, (respondents)

Docket No. C30389

Ontario Court of Appeal Toronto, Ontario Abella, Laskin and MacPherson JJ.A. Heard: July 20, 1999. Judgment: September 14, 1999. (17 paras.) On appeal from Gans J.

Counsel: Barry S. Wortzman, Q.C. and Sandra E. Dawe, for the appellants. Mark H. Arnold, for the respondents.

The following judgment was delivered by

[para1] THE COURT:-- This is an appeal by the plaintiffs from the order of Gans J. on a motion for summary judgment under Rule 20 of the Rules of Civil Procedure. Gans J. granted summary judgment dismissing the appellants' claim for declaratory relief and for an order transferring the garage to the respondent Condominium Corporation, as well as the appellants' claim for damages for inducing breach of contract: [Gans J., however, ordered that the appellants' claim for damages for breach of the Garage Agreement could proceed to trial. The respondents seek to cross-appeal that order.

[para2] The appellants were the developers of a residential condominium complex in downtown Toronto. The respondents are past and present members of the board of directors of that complex, the York Condominium Corporation No. 75 ("YCC 75").

[para3] The dispute between the parties is over the meaning of an agreement relating to the garage of the condominium (the Garage Agreement). The appellants' principal submissions are twofold: (1) the motions court judge failed to apply the proper test for summary judgment; and (2) it was an implied term of the Garage Agreement that title be transferred to the Condominium Corporation within a reasonable period of time and the motions judge erred in holding that parole evidence was inadmissible as a 'factual matrix' to show that the parties always intended YCC 75 to take title to the garage. Specifically, the appellants contend that the word 'option' in the agreement is really a misnomer, and that the true nature of the garage agreement is one of purchase and sale. We do not agree that the intention of the parties can be taken to have been anything other than to have the word 'option' convey its usual commercial meaning. Accordingly, we would dismiss the appeal for the reasons that follow. **FACTS**

[para4] The appellants commenced this action in the wake of a threat by the respondents to sue them for the cost of repairs to the garage and for the payment of hydro arrears. The appellants then alleged that YCC 75 was in breach of the Garage Agreement because it had failed to exercise its option to purchase the garage. The appellants also alleged that the respondents had adopted a strategy to frustrate the garage becoming commercially viable - a prerequisite under the agreement for exercise of YCC 75's option.

[para5] YCC 75 was a low income housing project financed by the Central Mortgage and Housing Corporation (CMHC). To meet CMHC's financing requirements, the garage was organized as a separate condominium unit (not part of the common elements), initially to be owned by some of the appellants and to be operated under the terms of the Garage Agreement. Thus, some of the appellants are the legal title holders. The garage itself comprises one unit out of four hundred and ninety-two that make up the condominium. At the time of the execution of the Garage Agreement, both the developer and the board of YCC 75 were controlled by the appellants. Therefore, as the motions court judge put it, at paragraph 7 of the reasons for judgment: "In the fall of 1972, the plaintiffs [appellants] qua developers entered into the Garage Agreement ostensibly with themselves as the declarant on behalf of the Corporation [YCC 75] with respect to the ownership, use and operation of the Garage."

[para6] The material sections of the Garage Agreement provide:

Howard [the appellants] constructed the buildings and other improvements which form the condominium units and common elements managed by the Corporation;

Howard is the registered owner of all of the condominium units of the Corporation, and the said condominium units are being sold to purchasers on the basis that Howard will lease to the unit owners parking spaces in the underground parking garage ...

Pursuant to an agreement dated the 25th day of September, 1970 between Central Mortgage and Housing Corporation and Howard, Howard is obliged to grant an option to the Corporation to purchase the said underground Garage as set out in Paragraph 11 of the said Agreement; Howard hereby grants to the Corporation the option to purchase the Garage on the terms and conditions hereinafter contained.

Howard shall manage the garage and be entitled to the income therefrom and be responsible for the expenses thereof, including mortgage interest, principal and taxes accruing due and payable prior to the time when the Corporation purchases the Garage.

The profit from the operation of the Garage, after allowing for a five percent (5%) management fee shall be applied by Howard in repayment of its equity in the Garage ...

Upon Howard being repaid its equity in the Garage, which equity is hereby agreed to be the sum of Twenty-four Thousand Eight Hundred and Forty-Five Dollars (\$24,845.00), the Garage shall be offered for sale to the Corporation at the amount then outstanding on the mortgage ...

Howard, forthwith upon being repaid its equity in the Garage, shall notify the Corporation that its equity has been repaid and the Corporation shall have the irrevocable option to purchase the Garage within Ninety (90) days of the giving of such notice for the amount then owing on the said mortgage in favour of Central Mortgage and Housing Corporation.

The Corporation's option to purchase the Garage shall be exercised as hereinafter provided within such Ninety-day period after which time the option shall be null and void and Howard shall be entitled to retain ownership of the Garage or to dispose of the Garage as it shall see fit. [Emphasis added.]

DISCUSSION

[para7] The appellants submit that this court "redefined" the role of the motions court judge on a Rule 20 motion in two of its recent decisions: Dawson et al. v. Rexcraft Warehouse and Storage Inc. et al.; Pacific & Western Trust Co. v. Carroll (1998), 164 D.L.R. (4th) 257 and Aguonie v. Galion Solid Waste Material Inc. (1998), 38 O.R. (3d) 161. We disagree. These cases confirmed and perhaps elaborated on the existing jurisprudence under Rule 20, but they did not change that jurisprudence. Further, this court affirmed in two recent decisions that the test for summary judgment under Rule 20 remains as it has since the Ungerman and Ontario Jockey Club cases: V.K. Mason Construction Ltd. v. Canadian General Insurance Group Ltd. (1998), 42 O.R. (3d) 618 at 625 per Finlayson J.A., and Transamerica Occidental Life Insurance Co. v. Toronto-Dominion Bank (1999), 173 D.L.R. (4th) 468 where Osborne J.A. stated the following at pages 482-483:

The purpose of Rule 20 and the limitations on its scope are now well-established. See Irving Ungerman Ltd. v. Galanis (1991), 4 O.R. (3d) 545 (C.A.). On all summary judgment motions, the core question is: has the moving party established that there is no genuine issue for trial. Rule 20.04(1) makes it clear that the party responding to a summary judgment motion, in this case the Insurers, may not rest on the pleadings, but must provide evidence from which the motions judge can conclude that there is a genuine issue for trial. See 11061590 Ontario Ltd. v. Ontario Jockey Club (1995), 21 O.R. (3d) 547 (C.A.).

A motions judge on a Rule 20 summary judgment motion, should not resolve issues of credibility, draw inferences from conflicting evidence, or from evidence that is not in conflict when more than one inference is reasonably available. As Borins J. (ad hoc) for this court, succinctly put it in Aguonie v. Galion Solid Waste Material (Ontario) Inc. (1998), 38 O.R. (3d) 161 (C.A.), at p. 173:

Evaluating credibility, weighing evidence, and drawing factual inferences are all functions reserved for the trier of fact.

Borins J.'s observations in Aguonie serve to reinforce Morden A.C.J.O.'s statements in Ungerman, which makes it clear that the mere existence of an issue of credibility will not defeat a motion for summary judgment. The issue of credibility must be a genuine issue. Morden A.C.J.O. said in Ungerman at pp. 551-52:

It is safe to say that 'genuine' means not spurious and, more specifically, that the words 'for trial' assist in showing the meaning of the term. If the evidence on a motion for summary judgment satisfies the court that there is no genuine issue of fact which requires a trial for its resolution, the requirements of the rule have been met. It must be clear that a trial is unnecessary. The burden is on the moving party to satisfy the court that the requirements of the rule have been met. Further, it is important to keep in mind that the court's function is not to resolve an issue of fact but to determine whether a genuine issue of fact exists.

It is a sensible general proposition that, if there is an issue of credibility, a trial is required and summary judgment should not be granted. ... the proposition that an issue of credibility precludes the granting of summary judgment applies only when what is said to be an issue of credibility is a genuine issue of credibility.

[para8] In our view, Gans J. correctly applied the Rule 20 jurisprudence of this court and correctly concluded that at least for the claims of equitable relief and damages for inducing breach of contract there is no genuine issue for trial.

[para9] The appellants argue that read literally the terms of the Garage Agreement produce a commercially absurd situation. They seek to introduce evidence to show what they claim is the true intent of the parties. In making this argument the appellants rely on the judgment of Estey J. in Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co., [1980] 1 S.C.R. 888 at 901 for the proposition that the object of the court in the interpretation and construction of a contract, and particularly a commercial contract, is to promote and advance the true intent of the parties, and to ensure that a realistic result, which is consistent with the commercial atmosphere is achieved. This is only a partial reading of the case. Estey J. also emphasized that the true intent of the parties is to be ascertained at the time the parties entered into the contract. He said at 901:

... the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract ... an interpretation which defeats the intention of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of the interpretation of the [contract] which promotes a sensible commercial result. [Emphasis added.]

[para10] Looking only at the words of the Garage Agreement the appeal must fail. The Garage Agreement is clear and unambiguous. It explicitly refers to an option, and nothing in the language of the document lends itself to an interpretation creating an obligation rather than an option to purchase.

[para11] This conclusion is reinforced by paragraph 7 of the Garage Agreement, which provides: The Corporation's option to purchase the Garage shall be exercised as hereinafter provided within such Ninety-day period after which time the option shall be null and void and Howard shall be entitled to retain ownership of the Garage or to dispose of the Garage as it shall see fit. [Emphasis added.]

[para12] If the Garage Agreement were truly intended to amount to an agreement of purchase and sale after a period of time, paragraph 7 would have no purpose. Therefore from the language of the document, the parties unquestionably intended to create an option of purchase in favour of YCC 75 when the triggering condition was satisfied.

[para13] However, the appellants seek to introduce parole evidence to show that a term should be implied in the Garage Agreement. We observe first that the appellants have not sought rectification; and second, that the mere assertion parole evidence is needed to interpret an agreement is not itself sufficient to resist a motion for summary judgment - the responding party (here the appellants) must at least show a reasonable basis for admitting parole evidence and, if admitted, that this evidence would raise a genuine issue for trial. However, in seeking to rely on parole evidence the appellants face two hurdles, both stemming from the observation of Estey J. in Consolidated Bathurst that the court must look to the intent of the parties at the time they entered into the contract, not at some future date.

[para14] First, the appellants effectively negotiated the Garage Agreement with themselves, and must be taken to have intended the meaning of the agreement they drafted. As Gans J. observed, "In other words, at the time the agreement was concluded, there was not an independent board and the individual directors who have been joined as party defendants had nothing to do with the Corporation's management and, I dare say, with the negotiations that resulted in the completed agreement."

[para15] Second, on the motion the appellants were obliged to put their best foot forward and "lead trump" in the words of Osborne J.A. in the Jockey Club case, yet they filed only the affidavit of Robin Bookbinder and some documents attached to his affidavit. It may be that the appellants had no other evidence to lead but Mr. Bookbinder was not present for and has no knowledge of what occurred surrounding the negotiation of the Garage Agreement. The documents relied on by the appellants begin in May, 1973, some eight months after the Garage Agreement was signed. Therefore the appellants produced no evidence of a "factual matrix" at the time of entering the contract. Admittedly, the subsequent conduct of the parties can cast light on their intention at the time the contract was made but on the facts of this case we see no basis for using the evidence relied on by the appellants in that way. Accordingly Gans J. correctly held that this evidence could not be admitted at trial as parole evidence to explain what are otherwise unambiguous terms of an option agreement. Thus, he was right in finding no genuine issue for trial on whether a term should be implied in the Agreement. That disposes of the appeal.

[para16] The respondents' cross-appeal is from an interlocutory order for which leave is required. Leave was not sought, and had it been, we would have refused it. The respondents argue that the appellants' claim for damages for breach of contract is statute-barred. The appellants, however, led evidence to raise a genuine issue for trial on whether the discoverability rule applies. Gans J. was correct to dismiss this part of the respondents' motion.

DISPOSITION

[para17] For these reasons, the appeal and the cross-appeal are each dismissed with costs.

ABELLA J.A. LASKIN J.A. MacPHERSON J.A.

CBR# 238

Peel Condominium Corporation No. 516, applicant, and Sharon Williams and 146 others, respondents

Court File No. 99-CV-164494

Ontario Court of Justice (General Division) Molloy J. Heard: March 12, 1999. Judgment: March 15, 1999.

Counsel: Patricia M. Conway and Scott MacEachern, for the applicant. Carol Dirks and Lisa Gunn, for Sharon Williams and certain of the respondents.

MOLLOY J.:-

A. BACKGROUND

[para1] The applicant condominium corporation applies to the court for directions pursuant to s. 49 of the Condominium Act, R.S.O. 1990, c. C-26 ("the Act") with respect to the conduct of a special general meeting of the unit owners currently scheduled for March 25, 1999. The applicant ("PCC516") is a residential condominium located in Mississauga and has 441 residential units. The 147 respondents are unit owners who signed a requisition calling for a special general meeting for the purpose of replacing the current Board of Directors.

[para2] A number of the unit owners in the condominium have been dissatisfied with the conduct of the Board of Directors for some time. There have been two other attempts to remove the Board in the past year, both of which resulted in special general meetings being called at which the majority of unit owners voted to retain the Board. It is fair to say, however, that support for the "dissident" unit owners group has been growing. The complaints of the respondents about the Board are varied but include allegations of conflict of interest, failure to act in the best interest of the corporation and failure to provide proper information to the unit owners with respect to important matters affecting their interests. Much of the dispute centred on the need for and cost of certain repairs which the Board has recommended be undertaken.

[para3] These proceedings were commenced in response to the unit owners' requisition for a special meeting. The requisition was precipitated by a notice sent by the Board in January 1999 to the unit owners indicating that the Board had decided to levy a special assessment of approximately \$7.15 million to be effective April 1, 1999 in order to carry out necessary extensive repairs to the building. The unit owners were given a number of payment options and advised that if they failed to respond by February 8, 1999, they would be deemed to have chosen to pay the assessed amount in one lump sum due on April 1, 1999. The average assessment per unit was approximately \$17,000.00.

[para4] On February 11, 1999, a requisition signed by approximately one-third of the unit owners was served on PCC516. The requisition required the Board to call a general meeting of the unit owners to vote on the removal and replacement of the Board. The Act imposes an obligation on the Board in these circumstances to call and hold the meeting within 30 days, failing which the requisitionists may call the meeting. Section 19(1) of the Act provides:

19-(1) The board shall, upon receipt of a requisition in writing made by owners who together own at least 15% of the units, call and hold a meeting of the owners and if the meeting is not called and held within thirty days of the receipt of the requisition, any of the requisitionists may call the meeting, and in such case, the meeting shall be held within sixty days of receipt of the requisition.

[para5] The condominium by-laws require 10 days notice for meetings. Therefore, the Board had to give notice by March 3, 1999 in order to hold a meeting within the time required under the Act. The Board did not give such notice by March 3. Instead the Board commenced this proceeding on February 23, 1999, obtained an order for substituted service, and served the requisitionists with notice of this proceeding on March 1, 1999. In this proceeding, PCC516 seeks directions from the court with respect to the conduct of the meeting and the use of proxies at the meeting as well as an order directing that the meeting not be held before March 31, 1999. On March 5, when it was apparent that the Board could no longer call a meeting within the 30 days required under the Act, the requisitionists themselves gave notice to all unit owners that the requisitioned meeting would be held on March 25, 1999.

B. JURISDICTION

[para6] This application is brought under s. 49 of the Act which provides:

49-(1) Where a duty imposed by this Act, the declaration, the by-laws or the rules is not performed, the corporation, any owner, the bureau, or any person having a registered mortgage against a unit and common interest, may apply to the Ontario Court (General Division) for an order directing the performance of the duty.

(2) The court may by order direct the performance of the duty and may include in the order any provisions that the court considers appropriate in the circumstances.

[para7] The within application is a novel use of s. 49. Typically this provision is used by one party to force another party to comply with an obligation in respect of which there has been a default. In the case before me, PCC516 was not in default at the time it commenced this proceeding and the order it now seeks is in respect of the performance of its own duties under the Act. The respondent unit owners take the position that there is no jurisdiction to grant the relief sought. They argue that s. 19 of the Act is a complete codification of how special meetings are to be called and that this section provides its own remedy for a board's default in its obligation to call a properly requisitioned meeting. The unit owners have exercised that remedy by calling the meeting within the time prescribed under the Act.

[para8] In my opinion, I do have the jurisdiction to make the orders sought by PCC516. The supervisory role of the Court under s. 49 arises where there is a duty which "is not performed". The Act does not require that the person required to perform the duty be in default before the Court's jurisdiction can be invoked. General principles of statutory interpretation require that the words of a statute be given their plain and ordinary meaning, unless to do so would lead to an absurdity: Ruth Sullivan, *Dreidger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994), at pp. 7 and 85-86. The ordinary meaning of the words in s. 49 is that an application can be made to the court at any time provided that the duty has not already been performed. No doubt, the vast

majority of situations falling within s. 49 involve a situation in which one party has defaulted in its performance of a duty and another party is seeking to compel compliance. The section could easily have been worded to only apply to such circumstances if that was the intention of the legislature. However, the section is cast more broadly and encompasses situations, such as this one, where there is a duty which has not yet been performed and where one of the parties wishes guidance from the court as to the performance of that duty. I am also of the view that there may be situations in which the type of relief requested by the applicant here (e.g. timing of the meeting, chair for the meeting, manner of voting, proxies, number and identity of scrutineers) could be appropriately ordered by the court. The discretionary power given to the court under s. 49(2) with respect to additional provisions is broad and can be interpreted as including terms as to how and when the duty under the Act is to be performed.

[para9] The powers of the court under s. 49 are clearly discretionary. While I may have jurisdiction to grant the relief sought by the applicant, I must be satisfied that the exercise of that discretion is appropriate in the circumstances of this case. One of the circumstances to be taken into account is the remedy available under s. 19 of the Act and the fact that the unit owners have already purported to exercise that remedy. This is not a situation in which the matter was before the court prior to the date upon which the duty was required to be performed. This proceeding was commenced before that date, but by the time of the hearing before me it was no longer possible for the Board to fulfil its duty by calling the meeting within the 30 days required in the Act. I say this not to be critical of the Board. As a practical matter, it would be extremely difficult to get this matter to the stage of a hearing within 20 days of service of the requisition. However, the fact remains that as of the date of the hearing, the 30 day period for the Board to call the meeting had expired and the unit owners had exercised their right to call the meeting.

C. RELIEF SOUGHT

1. Proxies

[para10] I am told that the group of unit owners who requisitioned the March 25th meeting has obtained proxies which will give them 230 votes at the meeting and that they intend to exercise those proxies to vote for the removal of the Board. The Board is concerned that some individuals who gave proxies may have done so without fully understanding the Board's position or based on misinformation. The Board proposes that a special form of proxy be issued along with the notice of meeting and information package from the Board and that only that form of proxy be recognized at the meeting.

[para11] I am not persuaded that there is any need for the court to intervene on this issue. It is open to the Board to communicate its views to the unit owners and to seek to persuade them to revoke any proxies they may have given. It is also open to the Board to send revocation forms and new proxy forms to the unit owners along with any information package that the Board chooses to send. If those unit owners are persuaded by the Board's position, they can revoke any proxy they have already given. I fail to see any basis for, in effect, revoking all existing proxies by court order and requiring all of those individuals who have not changed their minds to execute new proxies to the same effect as the old ones. In my view, this places an undue obstacle in the path of the unit owners who would be required to get all of those people who had previously signed to do so again. I would only be prepared to take such a step if there was clear evidence of wrongdoing in obtaining the proxies. There is no such evidence in this case.

[para12] My ruling on this point would be the same regardless of the timing of the meeting.

2. Timing of the Meeting

[para13] The applicant seeks an order that the special meeting be held on one of April 6, 7, or 8, 1999. One of the principal reasons initially given by the Board for delaying the meeting past March 13 was so that full information could be provided to the unit owners prior to the vote. The Board had retained independent consulting engineers to provide a second opinion on the timing and cost of the necessary repairs to the building and expected that this opinion would not be ready until mid-March. The Board needed to give 10 days notice of the meeting and proposed including information from this second opinion with the notice of meeting. At the hearing before me counsel advised that this report has now been obtained and that it estimates \$2 million for the repairs (as compared to the \$5 - 7 million estimate from the proposed contractor). The Board now wishes to get the comments of the first contractor on this new opinion and to provide that, along with other information, to the unit owners prior to the meeting. It is possible to get this information to the unit owners in time for the March 25th meeting. Therefore, I do not see this as a factor which would persuade me to interfere with the timing of the meeting already called by the requisitionists.

[para14] The applicant argued that the March 25th meeting was called improperly because the Act only authorizes the requisitionists to call the meeting if there has been a default by the Board. The Board acknowledges that it would have been in default if it had taken no steps by March 3, but argues that since the Board had commenced this application before March 3 and submitted the matter to the court, it should not be treated as having defaulted in its duty. On my interpretation of s. 19, it is not necessary to determine if the Board is in "default" of its obligations. The right of the requisitionists to call the meeting is triggered by the fact that the meeting has not been called by the Board, for whatever reason. Section 19 of the Act, like section 49, does not mention "default". In fact, the meeting was not called, and that is sufficient to give rise to the right of the requisitionists to call the meeting themselves.

[para15] In my opinion, the requisitionists were within their rights under s. 19 in calling the meeting, as they did, for March 25, 1999. The Act states that the right of the requisitionists to call a meeting arises "if the meeting is not called and held within 30 days". I do not read this provision as preventing the requisitionists from calling the meeting until the 30 day period has expired. Since at least 10 days notice is required to call a meeting, it was clear at the 20 day mark when no notice of meeting had been delivered, that the meeting could not take place within the 30 day period. At that point, the requisitionists were entitled to exercise their rights to call the meeting. Thus, it was clear on March 3 that the meeting could not be called within the 30 day period. It was therefore open to the requisitionists from that date forward to call the meeting themselves, provided that the meeting was scheduled within 60 days of when the requisition was delivered to the Board (i.e. before April 12, 1999). The requisitionists are also required to give at least 10 days notice of the meeting such that the last date for giving notice would be April 2. The requisitionists in fact gave notice on March 5 of a meeting scheduled for March 25. They are thus in compliance with the requirements of s. 19 of the Act.

[para16] By March 5, the requisitionists had already been served with notice of this proceeding returnable on March 12, 1999. However, the right to call the meeting is a right conferred on the requisitionists by statute. The commencement of legal proceedings by the Board does not operate to eradicate the statutory rights of the requisitionists. Further, the pending court hearing did not give rise to any obligation on the part of the unit owners to hold off on the exercise of their statutory remedies. Indeed, the rights of the unit owners could well have been jeopardized if they failed to take the action they did. They were facing a situation in which the Board had levied a special assessment which was to take effect on April 1, 1999 and which would result

in an average additional payment of \$17,000.00 for each unit. If the hearing did not proceed on March 12, or if the court declined to intervene in the matter, the unit owners could be left with very little time in which to validly call the meeting themselves before the March 31 deadline they believed they were facing. In these circumstances, I find no fault with the requisitionists proceeding to exercise their rights under s. 19 of the Act notwithstanding the fact that the Board had commenced this proceeding.

[para17] Counsel for the Board has given an undertaking that the special assessment levy will not take place until after the special meeting of unit owners, whenever it is held. Therefore, the Board argues that there is no compelling reason for the meeting to proceed on March 25 as opposed to April 6. Further, it is argued, the March 25th date is unfair to the Board because two members of the Board will be out of the country on that date and another is scheduled to be in hospital for tests. Also, the Board's solicitor will be unable to attend on March 25. Therefore, the Board submits that I should schedule the special meeting for one of the dates in April which is more convenient for the Board. I appreciate that there is a lot at stake for the individual Board members and that, particularly in light of some of the allegations made against them by unit owners, they wish to be present for the meeting. However, to grant the relief sought it would not be enough to simply direct that the meeting proceed on April 6. The meeting is already scheduled to proceed on March 25. In effect I am being asked to issue an injunction restraining the holding of a meeting which has been properly called under the Act. This is a direct interference with the rights of unit owners under the Act and should not be undertaken lightly.

[para18] Generally speaking, if a party has a problem proceeding with a scheduled meeting because of the unavailability of key people, the normal course of action is to move for an adjournment of the meeting. If there is no consensus, a vote may be required, but essentially this is a democratic process. If the majority of persons entitled to vote are persuaded that the requested adjournment is appropriate, then the meeting can be adjourned. If not, the meeting will continue.

[para19] The question for me to decide is whether I should intervene in that normal process and substitute my discretion for that of the unit owners at a duly constituted meeting. If I am of the view that fairness to the Board requires that the meeting be postponed, should I issue an order to that effect now and usurp the will of the unit owners who may be of a different view? I think that the answer to that question must be "No". The Act is structured to place decision making in respect of the affairs of condominium corporations in the hands of those directly affected, i.e. the unit owners. The court should be reluctant to interfere in the internal affairs of a corporation except in very exceptional circumstances. The circumstances of this case do not, in my opinion, warrant such intervention. It is for the members of the condominium corporation to decide how they wish to deal with this situation. I am mindful of the fact that not all of those people are parties to the proceeding before me. The only named respondents are the 147 unit owners who signed the requisition for the meeting. There are 441 unit owners who have been given notice of the meeting. Any order I make changing the date of the meeting will affect the rights of those individuals as well as the parties before the court. This is not a situation in which there is any evidence of irreparable harm to the interests of the Board members. If the majority of unit owners wish to proceed notwithstanding the absence of some of the Board members, I can see no basis for preemptively overruling their judgment on the matter. I am not in as good a position to weigh the advantages and disadvantages of an adjournment of the meeting as the attendees at the March 25th meeting will be. It may well be the case, for example, that some of the unit owners may not be available to attend the meeting on the April dates now proposed by the Board. There may also be difficulties with communicating the new date to all concerned or difficulties with the wording of the proxies if I simply direct that the meeting date be changed rather than allowing the matter to follow the normal process under the Act. The decision as to whether the meeting should be put off until April is, quite simply, better left to the determination of the parties involved as part of the democratic processes provided for in the legislation.

3. Conduct of the Meeting

[para20] It is clear from the material that there are strong differences of opinion between the Board and certain of the unit owners. It is also apparent that meetings in the past have been stormy and that there is a perception on each side that the tactics of the other have been unfair. The unit owners accuse the Board of bias and refusing to provide full information. The Board accuses the unit owners of being disruptive and preventing a rational and informed debate on the issues. The Board has brought forward a number of excellent suggestions for a process to be followed to avoid problems which have been experienced in the past. The Board proposes the appointment of an experienced and completely neutral chairperson for the meeting, a secret ballot for the vote on the removal of the current Board and the appointment of any replacement Board, the appointment of three scrutineers from each of the two competing camps to oversee the balloting, a controlled agenda with equal time for the Board and the disgruntled unit owners group to present their positions, and restrictions on the length of time permitted for each unit member to speak at the meeting. These are all reasonable and constructive suggestions which are likely to promote a rational debate and an informed vote. Indeed, there is a fair degree of consensus on these points as between counsel for the Board and counsel for a significant proportion of the requisitionists.

[para21] However, it is not enough for me to be satisfied that these are good ideas. I must be satisfied that the circumstances warrant a court order imposing these terms on the meeting. Again, there are rights of individuals not before the court to be considered. If I were to order that there be a three minute limit on all individual speakers at the meeting, I would be restricting the rights of individual unit owners who are not parties to these proceedings. Even if I direct that any such order has no impact on the rights of non-parties and leave it to the chair of the meeting to deal with them, the chair will be working within a structure imposed by the court and fairness to the individuals covered by the court order may well have an impact on the rights accorded to others at the meeting. The same difficulty arises if I appoint the chair for the meeting as I will be usurping the right of non-parties to either be the chair or to nominate a different chair.

[para22] Accordingly, although I recognize the importance of an orderly structure for the meeting and while I consider the suggestions made to be reasonable and directed towards that end, I do not consider that it is appropriate for me to impose these terms by court order. There is nothing to prevent counsel for the main protagonists from working out an agreement prior to the meeting as to how they propose to deal with these various issues, subject to ratification at the meeting. Such an agreement would assist in ensuring that the meeting itself is focused on the real areas of dispute and doesn't get sidetracked into bickering over the procedural issues. A key point is the acceptance by both sides, prior to the meeting, of an impartial chair person. If the parties are unable to agree on these matters, I would urge them to try mediation. However, I do not consider it necessary or appropriate for these matters to be resolved by court order.

D. ORDER

[para23] In the result, the application is dismissed. It was not, however, unreasonable for the Board to have commenced the proceeding and the process may well have been constructive in focusing the parties on some of the procedural matters which need to be addressed prior to the meeting. The Board was successful in convincing me on the principal issue of jurisdiction and has, in

my view, taken a reasonable position throughout. However, whether or not to grant the relief sought is a discretionary matter and I have declined in these circumstances to intervene. In these circumstances, it seems to me that it is appropriate to make no order as to costs. However, if the parties are not satisfied that this is the appropriate costs disposition they may make written submissions on that point. No doubt the parties will be busy with preparations for the meeting in the next short while. If one party makes a written submission on costs by April 5, 1999, the other party may submit a written reply by April 12, 1999. If no written submissions are made by April 5, 1999, there shall be no costs.

MOLLOY J.

Chiu v. Pacific Mall Developments Inc.

Fung Chiu, Catherine Pan and Tze Yeung Wong, Gary Ka Li Leung,, Yu-Tsing Simm, Lai-Fan Yip, Cai Qian Zhang and Alan Sit, plaintiffs (moving parties), and Pacific Mall Developments Inc. and Torgan Properties Inc. (each and both carrying on business as the Torgan Group) and Living Realty Inc., defendants (responding parties) And between Pacific Mall Developments Inc. and Torgan Properties Inc. (each and both carrying on business as the Torgan Group) and Living Realty Inc., plaintiffs, (defendants to the counterclaim) responding parties, and Tiao Hang Cho, Tong Hoi Lo and Wai Leng Jeong, Deborah Ho, Jeff Lau and 974755 Ontario Inc. and Jeff Lau and Royal Lalique International Inc., defendants (plaintiffs by counterclaim) moving parties Ontario Court of Justice (General Division) Toronto, Ontario Himel J. Heard: March 11-13, 1998. Judgment: July 28, 1998. (45 pp.)

Counsel: Stephen Schwartz, for the plaintiffs (purchasers). Aubrey Kauffman and Glenn Grenier, for Pacific Mall Developments Inc. and Torgan Properties Inc., (vendors).

[para1] HIMEL J.:-- Pacific Mall, a condominium shopping centre, was marketed to the Chinese community of the Greater Toronto area in 1993. This project received an overwhelming reception and the units were sold out within weeks. Certain of the purchasers, however, were dissatisfied and unwilling to proceed with the transactions. They applied for and received certificates of pending litigation and most of those units have not been sold or leased.

[para2] The vendor, Pacific Mall/The Torgan Group, is suing for the balance of the purchase price, fees and expenses. On these motions before the court, they apply for orders discharging the certificates of pending litigation.

[para3] The purchasers want to have the contracts set aside and claim damages and the return of their deposits. They also move for summary judgment on the basis that the vendor did not close the transactions within the time stipulated under the Agreements of Purchase and Sale. Two of the purchasers apply for certificates of pending litigation.

BACKGROUND

[para4] The Pacific Mall project is a large commercial condominium consisting of a shopping centre located at Steeles Avenue East and Kennedy Road in the Town of Markham. Marketing of the concept was done in 1993, construction began in 1995, interim occupancy occurred for some units in August of 1996 and registration as York Region Condominium Corporation No. 890 took place on September 2, 1997. The project was targeted to the Chinese community both as owners and shoppers and received a very favourable reception. The mall, consisting of approximately 250,000 square feet, was to be a two storey enclosed structure with approximately 230 small to medium size shops on the ground floor and with a second floor consisting mainly of restaurants (the purchasers say exclusively restaurants). The design included glass back walls to enable some visibility between the two floors.

[para5] As of the date of argument of the motions, all of the purchasers of stores on the main floor have closed their transactions and the businesses are operating. On the second floor, three restaurants are operating as are a children's playground and a boutique. Some of the units are owned and some are rented.

[para6] The units were marketed for sale by Living Realty Inc. and sold out quickly. The purchase and sale agreements were drafted by the Torgan Group as a standard document. The purchasers in these actions have paid collectively \$2.2 million towards the units they bought. The units ranged in price from \$229,800. to \$351,800. and deposits from \$68,940. to \$124,900. were paid. The vendor says that as a result of delays in the municipal approval process, the securing of easements and agreements from owners of neighbouring properties and construction delays, substantial completion of the units could not take place until August 22, 1996.

[para7] It is also the position of the vendor that from the outset, the purchasers on the second floor were made aware that they were buying a shell with a rear glass wall and no storefront overlooking the ground floor, with the idea that the purchasers would configure the floor plans of units as they wished and, in some cases, combine units. The vendor's view is that the substance of the contract was delivered. Following substantial completion, an interim closing was scheduled. Some of the purchasers interim closed; others did not. Because of the nature of condominium transactions, purchasers' interim closings are done when the unit is ready for occupancy or possession; a final closing is done when the documentation is ready for registration of title. With respect to these units, the vendor argues that Pacific Mall was ready for occupancy in August, 1996. Certain purchasers refused to interim close because they took the position that they did not agree the units were substantially completed. Other purchasers expressed certain concerns about the units, objected as to whether they were substantially complete but interim closed nonetheless. Later, they defaulted by stopping payment on post-dated cheques.

[para8] The purchasers allege that they were introduced to the Pacific Mall project by agents of Living Realty (except for Cho) and that the agents made certain material representations which caused them to enter into the agreements of purchase and sale. Those material facts included that: (1) the second floor of the mall would be for restaurants exclusively; (2) there would be public washrooms on the second floor; (3) there would be more than 40 units operating as restaurants on the second floor; (4) the purchasers were being asked to sign a standard form agreement drafted by the Torgan Group and therefore, did not need to read it; and (5) the project was to be completed by the spring of 1995.

[para9] The purchasers also allege that there was a failure to disclose material provisions in the agreements. Examples of these include: (1) that the units were subject to the declaration description and bylaws of the condominium corporation and that the agreements were examined by the purchasers, which they claim they did not read; (2) that Schedule "A" permits the units to be used for purposes other than restaurants; (3) that parking would be leased on terms which were not disclosed; and (4) that the agreement purports to take away the right to sue for various matters.

[para10] The purchasers say they relied on Living Realty agents and trusted them to bring to their attention all material information. Mr. Cho, who claims he dealt directly with Eli Swirsky of the Torgan Group, also alleges that he was told certain material facts about the project and not advised of certain provisions of the agreements which would have affected his decision about entering into this transaction.

[para11] In summary, the purchasers' position is that they did not receive what they bargained for and that the project was not constructed as represented. The main concerns are that there are no public washrooms on the second floor, the design of the second floor is not conducive to its operation as a food court, that there are no storage facilities, access for deliveries and disposal of waste is inadequate and that they were not told of an extra fee for the grease trap and fire-rated ceiling.

THE PARTIES TO THE LITIGATION

[para12] Actions were brought by the vendor against the purchasers for failure to close the transaction and seeking payment of occupancy fees and the balance of the purchase price. Statements of defence and counterclaims were filed claiming that the deposit monies should be returned, that the agreement is at an end and for damages.

[para13] There are three types of purchasers involved in the litigation. Group "A" purchasers did not complete the interim occupancy closing of their units and were sued in March of 1997. They have paid approximately 30% of the purchase price in addition to other charges and fees. In order to protect those funds paid, the purchasers sought and obtained certificates of pending litigation through ex parte motions made on October 3, 1997. The purchasers in this category are Lo/leong, 974755/Lau, Royal Lalique/Lau and Deborah Ho.

[para14] The second category of purchasers, Group "B", completed the interim occupancy closing (which meant they paid 50% of the purchase price as well as other charges and fees) but did not complete the final closing. They brought actions in September, 1997 against Pacific Mall and Living Realty Inc. and obtained certificates of pending litigation by ex parte motions on September 26, 1997. The purchasers in this group are: Gary Ka Li Leung, Fung Chiu, Yu -Tsing Simm, Pan Wong and Lai-Fan Yip.

[para15] Group "C" purchasers are those who completed the interim occupancy closing but not the final closing. They commenced action against Pacific Mall and Living Realty and are applying, on notice, for certificates of pending litigation. They are: Zhang and Sit.

[para16] There are two units (F26 and F28) which had certificates of pending litigation but sold with the consent of the purchaser Jeff Lau. The money paid by Lau towards the units has been placed in trust until the decision is given on whether the certificates of pending litigation should be discharged.

[para17] Tiao Hang Cho has brought a motion which seeks to have the vendor deposit monies in trust as he cannot register a certificate of pending litigation due to the sale of his units.

[para18] The defendants in these actions are the vendor, Pacific Mall Developments Inc. and Torgan Properties Inc. (carrying on business as The Torgan Group) and Living Realty Inc., the realtor who sold the units. Living Realty did not participate in the motions before this court.

THE NATURE OF THE MOTIONS

[para19] There are eleven sets of motions consisting of seventeen motions which were argued before me. The vendor is requesting an order discharging the certificates of pending litigation which were obtained ex parte. In the alternative, the vendor seeks an order requiring the purchasers to post security with the court for the unpaid balance of the purchase price of the units as a condition of maintaining the certificates of pending litigation. The purchasers are opposing the discharge motions and submit that if the certificates are discharged, it should only be on terms where alternate security is posted. The purchasers have also brought cross motions for summary judgment for the return of monies paid to the vendor on the basis that the vendor failed to convey title by the time stipulated under the Agreement of Purchase and Sale and as a result, the agreement is at an end and all monies should be returned to the purchasers. Finally, the purchasers are requesting certificates of pending litigation on notice as against two units owned by Zhang and Sit.

[para20] In order to advance the argument of these motions, counsel made certain stipulations and agreements. The first is that they agreed that there are genuine issues to be tried between the parties. Secondly, they agreed that cross-examinations were not needed but the parties may refer to affidavits filed which are not tested. Therefore, allegations made on the affidavits should be taken as asserted. Third, the purchasers agreed for the purposes of the motion that they were not seeking specific performance with an abatement of the purchase price. They are simply seeking termination and a return of the deposit. Finally, counsel agreed that there would be one main factum and brief supplementary facta which addressed the facts that are unique to the particular case. There are also two main affidavits used on the ex parte motions to which reference was made throughout argument of these motions. It is conceded that the motion for summary judgment is on a point of law only.

THE MOTIONS TO DISCHARGE THE CERTIFICATES OF PENDING LITIGATION

(a) Factual Background

[para21] Pacific Mall moves to have the certificates of pending litigation issued on an ex parte basis on September 26, 1997 and October 3, 1997 discharged.

[para22] The events prior to the bringing of the motions for certificates of pending litigation are summarized below:

1. Pacific Mall began actions in March of 1997 for damages as against the Group "A" purchasers who refused to interim close. The actions alleged breaches of the Agreements of Purchase and Sale and the claim was for the balance of the purchase price and the interim occupancy fees which were required under the Agreements of Purchase and Sale. Group "A" retained counsel, delivered statements of defence and took the position that the properties were not substantially completed by January 18, 1995 and that the agreements were terminated and monies paid as deposits by the purchasers should be returned.

2. During June of 1997, Ms. Laidlaw, counsel acting for the purchasers, wrote to Mr. Kauffman, counsel for the vendor, advising she was taking over representation of a number of purchasers who had not closed and asked Mr. Kauffman not to deliver defences to the original counterclaim. She also asked for his indulgence as she was taking a three week vacation. (Mr. Kauffman suggests that she sought this indulgence so she could amend the pleadings, plead misrepresentation and claim specific performance which was necessary for the motion for certificates of pending litigation). 3. A settlement meeting took place on August 6, 1997.

4. Ms. Laidlaw advised Mr. Kauffman on September 15, 1997 that she was changing law firms and would be delivering pleadings on behalf of her clients.

5. On September 25, 1997 Ms. Laidlaw issued a statement of claim on behalf of Group "B" purchasers who interim closed but did not complete the final closing and sought specific performance with abatement of the purchase price and certificates of pending litigation.

6. On September 26, 1997 orders were made ex parte granting the plaintiffs and other Group "B" purchasers, leave to issue certificates of pending litigation.

7. Certificates were registered on title on September 29, 1997.

8. Mr. Kauffman spoke to Ms. Laidlaw on September 30, 1997 but she did not tell him she had obtained the certificates of pending litigation for certain of the units, intended to amend the actions started by the former counsel to now claim specific performance nor that she was moving ex parte to obtain certificates of pending litigation on certain of the other units.

9. Ms. Laidlaw amended the defence and counterclaim for Group "A" purchasers and claimed specific performance without notice at that time to Mr. Kauffman.

10. Ms. Laidlaw sent copies of the orders and certificates of pending litigation that she obtained on September 26, 1997 to Mr. Kauffman by regular mail.

11. Ms. Laidlaw filed an affidavit sworn on September 25, 1997 in support of the ex parte motions before the Master on September 26, 1997. Mr. Kauffman objects to the quality of that evidence and argues that there was no sworn evidence before the Master on:

- (a) the background of the purchasers;
- (b) the circumstances under which the purchasers learned of the transaction;
- (c) the circumstances surrounding the execution of the Agreement of Purchase and Sale;
- (d) legal representation of the purchasers between the execution of the agreements and the failure to interim close or close;
- (e) specific provisions of the Agreement of Purchase and Sale, such as the "entire agreement" clause.

12. Mr. Kauffman points to the affidavit material filed by the vendor in, for example, the Leung case when the motion to vacate the certificate of pending litigation was brought. The material sets forth in detail the background of the purchaser, how the purchaser came to know about the project, the circumstances surrounding the signing of the Agreement of Purchase and Sale, the information meeting, the legal representation received during the transaction, the various extensions that were negotiated, and in particular, the lack of complaint about the execution of the Agreement of Purchase and Sale and its enforceability. He argues that this plaintiff is in default of several provisions of the Agreement of Purchase and Sale including:

- (a) he has failed to pay interim occupancy fees on a monthly basis;
- (b) he has failed to close the transaction and pay the balance of the purchase price, and
- (c) he has never indicated he is ready, willing and able to close the transaction.

[para23] The vendors' submission is that the motions for certificates of pending litigation did not have to proceed ex parte. However, in that counsel chose to proceed on that basis, counsel must be held to the highest standard of disclosure.

[para24] In addition to the deficiencies in the affidavit material set forth above, Mr. Kauffman points out that the evidence before the Master on September 26 and October 3, 1997 was problematic in that:

1. There was no sworn evidence about the dispute between the parties.
2. There was no attempt to disclose the position of the vendor.
3. There was no evidence of the appendices to the Agreement of Purchase and Sale being initialled or of the deposits being paid without protest (which, in Mr. Kauffman's view, affirmed the contract);
4. There was no evidence of the extensive correspondence between the parties' solicitors in connection with the closing of the transaction and availability of legal advice. 5. There was no evidence that the purchasers paid for the fire rated ceiling and grease trap;
6. There was no evidence that those who interim closed, such as Leung, had full knowledge of the physical state of the unit and the project at that time;
7. By way of example, with respect to Leung, there was no mention of his educational background and that he was a business person introduced to the project by his friend.
8. There is no reference in the affidavit material filed to the specific provisions of the agreement. In particular, the provision set out in Paragraph 20 of Schedule A prohibiting against the registration of a certificate of pending litigation was not pointed out to the Master.
9. Specifically, with reference to the affidavit material filed before the Master for the October 3 motion, Mr. Kauffman submits that it did not set forth the nature of the dispute, the circumstances of the purchasers or the vendor's position, nor did it highlight the significance of the failure to interim close for the Group "A" Purchasers with respect to a claim for specific performance.

[para25] It is the vendor's position that the registration of the certificates of pending litigation and the refusal of the purchasers to elect a remedy has resulted in prejudice. Pacific Mall cannot mitigate by marketing the units on the second floor of the shopping centre. Mr. Kauffman argues that the purchasers have taken inconsistent positions, that is, they argue the Agreement of Purchase and Sale is void and want the return of their deposits and at the same time, they argue they are ready, willing and able to close and want specific performance with an abatement of the purchase price. The vendors have requested that the purchasers elect the remedy they wish to pursue. As of October 17, 1997, they were not willing to make an election. Pacific Mall submits that not only can it not sell or lease the units which are subject to the certificates of pending litigation, but the vendor is required, as registered owner of the units, to pay monthly common expenses and taxes. In the Leung case, for example, those costs were \$14,796.00 per year. The balance of the purchase price owing is \$124,900.00 and the arrears of occupancy fees are \$22,738.72. It is argued that it is for this very reason, demonstrated by these various examples of prejudice, that the vendor included a clause in the Agreement of Purchase and Sale to which the purchaser agreed, not to register a certificate of pending litigation on title.

[para26] The purchasers' position is that the affidavit material before the Master disclosed the necessary facts and the main issues, namely: that Pacific Mall had sued some of the purchasers for failing to close, that the pleadings in the litigation were filed on the motion and there was reference to settlement discussions between counsel, that the agreements had provisions "preventing the registration of documents against title", and that the vendor would claim the purchasers had breached the agreement. It was argued that the purchasers had reason to doubt the bona fides of the vendor and exercised their right to proceed on a without notice basis.

(b) The Legal Issues

[para27] Section 103 of the Courts of Justice Act provides that a certificate of pending litigation may be issued in a proceeding in which an interest in land is in question. A motion may be made without notice in accordance with Rule 42.01(3). The following questions are relevant to whether the certificates should be discharged:

- (1) Can a claim for the return of monies under an Agreement of Purchase and Sale support a certificate of pending litigation?
- (2) What is the effect of the provision in the Agreement of Purchase and Sale which prohibits registration of certificates of pending litigation?
- (3) Did the purchasers make full and fair disclosure of all material facts when they brought their ex parte motions?
- (4) Should the court exercise its discretion in these circumstances to vacate the certificates of pending litigation?

A. Can a claim for the return of monies under an agreement of purchase and sale support a certificate of pending litigation?

[para28]

The purchasers' position is that the payment of a deposit pursuant to an Agreement of Purchase and Sale for real property entitles the purchaser to a lien upon the land and to a certificate of pending litigation. Purchasers of real estate have a lien on property to the extent of payments made by them. Furthermore, they submit that a breach of fiduciary duty by the real estate agent can give rise to an equitable interest in land which will support a claim for a certificate of pending litigation. The vendor argues that the purchasers have expressly agreed to not register a certificate of pending litigation on title, that such registration would cause harm and is a ground for termination of the agreement and that Pacific Mall is irrevocably appointed as attorney for the purpose of removing the certificate from title. The purchasers' position is that this exclusionary clause does not prevent a purchaser from registering a certificate of pending litigation where a vendor is in breach of contract. Applying the rule of construction, *contra proferentum*, counsel argues that the provisions of the contract must be read strictly against the party who drafted the agreement and that since the clause does not prohibit the registration of a certificate of pending litigation by the purchaser where the vendor is found in default of its obligations under the Agreement of Purchase and Sale, and there has been a fundamental breach of contract by the party seeking to rely on the exclusionary clause, it is unfair that the exclusionary clause should be able to survive the alleged breaches by the vendor. (See *Greenbaum v. 619908 Ontario Ltd.* (1986), 11 C.P.C. (2d) 26 (Ont. H.C.) at 42; *George Fernicola, in Trust v. Mod-Aire Homes Ltd. et al.* unreported S.C.O. File No. 21445/87, July 19, 1988 (Master) aff'd December 29, 1988 per Trainor J., *Chornedy Aluminium Co. Ltd. v. Belcourt Construction (Ottawa) Ltd.* (1979), 79 D.L.R. (3d) 170 (Ont. C.A.) aff'd (1980), 116 D.L.R. (3d) 193 (S.C.C.)).

A further submission is made on behalf of the purchasers that there is no evidence that they assented to clauses in the agreements which prevented the right to sue in tort and that they may be able to successfully sue in tort: *Beer et al. v. Townsgate I. Ltd et al.* (1998), 36 O.R. (3d) 136 (C.A.). They claim that they may be entitled to rescission [sic] of the contract and the return of the deposits on the basis of negligent misrepresentation and for damages by reason of breach of fiduciary duty owed to the purchasers by the Living Realty agents.

The purchasers have, for the purposes of these motions, abandoned their claim for specific performance. The Group "A" purchasers in their initial pleadings did not claim specific performance and it appears, elected to demand the return of the deposit and argue that the Agreement of Purchase and Sale was at an end. Group "A" and "B" purchasers have not made payments required under the agreement and have refused to close. They are not "ready, willing and able to perform" and do not fulfil the basic requirements for specific performance. Thus, their ground to support certificates of pending litigation must be through a "purchaser's lien".

[para29] This remedy was recognized in an earlier line of cases including *J. & P. Goldfuss Ltd. v. 306569 Ontario Ltd.* (1977), 4 C.P.C. 296 (Ont. H.C.) which is relied upon by the purchaser. The more recent thinking is that "a certificate of pending litigation is not appropriate if, on a fair and reasonable evaluation of the facts at hand and the legal proposition applicable to those facts, the remedy which the plaintiff in the action hopes to attain is limited, not to a judgment in rem, but a judgment for damages or return of deposit": *Kingsberg Developments Ltd. v. K. Mart Canada Ltd.* (1982), 40 O.R. (2d) 348 (H.C.) at 351.

[para30] In *746109 Ontario Ltd. v. Brown* (1993), 34 R.P.R. (2d) 69 (Ont. Gen. Div.) Salhany J. at page 73 held that section 103(6) of the Courts of Justice Act had changed the earlier law and that, "... unless the plaintiff is seeking an interest in the property in question, a certificate should not be granted or, alternatively, it should be discharged if granted." In *Pelligrino v. Macedon Development (1988) Ltd.* [1994] (unreported) leave to appeal was granted by the Ontario Court of Appeal but the appeal was dismissed for delay and thus the issue of a purchaser's lien was not determined on its merits. [para31] While the Court of Appeal has not yet clarified whether a purchaser seeking damages or the return of a deposit may assert a claim to an interest in

land so as to obtain a certificate of pending litigation, section 103(6)(a)(i) confers upon the court a discretion to discharge a certificate where the claim is for a sum of money in place of or as an alternative to the interest in the land claimed. In other words, this is a factor to consider in exercising discretion as to whether to give equitable relief and order the discharge. Furthermore, there is authority that a breach of fiduciary duty may give rise to an equitable interest in land and a judgment for restitution may follow to support a claim for a certificate of pending litigation. (See *Davidson v. Hyundai Auto Canada Inc.* (1987), 59 O.R. (2d) 789 (Master) which refers to *International Corona Resources Ltd. v. Lac Minerals Ltd.* (1986), 53 O.R. (2d) 737, 25 D.L.R. (4th) 504, 9 C.P.R. (3d) 7 (H.C.J.)). If at trial, material misrepresentations were found to have been made which induced the purchasers to enter into the contract, they may be entitled to rescission and damages. In other words, there may be a triable issue as to the interest in land. For these reasons, I would not discharge the certificates on this ground alone.

B. What is the effect of the provision in the Agreement of Purchase and Sale which prohibits registration of certificates of pending litigation?

[para32] Paragraph 20 of Schedule A of the Agreement of Purchase and Sale states:

The Purchaser further covenants and agrees ... that he will at no time register or attempt to register this agreement on title to the Unit or the said real property of which the Unit will form a part by way of caution, deposit, assignment, certificate of pending litigation or in any way whatsoever. It is expressly acknowledged that any such registration would cause substantial harm to the Vendor and it is therefore agreed by both parties hereto that any such registration or attempt at registration by the Purchaser or anyone acting for or through him, shall at the option of the Vendor, terminate this agreement and make it absolutely null and void and any deposit paid under this agreement shall immediately become due to the Vendor by way of liquidated damages and not as a penalty. In the event that this agreement, a caution, a deposit, an assignment, a certificate of pending litigation or any other instrument whatsoever is registered against or dealing with the title in contravention of this provisions, then the Purchaser hereby appoints the Vendor his due and lawful attorney for the purposes of removing the instrument from title including the giving of any discharge, the lifting of any caution, certificate of pending litigation or the assignment of any rights pursuant to this agreement ...

[para33] There are a number of cases where a clause prohibiting registration of a certificate of pending litigation has been upheld by the courts. In *Reznik v. Coolmur Properties Ltd.* (1982), 25 R.P.R. 43 (Ont. H.C.), Steele J. gave effect to such a provision which was clearly worded and demonstrated an acknowledgement by the purchaser that the registration of a certificate of pending litigation would cause harm to the project.

[para34] In certain cases cited by the purchasers the courts did not enforce clauses prohibiting the registration of the certificate of pending litigation. In *Greenbaum v. 619908 Ontario Ltd.*, supra, Sutherland J. held that the provisions of an Agreement of Purchase and Sale where the purchaser agreed not to register notice of the agreement or a caution against the title to the land was held not to be precise enough and, therefore, not sufficient to prohibit the registration of a certificate of pending litigation in the circumstances of the case. Similarly, in *George Fernicola in Trust v. Mod-Aire Homes Limited et al*; supra, the court considered a clause which used the words "agreement", "notice", "caution", "lien" and "charge" and held that these words cannot be interpreted to include a certificate of pending litigation. In *159 Frederick Ltd., et al.*, October 15, 1990 (Master) (unreported), the court also refused to give effect to a clause which prohibited the registration of "a document evidencing this agreement" or a "caution" or "notice of the agreement" and did not find that the parties intended to prohibit the purchaser from registering a certificate of pending litigation after starting an action to enforce the agreements.

[para35] The conclusion I reach from the case law is, if the provisions of an Agreement of Purchase and Sale are clearly worded and prohibit the registration of a certificate of pending litigation, the court will give effect to such a clause even if it can be established that the vendor was in breach of the agreement or that the agreement is at an end. (See, *Singer v. Reemark Sterling I. Ltd.* (1992), 24 R.P.R. (2d) 125 (Gen. Div.)). In my view, paragraph 20 of Schedule A of the Agreement of Purchase and Sale is clear. There being no ambiguity, the contra proferentum rule does not apply. The clause prohibiting the registration of a certificate of pending litigation was part of the Agreement of Purchase and Sale and must be given effect.

C. Did the purchasers make full and fair disclosure of all material facts when they brought their ex parte motions for certificates of pending litigation before the Master?

[para36]

Rule 42.01(3) provides that a motion for a certificate of pending litigation may be made without notice. Rule 39.01(6) provides:

Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application.

The test of what constitutes full and fair disclosure of material facts has been considered in a number of authorities. In *Pazner v. Ontario* (1990), 74 O.R. (2d) 130 (H.C.J.) it was held that material facts are those of which the judge would need to be aware in making a decision.

Inaccuracies in affidavit material and facts, which, if disclosed, would not have affected the outcome have not been held to be grounds for intervention. In *830356 Ontario Inc. v. 156170 Canada Ltd.* [1995] unreported (Gen. Div.) at paragraph 17, Chadwick J. set forth the test for disclosure as follows:

The test is not whether the certificate would or would not have been issued had the omitted disclosure been made but rather whether the omitted disclosure might have had an impact on the original granting of the order.

In other words, the party moving ex parte cannot file deficient material, obtain the order and then argue that "I would have obtained the order anyway".

It is the vendor's position that the deficiencies in the affidavit material might have had an impact on the Master's decision as to whether the motion should have been brought on notice, whether there was truly an "interest in land" being sought, what the effect is of the clause prohibiting registration of a certificate of pending litigation and the response of the vendor to the purchasers' allegations of misrepresentations.

To summarize, the vendor submits that the information was inadequate in that a solicitor's affidavit was filed, the affidavit material merely adopted allegations in the statement of claim, and there was a failure to swear that the contents of the pleadings

were true as well as to state the source of the information. Simply referring to the pleadings in deposing that certain purchasers will not be closing, Mr. Kauffman submits, is the "lynchpin" [sic]. There was a failure to specifically draw to the court's attention the clauses in the Agreement of Purchase and Sale prohibiting registration of a certificate of pending litigation and providing to the vendor an irrevocable power of attorney on behalf of the purchasers to lift such certificate, as well as the "entire agreement" clause. While the court must take note of the time available to prepare for such motions, Mr. Kauffman submits that Ms. Laidlaw had represented the purchasers since June of 1997, that the vendor was represented and that she chose to bring these motions ex parte on September 26, 1997, nonetheless. Therefore, she should be held to the highest standard of full and fair disclosure of all material facts.

[para37] Counsel for the purchasers argues that all material facts were before the Master including that the vendor was represented by counsel, that the purchasers were not going to close the deal and that they were asserting a purchasers' lien. The purchasers' submission is that the "test of non-disclosure is whether the facts omitted would have made the order doubtful": *Notarfonzo v. Goodman et al.* (1981), 24 C.P.C. 127 (Ont. H.C.) at 131. With this test in mind, it is submitted that more information before the Master would only have strengthened the purchasers' case and affirmed the need for certificates of pending litigation. Mr. Schwartz argues that rule 39.01(6) does not require that the certificate of pending litigation be discharged for material non-disclosure but rather that the court has a discretion to act upon that ground alone. The court, in his view, should not hold the moving party to a standard that does not consider the timing within which the initial motion is brought. In *931473 Ontario Ltd. v. Coldwell Banker Canada Inc.* (1991), 5 C.P.C. (3d) 238 (Gen. Div.), Sutherland J. refused to discharge the certificate of pending litigation under Rule 39.01(6) on this ground where the disclosures fell below the standard of full and fair disclosure but he was not able to say that disclosure of the omitted items would have made the issuance of the order doubtful. Rather, he considered the non-disclosures as a factor which he had to consider in deciding whether to discharge the certificate of pending litigation.

[para38] The case law on "full and fair disclosure of material facts" requires that the purchasers, in proceeding on an ex parte basis, must be held to a high standard. I am mindful of *Cimaroli v. Pugliese* (1988), 25 C.P.C. (2d) 10 (Ont. H.C.) where O'Driscoll J. found that the failure to draw to the court's attention a clause which prohibited the registration of a caution until after the transaction closed constituted material non-disclosure and *Faraci v. Polo Club Development Co. Ltd.* (1986), 6 W.D.C.P. 247 (Ontario Master) which held that the plaintiff failed to satisfy the onus to make full and fair disclosure. Accordingly, I find that the purchasers failed to give full and fair disclosure of the circumstances and position of the vendor and, in particular, the clause in the Agreement of Purchase and Sale prohibiting registration of a certificate of pending litigation and the "entire agreement" clause. The affidavit of Ms. Laidlaw which comprised the main evidence before the Master did not fairly describe the vendor's position nor point to the exclusionary clause in a meaningful way. However, I would not discharge the certificates of pending litigation on this ground alone. Rather, I will consider this factor in my overall consideration of the exercise of discretion to discharge a certificate of pending litigation.

D. Should the court exercise its discretion in these circumstances to vacate the certificates of pending litigation?

[para39] The Courts of Justice Act provides that the court has discretion to discharge a certificate of pending litigation (section 103(6)(a)(b)(c)). The onus is on the party seeking the discharge. How such discretion is to be exercised is discussed in *Clock Investments Ltd. v. Hardwood Estates Ltd.* (1977), 16 O.R. (2d) 671, 79 D.L.R. (3d) 129 where Steele J. said at p. 674:

... the governing test is that the Judge must exercise his discretion in equity and look at all the relevant matters between the parties in determining whether or not the certificate should be vacated.

[para40] The specific matters considered relevant include: whether the plaintiff is, or is not a shell corporation; whether there is an alternative claim for damages; whether damages would be a satisfactory remedy; whether the land is or is not unique; the presence or absence of another willing purchaser, and harm done to the defendant if the certificate remained and harm to the plaintiff if the certificate is removed with or without security: *572883 Ontario Inc. v. Dhunna* (1987), 24 C.P.C. (2d) 287 (Master Donkin).

[para41] I consider the following factors to be relevant in the motions before me:

- (1) There is no evidence that the vendor is a shell corporation.
- (2) There is nothing before me suggesting the land is unique; in fact, the parties have withdrawn their claim for specific performance.
- (3) The purchasers are applying for rescission and damages.
- (4) It would not be difficult to calculate damages.
- (5) There are no specific willing purchasers at this time.
- (6) Should the certificates remain on title, the vendor will have had the land tied up for several years (unable to sell or lease) and is responsible for condominium maintenance fees and taxes in the meantime.
- (7) The balance of harm to be done to the purchasers or vendor favours the vendor.
- (8) There was material non-disclosure of facts on the ex parte motion in that the vendor's position was not outlined properly and the specific provisions of the Agreement of Purchase and Sale prohibiting registration of the certificate of pending litigation and the entire agreement clause were not brought to the attention of the Master.
- (9) The clause prohibiting registration of the certificate of pending litigation was clearly worded.

[para42] There is a broad discretion conferred upon the court in weighing the relevant factors and deciding whether the motion is a proper one for discharging the certificate of pending litigation. Taking into account all of these factors, I find it just that the certificates of pending litigation be discharged. However, I do consider this an appropriate case to provide the purchasers with certain security pending the ultimate disposition of these actions.

THE MOTIONS FOR CERTIFICATES OF PENDING LITIGATION

[para43] The purchasers, Zhang and Sit, apply for orders granting certificates of pending litigation to be registered against title to their units (17 and 40). They submit that they meet the test under section 103. Where a motion is made on notice, the test is the same as if the motion was to discharge a certificate. The moving party must demonstrate that there is a reasonable claim to the interest in the land.

[para44] Given that these purchasers have abandoned their claim for specific performance and now sue for damages, the purchaser's lien for the deposit may not be sufficient to sustain a certificate. There is also the allegation of breach of fiduciary duty and damages. However, in the circumstances, there being no evidence that the vendor is a shell corporation, that a claim for damages as an alternative would be an unsatisfactory remedy and given the clause prohibiting the registration of a certificate of pending litigation in the Agreement of Purchase and Sale, I am not persuaded that it is just in the circumstances to grant an order for a certificate of pending litigation. However, I am satisfied that security should be provided by the vendor.

THE MOTION FOR SUMMARY JUDGMENT

[para45] Some of the purchasers have moved for summary judgment under Rule 20.04(4), claiming that the only genuine issue to be determined is one of law, that is, whether the vendor is in breach of the Agreements of Purchase and Sale by failing to deliver title to the purchasers by the closing date stipulated in the agreement. They submit that the date specified has passed, that being two years from the original closing date of January 18, 1995, as set out in clause 4 of the agreement. The purchasers argue that the agreement must be read as a whole. Since the vendor failed to register the declaration and description of the property by January 18, 1997 and, in fact, did not do so until September 2, 1997, the agreement must be terminated. The purchaser submits that the date of closing is a fundamental term of the purchase and sale agreement. Failure to deliver legal title to the property goes to the root of the agreement and the purchasers are entitled to treat the agreements as at an end and are entitled to a return of all the monies paid by them pursuant to the agreements.

[para46] The cases of *Lee v. Leslie Centres Ltd.* (1992), 23 R.P.R. (2d) 185 (Gen. Div.) and *Russ-Cad Management Ltd. v. Bayview 400 Industrial Developments Inc.* (1992), 24 R.P.R. (2d) 6 (Gen. Div.) seem to support the purchasers' position. Both cases held an Agreement of Purchase and Sale to be null and void where the condominium units in question had not been completed by the occupancy date set out in the agreement, nor by the proposed amendment to the occupancy date. Both found that the contra proferentum rule applied, and the latter held that a unilateral extension of the occupancy date by the vendor constituted anticipatory breach of the agreement. In those cases, unlike the one before me, there was no ultimate time limit specified.

[para47] However, subsequent to the two above-mentioned cases, the Ontario Court of Appeal released its decision in *Scanlon v. Castlepoint Development Corp.* (1992), 11 O.R. (3d) 744 (application for leave to appeal to the Supreme Court of Canada dismissed without reasons August 5, 1993). In very similar fact situations and with very similarly worded agreements (though again without an ultimate time limit), the court found that the contra proferentum rule did not apply, and that a clause in an Agreement of Purchase and Sale allowing the vendor to extend the closing date because of natural disasters, strikes, "or by any other cause of any kind whatsoever whether or not beyond the control of the Vendor" was a valid provision and not vague or contradictory. The purchasers were therefore bound by the Agreement of Purchase and Sale, despite the fact that the vendor had unilaterally extended the closing date, so long as there was no bad faith or willful negligence on the part of the vendor.

[para48] This reasoning has recently been affirmed by the Court of Appeal in *Townsgate 1 Ltd. v. Klein; Townsgate 1 Ltd. v. Farber* [1998]. In these cases, which were heard together, the wording of the agreement was virtually identical to that in *Scanlon*, and at issue was the relationship between the interim occupancy date, referred to in *Rosenberg J.A.*'s decision as the "possession closing date", and the final closing date, referred to as the "title closing date." A distinction is made between the two dates in the case of a condominium because of the declaration and registration requirements under the Condominium Act (R.S.O. 1990, c. C.26):

The registration process itself creates further delays that are beyond the control of the declarant [vendor]. Accordingly, the agreements of purchase and sale are structured to permit or, as in this case, to require the purchaser to take possession on an interim basis when the project is substantially complete and ready for occupancy (the possession closing). The final or title closing takes place after registration when the declarant can give title.

[para49] In these decisions, the precise wording of the agreement, as well as the intricacies of the chronology of events, are extremely important in determining the rights of the parties and whether a breach of the agreement has occurred.

[para50] In the case before me, the vendor did not convey title to the units by January 18, 1997, which the purchasers argue is the extended closing date provided for under clause 1 of Schedule C of the agreement. Schedule C, however, refers to the unit being "built" and "completed"; the words "title" and "conveyance" do not appear. On the evidence before me, it is not clear that the units were not 'substantially completed' by that date, as contemplated in the agreement. There is a genuine issue for trial, the outcome of which will depend in each case on the actual wording of the agreement, the conduct of the parties and the chronology of events. This is, accordingly, not an appropriate case for granting summary judgment.

THE MOTIONS ON BEHALF OF MR. CHO

[para51] In addition to his request for summary judgment, Mr. Cho applies for an order that monies he paid be returned to him or, in the alternative, the monies be paid in trust. Mr. Cho purchased two units; he did not interim close or pay occupancy fees. He did not deal with an agent from Living Realty but alleges that he dealt directly with Eli Swirsky of The Torgan Group. After Mr. Cho obtained certificates of pending litigation, the units were sold and he agreed to have the certificates of pending litigation removed from title to enable an innocent third party purchaser to close the transaction. Now, Mr. Cho argues that he has no security in the action and the court should order that monies be paid in trust. He relies on *Re Mactan Holdings Ltd. and 431736 Ontario Ltd. et al.* (1980), 31 O.R. (2d) 37 (Ont. H.C.) and *80 Wellesley Street East Ltd. v. Fundy Bay Builders Ltd. et al* [1972] 2 O.R. 280 (C.A.) as authorities that this court has jurisdiction to grant a mandatory order requiring posting of security in lieu of the interest in land where a party seeks the return of a deposit.

[para52] I am persuaded that Mr. Cho should be in no different position to that of any of the purchasers who registered their certificates of pending litigation, are now having them discharged but are protected in their actions through security provided by the vendor.

THE MOTIONS ON BEHALF OF MR. LAU

[para53] Mr. Lau sold two units and agreed to a resolution with the vendor to enable the closing to take place. The order of Wilkins J. was that the certificate of pending litigation be discharged and upon closing of the sale, the vendor's solicitors hold the proceeds in a separate interest bearing bank account until the litigation is concluded. Although I am exercising my discretion in the other cases to discharge the certificates of pending litigation, I am also requiring that there be security posted by the vendor. Accordingly, in this case, the vendor shall provide an irrevocable letter of credit in the amount of the sale price plus interest since the sale or shall retain the separate interest bearing account pending the conclusion of the litigation.

DISPOSITION

[para54] For the reasons given, there will be an order setting aside the ex parte orders of the Master dated September 26, 1997 and October 3, 1997 and directing the discharge of the certificates of pending litigation for all Group "A" and "B" purchasers as set out in Appendix I to this judgment. There will also be an order that the Vendor, Pacific Mall and The Torgan Group, shall provide evidence of security by way of irrevocable letters of credit in amounts reflecting monies paid on deposit, and for grease traps, sprinklers, and occupancy fees as set out in Appendix II to this judgment and interest earned thereon to date.

[para55] The motions on behalf of the purchasers Zhang and Sit for certificates of pending litigation are dismissed. However, they are entitled to have the vendor provide evidence of irrevocable letters of credit in an amount reflecting monies paid as deposits and for grease traps, sprinklers and occupancy fees and interest earned thereon to date.

[para56] If any of the units covered by this judgment are sold, the proceeds of sale which cover the deposit, monies paid for the grease traps, sprinklers, occupancy fees and interest shall be paid into court and held pending final disposition of these actions. The irrevocable letters of credit shall be reflected accordingly. Cautions on title may be necessary to give notice to any purchasers to pay the proceeds to the extent necessary into court.

[para57] The motion brought on behalf of Mr. Cho for the payment of the sale proceeds into trust is allowed to the extent that the amount of the deposits, the monies paid for grease traps, sprinklers and occupancy fees and the interest earned thereon shall be paid into a separate interest bearing bank account until the litigation is concluded.

[para58] The motions brought by Mr. Lau are allowed to the extent that the vendor shall provide evidence of an irrevocable letter of credit reflecting the deposits paid, the monies paid for sprinklers, grease traps and occupancy fees plus interest; in the alternative, the vendor shall retain the sale proceeds in a separate interest bearing account pending the conclusion of the litigation.

[para59] It is my intention that the properties in question not be tied up any longer. In my view, this will be of benefit to all parties. These protections are designed to facilitate that goal. Therefore, should the parties require assistance regarding matters such as security by way of letters of credit, I am available to hear submissions.

[para60] The motions for summary judgment brought on behalf of the purchasers listed in Appendix I to this judgment are dismissed.

[para61] If the parties are unable to resolve the issue of costs, counsel may contact my office to arrange for submissions to be made.

HIMEL J.

* * * * *

APPENDIX I

Schedule re: Summary of Motions and Relief Sought

Court Style Unit Capacity (Motion) File No. of Cause Description Category

97-CU- Tong Hoi Unit 6 Defendants 1 and 2 119839 Lo and (F35), Wai Leng Level 2 Jeong

97-CU- Jeff Lau Unit 9 Defendants 1 and 4 120612 and Royal (F28), Lalique Level 2 International Inc.

97-CU- Jeff Lau Unit 10 Defendants 1 and 4 120429 and 974755 (F26), Ontario Inc. Level 2

97-CV- Yu-Tsing Unit 16 Plaintiff 1 and 2 132658 Simm (F12), Level 2

97-CV- Cai Qian Unit 17 Plaintiff 1 and 3 135394 (Tony) Zhang (F10), Level 2

97-CV- Francis Unit 18 Plaintiff 132655 Chui (F8), Level 2

97-CV- Catherine Unit 20 Plaintiffs 1 and 2 132656 Pan and Tze (F3), Yeung Wong Level 2

97-CV- Lai-Fan Yip Unit 27 Plaintiff 1 and 2 132659 (F13), Level 2

Unit 28 (F16), Level 2

97-CV- Gary Leung Unit 30 Plaintiff 1 and 2 132657 (F20), Level 2

97-CU- Tiao Hang Unit 33 Defendant 1 and 5 119963 Cho (F27), Level 2

97-CU- Tiao Hang Unit 34 Defendant 1 and 5 119838 Cho (F29), Level 2

98-CV- Alan Sit Unit 40 Plaintiff 1 and 3 141632 (F52), Level 2

97-CU- Deborah Ho Unit 41 Defendant 1 and 2 119961 (F55), Level 2 Categories

1. Motion for summary judgment (relief: return of all monies paid plus interests and costs).
2. The Discharge Motions (discharge certificates, or, in the alternative purchasers to post security).
3. The Motion for Certificates (obtain order to register the certificates).
4. The Lau Motions (F26 & F28) (Relief: return of all monies paid, or excess paid above the second sale or otherwise hold in trust the monies paid).
5. The Cho Motions (F27 & F28) (Relief: return of all monies paid, or excess paid above the second sale or otherwise hold in trust the monies paid).

APPENDIX II

Schedule of Payments made by each Purchaser Name of UNITS Purchase Total Paid Paid Clients (F#s and Price Deposit for for Reg. #s Paid Grease Sprinkler Trap

Tong Hoi F35/ 229,800 68,940 7,712.82 1,203.75 Lo & Wai Unit 6 Leng Ieong

Jeff Lau F28/ 331,800 99,540 7,712.82 1,203.75 & Royal Unit 9 Laliq

Jeff Lau F26/ 351,800 105,540 7,712.82 1,203.75 & 974755 Unit 10 Ontario Inc.

Yu-Tsing F12/ 249,800 124,900 7,712.82 1,203.75 Simm Unit 16

Cai Qian F10/ 229,800 114,900 7,712.82 1,203.75 Zhang Unit 17

Fung Chui F8/ 249,800 124,900 7,712.82 1,203.75 Unit 18 Occupancy Fees Paid 6,174.69

Catherine F3/ 249,800 124,900 Pan & Tze Unit 20 15,425.66 1,203.75 Yeung Wong F1/ 249,800 124,900 Unit 21 Occupancy Fees Paid 36,493.28

Lai-Fan F13/ 249,800 124,900 Yip Unit 27 15,425.66 1,203.75

F16/ Unit 28 249,800 124,900 Occupancy Fees Paid 30,375.30

Gary F20/ 249,800 124,900 7,712.82 1,203.75 Leung Unit 30 Occupancy Fees Paid 21,278.83

Tiao Hang F27/ 351,800 105,540 Cho Unit 33 15,425.66 1,203.75

F29/ 331,800 99,540 Unit 34

Alan Sit F52/ 249,800 124,900 7,712.82 1,203.75 Unit 40 Occupancy Fees Paid 16,000

Deborah F55/ 249,800 74,900 7,712.82 1,203.75 Ho Unit 41

CBR# 078

Reid Alexander Clarke, applicant, and Middlesex Condominium Corporation No. 185, respondent

Court File No. 19909/96

Ontario Court of Justice (General Division) London, Ontario Desotti J. Oral judgment: February 19, 1996.

Counsel: R.A. Haas, for the applicant. M.H. Arnold, for the respondent.

[para1] DESOTTI J. (orally):-- The duty that is defined in the Condominium Act is not and has nothing to do with the issue of costs or no costs that were awarded in the Small Claims Court. This is not what this is about. The applicant brings an application in effect asking for a declaration indicating that the lien and or charge that resulted in costs assessed against the individual who had commenced the Small Claims Court action be removed from his particular unit.

[para2] Firstly, I am going to indicate that the initial endorsement by the trial judge in Small Claims Court is uncertain. The endorsement indicates that the word "with" was struck and the words "without costs" were placed in the file as part of the endorsement yet the reasons for judgment of the Small Claims Court judge clearly indicate with costs. In any event, it is the position of the respondent, Middlesex Condominium Corporation #185, that regardless of whether or not costs were on the Small Claims Court scale or there was no order as to costs that their solicitor and client costs incurred by their solicitors to defend this particular action should be borne exclusively by Reid Alexander Clarke.

[para3] They rely primarily on section 8.02 of their rules, and if I might turn to that, that rule specifically states: "Any loss, cost or damage incurred by the corporation by reason of a breach of any rules and regulations enforced from time to time by any resident et cetera shall be borne by such resident."

[para4] In my view, this particular rule or section does not contemplate a lawsuit commenced by the applicant in these proceedings and the successful defence of such a claim.

[para5] Had the Middlesex Condominium Corporation #185 brought an application in the first instance to enforce rules with respect to parking as a result of the continued breach of the applicant Reid Alexander Clarke, undoubtedly they would have had a very strong case. I will not comment whether they would have been successful, but certainly had they been successful in enforcing that particular duty, a duty to comply with reasonable parking requirements, first of all, an order would have issued to that effect, and secondly, undoubtedly, solicitor and client costs would have followed. But to say that that is the same as defending a Small Claims Court suit brought by Reid Alexander Clarke, and therefore, the costs incurred not within the context of the lawsuit, i.e., Small Claims Court, but the costs as result of defending that suit, which would be described as solicitor and client costs between Middlesex Condominium Corporation #185 and their own solicitor, in my view, is not only a stretch, it would be an improper interpretation of that particular section.

[para6] That section does not speak of that thing, and the cases that the counsel have brought forward in the book of authorities, in my view, does not allow for that interpretation. What really is the case as contained in the book of authorities, that were provided to me establish, is that when a condominium, after properly informing their members of problems or things that should or should not be corrected and these individuals continue to forgo and resist the persuasion of the corporation to comply with reasonable rules, then an application can be brought to an Ontario Court (General Division) judge to enforce that duty. That duty being the rule to park properly, et cetera.

[para7] In this particular case, all they did was defend a Small Claims Court action. In my view, that particular defence does not come within the language in section 8.02, and in my view, to impose that sort of cost on the applicant in this particular case would be improper and improper by their own rules. Accordingly, there are two aspects of this case. The second one was a counter-application. I am ordering that an order to issue in accordance with (1)(b) and (c) and (d) of the applicant record. Secondly, I am ordering that the issues raised in the counter-application, and specifically (1)(b) be adjourned.

[para8] In determining and weighing the issue of costs, I agree with the respondent's solicitor. Much of this difficulty and problem arose and has arisen as a result of the conduct of the applicant in the first instance in his commencing what was a poorly conceived suit, and as such, I am going to order that there be no costs of the applicant. I am not going to be awarding costs for these reasons. Firstly, it is clear that the condominium corporation had to defend an action which was clearly of questionable merit. It was more of the plaintiff in the case as referred to in the reasons of judgment of the Small Claims Court judge, he really was trying to defend the honour of his girlfriend who had her car towed away and probably was acting in self-righteous indignation, but nevertheless, that corporation had to defend, and it is true that they took, in my view, as I have ruled, a heavy-handed approach, and I agree with you, but on the other side of the line, they had to defend an action that was poorly constituted by the plaintiff. They had to expend money and I am certainly in this particular case weighing the equities as counsel has asked me to do.

[para9] In my view, even though you were successful in championing your cause with respect to those costs, you also forced the condominium in the first instance through your client to incur those costs, and no one has, firstly, questioned whether the costs were properly incurred or not. So let us assume for the moment that they were properly incurred, that is an expense that has to be borne by all the condominium owners, and it was occasioned by your particular client, and frankly, he who seeks equity must do equity.

[para10] I think you should be quite happy with the result, and indicate to the rest of the condominium owners that I although you won this particular thing, you did not and you are not going to be successful in the question of costs, and I would be ordering that there would be no costs in this particular application even considering the success that you have obtained for the reasons expressed. There will be no order as to costs with respect the applicant's application. The counter-application will be adjourned to the trial coordinator. I will endorse the record accordingly.

CBR# 129

Grossman Holdings Limited, J. Silver Holdings Limited, Bleeman Holdings Limited, Rose Park Howard Investments Limited, J. McCallum, Brownstone Developments Limited, Gerald Goldenberg and Mark Hanson, executor of the Estate of Jules Hanson, plaintiffs, and York Condominium Corporation No. 75, Savoy & Associates Limited, Kathryn Hild, Ivan Cody, Larry Wert, Ron Browne, Margaret Osmond and Joanna Qureshi, defendants

Court File No. 97-CV-134734

Ontario Court of Justice (General Division) Gans J. Heard: July 13, 1998. Judgment: August 4, 1998.

Counsel: Barry Wortzman, Q.C. and Sandra E. Dawe, for the plaintiffs. Mark A. Arnold, for the defendants.

GANS J.:--

I. Introduction

[para1] The plaintiffs developed a residential condominium project at 40 Homewood Avenue in the City of Toronto in the fall of 1972. The project was built under the then existing CMHC assisted housing program and was registered as York Condominium 75 (the "Corporation"). The condominium is comprised of 472 residential units and one unit representative of a three-storey garage (the "Garage"). The plaintiffs own a majority interest in the Garage in varying proportions, while title is held in the name of certain of the plaintiffs.

[para2] The plaintiffs commenced this action in the wake of a threat of suit for the cost of repairs to the Garage, as well as for the payment of hydro arrears. The plaintiffs seek, among other things, a declaration that as a result of certain express and/or implied terms of an agreement (the "Garage Agreement"), they are entitled to a mandatory order transferring title of the Garage to the Corporation, subject to related encumbrances and liabilities. If the plaintiffs succeed, the Corporation and not the plaintiffs will be responsible for the repair costs and hydro arrears.

[para3] It is the plaintiffs' position, notwithstanding the language of at least two agreements, namely, the Garage Agreement and an earlier agreement with the CMHC, that the Corporation was obliged at some time after 1972 and before 1992, to purchase the Garage. The plaintiffs assert that they are entitled to lead certain extrinsic evidence to establish the aforesaid express and/or implied terms, notwithstanding and as an exception to the parole evidence rule.

II. Nature of Motion

[para4] The defendants bring this motion pursuant to rule 21.01(1)(b) for an order that the Statement of Claim be struck out as disclosing no reasonable cause of action. In the alternative, the defendants argue they are entitled to summary judgment dismissing the action because on the facts of this case, and the law applied to same, there is no genuine issue for trial.

III. Motion - Rule 21

[para5] I accept as correct the plaintiffs' recitation of the law with respect to motions under this Rule. See the decision of Blair J. in *Toronto-Dominion Bank v. Deloitte Haskins & Sells et al.* (1991), 5 O.R. (3d) 417 (Gen. Div.) at p. 419. The moving party is restricted to the facts set forth in the pleadings, at which point the court is obliged to accept the matters pleaded as proven. In addition or as a corollary to the last mentioned proposition, the moving party is not entitled to rely upon any evidence contained in affidavits or adduced in the course of cross-examinations to augment its position under the Rule.

[para6] The defendants state that they are entitled to succeed under Rule 21 because s. 38 of the Condominium Act, R.S.O. 1990, c. 26 creates a complete "legal impediment" to the plaintiffs' claim. That section provides that a condominium corporation cannot make any substantial additions to the common elements or assets of the Corporation unless the consent of unit holders holding 80 percent of the outstanding units has first been received. The defendants do not plead specifically or even inferentially that the Act was not complied with at first instance. There is but a brief reference, in the first affidavit filed in support of the motion, to "unit holder approval" in respect of a 1974 proposal to purchase the Garage. In my view, the absence of an averment in the Statement of Defence that the requisite vote of the unit holders never took place is fatal to this branch of the motion. The defendants have failed to establish on the pleading that it is plain, obvious and beyond doubt that the plaintiffs will not succeed at trial. Having regard to the ultimate disposition of the motion, I would not unilaterally grant the defendants leave to amend the pleading to correct this deficiency, even if such a request had been made of me.

IV. Motion - Rule 20 [para7] The issues surrounding the second aspect of the defendants' motion are factually noteworthy. In the fall of 1972, the plaintiffs qua developers entered into the Garage Agreement ostensibly with themselves as the declarant on behalf of the Corporation with respect to the ownership, use and operation of the Garage. In other words, at the time the agreement was concluded, there was not an independent board and the individual directors who have been joined as party defendants had nothing to do with the Corporation's management and, I dare say, with the negotiations that resulted in the completed agreement.

[para8] The relevant portions of the Garage Agreement, including certain recitals, are reproduced extensively below. The designation "Howard" is the collective reference to the plaintiffs.

(a) Howard constructed the buildings and other improvements which form the condominium units and common elements managed by the Corporation;

(b) Howard, is the registered owner of all of the condominium units of the Corporation, and the said condominium units are being sold to purchasers on the basis that Howard will lease to the unit owners parking spaces in the underground parking garage ...

(c) Pursuant to an Agreement dated the 25th day of September, 1970 between Central Mortgage and Housing Corporation and Howard, Howard is obliged to grant an option to the Corporation to purchase the said underground Garage as set out in paragraph 11 of the said Agreement; ... 1. Howard hereby grants to the Corporation the option to purchase the Garage on the terms and conditions hereinafter contained.

2. Howard shall manage the Garage and be entitled to the income therefrom and be responsible for the expenses thereof, including mortgage interest, principal and taxes accruing due and payable prior to the time when the Corporation purchases the Garage. 4. The profit from the operation of the Garage, after allowing for a five per cent (5%) management fee, shall be applied by Howard in repayment of its equity in the Garage...

5. Upon Howard being repaid its equity in the Garage, which equity is hereby agreed to be the sum of Twenty-Four Thousand Eight Hundred and Forty-Five Dollars (\$24,845.00), the Garage shall be offered for sale to the Corporation at the amount then outstanding on the mortgage ...

6. Howard, forthwith upon being repaid its equity in the Garage, shall notify the Corporation that its equity has been repaid and the Corporation shall have the irrevocable option to purchase the Garage within Ninety (90) days of the giving of such notice for the amount then owing on the said mortgage in favour of Central Mortgage and Housing Corporation.

7. The Corporation's option to purchase the Garage shall be exercised as hereinafter provided within such Ninety-day period after which time the option shall be null and void and Howard shall be entitled to retain ownership of the Garage or to dispose of the Garage as it shall see fit.

[para9] As previously indicated, the plaintiffs take the position, notwithstanding the clear wording of the Garage Agreement, that the "parties" agreed the Corporation was obliged to purchase the Garage within a reasonable time after 1972, but, in any event within the first "10 or 20 years" after its execution. Mr. Wortzman, on behalf of the plaintiffs, argues in his usual forceful and eloquent fashion that the parole evidence rule should be suspended and evidence with respect to the Agreement's factual matrix should be received. Alternatively, as his factum suggests, it is the plaintiffs' position that the actual document does not constitute the whole agreement between the parties.

[para10] I have considered the cases and material to which reference was made by the plaintiffs during argument and as expressed in their prolix factum. I have also reviewed certain recent decision of this court and the Ontario Court of Appeal to which reference was not made even though an inquiry of their existence was posed by me during the course of argument. While none of the recent cases provides any new insight into the circumstances in which the parole evidence rule exceptions should be invoked, at least on the uncontroverted facts of this case, I draw the following few relevant conclusions based upon the jurisprudence with which I was presented:

1. As a general rule, if the language of a written agreement is clear and unambiguous, as in the instant case, parole evidence should not be admitted to add to, subtract from, vary, interpret or contradict the terms of the written agreement.

2. Parole evidence which is intended to contradict or vary the terms of a written agreement may be admitted for purposes of rectifying a written agreement in order to establish that a mistake was made in the document or that such does not reflect the agreement of the parties at first instance. A claim for rectification is not being advanced by the plaintiffs in this case. Furthermore, the plaintiffs are not suggesting that novation has occurred or that the conduct of the board after turnover amounted to the conclusion of a new deal.

3. On a more limited basis, parole evidence may be admitted to provide the factual matrix under which the agreement was negotiated to assist in the interpretation of the agreement.

[para11] From my analysis of the matters in issue, the plaintiffs take the position that the agreement they concluded with themselves at the time the Corporation was registered does not reflect the whole deal; that notwithstanding the agreement's clear and unequivocal terms that the Corporation could only purchase the Garage after the plaintiffs had recouped their "equity", which, Mr. Wortzman advised included all operating losses incurred along the way, the Corporation was obliged to purchase the Garage before the conditions precedent were achieved; that the use in several places of the term "option" to describe the nature of the "buy-sell" arrangement was, for all intents and purposes, a misnomer.

[para12] It is against this background that the plaintiffs urge me to consider the "evidence" which they suggest is confirmatory of the deal they seek to propound, notwithstanding the fact that I was then, as I am now, of the view that none of the parole evidence rule exceptions articulated by Lambert J.A. in *Gallen v. Allstate Grain Co.* (1984), 9 D.L.R. (4th) 496 (BCCA) at 506 comes into play.

V. Factual Matrix

[para13] The plaintiffs filed the affidavit of Robin Bookbinder, who is an officer of one of the plaintiffs' corporations. Noticeably, Mr. Bookbinder was not in the employ of any of the plaintiffs until many years after the condominium was built and the Garage Agreement was in place. Although there is one person who appears to have been involved in the project from its inception, and who apparently authored certain correspondence that Mr. Wortzman suggests is relevant to the matters in issue, an affidavit was not filed on his behalf in support of the plaintiffs' position. I make this observation in light of Mr. Wortzman's acknowledgment to me that although this gentleman is elderly and resides in England, he was available as an affiant. In the final analysis, and, as Mr. Wortzman again acknowledged during argument, other than the gentleman to whom reference was just made, the plaintiffs do not have anyone at their disposal who can testify on a first hand basis to the matters now in issue. Mr. Bookbinder's views are based on his reading of the documents, namely, the various agreements, minutes of meetings and correspondence - whose vantage point, I would observe - is not much different from my own.

[para14] That having been said, I was directed to several documents by Mr. Wortzman which he argued were supportive of his position and which he further argued mandates further review by a trial judge.

[para15] The material, in the main, demonstrates that after the takeover the Corporation was desirous of acquiring title to the Garage sooner rather than later. This posture appears to have changed when disputes arose with the plaintiffs qua developer over alleged deficiencies in the condominium's construction, resulting in a suit and a separate arbitration proceeding. As best as I can determine, the Corporation never again evinced an intention to take up the "option" to purchase the Garage. Indeed, the plaintiffs did not until relatively recently assert the position now being advanced in the instant action. [para16] I have read and reread the documents to which Mr. Wortzman has drawn my attention. While the material supports the position that the Corporation after takeover was more than a little anxious to take title to the Garage, no one on either side of the debate appears to have maintained the view that the Corporation's right to purchase was anything other than an option, exercisable after the plaintiffs recovered their

equity investment in the structure. In any event, the Corporation's short-lived desire to purchase the Garage was manifested for the first time after the plaintiffs ceased to control the board and therefore, temporally, such a desire could not have been within the contemplation of the signatories to the Garage Agreement nor formed part of the factual matrix at the time the agreement was executed.

[para17] In my view, the evidence upon which the plaintiffs seek to rely does not create a factual matrix against which the Garage Agreement must be read in order to understand it. Indeed, as previously suggested, the material to which reference was made is supportive of the interpretation advanced by the defendants, which Mr. Wortzman acknowledged was to be drawn from the wording of the Agreement itself. Furthermore, in my view, the material relied upon by the plaintiffs does not support the position that the Garage Agreement in its current form is not reflective of the deal between the "parties" at first instance. Putting the matter simply, this is not a case where any of the exception to the parole evidence rule ought to be applied.

[para18] I wish to point out that my conclusion is arrived at without evaluating credibility, weighing evidence, or drawing factual inferences from the material presented, tasks about which the Court of Appeal has recently expressed opinion. See the decision of the Court of Appeal in *Aguonie v. Galion Solid Waste Material Inc.* (1998), 156 D.L.R. (4th) 222. In my view, the decision to invoke the parole evidence rule can be made in the circumstances of this case as easily by a motions court judge as it can be by a trial judge. There are no facts in dispute or in issue that require an assessment or an evaluation necessitating resolution by a judge at trial. Having regard, therefore, to my reading of the Garage Agreement in light of the strictures of the parole evidence rule, I find that there is no genuine issue for trial and that the defendants are entitled to summary judgment as requested.

[para19] I observe parenthetically that Mr. Wortzman also argued that because the defendants had not filed affidavits of certain former board members who were involved in the early "debate" to purchase the Garage, they had not "put their best foot forward" and should be deprived of the relief now being sought. As I indicated to counsel during the course of argument, it is my view that this expression as used in the cases applied to a situation where a party had not adduced critical and available evidence, with the intention of leading such evidence at trial. In the case before me on the Rule 20 motion, the defendants did not rely on any evidence, per se, but, the relevant documents from which they were able to assert their position. They were not in any respect obliged to lead evidence which, from their perspective, would not advance their argument. Furthermore, as previously observed, it was the plaintiffs who chose not file an affidavit of one of the earliest participants in the saga, a fact which, if not fatal to their position, was not terribly helpful.

[para20] Accordingly, judgment will issue in favour of the defendants and the action will be dismissed.

[para21] If counsel are unable to come to an agreement with respect to the costs associated with the disposition of this motion and the action, an appointment for a further attendance before me may be arranged.

GANS J.

CBR# 079

Reid Alexander Clarke, plaintiff, and Middlesex Condominium Corporation No. 185, defendant

Court File No. 4020/94

Ontario Court of Justice (General Division) Small Claims Court - London, Ontario Proudfoot Deputy J. Oral judgment: August 14, 1995.

Counsel: No one appearing for the plaintiff. P.A. Ivanoff, for the defendant.

[para1] PROUDFOOT DEPUTY J. (orally):-- I am prepared to give judgment now. This is a case by Mr. Clarke against the condominium corporation which is the master corporation of the property where he owns one of the units, specifically unit 44. I am satisfied that the condominium corporation has acted reasonably and as I have indicated in my discussion of the matter with the solicitor Ivanoff, reasonably may not be perfectly.

[para2] As stated, I am satisfied that the condominium corporation has acted reasonably. They have passed a rule which is not a by-law. I think they have taken all reasonable and appropriate steps to distribute the rule, not only the initial rule, I should say, but the subsequent notices about it. I do not fault the condominium corporation in any way for the steps it took a) in passing the rule; b) notifying their members of the existence of the rule and all the subsequent notifications. There is some doubt in my mind as to whether or not Mr. Clarke may even have had notice before the first towing incident. He acknowledges he had notice before the second incident. He does not suggest that he notified his girlfriend who, as I recollect, was the recipient of Mr. Nash's towing favours on the occasion of the second tow.

[para3] I do not know whether he neglected, or wilfully was challenging the powers of the condominium directors by reason of some misapprehension as to whether or not this was a by-law that had to be registered but I think the condominium corporation was, in its own way, acting reasonably, attempting to acting reasonably, and took all reasonable steps to bring this rule and its intentions in respect to the enforcement of the rule to its members.

[para4] As I say, there is no question that Mr. Clarke had notice before the second towing incident and it may well be and I am not satisfied that he did not have notice before the first. I find that it would not be reasonable to require the condo corporation to go to the expense of putting in physical barriers or bumpers to prevent the sort of parking which does cause problems with snow removal and the use of the walkways of the sidewalk by children, so that a technical attack on the validity of the rule, in my view, fails.

[para5] Mr. Ivanoff has, in addition, raised the question of whether or not the plaintiff has suffered any damage. Even if the action had any merit, which I am holding it does not, whether it ought to have been brought in the name of the individuals who were towed away and paid the expense so that I am not sure that Mr. Clarke has any legal status to bring this action in that his payment, if he reimbursed the individuals, is a voluntary matter on his part. Perhaps as a result of his realization that he should have told those people about the rule of the condominium corporation about parking he felt guilty and felt some sort of a moral obligation because of his failure at least in the second circumstance to notify his girlfriend of the obligation not to block park on the sidewalk. In any event, for those various reasons, I think the action fails and the action will be dismissed with costs.

[para6] Having said that, if this rule is still in effect, it would not be inappropriate for the condo authorities to add a sign or signs to the existing QAP towing signs to warn strangers, that is first time parkers, regarding the existence of this rule so that they would have an opportunity of parking properly.

CBR# 141

Sophie Jaremko, (plaintiff/appellant), and Metropolitan Toronto Condominium Corporation No. 875, Donald Hastings, Ed Webster, Bruce Brunton, Michael Lucyk, Peter Hobbs, Len Rudner, Alice Brent, Corporation of the City of Etobicoke and Donald Ramsay, (defendants/respondents)

Docket No. C26724

Ontario Court of Appeal Toronto, Ontario Morden A.C.J.O., Catzman and Weiler J.J.A. Heard: May 7, 1998. Judgment: May 8, 1998.

Counsel: Richard R. Arblaster, for the appellant. Howard W. Winkler, for the respondent, Metropolitan Toronto Condominium Corporation No. 875 et al. Paul J. Green, for the respondent, Corporation of the City of Etobicoke.

The following judgment was delivered by

[para1] THE COURT (endorsement):-- The issue in this appeal is the proper application of cause of action *res judicata*. There had been three earlier proceedings involving the plaintiff and the defendant corporation respecting the dispute in question. In his reasons for judgment, O'Leary J. said at p. 2:

It is admitted by counsel for the plaintiff that this issue of alleged illegality was the basis for three prior separate applications to the court brought by the plaintiff against the defendant Condominium Corporation No 875.

[para2] An examination of the material filed in the three earlier proceedings indicates that the legality of both the structure and the use of the lay-by were in issue in those proceedings. Having regard to the admission set out above and the material filed on the motion, it was clearly open to O'Leary J. to find, as he did, that the doctrine of *res judicata* applied to this proceeding. Even assuming, as Mr. Arblaster submitted, that there may be a discretion in cases involving a public duty not to apply the doctrine of *res judicata*, this is not a case in which, bearing in mind the history of the litigation between these parties, that discretion should be exercised in favour of the plaintiff.

[para3] The doctrine of *res judicata* does not enure to the benefit of the City of Etobicoke and its Fire Chief because they were not parties to any of the prior proceedings. In our view, however, the action was properly dismissed against those defendants on the basis of abuse of process. In dismissing the action against them, O'Leary J. said:

Once it is established that the use being made of the driveway by the Corporation and its officers and directors is legal there can be no merit in a claim against Etobicoke and its Fire Chief, Donald Ramsay based on their failure to force the Condominium Corporation and its officers and directors to stop their illegal conduct. The action is therefore dismissed against Etobicoke and Ramsay.

[para4] The plaintiff's action is a collateral attack on the decisions in the three earlier proceedings to which she was a party. It is clear that, although he did not use the term, O'Leary J. dismissed the action against Etobicoke and the Fire Chief on the basis of abuse of process. We are not persuaded that he erred in so doing.

[para5] On the appeal, Mr. Arblaster raised, for the first time, the argument that the doctrine of *res judicata* contravenes the appellant's right to freedom of expression under s. 2(b) of the Charter of Rights and Freedoms. No material was filed before O'Leary J. with respect to this argument, and we decline to deal with it.

[para6] The appeal is dismissed with costs. MORDEN A.C.J.O. CATZMAN J.A. WEILER J.A.

CBR# 290

Pauline Shatkowsky, plaintiff, and King Rae Investments Inc., defendants

Court File No. 97-CV-128108

Ontario Court of Justice (General Division) B. Wright J. Heard: October 15 and 16, 1997. Judgment: November 4, 1997.

Counsel: Melvyn L. Solmon and Stuart N. Chelin, for the plaintiff. Carol A. Bargman, for the defendant.

[para1] B. WRIGHT J.:-- This matter began as an application seeking an order temporarily lifting an execution registered with the Sheriff of the Regional Municipality of York. The execution was registered in favour of the defendant against Joseph Shaw. Joseph Shaw is the son of the plaintiff, Pauline Shatkowsky. The purpose of the application was to permit the transfer of title to 14924 Yonge Street, Suite 102, from Joseph Shaw In Trust, to his son Jeffrey Shaw In Trust.

[para2] On September 8, 1997, Mr. Justice Somers heard the application and ordered the trial of the issues between the parties. The plaintiff maintains that Joseph Shaw is a bare trustee of the property to which the execution cannot attach. The defendant contends that Joseph Shaw is not a bare trustee of the property but holds a beneficial interest in the property which, therefore, is subject to the execution.

FACTS

[para3] The plaintiff is 95 years old and presently resides in a nursing home. For many years she lived in her home at 217 Lonsmount Drive in Toronto. Due to her advanced age the plaintiff, in June, 1995, gave her son, Joseph Shaw, power of attorney over her property and personal care.

[para4] Because it became increasingly difficult for the plaintiff to live alone in her home, it was decided to sell 217 Lonsmount and purchase a condominium. Prior to the sale of 217 Lonsmount, condominium unit 709 at 14924 Yonge Street was purchased in December, 1995, and the title taken in the name of Joseph Shaw In Trust. The Declaration of Trust signed by Joseph Shaw provided that he held the property in trust for the plaintiff and would deal with the property ". . . as directed in writing from time to time by the beneficiary ...". All subsequent Declarations of Trust were made in the same form. [para5] The property was taken in the name of Joseph Shaw In Trust on the recommendation of Jeffrey Cummings, the solicitor who acted in all of the transactions.

[para6] Prior to the sale of 217 Lonsmount, the title to that property was transferred to Joseph Shaw In Trust and a mortgage for \$100,000 placed on the property by Joseph Shaw In Trust. All transactions were authorized by the plaintiff. Joseph Shaw provided the plaintiff with a promissory note for \$100,000.

[para7] The plaintiff was not happy living in the 7th floor condominium. Her son began to look for a condominium on the 1st floor. 217 Lonsmount was sold with part of the proceeds going to purchase condominium unit 102. Unit 709 was sold.

[para8] The plaintiff could no longer live alone and moved to a nursing home sometime in August, 1996.

[para9] On September 5, 1996, the defendant obtained default judgment against Joseph Shaw and his company Granada Investments Limited for \$822,955.26 and a Writ of Seizure and Sale issued.

[para10] In April, 1997, Joseph Shaw In Trust entered into an agreement of purchase and sale to sell Unit 102 to M.D. McDonald In Trust. The transaction was to close on May 15, 1997.

[para11] The defendant was requested to lift the execution in order that Unit 102 could be sold and then to immediately re-file the execution. The defendant refused to lift the execution which resulted in the sale aborting and this litigation which raises the question of whether the execution affects Unit 102.

Bare Trustee or Beneficial Interest

[para12] The defendant contends that there are three reasons why I should find that Joseph Shaw is not a bare trustee but has a beneficial interest in Unit 102: (1) the manner in which Joseph Shaw has handled his mother's assets points to the plaintiff having gifted her assets, including Unit 102, to her son; (2) the plaintiff did not authorize the taking of the title to Unit 102 in the name of Joseph Shaw In Trust until after the filing of the execution: and, (3) the purported sale to McDonald was a sham.

[para13] A combination of the above three reasons simply means that the defendant alleges that the various transactions placing the plaintiff's assets in the name of Joseph Shaw. In Trust were fraudulent transactions for the purpose of defeating Joseph Shaw's creditors.

1. Did the Plaintiff Gift Her Assets?

[para14] There is no specific evidence that the plaintiff gave her assets to her son. The plaintiff did not give evidence. Due to her age and problems with the English language and perhaps her current health, it is not surprising that she was not called to testify by either party. However, pursuant to the Rules, the defendant had opportunity to examine her so that her evidence would be available for the court, but, the defendant chose not to examine her.

[para15] Joseph Shaw admits that he has used his mother's money for his and his family's personal use and for his companies. He testified that his mother was aware of his financial circumstances and although he did not discuss each amount of money for which cheques were written from her account, he did discuss with her the major amounts for which cheques were written.

[para16] Mr. Shaw said that the monies which went to him and his companies were loans which accumulated and from time to time were supported by promissory notes. Joseph Shaw admitted that if Unit 102 was sold it was possible that he would borrow some of the proceeds.

[para17] The plaintiff's cheque register at Tab 68 of Exhibit 1 shows the cheque history from May, 1995, to November, 1996. It is impossible to correlate the cheque register with the promissory notes. For example, there is a promissory note from Barbara-Allan Shaw, Joseph Shaw's wife, for \$24,000. However, the cheques written in her favour total \$79,700.

[para18] With respect to the apparent loans to Mr. Shaw's companies there are four promissory notes, two given by Granada for a total of \$120,000 and two given by 14872 Yonge Street for a total of \$115,000, although the round number amounts provided to the companies by cheque seem only to total \$97,000. There were other cheques written to pay for company expenses such as the lease of Mr. Shaw's car by Granada.

[para19] In argument, counsel for the defendant alleged that the promissory notes were all prepared at the same time in the office of Michael Rice and back-dated. Michael Rice was an associate of Joseph Shaw who for a period of time used Michael Rice's office. There is no evidence to support this allegation. The defendant could have called Michael Rice as a witness but chose not to call him to testify.

[para20] There is no question that Joseph Shaw used money from his mother's bank account for his own use and for the use of his companies. However, whether those monies were used or misused, the monies were assets of the plaintiff. There is insufficient evidence to prove on a balance of probabilities that the plaintiff gifted her assets to her son Joseph Shaw.

2. Title to Unit 102

[para21] It is admitted that the funds to purchase Unit 102 came from the sale of the plaintiffs home: 217 Lonsmount. However, the defendant alleges that the plaintiffs authorization that the title be in the name of Joseph Shaw In Trust was subsequent to the filing of the execution and, therefore, the purpose was to defeat creditors.

[para22] The purchaser on the Agreement of Purchase and Sale dated June, 1996, for Unit 102, is Joseph Shaw In Trust.

[para23] Tab 19 of Exhibit 1 is a note of a telephone conversation that Solicitor Cummings had with Joseph Shaw on July 8, 1996. It reads:

Title will be "in trust" for his mother - she's going to buy this from sale of Lonsmount. Can't live in #709 anymore. Declaration Reminder: do Trust (see Lonsmount)

[para24] Prior to leaving for vacation, Solicitor Cummings dictated a letter which was sent out by his secretary to the plaintiff in care of Joseph Shaw In Trust. The letter noted that the purchase of Unit 102 was completed August 16, 1996. The letter stated: "Our full report letter (including the Trust material) will follow in due course as soon as possible after I return from vacation.

[para25] On his return from vacation, Solicitor Cummings wrote a letter to Joseph Shaw In Trust which stated in part:

I am also enclosing three copies of a Declaration of Trust in respect of the Condominium unit, which I would ask you and your mother to sign (before witnesses), at your earliest possible convenience. Would you please return two copies to me for our records.

[para26] The Declaration of Trust was signed by Joseph Shaw and his mother on September 30, 1996.

[para27] I note that title to condominium unit 709 was taken in the name of Joseph Shaw In Trust. I also note that prior to its sale the title to 217 Lonsmount was in the name of Joseph Shaw In Trust. It can be implied that the title to Unit 102 would also be in the name of Joseph Shaw In Trust.

[para28] I find that the documentation relating to the purchase of Unit 102 discloses a clear intention that title to Unit 102 was, from the beginning, to be in the name of Joseph Shaw In Trust.

[para29] The defendant has failed to prove on a balance of probabilities that Unit 102 was placed in the name of Joseph Shaw In Trust for the purpose of defeating creditors.

3. Proposed Sale of Unit 102

[para30] The defendant alleges that the proposed sale of Unit 102 to D. McDonald was a sham because of the alleged close relationship between the proposed purchaser and Joseph Shaw. The defendant also alleges that the \$25,000 deposit cheque provided by McDonald was not a valid cheque because McDonald did not have sufficient funds in her account to cover the amount of the cheque.

[para31] In an affidavit sworn May 22, 1997, Sonia Etlin, secretary of Carol Bargman, the defendants counsel, deposes:

I am advised by William King, on behalf of the Defendant, King Rae Investments Inc. and do verily believe that the aforesaid named purchaser is a long time personal and business associate, partner and employee of the said Joseph Shaw.

[para32] The only evidence provided was that Ms. McDonald was an employee of Joseph Shaw.

[para33] Ms. McDonald testified that her parents rented a condominium unit in the same building. When she found out that Unit 102 was for sale, a decision was made to purchase the unit for her parents.

[para34] With respect to the deposit cheque dated either April 21 or 24, 1997, Ms. McDonald said that she would never issue a cheque if she did not have sufficient funds in her account.

[para35] Ms. McDonald was served with a Summons to Witness requiring her to bring to court her bank records pertaining to April, 1997. She explained that she had not read carefully the paragraph referring to the bank records and, therefore, did not bring with her those records.

[para36] Sonia Etlin gave evidence that she spoke by telephone with Ms. McDonald on two or three occasions concerning her attendance as a witness. However, there was no evidence that Ms. McDonald was reminded to bring her bank records.

[para37] If the issue of the \$25,000 deposit cheque was crucial to the defendant's position, Carol Bargman, during Ms. McDonald's testimony could have requested consent from Ms. McDonald to call the bank to obtain the information. Or, if requested, I would have ordered Ms. McDonald to call her bank and have the information faxed immediately to Carol Bargman. Ms. Bargman made no attempt to obtain the bank records.

[para38] I accept Ms. McDonald's evidence that Unit 102 was to be purchased for her parents and there were sufficient funds in her account to cover the \$25,000 deposit cheque.

[para39] The defendant has failed to prove on a balance of probabilities that the proposed sale of Unit 102 was a sham.

[para40] All of the defendant's arguments were designed to show that the title to Unit 102 was placed in the name of Joseph Shaw In Trust for the purpose of defeating creditors. [para41] But, if Joseph Shaw intended to defeat his creditors, it is probable that Unit 102 would not have been placed in his name in trust even if in law an execution cannot apply to the personal debts of a trustee. I suggest if Joseph Shaw was concerned about creditors it would have been a simple matter to have his mother's property placed in the name of another family member in trust or conveyed directly to another member of the family.

[para42] I find that Unit 102 is in the name of Joseph Shaw as a bare trustee and that he does not have a beneficial interest in that property. Therefore, the plaintiff has a right to the relief claimed in paras. 1(a), (b) and (c) of the Amended Statement of Claim and I so order with costs. If counsel cannot agree on costs I may be contacted to fix costs.

My Concern

[para43] Will the plaintiff have sufficient assets to pay for her nursing home care? Her bank account balance as at May 12, 1997, was \$5,379.46. Her money has been used by her son Joseph Shaw for the benefit of his family and his companies. [para44] I was not made aware of additional assets which she may have. There was evidence that some of her money may have been placed in GICs but the documentation is insufficient to determine if funds are still invested in her name.

[para45] I make it clear that I am not alleging that Joseph Shaw has mismanaged his mother's assets. Everything done may very well be legitimate. However, the evidence raises concerns.

[para46] No specific reason was given for transferring the title to Unit 102 from Joseph Shaw In Trust to Jeffrey Shaw In Trust. There is some evidence that the plaintiff may not have the capacity to give directions to her trustee. Since Joseph Shaw has power of attorney over her property, he still controls her assets.

[para47] The plaintiff's assets have been depleted in a short period of time. The promissory notes do not correlate with the amounts withdrawn from her account. There is no indication that Joseph Shaw or his companies can hope to repay the amounts allegedly borrowed. If Unit 102 is sold there is no assurance that the proceeds will be held for the plaintiff's benefit. The proceeds could be dissipated in the same manner as her other assets.

[para48] Although Joseph Shaw is the executor of the plaintiff's will, he testified that he was not a beneficiary under the will. It could be implied that Joseph Shaw has obtained his mother's assets and used them for his own benefit resulting in diminishing the assets available for the beneficiaries under her will.

[para49] The court cannot turn a blind eye to the above concerns, otherwise, justice is truly blind. There will be an order that the net proceeds from the sale of Unit 102 shall be used solely for the care of the plaintiff and for her sole benefit until further court order.

[para50] I am providing a copy of these reasons to the Office of the Public Guardian and Trustee for any action that office may wish to take in the circumstances of this case.

B. WRIGHT J.

CBR# 175

Marisa Marafioti (applicant/appellant), and Metropolitan Toronto Condominium Corporation No. 775 (respondent/respondent in appeal) And between Metropolitan Toronto Condominium Corporation No. 775, Metropolitan Toronto Condominium Corporation No. 769 and Metropolitan Toronto Condominium Corporation No. 785 (applicants/respondents in appeal), and Marisa Marafioti and Frank Marafioti (respondents/appellants)

Docket No. C19279

Ontario Court of Appeal Toronto, Ontario Morden A.C.J.O., Weiler and Goudge J.J.A. Heard: April 30, 1997. Judgment: May 2, 1997.

Appeal by the defendant unit holders from a decision finding that they breached a condominium rule by erecting a deck.

HELD: Appeal dismissed. The appellants breached Rule 21 and the judge below was justified in exercising her discretion and granting the respondent the relief requested.

Statutes, Regulations and Rules Cited: Condominium Act, R.S.O. 1990, c. C.26, s. 31(4).

Counsel: J. Dannial E.S. Baker, for the appellants. Andrea M. Habas, for the respondents.

The following judgment was delivered by [para1] THE COURT (endorsement):-- In our view, both appellants were in breach of the proposed Rule 21 of the condominium, the relevant portion of which is as follows:

No building or structure ... shall be erected ... placed, located, kept or maintained on the common elements.

[para2] Accordingly, the appellants were in breach of s. 31(4) of the Condominium Act, R.S.O. 1990, c. C.26. In these circumstances, it was clearly open to Greer J. to exercise her discretion under s. 49 and grant the relief requested by the respondent. Dr. Marafioti was directly involved in the agreement which breached the rule, as well as the declaration, and there was a proper basis for the order being made against both him and his wife. We agree with Greer J. that the decision in this case is governed by Corporation No. 279 v. Rochon et al. (1987), 44 R.P.R. 228 (Ont. C.A.).

[para3] We also agree with Greer J. that the respondent did not acquiesce in the presence of the deck.

[para4] The appeal is dismissed with costs including the costs of the motion before Labrosse J., fixed in the amount of \$6,000.

MORDEN A.C.J.O. WEILER J.A. GOUDGE J.A.

CBR# 178

Marika Property Management Inc. and Mary Khan, plaintiffs, and Santi Cappuccitti, defendant

Court File No. 95-CQ-64364

Ontario Court of Justice (General Division) Brampton, Ontario MacKenzie J. January 22, 1997.

Counsel: D.A.J. D'Oliviera for the plaintiffs. No one appearing for the defendant.

[para1] MacKENZIE J.:-- The plaintiffs in this libel action are Marika Property Management Inc., an Ontario business corporation engaged in the business of property management on behalf of condominium corporations, and Mary Khan, a businesswoman who is the principal of such corporation ("Khan"). The defendant is the originator and publisher of documents being a form of a newsletter described as the Woodland Manor Monitor ("the Monitor").

[para2] The plaintiffs claim that the publication of these writings contained material and information which defamed the plaintiffs and the plaintiffs accordingly seek damages against the defendant in respect of such conduct. The defendant failed to defend this action, was noted in default and in the result, he is deemed to admit the truth of all allegations of fact made in the statement of claim, pursuant to the Rules of Civil Practice, Rule 19.02(1)(a).

[para3] Pursuant to the provisions of such Rule, the defendant is deemed to admit the following:

1. He was the author and publisher of the Monitor;
2. That in or about the month of January, 1995, he published in the Monitor the following words: (A) "Why High Cable Rates?

Cable subscribers will be paying a whopping \$60.87 a month at P.C.C. 143 without a choice in the matter! Cable subscribers will have their present contract of \$22.76 a month canceled [sic] and a new deal signed for \$38.11 a month by the board of directors of P.C.C. 143.

The \$15.35 increase is not necessary. The board of directors with the support of Marika Property Management are refusing the soon to be announced Rogers Cable group rate of \$25.82 per month, and signing a new contract for an individual subscription rate that will add \$15.35 a moth to their monthly cost.

Owners at Woodland Manor will not get a reduction of the monthly maintenance fee equal to the \$22.76 a month group rate for cable service now paid. The new \$38.11 rate charge will be in addition to the \$22.76 making the new cost to householders a hard to accept \$60.87 a month!

The individual subscriber rate will permit individual subscribers to cancel cable service to their unit. Without the option of erecting a TV antenna or a satellite dish, the owner who refuses the extra charges will be shut out of the customary television service.

Mary Khan of Marika Property Management has been hinting at the rate change for many months without making a commitment on paper. Above the strident complaints of owners who attended the past public meeting, the new deal is here without an explanation.

Individual owners are organizing a protest to stop the ever increasing costs of living at the Woodland Manor."

(B) "Double Jeopardy Getting a cheque out of P.C.C. No. 143 takes years! The board of directors of P.C.C. No. 143 owed one of the unit owners the deductible for an insurance damage claim. After repeated requests, the board of directors discussed the debt but never got around to issuing the cheque and mailing it out.

Repeated requests to Mary Khan of Marika Property Management and to Ms. Gina Haltzworth the P.C.C. No. 143 treasurer received no response. The only avenue was to take it to Ontario General Division Court.

On November 17th, 1994, Judge Watson decided that half way between the \$1,000.00 claimed by the unit owner and the \$500.00 offered by the board of directors was fair, and signed a judgment for \$750.00. He did not attach an order for costs because the corporation lawyer was far costlier than the self representation by the condominium owner. The bank account of P.C.C. No. 143 was garnisheed and a cheque was promptly remitted to Ontario General Division Court in Mississauga.

In response to this judgment, Mary Khan of Marika Property Management and the board of directors want authority to change the By-Laws to permit the board to charge the cost of legal litigation back to any owner who takes the board to court. The owner will have to pay twice even when he is in the right."

(C) "Mortgage Mystery

The recently begun repairs and changes to the Woodland Manor have been costly and of the type that will impress real estate salesmen. An adequate explanation of the cost of the work and the mortgage to pay for it has never been put on paper for the information of the owners of P.C.C. 143. The tragedy is that the work was started before the mortgage had been applied for. Mary Khan of Marika Property Management had to send out a letter telling the owners of P.C.C. No. 143 that the bank wanted proof that the mortgage was authorized by 80% of the owners. There is no evidence available that this was done honestly.

Mary Khan of Marika Property Management is quick to threaten the owners of P.C.C. No. 143 that without the mortgage, each of the owners would have to pay a special assessment as high as \$8,000.00.

If the Mystery of the Woodland Mortgage is never revealed, many of the owners of P.C.C. No. 143 will be interested to learn it."

(D) "Phony Security

The best way to sell security is to scare people. Instead of shutting doors, leave them open to intruders. This is what seems to be the case at P.C.C. No. 143.

The doors of lobby A and B have been closed at 10:00 p.m. each evening for many years this forced all entrance to the building at lobby B which had the watchful television camera taping all entries and exits. Marika Property Management discontinued this practice. The additional traffic opportunity was felt immediately to the disadvantage of the owners of P.C.C. No. 143.

The solution was provided by Mary Khan of Marika Property Management with additional cameras, a new lock system and a security person patrolling at night. It seems an expensive alternative to locking four doors each night. The board of directors accepted the suggestion and has paid for it handsomely.

The quality of security is so low that a gentle push of the hand will get you past the garage doors every time. This is not the kind of electronic security the board of directors has paid for, or is it?"

3. That in or about the month of April, 1995, in a further issue of the Monitor, he published the following words:

(A) "Liens Are Extra Money

A recent notice sent out by Don Francis says that the board of directors of P.C.C. 143 has failed to collect \$56,308.00 of maintenance fees from unit owners. This would provide a legitimate reason to put a lien on a unit.

On closer inspection, many of the liens placed on units are of a nuisance nature. Bad bookkeeping has landed the board of directors in court because they would not believe the canceled [sic] cheques proffered by the unit owner to explain the error.

When you register 85 liens in a 175 unit complex, you have forced a lot of homeowners into power of sale situations.

The Ontario Condominium Act permits the placement of a lien on the second day of the month. If you are one day late, you can be liened. For a \$50.00 fee, Mary Khan of Marika Property management will charge you a \$300.00 fee for placing a lien on your property. A neat \$250.00 profit on each. When you do it 85 times, it gets you \$14,500.00 extra!

The tragedy is that one of the favourite lien times are around Christmas time."

4. That the words in paragraphs 2 and 3 above referred to and were understood to refer to the plaintiffs;

5. That the publication of these words resulted in injury to the credit, reputation and business of the plaintiffs and brought them into ridicule and contempt;

6. That the defendant published the words in question out of malice and spite towards the plaintiffs.

[para4] The case was called for hearing before me on the 14th of January, 1997, as an assessment for damages. In the circumstances of default by the defendant, I proceeded to deal with the case by proceeding to hearing of the claim with oral evidence being presented by the plaintiff pursuant to Rule 19.05(3). As a result of the oral evidence received at such hearing, the plaintiff has established on a balance of probabilities the following facts:

1. The defendant persisted in publishing and distributing defamatory materials in the so-called newsletters despite written warnings contained in letters by counsel for the plaintiffs;

2. That the defendant had competed with the plaintiffs to bid and obtain the property management contract in respect of Peel Condominium Corporation No. 143 (Woodland Manor) of the January, 1995 newsletter;

3. The defendant had verbally expressed to an employee of the plaintiff corporation an attitude of personal animosity and malice towards Mary Khan;

4. That notwithstanding a purported written retraction by the defendant of the libelous statements in the January and April, 1995 issues of the Monitor, the defendant published after the issuance of the Statement of Claim a further issue which was defamatory of the plaintiffs;

5. The defendant published and caused to be distributed the Monitor not only to the unit owners of the Woodland Manor Condominium (No. PCC 143) but also to unit owners of another condominium corporation managed by the plaintiffs and to the Association of Condominium Managers of Ontario;

6. As a result of such publication and distribution, Khan received numerous inquiries not only from unit holders of both the condominium corporations but also from the management of the Association of Condominium Managers of Ontario, the thrust of which inquiries went to the defendant's allegations of incompetence and lack of integrity on the part of the plaintiffs;

7. A 5-year management contract of the plaintiff corporation with Woodland Manor Peel Condominium Corporation No. 143 was terminated in December of 1996, some 3 years prior to its expiry date, and that the billings lost as a result of such termination were approximately \$168,000.00 on the basis of gross monthly billings of \$4,000.00 a month, with a net pre-tax profit of \$50,400.00 over the unexpired term of the contract.

Issues

[para5]

1. Whether the published writings by the defendant constitute a libel of the plaintiffs.

2. If so, what damages flow to the plaintiffs from such conduct.

The Law

[para6] A broad statement of the test to be utilized in determining whether words are capable of a defamatory meaning is that defamation is the dissemination of information that tarnishes the good name of a person, causing his or her standing in the community to be impaired or causing him or her to be pitied. The focus of defamation is that the meaning conveyed by the subject words should hurt or harm the reputation of the person being disparaged, having regard to the circumstances of the communication. In determining the effect of the allegedly defamatory words, the courts have adopted as a test the natural and ordinary meaning which would be reasonably attributed to such words by ordinary sensible people without special knowledge and who are neither unusually suspicious nor unusually naive (*Lewis v. Daily Telegraph*, [1964] A.C. 234, at page 259).

[para7] I am satisfied that the natural and ordinary meaning that is reasonably attributable to the words published by the defendant hurts the reputation of both plaintiffs thereby causing harm to reputations for honest dealings and integrity, particularly in the business community in which both plaintiffs operate. I am further satisfied that the defendant acted in his publication of the defamatory words out of malice and spite against the plaintiffs and particularly Khan. I therefore find that the writings published constitute a libel of the plaintiffs.

[para8] I now turn to the issue of quantification of damages.

[para9] A useful summary of the nature of damages in defamation actions can be found in *The Law of Defamation in Canada* (2nd ed.) (1994), R. Brown, in Vol. 2, page 25-2:

In every action for libel, and in actions for slander per se, damages are presumed. Actual injury does not have to be proved. Where the slander is not actionable per se, a plaintiff can recover only if special damages are shown. The award may be compensatory or, in appropriate cases, punitive. Compensatory damages are either general or special. In addition to providing compensation for the injury to the plaintiff's reputation, they may include such injuries as mental suffering, anguish, embarrassment, humiliation in any actual or anticipated pecuniary loss or social disadvantage. In assessing damages the court may consider the character and conduct of both plaintiff and defendant, together with the nature and character of the defamatory publication, the extent of its circulation and the principles under which it was made.

[para10] Compensatory damages are awarded primarily to compensate a plaintiff for the harm caused to his or her reputation and further for any hurt or injured feelings that the publication of the libel may have caused. General damages arise by inference of law and require neither special allegation nor proof. However, actual or special damages do not arise by inference of law and, as they are intended to compensate the plaintiff for the loss suffered as a natural and approximate result of the defamatory words, they must be proven at trial.

[para11] The essence of aggravated damages was stated in the majority judgment in *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130, per Cory J., page 1205, as follows:

Aggravated damages may be awarded in circumstances where the defendants' conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety arising from the libellous [defamatory] statement...

These damages take into account the additional harm caused to the plaintiff's feelings by the defendant's outrageous and malicious conduct.

[para12] It should be noted that like general damages or special damages, aggravated damages being compensatory in nature require consideration by the trier of the conduct of the defendant prior to the publication of the libel and continuing through to the conclusion of trial. If aggravated damages are to be awarded, there must be a finding that the defendant was motivated by actual malice which increase the plaintiff's injuries or the mental distress and humiliation of the plaintiff arising from the libellous conduct.

[para13] The nature of punitive damages was also canvassed in *Hill v. Church of Scientology*, supra, per Cory J. at page 1208:

Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

[para14] Applying the foregoing principles to the facts of the present case, I assess the plaintiffs' damages as follows:

1. The plaintiffs are awarded general damages in the amount of \$65,000.00, comprising actual damages arising out of lost profits from the termination of the corporate plaintiff's contract with Peel Condominium Corporation No. 143 in the sum of \$45,000.00 (after deducting a contingency factor of 10% of the established loss of \$50,000.00) and the sum of \$20,000.00 for injury and hurt to the reputation of both plaintiffs with respect to business integrity and honesty;

2. The plaintiffs are awarded the sum of \$20,000.00 as aggravated damages on the basis of the defendant's actual malice and his republication of the libel, both in the context of a purported retraction and apology and of further republication to the Association representing the plaintiff's business peers. The court, however, is not persuaded that the defendant's conduct is of such an egregiously outrageous nature so as to warrant the assessment of punitive damages, having regard to the test in *Walker v. CFTO Ltd.* (1987), 59 O.R. (2d) 104, (C.A.).

[para15] The plaintiffs shall have their costs herein which I hereby fix in the amount of \$8,500.00, inclusive of disbursement and applicable taxes.

MacKENZIE J.

CBR# 110

Durham Condominium Corporation No. 99, applicant, and Earl Michael Brousseau and Laurie Jane Allen, respondents

File No. 68691/95

Ontario Court of Justice (General Division) D.S. Ferguson J. November 25, 1996.

Counsel: G.F. Vella, for the applicant. J.M. Wortzman, for the respondents.

[para1] D.S. FERGUSON J.:-- There are some troubling features in the evidence.

[para2] 1. Section 38 of the Condominium Act, R.S.O. chap. C.26 appears to mandate the only procedure to be followed to determine whether or not an addition, alteration or improvement to or renovation of the common elements made be made. That section requires a vote of the unit owners.

[para3] The provisions of Article IV of the Declaration of the applicant condominium corporation appear to conflict with that statutory requirement. Section 1(d) states that no change may be made to the common elements except with the prior written consent of the board of the corporation. Section 2(c) states that no change may be made to an installation on the common elements without the prior consent of the board and further states that this consent shall be in the sole and unfettered discretion of the board.

[para4] Neither party seeks a declaration as to the validity of those provisions which purport to govern the process for determining whether or not the Respondent will be allowed to demolish his deck and build a replacement.

[para5] 2. The parties disagree as to whether the vote required by s. 38 of the Act is that of 80% of the owners or only a majority of owners. This depends on whether or not the replacement of the deck is a "substantial" change. Both parties have asked me to determine on the facts of the case whether or not the change is "substantial". However, Article III, s. 4(b) of the Declaration provides that the board has the absolute discretion to determine this issue. There is no evidence as to whether or not the board has made this determination but it appears it has not done so.

[para6] 3. This application is apparently brought as the result of a decision of the board. There is no evidence that the unit owners were consulted. The board is asking the court to exercise its discretion under s. 49(2) of the Act by making an order that the Respondent is to demolish his replacement deck which would then leave him in the position of applying through the board for a vote of the unit holders to determine whether or not he will be allowed to build a replacement deck. If the court were to accede to this request and subsequently the unit holders voted to permit the construction of the replacement deck this would be very prejudicial to the Respondent. It seems to me that in all the circumstances of this case the outcome of the vote of the unit holders is a significant factor which the court should know before it exercises its discretion. I also note the Respondent has taken the position in paragraph 33 of his affidavit of February 14, 1996 that this matter should be decided by a vote of the unit owners and has offered to pay for all the costs of the vote. His counsel has provided written confirmation of that proposal. If a vote were held and the Respondent did not abide by the vote or refused to pay the cost then the court could be asked to impose a sanction.

[para7] I conclude it is premature to determine this matter and I am going to adjourn it sine die to be brought on by either party on 7 days notice.

[para8] If the board holds a vote then the board may bring this matter on again on the basis of additional material indicating the outcome of the vote. If the board does not hold a vote within 3 months then the Respondent may bring this matter on again seeking a dismissal of the Application. I will hear submissions on costs if and when the application is brought on again.

D.S. FERGUSON J.

CBR# 229

Passmore Gates Developments Ltd., plaintiff/defendants by counterclaim, and Yim Chee Chung, Kam Lee and Cammy Chan, defendants/plaintiffs by counterclaim, and Kevin Lo and Sincere Realty Inc., third parties

File 57054/90"Q"(B)

Ontario Court of Justice (General Division) Non-Jury - Toronto, Ontario O'Brien J. Heard: April 22-26, 29, 30, May 1 and 6-10, 1996. Judgment: May 30, 1996. Sale of land -- Agreement to purchase -- Breach, by purchaser -- Defences -- Misrepresentation.

Counsel: Arleen Huggins, for the plaintiff. James Adamson, for the defendants. D.H. Rogers, Q.C. and Caspar Sinnige, for the third parties.

[para1] O'BRIEN J.:-- This case arises from an abortive real estate transaction which was entered into in March of 1989 and which ultimately failed to close in August 1990. The plaintiff Passmore Gates Development Ltd. ("Passmore"), the vendor, seeks damages from the defendant Yim Chee Chung ("Chung") the purchaser. Chung counterclaims for the return of her deposit and both Chung and Passmore claim over against one of the real estate agents involved, Kevin Lo ("Lo"), an employee of Sincere Realty ("Sincere").

[para2] The purchase involved eleven units in a commercial condominium development to be constructed in the northeast part of Scarborough which is primarily an industrial area. Chung purchased all units in trust. Nine of those units were for herself, one each was for the defendants Lee and Chan. The claims against those defendants were settled. This litigation involved the nine units Chung purchased for herself. The condominium complex was completed. Chung refused to close the transaction.

[para3] Chung alleges that she refused to complete the transaction because of misrepresentations made to her by Lo. The alleged misrepresentation was that although the property was in an area zoned as light industrial it was possible for her to operate a Chinese restaurant and retail outlets without zoning amendment.

[para4] Passmore's position is that Lo was acting solely as Chung's agent. It denies Lo made a misrepresentation, but if he did, he did not do so as Passmore's agent.

[para5] Lo and Passmore also allege Chung knew the property was zoned light industrial, that she purchased the units on speculation at the height of the Toronto area real estate boom and only advanced the restaurant theory when the real estate market commenced to fall in the Spring and Summer of 1990.

Issues

(1) Alleged misrepresentation

[para6] To a large extent, this involves credibility findings as to Chung's intentions, and representations she claims Lo made.

[para7] There were issues of whether Lo was agent for Passmore or Chung, or perhaps a dual agent. In view of the conclusions I have reached on credibility it is unnecessary to deal with those arguments.

(2) Lo's duty:

(a) to "qualify" Chung as a purchaser. That is, to determine her intentions, needs and abilities to complete the transaction;

(b) to advise Chung of the need to obtain legal advice before signing the purchase offer.

(3) The legal effect of clauses in the signed offer dealing with liquidated damages and penalties.

[para8] It is alleged the clauses limit damages to the deposits.

Background

The Project and the Sale Arrangements

[para9] The units in question were to be built as the second of a two-phase construction project. There were twenty units in each of two sections, all on ground level. By Spring 1989 most of the first section had been sold and Passmore planned to sell and construct the second phase.

[para10] The evidence indicates the real estate market in the Toronto area had been extremely good for a number of years and reached its peak in early 1989. It started into a very significant decline in the summer of 1990.

[para11] Passmore entered into an arrangement with Aceland Realty Inc. ("Aceland"), whereby that company was to be Passmore's exclusive agent to market the development and was to receive 2 1/2% commission on the sale of any unit. It was understood that Aceland could enter into agreements to co-operate with other real estate agents to sell units. In this case Aceland did sign such an agreement with Sincere Realty, (Lo's employer), whereby Sincere was to receive a 3% commission on all sales to Chung. It was understood by all that Passmore would eventually pay that commission.

[para12] Chung's offer of March 13, 1989 was accepted by Passmore that day. The price was one million, eight hundred twelve thousand, nine hundred and ninety eight dollars (\$1,812,998.00), based on a price of \$115.00 per square foot. The offer provided for an occupancy and closing date of January 18, 1990. The closing date was extended by Passmore during construction, as permitted in the agreement, and was eventually scheduled on July 27, 1990. It was then extended, at Chung's request, to July 31. Chung agreed to pay \$60,000. for that four-day extension. It was extended again to August 2, but did not close.

[para13] Chung changed solicitors a number of times during that period. In July her solicitors were Fraser & Beatty. On July 31 that firm arranged for the final extension to August 2. Fraser & Beatty then advised Passmore's lawyer that Del Zotto Zorzi had been retained by Chung. On August 2, Del Zotto Zorzi advised they were no longer acting on Chung's behalf.

[para14] Passmore's solicitors demanded Chung cure her default under the purchase agreement. She did not.

[para15] There was a subsequent meeting between Passmore and Chung sometime in late August or September of 1990, in an unsuccessful attempt to resolve the matter.

Chung's Background

[para16] This is of significance in view of some of the issues raised in this litigation. Chung is now 43 years old. She had a grade 9 education in Communist China and then worked for 2 1/2 years as a sewing machine operator in Hong Kong. She then came to Canada in 1973 and obtained work as a sewing machine operator. In 1979 she started her own business manufacturing ladies wear. She had three or four employees and had total sales of \$16,000 that year. By 1989 she had formed Ling May Fashion Contractors Inc., she had eighty to ninety employees and sales of over two million dollars, with estimated profits of 10-25%. She operated her business on the 3rd and 4th floors of a building on Spadina Avenue, with total floor space of approximately 20,000 square feet. The annual rental was approximately \$35,000.

[para17] In the years from 1983 to 1988 she purchased real estate in Toronto. By 1988 she had an equity of over one million dollars in those properties which consisted of residential, commercial and mixed residential-commercial.

[para18] Chung separated from her husband in 1979 and is the sole operator of her clothing business. She makes all decisions connected with real estate purchases.

[para19] Chung has slight difficulty speaking English but it is not a significant problem. She impressed me as an extremely intelligent and able business person.

[para20] By way of comparison, Lo is 56 years old. He came to Canada from Hong Kong in 1966. He has been a real estate agent since 1975. He has much more difficulty with English than Chung and impressed me as much less able than Chung. His knowledge of real estate matters could be described as basic or even rudimentary.

[para21] Chung had used the legal services of Kai Wing Tsang ("Tsang"), a Toronto solicitor who speaks both Cantonese ("Chung's dialect") and English. Tsang had acted for Chung since early in the 1980's. Chung did not obtain advice from Tsang prior to signing offers to purchase real estate.

[para22] Tsang testified at trial. In cross-examination he stated he believed he advised Chung to bring in offers to purchase before she signed them but said "she would not listen, she trusts few people".

[para23] During her cross-examination Chung conceded that as a business person she liked to "keep secret about her plans" and that was one of the reasons she signed purchase offers in trust.

[para24] She denied any specific accounting or legal advice in connection with the Passmore transaction but did admit that prior to that transaction she obtained accounting advice that when she bought real estate she should put the title into a separate company, and she had advice from her solicitor that he had numbered companies available to take title at the appropriate time.

[para25] In December 1988 Chung signed an offer to purchase 49.4 acres of farm land near Lake Simcoe in Innisfil township. Her plan was to develop it for house building and perhaps to have a small store or restaurant. Tsang, acting as her solicitor at that time, discovered the zoning did not permit development and Chung refused to close the transaction. She relied on a condition in the offer making it conditional on her being able to arrange satisfactory financing. Lo was her agent in that transaction and he had inserted that condition in the offer.

[para26] Chung's evidence in cross-examination on that point was interesting. She was evasive. She admitted at one point that Tsang explained to her that she could not develop the land and that was the reason she refused to complete the deal. She admitted she "said" she could not obtain financing but she did have financing available if she wanted it. At a later point, she claimed she did not know how Tsang got her out of the deal and she did not know how he was going to get her out of the transaction. Later in her cross-examination she suggested Tsang got her out by saying she could not arrange financing but he did that without her instructions.

[para27] Later, she said it was "okay for lawyer to say something to get out of deal by saying something not true" and she did not care how he got her out of the deal.

[para28] At the same point in her cross-examination she conceded that she did not think there was any way to get out of the Passmore transaction other than to blame Lo.

[para29] She had entered into the Passmore transaction shortly after the Innisfil transaction and admitted if she had not bought Passmore she would have bought something else.

[para30] In connection with the Passmore transaction Chung said she received advice about real estate from a friend by the name of Wong. She had known him for a number of years and he ran a business in the same building on Spadina in which Chung ran her operation.

[para31] Wong had purchased an industrial condominium in another development a very short distance from the Passmore development. Chung recalled Wong advised her to buy into the Passmore development quickly before it became public knowledge and if she did so, she would be able to get a better price.

[para32] Chung agreed she was interested in purchasing quickly and had not even gone to the site to look at the area before signing the offer.

(1) The Alleged Misrepresentation

(a) Chung's Evidence

[para33] Chung alleges that although Lo did tell her the property was in an area zoned light industrial he also told her that restaurant use was permitted and that it would be possible to develop the property in the same way that Mandarin Palace and New World property had been developed. Those latter areas are Chinese restaurant/retail emporiums located in North York near the Steeles Ave. Victoria Park intersection. They are about 7-8 kilometres from the Passmore property which is in Scarborough.

[para34] Chung claimed she had the idea of developing a restaurant/emporium from about 1986. She was uncertain as to whether she would have a buffet type restaurant or a food court complex.

[para35] She testified she had the idea of offering participation in such an investment to Hong Kong residents who were anxious to immigrate to Canada as those making investments had preferred immigration status.

[para36] She claimed that when talking to Lo, before there was any discussion of the Passmore project she "direct or indirect" told him she wanted to have a food court and that "direct or indirect" Lo showed her a number of properties which might be suitable for such a project.

[para37] Chung first heard of the Passmore project from Wong who had obtained a brochure describing it after purchasing units in a nearby project.

[para38] Chung recalled three meetings with Lo in which the purchase was discussed. There was some confusion as to exactly what occurred at each meeting.

[para39] At the first meeting, Lo came to her office at Wong's invitation. Chung had looked at the advertising brochure Wong obtained. She claimed she told Lo she wanted to open a restaurant and other stores in that property. Lo told her that although it was zoned light industrial the zoning permitted restaurants like New World or Mandarin Palace. Lo told her it was a case of "first come first served". There was a brief discussion of the builder's asking price of \$125.00 per square foot. Chung asked Lo to try for a lower price and to make sure nobody else was planning a restaurant in the development.

[para40] Chung was uncertain whether Lo phoned, or told her in person the builder would not accept a price of less than \$115.00 per square foot, but recalled there was a meeting in which price was discussed and she decided which units she wanted by looking at a sketch of the proposed construction. She recalled some discussion about not putting the walls up in some units. [para41] At the third meeting, Lo brought the purchase offer. He told her it was the builder's form and was a standard agreement. He discussed the total price, the arrangements for down payment, further deposit payments requested, and discussed the number of units to be purchased, and the financing required to complete. Chung believed her friend and employee Cammy Chan was present during part of that meeting. Chan then discussed purchasing a unit. Chung eventually purchased a unit in trust for Chan.

[para42] The purchase agreement consists of three pages with three schedules and totals eighteen pages. Chung claimed Lo did not go through the agreement in detail but did have her initial every page.

[para43] Chung admitted signing an acknowledgement in which she acknowledged receiving a copy of a zoning by-law indicating the permitted uses of the land and that the zoning was industrial (shown as (M)).

[para44] There was confusion on the point, but when testifying in chief, Chung claimed she could not remember receiving an extract of the by-law. During cross-examination she admitted she must have received an extract of the by-law as she did have a copy of it. She admitted Lo told her the zoning was industrial and she knew what that meant. I conclude Chung did receive an extract of the by-law (filed as part of Exhibit 8 at trial).

(b) Lo's Evidence

[para45] Lo claimed he sold Wong three units in a nearby commercial condominium building. One unit for Wong and two units for a friend of Wong's from Hong Kong. A short time later, Wong phoned and told Lo Chung wanted to buy ten units in the same condominium building and wanted the units to be together. Lo discovered that that project was almost sold out. He made some inquiries and discovered the Passmore project was very close and had units available. Lo got a brochure and gave it to Wong. About a week later Wong phoned and asked Lo to visit Chung's office, which he did. Wong was also present. There was a brief discussion in which Lo asked Chung if she was ready to buy and which units she wanted (referring to a sketch in the brochure). Chung picked out the units she wanted. There was another brief discussion about price and Lo suggested making an offer at \$105.00 per square foot.

[para46] Lo recalled there was no discussion about what use Chung wanted the make of the units. He assumed because Wong had purchased in an industrial condominium that Chung was also familiar with the area.

[para47] Following this Lo discussed prices with Leung, an agent with Aceland. Lo determined that the builder would not take less than \$115.00 per square foot. Lo obtained offer forms from Leung, had them copied and took them to Chung for signing. At that meeting, Lo claimed he read over the first three pages of the offer in English and then in Chinese. These pages contained the numbers of the units, the price, the deposits, references to the mortgage required to complete, and closing and occupancy dates.

[para48] Lo claimed he also had Chung sign the zoning acknowledgement (which consisted of three lines), and read to her the first two paragraphs of the attached zoning extract which defined industrial and general industrial uses. He claimed he read those to her in English and then Chinese. Lo claimed he gave Chung a copy of the zoning extract.

[para49] Lo was adamant that there was no suggestion from Wong or Chung that Chung wanted to use the property for a restaurant. The first he heard of that was in early Summer when he, Wong and Chung were eating at a Chinese restaurant. He testified Chung said she was thinking of using her units for a that purpose. Lo claimed he was surprised. He recalled saying that if she was serious she could apply for re-zoning and did mention that he knew the owner of the New World property and that person told him he had started out with a small restaurant and had expanded. The property was in an area zoned light industrial.

[para50] Lo claimed he had some discussion with Chung about opening a cafeteria for her workers if she was going to move her manufacturing from Spadina Avenue.

[para51] When cross-examined, Lo claimed he did not ask Chung what she proposed to do with the Passmore property. He thought she might be considering moving her Spadina Avenue business there or she was buying it as an investment.

[para52] He claimed he did not discuss her proposed use because Chung was a successful business person and he respected her business ability. He had been showing Chung properties since about mid-1988. He testified that when he was showing her properties he - "did not push her, I let her think and decide if she want to buy. I make up offer- she like she buy, she no like she no buy."

[para53] He claimed he relied on this past experience in connection with Passmore.

(c) Findings On Credibility

[para54] The major evidence supporting Chung's claim that she purchased Passmore with the intention of opening a restaurant complex was given by her friend and former employee Kam Lee. Lee was working in Chung's plant at the time Chung purchased. Lee recalled there was a lot of discussion among the factory workers that Chung, "the boss" was going to buy a mall. Lee testified she asked Chung, who confirmed she was, and also told Lee she was going to open a restaurant complex.

[para55] Lee's evidence on this point was so supportive it indicated to me she was biased. She testified that she asked Chung many times what Chung proposed to do with the property. She claimed she followed Chung around the plant for a day or two and in cross-examination claimed she must have asked Chung her intentions more than ten times in a day or two.

[para56] When testifying Lee volunteered, whenever possible, that Chung told her she intended to open a restaurant. Lee gave such answers even when those answers were unresponsive to the questions asked.

[para57] Although Passmore's claim against Lee has been settled I conclude Lee was doing her utmost to help Chung with this claim. I place little reliance on Lee's evidence.

[para58] Upon completion of Chung's cross-examination I felt I could place little reliance on Chung's credibility. There were a number of serious contradictions in her testimony. On occasions she was evasive and there were instances I felt she was using language problems and failing memory to avoid damaging answers.

[para59] I will outline a few of the major contradictions. [para60] In cross-examination Chung admitted Lo told her the property was zoned industrial and she knew what that meant. She claimed Lo did not tell her if she wanted a restaurant like New World she would have to re-zone.

[para61] She was confronted with her examination for discovery in which she admitted she understood industrial zoning did not allow restaurant use unless the zoning was amended in some way.

[para62] There was an alleged problem with mistranslation of the discovery evidence on this point as it was given with the assistance of a Cantonese interpreter. A Cantonese language expert was called as a trial witness. He listened to a tape recording of the discovery and testified he could not hear part of the answer which appeared on the discovery transcript. He did agree Chung said "Yes" when asked if she knew restaurant use required a zoning amendment.

[para63] At a further point in cross-examination Chung swore she did not know if her (proposed) restaurant got as big as New World she would have to re-zone. She was confronted with an affidavit she swore when resisting Passmore's motion for summary judgment. In that affidavit she "accepted" she knew if her restaurant ever reached the business volume of New World she would have to make an application for a zoning change.

[para64] She attempted to explain that inconsistency by blaming the lawyer who prepared the affidavit.

[para65] At the end of the exchange dealing with that issue she admitted when she bought the Passmore property she really hadn't made up her mind as to what she was going to do with it. She attempted to modify that admission in re-examination by stating she intended to operate a restaurant but hadn't made up her mind about running a buffet restaurant or a food court.

[para66] I was not impressed with that modification.

[para67] Her evidence relating to discussions with her solicitor Tsang was unsatisfactory. She claimed she either took the offer to him herself or perhaps Lo sent it to Tsang. She testified she discussed her intended use of the property as a restaurant with Tsang at a meeting about one month after the offer was signed. She believed Tsang had the offer, the acknowledgement and the zoning extract. She testified Tsang did not mention any potential zoning problem to her, that it was a problem he should have mentioned to her, and he was wrong in not doing so.

[para68] Tsang testified. I found him to be credible. He recalled the offer arrived at his office but it was merely deposited and "stayed there a long time as the property was not built". Tsang recalled he received the offer much later than the signing date of March 1989 and discussions about potential zoning problems occurred much later in 1989.

[para69] There was considerable evidence as to when Chung realized there was a zoning problem. She discussed the matter with another friend, Bill Yee, whom she knew through their joint political activity. He suggested there was a zoning problem. Chung felt he "was crazy" but eventually went with him to see David Smith a solicitor and politically active person. There were meetings at Smith's office when the zoning problems were discussed and Chung realized there was a very real problem with the zoning if she wanted to have a restaurant.

[para70] After receiving this information from Smith she contacted Henry Chu an architect whom she believed had very good political connections with some of the Scarborough politicians. She spoke to Chu sometime in July or August of 1990. He told her he would need a few days to look into the matter. Chung agreed to pay \$60,000 to Passmore for a five-day extension of the closing deadline to see what Chu could do for her. He eventually advised restaurant use was not permitted and in addition there was a problem with insufficient parking. He advised a zoning change was required and it would be expensive, lengthy and unlikely to succeed.

[para71] Tsang testified that when Chung realized there was a zoning problem she transferred the file to David Smith some time in February 1990. Tsang vaguely recalled some discussions with Chung in which she discussed running a restaurant but felt those conversations were probably late in 1989.

[para72] Tsang also testified he had discussed zoning issues with Chung prior to March 1989 in connection with a purchase she had made near Niagara Falls.

[para73] There was evidence relating to two tape recorded conversations Chung secretly made. Neither were disclosed on her affidavit of documents and production although she claimed she had given them both to the counsel then acting for her.

[para74] The first was of a phone conversation she had with Lo and the other was made at a meeting she had with representatives of Passmore when attempting to settle this dispute after her refusal to complete. Both recordings were made some time in August or September 1990. She purchased separate machines from Radio Shack for the purpose of making the two tape recordings, one for telephone use, the other a small unit she placed in her pocket.

[para75] Neither recording really assisted Chung's case. The discussion with Lo was as consistent with his claim that he discussed possible zoning changes and restaurant use with Chung well after she signed the purchase offer and with a view to helping her, as it was with Chung's allegations of misrepresentation.

[para76] Lo said nothing which confirmed Chung's claim that he misrepresented the matter prior to her signing the offer. I found this of some significance as Chung obviously was trying to obtain such an admission from him during the phone conversation.

[para77] The taped conversations with Passmore were mainly with a Mr. Fialkov one of the two persons running Passmore. In essence, Fialkov told Chung she had to close or be sued and while he would assist her where possible, he took the position that if Chung had a problem, it was with Lo, not Passmore.

[para78] On her examination for discovery in March 1992 Chung indicated she had the tape recording of Lo's phone conversation. She was specifically asked if she had taped any other person in connection with the case and denied doing so. Chung attempted to explain this obvious inconsistent answer by claiming confusion over phone tapes and tapes of conversations made person to person. I found this explanation completely unconvincing.

[para79] I conclude Chung was not a credible witness. Where her evidence conflicts with Lo I prefer that of Lo. [para80] I am not persuaded Chung had a definite intention to operate a restaurant complex at the Passmore location when she signed the purchase offer. I conclude she did not mention any such intent to Lo when discussing the purchase nor did she discuss it with her solicitor Tsang until well after she signed the offer.

[para81] I conclude Chung made the purchase as an investment or speculation at the height of the Toronto real estate boom and refused to complete the transaction after it appeared there was a sudden substantial decline in that market. I note her admission which I have referred to above that she felt the only way she could get out of the deal was to blame Lo.

[para82] I conclude Lo did make statements to Chung about the possibility of running a restaurant and the zoning situation but none of those statements were made prior to Chung signing the offer and Chung did not rely on them when making her decision to purchase.

(2)(a) Lo's duty to "qualify" Chung as a purchaser [para83] Most of the argument made on this point was based on the assumption that when Chung signed the offer to purchase she intended to operate a restaurant. I have concluded she did not.

[para84] There is no dispute that a real estate agent may incur liability to his or her principal based on general agency and negligence principles if there is a failure to meet reasonable or generally accepted standards of skill and care.

[para85] In this case there was evidence from Alan Manchester testifying on behalf of Chung, and John Shorthill on behalf of Lo. Both are qualified real estate agents. Mr. Shorthill's qualifications are more impressive than Mr. Manchester's. Lo also testified on this issue.

[para86] All witnesses agreed there was a general duty on a real estate agent to "qualify" a prospective purchaser by inquiring as to the needs, wants and ability to pay.

[para87] Mr. Manchester's evidence on this point became somewhat esoteric as he was asked to give an opinion based on assumptions that a prospective purchaser had an intention to start a Chinese restaurant but would not disclose that purpose. On the conclusions I have reached his opinion is of little assistance.

[para88] Lo agreed with the general duty on an agent to qualify a purchaser. I have referred above to his opinion of Chung as an astute business person and his general approach when showing properties to her.

[para89] When pressed on the issue on cross-examination he added it was "Chung's business" if she wanted to tell him her purposes in buying real estate. He felt she had her own private business planning. She might have intended to purchase Passmore in order to move her plant from Spadina Avenue, perhaps to re-sell to other investors from Hong Kong or, as an investment or speculation. From his past experience with her, he knew she often had her own reasons for purchasing real estate. He knew she realized the zoning was industrial, that she had expressed interest in purchasing at least ten units in an industrial condominium complex and had considered the Passmore project before he talked to her.

[para90] Mr. Shorthill was asked to assume an agent was dealing with a prospective purchaser whom he knew from past experience, who had shown an interest in purchasing various types of real estate, including vacant land and farmland for investment, was successful in business with significant finances and operated a garment business occupying over 10,000 square feet and had requested an agent to visit, expressed an interest in purchasing a number of units in an industrial condominium to be built.

[para91] Mr. Shorthill testified that if an agent obtained such information nothing further was required by way of qualification of the purchaser.

[para92] I accept that opinion. I conclude there was no failure on Lo's part to qualify Chung as a purchaser.

(2)(b) Lo's duty to recommend Chung obtain legal advice

[para93] On this point Mr. Manchester testified the offer Chung signed was a vendor's form which required a lot of study and a real estate agent should have advised Chung to seek legal advice before signing it. [para94] In cross-examination he conceded he was primarily involved in residential sales and had not sold an industrial condominium in the last five years.

[para95] Mr. Shorthill's business was primarily in commercial real estate. He testified he was familiar with the form of the offer used in this case and it was a standard builder's form commonly used in the purchase of commercial condominiums.

[para96] He was asked to assume the agent reviewed the main points of the offer and had used an acknowledgement and extract of the applicable zoning in order to bring the zoning to the attention of a purchaser.

[para97] He referred to the code of ethics of the Toronto Real Estate Board which provides that an agent shall not dissuade parties to a transaction from seeking legal advice. He testified there was no positive duty to recommend such advice.

[para98] There is nothing raised in the pleadings in this case that the offer was unfair.

[para99] Lo also knew Chung had used solicitor Tsang in connection with various real estate transactions prior to Passmore.

[para100] Chung's counsel relied on statements contained in Real Estate Agent Law in Canada (2nd Ed.) at p. 223 where it is suggested brokers may be under an obligation (to parties to a real estate transaction) to recommend legal advice. The author referred to *Palmeri v. Littleton*, [1979] 7 B.L.R. 113 (B.C.S.C.) at p. 120.

[para101] In that decision Trainor J. accepted the opinion of a legal expert and concluded there were occasions where the complexity of the transaction and where there was an interim agreement requiring legal interpretation both vendor and purchaser should be represented and safe practice required the conveyancing solicitor to do his utmost to encourage the vendor to seek independent legal advice. [Emphasis added.]

[para102] I am not persuaded that authority supports the argument there is a general duty on a real estate agent to advise a purchaser to seek legal advice nor the facts in this case required Lo to recommend it.

(3) Liquidated Damage Clauses

[para103] Chung's counsel argued the relevant clauses in this agreement operated to limit damages recoverable to the deposit which totalled \$412,597.97.

[para104] He relied on the decision in *Fraser v. Van Nus* (1987), 14 B.C.L.R. (2d) 111 (B.C.C.A.). There the court held it to be a question of contract construction as to whether or not a stipulated sum of damages for contract breach limited the damages recoverable.

[para105] In that case however the relevant portion of the clause was:

The owner may at the owner's option cancel this agreement, and in such event the amount paid by the purchaser shall be absolutely forfeited to the owner by way of liquidated damages.

[para106] The court noted at p. 113:

The vendors elected to terminate the contract when the purchaser told them he would not perform. They did not protest that the purchaser must fulfil his bargain.

[para107] The portions of the applicable clauses dealing with purchaser's default in the Passmore agreement are contained in Schedule 'A' clause 20 and Schedule 'B' clause 11 as follows:

Schedule A:

The vendor in addition to any other remedies this agreement provides, may, at its option declare this Agreement and the Occupancy Agreement to be at an end and any deposit monies together with all monies paid for any extras or charges shall be retained by the vendor as its liquidated damages and not as penalty.

Schedule B:

The vendor retains all its rights and remedies under the Agreement against the Purchaser and shall be at liberty to sell the unit with or without re-entry and all monies previously paid by the Purchaser shall be retained as liquidated damages and not as penalty and the Purchaser shall be liable to the Vendor for its cost and expenses incurred to restore the Unit to its original condition.

[para108] In this case, when Chung failed to complete, Passmore's solicitors wrote numerous letters demanding the default (in failing to complete) be remedied and failing that, advised Passmore would avail itself of all its legal remedies.

[para109] It was suggested in argument that one of those letters, dated October 3, 1990, accepted Chung's repudiation and limited the right to damages. I do not accept that argument. That letter went on to state that a damage claim was asserted and enclosed a Statement of Claim in the action. That letter did no more than assert Passmore's claim as is stipulated in *Mayson v. Clouet*, [1924] A.C. 980 (H.L.) at 985:

The other party has his option. He may still treat the contract as existing and sue for specific performance; or he may elect to hold the contract as at an end - i.e. no longer binding on him - while retaining the right to sue for damages in respect of the breach committed.

[para110] I conclude the clauses in this case do not have the effect of restricting Passmore's right to recover damages for the full loss caused by Chung's breach.

[para111] I follow the approach taken in *Raymer v. Stratton Woods Holdings Ltd.* (1988), 65 O.R. (2d) 16 (C.A.) at p. 21. Finlayson J.A. noted:

To conclude that forfeiture of the deposit was intended to cover all damages for breach of contract is to give no effect whatsoever to the words 'in addition to and without prejudice to any other remedy available to the vendor'.

[para112] At the same page he noted there would be no need to refer to expenses if the deposit was intended to be exhaustive of the remedy for damages.

[para113] In my view the clauses in this contract are not intended to limit the damages recoverable. Damages

[para114] No evidence relating to damages was tendered on behalf of Chung and there were no submissions in argument related to the quantum of damages which were proved on behalf of Passmore.

[para115] There will therefore be judgment in favour of Passmore against Chung for the sum of \$1,377,885.95 as outlined in revised Exhibit 7 at trial.

[para116] That exhibit includes prejudgment interest on all amounts claimed with the exception of claims for prejudgment interest on real estate commission paid on resales of Units 26 to 29 inclusive and Unit 34. Those items are shown in paragraph 6 of that exhibit. There will be prejudgment interest on those amounts (which total \$30,363.00) at the rate prescribed in the Courts of Justice Act from the time each commission was paid on the relevant resale.

Conclusions

[para117] There will be judgment for Passmore against Chung for amounts indicated above in the main action. Chung's counterclaim and Third Party claim against Lo is dismissed.

[para118] Passmore's Third Party Claim against Lo is also dismissed.

[para119] I ask counsel to contact my secretary to arrange a convenient date to make submissions on costs and to deal with any mathematical errors which may have been made above.

O'BRIEN J.

CBR# 100

Gordon Cummins and Catherine Cummins, applicants (respondents in appeal), and Napev Construction Limited, respondent (appellant in appeal)

Court File No. V393/94

Ontario Court of Justice (General Division) Divisional Court Southey, Steele and Carnwath JJ. Heard: January 19, 1995. Judgment: March 22, 1995.

Counsel: James E. Lewis, Q.C., for the appellant. Michael A. Spears, for the respondents.

The judgment of the Court was delivered by

[para1] STEELE J.:-- This is an appeal from the decision of Dunn J. where in a well reasoned Judgment he ordered Napev Construction Limited (the vendor) to pay to Gordon Cummins and Catherine Cummins (the purchasers) an amount attributable to interest on money paid by them to the vendor relating to their purchase of a condominium unit.

[para2] The parties entered into a usual form condominium purchase agreement that included payments on signing and on occupancy with a provision for a "phantom mortgage" as part of the purchase price. Phantom mortgages have been held to be legal under section 51(6) of the Condominium Act, R.S.O. 1990 c. 26 (the Act). (See: Albrecht v. Opemoco Inc. (1991), 5 O.R. (3d) 385).

[para3] After the purchasers obtained occupancy and before the final closing date, the purchasers requested the vendor to accept payment of the balance of the phantom mortgage to reduce their monthly occupancy fees under section 51(6) of the Act. Their letter agreement contained the following two clauses:

2. The amount of \$129,000.00 received will be applied to the payment of your unit. As agreed by both parties, no interest is to be paid on this amount from receipt to date of final closing. At final closing, both parties will be subject to standard final adjustments including payment of interest on your initial three (3) deposits totalling \$18,000.00.

3. In addition to the foregoing, when the Closing Date (as defined in the Agreement of Purchase and Sale made between Gordon J. and Catherine V. Cummins, as Purchaser and Napev Construction Limited, as Vendor (the "Sale Agreement")) has been designated pursuant to Paragraph 5 of the Sale Agreement, the Vendor shall deliver to the Purchaser a registerable transfer for the Property (as defined in undated Occupancy Agreement made between the Purchaser and the Vendor) without payment of any further consideration.

[para4] Thereafter the vendor reduced the occupancy charge under section 51(6) accordingly.

[para5] Dunn J. found that the arrangement made eminent sense to both Parties. He found that the letter agreement was an amendment to the original agreement of purchase and sale under the Act and that the money paid by the purchasers fell within the description of trust monies in sections 53(1) and 53(3) of the Act. He also found that by virtue of section 60 of the Act, the parties could not contract out of the provisions of the Act. He noted the injustice of the result where the purchasers had their occupancy fees reduced, but the vendor, having held trust money, must pay the interest thereon to the purchasers. In other words, the purchasers receive benefits both ways, while the vendor received minimal benefits.

[para6] In my opinion, Dunn J. was correct in his decision.

[para7] The applicable provisions of the Act are as follows:

51. (6) Where an agreement of purchase and sale entered into by a proposed declarant for a proposed unit for residential purposes permits or requires the purchaser to take possession of or occupy the unit before a deed or transfer of the unit acceptable for registration is delivered to the purchaser, the money paid in respect of such right or obligation to the proposed declarant shall be not greater, on a monthly basis, than the total of the following amounts;

1. The amount of interest that the purchaser would have paid, monthly, in respect of any mortgage or mortgages the purchaser is obligated to assume or give under the agreement of purchase and sale on delivery of a deed or transfer of the unit.

2. An amount reasonably estimated on a monthly basis for municipal taxes attributable to the proposed unit.

3. The projected monthly common expense contribution for that unit.

53. (1) All money received by or on behalf of a proposed declarant from a purchaser on account of a sale or an agreement for the purchase and sale of a proposed unit for residential purposes before the registration of the declaration and description, other than money paid as rent or as an occupancy charge, shall, despite the registration of the declaration and description thereafter, be held in trust by the person receiving such money for the person entitled thereto in respect of the agreement and such money shall be held in a separate account designated as a trust account

.....

(3) Subject to subsection (2), where a purchaser of a proposed unit under an agreement of purchase and sale referred to in subsection (1) enters into possession or occupation of the unit before a deed or transfer of the unit acceptable for registration is delivered to the purchaser, the proposed declarant shall pay interest at the prescribed rate on all money received by the proposed declaration on account of the purchase price from the day the purchaser enters into possession or occupation until the day a deed or transfer acceptable for registration is delivered to the purchaser. 60. This Act applies despite any agreement to the contrary. R.S.O. 1980, c. 84, s. 61.

[para8] At page 394 of the Albrecht decision, Robins J.A. made the following statements:

This brings me to para. 1 of s. 51(6), which is at the heart of the issue in this case. The mortgage interest component of the occupancy fee, which is almost invariably by far the largest of the three items enumerated in s. 51(6), is chargeable only in the case of a mortgage that the purchaser "is obligated to assume or give under the agreement of purchase and sale on delivery of a deed or transfer of the unit." Section 51(6) para. 1 does not deal with transactions in which the purchase price is paid in cash and no mortgage is to be assumed or given back by the purchaser on final closing. The reason for omitting those transactions and mandating that such purchasers be charged a lower occupancy fee than purchasers who assume or give back a mortgage is not readily apparent. Indeed, it is difficult to understand why the one class of purchasers should be afforded greater protection or be treated differently and more favourably than the other. No satisfactory reason for the distinction has been suggested by counsel, or is to be found in the texts or articles to which the court has been referred. It would indeed appear, as Dupont J. suggested in *Cadillac Fairview Corp. v. Allin* (1979), 7 R.P.R. 287, 25 O.R. (2d) 73, 100 D.L.R. (3d) 344 (H.C.), at p. 76 [O.R.], that the omission is simply the result of a possible oversight on the part of the legislature. ... By reason of the wording of s. 51(6) para. 1, the all-cash purchaser is placed in a better economic position than he or she would have been in had possession closing coincided with title closing. The section, viewed realistically, confers a windfall on such purchasers. They enjoy the same benefits of possession and hold the same possessory rights as a purchaser who agrees to assume or give back a mortgage on final closing; and, moreover, the carrying costs incurred by the vendor during the interim occupancy period are manifestly the same regardless of whether the purchaser is an all-cash purchaser or not. Nonetheless, for whatever reason, s. 51(6) requires that these purchasers be treated differently, and compels the vendor to accept a significantly lower occupancy rent from one class of purchasers than from another.

[para9] After referring again to the decision of Dupont J. in *Cadillac Fairview Corp. v. Allin*, supra. and quoting from it, Robins J.A. continued at p. 395:

The Phantom Mortgage Concept

Section 51(6) evidently proved so financially detrimental to condominium developers that many of them refused to enter into transactions in which no mortgage was to be assumed or given back on final closing. Their response to this legislation was to restructure their agreements of purchase and sale in such a way as to satisfy the formal requirements of s. 51(6) para. 1 and thereby become entitled to include a mortgage interest component in the occupancy fee. To achieve this end, purchasers, in what would otherwise be all-cash transactions, were required under the terms of their agreements of purchase and sale to complete their transactions by giving back on final closing a form of mortgage that has become popularly known as a "phantom mortgage." This colourful appellation recognizes that these mortgages were to have only a passing existence and would disappear shortly, if not immediately, after final closing. They were patently not intended as a form of permanent financing.

[para10] In my opinion, this shows that without a phantom mortgage, an all-cash purchaser must be treated in a different manner than one who has agreed to a phantom mortgage. In the present case, by accepting the money to eliminate the phantom mortgage, the vendor has placed the purchaser in the same position as an all-cash purchaser. The money was received on account of the purchase price and under section 53 it must be held in trust and interest thereon must be paid to the purchaser.

[para11] For these reasons the appeal should be dismissed.

[para12] In my opinion, however, the purchasers induced the vendor to take the money in order to receive the benefit of a reduced occupancy allowance. They now claim interest under the technical wording of the Act. I think the result, while legal, is unfair.

[para13] Dunn J. saw fit not to award costs and I would not award any costs either on the motion to quash or on the appeal.

STEELE J. SOUTHEY J. -- I agree. CARNWATH J. -- I agree.

CBR# 172

Macedon Developments (1988) Ltd., plaintiff, and Chris Bekaris and Christine Bekaris, defendants

Court File No. 74767/91Q

Ontario Court of Justice (General Division) Epstein J. Heard: February 14 and 15, 1995. Judgment: April 3, 1995.

Counsel: Michael Cohen, for the plaintiff. William Andrews, Q.C., for the defendants.

[para1] EPSTEIN J.:-- This case calls for the interpretation of an agreement between the parties, an agreement that pertained to a condominium apartment in Barrie, Ontario. The action arises seemingly in the context of yet another failed real estate transaction. The timing is predictable, the late 1980s and early 1990s. The plaintiff, Macedon Developments (1988) Ltd. ("Macedon"), and the defendants, Chris and Christine Bekaris (the "Bekarises"), entered into an agreement of purchase and sale with respect to the property on June 6, 1988 (the "Agreement").

[para2] The Agreement was reduced to writing in the form of a standard agreement of purchase and sale prepared by the developer. This document was signed by the parties.

[para3] The written contract was standard in many respects, including that it contemplated two closings characteristic of most condominium transactions: an interim closing, frequently referred to as an occupancy closing; and a final closing. However, the document was unique in that the actual date for occupancy closing was left blank even though the agreement of purchase and sale contained a detailed description of the rights and obligations associated with an interim closing. The written contract did specifically provide for a final closing date which was stated to be the latter of any occupancy date or a date fixed by Macedon not more than 30 days after the registration of the Declaration. Macedon eventually purported to establish May 15, 1990, as the date for an occupancy closing and subsequently February 15, 1991, for the final closing date. May 15, 1990, passed and the Bekarises took no steps toward an occupancy closing. Shortly thereafter, on August 16, 1990, Macedon formally took the position that the Bekarises were in default for not having complied with their requirements under an occupancy closing. Macedon eventually resold the condominium and commenced this action.

[para4] Macedon has claimed a declaration that the Agreement was terminated by the default of the Bekarises and that Macedon is thereby entitled to keep the deposit and recover damages resulting from the breach, damages measured primarily by the fall in the market value of the condominium evidenced by the price at which it was eventually resold.

[para5] In response, Mr. Andrews, counsel for the Bekarises, submits that as of August 1990, the Bekarises were not in default as they had no obligations to participate in any occupancy closing. Accordingly, it was Macedon that breached the Agreement by repudiating it before the final closing date. The Bekarises claim that, under these circumstances, they are entitled to the return of their deposit.

[para6] The parties have significantly divergent views of their rights and obligations under the Agreement. This divergence stems from the fact that the Bekarises and Macedon have taken very different positions on exactly what the Agreement between them was; specifically, was there an obligation on the Bekarises to participate in an interim closing?

[para7] Even though the parties have asked the Court to interpret the facts differently, the facts themselves are not in dispute. In about August of 1987, Mrs. Bekaris received a telephone call from a Mr. Vangi, a person whom she knew from the Greek community. He told her about an attractive short-term investment opportunity in a condominium development. This type of investment is commonly known as a "flip." Mrs. Bekaris and her husband would have to advance a deposit of approximately \$30,000. They would enter into an agreement to purchase a condominium apartment in Barrie, Ontario, but they would never have to take possession of it as the developer would resell it (likely at a profit) long before any closing.

[para8] Mrs. Bekaris and her husband, on the basis of this conversation, sent Macedon a cheque for \$10,000 in late August of 1987 to show their interest in the proposal. Then, on May 28, 1988, they drove to Barrie where they met Mr. Sam Nitsopoulos, the then president of Macedon, and his son, Louis, who was also working for the developer. Mr. Nitsopoulos senior, in the presence of his son, gave the Bekarises the same description and assurances as had Mr. Vangi about the nature of the transaction. Mr. and Mrs. Bekaris were told "just to buy it and that (he or his son would) sell it on [their] behalf." They would never have to occupy the unit. In reliance on these assurances, without knowing anything about the nature of the proposed development, which unit they were buying, and even without reading the agreement of purchase and sale, they entered into the Agreement by signing the document and paying the remainder of the deposit.

[para9] The couple did not concern themselves further with their investment until they began to receive from Macedon a series of what may be called form letters about an occupancy closing. These letters started September 18, 1989, and ended December 13, 1989, when the actual occupancy date of May 15, 1990, was announced. The Bekarises ignored these letters. Their explanation is that they were nothing but form letters for purchasers of the units who had agreed to an occupancy closing. The letters were clearly not relevant to their Agreement.

[para10] However, there was other activity. For example, Mr. and Mrs. Bekaris were asked to attend at the sales office in Toronto to select design finishes. The couple was getting nervous about the lack of success of Macedon and the Nitsopouloses in selling the unit and so Mr. and Mrs. Bekaris took their own steps to try to sell the condominium. In October 1989, they listed it for sale gradually reducing the selling price over the ensuing months.

[para11] May 15, 1990, passed and the Bekarises took no steps toward an interim closing. Macedon purported to extend the time for the Bekarises' occupancy closing. However, patience ran out and in their letter of August 23, 1990, the solicitors for Macedon advised the Bekarises that Macedon was terminating the Agreement for failure to close on occupancy date, would be taking forfeiture of the deposit, and would be exercising remedies to recover damages.

[para12] The Bekarises were never advised of the closing date of February 13, 1991. They were not invited to tender. Instead, Macedon resold the condominium and, in June 1991, issued the claim in this action.

[para13] The condominium was eventually sold August 19, 1993, after a first agreement entered into on June 5, 1991, failed to complete.

[para14] Against this factual background, the Agreement must be interpreted.

[para15] It is clear that the parties intended that their Agreement be reduced to writing and that the agreement of purchase and sale be the full and accurate embodiment of their understanding. However, as I have said, a problem has arisen in the interpretation of this document. The problem involves the meaning to be given to the blank space in the occupancy closing clause of the agreement of purchase and sale.

[para16] Macedon takes the position that this space was blank because at the time the Agreement was entered into in May 1988, the vagaries of construction made it impossible for a meaningful occupancy date to be selected. Mr. Cohen, solicitor for the plaintiff, argues that the letters subsequently sent from Macedon to the Bekarises can be used by the Court to interpret the blank space in support of a finding that it was incumbent on the Bekarises to close on the occupancy closing date and that this date was May 15, 1990. Mr. Cohen submits that the fact that the Bekarises took no stand in opposition to these letters further supports such a finding.

[para17] The Bekarises argue that the occupancy closing date was left blank because it was never contemplated by the parties that the Bekarises would participate in an interim closing. An occupancy closing would have been inconsistent with the notion of a real estate flip, a mere investment rather than an intention to occupy a new residence.

[para18] It is clear to me that the blank in the clause describing the occupancy closing is capable of both meanings: the one that a date was to be filled in when the timing became clearer; the other is that the purchasers did not intend, and therefore had no obligations, to participate in an occupancy closing. The blank clearly creates an ambiguity.

[para19] The defendants have urged me to admit the representations and assurances of the then president of Macedon that the Bekarises would not be obliged to close at the interim stage in order that the written contract may be interpreted according to the version they have submitted to the court.

[para20] Without hesitation, I accept the testimony of the Bekarises as to what was told to them on May 28, 1988, by Mr. Nitsopoulos, the man who at the time was president of Macedon. The credibility of Mr. and Mrs. Bekaris as truthful and accurate historians was not in any way impaired by cross-examination. Further, the plaintiff did not call any evidence, specifically that of Sam Nitsopoulos or his son, to contradict what the Bekarises had to say. Further, their subsequent actions, particularly ignoring the occupancy closing form letters, are completely consistent with their evidence of the May 28 conversation.

[para21] Next, I turn to whether the discussion is admissible. Normally, by reason of the application of the parol evidence rule, subject to certain exceptions, when the parties to an agreement have apparently set down all its terms in a document, extrinsic evidence is not admissible to add to, subtract from, or contract those terms. I note here that Mr. Cohen did not at any time challenge the admissibility of the statements of Mr. Nitsopoulos on May 28, 1988, as attested to by Mr. and Mrs. Bekaris.

[para22] In any event, I find the oral statements to be admissible under one of the well-recognized exceptions to the parol evidence rule that such evidence is relevant and may be admitted to dispel ambiguity. So if it is said that the oral representations that were made before the contract was signed are capable of clearing up an ambiguity, evidence can be given and in this case was given of the representations.

[para23] On the basis of the pleadings in this case, I have no doubt that this evidence is admissible to clarify the intentions of the parties in leaving the occupancy date blank.

[para24] Once this evidence is admitted under the application of the parol evidence rule, then the substantive law under that rule must then be considered. The critical parol evidence principle of substantive law was stated by Mr. Justice Martland in *Carmen Construction Ltd. v. Canadian Pacific Railway Co.*, [1982] 1 S.C.R. 958, as being that "a collateral agreement cannot be established where it is inconsistent with or contradicts the written agreement."

[para25] Mr. Cohen argues that this is what we have here, because to suggest that the Bekarises have no obligations to participate in an interim closing conflicts with the wording and obvious intention contained in several clear clauses in the agreement of purchase and sale, coupled with the subsequent occupancy date letters' to which the Bekarises did not object.

[para26] Mr. Justice Lambert, in the leading case of *Gallen v. Allstate Grain Co.* (1984), 9 D.L.R. (4th) 496 (B.C. C.A.), provides an extensive analysis of the principle described by Mr. Justice Martland. This analysis thankfully focuses on arriving at practical solutions to real-life problems of contract interpretation rather than becoming trapped by the archaic and sometimes unfair applications of the parol evidence rule.

[para27] In the midst of his commentary, Justice Lambert identifies a particular exception to the principle of not allowing parol evidence to contradict a written document. This exception is explicitly recognized in the decision of the Supreme Court of Canada in *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102, where it is clearly stated that a contract induced by an oral representation that is inconsistent with the form of written contract would not bind the party to whom the representation has been made.

[para28] This is a principle that has long been recognized by the courts. I refer to the decision of the Ontario Court of Appeal in *Tilden Rent-A-Car Co. v. Clendinning* (1978), 18 O.R. (2d) 601, a case that deals with printed forms, fairness, and, as Justice Lambert described in *Gallen*, supra, "real life." Mr. Justice Dubin, as he then was, writing for the court, stated at page 609:

In modern commercial practice, many standard form printed documents are signed without being read or understood. In many cases the parties seeking to rely on the terms of the contract know or ought to know that the signature of a party to the contract does not represent the true intention of the signer, and that the party signing is unaware of the stringent and onerous provisions which the standard form contains. Under such circumstances, I am of the opinion that the party seeking to rely on such terms should not be able to do so in the absence of first having taken reasonable measures to draw such terms to the attention of the other party, and, in the absence of such reasonable measures, it is not necessary for the party denying knowledge of such terms to prove either fraud, misrepresentation or non est factum.

[para29] True, there is a presumption, a strong presumption, that a document that looks like a contract is to be treated as the whole contract, but it is a rebuttable presumption.

[para30] In the case at bar, I have found there to be reliable evidence that the Bekarises were told by the president of Macedon that they would not have to participate in an occupancy closing. I have found that they relied on this representation in entering into the Agreement and in signing the agreement of purchase and sale. I have also found that this evidence is admissible to dispel the ambiguity caused by the blank in the document even though the statements arguably may be in conflict with the wording of the agreement of purchase and sale. To hold otherwise would not be just.

[para31] I therefore interpret the Agreement as not requiring the Bekarises to participate in an occupancy closing.

[para32] In the result, the Bekarises had no obligations to participate in the May 15, 1990, occupancy closing. They were therefore not in default when they received the letter of August 16, 1990, from Macedon's lawyers. It follows that the notification of default upon which Macedon relies to support its claim in this action is invalid.

[para33] Further, after the invalid default notice was sent by Macedon to the Bekarises, Macedon conducted itself in a way such as to have repudiated its contractual obligations to the Bekarises before they came due. Specifically, Macedon failed to notify the Bekarises of the date for final closing and failed to give it an opportunity to tender. [para34] Based on these findings, it was Macedon, not the Bekarises, that breached the Agreement.

[para35] It is clear from the jurisprudence that only in certain circumstances where a vendor terminates a contract for the sale of property is the purchaser entitled to the return of the deposit. The myriad of cases dealing with this issue appears to have established the principle that where the circumstances are such that it would be inequitable to allow the vendor to retain the land and the money, the purchaser may obtain relief from the forfeiture of such moneys. In all of the circumstances of this case, the equities favour the Bekarises. They are entitled to the return of their deposit.

[para36] The claim will be dismissed. The Bekarises are entitled to judgment in the counterclaim in the amount of \$31,780.

[para37] In my view, the Bekarises should have their costs on a party-and-party basis, as agreed upon by counsel or as assessed. If counsel wish to make submissions concerning costs or other matters, they may contact my secretary. EPSTEIN J.

CBR# 333

Townsgate I Limited, plaintiff, and Jayme Farber, defendant

Court File No. 92-CQ-29457

Ontario Court of Justice - General Division Toronto, Ontario Potts J. Heard: December 14, 1994. Judgment: January 26, 1995.

Jeffrey W. Kramer, for the plaintiff. Raymond Stancer, for the defendant.

POTTS J.:--

3D INTRODUCTION

[para1] This action arose as a result of a real estate transaction which failed to close. The defendant, Jayme Farber ("Mr. Farber") entered into an Agreement of Purchase and Sale dated February 24, 1989 (the "Agreement") with Townsgate I Limited ("Townsgate") for the purchase of a condominium unit for the price of \$316,000. In this action, Townsgate seeks damages as a result of what they claim to be a breach of the Agreement and by counterclaim, Mr. Farber seeks a return of the deposit, which is \$40,000. At the end of the trial, I dismissed the action against Mr. Farber and allowed the counterclaim for the return of the \$40,000 deposit.

FACTS

[para2] An agreed statement of facts was filed. The sequence of events leading up to the failure to close the transaction are important to consider. In accordance with the Agreement, the "Closing Date" is defined in paragraph 1(b) as meaning "the 6th day of May, 1991 or as advanced or extended by Paragraphs 12 and 13(d)". By letter dated November 13, 1990 from Townsgate to Mr. Farber, the Closing Date was extended to August 29, 1991, in accordance with the Agreement.

[para3] By letter dated July 15, 1991, from Townsgate to Mr. Farber, paragraph 13 of the Agreement was invoked which provided for an "Occupancy Date" before the Closing Date. Paragraph 13 of the Agreement reads as follows:

13. If the Unit is substantially completed sufficient to permit occupancy on Closing, and the Purchaser has been approved by the Mortgagee, but the declaration and description have not yet been registered, then the Purchaser shall occupy the Unit on that date (the "Occupancy Date") on the following terms and conditions:

....

(d) the Closing Date shall be extended to a date twenty (20) days after notice in writing is given by the Vendor's Solicitors to the Purchaser or his Solicitor that the declaration and description have been registered. If the Purchaser fails to close the transaction as aforesaid, through no fault of the Vendor, the Purchaser shall be in default hereunder, and shall be required to deliver vacant possession of the Unit. The Vendor shall in that event be entitled to retain all monies paid hereunder for damages and expenses and unpaid occupation charges. The Purchaser shall be responsible for the damages and expenses and the cost of redecorating as may be determined by the Vendor at its sole discretion as a result of the possession herein. (Emphasis added)

Thus, to invoke the mechanism of paragraph 13 of the Agreement to provide for an Occupancy Date, three conditions set out in that paragraph must exist:

- (1) the Unit is substantially completed, sufficient to permit occupancy on Closing
- (2) the Purchaser has been approved by the Mortgagee
- (3) the declaration and description have not been registered

[para4] The first paragraph of the letter dated July 15, 1991 is relevant and sets out as follows:

Further to our letter of November 13, 1990 the Interim Occupancy Closing Date for your unit is August 29, 1991 (the "Closing Date"). Although the Condominium has not been registered, the Unit is substantially completed sufficient to permit occupancy as set out in paragraph 13 of the Agreement of Purchase and Sale.

At the time of the July 15, 1991 letter, the conditions in paragraph 13 of the Agreement were met. As set out above, it was emphasized that the condominium had not been registered but that the unit was substantially completed sufficient to permit occupancy.

[para5] There was a further extension by letter dated August 26, 1991, from Townsgate to Mr. Farber. It was stated in this letter that:

Due to construction delays beyond our control, we are required to extend the closing date for your condominium unit to September 25, 1991 in accordance with the terms of your Agreement of Purchase and Sale.

It appears that even though the words "closing date" are used in the letter, the September 25, 1991 closing is actually the Occupancy Date. It is important to note that on August 26, 1991, the conditions set out in paragraph 13 of the Agreement were satisfied.

[para6] The declaration and description of the condominium corporation were registered on September 11, 1991. On August 26, 1991, the date upon which notice of the September 25, 1991 Occupancy Date was given to Mr. Farber, Townsgate did not know that the declaration and description would be registered on September 11, 1991 or on any date prior to September 25, 1991. Townsgate had no control over the date upon which the declaration and description would be registered. However, on September 25, 1991, the Occupancy Date, the last condition in paragraph 13 of the Agreement was not met due to the intervening registration that took place on September 11, 1991.

[para7] Although Townsgate did not have a deed available in registrable form to convey the unit to Mr. Farber, they were ready, willing, and able to provide occupancy to Mr. Farber on September 25, 1991 in accordance with the Occupancy Date contemplated by the Agreement. Townsgate did not provide notice to Mr. Farber of the registration of the declaration and description.

LEGAL ISSUES RAISED

[para8] The issue in this action concerns the interpretation of paragraph 13. More specifically, whether Mr. Farber was justified in not closing the transaction because of non-compliance with this paragraph or whether he was in breach of the Agreement as a result of his failure to attend on September 25, 1991 for the closing.

[para9] It is the position of Townsgate that Mr. Farber had no intention to complete the transaction for the condominium unit as the real estate market had collapsed just after he had signed the Agreement in February 1989. As a result of the diminished market value that Mr. Farber would have at closing, Townsgate argued that Mr. Farber is relying on a technical defence to avoid obligations. Townsgate relies on many factors to demonstrate that Mr. Farber had no intention to complete the transaction in accordance with the Agreement. Mr. Farber failed to:

- (a) attend to choose colours for the finishes to the subject condominium unit;
- (b) attend for the pre-closing inspection;
- (c) retain and instruct a lawyer to take the usual steps in respect of the closing; and
- (d) attend on September 25, 1991, the date set for the interim occupancy closing

[para10] Counsel for Townsgate urged me to consider all of the circumstances and find that Mr. Farber was in breach of the Agreement. With respect to paragraph 13, it was argued that the Agreement does not deal with a situation such as the one that arose in this case. Even though the Agreement does not contemplate this situation, it was submitted that no prejudice arose from the events occurring out of order. Therefore, the Agreement should be interpreted to deal with this situation of an intervening registration after notice of an Occupancy Date was given to Mr. Farber but before the actual Occupancy Date. It was further submitted that Occupancy Date as defined in paragraph 13 should be interpreted as being the date of notice of the Occupancy Date and in this case, as at the date of notice, all conditions were met.

[para11] Counsel for Mr. Farber stressed that Townsgate relies on the specific paragraph that they had not complied with. The July 15, 1991 letter relied on paragraph 13 of the Agreement to set the Occupancy Date. In fact, the provisions of paragraph 13 are quoted in the first paragraph of the letter. When extending this date by the August 26, 1991 letter, Townsgate was again relying on the terms of the Agreement. By letter dated October 11, 1991 from Goodman and Carr, solicitors for Townsgate, Mr. Farber was advised that as a result of the failure to attend for the purposes of closing the transaction, he repudiated the Agreement. The following portion of that letter is relevant:

Pursuant to the terms of the Agreement of Purchase and Sale, you were obliged to close the transaction of purchase and sale on the Occupancy Date, as such term is defined in the Agreement of Purchase and Sale. Our client had previously advised you that the transaction of purchase and sale was to close on September 25, 1991. On the said date, our client was ready, willing and able to close the transaction of purchase and sale... (Emphasis added)

[para12] Counsel for Mr. Farber argues that by the October 11, 1991 letter, Townsgate was relying on paragraph 13 of the Agreement. However, to benefit from paragraph 13, the three conditions set out above must be met in order for a vendor to demand that a purchaser take occupancy on the Occupancy Date. It is acknowledged that had the three conditions been met on the Occupancy Date, the purchaser had to move in or the purchaser would be in default under the Agreement. In this case, due to the intervening registration of the declaration and description, the third condition was not met and therefore, September 25, 1991 could no longer be the Occupancy Date. Counsel for Mr. Farber submitted that once the condominium was registered, Townsgate could have sent a letter advising Mr. Farber and then extended the completion of the transaction to a Closing Date. It was further submitted that the respective rights and obligations of a purchaser and a vendor are found in the Agreement and the rights which Townsgate is seeking to assert do not exist.

[para13] *Scanlon v. Castlepoint Development Corp.* (1992) 11 O.R. (3d) 744 (C.A.) (hereafter *Scanlon*) dealt with the interpretation of a virtually identical agreement of purchase and sale of a condominium. The vendor in that case notified the purchaser that the closing date for the condominium unit would be September 14, 1992 rather than November 4, 1991. The purchaser immediately sought a declaration that the vendor's unilateral extension of the closing date constituted an anticipatory breach of the agreement of purchase and sale entitling the purchaser to terminate the agreement. The purchaser was successful at first instance but this was reversed on appeal. [para14] *Robins J.A.* (Morden A.C.J.O. concurring) set out several principles to consider and this appears under the heading of "The Applicable Rules of Construction". This case, however, dealt with the interpretation of certain contractual provisions which were alleged to be in dispute, namely, paragraphs 13(d) and 22 (21 in the case at bar). It was held that the purpose and effect of paragraphs 13(d) and 22 were different and each were to be afforded a reasonable and distinct meaning. Further, the paragraphs were not contradictory and they did not create any ambiguity.

[para15] *Robins J.A.* addressed issues that arose when attempting to resolve a contradiction or ambiguity in the terms of a contract. In such a situation, he stated that the provisions should be read in light of the agreement as a whole. This case is distinguishable from the case at bar as there is no apparent contradiction or ambiguity. In the present case, the focus is on the interpretation of a single clause which appears to be clear and unambiguous. The Agreement was drafted by solicitors for Townsgate and terms were inserted for the benefit of the vendor. A situation arose which did not permit the vendors to rely on paragraph 13 of the Agreement and demand that the purchasers take occupancy. Townsgate could have contacted Mr. Farber after registration on September 11, 1991, two weeks before the Occupancy Date, and set a Closing Date. This was permitted pursuant to paragraph 12 of the Agreement which provides as follows:

12. The transaction of purchase and sale is to be completed on the Closing Date. The vendor shall have the right, from time to time, upon thirty (30) days notice in writing to the Purchaser or his solicitors to accelerate the Closing Date to any day as set out in such written notice.

[para16] Paragraph 13 has a very different application. Mr. Justice Robins commented on the purpose and effect of paragraph 13(d) in Scanlon at p. 772:

Paragraph 13(d) is manifestly designed to accommodate the delay created by the condominium registration process by effectively providing for the two-stage closing ... It does this in a somewhat indirect or circuitous manner. If the unit is at least substantially completed sufficient to permit occupancy on the closing date, that is, on November 4, 1991, but the project has not yet been registered, the purchaser is none the less to take occupancy on that date. (Emphasis added)

[para17] Once the declaration and description were registered and there was no longer a need for the two-stage closing, Townsgate lost the right to rely on paragraph 13 to provide for an Occupancy Date and had to arrange for a Closing Date after providing written notice pursuant to paragraph 12 of the Agreement.

[para18] Keeping in mind the principles enunciated by Robins J.A. at p. 776 in Scanlon, this is not to say that paragraph 13 is given no meaning or purpose and is effectively ruled out of the agreement, but rather, its application is for a very specific and distinct purpose. This clause deals with the situation in which the unit is ready for occupancy but, because of non-registration, the transaction cannot be concluded (See: Scanlon at p. 773). In other words, if there could not be a final closing, as long as the prerequisites to paragraph 13 were satisfied, an Occupancy Date could be set for closing and the date for finally closing the transaction would be postponed to an unspecified date twenty days after notice in writing was given that registration had taken place (See: paragraph 13(d) of the Agreement).

CONCLUSION

[para19] Paragraph 13 is clear that it applies only for the purposes for which it is intended. I am in agreement with Mr. Stancer that Townsgate sought to rely on paragraph 13 of the Agreement in declaring that there had been repudiation by Mr. Farber. However, they had no right whatsoever to rely on that paragraph after the declaration and description and been registered. The vendors drafted the agreement and should be bound by its terms. The vendors could have anticipated the situation as arose in this case and specifically provided for it in the Agreement, however, they did not.

[para20] Accordingly, I dismiss the action by the plaintiff and allow the counterclaim for the return of the \$40,000 deposit plus pre-judgment interest. As agreed by counsel, costs to the defendant.

POTTS J.

CBR# 074

Madan Chawla, Maria Di Paolo, Louis Kereakou, Shim and Lina Lan, Peter and Yvette Ng, Latiq and Fatima Qureshi, Angelo and Donatella Tagliabue and Jim Tantsidis, Applicants, and Hayter Street Developments Inc., Respondent

Action No. RE 4015/94

Ontario Court of Justice - General Division Toronto, Ontario Wein J. Heard: August 5, 1994. Judgment: September 7, 1994.

Michael A. Spears, for the Applicants. Theodore B. Rotenberg, for the Respondent.

WEIN J.:--

INTRODUCTION

[para1] Given the number of condominium purchases that currently occur in the housing industry, one would think that a clear and straightforward standard contract, with terms easily understood by both the purchaser and the vendor, would by now have been developed. However, such is not the case, as is apparent from the number of times the court is called upon to interpret what should be clear and simple terms of such contracts.

[para2] This particular case raises yet again a question concerning the interpretation of the occupancy date and title transfer date clauses in a standard form Agreement of Purchase and Sale relating to the purchase of condominium units. The applicants have applied under R.14.05(3)(d) for a declaration that the Agreements of Purchase and Sale are null and void, and seek a return of their deposits with interest.

[para3] The issue in this case is similar to the issue that was before this Court in *Kratz v. Parkside Hill Ltd.* (1992), 28 R.P.R. (2d) 150 (appeal to the Ontario Court of Appeal pending): resolution of the issue has required a close examination of the particular clauses of this agreement as compared to the clauses in the contract considered in *Kratz*.

[para4] The issue in this case is similar to the issue that was before this Court in *Kratz v. Parkside Hill Ltd.* (1992), 28 R.P.R. (2d) 150 (appeal to the Ontario Court of Appeal pending): resolution of the issue has required a close examination of the particular clauses of this agreement as compared to the clauses in the contract considered in *Kratz*.

FACTS

[para5] Each of the eight applicants entered into an individual Agreement of Purchase and Sale with the respondent, which was a condominium development company, for the purchase of a proposed condominium unit in a highrise residential condominium project under development in downtown Toronto. The Agreements of Purchase and Sale were signed between November 1988 and November 1989. All deposits were paid by the end of May 1990. At the time the agreements were signed, it was known and stated in the agreements that land development approvals were not in place and that the purchase was "a speculative risk investment".

[para6] While details of the purchase price and amounts of the deposit varied with the unit purchased, all applicants signed the same standard form agreement which was prepared by the developer's real estate agent. The material terms of that form relevant to this application are identical for each applicant.

[para7] As is commonly the case with condominium development projects, the agreement contemplated a two stage closing with a "Closing Date" or occupancy date contemplated when the unit was substantially completed and fit for occupancy and a "Unit Transfer Date" or title transfer date contemplated when a registrable transfer was available for transfer to the individual unit owner.

[para8] In this case, the units were finally available for occupancy in late January to early February 1994. Each of the applicants rescinded the agreement before the occupancy date and none has entered into occupancy or paid the balance due on occupancy. The project has not yet been registered and registrable transfers have accordingly not been delivered to the applicants.

[para9] The applicants contend that the respondent has breached the agreement by failing to deliver registrable transfers by what they contend is the final date for such transfer, April 30, 1994; the respondent contends that the applicants have defaulted on the agreement by failing to enter into occupancy as required and failing to pay the balance due. The applicants and respondent rely on the same clauses in the agreement in support of their respective positions; the issue, therefore, is one of interpretation of the agreement.

[para10] It may be noted that since the time the agreements were signed in 1988 and 1989, the units have fallen significantly in value as have real estate prices generally. The respondent has argued that this fact should be taken into account on this motion. However, I find that the reasons or motives of the applicants for rescinding the agreements are irrelevant to the issue of a ruling under R.14.05(3)(d) which simply involves questions of the interpretation of the agreements.

THE AGREEMENT

[para11] The agreement consisted of standard clauses setting out the purchase price, definitions and terms and conditions. Schedules to the agreement were expressly made an "integral part" of it.

[para12] The terms of the agreement and schedules relevant to the issue before the court are as follows:

Definitions:

2(a) The following terms used herein shall have the meanings below noted: ...

(iv) "Closing Date" shall mean the 30th day of April, 1992, or such accelerated or extended date pursuant to the terms hereof that the Unit is substantially completed by the Vendor for occupancy by the Purchaser in accordance with the provisions of paragraph 5 herein. If the Unit is substantially complete and fit for occupancy prior to the aforesaid date the Vendor shall have the unilateral

(sic) right to accelerate the Closing Date to any other particular day, upon giving the Purchaser not less than 60 days prior written notice of such alternate day on which the Purchaser shall be able to take possession of the Unit. (xiii) "Occupancy Date" means the earlier of the Unit Transfer Date or the date on which the Unit is substantially completed and fit for occupancy. ... (xvi) "Unit Transfer Date" shall mean the day the transfer of the Unit acceptable for registration is delivered to the Purchaser or to Purchaser's solicitor pursuant to the terms of this Agreement. ... Occupancy Date and Payments

11. If the Unit is substantially complete and fit for occupancy on the Closing Date, but the Declaration, the Description, By-laws and related documents have not been registered, then this Agreement shall continue in full force and effect and the Purchaser shall pay to the Vendor the balance of the Purchase Price.

The Purchaser covenants and agrees to close the acquisition of the title to the Unit on that date specified in a notice in writing to the Purchaser's solicitor from the Vendor's solicitor that the Vendor is in a position to complete the transfer of title to the unit, which date shall be a day occurring not less than 15 days after the Notification Date.

On each of the Closing Date and the Unit Transfer Date, the Purchaser shall deliver to the Vendor or its solicitors a clear and up-to-date execution certificate in the Purchaser's name.

Unit Transfer Date

12. The Unit Transfer Date shall be the date upon which a transfer of the Unit acceptable for registration is delivered to the Purchaser or the Purchaser's solicitors and shall be the later of - (a) the Closing Date, if the Condominium plan, the Declaration and the Description have been registered, and

(b) the date specified in a notice in writing from the Vendor to the Purchaser or his solicitors, stating that the Vendor is in a position to complete the transfer of title to the Unit, which date shall be a day occurring not less than 15 days after the Notification Date.

Extensions

16. In the event that the substantial completion of the Unit shall be delayed for any reason the Vendor shall be permitted reasonable extensions of time (or times) to substantially complete the Unit and the Closing Date shall be extended accordingly. If the Vendor shall be unable to substantially complete the Unit for occupancy with such reasonable extensions of time (or times) not exceeding twenty-four (24) months in the aggregate, the deposit monies shall be returned to the Purchaser without interest provided the Purchaser is not in default hereunder and this Agreement shall be at an end, and the Vendor shall have no further liability or obligations hereunder and shall not be liable to the Purchaser for any costs or damages whatsoever. Monies paid by the Purchaser for extras and upgrades (whether or not installed) with respect to the Unit are non-refundable. In each case, the Purchaser shall execute and complete such other documents affecting title as are necessary for the Vendor to re-sell the Unit to another purchaser. If the Unit is substantially completed and fit for occupancy by the Closing Date or any extension thereof, the transaction shall be completed in accordance with the terms of this Agreement and the Vendor shall complete any outstanding details of construction required by this Agreement within a reasonable time thereafter, having regard to weather conditions and the availability of labour and supplies. The Unit shall be deemed to be substantially completed when the interior work has been finished to permit occupancy notwithstanding that there remains other work within the Unit and common elements to be completed as more particularly detailed in Section 5 of this Agreement.

SCHEDULE "A" - OCCUPANCY AGREEMENT

[para13] The Occupancy Agreement specifies that transfer of title to the unit shall take place on the Unit Transfer Date and sets out interim occupancy terms.

[para14] In addition, with respect to transfer of title, it specifies:-

If the Vendor for any reason whatsoever is unable to register the Creating Documents and therefore is unable to deliver a registrable transfer of the Unit to the Purchaser within twelve (12) months after the Closing Date at the option of the Vendor, the Vendor may extend the date to which the Creating Documents are to be registered for a period up to twelve (12) months thereafter, by giving written notice thereof to the Purchaser, on or before the expiry of the first twelve (12) month period aforesaid. If within that time the Creating Documents are registered, the transaction shall be completed in accordance with the terms of this Agreement. If the Creating Documents have not been registered within the first twelve (12) months after the Closing Date, in the event that the Vendor does not extend the time period aforesaid, or, in the event that the Condominium Documents have not been registered within the extension period mentioned aforesaid, the Purchaser hereby consents to the termination of the Occupancy Agreement and the Agreement for such reason, and in such event, the Purchaser hereby agrees to vacate the Real Property, and deliver possession of the Real Property to the Vendor in its original state ...

[para15] The issue of interpretation upon which the applicants and respondent differ is what the term "Closing Date" in this part of Schedule 'A' means.

[para16] The applicants contend that it means the date initially defined in clause 2(a)(iv) of the agreement i.e. April 30, 1992, so that the maximum extension for registration of the Creating Documents is April 30, 1994.

[para17] The respondent contends that "Closing Date" means closing date as fully defined in clause 2(a)(iv) i.e. April 30, 1992 as accelerated or extended pursuant to other terms of the agreement, so that the maximum extension for registration of the Creating Documents contemplated by the agreement is April 30, 1996, which is twenty-four months beyond the latest possible Closing Date. As it turned out, given the applicants' occupancy availability in January to February 1994, the allowable extension on this reading would be to January/February 1996.

INTERPRETATION OF AGREEMENT

[para18] The law respecting interpretation of such agreements has been recently reviewed in the decision of this court in *Kratz v. Parkside Hill Ltd.* (supra).

[para19] As noted in Kratz, it is clear from the decision of the Supreme Court of Canada in Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co., [1980] 1 S.C.R. 888, that the first step in interpreting the agreement is to give effect to the intention of the parties as determined from the words used in the agreement.

The normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result.

per Estey, J. at 901

[para20] The contra proferentem doctrine will only apply if the application of these rules does not release the contract from ambiguity.

[para21] Applying these principles in this case, one must conclude that a literal reading of the relevant passages in the agreement supports the respondent's interpretation. While the undertaking of such a literal reading is not a particularly pleasant literary experience, as the agreement is written with verbose clauses and sub-clauses tenaciously modifying many terms, it can be simplified as follows:

[para22] 1. The Closing Date as defined in the definition section was at the time of signing an unfixed date, to be set in reference to April 30, 1992. It would be earlier if the units were ready to be occupied earlier and up to two years later if extended in accordance with clause 16 of the agreement. In this case the Closing Date ultimately settled for the individual applicants on dates in January and February 1994, in accordance with the extensions permitted under clause 16.

[para23] 2. The Unit Transfer date was defined in clause 12 as the later of:

- (a) the Closing Date, if the requisite plans were registered by then, and
- (b) the date specified in a notice in writing that the vendor was able to complete the transfer.

[para24] In this case, the definition in clause 12(a) did not apply as the plans were not registered by the Closing Date.

[para25] Schedule 'A' which was termed the "Occupancy Agreement" and which was, as noted before, made an "integral part" of the main agreement by clause 2(b), details what will happen if a registrable transfer is not available within 12 months of the Closing Date. In such event, the vendor could give a written notice of an additional extension of up to twelve months.

[para26] "Closing Date" in this context would literally, as well as logically, mean whatever date had come to be settled in accordance with the definition in clause 2(a)(iv). If it meant April 30, 1992 and only April 30, 1992, the vendor would have said so. Instead, the floating date as defined in clause 2(a)(iv) was expressly incorporated and an extension of twenty-four months at the maximum was permitted. [para27] Is this literal interpretation in accord with the true intent of the parties as expressed in the agreement as a whole? In the context of the commercial atmosphere surrounding the making of the agreement, as evidenced by the whole of the contract, the literal meaning is also the most realistic. It recognizes the realities, separately referred to in other parts of the agreement, that the undertaking was a speculative risk investment, that numerous by-law amendments and approvals required by law were not in place, and that it was quite likely that occupancy would predate registration.

[para28] Accordingly, there is no ambiguity in the agreement that would require the invocation of the contra proferentem doctrine.

[para29] It may be noted that the decision of this court in Kratz v. Parkside Hill Ltd. to which extensive reference was made during the course of argument, is distinguishable from the case at bar. While the issue was the same in Kratz, the contract was not. Most significantly, the agreement in Kratz tied the extension of the date for transfer of title to the right to extend the occupancy date, whereas in the case at bar the right to extend the closing date for occupancy purposes is defined separately from the right to extend the Unit Transfer Date.

[para30] Accordingly, at this point in time and on the material introduced on this application, it cannot be concluded that the respondent has breached its duty to deliver registrable transfers to the applicants in accordance with their agreements.

[para31] In view of this finding it is not necessary for me to make a ruling with respect to the issue of interest payable.

[para32] The application is dismissed.

[para33] The respondent shall have costs of this application fixed in the amount of \$2,000, plus G.S.T., payable forthwith.

WEIN J.

CBR# 097

Leonard Crocco, Plaintiff, and 844270 Ontario Inc., Defendant

Action No. 8719/92

Ontario Court of Justice - General Division Toronto, Ontario Bolan J. January 27, 1993.

Jackie E. McGaughey-Ward, for the Plaintiff. Paul C. Strickland, for the Defendant.

[para1] BOLAN J.:-- The issue in this motion is whether the interest component in a monthly occupancy fee demanded by the defendant of the plaintiff is in contravention of Section 51(6) of the Condominium Act R.S.O. 1980, Chapter 84.

[para2] The plaintiff is the purchaser of two residential condominium units in Sudbury Condominium Plan No. 12. He acquired these units pursuant to the terms of agreements of purchase and sale entered into with the defendant, and dated November 10 and 11, 1989. (See tabs D and E of the defendant's motion record). These agreements were on a vendor's standard form and contained, inter alia, the following terms:

(a) The purchaser was obliged to take interim occupancy of the two units upon substantial completion of same, notwithstanding that the condominiums were not registered and titles to the units could not be conveyed. On the date of interim occupancy (the possession closing) the purchaser was required to pay the balance of the purchase money.

(b) the interim occupancy of the units was to be governed by the terms of a vendor's standard occupancy agreement.

[para3] On January 18, 1990, one day before the closing date of the two transactions, the plaintiff and defendant entered into occupancy agreements. (See Tab G of defendant's motion record) The balance of the purchase monies was not paid on the possession closing. Possession was commenced on January 19, 1990 (the "Stub Period") and the plaintiff paid occupancy fees for both units. The occupancy fee for Unit 1 was determined as follows:

(a) estimated monthly realty taxes \$100.00 (b) estimated monthly common expenses 109.10 (c) estimated monthly interest 718.81 TOTAL \$927.91

The occupancy fee for Unit 2 was determined as follows:

(a) estimated monthly realty taxes \$100.00 (b) estimated monthly common expenses 109.10 (c) estimated monthly interest 934.44 TOTAL \$1,146.54

[para4] The plaintiff does not dispute that the common expense item and the realty taxes were properly charged, but disputes the claim for interest.

[para5] The interest component of the occupancy fee charged was calculated on the basis of the outstanding balance of the purchase price after subtracting the deposits paid by have paid, monthly, in respect of any mortgage or the interest rate which would be offered by a Canadian Chartered Bank for a conventional first mortgage with a one year term.

[para6] Section 51(6) of the Condominium Act provides that the purchaser of proposed residential condominium units may take possession and occupancy of the units before a deed or transfer can be delivered. It contains a number of provisions during the interim occupancy period including the following:

"51(6) Where an agreement of purchase and sale entered into by a proposed declarant for a proposed unit for residential purposes permits or requires the purchaser to take possession of or occupy the unit before a deed or transfer of the unit acceptable for registration is delivered to him, the money paid in respect of such right or obligation to the proposed declarant shall be not greater, on a monthly basis, than the total of the following amounts:

1. The amount of interest that the purchaser would mortgages he is obligated to assume or give under the agreement of purchase and sale on delivery of a deed or transfer of the unit.

2. An amount reasonably estimated on a monthly basis for municipal taxes attributable to the proposed unit.

3. The projected monthly common expense contribution for that unit."

[para7] The effect of Section 51(6) was to place a statutory limit on the amount of occupancy charges a condominium developer could impose on a purchaser. However, in its haste to protect purchasers from unscrupulous developers charging unreasonable or excessive occupancy rent, it created a windfall for all-cash purchasers at the expense of the developers. Under Section 51(6) of the Act, the all cash purchaser (or the purchaser who arranges his own financing) cannot be required to pay the interest component of the occupation rent. It means that the purchaser is - for all intents and purposes - living rent-free over the interim occupancy period, while at the same time, retaining his or her funds to invest during the same period. The disadvantage to the developers is that it denies them income for the likely costs of carrying the unit until the date of final closing.

[para8] The phantom mortgage was designed by developers to satisfy the formal requirement of Section 51(6) of the Act and at the same time became entitled to include a mortgage interest component in the occupancy fee. This concept was fully explored by the Ontario Court of Appeal in *Albrecht v. Opemoco* (1991) 21 R.P.R. (2d) 68. Mr. Justice Robins, writing for the Court, said at page 80:

"Section 51(6) evidently proved so financially detrimental to condominium developers that many of them refused to enter into transactions in which no mortgage was to be assumed or given back on final closing. Their response to this legislation was to restructure their agreements of purchase and sale in such a way as to satisfy the formal requirements of s. 51(6) and thereby become entitled to include a mortgage interest component in the occupancy fee. To achieve this end, the purchasers, in what would otherwise be all-cash transactions, were required under the terms of their agreements of purchase and sale to complete their transactions by giving back on final closing a form of mortgage that has become popularly known as a "phantom mortgage." This

colourful appellation recognizes that these mortgages were to have only a passing existence and would disappear shortly, if not immediately, after final closing. They were patently not intended as a form of permanent financing.

Robins J.A. continues at page 83:

"Whether a mortgage interest component can properly be charged on the basis of these agreements, as I view s. 51(6) 1, is not dependent on the precise manner in which the contemplated transactions are eventually concluded. The section focuses on the obligation of the purchaser existing under the agreement of purchase and sale to give a mortgage upon transfer of title."

[para9] In order to determine the validity of the interest component of the occupancy fee, one must look to the terms and conditions of the offer of purchase and sale. Nowhere in the offers is reference made to a mortgage. None of the usual variations of phantom mortgages can be found. It would appear that the issue was not addressed. Both offers call for the payment of a deposit of \$5,000 with the balance of the purchase price payable on closing. There is a provision for interim occupancy in the event of delay which calls for payment to the vendor of, the balance of the purchase price on "possession closing." However, no cash was paid on "possession". Instead, the parties executed occupancy agreements which called for monthly payments until the transaction could be closed. The occupancy agreements refers to these payments as "rental monies". Nowhere in the occupancy agreements is reference made to a mortgage.

[para10] Section 51(6) of the Condominium Act makes it quite clear that the amount of interest the purchaser is required to pay is in respect of any mortgage he is obligated to assume or give. Section 51(6) of the Act makes no mention of sales where no mortgage is assumed or given back. As Dupont J. said in *Cadillac Fairview Corp. v. Allin* (1979) 7 R.P.R. 287:

"The end result in such a case is a windfall gain to the cash purchaser if he is allowed to take possession prior to closing, and a serious and unexpected loss to the developer." Phantom mortgages in condominium purchases are legal in Ontario; however their validity must be determined by looking at the terms of the agreement of purchase and sale. I have carefully reviewed the agreements of purchase and sale and the occupancy agreements in this case and nowhere is any reference made to interest on a mortgage. Even a liberal interpretation of the section would not make the interest component of the occupancy fees in this case legal.

[para11] I find that the demand made by the defendant (vendor) for interest charges during the period of occupancy prior to closing was illegal and in contravention of Section 51(6) of the Condominium Act R.S.O. 1980 Chapter 84.

[para12] The plaintiff will accordingly have judgment against the defendant for \$17,257.06.

[para13] I do not feel that it would be proper, given the circumstances of this particular case, to award the plaintiff pre-judgment interest.

[para14] I make no order as to costs. BOLAN J.

CBR# 010

713953 Ontario Limited, Applicant, and Peel Condominium Corporation No. 294, Respondent

Action No. RE 310/92

Ontario Court of Justice - General Division Toronto, Ontario Hawkins J. Heard: June 4, 1992 Judgment: June 24, 1992

M.R. Hemingway, for the Applicant. A.S. Hukowich, for the Respondent.

HAWKINS J.:-- The applicant is the developer and declarant of an 88-unit office and commercial condominium in Mississauga. The respondent is the condominium corporation. The development is 80% occupied and the vast majority of the occupants are physicians.

The applicant still owns 9 units and 151 parking units. It has leased some of the units to Arlettes Cafe & Restaurant Ltd. (the "Restaurant Company") for purposes of a cafeteria. In order for services to be installed and hooked up, work has to be performed in and upon certain of the common elements. The respondent has passed, as it is authorized to do by section 9 of the Condominium Act, a special by-law to deal with the granting of easements through the common elements by means of a licence. The respondent won't grant the necessary licence to the applicant because the applicant is in arrears in its share of common expenses. Hence, this application, by which the applicant seeks to have the court either declare that the said special by-law does not apply to the work in question, or order that the respondent issue the necessary licences. I propose to deal with the two major disputes outstanding between the parties namely parking and common expense arrears.

Parking

The applicant still owns 151 underground parking spaces. At one stage in the history of the development, the applicant was seeking certain zoning permission and in an effort to drum up support for its zoning application, its circularized occupants with a mailing containing these words (inter alia):

"the developer will make the unsold underground parking spaces available for everyone. However, they will continue to be private property, and as such they will marketed to interested parties. The developer will paint 'reserved' signs for those parking spaces which are already privately owned".

For some time, access to the applicant's parking spaces was free (without charge) and unrestricted. To what should have been the surprise of no one, the applicant's had little or no success in selling parking spaces in an area which was open and free to the world at large. Every effort by the applicant to restrict access to its parking spaces to those who had purchased them has been met by counter measures by the respondent, who takes the position that the words quoted above constitute an open-ended undertaking by the applicant that access to its unsold parking spaces will be free and unrestricted. It is not necessary for me to resolve this issue though I must confess that the interpretation advanced by the respondent does seem a little out of touch with reality.

Arrears of Common Expenses

The applicant is in arrears of common expenses in the sum of almost \$100,000.00 which represents close to 25% of the respondent's annual budget. While the applicant in its material refers constantly to the "alleged" arrears there is not one jot of evidence to contradict the respondent's figures. Attempts were made to clear these arrears by a proposed transfer of one of the applicant's units to the respondent but the applicant insisted that such settlement include a settlement of the parking space dispute as well and the proposal came to nought. From this is it clear that the applicant, when it suits its purposes, is prepared to insist on a resolution of all outstanding issues but in the instant matter insists that the licence it seeks is a discrete matter which should be looked at by itself. The applicant submits that it is a mark of bad faith on the part of the respondent to insist on payment on the outstanding common expense arrears as a pre-condition to the granting of the common element in support of this application. Mr. Dabit paints himself as ann a resolution of the parking dispute as a further pre-condition I might have thought otherwise because the parking dispute is a genuine unresolved dispute. There is no dispute as to the common expense arrears. The money is owed.

The Doctrine of Clean Hands

There are two things which touch upon the doctrine of clean hands. There were earlier common expense arrears in connection with which the respondent had filed liens against the applicant's units. Those liens were prior to a large mortgage granted by the applicant to an associated corporate mortgagee. A settlement was reached concerning those earlier common expense arrears and the respondent lifted its lien. Some of the applicant's settlement cheques were dishonoured and the respondent refiled its lien but this time it found itself behind the large mortgage.

Further to the issue of clean hands, I refer to the affidavit of George Dabit sworn January 30th, 1992 and filed

innocent businessman caught in the cross fire between the applicant and the respondent. What he fails to disclose in his affidavit, and which emerged on his cross-examination, is that one of the principals of the applicant is a large partner in the restaurant business. Mr. Dabit's affidavit goes beyond mere non-disclosure and contains some outright falsehoods in paragraphs 20 and 21. It emerged from its cross-examination that he had not borrowed \$100,000.00 or any sums of money, that the 12% interest rate is a product of his imagination and that he is not obliged to pay rent until the restaurant opens for business.

For the reasons indicated above, this application is dismissed with costs.

HAWKINS J.

CBR# 345

Whitby Harbour Development Corp., Applicant/Landlord, and Stanley Cater (And 13 Others), Respondent(s)

Also reported at: 23 R.P.R. (2d) 25 23 R.P.R. (2d) 25

Ontario Court of Justice - General Division Newmarket, Ontario Macfarland J. March 18, 1992

A. Irvin Schein, for the Applicant/Landlord. Mark G. Quail, for the Respondents, except Rothman. Andrea M. Habas, for the Respondent, Rothman and Carr.

MACFARLAND J.:-- These applications are brought by Whitby Harbour Development Corporation as landlord against a number of tenants occupying certain units of a residential condominium project located at 360 Watson Street West, Whitby, Ontario.

The applicant is the owner and developer of the condominium project and the tenants are individually, parties to certain agreements of purchase and sale entered into with the applicant, save for one Bruce Carr about whom I shall have more to say later, for the purchase of a unit in the project.

The respondents began to occupy the units commencing at the end of February, 1991 through July, 1991.

As is usual in these projects, occupancy began from the ground floor up; the lower floors being occupied before the upper floors as they became completed.

Each of the named respondents has purported to rescind her or his Agreement of Purchase and Sale and each has failed to pay any occupation rent since at least November 1, 1991, and in the case of the Respondent Goodlet, since October 1, 1991.

The terms of the Agreements of Purchase and Sale are identical save of course for the unit numbers, price, names of the parties, etc.

The agreement is a voluminous document which contains a number of schedules.

Pursuant to the terms of that document, a purchaser is required to occupy the unit which is the subject of the agreement according to the terms of Schedule "A" to the Agreement of Purchase and Sale. Clause 2 of Schedule "A" provides:

"If the Unit is, in the opinion of the Vendor, substantially completed sufficient to permit occupancy but the Declaration and Description have not yet been registered, then the Purchaser shall pay to the Vendor as a further deposit the balance due on the Occupancy Date as set out in paragraph 2(b) hereof, and shall take occupancy of the Unit on that date pursuant to the terms of the Occupancy Agreement set out in Schedule B hereto (the "Occupancy Agreement"), at a monthly occupancy fee payable in advance determined in accordance with the Act said monthly occupancy fee not to be credited as payment towards the Purchase Price. In addition, at that time, the Purchaser shall provide to the Vendor a series of post-dated cheques representing a further twelve (12) months' occupancy fee."

Each of the respondents occupied their respective units in accordance with that provision until October, 1991 in the case of Goodlet and November, 1991 in the case of all other Respondents.

The condominium project is still not registered but the evidence of H.E. Phelps, which I accept, is that all matter are completed which are required to be completed and registration will likely occur on Monday or Tuesday of next week - March 16th or 17th. There has been an unusual delay caused by reason of an environmental audit required as the result of a complaint received by the Ministry of the Environment. The origin of that complaint is unknown, although Mr. Phelps harbours the suspicion that it originated with one of the respondents. Certainly, there is no satisfactory evidence before me that that is so.

The delay in registration accordingly, has been somewhat longer than is usual but for a perfectly valid reason and through no fault of the applicant, I find.

The occupation rent charged to the tenant - purchasers is in accordance with the provisions of the Condominium Act and is in no way exorbitant.

The tenants take the position that because the interest rates have been fluctuating downward since they entered their agreements, the landlord has in effect, been overcharging them. They point to the landlord's letter of November 15, 1991 to Mr. Corrado Giliberto as evidence of the landlord's admission of this overcharge.

I do not accept that submission as the evidence does not support it. The landlord's charges are in accordance with the provisions of the Condominium The landlord is required by Clause 2 of Schedule "B" of the Agreement of Purchase and Sale to adjust the portion of the occupancy fee consisting of interest on the closing date. In my view, the tenants are bound by that provision.

The letter to Giliberto is nothing more than a good faith gesture on the part of the landlord to tenants in good standing, to in effect move that interest adjustment date forward in the expectation that it would be of some help to the tenant to whom the offer was made in these most economically trying times. The tenants concede that it is only the interest portion of the occupancy fee which they dispute.

The tenants called no viva voce evidence as to the conditions of which they complain in paragraph 8 of the Affidavit of Gary Maidlow. The Affidavit recites "construction site conditions" and a "lack of recreational facilities".

The tenants were well aware of the terms of their respective agreements that a certain amount of construction would continue beyond the initial occupancy of the lower floors. It follows from the fact that the building was occupied in stages as the construction continued.

I accept the evidence of Mr. Phelps that the nature of the construction was minor - it involved the laying of carpet, installation of wall coverings and the like only on the occupied floors. In my view, it is unreasonable to expect these finishing touches would all have been entirely completed prior to occupancy.

Insofar as the recreational facilities are concerned, I accept Mr. Phelps' evidence that these were completed and available for use in October of 1991 - about the time these tenants decided to stop paying any occupancy rent.

In any event, paragraph 11(b) of Schedule "A" of the Agreement of Purchase and Sale provides:

"The vendor shall complete the common elements as soon as is reasonably practicable, but the failure of the Vendor to complete elements, including without limitation any amenities thereon, on or before the Occupancy Date or the Closing Date shall in no event entitle the Purchaser to refuse to take possession of the Unit and/or to close the within transaction on the Closing Date or to fail to remit to the Vendor the purchase monies required to be paid by the Purchaser hereunder."

It is no excuse for the tenants to refuse payment on this basis, particularly in view of the uncontradicted evidence that these facilities were available in October.

The delay in registration has been satisfactorily explained by the landlord.

Counsel for the tenants object to these issues being determined by the summary procedure available under Part IV of the Landlord and Tenant Act. Other actions have been commenced in the General Division by the landlord against these tenants for relief which, inter alia, includes the relief sought before me. These are actions commenced in the General Division in Toronto by certain of the tenants against the landlord for return of their deposit monies and other relief. In addition, the Respondent Rothman has commenced an application for similar relief hoping for summary judgment of that issue.

The tenants seek a stay of these proceedings pending the outcome of those other matters.

Although I expressed some doubt at the outset of these proceedings, I am satisfied that section 110(3)(e) contemplates that these proceedings are to be dealt with by the summary procedure available under the Landlord and Tenant Act.

In my view, these proceedings ought not to be delayed merely by reason of the fact that similar relief is also incidentally sought in those other actions. I am satisfied that I have jurisdiction to proceed with these applications and intend to do so. I take some comfort from the decision of the Divisional Court in RE: Lewis and Pinkofsky (1980) 28 O.R. (2d) 793 at p. 794. The tenants are in occupation and refusing to pay any monies whatever for that privilege. In addition, I accept Mr. Phelps' evidence that certain of the Respondents are causing difficulties at the development. They have posted signs and disrupt the landlord's dealings with prospective purchasers. Such actions may well come back to haunt them in the final analysis.

The deposit monies paid pursuant to the terms of the Agreements of Purchase and Sale are held in trust. The landlord has no access to or use of that money. It will remain in trust until the resolution of those issues relating to the purported rescission of the Agreements of Purchase and Sale.

The tenants have not paid the occupancy fees into court nor into any trust account; they have simply not paid them, even though they concede that they only dispute the interest portion of them.

In my view, the occupancy of the units is granted to the tenants only by virtue of the Agreements of Purchase and Sale. The rescission of those agreements in my view, ends any right of occupation. These tenants no longer have a right to occupy the units in question.

Counsel for the Respondent Rothman objects to the proceeding against her client. One Bruce Carr is also a signatory to the Occupancy Agreement but not to the Agreement of Purchase and Sale relating to what I shall refer to as the Rothman apartment.

She objects because Carr was not properly served and has not been made a party to these proceedings.

In my view, the Occupancy Agreement here is merely ancillary to the Agreement of Purchase and Sale. It gives no rights independent of the Agreement of Purchase and Sale. The fact that Carr is shown as an occupant of the unit and signed the Occupancy Agreement gives him no higher right than Rothman who is the party to the Agreement of Purchase and Sale. If her right to occupy is at an end, so too is his and it matters not that he was not separately served.

That Mr. Carr was well aware of these proceedings and the fact that he received documents for Rothman cannot be disputed on the evidence before me. Indeed, he was represented by counsel at the hearing.

He was served laterally and if need be, I grant leave to the applicant and abridge the time for service in relation to Carr.

If it is necessary that he be made a party to these proceedings, and in my view it is not, then I grant an order adding him to the proceedings.

In my view, the landlord's application must succeed. There is no viable defence presented before me.

The respondents did not, as is required by the legislation, pay the arrears owing into Court.

I accept the landlord's evidence with respect to the amounts owed to date and find those amounts to be as follows:

UNIT OCCUPANT ARREARS TO MARCH 13

101 BIGGS \$ 8,944.77 306 SMILLIE 13,509.22 309 GOODLET 10,302.19 403 EYRE 9,165.74 407 CATER 12,681.11 511 MAIDLOW 8,663.57 607 HERON 12,946.28 609 ROTHMAN 8,391.03 808 WINIARSKI 7,146.81 811 GRANT 8,214.26 1106 MCALPINE 10,942.52 1111 RATCLIFFE 8,649.42 1202 CROTIN 11,705.54 1207 TITIAN 14,424.07

The landlord's application therefore will succeed and an Order will issue declaring the tenancy agreements terminated; for Writs of Possession in respect of each of the units; for payment of arrears in accordance with the amounts I have determined to date and compensation at the respective per diem rates established for the respective units to the date that vacant possession is given to the landlord.

My Order will, however, be stayed until March 31, 1992 in order to give the tenants time to obtain alternative accommodation.

MACFARLAND J.

CBR# 285

Russ-Cad Management Limited and Carm-Cad Management Limited collectively c.o.b. as Drafcorn, In Trust, Plaintiffs, and Bayview 400 Industrial Developments Inc. and The Corporation of the City of Barrie, Defendants

50 C.L.R. 300 24 R.P.R. (2d) 6 Action No. 52063/90 Q Also reported at: 24 R.P.R. (2d) 6 50 C.L.R. 300 Action No. 52063/90 Q

Ontario Court of Justice - General Division Toronto, Ontario Dunnet J. Heard: March 19, 1992 Judgment: April 3, 1992

Matthew Halpin, for the Plaintiffs. Michael H. Turk, for the Defendants.

DUNNET J.:-- The plaintiff moves for summary judgment against the defendant, Bayview 400 Industrial Developments Inc.

The facts as I find them are as follows:

The plaintiff carries on the business of structural steel drafting for residential and commercial development projects.

Bayview is a developer of commercial condominiums.

Gray Watters, in Trust agreed to purchase from Bayview a commercial condominium unit having the municipal address, Unit 14, 130 Saunders Road, Barrie, Ontario.

On June 16, 1988 Gray Watters, in Trust assigned the Agreement of Purchase and Sale to the plaintiff.

The purchase price of the Unit was \$61,600. The plaintiff paid to Gray Watters, in Trust the sum of \$7,400 for the assignment and to Bayview, the sum of \$21,550 as a deposit. The Agreement provided that the balance of the purchase price of \$40,050 was to be financed by the assumption of a mortgage arranged by Bayview on closing.

In August 1989, the plaintiff received permission from Bayview to commence certain tenant improvements in anticipation of occupying the Unit on the closing date of September 1, 1989. Deficiencies in the construction and design of the Unit and Building were noticed and the plaintiff retained engineers to review the structural integrity and construction of the Unit.

The report that followed detailed deficiencies including:

- a) insufficient structural strength of the walls throughout the Unit;
- b) hollow masonry in the walls of the Unit and Building where the design drawings called for solid concrete;
- c) roof openings without necessary supporting structural steel framing for the roof deck.
- d) insufficient bearing plates for the roof joists;
- e) no lateral support devices from the roof joists to the partition walls;
- f) the roof assembly, workmanship and design were deficient;
- g) interior partition masonry walls not anchored to steel columns or cross walls;
- h) improperly welded or loose structural steel bridging for open web steel joists;
- i) inadequate construction of load bearing portions of walls resulting in cracking;
- j) improper placing of diagonal braces on sloping walls.

The Occupancy Certificate required under the Agreement of Purchase and Sale was delivered to Bayview on September 1, 1989.

It stated in part:

RUSS-CAD MANAGEMENT LTD. AND CARM-CAD MANAGEMENT LTD. c.o.b. DRAFCOM as Purchaser, having inspected Unit Number 14, in the Industrial Complex located at 130 Saunders Road in the City of Barrie, in the County of Simcoe, hereby accept the said unit and enter into occupancy thereof confirming the completion of the said unit in accordance with the terms of the Agreement of Purchase and Sale between the undersigned, as Purchaser, and Bayview and 400 Industrial Developments Inc., as Vendor, and confirming that no further work or rectification is required except as may be specifically noted herein. The undersigned hereby waives any claims, rights or entitlements and accepts the unit in its present condition except as noted.

Deficiencies/rectifications to be completed:

See Schedules A, B, C and D

I find that the Occupancy Certificate included the engineering reports referred to above and that they came to the attention of Bayview.

The plaintiff also forwarded copies of the engineering reports to the Corporation of the City of Barrie and the City requested from Bayview confirmation that the items specified complied with the Ontario Building Code, failing which the City would prevent further occupancy of the Building until the Building structure had been strengthened.

On November 17, 1989, an Order to Comply was sent by the City to Bayview requiring compliance with certain deficiencies on or before December 31, 1989, as follows:

ORDER NO.	DESCRIPTION OF NON COMPLIANCE SECTION & SUB-SECTION
1.	Block wall sections and piers to be 100% solid as noted on design drawings
2.	Masonry control joints to have grout removed and caulking installed
3.	Masonry demising walls to be laterally secured at top as directed by Structural Engineer
4.	Steel joists to be redesigned and adequately reinforced to support the design loads of mechanical roof-top units as per design drawings
5.	Roof top openings to be supported with steel channels as per design drawings
6.	Provide grouting for solid bearing under bearing plates of lintel beams
7.	Install missing diagonal bracing and correct those as noted by Structural Engineer
8.	Repair loose bridging in Unit 14
9.	Provide a report from Brandzel 11(1)(a) of Consultants Limited verifying that Building all work noted above has been Code Act completed and accepted
10.	Provide a report from an 11(1)(a) independent testing agency verifying of Building that walls are 100% solid where Code Act required

On February 28, 1990, the plaintiff was advised by the City that occupancy of the unit would be in violation of the Building Code Act, R.S.O. 1990, c. B.13.

In June, 1990, Bayview was charged with and convicted of failure to comply with a Work Order issued under the Building Code Act requiring restorative work to the Building and reports to be submitted by Bayview's engineers as well as an independent testing agency to verify work as completed.

In January, 1992 the City received an engineering report certifying that the design and as-built construction was in compliance with the design and construction standards of the Ontario Building Code. The City advised the plaintiff that it would withhold any recommendation for draft approval for condominium registration in order to receive its comments on or before January 31, 1992.

The plaintiff has been unable to inspect the Unit as the locks have been changed; the plaintiff has notified the City of continuing deficiencies within its knowledge. The City has not as yet given draft approval for the Unit to be registered under the Condominium Act, R.S.O. 1990, c. C. 26.

The Agreement of Purchase and Sale contemplated the registration of a Declaration as defined in the Condominium Act, in order to convey title.

The relevant provision of the Agreement states:

5.13 The Vendor covenants to proceed with all due diligence and dispatch to attempt to register the Declaration as quickly as possible. If the Vendor for any reason whatsoever, except its own wilful default, is unable to register the Declaration so as to enable delivery of a registerable transfer to the Purchaser within twelve (12) months of the Occupancy Date then the Vendor shall have the right to extend the time for registration of the declaration for a further period twelve (12) months or to declare this Article 5.00 and the Purchase Agreement, notwithstanding any intervening acts or negotiations, at an end and all monies paid by the Purchaser towards the purchase price, subject only to the proper set off claims of the Vendor for extras, shall be returned to the Purchaser without interest or deductions, provided however, that the Vendor shall not be obligated to return any monies of the Purchaser paid in pursuance of the Purchaser's occupancy of the Unit or in pursuance of extras ordered by the Purchaser unless the parties otherwise agree in writing. If the Vendor extends the time for registration of the Declaration by a further twelve months, and the Declaration is not registered at the end of such extended period, then this Agreement shall be at an end and monies paid shall be returned subject to the conditions and exceptions in this paragraph.

In my view, article 5.13 provides that upon proper notice, Bayview could extend the time required to deliver a registerable transfer to the plaintiffs by a maximum of 2 years beyond the occupation date of September 1, 1989. No notice was delivered and, in any event, more than 2 years have elapsed from the occupancy date. It is undisputed that Bayview has failed to register the Declaration in order to convey title.

In *Scanlon v. Castlepoint Development Corporation and Bramalea Limited*, an unreported decision of Austin J., released November 14, 1991, the vendor attempted unilaterally to change the date of closing with respect to the purchase of a condominium.

Austin J. held:

The closing was to be on November 4, 1991, and Bramalea's letter of May 31, 1991, changing the date, constituted an anticipatory breach of the agreement. The date of closing was a fundamental term. Scanlon was therefore entitled to treat the agreement as at an end. He is entitled to a declaration that the agreement is null and void.

In that case the court heard argument on the date set for closing, being November 4, 1991. In this case the application is being heard more than 1 years after the last date of registration that I have found available to Bayview under the Agreement. The date of closing of a condominium sale is a fundamental term, the breach of which entitles the purchaser to treat the Agreement as at an end.

In *Imperial Brass Ltd. v. Jacob Electric Systems Ltd.* (1989), 72 O.R. (2d) 17, the plaintiff claimed rescission of a contract to purchase a computer. In granting the rescission, Dennis Lane J. held at p. 25:

I find that the defects in the software as delivered, the delays experienced, and the probability of serious further delays in completing delivery made the defendant's performance totally different from what the parties had in contemplation when they entered into the contract. In such a case the breach is fundamental and rescission and damages may be awarded: ...

I find the combined effect of the deficiencies and delays which had to be addressed constitute a fundamental breach of the Agreement.

Bayview argues that the plaintiff breached the agreement by failing to provide financial disclosure relating to the assumption of the mortgage. There is no evidence of any demand by Bayview to submit papers for approval.

Bayview also argues that the plaintiff breached the terms of the Agreement by failing to provide common monthly expenses plus monthly occupancy costs as required under the Agreement in the event the Declaration was not registered on or before the occupancy date. The plaintiff submits such expenses are not payable in that the plaintiff was unable to occupy the Unit despite the delivery of the Occupancy Certificate. Nor were they permitted the use and enjoyment of the property. I agree.

Finally, Bayview argues that the deficiencies noted in the Occupancy Certificate were, on their face, minor in nature and did not affect the plaintiff's use and occupation of the Unit. I cannot agree.

Bayview suggests that the plaintiff was permitted to take possession of the unit in August 1989 to commence improvements, failed to obtain the required Building Permit and caused damage to the premises.

Despite these allegations, I have found in all of the circumstances that the Agreement is terminated by reason of the fundamental breach by Bayview.

Bayview alleges there is no evidence that occupancy was refused. Clearly I find there is evidence that occupancy would be in violation of the Building Code Act. Moreover, even if the plaintiff breached the Agreement, and I have found otherwise, and even if the plaintiff was not prevented by Bayview from occupying the Unit, I find that the Agreement is at an end by reason of Bayview's failure to register the Declaration on or before September 1, 1990.

The deficiencies were serious. From the outset the plaintiff brought them to the attention of Bayview. Bayview had full knowledge of the deficiencies and failed to remedy them in a timely fashion. Clearly, Bayview did not provide any reasonable explanation for the delay. I find, therefore, that the plaintiff is entitled to a declaration that the Agreement of Purchase and Sale dated May 16, 1988, is at an end because of a fundamental breach by Bayview and by reason of its failure to register the necessary Declaration.

There is no question that the plaintiff is entitled to the return of its deposit in the amount of \$21,550 pursuant to the provisions of article 5.13 of the Agreement.

The plaintiff also seeks judgment against Bayview for the sum of \$7,400 paid to Gray Watters, in Trust for the Assignment. The plaintiff took the Assignment, subject to all of the rights and liabilities of Gray Watters, in Trust pursuant to the Agreement, one of which was the right to terminate. Bayview was not a party to the Assignment other than to consent to it. Whatever claim the plaintiff may or may not have to the return of this sum from Gray Watters in Trust, and no such claim is before me, it is not one arising out of the Agreement between the parties to this litigation.

The plaintiff also claims interest on its deposit. Article 5.13 specifically provides that no interest is to be paid on any return of deposit. The situation before me is unlike that facing Austin, J. in Scanlon, supra, which dealt with s. 53(2) of the Condominium Act in connection with residential condominium purchases. Counsel have not directed me to any legislation giving a similar right to a purchaser of a commercial condominium.

The plaintiff is entitled to pre-judgment interest from the time its cause of action for the return of the deposit arose - that is, when it first exercised its right to terminate. In the absence of any evidence of an earlier exercise of that right, I find that the plaintiff first gave such notice when it issued the Statement of Claim on July 17, 1990. Pre-judgment interest is granted from that date at the rate of 11% per annum.

The plaintiff claims for tenant improvements, expert reports, utilities, insurance, telephone service, labour and legal fees paid prior to the commencement of these proceedings. These are amounts "paid in pursuance of the purchaser's occupancy of the Unit" and as such are specifically excepted by article 5.13.

Accordingly, the plaintiff shall have judgment against Bayview for the declarations claimed in paragraphs (a) and (b) of the Notice of Motion and the sum of \$21,550 plus pre-judgment interest at 11% from July 17, 1990 to date.

I am presently not aware of any reason why costs should not follow the event. Counsel may make written submissions in order that I may fix costs.

DUNNET J.

CBR# 201

Lou Morin and Sybil Shaver, Applicants (Respondents in Appeal), and Ontario New Home Warranty Program, Respondent (Appellant)

Action No. 845/90 Also reported at: 54 O.A.C. 347

Ontario Court of Justice - General Division Divisional Court - Toronto, Ontario Rosenberg J. Heard: November 28, 1991
Judgment: February 17, 1992

Janice B. Payne, for the Applicants (Respondents in Appeal). Netanus Rutherford, for the Respondent (Appellant).

The judgment of the Court was delivered by

ROSENBERG J. (orally):-- This is an appeal by the Ontario New Home Warranty Program (the warranty program) from the decision and order of the Commercial Registration Appeal Tribunal (the Tribunal) dated July 17, 1990.

The decision and order pertain to a claim made by the respondents under Section 14(1)(b) of the Ontario New Home Warranties Plan Act, R.S.O. 1980 c. 350 (the Act) for compensation for breach of warranty in respect of a condominium unit owned by them. Upon a request for a preliminary ruling from the Tribunal as to whether the Notice of Claim had been submitted within the prescribed one-year warranty period the Tribunal held in the affirmative.

The Tribunal therefore directed the appellant to inspect the respondents' condominium unit and to decide upon the merits of the claim.

THE FACTS:

The respondents are the present owners of a condominium unit known as Unit 209 in a condominium building municipally known as 2019 Carling Avenue in Ottawa, Ontario.

On April 29, 1985, the declaration and description of the condominium building were registered under the Condominium Act R.S.O. 1980, c. 84, as Carleton Condominium Corporation No. 283.

Prior to April 29, 1985, the land, on which condominium building is situate, was owned by Twenty-Nineteen Carling Terrace Ltd., the developer. The developer was, at all material times, a registered vendor under sections 6 and 7 of the Act, and the condominium building was enrolled under the developer's registration number pursuant to the Regulations under the Act.

On or about June 28, 1985, the developer transferred the title of Unit 209 to Peirvest Inc. As of that date, the unit was completed and ready for occupancy. The transfer to Peirvest Inc. was by way of a distribution of corporate assets. Peirvest Inc., as a 20-percent shareholder or joint venturer, received five units and assumed certain mortgage liabilities and other liabilities in consideration of the transfer. It is not alleged, nor was it argued before us, that the transfer was a sham; nor can it be said on the facts as recited that the transfer was an arm's length transfer. While the representative of Peirvest who gave evidence was not sure if a Certificate of Possession had been completed, and the appellant was not able to produce a copy of the Certificate of Possession, for the purpose of these reasons, it is assumed that a Certificate of Possession was completed and filed with the appellant on or about the 28th day of June, 1985. In fact, the appellant's computer so indicated.

Between June 28, 1985 and October 17, 1986, the unit remained vacant. Peirvest Inc. possessed the keys to the unit and had exclusive control over access to the unit. Peirvest Inc. first attempted to sell the unit but when the unit could not be sold after a reasonable period of time, it was listed for sale or rent.

On or about October 17, 1986, Peirvest Inc. transferred title to the respondents and the respondents moved into the unit on November 5 or 6, 1986. By letter dated August 10, 1987, the respondents gave written notice of a claim for breach of warranty to the appellant. By letter dated September 27, 1989, the appellant rendered a formal decision wherein it disallowed the respondents' claim on the ground that the prescribed one-year warranty period had commenced on June 28, 1985 and, therefore, had expired prior to the date of the respondents' notice of claim.

The respondents requested a hearing before the Tribunal pursuant to section 16(2) of the Act. That hearing resulted in the decision appealed from herein. The Tribunal's reasons, in essence, are found in the last two paragraphs of their decision, which are as follows:

The Ontario New Home Warranties Plan Act is remedial, consumer protection legislation and should be liberally construed, as was suggested by Mr. Justice R.E. Holland in the *Meadows of White Oaks II Ltd.* case, reported at 65 O.R. (2d) at p. 365.

Accordingly, this Tribunal concludes that the Applicants are the first occupants of the unit and should be inequity protected in their claims under the Act. Since their notice to the Plan was within one year of their acquisition of the unit, the Tribunal directs that the Program inspect the unit and decide upon the merits of the various claims made by Morin and Shaver.

STANDARD OF REVIEW:

By virtue of the Minister of Consumer and Commercial Relations Act, R.S.O. 1980, c. 274, the standard of review under section 11(5) is as follows:

An appeal under this section may be made on questions of law or fact or both, and the court may exercise all the powers of the Tribunal and for such purpose the court may substitute its opinion for that of the registrar or of the Tribunal or the court may refer the matter back to the Tribunal for rehearing in whole or in part in accordance with such direction as the court considers proper.

DECISION:

We should not be taken as necessarily agreeing with the reasons of the Tribunal but, by virtue of section 11 (supra), we have considered fact and law. By section 1(g) of the Act, "owner", means "a person who first acquires a home from its vendor for

occupancy, and his successors in title." In our view, Peirvest Inc. was not a person who acquired this home for occupancy. They acquired this home as a distribution of corporate assets and for the purpose of resale. It was only after they were unable to sell that they listed the property for sale or rent:

Accordingly, we agree with the Tribunal's conclusion. This Act is consumer protection and should be liberally construed in order to provide that protection. Our decision is based on the particular facts before us.

The appeal is dismissed.

---Following submissions as to costs:

I have endorsed the record of the Appeal Book, "For oral reasons given, the appeal is dismissed with costs fixed at \$3,000.00."

ROSENBERG J. McKEOWN J. BELL J.

CBR# 197

David Milgram, Applicant, and York Humber Limited, Respondent

Action No. A 109/90 Also reported at: 22 R.P.R. (2d) 102

Ontario Court of Justice - General Division Toronto Weekly Court McRAE J. Heard: February 11, 1992 Judgment: February 13, 1992

McRAE J. (orally):-- This is an application for:

a) a declaration that two agreements of purchase and sale dated June 28, 1988 entered into between the applicant and the respondent have been terminated effective November 5, 1990;

b) An order returning the deposits given by the applicant to the respondent pursuant to these agreements in an aggregate amount of \$40,000 with prejudgment interest thereon in accordance with the Courts of Justice Act from and including November 5, 1990. The grounds relied on by the applicant are that there have been two material changes to the disclosure statement required by the Condominium Act.

The facts disclose that on June 28, 1988, the applicant agreed to purchase two condominium units in a building to be built by the respondent at which time the applicant received the mandated disclosure statements. The disclosure statement appears at page 39 of the record and contains as item 6 therein the following notice:

6. PUBLIC ACTIVITY CENTRE

The Corporation will be required to lease to the City of York for \$1.00 per year part of the common elements consisting of space on the upper lobby level having a minimum area of 360 square metres for a public activity centre for various indoor functions which may include a senior citizen activity centre and a day nursery.

The site plan agreement entered into on July 19, 1989, one year later, by the developer and the Corporation of the City of York provides on page 22 in the supplementary record as item No. 13 under Public Activity Centre:

13. The Owner agrees to lease to the City a public activity centre on the site, at no cost to the City, prior to the final registration of any Plan of Condominium relating to the site and the terms and provisions of the lease shall be subject to the satisfaction of the Council for the City. The Owner also agrees to include the following interior and exterior finishes at no cost to the City, in association with the Public Activity Centre:

It is agreed between the Owner and the City that the Owner shall have the option of paying to the City the sum of \$225,000.00, in lieu of providing the aforementioned public activity centre, and shall have the right to make any necessary application for an approval from the Committee of Adjustment or Council for a variance, or amendment to the by-law, which would permit the exercise of such option. The said sum of \$225,000.00 shall be paid to the City prior to the submission of the application and shall be held by the City in escrow in an interest bearing account pending final approval of the application. In the event that the application is not finally approved, the City will return the said sum of \$225,000.00 with interest earned.

The owner opted to apply to the Committee of Adjustment for the variance which was accepted, and the owner paid the City \$225,000 instead of installing the activity centre as suggested in the disclosure statement. The builder used the 360 square metre space for five additional condominium units. No amendment to the disclosure statement was supplied to this purchaser as a result of this change.

The applicant argues that there are two material changes to the disclosure statement. The deletion of the public activity centre and the increase in the number of units from 408 to 413 with the concomitant decrease in the applicant's percentage interest in the building. The applicant says therefore that he is entitled to the relief he seeks, that is, to terminate the agreement. The test of what is a material change adopted by Justice Borins in *Budinsky et al. v. The Breakers East Inc.* is the following at page 43:

Therefore, in my view an amendment to a disclosure statement is required when it is necessary to correct an error, omission or defect in the contents of the statement prescribed by s. 52(6)(7) where the amendment is of such significance as to be likely to influence the decision of a reasonable purchaser to purchase the condominium unit or to alter the character of the disclosure statement.

I in my turn adopt that definition of a material change.

It is obvious that the test is an objective test. I have looked at the changes objectively and have concluded that the changes are not a material change as anticipated in the legislation. A reasonable person would quickly conclude that this change was minor and was clearly beneficial to purchasers. It is not without some significance that no suggestion of an economic loss has been presented to me. This was not a deletion of private amenities but a deletion of a public amenity available to all the residents of the City of York. The benefits to purchasers are clear. First of all the public would no longer have access to the main lobby of the building. It is significant that the municipality is not limited to using the public activities area for a senior citizen activity centre or a day care centre, other public activities could be undertaken in the space. The owners at the same time would be required to carry a very disadvantageous lease for a rent of \$1.00 per year. They would be required to maintain the premises, to pay for utilities including heat and to clean the premises. In my view the application fails on this first ground.

The applicant also argues that the increase in the number of apartments from 408 to 413 is a material change since the regulation requires the number of units be specifically declared. Section 52(6) requires that the disclosure statement contain a general description of the property or proposed property including the types and number of buildings, units and recreation and other amenities together with any conditions that apply to the provision of amenities. The disclosure statement reveals that there will be 408 residential units but it also provides that the declarant, the owner, reserves the right prior to registration either to combine any of the residential units into one or more larger units or to divide any of the units into a number of smaller units so long as there in no event be more than 416 residential units in the condominium and so long as the percentage interest of such combined or divided units is equal in total to the units which they replace. In other words the disclosure statement reveals that up to 416 apartments can be installed but only by subdividing other apartments so that the applicant's percentage interest is not decreased.

Five apartments in a space allotted for the public activity centre would decrease the applicant's percentage interest. However, it seems to me that this decrease of percentage interest which has been said to be approximately in the amount of three parts per one hundred thousand is so trivial as to not constitute a material change. In addition the effect of this decrease in the applicant's percentage interest is more than offset by the small decrease estimated at \$3.78 a month in the charges that the condominium corporation will be required to levy as a result of levies coming from these additional units. Therefore I have concluded that on both grounds the application fails. It is dismissed.

Costs fixed at \$3,500 in total to the respondent.

McRAE J.

CBR# 104

Walter Dick and Anne Dick, Plaintiffs, and Ernest Dennis, Defendant

Action No. 91-GD-14209

Also reported at: 20 R.P.R. (2d) 264

Ontario Court of Justice - General Division Windsor, Ontario Brockenshire J. September 27, 1991

Charles O. Spettigue, for the Plaintiffs. James K. Ball, for the Defendant.

BROCKENSHIRE J.:-- This is an action by vendors for specific performance of an agreement of sale of a condominium or alternately for damages. The defence disputed liability and also called for a review and reconsideration of some of the basic law of remedies relating to real property transactions. In the end my conclusion is that the Plaintiff must succeed despite the most able submissions of Mr. Ball, the defence counsel, for the reasons herein detailed.

FACTUAL SITUATION:

The Plaintiffs, Mr. and Mrs. Dick, are husband and wife who purchased adjoining residential condominium units in Bayview Towers, a new nine storey, 32 unit building in Leamington, one for their use, and the second for potential resale - both with a view to profit and to having control over who would be their next door neighbours.

The second Unit, 902, purchased in June of 1989 and immediately listed for resale, was repeatedly shown, and upgraded to make it more attractive, without attracting an offer.

The Defendant, Mr. Dennis, who was in his 50's, with a management position at a Leamington plant, a wife of over 30 years, and a matrimonial home of some 25 years, was experiencing unfortunate matrimonial difficulties, and was looking for a condominium for himself.

Robert McCormick, president of Wigle Realty which had the Dick listing, knew the Dick's, knew Mr. Dennis and his family, and lived in Bayview Towers himself. He became the middle man to bring together the willing sellers and the willing buyer, in an agreement of purchase and sale which he drafted. The Dicks and Mr. Dennis did not meet or speak directly to each other until after the agreement was executed. Both communicated their wishes and limitations to Mr. McCormick, who then developed a "scenario" to accommodate the positions of both.

A particular difficulty was the position of Mr. Dennis. He needed a place to stay very quickly, and had no ready funds. A precipitating factor in his matrimonial problems had been the transfer by his wife of the family savings of some \$290,000.00 to her own name.

The document produced on September 21, 1990 was a standard Ontario Real Estate Association Condominium Re-sale Agreement form, offering \$190,000.00, \$5,000.00 as a deposit, the balance subject to adjustments payable on closing on May 31, 1991, but with alterations and additions which became the subject of this action.

Despite closing being scheduled for May 31, 1991, the blank as to vacant possession was filled in to provide for vacant possession October 1, 1990. There were typed in, four paragraphs as follows:

"It is understood and agreed that the above mentioned deposit of monies shall be forfeited to the vendor in the event that this transaction does not close and further, the purchaser agrees to give vacant possession of the said premises in the event this transaction does not close, fifteen (15) days following receipt of written notice from the vendor.

The purchaser further agrees to pay an occupancy charge of one thousand five hundred dollars (\$1,500.00) per month, commencing October 1, 1990 and said charge to be payable on the first day of each month until said transaction is closed or otherwise terminated. Said charge to include common fees and taxes; all utilities shall be at the expense of the purchaser.

In the event that the purchaser closes earlier than the date herein set for closing, the vendor agrees to reduce the purchase price by five hundred (\$500.00) for each month.

The vendor agrees that in the event that the purchaser has not received his matrimonial settlement, in order to close on the date herein set out, the vendor shall grant the purchaser a sixty (60) day extension with the same occupancy charge."

This document was reviewed by Mr. Dennis, and signed by him. Mr. McCormick suggested Mr. Dennis might get legal advice before signing. In fact the lawyer acting for Mr. Dennis in his matrimonial matters was near by. That lawyer had advised that a settlement was likely by May 31, resulting in the specified closing date. However, Mr. Dennis decided the agreement was self explanatory, and declined obtaining legal advice.

Mr. McCormick then presented the offer to the Dicks, who countered by increasing the price to \$192,500.00. Mr. Dennis accepted the counter offer by initialling the change, produced the deposit and first occupancy payment, (which had been calculated as roughly equivalent to the carrying costs), received the keys, and moved in.

Then, in mid November, two unexpected things happened. Mr. Dennis worked out a reconciliation with his wife, and he was told that the plant of his employer was closing, resulting in the loss of his job. He advised the Dicks and McCormick of these events, and that he was moving back home, returned the keys, and moved out. The view of Mr. Dennis was that on his reading of the contract, the result of his action would be the loss of his deposit, and occupancy fees paid to date, but no more. The Dicks viewed the matter differently, and commenced this action for specific performance, or alternately damages. They also relisted the unit, but it remained unsold at trial.

EVIDENTIARY MATTERS:

This action turns on the interpretation of a written contract admittedly executed by the parties. Considerable viva voce evidence was allowed as to the understandings of the parties, despite the parol evidence rule. My basis for this is the relaxed approach to such rule, at least in real estate matters, espoused by Mr. Justice Thompson in the trial of *Barnett v. Harrison*, and impliedly accepted in the appeals to the Court of Appeal and Supreme Court of Canada [Footnote: [1971] 3 O.R. 821, affirmed by the Court of Appeal at [1973] 2 O.R. 176, and by the Supreme Court of Canada at 33 DLR (3d) 272, without mention of the evidentiary point.] and the special sub-set of that relaxed approach taken in the cases hereinafter referred to, on the meaning of the word "deposit". Considerable further evidence was allowed, not relating directly to the interpretation problem, to provide background and to test the credibility of the witnesses. My conclusion on credibility was that all of the witnesses, while subject to the frailties of memory and inherent bias, were honest and straight forward, and attempting to honestly and clearly set forth their recollections.

THE FORFEITURE CLAUSE:

The words "Or otherwise terminated", appear in the printed deposit provision, and were repeated by the realtor in his typed clause providing that occupancy fees would continue until "said transaction is closed or otherwise terminated". Mr. and Mrs. Dick were at a loss as to what "otherwise terminated" could mean, as the only termination they contemplated was closing they regarded this as a "done deal". The realtor felt it could cover things like mutual releases or frustration. The phrase appears only in relation to the occupancy charge and deposit, and would not be significant except for the support the Defendant sees the phrase as giving to his position, set out below, that the forfeiture clause contemplated termination other than by closing.

Mr. Dennis testified in chief, that he felt that the contract provision "the above mentioned deposit money shall be forfeited to the vendor in the event that this transaction does not close", limited his liability to loss of his deposit if he failed to close the deal. He had not asked the realtor to build in an escape clause, or a clause limiting liability. He did not discuss this clause at all with the realtor, but says the realtor said nothing inconsistent with his belief. He was surprised to see this "relief" in the offer, but while he then had no plans to go back to his wife, felt if it happened, this would be a way out of the deal. This position was greatly weakened in cross-examination when he testified that it never crossed his mind, when signing the offer, that if he went back to his wife he could get out of the contract, and that he knew the Dicks would not accept a rental, or a rent to own type of offer. He had no answer when asked whether a prudent person would give up a \$190,000.00 contract for \$5,000.00.

The Dicks and the realtor had no thought that these words would allow Mr. Dennis to escape with the loss of nothing but his deposit.

There therefore is no basis for rectification nor was it sought.

Mr. Dennis's belief, which he admits is his own interpretation, is quite simply wrong. In my view the words plainly provide for an absolute forfeiture of the \$5,000.00, even if the fault be that of the vendors or of some external source. This forfeiture (which could be reviewed under s. 111 of the courts of Justice Act, 1984), does not purport to release the parties of the legal obligations arising on the failure to close.

LIQUIDATED DAMAGES:

It was pleaded and extensively argued that the forfeiture clause should be interpreted as limiting the damage in the event of breach to the \$5,000.00 "deposit" which should be treated as "liquidated damages". *Dunlop Pneumatic Tyre v. New Garage in England*, [1915] A.C. 79 (H.L.), and *Loscal Holdings v. Brassos in Canada*, (1980) 111 D.L.R. (3d), 598 (Alta. C.A.), and the cases collected in each make it clear that despite what the parties may call such a sum, it is a question of construction to be decided upon the terms and circumstances of the particular contract, what it actually is.

The contest here is between a "deposit" and "liquidated damages". There is no suggestion that the sum is a penalty, or that there be any relief against its forfeiture.

A deposit has been defined in *Howe v. Smith*, (1884) 27 CH.D. 89, and *Soper v. Arnold*, (1889) 14 A.C. 429 (H.C.), as a guarantee that the contract will be performed, that the buyer means business. Liquidated damages are a genuine pre-estimate by the parties of the damages or an agreed limitation on the damages recoverable. [Footnote: *Anson's Law of Contract*, 24th Edition pp. 550-551, as quoted in *Lozcal Holdings v. Brassos*, supra.] Here the evidence unquestionably points to the \$5,000.00 being a true deposit.

Firstly, the parties and the realtor were all sure the deal would close. A reconciliation was not regarded by anyone as a real possibility, and the plant closure was completely unforeseen.

Secondly, there was no thought whatever of pre-estimating or of limiting damage in arriving at \$5,000.00. It was simply all that Mr. Dennis could put his hands on. The realtor had suggested \$10,000.00, but Mr. Dennis, in view of his wife's actions, could only put together \$5,000.00, and that by borrowing to the limit of two credit cards. The Dick's simply did not question or object to that amount, so it stayed.

Thirdly, the Dicks, the realtor and Mr. Dennis never in their evidence, characterized the \$5,000.00 as anything other than a true deposit - as Mr. Dick put it, to show good faith in making a deal. The only unusual aspect was that it was understood to be non-refundable.

POSITION OF THE REALTOR:

It was argued that the realtor prepared the contract as agent for the vendors, and so the "contra proferentum" rule should apply against him. I do not see any ambiguity that would call for the invocation of that rule. However, if ambiguity should be found elsewhere, I would find on the facts here that the agent, in preparing and presenting the offer, was in fact acting as the agent of the purchaser. The purchaser sought him out, provided him with intimate details of his affairs, and relied on him to prepare an offer for him, fitting his circumstances, that the vendors would accept. That in fact is what happened. This case fits squarely within the recent line of cases including *Wypych v. McDowell*, 11 R.P.R. (2d) 87, *Lee v. Chow*, 12 R.P.R. (2d) 217, and *Calandra V. B.A. Cleaners*, 73 O.R. (2d) 449.

CONCLUSION ON LIABILITY:

My conclusion is that the Defendant is liable for breach of his contract of purchase, and that his liability is not limited to the amounts paid to the date of the breach.

REMEDY:

The Plaintiffs were put to their election and elected specific performance as the remedy sought. The Defence argued strongly that specific performance was not appropriate, and further that the Plaintiffs had in fact suffered no loss. Remedy is considered under the following sub-headings.

(a) EVIDENCE - The Plaintiffs called Mr. Fred Mitchell, a duly qualified and experienced real estate appraiser who testified that this was a one of a kind building in a limited market. The only comparative for an opinion on a present market value were therefore sales of other units in the building. He found five or six original sales, and two re-sales of two bedroom units (such as 902) and some thirty sales in all. He did not factor in the intended sale to Mr. Dennis. By arithmetic calculation, he arrived at \$164,000.00 as a fair market valuation on Unit 902 as of August 30, 1991. He knew the floor plans of the two bedroom units were the same, but had no other information on the units. He had not inspected the other units and did not know the relationship, if any between the buyers and sellers, the marketing efforts exerted these sales, the length of time on the market, the effect of changes in the buildings reputation on sales, nor that the developer gave discounts to multiple buyers. His opinion was not bolstered by a comparative income approach or construction costs evaluations. He felt there would be a 5% margin for error in his figure.

Additionally the Plaintiffs lead evidence of the Dick's relisting of the property, which was extensively advertised and shown in open houses without attracting another buyer. There was evidence that the \$192,500.00 price was still fair in mid-november 1990, but thereafter the market became a buyers' market, and while open houses still attracted people, they were not people who could afford to buy.

(b) DAMAGES- The argument of the Defence was that the damages should be measured at the date of the breach, at that date the value had not decreased, and as the vendors retained the property and the deposit, they suffered no loss. While this position on timing is supported by many cases, going back to Laird v. Pim, (1841) 7 M. & W. 474, 171 E.R. 852, it ignores the principal of Wroth v. Tyler, [1973] 1 All ER. 897, apply in Ontario in Metropolitan Trust v. Pressure Concrete [Footnote: (1973) 37 D.L.R. (3d) 649, and on Appeal, (1975) 9 O.R. (2d) 375.] that a damage award should put the Plaintiffs in as good a position as if the contract had been performed even if to do so required assessing damages at a time subsequent to the breach.

(c) SPECIFIC PERFORMANCE - The Defence argument is a specific performance is not an appropriate remedy for the vendor of real property. Historically, it was granted to prospective purchasers because of the unique nature of the land in question. However, all the vendor is seeking is money, and the appropriate remedy is damages. This argument, advanced without reference to specific authority, in fact echoes the argument extensively developed by Professor Sharpe, in his in his text and elsewhere. [Footnote: Sharpe injunctions and specific performance - Toronto, Canada Law Book 1983, also R. Sharpe "Specific relief for contract Breach", study no. 5 in Reiter and Swan, studies in contract law-Toronto-Butterworths, 1980.] Professor Sharpe in his argument acknowledges the support in the authorities for the vendors right to specific performance, but he attacks the arguments used in Eastern Counties Rwy. Co., v. Hawkes, (1855) 5 H.L.C. 331, 10 E.R. 928, and in Hillingdon Estates, [1952] ch 627, to support the remedy - inadequacy of damages, reciprocity of remedy (as a purchaser would be so entitled) and conversion (calling on equity to enforce the completion of a transaction deemed equitably completed on execution of the agreement). His careful review, Sharpe, supra pp. 319-324, in my view, supports his conclusion - not that the remedy should not be available to vendors, but that "the vendor's case for specific performance is ordinarily much weaker than that of the purchaser" and "should the Courts be prepared to reconsider the virtually automatic award of specific performance of contracts for the purchase and sale of real estate, the vendor's right will be found to be somewhat wanting", Sharpe, supra, p. 324.

(d) CONCLUSION - I have carefully considered the caution put forward by Professor Sharpe. In my view if specific performance is to be granted today to a vendor of real property, it must be because a damage award might not provide an adequate remedy, even if calculated to the date of the trial, and not simply for historical reasons coupled with an election by the vendor.

The historical reasons - tied in to a previous agrarian society, where land represented wealth, and "a man's home was his castle" leading to the assumption of uniqueness of parcels of real estate, are being challenged and sometimes found wanting in actions by purchasers. [Footnote: See, for instance, Chaulk v. Fairview Const. Ltd. (1977) 3 R.P.R. Civfld C.A., and other cases collected by Paul Perell in Remedies and the Sale of Land-Toronto, Butterworths, 1988.] The reasons based on reciprocity and conversion, while perhaps providing an intellectual basis in the abstract for the remedy, do not help in deciding on its use in an individual case.

However, here, the property is in a limited market and extensive sales efforts since June of 1989 have produced only one prospective buyer - the Defendant. The property is unique in that it is a top floor, two bedroom Condominium in the only building of its kind in the marketing area. There is an obvious question of what kind of offer might eventually be forthcoming. The property was bought for re-sale, and attracts substantial monthly carrying costs. It produces no income. The vendors have no use for the Unit themselves. In these circumstances, should not the obligations of ownership and risks of eventual resale be transferred to the buyer despite his repudiation of his contract?

The vendors here did not use the claim for specific performance as a mere ploy to give themselves an option until trial against the vagaries of the market, but set out, as suggested in Asamara [Footnote: Asamara Oil Corp. v. Sea Oil & General Corp. [1979] 1 S.C.R. 633, varied [1979] 1 S.C.R. 677.] to attempt to mitigate the loss by relisting the property. The evidence of their realtor of attempts to re-sell give strength to their claim for equitable relief.

On the other hand the evidence on damages is weak. We have only one appraisal. Mr. Mitchell undoubtedly did his best, but acknowledges that he was faced with the problem of lack of comparative sales. An appraisal pre-supposes a willing and able buyer, and on the evidence of the realtor, prospective buyers in the limited market area are, in these economic times, simply unable. We have no satisfactory evidence of how long it might be before the Unit will sell. That would depend on the evidence, on future changes in the economy.

No contrary evidence was offered by the Defence, and on the balance of probabilities I accept the appraisal figure of \$164,000.00 as a fair measure of current value, as of August 31, 1991, and in this factual situation fix that date just before the trial commenced, as the time for assessment. However, while that finding might dispose of changes in market value to the date of trial, and together with a further finding that the Defendant is liable for accrued occupation charges, would see the financial position of the Plaintiffs protected to that date, such findings would do nothing to protect the Plaintiffs against the inevitable continuing interest, taxes, fees

and expenses until the Unit is sold, and would do nothing to protect either the Plaintiffs or the Defendant against changes in the market value between now and the time of the sale. No one knows how long it might be until a sale is achieved, and no one can now say whether either party might reap a windfall by a dollar figure now being assessed for the Defendant's breach.

In my view, the sentence quoted by Professor Sharpe "damages would not place him in the same situation as if the contract had been performed, for in that case he would have entirely got rid of his land, and he would have in his pocket, the net sum for which he had agreed to sell it" [Footnote: Eastern Counties Ry, C.O. supra.] is entirely applicable to the facts of this case.

JUDGMENT - For the foregoing reasons, specific performance of the contract of purchase and sale is hereby ordered, with closing to take place on or before 30 days from the entry of Judgment. The contract, while repudiated by the purchaser, has never been terminated. A term of the contract was that the purchaser pay an occupancy charge of \$1,500.00 per month until the transaction is closed. Performance of such term is a part of this Order. The Plaintiffs are to have prejudgment interest on all occupancy payments in arrears from the respective due dates at 10% and on the balance due on closing from May 31, 1991. Costs to the Plaintiffs.

BROCKENSHIRE J.

CBR# 206

Metropolitan Toronto Condominium Corporation No. 698, Applicant, and Metropolitan Toronto Condominium Corporation No. 562, Respondent

Action No. 2608/90

Ontario Court of Justice - General Division Toronto, Ontario Gibson J. January 10, 1992

J.H. Wigley, for the Applicant. J. Fine, for the Respondent.

GIBSON J.:-- The basic issue on this application under Rule 14.05 (3)(d) is the determination of a point of law as to whether the visitors to Metropolitan Toronto Condominium Corporation 698 (MTCC 698) may use the "down" ramp, which is on the common elements of MTCC 562, and park in the loading bays of the property owned by MTCC 698. The answer involves the interpretation of several agreements made over a period of years between various corporate entities.

There is not a great deal of dispute as to the actual facts surrounding this application but the chronology is a bit complicated.

In 1978 C.B.S. were the owners of a parcel of land situated between Yonge Street on the east, Davenport on the south, McMurrich on the west, and extending northerly to a point part way up in the block in question (with the exception of a small parcel of land at Davenport and Yonge).

The City of Toronto authorized C.B.S. to develop three buildings [* See paper copy for illustration of building A, B and C appended to judgment *] non different portions of the site (see the sketch which was Exhibit B. to the Stevenson affidavit which makes the configuration clearer).

a) Building "A" 18 Davenport Road (a senior citizens building fronting on Davenport).

b) Buildings "B1" and "B2" - a condo apartment building at 15 McMurrich Street (fronting on McMurrich) which ultimately became MTCC 562.

c) Building "C" - a mixed use commercial residential building fronting on Yonge Street. The northerly portion became an apartment condominium - 900 Yonge Street (which subsequently became MTCC 698). The southerly portion is a commercial building, now owned by 890 Yonge Street.

From the outset access to the various buildings was to be via McMurrich Street only.

The 15 McMurrich portion of the site was conveyed to Glenarm Investment (jointly owned by C.B.S. and Cadillac Fairview, the latter was retained to market and manage the project). C.B.S. retained a series of rights of way so that persons could reach the 890 and 900 Yonge portion of the site via the McMurrich access area. After construction of 15 McMurrich for a condo apartment building, MTCC 562 was formed.

The property fronting on Yonge Street was transferred to 900 Yonge Street Limited, who ultimately constructed on the northerly portion a condominium building (which became MTCC 698) and transferred the southerly portion to 890 Yonge Street Limited for commercial development.

All three buildings were connected to a central landscaped podium at the second storey level. Access was through these underground areas, and there were underground parking spaces for all three buildings below the podium. To reach the underground parking, persons and vehicles entered off McMurrich, and had to pass a central point overseen by the concierge at 15 McMurrich for security purposes.

The vehicle entrance off McMurrich Street is split into two parts - the most southerly entrance is marked with a "visitors only" sign. There are no signs over either of the two most northerly entrance and exit ramps. A series of photographs to the Stevenson affidavit portray the configuration just described.

Originally, to proceed with the development, a development agreement was executed by C.B.S., MTHC (who ran the senior citizens home) and the City of Toronto. As part of the agreement, C.B.S. and MTHC agreed to provide permanent vehicular access to the site from McMurrich Street. This agreement, dated May 17, 1979, was registered May 21, 1979 in the Land Registry Office.

To deal with shared garage and other facilities, and repair, operation, and management of all the proposed buildings, a Shared Facilities Agreement (SFA) was executed December 9, 1981 and registered May 13, 1982 by C.B.S. (who at the time was the owner of the Yonge Street portion of the site, which in part became MTCC 698), MTHC, Glenarm (representing the project at 15 McMurrich, which later became MTCC 562) and two large mortgagees. The overall effect was to create certain rights in respect of shared facilities among the parties either directly or to their successors in interest.

To further clarify and elaborate on each parties' respective rights and obligations in connection with shared facilities, a Shared Facilities Amending Agreement (SFAA) was entered into November 27, 1985 and registered December 23, 1985. The parties to this agreement were MTCC 562 (owners of 15 McMurrich), 900 Yonge (representing the owners and successors entitled to respective portion of this area - later MTCC 698), and 890 Yonge Street representing the interest of owners and successors entitled to the southerly commercial portion.

The purpose of SFAA agreement was to address certain issues which were the subject of litigation between MTCC 562 and Belmont Property (the builder of 890 and 900 Yonge) and the settlement was reflected in this agreement.

A Yonge Facilities Agreement (YFA) dated December 30, 1985, entered into by 890 Yonge and 900 Yonge, allocated obligations under SFA and SFAA.

On January 1, 1990 (registered January 4, 1990) a Yonge Facilities Amending Agreement (YFAA) was executed to further clarify the rights and obligations of the parties involved in the Yonge Street property. The parties to this agreement were MTCC

698, representing the northerly portion of 900 and 890 Yonge (the owners of the commercial southerly portion), and 900 Yonge Street, representing its own interests.

Since January 1, 1990, visitors to MTCC 698 were allowed access across the shared garage of MTCC 562 to MTCC 698's own property. MTCC 698 allowed them to park the cars in the loading bays and ramps at the rear (or west edge) of the MTCC 698 property pursuant to the terms of YFAA.

However, on January 16, 1990, MTCC 562 refused such access for visitors' vehicles to MTCC 698 (and still does) notwithstanding such visitors had been vouched for by unit owners of MTCC 698.

It was stated expressly in SFAA that where there is any conflict between SFA and SFAA that the terms of SFAA were to prevail.

The above agreements contain a three stage dispute resolution mechanism:

"1. The Shared Facilities Manager shall, within thirty days, resolve any matter of dispute relating to or arising out of the agreement as between the parties to the agreement.

2. If the Shared Facilities Manager is unwilling or unable to resolve the matter or dispute to the mutual satisfaction of the parties, it should be referred to the Project Committee for its consideration and resolution (composed of four members - two appointed by MTCC 562, one by the owner of 900 Yonge and one by the owner of 890 Yonge).

3. In the event the Project Committee is unwilling or unable to resolve the dispute to the mutual satisfaction of the parties, the agreement may be submitted to arbitration under the Arbitration Act." (The underlining is mine).

When the dispute arose as to the right of access of visitors' vehicles to 900 Yonge via the shared facilities, a letter from MTCC 698 was sent to the President of MTCC 562 in an attempt to work out a settlement. In addition, a Notice of Dispute was delivered to the Shared Facilities Manager, asking that the dispute be resolved.

Since no action was taken by the Manager by February 20th, MTCC 698 delivered a formal notice (by letter) to MTCC 562 requesting the convening of the Project Committee. While there was a meeting scheduled for March 5, 1990, the solicitor for MTCC 562 advised that their representatives would not attend, so that the meeting was not held as there was not a quorum.

MTCC 698, by letter dated April 9, 1990, suggested that the matter proceed to arbitration, under SFAA, but MTCC 562 made no response.

I cannot accede to the submissions of counsel for the respondent that the application should be dismissed on the basis that 890 Yonge Street and 900 Yonge Street were not parties to the application. I would be very surprised if they were not aware of the application and if they had felt it appropriate, or necessary, with respect to their rights to appear, they could have asked leave to be heard. I am satisfied that the real issue between the parties before me can be properly dealt with without the presence of those other two corporations.

While it could be held that the application should be dismissed or stayed because the dispute resolution provisions of the SFAA were not satisfied, I do not agree that such should be the case. In my view, neither party has really tried to use its best efforts to resolve this dispute through good faith negotiation. In my view, the respondent did not make the two members of the Project Committee available on the date of the scheduled meeting, or appear to try to co-operate to try and set up a timely meeting and it never replied to the written request by MTCC 698 for arbitration. Further, while MTCC 698 tried to invoke it, there is some evidence that MTCC 698 was trying to get around the announced situation that there was not to be any visitor parking in that condominium.

The real issue is whether, considering all the various agreements, particularly SFA and SFAA, and the fact that MTCC 562 is not a party to YFA and YFAA, does MTCC 698 have the right over the objections of MTCC 562 to demand that lawful visitors to MTCC 698 are entitled to drive over the respondent's property, and allow such vehicles to park in the loading bay areas on the property of MTCC 698 and 890 Yonge Street.

I have attempted to carefully review the relevant agreements and other documents. I agree with Mr. Wigley that Article 4.3 of SFAA appears to envisage visitors' vehicles having the right of passage over the Visitors' Emergency Ramp, and this concept appears to be reinforced by the provisions of MTCC 562 Bylaw No. 4. However, with some reluctance, I have concluded that the overall effect of SFAA, when one considers all of its provisions, particularly the definition of "parking space", those entitled to use "parking spaces", and the detailed plan or scheme of access to and use by vehicles to the complex, the right of park visitors' cars as sought by the applicant is not warranted in law. In my view the intent of the operative agreement (SFAA) was only to provide legal and proper parking at 900 Yonge Street. By definition, a "loading bay" is specifically not to be included within the definition of a "parking space" and the loading bays on the Yonge Street lands are specifically mentioned.

It appears that at one time the parties attempted to negotiate an arrangement whereby MTCC 562 receive some compensation for the arrangement MTCC 698 felt that it was entitled to, but they were unsuccessful, perhaps due to the position taken by the applicant, or the amount demanded by the respondent (or a combination of the two). Since the problem has arisen as a result of an agreement executed prior to MTCC 698 coming into existence, the parties may wish to again discuss a practical solution to the present impasse. The parties may speak to the issue of costs by a conference call if they wish on some mutually convenient day at 9.30 a.m. Counsel should speak to my secretary, Maie Grieve, (327-5295) to arrange this appointment.

My sincere apologies to the parties and their counsel for my lengthy delay in giving my judgment in this case. Unfortunately since mid July I underwent two surgical procedures, together with hospitalization and convalescence (one scheduled and one not) and I, unfortunately, fell behind in my judicial duties.

GIBSON J.

CBR# 071

Century 21 Heritage Ltd., Plaintiff, and Napev Construction Limited, Defendant

Action No. 17029/87

Ontario Court of Justice - General Division Toronto, Ontario Davidson J. Heard: November 26, 1991 Judgment: December 7, 1991

Sean Dewart, for the Plaintiff. Maurice Neirinch, for the Respondent.

DAVIDSON J.:-- The plaintiff's claim as a Real Estate Broker is for commission on a quantum meruit basis for services performed for the defendant, an owner and developer of condominium units in Mississauga.

The plaintiff's representative, Ernst Kreibom, drew up an exclusive listing agreement giving it the right to sell units in the condominium for a commission. The listing agreement was signed by the parties but it is agreed by counsel that it is not valid and cannot be enforced as it does not comply with sales agreement for the unit has become irrevocable.ess Brokers' Act. It is not dated. It does not contain a provision that it will expire on a certain date specified therein as required by those sections.

The parties, relying on its validity, did begin to implement its provisions. The plaintiff did work which I shall enlarge upon and that is the basis of the claim. The listing agreement provided for commission of 1 1/4% of the purchase price of each unit sold payable on a date when the

The plaintiff's claim relates to a certain nineteen units sold with 1 1/4% of the purchase prices amounting to \$35,375.00. At the time the agreement was signed in late June or early July 1986 the land was vacant.

The defendant's solicitors drew up an application to reserve called a Reservation, to be used by the plaintiff in the marketing of the condominium project. In effect this Reservation would be signed by an interested purchaser who would pay a deposit, a percentage of the estimated purchase price approximating \$3,000. This would give the purchaser the right to reserve an opportunity to purchase a specified unit with an estimated purchase price. Even if accepted by the defendant, the Reservation did not constitute a binding agreement of purchase and sale, it simply reserved the right to the purchaser to submit an offer to purchase the unit. As well, the purchaser could withdraw the application to reserve if certain documentation was not forthcoming by the defendant by a specified date.

It appears from the evidence that the reservations, if sufficient in number, would be acted upon by the defendant who would then proceed with the construction of the condominium project and the arranging of the requisite financing.

Evidence of the efforts of the plaintiff under the agreement was given by the plaintiffs' licensed salesman, the aforesaid Mr. Kreibom. This included his drafting of an advertising flyer which was printed and distributed in the approximate number of 50,000; the informing of thirty residential sales personnel in the plaintiff's employ; the holding of an open house and wine and cheese party at the adjacent subdivision clubhouse; the staffing of a sales office on the property by Mr. Kreibom who said he averaged four hour a day, seven days a week on the job, although perhaps not always on the site and also staffed by his co-employee, a licensed salesman, Mr. Broos and by a secretary employed by the plaintiff. His evidence is that the onsite office was open and staffed from noon to 9:00 p.m. through the week and a few hours Sundays.

Additionally, Mr. Kreibom and Mr. Broos kept cards of the identity of prospective purchasers and maintained a series of records filed as exhibits mostly in Mr. Kreibom's writing, some in Mr. Broos' writing, amounting in all to at least 290 names of potential purchasers.

Additionally, Mr. Kreibom drafted a letter subsequently sent out relating to a proposal of enlarging some units and targeting as recipients corporate officers and medical doctors. As I understand it, the enlargement did not take place.

Mr. Kreibom also drafted the letter subsequently adopted for sending out by the defendant to persons who had signed the reservations that I referred to which letter advised of the arranging of appointments to present the actual agreement of purchase and sale.

The defendant terminated the plaintiff's services by letter of October 15, 1986 reinstated the plaintiff by letter of October 21, 1986, apparently following upon a meeting of the parties on October 16 and terminated again by letter dated November 21, 1986. Those letters contained complaints of non-performance by the plaintiff and alleged lack of interest. Mr. Kreibom, in his evidence, denied some of the allegations specifically and others generally and outlined the work that he and others had done as I have referred to above.

The defendant called no evidence as to allegations of the plaintiff's non or poor performance. The listing agreement did not call for full-time activity by the plaintiff or its representatives.

I find the evidence of Mr. Kreibom credible and I accept it. It seemed to me that he did not seek to exaggerate, rather he seemed to moderate the importance of some of his and others efforts while acknowledging the defendant's own contribution in promoting the project and the incurring of expense and advertising in similar ventures. The latter, of course, was the defendant's responsibility under the contract.

By November 2, 1986 the plaintiff's sales report showed that 59 or close to one-half of the total units were covered by applications for reservations, 49 of those directly through the plaintiff, 10 through the defendant, the latter being obliged to refer prospective purchasers to the plaintiff. As at that date the defendant was not then in a position to produce agreements of purchase and sale to these purchasers, although it may have been so capable about November 21, 1986, the date of the final termination.

Accordingly, although terminated, I find on the evidence it was not justified on the grounds that had been set out in the defendant's letters. There is no evidence to support those grounds and I have the evidence of Mr. Kreibom, which is contrary to the suggestions.

The 19 units sold, which I referred to earlier, followed from 19 purchasers who had signed applications to reserve prior to the termination of the plaintiff's services and arising from the efforts of the plaintiff's representatives. The actual signing of the agreement of purchase and sale, however, was brought about by the efforts of one Jim Hewitt, who was employed by the defendant as sales manager as of January 30, 1987 and following, and prior to that as an unlicensed sales representative of Remax Limited, a real estate broker who had been appointed by the defendant when the plaintiff was terminated.

Hewitt's compensation from the defendant by his contract was 1 1/4% of the purchase price for each unit sold. In his evidence he estimates something less than 50% of the units were sold up to January 30, 1987, that is while Remax was the agent and he was an employee thereof and the rest of the sales took four months after that until all units were sold.

Mr. Hewitt's work included the arranging for signing of agreements of purchase and sale as well as the obligation to deal with the purchasers and the trades after the signing and right up until the time the purchaser took possession. His contract stipulated he would be at the site six hours per day Monday through Thursday and seven hours on Friday, Saturday and Sunday.

While it may be inferred that he did more for his 1 1/4% than was required to be done by the plaintiff, it is apparent that he started off with many reservations already signed and, of course, the plaintiff by its contract was required to continue to act as liaison between the vendor and the purchaser until the purchaser has taken physical possession. I find it difficult on the evidence to determine what material differences there might have been between the respective obligations of the plaintiff and Mr. Hewitt. Suffice to say that although the 1 1/4% was payable to the plaintiff when the purchase agreement became irrevocable, its services were to continue after that date.

The relevant sections of the Real Estate and Business Brokers Act are s. 23 which reads:

"23. Subject to section 32, no action shall be brought to charge any person for the payment of a commission or other remuneration for the sale, purchase, exchange or leasing of real estate,

(a) unless the agreement upon which the action is brought is in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized; or

(b) unless the broker or his salesman has obtained an offer in writing that is accepted; or

(c) unless the broker having been authorized in writing to list the property,

(i) shows the property to the purchaser, or

(ii) introduces the purchaser to the vendor for the purpose of discussing the proposed sale, purchase, exchange or leasing."

As previously stated (a) is not relevant here by reason of ss. 32(3) and 35(2)(a). The plaintiff's counsel's position is that (c) applies as the defendant did authorize the plaintiff in writing to list the property and (i) or (ii) are present here. He reasons that if the authorizing in writing had to be valid, there would be no need for (c) because it would be covered by (a). I do not agree with that position. "Agreement" as used in (a) might not necessarily be a listing agreement. It could be just a simple agreement for the payment of a commission for the sale of real estate. (c), on the other hand, specifically is an authorization to list and, as acknowledged by both counsel, is not valid for the reasons given.

In my opinion, accordingly, s. 23(c) is a defence to the plaintiff's action. If I am wrong in that I would go on and say that on the evidence I would have found on the balance of probabilities that it was a reasonable inference and I would make the inference that the requirements of (ii) have been established. This is accomplished by the plaintiff's representatives having procured the 19 reservations previously referred to.

Next it is plaintiff's counsel's position that (b) applies, namely that the plaintiff has "obtained an offer in writing that is accepted" He relies on *Cash v. George Dundas Realty Ltd.*, (1973) 1 O.R. 241, the decision of the Court of Appeal. The court there considered what in modern conveyance practices is required of an agent to enable him to assert that he has "obtained an offer in writing". The facts of that case briefly were that the plaintiff's agent and the president of the defendant agreed the defendant would pay the plaintiff a commission of 5% of the sale price in the event the plaintiff obtained a purchaser for the defendant's hotel. It was not in writing by way of a listing agreement and no claim was made under the present s. 23(c) of the Act. The plaintiff brought together the vendor and an individual who became the ultimate purchaser of the hotel. The plaintiff arranged to have the agreement of purchase and sale drafted by the purchaser's solicitor September 6, 1986 and on that date the vendor and the purchaser, the purchaser's solicitor and the plaintiff met and reviewed the draft agreement of purchase and sale. Although there is a dispute as to what took place at that meeting, the purchaser, vendor and plaintiff went to the vendor's solicitor's office with a copy of the draft offer prepared by the purchaser's solicitor.

The following Monday, September 9, the vendor and purchaser met in the office of the solicitor for the vendor and executed a revised agreement of purchase and sale dated September 9. It was stated by the court, and there were listed, several significant differences between the agreement of September 6 and that of September 9.

At page 247 Mr. Justice Estey, in delivering the judgment of the court stated:

"In modern day conveyancing practices the role of the agent being neither that of an owner nor purchaser, we cannot expect him to earn his entitlement by reaching decisions of policy in the negotiations of offers and counteroffers. Not being a solicitor his role as a draftsman may not always be required, or perhaps even tolerated, particularly in any complex commercial real estate transactions.

What then does cl. (b) require of a real estate agent when it stipulates that he must 'obtain' an offer in writing? The agent cannot establish the terms of the transaction as he is not an owner or a purchaser, nor is he the agent of either for these purposes. He cannot draw the agreement (unless requested to do so by one or both of the parties) as he has been supplanted frequently in this function by lawyers as was the case here. In commercial transactions involving the purchase, not only of real estate but of associated fixtures and personal property, complex tax ramifications frequently require the drafting to be done by a specialist in one or more fields of the law and effectively preclude the participation of the real estate agent.

In the inevitable give and take of negotiations and exchange of ideas in preparation for the sale of a property, such as a large hotel for the price of \$550,000, the real estate agent can at most be a conduit and a catalyst and, after the initial launching of negotiations, may only perform these limited roles, if requested or permitted by the principals.

Thus, we must look in a practical way for the meaning intended by the Legislature of the word 'obtain' in this section of the statute. Clearly the agent cannot succeed under cl. (b), if he is a mere instrumentality concerned in some pre-contractual stage with simply introducing the parties. The cataloguing of the possibilities embraced in or contemplated by this section is neither possible, nor useful, even if possible; the vendor cannot hide behind the statute when as here he agreed that the agent might earn a commission if he 'obtains' a purchaser; takes advantage of the agent's good offices to meet the purchaser; meets with the purchaser and agent to discuss a draft agreement arranged by the agent through the purchaser's solicitor; and allows the agent to deliver the draft to the vendor's solicitor for revision in the light of discussions held between the vendor, the purchaser and the agent, as well as amendments or additions proposed by the solicitor for the vendor himself. In such circumstances, the simple denial by the vendor of any intention to pay a commission to the agent cannot frustrate the agent in asserting his claim under cl. (b) when an acceptable offer by these processes is thereafter produced and executed in a direct sequence of events in which the real estate agent plaintiff is intimately involved.

Therefore, in construing the wording of cl. (b) and giving to it its plain meaning in the context of the buying and selling of real estate, I am of the opinion that the plaintiff broker 'has obtained an offer in writing' which the vendor accepted, when he obtained a draft offer from the purchaser's solicitor, arranged a meeting of the parties to discuss the draft, and thereafter delivered this draft in the company of the two principals to the vendor's solicitor, who made certain technical adjustments thereto and added some terms to the lengthy first draft prepared by the purchaser's solicitor."

In my opinion there is a marked material difference between the facts in *Cash* and the facts before me. The plaintiff's position here was terminated by the defendant before the form of purchase and sale agreement came into existence or, at the best, contemporaneously therewith. The plaintiff thereafter had nothing to do with obtaining an offer in writing that was accepted. It is not as though the defendant, without further expense on its part, secured a binding agreement of purchase and sale from purchasers. In fact, as I have recited, the defendant immediately retained another real estate broker in substitution of the plaintiff, kept that broker on for a short time; apparently resulting in some offers being secured and accepted and, thereafter, with Mr. Hewitt as its employee, proceeded to secure offers to purchase and accept them in respect to all of the units in the condominium project including the 19 units covered by the aforesaid Reservation. In doing this the defendant incurred an expense based upon a similar commission percentage of 1 1/4% and, as I have stated, the differences between the work which was required of the plaintiff and that of Mr. Hewitt cannot be assessed by me as being materially different.

In essence, it seems to me, on the facts before me, that the plaintiff's services were in the category of mere instrumentality concerned in some pre-contractual stage. That it introduced the parties, in conjunction with the substantial outlays of monies by the defendant for promotion, that the plaintiff's services then ceased and there was a substantial hiatus between that and the formality of the agreements of purchase and sale being obtained and accepted. Additionally, of course, there was the recited intervention of Remax and Mr. Hewitt and the requirement of services to complete the agreement of purchase and sale as to price, terms of payment, closing dates and financing.

The final position of the plaintiff's counsel is that the defendant should be estopped from denying the plaintiff's entitlement to payment for its services under a quantum meruit basis as both parties proceeded on the footing of a valid contract existing, and that the court should act so as to prevent unjust enrichment. That included the stated intention of the defendant in the Reservation to proceed promptly with the construction of the condominium. Nothing, in the evidence, suggests the defendant did otherwise. There is not a pleading of unjust enrichment. It was not until after action was commenced that the defects in the exclusive listing agreement were relied upon by the defendant.

Reference was had to *Donald Dyer Real Estate Ltd., v. Credit Mountain Land Co. Ltd.* (1975) 7 O.R. (2d) 449, decision of the Court of Appeal, and to *Deglman v. Guaranty Trust* (1954) 3 D.L.R. 785, decision of the Supreme Court of Canada.

In *Dyer* it is apparent that some form of representation is necessary to bring into operation an estoppel. In my view the actions of the defendant here in carrying out its obligations under the presumed valid listing agreement do not amount to such representation as would estop it from denying the plaintiff's claim.

In *Dyer* I read from the decision at page 453 per Mr. Justice Arnup who delivered the judgment of the court and I quote:

"The plaintiffs' case here is not that *Dyer Real Estate* provided services for which it has not been paid. The essence of the complaint is that *Dyer Real Estate* had been deprived of the opportunity to provide services, from which it would have earned commissions. The doctrine of quantum meruit does not apply. Nor does the doctrine of unjust enrichment, which has been applied in some cases where a defendant has received benefits which it is unjust for him to retain without paying for them."

In the case at bar the plaintiff was to get offers to purchase to earn its commission. The plaintiff was deprived of the opportunity to perform the services from which it would have earned the commissions. Nor can it be said in my view that this defendant received benefits which it is unjust for it to retain without paying for them. It has paid for them, albeit to someone else. Even if unjust enrichment is a factor I would have reference to the *Deglman* decision.

At page 788 in the reasons of Mr. Justice Cartwright I quote:

"There remains the question of recovery for the services rendered on the basis of a quantum meruit. On the findings of both Courts below the services were not given gratuitously but on the footing of a contractual relation: they were to be paid for. The statute in such a case does not touch the principle of restitution against what would otherwise be an unjust enrichment of the defendant at the expense of the plaintiff. This is exemplified in the simple case of part or full payment in money as the price under an oral contract; it would be inequitable to allow the promisor to keep both the land and the money and the other party to the bargain is entitled to recover what he has paid. Similarly is it in the case of services given.

This matter is elaborated exhaustively in the Restatement of the Law of Contract issued by the American Law Institute and Professor Williston's monumental work on Contracts, 1936, vol. 2, s. 536 deals with the same topic. On the principles there laid down the respondent is entitled to recover for his services and outlays what the deceased would have had to pay for them on a purely business basis to any other person in the position of the respondent." And then two quotes from the reasons of Mr. Justice Cartwright at page 795:

"In my view it was correctly decided in *Britain v. Rossiter* (1879), 11 Q.B.D. 123, that where there is an express contract between the parties which turns out to be unenforceable by reason of the Statute of Frauds no other contract between the parties can be implied from the doing of acts in performance of the express but unenforceable contract."

And a further quote on that page:

"In the case at bar all the acts for which the respondent asks to be paid under his alternative claim were clearly done in performance of the existing but unenforceable contract with the deceased that she would devise 548 Besserer St. to him, and to infer from them a fresh contract to pay the value of the services in money would be, in the words of Brett L.J. quoted above, to draw an inference contrary to the fact."

Continuing with the quote:

"In my opinion when the Statute of Frauds was pleaded the express contract was thereby rendered unenforceable, but the deceased having received the benefits of the full performance of the contract by the respondent, the law imposed upon her, and so on her estate, the obligation to pay the fair value of the services rendered to her." Here, in the case before me, the plaintiff did not fully perform the obligations of its contract, although prevented from doing so by the defendant's termination, and the defendant did pay for the services on a purely business basis, albeit to another person. In the end result, therefore, I have concluded that the plaintiff's action must be dismissed.

--- Submissions re costs.

I did not make any comment in my reasons for decision on any adverse interest which may be suggested from the defendant's conduct because I do not think it was material to the considerations I was giving in the reasons that I arrived at. Nor in the question of costs do I ascribe any ulterior motive to any of the conduct of the defendant. In my view this was a situation in which the defendant did make a decision terminating the plaintiff.

I have found that the preferred reasons for that did not hold up on the evidence that I heard. I ask myself is that an element to be considered in determining whether or not I should deprive the successful party of costs. In my view it is not. It is true that the action is pursued by the trustee in bankruptcy and obviously for benefit of creditors but a trustee in bankruptcy presumably is acting in the best interests of everyone and it is a considered decision on its part to proceed.

I do not believe there are any special circumstances here. I cannot lose sight of one of the elements I felt of material difference in the cases I have cited which is that the defendant did incur and did pay for the very costs which was being pursued by the plaintiff in the sale of the condominium units.

Putting all of that together it is my view that costs should follow the event and the plaintiff's action is accordingly dismissed with costs to be assessed.

CBR# 371

York Condominium Corporation No. 71, Applicant, and Glenn Joseph Sullivan and Marcel Parent, Respondents

Action No. M185600/89

Ontario District Court - York Judicial District Toronto, Ontario O'Connell D.C.J. May 11, 1990

B. Widman, for the Applicant. N. Qualer, for the Respondent, Sullivan. J. Ward, for the Respondent, Parent.

O'CONNELL D.C.J.:-- This is an application by the Condominium Corporation for orders as set forth in the application and the amended Notice of Application pursuant to Section 49 of the Condominium Act, R.S.O. 1980, Chapter 84, and amendments thereto.

The Applicant applies pursuant to the provisions of the Condominium Act Section 49(1) for the orders requested by reason of the fact, that the owner of the unit, Glenn Joseph Sullivan, and his tenant have allegedly not complied with the rules of the Corporation. There is filed in support of the application, the affidavit of Mary Salvadore, the affidavit of Brian McGee, the affidavit of Donald Wayne Jansen, the factum of the Applicant, the owner of the tenant, the cross-examinations and the authorities. I heard substantial and learned submissions on the issues raised by Counsel for the Applicant and for the Respondents. Attached to the affidavit of Brian McGee as Exhibit B, is a copy of the rules passed by the Board of Directors on September 12th, 1988 pursuant to Section 29 of the Act. The rules have not been amended and paragraphs 10(b), 12, 13, 16, 17, 20 and 21 as set forth in the affidavit of Brian McGee are made effective in accordance with the provisions of the Act. Attached to the same affidavit is Exhibit C. Exhibit C is a copy of the rules of the Corporation passed by the Board of Directors on March 14th, 1989. These rules were passed pursuant to Section 29 of the Condominium Act and are effective in accordance with the provisions of the Act. These rules and in particular paragraphs 1(a), 1(d), 10(a), 19 and 54 are as set forth in the affidavit of Brian McGee.

The issues that arise are:

(a) Did the tenant Parent, he being the tenant of Sullivan, do and continue to do acts which were acts prohibited in law under the rules? and

(b) Is the owner Sullivan responsible for the behaviour of his tenant, when the owner is notified of the breach of alleged rules and takes no steps to correct the conduct of his tenant?

It is submitted, that several of the complaints have been corrected. The restraining order is being sought so that this type of complaint does not reoccur. Complaints corrected are: there is no longer any parking in the visitors area, there is no longer any parking in the fire route area, and there is no longer a derelict vehicle parked in the driveway.

It is agreed by Counsel that the tenant Parent, parks a commercial vehicle in his driveway, a vehicle which is owned by his employer. Attached to the affidavit of Marcel Parent sworn on the 31st of October, 1989 and marked as Exhibit A, is a true copy of two photographs of that vehicle which the tenant admits that he has parked on the driveway portion of the exclusive common element in front of the townhouse occupied by him. The tenant denied knowledge of the rules until he was served with the application. The owner is obliged under the Act to furnish the Corporation with the lessee's acknowledgment to comply with the rules. The owner was aware of the concern of the Corporation by reason of the facts as set forth in the letters attached to the affidavits.

The owner has the same right to apply to the Court as the Corporation does. Under Section 29(1) of the Act, rules can be passed by the Corporation for the use of the common elements and for the purposes as set forth in the Act. Under Section 12(2) of Act, the Corporation has a duty to control, manage and administer the common elements. Under Section 12(1), the Corporation has a duty to effect compliance by the owners with the Act, the declaration, the bylaws and the rules. Under Section 29 of the Act, the Board has the right to make such rules respecting the use of the common elements to promote the safety, security or welfare of the owners and of the property, all for the purpose of preventing unreasonable interference with the use and enjoyment of the common elements and of other units.

It is submitted by the applicant Corporation that the declaration, bylaws and rules are vital to the integrity of the title acquired by the unit owner and he is not only bound by their term and their provisions, but he is entitled to insist that other unit owners are similarly bound (York Condominium Corporation No. 288 v. Harbour Square Commercial Inc. (1988) 49 R.P.R. 264).

In this application, the purpose of the rule is not an issue. The issue is, is the commercial aspect insofar as it relates to the vehicle, the only difference between the commercial van as described in the affidavit of Mr. Parent and a regular van, is the lettering on the van as shown in the photograph. The tenant through his Counsel, submits that this van, i.e. the commercial van, does not offend Section 29(1) of the Act in that its presence does not amount to an unreasonable interference with the common elements. The Respondent Sullivan, the owner, submits that this rule does not fall within the scope of Section 29 of the Statute as it does not promote safety, security or welfare of the owners for the purpose as set forth, that is, preventing unreasonable interference with the use and the enjoyment of the common elements of the units. The rule does not restrict a vehicle that is passenger type in nature.

It is clear to me, that the owner and/or his tenant is bound by rules passed by the Corporation. It is the obligation of the owner to ensure that the tenant complies with the rules as the tenant's relationship is with the owner and not of the Corporation. The definition of owner, includes tenants, and the declaration imposes upon an owner, a duty to comply with the declaration, bylaws and rules and to cause his tenant to comply with such. The liability upon the owner does not exceed the terms of the declaration, bylaws or rules.

In my view, it is irrelevant as to whether the unit is occupied by owner or tenant. The owner has the same rights as given to the Corporation. The Corporation has a right to pass the rules. The rules are for the general benefit of the owners. After the rules were passed, the second set of rules having been passed on March of 1989, the commercial vehicle was moved to the driveway of the unit and was there when the application was commenced. It is clear from the authorities, that the owner of a unit is responsible for this behaviour of a tenant of that unit and an order compelling compliance with the rules of the Corporation will issue against such owner (York Condominium No. 216 v. Nalevka, Rose Budd and William Budd unreported decision of Haley, D.C.J., December 17th, 1982).

It is likewise clear that the declaration, bylaws and rules of the Corporation are vital to the integrity of the title acquired by the individual unit owner who are bound by them as other unit owners are. The rules passed pursuant to the provisions of Section 29 of the Act, if valid, are for the use of the common elements and units, or any of them to promote the safety, security and welfare of the owners and of the property, or for the purpose of preventing unreasonable interference with the use and enjoyment of the common elements and of other units (Section 29(1)). Rules passed must be reasonable and consistent with the intent of the Act, the declaration and its bylaws. Under Section 31, each owner is bound by and shall comply with the Act, the declaration, bylaws and the rules.

It is clear that under Section 29, that the Corporation has the power to make rules to promote the safety, security or welfare of the owners and of the property, or for the purpose of preventing unreasonable interference with the use and enjoyment of the common elements and of other units. Considering the words used in Section 29 of the Act, is the presence of a commercial vehicle, such, that it would prevent unreasonable interference with the use and enjoyment of the common elements and of other units? Or, does it effect the safety, security or welfare of the owners this being a residential-type complex?

The Statute dictates how a condominium dwellers lifestyle is to be governed. Rules are passed pursuant to the Statute and must serve the purposes set forth in Section 29(1).

The relief sought here is as set forth in the application and the supplementary application, that is for an order which is discretionary in nature.

I am satisfied that the Board through its managers gave notice to the owner of the unit, that the owner received such notice and that the owner on the basis of the factum filed, conversed with the tenant as to the complaints, some of which have been answered save and except for the vehicle described as a commercial vehicle.

It would in my view, that is to allow this commercial vehicle to be parked contrary to the rules, interfere with the use and enjoyment of the other units and/or their occupants. If tenants of owners were allowed to park commercial vehicles as this tenant admitted he did, in the area immediately adjacent to the unit, then such would amount to a breach of the rules passed pursuant to the provisions of Section 29(1). It is obvious that the rule is breached as it relates to commercial vehicles. It is obvious to me, that the parking of such vehicles would be unsightly and thus interfere with the use and enjoyment of the elements, common to units in the complex.

It is obvious to me, that the rule serves one of the purposes as set forth in the section. Thus, it is operative and is for the benefit of all unit owners. Thus, it is reasonable and consistent with the Act, the declaration and the bylaws.

Accordingly, the application is allowed and the order will issue as against both owner and tenant as requested under paragraphs 1(c),(d), (e) and (h) of the application and paragraphs 1(K) and 1(1) of the supplementary application. The costs relative to the appearance on August 22nd, were reserved to the Judge hearing the application. An order should issue against the owner for costs of the August 22nd, 1989 hearing payable to the Corporation on a solicitor and client basis. I make no order as to costs as against the tenant under the circumstances as described.

O'CONNELL D.C.J.

CBR# 002

318816 Ontario Limited and Dr. Luciano Moro, Applicants (Respondents in Appeal), and Peel Condominium Corporation No. 255, 563863 Ontario Inc., Trinaz Property Management Ltd., and Sam Margie, Respondents (Appellants)

Action Nos. 375/88 and M155558/87

Ontario Supreme Court - Court of Appeal Toronto, Ontario Blair, Morden and Grange J.J.A. Heard: December 20, 1989
Judgment: January 12, 1990

Karl D. Jaffary, for the Appellant. Jonathan H. Fine, for the Respondent.

The judgment of the Court was delivered by

BLAIR J.A. (orally, endorsement):-- The judge of first instance appointed an inspector to investigate the affairs of the appellants and the condominium corporation purportedly under s. 40 of the Condominium Act, R.S.O. 1980, c. 84. There was no finding that the appellants or the condominium corporation fell within the meaning of "person" under s. 40(2) of the Act. That subsection refers to an "investigation of the affairs of any person in receipt of money mentioned in subsection (1)"; s-s.(1) provides that "[e]very person in receipt of money paid to or for the benefit of the [condominium] corporation shall, make available for examination by the corporation or any owner or mortgagee, all records relating to the receipt and disposition of such money." On the wording of the provision we do not think that the corporation itself could be "such person". Moreover, there was no finding upon any of the disputed issues that would justify such an investigation. Certainly, there can be no justification for awarding costs in advance of such findings.

The appeal must be allowed, the order below set aside, and the matter referred back to the District Court so that findings appropriate to the issues may be made. This may require the ordering of the trial of an issue or the directing of a reference.

The appellants will be entitled to the costs of the appeal. The costs of the first and second hearings will be in the discretion of the judge presiding at the second hearing.

BLAIR J.A. MORDEN J.A. GRANGE J.A.

CBR# 274

Re Sunforest Investment Corp et al. and Ontario New Home Warranty Program *

32 O.R. (3d) 59

Court File No. C23797

Court of Appeal for Ontario, Morden A.C.J.O., McKinlay and Laskin JJ.A. January 21, 1997

* Application for leave to appeal to the Supreme Court of Canada dismissed with costs July 10, 1997 (La Forest, Gonthier and Major JJ.). S.C.C. File No. 25897. S.C.C. Bulletin, 1997, p. 1366.

APPEAL from a judgment of the Divisional Court dismissing an appeal from a decision of the Commercial Registration Appeal Tribunal that denied claims under the Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31.

Larry J. Levine, Q.C., and Kevin D. Sherkin, for appellants. Brian M. Campbell, for respondent. Michael A. Spears, for intervenor, Durham Condominium Corp. No. 120.

The judgment of the court was delivered by

MCKINLAY J.A.: -- This is an appeal, with leave, from a decision of the Divisional Court dismissing an appeal from the decision of the Commercial Registration Appeal Tribunal denying claims by the appellants for compensation pursuant to the provisions of the Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31, for deposits paid and damages incurred on account of agreements to purchase condominium units, which agreements the appellants state were not completed because of default by the vendor developer.

The appellant, Sunforest Investment Corporation in trust, as trustee for eight individual investors, entered in agreements to purchase eight residential condominium units from the vendor, The Markan Group. The appellant, Paul Wing, agreed in his own name to purchase one unit.

The appellants acknowledge that they entered into the agreements for investment purposes, intending to rent the units when they became available for occupancy. The vendor represented to the purchasers that the units were covered by the Ontario New Home Warranty Program and that registration fees had been paid. Registration and enrolment numbers were provided for each condominium purchased. There were three areas of dispute before the Appeal Tribunal:

(i) that the purchases, being made for investment purposes only, were not covered by the provisions of the Ontario New Home Warranties Plan Act;

(ii) that the appellants, rather than the developer, failed to perform the contract by failing to apply for mortgage financing and failing to provide the vendor with financial information as required by the agreements of purchase and sale for the purpose of obtaining mortgage financing for each unit; and

(iii) that there was no evidence that the purchasers actually paid the deposit moneys as alleged.

(i) Application of the Ontario New Home Warranty Plan Act

The Appeal Tribunal dismissed the appellants' appeal on the basis that the appellants' purchases were not covered by the Warranty Program and the Divisional Court agreed with the reasons of the tribunal. The Divisional Court relied on a portion of the reasons of the tribunal in which the tribunal quoted the reasons of Carthy J.A. in the decision of this court in *Ontario New Home Warranty Program v. Marchant Building Corp.* (1991), 1 O.R. (3d) 513, 15 R.P.R. (2d) 113 (C.A.), leave to appeal to the Supreme Court of Canada refused October 17, 1991, where he said at p. 519:

... there is an apparent lack of harmony between the nature of these transactions and this protection afforded by the Act.

The *Marchant* case, and the decision of this court in *Brownstones East Limited Partnership v. Ontario New Home Warranty Program* (1992), 8 O.R. (3d) 545, 93 D.L.R. (4th) 400, which followed it, both involved investments in limited partnerships which held all of the units in large condominium projects. The investments were similar to a share interest in a corporation. It was in this context that the decisions were made, and to which the reasons were addressed. Both cases involved the question of whether the agreements of purchase and sale of interests in the partnerships resulted in the vendor under the agreement being a "vendor" within the terms of the Act, thereby requiring registration under the Act and the payment of premiums to the Warranty Program. Avoiding the requirement to pay premiums in both cases resulted in savings of very substantial amounts of money to the developers involved.

The relevant provision of the Act is s. 14(1)(a), which reads:

14(1) Where

(a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract,

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

For recovery under s. 14(1)(a), it is necessary that the vendor under the agreement of purchase and sale be a "vendor" within the definition of "vendor" in s. 1 of the Act, which reads

... a person who sells on his ... own behalf a home not previously occupied to an owner ...

The Marchant and Brownstone decisions were based primarily on the uncontested fact that there was no sale of a "home" involved in either case, but rather the sale of a partnership interest. The result, as detailed above, was that the vendors of the partnership interests did not have to register under the Act, and did not have to pay premiums to the Program.

This case is quite different. The purchases involved units each of which was a "home not previously occupied" within the above definition. The definition also requires that the home be sold to an "owner", who is defined in s. 1 as "a person who first acquires a home from its vendor for occupancy". The tribunal held that since these units were acquired for rental purposes, they were not acquired "for occupancy", because such occupancy must be that of the purchaser. It is obvious that the Act does not specifically say that, but the respondent takes the position that the words of Carthy J.A. in Marchant that "there is an apparent lack of harmony between the nature of [the transactions in that case] and protection afforded by the Act" supports its view that "occupancy" must be occupancy by the purchaser. In my view, had the legislature intended such a result, it could have said so in clear terms.

I agree with Holland J. in *Ontario New Home Warranty Program v. Meadows of White Oaks II Ltd.* (1988), 65 O.R. (2d) 362, 50 R.P.R. 186 (H.C.J.), that even where condominiums are purchased for tax shelters, they are purchased for occupancy and, therefore, the vendor of a condominium which has not been previously occupied must be registered and pay premiums under the Act. If that is so, the purchaser is protected by the provisions of the Act. In this case, the administrators of the Warranty Program required coverage, and accepted premiums pursuant to the provisions of the Act, but now wish to decline payment of the appellants' claims. They cannot have it both ways. Either the units are covered, in which case premiums must be paid and appropriate claims honoured, or the units are not covered, in which case premiums need not be paid and no claims may properly be made.

It follows that I would allow the appeal, subject to satisfactory resolution of the other two areas of dispute between the parties. The tribunal seems to have assumed the correctness of its decision on the applicability of the Act to the agreements in this case and thus did not deal with the other two disputes which were argued before us.

(ii) Failure to Perform Contract by not Qualifying for Mortgage Financing

The Program denied the claims of the appellants on the alternative basis that they had failed to qualify for assumption of the first mortgage against the property, and thus the agreement became null and void. As stated by the tribunal, counsel for the appellants argued that it would be an abuse of process to hear evidence on this point since Corbett J., on a motion for summary judgment in an action brought by them against the vendor, gave judgment in their favour for the total amount claimed. He was of the view that the doctrines of issue estoppel or res judicata should be applied by the tribunal.

The tribunal did not consider it appropriate to apply either doctrine in this case, since the tribunal was not a party to the proceedings before Corbett J., although it was notified of the proceedings when commenced. I agree. However, at the hearing before the tribunal, there was in fact substantial evidence adduced on this point. On the uncontradicted evidence of counsel acting for the appellants on the original transactions, it is clear that the appellants did all that was required by the agreements with respect to mortgage financing. The vendor at no time purported to declare the agreements null and void and forfeit the deposits, and neither did it at any time do all that was required of it to close the transaction. There was more than sufficient evidence adduced by the appellants before the tribunal to support their position that the vendor was in default under the agreements. No evidence was adduced by the Warranty Program. That being the case, there is nothing to be gained by sending the matter back for a determination of this issue.

(iii) Failure to Prove Payment of Deposits

It was the position of the Warranty Program that the payment of deposits under the agreements was not proven before the tribunal. On this issue also the Program adduced no evidence. However, there was substantial evidence by the appellants as to payment of the deposits. Indeed, the tribunal, in dealing with the issue of application of the Act to these agreements, stated that deposits were paid by the individual investors. Given the correspondence between solicitors for the parties, and the oral evidence before the tribunal, there can be no doubt on this issue. However, I am of the view that damages in excess of the deposits were not proven.

Result

I would allow the appeal, with costs, set aside the order of the Divisional Court, and grant judgment in favour of the appellants for all amounts paid as deposits on account of the agreements involved, plus interest on those amounts. I would award costs to the appellants before the Divisional Court and on the motion for leave to appeal to this court.

Appeal allowed.

CBR# 330

Tony's Broadloom & Floor Covering Ltd. et al. v. NMC Canada Inc. et al.

[Indexed as: Tony's Broadloom & Floor Covering Ltd. v. NMC Canada Inc.]

31 O.R. (3d) 481

No. C21028

Court of Appeal for Ontario, Doherty, Weiler and Laskin JJ.A. December 12, 1996

APPEAL from a summary judgment of White J. ((1995), 22 O.R. (3d) 244, 44 R.P.R. (2d) 29) dismissing an action for rescission.

Douglas Thomson, for appellants. Donald D. Hanna, for respondents. The judgment of the court was delivered by

DOHERTY J.A.: -- The appellants purchased certain property in Etobicoke in September 1988. In November 1988, they were told of the presence of Varsol and oil contaminant in the soil and the groundwater on the property. Some four-and-a-half years later, in February 1993, the appellants commenced this action claiming rescission of the agreement of purchase and sale and damages on the basis that the contaminants rendered the property of no value. The appellants and respondents brought motions for summary judgment in December 1994. White J. dismissed the appellants' motion, granted the respondents' motion and dismissed the action ((1995), 22 O.R. (3d) 244, 44 R.P.R. (2d) 29). The appellants now seek an order setting aside the dismissal of their action and a further order directing that the matter proceed to trial.

On the motion before White J., the appellants took the position that this was an appropriate case for summary judgment. They took the same position on their motion for leave to appeal to the Divisional Court from the decision of White J. and in the notice of appeal filed in this court. The appellants claim that a trial is needed to resolve various factual disputes that first appeared in their factum filed on this appeal. In my view, the appellants' eleventh hour attempt to rescue their action with the submission that this was not an appropriate case for summary judgment cannot succeed.

The property is located at 347 Royal York Road in Etobicoke and was zoned for industrial use. It had a long history of industrial use and the respondents had operated a factory on the property under the name Venco Metals ("Venco"), since 1974. Venco manufactured metal stamps and used Varsol to clean the machinery used in that process. Between 1979 and 1985, the dirty Varsol was dumped on the ground behind the factory. In 1985, the owner of the adjoining property complained about the presence of oil and Varsol in its sump pump pit. Representatives from the Ministry of the Environment and the City of Etobicoke investigated and determined that the dirty Varsol was likely migrating from the respondents' property to the neighbour's property through the groundwater. The respondents retained Monenco Consultants Ltd. ("Monenco") to investigate the problem and to advise as to what steps should be taken to control and eliminate the contamination. A short time later, in November 1985, Varsol and other solvents were classified as registerable hazardous waste material by O. Reg. 322/85 passed pursuant to the Environmental Protection Act, R.S.O. 1980, c. 141. Monenco reported that the soil and groundwater were contaminated with Varsol and oil and recommended that certain wells be installed on the property to capture the contaminant and control its spread. The respondents installed the recommended system in 1985 and retained Monenco to monitor the condition of the soil and groundwater.

Mr. Tony Tolomei, who controlled both corporate appellants, became interested in purchasing the property late in 1987. His carpet business was located about 100 metres from the property, and he had previously purchased and developed two other smaller properties in the area. Mr. Tolomei knew that Venco operated a manufacturing plant on the property, but he did not know the specific nature of that business.

Mr. Tolomei negotiated the purchase of the property with George Arndt, the Director of Finance for one of the respondent companies. On January 8, 1988, the parties entered into an agreement of purchase and sale calling for the sale of the property for a price of \$1,250,000. The appellants' solicitors drew up the agreement. The sale was originally to close in July, but was delayed until September 6, 1988 at the request of the respondents. Although Mr. Arndt was well aware of the contaminant in the groundwater and soil, he made no mention of it to Mr. Tolomei either before entering into the agreement in January or prior to closing in September. The appellants were unaware of the existence of the contaminant in the soil and groundwater before the closing of the transaction.

Mr. Tolomei wanted to build a multi-storey residential condominium on the property. In their statement of claim, the appellants pled that Mr. Tolomei told Mr. Arndt of the proposed condominium development. The respondents' statement of defence pled that at some time after the agreement of purchase and sale was signed, Mr. Tolomei informed Mr. Arndt that a condominium development was a possibility. In his examination for discovery and on the cross-examination on his affidavits filed on the motion for summary judgment, Mr. Tolomei admitted on at least three separate occasions that he did not tell Mr. Arndt or anyone connected with the respondents about his intended use of the property. Mr. Arndt made no reference to this issue in his affidavit and he was not cross-examined.

White J. found at p. 251 O.R., p. 37 R.P.R.: The vendor had no indication from the purchaser that the purchaser did not intend to continue the extant use of the property as a factory.

White J. was entitled to make that finding on a motion for summary judgment. In the face of Mr. Tolomei's repeated express admission that he did not tell anyone connected with the respondents about his proposed use of the property, and in the absence of any evidence to the contrary, I do not think a reasonable trier of fact could come to any conclusion but that reached by White J.

When he agreed to buy the property, Mr. Tolomei knew that the property was zoned for industrial use, and he knew that a factory had been operated on the site for many years. Mr. Tolomei also knew that the property would have to be re-zoned before he could proceed with his condominium development. Despite these facts, Mr. Tolomei chose not to investigate the property prior to agreeing to purchase it, or to make the agreement conditional upon appropriate re-zoning. The agreement of purchase and sale contained the following terms:

2. . . . Vendor agrees to give written consent for a building inspection by any governmental authority.

6. Purchaser shall be allowed until 11:59 p.m. on the 15th of June, 1988 to examine title to the property, at his own expense, to satisfy himself that there are no outstanding work orders affecting the property, that its present use may be lawfully continued . . .

8. Purchaser acknowledges having inspected the property prior to submitting this Offer and understands that upon Vendor accepting this Offer there shall be a binding agreement of purchase and sale between Purchaser and Vendor.

9. Vendor and Purchaser agree that there is no condition, express or implied, representation or warranty of any kind that the future intended use of the property by Purchaser is or will be lawful except as may be specifically stipulated elsewhere in this Agreement.

22. Notwithstanding any terms or conditions outlined in the printed portion herein, any provisions written or typed into this Offer shall be the true terms and shall supersede the printed portion in respect to the parts affected thereby. This Agreement shall constitute the entire agreement between the Purchaser and Vendor and there is no representation, warranty, collateral agreement or condition affecting this Agreement or the property or supported hereby other than as expressed herein in writing. This Agreement shall be read with all changes of gender or number required by the context.

(Emphasis added) Although the respondents gave the appellants full access to the property between January and September 1988, the appellants did nothing to determine the suitability of the property for the proposed use. Nor, as provided for in the agreement of purchase and sale, did the appellants obtain the respondents' consent to an inspection of the property by any governmental authority. According to Mr. Tolomei he did not even bother to visually inspect the property before the closing date.

In August 1988, the appellants did ask the respondents for permission to conduct certain soil tests on the property. The respondents gave that permission. For reasons which had nothing to do with the respondents, the tests were not done until after closing and the appellants did not receive a report from their consultant until December 1988. Although the tests were done to determine the feasibility of erecting a multi-storey building on the property, they clearly revealed the contaminant in the soil and groundwater.

In May 1988, some three months before the closing, Monenco wrote to the respondents indicating that their recent tests showed a substantial increase in the amount of contaminant captured by some of the wells installed in 1985. In August 1988, Monenco reported to the respondents that the system installed in 1985 was not functioning properly and had probably not been adequately maintained. Monenco told the respondents that the contaminant continued to migrate off the property and that the current system might not be adequate to collect and control the contaminant. Monenco also expressed concern about the nature of the discharge into the municipal sewage system. The respondents did not tell the appellants about either the May letter or the August report. They passed the August report on to the Ministry of the Environment after the transaction closed. The respondents were in contact with the Ontario Ministry of the Environment between November 1988 and April 1989. The Ministry made it clear that the property should be cleaned up and asked to be kept advised. No order was ever issued by the Ministry directing the cleanup and no cleanup has ever been undertaken.

The appellants were told of the contaminant problem in November 1988 by officials from the Ministry of the Environment. They continued to attempt to develop the property and brought a re-zoning application in June 1989. The appellants' efforts to develop the property were finally abandoned in 1991 when, according to Mr. Tolomei, the economy precluded any further attempt to develop the property. Since purchasing the property, the appellants have used it as a carpet storage facility and have also allowed other businesses to store property on the premises. Part of the former factory was also leased to a wholesale carpet seller.

The appellants did not plead that the property as purchased could not be used for industrial purposes. They led no evidence to that effect on the motion for summary judgment. The environmental audit prepared by the appellants' expert in October 1991 and April 1992 did not suggest that the property could not be used in its current condition for industrial purposes. Nor does the report suggest that the contaminant posed any ongoing danger to persons or property. According to the appellants' experts, if the property was developed for residential use, the contaminated soil would have to be taken to specially designated landfill sites, and this would substantially increase the cost of excavation. The report went on to indicate that the property could be used on an as is basis as a parking lot, yielding annual revenues of between \$24,000 and \$48,000 a year.

The evidence produced on the motions supports the conclusion that the presence of the contaminant did not render the continued use of the property for industrial purposes dangerous or illegal. The Ministry of the Environment and the City of Etobicoke have been aware of the contaminant since 1985. Neither had taken any steps to order a cleanup or curtail the industrial use of the property by Venco. Even after the Ministry became aware that the containment system installed in 1985 appeared to be inadequate, no steps were taken to prohibit the continued use of the property. While the Ministry of the Environment clearly wanted the contaminant cleaned up, there is no suggestion that absent a cleanup, the property could not be used for industrial purposes. The Ministry has never issued any order against the property and appears to have shown no interest in the contaminant for many years.

In oral argument, counsel for the appellants submitted that the classification of the contaminant as "hazardous industrial waste" in a regulation passed pursuant to the Environmental Protection Act established that any use of the property posed a danger. He also argued that the contaminant rendered the property "valueless". The evidence does not support the first submission and flatly contradicts the second. Counsel referred to no statutory or other authority which suggests that the presence of a contaminant characterized as hazardous under a regulation compels the conclusion that the continued use of the property for industrial purposes is dangerous or illegal. The appellants' own evidence established that the property had value in its existing state. The most that can be said on this record is that the presence of the contaminant could significantly increase the costs of developing the property for use as a residential condominium.

Much of the argument on the motion turned on whether the presence of the contaminant should be classified as a latent or patent defect in the property. I agree with the respondents' primary submission that it was neither. In *688350 Ontario Ltd. v. Piron*, [1994] (Gen. Div.), Epstein J. said at paras. 132-133:

A defect is generally understood to mean something that constitutes a failing, short-coming, fault, or imperfection. This is obviously a subjective concept. To adopt a phrase, one person's defect may be another person's ideal.

Obviously to make a determination of whether something is a defect in the quality of land, the intended use of the land must be taken into account.

In this case, the respondents agreed to sell, and the appellants agreed to buy industrial property. Unlike the situation in 688350 Ontario Ltd., supra, the respondents were not told of the appellants' intention to use the property for a very different purpose. The respondents had no reason to believe that the appellants would use the property for any purpose other than an industrial one. The question of whether the contaminant constituted a defect in the property must be considered in this context. This record offers no support for the contention that the contaminant impaired the continued use of the property for industrial purposes. The appellants got exactly what they bargained for -- industrial land. Their undisclosed intention to use the property for residential purposes does not alter the bargain the appellants made, or create a latent defect in the industrial property which the appellants agreed to purchase.

If I am wrong and the presence of the contaminant was a defect, I agree with the conclusion of White J. (at pp. 249-51 O.R., pp. 35-37 R.P.R.) that the defect was a patent one. It would have been readily discoverable by the appellants had they exercised reasonable vigilance in the circumstances. In deciding whether the appellants exercised reasonable vigilance, it must be remembered that the appellants were buying industrial land on which they proposed to build a residential condominium. A reasonable inspection of the property, reasonable inquiries of the respondents, and reasonable inquiries of the local and provincial authorities would have put the appellants on notice of the existence of the contaminant. Indeed, had the appellants pursued the taking of soil samples with reasonable diligence after the respondents had permitted them to take those samples, they would have learned of the existence of the contaminant before closing. Instead, the appellants chose not to disclose their intended use of the property and to take no steps to satisfy themselves that the property could be used for that purpose.

In reaching the conclusion that the defect, if any, was patent, I do not find it necessary to determine whether Mr. Tolomei actually saw the pipes and shed installed on the property in 1985 by Monenco. Instead, I agree with White J. (at p. 250 O.R., p. 36 R.P.R.), that on a reasonable inspection, these would have been apparent to the appellants, and would, along with the other circumstances, such as the location of the property, have caused inquiries to be made concerning their purpose.

The appellants submit that the question of whether the contaminant could have been discovered by the exercise of reasonable vigilance can only be properly decided after a trial. I disagree. The standard to be applied is an objective one and the motion record fully revealed the factors relevant to that assessment.

The appellants also submit that apart from the characterization of any defect as latent or patent, the vendors had a duty to bargain in good faith and breached that duty when they failed to advise the appellants of the information provided by Monenco in the spring and summer of 1988. The existence of a duty to bargain in good faith in an arms-length commercial transaction involving the sale of real property is debatable: see annotation of J. Lem to Justice White's decision at 44 R.P.R. (2d) 29 at pp. 30-31. In any event, I can see no evidence on this record of any basis for a finding of bad faith against the respondents. They made no misrepresentations. They gave the appellants ready access to information concerning the property and full physical access to the property, even to the extent of permitting investigations which were not required by the agreement of purchase and sale. Furthermore, they had no knowledge that the appellants intended to radically change the use of the property. I cannot agree that the failure to disclose information which did not affect the continued use of the property for industrial purposes, and which could have been obtained by the appellants through their own reasonable efforts, constitutes bad faith.

Two additional matters require brief reference. Apart entirely from any contractual obligation arising out of an agreement of purchase and sale, a vendor of real property may have a duty to warn a purchaser of dangers in or on the property which pose a risk of physical harm to persons or property: F. Coburn and G. Manning, Toxic Real Estate Manual (1996) at p. II-v to II-xiv. That principle has no application here. As indicated above, there is no evidence that the contaminant posed a risk of harm such as to render the use of the property for industrial purposes dangerous.

I would also stress that this action is not about the obligation, if any, of the respondents to contribute to, or fund exclusively, any cleanup of the property which may be undertaken by the appellants or ordered by the appropriate governmental authorities. The appellants have taken no steps to remove the contaminant and no cleanup has been ordered. If and when the appellants undertake a cleanup, or a cleanup order is made, the respondents' liability for costs attributable to that cleanup may have to be addressed in the appropriate forum. This action does not address those potential obligations.

I would dismiss the appeal with costs.

Appeal dismissed.

CBR# 252

Re Carleton Condominium Corporation No. 441 and Ontario New Home Warranty Program

28 O.R. (3d) 394

Ottawa Court File Nos. 00953/95 and 1056/95

APPEAL and application for judicial review of a decision of the Commercial Registration Appeal Tribunal.

James Davidson, for appellant. Netanus T. Rutherford, for respondent.

The judgment of the court was delivered by

SOUTHEY J.: -- There are two issues in this case. The first is whether a decision of the Commercial Registration Appeal Tribunal adjourning sine die an appeal to it from a decision of the Ontario New Home Warranty Program (the "Program") is appealable. The second is whether that decision of the Tribunal should be set aside on the appeal, if one lies, or on an application for judicial review.

The appeal before the tribunal was from a decision of the Program rejecting claims for compensation arising out of four alleged defects in a building owned by the appellant condominium corporation. The Tribunal, at the request of the Program, adjourned the hearing of the appeal sine die pending the final disposition of an action brought by the condominium corporation in the Ontario Court (General Division) against the general contractor, the architect and others involved in the construction of the building for damages arising out of the same defects.

The appeal to the Tribunal was brought under s. 11(1) of the Ministry of Consumer and Commercial Relations Act, R.S.O. 1990, c. M.21, which reads as follows:

11(1) Any party to proceedings before the Tribunal may appeal from its decision or order to the Divisional Court in accordance with the rules of court.

The Divisional Court is given broad powers on an appeal under s. 11(5), which reads:

(5) An appeal under this section may be made on questions of law or fact or both and the court may exercise all the powers of the Tribunal, and for such purpose the court may substitute its opinion for that of the Registrar or of the Tribunal, or the court may refer the matter back to the Tribunal for rehearing, in whole or in part, in accordance with such directions as the court considers proper.

Although there appears to be an unrestricted right of appeal from decisions of the Tribunal, it has been held by this court differently constituted that similar provisions respecting other tribunals confer a right of appeal only from final decisions or orders: see *Canadian Union of Public Employees v. Ontario Hospital Assn.* (1991), 35 C.C.E.L. 43 (Div. Ct., Davidson J.), applying *Roosma v. Ford Motor Co. of Canada Ltd.* (1988), 66 O.R. (2d) 18, 53 D.L.R. (4th) 90 (Div. Ct.).

The decision of the Tribunal in this case did not dispose of the claims of the condominium corporation. The decision is clearly an interlocutory one, not a final one. No valid reason was given for distinguishing the authorities above, and the appeal must be quashed for the reasons given in those cases.

I now turn to the application for judicial review. The decision of the Tribunal to adjourn its hearing pending the outcome of the court action was based on the well-recognized principle that the possibility of inconsistent decisions in multiple proceedings dealing with the same issues should be avoided. As to the choice of the forum in which the claims should be heard, the Tribunal quoted from one of its earlier rulings, which included the following passage from the decision of Davies J. in *Cooper v. Cooper*, [1952] 2 All E.R. 857 at p. 861, [1953] P. 26:

. . . there is in many respects a co-equal jurisdiction between courts of summary jurisdiction, on the one hand, and the High Court, on the other . . . The principle, as I have always understood it, which applies to such cases, is that if on the same issue between the same parties there is an actual conflict of jurisdiction, or a reasonable likelihood or probability of such a conflict of jurisdiction, the inferior court, as a matter of obvious convenience and public policy, should not proceed with the hearing of the summons.

As to the standard of review, this is a case in which there is no privative clause, there is a broad statutory right of appeal and the issue (whether proceedings before the Tribunal should be stayed) is one respecting which the Tribunal has no greater expertise than the courts. The appropriate standard of review in those circumstances, in my opinion, is that of correctness: see the decision of the Supreme Court of Canada in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at p. 590, 114 D.L.R. (4th) 385 at pp. 404-05.

The duty of the Tribunal in this case was to hold a hearing. Section 16(3) of the Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31, reads as follows:

16(3) Where a person or owner gives notice in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and may by order direct the Corporation to take such action as the Tribunal considers the Corporation ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Corporation.

That statutory duty, in my opinion, overrides the general rule against multiplicity of proceedings that was applied by the Tribunal.

I agree with the submission of counsel for the appellant that one of the purposes of the Ontario New Home Warranties Plan Act is to provide a quick, summary procedure which can be pursued by the consumer at less expense than litigation in the courts. The decision of the Tribunal would defeat that purpose.

The importance of the warranties imposed on vendors by the Ontario New Home Warranties Plan Act is demonstrated by s. 13(6) of the Act which provides that the warranties apply despite any agreement or waiver to the contrary and that they are in addition to any other rights the owner may have and to any other warranty agreed upon.

Section 13(1) of R.R.O. 1990, Reg. 892 under the Act provides that the Program is subrogated to all rights of recovery of a person to whom payment in respect of a claim has been made out of the guarantee fund under the Act. The Program may maintain an action in its own name against any person against whom the action lies in respect of such right of recovery.

Section 13(5) of the regulations requires any person who has been paid money out of the guarantee fund to notify the Program of any action that has been brought against any person who caused or contributed to the damages that resulted in the payment out of the guarantee fund.

These regulations obviously contemplate the prosecution of an action in respect of the defects leading to a claim after the Program has made payment out of the guarantee fund. The decision of the Tribunal requires a reversal in that order of proceedings. The Tribunal's decision to adjourn its hearing was a discretionary one, and should not be interfered with unless it was clearly wrong. After anxious consideration, and with the greatest respect for the Tribunal, I have decided that the decision was clearly wrong for the foregoing reasons.

An order will go setting aside the decision of the Tribunal and directing it to resume its hearing under s. 16(3) of the Ontario New Home Warranties Plan Act and to deal with the matter on the merits without awaiting determination of the action brought by the condominium corporation.

The parties may make submissions in writing within 15 days as to the disposition and amount of costs.

Order accordingly.

CBR# 012

Abdool et al. v. Anaheim Management Ltd. et al.

21 O.R. (3d) 453 Action No. 556/93

Ontario Court (General Division), Divisional Court, O'Brien, Moldaver and Flinn JJ. January 10, 1995

APPEAL from a judgment of Montgomery J., (1993), 15 O.R. (3d) 39, 16 C.P.C. (3d) 141 (Gen. Div.), refusing to certify the proceeding as a class action. Gavin MacKenzie and Jeremy J. De Melo, for appellants.

Robert J. Potts and Roger J. Horst, for respondent, Goldman, Sloan, Nash & Haber.

R.C. Heintzman and J.W. de Vries, for respondent, Deloitte and Touche.

H.S. Swartz, for Toronto-Dominion Bank and Adelaide Capital Corp.

O'BRIEN J.: -- This appeal is from the decision of Montgomery J. refusing to certify the proceeding as a class action pursuant to the Class Proceedings Act, 1992, S.O. 1992, c. 6. (The decision is now reported *Abdool v. Anaheim Management Ltd.* (1993), 15 O.R. (3d) 39, 16 C.P.C. (3d) 141.)

The Class Proceedings Act, 1992 is recent legislation and came into force January 1, 1993.

Montgomery J. dealt with another application to certify a class action during the same week that he heard this matter. That other matter is now reported: *Bendall v. McGhan Medical Corp.* (1993), 14 O.R. (3d) 734, 106 D.L.R. (4th) 339 (Gen. Div.).

This appeal raises the following issues:

- 1) Factors to be considered in a certification application.
- 2) The discretion available to a court asked to certify a proceeding.
- 3) The involvement of Securities Act (R.S.O. 1990, c. S.5) legislation on the transaction.

Facts

The plaintiffs were investor-owners in a tax-driven real estate project involving the purchase of units in a condominium in Mississauga. There were approximately 325 units in the building. Some were purchased individually and some by multiple owners.

The project was a financial failure. All plaintiffs lost money. Some have been sued and others have maintained their investment and thus avoided lawsuits against them, but seek to recover financial losses.

There are 150 plaintiffs named in the proceeding in which certification was sought. All were represented by one solicitor. Those plaintiffs estimate there are approximately 300 members in the proposed class.

One of the investors, and a named plaintiff, Irwin Lerson, has been proposed as the representative plaintiff under the Act.

The developers, Anaheim Management Ltd. and Anaheim Properties (Ontario) Limited ("Anaheim") have not defended the proceedings.

The real estate brokers involved in selling the units, Martin Capital Group and RLM Investments Incorporated (the "brokers"), did not appear before Montgomery J. and took no part in the application.

Most of the investors were directed to a pre-arranged source of financing provided by Central Guaranty Trust Company ("Central") through a combination of mortgage financing and promissory notes. That company encountered financial difficulties; there was a court-ordered winding up, and all mortgages, promissory notes and other financing documents have been assigned to Adelaide Capital ("Adelaide") and the Toronto Dominion Bank ("TDB"). Proceedings to collect on those documents have been commenced by those two corporations against many of the plaintiffs in these proceedings.

The solicitors for Anaheim were Goldman, Sloan.

An accounting firm, Deloitte & Touche ("Deloitte"), now known as Touche Ross, reviewed the financial forecasts Anaheim prepared for the project and wrote one letter in which they commented on that forecast.

The named investor-owners have commenced proceedings in their own names and now seek certification under the Class Proceedings Act, 1992. The proceedings are against the developers, the brokers, Central, Goldman, Sloan and Deloitte.

There are three categories of investor-owners: (i) those who still own units or interests in units and against whom no actions have been commenced.

(ii) those who are currently subject of proceedings commenced by Central's assignees on the mortgages, promissory notes and other financial documents.

(iii) those against whom judgments have been obtained in respect of the financial documents.

The investor-owners purchased the units on sales presentations which indicated the units were tax shelters, and for a payment of \$1,000 they would eventually acquire title to the units. The total sales price of each unit was \$161,450. It is alleged that the sales presentation was that the mortgage and financing charges would be offset by income to be received from the luxury condominium

units. The investor-owners would not occupy the units and all would be rented from a rental pool to be managed by the developer. The developer would manage the condominium and guaranteed rental payments for a period of time.

The investor-owners were told they could only be permitted to make the investment if approved by Central. This involved an investigation of their assets and income.

The project was not successful. The rental income was insufficient to meet expenses and the investors were called upon to meet the financial obligations they had undertaken in the mortgages, promissory notes and other financial documents signed by them.

The essence of the investors' claim is that there were misrepresentations as to the financial arrangements and the financial projections. They allege various relationships existed among all defendants, including those of principal and agent, partnership, joint venture and syndicate.

There are also allegations of breach of fiduciary duties, breach of the Securities Act and an allegation of solicitor-client relationship as between the investors and solicitors acting for the developers.

The relief claimed includes general, exemplary and punitive damages, rescission of the contracts and financial documents, including mortgages and promissory notes, and a stay of all proceedings against them.

Each of the named plaintiffs asserts a claim for \$300,000 for general damages.

The Decision Appealed From

(a) As it related to the solicitors

Montgomery J. held the claims against the solicitors depended on specific, individual facts including questions of whether any representations had been made to the investors or relied upon by them.

(b) As it related to Capital

He held the pleadings failed to disclose any cause of action as against Capital. He related the application for certification to an application under rule 21.01(1)(b) of the Rules of Civil Procedure, which is an application to strike a pleading as disclosing no cause of action, and to rule 25.06(1) relating to minimum disclosure required in pleadings. He noted plaintiffs' counsel declined his invitation to adjourn the application to amend and expand pleadings and concluded the pleadings failed to show any connection between investors and Central which permitted the loans to be attacked.

(c) As it related to Deloitte

He concluded each investor's case against that company rested upon individual reliance on alleged misrepresentations which were contained in a single letter. He held the claims, as pleaded, did not raise common issues, and procedural fairness to Deloitte required individual discovery and production of the plaintiffs. He also held the class proceeding was not the most effective way of disposing of the action.

In his reasons Montgomery J. also indicated Lerson, the proposed representative plaintiff, would not fairly and adequately represent the interests of the class. He gave no specific reasons for that conclusion.

Consideration of Issues Raised

(1) Factors to be considered in certification Those factors specifically mandated in the Act are outlined in ss. 5 and 6 as follows:

5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

(2) Despite subsection (1), where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of subclass members requires that they be separately represented, the court shall not certify the class proceeding unless there is a representative plaintiff or defendant who,

(a) would fairly and adequately represent the interests of the subclass;

(b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding; and

(c) does not have, on the common issues for the subclass, an interest in conflict with the interests of other subclass members.

(3) Each party to a motion for certification shall, on an affidavit filed for use on the motion, provide the party's best information on the number of members in the class.

(4) The court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence.

(5) An order certifying a class proceeding is not a determination of the merits of the proceeding.

(6) The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:

1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.

2. The relief claimed relates to separate contracts involving different class members.

3. Different remedies are sought for different class members.

4. The number of class members or the identity of each class member is not known.

5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

The Class Proceedings Act, 1992 was enacted after long legislative consideration. In 1982 the Ontario Law Reform Commission published a three-volume analysis dealing with the matter and made many suggestions for reform.

In 1990 the Attorney General's Advisory Committee on Class Action Reform delivered its report containing numerous recommendations. That report was tabled in the legislature in the summer of 1990.

In argument, counsel referred to those reports. Those reports included investigation of legislation and decided cases in the United States.

Those studies are a useful background in considering the intent of the legislation although they are not binding.

It seems clear the three main objects of the class proceeding legislation are:

(i) judicial economy, or the efficient handling of potentially complex cases of mass wrongs;

(ii) improved access to the courts for those whose actions might not otherwise be asserted. This involved claims which might have merit but legal costs of proceeding were disproportionate to the amount of each claim and hence many plaintiffs would be unable to pursue their legal remedies;

(iii) modification of behaviour of actual or potential wrongdoers who might otherwise be tempted to ignore public obligations.

(2) Discretion in certification

Appellants' counsel, in argument, relied on the apparent mandatory wording of s. 5(1) of the Act, specifying "the court shall certify" if certain requirements are met. I am not persuaded the approach to be taken is that simple.

Section 35 of the Class Proceedings Act, 1992 provides that the rules of court apply to class proceedings.

Rule 1.04(1) of the Rules of Civil Procedure provides:

1.04(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

I do not accept the submission that any complex, multiple-party lawsuit is entitled to certification merely because that is the "preferable procedure" for resolving common issues which may be involved in the litigation. In my view, some consideration must be given to individual issues involved in the litigation, the purposes of the Act, and the rights of the parties seeking, and opposing, certification.

In some cases, those rights may be best served by the normal court procedures involving production, discovery and cross-examination.

The court considering certification may consider alternative, or combinations of, remedies available under the rules. Some of these include:

-- intervention by non-parties pursuant to rule 13.01;

-- the appointment of a single judge to case manage and direct proceedings of two or more cases involving complicated issues pursuant to rule 37.15(1);

-- consolidation of cases under rule 6.01;

-- applications for interpretation of contracts or instruments under rule 14.04; -- determination of issues before trial by means of Rule 20 (summary judgment procedures), or Rules 21 and 22, which provide for determination of points of law, or special (or "test") cases. The latter procedure is usefully used when there are few facts in dispute or the facts can be agreed upon.

While s. 15 of the Class Proceedings Act, 1992 provides for discovery rights, they are available only after discovery of the representative plaintiff, and with leave of the court.

Section 25 of the Act also provides for participation of individual class members but that is available only after the court has determined common issues. In effect, there is a bifurcated hearing with various procedures for further hearings, references or other procedures. These procedures are available only on court order or on consent and after determination of common issues.

While access to the courts is obviously a worthwhile aim of the Act, it is to be noted the Law Reform Report commented on the concern that frivolous claims might be advanced and defendants "blackmailed" into settling them because of potential legal costs.

Under the Act, once certification is granted, class plaintiffs face little, if any, exposure to legal costs. Contingency fees are permitted for plaintiffs' counsel and s. 31 of the Act provides for the court to exercise its discretion regarding costs, and indicates class members are not liable for those costs except with respect to the determination of their own individual interests.

The relative weight to be given common and individual issues is a vexing matter.

In the reported decision of *Abdool*, supra, Montgomery J. noted at p. 51:

The Class Proceedings Act, 1992 was designed to remove some of the barriers to class actions that existed before its enactment. It was not intended to be used in circumstances where the individual issues to be determined predominate those issues common to the proposed class.

For this reason a class proceeding is not the most effective mechanism for resolution of this action and cannot be certified.

In *Bendall*, supra, Montgomery J. considered some of the American cases and Rule 23 of the U.S. Federal Rules dealing with class actions. (The relevant portion of that rule is annexed at Sch. 1 to these reasons [see pp. 467-68 post].)

One of the elements enumerated as a prerequisite to certification as a class action under the U.S. Federal Rule is rule 23(a), a portion of which is:

The court finds that the question of law or fact common to the members of the class predominates over any question affecting only the individual members, and that a class action is superior to other available methods of the fair and efficient adjudication of the controversy.

In the reported decision in *Bendall*, supra, at pp. 746-47, Montgomery noted:

While the American cases are helpful as a reflection of a 30-year history of class actions one must not lose sight of vital differences. Predominant issue is not a factor in our Act. It is critical under Federal Rule 23. The Ontario legislature had the benefit of a draft bill prepared by the Law Reform Commission after lengthy study and reflection on the American history of class actions. Ontario chose to emphasize the common issues.

(3) The Securities Act issues

The essence of this allegation is that Anaheim, Central and the brokers were "salesmen", "promoters" and "dealers" within the definition of sections of the Securities Act, the condominium sales were "trades" within the meaning of that Act, and a prospectus was normally required.

The plaintiffs allege those parties relied on the "sophisticated investor" exemption permitting sales of security interests greater than \$150,000 which is contained in s. 72(1)(d) of the Act. They claim that reliance was a sham, was invalid, and a prospectus was required. They claim the failure to file rendered all debts incurred in the purchase invalid. Conclusions

(1) The Security Act Issue

That issue is not specifically mentioned in Montgomery J.'s decision. It was apparently not stressed during argument before him.

While advanced on this appeal, it was not strenuously argued.

The point was precisely dealt with in a subsequent decision of Ground J. in his decision in *Bossé v. Mastercraft Group Inc.*

The decision, as yet unreported, was released on May 6, 1994. In it, Ground J. dealt with a factual situation almost identical to that in this case. It is interesting to note the matter was dealt with under Rule 20 as a motion for summary judgment.

Ground J. held the financial institutions involved could not be "issuers" or "promoters" within the meaning of the Securities Act and even if there had been a failure to comply with that Act the validity or enforceability of the loan transactions would not be affected. He granted summary judgment against the investors involved and dismissed their counterclaims against the financial institutions involved.

In my view, the Security Act issue raised in this proceeding is completely answered in the decision of Ground J. (The decision is now under appeal.) I rely on that decision and dismiss that ground of appeal.

(2) Factors considered

In dealing with this issue, I have outlined above my views as to the general approach which should be taken.

In considering the goals of the Act, Montgomery J. noted at p. 47 that the total claims of all plaintiffs was approximately \$100 million and that fact eliminated the goal of the Act in permitting advancement of small individual claims.

With respect, I think that statement is in error. The goal is to permit advancement of small claims where legal costs make it uneconomic to advance them. The total amount of the claims is not the consideration. Here, however, each individual claim advanced in the pleadings was \$300,000, plus claims for exemplary and punitive damages and claims for rescission.

The correct approach would have been to indicate that as each plaintiff had a very substantial claim the goal of the Act in advancing small claims was not met by the individual plaintiffs.

Montgomery J. also indicated at p. 48 that Lerson did not fairly and adequately represent the interest of the class sought to be certified. He did not give specific reasons for that conclusion other than not being satisfied on the evidence.

The evidence, which he carefully outlined in his decisions, indicated Lerson had expertise as an accountant with a tax specialty. He was familiar with tax shelters and had business interests in real estate. He had little involvement in dealing with the developer or the brokers and made the purchase largely on the recommendation of his business partner. He had no contact with the developer's lawyers, but had his own lawyer, whom he did not consult.

The evidence referred to indicated Lerson probably did not have the "typical involvement" in the purchases that other plaintiffs had.

In my view the "representative plaintiff" referred to in s. 5(1)(e) need not have typical experience with other plaintiffs. I think it sufficient that he has no conflict of interest and is shown to be an individual who will fairly and adequately advance the class claims.

I do not believe the decision turned on the matters of the total amounts of claims involved or in the personal experience of the proposed representative plaintiff, Lerson.

(3) The proceedings against Capital

In his decision, Montgomery J. held the pleadings did not disclose a cause of action against that defendant.

He approached that question relying on the approach to be taken under rules 21.01(1)(b) and 25.06(1).

That was a logical approach to take. He carefully reviewed the pleadings. I am not persuaded there was an error in approach or in the conclusion reached.

He further held each potential class member would have unique circumstances for entering into the investment and would have to be individually examined for documentary and oral discovery. He found a class action was not "preferable".

While he did not specifically say so, the unique circumstances would indicate there were problems in establishing common issues.

(4) Proceedings against Goldmans

In considering the potential claim against Goldmans, Montgomery J. noted the individual issues regarding each plaintiff would be determinative of liability. I believe he was correct in that conclusion. Again, there were no common issues.

I conclude Montgomery J. was correct in his determination of the issues as against Capital and Goldmans. That, in itself, is probably sufficient to dispose of this appeal.

In argument appellants' counsel was referred to s. 7 of the Act, which is as follows:

7. Where the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue as one or more proceedings between different parties and, for the purpose, the court may,

- (a) order the addition, deletion or substitution of parties;
- (b) order the amendment of the pleadings or notice of application; and
- (c) make any further order that it considers appropriate.

He candidly conceded that an application for certification was probably an "all or nothing" matter and if a plaintiff's application failed as against any of the potential defendants the certification should probably be refused.

Pursuant to s. 7, when certification is refused, the court may then make various orders for the conduct of the non-certified proceedings.

Assuming the "all or nothing" approach to certification is correct, the conclusions that the pleadings failed to disclose a cause of action against Capital and that there were no common issues as against Goldmans would be a valid reason for denying certification of the proceedings against all defendants.

(5) The proceedings against Deloitte

In the event the above assumption is incorrect, I deal with the claim as against Deloitte.

In considering that claim, Montgomery J. explored the case authority dealing with misrepresentation. He referred to the decision in *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465, [1963] 2 All E.R. 575 (H.L.). That decision indicates in an action for misrepresentation a plaintiff must prove that a representation was negligently made and the plaintiff reasonably relied upon it. He concluded reliance seemed to be an essential element of that cause of action.

He then made the statements referred to above that "a class proceeding was not the most effective mechanism for resolution of the action and that individual issues appeared to predominate" (emphasis added).

While I agree with Montgomery J.'s conclusion as to misrepresentation, I do not agree that an action for misrepresentation cannot be subject to certification as a class proceeding.

In this case there are common issues involving the question of whether the single letter was a misrepresentation. If so, there was a common issue as to whether it was negligently made and, finally, a common issue as to the effect of a disclaimer contained in that letter.

The issue of reliance of any misrepresentation did raise a very significant individual issue which required determination.

The matter of certification of a class proceeding where misrepresentation was involved is considered in *Peppiatt v. Nicol* (1993), 16 O.R. (3d) 133, 20 C.P.C. (3d) 272 (Ont. Gen. Div.), per Chilcott J.

A class action was certified in that proceeding. There, the alleged misrepresentations involved statements made in connection with the sale of memberships in a golf club to be constructed.

Chilcott J. rejected submissions that allegations of misrepresentation precluded certification.

In that case, it appears the alleged misrepresentations were contained in sales material which had limited distribution. It does not appear the issue of individual reliance was raised.

In my view, questions relating to misrepresentation could be the subject of certification of a class proceeding in some cases.

The issue, then, would be whether class proceedings would be a "preferable procedure" for dealing with those common issues under s. 5(1)(d) of the Act.

I conclude in this proceeding they would not.

I believe the preferable approach would be to consider the matter with a view to the aims of the legislation, the requirements contained in ss. 5 and 6 of the Act, and the relative merits of other procedures available under the rules for dealing with the common issues raised. The court should also consider the relative importance of common and individual issues as one of the factors in determining whether to certify or not.

On that approach, while I disagree with some of his reasoning, I agree with the result reached by Montgomery J. that class proceedings should not be certified as against Deloitte.

As this matter involves the interpretation of recent legislation I make no order as to costs.

SCHEDULE 1

Rule 23 of the U.S. Federal Rules

23(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

MOLDAVER J. (concurring): -- The plaintiffs appeal from the decision of the Honourable Mr. Justice Montgomery dated August 9, 1993 (now reported at (1993), 15 O.R. (3d) 39, 16 C.P.C. (3d) 142) dismissing their motion for, inter alia, an order certifying the action as a class proceeding pursuant to the Class Proceedings Act, 1992, S.O. 1992, c. 6 (the "Act").

My colleague O'Brien J. has set out the facts giving rise to the application for certification. He has also reproduced in full many of the relevant sections of the Act. There is no need to replicate his work. However, for the purposes of these separate reasons, I have considered some additional facts and sections of the Act.

Very briefly, the action arises from the sale and financing of units in a condominium project consisting of approximately 325 units. The plaintiffs are individuals who purchased units as tax-sheltered investments. The defendants are the developer and owner of the project (Anaheim), the developer's solicitors (Goldman, Sloan), the assignees of the trust company (Guaranty Trust) that financed most of the purchases (Toronto Dominion Bank and Adelaide Capital), the real estate brokers who solicited the purchases (Martin Capital Group Inc. and RLM Investments), and the accounting firm that reviewed the financial forecast distributed to the plaintiff investors (Deloitte Touche). The action is based on allegations of misrepresentation, negligence and breaches of statutory and fiduciary duties allegedly owed by the various defendants to the proposed class.

Analysis

Although we have been invited to determine many of the issues and uncertainties surrounding the proper interpretation of the Act, and in particular, ss. 5(1) and 6, I think it unwise to do so except where necessary to resolve what I believe to be the central issue before us. I would define that issue as follows: Having regard to the particular facts and circumstances of this case, did Montgomery J. err in concluding that a class proceeding would not be the preferable procedure for the resolution of the common issues.

Having framed the matter that way, let me say at the outset that I have not been persuaded that Montgomery J. erred in refusing to certify the action. Instead, for reasons which will become apparent, I am satisfied that he arrived at the correct result. However, I would not wish to be taken as necessarily agreeing with all of the reasons which he advanced in support of his conclusion.

I propose to deal briefly with several concerns arising from Montgomery J.'s reasons before turning to the central issue. For the sake of simplicity, I would refer to these concerns as "secondary issues".

Secondary Issues

Dealing first with the defendants Adelaide Capital Corporation ("Adelaide") and Toronto Dominion Bank ("Toronto Dominion"), I have difficulty accepting Montgomery J.'s conclusion that the pleadings revealed no cause of action against these defendants.

The principles to be applied when considering whether pleadings support a legal cause of action are as follows:

- (a) All allegations of fact, unless patently ridiculous or incapable of proof, must be accepted as proved;
- (b) The defendant, in order to succeed, must show that it is plain and obvious beyond doubt that the plaintiffs could not succeed;
- (c) The novelty of the cause of action will not militate against the plaintiffs; and
- (d) The statement of claim must be read as generously as possible, with a view to accommodating any inadequacies in the form of the allegations due to drafting deficiencies.

(See *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441, 13 C.R.R. 287; *Johnson v. Adamson* (1981), 34 O.R. (2d) 236, 128 D.L.R. (3d) 470 (C.A.); *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1990), 74 O.R. (2d) 225, 1 C.R.R. (2d) 211 (Div. Ct.).)

In concluding that no cause of action had been made out against Adelaide or Toronto Dominion, Montgomery J. stated at pp. 47-48:

There is no allegation of misrepresentation by the broker. The plaintiffs allege that the Trust Company was part of a partnership syndicate or joint venture for purposes of selling the investments in the project. They further allege an agency relationship between the vendor promoter and the Trust Company.

The plaintiffs allege a principal-and-agent relationship between the Brokers and other defendants and claimed the Brokers were agents of the Trust Company. However, there is no allegation that the Brokers made any misrepresentation. No material facts have been stated to support the basis of any type of relationship between the trust company and other defendants.

With respect, having particular regard to the first and fourth principles applicable to pleadings, I am satisfied that a generous reading of the claim as a whole supports the conclusion that the broker did make material misrepresentations. In this regard, I think that when paras. 18 through 23 of the claim under the heading "Representations" are read together with paragraphs 24-26 under the heading "Complaints re Performance", various misrepresentations are brought home to the brokers [See Appendix "A" at end of document.]

As to the relationship between Central Guaranty Trust and the defendants, in my opinion, material facts supportive of the relationships alleged have been set out in paras. 27 and 28 of the claim. In particular, as regards the brokers, para. 28 states that the brokers were agents of the defendants both individually and collectively and that an agency agreement to this effect was entered into between the various parties prior to the solicitation of the class plaintiffs.

For the purposes of these reasons, it is not necessary to decide whether the pleadings raised additional causes of action against Adelaide and Toronto Dominion. I have engaged in the foregoing analysis simply to point out that I am not persuaded that Adelaide and Toronto Dominion could escape certification on the grounds that the pleadings did not disclose a cause of action against them.

Montgomery J. also refused certification because he did not consider that Mr. Lerson, the proposed representative plaintiff, could fairly and adequately represent the interests of the class, as required by s. 5(1)(e)(i) of the Act. Montgomery J. gave no reasons for so concluding. I am not at all certain that he was correct in holding that Mr. Lerson would not fairly and adequately represent the interests of the class. Indeed, I find the reasoning of my colleague O'Brien J. persuasive on this issue. However, I do not consider it necessary to finally resolve this matter.

As regards the defendants Goldman, Sloan, Montgomery J. concluded that certification should be refused because (a) there were no common issues to be determined as required by s. 5(1)(c) of the Act and (b) a class proceeding was not the preferable procedural path to follow as required by s. 5(1)(d) of the Act.

While I will have more to say about the s. 5(1)(d) considerations, I would not wish to be taken as accepting Montgomery J.'s view that the claim raised no common issues against Goldman, Sloan. It may well be that the pleadings set out in para. 32 did just that [See Appendix "B" at end of document.]

Finally, with respect to the defendant Deloitte Touche, Montgomery J. was of the view that no common issues had been raised and further, that the Act "was designed to remove some of the barriers to class actions that existed before its enactment. It was not intended to be used in circumstances where the individual issues to be determined predominate those issues common to the proposed class" (p. 51) (emphasis added).

With respect, I disagree that the pleadings raised no common issues against Deloitte Touche. In my view, they raised two common issues:

- (1) Did the Deloitte letter amount to a misrepresentation and if so, was it made negligently? and
- (2) If the answer to question 1 is "yes", was Deloitte entitled to rely upon the disclaimer clause contained within that letter?

Likewise, I must respectfully disagree with Montgomery J.'s statement that the Act was not intended to be used in circumstances where the individual issues to be determined could be said to predominate the common issues. As will be seen, while I am of the view that individual issues ought not to be completely ignored when considering whether a "class proceeding would be the preferable procedure for the resolution of the common issues" as required under s. 5(1)(d) of the Act, I cannot accept that the legislature intended to incorporate the predominate issue test into the Act.

I now propose to set out my reasons for concluding that Montgomery J. did not err in refusing certification in this case.

Pivotal Issue: Analysis and Conclusions

In his able argument on behalf of the appellants, Mr. McKenzie submitted that it was proper for the court, when considering the requirements of s. 5(1)(d) of the Act, to take into account and weigh the three major goals of class actions. It will be recalled that s. 5(1)(d) requires that "a class proceeding would be the preferable procedure for the resolution of the common issues".

The three goals of the Act have been neatly summarized by Mr. McKenzie at p. 34 of his factum as follows:

- (1) Access to Justice -- permitting the advancement of meritorious claims which have previously been uneconomical to pursue because the damages for each individual plaintiff are too small for each claimant to recover through usual court procedures.
- (2) Judicial Economy -- resolving a large number of disputes in which there are common issues of fact or law within a single proceeding, avoiding inconsistent results, and preventing the court's resources from being overwhelmed by a multiplicity of proceedings.
- (3) Modification of Behaviour -- modifying the defendants' behaviour so as to inhibit misconduct by those who might ignore their obligations to the public.

I agree with Mr. MacKenzie's statement of the goals, save for his use of the word "meritorious" under the heading "Access to Justice". I am not at all certain that on a motion for certification, the moving parties must show a "meritorious" claim. Indeed, s. 5(5) of the Act would suggest the contrary. It reads:

5(5) An order certifying a class proceeding is not a determination of the merits of the proceeding.

Apart from that, accepting as I do that Mr. MacKenzie is correct in his submission that the three major goals of the Act should be considered and weighed when determining whether the requirements of s. 5(1)(d) of the Act have been met, my analysis of these factors has caused me to conclude that, on balance, the case at hand is not a proper one for certification.

Dealing first with the goal of "Access to Justice", there is nothing in the record which would even remotely suggest that it would be economically unfeasible for the plaintiffs to pursue their individual claims. Indeed, on the face of the record, the contrary would appear to be the case.

Each plaintiff has sought as against each defendant general and special damages not to exceed \$300,000. Each plaintiff has also sought punitive or exemplary damages against each defendant. Finally, as against Adelaide and Toronto Dominion, each plaintiff has sought rescission of contract, which, if successful, would relieve against individual liability for amounts well in excess of \$150,000.

In view of this, and in the absence of some evidence which would suggest that the cost of litigation would be prohibitive to the individuals, irrespective of the sizeable dollar figures at stake, I am not at all satisfied that, absent certification, these plaintiffs or any of them would be denied access to the justice system.

In my view, the legitimate purpose of enabling those members of the public to gain access to the justice system, which, but for certification, would otherwise be unfeasible, cannot be overstated. By the same token, great care must be taken to ensure that certification is truly necessary to give effect to this goal.

As a rule, certification should have as its root a number of individual claims which would otherwise be economically unfeasible to pursue. While not necessarily fatal to an order for certification, the absence of this important underpinning will certainly weigh in the balance against certification.

I propose next to deal with the matter of "Judicial Economy". In assessing this goal, I am of the view that s. 5(1)(d) must be read together with s. 6 of the Act, which reads:

6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:
 1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
 2. The relief claimed relates to separate contracts involving different class members.
 3. Different remedies are sought for different class members.
 4. A number of class members or the identity of each class member is not known.

5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

It will be recalled that earlier in these reasons, I concluded that it was not the intention of the legislature to incorporate a "predominate" issue test into s. 5(1)(d) of the Act. Neither, however, did the legislature intend that individual issues should be completely ignored. Had that been the case, there would have been no need for s. 6 of the Act, which, on its face, clearly relates to five separate individual issues, several of which may be said to impact on the question of judicial economy.

Section 6 of the Act directs that the court, in coming to its decision to certify or not, shall not refuse certification solely if any one of the five delineated grounds is found to exist. Implicit in this, however, is the recognition that a court is entitled to consider the grounds referred to in s. 6 and where two or more of them are found to exist, the cumulative effect of these may legitimately be factored into the s. 5(1)(d) equation.

That being so, consideration of those factors in the context of this case reveals the existence of four of the five grounds, namely:

(a) The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;

(b) The relief claimed relates to separate contracts involving different class members;

(c) Different remedies are sought for different class members;

(d) The class includes a sub-class whose members have claims or defences that raise common issues not shared by all class members.

Again, while not necessarily fatal to certification, the presence of four out of five of the grounds referred to in s. 6 of the Act weighs in the balance against certification.

In the context of the question -- how cost efficient will it be to resolve the common issues -- I think it necessary to look at the case as a whole but with particular emphasis on at least two important features, namely:

(1) If the action is certified, how likely is it that the court will feel constrained, in the interests of justice, to allow for discovery of most, if not all, of the individual plaintiffs, pursuant to s. 15(2) of the Act, after the representative party has been discovered? And
(2) Where, as here, a number of individual plaintiffs seek certification, is the case such that a determination of the class issue or issues will essentially resolve once and for all the question of liability of the various parties, irrespective of which side wins or loses, or is it such that even if the plaintiffs succeed on any one or more of the common issues, a series of trials on individual issues will, of necessity, be required to finally determine the question of liability?

Returning to the first of these considerations, it is important to note that the plaintiffs have pleaded breach of fiduciary duty as against each of the defendants. From my review of the record, it is apparent that save and except for a handful of plaintiffs who apparently retained the firm of Goldman, Sloan, in all other instances, as against the various defendants, including Goldman, Sloan, the existence of a fiduciary relationship, if any, will be dependent upon the nature of the particular dealings and relationship which the individuals may have had with the respective defendants.

That being the case, I fail to see how, if the action was certified, the "common fiduciary obligation issue" could possibly be determined absent discovery of just about every single plaintiff. Such a state of affairs could hardly be said to support the judicial economy goal.

As for the second consideration, it would appear that if some or all of the common issues are determined in favour of the plaintiffs, this would be but the beginning, not the end, of the liability inquiry. Thereafter, separate trials would be required in connection with each of the plaintiffs to determine the matter of detrimental reliance, the absence of which each and every defendant will seek to rely upon.

Again, looked at from this perspective, the judicial economy goal which would otherwise favour certification is far from evident.

Nonetheless, when considering the matter of judicial economy, it seems apparent that the court should also consider the alternatives to certification, which in this case, would be (a) a whole series of separate actions; or (b) the joining together of the separate actions into one large action.

Either of these alternatives would of course mean that each defendant could seek to discover the individual plaintiffs. While the prospects of this would seem to tell against judicial economy, I have, earlier in these reasons, attempted to show how individual discoveries would most likely be required even in the event of certification, given the fiduciary duty component of the pleadings.

Beyond that, given the significance of the particular facts and circumstances which may have caused the individual plaintiffs to purchase the condominium units and bearing in mind the common thread of detrimental reliance which runs through every case, while multiple discoveries might impact negatively on judicial economy in the short run, this could prove otherwise in the long run.

While it may be somewhat unfair to use Mr. Lerson, the proposed representative of the plaintiff, as an example, I do so only to explain the point. As the record indicates, Mr. Lerson was cross-examined on the affidavit he prepared in support of certification. As a result of his testimony (and without wishing to be seen as prejudging the matter) it would appear that Mr. Lerson's task of establishing detrimental reliance will be a most difficult one.

It is impossible to know how many other plaintiffs will fall into this category. However, I strongly expect that after discoveries, there will be a marked reduction in the number of claims left outstanding. By that, I have in mind that some of the plaintiffs may seek to abandon their claims; others may be forced to do so following upon motions for summary judgment; still others may choose to monitor a particular case similar to their own through discoveries and/or summary judgment proceedings before deciding whether or not to continue.

By these means, I am confident that judicial economy will more than likely come out ahead if certification is refused.

For all of these reasons, I have not been persuaded, on balance, that a resolution of the common issues following upon certification would lead to greater judicial economy.

That then leaves the third goal namely, "Behaviour Modification."

I think it fair to say that Mr. MacKenzie did not stress this goal in his submissions. That aside, I agree with the submissions made by the defendants that since the type of transaction giving rise to the various claims is now governed by the provisions of the Securities Act, R.S.O. 1990, c. S.5 (as amended), this alone would suffice to modify the future behaviour of the defendants. What's more, if some or all of the actions are continued on an individual basis and the claims are found to be meritorious, the court will be in a position to modify the behaviour of the defendants in its award of damages.

For all of these reasons, the plaintiffs have failed to meet their onus of establishing, in accordance with s. 5(1)(d) of the Act, that a class proceeding would be the preferable procedure for the resolution of the common issues. That being the case, this appeal must be dismissed.

For the reasons given by O'Brien J., I too am of the view that there should be no order as to costs.

APPENDIX "A"

EXCERPT FROM THE STATEMENT OF CLAIM Representations

18. The essential ingredients of the investment were represented by the Broker and the Vendor-Promoter as follows:

- 1) The only cash commitment that each Class Plaintiff would have to make, because of the way in which the deal was structured, was \$1000.00 per Unit;
- 2) That each Class Plaintiff would only be permitted to make the investment if approved by Central Guaranty Trust;
- 3) That it was a condition of the purchase and of financing by the Trust Company that the units be rented as part of a rental pool operated by the Anaheim Group, and not be lived in as a residential unit, which would together provide the funds with which to pay the financing charges to be paid to the Trust Company.
- 4) That no Class Plaintiff would have to pay either the mortgages or promissory notes, but that they would be paid from the rents obtained from the rental pools;
- 5) That Anaheim would guarantee the payment of rents, for a period of time, and would furthermore subsidize the interest which would be payable to the Trust Company so that the interest charges to the Investor-Owners would be largely covered by the income from the property.

19. The Class Plaintiffs were repeatedly advised by the Vendor-Promoter and the Broker that the unit was a "tax shelter investment", and they relied on the confidential offering memorandum as well as on the verbal misrepresentations made to them.

20. The Class Plaintiffs relied on the representations of the Vendor-Promoter and the Brokers concerning the cost to them of purchasing the Unit, including the cost of any financing, and agreed to do so only on the basis of making a one thousand dollar down payment per Unit, and upon being advised that the Unit could be maintained for only nominal carrying costs.

21. In particular, the Vendor-Promoter advised them in written representations and through the Brokers that it had an arrangement in place with its financial institution, the Trust Company, whereby the effective mortgage interest rate charged to them would be only 8.5% for the first three years based on a "services agreement" between these two Defendants and the intended investors. They were advised that they only had to make a thousand dollar down-payment, and that this special financing arrangement would greatly reduce the size of the mortgage payments.

22. The Class Plaintiffs was further advised that the Vendor- Promoter's property management company, Anaheim Properties (Ontario) Limited, and later Orange Properties Ltd., would arrange for the rental of the unit on their behalf, so that the effective cost to them including mortgage payments and maintenance fees would be extremely nominal each month.

23. The Class Plaintiffs state that it was very clear to the Brokers and the Vendor-Promoter that they only induced to purchase the Unit as a tax shelter and investment on the terms that they had been led to believe would be given, and that they could not afford the investment unless these arrangements were in place. Complaints re Performance

24. Material misrepresentations were made repeatedly to the Plaintiffs, and included a confidential document, entitled: "Anaheim Towers -- West Tower, Notes and Assumptions to Cash Projections, dated February 2, 1987. Specifics of these misrepresentations are set out below:

- 1) The financing provided by the Trust Company was at a much higher interest rate than those the Class Plaintiffs were led to believe that they would be committed to;
- 2) The "fixation" of these rates was done some two years after the signing of the agreements by the Investor- Owners to purchase Units in the Project, and was in any event at rates higher than those which could have been obtained had either Anaheim or the Trust Company acted in a commercially prudent manner;
- 3) The guarantee period of Anaheim commenced and was running for six months while the Units were deemed "habitable" but were not in fact rentable, due to ongoing construction;
- 4) Anaheim failed to maintain the interest rates at the ceiling which was promised, and as a consequence the full cost of the financing charges have fallen onto the Class Plaintiffs to pay;
- 5) The relationship between the various Defendants by Counterclaim was such that a partnership syndicate or joint venture was formed in the selling of investments in the Project, or alternatively the relationship between the various Defendants not made

distinct, so that it was the Class Plaintiff's reasonable belief that a partnership, syndicate or joint venture was formed in the selling of investments in the Project, and neither the actual relationships nor the actual intended remuneration and fees which were to be obtained by the Defendants were disclosed at the time Class Plaintiffs made their commitment to invest in the Project;

6) The Units were rented for the amounts which had been promised to each Investor-Owner after completion, in technical compliance with the agreements, but the renters of the Units were given an initial two months free rent;

7) The projections of rental income were unrealistic because while the Project had been sold as an investment to the Class Plaintiffs as a luxury condominium, the class of property that was finally built was not luxury, and as a result the failure to obtain the promised levels of rental income have meant that the Class Plaintiffs have had to make up the deficiency between the rental incomes and the financing charges.

8) The projections of rental income were in any event unrealistic, and as a result the failure to obtain the promised levels of rental income have meant that the Investor-Owners have had to make up the deficiency between the rental incomes and the financing charges.

As a result of these misrepresentations, and as the plaintiff knew or ought to have known that the Class Plaintiffs would rely on these misrepresentations, the Class Plaintiffs were induced into entering a contract with the plaintiff. The Defendants are therefore not entitled in equity to rely on the contract so entered into.

APPENDIX "B"

EXCERPT FROM THE STATEMENT OF CLAIM

32. The Class Plaintiffs state and the fact is that a relationship of solicitor and client existed between them and the law firm of Goldman, Sloan, Nash & Haber (the "Firm") for the following reasons:

1) The Firm was retained in respect of the closing of each and every closing of the purchase of the Units, to act for both the vendor and purchaser. The Class Plaintiffs state that the Firm was in a conflict of duty and interest in acting for the purchasers, being the Class Plaintiffs, and the Vendor-Promoter and the Trust Company, and further failed to advise the Class Plaintiffs notwithstanding their assumption of the responsibility of solicitor in respect of this transaction to the Class Plaintiffs.

2) Alternatively, due to the failure to adequately meet disclosure requirements of the Vendor-Promoter, and the other misrepresentations of the Vendor-Promoter through the Broker, the Firm had such knowledge of the circumstances of the transaction, and in particular that the Class Plaintiffs had not been given the opportunity to obtain independent advice due to the failure to provide disclosure in a timely manner, that the Firm became a trustee de son tort.

3) In the further alternative, the Firm advised the Class Plaintiffs during the course of completing the transaction as to their rights and obligations under the agreements which had been signed, and thereby assumed the role of solicitor to each and all of the Class Plaintiffs.

FLINN J. (concurring in the result): -- This appeal is from the decision of Montgomery J. [(1993), 15 O.R. (3d) 39, 16 C.P.C. (3d) 142] refusing to certify the proceeding as a class action.

I have had the benefit of reading the reasons of my colleagues O'Brien J. and Moldaver J. I agree that the appeal ought to be dismissed without costs. I adopt the reasons of each of them save that I respectfully disagree with the views of Moldaver J. and his comments as to the cause of action against Adelaide Capital Corporation and Toronto-Dominion Bank in what he describes as "secondary issues". However, I incline to his views that the statement of claim raises common issues against the defendant Goldman, Sloan, Nash & Haber. I do not find those two observations material to the result.

Appeal dismissed.

CBR# 279

Robinson v. Ontario New Home Warranty Program et al.; Real Estate Investment Counsel Limited et al., Third Parties Canadian Imperial Bank of Commerce v. Robinson

18 O.R. (3d) 269

Action No. 3204/92 and 3204/92B

Ontario Court (General Division), MacPherson J. May 3, 1994

ACTION for negligence for pure economic loss.

Lee P. Villar, for plaintiff.

Beth Symes, for defendants.

Andrew M. Diamond, for third party, Canadian Imperial Bank of Commerce.

MACPHERSON J.: --

INTRODUCTION

Although this litigation is complex, involving a claim, cross-claim, third party claim and fourth party claim, at the heart of the litigation are two crucial issues. The first is whether the acknowledged rule that the terms of letters of credit, which are important financial documents in the domestic and international banking communities, must be strictly complied with should be loosened in situations where important governmental policies and programs are alleged to collide with the rule. The second issue is whether the reasoning and decision of the Supreme Court of Canada in *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, 91 D.L.R. (4th) 289, the leading case dealing with recovery in negligence for economic loss, should be applied to protect a guarantor of a letter of credit who suffers financial loss when the holder of the letter of credit uses it for purposes not authorized by its terms.

A. FACTUAL BACKGROUND

Unfortunately, the factual background in this case is quite complicated. Nevertheless, an understanding of the relationships among the various parties and the chronology of events is crucial to the resolution of the two principal legal issues set out above and related issues. In an attempt to promote that understanding, I propose to divide this part of the judgment into two parts -- the parties and their dealings, and a summary of the litigation itself.

(1) Factual Background -- The Parties and Their Dealings

The defendant, Ontario New Home Warranty Program ("ONHWP") is the non-profit corporation designated to administer the Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31 (the "Act"). The Act establishes a consumer protection scheme for the purchasers and owners of new homes, including condominiums. Under the Act, every vendor or builder of a new home must be registered and must satisfy certain financial, technical and ethical criteria. Vendors are also required to provide certain statutory warranties to home buyers under the Act. ONHWP administers a compensation plan for purchasers or owners of new homes who lose their deposits or who have breach of warranty claims. The plan is funded by builders, not the Government of Ontario.

The third party, Real Estate Investment Counsel Ltd. ("REIC"), is a builder that registered under the Act to build a condominium complex in Aurora, known as the Anderson Place Townhouse Development. In support of its application for registration, REIC submitted an irrevocable letter of credit dated October 2, 1987, an executed vendor/builder agreement dated November 30, 1987, and a guarantee from two of the principals of REIC, William Salmon and Bruce Stewart, dated December 21, 1987.

The letter of credit, which was required by ONHWP, was issued by the third party, Canadian Imperial Bank of Commerce ("CIBC") to ONHWP in the amount of \$300,000 as security for deposits. It was an express condition of the letter of credit that if ONHWP wished to draw upon the credit, it must certify that the moneys were to be used pursuant to the obligations incurred by ONHWP in respect of deposit receipts from Anderson Place. The letter of credit permitted partial draws.

The plaintiff, Howard Robinson ("Robinson"), was the holder of a second mortgage against Anderson Place. On October 6, 1987 he gave CIBC a guarantee for REIC's liabilities to CIBC up to the sum of \$300,000. Robinson was a valued customer of CIBC. Neither REIC nor its principals Salmon and Stewart had a close relationship with CIBC. It is clear that CIBC was willing to issue the letter of credit because of Robinson's guarantee behind it.

The registration of REIC was granted on January 19, 1988. Sometime that year construction began on Anderson Place. On December 28, 1989 the condominium's declaration and description were registered. This marked the point at which the vendor's exposure for deposit claims ceased. Deposit claims relate to a purchaser's financial loss caused by the vendor's failure to perform the agreement of purchase and sale. In fact, no deposit claims were made against the Anderson Place project.

December 28, 1989 also marks the point at which the vendor's exposure for warranty claims commences. Under the Act, a vendor must warrant that the homes or condominium units it has sold are constructed in a workmanlike manner and are free from defects in material, are fit for habitation, are constructed in accordance with the Ontario Building Code, and are free of major structural defects.

In a letter dated April 20, 1990, the solicitors for REIC advised ONHWP that the project had been registered and that the sales of a majority of the units had been finalized. They requested the release of the letter of credit provided as security for the deposits. On June 20, 1990 ONHWP responded that there were unrectified construction deficiencies and that, therefore, it would release the letter of credit only if it was replaced by an irrevocable letter of credit in the amount of \$75,000 to cover warranty claims.

ONHWP took this position because, as early as the autumn of 1989, it had begun receiving written claims from unit owners in Anderson Place for breaches of warranty. ONHWP held several condominium inspections and conciliation meetings, which it stated REIC did not attend. On September 27, 1990 it informed CIBC that it had determined that the builder/vendor REIC was not living up to its obligations and therefore it was not prepared to return the letter of credit.

In December 1990 the Board of Directors of Anderson Place submitted a technical audit detailing numerous warrantable defects in the common elements of the condominium, along with written claims for breaches of warranty pertaining to the common elements.

At this juncture in the chronology, Robinson re-entered the picture. In June 1991 his solicitor telephoned ONHWP and informed it that Robinson was the guarantor of the letter of credit. The solicitor requested that it be released because the time for deposit claims had expired without any claims being made. In effect, Robinson was taking the position that the *raison d'être* for both the letter of credit and his personal guarantee had disappeared; hence his exposure under the guarantee should disappear as well.

A solicitor in ONHWP's legal department informed Robinson's solicitor that the matter was not free from doubt, that there was a similar case before the courts, and that ONHWP wanted to await a decision in that case before deciding what to do about the letter of credit in this case. However, ONHWP's solicitor also promised to review the file since the facts were different than those in the other case which did not involve a guarantor. On August 8, 1991 Robinson's solicitor wrote ONHWP's solicitor to confirm the telephone conversation and to request that action be taken.

On August 19, 1991 Greer J. released her decision in *Lakewood-by-the-Park v. Ontario New Home Warranty Program* (1991), 5 O.R. (3d) 527, 49 C.L.R. 241 (Gen. Div.). She held that the Act permitted ONHWP not to release a letter of credit for deposits until it received a replacement letter of credit for warranty deficiencies or, in the alternative, permitted ONHWP to transfer the letter of credit for deposits to one covering warranty deficiencies.

The next event in the chronology is a crucial one. On April 13, 1992 Willie Moskowitz, the Director of Building Services for ONHWP sent a demand for a payment of \$201,531 from the letter of credit to CIBC. In his draw letter Moskowitz certified that:

... monies drawn are to be and/or have been expended pursuant to obligations incurred or to be incurred by us in respect to deposit receipts as related to registration on behalf of the application re: Anderson Place, Aurora, Ontario.

(Emphasis added)

CIBC immediately honoured Moskowitz's demand since it complied in every respect with the terms of the letter of credit. ONHWP received the \$201,531 on April 15, 1992.

Unfortunately, the underlined passage in Moskowitz's letter was false. There were no obligations incurred by ONHWP in relation to deposit receipts. Moskowitz claimed that he had signed a form letter placed in front of him by a secretary without checking the file on Anderson Place and ascertaining whether or not the letter was accurate. As soon as it was called to his attention that the certification in the draw letter was not true, he stated that he advised the bank by telephone of the error and sought to return the funds. [See Note 1 at end of document.] On April 16, 1992 ONHWP returned the bank draft to CIBC with a covering letter asking for confirmation that the security still stood in favour of ONHWP in the full amount of \$300,000. CIBC refused to accept the draft and returned it to ONHWP [See Note 2 at end of document.] which placed the funds in an interest-bearing account pending resolution of the matter.

It appears that by the spring of 1992 REIC was (and remains today) an inactive and insolvent company. Therefore, after CIBC complied with ONHWP's demand, CIBC turned to Robinson and demanded \$201,531 on his guarantee. This caused Robinson's solicitor to write to ONHWP placing it on notice that Robinson would be making a claim for damages against ONHWP.

ONHWP then advised REIC in a letter dated April 30, 1992 that it would release funds from the letter of credit upon receipt of replacement security in the amount of \$400,000 for warranty payments. According to the letter, by that date over \$215,000 worth of remedial work on the units in Anderson Place had been carried out and there was an estimated \$137,000 worth of remedial work still to be done on the common elements. It is clear at this juncture that ONHWP had formed the opinion that it was entitled, in the absence of replacement security, to retain the \$201,531 that it had already received from the letter of credit and use these funds to meet warranty deficiencies even though the terms of the letter of credit specify that it is for deposit deficiencies. Recognizing that this was ONHWP's position, Robinson issued his statement of claim in this action on May 4, 1992.

On August 21, 1992, CIBC advised ONHWP that the letter of credit would expire on December 2, 1992. Consistent with its view that it was entitled to the full \$300,000, ONHWP attempted to draw the balance of \$98,469 in the letter of credit at a CIBC branch in Guelph. After being reminded that one of the terms of the letter of credit required demands to be made at a CIBC branch on King Street in Toronto, on December 1, 1992 ONHWP made a second attempt to draw the balance. The letter stated that ONHWP had expended moneys to meet warranty obligations. Because the terms of the letter of credit refer to deposit obligations, on December 2, 1992 CIBC refused to honour the call. The letter of credit expired that day.

(2) Factual Background -- The Litigation

The above chronology of events has given rise to a large number of claims which I will attempt to summarize in very brief fashion.

The main action involves Robinson as plaintiff and ONHWP as defendant. Robinson claims \$201,531 for the alleged wrongful act of ONHWP in drawing on the letter of credit for a purpose other than the one specified in its terms and conditions and for providing a false certification of the purpose for which it was drawing on the credit.

ONHWP counterclaims for a declaration that it is entitled to make a demand on the letter of credit and to obtain moneys from it where warranty claims have been allowed and paid for by ONHWP. In the alternative, ONHWP seeks a declaration that it is entitled to obtain replacement security in order to fund warranty claims.

There are also claims by ONHWP against REIC and CIBC. ONHWP is seeking either damages or an order that REIC post replacement security in favour of ONHWP for breaches of warranty and, should REIC not comply, it seeks a declaration that ONHWP is entitled to keep the letter of credit which will be deemed to apply to warranty obligations.

Against CIBC, ONHWP claims damages in the amount of \$98,469, the balance of the letter of credit, for the attempted draw that CIBC refused to honour. It also seeks a declaration that it is entitled to keep the \$201,531 already drawn on the letter of credit as well as the \$98,469 balance, as indemnity for warranty violations. Finally, in the event that the court finds ONHWP liable to Robinson, it seeks contribution or indemnity from CIBC.

CIBC requests an order dismissing ONHWP's claims against it. It has also brought a fourth party claim against Robinson seeking reimbursement, pursuant to Robinson's guarantee, if ONHWP is successful in obtaining a judgment against CIBC. In argument, counsel for Robinson conceded liability on the fourth party claim if ONHWP was successful in its third party claim against CIBC.

B. ISSUES

Although the chronology of events is long and complicated, and although the litigation is complex, at bottom there are, in my view, only three issues that need to be addressed:

1. Is ONHWP entitled to summary judgment against REIC?
2. Is ONHWP entitled to convert the letter of credit which on its face is stated to be available to meet deposit obligations into a source of funds to meet warranty obligations?
3. If the answer to Q. 2 is "No", then is there any legal basis on which Robinson can recover for the loss he has incurred under his guarantee?

I will consider these issues in turn.

Issue 1 -- Summary Judgment Against REIC?

This is the easy issue. ONHWP seeks one of two orders against REIC, either an order requiring REIC to post replacement security in the form of a bond or irrevocable letter of credit in the amount of \$400,000 to cover the warranty obligations of REIC to ONHWP, or judgment against REIC in the amount of \$395,000 for moneys spent by ONHWP to repair the deficiencies in the Anderson Place project.

It is clear that ONHWP is entitled to seek these remedies in this court. Section 19(1) of the Act authorizes ONHWP, if it believes that a builder or vendor is not complying with the Act, to apply to this court for an order directing the builder or vendor to comply: see *Lakewood*, supra, at p. 529 O.R., pp. 243-44 C.L.R.

On the merits, I am of the view that ONHWP is entitled to either of the orders it is seeking. Without going into any detail, it is obvious from the record that REIC has violated both the Act and the vendor/builder agreement it signed in 1987. It is also clear from the record that ONHWP has complied with the Act in its attempts to require REIC to meet its legal obligations. ONHWP has also complied with the procedural requirements for obtaining a summary judgment.

The real villain in this litigation is REIC which appears to have ignored or shirked its professional, financial, legal and moral obligations. Accordingly, ONHWP is entitled to the two remedies it seeks against REIC.

Unfortunately, this villain appears to be inactive and insolvent; it has also been invisible in the course of the litigation. Accordingly, although ONHWP succeeds against REIC, that success is meaningless in a practical sense. What this litigation is about is who is responsible for picking up the pieces of the financial mess left by REIC's post-construction disappearance from the Anderson Place project. Answering that question requires consideration of the other two issues in this case.

Issue 2 -- Letter of Credit

In its counterclaim, ONHWP seeks a declaration that it was entitled to make a demand on the CIBC letter of credit and to obtain moneys from it where warranty claims had been allowed and paid for by ONHWP. In its third party claim, ONHWP also claims damages for the balance of funds under the letter of credit. In both of these claims, ONHWP is in effect asserting that it is entitled to convert a letter of credit for deposit purposes into a letter of credit for warranty purposes.

It is perhaps useful at this juncture to set out the relevant terms of the letter of credit in issue in this litigation. The addressee of the letter of credit is ONHWP and the letter of credit provides in part:

Pursuant to the request of our customer, the said Real Estate Investment Counsel Limited, we, Canadian Imperial Bank of Commerce, hereby establish and give to you an Irrevocable Standby Letter of Credit in your favour in the total amount of \$300,000.00 which may be drawn upon us by you and which demand we shall honour without enquiring whether you have the right as between yourselves and our said customer to make such demand and without recognizing any claim of our said customer.

Provided, however, that you are to deliver to the Canadian Imperial Bank of Commerce, International Department, Toronto, Ontario, at such time as a written demand for payment is made upon us a certificate signed by you agreeing and/or confirming that monies drawn pursuant to this Standby Letter of Credit are to be and/or have been expended pursuant to obligations incurred or to be incurred by you in respect to Deposit Receipts as related to registration on behalf of Real Estate Investment Counsel Limited re: Anderson Place, Aurora, Ontario. (Emphasis added)

CIBC asserts that it honoured ONHWP's demand for \$201,531 on April 13, 1992 because ONHWP certified (falsely as it turned out) that the money would be used to reimburse ONHWP for deposit expenditures. CIBC asserts that it did not honour ONHWP's demand for the \$98,469 balance on December 1, 1992 because the demand stated that it was for warranty expenditures.

In taking these positions, CIBC's principal argument is that letters of credit must be strictly construed -- by banks and by the courts. I agree with CIBC's position and argument.

The letter of credit is a documentary instrument that plays a role of great importance in business and commerce. It is carefully and precisely regulated by the Uniform Customs and Practice for Documentary Credits (U.C.P.), a publication of the International Chamber of Commerce. The letter of credit and its regulation by the U.C.P. have been approved as part of Canadian law in many

cases, notably *Bank of Nova Scotia v. Angelica-Whitewear Ltd.*, [1987] 1 S.C.R. 59, 36 D.L.R. (4th) 161. In that case, the Supreme Court of Canada recognized the desirability of "as much uniformity as possible in the law with respect to these vital instruments of international commerce" (p. 83).

One of the basic features of letters of credit is that they are specific undertakings by a bank to pay if certain conditions stated in the letter of credit, and only those conditions, are met. The classic, although somewhat esoteric, formulation of the requirement that the terms of the letter of credit must conform precisely to the instructions of the client is found in Lord Goddard's judgment in *J.H. Rayner & Co. v. Hambros Bank Ltd.*, [1942] 2 All E.R. 694 at p. 703, [1943] K.B. 37 (C.A.):

The bank, if it accepts the mandate to open the credit, must do exactly what its customer requires it to do, and if the customer says: "I require a bill of lading for Coromandel groundnuts," the bank is not justified, in my judgment, in paying against a bill of lading for anything except Coromandel groundnuts, and it is no answer to say: "You know perfectly well machine shelled groundnut kernels are the same as Coromandel groundnuts". For all the bank knows, its customer may have a particular reason for wanting "Coromandel groundnuts" in the bill of lading. At any rate, that is the instruction which the customer has given to the bank, and if the bank wants to be reimbursed by the customer, it must show that it has performed its mandate. . . . The question is: what was the promise which they made to the beneficiary under the credit, and has the beneficiary availed himself of that promise?

The Supreme Court of Canada said much the same thing in *Angelica-Whitewear*, supra. Le Dain J. expressed the Canadian position in these terms, at pp. 93-94:

The documentary requirements under a letter of credit are determined by the terms and conditions of the credit, as supplemented by the Uniform Customs and Practice for Documentary Credits, which contain detailed rules respecting the requirements and interpretation of documents to be tendered with a draft.

The fundamental rule is that the documents must appear on their face, upon reasonably careful examination, to be in accordance with the terms and conditions of the letter of credit. . . .

There must be strict compliance with the terms and conditions of the letter of credit. This rule has been laid down in a number of English cases and followed in Canada. . . . The case that is most often cited for the rule of strict documentary compliance is *Equitable Trust Co. of New York v. Dawson Partners, Ltd.* (1926), 27 Ll. L. Rep. 49, where, in a frequently quoted passage, Viscount Sumner said in the House of Lords at p. 52:

It is both common ground and common sense that in such a transaction the accepting bank can only claim indemnity if the conditions on which it is authorised to accept are in the matter of the accompanying documents strictly observed. There is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines. The bank's branch abroad, which knows nothing officially of the details of the transaction thus financed, cannot take upon itself to decide what will do well enough and what will not. If it does as if it told, it is safe: if it declines to do anything else, it is safe; if it departs from the conditions laid down, it acts at its own risk.

(Emphasis in original)

See also *Royal Trust Corp. of Canada v. Royal Bank of Canada*, Ont. Gen. Div., per Borins J., released April 1, 1993 [summarized in 39 A.C.W.S. (3d) 247].

Based on these cases, CIBC's two decisions concerning the letter of credit in this case were entirely lawful. ONHWP's first demand was certified (falsely) to be for "deposit receipts" -- precisely what the letter of credit said. Thus, CIBC honoured the call. ONHWP's second demand was for "warranty obligations" -- a very different subject matter not covered by the letter of credit. Thus CIBC refused to honour the call. In both situations, in my view, CIBC made the correct decision supported by the Canadian law relating to letters of credit. [See Note 3 at end of document.]

ONHWP tries to overcome the case law relating specifically to letters of credit by arguing that the important public purposes of the Act suggest a liberal interpretation of its provisions, including specifically an interpretation that does not require ONHWP to pay out large amounts of money because the builder is a shell company, insolvent or cannot be located. ONHWP also argues that letters of credit are a valuable tool for ensuring the financial responsibility of builders.

I am sympathetic to these propositions. The Act does have important public purposes, especially the protection of purchasers of new homes and condominiums. And, although the Act makes no reference to letters of credit, it is clear that its provisions are broad enough to permit ONHWP to insist on obtaining letters of credit from builders.

However, it does not follow that, in utilizing letters of credit as a means of securing the admirable public purposes of the Act, ONHWP is free to ignore the clear law on letters of credit. ONHWP's argument on this point boils down to this: the important public purposes of the Act entitle ONHWP and the courts to infer the convertibility of letters of credit for deposits to letters of credit for warranties in spite of the rule of strict construction of these financial documents. I do not agree with this submission, for two reasons.

First, the Act says nothing about letters of credit. Even assuming that the Ontario legislature could enact provisions dealing with letters of credit issued by federally incorporated banks, there is not a word in the Act dealing with this subject matter. Accordingly, the better inference, in my view, is that if ONHWP wants to utilize letters of credit, as it is entitled to do, then it should be held to a utilization that complies with the Canadian law relating to letters of credit.

Second, ONHWP can achieve its public purposes under the current law of letters of credit. That is because it is ONHWP, not the banks or its customers, which controls the contents of the letter of credit. If ONHWP wants to insist that builders instruct their banks to provide a convertible letter of credit as a pre-condition to registration, it can do this. Indeed, that is precisely what ONHWP has done since 1990; it now requires a convertible letter of credit covering both deposit and warranty claims. So it is possible for ONHWP to perform its important statutory role and comply completely with the law relating to letters of credit. Since 1990, ONHWP itself has shown how easy it is to achieve this happy balance.

I want to make one other observation on this aspect of the case. It is, of course, appropriate to consider fully and carefully the important public purposes of any statute, including the provincial Act in issue in this litigation, and to try to promote the

worthwhile goals of the statute. One should not lose sight, however, of the important domestic and international purposes of financial documents like letters of credit. In many situations, a bank must decide whether to honour a demand on quite short notice. In this case CIBC had to make its decision on the second demand in less than 24 hours. The case law says that the only way for a financial institution to make its decision is to pay if the draw letter contains the right words. In my view, that is a safe and sensible method.

In *Angelica-Whitewear, Le Dain J.* rejected an argument that letters of credit should be interpreted with an eye to the underlying contract that led to the issuance of the letter of credit. He said, at p. 70:

The fundamental principle governing documentary letters of credit and the characteristic which gives them their international commercial utility and efficacy is that the obligation of the issuing bank to honour a draft on a credit when it is accompanied by documents which appear on their face to be in accordance with the terms and conditions of the credit is independent of the performance of the underlying contract for which the credit was issued.

(Emphasis added)

In a similar vein, it would be wrong to create a requirement that financial institutions add to their decision-making context a knowledge of statutes from many jurisdictions and an analysis and appreciation of the underlying purposes of the statutes. That, in my view, would undermine the rationale for, and method of operation of, letters of credit.

For these reasons, I conclude that ONHWP is not entitled to convert the letter of credit which on its face is stated to be available to meet deposit obligations into a source of funds to meet warranty obligations.

Issue 3 -- Can Robinson Recover for the Loss he has Incurred on his Guarantee?

It is now time for the plaintiff Robinson to reappear on the stage of this litigation. Having determined that ONHWP was not entitled on April 15, 1992 to obtain the \$201,531 from the letter of credit, the next question is whether, factually and legally, this had any effect on Robinson.

The factual component of the question is easy to answer. To this day, ONHWP retains the \$201,531 and it will be entitled to use it if it is successful in this litigation. Meanwhile, Robinson has honoured his guarantee to CIBC for \$201,531 plus interest. If he loses this litigation, he will forfeit this amount to the bank.

Before turning to Robinson's legal arguments, it would perhaps be useful to set out two other important factual points. First, the relevant portions of Robinson's guarantee state that he guarantees:

. . . the liabilities which Real Estate Investment Counsel Limited . . . has incurred or is under or may incur or be under to the Bank . . . the liability of the Guarantor hereunder being limited to the sum of

-- Three Hundred Thousand -- 00/100 dollars with interest from the date of demand for payment.

Second, in 1987, when CIBC issued the letter of credit, ONHWP had no knowledge that Robinson was a guarantor of the \$300,000 secured by it. However, on April 13 - 15, 1992, when ONHWP made its demand for, and received, \$201,531, it was aware of Robinson and his guarantee.

Robinson makes two principal arguments in support of his position that he is entitled to damages in the amount of \$201,531 plus interest. [See Note 4 at end of document.] I would label these arguments negligent misrepresentation, and economic loss flowing from ONHWP's negligence. [See Note 5 at end of document.] I will deal with these arguments in turn.

(1) Negligent Misrepresentation

Robinson contends that, in guaranteeing the letter of credit, he relied on what he claims was the representation of ONHWP to CIBC that ONHWP would act in accordance with the terms and conditions specified in the letter of credit. Robinson says that he suffered a loss when ONHWP subsequently misrepresented the reason it was drawing on the letter of credit and received \$201,531 as a direct consequence of the misrepresentation.

There are five required elements for a successful negligent misrepresentation claim set out in the famous case of *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465, [1963] 2 All E.R. 575, and affirmed most recently by the Supreme Court of Canada in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at p. 110, 99 D.L.R. (4th) 626:

The required elements for a successful Hedley Byrne claim . . . (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

In my view, elements (2) and (3) are clearly present in this case. The representation made by ONHWP to CIBC on April 13, 1992 -- that the \$201,531 was for deposit claims -- was untrue. And Moskowitz, the officer acting for ONHWP, was negligent in simply signing the letter prepared by his secretary without checking to determine the accuracy of the representation made in it.

However, I believe that element (4) is clearly missing in this case, for at least three reasons. First, ONHWP's misrepresentation on April 13, 1992 was made to CIBC, not to Robinson. Second, Robinson gave his guarantee on October 6, 1987, four and one-half years before ONHWP's misrepresentation. Third, the text of Robinson's guarantee (set out above) says nothing about letters of credit; it is an open-ended guarantee of all liabilities up to \$300,000 incurred by REIC, both before and after October 6, 1987. Having given an open guarantee in 1987, Robinson cannot now claim that he relied on a misrepresentation relating to a specific liability in it, especially when the misrepresentation was made several years later.

For these reasons, I see no nexus between Robinson's guarantee and the misrepresentation made by ONHWP on April 13, 1992.

(2) Economic Loss flowing from Negligence

Robinson contends that the necessary factors for finding liability in negligence are present on the facts of this case. Robinson suffered the damage of losing a large sum of money, and this damage was caused by the negligent act of ONHWP in making an erroneous (and, as I have determined, unlawful) demand on the letter of credit. ONHWP knew that Robinson was the guarantor of the letter of credit and therefore owed him a duty of care. There was proximity between them on the principle set out in *Donoghue v. Stevenson*, [1932] A.C. 562, [1932] All E.R. Rep. 1 (H.L.), that is, reasonable foreseeability on the part of ONHWP that Robinson would be affected by its action in drawing on the letter of credit. Furthermore, there was proximity in causation.

ONHWP argues that the starting point should be recognition that awards for pure economic loss are generally limited to cases involving contractual relationships and that courts have extended liability for pure economic loss to tort cases only in very limited circumstances. ONHWP submits that the facts of this case do not fit any of the existing categories for which courts have made awards for loss in tort cases, and there is no justification to extend the categories to include a guarantor in Robinson's situation. (a) The Law

Courts have traditionally been reluctant to find for the plaintiff in tort cases involving pure economic loss. Until recently, there were only three categories of cases in which it has been found that there was sufficient proximity to justify such an award. In the cases establishing each of these categories, the courts overcame their reluctance to make awards for pure economic loss to a large extent because of the clear duty of care arising out of the proximate relationship between the parties. In *Hedley Byrne*, supra, there was an undertaking by a professional and a correlative reliance on his opinion. In *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189, 40 D.L.R. (3d) 530, a manufacturer and a distributor of cranes knew that the plaintiff relied on them for advice concerning the operation of the cranes and therefore had a clear duty to warn the plaintiff of the necessity of repairs as soon as they became aware of defects in the cranes. And in *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641, a statute imposed a responsibility on a municipality towards the owners and occupiers of land.

ONHWP is correct in arguing that Robinson's claim does not fit any of these categories. However, that is not the end of the matter. In 1992 the Supreme Court of Canada revisited the question of pure economic loss in *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, supra, and set out analytic criteria that could be used to extend the categories for pure economic loss. Although the court built into the analysis means for limiting the extension of liability to prevent indeterminate and inappropriate or unreasonable liability, it did hold that the categories of economic loss are not closed. Accordingly, it is necessary to go beyond determining whether a specific situation comes within one of the existing categories and perform the analysis set out by the court to determine whether there should be a new category.

In *Norsk Pacific Steamship*, McLachlin J. enunciates a two- step analytic process. The first step qualifies the plaintiff to recover its economic loss, while the second step considers whether there are policy reasons to limit the defendant's liability. With respect to tort actions, in the first step a court should look to proximity as the qualifying factor. This criterion can serve both to justify the awarding of pure economic loss and to avoid indeterminate liability. In McLachlin J.'s words, at p. 1153:

In determining whether liability should be extended to a new situation, courts will have regard to the factors traditionally relevant to proximity such as the relationship between the parties, physical propinquity, assumed or imposed obligations and close causal connection. And they will insist on sufficient special factors to avoid the imposition of indeterminate and unreasonable liability.

In discussing the varied "traditional" factors, McLachlin J. indicates that they sometimes justify liability because they indicate proximity of causation of harm and other times because they establish sufficient proximity of relationship. She states, at p. 1152:

The matter may be put thus: before the law will impose liability there must be a connection between the defendant's conduct and the plaintiff's loss which makes it just for the defendant to indemnify the plaintiff. . . . In tort, the [link] is proximity. Proximity may consist of various forms of closeness -- physical, circumstantial, causal or assumed -- which serve to identify the categories of cases in which liability lies.

Viewed thus, the concept of proximity may be seen as an umbrella, covering a number of disparate circumstances in which the relationship between the parties is so close that it is just and reasonable to permit recovery in tort.

(Emphasis added)

If a court finds sufficient proximity in the first step of the analysis, it must then turn to the second step where it must decide whether to deny recovery for pure economic loss on policy or pragmatic grounds unrelated to the proximity analysis. The kinds of questions a court must ask in this second step are set out in this passage from McLachlin J.'s judgment, at p. 1155:

Are there practical reasons why the recovery of economic loss should be confined to cases where the plaintiff has sustained physical damage or injury or relied on a negligent misrepresentation? Will extension of recovery of economic loss to other situations open the floodgates of liability, prove so uncertain as to be unworkable, or have an adverse economic impact?

(b) Application of The Norsk Pacific Steamship Analysis to this Case

In my opinion, Robinson has brought himself within the first step of the analysis in *Norsk Pacific Steamship*. There is sufficient proximity between Robinson and ONHWP in both senses of the word as employed by McLachlin J. -- relational and causal.

With respect to the ONHWP-Robinson relationship, although ONHWP had no knowledge of Robinson's guarantee when it became the beneficiary of the letter of credit in 1987, that is not the relevant time frame. The act of which Robinson complains is Moskowitz's demand letter dated April 13, 1992 which drew \$201,531 from the letter of credit. That letter included a clear falsehood (that the money was to meet deposit claims) and it was the falsehood alone that enabled ONHWP to obtain the money. The falsehood, as ONHWP admits, arose because of the failure of its officer Moskowitz to check the contents of a letter which had been prepared by a secretary for his signature. Moskowitz's act, in my view, constitutes clear negligence.

The question, though, is: did ONHWP owe a duty of care to Robinson on April 13, 1992? I believe that it did. In June 1991 Robinson informed ONHWP that he was the guarantor of the letter of credit. This was confirmed by letter on August 8, 1991. Throughout the autumn of 1991 and winter of 1992, Robinson's solicitor regularly contacted ONHWP's solicitor, expressing his concern about the possibility that ONHWP might try to obtain funds under the letter of credit even though the "deposit" basis for it had expired years before.

On January 23, 1992 Robinson's solicitor wrote to ONHWP's solicitor, saying this about his client:

His position is only that of an unrelated third party who has guaranteed the bank's obligations pursuant to the enclosed Letter of Credit. Our question of you is how your client could ever provide a truthful certificate in the words required by the third paragraph of the Letter of Credit.

The third paragraph is the one containing the words "in respect to Deposit Receipts". ONHWP's solicitor did not reply to this letter. On February 24, 1992 Robinson's solicitor wrote again to ONHWP's solicitor, reminding him of his earlier, and as yet unanswered letter, and asking him to review the matter. Again, there was more silence from ONHWP's solicitor. [See Note 6 at end of document.] Then on April 13, 1992 it sent its demand letter containing the false certification to CIBC. CIBC, relying on the certification, released \$201,531 to ONHWP.

In my view, the best way to determine whether there is a duty of care is to ask the 60-year old question from *Donoghue v. Stevenson*: who is my neighbour? In the circumstances described above, I have no hesitation saying that on April 13, 1992 Robinson and ONHWP were neighbours in a negligence law context. They both had an interest in the same letter of credit. And they both knew of the other's interest. In short, they were more than foreseeable neighbours; they were actual neighbours clearly in each other's sight. In these circumstances, the "relational" component of the definition of proximity in *Norsk Pacific Steamship* is met. It follows that ONHWP owed Robinson a duty of care not to commit a negligent act with respect to the letter of credit. And, as discussed above, it breached that duty by sending a false demand letter without checking adequately, or at all, about the accuracy of the crucial passage in the letter.

I turn now to the "causal" component of the definition of proximity in *Norsk Pacific Steamship* which McLachlin J. described as "a connection between the defendant's conduct and the plaintiff's loss" (p. 1152). I believe that there is such a connection in this case.

Although it could be argued that Robinson would suffer a loss only if CIBC was forced to turn to him as guarantor because of the inability of the principal debtor, REIC, to meet its obligations, the reality in April 1992 was that if ONHWP obtained funds from the letter of credit, Robinson would end up reimbursing CIBC for these funds. As early as June 1990, ONHWP was aware of serious defects in the Anderson Place project and was trying, unsuccessfully, to obtain from REIC replacement security for the original letter of credit. And in June 1991, ONHWP became aware of, and was then repeatedly reminded of, Robinson's position as guarantor. So, for many months ONHWP had actual knowledge of REIC's financial instability and Robinson's exposure. In my view, on April 13, 1992 ONHWP knew that if it obtained funds under the letter of credit, Robinson would suffer a loss in precisely the same amount. This loss was a very direct, and highly probable (i.e., well beyond just reasonably foreseeable), consequence of ONHWP's act -- a negligent act, I have found -- of sending a letter with a false certification.

It remains only to consider the second step in the *Norsk Pacific Steamship* analysis, namely, to ask the question whether there are any pragmatic or policy reasons, divorced from proximity, for denying recovery. My answer is a clear "No".

In this case, there is no risk of indeterminate or unreasonable liability, which is often a concern in economic loss situations. Liability to a guarantor is fixed by the amounts of the payment which has been guaranteed. It cannot expand beyond that amount. Moreover, there is fairness in repaying money that was obtained improperly to the party who, in reality, ended up paying the money.

Furthermore, it is unlikely that a decision in favour of the plaintiff in this case will encourage frivolous claims (the old floodgates fear). It is presumably uncommon for beneficiaries of letters of credit to misrepresent the reason for which they are drawing on the credit. And, if they do, then it is just that the gates to recovery by those injured by their negligence be open.

Finally, in terms of policy considerations it needs to be restated that ONHWP changed its practice with respect to letters of credit in 1990. It now requires letters of credit from builders covering both deposit and warranty deficiencies. Thus, this type of litigation should not arise again because ONHWP itself has remedied the situation.

On this aspect of the case, ONHWP attempted to inject into the analysis the fact that Robinson was not only a guarantor of the letter of credit; he was also an investor (to the tune of a \$550,000 mortgage) in the Anderson Place project. ONHWP argued that since he probably signed the guarantee to protect his investment, this constituted, at a minimum, a policy reason for being cautious about allowing him recovery against ONHWP.

I disagree. The fact is that he guaranteed a certain amount (up to \$300,000) of certain types of debt. One of those debts was "deposit obligations" under a letter of credit. Whatever his motivation in entering into these formal legal commitments (and protecting a large investment may well be a very sensible motivation), he is entitled to rely on the fact that all parties will be governed by the law relating to the documents he has executed. I have found that ONHWP violated the law relating to letters of credit, that it did so negligently, and that Robinson suffered a large financial loss as a direct consequence of the negligent violation. I do not see how any of that is diminished by Robinson's motivation for providing his guarantee.

For these reasons, I conclude that Robinson should recover from ONHWP for the economic loss he suffered as a direct result of ONHWP's negligence.

C. DISPOSITION

The plaintiff Robinson is entitled to judgment against the defendant Ontario New Home Warranty Program in the amount of \$201,531 together with interest of \$6,179.83 to September 30, 1992 and further interest at the CIBC's prime rate from time to time. [See Note 7 at end of document.]

The defendant Ontario New Home Warranty Program is entitled to judgment against the third party Real Estate Investment Counsel Limited in the amount of \$395,000 together with appropriate interest for moneys spent to repair the deficiencies in the Anderson Place project. In the alternative, the third party Real Estate Investment Counsel Limited may post replacement security in the form of a bond or irrevocable letter of credit in the amount of \$400,000 to cover its continuing obligations to the defendant Ontario New Home Warranty Program.

The third party Canadian Imperial Bank of Commerce is entitled to an order dismissing the claim of the defendant (plaintiff by third party claim) Ontario New Home Warranty Program against it.

No order is required with respect to the fourth party claim brought by Canadian Imperial Bank of Commerce against Robinson.

No orders are made against the defendant Willie Moskowitz or the third party A. Ross Bumstead.

Costs may be spoken to, if necessary, bearing in mind who are the successful parties in the various claims.

Judgment accordingly.

Note 1: Although Moskowitz is a named defendant in this action, in fact Robinson has abandoned his claim against him. In effect, Robinson has accepted Moskowitz's mistake explanation and is not pursuing a claim grounded in fraud against either Moskowitz or his employer, ONHWP.

Note 2: Apparently, this was done in accordance with normal banking practices. In argument, both Robinson and ONHWP specifically disclaimed making any attack on CIBC for its refusal to accept the funds and reinstate the letter of credit on April 16, 1992.

Note 3: It should be noted that ONHWP relied heavily on the decision of Greer J. in Lakewood, supra. In that case a developer of a condominium apartment building posted a letter of credit in favour of ONHWP to protect the purchasers' deposits. There were no claims brought for deposits. After the building was constructed and all the units sold, the developer brought a motion for summary judgment to force the return of its letter of credit which ONHWP had not drawn on. ONHWP maintained that it needed the letter of credit to cover possible warranty claims and brought a cross-motion for a mandatory injunction to prevent the return of the letter of credit unless it was replaced by a new letter of credit.

Greer J. agreed with ONHWP and in effect permitted the letter of credit to be converted from its stated deposit base to a warranty base.

It is important, in my view, to note that in Lakewood the dispute before Greer J. was one involving only ONHWP and the builder. There was not a bank refusing to honour a call on a letter of credit. Accordingly, the argument and Greer J.'s decision were focused on interpreting the Ontario New Home Warranties Plan Act. Although that Act makes no specific reference to letters of credit, Greer J. held that a purposive interpretation of the Act (to protect the public by placing the burden of covering the losses associated with the construction of new homes and condominiums on builders and vendors) permitted the convertibility of the letter of credit in that case.

In this case, both Robinson and CIBC bring to the court's attention the Canadian law relating to letters of credit, including the decision of the Supreme Court of Canada in Angelica-Whitewear. In that decision, the court held that the fundamental principle governing letters of credit and the characteristic which gives them their commercial utility is that the issuing bank is obliged to honour a call on a letter of credit when the call is accompanied by documents which appear on their face to be in accordance with the terms and conditions of the letter of credit. Conversely, the bank is obliged not to honour the call if there is a discrepancy between the certifying documents tendered in support of the call and the terms and conditions of the letter of credit.

Note 4: Robinson does not advance three other arguments: (1) contract, presumably because there is no privity of contract between ONHWP and him; (2) breach of statutory duty, presumably because he has no rights or obligations under the Act; and (3) fraud, presumably because he accepts that Moskowitz's demand letter on April 13, 1992 resulted from a mistake (a negligent one, Robinson says), not any fraudulent intent or conduct.

Note 5: In oral argument, although not in his factum, counsel for Robinson also raised an argument grounded in unjust enrichment. Since counsel for ONHWP was taken by surprise by this argument, since it is possible to resolve this case on the basis of the other arguments raised by Robinson, and since, on the merits, I see no grounds for applying this equitable remedy in what is essentially a commercial case turning on the legal principles relating to letters of credit and negligence, I will not address it specifically in these reasons.

Note 6: ONHWP's counsel at the hearing on this case was not its solicitor throughout the pre-hearing dealings between the parties. Indeed, its solicitor was from one firm and its counsel was from another.

Note 7: The plaintiff sought punitive damages in the amount of \$20,000. In my view, this is not a case for making such an award.

CBR# 013

Abdool et al. v. Anaheim Management Ltd. et al.

15 O.R. (3d) 39

Action No. 93-CU-64221-CP

Ontario Court (General Division), Montgomery J. August 9, 1993

MOTION for an order pursuant to the Class Proceedings Act, 1992, S.O. 1992, c. 6, certifying the proceedings as a class action.

C.N. (Dino) Karbaliotis, for plaintiffs (class plaintiffs).

Howard S. Swartz, for defendants, Adelaide Capital Corp. and Toronto-Dominion Bank.

Robb C. Heintzman and Wendy A. Kelley, for defendant, Deloitte & Touche.

Robert J. Potts and Roger J. Horst, for defendant, Goldman, Sloan, Nash & Haber.

MONTGOMERY J.: -- This motion is for an order pursuant to the Class Proceedings Act, 1992, S.O. 1992, c. 6, certifying as a class action proceedings on behalf of all persons who purchased a unit in a condominium project owned by Anaheim Management Ltd. known as Anaheim Towers. Due to a court ordered winding up of Central Guaranty Trust Company, the Toronto-Dominion Bank and Adelaide Capital Corporation (the assignees) are parties by virtue of the assignment of debt instruments.

The Facts

The plaintiffs are investor-owners in a tax drive project who purchased units (the "Units") in the Anaheim Towers Project (the "Project") at 25 and 35 Trailwood Drive, Mississauga, Ontario. There are approximately 325 units in the project, many of which are owned by multiple owners. Multiple units are owned by one investor-owner in some cases.

One hundred and fifty investors have retained plaintiffs' counsel.

The units are condominiums which were purchased by the investor-owners. The purchase of the units was financed for the most part by Central Guaranty Trust Company (the "Trust Company") through a combination of mortgage financing and "Equity Line" promissory notes.

The majority of investor-owners were directed to a pre-arranged source of financing, being the Trust Company. The financing provided by the Trust Company was provided through these vehicles:

(a) mortgages were given by the Trust Company and secured against the individual units, or in the case of the limited partnership, secured by guarantee of the investor-owners of the debt with regard to a particular unit; (b) "equity line" promissory notes, unsecured by any real or chattel property, were given by the investor-owners to the Trust Company.

(c) further financing was arranged for some of the investor-owners with the Trust Company by way of collateral mortgages on other property owned by individual investor-owners or alternatively through guarantees obtained from spouses or business associates of the investor-owners.

There are different categories of investor-owners:

(a) those who are currently still owners of a unit or interest, or have sold their interest against whom no action has been commenced in respect of the financing given by the Trust Company or by the assignees of the Trust Company, the Toronto-Dominion Bank or the Adelaide Capital Corporation (the "assignees");

(b) those who currently are the subject of proceedings commenced by the Trust Company or the assignees, in respect of the promissory note or mortgage given by them to obtain financing in this project;

(c) those who have judgments against them with respect to the promissory notes or mortgage given by them to obtain financing from the Trust Company in this project, and whose units or interest have been seized in execution and sold, and possibly with deficits arising out of such sale.

With respect to the separate purchases of the units by the investor-owners, different circumstances governed each transaction:

(a) each investor-owner dealt with different people and had their own set of conversations;

(b) at least some of the investor-owners saw or had some advertisements;

(c) at least some of the investor-owners consulted or dealt with or through an investment broker as part of the process in deciding to make the investment;

CBR# 219

Ontario New Home Warranty Program v. 567292 Ontario Ltd. et al.

(H.C.J.)

71 O.R. (2d) 535

Action No. 28525/88 and 31517/88

ONTARIO High Court of Justice Philp J. January 5, 1990.

Civil procedure -- Summary judgment -- Entitlement -- New home warranty corporation claiming indemnity from architects and consultants for defective design construction and supervision -- Subrogated rights derived from owner -- Subject to six-year limitation period -- Unclear when cause of action arose -- Not to be decided on motions for summary judgment -- Professional Engineers Act, 1984, S.O. 1984, c. 13, s. 47 -- Rules of Civil Procedure, rule 20.01(3).

Courts -- Abuse of process -- Multiplicity of proceedings -- Court holding that new home warranty corporation had notice within one-year limitation period of warranty claims -- Corporation bringing subrogation actions -- Defendants defending on basis of six-year limitation period -- Different issue -- Actions not abuse of process -- Ontario New Home Warranties Plan Act, R.S.O. 1980, c. 350.

Limitations -- Contract -- Indemnity -- New home warranty corporation entitled to indemnity from builder under agreement and regulation -- Limitation period not beginning to run until corporation made payment to owner -- Revocation of builder's registration certificate not abrogating duty to indemnify -- Subsequent amalgamation of builder and other corporations no defence -- Business Corporations Act, 1982, S.O. 1982, c. 4, s. 178 -- R.R.O. 1980, Reg. 728, s. 1, para. 4.

The plaintiff corporation was established by the Ontario New Home Warranties Plan Act, R.S.O. 1980, c. 350, to administer a guarantee fund for the protection of new home buyers. It received complaints from a condominium corporation and individual unit owners about defects in construction by the builder from 1980 onwards. The builder had registered under the plan in 1979. In doing so, it agreed to indemnify the plaintiff for any defects for which the plaintiff was liable. In 1987 the plaintiff was held liable to the condominium corporation for the defects. The plaintiff commenced two actions in 1988, one against the successor of the builder, which had been amalgamated with other corporations, and the other against the architects and consulting engineers for indemnity. The action against the architects and engineers was based on negligence. The defendants brought these motions for summary judgment dismissing the actions on the ground that they were brought beyond the six-year limitation period.

Held, the motions should be dismissed.

(1) The builder's successor was required to indemnify the plaintiff under the agreement with the plaintiff and under R.R.O. 1980, Reg. 728, s. 1, para. 4. Limitations do not begin to run for a claim for indemnity until judgment enforcing the right of indemnity has been rendered. Hence, the action was timely. The fact that the builder's registration had been revoked was irrelevant, since the agreement did not abrogate liability upon revocation. Further, the fact that the builder did not have notice of the previous proceedings and did not take part in them did not exonerate the builder. In any event, the builder was not prejudiced by its inability to defend the claim in the initial stages. The amalgamated corporation was liable by reason of s. 178 of the Business Corporations Act, 1982, S.O. 1982, c. 4.

(2) Nor was the action against the successor to the builder an abuse of process. The previous action against the plaintiff was concerned with the issue whether the plaintiff had notice, within the one-year limitation period specified in the Act, of the defects. The action against the successor to the builder was concerned with the issue whether the action was barred by the six-year limitation period.

(3) The subrogated claims against the other defendants derived from the rights and liabilities of the builder by reason of s. 17 of R.R.O. 1980, Reg. 726. Those rights and liabilities included the six-year limitation period from the time the cause of action arose and, as distinct from the builder, the other defendants did not receive a benefit when the plaintiff paid the owner. It was unclear when the limitation period began to run against the other defendants, and there was a genuine issue to be tried. Hence, the matter should not be disposed of on a motion under rule 20.01(3). The fact that the defendant professional engineer had the benefit of a one-year limitation defence under s. 47 of the Professional Engineers Act, 1984, S.O. 1984, c. 13, was not relevant, since the section permits the trial judge to extend the period in appropriate cases.

Peterson Steels Inc. v. Arctic Steamship Line (1980), 114 D.L.R. (3d) 157, [1981] 2 F.C. 192, 21 C.P.C. 235, folld Morin v. Canadian Home Assurance Co., [1970] S.C.R. 561, [1970] I.L.R. Paragraph1-350; Royal Insurance Co. of Canada v. Aguiar (1984), 48 O.R. (2d) 705, 16 D.L.R. (4th) 477, 8 C.C.L.I. 300, [1985] I.L.R. Paragraph1-1868, 33 M.V.R. 133; Riviera Farms Ltd. v. Paegus Financial Corp. Ltd. (1988), 29 C.P.C. (2d) 217; Central Trust Co. v. Rafuse (1986), 31 D.L.R. (4th) 481, [1986] 2 S.C.R. 147, 75 N.S.R. (2d) 109, 34 B.L.R. 187, 37 C.C.L.T. 117, 69 N.R. 321, 42 R.P.R. 161; Victoria County Board of Education v. Bradstock, Reicher & Partners Ltd. (1984), 46 O.R. (2d) 674, 44 C.P.C. 314, consd Other cases referred to

Re York Condominium Corp. No. 528 and Ontario New Home Warranty Program (1987), 60 O.R. (2d) 662, 41 D.L.R. (4th) 142, 44 R.P.R. 209

Statutes referred to

Business Corporations Act, 1982, S.O. 1982, c. 4, s. 178 Limitations Act, R.S.O. 1980, c. 240 Ontario New Home Warranties Plan Act, R.S.O. 1980, c. 350, ss. 2, 12(1), 13, 14, 16 Professional Engineers Act, 1984, S.O. 1984, c. 13, s. 47

Rules and regulations referred to

R.R.O. 1980, Reg. 726 (Ontario New Home Warranties Plan Act), ss. 4, 17 [enacted O. Reg. 289/82, s. 1; rep. & sub. O. Reg. 219/87, s. 3(1)] R.R.O. 1980, Reg. 728 (Ontario New Home Warranties Plan Act), s. 1, para. 4 Rules of Civil Procedure, O. Reg. 560/84, rule 20.01(3) MOTIONS for summary judgment dismissing certain actions for limitation.

Brian Campbell, for plaintiff.

J. David Sloan and Alexandra Chyczij, for defendant, 567292 Ontario Limited (moving party).

S. Stieber, for defendant, John Stephenson Consultants Ltd. (moving party).

J. Norton, for defendants, Volgyesi & Propst Inc., Andrew Volgyesi and Stephen Propst (moving parties).

PHILP J.:-- The defendants in these two actions are moving under rule 20.01(3) for a summary judgment dismissing the plaintiff's actions on the ground that the actions are barred because they were commenced more than six years after the cause of action arose.

The plaintiff is a corporation created by the Ontario New Home Warranties Plan Act, R.S.O. 1980, c. 350 ("the Act"). Its objects under the Act include, firstly, the administration of the Ontario New Home Warranties Plan, and secondly, the establishment and administration of a guarantee fund from which compensation can be paid to an owner of a new home or condominium if the owner has a cause of action against the vendor for damages for breach of warranty: ss. 2, 13 and 14 of the Act.

The plaintiff commenced its first action against the defendants on May 12, 1988, for damages of \$1,030,695, being the sum of money it was required to pay to York Condominium Corporation No. 528 (Y.C.C.) by reason of an order of the Divisional Court, made on June 22, 1987. The plaintiff paid Y.C.C. this money on November 24, 1987.

The plaintiff commenced a second action on September 13, 1988, against Andrew Volgyesi and Stephen Propst (V. & P.). The plaintiff discovered upon receipt of the statement of defence of the defendants, Volgyesi & Propst Inc. (V. & P. Inc.), in the first action that it was incorrectly named. Hence the need to sue the individual architects in the second action to protect its claim for damages.

The plaintiff's claim against the defendants is based upon subrogation rights it is alleged to have acquired by s. 17(1) of R.R.O. 1980, Reg. 726 of the Act. In addition, it claims against the defendant 567292 Ontario Limited ("567292") by reason of s. 1, para. 4 of R.R.O. 1980, Reg. 728 of the Act which provides for indemnification by 567292. As well, the predecessor to 567292, High City Holdings Limited ("High City") entered into a vendor/builder agreement dated May 4, 1979, in which it agreed to indemnify the plaintiff for any payment such as that the plaintiff eventually made to Y.C.C.

The payment ordered to be made by the plaintiff to Y.C.C. was for the damages resulting to Y.C.C. as the owner of a new condominium built in 1979-80 by High City. Because of alleged defective workmanship by High City and, perhaps, defective design construction and supervision by V. & P. and the defendant John Stephenson Consultants Limited (Stephenson), the building developed unusual cracks, excessive efflorescence on exterior masonry, and penetration of water into the condominium units.

The building was completed either by March 13, 1980, or by August 13, 1980. The evidence is not clear which date is the correct date of completion, but for the purposes of these motions, it probably does not matter. The Act provides for a one-year warranty given by High City to the owner to run from the date of completion of the building.

Complaints from the owner and unit owners were received by the plaintiff from time to time from December 15, 1980 to June 21, 1982. By March 12, 1981, it had received a deficiency list from Y.C.C., the owner, and letters from the individual owners of units 202 and 303. By August 12, 1981, it had received a further notice from Y.C.C. dated May 25, 1981, complaining of water leaking through slabs.

The plaintiff inspected on October 9, 1981, and found "water damage caused by improper application of insulation on cold water pipes". It wrote to High City on October 19th requiring it to complete work on "warranted items". Following further complaints from unit owners, the plaintiff reinspected on May 5, 1982, and, on June 30, 1982, wrote to High City pressing it to effect repairs in respect to the complaints made by the unit owners.

On or shortly after September 16, 1982, the plaintiff received a report from Construction Control Limited (C.C.L.), a firm of consulting engineers retained by Y.C.C. to make further inspections in an effort to determine the cause of the water penetration.

In August, 1983, High City denied responsibility for the deficiencies complained of. One of its reasons was the alleged failure of the unit holders to give notices of complaint within the one-year limitation period which High City stated expired on March 12, 1981.

On August 4, 1984, Y.C.C. made a claim against the plaintiff and in the plaintiff's "decision", dated December 19, 1984, it denied the claim, stating that none of the deficiencies was covered by the Act. Y.C.C. appealed the plaintiff's decision to the Commercial Registration Appeal Tribunal ("C.R.A.T.") pursuant to s. 16 of the Act. On October 21, 1985, C.R.A.T. allowed only part of Y.C.C.'s appeal. Y.C.C. then appealed C.R.A.T.'s decision to the Divisional Court. On June 22, 1987, the Divisional Court allowed Y.C.C.'s appeal, reversed the decision of C.R.A.T., and gave judgment against the plaintiff in favour of Y.C.C. for \$762,287.04, plus 12% interest [see *Re York Condominium Corp. No. 528 and Ontario New Home Warranty Program* (1987), 60 O.R. (2d) 662, 41 D.L.R. (4th) 142, 44 R.P.R. 209]. As mentioned earlier, on November 24, 1987, the plaintiff paid the sum of \$1,030,695 to Y.C.C. pursuant to that judgment.

For the May 12, 1988 statement of claim to be valid, it must have been issued within six years from when the cause of action arose. In other words, the cause of action must have arisen since May 12, 1982.

There are two issues arising from these facts to be determined on these motions:

1. Is the plaintiff's claim an abuse of process because of the findings of the Divisional Court in their decision of June 22, 1987?
2. Had the six-year limitation period expired by the time the plaintiff issued its statement of claim on May 12, 1988? Also, can the plaintiff rely on the date of payment to Y.C.C. as the beginning of the limitation period by reason of (a) indemnification by 567292, and (b) subrogation rights against all defendants? Abuse of process

The Divisional Court dealt with the one-year warranty period provided by the Act and whether or not the defendant in that action, which is the plaintiff in this action (Warranty Program), had notice within the one year of the date the warranty took effect, as provided in ss. 13, 14 and 15 of the Act, and s. 4 of Reg. 726. That issue, in my opinion, is not the same issue presented in these actions. The question to be resolved in these actions involves the six-year limitation period under the Limitations Act, R.S.O. 1980, c. 240, and whether or not the six years had expired when the statement of claim was issued. The answer depends on criteria that are not necessarily the same as those under consideration by the Divisional Court. The Divisional Court was dealing with the notice required to be given by condominium unit owners, as set out in s. 4 of Reg. 726. That section required "written notice to the Corporation setting forth in reasonable detail information relating to the claim". Its finding that the plaintiff in these actions knew well within the one-year limitation period that there were claims made under the warranty set out in s. 12 (1) of the Act does not resolve the question before this court as to when the six-year limitation started to run. The Divisional Court made no finding on that issue. The answer to that question depends on the facts and law concerning the symptoms and details of the problems, and when the plaintiff had sufficient facts to enable it to present a claim against other tortfeasors not involved with the Act.

In my view, therefore, the plaintiff's actions do not create an abuse of process so as to enable me to dismiss its claims.

Issue estoppel does not apply because the parties in these actions are not the same parties in the Divisional Court decision. The plaintiff is the only party common to both actions.

Indemnification by 567292

Before dealing with the limitation issue, I should deal with the argument presented by the plaintiff that its claim against the defendant 567292 is based on indemnification and that the limitation period does not start running until the plaintiff actually paid out the money being sought in these actions or, alternatively, until the judgment was given against the plaintiff. The plaintiff's claim against 567292 is based, firstly, on the defendants' covenant in the vendor/builder agreement dated May 4, 1979, which reads as follows:

4.4(2) The Vendor shall diligently perform his warranty obligations under the Act, including his obligations in respect of each warranty certificate issued by the Corporation, and shall indemnify and save harmless the Corporation and its insurers from any loss which they or any of them may suffer by reason of the Vendor's failure to do so. In addition, the Vendor shall indemnify and save harmless the Corporation and its insurers in respect of any, loss which they or any of them may suffer owing to any major structural defect which appears within one year from the effective date of any warranty, notwithstanding that the claim in respect thereof is made against the Corporation after the first anniversary of such effective date.

Secondly, s. 1., para. 4 of Reg. 728 provides that:

4. The registrant shall indemnify and save harmless the Corporation ... from any loss which [it] may suffer by reason of his failure to diligently perform ... all obligations imposed on him under the Plan.

The registrant in this case was High City, which subsequently merged with other companies into the present company, 567292.

The payment by the plaintiff to the condominium owner, as required by the Divisional Court judgment, discharged the liability of 567292 to the owner. Hence, the plaintiff should have the right to recover such payment from the wrongdoer which has been unjustly enriched by reason of such payment. Under these circumstances, the limitation period should start to run when the defendant has been so enriched.

The action is taken against 567292 pursuant to the agreement to indemnify, as well as the statutory indemnification provided by s. 1, para. 4 of Reg. 728. In a claim for indemnity, the limitation period does not start to run until payment is made: see 28 Hals., 4th ed., pp. 300-1, para. 669, "Contract to Indemnify":

Upon a contract to indemnify, the statute of limitation runs from the time when the plaintiff actually suffers the loss, not from the time when the event happens which causes the loss.

In *Peterson Steels Inc. v. Arctic Steamship Line* (1980), 114 D.L.R. (3d) 157, [1981] 2 F.C. 192, 21 C.P.C. 235, after citing several authorities, Addy J. stated at p. 159: "The better view seems to be that the right to claim indemnity arises only after judgment against the person claiming indemnity has been rendered or the nature and extent of the claim has been otherwise determined."

The Supreme Court of Canada dealt with this issue in the case of *Morin v. Canadian Home Assurance Co.*, [1970] S.C.R. 561, [1970] I.L.R. Paragaph1-350. Fauteux J. at p. 565, concluded:

Obviously the prescription of an action cannot begin to run before the right to institute it originates. In the case at bar, whether it be an action for recovery or a subrogatory action, the right of respondent company to resort to it could not originate before the date of the payments which it made pursuant to the insurance policy and because of Gilles Morin's fault.

Counsel for 567292 argues in response to the above principle as follows:

1. The vendor/builder agreement, which contains the indemnification claim, was no longer valid by the time this action was commenced; and
2. It would be an abuse of process to allow the plaintiff to litigate this claim because of its failure to notify the defendant of the prior action between the plaintiff and Y.C.C.

With regard to the first argument, the defendant claims that its agreement to indemnify the plaintiff ended with the revocation of its registration certificate on July 8, 1982, in accordance with para. 5.1 of the vendor/builder agreement which reads, in part, as follows:

The termination of this agreement upon the termination of the Vendor's registration under the Plan shall not affect the liability of the Vendor to the Corporation under the Plan or in respect of any deposit receipt, performance guarantee or warranty certificate

which has been issued by or on behalf of the Corporation prior to such termination or which the Corporation may be obligated to issue after such termination.

The defendant argues that this section of the agreement makes no mention of indemnification. The section talks only of the termination not affecting liability in respect of any deposit receipt, performance guarantee or warranty certificate.

I cannot agree with this argument. In my view, the plain reading of the section provides that the termination of the vendor's registration does not affect the liability of the vendor to the corporation under the plan and then because of the use of the word "or", the other three specific areas are also not affected. The vendor's obligation to indemnify, in my view, therefore, continues in effect after revocation of its registration.

The second argument of counsel for 567292 is that by reason of the failure of the plaintiff to give notice to the defendant of the proceedings before C.R.A.T., and the appeal to the Divisional Court, the defendant has been denied the opportunity to take part in the earlier proceedings and to defend the claim in the initial stages.

Counsel further submits that the plaintiff is estopped from asserting its claim against 567292 by virtue of the expiry of the limitation period and the prejudice which would result to the defendant in being unable to assert claims in third party actions for compensation or indemnification against various subcontractors.

These appear to be two separate arguments. In any event, I fail to see how the defendant has been prejudiced by its inability to defend the claim in the initial stages. It was not a party to that earlier decision and, in my view, is not bound by the earlier decision. The plaintiff, as argued by its counsel, had no obligation under the plan to notify the defendant of the earlier proceedings, nor do the Act and regulations set out any way in which the defendant could have been made a party. Some of the correspondence filed indicates that the defendant did, in fact, have earlier knowledge of the problems asserted by Y.C.C. Letters from the plaintiff to High City indicated the plaintiff's intention to continue to hold the defendant responsible for rectification of the various problems.

I conclude, therefore, that the claim against 567292 for indemnification does not start to run until the judgment of the Divisional Court, namely, June 22, 1987. The plaintiff's action against 567292 is therefore not prescribed.

The defendant 567292 also argued that it is not bound by the covenants of High City. In my view, s. 178 of the Business Corporations Act, 1982, S.O. 1982, c. 4, is a complete answer to this argument. It reads as follows and is self-explanatory:

178. Upon the articles of amalgamation becoming effective:

.....

(b) the amalgamated corporation possesses all the property, rights, privileges and franchises and is subject to all liabilities, including civil, criminal and quasi-criminal, and all contracts, disabilities and debts of each of the amalgamating corporations.

Subrogation claim against the defendants V. & P. Inc. and Stephenson

The claim against V. & P. Inc. and Stephenson is not as clear. It depends upon the right of the plaintiff to be subrogated to the rights of recovery of the owner to whom it made payment. Section 17(1) of Reg. 726 under the Act confers this right of recovery upon the plaintiff. It reads as follows:

17(1) The Corporation shall be subrogated to all rights of recovery of a person to whom payment in respect of a claim has been made out of the guarantee fund under the Act and may maintain an action in its own name or the name of the person against any other person against whom the action lies in respect of such rights of recovery.

(2) The Corporation is entitled under its rights of recovery to conduct legal proceedings, including an action for damages, the quantum of which shall be limited to the amount paid out of the guarantee fund by the Corporation to the person whose rights are subrogated to the Corporation, including any legal costs, plus all costs incurred by the Corporation in the subrogated action.

The plaintiff argues similarly that the limitation period does not begin to run against V. & P. Inc. and Stephenson until the payment was made to Y.C.C. or until the Divisional Court judgment of June 22, 1987: see *Morin v. Canadian Home Assurance Co.*, supra.

In my view, the *Morin* case does not go that far. It deals with indemnification as a form of restitution. The plaintiff's right to subrogate imposes upon it the same rights and liabilities that are held by the person to whom it made payment, namely, Y.C.C. Similar to the *Morin* case, the payment to Y.C.C. by the plaintiff discharged the builder, 567292, from liability to the owner. In respect to the defendants V. & P. and Stephenson, however, such payment by the plaintiff did not discharge them from liability. The Y.C.C. was paid its claim, but the liability, if any, of V. & P. and Stephenson to it was not affected. The plaintiff's subrogated rights are no greater than those of Y.C.C. and the commencement of the six-year limitation period must be determined from the time the cause of action arose, which is when the defects were discovered. It does not commence on the date of payment.

The Ontario Court of Appeal dealt with this question in the case of *Royal Insurance Co. of Canada v. Aguiar* (1984), 48 O.R. (2d) 705, 16 D.L.R. (4th) 477, 8 C.C.L.I. 300 (C.A.). In that case, A., while operating an uninsured automobile in January, 1981, negligently caused injury to L.&C. L.&C. were insured under a standard policy with the plaintiff insurer, Royal Insurance Company, and they claimed against it under the uninsured automobile coverage. The claim was settled and, in March, 1983, Royal Insurance issued a writ claiming reimbursement from A. The Insurance Act, R.S.O. 1980, c. 218, provided that where an amount is paid in respect of uninsured motorists' coverage, the insurer is subrogated to the rights of the person to whom such payment is made. The Highway Traffic Act, R.S.O. 1980, c. 198, provided that actions for injuries arising out of automobile accidents must be brought within two years. The trial judge held that the rights of the insurer were no greater than those of the insured persons and, therefore, the Royal Insurance claim based on subrogation was defeated by the two-year limitation period set out in the Highway Traffic Act. Royal Insurance appealed to the Ontario Court of Appeal arguing that under the law of restitution, Royal Insurance was compelled to discharge the liability of A. and was therefore entitled to reimbursement from A. Mr. Justice Zuber rejected this argument stating that one of the conditions that must be met in a claim for restitution is that the payment made must have discharged the liability of the defendant. He cites *Fridman and McLeod, Restitution* (1982), c. 11, where they state at pp. 359-60 that "it is fundamental to any restitutionary action that in order to ground recovery, such benefit must have been

received by the Defendant". In the Royal Insurance case the payment by Royal Insurance to L. & C. did not discharge A. from liability. In other words, A. did not receive a benefit when Royal Insurance paid L.&C. L.&C. were paid their claims, but the liability of A. to L. & C. was not affected. A. would still have been liable to the Royal Insurance Company if negligent, as subrogee, had the claim been made in time.

It is difficult to reconcile the Morin case with the Royal Insurance case. Both deal with subrogatory actions, although the Morin case talks of a restitutionary claim as well. Suffice it to say that the main distinction between the claims against 567292 and the defendants V. & P. Inc. and Stephenson is that the plaintiff claims against 567292 by reason of its agreement to indemnify the plaintiff under the vendor/builder agreement, and by s. 1, para. 4 of Reg. 728. The claim against V. & P. Inc. and Stephenson, on the other hand, is founded in negligence and hence the subrogatory rights and liabilities of the plaintiff are derived from the rights and liabilities of Y.C.C., which includes the six-year limitation period from the time the cause of action arose.

In the case at bar, the payment by the plaintiff to Y.C.C. does not discharge the potential liability of V. & P. Inc. and Stephenson. The plaintiff therefore, under its subrogation rights of Y.C.C., is burdened with the same liabilities of Y.C.C., which includes the limitation period of six years.

Limitation period

There remains therefore the need to determine when the six- year limitation period started to run against Y.C.C. in order to determine whether the plaintiff's claim against V. & P. and Stephenson has been prescribed. If it is clear on the facts, then, as a matter of law, that issue can be determined on this motion pursuant to rule 20.01(3). If, on the other hand, there is a genuine issue to be tried, I must dismiss the motion for summary judgment and direct that the issue be tried.

The plaintiff argues that the cause of action arose after it received the September 16, 1982 report from C.C.L. Only then did it have sufficient material facts necessary to sustain an action. The defendants argue that the cause of action arose when the plaintiff or the owners at Y.C.C. received notice of the claims from the unit owners.

I have read carefully the pleadings and the affidavits filed and considered carefully the argument of counsel, and I must conclude that the determination of the commencement of the limitation period depends on mixed facts and law. On all the evidence before me, there is sufficient conflict and doubt in my mind as to the facts that I cannot make the necessary finding or determination without a full trial. I cannot answer the question of when the plaintiff knew or ought to have known that there were defects, or sufficient defects, for the limitation period to start running.

In *Central Trust Co. v. Rafuse* (1986), 31 D.L.R. (4th) 481, [1986] 2 S.C.R. 147, 75 N.S.R. (2d) 109, Le Dain J., who delivered the judgment of the court, said at p. 535 as follows:

I am thus of the view that the judgment of the majority in Kamloops laid down a general rule that a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence ...

The issue created by the facts in the case at bar is what are the "material facts" on which the cause of action is based and when should they have been discovered by the exercise of reasonable diligence. In other words, when had the plaintiff or owner acquired sufficient knowledge of the facts that give rise to the cause of action? The defendants take a different inference from the facts than the plaintiff does. There is a clear dispute between the parties as to what facts the plaintiff or owner must have known. As in *Riviera Farms Ltd. v. Paegus Financial Corp. Ltd.* (1988), 29 C.P.C. (2d) 217 (Ont. H.C.J.), some of the disputes here are "about inferences or conclusions of fact that should be drawn from different pieces of primary evidence". At p. 221, Campbell J. concluded: "It is not, however, the job of the Court on this kind of motion to decide which competing inferences should be drawn from disputed facts or, indeed, from primary facts that are not in dispute. That is the job of the trial Judge."

I agree with Mr. Justice Campbell and, accordingly, dismiss the motions brought by the defendants for summary judgment against the plaintiff. There is a genuine issue that needs to be tried.

I might add that counsel for Stephenson has also argued that Stephenson has the added defence of a one-year limitation period under the Professional Engineers Act, 1984, S.O. 1984, c. 13, s. 47(1). I note, however, that s. 47(2) allows the trial Judge to extend that limitation period:

47(2) ... if the court is satisfied that there are apparent grounds for the proceedings and that there are reasonable grounds for applying for the extension.

For the trial judge to be so satisfied it is necessary that he or she hear the evidence at trial. This determination cannot be made on this motion. The trial judge, after hearing the viva voce evidence, will be in a much better position to decide whether or not he or she should exercise his or her discretion to extend the limitation period: see *Victoria County Board of Education v. Bradstock, Reicher & Partners Ltd.* (1984), 46 O.R. (2d) 674, 44 C.P.C. 314 (Div. Ct.). In that case, Mr. Justice Southey, at p. 679, stated:

Another reason for not granting leave under Rule 124 in this case is that the trial judge will probably be in a better position to determine whether it is just to extend the limitation period under s. 28 (2) than would a judge hearing the matter in motions court on affidavit evidence.

A cross-motion was served by the plaintiff but the parties agreed that, because of the short notice, it was not argued before me at the hearing. I therefore have not dealt with the issues raised in the cross-motion in these reasons.

Conclusion

The three motions by the three parties will therefore be dismissed with costs to the plaintiff to be paid by the three defendants on an equal basis as if one motion.

Motions dismissed.

CBR# 220

Re Ontario New Home Warranty Program and Marchant Building Corp. et al. Re Platinum I Property Ltd. Partnership et al. and Ontario New Home Warranty Program

(H.C.J.)

68 O.R. (2d) 577

Action No. RE949/89 & RE2366/88

ONTARIO High Court of Justice Steele J. May 12, 1989.

TWO APPLICATIONS, heard together, for a declaration that certain builders must comply with the Ontario New Home Warranty Program and for a declaration that the program did not apply to them.

Brian M. Campbell, for Ontario New Home Warranty Program.

L. David Roebuck, for Marchant Building Corporation et al.

STEELE J.:-- There are two applications before me that substantially deal with the same matters. The Ontario New Home Warranty Program (O.N.H.W.P.) asks for a declaration that each of the respondents is acting or has acted as a vendor or builder without being registered contrary s. 6 of the Ontario New Home Warranties Plan Act, R.S.O. 1980, c. 350 (the Act), and directing them to comply with the Act and prohibiting them from acting as a builder on named lands or from selling condominium units of condominium projects built thereon.

The applicants, the Platinum I Property Limited Partnership and others (Platinum), ask for a declaration that the Act does not apply to the applicants with respect to the named condominium projects. The issue in both applications is the same but the O.N.H.W.P. application covers more projects than that of the Platinum application.

Counsel for O.N.H.W.P. submitted that the facts of these applications are similar to those in Ontario New Home Warranty Program v. Meadows of White Oaks II Ltd. (1988), 65 O.R. (2d) 362, 50 R.P.R. 186 (Ont. H.C.J.). I have reviewed the application records in the White Oaks case and find that while they both purport to provide tax shelters, there are substantial differences therein: the most notable being that in White Oaks the purchasers were directly buying an undivided interest of the beneficial ownership in land with a clear statement that they were not to be deemed a limited partnership. I will not set out the other differences. White Oaks is not binding on me relating to the present applications. However, it sets out the scheme of the Act and decided that "owner" under the Act includes the situation where the owner intends that the unit be occupied by a tenant. I agree with the conclusions therein. The present case involves an ingenious tax-driven investment scheme relating to the building of condominium units. This scheme provides for an investor to subscribe for one or more "interests" in a project and become a limited partner in the entire project in accordance with an offering memorandum prepared pursuant to the Securities Act, R.S.O. 1980, c. 466. The "interest" is defined as:

... an undivided beneficial ownership interest in the limited partnership represented by an initial capital contribution equal to the subscription price of each interest.

The number of "interests" is equal to the number of condominium units (unit). A specific unit is allocated to each "interest" at a price specified. The price varies according to the size or desirability of the unit.

The ownership of an "interest" entitles an investor to an appropriate share of any net income or loss of the limited partnership in a fiscal year. The net income consists of rental income from leases of the total units less the total operating expenses. The owner of an "interest" may vote at limited partnership meetings. A subscriber for an "interest" pays the subscription price by either paying 25% in cash at the time of subscription and financing the balance through a lender arranged by the limited partnership, or by financing 100% in such manner in the first instance.

Ownership of an "interest" entitles (but does not oblige) the investor to exchange his "interest" for actual title to his allotted unit after the condominium corporation has been registered and after such unit has been leased to tenants. To effect such exchange the investor must file an election. The consideration for the transfer of the unit to him is the surrender of his "interest" and possibly the payment of certain sums to compensate continuing limited partners for any recapture of capital cost allowance due to the specific transfer. Platinum submits that the scheme is for ownership interest in a limited partnership only with the intention that the entire project be leased for a number of years, and that the transfer of title of the unit is only an incidental financial protection.

O.N.H.W.P.'s position is that the purchase of an "interest" is in substance a purchase agreement in respect of a new home under the Act, because the investor may acquire title of a unit, and the subscription price is equivalent to the price of such unit, and that on subscribing for an "interest" the subscriber must tender a deposit.

Platinum submits that the Act does not apply primarily because they are not a "vendor" within the meaning of the Act.

The Act provides that no person shall act as a "vendor" or a "builder" unless he is registered.

In the present case, Marchant Building Corporation is the builder under a contract with the limited partnership.

Under the Act the units are "homes" (s. 1(d)). Marchant is a "builder" if it is under a contract with a "vendor" or "owner" (s. 1(a)). Selling includes entering into an agreement to sell (s. 1(l)).

The Act defines "owner" and "vendor" as follows:

1. In this Act,

(g) "owner" means a person who first acquires a home from its vendor for occupancy, and his successors in title;

(n) "vendor" means a person who sells on his own behalf a home not previously occupied to an owner and includes a builder who constructs a home under a contract with the owner;

In my opinion, the investor is an "owner" under the Act if the limited partnership is a "vendor". Whether or not the unit is occupied by a tenant before he acquires title is immaterial: see the White Oaks case. He has entered into an agreement that gives him the right to acquire title and therefore the agreement itself falls within the definition of "sell". He becomes the beneficial owner the moment he signs the subscription agreement to acquire his "interest".

The limited partnership has title to the project. When the subscriber paid for his "interest" he became one of the partners owning the project. However, the agreement also provides for the transfer to him of a specified unit. In my opinion, this was a sale by a vendor. The limited partnership was the "vendor" and the subscriber was the "owner" within the meaning of the Act. A partnership can "sell" a home to one of its individual partners. That is what is provided for in this case.

For these reasons it is declared that each of the respondents in the O.N.H.W.P. application are acting as a "vendor" or "builder" without being registered, contrary to s. 6 of the Act, and they are ordered to comply with the provisions of the Act, including not building until they have so complied.

There are some provisions in the regulations under the Act, particularly those that relate to deposits that are not entirely appropriate to the facts of this case, but this does not alter my conclusion.

The application of Platinum is dismissed.

O.N.H.W.P. is entitled to its costs in both applications.

Judgment accordingly.

CBR# 270

Re Reiners et al. and Mercer et al.

66 O.R. (2d) 641

Action No. 9174/88

ONTARIO District Court of Ontario West D.C.J. December 23, 1988.

MOTION to declare void the election of certain directors for a condominium corporation.

D.S. Strashin, for applicants.

L. Radomsky, for respondents.

WEST D.C.J.:-- On this motion the court has been asked to declare void the election of certain directors of a condominium corporation.

The facts are not in dispute. Prior to November 7, 1988, the applicants were the directors of Peel Condominium Corporation No. 7. The Corporation controls a complex of 217 town house units located at 475 Bramalea Rd. in the City of Mississauga. On November 7, 1988, a special general meeting of the Corporation was held pursuant to the requisition of certain owners to consider among other matters the removal of the directors. No issue was taken as to the validity of the meeting.

One hundred and twenty-six owners were represented at the meeting in person or by proxy. One hundred and nineteen ballots were cast with respect to the applicants Reiners, Gould and Armstrong and 117 ballots were cast with respect to the applicants Geer and Leblond. In each case a majority of the votes cast were in favour of removal. The number in favour ranged from 80 to 86 owners.

The outcome of this motion depends upon the interpretation placed upon s. 15(8) of the Condominium Act, R.S.O. 1980 c. 84. This subsection reads as follows:

15(8) Any director may be removed before the expiration of his term by a vote of owners who together own a majority of the units and the owners may elect, in accordance with the by-laws dealing with the election of directors, any person qualified to be a member of the board for the remainder of the term of the director removed.

It is the position of the applicants that s. 15(8) should be interpreted as requiring that those voting in favour of removal in each case must constitute a majority of the owners.

The position of the respondents is that as long as the owners voting at the meeting represent a majority of owners, actions taken at the meeting should be determined by a simple majority of votes cast.

Neither counsel was able to cite any authority to the court dealing with this issue.

The Shorter Oxford English Dictionary defines "vote" as:

The collective support of a special number or class of persons in a deliberative decision, election, etc.; a resolution or decision passed by, or carried in, an assembly as the result of voting; an expression of opinion formerly [sic] adopted by a meeting of any kind.

Black's Law Dictionary (5th ed.) defines "vote" as:

... the expression of one's will, preference, or choice, formally manifested by a member of a legislative or deliberative body, or of a constituency or a body of qualified electors, in regard to the decision to be made by the body as a whole upon any proposed measure or proceeding or in passing laws, rules or regulations, or the selection of an officer or representative. And the aggregate of the expressions of will or choice, thus manifested by individuals, is called the "vote of the body".

These definitions appear to support the proposition that "vote" refers to the action taken. The manner in which the vote is taken is controlled by s. 22(6) of the Act which reads:

22(6) Unless otherwise provided in this Act, all questions proposed for the consideration of the owners at a meeting of owners shall be determined by a majority of the votes cast.

As well, Words and Phrases Legal Maxims refers to *Re Young and Glanvilles Ltd.* (1918), 39 D.L.R. 629, [1918] 2 W.W.R. 352, 13 A.L.R. 265 (Alta. C.A.), as authority for the proposition that the words "... majority vote ..." mean a vote by a majority of the electors actually voting, not of those entitled to vote".

I therefore conclude that the requirement of majority representation contained in s. 15(8) relates to the constitution of the meeting in question. Once the meeting is validly constituted actions taken thereat are to be determined by a majority of the votes cast.

In the result the motion is dismissed with costs.

Motion dismissed.

CBR# 221

Re Ontario New Home Warranty Program and Meadows of White Oaks II Ltd. et al. and two other applications (H.C.J.)

65 O.R. (2d) 362

ONTARIO High Court of Justice R.E. Holland J. August 22, 1988.

APPLICATIONS, heard together, for the interpretation of a statute.

B. Campbell, for Ontario New Home Warranty Program.

L.J. Levine, Q.C., for Meadows of White Oaks II Limited et al. and Philmor (L'Esprit) Development Corporation.

Stephen Schwartz, for Carlyle Residences Inc.

R.E. HOLLAND J.:-- These three applications were heard together for interpretation of the provisions of the Ontario New Home Warranties Plan Act, R.S.O. 1980, c. 350 (the Act), and as to whether certain companies (the companies) must register pursuant to the provisions of the Act.

Facts

Ontario Home Warranty Program is a non-profit, non-share corporation, incorporated under the laws of Ontario designated pursuant to the Act to administer the Ontario New Home Warranty Plan.

The Act provides a scheme for warranty coverage, deposit refund coverage and compensation.

Vendor/builders of new homes are required to provide warranty and deposit coverage to purchaser/owners, failing which claims can be made to the warranty programme. If the claims are valid in respect of a breach of warranty, or failure to complete a purchase agreement, payment of such claims are made from the warranty programme guaranty fund. All vendor/builders of new homes in Ontario must be registered under the Act. The warranty programme has the authority to review the financial statements of applicants, their past conduct, and their technical ability, to determine whether registration will be granted. Terms and conditions may be imposed on the registrant sufficient to give effect to the Act.

A vendor/builder of new homes shall not commence construction prior to being registered with the warranty programme and paying all prescribed fees.

The companies are engaged in the construction and sale of condominium units in the Province of Ontario. For example, The Carlyle Residences Inc. is building a condominium project in the City of Mississauga consisting of four separate buildings each containing 341 units. By January, 1988, the first building was already 80% sold. The companies are not registered.

The position of the director of registration

For some years the director of registration for the programme had interpreted the legislation as excluding coverage where units were sold to investors who are not intended to occupy the units themselves but rather rent the units out to tenants. There has been a change of policy and the programme has now taken the position that registration is required.

The position of the companies

The companies take the position that they are not covered by the Act because the agreements of purchase and sale under which the units are sold indicate the clear intention to provide the purchaser with a tax shelter investment and under no circumstances will a purchaser ever occupy a unit on closing. Units will be rented since should a purchaser occupy his or her unit then the tax benefit would be lost and the whole intent and purpose of the agreement of purchase and sale would be nullified.

The agreements of purchase and sale

The agreements of purchase and sale are similar. I will consider the specific provisions of the "White Oaks" agreement. The parties are described in the general agreement as "Purchaser/Owner" and "Vendor". The general agreement provides for the purchase of a specific condominium unit.

Reemark Group Management is described as rental agent in the general agreement. The purchaser/owner acknowledges having read and understood the terms and conditions of the unit purchase agreement, trust agreement, development agreement, services agreement, rental management agreement, guaranty agreement and appliances lease, "which agreements ... form integral parts of" the general agreement and "agrees to comply with and be bound by each and every condition contained therein ...".

The unit purchase agreement provides for the sale and conveyance of the beneficial ownership of the unit. The agreement provides for the payment of a deposit and the assumption of a mortgage. The deposit is to be returned in the event that the purchase agreement is terminated by either party. The purchaser has the option to self-manage the unit following registration of the transfer. There is no provision that prevents the purchaser from occupying the unit. The projects are designed to be sold as tax shelters and should an owner choose to occupy his or her unit then the tax benefits would be lost.

Law

The Act contains the following provisions: 1. In this Act,

(a) "builder" means a person who undertakes the performance of all the work and supply of all the materials necessary to construct a completed home whether for the purpose of sale by himself or under a contract with a vendor or owner;

(d) "home" means,

(iii) a condominium dwelling unit, including the common elements, or

and includes any structure or appurtenance used in conjunction therewith, but does not include a dwelling built and sold for occupancy for temporary periods or for seasonal purposes; (g) "owner" means a person who first acquires a home from its vendor for occupancy, and his successors in title;

(n) "vendor" means a person who sells on his own behalf a home not previously occupied to an owner and includes a builder who constructs a home under a contract with the owner;

6. No person shall act as a vendor or a builder unless he is registered by the Registrar under this Act.

11(2) When a vendor enters into a contract for the sale of a home to an owner or for the construction of a home for an owner, the vendor shall deliver to the owner such documentation and notices respecting the Plan as are prescribed by the regulations.

12. A builder shall not commence to construct a home until he has notified the Corporation of the fact, has provided the Corporation with such particulars as the Corporation requires and has paid the prescribed fee to the Corporation.

15. For the purposes of sections 13 and 14 [which deal with warranties and compensation], a condominium corporation shall be deemed to be the owner of the common elements of the condominium and the warranties take effect on the date of the registration of the declaration and description.

The companies are builders as defined by the Act and the condominium units are "homes" not built, "for occupancy for temporary periods" such as a hotel.

The problem is raised by the definition of the word "owner". Counsel for the companies submit that the homes are not acquired for occupancy by the owner but rather for rental by the owner.

I do not understand why the words "for occupancy" were included in the definition of "owner" since it surely would be unusual for a person to acquire a home for anything other than occupancy. These particular homes will be occupied presumably by tenants. If the term "occupancy" was intended to be limited to occupancy by the owner, then the words "by the owner" could have been added. In the absence of any such words it appears to me that the purchasers come within the definition of "owner". In coming to this conclusion I accept that the legislation itself is remedial and should be liberally construed. However, the legislation should be given a strict interpretation in determining the class of persons to which the Act applies: *Clarkson Co. Ltd. v. Ace Lumber Ltd.* (1963), 36 D.L.R. (2d) 554, [1963] S.C.R. 110, 4 C.B.R. (N.S.) 116 (S.C.C.).

A condominium corporation can make a claim in respect of the common elements.

Conclusion

I conclude that the Act does apply and would apply even if a purchaser were absolutely prohibited from occupying a unit. In the present case even though it could well be financially unwise for a purchaser to occupy a unit there is no such prohibition and the Act clearly applies.

The companies must therefore register pursuant to the Act. There will be no costs of the application.

Judgment accordingly.

CBR# 258

Re Key et al. and St. George Holdings Co. Ltd. et al.

[1972] 3 O.R. 326-329

ONTARIO [HIGH COURT OF JUSTICE] KEITH, J. 1ST JUNE 1972.

APPLICATION under s. 23(2) of the Condominium Act, R.S.O. 1970, c. 77.

J.A. Ronson, for applicants.

B. Sischy, Q.C., for respondent, St. George Holdings Co. Ltd.

C.L. Morris, for respondents, Frank Gigal, Willard Kerr, Terrence Joseph McDonough and Sidni F. Marquis.

KEITH, J.(orally):-- This is an application brought by the owners of three units of a property at 190 St. George St., Toronto, the original owner of which was the respondent St. George Holdings Co. Limited, and which has been brought since July 28, 1971, under the provision of the Condominium Act, R.S.O. 1970, c. 77.

To state the problem shortly, the three applicants who are owners of residential units within the entire 12-story building, seek an order of the Court under s. 23 of the statute, which reads as follows:

23(1) Where a duty imposed by this Act, the declaration or the by-laws is not performed, the corporation, any owner, or any person having an encumbrance against a unit and common interest may apply to the Supreme Court for an order directing the performance of the duty.

(2) The court may by order direct performance of the duty, and may include in the order any provisions that the court considers appropriate in the circumstances. (3) Nothing in this section restricts the remedies otherwise available for failure to perform any duty imposed by this Act.

This power in the Court becomes important, having regard to the provisions of s. 12 of the Act, which reads as follows:

12(1) Each owner is bound by and shall comply with this Act, the declaration and the by-laws.

(2) Each owner has a right to the compliance by the other owners with this Act, the declaration and the by-laws.

(3) The corporation, and any person having an encumbrance against any unit and common interest, has a right to the compliance by the owners with this Act, the declaration and the by-laws.

The complaint of the three applicants, put very shortly, amounts to this. That at the time of the registration of the Declaration that is required to be registered to bring a property under the Condominium Act, in its accompanying description it appears that on the first level, the four units that face Lowther Ave. are shown as four totally independent units, and it is indicated that the location in which the walls that would separate those units one from the other and from the common walls belonging to the entire building, ought to be located on certain boundary lines. In point of fact, the evidence is that as between units one and two, and units three and four, the walls were never at any time fully constructed as shown on the description, but were left open pending any offers for the sale of one or two units or, indeed, for all of the four units, to a prospective purchaser. What is now proposed is that, without in any way increasing the total area that should be encompassed by these four units within the boundaries as shown, the area available to the units should be subdivided interiorly in a somewhat different fashion than that shown on the original plan that was filed at the time the property was brought under the Condominium Act. The effect of doing this will provide a common foyer or hallway for the occupants of units one and two, and a similar foyer or hallway to the occupants of units three and four. I am informed and the evidence supports this, that it is proposed that units one and two taken somewhat together in this manner, and units three and four also taken in the same manner, will be occupied by dentists for the practice of their profession, and that the object of subdividing the interior area is to make a useful and proper or suitable waiting room that would serve the dentists, whether the particular dentist was in the area that belongs to unit one or the area that belongs to unit two, and similarly with respect to units three and four.

It is urged on me that under the provisions of s. 12 of the Act, each owner being bound to comply with the Act, the declaration and the by-laws, and having a right to the compliance by the other owners with the Act, the declaration and the by-laws, and the boundary lines being shown as they are on the registered plan, that I have really no alternative, under s. 23(2), but to make an order that they be complied with. Of course, the result of that order would make it impossible for the contemplated internal layout of the units one and two, and units three and four, to be accomplished.

No question arises with respect to the use to be made of the actual units, as this is a permissible use and has been from the inception of the whole project. There were some reasons advanced as to why this proposed use would be inimical to the interests of the residential holders, but I doubt that unless it is shown that their real interest in the common elements of the condominium has been affected (and this has not been shown), that one should be particularly impressed with what I suspect are largely fanciful objections to the use being made.

In my view, there is no substance to this application. The proposal does not in any way detract from the amount of common element available to each and every unit holder. What it does is something that I think has always been contemplated, and, in my view, is quite permissible so long as the total obligation is not varied with respect to the occupants of the condominium as a whole. Thus when unit one, for example, is required to contribute a certain percentage to the operating costs of the condominium, no rearrangement of the interior partitions can change that without the approval of the unit holders in their entirety. That is not to say that, as between the owners of units one and two, for example, they themselves may not make contributions as they see fit. It is the over-all picture that must be regarded.

In the result, I have come to the conclusion that the application must be dismissed with costs.

Application dismissed.

CBR# 200

Louise Filion Morest, Appellant, v. Her Majesty the Queen, Respondent

[1992] T.C.J. No. 130

Action No. 91-2146(IT)

Tax Court of Canada Montreal, Quebec Rip T.C.J. Heard: January 13, 1992 Judgment: February 21, 1992

Serge Fournier, for the Appellant. Marie-Andrée Legault, for the Respondent.

RIP T.C.J.:-- The appellant, Louise Filion, has appealed from assessments of tax for 1986, 1987 and 1988, electing to proceed under the informal procedure provisions of the Tax Court of Canada. The Minister of National Revenue ("Minister") disallowed the appellant, in computing her income, to deduct purported rental losses with respect to a real property she owned at the time in the State of Florida on the basis the real property was not maintained in connection with a business or with a reasonable expectation of profit: paragraphs 18(1)(a) and 18(1)(h) of the Income Tax Act ("Act").

At all relevant times Ms. Filion was a public relations officer with Canadian National. In 1981 she was married to Yves Morest, a real estate agent in Quebec. She and Morest were of the view in 1981 that she ought to acquire a rental property in Florida. They spent about three weeks looking at various properties in the State, in particular in the Fort Lauderdale, Pompano and Sunrise areas. Filion testified she was looking for a real property of quality construction in a good secure area which would have a profit earning capacity. Filion said she sought the advice of Morest and real estate agents in Florida, in particular a Mr. Knopf of Keyes Realtor, to ensure the real property to be purchased was attractive from an income point of view. [TRANSLATION] "Profitability was very important", she insisted. She was informed by agents, there was, in Florida, a high season, as well as a low season for renting real property and she could expect a profit by renting for 25 weeks a year. A table was prepared at the time which showed the rents she could expect to receive from a condominium unit in Sunrise Village, near Fort Lauderdale.

December and January 8 weeks at \$450.00 \$3,600.00 October and November 8 weeks at \$350.00 \$2,800.00 February 1 week at \$450.00 \$ 450.00 March 4 weeks at \$450.00 \$1,800.00 May and June 2 weeks at \$275.00 \$ 550.00 July and August 2 weeks at \$275.00 \$ 550.00 ----- Total 25 weeks \$9,750.00

(Apparently an error was made on the table with respect to the month of February: the unit would be rented for four weeks in February.)

Filion considered her potential clientele for the real property to be family and people she knew in Quebec. She wanted to create what she called a [TRANSLATION] "regular clientele" who would rent for about four weeks at a time and return the following year.

The real property was acquired in June, 1981 for the purchase price of \$74,000.00 (U.S.). Filion paid a deposit of \$16,000.00 (U.S.) and the balance was financed by a Florida bank, secured by a first mortgage, with interest at 12.5% per annum, amortized over 29 years. No profit was foreseen for 1982 as only 20 weeks of occupancy was anticipated for that year once the unit was ready to accept guests. Mr. Knopf had suggested the appellant find a long term tenant "until we get organized" and then rent monthly or weekly.

Filion authorized Knopf to rent the real property for "around \$700.00 a month more or less" for one year, with an option for a further year if the tenant wished. Filion stated she actually wanted short term tenants but real estate agents in the area did not accept short term mandates and this was the reason for a one year term. However, in the June 22, 1981 edition of *Le Soleil*, Filion herself placed an advertisement offering to rent the real property on the same terms.

In 1982, Filion said she made efforts to bring the real property to the attention of the public who would visit Florida as tourists. She prepared a brochure, advertised in Quebec and Florida newspapers and called people who previously had expressed an interest in the real property. In order to cover operating costs she asked real estate agents in Florida and Canada to look for clients. She indicated the years 1982 to 1984 inclusive was the period to obtain a [TRANSLATION] "regular clientele".

The appellant's problems began early. Various clients who stayed on the property in 1983 and 1984 did not return as anticipated. Apparently, according to Filion's evidence, it became cheaper to travel from Quebec by charter and stay in tourist areas and near the Caribbean such as the Dominican Republic and Venezuela rather than Florida. At the same time Canada was experiencing a recession. Also, new construction, which Filion stated was unforeseen in 1981, took place around Sunrise and potential clientele preferred newer facilities. This resulted in vacancies and reduced rent from the real property. Also, she said, some people would make a reservation and not show up; she would retain the deposit, if any.

In 1986 Filion requested an agent in Florida, Roger Roy, who had a French Canadian clientele to attempt to rent the real property. She also made inquiries with a travel agent in Quebec who sent people to Florida. She had some success with Roy but no leads came from the travel agent.

Subsequently, in 1989, Filion sought long term tenants. One tenant entered into a one year lease but all his postdated cheques, except his first cheque, were returned for insufficient funds.

The persons who, in 1981, advised Filion a profit could be made on the real property, later on told her they had not foreseen new construction and an unfavourable economy, she testified. Filion insisted her rates for the unit were competitive but if people wanted to deal, she was prepared to deal since she preferred the real property be occupied rather than vacant.

Filion testified she stayed at the real property not more than five weeks during the time she owned the real property. When in Florida, she would stay at a hotel.

In 1981, Filion said, she not only projected gross rentals but also projected expenses. No projection of expenses was produced at trial. She stated that annual expenses for the years in appeal were \$10,000.00 to \$12,000.00 per annum, not including depreciation, and for 1981 would have been "a little less". These expenses included condominium fees, utilities, mortgage interest and escrow, insurance and taxes. Her losses for the years in appeal were the following:

1986 \$7,019.00 1987 \$11,867.00 1988 \$9,444.00

For the earlier years her losses from the real property were the following:

1981 \$8,744.00 1982 \$11,565.00 1983 \$10,065.00 1984 \$11,932.00 1985 \$11,321.00

For the period 1981 to 1988 Filion's total revenue from the real property was \$12,619.00 and expenses (not including depreciation) totalled \$101,576.27. As of December, 1988 the mortgage on the real property was \$57,782.00 (U.S.). The real property was sold in 1989.

The respondent's counsel cross examined Filion as to whether she purchased the real property to sell. On October 27, 1981 Knopf had sent Filion a letter enclosing copies of a brochure offering the real property for sale; the letter described, in part, the marketing of the real property.

In November 1981 Knopf wrote Filion advising her that he had been offering the real property for rent at \$600.00 per month without success and informed her the competition in the area was offering rentals at \$525.00 per month. He confirmed that "I am still placing ads for sale". Filion stated that she was obligated to authorize an agent to sell the real property in order to retain the services of a real estate agent in Florida. She had no intention to sell, she insisted.

In 1989 Filion rejected recommendations of Roger Roy, her real estate agent in Florida at the time, that she rent the real property. Apparently, by then she wished the real property to be sold. She did not wish to rent, she informed Roy, unless it was for a long period of time since in her view the real property tends to deteriorate faster when rented on a short term basis and she loses control of the occupant. She indicated to Roy that "occasionally, she rented the house for a few weeks to friends".

Counsel for the appellant submitted there were three factors responsible for the losses incurred by his client: the recession of the early 1980's [Note 1 appended to judgment], the proliferation of inexpensive charter trips to the Caribbean and unforeseen construction in the area. Were it not for these factors, he argued, Filion would have rented the real property as anticipated and projected rentals would have been realized. When Filion saw that there were problems in renting the real property she adjusted her plans and sought out realtors to rent the real property. The projections in 1981, he concluded, were reasonable, the [TRANSLATION] "regular clientele" she anticipated in 1981 was realistic at the time.

The appellant relied on the following reported cases: Ahluwalia v. M.N.R., 87 D.T.C. 592, Baker v. M.N.R., 87 D.T.C. 566, Paikin v. M.N.R., 87 D.T.C. 6 and McNeil v. The Queen, 89 D.T.C. 5516.

In Ahluwalia, the rental of a unit in Florida owned by the taxpayer was handled by the condominium owners association. The taxpayer paid off his first mortgage on the unit within seven years of purchase and his revenues from the real property increased from \$3,150.00 in 1979 to \$20,400.00 in 1986. Unforeseen repair costs was the root of his losses. In Baker one of the reasons for the losses was the discovery of the existence of a mortgage after acquisition of the real property. The taxpayer in Paikin obtained an open and fixed rate mortgage to enable him to pay down the mortgage as funds were available and had a full-time tenant, the taxpayer's mother, paying rent at fair market value. The trial judge in McNeil considered that since the real property in question had been approved by the Minister as a class 31 multiple unit residential building there was an implication that the Minister accepted that the real property was to be used for investment purposes. Also there were a number of combined factors affecting the rentability of the real property: unsightly excavation on adjoining property, unpleasant attitude by other occupants in the building and a condominium by-law precluding further rental of units. None of the factors found in these four cases are present in the instant appeal.

I am not satisfied Filion would not have sold the real property at any time after acquisition had a favourable price been offered. There is no evidence to corroborate that a real estate agent would not accept a mandate to find short term tenants or that no real estate agent would accept a mandate to rent without, at the same time, being authorized to sell the real property.

No friend or family member testified that he or she, in 1981, expressed a serious interest to Filion to rent the real property while vacationing in Florida. While Filion may have discussed her potential purchase with friends, I am not satisfied that such discussions could have served as a basis on which one would acquire a real property with the reasonable expectation of earning a profit from such a potential clientele. And if this clientele would not be realized, Filion, residing in Quebec and otherwise employed, would have to seek out clientele for a property hundreds of miles away. Such efforts would not, in ordinary circumstances, be susceptible of success.

I also have doubt that the projected rentals were reasonable. Filion's attempt in 1981 to rent the real property through Knopf were for rents in excess of the market value at the time. I am not confident that the rentals at market value would have generated a profit, taking into account the carrying costs of the mortgage, condominium costs, taxes, repairs and maintenance, insurance and utilities, let alone depreciation.

For these reasons, the appeals are dismissed.

* * * * *

APPENDIX

Note 1: I note that in the middle of the year 1981, the interest rates in Canada were very high and that their peak was not yet in sight; Mrs. Filion was surely aware of the economic situation in Canada when she bought the real property.

CBR# 156

Lambton Condominium Corp. No. 16. v. Plowright

Between

Lambton Condominium Corporation No. 16, plaintiff, and
Dennis Plowright also known as Denny Plowright, and Andrew
Spriet and Marga Murdoch carrying on business in partnership
as Pier 17 Docks, defendants

Court File No. 11662/92

Ontario Court of Justice (General Division)
Killeen J.

Heard: September 24, 25, 1997.

Judgment: December 22, 1997.

(16 pp.)

This was an action for a declaration that a lease had expired. The defendants, Plowright and others, built a condominium on riverside property. Prior to the registration of the condominium, they leased docking rights to a partnership, Pier 17. Plowright and the others controlled Pier 17. Pier 17 paid \$100 rent per annum for a 20-year term. The plaintiff corporation was created when the condominium was registered. The lease was detailed in clear language in disclosure statements to prospective unit owners. The corporation accepted rental payments and repair contributions from Pier 17. The corporation brought an action for a declaration that the lease had expired. It sought damages for trespass and unjust enrichment from the operation of the docks by Pier 17. The corporation contended that the lease expired as it was not ratified within 12 months of execution by the corporation's independent board of directors. It claimed that Plowright and the others failed to disclose their common interest in the condominium builder and Pier 17 after the independent board was elected.

Counsel:

Peter Dobbie, for the plaintiff.

Elizabeth Hewitt, for the defendant.

1 KILLEEN J.:— The plaintiff, Lambton Condominium Corporation No. 16 ("L.C.C."), has sued Pier 17 Docks ("Pier 17") for declaratory and related relief as follows:

- 1) a declaration that a lease between Sundaze Developments Inc. and Pier 17 Docks, dated September 19, 1986, has expired as of October 1, 1987, pursuant to s. 39 of the Condominium Act, R.S.O. 1990, c. C.26;
- 2) a declaration that the plaintiff is entitled to possession of the lands included in the lease;
- 3) consequential damages for trespass or unjust enrichment from October 1, 1987.

The Facts

2 In 1986 or earlier, a limited company known as Sundaze Developments Inc. ("Sundaze") decided to construct a 17-unit condominium building on a property it owned on the edge of the Ausable River at Grand Bend. At that time and subsequently the controlling interest in Sundaze was held by the three defendants in this action, namely, Dennis Plowright, Andrew Spriet and Marga Murdoch.

3 Before proceeding further with the condominium development, the three defendants made a decision on behalf of Sundaze to lease the docking rights in front of the property on the Ausable River to a partnership known as Pier 17 which they created for themselves in equal shares.

4 The actual lease from Sundaze to Pier 17 is dated September 19, 1986, and was registered on title on October 2 as Instrument No. 584670 in the land registry office in Sarnia. The demised lands under the lease are shown outlined in yellow on Ex. 8, an engineer's plot plan which outlines the complete site, including the condominium building which was actually constructed. The lands consist of a long dock or walkway running along the bank of Ausable River together with a retaining wall running along its course and, as well, the tenant was given exclusive use of an eight-car parking lot south of the west end of the dock along with rights of way to the parking lot and the dock for the purposes of the lease.

5 The lease contained a generous rental rate for the tenant. Pier 17 was only required to pay \$100 in rent for a 20-year rental term expiring on September 30, 2006. However, Pier 17 had to develop the dock for the leasing of docking spaces to boat owners by constructing six finger slips along the dock and water and electrical outlets. Also, Pier 17 was responsible for business and real property taxes, utility charges and prescribed shares of ordinary maintenance expenses on the dock and retaining wall.

6 Under para. 4.18 of the lease, Pier 17 also gave Sundaze a special "first right to lease dockage" at a discounted rate of 90% of regular annual docking charges.

7 It would seem that Pier 17 commenced operating the docking facilities in the 1987 season, well before the condominium building was ready for registration under the Condominium Act. There were 17 docking spaces available at the dock.

8 The building was completed in 1987 and the Declaration was registered on September 15, 1987, thereby formally creating L.C.C. as a legal entity under the Act. The turnover to an independent Board occurred at the October 31 Board meeting when a

new Board took over consisting of Marlene Bennett as president, Read Hilton as secretary, Diane Voll as treasurer, and Andrew Spriet and Marga Murdoch, two of the defendants, as vice-presidents.

9 There can be little doubt that the three fresh directors knew at the turnover, and probably much earlier, that the three defendants held the benefit of the Pier 17 lease on the docking rights. As well, such knowledge must also be attributed to all purchasers of units from time to time.

10 I have already noted that the lease itself was registered on title as early as October 2, 1986, about a year before the building was registered under the Act. Also, one must observe here that the lease was disclosed in clear language in the Declaration and Disclosure Statement, called for under the Act, as well as in each agreement of purchase and sale for an individual unit.

11 The Declaration discloses the lease and its rights in the following way:

4.5 Prior Lease of Waterfront

A portion of the Common Elements described as Parts 1, 2, 3, 4 and 5, Plan 25R-4697, are subject to a lease or/and right-of-way registered prior to the Declaration in favour of Pier 17 Docks. This lease covers the use of the waterfront for the purpose of contracting out the use of dock space on the Ausable River and includes a right-of-way providing for the use of eight parking spots at the West end of the site and the use of certain portions of the Common Elements for the purpose of access to the parking spots and the waterfront. This lease and right-of-way is for a twenty year term from the 1st day of October, 1986 and does not contain any provision for renewal.

12 The Disclosure Statement contains a very lengthy passage about the lease:

WATERFRONT

The waterfront area, being the land boarding the Ausable River upon which the retaining wall is constructed, while owned by the Condominium Corporation and forming part of the Common Elements will be subject to a Lease registered in favour of a third party prior to the application of the Condominium Act to this property. That Lease will run for a twenty (20) year term and will allow the Tenant the exclusive right to control the use of docking space on the Ausable River adjacent to the property.

The Lease also permits the Tenant and those individuals to whom it contracts docking space, the right to use eight (8) parking spots on the west end of the property for parking cars and to use certain areas for the purpose of walking between the parking spots and the docking areas.

Pursuant to the terms of this Lease, the Tenant will be required to pay for its share of the upkeep and maintenance on the retaining wall, the sidewalks and the parking areas. The Tenant will be required to pay for the cost of all water and hydro supplied to boaters and there will be separate meters installed for these utilities.

The effect of this Lease is that the leasing or contracting out of dockage space along the Ausable River adjacent to the property for the period of twenty (20) years will be controlled by the Tenant rather than the Condominium Corporation. The Lease does contain a provision allowing owners of Units within the Condominium to have the first right to obtain dockage space at a discount of 10% over that charged the general public.

Other than the requirement for contributing to repairs and maintenance and to paying for all utilities used, the Lease does not provide a rental income to the Condominium Corporation. The rent payable by the Tenant pursuant to the Lease is payable in a lump sum at the commencement of the Lease and no further rent will be received by the Condominium Corporation.

A copy of this Lease document will be delivered with the Disclosure Statement.

Finally, the Lease Agreement provides that there shall be no fence or structure constructed separating the Leased premises from the balance of the Common Elements, other than decorative structures.

13 It should be added that the Disclosure Statement, on its front page, contains a highlighted warning under which purchasers are advised to retain independent counsel so that they will be fully familiar with their rights and obligations under the Act and their agreements of purchase and sale.

14 The standard agreement of purchase and sale for this project also contained, in para. 7.01(f), another fair-disclosure passage about this lease and indicated that it was registered on title. The uncontradicted evidence of Mr. Spriet, a defence witness, was that when a sale agreement was concluded with a prospective purchaser, that purchaser received a "package" of materials, including the Declaration, Disclosure Statement and a copy of the lease.

15 Two unit owners, David Greig and Jane Few, testified at trial on behalf of the plaintiff. Their combined evidence really did not advance the plaintiff's case beyond what was already contained in the basic documentation filed at trial.

16 Mr. Greig bought a unit in October, 1988, and went on the Board in 1989. While he said that he knew nothing about the lease when he bought his unit, he acknowledged that he had a lawyer at the time of purchase. I have to say that his expressed lack of knowledge about the lease struck me as incredible, given the disclosure of the lease in the closing documents and his retention of a lawyer then.

17 While Mr. Greig and some other members of the Board from time to time seemed to be in doubt about what the lease contained in the 1988 - early 1990 period, there is no doubt they knew it existed and knew full well that Pier 17 was operating the docking facilities independently of the condominium corporation. They also knew that Pier 17 was owned and operated by the three defendants, Spriet, Murdoch and Plowright. This unalterable fact is reflected in the minutes of the Directors' meetings (Ex. 1) and the evidence of both Mr. Greig and Ms. Few.

18 One should note, here, that Ms. Murdoch and Mr. Spriet stayed on the Board after the October, 1987, turnover for several years and certainly did not hide their positions as owners of Pier 17.

19 The minutes for the June 11, 1989, meeting are helpful on the awareness of the Board. In those minutes the Board was wrestling with some repairs to the brickwork on the dock at an estimated cost of \$1,200. The Board decided to go ahead and Ms. Murdoch raised the point that Pier 17 should pay 50% under the lease provisions. For some unexplained reason, the Board did not have a copy of the lease even though it had been registered on title in 1986 and copies were provided to purchasers of units in the condominium building.

20 These repairs were in fact done in 1989 and Pier 17 issued a cheque on June 15, 1990, for \$1,000 which covered a \$600 or one-half contribution to the repairs together with \$400 towards apparent rental payments owing under the lease for 1987 through to 1990. Ironically, these rental payments were erroneously paid at the behest of Mr. Spriet who mistakenly thought that the lease called for \$100 annual rental payments. L.C.C. cashed this cheque on June 18 and has not seen fit to return the clearly erroneous overpayment to Pier 17. In fact, of course, the lease called for but one payment of \$100 for the entire 20-year lease and this rental payout probably was paid, as called for, on October 1, 1986, to the developer, Sundaze.

21 There is no doubt that the new unit owners and directors raised questions about the lease from time to time between 1988 and the spring of 1992. Even though the Board minutes show that a few directors were asking about the lease, I conclude that, by not later than May 21, 1990, the Board had finally got a copy from its lawyers. The April 8 minutes indicate that the chairperson, Diane Voll, was to get a copy from the lawyers and the May 21 minutes confirm, by silence, that this must have been done.

22 On June 15, the condominium had received the Pier 17 cheque for \$1,000 and cashed it. As I have said, it includes \$600 to cover one-half of the prior year's dock surface repairs and demonstrates that Pier 17 and L.C.C. were acting as if the lease existed and that they were acting under it. L.C.C., of course, had become a successor in title, or statutory assignee under the lease in virtue of its takeover of the condominium building from Sundaze in September, 1987, through registration of the Declaration.

23 It was not until February, 1992, that the Board decided to get a legal opinion about the validity of the lease. This initiative was undoubtedly precipitated by some new directors, including Ms. Few, who had registered some criticisms after she had purchased a unit in July, 1991, and gone on the Board in September as treasurer. By this time the Board had received some bad news about major repair costs to the retaining wall. The consulting engineering firm of Golder Associates had issued a report in late 1990 which said that the retaining wall would require major repairs, sometime in the next five or ten years, and costing about \$360,000.

24 The current action was, in fact, started on June 26, 1992, after that legal opinion was obtained.

The Legal Issues and Their Resolution

25 Mr. Dobbie, for the plaintiff, L.C.C., rests his case against the defendants on the applicability of sections 39 and 17 of the Act to the facts of this case. I will deal with his two liability arguments under these sections and then move on to the damages questions.

The Section 39 Argument

26 Section 39 reads as follows:

39(1) The corporation may by by-law terminate, on giving sixty days notice in writing, any agreement between the corporation and any person for the management of the property entered into at a time when the majority of the members of the board were elected when the declarant was the registered owner of a majority of the units.

(2) Every agreement for the provision of services on a continuing basis, every lease of the common elements or part thereof for business purposes and every agreement for the provision of recreation facilities to the corporation on other than a non-profit basis entered into by a corporation after the 1st day of June, 1979 and at a time when the majority of the members of the board were elected when the declarant was the registered owner of a majority of the units that does not expire within twelve months after its effective date shall be deemed to expire twelve months after its effective date unless, within the twelve month period, the agreement is ratified by the board at a time when the majority of the board members were elected after the declarant ceased to be the registered owner of a majority of the units.

27 Mr. Dobbie points out that the Act is a sui generis consumer protection law for purchasers of condominium units. It is aimed, in relevant part, at preventing "profiteering" by predatory developers of condominium projects across Ontario.

28 On his approach, s. 39(2) of the Act should be construed such that the lease entered by the developer corporation, Sundaze, with the three-person partnership, Pier 17, comprised of the defendants, Spriet, Plowright and Murdoch, is caught by the language of s. 39(2) and must be "deemed" to have expired 12 months after its effective date of October 1, 1986.

29 Ms. Hewitt, on the other hand, argues that Mr. Dobbie's interpretation of the reach of s. 39(2) is so broad as to constitute an attempt at a blatant re-writing of the subsection.

30 I agree with Ms. Hewitt's approach to this subsection and conclude that the words of the subsection cannot rationally bear the weight of the construction which Mr. Dobbie wishes to impose upon them.

31 Section 39(2) is a rather lengthy and awkwardly worded proviso but, in my view, its gist is this. It provides that leases or other agreements entered by a condominium corporation before the takeover by an independent Board will be deemed to have expired unless ratified by the independent Board within the 12-month period after the lease or agreement was entered and became effective.

32 In this case, the following facts are beyond dispute:

(1) The developer, Sundaze, owned the lands on which the condominium building was constructed and concurrently held the dockage rights which it leased to Pier 17 under the lease signed on September 30, 1986.

(2) This Pier 17 lease became effective by its terms on October 1, 1986, whereas the condominium corporation, L.C.C., only came into existence on September 15, 1997, with registration.

(3) In the intervening year after October 1, 1986, Pier 17 had set up the dock and its slips and was operating it on its own behalf to the knowledge of prospective purchasers of condominium units.

33 During argument, Mr. Dobbie argued that Sundaze, and its principals, were attempting to do an "end run" around s. 39(2) by granting the lease to three of its own principals acting as the partnership, Pier 17, and that it would be somehow unconscionable to allow Sundaze and the partnership to get away with this stratagem.

34 First, I note that there is no evidence supporting Mr. Dobbie's argument that the Sundaze-Pier 17 lease was an artificial stratagem constituting an end run around the statute. So far as I can see, the transaction was a perfectly legitimate business transaction and was fully documented in an above-the-board manner, including execution and registration of the lease and disclosure for income tax purposes. A few years later, in 1991, Revenue Canada re-assessed the transaction with the result that the partnership was effectively required to pay additional taxes arising from the amortization of this lease. However, Revenue Canada did not question the legitimacy of the lease or the Pier 17 partnership itself.

35 One of the defendants, Mr. Spriet, testified at the trial about the circumstances of the creation of the lease. He said that he and his partners in Sundaze assumed in 1986 that they had a right to make a business decision with respect to the dockage rights and that the decision they made would be unfettered by their plan to proceed with the condominium development. They essentially had three options for such dockage rights: first, the full dockage rights could be sold outright to someone immediately for a given lump-sum price; second, they could be sold later to unit owners after the condominium building was constructed with various pricing models on an individual basis or, third, they could be leased, as they were, to a third party well before the condominium corporation was created.

36 Mr. Spriet said that the decision made by him and his partners to set up a partnership and lease to that partnership for 20 years was a pure business decision. He and his partners simply felt that this lease structure would buttress their investment in the overall project and guarantee a reasonable return over the 20 years of the lease, after which the rights would revert to the condominium unit owners within the legal framework of the condominium building itself.

37 It is a fruitless exercise to attempt to identify grossly excessive profits from this lease over the years - even assuming such an exercise would be material.

38 The financial statements produced by the defence show that in the 1987-96 period, the gross revenues were \$108,990, or about \$11,000 per year, and the profit was around \$59,000. Assuming these figures held up for the balance of the lease, the profit for 20 years would be about \$100,000 and divisible in three portions.

39 One of the plaintiff's own witnesses, Ms. Jane Few, conceded in her evidence that she was familiar with other condominium projects in the area in 1986 where docking slips were readily sold for \$10-15,000 each. Thus, the 17 slips at this dock might well have been sold in 1986 for upwards of \$170,000 if Sundaze and its principals had elected that option.

40 During argument, Mr. Dobbie conceded, as I understood him, that, if Sundaze had sold the dockage rights in 1986, such a transaction could not be impeached now. I have to confess that I cannot see how the option which was chosen - a bona fide lease transaction well before the condominium corporation came into existence - can be challenged under s. 39.

41 Mr. Dobbie has submitted that after September 15, 1987, when L.C.C. was registered and received separate legal existence and status, L.C.C. became the successor landlord under the lease in place of Sundaze by operation of law. He argues, therefore, that L.C.C. effectively became a primary party to the lease within the contemplation of s. 39(2).

42 I cannot accept this argument, however ingenious it may seem.

43 As I read the Act, the registration of the Declaration on September 15, 1987, makes L.C.C. a statutory successor in title to Sundaze under the lease. It does not have a "relation-back" effect and deem L.C.C. to have originally entered the lease on September 30, 1996.

44 It is to be remembered here that the key language of s. 39(2) is that which refers to "Every agreement...every lease ... entered into by a corporation. ..." (Emphasis added.) Unless the English language can be totally stretched out of reasonable shape and meaning, that language must be restricted to agreements or leases actually entered into by the condominium corporation after it came into existence and not those entered into by a separate predecessor in title.

45 Ms. Hewitt put forward an argument which tellingly highlights the unreasonableness and even absurdity of the plaintiff's interpretive position. She points to the later clause in s. 39(2) which requires that any agreement or lease entered into by the first-directors' Board "shall be deemed to expire twelve months after its effective date" unless the later-created independent Board ratifies it within that period.

46 Here, she submits, the lease was signed on September 30, 1996, and commenced on October 1, its obvious "effective date". If Mr. Dobbie's interpretation were accepted, this lease would be deemed to have expired on October 1, 1997, a date when the independent Board did not even exist. This result creates both an absurdity and a patent injustice. Thus, she argues that well-accepted principles of statutory construction demand that Mr. Dobbie's interpretive approach be rejected.

47 I agree with the compelling logic of Ms. Hewitt's argument on this point: see, for example, such cases as *McNair v. Collins* (1912), 27 O.L.R. 44 (Div. Ct.) and *Newman v. Grand Trunk R.W. Co.* (1910), 20 O.L.R. 282 (Ont. H.C.).

48 Ms. Hewitt has also raised a final counter-argument based on common-law and equitable principles of ratification and estoppel. These arguments have some considerable merit from a factual perspective because there was, I find, full and appropriate disclosure of the dockage lease from the outset and the turnover Board and its successors did accept lease payments and contributions to repair costs. However, as it seems to me, these judge-made principles could not override any statutory rights provided under s. 39(2). Thus, in my view, s. 39(2) renders such principles moot.

The Section 17 Argument

49 The relevant portions of s. 17 are as follows:

17(1) Every director of a corporation who has, directly or indirectly, any interest in any contract or transaction to which the corporation is or is to be a party, other than a contract or transaction in which the director's interest is limited solely to his or her remuneration as a director, officer or employee, shall declare his or her interest in such contract or transaction at a meeting of the directors of the corporation and shall at that time disclose the nature and extent of such interest including, as to any contract or transaction involving the purchase or sale of property by or to the corporation, the cost of the property to the purchaser and the cost thereof to the seller, if acquired by the seller within five years before the date of the contract or transaction, to the extent to which such interest or information is within his or her knowledge or control, and shall not vote and shall not in respect of such contract or transaction be counted in the quorum.

(2) Subsection (1) does not require the disclosure of any interest in any contract or transaction unless the interest and the contract or transaction are both material.

(3) The declaration required in subsection (1) shall be made at the meeting of the directors at which the proposed contract or transaction is first considered, or if the director is not at the date of the meeting interested in the proposed contract or transaction, at the next meeting of the directors held after he or she becomes so interested, or if the director becomes interested in a contract or transaction after it is entered into, at the first meeting of the directors held after he or she becomes so interested, or if a contract or a proposed contract or transaction is one that in the ordinary course of the corporation's business would not require approval by the directors or owners, at the first meeting of the directors held after the director becomes aware of it.

(4) If a director has made a declaration and disclosure of his or her interest in a contract or transaction in compliance with this section and has not voted in respect of the contract or transaction at the meeting of the directors of the corporation, the director, if he or she was acting honestly and in good faith at the time the contract or transaction was entered into, is not by reason only of holding the office of director accountable to the corporation or to its owners for any profit or gain realized from the contract or transaction, and the contract or transaction is not voidable by reason only of the director's interest therein.

(5) Despite anything in this section, a director, if he or she was acting honestly and in good faith, is not accountable to the corporation or to the owners for any profit or gain realized from any such contract or transaction by reason only of holding the office of director, and the contract or transaction is not by reason only of the director's interest therein voidable,

(a) if the contract or transaction is confirmed or approved by at least two-thirds of the votes cast at a meeting of the owners duly called for that purpose; and

(b) if the nature and extent of the director's interest in the contract or transaction are declared and disclosed in reasonable detail in the notice calling the meeting.

50 Mr. Dobbie's argument under this section has similarities to and relationships with his s. 39 argument. He argues that, because L.C.C. became a party to the lease as successor landlord when the corporation was created on September 15, 1987, the three defendant directors, Spriet, Murdoch and Proudfoot had a duty of disclosure of their common interest in the Pier 17 lease at a meeting of the turnover Board.

51 I cannot agree with his excessively expansive reading of s. 17, whether considered alone or contextually in the light of the general thrust and purposes of the Act.

52 While s. 17(1) calls for disclosure by a director of "any interest in any contract or transaction to which the corporation is or is to be a party", the later language of s. 17 makes it abundantly clear that the declaration of interest relates to a "proposed contract" which is coming before the Board for first consideration and was not intended to apply, by relation back, to otherwise valid contracts which the corporation takes over through successor rights under the Act.

53 This interpretation is consistent with the interpretation I have given to s. 39 and comports with the sense of other sections of the Act.

54 For example, in s. 51(1), one finds a clear proviso which does reach or relate back in time to affect agreements of sale entered into by the declarant developer. Here, there is express mention that the "proposed declarant" must include in any agreement of purchase and sale certain protective provisos for future unit purchases, failing which these provisos will be "deemed" to be included. Again, s. 52(1) also reaches the prospective declarant by saying that an agreement of purchase and sale will "not be binding on the purchaser" until the declarant provides a current Disclosure Statement to that purchaser.

55 In the result, I conclude that s. 17 did not require the defendant partners to disclose their interest in the Pier 17 lease at any meeting of the Board, either before or after the turnover meeting.

56 I re-emphasize here that the evidence satisfies me that all the members of the first Board, along with the later turnover Board and its successors, knew full well that the three partners enjoyed the complete benefit of the Pier 17 lease. Two of these three partners stayed on the Board for several years and certainly did not hide their interests in the lease at all.

Damages

57 I must assess the plaintiff's claim for damages notwithstanding my findings on liability.

58 Mr. Dobbie's position was that, based on his s. 39 argument, the Pier 17 lease expired on October 1, 1987, that is, one year after its effective date. He asks, therefore, for damages based on unlawful possession and loss of profits since that date. Mr. Dobbie has helpfully presented a detailed summary of his claim based on the profit-and-loss statements of the defendants' earnings from the lease over the years. He arrives at a figure of \$90,733 using the net profit figure of \$59,828 appearing in the defendants' statements from 1987 to 1996 and adding additional sums totalling about \$31,000 for amortization and legal fees which the defendants claimed for income tax purposes.

59 I agree with Mr. Dobbie that the legal fees, totalling about \$8,000, should be charged back to the defendants but cannot accept his argument that the amortization sums should be similarly charged back. As a result, I would assess his damages at a rounded-off figure of \$67,000, plus pre-judgment interest of 5% from October 1, 1987.

Disposition

60 The plaintiff's action must accordingly be dismissed. I would have thought that costs should follow the event but, if counsel cannot agree, they may make submissions on costs, in writing, within the next 15 days.

KILLEEN J.

2005 CanLII 618 (ON S.C.)

COURT FILE NO.: 04-CV-028659

DATE: 2005-01-18

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: LANARK CONDOMINIUM CORPORATION
NUMBER 10 -and- 105 NORTH STREET LIMITED

BEFORE: The Honourable Mr. Justice Charles T. Hackland

COUNSEL: JOHN E. SUMMERS, for the Applicant

KEITH A. MACLAREN and JASON
DUTRIZAC, for the Respondent

HEARD: Ottawa, January 6, 2005

ENDORSEMENT

[1] The applicant is a condominium corporation and is owner of property described as Part 2 on registered Plan 27R-6582 in the County of Lanark. The respondent is the owner of the adjacent property, described as Part 1 on the registered Plan 27R-6581. The respondent has had the benefit of a right of way, in particular a roadway, over Part 2, being the applicant's land. There are issues between the parties as to whether this is a valid right of way and whether the right of way is overburdened by the usage being made of it by the respondent.

[2] The applicant seeks a declaration that the right of way is invalid for non-compliance with the Planning Act, R.S.O. 1990, C. P.

13 or, alternatively, because the description of the right of way is too vague to properly convey a right of way.

[3] There was no Planning Act approval for this right of way which was alleged to be created by the registration of the condominium declaration in June of 1997. Prior to the enactment of amendments to the Condominium Act in 1998 such approval was required, unless section 40(1) of the Land Titles Act, R.S.O. 1990, C.L.4, as amended, applied. Section 40(1) allowed for the creation of an easement by registration of a condominium declaration as long as the easement was "expressly intended to be an easement through the common elements and to benefit other land owned by the declarant". Unfortunately, the condominium declaration containing the easement or right of way in question does not describe the location of the right of way other than to provide that it is "over Part 2" of the applicant's lands and it is said to be "for the sole purposes of providing ingress and egress for vehicular and pedestrian access to and from [the Respondent's] lands". Accordingly, the applicant argues that the grant is so vague that it can not be said that section 40(1) of the Land Titles Act applies, i.e. it can not be said that the right of way was intended to be "through the common elements". Moreover, it is said that the vagueness in the description prevents the creation of a right of way at common law.

[4] While the applicant's position might ultimately be found to be correct, I can not make this decision on a motion under Rule 14.05(3) because there are disputed facts in the affidavit materials and still other important facts that are not before the Court. The available evidence satisfies me that at all material times there has existed a roadway which benefits the condominium on Part 2 as well as the senior citizen's complex subsequently constructed by the respondent on Part 1. An important triable issue exists as to whether the grantor of the right of way intended to make the grant in respect of this roadway and simply failed to accomplish this through inadequate drafting of the condominium declaration. If this is what

occurred, a trial judge, after hearing all of the relevant evidence, might be persuaded to grant rectification or equitable relief to the respondent.

[5] The respondent, by way of cross-motion, seeks a stay of this application on the basis that the issues between the parties must be arbitrated pursuant to the provisions of a Joint Use and Maintenance Agreement which the parties entered into in August of 1999. This agreement deals with the management of the easements as set out in the registered declaration and the "Shared Facilities", which are defined in the agreement to include "a private roadway" as well as utilities and certain shared recreational facilities. The provisions in question are the following:

"WHEREAS

D. Lanark Condominium Corporation NO. 10 and North Street have entered into this Agreement on a non-profit basis for the purpose of providing for the mutual maintenance, repair, replacement and cost sharing of the Shared Facilities situated on their respective lands and to define their respective rights and obligations with respect thereto.

5. In the event of any dispute between the parties hereto with respect to any matters arising from or pertaining to this Agreement, and such matter cannot be resolved between the parties, the matter in dispute, upon notice by one party to the other stipulating that it requires the matter to be submitted to arbitration, shall be submitted to a single arbitrator, mutually agreed upon and the decision of the arbitrator shall be binding upon the parties hereto."

[6] The question is therefore whether the issues in this application constitute a dispute between the parties "arising from or pertaining to this Agreement...", keeping in mind that the purpose of the Agreement, fairly construed, is to govern the use of the private

roadway (and other shared facilities) and to define the parties "respective rights and obligations with respect thereto."

[7] I see no merit in the applicant's argument that the arbitration clause in the agreement can not apply retroactively to issues which existed before the agreement was signed. There is nothing in the agreement to suggest such a restriction and no valid policy reason to support such an interpretation. It would seem to be very clear that the question of whether the respondent is overburdening the right of way by using it to provide access to a more intensive use building than originally contemplated by the grantor or/and by using it to provide access to an adjoining property owned by the respondent, falls squarely within the arbitration clause.

[8] The more difficult issue is whether the question of the validity of the right of way itself can be said to fall within the scope of the arbitration clause. I have reluctantly come to the conclusion that the essentially legal question of whether a valid right of way was ever created in the first place is outside the scope of the matters which the parties intended to be governed by the Joint Use and Maintenance Agreement. To determine whether a right of way exists in the first place is an inherently different issue from matters pertaining to its usage. I note as well that if the applicant's position is ultimately successful, municipal easements might also be invalidated and therefore the municipality and indeed other possible third parties who are not party to this agreement may be effected. I do not think the parties to this agreement ever intended such matters to fall within the arbitration clause.

[9] In the circumstances, I direct that there be a trial of this Application. The applicant will serve a Statement of Claim on the respondent and such other parties as should properly be involved within 30 days of the release of these reasons and matters will then proceed in accordance with the Rules of Civil Procedure. As neither

party has succeeded in terms of the relief claimed, costs will be left to the trial judge.

[10] I wish to express the Court's view that the parties' interests would be well served by including the arbitral issue of overburdening in this proceeding or in agreeing to mediate/arbitrate all issues so as to avoid the many difficulties associated with concurrent proceedings.

The Honourable Mr. Justice Charles T. Hackland

DATE: 18 January 2005

CBR# 191

Metropolitan Toronto Condominium Corp. No. 706 v. Quinto

Between

Metropolitan Toronto Condominium Corporation No. 706,
applicant (respondent in appeal), and
Gino Sal Quinto and Lorraine Hinds, respondents (appellants in
appeal)

Ontario Court of Appeal
Toronto, Ontario
Tarnopolsky, Finlayson and Galligan JJ.A.

January 15, 1991.
(2 pp.)

On appeal from Hoilett D.C.J.

Real property — Condominiums — Application of statute.

Appeal by Quinto from a judgment. At issue was whether the Condominium Corporation should have proceeded under the Landlord and Tenant Act rather than under the Condominium Act.

HELD: Appeal dismissed. The Condominium Corporation could only have proceeded under the Condominium Act.

Statutes, Regulations and Rules Cited:

Condominium Act.
Landlord and Tenant Act.

Counsel:

No counsel mentioned.

The judgment of the Court was delivered by

1 TARNOPOLSKY J.A. (endorsement):— On the application to admit fresh evidence we do not find the evidence not to be discoverable prior to the proceedings below and so the appeal is dismissed.

2 In our opinion the sole issue in this appeal is whether the applicant Condominium Corporation should have proceeded under the Landlord and Tenant Act rather than pursuant to the Condominium Act. However, the former Act does not provide for application by the Condominium Corporation and so the only Act under which the applicant could have proceeded is the Condominium Act. In our opinion the evidence before Hoilett J. was properly before him. The appeal is accordingly, dismissed with costs to the respondent by the appellant Hinds with this hearing and the earlier hearing of the Court. There shall be no order as to costs of the motion before Robins J.A.

TARNOPOLSKY J.A.

CBR# 235

Peel Condominium Corp. No. 449 v. Hogg

Between

Peel Condominium Corporation No. 449, applicant, and
Amy Elizabeth Frances Hogg, respondent

Court File No. A4625/96

Ontario Court of Justice (General Division)
Carnwath J.

Heard: January 16, 1997.

Judgment: January 30, 1997.

(11 pp.)

The applicant Condominium sought to enforce its no pets rule set out in its disclosure statement and declaration. The respondent was a unit holder who owned and kept a dog in her unit. In previous years, the applicant had not enforced the rule and several unit holders, including the respondent's predecessor in title, owned pets. The respondent pleaded laches and acquiescence.

Counsel:

Jonathan H. Fine, for the applicant.

Lesli Bisgould, for the respondent.

1 CARNWATH J.:— Peel Condominium Corporation No. 449 was created October 23, 1991 and is located at 155 Hillcrest Avenue, Mississauga, Ontario. Amy Hogg owns suite 2103, in which she lives with her dog, Jazz. Peel Condominium seeks to enforce the no-pet provision set out in its disclosure statement and declaration.

2 The issue to be decided is whether the acts of the original declarant, The Carlyle Residences (III) Inc. estops Peel Condominium from requiring Ms. Hogg to remove her pet from her residence.

NARRATIVE HISTORY INCLUDING MY FINDINGS OF FACT

3 Carlyle Residences was the original developer and declarant of the condominium. Ms. Hogg purchased her suite from Carlyle on October 28, 1993. She consulted a lawyer prior to her purchase and received a reporting letter following closing. She is one of 341 unit owners. As required by the Condominium Act, Ms. Hogg received the disclosure statement following which she had a ten-day cooling-off period to cancel her Agreement of Purchase and Sale. The disclosure statement noted in two places that the declaration provided that no animal, including those usually considered pets, should be allowed upon the common elements or kept or allowed in any residential unit. Indeed, the declaration as registered, prohibits the keeping of animals on the property.

4 Carlyle Residences' representatives controlled the board of directors of the condominium corporation until November 1995, at which time the first unit owner board of directors was elected. Carlyle Residences continued to manage the property until June 1996. During the time that Carlyle controlled the declarant's board of directors and continued to dispose of its unsold units, neither the board of directors, nor its related property manager (Carlyle Management Services Inc.), took any steps to enforce the no-pet provisions of the declaration. Therefore, at the time the unit owner board of directors took over in November, 1995, there was a significant pet problem in the building with dozens and dozens of suites occupied by pets and their owners.

5 Ms. Hogg did not have a dog when she bought her unit in October of 1993, but acquired Jazz in July of 1994 at a time when the condominium was still controlled by the declarant's board of directors. She concedes she did not make any inquiries as to whether pet ownership was permitted but she was aware of many pets living openly in the building. Because of the number of animals she observed, she believed pets were allowed. For the two years following July of 1994, Peel condominium never complained about Jazz, despite Ms. Hogg's open ownership; the dog was taken out three or four times a day through the lobby and past the security desk. Carlyle Management Services and its employees saw the dog on countless occasions, both in Ms. Hogg's unit and out of it, and never indicated there was a problem with having dogs in the building in general, or with Jazz in particular. The uncontroverted evidence is that Peel Condominium took no steps prior to April of 1996 to enforce the pet prohibition in the declaration, that pets lived openly in the building since 1990 and that many people were unaware of the prohibition.

6 Following its election in November of 1995, the first unit owner board of directors turned its attention to the pet problem. A decision was taken to require offending unit owners and residents to remove their pets, pursuant to the condominium corporation's perceived legal duty to require compliance with the declaration. In April 1996 the board sent a series of up to five letters to offending owners, granting the opportunity to voluntarily comply with the declaration. Ms. Hogg refuses to comply. Since the beginning of the campaign, most of the offending unit owners have voluntarily removed their pets upon terms negotiated between the board and the owners. It is Peel Condominium's position that Ms. Hogg is the only unit owner known to the condominium corporation that flatly refuses to comply with the declaration. Ms. Hogg acknowledges she has not made any attempt to call a meeting of owners to consider the question of amending the declaration. She understands that keeping Jazz in her unit is contrary to the declaration and that by accepting the deed, she agreed to be bound by the provisions of the declaration; she nevertheless requests an order that she be permitted to keep Jazz in her unit.

THE LAW

7 Registration of a declaration pursuant to the Condominium Act creates a condominium corporation, which is a corporation without share capital whose members are its unit owners from time to time. Its affairs are managed by a board of directors. The declaration is similar to articles of incorporation of a business corporation and is the constitution of the condominium corporation.

The declaration can be amended only with the consent of all the unit owners and mortgagees. The following judicial statement underscores the importance of the declaration:

The declaration, description and by-laws, including the rules, are therefore vital to the integrity of the title acquired by the unit owner. He is not only bound by their terms and provisions, but he is entitled to insist that the other unit owners are similarly bound.

There is no place in this scheme for any private arrangement between the developer and an individual unit owner. If an individual arrangement is made, it must be disclosed in the declaration (s. 3(1)(f)).

Re Carlton Condominium Corporation No. 279 and Rochon et al. (1987), 59 O.R. (2d) 545 at 552 (C.A.)

8 Ms. Hogg relies upon a private arrangement made between the declarant, Carlyle Residences, through its board of directors, with some but not all other unit holders, to the prejudice of the condominium corporation and the unit owners in compliance with the declaration. This private arrangement I find to have been created either by acts and statements of the original declarant encouraging the introduction of pets in order to sell units, or by acquiescence on the part of the original declarant from 1990 to November of 1995. The ability of the original declarant to bind subsequent unit owner boards of directors was also considered in Re: Carlton Condominium Corporation No. 279 v. Rochon et al. referred to above:

The scheme of the Act is to permit the declarant as "the owner or owners in fee simple of the land described in description at the time of registration of a declaration and description of the land ... "(s. 1(1)(l) to create the corporation by filing the said declaration and description (emphasis added). As it sells off the units, it loses control of the corporation to the purchasers who, as the owners of the units, become the new shareholders. I do not believe that the declarant can unilaterally change the declaration, cause the corporation to change it, or excuse individual unit owners from compliance therewith ... the declarant ... can never be a bona fide purchaser of a unit and it is these "unit owners" that the Condominium Act is intended to protect.

9 Under the Condominium Act the condominium corporation and each unit owner has a right to the compliance by all owners with the Act the declaration and the by-laws and rules of the corporation. Indeed, the condominium corporation has a duty to require compliance; where compliance is not forthcoming the condominium corporation has a right to apply to the Ontario Court (General Division) for an order directing the performance of the duty and the court may exercise its discretion, order direct performance of the duty and may include in the order any provisions that the court considers appropriate in the circumstances.

THE RESULT

10 I am invited by Ms. Hogg, through her counsel, to exercise my discretion by applying the equitable doctrines of laches and acquiescence as they apply to the facts of this case. In considering the exercise and my discretion, I am helped by the criteria considered by Herold J. in Metropolitan Toronto Condominium Corp. No. 776 v. Gifford [1989] O.J. No. 1691 Action No. M176258/89, Ontario District Court, York Judicial District, Toronto, October 11, 1989. Some of the relevant consideration found by Herold J. requiring consideration included the following:

- 1) The nature of the total development -- for example, is it a high-rise or townhouses? Does it consist of senior only or mixed residential?
- 2) What are the reasonable expectations of the other occupants of the development?
- 3) How seriously do other occupants take this particular issue as opposed to other issues?
- 4) Does the conduct of the unit owner in question interfere with others?
- 5) Have there been any complaints by other unit owners?
- 6) What is the relationship between or amongst the various interested parties?
- 7) What is the actual wording of the covenant which is being enforced -- are similar pets allowed, for example, while dogs are disallowed?
- 8) What are the advantages of requiring compliance compared to the advantages of permitting noncompliance?

11 Herold J. found that the reasonableness of a no pets clause was more apparent in the case of a high-rise apartment than in the case of townhouses. I agree and note that the building in question is 22 storeys high. How serious of the other occupants were with respect to this issue can be measured by the immediate action taken by the unit owners' board of directors shortly after the condominium corporation was turned over. There is little or no evidence to suggest the conduct of the unit owner interfered with others or that there were any significant complaints by other owners. The wording of the covenant is unequivocal - no pets. The major advantage permitting Ms. Hogg to keep Jazz in her unit would be to permit her to retain a dog of which she is extremely fond. The major advantage of requiring compliance to quote Herold J.:

... appears to me to be that a message will be sent out by the board to the unit owners that the declaration and by-laws are in place for a good reason and they will be enforced, and a message will also be sent by the court that where the board acts reasonably in carrying out its duty to enforce the by-laws and declaration, the board will be supported by the court. To permit non-compliance in this case would clearly open the door to numerous, possibly very legitimate, requests by other unit owners to exempt them from certain other requirements in the Declaration and by-laws on the basis that each case should be decided on its own merits. While I do not disagree that each case must be decided on its own merits, at least by the Court if not by the Board who appears to have no discretion, the general message surely must be that enforcement will be expected and exceptions will be rare and will require a Court Application in any event. A longer term result of this position will surely be that people will only move into the building if they are prepared to live by the rules of the community which they are joining -- if they are not they are perfectly free to join

another community whose rules and regulations may be more in keeping with their particular individual needs, wishes or preferences.

12 This last comment by Herold J., I find, to be particularly appropriate with regard to the matter before me. Considering the factors mentioned above, I exercise my discretion in favour of enforcing the declaration in granting the relief requested by the condominium corporation.

13 An order will go directing Amy Elizabeth Frances Hogg to comply with the declaration of Peel Condominium Corporation No. 449 and more particularly with articles III.6 and IV.5.D and requiring her to permanently remove the dog Jazz from suite 2103 and from the common elements of Peel Condominium Corporation No. 449.

14 My current view is that this is not a case for costs and therefore, unless representations are made to me within 20 days of the date of release of these reasons by either party claiming costs, there will be no costs of this application.

CARNWATH J.

CBR# 181

McDonough v. York Condominium Corp. No. 41

Between

John T. McDonough, applicant, and

York Condominium Corporation No. 41, known as Markham Glen,
respondent

Ontario District Court - York Judicial District

Toronto, Ontario

Gotlib D.C.J.

Heard: April 26, 1990.

Oral judgment: April 26, 1990.

(37 pp.)

Application for an order restraining the condominium board from destruction of the common swimming pool. Due to ongoing problems with security and vandalism at the pool, the board called a meeting of the owners in 1988 and held a vote regarding temporary closure of the pool. A similar discussion was held in 1989 regarding permanent closure of the pool. The applicants argued that insufficient notice was given regarding permanent closure of the pool, that the requisite consent of the owners to a material alteration to the common expenses was not obtained, that a temporary closure of the pool in 1988 was beyond the Board's powers, and that there was a discrepancy as to the amount of money available for restoration of the pool.

Counsel:

Brian P. Horgan, for the applicant.

Mary Kodric, for the respondent.

1 GOTLIB D.C.J. (orally):— The Court is ready to proceed in Reasons for an Order in the matter of an application by John T. McDonough, as applicant, against York Condominium Corporation No. 41, known as Markham Glen.

2 The Court proceeded in conjunction with an amended application record dated August 18, 1989. There are numerous requests contained in that application beginning with an Order restraining the respondent board from destruction of the swimming pool; ordering an estimate of repair costs for the pool, prepared by an outside auditor; requesting an Order that the respondents call a general meeting, presided over by an outside inspector; for redeliberation on a motion to close the pool, on due notice and including a secret ballot; for the appointment of J. Brian Sheedy of the firm of Deloitte & Touche as the inspector; and for other relief as therein set out.

3 Before I proceed further, I would like to raise some questions. The application contains about ten affidavits and exhibits, and all of those affidavits appear to be xeroxed copies.

(Discussion between Court and counsel.)

4 I go on with my Order. The subject matter of this dispute arose in the annual meetings of the Condominium Corporation as early as 1983, and the Court had filed with it certain letters which have been called ballots, but indicating that the subject of vandalism at the swimming pool attached to the property, has been under review at least since that time. This application under the Condominium Act concerns the closure of the swimming pool of the corporation. The respondent corporation is a condominium known as Markham Glen and contains 210 dwelling units and is located at 180 Markham Road in Scarborough. The applicant is the owner of unit 1505 in that development.

5 There is clear indication as early as 1983 that there was frequent vandalism, and more recently the swimming pool guard was attacked and refused to return and could not be replaced for 3 weeks. The pool itself has been kept open only during the months of July and August, in any event; the development has been in place for some 20 years.

6 The issues surround the conduct of the board of directors in calling the meeting and taking a vote to close the swimming pool. This has led to a loss of tempers. The matter has descended into name calling, and, for the purposes of this judgment, I choose to ignore those factors. There appears to be a great deal of anger and much irrationality in the conduct of the parties, which serves only to add fuel to the fire.

7 The Court here will deal with the legislation which affects the facts as they appear before the Court. The first and the most important is the Condominium Act, R.S.O., 1980, as amended, and the first section I will deal with is section 12; it contains the very trite obligation of the corporation. Section 12:

"(1) The objects of the corporation are to manage the property and any assets of the corporation.

(2) The corporation has a duty to control, manage and administer the common elements and the assets of the condominium corporation.

(3) The corporation has a duty to effect compliance by the owners with this Act, the declaration, the by-laws and the rules."

8 That latter section, of course, contemplates management by the corporation of defaulting owners or owners who are not complying with the rules.

9 I go on to section 20(1) which reads:

"(1) At least ten days written notice of every meeting of the owners specifying the place, the date and the hour thereof and the nature of the business to be presented shall be given to each owner or mortgagee entitled to vote, personally or by prepaid mail addressed to him at the address provided under subsection (2)."

10 Subsection (2) reads as follows:

"(2) The corporation shall maintain a record upon which shall be entered each owner or mortgagee who notifies the corporation of his entitlement to vote and of his address for service, and the notice of a meeting required by subsection (1) shall be deemed to be sufficiently given if given in accordance with subsection (1) to those persons entered on the record twelve days before the date of the meeting."

11 Section 22 reads as follows:

"(1) All voting by owners shall be on the basis of one vote per unit and, where two or more persons entitled to vote in respect of one unit disagree on their vote, the vote in respect of that unit shall not be counted.

(2) On a show of hands or on a poll, votes may be given either personally or by proxy.

(3) An instrument appointing a proxy shall be in writing under the hand of the appointer or his attorney, and may be either general or for a particular meeting."

12 The legislation goes on indicating other requirements, such as: a proxy need not be an owner; an owner is not entitled to vote if he is in arrears for more than 30 days of any contribution required; and unless otherwise provided, all questions are to be determined by majority of the votes cast; and that no owners are entitled to vote in respect of a unit that is intended for parking or storage purposes.

13 Section 24(1) is again trite:

"(1) Every director and officer of a corporation shall exercise the powers and discharge the duties of his office honestly and in good faith."

14 Section 38(1) is more important, probably the most important section for the purposes of this case.

"(1) The corporation may by a vote of owners who own 80 per cent of the units make any substantial addition, alteration or improvement to or renovation of the common elements or may make any substantial change in the assets of the corporation, and the corporation may by a vote of the owners make any other addition, alteration or improvement to or renovation of the common elements or may make any other change in the assets of the corporation."

15 I comment on that section at this time, so that the parties to this hearing will understand that I take the view, in law, that 80 per cent of the owners means 80 per cent of those who have attended a meeting to vote. That presupposes a valid notice given in sufficient time and with sufficient documentation to allow owners to consider the matter to be voted on at a meeting. It is inconceivable that 80 per cent of all of the owners would be required for a valid vote. There are those who do not wish to be involved in controversy for whatever private reasons they may have. There are those who are simply disinterested and do not care, and there are a hundred reasons why persons may choose to not be involved. Those who are unavailable may appoint a proxy to vote on their behalf, and therefore I judge that 80 per cent of the owners means 80 per cent of the owners present at a meeting of which they have been duly notified and furnished with supporting documentation.

16 Section 40(2) and section 40(4) have been referred to; I should include subsection (1). They read as follows:

"(1) Every person in receipt of money paid to or for the benefit of the corporation shall, upon reasonable notice and during normal business hours, make available for examination by the corporation or any owner or mortgagee, all records relating to the receipt and disposition of such money."

17 Subsection (2) has been relied upon:

"(2) Upon application to a judge of a county or district court by the corporation or any owner or mortgagee, the judge, if satisfied that the application is made in good faith and that it is prima facie in the best interest of the applicant to do so, may make an order, upon such terms as to the costs of the investigation or audit or otherwise as he considers proper, appointing an inspector to make such investigation of the affairs of any person in receipt of money mentioned in subsection (1) and to make such audit of accounts and records of such person as the judge considers necessary."

18 Subsection (4) refers to trust monies and reads as follows:

"(4) All money referred to in subsection (1) shall be held by the person in receipt thereof in trust for the performance of the duties and obligations in respect of which the money is paid, and he shall pay such money into a separate account at a chartered bank or trust company or a loan company or credit union authorized by law to receive money on deposit or a Province of Ontario Savings Office and shall designate the account as a trust account in the name of the corporation."

19 This section has been raised by the applicant, and I will rule on its principle in the facts before me, but it seems to me that that section applies to accounting for money received. The issues before this Court do not imply or suggest that there has been any misappropriation of funds or misspending. What is in issue before this Court is the interpretation of financial statements and the allocation and methods of dealing with monies to be raised; I do not believe that section 40 applies to the case before me.

20 The last part of the legislation I wish to deal with is section 49(1), which reads as follows:

"(1) Where a duty imposed by this Act, the declaration, the by-laws or the rules is not performed, the corporation, any owner, the bureau, or any person having a registered mortgage against a unit and common interest, may apply to the county or district court for an order directing the performance of the duty."

21 Subsection (2) reads as follows:

"(2) The court may by order direct performance of the duty and may include in the order any provisions that the court considers appropriate in the circumstances."

22 I go on to the creating documents of this condominium and refer, first of all, to the Declaration, and I refer to page 5 of a booklet comprising the condominium documents, under the heading "Common Expenses." Part II subsection says:

"(2) Each owner, including the Declarant, shall pay to the Corporation his proportionate share of the common expenses, which shall include payments towards any separate fund or funds, as may be provided for by the by-laws of the Corporation, and the assessment and collection of contributions towards the common expenses may be regulated by the Board of Directors of the Corporation pursuant to the by-laws of the Corporation."

23 I go on the Part VI of the Declaration:

"(1) The Corporation may by a vote of members, who own Eighty (80) per cent of the Common Elements, make any substantial additions, alterations, or improvements to or renovation of the Common Elements or make any substantial change in the assets of the Corporation."

24 Subsection (3) of that Part reads as follows:

"(3) For the purpose of this clause VI, the Board of Directors of the Corporation shall decide whether any addition, alteration or improvement to, or renovation to the common elements or any change in the assets of the Corporation is substantial."

25 Moving on to Part VII, it reads:

"(2) The Corporation shall repair the Common Elements after damage, which includes repair to all exterior doors ... all at its own expense."

26 The next part of the condominium documents that is of importance is set out in By-Law Number 1, Article III, part 6:

"No public notice or advertisement of meetings of members, either annual or general, shall be required, but a printed, written, typewritten or otherwise mechanically reproduced notice in which is stated the day, the hour and place of the meeting, together with an agenda of the business to be transacted thereat, shall be either delivered or mailed by ordinary mail with postage prepaid to each member and to all mortgagees who have notified the Corporation of the registration of its mortgage, at least ten days (exclusive of the day of delivery or mailing, but inclusive of the day for which notice is given) before the date of every meeting, addressed to such address as is given by the member or mortgagee to the Corporation for the purpose of notice ..."

27 It then goes on with other and further particulars of the notice.

28 I deal, lastly, with the matter of budget, which is referred to as Article X of the by-laws and is headed "Assessment and Collection of Contributions Towards the Common Expenses." Part I deals with the annual budget:

"The board shall, at least thirty (30) days prior to the commencement of each fiscal year, prepare and adopt a budget for the corporation for the next ensuing fiscal year, setting forth in categories estimates of the amount of the common expenses of the corporation for such year and allocating and assessing such common expenses for such fiscal year among the owners according to the proportion in which they are required to contribute to the common expenses as set forth in the Declaration. In preparing the budget the board shall estimate the amount of income to be received by the corporation from the use, operation or rental of any of the common elements. In addition to all expenses, charges and costs of the maintenance, repair or replacement of the common elements and any other common expenses, charges or costs, which the board may incur or spend, there shall be included in the annual budget provision for the following:

(a) A Contingency Fund, which fund shall be used and applied from time to time towards meeting the deficits and such other common purposes as the corporation may deem necessary;

(b) A Reserve Fund, which shall include moneys received to be accumulated in the Reserve Fund as provided for in paragraph 3 of this Article X and to be used or expended for major maintenance items, which occurs less frequently than annually and for major items of repair or replacement made necessary by damage, deterioration, or obsolescence."

29 Part 2 deals with the contingency fund. Part 3 deals with the reserve fund:

"The moneys in the Reserve Fund shall be accumulated and when the amount in the Reserve Fund reaches \$21,100.00 the board shall no longer be required to include any minimum amount to be credited to the Reserve Fund in the budget, but shall administer the Reserve Fund with a view to maintaining it at that level. When the Reserve Fund reaches \$21,100.00 the interest on it may be

transferred by the board of directors to the amount maintained by the corporation to satisfy common expenses, but otherwise the interest shall be accumulated in the Reserve Fund."

30 Part 4 reads as follows:

"Contingency and Reserve Funds Part of Common Expenses. The Contingency Fund and the Reserve Fund shall be deemed part of the common expenses and in the event of sale by the owner, such owner shall not be entitled to any refund of the whole or any part of the contributions or deposits made from time to time by him to the Contingency Fund or Reserve Fund, but all his interest in the unexpended portion of each of the said Funds, if any, shall be transferred and enure to the purchaser of the unit with whom the owner will make necessary adjustments."

31 Part 5 is a lengthy part and deals with copies of budget and notices of assessments indicating that those are to be delivered or mailed by first-class mail to each owner not more than 21 days after the beginning of the fiscal year and provides for the payment of the monthly instalments. Part 6 goes on to deal with special assessments:

"Special Assessments. If at any time during the course of any fiscal year the board shall determine that the annual assessment of contributions are inadequate by reason of the revision in the Board's estimates of either expenses or income the board shall prepare and cause to be delivered to each owner and to each mortgagee who has notified his interest to the corporation a revised budget for the balance of such fiscal year and thereafter monthly contributions shall be determined and paid on the basis of such revised budget."

32 It is quite apparent from the reading of the Condominium Act and the documents creating the condominium that there is a heavy onus on the board of directors; running a 210 unit building is not an easy job. The operation of a condominium development is the ultimate exercise in community cooperation and democratic procedure, and many condominium boards have chosen to employ professional managers to relieve a volunteer board of very onerous duties and very time-consuming negotiations.

33 The Court has reviewed the extensive pleadings. The application here consists of 138 pages, 10 affidavits and exhibits appended to them; in the respondent's material, the Court has before it 4 affidavits. There is also a factum, which has been filed on behalf of the applicant; the facts seem to turn on a number of complaints by this applicant. There are some allegations that are simply unbelievable and if a trial of an issue were to be held, evidence would have to be heard. As to the certain events which occurred and inaccuracies in reporting the events that occurred at the 1989 annual meeting of the condominium, those are simply put one way by the applicant and another way by the respondents, and there is no way for this Court to test the credibility of the persons making those depositions. Suffice it to say, on April 11th, 1989, the annual meeting of Markham Glen was held. Among the matters discussed, moved and voted on was a motion put forth by the board of directors of Markham Glen to close the swimming pool, a common element for that season. It is clear, however, from the materials before the Court that the matter of the closing of the swimming pool for the season was not listed on the agenda giving notice of the meeting, so those who might have been concerned about the closing of the pool for the summer were not aware that such an issue would be discussed. The discussion came up either under new business or under the budget discussion. It is not material for the purposes of this order where such discussion came up, but it was discussed, and a vote was taken, and the decision was taken to close the pool for the summer. The board took the position that it was not a material alteration to the common elements to close the pool for the summer. That, of course, is strenuously disagreed with by the applicant. I find, however, on the basis of the section which I have read from the condominium documents, that the board was in a position to make that decision. However, that being the case, the notice was still improper, the vote was improper, and even if an 80 per cent vote of the owners present at the meeting was not required, it being a temporary closure of the pool, the matter was sufficiently important to have listed it as an agenda item and to have supplied more details prior to the meeting so that unit owners could have considered it properly. I find that the vote was improperly taken at the meeting, and, accordingly, the pool was improperly closed for the summer of 1988.

34 It may well be that the president was inaccurate in reporting the events of the 1989 annual meeting, but I consider the demand by the applicant that a letter be circulated by the president, acknowledging that he was wrong in reporting events of the meeting, to be inappropriate. There were two conflicting versions of what happened, and unless the Court is asked to adjudicate on the credibility of the parties giving the evidence and examine them viva voce on a trial of an issue, I find it pointless to decide that either party was right or wrong and that a letter of apology, even if the president were wrong, is inappropriate and only has served to exacerbate the arguments between the parties. The matter of closing the swimming pool for 1989 arose again, and this was officially announced by a proper agenda and discussed at the meeting. A vote was taken at the meeting, and the applicant said he got an amendment passed. It is a strange amendment, but an amendment it is, and all that that did was state a proposition of law that the vote to close the pool is invalid if 80 per cent of the owners have not voted for it. The applicant has attacked the vote at that meeting, and, as a result, the respondent circulated a questionnaire and says that as a result of the response to the questionnaire, 80 per cent of the owners responding have voted to close the pool, and it is barely 80 per cent. The applicant attacks the questionnaire saying it was biased and confused the voters and did not clarify the issues.

35 Throughout these proceedings, the applicant has imputed sinister motives to this lay board of directors. It is apparent that a lot of temper has gone back and forth, but a lay board is just that. Members are usually ordinary people and may or may not have professionals on it who attempt to run the condominium corporation in their free time. If those people are retired, so much the better. They have more free time. If they carry on other jobs, of which I have no evidence, then that is something to fit into their spare time. Despite all of the allegations, I find no sinister motive on the part of the board of directors of this condominium; and the allegations that the annual meeting in the spring of 1989 was delayed on purpose, simply does not hold water. Mr. Rossiter gave his reasons for that, which I accept.

36 The applicant alleges bias on the part of the president of the board and indicates that he should be impartial as chairman of the meeting and alleges that the letter summarizing the proceedings of the annual meeting of May 10, 1989 was both misleading and misrepresentative. The letter, as I have said, contained a questionnaire asking owners to vote for either motion, that is, to keep the pool open or to close it. This, I find, was an informal way of the board getting an opinion as to whether the pool ought to be carried on. It is a common element, and the board of directors are under a duty to maintain it, to perform that duty in the best possible way, bearing in mind a commitment to all the condominium owners. I find, however, that their attempts to close the pool by reason of extravagant maintenance costs arising out of vandalism and new security needs was not properly carried out for the 1989 meeting.

37 It is the Court's view that what ought to have been done was that a budget should have been prepared and various estimates obtained in support of the costs alleged in the budget for repairing and maintaining the pool. It may well be that a consultant's opinion would be in order to discuss security requirements, accepting the report that a pool guard was assaulted and wouldn't return for 3 weeks. Physical assault is a much more serious matter than property damage. I think that is so serious that the board was correct in proceeding with great caution in the continuance of the pool. The board ought to have obtained a report on security from an outside person. They ought to have obtained three estimates for the repairs to the pool. They ought to have had three maintenance cost budgets. All these ought to have been included in the main budget, delivered to the unit owners with ample notice prior to the meeting with the notice of the meeting to discuss the closure of the pool by reason of the dangers involved in this day and age and with the expense involved in maintaining it.

38 I have already expressed the view that the owners on due notice are entitled to have proxies. They are entitled to attend or not attend and not vote, but every effort should be made by the board to fully inform the owners, so that those who are concerned can consider the matter and all the relevant facts and attend, if they wish, to make an informed vote. I have already said, also, that 80 per cent of those present at the meeting is what is required. It is an absolutely thankless and hopeless job to expect to communicate with and get responses from 210 people, and I do not think that the provisions in the Condominium Act or the by-laws were intended to impose that burden on a volunteer board.

39 The applicant requests a secret ballot; and I have grave difficulty in understanding the request. The applicant, on the one hand, wanted to examine the ballots received by the board of directors in 1989, and, in fact, I made an order requiring the respondent to deliver copies of those ballots to the applicant's counsel on or before April 23rd, 1990. Why the applicant should be entitled in one breath to say, 'I am entitled to see the ballots,' and to say in the next breath, 'This should be a secret ballot,' I have some difficulty in comprehending. I think that if the vote is to be taken at a meeting either by ballot or by a show of hands, there would be absolutely no difficulty. The real difficulty is having an informed electorate; there is a duty on the board to gather together and furnish unit owners with the materials so that the owners may vote in an informed way. Every kind of questionnaire is subject to scrutiny; I cannot imagine that there is one that anyone can design that would satisfy everybody, and, therefore, full disclosure of all relevant information would satisfy the need to be informed and would result in a simple conclusion to this agonizingly difficult matter by vote.

40 Mrs. McDonough, as shown by her affidavit, discovered how hard it is to get people out to provide information that is required, and work people being as busy as they are in the summer months in Metropolitan Toronto have to be given enough time to come in and inspect; it is not an easy matter. If three estimates and three reports could be obtained in under 3 months or 4 months, I would be very surprised, but that is not for me to decide. That is for the persons interested to pursue those matters and get them as quickly as they can because they are important in this context.

41 Not only is the swimming pool important for the amenities of those living in the condominium, but it also goes to the market value. The maintenance of security goes to the market value. We, unfortunately, live in a big city and big metropolitan area where crime is rampant. It is fuelled by drug problems, and anything can happen in a public area such as the swimming pool. I can see that the board of directors is taking its obligations very seriously in its attempt to deal with the difficulties that they have encountered in terms of vandalism and assault. I do not think those efforts should be minimized by the applicants. In fact, there should be some assistance to the directors in carrying out their duties, aside from criticism.

42 There is no doubt that the questionnaire is inappropriate, that insufficient information was furnished to the condominium owners for the meeting in May 1989, and so that vote is therefore nullified. A further vote is therefore required with the materials that I have enumerated to be furnished, and while the required notice of the meeting is 10 days, I would order, in the circumstances and in the inflammatory nature of the events that have transpired, that at least 30 days' notice of the meeting be given.

43 The annual meeting will be perforce late, this year. This is now April 26th. If the board of directors is to gather the information that I have ordered and is to give 30 days' notice of a meeting, it cannot be held early in the season, but I have no doubt that if it is done in this manner, it will resolve the issue for once and for all. It is absolutely vital that the voters be disclosed so that the respondent board can be satisfied that the persons voting are entitled to vote. Tenants are not entitled to vote. A proxy can vote.

44 As to the issue of intimidation, I am confident that with this Order that matter will die down. Unit owners are adult property owners, and their views should be respected; if there is any degree of harassment or haranguing from either side, I am sure that the unit owners will know how to deal with that. It has become a largely political issue, which is unfortunate, because a swimming pool can be a valuable asset to the condominium owners.

45 There has been some question about the interpretation of the audit statements and questioning whether there was \$20,000.00 or \$30,000.00 allocated and available to restore and maintain the pool for 1989. I believe that those matters are solved by having an outside chartered accountant, who is experienced in condominium accounting, deal with the matter, or, in the alternative, and I find it an appropriate alternative, the chartered accountants who deal with the audit of the respondents' accounts could be asked to attend a meeting and speak to that matter.

46 I find that the allegation that the respondent board was wrong in insisting on an assessment instead of a month by month instalment payment for any excess charges incurred to renovate the pool to be without foundation. Under the condominium documents and under the Condominium Act, the respondents have a discretion to decide whether it is appropriate to make an immediate assessment or whether or not to spread it over monthly payments as part of the common monthly assessment. This lay board, having to choose, did so and decided on an assessment. The allegation that they were \$42.00 wrong in their assessment is of no consequence. It is a matter of interpreting the statements, and that can be done by the auditor attending the special meeting, which I trust will be called, or an annual general meeting to discuss the pool closure.

47 The president has made up his mind that the pool ought to be closed. He is certainly entitled to that view. He is not entitled to enforce that view on any other unit owners. The meetings have not been conducted in accordance with any established rules of order and have, in fact, been fairly informal all these years. It is not unusual for people who get along reasonably well to adopt informal proceedings, but in a case of a violently disputed matter, such as here, the closure of the swimming pool permanently the board must take the right steps and serve the right notices. I do not think it is important whether this board followed Robert's Rules of Order, or any other rules of order, but in the circumstances it is vital for the board, at its next meeting, to adopt some

rules of order. Robert's is possible. It is American. There are others. It is regrettable that the operation of the board has come to that place; I order the board to do so at this time.

48 I find that the members of the board of directors have acted in good faith, although without following the statute. They have been ill-informed. They have carried out their fiduciary duties to the best of their ability insofar as this Court can observe from the affidavits filed. They were faced with a very angry owner who made very serious allegations about the conduct of the meeting and the manner in which the vote was carried on. The fact is that he was right about some issues and absolutely wrong about others. The interpretation of these by-laws and the Condominium Act is not exactly an easy matter. His demand that the president of the respondent issue a statement to all the owners of Markham Glen that he misreported the motion and its amendment at the annual meeting of May 10, 1989, I find to be entirely unreasonable. It may well be, and I make no finding of fact, that there was a misreporting of the events, but I attribute no sinister motive to the manner of the report. The amendment, if that is exactly how it was done, simply stated the law, and the result would have been the same without the amendment. Either the vote is approved by 80 per cent of the owners, or it is not, and that is a matter of law to be determined, obviously by the Court.

49 The applicant is, indeed, entitled to have the board comply with the Condominium Act, the declaration, the by-laws and the rules.

50 There are many decided cases to assist me. The ones referred to by counsel, *Stutz v. York Condominium Corporation No. 422* (unreported), Mandel C.C.J. 1983 and *York Condominium Corporation No. 460 v. Civobel & West Hill* (unreported) C.A. 1982 are not really on the point. Those cases called for an inspector to make an investigation and an audit. That implies an allegation of impropriety in terms of handling of money. That is not the case before me. The real issue is the interpretation of the financial statements. There is no suggestion anywhere in all the allegations before me that there has been any mishandling of money. *York Condominium Corporation No. 460 v. Civobel* involved money and the establishment of a trust fund, which is not an issue before me.

51 In fact, there are ten points aside from those raised in the application, which were argued before me on behalf of the applicant, and I will deal with those arguments now.

52 The first is that the chairman of the board entertained a motion without notice; I have already ruled and found in favour of the applicant.

53 The applicant says, also, that the board closed the pool for 1988 without the consent of 80 per cent of the owners. The board, I have found, was within its discretion to decide that the temporary closure did not constitute a change in the common elements. I have already ruled that the board of directors did not follow any established rules of order.

54 I decline to make any finding based on the conflicting evidence before me that the board incorrectly reported the events at the annual meeting of May 10th, 1989 I find that to be a matter of minor consequence in any event.

55 The applicant argues a contravention of York Condominium By-law Number 1, Article X, Part 6, in demanding an immediate assessment. I have ruled that it is in the discretion of the board to choose between an immediate assessment and spreading it over monthly payments.

56 The applicant, fifthly, asks for the appointment of an inspector based on the fact that the May 10th, 1989 meeting was improperly held and the meeting was improperly conducted and improperly reported in the minutes, and all this leads to support for the appointment of an inspector.

57 Sixthly, the respondent was, it is alleged, in error by \$47.65 in the total annual assessment; I have already ruled that in the absence of various estimates the amount of money being small, it is not of any real consequence.

58 The applicant alleges bias on the part of the president and vice-president of the board against the pool. It is clear that they feel that closing the pool was the best course of action. The allegation is that neutral scrutineers were not made available by the respondent, and this, I find, is not ordinarily required, where there is an amicable relationship between the owners and the board.

59 The applicant alleges that the respondents disregarded fair voting practices; I have already ruled on the questionnaire. In reply, the respondent says the respondent corporation depends on the board of directors and, for the most part, the majority rule binds all parties, and that the pool is one example of cooperative effort. The respondent alleges that in 1988 no one complained to it about the temporary closure of the pool and says that in 1988, and I have already ruled in support of that submission, that the closure was not the equivalent of a change in common elements.

60 For the respondent, it is said that no rules of order were used in 1989 because there was no requirement that rules be used; for 18 years the board of directors used the same format successfully; this was not an autocratic decision which should fail by reason of the failure to use rules. I have already ruled that in the unfortunate present circumstances, rules of order are to be adopted by the board at the next annual meeting to avoid any further difficulty with dissenting owners. I agree that there is no obligation anywhere in the Condominium Act requiring a board to follow certain rules of order, but in the particular circumstances of this hotly contested issue, which has taken up so much time and so much emotion, I find that is and appropriate resolution.

61 I agree with the respondent that this common element is not being singled out. It is subject to more vandalism than other common elements and must be treated seriously.

62 There is no question of the board threatening owners with a special assessment; I have found that it is within the power of the board to insist on a special assessment in appropriate circumstances.

63 What then is to be done in this set of circumstances? I presume the board will now proceed with an annual meeting for 1989. I have already ruled on the form of notice which must contain the full agenda. I have already ordered the supplying of estimates for repair and maintenance and a consultant's report on security. The last question remaining to be resolved is the question of who will conduct the meeting and count the votes.

64 I am not as fortunate as Judge Mandel was in the *Stutz* case. He had before him three names of inspectors. I know nothing of the qualifications of Mr. J. Brian Sheedy. Is he an auditor? Is he a consultant? Is he a clerk in the office of Deloitte &

Touche? I would think that the board of directors should have some say as to the person appointed to conduct the meeting, and I order the appointment of an inspector for the purpose of conducting the meeting and counting the votes either to be taken by ballot at the meeting or by a show of hands at the meeting. I am not prepared to designate the inspector at this time, as I have no information, and while section 40 contemplates an investigation of financial wrong-doing, which is simply not the case before me, I am prepared to appoint an inspector under section 40 for the purpose of examining the audit of the budget for 1990 and for conducting the meeting and counting votes to be taken at that meeting. The inspector will also be required to ensure that notice has been given in accordance with this Order and that appropriate material has been supplied to each owner. In the result, both counsel are ordered to each obtain the names and qualifications of two persons and to appear before me at a later date so that I can select the inspector and hope that this highly charged dispute can now be settled. Obviously, it will not occur this week. I will ask counsel to forward those names to me at their earliest convenience, if possible by May 17th. I can deal with the selection on that date or very soon thereafter. I require personal signed consents by each of the persons proposed that they are prepared to act as such an inspector.

65 I endorse this application: Inspector appointed. Counsel to submit two names each with curriculum vitae and consent. Order to go that notice of annual meeting for 1990 be sent to unit owners 30 days prior, accompanied by three estimates as to cost of pool repairs. Consultant's report as to security needs and pool closure to be listed as agenda items. Vote to be taken at meeting requiring 80 per cent of owners present at meeting to vote to close the pool in order for the board to proceed with pool closure. Inspector to preside at meeting. Respondent auditor, or other professional auditor, to be present to explain budget. Oral reasons dictated.

(Discussion between Court and counsel re. costs.)

66 As I said at the beginning, and I repeat it again, there has been a lot of ill-will created by this dispute. I have seldom seen so many angry people, and, in fact, I believe that both counsel have, unfortunately, lost their objectivity as well, and that has only added fuel to the fire. It is very important for counsel to remain objective otherwise the matters before the Court get obscured by lengthy arguments and an adoption of personal views of their client.

67 I think the applicant has been at least partly right. The applicant has tried to kill a flea with a sledgehammer. The respondent, I have found, has been in error in many respects, and I have found that the vote taken in 1989 was not a proper vote, proper information having not been available to those at the meeting, and, therefore, I have directed that a further vote be taken on special terms at the next annual meeting, whenever it is held, bearing in mind the amount of material that has to be collected before that meeting can be held.

68 I find fault on the part of both the parties in their conduct of this matter and I therefore decline to award any costs to either side.

CBR# 233

Peel Condominium Corp. No. 338 v. Young

IN THE MATTER OF the Condominium Act, R.S.O. 1990, c. C26,
Section 49, as amended

Between

Peel Condominium Corporation No. 338, applicant, and
Ling Kwong Junlly Young and Mei Ha Pang, respondents

Court file No. A4000/95

Ontario Court of Justice (General Division)
Brampton, Ontario
Webber J.

March 28, 1996.
(10 pp.)

This was an application by a condominium corporation for an order to require the respondent unitholders to remove their dog. The Youngs purchased a condominium in 1992. The condominium was governed by a declaration that forbade pets that weighed in excess of 25 pounds. The Youngs' dog exceeded this limit. The Youngs were aware of this restriction as they received the declaration from their lawyer and they signed an acknowledgment.

Counsel:

Richard J. Worsfold for the applicant.
Peter P. Chang for the respondents.

1 WEBBER J.:— The applicant, Peel Condominium Corporation No. 338 (Peel), seeks the following relief:

- (a) an order that the respondents adhere to and perform the duties and restrictions imposed on them by the Condominium Act, R.S.O. 1990, c. C26, Section 49, as amended, and the Declaration of the Condominium Corporation, Article IV(2)(d);
- (b) for an order requiring the respondents to remove the dog housed in unit 1705, 50 Kingsbridge Garden Circle, Mississauga, Ontario;
- (c) if required, an order terminating the occupancy of the respondents.

2 The respondents purchased a condominium, unit 1705, 50 Kingsbridge Garden Circle, Mississauga, in November of 1992. The condominium was governed by a declaration registered on title on May 25, 1989. The declaration is found at tab 2B in the applicant's record. Article IV(2)(d) on page 5 of the said declaration states, in part, "Pets must not exceed 25 pounds at maturity". When the respondents took possession of the condominium unit, they brought with them their dog. There is no issue that the dog weighs well in excess of 25 pounds.

3 The respondents, at the time of the purchase, were represented by a solicitor. They received a copy of the declaration. In addition, they signed a direction and acknowledgement dated November 19, 1992 (see p. 11 of the brief of undertakings of the respondents). Paragraph 5 of that document read as follows:

I/We acknowledge reviewing the declaration, description, by-laws and regulations of the Condominium Corporation herein and acknowledge your advice to review same from time to time as these are the documents which, by and large, govern our use of the property purchased herein.

4 In addition, they also received their solicitor's reporting letter dated November 18, 1992 (see p. 3, brief of undertakings of the respondents). Paragraph 14 of that reporting letter states as follows:

In the event that you have purchased a condominium we would remind you of the special nature of condominiums with respect to, among other things, governance, common elements, by-laws and rules and regulations. We would remind you to carefully read and review all of the documents received from the condominium corporation which are enclosed herein.

5 The applicant relies upon the provisions of the Condominium Act, R.S.O. 1990, c. 26, in this application. Section 3(3)(b) provides that the declaration may contain provisions respecting the occupation and use of the units in common elements. The applicant's position with reference to the relief sought is founded upon s. 31(1) and (2). Those sections read as follows:

31.-(1) Each owner is bound by and shall comply with this Act, the declaration, the by-laws and the rules.

(2) Each owner has a right to the compliance by the other owners with this Act, the declaration, the by-laws and the rules.

6 The applicant's position, simply put, is that the owner has not complied with the declaration. The condominium corporation, therefore, has the responsibility under s. 12(3) "to effect compliance by the owners with this Act, the declaration, the by-laws and the rules".

7 Section 49(1) provides as follows:

Where a duty imposed by this Act, the declaration, the by-laws or the rules is not performed, the corporation, any owner, the bureau, or any person having a registered mortgage against a unit and common interest, may apply to the Ontario Court (General Division) for an order directing the performance of the duty. R.S.O. 1980, c. 84, s. 49(1), revised.

8 Peel expressed its concern, by letter dated August 30, 1994, about the dog (see applicant's record, tab 2C). Certain other correspondence took place between the parties, but, unfortunately for all concerned, no resolution was reached.

9 Counsel for Peel submits that, on the face of these documents and facts, the order sought should be granted because, clearly, the respondents are in breach of the declaration.

10 The respondents raise a number of issues as to why the order sought should not be granted:

(1) They submit that there have been no complaints about the dog. In my view, complaints are not required but, in any event, there is the evidence of concerns, as mentioned earlier. Further, a supplementary affidavit, upon which no cross-examination was conducted, by one Gary Williams, the chairman of the Board of Directors, raises concerns about the dog in paragraphs 6 and 11 of that affidavit. This issue does not provide a basis upon which to refuse the order sought.

(2) The respondents, in their responding material, indicate their close relationship and affection for the dog. The dog forms part of their life and they take the position that they must have the dog live with them because of the nature of that relationship. I have no doubt that they are greatly attached to the dog, but that fact does not provide any legal basis for denying the order sought. As noted below, this issue can be considered as a discretionary matter.

(3) The respondents took the position that the application presently before me was not properly authorized. The respondents rely on s. 16(2) of the Act, which states:

No business of a corporation shall be transacted by its board except at a meeting of directors at which a quorum of the board is present.

This issue was never raised until the argument. It is answered, in my view, by the affidavit of Mr. Williams at paragraph 11, where he indicates that the board of directors instructed the property manager to commence this application. There is no merit to this submission.

(4) The respondents take the position that they had no knowledge of the restriction contained within the declaration. I cannot accept this as a basis upon which to deny the order sought. The respondents received the declaration, signed an acknowledgement and received their lawyer's letter, which dealt with the declaration. I can only conclude that they chose either not to read the declaration or they chose to ignore the same. Further, I find their position contradictory when they contend that they knew dogs were allowed but they were not aware of the 25-pound rule.

Gilbert D.C.J., as he then was, in *York Region Condominium Corp. No. 585 v. Gilbert*, released January 23, 1990, makes the comment as follows:

It seems to me that a prohibitive pet restriction could be contained in the Declaration or the bylaws or the rules of a condominium corporation provided that the prohibitive pet restrictions is brought to the attention of a purchaser of a condominium unit prior to the closing of the sale and purchase of the unit.

I agree with his comment and conclude that they had, or should have had, knowledge of the restriction.

(5) The respondents submit that it is an implied term that such a restriction should be reasonable. Counsel for the applicant does not disagree but contends that the restriction is, in fact, reasonable. I agree. The declaration gives to all owners the right to bring dogs into the premises, provided they do not weigh more than 25 pounds. This restriction is more reasonable than a blanket denial of pets within the condominium unit.

(6) The respondents request the Court exercise its discretion in favour of the respondents on all of the facts. The subject of discretion has been canvassed in detail by Herold D.C.J., as he then was, in a case which also involved a restriction in a declaration. In *Metropolitan Toronto Condominium Corp. No. 776 v. Gifford*, released October 11, 1989, Herold J. began his analysis at p. 6. He listed a number of criteria on page 6 of that judgment which are applicable to the case at bar. On the basis of a consideration of those criteria, he refused to exercise his discretion in favour of the condominium owner for the reasons given therein.

Both counsel cited a number of decisions, all of which dealt with either a by-law or a rule, as opposed to a declaration, which is involved in this case. There was only one other case which was referred to that involved a declaration; namely, that of *Nipissing Condominium Corp. No. 24 v. Ferris*, a decision of Hogg J. released June 23, 1993. In that fact situation, there was a declaration which prevented any pets in the building. The dog in question was described as "a therapy, utility animal and, more particularly, it is a hearing-assist dog". Hogg was aware of the decision of Herold J. but refused to exercise his discretion in favour of the condominium but did so in favour of the owner. Without specifying the reason why he exercised his discretion in favour of the

owner, Hogg J. concluded, on the facts of the case, that his discretion should be exercised in favour of the owner. The dog in this case, as noted above, is much needed by the respondents but not to the same extent as the dog was in the Gifford case decided by Herold J. Nor is the dog in this case as necessary to the respondents as the dog was referred to in the decision of Hogg. The most important criteria, as discussed by Herold J., was the issue of advantages of requiring compliance compared to the advantages of preventing non-compliance. At p. 7 of his decision, he states as follows:

... that the Declaration and by-laws are in place for a good reason and they will be enforced, and a message will also be sent by the Court that where the Board acts reasonably in carrying out its duty to enforce the by-laws and Declaration the Board will be supported by the Court.

On the basis of the facts of this case, the criteria as enumerated by Herold, I conclude that the discretion should not be exercised in favour of the owner.

11 I am of the opinion that my decision in this regard finds support in the decision of the Ontario Court of Appeal Re Carleton Condominium Corp. No. 279 and Rochon et al. (1987), 59 O.R. (2d) 545. In that case, Mr. Justice Finlayson, speaking for the court, at p. 552, states as follows:

The declaration, description and by-laws, including the rules, are therefore vital to the integrity of the title acquired by the unit owner. He is not only bound by their terms and provisions, but he is entitled to insist that the other unit owners are similarly bound. There is no place in this scheme for any private arrangement between the developer and an individual unit owner. If an individual arrangement is made, it must be disclosed in the declaration (s. 3(1)(f)).

12 Under all of the circumstances, the applicant is entitled to the relief sought in paragraphs (a) and (b) of the notice of application. As discussed with counsel, if the respondents do not respond to the finding of the Court, then it may be necessary for the matter to come back before the Court to deal with the relief sought in paragraph (c). This portion of the application is adjourned without date, returnable on 5 days' notice.

13 Counsel may address the issue of costs by fax. My endorsement on the application reads:

Order to go as asked in paragraphs (a) and (b) of the notice of application. Relief sought in paragraph (c) is adjourned without date returnable on 5 days notice.

WEBBER J.

CBR# 346

Windisman v. Toronto College Park Ltd.

Toronto College Park Ltd. v. Windisman et al.

[Indexed as: Windisman v. Toronto College Park Ltd.]

Court File No. 93-CQ-38966

Ontario Court (General Division),
Sharpe J.,

February 13, 1996

The defendant was the vendor and declarant of a multi-purpose, including residential, condominium project in downtown Toronto. Marketing of units began in 1986, and the defendant required purchasers to take interim occupancy during the spring of 1989. Final closings were in August and September 1990. In accordance with the Condominium Act and the agreements of purchase and sale, the defendant charged purchasers an interim occupancy fee. The fee was based on a mortgage to be given back on closing (sometimes based on a "phantom mortgage", where the purchaser was not giving back a mortgage) and on reasonable estimates for municipal taxes and projected common area expenses. The defendant was obliged by s. 53(3) of the Act to pay interest on the purchaser's deposits at the prescribed rate during the interim occupancy period.

As at the time of the final closings, there were several unsettled legal and factual issues and pending cases about the interpretation of the Condominium Act. Uncertain was the right of a developer to include in the interim occupancy fee a charge for a phantom mortgage. The precise rate for interest to be paid on the purchaser's deposit was uncertain because of a dispute about the interpretation of the governing regulation. Final assessments for realty taxes had not been determined, and the defendant had launched assessment appeals. The defendant was unsure about whether it would be required to contribute to the condominium corporation's reserve funds. In resolving these uncertainties: the defendant included a charge for "phantom mortgages", it paid interest on deposits on residential units at the lower of the contending interest rates, it did not pay interest on deposits for parking and storage units (under the condominium declaration, these units were available only for those residing in the residential units and were owned by the owner of the residential units) and it made a contribution to the reserve fund. The defendant alleged that this "final closing package" was designed to close the transaction upon fair and equitable terms, balancing the interests of the purchaser and the developer. It contended that the final closing package conferred a benefit on the purchasers.

After the final closing and after it was determined in *Ackland v. Yonge-Esplanade Enterprises Ltd.* that developers must pay interest at the higher of the contending interest rates, in proceedings under the Class Proceedings Act, 1992, S.O. 1992, c. 6, the plaintiff sued on her own behalf and on behalf of some 544 purchasers of units. The class claimed \$617,031.75 for underpaid interest on the residential units, and it claimed \$881,996.97 for unpaid interest on deposits for parking and storage units. The class claimed further that the interest should be paid on a compound basis, which the defendant disputed. The defendant also disputed the claim for interest on deposits for parking and storage units and took the position by way of defence and counterclaim that it should be permitted to readjust the terms of the final closings because had it known of its obligation to pay interest at the higher rate, it would have been entitled to require the purchasers to close on less favourable terms. The defendant alleged that in the circumstances the purchasers had been unjustly enriched and that there should be an adjustment for the realty tax charge, an adjustment on account of the payment to the reserve fund, and also for some claimants an adjustment of the mortgage interest charge.

Held, there should be judgment for the plaintiff.

The defendant was required by s. 53 of the Act to pay interest on the deposits for parking and storage spaces during the interim occupancy period. Under this section, with certain exceptions, all money received from a purchaser on account of a sale "of a proposed unit for residential purposes" was to be held in trust in a separate account, and where a purchaser enters into possession before a deed is delivered, the declarant must pay interest at the prescribed rate. Subject to this obligation to pay interest at the prescribed rate, the declarant is entitled by s. 53(4) to any interest earned on the money held in trust. The Act did not define "residential unit" and the Act's only reference to parking and storage units was in s. 22(7), which provided that no owner is entitled to a vote in respect of a unit that is intended for parking or storage purposes. The plain and ordinary meaning of the phrase "residential purposes", the context of the statute as a whole, an analysis of the purpose and scheme of the whole Act, and case-law about the purpose of s. 53 all supported the conclusion that purchasers were entitled to interest on the deposits paid for and parking and storage units. As a matter of statutory interpretation, this interpretation was sufficiently certain; it is not necessary to test the interpretation against every conceivable factual setting and statutory interpretation is very much a case-by-case exercise. The defendant, however, was not required to pay interest on deposits on a compound basis. Neither the Act nor the regulation could be read as imposing an obligation to pay compound interest. Moreover, the Act explicitly abrogated the ordinary duties of the trustee and entitled the developer to retain interest earned on deposits which exceeded the interest to be paid. In the face of these provisions, it was difficult to find a basis in law or in equity to impose a duty to pay interest on a compound basis.

The defendant was not entitled by the contract to readjust for municipal taxes, the amount paid to the reserve fund, or for mortgage interest. No provisions in the contract or in the closing documentation assisted the defendant. The notation "E. & O. E." (errors and omissions excepted) and the undertaking to readjust did not apply in circumstances where the defendant's own argument was that it deliberately developed a fair and equitable final closing package. The non-merger clause was not relevant to the issues at hand.

The principles of unjust enrichment also did not avail the defendant. An analysis of the facts showed that no benefit was conferred upon the members of the plaintiff class or detriment suffered by the defendant. If this was incorrect and there was a benefit conferred, there were clear juristic reasons which would entitle the plaintiff class to retain the benefit, namely, the closings of the contracts and the statutory entitlement of the plaintiff class to interest. It would be a startling result if a party, having assessed the risks and decided to complete a transaction on certain terms in light of those risks, could elect to reopen the transaction when one or more of the risks does not turn out as that party hoped. The law's general policy favouring security of transactions means that the courts will not grant restitutionary recovery where the parties have entered into a contract and that contract has not been held unenforceable or rescinded for a reason recognized by either law or equity.

Cases referred to

Abdool v. Somerset Place Developments of Georgetown Ltd. (1992), 10 O.R. (3d) 120, 96 D.L.R. (4th) 449, 27 R.P.R. (2d) 157 sub nom. Budinsky v. Breakers East (C.A.); Ackland v. Yonge-Esplanade Enterprises Ltd. (1992), 10 O.R. (3d) 97, 95 D.L.R. (4th) 560, 27 R.P.R. (2d) 1 (C.A.); Albrecht v. Opemoco Inc. (1991), 5 O.R. (3d) 385, 85 D.L.R. (4th) 289, 21 R.P.R. (2d) 68 (C.A.); Berman v. Karleton Co. (1982), 37 O.R. (2d) 176, 28 C.P.C. 168, 24 R.P.R. 8 (H.C.J.); Brock v. Cole (1983), 40 O.R. (2d) 97, 142 D.L.R. (3d) 461, 31 C.P.C. 184, 13 E.T.R. 235 (C.A.); Carleton Condominium Corp. No. 11 v. Shenkman Corp. (1985), 49 O.R. (2d) 194, 14 D.L.R. (4th) 571, 35 R.P.R. 28 (H.C.J.); Ceolaro v. York Humber Ltd. (1994), 53 C.P.R. (3d) 276, 37 R.P.R. (2d) 1 (Ont. Gen. Div.); Claiborne Industries Ltd. v. National Bank of Canada (1989), 69 O.R. (2d) 65, 59 D.L.R. (4th) 533, 34 O.A.C. 241 (C.A.); Dunkelman v. Neighbourhood Developments Ltd. (1985), 33 A.C.W.S. (2d) 288 (Ont. H.C.J.); Governor's Hill Developments Ltd. v. Robert (1993), 33 R.P.R. (2d) 67 (Ont. Gen. Div.); Grandby Investments Ltd. v. Wright (1981), 33 O.R. (2d) 341, 124 D.L.R. (3d) 313, 20 R.P.R. 30 (S.C.); Greenberg v. Meffert (1985), 50 O.R. (2d) 755, 18 D.L.R. (4th) 548, 7 C.C.E.L. 152, 37 R.P.R. 74 (C.A.); Handsaeme v. Dyck (1982), 20 Alta. L.R. (2d) 279, 26 R.P.R. 9 (Q.B.); Hashim v. Costain Ltd. (1986), 54 O.R. (2d) 790 (H.C.J.); Kiriri Cotton Co. v. Dewani, [1960] A.C. 192, [1960] 1 All E.R. 177, [1960] 2 W.L.R. 127, 104 Sol. Jo. 49 (P.C.); Lamb v. Costain Ltd. (1985), 49 O.R. (2d) 657, 40 R.P.R. 83 (H.C.J.); Lewis v. Westa Holdings Ltd. (1975), 8 O.R. (2d) 181 (Co. Ct.); Pettkus v. Becker, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257, 34 N.R. 384, 8 E.T.R. 143, 19 R.F.L. (2d) 165; R. v. Budget Car Rentals (Toronto) Ltd. (1981), 31 O.R. (2d) 161, 121 D.L.R. (3d) 111, 57 C.C.C. (2d) 201, 20 C.R. (3d) 66, 9 M.V.R. 52, 15 M.P.L.R. 172 (C.A.); R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606, 93 D.L.R. (4th) 36, 114 N.S.R. (2d) 91, 139 N.R. 241, 313 A.P.R. 91, 10 C.R.R. (2d) 34, 74 C.C.C. (3d) 289, 43 C.P.R. (3d) 1, 15 C.R. (4th) 1; Telford v. Holt, [1987] 2 S.C.R. 193, 41 D.L.R. (4th) 385, 54 Alta. L.R. (2d) 193, 78 N.R. 321, [1987] 6 W.W.R. 385, 37 B.L.R. 241, 21 C.P.C. (2d) 1, 46 R.P.R. 234; York Condominium Corp. No. 167 v. Newrey Holdings Ltd. (1981), 32 O.R. (2d) 458, 122 D.L.R. (3d) 280, 14 R.P.R. 62 (C.A.)

Statutes referred to

Landlord and Tenant Act, R.S.O. 1990, c. L.7

Authorities referred to

Loeb, A., Condominium Law and Administration, 2nd ed. (Toronto: Carswell, 1989), pp. 5-22.3 to 5-22.4 Maddaugh, P.D., and McCamus, J.D., The Law of Restitution (Aurora: Canada Law Book, 1990), p. 46 Oxford English Dictionary, "residential"

PROCEEDINGS under the Class Proceedings Act, 1992, S.O. 1992, c. 6.

J. Gardner Hodder and Andrew Frei, for plaintiffs. Jonathan Fine and Jack Pappalardo, for defendant.

SHARPE J.: —

Introduction

This class action concerns the statutory right of purchasers of condominium units for residential purposes to be paid interest on their deposits during the interim occupancy period. The plaintiff sues on her own behalf and on behalf of some 544 purchasers of units in two condominiums, collectively known as "The Liberties", developed by the defendant Toronto College Park. Upon the plaintiff's motion for summary judgment, Winkler J. ordered that there be an expedited trial of the common issues he had earlier certified as appropriate for determination by way of class proceeding. The trial was significantly facilitated by virtue of an agreed statement of facts. Only three witnesses were called, and there are few, if any, factual issues to be resolved.

Background

The Liberties condominiums form part of a major development project undertaken by the defendant in the area bounded by Bay, College, Yonge and Gerrard Streets in downtown Toronto. The overall development is multi-purpose. The condominiums involved in this action are comprised of dwelling units, parking and storage units, certain units owned by the condominium corporation and designated for non-residential purposes (recreational and other similar uses) and the usual common elements.

The defendant was the vendor, declarant and proposed declarant (hereafter "developer") within the meaning of the Condominium Act, R.S.O. 1980, c. 84. The defendant began to market the units in 1986 and 1987 and required the purchasers to take interim occupancy during the spring of 1989. Interim occupancy continued for approximately 18 months until final closing in August and September 1990. In accordance both with the Condominium Act and the agreements of purchase and sale, the defendant charged the purchasers an interim occupancy fee comprised of an amount for mortgage interest the purchaser would have to pay on final closing in respect of a mortgage to be assumed, an amount reasonably estimated on a monthly basis for municipal taxes attributable to the unit and the projected common expense contribution for the unit.

The defendant was required by s. 53(3) of the Condominium Act to pay interest on the purchasers' deposits during the interim occupancy period. The Act requires that interest be paid at a rate prescribed by regulation. The regulation fixes the rate at one per cent below the rate paid on the Province of Ontario Savings Office ("P.O.S.O.") savings accounts. At the time of interim occupancy, there was uncertainty as to whether the Act required developers to pay interest on deposits at the "lower Trillium" rate or at the "higher Trillium" rate offered by P.O.S.O. The defendant paid interest at the "lower Trillium" rate on the deposits for the dwelling units and paid no interest at all on deposits for parking and storage units.

It is conceded by the defendant that by virtue of the decision of the Court of Appeal in Ackland v. Yonge-Esplanade Enterprises Ltd. (1992), 10 O.R. (3d) 97, 95 D.L.R. (4th) 560, it ought to have paid purchasers at the higher Trillium rate on their deposits for dwelling units. The amount owing to the plaintiff class on this account is \$617,031.75. The plaintiff contends that the defendant was required by statute to also pay interest on the deposits for parking and storage units. It is agreed that if the plaintiff class succeeds on this point, the amount owing on account of parking and storage unit interest is \$881,996.97. The plaintiff further argues that all interest should have been paid on a compound basis.

The defendant disputes the entitlement of purchasers of parking and storage units to be paid any interest on their deposits, and also disputes the plaintiffs' contention that the interest on deposits should be compounded. Moreover, the defendant takes the position that in light of the plaintiffs' claim for interest under the statute, it should be permitted to revisit the terms upon which the final closings were accomplished on the ground that had it known of the obligation to pay interest at the higher Trillium rate, it would have been entitled to require the purchasers to close on less favourable terms. In particular, the defendant asserts the right to readjust the amounts charged during interim occupancy for taxes and as well, to a credit in its favour on account of payments made following closing to the condominium corporation's reserve funds. There is also a claim to readjust for the amount of mortgage interest charged some members of the plaintiff class.

Issues

1. Is the defendant required by s. 53 of the Condominium Act to pay interest on the deposits for parking and storage spaces during the interim occupancy period?
2. Is the defendant required to pay interest on deposits on a compound basis?
3. Is the defendant entitled by contract or under the law of unjust enrichment to revisit the adjustments on final closing with respect to:
 - (a) municipal taxes?
 - (b) the amounts paid to the condominium corporations' respective reserve funds?
 - (c) mortgage interest?

Findings and Analysis

1. Is the Defendant Required to Pay Interest on Deposits for Parking and Storage Units?

The relevant statutory provision is s. 53 which provides as follows:

53(1) All money received by or on behalf of a proposed declarant from a purchaser on account of a sale or an agreement for the purchase and sale of a proposed unit for residential purposes before the registration of the declaration and description, other than money paid as rent or as an occupancy charge, shall, notwithstanding the registration of the declaration and description thereafter, be held in trust by the person receiving such money for the person entitled thereto in respect of the agreement and such money shall be held in a separate account designated as a trust account at a chartered bank or trust company or a loan company or credit union authorized by law to receive money on deposit or a Province of Ontario Savings Office until,

- (a) its disposition to the person entitled thereto, or
- (b) delivery of prescribed security to the purchaser for repayment.

(2) Where an agreement of purchase and sale referred to in subsection (1) is terminated and the purchaser is entitled to the return of any money paid under the agreement, the proposed declarant shall pay to the purchaser interest on such money at the prescribed rate.

(3) Subject to subsection (2), where a purchaser of a proposed unit under an agreement of purchase and sale referred to in subsection (1) enters into possession or occupation of the unit before a deed or transfer of the unit acceptable for registration is delivered to him, the proposed declarant shall pay interest at the prescribed rate on all money received by him on account of the purchase price from the day the purchaser enters into possession or occupation until the day a deed or transfer acceptable for registration is delivered to him.

(4) Subject to subsections (2) and (3), the proposed declarant is entitled to any interest earned on the money required to be held in trust under subsection (1).

The Act does not define "residential unit" but the phrase also appears throughout ss. 51 to 55, the part of the Act which stipulates the terms upon which condominium units may be sold and leased by developers.

The only reference in the Act to parking and storage units is the following:

22(7) No owner is entitled to a vote in respect of a unit that is intended for parking or storage purposes.

The facts with respect to the parking and storage units purchased by members of the plaintiff class are as follows. Under the terms of the declarations, parking and storage units could be purchased only by purchasers of dwelling units at The Liberties. The parking units are in the underground garage and the storage units are contained within each building but physically separate from the dwelling units. A City of Toronto by-law requires the provision of specified minimum parking facilities for such buildings. The number of dwelling units exceeded the number of parking and storage units. The defendant required purchasers of dwelling units to enter separate agreements of purchase and sale for the parking and storage units. These were entered at a later time, after all the dwelling units had been sold. However, purchasers took title to their dwelling and parking and storage units in one single deed or transfer. Purchasers of dwelling units were required to pay a deposit of 25 per cent of the purchase price, while purchasers of parking and storage units were required to pay a deposit of 100 per cent of the purchase price of those units prior to interim closing.

Ownership and use of parking and storage units is strictly limited to those who reside in the dwelling units. The declarations of the two condominium corporations clearly provide that only owners of dwelling units may own parking and storage units, and further provide that no one may even use a parking unit who does not reside at the Liberties:

4.02 Ownership and Use of Parking Units

(a) No Parking Unit may be transferred to, or owned by, any person, other than the Declarant, who is not, or does not concurrently with the delivery of such transfer become, a registered Owner of a Dwelling Unit or of a dwelling unit in Phase b and no Parking Units shall be leased to, or used by, any person who does not reside in a Dwelling unit or a dwelling unit in Phase B. Furthermore, no Parking Unit shall be transferred or leased to, or used by, any person who is not a registered owner of a Dwelling Unit unless and until such person has:

(i) delivered to the Corporation an agreement, in a form prescribed by the Corporation, covenanting that such person, and any others permitted by such person to use such Unit, shall comply with the act the Declaration, the By-laws, the Rules and Reciprocal Agreements, including the provisions of this section; and

(ii) provided the Corporation with his name and full address.

(Emphasis added)

A similar provision applies with respect to storage units.

In argument, Mr. Fine contended that the concluding sentence of s. 4.02(a), commencing with "Furthermore" permitted owners of parking units to transfer them to persons who do not reside in the condominium. In my view, the language of the document simply will not bear that interpretation. It is clear from the underlined words which precede that sentence that parking units cannot be leased or transferred to anyone who does not reside in The Liberties. The sentence following relied upon by Mr. Fine deals with transfers to non-owner residents, but does not permit lease or transfer to a non-resident.

In light of these facts, are the agreements of purchase and sale for parking and storage units entered into by members of the plaintiff class agreements "for the purchase and sale of a proposed unit for residential purposes" within the meaning of s. 53(1)?

I turn first to the plain and ordinary meaning of the phrase "residential purpose". Those words, in my view, are clearly capable of embracing units for parking and storage in condominiums such as those involved in this case. The Oxford English Dictionary definition of "residential" includes the following: "connected with, pertaining or relating to, a residence or residences (in a general or specific sense)". Spaces to park a car and store items in close proximity to the place of other domestic functions and activities are common elements of a residence. Residences, including apartment-type residences in multiple-dwelling buildings, almost always provide space for parking and storage. The exigencies of modern life require that parking and storage facilities be made available to be used in connection with one's dwelling. Parking and storage units may, accordingly, be regarded as incidental or ancillary aspects or elements of a residence and, accordingly, in my view, may be said to fall within the ordinary meaning of the phrase "used for residential purposes" in the present context.

While clearly not dispositive of the issue before me, it is significant that with reference to another legislative scheme designed to protect consumers, the Landlord and Tenant Act, R.S.O. 1990, c. L.7, the phrase "used for residential purposes" has been interpreted to include a parking space rented by the tenant of an apartment complex. In *Lewis v. Westa Holdings Ltd.* (1975), 8 O.R. (2d) 181 (Co. Ct.) at p. 187, Judge Dymond dealt with the case of a tenant injured while using her parking space:

The parking space was as much a part of the residential premises as would be a garage attached to a private home, or an allocated trunk space in the basement of an apartment building, or even perhaps a milk-box in the wall of an apartment building. It was an adjunct of the residence itself, exclusive to the tenant and used by her for "residential purposes", that is, in connection with her normal living and not for business purposes.

I adopt Judge Dymond's treatment of the relationship between a parking space and a residence.

I turn from the plain and ordinary meaning of the words of s. 53 to the context of the statute as a whole. Is there anything in the Act itself which indicates that the deposits for parking and storage units should be either included or excluded from the protective reach of s. 53?

The defendant relies upon certain other provisions of the Act in support of its argument that no interest was payable on the deposits for parking and storage units. As already noted, the Act does not define "residential" or "residential purpose". Parking and storage units are not defined either, and they are specifically mentioned only in s. 22(7), *supra*, in relation to voting rights. It is argued that this provision in effect creates a category of condominium unit distinct from residential units and that this category must be maintained consistently throughout the Act, thereby precluding an interpretation of "unit for residential purposes" which includes parking and storage units. In my view, this argument reads far more into s. 22(7) than is warranted. Looking at the Act as a whole, it is apparent that the legislature chose not to create a scheme dependent upon rigid definitional categories. Rather, one finds an Act which establishes legislative distinctions appropriate to the particular issue at hand. In my view, s. 22(7) adopts the category "unit intended for parking or storage purposes" in relation to voting rights and nothing more.

It is, of course, imperative that the Act be interpreted as a consistent and coherent whole, but that does not mean that because one category of unit is distinguished from all others with respect to one issue, that category must forever remain a distinct category for all issues. Indeed, given the manner in which the Act deals with the myriad issues of condominium law, such an approach could lead to serious distortions. Accordingly, I reject the contention that the provision denying voting rights to owners of parking units means that agreements of purchase and sale for such units may not fall within s. 53 with respect to the developer's obligation to pay interest.

A similar argument advanced by the defendant relies on s. 34 dealing with the requirements imposed upon condominium corporations with respect to audits. Section 34(11) provides that the section "does not apply where the property consists of less than twenty-five units for residential purposes". It was submitted that if agreements for the purchase of parking and storage units

were held to fall within s. 53, then parking and storage units would have to be distinct "units for residential purposes" and counted as such for the purposes of this provision with the result that audits would be required in situations not intended by the legislature. The need to interpret the Act in a coherent and consistent manner does not preclude interpreting a phrase which appears in various parts of the statute in a manner which accords with the context and purpose of the provision being interpreted. In my view, it is clearly possible, given the context and purpose of these provisions, to hold that "unit for residential purposes" in s. 53 includes parking and storage units purchased in connection with a dwelling unit, but at the same time hold that a parking and storage unit should not be separately counted as a distinct unit "for residential purposes" when determining the number of units required to invoke the audit requirements of s. 34.

I turn next to the purpose of the Act as a whole and of s. 53 in particular. In my view, this consideration strongly supports the interpretation advanced by the plaintiff class. The Condominium Act provides a comprehensive scheme designed to protect consumers of condominium units. The Act recognizes an imbalance of bargaining power and seeks to redress that imbalance in favour of consumers: *Ceolaro v. York Humber Ltd.* (1994), 37 R.P.R. (2d) 1 at p. 73, 53 C.P.R. (3d) 276 (Ont. Gen. Div.), per Winkler J. The appropriate approach to interpreting the Condominium Act was described as follows by Krever J. in *Carleton Condominium Corp. No. 11 v. Shenkman Corp.* (1985), 49 O.R. (2d) 194 at p. 209, 14 D.L.R. (4th) 571 (H.C.J.):

The Condominium Act was, without question, remedial legislation. . . . As remedial legislation one is obliged to give it such a large and liberal interpretation as will best attain the object of the Act according to its true intent, meaning and spirit: see s. 10 of the Interpretation Act.

The protective purpose of the Act with respect to purchasers was emphasized by the Court of Appeal in *York Condominium Corp. No. 167 v. Newrey Holdings Ltd.* (1981), 32 O.R. (2d) 458, 122 D.L.R. (3d) 280.

This does not, of course, mean that the Act must always be interpreted in favour of the consumer. With reference to the interim occupancy fee provisions, the Court of Appeal held in *Albrecht v. Opemoco Inc.* (1991), 5 O.R. (3d) 385 at p. 393, 85 D.L.R. (4th) 289, that the Act "strikes a balance between developers and purchasers". Similarly, with reference to the disclosure provisions of s. 52, Robins J.A. stated in *Abdool v. Somerset Place Developments of Georgetown Ltd.* (1992), 10 O.R. (3d) 120 at p. 145, 96 D.L.R. (4th) 449 (C.A.), that the provision should be interpreted "in a manner that properly balances consumer protection and the commercial realities of the condominium industry".

The specific purpose of s. 53 has been the subject of judicial comment. It forms an important element of the consumer protection package and over the years has been tightened to deal with the increasingly sophisticated stratagems devised to circumvent the Act's legislative purpose: *Grandby Investments Ltd. v. Wright* (1981), 33 O.R. (2d) 341, 124 D.L.R. (3d) 313 (S.C.); *Dunkelman v. Neighbourhood Developments Ltd.* (1985), 33 A.C.W.S. (2d) 288 (Ont. H.C.J.); *Berman v. Karleton Co.* (1982), 37 O.R. (2d) 176, 28 C.P.C. 168 (H.C.J.); *Lamb v. Costain* (1985), 49 O.R. (2d) 657, 40 R.P.R. 83 (H.C.J.); *Hashim v. Costain Ltd.* (1986), 54 O.R. (2d) 790 (H.C.J.).

The obligation to pay interest on deposits during the interim occupancy period imposed by s. 53 is an exception to the usual situation where the vendor of real estate is not required to pay interest on the purchaser's deposit. The Ackland case, *supra*, holds that this exception was created by the legislature to protect condominium purchasers from developers delaying final closing and financing the project with the deposits. The obligation to pay interest on the deposit creates an incentive to bring the project to completion with minimal delay.

In light of these general and specific statutory purposes, the case for finding that deposits on parking and storage units are caught by s. 53 in the situation of The Liberties development is strong. It is difficult to see why a consumer should receive the protection of the Act when buying a dwelling unit but not a parking and storage space to be used in connection with the dwelling. It would be surprising if the legislature intended to deny the legislative protection just described with respect to purchases of parking and storage units in the factual setting presented by this case.

In argument, counsel for the defendant conceded that it followed from his submission that no interest is payable on parking and storage units that a developer could, in the case of a single agreement for a dwelling and parking unit, allocate a disproportionate portion of the deposit to the parking unit and thereby reduce the extent of its obligation to pay interest. In my view, an interpretation that would produce such a result is plainly unacceptable. It would open an obvious loop-hole in the statute's protective provisions. At best, such an interpretation is suggestive of a technical and narrow approach often associated with taxing legislation which is completely inconsistent with the legislative purpose just described.

The defendant placed particular emphasis on what I will label the uncertainty argument. It was submitted that the only acceptable definition of the phrase "unit for residential purposes" is one that on its face provides developers with an immediate and obvious answer to whether or not a deposit falls within s. 53. In the defendant's submission, the phenomenon of mixed use condominium developments means that the only interpretation up to this task is one that simply and cleanly excludes agreements for the purchase and sale of parking units from consideration. How could a developer know, counsel asked, how to deal with a deposit on a parking unit in a development which included both residential and commercial units? What if a purchaser bought both a dwelling and commercial unit together with a parking unit. How would the developer decide whether to treat the deposit as falling under the protection of s. 53? This situation should, counsel submitted, be regarded as the "litmus" test for any interpretation -- if it does not provide a clear answer, the interpretation must be rejected. This argument was bolstered by reference to the other consumer protection provisions applicable to sales of units for residential purposes found in ss. 51-55, and in particular to s. 55 which makes it an offence to knowingly contravene s. 53(1), requiring the developer to hold deposits on units for residential purposes in trust.

In my view, this argument is lacking in substance. In the first place, it exaggerates the degree of uncertainty that is encountered if deposits for certain parking units are protected by s. 53. In the vast majority of cases, it would be readily straightforward for a developer to determine whether a parking unit was being purchased in conjunction with a dwelling unit. Secondly, the defendant's argument aspires to an unrealistic if not impossible degree of certainty. One can certainly imagine situations where it might be difficult to determine the purpose for which the parking unit was being purchased and the defendant's "litmus test" scenario is one example. However, for virtually every statute on the books, it is possible to concoct such troublesome hypotheticals. Uncertainties like this represent run-of-the-mill interpretive questions routinely encountered with statutes of this kind. The suggestion that no interpretation should be accepted that cannot provide an immediate and obvious answer to all such hypotheticals would set an impossible and unworkable standard of clarity in legislative drafting and interpretation. It is plainly not the case that a court is precluded from adopting an interpretation of a statute unless it can confidently predict how that definition will operate in every

other conceivable factual setting. Statutory interpretation is very much a case-by-case exercise. While the court must carefully consider the overall legislative scheme with a view to interpreting any particular provision in a coherent and sensible manner, it will frequently be the case that further interpretation and refinements will be required in subsequent cases with reference to different facts.

The Supreme Court of Canada has held that certainty in statutory interpretation can only be achieved in relation to an instant case: *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at pp. 638-39, 93 D.L.R. (4th) 36 at pp. 56-57, per Gonthier J.:

Legal rules only provide a framework, a guide as to how one may behave, but certainty is only reached in instant cases, where law is actualized by a competent authority. In the meanwhile, conduct is guided by approximation. The process of approximation sometimes results in quite a narrow set of options, sometimes in a broader one. Legal dispositions therefore delineate a risk zone, and cannot hope to do more, unless they are directed at individual instances.

By setting out the boundaries of permissible and non-permissible conduct, these norms give rise to legal debate. They bear substance, and they allow for a discussion as to their actualization. They therefore limit enforcement discretion by introducing boundaries, and they also sufficiently delineate an area of risk to allow for substantive notice to citizens.

Indeed, no higher requirement as to certainty can be imposed on law in our modern state. Semantic arguments, based on a perception of language as an unequivocal medium, are unrealistic. Language is not the exact tool some may think it is. It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk. But it is inherent to our legal system that some conduct will fall along the boundaries of the area of risk; no definite prediction can then be made. Guidance, not direction, of conduct is a more realistic objective.

The fact that penal consequences may follow should a developer fail to observe the trust provisions does not alter my view as to the manner in which the statute should be interpreted. As the Court of Appeal stated in *R. v. Budget Car Rentals (Toronto) Ltd.* (1981), 31 O.R. (2d) 161 at p. 167, 121 D.L.R. (3d) 111 at p. 117, per Howland C.J.O.:

Among these principles is the often-quoted principle that a penal statute must be construed "strictly". That this is so is surely beyond dispute, but it is important that it should be clear what the principle really means, and what it does not mean. What it does mean is that where a person is charged with an offence created by a statute, the conduct of that person which gives rise to the charge, or the conduct of someone for which that person may be held answerable, must be such as can be clearly and unmistakably demonstrated to fall within the kind of conduct which is proscribed by the statute. What the principle does not mean is that because a statute is "penal" or contains provisions to which penal consequences for breaches are attached, the meaning that is to be given to language used in the statute is to be determined in accordance with a rule of construction that is somehow "stricter" than, or is to be applied more stringently than, the ordinary rules which apply to determine the meaning to be given to language used in statutes.

I hardly need add that if the developer wants to be certain of complying with the law in situations which appear close to the line, there is an easy solution: pay the purchaser interest on the deposit. An interpretation that might cause developers to err on the side of caution in a relatively small number of situations where the import of the statute is not clear is a small price to pay for an interpretation which so clearly accords with the overall purpose of the statute in the vast majority of cases.

For these reasons, I find that the defendant was required by s. 53(3) to pay members of the plaintiff class interest on deposits for parking and storage units during the interim occupancy period and that there is owing to the plaintiff class \$881,996.97 on that account.

2. Is the Defendant Required to pay Interest on a Compound Basis?

The plaintiff class submits that the defendant is required to pay interest on the deposits on a compound basis. First, it is submitted that interest during the interim occupancy period should be compounded, and second, it is submitted that "equitable interest" should be paid on interest outstanding from the date of final closing to payment.

Section 53, *supra*, does not explicitly require the developer to pay compound interest. R.R.O. 1980, Reg. 121, s. 33, stipulates the rate of interest, and provides as follows:

33. The rate of interest under subsections 53(2) and (3) of the Act on money held in trust under subsection 53(1) of the Act shall,

- (a) for the six months immediately following the last day of March of each year, be 1 per cent per annum below the rate paid on The Province of Ontario Savings Office savings accounts on the 1st day of April of that year; and
- (b) for the six months immediately following the last day of September of each year, be 1 per cent per annum below the rate paid on The Province of Ontario Savings Office savings accounts on the 1st day of October of that year.

It is argued by the plaintiff class that since s. 53(3) requires the developer to hold the deposits on trust, interest should be calculated on a compound basis to preclude the trustee from profiting at the expense of its beneficiaries. The developer will be able to invest the deposits to obtain compound interest and as trustee should pass that benefit on.

In my view, neither the Act nor the regulation can be read as imposing an obligation to pay compound interest. The Regulation imposes very detailed requirements with respect to the calculation of interest and fails to stipulate compounding. Moreover, the Act explicitly abrogates the ordinary duties of the trustee with respect to the use of the deposits. Developers are permitted to use the deposits and are required to pay interest at 1 per cent lower than the rate stipulated. The legislature has imposed a trust, but

relieved the trustee of some of the usual obligations with respect to use of the trust funds. The Act also contains a specific provision dealing with the right of the developer to retain interest earned on deposits which exceeds the amount of interest prescribed by the regulations: s. 54(4).

In the face of these specific provisions, it is difficult to find a basis in law to impose a duty to pay interest on a compound basis. Moreover, it appears to be widely accepted in practice that interest is to be calculated on a simple interest basis. A leading text, A. Loeb, *Condominium Law and Administration*, 2nd ed. (Toronto: Carswell, 1989), pp. 5-22.3 to 5-22.4, indicates that interest is to be calculated as simple interest, and the evidence in this case indicates this to be the industry practice. It is also worth noting that although there have been several reported cases dealing with the obligation to pay interest, the point of compound interest does not seem to have been even argued in any of these cases. For these reasons I find that the defendant was not in breach of its statutory obligations in failing to pay compound interest and I reject the plaintiff's claim in that regard.

I also reject the claim of the plaintiff class to equitable interest on the amount owing. Having dismissed the contention that there is an entitlement to compound interest while the money is subject to the statutory trust, it is difficult to see why compound interest should be required thereafter. Moreover, in my view, the conduct of the defendant is not comparable to that found in the cases relied upon by the plaintiff class. In *Brock v. Cole* (1983), 40 O.R. (2d) 97, 13 E.T.R. 235 (C.A.), a solicitor was found to have committed an obvious breach of trust and to have wrongfully withheld payment thereafter. Equitable interest was also awarded in *Claiborne Industries Ltd. v. National Bank of Canada* (1989), 69 O.R. (2d) 65, 59 D.L.R. (4th) 533 (C.A.), but there the court found a fraudulent conspiracy justifying an award of exemplary damages. The conduct of the defendant in the case at bar is not in the same category. While I have found in favour of the plaintiff class, it is my view that circumstances are more akin to a commercial claim for which the usual prejudgment interest rules are appropriate.

3. Is the Defendant Entitled by Contract or under the Law of Unjust Enrichment to Revisit the Adjustments on Final Closing?

The defendant asserts by way of defence and counterclaim that it is entitled to reopen the adjustments made on final closing in view of the claims asserted by the plaintiff class for interest. The defendant does not now advance these claims with a view to compelling members of the plaintiff class to make payments to it, but only to the extent necessary to reduce or eliminate the interest claim.

It is the position of the defendant that the terms of the final closings were more favourable to the plaintiff class than strictly required by the agreements of purchase and sale. The defendant submits that in closing the transactions on these allegedly favourable terms, it conferred a benefit upon the members of the plaintiff class that they should not be permitted to retain in addition to the interest claim. It is the defendant's position that it has, in effect, already given the plaintiff class the benefit of favourable closing terms and that if the members of the plaintiff class were now to receive further interest payments, they would be getting a "windfall". The defendant relies upon the adjustment on closing for real property taxes, payments it made to the condominium corporations' reserve funds following closing and the calculation of the mortgage interest component of the interim occupancy fee with respect to 25 purchasers.

I will consider the specifics of each of these items below, but turn first to the general question of whether the defendant has the right at this stage to reopen the terms upon which these transactions were closed.

Mr. Ian Galloway, president of the defendant and Mr. Martin Cukierman both gave evidence as to the circumstances of the final closings and the terms of the final closing package which supplemented the facts agreed to. At the time of final closing, the defendant faced a number of uncertainties. First and perhaps most serious was the "phantom mortgage" issue. Until the decision of the Court of Appeal in *Albrecht*, supra, the right of the developer to levy as part of the interim occupancy fee a charge for interest, where the purchaser was not entering a vendor take-back mortgage was uncertain. The interest component of the interim occupancy fee represented a significant amount for The Liberties development, approximately \$11 million. The second uncertainty was the question of whether interest had to be paid at the higher or lower Trillium rates. At the time of final closing there were no judicial decisions on this point. There were a number of decisions in the period from May 1991 to January 1992. The Court of Appeal rendered its decision in *Ackland*, supra, in October 1992 and the matter was not finally resolved until the Supreme Court of Canada refused leave to appeal from the decision of the Court of Appeal in May 1993. The third item of uncertainty was the matter of realty taxes. At the time of final closing, final assessments of the units for realty taxes had not been determined. As will be indicated, assessment appeals launched by the defendant were pending and accordingly the defendant did not know for certain the amount of its liability to taxes for the interim occupancy period. A fourth uncertainty identified by Mr. Galloway was the question of the condominium corporation's reserve funds and whether, in light of the extended interim occupancy period, the defendant would be required to contribute to those funds. Another uncertainty in the period leading up to final closing was the question of how long it would be before the defendant would be in a position to accomplish final closing. This was obviously known to the defendant by the time of the closings, but getting the closings done was clearly a matter of significant concern to the defendant. It was clearly in the defendant's interest to bring about the closings as smoothly as possible.

It is the defendant's position that in the face of these uncertainties, it developed a final closing package designed to close the transactions upon fair and equitable terms, balancing the interests of the purchasers and the developer. The defendant says that it attempted to complete the transactions in a manner that would put the purchasers in the same position they would have been in had interim and final closing been simultaneous. This is the principle identified by the judgment of the Court of Appeal in *Albrecht*, supra, over a year after the closings at issue here.

I will consider below the validity of the defendant's contention that the final closing package conferred a benefit upon the purchasers. Assuming for present purposes that the defendant is able to establish that a benefit was conferred, does the defendant have the right to reopen those transactions and readjust the terms of closing in view of the statutory claim for interest now advanced by the plaintiff class?

(a) Contract

The very purpose of a closing is to bring closure on a transaction and achieve finality in the legal relations between the parties. Contractual provisions and undertakings on closings may preclude finality from prevailing where a mistake has been made. It is, however, important to note that this is not a case of mistake nor is it a situation where circumstances unknown to the defendant at the time of the final closing have taken them by surprise. It is clear that the defendants carefully calculated the various risks and uncertainties, and decided to extend certain terms to the purchasers to bring about the final closing of a large number of transactions in a relatively short space of time. Included in the various risks considered by the defendant was the matter of how

much interest was owed to the members of the plaintiff class (although it would appear that the defendant did not take very seriously the risk that it might have to pay interest on the parking and storage deposits).

In asserting the right to reopen the closings, the defendant relies on contractual provisions, namely, the notation "E. & O. E." (errors and omissions excepted), the exchange of undertakings to readjust and the non-merger provision contained in the agreement of purchase and sale. The undertaking to re-adjust was in the following terms:

1. to readjust any item or items on the statement of adjustments if necessary forthwith upon demand including the payment of our proportionate share of any supplementary realty tax bills.
2. notwithstanding transfer of title to the unit, all my acknowledgements contained in the Agreement of Purchase and Sale shall remain in full force and effect and my obligations thereunder to be performed hereafter shall remain in full force and effect.

The non-merger provision of the agreement of purchase and sale is as follows:

Non-Merger -- All the acknowledgements of the Purchaser and the respective obligations of the Purchaser or the Vendor to be performed after either the Occupancy Date or the Closing Date shall remain in full force and effect notwithstanding the delivery of possession of the Unit or the transfer of title to the Unit, as the case may be.

In my view, none of these apply to the circumstances of the present case. The E. & O. E. notation by its very terms applies to errors or miscalculations. Similarly, the undertaking to adjust applies to errors made in determining the amounts owing upon final closing or where there is a specific agreement to re-adjust upon obtaining information not yet known: *Governor's Hill Developments Ltd. v. Robert* (1993), 33 R.P.R. (2d) 67 (Ont. Gen. Div.); *Handsaeame v. Dyck* (1982), 26 R.P.R. 9, 20 Alta. L.R. (2d) 279 (Q.B.). In my view, it is clear that there was no error or miscalculation to which either the undertakings to readjust or the "E. & O. E." notation could apply. It is a central element of the defendant's argument that it deliberately developed a fair and equitable final closing package which benefited the purchasers. In light of that submission, it is not open to the defendant to now say that there is an error to correct.

I fail to see what relevance the non-merger clause has to the issues at hand. Moreover, the claim of the plaintiff class is based on statute, not contract (a point reinforced by the defendant's successful objection at trial to any consideration being given to an alternative contractual argument to interest advanced by the plaintiff class). The argument of the defendant is, in effect, that a contractual provision permits it to avoid or reduce the obligations owed by statute to the members of the plaintiff class. Any contractual claim by the defendant to deprive the plaintiff class of the benefits of the Act is precluded by s. 61: "This Act applies notwithstanding any agreement to the contrary."

Accordingly, I find that the alleged benefits conferred upon the members of the plaintiff class were deliberately calculated in view of a variety of uncertainties, including that of the amount of interest payable on deposits, and that there is no contractual basis upon which the terms of final closing can be revisited.

(b) Unjust Enrichment and Equitable Set-off

Equity permits a party to reduce or eliminate the claim of another by way of set-off where some equitable ground can be shown for being protected against the adversary's demands: *Telford v. Holt*, [1987] 2 S.C.R. 193, 41 D.L.R. (4th) 385. In order to establish a claim for unjust enrichment a party must establish that a benefit has been conferred, a corresponding deprivation on the part of the party asserting the claim and the absence of any juristic reason, such as a contract or disposition of law, which entitles the other party to retain the benefit: *Pettkus v. Becker*, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257.

1. Was a benefit conferred upon the members of the plaintiff class?

It is necessary to consider each of the alleged benefits in turn. However, it should be noted at the outset that while the defendant claims it attempted to resolve these uncertainties in a fair and equitable manner as between itself and the purchasers, in fact the various uncertainties were resolved largely in the defendant's favour. It was assumed that the \$11 million phantom mortgage interest issue would be resolved in the defendant's favour; the defendant paid the lower rate of interest on deposits thereby saving just over \$600,000 (excluding the interest with respect to the parking and storage deposits); the tax issue was resolved by the flow-through approach which ensured that the defendant would be fully reimbursed for taxes. Only with respect to the reserve fund issue, a matter of approximately \$270,000, did the defendant pay out money it might not in the end have to pay and there, the money was paid not to the purchasers but the condominium corporations.

(i) Municipal Taxes

The defendants claim to have conferred a substantial benefit upon the plaintiff class with respect to the manner in which taxes were dealt with in the final closing package. As already indicated, the defendant was entitled by the Act and by the agreements of purchase and sale to levy a charge for taxes as part of the interim occupancy fee. However, the actual amount of taxes for which the defendant would be liable to the city for the period of interim occupancy was uncertain at the time of interim occupancy. Section 53(6) of the Act limits the municipal tax component of the interim occupancy fee to "an amount reasonably estimated on a monthly basis for municipal taxes attributable to the proposed unit". At the commencement of interim occupancy, the defendant adopted what appears to have been a wide-spread practice of developers and estimated taxes at 1.5 per cent of the purchase price. Apparently through inadvertence, no amount was charged with respect to taxes attributable to the parking and storage units.

The defendant knew well before final closing that the 1.5 per cent estimate of taxes was high. It received supplemental property tax assessments for 1989 in December 1989 and assessments for 1990 in January 1990 which showed that the actual taxes would be lower than the 1.5 per cent estimate. Moreover, the defendant retained a tax consultant who advised prior to final closing that the assessments themselves "were approximately 20 per cent over and above what they should have been" (Defendant's Written Submission, para. 190). Appeals against the assessments were launched in January and March 1990.

To its credit, the defendant did not assert the right to adjust for taxes on the basis of the 1.5 per cent estimate but decided to adopt a "flow-through" approach. This was accomplished by claiming against the purchasers the taxes the defendant had actually paid, and permitting the purchasers to carry on the assessment appeals as owners. If a purchaser decided to continue the appeal and the appeal was successful, the purchaser would reap the benefit.

It is agreed that the defendant has fully recovered every cent it paid during the interim occupancy period for realty taxes. The defendant contends, however, it was legally entitled to estimate the taxes as of final closing in accordance with the industry standard of 1.5 per cent of the purchase price. Having closed on the "flow-through" basis, the defendant argues that it conferred a benefit upon the plaintiff class for the difference, namely, \$495,435.86. It should be noted that this amount includes an item of \$108,159.06, the amount the defendant claims those purchasers who elected not to continue the appeals would have recovered had they done so.

In my view, the defendant's argument on this point is completely lacking in substance. First, while the final amount of the taxes remained uncertain by the date of final closing, in light of the assessments, the appeals against those assessments and the advice the defendant received from the tax consultant, the defendant clearly could not have believed that the estimate of 1.5 per cent was still a reasonable one. On the basis of what the defendant knew at the time of closing, it is my view that it would not have been justified in asserting 1.5 per cent of the purchase price as "an amount reasonably estimated" for municipal taxes. The agreement of purchase and sale explicitly provides that the occupancy fee "may be revised by the Vendor either retroactively or prospectively, or both, from time to time based on revised estimates of the items which may be lawfully taken into account in the calculation thereof". Contractual discretion of this kind must be exercised in accordance with objective standards, honesty and good faith: *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755 at p. 761, 18 D.L.R. (4th) 548 (C.A.), per Robins J.A.

Second, even if I am in error in finding that at the time of final closing the defendant could not have adjusted for taxes on the basis of the 1.5 per cent estimate, I find that the statutory and contractual right to act on the basis of a reasonable estimate of taxes has no application now that the amount of the taxes are actually known. The defendant asserts the right to readjust for taxes in light of what it now knows about the plaintiff's right to interest, but asks the court to permit it to ignore what it now knows about taxes. If the defendant were now permitted to claim almost half a million dollars more for taxes than it spent, then in my view, rather than avoiding an unjust enrichment in favour of the plaintiff class, the court would be creating one in favour of the defendant.

Third, it is clear that no benefit has been conferred upon the plaintiff class and no detriment has been suffered by the defendant. The defendant, as it was entitled, was fully reimbursed for taxes during the interim occupancy period. The defendant's argument really amounts to this: we now know that we owe the purchasers interest because of the Act and the manner in which it has been interpreted by the courts. Had we known that at the time, in order to reduce our liability under the statute, we likely could have got away with over-estimating the taxes and we should be permitted to do so now. This is plainly not an argument a court should accept.

For all of these reasons, I find that there has been no benefit conferred by the defendant upon the plaintiff class which is capable of being the subject of an unjust enrichment or equitable set-off claim.

(ii) Reserve Fund Contributions

Following final closing, the defendant made contributions to both Condominium Corporation's reserve funds in the amounts of \$216,520 and \$94,054 respectively (a total of \$310,574) whereas the "expected and required amount in the reserve fund at turnover meeting" was \$28,000 and \$12,625 respectively. The extra contributions (in total \$269,949) were made in view of the lengthy interim occupancy period. It is the position of the defendant that it was not legally required to make these contributions, although it thought that a claim might be made and it decided to make the payments so as to be seen by any court to have acted fairly and to remain faithful to the principle it adopted with respect to the final closings, namely, that the parties should be put in the same position they would have been in had interim and final closings been simultaneous. Had that occurred, the purchasers would have been required to contribute to the reserve funds, and the amounts contributed by the defendant were calculated on that basis.

In my view, the defendant has failed to establish any basis for asserting a counterclaim or set-off with respect to these funds.

The first and most obvious point is that the money was paid to the condominium corporations, not to the members of the plaintiff class. The condominium corporations are separate legal entities with a legal personality and interests distinct from that of the purchasers. The reserve fund contributions were not dealt with on final closing. Moreover, the Act provides that all agreements of purchase and sale of units for residential purposes shall be deemed to contain "a provision that the vendor will not collect from the purchaser any money on behalf of the corporation": s. 51(1)(d). Allowing the defendant to set off its contributions to the reserve funds would permit it to do indirectly what the law does not permit it to do directly.

Second, if one considers the claim in terms of unjust enrichment, the extent to which an enhancement of the reserve fund enriched the purchasers is questionable. The condominium corporations are precluded by statute from distributing the reserve fund to owners prior to dissolution of the condominium: s. 36. Already, 40 per cent of the original purchasers have sold their units. It may be theoretically possible for the vendor of a condominium unit to claim an adjustment on account of the reserve fund, but the defendant's own evidence is to the effect that this is not the usual practice and the Toronto Real Estate Board standard form agreement for condominium units contains a provision excluding such an adjustment. Hence, the likelihood of any purchaser benefiting directly is remote. While it was in the purchaser's interest to have the reserve fund enhanced so as to be available for future contingencies, it is difficult to see how a benefit of that kind could be measured for purposes of an unjust enrichment claim.

Third, it is clear that the defendant made a conscious decision in light of its perception of the legal requirements and the potential for claims it might face to pay money to the condominium corporations after the closing. That decision was taken on the basis of what the defendant then perceived to be in its best interest vis-à-vis the condominium corporations and without discussion with the members of the plaintiff class as to their rights and liabilities.

In these circumstances, in my view, it would be plainly inequitable and unjust now to force the members of the plaintiff class to accept on a dollar-for-dollar basis the remote benefit of an enhancement made to the reserve fund in lieu of the cash payment of interest to which they are by statute entitled.

For these reasons, I find that the contribution made by the defendant to the reserve funds of the condominium corporations following final closing does not represent a benefit in the hands of the plaintiff class which can form the subject of a counterclaim or set-off.

(iii) Mortgage Interest

The defendant also claims the right to readjust the mortgage interest component of the interim occupancy fee with respect to 25 purchasers. The basis for this claim is that interest was charged at a lower rate than that which the defendant was entitled to charge. The amount (\$20,044.62) does represent a benefit in the hands of the purchasers, although in light of what follows with respect to the "absence of a juristic reason" element of the unjust enrichment test, I note the following. It is the evidence of representatives of the defendant that this undercharging of interest was part of the deliberately planned final closing package. The undercharging of interest was part of the defendant's business response to the various contingencies and uncertainties that have been outlined.

2. Juristic reason entitling the plaintiff class to retain any benefit.

Even if I am wrong and there has been a benefit conferred, there are clear juristic reasons which entitle the plaintiff class to retain that benefit, namely the closings of the contracts of purchase and sale and the statutory entitlement of the plaintiff class to the interest.

A vital function of a contract is to permit the parties to allocate and assume risks with regard to their future legal positions. As already indicated, the defendant faced a number of uncertainties or risks as it considered how to bring about final closing, and it made a deliberate calculation of those risks in determining the final closing package. It would be a startling result if a party, having assessed the risks and decided to complete a transaction on certain terms in the light of those risks, could elect to reopen the transaction when one or more of the risks does not turn out as that party hoped. The defendant wanted the advantage of a final closing but now seeks to reverse ground and reopen the transactions in view of the fact that it wrongly predicted one of the known uncertainties. A contractual right is recognized as a juristic reason entitling a party to retain a benefit conferred: *Pettkus v. Becker*, supra. The law's general policy favouring security of transactions means that the courts will not grant restitutionary recovery where the parties have entered into a contract and that contract has not been held unenforceable or rescinded for a reason recognized by either law or equity: P.D. Maddaugh and J.D. McCamus, *The Law of Restitution* (Aurora: Canada Law Book, 1990), at p. 46. Another important reason not to permit the defendant to reopen the transactions is the fact that the plaintiff's claim to interest rests upon statute. The statutory rights conferred upon consumers by the Condominium Act cannot be bargained away: s. 61, supra. The principle established by the decision of the Privy Council in *Kiriri Cotton Co. v. Dewani*, [1960] A.C. 192 at p. 204, [1960] 1 All E.R. 177, is applicable by analogy. That case holds that if a statute imposes a duty of observing the law on one party -- "it being imposed on him specifically for the protection of the other" -- the other party can recover a payment made in a violation of the statute where both parties were acting under a mistake as to its application. It would seem to follow that there can be no claim based on unjust enrichment if the party upon whom the duty is imposed for the protection of the other seeks restitutionary recovery.

Accordingly, I find that even if there was a benefit conferred, there are juristic reasons to permit the members of the plaintiff class to retain the benefit.

Conclusion

Accordingly, the plaintiff class is entitled to the following:

1. Judgment against the defendant for interest on dwelling unit deposits in the amount of \$617,013.75.
2. Judgment against the defendant for interest on parking and storage unit deposits in the amount of \$881,996.97.
3. Prejudgment interest on these amounts from September 4, 1990, being the mid-point date of the closings at the rate prescribed by the Courts of Justice Act, R.S.O. 1990, c. C.43, namely 13.9 per cent.

After the commencement of this action, the defendant instructed the City of Toronto to withhold payment of tax refunds owing following the successful tax appeals continued by members of the plaintiff class. Those funds together with interest to August 31, 1993 have since been paid into court to the credit of this action. The plaintiff class seeks and is entitled to the following relief in that regard:

- (a) An order that the money paid into court to the credit of this action by the City of Toronto on account of tax refunds be paid out to Andrew Frei, solicitor for the plaintiff class, to be held in trust subject to further order concerning distribution.
- (b) An order requiring the defendant to provide any further necessary written directions and sign any necessary documentation in order to direct the City of Toronto to pay into court all refunds, plus accrued interest, in respect of appeals of municipal taxes for 1989, 1990, and 1991.
- (c) An order requiring the defendant to pay to Andrew Frei, in trust, any tax refunds received to the extent that the defendant has received or shall receive such refunds, such funds to be held in trust subject to further order of this court concerning distribution.
- (d) Judgment against the defendant for prejudgment interest on the moneys referred to in para. 4(a) from August 31, 1993 at the rate of 5.1 per cent.

All other claims, counterclaims and set-offs as between the plaintiff class and the defendant are dismissed.

As this trial effectively disposes of the issues between the parties, I will remain seized of this matter and invite the parties to make submissions as to costs and any further necessary orders, including the terms on which the matter should be referred back to Mr. Justice Winkler as contemplated by his order directing this trial of an issue.

Judgment accordingly.

CBR# 208

Re Metropolitan Toronto Condominium Corporation No. 979 et al.
and Camrost York Development Corporation et al.

[Indexed as: Metropolitan Toronto Condominium Corp. No. 979 v.
Camrost York Development Corp.]

Court File No. RE-5181/95

Ontario Court (General Division),
Sharpe J.

October 3, 1995

Prior to their respective purchases of lands from the Toronto Harbour Commissioners, CYD Corp. and CH Ltd. agreed that the lands to be purchased by CYD Corp. would be subject to an easement and right-of-way that would serve the adjoining lands to be purchased by CH Ltd. The purpose of the easement was to permit loading and for garbage removal on the adjoining lands. As it would cost CYD Corp. approximately \$250,000 to construct the easement, CH Ltd. agreed to pay an annual fee of \$25,000 for use of the easement. The agreement was carried forward in the transfer between the Commissioners and CYD Corp. The easement was constructed, and CYD Corp. developed its lands by the construction of two condominiums. After the registration of the condominiums under the Condominium Act, R.S.O. 1990, c. C.26, CYD Corp. conveyed the lands subject to the easement and right of way to the condominium corporations. However, it assigned the right to the annual easement fee to QQ Inc., a related company. The condominium corporations brought an application to determine their entitlement to the annual fee, and they contended that the right to the fee ran with the land as payment for the use of the easement. The respondents CYD Corp. and QQ Inc. contended that the fee was a personal right of CYD Corp. and its assigns.

The appropriate interpretation of the instrument was that the annual fee was a personal right. Several points supported this interpretation. First, under the transfer, the fee was to be paid to the "transferee" but there was no reference to "successors and assigns", as there was in other parts of the instrument; this suggested a personal right. The point that the right was personal was fortified by the provision stating: "Transferee shall be entitled to assign and/or direct that the said fee by [sic] payable to any other person, whether or not such person has rights in the lands being transferred." A clear distinction was here drawn between title to the land and entitlement to the fee. Further, the provision allowing the owner of the dominant tenement to end the easement also distinguished between the owner of the servient tenement and the owner of the right to the annual fee. Moreover, the transfer, while it expressly made the burden of the easement run with the land, was silent about the fee running with the land. Next, looking beyond the language of the parties, an investigation of the factual background to the transactions supported the respondents' position.

Turning next to the legal basis of the claim to the fee, the right to the annual fee was not the type of entitlement that, in law, could run with the land and pass to a successor in title. The requirements for establishing that a benefit of a covenant runs with the land are: (i) the transferee obtains the same legal estate as the transferor; (ii) it was intended that the covenant would pass automatically; and (iii) the covenant relates to the land transferred -- it must "touch and concern" the land. In this case, neither the second requirement, which was missing on the evidence, nor the third requirement was satisfied. The proposition that covenants to pay a periodical sum do not run with the land was supported by a long line of authority.

Finally, the applicants' argument that they were owed a fiduciary duty by the condominium developer was without merit. The grant of easement and agreement that the easement be paid for by way of annual fee was completed long before any units in the condominium had been marketed and was obvious from the title documents.

Cases referred to

Grant v. Edmondson, [1931] 1 Ch. 1, [1930] All E.R. Rep. 48, 100 L.J. Ch. 1, 143 L.T. 749 (C.A.), affg [1930] 2 Ch. 245; Milnes v. Branch (1816), 5 M. & S. 411, 105 E.R. 1011 (Q.B.); Parkinson v. Reid, [1966] S.C.R. 162, 56 D.L.R. (2d) 315; York Condominium Corp. No. 167 v. Newrey Holdings Ltd. (1981), 32 O.R. (2d) 458, 122 D.L.R. (3d) 280, 14 R.P.R. 62 (C.A.)

Authorities referred to

Halsbury's Laws of England, 4th ed. (1982), vol. 39, p. 563 Ziff, Principles of Property Law (1993), p. 307

APPLICATION to determine the entitlement to a fee for the use of an easement and right of way.

Robert Wright, for applicants.

Mark S. Hayes and Beth G. Beattie, for respondents.

SHARPE J.: — This application is brought to determine the entitlement to a fee of \$25,000 a year for the use of an easement and right of way (the "easement"). The easement is over lands formerly owned and developed by the respondent Camrost York Development Corporation ("Camrost") but now owned as part of the common elements of the applicant condominium corporations. The transfer by which Camrost acquired title to the lands also created the easement and provided for the payment of the annual fee. The issue to be resolved on this application is whether the right to the fee is a personal right of Camrost and its assigns or whether the right to the fee runs with the land and hence passed to the applicants upon their acquisition of title to the lands.

Facts

In May 1988 Camrost acquired from the Toronto Harbour Commissioners certain lands for the purpose of developing two condominium highrise towers. The 1988 transfer to Camrost was preceded by negotiations and dealings involving Camrost, Copthorne Holdings Ltd. ("Copthorne") and the Toronto Harbour Commissioners with respect to the use and development of other adjacent lands then owned by the Toronto Harbour Commissioners. Copthorne required the construction of a passerelle and easement to serve the land immediately adjacent to that being acquired by Camrost. That easement is the subject of this application. The purpose of the easement was to permit loading and unloading and for garbage removal at the adjacent property. Camrost advised Copthorne that the construction cost of the easement would be approximately \$250,000. It was agreed that Copthorne would not pay a lump sum to Camrost but rather that Copthorne would pay Camrost an annual fee of \$25,000 for the use of the easement. An agreement to this effect was entered in July 1987. The 1988 transfer between the Toronto Harbour Commissioners and Camrost carried this arrangement forward by reserving the easement and providing for the payment of an annual fee. The provisions of the transfer which create the easement and provide for the annual payment are as follows (emphasis added to passages crucial to this application):

Reserving unto the Transferor, its servants, employees and assigns a non-exclusive easement and right-of-way in, over, along and upon the lands described as Part of Block D, Plan E-640 and designated as Part 1 on Plan 63R-4062 for the benefit of those lands described as Part of Blocks D, E and F, Plan E-640 and designated as Parts 3 and 4 on Plan 63R-1166 (the "dominant tenement") for the use by the owners and occupants from time to time of the dominant tenement and that of their assigns, agents, employees and invitees including without limitation all persons requiring access from time to time to the buildings located on the dominant tenement and all vehicles necessary for all uses to which the said buildings are put, for the purpose of loading and unloading material at the adjacent loading docks and for access to garbage compactors for the purpose of removing garbage, the foregoing easement and right-of-way shall be subject to the following conditions:

1. There shall be payable to the Transferee an annual fee of Twenty-Five Thousand (\$25,000.00) Dollars for the use of the easement and right-of-way, such fee to commence upon the substantial completion of the easement area such that it is sufficiently complete for its permanent use (after construction of the parking garage) by the Transferor (it being understood that this will not require the top coat of paving material to be laid) and shall be payable quarterly in arrears. The said fee shall be increased at the end of each five (5) year period by an amount equal to the percentage increase during such five (5) year period in the Consumer Price Index for all items, as determined by Statistics Canada or successor index or agency. Upon written notice to the Transferor, the Transferee shall be entitled to assign and/or direct that the said fee by [sic] payable to any other person, whether or not such person has any rights in the lands herein transferred. Notwithstanding the foregoing, the said fee shall not be payable during any period of interruption of use, after substantial completion of the easement area, due to an exercise by the Transferor of its rights pursuant to paragraph 4 herein.
2. Parking on the right-of-way shall be prohibited and the enforcement of such prohibition shall be the responsibility of and under the sole jurisdiction and authority of the occupant of the dominant tenement. The occupant of the dominant tenement shall maintain the right-of-way at all times in good repair and free from ice, snow and other obstruction and agrees to indemnify and keep indemnified the Transferee, its servants, officers, employees, agents, successors and assigns of, from and against all manner of loss, damages, expense, suits, claims, liens and demands arising out of the use of the said right-of-way. The Transferee shall be responsible for the maintenance and repair of all reinforced concrete structural elements forming part of or supporting the right-of-way. If the Transferee disposes of its interest in the right-of-way or the structural elements supporting same then the foregoing responsibility shall be those of its successors in title and the Transferee shall be forever discharged from any further obligations or liability.
3. Failure to pay the fee required pursuant to paragraph 1 herein within fifteen (15) days after notice of non-payment is delivered by the Transferee to the owner and the occupant of the dominant tenement or persistent failure of the occupant to carry out its obligations pursuant to paragraph 2 herein shall give rise to a right of termination of the easement and right-of-way. In order for an event to constitute a failure to carry out an obligation under this paragraph, the owner and the occupant must have received notice in writing from the Transferee setting out the alleged failure and the owner or the occupant must have failed to correct the same within a reasonably practicable period dependent upon the type of obligation and external factors which may prevent immediate correct. Such termination shall not render the party enjoying the same liable for payment required to be made hereunder, except for the period concluding on the date of termination. Termination may be effected by registration on title of evidence of failure to comply with the provisions of this paragraph and of such notice of non-payment or persistent failure to carry out obligations. Upon written notice to the owner of the servient tenement and assignee of the fee payable, if any, by both the owner and occupant of the dominant tenement that the right-of-way is no longer required and the delivery of an appropriate release and abandonment thereof in registrable form and payment to the effective date of release of the right-of-way to the owner of the servient tenement, there shall be no further liability for any further payment.
4. The use of the easement and right-of-way may be interrupted from time to time:
 - (a) To permit the Transferee or its successors to fulfill the repair obligation contained in paragraph 2 herein. The Transferee shall give the owner and occupant of the dominant tenement, no less than thirty (30) days prior notice in writing of any such repairs unless such repairs constitute an emergency.
 - (b) To permit the construction or reconstruction, from time to time, of a parking garage or other structures on the lands herein transferred, provided that the Transferee uses its best efforts, subject to force majeure, to complete the construction of such structures in a timely fashion giving reasonable priority, having regard to normal construction practice, to completing construction in the easement area, in establishing its sequence of operation for such construction. The Transferee shall give the owner and occupant, no less than thirty (30) days notice in writing prior to commencing such construction.
5. The easement and right-of-way shall be subject to encroachment in an area extending not more than five hundred (500mm) millimeters south and west from the northerly and easterly boundaries respectively of the easement area to the extent necessary for the purpose of constructing and maintaining supporting columns or walls for an overhead passerelle connecting the structures located on the dominant and servient tenements.

RESTRICTIONS

AND THE SAID Transferee, its successors and assigns hereby covenants to and with the Transferor, its successors and assigns, to the intent that the burden of this covenant shall run with and bind the lands transferred to the Transferee herein, and every Part thereof, and shall run with and be for the benefit of the lands owned by the Transferor and hereunder described as the Dominant Tenement, that:

1. No building or other structures shall be erected upon the lands for use other than as residential premises and ancillary facilities thereto including a public square, general retail space and parking and that such residential premises and parking shall be governed by the provisions of the Condominium Act, R.S.O. 1980, Ch. 84, and amendments thereto, or any legislation passed in substitution therefor.
2. There shall be no change in the design or appearance of the exterior of any buildings erected on the lands, without the prior written approval of the Transferor or its successor in title to the Dominant Tenement, which may affect the aesthetics of such buildings.

The easement area was completed in October 1990. The condominiums were marketed by Camrost pursuant to the Condominium Act, R.S.O. 1990, c. C.26, in July and October 1991. Upon registration of the declarations required by the Condominium Act the land over which the easement is exercised became the property of the applicant condominium corporations.

In October 1994 Camrost assigned its right to the annual fee to Queen's Quay, a corporation within the Camrost corporate structure. Although invoices have been rendered, the fee has not been paid due to a dispute among the various prospective payors. That dispute is not the subject of nor is it relevant to the present application.

Position of the Parties

The applicants take the position that as the fee is described as being for the use of the easement, entitlement to the fee passed to them upon acquiring title to the lands over which the easement is enjoyed.

The respondents take the position that it was intended that Camrost would retain entitlement to the fee as the fee was the payment to Camrost for the construction of the easement. They submit that the language of the transfer makes it clear that the right to claim the fee was intended as a personal right to be enjoyed by Camrost or its assignee and, moreover, that in law such an interest does not run with the land and pass to the party who acquires title to the land.

Analysis

(1) Terms of the Transfer

The applicants argue that as the transfer provides for the payment of a fee "for the use of the easement", the right to the fee passes with title to the land. It is their submission that the parties owning the lands which bear the burden of the easement are entitled to the fee for its use. It is further submitted that, at the very least, the language of the transfer is ambiguous and that any doubt should be resolved against the respondent Camrost which, as a party to the transfer, must bear, or at least share, responsibility for its drafting. The *contra proferentem* principle is relied on. The applicants further contend that the transfer gives rise to an obligation on them to maintain and repair the easement, and that as the party responsible for repairs, they should enjoy the benefit of the annual fee.

While the terms of the transfer creating the easement and the obligation to pay an annual fee for its use are not crystal clear, it is my view that, on balance, an interpretation favouring the respondents is the appropriate one.

The first point to note is that the instrument provides that the annual fee is to be paid to "the Transferee" without any reference to the "successors and assigns" of the transferee. The omission of the words "successors and assigns" supports the contention that the right to receive the fee is a personal right rather than one which passes with title to the land over which the easement is exercised. The omission of any reference to "successors and assigns" is to be contrasted not only with standard usage in such instruments with respect to interests attaching to title in land, but also with other parts of the transfer itself where reference is made to "successors and assigns". The point is fortified by the terms of para. 1 which expressly provides that the "Transferee shall be entitled to assign and/or direct that the said fee payable by [sic] payable to any other person, whether or not such person has any rights in the lands herein transferred". This provision, in my view, indicates that the right to the fee is a right personal to the transferee. As the transferee is given the right to assign to another party having no interest in the land, clear distinction is drawn between title to the land and entitlement to the fee. It is difficult to imagine how the transferee could retain the right to assign the fee to a party who had no interest in the land if the right to the fee were an entitlement passing with title to the land.

A second indication that there is a distinction to be drawn between ownership of the land and entitlement to the fee is to be found in para. 3. There, it is provided that if the owner of the adjacent land, described as the "owner of the dominant tenement", no longer requires the right of way, "upon written notice to the owner of the servient tenement and assignee of the fee payable, if any" to that effect, the owner of the dominant tenement is discharged from further liability for the annual fee. Again, if entitlement to the fee were to pass to the owner of the land, it is difficult to see why notice to both the owner and the party entitled to receive the fee would be required.

A third point is that the concluding portion of the transfer dealing with the easement clearly provides "that the burden of this covenant shall run with and bind the lands transferred to the Transferee herein". However, nothing is said as to entitlement to the fee running with the lands and enuring to the benefit of the owner of those lands from time to time. This language is entirely consistent with the position of the respondents and, indeed, reinforces that position to the extent that it demonstrates a distinction in the minds of those drafting the instrument between the burden of the easement which does run with the land and the benefit of the annual fee which does not.

At first blush, it may seem that if a fee is to be paid for an easement, it should be paid to the owner of the lands which bears the burden of the easement. Upon analysis, however, it is apparent that there is nothing unusual in the subsequent owner of a property which is subject to an easement receiving nothing by way of compensation. Ordinarily where a previous owner sells an easement,

the successor in title must bear the burden of the easement without compensation. The existence of the easement will be a factor affecting the price the successor in title pays for the property. The applicants would have no claim against Camrost if it had been paid a lump sum for the easement prior to transfer of title to the applicants. I fail to see how the fact that payment for the easement is to be made over time makes any difference.

As noted, the applicants submit that they are responsible for the maintenance and repair of the structural elements supporting the easement. This is disputed by Camrost which takes the position that it remains responsible for these matters. The language of the transfer with respect to maintenance and repair is anything but clear. Paragraph 2 provides that the owner of the dominant tenement is responsible for ordinary maintenance, including ice and snow removal, while the "transferee" is responsible "for the maintenance and repair of all reinforced concrete structural elements forming part of or supporting the right of way." Paragraph 2 goes on to deal with responsibility in the event the "transferee disposes of its interest in the right of way or the structural elements supporting same". Responsibility for maintenance and repairs shifts to the transferee's "successors in title". The language here is ambiguous. A distinction is drawn between the transferee's interest in the right of way and its interest in the structural elements. If by "interest in the right of way" it is intended to refer to the transferee's right to receive the fee, then Camrost's position is supported. On the other hand, the reference to the transferee's "successors in title" becoming responsible for repairs supports the position of the applicants. In the end, this provision is unclear and, in my view, difficult to understand. It is surely odd, however, that each party should so vigorously insist that it is responsible for what might well prove to be a significant liability. Taken alone, this element of the terms of the transfer would seem to favour the position of the applicants. However, it must be considered in light of the rest of the instrument as well as in the light of the dealings between Camrost and Copthorne, which strongly suggests that Camrost remains liable for these repairs so long as it receives the annual fee, and that if entitlement to the fee is assigned, liability for the repairs is to be assumed by the assignee. Moreover, the position taken by the respondents on this aspect of the matter would make it difficult, if not impossible, for the respondents later to insist that the applicants are responsible for repair and maintenance of the structures necessary for the right of way.

(2) Intention of the Parties

The history of dealings between Camrost and Copthorne leading up to the creation of the easement and the inclusion of the easement in the transfer from The Toronto Harbour Commissioners strongly supports the position taken by the respondents. The uncontradicted affidavit evidence filed by the respondents indicates that it was always the intention of Camrost and the other parties involved that Camrost and its assigns would retain their entitlement to the annual fee so long as the easement was used, whether or not Camrost or its assigns had any interest in the lands over which the easement was enjoyed.

In effect, Camrost sold to Copthorne the right to an easement. The price for the easement was based largely on the fact that Camrost had to expend a considerable sum in structural work required for the easement. Rather than pay Camrost a lump sum for the easement, Copthorne agreed to pay Camrost an annual fee. That fee was tied to the use of the easement as a form of security to Camrost. If Copthorne, or its successor in title, did not pay the fee, the right to enjoy the easement could be denied.

Had Camrost simply sold the right of an easement to Copthorne for a lump sum payment, the applicants would clearly have no claim to that sum. In my view, it makes no difference that payment by Copthorne is structured as an annual fee rather than as a lump sum. In essence, the transaction is the same, and there is no reason in law or in equity to deny Camrost or its assigns the right to be paid for the right it sold, particularly as Camrost had to spend a considerable sum in constructing the structural elements necessary for the enjoyment of the easement.

Accordingly, it is my view that if one looks beyond the language of the transfer creating the easement to the intention of the parties, the evidence clearly supports the position of the respondents.

(3) Does the Right to an Annual Fee Run With the Land?

As there is no privity between the applicants and the owners of the dominant tenement, it is necessary to consider whether the benefit of the right to receive the annual fee for the use of the easement is an entitlement which, in law, is capable of passing with title to the successors in title of Camrost, the original "transferee" in the instrument creating the easement.

The applicants contend that the right to the fee does pass with title as it is expressly tied to the use of the easement. Counsel cites the Condominium Act, s. 2(4), which provides that "upon registration of a declaration and description, the land and the interests appurtenant to the land described in the description are governed by this Act". Reliance is also placed on the Conveyancing and Law of Property Act, R.S.O. 1990, c. C.34, s. 15(1), which provides as follows:

15(1) Every conveyance of land, unless an exception is specially made therein, includes all houses, outhouses, edifices, barns, stables, yards, gardens, orchards, commons, trees, woods, underwoods, mounds, fences, hedges, ditches, ways, waters, watercourses, lights, liberties, privileges, easements, profits, commodities, emoluments, hereditaments and appurtenances whatsoever to such land belonging or in anywise appertaining, or with such land demised, held, used, occupied and enjoyed or taken or known as part or parcel thereof, and, if the conveyance purports to convey an estate in fee simple, also the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits of the same land and of every part and parcel thereof, and all the estate, right, title, interest, inheritance, use, trust, property, profit, possession, claim and demand whatsoever of the grantor into, out of or upon the same land, and every part and parcel thereof, with their and every of their appurtenances.

These provisions beg the question of what interests are appurtenant to the land. The respondents argue that in law, an affirmative entitlement to future payments is not an interest which is capable of running with the land and passing to a successor in title. It is the respondents' position that as the right to the annual fee is not an interest which attaches to the land, the interest is not one to which the above-noted statutory provisions apply.

The requirements for establishing that a benefit of a covenant runs with the land are described as follows by Ziff, Principles of Property Law (1993), p. 307:

(i) the transferee obtains the same legal estate as the transferor; (ii) it was intended that the covenant would pass automatically; and, (iii) the covenant relates to the land transferred -- it must "touch and concern" the land.

The respondents contend that neither the second nor third requirements are met. The issue of the intent of the parties has already been canvassed at length, and as indicated above, it is my view that the intention of the parties was that the benefit of the covenant to pay the fee not pass with the title to the lands but only if expressly assigned by Camrost. That finding is, in my view, fatal to the claim that the applicants acquired the entitlement to the fee as it is clear there has been no assignment of that right to them by Camrost.

With respect to the third element, Prof. Ziff elaborates as follows (at p. 307):

The requirement that the covenant "touch and concern" the dominant land [here the lands of the applicants] is important throughout the law of covenants. This requirement limits the variety of restrictions that can pass from owner to owner. To touch and concern the land, the covenant must either (a) relate to the mode of occupation; or (b) directly, and not in some collateral manner, affect the value of the land. Restrictions on the use to which land is put is an example of a valid restriction.

It is to be noted that the discussion focuses on restrictions and it is clear that, in general, affirmative covenants requiring the expenditure of money or the doing of some act do not run with the land: *Parkinson v. Reid*, [1966] S.C.R. 162, 56 D.L.R. (2d) 315.

The proposition that covenants to pay a periodical sum do not run with the land is supported by a long line of authority. The principle was enunciated in *Milnes v. Branch* (1816), 5 M. & S. 411, 105 E.R. 1011 (Q.B.), and considered at length by the English Court of Appeal in *Grant v. Edmondson*, [1931] 1 Ch. 1, [1930] All E.R. Rep. 48. At issue in that case was an interest classified as a "rentcharge". There, it was held that the successors in title to the original beneficiary of a rentcharge were not entitled to sue for payments due unless the right to receive those payments had been specifically assigned to them. The trial judge, Clauson J., put the point as follows ([1930] 2 Ch. 245 at p. 254):

In technical language, the question is whether the benefit of the covenant runs with the rentcharge at law. For many years the general opinion of legal practitioners, as reflected in the ordinary text-books, has regarded as sound the doctrine that the benefit of a covenant (for example, for payment of the rentcharge) cannot run with a rentcharge at law, but the covenant must be treated as a covenant collateral or in gross.

(Citations omitted)

The Court of Appeal agreed after a very detailed review of the authorities. Lawrence L.J. stated (at pp. 20-21):

... it appears to me that Clauson J. was right in concluding that for many years past *Milnes v. Branch* has been accepted by the profession as having established the proposition that a covenant to pay a rentcharge does not run with the rent. Thus, in *Burton on Real Property*, 7th ed. (1850), p. 347: "In particular it seems that the covenant of the grantor runs neither with the land nor with the rent; but is merely a personal engagement between the parties. *Milnes v. Branch*"; in *Pollock on Contracts*, 8th ed. (1911), p. 249 (4): "An agreement to grant an annuity charged on land implies an agreement to give a personal covenant for payment; but by a somewhat curious distinction the burden of a covenant to pay a rentcharge does not run with the land charged, nor does the benefit of it run with the rent"; in *Halsbury's Laws of England*, vol. xxiv. (1912), p. 517, cl. 1021: "The due payment of a rentcharge is frequently secured by the covenant of the landowner who creates it. The burden of such a covenant does not run with the land so as to bind subsequent owners of the land; nor, it seems, does the benefit of the covenant run with the rentcharge so as to entitle subsequent owners of the rentcharge to sue," citing *Milnes v. Branch* and other cases; and in 1 *Smith's Leading Cases*, 13th ed. (1929), p. 98, in the notes to *Spencer's Case*, *Milnes v. Branch* is cited at length for the proposition that a covenant to pay the rentcharge does not run with the rent.

Lawrence L.J. added (at p. 26):

Whatever may be the foundation of the rule, and whether it rests on the broader principle that (except as between lessor and lessee) no covenant can run with an incorporeal hereditament, or whether it rests on the narrower principle that a covenant to pay a rentcharge is a collateral covenant or a covenant in gross which does not touch or concern the rentcharge or whether it rests on no principle and is merely arbitrary, I am of opinion that it is too firmly established to be disturbed by this Court.

As noted, *Grant v. Edmondson* dealt with an interest known as a "rentcharge". The right to receive a periodic sum from land may be classified as either an annuity or a rentcharge. The distinction between the two is that a rentcharge includes the right of distress for non-payment: see *Halsbury's Laws of England*, 4th ed. (1982), vol. 39, p. 563. It is clear that the fee in the case at bar does not constitute a rentcharge, as it does not include the right of distress for non-payment. However, I see no reason why the broader principle of *Parkinson v. Reid*, *Grant v. Edmondson* and *Milnes v. Branch* should not apply to an interest of the type at issue in this case, particularly as no authority has been cited to me in support of the proposition that an interest of this nature is capable of running with the land.

I conclude, therefore, that even if the applicants had satisfied the requirement that there was an intention to create a covenant that would run with the land, an interest of the kind at issue in this case is not capable of running with the land and that, absent a specific assignment of the right from original party to the covenant, the applicants have no claim to the fee.

(4) Fiduciary Duty

The applicants rely on the principle established in *York Condominium Corp. No. 167 v. Newrey Holdings Ltd.* (1981), 32 O.R. (2d) 458, 122 D.L.R. (3d) 280 (C.A.), that the owner-developer of a condominium owes the unit purchasers a fiduciary duty with respect to dealings in the interests appurtenant to the condominium. In my view, that case is clearly distinguishable from the case at bar. Here, the grant of the easement and agreement that the easement be paid for by way of annual fee was completed long before any units in the condominium had been marketed. The deal was struck at the same time Camrost itself acquired title to the lands on which the condominium was to be developed. At that point, Camrost was at liberty to dispose of its rights to those lands as it saw fit. The fiduciary duty enunciated in the *York Condominium* case arises after unit-holders have acquired an interest in the condominium to protect them from the developer dealing with the property to their detriment and for its own benefit. Here, the easement was created before any unit-holders had acquired any rights and its existence was disclosed in the required disclosure statement.

The applicants complain that the existence of the fee was not disclosed, but as the fee represented the price of the easement sold long before the condominium came into existence, I see no reason why it should have been disclosed. In any event, the fee was hardly something Camrost concealed as its existence is obvious from the title documents.

Conclusion

In my view, the claim of the applicants to entitlement to the fee for the easement fails, both in fact and in law. Although there is no cross-application by the respondents for a declaration of their entitlement, counsel submitted that as it necessarily follows from dismissal of the application that the respondents are entitled to the fee, a declaration to that effect would serve to clarify the issue in the future. I see no reason to refuse that request, and, accordingly, there shall be a declaration:

- (a) that the entitlement to the annual fee for the use of the easement does not run with the land and does not rest with the owner from time to time of the said land;
- (b) that Camrost or its assignee has all the right, title and interest to the annual fee for the use of the easement;
- (c) that the applicants have no interest in the annual fee for the use of the easement.

If the parties are unable to agree as to costs, I may be spoken to.

Order accordingly.

CBR# 362

York Condominium Corp. No. 35 v. Mosseau

Between

York Condominium Corporation No. 35, applicant, and
Marie Mosseau and Alfred Cadorette, respondents

And between

York Condominium Corporation No. 35, applicant, and
Thomas Smylie and Wendy Smylie, respondents

And between

York Condominium Corporation No. 35, applicant, and
John Steponas and Susan Steponas, respondents

Court File Nos. Re 5495/95, RE 5496/95 and RE 5497/95

Ontario Court of Justice (General Division)

Motions Court

Brockenshire J.

Heard: November 1, 1995.

Oral judgment: November 3, 1995.

(13 pp.)

The Condominium Corporation applied for an order that the respondents had breached an article of the Condominium Declaration, and an order requiring that they comply. Although the fact situations varied in the three cases, basically each of the respondents lived in condominium units whose windows had been altered. The Corporation wished to stick window strip mullions on the exterior of the windows to make them look the same as windows of other units in the building. The respondents refused to allow this to happen.

Counsel:

J.D. Pappalardo, counsel for the applicant.

J.D. MacMillan, counsel for the respondents.

1 BROCKENSHIRE J. (orally):— I have before me three applications brought by York Condominium Corporation No. 35 against three of the unit holders from that corporation, Steponas, Smylie, and Mosseau. The basic factual situation in all three of the applications is the same. There are some variances in the particulars.

2 I have undertaken to deal with these applications in my court because another matter before me was adjourned leaving available time. I appreciate and thank counsel for their assistance in leading me through three complex sets of documentation and attempting to explain to me the situation. Factual errors which I may make I would attribute to my own lack of knowledge to the background and inability to read the material before commencing and my reasons will be subject to a reserved right of correction should it prove necessary.

3 The relevant part of York Condominium Corporation No. 35 is a townhouse development. The townhouses have apparently from the photographs small backyards enclosed to a large extent by fencing and on the back of the units a door leading out and windows. The subject problem relates to the windows.

4 I am told that these units were constructed and registered sometime in the early 1970's, I have heard the date 1971, and that included in the particulars in the condominium plans duly registered were drawings of the proposed windows. I am further told that in fact the windows were not installed during construction in accordance with those drawings. There has been some suggestion that what went in was cheaper than what was called for.

5 In any event, what I have heard was a particular problem is shown in a series of photographs as Exhibit "E" in the Application Record in the Steponas matter where apparently the original windows had an upper and lower portion. The upper portion was divided by a strip running vertically. The lower portion was separated from the upper by a strip running horizontally and one-half of that lower portion had a slider type window in it so there was another divider running vertically across the bottom part.

6 I have heard and the affidavits indicate that for what I presume was a variety of reasons, a number of the owners in the condominium have made changes in the windows. They have done it at their expense. The changes I have heard of included doing away with the slider portion in the bottom for safety or aesthetic reasons and doing away with the divider in the top to give more of a picture window effect.

7 I have heard that the Condominium Corporation became concerned that the changes being carried out by the various owners was detracting from the uniformity in appearance of the units. That the Board in its wisdom pondered this difficulty for several years and finally in 1994 collectively started to take some action, exhibited apparently by minutes and resolutions of the Condominium Corporation.

8 The proposal of the Condominium Corporation was to attempt to create uniformity by installing at its expense strips on the outside of windows that had been altered which would be glued on to the new windows to make them look similar to the old windows. The Condominium Corporation, I presume, did this in the utmost of good faith with the purpose and intent of improving the general appearance of the entire development and further was prepared to do it at the general expense of the Condominium Corporation meaning expense of all of the people in the condominium.

9 I am told that a number of the condominium owners who had changed windows accepted that offer. The three parties brought before the court in these three applications did not accept the offer.

10 Fortunately, the same counsel appeared for all three which allowed for uniformity in treatment and brevity in argument.

11 The factual situation of the three is somewhat different. I am advised that the Smylie's purchased their unit in 1985. The windows in their unit had been altered before they purchased. They did nothing to the windows except that Mr. Smylie, who happens to be a glazier, in 1994 replaced a broken window on agreement with the Condominium Corporation who in fact paid for the installation of the replacement. Mr. Smylie is described as both a glazier and a artist. In his view the proposed strips which the Condominium Corporation would like to stick on his windows are offensive in appearance. He resists on the basis of de minimis, which is common to all three of the objectors, on the basis of laches, and on the basis of an implied acceptance by the Corporation both in not pointing out in an estoppel certificate that there could be a problem with the windows installed, and in accepting his work in continuing the variation if you will and paying for the bill in 1994.

12 Steponas moved in 1991 and they did not change their windows. Somebody before them probably did change the windows because the windows were not like the others that were installed by the contractor when the condominium was built. Interestingly though, the windows in the Steponas units are exactly as depicted in the Condominium Declaration Plans. So the argument of Steponas in addition to de minimis and laches is that they would have no way whatsoever of knowing that there was non-compliance. In fact from their position their windows complied exactly with what they were supposed to get from all of the registered documents.

13 Mosseau acquired her unit in 1991 and made a change in the windows at about the same time. Her argument is that if the Condominium Corporation had done anything about the other windows she relies particularly on Smylie, she would have known and had brought home to her that she could not and should not make a change and would not have put herself into the position she did. She in effect argues that the Condominium Corporation has slept on its rights to her disadvantage. Despite what must have been obvious work being done on this unit in 1991, the Condominium Corporation did nothing, apparently, to stop the work.

14 The Condominium Declaration makes maintenance of common elements a duty of the Corporation. I heard evidence that the outside windows of these units, per the efforts of some surveyor obtained no doubt at large expense, backed by the surveyor's opinion, would be a common element. The inside of the windows would go with the units.

15 Section 8(b) of the Condominium Declaration resolves the obvious problems that can arise in favour of the Condominium Corporation by providing that each unit holder shall, in addition to maintaining his unit, take care of repairs and replacements of all windows servicing his unit. The Condominium Corporation has of course the usual general power and authority to deal with and to regulate the common units. There is a provision under 9(a)(3) stating in part that no window shall be installed, removed or otherwise altered without the prior written consent of the Corporation. The position of the Corporation is that prior written consent was not given in the three separate instances of the changes in the three windows in the three units here before me.

16 The application that is brought before me in an attempt to arrive at a resolution of the impasse between the three unit holders and the Condominium Corporation, is an application for an order declaring the respondents have breached article 9(a)(3) of the Declaration, and an order requiring that they comply. In other words, that the unit holders be required to put the windows of their units back to the original condition of all of the other windows in the development.

17 There is an alternate application to the court for an order that the respondents not interfere with the installation of window strip mullions on the exterior of their unit windows. I heard no clear authority being cited for the power of the Condominium Corporation to install these strips on windows. Certainly I heard nothing of an attempt to amend the Declaration so as to amend the property description.

18 There is some reliance on general principles of condominium living, particularly reliance on York Condominium Corporation No. 118 v. Glidden et al., York County Court, Grossberg J. August 3, 1979; and York Condominium Corporation No. 216 v. Borsodi, (1983), 42 O.R. (2d) 99 at 106-109 Ct. which indicate and support generally the concept that inherent in the condominium concept is the principal that because condominium unit holders live in close proximity and share facilities in common, in order to promote the welfare of the majority of the owners, individual unit owners may be required to give up a certain degree of freedom of choice that they might otherwise enjoy in separately, privately owned property.

19 There was some reliance on York Region Condominium Corporation No. 585 v. Gilbert, Ont. Dist. Ct., Gilbert D.C.J., January 23, 1990 in which the court indicated that a restriction in a declaration may even have a degree of unreasonableness and still withstand attack in the courts.

20 My difficulty is that these cases are referring to and relying on provisions in the Declaration and when one becomes a unit owner one accepts what is in the Declaration. What is proposed here is a change from what is in the Declaration but not a change formally processed as such, but rather a change based upon the practicalities of the circumstances. The other argument is that it is within the general powers of the Condominium Corporation in managing the common units to make such alterations.

21 To my mind it is one thing, in the process of managing a common unit such as a parking area, to put in strips or bumpers or otherwise deal with it. It is something else to come and say in the course of managing a common unit which is the outside skin of a window, that we are going to put in effect, in the face of the owners, something which obstructs their view and which they find visually offensive.

22 The argument is that this would be for the general welfare. I can appreciate that as a view taken by the Condominium Corporation and I can appreciate these particular unit holders having a different view. And when I look at the photographs showing how circumscribed is the view in another sense of these back windows due to the fencing I feel the onus is on the Condominium Corporation to show that this proposal is for the general welfare, and I do not feel that onus has been met.

23 The de minimis argument is to my mind completely obvious. On first reading the factums, my first question to counsel was, is this a matter of principal. It appears that it is. It appears there has been stand-off. It appears that the parties rather than resolving it physically in the backyards have come to the court seeking an interpretation, for which they are to be commended. The cost of bringing three separate applications with all of the paper and documentation entailed therein in my view horrendously outweighs anything that either side could hope to gain.

24 The argument of laches, I am told by Mr. MacMillan, is supported in the case of activities of a condominium corporation by one case only. A decision in *Marafioti v. Metropolitan General Condominium No. 775*, a decision of Greer J., and reported in 39 R.P.R. (2d) at p. 47; a decision issued in May 1994. Greer J. addressed the general proposition about a six year delay by a corporation in bringing an application and whether it was now estopped. She looked to a definition of estoppel in the C.E.D. She looked to other cases including *Farrell v. Manchester* in the Supreme Court of Canada. In the particular case before her she felt the six year delay seemed like an inordinate time to wait but included in the particular case before her there was nothing to lead her to believe there was acquiescence.

25 In the case before me certainly there is objective, solid evidence of acquiescence in the case of Mr. Smylie when the Condominium Corporation paid in 1994 to replace a window which was not in compliance with the general scheme.

26 I have indicated that in the Mosseau situation where a change was made in 1991 shortly after acquiring the property without the required consent under 9(a)(3) but without any objection whatsoever, that surely there was acquiescence.

27 In the Steponas case, where apparently his window had been changed long before he acquired the property in 1991, which change would have been completely obvious to the management, but where no objection to the change was brought to the attention of he or his solicitors on his purchase in 1991. In my view, there was acquiescence.

28 I fully appreciate and I think I have earlier indicated that the Condominium Board on behalf of all the unit holders is probably attempting in good faith in the cheapest and simplest way resolve what they view as a problem. But also, in my view, it must be recognized that these units are people's homes and that while when they have agreed to live in a condominium development, they are accepting that there will be a uniformity and that there will be general rules and regulations, nevertheless, it does not in my view lie within the authority of the Condominium Corporation to sleep on its rights so that people acquire or feel they have acquires a proprietary right to the amenities which they are enjoying.

29 If with all three of these people the Condominium Corporation had indicated when they were first acquiring that there was a problem, that they may be asked to do something, that they may be asked to join with others in creating uniformity, these people would have been in a position to make a decision of whether to live there or not. In my view they have been lulled into a sense of security.

30 I do not find any general authority for the Condominium Corporation to directly force installation of these stick on strips on their windows. In my view the proposal to instead ask the court to order these people to take out their existing windows and to install windows which would meet the original scheme smacks of an abuse of authority.

31 For those reasons I dismiss all three applications.

BROCKENSHIRE J.

CBR# 120

Ghag Enterprises Ltd. v. Strata Corp. K-68

Between

Ghag Enterprises Ltd., Plaintiff, and
Strata Corporation K-68 and Gerling Global General Insurance,
Defendants

Kamloops Registry No. 18855

British Columbia Supreme Court
Kamloops, British Columbia
Lamperson J.

Heard: October 15, 1992

Judgment: October 20, 1992; filed October 22, 1992

(5 pp.)

This was a ruling with respect to whether the plaintiff was covered under a policy of insurance issued by the defendant G Co. to the defendant S Corp. The plaintiff G owned a townhouse in the S corp. complex. G rented the unit to C, whose daughter was injured when she fell on the driveway leading to the unit which was common property reserved for the exclusive use of the C's. Both G and S Corp. were found liable. The insurance policy provided for payment if S Corp. was found negligent with respect to someone's injury and section 54 of the Condominium Act extended that coverage to an owner such as G. The defendant argued that G's liability only arose by virtue of an oral tenancy agreement with the C's.

Statutes, Regulations and Rules Cited:

Occupiers' Liability Act.

Residential Tenancy Act.

Counsel for the Plaintiff: S. Devdley.

Counsel for the Defendants, Gerling Global General Insurance:

Frank R. Scordo.

LAMPERSON J.:— The parties have asked this court by way of special case to say whether the plaintiff, Ghag Enterprises Ltd. (Ghag) is covered under a policy of insurance issued by the defendant, Gerling Global General Insurance Company (Global), to Strata Corporation K-68 (Strata K-68).

Ghag was the owner of a town house (Unit 43) in the Strata K-68 complex. The driveway leading to the unit was common property reserved for the exclusive use of the occupants of Unit 43. Ghag rented that unit to Mr. and Mrs. Cater whose 8-year-old daughter was injured when she fell off her bicycle because of a deep indentation in the driveway. Houghton J. found both Ghag and Strata K-68 liable. Damages must still be dealt with. The specific questions which Ghag and Global have asked this court to answer are:

- (a) whether the common property of Strata Corporation K-68 is covered by insurance as provided by the defendant, Gerling Global General Insurance Company;
- (b) whether the defendant, Gerling Global General Insurance Company, is required to indemnify the plaintiff for liability and damages in Action No. 13822 of the Kamloops Registry brought on behalf of Malia Lynn Cater;
- (c) whether Gerling Global General Insurance Company is required to indemnify the plaintiff for its actual costs incurred in defending the proceedings brought under Action No. 13822 of the Kamloops Registry on behalf of Malia Lynn Cater;
- (d) whether the defendant, Gerling Global General Insurance Company, is required to indemnify the plaintiff for all actual costs incurred in these proceedings.

These questions raise two issues:

- (1) Is Ghag insured;
- (2) Did Ghag assume a contractual obligation thereby excluding himself from insurance coverage.

(1) Is Ghag Insured

The driveway was common property belonging to the strata corporation even though it was reserved for the exclusive use of the occupants of Unit 43. Section 34(1)(d) of the Condominium Act, R.S. c. 61 imposes upon the Strata Corporation a duty to keep common property and common facilities in a state of "good and serviceable repair." Subsection (2) provides that the strata corporation may obtain and maintain insurance for other perils including liability. Section 54 deals with the subject of insurance and provides:

" 54.(1) The Strata Corporation

(a) shall obtain and maintain insurance for the buildings, common facilities and any insurable improvements owned by the Strata Corporation to their replacement value against fire, and against other perils as are usually the subject of insurance in respect of similar properties; and

(b) may obtain and maintain insurance against other perils including liability to the amount it considers advisable.

(3) notwithstanding the terms of the policy,

(a) the Strata Corporation;

(b) the owners and tenants, from time to time of every strata lot shown on the strata plans; and

(c) all persons normally occupying the strata lot

shall be deemed to be included as named insured on a policy of insurance in force under subsection (1). "

In this case, the insurance provided for the payment of damages if the strata corporation was found negligent with respect to someone's injury. Section 54(3) of the Condominium Act extends that coverage to an owner such as Ghag. He is therefore covered by the policy of insurance. Defence counsel has argued that the coverage applies only to incidents which happen in common facilities as opposed to common property. The Condominium Act makes such a distinction. That is apparent from the Condominium Act. The distinction would, in my opinion, be important if we were dealing with the loss of property, but is immaterial when dealing with liability in tort.

(2) Did Ghag Exclude Itself from Coverage by Assuming a Contractual Obligation

The insurance policy provides coverage for liability incurred as a result of the commission of a tort and does not cover a situation where a person incurs liability as a result of a contract. *Dominion Bridge Co. v. Toronto General Insurance Company* 40 D.L.R. (2d) 840 has determined that if a plaintiff can claim damages both under a contract and by the tort of negligence, the obligations of an insurer to indemnify an insured for negligence is vitiated, and consequently the insured is not covered by the policy. Global argues that Ghag's liability arises by virtue of an oral tenancy agreement which it entered into with Mr. and Mrs. Cater. I do not agree with that contention. It seems to me that Malia Lynn Cater's claim for damages is founded in tort only since there is no privity of contract between her and Ghag. The situation may be somewhat different with respect to her parents, who are also plaintiffs. However, the tenancy agreement was oral and there is no evidence of the terms which were agreed to. Thus, the requirement to keep the premises safe is imposed upon the landlord by the Occupiers Liability Act and the Residential Tenancy Act. A perusal of the judgment of Houghton J. shows that he relied on those Acts to impose liability on both defendants and that he was not directly concerned with any tenancy agreement. It should also be noted that the statement of claim alleges a tort and not a breach of contract. It seems to me that the Occupiers Liability Act and the Residential Tenancy Act impose upon an owner certain duties much in the same way that the Motor Vehicle Act imposes certain duties upon drivers. I have concluded therefore this is a case where Ghag is liable in tort and not in contract vis a vis Mr. and Mrs. Cater.

The answers to the questions posed by the parties are as follows:

(a) Strata K-68 is covered by insurance with respect to acts of negligence regardless whether that act was committed in a common facility or on common property.

(b) Global is required to indemnify the plaintiffs for liability and damages in the action brought on behalf of Malia Lynn Cater.

(c) Global is required to indemnify the plaintiff for its actual costs incurred in defending the action brought by Malia Lynn Cater.

(d) Global is required to indemnify the plaintiff for all actual costs incurred in these proceedings.

LAMPERSO J.

CBR# 004

453048 British Columbia Ltd. v. Strata Plan KAS 1079

Between

453048 British Columbia Ltd., Petitioner, and
The Owners, Strata Plan KAS 1079, Respondents

Vernon Registry No. 13016

British Columbia Supreme Court
Vernon, British Columbia
(In Chambers)
Harvey J.

Heard: November 21, 1994.
Judgment: filed December 5, 1994.
(11 pp.)

Petition for declaratory relief. The petitioner was the developer of a strata-titled residential condominium project which was designed to be in six phases. Following the completion of the first phase and the sale of the units therein, the strata council of the respondent corporation was duly convened pursuant to the Condominium Act. What came out of the meeting was a special resolution by which the council passed a bylaw stating that no owner was allowed to permit any person, including himself, under the age of 50 years to occupy any strata lot for a period in excess of 21 days in any calendar year. The original disclosure statement on the basis of which the units were offered for sale referred to the complex as an adult-only building with no one under the age of 19 and at least one resident over the age of 50. However, prior to the closings on the strata lots of the phase one owners, an amended disclosure statement was filed with the Superintendent of Real Estate and the latter statement did not contain any reference restricting the use of the property to those over 50. The petitioner now sought a declaration that the bylaw adopted by the strata council was void, on the grounds that it was contrary to section 29 of the Condominium Act.

Statutes, Regulations and Rules Cited:

Human Rights Act, S.B.C. 1984, c. 22, ss. 4, 5(1)(a), 5(2) (b).

Counsel for the Petitioner: R.G. Kuhn.

Counsel for the Respondents: D.L. Schaefer.

1 HARVEY J.:— The petitioner applies for the following orders:

(a) an Order that Bylaw 131(3) of the Strata Corporation comprised of the owners, Strata Plan KAS 1079 (the "Strata Corporation"), which was added to the Bylaws of the Strata Corporation by special resolution passed on April 15, 1993, is void and of no force and effect;

(b) in the alternative, a declaration that Bylaw 131(3) of the Strata Corporation will not bind the owners of Strata Lots in phases 2 through 6, inclusive, of the residential development known as "Skyway Village" located on land described as:

PID 017-691-141
Lot B
Section 2
Township 8
Osoyoos Division
Yale District
Plan KAP46743, except Plan KAP47687 and KAS1079
(Phase 1); and,

(c) an Order that the Petitioner recover from the respondents the costs of this proceeding.

2 In bringing this petition, the petitioner relies upon ss. 27, 29 and 30 of the Condominium Act, R.S.B.C. 1979, c. 61 and s. 5 of the Human Rights Act, S.B.C. 1984, c. 22, as amended.

ISSUES

- 3
1. Is Bylaw 131(3) ultra vires as contravening s. 29 of the Condominium Act?
2. Is Bylaw 131(3) as adopted by the strata council ultra vires as being discriminatory?
3. Does s. 27 of the Condominium Act prevent application of Bylaw 131(3) to the owners of strata lots in phases 2 through 6?

FACTS

4 The Petitioner is a developer and the registered owner of lands in the City of Vernon upon which Skyway Village, a strata titled residential development, is to be constructed. The design and development of Skyway Village is by way of a phased

residential development in six phases. The respondent strata corporation is currently comprised of the owners of the 24 strata lots in the first of the six phases. When completed the development will be comprised of a total of 106 strata lots in the six phases.

5 The original developers of Skyway Village were 415731 British Columbia Ltd. and Western Rim Projects Ltd. Following the completion of phase 1, the original developers encountered difficulties and were unable to proceed with phases 2 through 6. The petitioner purchased the lands comprising Skyway Village (not including phase 1) from the original developers on November 5, 1993, after the original developers ran into financial difficulty.

6 The respondents rely upon a disclosure statement dated February 20, 1992 which referred to the complex as an adult only building, with no one under the age of 19 and at least one resident over the age of fifty. On June 23, 1992 an amended disclosure statement primarily dealing with phases 1, 2 and 3 of Skyway Village was filed by the original developers with the superintendent of real estate. This disclosure statement did not contain any reference restricting the use of the property to those over 50. I find as a fact that the purchasers of the units in phase 1 were aware of this change prior to closing on their strata lots.

7 Once the strata council was duly convened pursuant to the Condominium Act the strata council passed Bylaw 131(3) which states:

(3) No owner shall permit any person (including himself) under the age of fifty (50) years to occupy any strata lot by him (her) for a period in excess of 21 days aggregate in any calendar year. For the purpose of this sub-section 3, a person who uses his strata lot for overnight accommodation shall be deemed to have occupied the strata lot for one day for each occasion that he (she) uses the strata lot for his (her) overnight accommodation. Any variation is subject to approval in writing from the strata council.

8 The respondents submit that the Bylaw was passed in order to preserve their community as an "adult only" community as was originally marketed. The petitioner claims that the respondents are trying to change the nature of the development into a seniors only complex despite purchasing strata lots in a development that at that time had no such restriction.

ANALYSIS

Contravention of the Condominium Act

9 The petitioner submits that the Bylaw as passed by the strata council contravenes the Condominium Act, R.S.B.C. 1979, c. 61 (the "Act") on the basis that the Bylaw restricts the devolution, transfer, lease, mortgage or other dealing in land. Sections 29 and 30 state:

Dealings in Strata Lots

29. Subject to section 30, the bylaws do not operate to prohibit or restrict

(a) a devolution of a strata lot; or

(b) a transfer, lease, mortgage or other dealing with a strata lot,

or to destroy or modify an easement implied or created by this Act.

Restriction on Leasing: General

30. (1) A strata corporation administering a strata plan that is wholly or partially residential may, by bylaw, limit the number of residential strata lots within the strata plan that may be leased by the owners.

(2) A bylaw under subsection (1) shall set out the number of strata lots that may be leased and the manner in which the limitation will be enforced.

10 In the decision of this court in *Cowe v. Strata Plan* (1994), 92 B.C.L.R. (2d) 327, Madame Justice Saunders, in determining that a strata council did not have the ability to limit the rental of units to those owners who had personally occupied the unit for at least twelve months stated at page 330:

The starting and ending point on this issue is the statute itself. Sections 29 and 30 of the Act are a pair of statutory provisions that work together. Section 29 of the Act ensures there are no prohibitions or restrictions on leasing a strata lot covered by the bylaw except a bylaw passed under s. 30 of the Act. In the absence of s. 30, the Rental Limitation Bylaw in this case would be ultra vires the legislation. The bylaw relied upon by the Strata Council to refuse Ms. Cowe the opportunity to rent her strata lot must be within the parameters of s. 30.

Section 30(1) permits a strata corporation to "limit the number of residential strata lots within the strata plan that may be leased." Section 30(2) says that such a bylaw "shall set out the number of strata lots that may be leased and the manner in which the limitation will be enforced." The respondents contend s. 30(2) is not a comprehensive provision, and that the word "shall" should be read to mean the two requirements that follow, the number of rentable strata lots and the manner in which the limitation is enforced, are minimum requirements. They contend s. 30 permits other restrictions to be inserted into the s. 30 bylaw such as that found in the bylaw impugned in this action. I do not agree.

In my view, s. 30 only permits a quantitative restriction or prohibition on the leasing of residential strata lots by owners. The permissive subsection, s. 30(1), refers only to a limitation of the number of rentable strata lots. The mandatory subsection s. 30(2), then requires not only the number of strata lots that may be leased to be established, it also requires the manner of

enforcement to be established. In my view, s. 30(2) does not go further to permit the Strata Council to discriminate between owners that may rent their strata lot.

11 I accept the submission of the petitioner that as a result of Bylaw 131(3), the petitioner would be prevented from selling, transferring, leasing or otherwise dealing with any strata lots in any manner that would result in occupancy of any strata lot by any person less than the age of fifty years for more than 21 days per year. This effectively restricts the devolution of the strata lots by the petitioner, or the transfer, leasing or otherwise dealing with the strata lots by the petitioner. I do not find that the Bylaw falls within the ability of strata councils to enact bylaws pertaining to the use of the land, because its application is in all practical senses intended to control who owns and lives on the property.

HUMAN RIGHTS ACT

12 While I find that Bylaw 131(3) is contrary to sections 29 and 30 of the Condominium Act, I propose to consider as well the other substantive argument of the petitioner, that the Bylaw is in violation of the Human Rights Act, S.B.C. 1984, c. 22 in that it discriminates on potential tenants on the basis of age. The Human Rights Act does not explicitly exclude the possibility of discrimination on the basis of age. For example, s. 4 deals with the sale of property, and age is not one of the enumerated grounds on which discrimination is prohibited. Thus, a provision dealing with a sale of property which had restrictions based on age, would not contravene the Human Rights Act.

13 In contrast, s. 5 deals with the rental of property. The relevant portion is as follows:

5.(1) No person shall

(a) deny to a person or class of persons the right to occupy, as a tenant, space that is represented as being available for occupancy by a tenant...

because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or class of persons, or of any other person or class of persons.

(2) Subsection (1) does not apply...

(b) as it relates to family status or age,

(i) if the space is a rental unit in residential premises in which every rental unit is reserved for rental to a person 55 years of age or older or to 2 or more persons, at least one of whom is 55 years of age or older, or

(ii) a rental unit in a prescribed class of residential premises...

14 While section 4 does not include age as one of the enumerated grounds upon which the sale of property can be limited, it is included in section 5. The only exception is for restrictions for people over the age of 55, which is not the case here. The strata council would likely not have been in violation of the Human Rights Act if the Bylaw had stated "55 years of age" instead of 50 years of age, or if Skyway Village was "a prescribed class of residential premises", in other words, a designated senior complex.

15 For the reasons stated supra I find:

1. The Bylaw is ultra vires as contravening section 29 of the Condominium Act and it does not fall into the exception provided in Section 30.

2. The Bylaw is ultra vires in that it is contrary to section 5 of the British Columbia Human Rights Act and does not fall into the exception in section 5(2).

16 In keeping with the answers to the first and second issues, it is not necessary to consider whether Bylaw 131(3) would bind the owners of strata lots in phases 2 through 6 of Skyway Village.

17 The petitioner is entitled to costs of the petition on scale 3.

HARVEY J.

CBR# 317

Strata Plan No. LMS44 v. RBY Holdings Ltd.

Between

The Owners, Strata Plan No. LMS44, Plaintiff and
RBY Holdings Ltd., Pacific Crematorium Limited and Personal
Alternatives Cremation and Memorial Services Ltd., Defendants

Vancouver Registry No. A923876

British Columbia Supreme Court
Vancouver, British Columbia
Newbury J.

Judgment: filed July 30, 1993.
(15 pp.)

Application for determination of a question of law and a mandatory injunction. The defendant was the purchaser of a unit in an industrial and commercial real estate development. It sought to use the unit for the purpose of carrying on business as a mortuary and crematorium. The unit was subject to a statutory building scheme which provided that none of the strata units may be used for any purpose other than manufacturing, processing and storage. The plaintiff strata corporation asked the court to determine whether the defendant's use was consistent with the building scheme requirements. The main action was commenced to obtain redress for damages suffered by those owners as a result of the defendant's wrongful user of its unit. While there was evidence that the plaintiff obtained a special resolution authorizing the proceedings, no written consents of the owners required under section 15(7)(b) of the Condominium Act could be produced.

Statutes, Regulations and Rules Cited:

British Columbia Supreme Court Rules, Rule 34.
Land Title Act, s. 216.
J.E. Rogers, appearing for the Plaintiff.
K.R. Doyle, appearing for the Defendants.

NEWBURY J.:—

1 I heard two contested motions in this matter on June 25 -- first, the plaintiff's application for a determination under Rule 18A or the resolution of a "point of law" under Rule 34 relating to the interpretation of a statutory building scheme which is registered against the subject strata plan; and second, a motion for an order permanently enjoining the defendants from operating a mortuary or crematorium in and about unit 102 of the property. The property, located in Delta, is known as "Tilbury Corporate Centre". I understand it is of a type similar to many industrial parks in the Delta area -- that is, it is used for industrial/commercial purposes such as warehousing and food preparation and is fairly removed from the retail or downtown part of Delta.

2 Since counsel addressed themselves mainly to the substantive issues regarding the use of the unit, I propose to deal first with the point of law. I will assume, for purposes of this part of the discussion, that the plaintiff has standing to sue as it has. I will return later to that question, however, which will technically make my determination of the point of law dicta for purposes of the present application.

3 The facts of this case are simple: on June 19, 1992, RBY Holdings Ltd. purchased Unit 102 of Strata Plan LMS44. The Unit was then, and is now, subject to a Statutory building scheme registered in the Land Title Office which provides that none of the units (or "lots") may be used for any purpose whatsoever other than "manufacturing, processing, storage, wholesale, office, laboratory, profession or research and development purposes permitted by the municipality" and that "No lot will be used for any junk or salvage business or any other purpose which could or would be offensive to other occupants of the lands or the public by reason of odour, fumes, dust, smoke, noise or other pollution being generated as a result thereof or which could be hazardous by reason of danger of fire or explosion".

4 I am advised that at the time of the purchase, the municipal zoning by-law did permit the use of the premises for crematorium purposes, although it was later changed to do so. It seemed to be common ground that the defendant would be permitted to operate, despite the by-law amendment, as a nonconforming use.

5 Subsequent to their purchase, RBY Holdings Ltd. indicated that it wished to carry on business as a mortuary and crematorium in Unit 102 through two corporations (apparently related) --Pacific Crematorium Limited and Personal Alternatives Cremation and Memorial Services Ltd. The last-mentioned company has obtained a business license from the municipality to operate a mortuary in Unit 102. (I note, parenthetically, that Mr. Rogers on the plaintiff's behalf did not raise before me any question arising under section 46 of the Condominium Act in this regard.) In furtherance of its wish to carry on the business of a crematorium as well, the defendants sought permission from the strata corporation for the right to install the necessary gas line over the common property to Unit 102. Mr. Justice Scarth of this Court granted a mandatory injunction to RBY in action number A923494 to permit such installation, although his Lordship was careful to state that in granting the injunction he had not dealt with the intended use of the premises and that the question of whether that use was permitted under the zoning by-law (or, presumably, under the statutory building scheme) should be the subject of a separate application.

6 I understand that the necessary installations or servicing were carried out even before this judgment was rendered and that since approximately August, 1992, Personal Alternatives has been carrying on business from Unit 102, i.e., administering the provision of funeral arrangements for the disposition of the remains of deceased persons. Prior to receiving the mortuary license, Mr. Little's affidavit states that human remains were on the site only transitorily for the purpose of being transferred into cremation caskets and were then transported off-site to crematoria. Since that time, the company has been able to store human

remains in a "cool room" for periods generally not exceeding 48 hours, and the "occasional" embalming of human remains has been undertaken in a "preparation room". Mr. Little states that funeral and memorial services are not conducted on-site.

7 The affidavit material also discloses that all the necessary approvals have been received for the crematorium company to begin operations other than those that were specifically dependent upon completion of the required installations, which may now have been completed. However, cremation activities have not begun as yet.

8 In its Statement of Claim, the plaintiff seeks a declaration that the proposed use of Unit 102 as a crematorium or mortuary by any of the defendants contravenes the strata corporation's by-laws and the provisions of the building scheme registered against the property. The by-laws state that an owner shall not use his lot in a manner or for a purpose that will "cause a nuisance or hazard to any occupier of a lot". Because the question of whether the proposed uses of the property would constitute a nuisance or otherwise offend the by-laws is a question of fact which I would be reluctant to decide upon without the benefit of a trial, I propose to limit my consideration to the question of law posed under Rule 34, i.e., to whether the operation of a crematorium and/or mortuary violates the first part of paragraph 7(b) of the building scheme, assuming (as I must do under Rule 34) for purposes of this judgment that these activities will not result in the emission of odour, fumes, dust, smoke, or other pollution which could be hazardous. If this latter factual issue becomes relevant, it seems doubtful it would be appropriate for a determination under Rule 18A.

9 I am left, then, with the question, which I agree is one of law, of whether the building scheme permits the uses proposed by the defendants for Unit 102 of the Tilbury Corporate Centre. A great deal of argument was addressed to me on the questions of nuisance, offensiveness, injurious affection, community standards, and the "not in my backyard" syndrome, which the defendants say is operating here. All of these are irrelevant to the legal question of the construction of the first part of paragraph 7 (b). The question is whether the use of the lot for crematorium or mortuary purposes will be a use for a purpose other than "manufacturing, processing or storage". (None of the other permitted uses was seriously pursued by counsel, and rightly so, in my view).

10 The defendants argue that the storing of human remains on the premises for embalming and/or subsequent transportation out, is "storage" within the meaning of this paragraph and that cremation is a "process". In this regard, counsel for the defendants notes the use of the word "process" in the Cemetery and Funeral Services Act and in the "Guidelines for an Application of a Certificate of Operation to Establish a Crematorium" issued by the Registrar thereunder. He also cites cases that stand for the proposition that restrictive covenants must be construed restrictively and that documents must be given their "true meaning", i.e., the meaning that would be ascribed by "an ordinary intelligent person in construing the words in a proper way in light of the relevant circumstances".

11 On the question of "storage", he cites *Capital Regional District v. Mattison*, a decision of Mr. Justice Drake, suggesting that storage "implies a certain degree of permanence" and cannot be used to describe the display of perishable merchandise outside a shop in portable form. As far as "processing" is concerned, he points out that the OED definition includes "something that goes on or is carried on", "a continuous and regular action or succession of actions taking place or carried on in a definite manner", a particular method of operation in any manufacture", and that "process" is defined to mean "treating by a special process". Applying this to the facts, Mr. Doyle argues that cremation subjects the human body to a "process" by which its state is changed to what the layman would call ashes and bone fragments. Further, he says that the normal intelligent person reading the statutory building scheme would conclude that a mortuary business is "storing" human remains and that, accordingly, Mr. Little properly concluded that his proposed uses would be permitted.

12 Neither counsel cited the case of *Bourne v. Norwich Crematorium Ltd.* [1967] 2 All E.R. 576, a decision of the Chancery Division, which I brought to counsels' attention and on which I received written argument. In *Bourne*, the defendant was appealing to the General Commissioners of Income Tax against an assessment for the profits of its crematorium. The issue was whether the furnace chamber and chimney tower of the crematorium were "industrial buildings or structures" under the Income Tax Act, which defined an industrial building or structure as one in use "for the purposes of a trade which consists in the manufacture of goods or material or the subjection of goods or materials to any process". Mr. Justice Stamp found that the furnace chamber and chimney tower were not so qualified and stated as follows:

13 "I would say at once that my mind recoils as much by the description of the bodies of the dead as "goods or materials" as it does from the idea that what is done in that crematorium can be described as "the subjection of" the human corpse to a "process" ...

... In my judgment it would be a distortion of the English language to describe the living or the dead as goods or materials. The argument, of course, goes on inevitably to this: that just as "goods and materials" is wide enough to embrace, and does embrace, all things animate and inanimate, and so includes the dead human body, so the other words to which a meaning must be given, namely "subjection" and "process", are words of the widest import. Parliament cannot, so the argument as I understood it runs, have intended to exclude from the definition a process whereby refuse or waste material is destroyed or consumed by fire and, putting it crudely, for it can only be put crudely, the consumption by fire of the human body is a process. I protest against subjecting the English language, and more particularly a simple English phrase, to this kind of process of philology and semasiology. English words derive colour from those which surround them. Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back again into the sentence with the meaning which you have assigned to them as separate words, so as to give the sentence or phrase a meaning which as a sentence or phrase it cannot bear without distortion of the English language."

And further:

"I conclude that the consumption by fire of the mortal remains of homo sapiens is not the subjection of goods or materials to a process within the definition of "industrial building or structure"

This judgment has been cited on numerous occasions by numerous courts for the general rule of construction that "one must not at the end of the day distort that which has to be construed and give it a meaning which in its context one does not think it can possibly bear".

14 In my view, both this general principle and the specific holding of the Court in *Bourne* are applicable here. If one considers the context of the statutory building scheme and the particular development in question here, it is clear that what the draughtsman

had in mind was a building to be used for commercial purposes and that the manufacturing, processing and storage in question would have referred to raw or semi-processed materials or goods to be processed for resale or other commercial use.

15 I cannot agree that "processing" in this context can be distorted and expanded so as to include, in Mr. Justice Stamp's words, "the consumption by fire of the human body". The body is not being "processed", it is being consumed or destroyed by fire. Further, no commercial goods or materials result. The residue of ashes is obviously not a commercial product which I infer is contemplated by paragraph 7. (For the same reason, I would not regard an incinerator used to burn garbage as "processing" garbage.) As the Court held in *Tenneco Canada Inc. v. The Queen*, the normal meaning of "processing" requires that goods be made more marketable. Here we do not have "goods", we do not have "marketable goods", and, in my view, we do not have "processing" -- we have consumption or destruction of the human body. I would respectfully concur with Mr. Justice Stamp in concluding that it would be a distortion of the wording used in the scheme to conclude that cremation is within the ambit of "processing".

16 As far as "storage" is concerned, the same reasoning applies. First, since I read paragraph 7 to be referring to the storage, manufacture or processing of commercial goods or products of some kind, the word is not applicable. Second, I infer that the word in this context is intended to refer to longer-term storage than the temporary moving of a human body into the premises for embalming and shipment out. The purpose of bringing the bodies onto the premises is not to "store" them but to prepare them for burial or cremation. I have already noted Mr. Justice Drake's comments to the effect that "storage" generally implies something less transient or fleeting and suggest that this is not storage in the sense that a commercial parking lot, with cars going in and out, is not normally described as a place for the "storage" of cars. In the result, I would conclude that the operation of a mortuary does, and the operation of a crematorium would, contravene the terms of the building scheme registered against Unit 102. Subject to the issue of standing, I would have granted a declaration under Rule 34 to that effect and likely granted the prayer for a permanent injunction on that basis.

17 Another issue raised by counsel for the defendants concerned the applicability of paragraph 7 as a whole. Mr. Doyle notes that paragraph 7 refers to the use of any "Lot" and that "Lot" is defined to mean "any portion of the Lands constituting a single legally subdivided area in accordance with the requirements of the Land Title Act". He argued that the deposit of a strata plan to subdivide land into strata lots under the Condominium Act takes place under that statute and not under the Land Title Act.

18 However, this ignores section 2 of the Condominium Act, which states that "land may be subdivided into strata lots by the deposit of a strata plan, and the strata lots so created...may subject to this Act evolve or be disposed of in the same manner and form as any land the title to which is registered in a land title office."; and section 3 of the Act which states that "this Act, except Parts 7 and 8, applies to the Condominium Act unless inconsistent therewith." The two statutes interlock with the effect that a strata lot is treated to all intents and purposes like any other lot under the Land Title Act, subject to the additional restrictions and obligations contained in the Condominium Act.

19 Further, the statutory building scheme is registered under section 216 of the Land Title Act and from that date on, subsection 3 provides that the restrictions contained therein run with and bind all the land affected and every part of it without further registration. To suggest, then, that this building scheme does not apply to the strata units of Strata Plan LMS44 would effect a ridiculous result in contravention of this provision. I would therefore have not acceded to this objection.

20 I turn then to the more difficult question of the plaintiff's standing to sue as it has in this case to enforce the provisions of the building scheme relating to the use of Unit 102.

21 The question of in what capacity the corporation has sued to enjoin the breach of the building scheme -- whether on a matter relating to the common property or about matters "affecting individual strata lots" -- is not expressly addressed in the plaintiff's pleadings. Paragraph 21 of the Statement of Claim states that the proposed use of the premises by the defendants "contravenes the restrictions contained in the building scheme" and paragraph 22 states that the members of the plaintiff (not the strata corporation itself) have suffered damages as a result. (Paragraph 20(a) refers to "unreasonable interference" to the common property but this is framed to refer to an alleged breach of the by-law which I am not concerned with here.) Neither the pleadings nor the affidavit evidence indicate that the strata corporation is here concerned about damage it has suffered or will suffer as a result of the breach of the building scheme in its capacity as the owner of the common property or common facilities of the strata corporation. For example, there is no allegation that hallways or the parking lot of the building have been adversely affected or would be adversely affected by the proposed uses, or that other owners will be interfered with in their enjoyment of the hallways or parking lot. Thus I have no choice but to proceed on the basis that the claim is one made by the strata corporation on behalf of the other unitholders, and therefore falls under section 15(7)(b) of the Condominium Act.

22 That section enables the strata corporation to sue on their behalf if it has been authorized by special resolution of the owners and consents in writing signed by the owners who are affected have been obtained. Presumably, the purpose of this provision is to ensure that the strata corporation's funds are not used to benefit individual owners or pursue individual causes not concurred in by most unitholders.

23 Mr. Doyle argues that on the affidavit evidence before me, it is not clear that a special resolution was, in fact, passed at the meeting of the unitholders held on March 31 of this year. The minutes which were attached to the affidavit of Mr. Schuss, however, refer to the approval and continuation of legal proceedings against the owners of Unit 102 and to the approval and acceptance of the "lawyer's report... including approval for the continuation or approval of legal proceedings" against them, which was affirmed by a vote of 13 to 2. From this, it is reasonable to infer that the required special resolution was passed. I do not think it is fatal to the resolution that the phrase "special resolution" does not appear in the minutes. There is no allegation of which I am aware that proper notice of the meeting was not given, and indeed Mr. Doyle was present as proxy for his client.

24 I have not been provided, however, with the written consents referred to in subparagraph 15(7)(b) of the Act. When I asked Mr. Rogers about this, he replied that these could easily be prepared and filed, but evidently none existed at the time of the hearing and likely none have been prepared as yet. Mr. Rogers fell back on the argument that the strata corporation may under section 15 sue to enforce the building scheme insofar as the common facilities are affected. But again there is no allegation in the pleadings that the breach of the building scheme (as opposed to a breach of the by-laws) affects the common property. The damage claim is that members of the plaintiff have suffered damage in the form of loss of property value, problems with their employees and problems with customers visiting the premises.

25 In my view, it is not for the Court to remedy the deficiency in the pleadings or in the evidence, or to "wink" at the plaintiff's failure to comply with this procedural requirement. If it is an easy matter for the plaintiff to obtain the written consents required by this Act, then the plaintiff should do so and should have done so before the action was commenced.

26 Without argument, I would not want to reach any conclusion as to whether the action, insofar as it is concerned with matters affecting the individual strata lots, may be voidable or struck out because of this deficiency. But given that there is doubt on this point, and given that the pleadings are deficient insofar as an action in connection with the common property is concerned, it is clearly not appropriate for me to proceed further and consider the granting of injunctive relief before that question is addressed.

27 Quite apart from the questions of a prima facie case and the balance of convenience, the plaintiff as a creature of statute must have satisfied the statutory conditions to pursue this aspect of its claim and, I would have thought, does not otherwise have the capacity to do so. It would be inappropriate, to say the least, for this Court to grant an injunction, permanent or otherwise, or even a ruling under Rule 34 when the plaintiff's capacity to advance its claim is questionable.

28 With some reluctance, then, I conclude that the plaintiff's present application for injunctive relief and for the Rule 34 determination must be dismissed at this time. The defendants will have their costs of this application.

29 So that this is no doubt, however, I do wish to make it clear that if the plaintiff should at some point in the future dot its 'i's' and cross its 't's', both in terms of the pleadings and meeting the requirements of the Act, it will be at liberty to apply to me or any other Judge of this Court for a declaration under Rule 34 and/or a permanent injunction enjoining breach of the building scheme. I will not be seized of this matter, but will try to make myself available if possible. Counsel should communicate with the Registry in this regard. Obviously, such an application would eliminate the necessity of the seven-day trial which I understand is scheduled in this matter.

30 Anything further, counsel?

MR. ROGERS: My Lady, if we can arrange it through the Registry and get our 'is' dotted and our 't's' crossed, is Your Ladyship available in the month of August?

THE COURT: I am here until about 24 August.

MR. ROGERS: Thank you.

MR. DOYLE: I think based on your reasons, my friend and I should be able to agree on what orders flow from this. If not, we may be able to get before you again.

CBR# 091

Cook v. Strata Plan N-50

Between

Cecelia Cook, William Cook, Donald Andersen, Janice Andersen,
Walter Donald Sedman, Valerie Jean Sedman, Ronald Floyd Fjeld,
Maureen Fjeld, Douglas James Tair, Isobel Reid Tair, Gino
Luigi Savoia, Julio Savoia, Pamela Savoia, Shirley Hagarty,
Dale Wesley McIntyre, Lois Irene McIntyre, Gilbert Thomas
Wood, Betty Dawn Wood and Margaret Rose Hodson, Petitioners,
and
The owners, Strata Plan N-50, Respondent

Vancouver Registry No. A941493

British Columbia Supreme Court
Vancouver, British Columbia
(In Chambers)
Meredith J.

Heard: October 20, 1994.

Judgment: filed November 16, 1994.

(6 pp.)

These were motions with respect to a condominium matter for the appointment of an interim administrator or expert, for a trial and for an order that the petition stand as a statement of claim, and for leave to cross-examine deponents on their affidavits filed in support of the first motion.

Statutes, Regulations and Rules Cited:

British Columbia Supreme Court Rules, Rule 32A.

Counsel for the Petitioners: G.W. Ghikas.

Counsel for the Respondent: W.P. Lightbody, Q.C.

1 MEREDITH J.:— Counsel appeared to settle the formal order arising out of my reasons for judgment dated September 20, 1994. Mr. Lightbody makes the cogent point that the reasons do not accord with the relief sought in the several notices of motion that I should apparently have been considering rather than the petition. I must reconsider the order.

2 I had before me three notices of motion.

3 The first notice of motion was for the appointment of an "interim administrator". Under s. 71 of the Condominium Act an administrator "shall, to the exclusion of the Strata Corporation, have the powers and duties of the Strata Corporation or such of them as the court orders". The petitioners, at this stage, do not seek the appointment of someone to exercise the powers of the Strata Corporation. I am at a loss to know what is meant by "interim administrator". But the notice of motion does apply for the appointment of "an expert pursuant to Rule 32A of the Rules of Court". For the reasons which follow I appoint Strataco Management Ltd. an expert under the provisions of the rule to perform the functions I will enumerate in a moment.

4 The second notice of motion was of the petitioners supported by the affidavits to be read in support of the previous motion together with an affidavit of Deborah A. Satanove sworn August 18, 1994 to which an extensive report of Deloitte & Touche is exhibited. The relief sought in that notice of motion was:

- (a) that there be a trial of this proceeding generally;
- (b) the petition shall stand as the statement of claim;
- (c) the respondents have 14 days from the date of this order to file a statement of defence; and
- (d) the pre-trial procedures of discovery of documents and examinations for discovery as set out in the Rules of Court shall apply.

5 It seems to me that the petition would be wholly inappropriate to stand as a statement of claim for the reasons which I shall give. Thus, the motion must be denied. However, the petitioners will be at liberty to initiate an action should they be so advised. The motion must therefore be dismissed.

6 The third motion was that of the respondent Strata Corporation for leave to cross-examine the deponents Rigby, Harris, and Sedman on their respective affidavits filed in support of the first motion. I think little or nothing is to be achieved by the cross-examination at this time until the issues are defined. The motion is therefore denied. However, the respondent will be at liberty to renew the application when Strataco Management Ltd. has rendered its report or earlier by leave of the court.

7 I have said that I consider the relief sought in the petition and the facts asserted therein are inappropriate to stand as pleadings. However, the petition is a proceeding under the Supreme Court Rules. I therefore, am entitled to make an appointment of Strataco Management Ltd. as an expert under the provisions of the rule in the proceedings initiated by the petition, even though I doubt that the petition is the proper method of proceeding under the circumstances.

8 I think a distinction is to be drawn between oppression, that is to say, acts legally done but oppressive to the petitioners on the one hand, and acts illegally done, that is to say in this case, what may be in contravention of the provisions of the Condominium Act.

9 In paragraphs 10 to 16 of the petition, the petitioners seem to concede the legal propriety of the by-law governing membership on council. The objection seems to be that the developer has used its position to weight the membership of council against the petitioners. Perhaps the petitioners concede that the constitution of the council conforms to the requirements of the Condominium Act. In that case there would be no argument as to the legal propriety of the appointments. Perhaps the several prospectuses issued by the developer contemplated the organization that exists whether that organization conforms to the requirements of the Act or not. But I think the matter bears examination if only because the money of the petitioners is being used, it seems, to subsidize the operations of the developer (a conclusion I draw based on the Deloitte & Touche report). I conclude that the statement of claim should state clearly the facts upon which the plaintiff relies and the relief it seeks so that the defendant can state clearly its position with respect to the facts. The issues will thus be identified. If the facts are not sufficiently clear in the Deloitte report, it may be that amendments to the statement of claim will be necessary if new facts are adduced on discovery.

10 I think that the order arising out of these reasons should recite the four affidavits read in support including that of Deborah Satanove.

11 Then the order should say that Strataco Management Ltd. be appointed an expert to enquire into and report to the court by March 15, 1995 (not February 15 as formerly), its opinion and recommendations concerning:

- (1) The financial affairs of the respondent;
- (2) The adequacy of the record keeping of the respondent;
- (3) The adequacy of the management of the respondent; and
- (4) Such other matters as Strataco Management Ltd. may deem appropriate to draw to the court's attention.

12 The plaintiffs will be at liberty to apply to the court for directions in relation to the duties of Strataco Management Ltd. as an expert, and will be at liberty to extend the time of the report if necessary.

13 The fees and disbursements of Strataco Management Ltd. shall, unless the court otherwise orders, be paid by the respondent as an administrative expense and the fees of Strataco Management Ltd. shall be \$75 per hour (or \$500 per day) plus disbursements and out-of-pocket expenses.

14 The costs of the application are reserved pending consideration of the report of Strataco Management Ltd.

MEREDITH J.

CBR# 006

453881 BC Ltd. v. Strata Plan LMS508

Between

453881 BC Ltd., 453893 BC Ltd., 458185 BC Ltd.,
458183 BC Ltd., Monty Ray Fetterly and Jennifer Noreen
Fetterly, Petitioners, and
The Owners, Strata Plan LMS508, Respondents

New Westminster Registry No. S017337

British Columbia Supreme Court
New Westminster, British Columbia
Boyle J.

Heard: June 30, 1994.

Judgment: filed July 7, 1994.

(13 pp.)

Petition for an order restoring the applicants' right to rent out strata units in a residential condominium complex held in their names. A bylaw passed by the respondents, who were the other members of the strata corporation, was at the heart of this petition. It was challenged by the petitioners on the grounds, inter alia, that the bylaw was not properly adopted in that there was no compliance with the provisions of section 26(2) of the Condominium Act and that the sections 29 and 30 of the Act did not permit a prohibition of leases of strata units. With respect to the first ground, it was not disputed by the respondents that 14 days notice of the meeting at which the impugned bylaw was passed was not given; nor was it disputed that the details of the proposed bylaw change were not specified with the notice of the meeting.

Counsel for the Petitioners: Ronald A. Morrison.

Counsel for the Respondents: Elaine T. Cameron.

1 BOYLE J.:— The petition was brought by some of the strata title holders in a residential condominium complex (Emerald Court) who wish to retain or regain their right to rent out strata units held in their names. A bylaw passed by other members of the strata corporation ("the Respondents") was challenged by the Petitioners because it bars owners from renting.

2 The Fetterlys owned two units. As I understand it, they have sold one but wish to continue renting out the other as they have done in the past.

3 The numbered companies own several units bought from the owner/developer, JLK Investments Inc. ("JLK"), president of which is John Kuebler. Mr. Kuebler supports the Petitioners.

4 JLK holds title itself to ten units and 32% of the voting rights in the strata corporation. It is protected by a special agreement and is able to rent its own units. In the immediate term, the issue therefore does not trouble JLK but, presumably, if its units are put on the market in future, the right to rent would be a sales feature.

5 The Fetterlys became title holders March 12, 1993. The numbered companies became title holders November 25, 1993.

6 When the Fetterlys bought, the bylaws of the strata corporation did not restrict leasing out by title holders.

7 On August 31, 1993, at a meeting of the strata corporation, the minutes show a bylaw passed which read:

"No Emerald Court Strata lots are to be sold or re-sold for rental purposes. As of August 31, 1993, owners shall not lease their Strata lots to another person or to other persons, nor shall they allow a rental agency to act on their behalf to lease Emerald Court Strata lots."

8 The Petitioners challenge the by-law on several grounds:

1. S. 26(2) of the Condominium Act ("the Act") provides there shall be no amendment of bylaws without approval by special resolution. A special resolution as defined in s. 1 of the Act requires passage by not less than three-quarters of all persons entitled to vote. The vote must be taken at a general meeting of which there has been 14 days notice specifying the purpose of the special resolution.

It is not disputed there was not 14 days notice of the meeting at which the impugned bylaw was passed, nor is it disputed the details of the proposed bylaw change were not specified with the notice of the meeting.

2. There is an issue about vote counting. The Petitioners, supported by Mr. Kuebler, say he was at the meeting and did not vote the ten JLK units in favour of the bylaw. The Respondents, by affidavit, say he did. If JLK did not vote for the bylaw, it could not have passed because the necessary three-quarters majority could not have been achieved without those votes.

That issue could not be resolved without examination and cross-examination.

The Petitioners raised an alternative argument on the voting. The minutes show it was necessary for the chairman to vote to break "an equality of votes." The Petitioners ask, How can there be a three-quarters majority when, without the chairman's vote, there was equality?

3. The Petitioners say ss. 29 and 30 of the Act provide strata units may be leased absent a bylaw regulating that practice. They agree s. 30 permits a bylaw limiting the number of residential leases but argue it does not permit prohibition.

Sections 29 and 30 read:

"29. Subject to section 30, the bylaws do not operate to prohibit or restrict

(a) a devolution of a strata lot; or

(b) a transfer, lease, mortgage or other dealing with a strata lot, or to destroy or modify an easement implied or created by this Act.

30. (1) A strata corporation administering a strata plan that is wholly or partially residential may, by bylaw, limit the number of residential strata lots within the strata plan that may be leased by the owners.

(2) A bylaw under subsection (1) shall set out the number of strata lots that may be leased and the manner in which the limitation will be enforced."

The Petitioners say the bylaw is prohibitory and therefore ultra vires.

4. The petitioning numbered companies argue they are protected by s. 31(4) of the Act:

"31(4) Where an owner developer sells a strata lot that is leased to a tenant, or that he intended to lease to a tenant, pursuant to the disclosure statement, the purchaser may lease or continue to lease the strata lot to a tenant for the period disclosed in the statement. Thereafter the purchaser is not entitled to lease or continue to lease the strata lot except under the bylaws of the strata corporation."

9 The Respondents raise several factual arguments in reply to the petition. In part, those arguments rest upon statements the Respondents aver were made by Mr. Kuebler but which he denies. The Respondents say he assured respondent owners at two meetings and some owners personally, prior to the August 31, 1993, general meeting that there would be no rentals in the building and that he did not intend to rent out units.

10 Turning seriatim to the questions raised:

1. The method of serving notice of the general meeting at which the challenged bylaw was passed was by slipping it under the doors of the various suites.

[para1]S. 129(1) provides:

"Unless otherwise specifically stated ... delivery of any notice ... shall be well and sufficiently given if mailed to the owner ... and if left with him (or her) or some adult person at (the address of the strata lot)."

S. 129(1) does not bar other forms of delivering notice and I find no failure of service insofar as delivery goes as a result of the method employed. That point is too narrow in these circumstances. Service was not challenged at the time by those Petitioners who now challenge it but who were at the meeting at which the bylaw was discussed extensively.

Content of the notice is another matter. The Respondents agree the notice did not advise of the proposed bylaw change but aver it was a live and known issue well before the August 31, 1993, meeting and, in fact, the issue had been put to a vote at the First Annual General Meeting. At that meeting belief was a simple majority could decide the question. When the question was put, renting was rejected but not by 75%. Consequently, on review of the Act, an extraordinary general meeting was called. It is that meeting and the vote there that is at issue here.

Against the Petitioners' position that there must be and was not strict compliance with s. 7 of the Act which requires that notice of the meeting must specify the purpose of a special resolution, the Respondents argue that not only was the issue live and known but also that Mr. Kuebler and the Fetterlys waived any right to objection or the right of anyone taking title after them regarding notice because Mr. Kuebler and Monty Fetterly were present at the meeting, took part and voted. (Although how he voted is in issue, there is no issue that Mr. Kuebler did vote).

[para2]S. 125(2) of the Act provides:

"Unless a poll is requested (which was not done in this case), a declaration by the chairman that a resolution has, on a show of hands, been carried is conclusive evidence of the fact without proof of the number or proportion of votes recorded in favour or against the resolution."

Although that section has the appearance of finality, I did not conclude it prevented a subsequent challenge on the basis that a member's vote was miscounted (as so sworn) even though there is no present evidence of an objection being raised by that member at the time of the vote. Nor did I conclude the statute's mandatory requirement for specification of the content of a special resolution could be waived by attendance and discussion. It is a precondition necessary to passage.

There appear to be no cases directly on the question of degree of strictness to be applied in carrying out the notice requirements of the Act. The Petitioners argue the very strict rules applying to municipal cases should be followed. The Respondents argue the less stringent corporate cases should set the precedent.

To accept something other than strict compliance with the requirement under the Act for specifying, with the meeting notice, the "purpose of the special resolution" would be to allow the circumstances of each case to determine its outcome and to set a precedent which would open the way in other instances for argument, dissension and litigation which could be avoided readily by scrupulous attention to the simple requirements of the definition.

There is a good deal of sympathy due the Respondents for their argument that they are volunteers doing their best but strict compliance would make their task less complicated.

Dealing with neighbours requires give and take but the ground rules must be clear.

2. Vote counting: as noted above, cannot be dealt with on affidavits.

3. Prohibition: the Respondents do not disagree the Act does not permit prohibition of leasing but they argue the bylaw does not have the final effect of prohibition because s. 32 of the Act allows for an appeal against a strata corporation's refusal to permit lease of a unit. It reads:

"32(1) Where

(a) the owner developer is unable to obtain the owners' consent under section 31(5); or

(b) an owner is prevented from leasing by a bylaw under section 30; and

(c) hardship results to the owner developer or owner,

he may appeal to the strata council for permission to lease his strata lot, and the council shall not unreasonably refuse the appeal.

(2) Where an owner developer or owner appeals to the strata council, the council shall hear the appeal within 21 days after the date the owner developer or owner requested the strata council to hear the appeal, and, if the strata council has not delivered its decision within 7 days after hearing the appeal, the appeal shall be deemed to have been allowed.

(3) The strata council may on an appeal authorize the lease of one or more strata lots in contravention of the bylaw, or permit alteration of a rental disclosure statement without the consent of the owners."

The Respondents say the bylaw need not use the term "limit" when the limit is zero - subject to a right of appeal when the bylaw is read together with s. 32 of the Act.

Von Schottenstein v. Owners; Strata Plan 730 (1985) 64 B.C.L.R. 376 at 384 supports the Respondents argument:

"Mathematically, if one is to limit a number, there must be something more than zero remaining and less than 100%. However, because of the provisions of s. 32, I think there is something more than zero in the sense that there is always a right of appeal. Section 43 (dealing with oppression) has, as well, left the Court with rather startling powers of intervention."

In Re: Mattiazzo and Boffo and the Owners, Strata Plan No. Vr. 1144, (unreported Vancouver Registry No. A850287, March 21, 1985), it was held a strata corporation bylaw which prohibited leasing was ultra vires because of that prohibition. The Court was alive to the s. 32 appeal provision but did not find that provision saved the bylaw. It was not enough to say: each would-be owner/lessor can appeal under s. 32 where the bylaw was void.

[para13]I respectfully follow Mattiazzo.

[para14]The bylaw is ultra vires and of no force and effect.

4. The s. 31 argument, numbered (4) herein, need not be dealt with.

15 In this case the practical answer is the same as the legal answer: Do it again. In doing it again, a clear direction will be given by a properly conducted meeting on adequate notice and by, I suggest, a poll on request.

16 It will avoid as well the cost and time of further litigation.

17 The order will be that the challenged bylaws - and specifically bylaw 1.1 - is void and never was valid. The order will not include the relief sought in the items B, C, D, E and F of the prayer but this is not to endorse the conduct sought to be enjoined therein. It is only to indicate that this order is to restore the legal state of affairs before the bylaw was purported to be passed without entering into procedural matters and without making findings not necessary or appropriate to the arguments made.

18 As a footnote, nothing in these reasons is intended to find or to imply a finding regarding the conflicting averments concerning what was said by or to Mr. Kuebler by anyone at any time or to find or to imply a finding how Mr. Kuebler did or did not vote at the impugned meeting.

19 I am reluctant to order costs where the Respondents acted to the best of their non-professional knowledge and it is possible they were misled. However, counsel may speak to costs if they cannot agree.

BOYLE J.

CBR# 098

Cummins v. Napev Construction Ltd.

Action No. A2651/94

Ontario Court of Justice - General Division Dunn J. April 13, 1994.

Real Property -- Condominiums -- General -- "Phantom mortgages", legal status of advance payment of mortgage principal, applicability of section 53 of Condominium Act.

Application for an order directing the respondent to pay interest on money received from the applicant pursuant to section 53 of the Condominium Act. The applicants agreed to purchase a residential condominium unit and the agreement of purchase and sale provided for a "phantom mortgage" as part of the purchase price. This mortgage was given to allow the respondent vendor take advantage of the provisions of section 51(6) of the said Act. Subsequently, after the occupancy closing had taken place, the parties entered into a "new" agreement incorporating the applicants' proposal to pay off the balance of the first mortgage principal prior to final closing in order to reduce their monthly occupancy fee. Pursuant to the latter agreement, the respondent allowed the applicants to pay the sum of \$129,000 to be applied to their unit. As agreed by the parties, no interest was to be paid on this amount from receipt to date of final closing. However, the parties did not at the time advert their minds to the operation of section 53 of the Act.

HELD: Application allowed. Order made requiring the respondent to pay to the applicant interest on the sum of \$129,000 from the date of payment to the date of final closing. With the words of section 60 of the Condominium Act, the Legislature obviously intended that the provisions of the Act were to prevail notwithstanding the wishes of the parties, as evidenced by their agreement. In this case, the respondent received the principal amount of the "phantom mortgage" and, by virtue of section 51 of the Act, was obliged to deposit it in trust with an entitlement to interest earned on it. At the same time, it was obliged by the Act to pay interest to the applicant at the rate prescribed under the Act.

Statutes, Regulations and Rules Cited: Condominium Act, R.S.O. 1990, c. 26, ss. 51(6), 53(1), 53(3), 60.

CBR# 018

Ahuntsic Investments Inc. v. Cheng (Ont. C.A.)

Between

Ahuntsic Investments Incorporated and 755456 Ontario Limited,
Plaintiffs (Respondents), and
Annie Cheng, Defendant (Appellant)

Action No. C14187

Ontario Court of Appeal
Toronto, Ontario
Dubin C.J.O., Doherty and Weiler J.J.A.

Heard: June 8, 1994.

Judgment: June 13, 1994.

(4 pp.)

Appeal from a judgment finding the appellant was not justified in treating her agreement to purchase a condominium as being at an end and that she was obliged to complete the transaction. A work order was placed on the parking garage of the building in which the condominium was located two days before the expiry of the time period within which requisitions were to be made. However, no requisition was made within the time stipulated in section 9 of the agreement for the purchaser to satisfy herself that there were no outstanding municipal work orders affecting the real property. The trial judge held that the requisition made by the appellant after the expiry of the time stipulated in section 9 was out of time. The appellant argued that section 9 of the standard agreement of purchase and sale only applied to work orders in existence at the time the agreement was signed.

Robert A.L. Shour, for the Appellant.

Patricia Conway, for the Respondent.

The following judgment was delivered by

1 THE COURT (endorsement, dismissing the appeal with costs):— This is an appeal from the decision of Roberts J. reported at (1992) 28 R.P.R. (2d) 16. In a very unique set of circumstances, Roberts J. held that the appellant was not justified in treating her agreement to purchase a condominium as being at an end and was obliged to complete the transaction.

2 The decision of the trial judge is premised on three major conclusions which the appellant challenges.

(1) The requisition submitted by the appellant was out of time.

3 A work order was placed on the parking garage of the building in which the condominium was located two days before the expiry of the time period within which requisitions were to be made. No requisition was made within the time stipulated in s. 9 of the contract for the purchaser to satisfy herself that there were no outstanding municipal work orders affecting the real property. The appellant argued that s. 9 of the standard agreement of purchase and sale only applies to work orders in existence at the time the agreement is signed. On this interpretation, the time limit for requisitions in s. 9 would not apply to a work order placed on the property after the agreement was entered into and the appellant's requisition would not be out of time. We find that s. 9 does apply to a work order which has not been placed on the property at the time the contract is entered into but is placed on the property during the time period within which requisitions can be made. We agree with the trial judge that the requisition was out of time.

(2) The work order did not go to title.

4 We agree with the trial judge's conclusion that the work order did not affect the title to the property. It was only in the event that the condominium corporation did not do the work, that the city performed the work and placed a lien on the property for the cost of the work that title would be affected. There was no likelihood this would happen here. The purchaser was therefore not entitled to rely on clause 13 respecting defects in title to avoid the contract.

(3) The objection to the work order was sufficiently answered.

5 The condominium corporation at all times intended to satisfy the work order. The appellant was a member of the board of directors of the condominium corporation. She was aware of the by-law concerning parking garages and knew that there was a real possibility that a work order would issue. There was an emergency fund in place which had in excess of \$800,000 in it whose very purpose was to satisfy the work order. Although the exact cost of the repairs was not known prior to the closing date, the estimated cost for painting was \$84,000 plus the cost of some signs. This cost was to be shared amongst the 539 condominium units in 33 Harbour Square as well as the unit holders at 55 Harbour Square. In addition, the appellant had an estoppel certificate that if an assessment of unit holders was made during that year the purchaser would not be liable to pay for it. When the work was completed the costs referable to the unit amounted to \$181.65. In the unique set of circumstances of this case we agree with the trial judge's conclusion that the objection to the work order was sufficiently answered.

6 It might also be pointed out that the eventuality which arose in this case could have been the subject of a special clause which would have given the purchaser the right to requisition the removal of an outstanding municipal work order up to and including the date of closing or a clause indicating that the purchaser was entitled to raise any work orders discovered by a subsequent search after the expiry of the requisition date. The appellant is a real estate lawyer and the owner of another condominium in the building. She could have protected herself by inserting a special clause in the agreement and did not do so.

7 There is no issue with respect to the quantum of damages awarded.

8 The appeal will therefore be dismissed with costs.

DUBIN C.J.O.
DOHERTY J.A.
WEILER J.A.

CBR# 007

500 Glencairn Ltd. v. Farkas

Between

500 Glencairn Limited, Plaintiff, and
Freda Farkas, George Farkas and Roman Gofman, Defendants

Action No. 51347/90

Ontario Court of Justice - General Division
Toronto, Ontario
Then J.

January 31, 1994.
(43 pp.)

This was an action for damages for breach of an agreement of purchase and sale of a condominium. The defendants obtained interim possession and made interim occupancy payments for some time until they stopped payments. They later took the position that the agreement was rescinded by reason of material amendments to the disclosure documentation contained in the reciprocal agreement which was registered. The defendant F purchased the unit to resell it at a profit, but was unable to do so. He said that he wished to rescind the agreement because of the quality of the building which he had inspected and found only minor deficiencies. The defendants submitted that the plaintiff failed to mitigate.

Richard Storrey, for the Plaintiff.
Martin Banach, for the Defendants.

1 THEN J.:— This is an action for damages by the plaintiff for an alleged breach of an agreement of purchase and sale made by the defendant Freda Farkas said to be acting as trustee or agent on behalf of the defendants, George Farkas and Roman Gofman, whereby the plaintiff, 500 Glencairn Limited on June 13, 1988 agreed to sell and the defendant Freda Farkas on June 12, 1988 agreed to purchase Unit 310 at 500 Glencairn Avenue along with two parking units for a purchase price of \$391,900.00 subject to adjustments.

Background

2 The plaintiff is the developer and vendor of units in a condominium development located at 500 Glencairn which is comprised of 40 residential units, 60 parking units and a commercial use component. The defendant Freda Farkas resides in Toronto and is the spouse of her co-defendant George Farkas who is a chartered accountant also residing in Toronto. The remaining defendant is one Roman Gofman who is a real estate agent and also resides in Toronto. It is common ground that the defendants received a disclosure statement which is exhibit 1, Tab 5 in this proceeding and did not purport to rescind the agreement of purchase and sale as a result.

3 The defendants obtained interim possession of Unit 310 on October 4, 1989 pursuant to the agreement of purchase and sale. The defendants also assumed the obligation pursuant to the agreement of purchase and sale to make interim occupancy payments to the plaintiff. These payments commenced on October 4, 1989 and in respect of these payments the defendants provided a series of 12 post-dated cheques to the plaintiff in the sum of \$3,913.49. The cheques payable November 1, 1989 up to and including February 1, 1990 were cleared but the defendant Gofman caused payment to be stopped with respect to the March 1, 1990 payment and thereafter.

4 On April 18, 1990, the declaration and the description for the condominium development was registered and accordingly notice was given to the defendants that final or title closing under the agreement of purchase and sale would take place on May 11, 1990. The defendants advised that title would be taken in the name of Freda Farkas and Roman Gofman.

5 On May 11, 1990, the defendants took the position that the agreement of purchase and sale could be and was thereby being rescinded by reason of alleged material amendments to the disclosure documentation provided upon the execution of the agreement of purchase and sale. The alleged material amendments to the disclosure documentation were said to be contained in the reciprocal agreement registered by the plaintiff on April 18, 1990. The closing which was to take place on May 11, 1990 did not occur.

The Facts

6 The defendants takes the position that the reciprocal agreement (exhibit 1, Tab 22) constitutes a material amendment to the disclosure statement and that accordingly the defendant is entitled to rescind the agreement of purchase and sale in accordance with s. 52 of the Condominium Act as that section is explained by the Ontario Court of Appeal in *Abdool v. Somerset Place Developments of Georgetown Ltd.* (1993), 10 O.R. (3d) 120. The specific provisions of the reciprocal agreement (exhibit 1, Tab 22) in comparison with the initial disclosure document (exhibit 1, Tab 5) will be referred to extensively in due course. For present purposes it will be sufficient to express my agreement with the plaintiff's submission that after reading the disclosure documents, any reasonable purchaser would have known the following:

(a) that there was a commercial component to the
project,

(b) that the physical location of the commercial component and other items were shown on the plans which were part of the disclosure documents,

(c) that the commercial development would own and have access to certain parking spaces in the underground parking garage and that access to those spaces would be over certain portions of the condominium building,

(d) that the property would be subject to various easements, rights of way and/or licenses relating to the operation of the residential and commercial components,

(e) that the easements, rights of way and licenses would be more particularly described by reference plans and the condominium plans,

(f) that the condominium corporation would be entering into a reciprocal agreement which would deal with all necessary matters relating to the sharing of certain facilities,

(g) that the reciprocal agreement would deal with matters in addition to matters of access and easements,

(h) that the reciprocal agreement would provide that the condominium corporation would be responsible for the maintenance, replacement, repair and operation of the shared facilities,

(i) that the reciprocal agreement would specifically provide for proportions in which the condominium corporation and the owner of the commercial development would share in the cost of the maintenance, replacement, repair and operation of the shared facilities, and

(j) that the actual proportion of expenses to be borne by the condominium corporation and the commercial development were not set out in the disclosure documents but would be set out later in the reciprocal agreement.

7 In addition, Mr. Ezer, the president of the plaintiff and its majority shareholder, gave uncontradicted evidence that the financial burden on the condominium corporation regarding their share of the expenses of the shared facilities is relatively insignificant and more specifically Mr. Ezer testified that the purchaser of Unit 410, which is identical in all respects to Unit 310 but one floor higher, completed his sale and that the financial burden as disclosed in the disclosure statement was exactly the same regardless of the subsequent allocation of costs of the shared facilities in the reciprocal agreement.

8 Mr. Farkas, who was the only one of the defendants to testify at trial, acknowledged at trial that when he subsequently received the reciprocal agreement, shortly before the time set for final closing, he and his solicitors poured over the agreement looking for anything in it to use as a vehicle to avoid continuing on with the agreement of purchase and sale. This position was identical to the one taken by the defendant on discovery.

9 Both at trial and on discovery, the defendant indicated that his reason for purchasing Unit 310 was to resell the unit at a profit. The defendant Gofman on his discovery stated that one of the reasons why the defendants did not close in May of 1990, was that they could not resell the unit at a profit having attempted to do so from January 1990 until March 1990 and having dropped the asking price for the unit some \$72,000 from that which had been agreed by them in the agreement of purchase and sale.

10 Moreover, at trial Mr. Farkas stated that he had, during the time that he purchased Unit 310, also purchased two other condominium units. In his evidence upon discovery, the defendant Farkas stated that he had purchased only one other condominium unit. Having regard to all of the evidence, I am prepared to find as a fact that Mr. Farkas was a speculator in real estate. Mr. Farkas also testified that he wished to rescind the agreement of purchase and sale with respect to Unit 310 because of the quality of the building. Not only is the evidence of Mr. Farkas as to his involvement in the purchase of condominium units at the time of his purchase of Unit 310 somewhat contradictory, but, in September 1989 the evidence discloses that both Mr. Farkas and Mr. Gofman attended to inspect Unit 310 prior to interim closing and that the defendant Gofman signed the purchaser's certificate acknowledging that he had inspected the unit and that the deficiencies were of a minor nature and specifically noted and corrected. There was no indication by the defendants of any substantial complaint regarding the building or the unit. On all of the evidence, I do not accept the evidence of Mr. Farkas that the motivation behind his desire to rescind the agreement of purchase and sale pertains to the poor quality of the building or the unit.

11 Mr. Farkas on discovery also conceded that although he was claiming that the allocation of the shared facilities as set out in the reciprocal agreement constituted a material amendment he had no idea as to what his financial burden was going to be with respect to the shared facilities at the time he received the disclosure documents and that he was not really interested in that issue. Indeed he acknowledged that he had not even read that part of the disclosure statement dealing with reciprocal agreement which provided the description of the shared facilities.

12 Further, Mr. Farkas acknowledged that he knew that there was to be a commercial component to the building and that some arrangements would have to be entered between the condominium corporation and the owner of the commercial space regarding certain matters. These arrangements would have to include matters such as parking and access to common facilities as between the condominium corporation and the commercial development. He knew that there would have to be a sharing of expenses.

13 Mr. Farkas indicated that he knew that if he had any problems, questions or concerns regarding the disclosure statement he could those 10 days regarding the commercial development or the reciprocal agreement.

14 Mr. Farkas conceded in cross-examination that s. 20(g) of the agreement of purchase and sale obliged the defendants to take title subject to the reciprocal agreement.

15 Mr. Farkas also acknowledged that the defendants knew or should have known that the reciprocal agreement would deal with matters of mutual concern beyond matters such as access and easements.

The Issues

1. Does the reciprocal agreement constitute a "material amendment to the disclosure statement"?
2. Does the reciprocal agreement constitute an unpermitted encumbrance pursuant to the agreement of purchase and sale?

3. Can all of the defendants be held liable or is the plaintiff required to elect which of the defendants should be held liable?
4. (a) If the plaintiff had a duty to mitigate damages, did it discharge that duty?
- (b) What is the proper way to assess the plaintiff's damages and as of what date should the damages be assessed?
5. What, if any, is the quantum of damages in this

case?

1. Does the reciprocal agreement constitute a material amendment to the disclosure statement?

16 Section 52 of the Condominium Act provides as follows:

52(1) An agreement of purchase and sale entered into after the first day of June 1979 by a declarant or proposed declarant of a unit or proposed unit for residential purposes is not binding on the purchaser until the declarant or proposed declarant has delivered to the purchaser a copy of the current disclosure statement and all material amendments thereto.

(2) The purchaser, before receiving delivery of a deed to or transfer of the unit, may rescind the agreement of purchase and sale within 10 days after receiving the disclosure statement or, where there has been a material amendment thereto, within 10 days after receiving the material amendment.

17 In *Abdool v. Somerset Place Developments of Georgetown Ltd.*, supra, Robins J.A. on behalf of the Court of Appeal at p. 149, has stated the test that the purchaser must satisfy before availing himself or herself of the right to rescind within 10 days after receiving the "material amendment" to the disclosure statement:

I view the term "material amendment" as broad enough to include any change that should be reflected in the disclosure statement and would not limit it to the correction of errors, omissions or defects as Borins J. does. Subject to that reservation, the basic thrust of these approaches is essentially the same: the declarant must deliver an amended disclosure statement if the change is likely to influence the decision of a purchaser to purchase the condominium unit.

In the interests of consistency, I would determine the materiality of a change or amendment to the originally-delivered disclosure statement by reference to a test similar to that which I formulated earlier to determine the materiality of an alleged defect in a disclosure statement. Would a reasonable purchaser regard the change or amendment as sufficiently important to his or her decision to purchase that, had the disclosure statement contained the new or amended information at the time it was delivered, the purchaser would not likely have one ahead with the transaction but would have rescinded the agreement within the ten-day period? If the answer to this question is in the affirmative, the developer is obliged to deliver an amendment to the disclosure statement and the purchaser has ten days from the date of delivery within which to rescind.

Amendments that substantially change a purchaser's anticipated use and enjoyment of the unit or the amenities associated therewith or that adversely affect the value of the unit, are, I would think, clearly material amendments that revive the rescission period. A reasonable purchaser could objectively assert that he or she would not have proceeded with the deal had this information been available at the time of the original disclosure statement. (emphasis added)

18 It is the position of the defendant that certain features of the reciprocal agreement viewed both individually and cumulatively constitute material amendments to the disclosure documentation in the sense outlined by Robins J.A. in *Abdool*, supra, such that it was open to the defendant to invoke the right to rescind the agreement of purchase and sale set out in s. 52(2) of the Condominium Act and, the defendant having done so, the agreement of purchase and sale is at an end.

19 It will be convenient at this stage to set out both the defendants' and plaintiffs position with respect to certain of the impugned aspects of the reciprocal agreement in order to assess whether in the circumstances the defendant has met the test for rescission outlined in *Abdool*, supra.

20 It should be made clear that the summaries of the position of the parties which follow are gleaned from the written materials submitted to the court by counsel. Many of the matters referred to were significantly amplified in argument and in fairness to the excellent arguments advanced by both counsel in support of their respective position I wish to indicate that I have not overlooked the points raised in oral argument. However, in my view, the written materials have so succinctly captured the essence of the position of the parties on the crucial first issue that I find it unnecessary to elaborate further on the arguments of counsel or the facts of this action in order to come to a determination on the first issue.

(i) The defendants submit that Schedule C of the reciprocal agreement lists the easements and rights of way in favour of the commercial building. Schedule E of the reciprocal agreement lists the shared facilities that are owned by the condominium corporation which must be shared with the commercial units. However, it is the defendants' submission that it is impossible to determine easements, rights of way or shared facilities by looking only at the disclosure documentation without reference to Plan 66R-15797 and that accordingly the receipt by the defendants of the reciprocal agreement in conjunction with Plan 66R-15797 constitutes a significant material amendment to the disclosure documentation.

21 It is the plaintiff's submission that the plans which were part of the disclosure documentation do provide some detail as to the shared facilities and indeed a reasonable purchaser would not have expected anything more. Reference Plan 66R-15797 could not have been attached to the disclosure statement because that plan was not created until after the building was erected and the plan could be finalized. It is the plaintiff's submission that a reasonable purchaser would not have expected the detailed reference contained in Plan 66R-15797 to have been attached to the initial disclosure document.

(ii) The defendants submit that the allocation of the costs of the shared facilities is in itself material. It is the position of the defendants that the allocation came into being as well as the rationale for the allocation in November or December of 1989, in

accordance with a letter from Fairfield Management which is contained at tab 13 of exhibit 1 and that this information should have been brought to the attention of the defendants by the plaintiff.

22 It is the plaintiff's position that the disclosure documents made it quite clear that the allocation of shared costs would be set out later. The defendants accepted this state of affairs and cannot now be heard to say that the failure to disclose the precise allocation is a matter so material that they can invoke their right to rescind now that the amount of allocation has been made known to them. The plaintiff submits that if the defendants thought that the allocation of such costs was material, they could and should have exercised their right to rescind within the original 10 day period after the receipt of the disclosure documentation. The plaintiff submits that in the circumstances, unless the allocation of shared costs is in itself unreasonable, the defendants ought not to be in a position to rescind the agreement of purchase and sale.

(iii) The defendants submit that the failure to include the costs that the condominium corporation had to pay for facilities owned by the commercial development in the budget statement is material.

23 The plaintiff submits that some of the costs are included in the budget statement which is part of the disclosure documentation, as for example, the maintenance item; but that given the relatively insignificant amounts involved in this item, it cannot be said that the failure to specifically include all of these costs would have caused a reasonable purchaser to rescind the agreement.

(iv) The defendants submit that it is material that the disclosure documentation and the budget statement did not disclose that the condominium corporation was responsible by virtue of s. 3.03(a) of the reciprocal agreement to replace, repair, maintain and operate the shared facilities and was also responsible for outlays which would be classified as capital in nature for shared facilities they did not own, the largest one of which was the outside parking lot. Moreover, the defendants submit that the budget statement failed to disclose that the condominium corporation would receive an administration fee of \$12,000 per annum as set out in paragraph 3.03(n) of the reciprocal agreement and that the fee was non-reviewable over time.

24 It is the plaintiff's position that s. 3(e) of the disclosure statement does provide that the condominium corporation had the obligation to replace, repair, maintain and operate the shared facilities. The plaintiff submits that the word "replace" also clearly implies that an expense might be capital in nature. In the plaintiff's submission the fact that the budget statement failed to disclose that the condominium corporation would benefit by receiving a non-reviewable administration fee of \$12,000 per year is irrelevant.

(v) The defendants submit that s. 3.03 of the reciprocal agreement places various burdens on the condominium corporation as to reasonableness of repairs and obtaining quotations but if the condominium corporation fails in its duties as seen by the commercial development, the commercial development does not have the same obligation as to the reasonableness of repairs and quotations. The plaintiff submits that the condominium corporation has the right to take initiatives and do the repairs by virtue of s. 3(e) of the disclosure statement. The embellishment of that obligation and the corresponding obligations of the commercial development do not constitute a material amendment to what was disclosed in the disclosure documentation.

(vi) The defendants submit that the disclosure documentation fails to advise that pursuant to s. 5.01 of the reciprocal agreement, the condominium corporation may in circumstances be liable for 50% of the realty taxes notwithstanding that there is no commercial component to the taxes.

25 The plaintiff submits that the realty taxes with respect to the condominium corporation are assessed separately from the commercial component.

(vii) The defendants submit that the disclosure documentation and especially the budget statement failed to disclose that there would be cost sharing of joint insurance as set out in Article 6 of the reciprocal agreement. The defendants also submit the disclosure documentation fails to reveal that if there is a default for any reason by the condominium corporation, in addition to what one could consider would be the normal remedy of a lawsuit or arbitration, the commercial unit may register a lien as set out in s. 10 of the reciprocal agreement on the property of the condominium corporation. This, the defendants submit, would have the effect of having each owner personally liable up to their proportionate interest in the condominium as set out in s. 7 of the Condominium Act. This state of affairs, the defendants submit, could have some impact on refinancing or a sale.

26 The plaintiff submits that s. 3(f) of the disclosure statement did say that the reciprocal agreement would provide "for certain arrangements between the condominium corporation and the owner of a commercial development with respect to matters of insurance". The plaintiff submits that the fact the disclosure statement did not expressly say that there would be a cost sharing of joint insurance would not, in the plaintiff's submission, be material to a reasonable purchaser. Moreover, s. 3(g) of the disclosure statement specified that each owner would agree to pay their share based upon the percentage allocation for common expenses set out in the declaration in respect of the lands and all amounts for which the condominium corporation was responsible under the reciprocal agreement. According to the plaintiff, there is no evidence that the omissions in the disclosure documentation complained of by the defendants would have any effect or impact on refinancing or a sale.

(viii) The defendants submit that the disclosure documentation failed to disclose that pursuant to s. 11 of the reciprocal agreement the purchaser must not only obtain a consent of a subsequent owner to be bound by the reciprocal agreement but all mortgagees, chargees and other encumbrances must also sign a consent. The defendants submit that this section has a substantial effect on the ability to obtain financing or being able to sell the property to one who needs financing.

27 The plaintiff submits that paragraph 3(g) of the disclosure documentation pointed out that the reciprocal agreement would provide that it will bind the owners from time to time of the residential units. According to the plaintiff, any mortgagee or chargee of a unit is an owner. It was also the evidence of Mr. Ezer that these stipulations have had no impact on purchasers being able to obtain financing.

(ix) The defendants submit that the disclosure documentation failed to disclose that pursuant to s. 11.06 of the reciprocal agreement, the commercial Unit can be relieved of all liability by any sale (as opposed to a sale at fair market value to a bona fide purchaser) which could lead to a situation that the commercial unit could sell the property to a shell company without assets and in a declining market so that the value of the mortgagees on the property would be greater than the value of the commercial property and thus effectively shifting the entire burden of costs onto the condominium corporation.

28 The submission of the plaintiff is that the reciprocal agreement binds all subsequent owners of the commercial development and that the argument advanced by the defendants is of a theoretical nature and is not material in the relevant sense.

(x) The defendants submit that the letter from Fairfield Management Limited (exhibit 1, tab 13) states that the surface parking lot is exclusively for the usage of the commercial tenants and their customers but goes on to state that it is expected that evening visitors as well as service vehicles will use the lot. The defendants accordingly submit that the condominium corporation is burdened with costs associated with the parking lot without correspondingly having a legal right to use the parking lot. It would therefore follow that the condominium corporation must pay for those items in schedule A "surface parking" of the agreement which they have no right to use.

29 The plaintiff submits that the condominium corporation has the right to use the parking lot by virtue of ss. 1.01(k), 3.01 and exhibit E of the reciprocal agreement. Moreover, as a matter of practicality Mr. Ezer testified that the residents and their visitors do use the parking lot.

(xi) The defendants submit that schedule E of the reciprocal agreement states under the heading pertaining to maintenance staff that the "site superintendent hired by the condominium corporation is to be responsible for the following duties relating to commercial space". This responsibility, it was submitted by the defendants, was not disclosed in the budget or the balance of the disclosure documentation and accordingly it is now apparent that the condominium corporation must pay 80% of the maintenance staff relating to the commercial development. This according to the defendants constitutes a material amendment.

30 The position of the plaintiff is that the budget in the disclosure documentation provided for amounts pertaining to maintenance staff. The reciprocal agreement provided for the basis of allocation and the Fairfield letter (exhibit 1, tab 13) sets out the basis for the allocation which the plaintiff submits is in itself a reasonable one. It is the plaintiff's submission that none of these matters would have been material to a reasonable purchaser and certainly on the facts of this case were of no material import to the defendants based on their admissions at trial and on discovery.

(xii) The defendants submit that 60 parking units at a percentage of .07 per unit is allocated pursuant to Schedule D (allocation of common expenses of the declaration). The other 9 parking units are owned by the commercial development. On the basis of the disclosure documentation, each parking spot owned by the condominium was therefore to pay .07% of the total of all common expenses. On the other hand, the defendants submit the percentage as set out in Schedule E of the reciprocal agreement as to the costs of the underground garage allocates only 12% of the garage costs to the commercial unit. The parking spots owned by the unit holders and the parking spots owned by the commercial unit at the end of the day do not end up paying the same costs for their parking spaces and in addition the disclosure statement states that there are 69 parking units and therefore on a strict allocation the residential complex has been overburdened by at least one parking space.

31 The plaintiff submits that the commercial development lost one of the 9 parking spaces set out in the disclosure documentation as it had to be used for utilities and accordingly the final allocation was done on the basis of the final result, that is, 60 residential parking spots and 8 commercial spots. The ratio therefore is 60 to 8 which constituted the basis of Fairfield Management allocating 88% of the expenses to the residential complex and 12% of the expenses to the commercial development.

32 Based on all of the alleged discrepancies (and not just those which have been summarized) between the disclosure documentation and the reciprocal agreement, the defendant advances essentially two arguments.

33 First, the defendants submit that given its content the entire reciprocal agreement was material and that accordingly its very omission as part of the disclosure documentation rendered the disclosure documentation inadequate.

34 In answer to that argument, the plaintiff submits that there is nothing in the Condominium Act generally or in s. 52 specifically nor in the decision of the Court of Appeal in *Abdool*, supra, which mandates that any and all agreements which provide further clarification to the disclosure documents must be appended to the disclosure documents. It is Mr. Storrey's submission that the position being put forward by the defendants in essence is that notwithstanding the defendants obtained disclosure documentation which said that there would be a reciprocal agreement to be created later which would set out in addition to the disclosure documentation matters of relevance, the defendants would nevertheless be entitled to not rescind at that point in time even though they considered the lack of specificity in the disclosure documentation to be material, but were entitled to take that position later upon receipt of the reciprocal agreement. It is Mr. Storrey's position that that approach cannot be correct in law and ought to be rejected by this court.

35 I agree with the position taken by Mr. Storrey on this point. In my opinion, the reasonable purchaser was entitled to take the position, if he saw fit, that the original documentation was inadequate if he considered that there were material omissions within the meaning of *Abdool*, supra. However, the reasonable purchaser is not entitled upon receipt of the reciprocal agreement to which reference is made in the original documentation to take the position that in light of the further disclosure made in the reciprocal agreement that the original documentation is no longer adequate. I agree with Mr. Storrey that in this case on the basis of the original disclosure documentation as compared to the reciprocal agreement, the issue for this court is whether or not the reciprocal agreement constitutes a substantial or material amendment to the disclosure documentation within the meaning of *Abdool*, supra, so as to provide the reasonable purchaser with a right of rescission under s. 52(2) of the Condominium Act. That issue in turn in my opinion stands to be determined by examining those matters which the defendants claim have been substantially amended and it is to that issue which I now turn.

36 I agree with the defendants contention that some of the matters found in the reciprocal agreement were not specifically adverted to in the disclosure statement and that to that extent it may be said that the reciprocal agreement contains "amendments". However, the disclosure statement was not intended to cover each and every matter contained in the reciprocal agreement and does in my view, in any event, provide a summary of the significant features of the reciprocal agreement while specifying that the reciprocal agreement will embellish or amplify those matters adverted in the disclosure documentation. It would have been abundantly clear that the disclosure documentation would be amplified by the reciprocal agreement and that the purchaser was being asked to accept disclosure for the purposes of s. 52 of the Condominium Act on that basis. Moreover, in my opinion, I agree with the submission of the plaintiff that none of the matters raised by the defendants can properly be considered to be "material" in the sense outlined by the Court of Appeal in *Abdool*, supra, such that a reasonable purchaser would regard any of the alleged changes or amendments as sufficiently important that they may not have decided in the first instance to proceed with the purchase. I do not accept that any of the amendments or changes that the defendants have referred to in the reciprocal agreement

would substantially change a purchaser's anticipated use and enjoyment of the unit or would adversely affect the value of the unit so as to entitle the purchaser to rescind.

37 Moreover, on the facts of this case, it would appear quite evident that the defendant Farkas did not view the disclosure statement to be of significance to his objective of reselling the unit at a profit. On the other hand, the evidence is clear that Mr. Farkas examined the reciprocal agreement very carefully in an attempt to rescind the agreement of purchase and sale by attempting to locate material amendments to the disclosure documentation. There appears little doubt that this enterprise was motivated by a substantial decline in the value of condominium units and not by any concern on the part of the purchaser that the reciprocal agreement had affected changes depriving the purchaser of substantial use or enjoyment of the property or had occasioned a loss of value in the property. It must be clearly understood that in the circumstances of this case whether Mr. Farkas was a speculator or not is irrelevant to a determination of the first issue if the reciprocal agreement constitutes a material amendment to the disclosure documentation. I have found that none of the matters contained in the reciprocal agreement constitute a "material amendment" within the tent posited by Robins J.A. in *Abdool*, supra.

2. Does the reciprocal agreement constitute an unpermitted encumbrance?

38 Of relevance to the resolution of this issue is s. 20 of the agreement of purchase and sale which reads as follows:

20. The purchaser agrees to accept title to the purchased units subject to each and every of the following:

...

(g) a reciprocal agreement with respect to the commercial development for access, easements and other matters of mutual concern provided the title is good and free from all encumbrances except as herein provided the purchaser agrees to accept title subject to all restrictions, easements, conditions or covenants that run with the land and subject to all rights, licenses and easements now registered or to be registered for the supply and installation of telephone services, electricity, gas, sewers, water, television and/or cable facilities and other usual services and further subject to any registered agreements and the terms of the condominium documents in their final registered form. ... (emphasis added)

39 On this point I accept the defendants reliance upon the decision of the Divisional Court in *Valentini v. Reedco Wellington*, 69 O.R. (2d) 346, as standing for the proposition that the word "encumbrance" has a broad meaning which entails making lands subject to a charge or liability and that an encumbrance imposes obligations and potential costs on an owner.

40 I do not however accept the defendants' submission that in the circumstances of this case the words "and other matters of mutual concern" as they are found in s. 20(g) of the agreement of purchase and sale ought to be construed pursuant to the *eiusdem generis* principle so that the encumbrances would be confined to such things as licenses and rights of way since these are within the same class of items as easements and access. Rather, on this issue, I accept the plaintiff's submission that when the agreement of purchase and sale is looked at in context, the *eiusdem generis* interpretation ought not to prevail. In my opinion, when properly viewed in the context of the entire agreement of purchase and sale, it would be evident to any reasonable purchaser that "other matters of mutual concern" referred to all necessary matters, including matters of cost, relating to the sharing of certain facilities between the condominium corporation and the owner of the commercial development. I am fortified in this interpretation by the evidence of Mr. Farkas who testified that the defendants knew or should have known that the reciprocal agreement was to deal with matters of mutual concern beyond matters such as access and easements. I am not persuaded that the reciprocal agreement is a document which confers unilateral benefits to the vendor only. Rather, I am prepared to find that, on balance, it deals with matters of mutual benefit to both the residential development and the commercial development including matters of costs and that it was these matters contained in the reciprocal agreement pertaining to the sharing of certain facilities between the residential and commercial development that were contemplated by the phrase "other matters of mutual concern" found in s. 20(g) of the agreement of purchase and sale.

3. Which of the defendants should be held liable?

41 It is the position of the defendants that because Mrs. Farkas signed as an agent of her principals, that is to say her husband, the defendant George Farkas, and Roman Gofman, the plaintiff must elect against which of the defendants to obtain judgment.

42 On this issue, in his evidence in chief, the defendant, Mr. George Farkas, made it quite clear that the true partners in the transaction were he and Mr. Gofman and that in signing the agreement of purchase and sale, his wife was doing so not only without knowledge, but also on behalf and under the direction of the defendant George Farkas. In such circumstances, I accept *Trident Holdings Limited v. Danand Investments Limited et al.* (1988), 64 O.R. (2d) 65, a decision of the Court of Appeal relied upon by the plaintiff, for the proposition that the principals directing the actions of a bare trustee are liable to third parties when the bare trustee is acting as an agent for those principals and under their direction. On the facts of this case, I am prepared to find that Mrs. Freda Farkas was acting as a bare trustee for her co-defendants and that as such the defendants George Farkas and Roman Gofman are liable notwithstanding that they did not sign the agreement of purchase and sale.

43 However, in respect of the liability of Mrs. Farkas, the plaintiff also relies upon the proposition that a bare trustee if held to be acting as an agent for other beneficiaries can also be liable where the agent also benefits as a principal in the transaction. In support of this proposition, the plaintiff relies upon *Dolly Varden Mines Limited (N.P.L.) v. Sunshine Exploration Limited et al.* (1967), 64 D.L.R. (2d) 283 where at pp. 295-297 the following is found:

It is, of course, clear that Sunshine Ex. did act in this matter as an agent of Sunshine Ex. did act in this matter as an agent of Sunshine but that does not mean it could not be liable as a principal if in fact it did act as a principal, and if the documents disclose an intention that it should so act, and be liable as a principal. ... From these cases it appears that an agent may be liable under a contract in place of or in addition to its principal and the question of his liability will depend in any given case upon a construction of the documents. ...

Furthermore, Sunshine is also liable for the performance of the covenants of the operator jointly and severally with Sunshine Ex. and as a guarantor of the covenants of Sunshine Ex. Such liability arises as far as Sunshine is concerned from the agency

agreement which is executed by all of the parties and in so far as any variation was made in the terms of the principal agreement... (emphasis added)

44 On the facts of this case, the plaintiff submits that the defendant Freda Farkas was also going to directly benefit by this transaction by her taking title to a 50% undivided interest as tenant in common with Mr. Gofman and in addition she personally undertook the obligation to pay interim occupancy charges (ex. 1, tab 8).

45 In my opinion, the taking of title and the agreement to accept personal liability to pay the monthly occupancy charges is inconsistent with the defendant Mrs. Farkas acting solely as a bare trustee by signing the agreement of purchase and sale on behalf of her principals. Rather, these actions are consistent with her receiving a direct benefit from the transaction as a principal to that transaction. Consequently, I agree with the submission made by the plaintiff that the defendant Freda Farkas can also be held liable with the co-defendants and that the plaintiff accordingly is not obliged to elect whether to take a judgment against Freda Farkas or judgment against her co-defendants, George Farkas and Roman Gofman.

4. If the plaintiff had a duty to mitigate damages, did it discharge that duty?

46 At this stage, the plaintiff has, prior to judgment elected, if successful, to obtain his remedy for breach of the agreement of purchase and sale by way of damages and has thereby abandoned his claim to specific performance. Moreover, the plaintiff has conceded that the decision of the Supreme Court of Canada in *Asamera Oil Corp. v. Sea Oil & General Corp.*, [1979] 1 S.C.R. 633 is authority for the proposition that the mere assertion of a claim for specific performance does not oust the common law duty of the plaintiff to mitigate damages. The plaintiff does not seriously dispute that the plaintiff was required in this case to mitigate its damages and the action has properly proceeded on the footing that the plaintiff was required to mitigate damages as a matter of law.

47 The nature of the duty on the plaintiff to mitigate damages and the corresponding onus on the defendant to demonstrate that the plaintiff has not taken reasonable steps to discharge that duty has been set out by the Supreme Court of Canada in *Dobson v. Winton and Robbins Limited*, [1959] S.C.R. 775 as follows at p. 783:

In a common law action there is a duty upon the plaintiff to mitigate his damages and whether the course taken is a reasonable one is a question of fact; (Mayne on Damages, 11th Edition, pp. 147-8).

It is difficult to understand what more the plaintiff could have done in this case and he did adduce a considerable volume of evidence showing a reasonable attempt to mitigate his damages and, having done so, it is for the defendant to show that those steps were not such as a reasonable man would have taken in mitigating his damages and in disposing of the property; (Mayne on Damages, 11th Edition, p. 150).

48 In seeking to discharge the onus upon it to demonstrate an absence of mitigation on the part of the plaintiff, the defendant advances several specific omissions on the part of the plaintiff which the defendants submit are incompatible with any reasonable attempt at mitigation. In this respect the defendants submit that:

- (a) the plaintiff failed to place the unit on an MLS listing until August 27, 1991;
- (b) the plaintiff failed to advertise the unit;
- (c) the plaintiff refused to deal with any inquiries in regard to the unit referring the matter to the defendants who at all times and in their Statement of Defence had stated that the agreement was at an end;
- (d) the plaintiff failed to sell the property in the late summer and early fall of 1990; and
- (e) the plaintiff failed to rent the property.

49 While I am prepared to acknowledge that Unit 310 was not listed on MLS until August 27, 1991, I am not prepared to find that this fact assists the plaintiff in establishing a lack of mitigation. In coming to this conclusion I have examined Ex. 3 which the plaintiff has filed in order to demonstrate the efforts he made to either rent or sell all of the units in the project. I accept the evidence of the plaintiff that prior to August 1991 he exposed all of the units including 310 to prospective purchasers through the listing broker, Royal LePage. In this respect, I accept Mr. Ezer's evidence that from time to time he listed two or three units in order to attract purchasers to the building and that he instructed the agents to show all of the units in the building, including 310, as available for either rent or sale. I am prepared to find that the fact that an offer to rent 310 was received in September 1990 and that an offer to purchase in December 1990 supports the evidence of Mr. Ezer. I am further prepared to find that Mr. Ezer made reasonable efforts to both rent and sell Unit 310 prior to August 31, 1991. The fact of listing in August of 1991 does not in my opinion detract from the reasonableness of the steps to sell or rent Unit 310 prior to that date.

50 With respect to the issue of advertising, Mr. Ezer testified that given the close proximity of the project to synagogues and in view of certain features of the project including Sabbath elevators, effort was made to reach the Orthodox Jewish community through advertising in the Canadian Jewish News as well as in other newspapers and other media both prior to and after May 1990 which is the date when the agreement for the defendants' purchase of Unit 310 was to have closed. I am prepared to find on the basis of the evidence of Mr. Ezer which is uncontradicted and which is confirmed by Exhibit 3, tab 6 and tab 10, that Royal LePage engaged in extensive advertising with respect to the units in the project and that Mr. Ezer also engaged in some advertising on his own. The defendant has not shown a failure to mitigate because of a failure to advertise.

51 The defendant submits that in refusing to deal with inquiries with respect to either the rental or sale of Unit 310 and further in referring such inquiries to the defendant, the plaintiff acted unreasonably in failing thereby to mitigate his damages. I do not accept this submission. The plaintiff was entitled to pursue its remedies by way of specific performance and could not unilaterally either rent or sell the unit without forfeiting its right to specific performance. While I appreciate that the defendant in turn had the right to insist that the agreement was at an end, I cannot accept that the plaintiff, by referring prospective purchasers or renters to the defendant, failed to mitigate his damages. On the contrary, in my opinion, the plaintiff acted reasonably in the circumstances by referring inquiries to the defendant. Such action was all that the plaintiff could reasonably do by way of mitigation and still preserve his right to specific performance. It should be noted that the defendant did not respond to either communication with respect to an offer to rent or an offer to sell. It is unfortunate that the offer to rent made on September 12, 1990 could not have been effected on a without prejudice basis as was the rental from March to November 1992. In my opinion, it was not incumbent upon the plaintiff to take the initiative to do so; by communicating the offer to rent in September 1990 and the offer to purchase in December 1990 the plaintiff took steps which were reasonable in the circumstances.

52 The defendant next submits that the plaintiff ought to have sold the unit for \$175,000 in the late summer and early fall of 1990. I accept the submission of the plaintiff that to do so would not have been compatible with mitigation but on the contrary would have been clearly improvident.

53 It should be noted that the defendant agreed to purchase the unit for \$391,900 but, prior to closing, the defendants themselves listed the unit for sale for \$357,000 in January 1990 and subsequently reduced the listing price to \$319,500 in March of 1990. It is obvious that the market was in a period of rapid decline and as was conceded by Mr. Farkas at trial, there were no purchasers in early 1990 or at the time of the alleged breach in May 1990.

54 I accept the evidence of Mr. Ezer who testified that Unit 404 which was sold in October of 1990 for \$270,000 when the extra parking space is factored out was comparable to Unit 310 when allowance is made for the respective size and locations of the units. I accordingly accept the evidence of Mr. Ezer that the offer of \$175,000 made for the purchase of Unit 310 was inordinately low and that it would have been improvident for the plaintiff to have accepted the offer. I accordingly find that the failure by the plaintiff to accept the offer does not constitute a failure to mitigate damages but on the contrary was a reasonable course of action in the circumstances.

55 I moreover am prepared to find that the action of the plaintiff in communicating the offer to the defendant was a reasonable step compatible with mitigation in the circumstances. There were no further offers to purchase Unit 310 and in the context of the sale of only 3 of the units in the project between May 1990 and November 1992. I cannot say that the plaintiff acted unreasonably in refusing to sell the unit for \$175,000 in October 1990.

56 Finally, the defendant takes issue with the failure of the plaintiff to rent the unit in September 1990. I have already found that it was not unreasonable for the plaintiff not to unilaterally accept the offer made to rent the unit in September of 1990 because to have done so would have caused the plaintiff to lose the right to specific performance which the plaintiff was entitled to maintain. In my opinion, the plaintiff acted reasonably in communicating the offer to rent to the defendant and thereby reasonably discharged its obligation to mitigate the damages in all of the circumstances.

57 On all of the evidence, I cannot find that any of the alleged failings of the plaintiff viewed either individually or cumulatively assist the defendant in demonstrating that the plaintiff has failed to discharge his obligation to mitigate his damages. In the circumstances, I find that the plaintiff has taken all reasonable steps to mitigate his damages.

4. (b) What is the proper way to assess the plaintiff's damages and as of what date should the damages be assessed?

58 The defendant submits that damages ought to be assessed at the date of breach. The plaintiff however submits that in circumstances when the real estate market is declining the defendants ought not to be permitted to "cap" their liability but rather damages ought to be assessed at the date of trial in conformity with the principle that the plaintiff be put in the same position it would have been in if the breach had not occurred. I accept the position of the plaintiff which in my opinion is supported by the decision of Eberle J. in *Victoria Queen Investments Ltd. v. The Savarin Ltd.* (1979), R.P.R. 32. I accept as apt to the circumstances of this case what was stated by Eberle J. at p. 41-42:

There is an issue as to whether the second date is the appropriate date or not. The traditional date for assessing damages of this kind has been the date of breach. That would, in my view, be the end of June or early part of July 1976. There is no evidence of the value of the property at that time; though, from the evidence, I would conclude that it was worth more then than it was towards the end of 1977.

In support of its claim the defendant relies on the *Pressure Concrete* case, which I have referred to, which applied the date of assessment of damages, namely the trial, as the date on which to take the market value and therefore the Court ascertained the difference between that market value and the contract price.

There is another line of authority exemplified recently by the *100 Main Street* case, *supra*, in which the date of assessment was not taken but the date of the breach.

It appears to me that the distinction between those two cases is whether or not the party in the position of the plaintiff has kept the contract alive following its breach or repudiation by the opposite party; i.e., kept it alive, as by asserting a claim for specific performance. That was done in the *Pressure Concrete* case; it was done in this case; it was not done in the *100 Main Street* case.

In my view I should follow the *Pressure Concrete* case. It seems to me that not to do so would be to leave the defendant vendor, who counterclaims for damages, at the risk of the decline in value of the property after the date of the breach, and that to do so would not give the defendant proper compensation in damages, according to the principle that the damages should put that party in the position it would have been in if there had not been any breach of the contract.

59 In my opinion, it is appropriate to assess damages at the date of trial in the circumstances of this case.

5. What is the quantum of damages?

60 The plaintiff has filed as exhibit 5 in this proceeding a schedule of damages and a revised schedule of damages. The Revised Schedule of Damages is reproduced below:

REVISED SCHEDULE OF DAMAGES

Damages

Purchase Price	\$391,900.00
Occupancy Costs (etc.)	125,246.40

\$517,146.40	
Less Deposits	97,975.00

419,171.40
 Less Interest on deposits (see attachment) 23,387.58

 395,783.82
 Less Value today 207,321.26

 188,462.56
 Add Real Estate brokerage fee to sell
 (5% of value today) 10,366.06

 198,828.62
 Less Rental income (\$1,250 per month from May
 1, 1992 to Nov. 1, 1992 = 6 x \$1,250) 7,500.00

 Total damages \$191,328.62

61 In my view, the general approach taken by the plaintiff to the calculation of damages is correct. However, I differ with the plaintiff as to the quantum of total damages as well as the quantum of some of the items involved in the calculations for reasons which I will outline.

62 In view of my finding that the Reciprocal Agreement does not constitute a "material amendment" to the disclosure documentation the defendant is not entitled to rescind the agreement of purchase and sale.

63 The purchase price is correctly taken from the agreement of purchase and sale to be \$391,900.00 and I am prepared to confirm this figure in the revised schedule of damages as properly due to the plaintiff with respect to the purchase price of Unit 310.

64 The amount of \$125,246.40 with respect to occupancy costs is derived by the plaintiff by calculating \$3,913.95 per month by 32 months representing the time period from March 1, 1990 to November 1, 1992. The monthly amount for occupancy cost was agreed to by the parties to commence from the period of interim closing in October 1989. The defendants honoured their obligation by means of postdated cheques which were cashed by the plaintiff until the defendants ordered payment to be stopped in March 1990 on the basis that such payments were illegal "phantom mortgages". That argument has been formally abandoned. In my view, the defendants have been entitled to possession of Unit 310 from March 1990 to November 1992 and have been liable for the occupancy costs throughout this period. I confirm that \$125,246.40 is properly and correctly due to the plaintiff with respect to occupancy costs.

65 From this total amount of \$517,146.40 must be deducted \$97,975.00 which constitutes deposits made by the defendants in respect of the agreement of purchase and sale.

66 Also to be deducted is the amount of \$23,387.58 which constitutes interest on the deposits mandated by section 53 of the Condominium Act. The calculations of the amount is appended to the revised schedule of damages and the defendant takes no issue with it. I confirm that \$23,387.58 is properly deducted.

67 Also to be deducted is the value of the condominium unit today. The plaintiff has suggested four methods to calculate the amount value of Unit 310. The first is based on the sale of Unit 503 for \$165,000 in October 1992. Since the unit is 1,000 sq. ft. the plaintiff calculates that it was sold for \$165 a sq. ft. and that accordingly Unit 310 is worth (165 x 1,250 sq. ft.) \$206,250.00.

68 The first calculation does not take into account the two parking spaces allotted to Unit 310 and the second method which does take the parking spaces into account determines that the unit is worth \$213,750.00.

69 The third method is based on the sale in February 1992 of Unit 410 which is identical to Unit 310 and also has two parking spaces. The price for Unit 410 was \$220,000.00.

70 The fourth method is based on the current listing of Unit 201 at \$225,000. This unit is identical in size and parking amenities to 310.

71 The amount claimed by the plaintiff in the revised schedule of damages appears to be based on a calculation of current value by means of the first method, i.e. \$165 per sq. ft. While this method is based on current data, units 503 and 310 are not comparable either in size or location. In my view, this assessment of current value is too low bearing in mind that Unit 310 is bigger and has a preferable location as a corner unit with a southerly view.

72 The fourth suggested method of assessing the current value of Unit 310 is based on the current list at \$225,000 of Unit 201 which is identical in size and parking amenities to Unit 310. While Unit 201 is comparable as to size with Unit 310, it is not comparable as to location within the project. The southerly view favours Unit 310. Moreover, the list price of Unit 210 does not represent what a purchaser would be willing to pay.

73 I prefer to base the current value of Unit 310 on the third suggested method, i.e., on the purchase price of Unit 410.

74 While the estimate of current value of Unit 310 based on the purchase price of Unit 410 is less current than some of the other comparables, that estimate nevertheless is based on what a purchaser was willing to pay for an identical unit. In my view, the current value of Unit 310 is most fairly based on the purchase price of Unit 410 and accordingly I am prepared to deduct \$220,000 as indicative of the current value of the unit.

75 It follows that the brokerage fee to sell the unit, which I agree ought to be included will be calculated at 5% of \$220,000.

76 Finally, I accept that the rental income from May 1, 1992 to November 1, 1992 in the amount of \$7,500 as calculated in Ex. 5 ought also to be deducted.

77 I have accordingly proposed a schedule of damages as follows:

Damages

Purchase Price	\$391,900.00
Occupancy Costs (etc.)	125,246.40

17,146.40	
Less Deposits	97,975.00

419,171.40	
Less Interest on deposits	23,387.58

395,783.82	
Less Value today	220,000.00

175,783.82	
Add Real Estate brokerage fee to sell (5% of value today)	11,000.00

186,783.82	
Less Rental income (\$1,250 per month from May 1, 1992 to Nov. 1, 1992 = 6 x \$1,250)	7,500.00

Total Damages	\$179,283.82

78 There shall be judgment for the plaintiff in the amount of \$179,283.82 with costs of the action.

79 There shall be an order for pre-judgment and post-judgment interest in accordance with the Courts of Justice Act.

THEN J.

CBR# 303

Sparbrook Management Inc. v. Pacific Place Development Corp.

Between

Sparbrook Management Inc., Plaintiff, and
Pacific Place Development Corporation, Defendant

49 C.L.R. 148

New Westminster Registry No. C900733

British Columbia Supreme Court
New Westminster, British Columbia
Hogarth J.

Heard: October 15 - 18 and 25, 1991

Judgment: November 26, 1991

(34 pp.)

The plaintiff brought claims for rescission and damages pertaining to contracts for the sale of two condominium units by the defendant to the plaintiff. The plaintiff claimed that the provisions with regard to parking in interim agreements were a misrepresentation which was merged into a condition of the contracts which was breached.

Counsel for the Plaintiff: R. Pawliuk and S. Jermyn.

Counsel for the Defendant: C.A. Wallace.

HOGARTH J.:— This matter concerns claims for rescission and damages pertaining to contracts for the sale of two condominium units by the Defendant to the Plaintiff upon the basis that the Plaintiff did not get the accompanying parking space that was bargained for as a condition of each contract.

The Plaintiff is a development company, owned by Milan Jacobec, (Jacobec) and is engaged in the purchase of older apartments and buildings and renovating them into condominium units. The Defendant is a company which independently of the Plaintiff constructed a condominium apartment building at 1235 West Broadway in Vancouver.

Early in November 1989, the Plaintiff was in need of office space and Jacobec was attracted to the premises of the Defendant which was then in the process of construction. The building, when finished, was to consist of several floors of strata titled residential condominium units with lower floors of commercial offices and, when it attracted the attention of the Plaintiff, had reached the point where sales of the units were under way. One residential unit, #502, was a display suite and was used as a sales office as well as an advertisement.

Stella Kai was one of the salespersons employed by the Defendant's real estate agent and it was she who dealt with Jacobec exclusively when he expressed an interest in the purchase of a unit. There is a considerable amount of variance between the evidence of Kai and Jacobec and what follows are my conclusions after a consideration of all the evidence.

Jacobec indicated to Kai in the first instance that he wanted to buy a unit to use as his office but Kai advised that all the commercial units had been sold. It was then discussed and suggested that although the remaining units were for residential purposes, a "home" office would be an acceptable use that might be carried on in any of the remainder.

The residential units were being offered for sale on the basis that one parking space in the covered parking lot of the building was included in the sale price of any unit but, by paying a premium of \$8,000, a second space could be obtained. There can be no doubt that parking as a concomitant to the purchase of a unit was important as the street parking was restricted in the area and without appropriate private parking the sales would be much less attractive.

Jacobec was interested in more than two parking spaces but was told that the only way that that could be arranged was by the purchase of more than one unit as the limit was two for each. He decided that a second unit might well be a good investment in any event and, after attending the parking lot and selecting four spaces in close proximity, he made two separate offers with regard to two units - #301 and the display suite #502.

The offers were made November 10, 1989, on printed Interim Agreement forms provided by Stella Kai from a number on a table in the office. In all of these in the space allotted for the insertion of the terms and conditions some specific terms were typewritten which, with respect to parking, read:

"Purchase price includes () parking stalls # . This allocation is 99 year lease"

The purchase price, including the extra parking was \$301,000 for Unit #301 and \$385,000 for Unit #502, the display suite. The closing date for Unit #301 was December 15, 1989, but for Unit #502, it was delayed until February 15, 1990.

The parenthesis for the parking allocation with regard to Unit #301 was "21 & 22" and for Unit #502 "23 & 20".

The day after the offer was preferred, an addendum to each agreement was prepared and executed by the Plaintiff a portion of which read:

"Purchaser has received, read and accepted the disclosure statement"

and it further provided that the parking stalls were changed to 23, 24, 25 and 26. Jacobec accepted the changes so far as the spaces were concerned but due to his own haste received, but never read, the Disclosure Statement. Later the offers were accepted by the Defendant.

By the time of the sales to the Plaintiff (on October 23), the owners of Strata Plan VR 2506 (in substance the Defendant) had passed a resolution that the right to the use of certain parking stalls, including those sold to the Plaintiff, be granted to the Defendant, "for a term of 99 years or until the Strata Corporation is dissolved.....". It is of importance to note that this resolution made no provision that the grant could not be determined on reasonable notice or that there was to be a lease of the spaces.

It is further important to note that the Strata Council of the Strata Corporation had not been elected at that time or by the time the sales to the Plaintiff were made, however, the penthouse, the commercial units and two other residential units had been sold.

The Disclosure Statement, dated August 8, 1989, referred to in the addendum which had not been read by Jacobec, insofar as parking was concerned set forth some matters of material importance. It provided that upon the filing of the Strata Plan, the Defendant intended to have the Strata Corporation enter into an agreement, a form of which was attached, providing that a number of the stalls (which included those sold to the Plaintiff) would be for the exclusive use of the Defendant. The document further provided that the Defendant had the right to allocate parking stalls to various purchasers by way of partial assignment of this agreement with respect to any one or more stalls. The agreement contemplated by the Disclosure Statement provided that the Owners granted to the Defendant the "exclusive use and enjoyment" of the parking stalls "for a term of 99 years from the day of 1989, until the day of 2088" or "until the Strata Corporation dissolved or certain other irrelevant events might occur."

The agreement further stated that the "Strata Corporation warrants and represents that it has by unanimous resolution resolved that the within grant shall not be determinable whether on reasonable notice or otherwise."

This agreement was entered into on October 23, concurrently with the passing of the resolution I have earlier set out that purported to authorize it.

The Plaintiff was to get an assignment of this agreement insofar as its specific parking spaces were concerned (23 - 26, as set out in the addendum to the interims) and the form of the assignment was attached to the Disclosure Statement. This assignment, among other clauses, carried the proviso that the Plaintiff had acknowledged and agreed that if at some future time the agreement assigned were to be modified or terminated so as to affect the rights of the Plaintiff, all claims against the Defendant of any nature or kind were effectively waived.

Jacobec asserts that he expected that the provisions with respect to parking would be secured by a lease that provided the Plaintiff with irrevocable tenure on the allotted spaces for 99 years. During the course of his evidence I remarked that I had never seen such a document but he advised me that he had and said that he could provide me with a pro-form copy. Unfortunately he has not done so but counsel has suggested that it is a customary way of dealing with common property and I shall refer to the matter again as I have some doubt considering the problems with respect to the alienation of title to common property under the Condominium Act (post).

No action was taken by the Plaintiff to rescind either of the contracts within three days of receiving the Disclosure Statement (as permitted by Statute) or otherwise, until well into February following.

The sale with respect to Unit #301 was closed by the Plaintiff's solicitors, the title transferred and the Unit leased by the Plaintiff to Jacobec's secretary. There is a complete lacuna in the evidence as to what was said, done or signed with regard to the documents pertaining to the parking stalls at the time of the closure of the sale of this unit. Certainly there were no filings in the Land Titles Office with respect to the parking stalls, a matter which will be of later importance, however, there is some suggestion that the assignment contemplated by the Disclosure Statement was executed by the Defendant but this seems to have been mislaid. As there was no concern expressed by the solicitor for the Plaintiff on the completion of the arrangement, I can only conclude that the Plaintiff was satisfied with the matter at that time or that it had been overlooked.

It is of major significance to note, with regard to the closure of the sale of Unit #301, that there has been no evidence adduced to the effect that there was any covenant in the documents effecting the conveyance at the time of the closing of the sale that contained an obligation on the part of the Defendant to provide anything with respect to parking and the sole basis of the litigation is the covenant in the interim.

In February, prior to the completion of the second sale, the Plaintiff had second thoughts about the purchases. For reasons not supported by the evidence, he became suspicious of the financial worth of the Defendant and its ability to complete the project. He was aware of some deficiencies in the construction and a day or so before the finalization, he attended the building and noticed several items still uncompleted.

The next day, February 14, his solicitor upon his instructions wrote to the solicitor for the Defendant enclosing all sale documents required to transfer the unit but with a covering letter advising that the Plaintiff had serious misgivings concerning the purchases. These were based on specified items set out in the letter and advised that unless the Defendant rectified the matters on or before the next day (February 15, the closing date), the Plaintiff might well elect to rescind both agreements.

The matters referred to were enumerated threefold. First, much of the workmanship was shoddy and matters of construction not completed; second, there was a serious discrepancy between the parking promised in the Interim (a "99 year lease") and the documents provided which did not secure the use of the parking spots for 99 years; and third, that there had been no designation of the limited common property on the strata plans so that it conformed with the Disclosure Statement.

It was, of course, quite preposterous to suggest that the Defendant could attend to these matters before the next day even if justifiably required and the letter clearly indicates that the Plaintiff wished to be in a position to say that it was ready, willing and able to complete if the Defendant had met its obligations which it failed to do, thus justifying rescission. In any event, this right was eventually claimed and it is common ground that it hinges on a combination of the second and, in part, the third, of the above three concerns.

The solicitors for the Defendant took issue and confirmed that the Plaintiff did not intend to go through with the transactions and, as a consequence, the Defendant sold Unit #502 on March 1, at a much lesser price than the Plaintiff had agreed to pay. All remaining units were still unsold by the end of April when they were transferred to the participants in the Defendant Corporation.

Towards the end of March this litigation was commenced, based on allegations of the Plaintiff that there were misrepresentations, some since abandoned, which involved the nature of the parking that the Plaintiff was to receive and claiming the right to rescission of both contracts as well as damages. The Defendant has denied that any such misrepresentations were made and has counter-claimed for specific performance or damages for breach of contract as well as a declaration that the deposit with respect to Unit #502 be forfeited.

I think it important to comment that the Plaintiff has pleaded its case on the basis that there were two separate contracts for the purchase of separate units, as opposed to one contract for the purchase of two units, the performance of which was separated in time as to each and of significance there is no allegation of fraud.

It is further worthy of note that the Defendant has not pleaded that the completion of the sale of Unit #301 without objection has raised a waiver or an estoppel of the right to claim relief as pleaded although such was nonetheless raised in argument.

THE ISSUES

The Plaintiff says that the provisions set forth in the interim agreements with regard to parking were a misrepresentation that were merged in the interims into a "condition" of the contracts which was breached and as a consequence the Plaintiff is entitled to rescission of the contracts and damages.

The Defendant says that even if the covenants were "conditions", there was no breach thereof because the Plaintiff got substantially what it bargained for.

From these contentions two major issues emerge:

1. Was there a misrepresentation which became a "condition" of the contracts which was not substantially fulfilled?
2. If the answer above is in the affirmative, is the Plaintiff entitled to rescission and damages with respect to both the contracts bearing in mind that the one with regard to suite #301 was completely performed and title passed whereas title had yet to pass with regard to the other?

ISSUE 1:

WAS THE PARKING PROVISION A "CONDITION" WHICH WAS NOT SUBSTANTIALLY FULFILLED?

In order to appropriately deal this issue, it is necessary to refer to some aspects of the Condominium Act R.S.B.C. Chap. 61, which govern the transactions or are otherwise of concern.

At the outset, pursuant to the provisions of s. 118(2) of the Act the "owner developer", in this instance the Defendant, is to exercise all the powers and duties of the Council of the Strata Corporation until such time as it is elected. Thus, wherever the powers of the Strata Corporation are referred to, these are the powers of the Defendant so far as the case at bar is concerned.

Section 118(1) and (2) read as follows:

"118 (1) The powers and duties of the strata corporation shall, subject to any restriction imposed or direction given at a general meeting, be exercised and performed by the council of the strata corporation.

(2) The owner developer shall exercise the powers and duties of the strata council until a council is elected by the owners."

Further, apart from the units themselves, the remaining portions of the premises such as hallways and parking spaces and the like are known and defined by Section 1 as "common property", which, of course, is for the use of all owners subject to conditions controlled by the Statute.

This section further defines the concept of "limited common property" which applies to common property specifically designated under s. 53(1) and (2) of the Act for the use of one or more of the Strata Owners, as opposed to all of them.

"1. 'Common property' means so much of the land and buildings comprised in a strata plan that is not comprised in a strata lot shown on the strata plan, and includes pipes, wires, cables, chutes, ducts or other facilities for the passage or provision of water, sewage, drainage, gas, oil, electricity, telephone, radio, television services, garbage, heating and cooling systems and other services contained within a floor, wall or ceiling of a building shown on the strata plan, where the centre of the floor, wall or ceiling forms the common boundary of a strata lot with another strata lot or with common property.

"Limited common property' means common property designated under section 53(1) and (2) for the use of one or more strata lot owners."

"53. (1) A strata corporation, by special resolution, may designate an area as limited common property for the use of one or more strata lot owners and may remove the designation.

(2) An owner developer may, when the strata plan is tendered for registration, designate areas on the plan as limited common property for the exclusive use of one or more strata lot owners."

Section 5 of the Act provides that all parking spaces of units intended to be used for residential purposes are not to be designated as separate strata lots but are to be included as part of the strata lot of one unit or else as part of the "common property". This is of significance as it superficially prevents parking spaces from being dealt with exclusively for the benefit of

the buyers as though they had title to them and thus the right to unfettered and unrestricted possession unless they were specifically said to be a part of the title to the strata lot.

"5. Garages, parking spaces, storage areas and other areas or spaces related to the use of a strata lot that are intended for residential use shall not be designated as separate strata lots but shall be included as part of the strata lot or as part of the common property."

I am somewhat concerned that by virtue of the way that this section deals with "parking places" as either part of the title to the strata lot or as "common property", that it may be that a disposition by lease is unavailable for any part of the "common property".

Under the provisions of s. 17, contracts for the control of the "common property" are limited to matters affecting its security and maintenance and are to be determinable on three months notice.

Section 20 provides that the "common property" is declared to be owned by the owners as tenants in common and cannot be dealt with separately from the title to the unit the owner owns, except as the Act further provides.

"Common property" may be disposed of under s. 20 by special resolution of the Strata Council and by s. 21 all such dispositions shall be registered in the Land Titles office and, save and except leases of less than 3 years, shall be deemed a subdivision of land, a matter of great importance with respect to the alienation of title by way of lease or otherwise.

In conjunction with the definitions of "common property" and "limited common property", by s. 117(f) the Strata Corporation may grant any one owner the right to the exclusive use of common property and, unless the resolution providing for same unanimously provides otherwise, such a grant is determinable on reasonable notice. I would distinguish this disposition from a lease as a statutory licence.

"117. The strata corporation may

...

(f) grant an owner the right to exclusive use and enjoyment of common property, or special privileges for them, the grant to be determinable on reasonable notice, unless the strata corporation by unanimous resolution otherwise resolves."

Should the Strata Corporation choose to exercise the power under s. 117(f), granting an exclusive use of parking stalls, it must do so by a special resolution passed under the provisions of s. 53(1) which designates an area as "limited common property". But there is an important proviso in this subsection as it says that such a designation is a designation that may be removed. It is further provided by s. 53(6) that no such resolution has any effect unless it is filed in the Land Title Office.

Thus, there are four ways in which parking spaces can be dealt with when the units are sold. First, they can be included in the title to the unit as envisaged by s. 5; second, it may be they can form the subject of separate leases under s. 20; third, they can be declared as "limited common property", either determinable for exclusive use or otherwise, under ss. 117(f) and 53(1) and (2) or; fourth, they can be simply left as common property for the benefit of all on a catch as catch can basis and subject to the By-laws of the Council as made and amended from time to time.

It is conceded that there never was any disposition of the title to the parking stalls under ss. 5 or 20 by title, lease or any other alienation of interest and equally no resolution which provided that notice could not terminate any grant of their use of common property under s. 117(f); in addition, there was no designation of the parking stalls as "limited common property" under s. 53(1) and no filing ever made of any kind in the Land Title Office dealing with any restrictions on the use of "common property" whatsoever.

As there were no dispositions of the "common property" under any of the above provisions, the Plaintiff says that at any time its use of this portion of the "common property", that is, the parking stalls, was never free of interference or exclusive and could be determined by reasonable notice as the Strata Council had not otherwise resolved. The Plaintiff says that the Resolution of October 23, 1989, is no more than an ordinary resolution of the Strata Corporation which does not provide any irrevocable exclusive use of the parking stalls to the Defendant that could be assigned to the Plaintiff and what is worse, if such a use were interfered with, the Plaintiff, by virtue of the terms of the assignment, had no recourse against the Defendant by virtue of the disclaimer in the assignment.

There can be no doubt it was never envisaged by either party that the parking places would be included as part of the title to the units as s. 5 suggests. The property where the spaces were located was clearly "common property" separate from the title to the units and, thus, this aspect of the matter requires no further consideration.

Equally, I have no difficulty in coming to the conclusion that the Defendant covenanted to provide parking spaces by a "99 year lease". A lease is an interest in land as opposed to a licence and could only be achieved by the processes envisaged by s. 20 of the Act involving the disposition of a portion of the "common property". Although I am not without some doubt, this might have been effected if all the contingencies involved in the alienation of "common property" under s. 20 had been dealt with but the Defendant knew full well that the Resolution of October 23, 1989, which granted the Defendant the "right to the exclusive use and enjoyment" of the parking stall, did not authorize the execution of a lease and no lease was envisaged.

I would point out that according to one authority, the device of a "lease" in the sale of condominiums has been used in order to avoid the problems pertaining to the restrictions on the alienation of title to parking stalls under the prohibition contained in s. 5. In granting the "lease" for a term of 99 years the developer can assure the purchaser an exclusive use that cannot be achieved under the "licence" arrangements (and I use the word "licence" in a very general sense) that pertain to common property limited or otherwise. (See Pavlich Condominium Law in British Columbia (1983) p. 81). In any event, whatever the obstacles might have been to effect a "lease" of the parking spaces under the provisions of s. 20, which deals with the disposition of common property, the Defendant certainly did not commence to overcome them by the Resolution of October 23, 1989. This Resolution did no more than give the Defendant a "right to exclusive use and enjoyment" of the stalls, albeit purportedly for a period of 99 years, as part

of the "common property" which were and would eventually be held by all owners as tenants in common and subject to all the qualifications of the Act. It was this, and only this, that the Defendant could assign to the Plaintiff.

The deficiencies in the Defendant's commitment to the Plaintiff might well have been substantially overcome if the Defendant had made some effort to create the parking stalls as "limited common property" under s. 53, not determinable on notice by a resolution under s. 117(f). Such a process at least would have given the Plaintiff the succour of the exclusive use of the spaces assigned to him even though not under lease, and even though susceptible to variation by virtue of the provisions of s. 53(1) that empower the Council to revoke the designation of "limited common property".

Although I am not without some reservations as to whether the Plaintiff was really concerned at the time the interims were signed as to the precise nature of the parking arrangements he was to get, and probably would have been perfectly satisfied with parking stalls held as "limited common property" designated for his "exclusive use", without any provision for notice of termination, I have come to the conclusion that notwithstanding my reservations, the parking that was to be granted to him was not that agreed upon. It was in the last analysis, nothing more than a purported restricted allotment of common property that so far as tenure was concerned was worthless and could be abrogated at any time by the Council leaving the Plaintiff, by virtue of the disclaimer in the assignment, with no recourse against the Defendant.

Of course, if he had read the Disclosure Statement he would have immediately realized that not only was he not getting a lease but that there had been no declaration of the creation of "limited common property" and the least enquiry would have revealed that there had never been any resolution under the provisions of s. 117(f) that the grant of the stalls could not be determined on notice. In addition, had his solicitor paid homage to the problem on the closing of the sale of #301, he would have easily determined the true state of affairs by virtue of the lack of any filing in the Land Title Office creating a lease or creating "limited common property" that would have permitted exclusive use for 99 years.

Thus, it could be said that the Plaintiff was the author of his own misfortune, but I have concluded that in the absence of a plea of waiver or estoppel, the fact is that it was represented by the Defendant that what he was to receive was a lease and unless the Defendant can show that this covenant was fulfilled literally or in substance by the appropriate documentation, the Plaintiff is not estopped from claiming that it has been breached. I am of the view that the Plaintiff was entitled to assume that the Disclosure Statement set forth the particulars of the "lease" and the Defendant cannot thrust upon the Plaintiff the responsibility to clarify what was in the first instance its misrepresentation. Nor can the Defendant take advantage of the apparent oversight of the solicitor for the Plaintiff in failing to detect the defect unless it can be shown equally that the discrepancy was drawn to his attention.

Again, I note that the Defendant has not pleaded that the fact that he signed the addendum and otherwise completed the transaction, amounts to an estoppel or waiver of his right to assert a claim for relief. But even if this had been pleaded, (and I note the Defendant has argued it in any event) in my view there is little to show that the Plaintiff accepted the arrangement proposed by the Defendant to the extent that he is thereby estopped from asserting otherwise. It is clear that he did not read the Disclosure Statement as his endorsement on the addenda suggests, and equally clear his solicitor did not concern himself with the lack of a lease, but that does not mean that he accepted the arrangement that was proposed. If there had been an express waiver or if he had signed the assignment which would have indicated same by implication, the whole situation would then take on a different hue. Looking at the transaction as a whole, he was entitled to assume that the Disclosure Statement reflected the interims and the fact that he signed the addenda, which suggests that he accepted an alternative, although some evidence of waiver, does not raise a bar to relief, particularly in the light of the fact it was not pleaded.

The Defendant contends that s. 42 of the Act which gives the Plaintiff relief from any inequitable treatment indicates that in substance the Plaintiff received what it bargained for. That Section reads as follows:

"42. An owner may refer to arbitration or may apply to the court to prevent or remedy a matter where he alleges

- (a) the affairs of the strata corporation are being conducted, or the powers of the corporation or strata council are being exercised, in a manner oppressive to one or more owners, including himself; or
- (b) that some act of the strata corporation has been done or is threatened, or that some resolution of the owners or a class of owners has been passed or is proposed that is unfairly prejudicial to one or more owners, including himself."

The Defendant says that any problems that might arise in the future could be dealt with under the provisions of s. 42 which gives the Court the power to grant equitable relief and thus any deficiencies are really marginal. The Defendant cites the case of *Carney v. Owners, Strata Plan VR 634 (1981)* (1981) 30 B.C.L.R. 324 (B.C.S.C.) as authority for this proposition.

I am of the view that the subsequent case of *Hill v. Owners of Strata Plan NW 2477* (C of A, CA012112, Van Reg, July 4, 1991) is an answer to this contention. In this case the Owner Developer agreed to provide an extra parking place to the purchaser in the interim. The purchasers knew there was a problem with regard to the acquisition of a second space before the sale was closed and could not convince the Strata Council to allot the second space to them as the Owner Developer had promised. They closed the sale and later, after a number of developments, applied for equitable relief under s. 42.

The Court, having emphasised that no "limited common property" had been created by the Owner Developer, held that equitable relief ought to be refused, as to permit the Owner Developer to make any such arrangements without providing the appropriate restrictions on use, and then to allow relief under s. 42, would leave it open to the Owner Developer to make all kinds of commitments with respect to "common property" that would tie the hands of the Strata Council which was endowed by Statute to deal with same for the benefit of all the owners.

The same principle would be applicable to the Plaintiff's situation in the case at bar should problems arise, and although the facts are somewhat different, equitable relief, although perhaps possible, would be somewhat remote because of this case. Thus, the Defendant's contention that it assuages the sting of the failure of the Defendant to comply with the covenant, or that it is only inconsequential because of its availability, is of no avail.

The evidence established that parking was of importance to any sale and, in addition, substantial premiums would be paid for additional parking space. Ms. Kai, The Defendant's agent, was well aware that the Plaintiff wanted additional spaces and the

Plaintiff was entitled to assume that the word "lease" assured it of tenure and nature of such space without interruption for the period anticipated. This was a material misrepresentation and as parking was fundamental to the agreement it was a "condition" of the contract and it was breached, indeed, it was never intended that it be fulfilled.

Accordingly, the Plaintiff did not get what he bargained for so far as the tenure to the parking was concerned or any arrangement substantially the same.

ISSUE 2:**IS THE REMEDY OF RESCISSION AVAILABLE WITH REGARD TO EACH CONTRACT?**

The Plaintiff contends that as a consequence, it is entitled to rescission and damages with regard to the completed agreement and rescission with respect to the second.

I think it can be said to be quite trite law that where there has been a material misrepresentation which induced the contract in the first instance, which may or may not have been structured as one of the terms of the contract, and where the matter has arisen prior to the completion of the performance of the contract, the offended party has an option to treat the contract at an end and to claim rescission as at least one form of relief, particularly where the term is a "condition" as opposed to a "warranty" in the legal sense. Such is the situation with regard to Unit #502 as that contract had never been completely performed before the condition which reflected the misrepresentation was breached, or to put it more accurately, before it was discovered. I award the Plaintiff rescission of that agreement. I would point out that similar relief at law as opposed to equity would be available by virtue of there being a breach of a "condition" in any event, as opposed to a "condition" which was consequent on a misrepresentation which induced the contract whether it was the result of a misrepresentation or not. Such a determination also disposes of the Defendant's counter-claim for specific performance.

But in dealing with Unit No. 301, the situation is somewhat different because the contract had been performed, the title to the unit transferred to the Plaintiff, including, at the very least, a right to participate in the parking areas as "common property" held as a tenant in common with the other owners, possession delivered and the sale closed. Thus the question arises as to whether the purchaser can have rescission, as opposed to damages, with respect to a contract, the performance of which has been completed upon the basis that a misrepresentation has been made and a consequent condition of the contract was breached.

The law in such a situation, at least where the contract deals with the sale of lands, restricts the right of rescission to certain specific situations. It appears from the principles referred to in the case of *Short v. MacLennan and MacLennan* (1958) 16 D.L.R. (2d) 161 (S.C.C.), that in the absence of fraud, or an error "in substantialibus", there can be no rescission after performance unless the subject of the misrepresentation has been included as a condition of the interim agreement, or arises independently of it and, in either event, is designed to survive the deed of conveyance or is specifically contained in it: the theory being that the condition is merged with the deed of conveyance so that all matters may be considered at an end. These are the concepts referred to in substance in the quote from Duff J. in *Redican v Nesbitt* at p. 163 as follows:

"The vendee may rely after completion upon warranty, contractual condition, error in substantialibus, or fraud. Once the conveyance is settled and the estate has passed, it seems a reasonable application of the rule to hold that as to warranty or contractual condition resort must be had to the deed unless there has been a stipulation at an earlier stage which was not to be superseded by the deed, as in the case of a contract for compensation. *Bos v. Helsham* (1866), L.R. 2 Ex. 72. Misrepresentation which is not fraudulent, and does not give rise to error in substantialibus, could only operate after a completion as creating a contractual condition or a warranty. Finality and certainty in business affairs seems to require that as a rule, when there is a formal conveyance, such a condition or warranty should be therein expressed and that the acceptance of the conveyance by the vendee as finally vesting the property in him is the act which for this purpose marks the transition from contract in fieri to contract executed; and this appears to fit in with the general reasoning of the authorities."

Thus, if there is an absence of fraud, and no such collateral condition, the Plaintiff has to show that there was an error "in substantialibus".

The principles have been dealt with in *Di Castri, The Law of Vendor and Purchaser* (3d) at para. 936, who notes that the doctrine favours the vigilant and not the indolent, and *Fridman, The Law of Contract* (2nd) at p. 735, wherein he says that an error "in substantialibus" in dealing with realty transactions is to amount to a failure of consideration, a smaller quantity of land or a different kind of tenancy.

A problem concerned with the principle and similar to the case at bar, arose in the case of *John Bosworth v. Professional Syndicate* 97 D.L.R. (3d) 112 (Ont. High Ct. Robbins J.). The Plaintiff sold some land to the Defendant and in the contract of sale covenanted that it was zoned M2 (industrial-commercial) and honestly believing that that was the case. The conveyance was completed and title passed. Later it was found that the M2 Zoning had never been effected and, in effect, the property was zoned for solely industrial use, a matter that had been apparently overlooked by the purchaser's solicitor at the time of closing. The purchaser requested the Court to rescind the transaction.

The Court said (at p. 121) that when a conveyance is prepared, executed and delivered by a grantor to a grantee, there is a presumption that the conditions of the sale have been merged in the conveyance. This depends on the intentions of the parties according to the facts. If there is a stipulation that is intended to operate as an independent collateral agreement, then there is no merger, but generally speaking, a purchaser is restricted to those conditions and warranties set forth in the conveyance.

The Court refused rescission.

An analogous situation was considered by this Court in *Ruscheinsky v. A. Spencer Co.* (1948) 2 W.W.R. 392. In this case the Plaintiff bought and took possession of a grocery store and was assured that the landlord had consented to the transfer of the monthly tenancy, a matter which was critical to the sale so that the Plaintiff could obtain the benefit of certain rental regulations. Such a consent had never been obtained and relief was claimed by way of rescission on several grounds, including failure of consideration.

Coady J. cited *Kerr on Fraud* and other authorities in which it was said that rescission is available, notwithstanding completion of performance, if there was a complete difference between what was represented and what was taken, so as to constitute a failure

of consideration. In another cited authority, *Kennedy v. Panama, New Zealand and Australian Royal Mail* (1867) LR 2 Q.B. 580, it was held that there was to be a difference in substance between the thing bargained for and obtained.

Coady J. held, (at p. 397) that there was not only a difference in substance between what the Plaintiff got and what he was supposed to get, but there was an entire failure to secure one of the things he bargained and paid for (seemingly the consent of the landlord to the transfer) and, after reviewing the question of rescission further, ordered that it be granted. It is to be noted that the doctrine of error "in substantialibus" was not specifically discussed.

There is clearly a material difference between a claim for rescission after performance and that which takes place prior thereto and it would appear that in the absence of fraud, insofar as the breach of a condition is concerned, one of two matters must be established: either that the condition was such that its performance was intended to survive the conveyance of title, or that it was a matter of error "in substantialibus", that is, the Plaintiff did not receive substantially what was bargained for.

I do not believe it can be said that viewing the contract in the case at bar as a whole, the condition that the Defendant supply a 99 year lease for the parking could be said to be severable from the sale of each of the units in question to the extent that it was a covenant that acted independently of the covenant to transfer title. The parking went with the unit and the only reason that it was referred to by way of a separate condition was because it had never been made a part of the title to the units in the first place, obviously so there could be flexibility in the sale of parking spaces as to location and number. It was never intended, except in the literal sense, that the Plaintiff would have parking without title to the unit to which it pertained, that is, that it could have a 99 year lease on the parking but no title to the unit; they were part and parcel of the same transaction. If such were the case looked at reciprocally, if the Plaintiff had not received title to the units, he nonetheless could claim title to the parking which was absurd. Therefore, it was not a separate and distinct condition and when the title to the unit was passed, it cannot be said that the covenant to supply the lease survived the conveyance as a separate obligation. Thus, the provision was merged into a title to the "common property" shared as a tenant in common with the other owners when the conveyance was effected as provided by s. 5.

Can it be said that in the case at bar, the failure of the Plaintiff to get the lease for the parking was an error "in substantialibus" bearing in mind the above authorities?

I do not hesitate to say that I am affected by the fact that it was not the failure to get the parking that has brought about the litigation; the real triggering event was the conclusion that the Plaintiff had made a bad bargain; and in addition his predicament is apparently the result of the failure of his solicitor to be vigilant at the time of the closing of the sale.

In my view, this indicates that the "lease" was not the substantial part of the title that the Plaintiff would have the Court to believe, but is merely the excuse to get out of the transaction leaving the Defendant with the substantial drop in the market which has not been shown to be the result of the nature of the parking in any way. In addition, there is no evidence to show that, de facto, the Plaintiff will not have exclusive use to two parking spaces and such a situation draws a great deal from the argument that there has been a substantial failure of consideration.

But apart from the above, the contract has to be read as a whole to determine whether there was an error in substantialibus, that is, did the Plaintiff receive something substantially different from what he bargained for when the totality of the sale is considered?

He bargained and paid an additional sum for a unit with two parking spaces exclusively and indeterminable for his own use. He received a unit with two parking places in name only which he might well have to share at some future time with his other tenants in common or which might well be relocated or, alternatively, might well, de facto, be what he bargained for. There is no evidence that there is not enough parking for all the units in the building so it could be said that he did not get any parking at all, it was just that the parking is not indeterminably exclusive, or might well not be, depending how he makes out with the Strata Council at some future time, and I think it fair to assume that all owners will be dealt with equitably and in good faith as the Act requires.

It is a difficult point to resolve but I have come to the conclusion that although he did not get in its entirety what he bargained for, and although the parking provided was in substantial breach of the covenant with respect to that item, when considering the pith and substance of the sale, as well as the way in which the litigation was formulated, the deficiency was not sufficient to come within the rule which would allow rescission, and the Plaintiff must confine his remedy to damages.

I have not heard from counsel as to the calculation of damages from this perspective, but it seems to me that an order should go to the Master directing an appraisal of the value of the unit at the time of sale with a lease of the nature that was envisaged and a similar appraisal as to its value on the basis of what was received, the difference if any being the quantum. In this regard, I would grant liberty to apply if the formula is unacceptable.

There will accordingly be an order:

1. Setting aside the agreement pertaining to Unit #502 and, upon the exchange of the appropriate documentation, the return of all monies paid as deposit on the sale or otherwise thereunder with Court Ordered Interest from the date of the sale to the date of payment at the rate set by the Registrar at the date of sale and from time to time until payment; and
2. As to Unit #301, damages in the amount determined by the Master with Court Ordered Interest determined in the same manner; and
3. Dismissing the Defendant's counter-claim for specific performance with regard to Unit #502; and
4. Costs to the Plaintiff.

HOGARTH J.

CBR# 068

Carleton Condominium Corporation No. 347 v. Trendsetter Developments Ltd. et al.

9 O.R. (3d) 481; Action No. 626/91

Court of Appeal for Ontario, Robins, McKinlay and Arbour JJ.A.

Judgment: August 27, 1992

APPEAL from an order of the General Division declaring that the appellants could not vote at a meeting of unit owners of a condominium corporation.

Colin D. McKinnon, Q.C., and Kathryn Sabo, for appellants.

Janice B. Payne, for respondents.

The judgment of the court was delivered by

MCKINLAY J.A.:—The appellants, Trendsetter Developments Limited (Trendsetter), Thomas C. Assaly and Thomas C. Assaly Corporation Ltd. (Assaly Corp.), appeal a decision of the Ontario Court (General Division) dated July 22, 1991 wherein Isaac J., sitting in motions court, declared that the appellants Thomas C. Assaly and Assaly Corp. are not entitled to vote at meetings of unit owners of the Carleton Condominium Corporation No. 347 (the condominium) in their capacity as unit owners, and that the appellant Assaly Corp., as mortgagee, is not entitled to exercise a mortgagee's right to vote pursuant to s. 48 of the Condominium Act, R.S.O. 1980, c. 84 (now R.S.O. 1990, c. C.26) (the Act) [see (1991), 4 O.R. (3d) 300, 20 R.P.R. (2d) 9]. The decision of the motions court judge has been stayed pending appeal. Two applications were heard together, but only Application 52779/91 is the subject of this appeal.

The condominium was incorporated pursuant to the Condominium Act by registration by Trendsetter of a declaration and description on August 29, 1986. The property involved is a high-rise condominium in the City of Ottawa, known as the Kent Towers, which contains 219 residential units and seven commercial units. From its inception, the project was intended to be a mixed residential and commercial building. The appellant Trendsetter was amalgamated with Assaly Corp. on September 1, 1988, pursuant to the Business Corporations Act, 1982, S.O. 1982, c. 4 (now R.S.O. 1990, c. B.16), and was continued under the name Thomas C. Assaly Corporation Ltd. (Assaly Corp.). Thomas C. Assaly is the president and controlling shareholder of Assaly Corp.

Assaly Corp. owns two residential and seven commercial units in Kent Towers. One residential unit was obtained by foreclosure and the other as a result of a breach of the agreement of purchase and sale by an investor. The commercial units are provided for in the declaration of the condominium, and are subject to its provisions as well as to the provisions of the Act. Each investor was aware of the intention to have commercial units.

At the time of trial, Assaly Corp. held virtually all of the second and third mortgages registered against the condominium units. Each of the Assaly Corp. mortgages contains a clause permitting the mortgagee to exercise the unit owner's right to vote. A trust company holds first mortgages on all units, payment of which is guaranteed by Assaly Corp. Those mortgages also provide for exercise by the mortgagee of the unit owner's right to vote. There was some dispute during argument as to the number of mortgages held by Assaly Corp. at the time of the appeal hearing; however, neither counsel was able to provide adequate information as to the precise holdings. Counsel were informed by the court that this appeal would be decided on the basis that Assaly Corp. held in excess of 15 per cent of the junior mortgages on the units -- a fact agreed to at the time of the hearing before the motions court judge.

Thomas C. Assaly personally owns 53 residential units, and it is not disputed that those units were purchased by him at fair market value. A majority of the other units are owned by individual investors who take advantage of the

substantial tax benefits of ownership, as does Thomas C. Assaly with respect to his 53 units. Very few units are owner-occupied.

At the material time, the board of directors of the condominium were Gayle Duggan, Taxiarchis (Mike) Chatzipantazis, Thomas G. Assaly, Ashwin Shingadia and Gillian Brown, all of whom own residential units in the building. Thomas G. Assaly is the son of Thomas C. Assaly, and is employed by the Assaly group of companies.

Thomas C. Assaly has a controlling interest in Assaly Holdings Ltd., which in turn has a controlling interest in both Assaly Corp. and in a company called Asgo Management Ltd. (Asgo). Asgo became the manager of the condominium for a term of five years from October 15, 1986 by virtue of a management agreement entered into between Asgo and Trendsetter at a time when Trendsetter, as developer, was owner of 100 per cent of the units. Thomas C. Assaly makes all significant decisions on behalf of Assaly Corp. and on behalf of Asgo.

THE DISPUTE

In the spring of 1991 a dispute arose among the directors with respect to the future management of the condominium. The majority of the board of directors, consisting of Duggan, Chatzipantazis and Shingadia, were of the view that the management contract with Asgo should not be renewed on its expiry on October 14, 1991. Assaly and Brown were in favour of renewal of the Asgo contract, Brown proposing that she be hired as salaried managing director.

By letter dated June 7, 1991 Assaly Corp., in its capacity as mortgagee of no less than 15 per cent of the units, wrote to unit owners enclosing a notice, pursuant to s. 18(2) of the Act, of a special meeting of owners to remove Duggan, Chatzipantazis and Shingadia from the board of directors because they did not support the renewal of the Asgo agreement. It also sent to owners a notice indicating its intention to exercise the voting rights of all units against which it held mortgages. There was a dispute between counsel on the appeal as to whether Assaly Corp. at that time held mortgage security over at least 15 per cent of the units. As stated above, counsel were unable to satisfy us as to the then current status of the mortgages, and thus we are dealing with the issues on appeal as if Assaly Corp. does in fact hold mortgages over 15 per cent of the units.

Assaly Corp. had two reasons for calling the meeting of unit owners: first, it wished the renewal of the Asgo management contract, which was a profitable one, on its expiry on October 14, 1991; and second, it did not want to jeopardize the renewal of contracts which Asgo held with individual unit owners to manage their particular units.

Mr. Thomas C. Assaly, in cross-examination on his affidavit filed in the proceedings, stated that the appellants wished to maintain control over the management of the property to produce the best possible results for all investors. Gayle Duggan, in her filed affidavit, stated that the board of directors had encountered difficulties in dealing with Asgo as the condominium manager, particularly when Asgo or the appellant found themselves in a position adverse to the respondent.

THE ISSUES

Four issues were argued on appeal:

- (i) whether Thomas C. Assaly, as shareholder of the developer, could be a bona fide unit owner of condominium units under the Condominium Act ;
- (ii) whether Thomas C. Assaly's position as controlling shareholder of Assaly Corp. imposes a fiduciary duty upon him which prohibits him from exercising a right to vote as unit owner;
- (iii) whether Assaly Corp. is under a fiduciary duty which prohibits it from exercising its right to vote as unit owner; and

(iv) whether Assaly Corp. as mortgagee of a majority of the units of the condominium is entitled to vote under s. 48 of the Condominium Act?

(i) Controlling shareholder of declarant as bona fide owner of condominium units

The learned motions court judge held that Thomas C. Assaly was not entitled to vote at the meeting called by the mortgagee. At p. 34 of his reasons [p. 317 O.R., pp. 26-27 R.P.R.], he stated as follows:

The principles laid down in cases such as York Condominium No. 167, Peel Condominium Corp. No. 199, and Carleton Condominium Corp. No. 279, supra, are, first, that the Act was intended to benefit unit owners who are bona fide purchasers, secondly, that declarants and their successors and assignees stand in a fiduciary relationship to unit owners, and finally, that they may not use their positions to further their own economic interests at the expense of bona fide unit owners.

The decision by Thomas C. Assaly Corporation Ltd. to invoke the machinery of s. 18(2) of the Act in order to remove from office the majority directors of the board because they had the temerity to vote against renewal of the management agreement with Asgo Management Limited is, in my respectful view, nothing short of a massive use of its position to further its own economic advantage. This is the type of conduct which Carruthers J., in a different factual context, excoriated in Peel Condominium Corp. No. 199, supra, and I find it no less reprehensible here.

It follows from the foregoing that I accept the submissions of Mr. Davidson for the applicant that Thomas C. Assaly is not entitled to vote at the meeting.

The first and third principles referred to above involve the question of whether or not Thomas C. Assaly is a bona fide purchaser of his 53 units. The second principle relates to his position as the controlling mind of Assaly Corp. and of Asgo.

It is not disputed that Thomas C. Assaly paid fair market value for the units which he purchased in his personal capacity. The appellant argues that because he paid fair market value he is a bona fide purchaser within the terms of the Act, stating that s. 1(1)(1) refers to a "bona fide purchaser" as one "who actually pays fair market value". That is not a completely accurate reference to s. 1(1)(1). The section defines a "declarant" as follows:

(1) "declarant" means the owner or owners in fee simple of the land described in the description at the time of registration of a declaration and description of the land, and includes any successor or assignee of such owner or owners but does not include a bona fide purchaser of a unit who actually pays fair market value or any successor or assignee of such purchaser .

It is clear from that provision that, for any successor or assignee of the "declarant" to be exempt from the statutory obligations of a declarant, he must not only pay fair market value, but he must also be a bona fide purchaser. As stated above, payment of fair market value is not in issue in this case. However, the question whether Thomas C. Assaly was a bona fide purchaser is one of some difficulty. Although the motions court judge did not address the issue directly, it appears from his conclusions that he was of the view that Thomas C. Assaly could not be a bona fide purchaser because of his position in Assaly Corp. and in Asgo. He also appears to have considered that the calling of a meeting of unit holders by Assaly Corp. as mortgagee, pursuant to s. 18(2) of the Act, could be attributed to Thomas C. Assaly in his personal capacity. He relied on the decisions in Peel Condominium Corp. No. 199 v. Sanrose Construction (Dixie) Ltd. (1989), 68 O.R. (2d) 513, 5 R.P.R. (2d) 70 (H.C.J.); York Condominium Corp. No. 167 v. Newrey Holdings Ltd. (1981), 32 O.R. (2d) 458, 122 D.L.R. (3d) 280 (C.A.); and Carleton Condominium Corp. No. 279 v. Rochon (1987), 59 O.R. (2d) 545, 38 D.L.R. (4th) 430 (C.A.).

The Sanrose decision involved the failure of a developer to sell 57 out of 270 units in the Fairways condominium development in Mississauga in accordance with the requirements of s. 51(1)(b) of the Act, which requires sale by a declarant "without delay". In that case, the units left unsold were owned by the declarant corporation, by two individual defendants who were the individuals behind the original development plan, and also by other "persons or

entities" with whom they had a "connection or association". However, the question at issue in our case -- whether persons who have purchased units in their individual capacity must be treated in the same way under the Act as corporate declarants controlled by them -- was one that it was unnecessary to decide in the Sanrose case.

The declaration in Sanrose contained the following provision:

No person or company or persons or companies acting in consort or under common control shall be allowed to buy more than 1% of the total number of units.

No such provision is found in the declaration in this case. In Sanrose, the trial judge made several statements as to the intent of the Act and the intent of the declaration and by-laws of the condominium involved, but all were made in the context of the declarant's statutory duty to sell, and the above-quoted provision in the Sanrose declaration.

In the Rochon case, this court considered whether a private arrangement made between the purchaser of a unit and the declarant, prior to the sale of all of the units, was binding upon other purchasers -- a substantially different situation from the one before us. In that case, Finlayson J.A. stated [at p. 554 O.R., p. 439 D.L.R.]: "He (the declarant) can never be a bona fide purchaser of a unit and it is these 'unit owners' that the Condominium Act is intended to protect." Although that is a reasonable interpretation of the Act, it does not answer the question whether the controlling shareholder of a corporate declarant can become a bona fide purchaser of a unit.

Cases were cited to us addressing the issue whether a purchaser of particular property was a bona fide purchaser for value. I do not consider those cases to be of assistance in resolving the issue in this case. They arise most frequently in the context of alleged fraudulent conveyances and negotiable instrument cases. One question common to both is whether or not true value was paid for the conveyance or the bill. The second is, in the fraudulent conveyance cases, whether the intent of the transfer was to defraud, hinder, or delay creditors of the transferor and, in the negotiable instrument cases, whether the holder of the bill took with any notice of defect in title of previous holders. The context is substantially different in cases dealing with the statutory scheme established under the Condominium Act. In my view, once the payment of fair market value is determined, s. 1(1)(1) of the Act requires a further determination of whether the transaction was a true sale rather than merely a transfer to a nominee, and whether there was any underlying intent which would be inimical to the purposes of the Act.

It was argued by the respondent that where, as here, the purchaser is one and the same person as the controlling mind of the corporate declarant, the transaction is a mere sham to avoid the deemed covenant in s. 51(1)(b) of the Act that the declarant will "take all reasonable steps to sell the other residential units included in the property without delay". Such an interpretation of the Act would go much further than the common law of this province in piercing the corporate veil, and would preclude any developer controlling a closely held corporation from purchasing units in a condominium developed by that corporation, regardless of the purpose of the purchase.

Thomas C. Assaly purchased his units for investment purposes, and for the tax advantage which he could derive personally from their purchase -- the same reasons why most other owners purchased their units. The evidence indicates additional reasons for Mr. Assaly's purchases, not necessarily shared by other unit owners. These were the stabilization of prices of the units in the project, and the furthering of the interests of Asgo in maintaining its management contracts. There is no evidence that he acted as a mere nominee of Assaly Corp. in purchasing his units.

The remaining question is whether there are any facts in this case which indicate any underlying intent on the part of Mr. Assaly which would be inimical to the purposes of the Act. One of the main objectives of the Act is to place control of the condominium in the hands of the owners at the earliest possible date. However, nothing in the Act prohibits any individual from owning a sufficient number of units in the project to put him in control. Such a prohibition could be written into the declaration, as was done in the Sanrose case, but that was not done in this case. In any event, ownership of 53 out of 219 residential units does not of itself constitute control.

I see no facts surrounding his purchase of residential units which would preclude Thomas C. Assaly from exercising a vote as bona fide owner of each of his units.

(ii) Does the controlling shareholder of a declarant owe a fiduciary duty to owners, and if so, does that duty prohibit him from exercising a right to vote as unit owner?

The respondent takes the position that Thomas C. Assaly owes a fiduciary duty to the owners of units in the condominium as a result of his being the controlling mind of the declarant, and must, therefore, act in their interests alone when their interests are in conflict with his own. The only condominium case cited for that proposition was the decision of this court in *York Condominium Corp. No. 167 v. Newrey Holdings Ltd.*, supra. The relevant portion of that decision involved extra parking spaces remaining after parking spaces had been allocated to all residential units in the project. The developer declarant, prior to the registration of the declaration, proposed to sell the extra parking spaces and retain the proceeds. Its position was that, although the extra spaces were part of the common elements, they remained the property of the developer until registration of the declaration and could be disposed of by it at will. Wilson J.A., writing for the court, stated at p. 467 O.R., p. 289 D.L.R.:

With respect, I can see no reason why as a matter of simple contract law the parties cannot contract with reference to the Act and declaration prior to the registration of the declaration and in anticipation of its registration. Indeed, I think they must be taken to have done so where units in a condominium project are sold prior to registration since the condominium is substantially a creature of statute. It would be wholly unreal to view those transactions as agreements for the sale of separate pieces of real estate. This being so, I think the Court may look, and indeed must look, to the provisions of the Act and the declaration in determining the rights of the parties under the agreements of purchase and sale. I think they must also look to the general law of real property as to the status of a purchaser once his offer has been accepted. I do not think the position of the owner-developer remains unchanged after he starts to sell units. I think that at that point he has committed the character of the project to that of condominium under the Act and declaration. I think he has also placed himself in a fiduciary relationship to the unit purchasers not only with respect to their units but also with respect to the interests appurtenant thereto. He therefore holds the property in trust for the unit purchasers, present and prospective, and for the condominium corporation which will come into being upon registration of the declaration. I believe he is under a duty to protect the interests of all unit owners, present and prospective, and cannot put his own interests in conflict with theirs even although he himself continues to be an owner as long as any units remain unsold.

That decision supports the extension of principles of real property contract law to contracts involving the purchase of condominium units. I see nothing in the words quoted that indicates the imposition of a fiduciary duty upon a person who is himself a bona fide purchaser of units. Had an individual, owning a controlling interest in a condominium management corporation unconnected to the declarant, purchased the same number of units as Mr. Assaly, I cannot conceive of any voting issue being raised. I see no reason to treat Mr. Assaly differently from such a purchaser.

However, even if Mr. Assaly were subject to a fiduciary duty, it would not preclude his voting at meetings of unit holders. It would merely require that, in so doing, he vote in the interests of all unit holders, since it would be to all that he owed the duty, and not to a few. It is quite possible in this case that Mr. Assaly's interests correspond to those of the unit holders as a whole. There is no evidence of the views or interests of the unit holders as a group; the evidence merely indicates the opinion of some of the directors that Mr. Assaly would not vote in the interests of all unit holders.

Two potentially conflicting considerations are of importance in dealing with condominiums -- the first, that condominiums are creatures of statute, and courts should be cautious about reading into the statute rights and duties which the legislature did not see fit to include; and the second, that condominium corporations, unlike business corporations, are made up of individuals who make their homes in the premises operated by the corporation, or whose tenants do, and the fate of the corporation is of vital importance to them in their everyday lives. The efficient operation of the building is in Mr. Assaly's interests, as well as in the interests of the other owners.

It is my view, on the facts of this case, that Mr. Assaly does not owe a fiduciary duty to other unit holders, and can vote in any way he chooses as the bona fide purchaser of 53 residential units. However, in so stating, I wish to make

it clear that, in assessing situations such as this, one must look carefully at the facts. For example, if Mr. Assaly had purchased sufficient units to effect control of shareholders' meetings, the court might take a different view of the issue of fiduciary duty.

(iii) Does Assaly Corp. owe a fiduciary duty to unit owners which prohibits it from voting at meetings of unit owners?

The appellant concedes that a fiduciary duty is owed by the Assaly Corp. as declarant with respect to unsold residential units. Assaly Corp. owns two residential units -- one obtained as a result of a breach of an agreement of purchase and sale by an investor, and the other by foreclosure under a mortgage held by it.

Section 51(1)(b) of the Act states:

51(1) Every agreement of purchase and sale entered into by a proposed declarant for a proposed unit for residential purposes shall be deemed to contain,

(b) a covenant by the vendor to take all reasonable steps to sell the other residential units included in the property without delay other than any units mentioned in a statement under clause 54(1)(c) . . .

That provision does not cease to be effective merely because an agreement of purchase and sale has been aborted. The declarant continues to be bound by the deemed covenant to sell the unit involved "without delay". There can be no doubt on the facts of this case that the declarant has not fulfilled that covenant and, consequently, is subject to a fiduciary duty which precludes it from voting with respect to that unit other than in the interests of the unit owners as a whole.

Different considerations apply to the residential unit which was obtained as a result of mortgage foreclosure. Before Assaly Corp. took mortgage security over that unit, it had fulfilled the covenant to sell, and was no longer subject to any fiduciary obligation. Following default under the mortgage and subsequent foreclosure, it became owner not through its capacity as declarant, but as mortgagee; thus it would become a bona fide purchaser for value of the unit, and have the same right to vote as any other unit owner.

Commercial units, of which Assaly Corp. owns seven, are treated differently under the Act. The deemed covenant to sell under s. 51(1)(b) is limited specifically to residential units. The declaration does not stipulate that the commercial units be sold. On the contrary, purchasers of residential units would have been aware of the existence of commercial units, and should have anticipated the likelihood of their retention by the declarant for commercial rental purposes. I see no reason, pursuant to the statute or otherwise, why the declarant should not be at liberty to vote as owner of the commercial units.

(iv) Right of junior mortgagee to vote pursuant to s. 48 of the Act

Assaly Corp., at the time of trial, held virtually all second and third mortgages of the condominium units. As stated above, it is assumed for the purposes of these reasons that it held mortgage security over at least 15 per cent of the units, which entitled it, pursuant to s. 18(2) of the Act, to call a meeting of the owners of the condominium corporation at any time, subject only to the provisions of s. 48 of the Act, which reads:

48. Where a mortgage of a unit and common interest contains a provision that authorizes the mortgagee to exercise the right of the owner to vote or to consent, the mortgagee may exercise the right, and, where two or more such mortgages contain such a provision, the right may be exercised by the mortgagee who has priority.

The mortgages held by Assaly Corp. in this case do contain a provision authorizing the mortgagee of the unit to vote. The motions court judge concluded that Assaly Corp. was not entitled to vote the units over which it held mortgage security. In doing so, he stated: first, that he was following the decision of Philp J. in *Keyes v. Metropolitan Toronto Condominium Corp. No. 876 (1990)*, 73 O.R. (2d) 368, 11 R.P.R. (2d) 169 (H.C.J.); second,

that he was following the principles laid down in the decisions cited earlier in these reasons; and third, that the intent of the Act indicated that Assaly Corp. as mortgagee should not be entitled to vote.

The motions court judge did not elaborate on his second and third reasons. However, I find nothing in the cases referred to earlier which in any way clarifies the issue of a mortgagee's voting rights. Nor do I see anything in the Act which would indicate that a mortgagee, which also happens to be a declarant, is, therefore, precluded from exercising its statutory rights as mortgagee.

The issue of a mortgagee's right to vote was addressed by Philp J. in the *Keyes* case. He stated that the purpose of s. 48 of the Act was to protect the rights of mortgagees, who have an investment in the mortgaged units and, following the unreported decision of Krever J. in *Mann v. Canada Mortgage & Housing Corp.*, Ont. H.C.J., released May 21, 1982, held that the right of the mortgagee to vote in no way depends upon default under the mortgage. I am in complete agreement with that portion of the decision in *Keyes* and the reasoning on which it is based.

Philp J. went on in *Keyes* to consider the rights of junior mortgagees to vote in a situation where a first mortgagee does not avail itself of the opportunity. On that issue, he stated, at p. 579 O.R., p. 181 R.P.R.:

The words of s. 48 speak only of the right being exercised by the mortgagee who has priority, which, in my view, would be the first mortgagee. There is no provision for the right to be transferred to a mortgagee with lesser priority in the event that the first mortgagee decides not to exercise its right to vote. As well, paragraph (c)(i), contained in all mortgages and reproduced above, contemplates the mortgagee giving the mortgagor notice if it does not intend to exercise its vote, thereby enabling the mortgagor to exercise the right to vote. If, therefore, the developer does not have the first mortgage, he will not have the right to exercise the vote contained in the second mortgage, in my view, according to s. 48.

While s. 48 is not as clear as one would like, I am unable to agree with Philp J.'s interpretation of it. There can be no doubt that the first part of the section, down to the words, "the mortgagee may exercise the right", gives to any mortgagee, whose mortgage document contains the appropriate authorization to vote, the right to exercise that vote if it wishes to do so. The ambiguity lies in the words, "where two or more such mortgages contain such a provision, the right may be exercised by the mortgagee who has priority". Section 22(1) permits only one vote per unit at a meeting of unit owners. Consequently, only one mortgagee could vote a unit regardless of the number of mortgages registered against it. The latter part of s. 48 is permissive, and allows the mortgagee with priority to vote if it wishes to. It does not, however, prohibit voting by junior mortgagees if the senior mortgagee does not wish to avail itself of its rights. To hold otherwise, would be to limit the opening part of s. 48 to first mortgagees only; but the wording of that part indicates no such limitation. If the opening part were specifically limited to first mortgagees, then the latter part would be redundant. In addition, to construe the section in that way would limit the rights of the mortgagee and mortgagor to contract for the assignment of the owner's right to vote. To effect such a result, the Act would have to do so in very clear terms. I am satisfied that the legislature had no such intent, and that the right of a mortgagee to vote a unit arises by virtue of its agreement with the unit owner. However, it can be exercised only within the terms of that agreement, and only if a prior mortgagee does not avail itself of its right to vote.

RESULT

In result, I am of the view that the appellants are entitled to declarations that:

- a) Thomas C. Assaly is entitled to vote at unit owners' meetings as owner of the 53 residential units registered in his name.
- b) Assaly Corp. is entitled to vote at unit owners' meetings as owner of seven commercial units and one residential unit. It is entitled to vote in a fiduciary capacity only with respect to the one residential unit it owns as a result of the aborted agreement of purchase and sale.
- c) Assaly Corp. is entitled to exercise its rights as mortgagee to vote at unit owners' meetings, within the terms of its mortgages, but only in situations where prior mortgagees do not avail themselves of their prior right to vote.

I should like to comment on a matter which I consider to have confused the issues in this appeal. The disputes between the parties arose at a meeting of directors of the condominium corporation, but the issues in the appeal deal with matters which do not involve directors at all, but involve the rights and duties of registered unit owners and mortgagees. There is no doubt that all directors must act at all times in the interests of the condominium corporation as a whole. Their position is the same as the position of a director of any other corporation, and nothing in the Act reduces their responsibilities. Unit owners, however, are in a position similar to that of shareholders of a corporation -- they act in their own personal interests unless something in the general law or in the Act requires them to do otherwise. In this case, the proposed purpose of the unit owners' meeting is to replace some of the directors. If that is done within the terms of the Act and of the declaration and by-laws of the corporation, there can be no complaint. However, once new directors are appointed, they owe a fiduciary duty to the corporation and not to any other individual or organization. If they fail in the exercise of that duty, they are subject to the full force of the law.

I would set aside the judgment below, and in its place give judgment in favour of the appellants in accordance with these reasons. The appellants are entitled to their costs here and below.

Appeal allowed.

CBR# 384

York Region Condominium Corp. No. 771 v. Year Full Investment (Canada) Inc.

Action No. RE1446/92

Ontario Court (General Division),
Rosenberg J.

August 28, 1992

The applicant was the condominium corporation of a condominium containing both residential and commercial units. The respondent owned a commercial unit where it operated a successful Chinese restaurant. Under the condominium declaration, the respondent was required to pay 6.0501 per cent of all common expenses. Under the declaration, common expenses included water or sewage charges unless separately metered for each unit. The corporation's first year budget stated that excessive water consumption by retail units would result in a charge back to the unit. After the condominium corporation incurred expenses for water usage far in excess of anticipated, it installed a separate meter for the restaurant and discovered that the operation of the restaurant used great amounts of water. The applicant sought an order requiring the respondent to pay for the excess consumption of water. To the respondent's argument that water was not separately metered for each unit, the applicant stated that this was both physically and economically impractical and that the respondent was not prejudiced since the rest of the units would pay their share after the water metered to the respondent.

The philosophy of a condominium development is that the common expense proportions cannot be examined under a microscope. It is only where there is flagrant excessive use that there should be an adjustment. The respondent was using almost twice what all of the other units together used and the separate metering was necessary to prevent an unjust enrichment or windfall to the respondent and an undue hardship to the balance of the unit owners. It would not make sense to force the condominium corporation to go through the expense of metering all other units.

York Condominium Corp. No. 59 v. York Condominium Corp. No. 87 (1983), 42 O.R. (2d) 337, 148 D.L.R. (3d) 660, 29 R.P.R. 86 (C.A.), *consd*

APPLICATION for an order that the owner of a commercial condominium unit pay for excessive water consumption.

Jonathan H. Fine, for applicant.

David E. Wires, for respondent.

ROSENBERG J.:—

Nature of the application

The applicant, York Region Condominium Corporation No. 771 ("YRCC 771"), is a mixed use condominium corporation. The respondent is the owner of a commercial unit. The project contains both commercial units and residential units. The respondent operates a successful Chinese restaurant known as Bayview Gardens. In the course of the respondent's operation in food preparation and in other aspects of their operation they use an extraordinary amount of water. The applicant seeks to have a determination of whether or not the respondent is responsible for their metered water charges and if so requires an order that they pay these charges.

The project

The total project is composed of two buildings containing a total of 58 residential units and 45 commercial units together with parking, storage and locker units. There is a five-storey building, the commercial building, which fronts on Highway 7 and contains commercial and retail businesses. There is also a four-storey building, the residential building, which is located to the rear of the commercial building containing commercial and retail businesses on level 1 and residential units on levels 2, 3 and 4. The project is municipally known as 350 Kings Highway No. 7 East in the Town of Richmond Hill.

The respondent

The respondent is the owner of unit 1, level 1, and operates a Chinese food restaurant known as Bayview Gardens in the commercial building. By virtue of the declaration the respondent is required to pay 6.0501 per cent of all common expenses.

The problem

York Region Condominium Corporation (YRCC) 771 has incurred expenses for water usage far in excess of what should be the case. This has put the condominium corporation in a desperate financial position. At the time of the application there was \$22,460.35 owing to the Town of Richmond Hill in respect of water and sewage charges which amount was overdue. The applicant was not in a financial position to pay the bill and the Town of Richmond Hill threatened to shut off the water service to the buildings if the bill was not paid immediately. This would work to the detriment of both the applicant and the respondent and at the hearing I suggested to the respondent that the sum of approximately \$30,000 be advanced to the applicant by the respondent as a loan without prejudice to the respondent's rights pending my decision in this matter.

The budgeted amount for the first year of water charges for the total project was \$30,000. The estimate by the applicant which is not disputed by the respondent is that the respondent's own usage for the first year resulted in charges of \$57,293.74.

The reasons for the excessive water consumption

The respondent's restaurant contains approximately 250 seats and is quite successful. The respondent employs some 40 people on staff and the restaurant is open seven days per week. The respondent has its own special method of preparing food and in particular Chinese dried vegetables and seafood. One of the special methods consists of running water over the food and soaking it in water for hours at a time which makes the meat and seafood tender and tastier. This process continues throughout the day, starting with the dim sum preparation at 6:30 a.m. Running water over the food in this manner is a very important part of food preparation and the respondent attributes its success in part to this special method of food preparation. The respondent does not intend to change this practice.

In addition, all of the compressors for the respondent's walk-in coolers are cooled by water. This results in water running through the compressors 24 hours a day, 365 days a year. Had the compressors been air cooled this water usage would not have occurred. In addition the restaurant dishwasher is in use constantly throughout the day.

The restaurant also has the normal water use such as water to their customers, hot tea in teapots, cleaning and cooking and steaming of food, etc.

The discovery of the respondent's excess water use

The Town of Richmond Hill required that one bulk meter for water consumption be installed and it was up to the condominium to install check meters if necessary to measure individual consumption.

Shortly after the Bayview Gardens restaurant began operating in the fall of 1990, YRCC 771 noticed a dramatic increase in the amount of the water bills. After installing a check meter to monitor and determine the Bayview Gardens restaurant's individual usage, YRCC 771 discovered that most of the water which YRCC 771 was being charged, was used by the Bayview Gardens restaurant.

The condominium documents

The first year's budget of the condominium corporation distributed to purchasers of the condominium units including the respondent contained the following note in reference to the estimate of the \$30,000 for the first year's water and sewage charges.

Water

Represents the cost of water for normal household requirements and for normal requirements for cooling Condominium Corporation. Any excessive consumption by any Retail Unit will result in a back-charge being effected by the Condominium Corporation to such Retail Unit.

(Emphasis added)

The condominium corporation is now asking the court to require the respondent who owns a retail unit which has an excessive consumption of water to pay for such excess.

The Condominium Act, R.S.O. 1980, c. 84 as amended, s. 1(1) (h) defines common expenses as follows:

(h) "common expenses" means the expenses of the performance of the objects and duties of a corporation and any expenses specified as common expenses in this Act or in a declaration . . .

The schedule to the declaration provides the following:

Common expenses shall include the following:

All sums of money levied or charged to the condominium corporation on account of any or all public and private supplies of insurance coverage, taxes, utilities and services including without limiting the generality of the foregoing. Levies or charges for

.....

(iii) water or sewage unless separately metered for each unit.

The respondent points out that water has not been "separately metered for each unit" but only for its unit and a few other retail units and therefore the common expenses include water and sewage by virtue of the wording of the declaration. The applicant responds by pointing out that it is impractical both physically and economically to have a separate meter for each of the units in the building and that as far as the respondent is concerned the respondent is in no different position than if all of the units were separately metered since the rest of the units are willing to pay their share of the water in full after the water metered to the respondent is paid for by the respondent.

In the case of *York Condominium Corp. No. 59 v. York Condominium Corp. No. 87* (1983), 42 O.R. (2d) 337, 148 D.L.R. (3d) 660 (C.A.), the court was considering a dispute between two condominium corporations. The recreation facilities were common and shared by the two corporations. The corporations by agreement shared the cost of repairs. There was a structural deficiency and the original developer was being sued with regard to the structural deficiency in the recreation facilities. The recreation facilities, however, required that money be spent on them so that they could be used and the one corporation refused to pay its share of the cost on the grounds that it did not come within the language of its obligation to "repair". Cory J.A. (as he then was) in determining that the cost of correcting the structural deficiencies should be paid and in finding in favour of the applicant stated as follows [pp. 340-41 O.R., pp. 663-64 D.L.R.]:

As far as possible and with due regard for the particular mutual covenants of the individual owners the courts should bring a broad and equitable approach to the resolution of their problems.

Although this case does not deal with individual condominium owners within a single condominium, it is concerned with the relationship between two condominium corporations which form integral parts of a composite plan for condominium living. The development plan contemplated the mutual enjoyment and use of the pool by the occupants of both condominium corporations. The mutual enjoyment of a facility calls for a mutual obligation of repair.

The concept of repair in such a situation should not be approached in a narrow legalistic manner. Rather, the court should take into account a number of considerations. They may include the relationship of the parties, the wording of their contractual obligations, the nature of the total development, the total replacement cost of the facility to be repaired, the nature of the work required to effect the repairs, the facility to be repaired and the benefit which may be acquired by all parties if the repairs are effected compared to the detriment which might be occasioned by the failure to undertake the repairs. All pertinent factors should be taken into account to achieve as fair and equitable a result as possible.

I agree with the approach suggested by these reasons. It would not make sense to force the condominium corporation to go through the expense of metering all other units separately to collect the amount attributable to the excessive water use of the respondent.

The respondent's main contention in opposition to the application was that if it paid the full metered water cost to its premises that it would also be paying as part of its common expense payment a portion of the water consumption of other unit holders. The respondent also argued that it pays for its own waste disposal and therefore is paying not only its own cost of waste disposal but some part of the cost of waste disposal of other unit owners and that a similar argument applied with regard to gas and power.

The philosophy of a condominium development is that the common expense proportions cannot be examined under a microscope. The persons occupying a unit on the first floor cannot avoid any cost of the elevator because they don't use it. Similarly, a family with a large number of members may use a lot more of the utilities than a single person. Different retail units have different requirements of various services in the condominium. It is not until there is a flagrant excessive use such as the present one that there should be an adjustment. If this unit owner were using eight per cent or even 15 per cent of the total water usage of the condominium corporation an adjustment would not be required. However, this unit owner is using almost twice what all of the other units together use and the separate metering becomes necessary to prevent an unjust enrichment or windfall to the respondent and an undue hardship to the balance of the unit owners.

The argument by the respondent that there should be deducted from the amount payable by it for water metered to its own unit therefore fails. Some of the other water is used for the respondent's benefit including watering the lawn and cooling water to go into its air conditioning system.

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

It was argued that since the water is being metered to the respondent's premises, they should have as a credit their share of the water charges included in the common expenses that they pay. However, the response to this, which I accept, is that they are deriving benefit from the balance of the water in the total condominium. Similarly electric charges and waste disposal are common expenses of the total project and should be continued to be shared by the respondent even if the respondent might establish by a detailed analysis that after paying for their own they do not receive a six per cent benefit from the water, electric, gas and waste disposal included in the common expenses.

The figures that I have in the factum do not exactly correspond to the metering and if the parties cannot agree on the amount to be repaid by the respondent to the condominium corporation and on the question of interest and costs I will accept written submissions. Judgment accordingly.

Order accordingly.

CBR# 225

Ontario New Home Warranty Program v. Marchant Building Corp. (Ont. C.A.)

1 O.R. (3d) 513 15 R.P.R. (2d) 113

Ontario Court of Appeal McKinlay, Griffiths and Carthy JJ.A. February 11, 1991

Real property -- Condominiums -- Purchase of interest in partnership -- Ontario New Home Warranties Plan Act -- Whether applicable.

Appeal from an order holding that the appellants must register condominium projects under the Ontario New Home Warranties Plan Act. In order to provide tax deferrals, the agreements of purchase and sale provided for the purchase of an interest in a limited partnership at a price related to the value of a chosen condominium unit. The investor obtained the right to obtain title to the unit once the condominium was registered and the unit had been rented. The trial judge held that a sale occurred when the agreement between the limited partnership and an investor was signed. As these agreements were signed prior to construction, the condominium was not previously occupied and the Act applied.

HELD: Appeal allowed. The agreement with the limited partnership did not make an investor the beneficial owner of a condominium unit. The agreement gave an interest in a limited partnership but there was no real estate to which the agreement could attach. The option to obtain title only became an interest in land after registration and rental of the unit. At that time the investor's interest was irrelevant, because the Act had no application to property previously occupied. The essence of the agreement was a tax deferral. The agreement was not an agreement to sell a condominium unit within the meaning of the Act.

STATUTES, REGULATIONS AND RULES CITED: Ontario New Home Warranties Plan Act, R.S.O. 1980, c. 350, ss. 1, 1(1), 1(a), 1(g), 1(l), 1(n), 1(1), 6, 13. Ontario New Home Warranties Plan Act Regulations, R.R.O. 1980, Reg. 726, s. 1(1). Factors Act, 1889 (U.K.) 52 & 53 Vict. c. 45.

CBR# 147

Keyes, Middletown, Whaling and Miller v. Metropolitan Toronto Condominium Corporation 876, Strasscorp Holdings Inc. and J.R.H. Real Estate Ltd.

Indexed as: Keyes v. Metropolitan Toronto Condominium Corp.
876
(H.C.J.)

73 O.R. (2d) 568
Action No. RE 1199/90

ONTARIO
High Court of Justice
Philp J.

June 18, 1990.

S. Inc. was the developer of a condominium. S. Inc. held 92 vendor-take-back mortgages. The mortgages contained a clause providing that:

The Chargee is hereby irrevocably authorized and empowered to exercise the right of the Chargor as an Owner of the said lands to vote or to consent or to not vote or to refuse to consent in all matters relating to the affairs of the said Corporation without in any way consulting the Chargor in the manner in which the vote shall be exercised or not exercised and without incurring any liability to the owner or anyone else because of the manner in which such vote or right to consent in the affairs of the Corporation was exercised or not exercised.

Unit holders in the condominium who leased their units to third parties were required to enter into a management agreement with J.R.H. Paragraph 12 of the management agreement stated:

The Manager is hereby authorized and empowered to exercise the right of the Owner ... to vote or to consent in all matters relating to the affairs of the Condominium and the Manager shall be entitled to exercise such right to vote or consent unless the Owner gives prior written notice of his intention to exercise such rights in respect of any specific meeting of members of the Condominium, at least 48 hours prior to such meeting.

When S. Inc. no longer owned the majority of the units in the condominium, a meeting ("the turn-over meeting") was called pursuant to s. 26(1) of the Condominium Act to elect a new board of directors. Prior to the meeting, J.R.H. wrote to the over 200 absentee owners who had entered into the management agreement advising them that they were obligated to provide J.R.H. with a signed proxy which would be exercised on their behalf. Neither the letter nor the enclosed proxy form mentioned the owner's right to give 48 hours' notice of his intention to exercise his own vote at any specific meeting. Fifty-one owners returned executed proxies in favour of J.R.H., although seven of those were subsequently revoked and ten more were from owners who had authorized their mortgagee to exercise their voting rights. Notice was also sent to all mortgagors advising them that S. Inc. intended to vote on behalf of the mortgagors at the meeting.

The applicants challenged the validity of the 34 proxies given to J.R.H. and the validity of the reservation of voting rights clause contained in the mortgages. They obtained an order enjoining the respondents from holding the turn-over meeting pending resolution of those issues.

1. A person holding a proxy is merely an agent acting for the person giving the proxy and as such, is subject to the instructions of the giver, who may withdraw his or her authority at any time. While the proxy signed by the absentee owners was a proper one, the condition which J.R.H. attempted to put upon its withdrawal could not be upheld. If an owner attended at any meeting intending to vote, his attendance superseded the proxy he gave to J.R.H. J.R.H. apparently acknowledged that right, but its acknowledgment was not communicated to the absentee owners. J.R.H. had a positive duty to communicate with all absentee owners to advise them of their rights to attend the turn-over meeting and to vote regardless of any proxy signed by them. If J.R.H. did not send this notice, it could not exercise the proxy given to it because of the misleading portion of paragraph 12 of the management agreement.

2. The authority for the reservation of voting rights clause in the mortgages was found in s. 48 of the Act, which provides that where a mortgage of a unit contains a provision that authorizes the mortgagee to exercise the right of an owner to vote or to consent, the mortgagee may exercise the right. It was not necessary that the mortgage be in default before S. Inc. could exercise the right to vote. Section 48 was clear and unambiguous and made no mention of such a precondition. Any inconsistency between s. 48 and s. 26(1) could be rationalized. Section 48 was enacted for the protection of the mortgagee. S. Inc. had a substantial financial investment in the condominium by reason of the mortgages given back to it and should not be denied the protection provided by s. 48 merely because it was the developer of the condominium.

Section 48 provides for the exercise of voting rights only by the mortgagee who has priority, i.e., the first mortgagee. There is no provision for the right to be transferred to a mortgagee with lesser priority in the event that the first mortgagee decides not to exercise its right to vote. If S. Inc. does not have the first mortgage, it will not have the right to exercise the vote contained in the second mortgage.

Cousins v. International Brick Co., [1931] 2 Ch. 90 (C.A.); Sanrose Construction (Dixie) Ltd. v. Don-Com Venture Capital Corp. (1983), 44 O.R. (2d) 218, 24 B.L.R. 192, 30 R.P.R. 284 (Co. Ct.), *consd*

Other cases referred to

Mann v. Canada Mortgage & Housing Corp., Ont. H.C.J., Krever J., May 21, 1982

Statutes referred to

Interpretation Act, R.S.O. 1980, c. 219

APPLICATION challenging validity of proxies given by condominium unit owners to developer and of reservation of voting rights clause in mortgages given by unit owners to developer.

Patricia M. Conway, for applicants.

Allan Sternberg, for respondents.

PHILP J.:— The issue before the court on this application and cross-application involves the validity of, first, proxies given by owners of condominium units to the respondent, J.R.H. Real Estate Ltd. (J.R.H.), pursuant to a management agreement between J.R.H. and the unit holders and, secondly, reservation of a voting-rights clause contained in the mortgages given by owners of condominium units to the respondent developers, Strasscorp Holdings Inc. (Strasscorp).

Strasscorp developed a highrise condominium at 1001 Bay Street in Toronto containing 564 residential units. On February 23, 1990, the respondent, Metropolitan Toronto Condominium Corporation 876 (M.T.C.C. 876) was created by the registration of the declaration and description required by the Condominium Act, R.S.O. 1980, c. 84. At that time, Strasscorp was still the registered owner of all the units in the building and, accordingly, controlled the initial board of directors. During the week of April 2, 1990, title to over 400 units was transferred from Strasscorp to purchasers and, by April 4, Strasscorp no longer owned the majority of the units. Accordingly, pursuant to s. 26(1) of the Act, M.T.C.C. 876, by an April 25 letter to all registered owners, called a meeting to elect a new board of directors. The date of the meeting, commonly called the "turn-over meeting", was set for May 16, within the 21 days required by s. 26(1).

On the day called for the meeting, May 16, the applicants obtained an order from Mr. Justice McKeown enjoining the respondents from holding the meeting pending resolution of the above-mentioned issues concerning the validity of the proxies and the reservation of voting-rights clause. No notice of motion for a restraining order was given to the respondents nor their solicitors, who were known to the applicants' solicitors at that time. The solicitors for the respondents were advised of the order after 5 p.m. The meeting had been scheduled for 7:30 p.m. Needless to say, it did not proceed. Counsel for the respondents argues that the without-notice motion was not necessary and should not have been brought. It has caused the respondents considerable expense to postpone the arrangements that had been made. I curtailed argument on this objection in order to focus on the more important issues which I will now discuss. If necessary, I shall allow further argument on this objection, as well as the question of costs, at a later date.

Issue 1 -- Validity of proxies given to J.R.H.

The units in 1001 Bay Street were marketed and presold beginning in the spring of 1986. Purchasers, under the terms of their agreements of purchase and sale, agreed to occupy their respective units in person from the interim occupancy date when the units were substantially complete. This took place around the spring of 1988. They also agreed not to sell, transfer or assign their agreement of purchase and sale without the consent of the vendor, which consent could be arbitrarily withheld. Some purchasers preferred not to occupy their units but, rather, to lease them to third parties. The consent of Strasscorp to do this could only be obtained if the purchasers agreed to enter into a management agreement with J.R.H., the president of which was one Henry S. Strasser whose listed address is the same as the address of Alexander Strasser, the president and only director of Strasscorp. The only other director of J.R.H. is listed as Jane M. James.

The terms of the management agreement include paragraph 12, which reads as follows:

12. (a) The manager is hereby authorized and empowered to exercise the right of the Owner, as an owner of the Property, to vote or to consent in all matters relating to the affairs of the Condominium and the Manager shall be entitled to exercise such right to vote or consent unless the Owner gives prior written notice of his intention to exercise such rights in respect of any specific meeting of members of the Condominium, at least 48 hours prior to such meeting.

(b) This authorization is being given to the Manager, subject to any rights to vote or consent held by any mortgagee(s) of any mortgage(s) held on the Property.

(c) The manager shall not be responsible to the Owner for the exercise of the right to vote or consent, or for any failure to exercise such right, nor shall the Manager be under any obligation to vote or consent.

(d) The Owner shall, upon acquiring title to the Property, execute a proxy in favour of the Manager in the form specified or provided by the Manager, in respect of the Owner's right to vote or consent either generally or for any specific meeting, forthwith upon the request of the Manager.

On April 17, 1990, J.R.H. wrote to each of the over 200 absentee owners that entered into the management agreement advising them that they were "obligated to provide J.R.H. with a signed proxy which we will exercise on your behalf ". They were told to fill out the enclosed proxy form and send it back without delay. Neither the letter, nor the enclosed proxy form, mentions the owner's right to give 48 hours' notice of his intention to exercise his own vote at any specific meeting. The form attached to the letter appoints the manager of J.R.H. to be the proxy of the registered owner to vote on the owner's behalf "at any meeting of members of MTCC 876". Fifty-one owners returned executed proxies in favour of J.R.H., of which seven subsequently revoked their proxies intending to attend and vote at the turn-over meeting. Ten of the 51 proxies were from owners who had authorized their mortgagee to exercise their voting rights. Accordingly, there are only 34 proxies with which we are concerned in this issue. An additional 51 owners replied that they intended to attend and vote at the turn-over meeting.

The material before me also indicated that, in any event, J.R.H. did not intend, nor did it ever intend, to act on any proxy given by an owner who attends the turn-over meeting, or any other meeting, and indicates a preference to exercise his or her vote personally.

The law is clear that a person holding a proxy is merely an agent acting for the person giving the proxy and, as such, is subject to the instructions of the giver, who may withdraw his or her authority at any time. See *Cousins v. International Brick Co.*, [1931] 2 Ch. 90 (C.A.), at p. 102, where Lawrence L.J. said:

Every proxy is subject to an implied condition that it should only be used if the shareholder is unable or finds it inconvenient to attend the meeting. The proxy is merely the agent of the shareholder, and as between himself and his principal is not entitled to act contrary to the instructions of the latter.

The proxy signed by the 51 absentee owners is a proper one. The difficulty arises from the attempt by J.R.H. to put a condition upon its withdrawal. In my view, the condition cannot be upheld. If the owner attends at any meeting intending to vote, his attendance supersedes the proxy he gave to J.R.H. J.R.H. has apparently acknowledged this right, but their acknowledgment has not been communicated to the absentee owners. While I find the proxy to be valid, the lack of proper advice being conveyed to the owner creates a positive duty upon J.R.H. to communicate with all absentee owners to advise them of their rights to attend the turn-over meeting and to vote regardless of any proxy signed by them. If this notice is not sent by J.R.H., it is my order that it cannot exercise the proxy given to it because of the misleading portion of paragraph 12 of the management agreement; nor can it exercise any right purported to be given to it under paragraph 12(1).

Issue 2 -- Validity of the reservation-of-rights clause contained in the mortgage

The agreements of purchase and sale entered into by the owners and the developer all provide for several options to finance the purchase. The purchaser, after payment of a deposit, can give back to the vendor/developer on closing a first mortgage for a specified amount to be repayable on demand. As an alternative, the purchaser may assume a first mortgage to be arranged by the vendor and give back a second mortgage to the vendor for a specified amount, to be repayable on demand. The third option, of course, is to pay cash. The material before me indicates that at least two of the applicants in this case paid the full price on closing.

The agreements of purchase and sale all contain the following clause:

The mortgage may provide an assignment to the Mortgagee of the Purchaser's right to vote at all meetings of members of the condominium corporation provided that nothing herein contained, including the exercise by the Mortgagee of the right to vote, shall render the Mortgagee as a mortgagee in possession, any right to vote assigned to the Mortgagee does not entail any representation, express or implied, that the Mortgagee shall be in any way responsible to protect the interest of the Mortgagor, and the Mortgagee shall not be responsible for any exercise of the right to vote or any failure to exercise the right to vote.

The final count appears to be that the developer, Strasscorp, holds 92 vendor-take-back first mortgages and 66 vendor-take-back second mortgages behind C.I.B.C. Mortgage Corporation's first mortgages. All mortgages (including the C.I.B.C. first mortgages) contain the following clause relating to the exercise of the right to vote:

(C) The Chargee is hereby irrevocably authorized and empowered to exercise the right of the Chargor as an Owner of the said lands to vote or to consent or to not vote or to refuse to consent in all matters relating to the affairs of the said Corporation without in any way consulting the Chargor in the manner in which the vote shall be exercised or not exercised and without incurring any liability to the owner or anyone else because of the manner in which such vote or right to consent in the affairs of the Corporation was exercised or not exercised and provided that:

(i) The Chargee may at any time or from time to time give notice in writing to the Chargor and the said Condominium Corporation that the Chargee does not intend to exercise the said right to vote or consent and in that event, until the Chargee revokes the said notice, the Chargor may exercise the right to vote. Any such notice may be for an indeterminate period of time or for a limited period of time or for a specific meeting or manner.

(ii) The Chargee shall not by virtue of the assignment to the Chargee of the rights to vote or consent, be under any obligation to vote or consent or to protect the interests of the mortgagor or to give the notice contemplated by clause (i) above.

(iii) The exercise of the rights to vote or consent shall not constitute the Chargee a Mortgagee in possession.

The material indicates that Strasscorp subsequently allowed the demand mortgages held by it to be extended for a period of six months before demand is made.

On May 9, a notice in accordance with s. 20(3) was sent to all mortgagors over the signature of Strasscorp and C.I.B.C. advising the mortgagors that Strasscorp and C.I.B.C. intended to vote on behalf of the mortgagors at the turn-over meeting to be held on May 16. The notice refers only to the mortgages given to Strasscorp and, subsequently, "transferred to C.I.B.C.". I take that to mean only the first and second demand mortgages taken back by Strasscorp on closing, totalling 158 mortgages. The authority for the reservation of voting-rights clause in the mortgagees is found in s. 48 of the Act, which reads as follows:

48. Where a mortgage of a unit and common interest contains a provision that authorizes the mortgagee to exercise the right of the owner to vote or to consent, the mortgagee may exercise the right, and, where two or more such mortgages contain such a provision, the right may be exercised by the mortgagee who has priority.

Counsel for the applicants submits that Strasscorp, as the developer of the condominium, cannot exercise the owner's right to vote, in spite of the clause contained in the mortgage, for the following alternative reasons:

1. The mortgagee's right to vote can only be exercised if the mortgage is in default.

2. Even if that proposition cannot be upheld, s. 48 must be interpreted to exclude the developer as a mortgagee for the purposes of the turn-over meeting. If the mortgagee in s. 48 includes the developer, then the section would defeat the intent and purpose of the Act and, particularly, s. 26, which provides for the take-over meeting.

3. In any event, s. 48 provides that where there are two or more mortgages containing the same reservation of voting rights provision, "the right may be exercised by the mortgagee who has priority".

I shall deal with each of these propositions.

1. The purpose of the Act is to protect owners of condominiums, she argues, and s. 48 is inconsistent with that intent. The protection given by the section to mortgagees is only needed if the mortgager is in default. She cites the case of *Sanrose Construction (Dixie) Ltd. v. Don-Com Venture Capital Corp.* (1983), 44 O.R. (2d) 218, 24 B.L.R. 192, 30 R.P.R. 284 (Co. Ct.), a judgment of the Hon. Judge West, in support of this argument. In that case, Judge West held that a proxy granted by an owner of a unit within a condominium corporation and expressed to be irrevocable was invalid. In that case, the agreement of purchase and sale provided that, as part of the consideration of the purchase of the unit, the purchaser agreed to irrevocably grant to the plaintiff the right to vote at all meetings of unit owners and to deliver on closing a proxy to that effect. The reservation of voting rights by the developer-vendor was contained in the transfer of title to the unit to the purchaser. It reserved to the developer-vendor the purchaser's right to vote at all meetings of owners. In addition, a proxy was executed and delivered by the purchaser on closing. The proxy was expressed to be irrevocable without the prior consent of the vendor. The learned judge reviewed the meaning of proxy as being merely the agent of the shareholder who makes the appointment. He refers to the quotation made by Lawrence L.J. in *Cousins v. International Brick Co.*, supra, referred to above. In that case, the articles of association provided for votes to be given personally or by proxy. If given by proxy, it cannot be revoked except by a notice in writing received by the company before the meeting at which the proxy to be exercised is held. Luxmoore J., on p. 95, said:

The right of the shareholder to vote in person must, in my judgment, and in the absence of any special contract between himself and the company expressly precluding the right to vote in person where a proxy has been validly given, be paramount to the right of the proxy to vote in respect of the shares in question.

On appeal, Lord Hanworth M.R., on p. 101, stated that "[i]n the absence of clear words taking away the shareholder's personal right to vote after he has put in force the proxy system, that personal right remains and the shareholder is able to attend and give his own vote accordingly to his own volition and the proxy has no right to prevent it".

In the *Sanrose* case, supra, Judge West found that the proxy given to the plaintiff (developer) by the defendant (purchaser) and expressed to be irrevocable without the consent of the plaintiff, was not enforceable against the defendant. In his view, if the defendant chose to attend the meeting, the right of the plaintiff to act as its proxy is superseded. That case dealt with the reservation of the right to vote being contained in the transfer of title. In the case at bar, the reservation is contained either in a management agreement or in the mortgage given back to the vendor, or to the C.I.B.C. Mortgage Corporation. The reservation contained in the management agreement is analogous with *Sanrose* and I agree with Judge West's reasoning that it cannot prevent the owner from attending at the meeting and exercising his or her vote and thereby supersede the proxy given to the realty company. I have already expressed this opinion above.

The reservation in the mortgage in the case at bar, however, is expressly allowed by statute and, in my view, therefore comes within the exception referred to by Luxmoore J. at trial and Lord Hanworth M.R., on appeal in the *Cousins* case, supra.

Judge West, in obiter in *Sanrose*, supra, suggests that s. 48 allows the mortgagee to exercise the voting rights of the owner if it provides for such rights in the mortgage, and then only if the mortgage is in default, so that there would be no separation of ownership of a unit from ownership of the common interest in keeping with s. 7(5) of the Act. Section 7(5) of the Act states that: "The ownership of a unit shall not be separated from the ownership of the common interest, and any instrument that purports to separate the ownership of a unit from a common interest is void."

Judge West reasons that the reservation contained in the transfer of title of the voting rights of the owners effectively frustrates the owner's right to vote, and hence, separates the ownership in the common elements, which can only be exercised through voting. If, however, the mortgagor defaults in payments under the mortgage, then the mortgagee will become the legal owner of the unit and no separation of interest would occur. With great respect, I cannot agree with this reasoning. In my view, s. 7(5) contemplates a potential separation of ownership by transfer of title which may result in the owner losing his right to use the common elements, thereby destroying his enjoyment of his ownership in the unit. The giving of its voting rights to a mortgagee does not, in my opinion, separate the owner's interest in the common interests. In any event, Judge West's comments concerning s. 48 are obiter, since the instrument reserving the right to vote in *Sanrose* was the transfer of title and not the mortgage and s. 48 has no application.

In the unreported decision of *Mann v. Canada Mortgage & Housing Corp.* of Mr. Justice Krever, Ont. H.C.J., dated May 21, 1982, Krever J. stated, in considering s. 48 of the Act, as follows:

I cannot ... accept the submission that section 48 is limited in such a way that it only applies where the mortgage is in default. The section contemplates a mortgage containing the terms the mortgages in question before me do contain and I therefore say that there is nothing in the statute that inhibits the parties from contracting in the way that they did. I am obliged to give the statute a large and liberal interpretation by reason of the provisions of the Interpretation Act and it seems to me that section 48 was enacted in order that the rights of the mortgagee might be protected.

Subject to what I may say later concerning the last clause of the section dealing with two or more mortgages, I find that the wording of s. 48 is clear and unambiguous and the plain meaning of it does not include a mortgage that is in default. If the legislation had intended that the exercise of the right to vote by the mortgagee could only take effect if the mortgage was in default, it would have so provided. I conclude therefore that the applicants' first proposition to read in mortgage in default must fail.

2. Counsel for the applicants submits that the Condominium Act is consumer protection legislation and should be interpreted in that light. The plain wording of s. 48, she argues, is inconsistent with the general intent of the Act to protect the condominium

owner and, particularly, s. 26. By including the developer as a mortgagee in s. 48, the clear intention of s. 26(1) is subverted. Section 26(1) reads as follows:

26(1) The board elected at a time when the declarant owns a majority of the units shall, not more than twenty-one days after the declarant ceases to be the registered owner of a majority of the units, call a meeting of the owners to elect a new board, and such meeting shall be held within twenty-one days after the calling of the meeting.

The clear intention of this section, she argues, is to take the control of the condominium out of the hands of the developer when he no longer owns a majority of the units and put it into the hands of the unit owners. By ceasing to be the registered owner of a majority of the units, the section implies that he also loses voting control which should pass, at that time, to the owners. If he retains the majority vote by reason of a reservation clause in mortgages, as allowed by s. 48, then the purpose of s. 26 cannot be carried out. The developer would retain control and there would be no turn-over as contemplated by the section.

While I agree that there appears to be an inconsistency between s. 48 and s. 26, it can be rationalized. Section 48 is enacted for the protection of the mortgagee, whoever he, she or it might be. In this case, the developer has a substantial financial investment in the condominium by reason of the 158 mortgages given back to it by the various owners. He, therefore, should not be denied the protection provided by s. 48 merely because he is the developer of the condominium. Section 26, on the other hand, specifically requires the developer to turn over to the new board elected at the meeting all the records, documents and instruments listed in s. 26(3), as well as an audited financial statement, within 60 days of the meeting [s. 26(4)]. The Act in several sections places duties and obligations upon the developer which he must carry out by reason of the Act, regardless of the number of votes that he may have acquired by reason of the mortgages which he holds. Section 17 of the Act may also give assistance in preventing a conflict of interest between the developer and the corporation affecting the management of the corporation. Section 49 requires the performance of any duty imposed by the Act and provides for a remedy by application to a District Court.

In any event, as I stated above, the meaning of s. 48 is clear. If the Legislature had intended that a mortgage given back to a developer should be excluded from the right to exercise the owner's vote or consent, it would have so provided.

I cannot, therefore, agree with the applicants' second proposition.

3. The latter portion of s. 48 provides that where two or more mortgages contain a reservation of voting rights, "the right may be exercised by the mortgagee who has priority". Ms. Conway argues that this clause means that C.I.B.C. Mortgage Corporation, which holds the first mortgage, has the priority and the right to exercise the vote, if it wishes to do so. The wording does not leave it open for the second mortgage in priority to receive the right in the event that the first mortgagee declines to exercise it. Mr. Sternberg, on the other hand, argues that the clause should be interpreted to mean that if there are more than one mortgage, the right to vote will devolve down from the mortgagee with the highest priority to ones below if the first mortgagee declines to exercise its right. In any event, he argues, the right to vote does not belong to the unit owner or the mortgagor. It has been transferred to the mortgagee by reason of the reservation clause contained in the mortgage, he argues. No cases have been cited to me to support either side of this argument and I must look, therefore, at the wording of the section. The Interpretation Act, R.S.O. 1980, c. 219, provides that every Act shall be deemed to be remedial and I must give the section such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act, according to its true intent, meaning and spirit.

The words of s. 48 speak only of the right being exercised by the mortgagee who has priority, which, in my view, would be the first mortgagee. There is no provision for the right to be transferred to a mortgagee with lesser priority in the event that the first mortgagee decides not to exercise its right to vote. As well, paragraph (c)(i), contained in all mortgages and reproduced above, contemplates the mortgagee giving the mortgagor notice if it does not intend to exercise its vote, thereby enabling the mortgagor to exercise the right to vote. If, therefore, the developer does not have the first mortgage, he will not have the right to exercise the vote contained in the second mortgage, in my view, according to s. 48.

In my view, therefore, the reservation-of-rights clause contained in the mortgage is valid.

I, therefore, conclude that, according to my calculations, Strasscorp will have 92 votes by reason of the first mortgages held by it, plus 35 votes by reason of the 35 units still owned by it and, indirectly, the 34 proxies held by J.R.H., unless the owners of the units attend the meeting and exercise their right to vote.

In view of the need to submit further argument concerning the ex parte order obtained by the applicants and the issue of costs, the date of the turn-over meeting, which had tentatively been set for July 5, should be held in abeyance. I will be happy to discuss this further with counsel, preliminarily at any rate, by conference telephone call.

Order accordingly.

CBR# 192

Metropolitan Toronto Condominium Corp. No. 776 v. Gifford

Between

Metropolitan Toronto Condominium Corporation No. 776,

Applicant, and

John R. Gifford and Marion M. Gifford, Respondents

Action No. M176258/89

Ontario District Court - York Judicial District

Toronto, Ontario

Herold D.C.J.

October 11, 1989

Jay J. Roy, for the Applicant.

Paul H. Reinhardt, for the Respondents.

 HEROLD D.C.J.:— John R. Gifford and his wife, Marion, reside in Suite 210, 955 Millwood Road, Toronto, a five-storey condominium project containing 106 units for seniors, in East York. The condominium is registered as Metropolitan Toronto Condominium Corporation No. 776.

John Gifford served overseas during the Second World War and suffered a disabling stroke in 1971. Since 1971 he has been almost totally confined to a wheelchair and for the past six years he has relied upon "Chien," his 15-lb. poodle for companionship and therapeutic and emotional support.

Last year John and Marion moved into their new condominium apartment and this year they were instructed by the Board of Directors to remove the dog. The Board of Directors has candidly acknowledged that if anyone's personal situation deserves some sympathetic attention it is that of Mr. Gifford's and the Board has also acknowledged that at no time has there ever been any complaint that the dog in its behaviour or cleanliness has ever posed a problem or been a nuisance.

The Declaration of Metropolitan Toronto Condominium Corporation No. 776 deals with animals in connection with individual units at Article III.1(e) and in connection with the common elements at Article IV.5. Articles III.1(e) and IV.5 provide as follows:

(i) Article III.1(e) provides:

"No animal, livestock, or fowl of any kind other than:

(i) a "dog guide" as defined by The Blind Persons' Rights Act; or

(ii) a pet, being one cat; caged birds except for pigeons; tropical fish; and small caged animals usually considered to be pets shall be kept or allowed in any unit.

No animal, which is deemed by the board, in its absolute discretion, to be a nuisance shall be kept by any owner in the unit. Such owner shall, within two (2) weeks of receipt of a written notice from the board requesting removal of such animal, permanently remove such animal from the property. No breeding of animals for sale shall be carried on, in, or around any unit."

(ii) Article IV.5 provides:

"Animals - No animals, livestock, or fowl or any kind other than:

(a) a "dog guide" as defined by The Blind Persons' Rights Act; or

(b) a pet, being one cat; caged birds except for pigeons; tropical fish; and small caged animals usually considered to be shall be kept or allowed upon the common elements, unless being carried or on a leash excluding those parts thereof, of which any owner has the exclusive use. No animal that is deemed by the board in its absolute discretion to be a nuisance shall be kept by an owner on the common elements. Such owner shall, within two (2) weeks of receipt of a written notice from the board requesting removal of such animal, permanently remove such animal from the property. An owner shall immediately pick up and dispose of all dropping of his pet. No animal will be permitted on such parts of the common elements as may be designated from time to time by the board or the Manager."

There is no issue about the fact that the dog in question is not a "dog guide" nor is there an issue with respect to the fact that the owners were notified to remove the dog and have to refused to do so.

Pursuant to s. 12(3) of the Condominium Act, R.S.O. (1980) the Board of Directors has a duty to effect compliance by the unit owners with the Act and the Corporation's Declaration, by-laws and rules. The Board of Directors has no discretion in this regard. Where the Board attempts to enforce the Declaration and the unit owner refuses to comply the Corporation itself or any owner or

person having a registered unit mortgage may apply to the District Court for an order requiring compliance and pursuant to Paragraph 49(2) of the Act:

49(2) "The court may by order direct performance of the duty and may include in the order any provisions that the court considers appropriate in the circumstances."

Both parties acknowledge that the Court therefore has a discretion as to whether or not to enforce compliance with the Declaration, by-laws and rules but of course such discretion must be exercised judiciously.

In order to understand and appreciate the factors which must be considered in determining how the discretion is to be exercised some additional background information is necessary. Unlike many condominium corporations, this particular condominium was not simply a developer's plan and a developer's opinion as to what is good and what is not, finding its way into a Declaration. Rather, it is my understanding that perhaps 70% of the 154 occupants in the building were members of or associated with a senior citizens group which call itself "Stay-at-home-in-Leaside." These people saw a need for a senior citizens condominium project; a nucleus of the group had close dealings with the developer throughout all stages of the project. In particular the group had input into the building design and the condominium documents, including the Declaration and by-laws.

It has been stated by the Applicants and not disputed that the prohibition which is found against dogs was a provision which was purposely included in the Declaration with the prior knowledge, consent and approval of the seniors group.

Mr. and Mrs. Gifford were not members of the original group but purchased their unit as it were, on the open market. They were, apparently, advised prior to closing, by a real estate agent representing the condominium developer that small dogs were permitted. The Giffords were advised by their solicitor of the provisions of the Declaration prohibiting dogs. Apparently they concluded, incorrectly, as it turns out, that the representations made to them by the agent for the vendor were accurate and they elected to close the transaction in the face of the written Declaration. The Giffords argue that this representation made by the agent representing the condominium corporation at the time the project was being sold is a major factor that ought to be taken into account in determining whether or not the Court's discretion should be exercised in their favour at this time.

The Giffords also argue that the provision in the condominium Declaration prohibiting dogs other than seeing-eye dogs, and possibly the provision of the Condominium Act which enables the corporation to pass such Declarations and by-laws are contrary to the Ontario Human Rights Code. In other words, they argue that permitting a blind person to have a guide dog in the building but not permitting other persons who are ill or disabled to have a dog discriminates against the latter. The Giffords were not of the opinion that blind persons should be refused the right to have their guide dog in the building --rather, they suggested that because they are so permitted that others should be permitted as well.

The Condominium Corporation argued that while many cases can be made to justify giving serious consideration to an exception to the Declaration, by-laws and rules, to accede to such requests would create uncertainty and havoc whereas to maintain a firmness in enforcing the Declaration and by-laws as the Condominium Act requires them to do puts everyone on an equal footing and lets everyone know exactly where they stand in relation to the corporation and in relation to each other. The condominium corporation argues that this is a most desirable state of affairs particularly in a building comprised mainly of seniors, many of whom would like to make an exception in his or her particular case with respect to certain of the Declaration, by-laws or rules.

I intend to deal first with the human rights issue and thereafter with the manner in which I feel my discretion should be exercised in this case.

I have reviewed in detail the Blind Persons' Rights Act, R.S.O. (1980) C. 44 and Human Rights Code, Statutes of Ontario, 1981, C. 53, and the cases cited by counsel. Counsel for the Giffords argues that pursuant to s. 46(2) of the Human Rights Code, the Code prevails over the Declaration. In fact, s. 46(2) only provides that it prevails over an Act or Regulation unless the Act or Regulation specifically provides that it is to apply notwithstanding the Code. The Declaration is neither an Act nor a Regulation of the Legislature and as such, s. 42 does not apply.

It was conceded for the purposes of argument and if it had not been I would have found that Mr. Gifford suffers from a handicap as it is defined in the Human Rights Code. His counsel argues that the provisions in the Declaration which prohibit Mr. Gifford from having a dog amounts to:

"a requirement, qualification or factor (which) exists that is not discrimination on a prohibited ground but that would result in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination"

to use the words of section 10 of the Code. I cannot agree. Nowhere in the Declaration, either expressly or by necessary implication, is there a provision that persons suffering from the handicap from which Mr. Gifford suffers is not permitted to reside in the subject premises. The Declaration provides that no person (handicapped or otherwise) shall have a prohibited pet in the property. Mr. Gifford is, as he should be, on an equal footing with all other occupants on this issue. Even if this were not so I would have found that the exception contained in s. 10(1)(a) of the Code which excepts those requirements, qualifications or factors which are reasonable and bona fide in the circumstances would apply for the reasons that will be dealt with in my comments dealing with the exercise of discretion. To suggest that Mr. Gifford was discriminated against because the Declaration provided for "dog guides" within the meaning of the Blind Persons' Rights Act is ludicrous in the extreme. The latter Act clearly requires the Condominium Corporation to permit dog guides and the corporation would quite properly have been subject to a penalty if it had failed to do so. The Act also provides in section 1(2) thereof that it applies "notwithstanding any other Act or any Regulation, by-law or rule made thereunder." Accordingly, I cannot find and do not find that the Giffords have been discriminated against contrary to the provisions of the Human Rights Code.

My review of the relevant cases dealing with the discretion available to the Court in applying section 49 of the Condominium Act has led me to conclude that the relevant criteria in this case would include among other things, the following:

(1) The nature of the total development--for example, is it a high-rise or townhouses? Does it consist of seniors only or mixed residential?

- (2) What are the reasonable expectations of the other occupants of the development?
- (3) How seriously do other occupants take this particular issue as opposed to other issues?
- (4) Does the conduct of the unit owner in question interfere with others?
- (5) Have there been any complaints by other unit owners?
- (6) What is the relationship between or amongst the various interested parties?
- (7) What is the actual wording of the covenant which is being enforced--are similar pets allowed, for example, while dogs are disallowed?
- (8) What are the advantages of requiring compliance compared to the advantages of permitting non-compliance?

It seems clear to me that the reasonableness of a no pets clause is more apparent in the case of a high-rise apartment than in the case of townhouses. It is clear from the evidence that a great majority of the occupants agreed to a no pets clause and they considered it to be of sufficient importance that it was included in the Declaration which can only be amended on unanimous agreement rather than in the by-laws or the rules which can be changed more easily. When the occupants who assisted in the drafting of the Declaration expressed their opinions so strongly on the issue of no pets they obviously expected that all other occupants would comply. Surely it was on this basis among others, that people decided to purchase units in the building in question.

It is not disputed that the conduct of the Giffords in this case does not appear to have actually interfered with any other owners and there have been no complaints. All of the parties appear to be on a fairly equal footing in that they are all seniors and would therefore each to some degree suffer some of the disabilities of old age (together with, of course, the many benefits) although it is not disputed that Mr. Gifford may suffer to a greater extent than most. The covenant which is being enforced does not seem to me to be one which is arbitrary or unfair. For example, as stated above, dog guides are permitted and as well, certain caged birds, tropical fish, small caged animals and even one cat would be permitted provided, of course, that if any animals actually being on the premises are considered a nuisance they shall be removed. This is not simply a blanket arbitrary "no pets" clause but one which was given some serious consideration and for reasons which appeal to the majority, found its way into the Declaration.

Obviously, the major advantage of permitting non-compliance in this case would be that Mr. Gifford would be permitted to retain a dog of which he is very fond and upon which he may even be to some extent dependant. Another advantage is that he will be able to remain in this building which appears to be a very desirable one with very likable neighbours rather than having to move out as he has indicated he might do if he is not permitted to keep his dog there. The major advantage of requiring compliance, on the other hand, appears to me to be that a message will be sent out by the Board to the unit owners that the Declaration and by-laws are in place for a good reason and they will be enforced, and a message will also be sent by the Court that where the Board acts reasonably in carrying out its duty to enforce the by-laws and Declaration the Board will be supported by the Court. To permit non-compliance in this case would clearly open the door to numerous, possibly very legitimate, requests by other unit owners to exempt them from certain other requirements in the Declaration and by-laws on the basis that each case should be decided on its own merits. While I do not disagree that each case must be decided on its own merits, at least by the Court if not by the Board who appears to have no discretion, the general message surely must be that enforcement will be expected and exceptions will be rare and will require a Court Application in any event. A longer term result of this position will surely be that people will only move into the building if they are prepared to live by the rules of the community which they are joining--if they are not they are perfectly free to join another community whose rules and regulations may be more in keeping with their particular individual needs, wishes or preferences.

Considering all of the factors which I think should be considered in exercising discretion, I have come to the conclusion that my discretion should be exercised in favour of enforcing the Declaration and granting the relief requested by the Condominium Corporation.

Before leaving this matter, however, I should deal with what I believe was, in this particular case, a very potentially compelling reason for wishing to come down on the side of the unit occupants. I have no doubt on the basis of the material before me that they were seriously misled by the developer's real estate agent on the issue of their right to keep the dog in question and they relied upon the misrepresentation made to them to their substantial detriment. The law is clear, however, as a result of the decision of the Ontario Court of Appeal in *re Carleton Condominium Corp. No. 279 and Rochon et al.* (1987) 59 O.R. (2d) at p. 545, that the Declaration, by-laws and rules of a condominium corporation are vital to the integrity of the title required by a unit owner and that there is no place for a private arrangement between the declarant developer and an individual owner. To the extent that a private arrangement such as the one Mr. Gifford claims he had with the developer's agent existed it must be fully disclosed in the Declaration which is presumably read by every other unit owner before he or she agrees to take a unit. This is not to say that the Giffords do not have a cause of action arising out of the misrepresentation but rather that their cause of action is against the real estate agent and perhaps her principal or principals but not against Metropolitan Toronto Condominium Corporation No. 776 with whom she had no connection whatsoever.

For all of these reasons an Order will go directing John R. Gifford and Marion M. Gifford to comply with the Declaration of Metropolitan Toronto Condominium Corporation No. 776 and more particularly with Articles III.1(e) and IV.5 thereof and requiring them to permanently remove their dog from Suite 210 at 955 Millwood Road, East York, and from the common elements of Metropolitan Toronto Condominium Corporation No. 776 located at the same municipal address. In my view this is not a case for costs and accordingly, unless representations are made to me within twenty days of the date of release of these reasons in which either party claims to be entitled to costs, there will be no costs of this Application.

HEROLD D.C.J.

CBR# 011

A.L.M. Investments Ltd. v. Strata Plan NW 2320
(B.C.C.A.)

Between
A.L.M. Investments Ltd. and BJM Investments Inc., Petitioners,
(Respondents), and
The Owners Strata Plan NW 2320, Respondents, (Appellants)

Vancouver Reigistry No. CA009604

British Columbia Court of Appeal
Macfarlane, Taggart and Anderson JJ.A.

May 3, 1989

Counsel for the Appellant: D.W. Donohoe.
Counsel for the Respondents: S.H. Tick.

MACFARLANE J.A. (for the Court, dismissing the appeal):— This is an appeal from the decision of a chambers judge fixing the compensation payable respecting an encroachment by A.L.M. Investments Ltd. et al (the developers) on lands owned by the owners Strata Plan NW 2320 (the owners). The decision was made pursuant to s. 32 of the Property Law Act, R.S.B.C. 1979, c. 340 which provides in part:

Encroachment on adjoining land

32. (1) Where, on survey of land, it is found that a building on it encroaches on adjoining land - - the Supreme Court may on application

g(b) vest title to the land encroached on or enclosed in the owner of the land encroaching or enclosing, on making the compensation that the court determines;

The developers had constructed phases one and two of a condomimum project in 1985 and 1986. The owners occupy that part of the project. In planning the development of phase three adjoining the owners' property, an architect sited a new building across the phase line separating the first development from the new development. There was no advantage or gain to the developer from doing so as no higher density was achieved having regard to the whole project and the applicable municipal by-laws and regulations.

The siting has increased the common area within the rest of the development to the same extent as the encroachment on the owners' land reduced the common property in that particular area. The owners' share the new common property although their easy access to it is reduced.

The new condommum complex encroaches upon the owners' property by 99.9 square metres or about 1000 square feet. This ground area is occupied by three floors of the new building together with decks or patios adjoining the various strata units located within the encroachment. The floor area constructed within the area of this encroachment comprises 239 square metres including balconies and 213.57 square metres excluding the balconies.

Pursuant to s. 32(1)(b) an order was made vesting title in the developers to the land encroached upon. Title was registered June 13, 1988. The chambers judge fixed compensation at \$9,990 in a judgment pronounced June 16, 1988. Counsel agreed the assessment was intended to be nominal, and was based upon a concession by the developers that they would pay that amount.

The only evidence before the chambers judge as to value was that given by a real estate appraiser who filed two reports on behalf of the owners. The appraiser was present at the hearing but was not cross-examined by counsel for the developers. The developers did not produce any evidence as to value.

The reports of the appraiser were dated March 28, 1988 and June 2, 1988 respectively. They referred to five comparable sales, two of them in 1988 and three in 1987. In the end, it was the appraiser's opinion, having regard to a rising market in 1988, that the land value, based on the comparable and current market conditions, should be regarded as \$215 per square metre. Applying that figure to the land taken by these developers, the value was achieve an extra 113.67 square meters of buildable space and concluded that the developer would pay an extra \$24,439.05 (113.67 x \$215 per square metre). The appraiser's estimate to value was put in this way:

Estimate of value for:

1) 99.99 sq. meters under TCRD2 restrictions:
99.99 sq. meters x \$215.00 per sq. metre
= \$21,478.50
Add: Required amount of land necessary to obtain extra
113.67 sq. meters of floor area:
113.67 sq. meters x \$215.00 per sq. meter
= \$24,439.05
Total value of land component which could achieve a

total floor area of 213.57 sq. meters

 213.57 sq. meters x \$215.00 per sq. meter
 = \$45,917.55
 Add: Estimated cost of site preparation, Architect
 and Engineering fees and landscaping say
 \$20.00 per sq. meter x 99.9 sq. meters = \$
 1,988.00

 \$47,905.
 ROUNDED TO
 \$48,000.00*

*This cost for land does not include the
 developers profit from the sale of the
 213.57 sq. meters of floor area.

The chambers judge declined to accept the appraisal evidence as a basis for fixing compensation for these reasons:

With respect to the fair compensation I find the real estate appraisal to be of minimal value, primarily because it does not address the reality of the 1000 square feet at issue here. Neither am I able to accept the elaborate calculations and the assumptions made as having any relation to the circumstances here. I am prepared to concede that the valuation done by the appraiser may be appropriate to some kinds of expropriation, but I cannot find there to be a rational application of those principles of value to a 1000 square foot rectangle in the middle of a condominium development. Nonetheless the respondents are entitled to be compensated for something of value which they once had and no longer have.

I have concluded that, in fairness, I can go no further than Mr. Tick's concession of \$100 per square meter multiplied by the 99.9 square meters.

There will therefore be an award of \$9,990 as compensation to the respondents.

I think the chambers judge was entitled to treat the appraiser's valuation as inflated. No authority has been cited to us that would justify the appraiser's opinion that increased density in one part of the site is a proper basis for concluding that a developer would pay more in the market place for the 99.9 meters in question. The evidence of the architect is that there was no gain to the developer in the way in which construction was done. The overall density continued to be based upon a floor space ratio of one as required by the applicable municipal by-laws and regulations. Thus there would be no reason for a prospective buyer to pay more for this small area.

But there is authority to justify application of the per square meter value of the whole site in fixing the price of the small piece taken. That authority from the Alberta Court of Appeal was not put before the chambers judge. There were three cases cited by counsel for the appellant and they are: *The Queen v. Bonaventure Sales Ltd.* (1980) 22 L.C.R. 164 at 165; *Re: Cochm Pipelines Ltd.* and *Ratray et al* 1980 117 D.L.R. (3d) 442 at 446; *Re: Patson Industries Ltd. v. City of Calgary* (1983) 30 L.C.R. 190 at 191.

Bonaventure is the leading case. In that case McGillivray, C.J.A. has this to say at pp. 164-165:

... What was expropriated were two strips off the boundaries of the two parcels. They were not, of course, willing buyers or willing sellers of those strips. It is not reasonable to convert those strips into a saleable area of land for purposes of evaluation of that land per se

... We are all of the opinion that the only method of arriving at the fair market value was to take a fair market value of the whole of each parcel and then attribute the per acre value to the acreage taken

... we are of the opinion that the Board proceeded on a wrong principle in two respects: (a) in treating the land taken from two parcels as one; and (b) in equating strips taken with saleable acreage and treating it as saleable acreage to be valued by itself.

The owners contend that the chambers judge in this case ought not to have rejected the appraisal evidence because it did not deal with parcels comparable in size to the 99.9 square meters which had been encroached upon. The owners contend that the chambers judge should have applied the approach recognized by the Alberta Court of Appeal in the Bonaventure and in the other cases.

If the Bonaventure approach had been applied the valuation would have been in the order of \$21,000, as indicated in the first part of the appraiser's summary. The trial judge chose to regard the encroachment as a technical trespass however, and to fix an amount which reflected the relatively nominal nature of the matter. A sum of \$9,990 would not normally be regarded as nominal compensation, but the task of the chambers judge in fixing compensation in this case was facilitated by the developer's concession that \$100 per square meter would be appropriate. I am not persuaded that the chambers judge erred in fixing compensation on a nominal basis. The circumstances are unusual. This was a multi-phase condominium development. In the end there would be no interior lot lines between the separately constructed phases. There would be one condominium corporation owning the whole of the property. The owners, who were involved in this case, would be co-owners of all common property in the whole enterprise. The lot line in question would no longer exist and there would not have been any continuing encroachment, even if a vesting order had not been made. The owners now have a legal interest in an equivalent area of common property to that which was encroached upon, although they do not have as convenient access to it. I think that \$9,990 was an appropriate compensation in the circumstances.

There was some argument with respect to additional compensation for injurious affection and on the basis that the owners desire to separate the project into two parts, was hampered by what had occurred in this case. An application was made to adduce some

evidence with respect to the latter matter. I am not persuaded that that evidence ought to be admitted nor that any extra compensation ought to be awarded on the basis of injurious affection. I would dismiss the appeal.

MACFARLANE J.A.

TAGGART J.A.:— I agree.

ANDERSON J.A.:— I agree.

TAGGART J.A.:— The appeal is dismissed.

CBR# 383

York Region Condominium Corp. No. 545 v. 602809 Ontario Ltd.

Between

York Region Condominium Corporation No. 545, Applicant, and 602809 Ontario Ltd. and Ciro Excavating and Grading Ltd.,
Respondents

Action No. 9392/88

Ontario District Court - York Region Judicial District
Newmarket, Ontario
Zelinski D.C.J.

March 16, 1989

Kevin D. Sherkin, for the Applicant.

Morris Cooper, for the Respondents.

ZELINSKI D.C.J.:— The Applicant ("Corporation") seeks an Order requiring the Respondents to comply with its By-Law Number 7 ("The By-Law"), a declaration that the Respondents are in contravention of The By-Law, and an injunction restraining the Respondents from continuing to contravene The By-Law.

The Respondents respond that The By-Law is unreasonable, not properly the subject matter of a by-law made pursuant to The Condominium Act (the "Act") and, in any event, neither properly enacted nor registered, and therefore ineffective.

A rule, in identical language to The By-Law, was, at an earlier date, made by the Board of Directors of the Corporation. Its validity and enforceability is not before me.

The Facts

602809 Ontario Limited (the "Numbered Company") is the owner of Unit 22 of the Corporation. Ciro Excavating and Grading Ltd. ("Ciro") operates as a gravel trucker out of Unit 22, and is associated with and a tenant of Numbered Company. No issue arises out of the application of The By-Law to both Respondents if I conclude that it is valid and enforceable.

Units in the Corporation are intended to be owned and occupied for commercial/industrial purposes. During the period when its units were being sold, the Corporation's promotional brochures indicated the existence of oversized parking bays, ample paved parking and shipping areas, as well as a choice of methods to accommodate truck deliveries. In the agreement of purchase and sale entered into between Corporation and Numbered Company, heightened doorways particular to the requirements of Ciro's trucks were contracted for, and in Schedule 'B' of this agreement, in which construction specifications are set out, it was stated that "All asphalt paving to be heavy duty". In the responding affidavit of Ciro Barillari, ("Barillari") the president of both Respondents, he states that this suggests that operations such as his own were contemplated and invited. In any event he continues, when he purchased his unit "All parties knew or ought to have known of the nature of my business and the size and operation of my vehicles".

As part of Ciro's operations it would appear that between 7 and 11 double-axle trucks, each having a net weight in excess of 17500 lbs., are commonly parked overnight in an interior parking lot owned by Corporation and operated as part of its common elements. Except for entry/exit roadways, this parking area is surrounded by the buildings which contain the condominium units. Ciro has used this parking lot for its parking needs continuously since becoming a tenant.

In the affidavit of Robert T. Moore ("Moore"), a property manager in the employ of the Applicant's Management Company, he states:

- (a) that he has had ongoing management problems relative to the common elements because the owners and their visitors park their vehicles on fire routes and in undesignated areas;
- (b) that a large area of asphalt has necessarily been repaired at great cost despite the fact it "is only four years old";
- (c) that the owners feel that this "was very early" and "that it is from very heavy trucks that are continually being parked on the common elements", and
- (d) that "the reason the Corporation passed the By-Law was to cut down future asphalt repairs to the common elements as well as keeping heavy vehicles off the parking area at the time of night specified in the By-Law".

Barillari responds that the need for asphalt repair can be attributed to "poor asphaltting and soil compaction". He points out that numerous cars and trucks with their licence plates removed that have been parked in the lot for months without being moved. This, he states, is the reason why parking on fire routes or in undesignated areas becomes necessary. Based on instructions he has given to his drivers he indicates that such parking is not done by his employees. Moreover, he states the offensive parking is not likely to occur during the proscribed hours, as this is the quiet time for the use of the parking lot.

He also indicates that trucks not owned by him are parked overnight when loaded. He points out that these trucks will be able to continue to park overnight despite the fact that their loaded weights are in excess of 17500 lbs., since The By-Law has reference only to vehicle weights. As such he contends The By-Law discriminates against Ciro.

The By-Law and earlier rule, use exactly the same language, namely:

No owner shall park, place or leave any vehicle on the common elements between the hours of 11:00 p.m. and 5:00 a.m. whose vehicle weight exceeds 17,500 lbs.

Ciro argues that even if asphalt repairs are necessitated by truck usage, it is not parking but driving which does damage. He contends that the damage will only be exacerbated if it becomes necessary for him to remove his trucks in the evenings and to return them in the mornings.

The cause for the asphalt decay is conjectural on the parts of both Moore and Barillari. Neither has established any reasonable basis for the opinions they state. Notwithstanding this, it is significant that the asphalt repairs were made in an area which is not adjacent to the Respondents' premises, and not where Ciro's trucks are customarily parked.

Passage of The By-Law

On July 8, 1987 the Board of Directors of the Corporation passed the rule which is in the language of The By-Law. The owners were advised of this on June 8, 1987. On August 13, 1987 formal notice of a Special General Meeting, to be held August 16, 1987, was sent out by Moore, under cover of a letter bearing the letterhead of his employer, Bonita Management Ltd. ("Bonita"). A copy of the proposed by-law and an agenda was provided, as well as a proxy to be used by owners unable to attend the meeting. The formal notice was signed by Moore as follows:

York Region Condominium Corporation No. 545 Per: "Robert Moore" (C/S) -----
Bonita Management Ltd.

I do not know whether a corporate seal was in fact impressed, and if so whether it was the seal of Corporation or Bonita. The material filed indicates that Moore was not the the Corporation's Secretary. He is shown to have been present at the relevant owners' meeting by invitation as a representative of Bonita. At this meeting, and on other occasions, he was "recording secretary" on request. He has also acted as "secretary" on request. However, on June 4, 1987, in the minutes of the meeting of Directors when the rule was made, Mr. F. Pellegrini was described as the Corporation's Secretary. In the minutes of an earlier meeting Mr. T. Pica was described as Secretary. In the copy of the by-law and certificate which were registered as By-Law No. 7, Mr. Pellegrini signed as Secretary.

The word "Proposed" continues to be part of the heading describing The By-Law which was renumbered as By-Law No. 7 in the material registered on September 2, 1987.

The purpose of the meeting as set out in both the notice and the agenda was the "Discussion and voting on proposed, by-law No. 6". The copy of the by-law to be discussed, and all other materials, refer to "Proposed By-Law No. 6". (Emphasis added).

Numbered Corporation received its copy of the notice of the owners' meeting on or about August 15, 1987. The notice was preceded, on June 23, 1987, by Barillari's written objection to what he perceived to be the discriminatory intention of the rule. He referred to contemplated damages if it was enforced.

The minutes of the relevant meeting records the passing of The By-Law, as By-law No. 6, in the following language:

Mr. Moore advised the meeting that a motion would have to be made and seconded in order to discuss the proposed by-law addition.

On motion by Mr. Stefano, (Unit No. 15), seconded by Mr. Ciro Barallari [sic], it was agreed to nominate the proposed by-law No. 6 for discussion.

The Chairman then opened the by-law for discussion from the floor. Various views were expressed by opponents and proponents of the proposed by-law.

After allowing approximately 45 minutes for discussion, the Chairman then called for a vote on the matter and requested that all of the unit owners Utilize the ballots which were issued to them upon registration.

The Chairman then appointed Mr. Gerry Stefanuto, (Unit No. 15), and Mrs. Barrone, (Unit No. 1) as Scrutineers.

Following the tallying of the ballots, the Chairman announced that the by-law had been by a margin in excess of 51% as required by the Condominium Act of Ontario. Mr. Stefanuto, (Unit No. 15), moved that the ballots be destroyed, and this motion was seconded by Mrs. Barrone, (Unit No. 1), and carried on a show of hands. (Emphasis added)

There is no indication of any prior meeting of the Board of Directors of Corporation at which The By-Law, or any variation thereof, was passed. In his affidavit Moore states:

9. This By-Law was passed properly and was made by more than 51 percent of the members of the Corporation owning the common elements. (Emphasis added).

Arguably, the suggestion that The By-Law was "approved" by the owners, and its registration while still "proposed" is inconsistent with this statement. The language of the minutes is equally consistent with consideration having been given to the by-law under discussion by the owners, its approval and the expectation that it would be properly passed so that it would cease to a "proposed" by-law (which seemingly means it remains to be enacted).

The Law

In *Re Basmadjian v. York Condominium Corporation No. 52* (1981) 32 O.R. (2d) 523 at p. 526, Maloney J. sets out the priorities governing the application of the Act, the by-laws and the rules of condominiums in the following language:

A condominium corporation is governed by the Condominium Act, 1978 and its declaration, by-laws and rules. The Act sets out what must be contained in the declaration (s. 3(1)) and what may be contained in the declaration (s. 3(3)). Section 28(1) contains a list of the matters which the condominium corporation has power to adopt by by-laws (s. 3(5)). In addition, s. 60 provides that the provisions of the Act will apply notwithstanding any agreement to the contrary. Next to the provisions of the Act the declaration is to have priority. The declaration is subject to the Act and s. 3(5) provides where any provision in a declaration or by-law is inconsistent with the provisions of the Act, the Act prevails and the declaration or by-law is deemed to be amended accordingly. The declaration can be amended only with the consent of all the unit owners and all persons having registered mortgages against the units and common interests unless an application is made to a Judge pursuant to s. 3(8) of the Act, whereas by-laws can be amended or passed by a vote of only 51% of the unit owners. Counsel for the applicant likened the priority given to the declaration in the Condominium Act, 1978 to a constitution, amendment of which is subject to stringent safeguards. I accept this submission and it is clear that the declaration has priority over the by-laws. Section 28(1) provides for the passing of by-laws "not contrary to this Act or to the declaration" and also s. 28(4) of the Act provides:

28(4) 'The by-laws shall be reasonable and consistent with this Act and the declaration'.

The validity of any by-law, therefore, must be examined in the light of the priority given to the provisions of the Act and the declaration. A by-law may be upheld only if it falls within the matters contained in s. 28(1) and if it is reasonable and consistent with both the Condominium Act, 1978 and the declaration.

I am satisfied that, while knowledge or deemed knowledge of the intended use of "a condominium is germane to subsequent questions of reasonableness, contemplated or actual usage is not a bar to the enactment of valid by-laws, governing such use, and does not prevail over such by-laws, unless the use is specifically provided for in the Declaration. This is the conclusion reached by Finlayson J.A. in *Carleton Condominium Corporation No. 279 v. Rochon et al.* 44 R.P.R. 228 at p. 236, stated as follows:

The declaration, description and by-laws, including the rules, are therefore vital to the integrity of the title acquired by the unit owner. He is not only bound by their terms and provisions, but he is entitled to insist that the other unit owners are similarly bound. There is no place in this scheme for any private arrangement between the developer and an individual unit owner. If an individual arrangement is made, it must be disclosed in the declaration (s. 3(1)(f)).

S. 28 of the Act sets out the manner of enactment, appropriate scope and required confirmation of by-laws as well as the requisite reasonableness and registration of by-laws. It reads:

28-(1) The board may pass by-laws, not contrary to this Act or to the declaration,

- (a) to govern the number, qualification, nomination, election, term of office and remuneration of the directors;
- (b) to regulate the meeting, quorum and functions of the board;
- (c) to govern the appointment, remuneration, functions, duties and removal of agents, officers and employees of the corporation and the security, if any, to be given by them to it;
- (d) to govern the management of the property;
- (e) to govern the maintenance of the units and common elements;
- (f) to govern the use and management of the assets of the corporation;
- (g) specifying duties of the corporation;
- (h) to govern the assessment and collection of contributions towards the common expenses;
- (i) authorizing the borrowing of money to carry out the objects and duties of the corporation; and
- (j) respecting the conduct generally of the affairs of the corporation.

(2) Subject to subsection (5), a by-law passed under subsection (1) is not effective until it is confirmed, with or without variation, by owners who own not less than 51 per cent of the units at a meeting duly called for that purpose.

(3) A by-law relating to the remuneration of a director or directors shall fix the remuneration and the period for which it is to be paid.

(4) The by-laws shall be reasonable and consistent with this Act and the declaration.

(5) When a by-law or special by-law is made by the corporation, the corporation shall register a copy of the by-law or special by-law together with a certificate executed by the corporation that the by-law was made in accordance with this Act, the declaration and the by-laws, and until the copy and certificate are registered the by-law is ineffective. 1978, c. 84 s. 28.

Section 7 of the Act provides, in part, as follows:

7-(1) The owners are tenants in common of the common elements.

(2) An undivided interest in the common elements is appurtenant to each unit.

*** **

- (4) Each owner may make reasonable use of the common elements subject to this Act, the declaration, the by-laws and the rules.
- (5) The ownership of a unit shall not be separated from the ownership of the common interest and any instrument that purports to separate the ownership of a Unit from a common interest is void.
- (6) Except as provided by this Act, the common elements shall not be partitioned or divided.

Paragraph 5 of Article I of the Declaration provides:

5. Common Interest and Common Expenses

Each owner shall have an undivided interest in the common elements as a tenant in common with all other owners.

Paragraph 1) a) and b) of Article IV of the Declaration provides:

(1) Use of Common Elements

- (a) Subject to the provisions of the Act, the Declaration, the by-laws and the rules, each owner has the full use, occupancy and enjoyment of the whole or any part of the common elements, except as herein otherwise provided.
- (b) Driveways shall be used only for the purpose of motor vehicle ingress and egress and no obstructions to such driveways are permitted.

Reasonableness of The By-Law

Summarizing, to be enforceable a by-law must be reasonable and consistent with the Act and the declaration of the Corporation (S. 28(4)). Each owner is a co-owner of the common elements and entitled to enjoy the whole of the common elements provided, in turn, that its use is also reasonable (S. 7 and S. 29(1)).

In this instance, one of the stated objectives for enactment of The By-Law was to cut down on future asphalt repairs, based upon the view of a majority of the owners that repairs already made were required too early as a consequence of "very heavy trucks that are continually parked on common elements". As previously stated, this is conjectural. There is nothing in the material before me to establish that the cause of the asphalt damage can be attributed to Ciro, or its trucks, or to the use of the parking lot by trucks of the designated weight during the designated hours. If loss or damage caused by Ciro or its trucks can be established there is provision in By-Law No. 1 (Article XV) to seek indemnification for such damage.

The other stated objective which was intended to be addressed by The By-Law is the keeping of "heavy vehicles off the parking area at the time of night specified in The By-Law". There is no basis upon which this, in and of itself, has any merit. It does not justify any impairment of the right of an owner to use the common elements of which it is a co-owner.

Finally, The By-Law is not one of general application which can be readily identified as controlling improper parking on fire routes or in undesignated areas. The By-Law is specifically directed at Ciro, and as such is discriminatory.

Absent a proper, lawful motive, intended to remedy a meaningful problem which cannot reasonably be dealt with in other ways, a discriminatory by-law which impairs the statutory and declared rights of any condominium owner is unreasonable. No proper, lawful motive is indicated in this instance.

On the basis of the foregoing, I am of the opinion that The By-Law is unreasonable and invalid by reason of its contravention of S. 28(4) of the Act.

Improper Subject Matter

S. 28(1) enumerates those items which are the proper subject-matter of by-laws, whereas S. 29(1) deals with rules which may be made:

... to promote the safety or welfare of the owners and of the property or for the purpose of preventing unreasonable interference with the use and enjoyment of the common elements and of other units.

The Respondents argue that the restrictions contemplated in The By-Law fall within the scope, of rules even though the procedures to make rules are less stringent than those governing the enactment of by-laws.

I am of the opinion that the subject-matter of The By-Law falls within the scope of S. 28(1)(d) (management of property), S. 28(1)(e) (maintenance of common elements), and S. 28(1)(f) (use and/or management of assets) and, as such is intra vires of the Corporation.

Passage and Registration

The By-law was never passed, as a by-law, by the Board of Directors of the Corporation prior to its confirmation by the owners. Such passage and confirmation are statutory requirements. (S. 28(1) and (2))

A valid by-law, properly passed, is not effective until so confirmed by the required percentage at a meeting "duly called for that purpose". (S. 28(2)). Notice to the owners was sent by the manager. As such, it was not given in compliance with paragraph 6 of Article VI of By-Law No. 1 which requires that the secretary "... shall give or cause to be given all notices required to be given ...". In the result, the owners' meeting was not duly called.

The minutes of the owners' meeting are not specific. Given their most generous interpretation, it is clear that it was By-law No. 6 that was under consideration at the owners' meeting. A previous By-Law No. 6, which relates to assessments, was already in existence. S. 28(5) of the Act requires that a copy of each by-law together with a certificate executed by the corporation, to the effect that the by-law was made in accordance with the Act, must be registered for that by-law to be effective. In this instance the by-law and the certificate which were registered both referred to By-Law No. 7.

I do not believe that the number allocated to a by-law diminishes the fact that it is the content of the by-law which is enacted. I am also of the opinion that normally it would be improper for me to look behind the Secretary's Certificate. However, the accuracy of the certificate is in issue. I believe "copy" means a true copy and that a renumbered By-Law No. 7 is not a true copy of The By-Law which was approved by the owners who were dealing with By-Law No. 6. On this same basis, the certificate is not accurate.

Counsel for the Respondents argues that Article VIII, paragraph 2 of the By-Law of the Corporation requires that "all deeds, transfers, assignments and obligations on behalf of the Corporation may be signed by the President or a Vice-President together with the Secretary or any other director". As such he contends that the Document General, signed by the Corporation's solicitor, is not properly registered. I do not consider that the Document General which is a prescribed form attached to documents which are registered, is a deed, transfer, assignment or obligation. In my view it is the documents which are registered which are governed by Article VIII if they fall within the class of items mentioned. Whether by-laws or certificates are such documents need not be determined by me in this instance because S. 28(5) requires that not only must the y be registered, the certificate must be executed by the Corporation. In the absence of a general or specific resolution of the Directors authorizing the secretary to execute the certificate in question on behalf of the Corporation, I am of the view that it is not so executed.

The By-Law has not been enacted and it is still unregistered and therefore ineffective at this time.

Application denied.

I have heard no argument as to costs. Either party may apply to the Local Registrar for an appointment to deal with that matter within 21 days, in default of which costs of the Application to the Respondents.

CBR# 066

Carleton Condominium Corp. No. 75 v. Campeau Corp.

Between

Carleton Condominium Corporation No. 75, Carleton Condominium Corporation No. 88, Audrey Bayles, J. Victor Bond, Quentin Bond, Audree Gingras, Keven Mills, James Luff and William Trischuk, Plaintiffs, and
Campeau Corporation, Defendant, and
Antamex Limited, J. McBride & Sons Ltd., Dominic & Giovanni Floor Finishing Ltd., Duron Ontario Ltd., B.M.H. Contracting Ltd. and John J. Lunz, Third Parties

Action No. 12510/81

Supreme Court of Ontario - High Court of Justice
Ottawa Non-Jury
Trainor J.

Heard: June 30, 1988
Judgment: October 24, 1988

- A.T. Hewitt, Q.C. and C.F. Reil, for the Plaintiffs.
J.R. Sigouin, Q.C. and J.S. Cavanagh, for the Defendant.
G. Doak, for Antamex Limited.
D.C. Kardash, for J. McBride & Sons Ltd.
J. Webster and D.G. Menzies, for Duron Ontario Ltd.

TRAINOR J.:— This action brought by the plaintiff Condominium Corporations and two unit owners, Audrey Bayles and James Luff, is for damages arising from defects in design, construction and subsequent repair.

The statement of claim alleges numerous deficiencies most of which were settled prior to trial. I was not made aware of the terms of settlement.

The unresolved issues are stated by the plaintiffs to be the following:

It is the Plaintiffs' submission that the Defendant, Campeau Corporation, as the owner, developer and builder of the condominium project known as Strathmore Towers, owed a duty to the Plaintiffs to construct the project in accordance with sound building practice and in a good and workmanlike manner. The Plaintiffs contend that Defendant, Campeau, breached its duty to the Plaintiffs in the following manner:

- a. It neglected to follow its own specifications and the mandatory practice direction under CSA standard A23.1-1973 respecting the placement of cast in place concrete contrary to sound building practice;
- b. It failed to finish the concrete slabs in the garage in a good and workmanlike manner;
- c. It utilized a design in respect of the expansion Joints in the garage which was deficient in that it called for the use of inferior materials and did not provide for the proper sloping of the slabs away from the joint;
- d. It failed to provide windows to the condominium towers which were completely weather tight and impervious to moisture penetration contrary to its own specifications and sound building practice;
- e. It failed to provide screens which were structurally sound and able to be conveniently and easily removed by the class of persons one would normally expect to be handling them on a day to day basis, contrary to sound building practice.

A legal issue is raised by the defendant as to whether the corporations are limited in their recovery of damages assessed with respect to deficiencies in the common elements, to the number of original purchasers of units who are owners as of the date of trial in proportion to the number of units constructed. The evidence is that only Audrey Bayles falls within this category. There are conflicting decisions in Ontario on this issue.

York Condominium Corporation No. 76 v. Rose Park Wellesley Investments Ltd. et al. (1985), 48 O.R. (2d) 455; Carleton Condominium Corporation No. 11 v. Shenkman Corp. Ltd.; Grainger et al., Third Parties (1985), 49 O.R. (2d) 194.

A second legal issue arises with respect to the liability of the defendant in negligence to James Luff, a subsequent purchaser.

In view of the determination I have made of the other issues raised, I need not resolve the above matters.

The theory of the defendant's case is that there were no design defects; construction was in accordance with the plans and specifications and in accordance with the standards of the day; that the work was done in a proper manner in that any deficiencies were repaired by 1978; the problems the plaintiffs allege were the consequence of poor maintenance. It also alleges delay.

In 1973 the defendant's engineers and architects prepared plans and specifications for the construction of a twin tower condominium development and parking garage. Garage construction commenced on 20 May 1974 and was completed in the spring of 1975. Sales of individual units began in early 1975 and the condominium corporations were registered on 18 February 1976 (#75) and 8 November 1976 (No. 88).

The parking garage, the subject of the majority of remaining complaints, is a split level, above grade structure of concrete column and slab construction. It is a free standing building connected to the towers by walkways. It is unheated. Corporation No. 75 has jurisdiction over levels 1, 3, 5 and 7 of the garage and Corporation No. 88 over the even levels 2 to 8. Levels 7 & 8 are open to the elements and used mainly for guest parking.

The concrete slab specifications called for an exposed slab. However, the defendant, a pioneer at the time in exposed slab coverings, altered the specifications during construction as it was entitled to do. As a consequence, the third party Duron Ontario Ltd. (Duron), under a purchase order from the defendant, applied a wearing surface and sealant, known as duronite, to levels 3 through 6.

Duronite is a coal tar epoxy. In 1974 and 1975 the application of duronite was a three-stage process. Firstly, the concrete slab was washed with acid to etch the surface thereby permitting the formation of a mechanical bond between the concrete and the epoxy. Secondly, the epoxy coal tar in liquid form was applied to the etched concrete with a 1/8" squeegee, to a depth of 40 mills or 1/8 of an inch. Thirdly, silica sand was broadcast over the wet epoxy. The duronite was then left to dry overnight and the following day loose sand was swept from the surface.

Duronite was marketed in the 1970's as a wear surface impervious to moisture. The product had flaws because it was subject to pinholes caused by sand particles being dislodged by vehicular traffic and to cracking caused by shrinkage properties different from that of the concrete and by concrete cracking. These facts were known to both Duron and the defendant in 1974.

However, in the 1970's duronite was as good a product as the market sold except for a much more expressive cover, sold under the trademark, Scotch Clad. Scotch Clad was not popular in the construction industry.

The life expectancy of an exposed slab in the 1970's was 5 to 6 years. If the slab was covered with duronite and properly maintained its life expectancy was 10 to 20 years. In the 1980's duronite was improved by the addition of a polyurethane membrane and a tiecoat.

I remind myself that the standards of construction applicable to this case are those of the early 1970's. This building was constructed 14 years ago and the unconscionable delay in bringing the case to trial has caused the parties, and more particularly the witnesses, difficulty in remembering precisely the sequence of events during construction and repair, and even greater problems in defining the knowledge and practice of the construction industry more than a decade ago.

For example, contrary to the opinion expressed by Mr. Oliver, an engineer and architect called by the plaintiffs, what appears today to be a trite proposition, that de-icing salt, used extensively in snow control in the Ottawa area, has a devastating impact on reinforced concrete slabs used extensively in parking garages, was not fully appreciated by the construction industry in the 1970's.

The 7th and 8th levels of the garage were not treated until the spring of 1975 because of the onset of winter. In June, 1975, Duron acid washed these levels, routed and sealed shrinkage cracks, re-caulked expansion joints where required and applied two coats of polymer sealer, a water resistant product. This work constituted a second change to the specifications. The changes enhanced the quality of the structure.

In 1976, the condominium declarations were registered and the corporations assumed control of the garage and other common elements. They contracted management out to the defendant from 1 December 1976 until 1 January 1978. The defendant was replaced as manager by A.H. Fitzsimmons & Co. Ltd., and that company was later replaced by Graven Management. In 1977, because of unit owners' complaints, Mr. Oliver's engineering firm was retained by the Corporation. He inspected the common elements for defects in workmanship and materials. On inspection he observed the expansion joints being repaired by the defendant. He had no complaint, at the time, about the original design, construction or method of repair of these joints. His only comments were as follows:

- (1) the work must be done properly;
- (2) heating cables at the drains be operational;
- (3) where joints are vulnerable to leaks drain pipes might be added to control drip.

At trial he said the expansion joint design was substandard even though he agreed it was widely used.

Additionally, he found the westerly side of level 8 to have considerable spalling due to rainfall during the slab pour, or because of frost damage. He observed pooling that from observation he thought was caused by inadequate slab slope. He said, in his report and evidence, that "the spalling would continue at an increasing rate because of freeze-thaw cycles that would have a more severe impact on the upper levels than on the levels that had been properly sealed and provide a dense surface." (Emphasis mine). Mr. Oliver recommended that a rubberized membrane be installed with a wearcourse of rubberized asphalt. He agreed the procedure would be expensive. If put in place the membrane would constitute a betterment, not called for in the specifications. In his report, he does not make reference to slab slope but to a depression that he says should be built up.

Mr. Oliver further observed spalling in the westerly downramp of the upper levels. The reference to spalling denotes pitting or deterioration of the upper surface of the slab. He found that the duronite on lower levels had lifted or debonded in a number of areas of the garage. He recommended that the areas of debonding (the failure of the bond between the surface of the concrete and the duronite as opposed to delamination (separation of the upper surface of the concrete with the duronite in tact) be inspected,

marked and repaired. He agreed that the proper method of repair was that contained in the work order of 8 May 1978 from the defendant to Duron. The repairs were completed in 1978.

The work order reads:

To provide all labour, material and services required to complete the following Work:

A) Upper Deck

1. Chip out all spalled concrete to a sound surface.
2. Apply Duron epoxy adhesive.
3. Patch with high strength concrete.
4. Clean, sand, and vacuum entire surface.
5. Apply 2 coats of Duron polymer sealer.
6. Install new deck drains at low points of concrete slab.

B) Other Decks

1. Remove all loose Duronite.
2. Clean, sand, and vacuum exposed concrete.
3. Supply and install new Duronite to these areas.

At trial, Mr. Oliver's opinion was that the duronite problems were caused by lack of proper air entrainment in the concrete resulting in a soft concrete surface insufficient to hold the harder duronite. He said that insufficient air entrainment prevented the concrete surface from expanding and contracting during freeze-thaw cycles thereby reducing the life expectancy of the concrete surface.

A further contributing factor to the debonding, spalling and delaminations found by Mr. Oliver was the lack of a maintenance program. He said lack of maintenance accentuates the damage.

In the summer of 1978, the repair work authorized by the defendant's work order dated 8 May 1978 was carried out by Duron. Mr. Sam Tatta, a supervisor with Duron, Mr. Joe Reitani, a foreman with Duron, and Mr. Colton, the president of Duron, testified as to the condition of the garage and the corrective and remedial work completed.

Mr. Tatta recalls working on levels 7 and 8, in 1978. He found that water was pooling and not going to the drains. He said this was corrected. In addition, he observed spalled concrete. The spalling was corrected by chipping out the bad concrete to a solid surface; acid washing the areas and then applying two coats of polymer sealer. He said the conditions he observed were not unusual for parking garages. In his experience the combination of sun, weather, vehicular traffic and salt destroy the waterproofing quality of the polymer sealer so that a new application is required every two years.

Mr. Reitano worked on the top levels of the garage and on the duronite repair in 1978. He described the principal areas of duronite repair and replacement as those where vehicular traffic was heaviest. His evidence is consistent with the evidence as a whole. He said that removing pitted and cracked duronite, cleaning the concrete surface and applying new duronite was a normal or usual procedure. The secret he said was to do the repair at an early stage. He described the problem as similar to cancer. Once the concrete is exposed because of duronite pitting, cracking or debonding in a given area, the condition spreads rapidly. He said maintenance is essential.

Mr. Colton was another impressive witness. He proved to be knowledgeable and fair-minded. He testified that six or seven years ago major repairs were required in many parking garages in the Ottawa area because of the ravages of de-icing salt. The necessity of such repair continues today, even with improved construction methods. Duron, perhaps more than any other company, completed repairs to salt-damaged garages. Mr. Colton testified that of 25 parking garages with which he is familiar and that are similar to the subject, this garage was at least as good as most and better than many. He said this is particularly the case where slabs were left exposed. Duronite, he said, is waterproof provided, by proper inspection and maintenance, pinholes and cracking are not allowed to develop.

Mr. Colton testified that in 1974 the building industry lacked an appreciation of the impact of salt and water in combination with freeze-thaw cycles, on concrete. According to this witness salt does not impair the duronite surface. However, if pinholes develop and are not repaired, or salt and water are otherwise allowed to accumulate around and under the duronite, or if the concrete surface is cracked or otherwise unsound, then rapid deterioration occurs.

Mr. Colton's view was that regular inspection, repair and cleaning of garage floors is essential to this normal life expectancy. In his opinion the duronite floors on levels 3 to 6 served the plaintiffs well. He said that the repair his company performed in 1978 was contributed to by faulty concrete but the flawed concrete was corrected when the repair work was performed.

He said the practice in 1974 was not to use entrained air whether or not the surface was covered by duronite or polymer sealer. It was his view that even today air entrainment is undesirable where duronite is applied because the surface of the concrete becomes too soft as a result of the entrained air. On the other hand, today, air entrainment is desirable on levels such as 7 and 8 where polymer sealer is applied.

Mr. Colton felt that the defendant's reputation in 1974 and 1975 was that of a good builder and a pioneer in concrete slab protection.

Following the repairs in 1978 the plaintiff, on 29 November 1978, indicated satisfaction with the work but requested extended warranties which were provided by Duron.

Approximately one year later the corporations complained to the defendant that the work performed by Duron and the expansion joint repair completed in 1977 by that company were unsatisfactory. In 1978, following the repair, CMHC inspected and approved the project for final advance. The defendant declined to do further work and no one asked Duron to honour its guarantee.

CMHC inspectors were not called at trial. The fact of approval and final advance is therefore of little assistance to me in determining the issues raised in this action.

In 1979, Mr. V. Midgley became the site manager for Fitzsimmons. In October, 1980, approximately two years subsequent to the Duron repair work, he was authorized by the corporations to retain the services of Robert Halsall and Associates Ltd., consulting engineers. Mr. Malholtra, an engineer with the firm, inspected the garage in the fall of 1980. He testified that in general terms the garage was in good condition for its age and use. He said about 30% of the duronite had cracked and lifted allowing water and salt to pool, and that on levels 7 and 8 a sealer was not evident although the floors had been sealed. The following tests were performed:

- (1) A visual inspection;
- (2) the depth of the concrete slabs was measured;
- (3) chloride content was measured;
- (4) corrosion activity was determined.

Contrary to Mr. Midgley's testimony Mr. Malholtra found the concrete cover over the rebar in the slabs to be quite adequate. However, on level 3, in the southeast corner, he found excessive corrosion activity and some delamination as a result of corrosion in the rebar. This type of delamination, where rusting increases the circumference of the steel causing expansion that eventually results in the upper part of the slab cracking and lifting, was minimal. It had occurred where the duronite had pitted and cracked in the most heavily travelled areas of the garage.

Mr. Malholtra found low to medium corrosion activity on the remaining levels that was quite acceptable.

The expansion joints, he said, leaked at a number of locations most noticeably on levels 7 and 8. The expansion joints allow the slab to contract and expand without breaking. A water bar, consisting of rubber inserted into the edge of the slab on each side of the joint in such manner that the pieces of rubber overlap, prevents water from escaping through the joint to the level below. Styrofoam insulation is inserted to fill the opening to just below the slab surface. A sealant is then placed over the styrofoam. This witness did not think the expansion joint was suitable but said that design was outside his field. He recommended that the joint be raked out and a proper sealer installed.

He also noted spalling on levels 7 and 8, principally on level 8, and suggested removal of the delaminated concrete topping and re-sealing.

Mr. Malholtra set up a series of priorities to be undertaken by the Corporations from the fall of 1981 through 1983. He noted that there are no easy solutions to garage problems and that garage maintenance is a continual problem. Regular inspection and repair is required and he said penetrating sealers must be renewed periodically. The total estimated cost of his program was \$147,500 over three years or \$145 per unit per year. He said cleaning and continuous maintenance are absolutely essential to retard salt damage.

The Corporations postponed repairs until 1982 and 1983 when they contracted with Ottawa Structural Concrete Services Ltd. to do some of the work recommended. The work involved repairs to delaminated concrete, removing debonded duronite and application of a sealer. On level 8, the total area was sounded, and spalling repaired by crack filling and sandblasting the surface. A sealant was applied. As well the expansion joints were repaired with evazote.

According to Mr. Midgley the repaired areas continued to give minor problems while other areas that were not repaired continued to deteriorate. The corporations' cash outlay for repairs was \$7,668 in 1982 and \$58,000 in 1983.

In 1985, repairs costing \$330,955.71 were undertaken pursuant to recommendations and contract documents prepared by Vanco Structural Services Inc.. Duron was the successful bidder and did the work.

The plaintiffs acknowledge that the Vanco contracts constitute improvements far superior to that contemplated by the original specifications. They included the installation of a waterproof membrane and a new wear surface on levels 3 through 6.

The plaintiff corporations had not incurred any expenditure for repairs until 1982. Between August, 1982 and 3 June 1985 they spent \$418,339.31. They claim \$140,500 or about one-third of that amount which is approximately the cost of repair estimated by Halsall in 1981. In fact Mr. Midgley's breakdown per corporation was based on the Halsall reports. It is as follows.

Corp. 75 Corp. 88

- 1) Duronite repair \$21,500 \$21,500
 - 2) Expansion Joint 13,375 13,375
 - 3) Level 7 and 8 30,000 39,000
- \$64,875 \$73,875

The figures do not add up to \$140,500 as claimed, however the total figure is a reasonable one at which to assess damages related to the garage having regard to the total repair cost.

Mr. Henry Vander Velde is a partner in Vanco Structural Services Inc.. The condition survey report prepared for the plaintiff corporations in August, 1984 is under his signature. He was assisted by P.M. James. Mr. James was called by the plaintiffs as a witness but the far more experienced and qualified person Mr. Vander Velde was not. He was called by the defence.

I prefer Mr. Vander Velde's evidence with respect to concrete specifications, salt damage and the knowledge of the construction industry and standards in 1974 and 1975 to that of any other witness other than Mr. Colton. He is not a professional engineer. He has a degree from Algonquin College in civil technology but more importantly he spent about 15 years with Adjelian & Associates who were the consulting engineers for the defendant. He has been directly involved in the design and inspection of major construction projects most of his working life and conducted inspections during the building of the subject condominiums and garage.

It was his view that the specifications for garage slabs called for finished trowelled slabs containing 3% air maximum. He said that where 3% air or less is called for it was not the practice in the industry to call for air entrainment testing.

He testified that Adjelian & Associates were heavily involved in the design and preparation of specifications for garages similar to the subject and that the specifications in question were typical. He said Adjelian worked frequently with the defendant but were firm as to their requirements and did not roll over for a client.

Mr. Vander Velde inspected five to six similar structures per year in the late 1960's and during the 1970's. 70% of Vanco's work is the repair of parking garages. He said that duronite was available in the mid-1960's and 1970's but constituted an additional construction expense. Once applied, he testified, it is essential to inspect it for cracking and pinholing, debonding or delamination, and to repair immediately on discovery of such flaws. He said duronite's purpose is two-fold. It is a wearing surface and protects against moisture. If pinholes and cracking are not repaired the condition is worse than that encountered with an exposed slab because the water and salt penetrate into the slab and cannot be easily removed because of the duronite cover.

He said that the water bar used during construction of the expansion joints was common. There were known problems but few substitutes. It was an acceptable Joint in the 1970's, according to this witness.

Mr. Vander Velde was of the view that maintenance and cleaning are fundamental as is proper drainage. He said that compared to other garages of the same age in the Ottawa area, this garage was in good condition.

Inspection in 1984 revealed to him that 75% of the duronite was in good condition after ten years. He said that the rough concrete found on level 8 was likely caused by rainfall before the concrete had set. The latter problem is one that leaves little choice, according to Mr. Vander Velde, but to accept the condition and take preventative action to avoid future water penetration. He said that in 1974 most garages had inadequate drains whereas today flood tests are done and then drains drilled at the low spots.

Mr. Vander Velde testified that polymer sealer provides reasonable protection against salt and water penetration if it is applied properly and renewed periodically. However, he thought the specification called for entrained air for levels 7 and 8, though he considered it to be a gray area at the time.

In the Vanco report the following statement is made regarding pitting and debonding of the duronite. It reads, "this is indicative of water being trapped below the wearing surface, most likely having entered through the numerous pinholes found in the wearing surface, and undergoing freeze-thaw cycling. The considerable extent of the freeze-thaw damage is, in our opinion, clearly related to the inadequate air content and distribution found in the concrete".

The plaintiffs argue that this evidence supports their theory of lack of air entrainment as specified. I do not agree. The witness was clear in his evidence that 3% air or less was called for in the trowelled surface to which duronite was applied. The witness said in his evidence that if the duronite is allowed to remain pitted and cracked the trapped water (and salt which draws water to it) present a more serious condition than an exposed air entrained slab surface. An exposed slab would require air entrainment of 6% to 7% to allow the slab surface to expand and contract with less danger of surface delamination. The lack of air entrainment became a factor once the duronite became pitted and cracked allowing salt laden water to become trapped under and around the duronite.

The test cores taken by Vanco on all levels showed an average air entrainment of 2.9%. On the assumption that proper air entrainment served to lessen the ravages of the freeze-thaw cycle for exposed concrete it is difficult to explain why, only 12,000 square feet or 1/4 of the area of levels 7 and 8 located at the north-west corner of level 7 had failed but the rest of the surface had not.

Mr. Frank Privora, a graduate civil engineer, worked with Mr. Oliver's company, with Canada Cement and others, before opening his own consulting firm. He considered Adjelian & Associates to be the leaders in highrise design and specification. It was his view that the use of duronite on levels 3 through 6, and the use of polymer sealer on levels 7 and 8 brought the slabs into the category of non-exposed slabs requiring 3% or less air entrainment.

His view was that both duronite and polymer sealer must be kept clean and inspected after cleaning. He said a garage such as the subject should be swept once a month and then washed two, three or four times after the spring thaw with a low pressure hose. He said duronite would last indefinitely if this procedure was followed and cracks or pinholes sealed as they appeared.

Mr. Privora indicated that all slab over column garages develop cracks. Some of the cracks can be seen others cannot. The cracks form the routes or passages for the corrosive process. He said that the chloride ion in addition destroys the alkaline in concrete where moisture and oxygen are present.

His view was that air entrainment in the subject slabs was not required under the specifications. It would serve only to weaken the concrete. The solution, he said, is waterproofing. Mr. Privora testified that the standard construction practice at the time was to build exposed concrete slabs. The building industry had little knowledge about the impact of salt on these buildings. It was in the late 1970's and early 1980's that safeguards began to be taken.

Mr. Privora agreed that the evazote expansion joint designed by Halsall was an improvement, even though it failed in part following installation. It was his view that the original expansion Joint was commonly in use in the 1970's and that any expansion joint will leak or fail if not maintained by cleaning and repairing. Mr. Malholtra and Mr. James expressed the same view.

Mr. James assisted Mr. Vander Velde in preparation of the Vanco report which was described as a fact finding mission and not one set up to find fault. He found dirt in the expansion joints and other evidence of poor housekeeping.

He said the core sample survey conducted indicated a significant departure from specification regarding air entrainment. This departure, he felt, contributed to the surface delaminations he observed, or they may have been the result of poor workmanship.

Mr. James joined Vanco in 1984. He became licensed in Ontario, as a structural engineer more than a year after the Vanco report. The inspection of this garage was his first experience with such structures. He found debonding of the duronite as well as delaminations. He said that it was difficult to determine whether leaks in the expansion Joints were the result of poor design or poor maintenance. He found that the concrete patches on level 7 had deteriorated. He said this should not occur if the repair work was properly done. However, he agreed that salt combined with freeze-thaw cycles could have caused the defect, or careless snow removal may have been the cause. Mr. James was not prepared to say that poor housekeeping was the chief cause of the conditions he found.

The Parking Garage

The plaintiffs appear to rest their case in contract and negligence. They have not pleaded or argued breach of warranty. I have concluded from conflicting evidence that they must succeed or fail in warranty alone, and that the real issue in the case is whether repairs were completed in a good and workmanlike manner but failed because of lack of proper maintenance, including inspection, cleaning and repair or whether the failure of the repairs was caused by poor workmanship or inadequate materials.

The contract with the unit holders is found in the agreement of purchase and sale signed by the defendant and Audrey Bayles. She purchased unit 1608 together with an individual interest in the common elements on 1 May 1975 for \$37,900.

In the agreements, purchasers acknowledge inspection of the premises and all pertinent documents, including the plans and specifications. It is agreed for the purposes of this action that the contracts with all other original purchasers were in identical terms. She took occupancy on 17 May 1975, the date of substantial completion.

The agreement provides in part that:

7.a) If the subject Unit or Common Elements be as yet unstarted or be in the process of construction, the Vendor covenants to complete the same in accordance with the plans and specifications, all work and services to be done and performed in a good and workmanlike manner appropriate to the style and the nature of the Unit, notwithstanding which the Vendor may substitute other materials for those specified and may alter the said plans and specifications provided that any such substitutions and changes are acceptable to the mortgagee.

15.b) The Vendor covenants to give on the closing of this transaction a written warranty in its usual form which, with respect to the Unit shall expire one year from the date of interim occupancy, and with respect to the common elements shall expire one year from the date the Condominium is declared. The warranty shall be in respect of the structural soundness and quality of the Unit and Common Elements, and the Purchaser will accept such warranty in lieu of any other warranty or guarantee, expressed or implied, in respect to the quality or nature of workmanship and materials, it being understood and agreed that there is no representation, warranty, guaranty, collateral agreement or condition precedent to, concurrent with, or in any way affecting this Agreement or the subject land or dwelling other than as expressed herein. The said warranty shall not be transferable or assignable and shall not be enforceable by the Purchaser in any manner unless and until all monies payable by the Purchaser under this contract have been paid to the Vendor in full without holdback whatsoever. Notwithstanding the foregoing or anything contained in the said warranty, the Purchaser waives any right to any claims against the Vendor for damage to any ceilings or walls due to normal shrinkage or nail popping, and the Purchaser agrees that this Agreement may be pleaded by the Vendor in estoppel of any such claims by the Purchaser.

16 The Purchaser agrees that he will submit to the Vendor in writing before the scheduled date of possession a complete report on his "take-over" inspection of the real property duly signed by him and the field superintendent or other duly authorized representative of the Vendor and except as to items specifically listed in such report the Purchaser shall be conclusively deemed to have accepted the unit. The Purchaser agrees that he shall not submit any such report on his take-over inspection or other complaints to the Vendor unless he shall first have contacted the Vendor or its representatives before the scheduled date of possession by the Purchaser to arrange for a mutually convenient pre-inspection appointment. The Purchaser agrees that such pre-inspection is to be conducted jointly with the Purchaser and the Field Superintendent or other duly authorized representative of the Vendor and that he shall be deemed not to have submitted such a report and to have accepted the unit as then constructed in the absence of a joint pre-inspection report duly signed as aforesaid.

17 Should the Purchaser claim that the said Unit is defective or not in accordance with the contract in respect to materials, workmanship, construction or otherwise, or should any dispute arise between the Vendor and the Purchaser over any matter whatsoever relating to this transaction then the Vendor shall have the option of repaying to the Purchaser all monies paid hereunder, subject to paragraph 18 hereof, and all right, title and interest whatsoever hereby created or then existing in favour of the Purchaser, shall forthwith cease and determine, and the Unit hereby agreed to be sold shall revert to and vest in the Vendor and this Agreement shall be considered null and void; and the Purchaser shall do all such acts and execute all such assurances, deeds, releases and other documents as may be necessary at the Purchaser's expense to re-vest title to the said Unit in the Vendor. In the event the Purchaser shall fail or refuse to execute and/or deliver any such documents so requested within seven (7) days of such request, then the Vendor hereby stands irrevocably constituted as the Purchaser's attorney with power to execute and deliver to the Vendor such release and/or quit claim for and on behalf and in the name of the Purchaser.

There is no evidence in the record of occupancy prior to substantial completion, of deficiency lists prior to occupancy or of disputes covered by paragraph 17 of the agreement.

The warranty set out in paragraph 15(b) was given to Audrey Bayles on 17 May 1985, and to all other unit holders on their respective occupancy dates.

The warranty is entitled "Home Owners Guarantee". Pursuant to the warranty the defendant guaranteed that the condominium and garage:

... has been constructed in a thorough and workmanlike manner in accordance with accepted Home Building Standards. Inspection by local building authorities and by our trained personnel guarantees to you that all local codes, hydro regulations and municipal by-laws and where applicable, National Housing Act standards in existence at the time of construction have been complied with.

.....

Campeau will, at its option, either replace or repair free of costs, any defect which occurs under ordinary use and care, within one year from the date of delivery as shown above subject to the limitations hereinafter expressed. Such defects must be brought to Campeau's attention in writing within the one year period hereinbefore set out.

This guarantee shall be void where such defects were caused by acts of the purchaser or by your failure to implement the suggestions and recommendations set out in the booklet supplied with and supplementary to this certificate.

.....

Campeau does not assume liability or responsibility for:

- (a) Damage due to reasonable wear and tear or damage caused by termites or other insects, fire, lightning, tempest or other acts of God, or through negligence of the occupier of the home.
- (b) Conditions resulting from condensation or contraction or expansion common to the type and grade of materials used.
- (c) Checking or cracking of plaster or dry wall or nail-popping.
- (d) Latent defects inherent in the type and grade of materials used.
- (e) Minor depressions in grounds or driveway caused by setting of sewer, plumbing or utility ditches or ground grading.
- (f) Cracks common to concrete and masonry work.

In no event shall Campeau be liable hereunder for an amount in excess of that necessary to replace or repair the defective material or workmanship.

In view of the findings that I am about to make the defendant's liability, if any, for repairs to the expansion joints in the garage and the problems of delamination, debonding and spalling fall outside the terms of the individual contracts of purchase and guaranty. The plaintiffs' success or failure with regard to these claims is to be resolved by reference to additional warranties provided at the time of repair work, assuming that the deficient pleadings can be rectified.

The garage and condominium towers, in so far as the issues that were left to me to try are involved, were built in a good and workmanlike manner in accordance with the plans and specifications and the knowledge and practice prevailing in the industry in the mid-1970's.

The garage was and is today structurally sound. It was as sound a building as most garage structures built in the Ottawa area in the early and mid-1970's. It was designed and the specifications prepared by Adjelian & Associates, the foremost experts in the field, and the defendant's forces, including its sub-trades, built the garage in a competent manner, in accordance with the plans and specifications, and in accordance with the standards of the day.

The garage has served its purpose since occupancy commenced in early 1975. Not a single unit holder complained about its utility in spite of the uncontradicted evidence of leaks, delaminations, spalling and repair. There is an abundance of evidence of complaints from the various boards of directors from 1976 onward. There is no evidence of self-help on their part until 1982, nor did they implement any improvements to their maintenance program until very late in the game.

On the other hand, the defendant and its sub-trades cooperated throughout in attempting to fulfil their contractual commitments and to satisfy the boards' demands.

Contrary to Mr. Oliver's evidence, professional and non-professional, appreciation of the ravages of de-icing salt was minimal in 1974 and the products available to combat its effects were few and far from a perfect solution.

Adjelian & Associates employed the most knowledgeable of the experts, Mr. Vander Velde, to conduct inspections during construction. In addition the defendant contracted with Duron, specialists in concrete slab protection. I have little doubt on the evidence that had duronite and polymer sealer not been used to protect the slabs in this garage from salt-laden water (and the contractor was entitled to leave the slabs exposed under the contract documents) that given the skimpy maintenance program employed, the defects complained about, even with air entrainment, would have been substantially increased and structural failure likely by 1985.

When I speak of the lack of a maintenance program I am not being critical of anyone, until 1978. In the years 1974 through 1977 the boards of management of the plaintiff Corporations, the defendant and other professionals did not appreciate the absolute necessity for constant surveillance, regular removal of salt and water and speedy repair of defects in order to preserve the integrity of the concrete slabs. The defendant, however, did repairs from 1975 through 1978 as and when required and without regard to its limited warranty.

The main thrust of the plaintiffs' argument and evidence regarding the garage is that government standards for air entrainment called for in the specifications were not followed and the resulting and continuous repairs became necessary.

The C.S.A. standard relied upon includes Table 6 and Table 8. Its essential requirements are set out under the following heading:

9.4 Selecting Entrained Air Content

9.4.1 Where concrete is subjected to frequent cycles of freezing and thawing in the presence of moisture or de-icing salts it shall be air entrained in accordance with Table 8.

Table 8 specifies air entrainment in the range of 5 to 6%. The concrete slabs in the garage were in the main less than 3%.

The position taken by the plaintiffs fails to take into account two important considerations.

Firstly, the slabs in question were trowelled slabs and the specifications in the contract call for:

4.2.4 Air Entrainment

Exposed or exterior concrete - See Table 6, CSA A23.1

Non-exposed concrete 3% to 5% air. Finished-trowelled slabs and toppings in two-course slab construction - 3% air maximum.

(Emphasis added)

Secondly, 9.4 of the standard which the plaintiffs say applies, calls for air entrainment in the area of 6% where the slab is exposed to (1) frequent cycles of freezing and thawing, (2) in the presence of moisture or de-icing salts.

The concrete slabs in this garage were covered with duronite on levels 3 through 6 while levels 7 and 8 were treated with two coats of polymer sealer, a water repellent material. The purpose of air entrainment is to compensate for absorption of water, and its expansion and contraction during freeze-thaw cycles. Duronite, properly maintained, is waterproof, as is the sealer, thereby rendering air entrainment redundant. In addition, duronite, on the evidence I accept, is to be applied to a hard surface for maximum bonding. That is best achieved by 3% or less air.

Thirdly, the practice in the trade in the early 1970's was not to increase the quantity of air artificially in this type of structure. If I am in error in my interpretation of the standards I cannot say that the defendant's interpretation, that air entrainment was not required, having regard to the practice of the day and the fact that the concrete quality was in the control of experts, was unreasonable or one that constituted a breach of contract, or otherwise caused the garage to fall below standard.

Fourthly, 75% of the duronite did not debond or delaminate and yet the average air entrainment throughout the slabs was less than 3%. It can hardly be said with authority that the cause was insufficient air entrainment. The same is true of the level 7 and 8 spalling!

Delaminations, in the sense of salt corrosion damaging the rebar causing the concrete to break away due to expansion, were confined to about 500 square feet of a garage having a gross floor area of 160,000 square feet. In the remaining and much larger area (about 25 to 30%), where duronite lifted, it generally took the top surface of the concrete with it. This condition was the result of pinholes caused by the removal of silica sand during normal wear and tear of vehicular traffic or perhaps, in the area of the ramps, from trap rock protruding through the epoxy again caused by normal vehicular travel. Another cause was the development of cracks in the duronite from expansion and contraction or from the concrete cracking in the normal course of events. The pinholes or cracks allowed moisture and salt to reach the concrete, become trapped and cause damage to the concrete during freeze-thaw cycles, or as Mr. Privora said, they permit the salt to weaken the alkaline in the concrete.

Similarly, the expansion joint design met the standards of the day. Mr. Oliver did not like the design. He said it was substandard. However, during the expansion joint repair in 1977 he inspected the work yet failed to express the opinion to the people who hired him that he expressed 11 years later, at trial. In 1977, he thought eavestrough might assist. At trial he denied this but when confronted with his earlier report, during cross-examination, he conceded he had made the suggestion. His evidence indicates to me that he had difficulty separating current standards from those acceptable in another decade. His suggestion of eavestrough indicates, as other witnesses testified, that leaks do occur at expansion joints because of the movement of the slabs and normal traffic. The only remedy is detection and repair.

Halsall and Associates, in 1982, designed a much improved evazote expansion joint. It was unavailable in 1974, was more expensive and unfortunately it also leaked soon after installation.

Duron did not pour the slab surfaces in 1974 and 1975 prior to installation of the duronite. Its forces inspected the floors and then prepared them for the duronite. I am satisfied that floors 3 through 6 were constructed according to specification and that Duron did its work in an appropriate manner. The duronite failed in part because there was not in place a satisfactory maintenance program with the consequence that water and salt entered cracks and pinholes, penetrated the concrete and during freeze-thaw cycles damaged the concrete surface.

The expansion joints failed for the same reasons; lack of inspection, cleaning and repair.

Level 7 presents a more complex problem. The spalling that occurred to the westerly half of that level was caused by rainfall shortly after or during the concrete pour. Nevertheless the defendant's responsibility, if any, for the repairs undertaken by the plaintiffs in 1982 and 1985, must rest in extended warranty and not breach of the original contract or guarantee, as the condition was corrected by the 1978 repair.

In summary, the garage deficiencies were not caused by the fault of the defendant but by the lack of a proper maintenance program. Nonetheless the defendant repaired the defective areas without charge to the plaintiffs even though the majority of the repairs were beyond the one-year period of guarantee.

By 9 June 1977, the defendant acknowledged that it would correct the following deficiencies complained about by Corporation No. 75, even though its guarantee or warranty had expired in February, 1977.

- (a) Sealing of expansion joints in the garage;
- (b) repair the duronite to an acceptable standard;
- (c) exterior caulking of windows;
- (d) check improper fitting screens.

On 3 November 1977, Corporation No. 88 complained about the following matters relevant to the issues.

- (a) Floor drainage piping ruptured;
- (b) repair of expansion joints (item ongoing);
- (c) spalling on level 8 due to rainfall;
- (d) repair of duronite.

The complaints from Corporation No. 88 are in substance taken from the Oliver report of 1977.

Leaving the window claims aside, during 1977 and 1978 all of the requested repairs were made.

The expansion joint repair was completed by Duron in 1977. On 9 November 1978, Duron completed its work with respect to spalling, debonding and delamination. It guaranteed its work, in writing, against defects in material and workmanship. Delay has contributed to a great deal of uncertainty in this area. In 1977, Mr. Oliver advised the Corporations to attempt to obtain an extended warranty on the repairs. The plaintiffs sought and obtained warranties from both Duron and the defendant. I am satisfied on the evidence that a one-year warranty was received by the defendant for the expansion joint repair and in addition they received a one-year warranty for the duronite and polymer sealer repair from Duron. A two-year warranty had been sent to the defendant by Duron but this was altered to a one-year warranty in accordance with the practice in the industry. This one-year warranty was forwarded to the plaintiffs but the warranty for two years was not. For the purpose of this judgment I assume the plaintiffs were entitled to a two-year warranty but did not receive it.

On 29 November 1978, Corporation No. 88 reported some of the work as satisfactory, but other parts such as the expansion joint repair in 1977 unsatisfactory.

The attitude of the board of directors of the corporations becomes readily apparent upon reading the various letters of complaint. For example the board of Corporation No. 88 cannot understand why duronite was not provided, during the repair, on levels 7 and 8 at no cost to them, even though it was not specified in the work order, constituted an improvement and was not a part of the original specification. They requested aluminium paint to be renewed for connections that had rusted even though this had occurred in the garage in the normal course of events over time. In other instances they blame frozen drainage pipes in an unheated garage on the defendant where there is no evidence that the plaintiff corporations ever inspected the pipes or the heating cables, and where there is evidence that the electricity was not turned on.

There is uncontradicted evidence that the defendant did repairs and attempted to resolve the corporations' complaints. The plaintiff corporations, on the other hand, from 1976 until 1982 did not make any expenditure for repairs or maintenance save that the garage was cleaned once a year by sweeping it down with a machine and broom during 1979 and 1980. In 1981 students swept the garage. In 1983 or 1984 for the first time it was scraped, swept and washed. This lack of suitable maintenance prevailed in spite of Mr. Malholtra's warning to the plaintiffs in 1980, and Mr. Oliver's warning in his report in 1977 that spalling would continue at an increasing rate if the floor was not kept sealed. Mr. Oliver told the boards of the two corporations that more floor drains were required and that more frequent sweepings and washings were essential or the damage would be accentuated. The defendant installed the drains but inspection and maintenance was not stepped up.

I am satisfied on balance that the work done and materials used by Duron in 1977 and 1978 satisfied its obligation under the work order. I accept Mr. Colton's evidence in this regard. The work was completed in a proper manner. He said his company was never called back under the warranty it gave. I reject Mr. Midgley's evidence that, in 1979 Duron was asked to repair but refused to do so because the problem was delamination and not debonding. The plaintiffs were advised on 18 December 1978 that the only warranty in effect was the Duron warranty for the 1978 repair. For reasons, unexplained, the plaintiffs did not call on Duron to inspect and repair the continuing problems and areas of complaint even though the defendant refused to undertake further repair. As of that date, the Duron warranty was still in effect. I am satisfied that had the repairs failed because of poor workmanship or materials, a contention I reject, as opposed to lack of maintenance, Duron would have remedied the defects.

Screens and Windows

The allegation with respect to the screens is that they were defectively designed and could not be closed properly. At trial Mr. Midgley, the president of the current management company, said the screens could not be removed without twisting the frames

and as a consequence 75% of the total screens supplied have to date been replaced. He said that the defendant's assistance with the problem was sought but was not forthcoming.

Mr. Midgley was not on the site until 1979, some four years after occupation and at least two years following registration. His evidence is contradicted by Gaston Vinette, a customer services manager for the defendant.

James Luff, in 1981, found the screens in his unit to be somewhat difficult to take out. He said that even though the screens are warped to a degree, he has not had them replaced.

Audrey Bayles found her screens difficult to remove so she left them off.

Mr. Matthew, a unit holder since 1977, and president of Corporation No. 88 in 1979, said the screens did not fit.

Mr. Greer, the director of engineering for Antamex, the window and screen manufacturer, gave the court a detailed explanation of the window and screen design. The screen is removed by first removing a stop, then the window, followed by the screen.

He testified that the screens in his opinion could be removed without twisting or unduly bending the frame with the stop in place. However, removal of the stop increased the size of the opening thereby facilitating screen removal. His company was never contacted about this complaint.

Mr. O'Connell, a veteran of 32 years in the window and screen business, confirmed Mr. Greer's evidence.

I accept their evidence and conclude that the alleged design defect has not been established. Furthermore, I cannot accept the evidence that the defendant refused to reveal the fact that Antamex was the designer, manufacturer and supplier. The windows and screens were under warranty and the defendant would have no reason to refuse to call upon its subcontractor if complaints were received during the one-year warranty period. In any event, with a little ingenuity Antamex could have been discovered, or perhaps the screen removal puzzle otherwise resolved. The picture I have formed is of a condominium management team that is quick to complain but slow to act.

In addition, screen replacement by the plaintiffs was not started until 1981 and was completed in 1985, ten years post occupancy, and well beyond the warranty provided by the defendant and its subcontractor.

The second area of complaint, made by the plaintiffs but not pleaded, is that the vertical mullion joints of the windows in a number of units leaked. The problem was corrected according to Mr. Midgley, when in 1979 and 1982 the corporations paid St. Lawrence Caulking and Supply Ltd., \$4,733.40, and Queensway Caulking Ltd., \$8,160.00, to caulk the vertical mullions.

The plaintiff Audrey Bayles asks for payment for damage to the inside of her apartment because of moisture penetration that she discovered in 1979. Campeau repaired the problem but by 1981 it recurred. It is apparent that caulking the vertical mullion joints did not correct the problem in this unit. In 1981 this plaintiff paid a decorator \$26 to repair water damage around the windows, and \$75 to repair the ceiling.

In 1987 the same problems reappeared. The estimate for corrective repair is \$395.

Mr. James Luff purchased unit 1405 in September, 1978 from a previous owner but rented the unit until 1981. In July, 1981 he discovered a water damage problem and spent \$1,237.50 having it repaired. The apartment had been redecorated in 1978. There has been no recurrence of the problem since 1981. It appears therefore with respect to this unit, water problems occurred between 1978 and 1981. During the period the defendant had undertaken and replaced caulking and this appears to have solved the problem prior to the caulking of the mullion joints.

In August, 1982, Queensway, in addition to caulking mullion joints, replaced old caulking and caulked other areas of the windows and precast.

I am not satisfied that the plaintiffs have made out a case in this area for these reasons.

(1) I accept the evidence of Mr. Greer and Mr. O'Connell that Antamex designed, supplied and installed water-tight windows. Visual inspection of the vertical mullion joints reveals that water penetration through the joint, even without caulking, is unlikely. Caulking of the interior mullions is a simple task, carried out by experienced crews thousands of times and inspected by Mr. O'Connell, an expert who has been in the business most of his working life. Once caulked, water cannot enter. I find that the mullion joints were properly caulked during window installation.

(2) It was accepted by Mr. Midgley that the penetration of water could have been the result of failure of any one of premature caulking, failure of precast joints, roof leaks and condensation buildup inside the windows.

(3) The two specific complaints of damage inside the units were made long after the contractual warranty period. Caulking used in the early 1970's was known to dry up and fail in time. It is a continuing maintenance problem in any building. I am satisfied that the original caulking installed by J. McBride & Sons Ltd. was done in a workmanlike manner, and that the defendant acted reasonably throughout in repairing problems that arose in this area from 1975 until at least 1978 or 1979.

It is unnecessary for me to decide the legal issue raised by the plaintiff James Luff as to the liability of a builder to subsequent purchasers in negligence. I have some doubt that cases such as *Anns v. London Borough of Merton*, [1977] 2 All E.R. 492, and *City of Kamloops v. Nielsen* (1984), 10 D.L.R. (4th) 641, have any application to claims that by their very nature are warranty claims involving patent defects and not substantial construction errors of a latent nature. A subsequent purchaser should not be entitled to enjoy the benefits of a reduced purchase price and as well be entitled to damages from a third party builder.

The damages claimed for defective screens, for caulking the vertical mullions and for interior repairs should be reduced because they were not wholly established, and because they constituted improvements.

I reduce the damages claimed for screens by one-half, and for caulking the vertical mullions to \$4,733.40 for Corporation No. 75 and \$1,980 for Corporation No. 88. The claims made by Audrey Bayles and James Luff should also be reduced by half because of depreciation and betterment.

The action and the third party proceedings are dismissed.

TRAINOR J.

1 GOODMAN J.A. (endorsement):— In our opinion, the trial judge was in the best position to determine the question as to the reasonableness of the various third party proceedings instituted and continued to their conclusion by the defendant, who is the appellant in these proceedings. We are not persuaded that we should interfere in any way with the discretion which the trial judge has exercised in awarding costs. We are of the opinion that the award is one of costs based on the individual liability of the plaintiff and defendant for the third party costs, but as between themselves on a 50-50 basis.

2 Accordingly, the appeals are dismissed, but in the circumstances of this case, there will be no costs of the appeal and the application for leave to appeal.

GOODMAN J.A.

CBR# 278

REINERS v. MERCER,

66 O.R. (2d) 641 ONTARIO (Dist. Ct. -- West D.C.J.) December 23, 1988 Corporations -- Condominium corporation -- Application to declare void election of directors -- Majority of votes of owners present favouring removal of directors -- Application dismissed, majority of votes cast determining -- Condominium Act, R.S.O. 1980, c. 84, ss. 15(8), 22(6). This was an application for an order declaring void the election of certain directors of a condominium corporation. Prior to November 7, 1988, the applicants were directors of the corporation. On that date, a special general meeting was held pursuant to the request of certain owners to consider the removal of directors. No issue was taken as to the validity of the meeting. The majority of the votes cast were in favour of removal. A majority of the owners was present. HELD: The application was dismissed. The requirement of the majority representation contained in s. 15(8) of the Condominium Act related to the constitution of the meeting. Once the meeting was validly constituted actions taken thereat were to be determined by the majority of the votes cast.

CBR# 361

York Condominium Corp. No. 288 v. Harbour Square Commercial Inc.

Between

York Condominium Corporation No. 288, applicant/plaintiff, and
Harbour Square Commercial Incorporated, Jay-Cor Holdings
Limited and Harbour Square Deli Limited,
respondents/defendants

No. 308467/87

Ontario District Court - Judicial District of York
Davidson D.C.J.

May 6, 1988.

Counsel:

Peter Downard, for the plaintiff.
Alden Dychtenberg, for the defendant Harbour Square Commercial Inc.
Judith Bell, for the defendant Jay-Cor Holdings Ltd.
Harvey Mandel, for the defendant Harbour Square Deli Ltd.
Edwin Upenieks, for the defendant Gundel's Holdings Inc.

1 DAVIDSON D.C.J.:— This is a motion for summary judgment on one of the claims in the statement of claim being a claim for an order pursuant to s. 49(1) of the Condominium Act, R.S.O. 1980, c. 84, directing the defendants to comply with the declaration, by-laws, rules and regulations of the plaintiff and thus permanently refrain from trespassing upon the common elements of the plaintiff including, without limiting the generality of the foregoing, the space in front of and adjacent to the front wall and windows of commercial unit 1, level 1 of the plaintiff condominium.

2 The statement of claim seeks other relief including an interlocutory injunction, damages for trespass, punitive and exemplary damages and prejudgment interest. All defendants have filed statements of defence and Harbour Square Deli Ltd. (Deli) and Harbour Square Commercial Inc. (Commercial) cross-claim against other defendants.

3 It is the position of counsel on behalf of the plaintiff that there is no genuine issue for trial as between the plaintiff and the defendants in respect to the claim directing the defendants to comply as claimed in the statement of claim and the motion for judgment.

4 The plaintiff corporation in downtown Toronto on the waterfront contains 539 residential units and three commercial units.

5 The defendant, Commercial, is the owner of a commercial unit of the corporation, unit 1, level 1.

6 The defendants, Jay-Cor Holdings Ltd. (Jay-Cor), Gundel's Holdings Inc. (Gundel's) and Deli have separate leases of separate parts of the unit from Commercial at which each carry on businesses (Jay-Cor carries on a grocery business, Gundel's, a restaurant business and Deli, a restaurant business). Deli purchased its business from Jay-Cor by agreement July 21, 1986 and took over operation of the business in October 1986.

7 The plaintiff corporation is divided into units and common elements by the corporation's declaration which provides that the common elements of the corporation are all of the properties owned by the corporation except its units.

8 The declaration also provides that the bounds of the unit extend no further than the floor, ceiling, windows and walls of the unit. The front boundary of the unit is the unit side face of its front windows.

9 The declaration provides further:

"Subject to the provisions of this Act, this declaration and the by-laws and any rules and regulations passed pursuant thereto, each owner has the full use, occupancy and enjoyment of the whole or any part of the common elements, except as herein otherwise provided."

10 The rules and regulations of the corporation enacted pursuant to by-law No. 1 of the corporation provides:

"No unit owner shall do, or permit anything to be done, in his unit ... which will in any way ... obstruct or interfere with the rights of other owners, or in any way injure or annoy them."

11 Further, the rules and regulations provide:

"The owner shall not place, leave or permit to be placed or left in or upon the common elements (except those of which he has the exclusive use) any goods or things."

12 The declaration defines "exclusive use" common elements and they do not include the space in front of the front wall and windows of the unit.

13 The rules and regulations also require:

"The sidewalks entry, passageways and stairways used in common by the owners shall not be obstructed by any of the owners or used by them for any purpose other than ingress and egress to and from their respective units."

14 Finally, the declaration and the Condominium Act by s. 31(1) and 49(4) provide all owners and tenants of units must comply with the declaration, by-laws, rules and regulations of the corporation and that an owner who leases his or her unit remains jointly and severally bound with his or her tenant to satisfy this obligation.

15 I now deal with the alleged violations in respect to the various defendants.

Jay-Cor

16 Jay-Cor, as early as 1983, installed several tables and chairs on the common elements directly in front of the unit it leased for its business.

17 Jay-Cor advised the board of directors of the plaintiff corporation in 1984 that they wished to obtain a liquor licence for the portion of the common elements which they had begun to use in the restaurant business. The board indicated that it was indifferent to the use but was concerned that it had no legal right to allow the use and that it would be required to end Jay-Cor's use of the common elements if residents of the corporation complained about that use. The board decided that it would tolerate the use pending claims and caused Jay-Cor to be advised that it could proceed at its own risk. There does not appear to be any contradiction of this position asserted on behalf of the plaintiff.

18 As at April 25, 1984, the director of property management on behalf of York Condominium Corp. No. 510, located adjacent to the plaintiff condominium, objected to the liquor licence application for the patio area, taking the position that it was the board's view that the location of the licence patio was much too close to private residential land use. It is apparent that the director of property management for the plaintiff and for York Condominium Corp. No. 510 is one and the same person, John Oakes, and, indeed, John Oakes authored the letter on behalf of the plaintiff corporation on March 29, 1984, to Jay-Cor stating, inter alia: "The views of the Board at this point are reasonably supportive of your proposed use for this patio."

19 No objection was filed by the plaintiff corporation with the Liquor Licence Board of Ontario. The evidence, however, is as well per Keith Edwards of the plaintiff corporation on a cross-examination of his affidavit at p. 52, question 222 that the plaintiff corporation did not receive any written notice of the proposed patio liquor licence application. In any event there was no other formal objection to Jay-Cor from the plaintiff, to the use of the patio area and a liquor licence for the patio area was issued by the Liquor Licence Board of Ontario on July 9, 1985.

20 Jay-Cor used the outdoor premises during the summers of 1984, 1985 and 1986 without any other written objection from the plaintiff. In 1985 Jay-Cor had also begun to use the common elements in front of that part of the unit in which it ran a market and continued to do so through the summer and fall of 1987.

21 About October 1986 Jay-Cor sold that part of the business which included the licensed patio to Deli.

Deli

22 Deli continued with the use of the outdoor patio upon the purchase of the business from Jay-Cor for the rest of the outdoor eating season of 1986. No objection was taken.

23 On May 21, 1987, the plaintiff corporation wrote to Deli that it was to spruce up the patio area and, accordingly, Deli expended a sum of money in repainting the fence, potting flowers and in a general clean-up in anticipation of the summer 1987 season.

24 On June 24, 1987, the plaintiff corporation wrote to Deli requesting it to stop using the patio area. The letter recites receiving numerous complaints about the use of the common elements and July 15, 1987 was given as the date for it to stop using or placing material on any part of the common elements in default of which the plaintiff indicated that it would be forced to take legal action.

25 By letter July 7, 1987 Deli requested a meeting with the plaintiff corporation as it had spent close to \$1,000 for the clean-up and felt that there was a misunderstanding which might be discussed at a board meeting. There was apparently no response to this request.

Gundel's

26 In the summer of 1985 Gundel's installed tables and chairs on the common elements in front of its unit where it carried on a delicatessen business and that has continued through the summer and fall of 1987.

27 The use has been augmented by an antique cart to service the patio area and the number of tables and chairs was doubled to 8 and 24 respectively. During the operative summer months the furniture is apparently taken indoors at night, a free-standing sign remains outdoors and it is said that the patio is favourably received by Gundel's customers.

28 In its use of these common elements it is apparent that Gundel's has provided for weekly window washing and sidewalk sweeping and general maintenance of that area.

29 It is apparent from a number of photographs filed on the motion that the outdoor utilization is carried on in a colourful attractive and pleasing manner. It appears to me to be fully in accord with the accepted standard of dozens, if not hundreds of other outdoor eateries and markets.

30 Although there may not have been, and appear not to have been at least in the case of Gundel's, any complaints to the defendants from anyone about the use of the premises, it is apparent that the board of directors of the corporation began receiving complaints by early 1987 and as at April 29, 1987 letters were directed to all of the defendants by the plaintiff corporation

advising them of the complaints and reminding the defendants that they occupied the common elements "strictly at the pleasure of the Board of Directors".

31 In May of 1987 at the Eleventh Annual General Meeting of the corporation in response to complaints, the president agreed to ask the defendants who were contravening the regulations to remove their goods from the common elements. Thereafter, by a letter dated June 24, 1987 to Jay-Cor, Deli and Gundel's, those defendants were required to "[s]top using or placing material on any part of the common elements" and a letter of even date went to Commercial advising it of the requirement. The only reply was from Deli previously referred to.

32 Although it is suggested by the defendants that the portions being used by them are not positively delineated as "common elements", I am satisfied on the material and as recited above that, indeed, the defendants are occupying the common elements for the purposes of their outdoor business.

33 By s. 31(1) and 49(4) of the Condominium Act, a duty is imposed on every owner and lessee in a condominium corporation to comply with the Act and the declaration by-laws and rules of the condominium.

34 Section 7(4) provides "[e]ach owner may make reasonable use of the common elements subject to this Act, the declaration, the by-laws and the rules." By Section 7(6) "[e]xcept as provided by this Act, the common elements shall not be partitioned or divided."

35 By ss. 9(1), 1(1)(x) and 38(1), there is required that a special by-law requiring confirmation by the owners of at least two-thirds of the units must be passed before any part of the common elements may be leased or any easement or licence regarding the common elements granted. Before the common elements may be altered, improved, renovated or expanded, the approval of owners of 80 per cent of the condominium units is required. There has been no special by-law passed by the plaintiff corporation which would permit any of the dealings with the common elements in the way that has been done by these defendants.

36 As was stated in the decision *Carleton Condominium Corp. No. 279 v. Rochon* (1987), 59 O.R. (2d) 545, per Finlayson J. at p. 552:

"The declaration, description and by-laws, including the rules, are therefore vital to the integrity of the title acquired by the unit owner. He is not only bound by their terms and provisions, but he is entitled to insist that the other unit owners are similarly bound."

37 And further at p. 555:

"A condominium corporation is a creature of statute and has no greater authority than as set out in the Condominium Act."

38 The defendants all submit, in part, that their use of these areas is only seasonal and in the case of one defendant, not only seasonal but during daylight and early evening hours. To my way of thinking this is not a distinction which would take the use out of the declaration, rules and regulations and the Act.

39 The main thrust of the defence would appear to be that all defendants were given express consent by the board of directors to use the elements in the way they have or, at worst, there was silent acquiescence, that all defendants have expended and continue to expend monies in maintaining these common elements and that the plaintiff should be thereby estopped from denying a defendant's right and entitlement to continue such use.

40 As to the consent having been given by the board of directors it is apparent that it has been given on a "use at your own risk" basis to Jay-Cor and as regards Deli and Gundel's without a request of the plaintiff corporation for approval and, as far as I can see, without any apparent consideration flowing from the defendants to the plaintiff corporation. Even so, the authority of *Carleton, supra*, would appear to me to restrict the use of the common elements in the manner undertaken by the defendants unless it was shown to be within the authority of the Act, declaration, by-laws, rules or regulations.

41 The Act, by s. 61 provides: "This Act applies notwithstanding any agreement to the contrary."

42 Additionally, it would appear any detriment for expense in maintenance would be balanced by a corresponding benefit use of a rent free space with a view to profit.

43 Even if it could be said that the conduct of the plaintiff and the reliance thereon by the defendants to its detriment could be said to have been demonstrated here (and I do not feel on the evidence that it has), to give effect to an estoppel defence and to permit the occupation and use of the common elements to be carried on would be in direct violation of the statutory duties of the condominium corporation and the statutory obligations of the defendants.

44 The condominium corporation is created by the statute. The statute is for the benefit of a section of the public, that is, on the grounds of public policy.

45 I have reference to the decision *Maritime Electric Company v. General Dairies Limited*, [1937] 1 All E.R. 748, p. 591, a decision of the Judicial Committee of the Privy Council. In that case the plaintiff, an electrical power company, subject to the Public Utilities Act, R.S.N.B. 1927, c. 127, was required to furnish certain services by which its charges were strictly prescribed. The statute prohibited, under penalty, any giving of the service or receiving same at a less rate than prescribed. Owing to an error made by the plaintiff, the services were under-charged and when the plaintiff sued for the difference between the amounts paid and the correct amounts, the defendant pleaded estoppel. It is apparent in that decision that the under-charging arose by error or mistake and not by an agreement between the parties. At p. 596, Lord Maugham stated:

"The sections of the Public Utilities Act which are here in question are sections enacted for the benefit of a section of the public, that is, on grounds of public policy in a general sense. In such a case (and their Lordships do not propose to express any opinion as to statutes which are not within this category) where as here the statute imposes a duty of a positive kind, not avoidable by the performance of any formality, for the doing of the very act which the plaintiff seeks to do, it is not open to the defendant to set up an estoppel to prevent it. This conclusion must follow from the circumstance that an estoppel is only a rule of evidence which

under certain special circumstances can be invoked by a party to an action; it cannot therefore avail in such a case to release the plaintiff from an obligation to obey such a statute, nor can it enable the defendant to escape from a statutory obligation of such a kind on his part. It is immaterial whether the obligation is onerous or otherwise to the party suing. The duty of each party is to obey the law."

46 Similarly in *Western Fish Products Ltd. v. Penwith District Council*, [1981] 2 All E.R. 204, the Court of Appeal held that in respect to a local planning authority operating under a statute, an estoppel could not be raised to prevent such statutory body exercising its statutory discretion or performing its statutory duty.

47 In my opinion, the principles applicable in those decisions are equally applicable in the case before me and I conclude that the defence of an estoppel would not prevail even if its ingredients were established.

48 In the final analysis, therefore, I am of the view that there is no genuine issue for trial in respect to this claim asserted by the plaintiff and judgment will go in favour of the plaintiff against all the defendants in the wording of Item A in the notice of motion.

49 If the parties are unable to agree on the disposition of costs, an appointment may be arranged for submissions at counsels' convenience.

DAVIDSON D.C.J.

CBR# 189

Metropolitan Toronto Condominium Corp. No. 624 v. Ramdial

IN THE MATTER OF an Application under Section 49 of The Condominium Act, R.S.O. 1980 Chapter 84, as amended

Between

Metropolitan Toronto Condominium Corporation Number 624,
Applicant, and
George Ramdial, Nilufar Ramdial and Lana Salmon, Respondents

Action No. M159582/88

Ontario District Court - York Judicial District
Toronto, Ontario
Hudson D.C.J.

January 29, 1988

Joyce Harris and Howard W. Winkler, for the Applicant.

Irvin A. Rosen, for the Respondents.

HUDSON D.C.J. (orally):— Mr. and Mrs. Ramdial are the owners of 20 Dean Park Road, Penthouse No. 4, in Metropolitan Toronto, Condominium Corporation Number 624. There are 432 units in this condominium.

Mr. and Mrs. Ramdial have entered into an agreement of purchase and sale with Lana M. Salmon to sell their penthouse to Ms. Salmon for \$133,000. The closing date provided in the agreement is December 1st, 1987, but I am advised that this has been extended to February the 1st, 1988.

On January 21st, 1988, the Condominium Corporation learned that Ms. Salmon had a 13 year old child and that it was intended that Ms. Salmon and her 13 year old child would occupy the penthouse after the purchase was completed.

The declaration of the Condominium Corporation provides in Section 35 as follows:

s. 35 - "Adult Occupancy No unit owner or lessee of a unit shall permit anyone under the age of 16 years to ordinarily reside in such unit. Any unit resale or lease by anyone other than the declarant must be consented to by the Board of Directors within 15 days of their receipt of the Agreement of Purchase and Sale or lease, or alternatively, the Corporation may purchase or lease such unit on the same terms and conditions as set out in the said Agreement of Purchase and Sale or lease."

Section 35 was passed pursuant to Section 3(3)(b) of the Condominium Act, which provides as follows:

3(3)(b) "..... a declaration may contain,

(b) provisions respecting the occupation and use of the units and common elements;"

And also:

"(c) provisions restricting gifts, leases and sales of the units and common interests"

The Corporation commenced this application for an injunction to prevent the sale because of the duty imposed upon it by Section 12(3) of the Condominium Act as follows:

12(3) "The corporation has a duty to effect compliance by the owners with this Act, the declaration, the by-laws and the rules."

Not only does the Corporation have a duty to effect compliance and, therefore, a duty to commence this application, but the owners of the units have a right to have the corporation perform its duty, and it is provided in Section 12(5) of the Condominium Act as follows:

12(5) "Each owner and each person having a registered mortgage against a unit and common interest has the right to the performance of any duty of the corporation specified by this Act, the declaration, the by-laws and the rules."

In addition to the above, Mr. and Mrs. Ramdial are bound by Section 35 of the declaration because of Section 31(1) of the Condominium Act, which provides as follows:

31(1) "Each owner is bound by and shall comply with this Act, the declaration, the by-laws and the rules."

In *Re Carleton Condominium Corp. No. 279 and Rochon et al* 59 O.R. (2d) 545 is a case in which the developer of the condominium corporation made a special arrangement with a prospective purchaser of a penthouse so as to allow the prospective purchaser to put a television dish on the roof of the condominium. This was a privilege not afforded to the other unit owners.

Mr. Justice Finlayson, speaking for the Court of Appeal, at page 549 wrote:

"The Condominium Act was passed to permit individuals to be owners of the freehold estate in residential units in a building as opposed to tenants in an apartment building. This means that they have disposable real property which is an investment and not simply an expense. Its purchase can be financed by mortgage or lien in the same manner as any piece of real estate. The unit owners are tenants in common and have all the rights of any owner of land within the description of their unit (s. 1(1)(q) and (z)). By the nature of the building, there are certain 'common elements' which are defined by s. 1(1)(g) as 'all the property except the units'. It is therefore necessary that there be detailed agreements with respect to the maintenance, operation and occupation of these common elements so that the responsibilities and privileges of each unit owner are clearly established."

Section 2(1) of the Ontario Human Rights Code provides:

2(1) "Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of age family status"

Age is defined as follows in Section 9(1)(a):

9(1)(a) "'age' means an age that is 'eighteen years or more"

Therefore, in my opinion, Section 35 of the condominium declaration is not contrary to the Human Rights Code, because the declaration only restricts the occupancy of anyone under the age of 16.

Family status is defined as follows, in Section 9(1)(d):

9(1)(d) "'family status' means the status of being in a parent and child relationship".

Counsel for Mr. and Mrs. Ramdial has submitted that Section 35 of the declaration is contrary to the Code because it is discriminating against a mother and her child in preventing them from occupying the unit.

I disagree. The discrimination is not against parent and child. If the child is 16 years of age or older, then the child can occupy the unit with her or her parent or parents. The discrimination is respect to age, not with respect to family status.

Re Royal Insurance Co. of Canada and Ontario Human Rights Commission et al 51 O.R. (2d) 797 dealt with a case where a parent wanted to have his 16 year old child included in the parents' car insurance policy. The Royal Insurance Co. wanted an additional premium and the parent objected on the basis that it was discriminatory and, therefore, improper as being against the Human Rights Code. The parents' objection was that the additional premium was based on family status and was discriminatory.

Mr. Justice Montgomery, speaking for the Divisional Court, wrote at page 800:

"I am of the view that the complaint does not raise the family status ground of discrimination. It is not the parent and child relationship that causes the increase in premiums. Rather, it is the fact that the occasional driver is under 25 years of age. All parents are treated identically with respect to the rates of occasional drivers."

In my opinion, in the case at bar, Mrs. Salmon's child cannot occupy the unit in this Condominium Corporation because of the child's age and not because of the fact that it is her child as opposed to a stranger.

Therefore, in the result, an order will go requiring the respondents to comply with Section 35 of the Declaration of Metropolitan Toronto Condominium Corporation Number 624. There will be an injunction as requested in paragraph (c). I will also make an order abridging the time for service of this notice of application.

The reason I am making that order is because the Condominium Corporation only learned of the fact that Mrs. Salmon had a 13 year old child on January the 21st, and the application had to be dealt with today because, I am told by counsel for Mr. and Mrs. Ramdial, the solicitor acting for Mrs. Salmon would not consent to a postponement or a further postponement of the closing of the transaction.

If it had been possible to obtain a postponement of the closing of the transaction, I would have adjourned this hearing so as to provide an opportunity to have counsel for the Human Rights Commission appear and make submissions, but the application had to be dealt with today.

I will endorse the application record, order to go in terms of (a), (b) and (c).

I am sorry for the respondents and I appreciate that this is difficult for them but they are, after all, the authors of their own misfortune. They knew the provisions of the declaration with respect to adult occupancy and they chose to either disregard or to run the risks of an adverse judicial decision.

What about costs?

-- (Reporter's Note: Submissions made to the Court by counsel, re: costs, reported but not transcribed.)

THE COURT: It would appear to me from Section 35 of the declaration, that somewhere it should be provided that any agreement of purchase and sale or agreement to lease should be submitted to the Board of Directors for approval.

MR. ROSEN: Excuse me, sir. That was done in this case but it was only done last week.

THE COURT: Well, is it not supposed to be submitted for approval in a reasonably prompt manner?

MRS. HARRIS: Section 35 provides that it be within 15 days of receipt.

THE COURT: Of their receipt; I think that is the Board of Directors.

MRS. HARRIS: Yes, you're right. You're right.

-- (Reporter's Note: Further discussion between the Court and counsel, reported but not transcribed.)

THE COURT: Mr. and Mrs. Ramdial were unable to advertise in the papers that the building was for adult occupancy. They were advised by the Human Rights Commission that such a provision was contrary to the Human Rights Code.

In my opinion, they would clearly have been well advised to consult with the Directors of the Condominium Corporation before agreeing to sell their penthouse to a lady with a child under 16 years of age.

However, they were not acting in a completely irrational or unreasonable fashion after having been advised by the Human Rights Commission and after having been refused by the newspapers. This is a matter of first impression. This precise issue has apparently not come before the Courts prior to this.

In addition to all of that, Mr. and Mrs. Ramdial are clearly going to suffer a loss; if only by virtue of the fact that they are now the proud owners of two units.

I think, in fairness, there should be no costs.

Now, Mr. Rosen, in future you will have a precedent to which you can refer your clients.

MR. ROSEN: Thank you, sir.

MRS. HARRIS: Thank you, Your Honour.

THE COURT: You're welcome.

CERTIFIED CORRECT

SUSAN OLUBICK

OFFICIAL COURT REPORTER.

BROOKE J.A. (orally):— We are all of the view that the motion to quash must succeed.

We think any issue between the parties is moot. We are also persuaded that the record before the District Court judge is so deficient and incomplete that it would be wrong to let this appeal proceed, based as it is on five issues not raised before the District Court judge. These issues include important questions as to the constitutional validity of some sections of the Ontario Human Rights Code, which issues we think it likely will find their way here on a proper record one day. The record is deficient and incomplete because the appellant did not appear and make submissions to the District Court judge and, further, when the judge expressed the view that it would be best to adjourn the proceedings to hear from counsel for the Ontario Human Rights Commission, the parties refused to adjourn and insisted on proceeding rather than defer the closing of the transaction.

In the circumstances then, the motion succeeds, the appeal is quashed and the respondent, who is the appellant, will pay the costs.

BROOKE J.A.

LACOURCIERE J.A.

KREVER J.A.

CBR# 050

Boychuk v. Essex Condominium Corp. No. 2

Between

Norman Boychuk, Diane Boychuk, Robert Clark, Sally Clark, Clay Hackett, Myrna Hackett, Ronald Doherty, Cheryl Doherty and Rose Marie Rankin, Plaintiffs, and
Essex Condominium Corporation No. 2, Defendant

Ontario District Court - Essex County
Windsor, Ontario
Zalev D.C.J.

March 16, 1987

M.W. Shulgan, for the Plaintiffs.

R.J. Reynolds, for the Defendants.

ZALEV D.C.J.:— In this action the Plaintiffs claim a declaration that the work contracted by the Defendant for the purpose of roof replacements required the consent of 80 percent of owners of units in the Defendant as prescribed by s. 38 of the Condominium Act; a declaration that the requisite consent of the owners of units in the Defendant was not obtained before contracting the said work; a declaration that assessments purported to have been levied under the Condominium Act by the Defendant against the Plaintiffs' units are invalid; a declaration that the liens registered on behalf of the Defendant against the Plaintiffs' units as a result of the Plaintiffs' failure to pay the said assessment are invalid; and an order directing that the said liens be vacated.

The Defendant counter-claims for a declaration that the assessments levied by the Defendant against the Plaintiffs' units are valid; a declaration that the lien registered on behalf of the Defendant against the units owned by the Plaintiffs are valid; against each of the Plaintiffs the sum of \$2,000.00 and prejudgment interest on account of common expenses.

It was not necessary to hear any evidence, the parties having filed an agreed statement of fact. Those facts are as follows:

1. The Defendant is a condominium corporation duly constituted under the Condominium Act, R.S.O. 1980, c. 84. It consists of 125 residential condominium units and common elements apportioned amongst 23 buildings, each building contained under a common roof, as follows:

4 Buildings of 4 Units
8 Buildings of 5 Units
8 Buildings of 6 Units
3 Buildings of 7 Units

2. The Plaintiffs are the owners of the following units in the Defendant:

NAME UNIT

Norman Boychuk & Diane Boychuk 81
Robert Clark & Sally Clark 64
Clay Hackett & Myrna Hackett 65
Ronald Doherty & Cheryl Doherty 3
Rose Marie Rankin 33

3. Since approximately 1982 numerous and repeated problems have been experienced with the roof of each of the said buildings. Intermittent repairs have been made to the roofs on an "as needed" basis. It then became evident that all roofs required replacement.

4. During 1984 the Board of Directors of the Defendant addressed the necessity to resolve the continuing problems with the roofs of the condominium premises. A number of consultants were hired to conduct investigations into the nature of the roof problems and a number of contractors were invited to submit tenders setting forth the costs to be incurred to resolve the problems. The tenders presented to the Defendant ranged from approximately \$250,000.00 to approximately \$790,000.00. After consideration of all tenders a contract was awarded to Gauthier Roofing who was the contractor that submitted the lowest tender.

5. The Board of Directors of the Defendant conducted general meetings on a regular basis to keep the owners of units in the condominium corporation advised of the results of their ongoing investigation into this matter.

6. The Board of Directors of the Defendant conducted a general meeting of unit owners on August 30, 1984.

7. The reason for the meeting was to advise of a proposal under consideration intended to resolve the roof problems whether roof repairs would be effected.

8. The names of unit owners in attendance at that meeting were not recorded. The minutes of the said meeting reflect that owners of approximately 60 units out of the 125 were present and that of that number approximately 80% were in favour of effecting roof repairs under a plan which would provide all roofs to be repaired during the Fall of 1984. At the conclusion of the August 30, 1984 meeting the individuals in attendance were advised that another meeting would be conducted on September 11, 1984 and a notice to that effect dated September 5, 1984 was prepared.

9. A general meeting of the Defendants Corporation was conducted on September 11, 1984 after notice. Again no record was maintained of the names of owners in attendance at that meeting however the minutes of the meeting reflect that a show of hands indicated that the owners of 58 units of the 125 units were represented. Therefore, the meeting was attended by less than 50% of the unit owners. The purpose was to consider complete arrangements for roof work. It was said by Marnie Sadler, resident, that approximately 56 unit owners had expressed a willingness to pay an amount for roof work as noted by signatures recorded to that effect. At that meeting motions to the following effect were passed:

- (a) the Defendant would open a special account to receive funds for roof repairs;
- (b) owners were requested to pay \$1,000.00 into the account prior to October 15, 1984 and \$1,000.00 prior to November 15, 1984.

10. In addition to the above mentioned there were General Meetings conducted July 24 and August 7, 1984 and a Board meeting conducted September 11, 1984. There are no other Minutes of meetings conducted as meetings of the Board of Directors of the Defendant or as General Meetings of owners of units in the Defendant Corporation to reflect motions being passed to relate to the following:

- (a) to effect roof repairs;
- (b) to authorize a representative of the Condominium Corporation to contract with a roofing contractor to effect repairs;
- (c) to pass a by-law, resolution or other similar enactment to levy a special assessment for common fees or increase common fees.

11. The roof of each building is part of the common elements of the Defendant.

12. The Plaintiffs did not remit payment of the sum of \$2,000.00 into the account opened by the Defendant for roof work however a payment was made on behalf of the Plaintiffs, Hackett, by their mortgagee.

13. At the time the work was contracted the Defendant's reserve fund amounted to approximately \$50,000.00.

14. The Defendant registered liens against the units owned by each of the Plaintiffs on January 11, 1985 claiming that each of the Plaintiffs were in default of making payment of the \$2,000.00 "special assessment" levied by the Defendant.

15. The work has been completed by Gauthier Roofing and it has been paid.

16. All owners of units other than the Plaintiffs have paid the assessment.

17. The extracts from the Defendant's Declaration and By-Laws are validly enacted and the Minutes of meetings conducted as General Meetings of the owners or as meetings of the Board of Directors of the Defendant accurately reflect the nature of the business said to be conducted at such meetings.

The parties have also filed an agreed bundle of documents (Exhibit 2) which includes the declaration, By-law No. 1, Minutes of Meetings of Directors and Owners, various notices, and the contract with Gauthier Roofing.

The first question to be decided is this: Did the Board have the authority to enter into the contract with Gauthier Roofing and to pay Gauthier Roofing the sum due to it on completion of the work?

It is submitted by the Plaintiffs that such work (to use a neutral term) constituted "substantial addition, alteration, improvement to or renovation of the common elements" within the meaning of s. 38(1) of the Condominium Act, and such was not authorized by a vote of 80% of the Unit owners as required by that section.

The Defendant submits that this work was ordinary maintenance or repair effected under the Defendant's duty to maintain the common elements under s. 41(3) of the Act. Counsel referred to two cases in which s. 38(1) was considered.

In *Dyer v. York Condominium Corporation No. 274*, 14 R.P.R. 154, Hollingworth J., held that the expenditure of \$23,800.00 for caulking to prevent water seeping into the building which caused damage to the floors and walls of the individual units was not within s. 38(1). It was held that this was not a substantial addition, alteration, or improvement, but was maintenance within the meaning of s. 41. The Court adopted the meaning of maintenance in s. 41(3) as set out in Webster's New World Dictionary: to keep up, or to keep in a certain condition, e.g. good repair, to preserve.

In *Ronita Properties Limited, v. York Condominium Corporation No. 320* (January 27, 1981, unreported) Cornish C.C.J., considered the expenditure of \$140,000.00 to repair leaking roofs. There were 70 units in the Condominium. The Honourable Judge Cornish held that this was not within s. 38(1).

In considering the meaning to be ascribed to the words in the Act, I bear in mind two fundamental principles. The first is s. 10 of the Interpretation Act, and the second is set out in *Driedger, the Construction of Statutes*, p. 67:

"...The words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act and the intention of Parliament."

In reviewing the whole Act I find a number of different expressions used in relation to work done on or to the Condominium property, and these are:

"Repair" - s. 4(3)(e) and 42(1)

"Maintain" - s. 4(3)(e), s. 41(1), and s. 41(3)

"Maintenance" - s. 28(1)(e)

"Major Repair" - s. 36(1)
"Replacement" - s. 36(1)
"Addition" - s. 38(1)
"Alteration" - s. 38(1)
"Improvement" - s. 38(1)
"Renovation" - s. 38(1)
"Repair after damage" - s. 41(1)
"Repair of improvements" - s. 41(1)

I have also reviewed a great many cases in which all of these terms have been considered by Courts in England and across Canada in cases involving settled estates, real property assessment, landlord and tenant, and municipal By-laws. I do not think it necessary to cite them. They are of assistance in a general way only in showing how the Courts have approached the problem of interpreting words which in some contexts may be synonymous and often overlapping. I proceed on the basis that what is "major" and what is "substantial" are questions of fact to be decided on the evidence in each case. In determining whether or not the work done on or to the property is "repair", "maintenance", "addition", "alteration", etc., it is necessary to look at the state of the property before the work was done, consider the work done as a whole, and compare that with the result.

From the date of the declaration and By-law No. 1, I infer that these buildings were erected about the year 1970. The roof problems are described in some detail in the Minutes of various meetings in 1983 and 1984. I do not think it necessary to set out an exhaustive definition of the key words in s. 38(1) because I have concluded that what was done here fits within the general concept of maintenance. The words most aptly describing the work are "major repair and replacement" of common elements in s. 36(1). S. 36(2) requires the Corporation to set up one or more reserve funds. S. 36(1) defines a reserve fund as a fund set up by the Condominium Corporation for "major repairs and replacement of common elements... including...roofs...." Dictionary definitions support the conclusion that maintenance includes repair.

The words "addition" and "alteration" in s. 36(1) connote something added to the structure or some changes in the structure. "Improvement" carries with it the idea of betterment of an existing facility or enhancement in value, not merely replacement of something which was already there and worn out. Whatever "renovation" may be, in my view it does not include replacement of a leaky roof.

I draw some support from my approach from the Judgment of our Court of Appeal in York Condominium Corporation No. 59 vs. York Condominium Corporation No. 87, 42 O.R. (2d) (337). While it does not deal directly with the words of the Act, the Judgment of Cory J.A., at page 340 sets out what I regard to be a proper approach to the issues in this case:

"There is thus now, as there was in 1972, a statutory basis for the declaration to provide what are the common expenses, the occupation of common elements and an allocation of the obligation to repair them. This is just what the declarations in question did in this case. As well, s. 41 of the Act imposes upon Corporations an obligation to repair after damage and to maintain common elements.

As far as possible and with due regard for the particular mutual covenants of the individual owners, the Courts should bring a broad and equitable approach to the resolution of their problems."

And at page 341:

"Although this case does not deal with individual Condominium owners within a single Condominium, it is concerned with the relationship between two Condominium Corporations which form integral parts of a composite plan for Condominium living. The development plan contemplated the mutual enjoyment and use of the pool by the occupants of both Condominium Corporations. The mutual enjoyment of a facility calls for a mutual obligation of repair.

The concept of repair in such a situation should not be approached in a narrow legalistic manner. Rather, the Court should take into account a number of considerations. They may include the relationship of the parties, the wording of their contractual obligations, the nature of the total development, the total replacement cost of the facility to be repaired, the nature of the work required to effect the repairs, the facility to be repaired and the benefit which may be acquired by all parties if the repairs are effected compared to the detriment which might be occasioned by the failure to undertake the repairs. All pertinent factors should be taken into account to achieve as fair and equitable a result as possible.

The Declarations of the parties make reference to the 'maintenance' and 'repair' of the recreational facility. The Shorter Oxford English Dictionary defines these words in part as follows:

'Repair' - to restore to good condition renewal or replacement of decayed or damaged parts or by refixing what has given away; to mend;

'Maintain' to keep in repair;

There is nothing in these definitions that would restrict or narrow their meaning as contended by the Appellant. Rather, giving these words their original meaning, they are quite sufficient to encompass the repairs required to the roof of the pool. There is no reason why the Appellant should not be obligated to pay its share for the 'renewal or replacement of the decayed or damaged parts'."

Having concluded that s. 38 does not apply to this case, I turn to the second question: Was the assessment of \$2,000.00 per unit validly enacted?

The Plaintiffs' submit that the provisions of the Act and the Corporations procedural By-law were not followed and that the purported assessment cannot be enforced against the Plaintiffs. The Plaintiffs' rely on Article 6.05 of By-law No. 1 which provides:

"The members, by a vote of members who own sixty-six and two-thirds percentage of the common elements, may make By-laws:

(h) Regulating the Assessment and collection of contributions toward common expenses."

The Plaintiffs submit that proper notices of meetings were never sent to the owners, a proper quorum of owners was not present at any meeting of the owners when this matter was discussed, no vote was ever taken, and no By-law was ever passed authorizing such an assessment. Further, the signing of the Gauthier Roofing contract was never properly authorized by the Board.

It is to be noted that the Declaration and By-law No. 1 were drafted in accordance with the Act as it stood in 1970. Substantial amendments were made to the Act and were in force at the time the Board and owners were considering the roof problems in 1983 and 1984. In my view it was then open to the Board of Directors to pass a By-law under s. 28(h) of the Act which authorizes the Board to pass By-laws to govern the assessment and collection of contributions towards the common expenses. S. 28(2) provides that such a By-law is not effective until it is confirmed by the owners who own not less than fifty one percent of the Units at a meeting duly called for that purpose.

At a meeting of the Board on August 23, 1984 a motion was made and carried "to ask each unit owner to pay \$2,000.00 and to use the \$50,000.00 reserve fund to effect all above discussed roof repairs." The discussion immediately preceding concerned with the work to be done and which eventually was done by Gauthier Roofing. Obviously, this appears to be a mere resolution and not a By-law.

Meetings of the owners were held on August 30, 1984 and September 11, 1984 at which time the roof work and the assessment were discussed. I am prepared to assume that sufficient notice of these meetings was not given. It is clear that there was no confirmation within s. 28(2) by the Unit owners.

With respect to the contract with Gauthier Roofing, the Board dealt with that matter at its meeting on August 23, 1984. A motion was made and carried as follows:

"Contracts for roofs be awarded to Gauthier Roofing to be done in accordance with the specifications drawn up by Glenn Lemire and subject to negotiation of price pending actual number of Units per block being reroofed."

At the Board meeting of September 11, 1984 a motion was made and carried that "we contacted Gauthier Roofing and instruct them to begin the Romero block immediately."

It should be borne in mind that it was necessary for the Board to act quickly to have the work done before bad weather set in. The contractor's price was dependant on doing all units together and not piecemeal. Further, it has to be remembered that the Board members are not lawyers. There was no suggestion that they were acting in bad faith. In these circumstances what was done should be accepted if there was sufficient compliance with the requirements of the Act and By-law. Given the relationship of the parties, this is not a case for a narrow technical analysis. I am satisfied that the motions passed by the Board are sufficient authorization for execution of the contract with Gauthier Roofing on September 15, 1984. I also conclude that failure to call the Board's Assessment resolution a By-law is immaterial if there was proper confirmation of it by the owners.

Article 6.07 of By-law No. 1 provides that any member may at any time waive notice of any meeting and may ratify, approve and confirm any and all proceedings taken or had thereat. In my view this supplements the Act and is not void for being inconsistent with or repugnant to the Act. It is agreed that ninety six percent of the owners have paid the \$2,000.00 Assessment for the roof work. I can think of no more emphatic way of voting in favour of the Assessment. I find that the Assessment was validly passed. Even if this work was properly characterized as being within s. 38(1), this would be a complete answer to the Plaintiffs' submissions. The action must therefore be dismissed.

It follows that the liens for such Assessment were validly registered against the title to the Plaintiffs' Units and the Defendant is entitled to the relief claimed in the counterclaim.

Costs will follow the event unless counsel wish to make submissions with respect to costs, in which case I may be spoken to.

ZALEV D.C.J.

CBR# 369

Re York Condominium Corp. No. 528 and Ontario New Home
Warranty Program

60 O.R. (2d) 662

ONTARIO
HIGH COURT OF JUSTICE
DIVISIONAL COURT
GRIFFITHS, EBERLE AND ROSENBERG JJ.

22ND JUNE 1987.

The appellant notified the Ontario New Home Warranty Program within a year after its warranty took effect of water penetration and efflorescence relating to its building. The cause of the problem and appropriate method of correcting the defects were not found until after the end of the year-long limitation period. The programme denied liability on the ground that the claim was barred by s. 13(4) of the Ontario New Homes Warranties Plan Act, R.S.O. 1980, c. 350.

Statutes referred to

Ministry of Consumer and Commercial Relations Act, R.S.O. 1980, c. 274, s. 11(5)

Ontario New Home Warranties Plan Act, R.S.O. 1980, c. 350, ss. 13(1), (4), 14(1), 15, 16, 23(1)(g)

Rules and regulations referred to

R.R.O. 1980, Reg. 726 (Ontario New Home Warranties Plan Act), s. 4

APPEAL from a decision of the Commercial Registration Appeal Tribunal holding that certain claims under the Ontario New Homes Warranty Plan were statute-barred.

J. Hahn, for appellant.

B. Campbell, for respondent.

The judgment of the court was delivered by

ROSENBERG J.:—

Nature of application

The appellant appeals to this court pursuant to s. 11 of the Ministry of Consumer and Commercial Relations Act, R.S.O. 1980, c. 274, from the decision of the Commercial Registration Appeal Tribunal (the "Tribunal") rendered October 21, 1985. Section 11(5) of the said Act reads as follows:

11(5) An appeal under this section may be made on questions of law or fact or both and the court may exercise all the powers of the Tribunal, and for such purpose the court may substitute its opinion for that of the Registrar or of the Tribunal, or the court may refer the matter back to the Tribunal for rehearing, in whole or in part, in accordance with such directions as the court considers proper.

Background

The appellant is a condominium corporation created under the Condominium Act, R.S.O. 1980, c. 84, in connection with a 40-unit condominium apartment project. The appellant alleges certain construction deficiencies in the building of the condominium project by the developer. The developer is no longer available to pay any damages that the condominium corporation may be entitled to recover and, accordingly, the condominium corporation seeks to recover the maximum amount available from the fund established under the Ontario New Home Warranties Plan Act, R.S.O. 1980, c. 350 (the "Act"). The said Act provides the following:

13(1) Every vendor of a home warrants to the owner,

(a) that the home,

(i) is constructed in a workmanlike manner and is free from defects in material,

(ii) is fit for habitation, and

(iii) is constructed in accordance with the Ontario Building Code;

.....

(4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.

.....

15. For the purposes of sections 13 and 14, a condominium corporation shall be deemed to be the owner of the common elements of the condominium and the warranties take effect on the date of the registration of the declaration and description.

(Emphasis added.)

Section 14 provides:

14(1) Where,

(a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

(b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or

(c) the owner suffers damage because of a major structural defect as defined in the regulations for the purposes of section 13, and the claim is made within four years after the warranty expires or such longer time under such conditions as are prescribed,

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

(Emphasis added.)

Section 23(1)(g) provides:

23(1) The Corporation may make by-laws,

.....

(g) providing for the establishment and maintenance of the guarantee fund and governing procedures for claiming and determining claims for compensation from the guarantee fund;

Under R.R.O. 1980, Reg. 726, authorized by s. 23(1) of the Act, the corporation provided in s. 4 thereof:

4(1) Each person with a claim under the Plan shall give written notice of the claim to the Corporation.

(2) Forthwith upon receipt by the Corporation of such notice, the Corporation shall furnish the claimant with such forms as it or the insurers may reasonably require for the purpose of establishing and verifying the claimant's loss.

(3) If the Corporation fails to furnish such forms, the claimant is entitled to make his claim by giving written notice to the Corporation setting forth in reasonable detail information relating to the claim.

(4) Promptly after receipt by the Corporation of all information reasonably required to be furnished to it in respect of the claim and after determination of any disputes between the claimant and the vendor as to the liability of the vendor, the Corporation shall serve notice of its decision under section 14 of the Act.

(Emphasis added.)

The major issue is whether a claim of the appellant is barred by virtue of s. 13(4) of the Act as a result of its not having been made within one year after the registration of the condominium. In its decision, the Tribunal refused to order the Ontario New Home Warranty Program to pay to the appellant \$762,287.04 plus interest, or in the alternative, to order that the respondent repair the construction deficiencies.

The basis for their refusal was that the claims were not made within the one-year limitation period and further, that the respondents were not estopped from raising the limitation period as a result of responsibilities that they had assumed and letters that they had written after the expiration of the limitation period.

Facts

The declaration and description of the appellant were registered on August 13, 1980. Accordingly, the limitation period terminated at midnight on August 12, 1981.

The Condominium Act requires that the building be substantially completed and that there be a certificate of the architect to that effect at the time that the declaration is registered. Accordingly, it can be assumed that all major construction had been completed as of August 13, 1980.

At the time of the registration of the declaration creating the condominium corporation and subjecting the project to the Condominium Act, the developer was, as the developer invariably is, the owner of all of the units in the condominium project and, accordingly, in control of the board of the condominium. The practical effect of this is that the limitation period starts to run at a time when no claims will be made because the developer would at the outset be making claims against itself. The developer is required to eventually turn over the affairs of the corporation to an independent board elected by the unit owners. The timing of this will depend on how quickly units are sold. Until there is an independent board created, the only practical way in which notice

can be given of defects in construction or breaches of the warranties of the builder is through the complaints of individual unit owners. Even after the independent board has been elected, it will take some time for them to become familiar with the management process and to determine their obligations under the various statutes and to make claims, if they are appropriate, under the Act. This is of some significance since one of the issues before us is whether the appellant's obligation of notice within a one-year period is fulfilled if the symptoms of problems are the subject of written notice to the respondent or whether it is required that the details of the actual defects giving rise to the symptoms and even the method of curing those defects must be contained in the notice.

By January 23, 1981, the new condominium board was submitting deficiency lists to the developer with copies to the respondent. The appellant refers to these deficiencies as water penetration and efflorescence. These lists were submitted in writing and complied with the regulations in that regard. However, the wording used was not specific. The following complaints were made in writing during the one-year period that could refer to the efflorescence, water penetration and the wall defects:

- (1) Outside walls to clean, remove stain
- (2) Grouting to repair in places
- (3) Retaining wall beside garage entrance, water leak between sections.
- (4) Leak through ceiling (when raining) on to ramp just inside garage door
- (5) Ceiling leak at Bay-41/42
- (6) Basement:

Ceiling tiles damaged by water. Seal leaks and replace tiles.

- (7) Fifth Floor:

Ceiling tiles damaged by water. Seal leaks, replace tiles.

- (8) Stain on outside walls to be removed.

Note: In addition there are a number of places in the garage and basement where leaks in foundation and floors are suspected at times of heavy rain or spring thaw.

- (9) Grouting to be inspected and repaired as necessary.
- (10) Leak at garage entrance (ceiling) to be located and sealed.
- (11) Leaks in garage ceiling at bays 32, 35, 41 and 42 to be sealed.
- (12) Leaks in wall at NW, SW and SE corners of garage to be sealed.
- (13) Basement:

Replace tiles damages by condensation.

- (14) Fifth Floor:

Replace ceiling tiles damaged by condensation.

- (15) General:

Stucco has fallen off in some places.

On February 17, 1981, one of the tenants wrote with regard to Unit 303: "I write to advise you that water damage has occurred in the above Condominium." The writer, however, expressed an opinion as to the cause of the water damage, as follows: "The water damage can be found in the Dining Room ceiling and is caused by faulty workmanship on or around the balcony pertaining to the 4th Floor Condominium (Condo 403)."

After the expiration of the warranty period, the respondent wrote to the developer on a number of occasions of which the following, extracted from some of their letters, are examples:

June 30, 1982

Once again the people of this condominium are experiencing water problems in their suites from areas that would appear to be associated with the balconies above. These complaints date back to February of 1981 and fall within the builder's first year warranty period, so it is incumbent upon your firm to perform such work as is necessary to avoid further water problems.

September 24, 1982

On September 16, 1982 an investigation was made by Construction Control Ltd. in regards to the water problems being experienced by the residents of the above condominium.

I was present during part of the time and observed the testing being done therefore, I concur with the finding of Construction Control.

One of the basic problems is the construction of the brickwork, the assembly of which is completely contrary to the Ontario Building Code regarding cavity wall construction, a cavity wall being any wall that has a space between the inner and outer wythe as is the case at 30 Flen Elm where the space between appears to be approximately 1 inch in the area observed. The Ontario Building Code, under section 4.4.5.14(1)-(3) states that "where the space is not filled, such walls shall conform to the requirements for cavity walls".

In this case the masonry is:

- (1) not parged on the back of the face wythe.
- (2) not vented to allow for dispersal of moisture entrapped between wythes.
- (3) there is no through wall flashings as required by the code.

There is also an absence of vapor barrier in some locations which again is contrary to the code.

The visual result of the existing conditions is the extreme efflorescence on the masonry and the ingress of water into areas of the building.

Further testing on a balcony slab indicates that water is penetrating at the recess in the slab which accommodates the insulation.

As these conditions were existing within the first year of the condominium's registration, and as they were noted to your firm and also to the New Home Warranty Program, it is, under the terms of your registration, the responsibility of your firm to properly make the necessary corrections to the matters at fault. Should you not do so then the New Home Warranty Program will assume your responsibility and proceed to rectify the situation where required. Should we be obliged to do this, your firm will be invoiced for all warranted work done by us, plus administrative costs (and interest where applicable), the recovery of which will be pursued by all legal means.

I would strongly suggest that a meeting be held with all interested parties within the next few days and that you call the writer upon receipt of this letter so that arrangements may be made. Should we not hear from you by the 30th, of September 1982 the New Home Warranty Program will have no choice but to act in this matter.

October 14, 1982

[Referring to the letter of September 24, 1982]

... In the letter, a copy of which is enclosed, I noted four problems with the walls of the building, all four of which contravene the Ontario Building Code. It is our mandate, that when a condominium addresses complaints to us, we order the builder to make corrections, or if he fails to do so the New Home Warranty Program assumes the warranty obligations.

November 16, 1982

Thank you for your attendance and co-operation at our meeting of the 15th.

It is my understanding that High City Holdings will start remedial work directly on two suites, 309 and 213.

- (1) Balconies -- The balcony floors will be thoroughly cleaned of all substances to allow for bonding of a traffic membrane. This membrane to be turned up at the wall and bonded to prohibit water from penetrating through the wall. Also holes will be drilled horizontally through the edge of the slab into the depression containing the insulation to allow for drainage of trapped moisture.
- (2) Walls -- The exterior brick walls of both suites will be drilled at the concrete floor slab line and wicks and/or pipes inserted at appropriate intervals to allow for venting of entrapped moisture. I would suggest these holes be sloped from below the slab line up into the cavity being careful to see that the pipe/wick is at the floor line when inserted and not above it.

It is also my understanding that these actions taken are to be monitored to judge their effectiveness and if it appears that the desired results are not obtained then further steps will be taken. Should it prove effective then High City Holdings will at the arrival of good weather next year institute a like action on all remaining masonry walls. Prompt attention need also be paid to correcting problems within the suites where damage has occurred.

Further work is to be done on the foundation walls at suites 106 and 206. The area to be dug up, waterproofed and caulked where necessary and the grade raised at the wall to increase drainage away from the building.

I would appreciate a reply to this letter informing me of your agreement to all points raised.

December 9, 1982

Further to my letter to Mr. Wurman of September 24, 1982, I must now add one more Code violation to the many that now exists regarding the masonry walls.

On December 7, 1982, a Borescope examination was done in five different locations on the building and while it showed cavities in all walls it also showed a new problem which is the total lack of ties between the inner and outer wythes.

This violates the Ontario Building Code Section 9.20.9.2. - 9.20.9.3.(1) and, if you will, 9.20.9.7.(1).

I am having a difficult time understanding how so many things could go wrong with a relatively simple, straightforward part of the construction.

I also spoke with Mr. Serota and informed him of the fact that the New Home Warranty program has now taken over the responsibility of your warranty in effecting the immediate repairs to suites 213 and 309. All costs will be invoiced to your firm with appropriate surcharges as described in my letter of December 2, 1982.

April 6, 1983

This letter is further to previous correspondence and your condominium corporation's dealings to date with Mr. Dade of this office.

I am informed by Mr. Dade that two matters of major concern to York Condominium Corporation No. 528 remain outstanding, those are; (1) water entry associated with the balcony slab/ wall junction detailing and (2) excessive efflorescence on the exterior masonry walls. It is our opinion that the rectification of these two matters should be attended to by High City Holdings Limited under the provisions of their warranty. To that end, I have today notified them that they are required to commence the repairs by May 2, 1983.

As you are aware, the Warranty Program has investigated the cause of both problems. Mr. Dade feels we are now sufficiently prepared to solve those matters and, should High City Holdings fail to honour their warranty obligations, please be assured that the Warranty Program will do so in their stead.

I trust if you have any questions regarding the Warranty Program's intentions you will contact either Mr. Dade or myself.

(Emphasis added.)

The matter was first heard by the respondent as required under s. 16 of the Act and in its decision, dated December 19, 1984, it dealt with the complaints as separate and unrelated and stated as follows:

In further review of the claims, it has become evident that there are five items to be considered and, for simplicities sake the Warranty Program has identified them as follows.

- 1) Efflorescence
- 2) Balcony slabs
- 3) Exterior wall construction
- 4) Vapour barriers
- 5) Vertical cracks in brickwork

With regard to item 1, the decision of the respondent was as follows:

(1) The problem of staining and efflorescence was reported to the Warranty Program prior to the first year anniversary of the registration of the condominium declaration and was addressed by us as a vendor's warranty matter. The masonry contractor had not in our opinion, properly cleaned the brickwork after construction as good building practice would require. In addition, some efflorescence had occurred. The Warranty Program arranged and paid for the proper cleaning of the brickwork during October 1983 at a cost of \$27,100.00.

(Emphasis added.) From this, it can be seen that the warranty programme treated the efflorescence as having been the subject of proper notice during the limitation period but treated it as the problem and not as the symptom of the problem. When this matter came before the Tribunal on June 10, 11, 12, 13, 14, 19 and 20, 1985, they found:

We feel free and confident to state at the outset that this building was extremely shoddily constructed in many ways and we can make that a finding of fact for whatever it is worth. For example, the manner in which the vapour barriers were installed (or not installed) in the walls of the building was, in a word, disgraceful. The fact that this appalling shoddiness was approved in the periodical inspection reports both by the architects and the municipal inspectors is very hard to view with other than the gravest misgivings as to either the competence or integrity of such functionaries in the discharge of their duties -- duties owed to parties whom we deem to have been injured or who will in the future be injured, namely, present and ultimate owners and occupants of the units and common elements of 30 Glen Elm Ave. As well, the fact that water has entered and may in the future enter many of the units causing expense, inconvenience and loss of property value to the owners and the occupants and their successors (as well as the condominium corporation itself in respect to any common element affected), is deplorable as are the stains and marks of efflorescence and other deficiencies referred to in evidence, particularly in the highly impressive expert presentation of Mr. Tony Alexander, P.Eng. who was called on behalf of the appellant and which must surely rank as one of the most informative and persuasive of its type preserved in the Tribunal's annals.

(Emphasis added.)

The evidence of Mr. Tony Alexander was as follows:

Q. Mr. Alexander, with regards to this condominium, in your opinion, what way, if any, does the defects in the vapour barrier contribute towards the deficiencies of water penetration and efflorescence.

A. I think that the incomplete vapour barrier allows warm humid air to escape to the cold side of the insulation. In winter time this creates a problem in that the water vapour in the warm air will condense on the cold side of the insulation and form lenses of ice that will subsequently melt during a period of warmer weather. The resulting water would tend to travel back into the building during times of the year when the ambient air temperature outside is above freezing point.

Then you have a problem -- the problem of the warm humid air travelling on through the wall with the water, under certain conditions of temperature -- exterior temperature, condensing in the exterior brick work and then it would evaporate to the outside as water taking with it soluble salts which would be deposited on the outside surface as efflorescence.

Q. Mr. Alexander, did the plans call for a vapour barrier?

A. Yes.

And further:

Q. Mr. Alexander, in your opinion, what is the solution to this cause of water penetration and efflorescence?

A. I think there is only one permanent solution and that is to restore the exterior masonry to the condition called for in the architectural and engineering drawings; namely, a solid masonry wall.

Q. Okay and now, to make it solid, what does that entail? Does that entail taking the bricks down and putting up the mortar and then putting bricks back up?

A. Well, it entails filling the cavity and it entails installing wall tiles if they are, indeed, missing. That has been established at some locations -- at the location of the tile. The only way that I can see to achieve that would be to take down the outer skin of brick and put it up again which is quite a horrendous undertaking.

Q. In terms of cost, what would it cost to do that?

A. We prepared an approximate cost estimate. I believe it was 1983 and at that time we came up with an approximate cost of about \$925,000.00. Today it would be higher than that.

Q. I'm sorry. Today it would be what?

A. I said, today it would be higher than that -- possibly, something in excess of \$1,000,000.00.

In a decision of December 18, 1984, the respondent dealt with the balcony leaks, as follows:

(2) Regarding balcony related leaks, this matter as well was reported in the few units during the first year of registration. It is the Warranty Program's understanding of the problem that it is caused by the fact that the design calls for the masonry walls to rest on the structural, concrete floor slabs with no provisions in the design to prevent water entering the wall assembly from the higher surface of the balcony topping and, thus into the adjoining suite. (This condition is also contributing to the problem of efflorescence explained in Item 1).

Of the 40 units making up York Condo Corp 528, we are aware of 4 units which have such water entry problems.

(Emphasis added.)

In essence, the respondent dismissed all of the claims, except the efflorescence, on the basis that they were not made within the limitation period and refused to deal with the efflorescence on the basis that it had paid for cleaning off of mortar droppings, efflorescence, etc., associated with the original construction. The respondent further held that any further efflorescence that may have occurred was not a result of substandard workmanship or defective material, did not render the building unfit for habitation and did not result from construction not in accordance with the Ontario Building Code. With regard to the individual unit leaks, they refused to deal with these on the grounds that "the leaks are to the best of our knowledge due again to the failure of the design to anticipate water entry or the effect of the balcony drainage pattern".

When the matter came before the Tribunal, the Tribunal in their reasons repeated much of the correspondence that I have set out and the majority decision stated:

It will be noted that some of those letters were written to the vendor and developer, High City Holdings Ltd. As has already been indicated it is our opinion that High City Holdings Ltd. was a rather villainous entity. Our opinion, further, is that Mr. Dade and Mr. Maling, by means of their letters, were endeavouring to persuade or otherwise induce High City Holdings Ltd. to somehow do its honourable duty by these unit holders and the condominium corporation upon whom it had fobbed or otherwise conveyed the results of its shoddy incursion into the construction field. The purpose of their letters to the abominable developer was without question an honourable purpose -- simply, and on behalf of the present appellant and the unit holders who are not parties to these proceedings, to induce it to remedy the perceived defects in its construction of this building. None of the interested parties to this appeal would have other than applauded their efforts, especially had they produced the results which they intended, that is, to have brought about the restoration or cure of the problems to which they referred. However, they did not because the developer either would not or could not undo its structural misdeeds before being overtaken by nemesis. It is not clear to us whether this took the form of bankruptcy, the absconing of its officers and principals, or just what, but, as appears, the High City entity has now, metaphorically speaking, disappeared from the screen.

This left Mr. Dade and Mr. Maling, like so many letter-writers before them, as well as their employer, the warranty programme, in an ostensibly compromised and certainly embarrassing position. This was vis-a-vis the appellant and the unhappy unit holders. Now the latter have taken the position that the warranty programme is bound by their assertions or undertakings (set forth in the letters) as to the liability of the warranty programme or by their assertions (in the letters) that the warranty, in the cases of these claimants, was viable.

We repeat, the indiscretions (as the warranty programme has no doubt come to see them) contained in the Dade/Maling letters were intended to effect a good purpose. Equity, were it to come to some involvement in this issue (which it does not) would smile or at least look without disfavour upon that innocent fact at the outset. The claimants, both known and suspected in this case, now pin their hopes to the notion that the warranty programme, having putatively accepted liability for these problems in that correspondence, and having done so in writing, is in fact liable. That notion, so logical and straight forward in the mind of any simple right-thinking non-specialist observer, especially one who perceived a substantial financial benefit from it, becomes significantly less so when passed through the mind of a lawyer. For those who have received the alleged advantage of a legal education will know that a warranty which was bestowed in the first instance by an Act of provincial Parliament and which, upon the terms upon which it was created, has already expired, terminated, lapsed and died, cannot be brought back to life by a mere letter, no matter how well-intentioned or indiscreet. Parliament decreed that the warranty would die at midnight at the end of its first year of existence. Once dead, only Parliament can bring that warranty back to life. Nothing, no matter how well-intentioned and foolish, written or stated by an employee, agent or official of the warranty programme can alter or impede the inevitable operation of an Act of the provincial legislature.

But equity presents a possible exception to that general rule. This is the doctrine of estoppel. Had the warranty programme, by the letters to which exception has been taken, somehow induced the applicant of any other claimants to sustain a detriment in reliance upon the assertion set out in the letters referred to, then, on the authority of the rule in *Re: Wentworth Condominium Corporation No. 45*, a ruling released by the Tribunal April 17, 1985, the respondent would have been estopped from relying on s. 15 of the Act and from maintaining that the warranty had expired when the claim was made.

But that is not the case in this instance. Neither the appellant nor any of the unit holders (who are not parties to this appeal) suffered any detriment springing from any reliance they may have placed upon the respondent's letters. This was because their rights under the warranty were already dead when the first of such letters went out. He who lies on the ground cannot fall. He who is already dead cannot be slain. He whose rights are already dead cannot sustain a detriment -- other than disappointment -- from the communication to him of erroneous information, no matter how well or ill-intentioned. Consequently, the Dade/Maling letters upon which the appellant has placed some reliance and which are no doubt of considerable embarrassment to the respondent are of no effect at law. And that is why this appeal in respect to the bulk of the claims to which it relates must fail.

We feel that it must go without saying that we have a very great deal of sympathy with the appellant and the unit holders who are involved in this unfortunate matter. We wish them well in whatever further proceedings they may decide to undertake elsewhere. We are very pleased to be able to allow them the relief referred to in respect of the cleaning or repairing of the efflorescence, referred to above, as well as to the crack to which mention has been made.

We agree that they are the victims of a "raw deal" from the vendor. However, we are unable to find that the Ontario New Home Warranties Plan Act, R.S.O. 1980, c. 350, save as to the extent mentioned, is available as a tool to help them.

The minority decision found, with regard to the balconies:

"Since this problem was admittedly communicated to the ONHWP within the first year of registration, the ONHWP has a responsibility to repair the problem balconies to prevent further water penetration."

In addition to the letters which have been referred to that were written by the respondents, the respondents actually attempted to correct the wall deficiencies by filling the wall cavity to turn the wall into a solid wall. These efforts, however, were unsuccessful.

The Tribunal may well have been correct in their view of the estoppel argument with regard to the letters. Even the wall repairs undertaken might not support a finding of estoppel. Because of my views on the limitation period itself, it is not necessary to determine this issue.

In addition to the officers of the condominium corporation and some of the unit owners, two experts testified at the hearing before the Tribunal. The condominium corporation called on Mr. Alexander on their behalf and the respondent's expert was Mr. Tibor Pal. Neither Mr. Ray Dade nor Mr. Robert Maling, who had written the various letters on behalf of the respondent testified with regard to why these letters were written or why they had undertaken certain work to correct the wall deficiencies. The Tribunal's findings with regard to the motives of Mr. Dade and Mr. Maling were apparently based on reasons given by the respondent in its initial decision and on argument presented by counsel at the hearing.

Credibility

Normally, in an appeal such as this, it is not essential to determine credibility since the findings with regard to credibility of the Tribunal who saw the witnesses and their demeanour would be preferable. However, as the Tribunal did not make findings of fact in a number of areas because of their decision on the limitation period, it is necessary to review the evidence and determine questions of credibility. In doing so, I have considered the Tribunal's remarks praising Mr. Alexander and their obvious respect for his opinion. The only question of credibility before the Tribunal and before us arises in comparing the evidence of Mr. Alexander and Mr. Pal. The Tribunal obviously preferred the evidence of Mr. Alexander and in effect confirmed his evidence by their findings with regard to the workmanship in the project. This is also shown by the chairman's attitude towards the evasive answers given Mr. Pal on many occasions. At one point after the chairman had directed a question to Mr. Pal, he commented on the answer as follows:

THE CHAIRMAN: That's an awfully evasive answer to my question. It, certainly, doesn't apply that you've been listening to it for focusing your attention on my question. I don't understand how a person can answer a simple question in such an evasive manner.

Having reviewed the evidence of Mr. Alexander and Mr. Pal, I accept the evidence of Mr. Alexander over that of Mr. Pal with regard to the problems in this building.

With regard to the finding by the respondents that the balcony problem was caused by improper design and not by faulty workmanship, I accept the evidence of Mr. Alexander, which was as follows:

Q. ... Do those failures to build that balcony as shown in the drawings, in any way, contribute to water penetration?

A. Well, I think that all of those factors contribute to water penetration.

Q. If the balconies had been built as shown on the drawings and had all the things that they should have, would there be any water penetration?

A. From the balconies, no.

Mr. Alexander estimated the cost of restoring all of the balconies to a sound condition to be slightly in excess of \$200,000.

Decision

During the one-year limitation period, the respondent knew that there was water penetration into the building that was complained of in a number of ways. In addition to the deficiency lists submitted, it was advised in writing by various unit owners that water was coming into their units. Since the balconies were common elements and the walls were also common elements, the water could only be entering through common elements. The condominium corporation for the purposes of this appeal, and in accordance with the relevant statutes, are deemed to be the owners of the common elements, although in actual fact the unit owners own the common elements as tenants in common.

The notices did not specify the cause of the water penetration or the efflorescence. The notices in some cases specified remedies, such as cleaning, and causes, such as leakage through the balcony above. Nevertheless, the notices were satisfactory so long as they indicated the symptoms of the problem which they did. While the language was not what might be desired with hindsight, the respondent knew well within the one-year limitation period that there was a problem of efflorescence on the walls and that there was water penetration into the structure in various places. There is no evidence that indicates whether or not the leakage in the garage is connected to the wall defects. However, the garage is part of the main structure and is protected by the same walls as the units but at a different level. Accordingly, water penetration into the garage, which is clearly indicated in some of the deficiency lists, is on the balance of probabilities a result of the same defects as the water leakage in other parts of the structure which is indicated by the efflorescence on the outside of the structure. The pictures of the efflorescence show that the efflorescence is at all levels of the structure, including the wall of the garage. It would be impractical and unfair to expect the unit owners and the condominium corporation to advise the respondents within the one-year period not only of the symptoms of the problem but the cause of the problem and the appropriate method of correcting the defects.

In actual practice as happened in this case, the symptoms were noted, extensive investigations were undertaken, including opening up the wall, some methods of repair were attempted, such as the adding of flashing to the point where the balconies attach to the structure. It is only through this type of inspection, consultation with experts, and trial and error with regard to attempted remedies, that the appropriate method of correcting the deficiencies can be determined.

Accordingly, I would set aside the decision of the Tribunal and in its place I would give judgment in favour of the appellant against the respondent for \$762,287.04, plus interest at 12% per annum from the date of the respondent's original decision in this matter, namely, October 21, 1985, at which time it should have granted the application and either performed the repairs or paid the balance of its guarantee, which is limited to \$20,000 per unit, less the amount that it had previously expended, which net amount is \$762,287.04. The appellant shall also have its costs of these proceedings.

Judgment accordingly.

CBR# 324

Suleck v. Cairns Homes Ltd.

Between

John A. Suleck and Clarissa M. Sulek, Plaintiffs, and Cairns Homes Limited and Nu-West Group Limited, Defendants

Action No. 8301-07360

Alberta Court of Queen's Bench
Judicial District of Calgary
Medhurst J.

March 20, 1986

G.T.H. Locke, Esq., for the Plaintiffs.

G.F. Scott, Esq., D.G. Samuelson, Esq., for the Defendants.

REASONS FOR JUDGMENT

MEDHURST J.:— In 1981 the defendant Cairns Homes Limited ("Cairns") owned two building lots each containing approximately five acres in the Woodlands district in south Calgary overlooking Fish Creek Provincial Park. The defendant company intended to develop these two lots by constructing a condominium complex of high quality units called Wood Ridge Estates. The first phase was to be developed on Lot 4 Block 1 Plan 7811621 consisting of 44 units. The second phase was to be built on completion of the first phase on Lot 3 Block 1 Plan 7811621 and was to consist of 36 units.

In the summer of 1981 the plaintiffs approached a sales agent for the defendant Cairns with a view to purchasing one of the units to be built in this complex. Plans were shown to the plaintiffs of the four different units Cairns proposed to construct as well as the site location of the units that were available for sale in Lot 4. The plaintiffs were interested in buying one of the units and in July and in October paid a deposit of \$100.00 as evidence of this interest. Prices however had not been set and the development had not advanced to the stage where an agreement could be made. Nevertheless during the fall the plaintiffs had several meetings with the sales agent for Cairns, Dale Burke, concerning a proposed purchase. The first phase of the development was being constructed on Lot 4. The plaintiffs inquired about the development to be built on Lot 3 which adjoins and lies to the east of Lot 4. They were told by Mr. Burke that it was going to be developed with units similar to those being constructed on Lot 4 and would be the second phase of the Wood Ridge Estates development. The plaintiffs at one point suggested that perhaps they should wait for the development on Lot 3 but were told that this development would not proceed until Lot 4 was completed and that the price for the units would likely be higher.

Early in 1981 the plaintiffs received from the sales agent a marketing package containing information about the phase I development as well as an offer to purchase form for completion. These documents were taken by the plaintiffs to a lawyer who reviewed them. Reference was made by the lawyer to the Lift Station and Utilities Joint User Agreement which had been executed by Cairns as the proposed developer of Lot 4 and Lot 3. This agreement provides for sharing the costs of providing sewage facilities by the owners of the two parcels. It contemplates a development on both lots. On February 9, 1981 the plaintiffs offered to purchase unit 24, for \$210,900.00 and this offer was accepted by the defendant Cairns. This agreement (Exhibit 1) contains clause 14(b) on page 7 and clause 22 on page 10 which clauses purport to limit the plaintiffs remedies to those set out in the agreement.

Over the next several months the construction of condominium unit 24 purchased by the plaintiffs was completed. In addition to the construction of the standard plan provided in the purchase the plaintiffs installed extra and further improvements at an additional cost of approximately \$20,000.00. The total cost of the unit with improvements and extras was \$230,900.00. The plaintiffs took possession in the summer of 1981 and received a transfer of title in October of that year.

In December of 1981 the plaintiffs learned that the defendant Cairns had sold Lot 3 which was to have been developed as the second phase of the project and that a multifamily development was to be constructed in its place. Evidence was presented by the defendant Cairns that there had been a significant change in the economy of Calgary in the summer of 1981. Interest rates had escalated and a large percentage of the units built on Lot 4 had not yet been sold. As a result, Mr. Grozell, President of Cairns stated that a decision was made not to proceed with the phase II development on Lot 3 and to sell the land.

Lot 3 together with the architects plans and the City Development Permits which the defendant Cairns had obtained were sold to B. F. Klassen Construction (Canada) Limited. This company then applied to the Development Appeal Board for permission to increase the density of the development on Lot 3. Although the plaintiffs and others appeared at the hearing in opposition to this change of zoning, the approval was given. Lot 3 was later developed with 88 multifamily townhouse units.

The plaintiffs contend that this change in the development of Lot 3 from 36 quality condominiums to 88 multifamily units with a higher density constitutes a misrepresentation of the agreement they had made and this gives rise to rescission. They now seek to rescind their agreement of purchase or in the alternative damages for breach of contract. The defendants deny that these was a misrepresentation of an agreement with respect to the property or any breach of contract.

It is the submission on behalf of the plaintiffs that they purchased a quality condominium in the centre of a complex that was to have 44 units in the first phase and 36 units in the second phase. The development was to be private and secluded for upper income families appealing to retired couples or couples without children. As a result of the failure of the defendant Cairns to develop Lot 3 as intended with condominiums of compatible size and quality as on Lot 4 the plaintiffs contend that their lifestyle has been changed and the value of their property has been reduced. In short, it is said that the area is not the district that was represented and the plaintiffs are now entitled to redress.

For the defendant Cairns it is said that such representation was not intended to be either a term of the contract or a collateral term. Furthermore the statements made, it is said, were true as to the future intentions of the contractor at the time they were made

and therefore there was no breach or misrepresentation. If such a representation did constitute a collateral agreement, it is said to be unenforceable by virtue of the Statute of Frauds.

Statements that are made during the course of negotiations leading to an agreement may or may not become terms of the contract. Parties do not always reduce all the terms of their agreement to writing. It is possible that an agreement may be comprised of partly written terms and partly oral terms. It is always necessary in distinguishing issues of this kind to determine whether the statements made became a part of the contractual relationship between the parties.

In the language of the House of Lords in *Heilbert, Symons & Co. v. Buckleton* [1913] A.C. 30 at 43 there must be an intention to warrant the truth of the fact asserted.

It was argued on behalf of the plaintiffs that the statement made by Dale Burke as to the intended development on Lot 3 was a representation that was intended to have contractual effect. Reference was made to a recent decision of the British Columbia Court of Appeal. *Gallen et al v. Butterley, Nunweiler and Allstate Grain Company Ltd.* 53 B.C.L.R. In this case the plaintiffs, experienced farmers, contracted with the defendant grain company to buy buckwheat seed and to sell the crop. An employee of the defendant company assured the plaintiffs that the seed was a fast growing crop and would smother weeds. The agreement contained a clause stating that the defendant "gives no warranty as to the productiveness or any other matter pertaining to the seed sold to the producer and will not in anyway be responsible for the crop." Weeds grew and destroyed the crop. The plaintiffs succeeded in an action for damages for breach of contract notwithstanding the clause in the agreement. Lambert, J.A. in writing the majority judgment said at p. 51:

It is not necessary to distinguish, in this case, between conditions, warranties and other contractual terms that may give rise to claims in damages. But what must be done in this case is to distinguish between a warranty, where the breach gives rise to a claim for damages, and a bare and innocent misrepresentation, which may give rise to a claim in equity for rescission, but does not give rise to a claim for damages.

The distinction does not turn on whether the recipient of the representation acted on it. The distinction turns on whether the representation became a part of the contractual relationship between the maker and the recipient. That, in turn, depends on the intention of the parties, as derived from objective evidence, including, but not limited to, evidence that tends to show whether the representation was intended to be acted upon and was in fact acted upon.

The majority of the court held that the oral representation as to the quality of the seed was intended to be acted upon and to form part of the contract and was a warranty. They held that the oral warranty was intended to prevail. Seaton, J.A. in a dissenting opinion stated that the evidence fell short of that which was required to warrant the accuracy of the statement.

The court as well considered the application of the parol evidence rule in deciding on the admissibility of the oral statement and its affect on the exclusion of liability clause in the agreement. This rule provides that subject to certain exceptions extrinsic evidence is not admissible to add to, subtract from, vary or contradict terms of a written document. The oral representation was admitted in this case on the basis that the document did not contain the whole agreement or that it was part of a separate collateral contract.

The basic determinant in deciding whether a representation is a term of a contract is the intention of the parties objectively assessed. Certain decisions are of assistance in providing guidance in this regard. In *Rickview Construction Co. Ltd. v. Raspa* (1976), 11 O.R. (2d) 377 (C.A.) the Court of Appeal of Ontario was concerned with the following clause in an agreement of purchase and sale of a vacant lot in a residential subdivision:

It is understood and agreed that this is a vacant lot and the purchaser has the privilege to erect a single family dwelling on plans approved by the borough of Etobicoke. Being a fully served lot. . .

The vendor's agent had assured the purchaser that "It is a fully serviced lot. You have everything that is required, sewers, sanitary sewers and everything". After completion the purchaser discovered that the lot was not fully serviced and brought an action for damages for breach of contract.

Arnup J.A. in delivering the judgment of the court considered whether the representation was a term of the contract and said:

In my view, the clause here in question is not a "mere representation". Such a representation, if made innocently (i.e., without fraud) gives no cause of action for damages after closing although it turns out to be untrue ...

To elevate a "mere representation" to the category of a "warranty" it is not enough to show that the statement, originally made orally, has been included in the written contract. Such inclusion simply puts it beyond dispute that the representation was made: *Waxman v. Yeandle*, [1953] 2 D.L.R. 475 at 478 (C.A.).

What is required to lead a Court to construe a provision as a warranty has been expressed in a number of ways. In *Waxman v. Yeandle*, at p. 479, Roach, J.A., said:

In order to succeed in this action the plaintiff would have to prove that the defendants contracted with him that the representation was true and that in the event of its turning out to be untrue they would indemnify him against any loss that might thereby be occasioned to him.

At pp. 479-80 he said:

I am unable to conclude from the language used in the paragraph in question that it was the intention that that paragraph should constitute a warranty. A person can be made liable if he warrants the truth of a representation, but it must be made abundantly clear that the warranty was in fact given.

In the Richview Construction case the court held that the written term in the contract was a warranty but that it subsequently merged in the conveyance or transfer of title and the purchasers were denied a remedy.

In *Carman Construction Ltd. v. C.P. Rail* [1982] 1 S.C.R. 958, a recent decision of the Supreme Court of Canada the following statement is found at p. 966:

A collateral warranty is a contract collateral to the primary agreement. Its existence must be established, as in the case of any other contract, by proof of an intention to contract. In *Anson's Law of Contract* (25th ed.), the following passage appears at p. 126:

But all of these factors are at best only secondary guides and they are subsidiary to the main test of contractual intention, that is, whether there is evidence of an intention by one or both parties that there should be contractual liability in respect of the accuracy of the statement. The question therefore is: On the totality of evidence, must the person making the statement be taken to have warranted its accuracy, i.e. promised to make it good? This overriding principle was laid down in *Heilbut, Symons & Co. v. Buckleton* [[1913] A.C. 30]:

The respondent telephoned the appellants' agent and said "I understand you are bringing out a rubber company". The reply was 'We are'. The respondent asked for a prospectus, and was told there were none available. He then asked 'if it was all right', and the agent replied 'We are bringing it out'. On the faith of this, the respondent bought shares which turned out to be of little value. The company was not accurately described as "a rubber company", although this assurance had not been given in bad faith. The respondent claimed damages for breach of contract.

The House of Lords held that no breach of contract had been committed. There had been merely a representation and no warranty. There was no intention on the part of either or both of the parties that there should be a contractual liability in respect of the accuracy of the statement.

The effect of a claim for rescission is to determine that the contract is one that ought not to be enforced. This is said to be on the basis that the purchasers received something entirely different from that which they agreed to buy. This was the basis used by the Alberta Court of Appeal in *Alessio v. Jovica Marchuk and Melton Real Estate Ltd.* [1974] 2 W.W.R. 126 in deciding that the failure of a vendor to advise the purchaser of a building lot that a building permit would not issue until a sewage pump was installed constituted an error in "in substantialibus".

In my view the representation alleged by the purchasers even if established as a term of the agreement, would not be sufficient to justify the rescission of the contract in the event of a breach. The representation when made was a statement of intention of something that was to happen in the future. There is no evidence that it was made for the purpose of deceiving the purchasers. At the time it was made it was a true statement of the defendant Cairns intention with respect to the property. The representation or statement of the defendant Cairns intention with respect to Lot 3 can only be considered as being a warranty or a collateral term. This determination involves considering the intention of the parties at the time on the basis of all the evidence presented. It cannot be said by the purchasers that they received something different from that which they agreed to buy. The dispute is not over the subject covered by the purchase. It concerns development on an adjoining lot.

In this instance the plaintiffs first approached the defendants' agent for the purpose of considering the purchase of a condominium that was to be built on Lot 4. This was designated as phase I of the Wood Ridge Estates development and the plaintiffs were told that 44 units would be constructed on this lot. The plaintiffs were shown the building plans and the site plans relating to Lot 4 which was then in the process of being developed. It was only in response to the plaintiffs question concerning Lot 3, which was to the east of Lot 4, that the agent, according to the plaintiffs, stated that Lot 3 was going to be developed with condominiums similar to those being constructed on Lot 4. The agent, Dale Burke, stated that it was his understanding that phase II was supposed to be developed in a way compatible with phase I but he had no recollection of discussing phase II with the plaintiffs. He said he may have shown the plaintiffs the colored drawings concerning the proposed phase II (Exhibit 27). Mrs. Sulek however stated that in discussing the possibility of buying a unit in phase II she was told that they would probably be more expensive and they would not be available until all units in phase I had been built. It is these statements that the plaintiffs now say constituted a contractual term of the agreement made to purchase a condominium unit from the defendant Cairns in phase I.

The subsequent written documents executed by the plaintiffs and by the defendant Cairns contain no reference to any representation concerning the development on Lot 3. There is no evidence that the matter was discussed further either by the plaintiffs with their solicitor when reviewing the documents or by the plaintiffs with any of the defendants' representatives prior to receiving title. One would have thought that if such a term was present to their minds that they would have been concerned about limitation clauses 14(b) and 22 found in the agreement for sale (Exhibit 1).

There is in my view an absence of any evidence to support the plaintiffs contention that statement by the sales agent was a term of the sales agreement or was itself a collateral agreement. The statement by Mr. Burke in answer to the plaintiffs' question was in reply to a request for information only concerning the proposed development on Lot 3. It was a statement made of the defendant Cairns intended use of the lot at that time. There is nothing to suggest that this statement induced the plaintiffs to enter into a contract to purchase a unit on Lot 4. The existence of a plan of something to be developed in the future does not amount, in my view, to be a representation that the land is to be developed in a particular way.

There is no evidence of an intention on the part of either or both of the parties that there would be contractual liability in respect of the accuracy of the statement made by Mr. Burke. In my view the statement was not intended to be a term of the contract nor was it intended as a term of any collateral contract.

After consideration of all the evidence I find that the plaintiffs have failed to establish the existence of a contractual agreement with respect to phase II as alleged and accordingly the plaintiffs' claim is dismissed.

If I had held that the defendants were liable under a breach of a term of an agreement it would have been necessary to assess the damages. In this regard the evidence presented by the two real estate appraisers who testified is in conflict.

Eric M. Johnson testified on behalf of the plaintiffs and concluded that although there had been an overall drop in value in the condominium market in Calgary during the period in question, the reduction in value of the Wood Ridge Estates property was considerably greater. This disproportionate drop, in his view, was due to the high density development of townhouses immediately adjacent to Wood Ridge Estates. Mr. Johnson estimated the value of the plaintiffs' property as of January 1986 to be \$125,000.00. This conclusion was reached on the basis of comparable sales of units in Wood Ridge Estates during 1985. In considering the city wide average drop of condominium properties in Calgary for the period, Mr. Johnson stated the plaintiffs' property should have had a value of \$148,000.00. This further drop of \$23,000.00 to the plaintiffs' property he said is the result of the "inharmonious" townhouse development on Lot 3.

Gary Atkinson who testified on behalf of the defendants, stated that in his opinion the value of the plaintiffs' property in October 1985 was \$145,000.00. Both appraisers used the direct sales comparison approach in arriving at the current value but Mr. Atkinson made certain adjustments to the amount of the sales and only compared units of the same type as the plaintiffs. He stated that the extra improvements added in the construction of the condominium in 1981, resulted in the unit having increased value today. He also stated that in his view the location of the plaintiffs' unit, which overlooks the Fish Creek Provincial Park, as well as having an excellent view of the mountains to the west, made it more valuable than the other units used in the comparisons. He did not think the location of the townhouse development on Lot 3 had any negative affect on the value of the development on Lot 4.

Mr. Johnson had discounted both the location of the plaintiffs' unit and the extra improvements as adding anything to the present value of the plaintiffs' unit. The question then is whether the drop in value of the plaintiffs' unit was more than normal and if so can it be attributed to the development of the higher density townhouses on Lot 3.

Valuation is always somewhat arbitrary but it seems to me from the evidence that the excellent location of the plaintiffs' unit and the added improvements should result in giving it greater value than other units used in the value comparison.

For these reasons I am not satisfied that the development on Lot 3 has resulted in a greater than normal drop in value of the units on Lot 4.

The plaintiffs' claim is dismissed with costs.

MEDHURST J.

CBR# 058

Carleton Condominium Corp. No. 106 et al. v. Mastercraft Development Corp. Ltd.

49 O.R. (2d) 638

ONTARIO
COURT OF APPEAL
ZUBER, MORDEN AND CORY JJ.A.

31ST JANUARY 1985.

The appellant was the developer and declarant of the respondent condominium corporation. Under the declaration the appellant was entitled to the exclusive use of those parking spaces not required to be assigned to individual unit owners and was entitled to assign its rights thereto to any unit owner. It sold the rights to some of them to individual unit owners and it transferred the remainder to its successor to whom it also sold the remaining units in the building. The respondent then brought an action to recover the amount received by the appellant for the sale of the parking spaces to the unit owners and the deemed sale thereof to its successor. It was successful at trial. On appeal, held, the appeal should be allowed.

The transfer of the parking spaces was not contrary to the Condominium Act, R.S.O. 1970, c. 77, while the appellant remained the owner of units in the condominium, because provision was made for it in the declaration. The effect of the declaration was to permit the appellant to deal with the surplus parking spaces and, hence, to retain the proceeds of sale.

York Condominium Corp. No. 167 et al. v. Newrey Holdings Ltd. et al. (1981), 32 O.R. (2d) 458, 122 D.L.R. (3d) 280; leave to appeal to S.C.C. refused O.R. and D.L.R. loc. cit., 38 N.R. 129n, distd

APPEAL from a judgment holding that the appellant developer was liable to the respondent condominium corporation for moneys paid for parking spaces.

Robert I. Steinberg, for appellant.

Robert J. Winogron, for respondents.

The judgment of the court was delivered by

CORY J.A.:— The issue on this appeal is whether the condominium corporation, Carleton Condominium Corporation ("Carleton") or the developer, Mastercraft Development Corporation Ltd. ("Mastercraft"), is entitled to the proceeds and the deemed proceeds from the sale of certain outdoor parking spaces which are part of a condominium development.

Factual background

Mastercraft was the developer and declarant of Carleton Condominium Corporations 84 and 106 located at 2650 and 2630 Southvale Cres., Ottawa. Corporation 84 is comprised of 85 units and was ready for occupancy in May of 1975. It was declared a condominium by registration of a declaration on July 29, 1976. Corporation 106 comprises 84 units, was ready for occupancy in May, 1976, and was declared a condominium by registration of a declaration on April 6, 1977. The two buildings were developed as a single project known as Hawthorne Ridge. They share certain common elements including an indoor parking garage with 169 spaces, that is, one space for each unit and an outdoor parking area with 54 spaces of which 20 were reserved by the declarations for visitor parking.

Mastercraft owned a substantial number of units in the project until May of 1981, and continued to act as manager of the project until July of 1981.

The registered declarations with regard to the common elements state that:

Subject to the provisions of the Act, this Declaration and the by-laws and any rules and regulations passed pursuant thereto, each owner has the full use, occupancy and enjoyment of the whole or any part of the common elements, except as herein otherwise provided.

They go on to provide for certain "exclusive use" common elements so that each owner of a unit would be entitled to the exclusive use of (a) his unit's balcony, (b) one indoor storage space to be allocated by the condominium corporation, and (c) one indoor parking space to be allocated by the condominium corporation with the right to assign his right to the exclusive use of the parking space to any other unit owner in the project.

Article III(2)(d) of the declaration has a particular significance in this appeal. It reads in part as follows:

The Declarant shall be entitled to the exclusive use of the balance of the parking spaces ... and shall be entitled to assign its rights to any of such parking spaces to any other unit owner or successor in title to any unit owner ...

Pursuant to individual agreements Mastercraft assigned its right to the exclusive use of 19 outdoor parking spaces to 19 individual unit owners of the complex. These agreements were made between May 25, 1975 and March 28, 1980. The first parking space was sold for a consideration of \$1,000 and the balance of \$1,500 each. In most instances the sales of the outdoor parking spaces were dealt with in the agreement of purchase and sale relating to a unit in the complex, but some were dealt with

by subsequent agreement. In each case Mastercraft did not purport to assign ownership of the parking space but rather assigned the right to its exclusive use to the purchaser. Some purchasers have since resold their rights to other unit owners.

By written agreements dated February 6, 1981, Mastercraft agreed to sell to R & R Western Estates Limited its remaining 49 units in Condominium 106 and 29 units in Condominium 84, together with the exclusive right to their 76 related indoor parking spaces. The total purchase price was \$3,237,000 which amounts to \$41,500 per unit. The agreements did not deal with the right to the exclusive use of the remaining 14 outdoor parking spaces. Those rights were subsequently conveyed by Mastercraft to the same purchaser for a consideration of \$1 by agreement made on the same date as the closing of the sale of the condominium units. Although it would appear that Mastercraft received only \$1 for these 14 parking spaces the trial judge fixed a value of \$1,500 for each of them. This valuation was, I believe, reasonable in light of the prices obtained by Mastercraft for the other outdoor parking spaces. The trial judge fixed the total value of the outdoor parking spaces at \$49,000, \$28,000 for the 19 spaces dealt with between May 25, 1975 and March 28, 1980, and an additional \$21,000 as the deemed value of the last 14 spaces, transferred on April 30, 1981. It is the disposition of this amount that constitutes the major issue between the parties. A rudimentary arithmetic calculation leads to the observation that one parking space is not accounted for. Both sides conceded it has disappeared but no one was particularly concerned with the loss. Perhaps it was an inevitable casualty of the rigorous Ottawa winters. In any event, it was conceded that the missing space need not concern the court.

In addition to the parking spaces there was a minor outstanding difference between Mastercraft and Carleton Condominium. At the trial Mastercraft was held liable to Carleton Condominium for \$1,367.68 being one-half the amount of certain condominium fees which it did not collect from two unit owners during the period of its management.

Issue as to failure to collect condominium fees

The trial judge found that there had been a failure to collect on behalf of Mastercraft but that Carleton Condominium had failed to properly mitigate its damage and thus he arrived at the figure of \$1,367.68 as being one-half the fees which the defendant had not collected.

There was evidence upon which the trial judge could find that Mastercraft failed to properly collect condominium fees during the time in which it was a unit manager. In addition there was evidence upon which the finding could be made that Carleton failed to properly mitigate its damages when it took over the management of the project. In these circumstances the conclusion that Mastercraft owed to Carleton Condominium the sum of \$1,367.68 should not be varied.

Issue as to Mastercraft's liability for \$49,000, the value of sales and deemed value of sales of rights to outdoor parking spaces

Reasons of the trial judge

The trial judge made careful reference to the term of the declarations which provided that the declarant was to be entitled to the exclusive use of the "balance" of the parking spaces set out earlier. The provisions of the Condominium Act, R.S.O. 1970, c. 77 (the Condominium Act, 1970) are of great importance in the resolution of this case.

Following a reference to the Condominium Act, 1970, particularly ss. 3(2) and 7, the trial judge stated:

It has been argued in this case that the interest of the declarant in the parking spaces is not a separation of ownership but really a right to assign the use of them. If you follow the argument of the defendant through to its logical conclusion, you could have the developer owning rights in the common elements but not owning any unit in the building. Thus, when all units were sold the developer would be left, as in this case had the transfer not been made to Rampart, with no units but many parking spaces. This would leave the developer with a permanent right in respect to the building. In other words, the developer could continue to rent parking spaces after it ceased to have other rights in the building. This seems to me not to be logical within the context of the Condominium Act.

The case of York Condominium Corp. No. 167 et al. v. Newrey Holdings Ltd. et al. (1981), a decision of the Ontario Court of Appeal, 32 O.R. (2d) 458, 122 D.L.R. (3d) 280, is binding upon me, unless it can be distinguished. In that case Madam Justice Wilson J.A. gave the judgment of the court. The case is very similar to the present case, except in that case, the declaration did not provide specifically that the declarant was entitled to the exclusive use of the balance of the parking spaces. As in the Newrey Holdings case, by signing an agreement of purchase and sale each unit purchaser, in the present case, would acquire in equity:

"(1) the unit described in this Agreement of Purchase and sale;

(2) the right to the exclusive use and possession of one parking space; and

(3) the right to the exclusive use and possession of such additional parking space as may be assigned to him."

Madam Justice Wilson said in her decision at p. 467 O.R., p. 289 D.L.R.:

"I do not think the position of the owner-developer remains unchanged after he starts to sell units. I think that at that point he has committed the character of the project to that of condominium under the Act and declaration. I think he has also placed himself in a fiduciary relationship to the unit purchasers not only with respect to their units but also with respect to the interests appurtenant thereto. He therefore holds the property in trust for the unit purchasers, present and prospective, and for the condominium corporation which will come into being upon registration of the declaration. I believe he is under a duty to protect the interests of all unit owners, present and prospective, and cannot put his own interests in conflict with theirs even although he himself continues to be an owner as long as any units remain unsold."

On the basis of that decision and because I do not think the condominium declaration can affect the legal rights of the parties as set out in the Act, there will be judgment for the plaintiffs in respect of the moneys paid to the defendant for the parking spaces. Now I should clarify that. I understand that the first parking space sold for \$1,000. Since it was the first one sold it is reasonable

that it be sold for a lesser amount. I would fix the amount at \$1,000 for that space and \$1,500 for the other parking spaces disposed of, including those sold to Ramparts.

It is to be observed that the decision of the trial judge was founded upon the reasons given by this court in *York Condominium Corp. No. 167 et al. v. Newrey Holdings Ltd. et al.* (1981), 32 O.R. (2d) 458, 122 D.L.R. (3d) 280. However, although factually similar, that case is distinguishable on the basis of the wording of the declaration now before the court compared to that of the declaration considered in that case. *York Condominium Corp. v. Newrey* recognized that the rights of the parties must be determined by reference to both the Act and the declaration. When those references are made in this case they appear to support the position of Mastercraft.

Reference to the Condominium Act, 1970

Condominium property is composed of the designated "units" and the "common elements". The Condominium Act, 1970, s. 1(1) (g), defines common interest in this way:

(g) "common interest" means the interest in the common elements appurtenant to a unit;

All the parking spaces, whether indoor or outdoor, fall within that definition. The owners of the units are tenants in common of the common elements: see s. 7(1) of the Condominium Act. Subject to the declaration and by-laws, each owner may make reasonable use of the common elements: see s. 7(4) of the Act. Section 7 of the Act provides in part:

7(1) The owners are tenants in common of the common elements.

(2) An undivided interest in the common elements is appurtenant to each unit.

(3) The proportions of the common interests are those expressed in the declaration.

(4) Subject to this Act, the declaration and the by-laws, each owner may make reasonable use of the common elements.

(5) The ownership of a unit shall not be separated from the ownership of the common interest, and any instrument that purports to separate the ownership of a unit from a common interest is void.

(6) Except as provided by this Act, the common elements shall not be partitioned or divided.

The Condominium Act by s. 3(2)(b) and (c) contemplates that common elements may be specified for the exclusive use of one or more unit owners and that such a specification may be set out in the declaration.

3(2) In addition to the matters mentioned in subsection 1, a declaration may contain,

.....

(b) a specification of any parts of the common elements that are to be used by the owners of one or more designated units and not by all the owners;

(c) provisions respecting the occupation and use of the units and common elements;

There is a necessity for a designation of an exclusive use common element. In this case, the balcony attached to each unit, the indoor storage space and one indoor parking space were designated as exclusive use common elements. The list put forward as exclusive use elements in this development can well be expanded. It might include, for example, the exclusive use of a locker in the athletic facilities. To designate certain common elements as being for the exclusive use of certain unit owners is not only rational but essential in the concept and operation of a condominium.

By s. 1(1)(l) owner is defined as follows:

(l) "owner" means the owner or owners of the freehold estate or estates in a unit and common interest, but does not include a mortgagee unless in possession;

The owners so defined are tenants in common of the common elements and an undivided interest in the common elements appurtenant to each unit. By s. 7(4) of the Act, subject to the Act, declaration and by-laws, each owner may make a reasonable use of the common elements. By s. 7(5) the ownership of the unit shall not be separated from the ownership of the common interests and any instrument that purports to separate the ownership of a unit from a common interest is void.

The result of this reference to the Act is that, contrary to the conclusions of the learned trial judge, Mastercraft, as the developer, could not own any rights in the common elements if it was not also the owner of at least one unit in the condominium. Mastercraft could not continue to rent parking spaces after it ceased to own units in the building. Mastercraft was an owner of units in the condominium when it transferred its rights in the outdoor parking spaces to the purchaser of its remaining units. The transfer of the parking spaces then did not breach the provisions of the Condominium Act nor was it contrary to the aims or objects of that statute.

It remains to be considered whether or not the terms of the declaration are such that Mastercraft could transfer the interest in the parking spaces and retain any funds which it obtained for them. This requires a consideration of the declaration.

Reference to the declaration of rights of Mastercraft and comparison with the declaration of rights in *York Condominium v. Newrey*

In *York Condominium Corp. v. Newrey*, supra, it was argued that the developer could sell the rights to the additional outdoor parking spaces before the condominium declaration was registered. It was contended that the property was the developer's to deal with as he saw fit prior to registration of the declaration. This argument was accepted by the trial judge but rejected by this court. It was never disputed that the additional parking spaces were common elements.

Of great significance in this case was the wording of the declaration. The declaration and the comments of the court regarding it are set out at pp. 465-6 O.R., pp. 287-8 D.L.R., of the reasons where this appears:

"(c) Each owner is entitled to the exclusive use and possession for the parking of a motor vehicle of one parking space in the underground parking garage to be designated by the Condominium Corporation from time to time;

(d) Individual unit owners shall also be entitled to the exclusive use and possession of such additional parking space as may be purchased by such owner, the location of which is to be designated by the Condominium Corporation from time to time;"

The additional parking spaces in issue in the litigation are, of course, the spaces referred to in para. (d).

It seems to be implicit in the decision of Galligan J. that until the declaration was registered the purchasers of units had no interest in the additional parking spaces, that those remained in the ownership of the developer who was free to deal with them as it saw fit. I do not see how this can be so in face of the provisions of the Act and the declaration. Section 7 of the Act provides that the owners of units are tenants in common of the common elements (s-s. (1)) and that subject to the Act, the declaration and the by-laws each owner may make reasonable use of them (s-s. (4)). It seems to me that as soon as a unit purchaser enters into an agreement of purchase and sale of a unit he becomes the equitable owner of the unit and the interests appurtenant thereto even although the agreement cannot be closed until registration of the declaration. By signing an agreement of purchase and sale each unit purchaser acquires in equity:

(1) the unit described in his agreement of purchase and sale;

(2) the right to the exclusive use and possession of one parking space to be designated by the condominium corporation;

(3) the right to the exclusive use and possession of such additional parking space as may be purchased by him and designated by the condominium corporation.

In my view, the respondent developer could not, either before or after the registration of the declaration, deal with any part of the common elements so as to defeat the unit purchasers' equitable interests in them.

Further, at p. 467 O.R., p. 289 D.L.R.:

With respect, I can see no reason why as a matter of simple contract law the parties cannot contract with reference to the Act and declaration prior to the registration of the declaration and in anticipation of its registration. Indeed, I think they must be taken to have done so where units in a condominium project are sold prior to registration since the condominium is substantially a creature of statute. It would be wholly unreal to view those transactions as agreements for the sale of separate pieces of real estate. This being so, I think the Court may look, and indeed must look, to the provisions of the Act and the declaration in determining the rights of the parties under the agreements of purchase and sale.

It can be seen from the foregoing that the court was clearly of the view that both the Act and the declarations must be reviewed in order to determine the rights of the parties under the agreements of purchase and sale. In that case the declaration was reviewed and it was found that there was nothing contained in its terms that would give the developer the right to deal with the parking spaces. The sole argument put forward on behalf of the developer was that it could rely on the paper title it possessed before the registration of the declaration in order to deal with those spaces. It was never contended that the declaration authorized the developer to deal with the surplus parking spaces.

It will be remembered that in the present case the declaration specifically provides that the declarant (Mastercraft) was to be entitled to the exclusive use of the balance of the parking spaces and was entitled to assign its right to any such parking spaces to any other unit owner or a successor in title to a unit owner of the condominium corporation. It authorizes Mastercraft to deal with the outdoor parking spaces that remained after allocating 20 of such spaces for visitors' parking. This declaration gives the developer the very authority that was missing from the declaration in *York Condominium Corp. v. Newrey*, supra, where no authority was given the developer to deal with surplus parking spaces.

The required reference to the Act and declaration leads to two conclusions. First, nothing was done by Mastercraft that in any way infringed the provisions of the Act. Second, the declaration specifically authorized Mastercraft to deal with the surplus spaces. It follows that Mastercraft was entitled to deal with the outdoor parking spaces as it did and was entitled to retain the proceeds which it received for those spaces and is not obligated to pay to Carleton Condominium Corporation either the funds which it received or the funds which it was properly deemed to have received when it sold its remaining units and its interest in the parking spaces.

To that extent the appeal should be allowed with costs and the judgment at trial varied by deleting the sum of \$49,000 from the award to the plaintiff thus reducing it to the sum of \$1,367.68. Carleton should have its costs of the trial on the county court scale.

Appeal allowed.

CBR# 157

LANDMARK MONTEREY CONDOMINIUM COUNCIL ET AL. v. COMO,

9 Admin. L.R. 269 BRITISH COLUMBIA (Co. Ct.) December 5, 1984 Administrative law -- Duty of fairness owed by condominium corporation to respondent resident -- Scope of duty owed depending on circumstances -- Levying of two fines on respondent -- Respondent not present at hearing -- Fine based on possibly inaccurate complaints set aside -- Respondent entitled to be heard -- Fine based on late payment of maintenance assessment upheld -- Duty of fairness owed to respondent satisfied by advance notification of deadline -- Appeal allowed in part. This was an appeal by way of trial de novo from the imposition of two fines by the appellant condominium corporation pursuant to its by-laws. One fine of \$25 was levied because the respondent's children allegedly played with matches in a stairwell. The second fine of \$15 was imposed because the respondent paid his monthly maintenance assessment after its due date. Regarding the first fine, the respondent never was invited to any hearing regarding the alleged violation. The respondent had been notified by letter of the deadline for the maintenance assessment and the consequences of late payment. The respondent alleged that the appellant acted unfairly in its enforcement of the by-laws for the respondent was not given prior notice of when and where the appellant would consider the alleged breaches. HELD: The respondent's appeal was allowed in part. The \$25 fine was set aside and the \$15 fine upheld. The appellant's authority was administrative in nature and one of its duties was the enforcement of by-laws. Since the appellant had other responsibilities its procedural mechanism to enforce by-laws had to be simple. The procedure applicable to the appellant consistent with its duty of fairness required that when the appellant was informed of the conduct of the respondent's children it should have given the respondent an opportunity to be heard. It was improper for the appellant to levy a fine based on complaints that may have been inaccurate. However, the second fine was different, for no facts were in dispute and no assumptions were made. The respondent was informed in advance of the consequences of non-payment of the fine by its due date and the appellant's letter to the respondent fulfilled its duty of fairness. The second fine was a case of the respondent failing to meet an obligation he knew or ought to have known he was required to meet.

CBR# 292

Shoihet v. 110 Bloor West Development Corp.

Between

Earle I. Shoihet, Plaintiff, and

110 Bloor West Development Corporation Limited, Priene Limited and 377806 Ontario Limited, Defendants

Action No. 58993/80

Supreme Court of Ontario - High Court of Justice

Toronto Non-Jury

Trainor J.

Heard: June 4, 5, 6 and 7, 1984.

Judgment: June 27, 1984.

(25 pp.)

David S. Wilson, Esq., for the Plaintiff.

F.P. Morrison, Esq., for the Defendants.

1 TRAINOR J.:— This is an action for equitable damages arising out of a contract for the purchase and sale of a condominium unit in a complex developed by the defendants. At the end of the trial, the plaintiff elected damages instead of specific performance.

2 The plaintiff is a solicitor, aged 40, with thirteen years experience, much of it in the real estate field. The defendant, 110 Bloor West Development Corporation Limited is a developer. Its shares are owned by the other defendants, the registered owners of the lands in question. There is no issue that the defendant 110 Bloor West was the agent of the other defendants and had authority to enter into the agreements that are the subject of this action.

3 The parties signed an agreement of purchase and sale and an interim occupancy agreement on the 17 March 1979 with a closing date of 20 June 1980. The condominium complex was comprised of four floors of commercial space and seventeen floors of residential development containing 156 individual units. The purchase price of the plaintiff's unit was \$161,000, with a deposit of \$11,270 and the balance to be paid partly in cash and partly by way of mortgage.

4 The development was under construction at the time of purchase. It was handy to the plaintiff's leased residence at 44 Charles Street and the plaintiff visited often. The plaintiff leased the Charles Street property in May 1979, renewing the lease in October 1979 to end 31 January 1981. He continues to live at this address today. Strikes, involving sub-trades both on and off the condominium location, altered the progress schedule. As a consequence, closing dates for many of the units had to be changed. It may also be said that the defendants were less than efficient in finalizing arrangements with the plaintiff for Hudac inspections and apartment finish selection concerning choices of paint, floor tile, broadloom, appliances, cupboards vanity type, and others contemplated by the contracts. On several occasions inspection was frustrated because the notice sent by the defendants was late in arriving, or the premises were not ready for occupancy. Finish selection was delayed because of a misunderstanding. Other circumstances that were aggravating to the plaintiff included the defendants' failure to answer correspondence and its failure to accomplish much in the way of progress between Hudac inspections.

5 The interim closing date contemplated by the contract was changed from time to time. The procedure adopted in the initial stages was that the vendor would advise of the change and the plaintiff would go along without communication one way or the other. In September 1980 these changes were arranged by the vendors' solicitor, Mr. Johnston, advising the plaintiff's office of the new date and then confirming the advice by mail. The arrangement may seem to be a casual one, however, it is better understood when the terms of the contracts are examined. It was an arrangement satisfactory to the parties until the 1 October 1980 interim closing date.

6 In the month of September the main reasons for delay in inspection and closing were twofold. Firstly, the cupboards took five to six weeks to manufacture and deliver following selection made on 19 August 1980. The plaintiff was not happy about the delay as he thought he had made the selection at an earlier date. His letters of 15 and 19 September 1980 make it clear that he was aware of the problem. On 5 September 1980 the plaintiff had written to the defendants' solicitors as follows:

... I did not expect to close this transaction until the end of September at the earliest. Accordingly, I did not make the necessary moving arrangements nor have I sub-letted my apartment.

Furthermore, I have written Mr. Villiers on August 8th, August 14th and September 2nd with a view to finalising my discrepancies concerning my interior finish. To date I have not received a reply. More particularly in my letter dated August 8th, 1980 I asked Mr. Villiers to give me one months notice prior to the interim closing date so I could make the necessary arrangements as above.

I have some difficulty understanding the position the plaintiff took on 1 October 1980 in view of this correspondence. Secondly, it appears the kitchen cupboards arrived some time prior to 1 October 1980. They were expected on 17 September 1984 and although the exact date of arrival is uncertain it does not appear that they were in the unit on 24 September 1980. Mr. Sorichetti, the defendants' construction superintendent was candid in his evidence. He made no attempt to minimize the errors his office and staff made nor did he try to blame matters on the size of the project and the number of unavoidable delays they encountered. He said that he was embarrassed by the fact the unit was not ready for occupancy on 1 October 1980 when he attended with the plaintiff to complete the final inspection. He said the unit could and should have been completed as the work involved was about six and one-half hours in total involving several different trades. It was his opinion that even though the work to be done was minimal, the unit was not ready for a Hudac inspection, nor was it ready for occupancy on the morning of 1 October 1980. He concluded it was not therefore substantially complete, within the meaning of those words as they appear in the contracts.

7 On 19 September, Mr. Johnston telephoned the plaintiff's office and set 1 October 1980 as the interim closing date. His letter confirming his conversation stated that time would remain of the essence. On 24 September 1980, the plaintiff wrote to the defendants advising:

My interim closing date has been set for October 1st, 1980 and I expect my apartment to be fully completed on that date.

8 At 8:30 a.m. on 1 October, the plaintiff and Mr. Sorichetti attended at the unit and found the finishing incomplete. The parties differed to a minor extent with respect to the work that still had to be done. I prefer the evidence given by Mr. Sorichetti that I have referred to earlier.

9 The lower kitchen cabinet was in place but had to be fastened to the wall. The countertop could then be installed and the sink hooked up. The appliances, (except for the refrigerator), had to be brought to the unit from the storage area in the building and hooked up. In the two bathrooms, the vanity tops had to be installed and the bathroom fixtures installed and hooked up to the plumbing already in place. Shelving in a closet or cupboard in the bedroom had to be installed.

10 Mr. Sorichetti indicated to the plaintiff that the unit was not ready for a Hudac inspection and suggested it be postponed for a day or two. The plaintiff agreed. The two men then parted. Mr. Sorichetti returned to the unit, to determine the trades necessary to complete the work. He then instructed these trades to stay with the work in that unit until it was finished. Later, Mr. Sorichetti called Mr. Johnston to advise him that the Hudac inspection had not been completed.

11 Mr. Johnston then called the plaintiff's office and advised that the closing date was postponed until 7 October 1980. Mr. Johnston's office is in Whitby. He used Toronto offices near the development to conclude interim closings. He arranged several closings for specific dates so that both he and his secretary would have a full days work when they came to Toronto. It was for this reason he chose the 7 October 1980.

12 The plaintiff's secretary telephoned Mr. Johnston about noon on 1 October 1980 and advised that the plaintiff would be attending on him at 4 p.m. to interim close another unit purchased by one Murray. The message made no reference to the plaintiff's purchase. At 4 p.m. the plaintiff arrived and in about ten to fifteen minutes the Murray interim closing was completed.

13 The plaintiff then tendered the following documents on Mr. Johnston:

14 (1) A certified cheque for the balance to close as set out on the readjusted statement of adjustments.

15 (2) Post-dated occupancy cheques as stipulated in the contracts.

16 (3) Eight pages of requisitions covering matters of title, conveyance and building construction with this condition:

...On the condition that we receive from you today full and satisfactory answers to our letter dated September 26 and September 30, 1980 (delivered herewith)...

The letter in which this stipulation is made contains the following postscript:

17 I am not prepared to extend the closing to October 7, 1980 as you requested when talking to my secretary.

18 Mr. Johnston, in a classic understatement said that he was taken by surprise. The plaintiff told him he had retained a Mr. Scott as counsel and that Johnston was to deal with Scott. The plaintiff left and Johnston telephoned Scott after having the keys to the plaintiff's unit delivered. Scott was aware of the situation and waived tender of the keys. Mr. Johnston testified that if the plaintiff had been prepared to turn over the cheque he was prepared to hand over the keys.

19 Mr. Sorichetti learned of the tender about 5 p.m. He immediately went back to the condominium unit and found that all of the required work was complete except for removal of cartons and shavings the tradesmen had left behind.

20 The parties did not attempt further contact to resolve their differences. The plaintiff commenced this action for specific performance in early October and registered a *lis pendens*. Six months later the defendants, by letter, purported to terminate the contract. They have retained the deposit throughout.

21 The plaintiff testified that this condominium met all of his requirements and he knew of none comparable in the area he had chosen to reside. He said that when he tendered, then sued, his purpose was to prod the defendants into action. The defendants on the other hand say they were ready to close on 1 October 1980. It is remarkable that not even a telephone call was made by either in an attempt to resolve the stalemate.

22 In spite of the positions asserted by each side their willingness to complete the interim closing must be judged in the light of these important facts:

23 (1) The plaintiff made his tender conditional on the defendant's satisfying numerous requisitions with "full and satisfactory answers" that very day. The tender was made at 4:15 p.m.

24 (2) The defendants required that the plaintiff sign a document entitled "Undertaking and Release". Mr. Johnston sent the document to the plaintiff prior to the interim closing as he did with all other purchasers who were going to complete all or part of the finishing work on their units. The document provides in part that:

I, EARL I SHOIHET have inspected my unit, Unit No. 910, at 110 Bloor Street West (hereinafter referred to as "the Unit") and I HEREBY ACKNOWLEDGE that the Unit has been completed to the degree that has been specified by me. I HEREBY FURTHER ACKNOWLEDGE that the Unit has been constructed in a good and workmanlike manner to my complete and full satisfaction and in accordance with the agreement of purchase and sale between myself and ONE TEN FLOOR WEST DEVELOPMENT CORPORATION LIMITED.

IN CONSIDERATION of the completion of the Unit to my satisfaction, I HEREBY RELEASE ONE TEN BLOOR WEST DEVELOPMENT CORPORATION LIMITED, PRIENE LIMITED and 377806 ONTARIO LIMITED, their successors and assigns, from any further responsibility to complete the Unit, to repair any deficiencies to the Unit, or to do any further work of any nature or any sort to the Unit.

I HEREBY INDEMNIFY ONE TEN BLOOR WEST DEVELOPMENT CORPORATION LIMITED, PRIENE LIMITED and 377806 ONTARIO LIMITED from any and all damage, liability, causes of action or any harm or expense whatsoever that may be caused to them by virtue of my workmen or myself completing work on the Unit.

According to Mr. Johnston, it was a requirement on interim closing that this document be delivered in executed form.

25 (3) A further significant fact, particularly in light of the above requirement, was that no one representing the defendants ever told the plaintiff on 1 October 1980 or thereafter that his unit was complete and ready for occupancy; nor did the plaintiff take any steps to find out.

26 It is of fundamental importance to a resolution of the legal issues in this case, to understand the agreements they had entered into. The contracts contemplated the purchase of a condominium unit and other amenities that are not in issue in these proceedings, for a fixed price. Construction was incomplete on the date agreements were signed but specifications were set out, so that a prospective purchaser knew in some detail, at the beginning, what the end product was to be. The agreements further provided for two closing dates if certain things had not been accomplished, such as the registration of the Declaration and bylaw of the Condominium Corporation, at the time the plaintiff's unit was substantially completed. At the first closing the purchaser was to pay over the balance of the purchase price, as adjusted, deliver occupancy cheques in post-dated form at a predetermined amount and "execute and deliver" to the defendant any documents required by it to the extent that such was possible or practical.

27 The vendor in return was to allow the plaintiff possession of the unit as a licensee in possession. Final closing was to take place in accordance with specific terms after certain events had taken place. It was only prior to final closing that requisitions on title had to be satisfied and a deed delivered.

28 The Condominium Act, R.S.O. 1980, c. 84 imposes obligation and duties on both parties. Section 51 stipulates that certain covenants are implied in any agreement. As a result the defendants had an obligation to register the declaration without delay; to take all reasonable steps to sell the residential units; to deliver a deed without delay. There are other obligations. The legislation is designed to prevent unscrupulous developers from taking advantage of a rising market as the contract itself provides that the defendant need only return the deposit with interest if the Declaration has not been registered by closing or if a certain number of units have not been sold by a specified date.

29 In simple terms, a vendor cannot take advantage of a purchaser by his own default or neglect.

30 The contract documents provide for an inspection of the unit by the parties and completion of a Hudac New Home Warranty Program Certificate of Completion and Possession. It is apparent from the lengthy name that the inspection and certificate are for the protection of both parties. The agreements provide that completion of the inspection and certificate are conditions of the vendor's obligation to give occupancy and to complete the transaction.

31 Further, the contract says:

17. If the completion of the Unit or the common elements or registration of the Condominium is delayed by reason of strikes, lock-outs, fire, lightning, tempest, riot, war or unusual delay by common carriers or unavoidable casualties or by any other cause of any kind whatsoever, the Vendor shall be permitted a reasonable extension of time for completion and the date of closing shall be extended accordingly. If the Vendor is unable to complete the Unit and close this transaction within such extended time for closing, all monies paid hereunder by the Purchaser, other than any occupancy fees, shall be returned to him with interest and without deduction and this agreement shall be null and void. If the Unit is substantially completed by the Vendor on or before the date of closing or any extension thereof as aforesaid, this transaction shall be completed on such date notwithstanding that the Vendor has not fully completed the Unit or the common elements and the Vendor shall complete such outstanding work within a reasonable time after closing, having regard to weather conditions and the availability of labour and materials. In any event the Purchaser acknowledges that failure to complete the common elements on or before closing shall not be deemed to be a failure to complete the Unit. (emphasis mine)

32 The plaintiff sued for specific performance on 7 October 1980. His statement of claim alleges that the defendant was in default because it failed to have the unit ready for occupancy on the interim closing date and because it failed to satisfy the numerous requisitions insisted upon by the plaintiff. At trial the plaintiff, for the first time, said he did not rely on the defendant's failure to answer any of the requisitions except the one relating to substantial completion.

33 I have concluded that this action must fail with respect to specific performance or equitable damages.

34 The plaintiff elected damages in lieu of performance. Those damages include a claim for the difference between the original purchase price of \$161,000 and the value of the unit in today's market of \$217,212, or \$56,212. The plaintiff also claims \$1,108 paid for land transfer tax at the time of registration of the *lis pendens*; \$347.20 for tiling; and \$11,270 being the deposit.

35 In order to succeed in his claim for market value the plaintiff must establish that he was entitled to specific performance. The agreements that governed the relationship between the parties provided a remedy in the event of the defendant's failure to substantially complete by interim closing. Keeping in mind that it was the purchaser who insisted on substantial completion and occupancy on 1 October 1980 his rights under the contract were to put the agreements at an end and to have his deposit returned with interest. The defendants, in the circumstances of this case, were not entitled to invoke para. 17 of the agreement and thereby to insist on a 1 October 1980 closing because they had not taken reasonable steps to complete construction by the morning of 1 October 1980 and because they failed to notify the purchaser later in the day that substantial completion had been achieved. However, the defendants did not insist on the closing date. On the contrary, they asked for a few days to complete, and requested postponement of closing to 7 October 1980. Therefore, by contract, the plaintiff was not entitled to specific performance on 1 October nor was he so entitled on the date the writ was issued.

36 Further, the inspection required by the agreement as a condition to possession and completion of the transaction had not been accomplished. Again, the defendants, on 1 October could not rely on this fact to avoid the contract and they did not. I have found as a fact that the parties agreed to postpone the inspection for a day or so. Even without this finding, the uncontradicted evidence is that a postponement was requested by the defendants. Putting the plaintiff's case at its highest, no response was made by the plaintiff. It is clear therefore that the defendants on either version of the facts sought no advantage from their delay.

37 At the opening of trial I reserved on a motion by the defendants to amend their defence by adding a paragraph asserting that the parties agreed on an extension to 7 October 1980. There is evidence that supports this position arising from the fact that the inspection date was extended and because of the way in which this and prior extension had been arranged. I have decided to refuse the motion because of its timing and the substantial change it makes to the existing pleadings. The evidence with relation to extension is nevertheless relevant to the question whether the plaintiff acted reasonably in the position he took.

38 Assuming the plaintiff was ready to close and that his tender was proper, was his only remedy the return of his deposit? I think not. He was entitled to close, complete construction and sue for damages or claim damages arising from delay in completion while affirming the validity and binding effect of the agreement.

39 There are other reasons why the plaintiff's action was ill advised. The tender that he made was a conditional tender, where the conditions were not only improper in the sense that the defendant had no obligation to perform the vast majority of them at or before interim closing, but they were, to the plaintiff's knowledge, impossible to perform in the time frame allowed. I do not mean to imply that the plaintiff could not requisition on 1 October 1980, but he had no right to insist on answers as a condition of interim closing.

40 *Blanco v. Nugent*, [1949] 1 W.W.R. 723.

41 The plaintiff is an experienced solicitor. He acted on his own behalf on 1 October 1980 with the advice of counsel. Closing dates were extended on a number of occasions by Mr. Johnston in the same manner as that attempted on 1 October 1980. The plaintiff knew, at 8:30 am. that the Hudac inspection could not be completed and he agreed to allow the defendant a day or so to finish up. By noon that day he was aware of Mr. Johnston's call purporting to extend closing to 7 October 1980. He did nothing to indicate his intention to tender. Instead, the plaintiff arranged with Johnston to interim close another transaction with the defendants involving a condominium unit in the same building as the plaintiff's. His office arranged the closing at 4 p.m. The plaintiff failed to indicate, either that he would not extend his own closing to the 7th, or that he was going to tender subject to requisitions, but that is what he did.

42 However aggrieved the plaintiff felt by the defendants' conduct, he had a responsibility to deal fairly and reasonably with Mr. Johnston. The plaintiff's conduct was not that of a fair minded, responsible solicitor. He now seeks equity in this Court but comes to it without clean hands. I cannot condone his actions. On this ground alone, the plaintiff fails in his action for specific performance.

43 The defendants say that, in spite of the position the plaintiff put them in, they were ready to close and they tendered. I think not. The defendants had an obligation to advise the plaintiff of substantial completion and to arrange a new inspection date. They did neither.

44 In addition, the evidence disclosed that the "Undertaking and Release" would be insisted upon at interim closing. That document goes far beyond anything contemplated by the agreement of purchase and sale. The defendant had no right to insist on the plaintiff signing and delivering such a broadly worded document in circumstances where the Hudac inspection had not been made and the completion certificate remained unsigned.

45 On 1 October 1980, there was no valid tender made by either side. Subsequent to that date neither party sought to arrange a further inspection nor did they attempt to set a new closing date on reasonable notice.

46 On 1 October 1980 the defendants wrote a letter to all unit purchasers addressing problems unrelated to the particular facts of this case. The letter concluded with these words:

5. Closings

Closings for 110 Bloor West have been occurring on a regular basis to the present time and occupancy of the building is well underway. We intend to complete all transactions of purchase and sale in the immediate future; should there be any further questions which you may have please have your solicitor contact our solicitor Mr. Patrick Johnston at 686-2628.

On 12 March 1981 the defendant wrote to the plaintiff as follows:

Take notice that the Agreement of Purchase and Sale between Earle I. Shoihet and 110 Bloor West Development Corporation Limited dated the 17th day of March, 1979, is forthwith terminated as you have refused to complete the above noted transaction on an interim and/or final basis, contrary to the Interim Occupancy Agreement and contrary to the terms of the Agreement of Purchase and Sale.

47 No closing date was set for final closing nor did any party tender either before or after 12 March 1981. The parties, instead, were entrenched in irreversible litigation.

48 The plaintiff contends that in these circumstances the agreement remains valid and subsisting and he now has the right to set a closing date. I do not agree.

49 The plaintiff has elected damages in lieu of specific performance. In view of my determination his election is perhaps academic but, more importantly, the plaintiff chose the litigation route in circumstances where the remedy he sought was not only unavailable to him but by his own conduct he put it out of reach. The decision to sue crystallized the parties positions. The plaintiff had no right to anticipate that his action would bring matters to a head in circumstances where his position with respect to requisitions was totally unreasonable.

50 In cases where neither party can be said to be ready, willing and able to close on a stipulated date each party is entitled to set a new closing date on reasonable notice to the other. Almost four years have gone by and this has not been done either as to interim or final closing. Both sides were aware of the rising market situation and they did nothing. The plaintiff had the legal right, as did the defendants, to set a new closing date provided that they did so within a reasonable time. Four years is unreasonable. As a consequence the plaintiff has lost any right to now stipulate a closing date. The agreements are null and void.

51 In *Zender et al. v. Ball et al.* (1974) 5 O.R. (2d) 747, a case in which neither side was ready, willing or able to close and where they treated the contract as at an end, although neither was entitled to do so, Pennell J. said this at p. 758:

Both parties have treated the contract at an end; however, I think neither was entitled to do so. There has been a long delay since the original closing date and neither party has done anything to perfect his position and entitle himself to rely on the provisions of the contract. It would appear, therefore, that the Court should rescind the contract at this time and place the parties in the position they were in before they entered into it.

The deposit was in the form of a guarantee for the performance of this contract by the purchaser; however, a vendor who is also in default cannot take the position that he is entitled to both the land and the deposit of the purchaser. When a prospective purchaser makes a deposit on an agreement of purchase and sale, he creates an equitable interest in the subject property in an amount equal to what he had paid towards the purchase price, and he is entitled to a lien on the property if the sale goes of by a failure to complete not caused by himself.

For the reasons given, I think there should be judgment for the return of the deposit money.

52 The deposit, together with interest payable under the provisions of the Condominiums Act, is to be paid by the defendants to the plaintiff. In addition, the plaintiff is to be reimbursed the sum of \$347.20 expended on tiling the unit. That sum is payable without interest.

53 The defendant has been substantially successful in this action. However, an award of costs might encourage other developers to overreach in their demands for documents such as the release sought in this case, or to be careless or sloppy in fulfilling commitments to purchasers. The penalty of no costs will deter these defendants and hopefully others from reacting to the bad judgment of one party with their own lack of judgment. A trial is and should be the avenue of last resort. Legal costs are onerous compared to the cost of a telephone call or letter. The parties will learn that lesson by absorbing their costs.

TRAINOR J.

CBR# 374

York Condominium Corp. No. 161 v. York-Hannover Ltd

Between

York Condominium Corporation No. 161 and Jaroslav W. Frei on behalf of himself and all other members of York Condominium Corporation No. 161, and York Condominium Corporation No. 144 and Kenneth Molyneux on behalf of himself and all other members of York Condominium Corporation No. 144, Plaintiffs, and York-Hannover Limited, Defendant, and Sardina Investments Limited, Third Party, and Alba Painting and Decorating Limited, Amsen Farms Limited, Christie Sheet Metal Limited, Demiro Construction Limited, Disposal Services Limited, Durable Drywall Limited, El Dorado Masonry Limited, Jay Electric Limited, L and M Caulking Company Limited, Kregel Roofing and Tinsmithing Limited, carrying on business as Omega Roofing and Tinsmithing, Roman Railings Co. Limited, Sagripanti Bros. Concrete and Drains Limited, Speedy Tile and Carpet Contractors Limited, Zentil Plumbing and Heating Ltd. Co., 227223 Earth Moving Limited, John Garay and Associates Limited, Fourth Parties

Action No. 3096/76

Supreme Court of Ontario - High Court of Justice
Sutherland J.

Heard: June 29, 30, 1982.
Judgment: May 24, 1983.
(50 pp.)

Clifford F. Shnier, for the Plaintiff.
R.J. Arcand, for the Defendant.
David R. Rothwell, for the Third Party.
D. Gordon Bent, for the Fourth Party Zentil Plumbing & Heating Ltd. & Co..
Barry B. Papazian, for the Fourth Party John Garay & Associates Limited.

1 SUTHERLAND J.:— This matter involves the trial of certain of the issues arising in an action brought by the plaintiffs for damages in respect of alleged deficiencies in the construction of two condominium projects in the Borough of Etobicoke in Metropolitan Toronto, the issues here in question being between the plaintiffs, the defendant, the third party and two of the fourth parties, namely Zentil Plumbing and Heating Ltd. and Co. and John Garay and Associates Limited. The issues are set forth in a statement of "Agreed Issues to be Tried" signed by the solicitors for those parties.

2 The defendant, York-Hannover Limited, was formed by the amalgamation, pursuant to The Business Corporations Act, R.S.O. 1970, c. 53, of the former defendant Deltan Realty Limited and other corporations. By order dated January 21, 1981 Master Sandler ordered that the pleadings be deemed to be amended to reflect the amalgamation, and that the styles of cause of the main action and the third party proceedings thenceforth reflect the amalgamation and show York-Hannover Limited as defendant.

3 The trial proceeded on the basis of a "Statement of Agreed Facts" signed by the solicitors for all those parties, as supplemented by the documents filed as exhibits, namely, copies of the declaration and descriptions relating to the formation of the plaintiff condominium corporations, and a sample copy of the form of agreement of purchase and sale entered into by original purchasers of units in either of the condominium projects. It was common ground that there were no material differences in the form and contents of the declarations and the descriptions relating to the two condominium corporations.

4 It was also agreed that for these purposes the relevant version of The Condominium Act is that appearing in R.S.O. 1970, c. 77, as amended by S.O. 1972, c. 7, 1973, c. 121 and 1974, c. 133, and that the 1978 amendments conferring upon condominium corporations the power and authority to bring actions for damages to or deficiencies in individual units have no application to the case.

5 The substantive parts of the statement of Agreed Issues to be Tried are as follows:

AGREED ISSUES TO BE TRIED

The Plaintiff, Defendant, Third Party and the Fourth Parties, Zentil Plumbing & Heating Ltd. and John Garay & Associates Limited as the only parties concerned agree upon the terms of the issue or issues to be tried as follows:

(a) Do the alleged defects and deficiencies referred to in paragraphs 8(w), 8(x), and 10(g) of the Plaintiffs' Statement of Claim relate to common elements, or are the vertical fan coil units and the valves within them within the boundaries of the condominium units as defined in the Declarations and Descriptions?

(b) If the alleged defects and deficiencies do not relate to common elements, may the personal claims of individual unit owners be asserted in a class action or not? Directions as to the constitution and ascertainment of the class, and directions as to conduct of those personal claims will be required if the answer is affirmative.

DATED at Toronto, this 23rd day of June, 1982.

6 The substantive parts of the Statement of Agreed Facts are as follows (with added parenthetical references to the exhibits):

STATEMENT OF AGREED FACTS

1. The Plaintiff, York Condominium Corporation No. 161 (Y.C.C. 161) was created under The Condominium Act by the registration August 19, 1974 of Instrument No. B437003, the Declaration and Description, and is municipally known as 812 Burnhamthorpe Road, Etobicoke. A copy of the Declaration and Description will be filed by the Plaintiff at the trial. [Filed as Exhibits No. 1 and No. 2]
2. The Plaintiff, York Condominium Corporation No. 144 (Y.C.C. 144) was created under the Act by the registration June 3, 1974 of Instrument No. B428046, the Declaration and Description, and is municipally known as 820 Burnhamthorpe Road, Etobicoke. A copy of the Declaration and Description will be filed by the Plaintiff at the trial. [Exhibits No. 3 and 4]
3. The Plaintiff, Jaroslav W. Frei departed this life January 12, 1981, and by the Order of Master Sischy dated May 7, 1982, the cause of action insofar as it was brought by the late Doctor Frei was continued at the suit of John Cleave, on behalf of himself and all other members of Y.C.C. 161, such Order to be deemed effective nunc pro tunc as of January 21, 1981, and without prejudice to the right of the Defendant and Third Party to plead that the action insofar as it was brought by the later Doctor Frei had abated. Both Jaroslav W. Frei and John Cleave were original purchasers from the Defendant and John Cleave remains an owner of a unit in Y.C.C. 161.
4. The Plaintiff, Kenneth Molyneux was an original purchaser from the Defendant and remains an owner of a unit in Y.C.C. 144.
5. A typical Agreement of Purchase and Sale representative of original sales of units will be filed by the Plaintiff at the trial. [Exhibit No. 5]
6. The Defendant, York-Hannover Limited, is a limited company incorporated under the provisions of the Ontario Business Corporations Act and is the successor to Deltan Realty Limited which was the Declarant of both Y.C.C. 161 and Y.C.C. 144 as well as being the vendor on all the original unit sales. The Defendant was not the manager of either building.
7. The Third Party, Sardina Investments Limited, was amalgamated with and continued as Del Corporation Limited by Articles of Amalgamation dated June 30, 1978, and was at all material times the sole general contractor retained by the Defendant to build both Y.C.C. 161 and Y.C.C. 144. The Third Party was neither vendor of units nor manager of either building.
8. The Fourth Party, Zentil Plumbing & Heating Ltd. and Co. was, at the material time, a limited partnership carrying on business as a plumbing and mechanical contractor, and by a contract with the Third Party dated July 26, 1971 and an addendum thereto dated June 2, 1975, the Fourth Party Zentil agreed to perform all the plumbing and mechanical work in accordance with the plans and specifications therefore.
9. The Fourth Party, John Garay and Associates Limited is a private Ontario corporation and was retained as a consulting engineer inter alia to prepare plumbing, mechanical and electrical specifications for the proposed condominium apartment buildings that became Y.C.C. 161 and Y.C.C.
10. Paragraphs 8(w), 8(x), and 10(g) of the Plaintiffs' Statement of Claim refer to vertical fan coil units (and the valves within such units at Y.C.C. 161) which were installed, two per suite, by the Fourth Party, Zentil, in each of the 216 suites in each building.
11. The vertical fan coil units installed are themselves in accordance with the plans and specifications of the Fourth Party, Garay, but the quality of workmanship of installation is reserved for subsequent evidence. A set of the mechanical plans will be filed at the trial by the Plaintiff.
12. The function of the vertical fan coil units is to heat the suites by warming air blown over a coil filled with hot water in the winter, and to cool the suites by cooling air blown over a coil filled with cold water in the summer.
13. In one season, a boiler or boilers in the penthouse mechanical room of each building delivers hot water through risers to each fan coil unit, and in the opposite season, a chiller in the penthouse mechanical room delivers cold water through the same risers to the fan coil units. There are three risers running through each line of fan coil units: a supply riser; a return riser; and a condensate drain pipe.
14. A control permits the occupants of each suite to regulate both heating and cooling as required from each vertical fan coil unit.
15. Periodic maintenance is required by the occupants of each suite who are required to remove the lower grill over the air-intake access to the vertical fan coil unit in order to remove and replace a filter in the grill assembly.
16. Some periodic maintenance may be required to a degree which is disputed by the occupants of each suite to ensure the free flow of water which may accumulate in a condensate pan, placed horizontally in the fan coil unit, which has a drainage hole and detachable drainage tube.
17. Facility of access to thoroughly clean the condensate pan is the subject matter of paragraphs 8(w) and 10(g) and the quality of the two valves in each of the vertical fan coil units is the subject matter of paragraph 8(x), the valves being integral parts of the vertical fan coil unit installed by the Fourth Party, Zentil, but fabricated by a supplier who is not a party to the action.
18. The Declaration of each building is identical in all material respects and provides, inter alia, as follows:

I INTRODUCTORY

(1) Definitions - The following terms used herein have the meanings set out below, unless the context otherwise requires:

(a) common elements means all the property except the units;

(b) common interest means the interest in the common elements appurtenant to a unit;

(e) unit means a part or parts of the land included in the description, and designated as a unit by its boundaries and all the material parts of the land within this space at the time the declaration and description are registered.

(f) The definition of "unit" for the purposes of the duties to repair and maintain under Section 16 and 17 of the Act and this declaration shall extend to all improvements made by the Declarant in accordance with its architectural plans notwithstanding that some of such improvements may be made after registration of the declaration;

(g) Other terms used herein shall have ascribed to them the definitions contained in the Act, as amended from time to time.

(4) Boundaries of Units and Monuments

The monuments controlling the extent of the units are the physical surfaces mentioned in the boundaries of units in Schedule "C" attached hereto.

IV UNITS

(1) Occupation and Use

The occupation and use of the units shall be in accordance with the following restrictions and stipulations save and except Unit 6, level 1;

(d) No owner shall make any structural change or alteration in or to his unit or make any change to an installation upon the common elements, or maintain, decorate, alter or repair any part of the common elements, except for maintenance of those parts of the common elements which he has the duty to maintain, without the consent of the board.

VI MAINTENANCE AND REPAIRS

(1) Each owner shall maintain his unit, and, subject to the provisions of this declaration, each owner shall repair his unit after damage, all at his own expense. The owners of units 3, 4, 8 and 9 on levels 21 and 22 having fireplaces constructed as part of their units shall be responsible at their own expense for the cleaning and/or sweeping where necessary, of the chimney appurtenant to such fireplace and unit.

Each owner shall be responsible for all damages to any and all other units and to the common elements, which are caused by the failure of the owner to so maintain and repair his unit, save and except for any such damages to the common elements for which the cost of repairing same may be recovered under any policy or policies of insurance held by the corporation.

7 The corporation shall make any repairs or maintenance (hereinafter referred to as repairs) that an owner is obligated to make and in such an event, an owner shall be deemed to have consented to having repairs done to his unit by the corporation; and an owner shall reimburse the corporation in full for the cost of such repairs, including any legal or collection costs incurred by the corporation in order to collect the costs of such repairs, and all such sums of money shall bear interest at the rate of twelve per cent (12 per cent) per annum. The corporation may collect all such sums of money in such instalments as the board may decide upon, which instalments shall be added to the monthly contributions towards the common expenses of such owner, after receipt of a notice from the corporation thereof. All such payments are deemed to be additional contributions towards the common expenses and recoverable as such.

(2) Repairs and Maintenance of Common Elements by the Corporation

The corporation shall repair and maintain the common elements which include repair and maintenance to all doors which provide the means of ingress to and egress from a unit and to all windows, save and except maintenance of interior surfaces of windows, all at its own expense.

IX INSURANCE

(1) By the Corporation

The corporation shall be required to obtain and maintain to the extent obtainable from the insurance industry, the following insurance, in one or more policies: -

(a) Insurance against damage by fire with extended coverage and such other perils as the board may from time to time deem advisable, insuring: (i) the property, excluding the units;

(3) By the Owner

It is acknowledged that the foregoing insurance is the only insurance required to be obtained and maintained by the corporation and that the following insurance, or any other insurance, if deemed necessary or desirable by any owner, may be obtained and maintained by such owner:

(a) Insurance on any additions or improvements made by the owner to his unit and for furnishings, fixtures, equipment, decorating and personal property and chattels of the owner contained within his unit.

SCHEDULE "C"

1) Monuments controlling the extent of units described and numbered in the Description, save and except for Unit 6, Level 1, are the physical surfaces and fully described as follows:

(a) Each unit is bounded vertically by:

(i) the upper surface of the concrete floor slab beneath the unit.

(ii) the under surface of concrete ceiling.

(b) Each unit is bounded horizontally by the interior surface of the unfinished concrete, masonry or block walls. In the vicinity of pipe spaces between certain units, unit is bounded horizontally by the back side of dry wall.

(c) In the vicinity of windows, window frames and exterior doors, the unit boundaries shall be the unfinished interior surfaces of such windows, window frames and doors.

(d) Provided that any pipes, wires and cables used for power, water and drainage which are within any walls or floors together with any furnace ducts and controls which may be within any unit shall be excluded from such unit.

19. The locations of the vertical fan coil units are within the boundaries of the Units as defined in the Declaration and as shown in the Description of each building. They are enclosed in drywall so that the only portions normally visible are the supply air grill, the return air grill and the thermostat control.

20. With respect to a possible class action for personal claims of individual unit owners:

(a) Certain original purchasers have now sold their units either before or after institution of proceedings;

(b) Resale purchasers have no contractual relationship with the Defendant;

(c) Expense has been incurred with respect to some but by no means all vertical fan coil units while some vertical fan coil units have not occasioned any expense to date.

(d) Individual unit owners have not, to date, been obliged to opt into or out of a class action for personal claims;

(e) The Plaintiffs' proposed rectification work is said to be for the same work at a uniform cost per vertical fan coil unit, but the other parties dispute the necessity of all or parts of the proposed work and where valves have been replaced already or in those few cases where access has been facilitated already, either less work or no work may be required even in the event that the Plaintiff succeeds in establishing liability for the alleged deficiencies.

These agreed facts are respectfully submitted by the undersigned parties through their respective solicitors, this 24th day of June, 1982 for trial before The Honourable Mr. Justice Sutherland June 29, 1982.

8 Paragraphs 8(w), 8(x) and 10(g) of the plaintiffs' Statement of Claim state as follows:

8(w) The valves above and below the coil in the heating and air-conditioning units are defective and frequently break, causing extensive damage to the walls and carpeting in the suites. Approximately ten percent of these valves have already been replaced, and it has become necessary to order the replacement of the remainder to avoid additional accumulation of damages.

8(x) The installation of the heating and air-conditioning units in all the suites is defective thereby rendering the units unserviceable. As presently installed access to the condensate pan and to the heat exchanger and water delivery systems is not possible except by cutting through the drywall and the surrounding sheet metal. It is estimated that the cost of remedying this defect will be approximately \$38,970.00.

10(g) The installation of the heating and air-conditioning units in all the suites is defective, thereby rendering the units unserviceable. As presently installed, access to the condensate pan and to the heat exchanger and water delivery systems is not

possible except by cutting through the drywall and the surrounding sheet metal. This is a major design and construction deficiency affecting accessibility to about 440 heating and air-conditioning units.

9 The first of the agreed issues to be tried amounts in effect to the question of whether the fan coil units in each condominium unit within the condominium projects form parts of the common elements of the respective separate condominium units in which they are found, and so not parts of the common elements, the two categories being mutually exclusive.

10 At trial there was a preliminary issue based on the wording of paragraph (a) of the Agreed Issues. It was argued that because paragraph (a) states in part: "Do the alleged defects ... relate to common elements or are the vertical fan coil units ... within the boundaries of the condominium units as defined in the Declarations and Descriptions?", it would follow that if I found that the vertical fan coil units were within the boundaries of the condominium units I would have no alternative but to hold that the fan coil units were not common elements.

11 Although paragraph (a) is unhappily worded, and so could have borne that interpretation, I rejected the argument because to have accepted it would have resulted in a deal issue between the parties being decided on the basis of an unfortunate slip in the wording of the "Agreed Issues". It is common ground that the fan coil units are situated within the boundaries of the condominium units. That has never been in issue. The real issue is whether the vertical fan coil units are within the exceptions provided by paragraph 1(d) of Schedule "C" to the Declaration, which states:

Provided that any pipes, wires and cables used for power, water and drainage which are within any walls or floors, together with any furnace ducts and controls which may be within any unit shall be excluded from such unit.

12 The plaintiffs contend that the vertical fan coil units and the valves within them are all common elements, and Mr. Shnier pointed out that, if that view were upheld and liability were established, the full measure of compensation would be recoverable by the condominium corporations, notwithstanding significant turnovers among the owners of the units since the cause of actions first arose. See the judgment of Gray J. in *Loader et al. v. Rose Park Wellesley Investments Ltd. et al.* (1980), 17 C.P.C. 150, at pp. 160 and 161. That case also stands for the proposition that under the old Act the condominium corporation was the only appropriate plaintiff where common elements were the subject of the litigation.

13 The plaintiffs argue, firstly, that the plain meaning of the words in sub-paragraph (d) of clause (1) of Schedule "C" to the declaration would exclude the fan coil units and, secondly, in the alternative that, at the very least, it is not clear that they are not excluded and, therefore, that the ambiguity should be reserved in favour of the plaintiffs, on the basis of the doctrine of *contra proferentum*.

14 The plaintiffs referring to paragraphs 11 through 14 of the agreed facts, state that the fan coil units are connected by a series of risers, namely a supply pipe running vertically through the buildings, and that the risers are aligned vertically because the fan coil units on one floor are directly below fan coil units on the floors above. It is asserted by the plaintiffs that the coil part of the fan coil unit is no more than a narrower pipe, filled with hot or cold water, depending on the season. Moreover, the whole system is changed over from heating to cooling, and vice versa at one time, with the unit owners having no ability to opt out of that decision but only the ability to use their controls to increase or decrease the amount of heating, or cooling, taking place in their units.

15 Counsel for the plaintiffs asserts that the coil in a fan coil unit is a "pipe" as that term is used in paragraph 1(d) of Schedule "C" and that, as the fan coil units are fully enclosed in dry wall except for air grills, the coils are "within ... walls" and so constitute the sort of pipes referred to in the first part of paragraph 1(d).

16 With respect to the meaning of the word "pipe", Mr. Shnier referred to dictionaries, including (a) the Webster International Dictionary, where the third meaning given for the word is:

3. A hollow tube of any length and thickness and of whatsoever material - metal, earthenware, etc., whether consisting of a single length or in a continuous series joined end-wise ...;

and (b) the Concise Oxford Dictionary, Sixth Edition, where the first meaning of the noun "pipe" is:

1. Tube of wood, metal, etc. especially for conveying water, gas, etc.

It is asserted that the coil in a fan coil unit is a tube for the conveying of water and is therefore a pipe, and further that there is nothing in the declarations or in any of the other documents pertaining to the existence of the condominium corporations to suggest that a coil is not a pipe, or that "water" there has its meaning confined to domestic water supply and excludes heating water.

17 Counsel for the other parties represented all contended that the coils in fan coil units, while within dictionary definitions of "pipes", were simply not pipes within the meaning of paragraph 1(d), where pipes mean water pipes, waste drain pipes and the risers, among others, but not the coils. These parties further argued strongly that what are in issue are fan coil units which are units and consist of coils, valves, fans, and fan motors, and not simply of coils. Against the plaintiffs it was also argued that the fact that the fan coil units were housed in dry wall did not mean that they were "within any walls or floors" as would have to be the case to bring "pipes" within the exclusion in paragraph 1(d). Mr. Rothwell argued that whether or not dry wall was used as a housing for the fan coil units could not be determinative of whether the fan coil units formed part of the common elements.

18 On this issue Mr. Papazian, for fourth party, John Garay & Associates Limited, also argued that the fan coil units serve, and are for the benefit of, the individual condominium units and not the building as a whole, and therefore that they should not be held to be common elements. This argument loses some, but I think not all, of its force when one recognises that under the declaration there are some common elements that are for the exclusive enjoyment of the occupants of particular units - parking spaces and balconies being the most obvious.

19 A parallel argument that could have been made is that, under s-ss. 24(1) and 24(2) of the old Act it was provided that an agreement of purchase and sale for a condominium unit was not binding on the purchaser, unless common elements that were for

the exclusive benefit of one or a few condominium units were identified in documents delivered to the purchaser. Nowhere in our declaration or in descriptions or in any schedules thereto are the fan coil units (which obviously are for the sole benefit of the housing units in which they are situated) identified as exclusive-use common elements. The form of agreement of purchaser and sale used for the sale of units in both buildings (exhibit 5), does not identify exclusive-use common element. Instead, by its clause 13, the purchaser acknowledges that the documents required by the "old Act" have not yet been registered and that the agreement of purchase and sale is "conditional upon such registration". In the declaration, Schedule "F" sets forth the parking spaces that are for the exclusive use of the owners of the respective units, and, since the parking areas are common elements, this provides an example of compliance with the requirement of s. 24 of the old Act that exclusive-use common elements be identified. The same information as to parking spaces is set forth in graphic form in exhibit E attached to the description (filed as exhibits 2 and 4 in this action). Schedule "F" to each declaration also states that on levels 1 to 22 ownership of a unit confers the right "to exclusive use or possession of such patio or balcony to which there is direct access from such unit". I suppose the draftsman, if he considered fan coil units to be common elements might be forgiven for not so declaring in Schedule "G", because, as a practical matter, the location of the fan coil units wholly within the dwelling units makes it virtually impossible for anyone other than the occupant of that dwelling unit to enjoy possession or assert any control over such units. However, the plaintiffs, in addition to the onus of showing that the fan coil units are within the exclusions in paragraph 1(d), faces the added difficulty that the fan coil units, if part of the common elements, are either (a) not exclusive-use common elements (which is absurd) or, (b) exclusive-use common elements but not distinguished as such, which means that under the provisions of s. 24(2) of the old Act, the agreements of purchase and sale with respect to the individual dwelling units were not binding upon the purchasers referred to therein. It is not easy to accept that the developer can have intended the latter result.

20 The defendant and its supporter argued that the fact that the fan coil units are attached to common elements, the risers, does not make them common elements any more than toilets, dishwashers, basins, sinks, bath tubs, and stoves - all attached or connected to common elements - are themselves common elements. The plaintiffs' reply was that the fan coil units, unlike the other items just mentioned, are not merely receptacles attached to common elements, they are integral parts of the heating (cooling) system, and so included in "pipes". But are they "pipes"?

21 It is stated in paragraph 11 of the argued facts that "a set of mechanical plans will be filed at trial by the plaintiff" but such mechanical plans were not made exhibits at the hearing, and so I have had to take a round-about route to determine the physical relationship between the risers and the coils. In paragraph 13 of the agreed facts, it is stated that three risers run through each line of fan coil units". I take the phrase "line of fan coil units" to mean that a fan coil unit in any condominium unit on one floor is located more or less exactly above a fan coil unit in the condominium unit on the floor below, and so on throughout the floors, so that when the risers are stated to be "running through a line of fan coil units" that does not mean that, for example, the water arriving via the supply riser from the boiler in the penthouse mechanical room at a fan coil unit on the ground floor will have been through the coil of every fan coil unit in the "line of fan coil units" of which that ground floor fan coil unit is a part. It is not stated that hot water cannot get to a ground floor fan coil unit without going through the coils of all the fan coil units stacked above that ground floor unit. To put it another way, the risers are stated to run through a line of fan coil units, but it is not stated that the coils in the fan coil units are part of the risers, and I believe that they are not, for three reasons, as follows:

(1) In paragraph 13, where it states that "there are three risers running through each line of fan coil units", there is no differentiation between the way the three risers run through the line, whereas if the coil formed part of the supply riser the return riser would not run through the line of fan coil units in the same way, but would merely be a general return riser receiving the water after it left the lowest fan coil unit in the "line" and returning it to the boiler (or the chillers as the case may be).

(2) In such an arrangement there would be no purpose for valves in connection with each fan coil unit, indeed they would be counterproductive if they permitted an upstream owner to affect the rate at which supply water (hot or cold) became available to downstream fan coil units of other owners. The pleadings do make it clear that there are two valves in connection with each fan coil unit.

(3) It is stated in paragraph 16 of the agreed facts that the condensate pan "has a drainage hole and a detachable drainage tube" which I take it leads to the riser known as the condensate drain pipe, which is one of the risers said in paragraph 13 to be "running through each line of fan coil units".

22 I conclude that the fan coil units, although connected to risers that are "pipes", referred to in paragraph 1(d) of Schedule "C" are not themselves, nor are their coils, "pipes" within the meaning of paragraph 1(d). That term should be given its plain meaning, which would exclude the fan coil units from the meaning of "pipes", even though the coils in the fan coil units are acknowledgedly within the dictionary definitions of pipes. In my view there is no ambiguity on this narrow question and so there is no reason to consider the doctrine of contra proferentum with respect to it.

23 On the first test in paragraph (d) the fan coil units would be common elements if they were "pipes" and if they were "within any walls or floors". On the view I take of the first element I need not deal with the second element. However, I am of the opinion that, although the fan coil units are enclosed in dry wall they are not "within any walls or floors" as contemplated by paragraph 1(d).

24 That brings us to the second branch of the plaintiffs' argument with respect to paragraph 1(d), to the effect that the fan coil units are common elements because they are "furnace ducts and controls which may be within any unit", and so "shall be excluded from such unit". It will be recalled that individual units and common elements are mutually exclusive. It is especially with regard to this interpretation that the plaintiffs pressed their contra proferentum argument, stating that there is ambiguity and that the ambiguity must be resolved in favour of the plaintiffs.

25 The observations made above with respect to s. 24 of the old Act, and the fact that neither the declarations (exhibits 1 and 3) nor the descriptions (exhibits 2 and 4) refer to fan coil units as common elements, or, more importantly, as exclusive or restricted use common elements - even although not to do so if they were in fact exclusive-use or restricted-use common elements could render agreements of purchase and sale unenforceable - apply with equal force to this argument on the second branch of paragraph 1(d) of Schedule "C".

26 The plaintiff again refers to dictionary definitions, noting that Webster, supra, defines a "duct" as a "channel for fluid, that the Concise Oxford Dictionary, supra, gives as a primary meaning of duct that of "a channel for fluid" and that a boiler is sometimes "a vessel for water heated by a furnace". It is contended for the plaintiffs that the fan coils are "ducts" and because connected with the boilers (at least in winter) they are "furnace ducts" within the meaning of the second branch of paragraph 1(d), and so excluded from the dwelling units and thus are common elements. The plaintiff asserts further that the controls in each

dwelling unit are the "controls" referred to in paragraph 1(d) and so excluded, and that a fortiori the fan coil units are also excluded and so are common elements.

27 The plaintiff argues that nothing in the declarations or the descriptions states that the fan coil units are not "furnace ducts", and that if those who drafted the declarations had wanted to include the fan coil units as parts of the individual dwelling units (i.e. excluded from the common elements) as was done in the case of the declaration with respect to a condominium building at 110 Bloor Street West in Toronto, they could have done so. In that case the declaration stated that:

The Units shall include the fan coil air cooling and heating equipment from shut valve to shut off valve and where applicable the fire place and fire and shall not include such pipes, wires and cables located within the above-mentioned boundaries that provide service to more than one unit.

28 The defendant and its supporters of course argue that the above quoted provision was inserted out of an abundance of caution to state the obvious. They also argue that the quotation reflects the proper distinction between the fan coil units themselves and on the other hand those "pipes ... located within the above-mentioned boundaries, that provide ... service to more than one unit" and that the latter are, properly, stated to be common elements.

29 The plaintiff argued that the fan coil units and the "furnace ducts", are integral parts of an integrated heating system instead of mere receptacles such as basins, bath tubs, toilets, and dishwashers. In this regard my observations above about the pipes "running through a line of fan coil units" are applicable and tend to support the view that the fan coil units may be viewed as separate from the common elements that service more than one unit.

30 The plaintiffs argue that paragraph 1(d) is, at best, ambiguous and that the ambiguity should be resolved in favour of the plaintiffs on the basis of the doctrine of contra proferentum. Implicit in this is the assertion that, because the declaration is referred to in the agreements of purchase and sale it is incorporated by reference and therefore is a contractual document. The declarations are very much the creations of the developer and their terms are settled by the developer and proffered to each original purchaser of a unit, with the purchasers having to "take it or leave it".

31 With respect to the doctrine of contra proferentum Mr. Shnier referred to two passages from the third edition of the Canadian Encyclopedic Digest, and to the reports of three cases. The two passages are as follows:

497. Where a contractual provision is sufficiently ambiguous that it is reasonably capable of more than one construction, it will be construed against the party responsible for drafting and tendering the contract and in favour of the opposite party. But if there is reasonable certainty as to the proper meaning of a provision, even though some difficulty in construction may exist, there is no warrant for employing this rule. The rule applies to complicated contracts, deeds and standardized business documents since care in draftsmanship may be expected in such cases, but the rule does not extend to informal contracts such as contracts formed from correspondence nor to printed forms which have been substantially amended bilaterally before execution. The rule applies with particular force to exceptions to or reservations from the primary covenants of deeds. [Footnotes and footnote references omitted]

499. If alternative constructions of contractual provisions are possible, the courts will avoid interpretations that are absurd, unjust or even improbable. Similarly, the courts will shrink from interpretations which would render a party's promises meaningless, the transaction void or would involve illegality such as contravention of a statutory prohibition, since it will be presumed that the parties did not intend to violate the law. [Footnotes and footnote references omitted]

32 The principal argument of the defendant and its supporters is that paragraph 1(d) is not ambiguous. As was stated vigorously and almost poetically by Mr. Arcand (without any apology to Gertrude Stein), "A fan coil unit is a fan coil unit is a fan coil unit; it is not a pipe or a wire or a duct but a fan coil unit." It was also pointed out that although incorporated by reference in the agreements of purchase and sale the main purpose of the declarations was not to embody contractual provisions between the developer and original purchasers of units. It is the basic document, after the statute, in determining the rights of unit holders inter se and vis-a-vis the condominium corporation. Many of its provisions are required by statute. It is an on-going document that can be amended, albeit that under the old Act that took the affirmative votes of the holders of all the units.

33 The decision of the Court of Appeal in *Chin v. Jacobs et al.*, [1972] 2 O.R. 54 involved at the appellate level a clear application of the "rule" of contra proferentum to construe a manifestly ambiguous term against the employers who had the employment contract drawn up. Mackay, J.A. also stated that the Court of Appeal was not convinced that the trial judge was in error in holding against the employers. The trial judge referred to contra proferentum but also to the fact that of the other two possible interpretations one should be rejected as being improvidently generous to the employee, and the other should be rejected with the aid of contra proferentum, as being unfair to the employee.

34 In *John Lee & Son (Grantham) Ltd. et al. v. Railway Executive*, [1949] 2 All E.R. 581, Evershed M.R. construed a contract of indemnity against the party that proffered the contract, stating that the rule of contra proferentum should be applied, but the principal ground for his decision, it appears to me, is found in the statement that "because of the extravagant result which the former view involves, I think that the latter construction is the one which the court ought to adopt." (my emphasis). In the same judgment Evershed M.R. also stated that "as a matter of construction of this kind other cases provide a very uncertain guide and each document must be construed according to its own terms."

35 The decision of Ferguson J. in *Township of Red Lake v. Dawson*, [1964] 1 O.R. 324, while expressly stating that the contract there under consideration should be construed against the municipality that prepared it, referred also to several legal principles of much more fundamental importance than the contra proferentum rule, and I am convinced that the rule played but a small part in adding to the already sufficient reasons for the decision.

36 To return to the above-quoted excerpts from the Canadian Encyclopedic Digest, it will seem that ambiguity is there distinguished from difficulty of interpretation. Furthermore, in the second of the two passages quoted above, it is pointed out that the courts will shrink from an interpretation which would involve illegality, or render a party's promises meaningless. In that connection I refer again to the effect under s. 24 of the old Act of having exclusive-use common elements not described as such in the contracting documents of an Ontario condominium.

37 Even assuming that the declarations are contractual documents to which the contra proferentum rule would apply, and although the second part of paragraph 1(d) of Schedule "C" presents some difficulties of interpretation, when I consider the document as a whole, I do not find the clause to be ambiguous. I hold that the fan coil units are not parts of the common elements but form part of the dwelling units in which they are located.

38 Under the old Act, as interpreted by the courts, a condominium corporation was the only proper plaintiff to bring an action in respect of the common elements, but was not a proper representative plaintiff to bring a class action on behalf of the rights of unit holders relating to their separate units. Under the current Condominium Act the condominium can sue to recover for damages not only to the common elements but also to the several units.

39 The second main issue is whether the claims of individual unit holders, referred to in paras. 8(w), 8(x) and 10(g) of the plaintiffs' statement of claim, may be asserted in a class action.

40 It was conceded by the plaintiffs during the trial of these issues that, if a class action were allowed the class would have to be limited to those unit purchasers who purchased their units from the developer and who still own their units. When counsel for the third party and counsel for the defendant objected to the lateness of this concession, Mr. Shnier referred to the Court of Appeal judgment in *Naken et al. v. General Motors of Canada Ltd. et al.* (1978), 21 O.R. (2d) 78, where, although an appeal from the Divisional Court decision striking out the statement of claim in a class action was dismissed, leave was granted to the plaintiffs to deliver an amended statement of claim restricting the class as specified by the Court of Appeal. Mr. Shnier argued that it is clearly not too late to limit the class in this action, and I agree with him.

41 There is a further difficulty with respect to the determination of the class. There is no express warranty that the units and common elements will be completed in a workmanlike manner. Indeed in the form of agreement of purchase and sale (exhibit 5), that was conceded by all parties to be a standard form of agreement used with respect to the units in both buildings, it is stated, in cl. 12, as follows:

This offer when accepted shall constitute a binding contract of purchase and sale. It is agreed and understood that there is no representation, warranty, collateral term or condition affecting this agreement, the building or the unit, other than expressed herein in writing.

This is an attempt to exclude all other warranties. It was common ground at the trial of these issues that an implied warranty to build in a good and workmanlike manner applies only in respect of dwellings not completed at the time they are agreed to be sold. See *Croft v. Prendergast*, [1949] O.R. 282 (C.A.), and the cases referred to therein. The appropriate class could be further limited to those who purchased before their units were completed. Given the nature of condominium ownership where each unit owner owns his unit and has an interest, as tenant in common, in the common elements, the fixing of the time of completion could be very difficult to determine. The plaintiffs contend that the class can be described now on a formula basis, as those unit owners who purchased from the developer before the completion of relevant construction and who still own their units, and that once the date of completion is established the records of the condominium corporation will easily provide the answers as to who is in the class. That may determine eligibility but there could still be problems with respect to persons who might wish to opt out of the class.

42 The plaintiffs' case was vigorously argued by Mr. Shnier. In brief, his argument was that subject to the above mentioned limitations of the class, this case was appropriate for a class action because the allegation of faultiness in the design and quality of the valves, and the improper housing of the fan coil units, are common grievances affecting everyone in the class. Mr. Shnier contends that the complaint is not with leakage but with faulty valves and faulty housings, i.e. that a unit holder does not have to have experienced leakage yet in order to have been damaged, because the fault is that he now owns a fan coil unit to which he does not have proper access for maintenance, and in one building so many valves have leaked that all the valves can now be said to be faulty, whether or not they have leaked to date. The plaintiffs assert that the complaint is the same for all members of the classes and that this case can be distinguished from *York Condominium Corp. No. 148 v. Singular Investments Ltd.* (1977), 16 O.R. (2d) 31, where Henry J., after reviewing the requirements for a class action as listed by Morand J. in *Farnham v. Fingold*, [1972] 3 O.R. 688, held that a class action should not be allowed because there were different breaches of contract and different negligence allegations with respect to different units. Clearly in this case the focus has been narrowed and the scope of individual differences has been reduced, but the question remains whether there are not sufficient remaining individual differences to make the class remedy inappropriate given the limitations of the present Rule 75. Henry J., at page 35, states as follows:

... If I could briefly summarize the thrust of the authorities cited by Morand J., it is this: that the class action is designed to create a fund which will normally be identified as a global amount of damages in which all those who are members of the class will have some interest to greater or lesser degree, but that the division of the fund among them will be a matter to be determined by some mechanism set up under the supervision of the Court. This is quite different in my view from the creation of such a fund by determining the individual amounts of damages suffered by the members of the class which must be determined before the total fund can be identified; moreover, in the determination of that particular series of issues, the Court may be called upon to deal with distinct relationships in law, whether it be contract or tort, as between the defendant and the individual owners. In the circumstances it appears to me that the matter does not fall within the concept of a class action at all.

The plaintiffs contend that in this case individual assessments will not be required, asserting that a single contract can be let to a builder who will make all the fan coil units accessible, and that the cost can be divided among the unit owners in the class, and that the same reasoning applies to the replacement of valves. Clearly this is closer to the mark than were the various contracts in the *Singular Investment* case, but does it go far enough?

43 The defendants and their supporters argue that being able to let single contracts is not the issue and does not constitute the global "fund" referred to in the cases. They say that individual unit holders have a duty to mitigate their damages, if any, and that will involve assessments. They assert that they should not be deprived of discovery as to mitigation, and as to actual harm, if any, suffered by way of leakage. Further the defendants argue that the valves in question have been installed and working for eight years, and that there have been no problems with most of them and, accordingly, that the design of the valves is not faulty. As to the last point, the plaintiffs reply that the assertions of the defendants go to the question of the faultiness of the design of the valves, but that question is itself a triable issue that can best be resolved in a class action.

44 As to the overall repair contracts the defendants contend that many unit owners may not want to replace valves that have given them no problems; and, even if they were awarded damages, there is nothing to prevent a unit holder from pocketing the

money and keeping the valves he has. Furthermore, some of the valves have been replaced and access to some of the fan coil units has been provided.

45 The defendants contend that the measure of damages cannot be derived by mathematical calculations or on a pro rata basis, but that individual assessments will be required and maintenance will be a differentiating issue.

46 The nature of the groups that might form the classes was also considered. The defendants and their supporters contend that the policy considerations relating to "mass wrongs" need not be brought to bear in this case. The unit owners can readily get in touch with each other. The amounts involved are sufficient to have made joint action by joinder of parties appropriate and practical, and in those circumstances the defendants would not be deprived of discoveries.

47 There was discussion of whether the plaintiffs should have revised their actions when the amendments to the Condominium Act came into force, and proceeded by having the condominium corporations act as plaintiffs in respect of both the common elements and the individual units. The defendants said that should have been done but the plaintiffs argued that such proceedings would have been attacked as attempting to give retroactive or retrospective effect to the new provisions. I do not decide the matter but I would have thought that in this regard the amendments could be regarded as procedural law and so applicable.

48 If a class action were to be allowed it could only be under Rule 75 which provides that:

75. Where there are numerous persons having the same interest, one or more may sue or be sued or may be authorized by the court to defend on behalf of, or for the benefit of, all.

49 I have read the cases cited by counsel and I think that the following excerpt from the Ontario Law Reform Commission Report on Class Actions (1982), vol. 1, p. 25, affords a good summary of the law in Ontario before the recent decision of the Supreme Court of Canada in *General Motors of Canada Limited v. Naken*, unreported, pronounced February 8, 1983, the excerpt from that commission's report being as follows:

As will be explained in greater detail below, damage class actions have been allowed to proceed to trial where the full liability of the defendant to the class can be determined without resort to individual proceedings because of the existence of common proof. Consequently, where, in a class action, the damages claimed are a lump sum owing to the class, which can be established by common evidence, the action will be permitted to proceed in class form. A damage class action also will be allowed to be maintained where the amount of damages claimed on behalf of each of the class members is identical. Finally, the court will not dismiss a damage class action where the amount claimed for each member of the class is readily ascertainable, for example, by mathematical calculation.

50 I cannot agree with the plaintiffs that there will not be a need for individual assessments, and for differences based upon mitigation or the lack of it. In this regard the following statement of Jessup J.A., in *Farnham v. Fingold*, [1973] 2 O.R. 132, at p. 136, is instructive:

[W]here the members of a class have damages that must be separately assessed, it would be unjust to permit them to be claimed in a class action because the defendant would be deprived of individual discoveries, and, in the event of success, would have recourse for costs only against the named plaintiff although his costs were increased by multiple separate claims.

51 Before the Court of appeal decision in *Naken*, the prevailing view in Ontario, as expressed in decisions such as *Loader et al. v. Rose Park Wellesley Investments Ltd. et al.* (1980), 17 C.P.C. 150; and *York Condominium Corporation No. 228 et al. v. Tenen Investments Ltd. et al.* (1977), 17 O.R. (2d) 579 was that, because of the likelihood of different defences a class action was not the appropriate form in which to litigate complaints of deficiencies in construction of individual units in a condominium. The court of Appeal judgment in *Naken* was urged by the plaintiff, along with the judgment of Stark J. in *Cobbold v. Time Canada Limited* (1976), 13 O.R. (2d) 567, as indicating that the courts were now prepared to take a more generous view of what could be accomplished by way of class actions under Rule 75.

52 In my view those cases did not go far enough to assist the plaintiffs in this matter. This case involves too many individual elements to bring it within the jurisprudence as to a "common fund" or within even the extended meaning of the "same interest" under Rule 75. In my opinion the matter has been put beyond question by the recent decision of the Supreme Court of Canada in *General Motors of Canada Ltd. v. Naken et al.*, *supra*.

53 Denial of discovery would clearly be a prejudice to the defendants and to the third and fourth parties here represented. Moreover this is not a case where the amount of the "fund" is ascertainable by the means of relatively straightforward computations; individual claims, involving more than computation, involving assessment would have to be added up if it were attempted to arrive at a find. Similar or the same, calculations would be required in order to determine the participation of individual claimants in the overall find. The difficulties affect both ends of the process. There is no readily determined find at the beginning; and there is no readily calculable basis, such as the number shows of a class of a corporation's share capital owned by each putative member of the class or the time remaining on the respective magazine subscriptions of the claimants, for determining the share of individual claimants if a global amount were capable of being recovered.

54 It was argued strongly for the plaintiff that declaratory judgments on a class action basis as to the general questions of design and construction in the matter of valves and in the matter of the accessibility of the condensate drain pans in the fan coil units would prove convenient and appropriate, and that given declaratory judgments on those issues, the assessment of individual differences would not be difficult. With respect, I believe that in this case the declaratory judgments even if obtained, and that is problematical, would not settle a sufficiently great proportion of the issues involved to constitute the degree of convenience called for by the cases; too much would be left to individual assessments. This case is not analogous to cases where declarations are sought as to the statutory rights of a case of persons, where the declarations would virtually resolve the only issues reasonably expected to require adjudication. See *Chastain et al. v. British Columbia Hydro and Power Authority*, [1973] 2 W.W.R. 481 and *Shaw et al. v. Real Estate Board of Greater Vancouver*, [1973] 4 W.W.R. 391, and the leading case of *Duke of Bedford v. Ellis*, [1901] A.C. 1.

55 Accordingly I have answered the question in the negative, stating that claims in respect of the alleged construction deficiencies may not be asserted in a class action.

56 Notwithstanding that I have had the benefit of written submissions as to the costs of the trial of the two issues dealt with herein, I believe that the question of costs with respect to such issues should be left for disposition by the judge dealing with the main action. The written submissions will be available to such judge and that judge will be able to consider them against the background of the whole action.

SUTHERLAND J.

CBR# 273

RE SCOFFIELD AND STRATA CORPORATION N.W. 73 ET AL.,

(1983) 145 D.L.R. (3d) 574 BRITISH COLUMBIA (C.A.) 1983 Condominiums -- Rules -- Procedure -- Fairness -- Condominium council holding meeting and imposing fine on appellant for illegally keeping a cat on her premises, without first informing appellant in any way -- Council found to have acted without fairness -- Appellant discharged from payment of fine and lien discharged -- Condominium Act, R.S.B.C. 1979, c. 61, s. 42. This was an appeal from a judgment which found that a strata corporation properly imposed a fine on the appellant and placed a lien against her property. The condominium council imposed the fine after holding a meeting concerning complaints that the appellant was illegally keeping a cat on her premises. The appellant was never informed in any way of the complaint. HELD: The appeal was allowed. The appellant was discharged from paying the fine and the lien was discharged. There was a minima requirement of fairness that the appellant receive some notice to know why the council was meeting and to know that she faced the risk of a fine. The council had thus acted without fairness. Under s. 42 of the Condominium Act it was possible for an owner to come before the Court alleging that an act of the strata corporation was unfairly prejudicial to the owner.

CBR# 241

R. v. SOUTHDOWN BUILDERS LTD.,

(1981) 57 C.P.R. (2d) 56 ONTARIO (Co. Ct.) 1981 False advertising -- Strict liability offence -- Accused failing to show due diligence -- False statement not insignificant -- Condominium owners seriously prejudiced -- Busy executive lax in his responsibilities -- \$10,000 fine -- Combines Investigation Act, R.S.C. 1970, c. C23, s. 37(1)(a). The accused corporation was charged with false advertising contrary to s. 37(1)(a) of the Combines Investigation Act. A brochure intended to promote the sale of condominiums owned by the accused stated that the units were equipped with individual heat and air-conditioning controls that were "guaranteed trouble-free for ten years by G.L. leaders in their field". In fact, the condominium purchasers received only a one-year warranty and an additional four years for the refrigeration unit. The main witness for the defence was L, a director of the accused, who testified that he honestly thought that a ten-year warranty would be given and that he had nothing to do with the brochure. The defence also argued that the difference between the actual warranty given and the promised warranty was not a substantial matter. HELD: The accused was convicted and fined \$10,000. The offence was one of strict liability. For a successful defence, the accused had to show due diligence on a balance of probabilities. Persons in control of the day-to-day operations of a corporation must exercise a degree of supervision and control. If L honestly believed that a ten-year service contract would somehow be thrown into the deal, that belief was unreasonable. In not knowing of the brochure, L showed no control over the advertising activities of the accused. In short, a busy executive was lax in his responsibilities. It was perfectly clear on the evidence that the condominium purchasers were severely prejudiced by not being given a ten-year service contract.

CBR# 375

YORK CONDOMINIUM CORPORATION NO. 167 ET AL. v. NEWREY HOLDINGS LTD. ET AL.,

(1980) 14 R.P.R. 62 ONTARIO (H.C.J.) 1980 Condominium -- Common elements -- Whether janitor's suite included in common elements -- Whether developer entitled to retain proceeds of sale of parking spaces -- Condominium Act, R.S.O. 1970, c. 77, s. 77. This was an action by the condominium corporation for a declaration that the janitor's suite was part of the common property and that the corporation was entitled to the proceeds of the sale of 34 parking spaces. The defendant developer counterclaimed for wrongful termination of a management agreement. The purchasers took control of the corporation from the defendant on October 8, 1974. It made no mortgage payments on the janitor's suite, but did pay rent to the defendant for some months. There was never any agreement that the unit would form part of the common property. Of the 34 parking spaces in question, only one was sold after October 8. The management agreement had been made between the defendant and the corporation when the corporation was still controlled by the defendant.

HELD: The declaration was refused and the counterclaim was dismissed. The janitor's suite did not become part of the corporation property unless there was a common intention that it would. The plaintiff did not establish on a reasonable balance of probability that such an intention existed. The defendant could not be prohibited from selling additional parking spaces prior to registration of the declaration on October 8 and was entitled to retain the proceeds of such sales. After registration, however, the defendant became merely a tenant in common with other unit owners. The proceeds of the space sold after that date should therefore be divided in proportion to the number of units held by the defendant and the other owners. The evidence relating to the counterclaim suggested that the defendant had not exercised its management duties in good faith. This justified termination of the agreement without notice.

CBR# 111

Dyer v. York Condominium Corp. No. 274

Between

Kenneth F. Dyer, plaintiff, and York Condominium Corporation No. 274, defendant

Ontario Supreme Court - High Court of Justice

Toronto Motions Court

Hollingworth J.

Heard: May 27, 1980.

Oral judgment: May 27, 1980. Reasons: June 16, 1980.

(6 pp.)

Counsel:

Paul Bannon, for the plaintiff.

John Hahn, for the defendant.

1 HOLLINGWORTH J. (orally):— This is a motion in which the plaintiff applicant asks for an interim injunction restraining the defendant Condominium Corporation from making any addition, alteration, improvement to or renovation of the common elements of the defendant at the property known as 75 Graydon Hall Drive in Don Mills.

2 This is a rush application and the fact that the Condominium Corporation was only served with papers in the matter last night at 10:30 perhaps accounts somewhat for the paucity of material before me.

3 Very briefly, the Condominium Corporation Board of Directors felt that the caulking on the outside of the building was in need of repair. Apparently because of the problems with the caulking, water is seeping through the outside of the building into various units causing damage to the floors and walls of the said individual units. Apparently complaints have been received by the Corporation over a six month period and as a result of these complaints and the damage which has been occasioned as indicated and after discussion with experts, the Board of Directors acted and hired a company called Day Restoration Limited who agreed to make the repairs involving thirty days' worth of work at a cost of \$23,800. I am advised that the work has already been started, swing stages are up on the roof and major portions of the old caulking have been removed.

4 The plaintiff takes grave exception to this and asks for an injunction to stop the Corporation from having the caulking done. The plaintiff's counsel invokes Section 38 of The Condominium Act and states that there should have been a meeting because the work is "substantial" and because of that aspect a meeting should have been held to have the approbation of the condominium owners or at least 80% of the owners. He also points out that it may well come under Sections 42 and 41(3) but again Section 42 deals with substantial damage and Section 41 deals with repair after damage and also maintenance.

5 Counsel for the defendant states that Section 38 is only applicable for substantial alterations and that if there are dissenters that under Section 38(4) the Corporation must buy back the unit from the dissenter. He says that Section 41 is the operative section and either for repairs or maintenance it is incumbent upon the Corporation to proceed with the work. That is their job, so long, of course, as it is not of a substantial nature.

6 I would have to consider in any case after a hearing of the facts, whether or not there is either a prima facie case or a serious issue to be tried and then consider the matters of irreparable harm and balance of convenience.

7 From the facts which I have gleaned from the affidavit material filed before me, I must make a finding first of all whether there is any substantial work done in connection with the "addition, alteration or improvement to or renovation of the common elements". Section 38(1) deserves to be quoted. It reads:

The Corporation may by a vote of owners who own 80% of the units make any substantial addition, alteration or improvement to or renovation of the common elements or may make any substantial change in the assets of the Corporation and the Corporation may by a vote of the owners make any other addition, alteration or improvement to or renovation of the common elements or may make any other change in the assets of the Corporation.

8 In reply, Mr. Bannon seemed to indicate that it was not necessary that the word "substantial" be read into this latter part of the subsection and he says "and the Corporation may by a vote of the owners, make any other addition, alteration or improvement to the renovation of the common elements." What he has read is correct but he has forgotten the fact that the word "and" immediately before that indicates that it is conjunctive and therefore that this part refers to the "substantial" quoted above. I have no hesitation in saying that Section 38(1) deals only with substantial "addition alteration or improvement to or renovation of the common elements" and I find as a fact in this case that the caulking is not a "substantial" addition or alteration or improvement.

9 I now turn to Section 41 which talks about repairs and maintenance, and as Mr. Bannon correctly says, the words again and again are repair after damage. I find again that there is no repair after damage in this connection and I take it, although it does not say it, that "after damage" would imply damage from some act of God, some storm or tempest.

10 Turning to subsection (3) the Corporation shall maintain the common elements and going to the dictionary, the Webster's New World Dictionary refers to maintenance, inter alia, as "to keep or keep up" or "to keep in a certain condition", e.g. good repair, to preserve. That is the case with the caulking in this particular matter against Section 42(1) which reads:

Where damage to the building occurs the Board shall determine within thirty days of the occurrence whether there has been substantial damage to 25% of the building.

I find as a fact that that section is not applicable here. There has been no substantial damage to 25% of the building and again, as I have said above, I feel that this is really a matter of maintenance and that the Corporation shall maintain the common elements.

11 The next thing I have to determine is whether or not, after finding that there has been no substantial damage and substantial alteration as a result of what the Corporation is doing, a meeting should be held. There is a conflict in the evidence whether or not owners under Section 19(1) have instructed the Board to call and hold a meeting of the owners, I find there is not sufficient evidence before me that 15% of the owners have called for a meeting but it is generally conceded by both counsel that if there is no substantial damage, and I find as a fact that there hasn't been, then it is not incumbent upon the Board of Directors to call a meeting but if the owners had taken the initiative then a meeting would have been called. Such has not been the case.

12 I therefore find that the Board has acted quite properly. They were confronted with a situation in which caulking needed to be done to prevent substantial damage to various owners of the condominium from the seepage of water into their individual apartments and they have done so quite properly in my opinion.

13 I therefore find that regardless of how one looks at it, whether it is a prima facie case or a serious issue to be tried, that in either case that such has not been met, and that would end the matter except that I must consider the matter of irreparable harm and balance of convenience.

14 I find that in this particular case there was no irreparable harm to the plaintiff. There would be irreparable harm to the owners of the condominium if this work were not done and individual owners of the condominium found that their apartments were ruined by the seepage of rain and the same argument could be applicable regarding the balance of convenience.

15 I therefore find that the plaintiff fails; he will not be given an injunction and this motion is therefore dismissed with costs to be taxed.

HOLLINGWORTH J.

CBR# 264

Re Peel Condominium Corp. No. 73 and Rogers et al.

21 O.R. (2d) 521
 ONTARIO

ONTARIO
 COURT OF APPEAL
 HOWLAND, C.J.O., BROOKE AND WILSON, J.J.A.

12TH OCTOBER 1978.

APPEAL from an order dismissing an application brought pursuant to s. 23 of the Condominium Act, R.S.O. 1970, c. 77.

John Barkwell, for appellant.

George A. Rogers, appearing in person.

 The judgment of the Court was delivered by

BROOKE, J.A.:— Peel Condominium Corporation No. 73 (the Corporation) appeals from the dismissal of its application brought pursuant to s. 23 of the Condominium Act, R.S.O. 1970, c. 77 (the Act), as amended by 1974, c. 133, s. 13. By that section it is provided:

PERFORMANCE OF DUTIES

23(1) Where a duty imposed by this Act, the declaration or the by-laws is not performed, the corporation, any owner, or any person having an encumbrance against a unit and common interest may apply to the county or district court for an order directing the performance of the duty.

(2) The court may by order direct performance of the duty, and may include in the order any provisions that the court considers appropriate in the circumstances.

(2a) The lessee of a unit is subject to the duties imposed by this Act, the declaration and the by-laws, on an owner, except those duties respecting common expenses, and this section applies in the same manner as to an owner and where the lessee is in contravention of an order under this section, the court may terminate the lease.

(3) Nothing in this section restricts the remedies otherwise available for failure to perform any duty imposed by this Act.

The Corporation sought an order requiring the Rogers to take down four cedar trees. The Rogers took possession of their townhouse unit in the summer of 1974 and the next year planted the trees in the garden area adjacent to their unit. By art. VII(b) of the declaration the Rogers had been granted exclusive use of the small garden area adjoining their unit. The Corporation contended that as that area was a part of the common elements such exclusive use did not include the right to plant trees as this was prohibited by the provisions of the declaration to the effect that with certain express exceptions the unit owners could not make additions, alterations, improvements or renovations to the common elements without the prior written consent of the board.

Article XV of the declaration imposes upon the unit owner a duty to comply with the declaration, by-laws, and rules and regulations of the Corporation. The relevant provisions of the declaration relied upon by both parties were:

Article VII

.....
 (b) The owner of each unit shall have the exclusive use, subject to the provisions of this declaration, the by-laws of the corporation and the rules and regulations passed pursuant thereto, of the heating system located in each such unit, including without limitation the furnace controls and ducts and shall also have the exclusive use, subject to the provisions of this declaration, the by-laws of the corporation and the rules and regulations passed pursuant thereto of an enclosed patio or small garden area designated by being numbered the same as the number of such unit and the letter "A" following such number as designated on Part 1 (Sheet 2) of the Description and shall also have the exclusive use of the balcony to which his unit shall give sole access.

.....
 Article XI

.....
 3. Maintenance of Common Elements: The common elements shall be maintained by the corporation, save and except for any enclosed patio or small garden area, inner surface of any window, or inner surface of doors leading out of any units and any balconies to which any unit shall give sole access to, which excluded portions of common elements shall be maintained by each owner having the exclusive use thereof.

4. Additions, alterations or improvements by owners: No owner shall make any structural change in or to his unit or any change to an installation upon the common elements, maintain, decorate, alter or repair any part of the common elements (except for any inner surface of any window, or inner surface of doors leading out of any unit, of which such owner has the exclusive use)

without the prior written consent thereto of the board. Any such change shall, if approved by the board, be made in accordance with the provisions of all relevant municipal and other governmental by-laws, rules, regulations or ordinances, and in accordance with the conditions, if any, of such approval by the board.

Section 14 of the Act authorizes the Corporation to make any substantial addition, alteration or improvement to or renovation of the common elements by the vote of members owning a specified percentage thereof and to make other additions, alterations, improvements or renovations by a vote of a majority of the members.

On the return of the Corporation's application, after considering the evidence given viva voce by Mr. Rogers, the affidavit of the Corporation's property manager, some correspondence between the parties, and the relevant documents, the learned Judge of the County and District Court dismissed the application. He did so because he was of the view that the Corporation "has not shown that the area where the trees are located are not within 'the exclusive use' area contemplated". This finding was right. The evidence is clear that the four trees were planted within the area of the small garden over which the Rogers had exclusive use. But with respect, as that area was a part of the common elements, the issue was whether the Rogers' exclusive use was limited by the provisions of art. XI, para. 4 above so that he was duty bound not to plant the trees there. In other words was the planting of the trees an alteration of the common elements for which he required the consent of the board?

The evidence led by the Rogers as to the circumstances surrounding the planting of the trees was not really contradicted. Indeed the Corporation's manager who made the affidavit was not called upon to give evidence, and no doubt could not have testified in relation to the time when the events transpired, because he was not then employed there. In his evidence Mr. Rogers asserted that before he had purchased the unit he had received a copy of an earlier form of the declaration which gave him the exclusive use of "an enclosed patio or deck and small garden area". He relies on the passages conferring upon him exclusive use of the garden area and he says he "took this place with the understanding I had a garden area and could put some trees in".

Counsel for the Corporation contends that in the circumstances the Rogers' right to plant trees in this part of the common elements has been taken away by clear language or by necessary implication. He relies upon the words of art. XI, para. 4 and s. 14 of the Act referred to. He submits that in considering the provisions of the declaration the Court should have regard to the underlying principles of the concept of a condominium, and in particular that there may be curtailment of individual rights normally associated with private property if the majority interest in the common elements is to be maintained. The principle cannot be doubted, but in my view it should not be used to reduce the grant of an exclusive use of the garden area to simple occupation of a piece of ground. This is, in my opinion, the effect of counsel's submission. The construction contended for is a strained one. I think that reasonable people would, as this man did, understand that if they were granted exclusive use of a garden area they could have a garden there. If it had been intended to restrict its exclusive use to a grassy area the declaration could have so provided. A garden is a place where one can plant flowers, fruit or vegetables: see the Shorter Oxford English Dictionary, 3rd ed., vol. I, p. 832, col. 1. By custom it is a place where shrubs and trees are planted for privacy and shade. It may be that having regard to the powers of the Corporation under the Act and the declaration, specific by-laws or rules could have been passed restricting the use of the garden area, for example, as to the height or type of plants or trees. The declaration should be interpreted so as to give meaning to it as a whole. In my opinion the prohibition in art. XI, para. 4 against alterations without the consent of the board, contemplated some more far-reaching change than the normal planting of trees or shrubs in a garden area. Section 7(4) of the Act provides that:

7(4) Subject to this Act, the declaration and the by-laws, each owner may make reasonable use of the common elements.

The planting of the four cedar trees in question constituted a reasonable use of the common elements of which the respondents had been given exclusive use.

There is a second reason why I think the appeal should be dismissed. As was pointed out by Sheard, Co. Ct. J., in *York Condominium Corporation No. 297 v. Chris Karl Wiesner and Janet Mary Wiesner* (an unreported judgment of the County Court of the Judicial District of York, dated July 28, 1978), s. 23 authorizes the Court to exercise its discretion in granting the relief provided by the section. The quality of the evidence before the Court is always of significance in the exercise of such discretion. In my opinion the respondent George A. Rogers' evidence given under oath and tested by cross-examination remained undenied. In the absence of a clear finding by the trial Judge that the evidence of the respondent George A. Rogers was unacceptable, in my view the Corporation's case resting on the affidavit of the manager is deserving only of little weight. The evidence of the respondent George A. Rogers that he purchased the property with the understanding that he had exclusive use of the garden and could plant trees there is consistent with the interpretation of the declaration he contends for.

Accordingly, the appeal should be dismissed and the respondents will have their disbursements.

Appeal dismissed.

CBR# 265

Re Peel Condominium Corporation No. 78 and Harthen et al.

20 O.R. (2d) 225

ONTARIO

ONTARIO

COUNTY COURT

JUDICIAL DISTRICT OF PEEL

MISENER, CO. CT. J.

16TH MARCH 1978.

APPLICATION to enforce a condominium declaration.

W. A. Harrison, for applicant.

L. D. Pringle, for respondents.

MISENER, CO. CT. J.:— This is an application brought by Peel Condominium Corporation No. 78. The declaration that by statute creates that corporation prohibits all owners, tenants and residents of units from keeping dogs, cats, reptiles or rodents in their units or on any part of the common elements. The condominium itself consists of 204 units. Some 22 of the owners have ignored that prohibition and continue to resist the attempts of the corporation to persuade them otherwise. The corporation seeks the assistance of this Court.

The facts essential to a determination of this matter are straightforward enough. The lands and premises in question were, prior to August 28, 1975, owned by Bramalea Consolidated Developments Limited. I shall refer to that company hereafter as "Bramalea". On that date, August 28, 1975, Bramalea registered the declaration that I have referred to above in the Land Titles Office in Brampton. However, prior to August 28, 1975, Bramalea entered into written agreements of purchase and sale with most, if not all, of the respondents. According to those respondents who filed affidavits opposing this motion, they were severely misled by the agents of Bramalea. None of them were told that pets were or would be prohibited. Some of them were actually assured that pets would be permitted. Some were not only so assured but as well shown a copy of a proposed declaration that contained no prohibition against the keeping of pets. None of the respondents actually completed his purchase prior to October 7, 1975, but most are firm that neither they nor their solicitors were ever aware of the terms of the declaration that, as I have said, was in fact registered on August 28, 1975, until some time after completion. From that I assume that none of the solicitors who acted for these purchasers took the trouble to peruse the declaration at the Land Titles Office.

Needless to say, some of the respondents swear that, had they known of this prohibition, they would never have made their purchases.

In support of the motion, Mr. Harrison relies upon some four sections of the Condominium Act, R.S.O. 1970, c. 77, as amended. Firstly, s. 3(2)(c) provides that a declaration may contain provisions respecting the occupation and use of the units and common elements. Section 9(1) provides that the registration of a declaration creates a corporation without share capital whose members are the owners from time to time. By virtue of s. 12, each owner is bound by the declaration and each owner has a right to the compliance by the other owners with the declaration. Since each owner has a right to compliance by other owners with the declaration, the latter by necessary implication are under a duty to comply. Section 23(1) [am. 1974, c. 133, s. 13(1)] gives the corporation status to apply to the County Court for an order directing the performance of any duty imposed by the declaration or by the Act, and s. 23(2) expressly grants to that Court the right to direct performance of that duty. On the facts of this case, Mr. Harrison says that there is no reason why the Court should not exercise its discretion to compel compliance with the declaration since it is clear on the material filed, that that is the wish of the board of directors of the corporation.

Mr. Pringle, on behalf of the respondents, resists the motion on three grounds. In spite of his most able submissions, I think that the applicant is entitled to the relief it requests and I think I can best give my reasons for that conclusion by dealing with Mr. Pringle's grounds one by one.

Firstly, he says that the prohibition in question is simply ultra vires the corporation. The Act that creates the corporation sets the limits of its powers. Section 3(2) permits the inclusion of "provisions respecting the occupation and use of the units and common elements". Section 18 of the declaration here in question reads as follows:

All present and future owners, tenants, and residents of units ... shall not keep dogs, cats, reptiles or rodents in their units or on any part of the common elements.

Mr. Pringle says that that provision is not one "respecting the occupation and use" but rather is one that seeks to regulate the conduct of the owner. Regulation of conduct is not permitted by the Act, and so s. 18 of the declaration is beyond the power of the corporation and therefore void.

I do not agree. It may be that s. 18 of the declaration regulates conduct, but it surely is as well a provision respecting the use of the units and common elements. The word "respecting" surely means "relating to" or "concerned with" or "with reference to". I cannot think that the word "occupation" restricts the ordinary meaning of the word "use" although I readily acknowledge that certain observations made by Howland, J.A. (as he then was), in *Re York Condominium Corp. No. 42 and Melanson* (1975), 9 O.R. (2d) 116 at p. 122, 59 D.L.R. (3d) 524, might appear to give support to the opposite conclusion. But in my view "occupation" refers to the manner or nature of the physical possession in itself whereas "use" refers to the enjoyment of the premises once physical possession has been acquired. In my view, they are concepts essentially so different that a conjunctive interpretation in the sense that the regulation must relate both to occupation and to use before it is intra vires has the effect of

making the phrase meaningless, and I have the gravest difficulty in contemplating how any provision could, strictly speaking, relate to both occupation and to use.

The second ground raised by Mr. Pringle is this. He says that s. 7 of the declaration provides in clear terms that each unit shall be occupied and used only as a residence for a single family and for no other purpose. That section, he says, is in its very terms free from restriction of any kind and it follows therefore that such occupation must carry with it all the incidents that the law confers upon the family. One of those incidents is the right to keep pets. Section 18 of the declaration then purports to derogate from that right and this it cannot do.

My difficulty is in understanding the logic of this argument. Mr. Pringle says that the main reason preventing a derogation from the apparent common law right of the "single family" to keep pets is the York Condominium case, *supra*, but I have not been able to find such a declaration in that judgment. Moreover I see no "blatant inconsistency" (to use Mr. Pringle's phrase) between ss. 7 and 18 for the reasons I have attempted to give earlier. Section 7, in my view, relates to occupation. Section 18 relates to use. I see nothing inconsistent in a section restricting the nature of the occupation and then further restricting the use to which those in proper occupation may put to the premises.

Finally, he says that there is here a manifest error in the declaration itself, and that this manifest error should be corrected by expunging s. 18 of the declaration altogether. That argument takes these lines. Firstly, he says that, as a matter of fact, the respondents were grossly misled by Bramalea, the developer. Section 24b [enacted 1974, c. 133, s. 14] imposes on the proposed declarant (i.e., the developer) the obligation to deliver over to the proposed purchaser, upon the execution of the agreement of sale, a copy, *inter alia*, of the proposed declaration, and, at least 10 days before delivery of the deed, to deliver over a copy of the declaration or confirmation that the declaration is identical in all substantial or material respects to the proposed declaration previously delivered. Bramalea certainly did not comply with that section, and indeed actively misled whether innocently or otherwise, some of the respondents by delivering over a proposed declaration without any restriction on the keeping of pets at the same time verbally assuring them that pets were in fact permitted. Mr. Pringle says that the difference between the proposed declaration and the declaration actually registered constitutes a "manifest error or inconsistency in the declaration" as those words are used in s. 3(6) [enacted *ibid.*, s. 2(2)] of the Condominium Act, and by virtue of the same section, may be corrected by a Judge of the County Court.

Again I find myself unable to agree with that submission. I do agree that in determining whether or not there is a manifest error or inconsistency, the contents of any proposed declaration may well be relevant, but in a factual sense I cannot think that there is here "error or inconsistency". There is nothing to suggest that Bramalea made an error or that the vast majority of the ultimate purchasers thought so at any time, let alone at this stage. Rather, the developer consciously chose to change the proposed declaration, deliberately inserting the impugned s. 18 into the declaration that represented the final draft and which, as I have said, was duly registered. On any ordinary understanding of the words, I do not think that anyone would say that as a result of that "a manifest error or inconsistency in the declaration" arose. It may be unfair or unjust. It may even be manifestly unfair or unjust. But it is not an error.

Mr. Harrison seeks to answer this last objection of Mr. Pringle by invoking a host of concepts ranging from a submission that the statutory remedy of rescission provided by s. 24b exhausts the remedies available to those alleged to have been misled to a submission that any remedy that might have been available is extinguished by the doctrine of merger upon the delivery of the deed. In the view that I have taken, it is happily unnecessary for me to consider any of these concepts. I would point out, however, that, whatever the remedies, they are surely remedies against Bramalea, not against the condominium corporation, and to seek relief by way of an amendment to the declaration would result in the imposition of something akin to vicarious liability to the serious detriment of the majority of the shareholders of the condominium corporation.

Section 23(2) of the Condominium Act provides as follows:

23(2) The court may by order direct performance of the duty, and may include in the order any provisions that the court considers appropriate in the circumstances.

I think that the relief provided by that section is a discretionary one. The relief is sought by the corporation itself. By the very terms of the statute, the corporation has the duty to effect compliance by the owners of units with the Act, and the declaration. Moreover, s. 12 specifically gives the corporation a right to the compliance by the owners with the Act and the declaration. When I add to that statutory duty and statutory right the fact that, on the material filed, the great majority of the owners have adhered to the prohibition set out in s. 18 of the declaration, then it seems to me that I am duty bound, in the judicial exercise of that discretion, to give the corporation the assistance of the Court.

Accordingly, there will be an order directing the respondents to comply with s. 18 of the declaration as registered, and specifically directing them to remove any dog, cat, reptile or rodent from any unit occupied by them and from any part of the common elements within 30 days of the date of service upon them of a true copy of this order as issued and entered.

I do not think that this is a proper case for costs.

Order accordingly.

CBR# 034

YORK CONDOMINIUM CO. No. 104 v. SUPREME AUTOMATIC WASHING MACHINE CO.,

(1978) 18 O.R. (2d) 596

ONTARIO (H.C.J.) 1978

Condominium leasing laundry premises to operator of washing machine -- Issue of renewal of lease -- Management seeking declaration that unregistered lease invalid and renewal clause ineffective -- Applicant claiming also that lease ultra vires the management -- Management found to be agent for owner -- Authority to lease not ultra vires -- Lease itself invalid for lack of registration as against individual owners -- Interim order issued -- Condominium Act, R.S.O. 1970, c. 77, ss. 1(1) (n), 9(4). The original management of the condominium in question leased the laundry premises to the respondent in April 1973 for two years. The lease contained a clause providing that unless notice was given to the lessee to the contrary, it should be extended automatically for a further five years. The new management informed the lessee in February 1975 that it wished to terminate the lease on May 31, 1975. The lessee insisted on its right to renew the lease and this led to the present application for a declaration that the renewal term of the lease was invalid. The application was based on two grounds: (1) since the lease was not registered in the Land Titles Office, the registered interests of the members of the corporations had priority over the renewal terms contained in the lease as there was no actual occupation pursuant to the renewal terms until the original demise had expired; (2) the lease was not binding because it was ultra vires the condominium corporation to pass by-laws allowing the corporation to lease common elements.

HELD: Dealing with the second point first, the Court found that the by-law was not ultra vires. Under s. 1(1)(n) of the Condominium Act "property" included any land added to the common elements. The term "property" in s. 9(4) was not confined to what was owned by the corporation, so that the leasing of common elements would be included in an authority to manage the property and consistent with the objects of the corporation. As to the priority of the interests of individual owners over the renewal term, the Court found that there was no dispute over the binding effect of the original tenure of the lease. In order to protect a renewal term a lease had to be registered, which was not the case here. Therefore, the first ground taken by the applicant was valid. However, since the parties seemed to contemplate the trial of an issue it was difficult to tell what order should issue. The Court decided to wait until spoken to about it by the parties.

CBR# 276

Re York Condominium Corp. No. 42 and Melanson

(1976), 9 O.R. (2d) 116

ONTARIO
COURT OF APPEAL
KELLY, HOULDEN
and HOWLAND, J.J.A.

14TH APRIL 1975

Section 10(1)(b) of the Condominium Act, R.S.O. 1970, c. 77, empowers a condominium corporation to make by-laws "governing the use of units or any of them for the purpose of preventing unreasonable interference with the use and enjoyment of the common elements and other units", and s-s. (1)(c) gives a similar power to make by-laws "governing the use of the common elements". The power to make by-laws under cl. (b) of s. 10(1) is more restrictive than the power under cl. (c) in that the by-law must be directed to the prevention of unreasonable interference with the use and enjoyment of the common elements and other units. A by-law governing the allowing or keeping of animals in the units or common elements is properly within the scope of s. 10(1)(b). However, a by-law prohibiting the keeping of all animals in or about the property goes far beyond the scope of s. 10(1)(b) as it prohibits the keeping of animals which could not be the cause of unreasonable interference. Moreover, although a corporation could prohibit animals generally from being allowed upon the common elements, where the by-law makes the prohibition applicable to both common elements and units, the by-law is not severable and must be quashed.

[Re Morrison and City of Kingston, [1938] O.R. 21, [1937] 4 D.L.R. 740, 69 C.C.C. 251; Re Musty's Service Stations Ltd. and Ottawa, [1959] O.R. 342, 22 D.L.R. (2d) 311, 124 C.C.C. 85, apld; City of Toronto v. Virgo, [1896] A.C. 88; Re Karry and City of Chatham (1910), 21 O.L.R. 566; Re R. v. Napier, [1941] O.R. 30, [1941] 1 D.L.R. 528, 75 C.C.C. 191; Arbuckle Smith & Co., Ltd. v. Greenock Corp., [1960] 1 All E.R. 568; R. v. Lou Hay Hung, [1946] O.R. 187; Newcastle City Council v. Royal Newcastle Hospital, [1959] A.C. 248; Sterling Village Condominium Inc. v. Breitenbach (1971), Fla., 251 So. 2d 685; Strickland v. Hayes, [1896] 1 Q.B. 290, reld to]

APPEAL from an order of Pennell, J., made pursuant to s. 23 of the Condominium Act, requiring the appellant to remove his dog from his condominium unit.

L.D. Pringle, for appellant.

Geoffrey G.R. Pacey, for respondent.

The judgment of the Court was delivered by

HOWLAND, J.A.:— This is an appeal by Bruce Melanson (Melanson) from an order of Pennell, J., dated September 26, 1974, made pursuant to s. 23 of the Condominium Act, R.S.O. 1970, c. 77 (the Act), requiring Melanson to remove from his condominium unit the dog being kept therein within ninety (90) days of service of the order upon him.

York Condominium Corporation No. 42 (the Corporation) was created on August 18, 1971, by the registration of a declaration and description pursuant to s. 9 of the Act. Under s. 3(2) of the Act a declaration may contain:

(c) provisions respecting the occupation and use of the units and common elements;

Paragraph (a) of art. XII of the declaration provided:

No unit shall be occupied by more than a single family and shall be used only as a residence for such single family and for no other purpose.

On August 18, 1971, the Corporation enacted By-law Number One. Section 11(1) [since am. 1974, c. 133, s. 8] of the Act provides:

11(1) The by-laws may provide for the making of rules by the owners respecting the use of the common elements for the purpose of preventing unreasonable interference with the use and enjoyment of the units and common elements.

In accordance with this provision, para. (a) of art. III of this by-law made the following provision for the passing of rules respecting the use of the common elements:

The owners, by a vote of members who own fifty-one per cent (51%) of the common elements, may make rules respecting the use of the common elements for the purpose of preventing unreasonable interference with the use and enjoyment of the units and common elements.

By-law Number One was duly registered and became effective on August 18, 1971.

On August 19, 1971, By-law Number Two was enacted by the Corporation. It included the following provision:

The following rules and regulations shall be observed by the owners and the term owner shall include the owner or any other person occupying the unit with the owner's approval: ...

14. No animal shall be allowed upon or kept in or about the property.

Paragraph 14 is hereafter referred to as the "prohibitive paragraph".

By-law Number Two was duly registered and became effective on September 9, 1971. Both By-law Number One and Bylaw Number Two were enacted by Delzotto Enterprises Limited as the owner of all the units and the sole member of the Corporation.

Melanson is the owner of one of the units. By letter dated August 6, 1974, from the solicitors for the Corporation, Melanson was directed to remove his dog from the condominium complex on or before August 23, 1974. An application was then made by the Corporation to enforce compliance with By-law Number Two.

The issue in this appeal is whether the Corporation has exceeded its statutory powers in enacting the prohibitive paragraph, or if it did have the power, is the prohibitive paragraph enforceable? As the Corporation is a statutory creation, the relevant rights and duties of an owner and of the Corporation must be found in the Act. The following provisions are relevant:

2(6) Upon registration of a declaration and description, the land and the interests appurtenant to the land described in the description are governed by this Act.

6(2) Subject to this Act, the declaration and the by-laws, each owner is entitled to exclusive ownership and use of his unit.

7(4) Subject to this Act, the declaration and the by-laws, each owner may make reasonable use of the common elements.

9(12) The corporation has a duty to effect compliance by the owners with this Act, the declaration and the by-laws.

12(1) Each owner is bound by and shall comply with this Act, the declaration and the by-laws.

.....

(3) The corporation ... has a right to the compliance by the owners with this Act, the declaration and the by-laws.

In creating a condominium corporation, a developer has to consider carefully what restrictions it is going to impose on the user of the units and common elements because such restrictions will affect the character of the condominium and the marketability of its units. The prohibitive paragraph could have been included in the declaration pursuant to s. 3(2) of the Act, just as the declaration provided that each unit should be used only as a single-family residence. However, the objection to so doing is that under s. 3(3) of the Act the declaration may be amended only with the consent of all owners and all persons having registered encumbrances against the units and common interests. In the case of a restriction such as the prohibitive paragraph this could be a formidable task.

Here the prohibitive paragraph was embodied in a by-law. This provides greater flexibility. Since no higher percentage was specified in the declaration, under s. 10(1) of the Act the making of such by-laws only required the vote of members owning 66 2/3% of the common elements. If the prohibitive paragraph in question falls within the Corporation's power to make by-laws, the fact that it is described in By-law Number Two as a rule or regulation does not, in my opinion, affect its validity as a by-law. It is true that the prohibitive paragraph, whilst embodied in By-law Number Two, is referred to as a rule or regulation. In pursuance of s. 11(1) of the Act, By-law Number One authorized the owners, by a vote of members owning 51% of the common elements, to make rules, but such power was limited to rules respecting the use of the common elements. By-law Number Two draws a distinction between the units, the common elements and the property. The by-law does not contain a provision that the word "property" shall have the same meaning in the by-law as in the definition of property in s. 1(1)(n) of the Act, i.e.: "the land and interests appurtenant to the land described in the description". In my view, however, this is the only proper interpretation to be given to the word in the prohibitive paragraph. Consequently, the attempt to impose restrictions respecting the units would go beyond the powers of the members under By-law Number One to make rules.

Under s. 10(1) the Corporation has power to make by-laws:

- (b) governing the use of units or any of them for the purpose of preventing unreasonable interference with the use and enjoyment of the common elements and other units;
- (c) governing the use of the common elements;

Under s. 10(2) such by-laws shall be reasonable and consistent with the Act and the declaration.

In order to fall within the Corporation's power to make by-laws under s. 10 of the Act, four matters have to be considered:

- (i) are the words "governing the use" in s. 10(1)(b) and (c) of the Act broad enough to include the making of a by-law regulating the allowing of animals upon or the keeping of animals in or about the property?
- (ii) are the words "no animal" in the prohibitive paragraph so broad as to be beyond the powers of the Corporation under s. 10(1)(b) of the Act?
- (iii) is the prohibitive paragraph reasonable and consistent with the Act and the declaration as required by s. 10(2) of the Act?
- (iv) is the word "animal" in the prohibitive paragraph so broad that even if the Corporation had power to enact the prohibitive paragraph it is incapable of enforcement?

"Govern" is defined in The Shorter Oxford English Dictionary, 3rd ed., vol. I, at p. 816, to mean: "To rule with authority ... to regulate the affairs of (a body of men)."

A careful distinction has to be drawn between the power to regulate or govern and the power to prohibit. In *City of Toronto v. Virgo*, [1896] A.C. 88, the Judicial Committee of the Privy Council had to consider whether under a power to pass by-laws "for ... regulating and governing hawkers or petty chapmen, and other persons carrying on petty trades", the Council might prohibit hawkers from plying their trade at all in a substantial and important part of the city. Lord Davey stated, at pp. 93-4.

No doubt the regulation and governance of a trade may involve the imposition of restrictions on its exercise both as to time and to a certain extent as to place where such restrictions are in the opinion of the public authority necessary to prevent a nuisance or for the maintenance of order. But their Lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed.

.....

Several cases in the English and Canadian reports were referred to in illustration of the respondent's argument ... through all these cases the general principle may be traced, that a municipal power of regulation or of making by-laws for good government, without express words of prohibition, does not authorize the making it unlawful to carry on a lawful trade in a lawful manner.

In *Re Karry and City of Chatham* (1910), 21 O.L.R. 566, the Court of Appeal had to consider whether a by-law of the City of Chatham, stipulating the hours when eating houses should be closed, was a "regulation" authorized by the Municipal Act which provided that the Council could pass by-laws "for limiting the number of and regulating such houses". Magee, J.A., pointed out at p. 573: "The partial prohibition, it has thus long been recognised, may well come within the powers of regulation."

In *Re R. v. Napier*, [1941] O.R. 30, [1941] 1 D.L.R. 528, 75 C.C.C. 191, the statute authorized the passing of by-laws "For licensing, regulating and governing bill posters ...". A by-law had been passed prohibiting the distributing of bills by leaving them in or on parked motor-cars or by handing them to persons on the street. Hogg, J., concluded at p. 34 O.R., pp. 531-2 D.L.R., that:

... the prevention of such activities in connection with this trade or calling is not of such a degree that it can be said to be practically a prohibition of the entire business or trade of bill distributors. There is still left to them the large field, which seems to constitute the greater part -- or at least as great a part -- of this business, namely, of leaving bills at the residences and other buildings in the municipality.

Here the power of the Corporation is to make by-laws "governing the use of units" and "governing the use of the common elements". In this appeal, the prohibitive paragraph as to allowing animals upon or keeping them in or about the units or common elements, is only a partial prohibition of the use of the units or the common elements. It would properly fall within the power to regulate the use of the units and common elements. In my view the word "governing" in s. 10(1)(b) is broad enough to include the restriction respecting animals in the prohibitive paragraph. It would be quite different if the power in s. 10(1)(b) and (c) of the Act had been to make by-laws governing the allowing or keeping of animals on the units or the common elements. In that event the prohibitive clause would have been ultra vires of the Corporation as it would have been a prohibition rather than a regulation.

It should be pointed out that the power to make by-laws under s. 10(1)(b) and under s. 10(1)(c) is with respect to "the use" of units and the common elements, whereas s. 3(2) (c) stipulates that the declaration may contain provisions respecting "the occupation and use" of the units and common elements.

As Lord Radcliffe pointed out in *Arbuckle Smith & Co., Ltd. v. Greenock Corp.*, [1960] 1 All E.R. 568 at p. 574:

"Use" is not a word of precise meaning, but in general it conveys the idea of enjoyment derived by the user from the corpus of the object enjoyed.

Robertson, C.J.O., in *R. v. Lou Hay Hung*, [1946] O.R. 187, stated at pp. 191-2:

The words "occupy" and "occupant" have a variety of shades of meaning. No doubt, we commonly speak of the "occupants" of a dwelling-house, meaning thereby all persons who, at the time, live there. We use the word in even a wider sense when we speak of the "occupants" of premises, meaning thereby all the persons who happen to be within them at the particular time. Primarily, however, "to occupy" means "to take possession" ...

Possession is a primary element but occupation includes something more. As Lord Denning explained in *Newcastle City Council v. Royal Newcastle Hospital*, [1959] A.C. 248 at p. 255: "Occupation is matter of fact and only exists where there is sufficient measure of control to prevent strangers from interfering ...".

Under s. 3(2)(c) of the Act, the right to include a provision in the declaration respecting occupation of the units would embrace such matters as restricting the use to single-family residences. On the other hand, the right to restrict the keeping of animals in such units as incidental to such single-family use would seem properly to fall within the power to make by-laws governing the use of units.

It will also be noted that the power to make by-laws is more restrictive under s. 10(1)(b) of the Act than it is under s. 10(1)(c). Under s. 10(1)(b) the power can only be exercised "for the purpose of preventing unreasonable interference with the use and enjoyment of the common elements and other units". This brings me to a consideration of the second question, whether the words "no animals" in the prohibitive paragraph are so broad as to be ultra vires of the Corporation.

The word "animal" is very comprehensive. The definition in *The Shorter Oxford English Dictionary*, 3rd ed., at p. 68, includes: "1. A living being, endowed with sensation and voluntary motion, but in the lowest forms distinguishable from vegetable forms ... 2. One of the lower animals; a brute or beast, as distinguished from man." *Black's Law Dictionary*, 4th ed., defines "animal" as "Any animate being which is endowed with the power of voluntary motion. An animate being, not human." In *The Shorter Oxford English Dictionary*, supra, at p. 181, it is noted that the word "bird" is defined as "any feathered vertebrate animal" and at p. 705, that "fish" is defined as "In pop. language, any animal living exclusively in the water ... In scientific language any vertebrate animal provided with gills throughout life, and cold-blooded; the limbs, if present, being modified into fins."

The words "no animal" in the prohibitive paragraph are wide enough to include not only cats and dogs but such animals as hamsters, canaries and goldfish. Can it be said that the broad prohibition against any animal being allowed upon or kept in or about the units is for the purpose of preventing unreasonable interference with the use and enjoyment of the common elements and other units? In my opinion it cannot. I am unable to conclude that goldfish, for example, would cause such unreasonable interference. Section 6(2) of the Act makes it clear that subject to the Act, the declaration, and the by-laws, each owner is entitled to exclusive ownership and use of his unit. One of the incidents of such ownership is the right to keep pets. The declaration does not contain any prohibition against the keeping of animals in the units. It is appreciated that it is important in a condominium development, particularly a condominium apartment building, to prevent the owner of a unit from unreasonably interfering with the use and enjoyment by others of their units and of the common elements. As *Driver, Assoc. J.*, stated in *Sterling Village Condominium, Inc. v. Breitenbach* (1971), Fla., 251 So. 2d 685 at p. 688:

Every man may justly consider his home his castle and himself as the king thereof; nonetheless his sovereign fiat to use his property as he pleases must yield, at least in degree, where ownership is in common or cooperation with others. The benefits of condominium living and ownership demand no less.

The owners of 66 2/3% or more of the common elements may wish to pass a by-law to protect themselves against unreasonable interference by way of vicious, malodorous, dirty or noisy animals, or pollution of the common elements. However, the prohibitive paragraph in question goes far beyond the limited powers in s. 10(1)(b) to govern the use of units and would have the effect of prohibiting animals in or about the units which could not be the cause of unreasonable interference.

In my view, the prohibitive paragraph in question, in so far as it governs the use of units, is beyond the powers of the Corporation.

It should be observed that the powers of the Corporation under s. 10(1)(c) are to govern the use of the common elements and there is no limitation on the exercise of this power as in the case of s. 10(1)(b). It would seem that under s. 10 (1)(c) the Corporation could prohibit animals generally from being allowed upon the common elements.

If access to the units can only be obtained by passing through the common elements, then even if the portion of the prohibitive paragraph governing the use of the units were invalid, the owner of a unit might be prohibited from bringing animals into the units. The question arises whether the portion of the prohibitive paragraph which regulates the use of the units is severable from the portion which regulates the use of the common elements, or whether the entire prohibitive paragraph is ultra vires of the Corporation.

As Craies points out in his text on Statute Law, 6th ed. (1963), at p. 335, there is some difference of judicial opinion as to whether a by-law is severable or divisible. In *Strickland v. Hayes*, [1896] 1 Q.B. 290 at p. 292, Lindley, L.J., stated:

There is plenty of authority for saying that if a by-law can be divided, one part may be rejected as bad while the rest may be held to be good.

On the question of severability, decisions respecting the exercise of the jurisdiction of the Supreme Court to quash a municipal by-law in whole or in part under s. 283(1) of the Municipal Act, R.S.O. 1970, c. 284, are of assistance. In *Re Morrison and City of Kingston*, [1938] O.R. 21 at p. 27, [1937] 4 D.L.R. 740 at p. 745, 69 C.C.C. 251, Middleton, J.A., said:

It is not, I think, competent to the Court to quash part of a by-law, unless it is clearly severable from the provisions that remain.

This statement was approved by the Court of Appeal in *Re Musty's Service Stations Ltd. and Ottawa*, [1959] O.R. 342, 22 D.L.R. (2d) 311, 124 C.C.C. 85, where Aylesworth, J.A., in delivering the judgment of the Court, concluded that the invalid provisions of the by-law were integral and indispensable parts of the by-law and were not severable from the rest of the by-law.

In so far as the prohibitive paragraph itself is concerned, in view of the fact that the prohibition is made applicable to the property which includes both the units and the common elements, I do not think it is possible to sever the portion of the paragraph which deals with the units from the portion which deals with the common elements even if s. 10(1)(c) was wide enough to permit the restriction so far as the common elements were concerned.

Having reached this conclusion it is not necessary to consider the third question which arises as a result of s. 10(2) of the Act which provides:

10(2) The by-laws shall be reasonable and consistent with this Act and the declaration.

Nor is it necessary to consider the fourth question, that the word "animal" in the prohibitive paragraph is so broad that even if the Corporation had power to enact the prohibitive paragraph it is incapable of enforcement.

Paragraph 14 of By-law Number Two is, in my view, beyond the powers of the Corporation in its entirety. It is not necessary to express any view as to the validity of the remaining provisions of By-law Number Two as para. 14 is severable from the remaining provisions of the by-law.

The appeal should be allowed, the order of Pennell, J., set aside and in its place there should be an order dismissing the application brought by the applicant by its notice of motion dated August 27, 1974. The appellant should have his costs of this appeal and of the application before Pennell, J.

Appeal allowed.

CBR# 253

Re Crossroads Apartments Ltd. and Phillips

ONTARIO
HIGH COURT OF JUSTICE
MORDEN, J.

MAY 3, 1974

Section 29(2) (am. 1971, Vol. 2, c. 2, s. 1; 1972, c. 118, s. 3; 1973, c. 168, s. 6) of the Planning Act, R.S.O. 1970, c. 349, prohibits the entering into of an agreement for the sale of land where the vendor retains abutting lands, except in specified situations. However, s. 24 (re-enacted 1972, c. 7, s. 1; am. 1973, c. 121, s. 1) of the Condominium Act, R.S.O. 1970, c. 77, provides that, inter alia, ss. 29 and 34 of the Planning Act do not apply to dealings with units and common interests and descriptions made for the purposes of the Condominium Act. Since until there is registration there can be no unit and common interests to which the Condominium Act applies, the effect of the Planning Act is only excluded upon registration of the condominium project. Moreover, since condominium developments may involve vertical division of the units on one horizontal plane as well as strata interests in buildings, there is no policy reason for excluding the operation of the Planning Act from proposed condominium developments. The application of the Planning Act to proposed condominium development cannot turn on the nature of the development, i.e., be inapplicable to strata development but applicable to development involving vertical divisions on one horizontal plane. Therefore, for a contract for a sale of a condominium unit not to run afoul of s. 29 of the Planning Act, the agreement should contain an express condition that it is to be effective only if the provisions of the Planning Act are complied with or only in the event that the relevant description is registered under the Condominium Act.

[Re Macval Enterprises Ltd. and Township of Nepean et al., [1972] 2 O.R. 458, 25 D.L.R. (3d) 682; Re Lambert Island Ltd. v. A.-G. Ont., [1972] 2 O.R. 659, 26 D.L.R. (3d) 391; Murray Elias Ltd. v. Walsam Investments Ltd., [1964] 2 O.R. 381, 45 D.L.R. (2d) 561; affd [1965] 2 O.R. 672n, 51 D.L.R. (2d) 590n; Rogers et al. v. Leonard (1973), 1 O.R. (2d) 57, 39 D.L.R. (3d) 349; Canadian Dyers Ass'n Ltd. v. Burton (1920), 47 O.L.R. 259, refd to]

APPLICATION under Rules 611 and 612 of the Rules of Practice for an order determining the rights of the parties under a certain agreement.

A.B. Rosenberg, Q.C., for applicant.

V.L. Palermo and R.T.J. Velanoff, for respondent.

MORDEN, J.:— This is an application by Crossroads Apartments Limited under Rules 611 and 612 for an order declaring and determining the rights of the parties under an agreement dated May 1, 1973, made between the applicant and the respondent, Derek G. Phillips. The agreement reads:

RECORD OF RESERVATION

The undersigned, CROSSROADS APARTMENTS LIMITED, hereinafter referred to as the Developer, acknowledges the receipt of \$200.00 from Derek Phillips hereinafter referred to as the Purchaser, as a reservation deposit in connection with Home #2010 Unit #10 (2as), Level #19, Crossroads Condominium Homes at a price of \$33,275. Building C.

The conditions of this Reservation Agreement shall be:

1. That the Purchaser upon being notified by the Vendor, or his Agent shall, within 15 days of such notification, inspect the model suite presentation of the Vendor. After such inspection the Purchaser may elect to proceed with his purchase and complete the formal documents required or he may cancel the Agreement and the deposit monies shall be refunded forthwith without interest or deduction.
2. This Agreement is further conditional upon the Purchaser and the Vendor entering into an Agreement of Purchase and Sale satisfactory to both parties, which shall provide (among other things) for an additional deposit by the Purchaser. Failing both parties entering into such Agreement within a period of 20 days after the notification to inspect the model suite (as referred to in paragraph 1 above) this agreement shall be null and void and the deposit refunded forthwith.

Dated at Toronto this 1st day of May, 1973.

"D.G. Phillips" Purchaser [Indecipherable]

(Crossroads Apartments Limited)

The applicant filed in support of its application an affidavit sworn by its manager, Barry Siskind, in which he deposed as to the circumstances relating to the coming into existence of this record of reservation.

This affidavit indicates that the purpose of the application is to determine "whether or not the record of reservation in all of the surrounding circumstances is a legally enforceable document in so far as the Respondent is concerned".

An affidavit has been filed on behalf of the respondent sworn by himself in which events and documents coming into being subsequent to the date of the record of reservation are referred to, particular reference being made to an undated agreement of

purchase and sale signed by the respondent but not by the applicant. In the statement of fact and law filed on behalf of the respondent he asks for an order "declaring that the record of reservation ... is an enforceable agreement by the Applicant and does create an interest in land" and further "for an order declaring that the offer to purchase [the aforesaid agreement of purchase and sale] ... is an enforceable agreement by the applicant and does create an interest in land". The basic submission is that each of these documents is enforceable by both parties.

Obviously the respondent had attempted to enlarge the issues to be determined in the motion and also the range of facts before the Court. Mr. Rosenberg has facilitated matters by agreeing that for the purpose of the motion he does not dispute the facts set forth in the respondent's affidavit, even though many of them are put in the form of hearsay assertions, and he agrees that they may be considered by the Court and that the issues to be determined may be correspondingly expanded.

I believe that the material facts giving rise to the issues to be decided may be stated in relatively short compass. The record of reservation quoted above was executed on or about May 1, 1973. The respondent furnished the applicant's sales agent with a deposit cheque in the amount of \$200 at that time. The document related to a unit in a 218-unit project on the west side of Muirhead Rd. in the Borough of North York "which is intended to be registered as a condominium" (Siskind affidavit, para. 2). I shall consider later in these reasons what this means in the light of the relevant statutory provisions. In the course of construction of the project building the applicant encountered strikes and shortages of material that caused delay and increase in costs above estimate. This has prevented it from registering the project although it had been intended that it would be registered "long before this date [January 21, 1974]" (Siskind affidavit, para. 5).

The respondent inspected the model suite referred to in a notification to inspect dated August 27, 1973, within seven days after its receipt and indicated his willingness to purchase the suite pursuant to the terms of the record of reservation. Following an apparent attempt by the applicant, or its sales representative, to increase the purchase price by \$5,000 to \$6,000 above the price set forth in the record of reservation, the respondent's solicitor and the applicant's solicitor engaged in telephone and letter communication. A document entitled "CROSSROADS APARTMENTS LIMITED AGREEMENT OF PURCHASE AND SALE" (referred to above) was sent by the applicant's solicitor to the respondent's solicitor. It provided for a purchase price of \$32,375 (not \$33,275, as stated in the record of reservation), a deposit of \$8,945, the assumption by the respondent of

an N.H.A. insured first mortgage in favour of the Provincial Bank of Canada (the "lending institution") for the amount of ... \$23,230.00 more or less as determined by C.M.H.C. for the lending institution, repayable approximately \$183.46 monthly for principal and interest at the rate of 9 1/4% per annum together with 1/12 of the estimated annual taxes, said mortgage having 5 years to run ...

The following provisions were not filled in or completed: that relating to a second mortgage (which could have been deleted "if not applicable"), and those for the amount payable on closing, the date of the offer, the irrevocable date and the closing date. The respondent's solicitor telephoned the applicant's solicitor and questioned him regarding the missing terms. He was advised that they would be inserted on receipt of the executed offer and he was further advised that "only a further \$500.000 [for the deposit] would be required and not the \$8,945.00 as indicated in the Agreement" (Phillips affidavit, para. 22). The respondent signed the agreement of purchase and sale in the presence of his solicitor, initialled the change in the purchase price from \$32,375 to \$33,275 and made no other changes in it. On or about October 2, 1973, the agreement together with a cheque for \$500 was mailed by the respondent's solicitor to the applicant or its representative.

By a letter dated October 3, 1973, the applicant's solicitor wrote to the respondent's solicitor wishing to advise that certain specified particulars were inadvertently omitted from the agreement which should form part thereof. The provisions respecting the second mortgage, the amount payable on closing and the provision respecting termination if the purchaser were unable to sell his house (none of which had been completed) were all to be deleted and a provision specifically identifying the parking space and a provision that the closing date was to be January 18, 1974, were to be inserted. The letter concluded: "The irrevocable date is Friday, October 5th, 1973 at 4:00 p.m. Executed copies of the Agreement must be delivered to our client on or before such time for acceptance."

The agreement was never executed by the applicant. The transcript of the cross-examination of Barry Siskind indicates that it was the applicant's intention to enter into the agreement with the respondent with the correct price and changes which had been made to the body of the contract (Q. 94). It was not executed because the applicant had not received a cheque for the proper amount of the deposit, \$8,945 (Qq. 95 to 96). "... I did know that the amount of the deposit was to be equal to the amount of the purchase price less the \$200.00 that Mr. Phillips had already given us, less the amount of the first mortgage" (Q. 99). It may be noted that this is not in accord with the evidence respecting the oral communication referred to above relating to the deposit being \$500. I mention this to complete the narration. In my view, the discrepancy is not material to the ultimate disposition of this application.

The applicant submits that the record of reservation did not create an enforceable obligation by reason of: (a) non-compliance with s. 29 [am. 1971, Vol. 2, c. 2, s. 1; 1972, c. 118, s. 3; 1973, c. 168, s. 6] of the Planning Act, R.S.O. 1970, c. 349, and (b) lack of intention, appearing on its face, to create a binding contract. The respondent submits that: (a) the Planning Act, by reason of s. 24(1) of the Condominium Act, R.S.O. 1970, c. 77, is not applicable and that the record of reservation is binding according to its own terms or as supplemented by the conduct of the parties following May 1, 1973, or, in the alternative, the agreement of purchase and sale, in the light of the surrounding circumstances, created an enforceable obligation.

I turn first to the record of reservation. In my view, both of the applicant's submissions are entitled to succeed. Section 29(2) of the Planning Act, if I may summarize it in so far as it is applicable to this matter, prohibits the entering into of agreements of sale of land where the vendor retains abutting land, except in certain specified situations, set forth in cls. (a), (c), (d), and (e) thereto. Substantially the same prohibition is contained in s. 29(4) respecting agreements and transfers, etc. of "a part of any lot or block of land" within a registered plan of subdivision. These prohibitions are buttressed by s. 29(7) which provides:

29(7) An agreement, conveyance, mortgage or charge made, or a power of appointment granted, assigned or exercised in contravention of this section or a predecessor thereof does not create or convey any interest in land, but this section does not affect an agreement entered into subject to the express condition contained therein that such agreement is to be effective only if the provisions of this section are complied with.

This application has proceeded on the basis that the vendor is retaining abutting land and that the unit in question is self-contained and above ground.

In *Coke upon Littleton* (London, 1832), p. 486, it is said that "a man may have an inheritance in an upper chamber, though the lower building and soile be in another, and seeing that it is an inheritance corporeall it shall passe by livery" and this common law position was recognized in *Iredale v. Loudon et al.* (1908), 40 S.C.R. 313, where title to an upper room in a building was acquired under the Statute of Limitations. It would thus appear that the Planning Act prohibition would be applicable to the sale of such an interest. Further, the Condominium Act in s. 6(1) provides that:

6(1) Units and common interests are real property for all purposes.

but it should be stated now that is not applicable, as such, until registration of the declaration (s. 3) and description (s. 4) and in this regard reference is made to s. 2(6) which I shall discuss shortly.

The key provision in this application is s. 24 of the Condominium Act, as re-enacted by 1972, c. 7, s. 1, and amended by 1973, c. 121, s. 1. It reads:

24(1) Section 29 and clause b of subsection 1 of section 32 of The Planning Act do not apply in respect of dealings with units and common interests.

(2) Subject to subsection 3, the provisions of section 33 of The Planning Act that apply to plans of subdivision apply *mutatis mutandis* to descriptions under this Act, and a description shall not be registered unless approved or exempted by the Minister of Housing.

(3) Before making an application under subsection 1 of section 33 of The Planning Act, the owner of a property or someone authorized by him in writing may apply to the Minister to have the description or any part of the description exempted from such section 33, or from any provision thereof, and where in the opinion of the Minister such exemption is appropriate in the circumstances, he may grant the exemption.

(4) Section 34 of The Planning Act does not apply in respect to descriptions made for the purposes of this Act.

The respondent takes the basic position that s-s. (1) excludes the record of reservation from the Planning Act prohibition. This would be so if the concluding language therein can be read as "proposed units and common interests" rather than "registered units and common interests". In my opinion, the latter interpretation is the correct one. Until there is registration there can be no unit and common interests to which the Act applies. I refer to the following provisions therein:

1(1) In this Act,

(g) "common interest" means the interest in the common elements appurtenant to a unit;

(i) "declaration" means the declaration specified in section 3, and includes any amendments;

(j) "description" means the description specified in section 4;

(o) "registered" means registered under The Land Titles Act or The Registry Act;

(r) "unit" means a part or parts of the land included in the description and designated as a unit by the description, and comprises the space enclosed by its boundaries and all the material parts of the land within this space at the time the declaration and description are registered.

(2) For the purposes of this Act, the ownership of land includes the ownership of space.

2(6) Upon registration of a declaration and description, the land and the interests appurtenant to the land described in the description are governed by this Act.

4(1) A description shall contain,

(a) a plan of survey showing the perimeter of the horizontal surface of the land and the perimeter of the buildings;

(b) structural plans of the buildings;

(c) a specification of the boundaries of each unit by reference to the buildings;

(d) diagrams showing the shape and dimensions of each unit and the approximate location of each unit in relation to the other units and the buildings;

(e) a certificate of a surveyor that the buildings have been constructed and that the diagrams of the units are substantially accurate and substantially in accordance with the structural plans; and

(f) a description of any interests appurtenant to the land that are included in the property,

prepared in accordance with the regulations.

(2) A description shall not be registered unless it has been approved in accordance with the regulations.

If there be any doubt that the definition of "unit" set forth in s. 1(1)(r), to which the "common interest" is "appurtenant" (s. 1(1)(g)) is such that "units" have to be specified in registered descriptions (it could not be argued that registration relates only to the "comprises" and the "means" part of the definition) s. 2(6) makes the matter clear. It is only upon registration that the Act comes into play and a proposed unit becomes "a unit". It cannot be a unit to which the Act is applicable at any time short of registration. This, in my view, is a complete answer to the respondent's contention, which was supported by submissions of a policy nature.

The policy considerations were to the effect that the Planning Act provisions respecting the purpose of controlling the process of subdividing land (which perhaps may be fairly gleaned from the matters set forth in s. 33(4) of the Act

33(4) ... regard shall be had ... to the health, safety, convenience and welfare of the future inhabitants ...

as well as such matters as conformance of the draft plan to the official plan and the adequacy of utilities and municipal services, to mention only a few) really have no practical or reasonable application to the sale of space in a building which is in all likelihood no different from an apartment building in which the various parts are leased to tenants. This latter activity, it is submitted, does not form a legal (apart from leases for 21 years or more) or policy point of view have any bearing on the requirements or purpose of subdivision control policy. I must say that in a substantial majority of situations I would think that this is a valid observation. However, it is not sufficient to weigh successfully against the interpretation of s. 24(1) in the statutory context set forth above. Further, it overlooks two other aspects of the legislation. First, sss. (2) and (3) of s. 24 of the Condominium Act indicate a legislative recognition that in some cases Planning Act policies, specifically those set forth in s. 33 [am. 1971, Vol. 2, c. 2, s. 3; 1972, c. 118, s. 5; 1973, c. 168, s. 9], may be applicable to a proposed condominium development and, secondly (and this may well relate to the first aspect), some condominium developments may involve vertical division of units on one horizontal plane. There is nothing in the Act (popular notions of the condominium concept may well be something else) restricting it to strata interests in buildings. This point has been touched upon by Lacourciere, J., in *Re Macval Enterprises Ltd. and Township of Nepean et al.*, [1972] 2 O.R. 458 at pp. 461-2, 25 D.L.R. (3d) 682 at pp. 685-6, and by Lerner, J., in *Re Lambert Island Ltd. and A.-G. Ont.*, [1972] 2 O.R. 659 at p. 668, 26 D.L.R. (3d) 391 at p. 400.

If I am right that the Condominium Act is applicable to the vertical division of units on one horizontal plane, perforce ground level, then the inapplicability of the respondent's policy argument becomes apparent. With respect to a proposed development involving such vertical division a developer could escape the clear policy results intended by the Planning Act by use of the label on his plan "Proposed Condominium" and the inclusion, in the proposal of a common interest (for example, a small parking area) appurtenant to the units. The application of the Planning Act to a proposed condominium development cannot turn on the nature of the development, i.e., be inapplicable to strata development but applicable to development involving vertical divisions on one horizontal plane. It has to apply to all proposed condominiums.

I appreciate the practical consequences of this holding as far as the development, particularly the financing thereof, of condominium projects is concerned. I would think that the difficulties imposed by the Planning Act could be met by appropriately worded conditional provisions in agreements of purchase and sale of proposed units. I shall return to this point later in these reasons but note now that there is nothing in the record of reservation indicating an intention that it is to be subject to compliance with the Planning Act: *Murray Elias Ltd. v. Walsam Investments Ltd.*, [1964] 2 O.R. 381, 45 D.L.R. (2d) 561; affirmed [1965] 2 O.R. 672n, 51 D.L.R. (2d) 590n, and clearly there is no express provision therein that it is conditional upon compliance with s. 29: *Rogers et al. v. Leonard* (1973), 1 O.R. (2d) 57, 39 D.L.R. (3d) 349.

As far as the second point respecting the record of reservation is concerned it is clear to me that it discloses the intention of the parties that further terms, including an additional deposit, would be negotiated by them and then embodied into a written agreement of purchase and sale. It was not intended to be a binding agreement in itself. Further I do not see how it could be made binding by the subsequent conduct of the parties. By its own terms it looked to the entering into of such an agreement, otherwise it would be null and void. The conduct, involving the discussion of terms outside those contained in the document, cannot be resorted to to explain any possible ambiguities therein (as in *Canadian Dyers Ass'n Ltd. v. Burton* (1920), 47 O.L.R. 259, referred to by counsel for the respondent) and is of no assistance in converting it into an enforceable agreement.

The applicant raised in the statement of fact and law filed on its behalf the question as to the effectiveness of the record of reservation by reason of the lack of a corporate seal thereon. Mr. Rosenberg during the hearing of the motion withdrew this point and submitted that the application should be decided on the basis that the record was properly executed by a duly-authorized officer of the applicant.

As far as the agreement of purchase and sale is concerned it too falls short of resulting in an enforceable agreement. It never did set forth such essential terms as the correct deposit as alleged by the respondent. As to those terms settled orally, also as alleged by the respondent, reference can be made to para. 18(d) thereof which provides that:

... there is no representation, warranty, collateral agreement, or condition affecting this agreement ... other than as expressed herein in writing.

Further, there has been no compliance with s. 4 of the Statute of Frauds, R.S.O. 1970, c. 444.

In addition, it is not clear to me that the Planning Act hurdle discussed above has been successfully cleared by this document. Paragraph 11 therein should be considered. It reads:

This Agreement is subject to compliance with Section 29 of The Planning Act and the parties agree irrevocably that the exemption by virtue of Section 24(4) of The Condominium Act shall be conclusively deemed compliance with this provision and compliance with Section 29 of The Planning Act.

On its face this is a confusing provision. First, what is the exemption by virtue of s. 24(4) of the Condominium Act? It, as re-enacted by 1972, c. 7, s. 1, reads:

24(4) Section 34 of The Planning Act does not apply in respect to descriptions made for the purposes of this Act.

Section 34 makes it an offence to subdivide and offer for sale, agree to sell or sell land "by a description in accordance with an unregistered plan of subdivision". I do not think that the inapplicability of this offence-creation section to "descriptions made for the purposes of this Act" has any bearing on the issue of enforceability of the agreement since the basic prohibition against grants of land not being described in accordance with and being within a registered plan of subdivision provided for in s. 29(2) of the Planning Act, is still applicable. However, it is possible that para. 11 was drawn prior to the amendment of s. 24 of the Condominium Act by 1972, c. 7, s. 1 (apparently a correcting amendment), when s-s. (4) referred to s. 29 of the Planning Act. If it is so read then it is difficult to give it effect together within s. 24(1) which, prior to the 1972 amendment, made s. 26 of the Planning Act (concerned with grading or clearing lands held by a municipality) inapplicable to "dealings" with units and common interests (obviously an error in reference) and, after the amendment, made s. 29 so inapplicable. The best light which could be put on para. 11 (and there may well be no warrant for this) is that it should be read as referring to "the exemption by virtue of" s. 24(1) of the Condominium Act, as it now reads.

What is this "exemption"? As indicated above it becomes effective, i.e., the transfer prohibition contained in s. 29 of the Planning Act becomes inapplicable, only upon registration of the declaration and description. Until such time the Planning Act prohibition remains in force. The situation is an awkward one, to say the least. Prior to such registration the only practical method of avoiding contravention of the Planning Act with respect to the transfer of land is to obtain the consent to the transaction by the committee of adjustment. I refer to ss. 29(1), (2)(e), (4)(d), and 42(3) of the Planning Act. Although s-ss. (2) and (3) of s. 24 in the Condominium Act indicate that, in the absence of an exemption granted by the Minister, a proposed description is to be processed in the same manner as a proposed plan of subdivision under s. 33 of the Planning Act down to approval by the Minister, this is as far as they go. It is not provided that an approved description is to be registered under the Planning Act (s. 33(14)) and thereby make the exception provided for in s. 29(2) (a) of the Planning Act (the land being "described in accordance with [and being] within a registered plan of subdivision") applicable. The requirement of registration is set forth only in the Condominium Act.

It is difficult to see how "the exemption by virtue of section 24(1) [if we can read it as intending this subsection] shall be conclusively deemed to be compliance with section 29 of The Planning Act". I do not think that it is open to parties to a contract to deem something to be in compliance with, i.e., not to contravene, a public law if in fact what is contemplated cannot independently be considered compliance. Further, how can the mere existence of the so-called exemption be considered a form of compliance by the parties? As I have said, s. 29 of the Planning Act ceases to be applicable upon registration of the declaration and description -- which brings the Condominium Act, including s. 24(1), into play.

In summary, s. 29 of the Planning Act is applicable until such registration but not after. For a contract not to run afoul of it I would think that it should contain an express condition that the agreement is to be effective only if the provisions of the section are complied with (see Planning Act, s. 29(7)) or, in the event that the relevant description is registered under the Condominium Act, upon such registration. It may be this latter requirement can properly be implied from what is in para. 11 of the agreement, although one reading of the language would indicate that the mere existence of the Condominium Act subsection, without the required steps having been completed to invoke it, is to be regarded as compliance. Having regard to the confusing statutory reference in the agreement and the issues just discussed I think it can be said that whether or not the Planning Act prohibition has been effectively circumvented is not completely free from doubt. As may be gathered, this is not the most obvious bar to the enforceability of the agreement.

In the result, an order may issue declaring that neither the record of reservation nor the agreement of purchase and sale are enforceable agreements and that neither of them create interests in land. I may be spoken to on costs.

Order accordingly.

CBR# 318

The Owners, Strata Plan No. VR 1720, plaintiff (respondent/appellant), and Spaceworks Architects (A Partnership), Peter Reese, Thaddeus Young, Gordon Spratt & Associates Ltd., defendants (appellants/respondents), and Bart Developments Ltd., Galleria II Developments Ltd., Partnership, Molnar Construction Ltd., Gordon Spratt & Associates Ltd., Scott Calvert, Tamm/Tacy and Associates Ltd., Spectrum Industries Ltd. (formerly Western Waterproofing & Membranes Ltd.), CSA Building Sciences Ltd., CSA Building Sciences Western Ltd., Ralph Jeck, Murray Frank and Christian Skene, defendants

BCCA 585 Vancouver Registry No. CA024327

British Columbia Court of Appeal Vancouver, British Columbia Esson, Prowse and Mackenzie JJ.A. Oral judgment: October 7, 1999. Released: October 28, 1999.

Counsel: C.A. Wallace, for the appellants/respondents, Spaceworks Architects (A Partnership), Peter Reese, and Thaddeus Young. D.A. Garner, for the appellant/respondent, Gordon Spratt & Associates Ltd. D.P. Church and I.G. Schildt, for the respondent/appellant.

The judgment of the Court was delivered by

[para1] ESSON J.A. (orally):-- This is an action in which the plaintiffs, who are owners of a substantial condominium structure, seek damages arising from a serious case of the leaky condo syndrome. The defendants include the developers, contractors, and a consultant consulted by the owners before the action was brought. For present purposes, I need refer only to the appellants who are respectively the architects and an engineering firm which was involved in some aspects at least of the design of the building and in inspection during construction. The architects were the overall designers.

[para2] Those defendants applied under Rule 18A for a ruling that the action as against them was barred by limitation. The building was completed in 1986. The writ was issued in December 1995. It is clear then that the action can be held to be brought within time only by invoking the postponement provisions set out in s. 6(4) of the Limitations Act.

[para3] The application under Rule 18A was heard by Madam Justice Humphries who reserved her decision and ultimately gave a ruling which is somewhat unusual. She found that two discrete aspects of the plaintiff's claim, one dealing with the roof of the building and one with the stucco surface, were indeed barred, i.e., that the plaintiffs were unable to establish that they could meet all of the conditions of s. 6(4), and particularly the provision regarding their means of knowledge. [para4] With respect to the balance of the claim, which is the bulk of the overall claim, the summary trial judge found that it would be unfair or unjust to rule on the basis of the evidence which she had heard. She therefore referred those aspects of the limitation issue to the trial judge for determination. That ruling of course was an exercise of the discretion conferred upon her by the plain words of Rule 18A. The judge gave extensive reasons for that decision. In spite of the vigorous submissions of counsel for the appellants, I am satisfied that was an appropriate exercise of the discretion and that there is no basis upon which this Court can interfere.

[para5] That brings me to the cross-appeal by the plaintiffs. It is directed to the ruling that two aspects of the claim are statute-barred. The submission essentially is that, if the plaintiffs had sought legal advice in November 1989, they would not have been advised that there was a reasonable prospect of success in an action in negligence for repairs to a defective building. On this point, the judge held that the cost of replacement, which is the basis for those two aspects of the claim, was not one for pure economic loss but rather, as she put it, were actual repair costs resulting from physical damage. In this Court, the defendants have not sought to uphold that basis of decision, but nevertheless contend that the decision was correct in substance. In their factum, the plaintiffs put the matter this way:

In light of these cases, the reasonably competent notional legal advisor in November 1989 would not have provided a favourable opinion concerning the prospects of a successful legal action. Indeed, this would likely have remained the gist of any legal advice provided to the Respondent prior to the decision of the Supreme Court of Canada in *Winnipeg Condominium* (1995), 121 D.L.R. (4th) 193 (S.C.C.) in which the Supreme Court of Canada held that the cost of remedying such defects would be recoverable if the defects were such that they caused a reasonable apprehension of danger. That is the Respondent's allegation in this action. In this respect, it should be noted that Manitoba Court of Appeal in *Winnipeg Condominium* dismissed the plaintiff's claim largely on the basis of the decision in *D&F Estates*. [para6] Accepting that the claim is one for pure economic loss, I do not accept that a reasonably prudent legal advisor in 1989 would have advised against joining the architect and engineer. The argument based on *Winnipeg Condominium* is essentially based on the contention that the law was settled in 1973 in *Rivtow Marine Ltd. v. Washington Iron Works et al* (1973), 40 D.L.R. (3d) 530 (S.C.C.) and that a prudent lawyer would not have considered it to have been changed until the decision of the Supreme Court in *Winnipeg Condominium* was known. That argument essentially ignores the general thrust of Canadian tort law in the years since *Rivtow* was decided. I need only refer to *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2 (S.C.C.) as an example of the case authorities and writings which any prudent advisor would have had in mind in 1989. As a matter of interest, I note that the *Winnipeg Condominium* case itself was begun in 1989 considerably earlier in the year than the relevant date in this case. I do not suggest that is an important circumstance, but is part of the picture.

[para7] I would therefore dismiss the appeal and the cross-appeal. ESSON J.A.

[para8] PROWSE J.A.:-- I agree.

[para9] MACKENZIE J.A.:-- I agree.

[para10] ESSON J.A.:-- The appeal and cross-appeal are dismissed.

CBR# 177

Marco Polo Properties Ltd., petitioner, and The Owners, Strata Plan LMS 1328, respondent

Vancouver Registry No. A991371

British Columbia Supreme Court Vancouver, British Columbia Davies J. (In Chambers) Oral judgment: August 5, 1999. Released: August 27, 1999.

Counsel: J. Bleay, for the petitioner. J.G. Mendes, H.D. Neun and L. Ridgway, for the respondent. [Ed. note: A Corrigendum was released by the Court September 14, 1999, the correction has been made to the text and the Corrigendum is appended to this document.]

DAVIES J.:--

Introduction

[para1] The respondent's 194-unit condominium development in Surrey, British Columbia has become what is commonly known as a "leaky condo" development. The project was developed by the petitioner in 1994 and the petitioner still owns 24 units in it.

[para2] At its annual general meeting on February 18, 1999, a majority of the respondent's owners passed a budget resolution requiring that each unit owner pay a proportionate share of a \$2,467,000 assessment intended to fund the repair of the waterproof envelope of the buildings comprising the project. That payment was required to be made in one lump-sum payment due on April 1, 1999.

Issues

[para3] The petitioner challenges the validity of this budget resolution, raising three issues for determination:

Firstly, did the repair assessment require the approval of 75 percent of the unit owners in the development by way of a special resolution, rather than a mere majority by ordinary resolution;

Secondly, do the respondent's bylaws and the Condominium Act, R.S.B.C. 1996, c.34 (the "Act") allow a requirement that the amount assessed for the repair of the building envelope be paid in one lump-sum payment, rather than by equal monthly instalments; and

Thirdly, were the respondent's actions in assessing the repair assessment oppressive and unfairly prejudicial to the petitioner under section 42 of the Act?

Background

[para4] The respondent's condominium development is comprised of a 16-story high-rise containing 128 units known as Grandview Court, and a 66-unit 4-story wood frame structure known as Parkview Court.

[para5] The development has suffered from water ingress since it was completed in 1994. The petitioner and the contractor which built the development attended to annual repairs of the leaks from 1994 to October of 1998. Since that time the respondent strata council has been spending monies on temporary repairs and other measures to mitigate water ingress and damage.

[para6] In May of 1998, the respondent retained R.D.H. Building Engineering Limited (R.D.H.) to investigate the project's water ingress problems. R.D.H.'s report on Grandview Court was delivered in September 30, 1998. Among other things, it stated:

Evidence found during our investigation, coupled with reports of water ingress into suites, indicates significant moisture problems with the building envelope of Grandview Court.... [I]t is our opinion that even with ongoing and extensive maintenance, acceptable long-term performance of current wall and window assemblies is unlikely.

[para7] R.D.H.'s report on Parkview Court was delivered on October 19, 1998. It stated, among other things, that:

Our investigation, and problems reported by owners, clearly indicate significant problems of water penetration. Deterioration of sheathing and framing, resulting from rain penetration has occurred in several areas of the building.... Deterioration of structural members, such as balcony joists, is a serious condition and compromises the life safety of occupants. Such damage must be repaired as a matter of urgency.

And further that:

Remedial work to date appears to have been carried out but on a piecemeal basis. While this work may have, at least temporarily, corrected some of the problems it does not address fundamental issues of wall design and should not be viewed as a viable long-term solution.

[para8] On October 21, 1998, the respondent retained Levelton Engineering Limited, another engineering company specializing in building envelope repairs, to provide a second opinion. On November 13, 1998, Levelton Engineering Limited delivered a report, which concluded:

Levelton believes that the investigation performed by RDH was in general accordance with good practice. Levelton agrees with RDH that the deterioration of the wall assembly will be progressive and that water ingress problems will become more serious as time goes on. Based upon the data contained in [the Grandview report] it is therefore Levelton's opinion that aggressive intervention such as described in the recommendations section of the RDH report is warranted.

[para9] Following receipt of those reports, the respondent's strata council convened extraordinary general meetings on November 16, 1998 and December 19, 1998 at which special resolutions were proposed for an assessment of sufficient funds in the amount of approximately \$2.4 million to complete the remedial work determined as being necessary by R.D.H. under a Plan B option.

Those resolutions each failed to obtain the approval of 75 percent of the unit holders. The petitioner voted all of its units against the assessments on both occasions and was joined by some other unit holders in so doing.

[para10] When the respondent held its annual general meeting on February 18, 1999, its council once again proposed a special resolution for an assessment of sufficient funds to carry out the remedial work proposed by R.D.H. under Plan B. Council had determined that the work must be immediately undertaken for the present well-being of the development and to avoid future repair cost increases. Council also proposed an ordinary resolution which would make the same repair costs payable in one lump-sum payment as part of the respondent's annual budget for 1999-2000 if the special resolution failed to obtain the approval of 75 percent of the unit holders.

[para11] The February 18, 1999 special resolution failed to obtain the required 75 percent approval of unit holders. The petitioner voted against that special resolution as did seven other unit holders. One unit holder abstained, while 86 voted in favour. The ordinary resolution was then proposed and passed, with 86 unit holders voting in favour, seven against, and 25 abstentions.

[para12] Since April of 1999, the respondent has received reports of fungal contamination in several areas of the development. The evidence establishes that such contamination may pose a serious health hazard to the occupants of the development, increasing the urgency of the remedial work to repair the building envelope as proposed by R.D.H.

[para13] On May 17, 1999, the petitioner filed this petition challenging the validity of the repair assessments against it. No repairs have been undertaken, pending determination of the issues raised by this petition.

Discussion and Analysis

ISSUE 1: Did the repair assessment require the approval of 75 percent of the unit holders in the development by way of a special resolution, rather than a mere majority by ordinary resolution?

[para14] The petitioner says that the repairs deemed necessary by R.D.H. are "unusual and extraordinary expenses" which may only be funded through assessments approved by special resolution under section 49 of the Act or by payments from the "contingency reserve fund" required to be established and funded by each strata corporation under section 35(1)(b) of the Act.

[para15] The respondent says that in the special circumstances of this development the contemplated repairs are not "unusual or extraordinary expenses". It says they are expenses of a nature which have historically been required annually so that they need not be funded by the contingency reserve fund. It also says that it is not the amount of the costs of repairs which determines whether a repair is unusual or extraordinary, but rather the nature of the repairs as an ongoing annual item of cost to these owners. It says further these repairs are urgent and that prudence dictates that remedial measures which will alleviate future repair and maintenance costs can be undertaken as an annual budgetary item. The respondent also says that it is mandated by the Act to carry out such repairs and that the will of the majority ought not to be defeated by a self-interested minority so as to preclude the majority from acting responsibly, in accordance with its legal obligations under the Act. [para16] It is common ground that there are insufficient funds in the respondent's contingency reserve fund to undertake the repairs and that the establishment of a fund sufficient to do so in the future would take many years unless special levies are made, which special levies would also require special resolutions under section 4 of the Regulations to the Act.

[para17] The applicable sections of the Act relating to the submissions of the parties are sections 1, 14, 34(1)(d), 35, 40, 49, 116(b), (d) and (f), and 128(1) and (11). Those sections provide as follows:

[para18]

Section 1:

'Contingency reserve fund' means a fund for the expenditures, other than annual, of the strata corporation for repair, maintenance, and replacement of the common property, common facilities and other assets of the strata corporation, including if applicable, without limiting this definition, the roof, exterior of the buildings, roads, sidewalks, sewers, heating, electrical and plumbing systems, elevators, laundry and recreational facilities.

Section 14:

Subject to this Act, the strata corporation is responsible for the enforcement of the bylaws, and the control, management and administration of the common property, common facilities, and the assets of the corporation.

Section 34(1)(d):

A strata corporation must do all of the following:

(d) keep in a state of good and serviceable repair and properly maintain common property, common facilities and assets of the strata corporation.

Section 35:

(1) A strata corporation must do all of the following:

(a) establish a fund for administrative expenses sufficient for the control, management and administration of the common property, for the payment of premiums on policies of insurance and for the discharge of other obligations of the corporation;

(b) establish a contingency reserve fund not exceeding an amount calculated in the manner set by regulation and determine the annual levy for the contingency reserve fund; and the levy must, if the amount of the reserve is less than 25% of the total annual

budget of the strata corporation, be not less than 5% of that budget; and the strata corporation must hold the fund as a reserve fund to pay unusual or extraordinary future expenses;

(c) determine the amounts to be raised for the purposes set out in this section and notify the strata lot owners of those amounts;

(d) raise the amounts so determined by levying contributions on the owners in proportion to the unit entitlement of their respective strata lots in the manner provided for in the bylaws.

(2) A strata council must not make expenditures out of the contingency reserve fund without a special resolution, unless the strata council considers that the expenditure is necessary to meet an emergency.

(3) Unless otherwise provided in the bylaws, there must be no reduction of the contribution of the owner developer under subsection (1)(d) for strata lots owned by the owner developer. (4) Unless otherwise provided in the bylaws, the contributions levied under subsection (1)(d) become due and payable on the first day of each month.

Section 40:

If a strata corporation fails to fulfil an obligation under this Act or bylaws, the owner of a strata lot, or a registered mortgagee, may apply to the court for a mandatory injunction requiring the strata corporation to perform the obligation.

Section 49:

Unless otherwise provided by a bylaw added to Part 5, a strata council must not, except in emergencies, authorize, without authorization by a special resolution of the strata corporation, an expenditure of more than \$500 which was not set out in the annual budget of the corporation and approved by the owners at a general meeting.

Section 116(b), (d) and (f):

A strata corporation must do all of the following:

(b) keep in a state of good and serviceable repair and properly maintain the fixtures and fittings, including the elevators, swimming pool and recreational facilities, if any, and other apparatus and equipment used in connection with the common property, common facilities or other assets of the corporation;

(d) maintain and repair, including renewal where reasonably necessary, pipes, wires, cables, chutes and ducts existing in the parcel and capable of being used in connection with the enjoyment of more than one strata lot or common property;

(f) maintain and repair the exterior of the buildings, excluding windows, doors, balconies and patios included in a strata lot, including the decorating of the whole of the exterior of the buildings.

Section 128(1):

The strata lot owner's contribution to the common expenses of the strata corporation must be levied in accordance with this bylaw.

Section 128(11):

At each annual general meeting after the first annual general meeting, the strata corporation must prepare an annual budget for the following 12 month period and, after that, all owners must, subject to subsections (2) and (3), pay a monthly assessment in accordance with their unit entitlement.

[para19] I am satisfied that in the circumstances of this case the inclusion of the remedial cost to repair the waterproof envelopes of the buildings in this development was properly included in the respondent's annual budget under section 35(1)(a). That section requires that a strata corporation must:

establish a fund for administrative expenses sufficient for the control, management and administration of the common property, for the payment of premiums on policies of insurance and for the discharge of other obligations of the corporation.

I emphasize "and for the discharge of other obligations of the corporation."

[para20] In my opinion, included in those other obligations is the respondent's duty to repair, required by sections 14, 34(1)(d), and 116(b), (d) and (f).

[para21] As to the importance of that obligation to repair, I refer to the decision of this court in *Royal Bank of Canada v. Holden* [1996], B.C.J. No. 2360 (Q.L.) (B.C.S.C.), in which Bauman, J. said (at paragraph 17):

The strata corporation has certain essential duties under the Act to maintain common property, common facilities, and assets of the corporation. These are fundamental duties, and I perceive, their execution by the strata corporation is critical to the realization of the condominium concept - that is people living together in individually owned units within a common shell.

[para22] I do not agree with the petitioner's submission that such repair costs can only be funded through an assessment by a special resolution under section 49 or through the contingency reserve fund. While those are available means of funding, they are not exclusive.

[para23] The attempts of the respondent's strata council to obtain approval of 75 percent of the owners prior to February 18, 1999 was required under section 49 prior to February 18, 1999, because the repairs had not been addressed as a budgetary item in the 1998-1999 budget. That was not, however, the case on February 18, 1999, when the issue was addressed as a budget assessment.

[para24] I am also of the opinion that the use of funds from the contingency reserve fund is not mandatory upon the respondent because section 35(1)(b) mandates that those funds be used to create a fund for unusual or extraordinary future expenses. Aside

from the practical problem of the contingency reserve fund having insufficient funds to pay for the repairs, the repairs now needed are not future repairs, they are required imminently and on an urgent basis, and have continued as such on an annual basis since the project was completed.

[para25] While the Act does contain specific provisions requiring the passing of special resolutions to obtain funding for expenditures deemed necessary by the strata corporation, there is no such specific reference to remedial or repair work which is identified as being necessary as part of the annual budget process required to be undertaken by a strata corporation. I am not prepared to read into the Act such a requirement, notwithstanding the amount of the assessment in issue in this case. In my opinion, unless the Act specifically requires the approval of 75 percent of the unit holders before an assessment can be made, the general democratic principles of condominium living and administration should prevail.

[para26] In support of this principle, I adopt the following statement of this court in *Sterloff v. Strata Plan VR2613* [1994], B.C.J. No. 445 (Q.L.), wherein Wilson, J. stated (at paragraph 35):

Pursuant to its bylaws, the strata corporation must control, manage, and administer the common property for the benefit of all owners. It seems to me that in carrying out that mandate, the corporation, among other things, must endeavour to accomplish the greatest good for the greatest number.

[para27] I believe I am also supported in my conclusion that in the absence of a specific requirement for a special resolution, the principles of democracy should apply to the rights and obligations of the owners of units in the strata corporation, by section 40 of the Act which provides that:

If a strata corporation fails to fulfil an obligation under this Act or bylaws, the owner of a strata lot, or a registered mortgagee, may apply to the court for a mandatory injunction requiring the strata corporation to perform the obligation.

[para28] Surely it cannot be the case that if there is a duty to repair a condition of a strata corporation which is dangerous to the health, safety and well-being of an owner or owners; which is enforceable by court order, it must not be open to a reluctant strata corporation to say, we cannot comply with such a court order because a minority of our members refuses to allow us to do so.

ISSUE 2: Do the respondent's bylaws and the Act allow a requirement that the amount assessed for the repair of the building envelope be paid in one lump-sum payment, rather than by equal monthly instalments?

[para29] The petitioner argues that sections 128, 35(1)(d) and 35(4) of the Act require that an annual assessment under section 35 must be paid in equal monthly instalments.

[para30] The respondent argues that there is no such specific requirement and that a strata corporation should be left free to determine whether a fund such as the one in issue is to be collected at the beginning of the year or at some other time during the year, presumably as the expenditure of the funds becomes necessary. It points to the urgency of the situation in support of the logic of allowing the majority of the owners the discretion to set the date upon which an assessment will fall due.

[para31] Notwithstanding my sympathy for the immediacy of the problem faced by the respondent, I am persuaded that section 35(1)(d) and 35(4) of the Act must be read to require that the total budgetary items approved in an annual budget under section 35(1)(d), which in this case includes the repair assessment of \$2,467,000, "become payable on the 1st of each month", i.e. by monthly instalments. I have no evidence that the respondent's bylaws have amended the statutory bylaws set forth in the Act to provide otherwise.

[para32] I am satisfied that until such time as there is an amendment to its bylaws, the respondent cannot require payment of the funds assessed under section 35(1)(d) other than by equal monthly instalments.

[para33] Having said that, however, I am not prepared to say that the assessment against the petitioner of its proportionate share of the repair costs in this case is invalidated by reason of the requirement of a lump-sum payment. The remedy to which the petitioner is entitled is one rectifying the assessment to provide that it may be paid in equal monthly instalments over the one year term of the budget in the same manner as all other assessments approved in the budget by ordinary resolution on February 18, 1999. The petitioner shall, therefore, be immediately responsible for the monthly payments due between February 1, 1999 and August 1, 1999.

ISSUE 3: Were the respondent's actions in assessing the repair assessment oppressive or unduly prejudicial to the petitioner under section 42 of the Act?

[para34] The petitioner argues that in assessing the building envelope repair costs by way of ordinary resolution after having three times failed to obtain the necessary 75 percent approval of the unit holders for that assessment by way of special resolution, the respondent was acting oppressively and that its actions were unfairly prejudicial to the petitioner's interests under section 42 of the Act.

[para35] Section 42 of the Act provides that:

An owner may refer to arbitration or may apply to the court to prevent or remedy a matter if the owner alleges

(a) that the affairs of the strata corporation are being conducted, or the powers of the corporation or strata council are being exercised, in a manner oppressive to one or more owners, including himself or herself, or

(b) that some act of the strata corporation has been done or is threatened, or that some resolution of the owners or a class of owners has been passed or is proposed that is unfairly prejudicial to one or more owners, including himself or herself. [para36] Section 43 of the Act grants the court broad powers to remedy conduct which is determined by the court to be oppressive or unduly prejudicial.

[para37] The petitioner relies upon the decision of this court in *Blue Red Holdings v. Strata BR857* (1994), 42 R.P.R. (2d) 49, in arguing that the actions of the respondent in assessing the repair costs by ordinary resolution was procedurally unfair and oppressive to the interests of the petitioner, which was entitled to rely upon the respondent's recognition that a special resolution was required.

[para38] I do not agree with that argument. In my opinion, the respondent was obligated to seek approval of the repair assessments by special resolutions prior to its February 18, 1999 annual general meeting, because the assessment related to a new expense which had not been adopted by the budget of the previous year. Section 49 applied in that situation unless the repairs were deemed by the respondent's strata council to be required on an emergency basis.

[para39] While that argument might have been available to the respondent, I do note that the reports of R.D.H. and Levelton at that time had not yet raised the serious health issues related to fungal contamination which is now in evidence.

[para40] The attempt to pass the repair assessment by special resolution at the February 18, 1999 Annual General Meeting prior to proceeding an ordinary budget resolution vote is more troubling in that it could be viewed as a means of attempting to deny the petitioner a right to rely on a special resolution on a matter of significant cost. I have, however, already determined that the repair assessment under section 35(1)(a) was a valid assessment, and while I have determined that the lump-sum aspect of the assessment is not maintainable, it does not follow that the assessment was oppressive or unfairly prejudicial as against the petitioner under section 42.

[para41] In *Vold v. Strata Corporation No. 202 (1993)*, 31 R.P.R. (2d) 129 (B.C.S.C.) at 134, when considering whether the affairs or powers or acts of a corporation have been exercised in a manner oppressive or unfairly prejudicial, Melvin, J. determined that the court should look at the cumulative effect of the conduct complained of. In this case, unlike the situation in *Blue Red Holdings*, the majority was not acting in a such manner as to impose obligations upon an owner without reciprocal benefit. The petitioner is not being required to contribute to repairs to any greater extent than any other unit holder for the units which it owns and the petitioner will receive the full benefit of the repairs to each of its units.

[para42] In my opinion the respondent's attempt to obtain approval by way of special resolution was simply a wise attempt to obtain such approval because of the large amounts in issue, and to attempt to preclude litigation such as this. The assessment by way of ordinary resolution was the legitimate reaction by the respondent to the petitioner's unwillingness to contribute its proportion of the share of the repair costs, and by so doing, thwart the pressing needs of the respondent to protect the health and safety of all of its unit holders and comply with the statutory duty to repair. I see no evidence of procedural bad faith or any attempt to single out the petitioner for unfair treatment.

[para43] It cannot be said that the cumulative effects of the respondent's actions are prejudicial to the petitioner. The petitioner is simply being required to pay its proportionate share of the cost of remedying an urgent health and safety problem. It will benefit equally with all other owners for those rectification efforts.

[para44] In addressing this issue of oppression and prejudice as alleged by the petitioner, one cannot help but wonder at the motivation of the petitioner in seeking to preclude these urgent and necessary repairs from proceeding, and by so doing, cause the respondent to be in breach of the duty to repair it owes all owners, including the petitioner, under the Act. Although the petitioner has the right to vote its unit entitlement as it sees fit, I see no basis in this case to interfere with the efforts of a substantial majority of the owners of the project to comply with those obligations which the respondent has for the health and safety of all concerned.

Costs

[para45] The respondent has been largely successful in this matter. The petitioner has been largely unsuccessful. The respondent is entitled to two-thirds of its costs against the petitioner on Scale 3. The petitioner is entitled to no costs.

DAVIES J.

* * * * *

CORRIGENDUM

With respect to my Oral Reasons for Judgment, pronounced August 5, 1999, on page 16, paragraph 33, last line, the date "April 1, 1999" should be "February 1, 1999".

DAVIES J.

CBR# 168

Martha Morales Lopez and Martha Angelica Lopez, plaintiffs, and Michael Shea and Bonnie Shea, defendants

Vancouver Registry No. C972091

British Columbia Supreme Court Vancouver, British Columbia E.R.A. Edwards J. Heard: May 19, 1999. Judgment: filed May 25, 1999.

Counsel: Julien A. Dawson, for the plaintiffs. Christopher R. Bacon, for the defendants.

[para1] E.R.A. EDWARDS J.:-- The defendants apply under Rule 18A for summary dismissal of the action.

[para2] The plaintiffs allege the defendants fraudulently misrepresented the condition of a condominium unit they sold the plaintiffs in April 1993 for \$205,000 by "actively concealing" a latent defect in the fabric of the building. The plaintiff's seek "recession" (sic) of the purchase contract and damages.

[para3] The defect alleged is a crack in the concrete foundation of the unit purchased by the plaintiffs which caused it to leak in March 1995. It was repaired twice over the ensuing year or so by the strata council at no cost to the plaintiffs. The active concealment alleged is the construction of a gyproc wall over the cracked concrete wall.

[para4] Apart from \$1300 water damage to a sofa, the plaintiff's main claim is for the \$43,000 loss they sustained when they sold the unit in June 1997. Between 1994 and 1997 the plaintiffs were subject to special assessments by the strata corporation totaling about \$2600 for leak related repairs to other buildings in the condominium complex. This amount they also claim as damages.

[para5] The plaintiffs' position is that had they been aware of the crack at the time of purchase they would not have bought the unit and incurred the special assessments or the loss on resale.

[para6] The plaintiffs did not inquire about the repair history of the unit or the complex before their purchase and did not read the strata council minutes which disclosed leak problems with the foundations of two of the seven buildings in the complex. Neither was the building in which the unit they purchased is located.

[para7] The evidence of the defendants, corroborated by the condominium property manager, is that these leak problems in the other buildings had been resolved by 1989. The property manager also deposed that there was no recurrence of the problems in the other buildings until August 1994.

[para8] Having alleged fraud, the onus is on the plaintiffs to prove the defendants knew of and concealed the foundation leak at the time of sale. [para9] The evidence on which they rely to do so is the following:

(a) The evidence of the plaintiff Ms. M.M. Lopez and her common law husband Mr. Faber that after the leak developed in March 1995 the gyproc wall was removed in May 1995 to reveal the leaking crack which had apparently been repaired earlier.

(b) The hearsay evidence of an as yet unidentified repairer who Mr. Faber deposed had told him on inspecting the leak there were several cracks and "the patch-like appearance of the lighter concrete indicated an earlier negligent attempt to repair the cracks."

(c) The hearsay evidence of a neighbour, Mr. Allen, who Ms. M.M. Lopez deposed told her the defendant, Mr. M. Shea, unsuccessfully attempted to repair "the crack" in February 1993.

[para10] From this evidence, evidence that the neighbour Mr. Allen had repaired a similar crack in 1993 and the fact the defendants had been the only occupants of the unit from its initial purchase, the plaintiffs would have the court infer that the defendants knew of the crack, repaired it negligently and deliberately covered it with the gyproc wall to hide the repair.

[para11] The defendant Mr. M. Shea deposed that he constructed the gyproc wall in 1988 and repositioned it in 1989 in order to finish the lower level of the unit and that he neither noticed any cracks nor repaired the concrete wall.

[para12] On discovery Ms. M.M. Lopez acknowledged that she and Mr. Allen "assumed" Mr. Shea had repaired the crack in 1993.

[para13] Mr. Allen deposed that the crack he repaired was adjacent to another unit, not 202 the one in question here, that he never discussed with the defendants and was unaware of any leak in unit 202 or any repairs to unit 202 related to the foundation before 1993. He further deposed he had never advised Ms. M.M. Lopez that a leak or repairs had occurred to unit 202 while occupied by the defendants. [para14] The plaintiffs have no direct evidence that the defendants repaired the crack. At best they have evidence of a repair to a crack which prevented it from leaking for two years after they purchased the unit. This was longer than the effect of the initial repair done by the repairer they hope to call as an expert to say the earlier repair was negligent and "bound to fail". His repair had to be redone within about one year.

[para15] Ms. M.M. Lopez deposed in May 1999 she was confident that the repairer could be located, although counsel acknowledged neither the plaintiffs nor the repairer's former employer now knew his name. There is no certainty he could be qualified as an expert on crack repair if identified and brought to testify at a trial.

[para16] For the plaintiffs to succeed in proving fraud, the court would have to conclude on the basis of the possible "expert" testimony that the repair, if not done by Mr. Shea, would have been obvious to Mr. Shea when he installed the gyproc wall and that it also would have been obvious to the defendants that the repair was "bound to fail" and cause a leak.

[para17] The fact it did not leak for at least two years from the date of the plaintiffs' purchase and for perhaps as long as six years (if the court were to find Mr. M. Shea repaired it when the gyproc wall was last installed in 1989) or even longer if the court were to find it had been repaired when the foundation was initially constructed, leads to the inference the defendants did not know at the time they sold to the plaintiffs that the repair was bound to fail.

[para18] Even if the court found the defendants knew of the crack, and concealed the fact it had been repaired and even if it were obvious to an expert the repair was bound to fail, that does not prove fraud on the part of the defendants in concealing a repair which had not yet failed in 1993.

[para19] The plaintiffs' case rests on the proposition that an expert might say "it was obvious to any lay person the repair would fail" and that the court would prefer that evidence to the evidence that it had not failed until 1995.

[para20] In light of the fact the plaintiffs pleaded fraud without that expert evidence and in the two years since have not obtained that evidence, it is extremely unlikely the court would find the defendants were aware of the leak at the time of sale. On the evidence before the court now, interpreted most favourably to the plaintiffs, the defendants were obliged to disclose not a potential leak but the fact of the repaired crack.

[para21] For the plaintiffs to succeed the court would therefore have to conclude that if the plaintiffs been advised "a foundation crack has been repaired and is not leaking" they would not have purchased the unit.

[para22] The facts the plaintiffs did not make any inquiry about previous repairs or risk of problems before purchase and did not commence this proceeding for rescission immediately upon learning of the leak and the crack, but only much later after the leak was repaired and when other parts of the complex deteriorated resulting in the special assessments mentioned above, indicates such a conclusion is not consistent with the plaintiffs' action, or rather inaction, in 1993 and 1995. In 1993 they sought no information about past problems in the unit or complex. In 1995 when they learned of the leak they were content to have it repaired at no cost to them.

[para23] The plaintiffs' counsel argued it would be unjust to decide the case without a trial at which the repairer might (or might not) give evidence which, even if it corresponded to the "best case" the plaintiffs could hope for, would not overcome their inability to prove that the alleged fraudulent mis-representation resulted in them purchasing the unit, that is that they would not have purchased it with knowledge of the repaired crack. Whatever the repairer told them, it did not move them to allege fraud when they learned of his opinion. Nor did they record or verify his advice in order to do so if repairs were ineffective.

[para24] I conclude the case can be decided on the basis of the affidavit and discovery evidence presently before the court, even if there might be more evidence favourable to the plaintiffs, since that evidence would not prove the damages alleged were a consequence of the alleged fraudulent misrepresentation.

[para25] Even if the expert's evidence proved the defendants knew of the repaired crack and that the repair would fail, since the crack was eventually repaired, at no cost to the plaintiffs before they resold the unit, the facts, at their most favourable to the plaintiffs, would not support the claim to rescission. Further, the special assessments and loss on resale are not damages in any way referable to the cracked foundation. They are referable to the deterioration of other parts of the complex after the defendants sold and which they cannot therefore have concealed.

[para26] To order this case to trial would simply expose the parties to further and unnecessary expense.

[para27] The action is dismissed. The defendants are entitled to costs on Scale 3.

E.R.A. EDWARDS J.

CBR# 148

Chung Hing Kok, Shun Ngan Kong, Samson Laser & Production Co. Ltd. and Simon Lam Tai Lam, plaintiffs, and The Owners, Strata Plan LMS 463, defendant

Vancouver Registry No. A980143

British Columbia Supreme Court Vancouver, British Columbia Tysoe J. Heard: March 31, 1999. Judgment: filed April 21, 1999.

Counsel: Richard J. Olson, for the plaintiffs. Peggy M. Tugwood, for the defendant.

[para1] TYSOE J.-- The Plaintiffs apply by way of a Rule 18A summary trial for the relief claimed in the Statement of Claim. In short, the Plaintiffs seek a declaration that two bylaws of the Defendant are unenforceable or, alternatively, a declaration that the two bylaws have not been applied in accordance with their terms.

BACKGROUND FACTS

[para2] The Defendant is a strata corporation whose members are the owners of the strata lots which comprise a retail shopping centre in Richmond, B.C., known as Parker Place. The Plaintiffs, Chung Hing Kok and Shun Ngan Kong, are the owners of one of the strata lots in the centre (the "Plaintiffs' Unit" or the "Unit"). The Plaintiff, Samson Laser & Production Co. Ltd. ("Samson Laser"), is the lessee of the Unit and the Plaintiff, Simon Lam Tai Lam, is the guarantor of the lease.

[para3] At the times material to this action the Bylaws of the Defendant included a bylaw relating to a change in the usage of strata lots (the "Use Bylaw"), the relevant portion of which reads as follows: ... no owner or occupier of a strata lot shall change the nature of his business without first obtaining the written approval from the strata council. The strata council must promptly consider any request for 'change of use' and will base their decision on the following considerations:

1. (a) No owner or occupier of a strata lot shall be allowed to change the nature of his business to a business the primary nature of which is actively carried on in one or more strata lots in the same section of the shopping centre (definition of 'section below').

(b) Consideration #1a) above will be applicable in all cases except whereby all other shop owners of the same trade, in active operation, agree to the proposed change ...

[para4] Up until 1997 the Plaintiffs' Unit was used for the sale of Buddhist items. Although the materials are not explicit in this regard, I gather that Mr. Kok and his wife purchased the Unit at some point in the first few months of 1997 because there were requests for change of use approval made in January 1997 by a Mr. Wong who was identified in the correspondence as the owner of the Unit.

[para5] On January 3, 1997 Mr. Wong applied to change the use of the Unit to music CDs, audio equipment, accessories and computers. On January 11 Mr. Wong was advised that the Defendant's strata council (the "Strata Council" or the "Council") had approved the change to the sale of music CDs but not the sale of the other items. On January 12 Mr. Wong applied to change the use of the Unit to a book store and music shop. The Strata Council rejected Mr. Wong's application because the owner of another unit had objected on the basis that Mr. Wong's proposed use was similar to his unit's usage. Mr. Wong wrote to the mall manager on January 22 and, after referencing the approval to change the use to the sale of music CDs, he stated that the Unit would remain as a business selling Buddhist items until May 1 before the type of business would be changed.

[para6] On March 1 the owner of another unit (the "Competing Unit"), who had an authorized use of audio and video equipment and laser discs, applied to revise his use to include audio and video hardware and software, including music discs. The change or expansion of usage was approved by the Strata Council, which did not notify the owner of the Plaintiffs' Unit about the proposed change.

[para7] In April Mr. Kok, who had then become the owner of the Plaintiffs' Unit with his wife, applied to change the use of the Unit to the business of a travel agent. This change was approved by the Strata Council but Mr. Kok was not able to finalize a lease arrangement with the prospective tenant. On May 5 Mr. Kok wrote to the Strata Council cancelling the travel agency usage and applying to operate a candy store. The Council rejected the application because another owner objected on the basis of conflict of interest.

[para8] On June 25 Mr. Kok and his wife entered into an offer to lease with Samson Laser. On the same day Mr. Kok delivered to the office of the mall manager a letter from Samson Laser stating that it intended to sell music discs and software and gift items related to music.

[para9] On June 28 Mr. Kok was in attendance at a function took place on July 8 and the Council considered the change of and a member of the Strata Council. He asked the mall manager if the Council had approved the use of the Plaintiffs' Unit for the sale of music CDs and the mall manager responded that it should not be a problem but it still had to be considered by the Council. Mr. Kok has deposed that two days later he telephoned the member of the Strata Council who had overheard this conversation and that this person told him his application had been approved by the Council. The Defendant did not file any affidavit evidence from this member of the Strata Council but there had been no meeting of the Council between June 28 and June 30 at which Mr. Kok's application could have been approved.

[para10] Mr. Kok and his wife entered into a lease with Samson Laser on July 4. Samson Laser opened business selling music CDs on September 6 and has been carrying on this business to date.

[para11] The next regular meeting of the Strata Council

use request for the Plaintiffs' Unit. Two days later the mall manager sent to the owner of the Competing Unit the usual form of letter which is sent to owners of other strata lots which carry products similar to the ones entailed in a change use of request. The letter stated that the consent of the owner of the Competing Unit was required for strata council consideration because the applicant for the change of use was proposing to carry products which are similar to the ones now carried in the Competing Unit. The owner of the Competing Unit responded to this letter by objecting to the change of use which involved software related to

music. On July 19, the day after Mr. Kok wrote a letter to the Strata Council requesting a written reply to his application, the mall manager notified him that the application had been rejected.

[para12] On July 31 Mr. Kok made another request to change the use of the Plaintiffs' Unit to the sale of music CDs. The Strata Council reconsidered the matter at its next meeting on August 14 and confirmed its previous decision in view of the objection from the owner of the Competing Unit. Mr. Kok was notified again that his application was rejected.

[para13] When Samson Laser opened its business on September 6, the mall manager resorted to the bylaw relating to violations of the Defendant's Bylaws (the "Fine Bylaw"), which reads as follows:

Violation of By-Laws (Ref. Condominium Act Sec. 127)

An infraction of (sic) violation of the By-laws of LMS 463 or any of the Rules and Regulations established pursuant to these By-laws on the part of an owner, his employees, his agents, invitees or tenants, may be corrected, remedied or cured by the Strata Corporation, as follows:

- First Violation - warning letter;
- Second Violation - \$50.00 fine;
- Further Violation - maximum \$150.00 fine per occurrence.

Any costs or expenses so incurred by the Strata Corporation shall be charged to the owner. Such charges shall be immediately paid by owners.

[para14] The mall manager sent a warning letter to the Plaintiffs' Unit on September 6 and then sent letters levying daily fines for the rest of the month. He sent a new warning letter on the first day of each successive month and letters levying fines on the remaining days of each month. As at the end of February 1999 the fines total \$75,465.11, inclusive of late payment charges. The Defendant has not attempted to exercise any other remedy to enforce compliance with the Use Bylaw.

[para15] Mr. Kok and his wife first took steps to terminate Samson Laser's tenancy. On October 9, 1997 Madam Justice D. Smith ordered Samson Laser to deliver up vacant possession of the Unit. After Samson Laser filed a notice of appeal and a notice of motion seeking a stay, the parties negotiated a settlement, one term of which was that the parties would jointly challenge the Defendant in connection with the change in use. This action was commenced in January 1998 and this Rule 18A summary trial was initiated by notice of motion dated December 18, 1998.

ISSUES

[para16] The Notice of Motion seeks the relief claimed in the Statement of Claim, which is as follows:

- a) a declaration that the Use Bylaw is ultra vires the Condominium Act [See Note 1 below] (the "Act");
- b) a declaration that the Use Bylaw is unenforceable as a restraint of trade;
- c) in the alternative, a declaration that the Defendant is estopped from enforcing the Use Bylaw;
- d) in the further alternative, a declaration that the Strata Council has applied irrelevant considerations in applying the Use Bylaw to the Plaintiffs;
- e) a declaration that the Fine Bylaw is ultra vires the Act;
- f) in the alternative, a declaration that the Fine Bylaw is unenforceable;
- g) in the further alternative, a declaration that the Fine Bylaw has not been applied by the Defendant in accordance with its terms;
- h) damages; and
- i) costs.

Note 1: Condominium Act, R.S.B.C. 1996, c. 64.

[para17] Several things occurred at the hearing of the summary trial in relation to the issues to be decided. First, counsel agreed that the issue of damages was not before me. Second, counsel did not make submissions on costs and counsel for the Defendant asked that the matter of costs await my decision. Third, counsel for the Plaintiffs made a submission that the Court should relieve against the penal nature of the fines pursuant to s. 24 of the Law and Equity Act. [See Note 2 below] Fourth, I raised the point of whether an argument could be made that the Plaintiffs have not breached the Use Bylaw because the Strata Council did approve the change of use to the sale of CDs in January 1997 and there was no intervening change in use before the business was changed from the sale of Buddhist items to the sale of music CDs.

Note 2: Law and Equity Act, R.S.B.C. 1996, c. 253.

[para18] The first two points cause no difficulty and those issues may simply be deferred. I have concluded that as neither of the third or fourth points were pleaded, it would not be appropriate for me to deal with them in the absence of amendments to the Statement of Claim.

DISCUSSION

(a) Validity of the Use Bylaw

[para19] The Plaintiffs argue that the Use Bylaw is ultra vires the Act for the following reasons:

- a) it is not authorized by s. 26(1) of the Act;
- b) it is prohibited by s. 29 of the Act;
- c) it represents an unlawful delegation to the Strata Council.

[para20] Subsection 26(1) reads as follows:

A strata corporation must have bylaws providing for the control, management, administration, use and enjoyment of the strata lots and common property, common facilities and other assets of the strata corporation.

[para21] Counsel for the Plaintiffs makes two points about s. 26(1). First, he says that the section refers to strata lots in the plural and does not authorize bylaws in respect of the use of a single strata lot. Second, he says that the word "and" following the words "strata lots" is conjunctive and that the section only permits bylaws in respect of the use of strata lots in conjunction with the assets of the strata corporation. I do not find these arguments to be persuasive.

[para22] The Use Bylaw does affect the strata lots generally. It has not singled out one strata lot. It applies to all of the strata lots, although its application may affect the strata lots differently.

[para23] Further, it cannot be successfully maintained that the Legislature did not contemplate the imposition of a use restriction against a strata lot in view of s. 131(2) of the Act, which reads:

When the purpose for which a strata lot is intended to be used is shown expressly or by necessary implication on or by the registered strata plan, an owner must not use his or her strata lot for any other purpose, or permit it to be so used.

As the Legislature contemplated that the use of a strata lot can be restricted on the strata plan, it follows that the use of strata lots can similarly be restricted in the bylaws. Apart from the Plaintiffs' submission regarding s. 29, there is nothing in the Act to prevent it. The Defendant introduced evidence to the effect that it is usual for shopping centre leases to contain use clauses, both for the benefit of the landlord and the tenant, and this is also reflected in the authorities. [See Note 3 below] The Use Bylaw in the present case, which was passed by 75% of the owners who voted on the resolution, protects owners of strata lots from other owners starting a competing business. In my view, the Use Bylaw was passed for a legitimate purpose connected to the operation of strata lots as a shopping centre and there is no reason to construe s. 26(1) in a narrow fashion to detract from the plain and ordinary meaning of the words which allow for bylaws providing for the use of the strata lots.

Note 3: See, for example, *Krahn Enterprises Ltd. v. Big Apple Imports Ltd.*, [1993] 1 W.W.R. 364 (Man. Q.B.) and the discussion in H.M. Haber, *Landlord's Rights and Remedies in a Commercial Lease* (Toronto: Canada Law Book Inc., 1996) at pp. 88 - 90.

[para24] If I were to accept that the word "and" is conjunctive, it would logically follow that the next "and" in the subsection (i.e., the one following the word "facilities") is also conjunctive and that would unduly restrict the meaning of the subsection. In my view, the "and" in question was intended to be disjunctive so that bylaws can deal separately with strata lots (as well as dealing separately with the common property, common facilities or other assets of the strata corporation).

[para25] The next argument of the Plaintiffs is that the Use Bylaw is prohibited by s. 29 which reads as follows:

Subject to section 30, the bylaws do not operate

- a) to prohibit or restrict
 - (i) a devolution of a strata lot, or
 - (ii) a transfer, lease, mortgage or other dealing with a strata lot,
- (b) to destroy or modify an easement implied or created by this Act.

The Plaintiffs say that the Use Bylaw restricts the use to which strata lots may be put and this constitutes a restriction on the devolution and the transferring, leasing and mortgaging of the strata lot.

[para26] In my view, s. 29 was not intended to prevent bylaws, which have been enacted for some other proper purpose, from incidentally having the effect of making a strata lot less desirable to some heirs, purchasers, lessees and mortgagees. Like many other features of a strata lot, a use bylaw may make the strata lot less desirable to some persons but more desirable to other persons. This does not constitute a prohibition or restriction on the devolution, transferring, leasing or mortgaging of the strata lot because the owner is still entitled to devise, transfer, lease or mortgage the strata lot to any other person.

[para27] In addition, there is no evidence demonstrating that the Use Bylaw restricts the devolution, transferring, leasing or mortgaging of any strata lot. In *Marshall v. Strata Plan No. NW 2584*, [See Note 4 below] the strata corporation passed a bylaw providing that only persons at least 55 years old could reside in the development. Henderson J. held that expert evidence was necessary to demonstrate that the age bylaw restricted the value of the strata lot and he declined to give effect to the argument.

Note 4: *Marshall v. Strata Plan No. NW 2584* (1996), 27 B.C.L.R. (3d) 70 (B.C.S.C.).

[para28] The Plaintiffs' final argument regarding the validity of the Use Bylaw is that it represents a delegation of the power to regulate the use of strata lots to the Strata Council. They submit that there is no provision of the Act which permits a strata corporation to delegate the power to the strata council. However, it is my view that the Legislature clearly intended such a delegation. The Act provides that the bylaws of a strata corporation shall be the bylaws set out in Part 5 of the Act unless the strata corporation adopts other bylaws. Subsection 118(1), which is part of the Part 5 bylaws, reads as follows:

Subject to any restriction imposed or direction given at a general meeting, the powers and duties of the strata corporation must be exercised and performed by the council of the strata corporation.

In other words, the powers and duties of the strata corporation are delegated to its strata council pursuant to this bylaw (subject, of course, the members of the strata corporation being required to vote on any resolution required by the Act or the bylaws). Although the Defendant did not adopt the Part 5 bylaws, its Bylaws contain a provision virtually identical to s. 118(1). As contemplated by the Legislature, the powers and duties of the Defendant have been delegated to the Strata Council.

[para29] Before I leave this topic, I should mention that I was referred to the text *Condominium Law & Practice in British Columbia*, [See Note 5 below] in which the authors discuss use bylaws. They state that the commonly held view of s. 26(1) is that strata corporations may regulate land use through their bylaws but they then set forth five arguments against this commonly held view. Some of these arguments were utilized in whole or in part by the Plaintiffs. I have considered all of these arguments and none of them cause me to conclude that the commonly held view is wrong.

Note 5: Fairweather and Ramsay, *Condominium Law & Practice in British Columbia* (1998).

[para30] I hold that the Use Bylaw is *intra vires* the Act.

(b) Restraint of Trade

[para31] During his submissions, counsel for the Plaintiffs stated that he was not pressing his argument on this topic.

[para32] As I stated above, it is usual for shopping centre leases to contain use clauses and they have regularly been enforced by the courts. I refer only to the authority cited by counsel for the Defendant, *Halifax-Dartmouth Bridge Commission v. Imperial Oil Ltd.* [See Note 6 below]

Note 6: *Halifax-Dartmouth Bridge Commission v. Imperial Oil Ltd.* (1980), 14 R.P.R. 69 (N.S.S.C.).

[para33] The Plaintiffs argue that the current situation is different from a leased shopping centre where the property is owned by a landlord who may be presumed to wish to develop a thriving community. They say that this situation is more similar to owners of properties on a street who cannot control the use to which their neighbours put their properties.

[para34] In my view, Parker Place is more similar to a leased shopping centre than to businesses on a street. However, the distinction which the Plaintiffs endeavour to make misses the point. There is nothing to stop the owners of properties on a street from agreeing to restrictive covenants which regulate the use to which they put their properties. The fact that this rarely occurs does not mean that it is an unlawful restraint of trade when it does occur. The relevant considerations are whether there are legitimate reasons for the restraint and whether the restraint is reasonable. The Plaintiffs have not demonstrated that the purpose of the Use Bylaw is illegitimate or that the restraint created by the Use Bylaw is unreasonable.

[para35] The Use Bylaw does not constitute an improper restraint of trade.

(c) Estoppel

[para36] The Plaintiffs submit that the Defendant is estopped from enforcing the Use Bylaw because a member of the Strata Council told Mr. Kok that the Council had approved his application to change the use of the Plaintiffs' Unit to the sale of music CDs.

[para37] There are three flaws in this submission. First, Mr. Kok was not told by the Strata Council or its agent, the mall manager, that his application had been approved. He was allegedly told by a member of the Strata Council who did not have actual or ostensible authority to bind the Defendant. Second, the Use Bylaw provides that any change in use must be approved in writing and Mr. Kok was not advised in writing that his application had been approved. Mr. Kok was aware of this requirement because he wrote to the Strata Council on July 18 requesting a written reply. He would not have written this letter if he was relying on the statement allegedly made by the member of the Strata Council. Third, the lease which Mr. Kok and his wife entered into with Samson Laser provided that Samson Laser was responsible for obtaining all necessary approvals for its business, including any approval of the strata corporation. As Mr. Kok and his wife were not accepting responsibility to obtain the approval of the Strata Council for the use to which Samson Laser intended to put the Unit, they cannot be said to have relied on the oral representation in entering into the lease.

[para38] I find that the Defendant is not estopped from enforcing the Use Bylaw.

(d) Irrelevant Considerations

[para39] The Plaintiffs argue that the Defendant simply relied on another tenant voicing its objection to the proposed change in use and that this was not the proper consideration under the terms of the Use Bylaw.

[para40] There is no direct evidence of the discussion which took place at the meeting of the Strata Council on July 8, 1997 with respect to the Plaintiffs' Unit. However, the mall manager has deposed in his affidavit about the normal practice of the Defendant with respect to the Use Bylaw. He stated that no owner is allowed to change the nature of his business where the primary nature of the new business is actively carried on by another owner and that the standard form of letter is sent to competing owners.

[para41] In my view, the Plaintiffs have not proven on a balance of probabilities that the Defendant applied irrelevant considerations in applying the Use Bylaw in this case. The evidence is that the Strata Council considered Mr. Kok's request at its meeting held on July 8, 1997 and that the mall manager sent the standard form of letter to the owner of the Competing Unit on July 10, 1997. The owner of the Competing Unit did not provide his consent to Mr. Kok's proposed change in use and Mr. Kok's request was not approved.

[para42] Although it would be preferable for the wording of the standard form of letter to more closely conform to the wording of the Use Bylaw, the evidence does not establish that the Strata Council relied solely on an objection from another owner. The standard form of letter represents an inquiry under clause 1(b) of the Use Bylaw as to whether all other shop owners of the same trade are prepared to agree to the proposed change. The letter is sent out by the mall manager after the Strata Council has considered the change of use request.

[para43] The evidence does not disclose what was considered by the Strata Council at its July 8 meeting. The minutes of the meeting simply acknowledge receipt of the letter requesting approval to sell music related software and note that the Plaintiffs' Unit had been previously approved as a travel agent.

[para44] In the absence of any evidence that the Strata Council applied irrelevant considerations at its July 8 meeting, I cannot give effect to the Plaintiffs' submission in this regard. If it were necessary for me to draw inferences from the evidence available to me, I would conclude that the Strata Council did apply proper considerations. The letter to the owner of the Competing Unit was sent two days after the July 8 meeting. I would infer that having determined that the primary nature of the business proposed to be carried on at the Plaintiffs' Unit was actively carried on by the owner of the Competing Unit, the Strata Council decided that its approval could not be given unless the owner of the Competing Unit agreed to the proposed change.

(e) Validity of the Fine Bylaw

[para45] The Plaintiffs submit that the Fine Bylaw does not comply with s. 50 of the Act, which reads as follows:

If a strata corporation wishes to impose a fine of more than \$25 for a breach of a bylaw, rule or regulation, it must amend the bylaws in Part 5 and the resolution must recite the bylaw, rule or regulation and the amount of the fine.

The Plaintiffs argue that the last phrase of s. 50 means that there cannot be a generic fine applicable to the breach of any bylaw. I agree with this argument.

[para46] Section 50 is very clear that a fine of more than \$25 can only be imposed if the resolution amending the Part 5 bylaws recites the bylaw. If it were intended that the strata corporation could impose fines exceeding \$25 without identifying the bylaw to which each such fine applies, the last phrase of s. 50 would be unnecessary and the section would have ended after the reference to "Part 5". Meaning must be given to these last words of s. 50, and the plain and ordinary meaning of the words is that the amending resolution must specify each bylaw to which a fine greater than \$25 will apply.

[para47] I do not believe that the Legislature intended to allow strata corporations to impose blanket fines in excess of \$25 without considering the differences in the bylaws. The seriousness of breaches of the bylaws will vary according to the nature of each bylaw, and one would think that the amount of the fine should be proportionate to the seriousness of the breach. In addition, breaches of bylaws can be isolated events or they can be continuing in nature, and one would think that this should be reflected in the imposition of the fine. It is my view that the Legislature intended to require the strata corporation to direct its mind to each bylaw when setting fines in excess of \$25 and to set an appropriate fine depending on the seriousness and nature of the breach.

[para48] The Defendant relies on the decision in *Lau v. Strata Corporation No. LMS 463*, [See Note 7 below] a case which involved the Defendant and the very bylaw now under consideration. Taylor J. concluded that the strata corporation had the authority to impose fines under the Fine Bylaw. Although his Reasons for Judgment make passing reference to s. 50, it does not appear that any argument was made regarding the validity of the Fine Bylaw. I do not consider the *Lau* decision to be binding on me with respect to this point.

Note 7: *Lau v. Strata Corporation No. LMS 463*, [1996] B.C.J. No. 1728 (Q.L.) (B.C.S.C.).

[para49] I find that the Fine Bylaw does not comply with s. 50 of the Act and is ultra vires. (f) Enforceability of the Fine Bylaw

[para50] The Plaintiffs did not make a separate argument under this topic. Included as part of the written submission under the previous heading was a one sentence argument that there are no words in the Fine Bylaw that make an owner liable to a fine. The Fine Bylaw does state that the costs or expenses are to be charged to the owner and this raises the issue of whether the fines constitute such costs or expenses. I will deal further with this point under the next heading.

[para51] Having already concluded that the Fine Bylaw is ultra vires and without the benefit of additional submissions, I make no further determination as to the enforceability of the Fine Bylaw.

(g) Fine Bylaw Not Properly Applied

[para52] The Plaintiffs argue that the Fine Bylaw does not authorize daily fines and that the only occurrence of a breach was when the use of the Plaintiff's Unit changed on September 6, 1997 without the approval of the Strata Council. This submission is contrary to the decision of Taylor J. in the *Lau* case, which I consider to be binding on me in this regard.

[para53] However, there is another problem with the Fine Bylaw which was not argued in the *Lau* case. For ease of reference, I will repeat the wording of the Fine Bylaw:

Violation of By-Laws (Ref. Condominium Act Sec. 127)

An infraction of (sic) violation of the By-laws of LMS 463 or any of the Rules and Regulations established pursuant to these By-laws on the part of an owner, his employees, his agents, invitees or tenants, may be corrected, remedied or cured by the Strata Corporation, as follows:

- First Violation - warning letter;
- Second Violation - \$50.00 fine;
- Further Violation - maximum \$150.00 fine per occurrence.

Any costs or expenses so incurred by the Strata Corporation shall be charged to the owner. Such charges shall be immediately paid by owners.

The heading of the Fine Bylaw references s. 127, not s. 50. Subsections (1) and (2) of s. 127, which are part of the Part 5 bylaws, read as follows:

1) An infraction or violation of these bylaws or any rules and regulations established under them on the part of an owner, the owner's employees, agents, invitees or tenants may be corrected, remedied or cured the strata corporation.

2) Any costs or expense incurred under subsection (1) by the corporation

(a) must be charged to that owner, and

(b) must be added to and become a part of the assessment of that owner for the month next following the date on which the costs or expenses are incurred, but not necessarily paid by the corporation, and become due and payable on the date of payment of the monthly assessment.

[para54] It appears that the Fine Bylaw is an attempt to combine a resolution required under s. 50 and a replacement of the model bylaw represented by s. 127. The problem which arises is that s. 50 and the s. 127 bylaw address two totally different things. Section 50 deals with fines and the s. 127 bylaw deals with the costs incurred by the strata corporation to correct, remedy or cure a violation of the bylaws. Section 50 is penal in nature to discourage violations, while the s. 127 bylaw is intended to reimburse the strata corporation for the costs which it incurs. Each has a different objective and cannot be combined with the other.

[para55] I return to the wording of the Fine Bylaw. It first states that a violation of the Defendant's Bylaws may be corrected, remedied or cured by the Defendant. Thereafter follows fines in respect of second and further violations. It concludes with the phrase that any "costs so incurred by the Strata Corporation shall be charged to the owner". However, there is no evidence that the Defendant incurred any costs to correct, remedy or cure the violation of the Use Bylaw by the Plaintiffs. The amounts which were purportedly assessed as fines were not incurred by the Defendant. The imposition of fines does not serve to correct, remedy or cure violations of the Bylaws but, rather, their purpose is to discourage violations of the Bylaws.

[para56] I conclude that the Fine Bylaw has not been applied in accordance with its terms because the Defendant has not incurred the costs which have been charged to Mr. Kok and his wife as fines and the fines do not serve to correct, remedy or cure any violation of the Bylaws.

CONCLUSION

[para57] My conclusions regarding the relief claimed in the Statement of Claim (other than the issues of damages and costs) are as follows:

a) the Use Bylaw is not ultra vires the Act;

b) the Use Bylaw is not unenforceable as a restraint of trade; c) the Defendant is not estopped from enforcing the Use Bylaw;

d) it has not been proven on a balance of probabilities that the Strata Council applied irrelevant considerations in applying the Use Bylaw to the Plaintiffs;

e) the Fine Bylaw is ultra vires the Act;

f) no further determination is made with respect to the enforceability of the Fine Bylaw;

g) if it is valid and enforceable, the Fine Bylaw was not applied in accordance with its terms.

[para58] Counsel may make arrangements through Trial Division for a hearing in respect of the costs of this summary trial or, if both counsel are agreeable, submissions on costs may be made in writing directed through Trial Division.

TYSOEJ.

CBR# 030

Astro Contracting Ltd., plaintiff, and Farrington Cove Properties Ltd., defendant, and William G. Keim, defendant by counterclaim And between William George Keim, Marcia Ethel Keim and Astro Contracting Ltd., plaintiffs, Farrington Cove Properties Ltd., defendant

Vancouver Registry Nos. A953088 and C961116

British Columbia Supreme Court Vancouver, British Columbia Satanove J. Heard: September 14 - 18, 21, 22, 25, 29, and October 1, 1998. Judgment: filed October 22, 1998. Building contracts -- The contract -- Implied terms -- Compliance with building codes -- Suitability of design -- Plans and specifications -- Builder's duty respecting -- Breach -- Fundamental breach, what constitutes -- Payment, compensation to builder -- Liability of builder -- Negligence -- Lack of skilful performance of contract -- Damages, measure of -- Duty of owner to mitigate -- Evidence and proof.

Counsel: Derek J. Mullan, Q.C., and Allyson L. Baker, for the plaintiff. Rose-Mary Basham, Q.C. and Elizabeth Lui, for the defendant.

SATANOVE J.:-

INTRODUCTION

[para1] This lawsuit involved two actions which were heard together. They both arose out of the partial construction of a phased condominium project known as Farrington Cove. Farrington Cove is located near Pender Harbour on the Sunshine Coast.

[para2] In action A953088 the contractor Astro Contracting Ltd. ("Astro") claimed against the owner, Farrington Cove Properties Ltd. ("Farrington Co.") for money owing under two construction contracts, one of which was the subject of a builders lien filed by the plaintiff on July 26, 1995. By way of counterclaim Farrington Co. sought a set-off against the amounts claimed by the plaintiff, and damages for incomplete work, deficient work, double billing and over charging. The defendant's pleadings also sought damages for a breach of fiduciary duty and judgment against Mr. Keim personally.

[para3] In action C961116 the principal of Astro, Mr. Keim, together with his wife and Astro, claimed against Farrington Co. for failing to complete the sale to them of one of the units in Farrington Co. The defendant denied any binding agreement to sell the unit and in the alternative, sought to keep the deposit.

ACTION NUMBER A953088

[para4] In 1989 Farrington Cove was a 15 acre property with minimal development. George Magnus, an Englishman residing in Hong Kong with a summer home in British Columbia introduced the property to Mr. Hamilton Ho, a Hong Kong resident and investor. Mr. Ho bought and held the property in condominium units in phases with a view to targeting wealthy using the name of Farrington Co. Mr. Ho wanted to build 100 Hong Kong or Vancouver residents as potential purchasers.

[para5] Mr. Magnus introduced Mr. Ho to Mr. Keim who had built Mr. Magnus' home on Pearson Island. Mr. Ho retained Mr. Keim's company Astro to construct the project.

[para6] At all times Mr. Magnus was the liaison or intermediary between Mr. Keim and Mr. Ho. Mr. Keim only met with Mr. Ho on two occasions. The agreements reached between the defendant and the plaintiff were negotiated through Mr. Magnus. Although Mr. Keim sent documents directly to Mr. Ho, Mr. Magnus testified that they were reviewed by him and discussed between Mr. Ho and him before Mr. Magnus replied.

[para7] Mr. Ho did not testify and the defendant did not seriously contest that Mr. Magnus was the defendant's agent from 1989 to 1995. I find that whatever arrangements or statements were made by Mr. Magnus during this time were binding on the defendant.

[para8] When the plaintiff was retained, the project had already been zoned for 100 units and a site layout had been prepared by the original owners. Over time and through discussions with Mr. Magnus the site layout was revised by the plaintiff with input from Mr. Ho and a draftsman, Mr. Yurick.

[para9] Two site plans were tendered into evidence: the one shown on the front cover of the Jensen Surveying & Engineering Ltd. ("Jensen") infrastructure design drawings, and the one prepared by Mr. Yurick and dated July 23, 1990.

[para10] There was a dispute about which site plan superseded the other, but I find that it was clear on the evidence that the site plan on the Jensen drawings preceded Mr. Yurick's drawing. The site plan used by Jensen in its key plan appears in drawings dated February, 1990 and shows building orientation and road alignments which were subsequently changed and reflected to some extent in the Yurick drawing. The phase 3 drawings which were certified by the structural engineers on April 23, 1993 show a site plan similar to the Yurick drawing, not the Jensen drawings.

[para11] It is important to note that at this stage Mr. Ho had a style of project in mind that he was trying to develop. His model was "Isola Bella", a condominium complex in Hong Kong in which Mr. Ho owned a unit. I mention this because when Farrington Co. was purchased by Tangran Developments Ltd. ("Tangran") in 1995, the new owners had quite different ideas about the type of complex which would be suitable for the property and their marketing concept. In many respects, this difference in vision lay at the heart of the dispute and it was necessary to analyze the defendant's counterclaim for defects and deficiencies in this context.

[para12] Quotes were provided by the plaintiff for various aspects of the work. Prices were negotiated and fixed for the following services, each of which were the subject of a separate quotation and letter to the defendant:

1. site preparation; 2. seawall construction and backfilling; 3. surplus materials; 4. grading; 5. peninsula road; 6. clearing and excavation; 7. excavation for relocating road; 8. clearing and burning; 9. infrastructure; 10. retaining wall and foundations; 11. villas 1, 2, 5 & 6; 12. villas 3 & 4; 13. retaining wall and foundations for units 7 - 14; 14. completion of unit 2; 15. completion through dry wall of units 1 & 5; 16. foundations for units 51 - 54; and 17. construction of units 7 - 14.

[para13] Other services were agreed to be done for cost plus a 15 percent fee.

[para14] Work was done by the plaintiff from November, 1989 to January, 1995. The defendant was always slow in paying its accounts but by November, 1994 it was seriously delinquent and after January, 1995 it stopped paying altogether.

[para15] The defendant's refusal to pay in 1995 was not explained or justified to the plaintiff at the time. Later Mr. Keim learned that Mr. Ho was in the process of selling the project to another developer.

[para16] Mr. Magnus was asked to cease his involvement in early 1995. Before he did he strongly advised Mr. Ho to pay the outstanding accounts to Mr. Keim as they were legitimately owing.

[para17] In the meantime the Keims had to obtain a high interest mortgage over their home in order to pay their sub-trades. Ultimately their home was sold to discharge the mortgage.

[para18] In April, 1995 Farrington Co.'s solicitors asked Mr. Keim to provide certain information about the project because Mr. Ho was selling it to Tangran. A quantity surveyor and forensic accountant were dispatched to review the project and the plaintiff's invoices, ostensibly to determine a cutoff point for Mr. Ho's financial responsibility for the project. However, Mr. Murray, the quantity surveyor, admitted at trial that he was told by Tangran that they were "suspicious" of the plaintiff. Part of Mr. Murray's mandate was to investigate those suspicions without letting on to Mr. Keim that Astro's business practices were the subject of the review. Mr. Murray was told to look for overcharging and double billing.

[para19] The plaintiff cooperated with the requests for information until a request was made for Astro's financial records relating to its fixed price contracts. Astro refused to release these, taking the position that the defendant was not entitled to them.

[para20] In July, 1995 Astro filed its builders lien for \$217,374.44. In August, 1995 Astro was dismissed from the project. In September, 1995 it started this action and in November, 1995 the defendant filed its counterclaim.

[para21] Although the pleadings disclosed numerous issues between the parties, many of these had paled by the end of trial.

[para22] The defendant had pleaded that both Mr. Keim and Astro were liable for breach of fiduciary duty to the defendant. Despite the able submissions of counsel I found no duty or relationship to have existed between Mr. Keim or Astro and Mr. Ho other than the usual duty and relationship that existed between a general contractor and an owner. The fact that Mr. Ho was an off-shore businessman of little experience in construction did not create the special relationship required to invoke a fiduciary duty. [para23] In any event I found Mr. Ho relied on others such as Mr. Magnus, Mr. Alexander (an engineer) and Mr. Ho's employees in his San Francisco office to assist him in trying to develop a profitable project. Astro was retained for its construction expertise, not as a project manager. Astro was not responsible for the financing, profit projections, or marketing of the project.

[para24] Astro was hired to perform discrete services which I have listed earlier. These services were the subject of separate contracts which, while not in standard form, were contained in writing in the form of letters from the plaintiff to the defendant.

[para25] The terms of these contracts, both express and implied, were largely undisputed by the parties. Pursuant to the contract to construct units 7 - 14 the plaintiff was prima facie entitled to its builders lien for the amount claimed, and pursuant to the infrastructure contract the plaintiff was prima facie entitled to \$66,000 for the balance of the fixed price plus GST. The plaintiff conceded that \$46,481.95 should be deducted from these amounts for accounting errors. The other accounting errors alleged by the defendant were unsubstantiated on the evidence.

[para26] The real issues were whether any of the contracts were breached by the plaintiff, and the extent to which the defendant was entitled to set off against the amounts owing to the plaintiff any damages caused to the defendant.

[para27] Specifically:

1. Did the plaintiff breach the infrastructure contract by:

a) failing to build the infrastructure in a proper and workmanlike manner? b) failing to build the infrastructure in accordance with plans and other directions provided by the appropriate engineering professionals? and c) failure to obtain the required approvals and certifications?

2. Did the plaintiff breach the contracts to construct units 1 - 6 by failing to complete or build them in a good, workmanlike manner with materials that were reasonably fit for their purpose?

3. Did the plaintiff overcharge for the value of completed work under the retaining wall contracts and the contract to construct units 7 - 14?

4. Did the plaintiff double bill the defendant by charging as extras certain items which were included in the fixed price contracts?

a) The Infrastructure Contract

[para28] Mr. Keim testified that by the time of termination of the plaintiff's services, all infrastructure set out in the letter agreement of August 1, 1990 had been completed except for the installation of two concrete castings for the underground hydro works which could not be done until the nearby road had been completed.

[para29] It was common ground that whatever was built by the plaintiff as infrastructure was not in accordance with the blueprinted, allegedly final design drawings of Jensen, the engineers which were hired by the plaintiff to design the infrastructure.

[para30] The issue was whether these drawings (exhibit 40) were issued to the plaintiff for construction purposes or whether he was told by the engineers to use a single sketch, exhibit 15, as a guide for construction and to make field changes as appropriate.

[para31] Much evidence was led about which plans were issued when and which plans were actually used by the plaintiff in construction. On examination for discovery Mr. Keim conceded that exhibit 40 was the set of infrastructure plans that was

approved by the Sunshine Coast Regional District ("SCRD") and the Ministry of Transportation and Highways ("MOTH") and that he was supposed to adhere to it. Elsewhere in his examination for discovery he alluded to changes made by the engineers on a separate drawing given to him for construction purposes. This drawing was not produced at the discovery and was not disclosed on a list of documents until May, 1997.

[para32] At trial the plaintiff denied ever receiving exhibit 40. He said he received exhibit 16, the predecessor to exhibit 40. It was undisputed that exhibit 16 was merely a set of preliminary drawings not to be used for construction purposes.

[para33] A peculiar aspect about exhibit 40 was that it was based on the same key plan and site layout as appeared in exhibit 16. Exhibit 16 was prepared in February, 1990 and by the time the infrastructure contract was entered into, the site plan had been revised substantially.

[para34] Mr. Jensen explained that as a design evolved and revisions were made to meet approval with the governing bodies, new original drawings were not usually prepared because of the expense. Instead blueprints of the original design were modified to reflect the revisions. Therefore, it was not surprising to him that the front cover and key plan of exhibit 40 still showed the old site layout.

[para35] Another peculiar aspect of the plans was that exhibit 40 was not signed nor sealed by Jensen, nor stamped "for construction", nor marked with the approvals of MOTH, Garden Bay Waterworks or SCRD.

[para36] This latter point is important because it was unclear from the evidence what parts of the infrastructure as designed (not as built) did receive approval. Part of the source of confusion was that Mr. Wong, the project engineer employed by Jensen, did not testify. Mr. Jensen's evidence was largely a reconstruction of events based on Mr. Wong's file.

[para37] The documents indicated that some approvals were received after the fact. For example the sewage disposal system design of West and Associates was approved by B.C. Environment, Waste Management Branch on July 20, 1993. The Provincial Electrical Inspector approved the electrical work and B.C. Hydro approved the power lines. The geotechnical, structural and mechanical engineers accepted the work in place. However, the watermain was not certified by Jensen and was never approved by Garden Bay Waterworks. Only a portion of the sanitary pipeworks to the treatment plant were certified by Jensen.

[para38] In conclusion, I cannot find that exhibit 40 contained the final design drawings for the infrastructure. However, this does not assist the plaintiff very much because it agreed to build the infrastructure in accordance with approved plans and specifications. It appeared to have constructed the infrastructure before any final plans were approved by MOTH or Garden Bay Waterworks.

[para39] The defendant hired Mr. Panzer, an engineer from UMA Engineering Ltd. to review and assess the infrastructure design. Part of his assessment was to compare the infrastructure as built with the one shown in exhibit 40. In summary, he concluded that the roads generally conformed to the design except the entrance to Sinclair Bay Road, the width of the pavement in spots, the intersection between roads A & D and the lack of curbs. The waterworks were slightly out of alignment with the design, and services for future units were not installed. The design for the sewage system called for a constant slope but the actual construction showed sewers with shallow grades and manholes with deep drops.

[para40] Mr. Panzer also itemized a number of deficiencies in the sewer and drainage systems, waterworks and roads.

[para41] In most respects Mr. Panzer was a reasonable expert witness who answered questions directly and qualified his estimates as preliminary when appropriate.

[para42] He roughly estimated the cost to "correct the entrance way" to be \$60,000. However, it was clear from his evidence that the defendant had significantly changed the site layout of the project and the entrance way was not being "corrected" to accord with exhibit 40, but rather with the new layout. Mr. Panzer gave no evidence of the cost to modify the entrance way to match exhibit 40.

[para43] Mr. Christopher Ho (no relation to Mr. Hamilton Ho) confirmed in his testimony that the defendant had created a new site plan, exhibit 45. The configuration of the roads had changed and 31 multi-family units were planned along with single detached family cottages. The putting green and swimming pools had been removed.

[para44] As I mentioned earlier, the defendant's complaints of defects and deficiencies must be viewed in light of the defendant's change in plan for Farrington Cove. It was not clear on the evidence what parts, if any, of the plaintiff's infrastructure would remain after the defendant starting reconstructing the project.

[para45] The plaintiff's main claim was for breach of contract in that it failed to receive an infrastructure which had been approved by MOTH and Garden Bay Waterworks. Mr. Ho testified that the defendant could not receive approval from MOTH for the entrance way built by the plaintiff. There was no evidence that the waterworks ever received approval either.

[para46] Considering all the evidence on a balance of probabilities, I find that the plaintiff was in breach of the infrastructure contract in that it failed to construct the infrastructure according to a design which had been or could have been approved by the appropriate authorities. I further find that this was a fundamental breach of the infrastructure contract and that the defendant was entitled to terminate the infrastructure contract in August, 1995.

[para47] I find that the plaintiff was not entitled to the outstanding balance of \$66,000 under the infrastructure contract because of this fundamental breach and because it did not prove that it did work under the contract for which it was not paid. (*Argus v. Pinalski* (1990), 41 C.L.R. 284 (B.C.S.C.) and *R.F.M. Electric Ltd. v. University of British Columbia*, [1992] B.C.J. No. 1810, (24 August 1992), Vancouver F882148 (B.C.S.C.))

[para48] In addition, the defendant was entitled to be put into the same position it would have been if the plaintiff had carried out the infrastructure contract properly. Mr. Panzer estimated that the cost of changing the entrance way to meet MOTH approval was \$60,000. He estimated that \$77,500 would be required to rectify the bends in pipe, rock protrusions and to build a constant slope structure.

[para49] The defendant also claimed \$20,000 for individual unit connections but I do not find that the infrastructure contract called for these. Mr. Keim always billed these as an extra and they were paid for as an extra.

[para50] I allow the defendant's claim for defects and deficiencies in the infrastructure contract at \$137,500.

[para51] The defendant also claimed for the failure to complete work which had been billed and paid for under the infrastructure contract. This work was itemized as roads, curbs, sanitary sewers, forced sanitary, manholes, force main pump, watermain, service connection, tees, bends, storm drainage, ditching, telephone and cable. The value of this incomplete work was assessed by Mr. Murray, a quantity surveyor, at \$282,000. The defendant conceded \$50,000 of this was not paid under the infrastructure contract and therefore it claimed \$232,000.

[para52] There were two major problems with this claim. Firstly, a number of the items did not form part of the fixed price infrastructure contract, such as the spur roads and service connections.

[para53] Secondly, Mr. Murray's calculations were not trustworthy and his opinions appeared tainted with bias.

[para54] Mr. Murray's report was prepared for the defendant in June, 1995 shortly after the defendant took over Farrington Co. Mr. Murray's mandate was to look for overcharging and double billing without telling Mr. Keim.

[para55] The tone of his report matched his mandate. He implied that Mr. Keim grossly over billed and double billed but at trial said he was unable to prove this and that the billing discrepancies he did find did not suggest dishonesty on Mr. Keim's part.

[para56] He said the opinions in his report were his but the measurements and calculations were done by a quantity surveyor in training. He said he checked the trainees work, then later said he did not check all of it.

[para57] In his report he said the February, 1990 drawings were approved by the municipality. In cross examination he said he did not know where this information came from.

[para58] In his report Mr. Murray said the credit provided by the plaintiff for lumber removed from the site was "probably low". In cross examination he said he did not know how much lumber had been removed or what price had been received. He finally admitted he had no facts on which to base this part of his opinion.

[para59] At trial Mr. Murray appeared very confused by which drawings he received and when. This was eventually sorted out and he admitted that he was given a revised site plan by the defendant (exhibit 41) but used it only to check the phasing of the project.

[para60] At page 10 of his report Mr. Murray said \$90,000 worth of work was outstanding on the sanitary sewers, but his itemization of that work only amounted to \$79,000. He estimated \$16,000 for curbs but appendix C showed the figure of \$13,760.40. He recommended allowances of \$54,000, \$20,000 and \$50,000 for completing excavation, storm lines and ditching but then said it was not possible to measure the extent of the work which was required.

[para61] Mr. Murray did not bring his working papers to court so the complete calculations in the appendices to his report could not be checked by the plaintiff. However, in my view the plaintiff successfully challenged a sufficient number of Mr. Murray's calculations and conclusions to make me lose confidence in his report and opinions. He "short changed" the value of the work completed by the plaintiff with respect to the retaining walls and construction of units 7 - 14 by using incorrect measurements and lower rates for the completed work.

[para62] In my opinion it would be unsafe to rely on Mr. Murray's opinion of the state of completion of work, or the value of completed work, or the state of deficiencies in the completed work.

[para63] The only reliable evidence with respect to breach of the infrastructure contract was found in Mr. Panzer's report.

[para64] I conclude that the extent of the damage suffered by the defendant for breach of the infrastructure contract should be set at \$137,500.

b) The Contract for Construction of Units 1 - 6

[para65] The fixed price for this contract was \$710,000 plus GST. When the plaintiff's contract was terminated, units 2, 3 & 4 had been completed and units 1, 5 & 6 had been completed to the drywall and insulation stage. Even Mr. Murray took no real issue with the extent of the completed work.

[para66] The defendant's complaint was that the construction of these units was so deficient it was less expensive to demolish the units than repair them. I am also cognizant of the fact that the new ownership preferred to start again with a different design and style of residences for the property.

[para67] The defendant relied on a report of Mr. Wandling and Mr. Elias dated August 7, 1997 which itemized the deficiencies they found on their inspection of units 1 - 6 in August, 1997, two years after the plaintiff left the site. The general character of these deficiencies was leakage and water damage.

[para68] The plaintiff offered no evidence to contradict Mr. Wandling's findings in this regard or Mr. Ho's analysis of the cost to rectify versus the cost to demolish. Demolition of the units resulted in a less expensive claim, and therefore I am obliged to find that the defendant by demolishing the units has mitigated its loss.

[para69] Based on the evidence before me the defendant has made out its claim for \$50,423.79 for the demolition cost of units 1 - 6. c) Retaining Walls and Construction of Units 7 - 14

[para70] The defendant claimed that the plaintiff overcharged for work on the retaining walls by \$77,665, work on units 1 - 6 by \$8,300 and work on units 7 - 14 by \$178,600 for a total of \$264,565.

[para71] There were two flaws in this claim. Firstly, the defendant relied on the opinions of Mr. Murray contained in his report of June, 1995 and I have found this report to be unreliable.

[para72] Secondly, the nature of the contracts between the plaintiff and defendant were for a fixed price. If the actual value of the work was less than the contract price, then the plaintiff had negotiated a profitable contract. The court will not interfere with a commercial contract negotiated by two experienced businessmen of similar bargaining positions.

[para73] The only time the value of the work in place becomes relevant is if the breach by the plaintiff was so serious that the defendant was entitled to treat the contract as at an end. (*Angus v. Pinalski*, supra, and *R.F.M. Electric Ltd. v. University of British Columbia*, supra.)

[para74] The contracts at issue in this part of the defendant's counterclaim were substantially completed and the defendant was not claiming for any deficiencies in the work. I cannot find any fundamental breach of the retaining wall or unit 7 - 14 contracts up to the time these contracts were terminated by the defendant in August, 1995.

[para75] Therefore the defendant was not entitled to claim the difference between actual value of the work completed and the amount invoiced and even if it were, I would not have accepted Mr. Murray's evidence of value.

d) Double billing

[para76] The defendant provided me with a chart which compared invoices for certain work which were rendered under fixed price contracts with invoices allegedly for the same work which were rendered on a cost plus basis.

[para77] The plaintiff tendered evidence to dispute only two of these invoices. I accept Mr. Keim's explanation that \$13,105 was incurred as an extra for seawall stabilization because the geotechnical engineer required additional work after the seawall construction had been completed according to plan and according to the letter agreement of February 9, 1990.

[para78] I also accept the plaintiff's submission that it never charged a 15 percent fee for the labour provided by the plaintiff itself. This was evidenced by the Summaries of Extra Costs which formed part of exhibit 13 at tabs 31 and 33.

[para79] The plaintiff conceded the double billing of the guest parking lot paving and this amount of \$16,810.77 was already included in the \$46,481.95 it had conceded for accounting mistakes.

[para80] The remainder of the double charges which were claimed was not disputed by the plaintiff, in evidence or in submissions, and therefore I find that the defendant is entitled to the sum of \$49,063.59 as a further set off against the plaintiff's claim.

ACTION NUMBER C961116

[para81] The plaintiffs, Mr. and Mrs. Keim and Astro pleaded that they had made an oral agreement in August, 1994 with the defendant through Mr. Magnus for the purchase of unit 6. Unit 6 was partially completed and the price was to be \$50,000. The completion date was to be the earlier of December 31, 1995 or on completion of the phase 1 stratification.

[para82] The evidence at trial did not prove on a balance of probabilities that the plaintiffs had a binding and enforceable contract for the purchase of unit 6.

[para83] Mr. Keim testified that he discussed taking one of the units himself at the beginning of the project. In July, 1994 Mr. Keim told Mr. Magnus that he wanted unit 6 for a summer home and retirement. He told Mr. Magnus that he had done lots of extra work for which he had not been paid and that it would be a good idea to have him living on site during the rest of the phases. Mr. Magnus discussed it with Mr. Ho and advised Mr. Keim that he could have a unit but that he would have to pay \$50,000 for the cost of the shell. He would have until December, 1995 to pay and the \$50,000 would be deducted from invoices rendered by Astro to the defendant.

[para84] Mr. Keim said as a result of this agreement he proceeded to finish unit 6 and spent \$49,329.66 on finishing it. By way of credit on an invoice dated December 1, 1994 Astro paid \$25,000 towards the down payment.

[para85] Mr. Keim's evidence was contradicted in a number of ways:

a) On cross examination Mr. Magnus said he could not recall when the deal was to complete and that no date for the payment of the balance of \$25,000 was agreed. b) Mr. Keim said on his examination for discovery that the contract was not made until after September, 1994. c) Mr. Keim's solicitors wrote to the defendant's solicitors demanding that the deal complete by October 31, 1995. There was no mention in the letter of the completion date of December 31, 1995. d) The parties to the contract were always alleged to be Mr. and Mrs. Keim. In September, 1998 the plaintiffs' amended their statement of claim to add Astro as a party to the contract. e) The total value of unit 6 as of August, 1994 was in excess of \$200,000.

[para86] In order to find any enforceable contract, there must be certainty of terms. It was questionable on the evidence whether the Keims and/or Astro were parties to the alleged contract. It also was not clear whether \$50,000 was the price or a mere down payment. The alleged consideration included work for which the plaintiff never charged, but Mr. Keim's evidence as to the nature of this work was very vague. The date for completion was not established on the evidence.

[para87] Further, in order to enforce a contract for the sale of land, the contract must be in writing or partly performed. It was common ground that there was no written agreement for unit 6, but the plaintiffs relied on a notation on an invoice that \$25,000 was being deducted as payment toward unit 6.

[para88] I accept the Keim's evidence that they thought they had a deal to purchase unit 6 and that they consequently caused Astro to make a down payment of \$25,000 and to expend a further sum towards finishing the unit for which Astro was not reimbursed by the defendant. Unfortunately, the evidence was insufficient to establish the necessary consensus ad idem between the parties or the certainty of terms required to find a legal contract.

[para89] Nonetheless it would result in an unjust enrichment of the defendant if I did not order it to return the deposit monies of \$25,000 and to reimburse Astro for the \$49,329.66 labour and materials it expended on the unit without compensation. Astro acted to its detriment through the Keim's belief that they had a contract. Although unit 6 was ultimately demolished, the defendant was still enriched at the time the plaintiffs made the improvements, without juristic reason. (Pettkus v. Becker, [1980] 2 S.C.R. 834 (S.C.C.))

[para90] The plaintiff Astro shall have judgment in this action against the defendant for \$74,329.66.

CONCLUSION [para91] I find that Astro is entitled to judgment and a declaration of builders lien in the sum of \$217,374.44. I find that Astro is also entitled to a judgment against the defendant for \$74,329.66.

[para92] I find that the defendant is entitled under its counterclaim to judgment against Astro for:

\$137,500.00 breach of the infrastructure contract \$ 50,423.79 breach of the units 1 - 6 contract \$49,063.59 double billing \$46,481.95 mistaken accounting ----- \$283,469.33 TOTAL

[para93] Although the plaintiff's judgment slightly exceeded the amount awarded to the defendant, success was more or less equally divided. Under the circumstances it would be appropriate for each party to bear its own costs.

SATANOVE J.

CBR# 133

Robert Blair Hewitt, plaintiff, and Strata Corporation N.W. 1282, defendant

Chilliwack Registry No. S0006408

British Columbia Supreme Court Chilliwack, British Columbia McKinnon J. Heard: March 24 and 27, 1997. Judgment: filed May 13, 1997.

Counsel: D.D.E. Lacusta, for the plaintiff. D. Stander, for the defendant.

[para1] McKINNON J.:-- The plaintiff applies pursuant t R. 18A for judgment against the defendant strata corporation in the sum of \$10,896.04 which amount represents fines and assessments made against him by the corporation. This amount was paid to the defendant "under protest" upon sale of the plaintiff's unit in August, 1996. The plaintiff also seeks an order that the defendant produce legal accounts billed to the defendant by its solicitor, which is part of the sum assessed.

[para2] The plaintiff was a resident and owner of a strata unit in the defendant's complex from June, 1993 to August, 1996. In 1994, the council imposed fines totalling \$1,300 for alleged breach of various bylaws ranging from having an unleashed dog to "damaging the reputation of the strata."

[para3] The defendant also commenced action in November, 1995 for defamation consequent upon the plaintiff's refusal to apologize for alleged remarks said to be injurious to the reputation of the complex.

[para4] Costs of the defamation action of \$6,398, incurred by the council, were added to the defendant's assessment pursuant to s. 13(2) of the Strata Bylaws.

[para5] A certificate of default in the sum of \$7,698 was filed against Mr. Hewitt's unit in July, 1995 and a formal demand for payment was made the following January. Having received no response, the council proceeded to enforce payment with a petition, at which point Mr. Hewitt retained counsel.

[para6] A cross-petition was filed alleging irregularities in the assessment of the penalties. The strata council ultimately accepted that procedural fairness had not occurred in that Mr. Hewitt had not been given notice that penalties could be assessed and imposed at the council meeting. Settlement discussions occurred between counsel, then with Mr. Hewitt directly when his counsel ceased to act.

[para7] An agreement was eventually reached whereby the petition and cross-petition would be dismissed and the lien withdrawn from the plaintiff's unit. There is disagreement as to what was intended by this agreement and specifically whether the council had the right to "reintroduce" the penalties subsequently after proper notice to Mr. Hewitt. I consider that issue resolved by the clear wording employed by Mr. Hewitt in returning the discontinuance notice. On October 20, 1995 he returned the endorsed notice with the following covering letter:

Dear Mr. Stander;

The attached Notice of Discontinuance is delivered to you today for filing in accordance with the Settlement agreed to on Oct. 11.

The terms of the settlement are:

1. The Strata Council discontinues it's petition against me.
2. I discontinue my cross-application against the Strata Council.
3. The Strata Council withdraws its fines and ensures that any future fines are levied only after proper notice to me, in accordance with the case authorities which Mr. Maddock, has argued are applicable to the Strata Corporation's business.

Each party discontinues this proceeding against the other party without costs to either party.

Sincerely,

R. Blair Hewitt, B.A.

[para8] That letter and discontinuance reflected the position of defendant's counsel that among other things provided that: "our client would withdraw the current fines, and ensure that ANY FUTURE FINES ARE LEVIED ONLY AFTER PROPER NOTICE TO YOU, [my emphasis] in accordance with the case authorities which Mr. Maddock has argued are applicable to this Strata Corporation's business."

[para9] Mr. Casey Langbroek, manager of the Strata, deposed that the noted resolution was purely to correct the procedural irregularity with no intent whatever to abandon the substantive issues. Indeed the defamation action remained extant. On October 30, 1995 Mr. Hewitt was given written notice of a Strata meeting to be held November 3, 1995 to discuss issues. [para10] The plaintiff failed to attend the November 3, meeting at which it was determined the fines and legal fees previously assessed should be reconsidered and a further meeting for that purpose was scheduled for November 10. In a letter to Mr. Hewitt dated November 6, he was specifically informed that the meeting on November 10 would consider fines and costs of \$10,091.04. The November 3 minutes were also enclosed and he was urged to attend.

[para11] The plaintiff failed to attend and the figures earlier provided to him were then assessed and he was so advised in a letter dated November 16, 1995. He and his counsel (involved for part of the proceedings) both deposed that they considered the discontinuance as precluding further action for these sums. I am unable to accept that Mr. Hewitt could have reasonably held that view.

[para12] Mr. C. Maddock, acting on a limited retainer, negotiated discussion and potential resolution. On October 11, 1995 he instructed counsel for the defendant that Mr. Hewitt would settle if:

1. the Strata Corporation will CANCEL [my emphasis] all fines;
2. you will attend upon removal of the lien filed pursuant to Section 37(3) of the Condominium Act;
3. you will discontinue this proceeding, without costs;
4. Mr. Hewitt will discontinue his cross-application, without costs.

[para13] Mr. Stander, for the Strata council, responded with the letter referred to above which does not accept these terms and specifically rejects "cancellation" of fines. There is nothing sharp or misleading about Mr. Stander's response. He clearly sets out that the council retained the right to proceed with fines, "after proper notice...."

[para14] Mr. Maddock obviously was thinking of the terms in his letter and not those ultimately concluded between Mr. Hewitt and Mr. Stander, when he suggested to Mr. Hewitt that he need not attend the council meeting. There is nothing whatever in the resolution that suggests a "release" and give the explicit language contained about the possibility of future claims, there is nothing that Mr. Hewitt could reasonably have concluded as equating to a release.

[para15] Possibly Mr. Hewitt misconstrued the wording of Mr. Stander's letter to him dated October 11, 1995 which contains the phrase, "The settlement offer which you refer to is the same offer made TO [my emphasis] Chris Maddock...." It may be that Mr. Hewitt read that but inserted in his mind the word "BY" and thus came to believe he was dealing with his former lawyer's proposal. The settlement offer made BY Mr. Maddock was, however, clearly rejected by Mr. Stander. That is the most charitable view I could take of Mr. Hewitt's position which in any event does not advance his cause. His confirming letter to Mr. Stander suggests to me that he well knew there would be no "cancellation."

[para16] Mr. Hewitt was given the opportunity to contest the allegations of continuing misconduct and might well have persuaded the council in that regard had he attended the meeting, or had he sent a representative. He chose instead to rely upon the discontinuance which cannot under any reasonable interpretation be considered a "release." In the result, find the council was entitled to assess the fines in accordance with the Act but it remains to consider whether the assessment of legal fees relative to the defamation action are so authorized.

[para17] Mr. Stander, for the defendant, acknowledges that the assessment of legal fees against the defendant, incurred by the council on the defamation action, is an extraordinary right, but authorized by the Condominium Act. He argues that the Legislature contemplated such recovery and did so consciously, recognizing the special nature of condominium living that requires unique and special controls.

[para18] The defendant argues that given the particular provisions of the Condominium Act, it is entitled to assess Mr. Hewitt for its legal costs in prosecuting him for defamation, regardless of the ultimate trial outcome. It is akin to requiring a party to pay the ongoing legal costs of the other side before Court resolution. That is certainly an unusual proposition that would have to be clearly legislated.

[para19] If I understand the defendant's position, it claims that s. 127 of the Act is authority for the imposition and collection of the legal costs associated with the as yet unresolved defamation action. That section reads:

127. (1) An infraction or violation of these bylaws or any rules and regulations established under them on the part of an owner, his employees, agents, invitees or tenants may be corrected, remedied or cured by the strata corporation. ANY COSTS OR EXPENSE SO INCURRED BY THE CORPORATION SHALL BE CHARGED TO THAT OWNER [my emphasis] and shall be added to and become a part of the assessment of that owner for the month next following the date....

[para20] It is contended that by combining the provisions of s. 37(3) and (8) with the ratio of Owners, Strata Corporation V.R. 873 v. Crumley 40 B.C.L.R. 80, against the intent of the Act, one can find authority for the defendant's proposition. I am unable to do so.

[para21] The provisions of s. 37 deal with the enforcement of legitimate liens filed against an owner's unit. This would reference the fines/assessments levied against Mr. Hewitt for (mis)conduct not disputed. Section 127 provides for the collection of costs associated with "correcting, remedying, or curing," a breach of bylaws. Crumley interprets "legal costs of a proceeding" as set out in s. 37(8) to mean the taxable party-and-party costs of proceedings taken by a strata corporation pursuant to s. 37(3) to obtain judgment against an owner for the amount owing by him or her for arrears of monthly assessments.

[para22] I am unable to see where any of that could lead to the drastic right claimed for the council. One only has to consider what would happen if Mr. Hewitt successfully defended the defamation action to question the logic and fairness of this contention.

[para23] Even if one could accept that defamation was a breach of the bylaws, rules or regulations, surely it must first be proved, and only then could one consider the assessment and collection issue.

[para24] I find there is no authority under the Condominium Act to assess the legal costs of the ongoing defamation action, extracted from the plaintiff on sale of his unit, and grant judgment in his favour in the amount associated with those accounts. If counsel cannot agree on the sum then they have liberty to apply. The plaintiff's claim for judgment for the fines/assessments is as indicated dismissed. Given the divided success, each side will bear its own costs.

[para25] Since I have accepted the plaintiff's argument respecting the legal fees, it is unnecessary to deal with the claim for disclosure of the accounts.

[para26] Judgment accordingly.

McKINNON J.

CBR# 321

The Owners, Strata Plan NW961, petitioner, and John Herberto Martins Leal and Joanne Terese DaSilva-Leal, respondents

Vancouver Registry No. A961398

British Columbia Supreme Court Vancouver, British Columbia Davies J. Heard: May 8, 1996 Judgment: June 13, 1996. Filed: June 18, 1996.

Counsel: Patrick A. Williams, for the petitioner. Respondents appearing on their own behalf.

[para1] DAVIES J.:-- The petitioner applies for relief pursuant to the provisions of the Condominium Act, R.S.B.C. 1979, Chapter 61 and Amendments thereto, concerning the respondents' construction of an enclosure on the patio adjacent to the respondents' strata lot.

[para2] The condominium complex comprising Strata Plan NW961 consists of six strata lots, each of which has a patio or balcony area attached to it. All of the patio areas are a part of the common property of the complex, however, by reason of proximity to the individual strata lots which they abut and historical usage, each separate patio area has been effectively treated as the exclusive property of the strata lot to which it attaches.

[para3] Notwithstanding that de facto treatment as exclusive property, the evidence indicates that from time to time the owners of Strata Plan NW961 through annual or other meetings of the owners have retained and exercised jurisdiction over the individual patio areas as common property. The formality of the exercise of that jurisdiction has been haphazard and inconsistent which is not surprising given the relatively small number of strata lots in the complex.

[para4] The informality to which I refer is evidenced by paragraph 6 of the Petition which states that:

" 6. The bylaws of the Strata Corporation were amended by special resolution dated January 25, 1996, registered March 4, 1996 in the Land Title Office under Number BK062902. Included in the registration was Rule and Regulation Number 4 which provided:

An owner shall complete an application form and receive the approval of the Council for the installation of a patio cover and abide by the terms of the application.

Until the passage of this resolution, good taste, together with Council or Owners approval dictated the parameters within which owners were to conduct themselves when covering the patios. "

[para5] The January 25, 1996 amendment to the petitioner's by-laws postdates the disputes in issue and was obviously an attempt by the owners of the petitioner other than the respondents to gain further advantage or authority in exercising jurisdiction over the subject patio. That it was aimed solely at the respondents in relation to the matter before me is beyond dispute.

[para6] In seeking a declaration that the respondents are in breach of the petitioner's by-laws, the petitioner relies upon:

(a) section 115(d) of the Condominium Act which provide that:

" 115. An owner shall... (d) use and enjoy the common property, common facilities or other assets of the strata corporation in a manner that will not unreasonably interfere with their use and enjoyment by other owners, their families or visitors.";

(b) resolutions passed at meetings of its owners on April 26, 1995, September 7, 1995 and December 12, 1995

and

(c) the aforesaid January 25, 1996 by-law amendment.

[para7] The specific breaches alleged are that:

(a) the enclosure constructed by the respondents on the subject patio unreasonably interferes with the use and enjoyment of that patio as common property by other owners; and

(b) the respondents did not obtain the necessary approval of the petitioner's other owners to allow its construction.

[para8] In response to these alleged breaches, the respondents say that not only is the enclosure constructed on "their" patio not an unreasonable interference with the use of that common property by others, but that it was in fact approved by Ms. Fowler and Mr. Murphy, two members of the petitioner's strata council prior to construction. They say further that in the circumstances of this case, the other owners have acted oppressively and unfairly prejudicially in their dealings with the respondents over this issue including the passage of the above referenced resolutions and the January 25, 1996 by-law amendment and in these subsequent enforcement proceedings.

[para9] While a general allegation has been made that the subject patio cover is an "eyesore", in my judgment there is no evidentiary support for that allegation especially in the circumstances of all of the other owners' enclosures in respect of which no complaint has been made.

[para10] The only potential "unreasonable interference" which I consider has evidentiary support is that involving the complaint of Ms. Fowler who is the present president of the petitioner's strata council. Ms. Fowler has deposed that:

" The owners to the east of my strata lot have also erected a covering; however it is clear plexi-glass and does not interfere with my enjoyment of my strata lot or the common property. "

[para11] From the photographs exhibited in the affidavit material, it is clear to me that the only substance to Ms. Fowler's complaint is that the enclosed patio cover on the subject patio interferes with her view.

[para12] Support for my analysis that this is really a dispute effecting only Ms. Fowler's strata lot is found in the resolution of the petitioner which gave to the respondents an option to remove the present roof portion of the subject patio enclosure and replace it with a smoked plexi-glass cover.

[para13] In response to that option, as noted above, the respondents say that they believed that they had the approval of Ms. Fowler and also of Mr. Murphy to construct the existing roof structure. They also say that the roof in its present state, which is a combination of grey shingles and clear plexi-glass was and is needed to protect their privacy.

[para14] As to the allegation of approval by Ms. Fowler and Mr. Murphy, the fact is that even if such approval had been given and the evidence is contradictory on this point, such approval could not bind the other owners who by resolution had reserved to themselves the approval process. [para15] As to the privacy issue, it is clear that the smoked plexi-glass solution would give privacy protection and at the same time deal with Ms. Fowler's concerns. In addition, I was advised by the respondent, John Leal, that the cost to remove the existing cover and replace it with a smoked plexi-glass cover would be approximately \$600.00.

[para16] In determining the issues in this case and particularly the allegation of oppressive and unfairly prejudicial conduct under s. 42 of the Condominium Act made by the respondents, I have considered *Gray v. Strata Plan VR840*, (1994) 41 R.P.R. (2nd) 79, a decision of this court, in which Mr. Justice Errico considered that issue in resolving issues involving a patio enclosure.

[para17] As in *Gray*, I do not find that the owners of this strata corporation acted oppressively. While enforcement of control over other patio areas had previously been less formal, it was not a control which had ever been abdicated. The respondents were aware of that when the resolutions were passed.

[para18] In my judgment, the owners of this strata corporation attempted to balance legitimate but competing interests of two owners and in my judgment in the circumstances of this case, the cover of the enclosure as constructed does unreasonably interfere with Ms. Fowler's enjoyment of her strata lot and as such, contravenes s. 115(d).

[para19] The inexpensive option of curing the problem by replacing the patio cover with a smoked plexi-glass cover is one with which the respondents could have and should have complied. In not doing so, the respondents have acted unreasonably and without due regard to the interests of others.

[para20] The petition is therefore allowed to the extent that the respondents are hereby ordered to remove the existing cover from the subject patio enclosure and replace it with a plexi-glass cover in the same design as that shown in Exhibit A of the respondents' affidavit sworn May 6, 1996. The cost of such removal and replacement shall be borne solely by the respondents and the plexi-glass cover to be installed may, at the sole option of the respondents, be either of clear or smoked plexi-glass material.

[para21] As to the issue of the costs of the bringing and hearing of this petition and notwithstanding my comments with respect to the respondents' unreasonableness in not complying with the petitioner's resolutions, I am also troubled by the manner in which the owners of the petitioner used their power in this matter. I say that not with respect to the reservation of their right to approve the design of the patio cover but in relation to the uneven application of the petitioner's by-laws generally and the attempt to gain advantage by the passage of the by-law amendment. I am also concerned that personal animosity as between Ms. Fowler and the respondents and also between some other owners and the respondents in relation to ancillary matters were brought into this dispute. In my view, that exacerbated the situation unnecessarily.

[para22] Accordingly, while the petitioner has been largely successful in result, I bear all of these matters in mind in assessing costs. In so doing, I have determined that the respondents shall pay the petitioner's costs of this petition on a lump sum basis of \$1,000.00 inclusive of disbursements and that such costs shall be the respondents only requirement to contribute to the petitioner's costs. The petitioner may not in any other way assess any additional portion of its costs in pursuing these issues against the respondents either by way of strata fee or strata expense assessments or otherwise.

DAVIES J.

CBR# 125

Shane Gray and Sherry Gray, Petitioners, and The Owners Strata Plan No. VR840, Respondent

Vancouver Registry No. A941539

British Columbia Supreme Court Vancouver, British Columbia (In Chambers) Errico J. Heard: August 5, 1994. Judgment: September 27, 1994. Filed: September 29, 1994.

[para1] ERRICO J.:-- This petition is brought by the owners of a strata lot against the Strata Corporation for relief under sections 42 and 43 of the Condominium Act R.S.B.C. (1979) c. 61.

[para2] Section 42 reads as follows:

"An owner may refer to arbitration or may apply to the court to prevent or remedy a matter where he alleges

(a) the affairs of the strata corporation are being conducted, or the powers of the corporation or strata council are being exercised, in a manner oppressive to one or more owners, including himself; or

(b) that some act of the strata corporation has been done or is threatened, or that some resolution of the owners or a class of owners has been passed or is proposed that is unfairly prejudicial to one or more owners, including himself."

[para3] The relief sought in the petition is for an order that the decision of the Strata Council denying the petitioners' request to be allowed to enclose with glass the patio area of the petitioners' strata lot be set aside as oppressive or unfairly prejudicial. The facts alleged in the petition include a statement that the petitioners' strata lot contains an open patio area. The reference to the area being part of the petitioners' strata lot is not accurate. In fact, the area in question is limited common property for the use of the petitioners as the owners of strata lot M2 and as such is owned by all of the owners of the respondent strata corporation.

[para4] Strata Plan VR840 comprises a fifteen story building constructed on waterfront property in West Vancouver, with 114 units. Each strata lot on each level above ground has limited common property balconies. Of the over one hundred suites that have balconies, over half of them have been granted permission for the construction of glass enclosures. The one other ground floor strata lot with patio for limited common property to its use has been granted permission for a glass enclosure. That strata lot is located on the side of the building and does not face the waterfront nor the common property that incorporates the gardens and swimming pool. It is also partially below grade level. The grounds upon which strata lot M2 face are common property incorporating gardens and a swimming pool, areas obviously used by all of the strata owners and their guests for recreation purposes.

[para5] The applicable by-law of the respondent strata corporation is section 138(4)(b), (6) and (7):

"(4)(b) No alteration shall be made to the boundary wall or between a Strata Lot and an adjacent limited common property balcony or patio, including the windows and sliding glass door, if this will have the effect of incorporating the balcony or patio in whole or in part into the Strata Lot or of providing an encroachment by the Strata Lot on to any part of the balcony or of failing to provide a complete closure between Strata Lot and balcony.

(6) No balconies shall be enclosed in glass without prior written permission of the Strata Council. All glass enclosures must conform to the plans set out in Development Permit #83-02 issued by the Municipality of West Vancouver.

(7) No alterations or installations of fixtures shall be made to limited common property balconies or patios without prior Council approval. Such approval not to be unreasonably withheld."

[para6] In April 1993 the former owner of strata lot M2 applied for permission to enclose the patio, the limited common property in question, and on July 6th the Strata Council denied permission. I do not have any particulars of the nature of the closure requested. Shortly after that the petitioners purchased the strata lot, and on December 29th, 1993 requested Council approval for their enclosure of the entire length of the exterior area of their strata lot. The sketch plan accompanying the request shows an area substantially larger than the area of the limited common property. On February 4th, 1994 the petitioners wrote the Strata Council for permission to enclose the limited common property for the use of their strata lot. Enclosed as part of the renewal application was a letter from a glass installation firm to the effect that in their opinion mounting of the glass on the existing slab should be no problem. On February 7th the Strata Council met and in a letter to the petitioner from the property manager, the petitioners were advised as follows:

"Council feels that as the proposed enclosure would be unique to the Seastrand and would impact on the visual appearance, it would be appropriate to refer your request to the Owners for attention. This Council will do at the Annual General Meeting to be held March 16, 1994."

[para7] At the Annual General Meeting held March 16th, 1994, after discussion expressing concerns about the visual impact to the south side of the building, overall height and possible increased heating costs, a motion was passed that the request for a patio enclosure for suite M2 not be approved at this time and that the matter be referred to council for further study. The minutes that record this motion then continues with the following:

"This motion was put forward with the understanding that the Owners of M2 would have a professional engineering study undertaken to determine the base stability and the requirements for new footings and/or concrete pad. As well, the Owners of M2 would provide an architectural rendering giving Owners a better perspective of the visual impact. Once the above information has been received by Council, an Extraordinary Meeting will be called so that all Owners may have the opportunity of reviewing the material before reaching a decision."

[para8] It would appear that the petitioners were aware of those requirements. In paragraph 7 of his affidavit, Mr. Gray makes reference thereto. The position of the petitioners was, and is, that they believed that they had fulfilled all of the necessary requirements prior to February 4th, 1994.

[para9] By letter of February 4th, 1994, prior to the meeting, the petitioners wrote the Strata Council that if they did not receive a favourable response on February 11th they would deal with the matter through legal counsel. By letter of April 15th, 1994 a letter from the petitioners' solicitors advising that unless the permission was received by April 22nd, 1994 they would take proceedings under the Condominium Act.

[para10] By letter of April 28th, 1994 in reply to the petitioners' solicitor, Mrs. Guernsey, the property manager, confirmed that the petitioners had attended the meeting of March 16th, 1994 and that the Council, upon receipt of what was requested in the meeting of March 16th, would convene a extraordinary General Meeting to deal with the question.

[para11] It appears from the foregoing that while the petitioners have not received the permission they have requested, there has as yet been no express refusal. I think that the situation that existed at the time of the commencement of this proceeding and at this time is that the permission sought has been withheld pending receipt of the information mentioned in the minutes of the Annual General Meeting of March 16th.

[para12] Counsel for the petitioners submits that the Strata Council should not have referred the matter to the General Meeting of the Strata Owners and that the further requirements imposed at the meeting of March 16th, 1994 could not be imposed upon the petitioners as they made applicatio by February 4th, 1994. He further submits the refusal of Council to make a decision and grant permission and to refer the matter to the Annual General Meeting, was an action that Council was not authorized to make.

[para13] Section 118 (1) of the Condominium Act reads as follows:

"The powers and duties of the strata corporation shall, subject to any restriction imposed or direction given at a general meeting, be exercised and performed by the council of the strata corporation."

[para14] I do not read that section as limiting the restrictions imposed or direction given by a General Meeting to be limited to those in place prior to a matter coming before a Strata Council for decision or action. I am in agreement with counsel for the respondent that such interpretation would be applicable to a by-law of the Strata Corporation and not to a restriction or direction referred to in section 118.

[para15] Was then the action of the Strata Corporation i refusing to grant the permission requested and requiring the report and architectural depiction an exercise of their powers in a manner oppressive to the petitioners, or were those actions unfairly prejudicial to the petitioners?

[para16] In considering what constitutes "oppressive" and "unfairly prejudicial" in section 42 of the Condominium Act, reliance may be placed upon the interpretation of those words as they appear in section 224 of the Company Act, R.S.B.C. 1979, c. 59. This approach was used by Lander J. in *Esteem Investments Ltd. v. Owners, Strata Plan No. VR 1513 (1987)*, 21 B.C.L.R. (2d) 352. This judgment was successfully appealed (1989), 32 B.C.L.R. (2d) 324, but the Court of Appeal did not comment on or disapprove of the application of decisions interpreting section 224 of the Company Act. Similarly in *Vold et al. v. The Owners, Strata Corporation 202*, [1993] B.C.J. No. 344, February 16th, 1993 No. 3441/92, Victoria Registry, Melvin J. found that there was an analogy between the strata corporation owner and shareholders of a corporation and considered decisions involving "oppression" as it applies to the rights of shareholders.

[para17] Lander J. in *Esteem Investments* applied the decision in *Nystad v. Harcrest Apartments Limited et al (1986)*, 3 B.C.L.R. (2d) 39, where McEachern C.J.S.C. concluded that there would be no oppression remedy open to an injured minority shareholder when the directors have acted in good faith. McEachern C.J.S.C. at page 45 adopted the definition of "good faith" in *Black's Law Dictionary* 5th edition as follows:

"'Good faith' according to *Black's Law Dictionary*, 5th ed. (1979), has no technical meaning but is a term used 'to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation', or, 'An honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with absence of all information, notice, or benefit or belief of facts which render transaction unconscientious'. This definition leaves little room for a lack of probity or fair dealing and it therefore appears that there may be no 'oppression' remedy open to the injured minority shareholder when the directors have acted in good faith."

[para18] In *Nystad*, McEachern C.J.S.C. also considered th words "unfairly prejudicial" as being broader than the term "oppressive" and that the focus considering the words "unfairly prejudicial" is on the effect of the injured shareholder of the impugned conduct.

[para19] In *Esteem* Lander J. also considered the decision of Fulton J. in *Diligenti v. RWMD Operations Kelowna Ltd. (1976)* 1 B.C.L.R. 36 (S.C.) as follows:

"In *Diligenti*, Fulton J. utilized the dictionary definitions of the words 'prejudicial' and 'unfairly' and concluded at p. 46: 'It is significant that the dictionary definitions support the instinctive reactions that what is unjust and inequitable is obviously also unfairly prejudicial.'"

[para20] In considering then the actions of the Strata Corporation in acting as it did on the request of the petitioners, can it be said that those actions were oppressive to the petitioners or that it was unfairly prejudicial to them?

[para21] I have concluded that those actions are not oppressive. There is no suggestion in the evidence that the Strata Corporation, either through the actions of the Strata Council or through the General Meeting, did not act in good faith. The action of the Strata Council in referring the matter to the Annual General Meeting and the decision of the Annual General Meeting to defer a consideration of the application for permission until certain other requirements were provided, in my view, do not indicate any lack of good faith.

[para22] Were those activities unfairly prejudicial to the petitioners? The petitioners have not been permitted, to this time, to enclose their patio when a majority of the other strata lot owners have been allowed to enclose their balconies and where the owners of strata lot 1, the other strata lot that is on the ground level, have been allowed to so enclose their patio.

[para23] In considering the question of unfairly prejudicial, consideration must be given to the effect of the enclosure of the petitioner's patio on the other owners. This particular area has, in my view, some uniqueness in that it is in the front or view

portion of the property and, mor importantly, is immediately adjacent to an area of common property enjoyed by the other strata owners as a garden and recreation area. The requirement of the Strata Corporation for there to be an architectural depiction of the proposed enclosure is not unreasonable in those circumstances. Nor is the requirement for some structural reports unreasonable when there is at least a question as to the stability of the concrete slab upon which it is proposed to be constructed. In considering whether the prejudice to the petitioners is unfair, I must consider the effect of this proposed enclosure on all of the other strata lot owners and on considering that I do not find that the refusal to grant the permission pending the provision of the requirements of the March 16th Annual General Meeting to be unfairly prejudicial.

[para24] Accordingly, the petition must be dismissed with costs to the respondents.

ERRICO J.

CBR# 053

Zenna Buchbinder, Petitioner, (Appellant), and The Owners, Strata Plan VR2096, Respondents, (Respondents)

Vancouver Registry: CA012753

Also reported at: 12 B.C.A.C. 132 23 W.A.C. 132 65 B.C.L.R. (2d) 325

British Columbia Court of Appeal McEachern, C.J.B.C., Locke and Proudfoot J.J.A. Heard: March 3, 1992 Judgment: April 7, 1992

Counsel for the Appellant: Charles F. Willms. Counsel for the Respondents: William E. Knutson.

PROUDFOOT J.A. (for the Court, allowing the appeal):-- This is an appeal from a decision pronounced July 5th, 1990, dismissing the petition of the appellant without giving reasons.

The Facts

The appellant, through a company known as Inzan Inc., of which she is the sole shareholder, purchased a strata unit at 1559 Mariner's Walk, Vancouver, British Columbia, Strata Plan VR2096. The purchase was made in March, 1988. The appellant has resided in the unit from the date of purchase. The unit was transferred to the appellant by the company after purchase by her on March 20th, 1990.

On April 11, 1988 at the annual general meeting of the Strata Corporation, a by-law was passed effecting changes to the exterior of the complex. It was called the "Building Exterior By-law" and read in part:

No visible changes to the building's exterior are permitted. These changes include but are not limited to the following: any change which requires approval from the City of Vancouver; changes to the colouring and/or finish of the building's exterior; any additions or deletions of a permanent or semi-permanent nature; enclosures of common and/or limited common property and awnings or canopies. [Emphasi added]

Strata lot owners would be given notice if the by-law had not been complied with and would have to remove the offending structure within 30 days after notice. A penalty would be imposed for non-compliance. The by-law applied to any changes made after December 14, 1987.

In March, 1990, the appellant erected an aluminum garden shed on a patio area outside her residence at 1559 Mariner's Walk. The appellant concedes in her factum, paragraph 2, that the area where the shed was erected is "limited common property". There is disagreement between the parties as to whether the shed is fixed or free-standing. The respondent takes the position the shed was bolted down to the appellant's patio and against an exterior wall and stairway. The appellant argues there was no admissible evidence to support the respondents' position that it is attached. (2365

The only evidence available relating to this aspect is found in an affidavit filed by Elizabeth Barnes, dated June 26, 1990, where she states:

4. I am informed by Ron Jaworski and do verily believe that Mr. Jaworski attended at the subject property in April 1990 to inspect the aluminum shed and noted that it had been bolted down to the patio.

This hearsay evidence is dealt with in a supplementary affidavit of Zenna Buchbinder dated July 4th, 1990, with the following reply:

5. The garden unit in question is a chattel and not a fixture or any kind of change to the building exterior, I have not made any changes to the exterior of the building nor have I added any fixture to the common or limited common property.

The matter is also referred to in paragraph 2 of the appellant's reply factum in the following terms:

2. . . . there was no admissible evidence before the Chambers Judge that the garden shed was bolted down to the Appellant's patio. In fact, the garden shed was not bolted to the patio or the building.

In April, 1990, the appellant was notified by the Strata Council that the shed was erected in contravention of the by-law and would have to be removed.

The appellant filed a petition seeking several declarations. However, on this appeal the only issue pursued is whether or not the Chambers Judge erred in ruling that the garden shed breached the building exterior by-law. In her petition, she sought a "declaration that the by-law does not cover the garden shed".

Appellant's counsel argues that the plain and ordinary language of the by-law is the proper construction that the court should place on its meaning and that a free-standing structure does not fall within the by-law and there is, therefore, no breach. He relies on the Rules of Statutory Interpretation as enunciated in the case of *Great Western Railway Company v. Carpalla United China Clay Company, Limited*, (1909) 1 Ch. 218 (C.A.) at p. 236:

A written instrument must be "construed according to its sense and meaning, as collected in the first place from the terms used in it which terms are themselves to be understood in their plain, ordinary, and popular sense, . . .

Respondents' counsel argues that the interpretation cannot be so constrained but must be viewed as well within the entire circumstances, including the purpose for the initial introduction of the by-law, as stated in the Leckie affidavit, "to maintain and preserve the exterior appearance and landscaping of the Lagoon complex".

To support that argument, respondents' counsel cites the case of *Fairwood Greens Homeowners' Association Inc. v. Young*, 26 Wash. App. 758 (1980), 614 P.R. (2d) 219. In my view, that case does not assist the respondent. Dore, J. makes these comments (at p. 223):

. . . Restrictions being in derogation of the common law right to use land for all lawful purposes will not be extended by implication to include any use not clearly expressed, *Burton v. Douglas County*, supra, nor will they be aided or extended by judicial construction, *Gwinn v. Clearer*, supra; *Granger v. Boulls*, 21 Wash. 2d 597, 152 P. 2d 325 (1944) . . . It would seem to me that a more convincing argument can be made for the appellant's position that the by-law cannot be invoked to specifically forbid strata owners from assembling garden sheds on a patio in that there is no mention of garden sheds within the by-law.

Respondents' counsel then asks the Court to examine the purpose of the by-law. The Minutes of the Annual General Meeting of April 11th, 1988, recorded under heading 9.2 "Changes to Exterior of Building By-law" state as follows:

The main "draw" to the lagoons was the design. This by-law would prevent its unnecessary change.

This purpose was referred to earlier when dealing with the Leckie affidavit. Here, the respondents argue that even if the by-law does not specifically, or generally, prevent the appellant from erecting the garden shed, the principle of community can be applied. The case of *Metropolitan Toronto Condominium Corp. No. 702 v. Sonshine et al.* (1989), 8 R.P.R. (2d) 183 is relied on to support that proposition. In the *Metropolitan* case, an owner, in contravention of a by-law, affixed a canopy to the exterior wall of his unit. The by-law provided a method for owners to obtain their canopy if a sufficient number of owners could be convinced the canopy was an acceptable amenity. Haley, D.C.J. made these comments about the principle of community (at p. 187):

One has to keep in mind that condominium living works on a principle of community, and that such decisions affecting the common elements must reflect community concerns and not the wishes of particular unit owners. I do not think this is a question of whether the rule is reasonable.

This is not analogous to the situation in the case at bar. The principle of community living has only been applied where there has been a clear infraction of a condominium by-law. The argument advanced is that when people join a condominium development they agree to abide by the declaration of community living. In the case at bar, a garden shed being placed on a patio was not specifically prohibited by the by-law. The intention may have been to maintain the integrity of the complex (the aesthetics), however, it would be unreasonable to conclude that, based on the principle of community living, condominium owners should assume they are not entitled to place any object on their patios. The respondent, in my view, does not advance a convincing argument on the breach of the principle of community living unless the appellant has been found to be in contravention of a specific by-law.

If that principle exists, and has application in the case at bar, it must still be ascertained where the appellant was in breach of the "no change to building exterior" by-law. The by-law prohibition refers to "building's exterior". "Exterior" is defined in *The Shorter Oxford English Dictionary*, Third Edition (1978) as:

Outer; pertaining to or connected with the outside; visible on the outside.

A question can be posed, does this merely include the building walls or does it extend to cover the patio area where the garden shed was placed?

In the *City of New Orleans v. Impastato* (1941), 3 SO (2d) 559, 561 (Supreme Court of Louisiana) alterations were made to the rear of a building. The court states (at p. 561): The word "exterior", as applied to a building, clearly means all of the outer surfaces thereof as distinguished from its interior or the portion enclosed by the outer surfaces.

In my view, the patio is not incorporated within the definition of building exterior. It is not part of the outer walls. The building exterior could only refer to the walls as the word "exterior" modifies building and does not extend to cover a patio adjacent to that building. Accordingly, it is not a contravention of the by-law to erect a storage shed and place it on the patio. The situation would be considerably altered if the shed were attached to the building specifically to a staircase or a wall.

The next consideration involves the word "changes". I refer specifically to the words, "additions . . . of a permanent or semi-permanent nature". Respondents' counsel argues that this shed is an addition. That argument cannot succeed. There is no evidence that supports the proposition that the shed is attached to anything, it is a free-standing structure.

Although *In re Blgrave's Settled Estates*, (1903) 1 Ch. 560 (C.A.), has a different fact pattern it nevertheless provides some useful comments when dealing with additions to property. Collins, M.R. said (at p. 563):

Mr. Dibdin does not, and cannot, contend that something added to the building which is not attached to it, such as furniture and loose chattels, can be said to be an addition to the building. But why not, if his main argument is correct? The plant is not any more than the furniture an addition of like to like, but is merely something that adds to the amenities of the building. Into what categories are you to divide the additions? You can only get three gradations--namely, loose chattels which are not attached at all, fixtures which are attached in a certain sense, and actual structural additions. Which of those is meant? It seems to me that it would be very difficult to divide off any possible alternative short of an actual structural addition. Prima facie it seems to me that the addition meant by the section is a structural addition to the building, and that it is not satisfied by putting wires into a building or putting an engine into an engine-house. [Emphasis added I adopt those words. This shed is not an addition of a permanent or semi-permanent nature within the wording of the by-law.]

Finally, is this shed "an enclosure of common or limited property?"

If it is, the respondent argues it would be prohibited under this by-law. While it can be argued that the shed encloses the portion covered by the shed, it is stretching logic well beyond the reasonable to conclude that this shed is an enclosure of the common or limited property. That argument cannot succeed.

Respondents' counsel presents one further argument referred to in paragraph 14 of respondents' factum:

The Appellant at no time had the permission of the Respondent to erect the shed, and had been informed it was contrary to the by-law.

The case of *The Owners Strata Plan No. 51 v. Davies*, unreported S.C.B.C. Decision 2134 (Duncan Registry) May 17, 1988 is cited in support of this argument. The by-law in the *Davies*' case required the "approval of the Strata Corporation in order to place

or park anything on common property". In the case at bar, approval was not required to make use of a garden shed on limited common property. That argument cannot succeed on this basis.

In summary, this garden shed does not fall within the specific prohibitions of the by-law. It is not a change to the building's exterior and is not an addition to or an enclosure of the limited common property. To give such a broad interpretation to the by-law would make matters even more difficult for condominium owners trying to interpret ambiguous and generalizing by-laws. If the Strata Council wants to prohibit garden sheds, or similar free-standing structures, they can easily adopt such a course of action.

Accordingly, the appeal is allowed.

PROUDFOOT J.A. McEACHERN C.J.B.C.:-- I agree. LOCKE J.A.:-- I agree.

CASE REFERENCE NO. 155

Zerakhanu Fazal Lalji-Samji, Petitioner, and The Owners, Strata Plan VR-2135, Respondent

[1992] B.C.J. No. 176

Vancouver Registry No. A913001

British Columbia Supreme Court Vancouver, British Columbia Meredith J. Heard: January 10, 1992 Judgment: January 14, 1992

Counsel for the Petitioner: E.A. Dolden. Counsel for the Respondent: J.A. Bleay. MEREDITH J.:-- I conclude this appeal from the decision of His Honour Judge Gillis should be allowed.

The petitioner is the owner of a strata lot in the Strata Plan above mentioned. A rug in the lobby of the building constituting common property was ruined when bleach from a box belonging to the plaintiff leaked onto it. The petitioner says that the Strata Corporation either did or should have insured against the risk. If insurance had been effected the insurer standing in the shoes of the Strata Corporation would have no claim against the petitioner. This is so because under the terms of the Condominium Act the owners are "deemed to be included as the named insured". Thus had the Strata Corporation placed the insurance as it was obliged to do there would be no claim against the petitioner because the petitioner was a beneficiary under the policy.

The obligation of the Corporation and the benefit conferred on the owners are set out this way in the Act:

54.(1) The strata corporation (a) shall obtain and maintain insurance for the buildings, common facilities and any insurable improvements owned by the strata corporation to their replacement value against fire and against other perils as are usually the subject of insurance in respect of similar properties;

...

(3) Notwithstanding the terms of the policy, (a) the strata corporation; (b) the owners and tenants from time to time of every strata lot shown on the strata plan; and (c) all persons normally occupying the strata lots shall be deemed to be included as the named insured on a policy of insurance in force under subsection (1).

Counsel for the respondent conceded in argument that the conclusion contended for by the petitioner as above is correct. He then said that insurance against leakage of this sort was not "usually the subject of insurance in respect of similar properties". Although there is no evidence on the point, I conclude that "leakage of contents" (the actual exclusion in the insurance policy taken by the Strata Corporation on behalf of the owners) being an obvious and ominous peril (take a leakage of water for instance) would be usually the subject of insurance in respect of similar properties.

The appeal is allowed.

MEREDITH J.

CBR# 242

R.J. Miller & Associates (1986) Ltd., Petitioner, and The Owners, Strata Plan No. K577, Respondent

Kelowna Registry No.: 7096

British Columbia Supreme Court Kelowna, British Columbia Lamperson J. Heard: July 6, 1990 Judgment: August 1, 1990

Counsel for the Petitioner: Barry M. Davies. Counsel for the Respondent: Brian R. Henderson. Counsel for Mr. Solski: David L. Polley.

LAMPERSON J.:-- The petitioner seeks an order pursuant to s. 42 of the Condominium Act, R.S.B.C. 1979, c. 61 restraining the respondent strata corporation from selling certain common property which fronts the petitioner's strata lot because such a sale would be unfairly prejudicial to the petitioner.

The strata complex is a former hotel which is situated on Abbott Street in the city of Kelowna and which fronts the city park and Okanagan Lake. Some time ago, the hotel was subdivided under the Condominium Act. The main floor consists of two commercial strata lots, one of which belongs to the petitioner and houses professional offices and the other of which houses a restaurant known as the Mad Greek Restaurant. The upper floors contain 18 apartments which are classified as residential lots.

The petitioner's offices have floor-to-ceiling windows and overlook a courtyard, an unused swimming pool, the park and Okanagan Lake. Although there is a common walkway, people visiting the petitioner's offices customarily go through the courtyard. The net result is that the petitioner's offices have a rather elegant ambience. None of the other strata lots, including the Mad Greek Restaurant, benefit from this courtyard. Accordingly, the strata corporation entertained offers from persons wishing to purchase the courtyard. The petitioner made an offer in an attempt to protect his interest. Mr. Solski, the owner of the Mad Greek Restaurant made a higher offer which was accepted by the respondent. It is clear that Mr. Solski intends to build some sort of a structure in the open space. There is some suggestion that it might be a cabaret or nightclub but the evidence is not clear in that regard. The result would be that the petitioner's offices would look onto a 4-foot common walkway and a wall. The access to the petitioner's office would be indirect and I suspect rather unattractive and awkward. The offices would be at the back of the building. The petitioner purchased this strata lot because of its unique location and the ambience which it provides. The unique and pleasant character of its offices will be destroyed if, in fact, a building is constructed within the vacant space.

The respondent argues that the relief sought by the petitioner is extreme in that it would take away rights held by the strata corporation and its members, and that the petitioner must have been aware that the strata corporation was entitled to sell common property and that therefore it should have considered that possibility when purchasing its Lot 2.

There is no question that a strata corporation may dispose of common property provided it complies with the requirements of s. 20 of the Condominium Act. For the purposes of this hearing, the petitioner has not argued that the respondent failed to meet those requirements. The petitioner simply relies on s. 42(b) which states:

"42. An owner may refer to arbitration or may apply to the court to prevent or remedy a matter where he alleges

(b) that some act of the strata corporation has been done or is threatened, or that some resolution of the owners or a class of owners has been passed or is proposed that is unfairly prejudicial to one or more owners, including himself."

Section 43 provides:

"43. On an application to court under section 42, the court may make the interim or final order it considers appropriate, and, without limiting the generality of that power, may

(a) direct or prohibit an act of council or vary a transaction or resolution; and (b) regulate the conduct of the corporation's future affairs."

Thus, the question is whether the strata council's actions are unfairly prejudicial to the petitioner. Lander J. dealt with this issue in *Esteem Investments Ltd. v. Owners, Strata Plan No. VR 1513 21 B.C.L.R. (2d) 352*. In his reasons, he stated that the cases pertaining to s. 224 of the Company Act are relevant in interpreting the term "unfairly prejudicial." The British Columbia Court of Appeal reversed Lander J., but not on this point.

Fulton J. considered the meaning of "unfairly prejudicial" in *Diligenti v. R.W.M.D. Operations Kelowna Ltd. (1976) 1 B.C.L.R. 36*. At page 45 he stated:

"There has been no interpretation, in this context, of the words 'unfairly prejudicial.' Turning to the dictionaries for assistance, I find the following definitions in the *Shorter Oxford English Dictionary*, 3rd ed.:

'Prejudice . . . I. Injury, detriment, or damage, caused to a person by judgment or action in which his rights are disregarded; hence, injury to a person or thing likely to be the consequence of some action . . .

Prejudicial . . . I. Causing prejudice; detrimental, damaging (to rights, interest, etc.) . . .

Unfair . . . Not fair or equitable; unjust . . . Hence, unfairly.'

It is significant that the dictionary definitions support the instinctive reactions that what is unjust and inequitable is obviously also unfairly prejudicial."

That opinion was endorsed by McEachern C.J.S.C. (as he then was) in *Nystad v. Harcrest Apartments Limited (1986), 3 B.C.L.R. (2d) 39*.

In my opinion the character of the petitioner's offices would change dramatically for the worse if a building were constructed in what is now a courtyard, and would result in the petitioner suffering a substantial loss. The other strata owners would benefit substantially at considerable cost to the petitioner. I do not think that it is fair to assert that the petitioner should have expected

that the common property would ultimately be sold with the result that its offices would be in the back of the building. Accordingly, I have decided to enjoin the respondents from disposing of the common property in question without the consent of the petitioner, or alternatively, the consent of the court.

LAMPERSON J.

CBR# 280

Margaret Roche-Heywood, Petitioner, and The Owners, Strata Plan No. 953, Respondents

Victoria Registry No.: 89 1819

British Columbia Supreme Court Victoria, British Columbia Murphy L.J.S.C. Heard: May 4 & 7, 1990 Judgment: June 21, 1990

Counsel for the petitioner: P.W. Klassen. Counsel for the respondents: W.R. Lambert.

MURPHY L.J.S.C.:-- The petitioner applies to this Court for a declaration that 1. The powers of the Strata Corporation have been exercised in a manner that is or may be unfairly prejudicial to the petitioner.

The petitioner also applies for an order that:

1. The strata corporation vary the bylaws of the corporation to allow window coverings of the type installed in the petitioner's suite;
2. The strata corporation is prohibited from enforcing the bylaws of the corporation concerning window coverings as against the petitioner;
3. Costs.

The applications are made pursuant to sections 42 and 43 of the Condominium Act, R.S.B.C. 1979, c.61;

42. An owner may refer to arbitration or may apply to the court to prevent or remedy a matter where he alleges

(a) the affairs of the strata corporation are being conducted, or the powers of the corporation or strata council are being exercised, in a manner oppressive to one or more owners, including himself; or

(b) that some act of the strata corporation has been done or is threatened, or that some resolution of the owners or a class of owners has been passed or is proposed that is unfairly prejudicial to one or more owners, including himself.

43. On an application to court under section 42, the court may make the interim or final order it considers appropriate, and, without limiting the generality of that power, may

(a) direct or prohibit an act of council or vary a transaction or resolution; and

(b) regulate the conduct of the corporation's future affairs.

The issue is whether the bylaw is unfairly prejudicial to the petitioner, under s. 42(b). At the conclusion of the petitioner's argument, Mr. Lambert, on behalf of the respondent strata owners, submitted that relief under s. 42(a) was not claimed in the petition. Mr. Klassen, counsel for the petitioner, replied that he was only seeking relief under s. 42(b). I mention this as Mr. Klassen in his argument had covered both the matters of oppressive acts and unfair prejudice. On reading the petition, in preparing these reasons, I notice that the petition refers to section 42 without specifically mentioning either subsection. In any event, in view of Mr. Klassen's position, the matter falls to be decided under section 42(b).

In reciting the facts that follow, I have borrowed from the petitioner's brief as to the facts I consider relevant and are not in dispute:

1. The petitioner is the owner of and resides in Suite 701 - 640 Montreal Street, Victoria, British Columbia (hereinafter referred to as the "Suite"). The Suite is one of two penthouse units located on the 7th and uppermost floor of the condominium building located at the above address (hereinafter referred to as the Building). The unit is part of Strata Corporation No. 953 (hereinafter referred to as the "Strata Corporation"). The building is situated between the waterfront on Victoria Harbour and Montreal Street.

2. The construction of the building is such that on both the Montreal Street side and the water side, that the front walls of the two penthouse units are set back from the front wall of the floor below, thereby affording a tiered appearance.

3. Prior to February 1988, there were balconies both on the Montreal Street and waterfront sides of the Suite. In 1988 the petitioner made application to the Strata Council for a permission to enclose the balcony areas with glass to construct a sunroom. Permission was granted.

4. Having constructed the enclosures the petitioner found it necessary to provide window coverings for the newly created windows. After seeking advice of a professional the petitioner chose horizontal venetian blinds of a colour that blended with the other window hangings in the building. 5. At the time of installation of the blinds, there was a provision governing the installation of replacement drapes. The bylaws provided:

Sec. 137: ... Interior sun drapes next to the windows shall not be removed unless they are replaced by similar drapes of such colour and material as approved by Council.

6. The blinds were installed in or about March 1988. By letter dated October 31, 1988, the strata council through its manager instructed the petitioner to remove the blinds within 30 days. This was the first communication the petitioner received regarding the blinds.

7. The petitioner responded by letter dated November 15, 1988, apologizing to strata council and explaining her reasons for selecting the venetian blinds, and seeking permission of the strata council.

8. The strata council responded by letter dated January 17, 1989 stating that the strata council could not give approval. After further correspondence between the parties and their solicitors, the petitioner was advised by letter dated May 19, 1989 that a general meeting would be called to consider a change to the bylaws.

9. On or about July 6, 1989, the petitioner received a notice of meeting for July 25, 1989 proposing to amend bylaw 137 to read:

137. ... Interior sun drapes next to the windows shall not be removed unless they are replaced by similar drapes, or fabric or fabric covered vertical blinds, or venetian (horizontal) blinds of such colour and material as may be approved by Council.

The petitioner did not attend the meeting.

10. The meeting was held and at the meeting bylaw 137 was amended in such a fashion as to permit vertical blinds, but not horizontal blinds.

11. After the meeting of July 25, 1989 the strata council renewed its demand that the blinds be removed. The petitioner filed the within petition on September 11, 1989. 12. Subsequent to issuance of the petition a further meeting was held to reconsider, but the form of the bylaw remained as amended at the July 15, 1989, meeting.

With respect to the bylaws of a strata corporation, the Act provides:

26. (1) The strata corporation shall have bylaws providing for the control, management, administration, use and enjoyment of the strata lots and common property, common facilities and other assets of the strata corporation, and the bylaws shall be the bylaws set out in Part 5 until they have been altered or repealed under this Act at the time of alteration or repeal.

and:

28. (1) The bylaws set out in Part 5 have force and effect from the time of the deposit of the strata plan in the land title office until amended or repealed under sections 26 and 27.

Under Part 5 of the Act, headed "Bylaws", section 115 sets out the duties of an owner. Subsections (c) and (g) are relevant:

(c) repair and maintain his strata lot, including windows and doors, and areas allocated to his exclusive use, and keep them in a state of good repair, reasonable wear and tear and damage by fire, storm, tempest or act of God excepted;

(g) comply strictly with these bylaws, and all other bylaws of the strata corporation, and with the rules and regulations adopted from time to time;

The duties of a strata corporation are set out in section 116. Subsection (f) is relevant:

(f) maintain and repair the exterior of the buildings, excluding windows, doors, balconies and patios included in a strata lot, including the decorating of the whole of the exterior of the buildings;

The bylaws of the respondent strata corporation ultimately adopted are all of the sections in Part 5 of the Condominium Act, i.e. sections 115-132, with additional bylaws numbered consecutively from 133 to 145. There was no alteration or repeal as provided for in section 26, nor were they amended or repealed as provided for in section 28(1). I do not know why the Legislature has chosen to use the word "altered" in section 26 and the word "amended" in section 28. In effect, the bylaws, set out in sections 115-132 were neither amended nor repealed; they were added to. In any event, there was no issue taken with the procedure resulting in the addition to the statutory bylaws. I proceed on the basis, therefore, that sections 115-132 of Part 5 of the Condominium Act, together with the additional bylaws 133-145, are the bylaws under the general provision of section 26, which provide that, "the strata corporation shall have bylaws providing for the control, management, administration, use and enjoyment of the strata lots..."

Mr. Lambert, on behalf of the strata corporation, concedes that the first sentence in bylaw 137, which I have not quoted, does not apply. The question is, therefore, whether, in the circumstances, the corporation should be prohibited from enforcing the existing bylaw and whether the bylaw should be varied. I previously referred to it but I shall repeat it: the exterior of the buildings." This section excludes the Interior sun drapes next to the windows shall not be removed unless they are replaced by similar drapes, as approved by Council.

Statutory bylaw section 115(c) of the Condominium Act provides that the owner shall, "repair and maintain his strata lot, including windows and doors...". Bylaw 116(f) being section 116(f) of the Act provides that the strata corporation shall maintain and repair the exterior of the buildings, excluding windows, ...including the decorating of the whole of windows from the strata corporation's duty to maintain and repair the exterior of the buildings, but it is responsible for the decorating of the whole of the exterior of the buildings. As to decorating, I interpret this to include the windows and any window coverings when drawn or exposed to the outside.

So far as it goes, the bylaw is not unfairly prejudicial to any of the owners even though the effect is to control the interior colour of the drapes. However, an owner can overcome this, presumably, by installing drapes of a colour and material of his or her own choosing on the interior side of the existing sun drapes, without violating the bylaw or, in the case of the amended bylaw, vertical blinds. However, when the blinds are closed or the drapes are drawn the exterior side, depending upon the colour, would not necessarily be in harmony with the colour of the sun drapes approved by council. In such a situation there could be no violation of the bylaw if the sun drapes next to the windows would not have been removed. However, in keeping with the intent of the bylaw, the sun drapes would have to be drawn at all times that the interior drapes or vertical blinds were drawn or closed as the case may be.

An owner, on the other hand, could remove the sun drapes and replace them, under the new bylaw, with drapes of a colour and material of his own choosing, leaving the council the right to approve colour and material of the liner exposed to the outside. The same would apply to the fabric of the vertical blinds exposed to the outside.

The original bylaw referred to both the drapes and the windows as then existing . To provide that interior sun drapes next to the windows shall not be removed identifies specific sun drapes and specific windows. The petitioner, in this case, after receiving permission to enclose the balcony areas with glass, thereby creating sun rooms, installed horizontal venetian blinds in newly constructed windows and, if I recall, windows which previously had no drapes. Following that, the bylaw was amended to allow the installation of vertical blinds subject to the approval of council as to material and colour. However, at the time of installation

there were no sun drapes to remove as none had been there before. The existing windows became interior windows or were removed altogether. At the time of granting permission to enclose the balcony areas the bylaw should have been amended to provide for the installation of drapes or vertical blinds, or whatever, next to the newly created windows. Failing that, permission should have been granted only on condition that drapes similar to the ones already existing would be installed in the newly created windows.

The bylaw, as it existed at the time the horizontal blinds were installed by the petitioner, was of no force and effect with respect to the newly created windows. Consequently, the corporation's demand at this time that the blinds be removed is an exercise in its responsibility for the decorating of the whole of the exterior of the building in a manner that is unfairly prejudicial to the petitioner.

The council is prohibited from demanding that the blinds be removed or taking any steps or action to remove the said blinds or to have them removed. The council is directed to vary the relevant bylaw to allow window coverings in all suites of the material and colour installed in the petitioner's suite. In the alternative, should the council wish to maintain a 'vertical' approach in all windows the bylaw should be amended to provide for same in all existing windows and future enclosed glass areas provided it pays to the petitioner the cost of replacing the installed horizontal blinds with vertical blinds. Any new bylaw, or any alteration or amendment to the existing bylaw, should make it clear that the council has the right to approve the colour and material of the drape or slats exposed to the outside when drawn or closed.

The parties shall have liberty to apply with respect to any proposed change in the bylaw.

The petitioner shall have her costs of these proceedings.

MURPHY L.J.S.C.

CBR# 514

Margaret Roche-Heywood, Petitioner, and The Owners, Strata Plan No. 953, Respondents

Victoria Registry No.: 89 1819

British Columbia Supreme Court Victoria, British Columbia Murphy L.J.S.C. Heard: May 4 & 7, 1990 Judgment: June 21, 1990

Counsel for the petitioner: P.W. Klassen. Counsel for the respondents: W.R. Lambert.

MURPHY L.J.S.C.:-- The petitioner applies to this Court for a declaration that 1. The powers of the Strata Corporation have been exercised in a manner that is or may be unfairly prejudicial to the petitioner.

The petitioner also applies for an order that:

1. The strata corporation vary the bylaws of the corporation to allow window coverings of the type installed in the petitioner's suite;
2. The strata corporation is prohibited from enforcing the bylaws of the corporation concerning window coverings as against the petitioner;
3. Costs.

The applications are made pursuant to sections 42 and 43 of the Condominium Act, R.S.B.C. 1979, c.61;

42. An owner may refer to arbitration or may apply to the court to prevent or remedy a matter where he alleges

(a) the affairs of the strata corporation are being conducted, or the powers of the corporation or strata council are being exercised, in a manner oppressive to one or more owners, including himself; or

(b) that some act of the strata corporation has been done or is threatened, or that some resolution of the owners or a class of owners has been passed or is proposed that is unfairly prejudicial to one or more owners, including himself.

43. On an application to court under section 42, the court may make the interim or final order it considers appropriate, and, without limiting the generality of that power, may

(a) direct or prohibit an act of council or vary a transaction or resolution; and

(b) regulate the conduct of the corporation's future affairs.

The issue is whether the bylaw is unfairly prejudicial to the petitioner, under s. 42(b). At the conclusion of the petitioner's argument, Mr. Lambert, on behalf of the respondent strata owners, submitted that relief under s. 42(a) was not claimed in the petition. Mr. Klassen, counsel for the petitioner, replied that he was only seeking relief under s. 42(b). I mention this as Mr. Klassen in his argument had covered both the matters of oppressive acts and unfair prejudice. On reading the petition, in preparing these reasons, I notice that the petition refers to section 42 without specifically mentioning either subsection. In any event, in view of Mr. Klassen's position, the matter falls to be decided under section 42(b).

In reciting the facts that follow, I have borrowed from the petitioner's brief as to the facts I consider relevant and are not in dispute:

1. The petitioner is the owner of and resides in Suite 701 - 640 Montreal Street, Victoria, British Columbia (hereinafter referred to as the "Suite"). The Suite is one of two penthouse units located on the 7th and uppermost floor of the condominium building located at the above address (hereinafter referred to as the Building). The unit is part of Strata Corporation No. 953 (hereinafter referred to as the "Strata Corporation"). The building is situated between the waterfront on Victoria Harbour and Montreal Street.

2. The construction of the building is such that on both the Montreal Street side and the water side, that the front walls of the two penthouse units are set back from the front wall of the floor below, thereby affording a tiered appearance.

3. Prior to February 1988, there were balconies both on the Montreal Street and waterfront sides of the Suite. In 1988 the petitioner made application to the Strata Council for a permission to enclose the balcony areas with glass to construct a sunroom. Permission was granted.

4. Having constructed the enclosures the petitioner found it necessary to provide window coverings for the newly created windows. After seeking advice of a professional the petitioner chose horizontal venetian blinds of a colour that blended with the other window hangings in the building. 5. At the time of installation of the blinds, there was a provision governing the installation of replacement drapes. The bylaws provided:

Sec. 137: ... Interior sun drapes next to the windows shall not be removed unless they are replaced by similar drapes of such colour and material as approved by Council.

6. The blinds were installed in or about March 1988. By letter dated October 31, 1988, the strata council through its manager instructed the petitioner to remove the blinds within 30 days. This was the first communication the petitioner received regarding the blinds.

7. The petitioner responded by letter dated November 15, 1988, apologizing to strata council and explaining her reasons for selecting the venetian blinds, and seeking permission of the strata council.

8. The strata council responded by letter dated January 17, 1989 stating that the strata council could not give approval. After further correspondence between the parties and their solicitors, the petitioner was advised by letter dated May 19, 1989 that a general meeting would be called to consider a change to the bylaws.

9. On or about July 6, 1989, the petitioner received a notice of meeting for July 25, 1989 proposing to amend bylaw 137 to read:

137. ... Interior sun drapes next to the windows shall not be removed unless they are replaced by similar drapes, or fabric or fabric covered vertical blinds, or venetian (horizontal) blinds of such colour and material as may be approved by Council.

The petitioner did not attend the meeting.

10. The meeting was held and at the meeting bylaw 137 was amended in such a fashion as to permit vertical blinds, but not horizontal blinds.

11. After the meeting of July 25, 1989 the strata council renewed its demand that the blinds be removed. The petitioner filed the within petition on September 11, 1989. 12. Subsequent to issuance of the petition a further meeting was held to reconsider, but the form of the bylaw remained as amended at the July 15, 1989, meeting.

With respect to the bylaws of a strata corporation, the Act provides:

26. (1) The strata corporation shall have bylaws providing for the control, management, administration, use and enjoyment of the strata lots and common property, common facilities and other assets of the strata corporation, and the bylaws shall be the bylaws set out in Part 5 until they have been altered or repealed under this Act at the time of alteration or repeal.

and:

28. (1) The bylaws set out in Part 5 have force and effect from the time of the deposit of the strata plan in the land title office until amended or repealed under sections 26 and 27.

Under Part 5 of the Act, headed "Bylaws", section 115 sets out the duties of an owner. Subsections (c) and (g) are relevant:

(c) repair and maintain his strata lot, including windows and doors, and areas allocated to his exclusive use, and keep them in a state of good repair, reasonable wear and tear and damage by fire, storm, tempest or act of God excepted;

(g) comply strictly with these bylaws, and all other bylaws of the strata corporation, and with the rules and regulations adopted from time to time;

The duties of a strata corporation are set out in section 116. Subsection (f) is relevant:

(f) maintain and repair the exterior of the buildings, excluding windows, doors, balconies and patios included in a strata lot, including the decorating of the whole of the exterior of the buildings;

The bylaws of the respondent strata corporation ultimately adopted are all of the sections in Part 5 of the Condominium Act, i.e. sections 115-132, with additional bylaws numbered consecutively from 133 to 145. There was no alteration or repeal as provided for in section 26, nor were they amended or repealed as provided for in section 28(1). I do not know why the Legislature has chosen to use the word "altered" in section 26 and the word "amended" in section 28. In effect, the bylaws, set out in sections 115-132 were neither amended nor repealed; they were added to. In any event, there was no issue taken with the procedure resulting in the addition to the statutory bylaws. I proceed on the basis, therefore, that sections 115-132 of Part 5 of the Condominium Act, together with the additional bylaws 133-145, are the bylaws under the general provision of section 26, which provide that, "the strata corporation shall have bylaws providing for the control, management, administration, use and enjoyment of the strata lots..."

Mr. Lambert, on behalf of the strata corporation, concedes that the first sentence in bylaw 137, which I have not quoted, does not apply. The question is, therefore, whether, in the circumstances, the corporation should be prohibited from enforcing the existing bylaw and whether the bylaw should be varied. I previously referred to it but I shall repeat it: the exterior of the buildings." This section excludes the Interior sun drapes next to the windows shall not be removed unless they are replaced by similar drapes, as approved by Council.

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So far as it goes, the bylaw is not unfairly prejudicial to any of the owners even though the effect is to control the interior colour of the drapes. However, an owner can overcome this, presumably, by installing drapes of a colour and material of his or her own choosing on the interior side of the existing sun drapes, without violating the bylaw or, in the case of the amended bylaw, vertical blinds. However, when the blinds are closed or the drapes are drawn the exterior side, depending upon the colour, would not necessarily be in harmony with the colour of the sun drapes approved by council. In such a situation there could be no violation of the bylaw if the sun drapes next to the windows would not have been removed. However, in keeping with the intent of the bylaw, the sun drapes would have to be drawn at all times that the interior drapes or vertical blinds were drawn or closed as the case may be.

An owner, on the other hand, could remove the sun drapes and replace them, under the new bylaw, with drapes of a colour and material of his own choosing, leaving the council the right to approve colour and material of the liner exposed to the outside. The same would apply to the fabric of the vertical blinds exposed to the outside.

The original bylaw referred to both the drapes and the windows as then existing . To provide that interior sun drapes next to the windows shall not be removed identifies specific sun drapes and specific windows. The petitioner, in this case, after receiving permission to enclose the balcony areas with glass, thereby creating sun rooms, installed horizontal venetian blinds in newly constructed windows and, if I recall, windows which previously had no drapes. Following that, the bylaw was amended to allow the installation of vertical blinds subject to the approval of council as to material and colour. However, at the time of installation

there were no sun drapes to remove as none had been there before. The existing windows became interior windows or were removed altogether. At the time of granting permission to enclose the balcony areas the bylaw should have been amended to provide for the installation of drapes or vertical blinds, or whatever, next to the newly created windows. Failing that, permission should have been granted only on condition that drapes similar to the ones already existing would be installed in the newly created windows.

The bylaw, as it existed at the time the horizontal blinds were installed by the petitioner, was of no force and effect with respect to the newly created windows. Consequently, the corporation's demand at this time that the blinds be removed is an exercise in its responsibility for the decorating of the whole of the exterior of the building in a manner that is unfairly prejudicial to the petitioner.

The council is prohibited from demanding that the blinds be removed or taking any steps or action to remove the said blinds or to have them removed. The council is directed to vary the relevant bylaw to allow window coverings in all suites of the material and colour installed in the petitioner's suite. In the alternative, should the council wish to maintain a 'vertical' approach in all windows the bylaw should be amended to provide for same in all existing windows and future enclosed glass areas provided it pays to the petitioner the cost of replacing the installed horizontal blinds with vertical blinds. Any new bylaw, or any alteration or amendment to the existing bylaw, should make it clear that the council has the right to approve the colour and material of the drape or slats exposed to the outside when drawn or closed.

The parties shall have liberty to apply with respect to any proposed change in the bylaw.

The petitioner shall have her costs of these proceedings.

MURPHY L.J.S.C.

CBR# 062

Carleton Condominium Corporation No. 32, appellant, and Camdev Corporation, Adjeleian, Allen, Rubeli Limited, and the Corporation of the City of Ottawa and Rosto Construction Ltd., respondents

Docket No. C32384

Ontario Court of Appeal Toronto, Ontario Osborne A.C.J.O., Catzman and Charron JJ.A. Heard: September 7, 1999. Judgment: September 22, 1999.

Counsel: James Davidson, for the appellant. Nancy Brooks and Gordon Cameron, for the respondents. The following judgment was delivered by

[para1] THE COURT:-- The appeal turns on whether the exclusionary clause, contained in the Agreements of Purchase and Sale of unfinished condominium units, is sufficiently clear to exclude the common law warranty of construction implied by law in the sale of uncompleted housing property.

[para2] Forget J., on a motion brought pursuant to Rule 21.01(1)(a) of the Rules of Civil Procedure for the determination of certain questions of law, held that the clause was sufficiently wide to exclude the common law implied warranty. Consequently, he held that the appellant, Carleton Condominium Corporation No. 32 ("C.C.C. No. 32"), did not have the benefit of the common law implied warranty of construction with respect to common elements in its action against the respondent developer and builder, Camdev Corporation, for damages for defects in construction of the common elements.

[para3] We agree with this conclusion. In light of this finding, it was not necessary for the motions judge to determine the question of duration of any liability under an implied common law warranty and we do not propose to deal with this additional issue. We also find it unnecessary to determine the second question of law raised on the motion as to whether C.C.C. No. 32 could assert the common law implied warranty with respect to all units, including those to which the warranty did not extend because the units were completed when sold, so as to allow for full recovery of damages to the common elements.

[para4] It is clear there is no implied warranty of fitness for human habitation upon the purchase of housing property that is already completed at the time of sale. The common law doctrine of caveat emptor governs with respect to the sale of real property and the purchaser must generally seek protection either by express warranty or by independent examination of the premises. However, in the case of unfinished premises, the common law implies a warranty of construction since there is no opportunity for inspection of the finished premises at the time of sale. See *Fraser-Reid v. Droumtsekas*, [1980] 1 S.C.R. 720.

[para5] The parties to an agreement of purchase and sale of unfinished housing property are nonetheless free to make their own bargain. Hence, they are at liberty to exclude the application of any common law implied warranty by the terms of their contract. And, as stated by this court in *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.* (1997), 34 O.R. (3d) 1 at 10, an exclusionary clause should prima facie be enforced according to its true meaning, with relief being granted only if the test in *Hunter Engineering Company Inc. v. Syncrude*, [1989] 1 S.C.R. 427 is met:

Relief should be granted only if the clause, seen in the light of the entire agreement, can be said, on Dickson C.J.C.'s test to be "unconscionable" or, on Wilson J.'s test, to be "unfair or unreasonable". The difference in practice between these alternatives, as Professor Waddams has observed, "is unlikely to be large": Waddams, *The Law of Contract* 3rd. (1993), at p. 323

[para6] In this case, the agreement of purchase and sale contained the following clause:

It is hereby expressly understood and agreed that other than a written one-year guarantee to be issued by the Vendor to the Purchaser, which guarantee shall be personal to the Purchaser and shall be non-assignable to any subsequent Purchaser, there are no warranties or conditions either oral or written save those expressed in this Agreement.

[para7] In performance of this clause, a written one-year guarantee was delivered to the purchasers on closing. It contained, amongst other provisions, the following clause:

This is the only guarantee made or authorized with respect to your home and is in lieu of all other guarantees expressed or implied and of all other obligations and liabilities on part whether with respect to materials or workmanship in the home, damages suffered by the purchaser or others or to his or their effects or otherwise. No guarantee is made beyond the time limited above even though the claimed defect does not become apparent within such period.

[para8] The appellant argues that the clause contained in the agreement of purchase and sale is not wide enough to exclude the common law implied warranty since it refers only to "oral" or "written" warranties. While it is conceded that the further written warranty delivered on closing is wide enough to exclude "implied" warranties, it is argued that this clause is unenforceable against the purchasers since it was given unilaterally by the vendor without consideration.

[para9] We see no merit to the appellant's latter argument. In our view, it is clear under the terms of the Agreement of Purchase and Sale that the parties agreed that the only warranty given by the vendor was the written one-year guarantee to be issued by the vendor. The written guarantee in question was issued in accordance with the terms of the agreement and accepted by the purchasers upon closing the transaction. Indeed, claims were made under this guarantee. Hence the written guarantee forms part of the bargain between the parties and, by its terms, it clearly excludes any implied warranty of construction.

[para10] Finally, we agree with the motions judge that there is no reason why the exclusionary clause in the written guarantee should not be enforced according to its plain meaning. It is not unconscionable, unfair or unreasonable.

[para11] We would dismiss the appeal, confirm the motions judge's answer to the first question of law, and make no comment on the second question.

[para12] On consent of the parties, the costs of the motion and the appeal (including airfare) are in the cause.

OSBORNE A.C.J.O. CATZMAN J.A. CHARRON J.A.

CBR# 214

Niagara North Condominium Corporation No. 7, applicant, and Peter Goodhew and Gail Goodhew, respondent

Court File No. 39,595/97

Ontario Court of Justice (General Division) St. Catharines, Ontario Dandie J. December 18, 1997.

Counsel: James D. Almas, for the respondents. No counsel mentioned for the applicant.

[para1] DANDIE J.:-- At issue is what interpretation should be placed upon two perhaps competing sections of the Condominium Declaration namely part IV Units (1) occupation & use (sub.para. (e)) which paraphrased states that plans for alterations or repairs to a unit are to be submitted for approval and the Board SHALL approve the plans unless the proposed alterations or repairs or the manner of carrying them out are likely to damage or impair the value of any other unit or the common elements. The respondents rely upon this section to place a burden upon the applicant to establish that the installation of a wall unit air conditioner by the respondents has damaged or impaired the value of any other unit or the common elements and part VII Maintenance & Repairs, para (4) Additions or Improvements by Owners which paraphrased reads that prior consent in writing of the Board is required and that any such change shall be in accordance with any condition set by the Board. Approval was obtained in writing to the installation of a air conditioner through the wall under a window which looks out onto the unit's outdoor balcony. The location required by the Board was not acceptable to the respondents who then spoke with two members of the Board of Directors, who in their minds at least, came away with the understanding that it would be in order to place the air conditioning unit in an alternate location. The applicants' position is that consent in writing to th alternate location was not obtained and that the respondents' conclusion that they had received verbal consent to the change was not warranted having regard to the evidence as the applicant understood the conversations to be. I expressed the opinion that the conflicting evidence as to what was said concerning approval of the alternate location could only be resolved by a trial of an issue. The respondents argued that it was not necessary to resolve the conflicting evidence because part IV Units occupation and use should prevail, and there being no evidence that the alternate location has damaged or impaired the value of any other unit or the common elements, the application should be dismissed.

[para2] The applicants' position is that the integrity of the by-laws and regulations is essential and there is good reason to enforce the rules and regulations, that the respondent not having complied, they ought to be forced to comply.

[para3] The respondents' position is that the location where they installed the air conditioning unit is superior to the location demanded by the Board and that the Board has not established that the air conditioner in its present location has damaged or impaired the value of any other unit or the common elements.

[para4] I have examined the photographs submitted by the respondents and find that according to the photographs there does not appear to be any perceived damage or impairment of the value of the common elements. I find that it is incumbent upon the applicant to establish impairment or damage, that they have not done so and the application is dismissed.

[para5] I may be addressed in writing as to costs, Respondent by Jan 14 98, applicant 10 days after (Jan. 25, '98), reply if any 10 days after (Feb. 4, '98).

DANDIE J.

CBR# 038

Jane Barnes and Wendell Green, plaintiffs, and Highland Park Development Corporation, defendant

Court File No. C41564/97

Ontario Court of Justice (General Division) Himel J. Heard: January 22, 1998. Judgment: February 18, 1998.

Counsel: Reginald Bradburn, for the plaintiffs. G. Slemko, for the defendant.

[para1] HIMEL J.:-- This is a motion for a declaration that an agreement of purchase and sale for a condominium is void and that the plaintiffs properly terminated such agreement, or in the alternative, that the agreement is void as a result of the defendant having breached it by attempting unilaterally to extend the closing date thereunder by a period in excess of 120 days. The plaintiffs also move for summary judgment under Rule 20.01(1) and Rule 20.04 of the Rules of Civil Procedure asserting that the only genuine issue for trial is an issue of law, namely, the interpretation of a clause in the agreement of purchase and sale and that if the legal issue is determined in their favour on this motion, judgment should be granted.

THE FACTS

[para2] The plaintiffs, Jane Barnes and Wendell Green, entered into an agreement on October 12, 1995 to purchase property, Unit 64, Level 1, known as townhouse 143 at 455 Apache Court, Mississauga, Ontario, from the defendant, Highland Park Development Corporation. The offer was accepted on October 12, 1995. The plaintiffs paid a deposit of \$8,500.00 to the defendant. The unit had not yet been built and clause 4 of the agreement provided that the occupancy date would be April 23, 1996. Construction of the unit was delayed as a result of a bricklayers' strike which lasted almost three months and the plaintiffs' solicitor was informed of this delay by the defendant's solicitor. The defendant's solicitor wrote to the plaintiffs' solicitor on June 19, 1996 advising that the strike had ended but did not provide a new closing date. On July 18, 1996, the defendant's solicitor wrote that the new "interim occupancy date" was September 16, 1996. On August 19, 1996, the plaintiffs' solicitor wrote the defendant's solicitor by facsimile transmission and ordinary mail stating that they were terminating the agreement.

[para3] There was no response by the defendant until September 3, 1996 at which time, the defendant wrote to state that it was refusing to accept the termination.

[para4] The relevant documentation to be considered in the interpretation of the clause in the agreement of purchase and sale includes:

1. The agreement of purchase and sale dated October 12, 1995.
2. Provisions of Ontario Regulation 894 made under the Ontario New Home Warranties Plan Act, R.S.O. 1990, c. 031 which were appended to the agreement and form part thereto as Schedule "G". The pertinent portion of Schedule "G", as appended to the agreement of purchase and sale provides:

EXTENSION AND TERMINATION

5.(i) If the Vendor cannot close by the Closing Date in the Agreement because additional time is required for construction of the Unit, the Vendor shall extend the Closing Date one or more times as may be required by the Vendor by notice in writing to the Purchaser as soon as reasonably possible and in any event prior to the Closing Date or extended Closing Date, all extensions in the aggregate not to exceed 120 days. However, the Vendor shall not extend Closing if the parties have specifically agreed in writing that the Vendor cannot, and the Purchaser does not waive this covenant.

(ii) The Vendor shall take all reasonable steps to construct the Unit without delay.

(iii) If the Closing Date in the Agreement has been extended for 120 days and the Vendor still requires further time for construction of the dwelling, unless subsequent to the Closing Date in the Agreement, the parties otherwise agree the Purchaser may terminate the Agreement within the 10 days immediately after the 120 days have elapsed by delivering or mailing notice in writing to the Vendor at the address shown above (which notice may also be given between solicitors), and upon the giving of such notice this Agreement shall be at an end and all sums paid by the Purchaser shall be returned without interest or deduction. However if the Purchaser does not terminate as above, Closing shall be deemed to be extended to a date 5 days following completion of the dwelling as required by the Agreement but, unless the parties otherwise agree, not later than a further 120 days after the initial 120 day period ...

(iv) Notwithstanding any provision to the contrary contained in it, this Agreement shall not be terminated by the Vendor by reason of failure to complete the dwelling as specified in the Agreement within a period of time or by a date specified in the Agreement, extended as above, unless the Purchaser consents to the termination in writing or the Agreement is ended pursuant to 5(iii) above.

(v) Where there is conflict or ambiguity between the Agreement and this Schedule, this Schedule shall prevail.

Clause 23 of Schedule "F" is also relevant to these proceedings. That clause provides:

23. Any notice required to be delivered pursuant to this Agreement to the Purchaser may either be delivered personally or be delivered by prepaid mail or facsimile transmission addressed to the Purchaser's solicitor or the Purchaser at his last known address and, in the case of the Vendor, any notice required to be delivered pursuant to this Agreement must be delivered personally or sent by facsimile transmission to the Vendor in the care of its solicitors. In the event that such notice is mailed as aforesaid, it shall be deemed to have been received by the party to whom it is addressed on the third business day following the date of its mailing. In the event of a pending or actual mail stoppage, all notices shall be delivered or sent by facsimile transmission.

THE ISSUES

[para5] According to the plaintiffs, the issues to be decided are these: 1. Did the letter delivered via facsimile transmission comply with the termination provisions of Schedule "G" and Ontario Regulation 894?

2. Did the plaintiffs properly terminate the agreement by the delivery of their notice to the defendant by ordinary mail on August 19, 1996?

3. Did the defendant commit an anticipatory breach of the agreement?

[para6] According to the defendant, the issues to be decided are as follows:

1. Did the plaintiffs' failure to object to the extension of the closing date until one (1) month after the extension was made disentitle the plaintiffs from subsequently relying on Schedule "G" to the agreement to terminate the agreement?

2. Are the plaintiffs entitled to rely upon the delay caused by the bricklayers' strike and their own conduct in failing to make finishing selections to terminate the agreement?

3. Was notice of the plaintiffs' intention to terminate delivered outside of the ten (10) day period contemplated by the Ontario New Homes Warranties Plan Act addendum attached to Schedule "G" to the agreement, such that the said notice was not effective?

POSITION OF THE PARTIES

[para7] The plaintiffs take the position that under the agreement of purchase and sale the defendant had to meet a closing date of no later than 120 days from the date of April 23, 1996 and that the aggregate extension period expired on August 21, 1996. The plaintiffs argue that they complied with Schedule "G" of the agreement by delivering notice of termination to the defendants by facsimile transmission on August 19, 1996 or by ordinary mail which was sent on August 19, 1996. They argue that Schedule "F" of the agreement provides in paragraph 23 that any notice that is mailed is deemed to have been received on the third business day following the date of mailing, namely, August 22, 1996. They submit that paragraph 5(iii) of Schedule "G" of the agreement provides that if the closing date in the agreement had been extended 120 days and the vendor still requires further time for construction, the plaintiff may terminate the agreement within 10 days after the 120 days has elapsed by delivering notice in writing. They submit that, at that point, the agreement was at an end and all sums paid by the purchaser were to be returned without interest or deduction. The plaintiffs submit that paragraph 5(iii) is part of consumer protection legislation and should be given a broad liberal interpretation to benefit the plaintiffs (see: *Wong v. Greyrock (Saddlebrook) Building Corp.* (1993), 34 R.P.R. (2d) 215 (Ont.Gen.Div.) at 220). They submit that proper notice to terminate was given by both facsimile transmission and by ordinary mail. The plaintiffs also argue that the defendant attempted to extend the closing date unilaterally to September 16, 1996 which is 145 days from the original closing date and, therefore, committed an anticipatory breach of the agreement.

[para8] The defendant's position is that had the defendant been aware that the plaintiffs wanted to adhere strictly to the 120 day period provided by Schedule "G", the defendant could have pulled workers from elsewhere to complete the plaintiffs' unit. Counsel submits that a party cannot cancel a contract without giving notice so as to allow the other party an opportunity to comply (see *Three D Developments Kingswood Ltd. v. Marshall* (1994), 39 R.P.R. (2d) 241 (Ont.Gen.Div.)). The defendant also argues that the vendor is not responsible for delays caused by strikes and that the plaintiffs contributed to the delay by not attending on two previously arranged occasions to make finishing selections provided in the agreement.

[para9] The defendant submits that it rejected the plaintiffs' purported termination because no notice was received within the ten day window following the 120 day period after the original date of closing under Schedule "G" to the agreement. The defendant relies on a decision of the Ontario New Homes Warranty Program dated January 15, 1997 which denied a claim by the plaintiffs and found that the notice to terminate was not made within the proper 10 day notice period under paragraph 5(iii) of Schedule "G", Ontario Regulation 894. Finally, the defendant's counsel takes the position that the date which determines the window for the termination period following the 120 days should be interpreted under the agreement of purchase and sale to be,

"... the later of:

(i) the "Occupancy Date"; or

(ii) a date 14 days after the Vendor's solicitor notifies the Purchaser or his solicitor of the registration of the Condominium and requests a formal closing with a specified date for closing; ..."

WHETHER THE CASE FALLS WITHIN RULE 20.04

[para10] As a preliminary matter, it must be determined whether there are any issues of fact more appropriately dealt with at a full trial than in a summary judgment application. The relevant facts in this case are not in dispute. There is no factual dispute that needs to be resolved in order to determine the main legal issue in this action. That issue, whether the contract was properly terminated by the applicant, can be determined by answering the following questions:

1. Was it open to the plaintiffs to avail themselves of the termination procedure set out in clause 5(iii) of Schedule "G", given that:

(a) the major cause of the delay was an event beyond the control of the respondent, specifically a bricklayers' strike;

(b) the plaintiffs did not make any objections to the delay during the strike or at the time the occupancy date was extended by the July 18, 1996 letter;

(c) the plaintiffs were partially responsible for the delay because they did not meet with the defendant to make "purchasers' finishing selections" for the unit; and

(d) the "closing date" as defined in Schedule "G" was not the same as the proposed occupancy date of April 23, 1996?

2. If it was open to the plaintiffs to avail themselves of cl. 5(iii), did they follow the proper procedure for a valid termination?

THE AVAILABILITY OF CLAUSE 5(iii)**(a) Delay caused by strike:**

[para11] There appears to be no dispute that the bricklayers' strike was the major cause of the delay in completion of the townhouse unit. The issue is whether this delay disentitles the plaintiffs from relying on the termination procedure set out in clause 5(iii). In support of this argument, counsel for the defendant relies on changes made to the Regulations under the Ontario New Home Warranties Plan Act as a result of O. Reg. 117/91, s. 1. Regulation 117/91 amended R.R.O. 1990, Reg. 892, s. 17. The provision upon which the applicant seeks to rely provides:

17(11) Subsection (5) does not apply to a period of delay in occupancy caused by strike, fire, flood, act of God or civil insurrection.

Subsection 17(5) provides that, in certain situations, a vendor may become liable to a purchaser for living expenses and other costs if the purchaser is unable to occupy the unit within five days of the "confirmed occupancy date". The term "confirmed occupancy date" is defined in subsections 17(6) and 17(7).

[para12] The provisions contemplate that a vendor will be responsible to a purchaser for living expenses that a purchaser may incur because a unit is not ready on the promised occupancy date. That was not the case in this action. The applicants here are not seeking damages for living expenses, and it therefore appears that s. 17(11) is not relevant.

[para13] It may be that the defendant is arguing that, by analogy, the terms of clause 5(iii) should be read in such a way as to relieve the vendor from strict compliance with the 120-day deadline given that the reason for the delay was a strike. In essence, the defendant is asking the court to find that there is an implied term of the agreement of purchase and sale that the vendor is relieved of the effect of a delay in occupancy caused by a strike or other intervening act beyond the vendor's control. This reasoning is akin to the long line of common law cases dealing with the doctrine of frustration. The doctrine applies where a supervening cause prevents the contract from being performed. Where frustration applies, both parties are discharged from performing the contract. In this case, the vendor asserts that the supervening event should not lead to a discharge of the contract, but merely a delay in its performance. Viscount Simon L.C. explained the underlying rationale for the doctrine of frustration in the following terms:

... The most satisfactory basis, I think, on which the doctrine can be put is that it depends on an implied term in the contract of the parties. This was the basis adopted in *Taylor v. Caldwell* (3 B. & S. 839) which is practically the first case of the modern line of authorities. It is the view taken in many later cases ... It has the advantage of bringing out the distinction that there can be no discharge by supervening impossibility if the express terms of the contract bind the parties to performance notwithstanding that the supervening event may occur. Discharge by supervening impossibility is not a common law rule of general application, like discharge by supervening illegality; whether the contract is terminated or not depends on its terms and the surrounding circumstances in each case ...

See *Joseph Constantine Steamship Line, Limited v. Imperial Smelting Corporation, Limited* [1942] A.C. 154 (H.L.) at 163.

[para14] What is clearly contemplated is that the parties are entitled to allocate the risk of unforeseen, intervening events that may either frustrate or delay performance of the contract. In this case, the contract contains no force majeure clause which would relieve the vendor of liability due to delays caused by labour disputes. Further, the wording of clause 5(iii) is quite clear: it will apply if the closing date has been "extended for 120 days and the Vendor still requires further time for the construction of the dwelling". Nowhere does clause 5(iii) provide for additional delays if the vendor is unable to finish the construction due to circumstances beyond its control; instead, it implies that the vendor will be held strictly to the terms of the contract. Such an interpretation makes sense in a commercial context. It is the vendor who is in control of building the project and it is the vendor who is best able to estimate how long it will take to complete. Furthermore, the vendor can delay closing up to 120 days after its original estimate. It must also be remembered that clause 5(iii) does not render the vendor liable in damages for its delay, nor must it pay interest on the deposit monies.

(b) Plaintiffs' lack of objection:

[para15] The defendant asserts that it should not be bound to strictly comply with the closing date because the plaintiffs did not object to the extension beyond the 120-day period. In a letter addressed to the plaintiffs' solicitors, dated July 18, 1996, the vendor advised the purchaser about the postponement of the occupancy date in the following terms:

Pursuant to paragraph 5 of the Warranty Program schedule "G" to the Agreement and the notice provisions set out in paragraph 23 of Schedule "F", you are hereby notified that September 16, 1996 is the new date for interim occupancy.

The plaintiffs did not respond to this letter until August 19, 1996, at which time they purported to terminate the agreement pursuant to clause 5(iii).

[para16] Counsel for the vendor argues that the initial lack of response constituted a waiver of the purchasers' right to hold the vendor to the 120-day extension limit. It is clear the doctrine of promissory estoppel does not apply here, as estoppel requires the party "waiving" its right to make an unambiguous representation that the right is being waived. See, for example, *Re Tudale Explorations Ltd. and Bruce et al.* (1978), 20 O.R. (2d) 593 (Div. Ct.).

[para17] The classic definition of waiver was expounded by Lord Denning in *W.J. Alan & Co. Ltd. v. El Nasr Export and Import Co.*, [1972] 2 All E.R. 127 (C.A.) at p. 140:

The principle of waiver is simply this: If one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted on, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so ...

[para18] Upon receipt of the July 18 letter, the purchasers had the option of either accepting the new occupancy date or rejecting it. In order to accept the date, they needed to do nothing but wait until the unit was ready and move in. The process of rejecting the new date (and thereby terminating the contract) was set out in clause 5(iii), which required them to notify the vendor after the 120-day had elapsed. That is precisely what the purchasers purported to do. The purchasers' silence after receiving the July 18

letter cannot be taken as a waiver of the rights-under clause 5(iii). Given that the contract provided a specific mechanism by which the purchasers could reject the offer of a new closing date (i.e. by terminating the agreement), the purchasers' silence after the July 18 letter could not reasonably be construed as a waiver of any rights. It should also be noted that the July 18 letter does not ask for a reply and does not suggest that, if the extended date is unsatisfactory to the purchasers, the vendor could redirect its resources and have the unit completed on time.

[para19] The facts of this case may be distinguished from those in *Three D Developments Kingswood Ltd. v. Marshall* (supra). In that case, the court did not consider any contractual provision prescribing the method whereby the purchaser could terminate if there was a delay in the occupancy date. Further, the purchaser in that case, after receiving notice of the delayed occupancy date, instructed his solicitor to search the title on the property. When the purchaser requested he be released from the transaction, he explained that he would be relocating to another city to take up a new job. The court held that the purchaser had not treated the contract as at an end when the occupancy date was extended and, further, his subsequent conduct (in ordering his lawyer to search title) indicated that he planned to complete the transaction.

[para20] In the case at bar, the purchasers gave no indication that they planned to complete the transaction; they waited, as they were permitted to do under the contract, until 120 days elapsed and then gave notice of termination.

(c) Delay making "purchasers' final selections":

[para21] The defendant argued that the plaintiffs' delay in meeting with employees of the defendant to make final selections for the unit, such as choosing the colour of the ceramic tile, places part of the responsibility for the delay on the purchasers. According to a letter from the vendor's solicitors to the purchasers' solicitors, Exhibit "H" to the affidavit of Peter Plastina, the purchasers missed two appointments in August, which were scheduled so that the purchasers could make their selections. If there was any delay attributable to the purchasers, it arose after the occupancy date of September 16, 1996 had already been named by the vendor. That date itself is beyond the 120-day period. The purchasers' conduct may have caused the vendor to be unable to make the unit available until after September 16, but that is irrelevant to these proceedings. As of July 18, the occupancy date had been set at a date beyond the 120-day period, and the purchasers were entitled to rely on clause 5(iii). Further delays after July 18 are irrelevant with reference to the provision of clause 5(iii) allowing the purchasers to terminate the agreement.

[para22] It should further be noted that, had the purchasers met with employees of the vendor and made selections for the unit, that conduct may well have been viewed as implying a waiver of the purchasers' rights under clause 5(iii).

(d) Definition of "closing date": [para23] Clause 5(iii) allows the purchasers to terminate the agreement if the vendor needs more time to complete construction after the "Closing Date in the Agreement" has been extended for 120 days. The respondent argues that the phrase "Closing Date in the Agreement" should be read in light of clause 3 of the agreement of purchase and sale, which provides:

3. This transaction of purchase and sale is to be completed on the Closing Date which is to be the later of:

(i) the "Occupancy Date"; or

(ii) a date 14 days after the Vendor's solicitor notifies the Purchaser or his solicitor of the registration of the Condominium and requests a formal closing with a specified date for closing;

provided that the Vendor shall have the option of advancing the Closing Date on sixty (60) day written notice to the Purchaser.

Clause 4 of the agreement provides that the "Occupancy Date" shall be April 23, 1996. The respondent contends that April 23 was not the "Closing Date" for the purpose of clause 5(iii) in Schedule "G". Rather, the "Closing Date" could fall sometime later, i.e. the date 14 days after the vendor's solicitor notified the purchaser of the registration of the condominium. The logical conclusion from this argument is that "Closing Date" is wholly within the control of the vendor. If the "Occupancy Date" is delayed, then the vendor can simply delay notifying the purchaser of the registration of the condominium. On that interpretation of "Closing Date", the vendor could delay occupation for an indeterminate amount of time and the purchaser would never be able to invoke clause 5(iii).

[para24] It must be noted that Schedule "G" was incorporated into the agreement of purchase and sale pursuant to R.R.O. 1990, Reg. 894 (as amended), s. 12, which requires that schedule to form a part of every such agreement. The Regulations are pursuant to the Ontario New Home Warranties Plan Act. "Closing date" is not defined in those Regulations nor in the Act, but it seems plain from the terms in clause 5 of Schedule "G" that the Regulation is designed to protect purchasers in the event the vendor fails to complete the unit in a timely fashion. Clause 5(i) provides that the vendor can extend the "Closing Date" up to 120 days, but also allows the parties to opt out of this clause, which would mean the purchaser could hold the vendor to strict compliance with the deadline initially agreed upon. Clause 5(ii) provides that the vendor shall take all reasonable steps to complete construction. Clause 5(iv) provides that, in spite of any delays, etc. on the part of the vendor, the purchaser must consent before the agreement can be terminated.

[para25] The purpose of this clause is clearly to protect the purchaser from undue delays in construction of the unit. If the parties agree, the purchaser is entitled to hold the vendor to strict compliance with the original occupation date. The vendor is required to avoid undue delay in construction. Even if the purchaser is entitled to terminate the agreement, he or she can refuse to do so and the vendor may be bound to complete the transaction.

[para26] Therefore, "Closing Date" as used in the schedule must refer to what is known in the agreement which must mean the initially agreed upon occupancy date. Any other definition of "Closing Date" would render meaningless the protections provided to purchasers in clause 5.

[para27] If that is the case, there is clearly a conflict between the meaning of "Closing Date" in clause 5 of the schedule and "Closing Date" in clause 3 of the agreement. In the event of a conflict between the schedule and the agreement, clause 5(v) of the schedule provides that the schedule shall prevail. It seems clear, therefore, that the meaning of "Closing Date" which is implicit in Schedule "G" prevails. The "Closing Date" for the purposes of clause 5(iii), therefore, was April 23, 1996. The vendor was entitled to extend that date by 120 days. If the vendor extended that date for more than 120 days, the purchasers were entitled to terminate the agreement provided they followed the process set out in clause 5(iii).

CONCLUSION

[para28] In my view, the plaintiffs were entitled to rely on clause 5(iii) in terminating the agreement. Although the cause of the delay may have been beyond the control of the vendors, the agreement contemplated that it was the vendors who would bear the risk of such contingencies. The plaintiffs' failure to object to the July 18, 1996 letter advising of the extended closing date did not constitute a waiver and did not give rise to an estoppel. The plaintiffs' failure to make final selections during August was irrelevant, as the closing date had already been extended beyond the 120-day period. Finally, the definition of closing date in cl. 3 of the agreement does not apply to the provisions of Schedule "G", which clearly contemplates "Closing Date" to mean the original occupancy date.

THE PROPER PROCEDURE FOR INVOKING CLAUSE 5(iii):

[para29] Clause 5(iii) allowed the purchasers to terminate the agreement by providing notice "within the 10 days immediately after the 120 days have elapsed by delivering or mailing notice". The 120-day delay from the initial April 23, 1996 closing date elapsed on August 21, 1996. The purchasers' solicitors sent a facsimile to the vendor's solicitors on August 19, 1996, purported to terminate the agreement. On the same day, the purchasers' solicitors mailed a notice to the same effect.

[para30] The facsimile transmission was not sent within the 10 days immediately after the 120-day period. However, the mailed notice may well have been. Clause 23 of Schedule "F" of the agreement provides that delivery of notices to the vendor must be done personally or via fax. However, clause 5(iii) of Schedule "G" specifically allows the purchaser to mail notice of termination. Given the provision in clause 5(v), that, where there is a conflict, Schedule "G" shall prevail, it was open to the purchaser to mail the notice. Clause 23 in Schedule "F" also provides that any notice mailed between the parties is "deemed to be received by the party to whom it is addressed on the third business day following the date of its mailing". There seems to be no conflict between this part of clause 23 and the provisions of Schedule "G" and it is therefore applicable to mailing notice of termination under clause 5(iii). If that is the case, then, regardless of when the notice was received by the vendor's solicitors, it was deemed to be received on August 22, 1996. That date falls within the 10 days immediately after the 120-day delay period.

[para31] In my opinion, the plaintiffs have properly terminated the agreement of purchase and sale and are entitled to summary judgment pursuant to Rule 20.04(4).

DAMAGES

[para32] The plaintiffs in this case have applied pursuant to Rule 20.04(3), which allows the court to order a trial on the issues of damages. The prerequisite to ordering such a trial is that "the court is satisfied that the only genuine issue is the amount to which a moving party is entitled". This provision requires the court to be satisfied that there is a genuine issue regarding damages before ordering a trial on the matter. It therefore appears to be open to the court to deny a motion under Rule 20.04(3) if it is convinced that there is no genuine issue regarding the amount to which the plaintiffs are entitled.

[para33] In this case, clause 5(iii) makes it clear that, upon the purchasers' exercise of the termination clause, the vendor is required to return the deposit, without interest. In essence, the clause contemplates rescission of the contract. Rescission is available at common law where there is an innocent misrepresentation or a mutual mistake regarding an essential term of the contract. When rescission occurs, the general rule is that the contract is at an end. For a sale of goods contract, the vendor would be entitled to the return of the property sold and the purchaser would be entitled to the return of the purchase price paid. As noted by G.H.L. Fridman in *Restitution*, Second Edition, (Carswell, 1992) at p. 200:

The nature and effect of rescission of a contract are such that the innocent party (or both parties if both are innocent) should be restored to the position in which such party was (or both parties were) prior to the making of the contract. The policy of the law is to prevent either party obtaining an undue advantage or an unjust enrichment ... there ought to be a complete restoration between the parties of whatever tangible benefits either party has received from the other under the contract that is rescinded.

By analogy, clause 5(iii) contemplates rescission in that the vendor keeps the real property and the purchasers get their deposit back.

[para34] The damages claimed in the statement of claim do not flow from any breach of contract. It is clear from the contract that any "breach" by the vendor regarding a delayed closing date would be resolved under the provisions of clause 5(iii). At the point that the plaintiffs exercised their rights under clause 5(iii) the contract was terminated and any subsequent actions on the part of the defendant cannot be viewed as a breach of contract.

[para35] The plaintiffs in this case have asked for a declaration that the contract was terminated on August 22, 1996. Upon making such a declaration, it follows as a matter of law that the plaintiffs are only entitled to the return of their deposit. Therefore, there appears to be no genuine issue regarding damages that would necessitate a trial.

[para36] Regarding interest, clause 5(iii) makes it clear that, upon termination, the deposit is returnable "without interest or deduction". The plaintiffs are, therefore, not entitled to interest prior to the date of termination, August 22, 1996. Clause 5(iii) makes no mention of when the vendor must return the deposit. In that case, it may be assumed that the vendor would be afforded a reasonable amount of time to return the money. Pre-judgment interest, therefore, will run from two weeks after the termination date of August 22, 1996.

[para37] Accordingly, summary judgment is granted in favour of the plaintiffs as follows:

- (a) The deposit of \$8,500.00 will be paid to the plaintiffs;
- (b) Pre-judgment interest is granted to the plaintiffs from September 2, 1996 pursuant to the Courts of Justice Act;
- (c) All other claims in the Statement of Claim are dismissed.

[para38] With respect to costs of the motion and application, as agreed upon by counsel, they may file written submissions with me within 15 days following the date of release of this judgment.

HIMEL J.

CBR# 226

Ormond et al., and Richmond Square Development Corporation And between Granovsky, and Richmond Square Development Corporation

Doc. Nos. 4347/89 and 4583T

Ontario Supreme Court - High Court of Justice Master Browne Oral judgment: June 7, 1990.

Counsel: P.C. Strickland, for the plaintiffs. A. Steele, for the defendants.

[para1] MASTER BROWNE (orally):-- On these references there is one issue that remains outstanding and is common to both transactions. The issue is to adjust the figures between vendor and purchaser for the purpose of closing a condominium purchase and sale pursuant to previous judgments directing a reference to determine such amount. Each party, vendor and purchaser, has submitted a statement of adjustments. There is basic agreement that the statements of adjustment prepared on behalf of the purchasers are an adequate reflection of the amount required to close except for one issue: that is the entitlement to credit to the purchasers for occupancy fees. This involves a consideration of phantom mortgages, the wording of the agreement of purchase and sale and, in particular, s. 51(6) of the Condominium Act, R.S.O. 1980, c. 84, which provides for the vendor an entitlement to occupancy fees. There are three elements spelled out in that section. The amounts payable for estimated or projected common expenses and the amount reasonably estimated for municipal taxes are not in dispute. What is in dispute is the amount pursuant to s. 51(6):

"The amount of interest that the purchaser would have paid, monthly, in respect of any mortgage or mortgages he is obligated to assume or give under the agreement of purchase and sale on delivery of a deed or transfer of the unit."

[para2] There is great similarity in the material before me and that considered by Rosenberg J. in Albrecht v. Opemoco Incorporated (1989), 70 O.R. (2d) 151. The phantom mortgage provisions in that decision included a right of election whereby the purchasers could elect to give the mortgage. That is absent on the facts before me, and it is argued that it is a material distinction. I do not agree with that position. The provisions dealing with the phantom mortgage are found in Schedule A, para. 14 of the agreement of purchase and sale, which spells out that the mortgage will have an interest rate fixed by formula, repayable interest only monthly and be due 30 days after the closing date. The provisions also include:

"The Vendor shall be under no obligation to complete the sale of the Unit unless the Purchaser shall have first deposited in escrow with the Vendor's solicitor a certified cheque sufficient in amount to pay the entire principal balance of the Vendor Take Back Mortgage. It is understood that such certified cheque is to be applied by the Vendor's solicitor to discharge the Vendor Tak Back Mortgage at any time after closing upon demand by the Vendor."

[para3] That is substantially similar to the provisions in the phantom mortgage considered by Rosenberg J. He sets out a similar paragraph on p. 156.

[para4] In his judgment, he traces the history of the Condominium Act in Ontario and the treatment of occupancy costs. He reviews the aim of the legislation in addressing occupation costs, which might have been, without legislated safeguards, too onerous from a purchaser's point of view. As he indicates and as is indicated in the quoted reasons by Dupont J., the amendments to the Act and the section now for consideration permit in certain fact situations, of which Rosenberg J. gives examples, a purchaser to benefit in a windfall sense. It is not disputed that a developer has costs of construction and carrying costs of the development down to closing and an entitlement to, at the practical level, recover something on account of that cost. However, as the examples given illustrate, there remain situations where the purchasers may, in certain fact situations, be beneficiaries of a windfall. [para5] The facts before Rosenberg J. may have been more compelling than the facts before me, but I find there is sufficient dovetailing and overlapping of the facts in both cases to make those reasons not only persuasive, but binding upon me. The headnote characterizes the phantom mortgages in the Albrecht decision as being clearly a sham to avoid s. 51(6). The quoted provision from the agreement of purchase and sale supports that same conclusion which I make. I find that the credits shown upon the statements of adjustments are proper, and I have endorsed my procedure book:

"For oral reasons given the purchasers are to be given credit for refund of occupancy fee re: interest component of the phantom mortgage."

[para6] In the result funds shall be paid into court subject to further order and in particular not to be paid out until all costs of the plaintiffs have been satisfied. Plaintiffs may apply for a vesting order at the costs of the defendant.

[para7] The statement of adjustments prepared by plaintiffs is approved.

[para8] Balance to close is adjusted further as follows:

"Re Ormond:

Balance payable as per the statement: \$70,950.00 Less refund to purchaser: \$21,090.33

\$49,859.67 Less costs assessed as per judgment: \$ 4,963.60

\$44,896.07 Less reference costs to date: \$600.00

Revised or adjusted balance Payable into court to close: \$44,296.07

Re Granovsky:

Balance payable as per the statement: \$72,375.00 Less refund to purchaser: \$5,922.73

\$66,452.27 Less costs assessed as per judgment and order made this date: \$5,123.07

\$61,329.20 Less reference costs to date: \$600.00

Revised or adjusted balance Payable into court to close: \$60,729.20"

[para9] There will be an interim report prepared incorporating those findings.

MASTER BROWNE

CBR# 334

Kerry Turner and William Turner, applicants (respondents), and Ontario New Home Warranty Program, respondent (appellant)

Court File No. 230/97

Ontario Court of Justice (General Division) Divisional Court O'Leary, Campbell and Salhany JJ. Heard: September 15, 1997. Oral judgment: September 22, 1997.

Counsel: Carol Street, for the applicants (respondents). Douglas Christie, for the respondent (appellant).

Reasons for judgment were delivered by O'Leary J., concurred in by Campbell J. Separate reasons were delivered by Salhany J.

[para1] O'LEARY J. (orally):-- This is an appeal by the Ontario New Home Warranty Program from a decision of the Commercial Registration Appeal Tribunal which awarded a sum of money to the applicants who had been the purchasers of a condominium unit. The agreement of purchase and sale under which the purchasers agreed to buy the unit provides that the vendor for reasons beyond its control can extend the time for occupancy. The agreement also provides:

2. (b) The purchase and sale of the Unit shall be completed on the later of the occupancy date, or on a date fixed by the Vendor not more than 30 days after registration of the Declaration, or such later date as permitted by this agreement.

[para2] The vendor fixed Jan. 29, 1991 as the closing date. The agreement of purchase and sale makes no provision for a further fixing or extension of the closing date. On Jan. 29, 1991 the vendor could not close the transaction because a large lien had been registered which it could not discharge. It is irrelevant that the purchasers could not close as well on Jan. 29, 1991 because the vendor's failure to remove the lien was the cause of the purchasers' inability to close because they could not raise the necessary mortgage.

[para3] Accordingly the transaction was at an end on Jan. 29, 1991. The purchasers were entitled to call the deal off and look to the vendor for repayment of the moneys paid to it.

[para4] The purchasers then fall within s. 14(1) of the Ontario Home Warranty Plan in that they had a cause of action in damages against the vendor because of the vendor's failure to perform the contract. The amount of those damages was the amount that the purchasers had already paid to the vendor on account of the purchase price.

[para5] It was argued by the appellant that the purchasers showed a lack of good faith by failing to permit an extension of the closing date on Jan. 29, 1991 in that they so refuse because the price of the condominium unit had greatly decreased over the prior months. The evidence in that regard does not convince me that the purchasers acted for that reason or indeed that in any other way they were acting in bad faith when they abandoned the condominium unit within a day or two of Jan. 29, 1991 and called the transaction off.

[para6] Accordingly then the appeal is dismissed.

O' LEARY J. CAMPBELL J. -- I agree.

[para7] SALHANY J. (orally dissenting):-- With regret I must dissent from my colleagues. I would allow the appeal and dismiss the application for compensation. In my view, the jurisdiction of the tribunal to pay out of the guaranteed fund to a purchaser lies in s. 14(1) (a) of the Ontario New Home Warranty Plan. That section only authorizes payment where the purchaser has a cause of action in damages against the vendor for:

(a) financial loss resulting from the bankruptcy of the vendor; or (b) the vendor's failure to perform a contract.

The purpose of the legislation, in my view, is to compensate a purchaser for the acts of the vendor over which the purchaser has no control, such as the bankruptcy of the vendor or the inability of the vendor to close. To put it another way, it is the actions of the vendor which must cause the loss suffered by the purchaser.

[para8] It is true that in this case the vendor was unable to close on a specific date because there were liens on the property. However, at some later time, the vendor was able to close but the purchasers were not prepared to do so because, understandably, the price of the unit had fallen dramatically. That fall in value had nothing to do with the actions of the vendor. The value would have fallen in any event, even if the purchasers had closed the transaction on the agreed date of closing.

[para9] The position of the respondent is that the purchasers were entitled to walk away from the agreement because the vendor failed to close on the date set out in the agreement of purchase and sale and, that in the specific circumstances of this case, there was no obligation on the purchaser to extend the date of closing. In my view, the fact that the purchaser may have been entitled in law to walk away from its contractual obligations vis -à-vis the vendor entitled it to recover from the vendor its deposit. But it did not give the purchaser the right to recover damages from the vendor for breach of contract, which is the jurisdictional basis for the tribunal to make the award under s. 14(1)(a) of the Act.

[para10] The purchasers did not bring an action to recover the amount of its deposit. Had they done so, been successful and unable to recover from the vendor, then it might have been open for them to seek recovery under the plan on the basis of the bankruptcy of the vendor.

[para11] I am not suggesting that the purchasers had any obligation to do so. Simply, had they done so and been unable to recover because of the vendor's lack of funds, then the purchaser might have been able to recover because of the bankruptcy of the vendor. In such instance, the purchasers would have fallen clearly within a s. 14(1)(a). [para12] For these reasons I would allow the appeal and dismiss the application before the tribunal with costs.

SALHANY J.

CBR# 024

Almel Inc., applicant (appellant), and Halton Condominium Corporation No. 77, respondent (respondent in appeal)

No. C14754

Ontario Court of Appeal Toronto, Ontario McMurtry C.J.O., Osborne and Charron JJ.A. Heard: February 6, 1997. Judgment: February 28, 1997.

Counsel: P. David McCutcheon for the appellant. B. Duxbury for the respondent.

The following judgment was delivered by

[para1] THE COURT (endorsement):-- This appeal concerns the interpretation of a grant of right of way to the appellant, Almel Inc., over the property of the respondent, Halton Condominium Corporation No. 77. The appellant, which operates a gasoline and service station on the subject property, intends to add a car wash facility, and wishes to use the right of way as a turning area for vehicles using the car wash. The appellant also wishes to grade and pave or gravel a portion of the right of way in order to facilitate this intended use.

[para2] In the proceedings below, the appellant sought a declaration that it is entitled to make use of the right of way as proposed. The respondent contended that the proposed use went beyond the scope of the grant and that, in any event, the right of way had been extinguished since it no longer served its original intended purpose. Although the motions judge was of the view that the right of way had not been extinguished, she dismissed the appellant's application on the ground that the proposed use went beyond the scope of the grant.

[para3] The governing principles are not in issue. When a right of way has been created by express grant, the scope of permissible use depends on the words used. The circumstances existing at the time of the grant may also be looked at to construe the nature and extent of the rights conveyed. See *Laurie v. Winch*, [1953] 1 S.C.R. 49. In the case of a general grant, as here, the permissible use is not limited to the original use. Although the owner of the dominant tenement cannot alter the type of use of the right of way beyond its original scope, the burden on the servient tenement can be reasonably increased so long as the use is of the same general nature, and it can reasonably be said to have been in the contemplation of the parties at the time of the grant.

[para4] The right of way was granted by the respondent's predecessor in title by an indenture dated November 16, 1955. The indenture granted "a right-of-way in perpetuity in common with the vendors, their heirs and assigns, over, along and upon a strip of land ..., the said right-of-way being for the purpose of ingress, egress, and regress only and not for the purpose of erecting any building, buildings, pumps, or outlets." The right of way is thirty feet wide and runs the full depth of the appellant's property. It is situated between the properties of the appellant and the respondent. [para5] At the time the right of way was granted, the appellant's property was vacant land intended to be used for a gasoline and service station. Since the mid-1950s, the appellant's property has been used commercially as a gasoline and service station. The respondent's property was used for commercial purposes at the time of the grant. The Top Hat Restaurant was located approximately five feet from the right of way; the Top Hat Motel was also located on the property, further away from the right of way. In the mid-1970s, the restaurant and motel were demolished, and a condominium was built that still exists today.

[para6] Prior to the construction of the condominium, the right of way provided access between the restaurant, the motel and the gasoline station, as well as access to Lakeshore Road East, which is adjacent to both properties. Since the construction of the condominium, the right of way land has served a variety of functions, including access to and from Lakeshore Road East to both properties, parking, and grassed areas.

[para7] At the outset, it should be indicated that we see no merit to the respondent's contention that the right of way has been extinguished. Before a right of way created by grant can be extinguished, it must be demonstrated that the party entitled to it had a settled intention to abandon the right of way: *Tehidy Minerals Ltd. v. Norman*, [1971] 2 All E.R. 475 (C.A.); *Liscombe v. Maughan* (1928), 62 O.L.R. 328 (C.A.). The evidence does not in any way support such a finding.

[para8] In our view, the appeal must be allowed. First, there is nothing in the wording of the grant that would restrict the appellant from using the right of way in the manner proposed. Second, the addition of a car wash to the appellant's business will not bring about a change in use of the right of way. The intention is still to use the right of way "for the purpose of ingress, egress, and regress". And, since it must be assumed that the grant was intended to be effective for the purposes for which the property was designed to be used or was actually used, the right of "ingress, egress and regress" includes a right to stop for a reasonable time for the legitimate business purposes of the appellant. See *McIlraith v. Grady*, [1968] 1 Q.B. 468 (C.A.). Third, we are of the view that while the addition of the car wash to the gasoline and service station may result in an increased burden on the servient tenement, in the sense that the right of way will likely be used more frequently, the intended use remains of the same general nature, and can reasonably be said to have been in the contemplation of the parties at the time of the grant.

[para9] The appeal is therefore allowed, the judgment below is set aside and in its stead it is hereby declared that the appellant is entitled to use the right of way as a turning area for vehicles using the car wash and that it is entitled to grade and pave or gravel a portion of the right of way in order to facilitate such use.

[para10] The appellant is entitled to its costs on the appeal and in the court below.

McMURTRY C.J.O. OSBORNE J.A. CHARRON J.A.

CBR# 299

Skyrise Developments Limited, plaintiff, and Louis Aldrovandi and Gianna Aldrovandi, defendants

Court File No. 93-CQ-40341

Ontario Court of Justice (General Division) Hawkins J. Heard: November 5-8, 18 and 22, 1996. Judgment: February 6, 1997.

Counsel: Howard Gerson, for the plaintiff. Christopher Dockrill, for the defendants.

[para1] HAWKINS J.:-- This is an action by a condominium developer for damages occasioned by the Defendants' failure to complete the purchase of a condominium unit. The Defendants counterclaim for the return of their deposit and "extra" monies paid under the contract.

[para2] The unit in question (Suite 1604) is located in a luxury high-rise development in the Yonge/Steeles area.

[para3] The Defendants, Louis and Gianna Aldrovandi are in what is frequently referred to as their "golden years". He is 70, she is 63 and they have been married 40 years. Mr. Aldrovandi has a technical school education and a background in heavy construction equipment.

[para4] They have resided in the same house in Scarborough since 1969. In 1986 a daughter died. Mr. Aldrovandi's work takes him away from home frequently. The daughter had been a comfort to and company for Mrs. Aldrovandi. Following the child's death, Mrs. Aldrovandi began to feel uncomfortable and uneasy about staying alone in the house at night. Although the daughter's death had absolutely nothing to do with lack of security, the Aldrovandi's had a security system installed following the death of their daughter.

[para5] Against this background, Mr. and Mrs. Aldrovandi, on 15 May 1989, entered into an agreement of purchase and sale for the subject property with occupancy for 12 December 1991, some 2-1/2 years down the road. The price was \$458,300. [para6] By letter dated 5 November 1991, the Aldrovandis were advised that the unit would be ready for occupancy on time, i.e. 12 December 1991, and they were given all the necessary information to arrange a pre-occupancy inspection.

[para7] The response to that was a letter from the Plaintiff's solicitor, dated 21 November 1991, almost peremptory in tone, asking for a reduction in purchase price based on the decline in condominium prices. It worked. The vendors agreed to a reduction of \$83,300 (just over 18%).

[para8] The Defendants did not take occupancy on 12 December 1991. Instead their solicitor wrote a letter on that very day complaining of the lack of a security system and a number of complaints having to do with unfinished entrance, lack of carpet in the corridors, dirt and dust and continuing construction.

[para9] The vendor's solicitors responded four days later, making it crystal and unmistakably clear that in their view the complaints, even if valid, did not excuse the purchasers from their occupancy obligations. [para10] It is appropriate to emphasize that "occupancy" does not require the purchasers to move in. Rather, it involves essentially financial obligations.

[para11] The stern letter from the vendor's solicitors brought a response from the purchasers' solicitors dated 27 December 1991. The substance of the purchasers' complaints had shifted from the physical state of the building to an alleged representation, at the time the agreement of purchase and sale was entered into (May 1989), that approximately 70% of the units had already been sold. The purchasers complained that it would take another three months (say, March 1992) for even 30% occupancy to be obtained. They did not want to live in an incomplete and deserted building and asked for an extension of occupancy date for approximately three months.

[para12] By letter of 25 March 1992, the purchasers were directly advised by the vendor's solicitors that their failure to comply with the occupancy requirements had put them in breach and that the agreement was, therefore, terminated.

[para13] The purchasers' solicitors responded to that letter of 16 April 1992, alleging a representation given at the time of the agreement of purchase and sale that the purchasers would not have to take occupancy until the building was fully occupied.

[para14] The issues to be determined are as follows:

1. Was the unit, as of 12 December 1991 "substantially completed sufficient to permit occupancy"?
2. Was there a misrepresentation in May 1989 that the building was 70% sold?
3. Was there a representation in May 1989 that the Aldrovandis would not be required to take occupancy until the building was fully occupied?
4. Was there, at 12 December 1991, a lack of security sufficient to excuse the purchasers from their contractual obligation to occupy?

[para15] The unit was inspected on 6 December 1991 and a Township of Vaughan Provisional Occupancy Certificate was issued that same day. Mr. Doug Overholt, the Senior Building Inspector for the Township, testified that a Provisional Occupancy Certificate permits occupancy. The inspection is concerned with essential services and safety but not with aesthetics and not with a security system which has nothing to do with the building code.

[para16] I am satisfied that the unit satisfied the Township's requirements for occupancy and also the contractual requirement that it be "substantially completed sufficient to permit occupancy".

[para17] Mrs. Sylvia Gold was the real estate agent who dealt with the Aldrovandis. She is no longer connected with the vendor. She had no present memory of her dealings with the Aldrovandis, which is not at all surprising, considering the number of purchasers she must have dealt with both before and after May 1989. There were 2 buildings connected with this project. "Phase I" fronting on Yonge Street, was open for sale in 1987 or 1988. "Phase II" (the subject phase) fronting on Clarke Avenue was

open for sale in 1989. By May 1989 only 8-10 contracts had been signed according to Mrs. Gold. She says that she never told the Aldrovandis or anyone else in May 1989 that Phase II was then over 70% sold. She said she may have made such a remark about Phase I which was, at that time, about 70% sold.

[para18] Mrs. Gold is equally firm in her testimony that she never told the Aldrovandis that they did not have to comply with the occupancy terms of the agreement until a certain level of occupancy had been attained. She conceded that security was generally an important consideration and often discussed with prospective purchasers. There was to be a "security pad" in each unit, card readers for the garage and an "enter phone" system in the lobby.

[para19] At trial Mrs. Aldrovandi said it was Mrs. Gold who raised the issue of security. Mrs. Aldrovandi could not recall any of the details of what was discussed.

[para20] As at 29 November 1991, the vendor's Site Superintendent had certified that the security system was 90% complete. The president of the installer ("S.I.S.") testified that the remaining 10% related to some security cameras and equipment which related only to some penthouse suites and had nothing to do with general security. The general manager of the security guard company ("Probe") testified that 14 hour a day security was scheduled up to 14 December 1991 and thereafter 24 hour per day.

[para21] Mrs. Raisa Galperin and her husband had an occupancy date of 13 December 1991. They moved in on 7 January 1992. Mrs. Galperin was in the building practically every day between those two dates, keeping an eye on upgrading being done in her unit. She says that glass and marble were installed in the lobby and it was so beautiful she invited friends in just to see it. She testified that there were security guards in place and that her security card worked perfectly. She said there were lots of workmen about but also lots of superintendents. She felt quite safe.

[para22] Elio Gigone is a semi-retired contractor and an acquaintance of the purchasers. He accompanied them on the pre-occupancy inspection. He described a plywood and tarpaulin tunnel in place. He said that he was not interested in looking at other than the unit itself.

[para23] Mrs. Aldrovandi described the building as a "construction site". I should emphasize that there were no significant complaints about the unit itself. She had no memory of any conversation where anyone told her she would not have to occupy until a certain level of occupancy was reached.

[para24] Mr. Aldrovandi, in his evidence, admitted that no one told him that he did not have to move in until the building was full.

[para25] I am satisfied that the purchasers had second thoughts about making the move as occupancy date drew near and wanted either to avoid the transaction altogether or at least postpone it as long as possible. There is no question that construction was still ongoing at their occupancy date, but, nevertheless, the unit was "substantially completed sufficient to permit occupancy". The ongoing work in the common areas may have left something to be desired aesthetically, but it did not prevent access to the unit.

[para26] The Plaintiffs claim, therefore, succeeds and the counterclaim fails.

Damages:

[para27] In calculating the damages, I think it appropriate to use the original sale price (\$458,300). The reduced price offered without quarrel by the vendors (\$375,000) was conditional on the purchasers' completing occupancy closing by the scheduled date of 12 December 1991. They did not, and I am of the view that the reduced price vanished for all purposes.

[para28] The unit was re-sold on 30 November 1992 for \$263,000. I am satisfied that the vendors exercised reasonable efforts to mitigate damages and that the resale price was reasonable.

[para29] I agree with the submissions of counsel for the Defendants that the claim of the Plaintiff for both prejudgment interest on the principle loss on resale and loss of use of money on a proposed "vendor take-back" mortgage represents "double dipping".

[para30] I assess the Plaintiff's damages to 4 November 1996 at \$248,195.15 all as set out in column A of figure 8 of the Defendants' written submissions, a copy of which is annexed to these reasons. [para31] Plaintiff is entitled to whatever order is necessary to release any security lodged to release the property from a certificate of pending litigation. If counsel are unable to agree on the updated damage figures to the date of these reasons, I may be spoken to.

[para32] Plaintiff is to have its costs after assessment. As judgment was reserved and the question of costs was not addressed, I may be spoken to as well.

HAWKINS J.

* * * * *

APPENDIX A

Skyrise Developments Ltd. v. Aldrovandi Court File No. 93-CQ-40341 DAMAGE CALCULATIONS

Original Price \$458,300.00 Discount 83,300.00

Deposit 40,000.00

New Price 375,000.00

Resale Price 263,000.00

Assessed Value 297,000.00

Extras 12,000.00

Occupancy A 1 B 2 C 3 D 4 Fees 5,294.49 \$5,294.49 \$5,294.49 \$5,294.49 \$5,294.49

Common Expenses 389.41 3,816.22 3,816.22 3,816.22 3,816.22

Taxes 262.79 2,575.34 2,575.34 2,575.34 2,575.34

PJI Rate 6.2%

Occupancy Date 12-Dec-91

Fees Date 04-Feb-92

Resale Date 30-Nov-92

Trial Date 04-Nov-96

Mid Points

Occupancy Date 08-Jan-92

Common Expenses 30-Jul-92

Principal Loss 167,300. 84,000. 121,300. 38,000.

PJI

to Nov 30/92 25,153.01 20,144.05 25,153.01 20,144.05

to Nov 4/96 40,779.95 20,475.29 29,567.29 9,262.63

Occup. Fees 1,584.63 1,584.63 1,584.63 1,584.63

Comm. Exp. 1,691.50 1,691.50 1,691.50 1,691.50

TOTAL 248,195.15 139,581.53 190,982.49 82,368.87

Figure 8

1 Based upon an initial price of \$458,300., without the abatement, and including the additional cost of the extra parking location and locker at \$12,000; with a resale at \$263,000.

2 Based upon the reduced price of \$375,000. and including the extra parking location and locker; with a resale at \$263,000.

3 Based upon the initial price of \$458,300., without the abatement; excluding the extra parking location and locker; with a resale at \$297,000.

4 Based upon the reduced price of \$375,000; without the extra parking location and locker; with a resale at \$297,000.

CBR# 160

Landmark of Thornhill Limited, plaintiff, and Bosko Milic, defendant

Court File No. 09428/90U

Ontario Court of Justice (General Division) McGarry J. Heard: January 18 and June 3, 1996. Judgment: September 10, 1996.

Counsel: Patricia Conway and Jennifer Roberts-Logan, for the plaintiff. Michael Czuma, for the defendant.

[para1] McGARRY J.:-- The plaintiff is claiming specific performance related to an agreement of purchase and sale date the 30th day of May, 1988 with respect to a condominium project developed by the plaintiff in Thornhill. The claim is based upon an agreement of purchase and sale dated May 30, 1988 (the "agreement") filed as Ex. 3, Tab 2. The defence acknowledges having signed the agreement which calls for the purchase of the unit described as unit 17, level 12, being suite 1218 in building B, Bayview Avenue and Green Lane. The purchase price was \$274,300. The closing was to take place as defined in the agreement being the 31st day of July, 1990 or a date when the condominium was substantially completed by the plaintiff. The defendant provided the plaintiff with deposits totalling \$54,860. It is further agreed that the closing date which was scheduled for October 25, 1990 was aborted and as a result, the plaintiff suffered a loss which is calculated at Ex. 3, Tab 14 as being \$69,591.14 as of the 8th day of March, 1995. Counsel for the defence did not raise the issue of mitigation nor the calculation of damages and thus, the plaintiffs claim is established as of that date.

[para2] The defence is to the effect that the defendant attended at the plaintiffs sales office and signed the agreement; however, it is alleged that the plaintiff failed to provide the defendant with a disclosure statement contained in Ex. 3, Tab 1. In addition, the defence claims that the unit when built was not of a quality as had been advertised and that a firehall had been built on adjoining lands. The defence alleges that these lands were described as being used for recreational purposes rather than for a firehall. It is claimed by the defendant that he relied upon these representations, when coupled with a lack of a disclosure statement, the defence claims there is a right of rescission of the contract.

[para3] The plaintiff called various witnesses who stated that it was in the normal course of their sales to provide purchasers with an agreement of purchase and sale and thereafter a disclosure statement as contained in the exhibit. Having listened to the plaintiff's representatives and the defendant, I am satisfied that in fact the defendant did receive the disclosure statement and thus, this right of rescission is not available to him. I feel that I am supported in this conclusion when I review the letter of the defendant's real estate solicitor dated October 11, 1990 at Ex. 3, Tab 8 wherein he advises the defendant as follows:

Further to your attendance in my office on October 11th, 1990 I confirm your instructions that we are to take no further action whatsoever with respect to the above noted transaction, and that you are fully aware of the consequences to you in the event you fail to complete the interim closing of this transaction. In this regard I enclose a copy of the Direction and Acknowledgment that we reviewed following our exhaustive discussion of this matter, and which you signed in my office.

[para4] Of course if you have any further questions relating to the aforementioned, I trust that you will not hesitate to contact me.

[para5] In addition, the defendant acknowledged executing the "Direction and Acknowledgment" which basically states that he has directed his solicitor to take no further action and that he understands the consequences of not closing the transactions including the fact that he would be sued for damages as a result of his failure to complete the interim closing.

[para6] The defence did not call the real estate solicitor and I draw an adverse finding as clearly he would have enlarged on his comments in his letter to the defendant.

[para7] The defendant gave evidence with respect to discussions between himself and representatives of the plaintiff company concerning the quality of the building and I can state that whenever there is a conflict between his evidence and that of the witnesses for the plaintiff, I accept their evidence which again is supported by photographs filed as various Exhibits being 7, 8, 9 and 10. This would indicate that the project when built was of high quality. The location of the firehall does not provide any legal grounds for rescission.

[para8] In giving his evidence, the defendant testified to the effect that he had been involved in a number of real estate transactions and in my view in light of his circumstances, it was very likely his intention to purchase the condominium and sell it in the near future for a profit as he had done previously. The timing of this particular transaction could not have been worse for the defendant as evidenced by the fact that the subsequent sale in May of 1992 resulted in a price of \$189,000.

[para9] In all of the circumstances, I find that the plaintiff acted appropriately and that the agreement of purchase and sale is binding upon both parties and consequently, the plaintiff is entitled to judgment in the sum of \$69,591.14 with interest running from the 8th day of March, 1995 in accordance with the Courts of Justice Act.

[para10] Subject to submissions in writing by counsel for the parties within the next 30 days, I award costs to the plaintiff on a party and party basis.

McGARRY J.

CBR# 349

Ruth Ma Wong, applicant (respondent), and Vogue Developments Inc., respondent (appellant)

Court File Nos. 874/90 and C8427

Ontario Court of Appeal Toronto, Ontario Robins, McKinlay and Labrosse JJ.A. June 10, 1994.

Counsel: John P. Conway, counsel for the respondent (appellant). David Brown, counsel for the applicant (respondent).

The judgment of the Court was delivered by

[para1] ROBINS J.A. (endorsement):-- Under the terms of the agreements of purchase and sale in issue, the purchaser (respondent) was obligated to assume a first mortgage by way of payment for the balance of the purchase price. The vendor was accordingly entitled to receive a monthly occupancy fee which included the mortgage component provided for in s. 5(6)(1) of the Condominium Act. Article 5.01 of the agreement provided for an "adjustment" to cover any costs the vendor might sustain "in connection with the discharge and discontinuance" of the first mortgage arranged by the vendor (appellant) should the purchaser request that the transaction be completed "without the assumption of a first mortgage" and discharge of the first mortgage applicable to the purchaser's units could not be obtained until the final closings after the project had been registered. Throughout the period of interim occupancy the purchaser remained obliged to assume the mortgages contemplated by the agreements. The vendor's receipt of the mortgage component of the occupancy fee cannot be considered in violation of the s. 5(6)(1). Until closing, the agreement provides for the financing of the transaction, in part, by way of the first mortgage. Article 5.01 does not amend the payment provisions. It does no more than require the purchaser to pay the vendor's costs in, procuring the discharge of the mortgage on the purchaser's units. It is to be borne in mind that the purchaser has had the benefit of occupancy during the interim period. The statements of adjustment anticipates the assumption of first mortgages also. To conclude that this component of the occupancy fee should be recovered by the purchaser in the circumstances of this case and in, the light of these contract provisions is to produce a patently unfair and unanticipated result.

[para2] Accordingly, the appeal will be allowed, the order of O'Connell J. will be set aside and in place thereof an order will issue dismissing the respondent's application and directing that, that Bratty and partners pay the monies held in trust pursuant to the order of Rosenberg J., plus accrued interest to the appellant.

[para3] The appellant is entitled to the costs of the fixed at \$3500.00 and the costs in the court below fixed at \$1000.00.

ROBINS J.A.

CBR# 332

Townsgate 1 Limited, Plaintiff, and Brian Klein, Defendant

Action No. 92-CQ-29472

Ontario Court of Justice - General Division Toronto, Ontario Davidson J. November 8, 1994.

J.W. Kramer, for the Plaintiff. L.M. Shelson, for the Defendant.

[para1] DAVIDSON J.:-- This action involves the interpretation of certain sections of an Agreement of Purchase and Sale of a condominium unit wherein the plaintiff was vendor and the defendant was purchaser.

[para2] The contract was entered into by the vendor's acceptance of the purchaser's offer dated March 6, 1989. At that time no construction had commenced.

[para3] The closing date by paragraph 1(b) means "the 14th day of May, 1991 or as advanced or extended by paragraphs 12 and 13(d)."

[para4] Paragraph 12 is not relevant in the facts of this case. The paragraphs of the Agreement of Purchase and Sale which require interpretation are as follows -

"13. If the unit is substantially completed, sufficient to permit occupancy on closing, and the purchaser has been approved by the mortgagee, but the declaration and description have not been registered, then the purchaser shall occupy the unit on that date ("the occupancy date") on the following terms and conditions:

(d) The closing date shall be extended to a date twenty (20) days after notice in writing is given by the vendor's solicitors to the purchaser or his solicitor that the declaration and description have been registered. If the purchaser fails to close the transaction as aforesaid, through no fault of the vendor, the purchaser shall be in default hereunder, and shall be required to deliver vacant possession of the unit. The vendor shall in that event be entitled to retain all monies paid hereunder for damages and expenses and unpaid occupation charges. The purchaser shall be responsible for the damages and expenses and the cost of redecorating as may be determined by the vendor at its sole discretion as a result of the possession herein;

21. If the completion of the unit or the common elements is delayed by reasons of strikes, lock-outs, fire, lightening, tempest, riot, war and unusual delay by common carriers or unavoidable casualties or by any other cause of any kind whatsoever whether or not beyond the control of the vendor, the vendor shall be permitted extensions of time from time to time for completion and the closing date shall be extended accordingly. If the vendor is unable to complete the unit and close this transaction within such extended time or times for closing, all monies paid hereunder by the purchaser other than any occupancy fees, shall be returned to him and this agreement shall be null and void. If the unit is substantially completed by the vendor on or before closing or any extension thereof as aforesaid, this transactions shall be completed on such date notwithstanding that the vendor has not fully completed the unit or the common elements and the vendor shall complete such outstanding work within a reasonable time after closing, having regard to weather conditions and the availability of labour and materials. In any event the purchaser acknowledges that the failure to complete the common elements on or before closing shall not be deemed to be a failure to complete the unit."

[para5] By letter dated November 13, 1990 the vendor advised the purchaser inter alia -

"However various circumstances completely beyond our control, such as the recent electricians' strike, and construction delays, have forced us to extend the closing date of your condominium to September 5, 1991."

[para6] There is no issue that this was a legitimate extension of the closing date pursuant to Section 21 of the agreement aforesaid.

[para7] By letter dated July 15, 1991 the vendor wrote to the defendant advising inter alia -

"Further to our letter of November 13, 1990 the Interim Occupancy Closing Date for your unit is September 5, 1991 (the closing date). Although the condominium has not been registered the unit is substantially completed sufficient to permit occupancy as set out in paragraph 13 of the Agreement of Purchase and Sale .. To arrange a time and date to move into your unit please contact Eileen Buchanan at 787-0256 as soon as possible."

[para8] By letter dated August 27, 1991 the plaintiff wrote to the defendant advising inter alia -

"Due to construction delays beyond our control we are required to extend the closing date for your condominium unit to October 8, 1991 in accordance with the terms of your Agreement of Purchase and Sale...

Please contact Eileen Buchanan 787-0256 to arrange for a pre-delivery inspection in compliance with Ontario New Home Warranties Plan Act."

[para9] It is the position of the plaintiff that this was a proper notice of extension under paragraph 21 of the agreement.

[para10] On September 12, 1991 the vendor wrote to the purchaser advising inter alia -

"This letter replaces the letter of August 26, 1991

Due to further construction delays beyond our control, we are required to further extend the closing date for your condominium unit to October 31, 1991 in accordance with the terms of your Agreement of Purchase and Sale ...

Please contract Eileen Buchanan at 787-0256 to arrange for a pre-delivery inspection in compliance with Ontario New Home Warranties Plan Act."

[para11] It is the position of the plaintiff that this notice was a proper extension pursuant to paragraph 21 of the agreement.

[para12] In fact the transaction did not close on October 31, 1991 and it is acknowledged by the defendant through counsel that if the court determines that that was a legitimate closing date binding upon the purchaser then it is conceded that the plaintiff/vendor was willing and able to close the transaction as at that date.

[para13] By letter dated October 25, 1991 the solicitors for the vendor advised the purchaser that the condominium project was registered September 11, 1991 and it gave notice that the final closing of the subject transaction would take place November 18, 1991 and confirmed the interim occupancy closing would occur as originally scheduled (October 31, 1991).

[para14] The purchase price in the Klein transaction was \$321,000. In fact upon the purchaser's failure to close the transaction the vendor relisted the property for sale and ultimately obtained a purchaser dated April 26, 1993 closing June 1, 1993 at a price of \$182,000.

[para15] The plaintiff's claim is for the price difference after crediting the deposit of \$40,000 plus occupancy costs, plus interest.

[para16] The above recited paragraphs in the Agreement of Purchase and Sale are exactly the same as those considered by the Ontario Court of Appeal in *Scanlon v. Castlepoint Development Corporation et al.* (1993), 11 O.R. (3d) p. 744. It was held therein that paragraphs 13(d) and 22 (21 in the case at Bar) served different purposes, they were not contradictory and they did not create any ambiguity such a to invoke the doctrine of *contra proferentum*.

[para17] In *Scanlon*, the vendor notified the purchaser that the closing date for his unit would be September 14, 1992 rather than November 4, 1991. The purchaser responded with an application seeking a declaration that the vendor's unilateral extension of the closing date was an anticipatory breach entitling the purchaser to end the agreement. The purchaser's successful application was reversed on appeal.

[para18] As recited in the facts of this case, the purchaser did not take exception to the first extension but contends that it is not open to the vendor to extend the interim occupancy date as it purported to do in the letter of August 27, 1991 and the "replacement letter" of September 12, 1991. In my opinion on the basis that paragraph 13(d) and 21 serve different purposes, I am of the view that the vendor is entitled to rely on paragraph 21 in the circumstances in the case at Bar. It is to be noted in that paragraph "extensions" is plural. It is followed by "and the closing date shall be extended accordingly". On the evidence of Mr. Zagdanski, an Officer and Director and principal participant in the development on behalf of the plaintiff, the plaintiff wa faced with numerous and ongoing construction delays.

[para19] Leading up to the first extension of the closing date to September 5, 1991 he testified as to an electricians' strike coupled with very wet Spring conditions giving rise to water problems and hampering foundation construction. He testified that all of the builders in projects underway were anxious to have all the trades and suppliers of material giving them first priority. Everyone was in a backlog position and in August of 1990 there was a precast concrete supply deficiency causing a further delay.

[para20] He testified that the necessity of extending the closing date to October 8, 1991 by letter of August 27, 1991 was by reason of a strike of trim carpenters lasting up to two weeks and being compounded again by the backlog problem in the construction industry.

[para21] Mr. Zagdanski's evidence as to the reason for extending the closing to October 31, 1991 by the replacement letter of September 12, 1991 was partly by reason of the trim carpenters' strike but additionally because the purchaser's suite was one in a line with a construction hoist o elevator. The materials would be sent up on the hoist and all of the suites in line with the hoist had to wait for its dismantling before the entirety of completion of the suite could be had. This latter work included installation of windows and dry wall and thereafter sanding, painting, flooring and trim work.

[para22] There was not any contradiction of the evidence of Mr. Zagdanski and my assessment of his evidence was that it was reliable and I accept it. It may well be that the various times set for completion and interim occupancy date were perhaps optimistic but I accept that it was done bona fide and in a timely way to keep the purchaser advised. Indeed, I cannot conceive of any reason why the vendor would not proceed as expeditiously as possible to put itself in a position to close the transaction.

[para23] I note as well that on all the correspondence going to the purchaser he was asked to contact the vendor's representative and given a telephone number if he had any questions and to arrange moving times and to attend for a pre-delivery(?) inspection. The purchaser at no time responded to any of these notices. [para24] In fact, Mr. Klein testified that he had decided between May and July of 1991 that he was not going to close the transaction but at no time did he so advise the vendor. At no time did he make any arrangements for funding, moving or obtaining the services of a lawyer.

[para25] He acknowledges that by the time August 27, 1991 letter had been received by him and he having decided not to close, that thereafter nothing done by the vendor caused any prejudice to him.

[para26] On the evidence I find as a fact that the delays encountered by the plaintiff requiring it to extend the date for closing and the interim occupancy date clearly came within paragraph 21 of the agreement and were beyond the control of the vendor.

[para27] In the result I find that although the facts in the case at Bar are modestly different from those in *Scanlon*, the principles in *Scanlon* apply, notwithstanding and the plaintiff was not in breach of the contract of purchase and sale and is entitled to judgment. [para28] On the question of damages, it is agreed by counsel that the price difference on the resale after adjustments for deposits received and G.S.T. is \$106,803.98 and that the total occupancy costs to which the plaintiff would be entitled, amounts to \$10,756.37.

[para29] As to loss of interest the plaintiff has calculated it on the basis of the prime rate plus 1/2% which was the amount it was obliged to pay to its bank. This calculation of interest is \$44,407.49.

[para30] In regard to interest, the plaintiff's representative having testified as to the rate which I find to be reasonable in the circumstances, justifies the fixing of the amount for interest as calculated by the plaintiff.

[para31] In the final analysis therefore the plaintiff will have judgment for \$161,967.84.

[para32] Counsel may arrange an appointment to speak to prejudgment interest and costs if they are unable to agree to same.
[para33] I am advised that the amount of the deposit is held in the trust account of Goodman and Carr and there will be an order releasing the deposit and any accrued interest to the plaintiff.

DAVIDSON J.

CBR# 124

Shawna Granovsky, in trust (Plaintiff (Respondent)), and Richmond Square Development Corporation and Trenlon Corporation (Defendants (Appellants)) And Between John Patrick Ormond and Liane Louise Ormond (Plaintiffs (Respondents)), and Richmond Square Development Corporation and Trenlon Corporation (Defendants (Appellants))

Action Nos. C9292 and C9259

Ontario Court of Appeal Toronto, Ontario Houlden, Grange and McKinlay JJ.A. Heard: February 23, 1993. Judgment: March 16, 1993.

P. Daryl Wilson, for the Appellants. Nick W. Fursman, for the Respondent.

The following judgment was delivered by THE COURT (orally, endorsement):-- The appellant in both of these cases entered into an agreement to sell (to each of the respondents) individual condominium units in a residential condominium highrise built in London, Ontario. Each respondent took possession on the day agreed in the respective Agreement of Purchase and Sale. The vendor purported to terminate the agreement for nonpayment of occupancy fees, which were defined in the agreement as taxes, common element expenses, and interest payments on mortgages in favour of the vendor, representing the unpaid portion of the purchase price.

In response, the purchasers commenced actions for specific performance, each action resulting in summary judgment in favour of the plaintiff. On a reference to determine the amount payable on closing, the Master stated in oral reasons that the plaintiffs were entitled to a credit for amounts paid on account of the interest portion of the occupancy cost from the time of taking possession, based on the decision of the Ontario High Court of Justice in *Re Albrecht, et al. v. Opemoco Inc. et al.* (1989) 70 O.R. (2d), 151. This court in *Re Albrecht, et al. v. Opemoco Inc. et al.* (1991) 5 O.R. (3d) reversed that decision, and held that the interest component was properly recoverable by vendors of condominium units.

All parties to these appeals agree that, in light of this court's decision in *Albrecht*, the portion of the Master's decision dealing with interest, and his report incorporating that decision, were incorrect. The Master's report was confirmed by Thompson L.J.S.C. We have been informed that at least one of the respondents has not only failed to pay the interest component from the time of the confirmation of the report, but has also failed to pay taxes and common element expenses. Under the circumstances, we are of the view that these cases must be referred back to a judge of the General Division to determine, on the basis of all the facts, the appropriate date of closing and the appropriate adjustments on closing as of that date.

One-half of the taxed costs of each appeal will be to the appellant; the costs of the reference will be in the discretion of the judge hearing the reference.

HOULDEN J.A. GRANGE J.A. MCKINLAY J.A.

CBR# 151

Herb Kratz, Plaintiff, and Parkside Hill Limited, Defendant

Action No. 91-CQ-12732

Ontario Court of Justice - General Division Toronto Weekly Court J. Macdonald J. Heard: October 1, 1992 Judgment: November 5, 1992

Charles Wagman, for the Applicant/Plaintiff (Defendant by Counterclaim). Stephen Schwartz, for the Respondent/Defendant (Plaintiff by Counterclaim).

J. MACDONALD J. (orally):-- Herb Kratz purchased a residential condominium unit from Parkside Hill Limited. When the agreement of purchase and sale was signed, construction had not yet started. The agreement contemplated a two-stage closing. The first, or "occupancy closing" was to take place on substantial completion. The second, known commonly as the "title closing" and described in the agreement as the "unit transfer date" was to take place either on the occupancy closing or later, if necessary. It is common ground that the occupancy closing took place on February 25, 1991, and that the plaintiff went into occupation.

The defendant registered the condominium documents on November 21, 1991 and was in a position for title closing on December 17, 1991. The dispute herein is whether the agreement required that title closing take place on or before October 31, 1991. Matters came to a head when the defendant wrote to the plaintiff on October 23, 1991 and stated that it anticipated registration of documents sometime between November 8th and 11th, 1991 and a title closing on December 11, 1991. The plaintiff replied by means of a letter from his counsel dated November 7, 1991 which stated that the agreement required that title closing take place on or before November 1, 1991, and that the plaintiff was entitled to avoid the transaction.

Litigation followed and each party now seeks summary judgment pursuant to Rule 20 enforcing the agreement by awarding damages allegedly flowing from breach of it. In addition, the defendant counter claims as a result of the plaintiff's tenant being in occupation of the unit on and after November 1, 1991.

For purposes of these motions, the parties agree as follows:

- a) the agreement of purchase and sale was prepared by the defendant's solicitors in a standard form which was then proffered to the plaintiff;
- b) the intention of the parties is to be determined entirely from the written agreement;
- c) what the parties seek in reality is an interpretation of the agreement such as might take place pursuant to Rule 14.05(d);
- d) the issue of the plaintiff's occupation of the unit on and after November 1, 1991 is to be left aside, pending interpretation of the agreement.

The law respecting interpretation of such an agreement is found in the reasons of Estey J., for the majority of the Supreme Court of Canada, in *Consolidated-Bathurst Export Limited v. Mutual Boiler and Machinery Insurance Company*, [1980] 1 S.C.R. 888. The interpretation takes place in two steps. The first step is giving effect to the intention of the parties, as determined from the words they have used. As Estey J. said at page 901:

... the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result.

If, after application of these rules, the contractual wording still shrouds in ambiguity the agreement achieved by the parties, the second step is the application of the *contra proferentum* doctrine. As described by Estey J. at p. 899 S.C.R., the doctrine establishes:

... that where an ambiguity is found to exist in the terminology employed in the contract, such terminology shall be construed against the insurance carrier as being the author, or at least the party in control of the contents of the contract.

In *Indemnity Insurance Company of North America v. Excel Cleaning Service*, [1954] S.C.R. 169 at pp. 179-180, the Supreme Court described the rationale for the doctrine, in a passage also quoted by Estey J. at p. 900 S.C.R.:

The basis for such being that the insurer, by such clauses, seeks to impose exceptions and limitations to the coverage he has already described and, therefore, should use language that clearly expresses the extent and scope of these exceptions and limitations and, in so far as he fails to do so, the language of the coverage should obtain

In a passage also quoted by Estey J. at p. 901 S.C.R., Lindley L.J. stated in *Cornish v. Accident Insurance Company* (1889), 23 Q.B. 453 (C.A.) at 456, that the *contra proferentum* doctrine applies in the following circumstances:

In a case on the line, in a case of real doubt, the policy ought to be construed most strongly against the insurers; they frame the policy and insert the exceptions. But this principle ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt or magnifying an ambiguity, when the circumstances of the case raise no real difficulty.

The reasons quoted above refer to insurance interpretations. However, as was said by Meredith J.A. in *Pense v. Northern Life Assurance Co.* (1907), 15 O.L.R. 131 (C.A.) at 137:

There is no just reason for applying any different rule of construction to a contract of insurance from that of a contract of any other kind ...

The relevant provisions of the agreement are as follows:

2. (a) The Purchaser shall occupy the unit on the first day of May, 1990, or such extended or accelerated date pursuant to the terms hereof that the Unit is substantially completed by the Vendor for occupancy by the purchaser (the "Closing Date");

(b) The transfer of title to the Unit shall be completed on the later of the Closing Date or a date established by the Vendor in accordance with paragraph 21 (the "Unit Transfer Date").

3. The meaning of words and phrases used in this Agreement, its Schedules and Appendices shall have the meaning ascribed to them in the Condominium Act, R.S.O. 1980, c. 84 and any amendments thereto (the "Act") unless otherwise provided for as follows:

...

(g) "Unit Transfer Date" shall mean the day a Transfer of the Unit for registration is delivered to the Purchaser or the Purchaser's Solicitors.

13. The transaction of purchase and sale shall be completed on the Closing Date or an extension thereof as may be permitted under this Agreement, at which time vacant possession of the Unit will be given to the Purchaser. The Vendor shall be entitled upon giving at least 45 days written notice to the Purchaser or his Solicitor, to accelerate the Closing Date provided the Unit is substantially complete and fit for occupancy on such earlier date.

Upon registration of the Condominium, the Vendor's Solicitor shall designate a date not less than 21 days nor more than 60 days after registration of the Condominium Documents as the Unit Transfer Date by delivery of written notice of such date to the Purchaser or his solicitor.

21. In the event substantial completion of the Unit shall be delayed for any reason other than the wilful neglect of the Vendor, the Vendor shall be permitted reasonable extensions of time (not exceeding eighteen (18) months in the aggregate) to substantially complete the Unit and the Closing Date shall be extended accordingly. If the Vendor shall be unable to complete the Unit for occupancy within such reasonable extensions of time, all moneys to the extent provided for in paragraph 21, shall be returned to the Purchaser and this Agreement shall be null and void and the Vendor shall not be liable to the Purchaser for damages. If the Unit is substantially completed for occupancy by the closing Date or any acceleration/extension thereof this transaction shall be completed on such date notwithstanding that the Vendor has not fully completed the Unit or the common elements and the Vendor shall complete such outstanding work required by this Agreement within a reasonable time after the Closing Date, having regard to weather conditions and the availability of labour and materials. The Unit shall be deemed to be substantially completed when the interior work has been finished to permit occupancy. The Purchase acknowledges that failure to complete the common elements on or before the Closing Date shall not be deemed to be a failure to complete the Unit.

24. (paraphrased) If the Unit is substantially complete and fit for occupancy on the Closing Date, but it is not possible to make that date the Unit Transfer Date, the plaintiff's occupancy shall be pursuant to an Occupancy Licence in the form of Schedule "E" to the Agreement.

38. (paraphrased) Each of the provisions of this agreement is independent and severable, and the unenforceability of any provision does not impair the rest of the agreement.

Schedule E

E.1. The transfer of title to the Unit shall take place on the Unit Transfer Date upon which date, unless otherwise expressly provided for hereunder, the terms of this licence shall be determined.

E.10. The Vendor covenants to proceed with all due diligence and dispatch to register the Condominium Documents. If the vendor for any reason whatsoever is unable to register the Condominium Documents and therefore is unable to deliver a registrable transfer to the Purchaser within eighteen (18) months after the Closing Date, the Purchaser or Vendor shall have the right after such eighteen (18) month period to declare, on giving sixty (60) days written notice to the other, that this Occupancy Licence and the Agreement, notwithstanding any intervening act or negotiations, will be at an end. The Purchaser shall give up vacant possession and pay the Occupancy Licence Fee to such date, after which the agreement and Occupancy Licence shall be terminated and all moneys paid to the Vendor on account of the Purchase Price shall be returned to the Purchase subject to any repair and redecorating expenses of the Vendor necessary to restore the Unit to its original state of occupancy, reasonable wear and tear excepted. The Purchaser agrees to provide the Vendor with a release of this Agreement in the Vendor's standard form.

It will be noted that paragraph 2(a) of the agreement says that the occupancy closing shall be on May 1, 1990 or a later date "that the unit is substantially completed by the vendor for occupancy by the purchaser", and that the date of the occupancy closing is defined as the "closing date". Paragraph 2(b) says that the title closing shall be on the later of the occupancy closing date or a "date established by the vendor in accordance with paragraph 21". The substance of the dispute arises at this juncture. The plaintiff states that the title closing date may only be postponed to the extent permitted by paragraph 21, namely up to 18 months "in the aggregate". While paragraph 21 does not mention the date from which the said 18 month period is to be measured, it is the plaintiff's position that the phrase "18 months in the aggregate" must refer to any delay by the vendor in establishing the dates of either the occupancy closing or the title closing and as a result, the period of aggregate permissible delay runs from May 1, 1990. Consequently, the plaintiff contends that the defendant was obliged to complete the title closing on or before October 31, 1991. Nothing turns on the fact that a letter from the plaintiff's lawyer dated November 7, 1991 mentioned that closing was required on or before November 1, 1991.

The defendant's position is that the terms of paragraph 21 address only occupancy closing issues and as a result, the reference in paragraph 2(b) to paragraph 21 is mere surplusage respecting the timing of the title closing, and should not be given effect. The defendant contends that paragraph E.10 is directed to the time period in which the defendant may complete the title closing, and it may take place up to 18 months after the occupancy closing, which may be up to 18 months after May 1, 1990 pursuant to paragraph 21. Consequently, the defendant says that it has up to May 1, 1993 to convey title.

My conclusions are as follows. Paragraph 2(b) establishes that the title closing date shall be either the occupancy closing date or such later date as established by the defendant "in accordance with paragraph 21". It is true that paragraph 21 establishes various provisions which apply to occupancy closing. However, nothing in paragraph 21 prevents any of those provisions from also being used to define or limit the defendant's discretion in determining when title closing will take place. The parties have agreed in paragraph 2(b) to apply the timing provision in paragraph 21 to the title closing date as well and as a result, the use of the word "aggregate" becomes particularly significant. When imported into paragraph 2(b), it connotes collecting into one period the sum total of all delay by the vendor in setting the date of either occupancy closing or title closing.

The dominant purpose of this agreement was to convey title to the plaintiff. The commercial context was that the defendant was building the unit for the plaintiff and of the two, only the defendant had any control over construction progress and closing dates. In my opinion, the parties reflected both the purpose of this transaction and the circumstances in which it was taking place by establishing a finite and determinable limit upon the defendant's ability to postpone the passing of title. There is only one date specified in the context of closing dates, and that is May 1, 1990. It is the only date from which a finite and determinable limit upon the defendant's discretion may be measured. It was the intention of the parties that the aggregate period of permissible delay was 18 months measured from this date.

To be understood correctly, paragraph E.10 must be read in context. Paragraph 24 gives rise to Schedule E. It establishes an occupancy license if the title closing does not take place at the same time as the occupancy closing, and provides that such an occupancy license is governed by the provisions of Schedule E, including paragraph E.10. Part of paragraph E.10 addresses occupancy issues but it goes on to address title closing issues as well. If the defendant is unable to deliver a registrable transfer to the plaintiff within eighteen months after the "closing date" (which is defined by paragraph 2(a) as the occupancy closing date, and which may be later than May 1, 1990) then a mechanism is established to end both the occupancy license and the agreement. To the extent that paragraph E.10 addresses the ending of an occupancy license, it is compatible with the rest of the agreement. However, in addressing termination of the agreement itself if the defendant is "unable to deliver a registrable transfer" within eighteen months of the occupancy closing, it appears to state that it is permissible for the defendant to delay the title closing for eighteen months after the occupancy closing. This is clearly inconsistent with the provisions of paragraphs 2 and 21. It is also inconsistent with paragraph 24, which describes Schedule E as containing the terms of the occupancy license, and nothing more. To the extent that ambiguity arises from this apparent dilution of the defendant's obligation to convey title within 18 months of May 1, 1990, these words must be interpreted against the interests of the defendant and in a manner favourable to the plaintiff, pursuant to the "contra proferentum" doctrine. I conclude therefore that the defendant was obliged to complete the title closing on or before October 31, 1991.

There is no inconsistency between the sixty day notice period for termination of the occupancy license in paragraph E.10 and the termination of the agreement of purchase and sale on another date. The agreement distinguishes between occupancy rights and ownership interests and in addressing occupancy rights, paragraph E.10 provides the time necessary for a person in occupation to re-establish a residence.

The plaintiff therefore succeeds on his summary judgment motion and I grant a declaration that the agreement of purchase and sale between the parties dated October 25, 1988 ended on November 10, 1991, being the date upon which the defendant is deemed by paragraph 40 to have received the letter from the plaintiff's lawyer dated November 7, 1991. I order the defendant to return the plaintiff's deposit, which is agreed to be in the amount of \$42,300 and to pay prejudgment interest on that amount at 8.8% per annum from November 10, 1991. I also dismiss the counterclaim except as it relates to the obligations of the plaintiff, defendant by counterclaim to pay for occupancy of the premises on and after November 1, 1991, given that payments pursuant to the occupancy license ended as of October 31, 1991.

The summary judgment motion brought on behalf of the defendant, plaintiff by counterclaim is dismissed. On consent, the dismissal is without costs and without prejudice to its right to bring a further summary judgment motion respecting the obligations of the plaintiff, defendant by counterclaim to pay for occupancy of the premises, as mentioned above.

The plaintiff shall have his costs, of both the action and counterclaim, to the extent it has been dismissed, fixed in the amount of \$3,500.

J. MACDONALD J.

CBR# 326

Symphony Place Corporation, Landlord, and Pier One Restaurants Limited, Tenant

Action No. L33201/92

Ontario Court of Justice - General Division Non-Jury Sittings - Toronto, Ontario Sheard J. April 22, 1992

D.E. Klukach, for the Applicant/Landlord. S.H. Starkman, for the Respondent/Tenant.

SHEARD J.:-- This is an application for possession of a condominium apartment unit, brought by the landlord/vendor, Symphony Place Corporation, against Pier One Restaurants Limited, described in the landlord and tenant application as the tenant. The matter involves a certain amount of complexity and what could be described as interesting questions. These questions are in a subject in which there is, I am told, no helpful authority, which is somewhat surprising to me, but I am certainly not aware of any useful authority that can come to assist me in this matter. It might be helpful for me to give a brief summary of what appear to me to be the significant facts.

Under the date of August 26, 1987, an agreement in writing was made between Pier One Restaurants Limited, as purchaser, and Symphony Place Corporation, as vendor, to purchase suite number 2401 in the condominium apartment building, price of \$330,000. A deposit of \$49,500 was paid at the time of the making of the contract, and the cash balance (the sum of one dollar) was to be paid on closing, subject to adjustments, with the rest of the purchase price being made up of a first mortgage in the principal sum of \$280,499.

The controlling officer and shareholder of Pier One Restaurants Limited is Mr. Carl Hoffman. He and his wife have been living in the apartment unit from the date of approximately April of 1990. There has been no issue made of the fact that some of these proceedings refer to Pier One Restaurants Limited, and in other proceedings Carl Hoffman is the party.

The occupancy date, at which point, as mentioned, Mr. and Mrs. Hoffman took possession, was April 21, 1990. Thereafter, until the closing date, which was February 21st, 1991, an occupancy fee of \$3,653.85 per month has been payable, at the request of the vendor, Symphony Place Corporation. In fact, a dispute has arisen and in consequence of that the occupancy fee has not been paid since about February of 1991. In that month the last payment was made by Mr. Hoffman.

On April the 29th, 1991, an action was brought in this court in which the plaintiff is Carl Hoffman and the defendants are Symphony Place Corporation and the Rose Corporation. The latter entity is described in the action as the developer, promoter and author of the sales literature related to the subject property. In that action relief of various kinds is sought, but in particular the plaintiff claims specific performance of the agreement of purchase and sale subject to an abatement of the purchase price, and various other abatements, relating to the allegation that the size of the apartment unit is approximately 25 percent less than the plaintiff alleges it should have been when he entered into the contract; that is to say that the area of the unit is, in fact, about 920 square feet when the plaintiff alleges it should have been 1220 square feet. That is a deficiency of approximately one-quarter. In addition, other allegations or claims are made by the plaintiff including that the completion of the unit, which the plaintiff describes as a "luxury unit," does not meet the standards of a luxury unit and, in addition, that the possession of the unit is seriously interfered with by the fact that access to outside platforms or balconies required to be used by window cleaners must be made through the subject unit which gives rise to interference with his quiet enjoyment of the apartment. There are other allegations, but it is not necessary for me to mention anything further in the context of what I am dealing with at the moment.

As it happens, I am informed that the defendants were noted in default in July of 1991. I am informed that there are some pending proceedings in which the defendant will seek to have the noting in default set aside and file a Statement of Defence and a Counterclaim. In the material that was put before me today in connection with the landlord and tenant application is a draft Statement of Defence and Counterclaim to the action in which Carl Hoffman is the plaintiff and Symphony Place Corporation et al. are the defendants.

At the outset today Mr. Starkman, who appears for Mr. Hoffman, raised two preliminary procedural objections. The first of these is that the notice served by the landlord was fatally deficient by reason of the fact that it did not comply with ss. 97(1)(d)(ii) of the Landlord and Tenant Act. That subsection reads as follows:

"A notice of termination of tenancy shall be in writing and shall inform the tenant that the tenant need not vacate the premises pursuant to the notice, but that the landlord may regain possession by application for a writ of possession to be obtained from the local registrar of the Ontario Court (General Division), which application the tenant is entitled to dispute."

The notice in this case was served on Mr. Hoffman on November 27, 1991, in Form 6, a printed form under the Landlord and Tenant Act. The form of notice was, in fact, a photocopy of the face page of Form 6, but by an apparent oversight the reverse side of the form was not photocopied, and, as a result, the reference on the face of the notice, "please refer to notes on back of this form," became meaningless because the back of the form was blank. Mr. Starkman's submission was that the requirements of the Act were stringent, and failure to comply with this mandatory provision in s. 97 meant that the Court lacked jurisdiction to entertain the application since it has not been properly brought before the Court.

In response to that submission, Miss Klukach made reference to the Ontario Court of Appeal in *Re Bhagwandin an Wright*, 65 O.R. (2d) 204. In the course of the judgment of Mr. Justice Lacourciere -- he who appears for the landlord in this application made reference to indeed the very section which was then numbered 99 instead of its present number of s. 97, although his reference was to another subsection, ss. 99(1)(d)(i) in particular -- but in the course of his reasons, Lacourciere J.A. referred to s. 27(d) of the Interpretation Act reading:

"where a form is prescribed, deviations therefrom not affecting the substance or calculated to mislead do not vitiate it."

In the particular facts of that case, the Court of Appeal per Lacourciere J.A. came to the conclusion that the deficiency in that case was not fatal to the proceedings. He said:

"In our view, the test for the sufficiency of the notice of termination is that particulars be given so that the tenant is not misled,"

and he quoted from a judgment of Chief Justice Laskin in *Atkinson v. Municipality of Metropolitan Toronto*, a judgment of the Supreme Court of Canada where Laskin C.J.C.,

"speaking for the majority of the court on the issue of the validity of a notice of termination, made it clear that validity should not rest on a narrow technicality, and that subtleties ought to be and are disregarded as out of place in the interpretation of validity of a notice. Although the court was dealing with a predecessor of the Act, we see no reason to depart from that recommendation."

Here I think it is manifest that there is no prejudice to the tenant ensuing from the fact that the notice did not contain the advice specified under s. 97. Considering that Mr. Hoffman has commenced proceedings, to which I have made reference, and is indeed still in possession some many months after the notice was served on him, I do not consider the fact that the notice failed to contain the information referred to in s. 97 renders the notice ineffectual, and on what appears to be the view of the Ontario Court of Appeal and the application of ss. 27(d) of the Interpretation Act, with respect, I reject the argument submitted by Mr. Starkman.

The second procedural objection raised by Mr. Starkman has to do with the grounds on which this application is founded. In the form of the notice, as is standard, twelve reasons are set out. Reason number twelve is the reason upon which this application is brought, that being:

"The tenancy arose by virtue of an agreement of purchase and sale of a proposed condominium unit and the agreement of purchase and sale has been terminated."

In the notice the following particulars are set out under Schedule "A":

"The landlord, as vendor, and the tenant, as purchaser, entered into a written Agreement of Purchase and Sale dated August 26, 1987 for the purchase of the subject property. The closing date for the purchase was fixed for February 20, 1991. The tenant failed, neglected or refused to complete the purchase of the transaction on that date. The landlord tendered the closing documentation on the tenant's solicitor on February 20, 1991. The landlord has commenced an action against the tenant for the tenant's breach of the Agreement of Purchase and Sale. The Agreement of Purchase and Sale has been terminated."

I have to ask you, by the way, when it says the landlord has commenced an action, has it?

MR. STARKMAN: No.

MS. KLUKACH: No, it is the tenant that commenced. The landlord had

THE COURT: Yes, all right.

MS. KLUKACH: It's a long story.

THE COURT: That's all right. I don't want to interrupt.

The reference to the landlord has commenced an action in that notice appears to have been in error. I will not expound on that now. As has been mentioned, the principal relief sought by Mr. Hoffman in the action in which he is plaintiff is specific performance of the Agreement of Purchase and Sale with an abatement, with indeed a substantial abatement.

The position of the landlord, not surprisingly, is that the Agreement of Purchase and Sale is terminated, has been terminated because the purchaser failed to close on the closing date of February 20th, 1991. This is indeed a major issue between the parties. Mr. Starkman has mentioned that in the draft Statement of Defence, among the various forms of relief sought by the landlord and indeed as item (a), in an alphabetical series of items of relief extending to alphabetical (i), in the counterclaim is specific performance of the Agreement of Purchase and Sale, and looking at that element in the counterclaim, and in the plaintiff's claim, on each side is a request to the Court for an order for specific performance of the Agreement of Purchase and Sale that was to have been closed on February the 20th, 1991. In the case of Mr. Hoffman, the specific performance that he is seeking is, of course, subject to substantial abatement, so it can hardly be said that the two principal parties to this litigation are ad idem as to the relief, even though nominally they appear to be seeking the same relief, although in the case of the landlord, the claim for specific performance in the counterclaim is one of a number of claims for relief.

It is submitted by Ms. Klukach that it is not necessary for me to enter into the hearing of evidence to determine whether, in fact, the Agreement of Purchase and Sale has been terminated and that it is sufficient that since there is no factual issue that the sale was not closed on the closing date that it is sufficient to proceed on the assertion by the landlord/vendor that the Agreement of Purchase and Sale, at least from its point of view, is terminated. Mr. Starkman submits, if I understand him, putting his submissions in a nutshell, that the matter of whether or not the Agreement of Purchase and Sale has been terminated must be decided but that this is not the appropriate forum in which that should be decided; that it should be left for decision in the litigation in which his client is the plaintiff.

The notice of application brought by the landlord as originally framed asks for payment of arrears of rent in the amount of \$10,697.04. On analysis, it appears that that figure was arrived at by taking common expenses for a period of twelve months, at \$472.08 a month, equalling \$5,664.96, realty taxes for twelve months, at \$340.66 a month, equalling \$4,087.92, and a reserve fund contribution of \$944.16. The reserve fund, as can be seen, is equal to two months common expenses. Arithmetically those figures add up to \$10,697.04. They would appear to be premised on a wrong conception of "rent owing" by Mr. Hoffman, and indeed, when I raised the subject on my return to court after perusing this material over the lunch hour, Ms. Klukach acknowledged that that was in error and provided me with a copy of a notice of motion bearing today's date and containing an affidavit made by another lawyer in her firm, sworn today, in which is requested leave to amend the claim for payment of arrears to the amount of \$40,192.35. That figure arithmetically is eleven times the monthly occupancy fee of \$3,653.85.

In the Agreement of Purchase and Sale there is a Schedule "D" which is captioned "Occupancy Licence." It reads in part as follows:

"1. (a) The Purchaser shall pay to the Vendor on the Possession Date an amount equal to the balance due on closing together with such adjustments as in the sole discretion of the Vendor are to be adjusted and collected on the Closing Date. (b) During the period from the Possession Date to the Closing Date, the Purchaser shall pay to the Vendor as a monthly Occupancy Fee, payable monthly in advance, a sum calculated in accordance with the Act. It is acknowledged that all the components of the monthly

Occupancy Fee are estimated only and are subject to increase or decrease in the sole discretion of the Vendor and any readjustment shall be made 30 days after the Vendor's demand therefor, with a final readjustment to be made on the Closing Date. It is understood and agreed that such occupancy fee is not to be credited against the purchase price."

I have to say that I have difficulty with the proposition that the appropriate monthly amount to be described as arrears of rent is the same \$3,653.85 amount as the occupancy fee. It is apparent from the contract, the Agreement of Purchase and Sale, that the occupancy fee is subject to adjustment or final adjustment on closing and, as is described in Schedule "D", it is an occupancy fee in which the components are estimated only. It does not seem to me that that amount meets the definition of an agreed rent, and while that by itself may not be fatal to dealing with the matter, as I considered the matter further, it would seem to me that what is being sought here is to fit within the provisions of the Landlord and Tenant Act a situation that the Landlord and Tenant Act is not designed to accommodate.

Section 110(3)(e) reads:

"A judge hearing an application shall not direct the issue of a writ of possession unless the judge is satisfied that one or more of the causes for termination of a tenancy agreement specified in section 108 or 109 exists or that, (e) the tenancy arose by virtue of or collateral to a bona fide agreement of purchase and sale of a proposed unit within the meaning of the Condominium Act and the agreement of purchase and sale has been terminated."

It does not appear to me that that provision contemplates the factual situation that appears to exist here, where there has been a failure to close, but against the background of a position taken by the tenant in which the tenant has brought an action to seek judicial vindication of his position and seeks relief including the performance, not the abandonment, the performance of the contract, as he alleges it to be. It might be argued that what is to stop any tenant from bringing such proceedings, on specious grounds, thereby escaping the sanctions and the procedures that could otherwise be brought under the Landlord and Tenant Act. I do not think that is a question that I must answer in the circumstances and particular facts of this case.

I think in this case, where the action has been brought by the tenant for whatever reasons -- it has not been responded to by the landlord, but presumably that will happen or an attempt will be made by the landlord to defend the action that was commenced by the tenant in February of 1991 -- I do not think that the application under this particular subsection of the Landlord and Tenant Act is appropriate, and I think that the result of me proceeding further to entertain this application would be a disruptive procedure and would not be in the proper interest of either party. I am mindful of the fact that a deposit of \$48,500 was paid at the outset by Mr. Hoffman's company, which may be of some comfort to the landlord in terms of the ultimate outcome of these matters, but I cannot see that the facts here can be warped into ss. 110(3)(e) and the matter proceeded on as a landlord and tenant application for possession with relief in the form of a monetary judgment. I do not lose sight of the fact that if a judgment were given in the amount sought, some \$40,000, and the sale was ultimately closed, and that is within the ambit of possibilities, Ms. Klukach's response to me in questions put to her was that there would normally be some adjustment of the occupancy fee and that adjustment would be placed in doubt if the occupancy fee were equated with and treated as arrears of rent.

I therefore must dismiss this application. I would express the view now that because of the novelty of the matter, this is not an appropriate case for costs. I will hear Mr. Starkman on that.

* * * * *

-- Reporter's Note: Submissions to the Court by counsel re costs reported but not transcribed.

THE COURT: Well, I'll consider the subject of costs. X7 We'll take a brief indulgence. I'll think about that overnight. I don't know. As I say, if a transcript of this is ordered, I'll reserve the right to fine-tune this a bit and I felt it was in your interests for me to put together such reasons as I could now rather than keep you waiting and I will in any event make my endorsement between now and tomorrow morning and in that endorsement will be the costs disposition.

CBR# 179

Marotta Holdings Limited, Applicant, and 912564 Ontario Inc. and Canadian Imperial Bank of Commerce, Respondents

Action No. RE1000/91

Ontario Court of Justice - General Division Toronto, Ontario Hayes J. Heard: May 26, 1992 Judgment: June 23, 1992

Mario Merocchi, for the Applicant. Alden M. Dychtenberg, for the Respondent, 912564 Ontario Inc.

HAYES J.:-- This is an application for an order rectifying the register with respect to Units 122, 123 and 124, Level A Metropolitan Toronto Condominium Plan No. 863 and for an order rectifying the legal description in certain instruments relating to Units 122, 123 and 124 which are parking spaces.

The Respondent the Canadian Imperial Bank of Commerce did not appear although duly served.

The Applicant entered into separate Agreements of Purchase and Sale with Concetta Morelli in trust for Units 8, 9 and 10 on Level 5 being office condominiums. These Agreements of Purchase and Sale do not make any reference to Units 122, 123 and 124 nor do they make any statement with respect to parking spaces. The purchaser directed that title be taken in 912564 Ontario Inc.

When the applicant purchased the properties in question the transfers to him included Units 122, 123 and 124 (parking spaces) with Units 8, 9 and 10 the office condominiums.

The applicants position is that the transfers to 912564 Ontario Inc. through inadvertence included the parking units. The applicants position is that it never agreed to sell the parking units to Concetta Morelli and they were mistakenly included in the transfer, charges and assignment of charges.

John Peruzza the Real Estate agent of the applicant discussed the deal with Mr. Marotta the owner of Marotta Holdings Limited and he indicated that the parking units were extra and told him to quote \$25,000 per unit. Peruzza stated in his cross-examination that Mr. Morelli asked what was included in the units and he told him the parking units were extra and if the purchaser wanted underground parking he would have to pay extra. If he did not pay extra there would be common area parking above ground.

The Agreements of Purchase and Sale were apparently prepared and completed after this discussion and they do not include any reference to parking spaces. Peruzza stated that where parking spaces were included they are ordinarily set out in the agreement.

Giovanni Morelli the husband of Concetta Morelli in his cross-examination agrees he was not shown any parking units by Peruzza and he did not have any discussions with him concerning the parking spaces. He states: "I assumed the units came with parking". Further in his cross-examination he acknowledges that in his conversation with Mr. Marotta about price there was no discussion about parking units being included.

This discussion was before the agreements were signed. The Morellis simply assumed parking units were included. They acknowledge that they did not have any discussions with anyone with respect to parking prior to signing the Agreements of Purchase and Sale.

The reference line in a number of documents in the real estate transaction including letters and various directions, warranties, and undertakings and statement of adjustments refer only to the office condominiums.

Anthony Maniaci solicitor for the vendor forwarded transfers of the office condominium units and he states through inadvertence he included in the transfers the parking units. The letter of September 13th, 1990 from Mr. Maniaci to the solicitor for the purchaser enclosing the transfer refers only to the office condominiums.

Allan Mandel solicitor for the purchaser following his examination of the search report received by him and having received the transfers noted above was aware that the transfers were to convey a greater interest that is parking space than provided for in the Agreements of Purchase and Sale.

Allan Mandel contacted his client and after some time he was advised that his client only assumed that parking was included with the office condominium units. He did not contact Mr. Maniaci. He submitted a letter of requisition for each Agreement of Purchase and Sale with a title line which included the parking spaces.

The Statement of Adjustments did not include any adjustments relating to the parking units. Following the closing the purchaser was assessed condominium charges with respect to the parking units.

The transfers, declaration of possession and mortgage related documents were executed by the vendor and it is stated through inadvertence included the parking units.

Mr. Mandel's reporting letter to his client did not make any reference to the parking units as being part of the property to which they had received title. Mr. Mandel believes this was an oversight on his part.

Anthony Maniaci solicitor for the vendor was advised of the error by Mr. Marotta in November of 1990 after the vendor returned from Florida and discovered the parking cards had been released for the parking units.

Shortly thereafter, Mr. Maniaci advised Mr. Mandel the parking units had been inadvertently conveyed to the purchasers and they should be reconveyed but the purchasers refused.

The problem of denial of any mistake and conflicting testimony has been considered by the Supreme Court of Canada in:

Hart v. Boutilier (1916) 56 D.L.R. 620 (S.C.C.) at p. 626 Davies J.

"On this point there is a sharp conflict between the parties and as the trial judge remarks if there was nothing else in the case except the conflicting evidence of two equally credible witnesses there could be only one result and the plaintiff must fail. But the mere fact of there having been a conflict between the evidence of the contracting parties as to what property was mutually agreed to be sold one affirming and the other denying that the description of the land and the deed sought to be reformed omitted a part of the land mutually agreed to be included in it would not suffice to bar the plaintiff from the relief he sought.

If as in the case before us the trial judge Harris J. felt himself compelled not to believe the defendant and if as he found, "All the other evidence documentary and otherwise pointed irresistibly and convincingly to the fact that the contract was as the plaintiff contended" and was so mutually understood by the parties, the mere denial of the defendant of that fact should not prevail to prevent the reformation being granted and Duff J. at page 230

"It is germane to the question arising on thi appeal to observe that the mere fact of denial by the defendant that he had any intention other than that expressed in the Deed is not in itself a sufficient ground for denying relief to the plaintiff".

I have reviewed all of the circumstances, the documents, the affidavit material, and the cross-examinations of the deponents.

The purchaser's position that they assumed parking was included when they also state there was no discussion about it, the evidence of John Paruzza that he advised Giovanni Morelli that the parking units were extra and Giovanni Morelli's evidence that there was no discussion with the vendor about the parking units does not have any rational basis with respect to the agreement of the parties prior to the signing of the Agreements of Purchase and Sale. I do not accept the evidence of the Morellis. I find that the Agreements of Purchase and Sale for only the office condominium units represent the complete agreement of the parties.

In arriving at this conclusion, I have taken into account the relevant experience of the vendor in these transactions as compared to the purchaser's lack of experience.

I am satisfied that the Agreements of Purchase and Sale represent the common intention and mutual agreement of the parties and also that the parties had such common intention prior to the signing of the agreements.

The reporting letters by Mr. Mandel and his title opinion contained therein do not indicate that the purchasers acquired any title in the parking units.

I have considered the circumstances and the time within which the error in the transfers and other documentation was discovered and I do not consider that lapse of time to be a bar to this application or the relief sought.

The transfers and other documentation including the parking units represent a mistake with respect to what I have found to be a mutual understanding as to what was being purchased, that is the office condominiums only as is clearly set out in the Agreements of Purchase and Sale. In determining if rectification should be granted, I have considered the various authorities submitted and I have concluded that there must be "convincing proof".

See: *Peter Pan Drive In Ltd. v. Flambro Realty Ltd.* (1978), 22 O.R. (2d) 291 (H.C.J. Eberle J. 295 and 296 affirmed by the Ontario Court of Appeal at (1980) 26 O.R. (2d) 746.

I have considered the authorities indicating the restraint that must be used in granting rectification. In this matter upon all of the material, cross-examinations and documents I am satisfied that there is convincing proof that the transfers and related documentation did not correctly express the common intention and mutual agreement of the parties.

There will therefore be judgment for the Applicant granting the application for the relief set out in the application as follows: 1(a), (b), (c) and (d).

It is the intention of the Court to assess the costs on this application. Therefore I shall be pleased to receive submissions as to nature and quantum of the order for costs on or before 2 weeks from the date of this judgment.

HAYES J.

CBR# 359

York Condominium Corporation No. 206, Plaintiff, and Almeida & Almeida Landscaping Co. Ltd. et al., Defendants

Ontario Court of Justice - General Division Non-Jury Sittings - Toronto, Ontario Dunnet J. March 17, 1992

M.A. Cummings, for the Plaintiff. M. Narea, for the Defendants.

DUNNET J. (orally):-- The plaintiff moves for an injunction restraining certain unit owners from holding a special meeting today at eight o'clock p.m. at Ste. Charles Garnier Catholic School. The plaintiff claims that the requisition purportedly given pursuant to s. 19(1) of The Condominium Act and presented to the Board of Directors on January 31, 1992, failed to be properly executed by 15% of the unit holders. The plaintiff calls into question the propriety of the requisition and submits that the requisition document contains forgeries, signatures of renters, people purporting to be owners, signatures of children, and signatures obtained by false pretences, the use of intimidation and obtained under the threats. These allegations are in my view very serious.

Approximately twenty-six of the one hundred and twenty unit owners are represented in court today and their spokesman Miguel Narea requests an adjournment of the motion in order that all interested home owners be present and represented. The spokesman submits, in the alternative, that the meeting scheduled for today proceed.

In view of the serious allegations calling into question the propriety of the requisition, I am prepared to grant the injunction on the plaintiff's undertaking as to damages restraining the unit owners from holding the meeting scheduled for today at eight o'clock p.m.. I order that such meeting be adjourned and to held within thirty days from the date of this order on ten days notice properly given. I order that on the undertaking of Miguel Narea to so act, he maintain and register for fourteen days from the date of this order for execution by any unit owner a requisition for a meeting of share holders pursuant to s. 19(1) The Condominium Act requiring the Board of Directors to hold such a meeting of holders, provided not fewer than eighteen unit holders execute the register.

In the interim, there will be an order that all affected parties be given an opportunity on reasonable notice of one day to examine, during business hours 9:00 a.m. to 5:00 p.m. documents to which they are entitled pursuant to The Condominium Act.

I will endorse the record:

For oral reasons given today, the motion is granted on terms."

MS. CUMMINGS: Thank you.

CBR# 282

Rogers Cove Limited, Plaintiff, and John A. Slood, Defendant

Action No. 1738/91

Ontario Court of Justice - General Division Guelph, Ontario Langdon J. Heard: September 9 and 10, 1991 Judgment: September 18, 1991 James L. Robinson, for the Plaintiff. Gordon P. Maxwell, for the Defendant.

LANGDON J.:-- Rogers Cove Limited developed a condominium report near Huntsville. Before registration was complete, it sold a unit to Slood. The agreement was signed September 12, 1988. On signing Rogers Cove delivered to Slood the Disclosure Statement required by section 52(1) of the Condominium Act.

Slood retained solicitors who, by letter dated September 15, 1988, notified Rogers Cove's solicitors that they were acting. The deal has not closed.

On September 28, 1989, Rogers Cove mailed to Slood's residence a material amendment to the Disclosure Statement. A copy was not sent to Slood's solicitors. The accompanying letter referred to this document as "revised Disclosure Documents". The letter said nothing about any rights of rescission nor did it specify in what respects the original was changed.

The original Disclosure Statement consisted of 14 pages of fine print. The amended Disclosure Statement also consisted of 14 pages of fine print which, on a cursory examination, were indistinguishable from the original.

The amended Disclosure Statement differed from the original in the following respects: Change No. 1 - p. 1, pars. 2: The following sentence was added:

"the lands are shown on a copy of the Declarant's Proposed Plan of Subdivision attached to this Disclosure Statement."

but a copy of the plan was not attached.

Change No. 2 - p. 1, par. 3 of the amended Disclosure Document is reproduced; the underlined words were not in the original document which is otherwise identical.

"Rogers Cove will consist of successive phases of multiple unit residential developments, serviced single family lots and ancillary and related uses.

Change No. 3 - p. 2, par. b: Under the heading "Amenities and Shared Facilities:" The original Disclosure Statement specified as part of the shared facilities

"part of the waterfront, the swimming pool, tennis courts and park area".

The amended Disclosure Statement deleted any reference to those facilities. As well, a scheme in the original providing for payment of the costs of shared facilities by successive condominium corporations was deleted. The amended Disclosure Statement specified parking spaces and walkways which were not mentioned in the original.

With the exceptions noted above the original and amended Disclosure Statements were identical.

Slood received but did not immediately read his amended Disclosure Statement. He gave it, to his solicitors March 28, 1990. On April 3, 1990, they wrote to Rogers Cove's solicitors purporting to rescind the agreement.

The material parts of the Condominium Act are as follows:

52(1) An agreement of purchase and sale entered into after the 1st day of June, 1978 by a declarant or proposed declarant of a unit or proposed unit for residential purposes is not binding on the purchaser until the declarant or proposed declarant has delivered to the purchaser a copy of the current disclosure statement and all material amendments thereto.

52(2) The purchaser, before receiving delivery of a deed to or transfer of the unit, may rescind the agreement of purchase and sale within ten days after receiving the disclosure statement or, where there has been a material amendment thereto, within ten days after receiving the material amendment.

52(3) A person may rescind an agreement of purchase and sale under subsection (2) by giving written notice of the rescission to the declarant or proposed declarant or to the solicitor of the declarant or proposed declarant.

52(6)(b) The disclosure statement referred to in subsection (1) shall contain and fully and accurately disclose,

(b) a general description of the property or proposed property including the types and number of buildings, units and recreational and other amenities together with any conditions that apply to the provisions of amenities; (emphasis added)

The Special Case stated under R. 22 asks three questions:

(1) Did the delivery of Exhibit "F" to the defendant on the 28th day of September, 1989 give rise to a right of rescission under s. 52(2) of the Act? (Exhibit "F" is the amended Disclosure Statement).

(2) If the answer to Question 1 is yes, had that right expired prior to April 3, 1990?

(3) If the answers to Questions 1 and 2 are yes and no, respectively, did the letter of April 3, 1990 constitute a valid exercise of the Defendant's right of rescission under the Act? The amended Disclosure Statement is clearly a "material amendment" within the meaning of S. 52(2). Change No. 2 was clearly capable of changing the entire character of the development, from multiple unit residential (buildings) exclusively to include serviced single family lots. The removal from the shared amenities of "part of the waterfront, the swimming pool, tennis courts and park area" also represents very substantial alteration to a resort community.

Considering the enormous potential for change embraced by these altered words, the visual representation of the proposed changes upon a copy of the plan of subdivision which was referred to but not enclosed could reasonably be considered indispensable to a buyer's understanding both of the nature and of the extent of the proposed changes.

The purpose of a Disclosure Statement (or amendment) is obvious:

"to permit the purchaser to be able to make an informed decision ... to rescind or affirm ..." per Carruthers, J. in *Benner et al. vs H.L.S. York* 52 O.R. (2d) 243 at 246. See also *Blenus Wright, J. in Abdool et al. vs Somerset Place* released July 24, 1991 unreported, especially at pages 9 to 13.

Sloot's counsel objected to Sloot being served with the material amendments. He argued that once Sloot's solicitor identified himself as acting for the purchaser, the document should have been sent to him and that the ten days should not run until after he had received it. To accept such contention would be to validate his rescission dated April 3, 1990 even if receipt of the material amendment mailed to Sloot September 28, 1989 was complete.

I find no merit in this contention. S. 52(1) specifically provides that the agreement is not binding until the Disclosure Statement is delivered "to the purchaser".

S. 52(2) give to the purchaser a right to rescind ten days after receiving the material amendment.

In contrast, s. 52(3) permits a person to rescind by giving written notice "to the declarant or proposed declarant or to the solicitor of the declarant or proposed declarant". From the express wording of the provisions I conclude that service of the Disclosure Statement or material amendment is to be made on the purchaser. One way of doing that might be to serve the solicitor but the purpose is to serve the purchaser. That was done or at least commenced.

Mr. Sloot's counsel also objected that neither the material alteration nor the covering letter specifically referred the reader to rights of rescission. Clearly, such a mention would be desirable, but the statute does not require it. Subsection (6) to (9) of s. 52 specify what must be contained. Sloot's counsel also objected that the material alteration should at least have directed the buyer specifically to the areas of the disclosure statement which were changed. A detailed comparison of two sets of 14 pages of fine print for alterations or omissions is more than the average purchaser is likely to undertake; witness Mr. Sloot. Again, the answer is that the statute does not require specific direction to changed areas.

On the admitted facts, I conclude that Rogers Cove began but did not complete delivery of the material amendment. On receipt of the material amendment as sent, Sloot had two options.

(1) Despite the omission of the copy of the Plan of Subdivision, he could decide, on the basis of the material submitted, that he either did or did not wish to rescind the agreement and act, if necessary, within ten days to enforce his statutory rights.

(2) Alternatively, he could insist on receiving the copy of the Plan of Subdivision before making his decision. In this case, the statutory ten day period would not begin to run until after he had received it.

For Sloot to choose the first option and decide, as he did, to rescind without first receiving the Plan of Subdivision entails on admission that he had received sufficient information on which to base a decision and implies a waiver of his right to receive the Plan of Subdivision.

The view that I have taken that receipt of the material alteration was incomplete, was not advanced by the parties.

Thus the three questions were not framed with a view to the conclusions I have reached.

The answer to question one is a qualified yes. Receipt of Exhibit F did give rise to a statutory right to rescind under s. 52(2), but only because Sloot, by his conduct, waived receipt of the Plan of Subdivision.

In his letter of April 3rd purporting to rescind the agreement, Sloot's counsel did object to non-receipt of the Plan of Subdivision; but Sloot made his decision despite non-receipt.

The answer to question 2 is likewise a qualified yes. Having made the choice he did, his attempt to exercise his statutory rights was too late.

The answer to question 3 is likewise a qualified yes. By reason of its lateness, Sloot's letter of rescission was not a valid exercise of his statutory right to rescind the agreement. However, the material which was delivered made it clear that Rogers Cove was unilaterally attempting to alter the terms of the agreement. The original disclosure statement is to be considered incorporated by reference into that agreement. It follows that Rogers Cove intended ultimately to convey something materially different from that for which Sloot had contracted. That entitles Sloot to rescind as he did altogether independent of the statute. I consider that the rights of rescission conferred in s. 52 are in addition to and not in substitution for a purchaser's rights in equity to rescind an agreement.

Therefore, the letter of April 3rd, while not a valid exercise of a statutory right to rescind, was a valid exercise of the equitable right to rescind.

I therefore order that Sloot's deposit be repaid to him, together with interest as provided in The Condominium Act. The action for specific performance or damages in the alternative is dismissed with costs.

LANGDON J.

CBR# 069

Faye Carroll, James Christopher Carroll, Russell Stephen Carroll, Douglas William Carroll and Alene Mathews, Plaintiffs, and Metropolitan Toronto Condominium Corporation No. 560 and W.H. Bosley & Co. Ltd., Defendants

Action No. 270015/86U

Ontario Court of Justice - General Division Toronto, Ontario Ferrier J. Heard: January 9, 10, 13, 14, 15, 16, 17, 1992 Judgment: March 31, 1992

Loretta P. Merritt, for the Plaintiffs. Barry Brown, Q.C., for the Defendant.

FERRIER J.:-- The short set of stairs in the foyer at 89 Elm Avenue, Toronto did not conform to the Ontario Building Code. Faye Carroll, a 49 year old real estate agent, had a serious fall down those stairs when she was leaving the building on September 20, 1985. She broke her hip, and, despite successful surgery immediately following the accident, she required a total hip replacement almost five years later.

The building is a luxurious old mansion in the Rosedale district of Toronto which had been converted in about 1980, to a condominium with four apartment units. Faye Carroll fell after exiting the ground floor unit, described as unit 1 West.

The Premises Generally:

Much of the original character of the building was retained when it was converted to condominium units. The building has been described by various witnesses as charming, luxurious and first class. It was very well maintained at all relevant points in time. The condominium owners were concerned about safety and on at least two occasions had made corrections to remedy what they perceived to be unsafe conditions. The first of these related to the exterior front walk leading from the public sidewalk to the building. Beautiful tiles had to be replaced by interlocking paving stones because the tiles were slippery when wet. Exterior lights at the side of the building were upgraded to provide more lighting because it was considered that the existing lighting was insufficient in that area.

Three of the apartment units have access from the street through what was the original front door to the mansion. The fourth unit has access from the side of the building. All units have access by way of a rear door.

Gaining access to the three units through the front door of the building involves entering through the front door onto a marble foyer and turning to the right. At that point, one faces a two riser set of steps up to a landing. (From the marble floor, there is one riser up to a step and a second riser to the landing.) It was on these steps that the accident occurred. One is then in front of the door to unit 1 west which enters onto the landing. The stairs then continue upwards to the left at right angles to the landing. It is these upper stairs that are used to gain access to the two units which are at upper levels. When one exits from the ground floor unit, one traverses the landing, descends the two riser set of steps to the marble floor, and exits the building to the left through the main front door.

All the physical elements in the foyer, including the stairs, the carpet on the stairs, the marble flooring, the landing and the front door to the premises were, at all relevant times, in an excellent state of repair and well maintained.

The Accident:

The plaintiff was a real estate sales person engaged in residential sales in the employ of W.H. Bosley & Co. Ltd. It was her habit to venture forth each morning to inspect residential properties at open houses which were held at the instance of the listing agents for the properties. On the morning of September 20th, Faye Carroll had inspected several properties and the ground floor unit at 89 Elm Avenue was the last property on her list for the morning. She arrived at the premises shortly before noon. It was a bright, sunny day. She entered the building through the main door at the front, crossed the marble floor, ascended the stairs to the landing, crossed the landing and entered the ground floor unit.

She inspected the apartment unit that was for sale and spent a few minutes chatting with Dorothy Elliott, the listing agent. She stayed a total of about ten to fifteen minutes. When she left, she exited through the front door of the unit, traversed the landing, stepped off the landing and fell to the marble floor two steps down. She described the sensation as "stepping into air".

It is apparent from her evidence that she thought there was one step down when in fact there were two. She stepped down, expecting to be at the level of the marble floor. In fact, her stride was such that her foot was beyond the edge of the first step and six inches above the floor. She fell to the marble floor and experienced immediate severe pain. She had suffered a sub-capital fracture of the right femur. She was screaming with pain and Dorothy Elliott and others came to her aid. She was immediately taken to hospital. Other than the plaintiff, no one witnessed the accident.

At the conclusion of her visit with Dorothy Elliott in the ground floor unit, and immediately before exiting the unit before the accident, Faye Carroll said "I have to dash" or "I must dash" or "I must fly". She testified that her words were a figure of speech, a way of politely concluding her visit and that she was not in a hurry.

The police report filed as exhibit 2 in the action shows Dorothy Elliott as a witness interviewed by the police. The police report does not specifically attribute words to Dorothy Elliott in reference to the accident but the report does state that the plaintiff was walking out the door.

Dorothy Elliott testified that at the conclusion of her conversation with the plaintiff, Faye Carroll said "It's late, I've got to go" or "I've got to fly" and she "ran" out the door of the ground floor unit. This witness indicated that the plaintiff was going very quickly as opposed to strolling as she made her way toward the door exiting the unit. She did not see the plaintiff fall. In her evidence, at various points, she described the plaintiff as running, nearly running, going very quickly, going faster than quickly but she "was not running the Boston Marathon".

The foregoing is the only evidence concerning the speed with which Faye Carroll exited the unit and headed toward the landing and the stairs.

I accept the evidence of Dorothy Elliott that the plaintiff was walking very quickly when the plaintiff left the unit, but Dorothy Elliott did not see the plaintiff traverse the landing. Dorothy Elliott gave her evidence in a forthright and emphatic manner on this point and admitted in cross-examination that she had used various words to describe the pace of the plaintiff including the word "running" and on balance conceded that the plaintiff was not, in fact, running; but she maintained her evidence that the plaintiff was indeed moving at a very fast pace.

Dorothy Elliott was employed as a commissioned sales person with W.H. Bosley & Co. Ltd. That company had been a defendant in the proceedings but the action against that defendant was settled shortly before trial. Dorothy Elliott had been examined for discovery. She could fairly be said to be not a totally disinterested witness, in view of the fact that at one point her long time employer was being sued. Having observed the demeanour of Mrs. Elliott in the witness box and the demeanour of the plaintiff on this point, a serious point in the evidence, I accept the evidence of Dorothy Elliott over that of the plaintiff. The plaintiff was walking at a very fast pace when she exited the ground floor apartment. I also conclude from the evidence that she maintained that pace when she traversed the landing.

The Foyer Area:

The building faces north onto Elm Avenue and the front door has a large glass panel comprising a substantial portion of the surface area of the door. This permits a substantial amount of natural light to enter the foyer area and onto the marble flooring. There are also two windows of a smaller size adjacent to the door which also permit light to enter the foyer area. These windows are above a wall unit which contains interior mail boxes and the windows are located above the landing in question. In the ceiling, there is a flush mounted light fixture which has been described as a crystal chandelier but which is not of the type that hangs down from the ceiling.

The carpet on the stairs, the landing, and the stairs leading to the units above is a dark maroon colour with a white checkerboard pattern. The squares in the checkerboard are approximately one and one-half inches square. The risers on the stairs in question are approximately six inches high and the tread is approximately 11 and one quarter inches wide. The width of the landing is eighty-eight inches and the distance from the door of the ground floor unit to the edge of the landing is fifty-eight inches or approximately five feet. From the lowest riser to the far wall of the foyer is about seven feet.

There are no handrails on the stairs in question, although on the north side of the stairs is the wall unit above-described which is affixed to the wall and which stands on the landing, the steps and the floor. It could not be readily grasped with the hand in the event of a misstep by someone using the stairs. At the other end of the landing, more than seven feet distant, there is a newel post which stands on the step six inches below the level of the landing. This newel post is the conclusion of the railing which serves the upper stairs leading to the units above.

The officer who prepared the police report was not called as a witness. His report indicates that the conditions at the scene were "semi-dark". The plaintiff testified that her recollection after the fall was that someone turned on the chandelier in the foyer but that until that was done, the area was dim or dimly lit. Ms. Bancroft testified that the foyer was dimly lit when she was there. Mr. O'Callahan testified on behalf of the defence that the power to the chandelier and to the electrical facilities in the foyer could only be turned on or off by access to a switch in an electrical panel at the rear of the building and that the chandelier was always left on twenty-four hours a day. Other defence witnesses confirmed that the chandelier was always on and the foyer was always adequately lit.

On balance, I find that the plaintiff's recollection is inaccurate and that the chandelier was, in fact, turned on on the day in question. I also find on balance that the area was reasonably well lighted at the time of the accident.

Photographs of the interior of the ground floor unit depict a bright and very well lit apartment unit with numerous large windows. When one leaves the ground floor unit, one leaves a brightly lit apartment living room area, passes through a small, darker foyer in the unit, out the door of the unit, across the dark carpet on the landing and the stairs, and down the two steps onto the bright marble floor. One also faces the substantial ambient light entering from the front door of the building. The wall of the foyer directly ahead is covered in light coloured material.

I accept the evidence of those witnesses called on behalf of the defence who are present and former owners of units in the building that, over the course of the approximately five years prior to the accident, many people of widely ranging ages from very young to elderly, had entered and exited the building through the front door and had used the two riser stairs ("the stairs") without incident.

Although precise numbers were not given in evidence, it is reasonable to conclude from the evidence that the stairs had been used on a few hundred occasions by non-residents of the building. Some of these visitors were accessing the ground floor unit and others were accessing the units on the upper floors. There was no evidence of any prior complaint about the condition of the stairs or about any danger in connection with the stairs. None of the unit owners called by the defence, all of whom had used the stairs, perceived any danger. Bonnie Bancroft, also a real estate agent, had been at the premises earlier on the day in question. She testified that she had difficulty when exiting down the stairs and through the foyer. She said she had a sense of vertigo and a slight feeling of panic -- she was affected by the light, the pattern in the carpet and the different surfaces experienced in a matter of a few seconds. She is a personal friend of the plaintiff and had been a co-worker.

It is important to note that the view of the stairs in question had by persons descending the upper stairs is substantially different than the view had by persons exiting from the ground floor unit. When one descends the upper stairs to the landing and the stairs in question, one can readily perceive that the stairs in question are a two riser set of steps. The evidence of the owners in the upper level units to the effect that they and their guests never had difficulty negotiating the stairs is, accordingly, not particularly helpful.

The Ontario Building Code:

Various provisions of Regulation 87 under the Building Code Act, R.S.O. 1980, c. 51, as amended, are relevant:

1.1.39. "dwelling unit" means a room or suite of rooms used or intended to be used as a domicile by one or more persons and usually containing cooking, eating, living, sleeping and sanitary facilities;

3.4.8.1. Except when stated otherwise, these requirements apply to both interior and exterior exits.

3.4.8.2. The finish for treads and landings of interior and exterior stairs and ramps accessible to the public shall have non-skid finish or be provided with non-skid strips.

3.4.8.3 Every flight of interior stairs shall have at least 3 risers...

3.4.8.5.(1) Every exit ramp or stairway shall have a handrail on at least one side and where 44 in. or more in width shall have handrails on both sides.

9.8.2.2. Except for interior stairs within a dwelling unit, at least 3 risers shall be provided for interior stairs.

9.8.3.3. Interior stairs not contained within dwelling units and exterior stairs for buildings

9.8.7.1. Except as permitted in Articles 9.8.7.2. and 9.8.7.3., a handrail shall be provided on at least 1 side of stairs less than 44-in. in width, and on 2 sides of stairs 44-in. in width or greater.

9.8.7.2. Handrails are not required for stairs within a dwelling unit that have fewer than 3 risers. 9.8.7.3. Only 1 handrail is required on exterior stairs more than 44-in. in width and having 3 or more risers provided such stairs serve not more than 1 dwelling unit.

A "flight of stairs" is not defined in the Regulation but the Shorter Oxford Dictionary defines a flight as "the series of stairs between any two landings".

In the context of the building code, a reading of the above provisions draws one to the following conclusions in reference to the two riser stairs in question:

(1) the stairs are a flight of stairs.

(2) the stairs are a flight of interior stairs not within a dwelling unit.

(3) the construction of the stairs is in breach of the Regulation under the Building Code, in particular s. 3.4.8.3 and s. 9.8.2.2. in that there are only two risers rather than the required three. (4) the construction of the stairs is in breach of Regulation 87 in that there are no handrails on either side of the stairs: s. 3.4.8.5.(1) and s. 9.8.7.1.

It is arguable that the newel post may qualify as a handrail but the Building Code requires handrails on both sides of the stairs.

Jacob L. Pauls testified on behalf of the plaintiff. He is an expert in construction and design safety. He has had extensive experience in advising on the safe construction of public and residential buildings with emphasis on means of ingress and egress, fire safety, safety for disabled persons and design safety as it pertains to use of buildings by persons. Included in his expertise is significant consulting and advisory experience concerning stair safety. He has been an advisor in the development of building codes. His evidence, to a large extent, explained the reasons for the above noted provisions of the Ontario Building Code. He described the three main criteria concerning the safe construction of stairs as follows: (1) the ability to see the stairs as one approaches and uses them;

(2) the physical geometry of the stairs, including depth and horizontal measurement; and

(3) the ability to reach and grasp handrails.

Surface covering of the stairs and the surrounding area, the lighting over the stairs and the surrounding light are relevant in the first factor. Handrails perform three functions:

(1) as an indication or signal of the very presence of stairs;

(2) as support for the person using the stairs; and

(3) as a device offering an opportunity to recover in the event of a misstep or a fall.

Mr. Pauls testified that the reason for the requirement of at least three risers is because the risk of fall is many times higher on "limited riser" stairs which these stairs are. When a person is approaching limited riser stairs, especially when descending, there is a significant perceptual problem. A person either fails to see the limited riser stairs or misjudges the number of risers. Mr. Pauls described limited riser stairs as being at the worst end of the extreme in stair danger. He was uncompromising in his evidence that these kinds of stairs should not be built.

In his opinion, there were several other factors in the foyer area that made the stairs unsafe. The first is the lack of handrails. The newel post and the wall unit on the north side of the landing were inadequate substitutes for handrails. Handrails are meant to be capable of being grasped by the hand. In his opinion, the lack of adequate handrails on these stairs was a significant deficiency.

Although the amount of light emanating from the chandelier was relevant, and low light would have produced greater danger, the other features in the foyer, especially the large amount of ambient light entering from the front door, resulted in the danger persisting even if the chandelier was indeed turned on at the time of the accident.

The other factors include the type of pattern in the carpet. The pattern itself made it difficult to discern the fact that there were two risers. There were no markings on the edge of the steps to clearly indicate their existence.

Mr. Pauls indicated that the natural light flooding the marble floor and the wall of the foyer, faced by a person descending the stairs, was the predominant light in the area. The large amount of light emanating from the marble floor and the wall and the front door added to the perceptual difficulties.

Mr. Pauls indicated that the experience of Faye Carroll in negotiating the steps was a classic example of an "air step" -- stepping into air rather than onto solid ground.

The plaintiff was wearing shoes with a 2 inch heel and was wearing tinted glasses at the time of the accident. In the opinion of Mr. Pauls, neither of these two factors contributed to the accident.

Mr. Pauls' opinion was that these were unusually dangerous stairs. His evidence was that changes could readily be made to make them safe. Freestanding handrails could be installed to meet the Building Code requirements. The visibility of the nosings (edges) of the steps could be improved by highlighting them with an appropriate stripe. Improved lighting focusing on the steps themselves was another measure. Obviously, none of these changes would have involved significant expense.

In the opinion of Mr. Pauls, the failure to comply with the Building Code was the major cause of the accident and if the Code had been complied with the occurrence could have been prevented.

I accept the evidence of Mr. Pauls that the stairs in question were unsafe for the reasons described by him. No expert witnesses were called by the defence to contradict his evidence or opinion.

Liability:

The duty of care owed by the defendant is found in s. 31 of the Occupiers' Liability Act, R.S.O. 1980, c. 322: An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.

This statute imposes an affirmative duty upon occupiers to take reasonable care for the safety of people who are permitted on the premises. The statute does away with the old common law position that an occupier was only liable for unusual dangers of which he was aware or ought to have been aware: *Preston v. Canadian Legion (Kingsway Branch No. 175)* (1981), 123 D.L.R. (3d) 645, 29 A.R. 532 (C.A.) and *Waldick et al. v. Malcom et al.* (1991), 83 D.L.R. (4th) 114 (S.C.C.).

The duty under the statute does not change but the factors that are relevant to an assessment of what constitutes reasonable care will necessarily be very specific to each fact situation -- thus the proviso "such care as in all circumstances of the case is reasonable": *Waldick et al. v. Malcom et al.*, supra. A breach of a statutory provision designed for the safety and protection of members of the public and which is an effective cause of an accident, imposes at least a prima facie liability on the person in breach: *Sterling Trust Corp. v. Postma and Little* (1964), 48 D.L.R. (2d) 423 (S.C.C.) and *Schofield et al. v. Town of Oakville*, [1968] 2 O.R. 409 (Ont. C.A.).

The provisions of the Building Code Act above referred to clearly are enacted for the safety and protection of users of stairs.

Cartwright J. in *Sterling Trust*, supra, adopted two observations made in the House of Lords in *Lochgelly Iron and Coal Company Limited v. M'Mullan*, [1934] A.C. 1, as follows:

In such a case as the present the liability is something which goes beyond and is on a different plane from the liability for breach of a duty under the ordinary law, apart from the statute, because not only is the duty one which cannot be delegated but, whereas at the ordinary law the standard of duty must be fixed by the verdict of a jury, the statutory duty is conclusively fixed by the statute. ...

I cannot think that the true position is, as appears to be suggested, that in such cases negligence only exists where the tribunal of fact agrees with the Legislature that the precaution is one that ought to be taken. The very object of the legislation is to put that particular precaution beyond controversy.

Cartwright J. also said:

If the burden could be discharged simply by showing that the person upon whom it lay neither intended nor knew of the breach, the protection which it is the purpose of the statute to afford would in most cases prove illusory.

Evidence of prior safe use of the stairs is relevant but not determinative: *Crerar v. Dover and Dover*, [1986] 2 W.W.R. 562 (B.C.C.A.) and *Oakley v. Metropolitan Toronto (Municipality)* (unreported, O'Driscoll J. May 3, 1988). Considering the provisions of the Building Code and the breach of those provisions, and considering the other factors referred to which created an unsafe condition, I find the defendant liable in negligence for failing to meet the duty of care imposed by the Occupiers' Liability Act.

Contributory Negligence:

The major element to be considered is the rapid pace of the plaintiff in leaving the premises. A less significant element is the fact that she was wearing tinted glasses, admittedly for only cosmetic purposes. These glasses must have had some effect, however slight, on the ability of the plaintiff to negotiate the steps in question, bearing in mind all of the other circumstances that existed in the foyer. I do not accept Mr. Paul's opinion in respect to the glasses. The evidence does not satisfy me that the shoes worn by the plaintiff had any causative effect to the mishap. I conclude that the plaintiff was not exercising sufficient care in the circumstances and I assess the contributory negligence of the plaintiff at 35%.

General Damages:

Prior to the injury, the plaintiff was a healthy and reasonably active 49 year old woman. The day following the injury, she underwent surgery and a pin and plate were installed across the fracture to hold it in position. After about a one week stay in hospital, she was transferred to St. John's Convalescent Hospital, remaining there for about three months. During her period at St. John's, she was involved in a rehabilitation programme. On leaving St. John's at the end of the year, she went to her son's home in Austin, Texas over the Christmas period and then went to Florida for the purpose of recuperation.

In June, 1986, she returned to work part time as a real estate agent. In February, 1987, the plaintiff resumed work full time and continued into 1988. She had had some continuing discomfort and pain in the hip and in June, 1988, the pin and plate were removed. She was off work again for about two and one-half months and in September, 1988 she returned to work as a real estate agent. She continued in this regard until May, 1989 when she left her then employment for reasons unrelated to her injury and went to work for another broker but was not active through the period May to December, 1989.

She was still having pain and discomfort in connection with her hip and in August, 1989, a bone scan revealed a cold spot indicating the possibility of avascular necrosis of her hip. No such indication had been turned up in any of her intervening examinations. Her hip continued to deteriorate and in February, 1990, it was recommended that she have a total hip replacement. She obtained a second opinion and decided to undertake the surgery. In July, 1990, she had a non-cemented total hip replacement and after about a week to ten days in hospital, spent about six to seven weeks at St. John's Convalescent Hospital. By late October, 1990, she was advised by Dr. Silverstein to try to return to her normal activities. From March to May, 1991, she went with her mother and sister on a driving trip to visit relatives in the United States and she participated in the driving.

By the time of trial, her condition was such that she was able to return to work and resume most of her normal activities. Nevertheless, she is likely to have some continuing discomfort in the hip or groin area and her future activities will be restricted as a result of the injury. She will have to avoid vigorous sport activities and excessive walking or standing. She should avoid excess strain to her hip in activities such as skiing, body contact or other competitive sports. She is advised to avoid work that involves excess strain to the hip, such as work that involves a lot of stair climbing, climbing ladders, squatting, and bending.

The evidence also establishes that during the period of time from the date of the injury to the date of trial, Faye Carroll has been in pain or discomfort in varying degrees of severity with very few totally pain free periods. She has been taking pain medication throughout almost the entire period. She has not had an easy time of it.

There is no doubt that the hip replacement was necessitated directly as a result of the original injury. The medical evidence also establishes that there is a significant likelihood that she will require a hip revision in the future. The evidence establishes a high probability that this will be required somewhere in the range of ten to twenty years from the date of the hip replacement, July, 1990. On the evidence, I conclude that this is likely to occur approximately fifteen years hence, or approximately sixteen and one half years from July, 1990.

The medical evidence indicates that the plaintiff should be able to go without a cane by now and that her walking should be largely unrestricted by now.

I assess the plaintiff's general damages for the fractured hip and its consequences including pain, loss of enjoyment of life, the total hip replacement and the probability that she will require a further hip replacement at \$90,000.

I should add that the plaintiff was involved in a minor motor vehicle accident in 1987 but the evidence does not establish that that incident had any impact on the problems suffered by the plaintiff as a result of her fractured hip.

Income loss to date of Trial:

Faye Carroll worked as a real estate agent starting in 1965, when she got her license and worked as such except during the years 1973, 1980 and 1981, and 1984. I accept her evidence that she had decided by September, 1985 that her future career was going to be in real estate until her retirement. This was a viable career option and is consistent with the testing and assessment undertaken after the injury by Cameron Webber, a vocational rehabilitation specialist called as a witness on behalf of the plaintiff.

The only income figures available showing the income earned by the plaintiff up to 1985 were as follows:

1980 - \$23,379 (non-real estate sales) 1981 - \$32,309 (non-real estate sales) 1982 - \$7,715 (unemployment insurance) 1983 - \$2,145 (unemployment insurance) 1984 - \$19,115 (non-real estate sales) 1985 - \$19,984 (of which approximately \$7,000 was related to real estate sales with a net income after expenses of \$13,476 total for the year).

1986 - Nil 1987 - \$10,296 (net after expenses - real estate sales) 1988 - \$17,499 (gross before expenses-real estate sales) 1989 - \$5,215 (gross before expenses-real estate sales)

The plaintiff earned no income in 1990 and 1991. The plaintiff thought that she should change her career plans and pursue a career in life insurance sales and, in the first two months of 1990, she took a course leading to that end, but concluded for valid reasons that it was not a wise choice for her. She had the total hip replacement in July that year and has not worked since.

It should be noted that in 1980 and 1981, up to February, 1982, the plaintiff was involved in business development and public relations and research work in some way connected with real estate but she was not involved in direct real estate sales. In 1982 and 1983, she earned no income whatever from employment and this was not satisfactorily explained in her evidence. In 1984, her income was derived from a company that she had incorporated in the business of closet space systems. Her taxable income in 1985 was also comprised of income from that source (although earned in 1984) and she had earned no income in 1985 until she joined Bosley in April, 1985. Her closet space business had ceased in 1984. In the six months prior to the accident, she had earned \$7,000 with Bosley Real Estate. Tax returns either were not filed or were not available for some of the above-mentioned years. In some instances, only T-4 slips were available and in those cases it was not established to what extent expenses were incurred to earn the income.

After the accident, when she did return to work, she went into commercial real estate sales on a part time basis. She had no background in commercial sales. She indicated in her evidence that she did this because it was more of a 9:00 to 5:00 job with less physical demands. She earned no income for the eight month period that she undertook this endeavour. When she did return to residential real estate sales, she earned approximately \$10,000 net after expenses over the course of approximately one year. This was at Sadie Moranis Real Estate. In May, 1989, she resigned from that position and went to work for another broker but made little effort to work. It was during this period after May, 1989 that her hip was seriously deteriorating and causing considerable pain and discomfort.

Against this background, I must assess an amount that the plaintiff would probably have earned had the accident not occurred, during the period from the date of the accident to the date of trial. In assessing this amount, I must have regard for the income earning history of the plaintiff in the years prior to the accident. In my view, it is appropriate to take an average of the income earned from 1980 to 1985 inclusive. That average is approximately \$15,550 per year. In my view, recognizing that it is impossible to be precise, the plaintiff in this case had a demonstrated earning capacity as at the date of the accident in the amount of approximately \$15,550 per annum.

Her loss to the date of trial is that figure multiplied by 6 1/3 years (the time period from the date of the accident to the date of trial) plus an amount for inflation. I calculate that sum to be \$112,642 allowing an inflation rate of 5% per annum. Her income in the sixth year would have been \$19,845. Because one cannot be precise, and because not all expenses should necessarily be deducted, in my view it is appropriate to round off the figure to \$115,000 and the sixth year to \$20,000 (which then is her present earning capacity on a full time basis.) From the \$115,000 should be deducted her actual earnings during the period, which were approximately \$33,000. Because no figures were produced for the expenses for 1988 and 1989, I can only allow an amount considered reasonable in the circumstances. I feel \$7,000 is reasonable in the circumstances, for net earnings of \$26,000. Deducting that sum from \$115,000, the plaintiff's loss is \$89,000.

I have considered the evidence of Howard Rosen, a Chartered Accountant, business valuator and appraiser. He was called as an expert in litigation accounting and business valuation to give evidence concerning the economic losses arising from the injuries in this case. One can take approaches slightly different than those taken by Mr. Rosen and I have done that in consequence of the argument of counsel for the defendant. However, even acceding to the argument of the defendant, the results nevertheless fall into the same range as those determined by Mr. Rosen. His figure was a loss to the date of trial of \$91,900 (after deduction of the actual earnings). He did not, however, take into account the question of further mitigation by the plaintiff. In my view, this is a case where the plaintiff ought reasonably to have mitigated her damages further by part or full time employment to produce the equivalent of about a year and a half's income. Accordingly, the figure for loss of income to the date of trial should be reduced by approximately that sum and I therefore assess the plaintiff's loss under this heading at \$65,000. As to future income loss, the evidence does not satisfy me that the plaintiff will not be able to work to age 65. It may be that she would prefer to retire earlier than that, but I do not find that there will be any medical necessity for her to do so. On the other hand, I do not feel that the plaintiff will be able to work as a real estate agent on a full time basis. She does have other options but real estate is a reasonable career path for her, and in my view, such a finding is warranted even though she will only be able to work part time.

Once again, I have considered the analysis and calculations and the evidence given by Mr. Rosen. By applying the appropriate discount, he determined that the present value of the plaintiff's expected life earnings to age 65, assuming an income level in 1992 of \$22,700 per annum, is \$191,742. As indicated, in my view the appropriate income figure for 1992 is approximately \$20,000 net after expenses. On Mr. Rosen's discount figure of 8.4468 the present value of her income to age 65 would be \$168,936.

Based on the medical evidence, I conclude that the plaintiff's capacity to work full time as a real estate agent has been reduced as a result of the injury by 40%. Her loss is, accordingly, \$67,600 (rounded).

Future Medical Expenses:

I have already indicated that the plaintiff will require revision surgery. Estimates have been given by various medical experts as to when that revision surgery will be necessary. As indicated, it is my view that the probability is that it will be required fifteen years hence. In this context, I have also reviewed the figures presented by Mr. Rosen. He based his calculations on a 1990 O.H.I.P. expense of \$15,918. Assuming that revision surgery was necessary fifteen years from July, 1990, the present value of the cost of such surgery is \$10,990 with some slight downward adjustment to take account of mortality figures. At the twenty year level, the present value of the cost of the surgery would be approximately \$9,500 with about a five percent downward adjustment for mortality figures. Because I have found that the surgery is likely to be necessary at a point fifteen years hence, I assess the present value of the cost of that surgery at \$10,000.

I should add that in arriving at the figures for past and future income losses, I have considered positive and negative contingencies. In this case, they include the possibility of periods of unemployment, additional illnesses, fluctuations in the real estate market activity and the other normal contingencies of life including the possibility that the plaintiff might be able to work beyond age 65 and might be able, at some point, to work full time. In my view, all of the contingencies, negative and positive, even out to such a degree that no further adjustment should be made for them.

Special Damages:

The special damages are detailed in exhibit 26. The plaintiff maintains her claim for all of the special damages listed in the five page summary except that the O.H.I.P. figure was adjusted to an amount of \$32,180.14. The total special damages claimed, accordingly, total \$51,395.97.

I have reviewed exhibit 26 to determine whether or not the expenses claimed are reasonable and causally connected to the injury. Using that test, and bearing in mind the nature of the injury and its effect on the plaintiff, I allow all of the expenses claimed with the exception of the following: Private Nursing costs - \$7,765.

Some of these costs were incurred while the plaintiff was in hospital and some were incurred while the plaintiff was at home following the removal of the plate and pin. While at home during this period, she was not confined to bed.

Transportation Costs:

Two of the expenses claimed under the heading of taxi fares are for limousine expenses. In my view these are not reasonable. In addition, many of the taxi fares were incurred at a time when the plaintiff was able to drive. I allow \$100 for taxi fares and I allow mileage for the use of the plaintiff's own vehicle at \$129.50 as claimed.

Parking:

I do not consider this to be a reasonable expense in the circumstances.

Long Distance Telephone Charges: The evidence indicates that the plaintiff was in the habit of calling her mother and her children extensively by telephone prior to the accident. In my view, the expenses claimed are not reasonable in the circumstances. I allow \$300.00, a reduction of \$948.29.

Accordingly, the sum of \$10,307.24 should be deleted from the special damages claimed with the resultant assessment of \$41,088.73, of which \$32,182.14 is for O.H.I.P.

Family Law Act Claims:

The balance of the claims relate to damages for the three sons of the plaintiff and for the plaintiff's mother. None of these plaintiffs gave evidence and in my view the evidence does not support an award to any of these parties.

Summary of Damages:

The following then is a summary of the damages:

General Damages \$ 90,000.00 Past Pecuniary Loss: Income \$ 65,000.00 O.H.I.P. \$ 32,182.14 Other Special Damages \$ 8,906.59
Future Pecuniary Loss: Income \$ 67,600.00 O.H.I.P. \$ 10,000.00 ----- TOTAL \$273,688.73

Therefore, judgment for the plaintiff is for 65% of that amount, being \$177,897.67 (O.H.I.P.'s share of this is \$27,418.39).

I will hear counsel on the effect, if any, of the settlement with the defendant Bosley upon the recovery under this judgment, pre-judgment interest, costs and any other matter considered needing clarification.

FERRIER J.

CBR# 049

Jane Bondy, Applicant, and P.C. Cove Builders Inc. and Pilots' Cove Estates Inc., Respondent

Action No. 90-GD-13838

Ontario Court of Justice - General Division Windsor, Ontario Zalev J. December 5, 1991 Charles R. Gascoyne, for the Applicant. W.A. McClelland, for the Respondent.

ZALEV J.:-- On August 17, 1989, the Applicant Jane Bondy ("Bondy") as purchaser, entered into a written contract with the Respondent P.C. Cove Builders Inc., ("Cove Builders"), as vendor, for the purchase of a proposed condominium unit in the third phase of a condominium development in the village of St. Clair Beach. The purchase price was \$249,000.00 with \$20,000.00 down and the balance, subject to adjustments, to be a mortgage given back to Cove Builders on the date of closing. The whole mortgage balance was due 30 days after closing. Bondy also agreed to pay the sum of \$17,000.00 for extras.

In the event that substantial completion of the unit was achieved before the registration of a declaration and description, they agreed to an interim closing following which Bondy would occupy the unit and pay a monthly occupancy fee based upon Cove Builder's estimate of mortgage interest, taxes and common expenses. The occupancy fee was not to be credited against the purchase price.

The unit was substantially completed in May 1990 and Bondy occupied the unit from about May 15, 1990 to August 25, 1990. During that period she paid occupancy fees of \$9701.

On September 4, 1990. Bondy's solicitors wrote to Cove Builders' Toronto solicitors advising that if the condominium documents were not registered and the deal closed on or before September 28, 1990, she would consider the agreement null and void. The condominium documents were registered on October 11, 1990. On October 23, 1990, the Windsor solicitor for Cove Builders wrote to Bondy's solicitor advising of registration, fixing closing for on or before October 31, 1990 and enclosing draft documents including the transfer and mortgage back. The mortgage back was to be discharged on closing. On October 25, 1990, Cove Builders' Windsor solicitor delivered a notice to Bondy's solicitors requiring closing on November 14, 1990 together with a statement of adjustments showing the whole balance due by certified cheque with no provision for a mortgage back. On November 6, 1990, Bondy's solicitor telephoned Cove Builders' Toronto solicitor and said the agreement had been rescinded by the letter of September 4, 1990. That letter had never reached Cove Builders' Toronto solicitor.

Bondy deposes that it was on November 12, 1990 that her solicitors discovered that the title was registered in the name of the respondent, Pilots' Cove Estates Inc. ("Cove Estates") and not in the name of Cove Builders. This is contradicted by the record which shows that Bondy's solicitor received a draft transfer, charge, statutory declaration and undertakings, all in the name of Cove Estates enclosed in a letter dated October 23, 1990. Both Cove Builders and Cove Estates are Ontario Corporations. All the shares of Cove Builders are owned by Cove Estates. The officers and directors of each corporation are the same.

On November 14, 1990, Bondy instructed her solicitor to treat the agreement as null and void. The closing documents were tendered on Bondy's solicitors that day. The transfer showed Cove Estates as the transferor. Bondy's solicitors refused to close, taking the position that Cove Builders with whom Bondy contracted, never had title. This position was confirmed by Bondy's solicitors by letter to Cove Builders' Windsor solicitor on November 14, 1990 after tender was made.

This is an application by Bondy, inter alia, for a declaration that she has properly rescinded the contract, and for an order for repayment of the sums paid to Cove Builders.

In the view I take of the matter, I need only deal with one issue on this aspect of the application whether or not Bondy had a right to repudiate, and did repudiate, by reason of the fact that Cove Builders never had title to the unit. There is authority for the proposition that if a vendor is able to make good title before the day fixed for completion, the contract can be enforced by the vendor - see re Bryant and Barningham (1889) 44, c. 218, at pg. 223. However, for the purposes of this application, I will accept that where a vendor has no title, as opposed to an imperfect title, the vendor may terminate the agreement. But, on discovering the vendor's lack of title, the purchaser is bound to repudiate with "reasonable promptness" or "forthwith" - see Dart on Vendors and Purchasers, (7th) pg. 1067.

I find that Bondy did not repudiate forthwith or with reasonable promptness on discovering Cove Builders' lack of title. Firstly, it is inconceivable that Bondy's solicitors were not aware of the state of the title at least 30 days prior to closing as that is the deadline provided in the contract for delivery of requisitions on title. In any event, I find that they were aware of the title on receipt of the draft documents accompanying the letter of October 23, 1990. The knowledge of the solicitors is imputed to Bondy. I find that Bondy did not repudiate forthwith or with reasonable promptness. Even accepting Bondy's affidavit (which I do not) that the first knowledge of the title being in Cove Estates was on November 12, 1990, the result would be the same. With closing fixed for November 14, 1990, Bondy was bound to repudiate immediately. Waiting until tender was made on November 14, 1990, was not forthwith or within a reasonable time in those circumstances.

The applicant relied on Caplan v. Coles (1982) 27 R.P.R. 83, a judgment of the British Columbia Supreme Court. That case is distinguishable in that the purchaser was entitled under British Columbia statutes to a conveyance from, and the benefit of the covenants of, the vendor named in the contract. In any event, it has not been shown that the vendor's covenants were material - see also Victorian Homes (Ontario) Inc., v. DeFreitas, per Rosenberg J. March 6, 1991, (unreported).

The claim for the said declaration and order on this ground therefore fails.

Bondy took the position that Cove Estates was not a registered vendor under the new Homes Warranty Act. Cove Builders was so registered. The contract of sale was with Cove Builders. In these circumstances Bondy was entitled to the benefits of the Act through Cove Builders which complied with all requirements of the Act. Bondy was not entitled to rescind on this ground.

Bondy also took the position that the disclosure statement was erroneous and insufficient. The purpose of the disclosure statement is to permit the purchaser to make an informed decision as to whether to elect to rescind or affirm the contract of sale. An objective standard is to be applied in determining whether or not the disclosure statement complies with the Condominium Act. It is significant that Bondy occupied the unit and paid the expenses for some 3 months without making any complaint. In my view the disclosure statement here meets the objective standard.

Bondy also submits that registration of the description and declaration by Cove Builders was a condition precedent which Cove Builders failed to perform.

Paragraph 8(j) of the contract states that the contract is conditional upon registration, failing which the contract is null and void. The description and declaration were not registered by Cove Builders, but were registered by Cove Estates. Bondy says that does not comply with the contract. As Cove Estates had title, the contract provision was satisfactorily performed.

Finally, Bondy submits that the mortgage back to the vendor was a sham or phantom mortgage disentitling the vendor to charge interest as part of the interim occupancy charges. This submission was based on the Judgment of Rosenberg J. in *Albrecht v. Opemoco* (1989) 70 O.R. (2d) 151. I reserved judgment as an Appeal from that judgment was then pending in the Court of Appeal. On November 28, 1991, the Court of Appeal gave judgment allowing the Appeal and upholding the validity of this type of mortgage. This submission therefore fails.

In the result the application is dismissed with costs to the Respondent to be assessed.

ZALEV J.

CBR# 287

Joe F. Scanlon, Applicant, and Castlepoint Development Corporation and Bramalea Limited, Respondents

Action No. RE1412/91

Ontario Court of Justice - General Division Toronto Weekly Court Austin J. Heard: November 4, 1991 Judgment: November 14, 1991

Angela M. Costigan, for the Applicant. Stanley B. Bush, for Bramalea Limited.

AUSTIN J.:-- Scanlon agreed to buy a condominium from Castlepoint. Castlepoint assigned the agreement to Bramalea. Construction did not proceed as quickly as planned. Bramalea changed the closing date from November 4, 1991, to September 14, 1992. Scanlon asks the court to declare the agreement void and to order repayment of his deposits.

The claim is made by way of application. It is put on two bases:

(1) The change of closing date was an anticipatory breach of contract which entitled Scanlon to terminate it.

(2) Castlepoint did not make the disclosure required by s. 52 of the Condominium Act, and as a result the agreement is not binding on Scanlon.

The basis of the anticipatory breach argument is that closing was fixed at November 4, 1991, by the agreement. It was apparent by May 1991 that construction would not be sufficiently advanced by November so Bramalea unilaterally changed the date to September 14, 1992. Bramalea's position is that while November 4, 1991, was originally set for closing, the agreement permitted it to extend the time for performance and thereby postpone the date for closing. Scanlon says that the relevant provisions of the agreement are contradictory, that contra proferentum applies, and the agreement must be interpreted in a manner more favourable to him.

The agreement was drafted by or on behalf of Castlepoint. Bramalea admits that it is bound by it. The relevant terms, in logical order, are as follows:

12. The transaction of purchase and sale is to be completed on the Closing Date.

....

1. The following definitions shall apply to this Agreement:

....

(b) "Closing Date" or "Closing" means the 4th day of November, 1991 or as extended by Paragraph 13(d).

....

13. If the Unit is substantially completed sufficient to permit occupancy on Closing, but the declaration and description have not been registered, then the Purchaser shall occupy the Unit on that date (the "Occupancy Date") on the following terms and conditions:

....

(d) the Closing Date shall be extended to a date 20 days after notice in writing is given by the Vendor's Solicitors to the Purchaser or his Solicitor that the declaration and description have been registered. If the Purchaser fails to close the transaction as aforesaid, through no fault of the Vendor, the Purchaser shall be in default hereunder, and shall be required to deliver vacant possession of the Unit. The Vendor shall in that event be entitled to retain all monies paid hereunder for damages and expenses and unpaid occupation charges. The Purchaser shall be responsible for the damages and expenses and the cost of redecorating as may be determined by the Vendor at its sole discretion as a result of the possession herein;

....

22. If the completion of the Unit or the common elements is delayed by reasons of strikes, lock-outs, fire, lightning, tempest, riot, war and unusual delay by common carriers or unavoidable casualties or by any other cause of any kind whatsoever whether or not beyond the control of the Vendor, the Vendor shall be permitted extensions of time from time to time for completion and the Closing Date shall be extended accordingly. If the Vendor is unable to complete the Unit and close this transaction within such extended time or times for closing, all monies paid hereunder by the Purchaser other than any occupancy fees, shall be returned to him and this Agreement shall be null and void. If the unit is substantially completed by the Vendor on or before Closing or any extension thereof as aforesaid, this transaction shall be completed on such date notwithstanding that the Vendor has not fully completed the Unit or the common elements and the Vendor shall complete such outstanding work within a reasonable time after Closing, having regard to weather conditions and the availability of labour and materials. In any event the Purchaser acknowledges that failure to complete the common elements on or before Closing shall not be deemed to be a failure to complete the Unit.

By coincidence, this matter was heard on November 4, 1991. The condominium was not ready for occupation on that date. According to Scanlon, one looks first to clause 12. It provides for completion of the purchase on the "Closing Date." That term is defined by s. 1(b) as November 4, 1991, "or as extended by Paragraph 13(d)." Paragraph 13(d) is inapplicable because the Unit was not substantially completed sufficient to permit occupancy on November 4, 1991. Therefore, the date is not extended; it remains at November 4, 1991.

Bramalea's argument is that clause 22 overrides the November 4, 1991, date in the event of delay. The delay may be the result of almost any cause whatever. Counsel for Bramalea acknowledged that, whatever the cause, it would be limited by what was reasonable and by what was in good faith.

The first issue is whether, in these circumstances, there is a conflict or contradiction in the terms of the agreement. If there is, the second issue is how it is to be resolved.

In my opinion, there is a contradiction. Clauses 12 and 1(b) provide for a closing on November 4, 1991, subject to clause 13(d). Clause 13(d) does not apply in the circumstances. The closing is therefore fixed for November 4, 1991. Clause 22, on the other hand, gives the Vendor the right to virtually unlimited extensions. Clause 22, therefore, conflicts with or is contradictory to clauses 12 and 1(b). If it had been the intention of the parties that clause 22 override the others, then 1(b) would have read, "or as extended by Paragraphs 13(d) and 22.

In such circumstances, the agreement is to be interpreted "against" the party who drafted it, in this case, Castlepoint and Bramalea. *Chin v. Jacobs et al.* (1972), 24 D.L.R. (3d) 636 (Ont. C.A.) at pp. 641-642. I therefore find that clauses 12 and 1(b) apply. The closing was to be on November 4, 1991, and Bramalea's letter of May 31, 1991, changing the date, constituted an anticipatory breach of the agreement. The date of closing was a fundamental term. Scanlon was therefore entitled to treat the agreement as at an end. He is entitled to a declaration that the agreement is null and void.

In these circumstances it is not necessary to deal with the question of the adequacy of the disclosure made by Castlepoint.

Scanlon is entitled to the return of his deposits, with interest. There is an issue as to the rate of interest. That matter and the question of costs, entitlement and quantum, may be addressed by letter. In the meantime, Scanlon is entitled to issue a certificate of pending litigation and to register the same against the lands in issue.

AUSTIN J.

CBR# 357

York Condominium Corporation No. 166, Applicant, and Rafael Nunez and Graciela Nunez, Respondents

Action No. 12725/90

Ontario District Court - York Region Judicial District Newmarket, Ontario Loukidelis D.C.J. Heard: April 5 and 12, 1990
Judgment: April 20, 1990

J.A. Rogers, for the Applicant. M. Herman, for the Respondents.

LOUKIDELIS D.C.J.:-- At the conclusion of the hearing, I indicated that I would reserve my decision and would attempt to give brief written reasons as soon as possible.

The applicant corporation seeks a declaration that the respondent owners are in breach of certain provisions of the declaration, by-law and rules of the corporation.

There were three main complaints:

1. Undue noise emanating from the respondents' unit being unit five, level 12 and being described as unit 1205, contrary to Rule 9.
2. The improper storage of furniture and other items on the unit balcony.
3. The keeping of a vehicle in the corporation garage which is not in operating condition, contrary to parking rule three.

The matter has unfortunately been somewhat complicated by racial overtones -- at least in the minds of the respondents. I will refer to this point later in my judgment. The respondents obviously felt that they were not being treated fairly and this has exacerbated a tense situation. The respondents have for the past several months been attempting to sell their unit and leave the building but have been unsuccessful to date.

Undue Noise: I find on the evidence that the complaints made by various other unit owners to the condominium board concerning the noise emanating from unit 1205 were indeed, valid complaints. I find also that on several occasions, the complaining neighbours were unable to contact the occupants by telephone or by knocking on their door.

Other than the odd domestic dispute which disturbed some of the neighbours, the obvious problem was the playing of loud stereo music and drums throughout several evenings and particularly after 11:00 p.m.. I find on the evidence that the loud music and the drum playing was done by their son, Roberto. Roberto, who is 15 years of age, has a learning disability and has no perception of time. He readily admitted that he has played the drums and that he turned the stereo up quite loudly. Mrs. Nunez, in her evidence, indicated that Roberto was supervised most evenings when she and her husband were out working. I simply do not accept her testimony on that particular point. I find that the child was left by himself an average of three or four evenings a week. The evidence of Roberto is consistent with the evidence of the complaining' neighbours that they were unable to attract his attention on several occasions, either because he did not wish or was afraid to answer the door or simply did not hear the knocks on the door or the telephone. The respondents, of course, are responsible for any occupant in their unit including their children. Notwithstanding the complaints they received, the respondents continued to leave Roberto unsupervised and allowed the incidents to continue. As indicated, I must accept the affidavit evidence and viva voce evidence of the complaining neighbours concerning the noise. The evidence of Mr. Graf, on behalf of the respondents, does not sway me to find that the complaints were unfounded. In addition, I find that on some occasions, drums were being played in addition to the stereo and Mr. Graf did not take this into account in his tests.

Balcony Storage:

While technically in breach of the rules by storing items on the balcony for brief periods of time, the respondents in my view, had a reasonable excuse in that on two occasions, they were having the rugs cleaned and the only sensible place to store many of the items temporarily, was on their balcony.

I find that the photos of the overcrowded balcony taken in November, 1989, do not properly depict the condition of the balcony at the time the complaints were made in August of 1989. This was a temporary breach and does not in my view, require a court declaration.

Storage of Motor Vehicle:

The evidence concerning the "inoperable vehicle" raised some very interesting sidelights. The corporation manager and the president allege that the vehicle was not properly licensed and sat as a derelict vehicle with the same flat the over several weeks or months.

The evidence indicates that in fact, at the time of their concern, the vehicle was properly licensed. i.e. the owners had proper plates for same. Mr. Nunez also claims that he, in fact, has driven the vehicle in the past few weeks and that the flat tire shown in the photographs, is a recurring problem caused, he suspects, by vandals. That is no doubt possible. I must accept his evidence corroborated by his bills that he indeed had the flat tire fixed on two occasions. However, the question of the rear license plate being properly attached to the vehicle, I find to be opposite to what Mr. Nunez claims. I accept the evidence of Mr. Kenny on this point. While Mr. Nunez had the proper licenses, they probably were not properly attached.

As I indicated however, during the hearing, little turns on this point except perhaps the matter of credibility. On all the evidence, I am not satisfied that there has been a breach of the parking rule and would make no order in this regard.

Returning now to the question of any possible racial prejudice, I accept the evidence of Mrs. Nunez that their son, Roberto, who as I indicated has a learning disability and appears to be a very sensitive lad was the object of a racial slur by someone at the condominium swimming pool who was in charge. He was referred to by such person as "brown boy".

A second incident Which took place in the lobby shortly after the respondents moved in again concerned their son, Roberto and the now president of the corporation, Mr. Russon. I accept the evidence of Roberto and his father in that Mr. Russon spoke sharply to Roberto whom he did not know at that time with the words, "Hey, boy, what are you doing here?" I accept that while the tone and words were impolite, I do not find that they were racially motivated as Mr. Nunez claims. As indicated, the Nunezs had just moved in and Roberto was not known to Mr. Russon.

Unfortunately, the above two incidents upset the respondents and set the tone of their relationship with the corporation and some of their neighbours.

In addition, there appeared to be an uneven application of some rules such as,

- (a) the storage of signs in parking areas,
- (b) other owners storing items on their balconies,
- (c) the fact that the hours for the use of the service elevator were not extended to them on the first day that they moved in.

When one is conscious of prejudice, matters such as those referred to above are often taken as acts of prejudice.

Mr. Kenny admitted on cross-examination that indeed the same procedure was not followed exactly in all complaints. I am not, however, prepared to find that this fact was proof of racial prejudice on his part or on the part of the corporation.

Having found the respondents did, in fact, breach Rule 9 of the condominium corporation, I would make the requested order requiring the respondents to comply with Rule 9 of the applicant corporation.

The applicant also seeks solicitor/client costs. I quite agree that on an application such as this that an offending owner, particularly where the offence is repeated, should be liable for the costs of any action taken against him on a solicitor/client scale.

However, in this case, the corporation was successful on only one of three points. In addition, having found that indeed there was a racial slur aimed at the respondents' son at the swimming pool by an employee of the corporation, I would allow the applicant one-third of its costs on this application on a solicitor/client scale.

In summary therefore, I make the following order: 1. That the respondents be required to comply with Rule 9 of the applicant condominium corporation.

2. Requiring the respondents to pay to the applicant, one- third of its assessed costs on a solicitor/client basis.

LOUKIDELIS D.C.J.

CBR# 045

Berry et al. v. Indian Park Association

44 O.R. (3d) 301

Docket No. C28753

Court of Appeal for Ontario Abella, Laskin and Rosenberg JJ.A. May 3, 1999

Michael M. Miller, for appellant. Martin Scisizzi, for respondents.

The judgment of the court was delivered by

LASKIN J.A.: -- Sugarbush is a rural community near the Horseshoe Valley Ski Resort. It was developed in three phases. The homes in Phases I and II form a recreational cottage community. The homes in Phase III, which were built much later, form a modern residential subdivision. The appellant Indian Park Association maintains a recreation centre and other common areas in the community for the benefit of all the residents. The Association's by-laws require every resident of Sugarbush to be a member of the Association. The by-laws also contain a number of restrictive covenants, restricting how owners can use their land. The Association claims that these land use restrictions are enforceable because they are part of a valid building scheme covering all the lots in Sugarbush.

The respondents are a group of aggrieved neighbours who live in homes in Phase III of the Sugarbush community. They object to being required to join the Association and to being required to comply with the land use restrictions in the Association's by-laws. These owners applied to court to be relieved of their obligations under the by-laws. In a judgment dated April 24, 1997 [reported 33 O.R. (3d) 522, 12 R.P.R. (3d) 315], Eberhard J. declared that the challenged by-laws of the Association were not enforceable against the lots in Phase III. She held that there was no valid building scheme over Phase III and that the challenged by-laws exceeded the powers of the Association in its letters patent and in the Corporations Act, R.S.O. 1990, c. C.38.

The Association appeals and submits that Eberhard J. erred both in failing to find a valid building scheme and in holding that the Association exceeded its powers in passing the by-laws in question.

The Facts

The homes in Phases I and II of the Sugarbush community were built in 1974 and 1975 by two developers, Kitwee Developments Incorporated and Modco Investments Ltd. Phase I consists of 94 lots, Phase II of 63 lots. Kitwee and Modco built small, rustic, wooden chalets on these lots. These chalets were built for seasonal use by those who skied at Horseshoe Valley. They had few amenities and were located in quiet, wooded and somewhat isolated surroundings.

Under a development agreement with the local municipality, Kitwee and Modco provided the part-time residents of Sugarbush with a number of services that the municipality was unable or unwilling to provide, including snow and garbage removal and the supply of clean water. To maintain these services and to allocate their costs to the residents, Kitwee and Modco applied to turn Phases I and II into a condominium. However, their application was rejected. Kitwee then created a "mock" condominium scheme by incorporating the Association as a non-share capital corporation.

On August 30, 1974, Kitwee, Modco and the Association signed an agreement (the Kitwee agreement) which expressly established a building scheme governing the management of the land in Phases I and II. Under the Kitwee agreement, the Association undertook to manage and maintain for the residents the water supply and distribution system and the sewage disposal system. Kitwee also transferred some land in Sugarbush to the Association to be used for a common parking lot and a recreational centre. In addition, Kitwee and Modco agreed with the Association that when they sold lots in Phases I and II they would impose on the purchasers a number of restrictive covenants affecting how lot owners could use and enjoy their land. These land (or lot) use restrictions were contained in the Association's by-laws and were registered against title to each lot in Phases I and II. They provided:

Provisions Respecting the Lots: The use of the Lots shall be in accordance with the following restrictions for the enhancement in value of all of the Lots and Land and the better enjoyment thereof by the members:

(i) No garage or fence shall be constructed or erected on any Lot save and except each lot owner may construct and install a pool which can be fenced in accordance with the by-laws and zoning restrictions of the Township of Oro. (ii) . . . no improvements, alterations or additions to any Lot or to the exterior of any premises thereon shall be made, performed or constructed without the prior written approval of the board, which approval shall not be unreasonably withheld.

(iii) No trees shall be cut down other than those which are dead or diseased

(iv) No motor vehicles of any kind other than snowmobiles or motorcycles shall be parked on any Lot . . . only snowmobiles may be driven on or over the lands owned by the Corporation or parked on such lands.

(v) There shall be no littering on any Lot

(vi) No animal shall be kept or brought on any Lot other than domestic animals normally regarded as pets.

(vii) No signs advertising any Lot for sale or rent shall be placed thereon without the prior written approval of the board which approval shall not be unreasonably withheld.

(viii) The beneficial ownership in and to any Lot shall not be transferred by sale, gift, bequest or otherwise, other than to a person who shall acknowledge, in writing, to the Corporation his membership therein and accordingly his obligations to observe this and any other By-laws of the Corporation.

When Phases I and II were built in 1974 and 1975 no further development within the Sugarbush community was contemplated. However, in 1988 the directors of the Association negotiated with Monica Interior Designs Ltd., the owner of the adjoining land,

to amalgamate its land with the original Sugarbush community. Instead, however, of adding to the existing seasonal cottage community, Monica developed its land into a modern residential subdivision, consisting of year-round homes with amenities including private driveways, garages, lawns and basements. Monica's development became Phase III of the Sugarbush community. Phase III consists of 178 lots on which Monica has built 82 permanent homes. In November 1988 before any Phase III lots had been sold, the Association passed new by-laws, containing even more onerous restrictions on the use of lots in Sugarbush. These new restrictions included:

1. Board approval must be obtained for the construction or installation of any structure of all new dwellings prior to receiving a building permit, excepting those homes built by the developer.

6. No pool or fence shall be constructed or erected on any Lot.

7. Except in authorized garages, Lots may not be used to store the following: unlicensed vehicles, boats, trailers, mobile vans, non-permanent structures not approved by the Board, heavy equipment, machinery, garbage and debris. These items will be removed at the Owner's expense.

10. Only vehicles used for normal passenger transportation should be parked on the lots. Commercial trucks and other commercial vehicles may not be parked within Sugarbush.

.....

14. Lots cannot be used for commercial ventures. Home occupations are permitted as long as lots are not advertised for commercial use.

.....

17. Lots shall be used for single family use only. For the purpose of this By-law "family" means one human being or two or more human beings related by blood, marriage or legal adoption or a group of not more than three human beings who need not be related by blood or marriage living together as a single housekeeping unit

In August 1991 Monica and the Association signed an agreement ("the Monica agreement") by which the Phase III lands were brought under the umbrella of the Association's management of Sugarbush. Monica agreed "on behalf of itself, its successors and assigns" to abide by the Association's by-laws, rules and regulations. In turn, the purchasers of lots in Phase III became members of the Association and also undertook in their agreements of purchase and sale to comply with the Association's by-laws, rules and regulations.

Although the Phase III development has commonly being considered part of the Sugarbush community, it differs in significant ways from the development in Phases I and II. Phase III was built years later and by a different developer than Phases I and II. The Phase III land was developed as a modern permanent residential subdivision. The developer, Monica, built large, brick homes with basements and private driveways. The homeowners use municipal garbage collection. The land in Phases I and II was developed as a seasonal, recreational cottage community. The developers, Kitwee and Modco, built small, wooden cottages without basements or private driveways. The cottagers use common parking lots and garbage dumpsters. The Monica agreement covering Phase III does not refer to the establishment of a building scheme. The Kitwee agreement, covering Phases I and II, does refer to the establishment of a building scheme. Finally, the Association's restrictive covenants are not registered on title to the land in Phase III, but are registered on title to the land in Phases I and II.

These differences led to disputes between Phase III residents and the Association, which was controlled by the residents in Phases I and II. The Phase III residents complained that many of the services provided by the Association and for which they paid yearly maintenance fees, were irrelevant to them. For example, the Association provides garbage collection, sewage disposal, water supply and distribution, and snow removal from garbage dumpsters and common parking lots. The Phase III residents contributed to the costs of these services which they did not need and which benefited only the residents in Phases I and II. Eventually, many of the Phase III residents stopped paying their maintenance fees and these court proceedings were launched.

First Issue: Are the Phase III lands part of a valid building scheme?

The Association seeks to enforce its by-laws, including those containing land use restrictions, against the owners of land in Phase III. These by-laws amount to restrictive covenants, restricting the way in which the owners may use their property. Because no privity of contract exists between the Association and the Phase III owners, the Association cannot enforce its by-laws under contract law.

But restrictive covenants relating to land are also governed by property law. In some circumstances, property law principles permit restrictive covenants relating to land to be enforced despite the lack of privity of contract. For example, one exception, in equity, provides that if certain conditions are met, both the burden and the benefit of a restrictive covenant may be annexed to the land and so "run with the land". This exception, which originates in the case of *Tulk v. Moxhay* (1848), 41 E.R. 1143 (Ch.), does not apply here. The Association concedes that the restrictive covenants in its by- laws do not run with the Phase III lands under the principles in *Tulk v. Moxhay*.

The Association relies on another equitable exception by which restrictive covenants relating to land may be enforced. This exception concerns building schemes. A restrictive covenant imposed for the purpose of land development may be enforceable despite the lack of privity of contract, if the land is included within a building scheme. A building scheme may exist when restrictive covenants are imposed during the course of development with the intent that once the scheme has crystallized on the sale of the first lot, the vendor will be bound by the scheme and the restrictions will be mutually enforceable by the purchasers of the various lots. [See Note 1 at end of document] The rationale for building schemes rests on the notion that because the restrictions are imposed for the general benefit of the development, all owners have a common interest in their enforcement. This underlying notion of community of interest imports reciprocity of obligation. [See Note 2 at end of document] Thus, under a valid building scheme, restrictive covenants are enforceable by and against the original purchasers and their assignees.

The Association submits that the Phase III land is included within a valid building scheme and thus it may enforce the land use restrictions in its by-laws against homeowners in Phase III. The Association frames this submission on two different footings -- either the Phase III development became part of the pre-existing Phase I and II building scheme or an entirely separate building

scheme exists for Phase III. The latter footing has no merit whatsoever. The Association has sought to enforce the same set of restrictions against Phases I, II and III; it has never treated the Phase III land as a separate scheme. The Association always considered that only one building scheme existed, which comprised Phases I, II and III of the Sugarbush community. Thus I focus on whether the Phase III development, when built in 1988, became part of an existing building scheme. As did the trial judge, I assume without deciding, that a valid building scheme exists for Phases I and II.

Elliston v. Reacher, [1908] 2 Ch. 374 at p. 384, affirmed [1908] 2 Ch. 665 is still the leading case on the requirements of a building scheme. In that case Parker J. set out four requirements that must be met to enforce restrictive covenants as part of a valid scheme.

. . . it must be proved

(1) that both the plaintiffs and the defendants derive title under a common vendor;

(2) that previously to selling the lands to which the plaintiffs and defendants are respectively entitled, the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiffs and the defendants respectively), for sale in the lots subject to restrictions intended to be imposed on all the lots, and which, though varying in details as to particular lots, are consistent and consistent only with some general scheme of development;

(3) that these restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold, whether or not they were also intended to be and were for the benefit of other land retained by the vendor; and

(4) that both the plaintiffs and the defendants, or their predecessors in title, purchased their lots from the common vendor upon the footing that the restrictions subject to which the purchasers were made were to enure for the benefit of the other lots included in the general scheme whether or not they were also to enure for the benefit of other lands retained by the vendors.

Although its strict requirements have been relaxed in some jurisdictions, *Elliston v. Reacher* has been consistently applied by courts in Ontario including this court. [See Note 3 at end of document] However, the requirements of *Elliston v. Reacher* co-exist with the provisions of the Land Titles Act, R.S.O. 1980, c. 230, which permit restrictive covenants to be registered and thus annexed to land. Sections 118(1), (3) and (5), the provisions of the Act in force when this case arose, [See Note 4 at end of document] prescribed the procedure and requirements for registration:

118(1) Upon the application of the owner of land that is being registered or of the registered owner of land, the land registrar may register as annexed to the land a condition or restriction that the land or a specified part thereof is not to be built upon, or is to be or is not to be used in a particular manner, or any other condition or restriction running with or capable of being legally annexed to land.

(3) Upon the application of the owner of land that is being registered or of the registered owner of land, the land registrar may register as annexed to the land a covenant that the land or a specified part thereof is not to be built upon, or is to be or is not to be used in a particular manner, or any other covenant running with or capable of being legally annexed to land.

(5) The first owner and every transferee, and every other person deriving title from him, shall be deemed to be affected with notice of such condition or covenant, but any such condition or covenant may be modified or discharged by order of the court on proof to the satisfaction of the court that the modification will be beneficial to the persons principally interested in the enforcement of the condition or covenant.

The trial judge considered *Elliston v. Reacher* and s. 118 of the Land Titles Act and found that Monica did not establish a building scheme over the Phase III land. I think that for two main reasons the trial judge was correct in her finding. First, Monica did not apply to register the land use restrictions now sought to be enforced as restrictive covenants under s. 118 of the Land Titles Act. Instead, it simply registered notice of the Monica agreement (which included the Association's letters patent and by-laws as schedules) under s. 74 of the Land Titles Act. The trial judge held, and I agree with her, that registration of notice of the agreement did not have the effect of annexing the land use restrictions in the Association's by-laws to the Phase III lots. Monica's failure to register the restrictions on land use as restrictive covenants under s. 118 of the Land Titles Act stands in sharp contrast to the action taken by Kitwee concerning the land in Phases I and II. In 1974 Kitwee applied to the land registrar under s. 118 of the Act to annex to the Phase I and II lands the restrictive covenants underpinning the building scheme. The land registrar exercised his discretion by registering these restrictive covenants. I think that there is much to be said for the recommendation of the 1989 Ontario Law Reform Commission Report on Covenants Affecting Freehold Land (at p. 158):

In the event that the formal requirements [of registration of a building scheme] are not satisfied, the instrument should be deemed conclusively not to create a land obligation or a development scheme (although, in such a case, the instrument might create a personal covenant or other obligation).

At least Monica's failure to register the land use restrictions as restrictive covenants affords strong evidence against the establishment of the building scheme over Phase III.

Second, apart from s. 118 of the Land Titles Act, the requirements of *Elliston v. Reacher* have not been met. The first requirement is a common vendor. There is no common vendor. The Association and the owners of Sugarbush received title to their lands from three vendors, Kitwee, Modco, and Monica. Some courts, however, have relaxed the requirement of common vendor and instead focused on the other requirements of the *Elliston v. Reacher*. [See Note 5 at end of document]

Even if I were to ignore the common vendor requirement, the second requirement in *Elliston v. Reacher* has not been satisfied. Under the second requirement, before selling any land, the vendor must have laid out its property for sale in lots subject to restrictions intended to be imposed on all the lots and consistent with a general scheme of development. In 1974 and 1975 when Sugarbush was conceived and developed by Kitwee and Modco, Phase III was not laid out or defined as part of the Sugarbush community. Indeed, Phase III was not even contemplated at the time.

Moreover, I cannot find in the record any evidence that Monica intended to establish a valid building scheme and to impose the Association's by-laws on all Phase III lot owners. Again the contrast between what Kitwee did in 1974/75 and what Monica did in 1988 is instructive: in 1974 and 1975 Kitwee registered on title to the Phases I and II lands an agreement between it, Modco and the Association, which expressly recited that "the parties hereto have agreed to the establishment of a building scheme for the

better enjoyment of and the enhancement of the value of the said lands." The Monica agreement contains no express intention to establish a building scheme. Although such an intention might be inferred in an appropriate case, all that the Monica agreement recited was that Monica "wished" all Phase III lot owners to become members of the Association. This wish falls short of intending to impose the Association's by-laws on each owner.

Also, the Phase III development is not consistent with the scheme of development established in Phases I and II. The scheme developed in Phases I and II preserves Sugarbush as a recreational cottage community; Phase III is a modern residential subdivision. Counsel for the respondent owners accurately described Sugarbush as an "incongruous marriage" between Phases I and II on the one hand, and Phase III on the other. The benefits of the building scheme are not shared by the Phase III residents.

In summary, the restrictive covenants were not registered under the Land Titles Act, and the Association has not met the *Elliston v. Reacher* requirements for establishing the existence of a building scheme. Accordingly, the Association must fail on this first issue.

Second Issue: Are the Association's by-laws restricting land use and requiring mandatory membership enforceable?

In every agreement of purchase and sale between Monica and a purchaser of a lot or home in Phase III, the purchaser agreed to abide by the rules of the Association. The Association therefore submits that its by-laws are binding on Phase III owners. The trial judge rejected this submission. She held that the Association exceeded its powers in passing by-laws that restricted the use to which Phase III owners could put their property and that required all owners to become members of the Association. She therefore concluded that the Association could not enforce its by-laws restricting land use and that the Phase III owners had the right to terminate their membership in the Association. I agree with her conclusion.

In addition to imposing a mandatory membership scheme the Association's by-laws, in effect, restricted members from:

- installing a swing set on their land without the approval of the Association's directors;
- placing a dog house on their land without the approval of the Association's directors;
- building a patio on their land without the approval of the Association's directors;
- building a deck on their land without the approval of the Association's directors;
- installing a shed on their land without the approval of the Association's directors;
- building a garage on their land without the approval of the Association's directors;
- planting trees on their land without the approval of the Association's directors;
- painting their house without the approval of the Association's directors;
- renting space in their home to a temporary lodger without the approval of the Association's directors;
- altering, improving, or adding to their property without the approval of the Association's directors;
- installing a pool on their land;
- paving their driveway;
- building fences;
- parking boats, trailers, mobile vans or other recreational vehicles on their land; -- resigning from the Association;
- transferring their membership in the Association unless they transfer ownership of their homes.

The Association is a non-share capital corporation. Its powers to require mandatory membership and to impose these land use restrictions must be found in its letters patent or in the Corporations Act. The objects of the Association set out in its letters patent are:

- (a) To acquire the ownership of certain lands and premises in the Township of Oro, in the County of Simcoe and Province of Ontario [i.e., the common lands of Sugarbush and not privately held lands] and to manage, maintain, develop and improve such lands for the benefit of the members of the Corporation;
- (b) To manage and maintain any services for the mutual benefit of the members of the Corporation;
- (c) To erect and maintain a building or buildings on the said lands [i.e., the recreation centre];
- (d) To promote social activities among the members;
- (e) To advance the interests and welfare of the members of the Corporation; and
- (f) To assess and collect from the member of the Corporation such sums of money as the Corporation may deem necessary, from time to time, for the purpose of carrying out the said objects.

(Emphasis added)

The Association submits that subparas. (a) and (e) give it the power to impose the by-laws challenged by the owners. I disagree. Far more specific language would be required to give the Association the power to pass by-laws restricting how owners can use their own land or indeed the power to require every owner to become a member of the Association. Eberhard J. made the same point in the following passage in her reasons [at p. 536 O.R.]:

It cannot be imagined that a non-share capital corporation without the benefit of these vast bodies of supporting law could take upon itself the power to restrict use of privately owned land of its members under the general object "to advance the interest and welfare of the members of the corporation" appearing in a list of specific objects which make no mention of the use of private lands. Neither could it be imagined that the general duty of the corporation "to advance the interest and welfare of the members, in a list of duties concerned with managing common land, managing the water supply, collecting contributions for common expenses and effecting compliance with bylaws, could support the much more significant duty to control the use of privately owned lands.

A general object to advance the interest of members of a corporation must be read together with the other objects in order to understand what is intended. A general clause is not licence to pursue a direction that is not consistent with the total objects of the corporation.

I find that in so far as the by-laws purport to restrict the use of private land, they are manifestly outside of the objects of the corporation.

Equally, nothing in either s. 23 of the Corporations Act (the section giving the Association powers incidental and ancillary to its objects) or in s. 129 (the section giving the Association's directors the power to pass by-laws consistent with the Association's objects) assists the Association's position. The challenged by-laws are beyond its powers and therefore unenforceable.

Even if the Association had the power to pass these by-laws, I doubt that it could enforce them against Phase III owners. No privity of contract exists between the Association and these owners and, absent a valid building scheme covering Phase III, the Association does not have standing to enforce its by-laws.

Conclusion

For these reasons I would dismiss the Association's appeal with costs.

Appeal dismissed with costs.

Notes

Note 1: Report on Covenants Affecting Freehold Land, Ontario Law Reform Commission (1989) at pp. 41-42.

Note 2: *Spicer v. Martin* (1888), 14 App. Cas. 12 at p. 25.

Note 3: See, for example, *Scharf v. Mac's Milk Ltd.*, [1965] 2 O.R. 640, 51 D.L.R. (2d) 565 (C.A.).

Note 4: Section 119 of the current Land Titles Act, R.S.O. 1990, c. L.5 prescribes a similar procedure.

Note 5: See *Dorrell v. Mueller* (1975), 16 O.R. (2d) 795 (Dist. Ct.); cf *Re Lakhani v. Weinstein* (1980), 31 O.R. (2d) 65 (H.C.J.).

CBR# 093

Counsel Holdings Canada Limited v. The Chanel Club Limited et al.

43 O.R. (3d) 319

Docket No. C27207

Ontario Court of Appeal Labrosse, Charron and Feldman JJ.A. March 5, 1999

NOTE: An appeal from the above-cited judgment of the Ontario Court (General Division) (Adams J.), reported at 33 O.R. (3d) 285, to the Court of Appeal for Ontario was dismissed on March 5, 1999. The court's endorsement was as follows:

BY THE COURT: -- This appeal involves a question of priority to the proceeds from the sale of property, The contest is between Counsel Holdings' first mortgage (registered) and ONHWP's subrogated rights of purchasers (unregistered) to recover their deposits paid under purchase agreements of condominium units of which Counsel Holdings had notice.

It is undisputed that Counsel Holdings has first priority under its mortgage except to the extent that it had actual notice of a prior interest. ONHWP relies on the purchase agreements to impute notice to Counsel Holdings. Paragraph 26 of the purchase agreements expressly subordinated the rights of purchasers to Counsel Holdings' mortgage. ONHWP argues, however, that Counsel Holdings cannot claim the benefit of the subordination clause because it is not a party to the purchase agreements.

In our view, the issue is not one of privity of contract but of notice. The trial judge correctly held that notice of an interest that is expressly stated to be subordinate to the mortgage is not actual notice of a "prior" interest and, therefore, cannot defeat Counsel Holdings' registered interest. Counsel relied on the case of Euroclean Canada Inc. v. Forest Glade Investments Ltd. (1985), 49 O.R. (2d) 769, 16 D.L.R. (4th) 289 (C.A.). However, that case is not of assistance to the appellant as it does not deal with the issue of notice.

Alternatively, ONHWP argues that, as a matter of construction, the subordination clause does not apply to the purchasers' equitable liens because the liens do not arise from the contract but by operation of law. The trial judge was correct in rejecting this argument. The purchasers' claim to their deposits clearly arose under the purchase agreements and any rights flowing therefrom are subject to the terms of those agreements, including the subrogation clause.

The ground of appeal with respect to the deposits being subject to a trust claim, an argument that the trial judge held to be without merit, has been abandoned.

In the result, we agree with the trial judge's conclusions on the two issues raised on appeal. The appeal is dismissed with costs.

Harry C.G. Underwood, for appellant, Ontario New Home Warranty Program ("ONHWP"). Benjamin Zarnett and Graham D. Smith, for respondent.

CBR# 106

Dinicola et al. v. Huang & Danczkay Properties

40 O.R. (3d) 252

Docket No. C24850

Ontario Court of Appeal Finlayson, McKinlay and Labrosse JJ.A. June 19, 1998

NOTE: An appeal of the judgment of the Ontario Court (General Division) (Beaulieu J.), reported at 29 O.R. (3d) 161, to the Court of Appeal for Ontario was dismissed on June 19, 1998. The court's endorsement was as follows:

BY THE COURT: -- The appellant appeals the decision of Beaulieu J. [reported (1996), 29 O.R. (3d) 161, 135 D.L.R. (4th) 525, 2 R.P.R. (3d) 267] awarding the respondents damages for breach of contract of their respective condominium purchase agreements with the appellant.

The trial judge rejected the defence that the agreements were frustrated by an unanticipated event, namely the failure to get municipal approval for the project. Additionally, he found that the conduct of the appellant caused or contributed to the non-performance of the agreements.

It is apparent to us that the risk of the City of Toronto not approving the development was a direct concern of the appellant going into the negotiations of the individual condominium agreements. After all, the agreements were executed before the appellant even owned the property. To perform the agreements, the appellant had to get development approval and as experienced developers they must have been aware that their preferred design for the project could be rejected. This risk was alleviated to some extent by the terms of the agreements, in particular cl. 38, an escape clause which permitted the appellant to terminate the agreements without liability on or before June 30, 1988, in the event that municipal approval of the development was not obtained. The appellant also protected itself with cls. 25(h) and 26 which permitted it to make major design changes.

It can scarcely be said that cl. 38 did not contemplate specifically what happened in this case. The appellant was assuming the risk after June 30, 1988 that the municipality might not approve the project. For their part, the respondents made commitments to purchase units, and if the development was not going to proceed as planned as of June 30, 1988 (as was the case since development approval was not obtained), had cl. 38 been triggered, then they could have retrieved their deposits and re-entered the market rather than risk that the units may never materialize. However, only the appellant had the ability to terminate without liability under cl. 38 and it did not do so. Accordingly, the trade-off to the appellant of acquiring the privilege of locking the respondents into the agreements past June 30, 1988 was the assumption of the risk that the project might not be approved.

Accordingly, the trial judge was entitled to find as he did that the appellant could not argue that what occurred was "entirely beyond what was contemplated by the parties".

The appellant argues that, nonetheless, what happened here was not a normal approval process. The appellant found itself in a "war" with the City over the development philosophy for the entire harbourfront property -- it was beyond any normal contemplation. The trial judge gives no indication that he did not appreciate the detailed evidence respecting the appellant's problems in negotiations with the City. Additionally, he was entitled on the evidence to find that the conduct of the appellant in failing to respond reasonably to the letter from the Chairman of the Land Use Committee and the subsequent hard line taken with the City contributed to the failure to obtain the requisite approvals for the development.

The trial judge held that the appellant made a conscious decision to waive the termination right in the escape clause and therefore assumed the risk of liability inherent in the agreements to construct and deliver possession of the units without first obtaining approval for construction. He considered all of the clauses relevant to termination (cls. 6(c), 26, 30(1) and 37) and concluded that none of them relieved the appellant from liability.

The trial judge further held that the appellant failed to use reasonable efforts and failed to take all reasonable steps to obtain the municipal approval required for the proposed project. He also held that the appellant could not rely on its refusal to negotiate with the municipality, which the trial judge found to be unreasonable, to excuse itself from the performance of the agreements.

It is essentially on the basis of these findings that the trial judge concluded that the appellants breached the agreements and that the doctrine of frustration could not assist the appellant. The alleged unanticipated event was not "so fundamental as to be regarded by the law both as striking at the root of the agreement and as entirely beyond what was contemplated by the parties when they entered into the agreement": see *Leitch Transport Ltd. v. Neonex International Ltd.* (1979), 27 O.R. (2d) 363, 8 B.L.R. 257 (C.A.).

The trial judge awarded damages intended to place the respondents in the same position as they would have been had the agreements been performed. The respondents had not only paid the necessary deposits required under the agreements, they had committed themselves to the balance of the purchase price until the proposed date of possession. Accordingly, they should be compensated for the value of their investments as found by the trial judge.

With respect to the appropriate date to assess the damages, the trial judge rejected the extended possession dates provided for in the agreements and the date of the breach of the agreements. (The appellant did not argue that the date of the breach was the appropriate date and we need not consider it.) The trial judge found that in the circumstances, the date specified in the respective agreements for delivery or possession of the units to the respondents was the appropriate date: see *Ritcher v. Simpson* (1982), 24 R.P.R. 37, 37 B.C.L.R. 325 (S.C.). He then based his assessment on the calculation provided by the appellant's expert witness.

There was ample evidence to support the trial judge's findings and conclusions referred to above. We see no proper basis to interfere.

The appeal is dismissed with costs.

W. Ross Murray, Q.C., and Wendy J. Earle, for appellants. Harold W. Sterling and Robert W. Kerkmann, for respondents.

CBR# 335

Urbanetics Limited v. Ontario New Home Warranty Program

31 O.R. (3d) 284

No. 307/94

Ontario Court (General Division), Divisional Court, O'Driscoll, Borkovich and Corbett JJ. November 14, 1996

APPEAL pursuant to s. 11(5) of the Ministry of Consumer and Commercial Relations Act, R.S.O. 1990, c. M.21.

Glenn R. Solomon and David Paul Preger, for appellant/ respondent in cross-appeal. Brian Campbell, for respondent/appellant in cross-appeal.

The judgment of the court was delivered by

ODRISCOLL J.: --

I. Nature of Proceedings Under s. 11(5) of the Ministry of Consumer and Commercial Relations Act, R.S.O. 1990, c. M.21, as amended ("M.C.C.R.A."), Urbanetics Limited ("Urbanetics") appeals to the Divisional Court from an order of the Commercial Registration Appeal Tribunal ("Tribunal"), dated April 11, 1994, following 31 days of hearings.

Section 11(5) of the M.C.C.R.A.:

11(5) An appeal under this section may be made on questions of law or fact or both and the court may exercise all the powers of the Tribunal, and for such purpose the court may substitute its opinion for that of the Registrar or of the Tribunal, or the court may refer the matter back to the Tribunal, or the court may refer the matter back to the Tribunal for rehearing, in whole or in part, in accordance with such directions as the court considers proper.

In the order under appeal:

(i) Teron International Urban Development Corporation Ltd. ("T.I.U.D.C.L.") was ordered to pay to the Ontario New Home Warranty Program (the "Program") the sum of \$166,750 within 90 days of the date of the issue of the order;

(ii) that if that sum were paid as directed, the Registrar of the Program should not carry out his proposal, dated September 10, 1990, to refuse to renew the registration of Urbanetics under the Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31 (the "Act"), ss. 7, 8 and 9;

(iii) that if that sum were not paid as directed, the Registrar should carry out his proposal.

The Program cross-appealed and asked that the decision of the Tribunal "be set aside and that the issue of damages and vendor's liability be referred back to the Tribunal to determine the proper quantum of damages for breach of warranty, and the extent of the vendor's liability for breach of warranty".

On September 19, 1996, at the conclusion of argument, the members of the court recessed, returned and announced that the appeal was allowed with reasons to follow. At that time, counsel agreed that because the appeal had been allowed, the cross-appeal was rendered moot and is dismissed.

II. Summary of Facts Relevant to Appeal

1. William Teron (father) and Chris Teron (son) are officers and/or directors of both Urbanetics and T.I.U.D.C.L.

2. T.I.U.D.C.L., registered as a vendor and a builder under the Act, was the vendor and builder of a condominium project consisting of two six-storey buildings and several townhouses. Counsel for the appellant told us that William Teron lives in one of the buildings.

3. Upon completion, there were a number of deficiencies brought to the attention of T.I.U.D.C.L. by unit owners; it appears that all were remedied satisfactorily by T.I.U.D.C.L. The only difficulties that remained extant were experienced by Carlton Condominium Corporation No. 256 ("C.C.C. 256"), the owner of common areas, with regard to common elements and principally waterleaks to the "curtain walls" of the two buildings.

4. Despite some repairs and the commissioning of reports, C.C.C. 256 continued to complain of "curtain wall leaks".

5. Meetings and negotiations took place amongst the Program, T.I.U.D.C.L. and C.C.C. 256. However, on June 3, 1988, T.I.U.D.C.L. received a copy of a letter from the Program addressed to C.C.C. 256 advising C.C.C. 256 to place for quotation the items listed in Schedule "A" thereto and that the Program would pay all reasonable costs. The letter from the Program stated that the specifications should be developed from the Morrison Hersfield Report ("M.H. Report"), a study commissioned and paid for by T.I.U.D.C.L.

6. T.I.U.D.C.L. took the position that C.C.C. 256 did not carry out the instructions given by the Program to obtain specifications and a tender based on the M.H. Report. T.I.U.D.C.L. further claimed that instead, C.C.C. 256 obtained a new recommendation from the architects stating that all the windows and every pane of glass on all four sides of both six-storey buildings should be pulled out and replaced -- this recommendation included replacing:

(i) all of the sliding doors about which no complaint had ever been made; (ii) many of the windows on the other three sides about which no complaints had ever been made; and

(iii) all of the repairs that T.I.U.D.C.L. had done up to that point.

7. T.I.U.D.C.L. further took the position that C.C.C. 256 had completely ignored the instructions of the Program. However, in August 1989, the Program advised C.C.C. 256 that it had reviewed the specifications and found them to be in order.

8. On August 1, 1990, the Program issued a cheque in the amount of \$1,301,154.61 to settle C.C.C. 256's claims against the Program. On the same day, the Program invoiced T.I.U.D.C.L. for a total of \$1,542,465.66 (which includes the Program's 15 per cent administration fee).

9. The Program paid out \$1,325,934.69 notwithstanding the fact that the limit of its statutory or regulatory liability was \$920,000.

10. T.I.U.D.C.L. did not pay the amount demanded by the Program because it took the position that the Program had acted beyond its powers and because of the course of conduct adopted by the Program.

11. Counsel for the appellant told us that the Program was suing T.I.U.D.C.L. for \$1.5 million.

12. T.I.U.D.C.L. allowed its registration to lapse under the Ontario New Home Warranties Plan Act, R.S.O. 1980, c. 350 (now R.S.O. 1990, c. O.31).

13. By letter, dated September 10, 1990, the Registrar sent a notice of proposal to the appellant, Urbanetics Limited, stating: The Registrar gives notice of his proposal (the "Proposal") to refuse to renew your registration for the reasons shown on the reverse side of this notice.

The reasons on the reverse side of the notice state:

The past conduct of Mr. Chris Teron and Mr. William Teron directors and officers of Urbanetics Limited affords reasonable grounds for belief that the applicant's undertakings will not be carried out in accordance with law and with integrity and honesty, to WIT:

As directors and officers of Teron International Urban Development Corporation Ltd., Mr. Chris Teron and Mr. William Teron permitted that company to violate its statutory obligations which led to the Ontario New Home Warranty Program having to pay out of its Guarantee Fund the total sum of \$1,524,824.89 for warranted repairs. This all being contrary to the provisions of Section 4(4) subsection (2) of the Vendor/Builder Agreement executed by the above company.

14. Urbanetics appealed to the Tribunal. The 31 days of hearing took place between September 1991 and November 1993. On April 11, 1994, the Tribunal's reasons for decision and order (83 pages) were released.

III. Findings of the Tribunal

The tribunal therefore finds that the amount for which Teron International should have been liable for the completion of the remedial work by the Program was \$166,750.00.

Another consideration which the Tribunal considers important in this case is the fact that the Registrar, the exercise of whose discretion we have to consider, is the very person in the Program who has to take a large part of the responsibility for decisions which we have found to be peculiar to say the least, and whose conduct at the final meeting with the Terons was such that we would not think it should be standard procedure. With all of these considerations in mind, the Tribunal has reached the conclusion that it should now form its opinion upon the critical question and as provided by s. 16(3) of the Act substitute that opinion for that of the Registrar set out in the proposal.

The Tribunal does not find that the conduct of William Teron and Chris Teron in refusing to cause Teron International to pay \$1,524,824.89 to the Program affords any reasonable grounds for belief that the applicants' undertaking will not be carried out in accordance with law and with integrity or honesty. While we have set out above certain criticisms of Teron International (and therefore of the two men who substantially control that company), none of these encompass any dishonesty or lack of integrity. The conduct of the matter by the Program was such that the only course available to the Terons to dispute the position of the Program and resist this very large and, in the result, unjustified claim was to do exactly what they did. We must, therefore, find that the sole ground upon which the Registrar bases his Proposal cannot be supported.

6. Question of the order which should be made herein

Upon the foregoing finding, the Tribunal would probably be justified in simply making an order directing that the Registrar not carry out his proposal. However, there are reasons why we should consider an alternative to this conclusion. It is our view that, upon the findings which we have made, the Program would now be justified in demanding payment from Teron International of the sum of \$166,750 and, if the same were not paid within a reasonable time, to put this failure forward as the basis of a new proposal to the same effect as this one except for the amount involved. We have to consider whether we have jurisdiction to make such an alternative order herein. In his argument in reply, as noted above, Mr. Campbell strongly submitted that we have such jurisdiction and for reasons which we shall outline briefly we accept his submission.

It does not seem right to require the Registrar to have to issue a new proposal and perhaps have to come back to this Tribunal a second time with such proposal based on a fact situation which has been established after such a long and thorough hearing. It is also perhaps important on this point to keep in mind that, while considerably the greater of the criticism for the mismanagement of the whole matter rests with the Program, the applicant is not free from blame. If it had carried out the recommendations of Morrison Hershfield with dispatch, that should have been an end of the whole matter. Also, if as soon as it got a copy of the letter of June 3, 1988, it had gone after the Program and insisted that proper instructions for quotations and tender be issued on the basis of the Morrison Hershfield Report, the Program would likely have corrected the mistake in accordance with its own decision to proceed on that basis. On the other hand, if the Program had refused to put it right in those circumstances, it would have been clear to everyone at that time, that the total responsibility for the mishandling of the matter rested with the program.

Therefore, we are of the view that the provisions of s. 16(3) of the Act give us authority to make the order hereunder:

16(3) . . . and may by order direct the Corporation to take such action as the Tribunal considers the Corporation ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Corporation.

Accordingly we have concluded that the order we should make is that the Registrar should renew the registration of Urbanetics Limited on condition that there be paid to the Program on behalf of Teron International Urban Development Corporation Ltd., the sum of \$166,750.00 within a reasonable time.

By virtue of the authority vested in it by s. 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs that:

(1) There shall be paid to the Ontario New Home Warranty Program on behalf of Teron International Urban Development Corporation Ltd., the sum of \$166,750.00 within 90 days of the date of the issue of this order;

(2) That in the event, the said sum of \$166,750.00 is paid as directed, the Registrar shall not carry out his proposal;

(3) That in the event the said sum is not paid as directed, the Registrar shall carry out his proposal.

IV. Relevant Sections of the Ontario New Home Warranties Plan Act

6. No person shall act as a vendor or a builder unless the person is registered by the Registrar under this Act.

7(1) An applicant is entitled to registration by the Registrar except where,

(c) the applicant is a corporation and,

.....

(ii) the past conduct of its officers or directors affords reasonable grounds for belief that its undertakings will not be carried on in accordance with law and with integrity and honesty . . .

8(2) Subject to section 9, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 7, if the registrant were an applicant, or where the registrant has a record of breaches of warranties or of failure or unwillingness to complete performance of contracts or is in breach of a term or condition of the registration.

9(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefor, on the applicant or registrant.

(2) A notice under subsection (1) shall state that the applicant or registrant is entitled to a hearing by the Tribunal if the applicant or registrant mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Registrar and the Tribunal.

(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar. V. Conclusions

1. As seen in the Tribunal's reasons for decision and order, supra:

The Tribunal does not find that the conduct of William Teron and Chris Teron in refusing to cause Teron International to pay \$1,524,824.89 to the Program affords any reasonable grounds for belief that the applicants' undertaking will not be carried out in accordance with law and with integrity or honesty . . . We must, therefore, find that the sole ground upon which the Registrar bases his proposal cannot be supported.

2. In its reasons (Appeal Book, p. 84), the Tribunal found that the amount of the remedial work for which T.I.U.D.C.L. should have been liable was \$166,750.

3. In our view, because the sole ground alleged by the Registrar "cannot be supported" (i.e., it was dismissed), and because of the wording of s. 7(1)(c)(ii) and s. 8(2) of the Act, the Tribunal should have ordered that the Registrar's proposal not be carried out unless some other legal basis existed that authorized a condition to be attached to the "dismissal".

4. It is true that s. 9(5) of the Act states that "the Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of this Act". In its reasons for decision and order (Appeal Book, p. 91) the Tribunal said: "It does not seem right to require the Registrar to have to issue a new proposal and perhaps have to come back to this Tribunal a second time with such proposal based on the fact situation which has been established after such a long and thorough hearing."

5. The factum of counsel for Urbanetics states:

It is respectfully submitted that the Registrar cannot use the threat of refusal to renew a registration as a method of trying to collect an unpaid debt arising under the Act.

It is respectfully submitted that the Tribunal erred in law in imposing the condition upon the renewal of the registration of the Appellant solely for the purpose of expediency rather than to give effect to the purposes of the Act.

I agree with those statements set out in the factum.

In *Village Shopping Plaza (Waterdown) Ltd. v. Hamilton- Wentworth (Regional Municipality)* (1981), 34 O.R. (2d) 311 at p. 315, 127 D.L.R. (3d) 354 (Div. Ct.):

The power to impose terms and conditions must, however, be exercised within the perspective within which the statute is intended to operate: *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at p. 140, 16 D.L.R. (2d) 689. The stated objective of the Act is

the maintenance of the escarpment and the control of compatible development. The Commission's own staff agreed that the applicants' proposed development conformed to its policies. In the absence of any express or necessarily implied statutory authorization, the Commission was not, in my view, entitled to oblige the applicants to satisfy Hamilton-Wentworth's road widening policy as a condition of issuing a development permit.

6. The Tribunal in this case concluded that the sole allegation must be "dismissed". In my view, the Tribunal had no jurisdiction to tag the impugned condition onto the dismissal.

7. In my view, s. 16(3) of the Act has no relevancy to the case at bar because s. 16 deals with a hearing before the Tribunal of a "person or owner affected" by a decision of the Corporation. Section 14(1) of the Act speaks of "a person who has entered into a contract with a vendor for the provision of a home". Under s. 1(g) of the Act an "owner" means "a person who first acquires a home from its vendor for occupancy, and the successors in title". The s. 16 hearing before the Tribunal is for a "person affected" and/or an "owner". The s. 16 hearing is not about a hearing sought by a "builder" or "vendor" as defined respectively in s. 1(a) and (n) of the Act.

8. It will be noted that in *Re 982681 Ontario Ltd. (Griffin Construction)* October 6, 1993, the Tribunal, with the same presiding chairperson who presided in the case at bar, said at p. 7:

It is also important to note that the stricture placed against the applicant by the statute is not that a registration should not be granted to a company if there is an unpaid debt to the Program by one of its officers or directors or by another company of which such officer or director was also a director or officer or in which he was in some way a principal. In other words, the Registrar cannot use this proceeding simply as a method of trying to collect an unpaid debt of this kind. The stricture placed against a corporate applicant is that it should not receive its registration if the "past conduct of its officers or directors affords reasonable grounds for belief that its undertakings will not be carried on in accordance with law and with integrity or honesty". So the registration should not be refused simply because the Program has not been paid. It should only be refused if the conduct of Mr. Griffin in dealing with the earlier problem leading to the \$2,075 debt is such as to lead a reasonable person to conclude that he is less than honest and lacks integrity.

VI. Result

The appeal is allowed; the order of the Tribunal, dated April 11, 1994, is set aside. An order will issue directing the Registrar of the respondent to register or renew, without condition, the registration of Urbanetics Limited.

The cross-appeal is dismissed as being moot.

VII. Costs

After announcing that the appeal would be allowed, counsel were asked for submissions as to the quantum of fixed costs. Counsel for the appellant submitted that an appropriate amount would be \$7,500; counsel for the Plan submitted that the figure should be \$5,000.

The respondent shall pay to the appellant its costs fixed at \$5,000.

Appeal allowed.

CBR# 232

Peel Condominium Corp. No. 199 v. Sanrose Construction (Dixie) Ltd. et al.

10 O.R. (3d) 640

File Nos. 418/89 and 419/89

Court of Appeal for Ontario Robins, McKinlay and Labrosse JJ.A. September 23, 1992

NOTE: On an appeal and a cross-appeal from the judgment of Carruthers J. of the High Court of Justice, reported at 68 O.R. (2d) 513, to the Court of Appeal, the appeal was dismissed with costs and the cross-appeal was dismissed without costs on September 23, 1992. The judgment of the court endorsed on the appeal book was as follows:

We are of the opinion that there is ample evidence to support the trial judge's conclusion that the appellant Sanrose failed in its duty to take all reasonable steps to sell the units owned by it in the condominium project in issue. The proceedings against the appellant Town-City Realty Ltd., contrary to the view of the trial judge, fall within the provisions of s. 49 of the Condominium Act, R.S.O. 1980, c. 84, and were not a nullity by reason of non-compliance with s. 14(2).

On the basis of the facts found by the trial judge, he was entitled to grant the relief he did in favour of the respondent against the appellants. We are not persuaded that there is any basis upon which this court can properly interfere with his disposition. The judge exercised his discretion in referring the matter to the local judge rather than appointing a receiver. There is no error in principle in this respect and we would not interfere. In the result the appeal will be dismissed with costs. The cross-appeal will be dismissed without costs.

John I. Laskin and Jeremy Freedman, for all appellants other than Town-City Realty Ltd.

B. Zarnett, for appellant, Town-City Realty Ltd.

J.A. Campion, for respondent.

CBR# 154

Lakewood by the Park Ltd. v. Ontario Home Warranty Program (Gen. Div.)

5 O.R. (3d) 527

ONTARIO Ontario Court (General Division) Greer J. August 19, 1991

MOTION by plaintiff for summary judgment; CROSS-MOTION by defendant for a mandatory injunction. Sandra L. Secord, for plaintiff.

Philip P. Healey, for defendant.

GREER J. (orally):-- This is a motion by Lakewood by the Park Limited (Lakewood) for summary judgment. There is also a cross-motion by the Ontario New Home Warranty Program (the program) for a mandatory injunction to prevent the return to Lakewood of a letter of credit held by the program on its behalf, unless replaced by a new letter of credit. The cross-motion was heard prior to the motion.

The cross-motion was heard on June 7, and on August 9, 1991. Lakewood is a developer registered under the program. Lakewood and the program had entered into a vendor builder agreement with respect to the construction of a condominium apartment building. The agreement had been entered into on May 27, 1987. It was agreed by the parties that in order for Lakewood to begin construction of the building, a building permit had to issue and that a building permit would only issue where the builder was registered with the program. We are, in these reasons for judgment, dealing with the cross-motion only. It was also agreed by the parties that the condominium building had been completely constructed and that as of August 9, 1991, all of the units of the building had been sold. The project was registered on October 26, 1990.

Under the Ontario New Home Warranties Plan Act, R.S.O. 1980, c. 350, a builder is required to post a letter of credit for the deposits of purchasers in order to protect the deposits of purchasers in the event that something should go amiss in the construction of the building.

Lakewood brought on a motion for summary judgment in order to force the return of its letter of credit with respect to the deposits because it said that the project was now registered and that all of the units were sold. The program took the position that it could reasonably require a letter of credit for deficiency problems. It appeared on the evidence, and in more particular on the affidavit of Mr. Humphrey, that there were indeed such deficiency problems.

The program also took the position that the letter of credit could be reduced as deficiencies were corrected, but that it did not have to return the letter of credit while there were deficiencies. The program, as of August 9, 1991, was asking only for a reduced letter of credit in the amount of \$104,000, or in the alternative, to keep the letter of credit, which it presently holds, and have the amount of that credit reduced.

There was a jurisdictional question raised by Lakewood with respect to my authority to hear this motion. Reference was made to the Ontario New Home Warranties Plan Act and, in particular, s. 19(1) of the Act, which reads:

19.(1) Where it appears to the Corporation that any vendor or builder does not comply with any provision of this Act or the regulations, notwithstanding the imposition of any penalty in respect of such non-compliance and in addition to any other rights it may have, the Corporation may apply to a judge of the High Court for an order directing such person to comply with such provision and, upon the application, the judge may make the order or such other order as the judge thinks fit.

In particular, counsel drew my attention to the words "upon the application" and also the words which were in the margin of the Act and which read "Restraining order". In s. 19, I do not believe that the word "application" is used in the sense that it means an originating notice of application. I am satisfied that the wording of s. 19 is broad enough that the legislature intended, in using the words, "in addition to any other rights it may have", that such a motion could be brought on as the program has done. The words in the margin (and I may be using an incorrect term here), I believe can be called "moon gloss" in that they are simply helpful to counsel when they are looking through the sections of the Act, that they have no legal meaning at all, and that the headings or marginal notes are not part of the statute.

Counsel for both parties made reference to various sections of the Act. There was no dispute that Lakewood was a builder within the meaning of the Act. The Act quite clearly is there for the protection of the purchasers with respect to their deposits, but it is also there for protection against claims and warranty claims. The Act, in my view, is there to ensure public protection. It is dedicated to serving the public interest and is therefore open to a broad liberal interpretation of its provisions.

Section 7(1) of the Act deals with the registration of vendors and builders as follows:

7.(1) An applicant is entitled to registration by the Registrar except where,

(a) having regard to his financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of his undertakings ...

The section also makes reference to the case of an applicant who does not have sufficient technical competence to consistently perform the warranties. Section 7(2) states that:

(2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant or imposed by the Tribunal or prescribed by the regulations.

R.R.O. 1980, Reg. 728 of the Act sets out terms and conditions of registration of builders and vendors. Section 1 para. 3 of the regulation states:

3. The registrant shall diligently perform or cause to be performed all obligations imposed on him under the Plan and under any agreement made by him with the Corporation in respect of the Plan.

Section 13(1) of the Act sets out the warranties which are given by every vendor of a home which the vendor warrants to the owner. Section 13(1) reads as follows:

13.(1) Every vendor of a home warrants to the owner,

(a) that the home,

(i) is constructed in a workmanlike manner and is free from defects in material,

(ii) is fit for habitation, and

(iii) is constructed in accordance with the Ontario Building Code;

(b) that the home is free of major structural defects as defined by the regulations; and (c) such other warranties as are prescribed by the regulations.

Section 14(1) of the Act sets out that:

14.(1) Where,

(b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or

(c) the owner suffers damage because of a major structural defect as defined in the regulations ... and the claim is made within four years after the warranty expires or such longer time under such conditions as are prescribed, the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

The owner has remedies under the vendor builder agreement which are also available to it. Under those remedies, the builder must indemnify and save harmless the corporation.

Counsel also made reference to ss. 8 and 9 of the Act which set out the revocation of registration and the refusal by the registrar to renew a registration. Section 8(2) states:

(2) ... where the registrant has a record of breaches of warranties or of failure or unwillingness to complete performance of contracts or is in breach of a term or condition of the registration.

Counsel for the program has stated that the registrar has moved under this section of the Act, but made it clear that it would be a lengthy period of time before that matter was even heard.

In looking at the various remedies that are given to the owner under the Act or under the agreement, I am of the view that these remedies may end up being hollow in the event that the builder is bankrupt, insolvent, or is a shell company against which execution could not be levied as there would be no assets against which to levy. Given this, and the most recent attempt by the legislature to ensure that all vendor builders of high rise condominiums provide protection for the public in purchasing condominiums, the program issued Bulletin No. 19, which I brought to the attention of counsel on the second day of this motion.

Bulletin No. 19 supersedes an earlier bulletin, but makes it quite clear that it only applies to most vendor builders of high rise condominiums who are enrolled under the provisions of the Ontario New Home Warranties Plan Act after March 31, 1989. Those vendor builders will be required, as a condition of continued registration, to provide the program with a number of things which are set out in the Bulletin. It is interesting to note that the guidelines to the Bulletin outline a very clear analysis of what is expected with respect to site review and reporting by a third party inspection of the building or by the original design architect or engineer.

In addition, it is also clear that the legislature, in issuing this Bulletin, was attempting to codify what it had expected to be done by vendor builders. In certain respects, it is holding vendor builders to perhaps a higher standard of care now in completing deficiencies, before they walk away from buildings.

I am advised by counsel that the program now requires vendor builders to obtain convertible letters of credit to cover deficiencies and warrant claims. It is therefore clear to me that this program is an evolving program of evolving legislation to protect the public.

Ms. Secord, in her argument on behalf of her client's position, was well organized and prepared. Ms. Secord pointed out that her client had been rated as excellent by the program in the early or late 1970s. I did, however, have difficulties with this as a present rating when I read the affidavit of the inspector, Mr. Humphrey and the transcript of the examination of John Garay, the vendor builder. It appeared to me that there were a number of major deficiencies which were set out by Mr. Humphrey in his site reviews. I found Mr. Garay to be less than forthright in his examination, given the fact that he was a builder of many years' experience and given the fact that he had been in the 1970s considered or rated as excellent with respect to some of his earlier buildings.

Lakewood contends that there was no initial request made for security for the deficiencies. The difficulty which the program is faced with under the old system, if I may call it that, is that the Act provides for an immediate letter of credit with respect to the deposits, but does not provide for a convertible letter of credit, which is now the type of letter being used. The Act does, in my view, provide for the program to ask for additional letters of credit, which, from a practical point of view, would not be asked for at the beginning of the project. It would have been premature under the old rules to ask for a letter of credit prior to the building being out of the ground. It is only when most of the building has been constructed, if not all of the building, that deficiencies appear. Deficiencies can be either major or minor. I was not impressed with Mr. Garay's statement in his affidavit that there were no such deficiencies. It appeared that Lakewood, even after the affidavit was sworn by Mr. Garay, corrected certain deficiencies which the inspector had noted. The legislature now makes it clear that there must be a convertible letter of credit posted and it now has the vendor builder use third party guarantees. It is not in the public interest to have the plan, when things go wrong, pay out large amounts of money because the builder is a shell company, insolvent, or cannot be located, or that the guarantees given by the individuals or the corporation are worthless. The public has a right to be protected and as the number of condominiums being built increases each year, it is incumbent upon the legislature to continue to revise its bulletins and its statutes in this regard.

Counsel made reference to a number of cases. Although I have reviewed them all in preparing these reasons for judgment, I only make reference to a few of them. It should be noted that the granting of mandatory injunctions is not granted lightly. Lakewood's counsel made reference to the case of *Chitel v. Rothbart*, a decision of the Ontario Court of Appeal (1982), 39 O.R. (2d) 513, 141 D.L.R. (3d) 269. In that case, it sets out that Mareva injunctions are recognized in Ontario and may be granted if certain criteria are met. Counsel for the program was simply asking for a mandatory injunction, although counsel for Lakewood seemed to categorize it as a Mareva injunction. In any event, the principles in the *Chitel* case are useful, and these are that the plaintiff should make full and frank disclosure of all matters in his knowledge which are material for the judge to know; the plaintiff should give particulars of his claim against the defendant, stating the ground of his claim, the amount thereof and fairly state the points made against it by the defendant; the plaintiff should give some grounds for believing that the defendants have assets here; and the plaintiffs should give some ground for believing that there is risk of the assets being removed before the judgment or reward is granted. The plaintiff must give an undertaking as to damages. While these criteria clearly deal with a Mareva injunction, and in that particular instance there was a question of whether there was the risk of removal of the assets, the general principles apply.

In this instance, the program has made full and frank disclosure of all matters. These were brought up to date. The fact that the letter of credit had been reduced to \$104,000 as of August 9, 1991 was important. The program has set out the particulars of the deficiencies and its concern if such a mandatory injunction is not made with respect to the letter of credit. If the letter of credit is tendered and there are deficiencies, the condominium owner's only recourse is to go against the program for these deficiencies.

There is no proof that the personal guarantee or the guarantee of the company could be acted upon by the program in the event of the program having to pay monies out for repairs. I am also mindful that the granting of any injunction must be just and convenient. In the case of *Carlton Realty Co. v. Maple Leaf Mills Ltd.*, a judgment of the Ontario High Court of Justice (1978), 22 O.R. (2d) 198, 93 D.L.R. (3d) 106, the court points out at p. 201 O.R., pp. 109-10 D.L.R., that:

Interim injunctions should not be freely granted by a Court. An injunction is an extraordinary remedy. However, in proper cases they are granted and they are the appropriate remedy, in effect, to preserve the status quo until the trial of an action.

The court at p. 203 O.R., p. 111 D.L.R., also points out that:

Each case must be considered on its own merits and then the discretion of the Court must be exercised.

Further on p. 203 O.R., p. 111 D.L.R., the court states:

Damages are a very serious factor to be considered. An applicant must show that he will suffer harm that cannot be adequately compensated in damages if the injunction is not granted. This is usually referred to as irreparable harm. Again, this is a question of degree in the Judge's mind. Clearly, if damages, although not readily ascertainable at the time of the application, are an adequate remedy an injunction should not and will not be granted.

The court also noted at p. 203 O.R., p. 112 D.L.R.:

When both parties will suffer, then the problem surely becomes one of weight.

The cases which were referred to me by the counsel for the program, in certain instances, dealt with issues of recurring breaches. There can be an analogy made to those recurring breaches, not necessarily recurring deficiencies, with the number of deficiencies which have appeared in the building.

In the case of *Ontario (Attorney General) v. Grabarchuk* (1975), 11 O.R. (2d) 607, 67 D.L.R. (3d) 31, an Ontario Divisional Court decision, the court noted at p. 614 O.R., p. 38 D.L.R.:

As between private parties, the justice and convenience on an interlocutory injunction is usually decided in the light of a number of elements. These include the balance of convenience and the irreparability of the apprehended damage ...

Further on p. 614 O.R., p. 38 D.L.R.:

The criteria are then to assist a Court to decide whether to grant a party some kind of relief other than damages, that is, to interpose a kind of relief rather than the usual relief sought in the law Courts, which is damages.

Counsel for the program also made reference to the recent case of *Ontario New Home Warranty Program v. Lukenda* (1989), 3 R.P.R. (2d) 238 (Ont. H.C.J.), which was affirmed by the Ontario Court of Appeal in (1991), 2 O.R. (3d) 675, 47 O.A.C. 388. This is the most recent decision of our courts with respect to the program. The issues, while not the same as the ones at bar, dealt with a third party guarantee. The Ontario Court of Appeal reviews the purposes of the legislation on pp. 676-77 O.R., pp. 389-90 O.A.C., of the judgment. At the bottom of p. 676 O.R., pp. 389-90 O.A.C., the court notes:

The major purpose of the Plan Act is to protect purchasers of new homes by requiring that vendors and builders be screened for financial responsibility, integrity and technical competence. To assure public protection, it provides for warranties, a guarantee bond and compensation in the event of loss by a purchaser resulting from dealings with a registrant. In order to effect the purposes of the Plan Act, a broad and liberal interpretation of its provisions is appropriate.

If we look at the provisions of s. 7 of the Act, it is clear that the whole question of the financial responsibility of the vendor and builder is in the mind of the legislature. In the *Lukenda* case, the Court of Appeal held that the corporation had the corporate power to make the vendor builder provide a third party guarantee. That is not the issue in this case, but there is an analogy with respect to letters of credit. The whole question of integrity deals with deposit claims and the guarantees and statements made by the builder; and the whole question of technical competence certainly deals with warranty claims and the question of deficiencies.

I am satisfied that the program has, and the Act provides the program with, authority to require additional letters of credit in addition to the letter of credit with respect to the deposit. An order will go for the mandatory injunctive relief sought by the Ontario New Home Warranty Program. If Lakewood chooses to file a new letter of credit for \$104,000 with the program, the program may surrender its old letter of credit which dealt with deposits. In the event that Lakewood chooses not to file such a new letter of credit, the program may transfer the present letter of credit to a letter of credit covering deficiencies. I will leave the practicalities of this to Lakewood and the program.

The legislature intended the public to be protected and there has been an evolution of this legislation and an evolution of the administration of the plan over the years since Lakewood entering into the original building agreement. There would be no protection for owners if the program had to go against a shell company or an insolvent builder or had to call upon the guarantee of a builder that had no backing to it.

Cross-motion granted.

CBR# 336

Board of Regents of Victoria University v. Heritage Properties Ltd., Crazy Horse Developments Ltd., Upper Canada Land Corp., One St. Thomas Ltd. and Jasmac Canada Ltd.

(Gen. Div.)

4 O.R. (3d) 655

Action No. 55534/90Q

ONTARIO Ontario Court (General Division) Sutherland J. August 27, 1991

MOTIONS by the defendants (applicants) for a determination of a question of law and for an order dismissing the plaintiff's action.

Richard Storrey, for plaintiff (respondent).

P. David McCutcheon, for defendants (applicants).

SUTHERLAND J.:-- These motions are brought by the defendants Jasmac Canada Inc. and One St. Thomas Limited, under rules 21.01(1) and 20.01 of the Rules of Civil Procedure, O. Reg. 560/84, in the plaintiff's action to enforce a covenant relating to, and purporting to restrict the use of, a valuable parcel of land in the City of Toronto.

The plaintiff is a body corporate created under the Victoria University Act, 1951, S.O. 1951, c. 119, and is responsible for the management and administration of Victoria University. All real and personal property used or occupied by Victoria University is vested in the plaintiff.

It is common ground that, as pleaded by it, the plaintiff, by a deed (the Victoria Deed) dated May 19, 1981, and registered as Instrument No. CT 478787, conveyed to the defendant Heritage Properties Limited the whole of Lots 21 and 22 and part of Lot 23 on the north side of Charles Street West according to a plan filed in the Land Registry Office for the Registry Division of Toronto (No. 63) as Plan No. 97, and part of Charles Street West which lands are hereinafter sometimes referred to as the "Transferred Lands".

It is also common ground that, as pleaded by the plaintiff, the Victoria Deed contains covenants on the part of the defendant Heritage Properties Limited as follows:

AND the Grantee COVENANTS with the Grantor, its successors and assigns, that, as a covenant running with the land, it will not erect or cause to be erected at any time on any portion of Lots 21, 22, 23, 24 or 25, Plan 97, Toronto, or on the part of Charles Street West closed by City of Toronto By-Law 38/70, any building having a height in excess of 20 metres, and the Grantee covenants and agrees to secure and register a similar covenant from any purchaser or assignee of the Grantee.

The height of the said building shall be calculated in accordance with the provisions of the City of Toronto By-law, 20623, as of the date hereof, including the application of such by-law to such permissible heights for stair tower, elevator shaft, chimney stock or other heating, cooling or ventilating equipment, or window washing equipment, located on the roof of such building, or any fence, wall or structure enclosing such elements.

It is noted that, although the first of the above-quoted covenants purports to run with the land, no dominant tenement, or land for the benefit of which that covenant was taken, is described or referred to in the covenants. It is also an accepted fact that no dominant tenement, or benefited land, is described or referred to anywhere else in the Victoria Deed.

It is noted that the lands whose use is purported to be affected by the above-quoted covenant (hereinafter sometimes called the "Covenant Lands") include but are more extensive than the Transferred Lands conveyed by the Victoria Deed.

According to the pleadings it is common ground (and for purposes of the rule 20.01 motion, I find) that:

1. all of the defendant corporations were incorporated under the laws of Ontario with their head offices at the City of Toronto;
2. by a deed dated April 2, 1982, and registered on May 5, 1982, as Instrument No. CT531040, Heritage Properties Limited conveyed the Covenant Lands and other lands to the named defendant Crazy Horse Developments Limited. An affidavit annexed to Instrument No. CT 531040 shows that simultaneously abutting land under the land titles system was transferred by Heritage Developments to Crazy Horse Development;
3. in 1985 Crazy Horse conveyed the Covenant Lands and other abutting lands to the defendant Upper Canada Land Corporation (Upper Canada);
4. the deeds or transfers referred to in paras. 3 and 4 above contained covenants in substantially the same terms, as between the respective grantors and grantees, as the above-quoted covenant from the Victoria Deed;
5. the defendant Crazy Horse Developments Limited was dissolved on June 2, 1986, for failure to comply with the Corporations Tax Act, R.S.O. 1980, c. 97;
6. by a deed dated August 14, 1987, and registered as Instrument No. CT893555 Upper Canada in turn conveyed the Covenant Lands and other, abutting, lands to the defendant One St. Thomas Limited; 7. the last-mentioned deed, from Upper Canada to One St. Thomas Limited did not contain a covenant like or comparable to the above-quoted covenant from the Victoria Deed;
8. the defendant Jasmac Canada Limited has filed with the City of Toronto a development application covering the Covenant Lands and other, abutting, lands wherein it seeks approval of an 11-storey hotel development, and it is uncontestably true that an 11-storey building would exceed the 20-metre height limit specified in the above-mentioned covenants;

9. The defendant One St. Thomas Limited is the registered owner of the Covenant Lands and the defendant, Jasmac Canada Inc., is the beneficial owner of those lands.

Moreover, it is pleaded by the plaintiff that Upper Canada was holding the lands as trustee for One St. Thomas Limited at the time it conveyed the lands to the latter and that One St. Thomas Limited is bound by the covenants given by its trustee, Upper Canada, in the deed from Crazy Horse Developments to Upper Canada.

In the action the plaintiff claims:

- (a) a declaration that none of the defendants are permitted to erect or cause to be erected on the Covenant Lands any building having a height in excess of 20 metres;
- (b) a permanent injunction restraining the defendants or any of them from erecting or causing to be erected upon the Covenant Lands any such building;
- (c) its costs of the action; and,
- (d) such further and other relief as may seem just.

The plaintiff pleads and asserts that the first of the above-quoted covenants in the Victoria Deed is a valid covenant which runs with the Transferred Lands and binds all subsequent transferees of those lands, including any and all of the defendants.

In the alternative the plaintiff pleads that the covenant in question was for the plaintiff's benefit and that each transferee of the Transferred Lands in taking a like covenant from its transferee was doing so as required, as the agent of the plaintiff.

The plaintiff further pleads that each of the defendants acquired its interest in the Transferred Lands with "express knowledge" (which I take to mean actual knowledge) that the lands were subject to the said covenant in favour of the plaintiff and accordingly that all of the defendants are bound by the same covenant or a covenant to exactly the same effect.

In their statement of defence the defendants One St. Thomas Limited and Jasmac Canada Inc. deny that the first above-quoted covenant is a valid covenant which runs with the land and binds all subsequent transferees, including themselves. Those defendants state that the covenant does not bind the lands because:

- (a) there is no privity of contract or estate between the plaintiff and these defendants;
- (b) there is no covenant in the deed or otherwise between these defendants and the defendant, Upper Canada Land Corporation;
- (c) the objects of the restrictive covenant are unattainable or obsolete by reason of changes and proposed changes to the neighbourhood including changes proposed by the plaintiff, and the restrictive covenant ought to be modified accordingly;
- (d) the restrictive covenant was granted in respect of Lots 21 to 25, Plan 97 Toronto and other lands, but the deeds dated May 29, 1981, April 2, 1982 and December 16, 1985 conveyed only the subject lands, being Lots 21, 22 and part of Lot 23.
- (e) the dominant tenement for the benefit of which the covenant was given is not ascertainable from the deeds referred to in the statement of claim.

The moving party defendants also plead that even if that covenant was binding upon them, which they deny, the plaintiff is still not entitled in equity to the relief it seeks because, by an agreement dated May 28, 1987 (the May 1987 agreement) with Upper Canada, the plaintiff consented to the erection on the Transferred Lands of a residential condominium building having a height of up to 133 feet and agreed, in return for a donation of \$300,000, to delete the registered restriction. These defendants plead that the plaintiff is thus estopped from claiming the declaration and the injunctive relief it seeks in the action.

The moving party defendants also deny that the successive transferees of the Transferred Lands were required in law, as agents for and on behalf of the plaintiff, to obtain from their respective transferees a covenant identical to the covenants in the Victoria Deed.

And the moving party defendants also counterclaim for damages for inducing breach of contract and for wrongful interference with contractual relations or, in the alternative, for slander of title, for punitive damages and for declaratory relief to the effect that the original covenant and the subsequent covenants in the same terms are not binding upon them and do not run with the Transferred Lands or the Covenant Lands.

These defendants also plead and assert that the plaintiff owns other development land nearby which is proposed to be developed as a hotel and that the plaintiff seeks to hinder them in proceeding with their hotel development in order to obtain a more favourable rezoning for the hotel proposed for its own lands. In its reply and defence to counterclaims the plaintiff repeats its allegations, denies that the May 1987 agreement gives rise to any waiver or estoppel of its claims to a declaration and an injunction based on the covenant, and asserts that these defendants have affirmed the existence and validity of the covenant:

- (i) by requesting a further agreement, the draft of which acknowledges the May 1987 agreement (and the related donation agreement of the same date) which agreements assume the validity of the covenant;
- (ii) by requesting a release of the covenant; and
- (iii) by requesting an amendment to the May 1987 agreement to permit Jasmac's proposed hotel developments.

It is pleaded and argued by the plaintiff that such requests show clearly that these defendants had actual notice of the covenant and treated it as valid and enforceable and it is pleaded, and submitted, that they are accordingly estopped from denying the validity and enforceability of the covenant. The motions

As stated in their notice of motion, the moving parties bring these motions for:

(a) a determination of the following question of law:

(i) whether the plaintiff can enforce a restrictive covenant where the deed or document containing the restrictive covenant does not explicitly refer to the lands to be benefited.

(b) judgment for dismissal of the plaintiff's claim with costs or, in the alternative, for an order directing that the action proceed to trial in whole or in part;

(c) their costs of this motion and action on a solicitor-and- client basis; and,

(d) such further and other relief as this Honourable Court may deem just.

In the factum served and filed on behalf of the moving party defendants the main question is expressed somewhat differently, making it clear that the issue is whether the covenant set out in the Victoria Deed is one that can be enforced by the plaintiff against the moving party defendants. The later formulation makes no specific reference to the question of whether the covenant is one that runs with either the Transferred Lands or the more extensive Covenant Lands, and it tends to blur the distinctions between that question and the question of whether the covenant has any validity in contract, either directly as against Heritage Properties Limited or indirectly against the subsequent transferees by virtue of the asserted "chaining" effect of the covenants in all but the last of the subsequent transfers of the Covenant Lands (which include the Transferred Lands in all such cases). That formulation of the question also blurs the distinction between what relief or remedy is sought under rule 21.01 and the dismissal of the action, as sought under rule 20.01. The formulation in the factum is as follows:

Is the restrictive covenant set out in the ... (Victoria Deed) ... which does not describe the lands to be benefited, a valid restrictive covenant which can be enforced by the plaintiff against the defendants, One St. Thomas Limited and Jasmac Canada Inc.

(Emphasis added)

As stated, the question is whether the covenant can be enforced in any way against the moving party defendants, i.e., as a covenant running with the Covenant Lands (or the included Transferred Lands) or in any other way. In view of the plaintiff's alternative arguments that the covenant is enforceable on the basis of the "chaining" of like covenants or on the basis of an estoppel arising in connection with the May 1987 agreement (and the related donation agreement) and in view of the differences between Rule 21 and Rule 20 with respect to the admissibility of evidence and the tests to be applied, it is preferable to isolate, as the main issue under rule 21.01(1), the question of whether the covenant is one that runs with the above-mentioned lands of the defendants or any part thereof.

Rule 21

Under Rule 21 questions of law may be determined prior to trial where such determination will dispose of all or part of the action or substantially shorten the trial or substantially reduce costs. For convenience I set out clauses 21.01(1)(a) and 21.01(2)(a) of the rule:

21.01(1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs ...

.....

21.02(2) No evidence is admissible on a motion,

(a) under clause 1(a) except with leave of a judge or on consent of the parties ...

Facts for purposes of the Rule 21 motion

For the purposes of Rule 21, in determining a question of law, the court is to have regard to the pleadings and, as stated by Callaghan A.C.J.H.C. in *Barnes v. Kaladar, Anglesea and Effingham (Townships)* (1985), 52 O.R. (2d) 283, 6 C.P.C. (2d) 75 (H.C.J.), at p. 285 O.R., p. 77 C.P.C., primarily to the pleadings of the opposite party. Here, the task is simplified because many of the relevant facts pleaded by the plaintiff have been admitted by the moving party defendants and many are based on registered deeds or transfers copies of which were admitted on consent and would have been admitted with leave had such consent not been forthcoming. Accordingly, I may state that for purposes of the Rule 21 motion the statements in numbered paras. 1 through 9 above are assumed to be correct, as are the factual statements in the parts of the preceding paragraph above. Moreover, it is established for all purposes of these motions that the moving party defendants had notice of the covenant and of the identically worded covenants in the deeds or transfers of the Covenant Lands to the transferees down to and including the covenant in the deed to Upper Canada.

The threshold test under Rule 21.01

It was held by Van Camp J. in *Byrne v. Goodyear Canada Inc.* (1981), 33 O.R. (2d) 800, 125 D.L.R. (3d) 695 (H.C.J.), at p. 801 O.R., p. 696 D.L.R., following the decision of Lief J. in *Piuti v. Toronto (Board of Education)* (1974), 6 O.R. (2d) 172 (H.C.J.), that under the predecessor rule, i.e., Rule 124 of the Rules of Practice, R.R.O. 1980, Reg. 540, the decision requested of the court must not be contingent on the resolution of any dispute as to facts. That principle was applied to a motion under rule 21.01 by Callaghan A.C.J.H.C. in *Barnes*, supra, where it was also confirmed that the court should not allow itself to be led into the realm of the hypothetical as it would be if it were placed in the position of advising a plaintiff as to the validity of its cause of action when the facts which form the substratum of the alleged cause of action were in dispute. In *Barnes* the following statement by Mr. Justice Orde, for the Court of Appeal, in *Fisher v. Albert* (1921), 50 O.L.R. 68, 64 D.L.R. 153 (S.C.), at p. 72 O.L.R., pp. 156-57 D.L.R., with respect to the predecessor rule was approved by Callaghan A.C.J.H.C. at p. 286 O.R., p. 78 C.P.C., with regard to rule 21.01(1)(a):

Its object was to provide either for the disposal of the whole action or some important phase of it, by dealing with some question of law upon a state of facts admitted for the purposes of the motion In *Seede v. Camco Inc.* (1985), 50 O.R. (2d) 218, 50 C.P.C.

78 (H.C.J.), affd (1986), 55 O.R. (2d) 352 (C.A.) [leave to appeal to S.C.C. refused (1986), 55 O.R. (2d) 352n, 71 N.R. 82n], Flinn L.J.S.C. (at p. 220 O.R., p. 81 C.P.C.), after stating that Rule 21 had broadened the right of access to the court on a preliminary motion, stated with respect to the motion before him that:

There is no factual dispute and the pleadings are closed. I therefore think it appropriate to consider the provisions of Rule 21 satisfied and to deal with the matter.

In Seede, success on the motion resulted in the dismissal of all of the claims of one of the claimants but, as is clear from the wording of clause 21.01(1)(a) and from Barnes, supra, Rule 21 may be used to dispose of part of an action. See also to the same effect, with respect to the predecessor rule, the judgment of Rosenberg J. in City National Leasing Ltd. v. General Motors of Canada Ltd. (1984), 47 O.R. (2d) 653, 12 D.L.R. (4th) 273 (H.C.J.), revd in part on other grounds (1986), 54 O.R. (2d) 626, 28 D.L.R. (4th) 158 (C.A.), affd [1989] 1 S.C.R. 641, 58 D.L.R. (4th) 255. Here, there can be framed a question of law on the facts raised by the pleadings of the plaintiff and agreed facts, and the determination of the question would dispose of an important part of the action, at the least.

The degree of certainty required with respect to the determination of a point of law before trial makes it desirable to reframe the above-quoted questions to break out and isolate for separate treatment the question that is most clearly a question of law arising upon the pleadings of the plaintiff and admitted facts, and that I do under the next heading.

Whether the covenant runs with the Transferred Lands where no benefited lands are identified in the Victoria Deed

The question that is most clearly a question of law free of any dispute as to relevant facts is the question of whether under the law of Ontario a restrictive covenant will run as to burden with the purportedly servient lands where the deed or other instrument containing the covenant does not identify the lands of the grantor that are intended to be benefited by the covenant. It is to that question that I now turn. The moving parties submit that on the authorities the question must be answered in the negative, i.e., that, because the Victoria Deed did not describe or identify any lands of the plaintiff that were intended to be benefited by the covenant, the burden of the covenant does not run with the Transferred Lands or with the Covenant Lands or with any part of either. It is submitted that, failing such identification of the lands to be benefited, the covenant is merely a personal covenant and is not enforceable against a successor in title of the covenantor. In support of this proposition the moving parties cite: British United Automobiles Ltd. v. Volvo Canada Ltd. (1980), 29 O.R. (2d) 725, 114 D.L.R. (3d) 488 (H.C.J., Osler J.); Canadian Construction Co. v. Beaver (Alberta) Lumber Ltd., [1955] S.C.R. 682, [1955] 3 D.L.R. 502; R. v. York (Township), [1960] O.R. 238, 23 D.L.R. (2d) 465 sub nom. 125 Varsity Rd. Ltd. v. York Township (C.A.); Galbraith v. Madawaska Club Ltd., [1961] S.C.R. 639, 29 D.L.R. (2d) 153; McGregor v. Boyd Builders Ltd., [1966] 1 O.R. 424, 54 D.L.R. (2d) 112 (H.C.J., Lief J.); and Sekretov v. Toronto (City), [1973] 2 O.R. 161, 33 D.L.R. (3d) 257 (C.A.).

On behalf of the respondent plaintiff it is submitted that none of the decisions relied on by the moving parties have held a covenant expressed to run with the servient lands to be unenforceable against a successor to the covenantor where such successor had actual knowledge of both the covenant and the benefiting lands. It is further submitted that, while the covenantee must own land capable of being benefited, such benefited land may be ascertained from the deed creating the covenant or from circumstances surrounding its execution which make the identity of the benefited lands, or dominant tenement, readily apparent. In support of the later proposition reliance is placed upon Tulk v. Moxhay (1848), 2 Ph. 774, 41 E.R. 1143 (L.C.), a leading early case, if not the leading early case, establishing that negative covenants would run with the lands in equity, but a decision which later authorities have refined and narrowed. The plaintiff also relies for the same propositions on the decision of Wilberforce J. in Marten v. Flight Refuelling Ltd., [1962] Ch. 115, [1961] 2 All E.R. 696 (Ch. D.), a decision that was expressly stated by Schroeder J.A. in Sekretov, supra, at pp. 166-67 O.R., pp. 262-63 D.L.R., not to reflect the law of Ontario, as enunciated by the Supreme Court of Canada in Galbraith v. Madawaska Club Ltd., supra, and in Canadian Construction Co. v. Beaver (Alberta) Lumber Ltd., supra. For support of his contention that where the transferees of the Covenant Lands have actual notice of both the covenant and the lands to be benefited by the covenant there is not a requirement that the lands to be benefited be identified in the deed containing the covenant, counsel for the plaintiff cites the following excerpt from p. 26 of the Ontario Law Reform Commission's Report on Covenants Affecting Freehold Lands (Toronto: 1989) (the Report) which excerpt appears in the part of the Report entitled "Covenants Running With Freehold Land in Equity" under the sub-heading "(b) The Running of the Burden", and is as follows:

For the burden of a restrictive covenant to run with the land in equity, five requirements must be satisfied:

- (1) the covenant must be negative in operation;
- (2) the covenantee must own land for the benefit of which the covenant was given;
- (3) the covenant must touch and concern the land of the covenantee; (4) the covenant must be intended to run with land belonging to the covenantor; and
- (5) the assignee of the covenantor must not be a bona fide purchaser for value of the legal estate without notice of the covenant.

There can be no issue as to requirement (1) above, because that requirement has been a sine qua non for the running of restrictive covenants at least since Tulk v. Moxhay, supra. Nor is there any issue as to that part of requirement (2) above that requires that the covenantee own land capable of being benefited by the covenant: London County Council v. Allen, [1914] 3 K.B. 642, [1914-15] All E.R. 1008 (C.A.); R. v. York (Township) (C.A.), supra; Galbraith v. Madawaska Club Ltd., supra, British United Automobiles Ltd. v. Volvo Canada Ltd., supra. With respect to requirement (4) listed above, it is clear from the terms of the covenant that it was intended to run with land belonging to the covenantor, Heritage Properties Limited, i.e., the Covenant Lands (which include the Transferred Lands). Nor can it be said with reference to requirement (5) above that any of the assignees of the original covenantor, Heritage Properties, were without notice of the covenant, whether by virtue of registration of the Victoria Deed and the subsequent deeds and transfers, the negotiations and correspondence with regard to the May 1987 agreement or by the imputation, to the beneficial owner, of knowledge possessed by the trustee for such beneficial owner.

Of the five requirements set forth in the above excerpt from the Report what remains for consideration are (i) that part of requirement (2) relating to the identification of the covenantee's land for the benefit of which the covenant is taken and (ii) requirement (3), i.e., that the covenant must "touch and concern the land of the covenantee". It is not asserted by the moving parties that the nature of the restriction sought to be imposed by the covenant is not such that it would touch and concern

adjoining or nearby land of the plaintiff if such were identified. The focus is therefore on the non-identification of benefiting lands in the Victoria Deed.

That must be the issue in respect of which the above excerpt from the Report is cited on behalf of the plaintiff.

It will be noted from the excerpt that nowhere therein is it stated that the land of the covenantee that is intended to be benefited by the covenant must be identified in the deed or other instrument in which the covenant is set forth. Requirement (3) speaks of "the land of the covenantee" but that is as close as the brief excerpt comes to a suggestion that the land of the covenantee must be identified. Apparently it was for that slender ray of encouragement -- by omission -- that the excerpt was cited.

The subsection of the Report dealing with the running of the burden of restrictive covenants affecting freehold land extends to slightly more than six pages and consists mainly of discussions of each of the five requirements referred to in the excerpt.

It is, to say the least, surprising that in the factum filed on behalf of the plaintiff the above excerpt is quoted without more and that in the book of authorities filed on behalf of the plaintiff, p. 26 of the Report is included without any of the immediately following pages, where the enumerated five requirements are discussed. Indeed, on the very next page of the Report there appears the following quotation from the judgment of Schroeder J.A. for the Court of Appeal in *Sekretov v. Toronto (City)*, supra, at pp. 165-66 O.R., pp. 261-62 D.L.R.:

The law of Ontario and of the other common law Provinces plainly require that the dominant land for the benefit of which a restrictive covenant is imposed in a deed from the covenantee to a purchaser of other lands of the covenantee must be ascertainable from the deed itself; otherwise, it is personal and collateral to the conveyance as being for the benefit of the covenantee alone and not enforceable against a successor in title to the purchaser.

In the reasons of Schroeder J.A. in *Sekretov*, supra, at p. 166 O.R., p. 262 D.L.R., the above-quoted passage is followed immediately by the statement that:

This was laid down by Judson J. in *Galbraith v. Madawaska Club Ltd.*, supra, in the plainest terms, the minimum requirement being, as the learned jurist stated, that the deed itself must so define the land to be benefited as to make it easily ascertainable.

The language used in the *Madawaska Club* case clearly excludes any motion of annexation to dominant land by implication.

In *Galbraith*, supra, the statements above referred to appear at pp. 651-53 S.C.R., pp. 164-67 D.L.R. At p. 654 S.C.R., p. 167 D.L.R., where Judson J. is speaking of the principal judgment of the Supreme Court of Canada in *Canadian Construction Co. v. Beaver (Alberta) Lumber Ltd.*, supra, the following appears:

However, the plain implication in the judgment of this Court in affirming the trial judgment was that a restrictive covenant contained in an agreement which omits all reference to any dominant land, although it sets out the restrictions placed upon the servient land, is unenforceable by the covenantee against a successor in title of the covenantor, since such an agreement expresses no intention that any other lands should be benefited by the covenant. A covenant running with the land cannot be created in this manner and in the absence of any attempted annexation of the benefit to some particular land of the covenantee, the covenant is personal and collateral to the conveyance as being for the benefit of the covenantee alone. To the same effect is the 1965 decision of Lief J. in *McGregor v. Boyd Builders Ltd.*, supra. There, as here, the covenant was expressed to be a restrictive covenant the burden of which ran with the land of the covenantor, and there, as here, no land of the covenantee was described in the deed. The decision was of particular interest because the covenantee owned nearby land capable of benefiting from the covenant. Lief J. cited *Reid v. Bickerstaff*, [1909] 2 Ch. 305, 78 L.J. Ch. 753 (C.A.), for the proposition that the mere fact that the covenantee owns adjoining land is not sufficient to establish that the covenant was imposed for the benefit of such adjoining land. Lief J. further held that the failure to designate the dominant lands in the deed containing the covenant was fatal to the covenantee's expressed intention to have the burden of the covenant run with the identified lands of the covenantor. The decision in *McGregor* was expressly approved by the Court of Appeal in *Sekretov*, supra.

The decisions in *Galbraith* and *Sekretov* are binding upon me and constitute a sufficient basis for a declaration that the covenant here in question does not run with the lands of the covenantor so as to make any of the Transferred Lands or any of the Covenant Lands subject, for that reason, to the covenant in the Victoria Deed. A declaratory judgment to that effect will issue pursuant to Rule 21.

It is true that many of the decisions referred to above and relied on by the moving parties were not decided only, or primarily, upon the ground that the lands to be benefited by the covenant were not identified in the deed containing the covenant. Thus in *British United Automobiles Ltd. v. Volvo Canada Ltd.*, supra; *R. v. York (Township)*, supra, *Galbraith v. Madawaska Club Ltd.*, supra, and probably *Sekretov*, the covenantee owned no nearby land capable of benefiting from the covenant. In *Galbraith* there was the further factor that the covenant in question was held not to "touch and concern" the land. And in *Sekretov* the covenant was also held to be void for vagueness. Moreover, in the Supreme Court of Canada decision in *Canadian Construction Co. v. Beaver (Alberta) Lumber Ltd.*, supra, the principal judgment was based on a matter of construction of the particular wording of the covenant, and it was held that the covenant was intended to be a personal covenant and not a covenant running with the land. Notwithstanding those matters, it has been clearly stated in decisions that are binding upon me, principally in *Galbraith* and *Sekretov*, that a purported restrictive covenant does not run with the lands of the covenantor, so as to bind successive owners of the covenantor's lands unless the lands of the covenantee to be benefited by the covenant are described in the deed or instrument containing the covenant. The approval in *Sekretov* of the decision of Lief J. in *McGregor* is important in this connection, because in *McGregor* the covenantee owned nearby land capable of being benefited and the burden of the covenant itself was expressed to be intended to run with identified lands of the covenantor.

As was pointed out by Schroeder J.A. in *Sekretov*, at p. 167 O.R., p. 263 D.L.R., the result is in accord with the policy reflected in the Land Titles Act, now s. 118(4) of R.S.O. 1980, c. 230 [then s. 129(4) of R.S.O. 1970, c. 234], which provides, among other things, that a restrictive covenant shall not be registered unless the covenantee owns land to be benefited and that land is mentioned in the covenant. See also the Registry Act, R.S.O. 1980, c. 445, s. 22(1).

Counsel for the plaintiff submits that the decision in *Besinnett v. White* (1925), 58 O.L.R. 125, [1926] 1 D.L.R. 95 (C.A.), stands for the proposition that where the subsequent purchaser of the servient lands has actual notice of the covenant and of the lands intended to be benefited by the covenant he is put upon his inquiry and cannot escape being held bound in equity by pointing out that the covenant and the lands to be bound thereby are not apparent from the registered title to the (servient) lands purchased by

him. Besinnett would appear to have stood for that proposition and also for the proposition that an equitable interest in the lands to be benefited, even an equitable interest under an oral agreement, was a sufficient interest in the dominant land to give the person entitled to such equitable interest a right to enforce a restrictive covenant otherwise enforceable. Besinnett is still cited for the last-mentioned proposition but that is not the aspect of the case that is of relevance here, except that it reflects a more flexible attitude toward the court's equitable jurisdiction than is reflected in later cases such as Galbraith and Sekretov, supra.

The facts in Besinnett material to the first proposition above may be simply stated. At the time of trial there were three lots, being a hardware store, and immediately to the south a vacant lot and immediately to the south of that a residential lot with a residence on it. At the time of trial the defendant White owned the hardware store and the vacant lot, and the plaintiff, Mrs. Besinnett, owned the residence. The plaintiff in 1919 had conveyed the vacant lot to one Brown, White's predecessor in title, taking in the conveyance a covenant from Brown [p. 126 O.R., p. 96 D.L.R.]:

... not to erect on the said premises a store or workshop and to use the said lands as a residence only.

The lands to be benefited by the covenant were not identified in the deed from Besinnett to Brown but the court was satisfied that the covenant was taken to benefit the residential lands immediately to the south of the vacant land. In 1924 White purchased the store and the vacant land from Brown with actual knowledge of the covenant. White proceeded to install gas pumps on the heretofore vacant land, contending that he was not bound by the covenant because there was "nothing on the face of the registered conveyance which would establish the validity of the covenant". The court upheld and enforced the covenant stating that it was taken to benefit identified land and that the defendant White had actual notice of it. Middleton J.A. cited with approval the decision in *Formby v. Barker*, [1903] 2 Ch. 539, [1900-3] All E.R. Rep. 445 (C.A.) including a statement of Vaughan Williams L.J., at p. 551 Ch., p. 449 All E.R., to the effect that the identity of the lands intended to be benefited "can be inferred from surrounding circumstances". The last statement will be seen to be clearly contrary to what was subsequently held in Galbraith, supra, and in Sekretov, supra, to mention only two of the Canadian decisions referred to above.

Counsel for the plaintiff takes comfort from the fact that Besinnett v. White was cited by Laskin J.A. in *Russo v. Field*, [1970] 3 O.R. 229, 12 D.L.R. (3d) 665 (C.A.), a decision subsequent to Galbraith, supra, but before Sekretov, supra. In Russo, at p. 245 O.R., p. 681 D.L.R., Laskin J.A. cited Besinnett as follows:

If there is actual notice of a restrictive covenant, whether by virtue of or apart from registration of the document in which it is included, the person having such notice cannot escape by contending that the covenant must disclose on its face that it is enforceable: see *Besinnett v. White*, 58 O.L.R. 125, [1926] 1 D.L.R. 95.

With respect, I agree that the foregoing excerpt correctly states one of the propositions affirmed in *Besinnett v. White*. However, in my respectful opinion, that proposition does not express or embody the governing law in Ontario on the question of whether or not a negative covenant expressed to run with the lands of the covenantor and which touches and concerns identified [lands] of the covenantor will run with the lands of the covenantor where no lands of the covenantee are identified in the deed or instrument embodying the covenant as being the lands of the covenantee for the benefit of which the covenant is taken. Although the Court of Appeal decision in *Russo v. Field* was released in 1970, it appears from the report that none of *Canadian Construction Co. v. Beaver (Alberta) Lumber Ltd.*, supra (1955, S.C.C.); *R. v. York (Township)*, supra (1960, Ont. C.A.); *Galbraith v. Madawaska Club Ltd.*, supra (1961, S.C.C.) and *McGregor v. Boyd Builders Ltd.*, supra (1965, Ont. H.C.J.) were considered by the court.

Russo v. Field was a case relating to restrictive covenants in leases of parts of a shopping centre. The defendant, Menat Construction Ltd., owner of the shopping centre, leased retail premises in the centre to the plaintiff under a lease which:

- (i) recited that it was the intention of the lessor to see to it that the various businesses in the centre would be non-competitive with each other; and
- (ii) contained a covenant by the plaintiff limiting his use of the premises to the business of a hairdresser and beauty salon; and
- (iii) contained a covenant by the lessor not to "suffer or permit any of the other stores to carry on the business of a hairdresser and Beauty Salon" [p. 243 O.R., p. 679 D.L.R.].

Later the defendant lessor entered into a lease of the adjoining premises in the centre with Henry and Ann Field. Under that lease the lessees covenanted not to use their premises [p. 242 O.R., p. 678 D.L.R.] "for any purpose other than to manufacture wigs and to retail wigs and associated items and service wigs", and the lessor covenanted with the Fields not to "suffer or permit ... any other store in the shopping centre to carry on the principal business of manufacturing and retailing wigs and servicing wigs" [emphasis added].

In Russo the land was under the Land Titles Act [then R.S.O. 1960, c. 204]. A notice of lease had been filed in the land titles office with respect to the plaintiff's lease and that notice was filed before the Fields entered into their lease. When the Fields opened for business the plaintiff sued for an injunction and damages. At trial the plaintiff obtained an injunction against the defendant Field and damages against the former lessor (the property having been sold in the interval). The appeal was allowed, MacKay J.A. dissenting. The main issues were: (i) whether in fact the wig business constituted prohibited competition with the hairdressing and beauty salon business of the plaintiff; and (ii) whether the registration of the plaintiff's notice of lease, which itself said nothing about the restrictive covenant, constituted the required notice to the defendant Field of the restrictive covenant in the plaintiff's lease.

The issue that is uppermost in the case at bar was not really an issue in *Russo v. Field*. It was quickly established that the plaintiff's leased premises were the "lands" of the covenantee to be benefited by the landlord's covenant, that restrictive covenants can run with leasehold lands, that the burdened lands were all the other lands in the shopping centre (or at least those leased after the plaintiff's lands), and that the covenant touched and concerned the plaintiff's leasehold property and the property of the landlord in the shopping centre. The real issues were the two referred to as such above and only the question of notice has the remotest bearing on our issues. The majority in the Court of Appeal held that the business carried on by the defendant Field did not constitute a breach of the non-competition covenant. MacKay J.A. was of the opinion that it did. The three judges of the Court of Appeal were of the view that the plaintiff's registration of her notice of lease constituted notice to the defendant Field of the contents of the plaintiff's lease, including the non-competition clause running as to burden with the landlord's shopping centre lands including the premises leased to Field. In the Supreme Court of Canada ([1973] S.C.R. 466, 34 D.L.R. (3d) 704) the plaintiff was successful in reversing the majority finding of the Court of Appeal as to whether the businesses were competitive but the Court of Appeal was upheld as to the notice issue. *Russo v. Field* in the Supreme Court of Canada cannot reasonably be

regarded as a reversal of that court's decisions in *Canadian Construction Co. v. Beaver (Alberta) Lumber Ltd.*, supra, and *Galbraith*, supra, to the effect that for a restrictive covenant to run with the lands, the lands of the covenantees to be benefited by the covenant must be identified in the deed or other instrument containing the covenant. The above-quoted brief reference to *Besinnett v. White* in the reasons of Laskin J.A. in *Russo v. Field*, a case scarcely concerned with the identification of the lands of the covenantee to be benefited, clearly does not displace the Court of Appeal in *Sekretov*, supra, a later decision dealing directly with the point here in issue.

As stated, a declaration will issue that the covenant here in question does not run with the lands of the covenantor so as to be binding, for that reason, upon the present owners of the Covenant Lands.

Other issues

1. The moving party defendants appear to be taking the position that, because it does not run with the land, the covenant is invalid and without effect. In fairness it may be that the moving party defendants assert only that the covenant is not binding upon them and imposes no liability upon them.

2. The plaintiffs assert a "chaining effect" whereby the successive transferees when they in turn transfer the Transferred Lands are required to obtain, as agents of the plaintiff, an identical covenant from their respective transferees. The plaintiffs thus assert that by virtue of such agency there is privity of contract between the plaintiff and the successive transferees of the Transferred Lands down to and including Upper Canada and that the further conveyances did not represent a change in beneficial ownership with the result, it is submitted, that subsequent beneficial owners, being the moving parties, are also bound in contract. This issue gives rise to sub-issues as to the meaning of the covenant, as to implied agency and as to the remedies available to the plaintiff as well as issues as to the jurisdiction under Rule 20.

3. The plaintiff asserts that by virtue of the May 1987 agreement, in which the land of the plaintiff is identified and in which the parties not at arm's length with the moving parties obtained a conditional modification of the covenant here in issue, the moving parties are:

(i) estopped from denying knowledge of the lands to be benefited and knowledge of the covenant; and

(ii) estopped from denying that they are contractually bound by the covenant.

4. The moving parties also assert an estoppel or waiver effect of the 1987 agreements, arguing that since the plaintiff has consented to the construction on the Covenant Lands of an 11-storey building, so long as it is used for condominium apartments and is built in accordance with plans approved by the plaintiffs, it cannot now be bound to assert the original covenant.

5. Although it was not raised by either party, there is at pp. 29 and 30 of the above-mentioned Report on Covenants Affecting Freehold Land a statement that could give rise to an issue in this case, that is:

Before we turn to consider the running of the benefit of a restrictive covenant, it should be noted that even though the burden of a restrictive covenant may not run with the servient land in a particular case, a purchaser of the servient land may nevertheless be held liable for its breach. A covenantor does not breach the covenant upon agreeing to sell the burdened land to a purchaser who he knows will breach the covenant (*Tophams Ltd. v. Earl of Sefton*, [1965] 3 All E.R. 1 (C.A.); not appealed further at this point). In this latter situation an injunction will lie as well against the vendor to prevent the conveyance. Moreover, an action in damages may lie against the purchaser for inducing breach of contract or for the tort of conspiracy (*Tophams (C.A.) and Midland Bank Trust Co. Ltd. v. Green (No. 3)*, [1981] 3 All E.R. 744 (C.A.)). Further, a mandatory injunction directing a reconveyance may also be obtained in these circumstances (*Esso Petroleum Co. Ltd. v. Kingswood Motors (Addlestone) Ltd.*, [1973] 3 All E.R. 1057).

(Citations derived from footnotes)

6. The plaintiff asserts a broader view of the jurisdiction of the court under Rule 20, and submits that there are factual issues which are material and can be dealt with only at trial.

7. The moving parties ask that, if a trial is necessary, there be an order for an expedited trial. The request is not opposed.

Order for an expedited trial For reasons to be briefly stated below the motion for a summary judgment under Rule 20 dismissing the whole of the plaintiff's action must in my opinion be dismissed. In view of the circumstances of this case, and the effect that a decision herein may have on development not only of the Covenant Lands but of other lands in the area, an order will issue for an expedited trial of this action. I will make that order notwithstanding my view that both sides on this motion have fallen short of the optimum use of Rule 20 of the Rules of Civil Procedure.

Rule 20

The moving parties put their main emphasis on the motion under Rule 21 for an order declaring that the covenant here in question does not run with the lands of the covenantee so as to be binding upon the moving parties. They speak, however, of the validity of the covenant, referring to the above-mentioned language in *Sekretov*, supra. In their factum the moving parties made no direct reference to Rule 20, nor does their book of authorities include any decision relating to Rule 20, but Rule 20 is invoked insofar as the moving parties request a summary judgment in their favour. No supplementary material was filed to answer the assertions in the factum of the plaintiff as to the scope of Rule 20, the alleged estoppel, or the alleged implied agency and allegedly resulting privity of contract between the plaintiff and the moving party defendants or their privies.

Neither side sought an adjournment to allow time for cross-examinations on the affidavits filed.

For its part, the respondent plaintiff argued with respect to Rule 20 that the required evidentiary basis for a determination of the issues had not been established and that summary judgment under Rule 20 should be granted only where there is no reason to doubt what the judgment of the court would be if the matter went to trial. In support of its position the plaintiff cites only *Mensah v. Robinson*, Ont. H.C.J., Watt J., February 22, 1989 [summarized at 14 A.C.W.S. (2d) 53, 15 W.D.C.P. 228], and *Arnoldson y Serpa v. Confederation Life Association* (1974), 3 O.R. (2d) 721, 46 D.L.R. (3d) 641 (C.A.), the latter a decision with respect to the predecessor, and different, rule under the former Rules of Practice. No reference was made to the leading cases of *Vaughan v. Warner Communications Inc.* (1986), 56 O.R. (2d) 242, 10 C.P.C. (2d) 205 (H.C.J.), and *Pizza Pizza Ltd. v. Gillespie* (1990), 75

O.R. (2d) 225, 45 C.P.C. (2d) 168 (Gen. Div.). Perhaps more importantly for these purposes there was no reference to, and no apparent awareness of, the decision of Anderson J. in 209991 Ontario Ltd. v. Canadian Imperial Bank of Commerce (1988), 39 B.L.R. 44, 24 C.P.C. (2d) 248 (Ont. H.C.J.) (The C.I.B.C. case), and particularly the passage at p. 62 B.L.R., p. 266 C.P.C., where it is stated that a party who has been made a respondent in a motion under Rule 20 should recognize the seriousness of his plight and see the necessity "to put a best foot forward, as failure to do so may be fatal". Here the plaintiff respondent sought to have questions left for trial when he had not put his best foot forward on this motion.

I respectfully adopt the reasoning of *Pizza Pizza Ltd. v. Gillespie* and, as to the latter part, that of the C.I.B.C. case, as setting forth the tests and approaches that are appropriate on a motion under Rule 20.

The respondent plaintiff is saved in this regard by the fact that the moving party defendants did not put their best foot forward on the Rule 20 motion, in that they made scant response to the submissions of the plaintiff as to implied agency that would entail privity of contract between the plaintiff and the defendant Upper Canada and they did not address at all the questions arising out of the above-quoted passage from the Report, referring to the decisions in *Tophams Ltd. v. Sefton (Earl)*, [1967] 1 A.C. 50, [1966] 1 All E.R. 1039 (H.L.) and *Esso Petroleum Co. Ltd. v. Kingswood Motors (Addlestone) Ltd.*, [1974] Q.B. 142, [1973] 3 All E.R. 1057 (D.C.).

The proposition that parties to a Rule 20 motion must put their best foot forward on such a motion and not hang back waiting for trial finds support in the Court of Appeal decision in *Pollon v. American Home Assurance Co.* (1991), 3 O.R. (3d) 59, 79 D.L.R. (4th) 178 (C.A.), where at p. 61 O.R., p. 180 D.L.R., Blair J.A., speaking for the court, cited with approval in that connection both *Pizza Pizza Ltd. v. Gillespie* and the C.I.B.C. case.

Notwithstanding that, as to be amplified below, I am of the opinion that summary judgment dismissing in whole the plaintiff's action against the moving party defendants cannot be granted, there are certain of the above-enumerated other issues that can and should be disposed of under Rule 20 on this record and it is to them that I now turn.

Whether the moving party defendants are bound by estoppel to comply with the covenant

As referred to above in Item 3 under "Other issues", the plaintiff argues that the moving party defendants are by virtue of the 1987 agreements estopped from denying:

(a) notice of the covenant;

(b) notice of the lands of the covenantee intended to be benefited by the covenant; and

(c) that they are bound by the covenant on the basis of promissory estoppel, on the ground that their privies (persons not at arm's length with them) entered into the 1987 agreements which identified retained lands of the plaintiff and which recited the covenant and were clearly premised upon its validity and effectiveness in that they purported to amend the covenant or effect a partial or conditional release thereof.

The questions of notice of the covenant and notice of the lands of the covenantee intended to be benefited by the covenant have been dealt with at length above. While notice of the covenant is essential to its enforceability as a covenant running with the land, as is notice of the land of the covenantee intended to be benefited, the presence of those two factors do not under the law of Ontario overcome the deficiency where the land of the covenantee that is intended to be benefited is not identified in the deed or instrument containing the covenant. As stated, I regard *Galbraith and Sekretov* as binding upon me in that regard.

With respect to (c) above, i.e., the question of promissory estoppel, the plaintiff has not shown that it has been induced by a representation of the moving parties or their privies to alter its position to its disadvantage. The other parties, as then advised, appear to have regarded the covenant as binding upon them. At the least they were willing to proceed for the purposes of the 1987 agreements, as though the covenant were binding upon them. And the plaintiff was prepared, on terms, to relax or waive the covenant. There is nothing in the 1987 agreements stating that the covenant was extinguished or released for all purposes. If there had been the plaintiff would clearly have had no basis upon which to commence this action!

In the 1987 agreements the plaintiff agreed to consent, subject to strict conditions, to a departure from the height-control aspects of the covenant. The plaintiff, then as now, assumed that the covenant was enforceable. The other parties probably also thought the covenant was binding upon them but may simply have wanted to avoid litigation. Later correspondence from the previous solicitors for the defendants suggests that they regarded the covenant as valid and binding upon their clients. But still there is lacking an element essential for promissory estoppel. The plaintiff cannot show that it relied to its detriment upon a representation by the moving party defendants or their privies or changed its position based upon such a representation. Most probably it was an unpleasant surprise for the plaintiff to learn that the moving party defendants, differently advised, were taking the position that the burden of the covenant did not run with the lands and that the covenant was not otherwise binding upon them but that does not supply the missing element. Anyone who has read this far will doubtless be delighted to learn that I do not feel compelled for these purposes to say a great deal about the law of promissory estoppel. In *Tudale Explorations Ltd. v. Bruce* (1978), 20 O.R. (2d) 593, 88 D.L.R. (3d) 584, Grange J., speaking for the Divisional Court, at p. 596 O.R., p. 588 D.L.R., cited with approval the following passage from *Snell's Principles of Equity*, 27th ed (London: Sweet & Maxwell, 1973) at p. 563:

Where by his words or conduct one party to a transaction makes to the other an unambiguous promise or assurance which is intended to affect the legal relations between them (whether contractual or otherwise), and the other party acts upon it, altering his position to his detriment, the party making the promise or assurance will not be permitted to act inconsistently with it.

Here, the plaintiff did not alter its position to its detriment. Since the building contemplated by the 1987 agreements was not proceeded with, the conditions were not met, and the agreement has no effect upon the present positions of the parties.

Accordingly a declaration will issue that the moving parties are not estopped from asserting that the covenant is not binding upon them. Whether the plaintiff has waived the covenant

With reference to Item 4 under "Other issues" above, it is my opinion that there is no genuine issue for trial on the question of whether the plaintiff, by entering into the 1987 agreements waived the covenant in such a way as to prevent it from now seeking to enforce the covenant. In my opinion it clearly did not. In the 1987 agreements the plaintiff agreed to the construction on the Covenant Lands of an 11-storey building provided that it was to be used as condominium residences and provided that the plans

met the approval of the plaintiff. That agreement was premised upon the validity and effectiveness of the covenant. It does not establish the validity and effectiveness but neither does the entry into of such agreement constitute any sort of waiver of the covenant beyond the variation or relaxation specifically provided for in the 1987 agreement.

A declaration to that effect will issue under Rule 20.

Whether the covenant is wholly invalid

As noted in Item 1 under "Other issues" above, the moving party defendants submit not only that the covenant here in question does not run with the land but also that it is not a valid covenant because of the failure to identify lands to be benefited. Sekretov, supra, at p. 165 O.R., p. 261 D.L.R., is cited as authority for that proposition. It is true that in referring to the decision of the trial judge, Schroeder J.A. states, at pp. 162 and 165 O.R., pp. 258 and 261 D.L.R., respectively, that the covenants "were adjudged and declared to be invalid" and that:

The principal ground upon which the learned Judge held the purported restrictive conditions to be invalid was that the covenantee did not specify in the covenant with which the servient land was intended to be burdened the dominant land to be benefited thereby.

[Emphasis added]

I do not take those statements to mean that such covenant is a nullity but only that it is not valid and enforceable as a restrictive covenant running with the land. Although the covenant does not qualify as a restrictive covenant under the law of property, it may still have validity under the law of contract and give the original covenantee (which our plaintiff is) a right of action against the original covenantor. This rather obvious point is made in the above-mentioned Report at pp. 28 and 29, after a discussion of Sekretov, in the following statements:

Of course, as we have noted above, the plaintiff, being the original covenantee, could succeed against the original covenantor, but not against his assignee.

.....

It should be noted however, that since privity of contract exists between them, the original covenantee will retain a contractual right of action against the original covenantor, notwithstanding the conveyance.

It follows that the covenant was valid in contract at least to the extent of giving the plaintiff a right of action in contract against the defendant Heritage Properties Limited, had the latter breached the covenant. It appears from the record, however, that Heritage did no building on the Covenant Lands and that when it conveyed to the defendant Crazy Horse Developments Limited it took from Crazy Horse a covenant in the exact terms of the covenant in the Victoria Deed and so on the facts Heritage did not breach the covenant but complied with it exactly.

That leaves to be considered Items 2 (chaining) and 5 under "Other issues" above.

The alleged chaining effect

The plaintiff's position on this issue was outlined above as Item 2 under "Other issues". A real difficulty with the "chaining" concept being advanced here is that it depends upon a crucial implied term, namely, that each transferrer, in exacting the covenant from his transferee, is acting as the agent of the plaintiff, so as to effect a direct contractual link, i.e., privity of contract, between the plaintiff and the successive transferees. That is an arguable point. Why else would an intermediate transferrer exact such a covenant from his transferee? If the intermediate transferrer retained no land in the area he would have no affirmative interest in obtaining a covenant from his transferee, only a defensive desire not to make himself liable in contract to his transferrer. Does that make the intermediate transferrer the agent of the plaintiff when he exacts the covenant from his transferee? Possibly, but in my opinion it cannot be said that on this point there is not a genuine issue for trial. It is possible that the draughtsman, having failed to specify the lands of the covenantee intended to be benefited by the covenant, made a further error by wording the covenant in such a way as to make it useless to the plaintiff except as against Heritage Properties, the direct transferee from the plaintiff. A better way to have drawn the provision is exemplified in *Esso Petroleum Co. Ltd. v. Kingswood Motors*, supra, where the original covenantor agreed not to part with the subject lands without having required the purchaser from him to have entered into an agreement with the original grantor, Esso. There would then be either privity of contract between Esso and the transferee or a clear breach of contract by the original covenantor.

The chaining concept faces another problem on the facts: the second transferee of the Covenant Lands, after having conveyed the Covenant Lands to Upper Canada, in a deed containing the required covenant, had its corporate registration cancelled, and so, subject to revival, its corporate existence terminated before the commencement of this action. If in exacting the covenant from Upper Canada, Crazy Horse was acting as the agent of the plaintiff and effecting a direct contract between the plaintiff and Upper Canada, the subsequent cancellation of the registration of Crazy Horse would have no effect. Otherwise the link in the chain is broken, subject to the possibility that under the applicable Ontario corporations statute, Crazy Horse can be revived at the behest of the plaintiff. There is nothing in the record as to that possibility. The usual remedy against a covenantor who has already conveyed away the subject property is damages, but in the next section I refer to the Esso case as a decision ordering a reconveyance of the subject lands where they were conveyed in breach of a covenant to a party not dealing at arm's length with the party who conveyed the land in breach of the covenant to exact an agreement. I deal further with that below.

In my opinion it cannot be said on the record that there is not a genuine issue for trial on the question of the implied agency of the successive transferrers.

The simple assertion on behalf of the moving parties that there is no privity of contract between either of them and the plaintiff does not face up to the possibilities, and I here say no more than not unreasonable possibilities, that through a combination of (i) implied agency and (ii) the view taken in *Esso*, supra, of a transfer that omits the covenant where the transferrer and the transferee were not at arm's length, the plaintiff may have an action in damages against Upper Canada and the moving parties and, perhaps a right to a mandatory injunction for a reconveyance to Upper Canada. On this record I am not convinced that those propositions cannot survive scrutiny. There is little dispute as to the facts. I do not say that this issue and the one discussed below need necessarily have gone to trial. On a fuller record and with approaches by both counsel that addressed these issues, the matter

might have been disposed of on this motion. As this record is, there are relevant and material issues as to which it cannot be said that there are not genuine issues outstanding, for disposition after a trial or, perhaps, after a further motion to be heard on further materials, cross-examinations, and submissions of law as to the remaining issues.

Item 5, under "Other issues" above

Reference is made to the last above-quoted excerpt from the Report, as though such excerpts were repeated here. As indicated, neither that excerpt or any decision referred to therein was referred to by either counsel or in any of the material filed, although that section of the Report was cited by counsel for the plaintiff. It is stated in the excerpt that, even where the burden of a covenant does not run with the subject land, a purchaser of that land from the covenantor may be held liable for a breach of the covenant -- possibly in tort for inducing breach of contract -- and, further, in certain circumstances, such as where the subject land is conveyed, not at arm's length, without compliance with a contractual obligation to exact a covenant from the transferee, a mandatory injunction may issue to require a reconveyance to the covenantor. As to the mandatory injunction to reconvey, see *Esso*, supra. It may be that *Esso*, where the covenant was one obligating a gasoline retailer to purchase all of its petroleum products from the covenantee, is a decision that would not be followed in Ontario with respect to a covenant restricting the height of building on the subject land and purporting to require each transferee of the subject land to exact a similar covenant from his transferee. I have had no submissions and have been referred to no authorities on the point. The House of Lords' decision in *Tophams Ltd. v. Sefton (Earl)*, supra, is cited in the Report as authority for the proposition that a covenantor does not breach the covenant upon agreeing to sell the burdened land to a purchaser who he knows will breach the covenant. The covenantor had covenanted that during the lifetime of the Earl of Sefton he would not "cause or permit" the subject land to be used other than for horse racing and related uses. The issue was dealt with as a matter of construction of the covenant, with the majority in the House of Lords holding that what of the covenantor/transferrer and therefore the latter was not "permitting" a changed use if he was then powerless to prevent it. The minority in the House of Lords (Lords Reid and Wilberforce) and the majority of the Court of Appeal placed their focus on an earlier point in time, stating in effect that by conveying to someone that it knew would not comply with the covenant the covenantor was, when he still had control of the situation, "permitting" the new use, contrary to the covenant. I make bold to express the hope that the majority view will not be followed in Ontario or will be confined narrowly to its particular facts, so as not to justify the broad generalization made with respect thereto in the Report. But that is not our issue. On this branch of the case our problem is that the relevant statements of law in the Report have not been addressed. I have knowledge of them; they appear to have a possible bearing on the outcome and I am accordingly not in a position to say that there is no genuine issue for trial, in the sense that I cannot on this record dispose of all of the questions that may be relevant and material.

For example, it may be that the approach of our courts in *R. v. York (Township)*, supra, and in *Galbraith* and in *Sekretov* with regard to when covenants run with the land represents a sharp distinction between matters of property law and matters of contract and could lead Ontario courts to confine a trade case such as *Esso* to trade cases and not to building restrictions.

Whether to allow a further motion under Rule 20

The importance of the decision of Anderson J. in the C.I.B.C. case, supra, is that it puts the parties on notice that on a Rule 20 motion they should fire the guns they have because otherwise the decision could go against them at that stage with no recourse except an appeal. With respect, I believe that to be the general rule. This, however, may be an exceptional case. Many of the facts are documentary and not subject to dispute. Both parties have failed to put enough into the motion. The objective of Rule 20 to avoid trials where they are not necessary, remains. In the circumstances the motion will be dismissed as to: (i) the issue of the implied agency with respect to the sub-covenant; and (ii) the issues arising from the above-quoted excerpt from the Report, but without prejudice to either party bringing on another motion under Rule 20 with respect to those issues.

Disposition

Accordingly, I have endorsed the motion record as follows:

For handwritten reasons to be released when typed and checked, order to go:

- (i) declaring that the burden of the covenant here in question does not run with the lands referred to in such reasons as the "Covenant Lands" or with any part thereof;
- (ii) declaring that the agreements entered into in 1987 between the plaintiff and predecessors in title of the moving parties (not at arm's length with the moving parties) with respect to the Covenant Lands do not estop the moving parties from asserting that they are not bound by the covenants here in question;
- (iii) declaring that the plaintiff in entering into the said 1987 agreements did not waive, for purposes other than as specified in such agreements, whatever its rights were and are to enforce the covenants here in question;
- (iv) ordering an expedited trial, subject as hereinafter stated;
- (v) dismissing the balance of the motion for summary judgment without prejudice to the right hereby granted to either party to bring a further motion for judgment after the filing of further materials, including cross-examinations, on affidavit material relating to the remaining issues and filing factums dealing, at the least, with (i) the question of implied agency as asserted by the plaintiff with regard to the sub-covenant herein, and (ii) the propositions referred to in the passage quoted in the reasons from pp. 28 and 29 of the Report on Covenants Affecting Freehold Land (1989) of the Ontario Law Reform Commission;
- (vi) providing that the order herein for an expedited trial is to be stayed, subject to an agreement of counsel to the contrary, to allow time for a further motion as referred to in (v) above.

Costs

To date success is divided with the moving parties having achieved the main result they sought and having at the least significantly narrowed the issues. Given the disposition above and the possibility of a further motion, submissions as to costs may be made to me, orally or in writing, forthwith if it is decided not to proceed with a further Rule 20 motion and subsequent to such further motion if it is proceeded with.

Order accordingly.

CBR# 137

Her Majesty the Queen, plaintiff, and Huang and Danczkay Limited, defendant

[1998] F.C.J. No. 796 Court File No. T-2463-93

Federal Court of Canada - Trial Division Toronto, Ontario Wetston J. Heard: March 31, 1998 Judgment: June 5, 1998 Counsel: Marie-Thérèse Boris, for the plaintiff. Paul Bleiwas and Earl I. Miller, for the defendant.

[para1] WETSTON J.:-- The Plaintiff, her Majesty the Queen (the "Minister"), appeals the decision of the Tax Court of Canada, dated 17 June 1993, whereby the Defendant's appeal in respect of its 1980, 1981, 1983 and 1985 taxation years was allowed. The defendant, Huang and Danczkay Limited (the "taxpayer"), is a Canadian-controlled real estate company, incorporated under the laws of Ontario.

[para2] The parties have agreed that the following facts are not in dispute:

1. The Defendant, an Ontario corporation, incorporated in 1971, is a Canadian-controlled private corporation ('c.c.p.c.') owned equally by Michael Huang and Bela Danczkay.
2. The Defendant carries on the practice of consulting engineer and the business of real estate development and property management.
3. In 1979, the Silver Creek-Cedarwood Partnership ('Silver Creek-Cedarwood'), a limited partnership, constituted under the laws of Alberta, was formed by B.P.M. (Mill St.) Developments Limited, a wholly-owned subsidiary of the Defendant, as general partner, and Michael Huang and Bela Danczkay as limited partners ('the Promoters'). In 1979, 350 additional units were issued to the public for \$10,000 per unit payable \$1,500 at closing and the balance of \$8,500 by way of a promissory note payable in yearly instalments of \$2,500, \$2,500, \$1,000, \$1,000, \$750 and \$750, together with interest on the unpaid balance at the rate of 11 1/2% per annum calculated and payable yearly.
4. Silver Creek-Cedarwood was organized to acquire certain lands and to construct, own and operate apartment projects on such lands (the 'Projects'). By an agreement dated November 29, 1979 (the 'Transfer Agreement') Silver Creek-Cedarwood acquired the Projects in consideration for it assuming the liability of \$1,700,500 owing by the vendor to the Defendant. 5. By agreement dated November 29, 1979 (the 'Development Agreement') among Silver Creek-Cedarwood, the Defendant and the Promoters, i) the Defendant agreed to complete the projects for \$9,522,976 and provide certain initial services essential to Silver Creek-Cedarwood as described in paragraph 6 below, and ii) the Promoters and the Defendant agreed to provide certain covenants and guarantees in connection with the Projects.
6. Pursuant to the Development Agreement, the Defendant agreed to provide to Silver Creek-Cedarwood initial services described in the table below for the consideration set out therein.

Silver Creek Cedarwood Total CMHC mortgage insurance fee \$ 79,300 \$ 66,536 \$ 145,836

CMHC mortgage application fee 7,350 7,735 15,085 Interest during construction and lease-up 1,493,823 1,217,282 2,711,105

Mortgage guarantee fee 80,291 67,368 147,659

Mortgage brokerage fee 64,233 53,894 118,127

Legal Fees relating to mortgage financing and other documentation 25,000 25,000 50,000

Landscaping 100,000 50,000 150,000

Administration and leasing services 362,000 243,300 605,300

Cash flow guarantee	171,525	145,349	316,874	_____	\$2,383,522	\$1,876,464
	\$4,259,986					

7. The total cost of the Project and initial services to Silver Creek-Cedarwood was \$14,920,000. In accordance with the Development Agreement, Silver Creek-Cedarwood issued to the Defendant a promissory note in the amount of \$3,107,300 (the 'Purchase Money Note'). The terms and conditions of the Purchase Money Note provide for the principal to be paid over a period of six years, together with interest at the rate of 11 1/2% per annum. In addition, the Purchase Money Note includes a right of set-off in the event the Defendant defaults on its obligations under the Development Agreement.

8. In 1980, the Stonehill Partnership, a limited partnership, constituted under the laws of Alberta, was formed by 444222 Ontario Limited, a wholly-owned subsidiary of the Defendant, as general partner, and Michael Huang and Bela Danczkay as limited partners. In 1980, 450 additional units were issued to the public for \$10,000 per unit, payable \$2,500 at closing and the balance of \$7,500 by way of promissory note payable in yearly instalments of \$2,500, \$1,500, \$1,500, \$1,000 and \$1,000, together with interest on the unpaid balance on the rate of 12% per annum calculated payable yearly.

9. The Stonehill Partnership was organized to acquire, complete and operate two apartment projects in Scarborough, Ontario (the 'Stonehill Project'). On June 30, 1980, Stonehill Partnership acquired from the Defendant land upon which the Stonehill Project was to be constructed, and partially completed buildings for an agreed purchase price of \$7,000,000.

10. By agreement dated June 30, 1980 (the 'Stonehill Development Agreement') among the Stonehill Partnership, the Defendant and the Promoters, i) the Defendant agreed to complete the Stonehill Project and provide certain initial services essential to the Stonehill Partnership for a fixed price, and ii) the Promoters and the Defendant agreed to provide certain covenants and guarantees in connection with the Stonehill Project.

11. Pursuant to the Stonehill Development Agreement, the Defendant agreed to provide to the Stonehill Partnership initial services described in the table below for the consideration set out therein.

100 Wintergarden Springdale Total Place

CMHC mortgage insurance fee \$ 71,875 \$ 48,125 \$120,000 CMHC mortgage application fee 10,500 5,250 15,750

Interest during completion of construction and lease-up 736,430 477,720 1,214,150

Mortgage guarantee fee 217,958 145,938 363,896

Legal fees relating to mortgage financing and other required documentation with respect to operations 12,000 8,000 20,000

Landscaping 90,000 60,000 150,000

Leasing services 300,000 150,000 450,000

Cashflow guarantee 448,260 293,880 742,140

Administrative services 90,000 60,000 150,000 Mortgage brokerage fee 48,000 32,000 80,000

\$2,025,023 \$1,280,913 \$3,305,936

12. The total cost of the Stonehill Project and initial services to the Stonehill Project was \$17,264,000. In accordance with the Stonehill Development Agreement, the Stonehill Partnership issued to the Defendant a promissory note in the amount of \$4,044,000 (the 'Purchase Money Note'), and agreed to deliver to the Defendant mortgages for the remainder of the cost. The terms and conditions of the Purchase Money Note provide for the principal to be paid over a period of seven years, together with interest at the rate of 12% per annum calculated and payable yearly. In addition, the Purchase Money Note includes a right of set-off in the event the Defendant defaults on its obligations under the Stonehill Development Agreement.

13. In 1981, the Burnhill Partnership, a limited partnership, constituted under the laws of Ontario, was formed by Lachesis Developments Ltd., a wholly-owned subsidiary of the Defendant, as general partner, and Michael Huang and Bela Danczkay as limited partners. In 1981, 400 additional units were issued to the public for \$10,000 per unit, payable \$1,250 at closing and the balance of \$8,750 by way of promissory note, payable in yearly instalments of \$2,200, \$1,150, \$1,150, \$1,300, \$1,450 and \$1,500, together with interest at the rate specified by formula.

14. The Burnhill Partnership was organized to acquire, construct and operate a 238 suite apartment project in Scarborough, Ontario (the 'Burnhill Project'). On October 21, 1981, Burnhill Partnership acquired from the Defendant beneficial title to the land upon which the Burnhill Project was to be constructed for an agreed purchase price of \$1,190,000.

15. By agreement dated October 21, 1981 (the 'Purchase and Development Agreement') among the Burnhill Partnership, the Defendant and the Promoters, i) the Defendant agreed to construct the Burnhill Project and provide certain initial services essential to the Burnhill Partnership for a fixed price, and ii) the Promoters and the Defendant agreed to provide certain covenants and guarantees in connection with the Burnhill Project.

16. Pursuant to the Purchase and Development Agreement, the Defendant agreed to provide to the Burnhill Partnership initial services described in the table below for the consideration set out therein.

Total Project

CMHC mortgage insurance fee... \$ 77,826 CMHC mortgage application fee... 14,400 Interest during construction and lease-up... 1,429,976 Mortgage guarantee fee... 96,688 Realty taxes, insurance and other... 119,000 Legal fees relating to mortgage financing... 20,000 Landscaping... 154,700 Leasing Services... 261,800 Cash flow guarantee... 450,924 Administrative services... 238,000 Mortgage brokerage fee... 63,070 Mortgage rate buydown fee... 1,221,797 Purchase money note rate buydown fee... 359,093 ----- \$4,507,274 =====

17. The total cost of the Burnhill Project and initial services to the Burnhill Partnership was \$13,996,000. In accordance with the Purchase and Development Agreement, the Burnhill Partnership issued to the Defendant a promissory note in the amount of \$3,599,000 (the 'Purchase Money Note'). The terms and conditions of the Purchase Money Note provide for the principal to be paid over a period of six years, together with interest at the rate specified by formula. In addition, the Purchase Money Note includes a right of set-off in the event that the Defendant defaults on its obligations under the Purchase and Development Agreement.

18. As part of the Purchase and Development Agreement, the Defendant undertook to obtain condominium registration for the Burnhill Project by January 1, 1984, failing which it agreed to reduce the purchase price by \$1,589,000.

19. The Defendant was unable to comply with certain municipal requirements for condominium registration and as a result the purchase price of the Burnhill Project was reduced by \$1,589,000, in accordance with the Purchase and Development Agreement.

20. In computing its net income for the 1980, 1981, 1982 and 1983 taxation years, the Defendant deducted the uncollected portion of the Silver Creek-Cedarwood Purchase Money Note and the Stonehill Partnership Purchase Money Note.

21. In computing its net income for the 1983 taxation year, the Defendant deducted the uncollected portion of the Burnhill Partnership Purchase Money Note.

22. For each of the 1981, 1982, 1983 and 1985 taxation years, the Defendant included in computing its income the amount deducted in computing its income for the immediately preceding year in respect of each of the Purchase Money Notes.

23. By Notices of Reassessment dated July 8, 1988, the Minister of National Revenue disallowed the Defendant's deduction and included in income the full amount of each of the Purchase Money Notes in the year each of the said Notes was received, on the basis that section 3 and subsection 9(1) of the Act precluded the Defendant claiming a deduction in respect of the uncollected portion of each of the said Notes.

24. By Notice of Confirmation dated September 1, 1989, the Minister of National Revenue disallowed the Defendant's notice of objections for the 1980, 1981, 1982, 1983 and 1985 taxation years and confirmed the reassessments as issued. The Wrap-around mortgages were given by two of the limited partnerships [Stonehill and Burnhill] to the Defendant. The Defendant argued that these Wrap-around Mortgages should be given the same income treatment for tax purposes as the Defendant gave to the Purchase Money Notes.

[para3] At issue is whether the uncollected portions of the purchase money notes ("notes") and wrap-around mortgages ("mortgages") are 'receivable' within the meaning of s. 12(1)(b) of the Act.

[para4] The Minister argues that the notes and mortgages were earned by the defendant in the years in question and must be included in the computation of the defendant's income for tax purposes pursuant to ss. 9 & 12 of the Act and in accordance with generally accepted accounting principles ("GAAP"). The Minister says that the defendant has confused the recognition of income in the taxation year in which it is earned with a situation where the defendant may be entitled to a reserve for amounts not received or for contingent future payments.

[para5] It is further argued that, as the notes and mortgages were the consideration received by the defendant upon the sale of the properties in question, they were properly included by the defendant as receivables in the years in which these sales took place. Concomitant with these sales, it is acknowledged that the defendant undertook potential future obligations which might, or might not, have resulted in expenditures by it in future years. It is also submitted that these conditional expenditures were not deductions of the kind which could be the subject of a reserve under s. 20(1) of the Act, as the defendant had originally claimed.

[para6] The Minister argues that the obligations undertaken by the defendant in relation to the notes and mortgages are properly characterised as "contingent payables", i.e. amounts that may at some time in the future become payable under the cash flow guarantee. It is further submitted that a contingent amount payable cannot be considered an expense incurred in the current year, pursuant to s. 18(1)(e). However, regardless of whether these obligations constitute contingent payables or conditional expenditures which may be the subject of a reserve, the notes and mortgages to which they were attached are receivables which must be included in income in the years in which they were earned, in order to portray the most accurate picture of the defendant's profit in a given year.

[para7] In other words, the Minister argues that the Defendant is attempting to transform a contingent payable, i.e. an amount which may become payable in the future under one of the obligations attached to the notes or mortgages, into unearned income, rather than a current deduction, such as a reserve, which it had originally attempted to do. It is submitted that the notes and mortgages are earned in the years in which they are received. As contingent amounts payable, the obligations attached to the notes and mortgages may only be accounted for as deductions in the taxation years in which the need to fulfill the obligations is actually realised.

[para8] The Minister's expert witness, Mr. Irving L. Rosen, identified two acceptable methods for the recognition of income by a "developer" such as the defendant: the completed contract method, and the percentage of completion method. In his opinion, the defendant was acting in accordance with GAAP by initially adopting the former method to recognise the notes and mortgages as receivables. However, Mr. Rosen testified that for the defendant to apply the completed contract method, and recognise the notes and mortgages as receivables in the year in which they were incurred, for business and reporting purposes, but not recognise these same notes and mortgages as receivables for taxation purposes runs contrary to established accounting principles.

[para9] Mr. Rosen was of the opinion that the various obligations attached to the notes and mortgages do not affect the earning of the income, and thus the timing of their recognition as income earned. Rather, it is submitted that these obligations are conditions which affect only the collection of the note or the mortgage receivable. It is suggested that if a real cost arising from one of these obligations was incurred at a later date, a separate provision could be made at that time to address amounts paid out at that time.

[para10] The Defendant argues that the notes and mortgages were receivable only in accordance with the payment schedules set out in the development agreements, and then only if the Defendant continued to meet its obligations under each development agreement. Because of these continuing conditions precedent, therefore, it is argued that the defendant did not have an immediate, absolute and unconditional right to sue for the uncollected portion of the notes and mortgages in any of the particular taxation years in issue.

[para11] The Defendant argues that the uncollected amounts outstanding under the notes and mortgages ought not to have been included in its income for tax purposes for those years. It is submitted that it should not have originally included them, subject to a reserve to account for the outstanding obligations attached to them. Moreover, it is argued that to have included the notes and mortgages in income as receivables did not present an accurate picture of the Defendant's profit, for any of the years at issue, regardless of whether a reserve was applicable for the continuing obligations, or if the obligations were regarded merely as contingent payables.

[para12] It is submitted that the most accurate picture of the Defendant's income, for any of the years at issue, is the one in which the notes and mortgages are not regarded as receivables, until such time as the defendant has an immediate, absolute and unconditional right to the collection of the amounts as stipulated in the payment schedule provided under the notes and mortgages. The Defendant argues that this approach is in accord with the generally accepted business principles applicable to this case, i.e. U.S. Financial Accounting Standard ("F.A.S.") No. 66, and the Recommended Accounting Practices for Real Estate Companies ("R.A.P.R.E.C.") established by the Canadian Institute of Public Real Estate Companies ("C.I.P.E.C."). It is argued that recourse should be had to F.A.S. No. 66 and the R.A.P.R.E.C., as the Canadian Institute of Chartered Accountants handbook does not specifically address this situation.

[para13] In the opinion of the Defendant's expert witness, Mr. Wardell, the fundamental question of ascertaining the actual role of the defendant in the three MURB projects, must be addressed prior to arriving at the proper accounting analysis with respect to the revenue recognition criteria applicable in this case. Mr. Wardell indicates that the defendant did not act as a simple contractor, who would follow accounting procedures typically used by contractors in recognising contract revenues. Rather, the defendant acted as a real estate developer, and should have recognised its profit in accordance with GAAP standards applicable to real estate transactions.

[para14] Mr. Wardell testified that the fundamental criteria that must be met in order to recognise profit for real estate transactions under Canadian GAAP, is that the profit must be determinable, i.e. that the collectibility of the sales price is reasonably assured, and that the earnings process is virtually complete, i.e. that the defendant is not obligated to perform any significant activities after the sale to earn the profit. With recourse to FAS No. 66 and the CIPREC guidelines, Mr. Wardell has indicated that neither of these two criteria have been met in this case. This is because the cash down payments involved were not sufficient, and the defendant was required to perform various obligations prior to the notes and mortgages becoming fully payable. He also notes that the Defendant retained the risk of ownership as general partner in each MURB project, and guarantor of cash flow pursuant to the purchase and development agreements. Accordingly, the Defendant should not have accounted for the notes and mortgages as receivables in the years they were generated, rather than as per the schedules upon which they were to have been due.

[para15] The Supreme Court of Canada has recently set out the following principles, to be applied on a case-by-case basis, to the computation of profit under ss. 9 & 12 of the Act: *Canderel Limited v. The Queen* 98 DTC 6100 at 6110:

(1) The determination of profit is a question of law. (2) The profit of a business for a taxation year is to be determined by setting against the revenues from the business for that year the expenses incurred in earning said income: ... (3) In seeking to ascertain profit, the goal is to obtain an accurate picture of the defendant's profit for the given year. (4) In ascertaining profit, the defendant is free to adopt any method which is not inconsistent with (a) the provisions of the Income Tax Act ; (b) established case law principles or rules of law; and (c) well-accepted business principles.

(5) Well-accepted business principles, which include but are not limited to the formal codification found in G.A.A.P., are not rules of law but interpretive aids. To the extent that they may influence the calculation of income, they will do so only on a case-by-case basis, depending on the facts of the defendant's financial situation.

(6) On reassessment, once the defendant has shown that he has provided an accurate picture of income for the year, which is consistent with the Act, the case law, and well-accepted business principles, the onus shifts to the Minister to show either that the figure provided does not represent an accurate picture, or that another method of computation would provide a more accurate picture.

[para16] In my opinion, the above passage indicates that, in determining profit, a Court should determine whether the case at hand can be resolved through a purposive approach to the relevant provisions of the Act, and to the established principles of case law. In certain cases, it may not be necessary to resort formally to the various well-accepted business principles as an interpretive aid: *Canderel*, supra at 6109. "However, when no specific legal rule has been developed, either in the case law or under the Act, the taxpayer will be free to calculate his or her income in accordance with well-accepted business principles, and to adopt whichever of these is appropriate in the particular circumstances, is not inconsistent with the law, and... yields an accurate picture of his profit for the year": *Canderel*, supra at 6107.

[para17] Paragraph 12(b)(1) of the Act, as it was then drafted, provides:

(1) There shall be included in computing the income of a defendant for a taxation year as income from a business or property such of the following amounts as are applicable: ... (b) any amount receivable by the defendant in respect of property sold or services rendered in the course of a business in the year, notwithstanding that the amount or any part thereof is not due until a subsequent year, unless the method adopted by the defendant for ...

[para18] The parties have agreed that recent amendments to this provision have no bearing on the issue of whether the notes and mortgages constitute a 'receivable'. Use of the term 'receivable' has been considered recently by Cullen J. in *West Hill Redevelopment Company Limited v. The Queen*, 91 DTC 5430 (F.C.T.D.), where a defendant who took back mortgages from purchasers of its condominium units at interest rates below the prevailing market rates was required to include in income the face value, rather than the fair market value, of such amounts secured by the mortgages as receivables pursuant to paragraph 12(1)(b). Cullen J. determined, at 5433, that the mortgages were receivable within the meaning of the subsection. He did so because 'receivable' has been interpreted to mean that a defendant has an unconditional legal, though not necessarily immediate, right to receive an amount in question: *The Queen v. Imperial General Properties Ltd.*, 85 DTC 5045 (F.C.A.) & *M.N.R. v. Colford* 60 DTC 1131 (Ex. Ct.).

[para19] In *Kenneth B.S. Robertson v. M.N.R.* (1944), 2 DTC 655 at 661 (Ex. Ct.), it was noted that for an amount to be considered a 'receivable', the defendant must have a right to its disposition, use or enjoyment which is absolute and under no restriction, contractual or otherwise. More recently, in *Ikea Limited v. The Queen*, 98 DTC 6092 at 6099 (S.C.C.), Mr. Justice Iacobucci has noted that the characterisation of what constitutes a 'receivable' is guided by the 'realisation principle'. The ultimate effect of the realisation principle is that amounts received or realised by a defendant are taxable in the year received if they are free of conditions or restrictions upon their use, subject to any contrary provision of the Act or other rule of law.

[para20] Accordingly, an amount is to be characterized as 'receivable' only if there is at present an immediate, absolute and unconditional right to collect it, even though it may not be actually collected until some time in the future. In this case, however, the notes and mortgages were subject to the condition precedent of being in compliance with the obligations contained within each of the purchase and development agreements. These obligations included the construction and development of the projects into functioning MURBS and the management and initial leasing of the development properties. In addition, the defendant would be required to honour the cash flow guarantees for the period of the development agreements, make pay-outs in relation to initial services as they fell due, and to ultimately discharge the underlying institutional mortgages. If these obligations, which extended over the period of each development agreement, were not fulfilled, the defendant would not have an immediate, absolute and unconditional right to collect the amounts receivable for a particular period as set forth in the payment schedule under the notes and mortgages.

[para21] In my opinion, the cash flow guarantee obligation did not have the character of a contingent payable, as has been suggested by the Minister. While it is uncertain what the full affect of this obligation would eventually be, in terms of the money to be paid out by the Defendant to honour it, it is nonetheless clear that this obligation was part of purchase and development agreements that required specific performance after an accounting. Similarly, in order for the mortgages to be receivable by the Defendant, as set forth in the payment schedule, over the period of the purchase and development agreement, the Defendant was required to fulfil its ongoing obligations in respect of the underlying mortgages. This obligation was an integral part of the purchase and development agreement and related directly to its right to receive payments under the development mortgages.

[para22] Accordingly, as a result of these ongoing obligations, the Defendant did not have an immediate, absolute and unconditional right to sue for the uncollected portion of the notes and the mortgages in any of the particular taxation years: Robertson, supra at 661; Colford, supra at 1135. Therefore, the uncollected portion of the notes and mortgages were not 'receivable' as contemplated under s. 12(1)(b) of the Act, and should not have been included in income in any of the taxation years, until such time as the conditions precedent attached to each development agreement had been satisfied.

[para23] I therefore find that the Defendant's proposed method of accounting for the notes and mortgages is consistent with the Act and established principles contained within the case law.

[para24] Further, the Minister has failed to convince me that his proposed method of ascertaining profit provides a more accurate picture of the Defendant's income than that which was obtained by the Defendant through recourse to GAAP, FAS No. 66, and the CIPREC guidelines. As indicated by the Defendant's expert, Mr. Wardell, the fundamental criteria that must be met, under GAAP, in order to recognise profit for real estate transactions such as those undertaken by the Defendant is that the profit must be determinable. As a result of the obligations agreed to by the Defendant in the purchase and development agreements, the collectibility of the sales price in each of the three agreements was not reasonably assured at the time each agreement was concluded.

[para25] Moreover, the earnings process for each agreement was not virtually complete at the conclusion of each agreement, as the Defendant retained the risk of ownership as general partner in each MURB project, and as guarantor of cash flow, commitments which necessitated the Defendant's involvement after the sale to earn its profit. As such, it would present a less accurate portrayal of the Defendant's profit, as a real estate developer, if the uncollected portions of the notes, and the mortgages, were treated as receivables in the taxation years during which each purchase and development agreement was concluded.

[para26] Accordingly, the appeal shall be dismissed. The Defendant shall have its costs.

WETSTON J.

CBR# 149

Nicholas John Koppert, Appellant, and Her Majesty the Queen, Respondent

[1998] T.C.J. No. 1088 Court File No. 96-2096(GST)

Tax Court of Canada London, Ontario Brulé T.C.J. Heard: October 20, 1998 Judgment: December 11, 1998

The Appellant, in person. N. Goulard, for the Respondent.

JUDGMENT:-- The appeal from the assessment made under the Excise Tax Act, notice of which is dated December 16, 1994 and bears number 08PD0101904 is dismissed in accordance with the attached Reasons for Judgment.

REASONS FOR JUDGMENT

[para1] BRULÉ T.C.J.:-- This appeal, pursuant to the informal procedure respecting the appellant's claim that he was not liable for Goods and Services Tax (GST) on the sale of a property, was heard at London, Ontario, on October 20, 1998. The appellant was the only witness.

Facts

[para2] The appellant, Nicholas Koppert (NK), purchased real property located at 4701-2 Glacier Drive, Whistler, British Columbia (the "Property") on February 15, 1990. The Property was considered a strata unit and the appellant made the Property available for both long and short-term rentals. When the appellant rented the Property on a short-term basis, he collected and remitted GST in respect of the short-term rentals. A short-term rental is considered a rental for less than 60 days. The appellant sold the property on December 2, 1992 for a price of \$205,000. The appellant did not collect from the purchaser and remit GST in respect of the sale price of the Property. The Minister issued an assessment on the basis that the sale of the Property was a taxable supply and the appellant should have collected GST from the purchaser and remitted such GST on such supply.

Issue

[para3] The sole issue is whether the sale of the Property was a taxable supply or whether the Property was a "residential complex", the sale of which is exempt from GST pursuant to section 2 of Part I of Schedule V of the Excise Tax Act (the "Act").

Appellant's Position

[para4] The appellant claims that the Property is comparable to a residential condominium and that he rented the Property to tenants on both a short-term (less than sixty days) and on a long-term basis (more than sixty days). The appellant submits that the rentals were not all or substantially all short-term rentals. The appellant makes this calculation by comparing the number of days the Property was rented on a short-term basis to the number of days that it was rented on a long-term basis.

Respondent's Position

[para5] The Minister submits that all or substantially all of the rentals of the Property were on a short-term basis. The Minister further submits that "all or substantially all" should be calculated by the total revenue method. The total revenue method compares the total revenue from short-term rentals with the total revenue from long-term rentals (over 60 days).

Analysis

[para6] GST is payable on all taxable supplies made in Canada by a registrant. The term "taxable supply" is defined in subsection 123(1) of the Act which reads as follows:

""taxable supply"

"taxable supply" means a supply that is made in the course of a commercial activity;"

[para7] The phrase "in the course of a commercial activity" is defined in subsection 123(1) of the Act and reads as follows:

""commercial activity"

"commercial activity" of a person means

(a) a business carried on by the person (other than a business carried on by an individual or a partnership, all of the members of which are individuals, without a reasonable expectation of profit), except to the extent to which the business involves the making of exempt supplies by the person,

(b) an adventure or concern of the person in the nature of trade (other than an adventure or concern engaged in by an individual or a partnership, all of the members of which are individuals, without a reasonable expectation of profit), except to the extent to which the adventure or concern involves the making of exempt supplies by the person, and

(c) the making of a supply (other than an exempt supply) by the person of real property of the person, including anything done by the person in the course of or in connection with the making of the supply;"

[para8] The three paragraphs of the definition of "commercial activity" expressly exclude the making of an exempt supply. Therefore, if the supply being made is an exempt supply, it does not fall within the definition of commercial activity. If the supply is not made in the course of a commercial activity then it is not a taxable supply. Exempt supplies are set out in Schedule V of the Act. More specifically Part I deals with real property. Section 2 of Part I of Schedule V of the Act reads as follows:

"Schedule V - Exempt Supplies Part I - Real Property

2. A supply by way of sale of a residential complex or an interest therein made by a person who is not a builder of the complex or, where the complex is a multiple unit residential complex, an addition thereto, unless the person claimed an input tax credit in respect of the last acquisition by the person of the complex, or in respect of the acquisition or importation by the person, after the complex was last acquired by the person, of an improvement to the complex."

[para9] It must be determined whether the Property that the appellant sold was a "residential complex". The definition for a "residential complex" is set out in subsection 123(1) of the Act and reads as follows:

"residential complex"

"residential complex" means

(a) that part of a building in which one or more residential units are located, together with (i) that part of any common areas and other appurtenances to the building and the land immediately contiguous to the building that is reasonably necessary for the use and enjoyment of the building as a place of residence for individuals, and

(ii) that proportion of the land subjacent to the building that that part of the building is of the whole building,

(b) that part of a building that is

(i) the whole or part of a semi-detached house, rowhouse unit, residential condominium unit or other similar premises that is, or is intended to be, a separate parcel or other division of real property owned, or intended to be owned, apart from any other unit in the building, and

(ii) a residential unit, together with that proportion of any common areas and other appurtenances to the building and the land subjacent or immediately contiguous to the building that is attributable to the unit and that is reasonably necessary for its use and enjoyment as a place of residence for individuals,

(c) the whole of a building described in paragraph (a), or the whole of a premises described in subparagraph (b)(i), that is owned by or has been supplied by way of sale to an individual and that is used primarily as a place of residence of the individual, an individual related to the individual or a former spouse of the individual, together with

(i) in the case of a building described in paragraph (a), any appurtenances to the building, the land subjacent to the building and that part of the land immediately contiguous to the building, that are reasonably necessary for the use and enjoyment of the building, and (ii) in the case of a premises described in subparagraph (b)(i), that part of any common areas and other appurtenances to the building and the land subjacent or immediately contiguous to the building that is attributable to the unit and that is reasonably necessary for the use and enjoyment of the unit,

(d) a mobile home, together with any appurtenances to the home and, where the home is affixed to land (other than a site in a residential trailer park) for the purpose of its use and enjoyment as a place of residence for individuals, the land subjacent or immediately contiguous to the home that is attributable to the home and is reasonably necessary for that purpose, and

(e) a floating home,

but does not include a building, or that part of a building, that is a hotel, a motel, an inn, a boarding house, a lodging house or other similar premises, or the land and appurtenances attributable to the building or part, where the building is not described in paragraph (c) and all or substantially all of the supplies of residential units in the building are part by way of lease, licence or similar arrangement are, or are expected to be, for periods of continuous possession or use of less than sixty days;"

[para10] Both the appellant and respondent agree that the issue is whether the exclusionary words at the end of the definition of "residential complex" apply to the building or part that meets all of the following conditions: 1) the building must be a hotel, motel, inn, boarding house or other similar premises, 2) the building is not described in paragraph (c) above and 3) all or substantially all of the rentals of "residential units" in the building are for less than 60 days.

[para11] With respect to whether the Property was a hotel, motel, inn, boarding house or other similar premises, the respondent submits that the Property should be considered a similar premise. Based on the evidence at trial, it is my opinion that the Property is to be considered a similar premise. The appellant had an arrangement with Whistler Chalets Limited ("Whistler") in which the condominium could be rented for the weekend, the week or other periods of time. It was available to the public for temporary accommodation. The occupants would either be mailed the key or could pick up the key at a place arranged by Whistler. Whistler provided cleaning services upon the departure of each occupant.

[para12] The second requirement is that the building is not described in paragraph 123(1)(c) "residential complex" which refers to a building that is used primarily as a place of residence of the individual or a related individual. The appellant admits that the Property was not used primarily as a place of residence for himself or a person related to him.

[para13] With respect to whether all or substantially all of the rentals were for less than 60 days, both the appellant and respondent agree that all or substantially all is to be interpreted as 90% (for Revenue Canada's position). The appellant submits that this calculation should be based on a comparison of the number of days that the property was either rented on a short-term or long-term basis. The respondent submits that the calculation should be based on a comparison of the gross revenues generated by short-term rentals of the Property as opposed to long-term rentals.

[para14] The appellant owned the Property for approximately 34 1/2 months. During this period, the Property was used for short-term rentals aside from a long-term rental that consisted of a 6 1/2 months lease. Aside from the records of the monthly payments, the appellant did not produce any evidence to substantiate this lease. To prove the existence of the lease, the appellant relied upon his personal records of rent payments received.

[para15] As to the gross revenue method, the evidence before the Court was that the gross revenue from short-term rentals in 1990, 1991, and 1992 was \$24,633.00, \$36,529.00 and \$16,475.00 respectively. The gross revenue from long-term rentals for 1990, 1991 and 1992 was \$5,200.00. This amount was from the 6 1/2 months rental in 1992. Therefore, the percentage of gross rental revenue that came from the long-term rental was 6.3%. (The total gross revenue from long-term and short-term rentals was

\$82,837.00. The gross revenue from the long-term rental, namely \$5,200, represents 6.3% of the total amount.) The appellant submits that in establishing whether the Property meets the all or substantially all requirement under the gross revenue method, the revenue from 1990 is not relevant to the calculation as this period was prior to the introduction of the GST. Even if this submission was to be accepted by the Court, it would not alter the outcome that over 90 % of the rentals of the Property were for less than 60 days. (The total gross revenue from long-term and short-term rentals for the 1991 and 1992 years was \$58,204. The gross revenue from the long-term rental, namely \$5,200, represents 8.9% of the total amount.) In the Court's opinion, upon the facts before it, the gross revenue method should be adopted and as a result it is my opinion that all or substantially all of the rentals were for periods of less than 60 days.

[para16] It is the Court's opinion that the Property meets all three requirements in the closing words in the definition of "residential complex" in subsection 123(1) of the Act. The Property is excluded from the definition of "residential complex" and is to be considered a taxable supply. The appellant had a statutory duty under subsection 221(1) of the Act to collect tax from the recipient of the Property. The exceptions in subsection 221(2) of the Act do not apply to this case.

[para17] The net result is that the appeal is dismissed.

CBR# 025

Elizabeth M. Amato, Appellant, and Her Majesty the Queen, Respondent And between Eugenio Amato, Appellant, and Her Majesty the Queen, Respondent

[1998] T.C.J. No. 457 Court File Nos. 97-2251(IT)I, 97-2252(IT)I

Tax Court of Canada Toronto, Ontario Rip T.C.J. Heard: May 28, 1998 Judgment: June 3, 1998

E.C. Defreitas, for the Appellant.
Sean O'Donnell, for the Respondent.

JUDGMENT:-- The appeals from the assessments made under the Income Tax Act for the 1992, 1993 and 1994 taxation years are allowed, with costs, if any, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the expenses incurred by the Appellant with respect to a condominium unit on Sandhurst Circle, Scarborough, Ontario, were not personal or living expenses and are deductible in computing the Appellant's income.

REASONS FOR JUDGMENT

[para1] RIP T.C.J.:-- The appellants, Elizabeth M. Amato and Eugenio Amato, wife and husband, have appealed their assessments for 1992, 1993 and 1994 on the basis that when they acquired a condominium unit in May 1987, they had a reasonable expectation of profit from this property and that the expenses incurred by them during the years in appeal, which were disallowed by the Minister of National Revenue ("Minister"), were incurred by them for the purpose of gaining or producing income from a business or property. [See Note 1 below]

Note 1: The Minister also alleged that the expenses were not reasonable in the circumstances. However there was no evidence from either the appellants nor the respondent with respect to this issue.

[para2] In May 1987 the appellants purchased a condominium unit located at Sandhurst Circle in the City of Scarborough, Ontario. The purchase price for the property was \$138,000. The appellants borrowed \$57,000 with security being a mortgage on their home in Markham, Ontario and their bank advanced \$88,000 with security being a first mortgage on the Scarborough property.

[para3] The appeals were heard on common evidence. Mrs. Amato testified on behalf of herself and her husband. The Amatos and their two children emigrated to Canada from Uruguay in 1977. Since they could not speak English, the Amatos were unable to secure employment in the field they were trained in, Mrs. Amato as a teacher of physical education and Mr. Amato as an electrician. They obtained positions as building superintendents. Soon their skills were recognized and it was suggested to them that they start a building maintenance business. This they did, and they were successful. Mrs. Amato testified that the business now employs approximately 60 people, some of whom are part-time.

[para4] Throughout the time they operated the business, the Amatos relied upon advice from their bank manager. Sometime in about 1987, the bank manager suggested that they purchase investment property, in particular, real estate. Mrs. Amato recalled that the bank manager calculated how much money they could afford to put down and how much the bank was willing to lend them on security of their assets and what price he thought they could afford. He also told them how much interest they could afford to pay to finance the property and how much cash-flow would be necessary to support the payments of interest. The bank manager also referred them to a real estate agency next door to the bank. It was on the basis of the advice from their bank manager that the Amatos acquired the Scarborough property.

[para5] On acquiring the property the appellants incurred additional expenses to make the property more attractive.

[para6] Unfortunately, from the time they bought the property until 1994 the appellants failed to show a profit from renting the property and claimed the following losses:

YEAR TOTAL RENTAL EACH APPELLANT'S LOSS SHARE - 50%

1987 \$ 1,478 \$ 739 1988 \$ 5,378 \$2,689 1989 \$ 2,934 \$1,467 1990 \$ 2,382 \$1,191 1991 \$ 2,196 \$1,098 1992 \$17,438 \$8,719
1993 \$18,190 \$9,095 1994 \$17,848 \$8,924

[para7] One of the assumptions of fact that the Minister considered when he made the assessments was that the Scarborough property was vacant throughout 1993 and 1994. Mrs. Amato recalled that it was very difficult to rent the property during those years. She said people were losing jobs and that the people applying to rent the unit were not reliable. She said they either had poor credit ratings or their references from previous landlords were not favourable. She and Mr. Amato decided to renovate the unit so as to get a better grade of tenant.

[para8] The appellants advertized the unit for rent in newspapers throughout the years in appeal. Although the appellants did not claim the costs of advertising as an expenses, Mrs. Amato stated she gave receipts to an official of Revenue Canada. The asking price for the unit was \$1,100 per month. She stated that at time of trial the unit is being rented for \$1,000 per month. She also indicated that they are now making a profit of about \$10 per month on the unit.

[para9] According to Mrs. Amato, the intent in acquiring the Scarborough property in 1987 was so that she and her husband would have some income on their retirement. They did not intend to sell the property and, indeed, have not attempted to sell the property. She stated that they are making efforts to reduce the mortgage on the property.

[para10] Mrs. Amato stated that at least on one occasion a tenant left the unit in a "mess" and the Amatos incurred unexpected costs to repair the unit.

[para11] Mrs. Amato's credibility was not challenged in cross-examination.

[para12] The respondent's position is that there was no reasonable expectation of profit on the acquisition of the property and since there was no reasonable expectation of profit, the Amatos had no source of income from the property. Respondent's counsel acknowledges that there was no personal element in the acquisition of the property.

[para13] In *Moldowan v. The Queen*, 77 D.T.C. 5213, a decision of the Supreme Court of Canada, Dickson, J. (as he then was) held that in order to have a "source of income" the taxpayer must have a profit or a reasonable expectation of profit. On page 5215 he explained that:

There is a vast case literature on what reasonable expectation of profit means and it is by no means entirely consistent. In my view, whether a taxpayer has a reasonable expectation of profit is an objective determination to be made from all of the facts. The following criteria should be considered: the profit and loss experience in past years, the taxpayer's training, the taxpayer's intended course of action, the capability of the venture as capitalized to show a profit after charging capital cost allowance. The list is not intended to be exhaustive. The factors will differ with the nature and extent of the undertaking: *The Queen v. Matthews* (1974), 28 D.T.C. 6193. One would not expect a farmer who purchased a productive going operation to suffer the same start-up losses as the man who begins a tree farm on raw land.

[para14] Respondent's counsel submitted that the appellants had at least eight years of losses on the property, no experience or training in holding real estate, no intended course of action to demonstrate that the property could be successful and they failed to show that the property, as capitalized, can show a profit. He added that the property has not proven to be capable of producing a profit over the long term. Thus, he submitted, the property could not be said to be a source of income to the Amatos in the years in appeal.

[para15] In *Tonn et al. v. The Queen*, 96 D.T.C. 6001, the Federal Court of Appeal confirmed that it is not the place of a court to second-guess the business acumen of a taxpayer whose commercial venture turns out to be less profitable than anticipated. See also *A. G. of Canada v. Mastri*, 97 D.T.C. 5420 at 5423 (F.C.A.). In the appeal at bar there are circumstances, not usually present in cases such as this, that are favourable to the appellants' claims.

[para16] The question before me is whether or not the appellants had a reasonable expectation of profit and the determination of that question is an objective determination to be made from all of the facts. This is what was stated by the Supreme Court in *Moldowan*, supra. The appellants at bar were immigrants to Canada. They carry on a successful business. In making various investment and business decisions they rely upon the advice of their bank manager. They, themselves, do not believe they had the expertise to make such decisions. It was the bank manager who suggested to them that they acquire a rental property. He sat down with them and advised them, among other things, how much they could afford to pay for the property and how much rent they would have to receive from the property to meet their mortgage obligations. They acquired the property for a price which the bank manager said would be appropriate. They had confidence in their bank manager.

[para17] At the time of the acquisition of the property, it is clear to me the appellants had a reasonable expectation of profit from the property. In considering whether there is a reasonable expectation of profit in the minds of taxpayers, as opposed to their hope of profit, one ought to consider, in addition to the criteria set down in *Moldowan*, their background and their source of counsel in deciding to invest. To the appellants, a bank manager is a competent and knowledgeable individual who could advise them how to make an affordable, secure and profitable investment. That they incurred losses since 1987, including the years in appeal, and, for example, that they had no investment background or training, do not, on the specific and peculiar facts of this appeal, negate the appellants' reasonable expectation of profit from the property over the long term.

[para18] Accordingly, their appeals will be allowed with one set of costs, if any.

CBR# 210

Nathoo v. Diamond Robinson Management Ltd.

Between

Ashie Nathoo, claimant, and Diamond Robinson Management Ltd.

Vancouver Registry No. C95-19006

British Columbia Provincial Court
(Civil Division)
Vancouver, British Columbia
Burdett Prov. Ct. J.

Heard: March 27, 1997.

Judgment: filed June 5, 1997.

(6 pp.)

Action to recover a deposit paid for the purchase of a condominium unit. On the basis of a floor plan, the claimant entered into a contract with the defendants to purchase the unit. When the building was completed, the claimant inspected his unit. He complained of various finishing deficiencies, poor workmanship, water damage and an obvious seam in the centre of the living room carpet. He also noticed significant changes to the plans, such as a reduction in his usable bedroom space, a hall closet moved to the living room, and a whirlpool for the use of tenants placed directly in front of his patio. The contract provided for the vendor to make minor variations to the plans and specifications at the vendor's discretion. The contract also provided that if there was a dispute concerning deficiencies, the matter was to go to an independent architect for a binding opinion. The claimant decided he no longer wanted to purchase the unit and sought the return of his deposit.

Counsel:

Ashie Nathoo, appearing on his own behalf.

T. Sutcliffe, for the defendant.

1 BURDETT PROV. CT. J.:— Dr. Ashie Nathoo was the purchaser of one unit in a pre-sold condominium tower at 488 Helmcken Street. The description and plans Dr. Nathoo was shown and upon which he based his decision, were marked as Exhibit 3.

2 The building was to be constructed at the corner of Richards and Helmcken Streets in Vancouver, have fourteen floors, and a variety of different floor plan options from which a purchaser could choose. A brochure was provided which listed a number of features the development would have, such as the quality of appliances, cabinetry and fixtures, as well as the facilities in the building the owners would have at their disposal.

3 Dr. Nathoo chose a unit on the second floor, with a floor plan described as "Unit W." He entered into a contract (Exhibit 1) with the defendants to purchase the unit for \$178,000. Under the contract Dr. Nathoo paid an initial deposit of \$500, a second deposit when the subject conditions were removed and then ten monthly payments of \$534 from August 1, 1994 until May 1, 1995.

4 When the building was finally completed, Dr. Nathoo inspected unit 201. Wayne Lee, a representative of the defendants, accompanied Dr. Nathoo as he inspected suite 201. Dr. Nathoo noticed a number of deficiencies, and Mr. Lee noted some of them down on the "Completion Inspection Certificate" (Exhibit 4). Twenty-five items were listed, many of which could be characterized as finishing deficiencies: unfinished details, cracks in drywall, scratches on finished surfaces and obvious damage done by the trades. Dr. Nathoo described the quality of workmanship as poor. There was substantial water damage done to the suite while the building was under construction, and some of the items on the list related to unfinished repairs to the suite due to the water damage.

5 Dr. Nathoo noted other problems: there was an obvious seam running in the centre of the living room carpet, the floor plan had changed, there was an additional window, different doors were placed in closets, the kitchen cupboards were poorly installed, and a Jacuzzi for the use of the residents of the building was now located directly in front of his patio.

6 Dr. Nathoo testified that in his discussion with Mr. Lee about the state of unit 201, Mr. Lee refused to replace the carpet, or replace the drywall. It was Dr. Nathoo's evidence that the inspection was rushed and he was not given the opportunity to note down all of his concerns. He later completed an addendum to the deficiency list on his own (Exhibit 5).

7 Mr. Lee denied that the meeting was cut short, and indicated that Dr. Nathoo could have taken as much as time as he wished. He did agree that he refused to replace the carpet, and described it as up to industry standard. Mr. Lee testified that some of the other items which Dr. Nathoo described as substandard workmanship were up to industry standards, as far as Lee was concerned.

8 Dr. Nathoo and Mr. Lee's meeting ended with Mr. Lee promising that a number of repairs would be carried out. Dr. Nathoo returned to the suite ten days later. Some of the repairs had been done, some repairs were poorly done, and some of the deficiencies had not been remedied at all.

9 Vincent Loo was the assistant property manager of the project. It was his opinion that the workmanship on the project was "good." He agreed that there were changes to the floor plan to unit 201, in particular the closets were changed, both in location and dimensions. It was his opinion that the changed designed "improved the flow" of the unit. A glass block window was added to the closet in the master bedroom to bring natural light into the unit. He explained that several large, box-like protrusions in the master bedroom were necessary for boxing in the sprinkler system. He agreed that the original plans called for double bi-fold doors on the closets and single doors were installed. Mr. Loo was of the same opinion as Mr. Lee: that a visible seam running

down the centre of the living room was well within the industry standard. He was not aware of that when the decision was made to move the outside Jacuzzi to the location just off Dr. Nathoo's suite.

10 After viewing the suite and re-inspecting it ten days later, Dr. Nathoo decided that he was no longer interested in purchasing the unit. Correspondence was exchanged between counsel for the defendants and Dr. Nathoo at the date set for the completion of the conveyance of unit 201. Dr. Nathoo did not complete the transaction. His evidence was he no longer wanted the suite due to the combination of poor workmanship, deficiencies and changes to the plans. He testified that unit 201 was not at all similar in quality of workmanship or materials as the display unit he originally viewed before he entered into the contract. He seeks the return of his deposit.

ISSUES

11 Were the changes to unit 201 "minor," or so significant that Dr. Nathoo was entitled to rescind the contract? Were the deficiencies and poor workmanship so substantial as to constitute a fundamental breach of contract?

ANALYSIS

12 The contract provided under clause 2.5:

2.5 The Purchaser acknowledges and agrees that:

(a) the Vendor may from time to time in its discretion, or as required by any governmental authority or the Vendor's mortgagee, make minor variation to the plans and specifications pertaining to the Property plans or the development of which the Property forms a part (including architectural, structural, engineering, landscaping, grading, mechanical, site service or other plans) or pertaining to any recreational amenities within the development or any other amenity situate within the development from the plans and specifications existing at the inception of construction of the development or as they exist at the time the Purchaser has entered in this Contract of Purchase and Sale or as same as may be illustrated in any sales brochure, models in the sales office or otherwise and the Purchaser shall have absolutely no claim or cause of action against the Vendor for any such changes, variances or modifications nor shall the Purchaser be entitled to any notice thereof. With respect to change in area, minor variation shall mean any change not exceeding 3 per cent of the area represented to the Purchaser at the date hereof; and

(b) the Vendor may substitute such other materials in the construction of the Property and the development (including common areas) from time to time from those specified or contemplated in the aforesaid plans and specifications, provided that any substituted material is equal to the material originally indicated in the said plans and specifications.

Clause 5.7 is also relevant:

5.7 If the purchaser is in breach of his obligation hereunder, the Deposit paid by the Purchaser shall be absolutely forfeited to the Vendor as liquidated damages (and not as a penalty), the parties agreeing that such amount constitutes a genuine and reasonable pre-estimate of the damages suffered by the Vendor as a result of such breach.

Deficiencies

13 I examined photographs (Exhibit 4a) of some of the deficiencies and areas where Dr. Nathoo claimed poor workmanship was exhibited. The photographs clearly show slipshod and sloppy workmanship. A lock was installed on the bedroom after Dr. Nathoo complained that the passage set had no locking mechanism. The lock is cheap, flimsy and poorly installed. A new passage set with a lock should have been installed. The kitchen cabinet installation was poorly done, with no fillers installed where a cabinet could not fit. The installer simply left an empty space. The cabinet in the bathroom had an obvious chip missing from it.

14 Mr. Lee agreed that there was substantial water damage in the suite, but asserted that the drywall did not need to be replaced. I find Dr. Nathoo's concerns about the drywall to be reasonable. The suite needed to be painted again. I do not accept Mr. Loo or Mr. Lee's assertion that the visible carpet seam in the centre of the living room was within acceptable industry standards.

15 I do not intend to go through all of the deficiencies. I accept Dr. Nathoo's evidence concerning the deficiencies and poor workmanship. I specifically reject Mr. Lee's evidence where it conflicts with Dr. Nathoo's. Mr. Lee was a poor witness. He was evasive during cross-examination. He had a poor recollection of the events, and during a substantial amount of his testimony it was obvious that he was trying to reconstruct what happened with Dr. Nathoo by referring to his usual conduct during inspections with purchasers. I place little weight on his testimony and no weight on his opinion on what are construction industry standards.

16 Counsel submitted that each of the deficiencies could have been remedied. He argued that Dr. Nathoo had a remedy under clause 5.3 of the contract. This clause provides that if there is a dispute concerning deficiencies, the defendant was to obtain the opinion of an independent architect. This opinion was to be binding on the claimant and the defendant.

17 Although the deficiencies were widespread, and Dr. Nathoo was justified in believing that Mr. Lee had no intention of having most of them fixed, Dr. Nathoo had the protection of clause 5.3. All of the deficiencies were capable of being repaired. His proper course, had the deficiencies been the only problem, was to invoke clause 5.3 and have the matter go to an independent architect. The deficiencies and poor workmanship alone did not constitute a fundamental breach of the contract.

Modifications

18 I will set out the changes to the unit, and the complaints Dr. Nathoo has of them. Four box-like projections were installed on the master bedroom walls. The usable space in the bedroom has decreased. The closet door has a single bi-fold door at the end of the closet. Access is impossible to the far end of the closet if any clothes are hung in it. The closet now has a large glass block window in it. Dr. Nathoo's concern was that his clothes would fade with exposure to the sun. The Jacuzzi used by all residents has been moved to a location directly in front of his patio. Anyone using the Jacuzzi has a direct view into unit 201.

The unit has lost a large degree of privacy. The hallway closet was moved from a location directly opposite the front door, to a location in the living room. The closet shape changed from a standard box to a triangle. Dr. Nathoo's complaint was that the original location of the hall closet was the proper one. It is impossible to hang any clothes in the closet as the triangular shape prevents the door from closing.

19 Counsel for the defendants relies on the authorities of *Topnotch Ltd. v. Welldone Ventures Canada Inc. Developments*, 48 C.L.R. 159; *Richards v. Law Development Group (Georgetown) Ltd.*, [1994] O.J. No. 2914 and *Three Developments (Kingswood) Ltd. v. George Gogos*, 45 R.P.R. (2d) 121.

20 Although counsel did not refer to it, I found the decision of *Lau v. 1755 Holdings Ltd.*, [1995] B.C.J. No. 1663 to be particularly helpful. Both Mr. Justice Warren's decision at trial and the decision of the British Columbia Court of Appeal [1996] B.C.J. No. 2441 confirming the trial judgement, discuss the relevant law in British Columbia.

21 The test for fundamental breach of contract is set out in the decision of *Hunter Engineering Co. v. Syncrude Ltd. et al* [1989] 1 S.C.R. 426. Madam Justice Wilson stated that the test for fundamental breach was whether or not the plaintiff has been deprived of substantially the whole benefit which was the intention of the parties that he should obtain from the contract. The Hunter decision concerned a conveyer belt, and Madam Justice Wilson pointed out, that as defensive as it was, it could be repaired and could continue to function as a conveyer belt. Mr. Justice MacEachern made the following comment in considering the Hunter decision:

I think there is a substantial difference between a piece of machinery that can be repaired or some other item of commerce and a residence where someone is going to move in and live and hopefully enjoy it. We are all entitled to some preferences in the ambiance in which we live and I think windows and heating are of particular importance.

22 In the Lau decision a similar term in the contract allowed for minor changes in the plan. There, a number of windows were deleted from the plans, built-in book shelves were deleted, recessed lighting was not installed, nor a high-quality carpet. The entrance to the building did not contain the type of fountain and reflecting pool as described in the promotional brochure. The balcony railings were cement rather than glass. Mr. Justice Warren concluded that the changes and omissions were not so trivial or inconsequential that they could be described as minor. He found that those changes amounted to a fundamental breach of contract.

23 In this case the changes to unit 201 were not insignificant. One closet could only be partially used. The hall closet was moved to an entirely inappropriate location in the living room. It was completely unusable due its shape. The boxes extending into the bedroom substantially diminished the usable space. The placement of the Jacuzzi directly outside Dr. Nathoo's unit substantially altered the privacy and quiet enjoyment of his suite. These changes cannot be described as minor variations to the plans. They could not be remedied by repairs. I conclude that unit 201 was not substantially in accordance with the plans Dr. Nathoo had seen before construction, the plans upon which he based his decision to purchase the unit. The changes were so essential as to amount to a fundamental breach entitling the claimant to rescission.

24 The claimant is entitled to the return of his deposit of \$8,366.00, prejudgment interest from May 10, 1995 until today, fees of \$120.00 and any reasonable expenses associated with the conduct of this action.

BURDETT PROV. CT. J.

CBR# 610

Lau v. 1755 Holdings Ltd.

[1996] B.C.J. No. 2441

Vancouver Registry No. CA020760

British Columbia Court of Appeal McEachern C.J.B.C., Rowles, and Ryan J.J.A. November 8, 1996. Contracts -- Performance or breach -- Fundamental breach -- What constitutes a fundamental breach.

This was an appeal of an award of damages for breach of contract. The respondents purchased units in a condominium building. They were shown detailed brochures and unit plans which they relied on in making their purchase decisions. They paid deposits. Upon occupation, they discovered that significant changes had been made to the plans. Windows were smaller or missing and heating equipment was different. The respondents were granted damages for breach of contract. The trial judge found that the appellant holding company committed a fundamental breach when it altered the unit plans during construction. The holding company appealed the award on the basis that the trial judge erred in applying the test for fundamental breach.

HELD: The appeal was dismissed. There was sufficient evidence for the trial judge to find that there was a fundamental breach of contract. The changes to the units could not be repaired. They deprived the respondents of the benefits promised by the holding company.

CBR# 337

Village Grove Corp. v. Collins

Court File No. 94-GD-29999

Ontario Court of Justice (General Division) McMahon J. February 15, 1996.

Real property -- Condominiums -- Purchasers -- Disclosure to -- Completion dates -- Breach of duty of disclosure -- Remedies.

The defendant moved for a declaration that the agreement of purchase and sale was not binding for failure to deliver a disclosure statement that complied with the Condominium Act and an order striking out the plaintiff's pleadings. The defendant received a disclosure statement which did not contain the proposed dates for the completion of certain amenities. He later rescinded the agreement. The plaintiff submitted that the failure to include these dates was not a material defect.

HELD: The application was granted and the claim dismissed. Section 52(6)(f) of the Act, which provided for the insertion of completion dates in the disclosure statement, was mandatory. Lawful disclosure was never delivered in accordance with the statutory requirements. It was therefore open to the defendant to rescind the contract.

Statutes, Regulations and Rules Cited: Condominium Act, R.S.O. 1990, c. 26, s. 52. Ontario Rules of Practice, Rule 21.01.

CBR# 131

Heritage Mountain Lodges Inc. v. Pingitore
File No. 92-CQ-25145

Ontario Court of Justice (General Division) Taliano J. January 23, 1996.

Securities regulation -- Definitions -- Security, investment contract defined -- Trading in securities -- What constitutes -- Sale of land.

This was a motion by the plaintiff for summary judgment. The plaintiff sued for damages resulting from the defendant's failure to close an agreement of purchase and sale. The defendant entered into the agreement with the plaintiff to buy a condominium unit. A lease management agreement provided that the defendant would have the use of the unit for 120 days per year. For the balance of the year, the unit was to be controlled and managed exclusively by the plaintiff promoter and any profits which were generated were to be divided between the promoter and the defendant according to a previously agreed formula. The defendant's argument on this motion was that the agreement of purchase and sale and the lease management agreement were void for non-compliance with the Ontario Securities Act, which required a trader in securities to be registered as a dealer and further required the filing of a prospectus before trading in a security. The plaintiff submitted that the transactions were not governed by the Act.

HELD: Motion dismissed. The Securities Act regulated the trading of a "security" and that term included any "investment contract". An investment contract for the purposes of the Securities Act meant a contract, transaction or scheme, whereby a person invested his money in a common enterprise and was led to expect profits from the efforts of the promoter or third party. The purchase agreement and the lease management agreement in the present case appeared to meet the test for a "security". Accordingly, there was a triable issue which should be determined at trial.

CBR# 139

George Brent Jackson and Hazel Elizabeth Jackson, plaintiffs, and Peter Nam-San Mark, defendant

New Westminster Registry No. S029846

British Columbia Supreme Court, New Westminster, British Columbia, Boyle J. Heard: November 27, 1997. Judgment: filed December 11, 1997.

Counsel: J. Michael Le Dressay, for the plaintiffs. John Kaminsky, for the defendant.

[para1] BOYLE J.-- The Plaintiffs purchased a newly constructed home from the Defendant in April 1994. The Defendant had just entered the home construction business. This was his first project.

[para2] One day, three months later, one of the Plaintiffs was washing the family car in the driveway, just in front of the attached garage. Water began leaking through an adjacent foundation wall into the basement.

[para3] It was not a flood but it was enough to cause real concern.

[para4] Upon notification, the Defendant made a genuine effort to remedy the problem but without success. Eventually the Plaintiffs made their own arrangements and, after some further failure, the problem was solved.

[para5] Other defects, cracks in the foundation wall, also became apparent. At the time of purchase the cracks did not affect the structural integrity of the home but, when they were discovered subsequently, they, together with the water problems, were extremely unsettling to the Plaintiffs who had bought the residence as a "step up" into a quality "executive home".

[para6] They decided to sell and did so.

[para7] The Plaintiffs sue for their costs accrued in repairing the leaks and they sue for a loss in market value upon their sale of the home. They attribute the loss to rejection at or near their listing price because of the history of problems which they properly disclosed when offering the residence for sale.

[para8] The Plaintiffs paid \$256,000. They listed for sale (after reductions without offers) at \$259,000. They sold for \$239,000. An appraisal was filed giving a \$272,000 market value at the time of sale. The appraiser was not asked to factor in the troublesome history in order that the Plaintiffs could establish a value had the home been trouble-free.

[para9] The action is in tort and in contract. In tort, the Plaintiffs claim misrepresentation, in particular by alleging the Defendant "intentionally covering leaks and cracks in the foundation with tar and insulation in such a manner that the leaks and cracks were not visible to the Plaintiffs ... to induce the Plaintiffs into completing the contract without reservation ..."

[para10] The claim in contract relies on the leaking foundation wall.

[para11] The Defendant in answer submits the home was completed in a workmanlike manner in accordance with the local building code and established standards. [para12] The Defendant says "the Plaintiffs purchased a completed house without inducement or representation ... or cover up or concealment ..."

[para13] The Defendant says further he took appropriate steps to stop the seepage which he asserts would have succeeded had the Defendant not intervened and insisted on measures with which the Defendant was not in agreement.

[para14] The evidence did not show the Defendant was aware at the time of sale the foundation wall would leak. He was aware of the cracks.

BASEMENT LEAKAGE

[para15] These reasons will deal first with the leaking wall.

[para16] When seepage in the basement was first discovered by the Plaintiffs, the Defendant tried to stop it by cleaning the interior surface of the wall of a "damp-proof" coating of tar, roughing out the concrete where the water was coming in and applying a commercial compound (Xypex) designed as a hydraulic cement.

[para17] It did not work.

[para18] The Defendant then concluded the seepage would have to be stopped from the outside. Extensive excavation was done. Tar was sprayed on the exterior foundation wall and, upon the Plaintiffs' insistence, rubber matting panels were glued onto the outside walls. Some drainrock was placed over mesh covering the perimeter drain, a load of unwashed sand was placed on top of that and the excavated fill was replaced.

[para19] That did not work either.

[para20] The Plaintiff (Mr. Jackson) and Defendant had been at odds over the technique to follow on the outside. The Defendant wanted to apply a one inch thick coat of tar. The Plaintiff insisted on a sheathing of rubber membrane which had been recommended to him by a municipal building inspector.

[para21] The Defendant gave way to the Plaintiff but the rubber material he obtained came not as continuous sheathing but in panels which had to be glued individually to the wall and to one another. They were intended for use on roofs, not for exterior basement walls which were, as here, subsequently back filled.

[para22] Although the rubber substance was applied at the Plaintiffs' insistence, the fact the wrong kind was used frees the Plaintiffs from a shared responsibility for an inappropriate product being employed. The plaintiff did enquire of suppliers for a suitable product but did not find a source, nor even an identifying brand name. He left it then to the Defendant.

[para23] The Plaintiff had run a hose at a trickle on the backfill after the Defendant had completed his work. His purpose was to improve compaction. The Defendant argued that had contributed to failure by being undertaken too soon with the consequence the panels pulled away from the wall.

[para24] So far as evidence goes, I took that as a passing observation not as a fact based upon proof.

[para25] The Plaintiffs did endorse the panels the Defendant found but they did so, I infer, simply because they were rubber. The Plaintiffs were entitled to rely upon the Defendant to have obtained the recommended material.

[para26] When the wall continued to leak, the Defendant refused to do more repair work on the ground he was not responsible for the consequences of following the Plaintiffs' insistence.

[para27] The Plaintiffs then, on their own, retained a firm (Water Seal) specializing in problems of this kind. Once more the ground was excavated, water-proofing was applied, drain rock was trucked in and backfill again was used to level the surface.

[para28] The job was guaranteed for one year. Thirteen months later the wall was leaking again.

[para29] The Plaintiffs then went to the engineers (Central Valley) who had been retained originally by the Defendant to verify under the local building bylaw, the structural integrity of the house.

[para30] That consultation led to a subcontractor (Fichtner) who was called in to sandblast the interior of the leaking wall and to apply a hydraulic barrier, again Xypex.

[para31] It did not work.

[para32] The Plaintiffs then went to a second engineering firm, Lang. Lang put them on to a water-proofing contractor Magna. That firm again excavated, this time even more extensively than the others including jack-hammering one-half the floor of the two-car garage.

[para33] The Magna invoice describes the work done by it:

. Remove one-half of garage floor. . Five feet of driveway across the front of the house, remove and replace front steps (they had been sinking anyway not being held to the main house by rebar). . Found crack in front corner of garage. . Found water in garage that came through crack. . Found water under the driveway main (improper fill was used to backfill up against foundation wall - (the evidence was it was sand and impervious clay; the former was capable of blocking the drains. In November 1995, the drains had been cleaned and found clogged at the sump). . Repaired all cracks that were found. . Replaced fill with proper drain rock, connecting perimeter drains. . Warranty five years.

[para34] Magna used the proper rubber membrane.

[para35] That worked.

[para36] With that unhappy history, the Plaintiffs claimed:

The Defendant breached the agreement in failing to construct the foundations of the house or, alternatively, in failing to repair damage to the foundations to the house which occurred during construction so as to render the foundations sound, water-proof and fit for their purpose generally.

[para37] I concluded the leaking wall fell within *Strata Plan N.W. 2294 v. Oak Tree Construction Inc.* (1994), 93 B.C.L.R. (2d) 50. In that case a condominium leaked. The claim against the builder in Oak Tree was framed on the basis of an implied warranty.

[para38] The Court held at p. 52:

In relation to latent defects in a building intended for habitation but which is not complete when the purchase and sale commitment is made, the law imposes on the builder, in favour of the purchaser, an implied warranty ... that the building will be fit for its purpose, namely habitation.

[para39] The warranty:

"Is implied by operation of law and not by the agreement of parties through the operation of the 'officious bystander' test.

... where the parties agree that the house will be completed, then the law implies the further agreement that it shall be completed in an efficient and workmanlike manner ... It is also important to note that the test is not 'substantial completion' but 'completion'.

The question of whether completion has occurred is a question of fact.

The warranty implied by operation of law cannot be excluded except by clear contractual terms."

[para40] In Oak Tree the builder developed the project, built the building and sold the units to the owners. The same steps were followed here.

[para41] The standard form agreement of purchase and sale in this case provided:

There are no representations, warranties, guarantees, promises or agreements other than those set out herein, all of which will survive the completion of the sale.

[para42] That is no more a bar to this action than was a term in Oak Tree which provided: "There is no warranty by or on behalf of the developer in respect to the development, including lots or common property."

[para43] The Plaintiffs' realtor added to the agreement of purchase and sale, a warranty against structural defects but its inclusion does not infer the exclusion of the implied warranty of completion, a warranty of "habitability" as it is described by Taylor J.A. (as he then was) in Oak Tree at p. 55.

[para44] The pleadings in this action lack some precision but they are sufficiently clear to (with amendment at trial) encompass the implied warranty.

[para45] The Defendant had initially set out with a good heart to leave the Plaintiffs well satisfied with their purchase. He corrected the minor complaints of the usual sort and it was his intention to do the same when the leaks appeared. Some problems, including one described as "foundation leak below living room window", were set out in a memo jointly signed July 14, 1994.

[para46] That gives weight to recognition of the obligation in the Defendant's own mind of what is conveyed legally by the implied warranty.

[para47] The Defendant never relied on the written warranty.

[para48] It would be unfair to the Defendant to leave an impression he had sought to build anything other than a good quality home. He wanted to create a good reputation and he did his best to that end but he must bear the responsibility for the condition of the leaking wall.

[para49] The Plaintiffs are entitled to their expenses in bringing the leaks to an end but excluding the work done by Water Seal (\$1,765.50) and Fichtner (\$925.55) because the Defendant should not be held responsible for their failure when he did not engage their services.

[para50] The Plaintiffs are entitled to compensation from the Defendant for:

Flashing \$50.12 Compactor rental 40.00 Stucco repair 267.50 Front steps 749.00 Rocky Mountain Landscaping 1,155.00 Drain cleaning 203.30 Magna Pacific 4,810.00

(plus G.S.T.)

Straight Line Maintenance 887.35

Lang Engineering 224.70

Delco Exteriors 235.40

[para51] Both landscaping costs are included. They are intermingled with successful and unsuccessful remedial work on the wall.

[para52] Interest at the Registrar's rates from date of payment. Perhaps counsel can agree on a common date.

FOUNDATION CRACKS

[para53] Turning to the issues arising from the cracked wall:

[para54] The home had the appearance of completion when the Plaintiffs came upon it and decided to buy. However, it had the latent problem of leaking and also the cracks in foundation wall which were not apparent.

[para55] The Defendant had an experienced supervisor overseeing the job but he himself spent a good deal of time on the site. He was well aware of the cracks.

[para56] My impression was that the Defendant hoped to gain sufficient experience to act as supervisor himself in the future. For the time being his lender required a site manager because the Defendant's previous work had been limited to renovation.

[para57] During construction two cracks which are the subject of this branch of the claim appeared. One was in what is described as the southeast corner of the garage. The other was in the southwest corner.

[para58] Both were beneath the slab floor. The southwest crack was at a point bearing no load. It was hidden from view by backfill.

[para59] The southeast crack was at a load bearing point. It would have been immediately apparent to anyone entering the basement except that it was covered by styrofoam insulation. It was so severe that the wall required reinforcing by building a second wall behind and beyond the section that was cracked.

[para60] When the reinforcing wall was completed, it was approved as safe and secure by an engineer and a building inspector.

[para61] Unfortunately that crack and its repairs were misdescribed in the disclosure statement as being to the southwest corner not southeast where they in fact were. The statement read: "During construction the S.W. corner of the garage wall was damaged by the front end loader while backfilling. Reinforcing walls were installed and inspected." Furthermore, the Defendant personally indicated on the site to the Plaintiffs (or one of them) the southwest corner as being the location of the crack referred to in the disclosure statement which had necessitated reinforcement.

[para62] Although the foundation was safe and secure after the reinforcing work was done, the southeast crack itself was not filled and remained apparent from inside the basement but for the styrofoam which concealed it. Photos exhibited show a startling break in the wall.

[para63] The consequence of the misstatement of location of the major crack was that the Plaintiffs were not particularly concerned about it. I was satisfied the Plaintiffs relied on what they had been told and shown and the Defendant knew it.

[para64] The reasons for that were:

[para65] They believed it was at a non-load bearing point which had been shown them from outside the residence by the Defendant. They had the reassurance of the disclosure statement (wrongly referring to the southwest corner); the southwest corner shown them was not exposed; it was backfilled so it could not be inspected readily; their realtor, having read the disclosure statement, had added a one-year just-in-case warranty to the agreement of purchase and sale obliging the Defendant to be responsible for "major structural defects", "defects" specified to mean "defects which adversely affect the load-bearing portion of the improvements" but that did not reveal or touch the aesthetic factor of the hidden crack.

[para66] The Plaintiffs were unaware until after this litigation commenced of the crack in the southeast corner. They saw it after the styrofoam covering it had been stripped away. To them it was not just a crack. It was a "fissure".

[para67] It had been open to them to make further enquiry having seen the disclosure statement but they did not. That was not unreasonable in the circumstances. They had no inkling of the crack behind the styrofoam and no reason to tear the styrofoam off the wall, the entire wall being insulated. Being alerted by disclosure of one crack, it was reasonable to infer there were no others.

[para68] The Plaintiffs testified - and I accepted - they would not have purchased the house if they had seen the crack in the southeast corner - even given reassurance of the approved reinforcement. They were in a buyers' market. The home was in a small, controlled, high standard subdivision under development by various builders. They had a choice.

[para69] The Defendant was frank in his response to questions concerning the hidden crack. It was securely covered by styrofoam insulation. Asked whether he "didn't want people to see it", he replied: "that is probably true". He added that the local building bylaw required insulation and that the crack would be covered in any event.

[para70] His position was there was no onus on him to show prospective purchasers the crack in the basement wall. Disclosure was all that was required. Enquiry was up to them. The wall was structurally sound with the reinforcing work approved.

[para71] He was anxious to sell. There had been no offers. His financing was tight.

[para72] His answers were so straightforward they led me to conclude the misdescription of location in the disclosure statement was not deliberate. It, however, was a negligent misrepresentation. It led the Plaintiffs to make a purchase they would not have made had they known the true location of the major crack which would have been easily observable upon removal of the covering insulation.

[para73] They were entitled to see and judge for themselves. The Defendant's argument about onus once there was disclosure fails because the disclosure was a misdirection.

[para74] The case of *Kingu v. Walmar Ventures Ltd.* (1986), 10 B.C.L.R. (2d) 15, sets out at p. 23 the requirements for proof of tort liability in negligent misrepresentation.

[para75] They are:

i a false statement negligently made;

ii a duty of care on the person making the statement to the recipient. A duty of care does not arise unless:

(a) the person making the statement is possessed of special skill or knowledge on the matter in question;

(b) the circumstances establish that a reasonable person making that statement would know that the recipient is relying upon his skill or judgment;

iii reasonable reliance on the statement by its recipient; and

iv loss suffered as a consequence of the reliance.

[para76] The Plaintiff is not confined to his/her contractual remedies. A remedy is available for pre-contractual representations.

[para77] Because neither crack reduced the soundness of the structure at the time of purchase, it cannot be said the Plaintiffs bought a home with foundations that were not sound "and fit for their purpose generally".

[para78] The Plaintiffs cannot recover damages on that basis.

[para79] The question then is: can they recover damages for their loss on resale on the ground of negligent misrepresentation? (It was not argued that they could have remained in the home, repairs complete, and suffered no resale loss. In any event, it was not unreasonable for them to wish to be free of the ghosts of disarray that haunted them).

[para80] The foundation wall leaks are not a factor in this branch of the claim because there was no misrepresentation with respect to them (or representation either so far as that goes).

[para81] The issue on the loss as claimed is whether it has been proven the subsequent purchaser paid \$30,000 less than the price listed and well below the appraisal value because of the history of the cracks the Plaintiffs disclosed to that purchaser or were there other factors such as (for instance) a falling market that accounted for the difference?

[para82] It is not unreasonable to conclude a factor in the modest sale price received by the Plaintiffs was the history of the home. However, no evidence was called from the buyer or would-be buyers to verify that this was so. (Either party could have called that person).

[para83] Nevertheless I concluded the matter of proof could be decided on the circumstances without direct evidence. There is no other reasonable inference than that the large gap between market value and sale price was contributed to by the history of the home. No evidence showed the contrary.

[para84] Because the leaks are not within the reach of the negligent misrepresentation, their affect upon the price offered by the subsequent purchaser cannot be taken into account when calculating damages.

[para85] A buyer is unlikely to have separated the defects between leaks and cracks and so, notionally, 50/50 is a fair attribution of the loss between the two faults.

[para86] The Plaintiffs will receive \$5,000 for their claim of lost value.

[para87] The Plaintiffs claimed at trial (on grounds there is no need to dwell upon here) \$1,500 in lost rent. That claim is dismissed. It was neither set out in the statement of claim nor particularized on request made at discovery.

[para88] Interest at the Registrar's rates from the date of resale.

[para89] Costs at Scale Three.

BOYLE J.

CBR# 245

The Owners, Strata Plan No. LMS44, plaintiff (respondent), and RBY Holdings Ltd., Pacific Crematorium Limited, and Personal Alternatives Cremation and Memorial Services Ltd., defendants (appellants)

Vancouver Registry No. CA017934

British Columbia Court of Appeal Vancouver, British Columbia Macfarlane, Taylor and Finch J.J.A. Heard: May 27, 1994. Judgment: filed June 30, 1994.

Counsel: Brian J. Wallace, Q.C. and Kelly R. Doyle, for the appellants. J. Rogers, for the respondent.

[para1] THE COURT:-- This appeal concerns the interpretation of a restrictive covenant affecting the use of premises owned by the appellants in a commercial/industrial condominium development in an industrial park.

[para2] The appellants use the premises for the operation of a mortuary, and propose to carry on a crematorium business there as well.

[para3] Madam Justice Newbury held that the operation of a crematorium or the carrying on of a mortuary business upon the premises contravened the Statutory Building Scheme which is registered in the Land Title Office and which charges the premises in question.

[para4] The provision in the Statutory Building Scheme which is the subject of interpretation in these proceedings reads as follows:

... no Lot will be used for any purpose whatsoever other than manufacturing, processing, storage, wholesale, office laboratory, profession, or research and development purposes permitted by the Municipality ...

[para5] The appellants submit that Madam Justice Newbury gave too strict an interpretation to the words of the restrictive covenant. The appellants contend that the storing of human remains on the premises for embalming and/or subsequent transportation out is "storage" within the meaning of the restrictive covenant, and that cremation is a "process".

[para6] Madam Justice Newbury held that the words must be given their true meaning (i.e. the meaning that would be ascribed by an ordinary intelligent person in construing the words in a proper way in light of the relevant circumstances).

[para7] In *Hutton v. Watlin*, [1948] 1 Ch. 398 (C.A.), a decision on which Mr. Wallace particularly relies, Lord Greene, M.R., said that a restrictive covenant should be construed from the point of view of the "purchaser", that is to say the person whose use it restricts. Mr. Wallace says we should construe the words with which we are here concerned in the context of the appellants' business and the terms of the Cemetery and Funeral Services Act, S.B.C. 1989 Ch. 21, which would, of course be in the minds of its principals, and the particular meaning which the words "process" and "storage" have to them. While Lord Greene's words might, in isolation, seem to support that approach, they must, of course, be considered with proper regard to the whole context. What Lord Greene says (at p. 403) is this:

The true construction of a document means no more than that the court puts upon it the true meaning, being the meaning which the other party, to whom the document was handed or who is relying upon it, would put upon it as an ordinary intelligent person construing the words in a proper way in the light of the relevant circumstances. This document, on the face of it, was intended to be handed to the purchaser, and it is produced by the purchaser. Indeed, the whole tenor of the document indicates that it is to be the purchaser's document. What then would the purchaser when she received the document have thought it meant as an ordinary reasonable person, intelligently understanding the English language and construing it in the light of the relevant circumstances.

Taking that passage as a whole it seems to me that the Master of the Rolls was speaking of examining the covenant from the purchaser's viewpoint only in the sense that it is not to be construed in the context of the particular point of view of the person who drew it. That statement does not, however, mean that the covenant is to be construed in the light of the special knowledge, or point of view, of any particular purchaser. That would require that the clause be given a different meaning according to the situation of each particular purchaser reading it. In saying that the court is to give the document such meaning as the purchaser would give it "as an ordinary reasonable person, intelligently understanding the English language and construing it in the light of the relevant circumstances", Lord Greene makes it plain that the words are, in fact, to be construed objectively and from the perspective of purchasers as a class, rather than from the point of view of particular purchasers. The manner in which a funeral director might understand the words "process" and "storage" cannot be determinative in construing the words with which we are here concerned unless they would be so understood generally by "the ordinary reasonable person intelligently understanding the English language", construing the clause "in the light of the relevant circumstances".

[para8] Construed objectively, the words seem to contemplate two sorts of activity, the first encompassing the words "manufacturing, processing, storage, wholesale" and having to do with the handling of goods, material or merchandise, and the second encompassing the words "office, laboratory, profession, or research and development purposes", which have to do with the rendering of services. It seems inconceivable that anything done by one human being to another could come within the first class of activities, and we do not understand how the fact that a human body, rather than a living person, is involved would make a difference. It is plain that the second part of the passage with which we are dealing, that concerned with services, could not encompass services of the sort offered by these appellants, nor, indeed, was that suggested in argument before us.

[para9] Madam Justice Newbury said she could not agree that "processing" in this context can be distorted and expanded so as to include the consumption by fire of the human body. She said:

... The body is not being 'processed', it is being consumed or destroyed by fire. Further, no commercial goods or materials result. The residue of ashes is obviously not a commercial product which I infer is contemplated by paragraph 7. (For the same reason, I would not regard an incinerator used to burn garbage as 'processing' garbage.) As the Court held in *Tenneco Canada Inc. v. The Queen* [1988] 2 F.C. 3 at 9, citing *Federal Farms Ltd. v. M.N.R.* [1966] Ex. C.R. 410] the normal meaning of 'processing' requires that goods be made more marketable. Here we do not have 'goods'; we do not have 'marketable goods', and, in my view, we do not have 'processing' -- we have consumption or destruction of the human body. ...

As far as 'storage' is concerned, the same reasoning applies. First, since I read paragraph 7 to be referring to the storage, manufacture or processing of commercial goods or products of some kind, the word is not applicable. Second, I infer that the word in this context is intended to refer to longer-term storage rather than the temporary moving of a human body into the premises for embalming and shipment out. The purpose of bringing the bodies onto the premises is not to 'store' them but to prepare them for burial or cremation.

In our view that is a correct interpretation of the words "processing" and "storage" in light of all the circumstances.

[para10] We also agree with Madam Justice Newbury when she said:

I should also note the argument made by Mr. Fraser during the August hearing that the words "purposes permitted by the municipality" in paragraph 7(b) of the scheme indicate that the draftsman intended the uses permitted under the building scheme to be coextensive with those contained in the municipal zoning by-law from time to time. Since the by-law in force at the time expressly permitted the operation of "crematoriums and mortuaries" under the "light industrial" classification, he argues that it can be inferred that the draftsman had no intention of prohibiting such uses.

The obvious response to this argument, of course, is that if that had been the intention of the draftsman, the first four lines of paragraph 7(b) of the scheme would have been completely superfluous.

[para11] We do not agree, however, that the words "permitted by the Municipality are intended to modify only the phrase "and development purposes". However, that difference does not in any way affect the conclusion to which we have just referred.

[para12] We are in substantial agreement with the balance of the reasons of Madam Justice Newbury and would dismiss the appeal.

[para13] The pronouncement of judgment on this appeal was postponed until June 30, 1994 to give the appellants time within which to comply with the terms of the injunction, or to apply to the trial court to relax its terms so that the appellants could fulfill their contractual obligations before ceasing its business on the premises. MACFARLANE J.A. TAYLOR J.A. FINCH J.A.

* * * * *

Corrigendum

June 30, 1994

TAYLOR J.A.:-- In written reasons of the Court dated June 30, 1994, the word "can" on page 4 at the beginning of the fifth last line of paragraph 7 should be "cannot".

TAYLOR J.A.

CBR# 107

Esther Ruth Dirksen, claimant, and Jess Chi Shum Au, Alice Tai Png Au and Francis Cheung, defendants

Vancouver Registry No. C94-07297

British Columbia Provincial Court (Civil Division) Vancouver, British Columbia Martinson Prov. Ct. J. Heard: November 28, 1996. Judgment: filed December 18, 1996.

Counsel: Esther Dirksen, appeared in person. R. Press, for Mr. Au and Mrs. Au. Shannon M. Larter, for Francis Cheung.

[para1] MARTINSON PROV. CT. J.:-- This is a claim by Esther Dirksen for deceit or alternatively fraudulent, negligent or innocent misrepresentation, against Jess Chi Shum Au, Alice Tai Png Au and Francis Cheung, the listing real estate agent. Ms. Dirksen purchased a condominium in April, 1994 from Mr. and Mrs. Au. They did not disclose any water damage problems to her. Neither did Mr. Cheung. Mr. and Mrs. Au completed a Disclosure Statement on February 8, 1994 with the assistance of Mr. Cheung. The following two questions in the Disclosure Statement were answered "no":

K. Are you aware of any damage due to wind, fire, water?

M. Are you aware of any roof leakage or unrepaired damage?

[para2] Shortly after the purchase Ms. Dirksen had recurring water problems. Investigation revealed that the property had been originally listed in the Spring of 1993 and since then had twice been taken off the market due to water damage. The last time was in November, 1993. Mr. and Mrs. Au were also having considerable difficulty selling the property. The evidence showed that when water problems were discovered Mr. Au contracted the Strata Corporation to arrange to have the problems fixed. Steps were taken by the Strata Corporation to do repairs.

[para3] In February, 1994 Mr. and Mrs. Au replaced the carpet. Mr. Au said that this was done to make the unit sell better as the carpet was old and it would also make the unit look bigger. He said that potential buyers complained about the small size of the kitchen. The carpet installer was called as a witness to say that he didn't see any rotting. Ms. Dirksen said that she discovered plastic stuffed between the wall and floor.

[para4] Ms. Dirksen sold the property at a profit in the spring of 1995. She outlined a number of renovations she completed which added to the value of the property. When she listed the property on February 15, 1995 she also answered "no" to the same two questions on the Disclosure Statement. However, she starred each and said: "Floor and deck leaks were repaired in the fall of 94. No further leaks have since occurred. Invoices are available".

DISCUSSION

[para5] I will first consider whether there has been a negligent misrepresentation. In *Brar et al. v. Mutti*, [1994] B.C.J. No. 2426, B.C.S.C., October 24, 1994, New Westminster Registry No. C914347, Davies J. considered the requirements of an action for negligent misrepresentation set out by the Supreme Court of Canada in *Queen v. Cognos Inc.* (1993), 99 D.L.R. (4th) 626 (S.C.C.) They are: (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation must be untrue, inaccurate or misleading; (3) the representor must have acted negligently in making the misrepresentation; (4) the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted. All five criteria must be established. (1) Duty of Care

[para6] Proximity was an issues. There was a sufficient relationship of proximity to create a duty of care between Ms. Dirksen and Mr. and Mrs. Au. It was argued that there was not a sufficient relationship of proximity to create a duty of care between Ms. Dirksen and Mr. Cheung. Mr. Cheung had not met the Claimant and had no communication with her. He was not asked about water problems by her or her agent.

[para7] In *Bango v. Holt et al* B.C.S.C. [1971] 5 W.W.R. 522 it was decided that a quasi-fiduciary relationship between a potential purchaser and real estate agent can arise under the doctrine of *Hedley Byrne & Co. v. Heller*. In this case Mr. Cheung was the listing agent who showed the property and had considerable knowledge about the water problems, to the extent that he had to remove the property from the market twice. He assisted in the completion of the Disclosure Statement. He dealt with Ms. Dirksen's agent. In these circumstances there is sufficient proximity to create a duty of care.

(2) A misrepresentation that is untrue, inaccurate or misleading

[para8] Were there representations? In *Brar et al v. Mutti* B.C.S.C., October 21, 1994, New Westminster Registry No. C914347, Davies J. found that silence can be a negligent misrepresentation. Neither the owners nor Mr. Cheung mentioned the water damage to either Ms. Dirksen or her agent. The defendants collaborated in the writing of the Disclosure Statement. Both those actions amounted to representations that there were no water problems. The fact that the Disclosure Statement was not incorporated into the contract does not make the content any less a representation.

[para9] Were the representations untrue, inaccurate or misleading? In my view they were untrue, inaccurate and misleading. I am satisfied that the leakage and water damage problems experienced by Mr. and Mrs. Au were major. Ms. Dirksen has the onus of proving there is a nexus between the water problems that she had and those experienced by Mr. and Mrs. Au. Ms. Dirksen gave extensive evidence about the nature and location of the leaks she had and the times when they occurred. That evidence, combined with the evidence as to the nature of and timing of the water problems Mr. Au and Mrs. Au had, makes it more likely than not that they are related.

[para10] The defendants did not call evidence to rebut that evidence. In the absence of expert evidence to the contrary I am satisfied that the leaks were related. I was referred to the case of *Haag et al v. Marshall* B.C.C.A. 61 D.L.R. (4th) 371. In that case no satisfactory evidence of causation was presented when it could have been. In this case I have found that there was satisfactory evidence of causation.

(3) The representor must have acted negligently in making the misrepresentation

[para11] The defects causing the water problems were latent defects. In *Gronua v. Schlamp Investments Ltd.; Canada Trust Co., Third Party* 52 D.L.R. (3d) 631 Manitoba Queen's Bench, Solomon J. said at p. 636 that "latent defects are those not readily apparent to the purchaser during ordinary inspection of the property he proposes to buy". The defects in this case were ones that would not be obvious to Ms. Dirksen and her bother-in-law at the time they viewed the property.

[para12] Viewing the actions of the defendants most favourably, it was unduly optimistic in the circumstances to represent that there were no water problems. There was no suggestion that any of the defendants have an expertise in the detection and repair of water damage. No expert evidence was called on behalf of any of the defendants to support the view that the tests that were conducted and the repairs that were done did in fact solve the problem.

[para13] Because of the history of the water problems and their lack of expertise it was not reasonable to answer "no" on the Disclosure Statement. The Defendants were much more concerned about selling a property that had been on the market for nearly a year than they were in accurately representing the state of affairs with respect to water problems. Ms. Dirksen was misled by this absence of disclosure. Failure to make disclosure was negligent.

[para14] This case is different on its facts from those being considered by Mr. Justice Boyle in *Arsenault v. Pederson* B.C.S.C. Boyle J., [1996] B.C.J. No. 1026. The repairs in that case were distant in time and did not occur during the course of unsuccessful efforts to sell the property.

(4) The representee must have relied, in a reasonable manner, on the negligent misrepresentation

[para15] I am satisfied that Ms. Dirksen saw the Disclosure Statement before she removed the inspection condition. If the Disclosure Statement had disclosed the problem she would not have removed the condition. Even in the absence of a Disclosure Statement, I am satisfied that she would not have purchased the unit if she had been told about water problems.

(5) The reliance must have been detrimental to the representee in the sense that damage resulted.

[para16] I am satisfied based on the evidence presented that Ms. Dirksen suffered damage as a result of the negligent misrepresentation. The value of the property would have been from 7% to 10% less with the water damage. She paid \$182,000.00. I assess the actual value at \$167,000.00. [para17] The misrepresentation must be material. In *C.R.F. Holdings Ltd., Comor Supplies Ltd. and Faessler v. Fundy Chemical International Limited and Smerchanski* 33 B.C.L.R. 291, B.C.C.A., Craig J.A. discussed the importance of a representation being material, not merely an incidental factor. He quoted *Hinchey v. Gonda* [1955] O.W.N. 125 (H.C.) where it was said at p. 127:

A misrepresentation, to be material, must be one necessarily influencing and inducing the transaction and affecting and going to its very essence and substance. Misrepresentations which are of such a nature as, if true, to add substantially to the value of the property, or are calculated to increase substantially its apparent value, are material.

In my view the misrepresentations in this case meet that test.

CONCLUSION

[para18] There will therefore be a Payment Order against all three defendants, jointly and severally for \$10,000.00, interest pursuant to the Court Order Interest Act from April 9, 1994 and filing and service costs of \$150.00.

MARTINSON PROV. CT. J.

CBR# 217

The Corporation of the District of North Vancouver, plaintiff, and Colleen Ann Lunde, Margot Marie Sills, Maria Elena Fish, John Franklin Noonan, Helen Elizabeth Forward, Susan Katharine Pretty, James Edward Duchscherer, Axle Joseph Christiansen, Sharon-lee Boyko, Kwong Chi Wong, Roderick Neal Cox, Gary Alfred Westerberg, Randy Price, Mike Legault, Albert Gardner, John Hawkins, Les Suchy, Paulo Paiva, John McEwen, Yasunobu Sugawara, Elizabeth Fawcett, Jillian Mathewson, Susan Karen Leach, Linda Marie Walsoff, Gregory Van Der Made, Francesco Spina, Homa Valimohammadi Sharifi, Kari Tveit-pettersen, Margaret Gumbolt and Erich Karl Kunz, defendants, and Marksearch Properties Ltd., Co-operator General Insurance Company, Rod Wilburn and Janet Frost, third parties

Vancouver Registry No. A941209

British Columbia Supreme Court Vancouver, British Columbia Allan J. Heard: December 10th, 1996. Judgment: filed January 8, 1997.

Counsel: J.C. Grauer, for the plaintiff. P.A. Spencer, for the defendants, Sills, Leach and Gardner. A. Wade, for the defendant, Fawcett. R. De Filippi, for the Third Parties.

[para1] ALLAN J.:-- The plaintiff Corporation of the District of North Vancouver ("the District") seeks to enforce a portion of a covenant granted under s. 215 of the Land Title Act, R.S.B.C. 1979, c. 219 ("the Covenant"), and registered against strata lots owned by the defendants in a residential building known as Carlton At The Club ("the Building"). Paragraph 4(e) of that Covenant contains an age restriction which requires each suite to be occupied as a residential unit for a single household comprised only of persons over 19 years and including at least one "Older Citizen". An Older Citizen is described as a person who is at least 50 years of age. The age restriction does not apply to ownership of the units. [para2] Pursuant to Rule 18A, the District seeks a declaration as to the legal enforceability of the age restrictions in the Covenant. The following issues fall to be determined on this application:

(1) whether the age restriction in the Covenant is discriminatory and contravenes s. 5 of the Human Rights Act S.B.C. 1984, c. 22; (2) whether the age restriction is intra vires or ultra vires the powers of the District; (3) whether the Covenant is obsolete and should be cancelled pursuant to the provisions of s. 31 of the Property Law Act R.S.B.C. 1979, c. 340.

[para3] It was agreed that this application would deal only with those questions. Other issues raised by the defendants in the action, including estoppel, acquiescence, and reliance on the plaintiff's actions or inaction, were not argued on this application.

Background: [para4] In April 1988, the third party, Co-operators General Insurance Company, and the North Shore Winter Club approached the District with a proposal to develop land occupied by the Club. The proposal included the construction of a residential building for rental occupation by "active senior citizens" who would become members of the Club and the provision of "congregate care". Congregate care involves services for senior citizens who do not require physical care but share communal and activity needs. The plan envisaged the tenants joining the Club which would provide them with certain services, including food services.

[para5] The land was not zoned for the proposed Building. On August 17, 1989, following public hearings and a review process, the District approved the necessary rezoning and entered into an Agreement and s. 215 Covenant with the Club and the Developer. In 1990, the third party Marksearch Properties Ltd. became a partner in the development. On February 15, 1990, the Developers wrote to the District "to reaffirm our unswerving commitment to stand by the restrictions set out in the Section 215 Covenant for this proposal." [para6] Subsequently, the Developers sought the stratification of the building to individual strata lots instead of rental units. The District approved that conversion in January 1992. At the same time, the Developers also sought the elimination of the age restriction in the Covenant. The District considered that request but rejected it for a number of reasons: the Developers were fully aware of the age restrictions when they entered into the project; the original premise was to provide relatively affordable housing for older people; and a reduced parking ratio had been approved on the basis that senior units would generate less demand for parking.

[para7] Of the 182 residential units in the Building, approximately 133 are one-bedroom units. At the present time, approximately 150 units are occupied in accordance with the age restrictions imposed by the Covenant and approximately 30 are not. Some owners seek to have the age requirement enforced and others do not.

[para8] The defendants Ms. Sills, Ms. Leach, and Mr. Gardner purchased their units in 1992. Ms. Sills and Ms. Leach, who are under the age of 50, occupy their suites. Mr. Gardner and his wife, who are both over the age of 50, purchased their suite as an investment with the intention of renting it but encountered difficulties finding a tenant who satisfied the age requirements imposed by the Covenant. Mr. Gardner was informed by the advertising department of a local newspaper that his proposed advertisement was unacceptable if it restricted the age of potential tenants. The defendant Ms. Fawcett purchased her unit in 1993. She is under 50 and resides in her suite.

Whether the Covenant is discriminatory and contravenes the Human Rights Act:

[para9] The Covenant prohibits occupation of the residential units by persons under the age of 19 or persons over 19 but less than 50 unless they live there with at least one other person aged 50 or over.

[para10] The Human Rights Act, as amended, defines "age" as "an age of 19 years or more and less than 65 years". Age is not an enumerated ground of discrimination with respect to the purchase of property under s. 4. Section 5 deals with the issue of discrimination in rental premises. At the time the Covenant was registered, age was not a prohibited basis of discrimination under that Act. The relevant portions of s. 5 now provide:

S. 5 (1) No person shall

(a) deny to a person or class of persons the right to occupy, as a tenant, space that is represented as being available for occupancy by a tenant, or

(b) discriminate against a person or class of persons with respect to a term or condition of the tenancy of the space,

because of the . . . age of that person or class of persons

(2) Subsection (1) does not apply (b) as it relates to . . . age, (i) if the space is a rental unit in residential premises in which every rental unit is reserved for rental to a person 55 years of age or older or to 2 or more persons, at least one of whom is 55 years of age or older, or

(ii) a rental unit in a prescribed class of residential premises, and

(c) as it relates to a physical or mental disability, if

(i) the space is a rental unit in residential premises,

(ii) the rental unit and the residential premises of which the rental unit forms part,

(A) are designed to accommodate persons with disabilities, and

(B) conform to the prescribed standards, and

(iii) the rental unit is offered for rent exclusively to a person with a disability or to 2 or more persons at least one of whom has a physical or mental disability, as the case may be. (emphasis added)

[para11] Section 5(2)(b)(i) is not applicable. Mr. Grauer, counsel for the District, submits that the units in the Building fall within "a prescribed class of residential premises" within s. 5(2)(b)(ii) because they are "prescribed" in the Covenant. Counsel for the defendants say that such a class cannot be prescribed by Covenant but must be "prescribed" by the Lieutenant Governor in Council. Section 24 of the Act provides:

The Lieutenant Governor in Council may make regulations including but not limited to regulations prescribing the standards for the purpose of section 5.

(emphasis added)

[para12] I am unable to accept the plaintiff's interpretation that s. 24 applies only to s. 5(2)(c)(ii)(B) which refers specifically to "prescribed standards" and not to s. 5(2)(b)(ii). Mr. de Filippi, counsel for the third parties, who took no position on this application, directed the Court's attention to s. 29 of the Interpretation Act which provides that in an enactment, "'prescribed' means prescribed by regulation." The Lieutenant Governor in Council has not made regulations prescribing standards relating to the Building. Accordingly, I conclude that the strata lots are not "in a prescribed class of residential purposes" and that neither of the exemptions provided by s. 5(2) are applicable.

[para13] Mr. Spencer, counsel for the defendants Sills and Leach, submits that the restrictive Covenant violates s. 5(1) of the Act insofar as it requires an owner offering his or her unit for rent to discriminate against potential renters on the basis of age.

[para14] The plaintiff suggests that owners who wish to rent their suites can comply with both the Covenant and s. 5 of the Human Rights Act by renting to persons who comprise a single household comprised of members who are 19 or over and at least one of whom is 55 or over. Presumably, the strata corporation could pass by-laws pursuant to the Condominium Act to designate the Building as "residential premises in which every rental unit is reserved for rental to a person 55 years of age or older or 2 or more persons, at least one of whom is 55 years of age or older" in order to comply with the Human Rights Act: *Marshall & Marshall v. the Owners, Strata Plan No. NW 2584*, [1996] B.C.J. No. 1716 (August 1, 1996), Vancouver A961321 (B.C.S.C.). Such a designation would, of course, further restrict the age limitation in the Covenant which permits younger occupants to reside in the premises.

[para15] The Covenant did not breach the Act when it was registered. However, there is no question that the conduct of the owners of the units, if they choose to rent their premises, is subject to the subsequent amendments which prohibit discrimination on the basis of age. I conclude that the Act does not require that the age restriction in the Covenant be struck (or read down in particular instances to permit the owners to rent their units to persons under the age of 50). Instead, the owners are burdened with the obligation of complying with both the Covenant and the Act. Is the portion of the Covenant which purports to impose an age restriction on occupancy of the units ultra vires the powers of the District?

[para16] The relevant portions of s. 215 of the Land Title Act provides as follows: s. 215(1) A covenant described in subsection (1.1) in favour of . . . a municipality . . . as covenantee, may be registered against the title to the land subject to the covenant and is enforceable against the covenantor and the successors in title of the covenantor

(1.1) A covenant registrable under subsection (1) may be of a negative or positive nature and may include one or more of the following provisions:

(a) provisions in respect of

(i) the use of land, or (ii) the use of a building on or to be erected on land.

[para17] The defendants submit that the age restrictions in the Covenant are ultra vires the power of the District because they go beyond the restrictions imposed by the Rezoning By-law and exceed the authority of s. 215 of the Land Title Act.

[para18] The amended Rezoning By-law adds a "Comprehensive Development Zone 7", the purpose of which is "to accommodate a mixed residential/commercial recreation project." Its specified uses include a high-rise residential building and a recreation club. The By-law does not restrict the Building to a congregate care facility or seniors' facility, nor does it impose an age restriction on the occupants.

[para19] Should the terms of the Covenant be restricted to the narrow compass of the relevant bylaws which govern the use of land? The wording of s. 215 of the Land Title Act envisages a restrictive covenant governing the use of land or "a building". The issue then becomes whether "the use of a building" can include the age of its occupants or is restricted to such things as

commercial, industrial, or residential use of the property. The defendants submit that the District has the power to regulate the "use" of the land or the building but not to regulate the identity of the users.

[para20] In *Faminow v. Corporation of District of North Vancouver* (1988), 24 B.C.L.R. (2d) 49, the Court of Appeal allowed the District's appeal from a decision quashing a zoning by-law governing the use of single-family residential buildings. Relying on the authority of *Bell v. The Queen*, [1979] 2 S.C.R. 212, the chambers judge in *Faminow* had held that the District's power to regulate "use" did not empower it to regulate who, or how many persons, could occupy a unit. In *Bell*, the Court held that a by-law which restricted occupation to "family" and then defined "family" by reference to consanguinity, marriage and adoption only, was invalid.

[para21] In *Faminow*, the Court of Appeal held that the by-law in question was not unreasonable or inequitable in its consequences and ought not to have been quashed. According the District had not exceeded its powers in enacting it. The Court preferred the reasoning in *Smith v. Tiny* (1980), 27 O.R. (2d) 690 [affirmed 29 O.R. (2d) 661, leave to appeal to the S.C.C. refused 29 O.R. (2d) 661n.] In *Smith*, the Court concluded that the decision in *Bell* "must be interpreted in light of the particular by-law prohibition in issue in the case and the court's conclusion as to the unreasonable and inequitable consequences which flow from it."

[para22] In this case, the issue is whether the District had the power to impose the age restrictions in the Covenant rather than in a zoning by-law. I was not referred to any cases dealing with the powers of a municipality to govern the uses of land or buildings by covenant. However, I see no reason why the District's powers incorporated in a covenant pursuant to s. 215 of the Land Title Act should be more restricted than its authority to enact by-laws under s. 963(1)(c) of the Municipal Act which regulate, within a zone, the use of land, buildings and structures.

[para23] While many of the present owners are unhappy with the age restriction, it appears that the majority purchased their units on the basis of that restriction. Similarly, while some of the defendants may argue (in another forum) that they were given to understand the age restrictions would be removed or not enforced, there was no evidence before me that any of them were unaware of the Covenant. I do not consider the age restriction which is designed to create a community of older people to be unreasonable or inequitable. I conclude that the terms of the Covenant do not exceed the powers of the District.

Is the Covenant obsolete?

[para24] Section 31 of the Property Law Act provides:

(1) A person interested in land may apply to the Supreme Court for an order to modify or cancel a charge or interest against the land, registered . . . and being . . . a restrictive or other covenant

(2) The Court may make an order sought under subsection (1) on being satisfied that the application is not premature in the circumstances, and that

(a) by reason of changes in the character of the land, the neighbourhood or other circumstances the court considers material, the registered charge or interest is obsolete;

(b) the reasonable use of the land will be impeded, without practical benefit to others, if the registered charge or interest is not modified or cancelled; . . . (d) modification or cancellation will not injure the person entitled to the benefit of the registered charge or interest; or

(e) the registered instrument is invalid, unenforceable or has expired, and its registration should be cancelled.

[para25] Mr. Wade submits that the Covenant is obsolete because of numerous changes in the character of the land. For example, the concepts of affordable rental housing for seniors and congregate care were abandoned and anyone can now purchase the units; the Building was stratified in contrast to the original proposal of rental housing; and the concept of linking a congregate care facility with the Club's dining facilities was abandoned.

[para26] A judicial finding that those changes have rendered the Covenant obsolete would, in my respectful view, make a mockery of the municipal approval process. The Developers proposed the concept of seniors' housing and the District granted the necessary rezoning and building permits on the basis of the anticipated social benefits flowing from that concept. The Developers received certain concessions, such as reduced parking capacity, on the basis that seniors would require less parking spaces. In my respectful opinion, public policy mitigates against a conclusion that developers may receive benefits and concessions on the basis that they will construct a specific project with agreed-upon restrictions, and then have the restrictions removed because they had constructed a different project.

[para27] I would not cancel or modify the Covenant pursuant to s. 31 of the Property Law Act.

[para28] In summary, I have reached the following conclusions:

(1) the age restriction in the Covenant is not discriminatory and does not contravene the Human Rights Act; (2) the age restriction is *intra vires* the powers of the District; and (3) the Covenant is not obsolete and should not be struck pursuant to s. 31 of the Property Law Act. ALLAN J.

CBR# 240

Pinewood Recording Studios Ltd. v. City Tower Development Corp.

Between Pinewood Recording Studios Ltd., plaintiff, and City Tower Development Corp., Ledcor Industries Ltd., Bel Construction Ltd. and Pacific Blasting Demolition and Shoring Ltd. and LMT Construction Ltd., defendants, and Ledcor Industries Ltd. and LMT Construction Ltd., third parties And between Grimham Enterprises Ltd., plaintiff, and Pinewood Recording Studios Ltd., defendant, and City Tower Development Corp., Ledcor Industries Ltd., Bel Construction Ltd., Pacific Blasting Demolition and Shoring Ltd. and LMT Construction Ltd., third parties

Vancouver Registry Nos. C925558/A933928

British Columbia Supreme Court Vancouver, British Columbia Taylor J. Heard: November 27-December 1, December 4-8, 11-15, 18-22, 1995; January 15-19, 22-24 and March 4, 1996. Judgment: filed November 22, 1996.

Counsel: H.W. Wiebach and P.E. Norell, for the plaintiff, Pinewood Recording Studios Ltd. C.A. Wallace, for the defendants. C.G. Haddock, for the third parties. L.M. Candido, for the plaintiff, Grimham Enterprises Ltd.

[Ed. note: A Corrigendum was released by the Court December 9, 1996; the correction has been made to the text and the Corrigendum is appended to this document.]

[para1] TAYLOR J.A.:-- This is an action about sound, its production, propagation and effects.

[para2] These two actions were heard together by way of a Consent Order made December 28th, 1994. The first is a claim by Pinewood Recording Studios Ltd. ("Pinewood") against City Tower Development Corp. ("City"), Ledcor Industries Ltd. ("Ledcor") and LMT Construction Ltd. ("LMT"). All of the third party proceedings as between the defendants in the first action were discontinued shortly before the trial pursuant to an agreement by which all of those defendants were represented by the same counsel. All defenants and third parties in both actions are represented by the same counsel. By agreement of counsel it is not necessary to distinguish between the remaining defendants and/or third parties in terms of any division of liability nor any third party claims over. Collectively, therefore, they will be referred to as the defendants unless specifically identified.

[para3] Pinewood seeks damages against the defendants in nuisance, negligence and trespass. Simply stated the general issue is whether the defendants took reasonable steps in the construction of a residential tower to avoid unreasonable levels of sound and debris intruding into Pinewood's recording studio located at 1119 Homer Street, in the City of Vancouver ("the Premises").

[para4] The second action is a claim by Grimham Enterprises Ltd. ("Grimham") for rent unpaid by Pinewood from August 1st, 1993 to July 31st, 1994 in the agreed amount of \$299,021.33 together with interest on arrears provided for in Pinewood's lease less any abatement that Pinewood is entitled to by reason of the premises being unusable for the purposes for which Pinewood had leased them. The defendants are third parties in this action. As in the first action, by agreement of counsel it is not necessary to distinguish between the defendants as third parties in terms of any third party claims over.

[para5] Pinewood's alter ego and directing mind is Geoffrey Turner. Mr. Turner has been involved in the development and operation of sound recording studios since 1957. In 1976 Pinewood leased the Premises and under Mr. Turner's direction Pinewood developed it into two studios. In 1989 Pinewood entered into a further lease with Grimham for 1111 Homer Street, a portion of which was being used as administrative offices and the rest of which was either vacant or sublet to other tenants. The purpose of this additional space was to provide for future expansion of the operations of Pinewood.

[para6] Although not qualified as an expert in terms of sound and its transmission, Mr. Turner, who has had much practical experience, described his requirements for a sound recording studio as being a structure that provides an acoustical environment in which sound can be produced and recorded free from outside interference. A studio must be colourless in terms of other sound and the aim of construction is not so much to sound proof, a feat that is impossible, as it is to reduce the transmission of sound from outside to inside or vice versa.

[para7] With the assistance of a contractor, Joe Vassallo, who was to become a personal friend of Mr. Turner's, Pinewood developed two studios at the Premises in 1976. These will be referred to as Studios A and B.

[para8] The development of these studios involved the construction of a free standing room within the building itself. That room was detached from the exterior walls of the structure by an air gap of 1 inch to 2 inches. The walls of the studios were comprised of a series of layers including drywall, insulation and sound board panelling, the final and interior layer of which was covered with a variety of materials to reduce sound transmission.

[para9] The flooring of the studios consisted of a layer of sand sandwiched between two layers of concrete and was covered with a neoprene-like carpet. Upon this carpet was then built a series of rising steps which were designed to trap sound within the studio.

[para10] The ceiling consisted of joists, the undersides of which were covered with a material and on top of which were laid fibreglass insulation. Above this was the roof of the building.

[para11] In this generally described manner both Studios A and B were constructed in 1976.

[para12] The exterior south wall of Studio B lay along the property line adjoining the site owned by City, upon which a tower complex was to be built by Ledcor.

[para13] The exterior south wall of the Premises was constructed of masonry brick and mortar. In some areas the mortar on the exterior surface had been scraped off and was flush with the blocks. In other areas the mortar had not been scraped off and it protruded by reason of the weight of blocks laid upon the mortar during construction. In 1976 the interior side of this wall was clean of any protruding mortar. Both Mr. Vassallo and Mr. Turner inspected the wall prior to the studio construction and neither found any cracks in the wall. All debris or loose material was cleaned off before construction.

[para14] Prior to 1986 Pinewood's focus had been the recording of popular music, orchestral music and music for commercials.

[para15] In 1986 the nature of the work being done in Studio B changed to what is described as post-production work on films. This work involved the replacement of dialogue on films recorded on location. This process, known as audio dialogue replacement ("ADR"), is to eliminate extraneous sounds that may have been picked up during the filming on location. As well, other sounds are then mixed onto the film track.

[para16] ADR is a major aspect of film production. Actors come to the studio and redo their lines in synchronization with the film that is shown on a large screen. On average, 10 to 15 lines per hour are recorded. It is a time consuming process and it is essential that there be no unwanted sounds recorded. Actors and directors do not like to be delayed in part because of schedules and in part because most are generally busy people.

[para17] Later other sound effects are added. These consist of sounds retrieved from a library of sounds and those created by foley artists. An example of the latter would be the sounds of a person walking on leaves done by a trained artist walking on a bed of leaves within a foley pit. This work was done primarily in Studio A.

[para18] Work attended by actors or producers was referred to in Pinewood as "other" work. ADR work is "other" work. Work which was unattended and done by the technicians of Pinewood was referred to as "series" work. From time to time producers and staff of clients would attend when series work was being done. The work that was done outside of the attendance of actors or producers was work which could be scheduled at the convenience of Pinewood. "Other" work, however, was often done on short notice due to the demands of production or the actors' time and could not easily be scheduled at the times of Pinewood's choosing. The dictates of time, as opposed to simply the quality of the studio, play a significant role in the choice of which recording firm will be used to do ADR work.

[para19] In order to accommodate this ADR work renovations to Studio B were necessary. In 1986 under Mr. Turner's direction, Mr. Vassallo removed the interior walls of Studio B.

[para20] The evidence of both Turner and Vassallo, which I accept, was that after the internal walls were removed the interior south wall was without cracks or water stains and there was no debris found at its base. All that could be observed was some dust.

[para21] Again in a somewhat similar manner to the 1976 construction the walls were rebuilt. An air gap was left between the masonry wall and the first interior wall so that there was no contact between the two. A series of attached walls were then constructed and surfaced with materials that deadened or trapped internally created sound.

[para22] As well, the interior of Studio B was built to accommodate a large screen and speakers. A control booth outside but visible to the studio was constructed to provide sound isolation so that any equipment noise in the studio would not be recorded in the control booth.

[para23] Mr. Turner and Mr. Vassallo testified that no nails were used in this construction. Walls were assembled and drywall and sound board were attached by using screws and glue. The purpose of this was to provide rigidity to suppress any reverberations caused by loud sound.

[para24] The thickness of the four walls around Studio B ranged from 16 inches to 24 inches.

[para25] The floor was rebuilt to provide a series of sound traps designed to absorb sound created in the studio.

[para26] The ceiling was also reconstructed, changing the direction of joists, laying down plywood and then 60 inches of fibreglass insulation which was crushed to 50 inches in depth.

[para27] Changes were also made to the electrical wiring to ensure radio transmissions were not recorded and the interior surface of the walls was painted with a conductive paint so as to obscure any cellular phone transmissions.

[para28] The result, Mr. Turner testified, was a studio in which the work of Pinewood could be done without outside interference.

[para29] Decibels ("db") are the measure of loudness of sound. Steven Coomb, an expert who testified as to noise control measures, describes it as being a logarithmic scale similar to the Richter scale used to measure earthquakes. Small changes in db measurements result in substantial differences in loudness. An example is that a 10 db change is a change of some 50% in loudness.

[para30] Decibels are measured on two scales: Scale A, which is the approximate average likeness to what humans hear, and Scale C, which is a reading without bias. C Scales are used to provide a common basis to rate equipment in the "sound business". Measurements referred in these reasons are on the C Scale.

[para31] In August of 1991 Robert Strachan, an electrical engineer, conducted an assessment of traffic noises for City pursuant to the requirements of the City of Vancouver. He determined that for an 18 minute period at 1:30 p.m. on August 16th, 1991 the average ambient traffic noise at a location near City's premises was 65.5 db.

[para32] On February 18th, 1992, prior to the start of demolition work on the City site, Mr. Strachan, at Mr. Turner's request, made measurements of sound in Studio B. He recorded noise levels of 32.8 db (plus or minus 2 db) with the air conditioning system on and 24.1 db (plus or minus 2) with the air conditioning system off. In Studio A he obtained measurements of 23.8 db and 20.1 db respectively.

[para33] In approximately June of 1994 after all construction on the City site had been completed as well as repairs to a crack in the south wall and internal repairs to the Studio, to which I shall refer subsequently, Mr. Turner conducted a similar series of Studio B measurements resulting in readings of 30 to 31 db with equipment on and 24 to 25 db with it off. On the basis of these measurements I conclude that by June of 1994 Pinewood's Studio B's sound integrity was almost identical to that which existed in February of 1992.

[para34] Mr. Turner instructed Mr. Strachan to take the sound measurements in February of 1992 so that he would have a starting reference point for what in February of 1992 he viewed as the potential interference with Pinewood's operation that might develop as a result of the construction of the tower complex on the City site.

[para35] Beyond these measures, neither Pinewood nor its landlord, Grimham, took any steps to physically protect the building other than engaging in discussions and correspondence to which I shall subsequently refer.

[para36] In 1991 Turner became aware of the potential development on the City property, as a consequence of soil testing being done on the site. Mr. Don Ho who, together with his wife, is the owner of City testified that in 1991 he began the process of public hearings to obtain a permit to construct the tower complex. Pinewood was never notified of these hearings. However, on December 12th, 1990 Pinewood's solicitor at the time, Mr. Flader, wrote to City's architect expressing the concerns of Pinewood as to the potential effects of construction of the tower complex upon Pinewood's operation. In his representations to the City of Vancouver, Mr. Ho did not provide the City with a copy of that letter nor did he make the City of Vancouver aware of the concerns of Pinewood. Rather he informed its staff that neighbourhood residents and property owners were in favour of the development.

[para37] On September 27th, 1991 Grimham's property manager, Knowlton Realty, wrote to Mr. Ho reiterating the concerns of Pinewood as to the effects of demolition upon its operation. By that time City had entered into a contract with Ledcor for the development and construction of the tower complex. That construction contract was described by Mr. Ho as being one of a "guaranteed maximum price". Later the terms of that contract were varied to provide a cost-savings sharing arrangement.

[para38] On December 19th, 1991 Turner and Mr. Ho met for the first time in Pinewood Studio. Along with Mr. Ho was a Mr. Johnson of Ledcor. Both Mr. Ho and Mr. Turner testified in this trial. Mr. Johnson was not called.

[para39] Mr. Ho agrees that at that meeting he was informed of three concerns of Pinewood being: (1) dust; (2) noise in the studio; and (3) the manner of construction of the studio and the need to preserve air gaps between outer and interior walls.

[para40] There is a conflict between the evidence of Mr. Turner and Mr. Ho as to what was discussed beyond those three general areas. Mr. Turner testified that he asked that the wall of the building next to the studio be demolished by hand and that plywood be erected as a "first line of defence against sound." He said he requested of Mr. Ho that, when City's northern wall was about to be built, a covering of neoprene be laid against the wall. He testified that he offered to contribute to the cost of these measures. He did not, he said, receive any agreement on his requests and he had the sense that Mr. Ho and Mr. Johnson were maybe listening to his concerns without any commitment.

[para41] Mr. Ho denies these aspects were discussed. Mr. Ho described himself as being a chartered engineer who has for himself and others built numerous buildings in Canada over the past 13 years. He testified that the term "neoprene" was new to him. Mr. Ho testified that Mr. Turner requested access to the City site be kept as far away from Pinewood Studio as possible. He also testified that Mr. Turner informed him that while passing trucks would cause Pinewood no interference, trucks idling directly outside may. This latter aspect, he agrees, was raised in the context of an assertion by Mr. Turner that low frequency sounds caused more trouble to the studio than high frequency sounds. Mr. Ho said he did not believe this assertion. Mr. Ho and Mr. Turner agree that there was some discussion about scheduling the work of construction to accommodate Pinewood's recording schedules. Apart from that, Mr. Ho says that Mr. Turner was not interested in what City or Ledcor could do for him but merely wished to express his concerns.

[para42] Having heard both Mr. Turner and Mr. Ho I am satisfied the suggestions of Mr. Turner in terms of steps to be taken with respect to plywood and neoprene were, in fact, made. In his examination for discovery at Q.275-286 Mr. Ho, when asked about Mr. Turner's suggestion that the wall be demolished by hand, responded that he did not recall that being discussed. At trial he testified that he did recall a consideration of demolition by hand. His further response in cross-examination was "I did not instruct Ledcor to get quotes for demolition by hand, I left it as a construction matter to Ledcor."

[para43] Mr. Ho was questioned about a report from Geo Pacific Consultants dated May 1st, 1992, a copy of which was later given to Mr. Turner. Mr. Ho in his cross-examination denied that he had played a part in its drafting, yet when confronted with the draft report which contained many revisions in his own handwriting his response was "I did not encourage him [the author of the report] I just told him what the fact of the matter was".

[para44] I have little confidence in the evidence of Mr. Ho where it conflicts with that of Mr. Turner unless supported by others. I conclude that Mr. Turner, in fact, did raise the concerns that I have referred to in the meeting of December 1991.

[para45] Mr. Ho's approach to this project was that as long as whatever Mr. Turner requested was not an unusual method of construction and did not interfere abnormally, he was prepared to accommodate him. In short, Mr. Ho was going to build as it suited himself.

[para46] Mr. Ho agreed that he did not pass on to Ledcor the earlier correspondence from Pinewood and Grimham with respect to the concerns for the studio during construction. In particular, a letter dated September 18th, 1991 in which the issue of air gaps being maintained was raised was never provided to Ledcor.

[para47] It was argued by the plaintiffs that this was because City was negotiating a guaranteed maximum price contract with Ledcor. Little evidence was led in this respect. However, by the time of the December 1991 meeting, Ledcor was without question aware of the nature of both Pinewood's business and the construction of the studio. I am satisfied that following the December 19th, 1991 meeting both City and Ledcor, through their representatives, were aware of the studio, its construction and the concerns for the maintenance of that state of construction.

[para48] Over the Christmas period of 1991 Mr. Turner recognized the problems that he would face during construction and decided to attempt to relocate some of his operations to a studio in North Vancouver. This relocation decision was made because of the ADR work being done on demand by Pinewood's clients and the fact that Mr. Turner could not, in his opinion, tolerate the interruptions he expected from even an accommodating neighbour. As history would prove to Mr. Turner, while the North Vancouver studio provided an environment free from interruptions, the viability of that studio was limited by reason of its location.

[para49] Having heard nothing from Mr. Ho as a consequence of the December 1991 meeting Mr. Turner wrote to him on January 13th, 1992 and followed up with various phone calls, none of which were responded to. On February the 18th he had sound testing done by Mr. Strachan and on February 19th he had a solicitor write a letter to Mr. Ho which in part stated:

While my client is greatly concerned about the potential adverse effect upon his premises and business, he does not wish to be uncooperative. We would like you to take whatever steps may be required to prevent any potentially adverse impact on our client's premises and business.

That correspondence is of some consequence relating to the context of the September 18th, 1991 letter from Mr. Turner to Grimham's Property Manager, Knowlton Realty, a copy of which letter was provided to Mr. Ho with Knowlton's September 27, 1991 letter. In the September 18 letter, Mr. Turner stated:

The studio design called for a 1" air gap between the studio wall and the outside wall for isolation. If this gap is bridged by falling debris, caused by vibration or sudden shock, the effectiveness of the isolation will be reduced to a point where we will be able to hear traffic in the studio under normal conditions. It will be extremely difficult to fix this problem, because it will require major construction inside the facility, which will shut us down for several weeks.

At that point in time only the most unusual of noises such as an overhead clap of thunder or a siren directly outside the studio could be heard inside. Certainly, the ambient noises recorded by Mr. Strachan on August 16, 1991 did not penetrate the studio.

[para50] A further meeting was held on March 3rd, 1992. Again Mr. Ho and Mr. Johnson attended at Pinewood Studios. Mr. Turner toured them again through Pinewood Studios and reiterated to Mr. Ho those concerns that he had expressed in the December 1991 meeting. Mr. Turner testified that he sensed a lack of interest by both Mr. Ho and Mr. Johnson. Certainly, none of the requests of Mr. Turner either made in the December 1991 meeting or reiterated in the March 1992 meeting were acted upon.

[para51] Shortly after the March meeting Mr. Ho approached Mr. Turner to seek permission to drill under the Premises to secure anchor bolts necessary for the construction of foundations. Grimham had left that decision to Pinewood. Mr. Turner testified that he "gave him permission to drill if he would accept responsibility for any damage". Mr. Ho, according to Mr. Turner, did not respond to this caveat and merely insisted that Mr. Turner sign a document giving Pinewood's consent to the drilling. Turner declined to sign on those terms and that position was confirmed in a letter to Ledcor's solicitors dated May 1st, 1992.

[para52] Because Mr. Ho would not accept the caveat attached to the permission it was necessary to revise the plans to provide a different manner of construction. This caused both delay and some expense to the project as it required a stepping of foundation descending an additional level into the ground to attain the required number of parking stalls.

[para53] The significance of all of this in terms of Pinewood is that it caused a distinct negative shift in City's attitude towards Pinewood. City's reluctance to accommodate Pinewood was exemplified as late as 1994 by City's refusal to permit Pinewood to go onto the City site to conduct sound testing in order to confirm that repair work, which I shall subsequently discuss, had been successful. The reason given by Mr. Ho and his solicitors for this refusal can only be described as puerile. Likewise, when later faced with the problem of sound bridging caused during construction by debris and cement deposited between the north wall of the City tower and Pinewood's south wall, the response of Mr. Ho was "I did not give Ledcor instructions. It was up to Turner to tell exactly what he wanted removed." Given that Mr. Turner had made it explicitly clear as to what he thought was wrong that answer is specious at best.

[para54] Finally, Mr. Ho testified that he stopped "dealing reasonably with Mr. Turner" because of what he perceived was Turner's blackmailing demand for \$300,000.00 and because Turner had said that if it wasn't paid "He'd make my life miserable." It was the view of Mr. Ho that this was the amount of money demanded by Turner for a consent to drill under the Pinewood Studio. Mr. Turner agrees that he may well have demanded that sum but it was for compensation of the loss which he contemplated arising by reason of his having to move a portion of his business to North Vancouver.

[para55] On April 9th, 1992 Mr. Johnson of Ledcor notified Pinewood that demolition of the buildings on the City site would occur between April 15th and May 15th and he requested a copy of Pinewood's recording schedule. Dates were provided and assurances given to Pinewood that Ledcor would seek to "coordinate" activities with the schedule as far as practical. [para56] At this point in time Ledcor engaged Vince Kehoe to be site superintendent. As Mr. Turner testified he felt that now he had someone to whom he could talk. At that point Mr. Turner anticipated a period of three to four months of dust and noise during demolition and excavation but was of the view that once the wall on City's north side had been constructed "most of our problems would disappear." It had always been Mr. Turner's view that once the concrete wall was erected on City's north boundary it would improve his own studio's acoustical isolation. That theory was confirmed in the evidence of Mr. Yanchar and Mr. Keuhn.

[para57] Prior to demolition, plywood hoarding was erected around the site to protect the public. No instructions were given by either Mr. Ho or Mr. Johnson to Mr. Kehoe to cause any plywood to be placed between the Premises and the two-storey building to be demolished. Likewise, Pinewood did not take any action to protect itself in this respect nor did it take steps with respect to ensuring the dust that may have arisen during demolition did not interfere with its operations. The evidence is that the air conditioners for the Premises were equipped with filters. Demolition of the two-storey building next to Pinewood began on April 24th, 1992. Mr. Kehoe instructed those responsible for the demolition to simply "be careful" in reference to Pinewood's south wall.

[para58] The demolition was observed at various times by Mr. Kehoe and by Mr. Randy Kiss, an engineer at Pinewood. Mr. Kehoe testified that the north wall which was "slightly reinforced" was torn down by a backhoe operator in pieces. He, himself, did not see any contact with the Pinewood wall but he agreed that he was not constantly watching. Mr. Kiss observed an incident in which he saw a portion of the wall near Homer Street being pulled inward and breaking off causing the remainder to snap back beyond its previous position. He said he returned to Studio B expecting to find damage to the screen but was surprised to find none. He did not inspect the wall. He did not tell Mr. Turner about the incident until much later when in 1993 a step crack was located in the Premises' south masonry wall.

[para59] When Mr. Turner observed the step crack in 1993 he also observed masonry debris along a structural beam which ran perpendicular to the south wall. That beam led to a bathroom near the other side of the building where minor cracking was also observed.

[para60] A re-recording engineer, Mr. Hoogenboom, who worked freelance at Pinewood between 1990 and 1993 testified that up until he left in 1993 he felt thumps against the south wall and felt the building shake during construction. Brian Wilson, a structural engineer, made an inspection of the wall in 1992 following demolition. In the course of his inspection of Pinewood's south wall Mr. Wilson noted it had been painted. His evidence was that there was "nothing significant that I saw, no cracking that I can recall." However, Mr. Wilson agreed that he was not looking for cracks at the time. By the time the step crack was

discovered, City's north wall had been constructed to a level above that of Pinewood's. I am satisfied that the step crack which has been described occurred in the circumstances described by Mr. Kiss. If I am incorrect in this finding, then at the very latest the crack occurred during construction in the circumstances described by Mr. Hoogenboom.

[para61] Mr. Kehoe testified that before demolition he could see between City's north and Pinewood's south walls which were approximately 2-1/2 inches apart and that he observed points of mortar contact between the two. The evidence given later with respect to examinations of the debris between the City's new north wall and the studio's south wall was that one could not look into the space which was then 6 inches wide without a high-intensity light. Mr. Kehoe further testified that he had taken photographs of his observations yet those photographs were never produced in evidence. I do not accept that there was contact between the old walls prior to demolition nor that the step crack could have existed prior to demolition.

[para62] During the demolition and subsequent excavation Mr. Turner and others noticed an increase in dust when changing air conditioning filters. Excavation was completed by October of 1992.

[para63] In mid-1992 construction began at the south end of City's site. During this initial period there was little disturbance of the operations at Pinewood. The staff of Pinewood communicated well with Mr. Kehoe's on-site office and I find that there was a genuine attempt by both to cooperate despite City's having to redesign its foundations. I pause to say here that despite my observations in respect of the failure of Mr. Ho and Mr. Johnson to adequately instruct Leducor on how to avoid interference with Pinewood's operations, Leducor was well served by Mr. Kehoe. Despite my rejection of his evidence with respect to mortar contacts between the old walls, Mr. Kehoe impressed me as a man who at least tried to accommodate Pinewood.

[para64] As the construction on the City site moved closer to Pinewood, Tracey Tomicki, who had established a good rapport with Mr. Kehoe and who had the major responsibility of dealing with Mr. Kehoe's office in terms of scheduling, left Pinewood's employment.

[para65] She described relations between Pinewood and Leducor as sometimes working and sometimes not. At Mr. Turner's instructions she maintained a log of interferences and lost work time. Reporting logs of Leducor which were kept on a daily and weekly basis reflect both Leducor's attempt to accommodate Pinewood's schedule and increasing frustration with the interference in construction schedules caused by those attempts. Those notes suggest that from Leducor's perspective, Pinewood was generally satisfied with the measures taken by Leducor to accommodate known recording schedules. However, Leducor was falling behind schedule. Though this was not, according to Kehoe, because of Pinewood and its needs, sympathy for Pinewood waned as a consequence.

[para66] Mr. Turner, despite his awareness of dust generation through demolition and excavation, took no steps to alter his air conditioning filtering systems to deal with the obviously increased dust levels. According to Mr. Hoogenboom, the sole steps taken appear to be to cover equipment when not in use and clean air filters on air conditioners.

[para67] In July of 1992 prior to the commencement of construction, Brian Wilson, a civil engineer, who is an expert in geotechnical design and structural inspection and who, in fact, examined the south wall of Pinewood, was asked by Leducor to inspect the City site because of concern about vibrations caused by drilling anchor rods.

[para68] Based on his technician Brian Boltd's measurement, Mr. Wilson concluded any vibrations were below assessed construction noises as being marginally higher than levels capable of causing damage. Later in April of 1993 he background noises. Such an opinion is of little assistance as it represents only a snap-shot of a particular moment in time.

[para69] In December of 1992 Mr. Kehoe was aware that Pinewood had commenced these proceedings. Following February of 1993, after Ms. Tomicki's departure from Pinewood, Leducor was not provided with a written schedule of Pinewood's recording sessions; rather Mrs. Turner would call to inform Mr. Kehoe of recording sessions. Because of the nature of the construction, particularly concrete pours which had to be continuous, Pinewood often could not be accommodated.

[para70] During the pouring of City's north wall LMT used a sheet of plywood to ensure that concrete would not spill back onto the construction site. However this was not done to prevent spills between the new north wall and Pinewood's south wall. Upon completion of the north wall the gap between the two buildings was then filled to a depth, at its deepest, of 12 feet of pea gravel.

[para71] The creation of the wall did not fulfill Mr. Turner's expectations. On inspection it was observed by Mr. Turner and others that pieces of wood appeared to be jammed between the two walls. The consequence of this was that sound was being transmitted from the construction site into Pinewood's external south wall.

[para72] In addition, unbeknown to anyone at the time, debris had fallen from the inside of Pinewood's exterior south wall to bridge the gap between that wall and Studio B's interior wall. The cause of this was in dispute at this trial and at various times during cross-examination of Mr. Turner it was suggested that he had, in fact, placed pieces of plaster across the internal air gap and then photographed them to provide evidence of the sound bridging. I find no merit in these suggestions. I am satisfied that whatever debris was found in the internal gap was a direct consequence of the impact to Pinewood's wall during the course of demolition and the thumps and bangs observed by Mr. Hoogenboom during construction. Photographs of the wall, taken both after demolition and prior to construction of City's north wall illustrate what I am satisfied with are the teeth marks of the backhoe which scraped the wall in the course of demolition.

[para73] Likewise, I conclude that the step crack was caused by damage inflicted during the course of demolition or, alternatively, during construction. There simply is no other cause for a wall in apparent solid condition, as observed in 1986 by Mr. Vassallo when he rebuilt the Studio B, to develop a crack such as that shown in the photographs. Its causation is consistent with the observations of Mr. Kiss and Mr. Hoogenboom.

[para74] Thus, by April 1993 Pinewood's sound isolation was now compromised by two sources. The first was the bridging between the two external walls. The second was a step crack in Pinewood's wall which had dislodged plaster and debris into the internal air gap between the inside of Pinewood's south wall and Studio B's interior wall.

[para75] The use of Studio B thereafter declined. Pinewood could not do its work in the studio while the outside noises from the construction site were being transmitted into the studio. During the course of the trial tapes were played of recordings made at various times between July of 1992 and April of 1993. On those tapes, sounds not created in the studio, were clearly evident.

[para76] Mr. Turner complained to Mr. Kehoe. Pieces of wood jammed between the walls were removed. However, there was no change within the studio.

[para77] As a consequence, a sound engineer, Allan Lees, was engaged by Ledcor to record sounds in Studio B while a hand drill was operated on the City property. These tests were conducted on June 8th - 10th, 1993. Mr. Lees reported to Mr. Kehoe that he thought "Much of the sound heard in the studio came through bridges and their removal would improve the situation." On June 21st, 1993 Ledcor cut five holes in City's north wall at the garage level. It then began to remove debris. In a report dated June 25th, 1993 Mr. Lees concluded that "Removal of the debris and concrete bridges between the adjoining walls was very effective in reducing transmission." He also concluded there were no airborne noises getting into Studio A or B.

[para78] In late June 1993 after the removal the debris, Mr. Kehoe and Mr. Turner examined the holes cut in City's wall. Mr. Turner poked into the remaining pea gravel and felt something hard. Mr. Kehoe assured him that it was "native soil."

[para79] The sound intrusions continued. Further material was removed and in July of 1993 Mr. Lees reported no further remedial work was necessary. He assumed all bridging material had been removed and there was nothing more to be done. History was to show Mr. Lees to be wrong again. Pinewood continued to be plagued by sound intrusion.

[para80] In July of 1993, assured by the Lees' report that the bridging problem had been resolved, Mr. Turner had begun examination of the interior walls of the studio. Upon removal of insulation from the ceiling area he discovered the step crack in the south masonry wall to which I have earlier referred and a substantial amount of loose plaster and masonry lying across the bottom of the air space. The step crack extended down through five layers of building block. Mr. Kehoe was called to inspect the crack. Mr. Kehoe, on that inspection, assured Mr. Turner that all the debris had been removed from the air gap between the two external walls.

[para81] The step crack was repaired and when the use of Studio B resumed in September 1993 external sounds were still being heard.

[para82] The significance of the sound bridging becomes clear upon reviewing the evidence of Carl Yanchar. He described the theory behind sound studio construction as being that one seeks to "split mass." If, however, one joins the air space between the two walls it is like returning to a single wall. His evidence was that where there are multiple points of contact, removal of individual points of contact will not substantially resolve the problem of sound transmission until the last point of contact has been eliminated.

[para83] The purpose of creating the air gap between the exterior and internal walls is to "minimize the effect by which the interior walls are set in motion by externally generated sound." Mr. Yanchar testified that the two principles of sound isolation are:

1. separation of mass, i.e. the walls; and
2. sealing on the walls.

[para84] Despite the interior air gap Mr. Yanchar opined that a 20 inch connection between two separated walls can reduce sound isolation by as much as 25 db. As one removes points of contact there will be a gradual minor improvement until the last point of contact is removed at which point significant improvement will be observed.

[para85] It was also Mr. Yanchar's view that cracks such as the step crack should not be ignored as they tend to grow. He expressed the view that a step crack is more significant in terms of loss of sound isolation than a linear crack. He also testified that the greater the width of the crack the greater will be the loss of sound isolation. Mr. Yanchar did not measure the step crack in width.

[para86] In February of 1994 Mr. Wilson inspected two cracks inside Pinewood's premises. The first was an old crack of no consequence to these proceeds. The second was the step crack located near the top of the south wall. He concluded that such a crack impairs structural functioning but would only be a matter of concern if it were 1 mm or greater in width. He estimated this crack to be approximately .1 mm in width but said that he could be off by up to 100%. He was unable to express an opinion on the acoustical effects of such a crack but agreed that a stiffer wall would provide more sound attenuation than one with a crack.

[para87] Mr. Larry Kinakin, an engineer, was retained by Ledcor to inspect the exterior of Pinewood's Studio for any cracks in June of 1992. He did observe a stepping crack in the area that has been described by others in this case but said that he would not comment on a minor crack caused by shrinkage. Mr. Kinakin did not examine the interior of Pinewood's Studio and nor did he measure the crack that he saw. At that point in time no one was aware of the step crack. I do not conclude from his evidence that the step crack in issue was caused by shrinkage.

[para88] When provided with a description of the manner in which Studio B's ceiling was constructed from bottom to top, Mr. Yanchar expressed the view that such a ceiling would have a sound attenuation of between 55 and 60 db. Thus, he concluded that rain could not be heard but thunder overhead directly might. Mr. Yanchar testified that assuming a floor rating of approximately 30 db such a ceiling and roof would provide a sound attenuation of between 85 and 90 db directly at the roof. Expressed conversely a sound would have to be in that range to be even heard in Studio B on the assumption that the source of the noise was directly at the roof level. It is to be recalled that the preconstruction and post repair measurements of Mr. Turner put the floor rating at between 30 and 32 db.

[para89] Mr. Yanchar said that in his visit to the studio in July of 1995, with the doors closed and listening for traffic sounds he could hear nothing. I am satisfied that on this and other evidence that normal traffic sounds could not be heard in the studio assuming that its sound attenuation was not compromised.

[para90] Despite Mr. Turner's protests, after July 1993 Ledcor took the position that it had removed the bridging material and that whatever intrusions were being heard by those in Studio B were no longer of its concern. In October of 1993 Mr. Turner with the assistance of Mr. Vassallo cored through the Premises' foundations near a loading ramp to the rear of Studio B. A report prepared by Mr. Bruce Peters establishes that a considerable amount of debris consisting of concrete spillage and wood forms was in the gap between the two exterior walls. Mr. Kehoe was requested to view this and did so. [para91] Mr. Kehoe testified that he observed more debris and, as a consequence, instructions were given to cut further holes in City's north wall. All of the material in

the gap was to be removed down to the native soil. Mr. Kehoe testified that even at the bottom of the footing for the wall, forming material and concrete were located. By February of 1994 this work was accomplished. Much of the delay was in attempting to get Leducor's subcontractor, LMT, to do this work. Those attempts were abandoned and Leducor arranged to do that work on its own.

[para92] The examination for discovery evidence of James Taylor, the representative of LMT, was that while it was common to leave debris between external walls and then cover it with pea gravel it would have been an easy matter at no additional cost to have taken steps to avoid that occurring. LMT was simply not instructed to ensure that there was no debris left. Mr. Kehoe testified that it was only when the wall was almost completed that he became aware of the need for an air gap, yet on his examination for discovery his answer was somewhat different:

A. Nothing could be in that cavity in the line of form work or concrete?

Q. That is something you are aware of at all material times?

A. Yes.

[para93] Thus, while attempts were made to accommodate the recording sessions with varying degrees of success, there appears to have been little appreciation of the more fundamental and long-term concerns of Pinewood in terms of maintaining the integrity of its sound attenuation.

[para94] Leducor was aware of the significance of sound transmission into the Premises as evidenced by its correspondence to LMT on June 29th, 1993:

We understand that Pinewood Studios are continuing to press their damage claim against our firms claiming that the noise and excessive vibrations has seriously affected their business. The delay in completion of removal of the concrete only enhances Pinewood Studios Limited claim and leaves LMT Construction and Leducor open to further potential costs.

[para95] In April of 1994 Pinewood sought permission of City to conduct sound testing. By that time the repair to the step crack had been completed by Mr. Vassallo using a steel beam to prevent further expansion.

[para96] Despite the tardiness in response to Turner's concerns about continuing bridging between June of 1993 and October 1993, City, through its solicitors, declined permission for him to enter upon City's premises to conduct such non-destructive testing.

[para97] The purposes of that testing were set out in a letter, dated April 12, 1994, from the solicitor for Pinewood, Mr. Wiebach, to Mr. Doyle, solicitor for City. These were identified as being:

1. To pinpoint the location of bridges in the wall and thus localize repairs within the Studio.
2. To establish a "noise floor" against which the effectiveness of repairs could be assessed.

The results were to be provided to the defendants.

[para98] The responses to these requests for testing are not those that does anyone credit. In cross-examination Mr. Ho said that he supposed that he could have asked the property manager for permission but he could not give permission as he was not the Strata Council. He did not inquire of the property manager in any event. Those answers were not those given to Pinewood's solicitor for the stonewalling of its request to do the testing. Indeed, different and more obscure reasons were provided for the refusal to permit this testing. Mr. Ho's conduct and what instructions he gave to his counsel do him little credit.

[para99] Mr. Turner conducted these tests by a less satisfactory method using drilling on a site behind the Premises and made further repairs to his internal studio walls. At that point in time, Turner identified a number of spots on the south wall where higher than average readings were recorded of construction sounds. These he referred to as "hot spots". Mr. Turner testified and I accept that by mid-June of 1994, after the repairs were completed, Studio B was within one decibel of its pre-demolition sound attenuation. The only complaint raised is that the centre of Studio B has been slightly shifted acoustically, but Mr. Turner candidly describes Studio B as seeming "to function quite well".

[para100] Mr. Turner and Mr. Vassallo testified that because of Pinewood's inability to pay for repairs in 1993 by reason of its decline in revenues, an agreement was reached whereby Mr. Turner promised to pay Mr. Vassallo when he had the money. Mr. Vassallo testified that his understanding of the arrangement was that after 6 months there would be interest at 10%. The evidence of Mr. Turner was that he agreed to pay Mr. Vassallo \$65,000.00 plus taxes when he was in the position to do so. No account was rendered and apart from this figure no particulars of the cost of repairs was provided. Mr. Vassallo was asked to do the work because of the Studio's unique nature and his familiarity with it. Mr. Turner also testified that he had used staff members to do some of the repair work. He estimated this staff work to account for approximately \$9,000.00 in time. Not all of the work contemplated in the figure of \$65,000.00 has been completed.

[para101] Mr. Turner further testified that he wished to complete rebuilding Studio B at a cost which he estimates is \$175,000.00. The consequence of such repair, it would appear, bearing in mind Mr. Turner's evidence with respect to the functioning of the studio, would be essentially to correct the acoustical misalignment that I conclude is more of an annoyance than a hinderance to the work of the studio. Drawings filed as exhibits indicate substantial changes to what was in place prior to April 1992.

[para102] Outside of Studio B Mr. Turner has a number of small repairs to complete including a door that jams, cracks in the bathroom wall and refilling of the cored holes in the loading bays. These were items that, according to Mr. Vassallo, were part of the \$65,000.00. Mr. Vassallo testified that they had kept rough track of the costs of repairs completed to date which he estimated to be some \$40,000.00.

[para103] No other evidence was led with respect to restoration costs.

[para104] The North Vancouver Studio was developed in 1992 at a cost of some \$230,000.00. Its purpose was to provide a recording environment free from the disturbances that interfered with Pinewood's Homer Street operations. Its location, however, was not ideal as actors and producers preferred a downtown location.

[para105] Fundamental to this action is the extent to which sound, for whatever reason, entered the studio. Pinewood has been in the sound recording business since 1976. Following the renovations done in 1986/87 the work done in Studio B was predominantly involved with film production. Much evidence was led by both the plaintiff and the defendants as to what effect, if any, external sound both before and during construction had within the studios.

[para106] The evidence as to sound intrusion came from a multitude of witnesses. Fundamental to an appreciation of their evidence is the premise that the purpose of such a studio is to provide an environment that minimizes the intrusion of outside noise.

[para107] As noted earlier, there is no such thing as soundproofing and, thus, it is not uncommon to hear unusual but infrequently occurring external sounds. Without reciting the evidence of each of the many who testified as to when and what they may have heard I find that both before and after the construction the studios in the Premises did, in fact, accomplish that stated purpose and only the occasional loud externally caused sounds penetrated the studio before April of 1992. I do not accept the evidence of those who would assert that they heard commonplace sounds such as ambient street noises while in the studios.

[para108] In this respect I specifically refer to the evidence that established a "floor reading" in Studios A and B taken before demolition and then taken after the repairs in June of 1994. These floor readings separated by some three years vary by approximately 1 db, a difference indistinguishable to all but the most sensitive ear. That is significant in terms of the "pink noise test" generated by Pinewood following repairs that created a wide band of sound at 100 db's in Studio B. That sound could not be heard a meter outside of the studio.

[para109] In July of 1993 despite his optimism as to the removal of sound bridging material, Mr. Lees concluded that it was bridging sound and not airborne sound that could be heard in Studio B. His test revealed that the noise level in the Studio did not increase when cement trucks were mixing outside.

[para110] Much evidence was led as to what if anything happened to equipment in Studio B particularly during the period of April 1992 to May 1994. Witnesses who testified were both current and former employees and were led by both the plaintiff and the defendant.

[para111] The evidence establishes that the technical equipment used in a recording studio is both costly to acquire and complex to maintain. Without proper maintenance distortions occur in the recorded sound.

[para112] Mr. Turner testified to problems that he believed were caused by the exposure of a multitude of switches and controls to an increase in dust levels. His view was that while there are always problems with switches, as a consequence of construction they increased 10 fold. I am satisfied that Mr. Turner regards himself not merely as a technician but as an artist who demands of himself and others perfection not easily attained. What transpired between April of 1992 and May 1994 was unquestionably an upsetting interference with his work and that has, in my opinion, caused him to focus on the construction as a source of all wrong.

[para113] It is, therefore, to the evidence of others that I look to determine the extent of any damage to the equipment.

[para114] Mr. Kiss, an engineer employed by Pinewood, testified as to the stress caused by outside interferences. He testified that there was a change in the way equipment functioned but that such problems were not insurmountable and were corrected either easily or by having the maintenance staff repair the problem. He testified that switches that made noise, described as popping sounds, were of various ages.

[para115] Mr. Hoogenboom testified that occasional external sounds could be heard in Studio B before 1992 but they did not interfere with his work. During construction his work was interfered with and from time to time he would ask someone to go out to the City site to ask that the work there be stopped. He testified that sometimes it would not. He noticed no appreciable difference in the way in which equipment operated during the construction period.

[para116] Mr. Hoogenboom testified that he thought the amount of money claimed by Pinewood was not right. When asked how he knew of a specific amount he testified that senior counsel for the defence had informed him of this. While I deprecate such information being provided to a witness, I nevertheless accept the evidence of Mr. Hoogenboom that during construction sounds not heard before entered Studio B and occasionally the walls even shook.

[para117] Marshall Freund, Pinewood's maintenance manager from 1988 to mid-1995, testified that during construction equipment was covered with plastic but the incidence of maintenance did not increase over that period. He said that the equipment at Pinewood was of some vintage and that because of the modular nature, equipment components could be easily switched in the case of failure. He agreed that there was more dust during construction and that, while that should theoretically increase wear, the equipment was kept clean.

[para118] When Mr. Freund was confronted with an undated statement that he wrote regarding the state of equipment repairs, he testified that he had been asked by Mr. Turner to provide a statement as to what could have happened to the studio equipment as a result of the construction. Despite the opinions expressed in that letter I am of the opinion that Mr. Freund was a disinterested and frank witness.

[para119] Ruth Mahon worked as a recorder at Pinewood from 1991 until April of 1992. She primarily recorded foley sounds although she did some ADR work. She testified that in her use of equipment she would sometimes hear sounds caused by switches and would work around them or call in maintenance.

[para120] I conclude on the evidence that whatever effect dust drawn into the studio during construction may have had in terms of accelerated wear on Pinewood's equipment its effect was minimal in both the short and long term.

[para121] The plaintiff claims against the defendants in nuisance, negligence and trespass. Each are distinct causes of action, although, as I shall later conclude in these reasons, the tort of trespass so far as this action is concerned is subsumed into the tort of negligence. [para122] Simply stated, the claim of nuisance is founded upon the transmission of sound and dust from the City property to the Premises.

[para123] The claim of negligence is founded upon the acts of the defendants that were injurious to the plaintiff's property. These acts, it is said, include the impact on Pinewood's south wall which caused the step crack and the bridging of both the external and internal walls resulting in external sounds entering the plaintiff's premises.

[para124] These alleged acts of nuisance began earlier than those of negligence. Each overlapped and the consequences of the alleged acts of negligence persisted longer.

NUISANCE

[para125] Nuisance is the interference with an occupier's interest in the beneficial use of his/her land. See *National Capital Commission v. Pugliese*, [1979] 2 S.C.R. 104 at 115. The law with respect to nuisance imposes a duty upon those who interfere with their neighbours' use and comfort to take reasonable and proper care and use reasonable skill to ensure that the nuisance is reduced to a minimum. See *Andreae v. Selfridge and Company Ltd.*, (1937), [1938] 1 Ch. 1 (C.A.).

[para126] However, there is a caveat placed upon that general principle: if a plaintiff's use of property is abnormally sensitive, recovery may be denied because the standard to be applied in the assessment of whether there has been unreasonable activity causing interference is an objective one. Therefore, conduct must be governed only with reference to normal or ordinary persons, not idiosyncratic or abnormal use by a plaintiff (see A.M. Linden, *Canadian Tort Law*, 5th ed. (Toronto: Butterworths, 1993), at 518).

[para127] Where a defendant's interference is of a temporary nature, particularly in the case of construction, the defendants' argue that a greater tolerance for disturbance must be allowed. This, it is said, is particularly so where development is, from a public policy point of view, a sought after goal.

[para128] While that general proposition finds support in *Andreae v. Selfridge*, supra, at page 5, it is not a one-sided coin for as noted at page 6:

As time goes on new inventions and new methods enable land to be more profitably used ...

Thus the measure of reasonableness of the steps taken to reduce nuisance to a minimum must be assessed in the context of those new "inventions" and "methods" of reducing interference.

[para129] Pinewood's claim in nuisance arises from its complaints that the defendants failed to incorporate reasonable measures to reduce noise during construction and failed to make reasonable effort to control dust, grit and vibration.

[para130] City constructed its complex to make a profit. It was argued by the defendants that, apart from adjusting its construction scheduling, there is no obligation on a defendant to expend funds to reduce or eliminate the consequences of conduct that might interfere with the neighbour's enjoyment of land, regardless of whether the neighbour's use is ordinary or extraordinary.

[para131] In *Russell Transport Ltd. v. Ontario Malleable Iron Co.*, [1952] 4 D.L.R. 719 (Ont. H.C.) McRuer C.J.H.C. dealt with the difference between the term "reasonable" as it is used in nuisance actions as opposed to negligence actions. At page 731 he commented with respect to the former:

But here 'reasonable' means something more than merely 'taking proper care'. It signifies what is legally right between the parties, taking into account all the circumstances of the case, and some of these circumstances are often such as a man on the Clapham omnibus could not fully appreciate.

...

On the other hand, if the defendant has taken no reasonable precautions to protect his neighbour from injury by reason of operations on his own property the defence of reasonable user is of little avail.

[para132] In that case, the defendant had continued to operate a smelter and had adopted "no method of modern smoke or fume control." Motor vehicles stored nearby were damaged by the emissions from the smelter. Parenthetically, Chief Justice McRuer did not find the plaintiff's storage of automobiles to be a "particularly delicate trade or operation."

[para133] In my opinion, in the assessment of whether the defendants took reasonable steps, consideration must be given to what those steps and their cost might reasonably be.

[para134] Here the evidence is that before the bridging occurred there were steps that could have been taken at little relative expense. Those were communicated by Mr. Turner to Mr. Ho. In addition, there existed professionals such as Mr. Keuhn who could have given advice considering the transmission of airborne noise. In the context of this case, I do not regard noise conveyed through the ground to be capable of forming a basis for nuisance because had the bridging not occurred there is no evidence that such sounds would have interfered with Pinewood's operations.

[para135] The defendants argue that the operation of a sound recording studio is a use that is extraordinarily sensitive and, as such, whatever interference occurred does not constitute nuisance.

[para136] In *Nor-Video Services Ltd. v. Ontario Hydro* (1978), 19 O.R. (2d) 107 (Ont. H.C.J.) Robins J. considered the issue of a cable television operation that had been interfered with by hydro cables. Reception of a television signal had been impaired despite attempts by Ontario Hydro to find a solution. Hydro's defence, in part, was that the cable operation was an abnormally sensitive one and, thus, interference could not amount to nuisance. At page 117 Robins J. noted that:

The notion of nuisance is a broad and comprehensive one ...

And then went on to hold:

...The category of interests covered by the tort of nuisance ought not to be and need not be closed, in my opinion, to new or changing developments associated from time to time with normal usage and enjoyment of land. Accordingly, I would reject the defendant's submission and hold that television reception is an interest worthy of protection and entitled to vindication in law.

He then went on to consider the argument that Nor-Video had devoted its property to an unusually sensitive use and could not by doing so make a nuisance out of conduct or activity which would otherwise be harmless. I agree with Robins J. when at page 118 he stated:

... As a matter of general legal principle it is undisputed that an interference with something of abnormal sensitiveness or delicacy does not of itself constitute a nuisance. The law does not extend protection through nuisance to hypersensitive individuals or industries; it is against interferences to what objectively can be considered ordinary uses of property or enjoyments of life that protection is afforded.

[para137] In *MacNeill v. Devon Lumber* (1987), 42 C.C.L.T. 192, the New Brunswick Court of Appeal considered whether individuals with pre-existing allergic conditions could recover in nuisance for medical conditions arising from fine dust produced by a sawmill. Chief Justice Stratton held at page 198 that the plaintiffs:

... cannot recover damages ... for that portion of their claim resulting from their abnormal sensitivity to cedar wood dust.

[para138] However, he did conclude that damages were recoverable on the basis of interference with the plaintiffs' normal enjoyment of life.

[para139] A similar assessment of the issue of sensitivity was conducted by Cohen J. in *Kenny v. Schuster Real Estate Co.*, [1990] B.C.J. No. 1420 (19 June 1990), Vancouver C874184 (B.C.S.C.), in which he followed *Royal Anne Hotel Company Ltd. v. Ashcroft* (1979), 8 C.C.L.T. 179 (B.C.C.A.), concluding that the plaintiff was entitled to recovery for nuisance arising out of transmission of noise and cooking fumes from the defendant's restaurant to the plaintiff's condominium, as she was not "an overly sensitive person."

[para140] Whether the plaintiff falls into that unprotected class of the abnormally sensitive user is "a question of fact and degree." (See *Andreae v. Selfridge*, supra, at page 10.)

[para141] The recording of sound is not unique, but a lack of uniqueness does not entail a lack of sensitivity. The evidence in this trial was that there are some 14 studios engaged in the sound business in the Lower Mainland area. However, only three of those are engaged in the type of work done by the plaintiff. These studios are not at all similar to the reception of television signals whether by cable operator or by an individual.

[para142] On a review of all of the evidence I conclude that the plaintiff's operations were unusually sensitive in nature. The manner of construction of such a studio shows the need to operate in an environment that minimizes sound intrusion and permits only occasional interference from the outside.

[para143] The conclusion that Pinewood's operation is unusually sensitive is not determinative of the issue of nuisance. In *Mandrake Management Consultants Ltd. v. Toronto Transit Commission* (1993), 102 D.L.R. (4th) 12 at 19 the Ontario Court of Appeal set forth four factors to be considered when determining whether or not usage of property constituted nuisance. These are:

(a) the nature of the locality in question; (b) the severity of the harm; (c) the sensitivity of the plaintiff; (d) the utility of the defendant's conduct.

[para144] Here the locality is changing from one of small businesses, some of which have ceased to operate, to a high density residential area with some commercial shops. The evidence given at the trial was that between 1992 and 1994, in addition to City's development, two other residential towers were constructed in the same city block as City and Pinewood's locations. Clearly, it was an area whose time for redevelopment had come.

[para145] The severity of harm from airborne sound was of sufficient intensity to disrupt the plaintiff's work and made it inconvenient and embarrassing but it did not stop it altogether. In addition, any harm suffered as a result of airborne dust did not last for an unreasonably long time and was minimal in intensity.

[para146] Having concluded that the plaintiff's use of its land was unusually sensitive, the final question to be considered is the utility of the defendants' conduct. This area was destined for redevelopment. Although no consideration was given to the use of sound baffles, the defendants constructed the City project in accordance with generally accepted construction practices. Points of ingress and egress from the construction site were dictated by the City of Vancouver. The construction site operated generally within noise level standards set down by the City of Vancouver. As I have noted, measurements were taken to ensure compliance with the noise limit and generally these were complied with although without question from time to time they were exceeded.

[para147] Ledcor, through Mr. Kehoe, did from time to time compromise its construction schedule by accommodating the plaintiff's schedule for recording sessions, but this effort broke down after February of 1993 in part because of the departure of Ms. Tomicki and in part because of the demands of the construction schedule. It is clear, however, that after February of 1993 the north wall of the City site had been constructed and the baffle, in the form of the new concrete wall, that Mr. Turner had hoped for had been erected.

[para148] I am satisfied that the social utility to be gained from the City site construction at the time was reasonable.

[para149] As well, the plaintiff benefited from the construction of a higher, denser and more rigid wall than existed before.

[para150] The law of nuisance requires a balancing of the interests of neighbours and the lawful use of their respective property. I conclude that the balancing of these competing interests is such that City's use of land and the attendant interference as a consequence of its development does not constitute actionable nuisance. The claim of nuisance is dismissed.

NEGLIGENCE

[para151] The plaintiff claims, further as well as in the alternative, negligence. That negligence allegedly resulted in the compromise of the Premises' structural integrity. The particulars of this allegation are set forth in paragraph 23 of the plaintiff's Further Amended Statement of Claim filed May 15th, 1995. In summary, the acts of negligence are said to be:

1. The striking of the plaintiff's south wall causing:

(a) cracks within that wall; and

(b) the dislodgement of masonry and plaster within the internal airspace causing physical contact between the south wall and Studio B's interior wall.

2. The depositing of forming material and concrete spillage between the City site's north wall and the plaintiff's exterior south wall so that a permanent physical contact was constructed between the two.

[para152] The plaintiff says the combination of (1.) and (2.) resulted in sound being transmitted from the defendants' construction site into the plaintiff's recording studio thus compromising the work that was being done in those rooms. This transmission is said to be made possible through "sound bridging." The result was interference with production, loss of reputation and consequent loss of income.

[para153] Negligence is the "failure to use the care a reasonable man would have exercised under the same or similar circumstances and the degree of care required depends on the danger or risk involved." See *Thompson v. Fraser*, [1955] S.C.R. 419 at 425.

[para154] Pinewood initially cautioned Mr. Ho that steps should be taken to ensure that the studio's integrity was not compromised during construction. These warnings were not communicated to Ledcor. Then in a meeting in December 1991 Mr. Turner reiterated to both Mr. Ho and Mr. Johnson of Ledcor the importance of maintaining the air gaps during a tour through the Premises. Mr. Ho, in cross-examination, agreed that Mr. Turner had told him "it is important that this wall not be struck so that there might be a bridge of an air gap." As I have noted, I reject the evidence given by Mr. Ho to the effect that Mr. Turner did not make a request for hand demolition of the wall at the December 1991 meeting.

[para155] Be that as it may, the general tenor of those concerns, which I have previously discussed, was renewed in March of 1992 when Mr. Ho and Mr. Johnson again attended upon the Premises.

[para156] Thus, the defendants were specifically warned of the dangers of bridging and were aware of what consequences would flow from such bridges. They were also told of the consequences of damage to the Premises' south wall. The operations of the plaintiff's studio were, in fact, interfered with when the bridging occurred both between Pinewood's south wall and Studio B's wall and between Pinewood's and City's external walls. This could not be said to be an unforeseen consequence. What transpired cannot in any sense be said to be a consequence of an "unforeseen and unexplained failure" of the construction of the studio. See *Munshaw Colour Service Limited v. Vancouver* (1962), 38 W.W.R. 335 at 338 (S.C.C.).

[para157] Based upon the examination for discovery evidence of Mr. James Taylor of LMT, I conclude that the sound bridging was something that could have been easily avoided without cost or difficulty. Indeed, as evidenced by the photographs taken during the pouring of the wall, LMT took precautions to ensure the concrete would not fall back into its own building site. LMT could easily have taken similar precautions to ensure concrete would not fall between the walls.

[para158] The importance of the integrity of the south wall and the risk of debris falling into the internal air gap was clearly explained to the defendants' representatives prior to demolition. In the September 18, 1991 letter, a copy of which was given to Mr. Ho, those concerns were specifically referred to.

[para159] Later when Mr. Kehoe assumed his duties in early 1992, Mr. Turner reiterated these concerns to him. Mr. Kehoe's evidence was that he simply instructed those demolishing the wall not to come in contact with Pinewood's wall. No steps were taken to provide any form of buffer despite the fact the backhoe operator was manoeuvring his bucket into a 2-2 inch space from a distance of some 20 feet away. On more than one occasion, on the basis of the evidence of Mr. Kiss and Mr. Hoogenboom, violent contact was made with the south wall during the course of either demolition or construction.

[para160] The defendants are liable in negligence for the bridging that occurred both externally and internally in relation to Pinewood's south wall.

[para161] The consequence of that negligence is that initially because of the internal bridging, and then following February of 1993, because of the external bridging, sound intruded directly into Pinewood's studio disrupting recording sessions and causing the loss of productivity and reputation. The defendants are liable for damages to the plaintiff.

ADDITIONAL COMMENTS AS TO NUISANCE

[para162] Having concluded that the plaintiff's operations fall within the caveat respecting nuisance by reason of their sensitivity, it should be noted that where negligence is in issue, then the caveat has its own exception which would result in a liability in nuisance concurrent with liability in negligence. See *Grandel et al. v. Mason*, [1953] 1 S.C.R. 459.

[para163] Here, as a consequence of the negligent conduct of the defendants which resulted in the south wall being damaged and in the creation of the sound bridging, in addition to liability in negligence for foreseeable damage and loss, there is a concurrent liability in nuisance for the interference caused by the transmission of sound, whether airborne or groundborne, from the City site to the Premises. Thus, to the extent that the defendants' negligence resulted in the creation of a conduit that permitted the transmission of construction sounds into the Premises, and particularly Studio B, the defendants are liable to the plaintiff in nuisance.

[para164] As this limited liability in nuisance is concurrent with liability in negligence any damage that may have arisen under nuisance is compensated for under the tort of negligence.

TRESPASS

[para165] The plaintiff also claims a tort of trespass. Because of what I have concluded in terms of the negligence, in my opinion the claim of trespass is subsumed into the claim of negligence. Any damage that might have arisen under trespass is compensated for under the tort of negligence.

DAMAGES

[para166] The Plaintiff operated a sophisticated studio that played a significant role in post-production film work.

[para167] Much evidence was lead as to the specific films and television movies that have had their sound components recorded at Pinewood. Mr. Turner, as the alter ego of Pinewood, evidenced to me both a pride in his studio's work and an embarrassment over the consequence of the disturbance to production. While I have generally accepted his evidence in preference to that of those who sought to contradict it, I conclude that Mr. Turner is possessed of a degree of righteous indignation at the way he was treated, quite apart from the effects of the negligence of the defendants upon his operation. His voice at times was that of one crying in the wilderness as he sought to impress others, and in particular Mr. Ho, with his concerns. As he testified, he found in Mr. Kehoe a person with whom he thought he could talk about these concerns. Indeed Ledcor was fortunate to have such a person on its staff who despite the pressures in the early stages of construction attempted to accommodate Pinewood in terms of its scheduling. Regrettably, those taking Mr. Kehoe's directions did not always follow them and in the hurly burly of a construction site some of Mr. Turner's concerns went unattended.

[para168] Pinewood claims the following damages:

1. Loss of revenue; 2. Loss of future revenue; 3. Cost of repairs; 4. Cost of repairs and replacement of Pinewood equipment; 5. Expense mitigation in relation to the North Vancouver studio; 6. Aggravated, exemplary and punitive damages.

[para169] A Judge approaching this task of assessment is to be reminded of the comments by McEachern C.J.B.C. in *Begusic v. Clark, Wilson & Co.* (1991), 57 B.C.L.R. (2d) 273 at 290 (B.C.C.A.):

The assessment of damages is not a precise science; it is not even a calculation.

Elsewhere in *Begusic*, Chief Justice McEachern referred to the well known instruction of Lord Blackburn in *Livingstone v. Rawyards Coal Company* (1880), 5 App. Cas. 25 at 39 (H.L.) wherein he said the measure of damages should be:

... that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

[para170] Quite apart from the evidence of Pinewood's financial statements which I will shortly review, there are in this case two external factors which complicate the assessment of loss of revenue, both past and future.

[para171] The first is the evidence given by Mr. Tom Crowe, Manager of the Community Affairs for the B.C. Film Commission. Mr. Crowe testified that the Film Commission, in promoting film production in British Columbia, obtains from producers the amount of money spent in connection with film production in British Columbia. This is done on a voluntary basis and Mr. Crowe believes that the Commission does not necessarily know of all of the film productions. No figures are kept as to what proportion of the total film expenditures is made up of "post- production expenditures". Mr. Crowe believes that 80% of film production expenditures in British Columbia represents return business. The film production figures include feature movies, TV movies and pilot and special projects. The figures reveal a burgeoning industry in British Columbia:

1990 \$188,490,000.00 1991 \$176,014,000.00 1992 \$211,219,000.00 1993 \$285,965,000.00 1994 \$401,970,000.00

Production expenditures for 1995 to early December exceeded the 1994 figures. Additionally, Mr. Crowe testified that the advertising or commercial expenditures were not included in these figures and were reportedly in the range of \$40,000,000.00 to \$50,000,000.00 per year. [para172] The second factor was the development of other facilities which do the same work as Pinewood. In 1990, Post Modern Studios entered the field which to that point had been the almost exclusive preserve of the plaintiff. In 1991, Sharp Sound began to do similar work. Thus, beginning in 1990 competition developed.

[para173] The equipment in these studios varied. Pinewood uses analog equipment (i.e. tapes) whereas others use digital equipment (i.e. computers). From the evidence given by the various producers, including Connie Dolphin, Gary Winters and Gary Hall, the choice of equipment and, therefore, the studio appears to be as much a matter of personality as anything else.

1. PAST LOSS OF INCOME

[para174] During the period of 1986 to 1994 Pinewood's income, making allowances for rebates given and assigned to the year in which they were earned, was as follows:

1986 - \$562,172.00 1987 - \$861,675.00 1988 - \$1,053,798.00 1989 - \$1,615,232.00 1990 - \$1,516,270.00 1991 - \$1,628,661.00
1992 - \$1,079,441.00 1993 - \$1,442,121.00 1994 - \$ 953,862.00

The 1995 sales figures, net of taxes, and without any rebate adjustment was \$1,094,454.00.

[para175] The fiscal year end for Pinewood is September 30 and the evidence establishes there is often a time lag between work done and billing sent out and recorded.

[para176] The work of Pinewood was categorized as either "series" when no one was present except the staff of Pinewood or "other" when actors and producers were present. Generally, "other" work was done upon demand, often on very short notice, whereas "series" work could be scheduled at Pinewood's convenience.

[para177] I accept the evidence of Mr. Turner that quite apart from interruptions that caused Pinewood delay, as a studio run by an artist proud of its reputation, Pinewood, was reluctant to undertake work that would inevitably be interrupted resulting in the loss of credibility. I accept as well his evidence that over time bookings dropped off. While a portion of that may have been due to new competition from the other studios I conclude that a portion was a result of the gradual loss of reputation by reason of intrusion of sound in the studio and the attendant interruptions and delays.

[para178] Given the dramatic increase in the volume of expenditures in the film industry in British Columbia between 1992 and 1995 it is reasonable to conclude that a similar kind of increase in post-production expenditures would have occurred in the industry.

[para179] While some of that would inevitably go to new studios, given the early reputation of Pinewood, grudgingly acknowledged by Mr. Winters as being "better than anyone else in Vancouver" despite different technologies and the emergence of other studios, I am satisfied that Pinewood's reputation would have persisted into the 1990's. Pinewood, therefore, would have shared in that additional work. Mr. Turner testified that he expected to generate a gross income in 1992 of some \$2,000,000.00. While that, in my view, is somewhat optimistic it is not unreasonable to conclude that the income of Pinewood would continue to grow as the film industry also continued to expand.

[para180] During the period of 1991 to 1992, Cannell Film, a major client, left Pinewood for another studio. As I observed both Mr. Turner and Mr. Gary Winter, Cannell's post-production Director, it was apparent that these two men had a clash of personalities. Despite Mr. Winter's protestations that Cannell's departure was purely economic, I am satisfied on the evidence of Mr. Gary Hall who was in charge of the actual production for Cannell in Vancouver, that Pinewood was the preferred studio. I conclude that it was more a function of the personalities as opposed to production quality which led to the loss of Cannell's work. Be that as it may Pinewood's billings to Cannell dropped from \$667,500.62 in 1991 to \$21,381.42 in 1992. Yet notwithstanding such a loss, Pinewood's gross income fell by less than \$550,000.00. Thus, without the loss of Cannell, income levels for the year ending September 30, 1992 would have exceeded \$1,600,000.00. [para181] More significantly, while Pinewood had by 1993 returned closer to 1991 levels of income it was not, however, garnering any of the substantial growth that was occurring within the industry as a whole. By the September 1994 year end its income had fallen by more than a third from the previous year taking into account adjustments for rebates.

[para182] The loss of a reputation for quality does not occur immediately. Miss Tomicki testified that to mask the problems of sound intrusion, clients were, at times, told that the studio was booked when that was not the case. I am satisfied that the breach of the south wall and the internal bridging occurred in the time frame following April of 1992. It was during this period that Pinewood sought to mask its problems resulting from sound intrusion. However, the full impact of the sound intrusion on ADR production did not begin to show until some time following February 1993 when, as a result of the defendants' negligent acts, the footings and wall of the Premises and City's complex were joined.

[para183] Reputations are slowly built and, generally, if the quality of work declines reputations are slowly destroyed. [para184] Following its renovations in 1986 Pinewood's financial statements showed a steady increase in revenue as it moved into the new area of ADR. Its work was done in the presence of clients and its reputation in that field was gradually being established. Pinewood did not advertise. It relied upon word of the quality of its work being passed among those in the industry. As interruptions developed they became costly both in terms of time and the annoyance of clients. In 1993 the decline of Pinewood's reputation began. As succinctly put by plaintiff's counsel, the phone stopped ringing. It was the work done outside the presence of clients that permitted Pinewood to work around the interferences.

[para185] As a consequence of the decline in work that occurred in late 1993 and 1994, Pinewood reduced its staff. As Mr. Turner described, though Pinewood's recording work was returning to normal after July of 1994, the work did not immediately return. That began only after the middle of 1995 when, according to Mr. Turner, he was deluged with work by reason of his reduction in staff due to the decline of 1993 and 1994. Staff in this industry must be both technically and artistically competent to do the work of a studio such as Pinewood. Such staff additions do not occur overnight and it took time to redevelop the staff to handle this increase in work.

[para186] By September 30, 1995 Pinewood's gross income had increased to \$1,094,454.00 of which almost half was generated in the last three months of that fiscal year.

[para187] It costs money to earn money. The evidence is that in the years of 1989 to 1991 when there was no interruption, recording costs amounted to approximately 45.5% of gross income.

[para188] In assessing loss of past income I conclude the following:

1. Between 1991 and 1994 the film industry in British Columbia saw a 128% increase in reported expenditures.
2. Between 1990 and 1991 Pinewood's gross income increased. It fell in 1992 by reason of the loss of Cannell as a client, then increased in 1993 and then dropped by one-third in 1994. 1995 according to billings was an increase of approximately 15% over the 1994 fiscal year.
3. Despite natural fluctuations in the business no other cause can be ascribed to the decline in income levels during 1994 and 1995, as compared with the 1993 year income levels, other than a loss of business caused by the interference of Pinewood's operations. Given the offsetting factor of increased competition and the significant growth in the film industry following 1992 I find there would have been a substantial net growth in Pinewood's business had there not been the sound intrusions.
4. By September of 1995 Pinewood had rebounded to production levels consistent with 1993 but the ability to handle more work was constrained by having a reduced staff.
5. In order to meet with this increased business Pinewood would have been required to continue in its pattern of substantial technical investment which, according to the evidence of Mr. Turner, was estimated to be \$750,000.00 between 1988 and 1992 and which decreased thereafter.
6. Pinewood's overhead, including administration, apart from recording production costs, remained relatively fixed despite losses in income.

[para189] In his written argument the plaintiff's counsel postulated a multitude of scenarios as to the past and future income loss. Based upon various assumptions of growth, he argued that Pinewood's loss would continue almost indefinitely into the future. Calculations were provided to a ten year point. The evidence, however, is that Mr. Turner is the driving mind behind this enterprise and he had previously expressed a desire to retire.

[para190] As well, Pinewood had secured space for future expansion at 1111 Homer Street. This space was surrendered by reason of its financial problems due to the loss of work. Pinewood's surrender of that space was offset somewhat by its acquisition of the North Vancouver studio, but that studio was not entirely satisfactory. [para191] I have no doubt that prior to December of 1991 Pinewood had no other plans than to develop its 1111 Homer Street premise. Despite this it is apparent that the area in

which Pinewood was located was one undergoing urban development and Pinewood's leases with Grimham had a provision for a 2 year notice to vacate in the event Grimham elected to demolish the premises.

[para192] I find that Pinewood's gross income to its September 30 year end for the years of 1992 to 1995 was as follows:

1992 - \$1,079,441.00.

In this year there was no significant interference in Pinewood's work except for the loss of the Cannell work.

1993 - \$1,442,121.00.

During this year there was recovery of work from other sources with a commencement of the decline in the later part of the year due to the construction. 1994 - \$953,862.00

This was a period during which the full impact of construction upon Pinewood's ability to perform and its reputation was being felt.

1995 - \$1,094,454.00.

During this period the full impact was felt with recovery of work levels beginning by late 1995.

[para193] I am of the view that but for the negligence of the defendants the gross income of Pinewood in those same periods would have, in rounded figures and without consideration of the industry growth, developed into the following levels:

1993 - \$1,600,000.00 1994 - \$1,700,000.00 1995 - \$1,800,000.00

All of these figures are based upon September 30 year ends. [para194] By 1995 producers who had used other facilities would then be able to compare those studios with Pinewood. Some of the personalities in the industry would have changed and inevitably some of the work would have returned to Pinewood, subject to the general fluctuations that occur within this industry.

[para195] As well, I conclude that the industry would not be fully apprised of Pinewood's return to pre-1993 quality of work levels until 1995. As a consequence I conclude that much of the growth in the industry and, in particular, that 20% which according to Mr. Crowe was new work, would have bypassed Pinewood. I therefore conclude that it did not share as it should have in the growth that occurred in the film industry following 1992. I also conclude that had it so shared, it would have had the capacity to do the work and expand in an orderly manner.

[para196] Accordingly, Pinewood was left behind because of its problems and it will take time to attain the levels it would have but for these interferences.

[para197] Taking into account what I have found in terms of Pinewood's normal growth together with the effect of competition and the significant growth in the industry, which I conclude would have resulted in growth but at a lesser percentage rate than the industry figures indicate, I find that but for the negligence of the defendants Pinewood's gross income levels would have been:

1992 - \$1,079,441.00 (actual) 1993 - \$1,800,000.00 1994 - \$2,000,000.00 1995 - \$2,100,000.00

[para198] Thus there was a total past loss of gross income to September 30, 1995 of \$2,409,563.00.

[para199] In order to earn income Pinewood incurred recording costs averaging 45.5% of gross income between the years 1989 and 1991. I am of the opinion that general production costs as a percentage of gross income would have been stable during the period up to September 30, 1995. As a consequence the net past loss of income to September 30, 1995 is in the amount of \$1,313,211.90. [para200] In order to meet the demands of the increased volume of work Pinewood would have continued its policies of investing in new equipment. The evidence of Pinewood's maintenance man, Mr. Freund, was that the equipment ranged up to 15 years in age. With the age comes repair and/or replacement. The financial statements of Pinewood indicate a pattern of acquiring new production equipment. Using that as an indicator I find that in order to meet the demands of the increase of business that would have naturally occurred but for the defendants' negligence, Pinewood would have continued to invest additional money which I conclude, quite apart from the investment in the North Vancouver studio, would be in the amount of \$250,000.00. Accordingly this sum would be deducted from any income resulting in a loss up to September 30, 1995 of \$1,063,211.90.

[para201] There are contingencies in every business and one of those arises out of the fact that Mr. Turner was the alter ego of Pinewood. It is evident from his one attempt to sell the business that he was considering retirement and would have sought a role as a consultant. That would have removed Mr. Turner as a driving force behind Pinewood. While a new owner would bring a new direction that takes time to take effect. As well there are fluctuations that occur with loss and gain of clients and the loss and replacement of staff. I am of the view that a contingency discount of 10% should be applied in the circumstances and accordingly the past loss of income is set at \$956,890.80.

[para202] The loss of \$956,890.80 must be divided or apportioned to each of the three years (1993-1995) and I do so on the following basis:

1993 (30.5%) \$291,851.69 1994 (33.9%) \$324,385.98 1995 (35.6%) \$340,653.13 ----- \$956,890.80

[para203] These percentages are calculated by dividing the gross income for each year that should have been earned by the total of the gross income that should have been earned over that 3 year period.

2. FUTURE LOSS OF INCOME [para204] Counsel for Pinewood, in his submissions, put forth a further series of scenarios as to what the future loss might be following September 30, 1995. While an interesting theoretical exercise, I am satisfied that the catch-up process to which I have referred is not one which would go on indefinitely. I am satisfied that Pinewood will eventually attain the level of income that it should have attained taking into account normal growth, the effects of a rapidly expanding film industry in British Columbia and increased competition. From my observation of those members of the staff of Pinewood both past and present I am convinced that this studio is motivated to achieve high quality production. Nevertheless, Pinewood will

have to work hard to get where it should have been and to attain its fair share of that industry growth. Until that point is reached Pinewood will experience an ever decreasing loss.

[para205] That loss will continue for a short period of time as Pinewood rebuilds its staff and regains its fair share of the market that but for the negligence of the defendants it would have enjoyed. In my opinion, to attain the position in the market place that it would have had but for the events of 1992- 1994 it will take Pinewood a period of approximately four years from September 30, 1995. With each passing year the loss will decline as the capacity is filled and the work returns to Pinewood.

[para206] As mentioned by judges on many occasions, I note again that if the calculation of damages in respect of past earnings is not "a precise science" then that in respect of future loss is even less so. The calculation of future income loss is fraught with difficulties. This task simply represents the best judicial effort to place the plaintiff in the position it would have been in but for the negligence of the defendants. I find that in the four years following September 30, 1995 Pinewood, but for the negligence of the defendants, would have earned the following gross income in addition to what it will actually earn:

1996 - \$600,000.00 1997 - \$450,000.00 1998 - \$300,000.00 1999 - \$150,000.00

TOTAL - \$1,500,000.00 These figures require a discounting to present day values.

[para207] Pursuant to the provisions of B.C. Reg. 352/81 made under s. 51 of the Law and Equity Act, R.S.B.C. 1979, c. 224, a discount rate of 3.5% is applied to these future income losses. Accordingly, the present day values of these losses are set at:

Loss Present day value

1996 - \$600,000.00 \$600,000.00 1997 - \$450,000.00 \$434,782.61 1998 - \$300,000.00 \$280,053.21 1999 - \$150,000.00
\$135,291.41 ----- TOTAL \$1,500,000.00 \$1,450,127.23

[para208] From these losses must be taken production costs at 45.5% of gross income. Accordingly I conclude that the net income loss in present day values that will be suffered by Pinewood in the four years after September 30, 1995 is in the amount of \$790,319.34. [para209] I also consider it appropriate to apply a contingency with respect to future unknowns. Because the gaze into the future is less clear than into the past I consider it appropriate to apply a contingency of 15%; therefore, the present day value of future loss of net income is fixed at \$671,771.44.

3. COSTS OF REPAIRS TO PREMISES

[para210] I have already commented on the arrangement between Mr. Vassallo and Mr. Turner and the paucity of evidence as to the cost of what repairs were done and what remains to be done. It was Mr. Vassallo's evidence that the total repair cost was to be \$65,000.00 of which he believes some \$40,000.00 has already been consumed. Given Mr. Turner's evidence that Studio B now operates essentially as it did in 1991 with the exception of a minor shift of its acoustic centre, I am not satisfied that the defendants must bear Mr. Turner's estimated cost of a further \$130,000.00 to complete Studio B. That, in my opinion would not be reasonable. Turner testified that City's north wall, once properly completed, would enhance sound attenuation. If not increasing it, the wall has certainly maintained the sound attenuation levels of 1991. I do not accept on the evidence before me that such expensive repairs are necessary given the evidence of Mr. Turner and Mr. Kiss's evidence as to how Studio B and the Premises generally now function.

[para211] I do accept the evidence of Mr. Vassallo as to what was done and as to what has yet to be done. As well, I accept the evidence of Mr. Turner that in addition to Mr. Vassallo's 1994 estimate of \$65,000.00, Pinewood used staff time of a value of \$9,000.00 in effecting repairs. Given the effluxion of time since 1994 and that there will be an increase in costs to effect the necessary repairs, I fix the cost of repairs completed and to be completed at \$85,000.00 inclusive of applicable taxes. No allowance is made for interest on any unpaid sums to Mr. Vassallo.

4. COST OF REPAIRS TO EQUIPMENT

[para212] Because of my ruling with respect to nuisance I do not award any sum under this head of damages. I note that there was much conflict in the evidence as to the incidence of repairs as a consequence of the construction of the City project. The evidence of Marshall Freund, the plaintiff's maintenance man, was that he did not notice any increase in the frequency of equipment replacement or repairs after construction started. He did notice an increase in the amount of air blown dust during construction. But he testified that while this is theoretically capable of causing an increase in wear, he kept the equipment clean.

[para213] In the undated statement which Mr. Freund says he had been asked by Mr. Turner to prepare, Mr. Freund referred to the wear of tape heads and that "perhaps the increased dust was a factor." I would not, based on that evidence and that of the other staff, conclude that there was an increase in equipment wear even if liability in nuisance based on transmission of dust had been established.

[para214] As well, Pinewood was aware of the dust that would be created during the construction. Apart from the use of plastic over equipment when not in use, a greater attention to cleaning the air conditioning filters and the filters of the equipment itself would have ameliorated whatever complaints Mr. Turner had regarding dust. I do not draw from the evidence that there was any increased frequency in this activity during the construction period. The evidence also established that much of Pinewood's equipment was older. Thus, even if Pinewood had established nuisance based on the transmission of dust and an increase in equipment wear resulting from the defendants' construction, I would have denied Pinewood relief under this head based on its failure to take adequate steps to protect itself from dust.

5. NORTH SHORE STUDIO

[para215] Pinewood constructed the North Shore studio to shift some of the ADR work away from the Premises. That facility remains operational and, in turn, will serve Pinewood well as work returns to it which exceeds the limited capacity available at the Premises given the surrender of the additional space. It was designed for ADR and performed those functions in addition to Studio B. I do not conclude that there has been a loss from that, rather the creation of an asset.

6. AGGRAVATED AND PUNITIVE DAMAGES

[para216] The difference between aggravated and punitive damages is defined by Mr. Justice MacIntyre in *Vorvis v. Insurance Corporation of British Columbia* (1989), 8 D.L.R. (4th) 193 at 201-202 (S.C.C.) and followed in *Huff v. Price* (1990), 76 D.L.R. (4th) 138 at 153 (B.C.C.A.):

Aggravated damages are awarded to compensate for aggravated damage. As explained by Waddams, they take account of intangible injuries and by definition will generally augment damages assessed under the general rules relating to the assessment of damages. Aggravated damages are compensatory in nature and may only be awarded for that purpose. Punitive damages, on the other hand, are punitive in nature and may only be employed in circumstances where the conduct giving the cause for complaint is of such nature that it merits punishment.

...

Aggravated damages will frequently cover conduct which could also be the subject of punitive damages, but the role of aggravated damages remains compensatory.

[para217] As noted by the Court of Appeal in *Huff v. Price*, supra, at page 153, aggravated damages are an augmentation of compensatory damages and are awarded in circumstances of high-handedness or wilful or reckless indifference to the plaintiff's rights. Despite being compensatory, they have nothing to do with actual loss. Punitive damages are awarded to punish the defendant and set an example to others who might act in a similar manner. The conduct that gives rise to such awards must, in the words of MacIntyre J., be "harsh, vindictive, reprehensible and malicious."

[para218] I am of the opinion that the conduct of Mr. Ho, in response to Mr. Turner's expression of concerns about the importance of maintaining the structural integrity of both Pinewood's south wall and the air space behind it, was one of high-handedness. While espousing platitudes of concern, Mr. Ho never informed nor instructed his contractor, Ledcor, of Turner's concern, nor passed on Mr. Turner's correspondence. His attitude toward Mr. Turner became one of disinterest when Mr. Turner demanded that if damage was done by drilling the anchor bolts, City should bear the responsibility. Mr. Ho improperly regarded Turner to be a blackmailer.

[para219] As a consequence of the failure to communicate on the part of Mr. Ho and subsequently on the part of Mr. Johnson and Mr. Kehoe the south wall of the Premises was damaged because of the failure to take the simplest of precautions. LMT, unmindful of the need to maintain an air gap without bridging, followed what appears to be its usual practice of allowing concrete and forming material to spill over into the gap between buildings. It then covered it with pea gravel.

[para220] Prior to LMT constructing City's north wall, Mr. Kehoe was well aware of the need to maintain an air gap. He gave no instructions to LMT in this regard.

[para221] Upon Mr. Turner's discovery of the bridging Ledcor initially took steps to remove the debris. However, following Mr. Lee's less-than-correct assessment of the problem Ledcor ignored Mr. Turner's pleas that the sound was still penetrating Studio B. It was not until Pinewood cored through its own foundations to reveal more debris that Ledcor responded to Mr. Turner's concerns.

[para222] In my opinion, such conduct falls within those circumstances in which an award of aggravated damages is appropriate, as were described at page 153 in *Huff v. Price*, supra. I know of no impediment in the law to limit such damages to personal litigants. Corporate entities can also suffer humiliation and loss of self-confidence within the community in which they operate. I am of the view that such damages should be set in the amount of \$50,000.00.

[para223] In considering an award of punitive damages the following factors are to be taken into account assuming the described threshold of conduct has been passed:

1. the moral culpability of the defendant;
2. the amount of the damage award, excluding punitive damages; and
3. the profit, if any, made by the defendant from his/her wrongdoing.

See *Huff v. Price*, supra, at p. 154.

[para224] Punitive damages must not doubly compensate a plaintiff. The purpose is to punish and teach so that such conduct is not repeated.

[para225] Here there is no evidence as to the extent to which the defendants profited by their wrongful acts. Ledcor did not obtain any estimates for hand demolition of the wall. It would have taken time and manpower to hand-demolish it but I did not understand Mr. Kehoe's evidence to be that it was impossible, merely difficult.

[para226] I have earlier in these reasons concluded that the step crack occurred at the earliest during demolition. On the evidence of Mr. Kiss and Mr. Hoogenboom the studio wall was struck repeatedly. No steps were taken by Ledcor to protect against such impacts or the consequences in terms of cracking and bridging that would result.

[para227] The evidence of Mr. Taylor of LMT is that it would have cost no more to erect devices to protect spillage. The evidence is that the defendants ultimately incurred substantial expenses in removing the debris and concrete from the 6 inch space between the north and south walls.

[para228] In upholding an award for punitive damages of \$45,000.00, Mr. Justice Lambert in *Epstein v. Cressey Development Corp.* (1992), 65 B.C.L.R. (2d) 52 (B.C.C.A.) concluded at page 59 that going ahead with intentional trespass was "arrogant or high-handed conduct" on the part of the defendant developer. This conduct had two aspects. The first aspect was in not taking sufficient care before work was begun to ensure that the work could be completed without the trespass. The second was in deciding to go onto the property to stop erosion without even contacting the plaintiff.

[para229] I do not perceive the conduct of the defendants in respect of the south wall be deserving of punitive damages. The conduct of the defendants in this case is better described as negligent and reckless rather than harsh, vindictive, reprehensible and malicious. Accordingly, I make no award for punitive or exemplary damages.

7. COSTS

[para230] Counsel at the conclusion of argument requested liberty to speak to the issue of costs once judgment was rendered. They may arrange that. CLAIM FOR RENT AND COUNTERCLAIM FOR ABATEMENT

[para231] On July 14th, 1993 Pinewood's solicitor wrote to Grimham's solicitor. For reasons expressed in that letter Pinewood concluded that it could not develop the 8,000 square feet of additional space that it had been renting at 1111 Homer Street against future expansion. Pinewood wished to surrender that area and sought a rent reduction in large part because of its financial problems which it alleged arose as a result of the construction next door.

[para232] That space was surrendered and Pinewood did not make any rent payments over the next year. Pinewood and Grimham are in agreement that the amount owing as of the time of trial including interest amounts to \$299,021.33.

[para233] As against this claim, Pinewood seeks a set off by way of abatement pursuant to the terms of its lease of the Premises.

[para234] The lease by which Pinewood rented its premises contemplated its use for audio and video productions. Paragraph 11.01 of the lease provides for abatement in circumstances where damage has restricted the use of the premises and provides for an apportionment "according to the portion of the Premises which is non-usable by the lessee until such damage is repaired." Repairs in such circumstances were to be done with due diligence.

[para235] Those repairs which, in fact, were completed by Pinewood, were done in July 1994. Pinewood claims an abatement of all or some of the unpaid rent. A claim based upon quiet enjoyment was abandoned.

[para236] Pinewood points to claims in two areas of damage that it alleges resulted in the restricted use of the Premises and says further that Grimham failed to effect repairs as required. The first area of damage was the crack in Pinewood's south wall which earlier in these reasons I have concluded was most probably created during the course of demolition.

[para237] The second area of damage was the bridging of material both between City's north wall and Pinewood's south wall and between Pinewood's south wall and the interior wall of Studio B. The crack was discovered by Mr. Turner in May of 1993. Grimham's property agent was notified and Pinewood effected the repairs in July of 1994. Grimham did not effect the repairs as it took the view that this was the responsibility of Ledcor. Likewise, Grimham, once notified of the bridging, did not effect repairs. Not surprisingly it took the view that the responsibility for repair or restoration of the air gap rested with Ledcor.

[para238] For the purposes of considering the issue of abatement, I conclude that the crack and the external bridging permitted the transmission of external sounds into the Premises and the internal bridging permitted transmission of the sounds into the Studio B.

[para239] I have earlier concluded that Pinewood's operations were interrupted to the extent that loss of production and income occurred with the attendant consequences to reputation. It was only by mid-1995 that production billings returned to pre-construction levels. At no time, however, did Pinewood cease, other than momentarily, operations in the premises at 1119 Homer Street. There were disruptions and cancelled sessions but, as each of Pinewood's staff testified, they tried to work around the interference. Sometimes work was done without the client present. Often work would be done after or before construction work disturbances. But at no time did the use of the premises cease. The Premises continued to be used on a daily basis and it is for those interruptions and their consequences that the plaintiff is to be compensated by the defendants.

[para240] The test for abatement under paragraph 11 of the lease is not the same as that for negligence. Under paragraph 11 it is the restriction of use of a portion of the premises not a restriction in the amount of time that a premises can be used that triggers abatement.

[para241] I am satisfied that the abatement clause does not apply to the temporary interruptions experienced by Pinewood.

[para242] The losses of income incurred by Pinewood were not such as to deprive it of its ability to pay rent. Financial statements of Pinewood reveal that in each year substantial deductions were taken for non-cash expenses of amortization, yet Mr. Turner's reasons for not paying any rent during that one year period was on the basis of the entire premises being affected by the interruptions.

[para243] I am not satisfied that the Premises or any part of them were not useable during the period in which the rent was not paid. In addition, because Pinewood has already been compensated for its loss of income for that period it would be inappropriate to allow Pinewood's claim for abatement. In view of the fact that Pinewood's compensation is for those very interruptions caused by the cracks and bridging, Pinewood's counterclaim against Grimham for abatement is dismissed.

[para244] Grimham shall recover judgment against Pinewood in the agreed amount of \$299,021.33. It was my understanding from counsel that an agreement was reached that this was the total sum including interest due as of the commencement of this trial. Based on this understanding there will be judgment in the amount of \$299,021.33.

[para245] There shall be a further order that Pinewood pay interest pursuant to Article 6.17 on that sum from November 27, 1995 to the date of this judgment. [para246] If that sum does not include interest, interest pursuant to Article 6.17 under the lease shall commence on the 1st day of the resumption of rental payments by Pinewood to Grimham to the date of judgment. If my understanding as to the dates for the calculation of interest is not correct, counsel may speak to this issue.

[para247] As mentioned before, counsel wished to speak to the issue of costs once this judgment has been rendered and they may arrange that.

SUMMARY

[para248] Action No. C925558 Vancouver Registry Pinewood v. City Tower

1. Pinewood shall recover from the defendants damage by way of past loss of income in the amount of \$959,040.00 together with Court Order Interest as follows:

(i) on the sum of \$291,851.69 from September 30th, 1993;

(ii) on the sum of \$324,385.98 from September 30th, 1994;

(iii) on the sum of \$340,653.13 from September 30th, 1995.

2. Pinewood shall recover from the defendants damages for future loss of income in the amount of \$671,771.44.

3. Cost of past and future repairs in the amount of \$85,000.00.

4. Aggravated damages in the amount of \$50,000.00.

5. Court Order Interest on the sum of \$40,000.00, being the amount of actual repair work done from September 1st, 1994.

6. Costs may be spoken to if necessary.

SUMMARY

[para249] Action No. A933928 Vancouver Registry Grimham v. Pinewood.

1. Grimham shall recover judgment in the amount of \$299,021.33. If that sum is inclusive of interest under Article 6.17 of the Lease there shall be an order of interest under Article 6.17 from November 27, 1995 to and including the date of this judgment. If that sum does not include interest then Grimham is entitled to interest under Article 6.17 from the 1st day Pinewood recommenced the payment of rent up to and including the date of judgment. Counsel may speak to this issue if necessary.

2. Costs may be spoken to if necessary.

TAYLOR J.

CORRIGENDUM

Released December 9, 1996 Paragraph 2 of the reasons for judgment filed November 22nd, 1996, is amended by the deletion of the sentence:

"Claims against Bel Construction Ltd. ("Bel") and Pacific Blasting Demolition and Shoring Ltd. ("Pacific") have been discontinued."

and the insertion in its place of the following:

"All of the third party proceedings as between the defendants in the first action were discontinued shortly before the trial pursuant to an agreement by which all of those defendants were represented by the same counsel."

Paragraph 36 of the reasons for judgment is amended by the deletion of the name "Mr. Stanley Ho" and by the insertion of the name of "Mr. Don Ho" in its place.

TAYLOR J.

CBR# 320

The Owners, Strata Plan NW243, petitioners, and Kurt Lee Hansen and Linda Muriel McGlogan, respondents

Vancouver Registry No. C963919

British Columbia Supreme Court Vancouver, British Columbia Master Donaldson (In Chambers) Heard: August 7, 1996. Judgment: filed November 13, 1996.

Counsel: Patrick A. Williams, for the petitioners. Kurt L. Hansen, appearing on his own behalf.

[para1] MASTER DONALDSON:-- There is little dispute as to the facts in relation to this petition. The respondents are the Owners of Strata Lot 56, Strata Plan NW243, and the petitioner is the Strata Corporation, that is to say "the Owners, Strata Plan NW243".

[para2] The respondents have owned Strata Lot 56 since May 26, 1995.

[para3] The bylaws of the Strata Corporation were amended by special resolution dated the 25th of November, 1985 which includes the following provisions:

"151.1 An owner shall not

(e) do any act or permit any act to be done, or alter or permit to be altered his strata lot in any manner which will alter the exterior appearance of the structure comprising the strata lots without the consent in writing of the Strata Council;

(f) do anything or permit anything to be done on his strata lot or on the common property which will or would tend to increase the risk of fire or the rate of insurance premiums with respect thereto; (k) do or permit anything to be done that may cause damage to trees, plants, bushes, flowers or lawns and shall not place chairs, tables and other objects on the lawns and grounds so as to damage them or to prevent growth or to interfere with the cutting of the lawns or the maintenance of the grounds generally;

(w) do any act or thing or neglect or fail to do any act or thing which would render invalid any insurance and maintained by the Strata Corporation or which would increase the premium therefor."

[para4] Strata Lot 56 is a ground level strata lot and it is agreed that the Owners of Strata Lot 56 have exclusive use of common property serving as a patio. Within that area the respondents installed a hot tub sometime after June of 1995. It should be noted that the patio area is surrounded on all sides, either by a portion of the exterior wall of the building, a 6 ft. high solid fence or a 4 ft. high lattice fence/gateway. To suggest that it is open to the use of other owners of the strata plan is ludicrous. It is fully enclosed and clearly for the exclusive use of the Owners of Strata Lot 56 and any guests or invitees.

[para5] By letter dated the 2nd of June, 1995, Prudential Estates (RMD) Ltd., Property Management Division, under the signature of Steve Ellis, C.P.R.P.M., purportedly on behalf of the council of Owners Strata Plan NW243, wrote to the respondents. That letter is attached to the affidavit of Steve Ellis filed the 5th of July, 1996 as Exhibit "C". It references the "potential of disturbing noise to neighbours", a "significant question regarding the Strata Corporation's liability and insurance coverage for a hot tub" and refers to the Strata Corporation's bylaws being quite specific on the approval process required for "additions to the exterior of the strata lot". In the letter it refers to a telephone conversation Mr. Ellis states he had with Mr. Hansen, wherein he apparently advised that the hot tub could not be installed on the patio without first receiving the written approval of the Strata Council.

[para6] The hot tub is depicted in the photographs attached to the affidavit of Kurt Lee Hansen filed the 7th of August, 1996, and shows it to be a hot tub with a cedar exterior having a height of approximately 3 1/2 ft., and being square in dimension, approximately 6ft. by 6ft. It is shown to be completely within a fenced area adjacent to Strata Lot 56. Only if one stood on a small ladder and peered over the fence or looked between the slats of a lattice gate, which enclose the common property of which Strata Lot 56 has the exclusive use, would someone be able to observe the hot tub. One of the photographs shows a lock securing the cover to the hot tub. It apparently is "hard wired" to the electrical panel. This wiring was approved by the pertinent approval inspector on the 26th of October, 1995. It is mounted on 4ft. by 4ft. posts and is apparently movable, subject to the length of the wire.

[para7] In the affidavit of Mr. Ellis he states that the concerns in his letter of the 2nd of June, 1995 are "valid and real" and further states that the Strata Corporation plans to paint all the buildings this year, and "I am convinced the Strata Corporation will suffer increased costs of painting and suffer inconvenience as the result of the presence of the hot tub". He further states that "the continued presence of the hot tub unreasonably interferes with the use and enjoyment of the common property by other owners."

[para8] Mr. Hansen in his affidavit points out that there have been no noise complaints whatsoever, that there was no evidence at the hearing on the 7th of August, or prior, of any insurance risk, increased or otherwise, as a result of the placing of the hot tub.

[para9] There was no evidence at the hearing or otherwise of any increased cost or inconvenience relating to the proposed painting. There was no evidence at the hearing or in any affidavit of any attempt by others to use the area, much less that its presence, in fact, unreasonably interferes with the use and enjoyment of the common property by other owners.

[para10] On the 21st of November, 1995 a bylaw was passed which specifically excludes the installation of a hot tub. This bylaw was passed well after the hot tub was installed.

[para11] Various authorities were relied upon by counsel for the Strata Corporation in his able argument. Additionally, significant reference was made to various provisions of the Condominium Act.

[para12] I am satisfied that they are all distinguishable, in that the respondents have exclusive use of the common property, on and within which the hot tub has been placed. Its placement clearly does not bring it within the definitions of "building exterior", "walls", and is much more similar to the shed which was the subject of the decision of *Buchbinder v. Strata Plan VR2096* (1992) 65 B.C.L.R. (2d) 325.

[para13] Subsequent to the placement of the hot tub, the Strata Corporation has passed a bylaw which prohibits hot tubs. No authorities were provided which would indicate that the Strata Corporation can properly prohibit in a retroactive way the placement of a hot tub on common property which is clearly designated as being for the exclusive use of one of the strata units. No where is it indicated that the bylaws passed by Strata Counsel must be logical or, indeed, even sensible, when subjected to scrutiny after the fact. If a bylaw has been properly passed by a Strata Council it affects all members of the Strata Corporation and the Strata Council is able to take the steps it deems necessary to enforce that bylaw. I have made reference to the "background" and the purported concerns of the Strata Council, or perhaps more particularly the property manager, were referred to by both the petitioner and respondents in their material and argument. As the bylaw was passed subsequent to the placement of the hot tub I am satisfied that in the absence of authority to the contrary, the bylaw does not have retroactive effect and therefore this hot tub need not be removed by the respondents.

[para14] The petition therefore is dismissed. So far as the issue of costs are concerned, the respondents are entitled to their costs. In the usual course, the Owners of Strata Lot 56 would be required to pay a portion of the legal fees and the costs I have just ordered be incurred by the petitioners. I am satisfied that the Owners of Strata Lot 56 should not be required to bear any such fees, expenses or costs.

MASTER DONALDSON

CBR# 092

Cecelia Cook, William Cook, Donald Andersen, Janice Andersen, Walter Donald Sedman, Valerie Jean Sedman, Ronald Floyd Fjeld, Maureen Fjeld, Douglas James Tait, Isobel Reid Tait, Gino Luigi Savoia, Julio Savoia, Pamela Savoia, Shirley Hagarty, Dale Wesley McIntyre, Lois Irene McIntyre, Gilbert Thomas Wood, Betty Dawn Wood and Margaret Rose Hodson, petitioners, and The Owners, Strata Plan N-50 and Radium Valley Vacation Resort Ltd., respondents,

Vancouver Registry No. A941493

British Columbia Supreme Court Vancouver, British Columbia Huddart J. (In Chambers) Oral judgment: September 29, 1995.

Counsel: Deborah A. Satanove and Bruce E.B. Gailey, appearing on behalf of the petitioners. Richard J. Olson and Robert Lonergan, appearing on behalf of the respondent Radium Valley Vacation Resort Ltd. Walley P. Lightbody, Q.C., appearing on behalf of the respondent The Owners, Strata Plan N-50.

[para1] HUDDART J. (orally):-- The petitioners seek the appointment of an administrator of the respondent strata corporation under Section 71 of the Condominium Act and a forensic audit of the books of account of the strata corporation to determine the cause of and the responsibility for the substantial accumulated deficit of the strata corporation. In support they provide a great many affidavits, most of which explain the petitioners' concerns and suggest reasons for them. Responding affidavits also contain largely opinion.

[para2] Three documents are really helpful. the report of Touche Ross to the Strata Council dated August 5, 1994, the report of Strataco Management Ltd. to this court filed on March 31, 1995, and the plan of action in response to those reports approved by the Strata Council on July 8, 1995. Those documents show clearly that Radium Valley Vacation Resort Ltd. has made many serious mistakes in its management of the strata corporation under its contract to perform virtually all the duties of the Strata Council. They also establish that the management company has had difficulty in distinguishing its obligations as agent for the Strata Council from its obligations under agreements related to time-shared lots.

[para3] It is not clear whether the latter obligations derive from an agreement with its parent company, Radium Valley Leisure Park Estates Ltd., as lessor of the time-shared lots for recreational vehicles and motorhomes or from agreements with the two associations of lessees. For the purposes of this motion I need not concern myself with the precise nature of those relationships. Radium Valley Vacation Resort Ltd. is the de facto manager of the time-shared lots and the wholly owned subsidiary of the owner of those lots, Radium Valley Leisure Park Estates Ltd. In that relationship between developer and manager fully disclosed to the purchasers of strata lots lies the root of some of the concerns of the petitioners. In the differing visions of the petitioners and the developer for the future of the park lies the root of the other concerns. Both sides have supporters among strata lot owners and lessees of time-shared lots.

[para4] The struggle between competing groups in the strata corporation goes back at least to 1989. This application is only the latest in the series of expensive battles. It is unlikely to be the last before the parties run out of money. The fundamental difference in vision will be fought out in the companion proceeding between some home owners and the developer over the use of vacant land adjacent to the home owners' area of the strata corporation's total area.

[para5] The respondent developer wants this petition to be converted to a trial to be heard together with that action.

[para6] This court has intervened on at least six previous occasions. An attempted arbitration has failed. Meanwhile the strata corporation has suffered an accumulated operating deficit of about \$400,000. Until the Strata Council commissioned the review by Touche Ross nothing seems to have been done to deal with it, other than a modest per capita assessment in 1991 that may not have been lawful. The budgeting process has been hopelessly inadequate. The evidence gives no reason to conclude that the process will succeed for the coming year. The external accountants were of little assistance.

[para7] Volunteer members of the Strata Council including some of the petitioners have come and gone. Today there are six members on the Strata Council, two representing the home owners and their 59 lots, one representing the vacation home owners' 10 lots, and three the recreational vehicle owners' 11 lots. On an earlier application Mr. Justice Meredith doubted the legality of such a division given the absence of separate sections in the Constitution of the Strata Corporation.

[para8] After the receipt of the Strataco report ordered under Rule 32 by Mr. Justice Meredith the Strata Council, under what appears to have been the competent direction of Dexter Lindsay, prepared and distributed an action plan entitled "New Directions 95". That document demonstrates that the Strata Council had recognized the problems and was determined to solve them. Unfortunately they failed to take account of the concerns of the petitioners about the management company's loyalty to its principal, the Strata Corporation.

[para9] That plan contained two owners' resolutions that were unacceptable to the petitioners, firstly, a resolution authorizing an assessment to be paid to the management company as trustee for the developer and the lessee associations as their interests might appear, rather than to the Strata Corporation and, secondly, a resolution approving the 1994 financial statements. The plaintiffs obtained an injunction from Madam Justice Allen to prevent any resolution authorizing payment of any assessment to the management company and/or a resolution approving the financial statement.

[para10] The hearing of this petition was adjourned pending an extraordinary general meeting to be held on or before August 5, 1995. At that meeting the strata council was unable to obtain a seconder for its resolution to terminate the management contract in accordance with its terms, and was able to obtain approval for an assessment only sufficient to pay third parties. So the democratic process in which the Strata Council had vested confidence failed for reasons the evidence does not reveal beyond the differences between the two groups. [para11] The evidence does not give me confidence that the best efforts of the Strata Council will produce any better result at the annual general meeting to be held on November 25 at Radium. Meanwhile Mr. Lindsay had resigned and Valerie Davis, the principal of the developer and of the management company has become chair of the Strata Council. Indeed that happened before the extraordinary general meeting which she chaired.

[para12] Demonstrated inability to manage is sufficient cause for the appointment of an administrator. The only problem is that of cost. To date the Strata Corporation has become liable for \$101,000 for the professional fees of Touche, Ross, Strataco, and Connell Lightbody.

[para13] Ms Satanove says the time has come to stop the accumulation of legal costs, to appoint an administrator, to give the Strata Corporation the opportunity to be reorganized by a professional, and to pay the \$50,000 that the administrator will charge. The Strata Council asks for one more chance, the annual general meeting. The developer agrees, but says that if an administrator is appointed the administrator should be for a limited term and with limited powers.

[para14] The plaintiffs say that anything less than an administrator with the full powers of a Strata Corporation for one year will not work. I do not agree. I have decided that only the appointment of an administrator has any hope of bringing order to the affairs of the Strata Corporation, but I do not think that the democratic government of the community should be over-ridden entirely by this court. The developer owns or controls 27 of the home lots and the 80 time-shared lots, subject to its agreement as lessor with the lessees of the time-share units. Because the developer does not have confidence in Strataco's objectivity and for reason, in my view, having reviewed the report, I will not appoint Strataco as the administrator.

[para15] If counsel cannot agree on which of the other two management companies proposed by the petitioners should be appointed I will insert one of them arbitrarily into the order. If counsel cannot agree on the remuneration for the administrator I will fix the remuneration on the basis of written submissions presented with the orders proposed by each party.

[para16] The administrator will have all the powers and responsibilities of the Strata Council until January 31, 1996, but none of the powers of the Strata Corporation, that is of the owners. It will have liberty to apply for directions and further powers on two days' notice to counsel for those represented on this hearing. I anticipate that in the course of carrying out its duties the administrator will consult the Strata Council and its committees. On or before January 31 the administrator is to report to this court with such recommendations as it sees fit to make for the continued governance of the Strata Council and the Strata Corporation.

[para17] To assist the administrator and the parties at the least expense to all, I will hear any motions in this proceeding pending the receipt of that report. In this way I hope to relieve the concern of the petitioners that the court's partial solutions will continue to fail. I will not direct a financial audit at this time. Undoubtedly the administrator will take such steps as it considers appropriate to deal with such claims as the Strata Corporation may have against others and such claims as others may have against the Strata Corporation. I appreciate that counsel may have some questions or some comments.

HUDDART J.

CBR# 171

Ian Donaghy Macdonald and Shirley Ann Macdonald, Claimants, and Charles William McKay Burge and Elizabeth Burge, Defendants

Vancouver Registry No. A950508

British Columbia Supreme Court Vancouver, British Columbia Holmes J. Heard: June 30, 1995. Judgment: filed July 6, 1995.

On his own behalf and for Shirley Ann Macdonald, Claimants: I.A. Macdonald. Counsel for the Defendant: P. Shier.

[para1] HOLMES J.:-- This is an appeal from a decision of Judge Rodgers of the Provincial Court of British Columbia awarding damages to the claimants Macdonald against the defendants Burge.

[para2] The appeal was by way of trial de novo in this Court.

[para3] The Macdonalds claim damages against the Burges of \$3,848.46. The claim represents the amount they paid as "special assessment for repairs" as owners of one of 113 strata units, contained in five residential buildings, within a condominium complex in West Vancouver known as Strata VR 510.

[para4] The Macdonalds purchased their strata unit from the Burges under an Agreement for Sale of January 18, 1992 and took possession May 1, 1992. They claim the Burges negligently misrepresented a known future liability for repair costs and failed to disclose latent defects in the Strata Corporation buildings known to them.

[para5] The Macdonalds never met the Burges prior to the offer and acceptance as recorded by the Agreement for Sale of January 18, 1992. Mr. Macdonald thought they had on one occasion but on the evidence of other witnesses I find he was mistaken.

[para6] Some history is required for an understanding of what gave rise to the Macdonald's claims. Mr. Burge was the Chair of the Maintenance and Repair Committee of the Strata Council. His committee determined that extensive repair work was required to the five residential buildings comprising the complex. They were 14 years old, and repair costs were in excess of \$150,000 a year. His committee proposed the building be upgraded to resolve continuing repair and maintenance problems and that the substantial monies required be borrowed and repaid by special assessment on the strata owners.

[para7] The proposal was presented to the October 30, 1991 Annual General Meeting of owners and the Special Resolutions required for implementation were defeated.

[para8] The Burges listed their unit for sale in January 1992. The listing agent was Mr. Jordy Higgins, a well qualified and experienced realtor.

[para9] Mr. Burge appreciated the repair and maintenance issues, and its future financial consequence to owners, was of importance to prospective purchasers. He provided Ms. Higgins with a copy of the 1991 Annual General Meeting Minutes which outline the problem, the solution proposed, and recorded the defeat of the necessary Resolutions to implement the proposal suggested by Mr. Burge's committee.

[para10] Ms. Higgins included the following caution in the Fact Sheet on the unit prepared for circulation to prospective purchasers:

See L.S. re special assessment for maintenance.

[para11] Following defeat of the proposal advanced by Ms. Burge's committee at the 1991 Annual General Meeting the Strata Council pursued an alternative plan which involved proceeding with repairs to only one of the five buildings and then use that experience to test the repair technique proposed, its effectiveness, and determine the cost of proceeding to repair all buildings. The building chosen for this project was the one containing the Burge unit.

[para12] An Extraordinary General Meeting was held January 16, 1992 and a Special Resolution to implement the project, at a cost not to exceed \$90,000, was approved. It was to be funded by two special assessments of the owners, the first in February 1992, the second in May 1992. These two assessments in respect of the Burge unit totalled approximately \$800. Mr. Burge advised the Macdonalds he would pay these assessments, and he did.

[para13] The Macdonalds viewed the subject strata unit in the afternoon of January 18, 1992 in the company of their realtor, Ms. Hassam. Ms. Higgins testified on that occasion she spoke to the three of them and in the context of explaining evident leaks and repair problems with the Burge unit told them of the background to the repair and maintenance problems in the complex, the proposal that had been put forward by Mr. Burge's committee, and the rejection of it by the owners.

[para14] Ms. Higgins said she read them the gist of the Resolutions from the Annual General Meeting of October 30, 1991 Minutes, explained the differences between the "A" and "B" Resolutions proposed, and the fact of their defeat.

[para15] Copies of the Minutes were not given to the Macdonalds nor Ms. Hassam at that time as they were just viewing the unit and had made no commitment of purchase.

[para16] Ms. Higgins said she told the Macdonalds of the modified plan to repair the one building and its acceptance at the meeting of January 16, 1992 by Special Resolution vote approval. She told them Mr. Burge would be paying the required special assessments of February and May 1992 called for by that Special Resolution.

[para17] The Macdonalds decided very quickly they wished to purchase the unit and the Agreement for Sale was prepared by Ms. Hassam for presentation to the Burges. It is of consequence that the only conditions on the offer were:

Purchaser receiving and perusing and being satisfied with the By-Laws and Financial Statements of the Strata Corporation by January 19, 1992.

An addendum was added to the Agreement for Sale confirming:

Vendors will pay special assessment fees due in February 1992 and May 1992.

[para18] Ms. Hassam on behalf of the Macdonalds met in the evening of January 18, 1992 with Ms. Higgins and the Burges to present the offer to purchase.

[para19] Ms. Higgins testified there was again a full discussion at this time as to what had transpired at the October 30, 1991 Annual General Meeting regarding repair work, the fact it had been turned down, and the new plan proceeding in respect of only the one building. Mr. Burge had his complete file on the table where they sat discussing the matter. The file contained notices, minutes of meetings, statements, and his complete file from the Repair and Maintenance committee in a large three ring binder. Ms. Higgins explained the matter and Mr. Burge was there to answer questions and supply detail or documents he had, but none were requested by Ms. Hassam apart from the By-Laws and Financial Statements referred to in the Agreement for Sale.

[para20] Ms. Hassam does not recall discussion about the repair issue, but agreed it was possibly discussed. I accept there was a discussion as recalled by Ms. Higgins and Mr. Burge.

[para21] Mr. Hassam appeared not to believe she would fail to take any documents offered and give them to the Macdonalds. The evidence was not that she was offered a bundle of documents and declined to take them, but that a discussion about the repair problem was held, and she could have any documents Mr. Burge had regarding the matter upon request. The evidence is she did not request any documents or further information.

[para22] It appears Mr. Macdonald did not understand for a considerable period of time after his purchase the basic process of how the Strata Corporation would raise funds needed for repairs to Strata property. In particular it seems he did not appreciate that all strata owners contributed proportionately to the costs incurred. Mr. Macdonald appears to have been under the fundamental misconception that each building was a separate entity for purposes of assessment for repair. It is difficult to understand how he could have this misconception in view of the building in which he was an owner having \$90,000 of improvement work done with each owner only being assessed approximately \$800.

[para23] His initial reaction however when he learned that he was to be assessed for the future repair work to be undertaken on the remaining four buildings in the complex confirms his belief he was not to be assessed for any of that work as Mr. Burge had paid the assessment for his building. He must have realized his fundamental misconception had he looked at any of the materials concerning the repair work distributed to owners in advance of meetings to vote approval, which I am satisfied he received as it was mailed to all strata owners.

[para24] I conclude Mr. Macdonald's misunderstanding as to his liability as owner for future repair costs to all buildings comprising the Strata Corporation was not the result of any misrepresentation by the Burges or Ms. Higgins. It may well be however that his lack of basic knowledge as to the operation of the Strata Corporation in raising funds for future repair resulted in his not appreciating the significance of what Ms. Higgins outlined as to the status of the repair issue.

[para25] I accept the evidence of Mr. Burge and Ms. Higgins that the Macdonalds and their agent Ms. Hassam were advised of the incipient problem faced by the Strata owners as a result of the rejection of the October 30, 1991 Resolutions containing Mr. Burge's committee recommendations.

[para26] I further accept that all relevant documents that would provide any detail a purchaser might wish were offered by Ms. Higgins and Mr. Burge to Ms. Hassam upon request. In addition documents concerning the repair issue and assessments were readily available upon request from the Strata Corporation office.

[para27] The evidence does not support Mr. Burge having misrepresented anything material to the repair issue. The information he gave was accurate, no relevant information was withheld deliberately or negligently. Nothing was hidden. Indeed Mr. Burge went to great lengths in respect to the repair issue to place it clearly before all the owners so they had information on which to make their decisions.

[para28] There was no reliance, to their detriment, by the Macdonalds on any statement the Burges or Ms. Higgins made.

[para29] The allegation of non-disclosure of a latent defect known by the seller Mr. Burge is misconceived in the context of this matter. It is not a listing of the myriad of defects in the five strata corporation buildings which is at issue. The issue is the communication, or lack thereof, that there was a serious problem of deferred repairs and maintenance, which would require remedy sometime in the future, and would then be of substantial expense.

[para30] I have found that "information" was not "latent", nor could it be considered a "defect" in this matter. The information was communicated, documents were offered and readily available for detail if requested from Mr. Burge, or by minimal diligence from the Strata Corporation itself.

[para31] The claimants Macdonald have not proven their claims, the action is dismissed. The defendants Burge are entitled to payment out of Court of security posted for the appeal and the judgment below. The defendants Burge are also entitled to their taxable costs on appeal.

HOLMES J.

CBR# 319

The Owners, Strata Plan NW 498, Plaintiff, and Edwin Janzen doing business under the firm name and style of Janzen Roofing and the said Edwin Janzen, and Tania Maria Janzen, Defendants

Vancouver Registry No. A921983

British Columbia Supreme Court Vancouver, British Columbia Maczko J. Heard: May 24 - 27, 1994. Judgment: filed September 15, 1994.

[para1] MACZKO J.-- The plaintiff is a strata corporation with a condominium complex in Richmond. The plaintiff contracted with the defendant that the defendant would put a new roof on one of the buildings in the complex. The roof was completed by 1988 and by 1991 it had failed and water began to leak into some of the apartments below. The defendant refused to repair or replace the roof and this is an action for damages for breach of contract.

[para2] The roof is a single membrane system which involved the nailing of fibreboard to the existing tar and gravel roof and the placement of a single-ply membrane on top of the fibreboard. The membrane was torched and sealed along the edges and around various metal boxes on the roof but the main portion of the membrane was not fastened with an adhesive. The method is called "loose laid" as the membrane simply lies on the fibreboard. The membrane is laid in strips and nailed along the edge and the next piece is torched to the previous piece with a 4 inch overlap. No gravel was placed on top of the membrane.

[para3] The plaintiff summarizes its claim as follows:

(a) that the Plaintiff relied upon the Defendant for the design and installation of the new roof to Building A, which design was faulty and led to premature failure of the roofing system he installed, such that he is liable to the Plaintiff for breach of contract and in negligence;

(b) that the contract between the Plaintiff and the Defendant required the Defendant to install the new roof in accordance with manufacturer's specifications, which the Defendant failed to do;

(c) that the contract between the Plaintiff and the Defendant included various terms by implication, such as the design of the new roof would be reasonably fit and suitable for the purpose it was supplied, namely, a flat waterproof roof, that the work would be carried out with reasonable care and skill, and the roof would be constructed in a good workmanlike manner with proper installation techniques and materials, which the Defendant also failed to do;

(d) that the contract between the Plaintiff and the Defendant contained an express guarantee that the new roof would be maintenance free and leak-proof for ten years following installation, which guarantee has been breached by the premature failure of this roof;

(e) that the specific deficiencies of the new roof included a lack of compliance with the manufacturer's specifications for the membrane being installed (.e.g. failure to utilize a two-ply system where indicated, failure to utilize ballast or torch down the entire membrane, failure to use a base sheet, failure to torch around fire or perimeter walls), use of unsoldered vents, and insufficient insulation above existing tar and gravel roof causing condensation within the roofing system.

I find that the plaintiff's claim has been made out in every respect.

Contract Formation

[para4] The defendant argued that the plaintiff has not proved that there was a contract between the plaintiff and the defendant.

[para5] I find that a contract was formed and the evidence of that is overwhelming. The defendant gave a quote for doing the roof. On June 16, 1988, the strata council accepted the quote. That acceptance must have been communicated to the defendant because he started and completed the work and provided a guarantee.

Breach of Contract

[para6] I have been convinced by the evidence that it is bad practice to put a new roof over an old roof and that an old roof should be stripped off before a new roof is installed. The defendant said that he gave the owners two options at different prices. One involved going over the old roof and the other involved stripping off the old roof and putting on a new one. He said the owners chose the cheaper option.

[para7] The defendant gave no advice to the plaintiff regarding the cheaper option, i.e., putting a new roof over the old one is a bad practice and may create problems. In my view he should have given that advice. If he did not know it was bad practice then he should have, and if he simply does not agree with that position then his opinion does not conform to what I find to be the standard in the industry. Even if he thinks that going over an old roof is an acceptable option, he should have informed the owners of the other view and the risks which are generally accepted in the industry so that the plaintiff could make an informed choice. I find that the defendant was negligent in that respect.

[para8] The defendant pointed to three possible causes for the leaks. They are:

1. there may have been a leak in one or more of the valve boxes which put water into the boxes and then leaked under the membrane;

2. there was a snow build-up which caused snow to be blown under and up the caps on the vents and then melted with the result that water flowed under the membrane;

3. water came from the side of the roof from under the mansards which must have leaked.

None of these theories had any credible support in the evidence.

[para9] Based on the extent of the water damage, it seems improbable to me that sufficient water could come from the snow theory or from the mansard theory. A leakage in the valve boxes could cause enough water to discharge; however, there is no evidence that that ever happened other than the suggestions made by Mr. Turner, a former janitor. I do not accept his evidence on that point. He was clearly hostile to the strata corporation because he was fired for disloyalty and misconduct. His evidence was contradicted by others in significant respects and I accept the evidence of those other witnesses.

[para10] In any event it is the defendant's obligation to provide what he contracted to provide which is a roof fit for the purpose. Here he contracted to provide a roof and gave a 10 year guarantee in the following terms:

There is a 10 year guarantee on the installation of 4MM 100 percent Polyester Granulato Roofing System on 10160 Ryon Road, Richmond, B.C. completed on the 18th of July, 1988 by Janzen Roofing.

Due to the slowness of Dibiten Canada, the 10 year warantee [sic] has not yet arrived. In order to satisfy you, I sent a warantee [sic] of another customer as a sample. An identical is being issued to the above address.

[para11] After problems in the roof appeared and the defendant was contacted, he backed up his guarantee by stating "this guarantee will be honoured if there is a problem with the roof." This comment was recorded in the minutes of the strata council dated May 15, 1991. The comment purports to record a discussion between the defendant Mr. Janzen and Mr. Ellis, the property manager at that time.

[para12] The defendant takes the position that the roof has not failed and that the moisture problems and leaks that were experienced were not caused by failure of the roof system. Having heard the defendant's and the plaintiff's explanations for the possible cause of the leaks, I have concluded that the plaintiff's explanation for the leaks is far more likely. The extent of the moisture under the new membrane covered approximately 1,000 sq. ft. according to the defendant. I do not believe his explanation for the leaks could have caused such extensive damage. It is far more likely that the leaks occurred somewhere in the roof system as suggested by the plaintiff's experts and I accept the evidence of the plaintiff's experts.

[para13] One likely cause is that the metal vent boxes were not all soldered on the verticle seam. Mr. Janzen said that they were all soldered; however, two independent inspectors gave evidence that they inspected the roof vents and they saw a number of roof vents that were not soldered on the verticle seam. Mr. Janzen said they were not telling the truth. I accept the evidence of the plaintiff's experts. They had no reason to lie and I do not see how they could have been mistaken in saying what they actually saw. These men were experts specifically trained to inspect and look for the types of problems they described. I do not believe they could look at a vent and not be able to tell whether or not it had been soldered.

[para14] We also had the evidence of Mr. Turner, the former janitor at the strata complex. In spite of his obvious hostility to the plaintiff, he said that after moisture started dripping into the suites he went on to the roof and he said he could see pin holes in the vents and he could see water running into it. He said he coated six of the vents with tar which stopped the water from coming into the suites right away. Based on the evidence I have heard, those unsoldered vents were capable of causing the leaks as described. However, there were a number of other problems which might have caused the leaks as well.

[para15] The defendant used a single ply roofing system and the membrane material was purchased from Dibiten. The company produces a manual which instructs roofers on how the product should be applied. Dibiten also stipulates that the failure to follow the specifications will void the warranty. The defendant failed to follow the instructions in a number of respects: X4&1. The specifications provided that the Dibiten

membrane should be torched down so that all parts of the membrane are bonded to the surface below or, as an alternative, the membrane can be loose laid but, if that method is used the membrane must be ballasted by laying down gravel at a rate of 1,000 lbs per 100 sq. ft. The defendant followed neither of these procedures. He followed the procedure of loose laying the membrane in strips and overlapping the edges by 4 inches. The bottom strip was nailed and the top strip was torch bonded to the layer strip but only to the extent of the 4 inches. The Dibiten specifications do not provide for this procedure. The defendant said that he had attended a seminar in 1983 put on by Dibiten. He said he was told that the loose laid method which he used was acceptable, but this was not in the manual. I find his explanation improbable and there was no evidence from Dibiten to support his contention.

2. The specifications provided that a fibreglass sheet should be laid down before laying the membrane so that the membrane can be bonded to it. This was not done.

3. The specifications provided that two-ply membrane should be used on flashings. This was not done.

4. The specifications provided that on vents two-ply flashing should be used with a 6 inch overlap of Dibiten. This was not done.

5. All stacks and vents require two-ply flashing. This was not done. The specifications even provided drawings on how the two-ply flashing should be applied. The procedure was not followed.

6. The specifications describe in detail and show a diagram on how firewalls should be treated. Two-ply membrane should be applied with the membrane going over the top of one wall of the firewall and torched down. The defendant used only one-ply, brought the membrane only to the top edge of the firewall and nailed it. It was not torched down.

There are other respects in which the specifications were not followed. However, I have listed enough of them to illustrate that the defendant did not follow proper procedures and he did not do a good job. [para16] On my reading of the warranty conditions, Dibiten would be within its legal rights to deny the warranty because its product was improperly applied. Indeed, a warranty has never been supplied by Dibiten for the roof in question.

[para17] The defendant acknowledged that the purpose of the various specifications to which I have just referred is to ensure as far as possible that a roof will be waterproof. The defendant expressed the view that they were, in his opinion, not necessary. I reject his view. It is important to an owner to obtain a manufacturer's warranty. The roof must follow the specifications to get that warranty. Failure to follow the specifications and the failure to obtain the manufacturer's warranty is, in my view, a fundamental breach of this contract.

[para18] However, apart from the breach and apart from the specifications, I find that the defendant did not follow sound roofing practices as described by the plaintiff's experts, one of whom said that as an inspector he would not have approved this roof as

applied by the defendant. The roof is showing a number of problems. The system is deteriorating rapidly and will cause problems inside the building with rotting wood if it is not repaired.

[para19] On January 9, 1992, the defendant acknowledged to the chairperson of the strata council that the roof system had failed and needed to be replaced. This acknowledgment was confirmed in a letter written to the defendant. The membrane is stretching and bridging over corners so that if anyone stepped on it it would break. Nails are pushing up from the fibreboard and pushing up the membrane. No stripping was used on vents and this is considered to be bad practice and did not conform to the specifications provided by Dibiten. Stripping means that the flange of the metal vent box is placed on top of the membrane and then a second piece of membrane is laid on top of the flange and brought up the side of the metal vents and torched on.

The Warranty

[para20] The defendant said that he hand-delivered a conditional 10 year warranty to Century 21, the property managers for the plaintiff, on or about August 15, 1988, a month or so after the roofing job was completed. Mr. Morrison, the property manager at that time, said he never saw the conditional warranty until the litigation started. His evidence is supported by the fact that after it is alleged that the conditional warranty was delivered, he wrote to the defendant asking for the guarantee. He said the only document he received was a letter of October 19, 1988, which set out the terms of the guarantee referred to on page 5 of this judgment. It would seem very odd that Mr. Morrison should be asking for the guarantee if the warranty had already been received.

[para21] The defendant said he worked out of his home and his home was his business address. The document which purports to be the conditional warranty is dated August 15, 1988, and shows the defendant's address as 157th Avenue, Surrey. However, the October 19th guarantee shows the defendant's address as 108th Avenue, Surrey. The defendant did not move from 108th Avenue to 157th Avenue until November 1989. The defendant's explanation was that he was using two addresses and had two sets of stationery in 1988. One was on 108th Avenue where he was living and the other was 157th Avenue to where he moved in October, 1989. He said he was using the 157th address for two years and that it was the address of a friend and he subsequently bought the house on 157th Avenue from this friend. When asked to give his friend's name he said the person's name was Tim and his last name was a dutch name but that's all he could say at that time. The following day of the trial I asked the defendant some further questions about the discrepancy in the addresses and this time he said that he purchased the property from a Chinese couple and the name of his friend was Eddy Sunset. I do not accept his explanation.

[para22] The only rational conclusion I can reach is that the so-called 10 year conditional warranty was fabricated for the purposes of this action. I reject his explanation for the conditional warranty and I find that the defendant is bound by the guarantee provided on October 19, 1988.

[para23] A similar problem arose with regard to the quotations given by the defendant. He claims that he gave two options, one with the old roof being torn off and one without and that the plaintiff chose the cheaper option. Both quotes were dated July 29, 1988. However, one quote was on the 157th Avenue letterhead and the other was on the 108th Avenue letterhead. I do not accept his explanation for these documents and I find that the defendant is not a credible witness.

[para24] After problems with the roof appeared, there was a series of meetings which included different people at different times in which the parties attempted to discover the cause of the leaks. The meetings culminated in an agreement that an independent expert would be appointed to assess the problem and the defendant agreed to be bound by his findings. This agreement was confirmed in a letter from Mr. Ellis to Mr. Janzen on June 24, 1991. The letter stated "It was further understood that you would accept the findings of the inspector during review of the cut tests". At discovery Mr. Janzen said he had never seen the letter before. However, at trial he said that he contacted Mr. Ellis after he received the letter and informed him that he did not agree with that statement in the letter. During cross-examination he agreed that his statement on discovery was not true.

[para25] Mr. Weldon, an expert and an inspector from Acqua-Thermal Consultants Ltd., was selected and he prepared a report. The defendant then refused to accept the findings of Mr. Weldon and the problems with the roof remained unresolved. [para26] Another example of the defendant's lack of credibility was with regard to the cut tests that were performed by Acqua-Thermal. During his examination in chief, the defendant claimed that he recalled the day the tests were performed and meeting Mr. Weldon on that day, and he claimed to relate the substance of the discussion that he had with Mr. Weldon at that time. However, at his discovery he denied ever meeting Mr. Weldon on the roof or anyone from that firm. When the obvious discrepancy was put to the defendant he said "I do remember that we did cut tests but I don't specifically remember with whom I was up there." Again, I do not accept his evidence on this point.

[para27] I find that the defendant has breached his contract with the plaintiff to supply a roofing system which was fit for the purpose and I find that the defendant has not fulfilled his 10 year guarantee. The roof failed in less than 3 years and the defendant has made no attempt to rectify the problem.

[para28] The plaintiff claims \$51,146 as damages which is the cost of a new two-ply roof, and the cost of inspection \$1,070. If I awarded the amount claimed, the plaintiff would receive a new roof which was better than the one for which it had contracted. The contract with the defendant provided that the old roof would not be torn off and this meant a lower price. If I awarded \$51,146, the old roof would be torn off. The plaintiff is only entitled to what it lost. In this case the plaintiff spent \$37,550 on the roof and \$1,070 for inspections and I award damages in those amounts.

MACZKO J.

CBR# 203

Joan Morrison, Claimant, and Eddie Yan and New World Realty Ltd., Defendants

Vancouver Registry: No. 92-10210

British Columbia Provincial Court Vancouver, British Columbia Martinson Prov. Ct. J. Heard: March 2 and 16, 1994. Judgment: April 8, 1994.

Counsel for the Claimant: J. Anderson. Counsel for the Defendant: J. Clee and B. Nelson.

[para1] MARTINSON PROV. CT. J.:-- This is a claim by Joan Morrison for negligent misrepresentation with respect to her offer to purchase a condominium unit in downtown Vancouver. She states that Eddie Yan represented to her that the unit had a storage locker and that she relied on that representation. She did not close and lost her deposit. She is claiming the return of that \$5,000.00 deposit. The Defendants acknowledge that there was not a storage area but say that no such representation was made. Alternatively, they argue that even if there was, there was not reliance on it.

[para2] The issues to be determined are:

1. Was there a representation that there was a storage locker? 2. If there was, was reliance placed on it?

THE EVIDENCE:

[para3] The unit in question is a 450 square feet bachelor apartment but has a balcony that Ms. Morrison planned to enclose. It also had access to a private patio area. Ms. Morrison testified that it was small but she felt that she could close in the balcony and it would be fine. She said that while she and her realtor, Agnieska Hedller, were being shown the unit by Mr. Yan, she asked him about a storage locker because there was only one closet. She said he took them down where the cars are. They went to a door and he put a key in and said it was the wrong key. He said "I must have the wrong key, this is the storage room. This is the storage area." He said it was the usual apartment size. She learned that she might not be able to enclose the balcony and the storage became vitally important to store things like vacuum cleaners in.

[para4] A concern arose about leakage. She felt there was a water leakage problem. Mr. Lau, who owns the unit, said there was a small mark but he has never had any problem with leakage. Ms. Kowalski, the manager, said that there is no problem on the side of the building that this unit is on.

[para5] During the course of her discussions with Ms. Kowalski, Ms. Morrison discovered that there was no storage space. She decided to not go through with the deal. She said that Ms. Hedller recommended that she not proceed.

[para6] Ms. Morrison agreed that she did not make the offer subject to confirmation that there was a storage area and made no effort to actually see it. She said she "regrets that very much".

[para7] Ms. Hedller testified on behalf of Ms. Morrison. She said the question of a storage locker was not raised in the unit but she said they went downstairs. There was a door and Mr. Yan said it should be a locker. He tried the key and it wouldn't open. He did not say anything else. She never confirmed that there was a storage locker. She was asked if she would have included it in the offer and she said "of course".

[para8] Ms. Hedller said she did not advise Ms. Morrison to rescind the contract. She also said that Ms. Morrison would have preferred a storage locker but it was not included in her request. She did not say she needed a storage locker before she made the offer.

[para9] Mr. Yan said that the property was listed in September 1991. He had been in it several times and noticed no water problem. On December 7th he showed the unit to Ms. Morrison and Ms. Hedller. He said the viewing took about thirty minutes. There was no discussion about a storage area in the unit. They went downstairs to look at the common facilities. He was not asked about storage.

[para10] He said they looked at the parking facility and laundry facilities. There were two other doors and he did not know what they were. He used the common key. Ms. Morrison asked if it was a storage locker. He said he did not know and "would have to get back to her to confirm". If there was one it might be there but he didn't know if there was one.

[para11] He said that early the next morning Ms. Hedller called to say that she had an offer to present. Neither Ms. Morrison nor Ms. Hedller asked about the storage facility. He had not had time to check it out. There was no further conversation about it before the contract of purchase and sale was signed. He provided, as required, copies of the strata corporation by-laws and financial statements. He said they do not show storage units. He agreed in cross-examination that storage areas are shown on the strata plans but said they do not indicate that they relate to individual units.

[para12] He later learned that Ms. Morrison did not want to complete because of a water leakage problem. He said there was no evidence of such a problem. There was one small brown mark on one of the walls. They offered to solve the problem if there was a problem but she was not interested.

WAS THERE A REPRESENTATION THAT THERE WAS A STORAGE LOCKER?

The Claimants position:

[para13] I was referred to two cases: Maddocks v. Garneau B.C.S.C. July 2, 1986, New Westminster Registry No. C841013 [1986] B.C.J. No. 2734; and Pellatt and Pellatt v. Collis et al. B.C.S.C. November 16, 1984, Penticton Registry No. 343 P 81. In the Pellatt case Mr. Justice Locke considered the nature of the duty of a real estate agent and, in particular, the duty in the making of ambiguous statements. He referred at p. 8 to this statement in Bango v. Holt ([1971] 5 W.W.R. 522 at 528):

It is well established in this province that a quasi-fiduciary relationship between potential purchaser and real estate company does arise under the doctrine of Hedley Byrne & Co. v. Heller & Partners, [1964] A.C. 465 [1963] 3 W.L.R. 101, [1963] 2 All

E.R. 575. That legal duty has been recognized in this Court by Maclean J. in *Dodds v. Milman et al.* (1964), 47 W.W.R. 690, 45 D.L.R. (2d) 472, and Dryer J. in *Hopkins et al. v. Butts et al.* (1967), 65 D.L.R. (2d) 711. The doctrine of *Hedley Byrne v. Heller* has been quoted also with approval in our Court of Appeal, though distinguished in *Mutual Mortgage Corp'n. Ltd. v. Bank of Montreal et al.* (1965), 53 W.W.R. 724, and most recently in *Windsor Motors Ltd. v. Powell River* (1969), 68 W.W.R. 173, 4 D.L.R. (3d) 155. I quote from the judgment of Branca J.A. at p. 177:

In the *Hedley Byrne & Co.* case it was held that, quite apart from a contractual or fiduciary relationship a negligent though honest misrepresentation, whether verbal or in writing, might form the basis of an action for damages for financial loss, as the law implies a duty of care when and where a party seeking information from one possessed of special skills trusted that person to exercise due care and the party who makes the representations knows or should have know that reliance was being placed on his skill and his judgment.

[para14] It was argued that the evidence of Ms. Morrison should be accepted. If it is, there was a representation that was admittedly false.

The Defendants' Position:

[para15] The Defendants argued that there was no representation. Mr. Yan testified that there was not. Ms. Hedller, the Claimant's own witness, does not support her version of the conversation.

WAS THERE RELIANCE ON ANY REPRESENTATION?

The Claimant's Position:

[para16] It was argued that there was in fact reliance on the representation. Ms. Morrison took steps such as selling her bed. She said that she required the storage space because of the small size of the unit. It was further argued that the fact that she did not pursue the question of the storage area with Mr. Yan shows that she did in fact rely on what he said.

[para17] I was referred to this comment in the *Pellett* case at p. 7 on the issue of reliance:

... It does not lie in the mouth of a wrongdoing vendor to assign the importance of which of the representations made by vendor to purchaser is a cause of the sale.

Defendants' Position:

[para18] The Defendants argued that even if there was a representation no reliance was placed on it. it was not material to her. Her conduct was inconsistent with reliance. If she was relying on the representation she would have made its inclusion a term of the contract.

[para19] In support of that proposition I was referred to *Roberts and Whieldon v. Corrigan and Corrigan et al.*, [1993] B.C.J. No. 1671, B.C.S.C. July 15, 1993, (Kelowna Registry No. 14402) in which Mr. Justice Melnick said at p. 7:

It is clear to me from all of the evidence, notwithstanding the conflicts in it, that the Corrigals made no misrepresentation as to the condition of the roof or the home upon which the Plaintiffs relied. If so, they surely would have included such representation as a specific term of their offer to purchase. They did not do so and the contract of purchase and sale clearly indicated that there were no representations made by the Corrigals as vendors other those contained in the document.

[para20] I was also referred to *Guy v. Wagner et al.*, [1987] B.C.J. No. 138, B.C.S.C. February 9, 1987 (New Westminster Registry No. C841842) and *Davie v. Huckschlag et al.*, [1993] B.C.J. No. 1653, B.C.S.C. July 5, 1993 (Vancouver Registry No. C910767) in which claims were dismissed in spite of the fact that there were misrepresentations found and damages suffered because there was no reliance on the representations.

[para21] The evidence of Ms. Morrison was characterized as self-serving. The Defendants argue that she signed the contract of purchase and sale because of the location, the terrace and the view. She wrongly felt that there was a water problem and did not want to purchase the property because of that. That aspect of her claim was abandoned as she was unable to prove it. Now she wants to get her deposit back based on the fact that there was no storage closet.

[para22] I was referred to the letter sent to Mr. Yan in which Ms. Morrison said that she was not completing the deal because of "the leak from the roof" into the suite. There was no mention of the storage locker.

CONCLUSION:

[para23] In a civil case such as this, the Claimant must prove the claim on a balance of probabilities. That is, the Claimant must prove that it is more likely than not that the Claimant's version is the correct one. The British Columbia Court of Appeal has described the burden of proof in a civil proceeding as being the requirement to demonstrate "a greater probability that what (the Claimant) alleges is more correct than the contrary", *R. v. Findlay* (1944) 60 BCR 481.

[para24] Ms. Morrison must therefore satisfy me that it is more likely than not that the representation was made. For the following reasons I am not satisfied it was made. First, Ms. Morrison's evidence on the point is contradicted not only by Mr. Van but also by her own witness, Ms. Hedller. Second, she did not include the presence of a storage locker as a specific term of her offer. Third, it is clear from the evidence as a whole that Ms. Morrison did not complete the deal because she had a concern about water leakage, not because of the storage locker. Her claim that there was water leakage is unfounded and was not pursued in this case.

[para25] In view of this conclusion it is not necessary to deal with the issue of reliance.

[para26] The claim is dismissed.

MARTINSON PROV. CT. J.

CBR# 218

Ocean Park Towers Ltd., Plaintiff, and Conrad Hanson, Defendant

Vancouver Registry No. C914909

British Columbia Supreme Court Vancouver, British Columbia Williamson J. Heard: May 31, June 1, 2, 1994. Judgment: June 24, 1994.

Counsel for the Plaintiff: George E.H. Cadman. Counsel for the Defendant: Frank D. Corbett.

[para1] WILLIAMSON J.:-- In mid-June 1989 the defendant, president of a bank in the State of Washington, was enjoying a bicycle ride around the inner harbour area of Victoria, British Columbia. He noted with pleasure the beauty of the area and observed a number of condominium towers being built along the water. He also observed a sales office on a site on the Esquimalt side of the harbour where construction had not yet started. His interest piqued, he entered into a discussion with a sales representative for Ocean Park Towers, the proposed development. Ocean Park Towers was, he was told, to consist of two eight storey towers with six suites on each floor - a total of 96 units.

[para2] The sales representative, one Edward Moyes, showed the defendant Conrad Hanson a number of marketing materials including a pamphlet describing the development, and drawings which were described as coloured renderings of the completed project.

[para3] On June 17th, 1989, Mr. Hanson signed an offer to purchase on a standard British Columbia Real Estate Association form. The offer concerned suite 739 in the Ocean Tower - a suite known as a type "C" suite, located on the water side of the building.

[para4] The agreement provided for four different deposit payments: on signing, on 30 days, on 120 days and on 10 months. The sale price was \$343,000. The plaintiff accepted the offer. Mr. Hanson returned to his home in Washington.

[para5] Some six months later, at the end of December 1989, Mr. Hanson returned to the site. He again met with a representative of the plaintiff, this time Sandra DesLisle, informed her that he had already purchased one suite and entered into a discussion concerning purchase of a second suite. He once again toured the waterfront area and took a close look at the other developments. On December 30th, 1989, in the same type of standard contract that he had executed the previous June, he made an offer to purchase a second suite on the 7th floor of the Ocean Tower, suite 742, known as a type "F" suite. This suite was on the corner of the Ocean Tower closest to the Park Tower.

[para6] The second contract had similar staggered payments of deposits. The purchase price was \$328,000. The plaintiff accepted the offer.

[para7] I interject here that Moyes and DesLisle behaved exactly as one would expect real estate salespeople to act. They showed Mr. Hanson around, discussed the reputation of the developer, the characteristics of the Victoria real estate market, and the possibilities for rental income. However, neither was a licensed salesperson or agent as contemplated in the Real Estate Act, R.S.B.C. 1979, C. 356.

[para8] Some of the information they provided was false. Price lists showing all the units were given to Mr. Hanson and presumably other prospective purchasers. They listed a number of units as "sold" and a number subject to "pending" sales. This information was not true. The evidence disclosed this false information was prepared from time to time as part of a strategy to create for potential buyers the erroneous impression of activity in the market.

[para9] In April, 1991, Mr. Hanson completed the sale of the contract entered into June 17th, 1989, and took possession of suite 739. However, he declined to complete on the second contract.

[para10] The plaintiff commenced this action for specific performance or in the alternative for damages. As it turned out, the plaintiff was able to sell suite 742 in July of 1993. The selling price was \$275,000, \$53,000 less than the sale price of the December 30th, 1989 contract with the defendant. The plaintiff says there can be no doubt that the defendant entered into a binding contract and, as the plaintiff ended up having to sell the property later for less money, the defendant is liable for the loss.

[para11] The defendant says he is not bound by the contract. He says he was induced to enter the contract by a series of misrepresentations made by agents of the plaintiff. He says Sandra DesLisle misrepresented the quality of the view from suite 739, a factor which he says was critical to him and to his wife, misrepresented the efforts the plaintiff was prepared to make to assist him to rent the unit out, misrepresented the amount of rental income he could expect, and misrepresented the finished quality of the product.

[para12] The requirements for establishing that there has been a negligent misrepresentation have been conveniently set out by McLachlin, J.A. as she then was, in *Kingu v. Walmar Ventures Ltd.* (1986), 10 B.C.L.R. (2d) 15 at p. 23:

The question then is whether the requirements of tort liability on the basis of *Hedley Byrne* are satisfied in the case at bar. Those requirements may be summarized as follows:

- (1) A false statement negligently made;
- (2) A duty of care on the person making the statement to the recipient. A duty of care does not arise unless
 - (a) the person making the statement is possessed of special skill or knowledge on the matter in question, and
 - (b) the circumstances establish that a reasonable person making that statement would know the recipient is relying upon his skill or judgment;
- (3) Reasonable reliance on the statement by its recipient;

(4) Loss suffered as a consequence of the reliance.

[para13] Keeping this statement of the law in mind, I turn to the alleged misrepresentations. First, the defendant claimed there was a misrepresentation with respect to the quality of the construction and finish. He said he was concerned about ponding of water in some of the common areas, that the final colour of the exterior of the building was not as represented in drawings, and that there were some imperfections in the finish of the suite. In his final submission, defendant's counsel did not stress this argument.

[para14] The defendant, as is set out above, originally intended to purchase two units. He went through with the purchase of one, but did not complete on the second. He made it clear in his testimony that he completed the purchase of unit 739 because there were no misrepresentations with respect to that suite. He got, he said, what he bargained for. As the quality was acceptable in unit no. 739, it is difficult to see how the quality could have been unacceptable in unit no. 742, particular with respect to the alleged "ponding" and the concern about exterior colour. The evidence in this regard did not come near to showing false statements or reliance upon them. I find this claim unproven.

[para15] Second is the alleged misrepresentation concerning rent. This has two aspects. First, the defendant says that Mr. Moyes said that if unit 739 were to be rented he thought it would bring in approximately \$1,500 a month. Subsequently, in the December discussions leading to the offer to purchase unit 742, Ms. DesLisle told the plaintiff she thought that figure was approximately right, but that unit 739, being slightly less desirable, would bring in a slightly lower rent. It was also claimed the sales people spoke of the possibility of Ocean Park finding tenants for the defendant. This claim, then, concerned alleged representations by both Moyes and DesLisle.

[para16] I find these discussions did not amount to a misrepresentation. First, both Moyes and DesLisle were talking in approximate terms. Second, construction on the two towers had not yet commenced at the time. Any prediction as to the rental market sometime hence, when the towers were completed, would of necessity be speculative. The defendant, president of a bank in the State of Washington, would understand that. Finally, the defendant went through with the purchase of unit 739 despite the fact that he intended to rent it out for three to five years. If any misrepresentation on the subject of rent was not such as to deter him from the purchase of that unit, it could not be enough to allow him to get out of his agreement to purchase unit 742.

[para17] I turn now to the subject of view. This is the alleged misrepresentation upon which the defendant places most emphasis. He testified that view was critical. The quality of the view moved him to ask Moyes if he could purchase in the Ocean Tower rather than the Park Tower as the best view units were already sold in the Park Tower. The defendant discussed view at great length with both Moyes and DesLisle. He also walked around the site himself, observing where the towers were going to be placed, in order to best ascertain what the view might be.

[para18] In addition, he was given documents which expressly made representations concerning view. The first, filed as Exhibit 2 in these proceedings, is a 12-page pamphlet describing the development and setting out the floor plans of the various units. In its narrative, it describes the suites as having balconies "with low sills and glass balustrades open to the ocean and mountain views". On page 2 it lists:

. Elegant twin eight storey sculptured towers with viewpoints over Victoria's Inner Harbour and the Olympic snow capped mountains . View balconies are tucked into each suite . Patio doors and windows allow 180 degree views

[para19] The expression "180 degree views" must be considered, however, in light of the drawing on page 5 of the same document. That drawing depicts the relative position of the two towers. It shows that a person standing on the northwest balcony of suite 742 would have a view north and south, but that the view to the east would be obscured in part by Park Towers.

[para20] There was some evidence that given the height of the buildings unit 742, on the 7th floor, would be above other buildings in the vicinity. I do not, however, accept that this meant it would be higher than Park Towers. The Towers were to be essentially identical, and the seventh floor was not the top floor.

[para21] A second document was also provided to the defendant. This is the disclosure statement, required by statute, and it is common ground that it was provided. This document included a detailed site plan to scale showing the relative position of the two buildings. Looking carefully at this drawing, it is clear the view to the east from suite 742 would be partially obscured by the Park Tower.

[para22] Comparison of this site plan to photographs that were taken after the completion of the buildings and were also entered as exhibits at trial, confirms the plan represents accurately the relative placement of the buildings. While from suite "F" there is a view of the inlet leading to the Inner Harbour, and views northwest, the view east might be described as "partial". This is precisely the word used by Mrs. DesLisle when she testified about the discussions she had with the plaintiff. She said that suite 742 would have a "partial ocean view" unlike suite 739 which would have an unobstructed view.

[para23] The defendant agreed that he had received the disclosure statement. He also testified that he had read it, but, as he put it, "I did not read it in any great detail".

[para24] I find that the defendant has not established there was a misrepresentation concerning the view from 742.

[para25] In rejecting all of the alleged misrepresentations, I add that when the defendant wrote to the plaintiff on March 7, 1991, announcing he would not complete the purchase of suite 742, he made no reference to any of the misrepresentations claimed above. He simply said that having seen "the condominium project in person a few weeks ago my wife and I decided not to purchase unit 742F".

[para26] The defendant raises another defence. He says that because of the combinations of s. 49 (1), s.50(8) and s. 62 of the Real Estate Act the contract is unenforceable. The sections read as follows:

49. (1) In this Part the word "developer" means a person who, as principal, sells or leases, or offers or proposes to offer for sale or lease, subdivided land or more than 4 time share interests in one time share plan, but does not include a purchaser from the developer, or any subsequent purchaser, where the purchase is in respect of not more than 4 lots, 4 strata lots, one cooperative unit within a subdivision or 4 time share interests in one time share plan.

50.(8) No person, and no person on behalf of a developer, shall sell, lease or offer for sale or lease in the Province subdivided land, or more than 4 time share interests in one time share plan in respect of land, situated without the Province unless

(a) he is the holder of a valid and subsisting agent's licence and is acting on behalf of a developer, or is a licensed salesman employed by that agent;

.....

62. No promise or agreement to purchase or lease any subdivided land or time share interest is enforceable against the purchaser or tenant by a person who has breached any of the provisions of this Part, or by a successor in title of that person.

[para27] I add that as set out in s. 1 of the Act, "subdivided land" includes land that has been divided into five or more strata lots.

[para28] The gist of these sections is that while a developer may act on its own in offering for sale or selling subdivided land, if the developer elects to have other people assume that role on its behalf, those people must be licensed real estate agents, or licensed sales people employed by such agents.

[para29] Was Mrs. DesLisle "the developer" who as principal was offering for sale the Ocean Park strata units, or was she a person acting on behalf of the developer?

[para30] The evidence disclosed that the developer Ocean Park Towers retained a company called Swiftsure to market the suites in the two towers. Swiftsure had an interest in Ocean Park. Swiftsure in turn retained Eden Holdings to undertake the on-site marketing. This consisted of having an on-site sales trailer, with representatives present to meet with the public, provide them with information, and to, if possible, get them to sign an offer to purchase. The offer to purchase, in both cases before the Court in these proceedings, was on a standard British Columbia Real Estate Association form. The sales person filled in the blanks, had the prospective purchaser sign, and witnessed that signature by signing on a line indicating "Sales Representative". For each successful sale, Swiftsure was paid a commission of 5 percent and Eden Holdings a commission of 3.5 per cent.

[para31] Mr. Eden, the principal of Eden Holdings, testified. He said he had no interest in Ocean Park Towers Ltd., although in cross examination he said he was a director of the company (thus Ocean Park Ltd. must have known of the arrangement). He testified that Eden Holdings retained both Mr. Moyes and Ms. DesLisle to act as sales representatives. Neither Moyes nor DesLisle, on their own evidence, are real estate agents or licensed sales persons as defined by the Act.

[para32] Ms. DesLisle was not paid a salary by Eden Holdings Ltd. The scheme was that for each successful sale resulting from an offer to purchase which she brought to Ocean Park Towers, she would be paid \$1,000 as a referral fee. She had no experience in real estate; her normal profession is that of a music teacher. She worked under the above arrangement with Eden Holdings for about a year and managed to bring eleven successful offers to purchase. Mr. Moyes had the same arrangement as Ms. DesLisle except that he was paid \$1,500 for each sale he brought.

[para33] I find Ms. DesLisle was not a developer, which is to say was not a person, as principal, offering for sale or selling the Ocean Park units. She was not a part of Ocean Park Towers Ltd, nor was she part of Swiftsure or Eden Holdings. Rather, she was working independently, paid a referral fee for each successful offer to purchase she brought to the principals.

[para34] I find that she was a person who, on behalf of the developer, offered for sale an interest in subdivided land. As she is neither the holder of a valid and subsisting agent's licence, nor a licenced salesperson employed by such an agent, Ocean Park Towers Ltd., in so using her services, was in breach of s. 50(8) of the Real Estate Act. It follows that s. 62 of the Act governs and the agreement for the purchase and sale of suite 742 is not enforceable against the defendant purchaser by Ocean Park Towers Ltd.

[para35] The plaintiff's claim is dismissed. The deposit paid pursuant to the offer executed December 30, 1989, together with Court Order Interest at the registrar's rate prevailing from time to time, will be returned to the defendant. The defendant will have his costs at scale 3.

WILLIAMSON J.

CBR# 700

The Owners, Strata Plan No. LMS44, Plaintiff, and RBY Holdings Ltd., Pacific Crematorium Limited and Personal Alternatives Cremation and Memorial Services Ltd., Defendants

Vancouver Registry No. A923876

British Columbia Supreme Court Vancouver, British Columbia (In Chambers) Newbury J. Heard: October 12, 1993. Judgment: filed October 22, 1993.

Counsel for the Plaintiff: J.E. Rogers. Counsel for the Defendants: K.R. Doyle.

[para1] NEWBURY J.:-- The applications which were the subject of this hearing first came before me on June 25 of this year. The first was a motion by the plaintiff strata corporation for the determination of a question of law as to whether the use of certain premises in the strata development operation of a mortuary and crematorium would violate the terms of a statutory building scheme to which the land is subject; and the second was for a permanent injunction restraining such use in future. I addressed the Rule 34 question in obiter in an oral judgment delivered on July 30, but because of deficiencies in the plaintiff's Statement of Claim and doubts concerning its capacity to sue, I ruled at that time that both applications must be dismissed. The plaintiff was at liberty to re-apply once the requirements of the Condominium Act had been met and the necessary changes to its Statement of Claim had been made.

[para2] The deficiencies have now been remedied by the filing of an amended Statement of Claim, the terms of which were contested and adjudicated upon in late August. At that time, I issued an interim injunction restraining the defendants from carrying on the business of a crematorium in and about the subject property. I also indicated that counsel would be restricted on this occasion to bringing forth new facts that might be relevant, arguing cases not previously argued, and addressing the question of the appropriate remedy should the plaintiffs succeed on the question of law.

[para3] As stated in my earlier reasons, the facts of this case are simple: on June 19, 1992, RBY Holdings Ltd. ("RBY") purchased Unit 102 of Strata Plan LMS44, a development in Delta known as "Tilbury Corporate Centre", from Prudential Development Corporation ("Prudential"), a company that had developed the Centre and stratified it into 19 strata lots. Like all the other lots, or "Units", comprising the development, Unit 102 was and is subject to a statutory building scheme registered in the Land Titles Office. For purposes of this application, the key provision of the building scheme is paragraph 7(b), which provides:

"no Lot will be used for any purpose whatsoever other than manufacturing, processing, storage, wholesale, office, laboratory, profession or research and development purposes permitted by the Municipality and, without restricting the generality of the foregoing, no Lot will be used for any junk or salvage purposes or any other purpose which could or would be offensive to other occupants of the Lands or the public by reason of odour, fumes, dust, smoke, noise or other pollution bearing generated as a result thereof of which would be hazardous by reason of danger of fire or explosion;"

At the time of RBY's purchase, the applicable zoning by-law of Delta permitted the use of the premises for crematorium purposes. The by-law has since been amended to prohibit such use expressly, but I am advised the amendment will not affect the entitlement of the defendants to operate a crematorium in the premises as a non-conforming use.

[para4] There is evidence that suggests that in their negotiations with Prudential, RBY's principals, Mr. Young and Mr. Little, were less than forthcoming about their plans for the use of the premises; indeed, in a separate action, Prudential alleges that those plans were misrepresented and is seeking rescission of the sale. Since those allegations are not before me, it is sufficient to relate here that immediately after completing the purchase, RBY let it be known that it intended to carry on business as a mortuary and crematorium in Unit 102 through two corporations (apparently related) Pacific Crematorium Limited and Personal Alternatives Cremation and Memorial Services Ltd. ("Personal Alternatives"). The latter company obtained a business license from the Municipality of Delta to operate a mortuary in the premises and began business there some months ago, providing services in connection with funeral arrangements, restoring human remains in a "cool room" and embalming human remains in a "preparation room". Although Mr. Little previously deposed that human remains were kept on the premises for periods generally not exceeding 48 hours, his most recent affidavit states that in about 40% of its cases, the company keeps human remains on site for periods of up to a week.

[para5] Mr. Little also now deposes that a significant source of revenue to Personal Alternatives is the sale of cremation urns which are sold "exclusively to customers in connection with remains cremated under contract to our firm". In some instances where the company does not receive instructions with respect to the ultimate disposition of the cremated remains, or where the family of a deceased requires further time to arrange for ultimate disposition, cremated remains, either in cremation urns or "temporary containers", may remain on site for many months. If they are not claimed within one year, the authorization of the Registrar under the Cemetary and Funeral Services Act (the "Act") may be sought to dispose of the remains. The company also sells caskets, again only to customers with remains disposed of by burial under contract to the company. According to Mr. Little, the sale of caskets and cremation urns in connection with "the disposition of human remains and cremated remains is and remains an integral and important aspect of [Personal Alternatives'] business".

[para6] None of the defendants has commenced any cremation activities at the site as yet, although RBY was permitted to install the necessary gas line across the strata corporation's common property in accordance with an order of Scarth, J. made in a third action, #A923494. In making that order, Scarth, J. was careful to state that he had not dealt with the question of the intended use of the premises, which he indicated should be the subject of a separate application. That was the application that I first heard in June, 1993.

[para7] Despite suggestions given in August by counsel for the defendants that they were likely to be filing affidavit evidence of a Mr. Snickars, an official associated with the Registrar under the Act, concerning the "implications" of my earlier judgment, no such new evidence was forthcoming. Perhaps Mr. Fraser reconsidered the relevance of such opinion evidence. At the start of the hearing on October 12, however, Mr. Doyle applied for an adjournment so that he would have an opportunity to serve a subpoena on an officer of Intrawest Development Corporation, the original owner of the Corporate Centre lands, who sold to Prudential in 1990. Evidently this officer had been involved in drafting the statutory building scheme in question here. Despite the numerous exceptions that do exist to the parol evidence rule (see e.g. the list of exceptions noted by the Court in *Gallen v. Allstate Grain Co., Ltd.* (1984) 9 D.L.R. (4th) 496 (B.C.C.A.) at 506-7), I acceded to Mr. Rogers' argument that where a document is clear, or at least unambiguous, on its face, evidence of negotiations prior to or after the signing of the contract will not be admitted to create

an ambiguity. As noted in *Fridman, The Law of Contract in Canada* (1976) at 246, "Where the contract as written is ambiguous, extrinsic evidence can be admitted to resolve such ambiguity. But it must be an ambiguity that exists in the language as it stands, not one that is itself created by the evidence that is sought to be adduced." (See also the judgment of Lord Wilberforce in *Prenn v. Simmonds* [1971] 3 All E.R. 237 (H.L.), quoted by Gibbs, J. (as he then was) in *Cominco Ltd. v. C.P. Ltd.* (1988) 24 B.C.L.R. (2d) 124 at 133, and *Hillside Farms Ltd. v. British Columbia Hydro and Power Authority* (1977) 3 W.W.R. 749 (B.C.C.A.) at 753.

"Manufacturing, Processing or Storage"

[para8] I turn then to the substantive questions before me whether the use of Unit 102 as a crematorium and/or mortuary contravenes the statutory building scheme and if so, whether a permanent injunction should be granted. In approaching the first question, I again emphasize that I am considering only the question of law of whether the first part of paragraph 7(b) of the building scheme prohibits such uses. I am not considering whether the proposed uses would constitute a nuisance or otherwise offend the strata corporation's by-laws, those being questions of fact that would clearly require a full trial. Nor am I concerned with questions of "offensiveness", injurious affection, community standards, or municipal zoning considerations, which were argued at length by Mr. Doyle. As indicated in my earlier reasons, I assume for purposes of this application that the proposed activities would not constitute a nuisance, send smoke into the air, or otherwise offend applicable rules and by-laws. Those considerations are irrelevant to the purely legal question of the construction of the first part of paragraph 7(b) of the building scheme i.e., whether the use of the lot as a crematorium and/or mortuary is a use for a purpose other than "manufacturing, processing or storage".

[para9] On this issue I see no reason to depart from the comments made in obiter in my earlier judgment, which were as follows:

"The defendants argue that the storing of human remains on the premises for embalming and/or subsequent transportation out, is 'storage' within the meaning of this paragraph [7(b)] and that cremation is a 'process'. In this regard, counsel for the defendants notes the use of the word 'process' in the Cemetary and Funeral Services Act, and in the 'Guidelines for an Application of a Certificate of Operation to Establish a Crematorium' issue by the Registrar thereunder. He also cites cases that stand for the proposition that restrictive covenants must be construed restrictively and that documents must be given their 'true meaning', i.e., the meaning that would be ascribed by 'an ordinary intelligent person in construing the words in a proper way in light of the relevant circumstances'.

On the question of 'storage', he cites *Capital Regional District v. Mattison*, [Victoria Registry No. 87/0901, October 8, 1987 (S.C.B.C.)], a decision of Mr. Justice Drake, suggesting that storage 'implies a certain degree of permanence' and cannot be used to describe the display of perishable merchandise outside a shop in portable form. As far as 'processing' is concerned, he points out that the OED definition includes 'something that goes on or is carried on', 'a continuous and regular action or succession of actions taking place or carried on in a definite manner', 'a particular method of operation in any manufacture', and that 'process' is defined to mean 'treating by a special process'. Applying this to the facts, Mr. Doyle argues that cremation subjects the human body to a 'process' by which its state is changed to what the layman would call ashes and bone fragments. Further, he says that the normal intelligent person reading the statutory building scheme would conclude that a mortuary business is 'storing' human remains and that, accordingly, Mr. Little properly concluded that his proposed uses would be permitted.

Neither counsel cited the case of *Bourne v. Norwich Crematorium Ltd.* [1967] 2 All E.R. 576, a decision of the Chancery Division, which I brought to counsels' attention and on which I received written argument. In *Bourne*, the defendant was appealing to the General Commissioners of Income Tax against an assessment for the profits of its crematorium. The issue was whether the furnace chamber and chimney tower of the crematorium were 'industrial buildings or structures' under the Income Tax Act, which defined an industrial building or structure as one in use 'for the purposes of a trade which consists of the manufacture of goods or material or the subjection of goods or materials to any process'. Mr. Justice Stamp found that the furnace chamber and chimney tower were not so qualified and stated as follows:

'I would say at once that my mind recoils as much by the description of the bodies of the dead as "goods or materials" as it does from the idea that what is done in that crematorium can be described as "the subjection of" the human corpse to a "process"...

...In my judgment it would be a distortion of the English language to describe the living or the dead as goods or materials. The argument, of course, goes on inevitably to this : that just as "goods and materials" is wide enough to embrace, and does embrace, all things animate and inanimate, and so includes the dead human body, so the other words to which a meaning must be given, namely "subjection" and "process", are words of the widest import. Parliament cannot, so the argument as I understood it runs, have intended to exclude from the definition a process whereby refuse or waste material is destroyed or consumed by the fire, and putting it crudely, for it can only be put crudely, the consumption by fire of the human body is a process. I protest against subjecting the English language, and more particularly a simple English phrase, to this kind of process of philology or semasiology. English words derive colour from those which surround them. Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back again into the sentence with the meaning which you have assigned to them as separate words, so as to give the sentence or phrase a meaning which as a sentence or phrase it cannot bear without distortion of the English language.'

And further:

'... I conclude that the consumption by fire of the mortal remains of homo sapiens is not the subjection of goods or materials to a process within the definition of "industrial building or structure.'

This judgment has been cited on numerous occasions by numerous courts for the general rule of construction that 'one must not at the end of the day distort that which has to be construed and give it a meaning which in its context one does not think it can possibly bear'.

In my view, both this general principle and the specific holding of the Court in *Bourne* are applicable here. If one considers the context of the statutory building scheme and the particular development in question here, it is clear that what the draughtsman had in mind was a building to be used for commercial purposes and that the manufacturing, processing and storage in question would have referred to raw or semi-processed materials or goods to be processed for resale or other commercial use.

I cannot agree that 'processing' in this context can be distorted and expanded so as to include, in Mr. Justice Stamp's words, 'the consumption by fire of the human body'. The body is not being 'processed', it is being consumed or destroyed by fire. Further, no

commercial goods or materials result. The residue of ashes is obviously not a commercial product which I infer is contemplated by paragraph 7. (For the same reason, I would not regard an incinerator used to burn garbage as 'processing' garbage.) As the Court held in *Tenneco Canada Inc. v. The Queen* [1988] 2 F.C. 3 at 9, citing *Federal Farms Ltd. v. M.N.R.* [1966] Ex. C.R. 410] the normal meaning of 'processing' requires that goods be made more marketable. Here we do not have 'goods'; we do not have 'marketable goods', and, in my view, we do not have 'processing' -- we have consumption or destruction of the human body. I would respectfully concur with Mr. Justice Stamp in concluding that it would be a distortion of the wording used in the scheme to conclude that cremation is within the ambit of 'processing'.

As far as 'storage' is concerned, the same reasoning applies. First, since I read paragraph 7 to be referring to the storage, manufacture or processing of commercial goods or products of some kind, the word is not applicable. Second, I infer that the word in this context is intended to refer to longer-term storage rather than the temporary moving of a human body into the premises for embalming and shipment out. The purpose of bringing the bodies onto the premises is not to 'store' them but to prepare them for burial or cremation. I have already noted Mr. Justice Drake's comments to the effect that 'storage' generally implies something less transient or fleeting and suggests that this is not storage in the sense that a commercial parking lot, with cars going in and out, is not normally described as a place for the 'storage' of cars."

[para10] Mr. Little's most recent evidence that human bodies are being kept on the premises for periods of up to one week in many cases, does not in my view assist the defendants with my conclusion that paragraph 7 refers to the storage, manufacture or processing of commercial goods or products of some kind. As for the new evidence that Personal Alternatives sells urns and caskets, I agree that if it were storing such items alone for later use or resale, that would be a permitted use. However, the fact that the company does so only in conjunction with a cremation or burial contract takes this activity outside of the ambit of "storage" in the context of the building scheme.

[para11] I should also note the argument made by Mr. Fraser during the August hearing that the words "purposes permitted by the municipality" in paragraph 7(b) of the scheme indicate that the draftsman intended the uses permitted under the building scheme to be coextensive with those contained in the municipal zoning by-law from time to time. Since the by-law in force at the time expressly permitted the operation of "crematoriums and mortuaries" under the "light industrial" classification, he argues that it can be inferred that the draftsman had no intention of prohibiting such uses.

[para12] The obvious response to this argument, of course, is that if that had been the intention of the draftsman, the first four lines of paragraph 7(b) of the scheme would have been completely superfluous. Grammatically too, I note that the list of permitted uses listed in paragraph 7(b) ends with "or research", followed by "and development purposes permitted by the Municipality", which phrase therefore seems intended to modify only the phrase "and development purposes". On a more basic level, it is obvious that the form and wording of the zoning by-law are very different from those of the building scheme.

[para13] Nor am I persuaded by Mr. Fraser's argument that in reaching my conclusions set out above, I have disregarded the principle illustrated by the Supreme Court of Canada decision in *Russo et al. v. Field et al.* (1973) 34 D.L.R. (3d) 704 at 722, that the terms of legislation may be relevant to the interpretation of a restrictive covenant. In *Russo*, the Court considered the definition of "hairdresser" in the Apprenticeship Act of Ontario for assistance in construing that term in an agreement containing a non-competition clause. But in the case at bar, there is no reason to suppose that in preparing the building scheme, the draftsman had any reason to give any particular attention to the provincial legislation or government guidelines relating to cemeteries and crematoria. The building scheme was written in the context of a commercial real estate development, and should be construed as such.

[para14] Another argument made by the defendants was that Unit 102 was not a "Lot" for purposes of the building scheme. For the reasons set forth in my earlier judgment, I find that argument to be without merit.

[para15] It follows that a declaration will go pursuant to Rule 34 that the use of Unit 102 for the operation of a crematorium or for carrying on the business of a mortuary contravenes the statutory building scheme. Within the word "mortuary" I include the bringing of human bodies or other remains onto or off the site, the presence and preparation of bodies for burial (for example by embalming) or for cremation, and related activities normally carried on by a mortuary. I would not include, however, funeral arranging or counselling without the presence of bodies or remains on-site, as these would be permitted by the scheme as "office" or "profession".

Permanent Injunction

[para16] I turn next to the plaintiff's application for a permanent injunction restraining the defendants, their successors and assigns, from continued contravention of the building scheme as described above. Paragraph 15 of the building scheme provides as follows:

"The provisions hereof have been instituted for the general benefit of all owners of all parts of the Lands from time to time and each such owner, in agreeing to buy any part of the Lands acknowledges such general benefit and the personal benefit attaching to that part of the Lands purchased and agrees that their being in violation of the restrictions herein set out will constitute an injury and damage to all the owners of the Lots from time to time impossible to measure monetarily and, as a result, any or all the other owners of the Lots from time to time shall, in addition to all of the other remedies in law and in equity, be entitled to a decree or order restraining or enjoining any breach of any of the provisions hereof and any owner in breach of any such provisions and named in an application for such an order will not plead in defence thereto that there would be an adequate remedy at law."

In addition to relying on this "deemed damage" clause, counsel for the plaintiff filed affidavits of various strata lot owners deposing as to perceived actual damage. These include the statements of Mr. Sheren (as of May 17, 1993) that since the defendants' announcement of their intention to establish a crematorium and mortuary on their premises, average sale prices for units in the same building have fallen, resulting in loss to Mr. Sheren's company; that the two Units adjacent to Unit 102 have not sold; and that the "reputation of the development has definitely been negatively affected". Ms. Sellers, an officer of the company which owns Unit 107, deposes inter alia that to her knowledge every unit that has been sold since her company's purchase has sold for less per square foot than the purchase price and that when her company sells (which it is attempting to do) she expects to incur a loss. Mr. Sully, a prospective purchaser, deposes that he was told by the leasing agent for the Centre that the three or four unsold units can be obtained cheaply because of a "black mark" on the development by reason of the proposed crematorium.

[para17] Mr. Lam, the owner of Unit 108, deposes that the employees in his sandwich preparation and distribution business quit their jobs after indicating that they would rather quit than work at that location. He has had difficulty in hiring skilled replacement

employees because of the proximity of the intended crematorium and mortuary. He says that "Oriental employees will not be associated with or locate anywhere near a place of death including funeral homes, crematorium or cemeteries". Mr. Lam expresses the concern that if he decides to sell his unit, it is very unlikely any Oriental purchaser would be prepared to purchase it a fact that "effectively excludes a substantial portion of the parties who might otherwise be interested in purchasing my location." In his most recent affidavit, Mr. Lam says that he had plans for expansion of his business into Unit 113 in the Centre, but put such plans on hold when he heard of the defendants' success in obtaining a license to operate a mortuary in their unit.

[para18] Mr. Rogers on behalf of the plaintiff acknowledges that it is difficult to prove strictly damages of the kind described by the strata owners i.e. to approve that they are not due to market conditions and contends that for this very reason, injunctive relief is the only just remedy. In fact, he says, this situation was anticipated by the draftsman of the building scheme when paragraph 15 was included. I do not understand him to suggest that the clause requires that the Court automatically grant injunctive relief, but that injunctive relief is normally granted for the breach of a negative covenant relating to the use of land without proof of monetary damage (see, e.g., *Frisby v. Clearview Developments Ltd.* (1990) 48 M.P.L.R. 188 (B.C.S.C.)) and that the existence of the deemed damage clause should be an important factor in the Court's consideration. On the latter point, I find the following passage from Sharpe on Injunctions and Specific Performance (2d) at 7.750 under the heading "A Suggested Rationale", to be useful:

"An approach that might facilitate analysis here is to consider two categories. In the first, the nature of the plaintiff's interest is such as to give rise to an entitlement to specific performance but that interest is for some reason difficult to establish or the plaintiff wishes to be sure that it is accepted and admitted by the defendant. The agreement sets out the reasons for the inadequacy of damages so that, in case of breach, the agreement can be referred to as evidence to establish the plaintiff's case for specific performance. In this type of case, it is difficult to see why the Court should not pay careful attention to the agreement. There is a strong parallel here to the rule relating to the enforcement of liquidated damage clauses. Where the clause represents a reasonable and genuine attempt to estimate actual damages and it is fairly bargained, such a clause will be enforced. Difficulty and cost of proof of damages are thereby avoided, resulting in saving not only to the parties but also to the judicial system, the benefits of which have long been recognized. While liquidated damage clauses must be distinguished from penalties, which are not enforced, it is difficult to see stipulation of specific performance as constituting a penalty. It is surely a contradiction to suggest that performance of the very obligation promised is punitive in nature."

Although the author is here discussing specific performance, the same principles would seem to be applicable to a prohibitory injunction.

[para19] Mr. Doyle on behalf of the defendants emphasizes that in this case, the statutory building scheme was not a 'custom-made' agreement hammered out between two parties who are before the Court. Obviously, the defendants had no part in negotiating the building scheme and became bound by it only by virtue of its registration in the Land Titles Office. It is not alleged that the defendants were unaware of the existence of the building scheme, however, and indeed Mr. Young's affidavit makes it clear that they were very careful to investigate all aspects of the property before offering to buy Unit 102. Had they been more forthcoming about their plans in their discussions with Prudential or its agent, they might well have become aware of the defendants' opposition before buying the Unit if indeed the reaction was a surprise.

[para20] In any event, the circumstances of RBY's acquisition of Unit 102 and the terms of the building scheme are only two of the factors that must be considered by the Court in deciding whether injunctive relief should be granted. The cases cited by both counsel make it clear that the Court must consider as well the benefit to be gained by the plaintiff and the harm to be suffered by the defendants as a result of the granting of such relief. In this regard, I note that because of the proceedings in this action and in the action heard by Scarth, J., the defendants have not been in a position to construct the retort and stack and make the other major changes to Unit 102 that would be required to bring a crematorium into operation. However, Mr. Little deposes that the sewer hook-up and exhaust fan installation made after Scarth J.'s order apparently cost \$50,000 and that an additional \$50,000 was subsequently spent on advertising and marketing. Should the defendants be required to relocate their mortuary business to other premises, much of this expenditure would be lost and the defendants would suffer further expense and inconvenience. According to Mr. Doyle they would have a difficult time in locating a property where the applicable zoning by-laws would permit such businesses. Against this major loss and inconvenience, argues Mr. Doyle, must be balanced the claims of the plaintiff, which he says are unsubstantiated as yet, in the form of diminution in the value of the common property and of the individual members' lots, and the difficulties experienced by them in retaining employees and customers.

[para21] I have some sympathy for the defendants' position, but in the final analysis, I do not think that the equities against granting injunctive relief outweigh the more substantial equities arising from the fact of the breach of the negative covenant, the existence of paragraph 15 in the building scheme, and the circumstances of the defendants' purchase of Unit 102. To continue down the path of a trial to establish monetary damages suffered by the plaintiff would in my view be fruitless and would not tip the balance in the defendants' favour. Those cases cited by the defendants in which the courts have declined to grant injunctive relief to enforce negative covenants such as paragraph 7(b) are cases where an innocent defendant would have been forced to demolish a building (see *Trawick and Trawick v. Mastromonaco* (1983) 24 Alta. L.R. (2d) 389 (Q.B.) and *Wrotham Park Estate Co. v. Parkside Homes Ltd. et al.* [1974] 2 All E.R. 321 (Ch. Div.)) or where a covenant could not be enforced "as of course": see *Arbutus Park Estates Ltd. v. Fuller et al.* 1977 74 D.L.R. (3d) 257 (B.C.S.C.). These are very different from a situation such as this, where the injunction is a prohibitory rather than mandatory order and where proceedings were sought before major physical changes were made.

[para22] On balance, I conclude that the defendants, their successors and assigns should be permanently enjoined from carrying on the business of a mortuary or the business of a crematorium in or about the subject premises. Again I include in the definition of "mortuary" the activities described at p. 14 above.

[para23] At the close of argument in the last hearing, Mr. Rogers suggested that the injunction should also prohibit any advertising or "signage" using the words "crematorium" or "mortuary". These words appear in the names of two of the defendants, so that any such prohibition would prevent even the presence of signs bearing their names. I agree with Mr. Doyle that the scheme, or at least paragraph 7(b) thereof, is concerned only with the substantive use of the property, and not with advertising or use of trade names per se. I doubt that this Court has any authority on the basis of paragraph 7(b) to enjoin the use of the words "crematorium" or "mortuary" by the defendants in their signage on the property subject of course to other applicable by-laws and regulations.

Stay

[para24] Counsel for the defendants urges that if an injunction is granted, this Court should stay the Order pending the defendants' appeal from this judgment. It is trite law that this Court does have jurisdiction to stay its own orders (although a stay would more commonly be obtained in the Court of Appeal) and that in considering such an application, the Court must consider the factors it would consider in connection with an interlocutory injunction, as well as any special circumstances: see *Hong Kong Bank of Canada v. Touche Ross & Co.* (1988), 18 B.C.L.R. (2d) 55 (B.C.C.A.); *Man. (A.G.) v. Metro. Stores Ltd.*, [1987] 3 W.W.R. 1 (S.C.C.) at 15-17; *Canadian Commercial Bank v. Royal Oak Inn*, [1989] B.C.J. No. 65 (Vancouver Registry No. CA009541, dated January 9, 1989) (B.C.C.A.). The cases also make it clear that "unless justice requires it, a successful litigant should not lightly be deprived of the fruits of success". *Re Philip's Manufacturing Ltd.* (1992), 67 B.C.L.R. (2d) 385 (B.C.C.A.) at 388. As Mr. Rogers points out, in this case there is no suggestion that the defendants were not aware of the existence of the negative clause in paragraph 7 of the building scheme or that they were lulled into a sense of "false security", to make the expenditures they have. If ultimately the defendants succeed on appeal, they will have been forced to wait some considerable time before commencing business as a crematorium, and will have had to close down their mortuary operations in Unit 102. I am hopeful that the resulting expense and inconvenience can be softened to some degree by an order that the injunction against carrying on the business of a mortuary will not come into effect until a later date.

[para25] As far as the plaintiff is concerned, it has taken promptly all legal proceedings required to have this matter determined as soon as possible. In the meantime, the corporation and its members say they have suffered damages, albeit difficult to determine the quantum thereof. They seek to rely on a document which contemplated that no person contravening the negative covenant would raise as a defence the argument that damages would be an adequate remedy. The members of the plaintiff are small business men and women to whom loss of custom or employees, or diminution in property values, are major considerations. All in all, I am not convinced that having come as far as they have, they should be deprived of the fruits of their victory in this Court by the granting of a stay. Obviously, the defendants will be able to seek a stay in the Court of Appeal when they commence their appeal proceedings there.

Timing of Injunctive Relief

[para26] Mr. Doyle has asked that any permanent injunction be delayed for a period of ninety days in order to permit the defendants to relocate their business. It is now October 22. Ninety days would take the parties past the middle of January, 1994. Given the long period of notice that the defendants have had, I feel that ninety days is too long. Instead I will order that the portion of the permanent injunction relating to the mortuary operation will not come into effect until January 1, 1994. From and after that date, both crematorium and mortuary operations will be prohibited.

[para27] The costs of this application will be for the plaintiff.

NEWBURY J.

CBR# 118

Wendy Flynn and Douglas Hopp, Plaintiffs, and Steve Butler Construction Ltd., Defendant

Victoria Registry No. 902776

British Columbia Supreme Court Victoria, British Columbia Macdonell J. Heard: November 5, 1991 Judgment: November 26, 1991

Counsel for the Plaintiffs: Nicholas W. Lott. Counsel for the Defendant: Brian C. Roberts. MACDONELL J.:-- The plaintiffs' claim is for damages resulting from the defendant's failure to disclose that the house purchased by the plaintiffs from the defendant was insulated with urea formaldehyde foam insulation.

The circumstances briefly are that in the years 1981 and 1982 the defendant company was constructing a number of condominium apartment units in Courtenay. As motel space was at a premium, the defendant company decided to buy a house to accommodate its workmen. The house was fairly old and needed a lot of renovations, but was suitable for the defendant's needs. As the project came to an end the defendant determined to sell the house, and in April of 1982 it published an ad in the local press offering the house for sale or rent.

A Mr. Linden Peterson, an employee of the defendant company, expressed an interest in the house after he was told by the defendant's foreman, Clarence Kolowdziejak (referred to herein as "Clarence"), that the house was for sale. Mr. Peterson got the keys and looked at the house and thought it had potential. He arranged to have an appraiser look at it for financing purposes, who reported favourably on the house. Mr. Peterson went back, looked at the house again, and saw a plug in the siding which he removed and discovered urea formaldehyde foam insulation. He testified he got another appraisal firm, Cunningham & Rivard and told them about the urea formaldehyde, and as a result the appraisal firm recommended against taking a mortgage on the property. According to Mr. Peterson, he told Clarence on the job site that he was not interested in purchasing because of the urea formaldehyde insulation. He said that Clarence was surprised at there being this type of insulation. Apparently there had been no previous discussion between Peterson and Clarence about how the house was insulated. Mr. Peterson never made an offer for the house, which would have had to be made to Mr. Butler, the president of the defendant company, nor did he tell Mr. Butler of the presence of the urea formaldehyde foam.

The next persons interested in the house were the plaintiffs, who saw the ad for the property in the local press. Ms. Flynn called the telephone number contained in the ad and spoke to Mr. Butler in Victoria. He in turn told her to meet Clarence, who would be showing the house. Clarence took Ms. Flynn, the first plaintiff, around and made no representations. She then got in touch with Mr. Hopp, the other plaintiff, for the purpose of looking at the house, which they did. The two of them went through the house with Clarence. The plaintiffs did not ask Clarence how the house was insulated, nor did he tell them. There was some discussion about extra insulation in the ceiling and they saw that there was some pink insulation being put in the basement. There was never a disclosure as to the urea formaldehyde insulation. Neither of the plaintiffs would have purchased the house had they known that it was insulated with urea formaldehyde foam because of the adverse publicity that was in the news media at the time. The plaintiffs then proceeded to close the sale, and the two of them lived in the house until February of 1983. Thereafter they rented the house until 1990. In that year they decided to sell the house and listed it for sale and in due course an offer was received dated January 21, 1990. The contract of sale warranted on the part of the vendors that the property had not been insulated with urea formaldehyde insulation. The prospective purchasers went to obtain financing. The firm of Cunningham & Rivard again did an appraisal and the presence of urea formaldehyde foam insulation was disclosed and the sale fell through. The plaintiffs have not been successful in selling the property since then and have now moved back into it.

The plaintiffs ask for damages for deceit or fraud and rely on Section 6(3) of the Limitation Act to justify the Action not being taken until 1990 when the insulation was discovered.

The measure of damage is agreed between counsel if liability is found to be the amount of the cost of repair.

The case for the defendant is that Mr. Butler knew nothing about the insulation of the house, made no representations, nor were any questions asked by the plaintiffs as to the presence of formaldehyde foam insulation. The foreman Clarence was called for the defence and agreed that he did show the house to several people, but was not sure that they were necessarily the plaintiffs. He said he remembered Peterson, but he categorically denied that Peterson told him that the house was insulated with urea formaldehyde foam. He said that he had inspected the house before it was bought by the defendant but did not recall seeing white plugs in the exterior of the wall. He also said that in 1981 he knew nothing about urea formaldehyde insulation. He categorically denied that Peterson ever told him about the urea formaldehyde foam and said that Peterson did not tell him he had an appraisal to this effect. Mr. Steve Butler, president of the defendant company, testified that he knew nothing about it and that nothing had ever been disclosed to him.

What the case boils down to is whether to accept the evidence of Mr. Peterson over that of Clarence. If Peterson's evidence is accepted, is Clarence, as the foreman of the defendant and the person instructed to show the place, the agent of the defendant, and is his knowledge imputed to the defendant? I have carefully considered the evidence of Peterson, and that of Clarence, and conclude that the evidence of Peterson is to be preferred to that of Clarence for the defendant. Clarence was very vague about what happened as he candidly admitted it was almost ten years ago. It is my view that his memory is not as reliable as that of Peterson, who came across as a careful and reliable witness. Peterson had a very good reason to remember the event, as it was the presence of the urea formaldehyde insulation that was the cause of his being unable to buy the property. It is unlikely, in my view, that Peterson would not have told Clarence of the reason he was not buying when they saw each other at the job site. I find, therefore, that Peterson did disclose to Clarence the existence of the urea formaldehyde foam in the house, although this information was not forwarded on to the defendant company. Nevertheless, the knowledge of the agent is imputed to the principal and accordingly the plaintiffs succeed.

As far as the limitation defence is concerned, the position taken by the plaintiffs with respect to discovery on inspection was that they lived in the place for only a short period of time and for almost eight years they were away from Courtenay and the house was rented. Consequently, they were not in a position to go into possession to discover or inspect the house for any signs of foam insulation. Neither of the plaintiffs had any experience in construction and saw nothing to alert them to the form of insulation, unlike Mr. Peterson, who was a boat builder and finishing carpenter and very experienced in construction. As well, the first appraisal failed to discover the presence of the offending foam. As it happened, the siding on the house wore over the years and at the time of trial, photographs of the exterior of this modest house show plug marks indicative of some form of insulation being

installed from the outside, but this is not determinative of it being urea formaldehyde because other methods of insulation can be installed the same way. I conclude on the limitations issue that, in the circumstances, time does not commence to run against the plaintiffs as those facts on which a reasonable man would take appropriate advice and which would give rise to a reasonable prospect of success, were not within their knowledge until 1990.

On the issue of damages, the plaintiffs have called a witness in the restoration business who estimated the cost of the removal of the foam to be \$25,269.31. This amount is hotly contested by the defendant, which is in the contracting business. It is my view that the contractor employed to prepare the estimate is not sufficiently experienced in construction to give a reliable estimate. On looking at the estimate, it is my view that it is extravagant and unrealistic and I accept the evidence of Mr. Butler that \$7,500.00 is a reasonable amount to repair the damage, plus an allowance of 10% for overhead and profit, plus an allowance for G.S.T. There will be judgment accordingly and costs.

There will be prejudgment interest at the rate set by the Registrar from time to time from the discovery of the insulation.

MACDONELL J.

CBR# 108

Durham Condominium Corporation No. 120, plaintiff, and Ontario New Home Warranty Program, defendant

Court File No. 97-CV-129096CM

Ontario Court of Justice (General Division) Motions Court - Toronto, Ontario Jennings J. Heard: September 21, 1998. Oral judgment: September 23, 1998.

Counsel: Michael Spears, for the plaintiff. John Terry, for the defendant. [para1] JENNINGS J. (orally):-- In the proceedings before the Tribunal, Durham and Program agreed that 40% of the units were occupied prior to sale and accordingly Program was liable for only 60% of the cost of repairs to the units. The issue before the Tribunal was whether Program was liable for only 60% of the cost of repairs to the common elements or 100% of that cost. The issue had apparently been determined in Durham's favour some three weeks earlier by the Divisional Court in Carlton 394, although Durham's counsel was unaware of that decision and Program's counsel did not bring it to the attention of the Tribunal. The Tribunal ruled that the 40/60 ratio should apply to the common elements. Durham appealed that decision to the Divisional Court.

[para2] Program's counsel persuaded Durham's counsel to consent to an application to stay Durham's appeal pending the decision of the Court of Appeal in Sunforest, with counsel consenting to an order permitting Durham to intervene in the Sunforest appeal. Program's counsel stated in his affidavit in support of his motion to stay the Durham appeal that the same issue raised to the Durham appeal was raised in the Sunforest appeal. [para3] Program's counsel proposed that program would pay Durham \$120,000 (60%) on execution of a Release and a further \$105,000 (40%) if the appeal "of a dispute between the parties" (agreed by counsel to mean the issue of pro rata application) was unsuccessful. The Release was "in consideration of payment of \$120,000 forthwith and an additional \$105,000 only if the Warranty Program loses the appeal in the Court of Appeal". The appeal was dismissed and the Court of Appeal did not deal with the issue of pro rating common element repair costs. Counsel argued the issue of pro rata application before the Court of Appeal. Program now says it was expected by the parties that the Court of Appeal would deal with that issue and only if Program lost on that issue would it pay a further \$105,000.

[para4] Counsel has ostensible authority to bind the client to a settlement. No issue is taken with the authority of counsel in this case.

[para5] Program's counsel on the appeal was clearly mistaken as to the similarity of issues in the Sunforest and Durham matters as was virtually conceded by its counsel on this motion. That was a mistake of fact.

[para6] Agreements to settle made by counsel within their authority should not be lightly interfered with. Misapprehension of the facts is not a ground for re-opening a Settlement Agreement:

Scherer v. Paletta (1996), 2 O.R. 524

Cambrian v. Horner (1989), 69 O.R. (2d) 433

[para7] Program's counsel characterized the issues as being the same in the two matters in his affidavit. He obtained Durham's consent to a stay in the face of a pending motion. He prepared the Settlement agreement providing for payment out if the Sunforest appeal went against Program.

[para8] I do not think it is appropriate to go behind the agreement and hold it to be inapplicable because that same counsel hoped the Court of Appeal would deal with the particular issue the resolution of which the court found unnecessary to its decision.

[para9] The motion for summary judgment is allowed.

[para10] The cross-motion is dismissed.

[para11] Costs payable to Durham fixed at \$8,500 plus taxable disbursements and G.S.T.

JENNINGS J.

CBR# 075

Ching-Lee Chien and Ching-Ting Chien, applicants, and Law Development Group (Thornhill) Limited, respondent

Court File No. 97-CV-130820

Ontario Court of Justice (General Division) Hoilett J. June 30, 1998.

Counsel: Kevin D. Sherkin, for the applicants. Robert L. Love, for the respondent.

[para1] HOILETT J.-- A joint reading of the two facta filed sets out fairly comprehensively the factual context. The facts, however, are not in dispute and a brief rendition of those facts are sufficient for a disposition of this matter. The parties entered into an agreement of purchase and sale wherein the applicants agreed to purchase unit D27 in "building D", forming schedule "C" at Tab C of this record. Sch. "C" outlines the unit as bargained for; 445 s.f. of commercial space with two sides of the unit framed by plate glass, an unencumbered floor space and a wide corridor in the east, shared with the Bank of Hongkong. The doors to D27 were to be located at the N/W corner of the unit.

[para2] Tab 4, being Ex "B" to the affidavit of Ching-Lee Chien herein reflect unit D27 as completed. The following are the departures from the unit as bargained for: (1) instead of 445 s.f. of open space, there is a supporting pillar located more or less in the centre of the floor; (2) instead of 2 plate glass sides as contemplated in Sch "C", supra, there is one side only of plate glass (being a plate glass sliding door); that which should have been the other plate glass wall instead forms a common wall with the bank to the east, eliminating the corridor that the applicant had anticipated sharing with the bank.

[para3] The purpose for which D27 was intended to be a fast food take-out facility and the applicant avers that the wide corridor with the easy access between the bank and D27 was an important consideration in the decision to purchase the unit; the anticipation being that for the luncheon crowd there was a natural and easy flow of traffic between the bank and D27. The building as completed completely eclipsed that prospect. Similarly, two sides of plate glass promised greatly enhanced visibility, a prospect that was also aborted.

[para4] I am of the opinion that this application is to be disposed of based on the principle stated by Moldaver J. (as he then was) in *Stefanovska et al. v. Kok* (1990), 12 R.P.R. (2d) 80, and adopted by Day J. in *Coppard Farm Estates Inc. v. Gupta* (1994), 42 R.P.R. (2d) 302; that principle being that when that which is delivered is materially different from that bargained for the diminished party is entitled to be relieved of the obligation. In the present case I am of the opinion that the cumulative effect of the "variations" resulted in a material shortfall to the applicant who, in the circumstances, is entitled to a return of its deposit together with interest and costs. The language of Clause 15 of the Agreement must be reasonably construed and may not be read to impair materially what was bargained for even if, as the respondent submits, the market value remained substantially the same, concerning which Mr. Warren Stewart's opinion is dubious at best.

HOILETT J.

CBR# 077

Tak-Hing Chow, Chu Lin Lee, Joyce Chan, Salima Din and Edmund Chan, in trust, appellants (plaintiffs), and Dixie Park Inc., respondent (defendant)

C21283

Ontario Court of Appeal Toronto, Ontario Robins, Catzman and Doherty J.J.A. Heard: May 31, 1996. Oral judgment: June 7, 1996.

Counsel: Keith M. Landy, for the appellants. Barbra H. Miller, for the respondent.

The following judgment was delivered by [para1] THE COURT (oral endorsement):-- Summary judgment was granted in favour of the respondent on the basis of the motions court judge's conclusion that, on a proper interpretation of the agreements of purchase and sale, the appellants were obliged to satisfy themselves with respect to zoning requirements before they signed the agreements. That in turn involves the conclusion that the purchasers of these retail condominium units, which were then under construction, lost their right to make inquiries about zoning as soon as the agreements were signed.

[para2] In our view, that is not a reasonable and practical interpretation of paragraph 19 of Schedule "C" to the agreements, nor is it one that is compelled by the language which the respondent chose to employ in framing that paragraph. As we read that paragraph, the appellants were entitled to satisfy themselves with respect to zoning requirements subsequent to the execution of their agreements. We accept the submission of counsel for the appellants that, in the absence of any provision in the agreement setting a specific time limit for that purpose, it was open to them in the circumstances to do so, as they did, before the agreements closed.

[para3] Accordingly, the appeal is allowed, summary judgment in favour of the respondent is set aside and in its place judgment will issue in favour of the appellants for the following amounts, together with prejudgment interest calculated in accordance with the Courts of Justice Act: the appellant Chu Lin Lee, \$24,000; the appellant Edmund Chan, \$32,000; the appellant Salima Din, \$28,520; and the appellant Joyce Chan, \$24,000.

[para4] The appellants are entitled to their costs here and below. Costs in the court below are fixed in the sum of \$4,000 and in this court in the sum of \$3,000.

ROBINS J.A. CATZMAN J.A. DOHERTY J.A.

CBR# 123

Governor's Hill Developments Limited, Plaintiff, and Katherine Ruth Robert, Defendant, Johnston & Daniel Limited Realtor, Third Party

Action No. 92-CQ-26645A

Ontario Court of Justice - General Division Toronto, Ontario Eberle J. Heard: June 3, 1993. Judgment: July 12, 1993.

R. Freedman and R.P. Hoffman, for the Plaintiffs. D. Rothwell, for the Defendants. D.B. Garrow and P. Gutelius, for the Third Party.

[para1] EBERLE J.:-- "Vendor agrees to pay the G.S.T. on penthouse #19".

[para2] On that sentence hangs the tortuous tale in this case, leading to motions for summary judgment brought by all the parties to this litigation.

[para3] The sentence is found in the Agreement of Purchase and Sale of a new condominium unit, a transaction which is subject to G.S.T. The Agreement is a fairly standard one; but the above sentence is a typed addition. The issue is the effect, if any, of that sentence on the purchase price in the Agreement a purchase price which is stated to be \$775,000.00. The plaintiff is the seller, and the defendant is the purchaser.

[para4] The plaintiff's position is that the Agreement required the defendant to pay \$775,000.00; but not any further money to cover the G.S.T. on top of that. Thus, it says, the purchase price included the G.S.T., which the seller agreed to pay without receiving any larger sum from the defendant. The defendant argues that she fully satisfied her obligations to the seller under the Agreement by paying only \$724,299.07 consisting of a \$50,000.00 deposit and \$675,245.61 on closing. This total is the purchase price of \$775,000.00 less 7%, i.e. less the G.S.T; but includes an adjustment for realty taxes which is of no moment in this case.

[para5] The matter struck me at the outset as a narrow, though important, issue of interpretation of a written agreement. Nevertheless the ingenuity of counsel created a full day's argument.

[para6] How did the dispute arise? It arose because the vendor made a mistake in drafting the statement of adjustments. The clerk who drew it, evidently confused about the G.S.T., entered the sale price as \$724,299.07, rather than the correct, and only, figure in the Agreement, i.e., \$775,000.00. She had arrived at that figure by deducting the amount of the G.S.T. from the purchase price. That was certainly a mistake. Then she deducted the \$50,000.00 deposit; and there was a minor adjustment for the taxes, leading to a balance due on closing of \$675,245.61. Unfortunately, no one on the seller's side caught this mistake until several months later. In the meantime, the transaction closed and the defendant paid the sum of \$675,245.61, although her solicitor felt something was wrong. He so indicated to the clerk who had drawn the statement of adjustments, when she later called him to explain the error (see Colacitti cross-examination, page 40). The defendant now takes the position that she has paid all that she was required to pay.

[para7] It is important to add that, on closing, the purchaser delivered an undertaking to "re-adjust any items in the Statement of Adjustments, if necessary, after the closing.

[para8] On what I conceive to be the central and determinative issue, the answer is clear. If the Agreement had not contained the disputed sentence about the vendor paying the G.S.T., the purchaser would have had to pay the \$775,000.00 purchase price plus another 7% for the G.S.T. The effect of the disputed sentence is, in my opinion, to make the purchaser responsible for paying only \$775,000.00, with the vendor assuming responsibility for paying the G.S.T. The language chosen simply cannot mean that the purchase price, clearly stated in the Agreement both in words and in figures, is not the purchase price; but rather that the purchase price is only \$724,299.07. That figure nowhere appears in the Agreement. Language which was chosen to ensure that the purchaser did not pay more than \$775,000.00 in total cannot mean that the purchaser should only pay far less than \$775,000.00. The Agreement, by the way, was drawn up by or on behalf of the defendant; Although I cannot see any ambiguity in the language, if there were any, it should be interpreted against her.

[para9] In my opinion, the Agreement can bear no other interpretation than that the defendant was required to pay \$775,000.00. The defendant's interpretation reduces the stated purchase price by 7% That could only be done by ignoring the purchase price clearly stated in the Agreement. Yet the defendant agreed on her cross-examination at pages 15, 16 and 238 that the purchase price was \$775,000.00, consisting of a \$50,000.00 deposit and a further \$725,000.00 on closing. This evidence alone appears to destroy the defendant's position.

[para10] She also said at Q. 1571 to 1574 that the agent said that Governor's Hill would absorb the G.S.T., that accordingly she, the defendant, would not have to pay it; and that the agent said nothing else about the G.S.T.

[para11] The defendant bases one of her arguments on the fact that the vendor had always sold its new units at prices which included the G.S.T. I can see no force in that argument. I do not know how those agreements were drawn, but if they contained a sentence similar to that in this case, the meaning and effect would be as in this case. If they did not, then the agreement of purchase and sale would have obliged the purchaser to pay the G.S.T. on top of the sale price.

[para12] Nothing that I have been referred to in the lengthy cross-examinations contradicts the facts recited above. The defendant admits that the purchase price she was to pay was \$775,000.00, not less. Thus it is clear that the statement of adjustments contained a mistake in showing the purchase price as \$724,299.07. It was argued that this created a "unilateral mistake", as recognized in contract law. I cannot agree, for the purchaser must have known that the statement of adjustments contained a mistaken purchase price. No one, in my view, could honestly think otherwise. If the purchaser did not notice the error at the time of closing, she must have known instantly upon it being raised later, that the price shown in the statement of adjustments was not the purchase price shown in the Agreement. Again, in my view, no one could honestly think otherwise. The mistake is not in the contract itself, but in its performance. The question is simply -- has the defendant fully performed her contractual obligations or not?

[para13] Counsel argued strenuously that, if the wife were to pay \$775,000.00 for penthouse #19, and if the plaintiff then paid the G.S.T. to the government, that would in reality amount to the defendant "paying" the G.S.T., for the plaintiff would merely be

mailing the defendant's money to the government. Ingenious, perhaps; but nonsense. If there were any merit to it, the defendant should keep on using it to reduce the purchase price by successive amounts of 7% until she could get the penthouse for nothing! Not at all. The defendant knew that the Agreement meant that the vendor would "absorb" the G.S.T. The language utilized can in my opinion have only one meaning - the meaning contended for by the plaintiff. The defendant similarly has no basis for complaint against the agent who drew the Agreement accurately, and in accord with the defendant's wishes and instructions.

[para14] The defendant also points to the fact that the consideration inserted in the transfer of the land was \$724,299.07. This is correct, but irrelevant. The amount of consideration is shown in the transfer for purposes of calculating the land transfer tax payable on the transaction, and for no other purpose. Land transfer tax is not payable upon G.S.T., but only upon the net purchase price, apart from the G.S.T. Land transfer tax is not a tax upon tax. This argument is without merit.

[para15] That disposes of the matter between the plaintiff and the defendant. I shall mention only briefly some of the other arguments made. The defendant did not change her position to her detriment at all by closing the transaction. That position was ordained when her offer was accepted; and she became obliged to close according to the true meaning of the Agreement. Nor did her closing the sale of the other condominium the same day constitute a change of position to her detriment; that closing, too, was ordained when she had earlier accepted an offer on that unit. She did not change her position in any way in reliance upon the statement of adjustments. On the other hand, if she were to succeed in this matter, she would receive a windfall of approximately \$50,000.00.

[para16] The defendant's undertaking to readjust was executed by her in consideration of the closing of the transaction. This is a common conveyancing technique of long standing. I was not favoured with any authorities dealing with the meaning and effect to be given to such an undertaking, but I am satisfied that it should not be regarded as a mere formality. This is an appropriate case in which to give it the effect it purports to have. I hold that it entitles the plaintiff to claim the \$50,700.93 it seeks here, and requires the defendant to pay. Further, I hold that the undertaking to readjust should, at least in this case, be viewed as establishing conclusively that the closing of the transaction was not intended by the parties to stand in the way of any justified correction of the amounts shown in the statement of adjustments.

Third Party Claim

[para17] In the event that the plaintiff succeeds against the defendant, the defendant claims against the real estate agent who was involved in both the sale by the defendant of another unit in the same complex, and in the purchase by the defendant of penthouse No. 19. The claim as pleaded is for contribution or indemnity for any amount which the defendant may be required to pay to the plaintiff, or for damages of \$50,700.93. The main allegations pleaded are as follows:

"6. The third party as the authorized agent of the plaintiff, vendor represented to the defendant as purchaser under the Agreement that the price of \$775,000.00 was inclusive of G.S.T. and that the amount payable by the defendant would be approximately \$724,300.00 payable by way of a deposit of \$50,000.00 and approximately \$674,300.00 on closing subject to adjustments only for realty taxes.

10. The third party knew that the defendant was relying and reasonably relying upon the representations of the third party and that the defendant would not have agreed to the purchase price and the sale price in the two transactions unless the net proceeds by down-sizing was not less than \$100,000.00 after all costs and expenses incidental to the two transactions".

[para18] Since these allegations depend upon oral representations allegedly made by an employee of the third party to the defendant or to her husband, it is necessary to look briefly at the evidence of the defendant and her husband in their affidavits and cross-examinations.

In paragraph 19 of the husband's affidavit, he says:

"19. My wife and I were not under any pressure to sell our existing residence and in accepting a price of \$882,000.00 we relied upon the representation that the price of \$775,000.00 for penthouse #19 was inclusive of G.S.T. and that Governor's Hill Developments Limited would pay the G.S.T. that was part of that price."

20. We would not have accepted a sale price of \$882,000.00 and would have terminated the Agreement on or before February 29th, 1992 if calculations with the broker had not indicated that the net proceeds of down-sizing would be not less than \$100,000.00 after all costs and expenses incidental to the two transactions."

[para19] There are two issues here: one is, what if any representations were made by the agent to the defendant or her husband about the purchase price and the G.S.T.? and the other concerns whether or not the agent represented to the defendant that, as a result of the sale of the unit they then owned and the purchase of penthouse #19, they would realize a net cash gain of \$100,000.00.

[para20] Turning to consider the purchase price and the G.S.T., there is really no evidence that the agent made any representation whatever that the amount of the G.S.T. would be deducted from the purchase price. What was said was that the G.S.T. would be "absorbed" by the plaintiff; i.e., that the defendant would not have to pay the G.S.T. on top of the purchase price of \$775,000.00. This is what the defendant said at Q. 1571 to 1574 of her cross-examination previously mentioned. This is also what the husband said in paragraph 19 of his affidavit, quoted above. The offer drawn on behalf of the defendant was submitted and accepted. It was the husband who alone decided that the purchase price to be offered for penthouse #19 should be \$775,000.00. The evidence of the defendant already referred to in the main action establishes the absence of any merit in this aspect of the third party claim. I do not need to repeat the previous discussion of this point.

[para21] Concerning the alleged \$100,000.00 spread, there is no evidence that the agent made any such representation. The wife's answers at Q. 1,614 and following of her cross-examination do not advance the defendant's case. At Q. 303-304, she denied that Mrs. Fields, one of the two sales persons, promised her anything about the spread - "never", she said. In fact, I have not been referred to any satisfactory evidence of any representation made by the agent to the defendant about any \$100,000.00 spread. If that notion existed anywhere, it was only in the defendant's mind or that of her husband, upon whom she relied. It was after learning that a proposed purchaser was prepared to make an offer of \$882,000.00 for the unit they then owned that the husband decided that the price to be offered for penthouse #19 was \$775,000.00, although it was listed for sale at \$925,000.00. Even if the agent had some understanding that Mr. Robert would like to have a \$100,000.00 spread, there is no evidence that the agent made any factual representation to that effect.

[para22] For these reasons the third party claim fails entirely and is dismissed.

Costs

[para23] In the result, the plaintiff is entitled to judgment against the Defendant for \$50,700.93, together with pre-judgment interest at 7.7% per annum from May 1st, 1992 until today; and post-judgment interest in accordance with the Courts of Justice Act. The third party claim fails and is dismissed. Accordingly, the successful parties are both entitled to their costs against the defendant. I believe that these costs can be fixed rather than referred for assessment. Prior to the argument and at my request, each counsel supplied me with the figure for costs he would be seeking if successful in this matter. Counsel for the defendant sought \$20,000.00 in costs if he were to be successful. I consider that to be an appropriate measure of the costs which the defendant ought to pay to the successful parties.

[para24] Accordingly, I fix the costs to be payable by the defendant to each of the other parties at \$20,000.00.

EBERLE J.

CBR# 348

Jim Hop-on Wong, Ivy Wong, Mary Lam, Ian Lam, Manchi Lam and Ching-Chi P. Lo, Applicants, and Reemark Sterling II Limited, Respondent

Action No. RE 1228/92

Ontario Court of Justice - General Division Toronto, Ontario Hawkins J. Heard: September 3, 1992 Judgment: October 7, 1992

Alan J. Butcher, for the Applicants. Gary Caplan, for the Respondent.

HAWKINS J.:-- These are three applications in which the purchasers of condominium units seek declarations that the agreements are null and void and for relief consequential to such declarations.

The units are in the same building and the vendor is common to all three matters as are many of the facts. None of these purchasers ever occupied the units personally but they did occupy, at different times, through tenants. Significant dates and figures are as follows:

The "Wong" Purchase - Unit 1710

Price: \$158,040.00 Deposits paid: \$ 39,510.00 Contract occupancy date: 15 Sept. 1990 Actual occupancy date: 27 Nov. 1990 Monthly occupancy charge: \$ 1,653.75 Contract closing date: 30 Jan. 1991 First extended closing date: 20 Dec. 1991 Tenanted: Dec. 1990 - April 1992

The "Lam" Purchase - Unit 1604 Price: \$166,950.00 Deposits paid: \$ 41,738.00 Contract occupancy date: 15 Sept. 1990 Actual occupancy date: 23 Nov. 1990 Monthly occupancy charge: \$ 1,742.87 Contract closing date: 30 Jan. 1991 First extended closing date: 20 Dec. 1991 Tenanted: Dec. 1990 - Late 1991

The "Lam/Lo" Purchase - Unit 1714

Price: \$174,000.00 Deposits paid: \$ 43,500.00 Contract occupancy date: 15 Sept. 1990 Actual occupancy date: 23 Nov. 1990 Monthly occupancy charge: \$ 1,784.28 Contract closing date: 30 Jan. 1991 First extended closing date: 20 Dec. 1991 Tenanted: Dec. 1990 - April 1992

The vendor was unable to close by the contract closing date (30 Jan. 1991) and fixed a new closing date of 20 Dec. 1991. The vendor purported to extend the closing dates further as follows:

Date of Letter Purported Extension

12 Dec. 1991 16 Jan. 1992 2 Jan. 1992 30 Jan. 1992 20 Jan. 1992 13 Feb. 1992 3 Feb. 1992 27 Feb. 1992 14 Feb. 1992 9 Mar. 1992 4 Mar. 1992 17 Mar. 1992 11 Mar. 1992 26 Mar. 1992 17 Mar. 1992 24 Apr. 1992

The Wongs, through their solicitors, advised the vendors by letter dated 2 April 1992 that they would not be completing the transaction as a result of the vendor's unilateral extensions of the closing date after 20 December 1991.

The Ian Lams gave a similar notice to the vendors though not until the day before the latest extended closing date (April 23/April 24). Lam/Lo took a different tack. Upon receipt of the vendor's solicitors letter of 3 February 1992, purporting to fix a closing date of 27 February, Lam/Lo solicitors advised by letter dated 11 February 1992 that their client was willing to close on the previously-fixed date of 13 February, 1992 but not later. This offer was unequivocally rejected by the vendor.

The issues raised by these applications are:

1. Did the vendor have the right to extend the closing date beyond 20 December 1991?
2. Was there any conduct on the part of the purchasers to prevent them from treating these extensions as a repudiation by the vendors?

Issue One

The contractual occupancy date in all three agreements was 15 September 1990. Paragraph 8 of Schedule D to the agreement enables the vendor to extend the occupancy date for one or more periods of time such periods not to exceed eighteen months. The power in the vendor to extend the closing date is quite different. It is found in paragraph 5 of Schedule D in these words:

". . . in the event that the documents creating the Condominium Corporation have not been registered prior to the Closing Date the Closing Date shall be extended to a date designated by the Vendor or its solicitors as the Closing Date which date shall be not less than fifteen (15) days after notice in writing thereof is given by the Vendor or its solicitors to the Purchaser or its solicitor".

I find that the power to extend the closing date is exhausted by its single exercise. The wording itself refers to extension to "a date" not "a date or dates". Multiple extensions of time, when contemplated, were clearly provided for as in the case of extensions of the occupancy date as indicated above. If there is any uncertainty about the power to extend the closing date (and I think there is not) it should be interpreted contra proferentum. The answer to issue number one is "no". Issue Two

Both the Wongs and the Ian Lams let seven authorized extensions go by without protest, protesting only the eighth unilateral extension, in the Wongs case some twenty-two days before that final extended date and in the Ian Lams case on the very eve of the final extension date. In *King et al. v. Urban and Country Transport Ltd.* (1973) 1 O.R. (2d) 449 (C.A.) Arnup J.A. had this to say (at p. 456):

"Normally . . . when both parties let the time go by, and one of the parties wishes to reinstate time as of the essence, it is necessary to serve a notice upon the other party, fixing a new date for closing, which must be reasonable, and stating that time is to be of the essence with respect to the new date".

I find therefore that the applicants Jim Hop-On Wong, Ivy Wong, Mary Lam and Ian Lam, had, by their silence and inaction in the face of seven consecutive extensions by the vendor, elected to treat to the agreement of purchase and sale as still valid and subsisting and that it was incumbent on them to reinstate the essentiality of time by naming a new and reasonable date for closing. Their applications are, therefore, dismissed with costs.

The applicants Manchi Lam and Ching-Chi P.Lo are more fortunate. Their letter of February 11, 1992, in response to the vendor's fourth closing extension names a new date for closing being the previous closing date named by the vendor (February 13, 1992). Although that date is only two days away from the date of these purchasers' letter, the vendor's letter in response dated February 13 makes no issue of the shortness of the purchasers' notice but simply takes the imperious position that the closing is to be 27 February 1992 and that is that!

I find that Lam/Lo had the right to restore the essentiality of time to the agreement by naming a new reasonable closing date themselves, which they did, and that the vendor's rejection of that closing date relieved Lam/Lo from any need to tender on their proposed closing date.

Judgment is to issue in favour of Manchi Lam and Ching- Chi P. Lo declaring that the agreement of purchase and sale between them and Reemark Sterling II Limited dated 8 April 1988 is null and void.

Lam/Lo had tenants in the unit from December 1990 to April 1992, this tenancy being terminated by notice from Lam/Lo. It is appropriate that Lam/Lo pay occupancy fees up to the time that their tenant vacated. The material indicates that Sam/Lo have been arrears of occupancy fees from January 1992. These arrears amount to:

Jan/Feb/Mar 3 x \$1,784.28 = \$5,352.84 Apr. 1 - 19 19 x \$58.66 = \$1,114.54 ----- Total \$6,467.38

The Lam/Lo deposits total \$43,500.00. Against this figure is set off the occupancy fee arrears (\$6,467.38) for a net in favour of Lam/Lo \$37,032.62.

Judgment to issue for that sum together with pre-judgment interest thereon from 19 April 1992 and costs.

If I have misunderstood the figures in arriving at the above sums I may be spoken to as I may be concerning the issue of costs.

HAWKINS J.

CBR# 164

Lee v. Leslie Centres Ltd.

Between Nelson Lee, Che Jick Tam and Anne Lee, Applicants, and Leslie Centres Ltd., Respondent Action No. RE 205/92

Also reported at: 23 R.P.R. (2d) 185

Alan J. Butcher, for the Applicants. Paul A. Konikoff, for the Respondent.

MONTGOMERY J.:-- This application is for a declaration that an agreement of purchase and sale, executed September 8, 1988, is null and void, and for return of the deposit of \$102,000 plus interest.

THE FACTS:

The applicants are purchasers under an agreement of purchase and sale. The applicants agreed to purchase units in a commercial condominium development for the sum of \$510,000.

The agreement provides in paragraph 5(c) that the units shall be ready for occupancy on the 28th day of September, 1989. The wording of paragraph 5(c) is as follows:

"The Occupancy Date" shall be the 28th day of September 1989 or such extended or accelerated date pursuant to the terms hereof, and as provided for in paragraphs 2., & 25. to 36.

Paragraphs 2., & 25. to 36. provide for a licence governing the occupation of a completed unit from the occupancy date until final closing. None of the terms in those paragraphs provide for an extension of the occupancy date.

The respondent relies on paragraph 19 under the heading "Delays": 19. In the event, completion of the Unit or the common elements is delayed by reasons of strikes, lockouts, fire, lightning, tempest, availability of labour, fixtures or building materials, riot, war and unusual delay by common carriers or unavoidable casualties, municipal occupancy certificate or by any other cause of any kind whatsoever beyond the control of the vendor, the vendor shall be permitted, from time to time, extensions of time as required by it for completion and the Occupancy Date shall be extended from time to time accordingly.

The agreement provides that time is of the essence.

The units were not completed by September 28, 1989, the occupancy date set out in the agreement. Nor were the units completed by September 28, 1990, the proposed amendment to the occupancy date. To this date the units still remain incomplete and there is no evidence that construction has even commenced on the property.

The respondent contends that even if it is in default, the applicants are in default for failing to provide financial information on time.

Reliance is placed upon the decision of the Saskatchewan Court of Appeal in *Shaw Industries Ltd. et al. v. Greenland Enterprise Ltd. et al.* (1991), 16 R.P.R. (2d) 1. At p. 9 Southin J.A. said:

The underlying reason for this is that a party to a contract for the sale of land, who is in essential default, cannot be heard to complain of the wrongdoing of the other until he has given the other the opportunity to do right and is himself ready to do right. To cast stones, one must be without sin or at least have expiated one's sin.

I distinguish that case on the facts.

I conclude that there was no default on the part of the applicants here. Mr. Lee said in cross-examination that he was told by the agent that the financial information would be required some time in the future. There is some evidence based on information and belief to the contrary; that is not good enough. It was incumbent upon the respondent to produce firsthand evidence if it could. There were no letters from respondent's solicitors to purchasers' solicitors demanding or even requesting financial information.

I am satisfied the sole default is that of the respondent.

It is 2-1/2 years since the date fixed for closing. It is unreasonable now to try and fix a fresh date for closing on a commercial purchase where construction has not even started.

I see no solace in paragraph 19 of the agreement for the respondent. The *contra proferentem* rule applies against the respondent.

There is no need to tender here as no building has been built.

A declaration will issue that the agreement is null and void.

The respondent shall forthwith return the deposit of \$102,000, together with interest at 10 percent per annum, from the date of deposit.

Costs to the applicant fixed at \$1,500.

MONTGOMERY J.

CBR# 127

Evelyn Grimble and Wayne Grimble, Applicants, and 662092 Ontario Limited, Respondent

Action No. 6977/90

Ontario Supreme Court Judicial District of York Region - Newmarket, Ontario Shearer L.J.S.C. July 6, 1990

Jonathan H. Fine, for the Applicants. G.M. Caplan, for the Respondent.

SHEARER L.J.S.C.:--

ISSUE:

The applicants seek a determination of their rights under an Agreement of Purchase and Sale. By consent at the opening of the argument, it was agreed that paragraph 10 of the applicant's written argument should be incorporated into the final order resolving this matter, thereby disposing of that issue.

The remaining issue is whether the applicants (hereinafter called the tenants), are responsible for the carrying expenses of the Respondent, a condominium corporation (hereinafter called the landlord) in maintaining the condominium from the time the tenants occupied their condominium unit until the formal closing of the transaction.

The contract between the parties consists of two documents: an "Agreement of Purchase and Sale", accepted on March 8/89 and an "Interim Occupancy Agreement" dated Feb. 20/89 (which latter document amended the former by "adding thereto" certain clauses). These two documents are hereinafter referred to as "the contract".

The contract contains the following articles: 3.05 The sale price herein has been calculated on the basis of the Unit having an area of approximately 1,039 square feet at a sale price of \$200.00 per square foot. As soon as the Unit has been substantially completed the Vendor shall calculate the actual area of the unit and the sale price shall be adjusted at the said rate.

3.06 In the event the Declaration has not been registered on or before the Occupancy Date, the provisions of article 5.00 shall apply, and the Purchaser shall, during the period of such occupancy, pay in advance to the Vendor the sum of \$ ONE THOUSAND, TWO HUNDRED NINETY-EIGHT DOLLARS AND SEVENTY-FIVE CENTS (\$1,298.75) DOLLARS per month as an occupancy licence fee, which monthly license fee will not be credited towards payment of the purchase price. This amount is based on \$15.00 per square foot annual as occupancy licence fee (plus \$ per square foot annual estimated cost common area expenses which are subject to year end adjustment.)

It should be noted that the monthly "occupancy licence fee" (hereinafter called "rent") was determined by charging the tenants at the rate of \$15.00 for each square foot of their unit.

It is the interpretation of article 3.06 that creates the conflict between the parties. The tenants argue, first, that the paragraph clearly states that \$1,298.75 represents their full monthly liability. If that argument is rejected the tenants submit that the clause is ambiguous and that evidence extraneous to the contract should be admitted in order to establish that their interpretation is correct.

The landlord contends that section 3.06, when read in conjunction with other sections of the contract, make the intention of the parties clear, namely, that the tenants' liability is not restricted to payment of their rent, but includes also the carrying costs of the unit.

It is trite law that provisions of a contract should not be considered in isolation. The contract as a whole must be looked at in order to interpret any particular term and no terms should be taken as meaningless. Applying these principles to the contract in issue, I find the following articles to be helpful in determining the matter before me. For clarity, I omit portions of the various sections.

Section 3.07 states: "Realty taxes ... hydro, water and gas rates, fuel, estimated common expenses and mortgage interest ... occupancy licence fee ... and insurance ... shall be apportioned ... and ... be paid ..." on the closing date.

Section 5.02 states: "The Purchaser shall ... pay ... the balance of the purchase price with adjustments ... as set out in article 3.00." (This reference invokes the provisions of 3.07 above).

Section 5.12 "The Purchaser shall assume sole responsibility to the absolute exoneration of the Vendor for all realty taxes ... hydro, water, electric and heating costs, charges and expenses, attributable to the Unit." ... The Purchaser agrees that the occupancy license is to be ... "completely carefree to the Vendor". (The underlinings are mine).

These last 5 words are couched in simple English, uncluttered by legalese, and can be readily understood by laymen.

After a careful reading of the agreement as a whole and relying particularly on the above-mentioned articles, I am compelled to find that there is no ambiguity in the contract and that the intention of the parties is clear, namely, that the tenants are obliged to pay, in addition to the monthly rent, the carrying charges incurred by the landlord during the tenants' term of occupancy prior to closing.

In my view, poor draftsmanship on the part of the landlord in the preparation of the contract was partly responsible for motivating the applicants to bring this motion. For this reason, I make no order as to costs.

SHEARER L.J.S.C.

CBR# 249

Re Berry et al. and Indian Park Association

Re Indian Park Association and Langs et al.

[Indexed as: Berry v. Indian Park Assn.]

33 O.R. (3d) 522

Nos. G17626-96 and G-17406/96

Ontario Court (General Division), Eberhard J., April 24, 1997

APPLICATION for a declaration that the applicants were not bound by a building scheme.

Martin Scisizzi and Orlando V. DaSilva, for applicants and for respondents in counterapplication. Chrisandra Firth and Howard Hamilton, for respondent/ counterapplicant.

EBERHARD J.: -- Since 1974, the DeMartini family through corporations named Kitwee, Modco, and Monica have developed the Sugarbush properties along the Horseshoe Valley Road in the Corporation of the Township of Oro, County of Simcoe. Phase I and II were developed by Kitwee and Modco in 1974. Registered on title of each lot of Phase I and Phase II is an agreement between Kitwee and Modco and Indian Park Association setting out the intention to create a building scheme including covenants restricting the use of privately owned lots. Each deed conveying an individual lot within Phase I and Phase II refers to the restrictions set out in the registered agreement. Kitwee and Modco conveyed the common lands in Phases I and II to the Indian Park Association, which association each lot owner was required to join. Bylaw No. 1 of the Indian Park Association, in its original form, obligates each lot owner to pay dues of membership which are used to support the various objects of the corporation including maintenance of common areas. Bylaw No. 1 in its original form also included land use restrictions that were recorded in the registered agreement and referred to in each deed. The directors of Indian Park Association are elected from the membership comprised of each lot owner.

Registrations are under the Land Titles Act, R.S.O. 1980, c. 230.

In 1988, the DeMartini family, through the Monica Corporation, undertook the development of Sugarbush, Phase III. By agreement between Monica Corporation and the Indian Park Association, additional lands were conveyed to the Indian Park Association and Monica Corporation purported to bind its successors to membership in the Indian Park Association, to payment of dues associated with membership and compliance with association rules. This agreement was registered against each lot in Phase III. The agreement of purchase and sale used by Monica respecting each lot in Phase III included an acknowledgement by the purchaser that the agreement between Monica Corporation and the Indian Park Association, and the bylaws of Indian Park Association had been read. Notwithstanding that the bylaws are in the nature of restrictions on the use of privately owned land, restrictive covenants were not registered against each lot in Phase III.

Conflicts have developed. The applicants are a group of lot owners or former lot owners of Phase III who challenge the authority of the Indian Park Association to restrict their use of privately owned lots as well as the authority to collect dues. I find as a fact that the purchasers of lots in Phase III, as a consequence of the clause in the agreements of purchase and sale, must be taken to have had actual notice of an agreement which purports to bind them to membership in the Indian Park Association. Such membership requires payment of dues and compliance with land use bylaws.

The Applications

The applicants seek a declaration that the bylaws do not bind private lots in Phase III; a declaration that the owners of lots in Phase III are not bound; and that the owners of Phase III are either not members or are at liberty to terminate their membership in Indian Park Association. As an alternative, the applicants seek to wind up the Indian Park Association on the basis of the common law remedy for oppression or on the statutory basis that it is just and equitable to do so.

In the companion application, Indian Park Association moves for an injunction against the Langs to prevent them, as lot owners in Phase III, from parking a school bus on their property contrary to the bylaws of Indian Park Association. It is conceded that by parking a school bus as they have, the Langs are in breach of the bylaw.

The Issues

The issues in both applications are:

(a) Whether the bylaws of Indian Park Association with restrictions on the use of private lands are binding and enforceable upon the lands in Phase III; and,

(b) Whether the restrictions are valid as part of a building scheme.

I begin by underscoring those matters that I am not deciding. I have not been asked to determine whether there is a valid building scheme in relation to Phase I and II nor whether the bylaws of Indian Park Association are binding upon those lands. I must necessarily comment upon Phase I and II since theirs is the history of the Phase III arrangement. However, no relief is sought on behalf of any party in relation to Phase I and II in this litigation and I do not purport to decide what I am not asked.

I also decline relief by way of winding up the Indian Park Association. I have reviewed the cases cited by the applicant (*Ebrahimi v. Westbourne Galleries Ltd.*, [1972] 2 All E.R. 492, [1973] A.C. 360 (H.L.); *Rogers v. Agincourt Holdings Ltd.* (1976), 14 O.R. (2d) 489 at p. 493, 74 D.L.R. (3d) 152 (C.A.); *Kay v. Nipissing Twin Lakes Rod & Gun Club* (1993), 7 B.L.R. (2d) 225 (Ont. Gen. Div.); *Sobrinho v. Oakville Portuguese Canadian Club* (1982), 37 O.R. (2d) 581 (H.C.J.); *Sass v. St. Nicholas Mutual Benefit Assn. of Winnipeg*, [1937] S.C.R. 415, [1937] 2 D.L.R. 761; *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481, 23 B.L.R. (2d) 286 (C.A.)) and find that the actions of the Board of Directors on behalf of the majority shareholders are not of such a quality as to justify remedy sought. I have directed my mind to the nature and purpose of the association, its circumstances

of operation and the effect of dissent upon effective continuation. I have considered the reasonable expectations of members of the Association. I have considered whether the actions of the Board of Directors in purporting to enforce bylaws have been "high handed" or harmful to Phase III residents such that peace cannot be maintained between the residents while the Association continues to exist. In these considerations I have had a predisposition antagonistic to the concept that majority rule is sufficient justification. My imagination allows many examples of instances when the power of the majority over the rights of the individual or the interests of society might well demand external sanction. This was not such a case. If the bylaws are valid, the efforts of the Board of Directors were not unlawful though perhaps at times unnecessarily accusatorial. The proper remedy here is to determine whether the Phase III applicants are justified in their resistance to the enforcement of bylaws. If so, they should be relieved of obligations which are not properly theirs. If, however, it is the determination of the court that the bylaws do bind them, then the Board of Directors was proper in its effort to encourage compliance.

I proceed, therefore, to a determination of the enforceability of the bylaws.

Land Use Restrictions

Restrictions on the use of private land do not bind the land at law unless they fall within recognized categories: Ontario Law Reform Commission, Report on Covenants Affecting Freehold Land (1989), at p. 22. Such categories include a chain of personal covenants, devices involving the use of a rent charge, benefit claimed under a deed, certain positive covenants made in favour of public bodies, site plans and plans of subdivisions registered on title and more recently, covenants governed under the Condominium Act, R.S.O. 1990, c. C.26. These categories do not apply to the present case. Counsel for Indian Park Association has also conceded that the conditions for the running of the burden of a restrictive covenant in equity have not been met in present situation. I do note, however, that one of the requirements for the running of the burden of a restrictive covenant concerns notice. In equity

"A bona fide purchaser for value who acquires land without notice of a restriction, takes the property free of that restriction. . . .". This requirement is of limited relevance in Ontario because the equitable doctrine of notice has been replaced by the concept of statutory notice. Under the Registry Act the purchaser for value takes free of prior unregistered instrument unless the purchaser had actual notice before registration of the instrument under which he claims. Moreover, under the Land Titles Act, priority of registration prevails, despite actual or constructive notice. Thus, whether the lands is subject to the Registry Act or, the Land Titles Act, in order to protect the interest of the covenantee, the covenant should be registered on the title to the servient tenement.

(Ontario Law Reform Commission Report, *supra*, at p. 31.)

Having conceded non-compliance with the requirements of restrictive covenants, Indian Park Association relies on the argument that the restrictions are valid as part of a "building scheme". A "building scheme" involves the sale of building lots according to a plan and subject to restrictive covenants.

A building scheme may exist, therefore, when restrictive covenants are imposed during the course of development with intent that once the scheme has crystallized on the sale of the first lot or unit, the vendor will be bound by the scheme and the restrictions will be mutually enforceable by the purchasers of the several lots or units. In essence, once a building scheme has been established, equity treats the development as having its own local law.

(Reid v. Bickerstaff, [1909] 2 Ch. 305 at p. 319, 78 L.J. Ch. 753 (C.A.), cited in Ontario Law Reform Commission, Report on Covenants Affecting Freehold Land, *supra*, at p. 41.)

The traditional requirements accepted in Ontario are as follows:

(1.) that both the plaintiffs and defendants [that is, the owner of a lot seeking to enforce a restrictive covenant and the owner of a lot against whom he or she seeks enforcement] derive title under a common vendor; (2.) that previously to selling the lands to which the plaintiffs and defendants are respectively entitled the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiffs and the defendants respectively), for sale in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in details as to particular lots, are consistent and consistent only with some general scheme of development; (3.) that these restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold, whether or not they were also intended to be and were for the benefit of other land retained by the vendor; and (4.) that both the plaintiffs and the defendants, or their predecessors in title, purchase their lots from the common vendor upon the footing that the restrictions subject to which the purchases were made were to enure for the benefit of the other lots included in the general scheme whether or not they were also to enure for the benefit of other lands retained by the vendors.

(Elliston v. Reacher, [1908] 2 Ch. 374 at p. 384, affirmed [1908] 2 Ch. 665, [1908-10] All E.R. Rep. 612 (C.A.).)

A more liberal approach which has been rejected in Ontario nevertheless assists in understanding the concept of building schemes. English law requires only that the area of the scheme be clearly defined and that there be an intention to impose a scheme of restrictions, for the benefit of the purchasers and their successors, that would be mutually enforceable by them: McGarry and Wade, *The Law of Real Property*, 5th ed. (1984), c. 14 at pp. 791-92.

In 1988, the developer Monica could have created a building scheme. Monica owned all the lands laid out for sale in lots in Phase III. Land use restrictions such as those in place in Phases I and II were consistent and consistent only with some general scheme of development and the vendor intended benefit of such restrictions to be for all of the lots intended to be sold. By placing in the agreements of purchase and sale the requirement that the purchaser read the bylaws of Indian Park Association and the agreement between Monica and Indian Park Association binding Monica's successors to membership and compliance, the vendor Monica ensured that each lot was purchased upon the footing that the restrictions were made to enure for the benefit of other lots included in the general scheme.

However, I am not satisfied that Monica accomplished the goal of establishing a valid building scheme. This is so for several reasons:

First, I compare the method and documentation pursued by Monica in 1998 to that which was put in place by Kitwee and Modco in 1974 in relation to Phases I and II. The 1974 Kitwee agreement registered on title referred to the establishment of a "building scheme". Intention can be inferred without mention, but the 1988 Monica agreement recorded no such overt notice of such an

intention. The 1974 intention to establish a building scheme was supported by the registration of restrictive covenants on title and reference to them in every deed. A purchaser in Phase III was given notice of an agreement expressing the developers "wish" that

All lot and block owners . . . be members of I.P.A. and to enjoy the benefit of such membership and to be subject to compliance with the provisions of letters patent, bylaws, rules and regulations of the association as amended from time to time;

I.P.A. agreed

To amend its bylaws to admit any registered owner . . . subject to compliance with provisions of letters patent, bylaws, rules and regulations of the association as amended from time to time.

And:

Monica on behalf of itself, its successors and assigns agrees to abide by the bylaws, rules and regulations of I.P.A. in effect from time to time.

Indian Park Association argues that Monica created a building scheme that was flexible and placed in the hands of the lot owners their own power to impose land use restrictions as needed and agreed. The Association argues that all a purchaser needed to know was the nature of current restrictions imposed by Bylaw No. 1 and the mechanism for change contained therein and in the letters patent. Counsel for Indian Park Association could not, however, cite a single case in which a flexible land use restriction scheme had been validated nor indeed a single case in which land use restrictions imposed as part of a building scheme were not also registered on title.

The applicants have cited s. 118 of the Land Titles Act as the appropriate means in 1988 of registering restrictions on these lands.

118(1) Upon the application of the owner of land that is being registered or of the registered owner of land, the land registrar may register as annexed to the land a condition or restriction that the land or a specified part thereof is not to be built upon, or is to be or is not to be used in a particular manner, or any other condition or restriction running with or capable of being legally annexed to land.

(2) The land registrar may register as annexed to the land a condition, restriction or covenant that is included in a transfer of registered land that the land or a specified part thereof is not to be built upon, or is to be or is not to be used in a particular manner, or any other condition, restriction or covenant running with or capable of being legally annexed to land.

(3) Upon the application of the owner of land that is being registered or of the registered owner of land, the land registrar may register as annexed to the land a covenant that the land or a specified part thereof is not to be built upon, or is to be or is not to be used in a particular manner, or any other covenant running with or capable of being legally annexed to land.

.....

(10) Where a condition or restriction has been registered as annexed to land, the condition or restriction is as binding upon any person who becomes the registered owner of the land or a part thereof as if the condition or restriction had been in the form of a covenant entered into by the person who was the registered owner of the land at the time of the registration of the condition or restriction.

Clearly, that section sets out a co-ordinated scheme for the registration of restrictions running with or capable of being legally annexed to land. Indian Park Association submits, however, that s. 74 is equally effective to give notice of any "unregistered estate, right, interest or equity" referred to in a notice or restriction registered pursuant to that section.

74(1) Any person entitled to or interested in any unregistered estates, rights, interests or equities in registered land may protect the same from being impaired by any act of the registered owner by entering on the register such notices, cautions, inhibitions or other restrictions as are authorized by this Act or by the Director of Titles.

(2) Where a notice, caution, inhibition or restriction is registered, every registered owner of the land and every person deriving title through him, excepting owners of encumbrances registered prior to the registration of such notice, caution, inhibition or restriction, shall be deemed to be affected with notice of any unregistered estate, right, interest or equity referred to therein.

It is argued that registration of the agreement between Monica and Indian Park Association is sufficient notice to bind the land. I disagree.

Where a means of accomplishing notice is specifically set out, validation of an alternate, less specific means would introduce into land law an unwelcome uncertainty.

Moreover, I am not satisfied that notice by means of the registration of an agreement to comply with restrictions as amended from time to time is effective. Information recorded at the land titles office would be insufficient to notify a purchaser of the current state of the restrictions. We know, for instance, that some purchasers of Phase III lots were presented with copies of bylaws that were obsolete as the result of prior amendment. Even if the current bylaws could be ascertained, the purchaser would be forced to consider whether the bylaws as passed were valid and within the powers of the corporation. We know for instance that the Association concedes that its definition of "family" is beyond its jurisdiction and yet a restriction based on that definition appears in the current bylaws. Since the letters patent of Indian Park Association have been amended to allow changes in the bylaw with less than 100 per cent approval, a purchaser could not be certain that his obligations to the members of the association would remain stable. Nor could a purchaser be certain that his obligation would be limited to current lots since Indian Park Association has demonstrated its willingness to open its membership to Phase III and two more phases of development are currently pending.

The uncertainty arising from this scheme is such that it flies in the face of both common law and statutory policies. The strict common law rules suggest that courts were concerned that restrictive covenants could tend to render land inalienable and persons dealing subsequently with land would have great difficulty in ascertaining the existence of such covenants, because they do not normally have a physical manifestation: Ontario Law Reform Commission Report, p. 21.

Recording statutes, the Registry Act, R.S.O. 1990, c. R.20, and the Land Titles Act, were developed to comprehensively address these notice concerns. I am persuaded that the specificity required by these statutes is designed to ensure that notice of restrictions will be given to all owners under a building scheme. Under the Land Titles Act, priority of registration prevails despite actual or constructive notice. Anyone dealing subsequently with the land must be able to discover the existence and extent of obligations under the building scheme from the public record. This is consistent with the approach of the courts where there is a defect in registration such as a failure to adequately describe the subject lands. If the lands have not been adequately described, it will not matter that the vendor had an intention to create a building scheme, or that the original purchasers were aware of that intention: *Shen Investments Ltd. v. Mosca*, [1968] 2 O.R. 162, 68 D.L.R. (2d) 372 (H.C.J.).

The requirement in such an example that the area of a building scheme be defined with specificity reflects a concern with notice:

. . . there must be a defined area within which the scheme is operative . . . purchaser of one parcel cannot be subject to an implied obligation to purchasers of an undefined and unknown area. He must know both the extent of his burden and the extent of his benefit. Not only must the area be defined, but the obligations to be imposed within that area must be defined. Those obligations need not be identical. For example there may be houses of a certain value in one part and houses of a different value in another part. A building scheme is not created by the mere fact that the owner of an estate sells it in lots and takes varying covenants from various purchasers. There must be notice to the various purchasers of what I may venture to call the local law imposed by the vendors upon a definite area.

(*Reid v. Bickerstaff*, supra, at p. 319 (emphasis added).)

I find therefore that Monica did not succeed in establishing the building scheme which it may have intended because the specificity of notice was insufficient to permit anyone dealing subsequently with the land to be able to discover the existence and extent of the scheme from the public record.

The Bylaws

I also find that the land use restrictions contained in the bylaws of Indian Park Association are unenforceable against Phase III residents because such bylaws are ultra vires of the powers of the corporation. The objects of Indian Park Association are recorded in its letters patent as follows:

- (a) To acquire the ownership of certain lands and premises in the Township of Oro, in the County of Simcoe and the Province of Ontario and to manage, maintain, develop and improve such lands for the mutual benefit of the members of the corporation;
- (b) To manage and maintain any services for the mutual benefit of the members of the corporation;
- (c) To erect and maintain a building or buildings on the said lands for the mutual benefit of the members of the corporation;
- (d) To promote social activities among the members;
- (e) To advance the interests and welfare of the members of the corporation; and
- (f) To assess and collect from the members of the corporation such sums of money as the corporation may deem necessary from time to time for the purpose of carrying out the aforesaid objects . . .

The letters patent in their original form set out an amending formula requiring confirmation by 100 per cent of the members present in person or by proxy at a meeting of the members called for that purpose.

Upon its incorporation, the Association enacted "Bylaw No. 1" which enumerated several provisions relating to the transaction of the business and affairs of the Association. Bylaw No. 1 included, in particular, the following provisions:

1. Definitions

(iii) Land means all the land situate . . . in the Township of Oro . . . more particularly described as Part 1 on a Plan of Reference filed . . . as Number 51R-3329 . . . except for all lots as hereinafter defined . . . [i.e. the common lands with the Phase I and II lands]. (v) Lot means each of a total of 157 lots according to Plans of Subdivision filed or to be filed . . . [i.e., the privately owned lots with the Phase I and II lands].

2. Membership (i) Admission to Membership. Each owner of a lot shall ex officio be a member of the Corporation [i.e., the Association] . . .

(ii) Termination of Membership. Subject to the letters patent the interest of each member in the Corporation is not transferable and shall lapse and cease to exist . . . in the case of each of the other members, upon the transfer of the beneficial ownership in their respective lots. . . .

(iv) Rights of members. Each member shall be entitled to use and enjoy the Land in a reasonable manner, provided that if any member fails to pay his share of the common expenses or other charges contemplated herein when same are due, or fails to comply with the restrictions herein contained, such member shall not be entitled to use the land until such payment is made or the restrictions are complied with.

10. Duties of the Corporation . . .

(i) to manage, maintain, develop and improve the Land . . .

(ii) to manage and maintain the water supply and distribution system to the Lots . . . unless and until the Township assumes the management and maintenance of same.

(iii) to collect and receive all contributions towards the common expenses from the lot owner . . .

(iv) to effect compliance by the members with this and subsequent By-laws of the Corporation, the agreement dated August 30, 1974 between Kitwee . . . and the Corporation, each and every covenant given by each member and contained in the transfer to him of his Lot and each and every covenant notice of which is registered against the Lots.

(v) to advance the interest and welfare of the members.

Although the Association's letters patent did not enumerate, as one of its objects, the imposition of restrictions on the use and enjoyment of privately owned lots within the Phase I and II Lands, Bylaw No. 1, nevertheless, included the following lot use restrictions:

14. Provisions Respecting the Lots: The use of the Lots shall be in accordance with the following restrictions for the enhancement in value of all of the Lots and Land and the better enjoyment thereof by the members:

(i) No garage or fence shall be constructed or erected on any Lot save and except each lot owner may construct and install a pool which can be fenced in accordance with the by-laws and zoning restrictions of the Township of Oro.

(ii) . . . no improvements, alterations or additions to any Lot or to the exterior of any premises thereon shall be made, performed or constructed without the prior written approval of the board, which approval shall not be unreasonably withheld.

(iii) No trees shall be cut down other than those which are dead or diseased . . .

(iv) No motor vehicles of any kind other than snowmobiles or motorcycles shall be parked on any Lot, . . . only snowmobiles may be driven on or over the land owned by the Corporation or parked on such lands.

(v) There shall be no littering on any Lot . . .

(vi) No animal shall be kept or brought on any Lot other than domestic animals normally regarded as pets.

(vii) No signs advertising any Lot for sale or rent shall be placed thereon with the prior written approval of the board which approval shall not be unreasonably withheld.

(viii) The beneficial ownership in and to any Lot shall not be transferred by sale, gift, bequest or otherwise, other than to a person who shall acknowledge, in writing, to the Corporation his membership therein and accordingly his obligations to observe this and any other By-laws of the Corporation.

Without amending the objects of the Association enumerated in its letter patent, the Association entered into an agreement with Monica whereby the Association agreed to amend its bylaws to admit into membership any registered owner of a lot in Phase III. In November 1988 before executing the Monica agreement and before there were any Phase III members of the Association, the Indian Park Association purported to establish a new set of by-laws entitled By-Law No. 1 at the general annual meeting contained a number of additional provisions including, among other things, a change in the restrictions on the use of lots within Phases I, II and III some of which were more onerous as follows:

1. Board approval must be obtained for the construction or installation of any structure of all new dwellings prior to receiving a building permit, excepting those homes built by the developer.

6. No pool or fence shall be constructed or erected on any Lot.

7. Except in authorized garages, Lots may not be used to store the following: unlicensed vehicles, boats, trailers, mobile vans, non-permanent structures not approved by the Board, heavy equipment, machinery, garbage and debris. These items will be removed at the Owner's expense.

14. Lots cannot be used for commercial ventures. Home occupations are permitted as long as lots are not advertised for commercial use. 16. The beneficial ownership in and to any Lot shall not be transferred by sale, gift, bequest or otherwise, other than to a person who shall acknowledge to the Association his membership therein and accordingly his obligation to observe this and any other laws of the Association.

17. Lots shall be used for single family use only. For the purpose of this By-law "family" means one human being or two or more human beings related by blood, marriage or legal adoption or a group of not more than three human beings who need not be related by blood or marriage living together as a single housekeeping unit . . .

The letters patent of the Association were never amended to give the Association power to pass bylaws restricting the use and enjoyment of any privately owned lots within Phase III.

The Association, like all non-share capital corporations, was granted a corporate Charter at the discretion of the Lieutenant Governor for the purpose of carrying out objects, "of a patriotic, religious, philanthropic, charitable, educational, agricultural, scientific, artistic, social, professional, fraternal, sporting, or athletic nature or of any other useful purpose". In addition to deriving its powers from the objects listed in its letters patent, the association has additional specific power prescribed by s. 23 of the Corporations Act, R.S.O. 1990, c. C.38, as "ancillary and incidental", and therefore necessary to the attainment of the stated objects. Section 129 of the Corporations Act empowers the Association to pass specific and limited bylaws. Neither the objects of the association nor the Corporations Act empowers the Association to,

(a) impose a mandatory membership scheme on residents; or

(b) pass and, thereafter, attempt to enforce, bylaws which restrict the property and civil rights of the association members.

Restriction on civil rights and property rights, when it legitimately occurs, is typically accompanied by legislation of considerable specificity. As discussed above, to restrict the use of land, vast bodies of law have developed to control and regulate what may be restricted and how the restrictions can be accomplished. In a context of condominiums, the respective rights, obligations and limitations of those who submit to restriction and those who impose it are carefully regulated by detailed legislation. Restrictions

emanating from public bodies are regulated by many substantive and procedural requirements. A mechanism for review of restrictions is available.

It cannot be imagined that a non-share capital corporation without the benefit of these vast bodies of supporting law could take upon itself the power to restrict use of privately owned land of its members under the general object "to advance the interest and welfare of the members of the corporation" appearing in a list of specific objects which make no mention of the use of private lands. Neither could it be imagined that the general duty of the corporation "to advance the interest and welfare of the members", in a list of duties concerned with managing common land, managing the water supply, collecting contributions for common expenses and effecting compliance with bylaws, could support the much more significant duty to control the use of privately owned lands.

A general object to advance the interest of members of a corporation must be read together with the other objects in order to understand what is intended: *Kay v. Nipissing Twin Lakes Rod & Gun Club*, supra, at p. 229. A general clause is not a licence to pursue a direction that is not consistent with the total objects of the corporation.

I find that in so far as the bylaws purport to restrict the use of private land, they are manifestly outside of the objects of the corporation.

Consequently, by reason of my finding in relation to land use restriction and in relation to bylaws, this court declares that the bylaws of Indian Park Association are not enforceable to bind the private lots of Phase III.

Personal Obligation

The applicant has also asked for declarations that the owners of the lots of Phase III are not bound by the bylaws of Indian Park Association at all, and that they are not members, or if they are, that they may terminate their membership.

I began this judgment with a finding that the original purchasers of Phase III had actual notice of an agreement between Monica and Indian Park Association. By that agreement, Indian Park Association received certain lands in the Phase III development which they took responsibility for managing for the benefit of members. Registered owners of Phase III were admitted into the benefits of membership in the Association subject to compliance with the provisions of the letters patent, bylaws, rules and regulations of the association as amended from time to time. I have ruled that the bylaws are ineffective to permit Indian Park Association to restrict use of private lands. However, that is not the end of the relationship. Because of the agreement between Monica and Indian Park Association, membership is an incident of ownership of a lot. Common lands are under the control of the association. Financial obligations of a member are set out in Bylaw 1 as amended:

Default of payment.

Where a member is in default in his obligation to pay his contribution toward the operating expenses the Association may, thirty days after payment is due, register a notice of lien against his lot. Such lien shall be deemed to be a mortgage under the Mortgages Act R.S.O. 1980 Ch. 296 and any amendments to the Act. The association shall have, in addition to any other rights which it may have, such rights afforded to the mortgagee under the provisions of this Act. The board shall advise each mortgagee of any lot against which a notice of lien is registered of such registration if that mortgagee is on register with the association. The cost of enforcing the association's rights on non payment of contributions towards operating expenses, including legal fees calculated on a solicitor and his own client basis, shall be borne by member in default.

The rights of members are tied to payment:

(iv) Rights of members.

Each member who pays his share of expenses and abides by all the bylaws and covenants shall be entitled to use and enjoy the common Land, and facilities in a reasonable manner. If any member fails to pay his share of the common expenses or other charges set by the board when due, or fails to comply with the restrictions and obligations set out in the bylaws, such member shall not be entitled to use the land until such payment is made or the restrictions or the obligations are complied with. These provisions bring again to the forefront a concern obvious since the outset of this proceeding. Indian Park Association, through its argument and through the bylaws as indicated, takes the position that mandatory membership necessary in order to preserve the integrity of the Sugarbush neighbourhood. The terms of the bylaw setting out financial obligations of a member and the imposition of a lien in default of payments, makes continued membership unsatisfactory for those who merely do not wish to partake in the benefits of membership and do not perceive that their membership payments are used for any purpose beneficial to them. Therefore, they require a declaration that their membership is terminated or terminable though they may well continue to share aesthetic and environmental values with other members of the Indian Park Association. It may be quite ironic that such persons seek termination of their membership in an organization that they might gladly join if it were a voluntary neighbourhood association seeking only to maintain the aesthetic and environmental qualities of the common lands and raise enough money through association dues to maintain some common facilities.

In light of my finding that the bylaws restricting use of private land cannot be enforced, a clause converting a debt to a lien and deeming it to be a mortgage cannot coexist with a scheme demanding mandatory membership. The bylaws cannot bind the land. In so far as the default of payment clause set out purports to claim an interest in land upon default of payment, it is void.

I inquired of counsel for the applicants during argument whether purchasers of Phase III lots may be bound personally on the basis of the agreements of purchase and sale which they signed. It was suggested that any personal obligation arising thereby merged upon the closing of the sale. No argument was made that a personal, contractual liability persists. Further, counsel for the applicant argued that Indian Park Association could not enforce such a personal obligation as there was no privity of contract and no exception to the rule against enforcement for third party beneficiaries. No argument was made to the contrary.

I am left therefore with no basis upon which to enforce a requirement for mandatory membership in Indian Park Association upon lot owners of Phase III. I find that membership of Indian Park Association which the Association was obliged by contract with Monica to grant to the lot owners of Phase III is terminable upon the resignation of the members. With such termination, of course, will end any rights of the former members to share in the use and enjoyment of common lands and facilities just as non-paying members will not be entitled to use the common lands and facilities pursuant to cl. (iv) quoted above. Other consequences of cessation membership are not argued and I do not, at the request of counsel, decide. Clearly, subject to cl. (iv), lot owners of

Phase III have had available to them the benefits of membership, whether they choose to exercise them or not. In making a finding that the membership is terminable upon resignation, I specifically do not suggest thereby any requirement for the review of the expenditures of the Board of Directors to determine whether Phase III residents enjoyed their "fair share" of the Association expenditure. This judgment is not based on an acceptance of the argument that the expenditures of the association oppressively favoured members other than the applicants.

The Injunction

In the companion application, as indicated earlier, the injunction issue is solely dependent on the enforceability of bylaws relating to restrictions of use of private land. In light of my findings, the injunction is denied.

The Litigation

During argument, counsel expressed the view that once the enforceability issue was determined, new negotiations might yield final resolution of other issues raised in the claims. If argument is required on outstanding issues, the matter may be heard on a date arranged through the trial co-ordinator. A pretrial is suggested.

Costs may be addressed by conference call, on consent, arranged through the trial co-ordinator.

Order accordingly.

CBR# 102

DeSoto Developments Ltd. v. Ontario New Home Warranty Program *

8 O.R. (3d) 792

Action No.180/91

Ontario Court (General Division), Divisional Court, Montgomery, Carruthers and Campbell JJ. April 29, 1992

* Note: An appeal from the following judgment of the Ontario Court (General Division), Divisional Court, to the Court of Appeal for Ontario (Robins, Carthy and Laskin JJ.A.) was dismissed on December 5, 1994. See 21 O.R. (3d) 738

APPEAL from an order of the Commercial Registration Appeal Tribunal pursuant to s. 17(4) of the Ontario New Home Warranties Plan Act.

J. Ivan Marini, for applicant.

Brian M. Campbell, for respondent.

THE COURT:--This is an appeal from an order of the Commercial Registration Appeal Tribunal (the Tribunal), dated February 11, 1991, pursuant to the provisions of s. 17(4) of the Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31 (the Act).

The appellant (DeSoto), in December 1985, was registered as a "vendor/builder" under the Plan provided for in the Act and administered by the respondent corporation (the Program). R.R.O. 1980, Reg. 728, passed under the Act, outlines the "terms and conditions of registration of builders and vendors" registered under the Plan and s. 1 para (4) reads as follows:

1. The following are conditions of every registration under the Plan:

.....

4. The registrant shall indemnify and save harmless the Corporation and the insurers for the time being under any contract or contracts of insurance establishing the guarantee fund, from any loss which they or any of them may suffer by reason of his failure to diligently perform or cause to be performed all obligations imposed on him under the Plan and under any agreement made by him with the Corporation in respect of the Plan.

On September 20, 1988, the Registrar of the Plan issued a notice of proposal pursuant to the provisions of s. 7 of the Act to revoke the registration of DeSoto on two grounds. Then, on December 20, 1989, after DeSoto had initiated an appeal from that proposal to the Tribunal, the Registrar issued a revised notice of proposal to revoke DeSoto's registration for further reasons. These included the following:

(a) that the Appellant had a record of breaches of warranty sufficient to warrant the revocation of its registration, pursuant to the provisions of Section 8(2) of the Act. It was alleged that the Appellant's breaches of warranty and refusal or failure to rectify same, resulted in the "Warranty Program" paying a total of \$173,530.52 from the Compensation Fund established under the Act, to compensate the owners referred to in the revised Notice of Proposal, or as payment for work arranged by the "Warranty Program" in lieu of compensation. The "Warranty Program" further invoiced the Appellant for the said amount plus a 15% administration fee;

(b) that the Appellant did not have sufficient technical competence to consistently perform the warranties under the Act;

(c) that the Appellant breached a condition or conditions of registration, pursuant to the provisions of Section 8(2) of the Act, in that its breaches of warranty and failure to indemnify the "Warranty Program" constituted breaches of the conditions of registration prescribed by Ontario Regulation No. 728, Section 1, paragraphs 3 and 4.

DeSoto appealed this further proposal of the Registrar. A date for the hearing of the appeal was set by the Tribunal, and it caused a written notice thereof to be given to DeSoto. That notice reads, in part, as follows:

TAKE NOTICE that, in accordance with the requirements of the Applicant, pursuant to Section 9(4) of the Ontario New Home Warranties Plan Act, R.S.O. 1980, Chapter 350, before the Commercial Registration Appeal Tribunal, at the Tribunal's chambers, 10th Floor, 1 St. Clair Ave. West, Toronto, on Tuesday, the 7th day of February, 1989, at 9:30 o'clock in the forenoon, or so soon thereafter as the matter may be reached, and so from day to day until the hearing is concluded.

THE PURPOSE of such hearing is to enable the Tribunal --

to determine whether it will by order direct the Registrar to carry out his proposal or refrain from carrying out his proposal and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the Regulations thereunder.

The hearing took 15 days during the months of July and December 1990. At its conclusion the Tribunal directed the Registrar to carry out his proposal to revoke DeSoto's registration under the Plan. In addition, the Tribunal ordered DeSoto to pay \$221,139.80 to the Program. This amount is composed of \$192,227.44 paid by the Program on account of claims made against DeSoto, and, \$28,912.36 as administrative costs of the Program in connection therewith.

The single issue raised before us was whether the Tribunal possessed jurisdiction to order DeSoto to pay that amount of \$221,139.80.

Counsel were in agreement that if the Tribunal did have such jurisdiction, it had to be found in either, or both, of s. 9(4) or 9(5) of the Act, and particularly, s. 9(5). Those sections read as follows:

(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to

carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

(5) The Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of this Act.

In our view, neither of those sections provide any power to the Tribunal to require DeSoto to pay the amount in question. And this is particularly so given the fact that the Tribunal upheld the Registrar's decision to revoke DeSoto's registration under the Plan. We recognize that the Tribunal, in ordering that a registration be maintained, might wish to attach as a term or condition of doing so a requirement which relates to the registrant's obligations under para. 4 of s. 1 of Reg. 728. However, such term or condition cannot go so far as to require payment of an amount maintained by the Program to be owing to it. That must be the subject of a civil action taken in the appropriate provincial court.

In passing, we note that the Tribunal should include in its notice of hearing all of the forms of relief which it is intended will be considered at its hearing, in any event of its right or power to do so. In the present instance, the notice made no reference to the prospect of DeSoto being required to pay any amount of money; nor was it raised during the course of the hearing. See *York Condominium Corp. No. 216 v. Dudnik* (1991), 3 O.R. (3d) 360, 79 D.L.R. (4th) 161 (Div. Ct.).

For these reasons, this appeal is allowed and that portion of the Tribunal's order whereby DeSoto is required to pay \$221,139.80 to the Program is struck out. DeSoto shall have its costs of this appeal fixed in the amount of \$2,500, being the amount agreed upon by counsel.

Appeal allowed.

CBR# 072

Joan Ceolaro, Giulio Ceolaro, Louis Nemis, Venazio Vecchione, Sandra Vecchione, Kimberly Baird, and Pauline Waite, Plaintiffs, and York Humber Limited, Defendant And Between Catherine deBournet, Plaintiff, and York Humber Ltd., Defendant And Between Paul Dellacamera, Plaintiff, and York Humber Limited, Defendant And Between Tasso Eracles, Plaintiff, and York Humber Limited, Defendant And Between York Humber Limited, Plaintiff, and Stella Guida, Defendant And Between York Humber Limited, Plaintiff, and Johanne Guida and Michael Guida, Defendants

Action Nos. 92-CU-45770-CM, M2268/91U, M1105/91U, 92-CU-45771, 31727/91U and 72966/91Q Ontario Court of Justice - General Division Toronto, Ontario Winkler J. Heard: November 30, December 1-2, 8-10, 22, 1993, January 4-7, 10-12, 14, 24-27, 31, February 1-2, 7-11, 14-17, 21, 24, March 9-11, 1994. Judgment: March 29, 1994.

Jonathon Fine and Robert L. Riteman, for the Purchasers. William H. Richardson and Frank McLaughlin, for York Humber Ltd.

WINKLER J.:--

I. INTRODUCTION

[para1] In March of 1987 the Corporation of the City of York (the "City" or "City of York") called for proposals for the development of a parcel of land on Hickory Tree Road in the former Town of Weston. The Proposal Call contained information relating to the history of the site, on which the Town of Weston Sewage Treatment Plant (the "Plant") had been situated and operational until 1960-61. As a result, the proponent was asked to address certain environmental questions concerning the possible generation of methane gas on or adjacent to the site.

[para2] A developer, the Charles Group, later York Humber Limited ("YHL"), presented a development proposal for a residential high-rise condominium development which came to be known as River Ridge. The proposal was accepted by the City and, in August of 1987, an Agreement of Purchase and Sale was executed between the City and the Charles Group.

[para3] The Charles Group began work immediately toward meeting the requirements in the proposal call relating to the environmental matters. An expert was retained and studies conducted on the site. Negligible amounts of methane gas were located in different areas of the site. A methane ventilation and monitoring system ("methane gas system") was designed to deal with the possibility of methane gas migration to the building foundation. The plan was that all of the soil be removed from the area where the building was to be situated.

[para4] This activity continued through to August of 1988, culminating in approval for the project by the Ministry of the Environment ("MOE") and the City, in the fall of 1988. On September 26, 1988 YHL acquired the land.

[para5] In the meantime, condominium units in the development were pre-sold in June and July of 1988, at the height of the condominium market.

[para6] Construction of the building, including the methane gas system, began in January 1989. The development was ready for occupancy in November 1990 with title closing scheduled for the fall of 1991.

[para7] The purchasers, either terminated their Agreements of Purchase and Sale prior to closing or refused to complete their agreements with YHL at the time of final closing.

[para8] The salient issue raised by the purchasers is whether the environmental issue, that is a failure to disclose pertinent details about the nature of the site and the existence of the methane gas system, or the presence of the Environmental Agreement on title, entitles the purchasers to refuse to complete their agreements. Are the purchasers entitled to rescission?

[para9] YHL responds by stating that these facts were not material and that the agreement is not an encumbrance. The entire building envelope has been excavated and all soil relocated off-site. The methane gas system is in place and the approvals of the City and MOE have been obtained. No methane gas has ever been detected in the building or in the methane gas system. YHL seeks damages for breach of contract.

[para10] It should be noted that, at the outset of the trial, it was made clear that Mr. Charles was no longer involved with this matter. The reason for this is that YHL is in receivership and a receiver was appointed. Counsel who are said to be appearing for YHL are, in fact, taking instructions from the receiver appointed to YHL.

II. THE NATURE OF THIS PROCEEDING

[para11] This proceeding involves six separate actions on ten separate Agreements that were entered into between the vendor, YHL, and the purchasers from June to October 1988. By an order of Mr. Justice Keenan, made on June 30, 1992, the applications were converted into actions, and the trial of these separate actions was ordered to proceed as one. Counsel agreed that the trial proceed with the purchasers as plaintiffs and YHL, as defendant/plaintiff by counterclaim.

[para12] In this action, the purchasers seek a declaration that their agreements are not binding and the return of their deposits, with interest. YHL seeks damages for breach of contract.

[para13] Many of the facts are not in dispute. Counsel agreed upon the basic facts concerning the background leading up to the proceedings including much of the facts relating to the individual purchasers. Facts concerning the history of the site, events surrounding the Agreements, construction of the River Ridge development, as well as the circumstances leading up to the decision by the purchasers not to complete their Agreements, are largely not contentious. In addition, counsel have agreed on the facts relating to damages and mitigation.

[para14] The trial, however, extended over three months, twenty-two witnesses were called by the purchasers, two witnesses were called by the vendor, and written submissions totalling over 600 pages were filed.

[para15] Although by the end of trial it was clear that there was very little dispute factually, in serious contention in this proceeding are the legal consequences which flow from these facts.

III. BACKGROUND FACTS

A. YORK HUMBER LIMITED AND THE RIVER RIDGE SITE

[para16] The site overlooks the Humber River and adjacent parkland and is located in a commercial/residential area south of Weston Road and north of the Humber River in the Lawrence Avenue - Weston Road area of Toronto. It was originally owned by the City of York.

[para17] The site comprises 2.43 acres and is divided naturally into three sections; the building site west of the Metro Easement; the Metro Easement which divides the property north to south; and the lands east of the Metro Easement, sometimes referred to as the landfill area. The completed development covers the entire site, the areas outside of the building site being the location of driveways, landscaping and tennis courts.

[para18] It was that portion of the property that had formerly held the Weston Sewage Treatment Plant, the area west of the Metro Easement, that became the building site. The uncontroverted evidence is that, in the course of construction, all soils from the building envelope, including the remains of the Plant, were completely removed down to bedrock.

[para19] YHL is an Ontario company incorporated in June of 1988 for the specific purpose of purchasing the River Ridge site from the City of York. The Charles Group, headed by Louis Charles, had been involved in planning the project since mid-1987 and were the principals in YHL. The Charles Group were experienced developers and YHL became the River Ridge development vehicle.

B. ENVIRONMENTAL OVERVIEW AND THE QUESTION OF METHANE GAS

[para20] The history and prior use of the site had been a concern in terms of the appropriateness of the site for high rise development for some time. These concerns centred around the possible presence of methane gas on or near the site.

[para21] Methane gas is generated by the decomposition of organic materials. It can be produced subsurface in landfills where organic materials are present. If circumstances are conducive, it can migrate. In a concentration of methane to air of approximately 5% to 15%, methane gas is explosive. Hence the concern.

[para22] The following chronology is useful relating to the environmental assessment of and the development conditions attached to, the River Ridge site. But first it should be noted that, because the properties of methane gas, it is colourless, odourless and lighter than air, the method of testing for its presence is by drilling boreholes and inserting gas probes. Boreholes are also used to obtain subsurface soil samples to ascertain the presence of methanogenic materials such as domestic garbage or topsoil. If inert fill is encountered, such as concrete, sand or clayey silt, it is an indication that the site has "clean fill or till" that is, no putrescible or methanogenic materials are present and, therefore, there is no methane gas being generated.

C. CHRONOLOGY OF EVENTS

1959 Trunk sewers are installed in a sewer easement (the "Metro Easement") running north-south through the site, about one-third in from the east property limit. The sewer easement is about sixty feet wide and was excavated to bedrock and back-filled with inert fill.

1960 - 61 Town of Weston Sewage Treatment Plant, comprising 10 reinforced concrete digester tanks, plus clarifiers and settling ponds, ceases operation.

1971 - 72 The plant has been removed, leaving in place the floor slabs of the plant and the broken concrete bases of the tanks. The site has been graded over so that there is no visible evidence of the former treatment plant.

1972 - 1987 There is no evidence of significant quantities of new fill imported to the site apart from up to two metres of concrete rubble (inert fill) placed over the eastern third of the site since 1985. By 1982, the fill mass has developed a substantial vegetation cover.

1979 Dominion Soils Investigations Inc. ("Dominion Soils" or "DSII") carried out investigative work for the Borough of York in September 1979.

The investigation consisted of drilling a series of twelve boreholes to depths ranging from three to fifteen metres across the site. The locations of these boreholes are shown on Drawing 87*1596-1. DSII found that the site was underlain by heterogeneous earth fill consisting mainly of silt, sand, clayey silt, occasional boulders and gravel. Some construction rubble, such as glass, concrete and brick fragments, were also present in the fill.

1980 Warnock Hersey Professional Services Limited ("Warnock Hersey" or "WHPSL") carried out a second investigation for the Borough of York Planning Board in June of 1980.

This investigation also consisted of putting down twelve boreholes, to depths ranging from 6.1 to 11.3 m. The locations of these boreholes are also shown on Drawing 87*1596-1. The results of the boreholes are not shown on the stratigraphic sections of Drawing 87*1596-2 as borehole logs were not prepared in sufficient detail to allow their inclusion. WHPSL found that the site was covered by a thick deposit of fill material which varied in depth from approximately 6.1 to 12.2 m. They found that the fill material was comprised mostly of silt, clay, sand and broken shale, with variable and random amounts of construction rubble and topsoil material. No garbage or sanitary fill was encountered in any of the twelve boreholes.

WHPSL also carried out methane gas tests in the twelve boreholes. Only in Borehole B (outside the building site) was an explosive level of methane detected. In only one other borehole, Borehole F which has since been excavated, was a significant, but not explosive, concentration of methane gas detected.

1980 Morrison Beatty Limited and Gore & Storrie Limited ("Morrison, Beatty" or "MBGS") jointly carried out a "preliminary investigation" of an area of land of which the site is a part (2.43 acres) for the MOE as part of a study of fifty-four old waste

disposal sites in Central Ontario. MBGS methane testing found traces of methane in only three of twelve one metre deep holes, none of which were located on the site of the River Ridge project.

March 1987 The City of York Proposal Call was made public and contained the following information: history of site, summary of soil investigations, requirements relating to soil conditions, and, responsibilities of proponent.

September 1987 The Charles Group (later YHL) delivered a Development Proposal which included the recommendation of Dyche and Associates, Inc. (consulting engineers) for the installation of an interceptor trench to contain and then release any methane gas through vent pipes.

December 1987 The Charles Group retained Bruce A. Brown Associates Limited ("Brown Associates"), consultants in Environmental and Applied Earth Sciences, to carry out a proposal for the installation of a methane gas system.

March 1988 City of York passed By-law 1318-88 under The Planning Act, R.S.O. 1990, c. P-13 amending the zoning by-law to include specific conditions applicable to the construction of the condominium project, including the requirement that prior to the issuance of any building permit, approval shall be obtained from the Ministry of the Environment pursuant to Section 45 of the Environmental Protection Act, R.S.O. 1990, c. E-19.

April 1988 Brown Associates submitted the Environment Report which found, in part, at page 17:

An investigation comprising ten boreholes was carried out at the subject site, and revealed that the soils at the site consist predominantly of inorganic clayey silts and sandy silts, with trace amounts of construction rubble and topsoil. The fill soils overlay shale bedrock at elevations 110.5 to 112.5 m within the main fill area, i.e. at depths of 5 to 9 m.

The field work, and subsequent chemical analyses, revealed that, at the borehole locations, significant quantities of domestic or sanitary waste were not present. The vast majority of the soils on the site are inorganic. The results of the current investigation were very consistent with the results of the previous three investigations carried out at the site. Except for some recently placed rubble, it does not appear that any significant quantities of fill have been placed since the 1960's.

June 1988 Sales campaign begins.

July 1988 MOE's July 11, 1988 report to the City of York on the Brown Associates' Environmental Report directed that further testing be carried out in the area east of the Metro Easement and recommended that:

. to ensure public safety, and since section 45 approval is required, the proponent enter into a registered development agreement with the municipality where the owner agrees to the following:

. to design and construct environmental controls (a methane gas system) approved by MOE;

. use a consultant to oversee construction and certify installation;

. require all subsequent owners be made aware of wastes, the details of the methane gas system and agree to operate it to ensure public safety.

August 1988 Brown Associates submitted a Supplementary Environmental Report reporting, in particular, on soil investigations carried out on the lands east of the Metro Easement. At page 3-4 it reports, in part:

Analysis and Conclusions

The recent field investigation has indicated that the soils to the east of the building envelope are the same as were encountered in the boreholes put down within and near the building envelope; i.e. almost entirely inorganic clayey silt and sandy silt soils, with very minor inclusions of rubble and topsoil.

A total of 42 boreholes have now been put down across the site, located on both sides of the sewer easement, and no evidence of sanitary or domestic refuse has been encountered, with the exception of a localized zone in the bottom of Borehole 108.

No boreholes were put down within the sewer easement for fear of damaging the sewer installations. With regard to the soils within the sewer easement, we would refer to the proposal call made by the City of York for the development of the site wherein they cite information received from the Commissioner of Works for the City of York and the Director, Water Pollution Control, Metropolitan Works Department concerning the history of the site. From this information the City concluded:

(a) The operation of the Weston Sewage Treatment Plant was suspended in 1961 and finally dismantled in the late 1960's and early 1970's. The area comprising the sewer easement and the portion west of the sewer easement were backfilled with inert fill and the entire area was filled using inert fill. No garbage or incinerated material was known to be dumped within these areas.

(b) It appears that a portion of the site east of the sewer easement and west of the former Works Building was subject to dumping of incinerated ash up to around 1953-1956 (when the nearby Wilby Crescent incinerator was closed) and thereafter the occasional dumping of trash (rough garbage) up to 1960 by municipal forces.

Our own research confirms the City's conclusions.

From the preceding, we would infer that no deleterious soils are present within the sewer easement.

Additionally, from the preceding, we would infer that no waste was disposed of on the east side of the sewer easement since 1960, in excess of the 25 year time limit stipulated by Section 45 of the Environmental Protection Act. All the boreholes put down by this firm and by others indicate that the east portion of the site has not been used as a rough garbage dump, except with reference to the surface mounds of predominantly broken concrete, and that predominantly inorganic soils have been [sic] disposed of over this area.

In conclusion, we are of the opinion that the soils outside the building envelope are not of a sufficiently deleterious nature to warrant their wholesale excavation. With the exception of two localized areas meriting special treatment, we believe the soils outside the building envelope can be left in place, as the building perimeter defenses against methane gas migration and concentration would effectively vent any traces of methane gas which may flux in that direction.

September 1988 YHL and the City of York entered into the Environmental Agreement on September 6, 1988, and it was registered on title on September 26, 1988. The development agreement provides, in part:

10. The Developer acknowledges and agrees to enter into a confirmation agreement, confirming that this Agreement has been entered into as a condition of condominium approval under s. 50 of the Planning Act, 1983, S.O. 1983, c.1, as amended.

11. The Developer shall cause the Condominium Corporation to agree with the City to be bound by the provisions of this Agreement, and further agrees that it shall be a condition of condominium approval that the Condominium Corporation shall enter into an agreement with the City in terms similar to this Agreement.

13. Upon the registration of a declaration and description of the Proposed Development with respect to the Lands, the Developer will be released from the provisions of this Agreement, provided that the Condominium Corporation has entered into an agreement with the City as set out in paragraph 11.

September 22, The MOE granted approval under Section 45 of 1988 the Environmental Protection Act in consideration of YHL's commitment in the Environmental Agreement. The approval was based on the following information provided to the MOE that:

. YHL intends to acquire the property . YHL plans to construct two twenty storey residential condominium towers, with approximately 408 suites on the property

. YHL intends to construct in accordance with the procedures set out in both of Dr. Brown's reports (April, 1988 and August 8, 1988) dealing with the methane gas system

. YHL entered an agreement (the "Environmental Agreement"), dated September 6, 1988, with the City in which it is agreed that:

. best efforts will be used to register the agreement on title the day the lands are purchased from the City

. Dr. Brown or another engineering consultant will be retained

. the methane gas system will be constructed

. prior to occupancy, YHL will have the engineering consultant inspect and certify that the methane gas system was constructed substantially in accordance with the plans and specifications and inspect and certify that the proposed development has been constructed substantially in accordance with the recommendations of the Environmental Report

. YHL to cause the engineering consultant to provide the City with a report describing the clean-up of the lands and certifying the lands are acceptable to accommodate occupancy

. YHL to cause the engineering consultant to monitor and report on the methane gas system in the manner specified

. YHL to cause the Condominium Corporation to be bound by the agreement and a condition of condominium approval will be that the Condominium Corporation entered into a similar agreement with the City

In addition, the MOE required that:

. due to the proximity to the Humber River, YHL had to take all reasonable steps to ensure that the water quality of the river was not adversely affected by the planning, construction, and maintenance of the condominium towers

. an on-site inspector or environmental consultant be present at the time of excavation of the contaminated material to ensure that excavation and disposal of the material met environmental guidelines

September 26, YHL acquired the River Ridge property from the 1988 City of York for approximately \$5 million

January 1989 Construction commenced.

July - August YHL, the City of York and the Royal Bank of 1989 Canada (as mortgagee) entered into a Site Plan Agreement on July 19, 1989 registered on title on August 1, 1989.

October 1990 Construction completed, except for certain common areas which were all completed by July 1991.

The Methane Gas System Operation Manual, which was prepared by Bruce A. Brown Associates was delivered to YHL.

November 1990 Occupancy closings begin with Purchasers.

April 1991 Draft Plan Condominium approval.

July 1991 Confirming Agreement entered into between YHL and the City. It was required because:

. YHL signed and registered an Environmental Agreement whereby they agreed to construct a methane gas system and retain the services of an environmental engineer to monitor the system on a periodic basis.

. YHL applied under the Condominium Act for approval of the registration of a declaration and description against title to the lands. . The Commissioner of Planning of the Municipality of Metropolitan Toronto has imposed, as a condition of the approval, that YHL execute an agreement with the City for ongoing maintenance and monitoring of the methane gas system.

. Pursuant to paragraph 10 of the Environmental Agreement, YHL agreed with the City to confirm that the agreement has been entered into to satisfy the condition of condominium approval.

Given the above:

. YHL confirmed and agreed with the City that the Environmental Agreement was entered into as a condition of condominium approval and undertook to the City not to transfer any unit in the condominium to be created upon registration of a declaration and description against title to the lands until the registration of an agreement pursuant to paragraph 11 of the Environmental Agreement whereby the condominium corporation agreed with the City to assume YHL's obligations under the Environmental Agreement.

August 23, Metropolitan Toronto Condominium Corporation 1991 No. 983 ("MTCC No. 983") created by registration of declaration and description by YHL.

August 26, Assumption Agreement entered into between MTCC 1991 No. 983, the City and YHL. It provided that, whereas:

. by an agreement made on September 6, 1988 between YHL and the City and which was registered YHL agreed to construct a methane gas system and to retain the services of an environmental engineer to monitor the system on a periodic basis

. pursuant to paragraph 11 of the Environmental Agreement, YHL agreed to cause the condominium corporation to be created upon the registration of the lands under the Condominium Act to assume and to be bound by the provisions of the Environmental Agreement as a condition of condominium approval

. YHL entered into a Confirming Agreement with the City dated June 7, 1991 confirming that the Environmental Agreement was entered into as a condition of condominium approval and undertaking not to convey any unit in the condominium until registration of an agreement by the condominium corporation to assume the Environmental Agreement

. the declaration and description of the project have been registered and the condominium corporation created therefore having the authority to manage the land

. the Corporation has agreed to assume all of the obligations of YHL under the Environmental Agreement in fulfilment of YHL's obligations under both the Environmental Agreement and the Confirming Agreement

. the Environmental Agreement provides that YHL will be released from its obligations under the Environmental Agreement upon the assumption of such obligations by the Corporation.

Given the above:

. the corporation assumed all of YHL's obligations under the Environmental Agreement and agreed with the City to be bound by the obligations thereunder as if it were the original contracting party

. the corporation indemnified and saved YHL harmless from all losses, claims, actions, damages and liability in connection with the duties and obligations to be performed by the Corporation under the Environmental Agreement

. the Corporation acknowledged and confirmed that this agreement had been entered into as a condition of obtaining condominium approval

. the agreement enured to the benefit of and was binding upon the parties, their respective successors, and assigns.

September - October 1991 Final closings with purchasers

December 1991 YHL delivers Methane Gas System Operation Manual to Metropolitan Toronto Condominium Corporation No. 983 D. BACKGROUND OF THE SITE

1. Background of Site - Environmental

a) Proposal Call

[para23] In or about March, 1987 the City of York issued a Proposal Call for the redevelopment of lands owned by the City on Hickory Tree Road. At page 2, it states:

This is a proposal call for the sale and development of land presently owned by the Corporation of the City of York. The proposal will include a design for the development of the site, to which the proponent will be committed. Final approval of the sale is contingent on approval of a site specific rezoning and the Official Plan Amendment. The proponent will be responsible for the rezoning and Official Plan Amendment applications and all other approvals and permits required thereafter.

[para24] The Proposal Call outlined the history of the site as follows at page 4:

History

To assist in assessing the subsurface conditions on the site, the Commissioner of Works for the City of York and the Director, Water Pollution Control, Metropolitan Works Department, were requested to report on the use of the lands over the past several years when under their respective jurisdictions. From this information, the following conclusions can be made.

"(a) The operation of the Weston Sewage Treatment Plant was suspended in 1961 and was finally dismantled in the late 1960's and early 1970's. The area comprising the sewer easement (Parts 4, 5, and 6 on the legal survey, Appendix Item 2) and the portion of the site west of the sewer easement (Parts 1, 2, and 3) were backfilled with inert fill and the entire area was filled using inert fill. No garbage or incinerated material was known to be dumped within these areas.

(b) It appears that a portion of the site east of the sewer easement (Parts 8, 9, and 10) and west of the former Works Building, was subject to dumping of incinerated ash up to around 1953-1956 (when the nearby Wilby Crescent incinerator was closed), and thereafter the occasional dumping of trash (rough garbage) up to 1960 by municipal forces."

[para25] Referenced in the Proposal Call are two investigative studies conducted on the lands at the request of Planning Staff, City of York. The first was a preliminary report dated September 1979, prepared by Dominion Soils. The purpose of this study was to evaluate the suitability of the site for high rise development and to determine possible limitations. As the Proposal Call states at page 5:

This report had recommended certain design criteria as a result of the soil borings and analysis and had noted that the matter of the possible presence of methane gas should be further investigated

[para26] Dominion Soils had conducted borehole testing across the lands, an excerpt summarizing their finding of subsoil conditions in part is at page 5 of the report:

Subsoil Conditions

Details of the stratification in the boreholes are shown on each borehole log and can be summarized as follows:

Fill - The area is underlain by heterogeneous earth fill consisting mainly of silt, sand, clayey silt, occasional boulders and gravel. Some rubble, such as glass, concrete and brick fragments were also present in the fill. The fill extends to depth between 20.5 to 40 ft. below the present grade, i.e. to between elevations 348.9 and 357.5 ft.

Borehole No. 4 encountered obstruction at depths of 17.5 and 23 ft. below the ground surface, possibly on the remains of the old pump and boiler room structure of the former Sewage Treatment Plant.

In Boreholes 1 and 8, traces of chemicals were encountered at depths of approximately 23 and 29 ft. below the ground surface, respectively.

Shale Bedrock - The fill is underlain by the shale bedrock. The surface of the rock appears to be stepped or sloping from north to south. On the most northerly boreholes (Boreholes 7, 8, 9), the rock surface is at Elevation 355 to 357.5 ft. and in the remaining boreholes it is at an average elevation of 351 +/- ft.

The rock was cored in Boreholes 1, 3, 7, 8 and 10 to depths between 4.5 to 8 ft. below the rock surface, using diamond drilling techniques. In the other boreholes, it was possible to penetrate the rock with the augers. To the depths investigated, the horizontally and thinly bedded shale is weathered and is of very poor quality, as indicated by R.Q.D. values of 0 to 23 percent. Interbedded in the shale are occasional limestone bands.

[para27] The second study submitted on June 16, 1980 was prepared by Warnock Hersey. The purpose of this study was to determine the presence and possible hazard of the methane gas within the subsoil. Warnock Hersey also conducted borehole testing across the lands. It is quoted in the proposal call at page 6 as concluding:

Methane gas is absent or is in trace amounts over the major portion of the site. At localized areas, higher concentrations of methane gas are present. The sources of the methane is randomly located pockets of topsoil fill and organic layers at the base of the sewage disposal facilities. Such sources are capable of producing only low concentrations of methane gas. Sanitary land fill which can produce high concentrations of methane gas was not encountered.

It is our opinion that some precautions are required in design of the proposed structures to ensure that dangerous levels of methane do not develop in the basement levels. We do not believe that an elaborate protection system using a membrane and positive ventilation is warranted.

[para28] The MOE subsequently engaged Morrison Beatty to prepare a further soil investigation report in September, 1980. The Proposal Call itself notes, at pages 6-7:

This firm had conducted 10 boring tests on the site and 2 further test holes on adjacent lands in September of 1980. The study results found traces of methane gas in only 3 of the 12 holes tested. None of these three holes are located on the site.

This study notes that the previous soil studies indicate that large quantities of organic waste are not present at the site and that methane gas generation may be limited to the known areas of organic waste (e.g., garbage dump, sludge drying beds, digesters). This study had recommended the following:

- If building development is planned, a comprehensive field study will be required to identify the extent of organic wastes at the site; to assess the methane production from such wastes; and to evaluate the impact of the methane on the proposed structures. Permanent, multi-depth gas probes are required for this study, and monitoring of methane concentration and ground and atmospheric pressures should be carried out monthly between October and May.

After further discussions, the Ministry of the Environment had advised the City of York that it would favourable [sic] consider the development of these lands, subject to the conditions outlined in Section 4.2. [emphasis added]

[para29] After referring to these three reports, the Proposal Call then sets out the conditions that would apply to the development of the site including: requirements relating to soil conditions, amendments to the Official Plan and Site Plan Control. These will be discussed next under the heading "Development Conditions".

(b) The Charles Group

[para30] The Charles Group originally became interested in the development of the site in the spring of 1987. In or about September, 1987, having obtained a copy of the Proposal Call and discussed the matter with the City of York, the Charles Group submitted a development proposal. The proposal was for a residential high-rise condominium development with a variety of indoor recreational amenities as well and underground levels of parking.

[para31] The Charles Group's development proposal was selected by the City. Brown Associates was then retained by the Charles Group to carry out investigations of the lands.

(c) Environmental Report - April 7, 1988

[para32] Apart from the general background documents referenced in the Proposal Call, the only definitive source of evidence regarding the site is the work of Dr. Brown and Brown Associates. Brown Associates carried out a comprehensive field investigation on the lands including an examination of secondary sources (e.g., aerial photos), borehole testing and complete excavation of the entire building site into the bedrock, as well as excavation into forty percent of the Metro Easement. Moreover, Dr. Brown's findings are entirely consistent with each of the earlier studies. The results of Brown Associates' historical review were reported in an Environmental Report dated April 1988. At pages 2 and 3 of the report it states:

In 1947, the Weston Sewage Treatment Plant was already on site, having been initially constructed in 1926, it was originally located somewhat south of the limits of the subject property. In addition to the Plant, a series of rectangular settling ponds were present. Some fill had been placed over the eastern area of the site, but in general, the balance of the site was fairly heavily vegetated.

By 1954, the fill area had expanded, with considerable fill being placed to extend the table land in the area of the present day Motor Licence Bureau located east of the site. The sewage treatment plan was substantially larger, consisting of eight circular digesters, clarifiers and settling ponds which were located in the western area of the site. The square settling ponds noted in the 1947 photographs were no longer present. It appears that a ninth tank was under construction in 1954.

By 1956, a tenth tank is under construction. The face of the fill soils appears to be abrupt and steep. The surface of the fill appears to have low scrub vegetation growing on it, implying that little addition of fill has occurred since 1954. The damage by Hurricane Hazel, including evidence of a flood channel taking out many homes immediately across the river, is apparent in this photograph.

By 1959, some fill seems to have been actually removed from the site. The Motor Licence Bureau has now been constructed east of the site over fill soils. Trunk sewers were being installed in the parkland west of the site, and the other sections of the sewer under construction are visible on the other side of the river valley. A sewer easement presently runs north-south through the site, located about one third of the way in from the east property limit.

By 1962, additional fill has been placed on the site, right up to the edge of the sewage treatment plant. Some of the tanks in the plant appear to be empty, implying that the Plant is now out of service. A triangular patch has appeared in the parkland west of the site, possibly representing an area of further fill placement.

By 1966, the fill soils on site appear to have been moved around somewhat, although there is no evidence of additional fill having been imported. A berm appears to have been constructed along the east edge of the plant. Several tanks in the plant are empty. Construction of gabions along the northeast river's edge has commenced downstream of the site.

By 1968, all tanks in the plant are empty. No additional fill appears to have been placed.

By 1970, the plant still stands idle. The fill mass has grown low scrub vegetation, implying that little or no new fill has been imported.

By 1971, the plant has been removed. Typically, these demolition contracts involved removing the structure down to grade, leaving in place the floor slabs of the plant and the bases of the tanks. The fill mass has been flattened and soil regraded over the site of the former treatment plant.

By 1972, all evidence of the treatment plant has been removed.

Since 1972, no evidence has been found to suggest significant quantities of new fill imported to the site, with the exception of up to two metres of concrete rubble which has been placed over the eastern third of the site since 1985. By 1982, the fill mass has developed a substantial vegetation cover.

A survey of the site performed in 1984 by William J. Plaxton, OLS, indicated that the site was gently undulating, with an overall slope to the south toward the Humber River, with ground surface elevations ranging from 115 to 125 m, referenced to Geodetic datum.

The series of aerial photographs examined indicated that the bulk of the fill on the site was imported prior to 1963. As such, based on the information we obtained, Section 45 of the Environmental Protection Act would not be applicable to the subject site. The only recent importation, positively identified, of fill, is the concrete rubble placed over the eastern portion of the site in the last few years. This material is considered inert fill and therefore exempt from the EPA.

The nature of the fill that was imported to the site was predominantly inorganic soil materials, probably excavated from other sites in the municipality. No evidence of domestic garbage was noted. Although it is understood that some uncontrolled dumping has occurred sporadically over the years at the site, it is believed that the vast majority of the fill material at the site comprises inorganic soil.

[para33] Brown Associates conducted borehole testing by advancing ten boreholes around the building site. The contents of the boreholes were examined and methane gas readings were monitored from January to April, 1988. The Environmental Report contains the following, at pages 6-17:

Summarized Subsurface Conditions:

The following paragraphs contain a brief summary of the conditions encountered in the boreholes. Where pertinent, the results of the previous investigations are incorporated. For more details, the reader is referred to the individual Boring Logs attached to the rear of this report.

Boreholes 101 to 109, located on the main fill mass, encountered a heterogeneous mixture of predominantly cohesive and cohesionless inorganic fill soils, comprising mostly either clayey silts or sandy silts, throughout the entire borehole depth, until encountering shale bedrock. The fill soils ranged in thickness from 5 to 9 m and possessed minor amounts of topsoil and construction rubble (brick, concrete, wood, etc.), but with one exception were not observed to contain significant quantities domestic or sanitary refuse. These results are very consistent with the results of the previous investigations.

It is important to note that the zones of cohesive or cohesionless soils were not observed to be continuous from one borehole to the next. Given the random manner in which the fill soils were placed on the site, it is considered improbable that such continuous layers would actually exist.

In the bottom of Borehole 108, located just west of the sewer easement and outside of the proposed building envelope, about 1.2 m of fill soil contaminated with organics, metal, coal, ceramics and possessing a slight petrochemical odour, was encountered. The significance and possible origin of this zone is discussed in the following section.

Furthermore, the boreholes did not encounter any evidence of the former sewage treatment plant. Such evidence would have been present at the bottom of fill soils, and would have consisted either of concrete rubble as a result of the demolition of the buildings and tanks, or a highly organic layer representing sludge which might have been spread over the ground surface. In regards to the sludge, it is important to note that the plant stood idle for about a decade prior to its demolition in 1971. The aerial photographs taken during the decade that the plant stood idle indicated that, toward the end of the 1960's, the tanks were in fact empty and did not contain any sludge at all. In any event, any minor amount of sludge that might have remained in the tanks would have been exposed to the atmosphere, and would have thoroughly decomposed to its constituent parts through oxidation and freeze/thaw cycles.

Shale bedrock of the Georgian Bay formation was encountered across the site at elevations ranging from 110.5 to 112.5 m, sloping toward the south, toward the Humber River. As the site was once eroded by the river, the surface of the bedrock may be expected to form a series of steps or ledges, as opposed to being smooth. This is consistent with exposed bedrock surfaces across the valley from the site.

Groundwater was encountered at various depths within the fill deposit, indicative of perched water conditions. This is as expected as isolated zones of relatively impervious clayey silt fill soils would tend to prevent the facile downward migration of precipitation, creating a number of pools of groundwater having very limited extent, but present at higher elevations than the true groundwater regime across the site which is believed to be slightly above the bedrock surface.

Borehole 110, located on the tableland to the north and above the main fill mass, encountered from grade about 3.5 m of sandy silt fill soils, with little or no foreign matter, overlying competent glacial tills. Bedrock was encountered at a depth of 6.5 m (elevation 117.5 m), considerably above the bedrock level within the main fill mass to the south. At some unknown point south of the Borehole 110 it is thought likely that a near vertical ledge in the bedrock is present, leading down to the bedrock level over the bulk of the site. This ledge will likely be present continuously along the northern part of the site near the proposed limit of excavation, but its exact location may vary. Groundwater was not encountered in Borehole 110.

Methane Gas Monitoring Results and Analysis

Since the completion of the field work on January 9, 1988, measurements of the buildup of methane gas in the standpipes installed in Boreholes 101 to 109 have been made using a Gascope Combustible Gas Indicator, Model 60. The results of the readings up to April 7, 1988 have been summarized in tabular form at the rear of this report. These results indicate that except for Borehole 108, the concentration of methane gas inside the standpipes was well below the minimum explosive concentration of 4%. In Borehole 108, however, concentrations in excess of 5% have been measured. It should be noted that the methane gas trapped in the top of the standpipe installed in this borehole dissipated very rapidly after uncapping, implying that the standpipe was not in direct communication with a large volume of gas, but was instead acting as a reservoir for a small volume of gas which had migrated to the standpipe. As well, the standpipe in Borehole 109, located only about 15 m away, contained only a slight methane gas concentration, leading to the inference that the source of the methane gas buildup in Borehole 108 is localized in extent.

The low concentrations of methane gas in most of the standpipes confirms our belief that large quantities of methanogenic material are not buried in the fill soil mass on site. Most probably, the sources of the gas are minor inclusions of topsoil that were imported to the site when filling of the site was underway with predominantly inorganic soils excavated from construction sites.

Because of the lack of evidence of major organic deposits with the fill mass, and the low observed methane gas concentrations, it is difficult to draw any firm conclusions regarding the migration patterns of methane gas within the fill soils. Methane gas, being less dense than air, tends to rise to escape at the surface of the fill, and will do so unless impeded by an impervious soil mass of fine grained or frozen soils. When such a resistance is encountered the gas will then migrate laterally through layers or zones of more pervious material (sandy or cohesionless soils) until finding a conduit to the atmosphere. The lack of continuous sandy soil layers in the fill mass prevents a rational deduction of a preferred migration path for the gas. Due to the heterogeneity of the fill soil mass, it is believed that, rather than expand further resources on field explorations, laboratory testing and modelling, which would likely be inconclusive, it is more efficient to design passive protective systems for the proposed structure which will guard against any methane gas from migrating into the substructure of the buildings.

The proposed structure, like many others in the Toronto area, will be founded entirely on the Georgian Bay Formation, which is known to be moderately "gassy". All of the fill within the building envelope will therefore be removed from the site. The small volumes of methane generated from the rock are probably much greater than would be generated by the limited quantities of topsoil incorporated into adjacent fill materials.

Mitigation of Methane Gas Hazard:

As discussed earlier, the great majority of the fill soils at the site are inorganic sands, silts and clays mixed with very minor amounts of topsoil and construction rubble. The traces of methane observed in the standpipes installed in the boreholes are believed to originate primarily from minor inclusions of topsoil in the soil mass. However, it is known that local zones of more contaminated material exist in the fill mass, and these can generate higher levels of methane.

Within the building envelope, all of the fill soils will be excavated, thereby removing the source of potential gas generation from beneath the structure. The remaining fill soils surrounding the structure will therefore be the prime source of methane gas, and the majority of the soils are only slightly methanogenic. However, in the vicinity of Borehole 108 a zone of contaminated soil and groundwater was found outside of the building envelope. The soil and groundwater chemistry as reported elsewhere in this report dictate that the building excavation must be extended to remove this pocket of material.

The exact lateral extent of this zone is unknown at this time. It is recommended that a series of boreholes be put down around Borehole 108 so as to better define this zone. It is pointed out that as of May 1, 1988, the costs of disposing of such material in a sanitary landfill such as Keele Valley may rise from \$18 to \$50/tonne. By advancing these boreholes prior to construction, the owner will be able to assess the likely costs of removing this zone if the average concentrations of parameters of concern permit sanitary landfill disposal. We will be submitting under separate cover a detailed cost estimate for this work.

All of the investigations carried out to date on the site did not encounter evidence of sludge or wastes which may have been spread over the site when the treatment plant was demolished. As discussed earlier, aerial photographs taken in the 1960's indicate that the tanks were empty of sludge prior to demolition. Therefore, it is not surprising that a layer of such materials was never encountered in any of the dozens of boreholes put down across the site. In the unlikely event that some sludge is actually present beneath the proposed structure, it should be noted that it will be excavated and disposed of appropriately during the excavation operations. Although sludge is not expected to be present, it is unlikely that the remnants of the plant itself will be encountered. This is not of any environmental concern, as concrete rubble is classified as inert fill and is therefore exempt from the Environmental Protection Act.

Conclusions:

Historical research carried out for the site did not reveal any evidence of waste having been disposed of on the site during the last 25 years. Based on the available historical data Section 45 of the Environmental Protection Act is not considered to be applicable to this site.

An investigation comprising ten boreholes was carried out at the subject site, and revealed that the soils at the site consist predominantly of inorganic clayey silts and sandy silts, with trace amounts of construction rubble and topsoil. The fill soils overlay shale bedrock at elevations 110.5 to 112.5 m within the main fill area, i.e. at depths of 5 to 9 m.

The field work, and subsequent chemical analyses, revealed that, at the borehole locations, significant quantities of domestic or sanitary waste were not present. The vast majority of the soils on the site are inorganic. The results of the current investigation were very consistent with the results of the previous three investigations carried out at the site. Except for some recently placed rubble, it does not appear that any significant quantities of fill have been placed since the 1960's.

A single isolated zone, at the bottom of Borehole 108, was encountered which possessed significant levels of contamination. It is believed that this zone resulted from an isolated incident of illicit dumping of liquid industrial waste, which purportedly occurred in the past when the site was unsecured. The lateral and vertical extent of this zone is not well defined, and a supplementary field investigation, coupled with chemical analyses, is recommended to identify the quantity of material in this zone which may have to be disposed of in a licensed landfill.

The boreholes did not encounter any evidence of the former treatment plant; neither sludge from the tanks nor rubble from the demolition of the structure was observed. The absence of evidence of sludge was as expected, as aerial photographs taken while the plant was idle prior to demolition showed that the tanks were empty of sludge. The rubble resulting from the demolition of the plant, if still on site as is probable, would not be an environmental problem as such material is classified as an inert fill and exempt from the Environmental Protection Act.

The results of methane gas monitoring in wells installed in the boreholes indicated that, except in Borehole 108, explosive levels of methane gas did not accumulate in the wells. The low levels of methane that were measured in some of the other boreholes are believed to have originated from the presence of topsoil buried in the fill soils.

[para34] Brown Associates Environmental Report was submitted to the MOE. Dr. Brown testified that he had indicated separately as well as through his Environmental Report that further testing should be conducted in the area east of the Metro Easement. The MOE shared this view and required that additional testing be conducted in areas outside the building envelope.

(d) Brown Associates Supplementary Environmental Report - August 8, 1988 ("Supplementary Report")

[para35] Brown Associates proceeded to advance eight additional boreholes on July 25 - 27, 1988 in order to sample the subsoil conditions and to measure the buildup of methane gas in the boreholes. The Supplementary Report contains, at pages 2-5, the following:

Summarized Subsurface Conditions:

All boreholes encountered a heterogeneous mixture of predominantly cohesive and cohesionless inorganic fill soils, comprising mostly either clayey silts or sandy silts, throughout the entire borehole depth, until encountering shale bedrock. The fill soils ranged in depth from 6.4 to 11.5 m below grade and possessed minor amounts of construction debris (brick, concrete, wood, etc.) and topsoil, and were not observed to contain detectible amounts of domestic or sanitary refuse. The zones of cohesive and cohesionless fill soils were not observed to be continuous from one borehole to the next, consistent with random fill deposition. In Borehole 115 at a depth of about 3 m, a void was encountered, extending to a depth of about 6 m. As it proved impossible to continue sampling at the bottom of the void, the borehole was relocated a few metres to the south, where Borehole 115A was advanced, with sampling beginning at a depth of about 3 m.

The soil conditions encountered in the current investigation were consistent with those encountered in our first investigation and with the soil conditions encountered during earlier investigations carried out by other firms.

Methane Monitoring Results:

On August 4, 1988 the levels of methane gas in these wells, in addition to the wells installed during our first investigation, were measured using a Gascope Combustible Gas Indicator, Model 60. These results, as well as the results of earlier measurements in

the first series of monitoring wells including testing under winter conditions, are summarized in tabular form at the rear of this report.

These results indicate that low levels of methane gas were detected in all the monitoring wells, both old and new, with the exception of Borehole 108, where an initial gas concentration of 7.5% was observed, of the same magnitude as previous initial measurements in this borehole.

The low concentration of methane gas in the monitoring wells installed during the current field work is consistent with the largely inorganic fill soils that were encountered in these boreholes. These soils are not methanogenic, and the low levels of methane gas observed are believed to be consistent with the random inclusions of small pockets of topsoil observed in the boreholes.

Analysis and Conclusions:

The recent field investigation has indicated that the soils to the east of the building envelope are the same as were encountered in the boreholes put down within and near the building envelope; i.e. almost entirely inorganic clayey silt and sandy silt soils, with very minor inclusions of rubble and topsoil.

A total of 42 boreholes has now been put down across the site, located on both sides of the sewer easement, and no evidence of sanitary or domestic refuse has been encountered, with the exception of a localized zone in the bottom of Borehole 108.

No boreholes were put down within the sewer easement for fear of damaging the sewer installations. With regard to the soils within the sewer easement, we would refer to the proposal call made by the city of York for the development of the site wherein they cite information... Our own research confirms the City's conclusions.

From the preceding we would infer that no deleterious soils are present within the sewer easement.

Additionally, from the preceding, we would infer that no waste was disposed of on the east side of the sewer easement since 1960, in excess of the 25 year time limit stipulated by Section 45 of the Environmental Protection Act. All the boreholes put down by this firm and by others indicate that the east portion of the site has not been used as a rough garbage dump, except with reference to the surface mounds of predominantly broken concrete, and that predominantly inorganic soils have been disposed of over this area.

In conclusion, we are of the opinion that the soils outside the building envelope are not of a sufficiently deleterious nature to warrant their wholesale excavation. With the exception of two localized areas meriting special treatment, we believe the soils outside the building envelope can be left in place, as the building perimeter defences against methane gas migration and concentration would effectively vent any traces of methane gas which may flux in that direction.

For protection of the building, the continuous soil quality monitoring program would provide direction to the excavation contractor to follow any zone of deleterious soils beyond the required excavation limits. For example, the site boundary shoring west of borehole 108 will be extended to permit the soils around that borehole to be selectively removed.

Then, after describing the proposed mitigative system, the Supplementary Report, at page 5, continues:

It should be noted that even if all the soil within the site limits were to be excavated, we are of the opinion that this methane gas mitigation system would still be necessary, as the fill soils extend beyond the property lines, and could not be removed without trespassing. These soils could possibly generate methane gas which could migrate to the easement walls, under unusual adverse circumstances.

(d) MOE Approval under Section 45 of Environmental Protection Act

[para36] In the initial Proposal Call, the City of York had indicated that the MOE's primary concerns were with respect to the application of Sections 45 and 8 of the Environmental Protection Act ("EPA"). Section 8 was not applicable.

[para37] Section 45 (now s. 46) of the EPA provides as follows:

45. No use shall be made of land or land covered by water which has been used for the disposal of wastes within a period of twenty-five years from the year in which such land ceased to be so used unless the approval of the Minister for the proposed use has been given. 1971, c. 86, s. 46.

[para38] As stated earlier, in the course of the MOE's review of the application to amend the Official Plan and Zoning By-law 1-83, they reviewed the Environmental Report. By letter dated July 11, 1988 to the City of York, the MOE stated:

The subject report indicates that between 1968 and 1971 the old sewage treatment plant and its tanks were removed and, "the fill mass was flattened and the soil was regraded over the site of the former treatment plant". Based on cross sections provided (refer to drawing No. 87-1596-2 cross section A-A), wastes are found in the boreholes sampled in this area. From this we conclude that by regrading and moving waste onto the area of the former treatment plant approval under Section 45 of the EPA will be required.

[para39] After receipt of the Supplementary Report, the MOE, in a letter dated September 22, 1988, granted approval for the development under Section 45 of the EPA, subject to certain specified conditions which will be dealt with later.

(e) Excavation and Construction

[para40] Construction commenced in January, 1989. During construction, the footprint of the buildings was excavated to bedrock including the location of borehole 108.

[para41] Brown Associates provided full consultant engineering services for the development of the River Ridge property, including the design and construction supervision of the methane gas system, and full-time field supervision throughout the entire excavation and foundation placement.

[para42] All of the contents of the building envelope (which includes the three underground levels of parking) were excavated into bedrock. All soils within the building envelope were removed and disposed of off site. The remains of the Weston Sewage Treatment Plant were contained within the building envelope and were, in the course of excavation, completely removed and disposed of off site at a licensed landfill known at Keele Valley.

2. Background of Site - Development Conditions

[para43] Prior to the Charles Group becoming involved with the site, based on the possible presence of methane gas, governmental sensitivity at various levels had been expressed concerning the suitability of the site for proposed high rise development and possible conditions to be placed on such use.

[para44] Indeed, in 1984, in a letter attached to the Proposal Call, the MOE Chief of Approvals, Planning and Technical Support recommended that: section 45 approval be a requirement for use of the lands; the building site be limited to the westerly portion; an external active gas ventilation system be required for a proposed building; the section 45 approval be a condition precedent to obtaining a building permit; the process be controlled through land use designation, zoning and site plan control.

[para45] The City, in its Proposal Call, placed inter alia, the following restrictions on development of the site. In part, the restrictions are stated in the proposal call, at pages 7-8:

4.2 Requirements Relating to Soil Conditions

Based on the soil investigations done, and on the Ministry of the Environment evaluation, some restrictions will apply to the development. The Proponent should note that the Ministry's primary concerns are with the application of Sections 45 and 8 of the Environmental Protection Act; it is recommended that the proponent become familiar with these sections of the Act. Following are the restrictions which apply:

(1) That any development of the subject property to be limited to the westerly portion of the subject property (Parts 1, 2 and 3) and that the balance of the site to be used for amenity space and possible [sic] some surface off-street parking.

(2) Site Plan Approval pursuant to Section 40 of the Planning Act, 1983 will not be granted and no building permit will be issued until such time as a proper comprehensive geotechnical report is prepared to:

(a) Identify the extent of fill and any organic waste on the subject property.

(b) Assess the methane gas production from the site using multi-depth gas probes so that methane gas concentrations and ground atmospheric pressures are measured on a regular basis over a 6 month period which shall include the winter months.

(c) Evaluate the impact of methane gas on the proposed structures including the foundation and caissons.

(d) Recommend and design a ventilation system to control and remove all methane gas and to monitor methane gas generation.

(e) The terms of reference for this study and the findings and recommendations of this report when completed, shall be acceptable to City and the Ministry of the Environment.

(3) No building permit shall be issued until the plans, including a report from the geotechnical engineering firm, have been submitted and approved by the Ministry of the Environment. The geotechnical engineering firm shall certify the adequacy of the plans.

(4) That the building(s) shall not be occupied until such time as the ventilation system has been inspected and tested and until a statement is submitted to the City and the Ministry by a qualified geotechnical engineer stating that the system as been properly installed and is in proper operating condition.

(5) Proponent will be responsible for submitting reports prepared by a qualified independent firm, evaluating the performance of the ventilation system. The firm, the interval of the reports, and the length of time for which reports will be required, must be acceptable to the Ministry of the Environment. [Emphasis added]

[para46] On or about August 21, 1987, the Charles Group entered into an Agreement of Purchase and Sale with the City of York for the purchase of the lands for a purchase price of \$5,119,258.00. The agreement provided, at page 4, that:

15. The Purchaser acknowledges having read and examined the "Proposal Call for Redevelopment of Hickory Tree Road Site", including all documents attached to or issued with that Proposal Call, issued by the Vendor, and agrees to accept the property subject to all matters disclosed therein.

Attached to the Agreement of Purchase and Sale as one of the documents listed in Schedule "C" was the site plan.

[para47] On March 21, 1988 the City passed By-law No. 1318-88 amending the City's general zoning By-law 1-83 to permit the development of the site. The By-law requires a comprehensive geotechnical study; MOE section 45 approval prior to issuance of a building permit; and a restriction on occupancy until any required ventilation system is satisfactorily installed and operating. The relevant portions of the by-law are:

3. The buildings shall be located within the area marked as "Buildable Area" on the site plan attached as Schedule "B" hereto so as to provide the minimum setbacks shown on the site plan.

...

14. The foundation of the buildings erected on the site shall be designed by a qualified engineer, and such design shall be based on a comprehensive geotechnical study to be prepared by a qualified professional engineer and approved by the Commissioner of Buildings of the City of York.

Prior to the issuance of any building permit for any building on the site, approval shall be obtained from the Ministry of the Environment pursuant to Section 45 of the Environmental Protection Act, R.S.O. 1980, c. 141, for the construction of the building.

18. No portion of any building shall be occupied until any required ventilation system has been inspected and tested and until a qualified geotechnical engineer provides a certification that the system has been properly installed and is in proper operating conditions to the satisfaction of the Commissioner of Buildings for the City of York.

[para48] By letter dated July 11, 1988, the MOE made recommendations to the City with respect to amendments to the Official Plan and Zoning By-Law 1-83. The letter provided, in part, as follows:

Since Section 45 approval was required, this office would recommend that the proponent enter into a registered development agreement with the municipality where the owner agrees to:

- a) design and construct all necessary environmental controls based on the concept design approved by the Ministry;
- b) obtain the services of a consultant to oversee their construction, and certify their installation; and,
- c) require all subsequent owners to:
 - i) be made aware of the presence of wastes, the environmental control works, their maintenance and operational requirements; and,
 - ii) agree to maintain, monitor and operate the works as required to ensure public safety.

[para49] By agreement made September 6, 1988, YHL and the City of York entered into a development agreement in respect of the site. This development agreement, is referred to as the "Environmental Agreement", in which the City of York incorporated the development conditions from the Proposal Call and the recommendations of the MOE made in the July 11, 1988 letter referred to above.

[para50] Prior to September 6, 1988, the plans and specifications for a passive methane ventilation system had been filed by Brown Associates on behalf of YHL with the City and the MOE.

[para51] This chain of events resulted in the MOE granting section 45 approval under the EPA on September 22, 1988.

[para52] Before moving on, a number of points concerning the Environmental Agreement, which is a development agreement are appropriate.

[para53] The Environmental Agreement is an agreement between YHL, referred to in the agreement as the "Developer" and the City of York. It was executed by Louis Charles on behalf of YHL. It was registered on title on September 26, 1988.

[para54] This agreement was entered into as a condition of condominium approval.

[para55] Dr. Brown testified that this was the first time, to his knowledge, that a development transaction was structured so that the content of the Environmental Agreement was placed in a "stand alone" agreement. Previously, he said, these points were addressed as part of a development agreement. His rationale for the approach was that it was because the City was the vendor of the lands and city officials were more cautious than other vendors may have been. In any event, the new approach became the norm in other deals, thereafter, he stated.

[para56] The relevant provisions of the Environmental Agreement can be summarized as follows:

- . the developer is required to install the "Proposed Ventilation System" which includes the passive methane gas ventilation system and the active methane gas monitoring system;
- . occupancy is restricted until the system is tested, monitored and certified;
- . the developer is required to cause the condominium corporation to be bound by the provisions of the Agreement;
- . once the condominium corporation agrees with the City to be bound by the provisions of the Agreement, the developer will be released from obligations under the Agreement.

[para57] The text of the Agreement provides in part;

WHEREAS L.C. Holdings Limited is the proposed purchaser of certain lands from the City described in Schedule "A" attached hereto (hereinafter called the "Lands"), part of the same having been used previously as a sewage treatment plant;

AND WHEREAS L.C. Holdings Limited has given an irrevocable direction to the City to convey the Lands to the Developer;

AND WHEREAS the City has zoned the Lands to permit the construction of two residential condominium towers thereon (hereinafter called the "Proposed Development"); AND WHEREAS the Developer shall cause the construction of the Proposed Development and the creation of a condominium corporation (hereinafter called the "Condominium Corporation") under the Condominium Act, R.S.O. 1980, c.84, as amended.

AND WHEREAS the Developer has filed plans and specifications for a passive methane ventilation intercept system with the Ministry of the Environment and the City (hereinafter called the "Proposed Ventilation System");

AND WHEREAS the Developer has filed two environmental reports with the Ministry of the Environment dated April 1988 and August 8, 1988, which were prepared by its consulting engineer, Bruce A. Brown Associates Limited (hereinafter called the "Environmental Report");

NOW THEREFORE, THIS AGREEMENT WITNESSETH that in consideration of the mutual covenants herein contained, the parties agree each with the other as follows:

1. The Developer agrees to use its best efforts to register this Agreement on title on the day it purchases the Lands from the City.
 - 2.(a) The Developer agrees that the City assumes no responsibility for the Proposed Ventilation System and hereby undertakes to indemnify and save the City harmless from any claim of any nature whatsoever, including costs, whether arising out of negligence or otherwise and whether involving property damage or bodily injury including death or both resulting from this Agreement, or arising from any approvals to construct the Proposed Development or the use of the Lands for the Proposed Development.

(b) In this Agreement, City includes any agents, officers or employees of the City. 3. The Developer shall retain the services of Bruce A. Brown Associates Limited or another "Engineering Consultant" (hereinafter called the "Engineering Consultant") acceptable to the City's Commissioner of Buildings (hereinafter called the "Commissioner").
 4. The Developer shall cause the construction of the Proposed Ventilation System, as approved by the Ministry of the Environment.
 5. Prior to the occupancy of the Proposed Development, the Developer shall cause its Engineering Consultant to:
 - (a) inspect and certify that the passive methane ventilation intercept system that is constructed is substantially in accordance with the plans and specifications of the Proposed Ventilation System (hereinafter called the "Ventilation System").
 - (b) inspect and certify that the Proposed Development has been constructed substantially in accordance with the recommendations of the Environmental Report and,
 - (c) provide the City with an environmental report which describes the clean-up of the Lands and certifies that the Lands are acceptable to accommodate the occupancy of the Proposed Development.
 6. The Developers shall cause its Engineering Consultants to monitor the Ventilation System at regular intervals as follows:
 - a) the methodology of such monitoring shall be reviewed by the Ministry of the Environment and concurred in by the City, acting upon the advice and in accordance with the recommendations of the Engineering Consultant, prior to the commencement of the construction of the Proposed Development,
 - b) the monitoring shall commence after the Engineering Consultant has completed the inspection and certification referred to in paragraph 5(a), for a period of twelve (12) months at one (1) month intervals,
 - c) thereafter, the Engineering Consultant shall next inspect the Ventilation System at six (6) month intervals for two (2) further years or for such longer period as may be desirable after consideration of the reports referred to in paragraph 9 and consultations with the Commissioner and the Ministry of the Environment.
 7. Prior to occupancy of the Proposed Development, the Ventilation System shall be monitored for at least three (3) months as provided by paragraph 6(b).
 8. Upon the Engineering Consultant detecting gas at any point within the Ventilation System at concentrations of three (3%) percent or greater, monitoring shall be conducted the following two (2) days. If gas concentrations within the Ventilation System remain in excess of three (3%) percent for three (3) successive days, then the entire Ventilation System shall be reviewed by a qualified consultant, and the Developer shall cause any corrective works required to be carried out.
 9. The Developer shall direct the Engineering Consultant to document the monitoring results and Ventilation System performance details in an annual technical report which report shall also identify any problems with the Ventilation System and recommend corrective action. The said report shall be submitted to the Developer with copies being sent to the Ministry of the Environment, City Fire and Building Departments, the Developer's Insurer(s) for the Proposed Development and any corporation or public body that the City may deem appropriate. Any deficiency identified or any recommendation for further action(s) contained in such reports shall be remedied by the Developer, at its expense, forthwith or as required given the nature of the recommendations.
 10. The Developer acknowledges and agrees to enter into a confirmation agreement, confirming that this Agreement has been entered into as a condition of the condominium approval under s.50 of the Planning Act, 1983, S.O. 1983, c.1, as amended.
 11. The Developer shall cause the Condominium Corporation to agree with the City to be bound by the provisions of this Agreement, and further agrees that it shall be a condition of condominium approval that the Condominium Corporation shall enter into an agreement with the City in terms similar to this Agreement.
 12. This agreement shall enure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.
 13. Upon the registration of a declaration and description of the Proposed Development with respect to the Lands, the Developer will be released from the provisions of this Agreement, provided that the Condominium Corporation has entered into an agreement with the City as set out in paragraph 11. [Emphasis Added]
- [para58] The section 45 approval under the EPA was granted in a letter from the Minister of the Environment to YHL dated September 22, 1988, in consideration of a number of conditions including, that the condominium would be constructed in accordance with the procedures set out in Brown Associates' Environmental Reports, the Environmental Agreement and the conditions referred to therein. The MOE also specified:
- An on-site inspector or environmental consultant must be present at the time of excavation of the contaminated material to ensure that excavation and disposal of this material meets environmental guidelines. This consultant shall also carry out additional responsibilities as outlined in the Environmental Report.

It is to be noted that there will be a subsequent agreement under Section 50 of the Planning Act [S.O. 1983, c. 1 now R.S.O. 1990, c. P-13, s. 51] in connection with the proposed condominium. We would strongly advise the municipality and the developer to consult with Ministry staff concerning that agreement, prior to it being executed. This prior consultation will enable Ministry staff to be aware of all of the specifics of the proposed agreement and to comment thereon.

[para59] As a result, by agreement made July 19, 1989, YHL, the City and the Royal Bank of Canada (the "Vendors Mortgage") entered into a Site Plan Agreement pursuant to section 40 of the Planning Act S.O. 1983, c. 1 [now R.S.O. 1990, c. P-13, s. 41]. By this agreement YHL agreed to construct the buildings and provide other facilities on the site in accordance with the plans and drawings submitted by the owner for the development of the site. Such plans were on file with the City and available for review. Furthermore as owner, YHL agreed to retain a qualified professional engineer to design and carry out all necessary engineering required for the development of the site including the supervision of construction and the certification with respect to completion of the work.

[para60] On June 7, 1991, YHL and the City entered into the Confirming Agreement. The agreement was registered on title on July 17, 1991. By this agreement YHL "confirms and agrees" with the City that the Environmental Agreement has been entered into as a condition of condominium approval. YHL agrees not to transfer any unit in the condominium, to be created upon registration, until registration of an agreement pursuant to paragraph 11 of the Environmental Agreement, that is, an agreement by which the condominium corporation agrees with the City to assume YHL's obligations under the Environmental Agreement.

[para61] By letter dated August 9, 1991, the City confirmed to the Commissioner of Planning of the Municipality of Metropolitan Toronto ("Metro Toronto") that the five conditions imposed by the City on the development had been satisfied as of that date and that the City had no objection to Metro Toronto releasing the condominium for registration.

[para62] The Condominium Corporation, Metropolitan Toronto Condominium Plan No. 983 ("MTCC No. 983"), was created by registration of Declaration on August 23, 1991.

[para63] By agreement made August 26, 1991, the MTCC No. 983, the City and YHL entered into the Assumption Agreement. It was registered on title August 29, 1991. By the terms of this Agreement, which was entered into pursuant to the Environmental Agreement and the Confirming Agreement, the condominium corporation assumed all of YHL's obligations under the Environmental Agreement and agreed with the City to be bound by the terms thereof. YHL is released from its obligations under the Environmental Agreement. In addition, the condominium corporation agreed to indemnify YHL from all losses, claims, actions, damages and liabilities in connection with the duties and obligations under the Environmental Agreement. Further, the Agreement provides:

The Corporation acknowledges and confirms that this agreement has been entered into as a condition of obtaining condominium approval.

This agreement shall enure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.

The Assumption Agreement was executed on behalf of the condominium corporation by Louis Charles.

E. THE SALES CAMPAIGN

[para64] The River Ridge sales campaign began in or about June, 1988. In point of time, this was after the submission of the Environmental Report but prior to the submission of the Supplementary Report. The sales office was located at 250 Madison Avenue, in the Davenport/Spadina area of the City of Toronto. Martin Atkins Limited, Real Estate Broker, was retained by the Charles Group to market and sell the River Ridge condominium units to the general public.

[para65] Prior to the commencement of sales, YHL distributed a sales brochure promoting the development and offering prospective purchasers the opportunity to obtain an appointment to visit the sales centre. Newspaper advertisements were placed during the month of June leading up to the first day of sales on June 25, 1988.

[para66] The sales brochure indicated that "[t]he prices and specifications are subject to change without notice". This same language was repeated in the newspaper advertisements.

[para67] The setting in the sales office was replete with maps, plans and an artist's conception of the proposed development. The atmosphere which pervaded the sales office was symptomatic of events at the height or near height of the condominium market in Toronto. It was described by various witnesses as "chaotic", "frantic", with a sense of "urgency" which was the result of purchasers attempting to attain the unit of their choice before another purchaser secured it. There were numerous sales persons and numerous purchasers present at one time. The scene was complete with cheques and signed documents being exchanged and units marked as sold on the schematic drawings posted for purposes of assisting in selection of units. This situation was that of a vendor selling units in a heated market and purchasers, experienced and inexperienced, speculating and otherwise, trying to obtain a unit of choice before it was snatched up or before prices rose even higher.

[para68] Between June 25 and July 4, 1988, eight of the ten Agreements relevant to these proceedings were entered into.

[para69] The remaining two Agreements were executed by the following purchasers on the following dates: (1) July 29, 1988, Joan and Giulio Ceolaro; and, (2) October 23, 1988, Catherine deBournet.

[para70] Prior to entering into their respective Agreements of Purchase and Sale, none of the purchasers received any information with respect to the history and prior use of the property; governmental requirements concerning testing; the requirement for a methane gas system; restrictions relating to these, such as occupancy and reporting; and the requirement of MOE approval under section 45 of the EPA in respect of the site.

[para71] Each of the purchasers, except Michael and Johanne Guida admit the receipt of the condominium documents, which include a disclosure statement, pursuant to the requirements of the Condominium Act. There was no information disclosed in either the Agreements of Purchase and Sale or the condominium documents regarding the existence of the methane gas system and the prior use of the site. No subsequent disclosure statement was provided to the purchasers containing this information.

E. VENDOR - PURCHASER COMMUNICATIONS

[para72] This is a general chronology applicable to all purchasers. To the extent that events relating to a particular purchaser deviates from these they will be dealt with in the context of the individual purchasers below.

[para73] On February 13, 1990, YHL wrote to the purchasers to advise:

We regret to advise you that there will be a delay in occupancy of your condominium suite in River Ridge. Unfortunately, there have been delays in construction which we were unable to control. We have requested the General Contractor to provide us with a new occupancy schedule which will permit us to notify you of your new occupancy date. Of course, we will try to give you as much advance notice as possible.

[para74] On May 4, 1990, YHL wrote to purchasers with respect to the selection of the suite finishings. The letter provides: We are pleased to inform you that under the terms of Schedule B of the Agreement of Purchase and Sale, the Vendor hereby gives notice to the Purchaser that the Purchaser may now choose the broadloom, kitchen and bathroom finish packages from the Vendor's samples.

The letter of May 4, 1990 then specified an appointment date.

[para75] When purchasers attended at the offices of YHL, they were given a River Ridge Colour Selection Form to complete in respect of their suite. These forms were completed in or about May, 1990. The form which was signed by each purchaser specified:

Colours of all materials are as close as possible to builder's selection but not necessarily identical due to variance in manufacturing or supplier.

Materials actually installed shall be as close as possible in quality and quantity but not necessarily identical to the items specified.

[para76] On October 4, 1990, YHL wrote to purchasers to advise them of their occupancy date and the scheduled date of their Ontario New Home Warranty Program inspection. The letter also informed purchasers that on the day prior to occupancy, they would be required to deliver post-dated cheques for their monthly occupancy fees. The letter dealt with title closing as follows:

Title Closing

The Closing Date for completion of this transaction is scheduled to occur after the registration of the Condominium Declaration and Plan in accordance with the Agreement of Purchase and Sale. Our lawyer will notify your lawyer as soon as the Condominium has been registered and shall provide registration particulars so that your lawyer may attend to the title search. Notice of the Closing Date shall also be provided, and all closing documentation together with the Final Statement of Adjustments will be forwarded to your lawyer in advance of the Closing Date. Please ensure that you advise us or our lawyer of the name of your lawyer on the attached sheet or as soon as you have retained one so that all documentation and information may be delivered in a timely manner.

[para77] This letter also contained a schedule entitled "Calculation of Occupancy Payments" which set out the following: annual interest on principal amount of vendor take back mortgage, annual realty taxes, and monthly common expense charge, and the total monthly occupancy payment.

[para78] On October 26, 1990, YHL wrote to the purchasers to give notice of an amended occupancy fee having confirmed with the City of York Tax Department that the figures originally quoted were incorrect. This resulted in a decrease in the monthly occupancy fee figure.

[para79] When purchasers attended at the River Ridge project to inspect their suites under the Ontario New Home Warranty Program, they were given a Certificate of Completion and Possession to complete. Any items to be corrected or completed would be listed on the certificate. YHL was expected to sign the certificate as was the purchaser. [para80] The Vendor Certificate stated:

The Vendor hereby certifies to Ontario New Home Warranty Program as follows:

1. The home described on the face hereof is substantially completed and is ready for possession by the Purchaser(s) on the date of possession indicated on the face hereof subject only to the completion of seasonal work and items of a minor nature and to surface defects in workmanship and materials accepted by the Purchaser(s), all of which are more particularly described on the face hereof.

2. The Vendor will grant possession of the home to the Purchaser(s) on the date of possession.

[para81] The Purchaser Certificate specified:

The undersigned Purchaser(s) hereby certifies to Ontario New Home Warranty Program that the Purchaser(s) has/have inspected the home described on the face hereof and such home is substantially completed and is ready for possession by the Purchaser(s) on the date of possession indicated on the face hereof subject only to completion by the Vendor of seasonal work and items of a minor nature and to surface defects in workmanship and materials accepted by the Purchaser(s), all of which are more particularly described on the face hereof.

[para82] The Certificate of Completion and Possession further provides:

The Builder/Vendor warrants that the home is constructed in a workmanlike manner and free of defects and material for one year from the date of possession. A COMPLAINT MUST BE REPORTED TO BOTH THE VENDOR AND THE WARRANTY PROGRAM IN WRITING WITHIN THE FIRST YEAR OF OCCUPANCY.

[para83] The next standard letter between YHL and purchasers was dated April 24, 1991. In this letter, YHL informed the purchasers that the general contractor had completed all deficiencies as noted in the Architect's Inspection Reports. The letter requested purchasers to check their initial Ontario New Home Warranty Program Inspection Report to confirm whether there were any outstanding deficiencies, and invited purchasers to list separately other deficiencies which became apparent after occupancy. The letter further provides:

York Humber will not dismiss its responsibility to satisfy the purchasers' deficiencies and will endeavour to complete this work in a timely manner.

Under the Ontario New Home Warranty Program we have 1 year to complete the deficiencies but it is certainly our intention to complete all our responsibilities before that time.

[para84] The next standard communication between vendor and purchaser was a letter dated August 29, 1991 from YHL's solicitors, McCarthy Tétrault directed either to the purchaser or the purchaser's solicitors. The August 29, 1991 letter advised purchasers that on August 23, 1991 the Condominium Declaration had been registered and set out a closing schedule for the purchaser's unit. The closing dates were between September 23 and September 26, 1991.

[para85] On September 2, 1991, McCarthy Tétrault wrote to purchasers or purchasers' solicitors enclosing documentation with respect to the final closing.

F. THE METHANE GAS SYSTEM

[para86] Dr. Brown was called to testify by the vendor as both a fact witness, having been the principal environmental consultant for the project, and as an expert. He and his environmental firm, Brown Associates, wrote numerous reports regarding their investigative work. As well, Dr. Brown and his firm designed and supervised construction of the methane system employed at the River Ridge project. They supervised the excavation and soil removal from the project.

[para87] Dr. Brown was tendered and accepted as an expert in three key areas: (1) contaminant hydrogeology, (2) geotechnical engineering, and (3) urban planning as it relates to environmental matters.

[para88] Dr. Brown's credentials are noteworthy. Dr. Brown graduated from Queen's University in 1968 with a Bachelor degree in Science in the areas of Geological Sciences, Urban Planning, and Chemistry. He subsequently obtained a doctorate from Oxford University in Geochemistry followed by post-doctoral teaching at University College in London, England.

[para89] Dr. Brown has over twenty years experience as a principal of Brown Associates, a firm which specializes in the assessment of methane and hydrocarbon vapours and the protection of buildings and structures. In that capacity, Dr. Brown has practised as a contaminant hydrologist, a geotechnical engineer, and in urban planning.

[para90] In addition, Dr. Brown has been a qualified professional engineer in Ontario since 1972, and a member of both the Canadian Institute of Planners and the Ontario Professional Planners Institute. He was a member of the Planning Board for the City of North York for 5 years and Chairman of the Planning Advisory Committee for the City of North York for three years.

[para91] Dr. Brown is the author and co-author of several published reports related to his field of expertise including a study for the Office of the Greater Toronto Area in June 1990 on urban planning as it relates to the environment.

[para92] There was no dispute as to Dr. Brown's expertise with respect to the assessment of lands for methane production or the design and installation of appropriate mitigative systems. He testified that, since 1972, he has designed forty to forty-five mitigative systems of a significant scale to protect buildings. He also stated that he has assessed some three hundred properties where methane gas production was an issue.

[para93] Brian W. Beatty was called as an expert witness by the purchasers. Mr. Beatty prepared a written report dated June 14, 1993.

[para94] Mr. Beatty received a Bachelors of Science degree in Water Resource Engineering from the University of Guelph in 1968. Prior to that, in 1964, he received a diploma as a Certified Engineering Technician from Ryerson Polytechnical Institute. Although he received no education in respect of methane gas, its properties and modes of transport through soils, his field of study was limited to ground water, his evidence was that, through his work on landfill sites, he has gained experience with methane.

[para95] Mr. Beatty's qualification as an expert witness was limited to contaminant hydrogeology. He is not qualified as a geotechnical engineer (i.e., the field of engineering related to the design and construction of buildings), nor is he qualified as an urban planner as it relates to environmental matters.

1. History of the Site

[para96] In both his expert report and at trial, Dr. Brown gave evidence regarding the history of the River Ridge site and lands adjacent thereto. He testified that Brown Associates reviewed all available secondary sources including aerial photographs and earlier environmental studies in order to understand the site history.

[para97] The City owned the lands prior to the purchase by YHL on September 26, 1988 and presumably before the incorporation of the City of York, the Town of Weston. The evidence indicates that the City used the lands for two purposes: the Weston Sewage Plant (up to 1961) and the operation on adjacent property of the Wilby Crescent incinerator (up to about 1953-56). It is therefore apparent that the lands of which the River Ridge site forms a part, were under municipal control up to the date of sale to YHL.

[para98] In his testimony, Dr. Brown reviewed a collection of aerial photographs of the area containing the site. From these photographs he was able to determine the type of fill deposited on the site. It was his opinion that from these photographs he was able to determine that the fill was not domestic garbage, a finding consistent with the site having been under the control of the local municipality. Dr. Brown testified that he would not have expected domestic garbage to be present at the site because the local municipality did not have responsibility for domestic garbage, and that Metropolitan Toronto, which was responsible, did not have access to the site.

2. The Nature of the Site

[para99] Reference has previously been made to the Environmental Reports prepared by Brown Associates which detail the specific investigative work carried out on the site. In his evidence at trial, Dr. Brown reviewed the investigative findings with respect to the site. Referring to Exhibit 9, a map of the entire site, a summary of Dr. Brown's findings regarding the contents of the land is as follows:

. the most westerly portion of the site, described as a panhandle, was entirely original, unimpaired soil;

. the building envelope, which was outlined in pink on Exhibit 9, was centred on nine clarifier/digester tanks from the former Weston Sewage Plant, and that all of the plant was within the footprint of the underground part of the building. Prior to excavation, Dr. Brown was aware that the Plant was largely de-commissioned, and was buried with about 40 feet of predominantly inert fill. In the course of excavation, Dr. Brown established that most of the fill material was inert fill which met residential guidelines and could be used off-site. He also found localized zones of impaired soils which were associated with residual sludge found in the remaining tanks. This material required special handling and would have to be deposited in a licensed landfill. Dr. Brown had documented the specifics of the excavation and the disposal of fill materials;

. with respect to the Metro Easement, the green-coloured area on Exhibit 9, Dr. Brown testified that in the early 1960s when the Weston Sewage Treatment Plant was closed, Metro Toronto installed new storm and sanitary sewers that would by-pass the old plant. These new pipes were installed in the Metro Easement close to bedrock. Dr. Brown said that controlled inert fill material was placed on top of the pipes. He said that "controlled" materials means homogenous fill brought from outside the site. From his own examination during excavation, about 40% of the soil on the easement was removed during construction, Dr. Brown had determined that the fill material in the Metro Easement was quite homogenous, composed of predominantly silt and clay material. He testified that as the fill was inert there was no potential for methane gas production, and that because the fill in the Metro Easement was of low permeability, it would act as an impediment to methane gas migration;

. with respect to the lands east of the Metro Easement, coloured orange on Exhibit 9, and referred to in evidence as "the orange area", Dr. Brown testified that fill had been brought to the area in the 1950's and 1960's. From his investigation of secondary sources, he determined that no fill material had been deposited on the site in the last twenty-five years.

Dr. Brown further testified that based on the borehole logs made with respect to the orange area, his opinion was consistent with that of Warnock Hersey; the fill was heterogenous as it came from different locations, that the fill was predominantly inert fill from municipal works (concrete, bricks, glass, and wood), and that there were zones of top-soil which was consistent with the presence of surplus materials from public works. He concluded that there was a possibility that methanogenic material might be randomly located in the orange area.

Dr. Brown testified that the possibility of the orange area producing significant quantities of methane gas was very, very remote. He said that small quantities of gas might be produced in small, limited lenses or pockets. He said his finding was also consistent with that of Warnock Hersey. Once the pockets of gas are released, the methane will not be replenished, unlike large, active landfill sites. He testified that, for significant methane to be produced, he would have expected to find putrescible material indicating the presence of domestic garbage (e.g., orange peels, glass, tin cans, etc.) He would also expect to find in soil samples a gross, distinct odour, and to find leachate contamination in the ground water. He also said he would have expected to find readings of methane in the bore holes at concentrations well above the upper explosive range of 15%). Further, once the source of methane had been tapped into, he would have expected to have methane continuously coming off in significant quantities. None of these expectations were found in any of the testing done by Brown Associates or, indeed, by anyone else;

. with respect to the upper part of the site, Dr. Brown said there were no fill materials at or above the embankment that forms the northern portion of the site.

[para100] In cross-examination, Dr. Brown confirmed that his opinion based on the aerial photographs and the bore hole logs as to the nature of the fill deposited on the site was completely substantiated when Brown Associates proceeded to excavate the entire area of lands on which the project was built. He stated that Brown Associates had been 98% accurate with respect to the volumes of soil, rock etc. which had to be removed from the overall site and deposited off-site.

[para101] In cross-examination, Dr. Brown was asked about his findings with respect to the lands east of the orange area. He said that based on secondary sources and from his testing in the orange area, he was satisfied that he had an accurate understanding of all the fill areas, both with respect to delineation and content. He said there was no evidence to suggest that the fill area beyond the orange area was any different in nature than that found in the orange area. Dr. Brown's opinion was that there will not be any significant flux of methane migrating to the building.

[para102] One of the three specified purposes for Mr. Beatty's report was to provide a review of "the potential methane gas impacts at the site". In this regard, Mr. Beatty did not perform any primary investigative work as a basis for his opinion but relied entirely on secondary sources and the results of Dr. Brown's investigations.

[para103] Mr. Beatty did not examine any soil samples, take any methane readings from the lands adjacent to the building (the Metro Easement or the orange area), nor did he conduct any primary investigative research at the site concerning the contents of the landfill or its outer limits. Accordingly, he conceded that he was unable to offer an expert opinion as to the quantity of methane gas that could be produced on adjacent lands, nor could he offer an opinion regarding the pattern(s) of methane migration.

[para104] Indeed the only investigative work performed was by Mr. Beatty's assistant on May 5, 1993, the one day that Mr. Beatty attended at the site in order to inform himself about the methane ventilation and monitoring systems. In cross-examination, Mr. Beatty testified that his colleague had tested for the presence of methane in both the ventilation stand pipes and in the underground parking levels using a measuring device that could detect methane gas at 0.2% concentration in air. No methane gas was detected during these tests. Mr. Beatty did not record this fact in his expert report.

[para105] In cross-examination Mr. Beatty testified that the term "garbage dump" was a misnomer; that it had fallen out of use because it is misleading; that any impression created that the site was a garbage dump was unfounded. It implies the presence of methanogenic materials. It was necessary to determine the actual content of the site. A "landfill", on the other hand, may contain domestic or curb-side waste; industrial, commercial, institutional waste; and municipal fill, that is broken concrete, asphalt. In my opinion, the application of the term garbage dump to this site is inappropriate.

[para106] Mr. Beatty further conceded that there was no basis for a direct comparison between the River Ridge site and domestic waste, methanogenic landfills.

[para107] Mr. Beatty was critical of Dr. Brown's report in that, he stated, methane gas monitoring had not been conducted in a "systematic or continuous manner" on site. This view was based on Mr. Beatty's statement that the only monitoring had occurred in January to April, 1988 and once in August, 1988. However, apparently unknown to Mr. Beatty, Brown Associates had tested for methane at time of installation of the methane gas system and when the system was inspected and calibrated thereafter. Also, there was continuous monitoring on the site since work began in 1988, during construction, and after the system was in place in April, 1990. All of this "without incident". Therefore, Mr. Beatty's criticism on this score is unfounded in fact. In any event, there is no evidence that any methane has been detected at the building in the underground parking areas or in the stand pipes since construction began, a fact which Mr. Beatty does not address in his expert report.

[para108] Mr. Beatty, in his report notes a reference in the July 11, 1988 MOE letter to the effect that "testing to date is inconclusive in defining where definite locations of soil contamination may exist". This statement taken out of context ignores the fact that subsequent testing was conducted, referred to in the Supplementary Report, and MOE approval ultimately granted. Mr. Beatty's report creates a negative impression concerning the content of the Metro Easement, as containing sewage sludge. All of this is contrary to the evidence and is unsupported in fact.

[para109] Reference is had to a zone of impugned soils in the Metro Easement referred to by Dr. Brown in his Environmental Report 13. Dr. Brown explained that this soil was completely removed during excavation, that it was not, it turned out, on the easement but, rather, was in the building site and was a remnant of the sewage treatment plant. This was determined, Dr. Brown testified, from excavation after his written report referring to it was produced. I accept Dr. Brown's evidence that the Metro Easement contained only inert fills and that the reference in Environmental Report 13 was to soil from the building site which was excavated.

[para110] Mr. Beatty's conclusion, in his expert report, that there is a high probability that methane will be produced in adjacent areas and could migrate towards the condominium development is unsupported on the evidence. He did no primary investigative work on which to base this opinion, as contrasted with Dr. Brown who, in addition to his primary work, had the advantage of visual inspection of the site during excavation to verify his conclusions as to the nature of the site. In cross-examination, Mr. Beatty conceded that he could offer no expert opinion as to the quantity of methane gas that could be produced on the site; moreover, Mr. Beatty acknowledged that there was no evidence to suggest that the building was uninhabitable or that there was any danger of harm or injury. For all of these reasons, whenever Mr. Beatty's opinion concerning the nature of the site varies from that of Dr. Brown's, I accept the opinion of Dr. Brown.

C. Development Conditions: The Approvals Process

[para111] Dr. Brown gave evidence, in both his expert report and at trial, with respect to the development controls and the approvals process related to the River Ridge project. The specific development conditions imposed by the City, the MOE and Metro Toronto are set out above.

[para112] It was Dr. Brown's evidence that he was involved in the discussions with the City of York and the MOE regarding the conditions that would be imposed on the development of this site. He testified that because the City of York was the vendor of the land, added scrutiny was given to this development. For this reason, the City imposed several conditions on the development before agreeing to sell the land, before allowing the development to be constructed, and before allowing people to take occupancy of the project.

[para113] Dr. Brown was taken through each of the conditions required by the Environmental Agreement, in examination in chief, and confirmed that all of the development requirements had been complied with, specifically clauses 4; 5(a), (b), and (c); 6(a), (b), and (c); 7; 8 and 9.

[para114] The purchasers led no evidence to counter Dr. Brown's testimony that there had been proper compliance with all development conditions. Mr. Beatty's evidence in cross-examination was that he assumed that the developer in this case had complied with all of the requirements of the City, the MOE and Metro Toronto. Based on the foregoing, I find that all of the development conditions were properly met.

D. River Ridge Methane Ventilation and Monitoring Systems

[para115] During his evidence in chief, Dr. Brown gave a detailed description of the passive ventilation system, the active methane monitoring system, and the geotechnical aspects of construction which protect the underground structure of the buildings from migrating methane.

[para116] The passive methane collection and venting system is a system of perforated pipes below ground connected to a series of vertical stand pipes above ground to collect any methane gas and to vent the gas to the atmosphere. As stated, at page 15 of Dr. Brown's expert report:

All evidence shows that the only possible direction of migrating methane would be from the south [sic "east"], across the Metro Easement, and hence the standpipes are located on the appropriate side of the building.

Thus the piping ventilation system forms a line of defence along part of the southern and easterly side of the building.

[para117] Dr. Brown described the River Ridge building as having seven levels of protection from the possibility of methane migrating into the structure. They are:

1. thirty-six methane detectors strategically located in the areas of the underground parking garage (e.g., inside enclosed spaces);
2. mechanical air exchange in the parking levels with complete air exchange every fifteen minutes;
3. an eight to nine inch concrete wall made of 8,000 pounds per square inch concrete with steel reinforcing bars;
4. coating of sprayed bitumen on the external surface of the underground structure;

5. Hitek, a corrugated or waffle-like plastic and a spun filament polyester geotextile, affixed to the exterior underground surface;
6. clear limestone backfill and limestone chimneys;
7. low permeability backfill in the Metro Easement.

[para118] The methane detectors in the underground parking levels are calibrated to detect methane at 0.2%, which is 1/25th of the lowest explosive level of methane of 5.0%. These same detectors, like light bulbs, will ultimately require replacement. It is important to note, however, that the detectors become even more sensitive as they age.

[para119] The technical details of the mitigative systems and the 7 levels of defence withstood intensive cross-examination by counsel. Moreover, Dr. Brown's uncontroverted evidence is that there has never been any methane detected anywhere in the system since the construction of the building. Indeed, Mr. Beatty testified that he was aware that no methane had ever been detected.

[para120] Dr. Brown explained the reasons why he recommended the installation of the methane ventilation and monitoring systems. He said that the summer testing program of the orange area found limited but definite zones of methane gas. He could not wait four seasons to obtain a building permit. Therefore, Dr. Brown made a conservative estimate that the presence of methane gas in the orange area might be worse in the winter, assuming that there was more topsoil in the orange area and therefore more methanogenic material. He decided to put in a defence system because the soils in the Metro Easement were not enough to guarantee a high level of comfort for the project.

[para121] Dr. Brown testified that he recommended the systems be installed out of an abundance of caution. He assumed the worst case about events occurring off the building site which could cause any methane generated there to migrate (namely, paving the currently landscaped area, a change in the water table, etc.). He stated that while these are extremely remote possibilities, they are still possibilities and must be taken into account for engineering design purposes.

[para122] Further, Dr. Brown testified in cross-examination that the systems installed at the project were sufficient in his expert opinion to protect the building even if the fill in the orange area and in the land adjacent to the east were 100% municipal, curbside garbage.

[para123] Any suggestion on the part of the purchasers that these systems were negligently designed or installed, or that the River Ridge project is in any way unsafe, was totally unsubstantiated.

[para124] A second stipulated purpose of Mr. Beatty's expert report was to assess the effectiveness of the "methane mitigative system".

[para125] Mr. Beatty attended at the site on one occasion only on May 5, 1993 to examine the methane gas system. As Mr. Beatty's report makes clear, he could not see very much of the methane ventilation system because, except for the stand pipes, it is beneath the ground. He also said that he was shown a few of the methane monitors in the underground parking levels, but at the time he did not have the Monitor Location Plan so he could not see all of the 36 monitors in place. In the result, most of what he has to say regarding the methane gas system is based on Dr. Brown's reports.

[para126] In his report, Mr. Beatty describes the initial proposed methane gas system, referring to Brown Associates' Environmental Report. It is at this point that Mr. Beatty makes reference to the positive air pressure ventilation system designed for the underground parking levels. Subsequently in his report, Mr. Beatty describes as an "uncertainty" the fact that the garage is ventilated with exhaust fans that create a negative pressure.

[para127] This statement by Mr. Beatty is explained by a change in proposed ventilation system from positive to negative pressure set out in the Supplementary Environmental Report, where Brown Associates clearly indicate that the system design will incorporate negative ventilation. The Supplementary Report states: "The underground levels of the structure will be provided with negative ventilation to exhaust unwanted gases, whether they originate from automobiles or from outside the building....The details of the methane gas mitigation system have been provided separately to the Ministry in the form of drawings prepared by the architect and the mechanical consultant." Mr. Beatty appears to have overlooked this change when preparing his expert report.

[para128] However, in cross-examination, Mr. Beatty conceded that he knew that Dr. Brown had to move from a positive to a negative ventilation system in the underground parking level because, in consultation with the mechanical engineers, it was determined that a positive ventilation would blow car exhaust into the building. Mr. Beatty said he was also aware that the exhaust fans in the garage provided an air exchange every 15 minutes. Finally, Mr. Beatty was aware that the Ministry of the Environment had approved Dr. Brown's system design and had granted Section 45 approval on that basis. Mr. Beatty did not refer to any of this information in his report.

[para129] Mr. Beatty's conclusion in his report that "[t]he risk of methane migration toward the building is enhanced by the operation of a negative pressure exhaust system in the parking levels" is an aspect of geotechnical system design and goes beyond the ambit of his area of expertise. Accordingly, I attach no weight to this opinion

[para130] Mr. Beatty also agreed that one part of the mitigative system was the design and installation of the underground parking garage. He acknowledged that he had no experience with respect to designing the structure of the building to prevent methane gas from entering. This evidence thus falls into the same category as that concerning the exhaust system.

[para131] In reference to the various uncertainties referred to in his report regarding the methane gas system, Mr. Beatty acknowledged that Dr. Brown responded to each of these points in his expert report. For example, where in his report Mr. Beatty raises the concern, that he could not locate the geotextile at the ground surface of the building which in his opinion, would seriously retard the passive venting, Dr. Brown responded, at page 15: In fact, as shown in the schematic diagram (Schedule E) the HiTech 20 membrane was installed around the foundation of the building but, consistent with proper practice, was cut off below grade to avoid the undesirable consequences of having dirt, etc. run off the building down in to the intercept system clogging the ventilation.

[para132] Mr. Beatty testified in cross-examination that prior to testifying in chief, he was aware that the drainage sheet and geotextile filter did not go all the way to the surface because of potential problems with clogging. In any event, he agreed that as he did not understand the purpose of the drainage sheet and geo-textile filter and he would defer to Dr. Brown's opinion.

[para133] Mr. Beatty conceded that, because of the uncertainties he had about the system, he was unable to come to a firm opinion regarding the effectiveness of the mitigative system. Mr. Beatty had never designed a system similar to that designed by Dr. Brown; he had only evaluated the work of other engineers on one or two prior occasions; it was not his common practice to examine methane systems installed by other engineers.

[para134] Dr. Brown is an impeccably qualified expert. He was conservative and cautious in his design of the methane gas system which was installed under his supervision at River Ridge. He was able to provide a reasonable explanation squarely within the area of his expertise in response to each criticism of the system put forward by Mr. Beatty. I accept Dr. Brown's expert evidence regarding the appropriateness and effectiveness of the design and construction of the methane gas system, notwithstanding Mr. Beatty's concerns.

[para135] I accept the following statement on page 20 of Dr. Brown's expert report:

In summary, having reviewed Mr. Beatty's report carefully, I am completely satisfied with the safety and efficacy of the River Ridge Project and in particular, the methane monitoring and ventilation systems. I am bolstered in my view by the approvals given by the Minister of the Environment and the City of York for the project. [para136] The third area addressed by Mr. Beatty was the potential for on-going costs and liabilities of the system. Mr. Beatty indicated that the replacement cost of the system was in the order of \$100,000 to \$200,000. In cross examination he conceded that he did not know the cost of the system. In any case, the system Dr. Brown testified, would last the lifetime of the building since it was a "passive" system. This evidence was not refuted. Thus replacement cost is not a concern. Dr. Brown stated, at page 17, of his expert report:

The methane systems employed at the River Ridge site are designed to last the life of the building. I do not foresee any significant replacement costs. The methane ventilation system has no mechanical components that would require replacement or maintenance. It is a "passive" as opposed to "active" system. It is also a "breathing system": as changes in air pressure occur the effect will be a "breathing" of the air in the exterior ventilation system which has a flushing effect. In terms of the "active" methane monitoring system, it is very unlikely that it would ever require replacement to the extent suggested by Mr. Beatty (\$100,000 to \$200,000), if at all. In my opinion, if replacement became necessary (however unlikely) the cost would be nominal because the monitoring system is mostly wiring which could be retained; the only working parts which could be replaced are the annunciator panel and the detector heads which cost about 2% of the figures suggested by Mr. Beatty in his report.

[para137] Maintenance and monitoring of the methane gas system is performed by a qualified company called Enmet pursuant to a contract with YHL which was later assumed by the condominium corporation. Maintenance costs are minimal and counsel for the purchasers abandoned this point during argument as de minimus.

[para138] Summing up this point, Mr. Beatty testified that he would have done more testing of the site. Dr. Brown, however, testified that this was unnecessary because he understood the site to his satisfaction from all of the information before him. Further, the methane gas system was designed based on an assumed worst case scenario.

[para139] Mr. Beatty, in final analysis, took issue only with respect to the specific design which Dr. Brown incorporated into the methane gas system. His evidence was that he, Mr. Beatty, could design a system which would ensure the safety of residents of the building. Therefore, given that a safe system could be designed to protect the building from any methane gas risk, the only remaining question is the integrity of Dr. Brown's design. I accept Dr. Brown's expert opinion concerning this point.

[para140] Mr. Beatty testified that he assumed that the requirements of the MOE, the City, and Metro Toronto had been met for the development to proceed and be occupied. He stated that a developer was entitled to rely on the advice of its environmental expert, the approval of the MOE and the City as to the safety of the methane gas system. With all of this I agree.

[para141] Counsel for the purchasers made a point that the system had not been tested by Dr. Brown. It is clear that the methane monitoring system was tested and calibrated. The methane ventilation system is passive and no suggestion was ever made by the purchasers' counsel as to how and whether it could be tested. In the absence of such evidence, I am satisfied that Brown Associates did everything required in respect of testing the methane gas system, which Dr. Brown testified, was performed during construction.

5. No disclosure required to unit purchasers

[para142] In cross-examination, Dr. Brown was asked questions about his understanding of the recommendation of the MOE in the letter of July 11, 1988 that the owner require all "subsequent owners" to be made aware of the presence or requirements concerning the methane gas system. Did "subsequent owners" include the purchasers? Dr. Brown testified that "subsequent owners" referred to the condominium corporation which would become the subsequent owner of the site. He stated that he did not interpret this provision as a disclosure clause, but rather as a form of heirs and successors clause. He testified that in the circumstances, the condominium corporation would become the future owner and operator of the system. Dr. Brown freely conceded that he was not aware of any legal meaning attached in law to the term "subsequent owners". He stated, however, that in his dealings with the MOE and City officials they had been satisfied with the disclosure he made to the condominium corporation and there was no suggestion or recommendation that unit purchasers be notified.

[para143] Dr. Brown stated in cross-examination that had the MOE or the City wanted individual unit purchasers to have information about the site or the methane systems, this requirement could have been imposed; for example, they could have required disclosure in the Articles of Incorporation of the condominium. Dr. Brown indicated that this had been done elsewhere.

[para144] I accept Dr. Brown's evidence regarding the reference to "subsequent owners" in the MOE letter. In any event, no evidence was led by the purchasers to establish that the MOE or the City had imposed a requirement of disclosure of these matters to unit purchasers. Accordingly, I find that no such requirement had been imposed on the vendor.

IV. ISSUES OF LAW

[para145] Three main issues of law were argued on the facts in this case which are common to all of the purchasers. In addition, there were several other, "purchaser specific" issues relating to individual purchasers. These are addressed later. The three main issues, which will be dealt with below are:

1. Were the disclosure requirements under section 52 of the Condominium Act, R.S.O. 1990, c. C.26 met by YHL?
2. Did YHL owe a fiduciary duty to the purchasers of the condominium units?
 - a. if yes, did they owe a duty to continually disclose material information, at which point is this information deemed material?
 - b. if yes, was that duty breached by not disclosing the nature of the site including the governmental requirements and the possible need for a methane gas system?
3. Does the existence of the Environmental Agreement, the Confirming Agreement, and the Assumption Agreement constitute a cloud on title?
 - a. are the agreements encumbrances?
 - b. if yes, are they permitted encumbrances?
 - c. if they are encumbrances and they are not permitted encumbrances, did the purchasers accept them by neglecting to object to the title in a timely fashion?

A. ISSUE NO. 1: DISCLOSURE REQUIREMENTS PURSUANT TO SECTION 52 OF THE CONDOMINIUM ACT

[para146] Counsel for the purchasers, Mr. Fine, argued that YHL failed to meet the disclosure requirements imposed in the Condominium Act by failing to include, in the disclosure statement, details about the nature of the building site, the government requirements, the potential hazards of methane gas, the assumption of liability by the condominium corporation, the need for a methane gas system and the costs inherent therein. As a result of such failure, it was argued that the Agreement of Purchase and Sale is not binding upon the purchasers.

[para147] Section 52 of the Condominium Act contains a statutory scheme to deal with inadequate disclosure. Subsection 52(1) provides that an Agreement of Purchase and Sale is not binding until a copy of the current disclosure statement and all material amendments thereto are delivered to the purchaser. Subsection 52(2) permits a purchaser to rescind the Agreement within 10 days after receiving the disclosure statement or the amendments. Subsection 52(3) requires a purchaser who wishes to rescind, to give written notice to the declarant or proposed declarant, or the solicitor of the declarant or proposed declarant. Subsection 52(4) requires that all money paid by the person rescinding the agreement be refunded without penalty or charge, forthwith. Pursuant to subsection 52(5) a unit holder is entitled to damages where there were material statements or information contained in the required documents under the Act that were false or misleading and relied upon by the unit holder.

[para148] Subsection 52(6) requires full and accurate disclosure of certain information, the details of which are contained in the section. The relevant portions of the section read as follows:

(6) The disclosure statement referred to in subsection (1) shall contain and fully and accurately disclose,

.....

(b) a general description of the property or proposed property including the types and number of buildings, units and recreational and other amenities together with any conditions that apply to the provision of amenities;

.....

(d) a brief narrative description of the significant features of the existing or proposed declaration, by-laws and rules governing the use of the common elements and units, and of any contracts or leases that may be subject to termination or expiration under section 39;

(e) a budget statement for the one year period immediately following the registration of the declaration and the description.

(7) The budget statement mentioned in clause (6) (e) shall set out,

(a) the common expenses;

(b) the proposed amount of each expense;

(c) particulars of the type, frequency and level of the services to be provided;

(i) any services not included in the budget that the declarant or proposed declarant provides, or expenses that he pays and that might reasonably be expected to become, at any subsequent time, a common expense and the projected common expense contribution attributable to each of those services or expenses for each type of unit;

[para149] Section 39 of the Act (referred to in Section 52(6)(d)) states, in subsection 39(1), that the condominium corporation may terminate, with sixty days notice in writing, any agreement between the corporation and any person for the management of the property which was entered into when the declarant owned the majority of units and the majority of the board of the corporation were elected. Subsection 39(2) states that all agreements for the provision of services on a continuing basis which were entered into by the corporation at a time when the declarant held a majority of the units and a majority of the board were elected are deemed to be 12 month contracts starting from the date their effective date. These contracts can be extended if the board, elected after the declarant no longer holds a majority of the units, ratifies them.

[para150] The test to apply in determining the degree of disclosure required was articulated in *Abdool v. Somerset Place Developments* (1992), 10 O.R. (3d) 120 at 138-39 (Ont. C.A.) where Robins J.A. stated: I approach this question first by

reference to the applicable burden of proof. In my opinion, when a purchaser who has had the opportunity afforded by the cooling off period to consider the disclosure statement and the accompanying documentation, and has decided to go through with the transaction, subsequently seeks to rescind from his or her otherwise binding agreement of purchase and sale on the basis of the deficiency of the disclosure statement, the onus is on the purchaser to show that the disclosure statement fails to satisfy the requirements of the Act to the degree that the agreement must be declared non-binding.

To discharge this onus and prove the materiality of the complaint, in my opinion, the purchaser is obliged to establish objectively that had the information that was not disclosed, or that was inaccurately or insufficiently disclosed, been properly disclosed in the disclosure statement at the time it was delivered to the purchaser, a reasonable purchaser would have regarded the information as sufficiently important to the decision to purchase that he or she would not likely have gone ahead with the transaction but would instead have rescinded the agreement before the expiration of the ten-day cooling off period. [emphasis added]

[para151] It is clear, therefore, that the onus is on the purchasers to prove that there was a material non-disclosure.

[para152] In addition to the initial disclosure statement, there is an obligation on the developer to amend the Disclosure Statement where material information comes to light after the disclosure statement is distributed. The test to be applied in determining when such an amendment is necessary is similar to the general test for disclosure. In *Abdool, Robins J.A.* stated, at page 149:

Would a reasonable purchaser regard the change or amendment as sufficiently important to his or her decision to purchase that, had the disclosure statement contained the new or amended information at the time it was delivered, the purchaser would not likely have gone ahead with the transaction but would have rescinded the agreement within the ten day period? If the answer to this question is in the affirmative, the developer is obliged to deliver an amendment to the disclosure statement and the purchaser has ten days from the date of delivery with which to rescind. [emphasis added]

[para153] It was argued that the initial disclosure statement ought to have disclosed the following information, pursuant to s. 52(6)(b) of the Act, as information pertaining to a general description of the property or proposed property:

A. the information contained in the Proposal Call with respect to:

1. the history and former use of the property and the lands adjacent to it;
2. previous testing that had been carried out in respect of the site and the surrounding area;
3. the governmental requirements [site plan approval] for testing including:
 - a. Identification of the extent of fill and any organic waste;
 - b. Assessment of the methane gas production from the site;
 - c. Evaluation of the impact of methane gas on the proposed structures;
4. the requirement to recommend and design a ventilation system to control and remove all methane gas and to monitor methane gas generation;
5. the restrictions on occupancy;
6. the requirement for the submission of reports evaluating the performance of the ventilation system;
7. the requirements of the Ministry of the Environment including the requirement for approval in respect in the site under s. 45 of the Environmental Protection Act.

B. the retaining of Brown Associates to carry out the work for which Brown was retained;

C. the actual testing carried out by Brown Associates and the results thereof (to date), including Brown's recommendations.

[para154] It was further argued that YHL should have delivered amendments to the disclosure statement from time to time, which should have contained, and fully and accurately disclosed, the following information, pursuant to s. 52(6)(b) of the Act, as information pertaining to a general description of the property or proposed property:

A. the actual testing carried out by Brown and the results thereof, including Brown's recommendations;

B. the various other governmental approvals and requirements that were required in relation to the Methane Gas Ventilation and Monitoring System, including the installation, maintenance, testing and monitoring thereof;

C. the Minister's conditions of approval under s. 45 of the Environmental Protection Act;

D. the existence of the Methane Gas Ventilation and Monitoring System on the property;

E. the existence and terms of agreements providing for, inter alia:

1. the installation, maintenance and monitoring of the Methane Gas Ventilation and Monitoring System;
2. the assumption by the future condominium corporation of YHL's obligations contained in the Environmental Agreement;
3. the indemnification and saving harmless by the condominium corporation of both the City of York and YHL as set out in the Environmental Agreement and the Assumption Agreement;
4. the release of YHL from its obligations under the Environmental Agreement; and,

5. the providing of inspection and calibration services with respect to the Methane Gas Ventilation and Monitoring System on a continuing basis (the "Enmet Agreement");

F. that YHL would cause the condominium corporation to:

1. assume YHL's obligations and give the above-noted indemnities as set out in sub-paragraphs ii. and iii. immediately above;
2. enter into the Enmet Agreement;

G. the cost of maintenance and monitoring of the Methane Gas Ventilation and Monitoring System, and that such costs would be part of the common expenses of the condominium corporation;

H. the information on page 2 of the Operation Manual.

[para155] It was submitted that YHL should have delivered amendments to the disclosure statement from time to time, disclosing, pursuant to ss. 52(6)(e) and 52(7)(a) of the Act, the potential financial liability of the condominium corporation for:

A. the ongoing:

1. maintenance, repair and replacement of; and,
2. monitoring and reporting with respect to,

the Methane Gas Ventilation and Monitoring System;

B. the indemnification of the City of York contained the Environmental Agreement; and,

C. the indemnification of YHL contained in the Assumption Agreement,

all of which would be common expenses of the condominium corporation.

[para156] It was also submitted that YHL should have delivered an amendment to the disclosure statement, disclosing, pursuant to s. 52(6)(d) and s. 39 of the Act, a brief narrative description of the significant features of:

A. the Enmet Agreement; and,

B. the Environmental Agreement,

as these agreements were agreements for the provision of services on a continuing basis within the meaning of s. 39 of the Act.

[para157] It was conceded that the cost of maintenance of the system was a negligible amount. Counsel argued, however, that the fact of requiring maintenance of such a system is material information that the purchasers should have had in order to make an informed decision when entering into the Agreement of Purchase and Sale. If the developer was unable to disclose the information at that point then an amendment should have been distributed advising the purchasers of the existence of the system, the reasons for it and the condominium corporation's corresponding liability.

[para158] The Court of Appeal, in *Abdool*, provides some guidance regarding the contents of a disclosure statement as well as the seriousness of declaring a disclosure statement to be inaccurate. *Robins J.A.* stated at page 136:

To declare that otherwise binding agreements are unenforceable solely because of the disclosure statement is obviously a very serious matter. Depending, of course, on the real estate market, the adverse economic impact of such declarations on developers is manifest. Accordingly, it seems to me apparent that not every defect in a disclosure statement will warrant a declaration that an agreement is not binding. Before a defect can have that effect it must be of such substance as to render the disclosure statement defective in a material respect.

...

Agreements should not be rendered unenforceable by technical deficiencies or immaterial omissions in a disclosure statement. Contracting parties, it must be remembered, owe one another a duty to act reasonably and in good faith and to perform contracts honestly made.

[para159] The deficiencies complained of by Mr. Fine are numerous. As was stated in *Abdool* at page 146 it is necessary to:

...construe s. 52 in a manner that properly balances consumer protection and the commercial realities of the condominium industry and, if adopted, would require a disclosure document incompatible with the underlying aim of the section.

The vagueness of the requirements and the absence of statutory guidelines mandate a broad and flexible approach -- not a rigid or stringent one -- in determining whether a given disclosure statement is adequate.

In *Abdool*, it was alleged that there were several details missing from the disclosure statement. It was argued that, taken as a whole, there was inadequate disclosure. The Court of Appeal dismissed this approach and stated that the disclosure statement must be viewed in the context of the other documents provided. The Court held that there was no material non-disclosure requiring that the agreements be set aside.

[para160] The test of materiality is objective. Would a reasonable purchaser have regarded the information as being so important that he or she would not likely have completed the transaction? Counsel for the purchasers concedes in argument that the materiality must be measured at the time that the development has been completed for occupancy. The facts at that time, and now, militate against a finding of materiality. The methane gas system is in place shielding the development from the direction of any possible methane gas migration. The monitoring system has been tested and calibrated. Enmet is under contract to maintain the system. The building has, in *Dr. Brown's* opinion, in the form of the methane gas system, seven lines of defence. This system has

received the approval of the MOE and the City of York. All requirements of those bodies have been met and complied with. There is no danger to health or safety, nor is there any disruption or interference with the use or enjoyment of the individual purchasers' unit or the common elements. Although the Operation Manual for Methane Gas System states that the "only possible (but remote) danger" is that some methane gas might enter the underground area of the building, no methane gas has ever been detected in the building or the system. The methane gas system, Dr. Brown testified, was inserted in the development out of an abundance of caution, assuming a worst case scenario. If there is any migration of methane gas, the methane gas system, he asserts, will effectively vent it off. The system is, he said, no different than any other mechanical system in a large building. The Environmental Agreement and related agreements were normal development agreements, although they were structured here as stand-alone agreements. The Enmet agreement, providing for the monitoring and maintenance of the system, is a normal maintenance agreement, the ongoing cost of which purchasers' counsel concedes was insignificant.

[para161] As to the nature of the site, the building envelope has been excavated; the Metro Easement is comprised of inert fill; the area east of the easement does not contain any significant amount of impugned soil. This site is not nor has it ever been a garbage dump. The sewage treatment plant was removed in its entirety.

[para162] In the context of the foregoing analysis the methane gas system and nature of the site, together with the appurtenant details, including the development agreements, are not, in my opinion, facts which would be of such importance as to be likely to cause a reasonable purchaser not to complete the transaction. Counsel for the purchasers argued that many matters required ongoing disclosure under the Condominium Act. I am of the view that none of these matters were material.

[para163] Counsel for the purchasers argued that the prior use and history of the site and the presence of the methane gas system has a stigmatic effect on the development resulting in a diminished value for the units. This, he submits, renders these facts material. Barry Lebow, a real estate appraiser, was called as an expert witness by the purchasers. He stated that, although there was no stigma attached to the development at this time, it could occur in future. He relied, in giving his opinion, on his experience dealing with properties containing Urea Formaldehyde Foam Insulation ("UFFI") and the stigmatic effect of this product on value of such properties. Mr. Lebow admitted, in cross examination, to having no knowledge of methane gas; to not having conducted an appraisal on the development; and, that UFFI was a known carcinogenic and, therefore a restricted material subject to government regulation. He relied for his opinion on the statement from the Operation Manual referred to above and discussions with several friends.

[para164] Mr. Lebow had no knowledge of methane gas. The statement from the manual was taken totally out of context. There is no valid parallel between methane gas and UFFI and his comparison lacks any recognition of the presence of the methane gas system or its function. He conducted no appraisal, and he acknowledged that no stigma exists now. In addition, the residents of the building at River Ridge are protected from the dangers of gas with a system approved by the MOE and the City, whereas the buildings with UFFI cannot be. In my view, therefore, Mr. Lebow's opinion has no support in fact or otherwise and I give no weight whatever to it. I conclude that the history of the site, the nature of the property, the presence of the methane gas system, and the entire circumstances of this development, has not produced any stigmatic effect resulting in reduced values for these units. The reduced values have been the result, solely, of the fall in the condominium market in Toronto.

[para165] Finally, although the test is objective, I am given comfort in my conclusion that these matters are not material by the conduct of some of the purchasers in these transactions. Kimberly Baird was an associate real estate broker with Re/Max Professionals Inc. He learned of the methane gas issue in February or March, 1991, and of the system in May or June, 1991. He first raised the issue as a basis for not closing in a letter from his solicitors Fine and Deo dated October 4, 1991.

[para166] Stella Guida was a title searcher employed by the law firm of Goodman & Carr. In November, 1990 she discovered the Environmental Agreement on title. She discussed this with a planner and a solicitor of the law firm and took no action concerning the land use or the methane gas system. In a memo to her lawyer at the firm in which she discusses possible reasons to extricate herself from the transaction, she did not raise this issue. Her solicitor's letter to McCarthy Tétrault of April 18, 1991, likewise makes no mention of the environmental issue as being a basis for termination. These issues relating to the nature of the site and the methane gas system were not raised with YHL until the letter from Fine and Deo dated October 4, 1991 in which it was stated that she would not close.

[para167] Johanne and Michael Guida learned of this issue in the fall of 1990 from Stella Guida. No objection was raised with YHL by them until this litigation commenced. Mr. Guida told his solicitor about this issue in March, 1991, yet it was not referred to as a basis for objection in the solicitor's letter to McCarthy Tétrault dated March 7, 1991.

[para168] A number of purchasers, after being informed of the methane and land use issues, indicated that they would close their transactions if they could achieve an acceptable abatement in purchase price. [para169] Each of the purchasers in their evidence stated that, had they known the facts, details of which are set forth in the Agreed Statement of Facts, paragraphs 147 and 148, they would not have gone ahead with the transaction. Paragraphs 147 and 148 state:

147. Prior to entering into their respective Agreements of Purchase and Sale, none of the purchasers received any of the information contained in the Proposal Call with respect to:

- a. the history and former use of the property and the lands adjacent to it;
- b. previous testing that had been carried out in respect of the site and the surrounding area;
- c. the governmental requirements [site plan approval] for testing including:
 - i. Identification of the extent of fill and any organic waste;
 - ii. Assessment of the methane gas production from the site;
 - iii. Evaluation of the impact of methane gas on the proposed structures;
- d. the requirement to recommend and design a ventilation system to control and remove all methane gas and to monitor methane gas generation;
- e. the restrictions on occupancy;

- f. the requirement for the submission of reports evaluating the performance of the ventilation system;
- g. the requirements of the Ministry of the Environment including the requirement for approval in respect in the site under s. 45 of the Environmental Protection Act;

148. With the exception of Stella Guida, Michael and Johanne Guida, and Kim Baird, who obtained certain information about the existence of the Methane Gas Ventilation and Monitoring System prior to September, 1991, it was in August/September 1991 that any of the purchasers first received or were aware of any information about any of the following:

- a. the information set out in para. 147 above;
- b. the retaining of Brown to carry out the work for which Brown was retained;
- c. the actual testing carried out by Brown and the results thereof, including Brown's recommendations;
- d. the various other governmental approvals and requirements that were required in relation to the Methane Gas Ventilation and Monitoring System, including the installation, maintenance, testing and monitoring thereof;
- e. the Minister's conditions of approval under s. 45 of the Environmental Protection Act;
- f. the existence of the Methane Gas Ventilation and Monitoring System on the property;
- g. the existence and terms of agreements providing for, inter alia:
 - i. the installation, maintenance and monitoring of the Methane Gas Ventilation and Monitoring System;
 - ii. the assumption by the future condominium corporation of YHL's obligations contained in the Environmental Agreement;
 - iii. the indemnification and saving harmless by the condominium corporation of both the City of York and YHL as set out in the Environmental Agreement and the Assumption Agreement;
 - iv. the release of YHL from its obligations under the Environmental Agreement; and
 - v. the providing of inspection and calibration services with respect to the Methane Gas Ventilation and Monitoring System on a continuing basis (the "Enmet Agreement");
- h. that YHL would cause the condominium corporation to:
 - i. so assume YHL's obligations and give the above-noted indemnities as set out in sub-paragraphs ii. and iii. immediately above;
 - ii. enter into the Enmet Agreement;
 - iii. the cost of maintenance and monitoring of the Methane Gas Ventilation and Monitoring System, and that such costs would be part of the common expenses of the condominium corporation;
- j. the information on page 2 of the Operation Manual.

[para170] Dealing with the purchasers' evidence, first, the test as enunciated in *Abdool* is objective. The evidence regarding each purchaser's subjective motivation for not closing is, therefore, irrelevant. Secondly, in any event given the just stated evidence, I reject these purchaser statements. An objective analysis implies that a purchaser would be accurately and fully informed. The evidence was clear that the purchasers were not properly informed concerning the matters in paragraphs 147 and 148. Moreover, they did not take any steps to inform themselves with the result that their reaction to the information contained in these paragraphs was made without fully understanding the situation. A reasonable purchaser, so informed, would not, in my opinion, regard this information as so important as to not proceed. Accordingly, their evidence in this regard is not useful.

[para171] Counsel argued that these subjective views are relevant. He relies on the passage from *Abdool* wherein Robins J.A. makes reference to certain idiosyncratic circumstances which may render a point material to an individual purchaser. At page 149 Robins J.A. stated:

Amendments that substantially change a purchaser's anticipated use and enjoyment of the unit or the amenities associated therewith or that adversely affect the value of the unit, are, I would think, clearly material amendments that revive the rescission period. A reasonable purchaser could objectively assert that he or she would not have proceeded with the deal had this information been available at the time of the original disclosure statement. However, given the lifestyle aspects of condominium living, there may well be situations in which the individual circumstances of a particular purchaser may render an amendment which is not material to other purchasers, and which indeed may be acceptable to other purchasers in a given project, none the less material to this purchaser. The extent to which subjective considerations may reasonably be asserted in determining the materiality of the new or amended information is not before the court in these appeals and need not be considered. [emphasis added]

In my opinion, this statement refers, for example, to an amenity such as a gymnasium. If a purchaser decided to execute an Agreement of Purchase and Sale mainly because the complex had a gymnasium which this purchaser was planning to use a great deal for physical conditioning rather than pay a membership fee at a fitness club and the gymnasium was never built then there may be cause for refusing to complete the transaction for this one purchaser. To apply this proposition to the facts at hand would be a far stretch that would not do justice to the intent of Mr. Justice Robins' words.

[para172] The circumstances surrounding the land use and methane gas system issues is not a material fact within the meaning of the test in *Abdool* so as to entitle the purchasers, by reason of the non-disclosure, to refuse to complete their Agreements of Purchase and Sale with YHL. Further, the contention that disclosure in the form of amendments to the disclosure statement on an ongoing basis is impractical and contrary to the intentions of the statute.

[para173] In this proceeding, the non-disclosure boils down to one point: should the purchasers have been advised that the building was to be constructed next to a landfill site and that a methane gas system is required? The answer to this question is that, as a matter of public relations, it would have been wise to have done so. As a matter of law, however, there was no material non-disclosure of which warrants rescission of an otherwise valid contract.

B. ISSUE NO. 2: FIDUCIARY DUTY

[para174] Counsel for the purchasers argued that YHL owed an ongoing duty to the purchasers, because a fiduciary relationship existed between them and YHL, to disclose information about the nature of the site and the existence of the methane gas system as the information arose so that they could make an informed choice. This is, he stated, a significant purchase for most people and they have a right to know what they are buying before they buy it. This duty, it was argued, covers all material information from the inception of the project.

[para175] In *Frame v. Smith*, [1987] 2 S.C.R. 99, Madam Justice Wilson, in dissent, identified three general characteristics of a fiduciary. These characteristics were subsequently approved in *Lac Minerals v. Corona*, [1989] 2 S.C.R. 574 at 599. They are: (1) The fiduciary has scope for the exercise of some discretion or power.

(2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[para176] I was referred by counsel to several cases dealing with fiduciary duties in the context of a condominium development. The first of these was the decision in *York Condominium Corporation No. 167 v. Newrey Holdings Ltd.* (1981), 32 O.R. (2d) 458 (C.A.) leave to appeal to S.C.C. refused (1981), 32 O.R. (2d) 458n. In *Newrey* numerous purchasers had entered Agreements of Purchase and Sale. The developer still held title, however, and sold some of the parking spaces. The Court held that the developer owed a fiduciary duty to the purchasers after they had entered Agreements of Purchase and Sale in respect of the common elements, while it held title to the property. Madam Justice Wilson stated at page 467:

I do not think the position of the owner-developer remains unchanged after he starts to sell units. I think that at that point he has committed the character of the project to that of condominium under the Act and declaration. I think he has also placed himself in a fiduciary relationship to the unit purchasers not only with respect to their units but also with respect to the interests appurtenant thereto. He therefore holds the property in trust for the unit purchasers, present and prospective, and for the condominium corporation which will come into being upon registration of the declaration. I believe he is under a duty to protect the interests of all unit owners, present and prospective, and cannot put his own interests in conflict with theirs even although he himself continues to be an owner as long as any units remain unsold. [emphasis added]

The *Newrey* decision was followed by the Alberta and Saskatchewan Courts of Appeal in *Condominium Plan No. 86-S-36901 (Owners) v. Remai Construction (1981) Inc.* [1992] 1 W.W.R. 66 (Sask. C.A.) and *Terrace Corp. (Construction) Ltd. v. Condominium Plan No. 752-1207* (1983), 146 D.L.R. (3d) 324 (Alta. C.A.). The Ontario Court of Appeal, in *Carleton Condominium Corporation No. 347 v. Trendsetter Developments Ltd.* (1992), 9 O.R. (3d) 481 acknowledged the fiduciary duty of a developer as described in *Newrey*.

[para177] In *Remai* the developer and unit purchasers agreed that the caretaker's suite would be considered common property. The developer surreptitiously sold the suite to the condominium corporation as a separate unit while still controlling the condominium corporation. The Saskatchewan Court of Appeal held that the developer owed a fiduciary duty to the purchasers in respect of their individual units and the common elements. By selling the caretaker's unit contrary to a common intention that it be part of the common elements, the developer breached this duty.

[para178] The decision in *Terrace Construction*, like the decision in *Newrey*, dealt with parking spaces. In *Terrace Construction*, the developer, while controlling the condominium corporation and, therefore, the management company, arranged for a 99 year lease of certain parking stalls to be executed between the developer and the management company. The lease was disclosed to individual purchasers. The Alberta Court of Appeal held, however, that this constituted a breach of fiduciary duty resulting in the lease agreement being voidable.

[para179] In *Trendsetter*, the unit holders claimed that the development company and an individual unit holder who was very involved with the developer owed a fiduciary duty to the other unit holders when voting their units. The developer owned some units due to foreclosure proceedings and some which had not been sold. The individual owned some units for investment purposes. The board of directors of the condominium corporation sought to change management companies but were prevented from doing so if the units owned by the individual and the development company were voted to block this. The court held that the only fiduciary duty owed for voting purposes was in respect of those units held by the developer which had not been sold.

[para180] Counsel argued that the nature of the purchase transaction and the relative positions of the developer and the purchaser results in a fiduciary relationship being created. In terms of the nature of the purchase transaction he identified the following elements of the transaction which make it unique and complicated:

1. the concept of a condominium is a relatively new and not well understood one;
2. the condominium transaction is complex because of the documentation and the legislation (three statutes apply: the Condominium Act, the Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O-31, and the Landlord and Tenant Act, R.S.O. 1990, c. L-7) that affects a purchaser's rights and obligations;
3. closing is conditional upon Registration, which is dependant upon the approval of third parties (ie. environmental requirements); and
4. registration is often not achieved until many years after the Agreement of Purchase and Sale is signed, and at a time when the purchaser has already taken possession of the unit.

[para181] It was submitted that a developer of a condominium complex is analogous to a promoter of a corporation. In making this submission, counsel stated that the developer stands in a relatively advantageous position to the purchaser in several respects:

A. when units are sold in the conceptual stages of the project, the developer has the power to influence the course of events to its advantage and to the prejudice of the purchasers;

B. the developer may be aware of material information regarding the project that a purchaser could not reasonably obtain on a timely basis;

C. the ability to describe a proposed residential condominium building in a disclosure statement assists the condominium developer in pre-selling and pre-renting proposed units prior to construction and, as in this case, even prior to obtaining the land;
 D. the purchaser is required to take possession of the proposed unit and a condominium developer can generate revenue prior to the time that title is passed to the purchaser; and,

E. a condominium purchaser is often effectively committed to the completion of the transaction at or before the interim occupancy closing, having sold his previously occupied residence in order to pay the required substantial deposit prior to his obligation to assume occupancy:

- a. at a premature stage in the construction;
- b. prior to a proper vetting of the building;
- c. not having received title; and,

d. not knowing with certainty whether the transaction will eventually be completed. [emphasis in original] [para182] The purchaser stands in a disadvantageous position, he urges, because of the following factors:

A. where a developer elects to market proposed units during the conceptual stages of a project:

- 1. a purchaser has no alternative, but to rely and be dependant upon, and to put his or her trust and confidence in, that developer at all times;
- 2. to carry out what it has undertaken to do; and,
- 3. for complete and accurate disclosure of all information about the project;

e.g. such a purchaser would not have the opportunity, prior to entering into the Agreement of Purchase and Sale to hire a consultant to conduct a home inspection, in the same way that the purchaser of a re-sale property could do.

B. there is no certainty as to if or when the condominium purchase transaction will be completed, and accordingly:

- 1. the transaction of purchase and sale may never be completed; or,
- 2. the purchaser may remain a tenant for an undetermined amount of time, thereby foregoing the rights and benefits of ownership of real property that an owner would enjoy e.g. the ability to sell or mortgage the property. [emphasis in original]

[para183] Counsel suggested that the stringent requirements surrounding prospectus documents in the context of a promoter/investor relationship is analogous to the disclosure requirements of a developer in the developer/purchaser context. He relied upon the following authorities to explain the nature of a fiduciary duty and for the proposition that the onus is upon the fiduciary to establish that the duty has been met: *Hogar Estates Ltd., in Trust v. Shebron Holdings Ltd.* (1979), 25 O.R. (2d) 543 (H.C.) and *D'Atri v. Chilcott* (1975), 7 O.R. (2d) 249 (H.C.). In addition, counsel referred to the *D'Atri* decision as authority for the proposition that a fiduciary duty is owed by a real estate agent to the person on whose behalf they are selling of property. It was submitted that a developer in the position of YHL should have no less of a duty towards purchasers of condominium units.

[para184] Counsel further submitted that YHL had a high and continuing duty to disclose all material facts within its knowledge from time to time, the existence of which might, in any material degree, affect the nature, extent, and quality of the subject matter of the purchase, so that the purchasers had the fullest information upon which to make an informed decision regarding the purchase of a residential condominium unit in this project.

[para185] By not disclosing all of this, he concludes, YHL breached the duty it owed to the purchasers and such breach renders the Agreement of Purchase and Sale voidable at the purchaser's option. [para186] Counsel on behalf of the vendor, Mr. Richardson distinguished *Newrey, Remai, Terrace Construction*, and *Trendsetter* on several bases. He pointed out that in each of these cases relied on to establish a fiduciary duty between the condominium developer and the purchaser, the purchasers were seeking to have their rights under the condominium legislation recognized. The unit holders were seeking to have their rights to the common elements upheld by having transactions which deprived them of some portion of the common elements set aside. They were seeking to have their contractual rights enforced. Thus a fiduciary duty was found to exist so that the developer was found to hold items that were part of the common elements in trust for the unit holders. In the instant case, the purchasers seek to impose a broad fiduciary duty to disclose information on a continuing basis commencing at the point of sale. This duty is immeasurably broad and difficult to define. The cases do not support the proposition advanced by the purchasers. Those decisions, he submitted find a duty to be present in those fact specific situations. They have no parallel to the facts of this case.

[para187] The *Newrey* decision, counsel for the vendor emphasized, was based on the Condominium Act, R.S.O. 1970 which was subsequently substantially amended. The amendments were made in order to address problems of unscrupulous developers taking advantage of purchasers prior to the registration of the condominium corporation. The decision's relevance under the new statutory regime, is, therefore, questionable.

[para188] Counsel for the vendor relied on the decision of the British Columbia Court of Appeal in *Litwin Construction* (1973) *Ltd. v. Pan* (1988), 52 D.L.R. (4th) 459 (B.C.C.A.). That case involved a 33 unit townhouse complex which was purchased as an income tax shelter. The relationship between the parties was promoter/investor. After the transaction was started the rental housing market deteriorated and the real estate market suffered a sharp decline. The investors refused to complete. The investors claimed that the promoter failed to disclose certain information about the investment, such as the requirement for a prospectus under the real estate legislation. The Court held that no fiduciary duty was owed by the promoter to the investor. Fiduciary duties

should only be found to exist in limited circumstances, and only rarely in commercial relationships. The Court discussed the nature of a fiduciary relationship at pages 473-74:

The highest standard is the fiduciary standard. It arises where the obligation that is undertaken or imposed is the obligation of loyalty or selflessness arising from the fiduciary having entered a relationship where the other party is entitled to expect that the fiduciary will act in the other party's interests, or in the interests of both parties (where those interests coincide), to the exclusion of the fiduciary's own separate interests (where those interests are opposed), and where the fiduciary has the power to affect the other party's interests in a legal or practical sense, giving rise to a position of vulnerability in the other party.

[para189] As with those decisions relied upon by Mr. Fine, the Litwin decision is readily distinguishable from the case at bar. In Litwin the parties were in a commercial, promoter/investor, relationship which renders the decision of limited applicability. Although some of the purchasers in this matter may have been investors embarking on a commercial transaction, there were also those who were buying a family home. These were not purely commercial transactions, as was the case in Litwin. The general caution expressed by the Court regarding the high standard applicable to a fiduciary and that it should only be applied in limited circumstances is noteworthy, but, on its facts it lacks any parallel to the present case as support for the contention that no fiduciary duty exists here.

[para190] However, the broad, on-going fiduciary duty asserted by counsel for the purchasers, is not supportable by the authorities advanced. The duty expressed by counsel for the purchasers is not only broad but impractical. The commercial realities are such that a developer could not live up to this ongoing duty to inform.

[para191] I agree with counsel for the vendor that the Hogar and D'Atri decisions are not applicable to the case at hand given the very different fact situations. In Hogar the action was between parties to a joint venture. One party took advantage of the other by acting on information he withheld for his own benefit. In D'Atri the relationship of a real estate agent to the person for whom the property was being sold was in issue. The court referred to this as being a "peculiar relationship". It is clearly a very different relationship from the developer/purchaser relationship in these circumstances.

[para192] There can be no doubt that there is a need to protect potential purchasers in condominium transactions, especially where the units are purchased while the building is at its conceptual stage. The developer is the party in the preferred bargaining position. The purchasers enter into this environment with some uncertainty. They may not get precisely what they had in mind because things change during the construction of a building. The amendments to the Condominium Act were introduced to address problems faced by purchasers because of the inequality of bargaining power and to protect them from unscrupulous developers. The Act provides a comprehensive scheme designed to protect consumers. On the facts of this case, to go outside of that scheme and impose a broad fiduciary duty is not justified. The courts have seen fit in limited, well defined situations, within the rights conferred by the Act, to impose such a duty. In those cases the purchasers were seeking enforcement of rights provided by the Act. Here, the purchasers seek to establish rights beyond those provided in the Act. No authority has been proffered by the purchasers to support this extension and I decline to do so.

[para193] Returning to the three characteristics of a fiduciary identified by Madam Justice Wilson in the seminal decision in *Frame v. Smith*, even if the first two characteristics are present here, the third has not been met on the facts of this case and given the protection afforded by the Act in these circumstances.

[para194] The developer was not a fiduciary in these circumstances. Even if the developer was a fiduciary, there was no material non-disclosure, therefore there was no breach of the duty. Counsel for the purchasers stated that the test to determine materiality in the context of fiduciaries is the same as in the context of statutory disclosure requirements. Given the discussion of that in the previous section, my findings concerning materiality there are dispositive of the issue here. In addition, to find that an ongoing duty to disclose information as it arises would place too onerous a duty on a developer, both in terms of uncertainty and impracticality.

C. ISSUE NO. 3: DID THE DEVELOPERS OFFER A CLEAR TITLE TO THE PROPERTY?

[para195] The crux of this issue is whether the three agreements which were registered on title, the Environmental Agreement, the Confirming Agreement, and the Assumption Agreement, constitute encumbrances on title which are not "permitted encumbrances" within the meaning of the Agreements of Purchase and Sale. It is submitted, by counsel for the purchaser, that they are and, hence, the developer failed to deliver clear title to the property, contrary to the agreement, giving the purchasers a right to rescind. In addition, Mr. Fine argued that the purchasers were under no obligation to object to title pursuant to the requirements of the agreement because there was nothing the developer could do to remove the agreements from title.

[para196] The clause which is said to constitute an encumbrance is the save harmless clause in which the condominium corporation agrees that it:

shall indemnify and save York Humber harmless from all losses, claims, actions, damages and liability in connection with the duties and obligations to be performed by the corporation under the Environmental Agreement.

The relevant clause in the Environmental Agreement states that YHL agrees:

to indemnify and save the City harmless from any claim of any nature whatsoever, including costs, whether involving property damages or bodily injury including death or both resulting from this Agreement, or arising from any approvals to construct the Proposed Development or the use of the lands for the Proposed Development.

This imposes broad liability on the condominium corporation. The fact of its existence is evidence of the need for it. There is a danger, albeit remote, that methane will enter the building and that there will be harm as a result of it. Given the seven levels of protection, however, it is highly unlikely that anything would occur. Still, it is argued, the possibility exists.

[para197] Counsel for the purchasers argued that the agreements were encumbrances because they imposed obligations against the owner of the lands, including financial obligations, exposing the owner to potentially wide and unlimited liability. Moreover, they released rights against both the City and YHL which may otherwise have been available and potentially beneficial. In support of his argument counsel referred to several cases wherein a court found that an agreement was an encumbrance.

[para198] In response to the argument made on behalf of the purchasers, counsel for the vendor stated three propositions:

1. the agreements do not constitute an encumbrance;
2. if the agreements are an encumbrance, they are permitted encumbrances; or
3. even if they are encumbrances and are not permitted encumbrances, the purchasers should have objected to title within the required ten day period.

[para199] The meaning of "encumbrance" is contained in the Condominium Act at section 1(1) which states:

"encumbrance" means a claim that secures the payment of money or the performance of any other obligation, and includes a charge under the Land Titles Act, a mortgage and a lien.

It was argued for the purchasers that the agreements constitute an obligation and thus fall within the definition of encumbrance in the Condominium Act. Counsel for the vendors argued that the agreements do not impose any new obligation on the condominium corporation or the purchasers. Although the case law presented examining the meaning of encumbrance is not useful in determining whether these particular agreements are encumbrances, I am of the view that these agreements constitute an encumbrance within the meaning in the Condominium Act.

[para200] I am, however, of the opinion that they are permitted encumbrances within the meaning of that term as found in the Agreement of Purchase and Sale. The relevant portions of the Agreement of Purchase and Sale are:

C.15(2)

Title Matters

...

(2) Permitted Encumbrances:

The Purchaser shall:

(a) accept title to the Unit and to the Condominium subject to any mortgage referred to in subparagraph C.15(4) and the following:

(i) the provisions contained in the Condominium Documents;

(ii) all registered or unregistered subdivision, development or site plan agreements with any one or more of The Corporation of the City of York, The Municipality of Metropolitan Toronto or any other governmental authority having jurisdiction over the Unit and the Condominium, or any municipal by-laws affecting the Unit and the Condominium;

(iii) easements, rights-of-way, licences or agreements for the installation and maintenance of public or any other utilities, including without limitation, telephone and cable television and otherwise as may be required by the Vendor to service the Unit or any other part or parts of the Condominium;

(iv) agreements which may be necessary for the operation of the Condominium, the administration of the affairs and carrying out of the duties and obligations of the Corporation; and

(v) all leases, service or maintenance contracts and licence rights to occupy portions of the common elements, if any, which are in accordance with the Condominium Documents;

(b) satisfy himself as to the due compliance with the provisions of any such agreements, instruments or matters referred to in subparagraph (a) and not require releases of the Unit or the Condominium with respect thereto; and

(c) whether before or after the Closing Date, assume or accept, or permit, grant or consent to, whatever rights or easements shall be required for telephone, cable television, utilities, municipal or other services and utilities provided that such do not materially adversely affect the use of the Unit by the Purchaser as a private residence.

(3) Title to Unit:

Provided that the title to the Unit is good and free from all encumbrances except as described in this Agreement, and except for any restrictions or covenants registered on title, provided the same are complied with, and except for the restrictions, conditions, and covenants set out in the Condominium Documents; title shall be examined by the Purchaser at his expense and he shall not call for the production of any title deed or abstracts, proof or evidence of title, or any copies thereof. The Purchaser shall be allowed until 10 days after notice has been given by or on behalf of the Vendor (which notice shall also stipulate the Closing Date, which shall be a Business Day occurring not less than 10 days nor more than 120 days after the date on which such notice was given) to the Purchaser of the registration of the Creating Documents to examine such title at his own expense and if within that time he shall furnish the Vendor in writing with any valid objection to title which the Vendor shall be unwilling or unable to remove and which the Purchaser will not waive, this Agreement shall, notwithstanding any intermediate acts or negotiations in respect of such objections, be terminated and the Deposit, but not any Occupancy Fee, shall be returned, and the Vendor shall have no further liability or obligation and shall not be liable for any costs or damages. Save as to any valid objection so made within such time, the Purchaser shall be conclusively deemed to have accepted such title. [emphasis added]

The agreements in issue are clearly development agreements and operational agreements and thus "permitted encumbrances" for the purposes of clause C.15(2)(a)(ii) and (iv) of the Agreement of Purchase and Sale. Dr. Brown's evidence is clear that the content of the three agreements in question is commonly incorporated into one development agreement. These obligations commonly flow through to the condominium corporation, Mr. Beatty affirms. Thus, the mere fact that the agreements stand alone in this case does not mean that they are not development agreements for the purposes of the Agreement of Purchase and Sale. The MOE refers to these Agreements as development agreements and YHL is referred to in them as the developer. The methane gas system is an operating system in the building.

[para201] It was argued on behalf of the vendor that, even if these agreements were encumbrances and they were not permitted, the purchasers did not requisition information and object to title within the 10 day period specified in the Agreement of Purchase and Sale. Counsel for the purchasers argued that he was not required to object within the time period because there was nothing that could be done by the developer about the agreements. He also urged that one does not have to object within the requisition period in these circumstances in order to have a valid objection to title. In support of this proposition, counsel referred to *Brown v. Laffradi*, [1961] O.W.N. 263 (H.C.) which states that, if there is a latent defect in title then, even if the requisition is made after the required time has elapsed, it is a valid objection. At page 264 Justice McLennan said:

In my opinion it is clear on the evidence that while the requisition was late in point of time, no objection was taken on that ground and the right to raise it was waived by the solicitors for the vendors: *Re Marchmont Co. & Midanik*, [1947] O.W.N. 363. In any event the defect was latent and the objection to title whether made within the time stipulated or not is valid: *Re Mountroy Ltd. & Christiansen*, [1955] O.W.N. 318, affirmed 540. The defect is not a trivial one in my opinion, even although the amount of land involved is exceedingly small. The purchasers ought not be compelled to purchase a property which might involve them in a legal proceeding.

The problem in *Brown* was that the main wall of the building extended 4 inches over a right of way conveyed to the adjacent landowner. Due to this problem the bank would only advance the mortgage funds when the problem was corrected. Therefore, although this involved an "exceeding small" piece of land, it was a flaw in the title which had immediate ramifications on the purchaser's ability to get financing. It is clearly distinguishable from this case.

[para202] Based on the evidence and arguments put before me I find that these agreements are encumbrances within the meaning of the Act. They are, however, "permitted encumbrances" under the Agreement of Purchase and Sale. Finally, the purchasers did not object to title within the requisite period of time and, if these were encumbrances which were not "permitted", the purchasers would not now be in a position to object to title.

D. MISCELLANEOUS ISSUES OF LAW

1. Duty to disclose arising from status of a vendor of real property

[para203] Counsel for the purchasers argued that YHL had a duty to disclose the methane gas system as a vendor of real property. Counsel stated that the vendor of resale property has a duty to disclose a potentially dangerous situation to a proposed purchaser even if the potential danger does not constitute an immediate risk or hazard to the owners. A vendor has a duty not to conceal a potentially dangerous situation. For support of this proposition counsel referred the court to the decision of *Sevidal v. Chopra* (1987), 64 O.R. (2d) 169. In that decision there was radioactive soil in the backyard that did not pose an immediate danger but it had the potential of being dangerous. The court held that the vendors had the duty to disclose this fact to the purchasers.

[para204] The *Sevidal* decision is very different from the facts of this case. It dealt with a serious health risk; radioactive soil. Although not an immediate danger because buried, if the soil was disturbed it would proved to be dangerous. Evidence of the seriousness of the situation is that the government was planning to dig out all of the radioactive soil and ship it to a special disposal site. In addition, in *Sevidal* the court found that the vendors concealed the information about the soil and they were held liable in deceit. In the case at bar, although the purchasers were not told of the potential methane gas problem, the developer did work within the requirements of the government agencies to minimize the chances of it ever being a problem. There is no evidence about active concealment and there is no claim that YHL should be held liable in deceit. Radioactive soil in the backyard is a far cry from small pockets of methanogenic soil in one part of the property which will likely never reach the inside of the building because of the system in place.

[para205] Counsel for the vendor argued that the general rule to apply to real property transactions is caveat emptor. The only time caveat emptor is not applicable is where there is a latent defect. The decision of Mr. Justice R.E. Holland in *Caleb v. Potts* (November 5, 1986), [unreported] (Ont. S.C.) involved purchasers who were not aware that there was methane in the water system which required venting into a tank located in the basement. The court found that the methane in the water was a material factor that would tend to influence a purchaser to offer a lower price for the property but it was not so material that it rendered the property dangerous or uninhabitable. It was held, therefore, that there was no duty on the vendors to volunteer the information.

[para206] A recent decision of Mr. Justice McCombs was referred to called *Godin v. Jenovac*, (October 27, 1993), [unreported] (Ont. Ct. (Gen. Div.)). This decision, like *Caleb*, dealt with a residential sale and methane gas. In *Godin*, the purchasers went to the vendors house, told the vendor that they lived in the area, and bought the house. These purchasers then found out that there was a large landfill site very close to the house which required an active gas control system and was monitored on a regular basis. In fact, this landfill site had been a domestic garbage dump. Prior to the execution of the Agreement of Purchase and Sale there was an explosion on the perimeter of the site, about one quarter of a mile from the house, which injured two people which may have been caused by methane gas leaking from the site. There had, however, been no evidence of any migration of the gas from the site. Mr. Justice McCombs decided that the properties had not suffered a loss in value by reason of their proximity to the landfill sites. In addition, he concluded that there was no practice within the real estate industry to disclose the proximity of the landfill sites. Relying on *Marathon Realty Co. Ltd. v. Ginsberg* (1981), 18 R.P.R. 222 (Ont. H.C.), aff'd (1982), 24 R.P.R. 155 (Ont. C.A.) Mr. Justice McCombs said, at 13:

Even if a circumstance such as the proximity of the landfill sites might have a negative effect on the value, there is no general duty to disclose unless there is a health or safety risk.

He stated further that there was no evidence that the proximity of the landfill site posed a health hazard or other danger and there was no evidence from which it could be concluded that the proximity of the landfill site had a negative effect on the value of the property.

[para207] Mr. Beatty testified that he was unable to evaluate the risks inherent in methane gas given his limited knowledge of the site. Moreover, he acknowledged that there was no evidence to suggest that the building was uninhabitable or that there was any danger of harm or injury. This coincides with the testimony of Dr. Brown. Based on these two experts' opinions, therefore, there is no evidence that there are any immediate or potential health and safety risks at the River Ridge project resulting from the nature of the site.

[para208] I agree with counsel for the vendors that there was no obligation by YHL as the vendor of real property to disclose the methane gas system.

2. Misrepresentation

[para209] Counsel for the purchasers argued that there were material misrepresentations made by YHL that led the purchasers into executing the Agreement of Purchase and Sale. In particular, the written submissions on behalf of the purchasers stated:

1. that there would be floor to ceiling glass and floor to ceiling sliding glass doors leading out to the sun rooms;
2. "the spectacular glass walled rotunda includes an indoor sunken skylit swimming pool and lavish roman whirlpool". In fact, the pool does not fit this description and has no skylighting whatsoever and is not a swimming pool, but a wading pool being approximately three feet deep;
3. pedestrians walking on sidewalks or footpaths to and from the condominium project to the adjacent parkland. There are no such walkways;
4. the sales brochure indicates that the property of the condominium project has no barrier between it and the Humber River. In fact, there is a wire fence that surrounds the project, and but for two gates, completely obstructs any access from the condominium project to the adjacent parkland.

[para210] In addition to the above complaints, counsel for the purchasers stated that misrepresentations were made to one of the individual purchasers, Mr. Vecchione. These allegations are dealt with below in the section dealing with the individual purchasers.

[para211] Counsel for the purchasers asserted that, where there have been material misrepresentations a purchaser is entitled to refuse to complete their agreement of purchase and sale or, alternatively he or she is entitled to an abatement or damages as a result of the misrepresentations. He stated that an innocent misrepresentation is made when a party to a contract induces the other party to enter into the contract by false representation of material facts. A party who entered a contract on the basis of an innocent misrepresentation has a right of rescission because he or she did not get what was bargained for. In addition, counsel for the purchasers argued that the purchasers were under no duty to investigate. [para212] In response to this argument counsel for the vendor submitted that clause C.29 of the Agreement of Purchase and Sale is a complete answer. The relevant portion of that clause states:

C.29 Interpretation, etc. - ... The purchaser acknowledges that he has read the entire offer including Schedule A, B, C, D and E. There is no representation, warranty, collateral agreement or condition affecting this Agreement, the Building, the Condominium or the Unit, except as set forth herein and in the Condominium Documents and no promise or representation by any sales person or in any sales brochure shall be of any effect except as aforesaid... [emphasis in original]

It was submitted, therefore, that the purchasers cannot complain of any representations made orally by the sales representatives or in the sales brochures. The vendor was bound only to provide that which was in the relevant schedules. Even if the purchasers could rely on those representations, it was submitted that these were not material misrepresentations that induced the purchasers to enter into the contract. It was argued that there was no evidence that it was not possible to swim in the pool; that the lack of skylights meant it was dark; or that the view or lighting in the individual units was obstructed because the windows did not start exactly at the floor. In addition, counsel argued that the evidence was that there were gates conveniently placed in the perimeter security fence providing access to the parklands. Every resident had a key to the gates.

[para213] Clearly, the purchasers did not give this project a chance. They did not attend at the building on their dates of occupancy. They lacked actual knowledge of the nature of the completed development. The building manager, Mr. Lamrock, on the other hand, was there and related details about the status of the building on or about the occupancy dates. He explained that the amenities were functional, security was in place, some common areas were not quite finished but, generally, everything promised was there. Mr. Lamrock was a forthright and direct witness. He had an intimate knowledge of the development at all times material to this proceeding. I find his evidence to be credible. For these reasons, where there are conflicts between the evidence of the individual purchasers and that of Mr. Lamrock, I prefer Mr. Lamrock's evidence.

[para214] In my opinion, the purchasers got what they bargained for. When one buys something "sight unseen" one cannot expect to receive precisely what is imagined. Realistically, one must expect that variations from artists' sketches and general promotional statements will occur during the construction process. That is, of course, why clause C.29 exists. It would be virtually impossible to replicate an artist's conception. The practical reality is that circumstances change during construction and these are reflected in changes in the plans. In this case almost everything that was promised was provided. I will deal with each alleged misrepresentation separately.

[para215] The pool, which is 1.2 metres deep, is a swimming "lap" pool, not a diving pool. YHL did not, at any point, represent the pool's depth. None of the purchasers indicated a need for a deeper pool. I do not find this to be a misrepresentation of any kind.

[para216] The advertising material stated that the pool would be skylit. It is not. It does, however, have a bank of south facing windows and none of the purchasers complained that there was a lack of light in the pool area. In addition, clause C.29 prohibits the purchasers from relying on this as a misrepresentation. In any case, it is not material. I find that the purchasers were not induced to enter the contract on the basis of these representations.

[para217] The purchasers complained that the sidewalks and walkways that were promised were not present when they saw the building. There was no evidence that after they saw the building these walkways and sidewalks were not installed. Even if the sidewalks and walkways were never installed I do not view this as a material misrepresentation.

[para218] The purchasers complained that there was no access to the parklands or the river from the building site because of a fence erected around the site. Mr. Lamrock testified that there is a fence but there are gates. At the relevant time purchasers were provided with keys for the gates so that they could use them freely. Access was not, therefore, barred. I find that there was no misrepresentation with respect to access to the park.

[para219] The windows in the unit do not, literally, go floor to ceiling. They do, however, begin near the floor. None of the purchasers complained that their view was obstructed because the windows did not go to floor level or that there was insufficient light in the unit. I find that this was not a misrepresentation. In any event, the purchasers were not induced to purchase because of this representation.

[para220] The complaints made about the general condition of the building were based on inspections which took place prior to the completion of the building. Clause C.29 bars the purchasers from relying on representations made other than those contained in schedules A, B, C, D, and E. Even if the foregoing items were found to constitute misrepresentations they were of such minor nature as to be insufficient to be considered material so as to warrant rescission or damages. Given the nature of this development I am not convinced that there were misrepresentations and the purchasers' claims in this regard must fail.

C. Inadequate Pleadings

[para221] Counsel for the vendor argued that the pleadings delivered on behalf of the purchasers did not plead fiduciary duty with sufficient clarity with the result that this could not be relied on at trial.

[para222] The pleadings provide the particulars of fiduciary duty asserted without saying expressly that breach of fiduciary duty is being alleged. In the prayer for relief, however, damages for breach of fiduciary duty are sought. The relevant paragraphs of the Fresh as Amended Statement of Claim are:

1. THE PLAINTIFFS CLAIM: ...

IN THE ALTERNATIVE

d. damages against the defendant York Humber Limited for breach of contract, breach of common law warranty, breach of statutory duty, misrepresentation and for breach of fiduciary duty in the amount of \$100,000 with respect to each plaintiff

...

DUTY TO DISCLOSE METHANE GAS VENTILATION INTERCEPT SYSTEM

19. The defendant, as vendor and as the developer/declarant of this residential condominium project, owed a continuing duty to fully and accurately disclose to the plaintiffs:

a. that the land upon which the condominium project was to be built and the land adjacent to it, was at one time, a sewage treatment facility and landfill site, which if built upon, would necessitate the installation of methane gas ventilation intercept system, and the possible adverse consequences thereof;

b. that there was a possible danger of methane gas leakage into the building, ignition and explosion, thereby rendering the building potentially dangerous;

c. that the Province of Ontario and the City of York required the installation, maintenance, testing and monitoring of a methane gas management system for the collection, venting and detection of methane gas;

d. the existence and terms of agreements providing for, inter alia:

i. the installation, maintenance and monitoring of a methane gas intercept ventilation system;

ii. the assumption by the future condominium corporation of the provisions of an agreement made this 6th day of September, 1988 between York Humber and the City, which agreement was registered in the Land Registry Office for the Registry Division of Toronto Boroughs on September 26, 1988 as Instrument No. TB 543180 (the "Environmental Agreement"), as a condition of condominium approval;

iii. the indemnification and saving harmless of the defendant by the future condominium corporation from all losses, claims, actions, damages and liability in connection with the duties and obligations to be performed by the Corporation under the Environmental Agreement; and,

iv. the release of the defendant from its obligations under the Environmental Agreement.

e. that it would cause the future condominium corporation to be created upon the registration of the Lands of the Condominium Act, R.S.O. 1980, c. 84, as amended:

i. to assume and be bound by the provisions of an agreement made this 6th day of September, 1988 between York Humber and the City, which agreement was registered in the Land Registry Office for the Registry Division of Toronto Boroughs on September 26, 1988 as Instrument No. TB543180 (the "Environmental Agreement"), as a condition of condominium approval;

ii. to indemnify and save York Humber harmless from all losses, claims, actions, damages and liability in connection with the duties and obligations to be performed by the Corporation under the Environmental Agreement,

and that the defendant would be released from its obligations under the Environmental agreement upon so doing.

20. The defendant breached this duty by failing to disclose these matters to the plaintiffs. Consequently, the plaintiffs were entitled to treat the agreement as not binding on them and are entitled to the relief sought.

In addition, soon after the trial started, Mr. Fine presented Mr. Richardson with a statement of issues clearly setting out the characteristics of a fiduciary relationship, that it was being asserted here, and that he was seeking damages for breach of fiduciary duties. The book of authorities prepared on behalf of the purchasers clearly contained the leading cases on fiduciary duty. At all times counsel for the vendor was clearly aware that this argument would be made.

[para223] Counsel for the vendor was not justified in making this argument and it must fail.

V. PURCHASERS [para224] Common issues relating to the purchasers have already been dealt with above. All that remains to be dealt with are issues unique to the individual purchasers.

[para225] All of the purchasers testified that they expected to buy a condominium which coincided with the advertising materials. That is, a luxurious condominium with features including a beautiful view of the river and park, 24-hour security, recreational facilities and floor to ceiling windows. Most had general complaints about the fact that the windows were not floor to ceiling, the pool was only three feet deep, and access to the park was obstructed by a fence. These general complaints were dealt with above under the "Misrepresentation" heading.

A. CATHERINE DEBOURNET

[para226] On October 23, 1988 Catherine deBournet made an offer to purchase Suite 106S for \$258,700 which offer was accepted by YHL on November 1, 1988. Mrs. deBournet was told by the sales representative that the suite had a nice view of the park and the river. The sales representative also showed Mrs. deBournet the location of her unit on the floor plan at the sales office. At the same time, her husband Mr. deBournet, bought a unit in the same complex.

[para227] Mr. deBournet inspected, together with a family friend Lysanne Boyer, the premises on Mrs. deBournet's behalf on January 15, 1991 and had three major complaints:

1. the closet in the third bedroom was not deep enough for clothes hangers;
2. one bathroom door opened inward rather than outward; and
3. the view of the river and park was blocked by pillars.

Mrs. deBournet was never inside the unit and did not witness these deficiencies herself.

[para228] The developer was advised of these complaints and responded as follows:

1. the closet was constructed pursuant to the architect's plan and there was nothing that could be done with it; 2. the bathroom door would be corrected to open outward; and
3. the pillars were an integral architectural feature and had always been part of the development, that were illustrated in the design presentation drawings and project model.

[para229] The solicitors for YHL took the position that Mrs. deBournet was required to take occupancy on the date provided. Mr. Deo, acting for Mrs. deBournet, wrote to YHL in February of 1991 and stated that when the closet and bathroom are repaired his client will move in. It was not possible to repair the closet and there were no further communications between YHL and Mrs. deBournet until she brought an application to determine her rights under the Agreement of Purchase and Sale in August of 1991.

[para230] Lysanne Boyer, who is an architect and consultant engaged in the construction industry, testified that the view was only obstructed by the pillars in one of three rooms with windows overlooking the river and valley. She also admitted that the unit was habitable despite the complaints regarding the closet and bathroom door.

[para231] Mr. deBournet admitted in cross examination that if the deficiencies were repaired they would consider closing the transaction and they were prepared to negotiate an abatement to account for the pillars.

[para232] The deBournets purchased two units. One unit was supposed to be for them to live in while the other was for their teenaged son who could not remain at home because he did not get along with his brother but they wanted him living close by. In 1988 the son was 15 years of age. The combined purchase price of the units was approximately \$600,000. The combined occupancy fees were \$8,000 per month. The deBournets' combined income at the time was approximately \$110,000. The deBournets had previous experience in the condominium market having sold another unit prior to occupying it. Mr. deBournet was employed by a bank and had done research into the condominium market.

[para233] The explanation regarding the reasons for purchasing the unit are untenable. The assertion that this was purchased for their personal use is not substantiated. The cost involved exceeded their ability to pay. The occupancy date had never been changed by YHL. The unit was habitable. It is clear from all the evidence that this was a speculative venture. In my view the circumstances surrounding the deBournets' personal finances and the fact that the decline of the condominium market reduced the value of the unit, were the sole motivating factors in Mrs. deBournet's refusal to close. The objective was to extricate from an ill advised business venture. Therefore Mrs. deBournet is obliged to complete the Agreement of Purchase and Sale with YHL.

B. KIMBERLEY BAIRD

[para234] Mr. Baird made an offer to purchase Suite 503N for \$187,000 on June 25, 1988. The offer was accepted on July 4, 1988. At the time he entered into the Agreement of Purchase and Sale, Mr. Baird was an associate real estate broker.

[para235] Mr. Baird was a forthright witness who admitted that he purchased the unit as a speculative venture. After taking occupancy he rented the unit to a tenant. He was aware that the value of the unit had deteriorated due to the falling condominium market from the time that he had entered the Agreement of Purchase and Sale. He had other involvement in the condominium market buying units as investments. He was a knowledgeable investor.

[para236] All of the issues on which Mr. Baird relies to extricate himself from the Agreements of Purchase and Sale are common issues that are discussed above. Mr. Baird, therefore, given the reasons above, is obliged to complete the Agreement of Purchase and Sale with YHL.

C. JOAN AND GIULIO CEOLARO

[para237] Mr. and Mrs. Ceolaro made an offer to purchase Suite 1611S for \$207,900. This offer was accepted on August 9, 1988.

[para238] Mr. and Mrs. Ceolaro secured this unit for their daughters and their husbands. In addition the two couples held another unit. The daughter, Francesca Pintucci was a forthright witness who admitted that the units were purchased to live in over the short term but as an investment in the long term. She and her husband lived in the unit from December 1990 to September 1991. They closed on the other unit which they subsequently sold. Mrs. Pintucci admitted that the unit was habitable when she inspected it. Mrs. Pintucci stated that the existence of the methane gas system was the most important reason for not closing the transaction. This statement must be viewed in light of the fact, however, that the two couples closed on the other unit.

[para239] On the evidence no valid basis was established for refusing to complete the Agreement of Purchase and Sale and these purchasers are obliged to do so.

D. TASSO ERACLES

[para240] Mr. Eracles made an offer to purchase Suite 1604S for \$200,000 on June 25, 1988. The offer was accepted on July 4, 1988.

[para241] Mr. Eracles was a reliable witness. He is a property manager who purchased the unit as an investor. He testified that he was aware that the real estate market was falling. He completed the occupancy closing in January 1991 and rented the unit to a tenant. Mr. Eracles testified that the unit was habitable. There were some minor problems but not enough to keep him from closing. He said that he would have closed had he been able to obtain an abatement. In fact, he instructed his solicitors to seek an abatement of the purchase price.

[para242] Given the evidence it is clear that the only issues concerning Mr. Eracles are those which are common to all purchasers. He is, therefore, obliged to complete his Agreement of Purchase and Sale with YHL.

E. PAUL DELLACAMERA

[para243] Mr. Dellacamera offered to purchase Suite 503S for \$192,000 on June 30, 1988. On July 4, 1988 the offer was accepted.

[para244] Mr. Dellacamera's main complaint had to do with the ongoing construction with respect to the common elements on the occupation date. It was admitted that the interior of the unit was in satisfactory condition for occupancy. It was also admitted that he was aware that the condominium market had fallen by the fall of 1990.

[para245] Mr. Dellacamera had an occupancy date of November 8, 1990. He refused to move in given the condition of the common elements. This date was, therefore, extended to November 12, 1990 at which point he refused to move in. An extension to November 28, 1990 was granted to which neither Mr. Dellacamera nor his lawyer responded. He knew he was in breach of the Agreement of Purchase and Sale not to take occupancy. In February of 1991 he decided not to complete the agreement because he felt he was being asked to take possession of a premises which, in his opinion, were not finished yet he was not prepared to close when he knew everything was completed. He, therefore, commenced an application seeking a declaration that the Agreement of Purchase and Sale was not binding on him.

[para246] Mr. Dellacamera made no effort to inspect the project common elements at the occupancy date. He knew there was an occupancy permit and that other purchasers were moving in. Mr. Lamrock, the property manager for the project, testified that safe, unimpeded access was available. Mr. Dellacamera put forward no valid reason for refusing to complete the Agreement of Purchase and Sale and he is obliged to do so.

F. STELLA GUIDA

[para247] Ms. Guida made an offer to purchase Suite 903N for \$181,000 on June 25, 1988. On July 4, 1988 the offer was accepted. At the time Ms. Guida was a title searcher for Goodman & Carr. Ms. Guida claims she had no general knowledge that the real estate market was declining. She admitted, however, that she knew that her unit had decreased in value between 1988 and 1991.

[para248] Ms. Guida was originally scheduled to inspect her unit on November 15, 1990 and to take occupancy on November 22, 1990. On November 17, 1990 she inspected her unit and made a list of deficiencies. As a result of the inspection, the inspection and occupancy dates were rescheduled for November 29 and December 6, 1990. Subsequently the dates were rescheduled for December 8 and 12, 1990. On December 8, 1990 Ms. Guida, again, inspected her unit. She said that little had changed from the first inspection and she left a list similar to the first one prepared. Ms. Guida agreed that most of the items on the list were finishing items.

[para249] The law clerk at McCarthy Tétrault and the law clerk at Goodman & Carr arranged a new occupancy date of January 21, 1991. Ms. Podlesny, the law clerk at Goodman & Carr agreed that this new occupancy date had been set. Just prior to this date, Ms. Guida was on vacation. She returned on January 21, 1991 and was, then, advised of her occupancy date. Ms. Podlesny attempted to schedule another inspection with Toni Menna at YHL. This task was never completed and a new occupancy date was never set. No further steps were taken to arrange an inspection. Ms. Guida's file was transferred to the litigation department of Goodman & Carr in early February 1991. There was no further correspondence between Ms. Guida and YHL until Ms. Guida's solicitor, demanded the return of her deposit by letter dated April 18, 1991. The reason stipulated in the letter was that the vendor defaulted by failing to substantially complete the unit within the time period in the agreement. Ms. Guida agreed that she did not know what state her unit was in at the time the letter was written because she had last inspected on December 8, 1990. A letter dated April 25, 1991 was written by McCarthy Tétrault which stated that on January 16, 1991, Ms. Podlesny had been advised that the deficiencies in Ms. Guida's unit had been rectified and it was ready for occupancy. Neither Ms. Guida nor her solicitors responded to this letter.

[para250] Ms. Guida stated that she did not close for several reasons including the existence of the methane gas system, the fact that it was not a luxury building, the recreational facilities did not exist, etc. She agreed, however, that in the April 18, 1991 letter her solicitor only alleged that the unit had not been substantially completed.

[para251] As previously mentioned, Ms. Guida conducted a sub-search near the end of November 1990 and discovered the Environmental Agreement. Her concerns about the information in that agreement were not communicated to YHL until the letter dated October 4, 1991 from Mario Deo to YHL.

[para252] In view of the testimony of Ms. Guida and Ms. Podlesny, as well as the other evidence before me, I find that Ms. Guida was not justified in breaching the Agreement of Purchase and Sale. There was no evidence that, on January 21, 1991, the unit was not substantially complete and the other complaints regarding the building had not been rectified. In addition, it would appear that Ms. Guida did not want to close in that she made no real effort to re-inspect as she was required to do. I do not accept her stated motive for not closing. Accordingly, Ms. Guida is obliged to complete her Agreement of Purchase and Sale.

G. JOHANNE AND MICHAEL GUIDA

[para253] Mr. and Mrs. Guida made an offer to purchase Suite 1703N for \$188,000 on June 25, 1988. The offer was accepted on July 4, 1988. Mr. and Mrs. Guida claim that they purchased this unit as a residence.

[para254] Five weeks prior to the purchase of the River Ridge unit Mr. and Mrs. Guida purchased a condominium unit at the Park Mansion for \$263,650. The combined price of this unit and the one in issue is \$451,650. They purchased the Park Mansion unit as a residence also but Mrs. Guida testified that they planned to sell it after they purchased the River Ridge unit. Mr. and Mrs. Guida, at the time had a combined family income of approximately \$70,000.

[para255] The Guidas learned of the methane gas system from their cousin, Stella Guida, but made no mention of it to YHL until the litigation started.

[para256] On November 21, 1990, Mr. and Mrs. Guida signed an exclusive listing agreement with Winick Realty Corp. to list their unit for sale for \$217,800, almost \$20,000 more than the purchase price.

[para257] The main basis on which the Guidas seek to avoid the Agreement of Purchase and Sale is their claim that they were not provided a copy of the condominium disclosure statement at the time of entering the Agreement of Purchase and Sale or, for that matter, since then.

[para258] The Guidas claimed that a solicitor, Mr. Donnelly, was acting for them in the purchase transaction and that they left all of their documents with his receptionist after receiving them at the sales centre. Mr. Donnelly did not indicate that the condominium documents were missing.

[para259] Mr. and Mrs. Guida claim that they never received the condominium documents. They claim that they did not know, until they met with their new solicitor, Mr. Deacon, around March of 1991, what a disclosure statement was, that they were supposed to have received it when they signed the Agreement of Purchase and Sale and, that they had a statutory right of rescission. These purchasers stated that YHL was not notified, until March 1991, that they had not received the condominium documents. Mr. Deacon wrote, in a letter to McCarthy Tétrault, that Mr. Guida told him that because of the hectic atmosphere at the sales office and the large number of purchasers, the vendor's representatives had run out of copies of the disclosure documents and were unable to provide them with them. This was the first day of the sales campaign on which it is suggested that copies had run out.

[para260] The Guidas received a condominium document package as a result of the purchase of the Park Mansion unit just before the River Ridge purchase. In the proximity of their signatures on the acknowledgement was a reference to the Condominium Act and the statutory cooling off period. It is hard to believe they did not know what a disclosure statement was or the significance of it.

[para261] The Guidas' evidence is that they did not read the documents provided carefully; did not know what a disclosure statement was and yet they were sure that they had not received one; and, that the vendor had run out of copies. They had, just prior to this transaction, purchased another condominium and received a disclosure statement. In the present transaction they had delivered the documents to their solicitor as they had the Park Mansion documents and neither they, nor their solicitor, noted the absence of the statement. Mr. Donnelly, the solicitor, did not testify.

[para262] Considering all of the evidence of these purchasers, I cannot accept their evidence that they did not know what condominium documents were, the significance of them, or that they were supposed to receive them. I do not accept their evidence that they did not receive the condominium documents. I draw the inference that they received the disclosure statement and delivered it to Mr. Donnelly. It may not have been with the documents when they were transmitted to their new solicitor.

[para263] Accordingly, I must find that Mr. and Mrs. Guida breached the Agreement of Purchase and Sale.

H. LOUIS NEMES

[para264] Mr. Nemes made an offer to purchase Suite 604S on June 19, 1988 for \$191,000. This offer was accepted on July 4, 1988.

[para265] Mr. Nemes claims that he purchased this condominium as a residence for he and his wife and that they planned to sell their family home of 30 years and move into the Suite. Mr. Nemes entered into three other agreements for units in the River Ridge complex. He signed the agreements for Suite 2009 for which title was taken by his daughter. He signed the agreement for Suite 1909 for which title was taken by Angelo Maiolo. He assumed an agreement for Suite 406 for which title was taken by his wife on closing.

[para266] Mr. Nemes has extensive experience in purchasing real estate in Toronto. He has been involved in the purchase and construction of modular homes, the purchase, renovation, and resale of residential homes, and the purchase of condominium units as long-term investments. At the same time that he entered into the River Ridge agreements, for example, he and his wife entered into three Agreements of Purchase and Sale for units at the Liberty on Bay project. His son purchased a unit in a separate deal.

[para267] Mr. Nemes testified that he learned that the building and landscaping were not going to be the same as they were represented in the brochure. He testified that he found out about other common deficiencies such as the pool, the windows and the recreational room and he indicated that he could live with some of these things. He did not indicate that any of these factors influenced his decision not to close.

[para268] On February 2, 1991, Mr. Nemes took occupancy of the unit. He rented it out periodically until November 1991. In addition, he stayed in the unit periodically up until August of 1991.

[para269] Mr. Nemes stated that he decided not to close the deal after he found out about the methane gas system. Regardless of this information, however, his daughter, wife, and son closed their deals on the Suites in their names. The reason they closed is that they were able to get a 15% abatement. Mr. Nemes stated that he was willing to close provided an abatement was obtained.

[para270] Mr. Nemes was, obviously, an investor who speculated on the purchase of this unit. If an abatement was offered he claims he would have closed. He claims that the general complaints about the building were not the reason for not closing. I must find, therefore, that he was not justified in breaching the Agreement of Purchase and Sale.

I. VENANZIO VECCHIONE

[para271] On June 28, 1988 Mr. Vecchione made an offer to purchase Suite 2004S for \$210,500. The offer was accepted on July 4, 1988. On June 28, 1988, Mr. Vecchione also entered into an Agreement of Purchase and Sale for Suite 705 for \$116,500. He bought this unit as an investment and subsequently closed the transaction.

[para272] On March 9, 1991 Mr. Vecchione took occupancy of Suite 2004S. In November of 1991 Mr. Vecchione moved out of Suite 2004S and into Suite 705. He stayed there until September 1992 when he closed the deal to sell the unit.

[para273] Mr. Vecchione had three main complaints about his suite:

1. it was too hot;
2. the window frames were the wrong colour; and
3. the windows were leaking.

[para274] Mr. Vecchione's complaints with respect to the temperature of the suite stemmed from his claim that he was supposed to be able to independently control his heating and the cooling system in his suite and that the slanted windows in the sunroom and living room heat up the suite.

[para275] Mr. Vecchione expected the independently controlled heating and cooling system because of his visits to other condominium projects, his interpretation of Schedule "B" of the Agreement of Purchase and Sale, and the representations of the sales representatives. Mr. Vecchione agreed, however, that of the three condominium projects he had been in only one had the type of system he referred to; the Agreement of Purchase and Sale does not stipulate that there will be a separate heating and air conditioning system for each unit, and the sales representative simply repeated the items set out in Schedule "B"; he did not complain about the heating in his other unit, and that the agreement says that the mechanical system will be insufficient to cool some units during certain times of the day due to prolonged penetration of sunlight.

[para276] Mr. Vecchione claims that he was never informed that the slanted windows would be installed in his unit although he agreed that they were shown in the sales brochure. In addition, he admitted that he was aware that clause C.9 of the Agreement of Purchase and Sale provides that the vendor, without notice to the purchaser, can make changes to the plans and specifications provided the changes do not, in the aggregate, materially affect the size of the unit and substitute other items or materials for those provided for in the plans and specifications or in Schedule "B" provided that such other items or materials are equal to or better than the materials described in the plans and specifications or in Schedule "B".

[para277] Mr. Vecchione was advised by a representative of YHL to cover the windows and open some of them to alleviate the heating problem. Mr. Vecchione did this but did not cover the slanted windows. He said he was aware of the provision in the disclosure statement requiring unit holders to cover all the windows with coverings sufficient to interrupt sunlight. It was argued on his behalf that these slanted windows were skylights and that it defeats the purpose of a skylight to cover it with window coverings. In addition, the agreement refers to windows and doors, not skylights.

[para278] Mr. Vecchione complained about the window frames. He testified that in the dining room and bedroom they were beige while in the sunroom and living room they were white. An attempt had been made to paint the window frames in the dining room white but this did not work well. In the end, Mr. Vecchione claimed he ended up with window frames of three colours. Mr. Lamrock testified that, on inspection, the windows in the three rooms were the same colour. [para279] Mr. Vecchione said the windows in his unit started to leak in April 1991. The engineering firm and the contractor attempted to find and repair the problem. He said that the problems improved somewhat and that YHL agreed to address the remaining problems.

[para280] The construction placed on representations made by YHL concerning the heating and cooling of the units would require that the suites have individual heating and cooling devices. The evidence concerning the documents provided by the developer, the nature of the cooling and heating systems of the building, and the evidence of Mr. Vecchione, does not support this claim. Accordingly, I find that he breached his Agreement of Purchase and Sale.

J. PAULINE WAITE AND WILLIAM MCNABB

[para281] On July 4, 1988 Ms. Waite and Mr. McNabb offered to purchase Suite 1703S for \$203,000. This offer was accepted on July 6, 1988.

[para282] Ms. Waite testified that she purchased the unit as a long-term investment and as a residence for her mother-in-law. She intended to sell the unit in five to ten years for a profit. Ms. Waite testified that she was aware that the condominium market had dropped in February of 1991.

[para283] Ms. Waite stated that she expected the condominium to meet the expectations set out in the sales brochure and, in particular, she expected to be able to walk through the valley. Neither Ms. Waite nor Mr. McNabb inspected or took occupancy of their unit. In December 2, 1990 Ms. Waite and Mr. McNabb attended at the site despite the fact that their inspection date was not scheduled until December 13. As a result of this visit they became aware that the floor to ceiling windows were not present, that a fence was in place outside the building, that there was no gatehouse and that the building was in no state to be occupied. They did not visit their unit on December 2, 1990. On that date, however, they signed an exclusive listing agreement to sell their unit and

an exclusive listing agreement to lease their unit with Winick Realty Corp. The inspection dates were, subsequently, rescheduled for January 19 at which point Ms. Waite and Mr. McNabb did not inspect nor did they complete the occupancy closing scheduled January 21.

[para284] Six letters were sent by YHL and McCarthy Tétraut without response from Ms. Waite and her solicitor Mr. Velanoff concerning the interim and final closing. Ms. Waite stated that two reasons for not closing were Mr. Winick's refusal to let her interview prospective tenants, and the information she received about the cultural background of certain tenants. She stated the information about the methane gas was also a factor in her decision not to close. On October 4, 1991 Ms. Waite and Mr. McNabb, through their lawyer Mr. Deo, advised McCarthy Tétraut that they were not going to close the transaction and the reasons were listed.

[para285] Aside from complaints about the general condition of the building, Ms. Waite and Mr. McNabb had few complaints; they never even saw their unit. One of Ms. Waite's reasons for not closing smacks of discrimination and sounds like it is contrary to human rights legislation; the other reason is the methane gas system which has already been discussed. I therefore find that Ms. Waite and Mr. McNabb breached the Agreement of Purchase and Sale. VI. DISPOSITION OF PURCHASERS' CLAIMS AND VENDOR'S COUNTERCLAIM

[para286] Several matters have been dealt with above. The relevance of the nature of the site which is at the centre of this action was determined, as was the efficacy of the methane gas system itself. Of particular importance was whether the developer met its statutory duty to disclose and whether it had a broader obligation as a fiduciary to disclose. Aside from those two similar issues, was the question of whether the agreements were encumbrances and the ramifications of such a finding. Furthermore, of particular relevance to this action was the purchasers' evidence.

[para287] The essence of the history of the site revolves around two factors. First, the prior City of Weston Sewage Treatment Plant, which was located on what is now the building site. It was completely removed during excavation, down to bedrock, and is now precisely that; a matter of history. Secondly, the suggestion that the site was used as a garbage dump. This is not, nor was it ever, correct.

[para288] As for the nature of the site presently, the building site has been neutralized; the Metro Easement is comprised of inert fill. The evidence disclosed that there is nothing especially pernicious about the area east of the Metro Easement.

[para289] The methane gas system, with its seven levels of protection, is in place. The debate between the experts, Dr. Brown and Mr. Beatty, who were called to testify by the vendor and purchasers respectively, has narrowed to a difference as to the design of the system. Dr. Brown's design has received the approval of the MOE and the City. I am satisfied that the system is sound.

[para290] It is in this context that the purchasers assert a material non-disclosure, first regarding the condominium documents under the Condominium Act, and alternatively, on the basis of a broad fiduciary duty said to exist between developer and purchaser. These arguments are appealing conceptually. The essential underpinnings to support these assertions are, however, absent on the evidence before me. Hence I reject this line of argument.

[para291] More interesting is the submission that the development agreements, the Environmental Agreement and related documents, are encumbrances on title which the vendor, because of its contractual obligations, is unable to remove. Unfortunately for the purchasers, the vendor has a complete answer in that the development agreements are permitted encumbrances for the purposes of the Agreements of Purchase and Sale.

[para292] There are the several alleged material misrepresentations concerning the swimming pool, the floor to ceiling windows, etc. There is no evidence to establish these complaints, but in any event, the provision in the condominium documents regarding representations addresses this question conclusively.

[para293] This leaves only the individual purchasers' evidence which, instead of establishing their respective positions, in final analysis, proved the vendor's case. What emerged from this testimony was that the purchasers had no interest nor intention in completing their transactions. Strong indicia of this were refusals to inspect; refusals to respond to accommodation in the form of extended occupancy dates; in many cases an almost total absence of any knowledge concerning the unit; premature listing of the unit for re-sale; failure to communicate with the vendor or to follow up their complaints; a lack of knowledge of the factual basis for their complaints. The environmental issue was very much an afterthought.

[para294] A great deal had changed in the Canadian economy, and more particularly the Toronto real estate and condominium markets, between mid-1988, when the purchasers entered into their Agreements of Purchase and Sale, and the fall of 1990, when the building was ready for occupancy closing and the fall of 1991, when it was time for final closings. My sympathy is with these purchasers who have contracted to purchase units which, two to three years after the agreements were signed, were valued much lower than the purchase price. There is, however, no basis in law for them to be excused from their obligations under these agreements. As stated by Robins J.A., at page 136 of the Abdool decision, "[c]ontracting parties, it must be remembered, owe one another a duty to act reasonably and in good faith and to perform contracts honestly made."

[para295] For all of the above reasons I find that the purchasers' claims are dismissed. Flowing automatically from the dismissal of the purchaser's claims is the success of the vendor's counterclaim. That is, as indicated under the "Purchasers" heading, I find that all of the purchasers breached their Agreements of Purchase and Sale entered into with YHL. Consequently, the issue of damages is dealt with next.

VII. DAMAGES

[para296] The parties have agreed to the quantum of damages in the purchasers' worst case scenario. That is, where the purchasers are unsuccessful on every point and are found liable to the vendor for damages incurred as a result of the purchasers' breach of contract. There are, however, two remaining issues which require determination. These are mitigation and the applicable date of assessment.

A. MITIGATION

[para297] There are two issues related to mitigation. First, were the units listed for sale at an appropriate price? Second, should the units should have received special treatment in terms of marketing?

[para298] Counsel for the purchasers argued that the units were priced too high and, therefore, they did not sell. As a result, he asserted that YHL did not properly mitigate their damages because, if the units had been priced lower they would have sold more quickly so that the market decline would not have had such a marked adverse effect on the ultimate selling price of the units. Counsel argued that, because the units were overpriced there was a two year delay in the sale of the units because if they had been properly priced they would have sold a lot sooner.

[para299] Counsel for the vendor replied that the task of selling the units had been left to the judgment of a professional real estate agent. The prices were properly set in light of market conditions. There is no evidence that this judgment was exercised improperly. Delays in selling were the result of the lack of market demand. Counsel pointed out that, had the units been priced lower, and sold more quickly, counsel for the purchasers would have argued that the units were sold for a price less than they were worth.

[para300] I accept these submissions of counsel for the vendor.

[para301] The purchaser's counsel questions the manner in which the units were marketed by the agent. It is asserted that the units should not have been placed in the general pool with other units which the vendor had for sale. It was submitted that the resale units should have been given special treatment in terms of marketing emphasis. Counsel for the vendor replied by stating that there was no duty to treat the units in a special manner, all that was required was their best efforts to sell.

[para302] The duty to mitigate does not require that the vendor to use greater efforts to sell these units than it used to market other units in the building. I reject the argument of purchasers' counsel on this point.

[para303] In addition to the above, counsel for the purchasers argued that Mr. Eracles' unit could have sold sooner had YHL accepted two offers made by Mr. Connolly. These two offers were \$40,000 below the listed price. The offer made was clearly below the value of the unit at the time. YHL was entitled to refuse these offers.

[para304] For these reasons I find that YHL acted reasonably with respect to their duty to mitigate properly. There will be no reduction of damages on the grounds of a failure to mitigate.

B. DATE OF ASSESSMENT

[para305] The key to calculating damages in these circumstances is the determination of the relevant date for the assessment of the damages. Counsel for the purchasers argued that the date of assessment ought be to the date that the purchasers breached their agreements. Counsel for the vendors argued that the appropriate date is the date the units were sold or the date of trial for those units that were not sold.

[para306] Counsel for the vendor referred to decisions which stand for the proposition that, in a falling market, the appropriate date of assessment is the date of trial. These decisions are 100 Main Street v. W.B. Sullivan Construction Ltd. (1978), 20 O.R. (2d) 401 (C.A.), Rice v. Rawluk (1992), 8 O.R. (3d) 696 (Gen. Div.), Mid Park Construction (1988) Ltd. v. Krofchick (1992), 28 R.P.R. (2d) 80 (Ont. Ct. (Gen. Div.)), and Wilcox Lake Enterprises Inc. v. Starr (1993), 30 R.P.R. (2d) 75 (Ont. Ct. (Gen. Div.)). These decisions reflect the policy that a wrongdoer should not benefit because of falling market conditions. Although, traditionally, the general rule has been that damages are assessed at the date of breach, it is stated in these cases that, where this rule would result in unfairness due to adverse market conditions, the assessment should be made at the time of resale or trial, whichever is first. Counsel for the vendor stated that in real estate matters, where there is a sporadic market, it is the norm to use the date of resale or trial to calculate damages.

[para307] These transactions occurred in a declining market. The appropriate date for assessment of damages, for the reasons provided in the authorities, is the date of resale or trial, if unsold.

VII. CONCLUSION

[para308] The nature of the site and the methane gas system at River Ridge are not material facts which require disclosure under the Condominium Act. Apart from the statutory regulation of the development, there is no broad fiduciary duty on the developer to disclose, on a continuous basis, the facts relating to the site and the system. Moreover, these facts are not material in any event. While the Environmental Agreement, Confirming Agreement, and Assumption Agreement are encumbrances for the purposes of the Condominium Act, they are "permitted encumbrances" under the Agreements of Purchase and Sale. For all of these reasons there is no basis in law upon which the purchasers can obtain rescission of their agreements.

[para309] The methane gas system at River Ridge was designed by and constructed under the supervision of a leading expert in the field. The design of the system has withstood careful scrutiny. The system has received the approval of the Ministry of the Environment and the City of York. There is no danger to the safety and health of the inhabitants of the development. Methane gas has never been detected in the system or the building. In the final analysis, the system is no different from any other mechanical system in a large building.

[para310] The value of the condominium units has diminished in the period since the Agreements of Purchase and Sale were entered into in 1988. This is, unfortunately for the purchasers, the result of the recession and the vagaries of the real estate market.

[para311] In the result, the purchasers' claim for a declaration that the agreements of purchase and sale are not binding or, alternatively damages for misrepresentation are hereby dismissed. The vendor's actions for damages for breach of contract shall succeed.

[para312] I wish to express my gratitude to all counsel for the thoroughness of their preparation and the clarity of their presentation.

[para313] Counsel may attend, by appointment, to speak to costs.

WINKLER J.

CBR# 236

Peel Condominium Corp. No. 505 v. Cam-Valley Homes Ltd.

Between

Peel Condominium Corporation No. 505 and Peel Condominium Corporation No. 447, applicants (appellants/respondents by cross-appeal), and
Cam-Valley Homes Limited, Cam-Valley Developments Ltd and David Feldman, respondents (appellants/respondents by cross-appeal), and
Greater Toronto Home Builder's Association, (intervener)
The Ontario Real Estate Lawyers Association, (intervener)

Docket No. C33234

Ontario Court of Appeal Toronto, Ontario Finlayson, Labrosse and Weiler JJ.A. Heard: October 30-31, 2000. Judgment: March 6, 2001. (105 paras.)

On appeal from the judgment of Justice Gloria J. Epstein dated June 10, 1999.

Counsel*: Colin P. Stevenson for the appellants/respondents by cross-appeal. Patricia M. Conway, for the respondent/appellant by cross-appeal, Peel Condominium Corporation No. 505. Mark H. Arnold, for the respondent/appellant by cross-appeal, Peel Condominium Corporation No. 447. Jonathan F. Lancaster and Harry Herskowitz, for the intervener, Greater Toronto Home Builders' Association. Theodore B. Rotenberg and Howard D. Gerson, for the intervener, Ontario Real Estate Lawyers' Association.

Reasons for judgment were delivered by Finlayson J.A., concurred in by Labrosse J.A. Separate reasons were delivered by Weiler J.A.

[para1] FINLAYSON J.A.:-- The appellants, Cam-Valley Homes Limited and Cam-Valley Developments Ltd. appeal from the judgment of Madam Justice Epstein, dated June 10, 1999 in which she permanently enjoined Cam-Valley Homes Limited (successor in title to Cam-Valley Developments Ltd.) from developing for residential purposes certain lands adjacent to the condominium corporations Peel Condominium Corporation No. 447 ("PCC 447") and the respondent Peel Condominium Corporation No. 505 ("PCC 505"). PCC 505 cross-appeals from the trial judge's decision that the adjacent lands are not held in trust by Cam-Valley Homes for the respondent. The trial judge's reasons are reported at (1999), 28 R.P.R. (3d) 186.

Facts

[para2] At the return of the application in appeal on June 10, 1999, the condominium corporations sought a declaration that they were the beneficial owners of the adjacent lands registered in Cam-Valley Homes' name, and ancillary orders requiring the transfer of the disputed lands. It was common ground that the application could not deal with the damages claim, which was put over for a subsequent trial. In the absence of oral evidence the basic issue was the proper interpretation of the disclosure statement, declaration and reciprocal agreement and whether the adjacent lands were held in trust for the condominium corporations. A permanent injunction was neither sought in the notice of application nor argued in court.

The disputed lands

[para3] The adjacent lands that are in dispute comprise approximately two acres. They are referred to in the judgment as the Outdoor Recreation Area Lands ("ORA Lands"). The property makes up a part of Parcel Block II-1, Section M-199, in the City of Mississauga. Cam-Valley Homes is the assignee of these lands from Cam-Valley Developments.

[para4] PCC 447 is a high-rise, residential tower comprising 164 units. Cam-Valley Developments registered PCC 447 on October 3, 1991. PCC 505 comprises 56 townhouses adjacent to the property and in close proximity to PCC 447. Cam-Valley Homes finished PCC 505's 56 residential units in 1995. The units were sold between 1993 and 1994 and were registered on October 3, 1995.

[para5] PCC 447 and PCC 505 are part of an overall development: the Granite Gates Community in Mississauga. Between 1991 and 1993, the Granite Gates community was expected to comprise up to 750 units with a possible Outdoor Recreation Area ("ORA") consisting of four tennis courts, an outdoor pool and a putting green to serve the various residential projects within the Granite Gates community. Instead of the envisioned ORA, other recreation facilities have been provided for the Granite Gates Community.

Findings of the trial judge

[para6] These findings are clearly and succinctly set out in paragraphs 7 to 16 of the reasons. The trial judge found that this was a multi-phased condominium development, the concept being that each phase would be created as an independent condominium corporation with a different style and density, resulting in a unique urban community with a rural atmosphere.

[para7] The overall project was conceptualized and marketed as a woodland community with a recreation complex nestled among a grove of trees at its centre. Each condominium corporation would have an interest in, use of, and responsibility for, the ORA, which was to be conveyed to the condominium corporations when the last corporation was registered. The concept of an attractive wooded area centred around the ORA was used as a marketing tool by the developer. Purchasers relied upon representations made by the developer with respect to the overall nature of the development around the ORA.

[para8] The development was started with the construction of PCC 447. However, because of changes in the real estate market, the developer changed its plans for later phases of the development. The new plan focussed on building more townhouses and fewer residential towers by reducing the original number of units of 670 to 440. By the time units in PCC 505 were marketed and sold, the developer decided that the recreational and social core of the development, the ORA, would be used for another townhouse development. This change, the trial judge found, would "no doubt" alter the character of the community.

[para9] PCC 505 objected to the proposed townhouse development in place of the ORA and attempted to preserve its rights with respect to the ORA Lands. With the prospect of initiating negotiations to resolve the dispute, Cam-Valley Homes razed the forest on the ORA Lands, precipitating the application in appeal. The trial judge found that damages would be wholly inadequate to compensate the respondents, not only for the loss of the wooded area which they believed would be part of their community, but also for the loss of enjoyment of the overall character of their neighbourhood.

Supplementary affidavits from unit owners

[para10] There is no affidavit in the record from any unit owner in PCC 447. PCC 447 has withdrawn from this appeal and abandoned its cross-appeal. In a letter to the Registrar of this court dated October 25, 2000, a new counsel for PCC 447 enclosed a notice of change of solicitors and explained that his client was only joined in the original application at the opening of the hearing below and did not take an active part in the proceedings. Another corporation, PCC 489, comprised of townhouses, had originally joined with PCC 505 in filing a caution with respect to this dispute but it has since indicated that it does not intend to pursue the matter.

[para11] The statements from PCC 505 unit-owners are very general. They state that some of them were shown a model of the development; some were told that the ORA Lands might be maintained as a preserve for wild life; some say they paid a premium for a townhouse adjacent to the ORA Lands; and others say they were told that there would be outdoor recreational facilities built on the lands in question. PCC 505's own witnesses concede that they understood the outdoor recreational facilities might never be built and there is no mention of any oral representation that the subject lands would be conveyed to PCC 447 or PCC 505 in the event that they were not used for the ORA.

[para12] An affidavit provided by Alfred Roberts is interesting. Roberts and his wife reside in one of the units in PCC 505. He is a retired architect and a former director on the board of PCC 505. His affidavit is evidence of the residents' lack of interest in the ORA. In fact, his affidavit suggests that there is support to scrap the recreation centre plans in favour of building \$500,000 homes because the high quality of the housing development proposed for the property will enhance the present value of the condominium units. Roberts indicates that he had no interest in seeing the recreation centre built because "the maintenance costs would be unreasonable and divisive." He relays his understanding from the various salespersons for the developer that "it was unlikely that the outdoor recreation area would be built, in particular because the residents in the high-rise [PCC 447] which had already been completed were reluctant to participate in the costs associated with such a recreation area."

[para13] Roberts goes on to suggest that the board of PCC 505 has pursued a risky and expensive strategy that is detrimental to all PCC 505 unit-owners. Roberts' cross-examination by opposing counsel on his affidavit did not attack any of the above statements.

Analysis

[para14] The affidavit evidence of representations made by salespersons regarding the conveyance of the ORA Lands is of little assistance in this case. There is no serious suggestion that the representations were false at the time they were made. All indications are that the developer intended to go through with a much grander scheme but market forces compelled it to undertake a more modest development. Any representations that were made could only serve to concentrate the attention of prospective purchasers on the disclosure documents required by the Condominium Act, R.S.O. 1990, c. C.26 and its amendments, wherein the developer's obligations with respect to the ORA Lands are set out in detail. For the purposes of this case, they are the Disclosure Statement, the Proposed First Year Budget, the Proposed By-Law No. 2 (Reciprocal Agreements) and the Agreement of Purchase and Sale.

[para15] The Disclosure Statement for PCC 447 was used as the model before the trial judge and in this court. It places PCC 447 in Phase I and proposes that Cam-Valley Homes construct up to seven more condominium corporations in later phases. The Disclosure Statement then states that the construction timetable for future phases will be totally at the discretion of the declarant and that the declarant does not warrant that any phases will ever be constructed except for PCC 447. If the other proposed phases are not built, the common expenses for PCC 447 may increase in the future. The key clause for our purposes is:

The Declarant intends that the Proposed Corporations will all be operated and managed in a manner of co-operation between the Proposed Corporations. Each of the Proposed Corporations will be given a proportional interest (based on the number of dwelling units in each Corporation) as tenants in common in the outdoor recreation area to be constructed on Block II, Plan M-199, as outlined in this Disclosure Statement .

Precisely where on Block II of Plan M-199 the ORA is to be located is nowhere delineated on any drawing or in any document.

[para16] The Disclosure statement and related documents provide for the construction of "common facilities" and the execution of a "Reciprocal Agreement" for the sharing of the costs of the common facilities and the Gateway Entrance by the corporations. There is a description of the facilities that are to be built on the ORA Lands with the proviso that they will not be built until after the Terraced Apartments are built and in the event that they are not the ORA may never be constructed. The Terraced Apartments were not built.

[para17] The Proposed First Year Operating Budget states that the ORA may be constructed on Part Block II, Plan M-199 "if, and when the last Phase is constructed". It states unequivocally that "[t]he Declarant is under no obligation to complete the Outdoor Recreation Area".

[para18] The Proposed By-Law No. 2 (Reciprocal Agreement) deals with four common facilities: the Gateway Entrance, shared common element areas, outdoor road network and the ORA, collectively the "Common Facilities". Article 4.03 provides:

In the event that Cam-Valley does not proceed with the construction and registration of all Proposed Corporations or does not construct any of the Common Facilities contemplated herein, then this Agreement shall be deemed to be amended to delete references herein to any Common Facilities not constructed and Cam-Valley shall be under no obligation to construct or create same or shall Cam-Valley suffer any liability with respect thereto.

[para19] The Agreement of Purchase and Sale also contains a significant clause in "Schedule F - Phased Developments". Schedule F is an integral part of the agreement. It says:

The purchaser acknowledges that the Vendor and/or its successors and assigns and/or any related companies may in the future construct another building or buildings on parts of the Lands and the Purchaser agrees not to object to such construction nor deem such construction as an inconvenience or nuisance, or make a claim for damages or injuries or otherwise. The Purchaser hereby consents to any re-zoning required by the Lands in order for the Vendor to proceed with its future plans and hereby agrees not to object to any re-zoning and Committee of Adjustment applications brought by the Vendor. [Emphasis added.]

[para20] The agreement also defines "Lands":

3. a. "Lands" means that that certain parcel or tracts of lands and premises in the City of Mississauga described as part of block HH and II, Registered Plan M-199, Mississauga.

[para21] And the agreement contains the standard clause:

38. It is agreed that there is no representation or warranty other than as expressed herein in writing.

[para22] After reviewing these documents in detail, the trial judge concluded that the developer did not have to convey the ORA Lands to the condominium corporations until the ORA was completed and that the developer was under no obligation to construct an ORA of any nature on the Lands. She also said (at para. 39) that only if the ORA was built would there be an obligation on the developer to convey the ORA Lands:

The documents, if read with care, also contain provisions to the effect that only if the [ORA] is built would [Cam-Valley] have to convey the Lands to the participating condominium corporations.

[para23] In the next paragraph the trial judge refers to the arguments of PCC 505 as an "attempt to counter the logical conclusion based on this wording (that they are not entitled to a conveyance of the [ORA] Lands) by relying on the principles set out in Middlesex Condominium Corporation No. 87 v. 600 Talbot Street London Ltd. (1998), 37 O.R. (3d) 22 (C.A.)." At para. 42, the trial judge recites the submissions of counsel for PCC 505 that the documents in issue "clearly describe the [ORA] as part of the common facilities of the development and that reasonable purchasers would justifiably assume that the centre would be built and that the Lands would be conveyed. As such, following the lead of the Ontario Court of Appeal in Middlesex, the Declarant should be required to do just that."

[para24] In response to that submission, the trial judge recognized that in Middlesex the trial judge made a "strong finding" that there was an original intention that the asset in question (a superintendent's suite) would be one of the common elements. She then stated "I am not in a position to make such a finding in relation to the [ORA]".

[para25] The trial judge stated further at para. 44: "The fiduciary argument advanced by [PCC 505] is similarly flawed. The authority relied upon of York Condominium Corp. No. 167 v. Newrey Holdings Ltd. (1981), 32 O.R. (2d) 458 (C.A.) at p.467 involved [additional parking spaces]. The Court of Appeal found that the evidence was sufficient to support a finding that there was a common intention that the [parking spaces] would form part of the common elements of the corporation ." She added at para. 45:

What is of particular interest is that in Newrey Wilson J.A. described the position of a developer, once sales of units started to take place, as follows:

I think he has placed himself in a fiduciary relationship to the unit purchasers not only with respect to their units but also with respect to the interest appurtenant thereto. He therefore holds the property in trust for the unit purchasers, present and prospective, and for the condominium corporation which will come into being upon registration of the declaration. I believe he is under a duty to protect the interests of all unit owners present and prospective and cannot put his own interests in conflict with theirs even although he himself continues to be an owner as long as any units remain unsold.

[para26] The trial judge sums up Middlesex and Newrey by stating that while they stand for the proposition that a declarant is bound not to prefer its interests over those of the unit owners, the Court of Appeal has made it clear that the starting point must be the reasonable intention of the parties based on the evidence. She then concludes at para. 47 with the following remarks:

I have found that the evidence in this case does not support a finding that the Declarant intended that the purchasers believe the [ORA] was to be built and that the Lands would be conveyed and that a reasonable purchaser would assume that such would be the case.

[para27] The trial judge should have ended her analysis right here. Up to this point, she was correct. Instead, she commenced a fresh analysis based on the lack of clarity in the documentation. She stated that her findings above do not extinguish the rights of PCC 505 and PCC 447 because she finds that with two exceptions "the various documents do not contain any terms under which the Developer reserves to itself the right to build on the Lands if it abandons its plans to build [the ORA]".

[para28] The two exceptions are both found in Schedule F to the Agreement of Purchase and Sale, cited in full above. The one exception is an acknowledgement that the developer may in the future construct another building on parts of the property, the definition of which includes the ORA Lands. The second exception is that the purchaser agrees not to object to such construction and consents to any re-zoning such construction might entail. Nevertheless, the trial judge found that "the wording of the condominium documentation supports a finding that [Cam-Valley] never intended a reasonable purchaser to conclude that it planned to develop the [ORA] Lands for use other than as a recreation facility".

[para29] This is strange language. It suggests that Cam-Valley was attempting to conceal from prospective purchasers that it intended from the outset to develop the lands in question for a use other than an ORA. The history of the Granite Gates Community and the earlier findings of the trial judge belie such a conclusion. There is no suggestion that the developer was other than genuine in its original intention to build an ORA although its scope had not been settled. There is no evidence that the developer was acting in bad faith in reconfiguring the project because of market considerations over which it had no control. Whatever the frailty of language in the disclosure documents, it is clear to me that the language which is presently so controversial was designed to alert prospective purchasers that if the ORA did not go forward, the developer could use the lands for further development.

[para30] Accepting for the purpose of this analysis that the wording in the disclosure documents is ambiguous as to the status of the ORA Lands if they were not developed as originally planned, this ambiguity cannot support an action for specific performance or for an injunction. On any construction of the language, the affirmative obligation to convey the ORA Lands to the participating condominium corporations only arises in the event that the ORA is constructed. The ORA was not built and it is clear from the Budget and the Reciprocal Agreement that the developer was under no obligation to do so.

[para31] It must be remembered that the ORA Lands were not part of the land belonging to the condominium corporations. We are not dealing with a straightforward designation of common elements as in *Middlesex and Newrey*. The ORA Lands were retained by the developer and were to be conveyed to those condominium corporations that wanted to enter into a reciprocal agreement for sharing the costs of the construction of the common facilities and the carrying charges on the completed ORA. Where, as the trial judge found, the land did not have to be conveyed to the participating condominium corporations because the ORA was not going forward, the developer was free to deal with the ORA Lands as it chose. The affirmative obligation to convey the ORA Lands to participating condominiums no longer existed. Nothing further had to be said or done to enable the developer to retain title to the vacant land. It was only because the developer required a modification of the zoning to build additional units that it had the purchasers of qualified units agree in the Agreement of Purchase and Sale to any re-zoning required by the ORA Lands. This was included in order for the developer to proceed with its future plans without objection to re-zoning and Committee of Adjustment applications brought by the developer. The purchasers also agreed, interestingly enough, "not to object to such construction nor deem such construction as an inconvenience or nuisance, or make a claim for damages or injuries or otherwise".

[para32] The trial judge appears to have accepted the argument of counsel for PCC 505, which was repeated in this court, that all the saving clauses that protect the developer are buried away in voluminous documentation. The trial judge reasoned that the definition section of the agreements of purchase and sale includes a description from which an "astute purchaser" may have been fortunate enough to decipher that the area referred to in Schedule F includes the ORA Lands. I am sure that developers of condominiums are just as frustrated at having to produce these mountains of documents as the prospective purchasers are with having to read them. However, these documents are required of developers by the Condominium Act and non-compliance with the Act usually redounds to the prejudice of the developer. The detail required in the disclosure documents is a statutory burden, not a matter of choice. As for the purchasers, they were not buying paper plates: they were making a substantial investment in residential housing units that most intended to be their homes. If they proceeded without professional advice, that was their decision.

[para33] This brings us to the trial judge's analysis of the relationship between a purchaser and a developer that attracted the attention of the interveners. Starting at para. 55 the trial judge states:

Finally, I turn to an important point that, in my view, can clearly be made by the facts of this case. It is based on the vulnerability of the purchaser in the course of a purchase of a condominium unit from the Developer. The point is that a developer should not be allowed to rely on obscure or unclear contractual provisions in the condominium documentation in such a way as to defeat the reasonable expectations of the purchaser. Such would be contrary to the principles of good faith and fair dealing between contracting parties, contrary to the consumer protection objectives of the Act and to the developer's fiduciary obligations to purchasers of units. [Emphasis added.]

[para34] I do not believe that this accurately sets out the relationship in law between the developer and the purchasers of condominium units to the extent that the passage can be taken to say that there is a fiduciary relationship between a developer and a prospective purchaser of condominium units. A prospective purchaser cannot be the fiduciary of the developer in any accepted equitable sense; otherwise the developer could not negotiate with the buyer at all. Furthermore, the trial judge's emphasis on the Condominium Act as having "consumer protection objectives" does not reflect the balance that this court has said exists between that goal and the commercial realities of the condominium industry. The basis of the relationship is set out more accurately by Robins J.A. for this court in *Abdool v. Somerset Place Developments of Georgetown Ltd.* (1992), 10 O.R. (3d) 120. He held on behalf of the court at p. 145:

While I may generally agree with the learned judge's critique of the legislation, I am unable to accept his approach to the current disclosure requirements. In my respectful opinion, this approach fails to construe s. 52 in a manner that properly balances consumer protection and the commercial realities of the condominium industry and, if adopted, would require a disclosure document incompatible with the underlying aim of the section.

[para35] The objective of consumer protection is attained by the requirement of full disclosure under s. 52 of the Condominium Act and must be seen in the context of the full disclosure package. As Robins J.A. stated at p. 145:

The vagueness of the requirements and the absence of statutory guidelines mandate a broad and flexible approach -- not a rigid or stringent one -- in determining whether a given disclosure statement is adequate. As I indicated earlier, the disclosure statement cannot be viewed as separate from and unrelated to the other documents called for by s. 52(6) and (7); it must be seen in the context of the entire disclosure package. The narrative section of the disclosure statement can realistically be expected to do no more than highlight or summarize the most important features of the condominium documents and assist purchasers in comprehending those documents by directing them to the full text.

[para36] Earlier, Robins J.A. dealt with the standard of compliance by which disclosure is to be measured by the court.

He said at p. 136:

These disclosure provisions must of course be given a construction consistent with their consumer protection objectives. However, in judging the adequacy of the disclosure for the purpose of deciding whether an agreement is binding, the rights of both parties to the agreement must be taken into consideration. The purchaser is clearly entitled to the information called for by the Act in order to make an informed decision about his or her condominium purchase. At the same time however, once the 10 day period has expired, the vendor is entitled to assume that it has a binding agreement of purchase and sale and to rely on the certainty of that agreement in developing the project and conducting its business affairs.

[para37] The trial judge does not have any difficulty accepting that the general law of real property applies to condominiums. She relies on Wilson J.A.'s comments in *Newrey* at p. 467:

It would be wholly unreal to view those transactions as agreements for the sale of separate pieces of real estate. I think [the court] must also look to the general law of real property as to the status of a purchaser once his offer has been accepted. I do not

think the position of the owner/developer remains unchanged after he starts to sell units. I think that at that point he has committed the character of the project to that of condominium under the Act and declaration.

[para38] However, to the extent that Wilson J.A.'s statement can be read along with her earlier statements in *Newry* to hold that the developer is in a fiduciary relationship with prospective unit holders, this position is unsupported by the general law and is contradicted by recent decisions: see *Simone v. Daley* (1999), 170 D.L.R. (4th) 215 (Ont. C.A.); and see generally *Martel Building Ltd. v. Canada*, [2000] S.C.J. No. 60, 2000 SCC 60. I think that the weakness of the trial judge's analysis is that she fails to draw a bright line between the status of the respective developer and purchaser prior to executing a binding agreement of purchase and sale and the obligation of the contracting parties to complete the closing of the sale in good faith.

[para39] The trial judge continues in her analysis by stating that "I start with the principle that contracting parties owe one another a duty to act reasonably and in good faith and to perform contracts honestly made". She relies on *LeMesurier v. Andrus* (1986), 54 O.R. (2d) 1 at 7 (C.A.) where the court dealt with a dispute between a vendor and purchaser over the removal of an objection to title prior to the closing of the sale. The purchaser had complained that the private driveway was not fully within the property lines and the vendor, in response to a requisition on title had moved the curb of the driveway to a point within the property line and obtained a quit claim from the neighbour. However, the purchaser would not close and repudiated the contract. In an action for specific performance that was converted into an action for damages, *Grange J.A.* for the Court of Appeal held that the conduct of the purchaser was "capricious or arbitrary". He further stated at p. 7:

Vendors and purchasers owe a duty to each other honestly to perform a contract honestly made. As *Middleton J.* put it in *Hurley v. Roy* (1921), 50 O.L.R. 281 at 285, 64 D.L.R. 375 at 377: "The policy of the Court ought to be in favour of the enforcement of honest bargains".

[para40] *LeMesurier* is referred to by *Robins J.A.* in the same context at p.136 in *Abdool*. However, the concern in *LeMesurier* was with the parties' conduct in performing an executory contract: one already made. The trial judge appears to have taken this authority a step further by applying the principles in *LeMesurier* to the pre-contractual phase of the parties' relationship and, in particular, to the time that the agreements were being prepared by the developer.

This notion that the developer has an obligation to incorporate all the purchasers' "reasonable expectations" into the disclosure documents is unrealistic and unsupported by authority. *LeMesurier* does not decide that arm's length parties owe each other a duty of good faith during the bargaining phase of their relationship. In fact, there is supporting case law that there is no duty to bargain or negotiate in good faith: *Mannpar Enterprises Ltd. v. Canada* (1999), 173 D.L.R. (4th) 243 at 265-267 (B.C.C.A.) and *Weiss v. Schad*, [1999] O.J. No. 4356 at para. 123 (Sup. Ct.). As *Iacobucci and Major JJ.* Stated for the court in *Martel Buildings*, *supra*, at p. 24:

As a final note, we recognize that *Martel's* claim resembles the assertion of a duty to bargain in good faith. The breach of such a duty was alleged in the Federal Court, but not before this court. As noted by the courts below, a duty to bargain in good faith has not been recognized to date in Canadian law.

[para41] The trial judge continued at para. 57:

The developer has the resources to craft a carefully written series of documents and insert in the mass of inter-related clauses any contingency or qualification upon which it might later want to rely. The purchaser, who is entitled to rely upon the developer's obligations of good faith and fair dealing and upon the purposive application of the Act, cannot be expected to invest the amount of resources necessary to decipher the intricacies of the voluminous documentation that is fundamental to the relationship between the developer and the purchaser.

The element of trust that the prospective purchaser is entitled to have in terms of the fairness of the developer's drafting of the documents that record the transaction between the parties is in keeping with the fiduciary relationship identified by *Wilson J.A.* in *Newrey*. It follows that the purchaser is entitled to expect that if the developer wants to reserve certain material matters to its own unqualified discretion, such reservations must clearly and distinctly be set out in the documents.

[para42] Despite the fact that the trial judge had expressly found that *Newrey* did not apply to the facts of this case, she relied upon the good faith principle therein. Unfortunately, as with *LeMesurier*, she took the principle a step too far by applying it to the pre-contractual phase of the parties' relationship, i.e., before any sales of units have taken place.

[para43] In my respectful opinion, the fiduciary aspect of the relationship between a developer and the purchasers of units is not fully understood. The developer does not hold the condominium property in trust for the purchaser of the unit, it holds the title to the unit in trust for the prospective purchaser who has executed an agreement of purchase and sale to purchase a unit. The developer's good faith obligation, or duty, is to carry out the terms of the agreement and deliver whatever title the contract between the parties calls for. This obligation or duty is circumscribed by the documentation required by the Condominium Act. The purchaser, for his or her part, has an equitable interest in the unit by virtue of the agreement that is signed; an equitable interest that equity will enforce by specific performance. However, there is no overarching fiduciary duty arising out of the relationship of a vendor and purchaser as such. The suggestion by the trial judge that a prospective purchaser is entitled to repose some element of trust in the developer that it will deal with the purchaser's reasonable expectations in the disclosure documents introduces an element of paternalism that is totally unjustified in such a relationship. As I have indicated, the protection of the consumer rests with compliance by the developer with the disclosure provisions of the Condominium Act. It is inappropriate to refer to the unit holder as a fiduciary in any circumstance. The prospective purchaser is protected by the statutory requirement of full disclosure, not the extension of fiduciary principles to the bargaining process. After executing an agreement of purchase and sale, he or she is entitled to rely on the good faith of the developer to carry out the agreement honestly.

[para44] In *Simone*, *supra*, this court dealt with a sale of a house where the vendor became bankrupt and the deal could not be completed. The trial judge held that the vendor had been acting in "a fiduciary capacity" and that his breach of the agreement of purchase and sale constituted a "misappropriation" and "defalcation" under the Bankruptcy and Insolvency Act. In reversing the trial judge, *Blair J.* sitting ad hoc and speaking for the court said at pp. 222-223:

The relationship between the parties was that of vendor and purchaser, and in my opinion the existence of such a relationship does not, in itself, give rise to fiduciary duties. Nor does the fact that the vendors and purchasers happened to be friends, elevate

the relationship to a fiduciary level. The normal contractual relationship between a vendor and purchaser is not characterized by the reposing of a trust or confidence by one person in another and a consequent dependence resulting therefrom, which the authorities indicate give rise to a fiduciary duty. It is true that the vendor acts as trustee of the title for the purchaser pending completion of the transaction. However, to the extent that there may be an obligation of the vendor "to take steps to deal with the title in a manner harmful to the purchaser's beneficial interest", as the trial judge concluded, it is only in the sense of an obligation to be in a position to deliver title on closing. Breach of the obligation to convey the title, on tender of the purchase price at closing, is remedied by damages, or, in appropriate circumstances-because of the equitable requirement to hold title-by the equitable remedy of specific performance. There is no need to resort to the fiduciary concept. [Emphasis added.]

[para45] The trial judge accepted that there was no basis upon which she could order the appellants to convey the ORA Lands to PCC 505. However, she was sympathetic to the respondent and elected to grant a remedy that the respondents did not ask for and which the remaining respondent PCC 505 does not consider to be adequate. Indeed, I believe it is an undesirable remedy from the standpoint of all parties. If the appellants were obliged to convey the ORA Lands under the Agreement of Purchase and Sale, they would be entitled to receive a Reciprocal Agreement whereby the respondent corporation would be obliged to contribute to the carrying costs of the ORA Lands. By simply freezing the lands with an injunction, the trial judge denies the use of the ORA Lands to all parties. The appellants cannot build on it and would have considerable difficulty in selling it. The remaining respondent may have succeeded in preventing further development of the ORA Lands, but it has no right to use them nor has it any say in their maintenance.

[para46] Injunctions are not intended to be punitive. The applicants sought an interim injunction to maintain the status quo while its rights were adjudicated. This made sense, but they are clearly not happy with the status quo as a permanent solution.

[para47] I think the error in this case was in the attempt to fashion an ad hoc remedy in equity where there was a perception that the language of the documentation under s. 52 of the Condominium Act constituted inadequate disclosure. However, the remedy for inadequate disclosure in an appropriate case is either rescission or damages. The language of the Agreement of Purchase and Sale does not constitute an obligation to convey the ORA Lands in the circumstances that prevailed here. It is not the function of the court to replace the absence of an obligation with a remedy based on an unstated expectation of the purchaser grounded on some result driven concept of equity. As Blair J. stated in *Simone* at p. 224:

A fiduciary obligation must be grounded in the nature of the relationship which exists between the parties, however, and not on the result in law or equity which it is sought to reach. The courts have cautioned against this latter approach and the resort to what has been referred to as "false indicators of a fiduciary relationship", one of which may be the presence of conduct which attracts judicial sanction: see *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, 117 D.L.R. (4th) 161, per Sopinka J. and McLachlin J., at p. 463.

[para48] Rescission was not asked for in these proceedings and since the claim for damages is not before us, I decline to make any comment as to its appropriateness.

Disposition

[para49] For the reasons set out above, I would allow the appeal, set aside the judgment below and enter a judgment dismissing the application with costs. I would dismiss the cross-appeal. I would award the costs of the appeal and cross-appeal to the appellants.

FINLAYSON J.A. LABROSSE J.A. -- I agree.

[para50] WEILER J.A. (concurring in the result):-- I have had the benefit of reading the reasons for judgment of Finlayson J.A. I concur with his disposition but, with respect, I am of the opinion that the Developer owes a duty of good faith to the PCC 505 condominium owners.

I. OVERVIEW

[para51] The issue on this appeal is whether Epstein J. erred in granting an injunction against the appellant, Cam-Valley Homes Limited ("the Developer"), enjoining it from building 25 townhouses on 2.2 acres of land known as the Outdoor Recreation Area ("ORA") that was part of the Granite Gates development in Mississauga.

[para52] Peel Condominium Corporation 505 ("PCC 505"), the respondent and appellant by cross appeal, claims that in its marketing and disclosure documentation the Developer represented that it would build recreational facilities on the ORA land and would then transfer the facilities and land to PCC 505 condominium owner and others. Consequently, PCC 505 seeks a declaration of title to the ORA land or its proportionate share. The Developer asserts that it was made clear to prospective purchasers that it was not obliged to build any recreational facilities on the ORA land and that only if the facilities were built did it have an obligation to transfer the ORA land. Epstein J. found for the Developer on these two points.

[para53] On appeal to this court, Finlayson J.A. agrees with these two findings of Epstein J. I am also in agreement with these two findings.

[para54] Epstein J. went on to make a third finding. She found that the Developer intended for a reasonable purchaser to believe that if no recreational facilities were built, then the attractively wooded ORA land would be left in its natural state. Finlayson J.A. disagrees with this third finding. He is of the opinion that in Schedule F of the agreement of purchase and sale with the PCC 505 condominium purchasers, the Developer reserved to itself the right to build on the ORA land. On his interpretation, the Developer is free to develop the ORA by building townhouses on it without regard to the interests of the PCC 505 condominium owners.

[para55] I respectfully disagree with the interpretation placed on Schedule F of the agreement of purchase and sale by Finlayson J.A. For ease of reference I have reproduced Schedule F:

The purchaser acknowledges that the Vendor and/or its successors and assigns and/or any related companies may in the future construct another building or buildings on parts of the Lands and the Purchaser agrees not to object to such construction nor deem such construction as an inconvenience or nuisance, or make a claim for damages or injuries or otherwise. The Purchaser hereby consents to any re-zoning required by the Lands in order for the Vendor to proceed with its future plans and hereby agrees not to object to any re-zoning and Committee of Adjustment applications brought by the Vendor. [Emphasis added.]

I am of the opinion that Schedule F refers to those parts of the ORA land that the Developer had already disclosed it would be developing. Consequently, the agreement does not automatically reserve to the Developer the right to develop the ORA land in its own interests in the event that no recreational facilities are built.

[para56] If I accept Finlayson J.A.'s interpretation of Schedule F, however, I would nevertheless uphold Epstein J.'s imposition of a duty of good faith on the Developer. The imposition of a duty of good faith obliges the Developer to exercise its ownership rights with respect to the ORA land with candour and in a reasonable manner taking into consideration the interests of the PCC 505 condominium owners in having the land left in its natural state.

[para57] Such a duty is appropriate having regard to the manner in which Epstein J. found the Developer marketed the property, the unequal bargaining power between the Developer and the PCC 505 condominium owners and the lack of access of PCC 505 condominium owners to information concerning the future development of the ORA lands.

[para58] Epstein J. granted an injunction against the Developer enjoining it from developing the ORA lands. Finlayson J.A. would set aside the injunction enjoining the Developer from developing the lands and dismiss PCC 505's cross-appeal for a declaration of title. The injunction granted appears to be a final one, as opposed to an interlocutory injunction, the balance of the application for damages under several heads has been heard.

[para59] In the result, I agree with Finlayson J.A. that Epstein J. erred in granting a permanent injunction against the Developer and that it should be set aside. I would also refuse to grant PCC 505 an interest in the ORA land because I am of the opinion that, at this time, damages are an appropriate remedy. Although I concur that the appeal should be allowed, my basis for doing so is quite distinct from that of Finlayson J.A. and, for this reason, I have written this opinion.

II. ANALYSIS

[para60] It is helpful at this juncture to briefly review the first three findings of Epstein J. She found:

At para. 37: "While I find the wording of the contractual documentation to be confusing the repeated references to the uncertainty surrounding the construction of the Outdoor Recreation Area are sufficient to alert a prospective purchaser to the possibility that the development may include a recreational centre scaled down from that originally contemplated or may not contain such a facility at all."

Further at para. 38: " a reasonable purchaser knew or ought to have known that there was a possibility that there might never be a recreation centre on the Lands."

Consequently, Epstein J. held she was not in a position to make a finding that the ORA would be one of the common elements.

(2) In addition, at para. 43: " only if the Outdoor Recreation Area were to be constructed would the Developer have any obligation to convey the Lands."

(3) At para. 48: "With two exceptions the various documents do not contain any terms under which the Developer reserves to itself the right to build on the Lands if it abandons its plans to build an Outdoor Recreation Area I do not see how the wording of the documents permits the Developer to deny that the owners, present and prospective, have some interest in the Lands.

The clause that automatically amends the documents in the event that the Developer decides to change the nature of the project justifies the Developer in saying that it does not have to build but not that it can appropriate the Lands for itself. In short, I find that the Developer intended that the purchasers believe that the Lands would not be used for residential development and that a reasonable purchaser would assume that the Lands, if not used as a recreational facility, would not be otherwise developed." [Emphasis added.]

[para61] Epstein J. further stated at para. 53: "[The Developer] never intended a reasonable purchaser to conclude that it planned to develop the [ORA] Lands for use other than as a recreation facility". Epstein J. supported her third finding on the basis of a fiduciary duty owed by the Developer, as well as a duty of good faith, and in reliance on the consumer protection objectives behind the Condominium Act R.S.O. 1990, c. C-26 ("the Act").

[para62] As indicated, I agree with Finlayson J.A. that the first two findings made by Epstein J. are correct. My reasons will focus on her third finding.

A. Would a reasonable purchaser conclude that the ORA land would remain in its natural state if not developed as a recreational facility?

[para63] At para. 29, Finlayson J.A. finds that the language in the disclosure documents: "was designed to alert prospective purchasers that if the ORA did not go forward, the Developer could use the lands for further development." By this, he means all of the land, including the ORA land. This finding is based on his interpretation of two sentences found in Schedule F to the agreement of purchase and sale. These two sentences were the two exceptions considered by Epstein J. before making a finding to the opposite effect. In Schedule F, the purchaser first acknowledges that the vendor can construct other buildings on "parts of the `Lands'". "Lands" is defined to include all of the land for the project, including the land for the proposed ORA. Second, the purchaser agrees not to object to such construction or to any necessary rezoning.

[para64] Lands is defined as follows:

"Lands" means that certain parcel or tract of lands and premises in the City of Mississauga, in the Regional Municipality of Peel, described as Part of Block HH and II, registered Plan M-199, Mississauga. [See Note 1 below]

Note 1: The evidence filed in support of the application indicates that registered Plan M-199 was not included in the Agreement of Purchase and Sale. In addition, the site plan purchasers received with their Agreement did not refer to Blocks HH and II.

[para65] Epstein J.'s interpretation of Schedule F is found in para. 51:

First, the provisions of the contractual documentation concerning the possible use of the Lands that if the Lands were developed at all they would be used for a recreation facility and the clause in schedule "F" of the agreement of purchase and sale together with that in the disclosure statement, are capable of reconciliation. These latter clauses make reference to the possibility that the Developer may, in the future, construct another building or buildings on parts of the Property. It seems to me that they could be interpreted as referring to those parts already identified by the Developer as intended for residential development. [Emphasis in original.]

[para66] In my opinion, Epstein J.'s interpretation of Schedule F that changes could be made to those "parts" of the property already identified for development accords with the general principles of contractual interpretation. In interpreting the wording of a document, the intention of the parties at the time the document was entered into is a factor to consider with respect to the construction to be placed on the wording of the document: see Chitty on Contracts, vol. 1, General Principles, 28th ed. (London: Sweet and Maxwell, 1999) at 604. When the purchase and sale of a condominium takes place, the expressed intention of the Developer concerning "recreational and other amenities together with any conditions that apply that to the provision of amenities" must be contained in the Disclosure Statement: see s. 52(6) of the Act.

[para67] The Disclosure Statement is intended to be a readable description outlining what is in the other documents:

Hidden Valley Condominiums Inc. v. Vercaigne (1997), 12 R.P.R. (3d) 227 (Ont. Ct. (Gen. Div.)). [See Note 2 below] The adoption of a contextual approach to the interpretation of schedule F also requires recognition that purchasers and their lawyers would normally expect a developer to comply with s. 52(6)(b). Therefore, any reservation of a right by the Developer to build on the ORA should be specifically disclosed in the Disclosure Statement. In order to ascertain the intention and expectations of the parties it is necessary to have regard to the Disclosure Statement in interpreting Schedule F. I recognize, however, that the question of whether the Developer is in breach of its statutory obligation of disclosure under the Act is not before us.

Note 2: Feldman J. held, on facts similar to the case at bar, that the Developer was in breach of its disclosure obligations pursuant to s. 52 of the Condominium Act. An appeal from the decision of Feldman J. was abandoned on February 21, 1998. In Hidden Valley, the plaintiffs were the developers, marketers and declarants of a resort condominium project that was located close to recreational facilities. The plaintiffs did not have control over those recreational facilities, but, through inter-corporate relationships, did have control over a hotel. The promotional materials for the condominium units indicated that the hotel was to be upgraded by the addition of an outdoor swimming pool and new boat docks facilities. Hidden Valley maintained that their intention was to build the second pool and docks, even though they were not technically obliged to do so. It was also their understanding that as the resort was zoned for commercial use, the units were not for residential purposes and accordingly, there was no need to provide a disclosure statement pursuant to the Condominium Act. However, based on legal advice as to an abundance of caution, the plaintiffs provided the purchasers with all the documentation required for residential units and in particular the Disclosure Statement as required by s. 52 of the Act. Because of the recession, occupancy of the hotel was down in 1991, and there was already a lot of construction on the site, so by the closing date they had not built the second pool. The plaintiffs then proposed offering the purchasers extra amenities and cash in lieu of constructing the second pool. Several of the purchasers wanted to rescind the contract on the ground that the disclosure statement was deficient regarding the pool, the boat docks, and access to the hotel facilities. When the purchasers failed to close, the plaintiffs sold the units to others at a considerable loss. The plaintiffs brought an action for damages for the losses sustained as a result of the defendants' failure to close.

[para68] The relevant portion of the Disclosure Statement provides:

The Declarant also owns the lands adjacent to the Phase IV Lands (Additional Property) and currently proposes to register pursuant to the Condominium Act on part of the Additional Property, up to three (3) more Condominium Corporations. The project is proposed to consist of three (3) highrise towers (Adjacent Corporations) containing 154 dwelling units (Phase I) now registered as Peel Condominium Corporation 447 (PCC 447); about 186 dwelling units (Phase II) proposed; about 280 dwelling units (Phase III) proposed, in addition to the 56 townhouses of Phase IV. The Declarant may increase the number of units to the allowable limit of the current zoning or rezoning of the site may be required in order to construct a different number of units proposed and the building types, sizes and heights proposed. The Declarant may reduce or increase the number of phases and/or combine two or more buildings into one (1) condominium corporation. In the event that the Vendor cannot sell any of the buildings as condominiums some of the future phases may be rental apartments or may be downscaled to lower density housing. The exact and the final number may be substantially more or less than indicated herein.

The Declarant also intends to construct a townhouse community (Phase V) located on Block OO which is situated on the North side of the Collegeway.

The Declarant reserves the right to combine any one or more proposed phases into one condominium corporation and to register them as such rather than register them as two or more separate condominiums.

The construction timetable for the other phases will be totally at the discretion of the Declarant and the Declarant does not warrant that any other phase will ever be constructed. The Declarant is under no obligation to complete any portion of the project other than Phase IV. If the other phases are not built, common expense payments for Phase IV may increase in the future. [Emphasis added.]

[para69] The Disclosure Statement describes lands adjacent to the Phase IV Lands as Additional Property on which the Developer proposes to build three more Condominium Corporations (Adjacent Corporations) and the references to zoning or rezoning of the site and changes in the density of development must be read in this context. A further townhouse community is projected on another part of the property, Block 00. The word "proposed" means "suggested" or "offered" for consideration: Webster's Encyclopedic Unabridged Dictionary, (New York: Grammercy Books, 1989) S.V. There is no suggestion of development on the ORA lands in the Disclosure Statement.

[para70] The Disclosure Statement makes reference to the Reciprocal Agreement to be entered into by the condominium owners. In the Reciprocal Agreement, Adjacent Corporations is defined as, "the highrise and/or townhouse buildings to be built on the Future Phase Lands and currently intended to be registered as condominiums". The word "currently" means "presently, at the moment": Webster's, supra, S.V.

[para71] The reference to "proposed phases" in the disclosure statement and to "highrise and/or townhouse buildings currently intended to be registered as condominiums" in the reciprocal agreement support the interpretation of Epstein J. that the "parts of the Property" described in the agreement of purchase and sale were intended to be land on which the Developer proposed to build at the time that the documents were signed. This was not the ORA land.

[para72] Where, as in Schedule F, the wording "parts of the Lands" is more general than the specific wording in other documentation, there is ambiguity. In such cases, the court is entitled to look to the surrounding circumstances in interpreting the wording of the document. Here, the surrounding circumstances include the oral or affidavit evidence of the parties concerning the circumstances under which the agreement of purchase and sale was signed. The evidence of the PCC 505 unit purchasers that the property was marketed as being centred around the ORA, an attractive wooded area, is uniformly consistent and unchallenged. Some purchasers were told that the ORA lands might be maintained as a preserve for wildlife; while other purchasers stated they paid a premium for a townhouse adjacent to ORA lands. As noted by Finlayson J.A. at para. 7, the "[p]urchasers relied upon representations made by the Developer with respect to the overall nature of the development around the ORA." Thus, part of the Developer's representation was that unit holders were buying an urban home with a wooded area at its centre. On part of the wooded area, according to the Developer, amenities such as tennis courts or a swimming pool might be built or they might not be built. Although it is clear the Developer would not be liable if it did not build the amenities, there is no suggestion that if the amenities were not built, the Developer was entitled to cut down all of the trees and build townhouses.

[para73] The sequence of events also confirms the interpretation given to Schedule F by Epstein J. PCC 505 was registered October 3, 1995. However, it was only in 1996 that the directors of PCC 505 were advised that the Developer's plans for the ORA had changed. Thus, it was only after the units in PCC 505 were marketed and sold that the Developer changed its mind and decided that the ORA land would be used to build an additional 25 townhouses. [See Note 3 below]

Note 3: Finlayson J.A. states at para. 8: "By the time units in PCC 505 were marketed and sold, the Developer decided that the recreational and social core of the development, the ORA, would be used for another townhouse development." It seems to me that the reasons of Epstein J. indicate the opposite. The Developer originally decided to build a series of condominium towers. However, in 1991, after PCC 447, the first tower consisting of 164 units dwelling was constructed, the Developer decided that instead of more towers, townhouse units would be built. PCC 489 registered May 22, 1994, comprised 24 townhouses. PCC 505, registered October 3, 1995, consisted of 56 townhouses. Another project of 34 townhouses, the fourth phase, and a second tower of 134 units, the fifth phase, were approved. The direction of the project changed to less towers and more townhouses prior to the building of PCC 505. The Developer did not, however, disclose its intention to build 25 townhouses on the ORA lands until after PCC 505 was marketed, sold and registered.

[para74] The wording of the Disclosure Statement and Reciprocal Agreement, the evidence of the purchasers with regard to the circumstances under which they entered into agreements to purchase, and the sequence of events, all support the interpretation placed on Schedule F by Epstein J. Undoubtedly, the reference to the right of the builder to change its plans concerning "parts of the property" was meant to be a reference to those parts already intended for development and reserved to the Developer flexibility concerning the mix or type of housing that was to be built on those parts. It was not intended to reserve to the Developer the right to develop and build on the ORA if no recreational facilities were ever built. Thus, while the words in Schedule F could be interpreted so as to bear the construction put on them by Finlayson J.A., I am of the opinion that the construction adopted by Epstein J. more accurately reflects the intention and understanding of the parties at the relevant time.

[para75] At the time this application was initially heard, PCC 505's claim for damages against the Developer for breach of its disclosure obligations was, on common ground, argued but put over to a later date. This is regrettable. The effect of s. 52(1) of the Act is that an agreement of purchase and sale is binding only after the purchaser receives a disclosure statement that complies with ss. 52(6) and (7). If the Developer did not comply with its statutory disclosure obligations, the agreement of purchase and sale, including Schedule F, is not binding on the purchasers. The basis on which the Developer relies in order to build on the ORA land would then be completely undermined. Bifurcated applications are rarely, if ever, a good idea.

[para76] In accordance with her interpretation of the documentary evidence, Epstein J. made a finding that Cam- Valley "never intended a reasonable purchaser to conclude that it planned to develop the ORA Lands for use other than as a recreation facility". In other words, a reasonable purchaser would not have concluded that if the ORA was not built, the Developer could use the lands for its own profit as opposed to leaving them in their natural state. This finding is reasonably supported by the evidence and is entitled to deference. I would uphold it.

B. What is the basis for the imposition of a duty on the Developer to take into account the interests of the unit holders in PCC 505 in developing the ORA land?

[para77] PCC 505 submits that a fiduciary relationship exists between a condominium developer and a purchaser once the developer begins to sell units in the project. PCC 505 submitted that the Developer breached its fiduciary duty by representing that the ORA land would form part of the common elements of the condominium corporations or would be a unit in one of the condominium corporations owned proportionately by all.

[para78] Epstein J. rejected PCC 505's submission and held that as argued, the factual basis for the imposition of a fiduciary duty was lacking. She found that the Developer did not unequivocally represent that the ORA land would be proportionately transferred. It was only if the recreational amenities were built that the Developer had an obligation to convey the ORA lands and the Developer did say it might not build any recreational facilities. Epstein J. thus distinguished the decision in York Condominium Corp. No. 167 v. Newrey Holdings Ltd. (1981), 32 O.R. (2d) 458 (C.A.) on the factual basis that in that case there was a clear finding that the area at issue, a superintendent's suite, would form part of the common elements. She stated at para. 44:

The fiduciary argument as advanced by the applicants is similarly flawed. The authority relied upon of York Condominium Corp No. 167 v. Newrey Holdings Ltd. et al. (1981), 32 O.R. (2d) 458 [See Note 4 below] also involved a superintendent's suite. The Court of Appeal found that the evidence was sufficient to support a finding that there was a common intention that the suite would form part of the common elements of the corporation and that a prospective purchaser would be justified in assuming that

the suite would be one of the common elements. The Court felt justified in overcoming the potential problems created by the actual registered title and ordered a conveyance of the suite of the corporation.

While the *Middlesex* and *Newrey* cases stand for the proposition that the declarant is bound not to prefer its interests over those of the group of unit owners, the Court of Appeal has made it clear that the starting point must be a finding as to the reasonable intentions of the parties based on the evidence.

I have found that the evidence in this case does not support a finding that the Declarant intended that the purchasers believe the Outdoor Recreation Area was to be built and that the Lands would be conveyed and that a reasonable purchaser would assume that such would be the case.

Note 4: This is a reference to *Re Middlesex Condominium Corp. No. 87 and 600 Talbot Street* (1998), 37 O.R. (3d) 22 (C.A.). That case held that where the reasonable interpretation of the evidence is that, notwithstanding the registered title, the declarant intended a reasonable purchaser to believe, or to justifiably assume, that the disputed area (a superintendent's suite) was a common element or an asset of the corporation, the declarant will be required to convey the unit to the corporation. Section 52 of the Condominium Act did not change this common law right. The court also held that it is a question of fact whether the disputed area was intended to be part of the common elements.

[para79] Accordingly, Epstein J. was of the opinion that the factual basis for the imposition of a fiduciary relationship between the Developer and the unit holders of PCC 505 was lacking at this point.

[para80] However, Epstein J. states at para. 55:

an important point that, in my view, can clearly be made by the facts of this case is based on the vulnerability of the purchaser in the course of a purchase of a condominium unit from a Developer. The point is that a developer should not be allowed to rely on obscure or unclear contractual provisions in the condominium documentation in such a way as to defeat the reasonable expectations of the purchaser. Such would be contrary to the principles of good faith and fair dealing between contracting parties, contrary to the consumer protection objectives of the Act and to the developer's fiduciary obligations to purchasers of units. [Emphasis added.]

[para81] At this point in her reasons, Epstein J. had made a factual finding that the Developer intended a purchaser to believe, and reasonable purchasers would have believed, that if no recreational amenities were built, the ORA land would be left in its natural state. Based on her factual finding, she had a starting point in the evidence for considering whether the Developer could nevertheless ignore the interests of the unit holders of PCC 505. Epstein J. based the imposition of the Developer's duty not to prefer its interests over those of PCC 505 condominium owners on three principles: 1) a requirement of good faith and fair dealing between contracting parties; 2) the consumer protection objectives of the Act; and 3) the Developer's fiduciary obligations.

[para82] The imposition of a duty of good faith and a fiduciary duty are closely related. There is, however, at least one important difference. If, for example, A owes a fiduciary duty to B, A must act only in accordance with B's interests when A exercises its powers or exercises a discretion arising out of the relationship: see *Newrey Holdings; Hodgkinson v. Simms* (1994), 117 D.L.R. (4th) 161 (S.C.C.).

If, on the other hand, A owes a duty of good faith to B, A must give at least as much consideration to B's interests as it does to its own interests before exercising its power. Thus, if A owes a duty of good faith to B, so long as A deals honestly and reasonably with B, B's interests are not necessarily paramount: see e.g. *Freidman v. Mason*, [1958] S.C.R. 483.

1. The Developer's fiduciary obligations

[para83] Finlayson J.A. takes issue with the imposition of a fiduciary obligation on the Developer on the basis that it does not accurately set out the relationship between a developer and a prospective purchaser of condominium units. Epstein J., however, speaks of "purchasers" in her judgment and not prospective purchasers. As I have indicated, it was only after PCC 505 was sold that the Developer disclosed its intention to use the ORA for its own purposes. In any event, on the basis of *Newrey Holdings*, once the developer begins to sell units in the project, a fiduciary duty towards prospective purchasers can be imposed depending on the factual circumstances of the case.

[para84] In *Hodgkinson* at 174-75, the Supreme Court held that the existence of a contract does not necessarily preclude the existence of fiduciary obligations between the parties. In some cases, such as those involving principal and agent, the legal incidents of the contractual relationship give rise to a fiduciary duty. In others, by statute, agreement, or based on some unilateral undertaking, or, as in *Hodgkinson*, a representation that one party has an obligation to act for the other's benefit and cannot have regard to its own interests. Here, Epstein J. found that if no amenities were built, a reasonable purchaser would conclude that the ORA would not be developed but would be left in its natural state.

[para85] Whether or not a fiduciary duty exists is a question of fact: *Hodgkinson; Lac Minerals v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 648. Factors in the evidence that would support the imposition of a fiduciary duty on the Developer not to prefer its interests over those of the unit holders at this stage include:

1. the fact that the Developer had a discretion whether or not to build recreational facilities on the ORA;
2. the Developer exercised power and control over the ORA;
3. PCC 505 unit holders were obliged to rely on the Developer's discretion respecting the ORA after they purchased their units;
4. the credence and reliance the unit holders were likely to give the Disclosure Statement combined with what they were told at the time of purchase; and the Developer possessed information concerning the future development of the project not readily accessible to the PCC 505 purchasers.

[para86] Although Epstein J. mentions the Developer's fiduciary duties, she earlier rejected the existence of a fiduciary relationship in the circumstances of this case. The tenor of her reasons at paras. 56 to 59 leads me to conclude that she imposed a duty on the Developer not to act solely in accordance with its own interests on the basis of a requirement of good faith.

2. The duty of good faith

[para87] The Developer submits that no duty of good faith is owed to the condominium owners in PCC 505. Finlayson J.A. relies on *Martel Building Ltd. v. Canada*, 2000 S.C.C. 60. In that case, Iacobucci and Major JJ. commented at para. 73 that no overarching duty to bargain in good faith at common law has yet been recognized by Canadian courts.

[para88] Martel was concerned with whether there was a duty of good faith in pre-contractual negotiations. In Martel, it was contended that the Government of Canada, acting as a tender-calling authority, had a duty to bargain in good faith and was negligent in discharging that duty by not providing Martel, the bidder, with adequate information about the government's bargaining position respecting the renewal of a lease. Martel sued in tort. The Supreme Court reviewed a number of policy considerations that weigh against imposing a duty of care on parties negotiating a contract. First, the primary goal of negotiation is to achieve the most advantageous financial bargain. Second, economically efficient conduct could be deterred and, in some circumstances, is a valid rationale against extending liability. The Supreme Court stated at para. 67:

It would defeat the essence of negotiation and hobble the marketplace to extend a duty of care to the conduct of negotiations, and to label a party's failure to disclose its bottom line, its motives or its final position as negligent. Such a conclusion would of necessity force the disclosure of privately acquired information and the dissipation of any competitive advantage derived from it, all of which is incompatible with the activity of negotiating and bargaining.

[para89] Negotiations respecting the purchase of condominiums involve a very different atmosphere than the paradigm of a freely negotiated commercial contract between two equally sophisticated parties as in Martel. The developer is by statute mandated to disclose its "bottom line" because it is required to give full and accurate disclosure of information that a purchaser would regard as material to his or her decision to purchase in the Disclosure Statement.

[para90] A third reason given by the Supreme Court for not imposing a duty of good faith in the negotiation process is that it would interject after-the-fact insurance against the failure of a party to act with due diligence (at para. 68). This policy would have limited application to the purchase of a condominium where all pertinent information must be disclosed in the Disclosure Statement and the amount of independent due diligence a purchaser is required to exercise is thus mitigated. Because the scope and extent of a condominium project is within the unique knowledge of the Developer, the Act requires the Developer to provide the purchaser with information as opposed to placing the onus on the purchaser to try and independently seek out the information.

[para91] The fourth reason articulated by the Supreme Court for not imposing a duty of good faith in the negotiation process is that it could lead to courts having a regulatory function. A fifth and related reason is that to extend the tort of negligence to the conduct of negotiations could result in increased litigation (at para. 70). In the case before us, a regulatory function already exists by virtue of the Act and the courts are the arbiters and enforcers of that function. The reason for the Act is the protection of condominium purchasers. The Act regulates an activity that the Legislature has determined cannot be left entirely open to free market forces.

[para92] Finally, in this case, we are concerned with good faith in the execution of a contract and not simply pre-contractual negotiations leading to a tort action. The policy reasons of the Supreme Court for not imposing a duty of good faith have no application to this case.

[para93] If Finlayson J.A. is correct in his interpretation of Schedule F, that the developer would have a right to develop the ORA land, then the question that arises is whether the Developer is free to develop the ORA land without taking into consideration the reasonable expectations of the PCC 505 condominium purchasers concerning the ORA land the Developer engendered. The decision in Martel does not deal with the question of whether there is an implied duty of good faith on the parties in the performance of an existing contract.

[para94] That issue did, however, arise in three cases on appeal from the Quebec Court of Appeal to the Supreme Court. In the Civil Code context, the Supreme Court held that there was an implied duty of good faith: see *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122; *Bank of Montreal v. Kuet Leong Ng*, [1989] 2 S.C.R. 429; and *National Bank of Canada v. Soucisse*, [1981] 2 S.C.R. 339. The three cases, affirmed in *Bank of Montreal v. Bail Ltée*, [1992] 2 S.C.R. 554, deal with the interpretation of article 1024 of the Civil Code of Lower Canada as it existed at the time. Article 1024 simply stated:

The obligation of a contract extends not only to what is expressed in it, but also to all the consequences which, by equity, usage or law, are incident to the contract, according to its nature.

[para95] Equity may also be the foundation for an independent doctrine of good faith in the performance of a contract at common law. As noted by Grange J.A. in *LeMesurier v. Andrus* (1986), 54 O.R. (2d) 1 at 7 (C.A.):

As Middleton J. put it in *Hurley v. Roy* (1921), 50 O.L.R. 281 at 285: "The policy of the Court ought to be in favour of the enforcement of honest bargains ". The approach may be merely an example of the development of an independent doctrine of good faith in contract law at least in the performance of contracts, one explicitly set forth in the American Uniform Commercial Code and in the American Restatement and exhibited, although perhaps in disguised form, in many English and Canadian cases - see the lecture of Professor Belobaba, *Special Lectures of the Law Society of Upper Canada* (1985), p. 73, particularly the examples set forth on p. 83 et seq. [Emphasis added.]

Note 5: An example of the application of the doctrine of good faith in disguised form is the decision of Grange J.A. in *Steps Investments Ltd. v. Security Capital Corp.* (1976), 14 O.R. (2d) 259 (H.C.J.). In that case, Grange J. held that the vendor ought to have brought to the attention of the purchaser the significance of a proposed change to an agreement for the sale of shares. At p. 272, he stated:

It is not unreasonable, in my view, in modern commercial relations, to require the parties, where an important amendment is being made, to ensure that knowledge of such amendment comes to the other side. I do not mean that a party must overcome obtuseness in his opposite number but he must at least give him a real opportunity to appreciate the change. And if the circumstances are such that the amendment might readily be missed he should be particularly reluctant to assume such knowledge.

Robins J.A., after reviewing this passage in *Downtown Key West Development Corp. v. Massey Ferguson Industries Ltd.* (1996), 28 O.R. (3d) 327 (C.A.) at 338; leave to appeal to S.C.C. refused, [1996] S.C.C.A. No. 258, (1996), 96 O.A.C. 233, agreed with the approach of Grange J.A. on the basis of "equity and fair dealings".

[para96] Given the current state of the law, it is hardly surprising that the Supreme Court in *Martel* specifically left the question of the existence of an implied duty of good faith at common law in the performance of existing contracts to be definitively decided another day. The trend, as noted by the Supreme Court in *Houle*, is towards a just and fair approach to rights and obligations. Concurrent with this development is the requirement to exercise a contractual right with candour and in a reasonable manner based on an implied duty of good faith. [See Note 6 below]

Note 6: See The Hon. Justice Charles D. Gonthier, "Liberty, Equality, Fraternity: The Forgotten Leg of the Trilogy, or Fraternity: The Unspoken Third Pillar of Democracy" (2000) 45 McGill L.J. 567 at 583-84, subtitled "Good Faith in Contracts".

[para97] The requirement to exercise a contractual right in a reasonable manner is already recognized at common law in special categories of relationships. One example that readily comes to mind is the obligation of good faith and fair dealing on employers in the manner in which they dismiss an employee: *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701. At paras. 91-95, Iacobucci J. held that contracts of employment have unique characteristics that set them apart from ordinary commercial contracts. One of the unique characteristics is that the formation of the contract is not the result of the exercise of bargaining power between two equals. Further, the power imbalance is not limited to the formation of the contract itself but informs virtually all facets of the relationship because the relationship is typically one between a bearer of power and one without power.

[para98] In addition to a lack of bargaining power, the employee lacks the information necessary to achieve more favourable contractual terms. Iacobucci J. holds that the law ought to encourage the employers who exercise their right to terminate an employee to do so in a manner that minimizes the damage to the employee, both economically and in personal terms. To ensure that employees receive adequate protection from employers, Iacobucci J. holds employers to a duty of good faith and fair dealing in the manner they dismiss employees. Breach of this duty by conduct that is not candid or reasonable can be compensated for by adding to the length of notice the employer is obliged to give the employee upon termination.

[para99] Another relationship upon which the common law imposes a duty of good faith because of a disparity in access to information is that between an insurer and an insured. When an insured applies for insurance, it is really only the insured that is aware of certain information that is of critical importance to the insurer's assessment of the risk. The disparity in access to relevant and essential information led to the imposition of a duty of good faith on an applicant for insurance by requiring the prospective insured to communicate all relevant factors to the insurer: see *Carter v. Boehm* (1766), 97 E.R. 1162; *Coronation Insurance Co. v. Taku Air Transport Ltd.*, [1991] 3 S.C.R. 622 at 636ff. The passage of various insurance statutes has not displaced this longstanding common law duty of good faith.

[para100] Purchasers of condominiums share many of the same characteristics of both these special relationships. The purchaser of a condominium enters into a contract with a developer that is basically dictated by the developer and is not the result of the exercise of bargaining power between two equals. This power imbalance continues so long as the developer is developing the project. In addition to the lack of bargaining power, the condominium purchaser lacks the information necessary to achieve more favourable contractual terms with the developer. It is only the developer that is aware of the information with respect to the risks concerning the project and the extent to which those risks may require further modification of the projected development. While the developer has the right to change the development, just as an employer has a right to terminate an employee, that right must be exercised with candour and reasonableness, taking into consideration the interests of the condominium owners. The fact the Developer intended a reasonable purchaser to conclude the ORA land would be left in its natural state if no recreational facilities were built, the imbalance in bargaining power, combined with the disparity of access by PCC 505 condominium owners to relevant and essential information concerning the development of the ORA land, makes the imposition of a duty of good faith on the Developer a logical extension of the common law.

[para101] Indeed, having regard to the fact that a fiduciary duty, a much higher duty, has been imposed on condominium developers at common law (depending on the factual circumstances of a particular case), it would be logical to exact a duty of good faith from condominium developers when circumstances warrant. At the very least, the circumstances of this case warrant the imposition of such a duty on the facts as found by the trial judge. The existence of the Act in no way stands in the way of the imposition of such a duty. Both the insurance cases and the fact a fiduciary duty can be imposed notwithstanding the existence of the Act illustrate that the common law and statute law can be, and often are, interwoven.

III. REMEDY

Should a declaration of ownership be granted?

[para102] The appropriate remedy for breach of a duty of good faith appears to be an increase in damages within the context of a broader action: *United Grain Growers*.

[para103] Although PCC 505 alleged that the Developer breached its fiduciary duty, PCC 505 does not appear to have alleged the breach of the lesser duty of good faith. The original application does contain claims for damages for failing to construct the recreational facilities on the ORA, punitive or exemplary damages for the Developer's highhanded conduct in cutting down the trees, and a declaration that PCC 505 is entitled to damages against the Developer for breach of the disclosure statement pursuant to s. 52(5) of the Act.

[para104] Bearing in mind that the issue of damages is yet to be argued, I would, if necessary, grant leave to PCC 505 to amend its pleadings, if it desired to claim damages for breach of a duty of good faith with liberty to the Developer to respond. Assuming an amendment to the pleadings is made to claim damages at common law for breach of a duty of good faith, the damages, if any, could be assessed at the same time or immediately after PCC 505's other claims for damages have been heard.

IV. CONCLUSION

[para105] For the reasons I have given, I agree with Finlayson J.A.'s disposition.

WEILER J.A.

CBR# 035

Baer v. Condominium Plan 9123697

Between Grania Mary Baer, plaintiff, and The Owners: Condominium Plan 9123697, defendant

Action No. 9703 10188

Alberta Court of Queen's Bench Judicial District of Edmonton Lewis J. Heard: January 12, 2000. Judgment: May 4, 2000. (40 paras.)

Counsel: D.C. McGreer, for the plaintiff. S.J. Hammel and S.L. Hawes, for the defendant.

MEMORANDUM OF JUDGMENT

[para1] LEWIS J.:-- The Plaintiff is seeking, against her Condominium Association, the Defendant, general damages in the sum of \$300,000.00, plus special damages for prescription charges, psychological fees, moving expenses and for repair to her condominium unit so that it may be sold, or compensation for the market value of a similar unit in St. Albert, as well as costs of the action. In defending the action, the Defendant counterclaimed for unpaid condominium fees and special assessments made by the Defendant with interest and costs.

[para2] Counsel for the Plaintiff and Defendant filed the following agreed statement of facts on the second day of the trial:

1. The Plaintiff purchased a two bedroom Condominium with a parking stall in a new Condominium Development on February 13, 1992 municipally described as Suite 207, 3 Perron Street, St. Albert for \$99,000.00.

2. The Condominium Development is known as Whelehan Place. It consists of 62 dwelling units and is located in downtown, St. Albert.

3. The Plaintiff's suite is located on the main entrance level of the building, just off the lobby area, and above an underground multi-level parkade.

4. The Owners of all the Units in the Condominium Building, of which the Plaintiff is one, collectively have sued the Developers, Engineers and Architects of the building for deficiencies in the construction of the building overall, as well as consequential in-suite damage. The Plaintiff is named individually in that action for the particular damage caused to her suite. That action is tentatively scheduled for trial for November, 2000. The claim in that broader action is for the cost of correcting structural problems with the roof, foundation, parkade, building air pressure and balance and insufficient firewall installed within the common walls of the complex.

5. The deficiencies that the Plaintiff identifies as affecting her suite arise from deficiencies which date back to construction of the building in 1991.

6. The Plaintiff stopped eating, sleeping or spending any extended periods of time in her suite by April 1995. She has not occupied it in any manner since December 18, 1996.

7. From December 18, 1996 to December 31, 1997, the Plaintiff stayed at the apartment building Campus Towers in Edmonton at the expense of the Defendant.

8. The Plaintiff and the Defendant have not reached an agreement on the repair of the Plaintiff's suite. The Plaintiff's suite cannot be lived in because of its present state of disrepair.

9. The Condominium Association imposed the following special assessments:

i. \$75,000.00 levied on the unit owners due in two instalments on November 7, 1995 and December 7, 1995. The Plaintiff's portion was \$1004.10. [Changed in handwriting to July, Aug. and September '95.]

ii. \$75,000.00 levied on the unit owners due in three instalments on April 7, 1996, May 7, 1996 and June 7, 1996. The Plaintiff's portion was \$1,011.15.

iii. \$75,000.00 levied on unit owners due in three instalments on November 1, 1997, December 1, 1997, and January 1, 1998. The Plaintiff's portion was \$990.00

10. The Plaintiff paid the Condominium Fees and Special Assessments levied on her suite up to September 30, 1996.

11. The Plaintiff owes the Association Condominium Fees for her unit since September 30th, 1996 as follows:

a) Monthly condominium fees to January 31, 2000 \$5,852.00

b) Interest at 18% \$2,337.16

c) Last Special Assessment \$ 990.00

d) Interest on Special Assessment \$ 468.16

\$9,647.31

12. The monthly Condominium Fees for the Plaintiff's unit since 1995 have been approximately \$145.00.

13. The Plaintiff put \$25,727.00 as a down payment on the purchase of her suite in 1992 and she financed the balance of the purchase price with a mortgage from the Treasury Branches.

14. The appraised value of the Plaintiff's suite (June, 1999) is \$65,000.00 before repairs and \$78,000.00 after repairs.

15. The current balance outstanding on the Plaintiff's mortgage is approximately \$66,182.00.

16. The Plaintiff has continued to make her monthly mortgage and property tax payments of \$649.00 (\$530.00 mortgage and \$119.00 taxes) up to the present time.

[para3] The Plaintiff, according to her testimony, purchased condominium unit number 207 in Whelehan Place on December 10, 1991, for \$99,000.00, putting \$25,000.00 down as a deposit and financing the balance through a mortgage with the Treasury Branch. She took possession of her condominium in February 1992.

[para4] Sometime in 1993, the Plaintiff noticed her coffee table was listing, which was caused, as she testified, by the floor sinking. She contacted the builder and repairs were made to the area under the floor in about September 1994 to correct the listing. By October 24, 1994, she noticed the corner of her sunroom had a large crack. Again the builder was contacted. At about this time she noticed a crack in the living room wall, as well as the fact that the closet doors did not close properly. Repairs were done by the builder in about December of 1994. In early 1995, she noticed black areas on her carpet, as well as on the walls. She started to experience eye infection, vomiting and just simply felt terrible. She felt there was mould throughout her condominium unit she testified. There was also water infiltration on the main floor.

[para5] The Plaintiff moved out of her condominium unit in April of 1995, except for occasions when she returned to her condominium to bathe or dress, finally moving out permanently in 1996 and not returning to the unit. The unit has been unoccupied since.

[para6] In June of 1995, the Plaintiff arranged with a Mr. Ray Pratt of the Defendant's property management company, Simco Management, to correct the problems and repaint her suite. She was going to Ireland, her original home, for the summer months of July and August, 1995. When she returned at the end of the summer from Ireland, the work had not been done. On cross-examination, she testified that the reason this work had not been done according to Mr. Pratt, was because the water infiltration problems still existed. Mr. Pratt testified that the waterproofing of the building to solve the water infiltration problem commenced in August 1995 and was required to be done before any re-painting of the condominium units was undertaken as the water infiltration would continue until waterproofing was concluded. About one third of the building including the area around the Plaintiff's condominium unit was waterproofed by the end of May 1996. He described the waterproofing of the building as a very slow and costly process.

[para7] The Plaintiff first reported her condominium unit problems to the Defendant in about October of 1994, when she noticed the cracks in her living room wall.

[para8] Other problems were identified in the Plaintiff's condominium unit; the infiltration of air in areas around the baseboards, around the door off the corridor and around her bedroom window.

[para9] Problems were identified with the building itself, as follows:

1. Improperly waterproofed wood and concrete foundations, resulting in the infiltration of water into the parkade and into the wood sub-floors of the building, resulting in rotting and failure of the sub-floors in three units, including that of the Plaintiff. Commencing in the summer of 1995, carrying on to May 1996, the foundation was re-waterproofed and the sub-floors repaired at the same time;

2. Various areas of the foundation rotted or failed as a result of water infiltration and improperly constructed wood foundation systems. Some of these foundation sections have been reconstructed and fortified, whereas other areas of the building foundation where there may be rotting have not been repaired because of the financial constraints of the Defendant;

3. Deficient construction and design of the roofing system has resulted in the infiltration of outside water and leakage due to condensation causing drywall damage and other interior damage to various condominium units;

4. Improperly balanced ventilation system, resulting in back drafts and air circulation problems throughout the building;

5. The building did not meet applicable Fire Code requirements existing at the time the building was constructed;

6. Various insulation deficiencies, resulting in freezing of pipes and significant heat loss from the building and particular units.

[para10] Other units were experiencing problems similar to those of the Plaintiff resulting in the Defendant retaining a project manager, Simco Management, on December 16, 1994. About March 16, 1995, the Defendant retained Reid Jones Christopherson (R.J.C.), consulting engineers, to assess the building's problems and advise as to what should be done.

[para11] Defendant's Counsel provided a chronological history of the problems raised by the Plaintiff and other owners of condominium units in the building. This historical chronology of events is very helpful in understanding the seriousness of the problem faced by the Plaintiff, as well as other owners in this condominium project. This history of events which is attached as Appendix "A" was prepared from the exhibits entered at trial. The reference to the specific exhibits has been deleted in the appendix reproduction as such reference is of no assistance without each of the exhibits at hand to refer to.

[para12] The Plaintiff had a friend of hers, who was an electrical engineer, look at her suite in late 1995. He made some suggestions as to how the Plaintiff handle correction of the problems. On December 1, 1996, she hired another engineering friend, a Mr. Jones, to do a detailed report on her unit. She was not happy with what the Condominium Association was suggesting, in view of its engineering report from R.J.C. of December 6, 1996. As the Plaintiff said, she did not agree with the repair proposal of R.J.C. and she wanted her own engineer's report. She directed that no repairs were to be made to her unit without her consent; as she testified, she "wanted answers first and then repairs". She testified she wanted Mr. Jones' report and "what Bill would recommend I would trust". The only problem is that she did not provide the Defendant with a copy of Mr. Jones' report until about mid 1998, although available by the end of December 1996. The Plaintiff had called Mr. Jones prior to December 1, 1996, when, in December 1995, the floors were being dug up, asking him over to view the situation in her condominium.

[para13] In any event, there has been a standoff between the Plaintiff and the Defendant since the first half of 1997. The Plaintiff started this action on May 27, 1997. Nothing has been done with respect to the Plaintiff's condominium unit since early 1997. The Plaintiff has refused to let the Defendant into her condominium unit since about that time.

[para14] A separate action has been commenced by the Defendant against the builder of this condominium building and I understand from Counsel that this action is scheduled to go to trial in November of this year.

[para15] Plaintiff's Counsel argues that the Defendant was negligent in that it:

1. Failed to adequately respond to, investigate, report on and correct the problems in the Plaintiff's suite that the Plaintiff brought to their attention;
2. Failed to do so within a reasonable time;
3. Failed to provide an engineer's report, so that the Plaintiff could make a fully informed decision on the board's proposal for repair of building deficiencies and in-suite damage; and
4. Failed to date to provide a proper plan to repair the building deficiencies adversely effecting the Plaintiff's suite.

[para16] Defendant's Counsel identifies the issues to be determined in this trial as follows:

1. The extent of the obligation of the Condominium Association to repair and maintain the common property of the condominium project to permit the Plaintiff's quiet enjoyment of her unit;
2. Did the Condominium Association fail in its obligation to repair and maintain the common property;
3. If the Condominium Association failed in its obligation to repair and maintain the common property:
 - (a) Can the Plaintiff establish the existence of any contamination in her unit arising from that breach;
 - (b) Is there any evidence that contamination in her unit caused or aggravated the physical and mental illness the Plaintiff alleges she suffers from;
 - (c) If the Plaintiff has suffered damages as a result of the negligence or breach of statutory duty of the Condominium Association, has she properly mitigated her damages.

[para17] The Plaintiff did suffer from health and psychological problems. Her family doctor identified the health problems as being a swelling of the eyelids and pink eye. Her psychologist identified the psychological problems she has suffered because of her feeling "homeless" and the agony of this legal action. But the question is whether these health problems are directly caused by her condominium problems, or only partly caused by such problems, or not at all. As was pointed out in the evidence, the Plaintiff went through a divorce of her 25 year marriage in late 1989 or 1990, experienced two suicides in her family, as well as other problems. There is no question that the Plaintiff has experienced an extremely sad and almost unbearable situation over the past 10 years. She has the sympathy of everyone, including her close associates and friends, who have assisted her over these many years with her problems, some of whom testified at this trial. The Plaintiff has been very fortunate to have the cadre of friends and associates who have helped her. Otherwise, as her psychologist pointed out, she may not be here today, because of her suicidal tendencies at one point.

CAUSE OF ACTION

[para18] Under s. 30 of the Condominium Property Act of Alberta, the Condominium Association has a statutory duty to keep in a state of good and serviceable repair the common property of the condominium building.

[para19] As well, the bylaws of the Defendant corporation provide:

Rule 8: Duties of the Corporation

The Corporation shall:

- A) control, manage and administer the Common Property for the benefit of all the Owners and for the benefit of the entire Condominium Corporation;
- B) do all things required of it by the Act, these By-Laws, and any other resolutions of the Corporation in force from time to time;
- J) maintain and keep in a state of good repair, as may be required as a result of reasonable wear and tear or otherwise the following:
 - a) all outside surfaces of the Units, including without limiting the generality of the foregoing, exterior walls, exterior of the roof and all roofing materials, eavestroughs, exterior drains, exterior beams and trim, but excluding all Unit screen doors, doors, windows, mailboxes, door bell buttons, and light fixtures and their bulbs attached to the exterior of the Unit, all of which shall be the responsibility of the Unit Owners.

[para20] The Defendant has a statutory duty, as well as a contractual duty, under the bylaws of the Condominium Association to keep in a good state of repair the common property of the condominium building. Failure to do this may give rise to an action in negligence and a damage award if such damages can be proved.

[para21] I am satisfied that the Defendant took all of the steps it could to correct the problems. It hired a project manager and an engineering firm to determine the deficiency problems. The Defendant was never advised of any health problems associated with the Plaintiff's occupation of her condominium unit until after she had moved out of her condominium unit. Even then, such health problems could not be traced to the condominium unit with certainty. A number of repair proposals were made by the Defendant to the Plaintiff to repair her condominium unit in 1996 and 1997, and subsequently, all of which the Plaintiff rejected.

[para22] The Plaintiff did not report any health problems associated with living in her condominium unit to the Defendant until November, 1995. This was months after she had moved out of her condominium unit and into other accommodation. As soon as the Defendant learned of this situation, it took immediate steps to test the Plaintiff's condominium unit for gases, including carbon monoxide as well as mould and fungus.

[para23] Dr. Climenhaga, an ophthalmologist, to whom the Plaintiff's family physician, Dr. Morison, referred her, saw the Plaintiff on February 5, 1996. In his report dated the same date as he saw her, Dr. Climenhaga could not attribute the Plaintiff's blepharitis (swollen eyelids) to anything in her condominium unit. He said that the blepharitis was related to the skin and her mascara may be causing the problem. This did not change the Plaintiff's use of mascara. In his subsequent report dated October 18, 1999, Dr. Climenhaga did state that "it is impossible for me to relate any of her complaints of the blepharitis to the environment". This referral by Dr. Morison of the Plaintiff was made as Dr. Morison was of the view that the environment conditions in her condominium unit were the cause of her health problems.

[para24] The tests done by Northwest Utilities Limited and the Capital Health Authority in January and February, 1997, indicated no levels of carbon monoxide (CO) in the Plaintiff's condominium unit. I accept this evidence and find that there were no dangerous levels of gas including CO in the Plaintiff's unit. I do not accept Mr. Jones' evidence of his CO tests of the unit which indicated on one occasion a dangerous level of CO. He had made his tests after purchasing a CO tester from Canadian Tire and then expressed concern as to the accuracy of the tester suggesting that he redo the test, during the course of the trial, with a more accurate tester. This suggestion was refused in view of the number of other tests that had been done by third parties. Therefore, in view of this finding, I reject Plaintiff's counsel's argument that the strict liability rule enunciated originally in *Ryland v. Fletcher* (1868), L. R. 3 H. L. 330; 37 L. J. Ex. 161 and applied in *Frederic v. Perpetual Investments et al* [1969] 1 O.R. 186-190 and *Bisdams v. Brunette Holdings Ltd.*, [1993] O.J. No. 3378, .C.J. applies here as the Plaintiff has not proven the escape into her condominium unit of a harmful substance, that is, a dangerous gas or gases, or mould or fungus.

[para25] Although the tests of the soot or carbon deposits on the carpet and wall were not satisfactorily done, nothing negative could be determined from the testing done by the Alberta Research Council. As well the tests for mould or fungus in the Plaintiff's unit were negative. I am satisfied on the evidence, and find that there was no mould or fungus in the Plaintiff's unit.

[para26] The Defendant took the corrective step the latter half of 1995 and through 1996 of waterproofing the exterior walls of the building, concluding about one-third of the waterproofing necessary, at a considerable expense. This step alleviated the water infiltration problems in the Plaintiff's condominium unit as well as other condominium units.

[para27] Steps were taken by the Defendant to alleviate the infiltration of air into the Plaintiff's condominium, as well as other condominiums, with a balancing of the air system. As well, the roof was repaired to alleviate a water leakage problem.

[para28] Other problems were identified in 1995 and 1996, such as lack of firewall to conform with the Fire Building Code. After the Defendant had corrected the water infiltration problem, the air infiltration problem, including the possible escape into the Plaintiff's condominium unit of exhaust fumes from the car parkade below her condominium unit, it then started repair work on individual condominium units.

[para29] For a one year period in 1997, the Plaintiff stayed at an apartment in the Campus Towers in Edmonton at the total expense of the Defendant, but would not permit the Defendant to do any repairs to her condominium unit whatsoever, notwithstanding the proposals that had been made by the Defendant to the Plaintiff to complete such repairs on her unit. The purpose of the Plaintiff being provided accommodation elsewhere, at the Defendant's expense, was to give the Defendant the opportunity to conclude the repairs of the Plaintiff's condominium unit in order that she could return to live in it.

[para30] It was not until mid 1998 that the Plaintiff provided the Defendant with her engineer's report, and that simply pinpointed the problems that he investigated, but did not provide any proposal to alleviate the problems.

[para31] As the Plaintiff's psychologist said, she suffers from homelessness and the issue of this lawsuit hanging over her.

[para32] In my view, the Defendant has been overgenerous in its approach to the problems raised by the Plaintiff, but has received no cooperation whatsoever from the Plaintiff in its attempts to help the Plaintiff repair her condominium unit to a state where she can live in it.

[para33] I find that no negligence has been proven on the part of the Defendant in correcting the deficiencies to the building when these were brought to the Defendant's attention. It is interesting that none of the other condominium unit owners moved out of their condominium units, but had similar, and in some cases worse problems than the Plaintiff. I find that the Defendant acted in a reasonable and timely fashion to the concerns of the condominium owners' problems, including the Plaintiff. I find that the evidence does not establish any negligence on the part of the Defendant in carrying out its duties to maintain the condominium units, including the Plaintiff's condominium unit in a good serviceable state of repair, specifically the common areas which the Defendant is responsible for. In fact, I find that the Defendant went out of its way to accommodate the Plaintiff, but to no avail, due to the lack of assistance and co-operation of the Plaintiff.

[para34] If I am wrong in finding that there is no negligence on the part of the Defendant, then what damages flow if the Defendant was negligent? Certainly no mould problems were detected in the investigations done by the experts, that is, Span-Gas, or Northwestern Utilities, or the Capital Health Authority. No dangerous CO levels level were detected by Northwestern Utilities, or the Capital Health Authority, nor by Koliger Schmidt. The latter firm being an expert in interior air quality.

[para35] Consequently, the Plaintiff has not proven any injuries suffered by her because of the conditions in her condominium unit, and thus no damages could be awarded to the Plaintiff. The only damage the Plaintiff has suffered is to her unit, which she has steadfastly refused to let the Defendant make repairs to. Therefore, I find that the Plaintiff is the author of her own unfortunate set of circumstances and would award no damages to her for the repair necessary to her condominium unit if I had found the Defendant negligent in its duties.

[para36] As I have said, the Defendant is responsible for the common areas of the building, not for the damage to the individual condominium units unless such damage is caused, however it occurs, by the common areas such as the escape of gases from common area to a particular condominium unit or units, causing damage to that unit or its occupants.

[para37] The Defendant is not an insurer of the Plaintiff. The Defendant is obligated to do what is reasonable in carrying out its statutory duty. *Wright v. Strata Plan No. 205* [1998] B.C.J. No. 105 (B.C.C.A.), affirming [1996] B.C.J. No. 381 (B.C.S.C.).

[para38] Alternatively, as Defendant's Counsel argues, the Plaintiff has an obligation to mitigate. In this case, she has done just the opposite, that is, created road blocks and certainly done nothing to mitigate her damages. Therefore, on this basis also, she would not be entitled to any damage award.

[para39] Therefore, I dismiss the Plaintiff's claim against the Defendant with costs to the Defendant on the appropriate column.

[para40] I would allow the Defendant's claim for unpaid condominium fees, including interest, to whatever date Counsel calculated this interest in its agreed statement of facts, all of which totals \$9,647.31, which the Defendant will have judgment against the Plaintiff for, including costs of this counterclaim under the appropriate column of Schedule "C" of the Rules of the Court. This claim was not disputed by the Plaintiff.

LEWIS J.

* * * * *

APPENDIX "A"

DATE DESCRIPTION

October 24, This is the first occasion on which 1994 the Plaintiff complains to the Defendant and the builder about cracks in her walls and other construction deficiencies, including dampness in her unit, but no health concerns of her own are identified to the Defendant.

December 16, Simco Management is hired by the 1994 Defendant as project manager.

March 16, By this time, a number of deficiencies 1995 had been identified in the condominium building, and RJC is retained by the Defendant to assist in the investigation and repair of identified deficiencies.

March 30, Defendant proposes that an engineering 1995 study of the building be commissioned and work commences shortly thereafter.

April 4, 1995 A survey of owners is taken by the Defendant in order to identify construction and design deficiencies with the building.

April, 1995 Plaintiff moves out of her unit, no longer sleeping, eating or spending extended periods of time there, although she returned for clothes and baths on occasion.

May 23, 1995 Problems with the floors in units 201 and 203 are identified due to infiltration of water. These units are located on the same floor as the Plaintiff's unit.

May 29, 1995 The Plaintiff again complains to the Defendant about defects in her condominium unit, but no concern is raised by the Plaintiff with the Defendant about her health, infiltration of contaminants or blackening of carpets at this time.

June 20, 1995 Engineering proposals on how to deal with the dry rot associated with infiltration of water are addressed, and the first special levy is imposed to pay for foundation waterproofing work.

July 1995 The Plaintiff complains of blackening around the edges of her carpet and the same problem is identified in other units in the building.

July 1995 A further survey of owners is taken to identify the existence of building deficiencies, but the Plaintiff does not respond to this survey, presumably due to the fact that she is in Ireland.

Summer, 1995 Waterproofing on the foundation commences and this work, which is not concluded to this date, carries on into 1996. Work is also commenced on determining the cause of the soot and blackening of the carpets and walls in the units. RJC attributes the cause to fireplace malfunctioning, but also investigates the possibility of air balance problems as a cause of this problem.

October 1995 The Plaintiff reports 12 incidents of to October Blepharitis (swelling of the eyelids) to 1996 her physician, all of which incidents occur after the Plaintiff has moved out of her condominium unit.

October 28, RJC reports on the progress of foundation 1995 waterproofing work and investigations of soot problems.

October 30, Plaintiff obtains a report from her 1995 physician attributing her Blepharitis symptoms with allergies to mould. At no time is the existence of mould ever identified in the Plaintiff's unit, although numerous reports are commissioned to investigate this. The Span-Gas reports of January 31, 1996 and February 8, 1996 are negative, but these reports are not provided to the board. Also Capital Health Authority's report of February 8, 1996 is negative on this possibility.

November 1, A second special levy is approved by the 1995 Defendant to finance costs of investigation and repair.

November, The Plaintiff asks a friend, Mr. Ted 1995 Chambers, to look at her unit. He indicates that there is no obvious cause of blackening of carpets and no sign of moisture. Reference is made to air flow coming into the unit from below the baseboards of the walls and indicates possible infiltration of carbon monoxide (CO). Mr. Chambers does not prepare a report until September 1996 and the Defendant is not advised of his findings.

November 8, The Plaintiff complains about exclusion of 1995 in-unit damage as a repair priority. The Defendant explains that damaged units are not considered hazardous to health and are to be deferred to the Spring of 1996. If there were direct links to health problems, the board indicated that it would do the repairs immediately.

November 16, The Defendant approves a recommendation to 1995 have soot from the Plaintiff's unit analyzed by Alberta Research Council and repairs priced for the Plaintiff's unit.

December 4, The Plaintiff advises the Defendant that: 1995 She will be hiring her own engineer to conduct investigations; She must monitor any repairs; No one is to enter her unit without her permission.

December 4, At a board meeting, the following is 1995 discussed: An attempt to test carpet samples from the Plaintiff's unit has failed because of the inability to reach the Plaintiff; Repairs to the Plaintiff's unit will be deferred until receipt of the Plaintiff's engineer's report.

December 7, Bill Jones attends the Plaintiff's unit. 1995 Fireplace back draft is noted. Nothing is reported to the board in this regard.

December 7, RJC reports continued work on cleaning of 1995 stains and testing of fireplaces.

December 8, The board advises the Plaintiff that 1995 repairs to her unit will be deferred pending receipt of her engineer's report.

December 1995 The Plaintiff seeks assistance of the Capital Health Authority to investigate problems with suite.

January 5, The Plaintiff advises RJC (for the first 1996 time) of her suspicion that contaminants are entering her unit through the walls.

January 5, RJC conducts further testing of unit at 1996 the Plaintiff's request and reports to the Plaintiff that air leakage could have occurred through unsealed pipe penetration from parkade. Also advises that door sweeps should be removed.

January 10, RJC reports to the Board of findings with 1996 respect to the Plaintiff's unit as stated above. Also notes that dirt accumulations are evident due to master bedroom window not closing.

January 15, RJC reports to the Plaintiff that 1996 Northwest Utilities Limited (NUL) found no CO in unit and that fireplace was functioning properly.

January 16, Notice of assessment and condominium fee 1996 arrears issued to the Plaintiff.

January 18, RJC reports on work done to address 1996 problems with, among other areas, the Plaintiff's unit, including: Completion of a study with NUL, City of St. Albert and a mechanical contractor about soot and carpet blackening problems; Fireplaces not primary source of blackening; Board of Health found no unusual health concerns with the unit; Some of the problem will be corrected by air balancing.

January 23, RJC's report on January 18, 1996 1996 circulated to owners.

January 29, Plaintiff undergoes allergy tests. Tests 1996 determine allergies to moulds and household dust.

January 31, The Plaintiff commissions an investigation 1996 by Span-Gas. The tests reveal: No airborne yeast or mould in the unit; Elevated general biological contaminant which is not identifiable. This report not provided to the board.

February 5, The Plaintiff is referred to an 1996 ophthalmologist by Dr. Morison for assessment of her Blepharitis problem. Dr. Morison indicates that Plaintiff is "convinced" that the cause is something in her unit. Dr. Climenhaga is told by Plaintiff that she thinks mould in her apartment is causing her problem.

Dr. Climenhaga advises that the Blepharitis problems from which the Plaintiff is suffering is likely caused by her eye makeup. Plaintiff continues to wear mascara.

In follow-up report of Dr. Climenhaga on October 18, 1999, he states that it is impossible to relate the Plaintiff's eye condition to her apartment and reassures the Plaintiff as to the health of her eyes.

February 7, The Capital Health Authority reports no CO 1996 found in tests of Plaintiff's unit.

February 8, Span-Gas reports particle counts in the 1996 Plaintiff's unit are good and are not a concern.

February 8, The Capital Health Authority reports 1996 directly to the Plaintiff that: It investigated the Plaintiff's unit on January 12 and 15, 1996; No CO was found by NUL or Capital Health Authority on either day; Blackening of carpets is not due to mould or yeast; There is no dampness in the unit; The Span-Gas report of elevated bacterial counts was likely from outside air coming into unit through the open windows; High level of construction in the area at the time could have contributed to the elevated counts; No further work is warranted.

February 9, RJC reports to the board on its 1996 investigation of the Plaintiff's unit, including the following: Tests of fireplace showed no back draft; No CO found even with the fireplace operating; Windows open and dust and dirt were entering the unit; One small penetration into the unit was found and should be sealed (this was done shortly thereafter); The building lobby has dust and dirt that could be carried into the Plaintiff's unit; Construction activity in vicinity could contribute to this problem. RJC recommends: Air duct cleaning and balancing; Door sweeps be removed; The penetration sealed. That work is done shortly thereafter.

February 27, Tissue wipes from the Plaintiff's unit are 1996 submitted to Alberta Research Council for examination. The Alberta Research Council reports no findings of organic or inorganic contaminants.

March 13, Span-Gas issues a follow-up report at the 1996 request of the Plaintiff indicating that: Carpet samples are taken from the unit No mould or yeast in excess of that of occupied residences was found; Although not tested, the soot in the unit resembles automotive emissions; Air is flowing into the unit from base of walls. This report was not provided to the board prior to litigation. The third special levy is approved.

May 29, 1996 RJC reports to the Plaintiff that: Her unit has been effectively sealed off; The unit will continue to be monitored for further soot formation. No further soot formation is subsequently observed.

July 17, 1996 A proposal is made on repairs to Plaintiff's unit, including cleaning and repairing of sub-floor, once special assessment and condominium fees are paid. No repairs are authorized by the Plaintiff.

July 31, 1996 Report on construction process made to the owners. This report identifies repairs that would take place with the Plaintiff's unit.

September 19, The Plaintiff pays her condominium 1996 arrears. The board immediately gives directions to have repairs carried out.

October 4, The Plaintiff retains Counsel, Mr. Kevin 1996 Mott, who requests that the board pay the Plaintiff for temporary alternate accommodations.

October 10, The property manager advises Mr. Mott that 1996 the board can now carry out repairs to the Plaintiff's unit and asks for a meeting to arrange a course of action. No response is received until November 14, 1996.

October 17, The board confirm directions to proceed 1996 with repairs to the Plaintiff's unit without delay.

November 7, The ITV television station is asked by the 1996 Plaintiff to contact the property manager about the problems with her unit for a Trouble-Shooters episode.

November 12, ITV Trouble-Shooters episode airs. 1996

November 13, The board again requests a meeting with 1996 the Plaintiff to carry out repairs.

November 14, Mr. Mott agrees to meet with the property 1996 manager and a meeting takes place on November 21, 1996.

November 26, Mr. Mott forwards a proposal to the board 1996 for investigations of the Plaintiff's unit prepared by AD Williams (dated October 10, 1996).

December 4, RJC responds to the proposal by AD 1996 Williams for investigation of the Plaintiff's unit. It reports on a proposed manner of investigation and repair. The RJC report is forwarded to Mr. Mott.

December 5 Negotiations regarding alternative - 19, 1996 accommodations for the Plaintiff during repair end in selection of Campus Towers. The Plaintiff or her Counsel fail to respond to the proposal made by RJC for investigation and repair of the Plaintiff's unit.

May 27, 1997 This action commenced. No response is made by the Plaintiff regarding the repair procedure that had been proposed by RJC.

October, 1997 The fourth special levy is imposed.

November 20, The Condominium Association again proposes 1997 a plan of repair to Mr. Mott for his client's acceptance. Upon discontinuance of this action and a release, repairs will commence. This offer is rejected.

November 24, Mr. Mott advises that only inspections 1997 could be done to the Plaintiff's unit and that no repairs be carried out without authorization.

December 31, The Condominium Association, through its 1997 Counsel, confirms that the Plaintiff will not allow any repairs to proceed on her unit. On that basis, the Plaintiff is advised that the Condominium Association will no longer fund her alternative accommodations.

March 11, Mr. Mott advises that the Condominium 1998 Association should not enter

March 24, The Condominium Association, through its 1998 Counsel, again outlines a proposed repair procedure for the Plaintiff's unit, seeking authorization for those repairs and agreeing to fund alternative accommodations during the repair procedure. No discontinuance of the action is required. No authorization is granted to carry out these repairs.

June 10, 1998 A proposal is made by the Condominium Association that engineering experts for the Plaintiff (Jones) and Defendant (RJC) meet to discuss acceptable repair procedures. This proposal was never accepted.

CBR# 082

Condominium Plan No. 762 0380 v. Edmonton (City)

Between The Owners: Condominium Plan No. 762 0380, plaintiff, and The City of Edmonton, defendant

Action No. 9603 11780

Alberta Court of Queen's Bench Judicial District of Edmonton Cooke J. Heard: September 5, 2000. Judgment: February 12, 2001. Filed: February 13, 2001. (116 paras.)

Counsel: Louis M.H. Belzil, for the plaintiff. Roger Hofer, for the defendant.

REASONS FOR JUDGMENT

COOKE J.:--

FACTS

[para1] All of the evidence in this action was presented by way of an Agreed Statement of Facts pursuant to Rule 230 of the Alberta Rules of Court. The parties agreed that documents found by the Court to be relevant and otherwise admissible should not be taken to have proved the truth of the facts or statements contained therein except where agreed to by the parties.

A. The Parties

[para2] The Plaintiff is a condominium corporation under the Condominium Property Act, R.S.A. 1980, c. C-22 ("CPA"). It was established in 1976 and is commonly known as Academy Place.

[para3] The Academy Place condominium building is a mixed use condominium located at the corner of 100th Avenue and 116th Street in the City of Edmonton. The building itself is a 17 floor high rise with a basement. The basement, main and second floors of the building have a total of 22 commercial units. The remaining 105 residential units are located on the 3rd through 17th floors of the building.

[para4] The City of Edmonton is a municipal corporation contained under the Municipal Government Act, S.A. 1994, c. M-26.1 ("MGA").

B. The Condominium Property Act

[para5] Under the CPA, a condominium corporation is formed upon registration of a condominium plan with the Registrar of the Land Titles Offices. A condominium plan depicts individual units in the condominium building. The common property of the condominium is defined as all of those portions of the condominium building shown on a plan not otherwise comprised in a unit. The condominium plan shows the individual unit factors for each unit in the condominium building. Pursuant to s. 4(2) of the CPA, the common property in a registered condominium plan is held by owners of all of the units as tenants in common in shares proportional to their respective units.

[para6] Under the terms of the CPA, each unit shown on the plan must have assigned to it a number of "unit factors." In the case of Academy Place, the combined commercial units have 3319 out of 10,000 unit factors, as shown on the condominium plan. The combined residential units have 6,681 out of 10,000 unit factors.

[para7] The power to manage the common property of a condominium building is bestowed upon the Board of Managers constituted under s. 23 of the CPA. The Board of Managers is empowered pursuant to s. 31 of the Act to raise funds for the control, management and administration of the condominium property by levying owners in proportion to their unit factors for their respective units. These condominium fees cover expenses such as the following: heat, power, water, sewer, garbage removal, property taxes on the condominium parkade, janitorial services and elevator maintenance.

[para8] Condominium units in Edmonton are liable to be assessed property taxes owing to the City of Edmonton. The City levies its taxes based on its assessment of an individual unit including that unit's undivided share in the common property. Common property of a condominium corporation is not separately assessed.

[para9] Pursuant to the provisions of the CPA, Academy Place Condominium has duly enacted bylaws registered as instrument 792037957. The said bylaws were registered February 20, 1979, and have been in force continuously since that time.

C. The Subject Units

[para10] The present action concerns arrears of condominium fees on the following units in Academy Place: Units 1, 3, 7, 9, 17, 18 and 19. Each of these units fell into condominium fee arrears at various times between May 1, 1990 and October 1, 1990. Each of these units has been continuously in arrears since that date, and no payments have been received on the amounts owing. The City has paid monthly assessments on all of the subject units since April 1999, which funds have been received and segregated by the Plaintiff pending conclusion of these proceedings. The parties have agreed that the payment and acceptance of these amounts shall not constitute an admission or concession in these proceedings.

[para11] The same units each fell into arrears of property taxes at the same time as they fell into arrears of condominium fees. Property taxes were not paid June 30, 1990 for the 1990 property tax assessment and have not been paid since.

[para12] Pursuant to the provisions of the CPA and the bylaws of the Plaintiff, caveats in respect of unpaid condominium fees were filed at the following times against the following units:

Date Units

July 3, 1990 Units 17, 18 and 19 July 4, 1990 Unit 9 January 29, 1991 Units 1, 3 and 7

[para13] Pursuant to the provisions of the Tax Recovery Act, R.S.A. 1980, c. T-1 ("TRA"), tax notifications were registered against each of the units on May 30, 1992 by the Defendant.

[para14] At the time each of the units fell into condominium fee and property tax arrears they were owned by an Alberta corporation, Oskar Swiss Development Ltd. ("OSDL"). OSDL went into bankruptcy on February 16, 1993 at which time it continued to hold fee simple title to all of the subject units. According to the Statement of Affairs filed in the bankruptcy, the subject units were the only significant listed assets of the bankrupt.

[para15] The same Statement of Affairs shows the Plaintiff as a secured creditor of OSDL for unpaid condominium fees, and the Defendant as a preferred creditor of OSDL for unpaid property taxes.

[para16] On March 1, 1993 the Defendant gave notice of its intention to offer the lands for sale at public auction to be held April 22, 1993. Notice of the public auction was given in respect of all units. The sale also was advertised in the local paper as required by law.

[para17] The lands did not sell at the public auction and as a result notices were sent April 23, 1993 advising OSDL of the Defendant's intention to move to final acquisition under the TRA. Notices were sent in respect of all units in identical form.

[para18] On July 9, 1993 the Defendant received notice of the bankruptcy of OSDL, including notice of a stay of proceedings. This is the first notice the Defendant had received of the bankruptcy proceedings.

[para19] On July 12, 1993 the Plaintiff and Defendant each filed Proof of Claim in the bankruptcy proceedings.

[para20] The status of the title of the subject units did not change until September 21, 1994 when the Defendant executed transfers of land pursuant to the TRA.

[para21] The said transfers were registered on October 6, 1994. The Registrar of the Northern Alberta Land Registration District issued new titles in respect of the subject units. These titles each state that the City of Edmonton is the owner of an estate in fee simple as to the unit specified therein and as to a specified undivided portion of the common property as well. Opposite the word "consideration" is the statutorily mandated notation "Tax Forfeiture".

[para22] The Defendant's claim for unpaid property taxes was disallowed by the trustee in bankruptcy in February, 1997.

[para23] No monies were distributed either to the Plaintiff or the Defendant as creditors as a result of the administration of the bankruptcy of OSDL.

[para24] The Plaintiff commenced the present proceedings against the Defendant on May 31, 1996. As of that date the Defendant held title to the subject units in the manner described in paragraph 21.

D. Assessment of Common Area Expenses

[para25] Since the Plaintiff has been incorporated it has assessed condominium fees. The Plaintiff's earliest record referring to the assessment of condominium fees dates from 1977. The records for the Plaintiff concerning the assessment of condominium fees, to the extent they have been located, were summarized in a table attached to the Agreed Statement of Facts and marked as Exhibit 13.

[para26] To the knowledge of the current Board of Managers of the Plaintiff, and based upon a review of the corporate records, the Defendant's challenge to the validity of the resolutions assessing condominium fees prior to July, 1996 is the first and only challenge to the validity of these resolutions.

[para27] Basing the rates of assessment on the foregoing, the total arrears in condominium fees owing in respect of the subject units as of September 5, 2000 were:

- i. Arrears to September 5, 2000: \$341,739.59
- ii. Interest calculated at the rate prescribed by bylaw 44: (18% simple P.A.) \$330,301.81
- iii. GST on the above: \$ 47,042.90

Total: \$719,084.30

[para28] As at September 6, 2000 the outstanding property taxes due to the City on these units amounted to \$331,244.28.

E. Use of Units by The City of Edmonton

[para29] The Defendant has keys for each of the subject units in Academy Place. It received the keys in February, 1996 from the trustee in bankruptcy of OSDL after advising the trustee that it had taken title to the units.

[para30] Prior to February, 1996, the Plaintiff had no knowledge that the Defendant had taken title to the subject units. By letter dated February 13, 1996 and received by the Defendant February 16, 1996, the Defendant was advised of the arrears in condominium fees owing in respect of the subject units.

[para31] The usual practice of the Defendant when receiving tax forfeiture properties is to have tenants pay utility bills and maintenance costs. If there are no tenants in the property, the Defendant itself, if necessary, will pay utility costs and undertake repairs to preserve structural integrity of its tax forfeiture properties.

[para32] The ordinary practice of the Defendant is to sell or lease tax forfeiture properties which are unlikely to be redeemed. This is not a written policy, but has been the Defendant's practice for the last 12 years. In this case, the Defendant has been advised by its legal counsel to make no effort to lease or sell the units until the conclusion of these proceedings.

[para33] In June, 1998, the Defendant commissioned a further property appraisal in respect of the subject units. The collective appraised value of the units as of June, 1998 was \$99,500.00.

[para34] The outstanding condominium fee arrears and interest and the outstanding taxes exceed the value of the units at this time.

THE ISSUE

[para35] The issue in these proceedings is whether the Defendant, by reason of the exercise of its tax recovery powers, became liable in debt for all of the arrears of condominium fees and interest pursuant to s. 31(2) of the CPA, including those arrears which accrued due prior to its taking title as well as those which accrued due subsequent to that event?

[para36] At the heart of the Plaintiff's claim is s. 31(2) of the CPA, which reads:

31(2) A contribution levied as provided in subsection (1) is due and payable on the passing of a resolution to that effect and in accordance with the terms of the resolution, and may be recovered by an action for debt by the corporation

(a) from the person who was the owner at the time when the resolution was passed, and

(b) from the person who was the owner at the time when the action was instituted,

both jointly and severally.

[para37] The Plaintiff relies upon s. 31(2)(a) in respect of those arrears in condominium fees which accrued due since October 6, 1994, when the Defendant became the owner of the subject units. The first assessment after the Defendant took title was by way of a resolution dated July 19, 1995, effective September 1, 1995. The arrears accrued due after September 1, 1995 amount to \$162,829.30, without regard to interest. The Plaintiff's position is that these are arrears owing by the Defendant as "owner at the time the resolution was passed".

[para38] The Plaintiff relies upon s. 31(2)(b) in respect of its claim for arrears and interest which accrued due prior to October 6, 1994. Those arrears total \$178,910.29, without regard to interest. They accrued due while the units were held by OSDL. Given the provisions of s. 31(2)(b), the Plaintiff takes the position that the Defendant is liable for those arrears and associated interest as the Defendant was the owner of all of the subject units on May 31, 1996, the date when this action was commenced.

[para39] The defence raises the following four questions:

(a) Is the City an "owner" under the CPA and therefore liable for contributions which have been levied but remain unpaid?

(b) Is s. 31(2) of the CPA inconsistent with the TRA and the MGA? If so, what is the effect of this inconsistency?

(c) Does the City's failure to obtain leave under s. 69.4 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 invalidate its title to the subject units?

(d) Were any valid resolutions levying condominium fees passed by the Plaintiff during the fiscal years prior to 1996 - 97 and is interest payable on any such assessments which were properly levied?

ANALYSIS

A. Validity of the Assessments

[para40] I will address the fourth question first, namely whether the resolutions passed levying contributions during the fiscal years prior to 1996 - 97 are valid and whether interest is payable on any contributions which were properly levied but which have not yet been paid.

[para41] Section 31(1) of the CPA reads:

31(1) In addition to its other powers under this Act, the powers of a corporation include the following:

(a) to establish a fund for administrative expenses sufficient, in the opinion of the corporation, for the control, management and administration of the common property, for the payment of any premiums of insurance and for the discharge of any other obligation of the corporation;

(b) to determine from time to time the amounts to be raised for the purposes mentioned in clause (a);

(c) to raise amounts so determined by levying contributions on the owners in proportion to the unit factors for their respective units;

[Note an amendment to (c) in September 2000 is not relevant to the deliberations in this action.]

[para42] Section 31(2) refers to the passing of a resolution to levy contributions on the owners.

[para43] By virtue of sections 26, 30 and 31 of the Act and articles 20(i) and 44 of the bylaws of the Plaintiff, it is clear that it is the Board of Managers that has the duty to assess the estimated common expenses for the ensuing year. All matters at a meeting of the Board shall be determined by a majority vote with a casting vote to the chairman in addition to his original vote. As well, a quorum for a meeting of the Board shall be a majority of the members of the Board. Article 16 states that a resolution of the Board in writing signed by all of the members shall have the same effect as a resolution of the Board duly convened and held.

[para44] It is the Defendant's position that there is insufficient evidence of the passing of any resolutions levying contributions on the owners prior to July 17, 1996. The Defendant argues that s. 31(2) of the CPA imposes onerous obligations on subsequent

owners in terms of unpaid condominium fees. As a result, it is imperative that there be strict compliance with the CPA by the condominium corporation.

[para45] A distinction must be drawn between the existence of corporate decisions and evidence thereof (*Roman Hotels Ltd. v. Desrochers Hotels Ltd.* (1976), 69 D.L.R. (3d) 126 (Sask. C.A.)). A decision which is not recorded in the minutes may be proven by other means.

[para46] I have examined the 33 documents in Exhibit 14 appended to the Agreed Statement of Facts. While they leave something to be desired in terms of draftsmanship in the context of the requirements of s. 31(2), it is apparent that the Board initiated action each year with respect to the determination of a levy. In some years that action was to set the levy at a percentage increase over a previous year. In other years it was the preparation of a schedule setting forth each unit and its respective assessment levy. These documents are some evidence of the existence of the corporate resolutions made. While no evidence exists for some years as to whether the procedural requirements of notice and quorum were met, I am not prepared to speculate that there were such deficiencies as would allow me to find that in terms of s. 31(2) no resolution was passed. On this point the defence fails with respect to the amount of the levy.

[para47] The bylaws of the corporation clearly call for interest to be paid on all assessments or payments in arrears at the rate of eighteen percent per annum. Section 33 of the CPA provides that if any such interest is owing by an owner to the corporation, the corporation may recover that amount in the same manner as a contribution and for that purpose the interest amount is to be regarded as a contribution under s. 31.

[para48] In *Condominium Plan 82R42988 v. Royal Bank*, [1994] 7 W.W.R. 409, the Saskatchewan Court of Queen's Bench considered whether the equivalent of our s. 31(2) would allow a condominium corporation to claim interest as against a subsequent title holder on assessments levied as against the prior owner. The court held at para. 25 that:

For interest to be payable on unpaid contributions the resolution must say so if it is to be enforced. It is not enough that bylaws of the owner provide for payment of interest, at least it is not enough when suing a subsequent owner as in the present case. The bylaws are not binding on a successor owner retroactively. In any event, the resolutions imposing the assessment did not incorporate the bylaws into the resolution by reference.

[para49] I agree that the bylaws cannot bind a subsequent owner retroactively. Accordingly, the Defendant cannot be held liable for interest on condominium assessments which accrued due prior to the City taking title to the units. However, I am of the view that interest can be claimed on assessments levied after the Defendant acquired title as the City was bound by the bylaws of the condominium corporation.

B. Whether the Defendant is an "Owner"

[para50] I turn now to the interpretation of the word "owner" as set forth in s. 31(2) of the CPA, particularly in the context of the TRA and the MGA.

[para51] The Plaintiff's position is that the Defendant is an owner within the meaning of s. 31(2). Section 1(n) of the CPA defines an owner as the person who is registered as the owner of the fee simple estate in a unit.

[para52] The Defendant submits that, by virtue of the manner in which it acquired title to the units under the TRA, it does not own an estate in "fee simple" but rather some lesser estate.

[para53] As the term "fee simple" is not defined in the CPA or by reference to any other legislation, it must be defined by reference to the common law.

[para54] "Fee simple" is described in *Black's Law Dictionary*, 6th ed. (St. Paul: West Publishing Co., 1990) at 615 as meaning:

Typically, words "fee simple" standing alone create an absolute estate in the devisee and such words followed by a condition or special limitation create a defeasible fee. Absolute. A fee simple absolute is an estate limited absolutely to a person and his or her heirs and assigns forever without limitation or condition. An absolute or fee-simple estate is one in which the owner is entitled to the entire property, with unconditional power of disposition during one's life, and descending to one's heirs and legal representatives upon one's death intestate. Such estate is unlimited as to duration, disposition, and descendibility.

[para55] R.E. Megarry and H.W.R. Wade, in their text *The Law of Real Property*, 6th ed. (London: Stevens & Sons Ltd., 2000) at pp. 54 and 55 (see also *Shon Yee Benevolent Assoc. of Canada v. British Columbia* (1991), 55 B.C.L.R. (2d) 370 at 376 (S.C.)), describe the fee simple as "the most ample estate which can exist in land" and further suggest that "Pre-eminent among a fee simple owner's rights are his rights of alienation and his right to everything in, on or over the land."

[para56] In contrast to the fee simple absolute estate, Megarry and Wade define the fee simple defeasible and fee simple determinable (collectively referred to as "modified estates") respectively as follows (at pp 64-75):

Determinable fee: A determinable fee is a fee simple which will automatically determine on the occurrence of some specified event which may never occur.

A fee simple upon condition: Akin to but distinct from a determinable fee is a fee simple which has some condition attached to it by which the estate given to the grantee may be cut short.

[para57] The nature of the Defendant's interest in the subject units must be determined with reference to the TRA.

[para58] Prior to the coming into force of the current MGA on January 1, 1995, the Defendant's powers, rights and obligations in regard to taxation were set out in the *Municipal Taxation Act*, R.S.A. 1980, c. M-31, as amended, and the TRA.

[para59] It is common ground that the Defendant obtained title to the units pursuant to the TRA. As required by the TRA, each title was endorsed with the words "Final Acquisition and Tax Forfeiture".

[para60] The Plaintiff argues that the words "Final Acquisition and Tax Forfeiture" which appear on the various certificates of title and are a statutory requirement of both the TRA and the MGA, are simply an indication that no consideration in the usual sense passed upon the transfer of title from the defaulting taxpayer to the City of Edmonton.

[para61] The Plaintiff submits that no significance should be attached to these words in terms of diminishing the status of the Defendant's fee simple estate. I do not agree. These words were meant as a form of notice that the title is distinguishable from other titles and that there may be outstanding rights or interests affecting the land.

[para62] Under the TRA, provision is made for the recovery of municipal property taxes in the following manner:

* In March of each year, the municipality is to file with the Registrar a tax arrears list of all parcels with tax arrears of greater than one year (s. 3).

* The Registrar is to place tax recovery notifications on the certificates of title (s. 4).

* The municipality is to offer every parcel with a tax recovery notification on title for sale by public auction within three years from registration of the notification (s. 9).

* A parcel that is not sold at the first public auction may be sold only after it has been finally acquired by the municipality (s. 18(1)).

* If not sold at the public auction, the parcel is finally acquired by the municipality one year after the auction (s. 20(1)).

* The municipality may take title and thereupon becomes the owner of an estate in fee simple of the parcel free from all but certain prescribed encumbrances and any subsisting right under the TRA to redeem the parcel (s. 20(1)). Such final acquisition title is to be marked "Tax Forfeiture" by the Registrar (s. 20(2)).

[para63] The TRA and the MGA both provide for redemption rights on the part of the defaulting taxpayer and certain trust obligations on the part of the municipality.

[para64] Section 426 of the MGA states in part:

426(1) If the tax arrears in respect of a parcel of land are paid after the municipality becomes the owner of the parcel under section 424 but before the municipality dispose of the parcel under section 425(1), the municipality must notify the Registrar.

(2) The Registrar must cancel the certificate of title issued under section 424(2) and revive the certificate of title that was cancelled under section 424(2).

[para65] Section 428.2(1) and (2) read:

428.2(1) Despite anything in this Division, where a parcel of land has been offered for sale at a public auction and the certificate of title for the parcel has been marked "Tax Forfeiture" by the Registrar, the municipality may request the Registrar to cancel the existing certificate of title for the parcel of land and issue a certificate of title in the name of the municipality on the expiry of 15 years following the date of the public auction.

(2) On the issuance of a certificate of title in the name of the municipality, all responsibilities of the municipality under this Division to the previous owner of the parcel of land cease.

[para66] It should be noted that in the present case the redemption period under the TRA would not have expired until April of 1997, being approximately 11 months after filing of the Statement of Claim. However, it is clear from s. 435, the continuation provision of the MGA, and from the Transitional Regulation, A.R. 372/94 under the Act that a 15 year redemption period as provided for under that Act applies to the units in question.

[para67] Sections 427 and 427 of the MGA deal with the disposition of the proceeds from the sale of property, whether before or after the final acquisition of the property by a municipality. Section 427 states in part:

427(1) The money paid for a parcel of land at a public auction or pursuant to section 425

(a) must be deposited by the municipality in an account that is established solely for the purpose of depositing money from the sale or disposition of land under this Division, and

(b) must be paid out in accordance with this section and section 428.

(3) If there is any money remaining after payment of the tax arrears and costs listed in subsection (2), the municipality must notify the previous owner that there is money remaining.

(3.2) If the municipality is not satisfied that there are no debts that are secured by an encumbrance on the certificate of title for the parcel of land, the municipality must notify the previous owner that an application may be made under section 428(1) to recover all or part of the money.

[para68] The Alberta Court of Appeal in *Bailey v. Parkland (County)* No. 31 (1986), 71 A.R. 256, 45 Alta. L.R. (2d) 225 at 227 agreed with counsel for the appellant in that case that the County:

stands in the relationship of a trustee or a fiduciary to the owner whose lands have been sold for or are the subject of a tax sale, to see that the land is not sacrificed and to exercise great care in the best interests of the owner.

[para69] The Defendant argued that it is not the fee simple owner because the defaulting taxpayer is to receive the ultimate surplus of the sale proceeds, if any, and because any market value increase in the value of the land accrues not to the final acquisition title holder but to the defaulting taxpayer.

[para70] Many of the provisions of the TRA and the MGA relied upon by the Defendant are in the nature of statutory restraints, for example, the sections which prohibit municipal councillors or employees from bidding on tax sales. The Defendant placed particular emphasis upon the right of redemption in the defaulting taxpayer and the fact that any market value increase accrues to that taxpayer as the basis for its argument that the tax forfeiture title was something less than a fee simple estate.

[para71] Rather than attempt to characterize this as something less than a fee simple estate, I prefer to explain it on the basis of legal and equitable ownership.

[para72] When A sells a parcel of land to B under a formal agreement for sale, B becomes the equitable owner while A retains legal title, holding it as trustee for B pending payment of the balance of the purchase price. A, however, remains registered as the owner of the fee simple estate, for that is what he has bargained to deliver to B on payment of the purchase price.

[para73] My view is that *Bailey v. Parkland (County) No.31*, supra is authority that this is the position of the municipality until such time as it moves to the next step in the enforcement procedure under s. 425(1)(b) of the MGA, acquiring the land in effect by purchase, or s. 428.2(1), acquiring the land at the end of the redemption period, at which point the municipality becomes both the legal and equitable owner of the land.

[para74] As indicated by the authors of *Anger and Honsberger's Law of Real Property*, vol. 1, 2nd ed. (Aurora, Ont.: Canada Law Books Inc., 1985) at 99:

The rights of the owner of the fee simple may, however, be restricted. Thus, the estate may be subject to a condition, a collateral or an executory limitation, or to the terms of a trust. Moreover, it is subject to rules of public policy such as the rule against perpetuities, to restrictions such as the law of nuisance, and to modern statutory restraints, such as family disinheritance and matrimonial property legislation, environmental protection statutes, planning and zoning legislation, expropriation by the State, aeronautics legislation, and to the right of the Crown to minerals.

[para75] While the right of redemption in the defaulting taxpayer and the trust obligations imposed on the Defendant suggest that the taxpayer retains an equitable interest in the property, they do not derogate from the legal interest held by the City. That interest is a fee simple estate in the property. The Defendant is the owner of the freehold estate in possession of the lands.

[para76] I find support for my conclusion in the TRA itself. Section 20(1) of the Act declares that every parcel for which there is a subsisting tax notification or caveat is finally acquired by the municipality on the expiry of one year from the date of the sale. The section then provides that "the municipality may take title to the parcel and thereupon becomes the owner thereof subject" to various encumbrances and the former owner's right of redemption [emphasis mine].

[para77] Section 1(h) of the Act defines "owner" as "a person who is registered under the Land Titles Act as the owner of a freehold estate in possession of land." Section 1(u) of the MGA defines an "owner" as the person who is registered under the Land Titles Act as the owner of the fee simple estate in the land. Subsections 424(1) and (2) of the MGA further provide:

424(1) The municipality at whose request a tax recovery notification was endorsed on the certificate of title for a parcel of land may become the owner of the parcel after the public auction, if the parcel is not sold at the public auction.

(2) If the municipality wishes to become the owner of the parcel of land, it must request the Registrar to cancel the existing certificate of title for the parcel of land and issue a certificate of title in the name of the municipality.

[para78] The Defendant in the present case chose to take title to the units. It was described in the certificate of title for each unit as the owner of an estate in fee simple. Section 66(1) of the Land Titles Act, R.S.A. 1980, c. L-5 provides that every certificate of title is conclusive proof against all persons that the person named therein is entitled to the land included in the certificate for the estate or interest therein specified.

[para79] I agree with the Plaintiff's argument that it would be absurd if the TRA and MGA define ownership in relation to the registry but then disregard the registry in terms of defining the Defendant's estate in the land.

[para80] I find that the Defendant prima facie falls within the definition of "owner" of the units for purposes of s. 31(2) of the CPA.

C. Inconsistency Between CPA and TRA/MGA

[para81] The Plaintiff placed great emphasis on the definition of "owner" in the CPA, the TRA and the MGA. While I agree that the Defendant would seem to fall within the definition of "owner", I am concerned that the result of this determination leads to an inconsistency between s. 31(2) of the CPA and the historic thrust of tax recovery legislation.

[para82] In this case it would mean that the City, while fulfilling its statutory duty under the TRA to recover taxes in the sum of \$331,244.28 incurred a debt of \$719,084.30.

[para83] I am compelled to the view that there is an inconsistency by s. 348 of the MGA, which reads:

348 Taxes due to a municipality

(a) are an amount due to the municipality

(b) are recoverable as a debt due to the municipality

(c) take priority over the claims of every person except the Crown.

(d) are a special lien

(i) on land and any improvements to the land, if the tax is a property tax, a special tax or a local improvement tax

[para84] As well, s. 39 of the TRA provides that the Act supersedes all provisions inconsistent therewith in any other Act.

39 Subject to section 41, the provisions of this Act supersede all provisions inconsistent therewith and contained in any Act or Ordinance whether that Act or Ordinance is one of general application or relates to one municipality only. [Section 41 has no relevance to this matter.]

[para85] The goal of statutory interpretation is to determine the intention of the legislature. While the starting point must be the words used in the statute, the provision in question should be interpreted with the context of that provision in mind.

[para86] The contextual method of statutory interpretation assumes that there is horizontal consistency between statutes. An interpretation favouring harmony between statutes should prevail. Apparent conflicts should be resolved so as to re-establish that harmony (Pierre-André Côté, *The Interpretation of Legislation in Canada*, 2nd ed. (Cowansville, Québec: Les Éditions Yvons Blais Inc., 1991) p. 288).

[para87] In *Central and Eastern Trust Company v. Borland* (1981), 36 A.R. 260, 14 Alta. L.R. (2d) 376 Master Funduk held that the charge for unpaid condominium fees created by filing of a caveat is wiped out by an order for foreclosure obtained by a prior mortgagee. At p. 379 he suggested that:

If a mortgagee who obtains title to the lands by a final order of foreclosure is liable in debt for the outstanding condominium fees, there may be an absurdity in the charge the Condominium Property Act gives to secure the debt being wiped out by the final order of foreclosure. The mortgagee, as owner, is liable in debt and the charge no longer exists. However, if there is such an absurdity it is a matter for the legislators, not the court, to resolve.

[para88] In *Adler, Furman & Associates Ltd. v. Condominium Plan CDE 13442*, [1983] A.J. No. 290 Master Funduk considered a situation where a second mortgagee became the registered owner of certain condominium units by way of a foreclosure action commenced by the first mortgagee. The foreclosure order stipulated that the new title was to issue free and clear of all encumbrances, including the caveat filed by the respondent for unpaid condominium contributions. The respondent filed a further caveat. Master Funduk, applying a previous decision of Bowen J. in *Owners Condominium Plan No. 772, 1595 v. Greenacre Homes Ltd.*, Alta. Q.B., Edmonton No. 8203-22545 (unreported) held that the new caveats were valid charges on the land. On appeal ((1984) 37 Alta. L.R. (2d) 338, [1984] A.J. No. 734 (Q.B.)), Bowen J. stated at para. 13:

The Act is clear that the right of action in debt and the right to file a caveat follows the new owner when title is transferred. It may be that the foreclosure and vesting order in registering the title free and clear of all encumbrances does take away the respondent's rights against the appellant, but only in so far as they were trustees on that title. It does not and could not take away the respondents' rights in debt as against the appellants in the guise of new beneficial owners on the title.

In view of this court's decision in *Greenacre* one wonders how the vesting order was given free and clear of all encumbrances which would include the original caveats. This order was not appealed, although the respondents were given notice of it. I note that Master Funduk makes it clear that, in future, caveats filed by a condominium association will remain on title.

[para89] On further appeal ((1985) 37 Alta. L.R. (2d) 341 (C.A.)), Moir J.A., who delivered the judgment of the court, expressed the view that liability for condominium fees is not wiped out when a second mortgagee tenders on a first mortgagee's foreclosure application and gains title to the property. At para. 2 he stated:

The liability for condominium fees was clearly imposed on both the past and present registered owners of the condominium by s. 31(2) of the Condominium Property Act in this province. In our view, nothing in the Condominium Property Act (particularly s. 31) in any way undermines the indefeasibility provisions so clearly expressed in, and which underly [sic], the Land Titles Act of Alberta.

[para90] There is additional caselaw which confirms that the condominium corporation's claim for unpaid contributions can be advanced against a mortgagee after foreclosure (see *Condominium Plan No. 8110301 (Owners of) v. Sohal* (1984), 35 Alta. L.R. (2d) 23, [1984] A.J. No. 411 (Q.B.); *Condominium Plan No. 82R42988 v. Royal Bank of Canada*, supra). If there was any question of this, the matter has been clarified by the recent addition of s. 31(9) to the CPA (S.A. 1996 c. 12, s. 32), which came into force on September 1, 2000. Subsection 31(9) provides that notwithstanding s. 31(6), which equates the priority of a caveat filed in respect of unpaid contributions to that of a mortgage, the corporation's caveat is to remain on the title even if the property has, subsequent to filing of the caveat, been acquired by foreclosure, by an action for specific performance or by public auction conducted under those sections of the MGA dealing with the recovery of taxes relating to land.

[para91] It seems clear that the legislature intended that the debt for outstanding condominium contributions should apply to a mortgagee who has obtained title to the property through foreclosure and to a party who has obtained title through means of a public auction on sale of the property for outstanding taxes. These parties are in a position to avoid any debt liability. Section 31(2.1) of the CPA provides that an unpaid condominium contribution may be paid by a mortgagee who may add that amount to the amount owing under the mortgage. In addition, s. 31(3) stipulates that an estoppel certificate is to be provided by the condominium corporation on the request of a purchaser or mortgagee.

[para92] The City is in an entirely different position in that it cannot avoid liability unless it fails in its obligation to pursue tax recovery. It is significant that subsections 31(3) and (9) of the CPA do not refer to municipalities which have taken title to the property through tax forfeiture.

[para93] It would seem that an anomaly has been created by the recent amendments. It is surely beyond argument that a bidder at a tax sale makes a determination as to his final bid on the basis of his evaluation of market value and the total price which may be comprised of a cash payment and an assumption of liabilities.

[para94] Assume a condominium has a market value of \$60,000.00 but bears unpaid condominium fees of \$40,000.00 and unpaid taxes of \$25,000.00. The successful bidder will only bid the market value of \$60,000.00 on condition that the condominium fees are paid, given that the condominium corporation's caveat would otherwise remain against the title. The effect of s. 31(9) of the CPA is to give a preference to the condominium corporation over the municipality with respect to the \$5000.00 in unpaid taxes.

[para95] However, consider the position where the property is not sold at a tax sale but rather the municipality becomes the owner pursuant to s. 425(1)(b) or s. 428.2 of the MGA. Section 427(1) provides for a scheme of distribution for the money paid

for parcels acquired under s. 425(1)(b). Under this scheme, taxes are given priority. Section 428.2(4) provides that the municipality obtains the title free and clear of all but the enumerated encumbrances, which do not include condominium fees.

[para96] If s. 31(9) of the CPA has created an anomalous tax recovery result where the municipality disposes of the land by tax auction sale as opposed to acquisition under s. 425(1)(b) or s. 428.2, as I have described above, it does not fall to the Court to resolve that anomaly.

[para97] Returning to the fundamental issue of inconsistency between the CPA and the MGA, municipalities are in a priority position in terms of overdue taxes. Pursuant to s. 348 of the MGA the taxes due a municipality are a special lien on the land. To allow the Defendant to recover its overdue taxes through the tax forfeiture process but then to impose a debt liability on the City for the overdue condominium contributions levied prior to it taking title to the property, would be to defeat its priority position and special lien.

[para98] In order to avoid this inconsistency between the CPA and the MGA, I would interpret the term "owner" as it appears in s. 31(2)(b) of the CPA as excluding a municipality which has taken title to the parcel through the tax forfeiture process but which has not yet obtained an absolute fee simple interest in the land on expiry of the redemption period (i.e. become the beneficial as well as the legal owner). This exclusion or limitation would operate in a similar manner as s. 434.1(1) of the MGA which prohibits any action against a municipality with respect to the state and condition of land shown on the tax arrears list unless the municipality aggravates the condition of the land after it gains the right to possession of the land or becomes the owner of the land under s. 424.

[para99] Under the MGA, if the land remains unsold at the end of the redemption period and the municipality requests the Registrar to issue a new certificate of title in the name of the municipality, the municipality must deposit in the Environmental Protection and Enhancement Fund the lesser of the fair market value of the land and the amount of the remedial costs. Rather than imply a similar provision in the present case, I prefer to leave the matter to the legislature to resolve.

[para100] I recognize that my decision leaves open the question whether a purchaser of the subject lands from the Defendant would assume the liability for unpaid condominium fees. Again, I would suggest that that is a matter which should be addressed by the legislature. I would note, however, that such an outcome would not be inconsistent with s. 31(9) of the CPA.

[para101] Although I am prepared to limit the operation of s. 31(2)(b) as it relates to municipalities which have taken title on a tax forfeiture, I do not believe that a similar limitation is warranted with respect to s. 31(2)(a). Once the Defendant acquired title to the units in question, it was bound by the bylaws of the condominium corporation as would be any other owner. The contributions levied by way of resolution of the Board are an obligation of each owner, including the City. According to the parties' Agreed Statement of Facts, the Defendant ordinarily arranges for the tenants of tax forfeiture properties to pay utility and maintenance costs. If the City has not leased out the property, it takes responsibility for these costs itself. The condominium fees should be treated in a like manner.

D. Failure of the Defendant to Obtain Leave Under the Bankruptcy and Insolvency Act

[para102] The Defendant argues that because it failed to obtain leave under s. 69.3 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA"), its title to the subject condominium units is not valid. However, I note that the Defendant became aware of the bankruptcy proceedings in July of 1993 and first pleaded a defect in its title on September 4, 1997. Nevertheless, it has taken no steps to reconvey the title to the subject properties to the trustee in bankruptcy. Nor does it appear that the City's title to the units has been challenged by the trustee.

[para103] Section 69.3 specifies in part that:

69.3(1) Subject to subsection (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged.

(2) Subject to sections 79 and 127 to 135 and subsection 248(1), the bankruptcy of a debtor does not prevent a secured creditor from realizing or otherwise dealing with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed, unless the court otherwise orders, but in so ordering the court shall not postpone the right of the secured creditor to realize or otherwise deal with his security, except as follows

[para104] The Defendant suggests that the proper procedure for the City to have followed was to apply under s. 69.4 for the stay to be lifted. Section 69.4 states:

69.4 A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied

(a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or

(b) that it is equitable on other grounds to make such a declaration.

[para105] Forfeiture of property for non-payment of taxes was held to be a "remedy" for purposes of s. 69.3 in *Re Westline Ranch Ltd.* (1987), 65 C.B.R. (NS) 16 (B.C.C.A.), aff'd 60 C.B.R. (NS) 200 (B.C.S.C.).

[para106] The Defendant cites *Amanda Designs Boutique Limited v. Charisma Fashions Limited* (1972), 17 C.B.R. (NS) 16 (Ont. C.A.) in support of its contention that remedies which are pursued by a creditor when a stay is in place are ineffective to confer on the party pursuing those remedies any rights to the property involved. Kelly J.A., who delivered the judgment in that case, stated at pp. 19-20:

The object of the Bankruptcy Act is to ensure that the property of an insolvent person or corporation be made available for the benefit of creditors rateably subject only to the priorities established or recognized by the Act. It is inherent for the accomplishment of this purpose that, upon the Act coming into operation with respect to the property of a particular debtor, the rights of a creditor to pursue his own remedy, otherwise than as provided by the Act itself, should be suspended. In my opinion,

for the attainment of this purpose, it is essential that, after the Act imposes its operation on or in respect of the property of a debtor no act or proceeding not recognized by the Act should improve the position of a creditor or confer upon him any right not held by him at the time the Act comes into effect with respect to the debtor [emphasis mine].

And further at p. 25:

From a consideration of the foregoing I conclude that proceedings taken or continued in violation of s. 40(1), even though irregular, rather than null and void, in the sense that probably they are capable of being regularized ex post facto by the granting of leave nunc pro tunc, unless and until so regularized (and then subject to any conditions which may be imposed as a condition of granting the leave) are ineffective to confer upon the party taking them any rights to property levied or leviable by a sheriff.

[para107] The concern of the court in *Amanda Designs Boutique Limited*, supra was with actions taken by an unsecured creditor. The BIA defines a creditor as a person who has a claim, unsecured, preferred by virtue of priority under s. 136 or secured, provable as a claim under the Act (s. 2(1)). Any claim or liability provable in proceedings under the Act by a creditor is a provable claim. A secured creditor includes a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against property of the debtor as security for a debt due or accruing due from the debtor (s. 2(1)). Although a secured creditor may decide to prove his or her claim in the bankruptcy, the creditor may act as a stranger to the bankruptcy by realizing on the security. The BIA does not affect the secured creditor's treatment of their security. The policy of the Act is not to interfere with secured creditors except as necessary to protect the estate as to any surplus on realization of the security.

[para108] In *Donalda (Village) v. Toronto Dominion Bank* (1990), 111 A.R. 389, [1990] A.J. No. 1065 (Q.B.) the applicant sought an order declaring that it had priority over the respondent bank in relation to a mobile home owned by a bankrupt. Marshall J. referred to s. 69.3 of the BIA. He also referred to s. 136(1)(e) of the Act which provides:

136(1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

(e) municipal taxes assessed or levied against the bankrupt, within the two years immediately preceding his bankruptcy, that do not constitute a preferential lien or charge against the real property of the bankrupt, but not exceeding the value of the interest of the bankrupt in the property in respect of which the taxes were imposed as declared by the trustee

[para109] As Marshall J. observed at QL p. 3, s. 136 is confined to the assets that come into the hands of the trustee in bankruptcy and are available for distribution among the unsecured creditors. In view of its special lien for overdue taxes, a municipality in Alberta falls within the exception found in s. 136(1)(e) and its status as a secured creditor and priority are unchanged by the bankruptcy (see *New Brunswick v. 786371 Ontario Ltd.*, [1999] N.B.J. No. 17 (N.B.C.A.)).

[para110] The Ontario Court of Justice (general Division) in *Totalline Transport Inc. v. Caron Belanger Ernst & Young Inc.*, [1999] O.J. No. 660 held that in accordance with s. 69.3(2) of the BIA a secured creditor does not require special leave to exercise its security outside of the bankruptcy.

[para111] I am aware that the Defendant filed a Proof of Claim in the bankruptcy proceedings and that this Proof of Claim was disallowed. However, this did not occur until February 1977, some two and a half years after title to the subject units was registered in the name of the City. As I indicated previously, the Defendant's title to the units does not appear to have been challenged by the trustee in bankruptcy.

[para112] I am of the view that the City did not require leave to exercise its security outside of the bankruptcy (*Imperial Lumber Co. v. Johnson*, [1923] 1 D.L.R. 1125, (1923) 3 C.B.R. 707 (Alta. S.C.A.D.; *L.W. Houlter and C.H. Morawetz, Bankruptcy and Insolvency Act 1994* (Scarborough, Ontario: Carswell, 1993)). Even if I am wrong in this regard, I am of the view that the Defendant's title is valid unless and until challenged by the bankruptcy trustee.

CONCLUSION

[para113] The Plaintiff has presented sufficient evidence of the resolutions passed by its Board of Managers in which annual contributions were levied to satisfy s. 31 of the CPA. Interest on the condominium fee assessments was dealt with only in the bylaws of the Plaintiff corporation. While that is sufficient to establish liability on the part of the Defendant for interest on contributions levied after the City took title to the subject units, there is no liability for interest on fees assessed prior to the City taking title in the absence of an express resolution calling for interest.

[para114] The City prima facie became an owner of the property in question for purposes of s. 31 of the CPA on its taking title to these lands. However, as there is an inconsistency between the CPA and the MGA, the term "owner" as used in s. 31(2)(b) of the CPA is to be given a restricted meaning which excludes a municipality that has taken title to the parcel through the tax forfeiture process but which has not yet obtained an absolute fee simple interest in the land on expiry of the redemption period. Accordingly, the Defendant is not an owner under s. 31(2)(b) of the Act. This restricted definition does not apply to the term "owner" as used in s. 31(2)(a) of the CPA. Therefore, the City is liable for contributions levied since it has acquired title to the units.

[para115] The City's title to the lands is not invalid by reason of it not having obtained leave under s. 69.4 of the BIA.

[para116] The Plaintiff shall have its costs of this action.

COOKE J.

CBR# 095

Crawford v. London (City)

Between Thelma Crawford, plaintiff, and The Corporation of the City of London, defendant, and Ruebsam Engineers Inc. and Stevens Kroetsch Architects Inc., third parties

Court File No. 30707/99

Ontario Superior Court of Justice Gillese J. Heard: April 19, 2000. Judgment: May 29, 2000. (31 paras.)

Counsel: C. Scott Ritchie, Q.C. and C.M. Wright, for the plaintiff. B. McCall, for the defendant. No one appearing for the third parties.

[para1] GILLESE J.:-- This is a motion for leave to appeal the decision of Justice Haines dated February 3, 2000, the effect of which was to permit the plaintiff to continue the within action under the Class Proceedings Act, 1992.

Facts

[para2] In the late 1980s, six separate condominium developments were erected on Jalna Boulevard, Conway Drive, Deveron Crescent and Trafalgar Street in the City of London.

[para3] On or about July 20, 1995, the City of London, through its Fire Prevention Division, required that all fireplaces installed in these condominiums be rendered inoperative as they presented significant fire hazards. In total, the directive affected 999 individual condominium units and 6 condominium corporations.

[para4] All wood burning fireplaces in the condominium complexes in question were converted to insert fireplaces at the expense of the individual unit owners.

[para5] The six condominium corporations have made no claims and have expressly stated that they will not bring any claims under the Condominium Act.

[para6] The plaintiffs allege that the Building Inspectors and Plans Inspectors as the City of London breached their duty to properly inspect drawings, construction plans, and the construction of these condominiums and approved building plans which were deficient and which did not comply with the Ontario Building Codes.

[para7] Thelma Crawford, the proposed representative plaintiff, was the owner of three condominium units which contained the defective fireplaces and which were located in different condominium corporations.

[para8] In addition to the current owners, the class consists of a large number of former condominium unit owners who paid to replace the defective fireplaces in 1995.

[para9] The plaintiff, Thelma Crawford seeks certification as the representative plaintiff in a class proceeding under the Class Proceedings Act, 1992 on behalf of "[a] 11 persons who own or owned condominium units in which they were required to convert wood burning fireplaces to gas insert fireplaces" as a result of alleged deficiencies in the installation of the wood burning fireplaces.

[para10] The defendant, the Corporation of the City of London, brought a motion under Rule 20 for an order declaring that the Class Proceedings Act, 1992 did not apply to the special damages claim in this action.

[para11] Justice Haines held:

A plain reading of s. 37(a) of the CPA seems to preclude the application of that CPA where it can be said that the proceeding the plaintiff is seeking to pursue under the CPA may be brought by the plaintiff in a representative capacity under another Act. In such circumstances, a plaintiff or applicant must proceed under the other Act. This is not the case here. The plaintiff, a unit owner, cannot maintain a representative action under any, Act on behalf of current or former owners of any of the units in any of the subject condominium corporations. It may be that the unit owners will not be able to claim for damages to the common elements, but in my view that does not preclude the plaintiff from pursuing an action under the CPA for the damages the unit owners are entitled to claim.

Both counsel made submissions as to why one procedure was preferable to the other. These submissions may be important on a motion for certification but, in my view, are not relevant to the inquiry required under s. 37(a) of the CPA where the question is whether the subject proceeding is one which a plaintiff or applicant is permitted to bring in a representative capacity under another statute. If the answer to the question is "yes" the CPA does not apply. But if the answer is "no", as is my finding here, the action may be commenced under the CPA.

The Relevant Legislation

[para12] For convenience, the legislation relevant to the matters in issue is set out now.

[para13] Section 37(a) of the Class Proceedings Act, 1992, states:

37. This Act does not apply to,

(a) a proceeding that may be brought in a representative capacity under another Act.

[para14] Section 14(1) of The Condominium Act provides;

14.(1) The corporation after giving written notice to all owners and mortgagees may, on its own behalf and on behalf of an owner, sue for and recover damages and costs in respect of any damage to common elements, the assets of the corporation or

individual units, and the legal and court costs in any such actions brought in whole or in part on behalf of any owners in respect of their units shall be borne by those owners in proportion in which their interests are affected.

The Requirements for Leave to Appeal

[para15] Rule 62.02(4) of the Rules of Civil Procedure, R.R.O. 1990, Regulation 194, provides that leave to appeal an interlocutory order of a Judge shall not be granted unless,

(a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or

(b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

ISSUE #1: Rule 62.02(4)(a) - IS THERE A CONFLICTING DECISION?

[para16] Counsel are agreed that there is no decision directly in conflict with that rendered by Justice Haines. However, defendant City argues that Justice Haines was guided by different legal principles than in other cases decided on s. 37 of the CPA thus, for the purpose of Rule 62.02(4)(a), it can be said that there are conflicting decisions.

[para17] The first decision that the defendant City points to is *Millgate Financial Corp. v. B.F. Realty Holdings Ltd.* [1994] O.J. No. 1968. In *Millgate*, s. 37(c) of the CPA, 1992 was found to exclude the application of the CPA, 1992 when a previous proceeding had been commenced in another province. I do not find the legal principles used in *Millgate* to be at odds with those used by Justice Haines. In *Millgate*, Justice Farley held that the word "proceeding" in s. 37 could not refer to a "class proceeding". He held that the word "proceeding" refers to and includes litigation. Clearly, Justice Haines does not treat the word "proceeding" as if it refers to class proceedings. He also treats it as referring to litigation.

[para18] In para. 32 of the *Millgate* case, Justice Farley states:

Thus, it would appear to me that the CP Act should receive a broad interpretation which, of course, would allow it to fulfill what its proponents say are its obvious benefits. However, if it is to be broadly interpreted to achieve that end, I do not see how one can narrowly interpret the definition of proceeding in s. 37(c).

[para19] In the passage quoted, Justice Farley adopted the principle that the word "proceeding" in s. 37(c) is to be interpreted broadly. Given that Justice Haines took a broad view of the word proceeding in s. 37(a), I find his approach consistent with the approach of Justice Farley. Therefore, I find no inconsistency in the principles used by Justice Haines with those used in *Millgate*.

[para20] The defendant City then points to *Stern v. Imasco Ltd.*, [1999] O.J. No. 4235 and argues that the test employed by Justice Haines is substantially different from that used by Justice Cumming in *Stern*. In *Stern*, Cumming J. held that s. 37(a) did not apply to an action that might be brought by way of oppression remedy. The defendant argues that Justice Cumming established a "hallmark test" to be applied when considering s. 37(4) of the Class Proceedings Act, 1992. The defendant submits that the hallmark test is as follows:

To be a representative proceeding under another statute, the alternative proceeding must be binding on the members of the class. The court must be able to ascertain the binding effect of the decision at the outset of the litigation.

[para21] My reading of *Stern* does not accord with the view proposed by the defendant City. I accept that Cumming J. states, in para. 68 of the *Stern* decision, that:

The hallmark of an action "brought in a representative capacity" under a statute is a declaration made expressly by the court, or implicitly by the statute, at the front and of the proceeding that the complainant's action will govern the rights and obligations of the members of the specifically defined represented class.

However, in my view, the sentences quoted are Justice Cumming's view of how to determine whether an action is brought in a representative capacity. It is not a test to determine whether s. 37(a) applies. In my view, the factors which drive Justice Cumming to his conclusion that s. 37(a) of the Class Proceedings Act, 1992 did not constitute a bar to a class proceeding that alleged a claim based upon oppression within the ambit of the CBCA are found in paras. 71-77. In those paragraphs, he draws attention to the obligation of the class representative and class counsel to act in the best interests of the class as a whole, including absent class members. He notes the court's broad discretion to determine the conduct of the class proceeding and the significant policy objectives underlying the Class Proceedings Act. He specifically notes, in paras. 73 and 74, the following:

Where the criteria of the CPA are met such that certification would be given, then a claim of oppression under the CBCA should logically be able to be brought by way of a class proceeding. A purposive interpretation is to be given to the CPA. The utilization of the CPA is complementary and facilitative to achieving the objectives of the oppression remedy provisions of the CBCA.

As well, the statement of claim in the instant situation includes asserted claims beyond the claim of oppression. It would be anomalous and counter-productive to the policy goals of the CPA if there could be a class proceeding in respect of non-oppression claims and yet the claim of oppression had to be pursued as a separate action because of s. 37(a) of the C.P.A.

[para22] Justice Cumming concludes his analysis in para. 77:

I share the general observation of Blair, J. in *Re First Marathon Inc.*, [1999] O.J. No. 2805 (S.C.J.) at para. 27, cited by defendant's counsel, that "[c]lass action proceedings and the statutory procedure created for dealing with and approving corporate arrangements are two quite different procedures with two quite different purposes." However, it does not follow that a class proceeding can never be procedurally appropriate in respect of an oppression action.

[para23] The reasoning of Justice Cumming set out above is consonant with that of Justice Haines. Justice Haines uses a purposive approach to the CPA. He notes that the statement of claim in this matter includes claims beyond those that a condominium corporation could bring. It is implicit in his reasoning that it would be counter-productive to the goals of the CPA if there could be a class proceeding in respect of some claims and yet the claim had to be pursued under the Condominium Act.

And, it is clear that he concludes that the statutory procedure created for dealing with condominium actions has different purposes than class action proceedings and that a class proceeding can be procedurally appropriate in respect of actions involving condominiums. Thus, I cannot conclude that there is a difference in the legal principles that guided Justice Haines from those that Justice Cumming followed.

[para24] In conclusion, I find there is no conflicting decision within the meaning of r. 62.02(4)(a). As a consequence, there is no need to consider whether it is desirable that leave to appeal be granted.

ISSUE #2: Rule 62.02(4)(b) - IS THERE GOOD REASON TO DOUBT THE CORRECTNESS OF THE ORDER IN QUESTION?

[para25] The defendant City argues that there are two grounds that provide good reason to doubt the correctness of Justice Haines' order. First, it argues that Haines J. interpreted s. 37(a) of the Class Proceedings Act, 1992 so as to read into it the words "by the plaintiff". That is, the defendant says that Haines J. interpreted s. 37(a) as if it reads as follows:

This Act (i.e. CPA, 1992) does not apply to a proceeding that the plaintiff may bring in a representative capacity under another Act.

[para26] The actual wording of s. 37(a) does not have the underlined words "the plaintiff". The defendant City argues that where the words of the statute are precise and ambiguous, the court may not depart from the plain meaning of the words unless to do so would lead to absurd consequences and that there is a presumption against reading words into a statute.

[para27] The second ground argued by the defendant City is that the effect of Justice Haines' decision is contrary to the purpose of s. 37(a) of the Class Proceedings Act, 1992, which is to exclude from its ambit those actions for which there are special statutory representative proceedings. Section 14(1) of the Condominium Act is such a special provision, so that argument runs, in that it creates a substantive right in condominium corporations to bring "class actions" on behalf of unit owners. Thus, the defendant City argues since condominium corporations are the only entity with the right to bring an action for the full extent of the damages, the effect of Justice Haines' decision is to create a situation in which multiple actions may be brought on the same facts. In effect, the defendant City argues that the order of Justice Haines leads to a situation where a condominium unit owner has a right to commence a class proceeding even if his or her condominium corporation has already commenced an action. It argues that where special provision has been made for condominium corporations to bring a representative action for the full extent of the damages without the complexity and expense of the procedure set out in the Class Proceedings Act, 1992, the provisions of the Condominium Act are frustrated by the commencement of a class proceeding.

[para28] The reality is that a remedy under the Condominium Act is not available to this class for a number of reasons. First, a condominium corporation must bring an action under the Condominium Act and the six condominium corporations in question have refused to bring such actions. I note that there is no mechanism under the Condominium Act to force a condominium corporation to advance a claim on behalf of the unit owners and that it appears that the condominium corporations are in conflict with the unit owners based on the defendant City's proposed third party claims against the condominium corporation. Second, an action under s. 14(1) by a condominium corporation can be brought only on behalf of current owners. There is no provision in s. 14(1) of the Condominium Act that allows a representative action to be brought by a condominium corporation on behalf of former unit owners. Third, this proceeding involves a claim initiated by a single unit owner with condominium units in two different condominium corporations. Under s. 14(1) of the Condominium Act, a single unit owner cannot advance a representative action for the members of a single condominium corporation much less for individuals who own units in different condominium corporations.

[para29] In my view, the inquiry required by s. 37(a) is "Is this action a proceeding that may be brought in a representative capacity under the Condominium Act?" It is only when the answer to that question is affirmative that the Class Proceedings Act, 1992 does not apply and the proceeding cannot be brought pursuant to its provisions. Since this proceeding cannot be brought in a representative capacity under the Condominium Act, s. 37(a) of the CPA does not apply. There is nothing in the approach or result of the decision of Haines J., therefore, that gives me reason to doubt the correctness of his decision. There is no need to consider the second arm of the test in r. 62.02(4)(b).

Conclusion

[para30] Accordingly, the motion for leave to appeal is dismissed.

[para31] Counsel may make written submissions as to costs, both entitlement and quantum, within 20 days of the release of these reasons.

GILLESE J.

CBR# 112

Eberts v. Carleton Condominium Corp. No. 396

Between Sheila Eberts, applicant (respondent in appeal), and Carleton Condominium Corporation No. 396, Marcel Braun and Jean-Claude Levlièvre, respondents, and Claude-Alain Burdet In Trust, respondent (appellant)

Docket No. C33368

Ontario Court of Appeal Toronto, Ontario Finlayson and Carthy JJ.A. and Simmons J. (ad hoc) Heard: September 15, 2000. Judgment: October 16, 2000. (28 paras.)

On appeal from the judgment of Justice Roydon Kealey dated November 19, 1999.

Counsel: John A.M. Judge and Adrian C. Lang, for the appellant. Kenneth Radnoff and Beverly Johnson, for the respondent.

The judgment of the Court was delivered by

[para1] FINLAYSON J.A.:-- The appellant, Claude-Alain Burdet in Trust (the "Trust") appeals the judgment of the Honourable Mr. Justice Kealey declaring that 18 condominium units, 16 of which are presently owned by the Trust, are entitled to a total of three votes instead of the 18 stipulated by s. 22(1) of the Condominium Act, R.S.O. 1990 c. C.26.

Facts

[para2] Condominium Corporation No. 396 ("Condo 396") was developed in 1987 by 648578 Ontario Inc. (the "developer"). It is a 33 unit commercial condominium complex located at 112 Nelson Street in Ottawa with units on Levels A, 1 and 2. The respondent, Sheila Eberts ("Eberts"), purchased one unit in 1987 and has since leased it out as commercial space. The Trust purchased 18 units in 1997 and has since sold two of those units to third parties. The 16 units currently owned by the Trust are located on Level A, which is the basement. The trustee, Dr. Burdet, personally owns an additional three units located on Levels 1 and 2.

[para3] When Condo 396 was first advertised for sale, the development application of February 2, 1987, described the 33 units as "15 industrial commercial units and 18 storage units". However, when Condo 396 was first registered by Declaration, it provided that the 18 Level A units were unrestricted in use which entitled each unit to one vote in accordance with the Condominium Act. At that time, all 33 units were owned by the developer.

[para4] Before title to any of the units was transferred, an amendment to the Recitals of the Declaration was made on December 10, 1987 and registered in Land Titles. It clarified that Condo 396 contained 33 commercial units. Notwithstanding this change in the Recitals from when she purchased her unit in 1987, Eberts proceeded to close the sale without objection and without exercising her right of rescission. The trial judge found that she was not aware of the clarification made to the Declaration but it is clear from her cross-examination on her affidavit that she did concede that she was aware of the change. In any event, since the change to the Recitals was registered under the Land Title system, she is deemed to have knowledge of it.

[para5] In December 1987, the developer entered into agreements of purchase and sale for all 33 units. Eberts was one of the purchasers, acquiring unit 1 on level 2. On December 11, 1987 the 18 Level A units were transferred to 685310 Ontario Inc. in trust for Soloway, Wright, a law firm. These basement units were used to store files and records. On January 25, 1988, Soloway, Wright entered into an undertaking stipulating that as long as it remained the owner of the Level A units, it would not exercise more than three votes.

[para6] On May 20, 1988, Condo 396 brought an application pursuant to s. 3(8) of the Condominium Act, against the developer in the Ontario Court (General Division) for a declaration that the Level A storage units did not have voting rights. During the hearing of the application, Susan Gibson, a lawyer at Soloway, Wright, gave evidence that her firm was not prepared to restrict its ability to pass title to the 18 units, each with a separate vote. Ms. Gibson also gave evidence that the undertaking was provided to demonstrate the firm's "good faith" that it had no intention of controlling Condo. 396. No consideration was given for Soloway, Wright's voluntary limit to its voting rights.

[para7] The application was denied by Flanigan J. on June 14, 1988. In his brief endorsement, he stated:

[This is] not an inconsistency envisaged by the Condominium Act. This amendment if executed would clearly change the interest of the owners of the basement in the land. This is not what section 3(8) contemplates. Such changes should only be granted in clear cases and this is not one such case. Application dismissed with costs.

[para8] After the application failed, on January 25, 1989 Soloway, Wright entered into a settlement stipulating that it would take steps to permanently reduce the voting rights of the Level A units from 18 to three if all the necessary consents were obtained from the unit owners and the Declaration amended. However, the necessary consents were not obtained, the settlement letter was not registered on title against the Declaration or included in the archives of Condo 396, nor was it appended to any minutes of the unit owners' meetings.

[para9] On June 30, 1989 Condo 396 registered By-Law No. 4 against the Declaration which purported to reduce the 18 Level A voting rights to three. By-Law No. 4 was registered despite the fact that it had not been approved by the unit owners at a special meeting as required by s. 28(2) of the Condominium Act and consents had not yet been obtained from all unit owners. The By-Law could have no effect until an amendment to the Declaration was registered on title with the necessary consent of all unit owners, in light of s. 28(1) of the Condominium Act, which stipulates that a by-law must not be "contrary to this Act or to the declaration".

[para10] Over a period of several months in 1990, Dr. Burdet personally purchased two units on Level 2. In both instances, Dr. Burdet received an estoppel certificate with no mention of the purported changes to the 18 Level A voting rights. There was evidence that Dr. Burdet was present at the annual general meetings from 1991 to 1995 where the change to the voting scheme was approved. He attended his first meeting on April 18, 1991. At that meeting, Eberts contends that the minutes of the meeting reveal that all signatures had been previously obtained to amend the Declaration but, because they had been misplaced, the signatures had to be obtained again. In his affidavit, Dr. Burdet claims he did not receive all of the necessary signatures from the

owners and mortgagees. In addition, he asserts that none of the documents he received were originals. Thus, he alleges that he did not, nor did anyone else, have the proper authority to register the amendment to the Declaration.

[para11] On January 31, 1997, Dr. Burdet's Trust acquired the 18 Level A units from Soloway, Wright. At the annual general meeting on February 26, 1997, Dr. Burdet took the position that he held 18 votes for the units and became the president. No amendment was made to the Declaration to limit the voting rights of 18 Level A units. In 1997, the Trust sold two Level A units to third parties.

[para12] Eberts brought an application to amend the Declaration to provide that the voting rights of all 18 Level A units be permanently reduced to three votes, that alternatively the "settlement" with Soloway Wright be enforced, and in the further alternative that the respondent Trust and the owners of its units from time to time be prevented from exercising more than three votes. On November 19, 1999, Kealey J. granted the application and ordered the voting rights of the 18 Level A units be reduced to three.

Reasons of the applications judge

[para13] In ordering that the voting rights of the Level A units be reduced to three votes, the applications judge found that Soloway, Wright's settlement agreement was binding on all present and future unit owners. He also found that Dr. Burdet, a director of Condo 396, accepted responsibility for completing the formalization of the January 1989 agreement to reduce the voting rights of the basement units to three votes. He further found that the appellant Trust's conduct was unfair and that equity required the court's intervention under s. 3(8) of the Condominium Act to invoke the doctrine of proprietary estoppel. He reasoned that the Trust had notice of the reduction of voting rights for the 18 Level A units as arranged in the settlement agreement. He further held that it would be unfair to allow the 18 basement storage units (which made up 16 percent of the common elements) to have the power to control the entire condominium.

[para14] These additional findings were made by the applications judge:

Burdet's action or inaction which thwarted the amendment to the declaration repeats the initial wrongfulness by the developer and re-activates the detriment to the applicant insofar as her proprietary interest is concerned. The applicant and other unit holders ceded their rights to fully litigate the developer-owners December 1987 conduct in exchange for the agreement of limited voting rights for Level A. Burdet, as an owner director of the Corporation, further lulled the applicant and others by apparently accepting the responsibility of completing the formalization of the January 1989 agreement, while he did nothing for a year. Then, in direct conflict with such a commitment, he with the express intent of controlling the Corporation, purchased the 18 basement units and voted himself in as president.

Generally, equity is available to avoid injustice and protect the interests (property or otherwise) of society and individuals especially where such injustice arises as a result of unfair, unscrupulous and opportunistic conduct which accords advantage to the actor over the reasonable, fair and lawful expectancy of another when all is taken into account. Here, in my view the doctrine of proprietary estoppel applies to the facts.

Issues

1) Can the express provisions of the Condominium Act be overridden by principles of contract or equity to reduce the number of votes for the 18 Level A units to three?

2) Do the principles of proprietary estoppel apply?

Analysis

Issue 1: Application of principles of contract and equity to condominium voting rights

[para15] The application under appeal is misconceived. Condominiums are creatures of statute. The rights of the parties are governed by the documents authorized by the Condominium Act and can be changed only in the manner provided for therein. In this case there were a number of attempts to change the ratio of voting rights to condominium units without complying with the provisions of the Condominium Act. They all had to fail.

[para16] The first was the undertaking given by Soloway, Wright which was a unilateral agreement between a unit owner and the condominium corporation. This was ineffective because s. 60 of the Condominium Act provides that the "Act applies despite any agreement to the contrary."

[para17] The second attempt was the ill-advised application before Flanigan J. which he properly dismissed on the ground that the requested declaration exceeded his jurisdiction under s. 3(8) of the Act. Subsection 3(8) is restricted to amending a declaration where the motions judge "is satisfied that an amendment is necessary or desirable to correct an error or inconsistency in the declaration arising out of the carrying out of the intent and purpose of the declaration."

[para18] The third attempt was the passing of By-Law No. 4 which could not prevail because it was inconsistent with the Declaration.

[para19] The fourth attempt was the application under appeal which should have been dismissed for the same reason as the one before Flanigan J. Private agreements cannot override the provisions of the statute and equity can only prevail over an express statutory scheme in the rarest of circumstances of which this is not one. Moreover, s. 3(8) of the Condominium Act allows a judge to amend a declaration, but only for a collective purpose. The section cannot be used to enforce against third parties agreements between individual unit holders. Nor can the equitable doctrine of proprietary estoppel be utilized in the face of clear statutory direction.

[para20] In this case, the Declaration stipulated that there are 33 units. Subsection 22(1) of the Condominium Act provides:

All voting by owners shall be on the basis of one vote per unit and, where two or more persons entitled to vote in respect of one unit disagree on their vote, the vote in respect of that unit shall not be counted.

The wording of s. 22(1) is clear. To simply reduce the voting rights of the 18 Level A units to three would be contrary to s. 22(1). What is necessary is an amendment to the Declaration re-classifying the controversial units as storage space so as to make it clear that they are not units at all within the meaning of the Act.

[para21] Section 60 of the Condominium Act makes clear that regardless of the equitable nature of Soloway, Wright's settlement agreement, or the "unfair, unscrupulous and opportunistic" conduct of the appellant Trust, the agreement cannot supersede the express provisions of the Act: *Carleton Condominium Corp. No. 347 v. Trendsetter Developments Ltd.* (1992), 9 O.R. (3d) 481 at 490 (C.A.). Furthermore, ss. 3(4) and (5) of the Condominium Act provide that any amendment to a declaration that is inconsistent with the terms of the Act will be void and of no effect:

3(4) Subject to subsection (5), the declaration may be amended only with the consent of all owners and all persons having registered mortgages against the units and common interests.

3(5) Where any provision in a declaration or by-law is inconsistent with the provisions of this Act, the provisions of this Act shall prevail and the declaration or by-law is deemed to be amended accordingly.

[para22] I accept the appellant's submission that the combined effect of ss. 3(4), 3(5), 22(1) and 60 reflect the underlying policy of the Condominium Act which embraces the principle of one vote per unit. This right is fundamental and necessary to prevent any abuse that would be caused if contracting out of the Act were otherwise permitted.

Issue 2: Application of principles of proprietary estoppel

[para23] Proprietary estoppel is a form of promissory estoppel. It is commonly supposed that estoppel cannot give rise to a cause of action, but proprietary estoppel appears to be an exception to that rule: see Lord Denning in *Crabb v. Arun District Council*, [1976] 1 Ch. 179 at 187-188 (C.A.). But there must be an estoppel. The basic tenets of proprietary estoppel are described in *McGee, Snell's Equity*, 13 ed. (2000) at pp. 727-28:

Without attempting to provide a precise or comprehensive definition, it is possible to summarize the essential elements of proprietary estoppel as follows:

(i) An equity arises where:

(a) the owner of land (O) induces, encourages or allows the claimant (C) to believe that he has or will enjoy some right or benefit over O's property;

(b) in reliance upon this belief, C acts to his detriment to the knowledge of O; and

(c) O then seeks to take unconscionable advantage of C by denying him the right or benefit which he expected to receive.

(iv) The relief which the court may give may be either negative, in the form of an order restraining O from asserting his legal rights, or positive, by ordering O to either grant or convey to C some estate, right or interest in or over his land, to pay C appropriate compensation, or to act in some other way.

[para24] One has only to look at the above to understand that estoppel has no application to the facts of this case. This is a claimant (Eberts) who is an owner of one unit attempting to obtain relief against another owner (the Trust) based on some representations said to have been made by the Trust's predecessor in title (Soloway, Wright) to the developer of the condominium project; a representation, if it amounted to anything, that was not made to Eberts and on which she did not rely nor act to her detriment. Eberts bought her unit in 1987, long before Dr. Burdet or the Trust was involved and as the record seems to indicate, even before Soloway, Wright acquired its title. Accordingly, there was no inducement or representation made by the developer or Soloway, Wright to Eberts upon which she could have acted to her detriment. Furthermore, the representation was simply that Soloway, Wright would not vote its full units while it remained an owner of the units in question. It did not purport to be binding on its successors in title. As a conclusionary point, this issue was litigated before Flanigan J. and was terminated adversely to Eberts. This judgment, if not *res judicata*, is at least issue estoppel against Eberts.

[para25] Eberts attempts to circumvent this basic problem about the lack of evidence of her changing her position at all, much less to her detriment, by raising a new claim in estoppel. She maintains that she abandoned her appeal against the judgment of Flanigan J. because of the "settlement" with Soloway, Wright, which she maintains Dr. Burdet had undertaken to implement. She was abandoning nothing. Her appeal was hopeless. It would have been restricted to the original undertaking restricting voting rights of Soloway, Wright while it was the owner, not the subsequent conditional settlement which was intended, if completed, to bind successors and assigns. Dr. Burdet had no ability to carry out the settlement between Soloway, Wright and Condo 396. At best, he could only undertake to make his best efforts to obtain the unanimous consent of the unit owners other than himself and the Trust.

[para26] In his reasons, the applications judge held that "Burdet's action or inaction repeats the initial wrongfulness by the developer and reactivates the detriment to the applicant and other unit holders insofar as her proprietary interest is concerned". This finding is in error on a number of levels. The developer had not wronged Eberts. If it had, Dr. Burdet had nothing to do with it. There was no detriment to Eberts to re-activate. Ebert's proprietary interest remained unchanged from the day she signed her application to purchase her unit to the present day.

[para27] In my view of the facts of this case, the respondent Eberts appears to be convinced that she was somehow misled by the developer at the time she purchased her unit. This is all water under the bridge. Her grievance, whatever its merits, cannot be visited on Dr. Burdet who was operating under the rules laid down by the Condominium Act.

[para28] Accordingly, for the reasons stated, I would allow the appeal, set aside the judgment below and enter a judgment dismissing the application. The appellant should receive its costs, here and below.

FINLAYSON J.A. CARTHY J.A. -- I agree. SIMMONS J. (ad hoc) -- I agree.

Court File No. 99-CV179022

Ontario Superior Court of Justice Lamek J. Heard: October 16-17, 19-20, 2000. Judgment: January 18, 2001. (39 paras.)

Counsel: Angela Assuras, for the plaintiff. Fred Levitt, for the defendant.

[para1] LAMEK J. (endorsement):-- In this unhappy action, the plaintiff, Vernon Evered ("Evered") seeks repayment of an amount of \$20,000 U.S. that he had advanced to discharge the mortgage on a condominium owned by the defendant, Bernice Binstock ("Binstock") in Fort Lauderdale, Florida. In effect, he seeks to repudiate a written agreement entered into by the parties on November 9, 1997 on the ground that there has been a total failure of consideration flowing from Binstock. In a last-minute amendment to his Statement of Claim, he seeks further alternative relief, to which I shall refer later.

[para2] Evered is a widower in his mid-70s, Binstock a widow in her late 60s. They met after Evered responded to an advertisement placed by Binstock in the "personal" columns of a newspaper. That was in June, 1997.

[para3] A romantic and sexual relationship soon developed between them. They spent several months together in Fort Lauderdale, Florida in the Winter of 1997-8, living in a condominium owned by Binstock. She had bought the condominium in 1994 for approximately \$27,000 U.S. and it was subject to a mortgage held, originally, by California Federal Bank and later, by First Nationwide Mortgage.

[para4] While the parties were in Florida, their relationship began to deteriorate. From the evidence I have heard and from the letters written by Evered to Binstock (which were in evidence), it is apparent to me that Evered was given to bouts of intense jealousy. He was greatly upset when Binstock received a call from and went to visit a former lover who was dying. He was very suspicious about calls to Binstock from "Terry" who was said by Binstock to be a decorator friend with whom she had never had any romantic involvement. In short, I am satisfied that Evered was extremely possessive, suspicious and jealous in the relationship.

[para5] In April, 1998, the parties returned to Toronto where they maintained separate residences. It appeared that the relationship was over. But while they were still in Florida, there had been discussions about Binstock's financial situation. Evered had said that he wanted to "help her" with the condominium and had mentioned the possibility of an interest-free loan. He was outraged when, on their return to Toronto, with their relationship apparently at an end, Binstock asked if she could still have the loan. He refused.

[para6] Notwithstanding their estrangement, Evered sent a birthday card to Binstock on her birthday in August, 1998. He wrote her a letter on September 21, 1998. I read that letter as manifesting considerable concern for and tenderness towards Binstock. She obviously took the same message from it because in late October (Evered had been in England) she telephoned him and the relationship was resumed.

[para7] Early in November, 1998, Evered was diagnosed with serious heart problems that would require the implantation of a pacemaker. The parties had again talked about Evered's assisting Binstock with her financial situation. His health concerns added a measure of urgency to his desire to help Binstock and in the period from approximately November 3, 1998, the parties discussed and drafted the agreement that lies at the core of this lawsuit. I reproduce the agreement in full:

[set out entire agreement]

[para8] I accept the evidence of Binstock that although she actually typed the document on Evered's computer, the text of the agreement, with the exception of the second sentence in the third paragraph, was language dictated by Evered. I attach no significance to that, however Binstock's Statement of Defence alleges, somewhat half-heartedly, that she was afforded neither the time to consider the agreement or the opportunity to obtain independent legal advice. I am satisfied that she knew exactly what she was signing and understood the agreement and its ramifications and implications.

[para9] The agreement was executed by the parties before a notary on the morning of November 9, the day on which Evered was to be admitted to hospital for installation of his pacemaker. Upon leaving the notary's office, they went to the Toronto-Dominion Bank, where Evered had an account, and obtained a U.S. dollar draft for \$20,716.85 in favour of the mortgagee of Binstock's Florida condominium. The funds for the draft came from Evered's account. They then went to the Sheraton Centre and mailed the draft to the mortgagee. Evered then reported to the hospital. At his request, Binstock did not accompany him into the hospital.

[para10] Following Evered's discharge from hospital, the parties spent the Winter together in Florida, again at Binstock's condominium. In accordance with their agreement, Evered paid two-thirds of the monthly expenses (taxes, insurance, maintenance) giving Binstock \$200 per month. He continued to do so until April, 1999.

[para11] In May and June, 1999, an unfortunate situation arose that led to the ultimate break-up of the parties' relationship. On May 15, Evered gave to Binstock a cheque drawn on his account with the Toronto-Dominion Bank in the amount of \$1,000 U.S. in payment of his share of the condominium expenses for the following six months. His expectation was that Binstock would simply send the cheque to Florida where it would be deposited in the account that she had opened for the payment of condominium expenses. In fact, the defendant considered that there would likely be less delay in arranging for the payment of expenses if she deposited the cheque in her account in Toronto and then had the money sent by electronic transfer to Florida. When she went to deposit the cheque at the Bank of Montreal, she was told, after the bank's stamp had been endorsed on it, that there was some question as to whether the funds to be credited and transferred to Florida would be U.S. or Canadian dollars. She therefore retrieved the cheque. She says that she told Evered about the difficulty. He says he was told only that the cheque had not been honoured. He stopped payment on the cheque. In the meantime, Binstock had deposited the cheque into her account at the C.I.B.C. But when it was cleared through to Evered's bank, it was returned because of the stop payment order.

[para12] Evered then, on June 4, issued a replacement cheque to Binstock, this time in the amount of \$800 U.S. This time Binstock went to the Toronto-Dominion Bank on which the cheque was drawn and tried to cash it, intending to use the proceeds to buy a bank draft to send to the account in Florida. Evered's cheque recited on its face that it was for deposit into Binstock's Florida account, giving the number of that account. The teller at the Toronto-Dominion Bank offered to call Evered to seek approval for the cheque's being cashed but Binstock declined that offer, retrieved the cheque and mailed it to her account in Florida.

[para13] After Binstock had left the bank, the teller called Evered to tell him what had happened. Evered, suspicious that Binstock had tried to convert the cheque for her own benefit, stopped payment on it. Thus, when the cheque was cleared by the Florida bank back to Evered's bank it was rejected. It was never replaced and from May, 1998, forward, Evered failed or refused to contribute to the expenses of the condominium.

[para14] There is not a scrap of evidence that Binstock had any intention of making any use of either of the two cheques for any purpose other than that for which they were given to her. Evered, in my view, gave way to utterly unfounded suspicion of the motives and objectives of Binstock. But from that point, the situation and the relationship were beyond salvage.

[para15] In mid-June, 1999, a written proposal - looking very like an ultimatum - was made by Evered. It was rejected.

[para16] Evered now says that there was a total failure of consideration for his advance, entitling him to repudiate the agreement and recover the monies advanced. He says that Binstock failed to convey an interest in the condominium, contrary to her agreement. Binstock makes two responses. First, she says that Evered instructed her that he did not want his name on the title to the condominium. In not making a formal transfer of his two-thirds interest, she was simply complying with his stated wishes. According to Binstock - and in this regard her evidence is corroborated by Evered's evidence and actions, - Evered, throughout their relationship, was very concerned that there be no indicia of cohabitation between them. He was clearly anxious lest Binstock acquire any rights against his estate. His not wanting any public record of his co-ownership of the condominium with Binstock is entirely consistent with that concern and with his not wanting a deed to the property. Second, Binstock says that she was prepared at all times to have Evered's name on the title (as she put it "give him a deed") if he had asked for it.

[para17] It is apparent to me that what Evered wanted - and the desire intensified as the relationship cooled - was some formal acknowledgment of and protection for the two-thirds interest that he had bought. In his testimony, he referred to his wanting "a lien" in the nature of a mortgage interest. But it is plain from the evidence that he at no time took any steps or sought any advice as to how he could achieve his objective. No proof of Florida law was offered by either party to show what, if anything, could have been done, whether by registration of the agreement or some other document on title or by any other means.

[para18] Binstock argues that there has not been a total failure of consideration on her part. On the contrary, Evered has received exactly what he bargained for. So far as Binstock is concerned, Evered acquired a two-thirds interest in the condominium and the right to have his heirs share pro rata in the proceeds of the sale of the condominium after the death of the survivor of the parties. And he lived in the condominium for several months in the Winter of 1998-9, after the agreement had been made, including some weeks without Binstock.

[para19] This is not, in my view, a case for repudiation or rescission of the agreement. There has not been a total failure of consideration. There is no basis on which Evered may simply get his money back and walk away.

[para20] Equally, there is no basis for a finding that Binstock at any time breached the agreement. No evidence of any breach was adduced. There were merely the allegations that Binstock failed to transfer formally to Evered the interest that he had acquired; I have already dealt with that matter.

[para21] And beyond any question, even if there were an entitlement to compensatory damages or other relief, Evered has failed to show any basis for an award of punitive or exemplary damages.

[para22] The action is dismissed.

[para23] I refer now to the defence and counterclaim of Binstock. It is not necessary to consider the substance of several of the defences raised but I refer to them because they may have a bearing on the disposition that I may make as to costs.

[para24] The pleadings raised several; defences, all but one of which were abandoned, either formally or by inaction, during the course of trial. No evidence whatsoever was adduced to support the plea that the \$20,000 U.S. was a gift. It was only when I asked, during argument, whether Counsel intended to continue to assert that position that Counsel for Binstock advised me and Evered's Counsel that that defence was abandoned. Similarly, at the end of the trial, Mr. Levitt told me that he was abandoning the assertion that this Court lacked jurisdiction to entertain the action. The choice of law position raised in the pleadings (i.e. that Florida law applies to the argument) was not argued and there was no evidence of what the allegedly applicable Florida law would be.

[para25] The only defence came down to the proposition that would feed the counterclaim - that the only breach of the agreement was by Evered when he ceased to pay the agreed contributions to the monthly expenses of the condominium. That breach began with the month of May, 1999, and has continued to this day. At a monthly amount of \$200 U.S. the arrears total \$3,600 U.S. Binstock counterclaims that amount.

[para26] She also seeks declarations that she is entitled to accept Evered's breach and treat the agreement as at an end, no interest being conferred on Evered and there being no obligation to return the \$20,000 U.S. or any part of it.

[para27] Binstock is certainly entitled to damages for the breach by Evered. She shall have judgment for the Canadian dollar equivalent (converted in the manner specified in s. 121(1) of the Courts of Justice Act) for \$3,600 U.S.

[para28] The other relief for which Binstock counterclaims causes me much more concern. In the circumstances of this case, I am reluctant not only to deprive Evered of any interest in the condominium but also to order that his advance is totally lost. He may, in some respects, have acted badly towards Binstock but I am satisfied that in respect of this advance, he was, to a considerable extent, motivated by a genuine desire to assist Binstock. Nothing in the evidence persuaded me that the plaintiff committed any breach - let alone a fundamental breach - of the agreement, that would justify giving to Binstock the remedy she sought in her counterclaim.

[para29] In the course of argument, Mr. Levitt suggested that if I were not disposed to grant the relief that his client sought, I should declare the agreement to be subsisting. I pointed out to Mr. Levitt that he had not sought such resolution in his pleading and although it would probably flow as the inevitable consequence if I did not grant the relief sought by either party, it would make more sense if such a disposition were expressly sought, in the alternative, in the Statement of Defence and Counterclaim. After conferring with his client, Mr. Levitt moved for leave to amend. Ms. Assuras, for Evered, asked for time to consider whether she should adduce further oral evidence or set out in an affidavit the prejudice that Evered would suffer if leave were given to amend. I confess that I did not see what evidence could be led to respond to the newly-claimed relief but I gave her twenty-four hours to consider. I tried to make it clear that I would not insist on an affidavit and that any evidence could come before me by whatever means should be most appropriate and convenient.

[para30] The trial resumed at 4 p.m. on Thursday, October 19 to hear submissions with respect to the prejudice, if any, that would flow from the granting of leave to amend. Ms. Assuras required that a court reporter be in attendance, although she did not propose to adduce any testimony. At that late hour, no reporter was available and the matter was therefore put over until 9 a.m. on Friday, October 20, when Ms. Assuras made her submissions.

[para31] She urged me not to allow the requested amendment although she raised nothing that, in my view, amounted to prejudice. I explained to her that, in my opinion, the amendment was probably not necessary as it merely addressed the situation that would arise if I were to refuse to grant the main remedy sought respectively by the plaintiff and the defendant. I granted leave to amend, giving oral reasons therefor, and then entertained the submissions of Counsel as to the counterclaim. Thereafter, Ms. Assuras delivered her reply submissions in the main action and, at the end, filed a proposed amended Statement of Claim, in which Evered sought, in the alternative, essentially the same relief as that sought in the amended Counterclaim i.e. that the agreement continue in effect. Mr. Levitt raised no objection and did not allege prejudice. The amendment was allowed.

[para32] If, as I have concluded, neither party has the right to declare the agreement at an end, Evered does not get his money back and Binstock does not get to keep the money free of any interest of Evered in the condominium. The result is that the agreement goes on and is to be performed in accordance with its terms. This is not an unreasonable result. On its face, the agreement is not conditional upon or co-terminus with the continued relationship between the parties. Indeed, in his evidence at trial, Evered acknowledged that it was his understanding that the agreement would continue to bind him and Binstock even if they were no longer together. In all the circumstances, the only possible outcome of this action that will not do extreme damage to one or another of the parties is a declaration that the agreement, subject to certain terms, is still in effect and continues to bind the parties. But before considering the terms on which the agreement is to continue, I pause to address an issue raised in the plaintiff's amended Statement of Claim: that the plaintiff, having been deprived of the use of the condominium, should be compensated for that deprivation by an award of damages in the amount of \$10,000.

[para33] I do not see Evered's entitlement on the basis asserted to damages in the amount claimed or in any amount. Evered's rights and obligations under the agreement continued (as he himself understood) whether he and Binstock remained together or not. And if they were not together, then (subject to what I shall say later), it may be that Evered will be or will feel unwelcome in the condominium. That was surely in the cards as a possibility at all times from the date of the agreement. I do not see that a situation that was - or should have been - always in the contemplation of the parties gives rise to a damage claim when it actually comes to pass.

[para34] In my judgment, the agreement continues but should be subject to the following terms. First, that the parties promptly obtain advice from Florida counsel as to how Evered's interest in the condominium can best be protected and that they follow that advice.

[para35] Second, Evered's obligation to contribute two-thirds of the monthly expenses of the condominium can be satisfied in whatever way the parties may agree. He may choose to make regular payments, whether monthly, quarterly, or annually. Or the parties may agree that the obligation does not have to be satisfied on an ongoing, regular basis but may be accrued and deducted from the share of the proceeds that will eventually go to the Evered's estate. This may have some attraction but would have to have some provision built into it for interest to be paid by Evered or his estate on the unpaid amounts. And no matter how the expense obligation is satisfied, the parties should have an agreed method to quantify of the expenses and any changes that may occur from time to time.

[para36] Finally - and I do not make this a term of any Judgment - it is unfortunate that Evered, a part owner of the condominium and an ongoing contributor to its maintenance, should be precluded from using it. It would be unrealistic to impose a regime for making the condominium available for the parties at different times - and I sincerely hope that that would not be necessary. The parties are adult people who clearly at one time felt great affection and regard for each other. Now that this litigation is at an end, I do hope they can see their way clear to make a reasonable accommodation for their separate use of the condominium.

[para37] As for sale of the condominium, the time of sale is addressed in the agreement which will continue to govern unless a sale occurs beyond the parties' control (e.g. by a receiver, trustee in bankruptcy, or taxing authority) or by further agreement between the parties.

[para38] The question of the costs of the trial has troubled me. On the one hand, Binstock appears to have been successful, although not on the basis originally claimed. On the other hand, Evered has, no doubt, been put to considerable unnecessary expense because his Counsel had to prepare to meet evidence and arguments referred to in the pleadings that never materialised at the trial and of whose abandonment Mr. Levitt gave little or no warning prior to trial. The statement of defence upon which Binstock went to trial contained everything but the kitchen sink - and I would not have been surprised to find even that receptacle lurking in there somewhere. I do not blame Binstock for that lack of focus; she was in the hands of her solicitors. But there is no justification for requiring Evered to pay Binstock's costs. In the result, therefore, I make no Order as to costs. Each party will bear his or her own costs of the litigation.

[para39] The action is dismissed without costs except that the alternative relief claimed in the amended Statement of Claim (and the relief claimed in the amended Counterclaim) for a declaration that the agreement continues to bind the parties, is allowed in substance, without costs, subject to the terms that I have enunciated. And the defendant shall have judgment for the arrears of monthly maintenance expenses in the amount of \$3,600 U.S.

LAMEK J.

CBR# 119

Francis v. Condominium Plan No. 8222909

Between Brent Francis, Stan George Wong and Cynthia Ewanus, plaintiffs, and The Owners: Condominium Plan No. 8222909, defendant

Action No. 9803 02960

Alberta Court of Queen's Bench Judicial District of Edmonton Master Quinn Heard: June 12, 2000. Judgment: June 27, 2000. (27 paras.)

Counsel: Carmen L. Plante, for Brent Francis. Louis Belzil, for the defendant.

MEMORANDUM OF DECISION

[para1] MASTER QUINN:-- This is an application by the defendant condominium corporation for security for costs.

Background

[para2] The defendant corporation is made up of 221 condominium units. 211 units are located in a high rise building and 10 units are located separate from the high rise building. These 10 are townhouses. The plaintiff Brent Francis owns eight of the townhouses.

[para3] In September 1994 the corporation amended its by laws to grant a 65% rebate of condo fees to townhouse owners. The amended by law was registered September 14, 1994. When the plaintiffs purchased their townhouses they were provided with the amended by laws.

[para4] The assessment of condominium fees was made on a unit factor basis which caused townhouse owners to be liable for more than what was thought to be their proper share. The by laws were amended to permit this situation to be corrected by allowing a 65% rebate to the townhouse owners on condominium fees.

[para5] At the time the by laws were amended all of the units were owned by the developer. By December 1996 the developer was no longer involved and management of the condominiums affairs was being performed by a Board of Managers.

[para6] The Board of Managers received a legal opinion that the amended by laws were ultra vires, because the Condominium Property Act did not allow assessment of fees on anything other than unit factors.

[para7] At that time an amendment to the Condominium Property Act had been passed by the legislature (in May 1996) but it had never been proclaimed. It is still not proclaimed.

[para8] The Board of Managers took the position the amended by law was ultra vires. The plaintiffs took the position the amendment was intra vires.

[para9] A standstill agreement was reached between the Board and the townhouse owners that the matter would not be put before the courts and they would abide the outcome of the as yet unproclaimed legislation. It was thought that at least some of the problems between the plaintiffs and the Board would be resolved when the legislation was proclaimed.

[para10] Under the standstill agreement the corporation would continue to collect only the amount of \$163.43 per townhouse unit, which was the amount payable pursuant to the amended by law.

[para11] Brent Francis had purchased eight townhouses as a business venture, and he wanted to sell them. He requested estoppel certificates for his units.

[para12] The estoppel certificates the Board provided were not what Mr. Francis wanted. They indicated the rebate was invalid and that further condominium fees were owing in respect of each townhouse.

[para13] When the standstill agreement was made everyone involved apparently expected it would be proclaimed soon.

[para14] The delay apparently became intolerable to Mr. Francis because he could not get estoppel certificates he wanted and that situation made it difficult for him to sell his townhouses because he could not tell prospective purchasers there was no danger of arrears of condominium fees being claimed from them.

[para15] In any case the plaintiff townhouse owners have commenced this action which has been amended twice. The amended amended statement of claim was filed April 25, 2000.

[para16] The plaintiff Brent Francis lives out of the jurisdiction and there is no evidence he owns assets in the province. He does own the condominiums, but there is no evidence of the amount of his equity in them.

[para17] Counsel for the plaintiffs submits the defendant condominium corporation is the natural plaintiff, and that the present plaintiffs had no satisfactory alternative but commencing this action themselves having regard to the inactivity by the defendant condominium corporation.

[para18] The plaintiff submit the problem they are having arose from the amendment to the by laws of the condominium corporation and that the condominium corporation should have commenced legal proceedings for determination of the question as to the validity of the amendments. If matters had occurred in that fashion the present plaintiffs would have been supporting the view that the by laws as amended were valid and they would not have been required to furnish security for costs.

[para19] Both the plaintiffs and the defendant in the present circumstances are suffering the consequences of the actions of the developer of the project which was in control when the by laws were amended.

[para20] Both the plaintiffs and the defendant corporation have an interest in obtaining closure on the debate about the validity of the amended by laws.

[para21] If the said by laws are ultimately found to be valid the plaintiff Brent Francis will not be required to pay any costs and any security he was required to furnish would be released to him.

[para22] On the other hand if the said by laws are found to be invalid he will have lost this action and costs would normally be assessed against him.

[para23] I am of the opinion that security for costs should be furnished by Brent Francis. I am none the less inclined to give some favorable consideration to the argument that he was in an invidious situation due to the non-proclamation of the amendments to the Condominium Property Act and the failure of the condominium corporation to take any action to determine the validity or non validity of the aforesaid by law.

[para24] The condominium corporation was in a much better position than Francis was to just wait to see what would eventually happen.

[para25] Moreover, this case is mostly a question of law, and the trial should not have to last as long as the defendant corporation thinks.

[para26] I therefore require the plaintiff Brent Francis to furnish security for costs in the amount of \$10,000.00.

[para27] Costs of the present application will be in the cause.

MASTER QUINN

CBR# 808

Lear v. Klapstein

Between Karey Lear and Karey Lear Realty Ltd., plaintiffs, and Grant Klapstein and Cove Properties Ltd., defendants

Action No. 9803 09457

Alberta Court of Queen's Bench Judicial District of Edmonton Ritter J. Judgment: May 5, 2000. Filed: May 8, 2000. (62 paras.)

Counsel: Robert M. Curtis, Q.C., for the plaintiffs. Gerhard Seifner, for the defendants.

REASONS FOR JUDGMENT

RITTER J.:--

I. Introduction

[para1] This matter involves a claim by the Plaintiffs for real estate commissions they say are owing to them by the Defendants respecting two condominium developments developed by the Defendants and for which the Plaintiffs had an exclusive listing but which listing was purportedly terminated by the Defendants. The Defendants have advanced a counterclaim alleging that they over paid the Plaintiffs, and that the Plaintiff should re-imburse the Defendants for part of the real estate commissions previously paid. Little evidence was advanced with respect to the counterclaim and no real argument was made regarding it. If the Defendants are not abandoning the counterclaim, it is my determination that it is dismissed.

[para2] This matter involves the interpretation of a contract, the determination of the nature of the relationship between the parties, and the question of the manner in which the contract was allegedly terminated. The matter also engages consideration of the Parole Evidence Rule as both parties led evidence regarding the negotiations surrounding the creation of the contract, and each party suggests that there are vague and uncertain terms in the contract that require parole evidence for their interpretation.

[para3] In order to arrive at my decision, it is my view that a fairly detailed analysis of the factual matters giving rise to this action is required. In addition, it is my intention to consider several areas of law and relate factual considerations to those areas. Finally, I will deal with the question of damages and costs.

II. Factual Matters

[para4] The Plaintiff, Karey Lear, is a licenced real estate agent. She conducts her business through a company incorporated and wholly owned by herself, being Karey Lear Realty Ltd., the other Plaintiff.

[para5] The Defendant, Cove Properties Ltd., is also a corporation operating under the laws of the Province of Alberta and is wholly owned by the Defendant, Grant Klapstein. The Defendant, Cove Properties Ltd., is in the business of the development and sale of condominium properties throughout Alberta, and more particularly, in the city of Edmonton, in the province of Alberta.

[para6] The Plaintiffs became to be involved in four of the Defendant's projects. The first project the Plaintiffs became involved in was a project known as the Glenora Court. This was a condominium developed by the Defendant and located in central Edmonton. The Plaintiff, Karey Lear, initially became involved by working for the person that the Defendants had given an exclusive listing agreement to. Ultimately, this person terminated his relationship with the Defendants and the Defendants approached Karey Lear to act as their representative in the sale of the remaining units in Glenora Court. As a result of their negotiations, the parties entered into a Letter of Agreement, dated the 1st of February 1994, which appointed Karey Lear as the exclusive listing agent for Glenora Court. The agreement also provided that Karey Lear was to be paid commissions calculated at 2.5 percent of gross sales plus G.S.T. If an outside realtor was involved, the commission would be 3 percent to the selling agent and 1 percent to Karey Lear as the listing agent. Commissions were payable: 25 percent at the time of the formal Offer to Purchase being signed and down payment being made, and 75 percent on the closing date.

[para7] The agreement specifically stated that its duration was 60 days. However, notwithstanding this provision, once the 60 days elapsed, the parties continued as if the agreement were still in force and effect.

[para8] During the course of this arrangement Laara Tanner, another realtor, was engaged by the Defendant, Cove Properties Ltd., to provide assistance to the Plaintiff, Karey Lear. She was initially paid \$500 for each sale that she was directly involved in.

[para9] In early 1996, the Defendant, Grant Klapstein, discussed with the Plaintiff, Karey Lear, a project that Cove Properties Ltd. was developing in Calgary. This property was to be known as the Summit at Peterson Hill. Ms. Lear and Mr. Klapstein looked at the property site in January or February of 1996; and after some discussion, Ms. Lear agreed to work the property by attempting to sell the condominium units to be built on that property. Consequently, Ms. Lear was engaged by the Defendants to see to two projects at the same time. That is, the Glenora Court property and the Summit property in Calgary. In the spring of 1996, Ms. Lear spent Thursdays, Fridays, Saturdays, and Sundays in Calgary, and Mondays, Tuesdays, and Wednesdays in Edmonton.

[para10] No written agreement was entered into with respect to the Summit property. Ms. Lear testified that the parties had an oral agreement which would have entitled her to 3 percent of net purchase prices.

[para11] The Summit development did not proceed as Cove Properties Ltd. could not get the necessary approval from the Development Appeal Board in Calgary. By the time it was obvious that the Summit project was not going to proceed, Ms. Lear had spent four days a week during the months of March, April, and May of 1996 in Calgary. Subsequently, she spent some time there in June, as well, in order to return deposits, deal with disgruntled prospective purchasers, and the like.

[para12] After this project was cancelled, the Plaintiff, Karey Lear, had discussions with the Defendant, Grant Klapstein, during which she raised her concerns that she had devoted considerable time, effort, and expense in going to and from Calgary relative to the Summit property without any possibility of compensation. Ms. Lear testified that Mr. Klapstein told her not to worry, that she would be well compensated for her efforts as he was in the process of the commencement of a new condominium project on the

Whitemud Crossing area of Edmonton, Alberta, called the Chateaux at Whitemud Crossing. Ms. Lear says that Mr. Klapstein told her that she would make significant money on the sale of the Chateaux project, and this would make up for any losses that she might have experienced at the Summit project. She says that she was told that she would receive a 3 percent sales commission and that the entire project was hers. This encompassed some 58 units in a manner (apartment-style condos) and 18 villa units (duplex-style condos).

[para13] Ms. Lear testified that as Laara Tanner had worked out well at the Glenora Court project, she offered her a job at the Chateaux project. It was agreed that Ms. Tanner would receive, from Ms. Lear's commission, the sum of \$1,200 on each unit that was sold.

[para14] The Chateaux property was initially marketed from a sales site located on commercial premises, near the property. Ms. Lear and Ms. Tanner used floor plans, drawing books, samples, and other promotional material to sell the product. In the spring of 1997, the show home for the villa portion of the Chateaux project opened.

[para15] On the 12th of February 1997, Ms. Lear and her company entered into a Letter of Agreement with Mr. Klapstein and his company. This agreement states that Ms. Lear was appointed as the exclusive listing agent for the Chateaux project at Whitemud Crossing. Commissions were payable to Ms. Lear's company.

[para16] Commissions are stated to be 3 percent of the purchase price, exclusive of G.S.T. The agreement also provided that if a Chateaux unit was sold by an outside realtor, the developer would pay a flat fee of \$1,500 to the selling agent, and the 3 percent commission would continue to be paid to the listing agent.

[para17] The commissions were stated to be payable: 50 percent upon the Purchase Agreement being signed and the down payment being made, and 50 percent upon the closing date. There is no termination clause in the agreement, and it also contains no notice provision.

[para18] Ms. Lear says that there was no termination provision contained in the Letter of Agreement because the parties agreed that she was to sell all of the units developed by the Defendants in the Chateaux project. Mr. Klapstein testified to the effect that so long as Ms. Lear remained the exclusive listing agent, she would be receiving commission on all sales. He says it was clearly his understanding that that did not derogate from his right to terminate the arrangement with the agent at will.

[para19] In the spring of 1997, Ms. Lear and Mr. Klapstein spoke about another project being developed by Cove Properties Ltd. in west Edmonton, called Country Club Court. Ms. Lear says that they entered into an oral agreement whereby she would act as the exclusive listing agent for this condominium project as well. The terms and conditions were to be exactly the same as the terms and conditions relating to the Chateaux project. Initially, a sign was placed at the site of Country Club Court directing people to make inquiry at the Chateaux sales office. From the time that this sign was placed until the date the Defendants "terminated" Ms. Lear's contract, Ms. Lear had secured three reservation agreements which related to Country Club Court. It is noteworthy that reservation agreements do not constitute a Purchase Agreement. They are documents that reserve a particular unit for a proposed purchaser in contemplation of a project proceeding. This is done in exchange for a very small deposit which is refundable to the proposed purchaser should the purchaser decide not to proceed at the time the project is developed to a point where Purchase Agreements are available. If the purchaser does decide to proceed, the deposit forms part of the purchase deposit.

[para20] Through 1997, Ms. Lear and Laara Tanner continued with the marketing of both the Chateaux project and the Country Club project. In July of 1997, new players arrived on the scene. The defendant, Cove Properties Ltd., engaged Tim Coutu to act as its general manager. Mr. Coutu was introduced to Ms. Lear in late July of 1997; and at approximately the same time, Ms. Lear was informed that a new sales person would be placed at the site of the Country Club Court development. Ms. Lear was also informed by Mr. Klapstein that her commissions in the Country Club Court development would be reduced to 2 percent with this new person receiving the other 1 percent of the total 3 percent sales commissions to be paid to selling agents. As a result, Ms. Tanner's commissions for this project were reduced to \$600 for each unit sold.

[para21] Ms. Lear testified that she was reluctant to go along with this arrangement as the money she was to receive was being reduced. Further, she felt that between herself and Ms. Tanner, they would be able to sell both the Country Club project and the Chateaux project.

[para22] Mr. Klapstein testified and Ms. Lear acknowledged that she was to train the new person, who was described by Ms. Lear as being a pleasant individual but totally inexperienced in real estate marketing. It was Mr. Klapstein's evidence that in exchange for providing training and support to the new sales person, Ms. Lear would receive 2 percent of the commissions. Ms. Lear was also to review and approve all contracts obtained by this sales person.

[para23] During the month of August 1997, Ms. Lear had a "misunderstanding" with the new sales person at Country Club Court. This occurred as a result of a telephone call that she received from this person during which this person indicated she would be unable to work a particular day and asked Ms. Lear to cover for her. Ms. Lear was already covering for Ms. Tanner at the Chateaux and simply couldn't be at two places at once. Ms. Lear suggested to the Country Club sales person that if she had difficulty regarding care of her children, she should arrange to have someone on standby to provide for that care when something unforeseen arose. Alternatively, she should arrange to have someone cover for her when she suddenly was unable to work.

[para24] Also during the month of August of 1997, Mr. Coutu and Mr. Klapstein became concerned about the hours that the show home at the Chateaux was open. When the show home became available for occupancy by the sales team of Ms. Lear and Ms. Tanner, they initially worked between 3 to 7 on weekdays and 1 to 5 on weekends. Mr. Klapstein and Mr. Coutu wanted the show home to be open between 1 and 7 during the week as they were concerned that the building crew who were there were being bothered by prospective purchasers between the hours of 1 and 3.

[para25] Ms. Lear responded to this concern by indicating that between the hours of 1 and 3, she and Ms. Tanner normally dealt with prospective purchasers by having private meetings with them so as to conclude deals. She also raised a concern that there was yet no signage on the property indicating the hours that the show home was open, and this simply invited people to expect the show home to be open whenever they drove by the property.

[para26] The matter was resolved by Ms. Lear agreeing to keep a record of how she spent her time between 1 and 3 and to provide that record to Mr. Klapstein and Mr. Coutu on a monthly basis.

[para27] On September 30th, 1997, Ms. Lear was called to Grant Klapstein's office for a meeting. When she arrived, Mr. Coutu was there, but Mr. Klapstein was not. Mr. Coutu presented her with an envelope which contained various letters, mostly emanating from the sales person at the Country Club. These letters were critical of Ms. Lear.

[para28] Mr. Klapstein subsequently arrived, and Ms. Lear asked Mr. Klapstein and Mr. Coutu whether they wanted to hear her side of the story. Mr. Coutu responded that they did not. In fact, in attempting to retrieve the envelope and a daytimer, Mr. Coutu assaulted Ms. Lear.

[para29] If I were called upon to decide whether or not there was cause for termination of an employment relationship, I would conclude that there was nothing even approaching cause in Ms. Lear's conduct of her duties. The reasons advanced by the Defendants for termination of Ms. Lear's services are trifling and spurious. I am satisfied that the real reason for termination of Ms. Lear's services was that Mr. Coutu, for whatever reason, felt it necessary to assert his authority and, for whatever reason, Mr. Klapstein backed him in his actions. In fact, Mr. Klapstein now says that he regrets the manner in which Ms. Lear's contract was terminated. Further, at a subsequent date, Mr. Klapstein tried to re-engage Ms. Lear, which makes it abundantly clear that there was absolutely no reason for the act of termination.

[para30] I recognize that the termination of either an employment or contractual relationship is often fraught with emotion and difficulty. So-called experts have attempted to advise corporations and institutions as to how to terminate an employment relationship or a contractual relationship, but it is a rare case where a termination flows smoothly. At the same time, I have never heard of as high-handed, undignified, and mean-spirited termination as that which Ms. Lear was subjected to. Most of the conduct that goes to this conclusion emanated from Mr. Coutu, but Mr. Klapstein accepted that conduct; and because of that, he is identified with it.

[para31] A few days after the termination meeting, Ms. Lear met with Mr. Klapstein again as she needed to have access to the Cove Properties office for books and records that belonged to her. Mr. Klapstein met with Ms. Lear at a hotel restaurant and discussed her termination with her. During this meeting, he indicated that he felt badly about what had occurred. Also during this meeting, Ms. Lear raised the question of whether or not she could work during the grand opening of the Chateaux Maner show suites which was to occur later on the day of that meeting. Mr. Klapstein indicated that he would think about it and provide her with an answer shortly. He later called back and told her that she would not be able to do so.

[para32] During the course of the termination meeting and at subsequent meetings in the month of October 1997, Ms. Lear was presented with resignation letters but refused to sign them.

[para33] Throughout her involvement with the Defendants, Ms. Lear had, through her corporation, maintained private listings, particularly with respect to re-sale housing. The Defendants were aware that she maintained those private listings, and in some instances encouraged them. That was because some of the listings related to people who were potential customers of the Defendants but were not able to purchase a condominium from the Defendant development corporation until these persons had sold their own home.

[para34] On one previous occasion, Ms. Lear entered into negotiations with a condominium developer to represent that developer respecting a development that potentially conflicted or competed with the developments of the Defendant, Cove Properties Ltd., which were then underway. At that time, Ms. Lear spoke with Mr. Klapstein and asked him as to whether he had a concern about her representing both him and the potential competitor. I am satisfied that on the evidence, Mr. Klapstein made it clear that he did not want Ms. Lear to represent other developers who competed with Cove Properties product.

[para35] Subsequent to her termination, in order to replace the work she lost, Ms. Lear placed advertisements within trade publications indicating her specialty to be condominium sales. She also attended a trade gathering where she entered into discussions with another realtor, who at that time was contemplating leaving his agency relationship with Abbey Homes Ltd. That corporation also developed condominium properties, and I am satisfied that that corporation competed with Cove Properties Ltd. and its product.

[para36] As a result of an introduction by this realtor to the ownership of Abbey Homes Ltd., Ms. Lear was engaged to complete the last few sales that remained to be completed with respect to an existing project owned by Abbey Homes Ltd.

[para37] After that, Ms. Lear entered into further arrangements with Abbey Homes Ltd., whereby she continued to represent them in the sales of new condominium developments. These arrangements have continued to the date of trial; and at the date of trial, Ms. Lear was in discussion with the management of Abbey Homes Ltd. respecting representing them in the sale of further condominium properties that they are proposing to develop in the city of St. Albert, Alberta. I am satisfied that all of the product supplied by or proposed to be supplied by Abbey Homes Ltd. is to a significant extent competitive with the product supplied by Cove Properties Ltd., and comprising the Chateaux project and the Country Club project. I will deal with the money that Ms. Lear has made as a result of her representing Abbey Homes when I discuss damages near the conclusion of these Reasons.

III. Legal Analysis

The Nature of the Contract Between the Plaintiff and the Defendant Relating to the Chateaux Project

[para38] I am satisfied that the relationship between Ms. Lear and her corporation, and Cove Properties and Mr. Klapstein as reflected in the Letter of Agreement, dated the 12th of February 1997, and referenced earlier in these Reasons, did not constitute an employer-employee relationship. Ms. Lear does not contend that it constitutes such a relationship. Instead she suggests that the relationship is an agency relationship but one which cannot be terminated by the unilateral action of the Defendants.

[para39] As a general rule, an agency relationship may be terminated if either party decides to do so. In his text, *The Law of Agency*, 7th edition, Butterworths, Toronto, 1996, G.H.L. Fridman, Q.C. states at p. 389:

Since the relationship of principal and agent has been created by agreement between them, it follows that the relationship may be determined by both parties agreeing to the discharge of that relationship. It will also be determined if either party withdraws his original agreement. This will occur where the principal gives the agent notice of revocation of the agency or the agent gives the principal notice of renunciation. Any such notice may be given in any form: a deed or document in writing is unnecessary, even if the original authority was contained in a deed.

[para40] However, there are exceptions to these general principles. In some cases an agency relationship may be irrevocable. It is a well-established principle that an agency relationship may not be terminated by the principal without the agent's consent where the agent has been granted authority to act on the principal's behalf where there is an element of protection of an interest of the agent. In those cases, the authority is given for valuable consideration and is security in respect of a liability of the principal to the agent. (Re Hartt Group Ltd. and Land Securities Ltd. 7 D.L.R. (4th) 89 (NB QB)) I am also satisfied that the security interest may also be something of a more intangible nature such that the forbearance to pursue what one would normally expect to receive or giving up a right that one has or the parties may perceive that one has can constitute the security interest required in order to make an agency relationship irrevocable without the consent of the agent. For example, in *Richardson v. McClary* (1906) 16 Manitoba Reports 74 (CA), the Plaintiffs, who were entitled to a commission for finding a purchaser for the Defendant's farm, placed in their hands for sale, consented to forego the commission upon the Defendant giving them the special sole right to sell the land for a fixed higher price within a time named. The Defendant purported to terminate this relationship prior to the expiration of the time named. The Court found consideration in the Plaintiffs giving up their right to commission on a first sale in exchange for the special sole right to sell the land for a fixed higher price. In that situation, the agency could not be revoked at the will of a principal.

[para41] I am also satisfied that an agency relationship may not be terminated at the principal's will when the agent goes to the principal indicating their concern about expenditures, time, and effort that the agent has incurred respecting previous potential sales, and the principal responds by advising the agent that they will be well compensated by the fact that the principal is about to conduct the sale of another project, and the agent will receive an exclusive listing to that project.

[para42] The consideration is found in the agent's and principal's resolution of something they perceive to be a potential problem. It matters not whether in law the agent would have been successful in pursuing its claim. Consideration may arise with respect to resolution of potential claims.

[para43] There is a evidentiary dispute between the parties as to what occurred in terms of the resolution of the Summit expense issue. Ms. Lear testified that it was clearly understood that she would receive the commissions from the Chateaux project as compensation for her potential claim for losses that she incurred with respect to the Summit project. Mr. Klapstein testified that there was discussion about her expenses incurred with respect to the Summit and an indication that she would be receiving commissions from the Chateaux project. He recalls an indication that she would be receiving at least \$100,000 and points to the fact that to the point of her termination, she had earned and was ultimately paid commissions exceeding \$95,000, which is very close to the number that he recalls being mentioned, and which number was confirmed by Ms. Lear.

[para44] The Letter of Agreement, ultimately entered into between the parties states, "Karey Lear is appointed as the exclusive Listing Agent for The Chateaux project at Whitemud Crossing." Ms. Lear points to the fact that the Letter of Agreement relating to the previous development, Glenora Court, states that she was appointed as the exclusive listing agent for Glenora Court. The word "project" is omitted. She further points to the fact that there was no expiry date contained within the Chateaux agreement and says that that was because it was contemplated that there would be no expiry date.

[para45] The Letter of Agreement relating to this project was prepared by the Defendant, Cove Properties Ltd. The contra proferentem rule dictates that if there is an ambiguity, the ambiguity is to be resolved by adopting the meaning least favourable to the party who authored the contract. (*Alex Duff Realty Ltd. v. Eaglecrest Holdings Ltd. et al* (1983) 26 Alta L.R. (2d) 133 (CA)) It is Mr. Klapstein's interpretation of the Letter of Agreement that the word "project" simply means that Ms. Lear was appointed exclusive listing agent for the Chateaux project until her agency was terminated. Ms. Lear testifies that the word "project" was inserted for the purpose of indicating that she was to be the exclusive listing agent for the entire project at Whitemud Crossing.

[para46] In my view, there is an ambiguity as to the meaning of the word "project," and parole evidence is invited. Further, the contra proferentem rule dictates that the ambiguity be resolved in the favour of Ms. Lear as Mr. Klapstein's company drafted the document. I am satisfied that on the evidence, the parties agreed that Ms. Lear was to be the exclusive listing agent, and it was at that time understood that she would be selling all of the units at Whitemud Crossing. Subsequently, when Mr. Coutu was hired and immediately took a disliking to Ms. Lear, Mr. Klapstein forgot or ignored what had occurred in his negotiations with Ms. Lear a year earlier. In consequence, I conclude that the listing as contemplated by the Letter of Agreement relating to the Chateaux was not one which Mr. Klapstein and Cove Properties Ltd. could unilaterally terminate.

[para47] I am, however, satisfied that the circumstances relative to the Country Club condominium project were different. At the time this project first came to Ms. Lear's attention, she had already received the compensation for her interest in relation to foregoing pursuit of Summit expenses by way of the Chateaux Letter of Agreement. Further, Ms. Lear expended minimal, if any, effort in preparing this project for sale; and consideration of any real significance cannot be found in those efforts. I am, accordingly, satisfied that this oral listing could be terminated at the will of Mr. Klapstein and Cove Properties Ltd.

Section 22 Real Estate Act

[para48] Section 22 of the Real Estate Act R.S.A. 1980 Chapter R-4.5 provides:

22 No action shall be brought to charge a person by commission or otherwise for services rendered in connection with the sale of land or an interest in the land unless

(a) the brokerage agreement on which recovery is sought in the action or some note or memorandum of it is in writing signed by the party to be charged or by that person's agent lawfully authorized in writing, or

(b) in the case of a trade in real estate, the person sought to be charged

(i) has as a result of the services of a real estate broker employed by that person for the purpose effected a sale or lease of land or an interest in it, and

(ii) has either executed a transfer or lease signed by all other necessary parties and delivered it to the buyer or lessee, or has executed an agreement of sale of land, or an interest in it, signed by all necessary parties, entitling the buyer to possession of the land or any interest in it, as specified in the agreement, and has delivered the agreement to the buyer.

[para49] This provision was not expressly pled in the Statement of Defence; and at the commencement of the defence, the solicitor for the Defendant applied for an amendment for its pleadings to plead this provision. This amendment was objected to by the solicitor for the Plaintiff.

[para50] I am satisfied that the amendment is to be allowed. I am satisfied that the solicitor for the Plaintiff is not caught off guard, and substantially all evidence necessary to deal with this provision that was available to the Plaintiff has been adduced during the course of the trial.

[para51] At the trial, I indicated that I would reserve my decision with respect to the amendment and provide it in the course of these Reasons. I also indicated that if I allowed the amendment to the defence, I would allow a Plaintiff amendment to claim commissions on the basis of quantum meruit as they relate to the Country Club project. Having indicated that the amendment to the defence is to be allowed, the quantum meruit amendment to the claim is allowed as well.

[para52] I now turn to the question of what effect Section 22 has with respect to the Plaintiff's claims. First, I am satisfied it has no effect whatsoever in relation to any claim emanating from the Chateaux project. That is, because there is a written agreement between the parties. I am satisfied that that agreement is sufficient to constitute the type of agreement that is contemplated by Section 22 of the Real Estate Act.

[para53] Second, I come to the conclusion that Section 22 is a further bar to the Plaintiff's claims with respect to the Country Club project. Simply put, the services of Ms. Lear have, at most, effected the sale of three or four of the Country Club condominiums; and I will specifically deal with those in the damage portions of this decision.

Mitigation of Damages

[para54] It is the Plaintiff's position that the general requirement that a party who has suffered a loss as a result of a breach of contract is required to take whatever steps they can to reduce their damages suffered is not applicable in her circumstances. She is of the view that as an agent, she was not required to devote all of her working time exclusively to the Defendants and would have been able, with the assistance of employees, to take on the extra work that she ultimately obtained through Abbey Homes Ltd. even if she had continued to complete the Chateaux contract. This position is reflective of the general principles relating to mitigations of damages as they apply to agents. In *McGregor on Damages*, 14th edition Sweet & Maxwell Limited 1980, the learned author states at page 162:

The fact that the Plaintiff has made a similar service contract does not necessarily entail that he has avoided the loss. He will have not done so if he would have been capable of carrying out both contracts simultaneously, as will very frequently be the case where the plaintiff, especially if a company, would perform the contract by employing others to do the actual work. If, on the other hand, the defendant has bargained for the plaintiff's exclusive services, any other service contract made by the plaintiff on the defendant's breach will be a substituted contract, and the benefit derived from it will be taken into account in assessing the damages against the defendant.

[para55] I am satisfied that the latter portion of this expression of the principal applies in this matter. I am satisfied that Ms. Lear knew full well that she was not in a position to take on work from competitors of Cove Properties Ltd. while she was the exclusive listing agent with respect to the Chateaux project. This is because she had previously been so informed by Mr. Klapstein when she raised the issue while working on the Glenora Court project and because to do otherwise would place her in an obvious conflict-of-interest position.

[para56] Further, I am satisfied that the relationship between the parties was such that Ms. Lear owed the Defendants a fiduciary duty. I am satisfied that Ms. Lear, herself, recognized that she owed the Defendants a fiduciary duty as on the previous occasion when she considered taking a listing from a competitor, she checked with Mr. Klapstein and upon his indication of disapproval, did not proceed to do so. In consequence, I am satisfied that at least some of the commissions earned by Ms. Lear, subsequent to the termination, go towards mitigation of her damages. I will deal with exactly how much of her earned commissions go to mitigation in the next portion of this decision, which will deal with damages.

IV. Damages

[para57] There is no real dispute between the parties as to the mathematics of the commissions earned. At the conclusion of the trial, I indicated that what I would be doing in relation to damages would identify months of particular years, identify the project, and leave it to the parties to calculate the exact numbers from that identification.

[para58] As I have previously stated, Ms. Lear is entitled to commissions from the Chateaux project. She has been paid for some of that project already, but clearly has not been paid the agreed upon commission for all of the project. It is my decision that Ms. Lear is entitled to commissions for each and every sale of the Chateaux project in accordance with the Letter of Agreement relating to that project less the portion of the commission that she had agreed to pay to Laara Tanner.

[para59] It is also my decision in terms of mitigation the commissions earned by Ms. Lear for the Californian Manor II (an Abbey Homes Ltd. project) for the months of May, June, July, August, September, and October of 1998 are to be deducted as mitigation. Commissions earned with respect to the Californian Manor II for the month of November 1998 are not to be deducted as no commissions respecting the Chateaux were payable for the months of November and December of 1998; and while commissions were payable in the month of January 1999, I am satisfied that the work that would have been done to earn these commissions would have been substantially completed before the month of November 1998.

[para60] With respect to the Country Club Court project, at the time Ms. Lear's contract was terminated, three reservation agreements has been signed relative to this property. One of the parties did not complete. A second party ultimately completed, but purchased a different unit. It is noteworthy that the price on the different unit is exactly the same as the price on the unit that was reserved. I am satisfied that Ms. Lear earned her commission on a quantum meruit basis with respect to this property. She is, accordingly, entitled to her commission with respect to the Bleviss sale, less the amount of money she would have paid to Ms. Tanner, less 1 percent that was to be taken by the sales person who actually worked the Country Club Court project. The third reservation agreement related to Don and Mona Gross, and Ms. Lear has received a commission on a referral basis with respect to these purchasers. Again, I am satisfied that Ms. Lear has earned her commission on a quantum meruit basis, and the parties should therefore calculate her damages with respect to this sale on the basis of 3 percent of the sale price, excluding G.S.T., less 1 percent that is payable to the person who worked at the Country Club project and the money that was payable to Ms. Tanner.

[para61] In addition, Ms. Lear is entitled to interest in accordance with the pre-judgment interest on monies outstanding from time to time in accordance with my decision. Ms. Lear is entitled to her costs, calculated on the appropriate column.

[para62] Finally, the Defendant, Grant Klapstein, has raised the question of whether he is a proper party as his company owned the developments involved. I am satisfied that with respect to the Chateaux project, he is, since he is named in the contract. Therefore, Judgment is granted against Mr. Klapstein for the amount reflecting commissions payable less the appropriate deductions earlier referenced for the Chateaux project.

RITTER J.

COURT FILE NO.: 01-CV-219697CM

DATE: 20031208

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

WILLIAM MCKINSTRY AND BEVERLY ANN DEMPSTER

Plaintiffs

- and -

YORK CONDOMINIUM CORPORATION NO. 472 AND
WILLIAM VERRIER

Defendants

Robert B. Cohen, for the plaintiffs

Lloyd Cadsby, for the defendants

HEARD: October 9, 10, 14, 15, 16, 17, 2003

URIANSZ J.

[1] This case raises for the first time the interpretation and application of ss. 132 and 135 of the *Condominium Act, 1998*, S.O. c.19 (the "Act"), and their relationship to each other.

The Facts

[2] The defendant, York Condominium Corporation No. 472 ("YCC 472"), is one of two buildings in an upscale condominium complex known as Granite Place in Toronto. The defendant, William Verrier, was the president of the Board of Directors of YCC 472 at the time of the events.

[3] The plaintiffs, William McKinstry and Beverly Ann Dempster, are long-time residents of the complex and who, from time to time, have purchased, renovated, and resold condominium units in the complex and elsewhere.

[4] The plaintiffs purchased suite 302 in YCC 472 with the intention of renovating and reselling it. They became the registered owners of suite 302 on August 10, 2001. Suite 302 was somewhat notorious in the building. Ms. Dempster described it as "unique in its decoration". There were loud colors on the walls and floors. The electrical and plumbing services and some internal walls had been altered. Significantly, the master bedroom and the main bathroom had been made into an open area and a Jacuzzi had been installed. Some heating vents and air-conditioning intake vents had been blocked. Carpeting had been glued to the balcony damaging it, and tinting had been applied to the windows. Radiator leaks had damaged some of the wood flooring. The unit had been on the market for some seven months. The plaintiffs bought it for \$380,000.

[5] Suite 302 was on the southwest corner of the building. The living room was on the west side, overlooking a parking lot. The master bedroom and the bedroom/den were on the south side, overlooking a cemetery. The unit's terrace was on the west side connected to the living room.

[6] With the knowledge and consent of building manager, the plaintiffs proceeded with dismantling the alterations made by the previous owners and rectifying the plumbing and electrical

services. They testified the wall between the bedroom and the bedroom/den, had been moved a couple of feet to the east by the previous owners, and had to be torn down because it was blocking a vent. When the plaintiffs removed that wall, the plaintiffs remarked that the resulting larger space would make an attractive living room with a southern view, and that the existing living room could be split to create a bedroom and bedroom/den on the west side. They made the decision to reconfigure the suite on August 22. They considered the new layout so attractive that they decided to live in the unit rather than sell it, and listed their own residence for sale.

[7] The plaintiffs proceeded to erect the metal studding framework for the walls of the new layout. Their work on the renovation continued until September 5 when the Board of Directors of YCC 472 ordered them to cease the work immediately. Thereafter, on September 10, 2001, the Board of Directors resolved that it would not approve the plaintiffs' proposed reconfiguration of suite 302 and required the plaintiffs to complete their renovation in accordance with the suite's "as constructed" layout; that is with the living room facing west and the bedroom and bedroom/den facing south.

[8] On September 11, the next day, the plaintiffs agreed to comply with the Board's requirements. They removed the metal studding framework they had already installed and completed the renovation of the suite in accordance with its original layout. However, they no longer wished to live there. After completing the renovation they sold the suite 302 for \$530,000.

[9] The house rules of YCC 472 provide that planned alterations that are expected to take longer than four weeks require the written approval of the Board of Directors. The building manager can approve renovations expected to take less than four weeks. It is not contested that the plaintiffs' renovation, with the reconfiguration of the suite, would have taken longer than four

weeks. The plaintiffs recognize that they proceeded without express Board approval of the renovation. They claim that there was an established past practice of the Board not enforcing the house rules regarding renovations and so they had a reasonable expectation that the rules would not be enforced strictly in their case. They claim that the building manager of YCC 472 had approved their construction. They claim that Mr. Verrier, the president of the Board, represented to them that the Board that would approve their plans. They claim that by relying on the approval of the building manager and the representation of Mr. Verrier, they incurred construction, financing, and legal costs, suffered a loss of profit on the resale of the suite, and had to pay capital gains tax on the sale proceeds. They also seek punitive damages.

[10] The position of the defendant Verrier is that he acted as president of the Board of Directors at all times and that he is not personally liable for the plaintiffs' claims. At the end of the trial the plaintiffs consented to a dismissal of their claims against him.

[11] The position of the defendant YCC 472 is that its refusal to approve the plaintiffs' proposed reconfiguration of the unit was a reasonable exercise of its authority. Mr. Verrier and another director testified that the decision was based on three concerns. First and primarily, the Board was concerned that the relocation of the living and dining room areas of suite 302 would increase the noise heard in the bedrooms of the unit owners on the floors immediately above and below the suite. Second, the Board did not want to set a precedent. The Board was concerned that if it permitted this renovation, it would have to approve other future major renovations and that uncontrolled major changes to the standard unit layouts would result in a reduction in the value of all units in the building. Third, the Board was concerned that major deviation from the "as constructed" layout of walls would interfere with designed airflows, perhaps leading to excessive

heat, and that future purchasers of the unit might be able to hold the Board responsible for such deficiencies because it had approved the changes.

[12] The plaintiffs also claim that YCC 472 failed to fulfill its obligation to correct deficiencies in the windows and terrace of the unit. YCC 472's position is that the deficiencies were caused by unapproved alterations made by the previous owners, and were apparent at the time the plaintiffs purchased the unit.

[13] The defendants take the position that the court lacks any jurisdiction to entertain the plaintiffs' claim because the plaintiffs did not resort to mediation and arbitration as required by s. 132(4) of the *Act* which provides:

Every declaration shall be deemed to contain a provision that the corporation and the owners agree to submit a disagreement between the parties with respect to the declaration, by-laws or rules to mediation and arbitration in accordance with clauses (1) (a) and (b) respectively.

[14] The plaintiffs take the position that the defendants have waived the application of s. 132(4) by not raising it earlier.

[15] As well, the plaintiffs are seeking an oppression remedy pursuant to s. 135 of the *Act*. They claim that the Board's refusal to approve the reconfiguration of the unit was unreasonable, beyond the authority of YCC 472, and that it was oppressive, unfairly prejudicial to them, and unfairly disregarded their interests. They claim compensation under s. 135 of the *Condominium Act, 1998*. Section 135 provides:

(1) An owner, a corporation, a declarant or a mortgagee of a unit may make an application to the Superior Court of Justice for an order under this section.

(2) On an application, if the court determines that the conduct of an owner, a corporation, a declarant or a mortgagee of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant, it may make an order to rectify the matter.

(3) On an application, the judge may make any order the judge deems proper including,

(a) an order prohibiting the conduct referred to in the application; and

(b) an order requiring the payment of compensation.

[16] The defendants take the position that the mediation and arbitration requirement of s. 132(4) applies to s. 135 and that the plaintiffs cannot resort to the oppression remedy until they have exhausted mediation and arbitration. The plaintiffs submit that s. 132(4) does not apply to s. 135, and that even if they cannot proceed with their ordinary claims because of their failure to arbitrate, they can nevertheless proceed under s. 135.

Interpreting Sections 132 and 135 of the *Condominium Act, 1998*

[17] It is appropriate that I express a first impression of these provisions before applying them to the facts of this case.

[18] Section 10 of the *Interpretation Act, R.S.O. 1990, c. I.11* requires that these provisions be given a fair, large and liberal construction and interpretation.

Subsection 132(4)

[19] The Legislature's objective in enacting s. 132 is to enable the resolution of disputes arising within a condominium community through the more informal procedures of mediation and arbitration. To attain this objective, the phrase "with respect to the declaration, by-laws or rules" in s. 132(4), which applies to disagreements between owners and the condominium corporation, should be given a generous interpretation. It applies, in my view, to disagreements about the validity, interpretation, application, or non-application of the declaration, by-laws and rules. It must be noted that s. 132(4) does not require owners and condominium corporations to submit disagreements with respect to the *Act* to mediation and arbitration.

[20] The first issue is whether s. 132(4) applies where the initiating party wishes to claim damages resulting from the disagreement as well as resolving the dispute. The term "disagreements" in s. 132(4) should be interpreted broadly to encompass claims for damages arising from the subject matter of the disagreement. Such a broad interpretation is most consistent with the provision's objective of resolving disputes by informal procedures rather than by court action. A great many disagreements about declarations, by-laws and rules will be about responsibility for expenditures or about damage caused by failings or neglect. Imposing mediation and arbitration to resolve these disagreements, but requiring court action to claim money somehow at issue because of the disagreement, would frustrate the provision's aim to have disputes resolved quickly and efficiently.

[21] The *Arbitration Act, 1991*, S.O. 1991, c. 17 applies to arbitration required by s. 132(4). The terms of s. 132(4) refer to "arbitration in accordance with clauses (1)(a) and (b)" of s. 132. Subsection 132(1) refers to arbitration under the *Arbitration Act, 1991*. In any event, s. 2(3) of the *Arbitration Act, 1991* provides that the *Arbitration Act, 1991* applies to arbitration conducted in accordance with another Act, unless provided otherwise. Section 6 of the *Arbitration Act, 1991* indicates that a court's ability to

intervene in matters governed by the *Arbitration Act, 1991* is extremely limited.

[22] That the *Arbitration Act, 1991* applies supports an interpretation of s. 132(4) as encompassing a claim for damages. The *Arbitration Act, 1991* ensures the parties' rights to fair procedures, has a number of provisions that make it clear duplication between an arbitration and court action is to be avoided, and provides a process for enforcement of an arbitrator's decision.

[23] Section 138 of the *Courts of Justice Act, R.S.O. 1990, c. C.43* lends further support for the interpretation that arbitration under s. 132(4) may decide claims for damages by providing that "[a]s far as possible, multiplicity of legal proceedings shall be avoided". It makes little sense to have two separate proceedings, one to resolve the disagreement and a second to deal with damages arising from the disagreement.

[24] Counsel for the defendants, relying on *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, submitted that s. 132(4) of the *Condominium Act, 1998* deprives the court of any jurisdiction to deal with matters to which it applies, just as the mandatory arbitration clause does in the labour regime. I find that this is not entirely the case. The distinction is that the *Arbitration Act, 1991* does not apply to arbitrations pursuant to the mandatory arbitration provision of the *Labour Relations Act, R.S.O. 1995 c. 1*, whereas it does to arbitrations pursuant to the *Condominium Act, 1998*. The *Arbitration Act, 1991* contemplates situations where the court may entertain a proceeding about matters subject to arbitration. Subsection 7(1) of the *Arbitration Act, 1991* does provide that the court shall, on motion, stay a proceeding that is commenced in respect of a matter to be submitted to arbitration. However, s. 7(2) provides that the court may refuse to stay a proceeding for a number of reasons, such as undue delay in

bringing the motion to stay the proceeding or the matter is a proper one for default or summary judgment. Thus it is clear that matters subject to arbitration may proceed in court in some circumstances.

[25] Section 7 of the *Arbitration Act, 1991* has been applied in the context of other statutory regimes. For example, in *Boucher v. Soo Homes Inc.* (1980), 16 R.P.R. 119, the court had before it an action where there had not been compliance with s. 17(4) of *The Ontario New Home Warranties Plan Act, 1976*, S.O. 1976, c. 52 [now *Ontario New Warranties Plan Act*, R.S.O. 1990, c. O.31] which provided:

Every agreement between a vendor and prospective owner shall be deemed to contain a written agreement to submit present or future differences to arbitration, subject to appeal to the Supreme Court [now Divisional Court, as of R.S.O. 1990, c. O.31], and the *Arbitrations Act* applies.

[26] Stortini D.C.J. found that the defendant had waived its right to arbitration by failing to move for a stay of action prior to delivery of its statement of defence. He relied upon *Cole v. Can. Fire Ins. Co.* (1908), 15 O.L.R. 336, a decision of the Divisional Court of Ontario that held that the power given to the court to stay proceedings under the *Arbitrations Act* is upon an application after appearance and before pleading or any other step in the proceedings. He concluded that a motion to stay brought after delivery of the statement of defence must be refused. In *Cole*, Riddell J. states, at p.338, that the fact that the right to arbitration is given by legislation does not make that right, when given, any higher than if it had been obtained by private contract. Riddell J. also states that if the defendants choose to put in a pleading rather than move for a stay, they must be held to have elected that method of having their rights determined, and to have waived the provision for arbitration.

[27] *Boucher* was followed more recently in *Chewins v. El-Equip Inc.*, [1996] O.J. No. 1865 (Ont. Gen. Div.). The principles articulated in these cases should apply in the context of the *Condominium Act, 1998*.

Section 135

[28] The legislative objective of s. 135 is to grant the court the jurisdiction to protect condominium owners, corporations, declarants, and mortgagees from unfair treatment. The text of s. 135 has much in common with the corporate oppression remedy. Section 248 of the *Business Corporations Act, R.S.O. 1990, c. B.16* provides:

(1) A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section.

(2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,

- (a) any act or omission of the corporation or any of its affiliates threatens to effect a result;
- (b) the business or affairs of the corporation or any of its affiliates been or are threatened to be carried on or conducted in a manner;
- (c) the powers of the directors of the corporation or any of its affiliates have been or are threatened to be exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

[29] Lord Wilberforce in *Ebrahimi v. Westbourne Galleries Ltd.*, [1972] 2 All E.R. 492 (H.L.) at 535 indicated that a statutory provision such as this provides a bridge to the principles of equity and gives the court a broad jurisdiction to subject the exercise of legal rights to equitable considerations:

Acts which, in law, are valid exercises of powers conferred by the articles may nevertheless be entirely outside what can fairly be regarded as having been in the contemplation of the parties when they became members of the company.

[30] This passage shows that the parties' reasonable expectations are worthy of protection, and reasonable expectations have become a benchmark in the application of the corporate oppression remedy. Farley J. observed in *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1992), 3 B.L.R. (2d) 113 at para. 129:

Shareholder interests would appear to be intertwined with shareholder expectations. It does not appear to me that the shareholder expectations which are to be considered are those that a shareholder has as his own individual "wish list". They must be expectations which could be said to have been (or ought to have been considered as) part of the compact of the shareholders.

[31] The Supreme Court of Canada adopted the following often-quoted description of the corporate remedy in *Loewen, Ondaatje, McCutcheon & Co. c. Sparling* (1992), 97 D.L.R. (4th) 616 at 631-632 from D.H. Peterson, *Shareholder Remedies in Canada* (Toronto: Butterworths, 1989) at para. 18.1, p. 18.1. :

The oppression remedy may be considered the Charter of Rights and Freedoms of corporate law. It is a relatively new creature of statute, so it is little developed. It is broad and flexible, allowing any type of corporate activity to be the subject of judicial scrutiny. The potential protection it offers corporate

stakeholders is awesome. Nevertheless, the legislative intent of the oppression remedy is to balance the interests of those claiming rights from the Corporation against the ability of management to conduct business in an efficient manner.

[32] After quoting this passage, the Supreme Court said of the corporate remedy in the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44:

This remedy thus requires an interpretation consistent with its purpose. Cory J.A., as he then was, summarized this principle in *Sparling v. Royal Trustco Ltd.*, supra, at p. 693: "Here the C.B.C.A. has sought to provide a remedy. An interpretation which gives effect to the remedy is preferable to one which seeks to restrict or eliminate the remedial provision of the Act." And at p. 694: "Where a statute provides a remedy, its scope should not be unduly restricted. Rather, the courts should seek to provide the means to effect that remedy."

[33] This interpretative principle and the foregoing passages apply to s. 135 of the *Condominium Act, 1998*. This new creature of statute should not be unduly restricted but given a broad and flexible interpretation that will give effect to the remedy it created. Stakeholders may apply to protect their legitimate expectations from conduct that is unlawful or without authority, and even from conduct that may be technically authorized and ostensibly legal. The only prerequisite to the court's jurisdiction to fashion a remedy is that the conduct must be or threaten to be oppressive or unfairly prejudicial to the applicant, or unfairly disregard the interests of the applicant. Once that prerequisite is established, the court may "make any order the judge deems proper" including prohibiting the conduct and requiring the payment of compensation. This broad powerful remedy and the potential protection it offers are appropriately described as "awesome". It must be remembered that the section protects legitimate

expectations and not individual wish lists, and that the court must balance the objectively reasonable expectations of the owner with the condominium board's ability to exercise judgment and secure the safety, security and welfare of all owners and the condominium's property and assets.

[34] I reject the defendants' submission that the words "is or threatens to be" in s. 135(2) limits the remedy to conduct that is present or prospective. Section 4 of the Interpretation Act, R.S.O. 1990, c.I.11 provides that "the law shall be considered as always speaking and, where a matter or thing is expressed in the present tense, it is to be applied to the circumstances as they arise, so that effect may be given to each Act and every part of it according to its true intent and meaning". Moreover, s. 135(3) allows the court to prohibit the conduct or to make an order requiring the payment of compensation. Prohibiting the conduct would be appropriate where the conduct is threatened or taking place. Ordering compensation would be appropriate when the conduct has already taken place.

The Relationship of Subsection 132(4) and Section 135

[35] While s. 132(4) applies to "disagreements" and s. 135 applies to "conduct", there are circumstances where both provisions might seem to apply. For example, where an owner and a condominium corporation disagree about the meaning and proper application of the rules, the owner might allege that conduct that the corporation was taking or was threatening to take on its view of the rules was oppressive. Subsection 132(4) would apply to the disagreement, and s. 135 would apply to the threatened conduct. There is much scope for overlap as s. 135 could be invoked to impugn a decision or course of action purportedly taken or threatened to be taken under the declaration, by-laws or rules.

[36] This leads to the question of whether s. 132(4) requires an applicant to submit to mediation and arbitration the subject matter

of a s. 135 application where the conduct or threatened conduct is related to the declaration, by-laws or rules. The question is of considerable importance to the ambit of both sections. The *Arbitration Act, 1991* provides for the binding determination of the dispute between the parties. That is, if the arbitration were required before a s. 135 application could be brought about conduct or threatened conduct related to the declaration, by-laws or rules, then s. 135 would not be practically available in many cases. On the other hand, if resort to mediation and arbitration were not required, then the legislative goal of resolving disputes within the condominium corporation by these informal procedures would be significantly circumscribed.

[37] There are several reasons why I conclude that s. 132(4) does not require an applicant under section 135 to first resort to mediation and arbitration where the conduct complained of is related to a disagreement with respect to the declaration, by-laws or rules.

[38] First, section 135 states, without qualification, that an application may be made to the Superior Court of Justice.

[39] Second, many section 135 applications will be about a broad pattern of conduct, only a part of which is subject to s. 132(4). For example, a s. 135 application may complain of conduct both with respect to "the declaration, the by-laws or rules" and other conduct. I have already noted that s. 132(4) does not apply to disagreements between the parties with respect to the *Act*. A s. 135 application may be about conduct related to both the *Act* and by-laws. Making one part of such a broad application subject to mediation and arbitration would result in multiple proceedings.

[40] Third, the legislative intent that s. 132(4) does not apply to applications under s. 135 is apparent from the statute itself.

Sections 132 and 135 are in Part IX, titled "Enforcement", of the *Act*. Another section in that Part, subsection 134(1), contemplates an application to the Superior Court of Justice for an order enforcing compliance with any provision of the *Act*, declaration, by-laws or rules. Subsection 134(2) states: "If the mediation and arbitration processes described in section 132 are available, a person is not entitled to apply for an order under subsection (1) until the person has failed to obtain compliance through using those processes". There is no similar provision in s. 135 (or in ss. 130(1), 131(1), and 133(2) which also contemplate applications to the Court). The pointed inclusion of an explicit requirement to exhaust mediation and arbitration in s. 134, but not in s. 135, implies the Legislature did not intend that applicants seeking the oppression remedy must first resort to mediation and arbitration.

[41] Fourth, s. 135 applies to conduct or threatened conduct, and under section 135(3)(a) the court may prohibit the conduct. This makes clear that parties may resort to s. 135 with respect to conduct that has not taken place as yet, in order to prevent it from taking place. Such an application must be brought with dispatch and determined promptly in order to be effective. The time required to schedule and proceed with mediation and arbitration are not compatible with the dispatch that many section 135 applications would require.

[42] I conclude that a s. 135 applicant does not have to first resort to mediation and arbitration even though the conduct complained of may be related to a disagreement about the declaration, by-laws or rules.

Application to this Case

[43] In this case the plaintiffs proceeded by way of action and invoked the court's jurisdiction under s. 135 of the *Condominium Act, 1998* by way of an amendment to their statement of claim. The

defendants responded by pleading in their Amended Amended Statement of Defence that the condominium Board acted within its authority and reasonably. In closing argument the defendants, for the first time, argued that this court was without jurisdiction to give a remedy under section 135 because the plaintiffs had proceeded by way of action and s. 135 contemplates the making of "an application". I did not have the benefit of extensive argument of this issue, and neither side provided any authorities. Defendants' counsel did not provide any policy reason why it was important that a s. 135 applicant must proceed by way of application. Nor did defendants' counsel identify any prejudice to the defendants resulting from the fact the plaintiffs proceeded by way of action in this case. The defendants have had full discovery of the plaintiffs' position. In the circumstances of this case I regard the defendants' argument as unduly technical. I consider that the plaintiffs have made an application to the court under s. 135 within their action.

[44] In this case, the defendants must be taken to have waived the application of s. 132(4) as they raised it for the first time in their Amended Statement of Defence, amended February 2003, after all examinations for discovery had been completed. That was too late for the defendants to raise the issue. In any event, the plaintiffs' s. 135 application, brought within their action, is not subject to s. 132(4).

[45] The foregoing results in the situation where the plaintiffs are claiming damages for causes of action, such as detrimental reliance, and applying for relief under section 135 in respect of the same conduct. There is only one dispute between the parties. Section 135 is broad enough to encompass all the claims except for punitive damages. As I have concluded that all the plaintiff's claims, however characterized, must be dismissed I do not distinguish between the plaintiffs' action and s. 135 application in my analysis of the evidence and issues.

The Merits of the Plaintiffs' Claims

The House Rules

[46] Article VII of YCC 472's house rules deals with "alterations, traditions and renovations" in the following terms:

(1) Any owner/tenant having alterations done in his or her suite shall not permit anything to be done that will obstruct to interfere with the rights of other owners/tenants or in any way have a detrimental effect on other suites in the common elements. Noise and nuisance should be kept to a minimum. It is also an imperative that the appearance of the building be protected and that its structural integrity be safeguarded. Any owner/tenant having work done is expected to follow not only the letter of this Article but also its spirit.

(2) Any owner/tenant planning alterations must have his/her plan approved in writing by the manager before any work is begun. Depending on the nature of the alterations, Board approval may be required and the manager will advise the owner/tenant accordingly. If the planning alterations will take longer than four (4) weeks, written Board approval is required.

....

(7) In the event that there is a change in or deviation from the plans approved by the manager or the Board, as the case may be, such change or deviation, however slight, cannot be proceeded with until the manager has approved the change or deviation in writing.

(8) Management has the right to monitor work being done in a suite. In enforcing the declaration and house rules, the manager or a member of the building staff may enter the suite and may order that work be halted.

(Underlining added)

[47] I am satisfied that these rules are a proper exercise of the Board's authority, granted by s. 58 of the *Condominium Act, 1998*.

Alleged Approval of the Renovation by Building Management

[48] The evidence of the building manager, Mr. Bill Colucci, and of building maintenance staff, Mr. Ernesto Frugoni, that they did not represent to the plaintiffs that their plans to reconfigure the suite was acceptable was uncontradicted. Mr. Frugoni explained he did not see it as his role to discuss the project with the plaintiffs at all. Rather, his duty was to make periodic inspections and make reports to building management.

[49] At one point of her cross-examination, Ms. Dempster indicated that Bill Colucci had given approval to the plaintiffs' reconfiguration plan on or about August 22. When pressed for details, she indicated that she was not in the suite when Mr. Colucci allegedly gave approval. A few answers later, she indicated that she did not even have personal knowledge that Mr. Colucci was there at that time, and suggested the question be addressed to Mr. McKinstry. Mr. McKinstry did not testify that Mr. Colucci expressed any approval of the plans to reconfigure the suite.

[50] The plaintiffs pointed to the notices Mr. Colucci had posted in the building advising other residents of the construction. Certainly building management was aware of the fact that the plaintiffs were renovating suite 302. Building maintenance and management were there from time to time and other residents and board members must be taken to have read the notices. Mr. Verrier himself visited the suite on at least one occasion before August 22 while demolition was taking place.

[51] A critical observation is that when Mr. Colucci posted the notices on August 14 and 21, he could not have been aware of the plaintiffs' proposed reconfiguration of the suite, as the plaintiffs testified that they did not decide to reconfigure the suite until the afternoon of August 22. The plaintiffs simply could not have understood these notices as approval of the reconfiguration of the layout of the suite.

[52] Mr. Colucci had discretion under the house rules to approve alterations that would take less than four weeks. The notice dated August 14 indicates that the work was expected to take approximately three weeks. Mr. Colucci testified that this information came from the plaintiffs. The notice dated August 21 advises that there will be construction noise "over the next few weeks" and that demolition will take place on August 22, when noise may be louder than at any other time. There was no evidence whatsoever that Mr. Colucci expressed approval of a renovation expected to take more than four weeks and which involved the reconfiguration of the suite.

Alleged Approval of the Renovation by President of the Board

[53] Ms. Dempster testified that at a meeting of August 22, about 4:30 p.m., she discussed with Mr. Verrier the plan to relocate the walls in the suite. She said that Mr. Verrier wanted clarification and suggested that Mr. Frugoni provide her with the floor plan of the original layout of the suite so that she could indicate on it where they planned to place the walls. She said that he asked that this be prepared by the time he returned from vacation just before the next Board meeting. She said that Mr. Verrier told her that as long as Mr. Colucci and Mr. Frugoni remained involved, Board approval would be a formality.

[54] Later that day, Ms. Dempster sent Mr. Verrier an e-mail at 8:47. The e-mail was in evidence. Ms. Dempster testified that Mr.

Verrier then left a voice-mail telephone message for her at 10:30 p.m. that night. Ms. Dempster testified that Mr. Verrier said in the voice-mail that the plaintiffs had obviously gone beyond what was required and there should be no problem with the renovation. She testified that the plaintiffs' decision to live in the unit rather than sell it was based on the approval of their plan to reconfigure the suite given in the voice-mail. Mr. McKinstry testified that Ms. Dempster conveyed to him the content of Mr. Verrier's voice message, and he relied on the message to proceed with erecting the partition walls in the existing living room area.

[55] Mr. Verrier agreed in his testimony that he met with Ms. Dempster on August 22, and he agreed that he left her a voice-mail late that evening in which he said that as long as building maintenance and property management were content that all requirements were being met, then it was alright with him. However, Mr. Verrier testified that when he left this message, his understanding was still that the plaintiffs intended to restore the suite to the basic standard layout, and that he did not learn of their plans to reconfigure it until his return from vacation on September 5.

[56] I do not accept Ms. Dempster's versions of the meeting and of Mr. Verrier's voice message for several reasons.

[57] First, if Mr. Verrier had said in the afternoon meeting with Ms. Dempster that Board approval was a mere formality, his voice-mail added little. Yet, Mr. McKinstry did not testify about understanding that the reconfiguration plan had been approved at the afternoon meeting. He was clear that he understood from his communication with Ms. Dempster that the approval was given in the voice-mail later that night. I consider it highly likely that had Mr. Verrier said to Ms. Dempster in the afternoon that the Board's approval was a mere formality, she would have conveyed that to Mr. McKinstry.

[58] Second, if Ms. Dempster had disclosed the plaintiffs' decision to reconfigure the suite at the afternoon meeting, and if Mr. Verrier had said at that meeting that Board approval was a mere formality, I would expect that Ms. Dempster would have made some reference to these communications in her later e-mail. That is not the case. The second paragraph refers to the "changes that we thought we'd have to make to bring the structure, plumbing, electrical, and vent/ducts back to the original suite design". The fourth paragraph said the plaintiffs had "requested a copy of the original suite plumbing/electrical/vent/duct drawings.... We will sign off that this is the plan that we are using (returning to)." The sixth paragraph referred to the "extended time we'll require to bring this back to Granite Place intention (6-8 weeks)". It is possible to read these statements of intention to return to the original design as limited to the building services and not applying to the layout of the walls. But the e-mail makes no reference to the decision to reconfigure the walls, a matter that was supposedly discussed with Mr. Verrier. To the contrary the e-mail also says "only today did we finalize with a designer where we would need to position the walls to ensure we could utilize the original facilities". This single oblique reference to the walls' position is interesting. The walls placed in their original "as constructed" location would utilize the original facilities. The plaintiff's planned placement of the walls was not a question of need but a matter of the plaintiffs' wishes. The further statement "we've been working from the visual within the suite to be able to assess just how extensive this renovation (in the true sense of the word!) will be" implies no final plan had been adopted.

[59] Had the matter of a major relocation of the walls been discussed at the afternoon meeting, and had Mr. Verrier assured her that the Board's approval was a formality, I consider it certain that Ms. Dempster would have recapitulated that in the e-mail. I find the content of the coyly worded e-mail is inconsistent with what Ms. Dempster says took place at the afternoon meeting.

[60] Third, Ms. Dempster's memory of the meeting does not seem strong. She initially said that Mary Wasser, Ernesto Frugoni, and "Bill", meaning Mr. McKinstry, were also at the meeting. She admitted in cross-examination that Mr. McKinstry was not at the meeting.

[61] Fourth, Mr. Frugoni's testimony does not support Ms. Dempster's version. Mr. Frugoni did recall a meeting with Ms. Dempster and Mr. Verrier in Ms. Wasser's office. However, he could not say when the meeting he had in mind took place, but he was emphatic it was after the new wall dividing the living room had been partially constructed. Since I accept the plaintiffs' evidence that they did not start construction of the new walls until after August 22, I conclude that Mr. Frugoni recollected a different and later meeting. What is helpful in resolving the credibility issue is Mr. Frugoni's testimony, which I accept, in which he seemed to vividly recollect that he did not learn of the new walls until he saw the new wall dividing the living room almost completely built. I accept his testimony that no one told him new walls were going to be built in the apartment. This is inconsistent with Ms. Dempster's testimony that she indicated the plaintiffs' plans at the August 22 meeting with Mr. Verrier where Mr. Frugoni was present.

[62] Fifth, I consider it unlikely that Mr. Verrier would informally indicate approval of a major project without the submission of a construction plan and without the Board's sanction one day after he circulated his Chairman's Report, reviewed above, that "no contractor will be allowed access to the building until a renovation plan has been approved by Management."

[63] Finally, I found Mr. Verrier's testimony credible. I do not accept plaintiff's counsel submission that Mr. Verrier's testimony at trial was impeached on numerous occasions as inconsistent with

his examination for discovery. The matters on which Mr. Verrier was challenged were of such inconsequence that I found it difficult to understand what was alleged to be inconsistent.

[64] I find as a fact that Ms. Dempster did not disclose the plaintiffs' plans to reconfigure the suite at the August 22 afternoon meeting and Mr. Verrier did not say at that meeting that Board approval of their plan to reconfigure the suite would be a formality.

[65] This finding of fact has a determining effect on the question of whether Mr. Verrier conveyed approval in his voice-mail left later that night. Since Ms. Dempster did not indicate the walls were to be relocated at the afternoon meeting, and her later e-mail did not do so either, it may be concluded that Mr. Verrier did not know of the plaintiff's plans when he left the voice-mail. Whatever he said in that voicemail could not have related to the plaintiffs' plan to reconfigure the layout of the suite.

[66] I conclude that Mr. Verrier did not indicate the Board would approve the plaintiffs' plan to reconfigure the suite, or indicate that as long as the building manager and building maintenance were kept involved, the plan to reconfigure the suite would be acceptable.

Unfairness

[67] It remains to consider whether the Board's refusal to permit the plaintiffs to reconfigure the unit, while within the Board's legal authority, was oppressive or conduct that unfairly prejudiced them or unfairly disregarded their interests.

[68] The plaintiffs assert an interest worthy of protection, as their claim relates to the use and enjoyment of their property. They point out that the floor layouts attached to the condominium's declaration show only demising walls and not internal walls. As

such, they say they had a reasonable expectation that they would be able to rearrange the internal walls however they wished. I note that the plaintiffs' decision to purchase the unit was not dependent on getting approval to reconfigure it. Their communications to building management prior to August 22 are liberally sprinkled with references of how they "would be bringing this back to the original intended design". The impact of the Board's decision was that they had to revert to what was their original plan. I accept that once they had adopted the plan to reconfigure the suite, they decided to live there, and that the Board's decision greatly disappointed them. The Board's decision clearly interfered with how the plaintiffs wished to use and enjoy their property.

[69] I have already explained why the plaintiffs could not have an objectively reasonable expectation that the house rules regarding renovations would not be enforced. In this case, I am satisfied that the three reasons given by the Board for disapproving the plaintiffs' proposed renovation are each a reasonable and legitimate concern of a condominium board saddled with the responsibility of balancing the interests of individual unit holders against the welfare of other unit owners and the building itself.

[70] It is true, as the plaintiff points out, that the layout of a condominium unit cannot prevent the occupants from creating noise that disturbs other residents. It is also true that at several locations in the building, as it was designed, bedrooms are located immediately above or below living rooms. These situations arise at points between groups of floors in the building that have different unit layouts. Nevertheless, the concern that a living room beneath a bedroom contributes to noise disturbance is far from arbitrary, and in my view, a reasonable one. The units within a condominium abut each other closely, and Mr. Verrier explained that the mechanical aspects of the building, pipes, vents and so forth, conduct sound from one unit to another. Limiting the

instances where a bedroom is above or below a living room to those points in the building where the floor layout changed from one group of floors to another group of floors may not eliminate noise problems but may reasonably be considered to reduce noise problems.

[71] It is also true that one or two single units in the building had been turned into double units. There was no evidence as to whether these projects had been approved or not. The earlier renovation of suite 302 by the previous owners had not been approved. However, there was no change of rules in midstream that discriminated against the plaintiffs. Mr. Verrier was a new president of a new Board. The Board passed a resolution decrying the earlier unapproved construction projects, and gave all tenants notice of an intention to stiffen the enforcement of the house rules. There was no evidence that the plaintiffs were treated any differently than any other unit holder would have been. I regard as a legitimate consideration, the Board's concern that if it approved the plaintiffs' reconfiguration of their unit, the Board would have to treat other unit holders in the same way, and that this could diminish the overall value of the building because of haphazard and uncontrolled renovation. Suite 302 is an apt example. The plaintiffs emphasized the unconventional renovation of the previous owners. The unit was on the market for a prolonged period and the plaintiffs bought it for what seems an attractive price. The plaintiffs also emphasized that the previous renovation created hazardous conditions because building services were not handled properly.

[72] I also consider as reasonable within the purview of the Board, its concern that relocating the internal walls of a unit might potentially interfere with the building's services, such as ventilation. I do not accept the plaintiffs' submission that it was up to the Board to retain experts in this regard.

[73] Nor did the plaintiffs persuade me that YCC 472's decision not to rectify the deficiencies in the windows and the terrace, since those deficiencies were due to unapproved alterations made by the previous owners of the unit, was oppressive, unfairly prejudicial to them, or unfairly disregarded their interests.

[74] The plaintiffs have not satisfied me that the Board's conduct in this case considered as a whole was oppressive, unfairly prejudicial to them, or unfairly disregarded their interests.

Damages and Compensation

[75] The plaintiffs claim a loss in the value of the suite. They argue that if the living room had a southern view, the suite would be worth some \$80,000-\$120,000 more. I did not find the testimony or report of the plaintiff's expert persuasive in this regard. The expert had never been inside the suite and did not appreciate its actual layout before he prepared his opinion. For example, he had not considered that the plaintiffs' proposed reconfiguration would not have permitted access to the terrace from the living room. In any event, suite 302 eventually sold for \$402 a square foot, which compares favorably with the highest comparable unit identified by the expert as having sold for \$404 per square foot. I was not persuaded that a reconfigured suite 302 would have had a greater market value.

[76] The plaintiffs claim a loss of the capital gains exemption for a permanent residence because they decided not to live in suite 302 as a result of the Board's decision. While they may have lost the capital gains exemption on suite 302, they did enjoy the capital gains exemption on the unit in which they lived. As they led no evidence of the capital gain on that unit during the relevant time, they have failed to place before the court sufficient evidence to calculate any damage suffered in this regard.

[77] The plaintiffs testified that they installed a multitude of fixtures and accoutrements of superior quality in suite 302 because they planned to live there. Mr. McKinstry did indicate his opinion that the cost of an upgrade in quality of a fixture could not be recovered in a subsequent sale. He was not qualified as an expert so his opinion was not strictly admissible. In any event, he did not state that there would be no enhancement in the selling price where an entire renovation was done with superior quality fixtures.

[78] Had I been persuaded that the plaintiffs' claim had merit, I would assess their damages in the amount of \$21,500. The evidence was that there was some \$8,500 to \$9,500 in lost construction costs, and about \$13,000 in additional financing charges, condominium fees, and property taxes.

Conclusion

[79] The plaintiff's action and application under section 135 of the *Condominium Act, 1998* are dismissed.

[80] The parties may schedule a date, through my secretary, to address costs.

Juriansz J.

[81] **Released:** December 8, 2003

CBR# 183

McGrath v. B.G. Schickedanz Homes Inc.

Between Dorita McGrath, plaintiff, and B.G. Schickedanz Homes Inc., defendant

Court File No. 00-CV-195227

Ontario Superior Court of Justice Cameron J. Heard: September 14, 2000. Judgment: October 18, 2000. (80 paras.)

Counsel: Thomas W. Ward, for the plaintiff. Jarvis K. Postnikoff, for the defendant.

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CAMERON J.:--

MOTIONS

[para1] These are motions by the defendant B.G. Schickedanz Homes Inc. ("Schickedanz") to:

(a) Set aside under rules 37.14(1)(a) and 39.01(6) the ex parte order by Mr. Justice Nordheimer on August 9, 2000 granting a certificate of pending litigation ("CPL") against a condominium unit in a project under construction (the "Unit") which the plaintiff had agreed to purchase, on the grounds:

(i) The plaintiff ("Ms. McGrath") failed to make full and fair disclosure of all material facts in her affidavit dated August 4, 2000 filed in support of her ex parte motion ("the Original Affidavit");

(ii) Certain paragraphs in the Original Affidavit contain hearsay which is not admissible under rules 4.06(2) and 39.01(4), unqualified opinions and reference to settlement discussions; and

(iii) Absence of evidence of uniqueness of the Unit.

(b) Discharge the CPL under s. 103(6) of the Courts of Justice Act and rule 42.02 on the grounds:

(i) Inadmissible evidence was used to obtain the ex parte CPL;

(ii) Ms. McGrath claimed damages as an alternative to an interest in land;

(iii) The agreement of purchase and sale between Ms. McGrath and Schickedanz respecting the Unit (the "Agreement") contains a covenant by Ms. McGrath not to register the CPL; and

(iv) The Unit is not sufficiently unique to support a claim for specific performance.

(c) Strike out under rule 25.11 paragraphs in the Original Affidavit which:

(i) Contain hearsay and do not comply with rules 4.06(2) and 39.01(4);

(ii) Disclose settlement discussions; and

(iii) Constitute unqualified opinions.

FACTS

[para2] Under the Agreement, dated February 14, 1999, Ms. McGrath agreed to purchase, and Schickedanz agreed to sell, the Unit, then under construction, for \$160,000. The Unit was an architect designed 1400 square foot two-storey apartment with a loft built on top of two bungalow units, one of fifty-two similar units in a project of two hundred and eight units in the former City of York in northwest Toronto. The purchase price included a parking space in an underground garage. An amendment, made on signing the Agreement, provided for an additional four-piece bathroom and an additional closet in the master bedroom and deletion of a walk-in closet.

[para3] The Agreement provided for deposits totalling \$8,000 by May 12, 2000, with \$500 allocable to the parking space.

[para4] Under the Agreement, the rescission date was March 2, 1999 and the purchase and sale was to close November 30, 1999.

[para5] An amendment to the Agreement dated August 6, 1999 provided for a second parking space and a further non-refundable deposit of \$8,000. The copy attached to the Original Affidavit was signed by Ms. McGrath but not by Schickedanz. The copy in Schickedanz's motion record was signed by Schickedanz.

[para6] An amendment dated October 10, 1999, and apparently amended by Ms. McGrath on January 6, 2000, unsigned by Schickedanz, provided for a central vacuum (\$401.25), gas supply for two future fireplaces (\$299.60) and extension of drain and water lines to the loft for future three-piece bathroom (\$695.00). These items were installed although the January 6 amendment appears to have deleted the gas supply lines.

[para7] The Original Affidavit refers to payment of \$6,000 for two gas fireplaces but there is no amendment referring to them. Mr. Fernandes acknowledged they were installed. I note this admission notwithstanding deletion of the gas supply on January 6, 2000.

[para8] The Original Affidavit of Ms. McGrath supporting her ex parte motion to obtain a CPL exhibited the Agreement but not the 65 pages of Disclosure Statement and Condominium By-Laws, Rules, Management Agreement, Budget Statements, and Declaration ("Condominium Documents") referred to in the Agreement which showed the Declarant to be B.G. Schickedanz Central Inc. ("Central").

[para9] Closing of the purchase and sale was conditional on registration of the Condominium Documents and compliance with the Planning Act.

[para10] Ms. McGrath was obliged to take possession of the Unit on substantial completion of the Unit and pay an occupancy fee until closing, which would follow registration of the Condominium Documents.

[para11] Clause 16 of the Agreement provided:

NO REGISTRATION

16. The Purchaser covenants and agrees not to register this Agreement or any certificate or notice of this Agreement or a caution or any other document evidencing this Agreement against title to the Dwelling Unit or Parking Unit(s) without having first obtained the written consent of the Vendor to such registration, which consent may be arbitrarily and unreasonably withheld. In addition, the Purchaser further covenants and agrees not to give, register, or permit to be registered any encumbrance against the Dwelling Unit and/or Parking Unit(s), and the Purchaser covenants and agrees not to list for sale, advertise for sale, entertain any offers to sell, nor assign his interest under this Agreement, or in the Dwelling Unit and/or the Parking Unit(s) nor directly or indirectly permit any third party to list or advertise the Dwelling Unit and/or Parking Unit(s) for sale at any time until after their respective Title Closings have taken place, without the written consent of the Vendor, which consent may be arbitrarily and unreasonably withheld. Should the Purchaser be in default of his obligations under this paragraph, the Vendor may as agent and Attorney of the Purchaser, cause the removal of notice of this Agreement, caution or other document evidencing this Agreement, from title to the Dwelling Unit and/or Parking Unit(s). The Purchaser hereby irrevocably nominates, constitutes and appoints the Vendor as his agent and attorney in fact and in law to cause the removal of notice of this Agreement, any caution, or any other document whatsoever from title to either or both the Dwelling Unit and Parking Unit(s).

[para12] Clause 17 of the Agreement contained an agreement by the purchaser that:

This Agreement (and all of the purchaser's rights hereunder and all monies paid hereunder) is subordinate to and postponed to any mortgages arranged by the Vendor, and any advances thereunder and to any easement to provide services and access to the relevant Condominium, and to any lands or property adjacent thereto and owned by the Vendor Purchaser hereby irrevocably appoints the Vendor as his agent and attorney to execute any consent or other documents required by the Vendor to give effect to this paragraph.

[para13] In paragraph 13 of the Agreement Ms. McGrath, as purchaser of the Unit, agreed to comply with the provisions of the proposed Condominium Documents, including the Declaration, following the scheduled Occupancy Closing.

[para14] Occupancy was never called for by Schickedanz and never occurred before Schickedanz terminated the Agreement.

[para15] The 65 pages of unindexed Condominium Documents require approval by the board of directors to changes in the common elements. However the Condominium Documents do not take effect until their registration on title.

[para16] On June 15 or 16, 2000, Mr. Fernandes told Ms. McGrath that all amendments to the Agreement must be approved by him and that no one else could approve amendments on behalf of Schickedanz.

[para17] Schickedanz has no employees and there is no evidence of its assets or other businesses besides selling condominium units for Central.

[para18] A Schedule to the Agreement of Standard Features in the units in the project contains warranties on structure, workmanship and materials, apparently in accordance with the Ontario New Home Warranties Programme ("ONHWP") and provides that enrollment in ONHWP is paid for by the purchaser on closing.

The Skylights

[para19] Ms. McGrath was told that skylights were an available extra or upgrade "where possible".

[para20] On April 15, 2000 Mr. Dan Farrell, Customer Service Manager of Schickedanz who also does site construction superintendence, was told by Ms. McGrath that she was purchasing skylights from an independent supplier to install in the Unit. Ms. McGrath says she obtained Mr. Farrell's oral permission to install the skylights. Mr. Farrell denies giving such permission. When the skylights were available, Ms. McGrath says she obtained Mr. Farrell's oral approval again to install the skylights and her contractor installed them. Another employee of Schickedanz, Mr. Buck, was advised by Mr. Farrell that he had Mr. Farrell's permission to install the skylights. Mr. Farrell never objected to the installation of the skylights and never advised Ms. McGrath

that he did not have the authority to grant permission. Indeed, Schickedanz's sales office clerk advised Ms. McGrath to speak to Mr. Farrell for such consent. The skylights were installed on April 26, 2000. On June 15, 2000 Mr. Fernandes acknowledged their installation and advised Ms. McGrath that approvals for changes must be obtained from him.

[para21] I am satisfied that Schickedanz agreed to the installation of the skylights and held Mr. Farrell out as authorized to give such consent.

The Loft Bathroom

[para22] On October 10, 1999 Ms. McGrath signed an amendment to the Agreement respecting certain additional modifications noted above. These proposed modifications included extension of water supply and drainpipes to the loft for a future three-piece washroom in the loft. The document recited that \$1,396.35 was paid with the amendment. The amendment was not signed by Schickedanz. Mr. McGrath's cheque dated October 10, 1999 for \$1,396.35 accompanied the proposed amendment. Mr. Farrell mistakenly thought Schickedanz had agreed to the washroom and instructed Schickedanz's contractor to effect the changes covered by the "amendment", including the necessary water and drainpipe extensions for the loft bathroom. Schickedanz's workforce subsequently lifted a corner tub into the loft. Ms. McGrath says Mr. Fernandes was aware of piping extension and installation of the tub and did not object. Mr. Fernandes denies any such knowledge or consent. The cheque has not cleared Mr. McGrath's account, which Ms. McGrath did not mention in her Original Affidavit. There is no suggestion Schickedanz presented the cheque for payment.

Fireplaces

[para23] Schickedanz orally agreed to install two gas fireplaces, in addition to the gas lines for them covered by the unsigned "amendment". Mr. Fernandes says Ms. McGrath paid \$6,000 for the fireplaces but still owes \$1,340 for some related extras.

Occupancy Date

[para24] The original occupancy date was clearly extended to May 26, 2000 but the amendment to the Agreement effecting the change was not in evidence. Schickedanz failed to give Ms. McGrath occupancy on May 26, 2000. At a meeting on June 16, 2000 the parties signed an amendment to the Agreement extending the Occupancy Date to June 28, 2000. Under the amendment Schickedanz agreed to pay Ms. McGrath \$100 per day from June 16, 2000 until the Unit was available for possession.

Order to Comply and Termination

[para25] The installation of the skylights was contrary to the Ontario Building Code. The City of Toronto issued to Central an Order to Comply dated June 20, 2000 in respect of the skylights and the loft bathroom.

[para26] On June 21, 2000 Schickedanz demanded payment from Ms. McGrath of \$5,340 to restore the Unit to its original condition and remove the Order to Comply by July 5, 2000.

[para27] On July 6, 2000 Schickedanz declared the Agreement terminated by reason of Ms. McGrath's default in installing the skylights and the loft plumbing and tub.

[para28] On July 7, 2000 Ms. McGrath replied denying the Agreement could be terminated and asserting that the City would approve the skylights. Schickedanz's architect filed new plans permitting the City of Toronto to revoke the Order to Comply respecting the skylights. A building permit for the skylights will be issued on the architect affixing his stamp to the drawings filed with the application for the building permit.

[para29] Schickedanz blocked in the loft piping. The Order to Comply was withdrawn.

[para30] Following settlement attempts, on August 2, 2000 Schickedanz reaffirmed its position that the Agreement was terminated and advised Ms. McGrath that it would treat Ms. McGrath's deposit as forfeited, attempt to resell the Unit and claim damages. Schickedanz demanded removal of the loft tub.

[para31] Ms. McGrath responded with this action and the ex parte motion for the CPL. In the action she claims specific performance, damages and a CPL.

[para32] Virtually all the units in the development have been sold but there is at least one unit of the same model now for sale.

ANALYSIS

CPL

[para33] Section 103 of the CJA provides:

(1) The commencement of a proceeding in which an interest in land is in question is not notice of the proceeding to a person who is not a party until a certificate of pending litigation is issued by the court and [registered on title]

(6) The court may make an order discharging a certificate;

(a) Where the party at whose instance it was issued,

(i) Claims a sum of money in place of or as an alternative to the interest in the land claimed;

(ii) Does not have a reasonable claim to the interest in the land claimed; or

(iii) Does not prosecute the proceeding with reasonable diligence;

(b) Where the interests of the party at whose instance it was issued can be adequately protected by another form of security; or

(c) On any other grounds that is considered just,

and the court may, in making the order, impose such terms as to the giving of security or otherwise as the court considers just.

A CPL is an injunction preventing an owner from dealing with the land pending the determination of the claims of the plaintiff: See *Allan Candy Ltd. v. CIBC Mortgage Corp.*, [1994] O.J. No. 1300 per Crane J.

MOTION TO SET ASIDE

Disclosure Requirements

[para34] Ex parte motions are a very serious matter. They can have a devastating effect on an absent responding party. The Court relies upon the applicant for full and frank disclosure of all the relevant facts in the supporting affidavit material as required by rule 39.01(6). There is a heavy onus on counsel to make sure all the relevant facts are before the Court: See *830356 Ontario Inc. v. 156170 Canada Ltd.*, [1995] O.J. No. 687 per Chadwick J. Great injustice may be done if the requirement of honesty and candour is not strictly enforced: See *Swallow v. The Midlands Corp.* (1993), 14 O.R. (3d) 687 per Master Peppiatt at p. 694.

[para35] The Agreement was an exhibit to Ms. McGrath's Original Affidavit but the affidavit failed to refer to paragraph 16 in the Agreement headed in capital letters "No Registration" contained in the 11-page Agreement, to which were attached schedules respecting Standard Features, floor plans and locations and amendments.

[para36] A Judge of this Court preparing for a motion brought ex parte cannot be expected to read and analyze long and complex agreements and lengthy correspondence searching out positions which might be taken by the absent party. Judges do feel compelled to prepare an ex parte matter with particular care, to the extent time permits, in an effort to prevent abuse of the absent party's rights. The urgency of some matters often prevents preparation with the care the situation may require. The Judge will question counsel on matters which, in the Judge's limited perception of the matter, require further clarification to ensure the applicant is acting bona fide and to prevent abuse of the absent party's rights. However in the final analysis it is the responsibility of the party seeking the extraordinary relief to ensure that the rights of the absent party are fairly addressed by ensuring full and frank disclosure of the principal issues and the material facts respecting them.

[para37] In this case I am satisfied from the endorsement of Mr. Justice Nordheimer that counsel fulfilled his duty to the Court to address the issue of paragraph 16 of the Agreement and to raise the defendant's allegations of termination of the Agreement by reason of the plaintiff's alleged breaches of the Agreement.

Lack of Evidence of Uniqueness

[para38] Schickedanz complains that Ms. McGrath's affidavit failed to provide any evidence as to the unique character of the Unit and that Mr. Justice Nordheimer was wrong to assume that merely because an interest in land was claimed by a purchaser under an agreement that a CPL should be granted. The defendant argued that the entitlement to specific performance is an important element in determining the entitlement to a CPL: *572383 Ontario Inc. v. Dhunna* (1987), 24 C.P.C. (2d) 287 per Master Donkin. The defendant further argues that specific performance is not granted as a matter of course, and damages will not be considered an inadequate remedy, unless the real property which is the subject of the proceeding can be shown to be unique. In these days of the mass production of apartments of similar design in large buildings and houses of similar design in large subdivisions, a single unit or house among many of the same design cannot be said to have a peculiar or special value or to be irreplaceable: See *Semelhago v. Paramadevan* (1996), 136 D.L.R. (4th) 1 (S.C.C.); *Konjevic v. Horvat Properties Limited* (1998), 40 O.R. (3d) 633 (C.A.).

[para39] However the historical remedy of specific performance for loss of a bargain to purchase real property has not been negated. I agree with the statement by Low J. in *940060 Ontario Ltd. v. 529566 Ontario Ltd.*, [1999] O.J. No. 355 at para 14:

The presumption of uniqueness has not yet been replaced by a presumption of replaceability, and that what the Supreme Court did in *Semelhago* was to open the door to a critical inquiry as to the nature and function of the property in relation to the prospective purchaser.

[para40] In the context of the requirement for disclosure on an ex parte motion, the applicant for a CPL must give some evidence of uniqueness to support a claim for specific performance. This information is material to the issue of entitlement to a CPL.

[para41] The Unit was not comparable to the purchase of the custom-built house on a ravine lot considered in *Tropiano v. Stonevalley Estates Inc.* (1997), 36 O.R. (3d) 92 (Gen. Div.) nor land purchased for expansion of the use of the purchaser's adjoining property considered in *1072456 Ontario Ltd. v. Ernst & Young Inc.* (1997), 10 C.P.C. (4th) 351, per Master Clark.

[para42] Ms. McGrath did give some evidence of uniqueness in paragraph 5 of her Original Affidavit:

I have made changes to the property, including the installation of two skylights and I have also installed wiring for a stereo system throughout the property.

[para43] The signed amendments attached to the Agreement exhibited to the Original Affidavit refer to removal of a walk-in closet in the master bedroom and installation of a smaller closet and a four-piece bathroom en suite.

[para44] The Original Affidavit refers to written amendments, not signed by Schickedanz, to have the defendant rough-in a central vacuum system, provision for a rough-in of gas pipes for future fireplaces, provision of piping for a loft bathroom and a tub in that bathroom. The latter two items were implemented by Schickedanz's workforce.

[para45] There was some evidence in the Original Affidavit which established that the Unit would be different from the 51 other units of a similar basic design in the Project and that these differences were obtained by Ms. McGrath. Accordingly there was evidence of uniqueness.

Improper Evidence

[para46] Schickedanz complains that Ms. McGrath's Original Affidavit is based on unqualified opinions and hearsay, contrary to rules 4.06(2) and 39.01(4) and asks that this Court expunge paragraphs 8, 12, 13, 14, 16, 17 and 18 of the Original Affidavit.

[para47] Any defects in paragraph 8 are not apparent and were not referred to in argument.

[para48] Schickedanz complains that Ms. McGrath's Original Affidavit improperly disclosed settlement discussions in paragraphs 12, 13 and 14. I have not been persuaded of any detriment to Schickedanz because of the disclosure. On the contrary, paragraph 12 and part of paragraph 13 put squarely before Mr. Justice Nordheimer the positions of the parties in this dispute and the need for urgency in obtaining the CPL. I would expunge paragraph 14 as being part of the "without prejudice" negotiation.

[para49] Schickedanz complains of Ms. McGrath's "opinion" in paragraph 16 respecting her interpretation of clause 16 of the Agreement. It is clear that Ms. McGrath is not an expert in interpreting contracts. No Judge would be misled by this "opinion". I regard it as a statement of how she, as a party to the Agreement, understood the clause. It certainly brings to the Court's attention on an ex parte motion an issue on which Schickedanz may rely in defending the plaintiff's claim and it is clearly relevant and material to the issue of Ms. McGrath's entitlement to a CPL.

[para50] Schickedanz complains that Ms. McGrath's Original Affidavit gave double hearsay evidence in paragraph 17 respecting Schickedanz's financial status which she obtained from her husband without giving the source of his information. I would delete the first sentence of paragraph 17. The balance of the paragraph is a statement of her concern that a judgment for damages may not be collectable. In as much as the Declarant, Central, is a different entity from Schickedanz, and there is no obligation to hold the deposit in trust pending closing, I find some evidence to support this concern.

[para51] Schickedanz complains that Ms. McGrath offered opinions which she was not qualified to render. In paragraph 18 Ms. McGrath speculated that the market value of the Unit had increased and that she expected that any claim for damages may not be collectable. It was clear from the Original Affidavit that Ms. McGrath was a secretary and not a qualified appraiser. No Judge reading the affidavit would have been misled by this assertion. The statement of expectation is a fact and also a possibility. I decline to expunge it.

[para52] Schickedanz complains that despite knowing the names of Schickedanz's employees in the sales office and at the site, Ms. McGrath failed to give their names in her Original Affidavit. I agree that such particulars are desirable. They add credibility to the affidavit. However they are not material and their absence did not prejudice Schickedanz.

[para53] Schickedanz complains that Ms. McGrath's Original Affidavit failed to point out that under Schickedanz's published list of available extras attached to the Agreement skylights could only be installed "where possible" and Ms. McGrath offered no evidence to support the conclusion that their installation was possible. In the absence of the meaning of "where possible" and considering Mr. Farrell's oral agreement and the subsequent City of Toronto building permit allowing the skylights, I consider the omitted facts immaterial.

[para54] Schickedanz complains that Ms. McGrath's Original Affidavit referred to amendments to the Agreement which had not been signed by Schickedanz. The signed copy of the amendment respecting the second parking space in Mr. Fernandes' affidavit on this motion suggests Ms. McGrath did not always receive copies of amendments signed by Schickedanz. In view of Mr. Farrell's oral consent to the skylights, Mr. Fernandes' acknowledgment that Schickedanz's trades installed the tub and the absence of evidence of written agreement to other agreed amendments such as the gas fireplaces, the parties had clearly embarked on a course of action where signed written amendments were not necessary. Schickedanz was lax in enforcing the requirement for signed written amendments. It cannot now require, in the context of this motion, that the absence of signed written amendments be disclosed.

[para55] Schickedanz complains that Ms. McGrath's Original Affidavit failed to disclose that certain payments for extras had not been made. These issues would be relevant to the issues of termination and damages but was not material to the issue of entitlement to a CPL. Mr. Justice Nordheimer dearly appreciated Schickedanz's position that breach of the contract by Ms. McGrath justified termination by Schickedanz.

[para56] Schickedanz complains that the name of the Owner of the project, Central, was not disclosed. The name of the vendor, Schickedanz, was disclosed. I am not persuaded that the name of the true owner is material to obtaining a CPL. Schickedanz held itself out as having the authority of the owner to sell. The names of Schickedanz and the owner, Central, are so similar as to be evidence that Schickedanz was for all purposes of the sale the agent of Central and Central is bound by the Agreement made by its agent.

[para57] Schickedanz complains that Ms. McGrath failed to disclose in the Original Affidavit that her husband's cheque for \$1,396.35 dated October 10, 1999, in respect of extras in a signed amendment of that date, had not cleared her husband's account. This issue is irrelevant to a CPL. There is no evidence to suggest that the absence of clearance of the cheque is for any reason other than Schickedanz's failure to present the cheque. There is no evidence that it was not honoured because of some default by Mr. McGrath or Ms. McGrath.

[para58] Schickedanz complains that the Original Affidavit failed to raise the absence of approval by the condominium board of directors to the installation of the skylights, as would be required in the Condominium Documents on change of a common element. I am satisfied that with respect to a building still under construction and before registration of the Condominium Documents, this provision is inapplicable. There is no evidence that Central would have obtained such approval once the building permit was obtained by Schickedanz's architect. At that point Central owned the shares of the condominium corporation and controlled the election of the board of directors. Further this issue is not material to the obtaining of a CPL. It may be relevant to the issue of damages.

[para59] I am not persuaded that any material evidence was withheld, and if it was, such failure was not made with the intention of misleading the Court.

[para60] I expunge paragraph 14 and the first sentence of paragraph 17.

[para61] I dismiss the motion to set aside the CPL. There was sufficient disclosure on the ex parte motion.

MOTION TO DISCHARGE

Interest in Land

[para62] Under the Agreement, Ms. McGrath was entitled, and obliged, to occupy the Unit from the date of substantial completion until the closing date for the purchase of the Unit. On the closing date the parties were obliged to close and title would pass to Ms. McGrath. Schickedanz argued that Ms. McGrath had no right to an interest in land. The argument, as this Court understood it, rested on an alleged lack of uniqueness of the Unit and on the agreement by Ms. McGrath in the Agreement not to register a lien against the title to the Unit. In effect, Schickedanz argues that the Agreement was only a personal agreement between the parties and did not give rise to an interest in land.

Contract Prohibition Against CPL

[para63] The purchaser's undertaking, in clause 16 of the Agreement, not to register a lien in respect of the Agreement is an inherently reasonable clause. It is intended to prevent a purchaser of one of many units in a project from registering notice of the purchase and assertion of a lien which would impair the vendor's ability to obtain construction financing or access agreements. It is also intended to prevent resale prior to closing where a lien right could arise. The vendor Schickedanz has chosen to treat Ms. McGrath's alleged breaches of the Agreement as conduct constituting repudiation of the Agreement entitling Schickedanz to accept that repudiation, and terminate the agreement, thus entitling Schickedanz to resell the Unit.

[para64] Schickedanz cannot unilaterally terminate the agreement, or accept termination, and yet continue to rely on a clause inserted for its benefit which is detrimental to the purchaser's rights. There is nothing in the Agreement which allows the clause to survive termination.

[para65] Schickedanz has referred me to *Reznik v. Coolmur Properties Ltd.* (1982), 25 R.P.R. 43, (S.C.O.), per Steele J. where a similar clause was at issue when the purchaser sought a CPL. In that case the purchaser sought to terminate the agreement and obtain a return of his deposit. The ONHWP applied to that case and covered return of the purchaser's deposit if it was wrongly retained by the vendor.

[para66] Schickedanz is covered under the ONHWP and the evidence of Mr. Fernandes suggests that purchasers' deposits are insured for \$20,000, an amount less than the total of Ms. McGrath's investment for deposits and extras.

[para67] However, in this case it is the vendor Schickedanz which seeks the protection of a clause in a contract which it chose to terminate. It cannot have its cake and eat it too.

[para68] Clause 17 of the Agreement contains a postponement of any claim by Ms. McGrath to mortgages and access agreements arranged by Schickedanz. The harm alleged by Schickedanz in registration of the CPL may be non-existent because of the postponement.

[para69] I prefer to consider the exercise of my discretion as permitted by the CJA s. 103 and as exercised by Sutherland J. in *Greenbaum v. 619908 Ontario Ltd.* (1986), 11 C.P.C. (2d) 26 at 46 (S.C.O.).

Discharge of CPL

[para70] The onus is on a defendant to persuade the Court that the CPL should be discharged: *1072456 Ontario Ltd. v. Ernst & Young Inc.*, (1997), 10 C.P.C. (4th) 351 at 358 (Ont. Ct. Gen. Div.). The Judge should examine the whole of the evidence as it stands after cross-examination, without deciding disputed issues of fact and credibility, and consider whether the plaintiff's case constitutes a reasonable claim to the interest in land claimed: *Ibid.* at 359.

[para71] In exercising its discretion to discharge or vacate a CPL the Court should consider all the circumstances including:

- 1) Whether the plaintiff is a shell corporation;
- 2) Whether the land is unique;
- 3) The intent of the parties in acquiring the land;
- 4) Whether there is an alternative claim for damages;
- 5) The ease or difficulty in calculating damages;
- 6) Whether damages would be a satisfactory remedy;
- 7) The presence or absence of another willing purchaser;
- 8) The harm done to the plaintiff if the certificate is allowed to remain; or to the plaintiff if the certificate is removed, with or without security.

See *572383 Ontario Inc. v. Dhunna*, above, and cases cited therein at p. 291.

[para72] Mr. Fernandes refused to answer questions on cross-examination respecting the assets, liabilities or financial condition of Schickedanz. He also testified that all the sales staff are employees of Central and that Schickedanz has no employees. I am not persuaded that Schickedanz is any more than a shell corporation. There is a very real possibility that Schickedanz is without assets and was set up to protect Central's assets from liabilities arising out of sale agreements.

[para73] I am satisfied that Ms. McGrath purchased the Unit for the purpose of residing in it with her husband. She made a substantial investment in modifications to the standard plan for the Unit, including two gas fireplaces for \$6,000, indoor vacuum, \$3,000 for the skylights, stereo wiring, en suite bathroom in the master bedroom, modified cupboard and other features in accordance with the options listed on Schedule B to the Agreement.

[para74] These changes could have made the property unique to Ms. McGrath. I exclude any consideration of the loft bathroom in this issue of uniqueness as it is not permitted by the applicable building by-law or legislation.

[para75] There is an alternative claim for damages. However I do not see why this should deprive Ms. McGrath of specific performance if she is entitled to specific performance. In view of her right to payment until possession she may have a legitimate claim for damages in addition to, and not as an alternative to, specific performance. It is not clear that the claim for damages is limited to the same loss as that for which specific performance is sought.

[para76] I have no evidence or argument respecting calculation of damages.

[para77] There is no evidence of the existence of another willing purchaser. There is evidence of the availability of other units with a similar floor plan but there is no suggestion that any of them have any of the custom features obtained for the Unit by Ms. McGrath.

[para78] In balancing the harm to Ms. McGrath if she does not obtain the CPL against the harm to Schickedanz if the CPL is permitted to remain, I am satisfied Schickedanz's legitimate interests are probably protected by the terms of clause 17 of the Agreement while the CPL will protect Ms. McGrath's rights to the Unit pending resolution of the action. In any event, Schickedanz's termination of the Agreement triggered registration of the CPL. Schickedanz must live with the consequences of that position.

CONCLUSION

[para79] I dismiss the motion to discharge the lien.

[para80] Costs may be spoken to.

CAMERON J.

CBR# 291

Sherritt v. 690624 Ontario Inc. (c.o.b. Kings Terrace Condominiums)

Between Donna Ann Sherritt, plaintiff, and 690624 Ontario Inc., operating as Kings Terrace Condominiums, Bruno Megna, Rocco (Roy) Megna, Megna Real Estate and Insurance Limited and Milica Bjekic, defendants

Court File No. 1867/97

Ontario Superior Court of Justice Cavarzan J. Heard: May 23-25 and 29, 2000. Judgment: July 21, 2000. (47 paras.)

Counsel: George Gligoric, for the plaintiff. John V. Kranjc, for the defendants.

[para1] CAVARZAN J.:-- The plaintiff entered into an agreement of purchase and sale for the purchase of a condominium apartment unit on December 3, 1996. After extensive renovations were made to that unit by the vendor according to the plaintiff's specifications, the plaintiff took possession on February 28, 1997. She resided there until about May 14, 1997, when she vacated the unit and refused to complete the purchase.

[para2] In this action, the plaintiff claims from the corporate defendant the return of her deposit of \$5,500, and from the corporate defendant and the various individual defendants damages for breach of contract and for innocent and fraudulent misrepresentation. She claims damages for inducing breach of contract from the defendants Bruno and Rocco Megna. Exemplary or punitive damages are claimed against all defendants.

[para3] At the opening of trial I permitted the amendment of the statement of claim to include a claim for rescission of the agreement of purchase and sale. Also at the opening of trial, the counterclaim of the corporate defendant was dismissed without costs on consent of the parties.

BACKGROUND

[para4] The defendant corporation had undertaken the conversion of a five-storey, 36-units, 30 years old apartment building into a condominium development. The plan was to renovate each unit in accordance with the new owner's specifications, after it had been sold. Depending upon the speed with which the units were sold, the renovation of the common areas of the building was to be completed within one or two years of the commencement of sales. Model units were completed in the building as vehicles for illustrating graphically to potential purchasers the results of a completed renovation.

[para5] The plaintiff and her companion James Sherritt, whom she has since married, attended at an "open house" at another of the defendant corporation's condominium conversion projects. There they met the defendant Milica Bjekic, an agent for the defendant Megna Real Estate and Insurance Limited. She alerted them to the existence of the condominium conversion project at 2373 King Street East, named Kings Terrace Condominiums, and subsequently met them there to show them a model suite.

[para6] A brochure (Exhibit 3) describing the Kings Terrace project was received by the plaintiff, probably from Milica Bjekic. On one side it showed a photograph of the building and a floor plan of a unit. The printed text touted condominium living as "a better way to live", and described the project as "all new, with customers [sic] needs in mind". It advertises "three floor plans, with balconies, to choose from". In the text printed on the reverse side the following appears:

Totally renovated spacious units with two appliances and whirlpool.

Ceramic floor tiles in bright and efficient kitchens and baths.

New aluminum thermal paned windows.

Well maintained and secure building.

[para7] The plaintiff and Sherritt were not able to view unit 46, the unit which they ultimately chose, before signing an agreement of purchase and sale for that unit on December 3, 1996. It was still occupied by a rental tenant. Instead, they viewed a similar unit.

[para8] The agreement of purchase and sale was made conditional on the purchasers obtaining mortgage approval by January 17, 1997, and, I understand, on the sale of the plaintiff's house. A ten-day cooling-off period was also written into the agreement, during which the purchasers could review the condominium by-law and regulation (Exhibit 5). If the purchasers did not approve, they could give written notice to the vendor during that period thereby terminating the agreement.

[para9] By an amending agreement, the mortgage condition was extended for two weeks to January 31, 1997, at which time the plaintiff waived all conditions.

[para10] Appendix B of the agreement of purchase and sale referred to an "occupancy date" and a "closing date". Purchasers were required to take occupancy if the unit is "substantially completed" and "notwithstanding that the Vendor has not fully completed the Unit or the common elements". Section 3(c) of Appendix B provides as well that "the Vendor shall complete such outstanding work within a reasonable time after closing, having regard to weather conditions and the availability of labour and materials."

[para11] The closing date, defined in s.1(c) of Appendix B can be either the occupancy date or a date designated by the vendor's solicitor at least 30 days after the vendor's solicitor notifies the purchaser or purchaser's solicitor of the registration of the condominium and requests a formal closing with a specified closing date, whichever date is later.

[para12] On December 18, 1996, James Sherritt was deleted as a purchaser by an amendment to the agreement of purchase and sale, because of differences between him and the plaintiff. The plaintiff testified that she intended then to move into the unit alone.

[para13] Immediately upon occupying the unit, the plaintiff began to complain about items of unfinished work in her unit, about the condition of the common areas of the building, and about the general management of the development. Despite attempts by the vendors to rectify all of the alleged defects in unit 46, repairs and renovations were never completed to the plaintiff's

satisfaction. I will canvass some details of this dispute later in these reasons; suffice it to say for now that that dispute gives rise to issues of credibility.

[para14] By letter of April 1, 1997, the solicitor for the vendor advised the solicitor for the plaintiff that the condominium had been registered. He set the closing date for May 2, 1997. From that point on, the plaintiff took the position that she would not close the transaction until all her complaints about her unit and about the building generally were addressed to her satisfaction. As stated above, she vacated the premises on or about May 14, 1997.

[para15] The plaintiff had been among the first to purchase a unit at Kings Terrace Condominiums. At that time, some eight to ten others had been sold. The remaining 25 or 26 units were sold by mid-1997. The refinishing of the common areas occurred in late 1997 to early 1998, after the workers had completed the renovation of the units and the installation of a fire suppression system throughout the building. The paving of the outside parking area was the last common element completed. This was in the latter part of 1997, when no further construction vehicles and delivery trucks were attending on the property.

THE ISSUES

Did Milica Bjekic make misrepresentations which induced the plaintiff to enter into this agreement of purchase and sale?

[para16] Mr. Gligoric suggested in his closing submissions that this is a case about unequal bargaining power. He put his client's position rather colourfully by asserting that the defendants were thumbing their noses at the law and that, in this case, the seller's greed exceeds the customer's needs.

[para17] The evidence does not support that characterization of the case. The plaintiff is an experienced adult who had previously owned residential properties in Hamilton and in Caledonia. She together with James Sherritt, another experienced adult who had also previously owned residential property, initiated the hunt for a condominium dwelling unit. They were not content with what was offered at the Connaught Gardens Condominiums which they visited first. They did approve of the units at Kings Terrace.

[para18] Ms. Bjekic admitted that she had told them about the freedom from grass cutting, snow shovelling, and other aspects of outside maintenance, enjoyed by those who chose the "condominium lifestyle". She denied, however, having suggested to the plaintiff that the refinishing of all the common areas would be completed before the closing of the plaintiff's purchase. Her testimony, which I accept as credible and reliable, was that she told prospective purchasers that the common areas would not be completed until all the units had been sold and construction work in the building's units had been completed.

[para19] In her testimony, the plaintiff attributed all of the statements printed on Exhibit 3 to Ms. Bjekic as part of her sales pitch to the plaintiff. Ms. Bjekic testified that she did not hand out those brochures. They were available at the sites of the various condominium projects on stands in the model units. Nothing turns on whether or not Ms. Bjekic handed the brochures to these prospective purchasers. I have already noted above that she probably did hand them to the plaintiff.

[para20] No reasonable person would interpret literally the statement "All new, with customers needs in mind" when he or she knows that the reverse side of the brochure refers to "Totally renovated spacious units". When cross-examined, the plaintiff admitted that she had discussed the nature of the renovations which could be done to unit 46, including floor tiles, countertops, and choice of colours, prior to signing the agreement of purchase and sale.

[para21] With respect to the representations on the brochure (Exhibit 3), she acknowledged that Kings Terrace was adjacent to park land, that it backed onto green space and bicycle paths, that it was close to shopping, and that there was, indeed, an outstanding view from the balcony of unit 46 overlooking the Red Hill Ravine. She acknowledged as well that the unit had been renovated, although she insisted on saying "redone" as if that negated the suggestion that renovation had occurred. She agreed, nevertheless, that new thermopane windows had been installed, as well as new ceramic floors in the entrance hallway, bathroom, and kitchen. New sinks, taps, and cupboards were installed in the kitchen, although this work was not 100% complete on February 28, 1997. The bathroom was equipped with a new toilet, newly-tiled walls, a new mirror, and a new heat lamp. One wall of the bedroom had been moved and rebuilt according to her specifications. This necessitated the relocation of a heating register. The bedroom was then newly carpeted. New carpeting was installed in the living room. The building's original plaster walls were repaired, but not to her satisfaction.

[para22] In my view, the statements made on the brochure do not even qualify as puffery. They are statements of fact which reflected the reality evident to any prospective purchaser.

[para23] As for equality of bargaining power, this hardly qualifies as a case where it can be said that an inexperienced and vulnerable isolated individual was stampeded into a bad deal by high pressure sales tactics. The agreement of purchase and sale had a built-in ten-day cooling off period. The plaintiff had ample time to read the documentation provided to her and to consult a solicitor. She did, in fact, take the agreement of purchase and sale to her solicitor. The agreement was further conditional on the purchaser being approved for mortgage financing and on the sale of her house at 11 Martha Street. She testified that she had no intention of going through with the condominium purchase unless she first sold her house. The house was listed for sale for \$105,000; it sold for \$98,500. The purchase price for unit 46 was \$63,400 with an initial down payment of \$500.

[para24] The agreement of purchase and sale contained provisions alerting the purchaser to the nature of the transaction. Paragraph 2(b) of Appendix A cautions that as the unit is not newly constructed, it is not enrolled under and is not covered by the Ontario New Home Warranty Program. The plaintiff insisted that she was led to believe the contrary, although she did not say by whom. That is simply not credible. She claimed not to have been aware of the content of paragraph 2(b) but admitted that she was aware of paragraph 2(f) on the same page which cautioned that the unit purchased would not be identical to the model unit.

[para25] Paragraph 20 of Appendix B to the agreement of purchase and sale contemplated on-going work in the building:

20. The Purchaser shall not interfere with the completion by the Vendor of other Units and the common elements, in accordance with the plans and specifications. Until all the Units are completed and sold the Vendor may make such use of the unsold Units and the common elements as may facilitate such completion and sale showing of the Units and the display of signs.

[para26] Mr. Gligoric submitted that paragraph 3(c) of Appendix B conflicts with paragraph 20 in that it requires the Vendor to complete outstanding work within a reasonable time after closing. That paragraph favours the purchaser and ought to be read

contra proferentem in view of the fact that the agreement is a document prepared by the vendor. Paragraph 3(c) provides in part that:

(c) If the Unit is substantially completed by the Vendor on the Occupancy Date, the Purchaser shall take occupancy notwithstanding that the Vendor has not fully completed the Unit or the common elements and the Vendor shall complete such outstanding work within a reasonable time after closing, having regard to weather conditions and the availability of labour and materials. (Underlining added)

[para27] In my view there is no conflict between the two paragraphs. The document must be read as a whole. A reasonable time for completing outstanding work will necessarily be shorter for work on the units; it will necessarily be longer for work on the common elements. It makes no sense logically or practically to finish common areas if workers must use the common areas to transport construction materials and equipment and for the removal of debris.

[para28] The evidence does not support the allegation that Milica Bjekic made misrepresentations which induced the plaintiff to enter into the agreement of purchase and sale. Neither is there any credible evidence that either Bruno Megna or Rocco Megna made such representations. There is no need to consider, therefore, the distinction between innocent misrepresentations and fraudulent misrepresentations.

[para29] It is reasonable to infer, as suggested by Mr. Kranjc, that the plaintiff and James Sherritt had intended to try the condominium lifestyle together. By the time the plaintiff moved into the unit, however, she and Sherritt had had differences and the condominium lifestyle may not have held the same appeal for her.

Is the plaintiff entitled to rescission of the agreement of purchase and sale?

[para30] In *Cheshire, Fifoot & Furmston, Law Of Contract* (11th ed.) rescission is discussed as a remedy for misrepresentation. At p. 75 it is stated that:

It is a fundamental principle that the effect of a misrepresentation is to make the contract voidable and not void. This means that the contract is valid unless and until it is set aside by the representee. On discovering the misrepresentation the representee may elect to affirm or to rescind the contract.

A contract is affirmed if the representee declares his intention to proceed with the contract or does some act from which such an intention may reasonably be inferred.

A contract is rescinded if the representee makes it clear that he refuses to be bound by its provisions. The effect then is that the contract is terminated ab initio as if it had never existed.

[para31] My finding that there is no credible evidence to support the allegation that the plaintiff was induced to enter into the contract by misrepresentations, effectively rules out the remedy of rescission.

[para32] I am aware, however, that rescission is used in a second sense. Footnote 11 at p. 275 of *Cheshire, Fifoot & Furmston* notes that:

Unfortunately the word "rescission" is also often used to describe the position where a party elects to treat a contract as discharged because of a breach of one of the essential terms. But there the contract is not rendered void ab initio. The further liability of either party to perform the outstanding contractual obligations is terminated, but causes of action that have already arisen by virtue of the breach remain remediable by an action for damages.

[para33] In law, a party to a contract is entitled to treat herself as discharged from further liability where her co-contractor, without expressly or implicitly repudiating his obligations, commits a fundamental breach of contract. Macdonell J. in *Eagle Dancer Enterprises Ltd. v. Southam Printing Ltd.* (1992), 6 B.L.R. (2d) 45 (B.C.S.C.) reviewed the law on fundamental breach. At p.52 he summed up as follows:

The proper approach for determining whether a fundamental breach occurred can be found in the case of *Poole v. Tomenson Saunders Whitehead Ltd.*, 16 B.C.L.R. (2d) 349, [1987] 6 W.W.R. 273, 18 C.C.E.L. 238, 43 D.L.R. (4th) 56 (C.A.), where Wallace J. A. (per curiam) states, at p. 358 [B.C.L.R.]:

"The common theme, emphasized by every court, when determining whether a breach of contract justifies the innocent party terminating the contract rather than confining his remedy to the damages caused by the breach, is that the breach must be tantamount to the frustration of the contract either as a result of the unequivocal refusal of one party to perform his contractual obligation or as a result of conduct which has destroyed the commercial purpose of the contract, thereby entitling the innocent party to be relieved from future performance."

[para34] At p. 53, Macdonell J. adopts the following from p. 534 of G.H.C. Fridman, *The Law Of Contract In Canada*, (2d) ed. (Toronto Carswell, 1986)

The basic test comes down to the simple, if not obvious one of deciding what is the real purpose of the contract, the true benefit intended to be obtained by the injured party, the extent to which the misperformance by the defendant goes beyond falling short of what was desired by the victim of the breach and involves the complete denial to him of any benefit from the performance that was provided.

[para35] Here there was no unequivocal refusal of one party to perform its contractual obligations. Clearly, there were difficulties between the plaintiff and the defendants and their construction staff in arranging mutually convenient times to complete necessary work in the unit. The sum total of the plaintiff's complaints by the time the closing date became imminent amounted to plaster walls that needed to be refinished, periodic condensation on the windows, levelling of the kitchen cupboards, and the regrouting of the bathtub. All of these repairs were minor. I accept the testimony of the Megnas that they were always ready and willing to complete them. I accept the evidence of the two experts who testified. Both had done independent inspections of the unit. In essence, they agreed that the defects alleged were minor and that the total cost of correcting them would be less than \$1,000.

[para36] The conduct of the defendants cannot be said to have destroyed the commercial purpose of the contract. Renovations of unit 46 began within two days after the conditions on the agreement of purchase and sale were waived on January 31, 1997. The plaintiff attended at Unit 46 on February 1, 1997, at which time a floor plan showing how the bedroom wall was to be relocated was approved by the plaintiff. I accept the testimony of Rocco Megna that the floor tiles were installed as one of the last steps in the renovation of the unit, on or about February 20, 1997, and that the change in colour was the plaintiff's decision as reflected in the "Materials Chosen" form signed by her on February 11, 1997.

[para37] Work on the common areas began in mid-1997 and was completed between late 1997 and early 1998. The parking lot was paved in late 1997, and other exterior repairs, such as replastering and painting of the covered outside parking area were also completed at that time.

[para38] The holes in the hallway ceilings had been made to facilitate the installation of a fire suppression system for the building. This system was inspected and the holes were closed by mid-1997. This work was a necessary part of the conversion of an apartment building into a condominium project. These holes in the common area hallways and the generally unkempt condition of the parking areas around the building were featured prominently in exhibit 8, a videotape made by the plaintiff on April 15 and 16, 1997.

[para39] Tab 1 of the Supplementary Book of Exhibits (Exhibit 2) contains colour photographs of the exterior of the building which illustrate the results of the renovations undertaken. They show a clean, attractive, and well-maintained property. The same may be said about photograph 8 showing the interior of a building-entrance hallway.

[para40] With respect to the plaintiff's complaints about other deficiencies, I find them to be exaggerated and made for effect. For example, she alleged that the kitchen appliances were not in the unit on February 28, 1997, when she took possession. According to her, she intercepted appliance delivery men who were delivering appliances to another unit and prevailed upon them to deliver them to her unit. Exhibit 18, however, is an invoice from a furniture supplier showing delivery of a stove and refrigerator to Unit 46 on February 28, 1997.

[para41] Bruno Megna testified that complaints about the absence of a kitchen sink and of appliances on February 28th, which he denied as false, came to light only after this litigation was commenced.

[para42] A storage area within the building and two parking spaces were always available for Unit 46. Bruno Megna testified that the two parking spaces for that unit were at the entrance to the parking area adjacent to King Street. The plaintiff had complained, however, that the door of the car in an adjacent parking space would strike her car. Megna was not cross-examined on this testimony. I accept it as credible and as another illustration of the plaintiff's tendency to distort the facts for effect.

[para43] A videocamera at the front entrance of the building is permanently trained on the locked front door. Unit owners could monitor the entrance by tuning into Channel 3 on their cable T.V. service, and admit visitors only after visual identification. Bruno Megna testified that this system was installed by Rogers Cable in the mid-1980's and maintained by that company. He denied that the system was not operating, as asserted by the plaintiff. On cross-examination, he maintained that this feature made the building secure. He was not otherwise challenged on this matter, and I accept that testimony as credible.

[para44] Rocco Megna testified that the windows throughout the building had been replaced with new thermo-pane windows in 1996 and 1997. There have been no complaints about condensation from the owners of any of the other units. Roy Cooke who did an independent inspection of Unit 46 on June 12, 1997, found no evidence of condensation on the windows. He suggested that the simplest way to relieve excess humidity in the unit was to install a ceiling exhaust fan or to leave the patio door open 1/4 inch. I am unable to credit the plaintiff's testimony that the unit's windows were defective.

[para45] In my view there has been no fundamental breach of contract entitling the plaintiff to rescind it. She took possession of the unit when it was substantially renovated in accordance with the terms of the agreement of purchase and sale. She occupied it for some three months. She was entitled to insist that all of the minor deficiencies be corrected. If not corrected she may have been entitled to an award of damages; she is not entitled, however, to walk away from her obligations under the agreement and demand the remedy of rescission.

Is the plaintiff entitled to exemplary or punitive damages?

[para46] This claim is entirely misconceived. There is no evidence of the type of egregious conduct on the part of any of the defendants which would attract an award of exemplary or punitive damages. On the contrary, the evidence shows that they acted honourably and in good faith.

RESULT

[para47] The plaintiff's claim is dismissed. I may be spoken to on the matter of costs, if necessary.

CAVARZAN J.

CBR# 812

Gibraltar Mortgage Ltd. v. Ogilvie and Co.

Between Gibraltar Mortgage Ltd., plaintiff, and Ogilvie and Company and Edward Tapuska, defendants

Action No. 9801-03645

Alberta Court of Queen's Bench Judicial District of Calgary Hawco J. Judgment: filed March 2, 2001. (36 paras.)

Counsel: Allan J. Sattin, for the plaintiff. Gwen K. Randall, Q.C., for the defendant.

REASONS FOR JUDGMENT HAWCO J.:--

INTRODUCTION

[para1] The plaintiff hired the defendant Edward Tapuska to prepare and register a mortgage covering four separate parcels of land. Mr. Tapuska did prepare and register the mortgage against all but one of the parcels. He admits liability for failing to have registered the mortgage against parcel two ("the farmlands"). The only issue before the Court is whether the plaintiff has suffered any damages from Mr. Tapuska's negligence and if so, to what extent. I am satisfied that as a result of Mr. Tapuska's inadvertence, the plaintiff has suffered damages in the amount of \$137,000.

FACTS

[para2] The plaintiff is a private mortgage lender carrying on business in Calgary, Alberta. The defendant law firm at all times material to this action performed legal services for the plaintiff. Mr. Tapuska was the partner in the defendant law firm who performed the services.

[para3] By letter dated April 4, 1994, Derryvale Farms Limited and the plaintiff entered into an agreement for a construction mortgage of \$1.1 million, to be secured over four parcels of land, including the farmlands. The funds were to be used to complete a condominium project in Vulcan, Alberta.

[para4] The proposed mortgage represented 60 percent of the appraised value of all of the security totalling \$1.9 million as determined by appraisals obtained by the plaintiff at the time of the execution of the commitment letter. Included in the appraisals was an appraisal of the farmlands in the amount of \$137,000.

[para5] Mr. Tapuska was instructed by the plaintiff to prepare and register the mortgage security for the Derryvale loan over four parcels of land. He failed to register it against the farmlands, as stated above. Mr. Tapuska admits liability with respect to the failure to register the mortgage security against the farmlands.

[para6] Without having received the instructions to do so, Mr. Tapuska included in the mortgage, section 51(4) which reads:

At all times there shall be sufficient funds unadvanced under this Mortgage and retained by the Mortgagee to complete the construction and/or renovation of the project on the Property as well as a hold back of (10 percent) with respect to work already completed.

[para7] The plaintiff advanced \$752,000 of the mortgage funds to Derryvale by September of 1994. By October of 1994 the condominium project was in financial trouble and the plaintiff commenced foreclosure proceedings on October 23, 1994. An order for sale of the property was ordered on March 22, 1995.

[para8] One offer in the amount of \$400,000 to purchase the property on which the condominiums were to be built was received from Westland Capital Corp. This offer was rejected by the plaintiff, which then purchased the property in the foreclosure proceedings for \$482,000 by order dated May 11, 1995. The purchase price was based upon an appraisal from Reliance Appraisal Consultants Ltd. dated January 23, 1995. A deficiency judgment was entered for \$138,000 against Derryvale with respect to the mortgage.

[para9] Once the plaintiff had acquired title to the other three properties, it considered that it had three options: sell all of the property as it was; rent it for a period of time and then sell it; add value to the properties as they then existed and sell them. The commercial property was sold relatively quickly. The farm residence was rented for a period of time and then sold. With respect to the third parcel of land upon which the condominiums were under construction, the plaintiff decided to complete construction and then sell the properties. That was done over the next five years and, as of the date of trial, all units but two were sold.

[para10] It was the evidence of Mr. Darrell Cook, the president of the plaintiff, that the plaintiff became aware prior to the foreclosure proceeding that the farmlands had not been included in the security documents. It was his view at that time that there was no point in having then included them because the total property and project was encumbered far beyond its value. It appears to be agreed that as of the date of trial, the plaintiff had received a total of \$1.208 million for the condominiums which it had developed and sold. The residence and commercial lots brought in an additional \$156,000, for a total on the 3 parcels of land of \$1.364 million. It cost the plaintiff some \$657,000 to develop the condominiums and a further \$190,000 in foreclosure and property expenses. In addition, there were further costs of approximately \$25,000 relating to further foreclosure costs and legal fees. The total cost to the plaintiff in foreclosing, developing and selling all three parcels therefore appears to have been some \$872,000. The "gain" to the plaintiff then would have been approximately \$492,000. However, the plaintiff having advanced the debtor some \$825,000, the loss to the plaintiff at the end of the day was approximately \$333,000.

DAMAGES

[para11] The plaintiff's position was that its loss was \$137,000, being the value of the property not included in the mortgage documentation. Had the farmlands been covered by the mortgage, the plaintiff could have sold them for \$137,000. Its deficiency of \$138,000 would have been reduced by that amount and that was therefore the damages sustained.

[para12] The defendants' position was that, by virtue of the plaintiff having developed and sold the condominium project, it had reduced its losses to the extent that there were no damages suffered.

[para13] Ms. Brenda Pask of Clark Valuation Services Ltd. provided an opinion on the damages suffered by the plaintiff, as did Mr. R.T. Stainthorpe of Deloitte and Touche. It was Ms. Pask's opinion that two scenarios were possible. In the first, had the plaintiff had security on everything (including the farmlands) and had it sold everything as of the date of the foreclosure, it would suffered a net loss as against the monies advanced under the mortgage, of \$334,000. Against this, she measured the actual loss as sustained, that is, without the farmlands and with the plaintiff having completed and sold the condominiums. That, as pointed out above, resulted in a net loss to the plaintiff of approximately \$333,000. Under this scenario, there was therefore no loss or a minimal loss.

[para14] A revised first scenario whereby the farmland was included in the security and sold for a lesser amount than what it had ultimately been sold for would have resulted in the plaintiff suffering a greater loss than it ultimately did sustain. Again, this would result in the plaintiff suffering no loss.

[para15] In the second scenario Ms. Pask assumed the condominium project would have been sold for what a third party had offered (\$523,000) instead of the forced sale appraised value used in the first scenario (\$409,000). In this second scenario, the plaintiff would have sustained a loss of \$104,000 over and above what was actually received. A revised scenario #2, which Ms. Pask appeared to prefer, used a figure of \$400,000 from the sale of the condominium project and \$165,000 for the sale of the farmlands (assuming, of course, that they had been covered by the mortgage), and resulted in no loss having been sustained by the plaintiff.

[para16] The point which the defendant sought to make with Ms. Pask's evidence was that no matter how one looked at all of the figures, at the end of the day, given that the plaintiff had elected to develop and sell the condominium project, it did not lose any money by virtue of Mr. Tapuska's negligence. Even if the farmlands had been included, the plaintiff would still have sustained a loss because the amount it would have received for all of the properties would not have covered the amount of monies advanced. However, the loss which it did sustain, having elected to develop the properties was less than it would have sustained had the farmlands been included and all of the properties sold at the time of foreclosure.

[para17] In rebuttal to Ms. Pask's evidence, Mr. Stainthorpe was of the opinion that there were a number of errors in the Clark report. Firstly, while it recognized that the project suffered large losses, it did not recognize that those losses would have been reduced had the farmlands been available for foreclosure and sale.

[para18] Secondly, the Clark report did not factor in the interest costs related to the financing of the condominium project. Ms. Pask did not do so because in her view the plaintiff would have incurred financing costs regardless of whether sufficient security would have been in place at the time of foreclosure. She also seemed to be influenced by the fact that any financing which would have been provided to the plaintiff would have come from a related company. In Mr. Stainthorpe's view those financing costs, which would have been approximately \$340,000, should have been taken into consideration.

[para19] Thirdly, Mr. Stainthorpe took issue with the item "disbursements" in the amount of \$189,000 in all of the Clark scenarios. These were foreclosure costs and property expenses taken by Ms. Pask to have been incurred relating to the condominium project. In her report, Ms. Pask had assumed they would have been the same had the project been sold at the date of foreclosure or was developed and sold over several years. It was Mr. Stainthorpe's opinion that those costs used by Ms. Pask were overstated by approximately \$130,000 because if the project had not been developed, but had been sold on foreclosure, only approximately \$59,000 would have been incurred in foreclosure costs and property expenses.

[para20] It was Mr. Stainthorpe's opinion that which ever way it is viewed, the plaintiff's loss was \$137,000. He based that opinion on two methods of calculation. In the first method, he simply looked to the deficiency and judgment received by the plaintiff. That judgment determined that the plaintiff's loss was \$138,000. If the farmland had been available at the date of foreclosure, the deficiency would have been reduced by \$137,000.

[para21] In the second method, he assumed that the plaintiff would have received an income of \$153,834, had the mortgage of \$1.1 million not gone into foreclosure. His calculation of the losses sustained by the plaintiff as a result of the mortgage having gone into foreclosure, and having taken into consideration the monies which it did receive from all of the lands which were covered was \$569,000. That loss would have been reduced by \$137,000 had the plaintiff been able to realize upon the farmland at its appraised value.

ISSUES

[para22] There are two issues involved in this case. Firstly, when should the plaintiff's loss be calculated? Should it be calculated at the time of the foreclosure or at the date of the trial? Secondly, if the losses are to be calculated at the date of trial, has the plaintiff suffered any damages.

DECISION

[para23] In my respectful view, the proper date for calculation of plaintiff's damages should be as of the date of foreclosure. That would place the plaintiff's damages at the sum of \$137,000. However, even if the appropriate date is as of the date of trial the plaintiff's losses still are \$137,000. There would, in addition, be additional damages of \$6,580.50, being legal fees incurred.

REASONS

[para24] The defendants argue that a plaintiff has a duty to mitigate its losses so long as it is a reasonable course of action in the circumstances. In this case, there may not have been any duty to take over the project and develop it. However, having done so, the plaintiff has diminished its losses to the extent that it has suffered no damages.

[para25] The plaintiff's response to this is that once the sale of the lands takes place pursuant to the foreclosure proceedings, the damages are suffered. The fact that the plaintiff acquires title is not relevant. Any sale is as if the purchaser is a third party. What the plaintiff then does to or with the property has no bearing on the damages sustained. It is a new and unrelated venture. As Master Funduk stated in *American Savings and Loan Assn. v. Stechishin*, [1993] A.J. No. 830, at paragraph 30:

I should have thought that it was settled law that a sale to a mortgagee is not an order of foreclosure and so the purchasing mortgagee need not account for the land after it buys it.

[para26] It is clear that there was no duty on the plaintiff in this case to take over and develop the properties upon which it had foreclosed. But having done so, is it now obliged to look to what occurred thereafter to determine what loss, if any it sustained? In my respectful view, the answer is no.

[para27] The defendant has relied upon a number of authorities to advance its position on mitigation. One of those authorities is *Redpath Industries Ltd. v. The Ship "Cisco" et al* (1993), 110 D.L.R. (4th) 583 (Fed.C.A.). At page 606, Desjardins, J.A. quotes the following passage from *Cockburn v. Trusts and Guarantee Co.* (1917), 55 S.C.R. 264, at page 267:

As James, L.J. indicates, the second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business. But when in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution in the loss that he has suffered may be taken into account even though there was no duty on him to act.

[para28] It should be noted that in *Cockburn*, Duff, J. went on to quote with approval the following:

The subsequent transaction, if to be taken into account, must be one arising out of the consequences of the breach and in the ordinary course of business.

That principle was again adopted by the Supreme Court of Canada in *Epeco of Canada Ltd. v. Windmill Place* (1978), 82 D.L.R. (3rd) 1. It was also accepted in *1874000 Nova Scotia Ltd. v. Adams* (1997), 146 D.L.R. (4th) 466, where the Nova Scotia Court of Appeal accepted that where a client has undertaken a complete reorganisation of his business and has begun a new venture, any success he had ought not to be credited to the account of a negligent chartered accountant firm.

[para29] That is how I view what occurred here. The plaintiff was not in the business of developing and selling condominiums. It was a financier. The role that it assumed should not be characterized as one arising in the ordinary course of its business. Had it lost even more money because of its venture, I suspect the defendants would not be quite as ready to argue that the plaintiff's damages should be increased.

[para30] The plaintiff's damages are therefore set at the value of the property which was not covered by the mortgage as of the date of the foreclosure proceedings. That value is \$137,000. Interest should be payable on that amount from the date of the deficiency judgment.

[para31] In the event that I am wrong in my application of the principles of mitigation in this case, I would still set the damages at \$137,000. However, in that event, interest would not begin to run until October 31, 2000, which is the date used by Mr. Stainthorpe in his calculations.

[para32] I come to this conclusion because I accept Mr. Stainthorpe's calculation of damages as opposed to that prepared by Ms. Pask. I agree with Mr. Stainthorpe that financing costs were incurred and should have been taken into consideration by Ms. Pask in her calculations. I also agree with him that the costs in the amount of \$189,000 accepted by Ms. Pask were overstated by approximately \$130,000. I also note that Ms. Pask admitted that another disbursement in the amount of \$30,000 which she had deducted in the "planned results" of the second scenario ought not to have been deducted because of the foreclosure. Taking into consideration these matters, in the second scenario prepared by Ms. Pask there would have been a loss of some \$157,000 rather than a gain of \$10,000 as she had indicated.

[para33] According to Mr. Stainthorpe's opinion, which I accept, either one of two methods could have been used to calculate the effect upon the plaintiff, had it been able to realize upon the farmlands. Whichever method was used, the loss to the plaintiff as a result of its inability to realize upon the farmlands was \$137,000.

[para34] The plaintiff had also claimed damages in the amount of \$75,000 by virtue of clause 51(4) having been inserted into the mortgage and not having been followed. It was argued that had Mr. Tapuska withheld 10 percent of the funds advanced from time to time, the plaintiff's losses would have been reduced by \$75,000. I have difficulty with the plaintiff seeking to reap an additional benefit which, had its instructions been followed, would not have been forthcoming, after successfully recovering \$137,000 because Mr. Tapuska had failed to follow its original instructions. That portion of the claim is denied.

[para35] The parties have agreed that there is a valid claim for extra legal fees in the amount of \$6,580.50. Those are allowed.

[para36] The plaintiff is entitled to its costs.

HAWCO J.

CBR# 089

Condominium Plan No. 992 5205 v. Carrington Developments Ltd.

Between The Owners: Condominium Plan No. 992 5205 (Carrington Grande Whitemud), petitioner, and Carrington Developments Ltd., Ken Ferchoff, Dan Slaven, Jim Pepin and Melody Williams, respondent

Action No. 0003 08597

Alberta Court of Queen's Bench Judicial District of Edmonton Master Funduk Heard: July 27, 2000. Judgment: August 4, 2000. (19 paras.)

Counsel: V.A. Archer, for the applicant. D.F. Pawlowski, for the respondent.

MEMORANDUM OF DECISION

[para1] MASTER FUNDUK:-- There is a delightful comment by Wilson J. in *Spencer v. Continental Insurance Company*, [1945] 3 W.W.R. 161 (B.C.S.C.) about a judge occasionally being tempted to avert his nostrils in applying his mind to a case, p. 180. Shakespeare expressed the point somewhat differently in *Hamlet*.

[para2] I could not improve on Ms. Archer's excellent and compelling analysis of the facts and the law so I will be reasonably brief and deal only with some of the major arguments.

[para3] The Respondent built a residential condominium project. It sold units to buyers (unit owners) by written contracts. Units would have specific parking stalls which went with the unit.

[para4] There are 32 common property stalls, that is, stalls that do not go with any particular units. These are common property and so subject to the control of the Applicant. It is of course the Applicant's responsibility to maintain the stalls and to maintain them as common property.

[para5] The initial board of managers of the Applicant, stocked with the Respondent's employees, purported to give a 100 year "licence" of the common property stalls to the Respondent for the magnificent sum of \$10.00. Why would the Respondent, the developer, want to have a 100 year licence for 32 common property stalls? The answer is simple - money. The Respondent then offered to lease or sell the stalls to unit owners.

[para6] To try to keep any possible complaints out of the courts the same board of managers, stocked with the Respondent's employees, purported to enter into an agreement with the Respondent requiring any disputes to go to arbitration. To the untrained eye the sole signatory for each party appears to be the same. Everything was done the same day.

[para7] When the turnover happened the new board of managers demanded that the initial board, stocked with the Respondent's employee's, turn over all records. The records do not have a board resolution by the initial board for the disputes resolution agreement.

[para8] The new board is quite naturally dissatisfied with what happened and this lawsuit is the result of that.

One

[para9] The purchase contracts between the Respondent and unit owners cannot bind the Applicant regarding the common property. Very simply, A and B cannot by contract bind C. The Condominium Property Act does not change that basic principle of common law.

[para10] I do not agree that the alleged knowledge of unit holders can somehow bind the Applicant. Very simply, their knowledge is irrelevant.

[para11] S. 20 of the Act creates the corporation and says that it "consists of" unit owners. I do not agree that the corporation is the unit owners or that the unit owners are the corporation. Each exists as a person in law. A commercial corporation has shareholders but that is not appropriate to a condominium corporation given its special nature. The legislation limits who can have a legal status tied to the condominium corporation and chooses the neutral "consists of" instead of using descriptions like "shareholders" or "members" but the intent can still be gleaned from the legislation. The unit owners are members of the condominium corporation regardless of the synonyms used to describe their status.

[para12] A condominium corporation is a person in law and unit owners are persons in law. It is as simple as that. The unit owners cannot in law bind the condominium corporation.

[para13] In a commercial corporation the board of directors owes a duty to the corporation. There may be, at least in some situations, a fiduciary duty by directors: *155569 Canada Ltd. v. 248524 Alberta Ltd.*, 77 Alta. L.R. (3d) 231 (C.A.), para. 89. It can hardly be argued that a board of managers of a condominium corporation does not owe a duty to the corporation. It owes a duty to act honestly, in good faith and in the best interests of the corporation. When the board of managers are all employees of the Respondent they might in any given situation be in a conflict of interest and so owe a fiduciary duty to the condominium corporation.

[para14] I seriously doubt that any reasonable person would say that giving away some of the Applicant's common property for 100 years for \$10.00, regardless how it is dressed up, is in the best interests of the Applicant. Why stop there? Perhaps the initial board of managers could have also given the Respondent an exclusive 100 years "licence" for the common hallways so the Respondent could set up toll booths and charge a toll to users of the hallways.

[para15] My function today is not to decide on the legality of the "licence" agreement or the arbitration agreement. The Respondent applies for an order to stay the lawsuit and require arbitration.

[para16] But if the arbitration agreement is not valid, for whatever reason, there cannot be arbitration. Here the Applicant disputes the arbitration agreement itself so the comments of Viscount Simon in *Heyman v. Darwins Limited*, referred to in *Kathed Holdings Ltd. v. Theologian Management Ltd.*, [1996] A.J. 657 (Q.B.) are appropriate.

[para17] The Respondents who are individuals are the alleged employees of the Respondent. They are not parties to the arbitration agreement. I agree with Ms. Archer's position that this too is a ground for not directing arbitration: *1974347 Ontario Inc. v. Schlater*, [1997] A.J. No. 67 (Q.B.).

[para18] I do not find it necessary to deal with all the arguments raised by Ms. Archer although I find them all compelling individually and collectively. The bottom line is whether the initial board of managers was just a puppet of the Respondent (not an independent board) which acted contrary to a board's duties and with of course the Respondent's complicity. If so the two agreements may not be legally effective

[para19] The application is dismissed with costs to the Applicant on Column 5, the payment of which is not stayed.

MASTER FUNDUK

CBR# 056

Canada West Insurance Co. v. Guardian Insurance Co. of Canada

Between Canada West Insurance Company and Citybest Auto Centre Inc., plaintiffs, and Guardian Insurance Company of Canada, defendant

Action No. 9801-05891

Alberta Court of Queen's Bench Judicial District of Calgary Kent J. Heard: July 11, 2000. Judgment: filed August 4, 2000. (11 paras.)

Counsel: P.R. Mack, for the plaintiff. D.G. Davies, for the defendant.

REASONS FOR JUDGMENT

[para1] KENT J.:-- On May 4, 1996, there was an explosion at Citybest Auto Centre Inc., an auto repair business housed in an industrial condominium complex. Several third party liability claims were made against Citybest. They were paid by Canada West, Citybest's commercial liability insurer. Guardian had issued a policy of insurance to the condominium corporation. Canada West and Citybest bring this action seeking a declaration that Guardian is liable for a pro rata share (50%) of the claims and damages in accordance with that declaration. Guardian moves for summary judgment dismissing the claim on the basis that Citybest is not an insured under its policy.

[para2] The relevant portions of the Guardian policy are as follows:

1. The name insured is Association;
2. The business conducted by the insured at the risk location is a commercial condominium owner. By others as: offices, ret computers, private truck repair; and contractors' strg.

The word "Insured" means any person qualifying as such under Section II - WHO IS AN INSURED, of the form.

SECTION II - WHO IS AN INSURED

1. If you are designated in the Policy Designation as:

c. An organization other than a partnership or joint venture, you are an insured. Your executive officers and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.

[para3] There was an endorsement to the policy entitled "Limitation of coverage to the designated premises" which reads in part:

This insurance applies only to "bodily injury", "property damage", "personal injury", and "medical expense", arising out of the ownership, maintenance or use of the premises described in risk location number 1.

[para4] The by-laws of the owners of the condominium corporation require the corporation to obtain "public liability insurance with respect to liability claims arising out of the common property, a unit, the actions of an owner "

[para5] Guardian's argument is that under Section II, Citybest is simply not an insured. Even if you define stockholder in Section 1 (c) to include condominium owners, the coverage is only with respect to its liability as a member. The incident at issue did not arise in Citybest's role as stockholder but as a repairman.

[para6] Canada West and Citybest have two arguments. The first is that Citybest is an insured under the policy by virtue of the combined effect of provisions of the Condominium Property Act and the condominium by-laws. Section 38 of the Act provides that the condominium corporation shall maintain insurance on the units. Owner is defined as the fee simple or lease holder of a unit. An owner is also a member of the association by virtue of Section 20 of the Act which provides that the condominium corporation consists of the owners of the units. That makes Citybest a stockholder as defined in Section II of the Guardian policy. The policy does not restrict the location to any particular part of the property. Finally, the by-laws require the corporation to have liability insurance for claims arising out of a unit, or the actions of an owner. Taking all of the factors, Citybest is an insured.

[para7] The second argument is that the endorsement set out above refers to ownership of premises. If liability is triggered by ownership, then Citybest, an owner, must be covered.

[para8] This is a summary judgment application so I must be satisfied beyond doubt that the claim will fail. There is no case law that is particularly helpful in determining the meaning and therefore the applicability of the policy. In my view, when Section 38 of the Act requires the corporation to have insurance, that does not mean that the policy obtained covers any situation. It is the policy which determines who is an insured.

[para9] Section II of the policy does not include individual unit owners because they are not referred to, except in their capacity as members of the corporation, not in their capacity as business operators. It is as a business operator that Citybest's loss occurred. The endorsement is intended to address the geographical limits of the policy, not to extend the meaning of insured beyond that which is contained in Section II.

[para10] That leaves the by-laws. Canada West argues that because the by-laws say that there is to be liability coverage, that means the policy must cover the owners for liability claims. That conclusion does not follow. It is the policy which determines what the coverage is. Citybest is not an insured under the policy.

[para11] In the result, the application is granted and the claim is dismissed.

KENT J.

CBR# 815

Tymchuk v. Carrington Properties Ltd.

Between Mark Tymchuk, on behalf of himself and all other members of a class having claims against the other defendants, plaintiffs, and Carrington Properties Ltd., Main Street Developments Ltd., 563940 Alberta Ltd., 548016 Alberta Ltd., 563941 Alberta Ltd., Randall Klapstein and Kenneth Ferchoff, defendants

Action No. 9803 03242

Alberta Court of Queen's Bench Judicial District of Edmonton Master Breitreuz Heard: January 17, 2000. Judgment: April 10, 2000. (12 paras.)

Counsel: Mark Kirwin, for the plaintiffs. Dennis Pawlowski, for the defendants.

MEMORANDUM OF DECISION

[para1] MASTER BREITKREUZ:-- This is an application by the defendants under Rule 159 for summary judgment dismissing the plaintiffs' action, and a cross application by the plaintiffs to amend their statement of claim by adding a paragraph as shown in the draft amended statement of claim attached to the notice of motion.

[para2] The lawsuit involves the purchase by the plaintiffs of various condominium units in a condominium complex developed by the defendants. The purchase agreements included exclusive lease agreements purporting to grant to the purchasers the exclusive use of one covered stall or the exclusive use of one ordinary stall, i.e. with no roof over it, or both, for 100 years. The purchase agreement "is a large binder with hundreds of pages and this agreement would have been part of that." (Page 40 of Kenneth Ferchoff's cross examination on December 14, 1998.)

[para3] The cross-examination also showed that the defendants named as parties were not the only persons involved in this complicated maze, and one can easily understand the frustration and confusion caused to the plaintiffs and their counsel in attempting to determine who the correct defendants are. The transcript shows that three other numbered companies and the Randall Klapstein family trust were the sole shareholders of some of the numbered companies named as defendants. Regardless of the maze of corporate permutations and combinations which seems to have run rampant throughout this scheme, it appears that Randy Klapstein and Kenneth Ferchoff, and perhaps one other Ferchoff, were the directors of these various numerous corporations.

[para4] I think it is fair to say that the corporate conglomeration was so confusing and complex that even the corporate officer who swore the affidavit in support of the application and who was cross examined on his affidavit was unable to fully appreciate and understand the intricacies of the corporate structure. It is not surprising that there is a great deal of doubt as far as the purchasers are concerned regarding who they were dealing with, which makes it difficult for the purchasers and their counsel to determine against whom they ought to be enforcing their rights.

[para5] It may be that very little turns on who ought to ultimately be liable for the alleged breach of contract because it would appear that a number of the entities fit the proverbial strawman classification, but it may be relevant if it turns out that liability does attach to one or more of these entities who in fact have some substance to them. In my view the unravelling of this corporate scheme in the context of the documentation presented to the various purchasers to show who the principals were and who the agents were, and whether in the circumstances of the transaction generally, the purchasers should be permitted to produce evidence to challenge the defendants' evidence in that respect, is a triable issue.

[para6] In addition to the above issue is the question of whether the vendors, whoever that may ultimately be found to be, were selling something they could not sell because they did not own it, and could not own it, because it didn't exist in law.

[para7] This issue deals with the failure to properly designate the parking stalls. The plan that was submitted to Land Titles Office did not delineate the parking stalls in the condominium plan registered at Land Titles Office as required by s. 6(2) of the Condominium Property Act. The result of this is that the current executive and membership of the condominium corporation will not recognize these exclusive use lease agreements except for current original purchasers. This means that when the plaintiffs sell their condominium residences the exclusive use leases will not "run with the land", or I suppose in this context it would be accurate to say "run with the space". It is alleged that this decreases the value of the individual condominium units and that is a loss for which the law ought to give an award of damages.

[para8] Another issue which also deals with the alleged defect in the purchasers' titles to their parking stalls is the allegation that the condominium corporation, when the defendants/developers/vendors were also the condominium corporation, no exclusive use lease agreements were entered into for the benefit of the condominium corporation. At the relevant time when the defendants/developers/vendors were in control of the condominium corporation, the directors of it were Randall Klapstein and Kenneth Ferchoff (p. 44 of Ferchoff transcript).

[para9] Accordingly there is a vital link missing to perfect the title of the purchasers to these exclusive use leases.

[para10] The defendants have not persuaded me that the plaintiffs' case is so weak that it does not merit a trial.

[para11] The application of the defendants is dismissed and the application of the plaintiffs to amend the statement of claim to add paragraph 10 as reflected in the draft amended statement of claim attached to the notice of motion is allowed.

[para12] Counsel have asked me to leave the matter of costs open. If any further argument or discussion regarding costs needs to be made before me, it must be made within 30 days of the date of this decision.

MASTER BREITKREUZ

CBR# 368

York Condominium Corp. No. 511 v. Best Deal Motors & Collision Centre Inc.

APPLICATION UNDER Section 49 of The Condominium Act, R.S.O. 1990, c. C.26 as amended and Rule 14.05(2) of The Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Between York Condominium Corporation No. 511, applicant, and Best Deal Motors & Collision Centre Inc., respondent

Court File No. 00-CV-195796

Ontario Superior Court of Justice E.M. Macdonald J. Heard: October 19, 2000. Judgment: February 6, 2001. (13 paras.)

Counsel: Marc Koplowitz, for the applicant. Thomas S. Kent, for the respondent.

[para1] E.M. MACDONALD J.:-- In this application, York Condominium Corporation #511 ("York") seeks orders compelling the Respondent Best Deal Motors ("Best Deal") to remove within five days of any order of this court all vehicles which are said to be improperly stored or parked on the common elements of York's property. Other relief sought seeks to restrain the officers, directors, employees and customers of Best Deal from improperly parking vehicles on the common elements of York's property without prior written approval from its Board.

[para2] This application is brought after a history of a long-standing dispute between the parties over the use of parking spaces at this commercial condominium complex located at 2899 Steeles Avenue West in Toronto. The site is zoned for industrial and related uses. There are 31 units in the complex, 3 of which are owned by Best Deal. Best Deal is in the collision and repair business. It says that the nature of its business is such that on occasion, tow trucks deliver damaged vehicles after hours and deposit them proximate to the relevant auto storage repair shop doors, usually at the back or near the back of the premises.

[para3] The history includes 2 previous applications to this court. The first occurred in 1989. At that time, there were allegations that Best Deal was unlawfully posting signs on the common elements. The second application occurred in 1991 and alleged that Best Deal had caused damage to the common elements as a result of parking derelict and used motor vehicle parts on the common elements.

[para4] York's by-laws set out the parameters for the orderly and legal use of the common elements. Although issues were raised by Best Deal suggesting that the by-laws have not been administered in accordance with the provisions of the Condominium Act of Ontario R.S.O. 1990 c. C.26, I am unable to find that the enactment of the by-laws offends the Condominium Act. It is clear that York has been experiencing increasing problems for many years regarding parking at the complex which has designated parking spots for the use of the owners, their employees, tenants, and visitors. These problems are exacerbated by the admitted "extreme shortage of parking spots at the site." The property manager of York admits to this in his affidavit.

[para5] York says that it is forced to bring this application because Best Deal has continued to act in violation or breach of its by-laws, rules, and regulations as they relate to the parking of motor vehicles on the common elements.

[para6] In its factum and from the submissions of Mr. Kent, it was apparent that Best Deal believes that this application is not really about a fight over parking spaces. Best Deal believes that the motive which underlies this application is to force Best Deal out of business or, alternatively, force Best Deal to sell its 3 units and relocate its business which has outgrown the site. Best Deal says that it is virtually impossible to operate its expanding business in compliance with the wording of the relevant by-laws and rules. Best Deal questions the interpretation of these by-laws and rules by the board of directors and the management of York.

[para7] Essentially, Best Deal alleges that the enforcement of the regulations and by-laws has not been even-handed. Best Deal feels that it is being targeted by the management. It cites, among other things, irregularities in the maintenance of the records of York particularly for minutes of meetings wherein issues of parking were presented to the condominium owners and votes were taken on issues related to the number of parking spaces.

[para8] While I have some sympathy with Best Deal's complaints that the decisions of the Board appear to be arbitrary and that it has faced costly litigation pursued by Mr. Koplowitz who may be conflicted [See Note 1 below], I am unable to conclude, in the face of the evidence of parking problems, that this application should be dismissed.

Note 1: Mr. Koplowitz is a relative of Mr. Majer Lewkowicz who is one of three Directors of York. Mr. Lewkowicz owns, with his wife, three units in the complex. Mr. Koplowitz had been counsel to York for many years. I add that the matter of the alleged conflict of interest was never formally pursued by Best Deal.

[para9] From York's perspective, the principals of Best Deal are unreasonable. York alleges that they abuse the system and that customers frequently complain of too many cars being parked on the lots, the blocking of shipping doors and the blocking of fire routes. The materials contain pictures which show the layout of the complex, the existing parking signs and the roadways behind the units. Best Deal says that the parking signs are confusing and contradictory. Best Deal says the York seeks to restrict Best Deal to parking no more than 6 vehicles (2 per unit) anywhere on the common elements unless Best Deal applies for special parking privileges or applies in writing for special dispensation.

[para10] It is apparent that Best Deal believes that the board will not act in an even-handed fashion if Best Deal were to make such requests. It is clear that the relationship between the parties is not a cooperative one. The goodwill, that would be necessary in order to permit the latitude and flexibility that Best Deal believes it is entitled to, is absent. I cannot find any evidence that York's board has contravened the Condominium Act. In concluding as such, I have considered the factors that are frequently referred to as being considerations that the court may take into account when exercising its discretion in an application such as this. See, for example, Peel Condominium Corporation #449 v. Hogg, [1997] O.J. No. 623 OJ.

[para11] I now turn to the estoppel by conduct argument which was raised by Best Deal in defense of the application. In essence, it is this. York is said to have permitted Best Deal to grow its business since 1987 which was prior to the adoption of the by-law in issue. Initially, Best Deal had 2 units. In 1992 it acquired a third unit from Mr. Majer Lewkowicz. Best Deal says that it was not until February 2000 that York demanded that Best Deal cease and desist in its conduct with respect to parking spaces and deal with the accumulated parking tickets. Best Deal submits that the so-called "house rules" are directed at it only and that York has allowed Best Deal to build its business and then passes rules which, in effect, make the orderly operation of its business extremely difficult.

[para12] Best Deal says that York's approach to these difficulties infringes upon Best Deal's rights under the Condominium Declaration and effectively threatens to put it out of business. It is said that this very situation demonstrates the unreasonableness and unfairness of the by-laws and rules and refers to the "politics of the situation" which includes the allegations of a lack of even-handedness in the treatment of unit owners with respect to dispensations. Best Deal believes that this application is "spurned on" by Mr. Koplowitz.

[para13] With all of these factors in my mind and noting that there is evidence that these allegations of breach of the parking regulations and by-laws have indeed occurred, I am unable to conclude that the doctrine of laches or estoppel by conduct should apply in these circumstances to the benefit of Best Deal. I strongly disagree that the totality of the evidence is that there is "no real evidence of a parking problem". Aside from this evidence, there is a need to maintain the integrity of the Condominium Act and the rights and safety of all other owners. The history of the parking problem justifies this application. Accordingly, the application is granted. Relief shall go in accordance with paragraphs 1, 2, 3, 4, and 5 on pages 3 and 4 of the Notice of Application. If the parties wish to, they may make oral submissions on costs at a time convenient to them and the court.

E.M. MACDONALD J.

CBR# 027

Apartments International Inc. v. Metropolitan Toronto Condominium Corp. No. 1170

Between Apartments International Inc., applicant, and Metropolitan Toronto Condominium Corporation No. 1170 and H & R Property Management Ltd., respondents

Court File No. 00-CV-200580

Ontario Superior Court of Justice Cullity J. Heard: December 19, 2000. Judgment: January 3, 2001. (11 paras.)

Counsel: Michael A. Sears, for the applicant. Jonathan H. Fine, for the respondents.

[para1] CULLITY J.:-- The applicant is a tenant of a number of residential condominium units governed by the provisions of the Condominium Act (the "Act"). The units are part of a condominium project located at 7, King Street East, Toronto which comprises 314 residential units and six commercial units. The applicant's units are said to be owned by individuals who acquired them as investments. The respondents are the corporation created by the Act in respect of the project and the corporation's agent who manages it.

[para2] A dispute has apparently arisen with respect to the entitlement of the applicant and other tenants to operate what are described as "hotel - type" operations involving sub- leases. I have not been informed of the details of the dispute or of an application by the condominium corporation that is pending with respect to it. In the present application, the applicant seeks a number of orders pursuant to section 49 of the Act enforcing provisions of the registered declaration with respect to the project and the rules made by the Board of the corporation relating to access to, and use of, the common elements of the property including recreational areas and amenities. The respondents have challenged the standing of the applicant to apply pursuant to section 49 and, with the consent of the parties, this question was argued before me as a preliminary matter on the basis of the few facts to which I have referred and which are not in dispute. The procedure is, perhaps, unusual on an application but, given that the issue is one of statutory interpretation that, I believe, can be decided on a slender factual basis to which I have referred and that its determination may assist the parties in resolving their dispute - or, at least, to save costs by shortening the proceedings - I thought it appropriate to permit the matter to be dealt with in advance of the rest of the application.

[para3] Section 49 of the Act is as follows:

(1) Where a duty imposed by this Act, the declaration, the by-laws or the rules is not performed, the corporation, any owner, the bureau, or any person having a registered mortgage against a unit and common interest, may apply to the Ontario Court (General Division) for an order directing the performance of the duty.

(2) The court may by order direct performance of the duty and may include in the order any provisions that the court considers appropriate in the circumstances.

(3) Where the owner of a unit who has leased the unit defaults in the owner's obligation to contribute to the corporation towards the common expenses as provided under sub-section 32(1) and subsection 41(7), the corporation may by written notice to the lessee require the lessee to pay to the corporation, and upon receipt of such notice the lessee shall pay, out of the rent due under the lease, an amount equal to the default and such payment shall constitute payment toward rent under the lease and the lessee shall not by reason only of such payment to the corporation be in default of the lessee's obligation under the lease.

(4) The lessee of a unit is subject to the duties imposed by this Act, the declaration, the by-laws and the rules on an owner, except those duties respecting common expenses, and this section applies in the same manner as to an owner and, where the lessee is in contravention of an order under this section or where the lessee fails to pay, pursuant to a notice given under subsection (3), the court may terminate the lease.

(5) Nothing in this section restricts the remedies otherwise available for failure to perform any duty imposed by this Act.

(6) Where the owner of a unit leases the unit, the owner shall notify the corporation that the unit is leased and shall provide to the corporation the lessee's name and the owner's address. R.S.O. 1990, c. C.26, s. 49.

[para4] The applicant's position is that the words "and this section applies in the same manner as to an owner" in subsection 49(4) permit a tenant to make an application under subsection 49(1) as that procedure is expressly made available to the owner of a unit. In support of that submission, counsel relied also on cases in which has been said that the Act is remedial legislation that should be given a large and liberal interpretation to achieve its objects and is, as well, consumer protection legislation that must be interpreted to strike a fair balance between the rights of the corporation, the owners of units and tenants. He further submitted that it would be neither fair nor reasonable for a tenant to have to persuade its landlord to apply pursuant to section 49(1) if a condominium corporation was in breach of its duties under the Act or its rules.

[para5] Although I have given careful consideration to Mr. Spears' submissions, I do not believe they represent a correct interpretation of the legislation. Subsection 49(1) is both remedial and procedural. The remedy it provides is an order for the performance of a duty and the authorized procedure is an application. The substantive rights and duties for which the remedy and procedure are provided are spelled out correlatively in sections 12 and 31:

12(1) The objects of the corporation are to manage the property and any assets of the corporation.

(2) The corporation has a duty to control, manage and administer the common elements and the assets of the condominium corporation.

(3) The corporation has a duty to effect compliance by the owners with this Act, the declaration, the by-laws and the rules.

(4) The declaration or the by-laws may specify duties of the corporation consistent with its objects, responsibilities and duties.

(5) Each owner and each person having a registered mortgage against a unit and common interest has the right to the performance of any duty of the corporation specified by this Act, the declaration, the by-laws and the rules. R.S.O. 1990, c. C.26, s. 12.

31(1) Each owner is bound by and shall comply with this Act, the declaration, the by-laws and the rules.

(2) Each owner has a right to the compliance by the other owners with this Act, the declaration, the by-laws and the rules.

(3) The corporation, and every person having an encumbrance against any unit and common interest, has a right to the compliance by the owners with this Act, the declaration, the by-laws and the rules.

(4) Each person in occupation of a proposed unit is bound by and shall comply with the rules proposed by the proposed declarant where those rules are reasonable and consistent with this Act.

(5) Each person in occupation of a proposed unit has a right to the compliance by each other occupant of a proposed unit with the rules proposed by the proposed declarant.

(6) The proposed declarant has a duty, until registration of the declaration and description, to effect compliance by occupiers of proposed units with the rules proposed by the declarant. R.S.O. 1990, c. C.26, s. 31.

[para6] There is no reference to tenants in these sections. If the reference in subsection 49(4) to the application of the section "in the same manner as to an owner" is to have the effect for which the applicant contends, it would not just be the remedial and procedural provisions of subsection 49(1) that would be made available to the tenant but also the provisions of sections 12 and 31 that confer the substantive rights for which the remedy and the procedure are provided. I do not believe the words I have quoted are apt to have this quite far-reaching effect.

[para7] The words quoted appear in the subsection in the context of duties expressly imposed upon tenants and remedies conferred on the persons mentioned in subsection 49(1) in the event that a tenant does not comply with the terms of a written notice under subsection 49(3), or an order pursuant to subsection 49(2). There is, in my view, nothing in subsection 49(4) that supports an inference that tenants are to have the rights of owners of units under the Act. This is obvious in connection with certain rights such as a right to attend, and vote at, meetings of unit owners and I see nothing in the Act to distinguish such rights from those that the applicant seeks to enforce on an application pursuant to subsection 49(1).

[para8] As I understand it, the scheme of the Act is to create a new form of property ownership and to spell out carefully the rights and duties of the owners of units inter se and with respect to the condominium corporation that is created by the Act and which they control. Except as provided or authorized, by the legislation, an owner of a unit has the normal legal incidents of the owner of a freehold interest in real property. One of these incidents is the power to grant leases unless this is restricted by the declaration or (possibly) otherwise in accordance with the Act. I do not discern a legislative intention to confer on tenants statutory rights against the corporation or unit owners, or to alter the legal relationship between landlords and tenants except as provided in subsection 49(3). The duties referred to in subsection 49(4) are imposed on tenants for the protection of unit owners and, as I have indicated, I see nothing in the subsection or elsewhere in the Act that discloses an intention to confer rights on tenants. To describe the Act as consumer protection legislation begs the question, in this case, of the identity of the consumers intended to be protected. The power to enforce the duties of the corporation is that of the owners of the units so that, in the absence of an express or implied obligation to exercise it in the terms of the lease, the landlord's co-operation will be required.

[para9] For the above reasons - which I believe reflect the substance of the submissions of counsel for the respondents - I am of the opinion that the procedure in subsection 49(1) is not available to the tenant to enforce rights given to the owners of units and I so hold.

[para10] I note - although it has no bearing on my decision - that I was informed by counsel that the argument based on the inclusion of particular words in subsection 49(4) would not be available under the provisions of the new legislation when it is proclaimed in force.

[para11] I may be spoken to with respect to costs or, if counsel so agree, I will receive written submissions within 14 days of the release of these reasons.

CULLITY J.

CBR# 244

Raymond v. Peel Condominium Corp. No. 27

Between Laverne Raymond and Gervais Howell, and Peel Condominium Corporation No. 27

Court File No. 00-CV-191276

Ontario Superior Court of Justice Wein J. June 30, 2000 (21 paras.)

Counsel: Granville O. Cadogan, for the applicants. Ritchie J. Linton, for the respondent.

[para1] WEIN J. (endorsement):-- This application for an Order vacating a lien is based on a dispute concerning the responsibility for the cost of repairs to certain common elements of the condominium.

Underlying facts

[para2] The applicants purchased the condominium property on February 3, 2000. On the closing date, they were sent an Estoppel Certificate alleging that there was \$1,630.00 owing as a result of violations by the vendor. The corporation ultimately placed a lien on the premises for the repairs. The question that arises is whether, under the Condominium Act and the particular bylaws of this condominium, it was the corporation's duty or the unit owners' duty to repair and maintain the common elements in question.

[para3] It should be noted that prior to the purchase in question, the purchaser's solicitor wrote and requested an Estoppel Certificate in respect to the unit. In response, the management corporation responsible for the condominium conducted an inspection of the unit, a routine practice undertaken so that any deficiencies can be dealt with prior to the sale of any unit. The inspection disclosed certain deficiencies on the common elements which were noted in the Estoppel Certificate issued on the closing date. In particular, the violations included removal of walkway stones, replacement of damaged driveway asphalt, removal of garbage at the rear of the unit, and relocation of the privacy fence, to specify 12 feet from the townhouse. The Certificate also indicated the amount required to effect compliance, based on an estimate from the corporations standard contractors, and requested that funds be held back pending rectification.

[para4] The vendor of the premises, Wellesley Raymond, indicated in his affidavit that he had lived at the unit for 11 years and that at the time he purchased it in 1989, no violations had been brought to his attention. However, it appears that other damage to the common elements had been noted on an earlier Estoppel Certificate when he purchased the unit. With respect to the current damages, his affidavit indicated that the walkway stones existed at the time he purchased the unit and he had not changed them. He indicated that the stones were consistent with walkways in front of other units.

[para5] With respect to the driveway problems, he suggested that the cracks represented normal wear and tear. As well, the oil stains were said to be a common occurrence. Further, he indicated that the fence was already installed when he purchased the property and formed part of a larger network of fences. For these reasons the purchaser refused to pay for the repairs or to hold back money in the sale.

[para6] Because the purchaser denied the responsibility to have the unit owner do the repair and maintenance, the corporation ultimately placed a lien on the property.

Governing Legislation

[para7] Under Section 31 of the Condominium Act, owners are bound by the Act, Declaration, by-law and rules.

[para8] The Condominium Act gives the corporation a duty to effect compliance by the owners with the Act, declaration, by-laws and rules: Section 12(3). Section 29(3) indicates that the rules shall be complied with and enforced in the same manner as the bylaws.

[para9] Under Section 31(4) of the Act, where an owner defaults in the obligation to contribute towards common expenses, including expenses relating to repairs done to the owner's unit by the corporation, a lien for the unpaid amount may be placed against the unit.

[para10] The critical section in the legislation is Section 41. It reads as follows:

41. (1) For the purposes of this Act, the obligation to repair after damage and to maintain are mutually exclusive, and the obligation to repair after damage does not include the repair of improvements made to units after registration of the declaration and description.

(2) Subject to Section 42, the corporation shall repair the units and common elements after damage.

(3) The corporation shall maintain the common elements.

(4) Each owner shall maintain the owner's unit.

(5) Despite subsections (2), (3) and (4), the declaration may provide that,

(a) each owner shall, subject to section 42, repair the owner's unit after damage;

(b) the owners shall maintain the common elements or any part of the common elements;

(c) the corporation shall maintain the units; or

(d) each owner shall maintain and repair after damage those parts of the common elements of which the owner has the exclusive use.

(6) The corporation shall make any repairs that an owner is obligated to make and that the owner does not make within a reasonable time.

(7) An owner shall be deemed to have consented to have repairs done to the owner's unit by the corporation under this section and the cost of such repairs shall be added to the owner's contribution toward common expenses.

[para11] It is clear from subsection (5)(d) of that section that a Declaration may provide that each owner is to repair damage to parts of the common elements over which the owner has the exclusive use.

[para12] Article VI of the Declaration relating to this condominium states that:

Each owner shall be responsible for all damages to any and all other units and to the common elements, which are caused by the failure of the owner to so maintain and repair.

Article I prohibits alterations to exclusive use areas of the unit without the written permission of the Corporation.

Article II of the Declaration also clarifies that if an owner makes any changes, he shall be responsible for the cost of removal and replacement of the same, if necessary; and that any physical damage to common elements caused by an owner shall be repaired at the cost and expense of the unit owner.

Accordingly for this Condominium, the owners are responsible for the cost of any damage or alteration to the exclusive use areas, such as those involved in this case.

[para13] Under section 41 (6), the corporation is to make repairs that an owner is obligated to make, if they are not made within a reasonable time.

[para14] Of critical importance, in my view, is the wording of subsection (7), which indicates that an owner is deemed to have consented to repairs done to the owner's unit by the corporation and the cost of such a repair shall be added to the owner's contribution toward common expenses. The critical phrase is "done to the owner's unit".

[para15] In this case, the by-laws do provide that the owner is to maintain and repair exclusive-use areas of the common elements. Where that occurs, the question arises as to whether or not the costs can be added to the owner's contribution. This is the only logical reading of subsection 7 in the context of the Declaration applicable to this Corporation. "Done to the owner's unit" must include areas required to be repaired by the owner, where those are specifically included under the by-laws or Declaration of the particular corporation. Otherwise, the obligation on the corporation to make such repairs could not be reimbursed, as stated in the declaration.

Findings

A) Jurisdiction

[para16] The action by the unit owners was originally brought in Small Claims Court. The motion, however, was not set down, presumably because the plaintiff determined that the Small Claims Court lacked jurisdiction. The defendants have asked for costs of responding to the motion in Small Claims Court.

[para17] It is clear from the Courts of Justice Act, Section 23, that the Small Claims Court does not have the jurisdiction to make an order requested in this case. It is the Superior Court of Justice that has jurisdiction. Accordingly, the original application was brought in the wrong jurisdiction.

B) Authority to Claim the Lien

[para18] Given the by-laws applicable in this particular case, I am of the view that a lien could properly be placed on the property in respect of damage alleged to the common areas that were required to be maintained and repaired by the unit owner. As this was the alleged situation in this case, the lien was properly registered.

C) Comment on Affidavit Material Filed

[para19] Although not directly relevant to the issues on the Motion, it must be noted that the affidavit filed by the vendor of the unit in question indicates that the fence and sidewalk stones had been previously in place, since the original date of purchase. They were not referred to as deficiencies in his purchase, and the affidavit indicates that there was no damage beyond normal wear and tear done in this regard. The material filed indicates that the damage to the driveway was at most minimal, and can be characterized as normal wear and tear. There is, at the very least, a viable argument to be made that the corporation had, in effect, waived any right to claim for damages for repairing or replacing these elements. The management of the Corporation had changed in the interim years, so it is understandable that they may not have been aware of these facts, assuming the affidavit to be correct.

[para20] By contrast, the affidavit is silent with respect to the garbage said to have been in the backyard. In these circumstances, had there been a triable issue on this material, it might well have resulted in finding that the applicants were only responsible for the \$150.00 cost (plus GST) of removing the garbage at the rear of the unit. If necessary, however, there would have to be a trial on this issue.

Costs

[para21] On agreement of both counsel at the hearing, costs are to be fixed by me. Given the scope of the argument and the prior appearance at Small Claims Court, costs should be set in the amount of a total of \$900.00, payable by the applicants.

WEIN J.

CBR# 819

Metropolitan Toronto Condominium Corp. No. 781 v. Reyhanian

Between Metropolitan Toronto Condominium Corporation No. 781, applicant, and David Reyhanian, respondent

Court File No. 99-CV-181839

Ontario Superior Court of Justice Lamek J. Heard: July 6, 2000. Judgment: July 11, 2000. (21 paras.)

Counsel: Michael Spears, for the applicant. David Shiller, for the respondent.

[para1] LAMEK J.:-- This motion by the respondent was heard as a preliminary motion prior to the hearing of the applicant's motion for an Order holding the respondent in contempt of an Order made by Mesbur, J., dated December 30, 1999. For ease of reference, I shall refer to the respondent (the moving party today) as "Reyhanian" and to the applicant (today's responding party) as "MTCC 781".

[para2] Reyhanian moves for an Order striking out several paragraphs in certain of the affidavits filed by MTCC 781 in support of its contempt motion, striking out another of those affidavits in its entirety, and (in the alternative) permitting Reyhanian to enter and inspect the condominium unit of Douglas Workman, who is the deponent of certain of the affidavits in support of the contempt motion and the major complainant about certain activities of Reyhanian which led to the Order of Mesbur, J. A brief summary of the proceedings to date will be useful.

[para3] Reyhanian bought a unit in the residential condominium building known as King's Landing (MTCC 781), acquiring title in late October, 1999. He undertook certain renovations of the unit and, in the first half of November, 1999, moved approximately 60 pigeons into his unit, housing them, apparently, in one or the other or both of two solarium areas in the unit. Complaints were received by the board of directors of MTCC 781. The board - as it was empowered to do - declared the birds to be a nuisance and required Reyhanian to get rid of them. He refused to do so and MTCC 781 therefore made an application for a mandatory order requiring Reyhanian to remove the pigeons from his unit and to comply fully with the Condominium Act and with the Declaration and House Rules of MTCC 781. I quote from the reasons of Mesbur, J., on that application:

The respondent [Reyhanian] contends that the birds are intelligent and well-trained and pose no risk. He also says that there is no proof to connect his birds to the complaints of the other unit holders. With respect, I disagree. The letters [in the evidence] link the problems to the arrival of these pigeons. In the evidence there is ample proof, on the balance of probabilities that the respondent's pigeons have been on the common elements of the building. This is in clear contravention of Declaration 7, and House Rules 11 and 12 of Metro 781. The board has determined, in its absolute discretion that the animals are a nuisance pursuant to the Declaration. The board has also, in its absolute discretion pursuant to the House Rules, deemed the birds to be a nuisance. I disagree with the respondent's view that the rules are ridiculous, and in any case, following the reasoning of the Court of Appeal in YCC No. 382 v. Dvorchik should not substitute my own opinion about the propriety of a rule enacted by the board unless the rule is clearly unreasonable or contrary to the legislative scheme. The rules and declaration are, in my view, reasonable. The board has unfettered discretion acting on written complaints, to deem the birds a nuisance. It has done so. It has requested, pursuant to Rule 17, the removal of the birds. Respondent has failed to do so. The board has therefore been obliged to bring this application. I note that the respondent did not avail himself of the dispute mechanism contemplated by Rule 18, and did not choose to file any material on this motion. While I am sure he views his birds as extraordinary, and talented, their presence at the condominium is deemed a nuisance and they must be removed. Order to go in terms of paragraphs (a) (b) (c) and (e) of Notice of Application. (emphasis added)

[para4] Counsel before me agreed that the Order that was taken out should not have referred (as it did) to the removal of "all pigeons" being kept by the Respondent in the unit but only to all racing or homing pigeons. The Order was so varied on consent.

[para5] It is now alleged that at the beginning of February, 2000, the pigeons were, indeed removed from Reyhanian's unit but that he has subsequently introduced another large number of pigeons that are kept in the solarium areas of his unit but are also permitted to fly outside the unit and onto the balcony of that and other units. The balconies are common elements of the building. It is also alleged that Reyhanian has operated, on his balcony, a device with open flames, resulting in attendances by the Toronto Fire Department and the issue to MTCC 781 of a Notice of Violation by the Department. A Notice of Violation has also been issued against Reyhanian by the Animal Services branch of the Public Health department of the City of Toronto, apparently on the basis of unsanitary conditions observed by officers of that branch in the course of inspections of Reyhanian's unit and balcony in May, 2000. Once again, Reyhanian has filed no material in response to that filed by MTCC 781.

[para6] In support of its contempt motion, MTCC 781 has filed three affidavits of Kenneth Knights, the resident property manager of the building, sworn respectively on January 21, 2000, May 8, 2000 and May 19, 2000, and two affidavits of Douglas Workman (the owner of the unit immediately above that of Reyhanian) sworn respectively on April 30, 2000 and June 12, 2000. Other material has also been filed in support of the contempt motion but it is not in issue today and I therefore do not now refer to it.

[para7] As I have said, Reyhanian has filed no material in response to the contempt motion. Reyhanian's counsel, Mr. Shiller, cross-examined Kenneth Knights on his three affidavits on June 1, 2000, and Douglas Workman on his affidavit sworn on April 30, 2000, on June 7, 2000. On neither of those occasions did Mr. Shiller raise any objection to any of those affidavits or reserve any right to challenge the propriety or the admissibility of them or of any part of them. By contrast, when Mr. Shiller, on June 26, 2000, cross-examined Workman on his affidavit sworn on June 12, 2000, he stated his objection to the filing of that affidavit and expressly reserved his right to take the position that it was improper and should not be received into evidence. Mr. Shiller takes no issue with the admissibility of Workman's earlier affidavit, sworn on April 30, 2000.

[para8] I begin with Reyhanian's attack on certain matters in the Notice of Motion in the contempt motion. He seeks an Order striking out the following matters:

The motion is for

h) An Order directing the Respondent to maintain and/or repair his unit, in particular the two solariums and the carpeting, underpad and sub-floor of the unit bedroom as required by Article 9 of the Declaration and General House Rule No. 229;

i) An Order restraining the Respondent from contacting in any way, any member of the Applicant's board of directors:

j) An Order restraining the Respondent from threatening or harassing any resident of or person on the premises at 460/480 Queen's Quay West, Toronto;

k) An Order restraining the Respondent from interfering with or attempting to interfere with management, security, cleaning or other personnel in carrying out their duties at 460/480 Queen's Quay West, Toronto;

l) An Order directing the Respondent to forthwith list on a multiple listing service and sell, with vacant possession, Unit 10, Level 6 Metropolitan Toronto Condominium Plan No. 781 and its appurtenant common interests and municipally known as unit 703E, 460 Queen's Quay West, Toronto within four months of the date of the Order, any such transaction to close within a reasonable time of such sale and in any event not more than three months from the date of such sale and to forthwith vacate the said premises upon the completion of such sale transaction;

m) An Order directing that in the event that any sale and closing thereof as may be directed by this Honourable Court, is not accomplished in the time limited therefor, then, upon filing proof of such default, by way of affidavit:

(i) the Applicant shall have leave to issue a Writ of Possession directing the Sheriff of the City of Toronto to take possession of Unit 10, Level 6, municipally known as unit 703E, 460 Queen's Quay West, Toronto and to give possession of the said unit without delay to the Applicant;

(ii) the Applicant shall have leave to issue a Writ

of Seizure and Sale directing the Sheriff of the City of Toronto, to seize and sell Suite 703E, 460 Queen's Quay West, Toronto and to pay out the proceeds according to law .

[para9] Mr. Spears, for MTCC 781, attempts to justify these items in the relief sought by reference to Rule 60.11(5) which provides:

In disposing of a motion [for a contempt Order], the judge may make such order as is just, and where a finding of contempt is made, the judge may order that the person in contempt,

(d) do or refrain from doing any act;

and

(f) comply with any order that the judge considers necessary

[para10] It is Mr. Spears' contention that I thus have the jurisdiction, whether I find Reyhanian in contempt or not, to make other Orders of the kind sought in the Notice of Motion. That submission has not yet been argued fully before me and I make no ruling on its validity. For the purposes of today's motion, however, there is at least sufficient doubt about the issue to justify leaving in place, for the moment, the matters in the Notice of Motion quoted above.

[para11] To a considerable extent, the same thinking justifies a dismissal at this time, of that part of Reyhanian's motion to strike out paragraphs from the affidavits in support of the contempt motion. That attack is based on two grounds, the first of which is that many of the impugned paragraphs are irrelevant and are included only to add prejudicial colour to MTCC 781's position. It is certainly true that many of the paragraphs deal with matters and allegations that have no direct contact with the only matter relied on by Mr. Spears as providing a particular ground for a finding of contempt - the re-introduction of pigeons into Reyhanian's unit. It is also true that Mr. Spears also argues that in other respects Reyhanian's conduct has breached the Declaration and House Rules of MTCC 781 and thus constitute contempt of that part of Mesbur, J.'s Order that required that Reyhanian "comply with the Condominium Act and the Declaration and House Rules" of MTCC 781. Again, I make no ruling at this time that any particular act or event constitutes a breach or contempt of any part of Mesbur, J.'s Order but until such time as all of those matters have been fully argued the question of relevance cannot be determined. If contempt can be found in acts other than the pigeon issue or if Rule 60.11(5)(f) has the scope and meaning for which Mr. Spears contends, the paragraphs that are said to be irrelevant cannot be so characterized. If, on the other hand, I conclude after argument that the only possible ground for a finding of contempt is the alleged re-introduction of the pigeons and that without a finding of contempt Rule 60,11(5)(f) confers no jurisdiction upon me to make the other "ancillary" Orders that are sought, the impugned paragraphs may be seen to be irrelevant. And lest there be any doubt, I emphasize that at this point I have reached no conclusion as to whether there has been any act or conduct amounting to a breach or contempt of Mesbur, J.'s Order.

[para12] The other ground upon which Mr. Shiller argues that many of the paragraphs in the affidavits of Knights should be struck out is that they contain hearsay. His attack has two prongs: first, he says as a matter of substance, hearsay is not admissible in support of a contempt motion. And second, even if hearsay were admissible, the impugned paragraphs here do not satisfy the requirements of form that must be observed. I shall address the second aspect of the argument first.

[para13] Overall, Mr. Shiller rightly points out that contempt issues are treated very seriously by our Courts and that contempt is only to be found and punished when it is established in accordance with the strictest rules and with strict regard for the rights of the alleged contemner. As Ferrier, J., said in *Re Toronto Transit Commission and Ryan* (1998), 37 O.R. (3d) 266:

An allegation of contempt of court, whether civil or criminal, has a public dimension and attracts the procedural protections relating to offenses for which persons may be deprived of their liberty. An application in respect of the contempt of court is strictissimi juris and as a result calls for the most scrupulous attention of the courts to ensure adherence to all necessary safeguards.

[para14] One of those safeguards deals with the kind of evidence that may be adduced in support of allegations of contumacious conduct. Generally, affidavits should contain matters of the deponent's personal knowledge only. Rule 60.11(3) provides a limited exception to the general rule:

(3) An affidavit in support of a motion for a contempt order may contain statements of the deponent's information and belief only with respect to facts that are not contentious, and the source of the information and the fact of the belief shall be specified in the affidavit.

[para15] Initially, it was Mr. Shiller's contention that the Rule made it mandatory that the affidavit recite the formula "I am informed by X and do verily believe". He seemed to resile somewhat from that position as the argument progressed and in my view he was wise to do so. I cannot think that there can be many - if in fact there are any - situations today where a failure to recite verbatim a magic verbal formula can have the effect of invalidating the substance of a pleading or of an affidavit. Certainly, I do not believe that this is such a situation. In this case, Mr. Knights, in the first paragraph of each of his affidavits, states his belief in the truth of matters about which he has been informed. And where the source of information is not expressly identified in the same paragraph in which the statement is made the provider of the information can easily be discerned from the context or from documents exhibited to the affidavit and referred to as source or corroborating material. I do not consider the impugned paragraphs to be inadmissible for any formal defect.

[para16] The more important issue is whether hearsay (or information and belief) evidence is admissible at all in support of the contempt motion. The question becomes whether the matters upon which such evidence is tendered are "contentious". Mr. Shiller referred me to certain dictionary definitions, I did not consider them particularly helpful - or, at least, not to his position. The Dictionary of Canadian Law, for example, defined "contentious" as "contested". In my view, none of the matters that are said to be hearsay is disputed or contested in the sense that the truth of it has been challenged or contradicted. At no time has Reyhanian delivered any contradictory material or any material setting out a different version of the same matters. He is, of course, under no compulsion to give evidence and if he does not do so, no inference will be drawn against him. But if he does not give evidence, the evidence adduced by MTCC 781 stands uncontradicted and, if of sufficient weight, may well provide the basis for a finding against him. I may say that I have read carefully the transcripts of the cross-examination of Knights and of others on their affidavits. Even there, I do not see a dispute about the truth of any of the matters in issue. To a considerable extent the cross-examination focussed on the ability or inability of deponents to distinguish between racing or homing pigeons and other common-or-garden pigeons or to determine whether the fouling of balconies and railings was done by Reyhanian's pigeons or by other wild pigeons. These may be live issues for the contempt motion and may properly give rise to questions about the sufficiency of the evidence on that and other points. But that goes not to the admissibility of the evidence but rather to its ability to satisfy the burden and standard of proof in such a case.

[para17] I add this further point: Mr. Shiller, on receipt of the affidavits that he now attacks, made no objection to their form or content. He brought no motion attacking them. Instead, he proceeded to schedule and to conduct cross-examinations of the deponents of those affidavits. If it were necessary for me to address the point, I would be inclined to hold that Mr. Shiller had taken a fresh step in the proceeding and had lost his right to complain about the contents of the affidavits I do not so hold because, on the view that I have taken of the issues raised by Mr. Shiller, it is not necessary for me to do so. And if the affidavits were clearly improper, I would be reluctant to view them as admissible merely because counsel had not made timely objection to them. For the reasons set out above, the motion to strike out parts of the affidavits of Knights is dismissed.

[para18] With respect to that part of the motion that seeks an Order striking out the affidavit of Workman sworn on June 12, 2000, the situation is different. The usual practice, of course, is that affidavits upon which a moving party intends to rely are to be served with the Notice of Motion (Rule 39.01(2)). Here MTCC 781 served Workman's affidavit sworn on June 12, 2000, 5 days after he had been cross-examined on his earlier affidavit. The June 12 affidavit addressed two matters: certain allegedly threatening words and actions by Reyhanian at or immediately after Workman's cross-examination on June 7; and four instances of Reyhanian's having interfered with Workman's enjoyment of life in his condominium unit. Of those events, two allegedly preceded June 7, one occurred after that date and one was said to be a recurrent and continuing situation. It is not clear to me - and no explanation was offered - why three of the matters had not been raised in Workman's earlier affidavit.

[para19] In any event, it does not seem to me to be appropriate to permit old - or new - allegations to be added ad infinitum. As for the allegations of threatening behaviour on June 7, I have recognised, of course, that they could not have been included in any earlier affidavit but I do not see that they add anything substantial to the case. Mr. Shiller cross-examined on this affidavit but, as I said earlier, at the outset of that cross-examination he expressly reserved his right to challenge the propriety and admissibility of the affidavit. In my view, the challenge was well-founded. The affidavit sworn June 12, 2000 is struck out.

[para20] There remains only Mr. Shiller's request for an Order under Rule 32.01(1) permitting the inspection of the Workman condominium unit which lies immediately above that of Reyhanian. He argues that because allegations have been made that noise and smell from his unit are detectable in the Workman unit and are impairing the Workmans' enjoyment of their unit, it is necessary that Reyhanian or experts on his behalf be given access to the Workman unit to confirm or to dispute those allegations. I do not accept that argument. The alleged unpleasant experiences of the Workmans are not said to be continuous. Unless ongoing monitoring is to be permitted, the most that any expert could say is that on the occasion that he or she was there, no smell or sound was detected either at all or as emanating from Reyhanian's unit. Also, the board of directors of MTCC 781 has already deemed Reyhanian's pigeons to be a nuisance - as they are empowered to do. I do not see that and at best inconclusive report on the conditions prevailing on a particular day in the Workman unit can have any bearing on the propriety of continuing a situation that Mesbur, J., has already ordered be brought to an end. This aspect of Reyhanian's motion is also dismissed.

[para21] I shall deal with the costs of this motion when I hear the contempt motion next week.

LAMEK J.

CBR# 061

Carleton Condominium Corp. No. 244 v. Habcom Ltd.

Between Carleton Condominium Corporation No. 244, plaintiff, and Habcom Limited, Ian Johns, Sarah Jennings, V.K. Mason Construction Ltd., Adjeleian Allen Rubeli Limited, Gary C. Burr, Jannock Limited and Jannock Limited carrying on business as Canada Brick, Wantage Developments Inc., Bank of Montreal and 1048307 Inc., defendants

Court File No. 94-CV-080450

Ontario Superior Court of Justice Ottawa, Ontario Case Management Master Beaudoin May 3, 2000. (13 paras.)

Counsel: Christopher Moore, for the defendant/moving party, Wantage Developments Inc. Daniel Leduc, for the plaintiff/respondent party Carleton Condominium Corporation No. 244.

CASE MANAGEMENT MASTER BEAUDOIN:--

THE NATURE OF THE MOTION

[para1] The defendant, Wantage Developments Inc. brings this motion for summary judgment to dismiss the claims as against it. They also seek an order as to costs of the within action and of the motion as against the plaintiff and or the defendants Habcom Limited, Ian Johns and or Sarah Jennings. Counsel for the remaining defendants have not appeared on the motion, the court has been advised that he supports the position taken by the defendant Wantage on this motion.

HISTORY OF THE PROCEEDINGS

[para2] The within action was commenced by the plaintiffs on the 27th day of January 1994. They seek damages with regard to the number of building deficiencies against the developer, the general contractors, sub-contractors and designers. The claims relating to this specific defendant, Wantage, are referred to in paragraphs 1b, 26, 27 and 28 of the statement of claim. Although characterized by the moving party as a claim for specific performance, the claim is more properly identified by the plaintiff as a claim for declaration and performance of the trust. The defendant Wantage is the registered owner of unit number 25 of the plaintiff condominium corporation. The plaintiff seeks a declaration that Wantage holds that unit in trust for the plaintiff and further seeks an order directing a transfer of that unit to the plaintiff or damages for breach of trust in lieu of the transfer.

LEGAL BASIS FOR THE PLAINTIFF'S CLAIM

[para3] In support of their claim and in response to this motion, the plaintiff, cites the following passage from Waters, Law of Trusts in Canada 2nd ed. (1984), pp. 1034-1053, in their Memorandum of Fact and Law:

All property belonging to a trust, however much it may be changed or altered in its nature or character, and all fruits of such property, continue to be subject to the trust as long as the property can be ascertained. We submit that in this case, the trust property in question is ascertainable. A beneficiary, such as is claimed in respect of the Plaintiff here, may bring its action for breach of trust in order to assert its rights, or, the beneficiary can turn to another remedy, namely, the pursuit of the wrongly alienated or misappropriated trust property.

Again, the beneficiary is seeking compensation for the loss to the trust, but instead of requiring the trustee to compensate the trust out of its own pocket, the beneficiary's object is to make good the loss by recovering the trust property.

[para4] As appears from the affidavit of Albert Wong, in support of this motion, Wantage entered into an agreement of purchase of Unit 25, Level 1, CCC #244 with the defendant Habcom Limited the 18th of July, 1991. The purchase price for the subject unit was \$150,000.00 with a closing date of August 15th, 1991. He deposes that there were no indications from the vendor that there were any difficulties with respect of this property and that the vendor represented that it was legal and beneficial owner of the subject property and that there were no restrictions on the conveyance of that property. He further deposes that there was no evidence on the title as to any interest in this property other than the legal interest as represented by the vendor. Further, Wantage received a statutory declaration by Stephen C. Guest, on behalf of the vendor which, provided that during Habcom's ownership, no other person had indicated they had an interest in the property, that Habcom had complied to date with the by-laws of the Condominium Corporation. Further, and in advance of completing this transaction, Wantage obtained an Estoppel Certificate from the Condominium Corporation dated August 13th, 1991 which certificate made no mention of any interest on the part of the Condominium Corporation in the subject unit. That certificate was executed by Richard C. Monk, President, Condominium Corporation No. 244. Mr. Wong further deposes that the corporation was aware, long before the transaction was completed, of his intention to purchase the subject property and that no steps were taken by the corporation to indicate any objection to the transfer of the title of this property to Wantage.

[para5] In response, Gerald Wright deposes on behalf of the plaintiff that there are a series of different references in the condominium documents and other documents to the special use of Unit 25 including: a recreational unit, a pub, a lounge and a meeting room. He acknowledges that Habcom had the legal title to the unit and had the ability to sign and deliver a deed transferring Unit 25. It goes on to state in paragraph 6 of his affidavit:

However, the competing and different references to Unit 25 in the condominium documents registered on title should have raised the same questions we had upon retaining counsel in the fall of 1993, which led to this lawsuit. Those questions should have led to more specific inquiries by the Wantage prior to completing the transaction with Habcom. (emphasis mine)

Mr. Wright also deposes that the level of contributions or common fee expenses was a very small fraction of that paid by the owners of residential units. This small amount he argues, should have constituted notice to the purchaser that there was a limited use of the unit that was being purchased. In answer to Mr. Wong's assertion that Wantage had no information that the corporation took the position that Habcom was not entitled to convey Unit 25, he refers to a series of letters between Mr. Monk, the then President, and Wantage's own lawyer. All of that correspondence commences in October of 1991 some two and half months after the closing of the transaction. All of the correspondence addresses the issue of whether or not Wantage can operate the premises as a restaurant. It is clear that the premises were being operated as a restaurant known as "The Birdcage" at the time of Wantage's purchase. In fact, all of the correspondence deals with the issue whether or not Wantage will be able to continue to use the unit for that purpose. As he himself deposes the Corporation didn't raise questions itself until retaining counsel 2 years later.

[para6] In summary, the plaintiffs argue that Wantage had knowledge of the limited purpose for which the unit could be used, that fact and the lesser common expense fee should have given it notice that Habcom held the property in trust for the corporation. It is conceded that Wantage could not have had actual knowledge of such a trust if one existed. To succeed, the plaintiff has to establish that the plaintiff had constructive knowledge of the trust and that this constructive knowledge is sufficient to permit it to follow the declaration of that trust and a return of the property.

THE LAW

Rule 20.04(4) provides:

Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is made to a master, it shall be adjourned to be heard by a judge.

[para7] In *Haick v. Smith* (1988), 27 C.P.C. (2d) 193 (Master) it was held that the Master need only adjourn an issue of law to a judge where it is "genuine", meaning "arguable", with conflicting authority or no authority on the point. Otherwise the Master has jurisdiction to grant summary judgment.

Rule 24.04(2) sets out the test for summary judgment. It provides:

Where the court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the court shall grant summary judgment accordingly.

[para8] The determination of this question, namely whether or not there is a genuine issue for trial, has given rise to a number of appellate decisions. In this regard, the plaintiff relies on the Court of Appeal's decision in *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 at p. 173; where it was held that a motion's judge on a Rule 20 summary judgment motion should not resolve issues of credibility, draw issues from conflicting evidence, or from evidence that is not in conflict where more than one inference is reasonably available.

[para9] More recently the Supreme Court of Canada in *Guarantee Company of North America v. Gordon Capital et al.* (1999), 178 D.L.R. (4th) 1 (S.C.C.) considered this test at page 10, where the court held:

The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success".

The *Guarantee* (supra) was decided by Bellamy J. in *Moore v. Ogilvy Renault*, [2000] O.J. 983, at paragraph 9, Justice Bellamy states:

The moving party always has the onus of satisfying the court that there is no triable issue. The responding party, on the other hand, has the responsibility to put its best foot forward and to provide evidence from which the motions judge can conclude that there is a genuine issue for trial.

In taking a hard look at the merits, the court is entitled to assume that if a case is to proceed to trial the respondent would present no additional evidence: *Rogers Cable T.C. Limited v. 373041 Ontario Ltd.* (1994), 22 O. R. (3d) 25 (Gen. Div.).

[para10] The plaintiff concedes, on the basis of the authorities submitted to the court, that the remedy that it seeks will cease to be available once the property gets into the hands of the bona fide purchaser for value without notice but argues that constructive notice is sufficient. In support of this position, the moving party relies on a passage from the *Waters* text, found at page 1046:

If that third party is a bona fide purchaser for value, no proprietary remedy in equity is available, but a third party, who gave value but actually or constructively knew the facts or who knew nothing of the facts but was a donee, would be subject to recovery by an action either at law-where the claimant is able to sue at law - or in equity

In this case, the only fact that this moving party may have had constructive knowledge of this is the limited use of the unit. It is quite another step to suggest that that knowledge constituted constructive knowledge of a trust-giving rise to a beneficial interest in the unit on the part of the Corporation. More importantly, it seems to be well-settled law in the Province of Ontario that actual notice is required in dealing with interest in real property. In *Cohen v. McClintock* (1978), 19 O.R. (2d) 623 (H.C.), Cory, J., as then was, dealt with whether or not a conveyance of a property in trust constituted only constructive notice or actual notice of the trust. At issue was whether that conveyance of real property was a contravention of the Planning Legislation. At page 628 he stated:

I have been advised by both counsel that for many years it has been accepted by the profession that in considering title to real estate, the description of a predecessor in title as "trustee" constitutes only constructive notice and not actual notice of the trust. The practice was derived from the decision of the Court of Appeal in *Re McKinley and McCullough* (1919), 46 O.L.R. 535, 51 D.L.R. 659. There a motion heard first by Mr. Justice Middleton in Weekly Court. At p. 536 O.R., p. 660 D.L.R. of his reason, the following appears:

In my view, the Registry Act protects the registered owner against all unregistered equities, and in fact gives to the owner an absolute title, unless he has, before registration of the instrument under which he claims actual notice of the adverse right.

On the appeal of his decision, Merideth, C.J.O., at pp. 539-40 O.R., p. 662 D.L.R., stated:

The cases referred to by my brother Middleton, if any authority for the proposition were needed, establish that a purchaser for value without notice, whose conveyance is registered, is not affected by constructive notice of any prior instrument affecting the land or any interest in the land unless the instrument is registered or he has actual notice of it or of the existence of the interest.

That a person who has notice of an instrument has notice of its contents is undoubted, but it is only constructive notice.

In the case of a trust of land, the trust at all events if it is an express trust, must be evidenced by an instrument in writing, and there being no such instrument registered it is to be adjudged fraudulent and void against subsequent purchasers and mortgagees for valuable consideration without actual notice.

And finally, at p. 541 O.R., pp. 66304 D.L.R., of his reasons, the following paragraph:

All that the purchaser in this case had actual notice of was that the land was conveyed to the grantee "in trust" and but for the provisions of the Registry Act he would have been affected with notice, but only constructive notice, of fact and instruments, to a knowledge of which he would have been led by an inquiry for the instrument or other circumstances creating the trust; and such notice as that does not now affect the title of purchaser for value whose conveyance is registered.

[para11] Cory, J. went on to apply that decision in the *Re Cohen* (supra) case.

[para12] In conclusion, in order to succeed, and to follow the property into the hands of a subsequent purchaser, the law is clear that this purchaser had to have actual notice of the trust. In the within case, the purchaser may have constructive knowledge a restrictive covenant affecting his use of the property. Even if that constituted constructive knowledge of a trust; that would be insufficient to allow the plaintiff the remedy it seeks. The court is entitled to assume that the respondent has no further evidence to present and concludes that there is no triable issue.

[para13] For these reasons, the moving parties' motion for summary judgment is granted. Insofar as the moving party has sought costs of this motion and of this action not only from the plaintiff, but the "Habcom" defendants, the court will invite the parties to make written submissions as to costs within 20 days of the release of this decision.

CASE MANAGEMENT MASTER BEAUDOIN

CBR# 023

Alie v. Bertrand & Frère Construction Co.

Between Bernard Alie, [and approx. 137 others*], plaintiffs, and Bertrand & Frère Construction Company Limited, [and approx. 29 others*], defendants [* See Appendix A for complete Title of Case]

Court File No. 2104-1992

Ontario Superior Court of Justice Ottawa, Ontario Roy J. Heard: September 8, 1997. Judgment: April 17, 2000. (512 paras.)

Counsel: [Approx. 47 counsel listed. See Appendix B for complete list of counsel.]

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(a) Property Damage (b) Occurrence (c) What is the effect of Bertrand not having a "rip and tear" endorsement in their insurance policies? (d) Conclusion

(ii) Do the exclusionary clauses in the policies withdraw the claims from coverage?

(a) Own Product Exclusion (b) Faulty Workmanship Exclusion (c) Business Risk Exclusion (d) Impaired Property Exclusion

(iii) In which coverage period did the occurrence take place? Which trigger theory applies?

(a) The Exposure Theory (b) The Manifestation Theory (c) The Injury In Fact Theory (d) The Continuous or Tripple Trigger Theory (e) Conclusion

(iv) Do the insurers have other valid defences such as misrepresentation, non-disclosure, and late reporting?

(a) Misrepresentation and Non-Disclosure (b) Insurer's Position (c) Chubb's Further Position (d) Late Reporting

(v) What insurance limits are available and what deductible is Bertrand obligated to pay?

(vi) Other Issues

(a) Second and Subsequent Purchasers (b) Is Bertrand Fully Insured? (c) Did all of the damage take place Prior to 1989?

D. Apportionment of Responsibility between Insurers

3. Lafarge and Their Insurers

A. The facts

B. The Issues**(i) Estoppel**

(a) Introduction (b) Estoppel between the 1986 insurers and Lafarge (c) Estoppel between Lafarge and National Union

(ii) What is the scope of indemnification of the various insurance policies? Does it cover Lafarge's liability for the plaintiffs' damages?

(iii) Would any exclusionary clauses in the various insurance policies remove the claims from coverage? What effect does the "rip and tear" exclusion have on the respective policies?

(a) Introduction (b) The "product" or "work performed" exclusion (c) The "rip and tear" exclusion (d) The "professional liability" exclusion

(iv) Which trigger theory applies and which insurance coverage is triggered in fact? How should responsibility be allocated amongst the various insurers?

(v) Liability for, and apportionment of, defence and third party costs

(a) Introduction (b) General Principles (c) Primary Insurers (d) Excess Insurers (e) Does the duty to defend apply only when the underlying insurance has exhausted its limits? (f) Apportionment of defence and third party costs among the primary and excess insurers

(vi) What deductible is Lafarge obligated to pay?

(vii) Other Matters

(a) Are the insurers who are in breach of their duty to defend automatically obligated to indemnify? (b) Bodily injury coverage (c) Are Reliance Insurance limits reduced by amounts paid by other insurers in prior years? (d) National Union alleges no duty to indemnify because Lafarge did not tender

ROY J.:-

I. OVERVIEW

[para1] In Eastern Ontario, the mere mention within legal circles of the "infamous cement case" evoked incredulous head shaking. Small wonder!

[para2] The case involved approximately 137 plaintiffs suing 3 main defendants, who in turn sued 30 insurers. The subject matter of the litigation involved deteriorating residential concrete foundations. The homes in question were located in eastern Ontario, from Rockland to Hawkesbury, and east into Québec up to Montebello.

[para3] The trial commenced on September 8, 1997 and continued until mid-December 1998. A special courtroom was required to accommodate the number of parties and their counsel. On the first day of trial, there was approximately 50 counsel in attendance representing various interests and, most days, anywhere between 15 to 40 counsel would be present.

[para4] Due to the bilingual nature of the proceedings, interpreters were required and special interpreter equipment was needed to accommodate counsel. Over the course of the next 16 months, some 110 witnesses were called of which 15 were experts. Close to 600 exhibits, representing tons of paper, were put into evidence. Massive amounts of expert evidence were introduced, representing the opinions of leading world experts in concrete. Thousands of photos were utilized as evidence showing, from every possible angle, the deteriorating concrete over the last ten years.

[para5] Briefly, there was an overload of evidence. Too many witnesses, too many experts, too many exhibits, too many questions and answers. Unfortunately, class action proceedings were not available when this proceeding was started. Nevertheless, the issues and facts did not warrant such a lengthy trial and massive amounts of evidence.

[para6] Throughout the proceedings, often forgotten were the innocent plaintiffs. For them, like many Canadians, the purchase of their homes was the realization of a dream. For some, it was their first home; for others, it was their retirement home. None of the plaintiffs could have foreseen the nightmare that awaited them.

[para7] Most homes were purchased in 1986 and 1987. The plaintiffs started experiencing problems with their foundations within the year of the purchase. The real tragedy is that all but approximately 29 of the plaintiffs have been coping with this problem now for over 10 years. They really can't enjoy their homes and don't have the use of the basements. With the concrete in their foundations continually deteriorating, would the walls collapse before being replaced? They are in an extremely difficult situation. They can't sell, can't rent, and can't finance to repair. Most plaintiffs did not have sufficient funds to abandon their homes and live elsewhere. The Ontario New Home Warranty Program (the "Program") informed all but approximately 29 plaintiffs that their written notices were past the limitation period and, therefore, not entitled to consideration by the Program.

[para8] Thus, their only avenue for redress was the justice system. Without the benefit of class action procedure, it was difficult for the system to respond. A judge was appointed to case manage the action. Consolidation was ordered for all actions and attempts were made to reduce and simplify the issues. Orders were made to expedite discoveries of factual and expert evidence. For whatever reason, many initiatives taken to simplify and expedite the trial were not very successful. Although the damage incurred by the plaintiffs was obvious, it was difficult for the justice system to respond adequately and efficiently without the full cooperation of all counsel.

[para9] At the very outset of the trial, it became obvious that no consensus existed amongst counsel on how to deal with the evidence regarding liability, assessment of damages, and the issues in the actions between the defendants and their insurers. Basically, the first week was spent dealing with preliminary motions and setting out the trial procedure. Given that the plaintiffs

had been waiting over ten years for some form of redress, the Court decided to sit continuously until all the evidence was called on all issues involving all of the parties.

[para10] The defendant Bertrand had undertaken third party proceedings against five insurers. They, in turn, all responded to the plaintiffs' claims. Therefore, in accordance with the Rules, they were entitled to participate fully in the proceedings.

[para11] Seven insurers (the group of seven) represented most of the defendants forming contractors. They too were entitled to participate fully. Thankfully, all of the parties came to an agreement regarding these defendants and they were released from the action after approximately 100 days of trial.

[para12] The defendant Lafarge had undertaken third party proceedings against eighteen (18) insurers. They had not defended the main plaintiff action. Accordingly, they were not entitled to participate in the proceedings of the main action. Nevertheless, considering that they would be bound by the findings of fact in the main action, a limited number of these parties were allowed to cross-examine witnesses in the main action. Such examination would be restricted to evidence affecting issues in their action with the defendant Lafarge.

[para13] A trial with so many parties, so many counsel, and so many issues can be quite a challenge for a presiding Judge. By and large, I was very fortunate and grateful to receive the cooperation of most counsel. Without their assistance, the trial would have been much more laborious and still longer. Unfortunately, the conduct of a few counsel made life very difficult for everyone involved. One counsel in particular was litigating a case which was beyond her experience and competence. She has rendered a great disservice to her clients. A few counsel seemed to think that the strength of their case depended on the quantity rather than the quality of the evidence. Finally, throughout the trial, it became apparent that a few counsel, perhaps with their eye on another forum, were either continually raising needless objections or refusing to make admissions, thereby requiring the calling of unnecessary witnesses.

[para14] What I have to do is decide which of the defendants is responsible for the faulty concrete; assess the plaintiffs' damage; and determine if the responsible defendants can be indemnified by any of their insurers.

[para15] The challenge for the Court is to attempt to filter from this massive amount of evidence, only the relevant facts. From the thousands of pages of written submissions, I will attempt to deal with all issues as succinctly as possible. The innocent plaintiffs have been waiting for justice for too long. They deserve a decision that is clear and straightforward. I am sorry that I was not able to complete my judgment sooner.

II. BACKGROUND

[para16] The plaintiffs are the present owners of homes whose concrete foundations were poured primarily during the years 1986 and 1987. The concrete for all of the foundations was supplied by the defendant Bertrand. The defendant Lafarge supplied the cement powder and fly ash (FA) used in the batching of the concrete.

[para17] Within a year or two after the pouring of the concrete foundations, the homeowners started having problems with their foundations and made the following observations: excessive white powder often referred to as efflorescence on the concrete walls; parging on the outside walls, cracking and detaching itself from the concrete wall and falling off; concrete which was crumbling and deteriorating; excessive moisture in the basement; mildew and mould forming on the inside walls.

[para18] In the years between 1988 and 1992, the plaintiffs complained about their problems to the defendant Bertrand, to some of the other defendant sub-contractors and to the Program. Some attempts were made to repair the foundations, but these proved to be temporary and totally ineffective. Obviously, the parties did not fully appreciate the seriousness of the problem. It was not until some time in 1992 when the Program, after having received a large number of complaints, decided to hire experts to investigate and test the concrete. These experts concluded that the concrete in the foundation was seriously deficient and, as a result, a major structural defect existed. Accordingly, the Program decided that the only viable solution was to replace the foundations.

[para19] Unfortunately, most of the plaintiffs were not able to have their foundations replaced or repaired by the Program. They were beyond the 5-year limitation period when they realized the seriousness of the problem and notified the Program. Their only alternative was to start an action against the defendants.

III. ISSUES

[para20] This Court is being asked to decide the following issues:

1. What caused the problem?
2. Are the defendants liable?

In Contract? In Negligence?

If yes, how is the negligence to be apportioned?

3. What are the plaintiffs' damages?
4. Are the defendants entitled to indemnification from their insurers?
5. Are the plaintiffs entitled to pre-judgment interest and costs?
6. Are the plaintiffs entitled to costs?

IV. INTRODUCTION

1. The Parties:

A. The Plaintiffs

[para21] The plaintiffs are approximately 137 homeowners. The action involving all of the parties was a result of a consolidation order of a number of actions made by the case management judge of a number of actions. Within the action, there were various groups of plaintiffs represented by different counsel. The groups are as follows:

(i) The Alie Plaintiffs

[para22] They are the present owners of approximately 58 single-family residences and 20 condominium units (PCC 2). The trustee represents several of the homeowners in bankruptcy. Further, the trustee of the Estate of Gilles Turpin, a bankrupt, is claiming a loss of money on the sale price of four homes.

(ii) The Marcil Plaintiffs

[para23] They are the present owners of approximately 18 single-family residences, which they occupy as their homes with their families.

(iii) The Ontario New Home Warranty Program Plaintiffs

[para24] The Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31 (the "Act") establishes a consumer protection scheme for purchasers and owners of new homes, including condominiums. Through the subrogation provisions of the Statute, the Program represents the interest of 28 homeowners and one Condominium Corporation with 12 units (PCC 5). The Program, having either replaced or repaired the foundations of these homes, has a subrogated interest.

(iv) The Duval Plaintiffs

[para25] They are the present owners of four single-family residences.

(v) Independent Plaintiffs

[para26] There are five independent plaintiffs who are the present owners of single family residences.

B. The Defendants

[para27] There are two main defendants in these proceedings and they are Bertrand & Frère Construction Co. Limited (Bertrand) and Lafarge Canada Inc. (Lafarge).

(i) Bertrand & Frère Construction Co. Ltd. ("Bertrand")

[para28] Bertrand is the ready-mix operator who manufactured and supplied all of the concrete in the plaintiffs' foundations. Bertrand has been in the ready-mix business since 1960.

(ii) Lafarge Canada Inc. ("Lafarge")

[para29] The large multi-national corporation, Lafarge Corporation, owns Lafarge Canada Inc. Lafarge supplied Portland cement and St-Clair/Belle River Type C FA products to Bertrand. Bertrand used these products in the batching of its concrete that found its way into the plaintiffs' foundations.

(iii) Other Defendants

[para30] There are other defendants in these proceedings and they are:

1. Raymond Bertrand, a director of Bertrand.
2. The general and forming contractors.

[para31] Settlement was reached with several general contractors and forming contractors.

C. The Insurers

[para32] The third and fourth parties were the insurers.

* The defendant Bertrand started third party proceedings against five insurance companies.

* The defendant Lafarge started fourth party proceedings against eighteen insurance companies.

2. The Facts:**A. The Plaintiffs' Evidence**

[para33] The plaintiffs are the present owners of homes whose foundations were poured primarily during 1986-87, and possibly one foundation was poured in 1988. This action involving all of these parties is a consolidation of a number of actions by plaintiffs involving defendant and third parties. In order to facilitate the identification of individual plaintiffs, a numbering system was devised at trial (see Ex. 1A and 1B). The defendant Bertrand supplied all of the concrete in the plaintiffs' foundations. With possibly one exception, all of the concrete contained cement powder and FA supplied to the defendant Bertrand by the defendant Lafarge.

[para34] Within a year or two, the homeowners started observing problems with their concrete foundations. The problems and deterioration varied somewhat from house to house, but by and large they can be summarized as follows:

- * A fluffy white powder referred to as efflorescence was seen on the exterior surface of the foundation walls above grade and on exposed areas of the interior walls.
- * Substantial deterioration of the parging was present at the exposed exterior surfaces.
- * There was a deterioration and disintegration of the concrete on both the exterior and interior walls above grade.
- * An unusual softness and dustiness existed in the concrete in the foundation walls.
- * Also, observed was a soft layer of brownish coloured concrete on both the interior and exterior foundation walls.
- * There was cracking of some foundation walls in areas around corners or near windows.
- * Many interior foundation walls were wet and there was evidence of water penetration and leaking into the basement.
- * Most basements experienced high moisture and humidity. Many homeowners attempted to correct the problem by installing dehumidifiers and air exchangers.
- * Black moulds were observed in most foundation walls, especially in finished basements.
- * Many foundations had efflorescence and crumbling concrete in the interior foundation walls near the basement floor level.

[para35] At trial, some fifty (50) or so plaintiffs were called and confirmed the above observations. Further, a summary of the homeowners' observations given as a result of interrogatories is found in Ex. 19. The evidence of a large number of experts who testified confirms the plaintiffs' observations. Finally, all of the plaintiffs and many of the experts put into evidence large numbers of photographs confirming the plaintiffs' observations. At trial, the parties agreed that the evidence given by the plaintiffs who testified would be representative of those plaintiffs not called.

[para36] In the years between 1987 and 1992, the plaintiffs made complaints to the defendant Bertrand or to contractors who had either poured the concrete or installed the parging. Obviously, it was impossible for any of the parties involved to fully appreciate the seriousness of the problem. Attempts were made to repair or replace the parging. Some repairs were made to the foundations with latex or epoxy. All of the repairs proved to be just temporary and totally ineffective. The parties were not aware of the nature, extent and seriousness of the problem until the summer and fall of 1992 when the Program became involved with this matter.

[para37] The Program is a non-profit corporation that has the responsibility for administering the Act. This legislation establishes a consumer protection scheme for purchasers and owners of new homes, including condominiums. Under the Act, every vendor and builder of new homes must be registered under the Program and must enroll each proposed home or condominium building before the start of construction. The Act requires every vendor to provide owners of new homes with a certain specified warranty regarding the quality of construction. An owner who claims that a vendor/builder has breached a statutory warranty, may make a claim to the Program, which in turn is empowered to decide whether there has been a breach of warranty or whether there should be any payments made out of the guarantee fund to cover costs of remedial work. The guarantee fund is funded by the vendors/builders.

[para38] The Act is intended as a consumer protection plan for the benefit of people buying new homes. As consumer legislation, it must be construed in a liberal way to give effect to its central and important purpose. It is intended to remove from the consumer the need to engage in expensive and time consuming multi-party litigation to determine, on the basis of negligence and breach of contract, who is responsible for the defect in question. Through the subrogation provisions, responsibility for any Court proceeding to determine liability among various construction parties, with all of the costs, delays and procedural wrangling, is allocated to the Program.

[para39] Under the Act and Regulations, claims for ordinary defects must be made in writing to the Program within one year after the owner takes possession of the home. Owners who have more serious problems and make a claim for major structural defects must do so within five years of the date the home was completed and ready for possession.

[para40] The Program first became aware that there was a widespread problem with some residential foundations in Eastern Ontario on or around June 1992. Their field representative, Mr. Paul Rochon, noticed a trend in the homeowners' complaints that he was investigating in a number of homes east of Ottawa. Apparently, the Program received complaints from as many as 230 homeowners. Unfortunately, the vast majority of those complaints were received outside the five-year warranty period. The Program ultimately determined that 28 homeowners and 1 Condominium Corporation were entitled to warranty coverage, should it be determined that the foundation problems reported to the Program within the warranty period constituted a major structural defect.

[para41] The employees of the Program visited the home and had discussions with the parties, including the defendants. The Program retained the engineering firm of e to investigate the matter and test the concrete. The experts submitted a progress report in August 1992 (Ex. 228A). The report concluded that the concrete had serious deficiencies such as high absorption characteristics, comprehensive strengths well below the Ontario Building Code's requirement, lack of air entrainment, abusive amounts of water, low durability features including little or no resistance to freeze-thaw cycles, and a lower than preferred original aggregate quality. A second expert retained confirmed these findings. Accordingly, the Program decided that the only viable solution was to replace the foundations. The 28 plaintiffs either had their foundations replaced or agreed to a cash settlement and the owners of the condominiums had their foundation repaired.

[para42] The balance of the plaintiffs who were not covered by the Program had to retain counsel who in turn retained the services of experts. They became aware of the seriousness of the problem when their experts submitted their reports starting in the fall of 1992.

[para43] In my opinion, this case underscores a serious flaw in the Ontario New Home Warranties Act. As mentioned earlier, the Act was intended as a consumer protection plan for the benefit of people buying new homes. Unfortunately, it benefited only 29 of the 137 or so plaintiffs. Why? Because the five-year limitation period is too rigid and inflexible. An owner who has a serious problem has to make a claim within five (5) years of the date that the home was completed and ready for possession. As this case

illustrates, the owner may not appreciate that there is a serious problem within five years of the completion. The discoverability rule which makes limitation periods more flexible likely would not apply here. The Ontario Government, which has responsibility for this legislation, should give serious consideration to making the limitation period in the Act more consumer friendly. This case clearly illustrates how an inflexible, fixed period has denied the majority of the plaintiff's, who have a legitimate claim, the benefits of the Act.

B. The Defendants' Evidence

(i) Admissions by the Defendants

[para44] Admissions by Bertrand: Bertrand acknowledged that it supplied concrete to all of the plaintiffs' foundations. Bertrand also admitted that all of the foundations of all of the plaintiffs required total replacement except for Prescott Condominiums No. 2 (PCC 2) and No. 5 (PCC 5) and the foundation of the plaintiff Saumure (M-78).

[para45] Admissions by Lafarge: Lafarge admitted having supplied Bertrand with Portland cement powder during the period 1986 to 1991. Lafarge further admitted having supplied Bertrand with Type C FA which came from two Detroit Edison electrical generating stations known as St-Clair and Belle River commencing on May 28th, 1986, through the relevant time period and ending in 1991.

[para46] Admissions by all Defendants: All of the defendants admitted the contents of Bertrand's delivery slip summarized in Ex. 11 and 12. All of the defendants further admitted the homeowners' observations as contained in Ex. 385.

(ii) Bertrand's Evidence

[para47] Bertrand operates a quarry and sandpit and is well-known in Eastern Ontario and Western Quebec. They have been in the ready-mixed concrete business since 1960. They enjoyed a good reputation, especially with the forming contractors. Over the last 25 years, they have never encountered any serious problem with their ready-mixed concrete. In 1986, Bertrand operated two plants: one in L'Original, Ontario and the other in St-Isidore, Ontario. Both of Bertrand's ready-mix plants and the aggregate used in the manufacture of concrete had been approved by the Ministry of Transportation in Ontario ("MTO").

[para48] Various ingredients go into the manufacture of concrete. The main ones are: Portland cement, aggregate (which is crushed rocks, sand), and water. These are batched together in the right proportion depending on what use is to be made of the concrete. For our purposes, most of the concrete was used either for footings, foundation walls, or floors. In batching ready-mixed concrete, certain add mixtures such as water reducing agents and air-entraining agents which help the concrete withstand freeze-thaw cycles are often added. The concrete is then delivered to the site by ready-mix trucks. The forming contractors usually did the placing of the concrete at the site. Bertrand's testing program usually involved visits to the sites, slump testing, gradation and organics testing of the fine aggregate, casting cylinders to check compressive strengths, and determination of total air content.

[para49] From 1960 to 1983, Bertrand got its cement powder from Lafarge and other suppliers. For several years prior to 1986, Bertrand got its cement powder from a company called Miron. In the spring of 1986, Raymond Bertrand, a Director of Bertrand, met with Mr. Walter Smith, the Sales Manager for Lafarge for the Ontario region and Cal Hutter, Distribution Manager for the Ontario region of Lafarge. They convinced Bertrand to purchase cement powder and a new product Type C FA from Lafarge. Bertrand was told not only was FA cheaper, but its use would result in having a better and more workable concrete. Bertrand was told by the representative from Lafarge that it could replace cement powder by FA pound, for pound up to 40%. Bertrand was advised that the only draw back in the use of FA was that the concrete would be browner in colour and might have some efflorescence which would occur once and which could easily be washed off with water.

[para50] Bertrand used FA commencing May 29, 1986 until December 1, 1986. FA was not used during the winter months, that is December to March. Bertrand recommenced the use of FA on April 1, 1987 and continued until October 13, 1987. Bertrand resumed the use of FA April 1, 1988 until some time either in April or May 1988 when FA was discontinued. It resumed the use of FA in September 1988 until some time in 1991. According to Bertrand, it followed its very same mix design after 1986, as before except that it substituted FA for 20% of the cement powder. Except for a few loads, all of the concrete supplied to the plaintiffs was from Bertrand's L'Original plant. The St-Isidore plant was not equipped to substitute FA for cement powder.

(iii) Lafarge's Evidence:

[para51] Lafarge Corporation is a large multi-national corporation, well known throughout the world and with its head offices in France. It owns the defendant Lafarge Canada Inc. Lafarge Corporation had world sales of approximately \$16 billion in 1997, derived primarily from the manufacture and sale of cement powder. In Ontario, the defendant Lafarge has a plant at Bath, Ontario that manufactures and sells Portland cement.

(a) Fly Ash ("FA") - A Brief History

[para52] A number of the experts who testified in this matter indicated that the use of FA dates back to Roman days. They maintain that the Romans used volcanic ash mixed with lime to produce the mortar and concrete used to build their aqueducts. In Canada, the use of FA in concrete is governed by the National Standard CAN/C.S.A. A23.5, see Ex. 274. This Standard governs the use of all supplementary cementing materials including FA. FA is defined in the Standard as:

The finely divided residue that results from the combustion of pulverized coal and which is carried from the combustion chamber of a furnace by the exhaust gases.

Generally, there are two types of FA, Type F and Type C. Type F FA is produced from burning anthracite or bituminous coal or what is referred to as hard coal. Type C FA is produced from the burning of lignite or sub-bituminous coal often referred to as soft coal. For our purposes, the type of FA used was Type C. The source of the FA was the Detroit Edison Thermal Generating Plants at St-Clair and Belle-River. Type C FA is referred to as a pozzolans. What this means is that when mixed with Portland cement and water it forms compounds possessing cementing properties.

[para53] Apparently FA has been used widely since the 1930's. In the western United States, primarily Type C FA has been used, and in eastern Canada mostly Type F FA. In 1984-85, when Type C FA was first introduced in Ontario, ready-mix operators

would not have been familiar with this product and, in fact, Mr. Bertrand testified at trial that he had never heard of FA prior to meeting with the Lafarge representatives in 1986.

(b) Marketing of FA

[para54] In January 1985, Lafarge entered into a joint venture with a company called DBO Marketing to promote the sale and distribution of Type C FA to ready-mix companies. By an amendment to this agreement in July 1986, Lafarge acquired virtually the entire joint venture. The FA was transported from the Detroit Edison plants to a Lafarge facility located in Woodstock, Ontario. The FA then would be trucked from Woodstock to its respective customers across Ontario. As mentioned earlier, Lafarge started delivering FA to Bertrand in 1986.

(c) Testing of FA

[para55] Lafarge starting doing some testing of Type C FA in 1984 (see Ex. 380, vol. 1, tab 1). Lafarge also was involved in laboratory tests of Type C FA in an attempt to simulate and/or accelerate field conditions in order to evaluate the FA. These studies are referred to as the "Elmhirst Thesis" (see Ex. 380, vol. 2, tab 7), the Claude Bérard study at the Lafarge's Montreal Research and Technical Centre (see Ex. 380, tab 12) and the Lafarge Coppee Study in France (see Ex. 380, tab 9 and 11). Further, a number of ready-mix companies, mostly located in southern Ontario, made some limited use of Type C FA in their concrete and this was monitored by the companies and Lafarge. A few problems were encountered such as efflorescence and low strength, but nothing major or extensive, as was the case here in Eastern Ontario.

[para56] To assist Bertrand in introducing FA to its concrete mix, Lafarge sent a technical representative by the name of Blair to assist for a couple of days. A limited number of cylinders of concrete containing various percentages of FA were tested for compressive strength. Bertrand was told by Lafarge that it could substitute FA one-for-one for up to 40% of the cement powder in its concrete mix. It was also advised that its concrete may have a darker colour and may have some white powder which might easily be washed off the foundation walls. No other pertinent information or warning about FA was given by Lafarge to Bertrand prior to its introduction into the concrete mix.

[para57] When Bertrand advised Lafarge that it was getting complaints about the concrete from the plaintiffs, Lafarge sent representatives to investigate the matter. Basically, Lafarge concluded that Bertrand was having quality control problems and that its sand used in the concrete was too fine. Further, Lafarge indicated that the parging on the outside wall of the concrete foundation had not been done properly.

C. Evidence Not in Dispute

[para58] With few exceptions (Saumure M-78, Tremblay M-80), the evidence of all of the witnesses, including the experts, was consistent that all of the plaintiffs' foundation will have to be removed and replaced. The defendant Lafarge suggested at the opening of the trial that the plaintiffs' foundations would not have to be replaced, but could be repaired. Unfortunately, such evidence was not called and the only expert evidence before the Court is that the plaintiffs' foundations will have to be replaced, except for the condominiums and the plaintiffs' M-78 and M-80. The reasoning for such drastic remedy is as follows:

* The air void system in all of the plaintiffs' foundation is inadequate and fails to meet the minimum requirements of the Ontario Building Code and minimum CSA standards.

* Most of the leading experts called on behalf of all of the parties appear to agree that the deterioration of the concrete walls will continue unless they are replaced. Such concrete walls do not meet the Building Code requirements, and ultimately over time there is a risk of sudden collapse.

* The moulds observed in most of the plaintiffs' basements are hazardous to the health of the occupants.

V. WHAT CAUSED THE PROBLEM?

Two Theories: Freeze-thaw or Sulfate Attack

[para59] Many months were spent in this trial listening to evidence from the foremost concrete experts in the world giving opinion evidence as to the likely cause of the deterioration of the plaintiffs' foundation. Two competing theories emerged:

1. Damage due to cyclic freeze and thawing which occurs when concrete becomes critically saturated and, in the absence of an adequate air void system, breaks down and deteriorates during these cycles.

2. Damage resulting from some sort of attack brought about by the chemical composition of Type C FA and commonly referred to as internal sulfate attack.

[para60] The experts for some of the plaintiffs and for the defendant Lafarge, agreed that the damage was due to freeze-thaw mechanism, but for different reasons. The plaintiffs' expert maintained that the concrete could not withstand freeze-thaw damage because FA was inserted during the batching. Lafarge experts maintained that FA had nothing to do with the poor quality of the concrete, but rather the cause was Bertrand's over use of water and poor quality aggregate. The proponents of the second theory, sulfate attack, were the defendant Bertrand and some of the plaintiffs' experts.

[para61] My findings as to what caused the problem will be the determining factor in apportioning liability. Central to the whole issue of liability is the role played by the inclusion of FA in the mix. If the Court accepts the Lafarge theory that FA was not the cause of the problem, then it would have to likely reject the theory of sulfate attack and would conclude that freeze-thaw caused the problem and no liability rests with Lafarge.

[para62] On the other hand, if the Court concludes that FA was the cause of the problem, then certainly Lafarge would have to assume some of the liability. All of the experts called agree that the defective concrete lacked proper air entrainment, had low compressive strength and a high absorption level. Where the experts disagree is what caused the problem? Is it freeze-thaw or sulfate attack, and did the FA trigger both or either one of these mechanisms?

1. Is it freeze-thaw?

[para63] The experts who were the main advocates of the theory of freeze-thaw mechanism were Dr. N.K. Becker who testified on behalf of the Alie plaintiffs, Mr. Ryell of Trow Consulting Engineers Limited (TROW) who testified on behalf of the Program plaintiffs and Mr. Niels Thaulow of G.M. Idorn Consultants who testified on behalf of the defendant Lafarge.

[para64] The mandate of the Program's experts was simply to determine whether a major structural defect existed and whether foundations required replacement. Mr. Ryell of TROW identified the mechanism of deterioration as freeze-thaw damage and pointed to the lack of air entrainment, low compressive strength and high absorption of the concrete as a major cause of deterioration. Nevertheless, he was not prepared to rule out other possible factors and conceded that it was possible for sulfate attack and freeze-thaw damage to be occurring simultaneously and that the combination of the two mechanisms of deterioration would make the concrete conditions worse than if only one mechanism was occurring.

[para65] Dr. Becker basically agreed with Mr. Ryell of TROW as to the poor quality of the concrete. He concluded that the primary mechanism of deterioration was freeze-thaw damage and that the proximate cause of the lack of freeze-thaw durability was the presence of Type C FA in the concrete. Because of the financial constraints of his client, Dr. Becker conceded that this precluded him from doing exhaustive testing and, therefore, he could not rule out sulfate attack as a contributing mechanism of deterioration in the concrete.

[para66] Niels Thaulow of Idorn Consultants, who testified on behalf of Lafarge, was adamant that the deterioration was attributable to freeze-thaw. His evidence differed from that of Dr. Becker in that, in his opinion, the Type C FA did not contribute whatsoever to the deterioration of the concrete. He offered a variety of possible causes of the freeze-thaw deterioration, including poor quality of the sand used by Bertrand, the insufficient use of air entraining agents resulting in concrete that was not successfully air entrained, the presence and use of limestone fines by Bertrand, and the excessive use of water resulting in high water/cement ratios in the poured concrete.

(i) How Freeze-Thaw Cycle Can Do Damage to Concrete

[para67] Most of the experts who testified at this trial indicated that a number of factors have to be present for concrete to suffer damage as a result of freeze-thaw. They are:

- * the concrete has to be exposed to temperatures from minus 6 degrees to plus 2 degrees;
- * the concrete has to have an inadequate air void system; and,
- * the concrete has to be critically saturated.

(ii) The Freeze-Thaw Cycle

[para68] The most probative evidence on freeze-thaw cycle was submitted by the National Research Council (NRC) in a report dated September 11, 1996 (Ex. 407). Between November 20, 1995 and May 14, 1996, temperature and humidity measurements were monitored in concrete walls of three houses affected by deteriorating concrete. NRC concluded that for concrete to suffer a freeze-thaw cycle, the temperature must cycle from about plus 2 degrees Celsius to minus 6 degrees Celsius and have a dwell time at these temperatures of at least an hour. Most of the experts questioned at trial agreed with this conclusion except for Mr. Thaulow who gave an opinion that concrete actually freezes at minus 2 degrees Celsius. Based on the NRC report, the period in which temperatures of minus 6 degrees Celsius can be anticipated is between December and mid-March. Results indicated that the above grade portion of the basement walls in two of the houses was subject to as many as five freeze-thaw cycles per winter. The third house basement, poorly insulated and hot inside, did not suffer any cycles. Testing of the cores indicated that they had little freeze-thaw resistance. Given what most Canadians in this part of the country know about our winters, and given the location of the plaintiff houses, the NRC report simply confirmed that certain exposed areas of these concrete walls would be subject to a number of freeze-thaw cycles during the winter months. Conversely, large areas of basement walls and floors would not be subject to freeze-thaw cycle. How is it then that certain areas not subject to freeze-thaw cycle exhibited signs of deterioration?

(iii) Dr. Becker's Theory - FA the Proximate Cause:

[para69] In Dr. Becker's opinion, the proximate cause of the inherent lack of freeze-thaw durability of the concrete is the introduction of Type C FA as a partial replacement for normal Portland cement concrete into the Bertrand mix at its L'Original plant starting May 29, 1986. In his opinion, there were two ways that FA created the conditions in the concrete and enabled that deterioration to occur. The first was by entrapping air which misled the ready-mix operator into believing that there was a sufficient level of entrained air in the concrete. This caused the operator to reduce the amount of air entraining agent and resulted in the production of non-air entrained concrete that could not withstand repeated freezing and thawing without deteriorating.

[para70] Secondly, when FA was used, according to Dr. Becker, a large amount of additional water had to be added to allow the concrete to be poured easily. This additional water increased the water/cement ratio and caused the concrete to become more porous and to absorb large quantities of water, thus making it much easier for the concrete to become critically saturated. Walls that are critically saturated, or in other words filled with water, cannot withstand repeated freezing and thawing without the presence of an adequate air void system.

(a) FA and Air Entrainment

[para71] Dr. Becker, in his evidence and report (Ex. 270), referred to the Type C FA from St-Clair and Belle River as "quirky". The evaluations reports produced by Lafarge Canada confirmed that FA is not a product that is manufactured for use in concrete. It is a waste by-product generated by coal-fire power plants. Consequently, its properties and qualities can vary significantly from plant to plant, and from day to day, as a consequence of variation in the coal source, the degree to which it is pulverized, the precise manner in which it is burnt, and the operational efficiency of the specific scrubbers from which the FA is collected. Dr. Becker gave evidence that the test data contained in the Elmhirst Thesis (Ex. 276) represented the main laboratory test data relied on by Lafarge. The data clearly indicated that Type C FA from St-Clair and Belle River had entrapped large quantities of air in the concrete when used in conjunction with the water reducing agent, such as "prokrete N", used by Bertrand during the 1986-88 period.

[para72] The only equipment available to Bertrand to measure the total amount of air in concrete was a pressure vessel. This is the only device used to measure air content at most ready-mix plants. The air tests used by Bertrand did not distinguish between entrained and entrapped air. The entrapped air is not beneficial for concrete and is different from the entrained air. The entrained air is beneficial to the concrete as it provides air bubbles of the correct size and spacing to absorb the pressure created when water in the concrete freezes and expands. The entrapped air, which has neither the proper size nor spacing, does not have any beneficial qualities and has, in fact, harmful qualities which increase the amount of damage caused by freezing and thawing. Unfortunately, it is quite possible that what Bertrand was measuring was entrapped air and not entrained air.

[para73] The propensity of Type C FA to entrap air into concrete is also confirmed by certain field tests performed by Dan Brouwer of Red-D-Mix, a subsidiary of Lafarge. Dr. Becker's opinion is also confirmed by several tests performed by Dave Brand an employee of Lafarge in Sarnia in 1985. Mr. Thaulow testified that if an insufficient amount of air entraining agent were added to the concrete, no beneficial air entraining effect whatsoever would be produced. Tests obtained by Idorn confirmed that, in all of these plaintiffs' foundations where FA was substituted for cement powder in amounts of approximately 20%, the air void system was inadequate and did not meet the requirements of the Building Code or CSA Standards of 5 to 8%. Tests showing that the concrete contained unreacted air entraining agents confirm that Bertrand was adding the agent to the concrete. This is consistent with Dr. Becker's theory that FA, when used with the water reducing agent, entrapped air in Bertrand's concrete, causing Bertrand to reduce the amount of air entraining agent that it added to its mixes. Also, consistent with Dr. Becker's theory, is the fact that proper air entraining was observed in non-fly ash concrete at the St-Isidore's plant during the same period.

[para74] Finally, in support of Dr. Becker's evidence regarding FA's effect on air entrainment, there is CSA Standard A 23.5 at section A 4.3.1 which reads as follows:

The amount of air entraining add mixture required to obtain optimum air content normally increases appreciably when FA and natural posylin are used in concrete.

[para75] In summary, therefore, Dr. Becker's theory is that the defendant Bertrand, not being familiar with FA and not having been warned of the effects of FA on the air entraining system, would be batching concrete with an inadequate air void system. Consequently, the concrete would be unable to resist the freeze-thaw cycle when it became critically saturated.

(b) FA and High Water/Cement Ratio

[para76] If concrete is batched at a high water/cement ratio, the porosity and permeability of the concrete will increase. Such concrete will have numerous small, interconnected capillaries that will allow the concrete to absorb water and more easily become critically saturated. Generally, critical saturation occurs when all of the concrete capillaries and pores are filled in excess of 91% of their capacity. When water freezes in critically saturated concrete, it expands and can cause damage to the concrete unless there is an adequate air void system. All of the experts who examined and tested this concrete concluded that it was very porous. It was the evidence of the plaintiffs' experts and the expert for Lafarge that the water/cement ratio in the concrete was considerably higher than the .66 that had been Bertrand's target.

[para77] It was Dr. Becker's evidence that the addition of FA caused Bertrand to add additional amounts of water, thereby increasing the water/cement ratio. Dr. Becker seems to be in a minority with this opinion. The consensus of a number of other experts is that because of the spherical shape of FA particles, this reduces the water demand.

(iv) Niels Thaulow's Theory - Freeze-thaw (Lafarge)

[para78] The experts who testified on behalf of Lafarge indicated that, in their opinion, the process of deterioration was attributable to freeze-thaw. Niels Thaulow, a prominent Danish expert, was the main witness for Lafarge. Basically, his evidence was that the deterioration was due to a process of freeze-thaw in poor quality concrete. FA was not the cause, as he observed deterioration in concrete that was batched with or without FA. In his opinion, the poor quality of the concrete was attributable to:

* high water content caused by Bertrand's use of fine sand, which increased the water demand required to maintain a given slump in its mix;

* because of the high water/cement ratio, the concrete had high porosity and absorption;

* the concrete was not properly air entrained and, therefore, could not withstand freeze-thaw when it became critically saturated;

* because of the high absorption and high porosity, it easily became critically saturated and because it was not properly air entrained, it deteriorated when it went through freeze-thaw cycles;

* the soft brown outer layers of the concrete were attributed to a process called bicarbonation.

[para79] Mr. Thaulow's evidence reduced to simple terms would be as follows: the strength and durability of concrete are directly related to the water/cement ratio. The more water that is added to the concrete at the time of batching, the more porous and permeable it will be and the less strong it will be. The more permeable the concrete, the more easily it will become critically saturated. Mr. Thaulow defines porosity as the quantity of pores in the concrete. He indicates that permeability refers to the rate with which water may be transported through the concrete.

[para80] Mr. Thaulow testified that Idorn made extensive examination of thin sections of some hundred cores representing some 45 houses. The results of these examinations are contained in numerous reports presented to the Court (see Ex. 508). The examinations identified such things as the composition of the concrete, the porosity of the concrete, the carbonation of the concrete, the air voids in the concrete, the location of cracks in the concrete, and the absorption capacity of the concrete. Micro-observations of the paste in the interior of the concrete revealed that it was highly porous and cracked. Using a method called fluorescence microscopy (green tone), Mr. Thaulow testified that he was able to establish the relationship between porosity and water/cement ratio at the time the concrete was poured. He concluded that the water/cement ratio was considerably higher than was permitted under the CSA Guidelines.

[para81] He further established the relationship between water/cement ratio and absorption. Based on these examinations, he concluded that because Bertrand used excessive water, the concrete had a high water/cement ratio, low strength and high water absorption. In his opinion, this concrete would be very vulnerable to critical saturation.

[para82] He also identified that the concrete had a very poor, even non-existent air void system to resist freeze-thaw cycles. Accordingly, this concrete was non-frost resistant and would deteriorate if exposed to cycles of freezing and thawing in critically water-saturated conditions. He further testified that from his field observation, the damaged concrete easily could be critically saturated because he had observed ponding around the foundations. Ice and water were observed on the inside walls, and efflorescence occurred on the walls and slab.

[para83] Like Dr. Becker, he concluded that the damage to the concrete was due to freeze-thaw action on poor quality concrete. Where he differs with Dr. Becker is that he attributes the increased water demand and high water/cement ratio, not to the use of FA, but to the fineness of the sand and limestone crusher fines used by Bertrand in its concrete mix. Mr. Thaulow testified that from his field observation and SEM work (Scanning Electron Microscopy) the concrete, with or without FA, shows identical distress. Evidence submitted by Lafarge of the Idorn testing of the thin sections of samples taken by Lafarge led Mr. Thaulow to conclude that samples containing Type C FA and those without FA exhibited the same properties.

[para84] Mr. Thaulow further testified that the soft pliable appearance of the carbonated space on the ends of the core samples taken from the foundation was the result of a combination of high concrete porosity and exposure conditions. In his opinion, there was no evidence that carbonation zones were any deeper or softer in samples with FA than in samples without FA.

2. Sulfate Attack - FA is the Proximate Cause (Mr. Wib Langley, Dr. Robert Day, Mr. Laberge and others)

[para85] Experts called by the defendant Bertrand reached the conclusion that the primary cause of deterioration of the concrete was not freeze-thaw, but rather some form of attack resulting from the chemical composition of the concrete containing Type C FA. This opinion was advanced mainly by Mr. Wib Langley, an engineer with many years' experience in dealing with concrete, and supported by evidence of petrographers and scientists, experts in chemical analysis such as Messrs. Cornelius, Balinski, Erlin and Hime. Also, in support of the sulfate attack theory were Dr. Robert L. Day, an expert in concrete called by one of Bertrand's insurers, Chubb Insurance Co. of Canada, and Mr. Laberge, the expert called on behalf of the Marcil plaintiffs. All of these experts are in agreement that the substance which triggered the sulfate attack would have been the insertion of Type C FA in the concrete. They testified that the source of the chemical reactions, which deteriorate the concrete, is as a result of high sulfates and alkalis in the mix.

[para86] To understand the process one has to look at the composition of materials used to produce concrete. The main item used in the production of concrete is Portland cement. The production of Portland cement is a very controlled process. A product called gypsum, which is high in sulfate, is deliberately added during the production process to avoid flash setting resulting from the C3A (tricalcium aluminate) in the cement reacting with the water. The reaction of these two compounds (gypsum and C3A) forms ettringite, which occupies a larger volume than originally occupied by gypsum and C3A. If the formation of the ettringite takes place in the first couple of days or when the concrete is still in the plastic state, there is sufficient space in the concrete to allow for the expansive ettringite. What the cement producer attempts is the proper balance between the gypsum and the C3A so that after a proper reaction there is no sulfate left over to react after the first couple of days. If the required balance is not achieved and there are more sulfates than desirable, one is left with what is called over-sulfated cement. Excess sulfates then can continue to react with the aluminates released after the initial reaction. Hydration then occurs forming expansive deleterious compounds (such as ettringite) in the concrete once it has hardened. Over time and with moisture, a destructive mechanism known as sulfate attack occurs.

[para87] Unlike Portland cement, the production of FA is completely uncontrolled. As has been mentioned earlier, FA is a waste product resulting from the burning of coal. Most experts who testified at trial are in agreement that the properties of FA can be variable and depend on such factors as the type of coal that is burnt, the rate of ignition and the type of precipitators or scrubbing devices to collect it. The balance between sulfate and aluminates referred to in the manufacture of cement is not controlled in the production of FA. The percentage of either of these substances (sulfates and aluminates) can vary dramatically.

[para88] Lafarge purchased its FA from Detroit Edison on an "as is basis". Only Lafarge tested the FA. Apparently, weekly grab samples of the FA were taken as it was being loaded onto tankers for delivery. The only tests of the weekly samples were for the fineness and the loss on ignition. At the end of the month, the combined weekly samples were tested for chemical and physical components of the FA. According to Mr. Langley, the main expert for Bertrand, the tests showed a substantial variation in the sulfates and the alkali contents of the FA for the period from April 1986 to October 1987. (See Ex. 371). It was the evidence of a number of experts called, such as Mr. Langley and Dr. Day, that Lafarge testing of the FA was inadequate and that likely many thousands of tons of FA delivered to ready-mix operators were never tested. It was their evidence that the testing referred to above and the testing for the levels of SO₃ were not in accordance with the CSA specification (CSA A23.5-M86) (Ex. 274). It was also the evidence of the experts that no testing was done to determine if there was a balance between sulfate and calcium and other aluminates in the FA.

[para89] Bertrand's experts testified that the FA had sulfate levels higher than that of Portland cement and calcium or other aluminates levels equal or lower than in Portland cement. As a result, the mix of FA and Portland cement would result in a cementitious component that would be equivalent to a Portland cement that was over-sulfated. According to their evidence, concrete made with over sulfated cement could be a source of problem which could well worsen depending on the increase in sulfate. It was the evidence of the experts that the problem would not develop immediately, but over the passage of time and therefore was consistent with the evidence of the plaintiffs, as to the deterioration of their concrete foundations over the years.

[para90] Bertrand's experts testified that they did some sulfate profiles from cores taken from the plaintiffs foundation. It was their conclusion that there was sufficient sulfate to cause sulfate attack in the concrete. They concluded that the additional sulfate was contributed by the FA and was available for delayed reaction after the concrete had hardened. Petrographers and chemical engineers such as Balinski, Erlin and Hime testified that they observed ettringite and gypsum intergrown in the concrete samples examined.

[para91] According to Bertrand's experts, the efflorescence which was a source of complaint by most of the plaintiffs was examined and showed high levels of sodium sulfate, indicative of sodium salts being present in the hardened concrete. They testified that the levels of sodium and sulfate were higher than those normally found in concrete. If the sodium sulfate reacts with calcium hydroxide, it can result in a production of gypsum and ettringite. The movement of moisture can draw the sodium sulfate towards the surface of the concrete. According to the experts, a concentration of these salts occurs at the evaporation front, that is, anywhere from the surface to one inch inside the concrete. Concrete, therefore, at that location is exposed to very high concentrations of sodium sulfate which apparently can form compounds such as thenardite or mirabilite and may convert from

one phase to another depending on a number of factors. The conversion from thenardite to mirabilite can trigger expansive forces that cause the surface of the concrete to deteriorate. Some of the experts have referred to this mechanism causing damage near the surface of the concrete as salt crystallization.

[para92] One obvious question is, why is there no problem with the concrete which was batched by Bertrand using FA after 1988? The answer by Bertrand's expert is that the chemical composition of the FA after 1988 became less variable and, in fact, Lafarge was selling what it called the new Type C FA.

[para93] Dr. Robert L. Day, a professor at the Department of Civil Engineering at the University of Calgary, was called by Chubb Insurance. He did a visual inspection of over 75 houses. His observations, testings and conclusions are contained in Ex. 475A to 475D. With some exceptions, such as horizontal surfaces, he concluded that the freeze-thaw was not the primary mechanism of deterioration. One reason for this conclusion was that scaling and efflorescence was found in locations where freezing is not possible. In his opinion, the primary destruction mechanism for these houses, which exhibited moderate and severe attack, was associated with localized precipitation of soluble salts from within the porous structures of the concrete. He concluded that a sulfate-based efflorescence was an important element of the problem. Further, spalding or scaling of the depths of one to five millimetres on the inside wall was attributed to a mechanism of physical sulfate attack where precipitates build up beneath the surface of the concrete and over time cause volumetric expansion and cracking of the concrete. It was his opinion that this form of deterioration is not characteristic of freeze-thaw attack.

[para94] Looking at all of the ingredients in the Bertrand concrete, such as water, coarse aggregate, fine aggregate and cement, he concluded that all of these ingredients were in compliance with the codes and standards and were not a factor in the damage. He focused his investigation then on the Type C FA. In his conclusion, he reported that sulfates, aluminates, and alkalis contributed by the cementing system produced by the Lafarge Portland cement and the Lafarge FA were present in sufficient quantities to produce potentially large expansion. These expansions were due to a physical sulfate attack, the result of crystallization or precipitation of salts within the porous structure of the concrete that tried to occupy more space than was available to accommodate them.

[para95] Jacques Laberge, an engineer called on behalf of the Marcil plaintiffs, agrees with Mr. Langley and Dr. Day that the primary mechanism of deterioration is internal sulfate attack. He also concludes that the mechanism of freeze-thaw may have been an aggravating factor in certain areas of the concrete foundation. Where he differs in his evidence, from both Mr. Langley and Dr. Day, is that he concludes that the high level of sulfates and alkalis was present not only in the FA but in the Portland cement. Accordingly, he states that it is possible that there would be a sulfate attack even in concrete that did not contain FA.

3. Is it freeze-thaw or sulfate attack? Did the FA cause the problem?

(i) Why Focus on FA?

[para96] It would be impossible for the Court to determine which of the two competing theories, freeze-thaw or sulfate attack, caused the deterioration in the concrete without looking at the role played by the FA in the concrete mix. As discussed earlier, all of the experts, save those called by Lafarge, concluded that the FA was the source of the problem, either in the freeze-thaw or the sulfate attack theory.

[para97] As mentioned earlier, I heard from the foremost concrete experts in the world. Most of these experts had impressive curriculum vitae and were experienced and knowledgeable. They were the leading experts in the world in their respective specialties. Their evidence, in both their written reports and viva voce evidence in Court, was lengthy, detailed and, at times, overwhelming. Written submissions by counsel for the parties involved thousands of pages. The challenge for this Court was to wade through the massive evidence and the lengthy written submissions by counsel without becoming hopelessly confused. Throughout the process, it seemed every time an expert gave an opinion or attempted to set a general rule, he was faced with an exception either through cross-examination or from another expert. For example, with possibly one exception, all of the concrete in the plaintiffs' foundations contained FA. Yet, it was the evidence of a number of experts that some foundations apparently had damage and did not contain FA. Further, this same FA apparently had been used in the concrete in foundations placed in homes in southern Ontario with no apparent damage. Also, FA was used in the Bertrand concrete from 1988 to 1991, again with no apparent problems.

[para98] It was also the evidence of a number of experts that the cause of the problem was not the FA, but the quality and the fineness of the sand. Why is it then there is no problem with the concrete using the same sand, either before 1986 or after 1988? In reviewing and weighing all of this evidence, I had to constantly remind myself that very often in life, for every general rule, there is an exception, and that the exceptions do not make the general rule. Or then again, I recall the admonition of the medical professor to his students "Follow your diagnosis".

[para99] In determining whether FA was the cause of the problem, the Court has to first of all look at the ingredients which went into Bertrand's ready-mix before and after 1986. Evidence of witnesses, including experts, confirmed that the concrete contained the following ingredients:

- * fine aggregate (which was sand or at times sand mixed with limestone fines)
- * coarse aggregate (stone)
- * water
- * Portland cement
- * FA (after 1986)

[para100] With respect to these ingredients, witnesses, including experts, confirmed the following:

* The source of Bertrand's sand came from a pit called the "Malo pit" which was MTO approved. Bertrand had been using this sand on and off since the 1970s apparently with no problem, and continued using it until some time in late 1988. It was also Bertrand's evidence that when the sand was too fine it blended limestone fines with the sand. Bertrand apparently had been doing this since 1978 without any problems.

* Bertrand's coarse aggregate was approved for use by MTO and apparently Bertrand had never encountered any problems.

* The water used by Bertrand in its concrete was tested by a number of experts and deemed to be satisfactory for concrete use.

* It was the evidence of most experts, save for Mr. Thaulow and possibly Mr. Laberge, that the production of Portland cement is a very controlled process. Portland cement has been extensively tested in the past and its characteristics and properties in concrete are well known and predictable.

* As discussed earlier, it was the evidence of most experts that the production of FA in 1984-86 was completely uncontrolled. Its properties at that time could be extremely variable and were dependent upon a number of factors over which Lafarge had no control, as it was buying the FA on an "as is" basis.

[para101] Given the fact that Bertrand had been using this mix prior to 1986 without FA and apparently without any problem, it would be logical, as most experts have done, to focus on the FA. Basically, the experts are lined up in two camps: Messrs. Becker, Langley, Day, etc. who maintain that FA is the cause of the problem, and on the other side Mr. Thaulow who claims that FA played no role in the deterioration of the concrete. Those who say that FA caused the problem are themselves divided: those claiming that the deterioration of the concrete is due to freeze-thaw and those who claim that it is as a result of sulfate attack. Mr. Thaulow, who claims FA played no role, has testified that the cause of the concrete deterioration is freeze-thaw.

[para102] Basically, for the Court to conclude that FA played no part in the deterioration of this concrete, the Court has to accept the evidence of Lafarge's expert Mr. Thaulow.

(ii) Analysis of Mr. Thaulow's Evidence

[para103] It is important to scrutinize Mr. Thaulow's evidence closely in light of the other factual and expert evidence presented to the Court over these many months. Basically, his evidence is that FA was not the cause of the problem, but rather the fineness of the sand which caused Bertrand to use too much water, thereby affecting the durability and the porosity of the concrete. Given this premise, the question has to be asked, "Why did Bertrand not have any problems with its concrete before 1986 or after 1988 when it was not using FA?". In response to this, Lafarge alleges that Bertrand changed its source of sand in 1986 at the same time that it started using FA. The Court heard evidence that Bertrand's source of sand had been from the Malo pit for a number of years prior to 1986. In 1985, it was using sand from another source referred to as the Lacoste sand. In 1986 and for the following years, Bertrand's evidence was that it used mainly sand from the Malo pit, and that if the sand used was too fine, it was mixed with limestone fines. This practice was used by Bertrand for a good many years prior to 1986. The question is again asked, "If the Malo sand is the source of the problem, why did Bertrand not experience problems with its concrete when it was using Malo sand prior to 1986 or after 1988 when FA was not used in the mix?".

[para104] Looking at all of the evidence, the only reasonable conclusion for the Court is that the mix design of Bertrand was the same before and after 1986, except that FA was used after 1986.

[para105] Mr. Thaulow testified that, in his opinion, the high porosity in concrete was the result of a high water/cement ratio in the concrete at the time that it was placed. Mr. Thaulow's conclusions were based on the "green-tone method" of estimating water/cement ratio. His conclusions are in serious conflict with evidence of other experts.

[para106] The green-tone method is actually measuring porosity of the concrete. The tests done by Idorn was on concrete that had been placed anywhere from 5 to 10 years. It was the evidence of a number of experts that the porosity in concrete is less a function of water/cement ratio as concrete ages. The porosity could well be caused by such things as chemical reaction, leaching of efflorescence, poor compaction or large amounts of entrapped air.

[para107] Other experts have testified that hydration could well affect the porosity of concrete. It was Mr. Thaulow's evidence that according to the green-tone method the water/cement ratio at the time of placement ranged from 0.55 to 1.14. Concrete poured with this high a water/cement ratio has been referred to by many experts as "soup". It was their evidence that concrete with such a high water/cement ratio would have shown signs of serious segregation; in other words, such ingredients as aggregate in the concrete would have started to segregate from other ingredients. There is no evidence before the Court of wholesale segregation in the plaintiffs' foundations.

[para108] The Court has serious concerns about the reliability of the green-tone method in testing the water/cement ratio of concrete that has been placed for so many years. If the Court was to accept Mr. Thaulow's evidence that the use of fine sand by Bertrand increased the water demand on the concrete, then concrete poured without FA should be in worse shape than concrete poured with FA because it was the consensus of most of the experts that the use of FA generally reduces water demand.

[para109] It was Mr. Thaulow's evidence that he observed deterioration in foundations of plaintiffs' homes which did not contain FA. A closer scrutiny of this evidence would lead the Court to question this conclusion. Mr. Thaulow's evidence was that Idorn's testing of thin sections of 3 or 4 plaintiffs' foundations did not indicate the presence of FA. This evidence was disputed by the plaintiffs' expert, more specifically Mr. Erlin who found evidence of FA in these same foundations. There was also evidence that a few foundations had some concrete from Bertrand's St-Isidore plant which did not contain FA. The overwhelming evidence before the Court would indicate that all of the plaintiffs' foundations showing signs of deterioration did contain FA, except for the plaintiffs' M-78 and the non-plaintiff Menard. The evidence from experts who examined both of these homes is that although the concrete showed some signs of superficial scaling, the damage or distress to these foundations was not of the magnitude of all the other plaintiffs' homes which required replacement. Accordingly, the only reasonable conclusion for the Court is that all of the plaintiffs' foundations showing distress and serious damage requiring full replacement contained FA.

[para110] Mr. Thaulow also testified that Idorn's testing demonstrated that the depth of carbonation was the same for concrete with or without FA. As indicated earlier, some of the samples in which Idorn indicated there was no FA did, in fact, have a percentage of FA. Further, a closer scrutiny of Idorn's samples with and without FA clearly indicates a much greater depth of carbonation in those samples containing FA.

[para111] Mr. Thaulow also testified that the use of FA in concrete does not affect the air entrainment. Dr. Becker and a number of other experts disagree with that conclusion. In fact, another expert for Lafarge, Mr. Elmhirst, concluded that the use of FA

tended to increase entrapped air. Finally, CSA Standard A23.5 section A4.3.1 advises those using FA that this could increase appreciably the amount of air entraining add mixture required.

[para112] The defendant Lafarge alleged that it marketed Type C FA to its customers in southern Ontario without receiving any complaints from these customers. Records, ordered produced at trial, indicate that there were, in fact, complaints from these customers, such as efflorescence, cracking, scaling and some strength problems, but none of these problems were of the magnitude experienced by the plaintiffs. It is also in evidence that these customers were using a different mix than that used by the defendant Bertrand. It is well known and agreed to by all experts that the quality of the aggregate in southern Ontario is far superior to the aggregate in eastern Ontario. Further, these ready-mix producers from southern Ontario were using cement powder from Woodstock and not from Bath, Ontario. Many of the customers were also using slag mixed with the cement powder and the FA. Accordingly, it is difficult to make comparisons when the ingredients used in the mix are not the same.

[para113] Finally, Mr. Thaulow gave evidence in a number of areas which are clearly in conflict with the overwhelming evidence heard at trial. He testified that:

* In his opinion the freezing point of water in concrete is minus 2 degrees C, rather than minus 6 degrees C which was the evidence of all the other experts.

* Concrete containing sodium sulfate can become critically saturated if it is in contact with air at 77% relative humidity, when all other experts indicated that concrete is not fully saturated unless 91% of all the voids in concrete are full of water.

* In his opinion, there is no significant difference in the chemical properties of Type C or Type F FA, which is in conflict with all other experts, including Lafarge's' own experts.

* In his opinion, ordinary Portland cement is not chemically balanced, as was the evidence of other experts including Lafarge's.

* He did not feel that the quantity or composition of efflorescence exhibited in this case was unusual. Most other experts testified they had never seen the amount of efflorescence observed on the plaintiffs' foundations.

* He admitted seeing damage in areas not subject to freezing and thawing in only four homes, which is clearly in conflict with the evidence of the plaintiffs and most of the other experts.

Contrary to the evidence of a number of other experts:

* His tests show ettringite intergrown in the paste of concrete is not necessarily associated with the stress.

* He disagreed with the evidence of a number of experts that the conversion of thenardite to mirabilite results in volumetric expansion.

[para114] Lafarge argued that if FA was the cause of the problem, why did Bertrand not have any problems with its concrete after 1988 even if it continued using FA from 1988 to 1991. Evidence heard at trial is far from conclusive on these issues. There has been some evidence that Bertrand reduced the percentage of FA in the mix. Further, there is also some evidence that the FA became far more stable and consistent after 1988. Further, there is some evidence that Bertrand used more air entraining add mixture to the concrete. None of the above factors are necessarily conclusive, but they all clearly show there was a change in the mix after 1988.

(iii) Conclusion - FA

[para115] Given all of the above, the Court has to be very cautious in accepting Mr. Thaulow's conclusions as to the role played by the FA in the deterioration of the plaintiffs' foundations. Contrasting his evidence with that of the experts Becker, Langley, Hyme, Erlin, Day, and others as to the causal connection between the insertion of FA in the concrete and the deterioration of the plaintiffs' foundations. I have no difficulty in concluding that their evidence is far more logical and probative.

[para116] Clearly there is nothing inherently dangerous about FA. Most experts have testified that FA has been used safely and continues to be used in concrete without any problems. Nevertheless, in this case, in reviewing all of the evidence, the Court is led to the inescapable conclusion that, in 1986 and 1987, the addition of Type C FA to the Bertrand concrete ingredients greatly affected the quality and performance of the concrete and resulted in a product which was unsuitable for residential foundations.

[para117] If I had any doubts about the role played by the FA in the concrete, which I do not, I only have to consider the following factors that really make the case against the FA overwhelming:

* Bertrand basically had been using the same mix design since 1960 up until 1986 with no problems.

* Bertrand had two ready-mix plants, one in L'Original and one in St-Isidore. Both used basically the same mix design, except the L'Original plant used FA and St-Isidore did not. There were no problems whatsoever with the concrete from the St-Isidore plant.

* Bertrand did not use FA during the winter months and none of the foundations poured in the winter had any problems.

* Some of the concrete poured by Bertrand from the L'Original plant did not contain FA, i.e. flat surfaces and they had no problem.

* Bertrand poured concrete for two houses on the same street in L'Original, Ontario. One of the foundations had no FA and no problems; the other had FA and serious problems.

[para118] Because these facts lead to an obvious conclusion, and make the causal connection between FA and the concrete problems is no reason to reject them.

[para119] Given all of the above evidence, the Court can arrive at only one conclusion. The insertion of Type C FA in Bertrand's concrete in 1986 was the critical event that triggered the plaintiffs' foundation problems.

(iv) Conclusion - Freeze-Thaw or Sulfate Attack?

[para120] Having determined that FA is the cause of the problem, I have to decide whether the mechanism for deterioration is freeze-thaw or sulfate attack or both.

[para121] All of the experts are unanimous in concluding that this concrete was not properly air entrained and, therefore, could not withstand freeze-thaw processes. As mentioned earlier, two other factors have to be present for concrete to suffer damage as a result of freeze-thaw. It must be exposed to temperatures from minus 6 degrees to plus 2 degrees and it must be critically saturated. Much of the concrete in the plaintiffs' foundations would not be exposed to such temperatures. Further, most of the concrete in the plaintiffs' foundations could not possibly become critically saturated. In other words, damage was observed in vertical walls where the Court could not possibly conclude that such walls would have 91% of their pores filled with water.

[para122] Therefore, if the concrete exhibits damage in areas where it could not possibly be due to freeze-thaw, then the Court must conclude that the damage was caused by a chemical reaction called sulfate attack. This conclusion, of course, is supported by the expert evidence of Mr. Langley, Dr. Day and other experts called by the defendant Bertrand. Their expert and scientific evidence discussed earlier explains how it was that this concrete became over sulfated. Consistent with this conclusion is the following evidence:

- * The volume and composition of the efflorescence observed by all of the witnesses.
- * The deterioration, observed by most of the witnesses, occurred both inside and outside, above and below grade.
- * The inconsistent chemical composition of Type C FA purchased by Lafarge during the years 1986 to 1988.
- * The ettringite and gypsum found interwoven in the paste of the concrete by the experts which are a sign that sulfate attack is at hand.
- * A depth of carbonation on both the inside and the outside of the concrete walls above and below grade.
- * The slow, but methodical deterioration of the plaintiffs' foundations over a number of years.

4. Conclusion

[para123] All of the above evidence leads the Court to conclude that the primary mechanism of deterioration of the plaintiffs' foundations was sulfate attack.

[para124] Having come to this conclusion, I also accept the evidence of many experts that there are areas of the plaintiffs' foundations that have suffered damages as a result of both sulfate attack and freeze-thaw. For example, in areas at ground level where observations were made of water ponding, it would be reasonable to conclude that the concrete would become critically saturated and be exposed to temperatures that would make it vulnerable to freeze-thaw.

[para125] The evidence before me clearly demonstrates that the areas of the plaintiffs' foundations, which were undergoing both freeze-thaw and sulfate attack, appeared to be more seriously damaged.

VI. LIABILITY

[para126] The plaintiffs' claim against the defendants Bertrand and Lafarge is in negligence, and also for breach of contract against the defendant Bertrand.

1. In Contract

[para127] Based on the evidence heard at trial and the admissions made by the defendant Bertrand, most of the plaintiffs who purchased their concrete directly from Bertrand could establish a contractual link with Bertrand. Further, as a result of settlements entered into by the plaintiffs and some of the defendants' general contractors and forming contractors, the contractual rights existing between Bertrand and these contractors were assigned to the homeowners. There are, however, a number of plaintiffs who will be unable to establish a contractual link with the defendant Bertrand (see Appendix "D" of the Plaintiffs' Submissions and Tab 2 of Bertrand's Submissions). Given that the plaintiffs have a claim in negligence against both Bertrand and Lafarge, the Court will deal with the issue of breach of contract only with the plaintiffs who can establish a contractual link, either directly or through settlement, with Bertrand. There are also a number of defendant contractors who either filed defences, but did not appear at trial, or did not file defences and were noted in default.

[para128] At the opening of the trial, Bertrand admitted supplying concrete to all of the plaintiffs and that the foundation of the plaintiffs, with few exceptions, would have to be replaced. The defendant Raymond Bertrand also admitted at discovery (see Ex. 254B) that the concrete supplied by the defendant Bertrand to the plaintiffs' homes was unacceptable.

[para129] Finally, all of the experts who testified at trial were unanimous that this concrete did not have an adequate air-void system, had low compressive strength, high absorption and, therefore, was not fit for its intended purpose. Clearly this evidence supports the conclusion that there was a fundamental breach of the agreement between Bertrand and the plaintiffs with whom it had the contractual link.

[para130] Based on the evidence and Bertrand's admission, the concrete supplied to the plaintiffs did not meet the minimum requirements of the Ontario Building Code or CSA standard and, therefore, constitutes a breach of s. 15(1) of the Sale of Goods Act, R.S.O. 1990 c. S.1, I find this product did not reasonably meet its intended purpose.

2. In Negligence

[para131] The plaintiffs allege negligence by both defendants, which can be summarized as follows. The defendants added FA to Bertrand's concrete which was then supplied to the plaintiffs for their foundations without having done adequate testing. There was also a lack of notice to the consumer about possible problems with FA.

(i) Lafarge

[para132] Basically, the allegations of negligence against the defendant Lafarge are twofold:

1. That it marketed a product without having done adequate testing; and
2. That it failed in its duty to warn the consumer of possible problems with FA.

[para133] Regarding the first item, one would expect in the latter part of this century that it would be obvious, basic, common sense that a product would not be marketed without adequate testing to ensure its intended use and the protection of the ultimate consumer. That message should be clear to everyone, more so to multi-national corporations like the defendant Lafarge. The question obviously is, "Was Lafarge's testing of Type C FA prior to marketing adequate?".

[para134] I have already reviewed Lafarge's testing; it was as follows:

* The Norm Elmhirst 1985 Thesis (Ex. 276)

* A report from Lafarge Coppee in France (Ex. 380)

* A report dated March 1986 from Claude Bérard of Lafarge Research and Technical Centre in Montreal (Ex. 277)

[para135] Lafarge also relied on a MTO study of testing done in 1986 of FA, but this study was not released until 1988.

[para136] The Elmhirst Thesis was a laboratory study using concrete that had high strengths, low slump, and low water/cement ratio. This concrete, of course, differs considerably from the concrete that is used to pour foundations in eastern Ontario, which often is lean concrete having a high slump and a high water/cement ratio using a very different aggregate. Elmhirst also determined that the FA tended to entrap air and suggested further studies, something that was never done.

[para137] The Lafarge Coppee testing in the lab consisted of a motor bar expansion test on cubes. It found abnormally high levels of sodium and suggested further studies, something that was not done. The Bérard Report was also a lab study that was very limited and dealt basically with motor cubes.

[para138] The requirements for the use of supplementary cementing materials are set out in the National Standard of Canada A23.5 (Ex. 274). Section 5.1 sets out the requirements and general states:

A supplementary cementing material shall be drawn either from a lot that is sampled and tested prior to use or from a source that, by test on its production, has demonstrated that it consistently meets the requirements of this standard.

[para139] As mentioned earlier, Type C FA was a relatively new product in 1986. Lafarge was buying the FA from Detroit Edison on an "as is basis" and, therefore, this product was not being tested on its production. Given that the product had not demonstrated that it consistently met the requirements of the standard, the product had to be sampled and tested prior to its use. The evidence before me clearly indicates that Lafarge's testing protocol at its Woodstock plant did not comply with the standard. Lafarge took a weekly grab sample of FA from the storage silo as the FA was being loaded into the tanker for transport to a Lafarge customer. Apparently, part of that sample was tested for loss on ignition and fineness. The remainder of the sample was mixed with other weekly samples to form a composite sample that was then tested on a monthly basis for properties such as sulfur trioxide content. The standard states clearly that the product must be tested prior to its use. Here Lafarge was just taking the sample at the time that the product was being shipped to its customer. Further, what was being tested on a monthly basis was a composite sample. It was quite possible for customers to be using the product one-month prior to testing. Given that Type C FA was a new product in 1984-86, and given that Lafarge was buying the product on an "as is basis", one would have expected that it would at least have followed the relatively relaxed requirements of the standard.

[para140] Counsel for Lafarge have argued that Detroit Edison FA had been in use since 1984, and its records demonstrated that it had consistently met the requirements of the applicable standard. Accordingly, it did not have to test the FA prior to its use. The Belle River FA could not possibly meet this criterion because the plant did not become operational until June 1986. Accordingly, it had to test the FA prior to its use. Not surprisingly, Lafarge testing picked up substantial fluctuations of the sulfates and alkali level in the FA (see Ex. 371).

[para141] I have no difficulty in concluding that Lafarge's protocol for testing in 1986 did not meet the requirements of the standard.

[para142] Along with the guidelines contained in CSA A23.5 for the use of supplementary cementing materials, is Appendix "A" entitled "Guidelines for the Use of Supplementary Cementing Materials in Concrete". Section A10 provides for the evaluation of supplementary cementing materials. Section A10.2 reads as follow:

Minimum performance requirements for supplementary cementing materials are provided for in this standard. They are expressed in values derived from laboratory testing under standardized conditions, not intended to simulate job conditions. Data obtained in such a way are not to be expected to accurately predict the performance of concrete in the field. Their usefulness lies in assuring that minimum performance is met and that maximum uniformity of the product is maintained by the supplier.

[para143] Section A10.4 reads as follows:

In all applications of supplementary cementing materials, it is strongly recommended that adequate testing and trial batching be performed to establish their effects on concrete to be placed.

[para144] What is being suggested by these two sections is, again, really basic common sense. The FA should be tested in the field using the ingredients of the ready-mix supplier. It has been suggested by Lafarge that, in fact, there was field-testing with FA with ready-mix suppliers in southern Ontario. In fact, the Court would conclude that basically Lafarge was monitoring the concrete after it was poured, and not field-testing. The question that has to be asked is: "Is this field-testing or monitoring that was done with ready-mix suppliers in southern Ontario adequate field-testing that gives Lafarge the comfort that the FA could be used safely with the Bertrand mix?". There is no doubt that it does not. The clear wording of the section recommends that the testing of

the FA in concrete under field conditions be done with the ingredients to be used in the Bertrand mix. The Court is left wondering why Lafarge did not do this. After all, Bertrand was to be the first eastern Ontario ready-mix supplier to use FA, and Lafarge would be aware that the aggregates in eastern Ontario were of inferior quality to aggregates used in southern Ontario. I can only conclude that Lafarge did not follow what was recommended in the standard.

[para145] The Court heard evidence that, in 1984, attempts were made to convince Bertrand to use slag in its cement mixes. Apparently, field tests were conducted at Bertrand's plant for about six months by a representative of a subsidiary of Lafarge. Eventually, Bertrand decided it was too complicated to use slag as a substitute for cement powder.

[para146] By way of contrast, when Bertrand started introducing FA as a substitute for cement powder, Lafarge sent a representative to monitor the situation for a couple of days. Apparently, the concrete that was being batched was sent directly to the plaintiffs' foundations. Obviously, no field test was taking place. The only tests done were for comprehensive strength when the cement powder was replaced with various percentages of FA. Lafarge did no durability testing of the concrete before it was placed into the plaintiffs' foundations. By any reasonable standard, the testing done by Lafarge and Bertrand was inadequate.

[para147] Appendix "A" of CSA A23.5 sets out the responsibilities of the various parties in a construction project when supplementary cementing materials are used. It is clear that the Guidelines presume close cooperation between the various parties when using supplementary cementing materials. For example, section A2.2.2 reads as follows:

The owners should be familiar with these materials and their effect on the properties of concrete to avoid improper use. In evaluating these materials, he may seek the advice from the supplementary cementing materials supplier, concrete consultants, or qualified inspection and testing companies.

Again what the standards set out is just basic common sense. Unfortunately, the evidence before the Court establishes clearly that the cooperation and advice between the various parties was basically non-existent.

[para148] When Lafarge convinced Bertrand to use FA in its mix, the only information relayed to Bertrand was that the FA could be substituted with the cement powder on a 1:1 basis up to 40%; that there could be some efflorescence on the concrete after it set and it could be washed off easily; and that the colour of the concrete could be affected when FA was used in the mix. Given that FA was a new product with which Bertrand was totally unfamiliar, why would Lafarge not meet its obligation and duty and warn Bertrand of the following:

- * That FA was being bought from Detroit Edison on an "as is basis" and may well have variable chemical properties;
- * That it (Lafarge) had not performed any field-testing with the Bertrand aggregate and, therefore, Bertrand should either do field-testing itself or monitor closely, with the assistance of either the owners or the subcontractors, the performance of the concrete;
- * That problems had been experienced with the use of Type C FA in southern Ontario;
- * That the provisions of section 4.2.1 and section 4.2.2 of Appendix "A" regarding water requirements exist; and
- * That the provisions of section 4.3.1 regarding air content states:

The amount of air entraining add mixture required to obtain optimum air content normally increases appreciably when FA and natural pozzolans are used in the concrete.

[para149] Lafarge also knew that Bertrand tested the air content of its concrete with a device that did not differentiate between entrained and entrapped air. Why did they not advise of their laboratory testing indicating that the use of FA tended to entrap air?

[para150] Not only was there no cooperation, advice, or warning between the various parties, but Bertrand failed to notify or warn the owners and contractors that it was using a new product in its concrete in the Spring of 1986. It also follows that Lafarge, by not having done adequate testing of this new product, was not in a position to properly warn Bertrand of any potential problems.

[para151] Considering all of the evidence, there is no doubt that Lafarge did not meet its obligation to the consumer when marketing a new product (see *Hollis v. Dow Corning Corporation*, [1995] 4 S.C.R. 634 and *Bow Valley Husky (Bermuda) Limited v. St. John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210).

[para152] Because of Lafarge's failure to meet its obligation towards the consumer, it then can be held liable not only to those with whom it had a contractual relationship, but also to the consumer of the concrete containing FA (*Winnipeg Condominium Corp. No. 36 v. Bird Construction Ltd.*, [1995] 1 S.C.R. 85).

[para153] Given the risks involved, the Court is left somewhat perplexed as to why a large multi-national corporation like Lafarge, with a huge customer base, would market a new product without having taken all reasonable steps to assure its performance. Throughout the trial, this defendant has maintained that FA is not the cause of the problem and that there was adequate testing of Type C FA before its introduction to the Bertrand concrete.

[para154] The Court heard some evidence that in 1985, when Lafarge went into a joint venture with DBO Marketing, that it was going to "aggressively" promote the sale and distribution of Type C FA. It also heard that in the years 1985-87 the demand for cementitious material (cement powder) produced by Lafarge was greater than Lafarge's ability to produce Portland cement from both its plants in Bath and Woodstock.

[para155] There is also evidence that Lafarge was able to obtain FA from Detroit Edison at \$2.00 a ton. The cost of producing Portland cement was in the range of \$40.00 a ton. At trial, it was suggested by Lafarge that the trucking of FA raised the cost of this product to a point where it was just as expensive as Portland cement. Although the Court has not heard any detailed evidence of the cost of trucking, it is unlikely that that cost alone would raise the price of FA to the cost of Portland cement when delivered to the consumer. Based on this evidence, it would appear that FA would have been the ideal product for Lafarge in the years 1985-87. It would have a greater profit margin for Lafarge than its cement powder and, at the same time, help alleviate a demand for cementitious material from its customer base, which Lafarge could not meet with only Portland cement.

(ii) Bertrand

[para156] The defendant Bertrand was a small, relatively unsophisticated ready-mix producer in eastern Ontario. Its clients were mostly small contractors or homeowners purchasing concrete mainly for foundations. In business since 1960, it had experienced no problems with its concrete. Why then, in this context, would Bertrand be so easily seduced by Lafarge and allow the insertion of a new product Type C FA in its mix?

[para157] Bertrand's position, throughout the trial, is that it relied exclusively on the advice and expertise of its cement and FA supplier, Lafarge. Given Lafarge's size, sophistication, and access to resources, Bertrand's reliance on Lafarge is not all together surprising. What is of great concern to the Court is that Bertrand, having been provided so little information by Lafarge, was prepared to rely on it exclusively. Basically, it engaged in a policy of "willful blindness".

[para158] Bertrand had observed, just a few short years before, the testing that had taken place before the introduction of slag in its mix. Yet in 1986, it was prepared to blindly insert Type C FA into its mix, a product about which it knew nothing and had been provided virtually no information by Lafarge. Bertrand made no inquiries from other ready-mix operators who had used Type C FA in southern Ontario. It did not consult any independent engineers or government agencies, or at least review the CSA standards dealing with supplementary cementing materials. What is even more surprising is that Bertrand introduced FA into its mix against the advice of one of its senior control officers and plant manager, Mr. Cliff. Finally, and more perplexing to the Court is, why would Bertrand not enlist the assistance of its customers in monitoring the performance of its concrete after the introduction of FA? Bertrand did the very opposite. It did not tell anyone that it had introduced FA into its concrete.

[para159] Raymond Bertrand testified that the sole reason for introducing FA into his concrete was to produce a better product. His decision not to tell any of his clients appears to contradict that motive. On the evidence, the more logical explanation is that Bertrand would save money by substituting cement powder with FA, thereby increasing its profits. The profit motive, not unlike Lafarge's, is what explains Bertrand's action. That decision by both defendants turned out to be a terrible mistake for which the plaintiffs are still suffering.

[para160] Bertrand breached its duty of care to the plaintiffs. Given its type of business, it was altogether foreseeable that the concrete it was selling to the plaintiffs would end up in their foundations. The law is clear that a manufacturer has a duty to take reasonable care in the manufacture of its products and to ensure that it is free of defects (*Farro et al. v. Nutone Electrical Ltd. et al.* (1990), 72 O.R. (2d) 637 (C.A)).

[para161] In my opinion, given that Bertrand was provided so little information about FA and appeared to be very keen in inserting this product into its mix, it should have embarked on a program of independent testing. Bertrand could have enlisted the services of consulting engineers to do durability testing on concrete with FA. Further, Bertrand could have exhibited more caution when it inserted FA into its concrete. With the assistance of its clients, it could have used FA only in concrete intended for areas that were not critical, i.e. flat surfaces like sidewalks, patios, or where it could easily be monitored and replaced if necessary.

[para162] For the reasons set out above, the Court finds Bertrand negligent.

(iii) Raymond Bertrand's Personal Liability as a Director

[para163] Raymond Bertrand was a Director of the defendant Bertrand & Frère. Some of the plaintiffs are making claims against Raymond Bertrand personally. Allegations against Raymond Bertrand are set out in the Statement of Claim. The basis for these allegations are that Raymond Bertrand was solely responsible for the introduction of FA into Bertrand's concrete. He accepted Lafarge's advice about FA against the opposition of his plant and control manager, Mr. Cliff. He made no attempt to obtain independent expert advice regarding FA and proceeded to market concrete containing FA without doing any field-testing. Finally, he sold FA to his customers without advising them that he had introduced a new product, i.e. FA, to the concrete.

[para164] The general rule is that officers and directors of corporations are immune from personal liability for the actions of the corporation. This principal appears simple enough, the difficulty is in applying the developing jurisprudence to the facts. The issue of personal liability of officers and directors is reviewed recently in the Court of Appeal decision of *Adga Systems International Ltd. v. Valcom Ltd.* (1999), 43 O.R. (3d) 101. The judgment in that case by Carthy J.A. begins as follows:

This appeal presents for consideration once again the troublesome issue of the liability of officers and directors of a corporation for acts done in pursuance of a corporate purpose.

The question for the Court in *Adga Systems* was whether the respondents (officers and directors) can be sued for their actions as individuals, assuming those actions were generally directed to the best interests of their corporate employer. What also has to be kept in mind in *Adga Systems* is that the Court of Appeal did not decide the question on the merits, but rather determined only if there existed a cause of action requiring a trial to determine the merits of the action.

[para165] The Court then proceeded to review, in some detail, the existing jurisprudence on this issue. It is obvious from the jurisprudence that the law has evolved somewhat from the principle that an officer or a director of a corporation will not be held personally liable if he is acting within the scope of his authority and in the best interest of the corporation. Nevertheless, the Courts have attempted to limit the personal liability. One of the cases quoted in *Adga Systems* is *Normart Management Ltd. v. West Hill Redevelopment Company Ltd.* (1998), 37 O.R. (3d) 97 (C.A.). In that case, Finlayson J.A. reached the following conclusion at p. 102:

It is well established that the directing minds of corporations cannot be held civilly liable for the actions of the corporations they control and direct unless there is some conduct on the part of those directing minds that is either tortious in itself or exhibits a separate identity or interest from that of the corporations such as to make the acts or conduct complained of those of the directing minds.

[para166] The problem for trial judges is that in most actions against corporations, there are claims and allegations against officers and directors personally. Therefore, as it was stated by Finlayson J.A. in *Montreal Trust Co. of Canada v. Scotia McLeod Inc.* (1995), 129 D.L.R. (4th) 711 (Ont. C.A.) at p. 720:

The decided cases in which employees and officers of companies have been found personally liable for actions ostensibly carried out under a corporate name are fact-specific.

Basically what the Court found in Adga Systems International Ltd. is that where properly pleaded, officers who are employees can be liable for tortious conduct even when acting in the course of their duty. What I have to decide is whether the facts in this case support the pleadings and allegations.

[para167] There is no doubt that Raymond Bertrand was acting in his capacity as an officer and director of Bertrand, and never in his personal capacity. Accepting that his motive for his decision to insert FA in concrete was to increase corporate profit, he certainly was acting within his authority. It is alleged by the plaintiffs that withholding to its customers the fact that FA had been inserted in the concrete, constituted a fraudulent misrepresentation. I have a problem with that conclusion. Undoubtedly, the corporation owed a duty to its customers and I have made a finding that the corporation breached that duty. I cannot conclude that the breach of duty amounts to fraud. No one in this case has alleged that FA is inherently a bad product, or that Bertrand knowingly marketed a deficient concrete.

[para168] Basically, I cannot conclude that Raymond Bertrand's conduct exhibited a separate identity or interest from that of the corporation, or that his conduct was tortious. Accordingly, the claim against Raymond Bertrand personally will be dismissed.

3. Apportionment of Degree of Negligence as Between the Defendants

[para169] The grounds upon which findings of liability against both defendants Bertrand and Lafarge are based on my earlier comments in this section. I do not intend to repeat them. Although I have found negligence against both defendants, I have no difficulty in concluding that the defendant Lafarge must bear the majority of the responsibility for the damages incurred by the plaintiffs.

[para170] I do not intend to review in detail the respective negligence of both defendants, but some of the reasons for my conclusion in apportionment are as follows:

* It was Lafarge's decision to market the Type C FA without adequate testing. In reviewing the circumstances surrounding the sale of FA by Lafarge to Bertrand, it would be reasonable that Bertrand would rely on Lafarge's skill and judgment as to the quality of the product being sold. Bertrand is a small ready-mix operator in eastern Ontario, selling mostly low quality concrete to a rural population. Lafarge is a large multi-national corporation with unlimited resources and whose expertise is cementing materials.

* Lafarge failed in its obligation to assist Bertrand in the introduction of FA into its concrete mix. Lafarge did not provide Bertrand with adequate assistance when FA was first introduced in the mix in the spring of 1986. Lafarge also failed to do adequate field-testing with the Bertrand mix or to perform any durability test.

* Lafarge also did not provide Bertrand with the necessary information as to the properties of FA as set out in CSA A23.1 (Ex. 274). They, in fact, started after 1991 to provide information on FA to the ready-mix operators (see Ex. 351).

[para171] In comparing the respective negligence of both defendants, I conclude that Lafarge should bear 80% of the responsibility and Bertrand 20%.

VII. DAMAGES

[para172] According to the evidence before me, including the admissions by the defendants, it is obvious that all of the plaintiffs' foundations, with some exceptions, will have to be removed and replaced. For a number of the plaintiffs, this has already taken place.

[para173] Due to the nature of the evidence called at trial by the various groupings of plaintiffs, and because there are varying issues involving different plaintiffs, I will have to deal separately with groups of plaintiffs.

1. Marcil Plaintiffs

(i) Evidence and Findings:

[para174] The evidence involving the assessment of damages of the Marcil plaintiffs was not admitted at trial. Unfortunately, the construction expert called by counsel for the Marcil plaintiffs was not qualified as an expert. Accordingly, counsel for the Marcil plaintiffs accepted the estimate of damages put forward by the defendants Bertrand and Lafarge and contained in Ex. 297. These estimates of damages were prepared by the firm, Brunette & Cadieux Construction Inc. ("B&C"). Not included in the total price of replacing the foundations are the costs associated with the removal and replacement of the footings and the basement floors, and an allowance for accommodation for the owners when they will have to move out during construction.

(a) Footings

[para175] I have already determined that the primary mechanism of deterioration of this concrete is caused by sulfate attack. The excess sulfates and alkali come from the insertion of FA into the concrete. Consequently, if the walls of the foundation have to be replaced because they contain FA, I do not see why the footings should not also be replaced as they also contain FA.

[para176] It has been suggested by the defendant Bertrand that the footings do not suffer from chemical reaction because they are not subjected to wetting and drying cycles. On the other hand, there is evidence before the Court that some areas of walls have suffered deterioration even if they have not been subjected to wetting and drying cycles. Given the evidence of the experts as to the process of deterioration involved in sulfate attack and the fact that the processes can be very slow, I see no reason why the innocent plaintiffs should take the risk of having new foundation walls resting on concrete footings which may possibly deteriorate over time. The expert for the defendants, B&C, has estimated the cost of removal and replacement of the footings in each of the Marcil plaintiffs' estimates. That amount, therefore, should be added to the total of the replacement costs.

(b) Basement Floors

[para177] The basement floors did not contain FA and, therefore, would not be subjected to deterioration as a result of sulfate attack. The Court also heard evidence that the walls and footings of the foundation can be replaced without replacing the floors. Therefore, the total replacement cost estimate should not include an amount for the removal and replacement of the basement floor.

(c) Accommodation Allowance

[para178] The estimates, prepared by B&C for the defendants, state that the time required to complete the work for the plaintiffs will vary anywhere from 30 to 45 days. The estimates also indicate that, in most cases, the residents will have to move out of their houses for a period of between 15 and 20 days. These plaintiffs, therefore, should be entitled to an allowance for accommodation, for food and lodging, during the time they have to move out of their homes.

[para179] The Court heard evidence from various sources about reasonable accommodation costs. These amounts can vary from \$270 a day from the expert Naoum, called on behalf of the Alie plaintiffs, to an amount of \$50 a day paid by the Program to the homeowners whose foundations were replaced. I also heard evidence that hotel and motel costs in the area of the plaintiffs' homes could vary from \$50 to \$88 a day. Altogether, the evidence was not very satisfactory on this issue. Nevertheless, the Marcil plaintiffs should be entitled to reasonable accommodation costs during the 15 to 20 days they will have to vacate their homes. In my opinion, taking into consideration the number of adults, children, pets, etc., of the various homes, I would fix an amount of \$100 a day as reasonable costs for food and lodging.

[para180] All the Marcil plaintiffs, therefore, will be entitled to a per diem of \$100 for food and lodging during the 20 days they will have to vacate their homes, except the Marcil plaintiffs whose basement already has been replaced.

(d) Loss of Capital Value

[para181] It has been argued by counsel for Marcil that the Marcil plaintiffs should receive an amount for loss of capital value. Unfortunately, the evidence to support this claim is unsatisfactory. Accordingly, it is impossible for the Court to assess any value for the loss of capital value.

(e) Conclusion

[para182] The Marcil plaintiffs will be entitled to damages in accordance with the B&C estimates after adding on the amount for removal and replacement of the footings and the per diem for accommodation.

(ii) Saumure Residence (M-78)

[para183] The concrete in this residence did not contain FA. The best evidence before the Court would lead to the conclusion that this foundation did not exhibit the same distress as the other plaintiffs' residences. The defendant Bertrand denied this foundation needed replacement and I have no difficulty in concluding that the defendant's position was justified. The foundation did have some defects, but these were not related to defective concrete. Apparently, this plaintiff has received some compensation for the defects.

[para184] Accordingly, the claim for damages of the Saumure residence will be dismissed.

(iii) Tremblay Residence (M-80)

[para185] The concrete in the foundation of this residence contained FA. There is an admission on the part of the defendants that the concrete is defective and has to be replaced. The problem with this residence is that the foundation was constructed in the water table. It became obvious at trial that other parties should be defendants in this action. The matter was adjourned to allow service of the pleadings on the other defendants.

[para186] Before the end of trial, a settlement was reached between the plaintiffs and the other defendants for the sum of \$21,000. Because of the settlement, the Court never heard the circumstances of the construction or what remedies may have been possible to cure the water table problem had the concrete not been defective. In other words, this Court never heard evidence which would assist it in apportioning liability between the defendants Bertrand and Lafarge and the other defendants.

[para187] Obviously, the foundation in the Tremblay residence would have to be replaced regardless of the water table. Given the evidence, the only fair way to deal with this residence is to order the defendants Bertrand and Lafarge to compensate the plaintiff Tremblay in accordance with their assessment of damages prepared by B&C and detailed in Ex. 297. Like the other plaintiffs, the plaintiff Tremblay would be entitled to a reasonable amount for accommodation costs and to have the footings in her foundation replaced. The defendants, of course, would be entitled to a credit for the sums received by the plaintiff from the other defendants.

(iv) Marcil Residence (M-72)

[para188] These plaintiffs replaced their foundations, footings and basement floor in May of 1996. They submitted a claim for damages of \$96,905.66 (see Ex. 102). The defendants take issue with some items included in the Marcil plaintiffs' damages. One of the items included in the plaintiffs' claim is replacement of the basement floor. I have already ruled that the basement floors did not require replacement. The defendants suggest they be given a credit for \$5,000, which is reasonable.

[para189] Also included in the plaintiffs' claim are some 1041 hours at \$15.00 per hour for labour costs. Apparently, the labour was furnished by the plaintiffs themselves, their friends and relatives. The defendants dispute this amount on the basis that the plaintiffs are really not out-of-pocket for these labour costs, and that the claim should have been advanced by the individual who furnished the labour. Undoubtedly, as was so often the case in the Marcil plaintiffs' claim, the evidence presented to the Court could have been more helpful. Nevertheless, it would not be unreasonable for the Court to conclude that there would be considerable labour involved in the removal and replacement of a foundation of an existing home. Further, the defendants should not get credit for labour furnished by friends and relatives of the plaintiffs. Courts generally follow the well-known tort principle that a tortfeasor is not entitled to benefit from a gratuitous payment made by a third party to the plaintiff. I do find the hourly rate somewhat excessive, and I would award labour costs in this matter of \$10,000.

[para190] The defendants also dispute an amount of \$2,460 for accommodation. Apparently, the plaintiffs resided at their parents during construction. Again, I do not see why the defendants should benefit from a benefit made by the parents to the plaintiffs, and I would award the Marcil plaintiffs the same accommodation costs as the other plaintiffs, that is \$100 a day for 20 days. Accordingly, the accommodation claim should be reduced to \$2,000.

[para191] There is a further claim for storage for \$465. Apparently, this furniture was stored on their property and that amount was never paid. The plaintiffs' claim, therefore, should be reduced by that amount.

[para192] Finally, the plaintiffs reached a settlement with the forming contractor and received the sum of \$15,000. The plaintiffs' claim against these defendants should be reduced by that amount.

[para193] The plaintiffs' claim should also be reduced by the amount of \$239.59 for photographs and \$190.05 for coffee breaks. The above amounts, therefore, should be deducted from the total claim of \$96,905.66, and the defendants should reimburse the Marcil plaintiffs the sum of \$69,936.02.

[para194] There also may be settlements between the Marcil plaintiffs and other defendants that have not been brought to the Court's attention. The defendants, of course, would be entitled to a credit for any of these settlements.

2. Alie and Duval Plaintiffs

[para195] These plaintiffs called Mr. Andy Naoum of Capital Engineering ("Naoum") as an expert witness to give evidence as to the cost of replacing the foundations of their homes (see Ex. 253, Vol. 1 and 2). The defendants Bertrand and Lafarge called Mr. Roch Cadieux ("Cadieux") of the firm of B&C to give evidence regarding the replacement of the plaintiffs' foundations (see Ex. 262 and Ex. 513, Vol. 1 and 2). The evidence of these two experts differed sharply in areas such as time to complete the work and accommodation costs, brick replacement, engineering and supervision costs, and such items as backfill, floors and footings and garages. I intend to deal with each individual item later.

[para196] In reviewing the curriculum vitae and backgrounds of each of these experts, I have come to the following conclusion. Cadieux's work experience in the construction industry is far more impressive than Naoum's. The latter basically gained his experience having been involved with the Program plaintiffs in the replacement of the 28 foundations back in 1993-1994. Cadieux has been involved with the construction industry since 1962. Naoum's experience in preparing cost estimates is very limited. Cadieux has had his own construction company since 1984 and, in fact, was involved in the replacement of foundations for the Program plaintiffs in 1993. He has been preparing cost estimates for his company throughout those years. Cadieux's methodology and preparation in arriving at his cost estimates are far more scientific and precise than Naoum's. I have no difficulty in concluding that more probative value should be put on Cadieux's cost estimates than Naoum's. Therefore, after making a number of adjustments on items which I will discuss below, I would accept Cadieux's costs estimates for these plaintiffs' homes over that of Mr. Naoum's.

(i) Time to Complete the Project and Accommodation Allowance

[para197] I have already ordered that the Marcil plaintiffs be paid an accommodation allowance of \$100.00 per day for at least 20 days. In my opinion this should be the minimum for the Alie and Duval plaintiffs. Naoum's evidence as to the time to complete the work and accommodation allowance is clearly excessive. On the other hand, Mr. Cadieux may well be too conservative, especially as to the time that the plaintiffs' will have to vacate the premises while the work is going on. These plaintiffs will be compensated in accommodation allowance for a minimum of 20 days at \$100.00 per day. The plaintiffs where Cadieux's estimate for time exceeds 40 days to complete the work will be entitled to accommodation allowance of one half the number of days to complete the work, i.e. plaintiff Bissonnette (A-8) 50 days to complete the work should be entitled to 25 days accommodation allowance. Accordingly, the Cadieux cost estimates will be adjusted to include the accommodation allowance referred to above.

(ii) Brick Replacement

[para198] There were considerable differences in approach and costs between the two experts regarding the homes with outside brick walls. Naoum estimates are based on the theory that all of the brick would have to be removed and replaced with new brick. He stated this was the practice of all of the contractors during the replacement of the Program plaintiffs' homes.

[para199] Cadieux's estimate is premised on the theory that, with few exceptions, brick could be left undamaged during construction. He testified that although some bricks may well be damaged, they could be individually replaced. With few exceptions, his inquiries determined that most of the type of brick used in the plaintiffs' homes was still being manufactured. For those homes where the brick was no longer being manufactured, that brick would have to be totally replaced with new brick.

[para200] As stated earlier, Cadieux's experience in the field of construction, including masonry, is far more extensive than Naoum's. There is no doubt that, if these homes had to be lifted and transported any distance, it is unlikely that a brick wall would survive that kind of displacement. But this is not what is being proposed here. It was Cadieux's evidence that the plaintiffs' foundations could be replaced just by supporting or lifting the home a few inches. This can be done without even disconnecting the services. The brick wall can be supported in such a way as to leave most of it undamaged. It is quite possible that the bottom rows of bricks may suffer some minor damage. If the brick is still being manufactured, there is no reason why the walls could not be repaired with similar brick with very little esthetic effect on the whole wall.

[para201] Given the above circumstances, and considering the cost and the wastage of perfectly good bricks, I would accept the solution proposed by the defendants' witness, Cadieux, as to brick replacement.

(iii) Engineering and Supervision Costs

[para202] The parties, through their experts, disagree as to the necessity of having engineering and supervision work during the replacement of the foundations. Naoum, on behalf of the plaintiffs, testified that engineering assistance is necessary to deal with the contractors, obtain bids, review specifications, supervise the work and ensure that safety standards are maintained throughout. He has included an amount of 10% of the contract, which apparently is the industry norm for engineering and supervision costs.

[para203] Cadieux's cost estimates include an amount for engineering services with respect to design and approval of a support system for the house, but he has no blanket provision by way of a percentage allocation. The defendants maintain that it is not usual to have an on-site engineer for residential work and that supervision could be done by municipal building inspectors.

[para204] I have no difficulty in concluding that the plaintiffs should be allocated an amount for engineering and supervision costs. The removal and replacement of a foundation on an existing house is not ordinary residential construction. The plaintiffs' houses are going to have to be either raised or supported while the foundation is being replaced. In many cases, the brick walls also will have to be supported. Most of these houses probably have finished basements along with balconies and landscaping which may be attached to the house. The innocent plaintiffs are facing a predicament not of their doing. They deserve the satisfaction and comfort that corrective measures are done right. Replacing a foundation on an existing house is not a simple straightforward operation. It is reasonable that the plaintiffs should be entitled to have this work performed under the supervision of a competent engineer.

[para205] There appears to be agreement amongst the parties that the industry standard for engineering and supervision costs is 10%. Here there are a large number of plaintiffs in different groupings. There will be, obviously, some similarities and repetition in each project. It is reasonable, therefore, to conclude that there will be some economies of scale. I am convinced that these plaintiffs will not all have a different engineer. I am sure that a professional taking on a number of projects would reduce this rate from the standard 10%. Accordingly, I would award the Alie, Duval, Marcil plaintiffs and independent plaintiffs a fee of 7% of the cost of the work for engineering and supervision costs.

(iv) Contingencies

[para206] Generally contracts of this nature have an amount for contingencies. The amount, usually a percentage of the contract, is to ensure that the homeowner is protected for items which are unforeseen and involved extra cost. Both experts for the plaintiffs and defendants, Naoum and Cadieux, have in their estimates an amount for contingencies. The plaintiffs' expert is of the opinion that 5% is a reasonable amount for contingencies. The defendant expert has a fixed amount in the range of \$2,500 to \$3,000. In my opinion, the amount put aside by Mr. Cadieux is far too conservative. Considering the type of work that has to be performed on these homes, it would not be difficult to anticipate that all sorts of unforeseen events may well occur. If the Court is going to err, it should err in favour of the innocent plaintiffs. In my opinion, it therefore would be reasonable to have a 5% contingency amount set aside on each one of these contracts. This 5% allowance should also apply to the Marcil plaintiffs and the independent plaintiffs.

(v) Granular B Backfill and Landscaping

[para207] The plaintiffs' expert, Mr. Naoum, is of the opinion that the quality of the backfill around the foundations, the patios, the walkways, driveways, is of poor quality and should be replaced by granular B backfill. He estimates this cost would be approximately \$2,000 per home. I am not aware of any reliable evidence in this trial that the existing backfill is inadequate. Clearly to replace this backfill with granular B backfill would constitute betterment. In my opinion, the approach taken by the defendant expert from B&C is reasonable. I would reject the claim for granular B backfill.

(vi) Footings and Floors

[para208] I have already made a determination as to liability regarding these items for the Marcil plaintiffs and I would apply these conclusions to these plaintiffs.

(vii) Detached Garages

[para209] The Alie plaintiffs claim an additional amount of damages to replace the garage floors for the plaintiffs who have detached garages. This claim is supported by evidence that is most unsatisfactory. Originally, this item was not included in the plaintiffs' expert Naoum's estimate. Subsequently, these estimates were revised to include various amounts from anywhere between \$15,000 to \$40,000 to effect repairs on detached garages. There are no work sheets or estimates to support these amounts. Clearly this evidence appears to be an afterthought and based only on Mr. Naoum's judgment.

[para210] The Court wants to make every effort to ensure that the plaintiffs are fully compensated for all of their losses. Nevertheless, awards cannot be based on speculation. It may well be that some of the plaintiffs may incur additional costs involved with repairs to detached garages. Yet I cannot make awards based on guesswork and unreliable evidence. Accordingly, the plaintiffs' claim for damages for the detached garages will be rejected.

(viii) Cost Adjustment

[para211] After making the adjustments referred to above, I then would accept the estimates of B&C as being more reliable and representative of the cost of the repairs to the plaintiffs' homes. Considering these estimates were prepared in 1997, I also would deem it reasonable that there be a 3% upward adjustment per year up to the year when the work will be completed.

(ix) Apportionment of Settlement Funds Received from Plaintiff Contractors

[para212] During the course of the trial, the Alie plaintiffs reached settlements with various contractors. The total amount of the settlements was \$73,801.19. The parties agreed that the defendants would be entitled to a credit to be deducted from the plaintiffs' damages. Counsel for the Alie plaintiffs have suggested these funds be credited on a pro-rata basis in accordance with their table at Tab 3 of their Supplementary Written Submissions. That proposal appears to be fair, and I would order the apportionment of the settlement funds accordingly.

(x) Alie Plaintiffs with Special Problems:

(a) The Turpin Actions (A-58 to A-61)

[para213] The former owner of these four properties, Gilles Turpin, declared personal bankruptcy in 1997. The four homes A-58 to A-61 were sold under power of sale. The Trustee in Bankruptcy is claiming damages for the difference between fair market value if the homes would have had good foundations, and the amount received on the sale. Expert evidence is found at Ex. 580A,

B, C and D. The total amount of the loss is \$104,500. This amount is not disputed by the defendants. Accordingly, the Trustee will be entitled to the sum of \$104,500.

[para214] The Trustee makes a further claim of \$82,906.45, which is alleged to be expenses incurred during the marketing period. This amount is disputed by the defendants. The only way the Trustee can successfully claim the full amount is if I make a finding that Turpin's bankruptcy was attributable solely to the loss of rental income from these four properties. The evidence before me indicates otherwise. It is clear that Mr. Turpin was encountering serious financial problems with his construction business as early as 1994. Further, much of the debts and unsecured creditors, at the time of bankruptcy, had nothing to do with the four houses. Undoubtedly, the loss of rental income was a contributing factor in his bankruptcy, but was not the sole reason. Accordingly, I would find that the loss of rental income did not contribute any more than one third to his bankruptcy. The Trustee will be entitled to 1/3 of \$82,906.45.

[para215] The plaintiff also makes a further claim for hardship and inconvenience. I do not accept the plaintiff's submission that this plaintiff should get an increased amount because of increased hardship. I am of the opinion that he should get a decreased amount for two very important reasons. I am not aware of any evidence that indicated the plaintiff Turpin lived in any of these four homes. Secondly, there is the difficulty in relating the lack of rental income to his financial problems. In the circumstances, therefore, I would award this plaintiff the sum of \$2,500 for hardship and inconvenience.

(b) The Village of L'Orignal Recreation Facility (A-62)

[para216] The loss claimed by this plaintiff is set out at Ex. 250 and totals the sum of \$19,893.70. The defendant Bertrand does not dispute this amount. The defendant Lafarge disputes the damages on the basis that the foundation was never replaced. The fact is that this plaintiff received defective concrete, and the moving of the offices and the demolition of the building had something to do with the bad concrete. The plaintiff's damages here are reasonable and will be allowed.

(c) Royal Leduc (A-40)

[para217] This plaintiff had his foundation, basement floor and footings replaced in 1996. He has submitted an account for the work done totalling \$43,073 and work yet to be completed estimated at \$49,000, for a total cost of \$92,073.00 (see Ex. 70). The defendants dispute a number of the items listed in Ex. 70 and suggests that this plaintiff's claim be reduced to \$54,998. The plaintiff argues that the items listed in Ex. 70 are not out of line with their expert Naoum's estimate, especially when items such as engineering, contingencies, accommodation, G.S.T., and a detach garage are added on. The problem is that none of these costs were either expended by Leduc during the construction or claimed by him in Ex. 70. Nevertheless, I have to keep in mind that I am not aware of any estimate by any of the experts that provided for the complete replacement of these foundations for less than \$55,000.

[para218] In reviewing item by item in Ex. 70, I would make the following findings. The defendant disputes Mr. Leduc's hourly rate of \$20.00 per hour for what was basically labour work. I would agree that the hourly rate should be reduced to \$10.00 per hour. There is a claim for \$22,000 to replace all of the stones and brick. The evidence does not support that finding, although repairs will be necessary in the areas where the stones and brick are cracked. I would reduce that amount to \$7,500. The items for the broken windowsill and the landscaping are to remain as is. The item of \$5,000 for repaving the driveway should be reduced to \$3,500. The items for repairing the basement are to remain as is at \$8,000. The defendant disputes all of the items for repairing the upstairs of the house. I would think it reasonable to conclude that, given the type of repairs involved in lifting a house and replacing the foundation, there would be some damage to the upstairs of the house. I have also heard evidence as to the damage caused by the high humidity associated with the faulty concrete in the foundations. Accordingly, I would award an amount of \$5,000 for repairing the upstairs of the house. Unfortunately, the evidence does not support any other findings for allocating amounts as I have done for the other plaintiffs.

(d) The Choinière Action (A-18)

[para219] The plaintiff Choinière started an action against a notary public by the name of Roland Carrière who practiced with the law firm of Shelby, Houle, Assaly and Morrissette. The plaintiff's claim alleges professional negligence against Carrière in that he failed to properly register the plaintiff's home under the Program. Obviously, when the problems became apparent with the foundation, the plaintiffs' claim was rejected by the Plan. The defendants Bertrand and Lafarge and their insurers were brought into the action by way of third and fourth party actions. Settlement was reached between the plaintiff Choinière and Mr. Carrière wherein the latter purchased the plaintiff's home for \$70,000. One of the terms of settlement was that the plaintiff irrevocably assign their interest in their action to Mr. Carrière. The defendant Bertrand consented to the settlement, but preserved its right to challenge the validity of the assignment to Carrière.

[para220] The defendants Bertrand and Lafarge challenged the validity of the assignment and argued that the plaintiff Carrière's claim should be dismissed for the following reasons.

* The assignment to Mr. Carrière is invalid and unenforceable as being contrary to the laws of Champerty and Maintenance. Also, it is against Public Policy in Ontario in that the assignment is of a bare cause of action in tort.

* The plaintiffs have been fully compensated and, therefore, have suffered no damages.

* Further, Carrière purchased the plaintiffs' home "as is" and should not be entitled to any windfall in that if he is allowed to recover he would end up with a new foundation, which is substantially more than what he bought.

* With the assignment, the plaintiffs Choinière lost their status to sue.

[para221] A leading Canadian authority in respect to assignment and dealing with Champerty and Maintenance is Fredrickson v. I.C.B.C. (1986), 3 B.C.L.R. (2d) 145 (C.A.), affirmed in [1988] 1 S.C.R. 1089. McLachlin J.A. does a complete review of the jurisprudence. To quote her at page 152:

It is frequently said that a bare cause of action in tort is not assignable. This rule is based mainly on strictures of the common law against maintenance and champerty. Anglo-Canadian jurisprudence has never countenanced trafficking in litigation.

Then she goes on to state as follows. "The exact ambit of the rule is illusive." She then cites the jurisprudence indicating the exceptions to the rule, and at page 156 states as follows:

I would summarize the effect of these cases as follows. An assignment of a cause of action for non-personal tort is generally valid if the assignee has a sufficient pre-existing interest in the litigation to negate any taint of champerty or maintenance. In determining if this test is met, the Court should look at the totality of the transaction: *Trendtex*, per Lord Roskill at p. 531. A property interest ancillary to the cause of action assigned is sufficient to support an assignment, but not essential. A genuine pre-existing commercial interest will suffice. The term "commercial interest" is used in the sense of financial interest; it need not arise from commercial dealings in the narrow sense. Assignment of a cause of action to a stranger will not be permitted, nor will the Court uphold an assignment made for the purpose of obtaining more than what the assignee is legally entitled to.

[para222] In the Choinière matter it is obvious that the assignee, Mr. Carrière, had a property interest ancillary to the cause of action and a genuine pre-existing commercial interest in the litigation. One could hardly categorize Carrière's status as that of a stranger meddling in other peoples litigation.

[para223] If Mr. Carrière is entitled to have his foundation replaced, will he receive a windfall? In my opinion, all he will receive is an adequate foundation, something every other plaintiff in this action is asking for. Had there not been a settlement between Choinière and Carrière, and an assignment to Carrière, obviously the plaintiffs Choinière would have been entitled to damages to have their defective foundation replaced. Having come to an agreement to the satisfaction of both parties, I fail to understand why Carrière would not be entitled to the benefit of the assignment from the plaintiffs. I consider it to be in the interest of the administration of justice to have parties negotiate settlement to minimize the litigation. Finally, given the nature of the settlement and the assignment, I do not accept the defendants' position that Carrière was the only one who could sue.

[para224] In conclusion, therefore, this plaintiff will be entitled to the same remedies as the other plaintiffs outlined earlier, except that Roland Carrière will not be entitled to any award for hardship, inconvenience or mental distress.

3. New Home Warranty Program Plaintiffs

[para225] As mentioned earlier in this judgment, the Program replaced the foundation of some 28 plaintiffs and one condominium corporation (PCC No. 5). The Act then provides that the Program has a right of subrogation. Basically the Program's claim can be divided as follows:

- * As a subrogee for the homeowners, the foundations were either repaired or replaced.
- * In its own name for the cost incurred. They were in addition to and incidental to the cost of replacing the foundation.

[para226] Mostly these costs are for experts, such as engineers, and for administrative fees.

(i) Program's Subrogated Claim:

[para227] The Program's costs for replacing the defective foundations are detailed in Ex. 229A to 229L. The Program has summarized these costs at page 119 of their written argument. They are in three categories: foundation replacement costs of \$2,148,864.17; accommodation costs of \$71,478.50; and basement finishing costs of \$29,452.29 for a total of \$2,249,794.96.

(a) Is the Program's Claim a Nullity?

[para228] The defendant Lafarge argues that the Program's claim is a nullity because the program has no jurisdiction to sue in its own name. Actually, the Program plaintiff started a number of actions from 1995 to 1997. Some were in its own name and some were in the names of the individual plaintiffs. By an order of this Court in September 1997, all of these actions were consolidated and proceeded together at trial. In summary, the defendant Lafarge maintains that although regulations allow the Program to sue in its own name, such regulations are beyond what is permitted by the Statute. They also argue that by allowing the Program to sue in its own name, they are in fact curtailing the right of the defendants to the full discovery process. They also state that, by having a number of actions against the defendant, this is an abuse of process.

[para229] What Lafarge is advocating on this issue of nullity is somewhat confusing. The Program is a creature of Statute and in this case it is the Ontario New Home Warranty's Plan Act, R.S.O. 1990 c. 0.31. The jurisdiction of the Program is found within the Statute. Section 23 confers jurisdiction onto the Program to make by-laws. Section 23(1)(m) states:

The Corporation may make by-laws subrogating the corporation or named insurer to any right of recovery of a person in respect of a claim paid out of the insurance under the Plan and costs and providing the terms and conditions under which an action to enforce such rights may be begun, conducted and settled.

Section 13(1) of Regulation 892 of the 1990 Revised Regulation of Ontario states:

The Corporation shall be subrogated to all rights of recovery of a person to whom payment in respect of a claim has been made out of the guarantee fund under the Act and may maintain an action in its own name or the name of the person against any other person against whom the action lies in respect to such rights of recovery.

[para230] I fail to understand how this by-law confers onto the Program powers that are not given by s. 23(1)(m) of the Statute. The Court notes that s. 23(1)(m) is not referred to in the defendant Lafarge's written argument. Possibly it was not aware of the provisions of s. 23(1)(m) and hence the confusion about the Regulations. Given my earlier comments, I conclude that the provisions of s. 13(1) of Regulation 892 are consistent with the powers granted by the Statute.

[para231] Lafarge also argues that by allowing the Program to sue in its own name, its right to discovery is undermined. Given the discovery provision of our Rules, I reject Lafarge's argument on this issue, especially in this case where the evidence of most of the plaintiffs was similar. In fact, the parties came to an agreement that answers should be given by way of written questions and answers.

[para232] Lafarge's argument, that because various actions were started this was an abuse of process, has very little merit. The only reasons the plaintiff Program started actions in different names were because of Lafarge's objections and out of an abundance

of caution. Given that the consolidation order was made at the start of the trial and all of these actions were tried together, it is difficult for the Court to appreciate that the defendant was in any way prejudiced or that this was an abuse of process.

(b) Replacement Costs and the G.S.T.

[para233] The defendants accept as recoverable damages the amounts claimed by the Program for replacement costs totalling \$2,148,864.17, except any individual claim which exceeds \$100,000. In this case, two claims exceed that amount: the claim for Lalande 096 for \$107,020.74 and the claim for Martineau 099 for \$105,009.80. There is no dispute amongst the parties that Ontario Regulation 118/91 provides that the maximum amount payable to an owner is \$100,000, and for the condominium \$50,000 times the number of condominium dwelling units in the project. In this case, it would mean 24 units times \$50,000 or a total of \$1.2 million.

[para234] Clearly the amount \$100,000 was exceeded in the cases of plaintiff 0-96 and 0-99 and, therefore, the defendants argue they should not be made to pay any more than \$100,000. The Program plaintiffs state that these amounts include the G.S.T. and that the G.S.T. should not be included in the \$100,000 limit. Unfortunately, the defendants' written submissions are silent on the question of the G.S.T.

[para235] Over the past two decades the Regulation setting out the maximum limit have been amended from \$20,000 to \$50,000 to \$100,000. The plaintiffs state that all of these amendments are made at a time before the G.S.T. was in existence. Obviously, these amendments were made to correspond with the inflationary increases in the costs of housing over the years. When the last amendment upping the limit to \$100,000 was made in October 1989, it is unlikely that the G.S.T. was contemplated because it did not come into effect for another year. It is also not difficult for this Court to conclude that when the G.S.T. was enacted, the legislators did not intend to reduce the upper limit of compensation to these plaintiffs by 7%. In other words, it is unlikely that one year the provincial government would up the limit to \$100,000 and the federal government would reduce it by 7% the following year. Given that this legislation is intended to protect the consumer, it would be inconsistent for this Court to interpret the actions of the government to the detriment of the consumer. I agree with the interpretation made by the Program that the limit is exclusive of the G.S.T. Accordingly, I find that the limit of \$100,000 imposed by the Regulation does not include the G.S.T.

(c) Payments Made in Excess of the Statutory Limit

[para236] The defendants argue that they should not be liable for any payments by the Program to the plaintiffs that were in excess of the \$100,000 statutory limit. Clearly the Act's s. 14 provides payment to the owners out of the guarantee fund subject to such limits that are fixed by the Regulation. The latest Regulation is 118/91 which provides for a maximum of \$100,000. In reviewing the summary of the Program's claim set out at page 119 of its written argument, only one plaintiff's home exceeded \$100,000 once the G.S.T. had been deducted from the amount set out for foundation replacement costs.

[para237] According to the evidence of Mr. Reid who testified on behalf of the Program, all tenders for the replacement of the foundation exceeded the \$100,000 limit. The Program took the sensible approach of proceeding with the work and compensating the owner for the full amount of the cost even though it marginally exceeded the \$100,000 limit. Should the Program now be penalized for having acted reasonably towards this plaintiff?

[para238] Obviously if the plaintiff was pursuing this action himself, he would be entitled to full compensation. In fact, many of the Alie and Marcil plaintiffs will have claims exceeding \$100,000. I have already discussed the purpose of the legislation, that is the protection of the consumer. Clearly Regulation 118/91 setting the \$100,000 limit needs to be updated to correspond with today's new housing prices. I am also convinced that the \$100,000 limit was not intended for the protection of a third party tortfeasor, but rather to regularize relationships and disputes between vendors and owners.

[para239] I have already made findings and apportionment of negligence against the defendants Lafarge and Bertrand. Should the defendants benefit from a reasonable ex-gratia payment made by the Program to one of the plaintiffs? There is ample jurisprudence to suggest that such a payment does not accrue to the benefit of the third party tortfeasor. Meyers and The City of Guelph v. Hoffman, [1955] O.R. 965 (H.C.) and Coderre et al. v. Ethier et al. (1978), 19 O.R. (2d) 503 (H.C.). Also, I have to consider that the action by the Program is a consolidation of a number of actions, including the action taken in the plaintiff's own name. He would be entitled to full compensation. Therefore, the defendants should pay the Program any amount over \$100,000. Alternatively, the defendant could pay the plaintiff Lalonde (0-96) the amount over \$100,000, then the plaintiff would reimburse the Program that amount.

(d) Accommodation Costs and Basement Finishing Costs

[para240] The defendants' object to reimbursing the Program for payments to the plaintiffs for accommodation costs of \$71,478.50 and basement finishing costs of \$29,452.29. The basis of their objection is s. 13(2) and s. 6(6) of Regulation 892. Section 13(2) of the Regulation provides that the Program's subrogated action shall be for the following items:

- * The amount paid out of the guarantee fund to the homeowner claimant.
- * Legal costs and all costs incurred by the Program in the subrogated action.

[para241] In reviewing the summary of payments at page 119 of the Program's written argument, four plaintiffs received payments in excess of \$100,000 when payments of accommodation costs and basement finishing costs were included. Once the G.S.T. is deducted from these payments, only two plaintiffs that is 0-96 and 0-99, exceed \$100,000. Accordingly, the defendants argue that such payments could not have been out of the guarantee fund because they are in excess of \$100,000.

[para242] The defendants also rely on s. 6(6) of Regulation 892 and it reads as follows:

Liability under subsection (3) or (4) is limited to damage to the home only and liability under subsection (5) is limited to damage to the common elements only and there is no liability for any other damage, direct or indirect.

[para243] The defendants argue that the regulations do not authorize the Program to make any payments for accommodation costs or pay amounts in respect to what they called indirect damages such as basement finishing costs.

[para244] In reviewing the defendants' objection to the payments made by the Program and in interpreting the Statutes and Regulations, it is wise to be reminded that the major purpose of the Statute is to protect the purchasers of new homes. In order to effect the purposes of the Act, a broad and liberal interpretation of its provision is appropriate. (Ontario New Home Warranty Program v. Lukenda (1991), 2 O.R. (3d) 675 (C.A.).)

[para245] I have already decided that the other plaintiffs would be entitled to reasonable accommodation costs. The basis of the award is just common sense. How could you possibly lift a house, disconnect the services, take out the old foundation, and replace it without the occupants moving out? In relation to the basement finishing costs, how could you replace the foundation in a finished basement without incurring damages and costs to refinish the basement? In fact, there is an admission on the part of the defendants for the other plaintiffs that reasonable accommodation and basement finishing costs are justified. Why should these plaintiffs be denied reasonable accommodation costs of \$50.00 per day or reasonable refinishing costs of their basements? Obviously the Program took the sensible position to make these payments to the plaintiffs while the damage to their homes was being repaired. Should the Program be penalized for having taken a reasonable and compassionate approach towards the plaintiffs? Granted there is no specific regulation permitting payment of accommodation costs. In my opinion, the initiative taken by the Program is consistent with the major purpose of the Act. If expenditure is necessary and reasonable to properly repair the damages to the homes, it follows that the Program be reimbursed by the defendants.

[para246] The reimbursement by the defendants to the Program for payments made for accommodation and basement finishing is also consistent with the principle that gratuitous payments made by a third party would accrue no benefit to the tortfeasor. The jurisprudence on this issue has been referred to above. As cited earlier, only two plaintiffs' payments exceed the \$100,000 limit and I would make the same finding and make the same award as I made earlier. Accordingly, the Program will be entitled to be reimbursed a sum of \$71,478.50 for accommodation costs and \$29,452.29 for basement finishing costs paid to the plaintiffs as set out at page 119 of their submissions.

(ii) Additional Costs Incurred by the Program:

(a) Engineering Costs

[para247] The Program is claiming engineering costs in the amount of \$744,364.40 divided as follows: the investigative phase \$278,424.81; and the replacement phase \$464,939.59. A summary of these engineering costs can be found in Ex. 319. Basically these costs were paid to two firms: Proctor & Redfern and Trow Consulting. The defendants object to the payment of these amounts on the grounds that the Regulations do not provide for the payment of engineering costs, either by way of subrogation or otherwise.

[para248] I have no difficulty in allowing this claim and rejecting the defendants' objection. It would be impossible for the Program to fulfill its mandate in accordance with the Statute and meet its obligation towards the plaintiffs without encountering engineering costs. Once the Program receives complaints from the homeowners, it is obligated to investigate and determine whether the complaints have any validity. How else is this to be accomplished but by hiring engineers to determine if the concrete was defective and to determine if, in fact, there was any major structural defect. I can't perceive any alternative for the Program but to hire engineers to make that determination. Obviously the Program could not just proceed to repair or replace these foundations. It had to determine if the concrete was defective and propose a solution to the problem. Not only were engineering costs necessary to make that determination, but the evidence of these experts was necessary in order to prove the Program's claim in Court.

[para249] As with the issue of accommodation and basement costs, the damages to the homes could not have been repaired without incurring engineering costs. I have already decided that engineering costs were justified for the other plaintiffs, given the nature of the repairs that had to be effected on their homes. Accordingly, I find that the engineering costs associated with the replacement phase are also justified. On the evidence, I am not satisfied that there is any basis for concluding that any of these engineering costs are excessive and, therefore, the Program will be entitled to be reimbursed the full amount of the engineering costs.

(b) Administrative Fees

[para250] The Program is also claiming a 15% administrative fee on all the damages. This fee represents the Program's estimate of its administrative costs and of investigating and processing the claims of the homeowners in this matter. It argues that a 15% administrative fee is standard in the construction industry to cover overhead expenses. The Program has charged this 15% administrative fee in the past and it has received approval of the Courts (see *Re Andy Dimatteo Construction Ltd.* and *Ontario New Home Warranty Program* (1994), O.C.R.A.T.D No. 51 (C.R.A.T.) and (1995), 26 O.R. (3d) 104 (Div.Ct.). Further, Ontario Regulation 691/94 compels vendors/builders to pay an administrative fee of 15% on any amount that is paid out of the guarantee fund.

[para251] The defendants object to the payment of 15% administrative fee for the following reasons:

* Ontario Regulation 691/94 and the jurisprudence pertaining to the 15% administrative fee applies to vendors and builders, and not to subrogated actions against third parties in accordance with s. 13(2) of Regulation 892.

* The Program's claim for 15% administrative fee is excessive and duplicitous.

* The Program is a non-profit organization and it has failed to prove that it incurred additional administrative costs.

[para252] I agree with the defendants that Regulation 691/94, and the jurisprudence cited by the plaintiff deals mainly with payments made by vendors/builders and not with subrogated actions against third parties. Nevertheless, following the same reasoning that I applied for engineering fees, it would be reasonable to conclude that the Program would have to have encountered administrative fees if it was to process the plaintiffs' claim and repair the damages to their homes. In other words, given the number of claims in this matter, it would be impossible for the Program to fulfill its mandate towards the plaintiffs without encountering administrative expenses. What I have to decide is, has the Program justified and proven that it is entitled to a 15% administrative fee over and above the balance of its claim?

[para253] The Program argues that it is entitled to a 15% administrative fee based on its additional administrative costs in investigating and processing the claims of the homeowners. The evidence before me indicates that the investigation of the

problem and the supervision of the construction to correct the problem were performed by the engineers. I have already allowed plaintiffs' claim for engineering fees of \$744,364.40. Would it not be reasonable to conclude that the payment of these engineering fees would reduce somewhat the 15% administrative fee for at least investigating these problems? I agree with the defendants that to award the full 15% administrative fee over and above the fees for engineers would represent a considerable duplication. For this reason alone, I would reduce significantly the 15% administrative fee.

[para254] The Program has not called any cogent evidence establishing how it incurred additional costs to process the plaintiffs' claims. One would have thought that it would be simple enough to call evidence to show how the Program had to hire additional staff or to pay their staff overtime, etc.

[para255] The Court can appreciate that in the construction industry a standard 15% administrative fee is justified when you are dealing with people or companies who are in the business of making a profit. The Program is a non-profit organization. When the Program makes a reasonable expenditure in the furtherance of its mandate, such as paying accommodation costs to the plaintiffs or paying engineering fees, it should not be penalized and should be reimbursed. On the other hand, the Program is not entitled to make a profit out of the performance of its statutory function. To allow the Program's claim of a flat 15% on all the expenditures of the Program in this matter would be giving the Program double recovery and would not be fair to the defendants. Unfortunately, I also am not satisfied that the Program has proven its claim and has encountered additional expenditures for administrative fees to process the plaintiffs' claims. Accordingly, the Program's claim for administrative fee is dismissed.

(iii) Program's Claim and Settlement with the Contractors

[para256] The Program also had a claim against the general contractor who built the plaintiffs' homes and the subcontractors hired by the vendors/builders to pour the foundation of the Program's homes. During the course of the trial, the Program reached a settlement with all of the forming contractors and, therefore, does not seek judgment against them. Further, as mentioned earlier, settlement was arrived at with a number of defendant contractors as set out at page 131 of the written argument of the Program. The defendants Bertrand and Lafarge are entitled to a credit representing the total amount of \$58,817.86. The Program will also be entitled to judgment in contract against these vendors/builders set out in paragraph 2, 3 and 4 of page 136 of the Program's written argument.

(iv) Program Action: PCC 5 Action and the Stoesz Action

[para257] Given my rulings earlier about the Program pursuing their action in their own name, it is not necessary to deal with these two actions.

4. Independent Plaintiffs

(i) Houle/Assaly (I-111)

[para258] This plaintiff is not asking for total replacement of the foundation. Repairs were conducted on the concrete in the summer of 1993. The costs incurred were \$5,200 plus engineering fees of \$1,500 for a total of \$6,700. Although there is no claim for total replacement of the foundation, this plaintiff makes a claim for loss of capital value in the amount of \$60,000. This amount represents 20% of \$300,000 which is apparently the market value of the home. Unfortunately, no evidence was presented to the Court in support of this claim. Accordingly, the claim by the plaintiff for \$60,000 loss of capital value has to be dismissed. The plaintiff will, therefore, be entitled to the sum of \$6,700.

(ii) Kilbride (I-112); Wever (I-114); Wilson (I-115)

[para259] The defendants admit that the foundations on the three plaintiffs' homes have to be replaced. The plaintiffs Kilbride and Wever accept the defendants' expert, B&C, as a cost estimate for replacing their foundations. The plaintiff Wilson relies on the cost estimate as prepared by Mr. Naoum who testified for the Alie and Duval plaintiffs. My comments pertaining to the evidence of the experts, B&C and Naoum, in the section dealing with the Alie and Duval plaintiffs apply to these plaintiffs. Over and above the amounts set out in the B&C estimate to replace the foundation, my findings and award to the Alie and Duval plaintiffs pertaining to footings, accommodation, engineering fees, etc. will apply to these three plaintiffs.

[para260] Finally, the defendants are entitled to a credit for any settlement funds received from the contractors, and this shall be apportioned between the plaintiffs accordingly.

(iii) Lalonde Furniture Store (I-113)

[para261] The amount of damages for this plaintiff has been agreed upon between the plaintiffs and the defendants, and is set out in Ex. 24.

5. Damages for Hardship and Inconvenience

[para262] Most of the plaintiffs (except the Program plaintiffs) have made a claim for hardship and inconvenience. The Court heard from a large number of plaintiffs about the hardship and inconvenience resulting from the deficient concrete. Some of the plaintiffs' evidence under this heading was summarized in exhibits and in medical reports. The Alie and Duval plaintiffs have set out a list of the homeowners' complaints at pages 110, 111 and 112 of their written submissions. I have already commented earlier in my judgment about the hardship and inconvenience caused to the plaintiffs by the deteriorating concrete. In fact, there is an admission by the defendants that the plaintiffs are entitled to an award of damages for hardship and inconvenience. I will, therefore, be making an award for hardship and inconvenience.

[para263] What is in dispute between the parties is whether such damages should be awarded on a per plaintiff or per home basis; what is the proper quantum of damages under this heading; and finally, whether the plaintiffs who filed medical reports are entitled to an increased award under this heading.

[para264] The plaintiffs have argued that the Court should award damages for hardship and inconvenience to individual plaintiffs in a range of \$10,000 to \$20,000, with an additional amount of \$10,000 for those plaintiffs who have filed medical reports. Given the average number of plaintiffs per house, it would mean the Court would be awarding something in the range of \$20,000 to

\$40,000 per home. While I have the utmost sympathy for all of the plaintiffs caught in this predicament, I have no difficulty in concluding that the amounts suggested by the plaintiffs are somewhat excessive.

[para265] I am of the view that it would be very difficult, if not impossible, to make an equitable award under this heading to individual plaintiffs. The level of hardship and inconvenience is not uniform to each plaintiff. Some plaintiffs have testified, others have not. Some plaintiffs have medical reports, others have not. For some plaintiffs the problem was far more serious and for much longer than others. I have also heard evidence of problems encountered by family members who are not plaintiffs, i.e. children. In other words, the manner in which the evidence was presented to the Court, and even argued, makes the Court's task of making individual awards under this heading to each plaintiff next to impossible. Accordingly, I will be making an award for hardship and inconvenience to individuals on a per house basis. Obviously, any homes owned by corporate defendants are not entitled to an award under this heading.

[para266] Counsel for the plaintiffs have argued that those plaintiffs who have filed medical reports should receive an increased award of \$10,000 for hardship and inconvenience. Those plaintiffs are listed at page 113 of the written submissions of Alie and Duval plaintiffs. Originally, these plaintiffs had made a claim for personal injuries caused by the defective concrete. During the trial, these claims were dropped and it was suggested the evidence contained in the medical report be used in those plaintiffs' claims for hardship and inconvenience. I have reviewed the medical reports, and I find it very difficult to see the causal connection between the plaintiffs' condition and the deteriorating concrete. Undoubtedly, the condition of their basement did not help their medical condition, but to conclude that it was the cause of their aggravated medical condition meriting an increased award is not supported by the evidence found within the medical reports. I would conclude, therefore, that these plaintiffs, with the exception of the plaintiff Jacques Marcil who has maintained his claim for personal injury, should be treated the same as the other plaintiffs.

[para267] A review of the jurisprudence indicates that awards for damages for hardship and inconvenience have been relatively modest. One factor may be that most decisions cited by counsel for the parties date back to the early 1980's. Unfortunately, there is also a wide gap in the range suggested by the parties. The plaintiffs are suggesting an award of \$20,000 to \$40,000 per home, while the defendants are suggesting \$2,000 to \$3,000. I have already commented that the plaintiffs' range of damages is somewhat excessive, and I have also no difficulty in concluding that the defendants' range is much too conservative.

[para268] Two of the more important factors considered by the Courts in assessing damages under this heading are the nature of the hardship and the length of time it existed. I have already determined that, in this case, the inconvenience and the hardship were real and substantial. The problems encountered here by the plaintiffs were not just a minor irritant. They basically have been prevented, over these many years, from fully enjoying their homes. For most, this problem has been ongoing for over 10 years. Certainly after 1992, when experts reported their findings and the plaintiffs started their action, there should have been no doubt in the defendants' minds that the plaintiffs had a major structural defect. A few plaintiffs have corrected the problem and replaced the foundations on their homes. Unfortunately, for most plaintiffs, the hardship and inconvenience may well continue for a number of years.

[para269] In considering all of these factors and having in mind the number of occupants per home, the most equitable way of making an award for hardship and inconvenience would be on a yearly basis. I would, therefore, award the sum of \$7,000 per home for the period 1986-1993 and, thereafter, the sum of \$1,000 per year per home to continue until such time as the foundation is replaced or the problem is corrected.

6. Personal Injury Claim for Jacques Marcil (M-72)

[para270] Considering what all of these plaintiffs have had to endure over the last ten years, it is indeed surprising that this is the only claim made for personal injuries over and above the claims advanced for inconvenience and hardship. Mr. Marcil's claim is for personal injury for mental distress on the basis that the defective foundation and resulting litigation was the cause of Mr. Marcil's psychiatric problems. The claim is for general damages in the amount of \$100,000 and special damages for lost income for the years 1995 to 1997 of approximately \$35,000.

[para271] Unfortunately, for Mr. Marcil, the evidence and subsequent written submissions in support of such a substantial claim is hopelessly lacking. For this Court to make an award for general and special damages in the magnitude that is being requested, I would have to find that the defective foundation was the only reason for Mr. Marcil's problems. The evidence certainly does not support such a conclusion. The plaintiff Jacques Marcil testified, as did Dr. Luc Bourgon, Mr. Marcil's treating psychiatrist during the years 1995 to 1997. I have reviewed the medical records and reports from the Ottawa General Hospital and from Dr. Bourgon found at Ex. 226. I have also reviewed Ex. 216 through to Ex. 220. Dr. Lionel Béliveau, a psychiatrist retained by one of the insurers for the defendant Bertrand, also testified. He examined Mr. Marcil in June 1997 and prepared a medical report dated July 11th, 1997 found at Ex. 478A.

[para272] The above medical evidence and Mr. Marcil's history of prior treatment evolves to a point where Dr. Bourgon in 1997 diagnosed Mr. Marcil's problem as "bi-polar affective disorder, manic phase". Dr. Béliveau agrees with this diagnosis. According to the experts, such an illness is determined by bio-chemical factors from endocrinal or genetic origin. Both experts agree that different depressive or manic episodes of bi-polar disorder can be triggered by psychosocial factors. The plaintiff Marcil denied having any such episodes prior to 1995, but unfortunately Mr. Marcil's medical history or medical records were not before the Court.

[para273] I've attempted to find the causal connection between the faulty foundation and Mr. Marcil's condition from the evidence and to determine if it was the psychosocial factor which triggered Mr. Marcil's episode from 1995 to 1997. Unfortunately for Mr. Marcil, there were a number of other stress factors going on in his life such as:

- * His wife losing her job and going from a two-income family to one income
- * The separation from his wife and children
- * Problems related to his work and possible loss of his job

[para274] There is no doubt that the defective foundation and resulting litigation, including the financial problems related to the law suit, contributed to his abuse and his dependence on alcohol, and may have provoked the compression episodes of his bi-polar disorder. Both experts are in agreement with this conclusion. I also have to consider that Mr. Marcil started experiencing

problems with his foundation around 1989, and according to his evidence his psychiatric problems did not begin until 1995. Further, even after his foundation was replaced in 1996 and he had received some form of monetary compensation from an insurer he had further psychiatric problems in 1997.

[para275] In reviewing all of the evidence, therefore, and making the causal connection between the defective foundation and Mr. Marcil's psychiatric problems, I can only conclude that the defective foundation was one of a number of stress factors that could have triggered his psychiatric problem. Relating to the defendant's responsibility, I would assess the liability for Mr. Marcil's personal injuries at 20%. In assessing his general damages, the only evidence of long term prognosis for Mr. Marcil is Dr. Bourgon's medical report dated January 17th, 1997. He indicates that Mr. Marcil should be able to go through a successful rehabilitation program and should be able to eventually function reliably and work on a full-time basis. Certainly it would appear from the evidence of both experts that Mr. Marcil's condition can be maintained and controlled with proper medication. I would assess his general damages at \$40,000. As indicated earlier, the evidence indicates that the plaintiff's special damages are in the range of approximately \$35,000. Accordingly, the defendants' responsibility is 20% of the plaintiff's general and special damages over and above what the plaintiff would be entitled to for hardship and inconvenience.

7. Punitive Damages

[para276] All of the plaintiffs have made a claim for punitive damages against the defendant Lafarge. The Marcil plaintiffs have also made a claim for punitive damages against the defendant Bertrand. Originally, only the Marcil plaintiffs had made a claim for punitive damages. During the course of the trial, after the defendant Lafarge was ordered to disclose communication between it and its ready-mix clients in southern Ontario, the other plaintiffs made application to amend their pleadings to allow a claim for punitive damages. Given the provision of the Rules of Practice pertaining to amendments to pleadings, the application by these plaintiffs to amend their pleadings was allowed.

[para277] The evidence which forms the basis for their punitive damage claim is enumerated at page 140 on of the Plaintiffs' Written Submissions. This evidence is again reviewed in the Plaintiffs' Reply Submission pages 67 to 78. I have reviewed most of this evidence in my discussions about the negligence of the defendant Lafarge. Basically, the plaintiffs argue that Lafarge's failure to perform proper testing, both before and during the introduction of FA, justifies an award for punitive damages. Further, Lafarge's conduct throughout the litigation, be it at discovery or during the trial, and especially their failure to provide relevant information to the other parties, are also reasons for a punitive damage award.

[para278] The leading case on punitive damages is the Supreme Court of Canada decision of *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130. Cory J. discusses some of the general principals of punitive damages one of which is that punitive damages are awarded, not to compensate the plaintiff, but to punish the defendant and to deter the defendant and others from acting in an outrageous or reprehensible manner. At page 1208 of his decision, he states:

Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the Court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. There are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

[para279] Obviously, before an award for punitive damages is made, close review of the facts and circumstances of each case has to be made when the above principles are applied. In the *Hill v. Church of Scientology of Toronto*, supra, the Supreme Court had no difficulty in concluding that the jury was fully justified in awarding punitive damages against the defendant Church of Scientology for its outrageous conduct towards the plaintiff Hill. In a recent decision of February 1999, the Court of Appeal in *Whiten v. Pilot Insurance Co.* (1999), 42 O.R. (3d) 641 also felt the jury was justified in awarding punitive damages for the defendant's reprehensible conduct. However, it reduced the punitive damage award from \$1 million dollars to \$100,000. The Court of Appeal also discussed in that decision a number of other more modest punitive damage awards against insurance companies. Obviously, the Courts take the position that, in contracts of insurance between the insurer and its insured conduct is one of utmost good faith. Therefore, when the insurer, such as Pilot Insurance, denies the plaintiff's claim in the face of its own investigation and evidence, then it is acting in bad faith and the Courts have no hesitation in punishing such conduct. On the other hand, the Court refused to award punitive damages for a case of wrongful dismissal in *Vorvis v. The Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085. In the case of *Murano et al. v. The Bank of Montreal et al.* (1998), 41 O.R. (3d) 222, the Court of Appeal agreed with the trial judge who refused to make a punitive damage award. In that case, the Bank had wrongfully seized the debtor's property without giving reasonable notice and, further, disclosed to third parties confidential information involving the debtor. It is to be noted in that case that the plaintiffs were awarded a judgment in excess of \$4 million dollars and solicitor/client cost of close to one half million dollars.

[para280] Does the evidence before me support the plaintiffs' claim that the defendants' conduct was malicious, oppressive and high-handed? I have no difficulty in concluding that there is no such evidence against the defendant Bertrand. Accordingly, the punitive damage claim by the Marcil plaintiffs against Bertrand will be dismissed.

[para281] The plaintiffs' claim for punitive damages against the defendant Lafarge relies on far more extensive evidence that I have already reviewed in my findings on negligence. The question is, does it reach the level where it can be categorized as being malicious, oppressive and high-handed, that it offends the Court's sense of decency? Should the defendant Lafarge be punished over and above the award of damages and costs so as to deter this defendant or others from acting in a like manner? It is within this context that the evidence against Lafarge must be analyzed.

[para282] When Lafarge started to market Type C FA, it was not marketing an inherently bad product. When it convinced Bertrand to use FA in its concrete, it did not deliberately set out to undermine the quality of that product. It was negligent for reasons already given, but can its conduct be categorized as malicious and high-handed? I have to consider that FA was used in concrete for many years all over the world without problems. Lafarge did some testing and used Type C FA in concrete in southern Ontario without the widespread problems experienced here. Given its previous experience with FA, including its own testing, it was not altogether predictable that inserting FA in Bertrand mix would result in such bad concrete. In other words, interpreting the evidence at its very worst hardly supports the conclusion that Lafarge set out to market a bad product. While I have already expressed some strong concerns about Lafarge's conduct, I have some difficulty in concluding that it reaches the

level as to be considered egregious. My findings in negligence will result in Lafarge having to pay damages involving millions of dollars. Certainly this should act as a strong deterrent to this defendant and others.

[para283] Lafarge's relationship with the plaintiffs could not be put in the same category as the line of cases dealing with insurance contracts. In those cases, the insured was in a position of power over the insured that was in a vulnerable position, entirely dependent on the insurer when the loss occurred. For these reasons, in every insurance contract, an insurer has an implied obligation to deal with the claims of its insured in good faith. (See *Whiten v. Pilot Insurance Co.*, supra. I have already found that Lafarge breached its duty towards the consumer, but I could not conclude that there is a bad faith claim as exists in insurance contracts.

[para284] The plaintiffs also argue that Lafarge's conduct during the course of the litigation is further evidence of contempt by Lafarge for the litigation process and the rights of the plaintiffs. The plaintiffs cite the non-disclosure by Lafarge during the discovery process of evidence of complaints by ready-mix clients about their concrete. There is no doubt that Lafarge could have been more forthcoming and such evidence should have been disclosed to the other parties during the discovery process. Nevertheless, such evidence did not reveal problems nearly as serious or widespread as experienced in eastern Ontario. Generally speaking, conduct by a litigant such as non-disclosure is not sufficient reason to award punitive damages. There are other ways, such as costs, to censure such conduct.

[para285] When Lafarge's conduct is compared to that of the defendants in cases like *Hill v. Church of Scientology*, supra, and *Whiten v. Pilot Insurance*, supra, it is obvious that it does not reach the level of egregious conduct achieved by those defendants. I must, therefore, reluctantly dismiss the plaintiffs' claim for punitive damages.

VIII. PRE-JUDGMENT INTEREST

[para286] I will require some clarification on the part of the plaintiffs on the question of pre-judgment interest. All of the plaintiffs have claimed pre-judgment interest in accordance with the Courts of Justice Act. Unfortunately, in their submissions they appear to be suggesting an award different from what is claimed. The Marcil plaintiffs' written submissions are silent on the question of pre-judgment interest. The Alie and Duval plaintiffs are claiming pre-judgment interest on replacement cost starting December 1st, 1997, which obviously is not in accordance with their claim. Has there been some agreement with the defendants on the question of interest for replacement costs? These same plaintiffs claim interest in accordance with the Courts of Justice Act for the damages for hardship and inconvenience. The Program plaintiffs are claiming pre-judgment interest from the date when their experts submitted their reports in August 1992. Considering that this plaintiff is a non-profit entity, should it be awarded pre-judgment interest on monies that have not yet been expended to repair the plaintiffs' foundations? I appreciate there have been written submissions by the parties on some of these issues, but I will require clarification if I am to apply a consistent remedy to all plaintiffs.

IX. COSTS

[para287] I'll be asking the parties to make brief written submissions on the question of cost. Some of the issues that should be addressed by the parties are as follows:

- * Are the plaintiffs entitled to cost on a party party or on a solicitor client scale?
- * Should I fix the costs or should the matter of amount be determined by either assessment officer or the Master? Some of the factors to be considered on this issue are the number of parties and the length of the proceedings.
- * Should any of the parties be penalized on costs as a result of their conduct, either during the discovery process or the trial?

X. THE THIRD AND SUBSEQUENT PARTY ACTIONS: THE ACTIONS BETWEEN THE DEFENDANTS AND THEIR INSURERS

1. An Overview

[para288] Having dealt with the defendants' liability and the plaintiffs' entitlement to damages, I now have to consider whether the defendants are entitled to be indemnified by their insurers. The defendant Bertrand had started a third party action against five insurance companies with whom they had insurance contracts during the period 1986 to 1992. The defendant Lafarge sued some 18 insurance companies with whom they had insurance contracts for the same period. Lafarge is now proceeding against only 16 of these insurers. As can be expected, rights and obligation of the respective parties are generally found within the provisions of the particular policies. To quote Madam Justice McLachlin in *Reid Crowther and Partners Limited v. Simcoe and Erie General Insurance Co.*, [1993] 1 S.C.R. 252 at page 268-269:

In each case the Courts must examine the provisions of the particular policy at issue (and surrounding circumstances) to determine if the events in question fall within the terms of coverage of that particular policy. This is not to say that there are no principles governing this type of analysis. Far from it. In each case, the Courts must interpret the provisions of policy at issue in light of general principles of interpretation of insurance policies, including, but not limited to:

1. the contra proferentum rule
2. the principle that coverage provision should be construed broadly and exclusion clauses narrowly and,
3. the desirability, at least where the policy is ambiguous, of giving effect to the reasonable expectation of the parties.

[para289] I am indebted to all counsel involved who have thoroughly canvassed all issues and authorities in this area. They have submitted thousands of pages of jurisprudence that emphasizes once again that insurance litigation is alive and well, both in Canada and in the United States. Counsel for the Royal Insurance quoted a passage from a decision of Judge Warriner in *Stone and Webster Engineering Corp. v. American Motorists Insurance Co.*, 458 F. Supp. 792 (E.D. Virginia 1978) who likened the defendants formidable series of obstacles in attempting to fix liability on the insurer to the voyage of Odysseus, the great navigator of antiquity, who had to overcome all sorts of terrible hazards to make it back home to Ithaca. I feel like Odysseus. Certainly the analogy applies to the trial judge. I will have to navigate through all of the written submissions of the parties, adjudicate on all the issues before finally arriving at the end of this judgment.

[para290] Obviously, Courts in different jurisdictions have interpreted insurance policies differently. Generally, Courts in Canada have interpreted comprehensive general liability (C.G.L.) policies more narrowly than in the United States. Also, in the United States, interpretation of such policies has not always been consistent. Differing interpretations very often are not based on different facts. The challenge for this Court will be to interpret these insurance contracts using the guidance of the jurisprudence to arrive at a "common sense" result. Many of the issues involving Bertrand and their insurers are similar to that of Lafarge and their insurers. Nevertheless, because there are some issues that are different, I will deal with both defendants separately.

2. Bertrand and their Insurers

A. The Facts

[para291] After Bertrand was sued for damages by the plaintiff, it started third party proceeding against its C.G.L. insurers for indemnification. Bertrand's action was against five different insurers who provided coverage both as primary and umbrella insurance. The companies involved were Canadian General, Guardian, General Accident, Chubb and Royal Insurance. Bertrand and its insurers filed an agreed statement of fact that has been marked as Ex. 564A. The relevant insurance policies between Bertrand and its insurers are to be found at Ex. 564B.

B. Insurance Limits and the Deductible

[para292] The following chart, found at page 89 of Bertrand's Written Submissions, sets out the insurance coverage available to Bertrand the various years from 1986 to 1992. This chart is a helpful guide in appreciating the insurance limit, both for the primary and umbrella insurance, and the various deductibles applicable for the different policy periods.

DATE	1986	1987	1988	1989						
PRIMARY	FIDELITY General	USF&G	USF&G	USF&G	(Canadian General)	(Canadian General)	(Canadian General)	(Canadian General)	General	General
COVERAGE	\$1 million	\$1 million	\$1 million	\$1 million						
DEDUCTIBLE	\$1,000 per occurrence	\$1,000 per occurrence	\$1,000 per occurrence	\$1,000 per occurrence						
UMBRELLA	Guardian	General	Chubb	Chubb	Accident	COVER	\$5 million	\$4 million	\$4 million	\$4 million
DEDUCTIBLE	Retained	Retained	Retained	Retained	* Limit	Limit	Limit	Limit	\$10,000	\$10,000 \$0 \$0
TOTAL	\$6 million	\$5 million	\$5 million	\$5 million	AVAILABLE COVERAGE LIMITS					
DATE	1990	1991	1992							
PRIMARY	Royal	Royal	Royal							
COVERAGE	\$1 million	\$1 million	\$1 million							
DEDUCTIBLE	\$1,000 per occurrence	\$1,000 per occurrence	Maximum	occurrence	occurrence	\$2,000	per	claim		
UMBRELLA	Royal	Royal	Royal							
COVERAGE	\$4 million	\$4 million	\$4 million							
DEDUCTIBLE	Retained	Retained	Retained	* Limit	Limit	Limit	\$10,000	\$10,000	\$10,000	
TOTAL	\$5 million	\$5 million	\$5 million	AVAILABLE COVERAGE LIMITS						

* The Retained Limit in the umbrella policies only becomes applicable if there is no underlying insurance, at which point the insured effectively becomes self-insured for the retained limit.

[para293] Bertrand is seeking to be indemnified by its insurers for all damages awarded to the plaintiffs which are found to be Bertrand's responsibility except for the actual costs of the concrete used to replace the deteriorating foundations. Bertrand is also seeking indemnification from its insurers for any interest on any judgment and costs. The issue as to the obligation of the insurers to defend Bertrand and defence costs have been resolved between the parties. There is also an agreement between Bertrand and its insurers that no submissions will be made regarding coverage relating to specific heads of damages claimed by the plaintiff until the judgment is issued.

C. The Issues

[para294] The issues that I have to decide can be summarized as follows:

- (i) What is the scope of indemnification of these policies? Is the cost of replacing the foundation covered?
- (ii) Do the exclusionary clauses in the various policies withdraw the claims from coverage?
- (iii) In which coverage period did the occurrence take place? Which trigger theory applies?
- (iv) Do the insurers have other valid defences such as misrepresentation, non-disclosure, and late reporting?
- (v) What insurance limits are available and what deductible is Bertrand obligated to pay?
- (vi) Other Issues

(i) What is the scope of indemnification of these policies? Is the cost of replacing the foundation covered?

[para295] In insurance law, the interpretation of policies involves a two step process. It is for the insured to demonstrate the claim advanced comes within the insuring agreement. If the insured has satisfied the burden in the first step, then the onus is on the insurer to establish that a claim that would otherwise be covered is excluded by some term in the policy.

[para296] The wording of the various C.G.L. policies are similar and are summarized in Bertrand's written submissions at Tab 1. Basically, all of these policies have what is called an "occurrence property damage" endorsement. In such endorsement, the insurer undertakes to pay on behalf of the insured all sums, which the insured shall become legally obligated to pay for damages as a result of an occurrence. Obviously, the interpretation of the words "property damage" and "occurrence" will be of primary importance to determine coverage.

[para297] Before proceeding with the interpretation of the various endorsements and exclusions in the policies, it is important to appreciate the accepted purpose of a C.G.L. policy. It is a well established principle of Canadian insurance law that comprehensive general liability policies are intended to protect the insured from liability for injury or damage to persons or property of others; they are not intended to pay for costs associated with replacing the insured's defective work and products, which are purely economic losses. (See *Privest Properties Limited v. Foundation Co. of Canada* (1992), 6 C.C.L.I. (2d) 23 (B.C.S.C.) at page 7; *Carwald Concrete v. General Security Insurance Co. of Canada* (1986), 17 C.C.L.I. 241 (Alta.C.A.); *Carleton Iron Works Ltd. v. Ellis Don Construction Ltd. et al.*, [1996] O.J. No. 2427, [1996] I.L.R. 13373 (Ont.Gen.Div.). In other words, C.G.L. policies are not performance bonds. They will not pay the insured to remove and replace its own faulty work of deficient product. They are intended to indemnify the insured in a situation where the deficient product causes damages to a third party's property. The principle appears to be straightforward enough. Unfortunately, its application by Courts in various jurisdictions can be somewhat confusing.

(a) Property Damage

[para298] The definition of property damage is very similar in all of these insurance policies. Basically, the insuring agreements are intended to respond to any injury to or destruction of real or tangible personal property. Examples of such property damage are the environmental clean up costs after oil spilled from a storage tank (see *Hildon Hotel 1963 Ltd. v. Dominion Insurance Corporation Ltd.* (1968), 66 W.W.R. 289 (B.C.S.C.)); the cleaning up of ground water which had been polluted by a leak of chemicals from a sawmill operation (see *Greenwood Forest Products Ltd. v. United States Fire Insurance Co.*, 133 D.L.R. (3d) 486, [1982] I.L.R. 5836 (B.C.S.C.); or the replacement of electrical ducting, plumbing and grounding wire which had been rendered useless when it was embedded in faulty concrete (*Carwall Concrete and Gravel Co. v. General Security Insurance of Canada* (1986), 17 C.C.L.I. 241 (Alta.C.A.)).

[para299] A review of the jurisprudence leads this Court to conclude that the process of determining if the property damage is covered by the policies is not simple and straightforward. It involves a step by step process taking into consideration the various issues raised by counsel for the insured and the insurers.

[para300] The first matter I have to consider is the cause of the defective concrete. Earlier in my judgment, I have made a finding that the insertion of FA in the concrete mix resulted in a chemical reaction that was the main cause for the deteriorating concrete. If my finding had been different and I had concluded that the concrete could not resist freeze-thaw because Bertrand had used an inferior mix such as too much water or poor quality sand, then my conclusion in interpreting the words "property" or "occurrence" could well differ from that made based on my findings.

[para301] The insurers argue here that the replacement of the defective foundation is not covered by their C.G.L. policies because all the damages and costs incurred are to replace Bertrand's faulty concrete. In other words, the policies do not cover the insured's own work product or workmanship, and the costs associated with replacing the foundation are basically an economic loss.

[para302] The insured's position is that Bertrand supplied defective liquid concrete that was made into residential foundation by the owners or contractors. They argue that the concrete was incorporated into a foundation, be it as walls or footings or cement floors, etc. In other words, they are saying the concrete foundation is more than just Bertrand's product and involves the placing and shaping of the concrete along with forms containing tie rods, sometimes reinforcing steel, anchor bolts, etc. Also incorporated in the foundation are the outside parging, and very often finished basements on the inside.

[para303] A brief review of some of the leading cases will help illustrate the type of property damage that is and is not covered by the C.G.L. policies. In the *Privest Properties* case, the Court denied coverage for the cost of repair and replacement of spray fireproofing material which was found to contain asbestos. The Court concluded that there was no personal injury or damage to other property and therefore all that was involved was the cost of repairing or replacing the defective work, which is considered to be pure economic loss.

[para304] Further illustration of this principle can be found in the case of *Bird Construction Co. v. Allstate Insurance of Canada* (1996), 36 C.C.L.I. (2d) 29 (Man.C.A.). In that case, the defective property was masonry cladding which detached from a multi-storey building and fell several floors to the ground below. The Court rejected the theory that this defect to that part of the building caused damage to the rest of the building. I had to deal with similar facts in *Carleton Iron Works Ltd. v. Ellis Don Construction Ltd.*, supra. In that case, a piece of the outside cladding of the building fell and damaged motor vehicles below. A further investigation revealed that the welding on the metal brackets supporting the cladding was defective and had to be replaced. The insured incurred considerable expense to remove and reinstall the remaining cladding in order to effect the repairs to the faulty welding, and sought indemnification from its insurers for these expenses. I rejected the insured counsel's argument that there was damage to the building as a result of the problems with the exterior cladding. I found that this did not constitute damage to property of others like the damage to the motor vehicles caused by the falling cladding. I concluded that there was no coverage when what is claimed basically are the costs associated with repairing or replacing the insureds' defective work. The defectively installed exterior cladding did not impair the structural integrity of the building itself. The building could be used by its occupants for its intended purposes.

[para305] Let's review briefly a number of decisions where the Courts have found that damage to property was covered by the C.G.L. policies. One of the decisions which has been relied on by a number of subsequent cases is *Attorney General of Ontario v. Fatehi*, [1984] 2 S.C.R. 536. In that case, a claim was made for cleaning and repairing a highway that had been made impassible as a result of debris and gasoline strewn along the roadway and caused by the negligence of the respondent. The issue was

whether there had been damage to property or simply pure economic loss. Estey J. writing for the majority stated at 5441 as follows:

It is said by the respondent, and by the majority below, that the appellant must fail as its loss was pure economic loss, thus far unrecoverable at law. Whether that is so depends upon a question of both fact and law. On the facts as agreed, the road was blocked by the negligent actions of the respondent. It ceased to be a road in the sense of traffic-carrying facility.

The appellant as owner of the road has thereby suffered damage to its property.

[para306] In *Gulf Plastics Ltd. v. Cornhill Insurance Co. Ltd.*, [1990] B.C.J. No. 1541, [1990] I.L.R. 12644 (B.C.S.C.), aff'd (1991), 3 C.C.L.I. (2d) 203 (B.C.C.A.), the Court held there was property damage and insurance coverage where an ingredient used to manufacture film in plastic bags for the frozen food industry was defective, the plastic film was rendered useless for the purpose for which it was intended. The insured customer, as owner of the film supplied by the insured, suffered damage to its property because the film could not fulfill its intended purpose.

[para307] Another helpful precedent is the case of *Carwald Concrete Gravel and Concrete Ltd. v. General Security Insurance Co. of Canada*, supra. This case involved faulty concrete in the construction of a gas processing plant. The plant was to be constructed on a concrete pad. The plaintiff Carwald, a ready-mix contractor, supplied the concrete that was poured over electrical ducting, grounding wire and plumbing, which was embedded in the concrete. The concrete that was placed did not meet contractual specifications, due to a defect in the cement supplied by the cement supplier. The entire pad underlying the area including all of the embedded material was removed. The Court of Appeal found that the pouring of defective concrete made the embedded material useless. This constituted physical injury to tangible property. The Court found that the concrete supplier could not recover from its insurer for the defective concrete itself. What it could recover was all reasonable costs of placing its customer in the position in which it was before the defective concrete was poured.

[para308] Whether there is or is not coverage will depend on the facts of each case. Clearly if the defective product becomes part of the whole of a third parties product, or is incorporated in a third parties product and can't be removed or repaired without either rendering the third parties product useless or damaging it, the Courts have concluded that that is property damage and coverage will follow.

[para309] In following the sequences of events here, insertion of Lafarge's faulty FA into Bertrand's concrete would result in property damage suffered by a third party, that is Bertrand. Obviously, the problem cannot be resolved by attempting to remove the FA from Bertrand's concrete. I would have no difficulty, therefore, in concluding there had been property damage resulting in coverage.

[para310] Proceeding to the next step, has Bertrand's faulty concrete been incorporated or become part of the plaintiffs' foundation basically rendering the plaintiffs' property useless? The insurers seem to be suggesting that the concrete foundation is comprised of only Bertrand concrete, therefore, the foundations can be replaced and the costs associated with replacing the foundations is only an economic loss. I have some difficulty in following that reasoning. The evidence before me clearly suggests that the foundations were constructed by the forming contractors. They erected the forms, placed the concrete and were in charge of the consolidation and curing of the concrete. In some of these foundations there were tie rods, reinforcing steel and in most cases anchor bolts imbedded in the concrete. The plaintiffs' homes were then built and anchored to the foundation. Parging was placed by another subcontractor on the outside of the concrete foundations. On the inside, most of the plaintiffs had finished basements. How can Bertrand possibly remedy the problem of faulty concrete without destroying the foundation and most other third-party property attached to the foundation.

[para311] This situation is much different than the cases cited dealing either with insulation containing asbestos or the exterior cladding of a building. The structural integrity of the buildings in those cases was never threatened. In this case, the faulty concrete became incorporated in the foundation and the faulty foundation was incorporated into the home and the very structural integrity of these houses is threatened. If the foundations are not replaced they will collapse. That is not the case with faulty exterior cladding.

[para312] Bertrand concedes that it cannot be compensated from its insurers for replacing the defective concrete, but the balance of the damages claimed by the plaintiffs would be what is referred to in these policies as third party products. Given the evidence before me, I have no difficulty in concluding that property damage as defined in the policies includes most of the property damage claimed by the plaintiffs.

(b) Occurrence

[para313] The next matter that the Court has to determine on the issue of coverage is whether the property damage took place as a result of an "occurrence"? In the various insurance policies there are a few nuances in the definition of the word "occurrence". Generally, occurrence means "an accident including continuous or repeated exposures to conditions neither expected nor intended by the insured". The insurers have suggested that the faulty concrete was not accidental because it resulted from the negligence of the defendants. A number of cases have been cited in support of that proposition among others, *Carleton Iron Works*, supra; *Kitchener Silo Inc. v. Cigna Insurance of Canada*, [1991] O.J. No. 280, [1991] I.L.R. 12764 (Ont.Gen.Div.); or *Erie Concrete Products Ltd. v. Canadian General Insurance*, [1969] 2 O.R. 372 (H.C.). It is suggested by the insurers that when a product supplied simply fails to function properly, it is not an accident or an occurrence. One does not have to do any in depth research of insurance law to conclude that in most cases where an accident or occurrence takes place there is usually negligence on the part of somebody. What usually takes it out of the realm of accident or occurrence is when there is a finding of intent to cause that loss or a realization and assumption of the risk of that loss. *Canadian Indemnity Co. v. Walkem Machinery and Equipment Ltd.*, [1976] 1 S.C.R. 309.

[para314] A reading of the cases cited by the parties can be an exercise in confusion and frustration. The factual differences in those cases leading to different conclusions as to whether in fact there had been an occurrence or an accident are very often very subtle, and in fact sometimes non-existent. I can appreciate the frustration of counsel. Strong precedents can be found no matter what side of the issues the parties are. On the facts here, I do not think there can be any doubt that what took place was an occurrence within the meaning of the policy. The product that was inserted into Bertrand's concrete was not inherently bad. I have already made a finding that Lafarge and Bertrand were both negligent, but I could hardly conclude that they deliberately sold an inferior product to the plaintiffs. The damage that took place to the plaintiffs' foundations was certainly not expected or intended

by the defendants. My earlier findings on the evidence leads me to conclude that the damage caused to the plaintiffs' property was the result of an occurrence within the meaning of the policies.

(c) What is the effect of Bertrand not having a "rip and tear" endorsement in their insurance policies?

[para315] The parties in their agreed statement of fact (Ex. 564A) set out the facts re rip and tear endorsement in paragraphs 14 and 15. All of the insurers take the position that all of the policies would have granted Bertrand coverage to respond to the plaintiffs' damages had there been a rip and tear endorsement. They go on to argue that Bertrand's policies not having this endorsement do not then afford Bertrand coverage for the plaintiffs' damages. It is further acknowledged in the agreed facts that there is no standard rip and tear endorsement and the scope of any such endorsement required is dependent on the coverage provided in the policy, absent such endorsement.

[para316] Given the limited facts on this issue, the relevancy of the insurers' argument is somewhat tenuous. To accept the insurers' argument, I would have to conclude that the policies without the rip and tear endorsement do not afford Bertrand coverage. Further, there is no standard rip and tear endorsement and I have no idea what type of endorsement was being offered to Bertrand back in 1984, and whether such endorsement would have extended Bertrand's coverage. Would a rip and tear endorsement in the policies be affected by the exclusionary clauses? To accept the insurers' proposition the Court would have to enter the realm of speculation. The issue of coverage has to be decided on the agreement between the parties and the evidence before the Court. I, therefore, cannot accept the insurers' proposition on this issue.

(d) Conclusion

[para317] As a first step, I find that the scope of indemnification of these policies cover Bertrand for the plaintiffs' damages.

(ii) Do the exclusionary clauses in the various policies withdraw the claims from coverage?

[para318] Having found that the policies covered the cost of replacing the foundations, I now have to determine whether the exclusionary clauses in the various policies remove these claims from coverage. Most of these exclusionary clauses are similar in all of the policies. I intend to deal individually with each exclusionary clause.

(a) Own Product Exclusion

[para319] This exclusion is referred to in various policies as either product itself exclusion or defective products exclusion or named insured products exclusion. All of these have similar definitions in the policies. Basically, this clause removes all insurance coverage for the defendants' own product. In view of my earlier findings, this exclusionary clause only emphasizes again that there is no insurance coverage for the cost associated with Bertrand supplying new concrete to the third parties. Bertrand has already acknowledged that. The damage to the foundation and other elements of the house would not be affected by the exclusionary clause in that it is damage to property of others and not the property of the insured Bertrand.

(b) Faulty Workmanship Exclusion

[para320] This exclusion has been entitled under different policies as "Own Work Exclusion", "Performance Exclusion", "Work Exclusion", etc. It is principally designed to exclude the insured's liability to repair or replace defective or deficient work product. This exclusion has been consistently applied to the cost of repairing or replacing the insured's work product. A clear example where this exclusion would apply was the case of Carleton Iron Works Ltd., supra, where the insured welded the brackets holding the cladding to the side of the building in a deficient manner. The damages that followed were as a result of faulty workmanship of the insured and, therefore, this exclusionary clause would have prevented insurance coverage.

[para321] The only possible way that this exclusionary clause could apply here would be if I had made a finding that the deficient concrete was a result of Bertrand's faulty workmanship. That was not my conclusion. Bertrand did no other work on the plaintiffs' homes. Accordingly, this exclusion clause does not affect coverage.

(c) Business Risk Exclusion

[para322] A number of the insured's policies have what is referred to as "Business Risk Exclusion". Some of the insurers argue that this exclusion removes insurance coverage for the plaintiffs' damages. They rely on the decision of Weedo v. Stone-E-Brick Inc., 81 N.J. 233, 405 A.2d 788 (S.C. 1979). Basically that case says that the replacement or repair of faulty goods or works is a business expense to be borne by the insured. I am not altogether convinced that this exclusion does anything different from the two previous exclusionary clauses. Bertrand has already acknowledged that there is no coverage to supply new concrete. Also, I don't read this exclusionary clause as removing coverage for damage to properties of third parties which I have already found here.

(d) Impaired Property Exclusion

[para323] This exclusion is found only in the Royal Insurance Policies. All of the jurisprudence on this exclusion is American and apparently Canadian Courts have never been called upon to interpret the exclusion. The counsel for Royal argued that the Impaired Property Exclusion excludes all costs incurred for repair or replacement of the insured's product even where the contemplated repair or replacement involves other non-defective parts or property, in this case, the cost of lifting the houses off the foundations. What Royal is saying basically is that if the third-party product is rendered less useful and is not physically damaged, then the coverage is excluded. It is clear that if there has been physical injury or damage to third-party property, the exclusion has no application. I have already made a finding that there has been physical injury to third-party property and, therefore, the exclusion does not remove coverage.

(iii) In which coverage period did the occurrence take place? Which trigger theory applies?

[para324] Having made a determination that the plaintiffs' property damage was caused by an occurrence and covered by the insurers' policies, I now have to ascertain which policy or policies provide coverage to the insured Bertrand. Ex. 564A sets out which primary and umbrella policies were in force between the years 1986 to 1992. Basically, Canadian General was the primary insurer for the years 1986 to 1990 and Royal for the years 1990 to 1992. For the umbrella insurers, there was a Guardian policy

for 1986, General Accident for 1987, and Chubb for the years 1988 and 1989. Royal was both the primary and umbrella insurer from 1990 to 1992.

[para325] Generally speaking, if a finding is made that property damage occurred within the period of a particular policy that policy will have been "triggered" and the insurer will be required to indemnify the insured in accordance with the coverage afforded by the policy.

[para326] The above principle appears simple enough, but its application in this case is not. The problem is that C.G.L. policies are occurrence based and the damage to persons or to property can arise long after the negligent act was committed. This difficulty was commented on by the Supreme Court of Canada in *Reid Crowther and Partners Ltd. v. Simcoe and Erie General Insurance Co.*, supra, McLachlin J. stated at p. 2623 as follows:

"Occurrence" liability insurance policies work reasonably well in covering insureds such as automobile owners and drivers. Where an automobile operator is negligent and thereby causes damages, the nature of the negligent act and the resultant damages are in almost all cases known upon the happening of the negligent act or shortly thereafter. But for insureds who are professionals such as doctors, lawyers, engineers, etc. damages can result (or be discovered) many years after a negligent act is committed. This is even more the case for manufacturers and other types of insureds who can cause damages by producing hazardous products or toxic waste. Therefore, for each of these types of insureds, insurers are at risk for an unknown number of claims that may be made many years after the expiry of a particular policy of "occurrence" liability insurance.

Compounding the uncertainty of these "long-tail" risks caused to insurers was the evolving nature of law and science. The potential for future developments such as the increased availability and quality of scientific proof of causation of harm, expanded legal liability (e.g. "superfund" environmental legislation), and changes in the law as to quantum of damages, added to the uncertainty on the part of insurers as to the likely number of claims that would be made against their insureds in the future, as well as the unlikely amount of damages per claim for which individual insurers would have to provide indemnity.

[para327] A determination of which policy has been triggered in our circumstances is not a straightforward exercise. The plaintiffs' foundations were poured between June 1986 and April 1988. I have made a finding that the damage was caused by the insertion of FA into the Bertrand concrete resulting in a chemical reaction after the foundations were subjected to cyclic wetting and drying. A freeze-thaw process in areas where the concrete was completely saturated exacerbated the damage. The damage was manifested to the homeowners at different times (see Ex. 19). The damage over time was continuous and progressive until determination was made in 1992 that all of the foundations would have to be replaced.

[para328] The parties have canvassed extensively Court decisions on this issue. The common position that existed amongst the insurers up to this point has been broken. Not surprisingly, they are advocating different trigger theories which would exclude their policies from most, if not all, liability. Fortunately for the insurers, they have ample jurisprudence from Canada and especially the United States to support their theory.

[para329] The Courts in Canada and the U.S. have not consistently agreed upon a single theory by which determination of when occurrences took place may be made in order to identify which policy or policies are triggered. This is not surprising. The Courts in both Canada and the U.S. have done what Courts generally do and, that is, make findings that achieve the most equitable results. Therefore, in different circumstances, they have invoked different trigger theories. Over time, basically four theories have been applied by the Courts. They are:

(a) The Exposure Theory: coverage is triggered by the first exposure to the conditions which causes bodily injury or property damage.

(b) The Manifestation Theory: coverage is triggered or property damage is said to occur when the plaintiff first becomes aware of the property damage or the injury.

(c) The Injury In Fact Theory: coverage is triggered when property damage or injury actually occurs, whether it was observable or not.

(d) The Continuous or Triple Trigger Theory: the injury or property damage is said to occur from the time of the initial exposure to the time of the manifestation or discovery of the damage. I intend to review briefly each of these theories and determine which is most applicable in our circumstances.

(a) The Exposure Theory

[para330] Under the exposure theory, the mere exposure to harmful condition will be sufficient to cause damage within the meaning of a C.G.L. policy and determine the date of damage. In other words, if I was to accept this theory I would have to conclude that the insurers on risk at the time that the foundations were first poured and exposed to the condition which later caused the damage should bear Bertrand's entire percentage of the plaintiffs' loss. The insurers who are the strongest advocate of this theory are Royal Insurance and Chubb Insurance. They argue that the application of the exposure theory is consistent with the wording of their C.G.L. policy and the weight of the Canadian case law. A number of Canadian cases are cited at page 59 of Royal's submissions. The leading case which has been referred to by all parties is *Cansulex Ltd. v. Reid Stenhouse Ltd.* (1986), 18 C.C.L.I. 24 (B.C.S.C.). This case involved the improper loading of sulfur aboard a ship in Vancouver harbour that resulted in the corrosion of the hull. The corrosion became apparent only after the ship left port. The policy contained a provision that provided an indemnity would not be available for loss that occurred at sea. Basically, the Court had to decide between the exposure theory and the manifestation theory that was being advocated by the insurer. The Supreme Court held that the property damage occurred at the harbour at the time the hull was exposed to the wet sulfur. In other words, the Court found that the corrosion process began as soon as the wet sulfur came into contact with steel.

[para331] In reviewing the submissions of the parties and the Canadian case law, I find there are a number of very good reasons for not applying the exposure theory in this case. I am of the view that the plain wording of the policies provide that there will be coverage for property damage occurring during the policy period. The evidence before me clearly indicates that the property damage did not all occur, during the first year or two after pouring of the foundations. The damage occurred over several years, was continuous and progressive to a point where tests showed in 1992, that the foundations would have to be replaced. Using the exposure theory to conclude that the policies in force in the years 1986, 1987 and 1988 would bear the full burden of the plaintiffs' loss would be inconsistent with the wording of the policies.

[para332] Looking at the history and the development of the exposure theory, it is obvious that it was developed by the United States Courts to accommodate the asbestos bodily injury claims. At that time, the only competing theories were the exposure theory and the manifestation theory. By adopting the exposure theory, the Courts maximized insurance coverage. It could justify its acceptance of the exposure theory on the basis that asbestosis disease consisted of tiny injuries, which accumulated over time, that an individual was exposed to asbestos. Had the Court accepted the manifestation theory, the company in question would have been essentially uninsured: *Insurance Co. of North America v. Forty-Eight Insulation Inc.* 633 F.2d 1212 (6th Cir. 1980).

[para333] A number of learned authors and subsequent decisions have been critical of adopting the exposure theory that applied to bodily injuries to cases involving property damage: *Re Privest Properties*, supra.

[para334] A number of the cases cited by the proponents of the exposure theory involve cases dealing with first party property insurance policies. Here we are dealing with third party liability insurance. The wording in both of these policies is not the same and could well explain why the Courts have accepted the exposure theory. See *University of Saskatchewan v. Fireman's Fund Insurance Co. of Canada*, [1998] 5 W.W.R. 276 (Sask. C.A.).

[para335] In conclusion, given the evidence from experts and the homeowners that the damage was ongoing and progressive, I find that the application of the exposure theory to trigger coverage would be inconsistent with the wording of the policies and inequitable to the insurers who had policies in effect for the years 1986, 1987 and 1988.

(b) The Manifestation Theory

[para336] According to the manifestation theory, the policies in effect at the time of the discovery of the damage would be obligated to respond to the claim. The strongest advocate of this theory is the insurance company Canadian General. It argues that the date of manifestation would be in 1992, after the experts for the Program had tested the concrete and concluded that there was a major structural defect, and the foundations would have to be removed and replaced. If I were to accept Canadian General's proposition, then Royal's Insurance policies would be triggered as it was the primary and umbrella insurers for the years ending December 31, 1991 to December 31, 1992.

[para337] As can be expected, Royal Insurance spent considerable time and effort refuting the Manifestation Theory. It goes on to argue that, even if the Court applied the Manifestation Theory, there is considerable evidence from the plaintiffs (see Ex. 19) and from experts that the manifestation of the damage was observed prior to its coverage which started December 31st, 1989. Accepting this proposition from Royal would mean that Canadian General's policies prior to 1989 would be triggered.

[para338] In reviewing the case law, it's obvious that there are some advantages to the Manifestation Theory. In situations like this case where the damage is progressive and cumulative, it is usually easier to determine the date of the manifestation of the damage than the dates when the damage actually occurred. Very often in insurance cases when the damage is discovered, sometimes many years after it has actually taken place, Courts find such a date to be not only convenient but equitable towards the insured. In other words, when reviewing the evidence here, I am convinced that most Courts would find that the limitation period would start after 1992, when the plaintiffs ascertained that there was serious damage and the foundations would have to be replaced.

[para339] Despite the advantages of applying the Manifestation Theory, there are a number of very compelling reasons why it should be rejected in our circumstances. The cumulative evidence before me demonstrates that the damage to these foundations took place between the years 1986 and 1992. The damage was progressive and cumulative. To apply the Manifestation Theory would be inconsistent with the wording of these C.G.L. policies and the intentions of the parties to the contract. The C.G.L. policy requires that the injury or damage take place during the policy period. If I applied the Manifestation Theory on our facts, it would mean that the policies in existence in 1992 would be triggered and they would be responsible for the damage, which was in fact occurring during earlier policy periods. That would be not only unreasonable, but also inequitable. A number of learned authors on this issue have questioned whether it is fair that the last carrier on risk would have to carry the burden of defence and indemnity. Similarly, to conclude that all the damage had taken place prior to December 31st, 1989 is not supported by the evidence. Finally, recent decisions from Courts in this country have rejected the Manifestation Theory (see *University of Saskatchewan v. Fireman's Fund Insurance Co. of Canada*, supra).

[para340] Therefore, for the reasons cited above, I would reject the application of the Manifestation Theory.

(c) The Injury In Fact Theory

[para341] Under this theory, coverage is triggered in periods when the bodily injury or property damage actually occurs. Damage need not be manifest, but must exist in fact. The main proponents of this theory are the insurers Guardian, Royal and to some degree the defendant Bertrand. One compelling reason for the application of the Injury In Fact Theory is that it is the most consistent with the actual wording of the C.G.L. policies. A leading case on the Injury In Fact Theory is *American Home Products Corporation v. Liberty Mutual Insurance Co.* 565 F. Supp. 1485 (S.D.N.Y. 1983), Affd. 748 F.2d 760 (2nd Cir. 1984). The case involved a number of suits against a pharmaceutical company for personal injury. At page 1497, the Court states as follows:

An exposure that does not result in injury during coverage would not satisfy the policy's terms. On the other hand, a real but undiscovered injury, proved in retrospect to have existed at the relevant time, would establish coverage, irrespective of the time the injury became manifest.

[para342] The Canadian author, Gordon Hilliker, in *Liability Insurance Law in Canada*, 2nd ed. (Toronto: Butterworths, 1996), writes at p. 155 as follows:

The only one of these trigger theories which is entirely consistent with the CGL policy wording is, of course, the injury-in-fact theory. If it is possible, in retrospect, to pinpoint the date or dates when the injury or damage actually took place, then the other theories become irrelevant, for the wording of the CGL policy is clear - it refers to bodily injury or property damage during the policy period. An exposure to a hazard within the policy period which causes damage outside the policy period does not fit this wording. Nor should the manifestation of damage in one policy period relieve the previous insurer when the damage actually took place while that previous policy was in force.

Certainly there has been a number of recent Canadian decisions which have applied the Injury In Fact Theory and they are referred to in Guardian Insurance's written submissions at page 51.

[para343] The problem in applying only the Injury In Fact Theory to this case is determining when the damage actually occurred. My findings as to causation, the expert evidence and the observations of the plaintiffs (see Ex. 19) would support a finding that the damage actually started the same year the foundations were poured, that is 1986, 1987 and 1988. The evidence would also support a finding that the damage continued, was progressive and cumulative resulting in a finding by the experts in 1992 that all of the plaintiffs' foundations would have to be replaced. Obviously, the injury in fact is taking place over a number of years covering different policy periods. Attempting to apportion liability to various policy periods would be impossible. For example, what percentage of the damage occurred in the various years from 1986 to 1992? Given that the application of the Injury In Fact Theory alone cannot respond to our facts, I have to look at the Continuous or Triple Trigger Theory.

(d) The Continuous or Triple Trigger Theory

[para344] Under this theory, injury or damage to property is said to occur from the time of the initial exposure to the harmful substance to the time that injury is discovered. It often has been described by authors as the "continuous or repeated injury in fact theory". There are a number of very good reasons why the application of this theory is best suited to our facts.

[para345] There is ample case law where the continuous trigger theory has been applied. See *Gruol Construction Co. Inc. v. Insurance Co. of North America*, 524 P.2d 247 (Wash. App. 1974). In *Surrey (District) v. General Accident Assurance Co. of Canada* (1994), 92 B.C.L.R. (2d) 115 (S.C.), at p. 124, Allen J. stated:

In view of the difficulties in allocating the damage, I conclude that if there were a series of known insurers on the risk, it would be appropriate to hold them jointly and severally liable to the Insured for the entire risk.

This decision was sustained on appeal. Another helpful decision in the continuous trigger is *Zurich Insurance Co. v. Trans-America Insurance Co.* 34 Cal. Rptr. 2d 913 (Cal. App. 4th Dist. 1994). At page 922, the Court concluded:

The manifestation rule developed in the first party context is not appropriately applied across the board. Instead, in this liability context, a "continuing injury" trigger should be used, because property damage occurred beginning in 1976 and continued throughout the filing dates of the underlying lawsuits. Because these claimants alleged continuous and repeated exposure to a continuing series of loss-causing events, under these policies, a continuous trigger of coverage should apply. All carriers who were on the risk from the inception of harm to the time the loss was no longer contingent should be liable to the insured. And, as we discussed above, the loss could still be deemed contingent so long as it was unknown when the insurance was issued whether the insured's activity would result in a claim for property damage that occurred within the policy period.

[para346] On our facts, applying this principle, all of the primary and, if necessary, umbrella insurers from 1986 to 1992 would have their policies triggered. Clearly, after the experts on behalf of the Program plaintiffs completed their testing in 1992, the loss was no longer contingent. They concluded that all of the plaintiffs' (Program) foundations would have to be replaced.

[para347] Another helpful precedent in applying the Injury In Fact and the Continuous Trigger Theory is a case of *Sentinel Insurance Co. v. First Insurance Co. of Hawaii*, 875 P. 2d 894 (Hawaii 1994). Conceptually, the injury-in-fact trigger and the continuous trigger are on the same continuum and are complimentary, rather than mutually exclusive. In that case, the Court states as follows at p. 917:

[W]here injury-in-fact occurs continuously over a period covered by different insurers or policies, and actual apportionment of the injury is difficult or impossible to determine, the continuous injury trigger may be employed to equitably apportion liability among insurers.

That decision has been applied in the U.S. in subsequent cases.

[para348] A number of the parties have brought to my attention the case of *Montrose Chemical Corporation of California v. Admiral Insurance Co.* 913 P.2d 878 (Cal. 1995). I found this decision very helpful in understanding the wording of the C.G.L. policies and the relationship with the different trigger theories. To quote from the decision at p. 903:

Indeed, the drafting history of the standard occurrence-base CGL policy reflects that not only did the drafters understand the term occurrence to mean an accident or exposure to injurious conditions resulting in the occurrence of damage or injury during the policy period, they specifically considered and rejected the suggestion that language establishing a manifestation or discovery trigger of coverage be incorporated into the standard form CGL policy. Among the reasons relied on for rejecting the incorporation of such limitations into the standard definition in the coverage clauses were several stated equitable concerns: the difficulty of applying such limitations or requirements in cases of continuing damage or injury over the course of successive policy periods, the uncertainty of who would bear the burden of discovery requirements (i.e., the insured or third party claimants), the arbitrariness, from the carrier's perspective, of telescoping all damage in a continuing injury case into a single policy period, and the fear that policyholders could be disadvantaged by such an approach. In short, the insurance industry is on record as itself having identified several sound policy considerations favouring adoption of a continuous injury trigger of coverage in third party liability insurance context.

(e) Conclusion

[para349] Therefore, in applying a combination of Injury in Fact and Continuous Trigger Theory, I have the comfort of knowing that they are the theories that are:

- * the most consistent with the language of the policies and the intention of the parties;
- * the most equitable to both the insured and the insurers;
- * the remedy that was intended by the insurance industry in drafting C.G.L. policies.

(iv) Do the insurers have other valid defences such as misrepresentation, non-disclosure, and late reporting?

(a) Misrepresentation and Non-Disclosure

[para350] Bertrand's insurers, with the exception of Canadian General, have pleaded that the failure by Bertrand to disclose the facts involving the FA and problems with the foundations constitutes sufficient grounds which would allow them to void their respective policies. Two of the insurers, Royal and Chubb, have maintained this position and set out extensive argument in their written submissions.

[para351] The facts which are used in support of the insurers position regarding misrepresentation are set out in paragraphs 2, 3, 4, 10 and 11 of the Agreed Statement of Fact between the parties (see Ex. 564A). Basically, they are matters dealing with FA, problems with the foundation, Bertrand's investigation and cost of attempted repairs of the foundations.

[para352] When Courts deal with such matters as misrepresentation or non-disclosure, they usually proceed in a two step process. First, the Court determines whether there has been misrepresentation or concealment, and if the answer is negative that ends the matter. If the Court answers in the affirmative, then it has to determine whether the misrepresentation or concealment is material (see *Mutual Life Insurance Co. of New York v. Jeannotte* (1943), 10 I.L.R. 37 (S.C.C.)). The test as to materiality was set out in *Mutual Life Insurance Co. of New York v. Ontario Metal Products Co.*, [1925] A.C. 344 (P.C.) and to quote at page 351-352:

[I]t is a question of fact in each case whether, if the matters concealed or misrepresented had been truly disclosed, they would, on a fair consideration of the evidence, have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium.

[para353] The Supreme Court of Canada in the case of *Victory (Rural Municipality No. 226) v. Saskatchewan Guaranty and Fidelity Co.*, [1928] S.C.R. 264 stated that a misrepresentation or a concealment of a material fact, even if innocently made, will render the contract voidable.

[para354] The test as to misrepresentation or non-disclosure is an objective one. In other words, would a reasonable person in the applicant's position have concluded that there were circumstances which were likely to give rise to a claim (see *Sayle v. Jefco Insurance Co.* (1984), 9 C.C.L.I. 54 (B.C.S.C.); *Surrey (District) v. The General Accident Assurance Co. of Canada*, [1996] B.C.J. 849, [1996] I.L.R. 1-3325 (B.C.C.A.)).

(b) Insurer's Position

[para355] The insurer's argue that they should be entitled to void all of their policies. Their position is that the facts existing and within Bertrand's knowledge, starting in 1987 and increasing with each passing year, made it imperative for Bertrand to disclose this information when applying for insurance or to renew their insurance policy with the insurer Royal. In other words, a reasonable person in Bertrand's position would have appreciated that the cumulative effect of these facts was material to the risk and made it imperative for Bertrand to disclose these facts to the insurance co.

[para356] The facts in support of Royal's position are set out in great detail in pages 152 to 163 of their written submissions. Basically these facts relate to the plaintiffs' observations summarized at Ex. 19. They also involved attempted repairs by Bertrand that totalled some \$13,000.00 in 1989, \$21,000.00 in 1990 and approximately \$1,000.00 in 1991 for a grand total of close to \$36,000.00. The facts also deal with Bertrand's use and disuse of FA, complaints to Lafarge, reports by Mr. Brown from Lafarge, engineering reports received from its customers and finally letters threatening litigation from customers.

[para357] I have heard evidence over a period of 16 months, including the evidence of the plaintiffs, and 15 or so experts. In retrospect, I could well conclude that Bertrand may be exhibiting some willful blindness in not disclosing these facts especially to Royal. But that's not the test. Rather I have to determine whether a reasonable person in Bertrand's position, not knowing the seriousness of the problem would have disclosed these facts to Royal. I have to judge Bertrand's conduct under the circumstances and in the context of the situation existing from 1987 to 1991 when it first purchased insurance and renewed the policies with these insurers.

[para358] Certainly there was nothing about the use of FA which warranted disclosure. There was a long history of the use of FA in concrete and no information was ever furnished by Lafarge indicating anything other than esthetic problems. A discontinuance of using FA in the floors was a result of customer complaints. Lafarge had advised Bertrand to expect some efflorescence as a result of using FA in the concrete. The customers complained and like many other manufacturers, Bertrand discontinued the use of FA to curtail dissatisfaction of the customers. It would be difficult to conclude that Bertrand should have advised their insurers of that fact when no claim could be anticipated.

[para359] Problems with the parging are in the same category. Originally Bertrand was told by Lafarge that problems with the parging were the result of workmanship on the part of the subcontractor. At no time was Bertrand ever advised by Lafarge or anyone else that the problems with the parging were the result of a serious and fundamental problem with the concrete. Between the years 1988 to 1991, Bertrand and Lafarge paid close to some \$36,000.00 in attempting to repair the parging. Should that have been disclosed?

[para360] Throughout this period Bertrand was told by Lafarge, one of the most important cement producers in the world, that there was nothing wrong with the concrete. At what point should Bertrand have disregarded the information it received from Lafarge and anticipated a claim requiring disclosure?

[para361] As I have stated before, that can be a difficult call. In the context of the overall problem of these foundations, the parging problems are rather miniscule and could be considered more of an esthetic problem. \$36,000 expended over a period of four years, when compared to the overall plaintiff damages is rather small.

[para362] Should Bertrand's investigation or the investigation of others known by Bertrand have finally completed the picture making Bertrand realize that a claim could be anticipated? One has to keep in mind that the seriousness of the problem was not appreciated until the experts for the Program made a full analysis of the concrete in 1992. Bertrand had never had that kind of problem before and, therefore, the various observations and complaints of the plaintiffs could not reasonably lead Bertrand to conclude that there was a serious problem with the concrete.

[para363] Meanwhile, Bertrand was constantly getting advice from the experts at Lafarge that there was no fundamental problem with the concrete. In retrospect, it may be that Bertrand was too trusting of Lafarge, or waited too long to initiate its own

independent investigation. Nevertheless, in the context of 1987 to 1991, I cannot conclude that a reasonable person in Bertrand's position would have disclosed those facts to the insurers.

(c) Chubb's Further Position

[para364] Chubb also argues the following. It provided umbrella coverage for the periods December 31st, 1987 to December 31st, 1988, and December 31st, 1988 to December 31st, 1989. It alleges misrepresentation on the part of Bertrand when it answered questions 16, 20 and 24 in their application for insurance of December 1, 1987. I have carefully reviewed Chubb's written submission on this issue. I perused the application for insurance found at Tab 4 of Chubb's written submissions. I find no reliable evidence that would support the conclusion that Bertrand's answers to any of the questions referred above were misrepresentation.

(d) Late reporting

[para365] The parties have agreed at paragraph 6 of Ex. 564A as to the date and manner of notice sent by Bertrand to its insurers. The issue of absence of notice or late reporting is raised by some of the insurers. Paragraph 9 of the Agreed Statement of Fact Ex. 564A sets out Canadian General's position as to what steps it would have undertaken had it received proper notice. Chubb does likewise at paragraph 8 of Ex. 564A.

[para366] It is not all together clear from the insurers written submissions whether the lack of timely notice only has resulted in some prejudice to their defence or that in fact coverage should be denied.

[para367] I have reviewed the terms of the respective policies. I have considered section 129 of the Insurance Act, which is commonly referred to as the relief from forfeiture section. There is also a body of law which suggests that when an insurer denies liability or coverage, such actions by the insurer amounts to a waiver of its rights under the policy and, therefore, imperfect or non-compliance with some of the conditions in the policy does not prejudice the insurer in any way (see *La Cooperative Agricole de St. Isidore Ltée. v. Cooperators General Insurance*, [1997] O.J. No. 2550, (18 March 1997), (Ont. Gen.Div.) ; *Canadian Equipment Sales and Service Co. Ltd. v. Continental Insurance Co.* (1975), 9 O.R. (2d) 7 (C.A.).

[para368] In determining whether or not relief against forfeiture should be granted, the Courts generally look at the conduct of the insured to determine whether or not there has been bad faith. Then the Courts determine whether the insurer has suffered any prejudice (see *Thomas v. Hickey* (1995), 22 O.R. (3d) 331 (Gen.Div.)).

[para369] In reviewing the evidence, it is obvious there has been no bad faith on the part of Bertrand in the sense that there has been some form of concealment or misrepresentation. Three of the insurers were notified in 1992 and the other two insurers were notified in 1995. Once again, no one had any appreciation of the seriousness of the problem until 1992. Even for those insurers notified only in 1995, I have no evidence before me of concealment or misrepresentation on the part of Bertrand.

[para370] The insurers have not convinced me that they suffered any prejudice by any late reporting on the part of the defendant Bertrand. The trial of this action did not begin until September 1997 and continued until December 1998. There was ample time for the insurers to initiate and complete most of the investigations referred to in paragraphs 8 and 9 of the Agreed Statement of Facts (see Ex. 564A).

[para371] Accordingly, I would grant relief under the provisions of s. 129 of the Insurance Act for any late reporting.

(v) What insurance limits are available and what deductible is Bertrand obligated to pay?

[para372] Basically, Bertrand had obtained primary insurance of 1 million dollars per year and umbrella insurance coverage of 4 million dollars per year, except for 1986 when the umbrella coverage was 5 million dollars. The various deductibles are listed in the chart at page 126. All of the policies, except for Royal's primary policy set out a deductible amount on a per occurrence basis. Royal's primary policy sets out a deductible on a per claim basis. I have to interpret the words "occurrence" and "claim" in order to determine what deductibles have to be paid by Bertrand during each policy period.

[para373] Previously I made a finding that all policies in existence from 1986 to 1992 will be triggered and that liability will be apportioned on a pro rata basis. At the end of 1988, there were approximately 117 houses and 20 condominiums that were potential claimants. There obviously would be a smaller number of claimants for the years 1986 and 1987. The question is "Does a deductible per occurrence result in Bertrand paying the applicable deductible per claim"? This issue is relatively straightforward. A plain reading of the policies leads me to conclude that the various plaintiffs' claims are a result of a single occurrence. There is ample authority, both in Canada and in the U.S., supporting that interpretation (see *Lafarge Corporation et al. v. National Union Fire Insurance Co. et al.*, 935 F.Supp.675 (D.Md. 1996) and *Canadian Imperial Bank of Commerce v. Madill* (1983), 43 O.R. (2d) 1 (C.A.)). Therefore, Bertrand's responsibility for a deductible would be \$1,000.00 per policy period for the years 1986 to 1989 for primary insurance.

[para374] For the umbrella insurance, a deductible for the years 1986-1987, is a retained limit of \$10,000.00. This sum is applicable only if there is no underlying insurance, which there is here. For the years 1988-1989, where Chubb was the umbrella insurer, there is no deductible.

[para375] For the years 1990-1992, where Royal was the primary insurer, there was a deductible on a per claim basis. Both Bertrand and Royal are in agreement that the Courts have interpreted the word "claim" differently from "occurrence". Such interpretation, of course, is consistent with the wording of Royal's primary policy. Therefore, there are a total of 137 claimants for the years 1990, 1991 and 1992. Bertrand would have to pay the deductible per claim for each policy period. Royal's umbrella coverage policy is worded differently and refers to a deductible on a per occurrence basis. If such policies were triggered, obviously my interpretation of the word "occurrence" would be similar for such policies as my previous interpretation for the other policies.

(vi) Other Issues

(a) Second and Subsequent Purchasers

[para376] Guardian Insurance takes the position that second and subsequent purchasers are not covered under Guardian's policy. It's argued that the subsequent purchasers did not sustain any damage until they purchased the home. The previous owners may have sustained damage, but they are not making any claim.

[para377] I find it interesting that Guardian would be taking that position after having argued that the wording of the C.G.L. policy is that the property damage has to take place during the policy period. Applying the Injury In Fact Theory that is consistent with the wording of the policy, it would be reasonable to conclude there had been some damage during Guardian's policy period. Therefore, Guardian's policy would be triggered and it would not matter who was making the claim. Further, I have already decided that Bertrand's liability would be not only in contract, but also in negligence and under that heading there is ample authority for finding the manufacturer liable towards subsequent purchasers. I would, therefore, reject Guardian's submissions on the issue of second and subsequent purchasers.

(b) Is Bertrand Fully Insured?

[para378] Chubb Insurance appears to be putting forward the proposition that the plaintiffs' foundations continued to suffer damage after 1992 and would continue to do so until they collapsed. They argue, therefore, that when considering different trigger theories, I should conclude that there are a number of years where Bertrand would be uninsured.

[para379] I don't have much difficulty in rejecting that proposition. The evidence before me clearly indicates that by 1992 the foundations had suffered a major structural defect and would have to be replaced. At the opening of trial, Bertrand admitted the foundations would have to be replaced, and I was under the impression that the insurers agreed with that admission. After the Program proceeded to replace 28 foundations, it would have been natural for the other plaintiffs to expect the defendants to replace their foundations and dispute, if necessary, the question of liability at a later date.

[para380] To accept Chubb's proposition would mean that the longer this case was delayed, the greater burden of responsibility would be placed on Bertrand. Obviously Bertrand could not obtain insurance after 1992, after the experts for the Program determined that the foundations had suffered a major structural defect and would have to be replaced.

(c) Did all of the damage take place prior to 1989?

[para381] Royal Insurance argues that using the Injury In Fact Theory all of the damage to the foundations took place prior to December 1989 when Royal became Bertrand's insurer. That proposition appears to disregard a number of fundamental facts.

[para382] The plaintiffs' damages are based on the admission and finding that their foundations will have to be replaced. That conclusion was arrived at in 1992 by the experts for the Program plaintiffs. Even though the evidence supports the conclusion that the damage was occurring as early as 1986, no one appreciated the seriousness of the problem until 1992. It may be that with proper testing, the experts could have concluded prior to 1992 that the foundations would have to be replaced. To accept Royal's proposition, I would have to conclude that the foundations had suffered damage to the extent that they would have to be replaced prior to 1989. The evidence does not support such a conclusion. In fact, the evidence shows that the foundations continued to deteriorate after 1992 and will continue to do so until they collapse.

[para383] Royal also argues that there is expert evidence to support the proposition that the failure of the foundations was inevitable regardless of the mechanism of deterioration. No doubt Royal is correct that there is evidence to support that conclusion, but I have already rejected the occurrence theory as triggering these policies. I have accepted the Injury In Fact Theory because the C.G.L. policies require the damage to take place within the policy period.

D. Apportionment of Responsibility between Insurers

[para384] Having decided that the Injury In Fact Theory combined with the Continuous Trigger Theory should be applied to all the policies between 1986 and 1992, I now have to decide how to allocate the responsibility amongst the various insurers. I am indebted to Royal Insurance for their helpful submissions on this issue.

[para385] It has been suggested by a number of American authors that the only fair approach is a pro-rata allocation of responsibility for damage over the period of time that the damage occurred. When there are a number of insurers over that period, liability is shared pro-rata based on the time coverage provided by different insurers. In Canada, the Ontario Court of Appeal in *Re St. Paul Fire and Marine Insurance Co. et al. and Durabla Canada Ltd.* (1996), 29 O.R. (3d) 737 seemed to be disposed to a pro-rata allocation of responsibility.

[para386] The evidence before me would dictate that the most equitable allocation of responsibility would be on a pro-rata basis on the time coverage provided by the insurers. Between the years 1986 and 1992, there are seven different policy periods (see Ex. 564A). Approximately 45 houses and one condominium had their foundations poured in 1986. In 1987, approximately 70 homeowners had their foundations poured. Finally, the last three homeowners had their foundations poured in 1988. This would mean that of the seven policy periods the first period would have only the units built in 1986; the next period all the units built in 1986 1987; and the next five periods all the units built in 1986, 1987, and 1988. During that time, Canadian General Insurance was the primary insurer for four of those years and Royal for three. The umbrella insurers during Canadian General's four years were Guardian, General Accident, and Chubb for two years. Royal provided the umbrella coverage for the three years they were the primary insurers.

[para387] Therefore, Canadian General Insurance and their respective umbrella insurers would be responsible for the first four periods. Royal would be responsible for three of the periods for all of the foundations poured in 1986, 1987 and 1988. Obviously, if Canadian General's and Royal's limits were exceeded for any given year, the umbrella insurer for that year would be responsible for the balance.

3. Lafarge and Their Insurers

A. The facts

[para388] The defendant Lafarge started an action against eighteen of its insurers with whom it had contracted to provide insurance coverage for the period April 1, 1986 to April 1, 1993. It is now proceeding against only sixteen of these insurers, all who have denied liability to Lafarge under their respective contracts of insurance. One of the insurers, Kansa, has had a liquidator

appointed under the Winding Up Act and permission from the Quebec Superior Court was necessary in order for Lafarge to proceed against this insurer. Lafarge has listed its insurers, their policy period, limits and level of coverage, and applicable premiums in schedule A of their written submissions. The following chart sets out the primary and umbrella insurers for the various coverage periods from 1986 to 1993. I am grateful to counsel for Harbour Insurance Company and National Union Insurance Company for the preparation of this chart. Considering the number of insurance companies involved, the chart has been of great assistance in understanding the various insurance policies available to Lafarge in each year.

[para389] Lafarge seeks indemnification for the damages for which it is exposed as a result of a finding of liability. Lafarge is also asking to be indemnified for any costs for which it may be found liable to the plaintiffs, and Bertrand and its insurers. It also claims reimbursement for any expenses that it has incurred in defending itself against the plaintiffs and Bertrand. Lafarge insurers have all denied that they have any duty to defend Lafarge.

[para390] I appreciate that it was necessary for the insurers in making their written submissions to assume liability on the part of Lafarge. I do not conclude from the assumptions that they have made any admissions as to Lafarge's liability. Given the length and complexity of this case, the insurers should understand that by the time I read their written submissions, the question of the liability of the defendants had long been decided. I want to thank counsel for most of the insurers for having kept their written submissions brief and focussed.

B. The Issues

[para391] The issues that I have to decide can be summarized as follows:

(i) Estoppel - Are any of the parties estopped from pursuing any claim or defense against any other party?

(ii) What is the scope of indemnification of the various insurance policies? Does it cover Lafarge's liability for the plaintiffs' damages?

(iii) Would any of the exclusionary clauses in the various insurance policies remove the claims from coverage? What effect does the rip and tear exclusion have on the respective policies?

(iv) Which policy period of these primary and umbrella insurers is triggered? Which trigger theory applies? How should responsibility be allocated amongst the various Lafarge insurers?

(v) What is the liability for and apportionment of defense and third party costs?

(vi) What deductible is Lafarge obligated to pay?

(i) Estoppel

(a) Introduction

[para392] Most of Lafarge's insurers for the years 1986-87 and 1987-88, except for American Home, are invoking the principle of estoppel against Lafarge. Interestingly, Lafarge is then invoking the principle of estoppel against one of its insurers for the years 1989 to 1993, National Union. The basis upon which these parties are invoking estoppel against each other are judicial decisions in the United States that were made in litigation between some of these parties in cases referred to as the Nationwide case and the Lone Star case.

[para393] This litigation took place over a number of years during the 1990's. Some of it involved insurance coverage for Lafarge arising out of claims from the removal of concrete railway ties that had prematurely deteriorated. Within the context of that litigation, the presiding Judge Harvey made a number of judicial rulings and these can be found at Ex. 470 and 568.

[para394] For the purposes of the issue of estoppel, I will refer to the insurers invoking the principle of estoppel against Lafarge as the "1986 insurers" and the insurer against which Lafarge is invoking the principle as "National Union".

(b) Estoppel between the 1986 insurers and Lafarge

[para395] The 1986 insurers are arguing that Lafarge is estopped from denying that the "manifestation trigger theory" applies to the 1986 insurers' policies. In support of their proposition, the 1986 insurers rely on a memorandum and order made by Judge Harvey, dated October 6, 1995 and found at Tab 6 of Ex. 568. The 1986 insurers allege that the application of the manifestation theory results in their policies not being triggered during the years 1986 to 1988. Accordingly, they are asking the Court to dismiss the third party actions brought against them by Lafarge.

[para396] The only 1986 insurer who was a party in Judge Harvey's decision of 1995 is the insurer, Kansa. Some of these 1986 insurers attempted to bring their motions to dismiss the third party actions at the opening of trial. Obviously, I was not going to have this trial delayed by third party motions which could have been brought in a more timely fashion before the case management judge. Accordingly, the 1986 insurers' arguments have been postponed until now.

[para397] The legal basis upon which the 1986 insurers are invoking the issue of estoppel against Lafarge, has been commented upon by the learned author, Gary Watson in his article: "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990) 69 Can. Bar Rev. 623 and referred to in *Rae v. Rank City Wall Canada Limited*, [1985] O.J. No. 178, (1985), (Ont. C.A.) and summarized as follows:

It is a fundamental principle, that where any judicial tribunal having proper jurisdiction gives judgment, then that judgment would be *res judicata* not only as to the point actually decided but also with respect to any other issue necessary to the decision.

[para398] What the 1986 insurers are invoking is what is referred to as "issue" estoppel. The principle they are asking this Court to apply is that even if our litigation involves a different cause of action than in the Nationwide case, one of the issues decided in that case was the question of which trigger theory applies to these policies. Therefore Lafarge should be estopped from re-litigating that issue.

[para399] The Supreme Court of Canada in the case of *Angle v. MNR* (1974), 47 D.L.R. (3d) 544, set out four requirements before the doctrine of estoppel can be applied to a particular case:

- * that the same question has been decided;
- * that the judicial decision which is said to create estoppel was final;
- * that the parties to the judicial decisions or their privies were the same persons as the parties to the proceeding in which the estoppel is raised or their privies; and
- * the question out of which the estoppel is said to arise must have been fundamental to the decision arrived at in an earlier proceeding.

[para400] On the basis of these four requirements, it is obvious that the 1986 insurers' motion would fail. Only Kansa was a party in Judge Harvey's decision of 1995, *Lone Star*, supra. I also have serious doubts that Judge Harvey was deciding the same question, or that his decision was final or that it was fundamental to the earlier proceedings. Reading from Judge Harvey's decision at page 25, he states:

By way of their pending motions, Halifax, Wausau and Kansa contend that they are each entitled to summary judgment on the issue of indemnity because applicable Canadian law requires that a manifestation or discovery trigger of coverage theory be applied to the particular policies of insurance issued by each of them to Lafarge Canada.

[para401] Two other matters are noted at page 25 of his decision. He notes that although Boreal is the primary insurer, and a party to the main litigation, it did not join the other insurers for the summary judgment motion. He also notes that neither Lafarge nor any other parties to the litigation have disagreed with the contentions made by Halifax, Wausau and Kansa in their respective motions.

[para402] Judge Harvey, in granting summary judgment, applied the reasoning in *Allstate du Canada Cie d'assurance v. Assurance Royale du Canada*, in a 1994 decision of the Quebec Superior Court, Martin J., which applied the manifestation theory. Basically, he applied what he interpreted to be Quebec - Canadian Law in determining which trigger theory should apply to these policies. As I commented earlier in my discussions of trigger theories, other jurisdictions in Canada, including Ontario, have expressed serious reservations about the application of the manifestation theory to these C.G.L. policies. It is interesting that Judge Harvey, in a later memorandum and order of August 12, 1996, invoked Texas law and applied the "injury in fact" theory in interpreting National Union's policy.

[para403] Even if the 1986 insurers had met all of the requirements as set out in *Angle v. M.N.R.*, supra, which they have not, the Court retains the discretion to refuse to apply issue estoppel when to do so would cause unfairness or an injustice. Quoting from *Minott v. O'Shanter Developments Company* (1999), 42 O.R. (3d) 321 (C.A.) at p. 330, Laskin J.A. stated as follows:

Even had the three requirements been met, however, in my view, the Court has always retained a discretion to refuse to apply issue estoppel when to do so would cause unfairness or work an injustice.

[para404] Later, quoting Lord Upjohn in the case of *Carl Zeiss Stiftung v. Rayner Keeler Limited*, [1967] 1 A.C. 853 at 947, Laskin J.A. stated:

Issue estoppel is a rule of public policy and, as a rule of public policy, it seeks to balance the public interest in the finality of litigation with the private interest in achieving justice between litigants. Sometimes these two interests will be in conflict, or at least there will be tension between them. Judicial discretion is required to achieve practical justice without undermining the principles on which issue estoppel is founded. Issue estoppel should be applied flexibly where an unyielding application of it would be unfair to a party who is precluded from relitigating an issue.

[para405] Clearly, this is one of these situations where judicial discretion should be applied. Any cursory reading of the case law dealing with different trigger theories leads to the obvious conclusion that most of these decisions are "fact driven". I heard evidence for 16 months in this case. In deciding the proper "trigger theory" to these policies, I have to take into consideration the facts and the wording of the policies. To decide that Lafarge is estopped from making submissions on this issue and dismiss its claim against a "1986 insurers" would be unjust.

[para406] The Courts have also exercised some caution in applying issue estoppel on the basis of foreign judgments. To quote Lord Read in *Carl Zeiss Stiftung v. Rayner Keeler Limited*, supra, at p. 918:

In the first place, we are not familiar with modes of procedure in many foreign countries, and it may not be easy to be sure that a particular issue has been decided or that its decision was the basis of a foreign judgment and not merely collateral or obiter. Secondly, I have already alluded to the practical difficulties of a defendant in deciding whether, even in this country, he should incur the trouble and expense of deploying his full case in a trivial case. It is clear that there can be no estoppel of this character unless the formal judgment has a final judgment on the merits. When we come to the issue of estoppel I think that, by parity of reasoning, we should have to be satisfied that the issues in question cannot be relitigated in the foreign country.

[para407] Some of the 1986 insurers also have invoked the principle referred to by the American case law as "offensive non-mutual estoppel" to estop a defendant from re-litigating issues which it lost against another plaintiff. In Canada, we refer to this principle basically as preventing an abuse of process. A number of Court of Appeal decisions stand for the proposition that even if the parties are not the same, litigants should be protected from the burden of re-litigating issues with a party who had previously had a full and fair judicial hearing on this issue. See *Demeter v. British Pacific Life Insurance Company* (1984), 48 O.R. (2d) 266 (C.A.) and *Re Del Core and the Ontario College of Pharmacists* (1985), 57 O.R. (2d) 296 (C.A.). I have no hesitation in concluding that such a principle has no application here. To allow Lafarge to litigate insurance issues in this case could hardly be categorized as an abuse of process.

[para408] Finally, to apply the principle of issue estoppel could have serious impact on insurers for the other policy years, that is from 1989 to 1993. They were not parties to Judge Harvey's decision nor did they participate in the process. Do these parties not have the right to convince the Court as to which policies are triggered during the various policy periods? There is certainly a

possibility that their submissions could be undermined if I was to accept the proposition of issue estoppel and dismiss the action against all of the 1986 to 1988 insurers. In the context of this action, it certainly could be unfair to the other insurers.

[para409] For the reasons cited above, I would reject the application of the principle of issue estoppel against Lafarge and dismiss the 1986 insurers' motion.

(c) Estoppel between Lafarge and National Union

[para410] Lafarge also claims National Union is estopped from denying that the "injury in fact" trigger theory applies to each of National Union's umbrella policies. The basis for Lafarge's claim is Judge Harvey's memorandum and order dated August 12, 1996 and found at Tab 10 of Ex. 568.

[para411] Judge Harvey, after reviewing the various trigger theories, concluded that the Texas Supreme Court, if faced with circumstances as before him, that is, progressive property damage extended over a number of different insurance policy periods, would apply the "injury in fact" trigger theory. For the same reasons given between the 1986 insurers and Lafarge, I would reject the application of this principle against National Union. Again, it would be most unfair to National Union to be forced to accept Judge Harvey's decision of what was basically Texas law without closely reviewing the evidence in this case and the language of National Union's policies.

[para412] Finally, to apply issue Estoppel in our case could greatly affect some of the excess insurers. They were not parties in Judge Harvey's decision. If their status and rights are going to be affected, should they not have had an opportunity to participate in the process? Obviously it is unfair to them to apply issue estoppel.

(ii) What is the scope of indemnification of the various insurers' policies? Does it cover Lafarge's liability for the plaintiffs' damages?

[para413] All of the C.G.L. policies under which Lafarge seeks indemnification provide coverage for amounts that Lafarge is legally obligated to pay as damages for liability imposed upon Lafarge by law. These policies, of course, are very similar to the policies discussed in the section dealing with Bertrand's insurer. The damages referred to in the policies are for property damage caused by an occurrence during the policy period.

[para414] The question of whether property damage as defined by the C.G.L. policies would cover damages claimed by the plaintiffs, has been dealt with previously in my judgment. My decision on the issues between Bertrand and its insurers would apply here. I would reach the same conclusion for the meaning of the word "occurrence". Most of Lafarge's insurers, with some exception, do not take any great issue as to the scope of indemnification of the policies. They argue that the claims are removed from coverage because of the exclusionary clauses especially the clause dealing or referred to as "rip and tear" exclusion. I will be dealing with those issues in the following section.

[para415] One of the primary insurers for the years 1986 to 1988, Boreal, provided "rip and tear" coverage under the property damage liability coverage. This endorsement can be found at paragraph B(iii) of the policy. Paragraphs B(i) and B(ii) provide property damage coverage similar to what is found in the other insured C.G.L. policies. Boreal argues that if Lafarge is provided coverage, it is under paragraph B(iii) and not B(i) or (ii). As stated earlier, I have already made a finding in the section dealing with Bertrand and its insurers that property damage as defined in the C.G.L. policies would include the plaintiffs' damages for which Lafarge has been found liable. I do not intend to revisit that issue. It may be that the Boreal policy provides Lafarge with additional coverage. The parties may have had their reasons for including this coverage, I don't know. For our purposes, it does not affect the coverage provided to Lafarge under paragraphs B(i) and B(ii).

(iii) Would any of the exclusionary clauses in the various insurance policies remove the claims from coverage? What effect does the rip and tear exclusion have on the respective policies?

(a) Introduction

[para416] Lafarge's insurers invoke basically three exclusionary clauses which would remove any coverage from their policies. They are, the "product" or "work performed" exclusion, the "rip and tear" exclusion, and the "professional liability" exclusion. I intend to deal separately with each of these exclusionary clauses.

(b) The "product" or "work performed" exclusion

[para417] A number of the policies contain this exclusion. The wording of the exclusion in most of the policies is similar. This clause basically removes insurance coverage for Lafarge's own product and work. I dealt with the similar exclusion in the section dealing with Bertrand and its insurers. There really is no great dispute on this issue. The exclusion basically confirms what Lafarge is prepared to concede that there is no insurance coverage for the cost associated with Lafarge supplying new cementitious material to Bertrand. The damages claimed by the plaintiffs would not be affected by this exclusionary clause in that this is damage to property of others and not to the property of Lafarge.

(c) The "Rip and tear" Exclusion

[para418] The term "rip and tear" is a colloquial expression originating from the United States which graphically explains the process when property has to be removed and replaced. For our purposes, it describes the process where the plaintiff's foundation will have to be ripped out and then replaced. A few of the insurers provided "rip and tear" coverage while most other insurers had "rip and tear" exclusionary clauses. Most of the parties have expended considerable time and effort in their written submissions on this issue.

[para419] What complicates matters for the Court is there appears to be no standard "rip and tear" exclusionary clause. Most of the clauses in the various policies are worded differently. I, therefore, have to deal with the different policies individually and determine whether the language of that specific clause removes Lafarge's claim from coverage.

[para420] In proceeding with this analysis, I have considered the following general principles which apply to interpretation of insurance policies:

1. The contra proferentum rule,
2. The principle that coverage provisions should be construed broadly and exclusion clauses narrowly, and
3. The desirability, at least where the policy is ambiguous, to giving effect to the reasonable expectations of the parties.

(Reid Crowther and Partners Limited v. Simcoe and Erie General Insurance Company, supra, at p. 269.)

[para421] In interpreting these various rip and tear exclusionary clauses, I have also considered these following primary rules of construction:

1. words in a policy are to be construed according to their plain, ordinary and popular sense;
2. the policy should be considered in its entirety and be construed liberally so as to give effect to the purpose for which it was written;
3. where, due to an ambiguity, the policy wording is susceptible to two reasonable but opposing interpretations, the construction to be adopted is the one most favourable to the insured.

(Wagner v. Commercial Union Assurance Company of Canada (1994), 95 B.C.L.R. (2d) 273 (B.C.S.C.) at p. 277.)

[para422] The other important principle that I have considered in interpreting exclusionary clauses is found in the case of Weston Ornamental Ironworks Limited v. Continental Insurance Company, [1981] I.L.R. 11430 (Ont. C.A.), where Lacourcière J.A. stated as follows at page 479:

The exclusion clause should not be interpreted in a way which is repugnant to or inconsistent with the main purpose of the insurance coverage but so as to give effect to it. Thus, even if the exemption clause were found to be clear and unambiguous, it should not be enforced by the Courts when the result would be to defeat the main object of the contract or virtually nullify coverage sought for the protection from anticipated risk. The doctrine that in construing a contract, one must look at the entire document and reject words or indeed provisions which are inconsistent with the main purpose of the contract.

[para423] Another factor that I have considered in interpreting the various "rip and tear" exclusionary clauses is that both parties to these agreements are basically on an equal footing. Often that is not the case in insurance agreements. Here Lafarge is a large multi-national company who had the resources and qualified individuals to negotiate with various insurers in order to obtain the most adequate coverage. Further, many of the insurers invoking the "rip and tear" exclusionary clause are umbrella insurers situated at the second or higher level of coverage. Obviously, the risk being negotiated at that level is not the same as that of the primary insurers.

[para424] Before dealing individually with any of the policies, I would comment briefly on some of these submissions put forward by the insured Lafarge in its written submissions. Lafarge appears to suggest that, even if the parties agree, a rip and tear exclusionary clause cannot limit coverage given by a standard C.G.L. policy for property damage and personal injury. I have a problem with that proposition. I cannot see why two parties in a context of being on equal footing for purposes of negotiation could not limit the risk and coverage of a C.G.L. policy.

[para425] Lafarge also is putting forward the proposition that the plaintiffs' claim is not for compensation to remove and replace their foundation. They appear to refer to the plaintiffs' claim as one for compensation for loss expectation, etc. One only has to review briefly the damage brief put forward by the defendants to understand that the removal and replacement of the foundation walls is an important part of the plaintiffs' claim.

[para426] I now have to interpret the various "rip and tear" exclusions and determine how they affect coverage in the light of the principles cited above.

1. Kansa Insurance

[para427] The "rip and tear" exclusion in Kansa's Policy No. 2503422 reads as follows:

It is agreed that this policy shall not apply to any liability arising out of rip and tear:

Unless such liability is covered by valid and collectible underlying insurance at the full limits of liability as described in the schedule of underlying insurance, and then only for such hazard for which is afforded to said underlying insurance."

[para428] In this case the underlying insurance is Boreal Insurance which provides for "rip and tear" coverage. Obviously, therefore, Kansa's rip and tear exclusion does not apply. Counsel for Kansa appears to be suggesting that the "rip and tear" endorsement includes more than Lafarge's own "product" and "work", that is, cement and FA. He argues that such product and work involves the entire concrete foundation. I have already decided that issue in the section dealing with Bertrand and its insurers and I would not accept the proposition put forward by counsel.

[para429] In conclusion, therefore, Kansa's so-called "rip and tear" exclusion has no effect on Lafarge's insurance coverage for that policy.

2. Scottish and York Insurance

[para430] Scottish and York Insurance have two policies that contain "rip and tear" exclusion:

* For the year 1986, Policy No. 10105 which is part of the layer of coverage for \$10,000,000 with Chubb Insurance

* For the year 1987, Policy No. 11305 which is also part of the \$10,000,000 layer of insurance with Chubb Insurance

[para431] The wording of Scottish and York's "rip and tear" exclusion is very similar to that of Chubb Insurance. The exclusion reads as follows:

It is understood and agreed that this Policy does not apply to any sums which the Insurer shall become obligated to pay as damages, by reason of the liability imposed by law upon the Insured or assumed by the Insured under any contract or agreement because of an occurrence as herein defined during the policy period because of:

The cost of removing, replacing or repairing any property including loss of use of such property as the result of the introduction into it of concrete, cement, sand or aggregate, concrete blocks, other concrete products or other products manufactured, sold, handled or distributed by or on behalf of the Insured which is or are defective or which is not, or are not as specified or required.

[para432] The wording of the exclusion in Policy No. 11305 for the year 1987 is similar except in the last paragraph where it reads:

As a result of the introduction into it, a product manufactured, sold, handled or distributed by, or on behalf of the insured which is, or are defective, or which are not, or are not as specified, or required.

[para433] The plain wording of this exclusion would lead the Court to conclude that it applies to the plaintiff's damages for which Lafarge has been found to be liable and it involves the cost of removing, replacing or repairing any property containing Lafarge's defective product. It is difficult for this Court to imagine that if both parties to this insurance contract agree to exclude the plaintiffs' damages for cost of removing and replacing the foundations, how they could have used plainer words. By using the words "any property" they extended the exclusion to third party property. Then by proceeding to use the word "introduction" into it of Lafarge's defective product, this would include Lafarge's cement powder and FA.

[para434] In interpreting this exclusion, I have given the insured the benefit of all of the principles cited in my introduction. As stated earlier, I do not accept Lafarge's proposition concerning the application of its exclusion and their interpretation of what is contained in the plaintiffs' damages. A major component of these damages is the removal and replacement of the foundation walls.

[para435] I have some concern with the principle that an exemption clause, even if clear and unambiguous, should not be enforced by the Courts when the result would defeat the main object of the contract or virtually nullify the coverage sought for protection from anticipated risks: *Weston Ornamental Ironworks Limited v. Continental Insurance Company et al.*, supra. On the facts before me, should I refuse to enforce the rip and tear exclusion? As pre-disposed as I am, and for that matter most Courts are in concluding that there is coverage, I do not think it would be fair to do so in this case. Both parties are on an equal footing. Lafarge had employees who were experts in the field of insurance and whose job was to look after Lafarge's insurance needs. They purchased primary and umbrella insurance in the millions of dollars. They negotiated such things as coverage, endorsement, and risks on behalf of Lafarge. I have to conclude that they knew what they were doing, and were well aware of the wording of the rip and tear exclusion in the Scottish and York policies. The exclusion appears to be tailored exactly to Lafarge's business.

[para436] In conclusion, therefore, given the plain and all encompassing scope of the wording in these rip and tear exclusions, I can only conclude that they remove coverage for the cost of removal and replacement of the foundations.

3. Chubb Insurance

[para437] The rip and tear exclusionary clause in Chubb's policies is the same wording as found in Scottish York Policy No. 10105. Therefore, the interpretation that applied to the Scottish York exclusion would apply to the exclusion in Chubb's policies.

4. American Home Assurance Co.

[para438] The rip and tear exclusion in American Home Policy No. 6331773 for 1987-1988 is worded as follows:

In consideration of the premium charged, it is agreed that the coverage as afforded by this policy does not apply to any liability resulting from the removal, withdrawal, repair or replacement of concrete, piping, roofing, vinyl siding, insulation or construction products nor "the loss of use of tangible property including but not limited to materials, parts, equipment and labour costs to remove, withdraw, repair or replace concrete, piping, roofing, vinyl siding or insulation or construction products".

[para439] As can be seen, the wording in this exclusion is much different from the wording found in the exclusions of Scottish York and Chubb policies. It is not clear or unambiguous. Does the exclusion refer to the removal and replacement of Lafarge concrete or third party concrete. The exclusion appears to have been tailored to remove coverage for removal and replacement of concrete that had been supplied by Lafarge. The insured supplied cement powder and FA to Bertrand who then supplied the concrete to the plaintiffs.

[para440] If American Home intended to exclude coverage for the cost of removal and replacement of the plaintiffs' foundations the clause is not clear. It would have been simple enough to insert in the exclusion the words "any concrete or property which contained Lafarge's defective product".

[para441] In conclusion, therefore, the rip and tear exclusion in American Homes policy is ambiguous and subject to different interpretations and, the insured Lafarge is entitled to the benefit of the most favourable interpretation. Accordingly, I do not find this exclusion removes Lafarge's coverage for the cost of removal and replacement of the plaintiffs' foundations.

5. Guardian Insurance Co.

[para442] The rip and tear exclusion in Guardian's Policy No. 4178541 for the year 1987 is the same as that found in Scottish York's Policy No. 11305. Even if the wording in the second paragraph of this exclusion is a bit different from that found in the other Scottish York or Chubb policies, the interpretation would be the same. This exclusion would remove coverage for the cost of removing, replacing or repairing any property as a result of it containing Lafarge's defective product. Therefore, my interpretation for the previous Scottish York and Chubb policies would apply to Guardian's policy.

6. Reliance Insurance

[para443] The rip and tear exclusion for Reliance reads as follows:

It is agreed that no insurance is afforded for personal injury, bodily or property damage arising out of liability for ripping or tearing expenses and restoration.

It is further agreed that the following definition shall apply:

(a) ripping and tearing expenses shall mean the actual expenses incident to the intentional destruction and removal of concrete products which are found to be defective;

(b) restoration expenses shall mean such additional expenses paid as are necessary to place the structure in the same condition existing at the time such concrete products were determined to be defective;

(c) concrete products shall mean poured concrete, concrete block and pre-stressed structured concrete; and

(d) defective shall mean concrete products which, upon testing by an accredited testing agency, do not meet the contractual specification relating to compressive strength required for the specific construction in which such materials were incorporated.

[para444] Although this exclusion is lengthy and detailed, it is also unfortunately ambiguous and subject to various interpretations. It is important to underline again that Lafarge was supplying cement powder and FA and not concrete products as defined under paragraph (c) of the exclusion. Does the exclusion refer to concrete products supplied by Lafarge or concrete products of a third party?

[para445] It would appear to the Court that this exclusion was intended to limit liability of an insured that was in the business of supplying ready-mixed concrete. If such concrete proved to be defective and had to be removed and replaced, then this exclusion would probably apply. If Lafarge had supplied the ready-mixed concrete for the plaintiffs' foundations, likely this exclusion would have removed coverage.

[para446] Following the principles outlined in the introduction, the exclusionary clause, to remove coverage, has to be clear and unequivocal. In this case, it is not. The exclusion is subject to different interpretations. Accordingly, Lafarge is entitled to the most favourable interpretation. Its claim for the cost of removal and replacement of the plaintiffs' foundations is not removed by this exclusion.

7. Hartford and Harbor Insurance

[para447] Both of these insurers have similar rip and tear exclusion. Hartford's Policy No. 46XSSG57552 contains the following rip and tear exclusion:

It is hereby agreed that this policy shall not apply to: property damage liability for the costs of ripping and tearing out of any concrete which the named insured provided during the policy period, according to the customer specification and which did not meet such specification.

Harbor's policy reads as follows:

It is understood and agreed that this policy hereby excludes property damage liability for the cost or expenses of any destruction or removal of any concrete which the named insured provided, according to the customer specification and which did not meet such specification.

[para448] Both exclusions refer to the removal of any concrete that Lafarge provided. As stated before, Lafarge did not provide concrete but cement powder and FA. The exclusions, therefore, do not apply.

8. Federal Insurance

[para449] Federal's written submissions appear to be premised on the assumption that there were sufficient layers of underlying insurance, and that their policy would never be triggered. They are probably right. Unfortunately, none of the parties have brought to my attention the wording of the Federal rip and tear exclusion. Further, I was unable to locate the exclusion in reviewing the Federal's policy at Ex. 569A and B. Accordingly, I have to conclude that Lafarge's indemnity with Federal Insurance is not affected by their rip and tear exclusion.

8. Pacific Employers and California Union Insurance

[para450] Pacific Employers Insurance for the year 1988 to 1989 has no rip and tear exclusion, but apparently rely on the exclusion in the underlying insurance. I have already decided earlier that none of those exclusions removes Lafarge's coverage and, therefore, Pacific Employers has no effective exclusion. For the year 1989 to 1990, Pacific Employers have the following exclusion:

It is understood and agreed that such insurance as is afforded by this policy shall not apply to liability for property damage to property of others consisting of the costs of removing, repairing, and replacing any defective product manufactured, sold or distributed by the insured after such product has been sold, furnished or relinquished to another and incorporated as part of a structure constructed by any person or organization.

[para451] Pacific Employers Insurance policies covering the period April 1, 1990 to April 1, 1991 apparently have the same endorsement. The wording in this exclusion is not clear and unambiguous. It is subject to a variety of interpretations. The exclusion appears to contemplate that if Lafarge sold a defective product that has to be removed and replaced, then there is no coverage. In this case what has to be removed and replaced are the plaintiffs' foundations. Lafarge did not sell the concrete or the foundations. What Lafarge sold was the cement powder and FA to Bertrand. This exclusion, therefore, does not remove coverage.

[para452] California Union's Policy No. ZCX0109170 for the period 1990 to 1991 contains the following rip and tear exclusion:

In consideration of the premium charge, it is understood and agreed that the liability for personal injury or bodily injury or property damage does not apply to removal and/or costs of removal of defective concrete or any other product sold, manufactured, installed, distributed or handled by the named insured.

[para453] For reasons already given, this exclusion would not apply to Lafarge's coverage in that Lafarge did not sell or manufacture the concrete which has to be removed and replaced. This exclusion, therefore, does not affect Lafarge's coverage.

9. Royal Indemnity Co.

[para454] Royal Indemnity's policy has the following rip and tear exclusion:

It is agreed that there shall be no coverage under this policy to indemnify the insured for any of the following expenses:

1. Any expense incurred in removing concrete or concrete products from any structural building due to defective concrete or for improperly mixed, manufactured, poured form, cured, or install concrete.
2. Any expense for replacing forms, reinforcement, piping and wiring that are destroyed during the course of removing defective concrete products.
3. Any expense for returning the structure or building to the condition that existed prior to the installation of the concrete products.

[para455] This exclusion, like so many others, appears to contemplate a situation where Lafarge is supplying concrete products. We know that is not the case. Does this exclusion apply to a third party's concrete product? Like other exclusions referred to earlier, the wording is subject to different interpretations. Accordingly, if Lafarge is entitled to the benefit of the more favourable interpretation then the exclusion would not apply to a third party's concrete products. The exclusion, therefore, does not affect Lafarge's coverage.

10. Westchester Fire Insurance Co.

[para456] Westchester's rip and tear exclusion for Policy No. 531-2018016 for the years 1989 to 1990 reads as follows:

This insurance does not apply to any liability for property damage to property of others consisting of the costs of removing, repairing and replacing any defective product manufactured, sold or distributed by the insured after such product has been incorporated as part of the structure constructed by any person or organization.

[para457] This exclusion, like a number of other exclusions, is ambiguous. The product that has to be removed and replaced are the plaintiffs' foundations. Lafarge sold and distributed cement powder and FA to Bertrand. The product referred to in this exclusion is not the product sold and distributed by Lafarge. For this reason and others referred to in previous paragraphs, Westchester's rip and tear exclusion does not affect Lafarge's coverage.

(d) The "professional liability" exclusion

[para458] A number of the insurers had what is referred to as Professional Liability Exclusionary clauses in their policies. They argue that this exclusion removes coverage for Lafarge's liability to either the plaintiffs or Bertrand.

[para459] Most of these exclusionary clauses have similar wording:

This policy shall not apply to liability arising out of rendering of or failure to render professional services, or any error or omission, malpractice or mistake of a professional nature committed by or on behalf of the named insured in the conduct of any of the insured's business activities.

[para460] The insurers in their submissions rely mostly on allegations made by the defendant Bertrand against Lafarge. They argue that Lafarge, because of its size and expertise, owed a duty to the plaintiffs and Bertrand to do adequate testing of FA prior to putting this product on the market. They allege that because of Lafarge's special knowledge, there was an omission on Lafarge's part of not providing necessary professional services either before it marketed FA or at the time that it convinced Bertrand to introduce FA into its ready-mix. Such failure, according to the insurers, falls within the scope of the professional liability exclusion, thereby removing coverage.

[para461] Unfortunately, there appears to be very little Canadian case law interpreting the words "professional services" as used in the exclusion. Counsel have brought to my attention two Canadian cases, Chemetics International Ltd. v. Commercial Union Assurance Co., [1984] B.C.J. No. 1728, [1984] I.L.R. 11819 (B.C.C.A.) and Mercer v. Paradise (Town), [1991] N.J. No. 126, [1991] I.L.R. 12740 (Nfld. T.D.). On the facts, Lafarge supplied FA to Bertrand along with some technical assistance for a couple of days, to assist in the introduction of the FA into Bertrand's ready-mix. I would agree with the interpretation gleaned from the above two cases that the assistance furnished by Lafarge to Bertrand was in the nature of technical assistance and not professional services.

[para462] There also appears to be a suggestion that there was an omission of professional services by Lafarge which resulted in the marketing of over sulfated FA would. They argue such omission comes within the wording of the exclusion. I do not agree. In my opinion, the intent of the exclusion was to apply to deficient professional services supplied to one of Lafarge's clients.

[para463] In the final analysis, when I apply the principles of interpretation referred to in the introduction, it is obvious that the professional liability exclusionary clause is not clear and unambiguous so as to remove Lafarge's liability from coverage.

(iv) Which trigger theory applies and which insurance coverage is triggered in fact? How should responsibility be allocated amongst the various insurers?

[para464] I have reviewed at length the various trigger theories in the section dealing with Bertrand and its insurers. Having read written submissions of the various parties in this section, I see no reason why my decision in applying a combination of injury in fact and continuous trigger theory should not apply here.

[para465] My comments in relation to subsequent purchasers and the timing of the damage to the foundations would also apply.

[para466] My decision on apportionment of responsibility between insurers in the section dealing with Bertrand and its insurers would equally apply in this section.

(v) Liability for apportionment of defence and third party costs

(a) Introduction

[para467] The issues involved in this section are as complex and confusing as any I have had to deal with in this judgment. Given the length and complexity of this case, I am cognizant that the defence and third party costs could well rival the amount of damages. It is not surprising, therefore, that a good number of the parties have expended considerable time and effort in convincing the Court of their respective positions.

[para468] With so many parties advocating different interpretations, it is quite a challenge to determine which of these insurers has a duty to defend and the corresponding obligation to contribute to defence and third party costs. Only one insurer (Boreal) acknowledges that it may have an obligation to contribute to part of the defence and third party costs. The other primary insurer for five of the seven policy periods (Signa which is Lafarge's captive insurer) and all the excess insurers deny liability for defence and third party costs.

[para469] To further complicate matters, a good number of the policies of both the primary and excess insurers appear to give coverage for defence and third party costs in one section of the contract and exclude it in another section. Also, the coverage afforded for defence and third party costs in some of the excess insurance policies are dependent on the wording of not only their policies but also underlying policies.

[para470] As can be expected, there is no shortage of jurisprudence in this area. The parties have brought to my attention many cases, some of which at times support contradictory principles. In the process of arriving at a decision on these many issues, I have attempted to rely mostly on Canadian authorities and on the principle of equity and on common sense.

(b) General Principles

[para471] In interpreting the insurance policies dealing with duty to defend and responsibilities for costs, I have followed the various principles set out in my introduction dealing with the "rip and tear" exclusion.

[para472] One important principle relating to the construction of insurance contracts is that the duty to defend arises only where the pleadings raise a claim that appears to be covered under the agreement to indemnify in the contract. It is not necessary to prove that the obligation to indemnify will in fact arise in order to trigger the duty to defend; the mere possibility that a claim is within the policy may suffice. (See *Nichols v. American Home Assurance Co.*, [1990] 1 S.C.R. 801.) Therefore, at this stage of the pleadings, it is only necessary to show that the claims made by the plaintiffs against the insured Lafarge may well fall within the scope of the insurance policies. The duty to indemnify is triggered even if the allegations of the plaintiffs prove to be groundless. Evidence of underlying facts is not admissible in connection with the question of the insurer's obligation to defend. Whether that obligation exists is to be determined solely on the basis of the allegations in the pleadings, and on a clear exclusion in the policy. (See *Karpel v. Rumack* (1994), 19 O.R. (3d) 555 (Gen. Div.))

[para473] Having earlier apportioned Lafarge's responsibility for damages amongst the various insurers in accordance with the "continuous trigger theory", I would do likewise for the defence and third party costs. Such a pro-rate allocation of costs has received some approval by our Courts. (See *Re St. Paul Fire and Marine Insurance Co. et al. v. Durabla Canada*, supra.) As stated earlier, the wording of the policies affords coverage for property damage which occurs during the policy period and, therefore, allocation of defence and third party costs to the various policy periods is consistent with that principle.

[para474] When a finding is made that an insurer has a duty to defend, it would follow logically that such insurer would have the corresponding obligation to contribute to the costs of Lafarge's defence and third party costs.

[para475] When dealing with the insurers, I am focusing mainly on the primary and excess insurers who are providing coverage for the first \$10 million for each policy period. Given my findings on damages and allocation of responsibility in each policy period, it is unlikely that any excess insurers policies would be triggered above \$10 million.

(c) Primary Insurers

[para476] Given the structure of Lafarge's insurance program, it would be consistent that the primary insurer would be the first to be called upon to investigate, negotiate and defend any claim brought against the insured. Generally speaking, the language of the primary insurers' policies provides for that coverage. It makes sense that the insurer whose dollars will be first engaged should have the right and duty to undertake the defence of its insured while at the same time protecting its own best interests.

[para477] During the seven policy periods, Lafarge's primary coverage was provided by two insurers: Boreal, for the two years 1986-1987 and 1987-1988, and Signa, for the five years between 1988 and 1993. Considering my earlier findings as to liability, there really is no issue that Boreal had an obligation to defend for the years 1986 to 1988 and, therefore, would be responsible in part for the payment of Lafarge's defence and third party costs.

[para478] The situation involving the other primary insurer, Signa, is not as simple. Lafarge makes a summary statement that defence coverage is specifically excluded by Signa and, therefore, that obligation automatically rests with the excess insurers next in line, that is Reliance for 1988-1989, and National Union for the years 1989 to 1993. No factual evidence, other than the policies, and no case law is cited in support of this proposition.

[para479] There are a number of very good reasons why Lafarge's argument regarding Signa requires close scrutiny.

[para480] According to the evidence, Lafarge, for its own benefit and in order to control or reduce its insurance costs, made an agreement with an existing insurance company, Signa, to reinsure its risk and join Lafarge's captive insurance program. The practical effect of this, according to Lafarge's witness John B. Del Bagno, was to allow Lafarge to self-insure those risks while at the same time representing to the general public and its other insurers that a primary policy with a reputable rated insurer existed to guarantee payment of the insured risks under the policy. Such an agreement between Lafarge and Signa could hardly be categorized as your ordinary, arms' length insurer-insured agreement.

[para481] The interpretation of an agreement referred to above between Lafarge and Signa is certainly subject to the principles referred to in the interpretation of insurance contracts. As mentioned earlier, one part of the agreement appears to obligate Signa to defend any claim against Lafarge and be responsible for costs, while another part of the agreement appears to remove that responsibility. Generally speaking, an insured would be entitled to the benefit of the more favourable interpretation, but in this case, Lafarge is arguing otherwise. I would think the excess insurers immediately above the Signa policies for the years 1988 to 1993 would be entitled to the more favourable interpretation.

[para482] There is no evidence that the excess insurers were parties to the agreement between Signa and Lafarge, or that they were made aware of the reduced risk taken on by Signa and transferred to Lafarge, or finally, that they were going to have an additional risk because of the agreement between Signa and Lafarge. In fact, most of the excess insurance policies have a condition requiring maintenance of underlying insurance with the continued usual risks by Lafarge. If Lafarge enters into an insuring agreement with reduced risk with Signa for the purpose of controlling its insurance costs, how can it call upon the excess insurers to assume an increased liability that was never contemplated in the language of their policies?

[para483] In my opinion, there is also an element of unfairness towards the excess insurers for Lafarge to make an agreement with Signa that it would be responsible for the defence and third party costs, and then turn around and transfer that responsibility to the excess insurers. For Lafarge to accept the risk is equivalent to insuring itself or, for that matter, not having any insurance. In those circumstances, would it not be fair for Lafarge (along with the other insurers) to contribute to defence and third party costs. (See *Re St. Paul Fire and Marine Insurance v. Durabla Canada Ltd.*, supra.) For the reasons stated above, I find that Signa or Lafarge as primary insurers for the years 1988 to 1993 are responsible for their share of defence and third party costs.

(d) Excess Insurers

[para484] Lafarge, over and above having primary insurance for every policy period from 1986 to 1993, also had layers of excess insurance varying from \$20 million to \$65 million. See chart at page 116 of these reasons. In view of my apportionment of damages in the different policy years, my comments and decision will refer only to the excess insurance policies providing coverage up to \$10 million.

[para485] Except for minor variances, most of the excess insurance policies have similar wording. They provide for a duty to defend once the underlying insurance limits have been exhausted. Often this obligation is clearly stated in the policy or at times the excess insurance policy accepts the terms and conditions of the underlying insurance.

[para486] Some of the excess insurance policies provide coverage for defence and third party costs in one section of the policy, and appear to remove liability in another section. As stated earlier, applying the general principles of interpretation of insurance policies, the insured is entitled to the more favourable interpretation whenever the policy is not clear or unambiguous.

[para487] A number of the policies have the following wording:

The insurer shall not be called upon to assume charge of the settlement or defence of any claim made or suit brought, or proceeding instituted against the insured.

[para488] In my opinion, this condition does not remove the obligation to defend. In other words, the insurer is entitled to contribute or to participate in the proceedings as long as he is not called upon to be in charge of the defence.

[para489] A number of the excess insurers have raised other defences, which I do not intend to deal with individually. Suffice it to say that having reviewed all of the submissions made by counsel for the excess insurers, I would conclude that all of the policies provide coverage for defence costs once the limits of the underlying insurance has been exhausted.

(e) Does the duty to defend apply only when the underlying insurance has exhausted its limits?

[para490] It may be argued by some that I do not have to answer this question in that I have already made a finding that the excess insurers have a duty to defend. The next logical step would be that all excess insurers who have to contribute to Lafarge's coverage for damages as a result of the exhaustion of underlying limits should then contribute to defence and third party costs. Given the nature of this case, the effort and length of time involved and the issues, I think that it is important to reiterate the responsibility of the insurers.

[para491] Fortunately, this whole issue was thoroughly reviewed by our Court of Appeal in the case of *Broadhurst & Ball v. American Home Assurance Co.* (1990), 76 D.L.R. (4th) 80. Robins J.A., after reviewing a large number of authorities including United States cases, said at p. 94:

I am persuaded that the absence of any contractual nexus between primary and excess insurers should not, in the present circumstances, preclude the Court from ordering the excess insurer to pay its fair share of the costs of the defence of the Lumsden Building action. While it may be that an excess liability insurer is generally under no duty to participate in the insured's defence until the primary coverage is exhausted, it is manifest here, indeed, it is common ground, that the potential judgment against the insured respondents substantially exceeds the amounts of the limits of American Home primary policy and, should the action succeed, the primary policy will be exhausted. The excess carrier, Guardian, is plainly at risk. This is not a case in which it can be said that the amount claimed in the action, at least in terms of insurers' liability, bears no or little relation to the true value of the claim. Furthermore, as I noted earlier, the action is difficult and complex and will involve a lengthy trial. The costs of defending it will undoubtedly run into the many thousands of dollars.

In these circumstances, Guardian ought not to be entitled to excuse its non-performance of its obligations to defend by pointing to the defence being provided by another insurer and insisting that that insurer's defence relieves it of any obligation to involve itself in the defence. To conclude, as did the Court below, on the one hand, that Guardian has a clear contractual duty to defend the respondents under the terms of its policy and, on the other hand, that Guardian need do nothing in furtherance of the defence but may stand by and have the primary insurer bear the entire burden of the defence, is to render the contractual duty meaningless, and, at the same time, to confer a windfall on Guardian by permitting it to have its defence obligations discharged by another insurer.

[para492] I cannot think of a more appropriate reasoning to apply to our facts. A number of the excess insurers here argue that their obligation to defend should not be triggered until a primary insurer's limits have been exhausted. Some have even argued that there are no limits for defence and third party costs and, therefore, their obligation to defend should never be triggered. Others have argued that their obligation to defend is not triggered until the primary limits have in fact been paid.

[para493] In my opinion, it is far more reasonable to apply the reasoning in *Broadhurst & Ball*, supra, wherein the Court has decided that the duty of an excess insurer to defend is triggered upon the reasonable perception that the claim could pierce into its layer. There are also very important practical and policy considerations why such a principle should be applied in our type of action. As stated by the Court in *Broadhurst & Ball*, supra, at p. 95:

it is in her client's professional interests to get this matter resolved as quickly as possible. However, without the active involvement of Guardian, she submits, it is impractical to discuss with the other defendants the formulation of a common defence strategy or a possible joint settlement package.

[para494] As was stated by one American authority *Belmer v. Nationwide Mutual Insurance Co.*, 599 N.Y.S. 2d 427 (1993):

Conservation of judicial resources, equitable costs and fiduciary obligations between the various insureds and the carriers would be encouraged by increasing the mutuality of the obligation of costs of payment and costs of defence.

[para495] I accept and adopt the reasoning in *Broadhurst & Ball* and *Belmer*, supra, and apply it to our facts. Given the nature and amount of the plaintiffs' claim, the excess insurers for the first \$10 million should have had reasonable expectation that the underlying limits would be exhausted. At that point, their defence obligation would be triggered and they should become active participants in the process. The formulation of a common defence strategy may well make for a more efficient trial and would certainly have enhanced the prospect of a settlement. As was said in *Broadhurst & Ball*, supra, at p. 96:

As a matter of equity, the burden that these insurers assumed in insuring the same insured against the same risk should fall on both of them and the costs accordingly be shared by them.

(f) Apportionment of defence and third party costs among the primary and excess insurers

[para496] Having determined which primary and excess insurers had a duty to defend Lafarge, it follows that the duty is converted into a liability to reimburse Lafarge for reasonable defence and third party costs incurred in defending the action. (See *Canadian Indemnity Co. v. Simcoe and Erie General Insurance Co.* (1979), 103 D.L.R. (3d) 485 (N.S.C.A.)) I now have to determine how these costs are to be apportioned among the various primary and excess insurers. I am indebted to counsel, especially counsel for Lafarge, who have made helpful submissions on this issue. I am also greatly assisted by a large number of Canadian cases that have considered various approaches in allocating such costs.

[para497] I decided earlier to apportion the plaintiffs' damages for which Lafarge is responsible and which are covered by the policies of various insurers into seven policy periods. Some of the parties have suggested that the costs be apportioned in accordance with the limits of coverage provided by each insurer within one policy period. Others have suggested the costs be apportioned in accordance with the ultimate contribution of each insurer to the judgment. It is obvious from reading the cases that there is no single formula that is applicable in all circumstances. Apportionment of these costs is obviously an exercise in the Court's equitable jurisdiction. The insurers who will have to bear the burden of these costs have no agreements among themselves. Therefore, the apportionment of defence costs is done on a basis of equitable consideration.

[para498] In *Canadian Indemnity Co. v. Simcoe and Erie*, supra, the Nova Scotia Court of Appeal sets out some helpful principles at p. 488:

As a general rule, it appears reasonable that when two or more insurance companies are at risk on a claim, and the amount of that claim is unascertained at the time of commencement of the action, then the companies should be equally liable for the costs of defending the action. This approach, albeit arbitrary, avoids the possibility of becoming involved in complicated calculation based upon criteria which may change radically in each case.

Also at page 485:

I discard the suggestion that the apportionment should be based upon the possible risk assumed by each of the insurers, e.g., \$150,000 as against \$3,000,000. Nor should the criterion be the amount paid by the respective insurers in satisfaction of the total claim. This sort of analysis presupposes that the expenses incurred in defending an action will vary directly with the size of the claim. This is just not so. I do not think that legal fees are based solely upon the quantum of damages either assessed or agreed upon. The size of the claim is but one of the factors which prudent counsel will consider in arriving at an appropriate account. Likewise, the costs of expert assistance in preparing the defence is not governed solely by the amount of the claim.

[para499] *Robins J.A.* in *Broadhurst & Ball v. American Assurance Home Co.*, supra, states at p. 96:

In this situation, I do not think it appropriate to allocate costs simply by reference to the respective policy limits, although I would add, in other situations, this may well be a fitting basis for allocation. The costs of providing the defence here are clearly not necessarily related to the monetary limits of the policies.

[para500] More recently that principle was adopted in the case of *Schmieder v. Singh* (1998), 165 D.L.R. (4th) 503 (Ont. C.A.).

[para501] Applying the above principles to our facts, I am of the opinion that the fairest way of allocating defence and third party costs would be to divide them into seven equal segments representing the seven policy periods. From the pleadings, it is clear that all primary and excess insurers, up to \$10 million for each policy year, were at risk. For reasons given earlier, all of the primary and excess insurers within this layer would have a duty to defend and correspondingly a duty to reimburse Lafarge for its defence and third party costs. Within each policy period I would apportion these costs equally among the various primary and excess insurers which would give the following result: 1986-1987 equal apportionment of costs between Boreal, Kansa and Scottish York; 1987-1988 between Boreal, Scottish York, American Home and Guardian; 1988-1989 between Signa or Lafarge and Reliance; 1989-1990 up to 1992-1993 equally between Signa or Lafarge and National Union.

(vi) What deductible is Lafarge obligated to pay?

[para502] There appears to be very little dispute between the parties on this issue. The few parties that have made submissions have been very brief. My decision on this issue dealing with Bertrand and its insurers will, therefore, apply to these parties.

(vii) Other Matters

(a) Are the insurers who are in breach of their duty to defend automatically obligated to indemnify?

[para503] Lafarge appears to be suggesting that any insurer who is in breach of their duty to defend would automatically be obligated to indemnify the insured. Given our prior discussion about duty to defend and the fact that such an obligation flows from the pleadings, it is obvious that the duty to defend is much wider than the obligation to indemnify which is dependent on the facts at trial. Lafarge's above proposition, therefore, appears to be inconsistent with the position that it was advocating earlier about duty to defend.

[para504] I also am not aware of any Canadian case law supporting such a proposition. Earlier in my decision, I referred to the cases of Canadian Equipment Sales and Service Ltd. v. Continental Insurance Co., supra, and Cooperative Agricole de St. Isidore Ltée. v. Cooperators General Insurance Co., supra, which stand for the proposition that if an insurer denies liability or coverage, then the insurer is deemed to have waived its rights under the policy. Any imperfect or non-compliance with some of the conditions in the policy does not prejudice the insurer. That is a much different principle from what Lafarge is advocating.

[para505] Lafarge refers to the case of Re St. Paul Fire and Marine Insurance Co. v. Durabla, supra, where the trial judge referred to the duty to defend as a question of law to be decided by the Courts and not solely a decision of the insurer. I agree and certainly would encourage insurers to seek declaratory judgments from the Courts whenever duty to defend becomes an issue. I would think most insurers would and the incentive of having some control over the action and the costs of the defence and third party alone would provide the necessary incentive. Nevertheless, I do not see the above authority as supporting the proposition advocated by Lafarge.

[para506] I, therefore, would reject the proposition advocated by Lafarge.

(b) Bodily Injury Coverage

[para507] Boreal Insurance argues that its policy does not provide for coverage of the type of bodily injury that is claimed by the plaintiffs. I conclude that by bodily injury Boreal means the plaintiffs' claim for hardship and inconvenience. The only plaintiff who claimed general damages for personal injuries was Marcil (M-72). Boreal also argues that there is no evidence that any of the plaintiffs suffered bodily injury during Boreal's policy years.

[para508] I must say I have some difficulty in following the proposition put forward by Boreal. It appears to be suggesting that the hardship and inconvenience which is claimed by the plaintiff some how has to be unrelated to property damage. I do not intend to get into a minute analysis of the wording of Boreal's policy, but I have no difficulty in concluding that the wording of the policy includes the plaintiffs' claim for which Lafarge is responsible.

[para509] Earlier in my judgment, I reviewed the plaintiffs' claim for hardship and inconvenience. I made an award based on the length of time the plaintiffs endured the sub-standard condition of their foundations. This included the years in which Boreal provided insurance.

[para510] Therefore, I do not accept Boreal's interpretation of its insurance policy.

(c) Are Reliance Insurance limits reduced by amounts paid by other insurers in prior years?

[para511] Reliance Insurance appears to be suggesting that if damages are paid by insurers for the years 1986-1987 and 1987-1988, then Reliance's limits for 1988-1989 of \$10 million would be reduced by such amounts. Reliance relies on condition 2 of its policy. I have reviewed condition 2 and I cannot see how it would have any application on our facts. Given that I have made a finding that the damage occurred over seven policy periods and applied the "continuous trigger theory" in allocating the damage over those years, it is obvious condition 2 could not apply.

(d) National Union alleges no duty to indemnify because Lafarge did not tender

[para512] National Union argues that Lafarge did not make a proper tender and, therefore, it cannot be considered to have been in breach to its duty to defend. This defence appears to be one of those legal technicalities which existed in the mid-eighteenth century dealing with either contracts or real estate. As I understand it, a tender is another form of notice. I am satisfied that National Union had plenty of notice of the claim against Lafarge and would be well aware of its obligation under their policy. In the circumstances of this case, I am sure National Union would not be at all surprised that this defence is rejected. I would direct the parties to my earlier comments on pre-judgment interest and costs.

ROY J.

* * * * *

APPENDIX A

Complete Title of Case

Between Bernard Alie, Royal Aubin and Rachelle Aubin, Gilles Barrette and Nicole Barrette, Ronald Beaudoin and Louise Beaudoin, Armand Bédard and Lise Bédard, Francis Beks, Marcel Bissonnette, Maurice Boudrias, Richard Boudrias, Jacques Bouvier and Christine Bouvier, Sylvain Brazeau and Micheline Brazeau, Fernand Carrière, Marcel Carrière and Lucie Carrière, Herbert Chew and Shirley Chew, Alain Delorme and Suzie Delorme, Louis Demers and Elaine Touzin, Christian Denis and Danielle Duranceau Denis, Gilles Desrosiers, Guy Duchesne and Claire Duchesne, Bernard Durocher and Patricia Durocher, Richard Durocher and Lyne Durocher, Wilhelm Hack and Jana Hack, Douglas Harvey and Judith Harvey, Ross Higginson, Serge Lachaine, Yvon Laliberté and Hélène Laliberté, François Lalonde and Nicole Lalonde, Jacques B. Lalonde, Léopold Leduc, Royal Leduc and Délima Leduc, André Pilon and Claire Pilon, Louis Portelance, Claude Robitaille and Danielle Robitaille, Jean-

Yves Séguin and Claire Séguin, Jacques Simard and Monique Simard, Raymond Tessier and Ginette Tessier, Pierre Timbers and Carole Timbers, John Tollis and Eva Tollis, Gilles Turpin, Noëlla Bissonnette, Albert Besner and Martine Besner, Gaëtan Bougie, Raymond Bougie, Jacqueline Boulianne, Alan Burns, Rhéaume Champagne, Karolina Despotovitch, Ed Dimo, Danielle Duplantie, Alain Duval and Lucie Charbonneau, Aurèle Galipeau and Marjolaine Dubord, Michel Goulet, Kurt Hungerbuehler, Gérard Lalonde, Madeleine Leduc, Gaston Rozon and Murielle Rozon, Joe Vaillancourt and Nicole Thibault, Prescott Condominium Corporation No. 2, Estate of Hubert Séguin and Lucienne Séguin, Corporation of the Village of L'Orignal, Roger Parisien and Marguerite Parisien, Lise St-Denis, Bronwen Williams, Michel Barbarie and Louise Barbarie, André Roy and Nathalie Pilon, Michel Lamoureux, Yves Boulet and Susan Labelle, Claudette Denis, Richard Desjardins, William A. Kothe and Helene Kothe, Pierre Larocque and Lori Larocque, Ronnie G. Leduc and Michèle F. Leduc, Serge Meconse and Theresa C. Meconse, Serge Pilon and Monique Pilon, Gérard Théorêt and Diane Théorêt, Capris Realities Limited, Gary O'Neill and Lillian O'Neill, and Yves Choinière and Hélène Desrochers, plaintiffs, and Bertrand & Frère Construction Company Limited, Raymond Bertrand, Robert Bertrand, Jean Seguin, Michel Bertrand and Luc Bertrand, Iven Conway, Conway Cement Works Inc., Yves Laviolette and Réal Landriault carrying on business as I.C.L. Formwork Reg'd and I.C.L. Formwork Inc., Gaston Duval Rénovation Inc., Alfred Forming Ltd., Roger Carriere Construction Ltd., Raymond Burroughs carrying on business as Raymond Burroughs Construction, R. & G. Lapensée Formwork Vankleek Hill Inc., Michel Landry, J.G. Ravary Construction Inc., Yvon Desrosiers carrying on business as Yvon Desrosiers Construction and Ravco Development Corp., Raymond Boucher & Fils Construction Inc., Achille Bertrand, Maurice Laniel, Daniel St-Denis Construction Company Ltd., S & I Forming Ltd., and Lafarge Canada Inc., defendants

Appendix B

Complete Title of Counsel

Robert J. Smith, for Alie et al. and P.C.C. No. 2. Michel Z. Charbonneau, for Alie et al. and P.C.C. No. 2. Yves Boucher, for Alie et al. and P.C.C. No. 2. William J. Simpson, Q.C., for Duval et al. Ian Stauffer, for Duval et al. Jocelyne Lauzier, for Marcil et al. Robert Tolhurst, for Kilbride and Wever. Gary Boyd, for Lalonde Furniture. Walter Langley, for ONHWP. Sean Kelly, for ONHWP. Brian Parnega, for Alexandria Formwork and L.C.L. Formwork. Stephen Appotive, for Alfred Forming. Rod Landriault, for Bernard Pilon Ltd. and Yvon Lalonde Const. P. Donald Rasmussen, for Bertrand & Frère Constr. Co. Ltd., Raymond Bertrand, Robert Bertrand, Jean Seguin, Michel Bertrand and Luc Bertrand. Heather Acton, for Bertrand & Frère Constr. Co. Ltd., Raymond Bertrand, Robert Bertrand, Jean Seguin, Michel Bertrand and Luc Bertrand. D.J.T. Mungovan, for Canada Lafarge. Peter Cavanagh, for Canada Lafarge. Candace Thomas, for Charlebois & Dubuc. Emilio Binavince, for Iven Conway and Maurice Laniel. Michael Pantalony, for G & G Custom Homes. Mark Charron, for Insurer of Trempracon Dev. and Trempracon Developments Ltd. Pasquale Santini, for Insurer of Ravco Dev. Corp. David Bertschi, for the Insurer of St-Denis & Fils, Raymond Burroughs, Roger Carriere Construction and Gilles Dupont Construction. Van Krkachovski, for J.G. Ravary Const. Inc. and R & G Lapensee Formwork. Wayne Spooner, for Canadian General Insurance Co. Stuart Hendin, Q.C., for Chubb Insurance Co. Garth MacDonald, for Chubb Insurance Co. Brian Elkin, for General Accident Assurance Co. Vern Rogers, for Guardian Insurance Co. Donald MacDonald, for Royal Insurance. Keith Batten, for Royal Insurance. Robert J. Clayton, for AIU Insurance Company and National Union Fire Ins. Ted Schieck, for American Home Insurance, Guardian Insurance Company and Scottish & York Insurance. John McNeil, Q.C., for Boreal Insurance Co. Carolyn Routledge, for California Union Ins. Co., Insurance Company of North America and Pacific Employers Ins. Co. Jamieson Halfnight, for Chubb Insurance Co. and Federal Insurance Company. Glynis Evans, for Chubb Insurance Co. and Federal Insurance Company. Richard McLean, for First State Insurance Co. and Hartford Casualty Ins. Co. Frank Tosto, for First State Insurance Co. and Hartford Casualty Ins. Co. Marina Stefanovic, for Harbor Insurance Company. D.H. Rogers, for Kansa General International Ins. Co. Crawford MacIntyre, for Reliance Insurance Company. Noona Barlow, for Royal Indemnity. Ruth Henneberry, for Westchester Fire Ins. Co.

CRB# 087

Condominium Plan No. 942 1710 v. Christenson

Between The Owners: Condominium Plan No. 942 1710, plaintiff, and Greg Christenson, Christenson Developments Ltd., Christenson Property Management Ltd. and Can-Der Construction Ltd., defendants

Action No. 9803 21978

Alberta Court of Queen's Bench Judicial District of Edmonton Acton J. Heard: February 6, 2001. Judgment: March 7, 2001. Filed: March 9, 2001. (23 paras.)

Counsel: Donald J. Wilson, for the plaintiff. Barry D. Young, Q.C., for the defendants.

REASONS FOR JUDGMENT

[para1] ACTON J.:-- The Respondent Plaintiff, a condominium corporation, has been assigned the causes of action of the current owners of the condominium units. The condominium complex was developed and built by the Appellant Defendants, Christenson Developments Ltd. and Can-Der Construction Ltd. The essence of the Respondent's claim, as against Christenson Developments Ltd. and Can-Der Construction Ltd., relates to alleged negligence in designing, planning and constructing the complex.

[para2] The Respondent also claims that Christenson Property Management Ltd. failed, neglected or refused to perform the services required of it pursuant to its management contract and that Greg Christenson failed to reimburse the Respondent as agreed.

[para3] On August 3, 2000, Master Breitkreuz denied the Appellant Defendants' application for summary judgment. This is an appeal from that order.

[para4] The Appellant asks for summary judgment and states that the cause of action cannot succeed on two grounds. First, the Appellant argues that a general contractor is not held responsible for the negligent construction of a building to a subsequent purchaser of the building, who is not in contractual privity with the contractor, for the cost of repairing non-dangerous defects. As such, there is no cause of action against the defendants.

[para5] Second, the Appellant claims that the Offer to Purchase and Interim Agreement contains an express provision prohibiting the assignment of the Purchasers' rights without the written consent of the Vendor. Such consent was neither requested or provided. The Appellant claims that the owners were restricted by the assignment clause and could not assign their contractual rights to subsequent owners or to the Respondent Plaintiff in this action.

Amendment of the Statement of Defence:

[para6] The Appellant also seeks leave to amend its Statement of Defence to include:

The Defendants also state that the Offer to Purchase and Interim Agreement contains an express provision prohibiting the assignment of the Purchasers rights without the written consent of the Vendor. Such consent was neither requested or provided.

[para7] As stated above, this is one of the grounds upon which the Appellant relies in its application for summary judgment. The current Statement of Defence includes nothing about the limitation on the assignment of the contractual rights. Nor was it included in the Statement of Defence when the original application for summary judgment was before Master Breitkreuz.

[para8] The Respondent does not consent to the amendment. The Respondent submits that the application for summary judgment should proceed on the basis of the current Statement of Defence, without the requested amendment. It is argued that the Appellant should bring a separate application to request the amendment.

[para9] Rule 132, of the Alberta Rules of Court, relates to the amendment of pleadings:

The court may at any stage of the proceedings allow any party to alter or amend his pleadings or other proceedings in such manner and on such terms as may be necessary for the purpose of determining the real question in issue between the parties.

[para10] Considering all the circumstances, leave is given to the Appellant to amend its Statement of Defence. The application for summary judgment will be determined on the amended Statement of Defence. In making this determination I have considered whether there is any prejudice to the Respondent. With regard to the ongoing litigation I can see no prejudice to the Respondent. In relation to this particular application, the Respondent was not taken by surprise in any way. The Respondent was aware of the proposed amendment well in advance. The issue of the assignment clause was before Master Breitkreuz. This is evidenced by the fact that in the Master's decision he concludes the non- assignability of the purchase contracts is a triable issue and, as such, no summary judgment would be granted on that basis. Further, in the Memorandum of Argument for this application, the Respondent has addressed the issue of the assignability of the contractual rights. The Respondent has made submissions, and has included relevant case law, to show that there is a question of law that needs to be determined at trial. There is a concern that to disallow the amendment would necessitate further applications when the matter can be conveniently dealt with here.

Summary Judgment:

[para11] Rule 159(2) of the Rules of Court allows a defendant to apply for summary judgment.

(2) A defendant may, after delivering a statement of defence, on the ground that there is no merit to a claim or part of a claim or that the only genuine issue is as to amount, apply to the court for a judgment on an affidavit sworn by him or some other person who can swear positively to the facts, stating that there is no merit to the whole or part of the claim or that the only genuine issue is as to amount and that the deponent knows of no facts that would substantiate the claim or any part of it.

(3) On hearing this motion, if the court is satisfied that there is no genuine issue for trial with respect to any claim, the court may give summary judgment against the plaintiff or a defendant.

[para12] The test to be applied in an application for summary judgment, by a defendant, is whether it is plain and obvious that the action cannot succeed: *Boudreault v. Barrett* (1998), 291 A.R. 67 (C.A.). The court will look to the merits of the claim and the defence and determine whether there is an issue requiring a trial. A defendant must show more than a strong likelihood that he will succeed.

Economic Losses and Subsequent Purchasers:

[para13] The Appellant states that there is no cause of action in Canada that allows a subsequent purchaser to sue a contractor for deficiencies or defects in the building that are less than dangerous. In support of this proposition the Appellant relies on *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85 (S.C.C.) and *Blacklaws v. Morrow* (2000), 261 A.R. 28 (C.A.). In *Winnipeg Condo.*, LaForest J. states, at page 102:

In my view, where a contractor (or any other person) is negligent in planning or constructing a building, and where that building is found to contain defects resulting from that negligence which pose a real and substantial danger to the occupants of the building, the reasonable cost of repairing the defects and putting the building back into a non-dangerous state are recoverable in tort by the occupants.

[para14] As summarized in *Blacklaws*, by Fraser, C.J.A., at page 42: "The *Winnipeg Condo.* Case requires physical harm to the plaintiffs or their chattels, or imminent risk of it. A shoddy but dangerous building does not suffice for torts liability." This is the current state of the law in Canada. In the case at bar, the alleged deficiencies do not pose a real and substantial danger to the occupants of the building.

[para15] Although no cause of action presently exists, it is not plain and obvious that the Respondent has no chance of success. The facts in this case are distinct from the facts found in either *Blacklaws* or *Winnipeg Condo.* In *Blacklaws*, two issues were before the court. First, whether the owner of a company could be found personally liable in negligence for its nonperformance of its management contract, and second, whether it is appropriate to reverse the trial judge's dismissal of claims for civil fraud. The issue of a subsequent purchaser suffering economic losses due to shoddy workmanship was not before the court. The comments of Fraser, C.J.A., in relation to the *Winnipeg Condo.* case, were made in obiter.

[para16] In the *Winnipeg Condo.* case, the defects in the construction did pose a real and substantial danger. In that case, LaForest J. stated, at page 119:

Given the clear presence of a real and substantial danger in this case, I do not find it necessary to consider whether contractors should also in principle be held to owe a duty to subsequent purchasers for the cost of repairing non-dangerous defects in buildings. It was not raised by the parties.

He does note that a number of jurisdictions, including New Zealand, Australia, numerous American states and Quebec have all recognized some form of general duty of builders and contractors to subsequent purchasers with regard to the reasonable fitness and habitability of a building. LaForest states that he would "require argument more squarely focused on the issue before entertaining this possibility."

[para17] The *Winnipeg Condo.* case illustrates the fact that tort law is not static. The Manitoba Court of Appeal had struck the statement of claim as against the defendant contractor because the losses claimed were not recoverable in tort law. The Supreme Court found that the law in Canada had progressed to the point where contractors would owe a duty in the particular circumstances. As noted by Fraser C.J.A. in *Blacklaws* at page 41, the categories where defendants have been held liable for negligently causing economic loss are not closed.

[para18] The Supreme Court of Canada has stated that damages for these type of economic losses may be considered when the case arises on the basis of a full argument and with reference to the unique and distinct policy issues raised. Considering these statements, and the development of the law in other jurisdictions, it is not plain and obvious that the Respondent has no chance of success.

Assignability of the Contract:

[para19] The Respondent questions whether the terms of the Offer of Purchase actually provide the vendor with the unilateral right to arbitrarily withhold its consent to any assignment. The Respondent relies on *Welch Foods v. Cadbury Beverages Canada Inc.*, [1999] O.J. No. 544 (Gen. Div.), where the court reviews case authority that states parties to a contract must exercise their rights honestly, fairly and in good faith.

[para20] The issue of whether or not the provision is enforceable in the context of this type of purchase and sale agreement is a triable issue. As stated by Master Breitreuz, it is reasonably arguable that a court would hold this type of clause to be an unreasonable restraint against alienation of property rights.

Stay Due to Arbitration:

[para21] Master Breitreuz refused to grant a stay of proceedings pending arbitration. In doing so, he stated:

I have also concluded that it is not appropriate to grant a stay of proceedings pending arbitration. As Mr. Wilson pointed out, this appears to be a contradictory argument at least as far as assignees from original purchasers are concerned. If they get no rights by assignment they also cannot acquire a right to arbitration. My view is that it would be costly and inconvenient to allow some of the unit holders to proceed to arbitration while others proceed with the normal litigation. In addition to the expense and inconvenience involved there would be the additional delay factor and possibly two conflicting results.

[para22] The Appellant did not raise any arguments on this issue before me and I see no reason to set aside the determination made by Master Breitreuz.

[para23] The appeal from the decision of Master Breitreuz is dismissed.

ACTON J.

CBR# 823

Meadowlands Development Corp. v. Berger

Between The Meadowlands Development Corporation, plaintiff, and Victor Berger, defendant

Docket: P9802700282

Alberta Provincial Court Civil Division Medicine Hat, Alberta Debow Prov. Ct. J. Judgment: January 18, 2001. (15 paras.)

Counsel: B. Hill, for the plaintiff. F.C. Fisher, for the defendant.

JUDGMENT

[para1] DEBOW PROV. CT. J.:-- The Plaintiff sold a condominium to the Defendant. This is an action to recover the balance of the purchase price in the sum of \$4,000.00 and for extras provided to the Defendant in the sum of \$621.00. The purchase price, including upgrades, is \$177,213.00. A Certified Copy of Certificate of Land shows the land was transferred to the Defendant and his wife on December 4th, 1995. The Defendant transferred approximately \$173,000.00 to the Plaintiff holding back the sum of \$4,000.00. The Offer to Purchase specifies a possession date of October 15th, 1995.

[para2] In response to the Plaintiff's claim, the Defendant argues that the Plaintiff did "not provide the unit purchased on possession date as set forth in the contract between the parties:. The Defendant further takes the position that the Plaintiff failed to complete the contract putting the Defendant to extra expense resulting from the delay in providing the unit to the Defendant.

[para3] The Defendant has filed a counterclaim against the Plaintiff covering the claim for extra expenses to the Defendant caused by the Plaintiff's breach of contract.

[para4] The first issue is whether the parties by their conduct agreed mutually to adjust the possession date as reflected in the Offer to Purchase.

[para5] The second issue is whether the Defendant could have taken possession and occupied the property from the time the land was transferred to him on December 4th, 1995.

[para6] On the first issue, there is nothing in the evidence to show that either party by his conduct intended to be bound by the October 15th, 1995 possession date included in the Offer to Purchase. In fact, evidence shows that the parties continued to communicate with each other concerning ongoing changes to the drawings and to the property. Arrangements were eventually made to transfer the property on the December 4th date. I find that the effective possession date agreed to by the parties on the evidence is December 4th, 1995.

[para7] On the second issue, the evidence shows that the Defendant left the country on holidays on December 15th, 1995 and returned on the last two or three days of March, 1996. He designated a third party to represent his interests during his absence. Mr. Berger testified that when he returned from holidays some of the work still had not been completed. He further testified that he did not move into the property until approximately May 1st, 1996.

[para8] On this second issue, the evidence relating to the time at which the Defendant could have taken possession, in my view is not very clear. As I understand the arrangement, the Defendant was responsible for the completion of the basement development on his own with the exception of the rough-ins in the bathroom being completed by the Plaintiff. It was the responsibility of the Plaintiff, under the terms of the contract, to complete the upstairs which would include installing the linoleum and the rugs that were on the premises ready to be installed. However, it appears the Plaintiff understood that he was not to complete the upstairs until the Defendant completed the basement. This continuing misunderstanding between the parties caused a delay in the completion of the terms of the contract resulting in certain deficiencies. However, I am satisfied that these deficiencies, as described in the evidence, were such that they could have been remedied by the Plaintiff if it were not for the continuing apparent misunderstanding between the parties.

[para9] Notwithstanding the deficiencies, I find there was substantial compliance by the Plaintiff under the terms of the contract to the extent that the Defendant could have taken effective possession by the time the property was transferred on December 12th, 1995.

[para10] The evidence shows that the Plaintiff provided extra services, apart from the contract, for which the Plaintiff is entitled to be compensated in the sum of \$621.06 as follows:

a. \$117.00 to connect electricity to the stove b. \$374.50 installation of water softener c. \$129.06 connect the water softener by-pass

Subject to the counterclaim, the Plaintiff is entitled to judgment in the sum of \$4,621.06 consisting of the balance of the purchase price in the sum of \$4,000.00 plus the sum of \$621.06 for the extra services provided by the Plaintiff.

[para11] In the counterclaim of the Defendant, he claims damages against the Plaintiff for breach of contract as listed in Schedule "B" to the Dispute Note of the Defendant. I make the following findings:

a. Having found the effective possession date to be December 4th, 1995, the Defendant is not entitled to recover mortgage interest as claimed from December 1st, 1995 to May 1st, 1996.

b. The Defendant is not entitled to recover the cost of utilities for the period December 1st, 1995 to May 1st, 1996.

c. The Defendant is not entitled to recover the monthly Condominium fees for the period December 1st, 1995 to May 1st, 1996.

d. The evidence shows that the cement in the driveway deteriorated over a period of time. My view of the evidence is that this deterioration was not caused by any negligence on the part of the Plaintiff. The Plaintiff followed the industry standards on the Defendant's driveway as well as other driveways in the condominium complex. I accept the evidence that the deterioration was not caused by early or premature finishing as argued by counsel for the Defendant. There is evidence of the presence of general

freeze-thaw conditions the first winter which contributed to the problem. This fluctuating cycle between unusually hot temperature followed by a relatively rapid freezing resulted in what has been referred to as spalling. There is also evidence of continued ice build up on the street which held the water from the thawing ice on the driveway. Accordingly, the claim for damages relating to the driveway deterioration is denied.

e. With reference to the installation of the upgraded toilet the evidence is uncertain. The Defendant stated that he believed that he did pay \$100.00 for the upgraded toilet but couldn't confirm this with any degree of certainty. Also it was the recollection of the Plaintiff that one upgraded toilet was installed but the Defendant decided against a second upgraded toilet because of the additional expense. The Defendant's claim for the replacement cost of \$150.00 is denied.

f. The Defendant claims the Plaintiff agreed to credit the Defendant in the sum of \$300.00 in relation to the basement floor. The evidence does not support such a finding. It is clear that the completion of the basement improvements were the responsibility of the Defendant. The installation of a "warmfoot" base was the decision of the Defendant. The evidence is that the standard basement floor tolerance of six mil per liter was followed. Any basement surface slope variable was not an issue. The \$300.00 claim for the basement development is denied.

g. The Defendant claims that the Plaintiff agreed to a credit in the sum of \$300.00 in relation to the basement window. There is no evidence of such an agreement. The evidence is that the original outside basement window was installed in proximity to the wet bar kitchen structure. The location of this window was changed at the request of the Defendant. The Plaintiff testified that the removal and reinstallation of the window resulted in an extra cost of \$200.00 which was not charged to the Defendant. The Plaintiff testified that to the best of his recollection the window was probably changed three times. The claim for \$200.00 is denied.

h. The Defendant claims the sum of \$300.00 in relation to the stucco. There were cracks in the stucco that appeared over a period of time. Some of these cracks were caused by the shrinking of the underlying lumber (2"x10" dimensional lumber) used for the build outs along the bottom of the unit. These cracks were subject to the ongoing maintenance program usually under the direction of the Condominium Association. The stucco defects were not caused by the negligence of the Plaintiff. The claim for \$300.00 is denied.

i. The Defendant claims the sum of \$300.00 to sand and repaint the railings around the deck. The Defendant stated in his evidence that somebody quoted \$350.00 to remedy the problem but there was no confirmation on this point. The evidence is that the iron railings were ordered from a local iron works company and spray painted and installed. I am satisfied on the evidence that the problem with the railings was not due to the negligence of the Plaintiff. In my view the rusting that does occur is not a warranty issue but subject to continuing maintenance. The claim for \$300.00 is denied.

[para12] Accordingly the counterclaim of the Defendant is dismissed.

[para13] I assess nominal damages in the reasonable sum of \$500.00 to the benefit of the Defendant in relation to the outstanding deficiencies.

[para14] Judgment is hereby granted to the Plaintiff in the sum of \$4,121.06.

[para15] No costs are awarded to the Plaintiff or the Defendant.

DEBOW PROV. CT. J.

CBR# 824

Strathcona (County) v. Half Moon Lake Resort Ltd.

IN THE MATTER OF the Municipal Government Act S.A., 1994, c.M-26.1; AND IN THE MATTER OF the Land Titles Act R.S.A. 1980, c.L-5 AND IN THE MATTER OF the sale of lands within the south east quarter of Section 6, Township 52, Range 21, west of the Fourth Meridian, and within the boundaries of Strathcona County Between Strathcona County, applicant, and Half Moon Lake Resort Ltd., Apple Auction Corporation operating a business under the firm name and style Apple Auction Ltd. and Brian Lovig, respondents

Action No. 9903-22441

Alberta Court of Queen's Bench Judicial District of Edmonton Ritter J. Heard: May 11, 2000. Judgment: May 26, 2000. Filed: May 29, 2000. (34 paras.)

Counsel: B.A. Sjolie and J.S. Grundberg, for the applicant. M. McCabe and S. Thomas, for the respondents.

REASONS FOR JUDGMENT

RITTER J.:-

INTRODUCTION

[para1] This matter involves an allegation on the part of the Applicant that the Respondents are effecting the sale of lots from a parcel of land being 139 acres abutting Half Moon Lake. The 139 acres consist of 1 unsubdivided parcel of land which is located within the Applicant county.

[para2] The allegation of the Applicant is that 35 year leases entered into by the Respondents with respect to 50 parcels and proposed to be entered into with respect to 179 remaining parcels out of that 139 acre parcel really constitute the sale of, or proposed sale of, a total of 229 unsubdivided parcels. It is the position of the Applicants that this is contrary to provisions contained in the Land Titles Act, R.S.A. 1980, c.L-5 and the Municipal Government Act, S.A. 1994, c.M-26.1. Further, it is the position of the Applicant that the purpose of legislation contained in the two referenced Acts is to prohibit unauthorized subdivisions for two reasons:

- i) to enhance security of title;
- ii) to promote orderly and efficient development of land.

[para3] It is my intention to proceed with a reasonably detailed factual analysis and then to consider legal principles relating to subdivision and development of land and relate those principles to the facts as I find them. I will then consider the cost result emanating from my conclusions and any necessary and ancillary relief that the facts and conclusions dictate.

FACTUAL ANALYSIS

[para4] As I have already stated, this matter involves 35 year leases that the Respondents have already entered into with 50 different lessees. Each of the leases relates to a designated area within the 139 acre parcel earlier referenced. The designated area is described in the lease in the following terms: "the lessor has designated 229 ("areas") in the land set out in the leasehold survey previously registered as Document No. 99223374 in the Land Titles Office for the North Alberta Land Registration District".

[para5] From a historical perspective, this is the third different way in which the Respondents have attempted to deal with these 229 designated areas. In the spring of 1999 the Respondents had registered the plan of survey referenced in the lease as being previously registered. The Respondents advertised an auction of the various parcels identified in the plan of survey. They did so even though the subdivision had not been registered or approved.

[para6] The matter came to the attention of the Applicant, who then applied for and obtained an interim injunction from Bielby, J. preventing the auction from proceeding. Notwithstanding that injunction, the Respondents determined to proceed with something they considered not to be a sale. What they did was enter into leases in perpetuity with prospective purchasers. The proposed sale by auction and the leases in perpetuity were dealt with by Agrios, J. on the 29th of June, 1999. At that time, Agrios, J. granted judgment declaring the first contracts (being the sales) and the second contracts (being the leases in perpetuity) to be invalid on the grounds that the contracts were illegal attempts to subdivide lands contrary to the Municipal Government Act (s. 652) and the Land Titles Act (s. 95). Agrios, J. also granted a permanent injunction prohibiting the Respondents from entering into any further first contracts or second contracts.

[para7] The Respondents then decided to proceed on a new basis and prepared a third set of contracts which are the contracts before me. As noted, these contracts refer to a survey previously registered as Document No. 99223374 in the Land Titles Office for the North Alberta Land Registration District. The reason the document is referred to as having been registered is that Agrios, J. also ordered that the plan of survey be deregistered at the Land Titles Office.

[para8] With respect to the third contracts, some of the salient provisions include the fact that 229 parcels as set out in the leasehold survey previously registered are being sold, the term of the lease is for 35 years, all of the consideration for the lease is payable upon execution of the Lease Agreement, the lessees are responsible for a pro rata share of the property taxes and common costs, and a Tenants' Association is established with powers similar to those of a condominium corporation and with control over areas described as common areas.

[para9] Mr. Lovig is described as a co-covenantor in the lease, and joins and binds himself to perform each and every covenant contained in the lease agreement on the part of the lessor. Further, the lease provides that no improvements may be made or erected upon leased areas without prior written consent of the Tenants' Association, which consent is not to be unreasonably withheld. The lessees also agree to be bound by municipal bylaws in effect from time to time. Finally the leases contain a provision whereby the lessees agree that they will not file a caveat against the title to protect their interest under the lease.

[para10] Subsequent to Agrios, J.'s order and upon the Applicant becoming aware of the third contracts, the Applicant immediately moved to have the third contracts become the subject of injunctive relief and to have them declared void for illegality. An initial procedural hitch arose as it became apparent that the Applicants would be required to file a new Originating Notice as the previous one had been subsumed into the judgment rendered by Agrios, J. This was shortly accomplished and the process which ultimately resulted in the hearing before myself commenced in early December 1999 with a series of affidavits being filed by each party, examinations on affidavits, procedural applications, and other steps occurring between early December 1999 and May 11, 2000, when this application was heard by myself. One of those applications ultimately became a consent order for an interim injunction enjoining the Respondents from entering into any further leases with potential lessees.

[para11] I turn now to consideration of the law relative to the leasing of unsubdivided parcels of land.

LEGAL ANALYSIS

The Applicant's Position

[para12] It is the Applicant's position that the Land Titles Act and the Municipal Government Act, when read in conjunction, prohibit the leasing of unsubdivided land for 35 year terms or alternatively prohibit the leasing of unsubdivided lands the same as, or similar to, the type of unsubdivided lands proposed to be leased by the Respondents for 35 years. Section 95 (1) of the Land Titles Act provides in part:

95 (1) No lots shall be sold under agreement for sale or otherwise according to any townsite or subdivision plan until the plan creating the lots has been registered.

Section 652 of the Municipal Government Act provides in part:

652 (1) A Registrar may not accept for registration an instrument that has the effect or may have the effect of subdividing a parcel of land unless the subdivision has been approved by the subdivision authority.

[para13] It is the Applicant's position that policy considerations for orderly and economic development underlie or establish the purpose for these statutory provisions. These policy considerations include:

- a) concern for boundaries and title registration;
- b) concerns related to street pattern;
- c) control of lot sizes;
- d) concerns as to the cost burden of providing municipal services involved in a residential subdivision;
- e) the desire to obtain municipal services at minimal cost regardless of which party pays for it;
- f) the desire to design the creation of a pleasant and convenient environment; and
- g) the desire to preserve environmentally sensitive lands.

[para14] The Applicant suggests that the appropriate test for determining whether a particular transfer of an interest in land constitutes an unauthorized subdivision includes consideration of all of the facts, and where the purpose and effect or possible effect is a transfer of an interest in unsubdivided lands, then the transaction falls within the prohibited category under s. 652 of the Municipal Government Act and s. 95 (1) of the Land Titles Act: *Otan Developments Ltd. v. Kuropatwa* (1978), 7 Alta L.R. (2d) 274 (s.c. A.D.); leave to appeal refused [1978] 2 S.C.R. viii.

The Respondents' Position

[para15] It is the Respondents' position that there no longer exists a statutory provision preventing the leasing of unsubdivided parcels, particularly when those unsubdivided parcels are to be utilized in the continuation of an authorized use or a non-conforming but legal use of land. Further, it is the Respondents' position that they are entitled to and have arranged their affairs so to avoid the effects of the Municipal Government Act and the Land Titles Act which, had they not so arranged their affairs, would have necessitated a registration of a subdivision plan. It is their position that this is no different than a business person incorporating a company so as to minimize tax consequences. By doing so, such person might be avoiding some tax that otherwise would be payable, but his incorporation cannot be set aside as being illegal.

[para16] The Respondents acknowledge that there was a positive prohibition preventing the subdivision of land contained in s. 16 of the Planning Act, R.S.A. 1970, c. 276, which indicated that land could not be subdivided unless certain conditions had been met including the approval by the subdivision authority. It is the Respondents' position that this provision has not been carried forward into the current Land Titles Act and Municipal Government Act sections referenced above. What has been carried forward is a positive prohibition on the sale of unsubdivided land and a prohibition directed to the Registrar preventing him from registering instruments which have the effect or may have the effect of subdividing a parcel of land, unless the subdivision has been approved by the subdivision authority.

DO THE LEASES AND PROPOSED LEASES CONSTITUTE A SALE?

[para17] Section 95 of the Land Titles Act makes it clear that a sale of unsubdivided parcels is illegal. It is the position of the Applicants that the third contracts really constitute a sale as the proposed 35 year leases are merely a colourable attempt to circumvent the effects of s. 95(1) of the Land Titles Act.

[para18] I am satisfied that a lease can be a sale. A document may be a lease in form, but in substance be a sale. For example, Agrios, J. determined that the second contracts which proposed to grant a leasehold interest in perpetuity were really sales. I am also satisfied that leases fixed for very long terms can constitute a sale, especially where all of the rights and obligations of ownership pass from the lessor to the lessee.

[para19] I am satisfied that in determining whether or not a lease is a sale, the Court should look at all of the relevant facts and consider a number of factors. In my view, these factors would include:

1. The length of the term. Obviously the longer the term, the greater the prospect of the lease really being a sale.
2. The nature of the property. It is suggested in *Otan v. Kuropatwa*, supra, that the lease of a portion of a parcel leased as hay or grazing land or for parking lot purposes for a considerable period of time is perhaps different than the lease of a residential lot or a series of residential lots for a similar period of time.
3. Whether the property is fully developed. If development remains to be done, are there restrictions within the lease preventing redevelopment or additional development during the term of the lease? Does the Landlord retain the right of control with respect to redevelopment?
4. Is the existing or any potential development or redevelopment of the property an authorized development? If the existing or proposed development is not an authorized development, who has the responsibility of dealing with the developing authority?
5. Does the lease impact upon, or potentially impact upon, or affect the purposes of subdivision, in more than a transitory way?
6. The nature of the lessee. For instance, large multinational corporations, dealing with one another with respect to commercial or industrial premises, are clearly in a different position than are private individuals. For one thing, corporations have indefinite durations. The leasehold term relative to the life of a corporation is considerably different than what a leasehold term might be relative to the life of an individual. From an individual's point of view, all the benefits of ownership may well pass to that individual by way of something less than ownership in perpetuity because people simply do not live forever.
7. Any pre-existing history which points to what might be a colourable transaction. Have the lessor and lessee previously attempted to accomplish the same thing, and is this simply one step in a series of steps taken by the lessor and the lessee to avoid the necessity of subdivision?
8. Does the lease include an option to purchase? If the lease is for a very long period of time and includes an option to purchase with a very small payment required upon the exercise of the option, that suggests that the lease is really a sale.
9. When the rent is payable. If all the rent is payable at the commencement, that factor suggests that the lease is more properly a sale.
10. The cost of ownership. If absolutely every cost of ownership is borne by the lessee, again that factor suggests that what the parties are attempting to do is transfer ownership while utilizing a lease.

[para20] I do not suggest that these factors are exhaustive. As I have stated, each case should be considered individually and all of the facts giving rise to the matter should be reviewed by the Court.

[para21] I turn to the case before me. As I have already stated, the term of the lease is 35 years. This is a long term, but not one that is unheard of. In *Knowlton v. The Registrar of Land Titles et. al.* (1982), 19 Alta L.R. (2d) 31 (Q.B.), Miller, J. dealt with a lease for a MacDonald's restaurant located in the parking lot area of a shopping centre complex. The restaurant itself was located on unsubdivided lands. The term of the lease was for 40 years with an option to renew for 10 years. The rent was payable at the commencement of the term in the amount of \$535,000.00. The demised premises were not completely separated from the rest of the shopping centre lot, nor could they be dealt with completely freely by the lessee in any manner that it might desire. The lessor had a right of entry.

[para22] Miller, J. concluded that the lease was a bona fide lease of a portion of a shopping centre lot and did not constitute an unauthorized subdivision. In that context, Miller, J. was prepared to consider that a 40 year term renewable for a further 10 year period was not a sale.

[para23] There are however, some marked differences between this case and the circumstances in *Knowlton v. the Registrar*, supra. These include:

1. The nature of the property;
2. The number of parcels involved. There one parcel was involved, here 229 parcels are involved;
3. In the lease that has been granted by the Respondents, the lessor retains virtually no control;
4. The lease granted by the Respondents leaves the question of development to the lessee and directs the lessee to deal with the Tenants' Association established by the lessees and with the Development Authority. The rights relating to development have, therefore, been transferred to the lessees;
5. In *Knowlton v. The Registrar*, supra all development concerns had been dealt with. I am not satisfied that all development concerns have been dealt with in the leases granted by the Respondents. In fact, the leases specifically indicate that further development is contemplated and direct the lessees to deal with the Development Authority;
6. MacDonald's is a well known multinational corporation with an indefinite duration in terms of its natural life. The lessees in the case at bar (and I assume proposed lessees), do not constitute such corporations, but are individuals looking to secure vacation spots;
7. There was no pre-existing history in *Knowlton v. The Registrar*, supra, which pointed to a potential colourable transaction. Here, two attempts have been made to sell unsubdivided portions and these have failed. It is apparent that the lessor is attempting to gradually reduce the ownership rights conveyed to lessees or purchasers, so as to provide them with the maximum attributes of ownership possible and still fall within the characteristics of the lessor/lessee relationship. I am satisfied that the lessor is entitled to do this. However, if the lessor misses the mark such that what the lessor describes as being a lease, is really a sale, then s. 95(1) of the Land Titles Act has been breached and the contract is void for illegality.

[para24] Have the Respondents been successful in arranging their affairs so as to place themselves within the ambit of a true lease as opposed to a sale? The Respondents' own materials, circulated by them with the third contracts, are some indication of the Respondents' thinking regarding what is being conveyed by the third contracts. The third contract handouts circulated include the following statements:

Q. Why a 35 year lease?

A. 35 year lease as opposed to other terms is what the legal team recommended. They expressed 35 years as "one generation" which satisfied potential issues.

Q. I want ownership.

A. The lease program appears to be the only workable vehicle at this time. What's your age? Add 35 years to this, and the lease has similar characteristics of ownership. Also if the ownership were conveyed by way of a conventional plan, the price would be astronomically higher.

[para25] It is noteworthy that the lease provides for a form of management of all the 229 parcels and what are described as common areas within those parcels, that is almost identical to the form of management under a bare lands subdivision created under the Condominium Property Act, R.S.A. 1980, c.C-22. Of course, no Condominium Plan is proposed to be registered. However, the Condominium Property Act contains no provision requiring the registration of a Condominium Plan upon the institution of this form of management.

[para26] In my view, as part of the Courts inquiry, consideration should be had to the purpose of the legislation. I am satisfied that the purposes of the Land Titles Act and the Municipal Government Act provisions earlier referenced are as advanced by the Applicant, namely the security and certainty of title and the promotion of orderly and efficient development of land. In considering legislation very similar to s. 95 of the Land Titles Act, Duff, J. in *Boulevard Heights Ltd. v. Veilleux* (1915), 9 W.W.R. 742 at 745 stated:

I am disposed to think the better view to be that this enactment is intended to serve the general public interest in the security and certainty of title which is one of the main objects of the Land Titles Act.

[para27] I am satisfied that the entire scheme created by the third contract goes some distance to thwart these purposes.

[para28] At the hearing of this matter, I posed the scenario of the bankruptcy of the Respondents Half Moon Lake Resort Ltd. and Brian Lovig, and what protection would then be afforded to the lessees and proposed lessees as the agreement indicates that they are not even able to protect their interests by caveat. If they attempted to protect their interests by caveat, the Registrar would be required pursuant to the provisions of s. 652 of the Municipal Government Act to reject the caveat. The response from the Respondents was to the effect that leasehold interests are often subject to a mortgage and may be foreclosed out. This is particularly the case with respect to commercial premises, shopping centres, and the like. However, I am satisfied that it is not usual for all of the rent to be payable in advance. It is also frequently the case that shopping centre mortgagees who obtain title continue on with the lease; in recent economic times, it would be foolhardy to terminate the lease, thereby creating vacant space. Here, however, there is absolutely no advantage to a trustee in bankruptcy or a purchaser from that trustee carrying on with these leases as the entirety of the "rent" has already been paid to the Landlord.

[para29] If security of title is a purpose of the protection afforded by the Land Titles Act and the Municipal Government Act, then that purpose has been thwarted. What the lessees are receiving is insecurity of title.

[para30] Similarly, I have concerns that the second purpose of the relevant statutory regime, namely the orderly and efficient development of land, is, to some extent at least, being thwarted by the third contracts. Section 617 of the Municipal Government Act makes it clear that this is one of the purposes of Part 17 of the Municipal Government Act in which s. 615 is found. The leases themselves make it clear that continued development is contemplated as the process for such continued development is found within the lease. One can only speculate as to what issues proposed developments might raise and whether those issues will impact upon matters normally dealt with during the course of the process of subdivision approval. At a minimum, the sale or lease of a number of the lots does not comply with applicable development bylaws relating to setback from a body of water.

[para31] I am satisfied that the Court should look at both form and substance. Here substance departs from form. Having regard to all of the factors that I have enumerated, I am satisfied that the proposed leases include sufficient characteristics of sale so as to constitute a sale within the meaning attributed thereto in s. 95 (1) of the Land Titles Act. Consequently, the sale constituted within the leases is void for illegality.

[para32] Having come to this conclusion, I grant the Applicants the following relief:

- a) An order declaring that the purported leases pursuant to the third contracts are invalid, void, and illegal;
- b) An order granting a permanent injunction prohibiting the Respondents from soliciting purchasers for or otherwise leasing interests in the lands pursuant to the third contracts;
- c) An order requiring the Respondents to return any monies received pursuant to the third contracts to those individuals who paid them, without condition, within 2 months of the date of formal entry of the judgment emanating from these reasons;
- d) An order declaring that the Respondents are prohibited from selling or leasing any interest in the lands in question without prior court order and notice to the Applicants;
- e) An order that paragraph 4 of the Order of the Honourable Justice Moreau granted December 2, 1999, shall remain in effect notwithstanding the granting of final relief in this matter;
- f) An order that the Respondents shall not renew the mortgage currently registered in favour of Paragon Capital Corporation Ltd. or otherwise grant financial encumbrances respecting the lands without prior court order and notice to the Applicant.

[para33] The Applicant also applies for solicitor-client costs. It suggests that such costs are to be granted because of alleged misconduct by the Respondents in the conduct of this action. It provided a number of examples, but I am satisfied that those examples do not constitute anything close to the type of misconduct that is required for an award of costs on a solicitor and client basis. Consequently, the Applicant shall have costs on a party-party basis to be taxed. The Applicant also applies for court supervision of the Respondents' compliance with the orders that I have directed.

[para34] I am not satisfied that this matter calls for court supervision of my order. If the Respondents appeal, they may apply to the Court of Appeal for a stay respecting my order. Such a stay would render court supervision pointless. If the Respondents do not appeal, then it is my expectation that the Respondents will comply with the order and if they do not do so, the Applicant is of course in a position to take contempt proceedings. I consequently decline to direct court supervision as court supervision cannot be ordered with respect to every judgment or order made by this Court. I also come to this conclusion as the Respondents in their own brief indicate that if the transaction is determined to be a void transaction for illegality, then the Respondents will have to refund monies paid under the third contracts. I take that to mean that the Respondents intend to cooperate with the direction of this Court.

RITTER J.

CBR# 825

Canada Lands Co. CLC Ltd. v. Trizechahn Office Properties Ltd.

Between Canada Lands Company CLC Limited, applicant, and Trizechahn Office Properties Limited, respondent

Action No. 9903 23795

Alberta Court of Queen's Bench Judicial District of Edmonton Marshall J. Heard: January 14, 2000. Judgment: March 17, 2000. Filed: March 20, 2000. (30 paras.)

Counsel: Ken G. Nielsen, Q.C., for the applicant. Donald R. Cranston, Q.C., for the respondent.

REASONS FOR JUDGMENT

MARSHALL J.:--

INTRODUCTION

[para1] These applications arise because of the presence of a Waste Disposal System, which services the CN Tower and extends from the side of the Tower in Edmonton. The CN Tower is built on Lot 2 of lands owned by the Respondent, "Trizec", while nearly all of the compactor and dumpster of the Waste System are located on Lot 3, which is owned by the Applicant, "CLC".

[para2] After hearing the applications I found for the Respondent. These are the written reasons I undertook to provide.

[para3] CN was the registered owner from 1964 to 1995 of the lands now known as Lots 2, 3 and 4. In 1964 CN leased the lands which are Lot 2 to Allied Development Corp. Ltd. for 99 years. The CN Tower was then constructed on Lot 2.

[para4] In 1975 the leasehold title of Allied was assigned to a predecessor of Trizec. In 1995 CN sold Lot 2, including the CN Tower, to Trizec. Later in 1995 CN agreed to sell Lots 3 and 4 to CLC. Lot 3 is a large lot used for parking to the east of the Tower while Lot 4 is a similar lot west of the Tower. The title to Lots 3 and 4 was registered in the name of CLC in January 1998.

[para5] CLC purchased Lot 3 subject only to the encumbrances on the Certificate of Title and unregistered interests under s. 65 of the Land Titles Act, R.S.A. 1980, c. L-5, none of which refer expressly to the placement of the Waste System.

[para6] For at least 13 years, and likely for substantially longer, the Waste System that is the subject of this proceeding has been located in its present location. The exact time period is unclear because none of the Edmonton officers or employees of these parties can be certain. The Waste System is partly on Lot 2, but predominantly on Lot 3. The dumpster and almost all of the compactor are located on a concrete foundation on Lot 3. The concrete pad is approximately 20 feet by 54 feet in size. The waste chute is affixed to the exterior of the CN Tower and the bottom of the chute is secured to the compactor. The compactor is affixed to the concrete foundation by large bolts embedded into the concrete. The dumpster and recycling bin sit on the concrete pad at the end of the compactor. Waste from the CN Tower is discharged through the chute. The waste travels down the chute and into the compactor. The hydraulic compactor compresses the waste before depositing it into the dumpster. Waste removal trucks then empty the dumpster, or replace it with an empty dumpster.

[para7] The Waste System has been continuously used to dispose of all waste generated by occupants of the CN Tower for at least 13 years. For all of that time, CN, and then CLC, have permitted access to the dumpster and compactor over Lot 3 in order to maintain the Waste System as well as for waste removal. The Waste System is plainly and easily visible from any part of Lot 3.

[para8] CLC has entered into an agreement to sell Lots 3 and 4 to Terra Park Alberta Inc. Terra Park proposes to continue using Lot 3 primarily as a parking lot. CLC demanded that Trizec remove the Waste System from Lot 3 in November 1999. Trizec then advised CLC that it took the position that it is legally entitled to maintain the Waste System at its present location. The present application then ensued.

[para9] Counsel agreed before me that the only substantial factual issue is whether the Waste System can be relocated without substantial cost. While I cannot make any determination on this issue, it is nevertheless apparent that the Waste System was constructed to service the particular building and is fixed to a concrete pad which was constructed for it. It also appears that there is no ready means of relocating the Waste System.

[para10] CLC sought a declaration that Lot 3 is free and clear of any easement or any other right claimed by Trizec in relation to the Waste System. Trizec sought a declaration that it is entitled to maintain and operate its Waste System in its present location on Lot 3 pursuant to an implied easement.

ANALYSIS

[para11] Section 65(1) of the Land Titles Act states:

65(1) The land mentioned in any certificate of title granted under this Act is, by implication and without any special mention therein, subject to

(g) any right of way or other easement granted or acquired under any Act or law in force in Alberta.

[para12] In *Petro-Canada Inc. v. Shaganappi Village Shopping Centre Ltd.* (1990) 76 Alta. L.R. (2d) 162 (C.A.) the Court stated with reference to s. 65(1)(g) at page 164:

the twinning of "law" with "Act" usually indicates that "law" is being used in the sense of the common law. the common law can and does create a right of entry or easement in the absence of express contract. For example, the common law ceded to the holder of the mineral title a right, even in the absence of an express agreement, to enter on the surface to exploit the minerals: see the

history by Dea, J. in *Cabre Exploration Ltd. v. Arndt and Alberta*, 44 Alta. L.R. (2d) 250, [1986] 4 W.W.R. 261, 28 D.L.R. (4th) 747, 35 L.C.R. 213, 22 C.R.R. 319, 69 A.R. 296 (Q.B.). Another example is easement by necessity: see *Halsbury's Laws of England*, 4th ed., vol. 14, paras. 153-156.

It is evident that the "easement" referred to in s. 65(1)(g) includes an easement acquired under common law.

[para13] Trizec asserted that it is entitled to maintain and operate the Waste System in its present location because it enjoys an easement. It argued that three kinds of easements were established:

- (a) an implied easement of apparent accommodation, also known as an implied grant,
- (b) an implied easement from the intentions of Trizec and CN in the sale transaction, and
- (c) an implied easement of necessity.

AN IMPLIED EASEMENT OF APPARENT ACCOMMODATION

[para14] In *Condominium Plan No. 7810477 (Owners) v. Condominium Plan No. 7711723 (Owners)* (1997) 55 Alta. L.R. (3d) 198 (Q.B.) Justice Paperny summarized the law respecting this type of implied easement.

The doctrine of implied grant stems from the equity in the cases. Generally speaking, when the owner of two adjoining lots conveys one of them, he impliedly grants to the grantee all those continuous and apparent easements that are necessary to the reasonable use of the property granted and which are, at the time of the grant, used by the owner of the entirety for the benefit of the parts granted. This doctrine is based in the principle that a person cannot derogate from his own grant. See *Wheeldon v. Burrows* (1879), 48 L.J. Ch. 853 (Eng. C.A.), at 856; *Hart v. McMullin* (1899), 32 N.S.R. 340 (N.S. S.C.), confirmed on appeal to the Supreme Court of Canada (1900), 30 S.C.R. 245 (S.C.C.); *Fullerton v. Randall* (1918), 44 D.L.R. 356 (N.S. C.A.).

Upon the severance of a tenement by devise into several parts, not only do rights of way of strict necessity pass, but also rights of way which are necessary for the reasonable enjoyment of the part devised and which had been and were up to the time of the devise used by the owner of the entirety for the benefit of such parts. See 11 Hals., 2nd ed., 287 cited in *DuVernet v. Eisener*, [1951] 4 D.L.R. 406 (N.S. C.A.) at 412.

[para15] The rule in *Wheeldon v. Burrows* has been applied in various Canadian cases. It provides that to establish an easement of this nature, Trizec must show:

- (a) the easement was continuous and apparent,
- (b) the easement was necessary for the reasonable use of the property granted, and
- (c) the easement was used by the owner before the transfer.

The rule, as stated by Professor Ziff, "serves as a form of consumer protection, allowing a purchaser to acquire amenities (in the form of easements) that the purchased land appears to enjoy": *Principles of Property Law*, 2d ed. (Toronto: Carswell, 1996) at p. 339.

(a) The Easement Has Been Continuous and Apparent

[para16] Access to Lot 3 for the use and maintenance of the Waste System has been permitted without complaint from CN or its successor, CLC, for not less than thirteen years. Trizec's use of the Waste System, at first as lessee and since 1995, as an owner of Lot 2, has been continuous and notorious. Finally, the dimensions and location of the Waste System suggest that its existence on Lot 3 was apparent to interested third parties, including CLC.

(b) The Easement is Necessary for the Reasonable Enjoyment of the Property

[para17] Trizec need not prove an easement of necessity but that reasonable enjoyment of the property cannot be had without the easement; *Megarry & Wade The Law of Real Property*, Steven & Sons, London, 1984. The present Waste System has been in place for over thirteen years and is necessary for the disposal of waste accumulated by the occupants of the CN Tower. The CN Tower is an office building. Modern office buildings require an efficient Waste Disposal System. To move the current Waste System off Lot 3 would involve considerable inconvenience, both in terms of finding an alternate location and the actual physical relocation of the Waste System. Retaining use and access to the Waste System in its current location is necessary to maintain the property as an office building and for the reasonable enjoyment of that property.

(c) The Easement Was Used by the Owner, CN, for the Benefit of Lot 2 Prior to the Grant to Trizec

[para18] The Waste Disposal System was built more than 13 years ago. It has always been located in part on Lot 3 and the owner or occupant of Lot 2 has accessed Lot 3 in order to use and maintain the Waste System. Therefore, prior to the sale to Trizec, CN or those who leased through CN, were in continuous use of the Waste System and consequently were benefiting from use of and access to Lot 3.

[para19] CLC maintains that at the time of the transfer of Lots 2 and 3, CN was not benefiting from the use of the Waste System and access to it; the beneficiary was its tenant, Trizec or its predecessors. Therefore, CLC submits that the third arm of the test in *Wheeldon v. Burrows* is not met.

[para20] It appears to me that it matters not that CN was not the tenant exercising use of the Waste System. It owned both lots and permitted the tenant of Lot 2 to make use of Lot 3 to service the system. The construction and use of the Waste System on Lots 2 and 3 occurred while CN owned both lots. This amounted to creation of an easement prior to 1995.

[para21] In this regard, the case is similar to *Weeks and Toporowski v. Rogalski*, [1954] 4 D.L.R. 439 (Ont. H.C.J.) (reversed by Ont. C.A. on other grounds, 1 D.L.R. (2d) 709). The Court held at p. 447:

While the respective premises were not occupied by the owner personally, they were occupied by him through his tenants and I think it could be properly said that the right to occupy and use the part of the room in question projecting onto or into the other property was a continuous and apparent easement, necessary to the reasonable use of the property granted, and was used for the benefit of the part granted to the plaintiff Toporowski.

[para22] Accordingly, the Court found that the owner of the adjoining lots conveyed an easement of apparent accommodation to the Plaintiff when he transferred the land.

IMPLIED EASEMENT BASED ON THE INTENTIONS OF CN AND TRIZEC

[para23] I am satisfied the facts disclose that Trizec acquired an implied easement consistent with the intention of CN and Trizec when Lot 2 was transferred to Trizec.

[para24] In *Barton v. Raine* (1980) 114 D.L.R. (3d) 702 (Ont. C.A.), the Court found an implied easement based on intention where an owner of two adjacent properties with a common driveway sold one of the properties to his son. The Court held that the long established use of the driveway by the occupants of both properties was indicative of the parties' mutual intention that an implied easement was created with respect to the driveway. In determining the parties' intentions at the time of the father's transfer to his son, the Court found that it was not necessary to have "affirmative evidence" of the parties' intentions: *Barton*, supra at 711. Rather, the trial judge in *Barton v. Raine* [1979] O.J. No. 3150 at para. 46, held that the Court can determine whether the requisite intent existed through application of the following "officious bystander" test:

Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common "Oh, of course!"

[para25] As confirmed by the Court of Appeal in *Barton*, supra at 709, the easement must be both an obvious and "necessary inference from the circumstances in which the conveyance was made". There is no evidence of the precise understanding between CN and Trizec regarding the Waste System in 1995. However, it seems likely from the undisputed facts that continued use of the Waste System by Trizec was assured.

[para26] When CN sold Lot 2 to Trizec in 1995, the parties already had a twenty-year relationship. From March 1975 to September 1995, Trizec leased Lot 2 from CN. During this lease, Trizec used and maintained the Waste Disposal System on Lot 3. During Trizec's lease, CN did not complain about Trizec's use of Lot 3 for this purpose. Moreover, after Trizec bought Lot 2, neither CN nor its successor CLC complained about Trizec's continued use of Lot 3 for the Waste Disposal System until the present action. As held in *Barton*, supra at 709 with respect to the driveway, the existence of the Waste Disposal System on Lot 3 was an "accepted reality". Moreover, the Waste Disposal System, like the driveway in *Barton*, supra at 709, was a:

tangible physical fact, there to be seen by all who chose to see it, and the manner of its use would have been obvious to even the most casual observer of the physical features of the two properties.

[para27] In light of these circumstances, the reasonable inference is that CN and Trizec intended that the owner of Lot 2 would continue to have use of Lot 3 for the purposes of the Waste System.

EASEMENT OF NECESSITY

[para28] I am satisfied the proof of the element of necessity is so stringent that Trizec fails on that point. As stated in *Condominium Plan No. 7810477*, supra, at p. 353, it only applies "where there is no other way by which the grantee can get to the land so granted him, or over the land of the grantee where the land of the grantor is landlocked". Not only must a strict necessity be proven, the necessity cannot be proven by the party claiming the right-of-way. Mere inconvenience is not sufficient. These and other requirements, which are not met here, are discussed in *Re Stone* (1982) 38 N.B.R. (2d) 492 (N.B.T.D.).

CONCLUSION

[para29] I do not believe that a finding of an implied easement in these circumstances violates a fundamental principle of the Alberta Torrens system: indefeasibility of title. A primary goal of the Torrens system is provision to a purchaser of a title that discloses all interests affecting the parcel of land.

[para30] While the presence of the Waste System is not evident on the Certificate of Title for Lot 3, the Title, under the Land Titles Act, is subject to easements which exist by Alberta law. CN sold the Tower to Trizec without reference to it not having continuing use of its Waste System in its existing location. The Waste System was readily visible as an encroachment on Lot 3. CLC cannot complain of its presence at this point. On these particular facts, I see no erosion of the essential features of our Alberta Land Titles law.

MARSHALL J.

CBR# 826

York Condominium Corp. No. 253 v. Stobbs (Litigation guardian of)

Between York Condominium Corporation No. 253, and Mabel Adorea Stobbs by her litigation guardian Lauren Bailey

Court File No. 1183/00

Ontario Superior Court of Justice Stong J. March 7, 2001. (7 paras.)

Counsel: Joseph W. Ryan, for the plaintiff. Ben V. Hanuka, for the defendant.

[para1] STONG J.:-- The defendant, Mabel Adorea Stobbs, is the registered owner of Unit 9, Level 8 of York Condominium Plan No. 253, registered in the Land Registry Office for Land Titles of Toronto.

[para2] Ms. Stobbs has become disabled by Alzheimer's disease and her affairs are being tended to by her daughter, Lauren Bailey, acting under power of attorney. Ms. Stobbs was moved to a facility that could minister to the needs of her progressive condition and Ms. Bailey assumed occupancy of the unit.

[para3] The defendant's common expense account fell into arrears as a result of failure to pay any money in respect of common expenses for the months of July, August and September, 1999.

[para4] Despite frequent reminders of the outstanding balance owing on common expenses for the unit and the obligation to make the payments and the consequences that might flow from a failure to pay those outstanding common expense arrears, no payments were made which resulted in the plaintiff registering, on September 24, 1999, a Notice of Lien for the common expenses, an action to which legal expenses necessarily attached.

[para5] By written notice from the property manager, Mrs. Sandy Bristow, dated September 24, 1999, the defendant was advised that the outstanding arrears for common expenses was \$1,566.03. By letter of the same date from the solicitors for the plaintiff, the defendant was advised that the arrears for the common expenses were \$1,537.50 to which were added interest and legal expenses. Although the difference in the arrears as recorded by the different sources is minimal, did the obvious difference contribute to the delay in meeting the demands of the plaintiff at the time? The material before this court is silent in that regard and therefore is not helpful. I note as well that in her affidavit, Mrs. Bristow attests that the letter from the solicitors for the plaintiff dated September 24, 1999, advises the defendant that the outstanding arrears for common expenses was \$1,066.03. Is this a typographical error in her affidavit, or does it alert the reader to the fact that there may have been more than one or two figures being proffered as representing the arrears? What degree of confidence is this court to place in the ability of the plaintiff's agents to have presented an accurate picture to the defendant or her daughter acting on her behalf, particularly in light of the discrepancies which exist in the material presented in support of the plaintiff's motion? Again, the defendant's material on this motion does not give any assistance to this court with respect any discussions, if any, around arriving at an accurate figure for the outstanding amount of common arrears. Such information could very well have impacted on the decision this court has to make with respect the legitimacy of the mounting legal fees in this matter and whether the defendant should be liable for any or all. Therefore in the circumstances, costs will be awarded to the plaintiff.

[para6] During submissions, counsel for the plaintiff acknowledged that there are no outstanding arrears for common expenses at the time of the hearing of this motion, although the punctuality of their payment leaves much to be desired. There has been no payment to date on the legal fees which have accumulated.

[para7] Order to go:

1) This court issues an order for vacant possession of the unit involved, but its execution is held in abeyance pending the outcome of the conditions set out below.

2) Except as noted otherwise in the judicial endorsements on this file, and with the exception of the court appearance on January 16, 2001 for which each side will bear its own costs, all costs are to be awarded to the plaintiff on a party and party scale. This court would have ordered costs on a solicitor and client basis because a default in payment by one owner impacts directly on the other owners such that they are left to shoulder the arrears, however this court does not enjoy the confidence it needs in the ability of the plaintiff's agents to have presented to this owner an accurate accounting of the arrears in the beginning. Although the material presented is silent in this regard, the natural conclusion is that inaccurate and sometimes conflicting information could lead to discussion and delay in meeting one's obligations and influence the necessity of protracted legal expenses. In the absence of assisting evidence but as a result of the conflicting evidence arising out of the plaintiff's material, this court has made the order that costs payable to the plaintiff be assessed on a party and party basis.

3) Subject to the above, costs are to be assessed forthwith after taxation thereof.

4) After costs have been determined, the defendant will have 60 days within which to pay them to the plaintiff, failing which the breach of her obligations under the Condominium Act will be considered to subsist and the order for vacant possession can be executed.

STONG J.

CBR# 150

Kostolnik v. Vanbots Construction Corp.

IN THE MATTER OF the Construction Lien Act, R.S.O. 1990, c. C.30 as Amended

Between Ruth Clare Kostolnik, [and approx. 79 others*], home buyers, [* See Appendix A for complete Title of Case], and Vanbots Construction Corporation, Calligaro Tile Company Limited, Lopes Drywall & Acoustics Corp., Normac Kitchens Limited, Elio Dallas Construction Inc., Scaffold-Russ Dillworth Limited, Canform Structures Limited, Nortown Refrigeration Ltd., Beverly Caulking Inc., Konos Construction Ltd., Keystone Home Products Ltd., D/C Contracting Ltd. and Nortown Electrical Contractors Associates, lien claimants And between Liliane Catherine Vidicek, [and approx. 31 others*], home buyers (moving parties), [* See Appendix A for complete Title of Case], and Vanbots Construction Corporation, Calligaro Tile Company Limited, Lopes Drywall & Acoustics Corp., Normac Kitchens Limited, Elio Dallas Construction Inc., Scaffold-Russ Dillworth Limited, Canform Structures Limited, Nortown Refrigeration Ltd., Beverly Caulking Inc., Konos Construction Ltd., Keystone Home Products Ltd., D/C Contracting Ltd. and Nortown Electrical Contractors Associates, CRCE Construction Ltd., Trinity Contracting & Lanscaping Ltd. and Peerless Enterprises, lien claimants (responding parties)

Court File Nos. 00-CV-189647 and 00-CV-191039

Ontario Superior Court of Justice Master Saunders Heard: November 15, 2000. Judgment: December 30, 2000. (31 paras.)

Counsel: S. Naftolin and J. Armel, for the applicant home buyers. S.M. Addison, for the lien claimant, Vanbots Construction Corp. D. Martins, for the lien claimant, Tapes Drywall & Acoustics Corp.

[para1] MASTER SAUNDERS:-- This is a motion brought by the owners of 8 condominium units in a new condominium building at 500 Richmond St. West in the City of Toronto, to discharge the several claims for lien registered against the title to the above units.

[para2] There are 114 units in this building, however, this motion only deals with 8 of those units. The people who are home buyers on this motion are those individuals who have purchased units in the building and against which the lien claimants have registered their claims for lien.

[para3] The applicants have argued that they are home buyers within the definition of "home buyer" as set out in subsection 1 of section 1 of the Construction Lien Act. In such a case the liens would not attach to the interests of the applicants herein for the definition of owner does not include a home buyer.

[para4] In subsection 1(1) of the Construction Lien Act, owner is defined as follows:

"owner means any person, including the Crown, having an interest in a premises at whose request and,

- (a) upon whose credit, or
- (b) on whose behalf, or
- (c) with whose privity or consent, or
- (d) for whose direct benefit,

an improvement is made to the premises but does not include a home buyer; ("proprietaire")

[para5] In the same section, "home buyer" is also defined, and that definition is as follows:

"home buyer" means a person who buys the interest of an owner in a premises that is a home, whether built or not at the time the agreement of purchase and sale in respect thereof is entered into, provided,

- (a) not more than 30 per cent of the purchase price, excluding money held in trust under section 53 or the Condominium Act, is paid prior to the conveyance, and
- (b) the home is not conveyed until it is ready for occupancy, evidenced in the case of a new home by the issuance of a municipal permit authorizing occupancy or the issuance under the Ontario New Home Warranties Plan Act of a certificate of completion and possession; ("acquéreur d'un logement")

[para6] Subsection (a) under the definition of "home buyer" does not apply in the case, only subsection (b).

[para7] The argument put forward by the lien claimants is that the applicants, who have referred to themselves as home buyers, are not home buyers within the meaning of section 1(1) of the Act, and are therefore owners under the Construction Lien Act.

[para8] Firstly, the argument of the lien claimants is that for the applicants to come within the definition of "Home Buyer" as set out in section 1(1) of the Construction Lien Act, the applicants must prove that the home is ready for occupancy. I agree that the onus is on the applicants to prove "ready for occupancy", and from the evidence before me, I find that the applicants have satisfied that onus. They have produced pursuant to the definition of "home buyer" in section 1(1) of the Act, the municipal permit authorizing occupancy issued by the City of Toronto. This certificate was applied for and received by the general contractor and lien claimant Vanbots Construction Corp. hereinafter referred to as Vanbots. In addition each of the eight purchasers have been issued a certificate of completion and possession under the Ontario New Home Warranties Plan Act. These two documents are set out in the definition section of "Home Buyer" as evidence that the home is ready for occupancy. In fact, only one of these certificates was necessary.

[para9] The onus is now on the lien claimants to prove that notwithstanding the production of the municipal permit and the certificate of completion and possession, the homes were not ready for occupancy. The lien claimants have argued that the production of the permit and the certificate above referred to are only evidence of occupancy, not proof of occupancy. I agree, but

I find that the production of the two certificates is enough to shift the onus to the lien claimants to prove that the homes were not ready for occupancy.

[para10] I also must consider the meaning of "home" and whether the applicants have purchased a "home" referred to in the subsection defining "home buyer". Under the definition section, "home" is described as a condominium one-family dwelling unit. This subsection is as follows:

Sec. (1) "home" means,

(a) a self-contained one-family dwelling, detached or attached to one or more others by a common wall.

(b) a building composed of two self-contained, one-family dwellings under one ownership, or

(c) a condominium one-family dwelling unit, including the common interests appurtenant thereto, and includes any structure or works used in conjunction therewith; "(logement")

[para11] Counsel for the lien claimants referred to other definitions of home, especially that found in Blacks Law Dictionary. Since there is a definition of the word "home" in the Construction Lien Act, I therefore find that the definition found in Blacks Law Dictionary, need not be considered. The fact that 4 of the units were not going to be lived in by the purchasers but were going to be rented out, does not affect the definition of "home". There is nothing in the definition in the Construction Lien Act that says that the purchaser of the "home" under the Act has to live in the property.

[para12] I therefore find that the condominium units referred to in this motion are all homes under the definition of "home" in the Construction Lien Act.

[para13] The main question therefore is whether or not the homes were ready for occupancy, notwithstanding the municipal permit authorizing occupancy and the certificates of completion and possession under the Ontario New Homes Warranties Act.

[para14] In Section 1(1) of the Construction Lien Act, subsection (b) of the "home buyer" definition refers to the issuance of a municipal permit authorizing occupancy. Filed in tab 1, of the Home Buyers Exhibit Brief is the actual certificate of occupancy, dated February 11, 2000, which states that the area to be occupied is the complete building. The certificate also states as follows"

"The above mentioned building erected under the above building permit is authorized for occupancy pursuant to subsection 2.4.3 of the Ontario Building Code."

[para15] The heading for subsection 2.4.3 of the Ontario Building Code is "Occupancy of unfinished building" and thereafter there are further subsections from (a) to (o) setting out when the "Chief Building Official" shall issue a permit authorizing occupation of a building. Therefore the certificate of occupancy by itself does not indicate the building is complete and ready for occupancy. However, the section defining a home buyer does not set out the type of occupancy permit that is required under this section. I have assumed that it is the type that will allow a purchaser to occupy the home.

[para16] The first subsection under s. 2.4.3., being 2.4.3.1.(1) states

"2.4.3.1.(1) "a person may occupy or permit to be occupied any building or part thereof that has not been fully completed at the date of occupation where the Chief Building Official, or a person designated by the Chief Building Official has issued a permit authorizing occupation of the building or part thereof, prior to its completion and in accordance with Sentence (2)."

[para17] Sentence (2) states:

"2. The Chief Building Official or person designated by the Chief Building Official shall issue a permit authorizing occupation of a building where " and thereafter are subsections from (a) to (o).

[para18] However in the certificate of occupancy filed on this motion, there is no indication of which subsection from (a) to (o) is applicable. I find that what is contemplated under the Construction Lien Act, in the definition of home buyer, is a municipal permit authorizing occupancy which is exactly what the applicant home buyers have received.

[para19] In addition, there was also issued under the Ontario New Home Warranties Plan Act (O.N.H.W.P.) a certificate of completion and possession, in respect to each of the 8 units. In motion record #1, under tab F, there is filed the Ontario New Home Warranty certificate for each of the 8 units involved in this motion, plus other units in the project. I find that this is the Ontario new Home Warranty certificate as contemplated by the Construction Lien Act, under the definition of "Home Buyer." This is the certificate of completion and possession which is the evidence contemplated by the Act to show that the home is ready for occupancy.

[para20] There is filed by counsel for the lien claimants, in a brief called "Compendium of Documents of Vanbots Construction Corporation", certificates under the Ontario New Home Warranty Programme for each of the 8 units. The difference between these certificates and those filed in the motion record #1, tab F is that attached to these certificates are deficiency lists, which are quite lengthy, (in one case there are four pages of notes). Many of these lists state that the appliances have not been installed. With these deficiency lists, the lien claimants are attempting to show that the condominiums were not ready for occupancy. However, also filed on the hearing of the motion were other deficiency lists for each of the 8 units. These lists show the deficiencies to be much fewer than that shown in the deficiency lists in the Compendium of Documents. These lists show that the condominiums seem to have been ready for occupancy, for the deficiencies set out therein were minor. These lists were revised on February 7, 2000, after the deficiency lists attached to the certificates in the "Compendium of Documents of Vanbots Constructions Corporation".

[para21] Also affidavits have been filed by each of the individual owners, the applicants herein, and they have sworn that the units were ready for occupancy. However, that by itself is not enough since it is certainly to their benefit that the units be ready for occupancy.

[para22] It was also argued by counsel for the lien claimants that s. 2 of the the Construction Lien Act must be considered. This is the section dealing with whether a contract is substantially performed. I find that if the home is ready for occupancy, I need not concern myself with this section on this motion.

[para23] In addition to the two certificates filed by the applicant Home buyers, being the O.N.H.W.P. certificate and the Certificate of Occupancy, counsel for the applicants produced the transcript of Mr. Moscrop's cross-examination on June 16, 2000 on his affidavit, sworn April 3, 2000, in respect to an action brought by Vanbots against Cityscape Richmond Corporation and the architects. In this examination at p. 155, Q. 729, Mr. Moscrop stated that this project was ready for occupancy as of February 15, and that purchasers began moving into the project on February 15, 2000. Mr. Moscrop is a representative of the lien claimant Vanbots and was a Project Manager on the site. I should also point out that even though the cross-examination was in respect to an affidavit filed in a different action, the parties agreed that the questions asked and the answers given by Mr. Moscrop shall be treated as evidence given by Vanbots for the purpose of this motion.

[para24] The difficulty is that in the cross-examination of Mr. Moscrop on the 10th day of August, 2000 at p. 48 Mr. Moscrop stated that the units were not ready for occupancy which is diametrically opposed to what he said in his cross-examination on June 16, 2000.

[para25] In addition to the affidavits, cross-examination and certificates, I have also examined the last deficiency lists filed. They were prepared by Vanbots and I find that there is nothing listed in those lists that would indicate that the units were not ready for occupancy.

[para26] There was also some argument put forward by counsel for the lien claimants as to the date of purchase of 4 of these units and the relationship of the purchasers of the other 4 units to the development company Cityscape.

[para27] The units in question were purchased at different times by 8 different people. These units were conveyed to the purchasers on or about February 15, 2000 and the claims for lien were all registered on about February 21, 2000, after the conveyance of the units to the applicants herein.

[para28] Four of the 8 units were purchased in the year 2000 and were therefore subject to a quick closing date. The lien claimants are claiming that since the purchase was so close to the closing date, it could be inferred that these applicants purchased the units in question for the purpose of defeating the lien claimants claim for lien. From the material before me I find that this has not been proven. There is no evidence that the purchasers had purchased the units to claim priority over the lien claimants, and there is no evidence that these 4 purchasers were related to any of the officers of the development company Cityscape Richmond Corp.

[para29] The other 4 units were purchased in 1997, and in respect to three of these, the purchasers were related to the officers of the company. The 4th unit was purchased by the principal officers of Cityscape. I cannot find from the evidence before me that these latter 4 units were purchased to defeat the lien claimants, since there were no lien claimants in existence when the units were purchased; in fact I do not believe construction had even started.

[para30] Mr. Moscrop also indicated that to obtain the certificate of occupancy the systems in the building must be in proper working order which would be the fire alarm system, the elevators, the sprinklers, the mechanical system including the air make-up units, the boilers, the fans, smoke and heat detectors, and the fire pump and standpipe. All these systems were working and therefore the certificate of occupancy was issued. I therefore find that the units were ready for occupancy and that the applicants herein are home buyers under the Construction Lien Act and are entitled to an order discharging the lien claimants herein and vacating the certificates of action.

[para31] The parties may speak to me to obtain a time to argue the costs of this motion.

MASTER SAUNDERS

* * * * *

APPENDIX A Complete Title of Case

Between Ruth Clare Kostolnik, Elinor Gordon Ker Melville, Carl McGee, Iaszlo Kovari, Ildiko Kovari, Christine Paula Smith, Herman McKerlic Smith, Ceferina Llacer Trenholm, Brett Arthur Rattle, George Glora Simhoni, Francis William Harding Davies, Lynda Margaret Mae Davies, Tanya Coombs, Douglas Alan Lloyd Coombs, Laura Marie Cochrane, Randall George Cracknell, Anne Marie Gilberte Finnegan, Terrance Hanley, Ira Hanley, Jules Berman, Ena Valerie Robson, Richard Allen Wilkins, John James Bryan, Charles Derek Rennie, Robert Langton, John Farrauto, Richard Yan, Gregory Paull, Thomas Lebel, Summer Wedmire, David Wedemire, Greg Macdonald, Kelly McLaughlin, Magnus Clarke, Joel Sutherland, Dale Gordon Frederick Churchward, Catherine Elizabeth Clark, Colin Mooers, Marnie Fleming, Christopher Andrew Copeland, Jocelyne Chene, Humphrey Kadaner, Cathy Katrib, Anna Servedio Gomes, Daryl Gomes, Andrew Gristock, Linda Whelpdale, Eric Hutton, Brad Elliott, Katherine Cunningham, Lorena Maggiacomo, Phillip Douglas Robson, David Rosenblatt, Andrew Branscombe, Aaron Pilon, Tamara Roxanne Bahry, Frances Jeffries, Belverene Braithwaite, Jason Kirk Machtlinger, Mathew Rosenblatt, John Berman, Reuben Rosenblatt, Jill Tagg, Anthony Tagg, Lili Shalev, Penelope Jean Lillian Simmons, Greg Gorth, Glen Defreitas, Noam David Rosen, Irving Earl Rosen Sheila Rosenberg, Tracy Pether, Mike Sikic, Michael Augustine, Alec Stanimirovic, Vania Selvaggi, Robert Furse, Tara Lee Muir, Michael Pearson, Belinda Hobbs and Allon Eenglman, home buyers, and Vanbots Construction Corporation, Calligaro Tile Company Limited, Lopes Drywall & Acoustics Corp., Normac Kitchens Limited, Elio Dallas Construction Inc., Scaffold-Russ Dillworth Limited, Canform Structures Limited, Nortown Refrigeration Ltd., Beverly Caulking Inc., Konos Construction Ltd., Keystone Home Products Ltd., D/C Contracting Ltd. and Nortown Electrical Contractors Associates, lien claimants And between Liliane Catherine Vidicek, Donna Nelham, Paul Tremlett, John David Hurlbut, Mark Foster Leggett, Mary-Lynn Knudsen, Graham Robert Thomson Abbey, Sharon Abbey, Tara Madeline MacDonald, Carla Dyan Brown, Jon Ashley Hanneman, David Wayne Cornelius, Sherilyn Delagran, Indira Mohamed, Ahmed Mohamed, Ada Marian Zentil, Paul André Guimond, Steven David Petrofski, Morana Petrofski, Suzanne Lynch, Christopher Cheung, Deborah Lynn MacIntosh, Jim Yee Yoke, Joyce Yee, Puimond Yee, Nelson Matthew Cabral, Heln Bambrough, Falzel Merali Alladina, Catherine Wood, John Wood and Kerry Elizabeth Scrase, home buyers (moving parties), and Vanbots Construction Corporation, Calligaro Tile Company Limited, Lopes Drywall & Acoustics Corp., Normac Kitchens Limited, Elio Dallas Construction Inc., Scaffold-Russ Dillworth Limited, Canform Structures Limited, Nortown Refrigeration Ltd., Beverly Caulking Inc., Konos Construction Ltd., Keystone Home Products Ltd., D/C Contracting Ltd. and Nortown Electrical Contractors

Associates, CRCE Construction Ltd., Trinity Contracting & Landscaping Ltd. and Peerless Enterprises, lien claimants (responding parties)

CBR# 295**Singer v. Ontario New Home Warranty Program**

Between Allen & Nancy Singer, applicants (appellants), and Ontario New Home Warranty Program, respondent (respondent in Appeal)

Divisional Court File No. 372/98

Ontario Superior Court of Justice Divisional Court Then, Coe and Blair JJ. December 14, 2000. (9 paras.)

Counsel: Kevin D. Sherkin, for the applicants (appellants). James C. Tory and John Terry, for the respondent (respondent in Appeal).

The judgment of the Court was delivered by

[para1] BLAIR and THEN JJ.-- By letter dated October 23, 2000, Mr. Sherkin requested clarification as to whether the majority of the Court in its reasons released on October 20, 2000 intended that the applicants would be entitled to interest on the amounts determined by that judgment to be payable to the applicants by the Warranty Program, and consequently to an amount in excess of the \$20,000 payment limit, by virtue of subsection 6(2) of the Regulation.

[para2] Mr. Tory and Mr. Terry filed a lengthy brief in response which in effect seeks a reconsideration of one aspect of the majority decision and which articulates at some length the various ways in which the Majority has fallen into error. Those submissions are more appropriately addressed to a further Appellate Court, however, and we do not think them necessary for a determination of the narrower question of clarification raised by applicants' counsel. Mr. Sherkin did not invite, nor did the Court request, a re-argument of the appeal.

[para3] I propose, as part of this addendum to the majority reasons, to clarify certain matters pertaining to the interest question. In its reasons for decision, the Majority concluded that the pre-judgment interest awarded as part of the damage judgment granted by White J. constituted an aspect of the "financial loss" sustained as a result of the vendor's failure to perform the contract. The total amounts indicated therefore represented "the amount of such damage" that the Singers were "entitled to be paid out of the guarantee fund": Ontario New Home Warranty Program Act, subsection 14(1). In assessing the damages, the Majority took into consideration the tax benefits which the Singers had received, and deducted them from the financial losses sustained, before arriving at the amount to be paid out of the fund.

[para4] The Majority omitted to specify in its reasons, however, whether the Singers were entitled to interest under subsection 6(2) of the Regulations under the Act.

[para5] Subsections 6(1) and (2) of the Regulation state:

6(1) a purchaser who has a claim under clause 14(1)(a) of the Act in respect of a purchase agreement entered into after the 30th of June, 1988 is entitled to be paid out of the guarantee fund an amount for damages arising from the breach of the agreement by the vendor that does not exceed \$20,000.

(2) In the case of a home that is a condominium unit, the maximum limit under subsection (1) is increased by the amount of any interest owing on the amount to be paid out of the guarantee fund under subsection (1).

[para6] Thus, the Regulation contemplates that interest may be awarded on the amounts to be paid out of the fund, and it specifies that, in the case of condominium units, the \$20,000 cap on amounts to be paid may be increased if interest causes the total to exceed that limit. The Regulation defines interest to mean "the interest at the rate or rates prescribed under the Condominium Act required to be paid by the vendor on deposits".

[para7] The Ontario New Home Warranties Plan Act, itself, neither defines nor mentions "interest". However, it is clear from the provisions of subsection 14(1) that the Legislature contemplated purchasers would be compensated for their damages for financial loss resulting from a vendor's failure to perform the contract for the provision of the condominium unit, and that such purchasers are entitled to be paid out of the guarantee fund "the amount of such damage subject to such limits as are fixed by the regulations". In terms of the damages for financial losses sustained, those limits are \$20,000. However, in the case of condominium units, that amount may be increased to take into account interest payable on the up-to-\$20,000 amount to be paid.

[para8] I interpret the foregoing provisions of the Act and the Regulation to mean that a successful claimant against the Warranty Plan under subsection 14(1) of the Act is entitled to receive interest on the amount to be paid out of the guarantee fund, and that the purchaser is entitled to be paid that interest at the rate set out in the Condominium Act, as described above. While neither the ONHWP Act nor the Regulation stipulate as of when that interest should be paid, it makes sense that it should be paid at least from the date upon which the Warranty Programs order was made. To hold otherwise would be to erode the purchasers' ability to recover the true financial losses, and put a premium on delays in the process.

[para9] I would accordingly award the Singers interest at the Condominium Act rate on the amounts stipulated in the majority decision of the Court, payable from the date of the Warranty Program's initial decision denying the applicants' claims, namely November 25, 1992.

BLAIR R.S.J. THEN J.

CBR# 386

Yuen v. Peel Condominium Corp. 492

Between William Wai Chung Yuen and Anan Investment Co. Ltd., and Peel Condominium Corporation 492 and Sheppard Group

Court File No. 00-BN-0559

Ontario Superior Court of Justice Durno J. August 23, 2000. (19 paras.)

Counsel: Lawrence Wong, for the applicants. David Ruben, for the respondents.

[para1] DURNO J. (endorsement):-- The motion requires two areas to be addressed:

i) Is the Applicant responsible, jointly and severally, with the tenant for the outstanding common expenses, utilities and costs in relation to units 20, 21 and 22? If so, should interest be payable on the outstanding balance?

ii) Should the liens registered on the three units in 1996 and 1999 be discharged and the scope of those liens?

Is the Applicant Responsible to the Arrears?

[para2] Section 32 of the Condominium Act provides the "owner" shall contribute towards the common expenses "specified in the declaration." The definition of owner does not include a tenant.

[para3] The declaration provides each owner shall: pay his proportionate share of the common expenses (s. 9), require all agents, employees, lessees, licensees invitees and customers and other occupants to comply with the Act, declaration, by-laws and rules (s. 16(a)) and shall require his tenants to comply with the Act, declaration, by-laws and rules of the corporation.

[para4] The declaration provides any owner leasing his unit shall not be relieved from any of his obligations with respect to the unit, which obligation shall be joint and several with his tenant (s. 19).

[para5] Section 31 of the declaration provides the failure to take action to enforce any provision of the Act, declaration, by-laws or rules irrespective of the number of violations or breaches which may occur, shall not constitute a waiver of the right to do so thereafter, nor be deemed to abrogate or waive any such provision.

[para6] Finally, sections 23 and 24 of the declaration provide where the owner defaults in paying water services or hydro, until the monies are recovered, the amount outstanding shall form part of the common expenses.

[para7] In the lease the Applicants entered with their tenant, the tenant agreed to pay the common expenses and to conform to all by-laws and rules.

[para8] The Applicants voluntarily entered into the purchase of the units with the terms referred to above. They were aware of the "ground rules." In particular that they remained liable for the common expenses "as specified in the declaration". The provisions are clear.

[para9] While the Applicant argued the Respondent's lack of diligence in collecting and enforcing the tenant's liability according to the lease should relieve it, completely or partially, from their obligations, the waiver provision in s. 31 is a complete answer to that submission. The Applicant was aware of the declaration terms before entering the agreement to purchase.

[para10] Similarly, the submission the Respondents failed to exercise the proper standard of care in accordance with s. 24 of the Act is answered by s. 31 of the declaration. In addition, there is no evidentiary basis upon which I could conclude the directors of the corporation failed to exercise their powers or discharge their duties honestly or in good faith.

[para11] While the Applicant also argued the equities should favour the owners, for close to four years they received rent from the tenants and apparently made no efforts whatsoever to determine if the tenant was complying with the obligations which the Applicant was precluded from transferring totally to the tenant. While the Applicant may have sold units at a loss, that is not relevant to the determination of their liability.

[para12] The Applicant is responsible for the arrears jointly and severally with the tenant regardless of the liens issues.

[para13] As regards interest, it will be payable from August 17, 1999, the date the Applicant was advised of the amount in default. Interest will be payable at the rate of 24% per year, compounded monthly. By-laws Art. 11, para 6. Again the Applicant was aware of the provision.

THE LIENS

1996 Liens

[para14] No issue is taken that the liens were properly registered in 1996. The issue is whether they should have been discharged. Several facts lead me to conclude they should be discharged. First, when the Applicant requested the amounts outstanding, the Respondent gave a detailed reply in the August 17, 1999 letter. There is no reference to the outstanding fees associated with the liens. Second, had the Respondent taken the position the three liens were still effective, there was no need to register the 1999 liens since no further notice or registration was required in respect of "default in payment occurring or continuing after registration." S. 32(5) of the Condominium Act. Third, there is no explanation why two units would have fees of \$75.00 and one \$45.00. Fourth, the reference in submissions to the three \$50.00 fees noted on each lien does not coincide with the amount alleged to be outstanding. It appears the real basis of the Respondent's position is, since they were never discharged they could not have been paid the fees. While the affidavit of Jim Fung states the fees were not paid, the above noted factors persuade me it would be inappropriate to permit them to remain. The 1996 liens are discharged.

1999 Liens

[para15] The issue with respect to these liens is what amounts are included. No dispute is taken that common expense arrears for three months before the registration are properly included. The inclusion of the one year arrears for utilities is disputed.

[para16] I do not agree with the Respondent's interpretation of paragraphs 23 and 24 of the By-laws. The sections provide the municipality or utility may bill the corporation which may have the obligation to collect from each unit owner. They indicate the corporation, at its sole discretion, will bring an action against the defaulting owner to recover the amounts owing. Finally, until such money is recovered the outstanding amount shall form part of the common expenses and be paid by the corporation as part of the common expenses. I do not regard the final sentence as contingent on any action to recover the funds on behalf of the corporation. When the funds are not paid they become part of the common expenses and shall be paid.

[para17] Mr. Rubin contended the corporation would get a bill for the entire condominium. They would have sub metres to determine each unit's share and bill each owner. The corporation would pay only the amounts actually collected. He argued it was not until the corporation paid the arrears in November of 1999 that they became a common expense. Mr. Fung states the corporation decided in November of 1999 to exercise their discretion to take steps to collect the outstanding amounts, not that they paid the funds then. There is also no evidence an action has been commenced.

While I agree the arrears became a common expense there is nothing in para. 23 or 24 which makes the arrears part of the common expenses only after the corporation paid the arrears on behalf of the owner as contended by Mr. Rubin in submissions or when an action is commenced. Had the section read, "shall form part of the common expenses when paid by the corporation" the Respondent's position would be supported by the section. If the corporation waited several months to pay the arrears the lien would arise only when they were paid. That is not what the section says. The corporation can bring an action for the amount outstanding. The final sentence in the paragraph does not require an action to be started against the owner before the arrears are part of the common expenses. They become part of the common expenses when the default in payment occurs.

[para18] The 1999 liens relate to the common expenses for three months before the lien was placed and for utilities for the same three months only.

[para19] Counsel may make brief written submissions as to costs by September 1, 2000.

DURNO J.

CBR# 830

Avenue Structures Inc. v. Pacific Empire Development Inc.

IN THE MATTER OF the Construction Lien Act R.S.O. 1990, c. C.30 (as amended)

Between Avenue Structures Inc., plaintiff, and Pacific Empire Development Inc., Bank of China (Canada) and Excelsus Development Inc., defendants

Court File No. CLA96-CU-101828

Ontario Superior Court of Justice Master Sandler Heard: May 16 and 17, 2000. Judgment: August 23, 2000. (59 paras.)

Counsel: J.B. Berkow and Orië H. Niedzviecki, for the plaintiff and other lien claimants. D.I. Bristow, Q.C., for the defendant Bank of China (Canada).

MASTER SANDLER:--

Introduction

[para1] These reasons are being written to rule on one issue that was directed by me to be tried as a preliminary issue. That issue is the extent, if any, of the priority of the Bank of China as mortgagee, under two mortgages which it has against certain land on which a construction project was being built, over about 20 lien claimants. The priority relied upon by the bank is created by s. 78(3) of the Construction Lien Act.

[para2] Before turning to analyze the specific issue, I think it is necessary to explain how this issue comes to be tried before me.

[para3] The owner of the land in question is 842432 Ontario Inc. ("842432"). The land, originally, was in two adjoining parcels at a corner, one parcel known as 2095 Brimley Road and the second parcel known as 4430-38 Sheppard Avenue East. The Brimley Road parcel, being .94 acres, was purchased in August, 1989, for \$700,000. The Sheppard Avenue Parcel, being .784 acres, was purchased in November, 1989, for \$5 million with \$2 million cash being paid down, and a vendor take-back mortgage for \$3 million. The total acreage of the two parcels, which, since 1989, has been one site, is 1.714 acres or 74,661 sq. ft.

[para4] The defendant Pacific Empire Development Inc. ("Pacific Empire") is a related company to the registered owner, 842432. Some of the lien claimants in their actions named 842432 as the owner whereas other lien claimants named Pacific Empire as the owner. For the purposes of the trial of this issue, I can treat Pacific Empire and 842432 as one and the same. Neither company defended the lien actions.

[para5] In 1989, when these lands were acquired by the owner, they had a commercial/industrial zoning designation which allowed retail and office development with a maximum density of .40 times the area of the lot. The owner spent approximately three years in efforts to re-zone this property, and, finally, some time in 1993, obtained an increase in density to 1.6 times the area of the lot, which allowed a building size equal to four times the existing coverage. This meant that the owner would now be able to build what it wanted to build, namely, a 4-storey shopping mall to contain retail and restaurant space on levels 1 and 2, and office space on levels 3 and 4, with a 3-level underground parking garage for 431 cars. The project came to be known as the "Pacific Centre". The detailed formation of the plans for this project occurred in 1992 and 1993, during a severe downturn in the general economy, and in the Toronto real estate economy and market in particular. The evidence shows that the commercial real estate market in the Toronto area at this time was "weak".

[para6] The defendant bank initially became involved with this project in mid-1993. The bank placed a first mortgage on the land for \$2,750,000 in May, 1993, followed by a further second mortgage for \$2,900,000 in December, 1993. These two mortgages were put on as additional security for loans previously made by the bank to its customer, Lilee-Chu Investments Inc., and to the related companies, Pacific Developments and 842432, or to service a new line of credit for this customer (see exhibit 76, Tab 7). Later, in 1994, the bank decided to further finance the project with a capital loan of \$6 million, and a construction loan of \$13 million. The capital loan of \$6 million was advanced on October 20, 1994, and was used by the customer to pay off a prior indebtedness owing by the customer to the bank. This was really just a re-financing of existing loans. On November 3, 1994, a mortgage of \$30 million was registered by the bank against this property, and this was to further secure existing loans and to secure a loan for the future financing of the construction.

[para7] Construction started in early 1995, and continued until late October or early November, 1995, when the bank stopped financing the project for reasons that are still not clear to me. There was some evidence from Peter Wong, a former bank employee, who testified before me on May 13, 1999, under subpoena by the lien claimants, that there was, at least, suspicions by senior management of the bank about improper dealings between one of its employees, who was responsible for this customer and its loans, and the customer. The terms of the bank's loan, as set out in its commitment letter of November 30, 1993 (exhibit 76, Tab 11) had apparently not been met, and yet large advances had been made, and the bank feared for its loans. As of December, 1995, the bank was owed over \$15 million on its loans, and, as of May, 1996, the customer's overdraft was over \$3 million, for a total indebtedness of just over \$19,000,000 (see exhibit 76, Tab 20).

[para8] When the financing stopped, the owner-developer could not pay the trades and construction ceased in about January, 1996, and the liens started to be registered. The first lien was registered January 29, 1996, and the last lien was registered March 15, 1996. In all, there are 21 lien claimants of which 14 or 15 contracted directly with the owner/developer, and 6 or 7 are sub-contractors of one or more of these 14 or 15 contractors. The face value of all the liens is about \$3,387,700, although none of the liens have as yet been proved by the respective lien claimants. (One lien claimant, Sun Sing Construction, whose lien claim was \$337,777, has advised me that it will not be proving its lien in these proceedings, and I have noted in my procedure book that this lien is to be discharged.) Therefore, the face value of the current existing liens is just over \$3 million, but some of the sub-contractors' liens might be included in the claims of some of the contractors' liens.

[para9] The judgment of reference (in the Dymin Steel action) is dated May 1, 1996, and the first pre-trial took place before me on June 28, 1996. I was then advised that the owners, 842432 and Pacific Empire had not defended. I was told that the project was only partially completed, and was not useable, and had been abandoned by the owners. (This construction has remained in this uncompleted and unused state for over four years. Eventually, the municipality revoked the building permit, in February, 1999,

and then issued a demolition order in June, 1999, although the bank appealed that order. I have not been advised of the final result of that appeal. In 1997, there was some talk of the bank selling the project to a purchaser who would build a hotel/retail office complex, and so the site was re-zoned by the municipality in September, 1997, to permit such a use. The property remains listed for sale at an asking price of \$2,990,000. Any purchaser will probably have to demolish the existing partially-completed structure, and this factor will probably affect the sale price.)

[para10] It appeared to me at this first June, 1996 pre-trial that the main issues were the extent, if any, of the bank's priority for its first two mortgages under s. 78 of the Act over the lien claimants' claims and within the meaning of that term in s. 1(1) of the Act.

[para11] If the bank was an "owner", it would be responsible for 100% of, at least, the various "contractors" claims, and would have a statutory holdback liability to the various sub-contractor lien claimants.

[para12] Even if the bank was not an "owner", there remained the question of the priority of its three mortgages, being for \$2,750,000, \$2,900,000 and \$30 million. (Since it seems to be accepted by all parties that the current value of the land is somewhere between a low of \$1.5 million and a high of \$3 million, the bank's third mortgage of \$30 million becomes irrelevant, since the most that likely will be realized on a sale is a gross of about \$3 million, less sale expenses such as real estate commission and legal fees etc., so the net proceeds of sale will not likely even cover the bank's first mortgage of \$2,750,000.) But, under s. 78(2), if any of the bank's mortgages were taken with the intention of securing the financing of the improvement (the so-called "building mortgage"), the liens would have priority over any such mortgage to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV. If the value of all work done is found to be \$8 million (which is an reasonably approximately accurate figure but not yet actually established), then the lien claimants would have priority to the extent of about \$800,000, (10%), because the owners (842432 and Pacific Empire) never actually held back any holdback amounts for the lien claimants, i.e., a complete deficiency. Thus, the first \$800,000 (+/-) of any proceeds of sale would be paid, pro-rata, to those lien claimants who can establish proper liens for their proper amounts in priority to the bank's mortgages.

[para13] Even if s. 78(2) does not apply, because the bank's first two mortgages are found not to, be "building mortgages", then, under s. 78(3), these two mortgages, because they were registered "prior to the time when the first lien arose" (that is, were registered in May and December, 1993, with the first lien arising, as has now been agreed to by the parties, after December 1, 1994) would have priority over the liens to the extent of the lesser of (a) the actual value of the "premises" (a defined term) as of December 1, 1994, or (b), the total of all amounts that, prior to December 1, 1994, were advanced under these mortgages. The evidence shows that as of December 1, 1994, the bank had advanced \$6 million (see Exhibit 76, Tab 20, also marked Exhibit 53). The actual value of the "premises" as of December 1, 1994, was, as all parties agree, clearly less than \$6 million so the bank's priority, under s. 78(3), would be equal to the actual value of the "premises" as of December 1, 1994.

[para14] So, at the pre-trial on June 28, 1996, I consolidated all 21 (at that time) lien actions, re-titled the consolidated proceedings as. Avenue Structures v. Pacific Empire Development Inc. and Bank of China (Canada), since Avenue Structures Inc. had the largest lien claim by far at \$1,031,000, and gave carriage of the consolidated proceedings to Mr. Berkow, who acts for Avenue Structures as well as Malfar Mechanical (\$49,719) Mistyk Welding (\$514,412) and Interior Connection (\$68,810). I then ordered that the issues of the "bank-as-owner", and the priority issues under s. 78(2) and 78(3), were to proceed first, with the resolution of the various issues of the timeliness and quantum of the 21 lien claims being postponed to be resolved at a later date. The thinking was that if the bank was found not to be an "owner", and if the first two mortgages were found not to be "building mortgages", and if the value of the "premises" as of December 1, 1994 was found to be \$5 million as the bank was contending then, keeping in mind that the then (June, 1996) current gross value of the "premises" was thought to be \$3 million, the lien claimants would get nothing, and thus, there was no point in scrutinizing the timeliness and quantum of each lien. As I have noted earlier, the face value of the lien claims is just over \$3 million. It was thought that if the lien claimants as a group were successful on any of these preliminary issues, there would be some money "in the pot" and it might then make sense to resolve any disputed lien claims. But, if there was to be no money, or only a few cents on the dollar, then a careful screening of each of the 21 lien claims would not really make economic sense.

[para15] I gave further directions in connection with the prosecution of the said preliminary issues, and I required the various lien claimants to supply Mr. Berkow with details of their current claims and supporting documentation, and for the subcontractors to clarify whether their claims were included in their respective contractors' liens, or were in addition to the 14 or 15 contractors' claims.

[para16] There were further construction lien pre-trials on September 17, 1996, January 10, June 13, and October 10, 1997, April 24, August 21 and September 4, 1998, and April 30, 1999, at which various directions were given for the conduct and trial of the preliminary issues.

[para17] The trial started on May 10, 1999, and continued on May 11, 12, 13 and 14. I heard the evidence of several of the lien claimants, and the evidence of a former bank employee, Peter Wong. All this evidence was directed to the "bank-as-owner" issue. Only five trial days had been scheduled, based on counsel's original estimate, but on May 14, it became clear that much more trial time would be required, so a further 20 days were scheduled for February 14 through 24, 2000, and May 15 through June 1, 2000, the earliest times that were available to all of myself, Mr. Bristow and Mr. Berkow. (The trial re-start date was later changed to February 21, 2000.)

[para18] On February 18, 2000, I held a case conference/trial management conference at the request of both counsel. There had been some recent developments about what issues were now going to be pressed by Mr. Berkow, counsel with carriage. He was now of the view that the "bank-as-owner" issue should be dropped, and his personal clients, Avenue Structures and Mystik Welding, had given him such instructions, but he was concerned about how he was to deal with the remaining lien claimants, and also with his client, Interior Connection, with whom he had lost contact. I then gave certain directions.

[para19] I held another case conference/trial management conference on March 9, 2000, where I gave further directions as to how the problem of dropping the "bank-as-owner" issue was to be handled. I scheduled a further conference for April 18, to allow any opposing lien claimants to attend and make submissions. On April 18, counsel for the bank appeared, as did counsel for lien claimants Metric Mechanical and Wesco Distribution, neither of whom was opposed to the dropping of the "bank-as-owner" issue. No other lien claimant appeared. I therefore made an order striking out paragraphs 16 and 17 of the Avenue Structure statement of claim (the bank-as-owner allegations), and ordered that this issue would not be pursued when the trial resumed on May 15th. I ordered that the only remaining issue between the lien claimants and the bank would be the priority issues under s. 78, as pleaded in paragraphs I through 15 of Avenue's statement of claim. I further ordered that following such ruling, I would, at

a later date,, if necessary, deal with the timeliness and quantum of the lien of each lien claimant who still intended to pursue its lien claim.

[para20] On May 3, 2000, I held another trial management conference where I directed that the trial of the "priority issue" would now take place on May 16, 17 and 18, and Mr. Berkow was to let Mr. Bristow know by May 11 as to what specific sections of s. 78 he was relying on.

[para21] When the trial started on May 16, it was made clear to me by both counsel that the allegation by the lien claimants that the bank's first two mortgages of May 6, 1993 and December 21, 1993 were "building mortgages" within s. 78(2) was being dropped, and that it was now agreed that any advances thereunder were not made to finance the "improvement" on the land in question, and therefore, the issue about any deficiency in holdbacks, required to be retained by the owner under Part IV had disappeared.

[para22] The only priority claim that was now being asserted by the lien claimants was under s. 78(3). It was agreed between counsel that the bank's two mortgages of May 6, 1993, and December 21, 1993 were "prior" mortgages within s. 78(3). It was also agreed that the first lien arose, at the earliest, on December 2, 1994. So, the only issue to be tried was what was "the actual value of the premises at the time the first lien arose", since it was agreed by both counsel that this value was clearly less than the total amount of all amounts advanced prior to December 1, 1994, which, as I have noted earlier, was \$6 million. (That \$6 million was advanced on October 20, 1994 - see Exhibit 53.)

[para23] The current value of the "premises" is somewhere between a low of \$1.5 million dollars (the amount of a recent conditional offer that was received by the bank, but which did not close), and a high of \$2,860,000 (as of September 1, 1999 as appraised in Exhibit 76, Tab 23, Mr. Atkin's report), or, perhaps, the listing price of \$2,990,000, as of November, 1999. Mr. Berkow believes that the current value is possibly over \$3 million, but agrees that it is less than the \$6 million (plus) that is owed by the owners/borrowers to the bank, part of which is secured by the mortgages of May 6 and December 21, 1993.

[para24] This current value becomes important, because if I were to sell the premises under s. 65 of the Act in order to actually realize cash proceeds for distribution among the lien claimants, and if the net proceeds to be received are, say, \$2.5 million, then the bank's priority claim to these proceeds would be \$1,345,000, if I accept the lien claimants' valuation by Mr. Atkin of \$1,345,000 as of December 1, 1994, leaving \$1,155,000 for distribution among about \$3 million of lien claims (not yet proven). If the net proceeds of sale to be received are, say \$2 million, then, again accepting the lien claimants' valuation, the bank's priority would be \$1,345,000, leaving \$655,000 for distribution amongst \$3 million in lien claims. If the net proceeds of sale are \$1.5 million dollars, and again accepting the lien claimants' valuation of \$1,345,000, there would be \$165,000 (all less carriage costs and other legal costs) for distribution among \$3 million of lien claims. In other words, as the current value goes down, the amount available for the lien claimants goes down.

[para25] But, if I accept the bank's valuation at \$5.2 million as at December 1, 1994, (see Mr. Kovac's report - Exhibit 76, Tab 19), the bank's priority would be far in excess of everyone's view of the current value, that is, what a court sale under s. 65 of the Act would bring as net proceeds of sale. If I accept this valuation, the lien claimants would get nothing. In fact, if Mr. Kovac's report is found to be wrong, and the valuation as of December 1, 1994, is found to be, say, only \$3 million (rather than \$5.2 million), then the lien claimants will still get nothing after a sale, even if the current gross value is \$3 million.

[para26] It is only if I accept the lien claimants' valuation at \$1,345,000, as of December 1, 1994, and a future sale brings net proceeds above 51,345,000, that the lien claimants will start to receive any money on account of their claims. Net proceeds of sale at, say, \$2 million would produce \$655,000 of cash available for distribution to the lien claimants after the bank's priority claim of \$1,345,000 is paid out. If the lien claimants' claims are subsequently proven at \$3 million (an estimated figure), this would mean the lien claimants would receive $\$655,000 \times 100 - \$3,000,000 = 22$ cents on the dollar. This case shows the practical problems with the remedy of a lien under the Construction Lien Act during a period of generally failing real estate values or where some particular factor or event causes a fall in the value of specific property against which the liens are registered.

[para27] The above possible gross amounts for distribution to the lien claimants do not take into account Mr. Berkow's carriage costs and the legal costs of other counsel for the other lien claimants which would have to be paid out of the net proceeds of sale. So it can be seen that my decision on this preliminary issue of the value of the land as of December 1, 1994, is only the beginning of many issues that need resolution. I will also need to decide the validity of each lien claim and the quantum of each claim. Then, I will have to sell the land and deal with gross and net sale proceeds. Then I will have to deal with carriage costs and other costs, including the bank's costs if they are successful on the valuation/priority issue. So I am a long distance away from actually paying out any money to any of the lien claimants. But resolution of the valuation/priority issue is a necessary First step and so I now turn to address this issue.

The Valuation/Priority Issue - What was the actual value of the premises as of December 1, 1994?

[para28] At the opening of the hearing on May 16, counsel filed a joint document book that contains all the documents that are relevant to the valuation/priority issue. This book is marked exhibit 76 and has 23 tabs. The key documents are the following: the two deeds transferring the two parcels to 842432 Ontario Inc. in 1989, (tabs 1 and 3); the credit application by the borrowers (including 842432) for the bank loans (tab 7); the two mortgages to the bank dated May 6th and December 21, 1993 (tabs 8 and 14); the credit facility agreement with the borrowers, dated November 30, 1993, (tab 11); the credit application for the \$19 million line of credit, dated September 27, 1994 (tab 15) which is an important document and shows the situation just a few months before the crucial date of December 1, 1994; the credit facility letter for \$19 million dated September 30, 1994 (tab 16); and a letter from the bank dated June 7, 1996, outlining details of the three mortgages of the bank, and advances made thereunder, given in response to a s. 39(2) Construction Lien Act demand for information (tab 20).

[para29] In addition to these important documents, the fundamental documents are the appraisal report of Mr. Kovacs, the bank's expert, dated October 8, 1999 (tab 19) and the appraisal report of Mr. Atlin, the lien claimants' expert, dated November 2, 1999, (tab 23).

[para30] Finally, there is an earlier appraisal report of Mr. Kovacs, dated March 8, 1993, made at a time when the bank was considering extending credit facilities to the, borrowers (tab 6).

[para31] Both parties agree that the relevant date for the valuation is December 1, 1994, and that the valuation is to proceed as if the land was vacant, that is, the state of the land at the time the first lien arose, that is, when the first work was done. And I agree

with Mr. Bristow's submission that one must look at the conditions and knowledge that listed at that time, and in making the valuation, one ignores what happened subsequently. I agree that "actual value" means "market value", which means the most probable price that a property would bring in a competitive and open market, under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably. The approach to market value is well set out on p. 3 of the Atlin report, and p. 1 of the October Kovacs report (following the letter of transmittal and sketches and other miscellaneous material).

[para32] Mr. Atlin at trial, and in his report, says the value is \$1,345,000. Mr. Kovacs at trial, and in his October, 1999 report, says the value is \$5.2 million. (Mr. Kovacs in his March, 1993 report said the value of the property was \$5.5 million, which date was one year and nine months before the critical date of December 1, 1994. This earlier appraisal of Mr. Kovacs was apparently, the basis for the bank agreeing, in November, 1993, to make the loans it did, leading to its mortgages in 1994, and its advances in 1995).

[para33] Mr. Atlin's qualifications are found at Appendix "A" to his report. He is an accredited member of the Appraisal Institute of Canada (AACI). He has been an appraiser since 1980 with Stewart, Young & Mason Limited, now known as Stewart, Young, Hillesheim & Atlin Limited of which he is the president. He has an impressive list of qualifications as an appraiser.

[para34] Mr. Kovacs' qualifications are set out in Addendum "F" to his report. He received his AACI designation in 1989. He has been an appraiser since 1975. He worked for Royal Trust/Royal LePage from 1975 until 1993. In 1993, he became a partner in Wagner, Andrews and Kovacs Limited, his current position. He also has an impressive list of qualifications.

[para35] So, the question must be asked as to why these two very qualified appraisers have so diametrically opposed views as to the value of this property as of December 1, 1994?

The Atlin Report

[para36] Mr. Atlin's report is 47 pages long and - has 6 Appendices. He describes (at pp. 5-6) the ownership and legal history of the property and the current municipal assessment and realty taxes. He next gives a regional description (pp. 8-10), and a neighbourhood description (pp. 11-13), and a site description (pp. 13-14). He next deals with land use controls, i.e., zoning (pp. 15-16). He then describes the improvements, i.e., the existing state of incomplete construction (p. 17), and details the proposed development (pp. 18-19).

[para37] He then sets out a market overview (pp. 20-24) which is critically important. In summary, the 1980's, leading up to 1989 (when "842432" purchased the site for \$5.7 million), was a period of a dramatic rise in real estate prices and economic expansion. In 1990, 1991, 1992, and 1993, the real estate market changed dramatically, with an over-supply of property and a weak demand. Office vacancy rates rose sharply. The Greater Toronto office market in 1994 was in a "dismal state". The absorption and vacancy rates in the Metro Toronto East office market in 1993 and 1994 were at record lows, although 1994 was a little better than 1993 (see p. 21). The retail market and therefore, the demand for retail store space, fell dramatically in the period 1990 through 1994 (see p. 23).

[para38] Mr. Atlin then deals with the fundamental concept of "Highest and Best Use" at pp. 25-27. He deals with what uses are (i) legally permissible (ii) physically possible (iii) financially feasible and (iv) maximally productive. His conclusion, for the date of December 1, 1994, reads as follows:

"There was clearly no immediate demand for office development as at December 1994. Rent and vacancy rates were at such levels that office development was unaffordable. However, the site's zoning and location do lend themselves to such a use. Thus, office/retail development to the scale suggested by the development proposal is a highest and best used choice over the long term, but not feasible as at the effective date. (my emphasis) The property's location is also viable for retail uses consistent with the limited activity in the marketplace. Thus, an immediate highest and best use choice would be to, amend the zoning provisions, eliminating the office component obligation, and developing the site with a retail use." (see p. 26).

[para39] Mr. Atlin then continues, on pp. 28-31, to consider various approaches employed in the valuation of real estate and concludes that the Direct Comparison Approach is the only appropriate approach in this case. At pp. 32-34, Mr. Atlin reviews nine comparable sales, three after and six before the valuation date. He concludes that the site had a unit value of \$18 per S.F., and with 74,662 S.F., the value, as rounded, was \$1,345,000. He also said this site should be considered to have a Floor Space Index (F.S.I) of 0.40, which translates to (\$18 per S.F. divided by 0.40 =) \$45 per S.F. F.S.I. This density of 0.40 is not what is legally permissible, which is much higher at 1.65, but rather, what Mr. Atlin thinks is economically feasible.

[para40] Lastly, Mr. Atlin also values the site as of September 1, 1999, and gives the vacant land a value of \$820,000, and the improvements a value of \$2,040,000, for a total value of \$2,860,000.

The Kovacs Report

[para41] An introduction is at pp. 1-4. Next follows a market overview, pp. 5-7. Then follows the property description section, pp. 8-18, including the general area description, a site description, a description of the land use controls, a description of the improvements, and his view as to highest and best use, which Mr. Kovacs concludes was the proposed development itself, being a 4-storey condominium retail/office complex. Next follows the valuation section at pp. 19-33, including the four available valuation methods, and the ones he used here, being the Direct Comparison Approach and the Land Residual Method, to be found at pp. 20-25 and 26-32 respectively, and his final value estimate at p. 33. There follows seven Addenda, "A" through "G".

[para42] In Mr. Kovacs' direct evidence, he testified about the importance of the mix of population in this area, since one can assess demand for commercial space by knowing the users. He spoke about the pressure of Chinese immigration from Hong Kong, and their interest in owning commercial condominium properties, and how the Brimley - Sheppard area was an important one for Chinese business and customers. He also testified about the two most important factors for commercial development, being the permitted zoning and the permitted density. He testified that a density coverage of 1.65 is much more valuable than one of .40, and that even if an owner only built to a .40 coverage, the potential higher density had a value even if not immediately used. He disagrees with Mr. Atlin that this condominium/retail office development was not economically feasible. He felt that building a one-level retail strip mail like the other developments in the area, as Mr. Atlin recommended, would have been an underdevelopment.

[para43] In cross-examination, he agreed that the office market was weak, and that this project was to be about 60% office space, and that the office vacancy rate was high. He also agreed that, as of December, 1994, there had not been \$17 million worth of sales of units in this development, but only \$2 million, and that these sales were all retail units, and there had been no office unit sales. (The sales are detailed on p. 29 of his report). The said \$17 million figure was the level of sales that had to be achieved by the developer before it could obtain most of the loan money - see tab 15, p. 4 and tab 16, p. 3 - but for some unexplained, reason, the bank failed to insist on this protection.

[para44] Mr. Kovacs also agreed that the Land Residual Method of valuation is assumption driven, and that if any of the assumed numbers are wrong, this can fundamentally affect the valuation. He also agreed that he did not use the Land Residual Method in his March 8, 1993 valuation (tab 6).

Mr. Atlin's Review of Mr. Kovacs' Report

[para45] Mr. Kovacs concludes in his October report (pp. 17-18), that the highest and best use of this land, in December, 1994, was, in fact, the very proposed development itself, being a 4-storey condominium retail/office complex with 33% of the space being retail space, 44% being office space, and the balance, 23%, being a mix of retail and office space, and with 70% of the space being on the second, third and fourth floors. Mr. Atlin's disagrees with this view. He emphasizes the difference between a legally permissible and physically possible use, on the one hand, and a financially feasible use on the other - see his report, at pp. 25-26. He concludes that because there was no immediate demand for condominium office development, in December, 1994, the office/retail development, to the scale proposed by the planned development, was not economically feasible in December, 1994, although it was the highest and best use over the long term. The property's location and attributes were financially viable for retail uses like the other one-story retail developments in the area, with a density of 40% or .40.

[para46] Mr. Kovacs, at pp. 24-25 of his report, came up with a F.S.I rate of \$42.50 per S.F., and took 100% of the developable gross floor area, 123,197 S.F., and arrived at a value of \$5,100,000. Mr. Atlin testified that you cannot equate the same value per S.F. to both the ground floor retail space, and the upper level retail and the upper level office space. He said that at-grade retail space is vitally important and drives the value of any development. He disagrees with Mr. Kovacs' using his \$42.50 F.S.I rate for all 123,190 S.F. of rentable space. Mr. Atlin's dollar per S.F. rate of \$45 is not materially different from Mr. Kovacs' rate of \$42.50. He just differs on how such rate is to be applied. Mr. Kovacs uses an F.S.I. of 1.65. Mr. Atlin, by contrast, uses an F.S.I. of .40. This produces a rate of \$45 per S.F., F.S.I., or, putting it another way, \$18 per S.F. for 74,662 S.F. of land area - (see p. 35 of the Atlin report.) This is really the core of the disagreement between the approach of Mr. Atlin and Mr. Kovacs.

[para47] (F.S.I means "Floor Space Index" and is a density designation. It means "buildable space". i.e., both legally and physically buildable space, and financially viable buildable space. A 100,000 S.F. site (area), with a .40 (allowable and viable) density coverage, would equal a 0.40 F.S.I, and would result in a building of 40,000 S.F. The same site (100,000 S.F. area), with a 1.65 density (allowable and viable), would result in a building of 165,000 S.F. Any density over .50 must result in a multi-level development. Land can be priced at either dollars per S.F. or dollars per S.F. F.S.I. In this case, \$18 per S.F. of land area (74,662 S.F.) equals \$45 per S.F. F.S.I (\$18 by .40).

[para48] Also, Mr. Atlin testified that the Land Residual Method, used as an alternative method by Mr. Kovacs, (at pp. 26-32 of his report), producing a value of \$5.3 million, is an inappropriate valuation method for use in this case. This method is good for determining the feasibility of a development, but is not the right approach for ascertaining market value. Every element of the valuation, from the gross revenues to the development costs, is based on assumptions that are very problematic, and any error in any assumption can have a large impact on the bottom line value. I accept Mr. Atlin's opinion that the Land Residual Method is not the appropriate valuation method to be used in this case.

Other Observations

[para49] 1. This property was purchased in 1989 for \$5.7 million and 1989 was the top of the real estate market. The evidence shows that the commercial real estate market was at its lowest in 1993 and 1994. It defies ordinary logic that this particular property's value only fell from \$5.7 million to \$5.2 million from 1989 to 1994, whereas it is well known and the evidence shows that commercial and residential property in the Greater Toronto Area generally fell in value anywhere from 20% to 50% and sometimes more.

[para50] 2. The property was assessed for realty taxes by the Provincial Assessment Department at \$733,000 as of June 30, 1996. It is true that as of this date there was a derelict abandoned building on the site, but since the municipal assessment is based on 1996 market value, it is of some use in deciding what the December 1994 value was.

[para51] 3. Further, one of the protections that the bank had in its lending commitment of September 30, 1994, (tab 16) was that there had to be evidence of sales of at least \$17 million to bona fide arms-length purchasers, with deposits of not less than 30%. In fact, as of January 1, 1996, only 19% of the overall space had been pre-sold or pre-leased, and no office space whatsoever had been pre-sold or pre-leased. On p. 29 of Mr. Kovacs' report, tab 19, it shows 11 units sold on the ground Door (first level) and 8 units sold on the first floor (second level) for the total of \$2 million, far below the \$17 million requirement in the bank's commitment letter. These sales figures are as of early 1996, and strongly support what Mr. Atlin says about the office and retail market in and around 1994, (at pp. 20-24), and about the financial feasibility of the proposed use, at (pp. 25-26) and about what the feasible F.S.I was in 1994, being 0.04 and not 1.65. Obviously the bank wanted to tie sales and leasing performance to its loans, so that the borrowers could prove the financial viability of the project. There is no explanation given as to why the bank chose to overlook this protection.

[para52] 4. Further, the fact is that this project failed. The bank had lent, by November, 1995, about \$7.2 million for construction costs (see tab 20), and a total of about \$15.4 million in loans. (excluding the \$3.6 million overdraft), and decided, in early 1996, to stop further financing. Presumably, one of the factors in such a decision was the poor sales and leasing results, as reflected in the Morassutti Group report dated January 8, 1996 (see p. 19 of Atlin's report). The bank for some unexplained reason, did not insist on the protection it had of \$17 million in sales and leasing before loan money would be advanced. This failure of the project supports Mr. Atlin's negative view as to this projects' financial feasibility, and undermines the reliability of Mr. Kovacs' valuation.

[para53] 5. Further, Mr. Atlin disagreed with Mr. Bristow's suggestion, in cross-examination, that the second floor retail space in this development was as good and valuable as the first floor retail space, and that this project was comparable to the multi-level development at the Eaton Centre.

[para54] 6. Further, the evidence of Mr. Atlin shows that this location at Brimley and Sheppard was quite different from the Chinese developments on Highway No. 7 in Richmond Hill.

[para55] 7. Further, the densities of Mr. Atlin's comparables are all under .048, except the extremely successful Times Square project at Highway No. 7 and Leslie Street in Richmond Hill, sale No. 8, which still only had an F.S.I. of 0.56. All of Mr. Kovacs' comparables had an F.S.I. of 0.40 or under - see p. 22 of tab 19.

[para56] 8. Mr. Kovacs was hired by the bank in early 1993 to do a valuation for the purpose of considering whether to lend money on this project: see tabs 6, 7, 10, 11, 15, 16, 17. He valued the vacant land at \$5.5 million and the completed project at \$29 million. Commitments were made in 1994, and money was advanced in 1995. But in early 1996, the bank "pulled the plug" and the project failed. The bank is now at risk of losing most of its loans, and more, if it has to share the equity in this property with the lien claimants. Mr. Kovacs is now called upon to give his opinion as to value as of December 1, 1994, just 1 year and 9 months after his valuation date in his March, 1993 report. Mr. Kovacs is in a somewhat uncomfortable position. He can hardly admit that he was wrong in March 1993. He has a very strong interest in making his valuation for December, 1994, consistent with his valuation of March, 1993. This interest, and his previous involvement, and the risks he faces if he gives any other opinion, in my view cast some doubt on his objectivity as an expert witness and the role he is supposed to play: see *Fellowes, McNeil v. Kansa General* (1999), 40 O.R. (3d) 456; *Fenwick v Parklane Nurseries* (1997), 32 C.L.R. (2d) 25; *Interamerican Transport Systems v. Can. Pacific Express*, [1995] O.J. No. 3644, (November 29, 1995), *Feldman J., Toronto*, 59 A.C.W.S. (3d) 413, 67 pp., (otherwise unreported to my knowledge).

[para57] 9. The evidence (and common sense) tells me that the location and the permitted use of a commercial site are very important factors in its value. But also important is the permitted density, or coverage. But one must distinguish between legal density and financially viable density. A higher permissible density sometimes does not make financial sense, and developers do not have to build to the allowable density, and would not do so if the higher density does not make financial sense based on the economic factors, including a present demand for the space to be built. In some cases, a higher legal density, which will allow for future expansion when purchaser/tenant demand would justify such expansion, does make a property more valuable. In this case, Mr. Atlin chose to give no value to the factor of the permissible density of 1.65, which would have allowed for future development. He felt that an F.S.I. of .40 was the financially viable upper limit for this site, even though the legally permitted density was 1.65. (On the other hand, Mr. Kovacs felt that an F.S.I. of 1.65 was financially viable as of December 1994, and so his valuation was based on the full developable gross floor area of 123,197 S.F. at his price of \$42.50 per S.F.)

Conclusion

[para58] I prefer the approach and logic and independence of Mr. Atlin over that of Mr. Kovacs. However, I am troubled that Mr. Atlin has chosen not to take into account at all the higher permissible density of 1.65 that the developer had obtained for this site after three years of effort, and which was far in excess of the .40 density for most of the other commercial property in the area. Mr. Atlin admits that this increased density would allow for future development and expansion, even if such intensive development was not financially viable as of December, 1994. And this future potential is clearly worth something, as Mr. Bristow forcefully argues. In my view, something should be added to Mr. Atlin's valuation for this future potential, and an addition of 10% seems to be appropriate on all the evidence before me. I have therefore increased Mr. Atlin's valuation by \$134,500 and find this property had a market value, as of December 1, 1994, of \$1,479,500.

[para59] Now that the extent of the bank's priority on its mortgages is known, being \$1,479,500, counsel can contact me to fix a further hearing to determine how I am to proceed from this point on. Am I to sell the property and see whether net sale proceeds in excess of \$1,479,500 are recoverable? And does it make sense to begin a detailed evaluation of each lien? Or, should this process wait until after it is determined what the net sale proceeds are, to see if such an inquiry is worth the cost. And what about carriage costs and the costs of the proceedings to date? It seems to me that on the question of valuation, the lien claimants have had far more success than the bank. I will await a request from counsel before fixing a further hearing date. Perhaps with this issue decided, some sort of "deal" can be struck as between the bank and the lien claimants, and as between all the various lien claimants, inter se. (I am prepared to issue a formal Interim Report, if asked, to perm it either party to have my decision reviewed, under s. 62(3) and Rules 54.09(2), (3) and (5).)

MASTER SANDLER

CBR# 283

Rohoman v. York Condominium Corp. No. 141

Between Mohamed Rohoman, applicant, and York Condominium Corporation No. 141, respondent

Court File No. 00-CV-189822

Ontario Superior Court of Justice Chapnik J. Heard: June 8, 2000. Judgment: June 19, 2000. (11 paras.)

Counsel: Carl H. Cassian, for the applicant. Carol A. Dirks and David Thiel, for the respondent.

[para1] CHAPNIK J.-- The applicant participated in three requisitions filed with the Board of Directors pursuant to s. 19(1) of the Condominium Act 1990, chap. C.26 (the Act), requesting the Board call a special meeting of unit owners to vote on a resolution to remove and replace the members of the Board. The requisite number of valid signatures for such a requisition is 15% of the total unit owners or, in the case of YCC 141, 66 unit owners. Notwithstanding the determination by the Board that 81 signatures on the second petition were valid, it refused to call a special meeting of the unit owners. Upon a review of the evidence, I reject the respondent's submission that the circumstances surrounding the gathering of signatures tainted the entire requisition. In doing so, I have taken into account the 19 further statements which were not filed, but were referred to by Ms. Dirks on the respondent's behalf.

[para2] Section 19(1) of the Act permits the party requisitioning a special meeting of unit owners to call a meeting in circumstances where the Board of Directors refuses to do so.

[para3] Following the respondent's refusal to hold a special meeting of unit owners pursuant to the second requisition, the applicant was denied an opportunity to inspect the list of registered owners and mortgagees of the corporation. Accordingly, the applicant was placed in a catch 22 situation; and was unable to call an owner's meeting within the 60 day deadline imposed by s. 19(1) of the Act.

[para4] The respondent argues that, as a result of the state of unrest in the condominium community over a period of several months, some of the unit owners want their names removed from the petitions and some have expressly asked that their names and addresses not be released due to the harassing behaviour of certain unit owners, including the applicant. Indeed, this court has today issued a restraining order as against another unit owner, Mr. Merchant. There is no evidence, however, of harassment on the part of the applicant.

[para5] In lieu of providing the list of owners and mortgagees, the Board offered to mail out the notices of a members' meeting if the petitioners paid the costs associated with the mailing. This offer has consistently been rejected by the applicant and others. In my view, the offer is not sufficient to constitute substantial compliance with the provisions of the Act. The definition of "record" includes the registered owner and mortgagee list for a condominium corporation as referred to in s. 20(2) of the Act. Upon reading the materials, hearing counsels' submissions and balancing the various interests of the parties, I find that the Board is under a legal obligation to disclose the unit owner's list to the applicant. In this particular circumstance, the right to privacy and confidentiality of the owners does not override the statutory right of the applicant to reasonable access as provided for in s. 21 of the Act.

[para6] Related to this matter, is the more generalized issue of the inspections. Section 21 of the Act obliges the corporation to keep records and permits an owner or his agent to inspect the records on reasonable notice at any reasonable time. This section is to be broadly interpreted to allow unit owners open and liberal access to the affairs of the Board and the corporation. See McKay et al v. Waterloo North Condominium Corp. No. 23 (1992), 11 O.R. (3d) 341 at 345.

[para7] I appreciate the problems encountered by the Board when several owners consistently require inspections concurrently. In my view, however, the applicant's requests were reasonable in the circumstances. He gave notice to the Board of Directors on two occasions that he wished to inspect the records of YCC 141 pursuant to his rights under s. 21. The Board initially denied his request, but later permitted access for a limited period of two hours with no further inspection permitted. Considering the underlying policy of the Act, making the affairs and dealings of the corporation and Board, an "open book" to members of the corporation, the access permitted to the applicant was, in my view, not reasonable.

[para8] In all of the circumstances, orders shall issue:

1. declaring that the applicant's second requisition dated January 31, 2000 is valid;
2. granting the applicant an extension of time to call and hold an extraordinary meeting of the owners pursuant to s. 19(1) of the Act, to 30 days after receipt of the respondent's records pursuant to para 3 below.
3. Ordering the respondent to provide to the applicant, a list of each owner and mortgagee of YCC 141, as described in s. 20(2) of the Act.
4. Declaring that the applicant has the right, at a reasonable time and on reasonable notice, to inspect all of the respondent's records, including the right to make photocopies of any of them at the applicant's expense.

[para9] The applicant in his notice of application seeks punitive or exemplary damages. Mr. Cassian did not argue this point at the motion; and in my view, this is not a proper case for punitive damages, in any event.

[para10] As I noted at the hearing, the Board members appear to be attempting to carry out their duties in a fair and reasonable manner. They called an information meeting to explain the rationale for the special assessment; the answered inquiries; and they offered to send out notices on behalf of the members. Their actions may well have been ill-advised regarding the specific matters before this court, but they were not motivated by malice. The motion for exemplary damages, if pursued, is denied.

[para11] Unless there is some additional information of which I should be apprised, costs are awarded to the applicant on a party and party basis, fixed in the sum of \$2500 and payable forthwith.

CBR# 832

Rodriguez v. Raya

Between Ricardo Rodriguez, plaintiff/defendant by counterclaim, and Jose Pablo Raya, defendant/plaintiff by counterclaim

Court File No. 99-CT-001617SR

Ontario Superior Court of Justice Juriansz J. Heard: June 8 and 9, 2000. Judgment: June 12, 2000. (15 paras.)

Counsel: Stephanie Kalogeras, for the plaintiff. J. Lockhart, for the defendant.

[para1] JURIAN SZ J.:-- These are my reasons for judgement delivered orally at the end of the trial of this matter. The outcome of this case depends on the credibility of the parties. The credibility of testimony is assessed according to its internal consistency and degree to which it accords with reasonable likelihood. I am conscious that memories fade with time, and that in the litigation process memory often changes to support one's interest in the case. In this case there was much disagreement among the witnesses as to the dates of various events, and the period of time that Isabel Rodriguez lived with the defendant. For example, Steven Rodriguez, the plaintiff's son, testified that she lived with the defendant in December for possibly two weeks, whereas his father had her living there for only two or three days in mid January. The defendant had Isabel living with him from mid November until mid January, whereas his wife said she came to stay with them, at his parents' home, in the first week in December and that she left their apartment at the beginning of the second week of February. The defendant's father said Isabel came to live in his house for one week in December and stayed there until the defendant moved into the apartment, which he said was last week December. The defendant testified he moved into the apartment on December 11.

[para2] These differences of testimony do not necessarily mean that the witnesses in this case were dishonest. They simply illustrate that memory is not perfect and that the court faces a difficult task in re-constructing events in a case such as this.

[para3] There are two competing versions of the financial relationship between the parties:

1. The plaintiff's version is that the \$8,500 was a loan from a kind uncle to a favoured nephew to enable him to buy a condominium, and that in a different transaction that nephew agreed to care for the uncle's mother for the payment of \$980 a month to be paid from the mother's monthly income, which could be used to pay back the loan.

2. The defendant's version was that the uncle was desperate to find a place for his mother to live, and proposed to the nephew that he would provide the financial support so that the nephew could buy a larger condominium that he had planned to, if he would care for the mother, and that the loan would be repaid at the rate of \$450 per month from the mother's monthly income of \$980. The nephew would also receive \$450 a month from the mother for her care and accommodation.

[para4] I note that in both these versions the mother's income is being used to repay the advance of \$8,500. There was no evidence before me that the mother was involved in making any of the arrangements, and there was no evidence that her son, the plaintiff, had any legal authority to deal with the mother's money in any fashion whatsoever. The question arose in my mind, whether the fact that the mother was repaying the loan might be taken to suggest that the advance was made on her behalf and that she was the plaintiff's debtor. Nevertheless, the parties presented the case as involving issues only between two of them, and I am content to dispose of it on that basis.

[para5] I prefer the defendant's version of the agreement between them for several reasons.

[para6] First, the reason the plaintiff gave for needing a place for his mother to live did not ring true. I see no relationship between the uncertainty in his life and the immediate need to move his mother out of his house. I accept the testimony of Steven Rodriguez, who appeared honest and credible, that Isabel did not get along with his mother, that his mother felt Isabel was a burden and was tired of looking after her. In cross-examination Steven said clearly that the placement of Isabel with the defendant was to stop arguments between his mother and grandmother. Therefore, I disbelieve the testimony of the plaintiff on this point.

[para7] Second, no matter which version is accepted, the question of who would care for Isabel during the day would have arisen. The defendant worked and his wife was in school. Even on the plaintiff's version, as a loving and caring son, he would have wanted to make sure that someone was available to look after his mother during the day. Therefore I believe the defendant and his wife that there was a discussion about a Spanish-speaking nurse. I disbelieve the plaintiff's testimony that there was no discussion of a nurse.

[para8] Third, the plaintiff testified that he paid \$980 in cash to the defendant and that it was his intention to change the address on his mother's old age security cheques so that they went directly to the defendant's apartment. He did not explain how this would put the money into the defendant's hands as it would be necessary for Isabel to endorse the cheques. I do not think it likely that Isabel would have agreed to pay over her entire monthly income for her care accommodation without keeping some spending money for herself. Moreover, the defendant and his wife impressed me as careful persons and in my view they would have wanted some guarantee that they would actually receive the money from the plaintiff's mother. The plaintiff's version does not allow that. I disbelieve the plaintiff's testimony that the arrangement was the defendant would receive the mother's entire income each month.

[para9] Fourth, the defendant's version involves an elaborate proposal which has the ring of likelihood. If the defendant and his witnesses were fabricating their story, they could come up with a simpler one, for example that the money was simply a gift.

[para10] Fifth, all the supporting witnesses impressed me as honest and the issue in assessing their testimony is the reliability of their memory rather than their truthfulness. I do not believe that any aspect of the defendant's father's testimony can be regarded as fabricated. He supported the defendant's and the defendant's wife's testimony that there was a meeting in October. I accept that there was such a meeting. I accept that the defendant and his wife were present at it. I accept the plaintiff made a proposal that he would assist them to purchase a larger apartment if they cared for his mother and that he would be repaid by 1/2 of Isabel's cheque for \$900. Upon this proposal being made, the question naturally arises given the mother's age and poor health, and in my view the defendant could be expected to ask it: what would happen if Isabel died before the loan was repaid? I accept that he did ask the question as recounted in his father's testimony. I accept that the plaintiff responded that if something happened to his mother today, tomorrow, next week or next month the money should be considered as a gift.

[para11] Returning to the issue of the Spanish nurse, I find that the defendant's wife raised the issue of the daytime care of Isabel and that the plaintiff, in a desperate situation, promised to arrange for the nurse. In my view, without a daytime nurse the arrangement simply was not possible. The defendant's wife was a full-time student at university and I do not accept that a full-time undergraduate schedule could be as easily avoided as the plaintiff suggests.

[para12] This leaves the issue of whether the money would be considered a gift if Isabel had simply decided to stop living with defendant. At the time of the January meeting, Isabel was still living with the defendant, and had not yet decided to leave the defendant's home. At that point the loan was still outstanding. I am satisfied that at the January meeting the plaintiff was extremely emotionally upset. In the circumstances it was natural that he would be. His son-in-law confirmed that he was. I reject the plaintiff's testimony that he was not upset at the meeting. However, I accept his testimony that he was trying to act in a responsible manner to ensure that all his suppliers and creditors would be paid in full even though he was left with nothing but his house. He is obviously a person who takes his responsibilities and the fact that others have relied on him seriously. I accept his testimony that he was concerned for the future of his son-in-law and nephew who did not get along with his partner. In this situation, I find that it is in accord with reasonable likelihood that the defendant, who the plaintiff described as smart and bright, would ask why his uncle had not advised him of the financial problems of the business before he had bought a condominium. Given the plaintiff's concern about letting his nephew down, his strong character, and his pride as the patriarch of the family, I am satisfied that he responded that the least he could do was to consider the loan a gift, and that his nephew need no longer worry about it. Perhaps because of the degree to which he was upset in the meeting, the plaintiff does not recall making the statement. I consider the defendant's continued commitment to care for the plaintiff's mother in the precarious financial situation to be adequate consideration for the forgiveness of the loan.

[para13] In conclusion, assuming the \$8,500 was a loan from the plaintiff to the defendant, I find it was forgiven. Therefore the plaintiff's claim is dismissed.

[para14] The counterclaim is also dismissed. I find that the expenses for the furniture were thought to be part of the household expenses of which Isabel was expected to be a long-term member. The claim for quantum meruit is worthy of comment. I have found that the agreement was that the plaintiff would provide a daytime nurse. I do not accept that the defendant's wife would agree to compromise her university education for a few dollars a month. In fact, she did compromise her education to care for the plaintiff's mother and the plaintiff should be grateful to her for doing so. However, the defendant's wife did not join as a party to the counterclaim and her husband cannot claim a quantum meruit for her time and effort. Moreover, the defendant's counsel candidly stated that the counterclaim was a legal manoeuvre and not brought at the defendant's initiative.

[para15] The defendants served an offer to settle on May 19, 2000 which meets the requirements of Rule 49. The plaintiffs will pay the defendant's costs, as assessed, on a party and party scale to May 19, 2000 and on a solicitor and client scale thereafter.

JURIANSZ J.

CBR# 833

Peel Condominium Corp. No. 321 v. 679844 Ontario Ltd.

Between Peel Condominium Corporation No. 321, and 679844 Ontario Ltd. et al

Court File No. 99-CV-163107CM

Ontario Superior Court of Justice Master Polika March 6, 2000. (19 paras.)

Counsel: Brian H. Somer, for the plaintiff. Malcolm J. MacLeod, for the defendant 679844 Ontario Ltd.

[para1] MASTER POLIKA:-- The defendant 679844 Ontario Ltd. sought an order discharging and vacating the certificate of pending litigation registered against its lands pursuant to the order of Master Peterson dated March 5, 1999 or in the alternative an order discharging the certificate of pending litigation on payment into court of monies as security for the amount claimed by the plaintiff.

[para2] I heard the motion and endorsed the Form 77C as follows:

Order to go as follows: For reasons to be released order to go vacating and discharging the certificate of pending litigation. Counsel addressed me on the issue of costs. I can see no reason why costs should not follow the event. An offer to settle was tendered. Costs thus sought on a solicitor/client scale. Leaving offer aside given its terms respecting further registration and taking into account the preparation as evidenced by the materials and the complexity and novelty of the matters in issue, costs are fixed in the amount of \$1,950 inclusive of G.S.T. and disbursements, payable by the plaintiff to the moving defendant forthwith.

[para3] The plaintiff's claim as it relates to the certificate of pending litigation is based on Article 3.00, entitled Cost Sharing Provisions For the Common Driveway, of the agreement entered into between the moving defendant, the plaintiff and the Canadian Imperial Bank of Commerce.

[para4] Article 3.03 in particular provides that amounts not contributed by the moving defendant would bear interest at 20 per cent per annum calculated and compounded monthly until paid and that the amounts together with interest "shall, to the extent thereof, be and constitute a first lien and charge against" the defendant's lands set out in the agreement.

[para5] There is no dispute that the plaintiff commenced an action on March 20, 1998 being court file number 98-CV-144033CM, a case managed action, in substantially identical terms to the within action. Each action claims the sum of money allegedly owing, plus interest, pursuant to Article 3.00.

[para6] The moving defendant delivered a statement of defence in the 1998 action dated October 9, 1998. The within action was commenced on February 2, 1999 to satisfy certain statutory requirements as between the plaintiff and its constituent condominium owners. By February 2, 1999 there were two actions in place seeking the same monetary relief pursuant to Article 3.00.

[para7] In the 1998 action, as a consequence of an order made by Madam Justice Kitley at trial scheduling court, a case conference took place before me on March 3, 1999. The plaintiff failed to advise the other parties and as a consequence the case conference was adjourned to April 10, 1999 to address the transfer of the within action into case management, common settlement conference, trial together and a timetable for both actions and any consequential third party proceedings.

[para8] The affidavit in support of the motion for the certificate of pending litigation heard by Master Peterson was sworn by Mr. Del Ballo on March 2, 1999. The affidavit makes no reference whatsoever to the 1998 action or that the claim advanced on the basis of Article 3.00 was disputed in the statement of defence in the 1998 action.

[para9] When the motion came before Master Peterson the plaintiff knew that not only the substance of the claim was being defended in the 1998 action but also that the defendant was represented by counsel. The plaintiff proceeded with the motion nonetheless on an ex parte basis.

[para10] In *Allan Candy Ltd. v. CIBC Mortgage Corp.* [1994] O.J. No. 1300 Mr. Justice Crane held at paragraph 62 that "Material non-disclosure in itself is sufficient to justify an order discharging the certificate."

[para11] Before Master Peterson not only was the 1998 action and the defence advanced therein not disclosed but Mr. Del Ballo in paragraphs 13 to 15 makes statements the totality of which is to indicate that the moving defendant is not opposing or is agreeable to paying the amount claimed, a position contrary to that taken by the moving defendant in the 1998 action.

[para12] I am in agreement with the statement of Master Peterson made at page 752 in *Bank of Nova Scotia v Rawifilm Inc. et al.* (1994) 18 O.R. (3d) 743 to the following effect:

In concluding it might be useful to note that rule 42.01(3) provides that:

42.01(3) A motion for an order under subrule (1) may be made without notice. Thus, such a motion can always be made on notice and the issue of full and fair disclosure on an ex parte motion eliminated. While it is true, in certain circumstances, a quick ex parte order may be the way to proceed. However, in this case I note that the transfer being sought to be set aside was made by a deed dated May 26, 1992 and registered on June 3, 1992. The order was made on January 13, 1993. I am not certain that the urgency existed in this case that warranted the original motion being brought on an ex parte basis without providing extensive disclosure of all of the relevant information and documentation that was within the plaintiff's possession.

[para13] The claim has been before the courts since the commencement of the 1998 action. No circumstances were disclosed why the motion had to proceed ex parte after almost a year had gone by since the 1998 action was commenced. The plaintiff knew that the claim was defended and counsel were acting for the moving defendant.

[para14] The claim for the certificate of pending litigation was based on Article 3.00, that is a claim for monies allegedly due thereunder and because of the failure to pay the said funds a claim for a lien against the lands as provided in Article 3.00.

[para15] I find that the plaintiff's failure to disclose to Master Peterson the 1998 action, its defence and the pending case conference, given its purpose, amounts to material non-disclosure. Further, the assertion in paragraphs 13 to 15 of Mr. Del Ballo's affidavit border on a material misrepresentation which would have been cleared up had full disclosure been made or not required if notice had been given. On that basis order to go vacating and discharging the certificate of pending litigation.

[para16] In the event I am incorrect in that conclusion, I also find that the moving defendant has satisfied me that an order should be made discharging the certificate of pending litigation on payment into court by the moving defendant of monies sufficient to cover the amount claimed under Article 3.00 plus interest as set out in Article 3.00 up to the end of June 2000, the date upon which the plaintiff asserted that the trial in this matter would be concluded by. In that regard I find that the moving defendant has satisfied the requirements of sections 103(6)(a)(I), 103(6)(b) and 103(6)(c) of the Courts of Justice Act.

[para17] It is clear from the prayer for relief and the affidavit of Mr. Del Ballo that the plaintiff's claim is for a sum of money due under, Article 3.00 and the claim for a first lien and charge against the lands is to secure payment of the same. If monies totaling the amount of the monetary claim and the interest accruing to the end of June 2000 are paid into court then the claim for lien evaporates as the claim then will be fully secured.

[para18] There was some discussion of the continuing nature of the claim for a first lien and charge. What is not in dispute is that no such right exists unless monies become due pursuant to Article 3.00.

[para19] The parties agreed there was no impediment in the agreement to it being registered on title to the lands affected by Article 3.00. If registered it would serve as notice of the potential claim to any potential successors in title whether by way of transfer or encumbrance. Simply put, as I indicated to counsel, I did not understand why the agreement had not be registered on title and why instead the plaintiff was expending funds in pursuing its lien rights by certificate of pending litigation, particularly as the certificate of pending litigation only extended to the claims as presently set out in the action and not to any future claims based on Article 3.00. The course of action followed by the plaintiff vis-à-vis the certificate of pending litigation in the circumstances herein amount to an unnecessary expenditure of funds by the plaintiff and a waste of the court's time and resources.

MASTER POLIKA

CBR# 114**Edmunds v. Ontario New Home Warranty Program**

Between John Edmunds and Diana Linklater, applicants (appellants), and Ontario New Home Warranty Program, respondent

O.J. No. 1195

Ontario Superior Court of Justice Divisional Court - Toronto, Ontario O'Driscoll, Marchand and Aitken JJ. Heard: January 25, 2000. Judgment: April 7, 2000. (10 paras.)

Counsel: Helen A. Daley, for the applicants (appellants). Peter Balasubramanian, for the respondent.

The judgment of the Court was delivered by

[para1] O'DRISCOLL J. (orally):-- The appellants/applicants appeal to this Court under the provisions of s. 11(1) of the Ministry of Consumer and Commercial Relations Act, R.S.O. 1990, c. M.21 from the decision of the Commercial Registration Appeals Tribunal (CRAT), dated May 14, 1998, directing the Ontario New Home Warranty Program (Program) to disallow the appellants' claim.

[para2] The appellants each contracted with Buckingham Estates Limited for the purchase of a new condominium. The condominiums in question were located in Niagara Falls. Pursuant to two (2) contracts entered into by Edmunds and Buckingham, Edmunds agreed to purchase and the developer agreed to sell two (2) units of the condominium. The appellant, Linklater, entered into a similar agreement with Buckingham for the purchase of one (1) unit. The three (3) contracts required the payment of a deposit of \$17,900 per condominium, which was to be applied to the purchase price. Both appellants paid all required deposits under the contracts. According to the agreements, the date of possession of all three (3) units was June 1, 1989. The agreements allowed for an extension of the dates of possession until June 1, 1992. The appellants submit that a further term of the three agreements required the vendor, Buckingham, to provide mortgage financing to Edmunds and Linklater for the balance of the purchase price due upon closing.

[para3] In February 1991, Buckingham's principal became bankrupt, and, as a result, Buckingham abandoned the condominium project. According to the CRAT decision, by the terms of their agreements, the appellants agreed and undertook to accept the transfer of the title of their respective units from Coventry. According to the appellants, however, Coventry made it clear that it would not provide the mortgage financing, an essential term of the contracts between the appellants and Buckingham and would not complete those contracts pursuant to their terms.

[para4] A written notice was given by Coventry and received by the appellants toward the end of September 1991. The notice required the appellants to make payments of outstanding interim occupancy charges and it advised the appellants of Coventry's readiness to honour the agreements between the appellants and Buckingham and to close the transactions by November 1, 1991. The appellants did not comply with Coventry's request for payment of the occupancy fees and did not make any payments with respect to any amounts due and owing under the said agreements.

[para5] Subsequently, Coventry sold the three (3) units in question to third parties and reduced the purchase price of each unit so sold to the new purchasers by the amount of the deposits that were paid to Buckingham by the appellants.

[para6] The appellants argued before CRAT that they did nothing to forfeit their right to the return of the deposits under the purchase agreements with Buckingham. As a result, they submitted a claim to the Program for compensation for the loss of their deposits. The Ontario New Home Warranties Plan Act, states:

"14.(1) Where,

(a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

. the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations."

[para7] We are of the view that,

(1) the principal of the vendor went bankrupt and, thereafter, Buckingham breached the contract between Buckingham Estates and the appellants/purchasers;

(2) there was no new or second agreement between the appellants and Coventry. At pages 84-85 of the transcript, the witness, called by the Program before CRAT, a lawyer named Mr. Paul Heath, who was acting for Coventry, gave evidence as follows:

THE CHAIR: So is there - do you feel that this is possibly a variation of the agreement?

THE WITNESS: From our perspective, from Coventry's perspective, we had no agreement.

[para8] We are also of the view that there was no agency relationship as between Buckingham Estates and Coventry. We are also of the view that the appellants have fulfilled the conditions of s. 14(1) of the Act and are entitled to be paid out of the fund. Moreover, we are of the view that s. 14(2) of the Act:

(2) In assessing damages, the Corporation shall take into consideration any benefit, compensation or indemnity payable to the person or owner from any source.

is not applicable to the facts of this case.

[para9] In the result, the appeal is allowed, the decision on appeal is set aside. The appellants are entitled to be paid out of the Fund the amounts of the deposits, namely, three times \$17,900 plus interest as set out in:

- 1) Regulation 892 under the Ontario New Home Warranties Plan Act,
- 2) Section 53 of the Condominium Act, R.S.O. 1990, c. C.26, and
- 3) Section 35 and s. 53 of Regulation 96 made under the Condominium Act of Ontario.

[para10] After hearing submissions and then consulting with my colleagues, I have endorsed the back of the Appeal Book as follows:

"This appeal is allowed for the oral reasons given for the Court by O'Driscoll J. Costs of this appeal are fixed at \$5,000.00 payable by the Respondent to the Appellants."

O'DRISCOLL J. MARCHAND J. AITKEN J.

CBR# 835

Royal Trust Corp. of Canada v. Karenmax Investments Inc.

Between Royal Trust Corporation of Canada, plaintiff, and Karenmax Investments Inc., defendant And between Karenmax Investments Inc., plaintiff by counterclaim, and Royal Trust Corporation of Canada and the Owners: Condominium Plan No. 832 1384, defendants by counterclaim

Action No. 9603-12754

Alberta Court of Queen's Bench Judicial District of Edmonton Bielby J. Heard: March 6, 2001. Judgment: March 8, 2001. Filed: March 9, 2001. (23 paras.)

Counsel: Roderick C. Payne, for the applicant, Bartizan Capital Corporation. Eric D. Young, for the plaintiff, Royal Trust Corporation of Canada. W. Neil McKay, for the Court Appointed Listing Agent, Orville R. Craft Realty Inc.

REASONS FOR JUDGMENT

[para1] BIELBY J.:-- Karenmax Investments Inc. ("Bartizan") applies for an order extending the time in which it may file a Notice of Appeal and, if successful, then appeals from a decision of Master Funduk given November 10, 1998. In that decision the Master found that a financing condition on an offer to purchase condominium units ordered sold by the Court in a foreclosure action had been removed by Bartizan, the purchaser, within contractually specified time limits. As that sale did not subsequently proceed, the Master ordered the forfeiture of one-half of Bartizan's to the listing agent, Royal Trust Corporation of Canada ("Royal Trust"), pursuant to a further contractual term.

[para2] This dispute surrounds the timing of the receipt of a waiver of that financing condition by Royal Trust from Bartizan. The Offer to Purchase was made subject to that condition having been met or waived by 4:00 p.m. on April 13, 1998. In Master Funduk's written reasons for the decision which Bartizan now wishes to appeal he expressly found: "At 11:00 a.m. (B.C. time) April 13, Bartizan faxed to the Court its 'removal' of condition (a) [the financing condition]. That too is within the time deadline."

[para3] However, Bartizan's evidence is that it first learned on November 8, 2000 that the waiver of condition had not in fact been received by Royal Trust until 9:16 p.m. on April 13, 1998, more than five hours after the expiry of the time limit imposed by the Offer to Purchase. That waiver had been sent to Royal Trust by fax. The document states:

The Seller and Buyer agree that the Real Estate Purchase Contract dated March 25, 1998 is hereby amended as follows:

To remove the Condition Precedent 3(A)

Dated at Vancouver, in the Province of B.C. at 11 o'clock am this 13 day of April A.D. 1998.

[para4] However, on the cover sheet which accompanied this document, when sent by fax, one finds the information "Date - Apr. 13 Time - 21:16" showing that the document was in fact sent at 21:16 or 9:16 p.m. This latter evidence was not brought to the attention of Master Funduk before he made his decision.

[para5] His order was entered and executed. A Certificate of No Appeal was issued on December 8, 1998. The property was subsequently sold to another party. Nothing further occurred in this matter until after Royal Trust, in a separate action, sued Bartizan for the deficiency between the ultimate sale price of the foreclosed property and the purchase price in the original sale to Bartizan. It advanced an argument of issue estoppel by claiming that Bartizan is precluded from advancing a defence about the time of delivery of the waiver of the financing condition because of the findings of Master Funduk in this matter.

[para6] In support of this application, Keith Talbot, an officer of Bartizan, deposes that he learned for the first time on November 8, 2000 of the true timing of the delivery of the waiver of the financing provision when it was provided by way of answer to undertaking in the new action commenced by Royal Trust. Four days later this application to extend the time for appeal was launched.

[para7] He further deposes that he did not earlier raise the issue because he believed that the waiver had erroneously been sent by Bartizan's own realtor, Re/Max, to Royal Trust before the 4:00 p.m. deadline. Bartizan's counsel stated that the first time it learned that the waiver of condition had been sent at all was in August 1998 when Royal Trust applied before Master Funduk for the order under appeal. At that time the waiver, including the fax notation showing 21:16 as the time of receipt, was before the Master by way of affidavit but apparently Bartizan did not observe this notation at that time.

[para8] Mr. Talbot deposes that Bartizan did not raise with Re/Max the issue of why it had sent the waiver in circumstances it believed were erroneous because by August 1998 the relationship between Bartizan and Re/Max had collapsed.

[para9] There is no evidence as to when Royal Trust or its counsel first became aware that the fax cover sheet accompanying the waiver gave a different time for receipt of the fax than that given in the body of the waiver, or when they became aware of the actual time it was received. It is clear that Royal Trust had this knowledge by November 2000 when it was provided to Bartizan.

[para10] Bartizan requested Master Funduk to reconsider his decision in June 2000. The Master declined, apparently finding that he was functus officio. Bartizan then proceeded with this attempt to appeal.

[para11] Bartizan, in its Notice of Appeal, alleges that its appeal should be heard notwithstanding the significant passage of time since the order was made because it suggests that had the Master had the new evidence before him when making his decision, he would have rendered a different decision, and because it alleges that Royal Trust committed a fraud on the Court.

[para12] Bartizan acknowledges that it cannot meet the traditional four-step test for leave to appeal after the expiry of the appeal period. It argues that the appeal should nonetheless be allowed to proceed because of the existence of special circumstances.

[para13] Our Court of Appeal in *Cairns v. Cairns* [1931] 3 W.W.R. 335 set out the four requirements for hearing an appeal after the expiry of an appeal period as follows. The party seeking to appeal must:

- a. show a bona fide intention to appeal was entertained while the right to appeal existed and that the failure to appeal was by reason of some special circumstance which served to excuse or justify such failure;
- b. account for the delay and show that the other side was not so seriously prejudiced thereby as to make it unjust, having regard to the position of both parties, to disturb the judgment;
- c. to show that he has not taken the benefits of the judgment from which he is seeking to appeal; and
- d. to show that he would have a reasonable chance of success if allowed to prosecute the appeal.

[para14] Bartizan argues that these rules should be suspended here because of the existence of special circumstances. It relies upon the decision of the Alberta Court of Appeal in *Royal Bank of Canada v. Morin* (1977) 4 Alta. L.R. (2d) 127 where the Court held that an applicant may be excused from meeting these requirements if special circumstances existed, there created by the existence of two contemporaneous judicial decisions, one of which found a party liable on a loan and another which found that it was not liable. The Court noted that the situation on its face bespoke a miscarriage of justice.

[para15] In this case Bartizan argues there is a similar patent miscarriage of justice because of the existence of evidence which on its face contradicts a finding of fact made by the Master in earlier proceedings. However, this argument ignores the fact that Bartizan itself did not check into the facts in 1998 when it learned, to its apparent surprise, that the financing condition had been waived contrary to its instructions, leaving it liable to complete a multi-million dollar purchase. Further, the "new evidence" was equally available to it as to Royal Trust in August 1998 at the time the matter was argued before the Master; it was included in the affidavit evidence used to support that application. The difference in time between the date on the face of the fax and in the cover sheet was equally present for all parties to notice; it appears that none of them in fact may have noticed it at that time.

[para16] Bartizan's argument also ignores the consideration that it may be estopped from raising the actual time the fax was delivered through the action of its agent, Re/Max, in representing to Royal Trust and to Master Funduk that the waiver was to be effective as of 11:00 a.m. on April 13 by forwarding the waiver with that time inserted on its face.

[para17] Bartizan further argues that special circumstances exist which exempt it from meeting the four tests in Cairns, supra, because Royal Trust was represented by legal counsel before Master Funduk who did not advise the Master of the actual time of receipt of the waiver by Royal Trust. It argued that the lawyer representing Royal Trust had a positive duty to return to the Court and advise it of the error when it came to his attention, flowing from a lawyer's duty to be candid and honest and to safeguard the due process of law and the proper operation of institutions of justice pursuant to the Alberta Code of Professional Conduct, ch.1, commentary G.1, p.2.

[para18] However, there is no evidence to show when, if ever, the lawyer who represented Royal Trust before Master Funduk had it brought to his attention that the waiver of the financing condition was received after the time deadline. There is certainly no evidence to show that he learned of this before Master Funduk rendered his decision or before expiry of the statutory appeal period relating to that decision. The absence of evidence to show that Royal Trust or its counsel intentionally misled the Master, i.e. that either knew there was evidence to the contrary on the issue of timing of the receipt of the waiver and failed to tell the Master, removes this from the type of scenario described by the Supreme Court of Canada in *Harper v. Harper* (1979) 98 D.L.R. (3d) 600 and by the Alberta Court of Appeal in *Re Norris* (1996) 45 Alta. L.R. (3d) 1.

[para19] It is not enough to state that Royal Trust must have realized the waiver was not received before 4:00 p.m. on the date in question because, having received the waiver, it must have known when it was received. This assumes that someone was continually standing beside the fax machine at the Royal Trust office so as to note when the documents came through the fax, and that that someone advised the employee with actual knowledge of the effect of the timing of the waiver as to the time of its actual receipt. The evidence is equally consistent with the possibility that no one "twigged on to" the issue of the inconsistency between the time the fax equipment typed on the waiver cover sheet and the time expressly stated on the face of the waiver until sometime well after the expiry of the appeal period in question.

[para20] Further, the motive for attempting to undo the Master's decision is not to secure repayment of the deposit monies forfeited as a result of it but rather is motivated by an attempt to blunt an argument available to Royal Trust in separate litigation. This application is, therefore, a device to attempt to meet an evidentiary challenge arising elsewhere rather than as a result of Bartizan being aggrieved by the immediate result of the decision it now hopes to appeal.

[para21] For all these reasons, this situation falls far short of the special circumstances described in *Royal Bank of Canada v. Morin*, supra.

[para22] The allegations of fraud made in the Notice of Appeal were not addressed in argument, let alone in the affidavit evidence supporting the application.

[para23] This application is dismissed. Costs may be spoken to, if necessary.

BIELBY J.

Half Moon Lake Resort Ltd. v. Strathcona (County)

IN THE MATTER OF the Municipal Government Act, S.A. 1994, c. M-26.1; AND IN THE MATTER OF the Land Titles Act, R.S.A. 1980, c. L-5 AND IN THE MATTER OF the lands within the South East Quarter of Section 6, Township 52, Range 21, West of the Fourth Meridian, and within the boundaries of Strathcona County Between Half Moon Lake Resort Ltd., Apple Auction Ltd., and Brian Lovig, appellants (respondents), and Strathcona County, respondent (applicant) (Docket: 9903-0412-AC) And between Strathcona County, appellant (applicant), and Half Moon Lake Resort Ltd., Apple Auction Corporation operating a business under the firm name and style Apple Auction Ltd., and Brian Lovig, respondents (respondents) (Docket: 0003-0132-AC/0003-0133-AC) And between Half Moon Lake Resort Ltd., and Brian Lovig, appellants (respondents), and Strathcona County, respondent (applicant), and Apple Auction Ltd., operating a business under the firm name and style Apple Auction Ltd., not party to the appeal (Docket: 0003-0296-AC)

Docket: 9903-0412-AC, 0003-0132-AC, 0003-0133-AC and 0003-0296-AC

Alberta Court of Appeal Edmonton, Alberta McClung, Hunt and Berger JJ.A. Heard: November 28, 2000. Judgment: filed February 27, 2001. (52 paras.)

On appeal from the judgment of Agrios J. Dated June 29, 1999. Filed September 3, 1999. On appeal from the judgment of Moreau J. Dated March 10, 2000. Filed April 3, 2000. On appeal from the judgment of Ritter J. Dated May 11, 2000. Filed June 14, 2000.

Counsel: M.J. McCabe and K.L. Becker, for the appellants. B.A. Sj lie and J.S. Grundberg, for the respondent.

REASONS FOR JUDGMENT RESERVED

The judgment of the Court was delivered by

[para1] HUNT J.A.:-- A company owned a large tract of land which, for several decades, was operated as a campground. The company advertised an event at which it proposed to auction individual campsites pursuant to a form of contract. The local municipality obtained an interim injunction restraining the holding of the auction because the company had not obtained permission to subdivide its property. The company then developed two additional forms of contract pursuant to which it proposed to dispose of interests in its property. This appeal concerns the validity of the contracts in light of s. 95(1) of the Land Titles Act, R.S.A. 1980, c. L-5 ("LTA"). It also raises questions about the interaction between s. 95(1) and Part 17 of the Municipal Government Act, S.A. 1994, c. M-26.1 ("MGA").

[para2] I conclude that all three contracts are invalid but that the first chambers judge should not have awarded solicitor-client costs against the company. Thus I would allow the appeal in part.

BRIEF BACKGROUND

[para3] Although four appeals were filed, oral argument focussed on the two that concern the validity of the contracts and whether solicitor-client costs should have been awarded against the Appellants in the first decision considered here (Appeal 9903-0412). Since the parties agreed that the matters raised in the other two appeals (0003-0132/0003-0133) were moot or would be rendered moot by this Court's decision, these Reasons concentrate on the former issues. There is a thorough examination of the facts in the second chambers decision considered here (Appeal 0003-0296): [2000] A.J. No. 615.

[para4] The Appellant Lovig is the president of the Appellant Half Moon Lake Resort Ltd. ("Half Moon"). Half Moon owns about 139 acres ("the Lands") located in Strathcona County ("County"), which Lands are subject to the jurisdiction of the Respondent County. Under the relevant land use by-law, permitted uses for the Lands include campsites, outdoor amusement establishments and outdoor participant recreation. The Lands contain over 200 campsites and have been operated as a campground and dude ranch for several decades. Amenities such as boating, equestrian and miniature golf facilities are found on the Lands.

[para5] Half Moon advertised a public auction at which it proposed to dispose of interests in the Lands pursuant to a form of contract ("the First Contract"). In its advertising, Half Moon claimed to have obtained subdivision approval. This was not true, but Half Moon had registered a plan of survey at the Land Titles Office.

[para6] The County obtained an interim injunction which, among other things, prohibited sales under the First Contract. Half Moon then provided individuals with the opportunity to acquire interests in the Lands pursuant to another form of contract ("the Second Contract").

[para7] In cross-examination on an affidavit during this litigation, Lovig was asked about the purpose of registering the survey plan at the Land Titles Office. He said at A.B. 39-41 that it was "[t]o provide a record of definition of particular lot areas" and that it was to be used in conjunction with or for reference to the sale of the lots under the First and Second Contracts.

[para8] In the first decision under appeal, a permanent injunction was granted prohibiting the Appellants from entering into agreements in the form of the First and Second Contracts. In his brief Reasons, the chambers judge adopted the County's arguments, saying at A.B. 130 (9903-0412) that this was "clearly an attempt to do indirectly what cannot be done directly. It is clearly a colourable attempt to create a subdivision. This scheme would subvert both the Land Titles Act and the Planning Act."

[para9] He awarded solicitor-client costs against the Appellants, stating at A.B. 135 that there had been an attempt to flaunt the spirit and intent of the interim injunction order. In his view, the Second Contract was virtually the same as the First, the use of which had been prohibited by the interim injunction. He considered that the Appellants had ignored the interim injunction through a colourable attempt to accomplish with the Second Contract what they had been enjoined from accomplishing with the First. He ordered the Registrar of Land Titles to cancel the plan of survey registered by the Appellants.

[para10] In the second decision under appeal, supra, a chambers judge considered yet another form of contract ("the Third Contract"). He concluded that, while purporting to be a 35-year lease, the Third Contract actually involved a sale of lots and was invalid due to s. 95(1) of the LTA.

[para11] At para. 19, he set out some of the factors that a court should take into account in determining whether or not a purported lease is really a sale. In this case, the significant matters included the involvement of 229 parcels of land; the Appellants, as "lessors", retained virtually no control over the property; rights relating to development of the land had been transferred to the lessees; not all development concerns had been dealt with; the lessees and proposed lessees were individuals rather than corporations; and there had been two previous unsuccessful attempts to convey interests in the property to individual owners.

[para12] He concluded that the Third Contract thwarted the purposes of the LTA and the MGA, those purposes being "the security and certainty of title and the promotion of orderly and efficient development of land" (para. 26). He granted an order declaring the Third Contract invalid, void and illegal and permanently enjoining the Appellants from leasing interests in the Lands under such contracts.

LEGISLATION

s. 95(1), (3)(a) LTA

95(1) No lots shall be sold under agreement for sale or otherwise according to any townsite or subdivision plan until a plan creating the lots has been registered.

(3) No party to a sale or agreement for sale is entitled in a civil action or proceeding to rely on or plead the provisions of this section

(a) if the plan of subdivision by reference to which the sale or agreement for sale was made is registered when the action or proceeding is commenced

s. 616(m), (s), (u), (ee), 617, 652(1) MGA

616. In this Part,

(m) "lot" means

(i) a quarter section

(iv) a part of a parcel of land described in a certificate of title if the boundaries of the part are described in the certificate of title other than by reference to a legal subdivision, or

(v) a part of a parcel of land described in a certificate of title if the boundaries of the part are described in a certificate of title by reference to a plan of subdivision

(s) "parcel of land" means the aggregate of the one or more areas of land described in a certificate of title or described in a certificate of title by reference to a plan filed or registered in a land titles office

(u) "plan of subdivision" means a plan of survey prepared in accordance with the Land Titles Act for the purpose of effecting a subdivision

(ee) "subdivision" means the division of a parcel of land by an instrument and "subdivide" has a corresponding meaning

[Emphasis added.]

617. The purpose of this Part and the regulations and bylaws under this Part is to provide means whereby plans and related matters may be prepared and adopted

(a) to achieve the orderly, economical and beneficial development, use of land and patterns of human settlement, and

(b) to maintain and improve the quality of the physical environment within which patterns of human settlement are situated in Alberta,

without infringing on the rights of individuals for any public interest except to the extent that is necessary for the overall greater public interest.

652(1) A Registrar may not accept for registration an instrument that has the effect or may have the effect of subdividing a parcel of land unless the subdivision has been approved by a subdivision authority.

s. 16(d) Planning Act, R.S.A. 1970, c. 276 ("1970 Planning Act")

16. Land shall not be subdivided unless

(d) the proposed subdivision complies in all respects with this Act and The Subdivision and Transfer Regulations, and is approved in the manner prescribed by those regulations

THE FIRST AND SECOND CONTRACTS ("Contracts")

[para13] The First and Second Contracts, both titled "Contract of Purchase and Sale" (9903-0412 A.B. 204 and 212), are similar. The Purchaser agrees to purchase an undivided interest in Half Moon's Lands, coupled with another interest. Under the First Contract, the additional interest is called an Exclusive Use Area; under the Second, it is a Leased Area. In each case, the two interests together are referred to as "the Property".

[para14] Under the Contracts, the Exclusive Use Area and the Leased Area are specified by reference to an attached survey document. It is common ground that the survey document is the same as that registered by the Appellants at the Land Titles Office and cancelled by order of the first chambers judge.

[para15] The Contracts grant the Purchaser of the Property exclusive use of the Exclusive Use Area or the Leased Area, according to attached terms and conditions. One term is that the Purchaser shall be entitled to vacant possession of the Property unless provided otherwise in the Contract.

[para16] Details about the Exclusive Use Area and the Leased Area are set out in agreements attached to the Contracts (A.B. 208, 216). The terms of the attachments are also similar. They give the Purchasers "the exclusive right to occupy, use, improve and enjoy" the Exclusive Use or Leased Areas. Any improvements constructed thereon belong to the Purchaser.

[para17] Each Contract contemplates the establishment of an association having powers similar to those of a corporation under the Condominium Property Act, R.S.A. 1980, c. C-22, as amended. The Association has the power to approve improvements on the Leased or Exclusive Use Areas.

[para18] The main difference between the First and Second Contracts is the nature of the interest that accompanies the undivided interest. Under the First, the rights are said to be interests in land that can be protected by caveat (A.B. 208). Under the Second, the lease is for three years and can be renewed for three years (A.B. 216). Effectively, the lease is renewable perpetually since each Second Contract is automatically renewed by the renewal of a single lease held by any Purchaser.

THE THIRD CONTRACT

[para19] The Third Contract (0003-0296 A.B. 89) is titled Lease Agreement. It recites that Half Moon, the Lessor and owner of the Lands, has designated 229 areas as reflected on an attached Leasehold Survey. Again, it is common ground that this is the same survey referenced in the first two contracts. The Lessee agrees to lease one of those areas for a prepaid lump sum in return for the exclusive right to occupy, use, improve and quietly enjoy the Leased Area for 35 years. The Lessee agrees to pay a pro rata share of the property taxes for the Land and the Common Areas (being all the Land except the Leased Areas). A Tenants' Association will be established to set rules and regulations for the use of the Leased and Common Areas. Lovig is a co-covenantor under the Lease Agreement and undertakes to ensure that Half Moon performs its covenants. In fact, Half Moon's sole covenant, also made by the Lessee, is not to assign the lease unless a successor in interest promises to be bound by it. The Lessee undertakes not to file a caveat with respect to its interest.

[para20] Under the attached Terms and Conditions, improvements to the Leased Areas can be made only with the consent of the Tenants' Association. The document is silent as to ownership of improvements. A Management Committee representing the Association is empowered to supervise the enforcement of the Agreement. The Lessee agrees to comply with municipal by-laws.

THE VALIDITY OF THE CONTRACTS

The First and Second Contracts

[para21] Counsel for the Appellants stated during oral argument that if the Third Contract is invalid, so too are the First and Second. Since I conclude below that the Third Contract is invalid, little needs to be said about the First and Second.

[para22] The First and Second Contracts breach s. 95(1) of the LTA because the additional interests they convey (the Exclusive Use Area and the Leased Area) constitute the sale of a lot absent the registration of a subdivision plan. Such a contract is illegal: *Boulevard Heights v. Veilleux*, [1915] 52 S.C.R. 185.

[para23] The County concedes that the conveyance of an undivided interest in the Lands under the Contracts is unobjectionable because the sale of an undivided interest is not prohibited by s. 95(1). In my opinion, however, the conveyance of the additional interests constitutes the prohibited sale of a lot. To explain why, it is necessary to examine the nature of an undivided interest.

[para24] In order to create a tenancy in common, unity of possession must exist between the tenants, all of whom "are equally entitled to possession of the whole; their respective shares remain undivided during the currency of the relationship": B.H. Ziff, *Principles of Property Law*, 3rd ed. (Toronto: Carswell, 2000) at 304. Having an undivided interest and unity of possession in the whole parcel, no tenant in common can claim a greater right of possession to any part than could be claimed by any of the undivided owners: *Kasha v. Bye*, [1998] A.J. No. 697, Quinn M. Tenants in common share the right to possession of all the property so that their shares are undivided in the sense that no boundary has been demarcated. E.H. Burn, *Cheshire's Modern Law of Real Property*, 14th ed. (London: Sweet & Maxwell, 1988); R.E. Megarry and H.W.R. Wade, *The Law of Real Property*, 6th ed. (London: Butterworths, 2000), chapter 9 at 480.

[para25] Through the conveyance of the additional interests, the Contracts purport to grant an undivided owner the exclusive right of possession in perpetuity to part of the Lands. This is offensive to the nature of an undivided interest and can be seen in no other light than the sale of part of the Lands in contravention of s. 95(1).

[para26] This result is obvious as regards the Exclusive Use Area under the First Contract, which conveys a fee simple interest to a delineated portion of the Lands. The conveyance of the Leased Area under the Second Contract is slightly less objectionable on its face.

[para27] But an examination of the substance of the second transaction reveals the same result. Although it purports to convey a three-year leasehold interest, that interest is effectively renewable in perpetuity and has the hallmarks of a fee simple interest. For example, clause 2 of the Terms and Conditions attached to the Lease Agreement forming part of the Second Contract provides that the undivided interest and the lease interest "shall be deemed to be created concurrently and shall not be separated for any purpose whatsoever except where expressly authorized by this Agreement" (9903-0412 A.B. 218). The so-called lease interest has no elements typical of a leasehold interest, such as a real limited term or a lessor's right of re-entry for breach of a condition. In substance, the Second Contract grants exclusive rights in perpetuity to part of the Lands, absent an approved subdivision plan. It also breaches s. 95(1) and is illegal.

The Third Contract

[para28] To determine whether the Third Contract is valid, it is necessary to explore more fully the prohibition in s. 95(1) of the LTA and its relationship to Part 17 of the MGA. An understanding of Alberta's earlier planning laws, as interpreted by the courts, is also important.

[para29] The term "lot" is not defined in the LTA. The same term in a predecessor provision has been held to be capable of many meanings: *Andersen v. Sinclair* (1976), 2 Alta. L.R. (2d) ¶ at 71 (S.C.T.D.). A common usage is "[a] portion or parcel of land; any piece of land divided off or set apart for a particular use or purpose": *Town of Westmount v. Montreal Light, Heat and Power Co.*, [1911] 44 S.C.R. 364 at 377.

[para30] Subsection 616(m) of the MGA defines "lot" partly by reference to the term "plan of subdivision". The latter is defined in the same section as "a plan of survey prepared in accordance with the [LTA] for the purpose of effecting a subdivision". Since the only provision in Alberta law for creating a subdivision is found in Part 17 of the MGA, there is obviously a close link between the two statutes.

[para31] It is not necessary in this case to decide the precise extent to which the definition of "lot" in the MGA affects the same term in s. 95(1). It is sufficient to say that a "lot" in s. 95(1) refers to a piece of land that has been set apart for a particular use. At the least, this definition is compatible with the use of the term in the MGA.

[para32] The Appellants suggest that the Third Contract creates no "lot". I disagree. Each area to be leased is identified by reference to the same survey document which, according to Lovig's own testimony, was intended to define lot areas under the First and Second Contracts. This makes it apparent that the Third Contract creates pieces of land set apart for a particular use and involves lots as the term is used in s. 95(1).

[para33] The Appellants argue next that the Third Contract is not a "sale" but simply a lease that is not contrary to s. 95(1). They also assert that the Third Contract does not subdivide the Lands. They say that, in contrast to earlier legislation, there is now no prohibition against the subdivision of land absent planning approval, but only against registration at the Land Titles Office of an instrument having such an effect. Since they do not intend to use the Land Titles system, they claim the Third Contract is valid because it breaches no law. A response to these interrelated arguments requires an analysis of past planning law and how the LTA and Part 17 of the MGA interact.

[para34] Earlier planning legislation, as exemplified by s. 16 of the 1970 Planning Act, specifically prohibited subdivision without authority. Because this express prohibition is not found in the present MGA, a leading authority on municipal law in Alberta concludes that the MGA "does not purport to prohibit parties from entering into an unapproved transaction that has the effect of subdivision." F. A. Laux, *Planning Law and Practice in Alberta*, 2nd ed., looseleaf (Toronto: Carswell, 1996). The paragraph in which his observation is made, however, also states that "except for contracts for the sale of lots created in an unregistered plan which are expressly made illegal and unenforceable between the parties by s. 95 of the Land Titles Act, transactions between parties amounting to an unapproved subdivision are probably not ipso facto rendered void by the Municipal Government Act."

[para35] The sale of a lot is obviously a subdivision, so at least to this extent the Appellants are mistaken to assert that there is no longer a prohibition against unauthorized subdivision. In determining whether a transaction is the sale of a lot, the courts ought to analyse its substance and not just its form. Earlier cases decided under provisions other than s. 95(1) have done just that and are helpful in determining the real effect of the Third Contract. Three are of interest.

[para36] In *Otan Developments Ltd. v. Kuropatwa* (1978), 7 Alta. L.R. (2d) 274 (S.C.A.D.), a caveat protecting a lease was ordered removed because the Court concluded the lease had the effect of subdividing property without planning authority. The parties had entered into an agreement for the sale of the property, with the purchase price fully paid. When the owner failed to obtain subdivision approval, he leased part of the parcel to the purchaser for a term of 49 years at an annual rental of \$1.

[para37] Haddad J.A. concluded at 277 that the parties intended to give the appellant "virtually the same control over the one acre as he would have had by becoming the registered owner of that portion if that result could have been achieved." He underscored at 278 that not every lease would have the effect of subdividing land. Rather, in each case, the purpose and effect, or possible effect, of the lease must be examined.

[para38] *Morrow J.A.* (Prowse J.A. concurring) came to the same conclusion for different reasons. The contract provided that the lease would terminate as soon as a registerable transfer was obtained for the unsubdivided parcel to which it pertained. He viewed this as an attempt to achieve the same effect as if subdivision approval had been procured. He noted that it would be possible to lease part of a parcel for a considerable period of time for parking or hay or grazing purposes without infringing the planning legislation. But in this case the parties were "attempting to obtain the benefits of a subdivision under the guise of a lease without having to comply with the applicable legislation within the foreseeable future" (at 286). The transaction was colourable and attempted to thwart the object of the legislation.

[para39] On the other hand, in *Knowlton v. Registrar of Land Titles* (1982), 19 Alta. L.R. (2d) 31 (Q.B.), Miller J. concluded that the registration of a caveat protecting a lease ought not to be refused because the lease did not effect a subdivision. While McDonald's lease was lengthy (40 years with an option to renew for 10 years), it had a bona fide commercial rationale in that the building to be constructed on the premises would require a substantial capital investment. The building would revert to the lessor at the end of the lease, with the lessee entitled to remove only trade fixtures. Although pre-payment of the rent in the amount of approximately a half-million dollars was suggestive of a purchase, Miller J. noted at 39 that it might only represent the discounted present value of the rental to be paid over the lease's term.

[para40] Unlike in *Otan*, there was no attempt to circumvent the planning legislation. There was neither a prior unsuccessful attempt to subdivide nor any indication that the lease was intended to accomplish such a result. There was no undertaking by the landlord to try to obtain subdivision approval. Subdivision approval already obtained for the whole shopping centre permitted the construction of a building of the type contemplated by McDonald's. The lease contained such typical provisions as the need for the lessor's approval prior to assignment of the lease or the erection of signs. It also gave the lessor the right to enter the premises under certain circumstances.

[para41] *Robinson v. Guthrie* (1984), 51 A.R. 356 (C.A.) involved an application for a declaration that the appellant was a tenant under a 99-year lease covering part of a quarter section. The lease provided for rental by way of a lump sum and payment of one-

half the entire quarter section's annual taxes. There was no effort to obtain subdivision approval. Regardless of whether this transaction might be colourable, the Court of Appeal held that it violated the prohibition against unauthorized subdivision in s. 16 of the 1970 Planning Act because of its long term and the fact that the single advance payment approximated the cost of a fee simple parcel. At para. 9, Stevenson J.A. said that the transaction was intended to result in the division of the parcel for a long period of time, with all the other incidents of ownership.

[para42] These cases make it clear that each transaction must be examined to determine its true character and set out some of the appropriate factors to consider in that process. Do the essential elements of the Third Contract make it a real lease or is it in fact the "sale" of a lot prohibited by s. 95(1)?

[para43] The Appellants concede that, in answering this central question, the second chambers judge considered some relevant factors, including the length of the lease and the payment method. They complain, however, that he took account of inappropriate matters, including the existence of the First and Second Contracts, the fact that the Lessees were individuals rather than corporations, and a brochure prepared by the Appellants to explain why they were utilizing a 35-year lease. Even if some of these criticisms are valid, the totality of rights in the Third Contract suggests that it ought to be characterized as an invalid sale.

[para44] Neither the lengthy term of the lease nor payment of the rent by way of a lump sum, by themselves, would necessarily lead to the conclusion that the lease is really a sale. The critical point is that the Lessor retains virtually no control over the Lands. By implication, it may have a reversionary right to the Lands at the end of 35 years. In the meantime, however, the Lessor's common law right to re-enter for a breach has been delegated to the Lessees because the Tenants' Association has been granted rights to enforce the contract. Through the Association, the Lessees also have the right to approve improvements. Not only has the owner parted with possession of the Lands for the term of the lease, it has relinquished virtually all its rights to the property for that period.

[para45] Since s. 95(1) is directed, in part, at preventing unauthorized subdivision, the matter of planning mischief is relevant to its application. The Appellants assert that this transaction involves no planning mischief, since the Lands will continue to be used the same way as they have for several decades. The County contests this. Regardless of which view of the facts is correct, the Lessor's total relinquishment of control over the Lands to the Lessees for the next 35 years could pose enforcement problems for planning authorities in the interim. Although the Lessees have covenanted in the Third Contract to comply with municipal laws, if they do not, the recourse of the County would be to the Lessor. The evidence is that the County would deal with the registered owner, namely Half Moon (A.B. 36). But Half Moon has delegated its rights to the Tenants' Association, which does not own the Lands. Such a problem does not arise in the case of a condominium association (after which the Association is patterned) because such an association is itself an owner which is obligated to comply with planning laws. Most leases do not delegate the enforcement of their provisions to the lessees themselves. Thus, contrary to the Appellant's argument, there may be a degree of planning mischief in the Third Contract. This is an additional reason for characterizing it as a sale prohibited by s. 95(1).

[para46] I recognize that owners may deal with their property as they see fit, subject to valid legislation. Indeed, this principle is enshrined in s. 617 of the MGA, which describes the purpose of its planning provisions. Not every long-term lease of property will be characterized as the sale of a lot. But wherever lies the line between a lease and the sale of a lot, for the above reasons it has been crossed by the Third Contract. The second chambers judge correctly concluded that the contract breaches s. 95(1).

SOLICITOR-CLIENT COSTS

[para47] In my opinion, the first chambers judge erred in awarding solicitor-client costs against the Appellants. Costs orders are discretionary and will be interfered with on appeal only if there is a clear, palpable and overriding error: *Westersund v. Westersund* (1993), 157 A.R. 276 at 278 (C.A.). Notwithstanding this broad discretion and the necessity for appellate deference, it is appropriate to interfere if the trial or chambers judge has committed such a serious error: *Sidorsky et al. v. CFCN Communications Ltd. et al.* (1997), 206 A.R. 382 (C.A.).

[para48] It is clear from the authorities that solicitor-client costs are to be awarded only in rare and exceptional circumstances. *Jackson and Parkview Holdings v. Trimac Industries* (1993), 138 A.R. 161 at para. 12 (Q.B.). The first chambers judge concluded that solicitor-client costs were justified because of his view that, by employing the Second Contract, the Appellants were flaunting the intent of the interim injunction.

[para49] But the terms of the interim injunction order were appropriately precise, prohibiting only the use of the First Contract which was attached as an exhibit (A.B. 123-24). Indeed, this is exactly what the County had sought in its Notice of Motion. The order did not prohibit the use of a contract similar to the First Contract. The County complains, in part, that the Appellants neglected to inform it that they intended to employ a different form of contract. But the injunction order did not require this. Nor does any general legal principle.

[para50] While I agree with the first chambers judge that the Second Contract is illegal, there are differences between the two contracts that make the legality of the Second at least marginally more arguable than the First. The Appellants did not act wrongly in testing the limits of s. 95(1) by drafting the Second Contract in terms somewhat different than the First. They were entitled to order their affairs as they saw fit, risking the possibility that a later legal assessment of the Second Contract would characterize it as being contrary to s. 95(1). They flaunted neither the letter nor the spirit of the interim injunction. Thus, they were not guilty of misconduct or blameworthiness to justify an award of solicitor-client costs.

SUMMARY

[para51] All three contracts breach s. 95(1) of the LTA. Solicitor-client costs, however, should not have been granted by the first chambers judge. Therefore, I would allow the appeal in part.

[para52] Although the County sought solicitor-client costs on the appeal, I reject its assertion that the appeal was without merit. The issues raised are complex and important. Therefore, the County should receive only party-and-party costs under the appropriate column on the appeal.

HUNT J.A. McCLUNG J.A.:-- I concur. BERGER J.A.:-- I concur.

CBR# 837

Sun Life Trust Co. v. Kashwest Investments Ltd.

Between Sun Life Trust Company, plaintiff, and Kashwest Investments Ltd., Charles Walters and 551988 Alberta Ltd., defendant

Action No. 9603 06138

Alberta Court of Queen's Bench Judicial District of Edmonton Master Breitreuz Heard: September 18, 2000. Judgment: filed February 6, 2001. (26 paras.)

Counsel: E. Mirth, Q.C., for the plaintiff. Ken Alyluia, for the defendant Charles Walters.

REASONS FOR DECISION**MASTER BREITKREUZ:--****FACTS**

[para1] In 1990, Sun Life Trust Company ["Sun Life"] granted a mortgage to Kashwest Investments Ltd. ["Kashwest"] on a 15-suite apartment building. The principal amount of the mortgage was \$356,250.00. The term was for three years, with an interest rate of 12% per annum calculated semi-annually.

[para2] In late 1992, Charles Walters ["Walters"] purchased the apartment building and the land on which it is located from Kashwest. Walters paid a cash deposit of \$62,500.00 and assumed the mortgage. At the time of purchase, the balance owing on the mortgage was \$344,484.24 plus accrued interest of \$916.88. Walters' real estate agent transferred title to the property into Walters' name in January of 1993. In March of 1993, Walters transferred the property to 551988 Alberta Ltd. ["Numberco"], of which he was president and director.

[para3] Walters sought to renew the mortgage on behalf of Numberco in 1993, and after approximately one year he was finally able to negotiate an extension with Sun Life. Sun Life sent Walters a letter setting out the terms of the extension [the "Extension Agreement"] on April 7, 1994. The Extension Agreement provided that the mortgage would be extended for five years, at an interest rate of 8.25 per cent per annum calculated semi-annually. The monthly payment was reduced from \$3,677.00 to \$3,319.00. The Agreement named Numberco as the sole mortgagor, and Walters as an "Additional Covenantor." This clause, found in Paragraph 1, reads in part:

Additional The following persons(s) described as Covenantor(s): Additional Covenantor(s) shall be jointly and severally liable with the Mortgagor, for the fulfilment of the obligations set out in the Mortgage as extended and amended herein:

Charles Walters

[para4] Walters signed the Agreement. His legal counsel also signed it, as a witness to Walters' signature. On behalf of Numberco, Walters submitted post-dated cheques to cover one year of mortgage payments pursuant to the terms of the Extension Agreement. However, the document was never formally executed and Walters did not sign a statement to comply with the Guarantees Acknowledgment Act.

[para5] In June, 1994, Numberco defaulted on the mortgage. The amount owing on the mortgage as of June 14, 2000, noted in an affidavit of default, was \$570,882.14. This indebtedness exceeds the value of the property, according to the appraisal evidence of both parties. Sun Life's property appraiser placed the market value of the property at \$335,000.00 and the forced sale value at \$319,000.00, effective May 2, 2000. The appraisal obtained by Walters placed a value of \$400,000.00 on the property, effective October 1, 1999.

THE APPLICATION

[para6] Sun Life applied for summary judgment declaring the amount owing, and against Kashwest, Numberco, and Walters for the deficiency owing on the mortgage. Kashwest is not a party to the application. Sun Life is also applying for a "Rice" order to purchase the property for \$335,000.00. Walters' potential liability arises from his assumption of the mortgage from Kashwest. Pursuant to s. 62 of the Land Titles Act, the mortgagee has a right of action against the transferee of a mortgage. The transferee's liability remains even if the mortgage is subsequently transferred to another.

[para7] At the hearing of the application, Walters argued the defence of novation. According to Walters, Sun Life accepted the Extension Agreement as a substitution for the original mortgage. If a novation occurred, Sun Life accepted Numberco as the only debtor and released the previous mortgagors, including Walters, from their obligations. Walters further argued that because he did not comply with the Guarantees Acknowledgment Act, his covenant in the Extension Agreement cannot be enforced.

NOVATION

[para8] According to National Trust Co. v. Mead, [1990] 2 S.C.R. 410 ["Mead"], novation is a question of fact, determined by all of the circumstances of the parties' agreement. In Mead, a corporation had taken out a mortgage through National Trust to finance construction of a condominium building. Mead purchased the condominium unit from the corporation and assumed the mortgage, covenanting to be personally liable. Mead defaulted on the mortgage. Mead then argued that his assumption agreement with the corporation effected a novation, by replacing the original mortgage. If so, pursuant to Saskatchewan legislation that protects an individual from personal liability on a mortgage, Mead could not be found liable for the personal covenant in the "new" mortgage.

[para9] In Mead, Wilson J. clarified the law on novation, confirming three requirements for determining if a novation has occurred. She cited these requirements as they were set out in Polson v. Wulffsohn (1890), 2 B.C.R. 39, as follows at 427:

1. The new debtor must assume complete liability;
2. The creditor must accept the new debtor as principal debtor and not merely as an agent or guarantor; and

3. The creditor must accept the new contract in full satisfaction and substitution for the old contract.

She rejected a fourth requirement, the consent of the original debtor, which some courts have added.

[para10] Wilson J. held that the court may look at all the circumstances to determine if these requirements are fulfilled. Two critical factors are the conduct of the parties and whether changes were made to the terms of the contract. According to Wilson J., significant changes in the terms of a mortgage effected without the consent of the original debtor constitute strong evidence of novation.

[para11] Wilson J. considered the role of written agreements in the novation analysis. She held that while they do not determine the question, they provide compelling evidence of the parties' intentions. At page 433, she stated:

As Esson J.A. quite rightly noted, because novation is a question of fact, it would be wrong to hold that the execution of a document by itself would satisfy the doctrine. This is not to say, however, that such an agreement may not carry significant weight in determining whether a novation has taken place. Indeed, if the parties have directed their minds to setting out the terms of the debt relationship in writing, it seems to me that the terms of that agreement should conclude what the parties intended their relationship to be.

[para12] Wilson J. found that a clause in the assumption agreement allowing National Trust to release the corporation from liability did not effect a novation, but rather preserved National Trust's remedies against the corporation. She took into account a "no prejudice" clause in the original mortgage, which provided that any subsequent dealing would not affect or prejudice the rights of National Trust against the corporation. She stated, at page 438:

Taken together, these provisions are a strong indication that the assumption of the debt by Mead was not accepted by National Trust in full consideration and substitution of Remail's [the corporation's] obligation. The question therefore becomes whether the conduct of the parties can negate that indication.

[para13] Therefore, the parties' conduct may override the intentions shown by written agreements. In Mead, Wilson J. found that the evidence that National Trust had discontinued its suit against the corporation did not provide "an adequate basis on which to find an intention to release the original mortgagor:" p. 438. These circumstances were not of the compelling type necessary to found a novation.

[para14] Turning to the renewal agreement between the Numberco and Sun Life, Walters argues that novation is established by significant changes made to the mortgage in the Extension Agreement. The mortgage term changed from three to five years, the annual interest rate changed from 12% to 8.5%, and the monthly payments decreased from \$3,677.00 to \$3,319.00. However, significant changes to a contract are only one element of the evidence relevant to determining if novation occurred. I must consider all of the circumstances and whether the facts establish that the Extension Agreement replaced the original mortgage. The three requirements listed by Wilson J. in Mead must be fulfilled.

[para15] First, did the new debtor, Numberco, assume complete liability? Paragraph 1 of the Extension Agreement identifies the sole mortgagor as "551988 Alberta Ltd.," or Numberco. Paragraph 1 also contains the clause designating Walters as an "Additional Covenantor," which is cited above. Even though this clause provides that Walters remains "jointly and severally liable," he cannot be considered a co-mortgagor because he does not have an interest in the land: *Maritime Life Assurance Co. v. Tiwalsh Developments Ltd.* [1985] A.J. No. 276 (Q.B.). Walters is no longer a principal debtor. Numberco is liable to Sun Life for the whole amount, a fact unchanged by Sun Life's and Numberco's right to collect from a guarantor if Numberco is unable to satisfy the debt. Therefore, the first requirement is met.

[para16] The second requirement is also fulfilled. The question is whether Sun Life accepted the new debtor, Numberco, as principal debtor and not merely as an agent or guarantor. The Extension Agreement provides that Numberco is the sole mortgagor, and as such is the principal debtor.

[para17] The third requirement is that Sun Life accepted the Extension Agreement in full satisfaction and substitution for the original mortgage. As pointed out by Wilson J. in Mead, the written agreements entered into by the parties may provide conclusive evidence of their intentions. In the present case, two documents are relevant to Sun Life's intentions - the original mortgage and the Extension Agreement.

[para18] Paragraph 16 of the Extension Agreement indicates that Sun Life did not intend the Extension Agreement to replace the original mortgage. It reads as follows:

16. PRESERVATION OF RIGHTS

This Agreement to Extend Mortgage shall not amend, alter, vary or waive the Mortgage or any of the terms or provisions thereof or any of the rights or remedies thereunder, nor create a novation. The Mortgage shall be extended and amended as provided herein upon the registration of the Extension Agreement. [my emphasis].

[para19] The original mortgage agreement contains a "no prejudice" clause which suggests that Sun Life granted the mortgage with no intention of releasing original mortgagors from their obligations by entering into extension agreements. This clause reads as follows:

23 (c) THAT no extension of time given or alteration of interest rate or alteration of principal payments made by the Mortgagee to the Mortgagor or its assigns or anyone claiming under it or any other dealing by the Mortgagee with the owner of the said lands shall in any way prejudice or affect the rights of the Mortgagee against the Mortgagor, any other person or any subsequent Mortgagee.

[para20] The parties in *North West Trust Co. et. al. v. Singer (Henry) Ltd. et. al.* (1993), 146 A.R. 352 (Q.B.) executed a mortgage with a clause identical to the "no prejudice" clause above. The mortgagor in that case also argued that significant changes had taken place. Dea J. held that the clause, s. 25, was directly addressed to the issue of "significant changes" as raised by Wilson J. in Mead: para. 34. He held at para. 36:

The import of s. 25 of the mortgage is to authorize the plaintiff mortgagee to make the very kind of agreements that it made with Kershaw to extend the mortgage without creating a novation.

[para21] The "preservation of rights" clause and the "no prejudice" clause show that Sun Life contemplated the possibility that the Extension Agreement might be construed as a "new" mortgage and took steps to avoid that interpretation. The clauses are strong evidence that Sun Life did not intend to release prior mortgagors from their obligations. There is little else that Sun Life could have done to express its refusal to accept the Agreement as a substitution for the original mortgage. Walters signed the Extension Agreement on the terms offered by Sun Life, including the "preservation of rights" term, and in doing so had the advice of legal counsel.

[para22] However, as held by Wilson J. in Mead, novation can still be established from the parties' conduct. Walters argues that the circumstances under which he assumed the mortgage from Kashwest are relevant in this regard. He claims that title to the property was transferred into his name without his knowledge or consent, and points out that he transferred title to Numberco less than two months later. However, I do not agree that Walters' lack of intent to personally assume the mortgage is a circumstance that is relevant to the inquiry. The issue is whether Sun Life intended to accept the Extension Agreement in full substitution for the original mortgage. The circumstances surrounding a prior transfer of the property do not provide a basis to find an intention by Sun Life to release Walters from liability. Walters has not pointed to any other conduct by Sun Life that would suggest such an intention.

[para23] The Extension Agreement cannot be viewed as a new contract or a release of liability. Novation is not a triable issue in these circumstances.

GUARANTEES ACKNOWLEDGMENT ACT

[para24] Since Walters did not dispute liability on the personal covenant in the mortgage, in the event his novation argument was unsuccessful, there is no need to resort to the covenant in the Extension Agreement to find him liable for the deficiency. Therefore, I do not have to address the Guarantees Acknowledgment Act.

RICE ORDER

[para25] I am unable to decide on the basis of the evidence before me the amount of the credit Mr. Walters should receive for the value of the property; should it be \$335,000.00 or should it be \$400,000.00, or should it be somewhere in between? The best I can do on an interim basis is to permit transfer of the property to the name of the plaintiff and give the parties some time to resolve that issue, or make further submissions to me, failing which the issue of the amount of the deficiency will have to go to trial.

[para26] The plaintiff is entitled to its solicitor client costs.

MASTER BREITKREUZ

CBR# 838

Hough v. Alberta

Between William John Hough and Shirley June Hough, applicants, and Her Majesty in Right of the Province of Alberta (The "Crown"), respondent

Action No. 9712 000642

Alberta Court of Queen's Bench Judicial District of Wetaskiwin Red Deer, Alberta Sirrs J. Heard: November 2, 2000. Judgment: November 30, 2000. (12 paras.)

Counsel: Daniel Rowland, for the applicants. Stanley Margolis and Esther Schwab, for the respondent.

REASONS FOR JUDGMENT

SIRRS J.--

FACTS

[para1] In 1992, Mr. and Mrs. Hough purchased a section of land, 25-45-3-W5th, ("section 25") which is located approximately 12 kilometers southeast of Winfield, Alberta. Section 25 was purchased from Mr. and Mrs. Banta who in turn had purchased it from another party. Greenwall Bros. purchased section 25 from the Government of Alberta in 1966. Although section 25 is only 3 kilometers east of Highway 12, there is no public road existing which the Houghs might use to drive motor vehicles to and from section 25. There are undeveloped road allowances from both the east and west which would provide access to the south part of section 25 but the costs of building a new road on an allowance to the standards required by the County of Wetaskiwin are too high for the Houghs to bear considering the limited use they have in mind for section 25.

[para2] There is an existing gravel road which slices through the section that is immediately east of section 25 (section 30) which would provide the Houghs with suitable access. The gravel road was constructed on a date uncertain by Pan Canadian Petroleum Limited and Crestar Energy Inc. under authority of Licences of Occupation (L.O.C.) granted by the Government of Alberta, the registered owner, and the Respondent in this application. Crestar continues to use the gravel road to service a well site that is located in the middle of section 30; however, Pan Canadian is not presently operating their well site which is located at the west end of section 30 and thus has no interest, at present, in maintaining their portion of the gravel road. The Houghs obtained the consent of both oil companies in 1992 to use the gravel road to gain access to section 25. The previous owners, the Bantas, had been allowed the use of the gravel road; however, we have no evidence that owners prior to the Bantas used the gravel road. The Houghs did not obtain the consent of either the registered owner or the grazing lessee of section 30 to use the gravel road. Problems arose in August 1993 when Crestar, at the request of the grazing lessee, erected a locked gate which barred entry to the gravel road on section 30. Although the registered owner appears willing to permit the use of the gravel road by the Houghs the grazing lessee will have none of it. There is no argument that the lessee is not entitled to restrict access over section 30.

ANALYSIS

[para3] The Applicants seek to establish that there is an easement implied by grant or by necessity by which the Applicants may travel over the gravel road.

[para4] The Court has been referred to the Ontario Court of Appeal decision of Barton v. Raine, 29 O.R. (2d) 685 in which the Court of Appeal stated that the court should be loathe to imply easements and that as a general rule, an easement should be expressed in the clearest of terms. Exceptions to this rule are easements of necessity, reciprocal and mutual easements and easements that arise by necessary inference.

[para5] The case law regarding easements of necessity refers to situations where there is no other way by which land can be accessed. Justice Paperny in the case of Condominium Plan et al, [2000] 2 W.W.R. 591 in finding that there was no easement of necessity because businesses had access, albeit inconvenient and difficult access, made reference to the following authorities:

1. MacKinnon v. MacDonald (1988), 1 R.P.R. (2d) 185, is cited as authority for the position that an easement of necessity can only exist where the implied grantee of the easement has no other means whatsoever of reaching their land.

2. Re Stone (1982), 38 N.B.R. (2d) 492, at page 506 indicates that mere inconvenience is not sufficient reason for creating an easement of necessity.

[para6] In this case, the Houghs clearly face the inconvenience and expense of constructing a road on one of two road allowances when use of the gravel road would be so convenient and inexpensive, but they do have a means of access, and thus, the Houghs cannot be said to have need of an easement by way of necessity.

[para7] The Houghs have not argued that there is any case for a reciprocal or mutual easement in their situation, probably because there are no facts to support such an argument.

[para8] In regards to the last exception enunciated in Barton v. Raine i.e. of whether an easement arises by necessary inference from the facts surrounding the history of section 25, the Court has considered the following:

1. The Province of Alberta transferred title to section 25 to a third party believed to be Greenwall Bros. in 1966.
2. There are no facts before the Court to verify how Greenwall Bros. gained access to section 25.
3. There are no facts that suggest the gravel road existed in 1966 or that an access trail existed along the path of the present gravel road.
4. At some point before 1992, the Bantas were granted permission to use the gravel road to gain motor vehicle access to section 25.

5. The Houghs contacted and obtained the permission of the two oil companies to use the gravel road. The Houghs did not contact or obtain the permission of the registered owner or the lessee of section 30.

6. The Houghs knew at the time they purchased section 25 that the two oil companies only had access to section 30 by way of L.O.C. and not by way of any easement agreement.

7. Mrs. Hough met with County of Wetaskiwin officials prior to purchasing section 25 to discuss the situation concerning the road allowances.

[para9] In my opinion, the facts of this case do not warrant a finding that there is an easement by necessary inference. It is not known how section 25 was accessed between 1966 and the Bantas' ownership. There are no facts upon which the Court might find that it is necessary to cross through the middle of section 30 to get to section 25. The facts indicate that there are at least two other ways to access section 25.

[para10] The Houghs' argument, based on the rationale of *Dobson v. Tulloch* (1994), 17 O.R. (3d) 533 which indicates that where an owner of land grants a part of land and retains other parts himself, all easements necessary for the reasonable enjoyment are usually implied in favour of the part, so granted, must also fail. The Province of Alberta transferred section 25 in 1966. There are no facts upon which to infer that between 1966 and the Bantas' ownership or during the ownership of the Greenwall Bros. that the area of section 30, now occupied by the gravel road, was required for the enjoyment of section 25. To consider this argument, the Court would require much better evidence about the history of sections 25 and 30.

DECISION

[para11] Mr. and Mrs. Hough have not satisfied the Court that they are entitled to an easement created by implied grant or by necessity and their application is dismissed.

[para12] Should the parties wish to speak to costs, they may do so, provided that they contact the Clerk to arrange a hearing prior to February 28, 2001.

SIRRS J.

CBR# 839

Bibieffe International Holdings B.V. v. York Region Condominium Corp. No. 838

Between Bibieffe International Holdings B.V., (plaintiff/respondent), and York Region Condominium Corporation No. 838 and Steelcon Group Inc., (defendants/appellants)

Docket No. C33094

Ontario Court of Appeal Toronto, Ontario Charron, MacPherson and Sharpe JJ.A. Heard: September 28, 2000. Judgment: September 29, 2000. (7 paras.)

Counsel: Richard Quance, for the appellants. Rocco Palmieri, for the respondent.

The following judgment was delivered by

[para1] THE COURT (endorsement):-- The respondent initiated this action to determine the rights of the parties under an easement over a strip of land adjacent to the lands of the appellant "for the purpose of pedestrian and vehicular access and egress and for the purpose of parking vehicles." The appellant takes the position that the easement affords it the exclusive right to park vehicles on the land governed by the easement. The respondent takes the position that it retains the right to use the lands for access and parking. The trial proceeded on the basis of an agreed statement of facts. The trial judge was asked to respond to three questions:

1. What is the proper interpretation to be given to the easement ?
2. Are the [respondents], including their occupants, customers, invitees, entitled to park vehicles [on the land governed by the easement]?
3. If the answer to question No. 2 is yes, then on what basis is such parking to be permitted? Is it on a "first come first serve basis" or otherwise?

[para2] The trial judge did not specifically answer these questions, but found that the language of the easement did not afford the appellant the exclusivity it claimed.

[para3] In our view, given the very general and abstract manner in which this case was presented, it was not possible for the trial judge to make anything approaching a definitive or exhaustive pronouncement of the rights of the parties. We affirm the judgment under appeal, but with the following qualification.

[para4] The grant of an easement does not amount to the grant of title to the lands and easements are ordinarily interpreted in a manner that does not deprive the servient owner of its proprietary rights. We agree with the trial judge that there is nothing in the language of this easement that would amount to a grant to the appellant the exclusive right to access and to park vehicles on the land.

[para5] On the other hand, it is clear that the respondent must exercise its residual rights as owner of the servient tenement in a manner consistent with the rights accorded by the easement. We also agree with the trial judge that there is nothing in the very meagre factual record to indicate that the respondents have substantially interfered with the rights granted by the easement. That conclusion is inevitable from the abstract manner in which the case was presented. However, this finding clearly does not mean that the respondent is free to access and park vehicles as it sees fit. The easement does not afford exclusivity to the appellant, but it does afford the appellant priority to this extent: the respondent must exercise its rights in a manner that respects the rights granted to the appellant. A blanket, unqualified right to park on a "first come first serve basis", if exercised by the respondent in a manner that deprived the appellant of the right to access to the land or the right to park vehicles, would not respect the rights granted by the easement. In our view, in light of the factual record before us, it is neither possible nor appropriate to attempt a more specific delineation of the respective rights of the parties.

[para6] Accordingly we would vary the judgment by adding the following words to paragraph 1: "but the Plaintiffs are required to exercise their rights as owners of Part 12 in a manner that respects the rights granted to the Defendants by the easement."

[para7] In our view, the parties should bear their own costs of the appeal.

CHARRON J.A. MacPHERSON J.A. SHARPE J.A.

CBR# 840

Sorenson v. Hardcastle

Between Egon Sorenson, plaintiff, and Josephine Hardcastle, defendant

Court File No. 24274/97

Ontario Superior Court of Justice Aitken J. Heard: August 5, 6 and 16-19, 1999. Judgment: April 19, 2000. (89 paras.)

Counsel: Gil D. Rumstein, for the plaintiff. Kurt W. Anders, for the defendant.

AITKEN J.:--

Opening:

[para1] In the mid-1970's Egon Sorensen and Josephine Hardcastle left their first spouses and started to cohabit. Their relationship lasted until 1997, but they never married. Until 1990, both parties worked outside the home, with brief periods of unemployment. Mr. Sorensen retired in 1990; Ms. Hardcastle continues to work. When the parties separated, Ms. Hardcastle had three parcels of real estate registered in her name with significant equity, including the property where the parties had lived since 1983. Mr. Sorensen had virtually no assets. He is now 79, Ms. Hardcastle is 68.

[para2] Egon Sorensen seeks an order declaring that he has a one-half interest in the three parcels of real estate held in Ms. Hardcastle's name, by virtue of a constructive trust. As well, he seeks spousal support in the amount of \$700 per month retroactive to June 1, 1999.

Credibility:

[para3] During the trial, I had concerns about the credibility of both Mr. Sorensen and Ms. Hardcastle and the reliability of their evidence. On the whole, I felt Mr. Sorensen was trying to be accurate in giving his testimony; however, I concluded that his version of the couple's story exaggerated his contributions to the relationship and minimized those of Ms. Hardcastle, perhaps as a result of his strong sense of having being wronged by Ms. Hardcastle. As well, Mr. Sorensen had some difficulty with dates and financial details. He has not kept comprehensive records that might have assisted him in reconstructing the parties financial relationship over the last 25 years. He tried his best to remember various payments between the two, but quite understandably had difficulty doing so.

[para4] Ms. Hardcastle did have detailed financial records; however, they showed her payments without showing her sources of income. This resulted in the appearance being given that she had paid virtually all of the parties' joint expenses, and especially the expenses associated with the three properties focused on in these proceedings. However, under cross-examination it became clear that Mr. Sorensen made a significant contribution of labour and money to the relationship, something which Ms. Hardcastle reluctantly had to concede. Ms. Hardcastle's evidence was provided in an unbalanced fashion which did not cast her in a good light. There were a number of occasions when Ms. Hardcastle was shown to have provided different information on the same subject at different times during these parties' long saga. Consequently, although Ms. Hardcastle was able to provide more documentary evidence, I looked upon her oral evidence with some skepticism.

Facts:

Background

[para5] Egon Sorensen was born of March 27, 1921 in Denmark. He married Kate Sorensen and they had three children. The family moved to Canada in 1951, and Mr. Sorensen has lived here since. Throughout his career in Canada Mr. Sorensen worked primarily in the construction field; in later years this involved being a superintendent of building projects, such as shopping centres and apartment complexes.

[para6] Josephine Hardcastle was born on March 12, 1932 in Great Britain. She trained as a secretary. On July 11, 1953, she married Frank Bernard Hardcastle. The couple had two children. The family immigrated to Canada in 1967 and settled in Ottawa.

[para7] Mr. Sorensen met Ms. Hardcastle in 1973, when each was still residing with his or her first spouse, the Sorensens on Sanderson Drive and the Hardcastles at 24 Parkglen, Nepean. Mr. Sorensen claims that he and Ms. Hardcastle cohabited from 1975 until their separation on May 29, 1997. Ms. Hardcastle claims that she and Mr. Sorensen started to cohabit only in 1980, and that prior to that he stayed at her home from time to time from 1978 onward, but not on a regular basis. In regard to this issue, I have the benefit of the pleadings when Frank Bernard Hardcastle petitioned for a divorce in January 1979 as well as the evidence of Mr. Sorensen's daughter, Irene Sleiman, and Ms. Hardcastle's daughter, Jacqueline Logsdail.

[para8] I find that Mr. Sorensen and Ms. Hardcastle started an affair in 1973 almost immediately after they met. Mr. Hardcastle became aware of the affair in July 1974, at which time Ms. Hardcastle advised him she wanted a separation. Shortly thereafter, Mr. Hardcastle moved out of the Parkglen property into a separate residence. The Hardcastles maintained an amicable relationship and continued to spend time together with their children; however, they never cohabited after July 1974. From July 1974 to 1979, Ms. Hardcastle, her children, and one or two boarders resided at the Parkglen property. By 1979, only Ms. Hardcastle's son, Peter, and two boarders remained with her.

[para9] I find that Mr. Sorensen advised his wife that he wanted a separation sometime in 1974 and by 1975 he was no longer living full-time at the Sanderson property. I find that from 1975 to 1979, Mr. Sorensen stayed up to three nights a week with Ms. Hardcastle at the Parkglen property, he stayed from time to time with Ms. Sorensen and otherwise he stayed from time to time in various towns and cities where he was working on projects. The Sanderson property was sold in the late seventies, at which time Ms. Sorensen moved to a Halifax Drive address. Mr. Sorensen stayed with her there from time to time, but spent most of his time at the Parkglen property. During this period, Mr. Sorensen also spent some time working both in Montreal and in New Brunswick.

[para10] I accept Ms. Hardcastle's evidence that prior to her divorce from Mr. Hardcastle being finalized, she was concerned about her financial security and did not want Mr. Sorensen to be seen as living full-time at the Parkglen property because she did not want to jeopardize her rights to spousal support. The Hardcastle divorce became absolute on March 30, 1980 at which time Ms. Hardcastle released any right she had to spousal support and she became the sole owner of the Parkglen property. Certainly by this time Mr. Sorensen was living full-time with Ms. Hardcastle at the Parkglen property.

[para11] From January 1975 until 1980, Josephine Hardcastle did clerical work at a real estate office. From 1975 to 1978, she also worked part-time as a waitress in a pub. Until approximately 1980, Mr. Hardcastle paid the mortgage on the Parkglen property, gave Ms. Hardcastle money for food and paid for the children's expenses. Until 1980, Ms. Hardcastle also had the rent of \$75 per week each from one or two boarders. Ms. Hardcastle (with Mr. Hardcastle's assistance up to 1980) paid the mortgage, utilities, property taxes and insurance in regard to the Parkglen property.

[para12] Throughout this period, Mr. Sorensen paid for some of the food, did some of the cooking, helped with the laundry and house cleaning, and did most of the outside work. In addition, he put in a large vegetable garden, tended to the garden, designed and supervised the installation of a cement patio with outdoor carpeting and a barbecue, installed wallpaper in three rooms and finished the basement. Mr. Sorensen estimated that he contributed approximately \$3,500 to these improvements in addition to his own labour.

[para13] Ms. Hardcastle acknowledges that Mr. Sorensen wallpapered some rooms in the Parkglen property, finished a recreation room in the basement and built a patio and barbecue; however, her evidence is that she paid for most of the materials involved with these projects.

[para14] In May 1981, the couple moved to Peterborough because Mr. Sorensen had been hired to supervise the construction of a shopping mall. They lived in an apartment paid for by Mr. Sorensen's employer and Mr. Sorensen paid most of the expenses. At this time, the Parkglen home was rented out and Ms. Hardcastle received \$1,000 per month as rent. Ms. Hardcastle did not work outside the home while she was in Peterborough. When the parties moved to Peterborough, they purchased furniture in part with a one-time contribution of \$400 from Mr. Sorensen's employer, and in part with a loan from Avco Financial, which was initially repaid by Mr. Sorensen and then subsequently by Ms. Hardcastle.

[para15] In May 1982, the parties returned to Ottawa and resumed residency at the Parkglen property. Both Mr. Sorensen and Ms. Hardcastle were unemployed during the period from January 1982 to the summer of 1982, at which time both found work. At this point, Ms. Hardcastle continued to pay the mortgage, cablevision, most utility bills, the furniture loan and other associated family and personal expenses. Mr. Sorensen paid for food, telephone, some utility bills, some car expenses and some entertainment expenses.

[para16] In 1983, Ms. Hardcastle sold the Parkglen property for \$140,000 and purchased a property on Kirkwood Avenue for \$170,000, paying a downpayment of \$100,000 and giving the vendor a mortgage back of \$70,000. The property was a triplex with two apartments upstairs, an apartment downstairs and a finished basement. Ms. Hardcastle had found the property and Mr. Sorensen inspected it and advised Ms. Hardcastle that it would be a good purchase. Mr. Sorensen offered to do any required repair work on the rental units.

[para17] From 1983 to 1998, Mr. Sorensen and Ms. Hardcastle resided in the ground floor apartment. The basement was turned into an apartment, and it and the two apartments on the second floor were rented. Mr. Sorensen believes Ms. Hardcastle received approximately \$1,200 per month as rent from the three apartments, the basement apartment yielding approximately \$500 per month. From 1982 to 1990 or 1991, Mr. Sorensen worked most of the time in the construction industry. From April 1986 onward, he also collected Old Age Security and Canada Pension Plan payments. Ms. Hardcastle worked at various jobs with real estate agencies from 1982 forward and had various periods of employment, the longest being from September 1986 to December 1987. Ms. Hardcastle's father lived with the couple and paid room and board from September 1985 to November 1987. Mr. Sorensen retired in 1990 (according to him) or 1991 (according to Ms. Hardcastle) and thereafter only received his Old Age Security and Canada Pension Plan payments. Ms. Hardcastle retired in 1997 and thereafter received Old Age Security, Canada Pension Plan payments and rental income.

[para18] Mr. Sorensen claims an interest in the Kirkwood property by virtue of the following contributions he made to the property:

- * He wallpapered the livingroom and diningroom.
- * He did the maintenance and repair work on the interior, such as changing light bulbs, painting and fixing taps and faucets.
- * He paid for some repairs on the building, for example some of the costs of renovating the kitchen, including the cost of countertops.
- * He did all of the maintenance work on the outside or paid to have it done, including cutting the grass, clipping the hedge and shovelling the snow. He cut down two trees, he paid to have the hedge taken out and negotiated a good price with workers he knew to have an iron fence installed. He installed a pond, concrete patio, flagpole and rockery garden.
- * He drew up the plans for a two-car garage in 1984, submitted them to City Hall and obtained a building permit at his expense and then hired a crew to construct the garage at a cost of approximately \$500. He paid for some of the materials for the garage and supervised the construction. Ms. Hardcastle paid most of the costs of the materials (approximately \$4,500). Mr. Sorensen built a shack at the back of the garage.
- * He planned and built the apartment in the basement in 1986 by putting in walls, some plumbing and some electrical work (though he acknowledged Ms. Hardcastle paid for some of the electrical work as well). He paid some of the plumbing expenses (though he acknowledged Ms. Hardcastle paid for some of it as well). He hired someone to build the kitchen cabinets and he paid for them (though he acknowledged the receipt was made out to Ms. Hardcastle and she produced receipts from him for \$3,800 which he acknowledged was the cost of the kitchen cabinets). His estimate of out of pocket expenses was \$500 and that his total contribution (considering the value of his labour) was \$8,000. He claims to have worked eight hours a day five days a week for a month to build this apartment.

* He placed advertisements for tenants for the various apartments and considered the tenancy applications with Ms. Hardcastle. He collected some of the tenants' cheques and deposited the cheques at the bank. Ms. Hardcastle kept the books for the property.

[para19] Although Ms. Hardcastle does not dispute the work done by Mr. Sorensen at the Kirkwood property, she does challenge his evidence regarding who paid for the materials and outside workmen. Where her evidence differs from that of Mr. Sorensen, she claims that:

* She paid for the building permit and building materials for the garage, and in fact obtained a loan of \$3,000 to help pay for the materials.

* She paid at least \$6,352 relating to the apartment, including the cost of the kitchen cabinets.

* She paid for the paint and wallpaper used by Mr. Sorensen at the Kirkwood property.

* She paid for the all of the landscaping endeavours, aside from the actual flagpole.

[para20] In addition, Mr. Sorensen claims that the division of labour within the household, while he and Ms. Hardcastle were residing at the Kirkwood property, was such that he did more than his share of household duties. Initially, both he and Ms. Hardcastle were working full-time outside of the home; however, Mr. Sorensen retired in 1990 and was then more available to do work at the Kirkwood property. He claims he did virtually all of the cooking, all of the grocery shopping, most of the vacuuming and dusting, most of the washing up after meals, half of the laundry and all of the snow removal (in the years when he did not hire a company to do it). He claims that he paid for all of the food, toiletries and sundries; some of the cable/hydro/water and sewage/oil bills; all snow removal; some cleaning; all telephone bills; all advertising bills for the various apartments; all boat expenses (for a boat they owned at one point); some of the property tax bills; car insurance, car repairs, car licences for two cars; all restaurant bills relating to family outings; all of the costs associated with vacations to Florida (1987 to 1990 or 1991); all of the rental and insurance costs associated with a jointly-owned trailer purchased in 1994 which was kept at a trailer park (except for all or part of the first year's rent, which Ms. Hardcastle paid).

[para21] Ms. Hardcastle acknowledges that during their cohabitation, Mr. Sorensen paid some of the property taxes on the Kirkwood property, approximately half of the cost of family entertainment, some of the costs of family vacations in Florida the year before his retirement (including a three-month stay there by Ms. Hardcastle), all costs related to the newspaper subscription from 1988 to 1994, telephone bills, some of the utility costs relating to the Kirkwood property, some of the snow plowing services to the Kirkwood property, and some of the costs of gifts.

[para22] Ms. Hardcastle claims that while she and Mr. Sorensen were residing at the Kirkwood property, she did the housekeeping (including the vacuuming, dusting, cleaning, laundry) and helped with the cooking (though Mr. Sorensen did more than she did once he had retired). I accept Ms. Hardcastle's evidence that during her extensive period of unemployment from 1986 to 1987, she assumed primary responsibility for housekeeping within the home, aside from the cooking. I also accept that during the entire period of their relationship, Mr. Sorensen was primarily responsible for all inside and outside maintenance and repairs and all matters associated with the parties' vehicles.

[para23] Josephine Hardcastle purchased two other rental properties while she was cohabiting with Egon Sorensen: 30 Seabrooke and 171 Thistledown. Mr. Sorensen did not put any of his own money into either Thistledown or Seabrooke. Nevertheless, Mr. Sorensen is claiming an interest in those properties by virtue of the following contributions which he claims he made to the properties:

* He painted the entire interior at Seabrooke.

* He painted some of the interior, repaired the kitchen ceiling and repaired some doors at Thistledown.

* He did all of the on-going maintenance work at both buildings which required him to go to the property approximately once a month.

* He showed the units to prospective tenants, and answered telephone calls from tenants regarding problems at the properties.

[para24] Ms. Hardcastle's evidence is that Mr. Sorensen painted the kitchen and patched up the ceiling at the Thistledown property and patched the walls to the basement at the Seabrooke property; however in both cases she paid for the cost of any materials.

[para25] From time to time during their relationship, one of the parties would lend money to the other. In 1977, Ms. Hardcastle obtained a bank loan of \$1,775 for the benefit of Mr. Sorensen, who was in financial difficulties. He had been paying his former spouse \$650 per month support, but expenses on their Sanderson property were not being paid. Ms. Hardcastle claims that Mr. Sorensen never repaid her for this loan; he claims that he did. Ms. Hardcastle borrowed money through Avco for furniture in Peterborough and she and Mr. Sorensen repaid this loan over time. In November 1983, Ms. Hardcastle lent Mr. Sorensen \$800 to send to his daughter in Lebanon so that he could buy a plane ticket home. This sum was eventually repaid. In 1989, Mr. Sorensen lent Ms. Hardcastle \$500 to buy some bonds; this sum was later repaid.

[para26] In June 1993, the parties purchased jointly a trailer which they park at Muskrat Lake. The purchase price of \$6,500 was paid for by Ms. Hardcastle, and Mr. Sorensen then reimbursed her \$2,925. The parties had agreed to share all expenses associated with this trailer equally, such as rental of the space, insurance, propane and miscellaneous upkeep. Mr. Sorensen claimed that he paid for all of the expenses associated every year but the first; however, Ms. Hardcastle produced cheques showing she had paid for most of these annual expenses.

[para27] In 1993, Mr. Sorensen persuaded Ms. Hardcastle to purchase a boat. He made an application in her name for a GM credit card, without her permission. The boat was purchased for \$4,500, with Ms. Hardcastle paying \$1,000 and the balance being put on the GM card. Ms. Hardcastle then repaid this amount over time, with a contribution of \$2,325 from Mr. Sorensen. In addition she paid a variety of other expenses for additions to the boat and such ongoing expenses as insurance. After the separation, Mr. Sorensen sold the boat to his daughter for \$4,200 and paid Ms. Hardcastle \$2,200.

[para28] Mr. Sorensen's earnings from employment, Old Age Security and Canada Pension Plan were \$52,284 in 1987, \$47,006 in 1988 and \$62,776 in 1989. He retired in 1990, at the age of 69 and his total income that year dropped to \$29,715. Subsequently his only source of income was Old Age Security and Canada Pension Plan which yielded \$12,000 to \$13,000 annually. Prior to 1987, Mr. Sorensen's average annual income had been approximately \$30,000. At the time of Mr. Sorensen's retirement in 1990, he had savings of \$9,000. He claims that those savings were used up paying day to day expenses for the household.

[para29] Mr. Sorensen and Ms. Hardcastle separated on May 29, 1997, but continued to live in the ground floor of the Kirkwood property until August 1, 1998, at which time Mr. Sorensen moved to an apartment on the second floor. He lived there until June of 1999, when he moved to a Senior Citizens Residence. His current income is \$1,258 per month, made up of Old Age Security of \$404.48 per month and Canada Pension Plan of \$687.75 per month. As of July 1999, he had no assets aside from his half interest in a trailer, worth \$3,000, some furniture and an old car. He had credit card debts of approximately \$3,400.

[para30] As of the summer of 1999, Ms. Hardcastle's income was \$19,660 from employment and \$9,500 from Old Age Security and Canada Pension Plan. According to her 1998 income tax return, her gross rental income totalled \$36,108 and she had no net rental income. She estimated her 1999 gross rental income would be \$34,087 but it could also be up to \$39,780, considering the rent she was charging on each unit.

[para31] Mr. Sorensen wants spousal support from Ms. Hardcastle so that his lifestyle would be closer to that they enjoyed while they were cohabiting. He lives in a one-bedroom motel-unit style garden home. All of his money goes to paying rent, utilities, food, trailer expenses and the carrying costs of his debts. He has no money for any frills, such as clothing, gifts, vacations, meals outside the home or recreation.

[para32] Ms. Hardcastle continues to work and wants to continue working as long as her health permits. Although she has high blood pressure, arthritis and some sleeping difficulties, she is able to work. Ms. Hardcastle continues to live at the Kirkwood property.

Valuations

[para33] The Parkglen property was purchased in November 1971 for \$38,500. Ms. Hardcastle paid a downpayment of \$10,000 and the balance was financed with a mortgage. The property was registered in Ms. Hardcastle's name alone. Mr. Sorensen estimated it had a value of \$60,000 to \$70,000 in 1975. Ms. Hardcastle testified that the value of the Parkglen property in 1980 would have been \$100,000; however, when she swore a Statement of Property in her divorce proceedings on April 30, 1979, she indicated a value of \$57,000 and an outstanding mortgage of \$23,000. When the Hardcastles divorced in 1980, Ms. Hardcastle became the sole owner of the Parkglen property. Mr. Sorensen's estimate of its value at that time was \$90,000. There is no dispute that as of March 1980, there was an outstanding mortgage against the Parkglen property of \$25,000. When the property sold in 1983 for \$140,000, Ms. Hardcastle received net proceeds of \$112,309.45 of which \$102,730.82 was used to purchase the Kirkwood property.

[para34] The Kirkwood property was purchased in October 1983 for \$170,000, with a downpayment of \$100,000 and a mortgage back of \$70,000. The Thistledown property was purchased in January 1989 for \$81,500 through the assumption of a first mortgage of \$50,895 and the placement of a second mortgage on the Kirkwood property of \$35,000. The Seabrooke property was purchased in November 1989 for \$115,000, financed through a first mortgage of \$67,000 and approximately \$50,000 of an inheritance from Ms. Hardcastle's father. Ms. Hardcastle paid for all of the legal fees and disbursements, including Land Transfer Tax, associated with the purchase of these properties.

[para35] The parties assigned the following values to the three properties in the summer of 1999:

Properties Ms. Hardcastle Mr. Sorensen Mortgage Equity

Kirkwood \$250,000 \$275,000 \$176,876 -\$201,876 -first mortgage \$51,036

-second mortgage (Thistledown) \$22,088

Thistledown \$75,000 \$79,000 \$36,925 \$38,075 -\$42,075

Seabrooke \$116,000 \$118,000 \$56,724 \$59,276 -\$61,276

There is no dispute that in the summer of 1997, the values of the three parcels of real estate were: Kirkwood property \$275,000, Thistledown property \$79,000 and Seabrooke property \$118,000.

[para36] It is admitted by Ms. Hardcastle that the various properties registered in her name are capable of being rented for the following monthly rents:

Thistledown unit \$760

Seabrooke unit \$875

Kirkwood - apt 1 \$630

Kirkwood - apt 2 \$550 (rent as of trial)

Kirkwood - apt 3 \$500

Evidence of Donald McCallum

[para37] Mr. Sorensen retained Donald McCallum, a certified real estate appraiser, for the purpose of estimating the value of the work and services Mr. Sorensen provided to Ms. Hardcastle in regard to the four properties over the years. Mr. McCallum inspected the basement and exterior of the Kirkwood property, the exterior of the Seabrooke property, the exterior of the Parkglen property and the interior and exterior of the Thistledown property (though only cursorily).

[para38] Mr. McCallum's opinion can be summarized as follows:

(a) Parkglen Property

Assumption as to work done by Egon Sorensen:

- * Wallpaper ground floor
- * Construct basement recreation room
- * Build exterior brick BBQ and patio area

Value of labour and materials (1999 dollars) \$9,500 to \$13,000

(b) Kirkwood Property

Assumption as to work done by Egon Sorensen:

- * Constructed one-bedroom basement apartment
- * Painted the interior of the ground floor and second floor apartments
- * Installed 2 small backyard ponds and a 24 foot flagpole
- * Installed a concrete patio
- * Arranged for the construction of an attached garage (management fee only)
- * Maintained the site area around the dwelling, including landscaping, snow removal, grass cutting and installation of flower boxes and gardens

Value of labour and materials (1999 dollars) \$24,340 to \$30,080

(c) Seabrooke Property

Assumption as to work done by Egon Sorensen:

- * Repaint interior

Value of labour and materials (1999 dollars) \$2,250 to \$3,000

(d) Thistledown Property

Assumption as to work done by Egon Sorensen:

- * Repair kitchen ceiling and repaint kitchen
- * Repair bathroom faucets

Value of labour and materials (1999 dollars) \$950 to \$1,200

(e) On-going Maintenance Work

Assumption as to work done by Egon Sorensen:

- * Maintenance of the site, grass cutting, snow removal, minor repairs required by tenants at all properties

Value of work (1999 dollars) (\$100 per month - 15 years) \$18,000

Total value of work (1999 dollars rounded off) \$55,000 to \$65,000

[para39] Mr. McCallum's evidence can be assigned virtually no weight in regard to the value of work performed by Mr. Sorensen at the various properties. He had only Mr. Sorensen's input in identifying the work Mr. Sorensen did and the materials he purchased. I have not accepted all of Mr. Sorensen's evidence as to the materials he purchased. Mr. McCallum had very little idea what an appropriate percentage breakdown would be for labour and materials in regard to the different projects he considered. To arrive at some of his cost estimates, Mr. McCallum acknowledged that he was guessing and that he had minimal knowledge or experience estimating the costs of some of the projects. His estimate of the time in which certain tasks could be done appeared to be sheer speculation and seemed unreasonable to me. He acknowledged in regard to some of the projects that he had no idea how much the materials would cost or what a worker would charge per hour for the required tasks.

[para40] Mr. McCallum believed that the cost of the basement apartment at Kirkwood could be recovered on a resale of the property and that the finished recreation room in the basement at Parkglen might increase the price of that property by \$5,000. Aside from that, he could not say that the other work done by Mr. Sorensen would necessarily have increased the value of the property concerned.

Law:

[para41] A constructive trust arises where a person who holds title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it (Austin Wakeman Scott, *The Law of Trusts*, 4th ed., vol. 5 (Boston: Little, Brown, 1989) at p. 304). There are two steps in the analysis before applying a constructive

trust. The first is to determine whether there has been unjust enrichment. The second is to decide whether constructive trust is the appropriate remedy.

[para42] The following three conditions must be present to establish unjust enrichment:

1. someone has been enriched through the contributions of another;
2. a corresponding deprivation has been suffered by the person who supplied the enrichment; and
3. there is an absence of any juristic reason for the enrichment itself.

(Pettkus v. Becker (1980), 117 D.L.R. (3d) 257 (S.C.C.) at 274).

[para43] Two remedies that the court can use to redress unjust enrichment are a monetary award and the imposition of a constructive trust. A constructive trust will not be imposed unless the plaintiff's contribution is substantial and has some connection to the property in question.

Analysis:

[para44] The starting point is a determination of whether Ms. Hardcastle has been unjustly enriched as a result of contributions made by Mr. Sorensen.

Enrichment

[para45] Mr. Sorensen contributed to "the family enterprise" in three ways: through the work he did at the Parkglen, Kirkwood, Thistledown and Seabrooke properties during the period from 1975 to 1997; through the financial contributions he made to the household; and through the provision of household services.

[para46] I find that work consisted of the following:

(a) Parkglen Property

- * putting in a large vegetable garden;
- * tending to the garden;
- * designing and supervising the installation of a cement patio with outdoor carpeting and a barbecue;
- * installing wallpaper in some rooms; and
- * finishing the basement.

(b) Kirkwood property

- * inspecting the property prior to purchase;
- * undertaking to maintain the property on Ms. Hardcastle's behalf;
- * wallpapering the livingroom and diningroom;
- * doing any maintenance and repair work on the interior, such as changing light bulbs, painting and fixing taps and faucets;
- * doing all of the maintenance work on the outside or paying to have it done, including cutting the grass, clipping the hedge, shovelling the snow, cutting down two trees, taking out the hedge and arranging for an iron fence to be installed;
- * installing a pond, concrete patio, flagpole and rockery garden;
- * drawing plans for a two-car garage and submitting them to City Hall;
- * hiring a crew to construct the garage at a cost of approximately \$500;
- * building a shack at the back of the garage;
- * planning and building an apartment in the basement by putting in walls, some plumbing and some electrical work, though most of the plumbing and electrical work was done by third parties at Ms. Hardcastle's expense;
- * knocking down a wall in the kitchen and renovating the kitchen, including paying for new countertops;
- * placing advertisements for tenants for the various apartments and considering the tenancy applications with Ms. Hardcastle;
- * collecting some of the tenants' cheques and depositing the cheques at the bank;
- * doing all of the on-going maintenance work for the tenants;
- * showing the units to prospective tenants, and answering telephone calls from tenants regarding problems at the property.

(c) Seabrooke Property

- * painting the entire interior at Seabrooke;

* doing all of the on-going maintenance work;

* showing the units to prospective tenants, and answering telephone calls from tenants regarding problems at the property.

(d) Thistledown property

* painting some of the interior;

* repairing the kitchen ceiling and some doors;

* doing all of the on-going maintenance work;

* showing the units to prospective tenants, and answering telephone calls from tenants regarding problems at the property.

[para47] There was considerable questioning of the parties as to who paid for the various repairs and improvements at the different properties, and the evidence was at times conflicting. I find that Ms. Hardcastle paid for the majority of the materials and subcontractors; however not much turns on this finding. I find that this pattern evolved in great part because Ms. Hardcastle wanted to have proof of expenses for income tax purposes.

[para48] While the parties were cohabiting, they functioned together as a cohesive family unit. Each had his or her role to play and contributions to make to the family unit. Over the years, although they kept their finances separately, each helped out the other if the other could not pay his or her bills. There were so-called loans back and forth. Each paid for certain necessary expenses for both of them. If Ms. Hardcastle was unemployed, Mr. Sorensen paid more of the bills, and vice versa. In regard to the rental properties, Ms. Hardcastle chose the investment properties, arranged for their financing, handled all of the interactions with real estate agents and lawyers to make the purchase happen, negotiated the leases on the most part, kept financial records, received cheques and paid bills. Mr. Sorensen showed the apartments, did any necessary repairs or improvements or arranged to have them done, and was on call if there was a problem. I find that Ms. Hardcastle relied on Mr. Sorensen's know-how in the construction field and his willingness to be the caretaker and repair person for the Kirkwood, Seabrooke and Thistledown properties when she purchased them. I also find that in order to assist her in justifying her expenses associated with rental units for income tax purposes, he kept a Tenants' Log Book where he recorded work done on the properties, the time it took and the disbursements involved. Although Mr. Sorensen was reimbursed by Ms. Hardcastle for most of his out-of-pocket expenditures, he was not paid for his labour. Nevertheless she recorded her expenses for income tax purposes as if he had been.

[para49] This is a case where one could get lost in the details and not see the big picture. Cancelled cheques, cheque registers, bank books, list of payments, tenant log books and numerous other documents were produced in an effort to prove the financial contributions made by the parties to the acquisition, maintenance and improvement of the various parcels of real estate in question. Without meticulous accounting records akin to those in a commercial setting, it is impossible to undo 20 years of financial and personal collaboration to calculate precise contributions.

[para50] Instead what is most telling and relevant is a comparison of the net worth of the parties when they entered their relationship and then when they separated. When Mr. Sorensen entered his relationship with Ms. Hardcastle, he had a car, but virtually no other assets. His equity in the Sanderson property had gone to pay debts. At separation in 1997, Mr. Sorensen's only assets consisted of a small amount of furniture, a 1987 Mercury automobile and his half interest in the trailer. There was no material evidence that he recklessly depleted his assets or that he lived extravagantly.

[para51] According to her Statement of Property sworn in 1979, Ms. Hardcastle's net worth at that time was \$27,354. In 1997, according to her sworn Financial Statement, her net worth was \$329,595. In other words, during the period of their cohabitation, Ms. Hardcastle's net worth increased \$302,241 and Mr. Sorensen's net worth increased by approximately \$2,200. After deducting an inheritance of approximately \$60,000 which Ms. Hardcastle received from her father, this still results in her net worth increasing \$240,000 more than the increase in Mr. Sorensen's net worth.

[para52] During the same period of cohabitation, if we compare the incomes of the parties (aside from rental incomes), Mr. Sorensen's total income from the 1970's to and including 1990 was significantly greater than that of Ms. Hardcastle. From 1991 to 1997 inclusive, Ms. Hardcastle's was greater because Mr. Sorensen had retired and was only in receipt of pension income.

[para53] What is also clear from Ms. Hardcastle's own records and from her financial statements is that the expenses she claims she paid during the period from 1980 to 1997 for her household with Mr. Sorensen and also for the various rental units far exceeded her earnings and rental income.

[para54] These factors lead me to conclude that Ms. Hardcastle relied on Mr. Sorensen's direct payment of some household expenses which allowed her to direct her monies to other expenses (such as the mortgage payments) associated not only with that portion of the Kirkwood property which she and Mr. Sorensen occupied, but also with all of the rental units at the Kirkwood, Seabrooke and Thistledown properties. As well, she must have received money from Mr. Sorensen which she in turn used to pay for some of the expenses which she paid by cheque or credit card during this period. Who wrote the actual cheque to pay for a repair or improvement was not particularly relevant when both were using their resources to pay for the expenses of daily living.

[para55] Finally, I find that this was not a case where one party did an inordinate share of the household chores. On the contrary, I find that household responsibilities were shared reasonably. I find that both parties did some of the cooking, washing-up, cleaning and laundry. Mr. Sorensen did the grocery-shopping, landscaping, outdoor maintenance, snow removal, and interior maintenance and repairs. Also he tended to the automobiles and often acted as Ms. Hardcastle's chauffeur. Ms. Hardcastle may have done more of the laundry and cleaning. Certainly, if one party was unemployed, that party assumed greater responsibility in the home if the other was employed.

[para56] In summary, Ms. Hardcastle was enriched through the contributions of money, labour and services received from Mr. Sorensen.

Deprivation

[para57] According to Cory J. in *Peter v. Beblow* (1993), 101 D.L.R. (4th) 621 (S.C.C.) at 632: " in a matrimonial or long-term common law relationship it should, in the absence of cogent evidence to the contrary, be taken that the enrichment of one party will result in a deprivation of the other." He went on to explain at p. 632:

In marriages or marriage-like relationships commercial matters and a great deal more will be involved. Clearly, parties to a family relationship will, in a commercial sense, share funds and financial goals. More importantly, couples such as the parties to this case will strive to make a home. By that I mean a place that provides safety, security and love and which is as well frequently the place where children may be cared for and nurtured. In a relationship that involves living and sleeping together, couples will share their worse fears and frustrations and their fondest dreams and aspirations. They will plan and work together to achieve their goals. Just as much as parties to a formal marriage, the partners in a long-term common law relationship will base their actions on mutual love and trust. They too are entitled in appropriate circumstances, to the relief provided by the remedy of constructive trust.

Twelve years is not an insignificant period of time to live in a relationship based on mutual trust and confidence. In those circumstances, there is a strong presumption that the services provided by one party will not be used solely to enrich the other. Both the reasonable expectations of the parties and equity will require that upon the termination of the relationship, the parties will receive an appropriate compensation based on the contribution each has made to the relationship.

[para58] According to Cory J., the balancing of benefits conferred and received in a common law relationship cannot be accomplished with precision, and a close scrutiny of contributions made by each party is unrealistic and unfair in the context of a family relationship. This is due in part to the myriad ways in which a party to a domestic relationship may contribute to the overall well being of the home and family. The guiding principles in the assessment of contributions are equity and fairness.

[para59] I find that Mr. Sorensen has suffered a deprivation in that despite an income which exceeded that of Ms. Hardcastle over the years (aside from rental income), he came out of their relationship with virtually nothing.

[para60] I am not persuaded by Ms. Hardcastle's argument that since Mr. Sorensen paid no rent while he was residing with her, he suffered no deprivation. Many of the expenses he paid (such as groceries, telephone, property taxes, transportation, vacation, entertainment), as well as all of the work he did, benefitted her as well as him. A precise balance sheet cannot be done in any meaningful way to compare the rent he would have paid elsewhere, the benefits he would have received for that rent and the freedom from responsibilities that he would have enjoyed had he not been cohabiting with Ms. Hardcastle.

Absence of juristic reason for enrichment

[para61] In *Pettkus v. Becker*, supra, Dickson J. said at p. 274:

I hold that where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.

[para62] The test is an objective one. In the absence of evidence establishing a contrary intention, it will be assumed that the parties to a common-law relationship expected to share in the assets created in the relationship should it end (*Peter v. Beblow*, supra, per Cory J. at p. 636). It is not necessary that there be evidence of promises to or plans of marriage or that the legal owner of the property had promised the claimant compensation for services provided. In short, " where a person provides 'spousal services' to another, those services should be taken as having been given with the expectation of compensation unless there is evidence to the contrary" (p. 636). This flows from the legal principle that a common law spouse is under no legal obligation at common law, in equity or by statute, to perform work or services for his or her partner (*Peter v. Beblow*, supra, per McLachlin J. at p. 646)

[para63] Here, Mr. Sorensen was under no obligation, contractual, statutory or otherwise, to provide work and services to Ms. Hardcastle to assist her in the preservation, maintenance or improvement of any of the properties she owned (*Pettkus v. Becker*, supra; *Sorochan v. Sorochan* (1986), 29 D.L.R. (4th) 1 (S.C.C.); *Peter v. Beblow*, supra).

[para64] I find that Mr. Sorensen expected to benefit from all of the rental properties in the sense of having access to the income from those properties in the future to help support him in his old age. He saw the rental properties as part of his retirement planning. I find that Ms. Hardcastle was well aware that Mr. Sorensen had this expectation, and she did nothing to dispel him of that belief until the time of separation.

[para65] Based on these findings, I conclude that there was an absence of juristic reason for Ms. Hardcastle to be enriched at Mr. Sorensen's expense.

Appropriate Remedy

[para66] Which remedy is more appropriate in this case? Before a constructive trust is imposed, a court must be satisfied that a monetary award would be inadequate and that there is a link between the contributions made and the property in which the trust is claimed (*Peter v. Beblow*, supra, per McLachlin J. at p. 650 and Cory J. at p. 637; *Sorochan v. Sorochan*, supra, per Dickson C.J.C. at p. 10; and *Pettkus v. Becker*, supra, per Dickson J. at p. 277).

[para67] The nature of the link that is required has been subject to analysis by the Supreme Court of Canada on numerous occasions. Dickson C.J.C. in *Sorochan v. Sorochan*, supra, at p. 10 stated:

While it is important to require that some nexus exist between the claimant's deprivation and the property in question, the link need not always take the form of contribution to the actual acquisition of the property. A contribution relating to the preservation, maintenance or improvement of property may also suffice.

[para68] Cory J. in *Peter v. Beblow*, supra, at p. 638, relying in part on *Pettkus v. Becker*, supra, stated that: " indirect financial contributions to the maintenance of property will be sufficient to establish the requisite property connection for the imposition of a constructive trust." Cory J. went so far as to state:

in a family relationship the work, services and contributions provided by one of the parties need not be clearly and directly linked to a specific property. As long as there was no compensation paid for the work and services provided by one party to the family relationship then it can be inferred that their provision permitted the other party to acquire lands or to improve them.

According to Cory J. in *Peter v. Beblow*, supra, at p. 640, ordinarily, in common-law situations, both partners will have an interest in the property acquired, improved or maintained during the course of the relationship. In situations where there is more than one property, it is a matter of discretion which property or properties are made subject to a constructive trust.

[para69] McLachlin J. in *Peter v. Beblow*, supra, at p. 649 stated that: " for a constructive trust to arise, the plaintiff must establish a direct link to the property which is the subject of the trust by reason of the plaintiff's contribution." She interpreted the reasons of Cory J. to suggest that while a link between the contribution and the property is essential in commercial cases for a constructive trust to arise, it may not be essential in family cases. She, on the other hand, would apply the same requirements for the imposition of a constructive trust, whether the question arose in the context of commercial or family litigation. In her mind, that required a link between the plaintiff's services, efforts or contributions and the property in question.

[para70] In the context of this case, I find nothing turns on the choice of the words "indirect" or "direct" used by Cory J. and McLachlin J. respectively in *Peter v. Beblow*, supra. Both acknowledge in their reasons that contributions of financial resources or services that benefit a family in a general sense or "the family enterprise" (the term used by McLachlin J.) may be sufficient to create a proprietary interest in property acquired or maintained by one of the parties to a common law relationship (*Pettkus v. Becker*, supra; *Peter v. Beblow*, supra, per McLachlin J. at 654 and per Cory J. at p. 638).

[para71] In certain situations a monetary award might be the most appropriate remedy, such as where the plaintiff's entitlement is small in relation to the value of the property or where the defendant is able to satisfy the claim without selling the property. Some factors to consider in assessing the appropriateness of each remedy would be the duration of the relationship, any special attachment of one of the parties to the property in question, any hardship caused to the defendant as a result of the remedy chosen and the probability of a monetary award's being paid. Of relevance as well is whether the plaintiff reasonably expected to receive an actual interest in property (as distinct from some other benefit such as a monetary amount) and whether the defendant was or reasonably ought to have been cognizant of that expectation (*Sorochan v. Sorochan*, supra, per Dickson J. at paras. 34 and 35).

[para72] While they were cohabiting, Mr. Sorensen never accompanied Ms. Hardcastle to the bank to co-sign a mortgage or loan (aside from a car loan). He never signed any agreement of purchase and sale, deed, mortgage or other document relating to the Parkglen, Kirkwood, Thistledown or Seabrooke properties. On the other hand, in 1993 or 1994, when the parties purchased a trailer at Muskrat Lake which they planned to use as recreational property, they did take title in their joint names. This showed that they did appreciate the difference between sole and joint legal title. This is of some relevance in regard to the parties' respective intentions.

[para73] I find that the imposition of a constructive trust is appropriate in regard to the Kirkwood property but not in regard to the Seabrooke or Thistledown properties, which were acquired in 1989. Mr. Sorensen's contributions to those two properties were less significant than his contributions to the Kirkwood property. He played no role in those properties being chosen, purchased or financed. In fact he declined the opportunity of sharing with Ms. Hardcastle in the purchase of the Thistledown property, his reason being that he disliked condominium units. Finally, a \$60,000 downpayment on the Seabrooke property came from an inheritance received by Ms. Hardcastle. I find that although Mr. Sorensen reasonably expected to benefit from the rental income to be received from these properties in the future, he did not expect to be a part owner of those properties.

[para74] The situation was different with the Kirkwood property. It was acquired in 1983, and both parties participated in considering it as an investment. They cohabited at this property until their separation in 1997. Mr. Sorensen helped to pay expenses associated with the couple's occupation of this property and he contributed money and labour to various repairs and improvements that advanced the quality of life of both himself and Ms. Hardcastle. According to Ms. Hardcastle, once the couple moved to the Kirkwood property, Mr. Sorensen made it clear that he considered the property as much his as Ms. Hardcastle's, and he wanted things done his way. Therefore I conclude that it would be appropriate to impose a constructive trust in favour of Mr. Sorensen for his contributions to the Kirkwood property.

[para75] In evaluating the contribution made by the plaintiff in situations where a court considers a monetary award appropriate, use should be made of "the value received" or quantum merit approach. What was the value of the financial contributions or the services provided? The value received approach quantifies the amount the defendant would have had to pay for the services on a purely business basis to any other person doing the work that was provided by the plaintiff. As I have already indicated, I can assign very little weight to Mr. McCallum's evidence as to the value received by Ms. Hardcastle in regard to Mr. Sorensen's contributions to the various properties.

[para76] Based on all of the evidence, my best estimate is that the value received in regard to the work done on the Seabrooke and Thistledown properties combined was \$12,000. I plan to use this to increase Mr. Sorensen's share in the Kirkwood property above that which I otherwise would have given.

[para77] Similarly, any contributions to the Parkglen property will be considered a contribution to the Kirkwood property in that the net proceeds from the sale of Parkglen were used to purchase Kirkwood. I find that the value of Mr. Sorensen's direct contribution to the Parkglen property through his labour and his indirect contribution through sharing of expenses with Ms. Hardcastle during the late 70's, and early 80's, and more specifically his paying for many of Ms. Hardcastle's expenses while the two resided in Peterborough, have a combined value of \$10,000 (based on a value received approach). Consequently, I assume that \$10,000 of the net proceeds of sale of the Parkglen property that were used to purchase the Kirkwood property was a direct financial contribution to that property by Mr. Sorensen.

[para78] Where a constructive trust is imposed, the court must be guided by the principle that the extent of the interest must be proportionate to the contribution (*Pettkus v. Becker*, supra, per Dickson J. at p. 277; *Peter v. Beblow*, supra, per McLachlin J. at p. 651). In determining the value of the plaintiff's contribution, regard must be had to the amount by which the property has been improved as a result of that contribution; this is "the value survived" approach (*Peter v. Beblow*, supra, per McLachlin J. at p. 651). The value surviving approach apportions the parties' interest in property on the basis of their respective contributions.

[para79] In regard to the Kirkwood property, when it was purchased in 1983, Ms. Hardcastle made a downpayment of \$100,000 from the Parkglen proceeds, of which I assume \$90,000 was a contribution from Ms. Hardcastle and \$10,000 was a contribution from Mr. Sorensen. I find that the present fair market value of the property is \$275,000, that assigned to it by Ms. Hardcastle in

her 1997 Financial Statement. I do not accept Ms. Hardcastle's evidence that the value of this property has decreased since 1997. Ms. Hardcastle currently has \$201,876 of equity in this property after deducting the first mortgage of \$51,036 and the second mortgage of \$22,088; however, in that the second mortgage relates to the purchase of Thistledown, and Ms. Hardcastle will remain the sole owner of that property, I am assuming for the purpose of these calculations that Ms. Hardcastle's current equity in the Kirkwood property is approximately \$224,000. If \$90,000 of this were allotted to Ms. Hardcastle and \$10,000 to Mr. Sorensen to give each credit for their respective contributions to the acquisition of this property, this leaves a balance of \$124,000. I conclude that the value survived of Mr. Sorensen's contributions to the Kirkwood property, after the date of acquisition, taking into account the value I have already determined in regard to the Seabrooke and Thistledown properties, is \$62,000. This results in Mr. Sorensen's interest in the Kirkwood property being \$72,000 or approximately 25% of the total fair market value.

[para80] Another way I was tempted to calculate Mr. Sorensen's interest in the Kirkwood property was as follows. In that the gross value of the property had increased from \$170,000 in 1983 to \$275,000 in 1997, an increase of 162%, I would consider the parties' respective contributions to the acquisition costs to be \$145,800 (162% x \$90,000) and \$16,200 (162% x \$10,000). The balance of \$113,000 of the current value would then relate to the mortgage and improvements made to the property, both of which I consider to have been contributed to on an equal basis by the parties, regardless of who actually paid the relevant bill. The sum of \$51,036 remains outstanding on the first mortgage and will be paid eventually by Ms. Hardcastle. If she receives credit for this, the balance to be divided between the parties becomes \$61,964. Half of this is \$30,982, which when added to \$16,200 produces a value of \$47,182, as Mr. Sorensen's portion. If the value Ms. Hardcastle received from Mr. Sorensen regarding the Seabrooke and Thistledown properties, namely \$12,000, is added to this, the total amount becomes \$59,180 or 21.5% of the gross value of the Kirkwood property. In my view, this percentage understates the significance of Mr. Sorensen's contributions. Consequently I prefer the first calculation.

[para81] Ms. Hardcastle shall hold 25% of the Kirkwood property in trust for Egon Sorensen by virtue of a constructive trust. Mr. Sorensen shall be deemed to have realized his 25% interest in the Kirkwood property upon payment to him of \$72,000 on or before June 30, 2000. If Mr. Sorensen has not received that sum by that date, he may bring a motion for partition and sale of the Kirkwood property. Such motion may be returnable before me by special appointment, or may be brought in the normal course before the presiding judge. Upon the sale of the property, Mr. Sorensen's interest in the property shall be calculated as 25% of the selling price. Ms. Hardcastle shall be solely liable for all of the carrying costs associated with the Kirkwood property and shall be solely liable for the repayment of any outstanding mortgages.

[botpara82] This result is consistent with that in *Bebbington v. Carter* (1997), 28 R.F.L. (4th) 305 (B.C.S.C.); *Harrison v. Kalinocha* (1994), 1 R.F.L. (4th) 313 (B.C.C.A.); *Kopanska v. Heczko*, [1998] O.J. No. 4484, 1998 Carswell Ont 4234 (Gen. Div.); and *Richer v. Smith*, [1998] B.C.J. No. 1184, 1998 Carswell BC 1080 (B.C.S.C.).

Trailer:

[para83] Since the date of separation, Mr. Sorensen has been in possession of the parties' jointly owned trailer at Muskrat Lake. I find that Ms. Hardcastle's interest in the trailer has a value of \$3,000. Mr. Sorensen shall have the option of purchasing Ms. Hardcastle's interest for \$3,000 payable by means of a credit against his interest in the Kirkwood property. Mr. Sorensen must advise Ms. Hardcastle by June 30, 2000, or by such earlier date when he realizes his interest in the Kirkwood property, as to whether he wishes to exercise this option or whether he wishes the trailer to be sold with the net proceeds being divided equally between himself and Ms. Hardcastle. If he chooses the latter alternative, the trailer shall be sold as soon as possible at a price and on terms agreed to by both parties. Mr. Sorensen shall be solely liable to pay all expenses associated with the trailer until Ms. Hardcastle has received her interest therein.

Spousal Support:

[para84] Ms. Hardcastle's income from employment, Old Age Security and the Canada Pension Plan totals \$29,217 annually. I find that Ms. Hardcastle could have net rental income from all of her units of at least \$6,000 annually; however, assuming Ms. Hardcastle sells one or more properties in order to satisfy this Judgment and pay debts, her net rental income thereafter will be closer to \$4,000. Consequently, for purpose of considering spousal support obligations, I find that Ms. Hardcastle's income from all sources presently is \$35,217, but foreseeably may be reduced to \$33,217.

[para85] Mr. Sorensen's income from Old Age Security and the Canada Pension Plan totals \$15,096 annually. Once he receives the sum of \$72,000 (or one-quarter of the fair market value of the Kirkwood property, if the payment is made after June 30, 2000), he should be able to earn an additional \$3,000 annually bringing his income to \$18,096.

[para86] The discrepancy in Ms. Hardcastle's income and Mr. Sorensen's income, after more than 17 years of cohabitation, requires attention, in that both spouses are entitled to comparable lifestyles following lengthy cohabitation and their operation as one family unit.

[para87] Consequently, I order Ms. Hardcastle to pay to Mr. Sorensen \$500 per month commencing September 1, 1999 and continuing until the first day of the month following Mr. Sorensen's realization of his interest in the Kirkwood property, after which this monthly spousal support payment shall be reduced to \$300 per month. Ms. Hardcastle's retirement shall be a material change in circumstances justifying a variation and possible termination of her spousal support obligations.

[para88] I note that on her sworn Financial Statement, Ms. Hardcastle shows a monthly deficit of \$2,067.92; however, this deficit is suspect. For example, in her Financial Statement, Ms. Hardcastle shows 1998 annual maintenance and repair bills for the three properties at \$10,321.12; whereas on her corresponding 1998 income tax return, she showed a total of \$1,961. Part of Ms. Hardcastle's deficit relates to legal fees of \$6,000 annually, which hopefully will not be an expense once this litigation is completed and Ms. Hardcastle sells one or more properties in order to pay her debts. Ms. Hardcastle acknowledged that she had shown some expenses twice, once under the relevant category and a second time as a monthly credit card payment. Finally Ms. Hardcastle acknowledged that some of her expenses were inflated and did not reflect her needs.

Costs:

[para89] The parties may arrange to address the issue of costs on a date to be set by the Trial Coordinator.

AITKEN J.

Morris A. Hunter Investments Ltd. v. First Burton Developments Inc.

Between Morris A. Hunter Investments Ltd. and 927290 Ontario Limited carrying on business as McGrath Hunter Properties, and First Burton Developments Inc.

[2000] O.J. No. 902 Court File No. 99-CV-180422

Ontario Superior Court of Justice Paisley J. Heard: March 10, 2000. Judgment: March 10, 2000. (5 paras.)

Counsel: Stephen LeDrew and K. Paige Backman, for the applicant. David M. Goodman and D.R. Squires, for the respondent.

[para1] PAISLEY J. (endorsement):-- The applicant seeks an Order permitting it to discharge easements registered on its land. The easements were created by agreement in 1990 and registered on lands owned by the applicants' predecessor in title. When the applicant purchased the land, it received a statutory declaration from a signing officer of the owner of the land that, " there is no easement or encumbrance whatsoever, affecting the said lands". There is no declaration from the owner of the contested easement to this effect, but the signing officer of the owner was also a principal of the owner of the easement. He deposes that he understood, " that this paragraph deals with unregistered easements rather than what is actually registered on title". The easement was apparently created to permit the owners of the two parcels of land to share a U-shaped driveway that would permit access to and from each parcel, in what was originally designed to be a commercial plaza. The owner of the contested easement did build a plaza on its land. The applicants' land remained vacant, but the applicant now intends to construct a condominium on its land, which it cannot do with the registered easement over the land in place.

[para2] It is argued that the respondent should be estopped from relying on the easement given the statutory declaration referred to. I am not persuaded that the record demonstrates an uncontested factual basis that the applicant relied on the statutory declaration or that it was ever intended to constitute an admission of abandonment of the registered easement. That is a question of fact which can only be established at trial. See *Dodd v. Davelore Enterprises Ltd.* [1994] O.J. No. 2532 @ p. 5:

"Abandonment has been defined as any action concerning the use of an easement indicating an intention by the owner to abandon the easement "

[para3] It is argued that the easement has been abandoned, or become obsolete, because the plaza developed never proceeded on the applicant's land, or that it is now impossible to use the easement as originally intended. A letter from the Lake Simcoe Conservation Authority, to the effect that the area is not suitable for car parking is cited. This too is a question of fact that would require a trial of the issue. See *Baker v. Harris* (1929), 64 O.L.R 513, (C.A.):

"If the easement was acquired by a grant of title , it is immaterial whether there has or has not the use of the easement for long periods of time. Easement so acquired can rarely be extinguished in any manner other than by express release or by circumstances so cogent as to preclude a quasi-releasor from denying the release". Cited in *Dodd v. Davelore*, supra, @ p. 5.

[para4] Finally, it is argued that the easement was not effectively conveyed, since the original grant did not include an express provision of a grant to the successors or assigns of the grantee. No cases are cited in support of this submission. In my view, there is no limitation on the grant of easement and its conveyance with a subsequent conveyance of the land is implicit.

[para5] The applicant requests an expedited trial of the issue of fact. I direct the trial to be case managed. The issue to be tried is whether the easement has been abandoned or extinguished.

PAISLEY J.

CBR# 841

862590 Ontario Ltd. v. Petro Canada Inc,

Between 862590 Ontario Limited and 865628 Ontario Limited, plaintiffs, and Petro Canada Inc., Acres International Limited and Arcturus Environmental, a division of Arcturus Diversified Holdings Incorporated, defendants

Court File No. 95-CU-93853

Ontario Superior Court of Justice C. Campbell J. Heard: January 5, 6, 10-15, 17-21, 25-28, 31 to February 3 and March 10, 2000. Judgment: March 27, 2000. (415 paras.)

Counsel: Ian F.H. Rogers, Q.C. and Joanna Rainbow, for the plaintiffs. Robert Falby, Q.C. and Tamara Farber, for the defendant Petro Canada Inc. Bonnie Tough, for the defendant Arcturus Environmental.

C. CAMPBELL J.:--

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I INTRODUCTION

[para1] The Plaintiffs claim against the Defendants for damages resulting from the non-disclosure prior to closing, of the environmental state of the site caused by aboveground and underground storage tanks in the property conveyed by Petro Canada to the Plaintiffs. As against Petro Canada the claim is in fraud and negligence, and as against Arcturus, its environmental consultants, in negligent misrepresentation.

[para2] This case concerns the responsibility as between the Plaintiff 862590 Ontario Limited ("590") (purchaser) and the Defendant Petro Canada (vendor) and Arcturus (its consultant) for the environmental state of a former petroleum bulk plant at the time of its sale in November of 1989. The Plaintiff 865628 Ontario Limited ("628") now controlled by Peter Azman, is the third mortgagee of the subject property.

[para3] A central feature in this case is the GUIDELINES FOR THE DE-COMMISSIONING AND CLEAN-UP OF SITES IN ONTARIO (the "Guidelines"), issued by the Ministry of the Environment ("MOE"), and in particular the role of odour from petrochemical hydrocarbons, as dealt with under the Guidelines at the relevant time.

[para4] The Plaintiffs' position is that the meaning and application of the Guidelines in 1989 required odour to be dealt with to the extent necessary to cleanse the soil so that there would no longer be odour that interfered with the proposed use and occupation of the land.

[para5] The Defendants' position is that the presence of odour required checking and investigation to ensure that objective criteria provided in the Guidelines were met and that this was done.

[para6] Acres International Limited ("Acres") and the MOE are no longer parties to this action, and while their actions are significant, no relief against either party is made by any party remaining in the action.

II. ISSUES

[para6a]

1. Did Petro Canada owe a duty to the Plaintiffs to advise on the environmental state of the subject site?
2. Did Petro Canada fraudulently, recklessly, or negligently misrepresent to the purchaser the environmental state of the subject property?
3. Are the obligations of Petro Canada limited by the contractual agreements between the parties?
4. Did the Defendant Arcturus owe a duty to the Plaintiffs with respect to its environmental report prepared for Petro Canada?
5. Did Arcturus negligently misrepresent the environmental state of the subject site?
6. Assuming either of the Defendants breached a duty to the Plaintiff, what damages flow from such breach and what is the appropriate assessment of those damages?

III SUMMARY

[para7] The following is a summary of the salient facts. 590, relying on a letter from the MOE (May 11, 1988) and having in its possession a copy of a report from Petro Canada's first environmental consultants (Acres), decided to purchase the subject lands. Prior to the closing date, Petro Canada was advised by the MOE of the existence of another consultant's report (Golder's - 1988) done for another prospective purchaser. The MOE requested further investigative work, which was carried out for Petro Canada by Arcturus, with the concurrence of the MOE.

[para8] The closing date of the purchase by 590 was extended pending receipt of the MOE letter of November 15, 1989, which stated that the lands had been "cleaned up in accordance with MOE guidelines".

[para9] Following closing, the Plaintiff claims it was unable to resell the property, as anticipated, due to the presence of hydrocarbon contamination, which it alleges Petro Canada and its consultants concealed from it. The claim for damages is the cost of clean-up and lost profit, together with a claim for consequential loss damages.

IV BACKGROUND FACTS

[para10] The land in question is situated on the south side of Oxford Street East, in the City of London, known as 1855 Oxford Street and is a parcel of approximately 9 acres, having a frontage of about 689 feet. The property was zoned industrial and is now zoned for a variety of commercial uses. The property was purchased in the early 1950's by what was then known as the British-American Oil Company, for use as a fuel depot and as a bulk sales plant.

[para11] British-American changed its name to Gulf Oil Canada Limited in approximately 1971 and in 1985 various assets, including the site in question, were sold by Gulf to Petro Canada. By then the terminal had been dismantled, leaving only an unused service building on the otherwise vacant land. What was clearly known to Petro Canada and indeed to the Plaintiffs was that in its prior use as a bulk terminal, there were some seven above-ground tanks, containing various petroleum products when the plant was in use.

[para12] The subject of this action is the contamination caused by the use and operation of the site including two underground storage tanks ("USTs") in the central west section, use of which the Plaintiffs claim was unknown to them at the time of their purchase of the land from Petro Canada. The Plaintiffs claim that Petro Canada knew of the existence of the use and the damage caused thereby. The Plaintiffs also allege that the Defendant consultants who were employed by Petro Canada were negligent in failing to discover and report on the damage caused by the underground tank use.

[para13] Petro Canada denies any knowledge of the existence and/or use of underground tanks or knowledge of any damage caused by any use of underground tanks, and in this respect is joined by the denial on the part of the consultants.

V THE WITNESSES FOR THE PLAINTIFFS

(i) Peter Azman

[para14] Mr. Azman is a real estate agent and a shareholder of 862590 Ontario Limited ("590") and a representative of 865628 Ontario Limited ("628"). As to formal training, he has the equivalent of a Grade 8 education, completed in Europe and in Canada. In addition to his experience as a real estate agent, he has operated several service stations. He has purchased two other Petro Canada facilities, one a bulk plant facility that he bought and sold, and the other a service station site. He has also bought and sold service station sites either for himself or for others in his family or friends.

[para15] From his previous experience, Mr. Azman was aware in 1988 of the fact that Petro Canada was "de-commissioning" or selling excess sites following their purchase of assets from Gulf Canada Limited. He would receive, as he did in this case, a mailing from Petro Canada that invited possible interested parties to bid for the property that was for sale.

[para16] A circular letter dated August 5, 1988 noted that offers would be accepted up to and including September 16, 1988 and were required to be submitted on a prescribed form. Azman testified that he researched the site with respect to zoning at the London City Hall and he knew that it had been a bulk plant with aboveground storage tanks.

[para17] He testified that, prior to the submission of any offer, he asked of John Cancelli, a Petro Canada employee with whom he had had previous dealings, whether there were available any environmental reports on the site.

[para18] As a result, Azman received from Cancelli a report prepared by Acres dated March 2, 1988 (the "Acres Report") and a letter dated May 19, 1988 from the MOE signed by one Peter Huras. The letter confirmed that, based on the Acres Report, there did not appear to be identified any environmental concerns and the MOE accepted the findings of the report.

[para19] Based on his investigation, and in particular because the site was across the street from the plant of 3M, Azman concluded that it would be an attractive site for a variety of fast-food and other commercial operations, including a service station.

[para20] Two offers were prepared. Azman, through his company Re/Max Professionals Inc. Realtor acted as agent for J. Rose and M. Sherrin, who were colleagues of Azman's, as prospective purchasers. The first offer was in the sum of \$630,000 and the second in the sum of \$730,000. Apparently neither of these was accepted, according to Azman, because Petro Canada took the property off the market.

[para21] Azman still believed that this was an attractive site and when the property was on the market again in the spring of 1989, he put in an offer in the sum of \$880,000, this time with J. Rose in Trust as the purchaser because it was uncertain just who would ultimately be involved on the purchase side.

[para22] A counter-offer was made by the purchasers and accepted by Petro Canada on June 7, 1989. The offer provided that Azman would receive a commission from Petro Canada as its agent upon completion of the sale. (A commission of \$35,000 was ultimately paid to Azman.)

[para23] In view of their importance, two clauses from the agreement are set out in full as follows:

"It is agreed that there is no representation, warranty, collateral agreement or condition affecting this agreement or the real property or supported hereof, other than as expressed herein in writing."

And in Schedule "A", as follows:

"The purchaser acknowledges receiving from the vendor the environmental aspects of site de-commissioning of the real property prepared by Acres International Limited, dated March, 1988, respecting its environmental assessment of the real property, together with the letter received from the Ministry of the Environment dated May 19, 1988, indicating that based on the data submitted by the said Acres International Limited, the objective of the Ministry of the Environment in minimising the potential for environmental and human health problems has been met, and the purchaser further acknowledges that it is satisfied with such report and accepts the real property in its present condition. The purchaser shall, on or before closing date of the transaction, arising out of this agreement (whether extended or advanced), provide the vendor with an indemnity to indemnify and save harmless the vendor, its successors and assigns, from any and all costs, loss, damages, claims and liabilities arising out of or in any way connected with any contamination of the real property whether disclosed by such assessment or not, such indemnity to survive the completion of this agreement."

[para24] Azman testified that when he received the revised offer from Petro Canada and before it was executed by Rose, he asked John Cancelli regarding underground tanks and Cancelli apparently responded that "there weren't any at this site, only an unconnected gas station to the east."

[para25] By that time, Mr. Sherrin had decided he did not want to participate in the purchase and a John I. Johnston, the purchaser's lawyer for the transaction and an acquaintance of Azman's, became a participant. Title was ultimately taken in the Plaintiff 590 of which Rose, Azman and Johnston are shareholders.

[para26] It was Azman's evidence that immediately after acceptance of the agreement to purchase, which had a closing date of October 31, 1989 on it, he began to call contacts in the real estate business regarding prospects for development or sale.

[para27] Azman identified a letter of October 11, 1989 addressed to Joe Rose Service Limited from one D.S. Boehm, an environmental officer with the MOE, a copy of which was sent directly to Azman. This letter indicated that the Acres Report, while it provided oil and grease analysis, did not provide an accurate assessment as to the extent of on-site volatile hydrocarbon contamination. Reference was made in the letter to a report of Golder Associates Ltd. (the "Golder Report") that had been received by the MOE and reviewed. In summary, the MOE letter directed that there be an environmental cleanup involving the excavation of certain soils. The cleanup was to be observed by an MOE official following which contamination sampling would be required and the work was to be completed in a timely fashion.

[para28] Azman testified that following receipt of the letter he then contacted Petro Canada. He did not ask for a copy of the Golder Report, explaining that it would have been given to him if Petro Canada had it. Johnston wrote on behalf of the purchaser 590 for an explanation from Petro Canada. Azman testified that he met with someone from Petro Canada, at which time it was agreed that if Petro Canada could clean up the site, the closing of the transaction would follow the cleanup. As a result the closing was extended to November 15, 1989.

[para29] Azman further gave evidence that to his knowledge the work with respect to the cleanup was supervised by one A.W. Panko of Arcturus, who had previously been associated with Acres and who had done the earlier report on the site. Dr. Panko was now carrying on the same activity in a new entity in which he was involved.

[para30] Azman said that on the early afternoon of November 7, 1989 he was contacted by John Cancelli of Petro Canada, who told him that he had the report of Arcturus (the "Arcturus Report") which Azman says he immediately obtained and read. He then

called Dr. Panko, who allegedly said, "the site was o.k., even for housing, and there was no need for him to worry". The purchaser partners then decided to wait for a letter from the MOE confirming that report. The MOE letter dated November 15, 1989 to Petro Canada read in full as follows:

"Thank you for the recent report entitled "Petro Canada, Oxford Street Bulk Terminal London, Ontario - Results of Cleanup". The areas identified as being contaminated have been successfully cleaned up in accordance with the Ministry of Environment's "Guidelines for Site De-Commissioning in Ontario". In addition, areas grossly contaminated with volatile hydrocarbons have been successfully removed. Thank you for your co-operation in this matter. If you have any further questions, please call ___ at 661-2200."

[para31] The letter was signed by D.S. Boehm, the environmental officer. Based on this information, the purchasers decided to close the deal and Azman started to promote the property.

[para32] Azman immediately marketed the property, and heard from one Dave Lucas, another Re/Max agent, on behalf of Southside Construction. Shortly thereafter an agreement of purchase and sale was entered into dated December 20, 1989, with one Vito Frijia in Trust, in the sum of \$1,250,000. The offer, which was accepted by 590, stated as follows:

"The vendor warrants that there is no soil contamination which would restrict or prohibit the construction of an industrial plaza on its subject property which would be in contravention of any municipal, provincial or federal government legislation."

In handwriting, the following was added to that paragraph: "as per letter dated November 15/89, attached" (the MOE letter). Azman testified that he provided Frijias with the Arcturus Report as well as the MOE letter.

[para33] In early 1990, before the closing date of March 15, 1990 Frijias indicated a problem to Azman, as Frijias had had the property inspected and environmentally tested by Trow Dames & Moore, environmental consultants. The tests showed contamination, presumably, according to Azman, due to the previous presence of underground tanks. On this basis Frijias was not prepared to close. [There was no mention in the Trow Dames & Moore report of USTs.]

[para34] Azman stated that based on the MOE letter, he and the Plaintiffs felt that the property was, as he described, "ok", and therefore they did not accept the position of Frijias for abatement that was originally suggested in the sum of \$400,000. The response by 590 was to attempt an exercise on a power of sale under the third mortgage held by 628. 628 was at the time controlled by the three shareholders of 590, and the action was used as a means to remove from title the agreement of purchase and sale registered by Frijias. Subsequently Frijias reduced his abatement claim to \$250,000 and rather than accept this, the Plaintiffs sued Frijias because as Azman testified in his view, they would be out money taking into account legal costs and expenses if they accepted an abatement bearing in mind the Plaintiffs' purchase price of \$880,000.

[para35] Azman took this position since as he stated he had talked to Dr. Panko of Arcturus prior to closing and was satisfied that the property had been properly cleaned and there was no reason for him to take a loss. It was not until a settlement with Frijias in that litigation in 1991 (each party bearing its own costs) that the cloud was removed from title. Apparently in the process Dr. Panko, according to Azman, had agreed to provide expert assistance to Azman in the litigation with Frijias. This was denied by Panko.)

[para36] Azman on behalf of 590 pursued and completed a re-zoning of the property from light industrial to commercial and subdivision from one into four parcels. Following re-zoning, Azman testified about contacts with the Tim Horton Donut chain, which had expressed interest in a portion of the site and had been prepared to purchase a parcel of 150 feet by 300 feet for the sum of \$150,000. An agreement of purchase and sale was completed and accepted on August 3, 1993. Later in August of that year, Tim Hortons advised the Plaintiffs that based on a report they received from their consultants, Trow Corporation, it was their view that the "property has never been remediated and is contaminated with oil and therefore the soil conditions are not satisfactory." Tim Horton indicated that the cost necessary to remediate had been estimated between \$50,000 and \$80,000 (for the parcel to be purchased) and determined not to close the transaction in view of the unsatisfactory soil conditions.

[para37] Azman testified that it was not until receipt of the Trow Consultants report of August 23, 1993 that he was certain that the property had not been properly dealt with.

[para38] Since 1993 the property has not been remediated nor has it been sold and only one parcel, namely that that had been occupied by London Marina under lease from December 1992, was later sold to it. Azman testified that immediately after receipt of the Trow report from Tim Hortons, he went out to the site with a backhoe and dug up material from a number of places, including three holes that were identified in the Trow report as numbers 1, 16 and 22, and put some of that material in jars, which he described as having a very heavy smell of petroleum and this material confirmed to him that the site would not be saleable until it was properly remediated. (In view of the evidence of the experts nothing turns on this evidence.)

[para39] Azman commenced this action in 1995 against Petro Canada and is trying to get compensation to be able to remediate. The price to London Marine of its portion of the land was \$260,000, comprised of some back rent, a purchase price attributed of \$226,000 and a vendor take-back mortgage of \$118,000. Apparently that mortgage is in default allegedly due to London Marine not paying due to contamination.

[para40] Under cross-examination, Azman admitted that other purchases of properties in which he was involved that had been bulk plant facilities or service stations, he could not recall having received any environmental reports. His response was that he didn't see any problems when he was buying or constructing on those sites. He agreed that when he bought a bulk terminal from Petro Canada on Merivale Road in Ottawa, he got an environmental report that had been done by Acres, and when he bought a service station on Montreal Road, he knew there had been underground tanks, but could not recall whether he received an environmental report or not.

[para41] Azman was aware of the Gasoline Handling Act and has owned two service stations with underground storage tanks. Azman conceded that prior to putting in the offer of September 16, 1988 he knew that there had been seven above-ground storage tanks and that the property had been used as a bulk plant.

[para42] He could not explain the increase in price in the two September 16th offers from \$630,000 to \$730,000, except to say that he thought it reflected what the market was doing, namely increasing. At all times Azman thought he could sell the property

and/or develop it with a goal of making money. He could not say whether as of September 16, 1988 he had a personal interest in the transaction; it may have turned out that it was only Rose and Sherrin.

[para43] As of April 1989 when 590 increased the offering price to \$880,000 Azman still thought the property was a good deal to sell or develop. The offer by Rose "in trust" reflected the decline of Sherrin to participate. Azman acknowledged being aware of the change in the environmental clause proposed by Petro Canada in that offer and confirmed that he still liked the site for development notwithstanding. He agreed that as a real estate agent he was familiar with the "entire agreement" clause (see paragraph 23 above).

[para44] Azman was asked whether he knew there was no covenant of Petro Canada that he could rely on and no warranty outside of the agreement. His answer was that he had the MOE letter and the Acres Report. He was asked whether he knew that something said orally wasn't part of the contract. He answered "not really", that he abided by a number of oral agreements.

[para45] Azman acknowledged that he did not explain the "entire agreements" clause to Rose. He simply reviewed the site with him; he thought it was a site ripe for development. He did not recommend an environmental consultant because he already had the Acres Report and the MOE letter.

[para46] Azman did not tell Petro Canada at any time before closing that he as their agent acquired an interest in the property as a shareholder of 590. He did not consider this a breach of his regulatory obligations as a real estate agent receiving a commission from Petro Canada.

[para47] On closing 590, as purchaser, gave a written indemnity to Petro Canada which reads as follows:

INDEMNITY AND RELEASE

Re: Petro Canada Inc. Sale to 862590 Ontario Limited 1855 Oxford Street, London, Ontario - (the "real property")

In consideration of the closing of the above sale transaction, the undersigned, 862590 Ontario Limited, and its successors and assigns, hereby indemnify, release and save harmless Petro-Canada Inc., its successors and assigns, from any and all costs, loss, damages, claims and liabilities of the real property whether or not disclosed by the Environmental Aspects of Site Decommissioning prepared by Acres International Limited dated March 1988 respecting Acres International Limited's environmental assessment of the real property, the May 19, 1988 and the November 15, 1989 acknowledgement letters of the Ministry of the Environment, all referred to it in an Agreement of Purchase and Sale between J. Rose, In trust, as Purchaser and Petro-Canada Inc., as Vendor, accepted on June 7, 1989. DATED at Etobicoke, Ontario this 15th day of November 1989.

[para48] When asked about the indemnity clause and whether it was important to him, Azman said yes, but he was relying on the MOE letter and the Acres Report. Azman agreed that Johnston, who was the lawyer on the transaction (and a 590 shareholder), reviewed the clause before it went back to Petro-Canada but could not recall any advice given by Johnston, or that he had it reviewed by Rose. Azman confirmed that he has an outstanding action against Johnston for alleged negligence in his handling of the transaction.

[para49] Azman knew that the site had a neighbouring service station with underground tanks and that there were other nearby sites with other companies' bulk plants and that the building onsite might have had an underground furnace tank. Azman could not recall thinking of it but he did know that there were underground fuel lines but didn't ask to find out how the fuels came to the rack.

[para50] Azman conceded that he knew that he could have put a condition in the offer to deal with underground tanks, he knew he could have inspected the property, he could have got an environmental expert but didn't do so because he didn't think there was a need for it, given his discussion with Petro Canada, Acres and the MOE letter.

[para51] Azman knew he was going to have to give an indemnity, whether or not the Acres Report disclosed all the contaminants. He conceded that he was not qualified to review the Acres Report; neither were his partners. He claims not to know what an environmental audit is or what the MOE Guidelines were and did not ask anyone. He acknowledged that the report does not say that Acres or Petro Canada did any remediation; simply an investigation.

[para52] Azman stated that he only quickly read the conclusion of the Acres Report and really relied on the MOE letter as he said, "If the MOE is happy, so am I". He didn't ask any questions but knew before closing that the MOE had a problem with the Acres Report. While he knew of the existence of the Golder Report, he did not do as he said he did with the Acres Report and call the author. He did not call Z Realty, who had ordered the Golder Report, because they were competitors and he didn't feel comfortable in doing so. He didn't ask Petro Canada for a copy on the basis that if they had had it, they would have given it to him.

[para53] Azman denied that his real intention was to sell as quickly as possible, notwithstanding that he started marketing immediately after the offer was completed. Another potential sale to one Gerzon at \$1.2 million failed because Gerzon did not want to increase the deposit as demanded by Azman.

[para54] Azman stated that he did not pass the Arcturus Report on to other potential purchasers because he knew that they were looking for the conclusion of the MOE letter of November 15, 1989 which he took to be a satisfactory cleanup. He agreed that in hindsight there is a lot that he didn't know or understand, but agreed that the closing was postponed due to MOE concerns.

[para55] Azman says when this was done he must have forgotten about the warranty and indemnity to Petro Canada.

[para56] Azman agreed that his first mention of his telephone conversation with Dr. Panko on November 7, 1989 discussing "the ability to build houses" came in his evidence in chief in this action. He agreed he has no precise memory of the call at all, apart from his long distance record.

(ii) Joseph Rose

[para57] Mr. Rose is the sole director and officer of 590 and one out of three shareholders. He is 53 years of age. He finished grade 12 and then did an auto mechanic apprenticeship. He has worked in service stations for several years and has owned his

own since 1994 and has for some time been out of gasoline selling, concentrating on auto repair. He is familiar with tank dips and underground tanks and had some that leaked and he left the retail business because of some of those problems.

[para58] Rose advised that he is a long-standing friend of Azman, who contacted him in early 1988. He wanted to make some money and was prepared to mortgage his family home to be able to do so. He identified the September '88 offers and assumed when they were rejected that they would put them in again when appropriate.

[para59] Originally the employee in his station, one Sherrin, was going to participate in the purchase transaction, but he left Rose's employ early in '89 and decided not to participate. Azman was to find others, because they still believed it was a good property. He agreed that Johnston became involved some time in the early part of 1989 and believes he may have gone over the offer with Johnston but isn't sure. As far as he was concerned, based on what Azman said, it sounded like a good site for sale or even development. Rose arranged for mortgages on his home for his share of the purchase, which at all times was going to be \$250,000.

[para60] Rose noted receiving a copy of the MOE letter of October 11, 1989 but immediately referred Boehm, who called about it, to Azman, because that was his matter to take care of. Rose assumed whatever would be done would be done by Azman, and he was satisfied that the problem was cleaned up by Petro Canada. He stated he relied on Johnston and Azman for the details.

[para61] Rose believes he looked at the Arcturus Report somewhere on the 8th or 9th of November and was happy that the property was being cleaned up. He identified the indemnity and release; he doesn't recall signing it. The November 15th MOE letter to him meant that everything was clean and they could go in.

[para62] Rose knew that right after closing Azman had a buyer, Southside Construction. It wasn't until the spring of the next year that he became aware of problems and that Southside would not close because of the contamination. Rose wasn't involved in the decision as to how that dispute would be dealt with. He noted that Southside put a cloud on title and ultimately the matter was settled. Rose felt Azman was happier with this result because Azman was anxious to have the property developed and he felt that if they had not settled, Southside would have continued to sue them.

[para63] In cross-examination Rose confirmed that Azman was primarily concerned with the property and that it was brought to Rose who relied on Azman and his experience with Petro Canada. Rose simply went along with what was being proposed. While Azman would have reviewed the offer with Azman briefly, he has no memory of any specific discussion regarding the "entire agreement" cause. He can not recall either that Johnston looked at this or any of the offers. He only recalled discussing documents with Johnston when they were going to close.

[para64] Regarding the indemnity in Schedule "A": Rose could not recall specifically that Azman brought it to his attention, but he remembers that the MOE was "the top law of the land" and it was really the MOE that he was relying on for the purpose of being able to close and then sell again.

[para65] According to Rose, all decisions regarding price were made by Azman. Rose knew Azman was going to get a commission; he didn't know that Azman was going to be an investor until right at the end. He knew there were going to be other investors but not who. By June he knew that Johnston was coming in. He agreed that he saw the Acres Report and the MOE letter at around the closing time, but relied on Azman to know if the environmental conditions were "ok". He did not recall any talk about the Golder Report prior to closing.

[para66] Rose stated that he was not aware of the Southside offer to settle for \$1 million made in early 1990 (i.e., an abatement of \$250,000). He left everything to Azman. He knew that Azman felt those guys would continue to sue them if they tried to close in any event.

[para67] Rose issued a Notice of Action in November 1995, claiming against Johnston and Gray (another lawyer for 590). That action is on hold. It alleges that Gray failed to advise 590 to settle with Southside with an abatement and against Johnston because he failed to suggest an environmental investigation. He was referred to the pleadings in that action which include a claim against Bennett Jones, a law firm: Rose agreed that in these pleadings there is no mention of his having the Arcturus Report prior to the placing of his mortgage. He didn't read any of those reports himself and he didn't discuss any of this with Gray, the lawyer for 590, namely the \$1 million offer or what release could be negotiated with Southside.

(iii) John I. Johnston

[para68] John Johnston is a barrister and solicitor called in 1951 following his war service with the Armoured Corps. and then with the Queen's Own Rifles. He retired in 1996. His general practice mainly in real estate and estates was conducted out of an office in New Toronto. He knew both Rose and Azman, both of whom operated in the district. He had previously acted for Azman, who brought this transaction to him when the offers were completed. It would appear that he got a copy of the offer on the 21st of June, 1989.

[para69] By that time it had been agreed that he would be one of the three partners. He was to put in \$400,000 and each of the others \$250,000. The mortgages back were to be for 6 months and open, with the closing to be on October 31, 1989.

[para70] Regarding Schedule "A" to the Agreement of Purchase and Sale, Johnston neither received nor saw the Acres Report or the MOE letter at the time of the offer. The partners discussed the signing of the indemnity as a necessary part of the closing. They knew, in his opinion, the nature of the documents.

[para71] While Rose brought in the letter of the MOE of October 11, 1989, he did not know anything of the Golder Report, nor did he see it. He knew that the property had been used as a storage depot prior. Johnston had never had a copy of the Arcturus Report. He believed he had seen it but had not kept a copy. He confirmed the circumstances regarding the extension of the closing.

[para72] Johnston stated that three or four days before November 15, Azman brought him a copy of the Arcturus Report and showed it to him and pointed out Section 3 which showed that the property was cleansed and clear. (see page 5, last two lines where the "soil was removed from the site")

[para73] Johnston acknowledged the potential sale to Southside and noted that while he followed the transaction and the ensuing litigation, Azman was in charge of both, including the discussions regarding settlement, and Azman took care of re-zoning.

[para74] Johnston recalled the potential sale to Tim Hortons. The agreement came into his office and Rose signed it. He indicated that the Trow report was sent to him by Azman or Tim Hortons, and he found it surprising to learn that there had been underground tanks. When asked when he first knew of these, he said, "I'm not sure. There was another report, I think it was the Golder Report done in 1988". But he did not recall knowing this before 1993.

[para75] He confirmed that the deal did not go through and the deposit was returned. He sent a letter to Petro Canada forwarding the Trow environmental report received from Tim Hortons, because he wanted Petro Canada to do something about it.

[para76] As of 1988 Johnston could not recall how long he'd known Azman; it may have been as long as 10 years. He was first consulted on this deal with the execution by both sides of the agreement of purchase and sale, and reconfirmed the receipt of the transmittal letter from Re/Max.

[para77] Reference was made to Exhibit 23 the statement of defence in the action commenced by Azman against Johnston to three previous transactions that he'd acted for Azman on, each sold at a profit. He confirmed that he was going to contribute through his wife in this project to make sure that the deal would close. He can not remember whether Azman told Petro Canada he was part of the purchasing group. He never thought about the issue of Azman's responsibility being an agent and a purchaser.

[para78] Johnston did not review the offer or the entire agreements clause with either of his fellow shareholders because they were sophisticated. He said that Azman knew the words were there because he arranged the offer. (Mr. Johnston was confused in several places regarding dates and letters, and drew assumptions from documents that he previously read.)

[para79] Johnston confirmed that he had seen but not read a copy of the MOE letter of May 19, 1988 and that he never had a copy of the Acres Report. He never advised Azman to have it reviewed by an environmental consultant. He didn't have personal familiarity with the MOE Guidelines.

[para80] The witness was referred to "The Canadian Institute Conference" environmental material on steps to be taken by a lawyer advising regarding environmental audit and representation & warranties. Johnston stated that he was not familiar with this material or the obligations.

(iv) Daniel Steven Boehm

[para81] Mr. Boehm is 43 years of age, now employed with Philip Services as a senior account manager in the environmental section. In 1984 he joined the MOE for the purpose of the implementation of the Ontario Regulation 309 to allow tracking of Ontario liquid waste, including contaminated soil. Mr. Boehm was responsible for the issuance of the November 15, 1989 letter.

[para82] Mr. Boehm's background includes a three-year Environmental Studies Diploma from Fanshaw College, which included one year of field work. He then worked for the Ontario Research Corporation in Third Party Monitoring and then at the MOE in the London Regional Office. In 1988 and '89 he became responsible for the area in which 1855 Oxford was located. Peter Huras was a colleague. He identified the Huras letter which took place during the transition period. Boehm then became responsible for the east part of London.

[para83] Boehm noted that during this period the MOE Guidelines for decontamination of Ontario sites were under considerable change and that the MOE also looked after noise, water and dust. He identified the February '89 guidelines and indicated that they were an evolving matter as of that time. In his work, Boehm dealt with either the owner or the owner's representative in large companies; however, he would often deal with an environmental representative or a consultant.

[para84] Boehm acknowledged that the Golder Report had been received by the MOE, and as well the memorandum by Acres comparing the Acres Report and the Golder Report. Boehm drafted the October 11, 1989 letter (being the person responsible) as there were some shortcomings that had been identified in the Golder Report since he felt the site needed to be further remediated and it was easier to do the work before the ground was frozen.

[para85] Boehm confirmed the draft work plan of Arcturus and the use by them of a TLV meter, which is a portable gas detector with a machine probe that goes into the ground. He noted one may also take bore hole samples for lab analysis or put the TLV meter down to the bottom of the hole. The samples were taken in the areas that had previously been identified as likely containing contaminants.

[para86] Boehm referred to the excavations that were done in early November 1989 in his presence with a backhoe and he observed what was taken out. His job was to see that the action plan was carried out without gross negligence.

[para87] Boehm was satisfied with the work done by Arcturus under the work plan and its results. He was satisfied that the MOE concerns had been addressed when he faxed out the November 15th letter the next day. He confirmed that odours were not well defined under the Guidelines, which were in a state of flux although there were some numbers for refinery sites.

[para88] In his cross-examination, Boehm conceded that as of 1988 it was usually only large companies that contacted the MOE and they would report based on their anticipated future use. Based on reporting, the MOE would decide what they thought was appropriate by way of further testing and remediation.

[para89] Boehm confirmed that the testing done by Acres was typical as was the MOE response based on the review of expert reports which indicated "objective realised" in the letter of May 11, 1989. This is only sent if there are no problems. He indicated that both the Acres and Golder Reports indicated the presence of hydrocarbons.

[para90] Boehm could not recall any request for the Golder Report from anyone as a result of his October 11 letter. If they had, he would have suggested a Freedom of Information request, or given the name of the person who commissioned the report. He could not recall speaking to either Azman or Rose regarding the letter.

[para91] Boehm stated that as of 1989, there were no criteria for volatile hydrocarbons in the Guidelines and the presence of them may or may not be a consideration for remediation based on the intended use or sensitivity to neighbouring watercourses.

He was satisfied with the work program of Arcturus as it related to volatile hydrocarbon testing and never heard from Azman as to what he was going to do with the property or what in fact was done. He had no concern about the Arcturus work and if the MOE had disagreed, he would comment. Silence does equal agreement. The test readings taken were below MOE guidelines, therefore the clearance letter was issued. Petro Canada would not have had the letter until November 16th and no-one contacted the MOE regarding a concern about the testing or the Arcturus Report.

[para92] Boehm confirmed that the Arcturus Report relied on the Acres history. He believed the Arcturus plan was appropriate, it was a limited job which was done and they said they had done it, and the MOE confirmed that they had done it. He did not expect work to be done by Arcturus beyond the plan. As of 1989 the main problem appeared to be vapours and prior to that there had been some free products and what he saw was relatively minor in nature.

[para93] Boehm further testified that the Acres Report was standard for its time. There were no guidelines in 1988 for problems from vapours from BTEXs (this refers to some "light" ends of the petroleum hydrocarbon spectrum consisting of butane, toluene, ethyl benzene and xylene).

[para94] As of November 1989 Boehm believed the subject property met the guidelines based on the totality of the information of all of the consultants and his personal observations, and when the Trow Dames report came in, in January 1990, it still met the guidelines. Using a TLV meter one would expect to get vapours from hydrocarbons. Boehm was referred to his having seen a "sheen" in the catchbasin, a rainbow appearance. He confirmed that this is not liquid petroleum itself but rather a mixture.

(v) John Cancelli

[para95] The Plaintiffs called as a witness John Cancelli, who previously worked at Petrofina from 1974 and then later at Petro Canada as development administrator in the real estate department. He worked under one Tab Charbonneau, who was responsible for deals and he did the paperwork. Cancelli related to John Thomson who was responsible for dismantling of bulk plants and terminals. Charbonneau and Thomson had come from Gulf to Petro Canada.

[para96] Cancelli explained the process involved when Petro Canada decided to sell a property. The proposal would go through various executive levels of approval for sales and he would then prepare a list that would be given to anyone who called for it. Petro Canada accepted tenders for the listed properties. Cancelli knew Azman as a Petro Canada dealer and sometime purchaser of sites.

[para97] Cancelli testified that the property in issue was withdrawn from the market after the first offers in September because of some environmental concerns and due to the legal description as to how it was configured. Petro Canada wanted to make sure it was ready to sell. Cancelli indicated that when a prospective purchaser asked for property information, he would give the person a plot plan obtained from the engineering department. He did so in this case and confirmed that he did not make a copy of the lower right hand corner of the plan he gave Azman, on the basis that the revisions to drawings and their prior history was the business only of Petro Canada. The full description in that corner indicates that the drawing was amended in 1981 and notes "replace earthen dikes with clay and remove underground tanks and large rack". The Plaintiffs now claim that they were misled into believing that there never were underground tanks.

[para98] Cancelli described that the land was put back on the market in 1990. Schedule A to the draft agreement was prepared by the legal department. The Azman offer was of interest to Petro Canada because it was at the right price with very few conditions, "something they could work with".

[para99] Cancelli explained that he was not directly involved following acceptance of the offer. He was asked whether he had any conversation regarding the condition of the property. The following is the extract from his examination in chief:

Q. Did you have a discussion at about that time with him [Azman] about the condition of the property? Do you remember that?

A. We talked about - yeah. Yes.

Q. What was said, can you recall now?

A. Well, we talked about the legal descriptions and the condition of the buildings and about a number of things.

Q. Anything about the condition of the land?

A. He inquired about some tanks, if they were still there or if they weren't still there.

Q. And what did you say about that?

A. We looked on the plan and we couldn't see any that were there even though at the bottom it indicated that there were. That was the bottom of the - the headings on the bottom of the plot plans.

Q. When did that take place?

A. Some of it prior to closing, some of it after - I mean, prior to the offer being executed and some of it afterwards.

Q. And there was a document called the Arcturus report. Do you remember that?

A. Yes.

Q. And did you have any discussion with him about that subject?

A. I gave him a couple of reports along with a letter from the Ministry saying the property was okay.

Q. Now, you already told us you gave him the Acres report, so you gave them a couple of reports?

A. I gave him the Acres report along with the letter from the Ministry, and there was another report after that that John Thompson gave me.

Q. And when would that be? When did you do that?

A. It would have been prior to closing.

Q. Okay. Mr. Rogers. Thanks very much. Your witness.

[para100] The witness confirmed in cross-examination that he didn't have anything to do with the operation of the site which was purchased from Gulf in 1975. The property was ready for sale when he first saw it. He did not know about any of the environmental issues as they were dealt with before the property was put on the market.

[para101] When asked about his discussion with Azman regarding tanks, Cancelli agreed that any discussion would have been in accordance with the drawings. He would not have misled as there was no reason for him to do so. As far as he understood from Mrs. Colluci (of the legal department), he was to make full disclosure and he believes that he would have responded to any question from Azman fully and truthfully, and would indicate what was on the drawing if he had it.

[para102] The witness did not know that Azman had an interest in the property personally. He confirmed that he gave Azman a copy of the Acres Report and a letter from the MOE before the offer (May 1989), and if questions had been asked he would have referred Azman to Thomson or someone else who would know the environmental issues. Cancelli knew that Azman was going to get a commission on the sale.

[para103] The question of when Cancelli first gave Azman a copy of the Arcturus Report arose again in his cross-examination since he gave a written statement in 1996 to Messrs. Panko and Difruscio of Arcturus. The following excerpt deals with the issue:

Q. And I understand that subsequent to that phone call, you met with Andy Panko and with Tony Difruscio at a Tim Horton's in North Toronto someplace?

A. That's true, yes.

Q. And they asked you to sign a letter -

A. Yes.

Q. - that you had never provided the Arcturus report prior to 1990 to Mr. Azman. I'm showing you that document. Is that your signature below the date November 5th, 1996?

A. Yes, it is.

Q. And I take it that November 5th, 1996, would have been the date that you met with Mr. Difruscio and Dr. Panko at the Tim Horton's?

A. I would assume so, yes.

Q. And looking up, there are the words: "Except for report provided in 1990" and there's initials there, "J.C."?

A. Yes.

Q. Are those your initials?

A. Yes.

Q. Also placed on this document on November 5th?

A. Yes.

Q. And did you write in the words: "Except for the report provided in 1990"?

A. Yes, I did.

Q. And I take it, Mr. Cancelli, that prior to your leaving the employment of Petro Canada you were aware that there were some issues with respect to the property that had been purchased by Mr. Rose?

A. Yes.

Q. You had continuing dealings with Mr. Azman?

A. Yes.

Q. And at some point in 1990, he went looking for a copy of the Arcturus report?

A. Okay. Yes.

Q. And he asked you if you would provide him with a copy?

A. Well, I'm pretty sure the copy was provided to him before that, but

Q. But you wrote in those words in 1996?

A. Yes.

Q. Mr. Cancelli, I'm not suggesting that you were trying to hide or keep things from Mr. Azman at all, but merely that this was not a matter in November of 1989 that was still within your office. It was up in the legal department by that time.

A. Yes.

Q. Thank you.

Ms. Tough. Those are all my questions.

The Court. Any re-examination?

Mr. Rogers. I have no further questions.

(vi) Kevin Pal

[para104] Mr. Pal is employed by the Insurers' Advisory Organization as an account advisor in environmental services. He provides information to the industry on environmental matters, with site plans and maps. He has been there for 2 years.

[para105] He described how fire insurance plans are drawn up by representatives of the organization, involving inspectors visiting the sites to take measurements, record information and relay that to draftspersons who draft the plans. The organization was commenced by the industry based on their demand. He identified a book of fire insurance plans produced by the IAO and indicated three plates, nos. 219 and 221 in particular, that relate to the subject property, and show on them underground tanks. He confirmed that in 1988 and 1989 IAO was a member-supported organization supported by insurance companies, who paid a fee for the work done. A percentage of revenue came from fee services but copies of plans are available at various locations including public archives, libraries and the University of Western Ontario.

[para106] Cross-examination confirmed that users were part of a general movement by the members to move to a private organization to work on a profit basis.

[para107] Ms. Tough confirmed from the witness that the website of the IAO indicates that they are marketing their services aggressively and have been since 1990. Prior to that time, the maps were held by the insurers. The maps actually ceased production in 1973 and then were delivered to the archival interests. A copy charge is required. That's now advertised and wasn't previously.

VI THE WITNESSES FOR THE DEFENDANT PETRO CANADA

(i) James Kitchen

[para108] Mr. Kitchen is the manager of corporate planning for Petro Canada's central regions. He is 51 years of age and has been employed first with Gulf Canada in 1971, then became a manager in London in charge of real estate and capital projects, and joined Petro Canada in 1985.

[para109] While in London, Kitchen had occasion to visit the subject site. It had a service station and a wash bay for trucks; the office had an accounting function and storage for advertising and product. He was aware of it being a bulk storage facility and while in the 70's it was operational, it was not in use on a daily basis. The trucks simply picked up exchange product from the Shell refinery. He was not aware of any underground storage tanks but would not have been surprised if there had been a top-up tank for fuel for the trucks.

[para110] In the period 1987-89, Kitchen was part of the group called "Distribution" within Petro Canada that was responsible for having equipment removed, making an environmental report and then determining whether the property had any other use for the company.

[para111] Because Petro Canada was a Crown corporation it had tended to dispose of properties on an open basis following appraisals. It had a list of persons who had requested information. Kitchen would not see individual offers but received periodically a summary from Cancelli. He confirmed that the subject property was taken off the market in September 1988 because Petro Canada had a number of offers with a wide range of prices, and difficulty in establishing market value. After the property was put back on the market in 1989 he did not have any further involvement.

(ii) John Thompson

[para112] This witness is now retired at 65 years of age. He started with B.A. in 1969 and was then with Gulf and Petro Canada. Mr. Thompson was a terminal superintendent at the Clarkson refinery from 1974 to 1986. The London bulk plant reported to him. From 1987 to 1989 his title was Safety, Health and Environmental Advisor, when he then retired. He worked for a short time for Arcturus around 1994 and now is fully retired. His specific responsibility in 1988 was for de-commissioning of bulk plants.

[para113] It was Thompson's responsibility to hire an expert (Acres) to carry out an inspection of the property and provide a report of the condition for environmental remediation. He provided a copy of the site plan to Acres, having received it from Petro Canada's engineering department. It was his recollection that the revision data on the drawing showing removal of USTs was on the document that he gave to Acres.

[para114] While Thompson had been on the subject site, he didn't have any knowledge of USTs and would have expected Acres to tell him about this in their report, if there were any. He dealt with two individuals, Davies and Panko at Acres. He had no problem with the draft report prepared by Acres and sent it on in final form to the MOE.

[para115] Thompson stated that if Acres had recommended remediation he would have given approval, since Petro Canada wanted to sell the site. He expected and received a letter from Huras at MOE, clearing the site. These letters were hard to get. When he got the MOE letter of May 19, 1988, he sent it on to the real estate department at Petro Canada to be ready for sale. That was the end of his involvement at that time.

[para116] When Thompson received the Golder Report dated November 11, 1988, he simply forwarded it to Acres for comment. When the MOE sent its letter of October 11, 1989, he referred it to Panko for delineation of a work program. They were the ones who were experienced and he decided to go with Panko and Frijia, now at Arcturus, since they had worked on the site before and those remaining at Acres were unknown to him.

[para117] Thompson testified that in early November 1989 the MOE was in attendance at the site at his request. He received a copy of the draft Arcturus Report and then received the November 15th letter from the MOE. He sent the MOE letter to the real estate department, and can't remember what, if anything, he did with the Arcturus Report.

[para118] In cross-examination, Thompson confirmed that he had no education or specific experience in the environmental field. His job was simply to get the site ready for disposal and he was not directly involved in guiding Acres or Arcturus in the specifics of the real estate transaction, including the indemnity.

(iii) Thomas A.B. Charbonneau

[para119] Mr. Charbonneau retired from Petro Canada in 1988 or 1989. He had been with Gulf since 1969 and was familiar with the property, having lived in London for 10 years and passed by it on a regular basis. He recalls having seen above-ground tanks only on the site and he had no responsibility for environmental review.

[para120] Charbonneau was responsible for obtaining appraisals prior to putting property for sale. Any site plan document given to appraisers would have come from the engineering department. He could not identify the specific document obtained in this case but believed it was a copy of the full "sepia" or original document containing revisions.

[para121] Charbonneau was not involved in the specifics of the real estate transaction beyond obtaining the offer from prospective purchasers and referring it to the real estate department. He was not responsible for either the environmental state of the property or anything having to do with the indemnity.

(iv) Rosemary Colluci

[para122] This witness is a long-time employee of Gulf and then Petro-Canada. She testified to events that took place 10-11 years ago. She was unable to recall many of the specifics of the real estate transaction, and discussions with individuals concerning it. She was called presumably to rebut the statement made in opening that Petro Canada through her, fraudulently deprived the plaintiff prior to closing of relevant and material information concerning the environmental state of the site.

[para123] To my mind the witness's lack of specific recall is completely understandable. The transaction in issue, insofar as Mrs. Colluci's duties were concerned, proceeded as a normal and straightforward event, which took place in the ordinary and usual course of her business as a law clerk responsible for the particulars of land transfers for Petro-Canada.

[para124] The issue of the receipt of the consultant reports (Acres, Arcturus), the obtaining of the letter of the MOE (November 15, 1989), along with the purchaser's indemnity, were all matters that were required by Mrs. Colluci for the purpose of closing. She had no responsibility for the actual obtaining of consultants' reports or for the scope of work to be done by consultants or what was or was not necessary to satisfy the MOE regarding the environmental state of the land. Mrs. Colluci received what others in the company believed was the appropriate information for her to provide to the purchaser in view of the indemnity that was being required of them.

[para125] In view of the allegations made in opening of fraudulent conduct on the part of Mrs. Colluci, further comment on her veracity is appropriate. A suggestion was made to her in cross-examination, that it was somewhat incongruous that she could recall the specific detail attending the purchaser's solicitor's office for the escrow closing, but not whether or not she had discussions with others in Petro-Canada regarding the environmental report.

[para126] To my mind, this is completely understandable and is consistent with her truthfulness as a witness. What was done by Mrs. Colluci in receipt of documents, information and then preparation of further documents, proceeded insofar as she was concerned uneventfully, as it was others who were responsible for the obtaining of the required documents.

[para127] What was eventful in her duties was to travel by car from North York to the Lakeshore Road in Etobicoke for an escrow closing, which she recalls.

[para128] Accepting the reason for her lack of recall with specificity of the routine, I find Mrs. Colluci entirely truthful and creditable. Not only can no inference be drawn from her lack of recall, I conclude that there was no agreement with her colleagues to deprive the purchasers of information with an intent to deceive them. There is nothing in her evidence to suggest that she ever had the Golder or Arcturus Reports, much less purposely withheld either of them or mentioned them to the purchaser's solicitor.

(v) John Barber

[para129] I accept from the evidence of Mr. Barber, that while it is not possible to say with certainty that there were USTs within the fenced area at one time, from a review of the engineering drawings, it is not likely that there were, given the way in which the bulk plant operated.

[para130] Mr. Barber explained the methodology for preparation of engineering documents and revisions to them. The intention of the drawing is to indicate what is on-site at the time of the revision block dates show. Based on this information and his testimony, I am satisfied that it is more likely than not that any USTs were removed prior to 1984 and were not present at the time of purchase.

VII THE WITNESSES FOR THE DEFENDANT ARCTURUS

(i) Anthony Difruscio

[para131] Formerly with Acres and then Arcturus, Mr. Difruscio is now the director of environmental and site remediation for Connor Pacific, the Broomfield division of Connor Pacific Inc. The company works in the remediation of contaminated

properties. From 1982-89 he was with Acres and moved from technician up to project scientist. In the spring of '89 he left to form Arcturus. In 1996 the shares of Arcturus were purchased by Connor Pacific.

[para132] Difruscio has master's degrees in Science and Computer Science.

[para133] In 1987 he was a project scientist at Acres. He had been involved in 20 bulk plants and service station sites as well as other petroleum contaminated sites. He was part of the field team working on the subject property. His job was to do the bore holes and take samples and help in the description of contamination.

[para134] In performing his job he used a hand auger with a bucket, like a post-hole auger and would take 6 inches at a time in a three inch diameter cylinder. The geologists would look at the logs and they would all smell and take sub-samples. Dr. Panko and others were involved in the study.

[para135] Difruscio was not responsible for the scope of the work but did help with the bore hole locations. He identified the Acres drawing that was used to map the bore holes. He could not recall what Petro Canada site plan drawing was used. He does not recall the MOE being on the site when they were with Acres. Regarding the Golder Report, he had no involvement in review of it while he was at Acres.

[para136] In November 1989, Difruscio testified, he was involved in a small cleanup on the site. Operating as Arcturus, Dr. Panko was the main contact; he spoke to Petro Canada. Petro Canada was Arcturus' main client at the time and he was involved in setting up the contract and arranging the landfill details from discussion with the MOE.

[para137] His role on site was that of a technician. He took vapour readings, made auger holes, and did confirmation through the TLV meter, measuring the combustible portion of the sample. He then took vapour readings from in-situ. This instrument was not used while he was at Acres.

[para138] The decision on the soil to be taken away was made by Boehm and Markel of the MOE based on looking at the samples and establishing a cut-off of 380 ppm and their sense of smell of the soil. Based on the Golder and Acres observation, they used the TLV meter in the same areas with the MOE concurrence.

[para139] The witness explained that the Arcturus office was in his basement in November of 1989, using a telephone line forwarded from Dr. Panko's office. The Arcturus Report was finished at 5:55 p.m. that day when Dr. Panko took it to Purolator for transmittal to Petro Canada. At noon on that day he faxed a draft copy to John Thompson at the Trafalgar location of Petro Canada. He then took the photographs for professional copying and completed the tables. Following the sending of the reports he had no further dealings with the subject site.

(ii) Andrew Panko

[para140] Dr. Panko has a PhD in Geology from McMaster and M.Sc. from Waterloo in 1977 and B.Sc. in Geology from Brock in 1975. He is a Fellow of the Geological Association of Canada. He ran Arcturus from 1989 and teaches at Brock as an environmental geologist and is a trustee of Brock University. He ended association with Arcturus when it sold out to Connor Pacific in 1996. From 1977 to 1989 he was with Acres and as of 1988 was a senior geologist. Panko had worked on at least 12 bulk terminals located throughout the province.

[para141] Dr. Panko described his involvement while at Acres in 1988. He surmises that he received instructions from John Thompson at Petro Canada and then contacted the MOE. As far as he can recall, the instructions were to comply with the MOE Guidelines as they related to de-commissioning satisfactory to the MOE.

[para142] Panko could not recall specifically the drawing that he obtained from Petro Canada but stated that it was a site plan and one that did not show the former service station to the east, or he would have added bore holes to the east near that site. He had no information to suggest the presence of USTs.

[para143] Panko did speak to the operator of the Petro Canada terminal across the street and chose bore holes beneath the area where there had been aboveground tanks, pipes and loading racks.

[para144] Panko recalled receiving the Golder Report and commenting on it, but had no further involvement with the property while at Acres. He does recall the attendance of MOE personnel while they were doing their first investigation, probably Huras. He did have a conversation with someone but can't recall what happened.

[para145] Panko did recall his retainer at Arcturus from Petro Canada in October of 1989 and his contact with Boehm at MOE regarding the proposed work plan.

[para146] Panko then explained what was done on November 1st and 2nd, including taking the auger holes vapour readings and comparing the data from Golder and Acres. He noted that the work plan was changed to better delineate the immediate area based on an upper cut-off of vapour readings of 380 ppm. (Vapour readings above this level for this purpose were considered indicative of contaminated soil.)

[para147] Arcturus did test pits, listing three in the report and then excavated and hauled away the soil containing above 380 ppm vapour readings. The report did not include all the vapour readings, because a number of them got excavated out. Following soil removal, a number of confirmatory readings were done, all in the presence of the MOE.

[para148] Panko testified that the Arcturus Report was sent in draft to Thompson of Petro Canada at 11:37 a.m. on November 7 and completed with delivery to Purolator at 5:55 the same day. He has no recollection of any call from Azman. He did not know who Azman was then. About a year later, he recalled a visit from Azman at their office to get a copy of the report. He knows this because of the letter to George Fraser, legal counsel at Petro Canada, indicating the request by Azman. He would not have given a report owned by a client without the permission of the client and that's why he wrote to Fraser.

[para149] Panko did not recall any discussion with Azman from October of 1990 until this litigation in late 1995, nor did he hear of any problems regarding the property.

[para150] On the Arcturus project, Panko proceeded with the same methodology as he had on other projects. He could not recall whether he expected to find volatile organic hydrocarbons, but agreed that he would have expected some gasoline and diesel and other hydrocarbons. He agreed that he saw some free product on the site, and this was not the same soil where the readings were about 380 ppm, but both areas were removed. If he had found any other free product, he would have removed it.

[para151] In discussion with the MOE in November 1989, Panko could recall no discussion regarding the Acres Report with any suggestion that its work did not meet the guidelines. As far as he could recall the Acres work did meet the guidelines at the time.

[para152] Dr. Panko rejected the suggestion made in cross-examination that in preparation for the Arcturus assignment, he would have needed all the historical site information. He agreed that if he were doing the assignment under today's guidelines, that might be necessary, but not in 1989. He agreed that he did not consider looking for a fire insurance plan either in 1988 or 1989.

[para153] When asked whether it was sensible to check the water, he noted that it was agreed with MOE that this was not to be a groundwater study. He looked to the MOE for guidance; that is why he went to them. He believed then and now that the above ground storage tanks were the most likely contamination source. He disagreed that sheen can come as easily from gasoline as from diesel or fuel oil, but does agree that there were odours of both.

[para154] Dr. Panko could not remember specifically receiving the Golder Report, but believes he received it, and he has no reason to doubt the findings that they made regarding hydrocarbon contamination. They were doing a geo-technical overview. He did not accept that he believed at the time that Golder came to a different conclusion. He does not think that the conclusion, even today, is a big difference. They described the same thing but the words are different. After seeing the Golder Report, he did not consider a gas survey and his reason was that there were only a few incidents of faint odour and without more indication, they would not have done more work.

[para155] In response to the suggestion that Golders were critical because Acres hadn't addressed the "other criteria" (referred to in the Guidelines), Panko responded that the MOE had accepted what had been proposed in 1988. He agreed that Golder's thought there was a problem under the guidelines. He disagreed that Golder's focussed on things that might be called "toxic and dangerous". He noted that since Golder's had subjective, not objective, data in their investigation, no definitive conclusions could be drawn from it. Golder's investigation was based on a different methodology for a different purpose.

[para156] Panko was referred to his not having noted that solvents were to be specifically checked. He said, "I noted what I thought should be done. The MOE was on-site. This was not written as the definitive conclusion, and what should or could have been done."

[para157] He rejected the suggestion that his assignment was a comprehensive or detailed investigation; it was simply a history, what he felt at the time and he believes the same now, given the subjective nature of odours.

[para158] In explaining the methodology of bore holes and vapour readings, Panko stated that he was seeking to confirm the subjective findings of Acres and Golders, to verify that data. If he had sought to remove all reference to hydrocarbon odours, the work plan would have been much more intensive, moving a great many more tons of material. The lead encountered did not exceed the draft 1997 guidelines and therefore didn't have to be removed.

[para159] Chemical analysis was contemplated, but on-site it was determined that it wasn't going to be done. He could not recall who made the recommendation; simply that it was made and it wasn't done. It was suggested that it was not done because it would have delayed the report. The witness rejected this: "we could have still done it".

VIII THE ENVIRONMENTAL REGULATORY FRAMEWORK

[para160] The Environmental Protection Act R.S.O. 1990 c. E.19 provides in sections 18 and 197, among others, for the Director under the Act to make certain orders affecting land when necessary to do so to protect the environment and human health.

[para161] To assist landowners and others in respect of their obligations, the MOE has, from time to time, issued guidelines. As of 1988, when Acres performed their environmental work, the guidelines were in "draft". As of 1989, when Arcturus performed its work, the guidelines that applied were those issued in February 1989. There appears to be no material difference between the draft and the 1989 guidelines, which provide in part as follows:

"Section 2. Definition the terms "decommission" and "decommissioning" are used to mean the mothballing, partial closure or complete closure of the facilities. The term "clean-up" means the restoration of a contaminated site to ensure the protection of human health and the environment. The decommissioning of facilities may or may not be associated with site clean-up.

Section 3. Purpose. The purpose of these Guidelines is to ensure that the decommissioning and clean-up of sites is completed in an environmentally acceptable manner and to ensure that the decommissioning and clean-up of sites in Ontario proceeds in as efficient, fair and consistent a manner as possible.

Section 6. Environmental Components of a Decommissioning or Site Clean-up Program Decommissioning and site clean-up can comprise four separate phases:

Phase I Planning the Decommissioning/Site Clean-up Phase II Designing and Implementing the Decommissioning/Site Clean-up Phase III Verifying Completion of a Satisfactory Decommissioning/Site Clean-up Phase IV Signing off.

Section 7.5 Level of Clean-up. In principle, remedial action will be required whenever contaminants are present at concentrations above ambient background levels. The development of clean-up criteria above background levels, however, may be undertaken by the proponent in accordance with the factors outlined in Section 7.5.2 and the land-use considerations described in Section 7.5.3."

[para162] Section 7.5.1 references Appendix A of the Guidelines, and provides for the upper limits of normal concentration in soils for a range of materials. Relevant to this case is Table A-2, which provides an upper limit of oil in the soil of 1% for fresh oil or 2% for weathered oil (a minimum of 2 years' exposure on the site). Table A-1 refers to the upper limits of normal concentrations of various minerals in surface soil, where the figure for lead is 500 in an urban setting.

[para163] Of particular relevance to the claims in this case are Sections 7.5.2, Development of Clean-up Criteria Above Background Levels:

"Clean-up criteria above background may be developed provided that the criteria are protective of human health and the environment. There are three general approaches that may be taken to developing clean-up criteria above background levels:

1) application of relevant MOE policies and guidelines; 2) application of clean-up criteria developed in other jurisdictions, where appropriate; and 3) development and application of site specific clean-up criteria.

Where a wide range of contaminants are present on-site, it may be acceptable to develop clean-up criteria above background levels based on indicator contaminants that represent the range of contaminants at the site. Selection of indicator contaminants must be done in consultation with MOE."

[para164] Section 7.5.2.1 provided under the heading "MOE Contaminant Policies, Guidelines and Requirements", that clean-up guidelines for additional contaminants, particularly organics, will be included in Appendix A as they are developed or adopted for use in Ontario.

[para165] Section 7.5.2.2 provided under the heading "Clean-up Criteria Developed in other Jurisdictions" that:

"Where MOE contaminant criteria guidelines for the contaminants of concern are not available to assist in clean-up criteria development, it may be possible to apply clean-up criteria developed in other jurisdictions. In order to apply clean-up criteria developed in other jurisdictions at a site in Ontario, the following factors should be taken into consideration:

1. The methods used to develop the criteria must be acceptable to MOE; 2. the proposed application of the criteria must be consistent with the application intended when the criteria were developed; 3. the criteria should be consistent with MOE's overall objective of establishing stringent criteria that are fully protective of human health and the environment."

(The criteria were to be developed and applied in consultation with the MOE.)

[para166] Section 7.5.2.3, under the heading "Site Specific Clean-Up Criteria", provided for MOE review of each stage of work of site-specific clean-up. Section 7.5.3 under the heading, "Proposed Future Land-use" provided for more stringent clean-up dependent upon the proposed future land-use of the site.

[para167] As described by one of the expert witnesses, the Guidelines up to and including 1989 contemplated the active involvement, and indeed approval of, the MOE with respect to the clean-up proposals. The question on these facts, is what is the requirement of Petro-Canada in respect of the Guidelines applicable at the time of its sale to the Plaintiff.

[para168] The 1998 Guidelines applicable at the time of trial are relevant to the Plaintiffs' claim for damages for the clean-up that is yet to occur. The two major differences between the 1989 Guidelines and the September 1998 Guidelines are the importance of objective criteria for clean-up and the onus put on the landowner or a proponent for compliance.

[para169] As noted in the 1998 Guidelines:

"This guideline provides advice and information to property owners and consultants to use when assessing the environmental condition of a property, when determining whether or not restoration is required, and in determining the kind of restoration needed to allow continued use or reuse of the site. The Ministry has provided the guideline, along with the supporting documentation, to assist landowners in making decisions on soil and/or groundwater quality for proposed or existing property uses."

[para170] The 1998 Guidelines describe three approaches for responding to site contamination. These approaches are background, generic and site-specific risk assessment. Relevant to this action is the generic approach which

"involves use of soil and groundwater quality criteria which have been developed to provide protection against the potential of adverse effects to human health, ecological health and the natural environment. The criteria may be applied to agricultural, residential/parkland and industrial/commercial land-uses. Criteria are also provided for potable and non-potable groundwater use"

"Groundwater criteria are provided for an extensive list of parameters. Analysis for all the criteria may not be necessary in all instances. Likewise, soil and groundwater analysis may sometimes be required for parameters not listed in the guideline. The decisions involved in site investigations and parameters for sample analysis are always based on consideration of the specific factors at each property."

"The generic soil and groundwater criteria may be modified to reflect particular site conditions. This is done through modification of relevant variables in the models and process used to develop the generic criteria. If appropriate, criteria from another jurisdiction may be proposed for use, or new generic criteria may be developed if criteria are not provided for a particular contaminant."

[para171] I accept the evidence of one of the experts, Mr. Phimister, who described the generic approach as provided for in the 1998 Guidelines in more detail. As he advised, there are a number of complex parameters which are used to provide specific criteria for soil restoration. These specifics replace the generality of the 1988 Guidelines. He explained that Table 6C, which includes odour as one of the variables, incorporates that as an element with a number of other variables in the determination of the extent to which remediation may be required in any particular instance.

[para172] Schedule A under the 1998 Guidelines contemplates the use of a Record of Site Condition, which is essentially a certificate to be completed by a consultant for an owner attesting to the remediation meeting the guidelines' requirements. The affidavit of the consultant is to be accompanied by a statement of the site owner.

[para173] As Mr. Phimister noted, the change in the regulatory regime changed from an active involvement of the MOE under the 1988 Guidelines to a more significant onus being put on the consultants and owners under the 1998 Guidelines for

determining compliance. Indeed, under the current Guidelines there is a role for the municipality, which will be described in more detail below.

IX THE ENVIRONMENTAL EXPERTS FOR THE PLAINTIFF

[para174] The site in question was subject to three environmental reviews prior to closing of the sale transaction and at least three following. Each of the experts attempted to predict the extent to which the site was or was not contaminated within the context of the environmental guidelines, using a variety of testing techniques. It is instructive to review each of the experts for the purpose, timing and conclusion of their reports.

[para175] The Plaintiffs called four environmental experts, three of those being witness of fact. Each of the three was called to identify a report prepared at the relevant time for clients who were prospective purchasers of the property. The liability and damage experts of each of the parties to this action relied on the results from the testing undertaken by the prior consultants. In their testimony, they elaborated on the evidence contained in their reports which were filed. A summary of those findings is necessary to put into context the opinion evidence of the parties' experts.

(i) Philip Bedel

[para176] Philip Bedel is a professional engineer with Golder Associates, a firm of geo-technical consultants. His firm completed a report for Z Realty in the fall of 1988. His client was a prospective purchaser of the site from Petro Canada. The report was sent not to Petro Canada, but to the MOE, which ultimately resulted in the MOE letter of October 1989, giving rise to the work undertaken by Arcturus.

[para177] Golder Associates were critical of the Acres Report, finding "the [Acres Report] is correct that hydrocarbons are one of the most likely contaminants to be found at his site; however, important errors have, in our opinion, been made in the assessment of them." He concluded that the MOE Guidelines had not been followed, since oil and grease was the only parameter considered and a collection of indicator contaminants should have been undertaken. The Report went on to detail analysis from some 26 bore holes from shallow soil samples.

[para178] The Report concluded "based on the Acres International Limited report and Golder Associates Geo-Technical investigation, there appears to be a large area where the surficial soils are heavily contaminated with volatile hydrocarbons including gasoline and solvents . and should in our opinion, be removed to prevent the hazardous build-up of combustible vapours in any structure built on the site. Run-off and groundwater flow from this site are no doubt contaminated as well."

[para179] In cross-examination Bedel conceded that while his firm's report indicated a problem, this was not a Phase I study under the Guidelines. He would need more information before he could reach a conclusion of any real risk of an explosive nature. He stated that there was a potential if there was a building put over the contaminated area, but agreed that further work of evacuation may determine whether or not it's a real problem; how much and far depends on what the use of the property is intended to be.

(ii) Edgar Taves

[para180] Mr. Taves was with Trow Dames and Moore ("TDM") in 1990 as an environmental consultant. He identified the report his firm prepared for Southside Construction. Taves had been with TDM for a year and a half and in that time was retained by Southside who were considering purchasing the subject property. He was to take a look at the environmental conditions on site and to consider their potential for re-development. He explained that his scope of retainer was relatively limited and they did two test pits on site and two shallow soil samples outside the fence. This was typical of an investigation where he was acting for confirmation on behalf of the purchaser.

[para181] He identified various invoices approximating \$4000; the work done was not exhaustive. Taves' job was to make an evaluation to determine field truth from what he had on site; he had as background the Acres Report and based on that he formulated a field program. The Acres Report gave mixed information. It implied that the property was ok, not exceeding MOE guidelines, but as he said, "we noted concerns about what had been done." In particular, as noted on page 2 of the Acres Report, a concern regarding gasoline which had not been studied. Taves noted that you only find what you look for, and since Acres did not check for it, therefore they did not find it.

[para182] Taves used two-test pits, recognized there are two testing methods, one using a shovel and auger, the second using a back hoe, and this would be 10-12 feet in length. As he described, "you smell the sample and you see the test pit. The third method, which wasn't used, is to drill and go as far as you can." This is more expensive. This was not used since they felt the contamination would be within the reach of a back hoe and that would be the best use of a limited budget.

[para183] The work was done on January 24, 1990 and based on the client's requirements and budget he did not do the full background of Phase I, but went to Phase II under the Guidelines. TDM included samples 1 and 2 outside the fence to see if there was an area of concern, particularly with a water sample of the storm water drainage. TDM had in addition the letter of the Acres tests, indicating that there was some concern regarding lead but not sufficient to make the hazardous level. Taves stated that the Acres oil and grease analysis would not identify gasoline, while he focused on the BTEX organic compounds and targeted those because Acres had identified oil and grease concentration. Taves confirmed that the MOE Guideline was 2% regarding oil and grease but stated that the presence of benzene drives the investigation when you're looking for organic compounds. Odour may or may not be significant but one is indirectly testing for it, although here TDM did not get into any level of detail. They did not do soil gas measurements.

[para184] Section 3.3 of the TDM report indicated that a vapour barrier may be necessary if there were to be sub-grade construction or replacement of fill. Section 3.2.1 noted there was no guidance exceedence for inorganic matters. Section 3.2.2 dealt with organic parameters, and the analysis he concluded is a classic indication of gasoline impact. TDM simply did not carry out the interpretation any further. The TDM Conclusion (4.0) with respect to chemical analysis was that it "indicates the soil quality is appropriate for either residential or commercial re-development."

[para185] Taves initiated contact with Boehm asking him to comment on soil gases. Taves agreed that the MOE only knows what it's been told. Taves was looking to see whether there was any knowledge on the MOE's part regarding neighbouring property.

[para186] Boehm's response of May 14, 1990 says in part, "Based upon the analyses provided in your report, it appears that the remedial measures previously taken at this site are adequate. Measured levels of contaminants fall below our decommissioning guidelines." Taves regards this as standard, namely "you meet the numbers but you may have to deal with the odour issue, it depends what's being done on site." He confirmed that other jurisdictions had dealt with odour in their own ways, some with no specific guidelines. Taves added, "If you had a contaminant for which there was no guideline, you could suggest one and the MOE might be prepared to accept it as per something like the Quebec guidelines".

[para187] With respect to cost of clean-up, based on the assumption other guidelines applied, TDM concluded that the site was contaminated for commercial use and Taves did a rough calculation of clean-up based on removing 1 meter over the whole site. He came up with a cost of \$418,000.00 as of 1990, and this did not include the implications of groundwater and perched water. His estimate was subject to a 20% contingency cost.

[para188] According to Taves, the concern under the MOE guidelines relates to Section 7.5.4 which says, "Asbestos parameters such as odour must be addressed regardless of the odour."

[para189] In cross-examination Taves admitted that he has now joined Conastoga, Rovers & Associates ("CRA"), which firm has been employed by the Plaintiffs for expert assistance in this action. He confirmed that the TDM report was prepared to the best of his ability reflecting opinions honestly held. He agreed that if the use of the property was going to be as a parking lot, there would be no problem, but if you have to build on it, particularly if you install a basement, you may have some problems. Taves confirmed that he was doing a preliminary site assessment and this was not unusual work, nor was the conclusion, that the constraints on redevelopment would be due to past storage activities.

[para190] Taves agreed that the Acres Report did not indicate that there was anything hazardous. He agreed if one eliminated the two test sites outside the fence, TDM's conclusion would be exactly the same as Acres. The witness confirmed he has no dispute with the MOE findings and conclusions and if he had had a dispute, he would have raised it with the MOE. When he completed the TDM report he did not know that there had been 157 tons of soil taken out because he had not been provided with a copy of the Arcturus Report.

[para191] Taves also agreed in cross-examination that as a consultant and given a new project, he would discuss with a client to find out what the client is trying to achieve, and how he can get there, depending upon what the client wants and how much the client is prepared to spend. This is called the Scope of Work. What was done here wasn't a Phase I or Phase II report under the MOE Guidelines but rather a "Limited Phase II".

[para192] Taves agreed that the importance of petroleum contaminants depends on the intended land use and the degree of contamination. He stated that for a former bulk plant he would expect to see some contamination and some smell. The real determination is whether or not the owner can do what it wants to do. A land for a parking lot may be different from land for houses. Therefore you have to know the purpose and extent of the regulatory endpoints. He commented on the difference between composite and discrete samples. Often, composite samples are done with a screw-type auger. He has less concern if a consultant uses a bucket-type auger. He believed that Acres didn't consistently go down to native soil, but made no criticism of this in his 1990 report. While critical of the Acres methodology, Taves could not point to an error in their results.

[para193] In taking his samples, Taves relied on the Acres work. He was questioned about encountering tile and stated that this could mean a number of things. He agreed that smell is a personal matter and unreliable as an absolute indicator but is a relative one. He agreed that both he and Acres found a sheen, and both tested for lead.

[para194] Regarding the BTEX testing done by TDM, he found that there were some hydrocarbons pointing towards gasoline and stated that is in effect the conclusion of the Acres Report. He agreed that at the time the MOE did not have any generic numbers in the Guidelines. He looked to the "MENVIQ" Quebec criteria. These numeric criteria will depend on the use to which the contaminated property will be put. He agreed that even comparing what was found on this site to Quebec criteria gave no real cause for concern. He agreed that the MOE could apply those guidelines if they wanted to, it was up to the MOE. He stated that if in 1990 Southside had a footprint for a proposed building he could have delineated more precisely the area to be remediated, either negatively or positively, and therefore not have remediated the whole site.

(iii) Gerald Ducharme

[para195] Ducharme was retained in August of 1993, when he was with Trow Consultants, to investigate the property as it related to hydrocarbons, to assist Tim Horton in its purchase evaluation, the intended use being commercial. He reviewed the historical documents at the University of Western Ontario (the "Insurance Maps") did a partial title search, reviewed aerial photographs, insurance plans, plus the Arcturus, Golder and Acres Reports.

[para196] The aerial photographs he reviewed show removal of tanks and this was to him an environmental concern. The fire insurance plans, he stated, had become available at the University of Western Ontario in about 1988 or 1989. This allowed a consultant to confirm whether or not tanks had been installed.

[para197] Samples were taken for lab testing but not done because the verbal findings of environmental contamination given to Tim Hortons resulted in a decision not to purchase.

(iv) Anthony Crutcher

[para198] The principal environmental consultant retained for the Plaintiffs to deal with issues of liability and damages was Anthony Crutcher. He is a civil engineer who graduated from the University of Waterloo in 1976 with Bachelor's degree and obtained a Masters degree in Science in 1977. He has been a principal of CRA since 1982. CRA started with 13 and now has 1000 people employed, mainly in North America. Crutcher has worked on 800 projects, 40-50 of those directly associated with hydrocarbon issues. He has testified on a number of occasions.

[para199] Following cross-examination on his qualifications, it was ruled that Anthony Crutcher is qualified to testify as an expert given his general qualifications. His limited expertise in the field of petroleum bulk assessments or remediation is a matter going to the weight of his evidence.

[para200] Crutcher reviewed all of the previous investigation and testing reports. He re-plotted on one drawing what he proffered as the known data on the site from 1988 to January 17, 2000.

[para201] Crutcher's conclusions were based on what he believed were one instance of petroleum hydrocarbons observed in the soil, approximately 6 instances of petroleum hydrocarbons observed on groundwater, approximately 28 instances of petroleum hydrocarbon odours documented in the soil and approximately 13 observations of hydrocarbon iridescence (sheen) observed on groundwater and 1 instance of a lead finding.

[para202] Based on his review, Crutcher reached the following conclusions in his report.

"The work conducted on Site by Acres and Arcturus prior to the sale of the Site identified field evidence of petroleum hydrocarbon impacted soil and groundwater, occurring over the majority of the area of the Site. This field evidence of impact was not investigated in accordance with the 1989 clean-up guidelines (MOE). "The field investigation and analytical methodologies utilised to investigate environmental conditions on Site, prior to the sale of the Site, were not appropriate to identify either the extent of soil and groundwater impact, or the chemical nature of the impact;"

[para203] The basis of Crutcher's conclusion of the work done by Acres is that Acres did not look for or report on volatile hydrocarbons. In Mr. Crutcher's view, the MOE Guidelines of 1988 and 1989 mandated a consultant in the presence of odour, to look to criteria developed in other jurisdictions to provide the basis for further investigation and determination of the extent of contamination. In his view, had this been done, as was later confirmed by Golder's, among others, it would have revealed exceedence of guidelines with respect to both hydrocarbons and lead.

[para204] Crutcher was also critical of the work undertaken by Arcturus in November of 1989, since in his view, the firm should have undertaken a complete survey for volatile hydrocarbons, including BTEX sampling as TDM and Trow had done later. In his view, at the time of the Arcturus Report, the site was contaminated with motor fuel and remediation work was required to obtain soil standards consistent with commercial land use.

[para205] Mr. Crutcher relied, among other things, on the statement of evidence that was filed from Walter Royal, a former site superintendent with Gulf Canada, of the subject premises. Mr. Royal recalled that there were two small underground tanks on the site for secondary usage, in the south-central portion of the fenced area, but no spills on the property from the underground tanks were recalled.

[para206] Crutcher included in his estimate of the area to be remediated the London Marine site, on the basis that that company may have a claim against the Plaintiffs or a defence to non-payment of its mortgage, based on contamination.

[para207] Crutcher made a visit to the site on January 17, 2000 during the course of the trial in an effort to determine the maximum extent of fill that might be required in the area of the underground storage tanks. In his view, soil extraction of some depth from the entirety of the site was the most reasonable means of remediation, as other methods would have a greater cost.

[para208] In reaching his conclusion that none of the investigations by Acres or Arcturus was in accordance with the 1989 MOE Guidelines, Crutcher was of the opinion that one could not rely on the MOE letter of November 15, 1989, because in his view it depends for its validity on the level of the person making it. One has to make some judgment as to the weight to be attached to the report. In his view, knowing that the Guidelines regarding oil and grease in hydrocarbons at the time did not deal with volatile BTEXs, one could not place any reliance on the MOE letter. In addition, because he knew who the individuals are and their limited qualifications and education, this adds to the limitation of the weight of the MOE opinion.

[para209] Under cross-examination, Crutcher conceded that his investigation on January 17, 2000 did not reveal a UST and if there had been one, he would likely have found it. Crutcher also conceded that none of the data collected would necessarily point to leaks from USTs, and his conclusion about hydrocarbon contamination comes more likely from operations than from USTs.

[para210] Crutcher was asked about his understanding of the nature of the Acres work and report, and agreed that it would identify to the Plaintiffs, if it were read, certain information regarding the site. He agreed that Acres did not do a clean-up and one does not have to be familiar with the Guidelines to know that they did not do this. It can, however, be confirmed by reading the report and the Guidelines.

[para211] Crutcher also conceded that as a consultant, the determination of the development of clean-up criteria in 1988 would be done in consultation with the MOE and he does not know what was done here. One important ingredient is the proposed land-use and he agreed that there would be different levels of clean-up depending on use. This would be done in consultation with the MOE. After hesitation, he agreed that there was information that showed continuing contamination as of November 1989, contained in the Acres Report, the Arcturus Report and the Golder Report.

[para212] Crutcher was again referred to the limited scope of the Arcturus work, namely to mitigate gasoline odours in the soil, rather than conducting an overall environmental mitigation of the site. He reiterated his interpretation of the 1989 MOE Guidelines, which he felt obligated Arcturus to mitigate all of the hydrocarbons onsite by removing sufficient soil to remove all odours.

[para213] It was Crutcher's view that this obligation remained notwithstanding the reports of Acres and Arcturus. He agreed the MOE letter would notify the Plaintiffs that there were hydrocarbons on the soil and potentially in the groundwater.

[para214] After an intensive review of all of the testing on-site, including his own, the witness conceded that there were some errors in the items on his figure and a difference of opinion between experts. He ended up agreeing that his effort was a worse-case scenario, because he assumed that aesthetic considerations, namely odour removal, would apply to the entire site. He then added an additional half-meter of soil removal and an additional 20% to his calculations to ensure completion.

[para215] Crutcher agreed that by 1993 and indeed by 1998 the Guidelines for Testing had become more sophisticated and detailed and indeed more sophisticated testing methods are in use in recent times than in 1988 and 1989. He also agreed that a full chemical analysis would be better than smell, and that there might be odour and vapour readings with no chemical detection of BTEXs.

X ENVIRONMENTAL EXPERTS FOR THE DEFENSE

(i) Roger Michael Woeller

[para216] Petro Canada's expert Mr. Woeller is with Water & Earth Science Associates. He has his B.Sc. in Geology and M.Sc. in Hydro-geology. His firm are environmental consultants dealing with water, soil and air. The witness has been involved in environmental assessment of 5 or 6 bulk petroleum sites, a number of service station sites (50 or 60) and several large industrial sites that have some hydrocarbon problems such as Uplands Airport in Ottawa, and Cambridge Bay in the NWT. The witness was accepted as an expert witness in the field of environmental assessment and remediation.

[para217] In his report Mr. Woeller was asked and responded to four questions:

[para218] Question One: Was it common in 1989 to undertake an environmental assessment? His answer is Yes. Woeller noted that purchasers and operators undertook assessments based on their needs and would often hire an independent reviewer to identify problems. This was often done for de-commissioning or for sale. In his view, some of the more precise measurements didn't come into play until the early '90s, although the tools were there before.

[para219] Question Two: At the time of closing, was there information sufficient to disclose environmental problems to a purchaser? His answer is Yes. He agrees with Golder No. 1 report (and as at page 38 (iii) of his report), that the work done by Acres and Arcturus identified contamination, certainly within the fenced area, and that the historical use of the site caused hydrocarbon contamination. There was nothing in the evidence he reviewed to suggest leaks from a UST. Woeller's report stated "If the purchaser expected the condition of the property at the time of the purchase to conform to background contamination concentrations (i.e., little or no contamination is present), it is our opinion that there was sufficient information to alert him to the condition of the property".

[para220] Mr. Woeller described environmental disclosure in 1988 in the following context. "Regarding legislation in 1985-87, we were walking in a vacuum. A proponent would propose and the MOE would consider it and might give a letter. In 1987 draft guidelines for de-commissioning and cleanup, as well as the Gasoline Handling Act, came more into play. The draft guidelines really dealt with process and to a crude extent, levels." By 1992, he went on to say, the focus was at fuel dispensing and bulk sites like gasoline stations, and by January 1996 there were explicit instructions about what up to then had been merely draft. This was the first fundamental feature for accurately dealing with levels.

[para221] Question Three: Did the information contained in the MOE letter of November 15th alert a purchaser to environmental concerns? Answering as a consultant, he said Yes. Indeed, the final distribution of contamination as seen in the CRA report is not in his view substantially different from what was identified in the previous reports. There were some larger areas to the southeast near the London Marine operation in what is indicated to have been a previous UST. From his review, he didn't find anything to indicate leakage from a UST or the presence of a UST: there were no concrete anchors or other evidence. He did not find any evidence of USTs within the fenced area near where the aboveground tanks were.

[para222] Question Four: Is the remedial program of the Plaintiffs reasonable? Woeller's answer is that it is not just reasonable, it is high. The criteria adopted are more than necessary or required for commercial or industrial end-use. It is removal without any detection of a problem.

[para223] Woeller stated that in 1988 and '89 it was difficult to get details of the measurement of containment of soils. The Golder No. 2 Report and the CRA Report took advantage of better techniques but should have presented particulars of other techniques.

[para224] The choice of depth for soil removal by CRA used in his view all the negative criteria and none of the positive. The guidelines are risk-based, which are intended to be averaged. Acres did a composite sample that was accurate for the time. In Woeller's view remediation is an incremental effort and one does not do anything more than necessary.

[para225] In cross-examination Woeller was referred to National guidelines that were promulgated by a petroleum industry task force known as PACE. He stated that as of 1989 PACE was not used uniformly as a guideline.

[para226] In Ontario at that time, while there were tests to use for volatile hydrocarbon contamination, due to the subjective nature of things like odours, the protocols varied. Hence individual site conditions were determined in consultation with the MOE based on the use to be made of the land. This was to be the case even though elements such as benzene are carcinogenic.

[para227] Woeller conceded that sheen is a good indicator of the presence of hydrocarbons but not necessarily of product. In his view one can have sheen and still meet the 1% 1989 criteria. He agreed that the Acres methodology did not address volatiles because they did not use testing methods to do so; they were using a different protocol. Woeller agreed in cross-examination that for investigation for delineation of volatiles, one must bear in mind all samples and continue to reappraise.

[para228] He was asked, if he had a project to clean up volatiles and got some studies regarding hydrocarbons, whether he simply would accept these when they indicated spots, or look at the issue from first principal. Woeller responded that he would consider the source's reputation of the findings. He would want to expand on what was being done, and verify the author's work. When asked if Acres hadn't looked for volatiles and Golder did only a geotechnical work, would he consider volatiles? He answered Yes.

[para229] It was suggested that under the PACE guidelines there were a variety of testing that could and should have been undertaken. Woeller responded by saying that he agrees with incremental remediation. That is, if there are strong odours the product may have migrated in the soil, it may not be contained where the odour is found. It may be an indication of a larger problem. The end is, in his view, not to remove the odour; it is simply a screening tool. Odour doesn't require action unless you have contamination.

[para230] He stated that the clean up suggested by CRA, in his view, is at the residential standard and now for hydrocarbons there are numerical values but in 1989, while health and aesthetics were important, the industry wasn't adept at quantifying. He does not believe that there is enough evidence of volatiles upon this site to warrant doing anything more than he suggests.

[para231] The anomaly on this site in his view is that there is a low volatile contamination level based on the screening and the vaporization studies by Arcturus, even in the "bad area". Therefore he concluded that there is not a lot of gasoline on this site.

Odour is only one indication, and with the vapour levels, it does not confirm a big problem. He stated that there might be an aesthetic problem, but nothing at an explosive level and nothing that would justify taking large amounts of soil from this site. Woeller agreed that sheen can represent free product, but based on the observations here, he would not conclude that this is in fact the case, given the vapour readings and the results.

[para232] He did not agree that the Trow observations of sheen can be taken as evidence of free product. When asked if he would sign off on this site, given the field notes and the Trow conclusions, the witness answered that he is satisfied that his proposal is a first estimate for a purchaser. It would be a starting point to bring the property into compliance and subject to information uncovered during the assignment, you would do more or less, and that's why he allowed a 20% contingency to deal with additional soil removal if necessary in his calculation of cost.

[para233] When asked what he would have done in 1989 with all of the data presently available except detailed BTEX readings now available, the witness responded, "My nature is to be conservative. I think everything would have met the MOE guidelines and there would not appear to be many volatiles. I would likely have done something more than Arcturus did, but I cannot say how much more".

(ii) Jim Phimister

[para234] Mr. Phimister was the expert called by Arcturus. He is a hydro-geologist who works extensively in retail petroleum sites, including gas stations, bulk plants, terminals and industrial plants with petroleum products. He has dealt with some 2500 leaks or spills since 1984 and about 2000 before that. He was tendered and accepted as an environmental expert in the practice, customs and site assessment of remediation and in the selection of methods and costing of remediation and the determination of the age and extent of hydrocarbons.

[para235] In completion of his report, he relied on written documents only for his opinion. In his view it is difficult to answer when contamination took place. He looked at a variety of circumstances. Knowing that BTEX becomes less over time, analysis works best when the samples are at depth. Therefore the evidence in his view would appear to be consistent with a surface spill, rather than a tank leak.

[para236] He was asked the question: Did Arcturus complete a scope of work in 1989 to an appropriate standard? In answering the question, he reviewed the correspondence with the MOE to understand the process.

[para237] The MOE laid out what they wanted and Arcturus recommended a work program, which the MOE observed and signed off. In his opinion, if the MOE wanted more, they would have asked. He had worked with both Boehm and Markel of the MOE in 1989 and the process of Arcturus was consistent with his practice with the MOE in 1989, and if anything is better documented.

[para238] Phimister suggested the standard of practice observed by Arcturus as can be seen in the following sequence:

Q. Was it reasonable to use a TLV meter?

A. We were using TLV in almost an identical process. In 1989 Arcturus was a head-on competitor.

Q. Would you expect an historical review, including interviews, for Arcturus' work?

A. Given the interview with the MOE, I think they had sufficient information and I would not expect them to start again. I would not expect them to consult insurance maps at that time, as they had no commercial use. I'd seen them with insurance companies, but did not routinely use them at that time.

[para239] Regarding the work plan change, the test pits chosen and removal of soil that was determined, the following exchange occurred:

Q. Was it unusual for the MOE to change the work plan?

A. The cleanup is an iterative process. You must change to reflect what is found in the ground. The MOE can direct and change what is necessary to know what should be done.

[para240] Regarding the vapour cut-off reading of 380 ppm, Phimister observed that it is a low criteria for '89. He stated we would have worked with 500 and now 5000 ppm (i.e., a lower reading is more environmentally protective).

[para241] Regarding hydrocarbon odour, he noted these are aromatic, which humans detect at low levels. For example, 50% of people can detect .1% in the air of xylene, and therefore if you smell it, you will dig down. If the hydrocarbon smell is released to the air, it will evaporate and not be there unless there's more beneath the surface.

[para242] Phimister put into context the current 1997 guidelines. He stated that the generic approach has produced a health-based number for 117 chemicals, and has specifically derived criteria numbers. Odours are taken into account and built into the tables. Prior to this, there was no scientifically-supportable number, and therefore the BTEX numbers in 1997 reflect, among other things, odours. They are incorporated as part of the rationale and one can therefore co-relate vapour and odour levels (e.g., 5.3 ppm benzene). Therefore you currently have 500 ppm vapour level using the MOE methodology. Each component has its own number and it comes out at around 5000 ppm if you take a soil sample. If you just use odour it may be 10,000 ppm; that is, more than smell can be present and still meet the guidelines.

[para243] Phimister testified that there will always be odour associated with petroleum sites when you dig down, unless all soil is removed. For a combustion, you need 13,000 ppm at lower concentration levels. There are lots of sites that have some odour in which the buildings and the site will meet the guidelines. The criteria that are set up are protective of vapour getting into buildings.

[para244] Phimister was asked specifically about 1989 actions in the following question-and-answer:

Q. Did Arcturus have an obligation to ensure that the site met the guidelines.

A. I think they did undertake that on a site-specific basis. There were no particular criteria at that time; they did the normal thing and satisfied the Ministry on a basis of "are you satisfied?". The guideline was based on site-specific criteria. In 1989 no one was cleaning to remove odour; it was being addressed but we didn't chase odours down.

[para245] Regarding the cost of remediation, he stated that there are three methods (1) dig-and-dump; (2) bio-remediation; and (3) thermal oxidation (latter not applicable for this site).

[para246] For bio-remediation, one removes the soil, as in a dig-and-dump, but puts into piles and lets microbes eat the hydrocarbons and then puts the soil back. The time depends on the soil, the ambient temperature and the type of contamination. This can be accomplished in four warm months within a year.

[para247] When asked "can the site be used during bio-remediation?" Phimister responded, "Yes. The holes for building can be accommodated."

[para248] Phimister outlined on a diagram the areas of BTEX exceedance in excess of 1997 guidelines and the areas of exceedance of TPH per the 1997 guidelines. Those areas were the factors that drove his extraction estimate. Using a factor of 2 cubic meters of soil equalling two tons, his cost estimate is a fixed-price basis, at \$88,920 and he believes that the soil will be remediated as to the guidelines, but there may be some odour.

[para249] This is to be compared to the \$50 a ton if one uses a dig-and-dump method. Exhibit 85 shows typical cost from the MOE which indicates an average cost of \$67 a ton.

[para250] Phimister would recommend the bio-remediation method here rather than dig-and-dump, because the soils are shallow and the amount to be aerated is good. He has used this method in Southwestern Ontario and at an Imperial Oil site across the street.

[para251] Phimister believes that the Plaintiffs' estimate is too high, because he believes you can do it for a great deal less. His usual experience is to only dig on part of the site, except where it is clear that the entire site is contaminated.

[para252] When using bio-remediation, he separates the clean soil from the dirty and, depending on a number of factors, it can be analyzed to distinguish those factors and move more or less. He urged that one can use a combination of bio-remediation and dig-and-dump for various parts, depending on the finding and cost. In Phimister's view the areas requiring remediation are confined to four discrete areas representing less than 25% of the entire site.

[para253] Mr. Phimister was asked in cross-examination whether given his opinion on the relatively small area to be remediated, he would sign a Record of Site Condition as provided for under 1998 Guidelines. The witness stated he would not complete a Record of Site Condition since it is not obligatory. He explained that site-specific records are not often used because this will pass the obligation to the municipality. In essence, what is involved is an affidavit from a consultant, who says that certain procedures have been followed. The MOE takes this to mean the full following of the guidelines, and therefore one cannot rely on work having been done previously before these specific guidelines. For example, to meet today's record of site condition requirements under the present guidelines, one would have to go and do the work over that had been done by Acres, Arcturus, Golder and others.

[para254] Phimister rejected the suggestion that more samples are necessary; he believes there are enough and that remediation by assessment is appropriate. The only reason that he would remove any soil is based on the chemical analysis done since 1993.

XI THE REBUTTAL WITNESSES

(i) Gerald Ducharme

[para255] In reply the witness was proffered as qualified to give expert evidence regarding investigation of contaminated sites and geo-technical evidence in three areas: (1) what did he observe when he visited the site in 1993? (2) how hydrocarbon spills behave in the soil; (3) how hydrocarbon vapour readings vary depending on methodology.

[para256] Objection was taken to his evidence on the basis that he was called as a fact expert in the Plaintiffs' case in chief and his report was accepted in terms of fact and now is sought to be bolstered by expert evidence. Notwithstanding that Ducharme did not advise the Court when he testified previously that he is now employed by the plaintiff's expert consultants CRA, his reply report was accepted on the basis that he may testify regarding the elaboration of factual issues raised in his report, limited however to new matters arising from the defence evidence.

[para257] The thrust of Ducharme's evidence was to rebut that of the defence experts. He purported to do so taking the position that as an engineer with a geo-technical background, he has a better understanding of hydrogeology than does a hydro-geologist.

[para258] In summary, it was his view that the appearance of sheen and free product referred to in his report would result from saturation of the soil mixing into the groundwater. This would occur only when the groundwater would not permit the dissolving of additional product in it.

[para259] In cross-examination Ducharme conceded that while his original Trow report did not say so, he equates sheen to mean free product, but that doesn't say anything about quantity.

[para260] I am of the view that the reply evidence of Ducharme adds little if anything to the debate about the extent of remediation required to meet today's guidelines.

[para261] While no doubt at some level fully saturated soil can result in product mixing with the groundwater, there is no credible evidence before me of this condition anywhere on the site. As the witness himself acknowledged, soils can mix with hydrocarbons and cause sheen in a situation far short of saturation.

(ii) Anthony Crutcher

[para262] Mr. Crutcher was recalled to testify to his reply report Exhibit L. He explained that when he did his original report he assumed that Petro Canada's expert Woeller was recommending removing soil from the entire site, not just from limited areas. His reply dealt with findings of contamination in areas other than those from which Woeller would remove soil.

[para263] Much of his evidence in reply repeated his previous testimony. Based on his concern that to meet the 1989 guidelines one had to eliminate odour and the lack of full chemical analysis of the site it all has to be cleaned.

[para264] Under cross-examination Crutcher again conceded that a number of areas on the site tested do not exceed the guidelines. In his view, however, some \$25,000 to \$35,000 of future chemical testing would be required to be definitive but he reiterated his previous view that there is sufficient information to justify the expenditure of his estimate of \$1,500,000 to meet the 1989 Guidelines. This is in spite of the existence that of 16 soil readings from various consultants only two do not meet current guidelines.

XII ANALYSIS & LAW

(i) The Arcturus Report

[para265] One major area of factual dispute between the parties concerns whether or not the Plaintiffs had in their possession and relied on a copy of the Arcturus Report prior to closing the purchase from Petro-Canada. Any analysis of evidence in this case must take into account that the events took place in 1988 and 1989 and that it was not until 1995, some six or seven years later, that many of the defence witnesses had notice that their memory of prior events would be tested.

[para266] I conclude on the evidence before me that Azman did not have in hand or rely on a copy of the Arcturus Report prior to closing. Mr. Azman has convinced himself over the years between the closing and the commencement of this action, that his phone call with Dr. Panko on November 7, 1989 must have included a review of the report that Panko was just completing for Petro-Canada.

[para267] There are several reasons that make it most unlikely that what Azman saw was the Arcturus Report. Rather, what he had and presumably did review was the previous Acres Report.

(1) The objective evidence of the Purolator slip, together with the evidence of Dr. Panko and Mr. Difruscio, make it clear that the report was not completed and sent until after the phone call in question.

(2) The fact that neither Dr. Panko nor Mr. Difruscio can recall the telephone call at all, and Azman cannot recall any details, leads me to conclude that Azman is mistaken when he says that he talked to Dr. Panko with his report in hand. I am satisfied that Panko and Difruscio would not have divulged the details of the report before it was sent to Petro-Canada and without the express permission of Petro-Canada. What Azman, Cancelli of Petro Canada and to an extent Dr. Panko and Mr. Difruscio were all interested in, was the timing of the Arcturus Report. As of November 7, 1989, an extended closing date had to be agreed upon when it was expected that the MOE letter necessary for that event would be received.

(3) In the Southside litigation, there is no reference in the pleadings or the affidavits of either Azman or the other side that refer to the Arcturus Report, although there is reference to the Acres Report.

(4) The details of the discussion with Dr. Panko attributing to him the statement "the land is good enough for houses", was not disclosed on examination for discovery when Azman was asked about the details of the discussion.

(5) Azman conceded in cross-examination that he is not qualified to review environmental reports, nor did he purport to read the Acres Report.

(6) Azman did not pass the Arcturus Report on to other potential purchasers.

(7) The indemnity and release given to Petro-Canada on closing makes no reference whatever to the Arcturus Report.

(8) Azman knew of the existence of the Golder Report, yet he did not ask Petro-Canada for a copy of it when he says the MOE told him they could not release a copy.

(9) Azman stated he primarily relied on the MOE letter of November 15, which he took to be complete clearance with respect to environmental problems. He was unaware of the specifics of the MOE Guidelines or that the site might require further remediation if new information came to light regarding the Guidelines.

(10) Azman has blamed almost everyone associated with the transaction and has commenced legal action against the lawyers Gray and Johnston and originally against the MOE in this action.

(11) Mr. Azman is a real estate speculator who expected to make a quick profit on a flip of the property. I conclude that he did indeed rely on the letter of the MOE as having confirmed the "clearance" of the land of contamination. When it appeared in 1995 that he was out of time to sue the MOE, he sought to tailor his evidence of events in 1989 to his advantage in this lawsuit.

[para268] I simply do not accept that Azman either read or paid any attention to the Arcturus Report in 1989. His sole interest and concern was the letter from the MOE. For the above reasons I am satisfied that neither Azman nor 590 saw or relied on the Arcturus Report prior to closing the sale with Petro-Canada.

[para269] I have no reason to doubt that Mr. Johnston was doing his best to be candid and honest in his evidence. It was obvious from his demeanour that with his age and the passage of years, his memory has somewhat faded. There were a number of minor items that I would expect that he could recall in some fashion that he could not at all.

[para270] It was obvious to me that in preparation for his evidence Mr. Johnston was considerably "refreshed" with the assistance of others. His files, which had previously been refused to be produced by the Plaintiffs on the ground of privilege (a position I fail to understand), include several documents in copy form that were faxed to him fairly recently from Mr. Rose. One would have expected these documents to have been in his file at the relevant time.

[para271] It is clear from Mr. Johnston's evidence that he left all of the business end of this transaction, including the terms of the offer, the indemnity and release, and the pricing and marketing of the property, to Mr. Azman. He was a passive investor, expecting that the transaction would result in a quick profit for resale. His role appears simply to have been as a conveyancer. He was not asked for legal advice or opinion by either Mr. Rose or Mr. Azman. While they did have several meetings, it would appear that they were as co-investors only. Mr. Johnston was content, as were the others, with the MOE letter and he paid no attention to what the experts said.

[para272] Mr. Johnston stated that he was shown a copy of the Arcturus Report prior to closing, but was not given a copy for his file. While I conclude that he was trying to be helpful to the Court, nevertheless I am satisfied that he is in error on this point.

[para273] In addition to the conclusions that I reached with respect to Messrs. Azman and Rose, I simply add that Mr. Johnston not only is personally affected by the outcome of this lawsuit as a shareholder, but as well he faces action by each of his fellow shareholders, claiming deficiencies in his legal advice. I have no doubt that he is anxious to cooperate and may well be vulnerable to suggestion of what happened at or near closing.

[para274] I find that it would be remarkable if he could remember with the clarity suggested by his evidence, one particular short discussion regarding the Arcturus Report, when his general recall of events at the time was understandably extremely poor. For this reason I do not accept that Mr. Johnston or the other shareholders of 590 relied on the Arcturus Report. They simply accepted what was said by the MOE and it is likely that language he recalls.

[para275] While Joseph Rose was the offeree on the property and a shareholder of 590, there is little that his evidence adds to this matter. There can be no doubt that he left most everything to do with this investment to Azman and the conveyancing details to Johnston, the lawyer.

[para276] Rose somehow purported to recall receiving a copy of the Arcturus Report, on or about November 9, 1989. While I have no doubt that Mr. Rose saw the Arcturus Report at some time, I must view with suspicion his conclusion as to timing. There is nothing in his description of events which would lead me to believe that he relied on anything but the MOE letter, and therefore he would have no need to know whether it was based on the Acres, Golder or Arcturus or any other report. He accepted, as he said, "that everything was clear and that they could go in", based on the MOE letter.

[para277] What I think is telling about Mr. Rose's reliance on Mr. Azman, is that he had nothing to do with the decision regarding whether or not to insist on Southside closing. Rose noted that Azman was happy that Southside hadn't closed when the matter became settled, as he, Azman, was anxious to have the property developed.

[para278] It was only after the fact that Rose saw any of the problems. I therefore conclude that Rose did not see the Arcturus Report at the time. Even if he did, it is clear that he did not rely on it in any way.

[para279] Had I been satisfied that the Plaintiffs did have the Arcturus Report, I would conclude on all of the evidence before me that the Plaintiffs did not put any reliance on the Report as such. The reliance, if any, on the part of the Plaintiffs with respect to the environmental state of the land in question, was on the MOE, and perhaps on Petro Canada, but not on Arcturus.

(ii) Underground Storage Tanks

[para280] The second major area of factual dispute concerns the allegation that Petro Canada purposely or recklessly with an intent to deceive, withheld information concerning underground storage tanks or their removal from the plaintiffs and/or Petro Canada's consultants.

[para281] I have reviewed the evidence both documentary and testimony, on the issue of USTs. The position of the Plaintiff would appear to be that Petro Canada and/or Acres and/or Arcturus knew or should have known of the present or former presence of USTs in the area of the aboveground storage tanks and in the field to the south as shown on the insurance maps.

[para282] The plaintiffs have not satisfied me on a balance of probabilities that any USTs were present when the aboveground tank racks and piping were removed from the site in 1984-85. Petro-Canada bought this site from Gulf in the asset purchase of 1986. I am satisfied that, given the state of records transferred to Petro-Canada from Gulf, there was no evidence on which it could be reasonably concluded by Petro-Canada that there were at the time of purchase USTs or any contamination associated with any previous USTs. There is nothing in the removal of tanks from the property by Petro-Canada in 1987 or for the lack of records of that, that is suggestive of removal of USTs at that time.

[para283] There is nothing in the evidence before me to lead to a conclusion that there are at present USTs on the subject site. I accept that there were USTs as shown on the insurance maps and the Petro Canada drawing, south of the aboveground tanks and that they were removed prior to the 1981 drawing revision.

[para284] Having heard and considered the evidence from the witnesses from Petro Canada and Arcturus, I am satisfied that there was no intentional withholding of any information either from the consultants or from the Plaintiffs for the purpose of encouraging a sale. The evidence adduced does not satisfy me that any of the hydrocarbon contamination that remains to be removed under the present Guidelines was specifically caused or contributed to by leaks from a UST as opposed to general operations of the site.

[para285] I am satisfied that Petro Canada did not advise Acres or Arcturus that there had been USTs on site. I come to this conclusion, since I am satisfied that both Acres and Arcturus would have, as Dr. Panko stated, made a more comprehensive investigation had they known of their potential existence.

[para286] There was nothing fraudulent or intentionally deceptive on the part of Petro Canada in withholding information. The site plan it provided did not contain a reference to removal of USTs. This omission, I am satisfied, was inadvertent on their part.

[para287] The odours that appear to remain in the soil are consistent with the operation of the plant site with aboveground storage tanks and the associated piping and loading areas.

(iii) The Duties of the Defendants

[para288] The Plaintiffs claim that Petro Canada owed a duty to the MOE to appropriately research the site to determine the potential contamination. It is suggested that Petro Canada failed in this duty since John Thompson was not familiar with or reviewed the Guidelines and did not obtain an appropriate plan of the site, so as to alert Dr. Panko to the former presence of a UST.

[para289] The same duty is sought to be imposed on Acres and Arcturus, namely to determine the history of USTs on the site. The Plaintiffs submit that this failure is a "material omission" in the site history as it was represented to the MOE and the purchasers.

[para290] I accept that the history obtained by Acres failed to deal with the background of the USTs. What is clear on the evidence is that Petro Canada relied on Acres to do what was required by way of historical examination to fulfill the requirements of the MOE.

[para291] Since Petro Canada had no reason to believe that the information given to Acres was incomplete and no question was raised by Acres, I conclude no additional duty to inquire and disclose lay with Petro Canada.

[para292] I accept that there is a conflict between the evidence of John Thompson and that of Andrew Panko on what site plan was given. I conclude that there was a duty on Acres to obtain the appropriate and relevant details of the site history. To the extent that there was any failure in this regard, it is that of Acres, not Petro Canada who relied on Acres. Nothing flows from such a failure however, since Acres is no longer a party to this action and no relief is sought in respect of Acres.

[para293] The Plaintiffs seek to attribute any omission to obtain a full site history to Arcturus, on the basis that Dr. Panko, who was with Acres in 1998, did not ask or find out what he should have when he was at Acres, and did not find out what he should have when retained at Arcturus.

[para294] As I have noted, the failure, if there is one, of Acres either originally or in responding to the Golder Report, is not something that can be attributed to Arcturus. They were and are separate entities. Dr. Panko was not the supervising manager at Acres. When he was retained in his capacity as a principal at Arcturus, it was with a very limited assignment; no-one testified that the retainer would suggest the need for a re-do of the site history and I conclude there is no breach of duty on his part in failing to do so.

[para295] The retainer was limited to resolving outstanding issues with the MOE. Likewise, given his assignment, there is no duty or indeed breach (absent) fraud on the part of Petro Canada in failing to request a full history at the time of the Arcturus investigation.

[para296] The Plaintiffs submit that the MOE recognized the failure of Acres' investigation when in May of 1989 it received a copy of the Golder material. The mention in the memorandum simply records that Acres' tests were "ineffective" for the volatile range of hydrocarbons and therefore there were "shortcomings" as Mr. Boehm testified. There was no suggestion in the evidence, apart from that of Mr. Crutcher, to suggest that non-testing for volatiles was negligence. Indeed, the MOE confirmed the Arcturus work plan, and this is evidence of the standard it expected to be met.

[para297] I conclude on the evidence of all of the witnesses that in 1989, with no specific guidelines for volatiles, the extent of clean-up depended greatly on intended use. Petro Canada asked Arcturus to do the work necessary for the property to be de-commissioned.

[para298] The Plaintiffs were unlike all the other prospective purchasers, namely Z Realty, Southside Construction, Tim Horton and even London Marine when it purchased; each of them hired their own consultant to provide an opinion on the suitability of the property for any particular purpose. It must be taken to be a conscious decision on the part of the Plaintiffs not to retain their own consultant, since they did not anticipate their own occupation and use but only the re-sale of the property in whole or in part.

[para299] The Plaintiffs now attribute the actions of Azman in not receiving the Golder Report of which he was aware, to a purposeful deception on the part of Petro Canada. I conclude that Azman's decision not to pursue obtaining the Golder Report a support for the statement that he made that it was the MOE letter that he was waiting for and upon which he was going to rely. It was that letter that he required before closing and which provided the inducement to complete the transaction. He chose not to find out what Golder's may have said, even when he knew their report resulted in a further investigation.

[para300] The Plaintiffs urge that there was an obligation on Petro Canada to ensure that the purchaser received Golder Report when that information was within Petro Canada's knowledge.

[para301] I am satisfied that Petro Canada acted reasonably once it received knowledge of the Golder Report, in contacting Acres and obtaining their comments. Even if I accepted the Plaintiff's argument, that Acres' response was incomplete and inaccurate, there is no evidence before me to suggest that Petro Canada was in any way negligent or unreasonable in relying on the Acres response to the Golder Report, which contains in part the following:

"With respect to MOE consultation and other aspects, the site de-commissioning guidelines were followed. Further, Golder's statement that the MOE personnel are "not normally qualified to comment on the technical details of the study", we point out here that the MOE personnel involved in this de-commissioning can draw from a wide variety of MOE-based resource people, to comment for them, and this fact has been the case on many of the de-commissioning projects Acres has undertaken."

[para302] And at page 4:

"As we are not privy to the proposed use of the property, we cannot comment on soil removal beyond that which applies to our terms of reference in performing an environmental audit of this site. This audit was performed according to MOE site de-commissioning guidelines, which have, in our opinion, been complied with."

[para303] Again, if it can be suggested that Acres was in any way in error in its response to the Golder Report, that is not the subject of this lawsuit in a way in which the Plaintiffs can raise as against either Petro Canada or Arcturus. I conclude that any duty on Petro Canada to the Plaintiffs regarding the Golder Report has been met. In the circumstances there was no duty to provide a report which not commissioned for Petro Canada. The fact that Mrs. Colluci said in her evidence that she would have provided any report in her possession, does not raise a duty on Petro Canada beyond what was done.

[para304] Azman knew as of October 11, as a result of the MOE letter, that further work was being done by Arcturus. If he or the Plaintiff's lawyer Johnson, wanted to rely on either that report or indeed the Golder Report, they could easily have insisted that the indemnity be amended to provide for reference to either of these reports had they chosen to do so. I am satisfied on the evidence before me that the only document that was important to the Plaintiffs and was relied on by them was the letter of the MOE dated November 15, 1989. Azman says for the purpose of establishing a duty on Arcturus, that he had the report. If indeed he had it, it was up to him to have it referred to in the indemnity.

[para305] The Plaintiffs submit that Arcturus did not do what was anticipated in its work plan. This proposition was not put to Mr. Boehm and I conclude that Arcturus did complete in a manner satisfactory to the MOE the work anticipated in its work plan as viewed by conditions encountered on site.

[para306] I accept that protection of the environment and adherence to not just the strictures of the legislation but as well the appropriate guidelines of the time, is a requirement of a party such as Petro Canada selling land that was previously used for petroleum purposes. According to all of the witnesses, in 1988 and 1989 the Ontario MOE Guidelines were in a state of flux and non-specific with respect to odours. It is simply not possible to attempt to adjudge the 1989 testing, reporting and recommendations of Arcturus, by the standards of 1999. The testing requirements, methodology and equipment have all changed. More importantly, the Guidelines themselves have substantially changed and become more specific.

[para307] Counsel for the Plaintiffs urges that I should find that Messrs. Rose and Azman were and still are not sophisticated, that they are of limited education and that Mr. Johnson was an elderly solicitor even in 1989 and that they did not have familiarity with the Guidelines.

[para308] The Defendants counter that by all appearances to Petro Canada, Azman was not only an experienced real estate agent who received a commission from Petro Canada on this sale, but had considerable experience with petro-chemical product sites, both service stations and bulk plants. Rose, in addition, was an experienced operator of a service station. As far as Petro Canada knew, Johnson (who to it was not known as a purchaser but only the solicitor) was an experienced, competent, reliable solicitor whom the Plaintiffs looked for advice. Even accepting the characterization of the Plaintiffs as urged by Plaintiffs' counsel, I find nothing in the evidence before me to such that Petro Canada should have suspected vulnerability on the part of the Plaintiffs or that they took any advantage of them.

[para309] In a similar vein, the Plaintiffs submit that they can rely on the suggested lack of expertise of the MOE to support the nature of a duty on Petro Canada to ensure that the Plaintiffs obtain all the "accurate and complete information".

[para310] There is nothing in the evidence before me to suggest that Petro Canada knew or ought to have known of any lack of expertise on the part of the MOE. I agree with the submissions of the Plaintiff that "the MOE statement was for the proponents' own use and did not amount to the MOE accepting liability." In this case, while the MOE did not "accept liability", neither did Petro Canada, as witnessed by the indemnity that it included as part of the sale transaction.

[para311] It was the Plaintiffs who relied on the MOE letter as if it were an acceptance of liability on the part of the MOE, and not Petro Canada, who put it forth as such. There is nothing in the evidence before me that Petro Canada did anything to mislead the MOE.

[para312] Neither is there anything to suggest that Arcturus did anything to mislead the MOE. Accepting the suggestion of the Plaintiffs, that the MOE might defer to Arcturus, does no lead to a conclusion that the MOE staff were not competent to assess the requirements of meeting the Guidelines or that Arcturus misled the MOE. None of the suggestions now made in argument were put to the MOE witness, Mr. Boehm.

(iv) The Claim of Fraud - The Law

[para313] The Plaintiffs' claim against both Petro Canada and Arcturus is in fraud and negligent misrepresentation. In both written and oral submissions, the Defendants complain about the lack of specificity and the changing nature of the supposed perpetrators of the fraud.

[para314] As noted by Winkler J. in *Toronto-Dominion Bank v. Leigh Instruments Ltd.* (1998) 40 B.L.R. (2d) 1 at 130, "Fraud is the most serious civil tort which can be alleged, and must be both strictly pleaded and strictly proved."

[para315] In his judgment at pages 131 and 132 (the reasons of which were approved by the Court of Appeal at (1999) 45 O.R. (3d) 417), Winkler J. set out the principles of fraudulent misrepresentation. In that extensive and careful analysis and the authorities referred to, the requirements of fraudulent misrepresentation may be summarized:

- (a) that there be a representation that is false;
- (b) that it be made knowingly; or
- (c) without belief in its truth; or
- (d) recklessly without caring,

The intention to deceive, or reckless disregard, is critical.

[para316] There is good reason for fraud or fraudulent misrepresentation to be regarded as a serious tort. It is among the most disparaging type of allegations that can be made against an individual or corporation. Since fraud can often have criminal as well as civil repercussions, a court's finding of fraud tends to reflect poorly indeed on the character or reputation of the perpetrator.

[para317] A finding of fraud is serious in its consequences, often carrying additional damages or other extended relief, when compared to liability based on negligence. As a result of significant ramifications for a finding of fraud, the fact-finding process is also required to be taken seriously.

[para318] Not surprisingly, the nature of the fact-finding process where fraud is alleged has received judicial consideration. One starts that with the proposition that notwithstanding that fraud may in circumstances involve criminal conduct, nevertheless when alleged in a civil suit, it will be measured on the civil standard, a balance of probabilities. See *Continental Ins. Co. v. Dalton Cartage Co.* [1982] 1 S.C.R. 164.

[para319] In that case, Laskin C.J.C. went on to say that the trier of fact could consider the cogency of evidence and is entitled to scrutinise the evidence with greater care, if there were serious allegations to be established. As the authors of the "Law of Evidence in Canada" 2nd ed., Sopinka, Letterman, Bryant 1999 at page 158 wrote,

"Thus, the trier of fact will consider the nature of a fact in issue, that is, its physical, religious, moral, ethical, social or legal character, and the consequences of its decision when determining if it is satisfied on a balance of probabilities."

[para320] These principles apply not only to actual fraudulent misrepresentation but as well where, as here, the allegations include misrepresentation by silence. Care must also be taken when scrutinising the evidence where, as in this case, the allegation is made against a corporation. Winkler J. in *Leigh Instruments* (supra at page 130) referred to *B.G. Checo v. B.C. Hydro* (1994) 4 C.C.L.T. (2d) 161 at 223 (aff'd [1993] 1 S.C.R. 12), where the jurisprudence on corporate responsibility in the context of a claim in fraudulent misrepresentation is traced and concluded,

"Where fraudulent misrepresentation is alleged against a corporation, the intention to deceive must still be strictly proved. Further, in order to attach liability to a corporation for fraud, the fraudulent intent must have been held by an individual person who is either a directing mind of the corporation, or who is acting in the course of their employment through the principle of respondeat superior or vicarious liability."

[para321] It is therefore necessary to scrutinise with care the duties and responsibilities of individuals within a corporation when in effect the allegation is that their silence amounted to a fraudulent misrepresentation.

[para322] If a material fact which was true at the time a contract was executed becomes false while the contract remains executory, or if a statement believed to be true at the time it was made is discovered to be false, then the representor has a duty to disclose the change in circumstances. The failure to do so may amount to a fraudulent misrepresentation. See: Parell, "False Statements" [1996] 8 *Advocates Quarterly* 232 at 242.

[para323] In *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Company* (1988) 54 D.L.R. (4th) 43 (B.C.C.A.) (aff'd on other grounds [1991] 3 S.C.R. 3), in referring to *Brownlie v. Campbell* (1880) 5 A.P.P. CAS 925 at 950,

"When a statement or representation has been made in the bona fide belief that it is true, and the party who has made it afterwards comes to find out that it is untrue, and discovers what he should have said, he can no longer honestly keep up that silence on the subject after that has come to his knowledge, thereby allowing the other party to go on, and still more, inducing him to go on, upon a statement which was honestly made at the time at which it was made, but which he has now retracted when he has become aware that it can no longer honestly be preserved in.

[para324] Fraud through "active non-disclosure" was considered by the Court of Appeal for Ontario in *Able v. McDonald* [1964] 2 O.R. 256 (C.A.) in which the Court held at 259:

"by active non-disclosure is meant that the defendants with the knowledge that the damage to the premises had occurred, actively prevented as far as they could, that knowledge from coming to the notice of the appellants."

[para325] What then are the allegations of fraud against Petro Canada and Arcturus? At the opening of this trial, counsel for the Plaintiffs suggested that Petro Canada was responsible for the fraud of Ms. Colluci, who was alleged to have fraudulently failed to disclose in correspondence to the Plaintiffs the existence of the Golder Report and the statements therein. This allegation was in effect abandoned in argument.

[para326] Counsel for the Defendant Petro Canada, in a supplementary written submission, pointed to several changes of position, both in pleading and at trial, with respect to the allegation of fraud.

[para327] Particular reference is made to the allegation in the Plaintiffs' written submissions, that Messrs. Thompson and Charbonneau fraudulently failed to advise Ms. Colluci of the existence of the Golder Report with the result that her belief that the statement that the Plaintiffs had been provided with all relevant information was false.

[para328] I have reviewed the Pleadings, the evidence, plus the written and oral submissions and conclude that the allegations of fraudulent misrepresentation put forward by the Plaintiffs may be summarized as follows:

1. That Petro Canada fraudulently failed to advise the Plaintiffs of the former presence of USTs on the site.
2. That Petro Canada fraudulently withheld from the Plaintiffs prior to their execution of the agreement of purchase and sale, both the Golder Report and the response by Acres to it.
3. That Petro Canada, by permitting Arcturus to proceed with an incomplete clean-up, based on its knowledge of USTs, fraudulently adopted the MOE letter of November 15, 1989, which it knew would be relied on, knowing full well that the statement that the site had been cleaned up and that volatile hydrocarbons had been removed, was false.
4. That Petro Canada, by its silence, implicitly represented that the land would be fit for commercial use without further clean-up, when it knew that statement to be false.

[para329] As against Arcturus, it is alleged that Dr. Panko, knowing of the limitations of the Acres work as reflected in the Golder Report, deceitfully failed to suggest a more complete clean-up. It was further submitted by the Plaintiffs in argument that Petro Canada could be said to have committed fraud, since it disclosed only favourable environmental information, and that Messrs. Charbonneau and Thompson studiously withheld the information concerning the Golder Report and allowed Petro Canada through Mrs. Colluci and Mr. Cancelli, to in effect warrant to the Plaintiffs that they had all of the relevant information, when they did not.

[para330] The Defendants complain, with justification in my view, that the propositions now sought to be advanced were not put to either Mr. Thompson or Mr. Charbonneau in cross-examination. I agree.

[para331] In my view, the proposition put forward by the Plaintiffs is not consistent with any other evidence. The evidence from Petro Canada's witnesses, particularly Mr. Thompson, was that he believed that the Golder Report was fully answered by the response put forward from Acres.

[para332] I have concluded that in light of the information received from Acres, Petro Canada was not under a duty to provide the purchaser with the Golder Report. I do not accept that the duty on Petro Canada was to provide "all environmental information in its possession". The Golder Report was not commissioned by Petro Canada. Petro Canada did not warrant that the purchaser had all relevant information. Petro Canada had a report from Acres that responded to Golder's and it heard nothing from the MOE prior to entering into the agreement of purchase and sale with the Plaintiffs. In the circumstances of the language of the schedule to the offer, and the anticipated indemnity, there was no fraud on the part of Petro Canada in not forwarding the Golder Report. It is important to note that Petro Canada did not purport to say to the Plaintiffs, that Golder's criticisms had been satisfactorily answered.

[para333] None of the propositions now sought to be attached to the conduct of Messrs. Charbonneau or Thompson was put to them directly. As the authors of "The Law of Evidence in Canada", 2nd Ed., Butterworths 1999, Sopinka, Letterman & Bryant, point out at page 954, in referring to what is known as the "Rule in Browne v. Dunne",

If the cross-examiner intends to impeach the credibility of a witness by means of extrinsic evidence, he must give that witness notice of his intention (1893), 6 R. 67 at 70-71 (H.L.)."

[para334] The authors at page 955 state that the Rule applies not only to contradictory evidence, but to closing argument as well. Reference is made again to Browne v. Dunne and the statement of Lord Halsebury at page 76-77:

"To my mind, nothing would be more absolutely unjust, than not to cross-examine witnesses upon evidence that they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to."

[para335] The above statement is apposite to the proposition now put forward as against most of Petro Canada's witnesses. Mrs. Colluci did testify that she would pass on any information given to her by others; but this evidence is not capable of the suggested inference, without foundation, that it was purposely withheld from her in order to deceive the Plaintiffs.

[para336] Counsel for the Plaintiffs have analogised the suggested failure to disclose all relevant environmental information, to the situation where vendors of a house fail to disclose a dangerous latent defect (radioactive soil). Reliance is placed on the case of Sevidal et. al. v. Chopra (1987) 64 O.R. (2d) 169. In that case Oyen J. (as she then was) held on the facts before her that the vendors found out between the time of entering into an agreement of purchase and sale and the closing, that there was contaminated soil on their property and decided not to inform the purchasers. In concluding that the vendors should have disclosed the discovery of radioactive material on their property, Madam Justice Oyen at page 188 referred to the case of Sorenson v. Kay Holdings [1979] 6 W.W.R. 193 (B.C.C.A.) and to the comments of McFarland J.A. at page 208:

"Where, as here, the claim is for damages for fraud, it is my opinion that the court must consider the whole of the dealings between the parties, from [the first meeting] until their contract was carried through to completion".

[para337] The Defendants rely on the case of Tony's Broadloom and Floor Covering Ltd. et.al. v. N.M.C. Canada Inc. (1996) 31 O.R. (3d) 481 (C.A.). In that case, the appellants had purchased property which they knew to have had an industrial use but were unaware of the existence of contaminants and the potential inadequacy of their containment. The vendors were not made aware by the purchasers of the intended change of use from industrial to residential. Dougherty J.A. held that the presence of the contaminant should not be classified as either latent or a patent defect in the property but when on to say at page 488:

"If I am wrong, and the presence of the contaminant was a defect, I agree with the conclusion of White J. (at page 249-252 O.R. pp. 35-37 R.P.R.) that the defect was a patent one. It would have been readily discoverable by the appellants had they exercised reasonable diligence in the circumstances. In deciding whether the appellants exercised reasonable diligence, it must be remembered that the appellants were buying industrial land on which they proposed to build a residential condominium. A reasonable inspection of the property, reasonable enquiries of the respondents and reasonable enquiries of the local and provincial authorities would have put the appellants on notice of the existence of the contaminant. Indeed, had the appellants pursued the taking of soil samples with reasonable diligence after the respondents had permitted them to take those samples, they would have learned of the existence of the contaminant before closing. Instead, the appellants chose not to disclose their intended use of the property and to take no steps to satisfy themselves that their property could be used for that purpose."

[para338] Based on the authorities I am satisfied that the state of the subject lands at the time of their purchase by the Plaintiffs does not represent a defect for which a claim lies in fraud. I adopt what was said by Madam Justice Epstein in 688350 Ontario Ltd. v. Piron [1994] O.J. No. 2844 (Gen.Div.) at paragraphs 132-133:

"A defect is generally understood to mean something that constituted a failing, a shortcoming, fault or imperfection. This is obviously a subjective concept. To adopt a phrase, one person's defect may be another person's ideal. "Obviously to make a determination of whether something is a defect in the quality of land, the intended use of the land must be taken into account."

[para339] Here, the Plaintiffs with knowledge that on closing they would have to give an indemnity to the vendors with respect to claims arising from environmental damage, upon knowing of the Golder Report and the further work done by Arcturus, took no further steps of their own to make any enquiries directly of the MOE, of Petro Canada or to hire their own consultant to confirm the environmental state of the property. Taking into account all of these circumstances and the alleged failures of Petro Canada's employees, I am satisfied that the Plaintiffs' claim in fraud must fail.

[para340] As part of its position regarding fraud, the Plaintiffs rely on the likely presence at some time of USTs on the site, and the failure of Petro-Canada to advise of their presence. Even accepting that revelation of the possible or former existence was a duty, there is absolutely nothing in the evidence to suggest that any such presence caused or contributed to any damage.

(v) Negligent Misrepresentation - The Law

[para341] The law of negligent misrepresentation in Canada was set out by the Supreme Court in the seminal case of *Queen v. Cognos Inc.* [1993] 1 S.C.R. 87. In that case, Iacobucci J., speaking for the court, set out at page 110 the five elements in a claim for negligent misrepresentation:

1. That there must be a "special relationship" between the representor and the representee;
2. The representation in question must be untrue, inaccurate or misleading;
3. The representor must have acted negligently in making said misrepresentation;
4. The representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
5. The reliance must have been detrimental to the representee in the sense that damages resulted.

[para342] Each of these elements must be made out for the plaintiff to be successful in his claim of negligent misrepresentation. The essence of the alleged negligent misrepresentation is that Petro Canada, with actions and deeds and the obtaining of the MOE letter of November 15, 1989, represented to the Plaintiffs that the subject site would be suitable for any use intended by the Plaintiffs and free from volatile petroleum hydrocarbons.

[para343] In urging their case on negligent misrepresentation, counsel for the Plaintiffs studiously avoided any reference to the contractual terms, namely the "entire agreements" clause referred to above, and the indemnity.

[para344] I am satisfied that any consideration of a claim for negligent misrepresentation in this context must take into account the provisions of the agreement of purchase and sale. See *Royal Bank v. Burgoyne* (1996) 152 N.S.R. (2d) 150. The language of the agreement of purchase makes it clear that Petro Canada is making no representations other than contained in the agreement.

(1) There Must Be A Duty Of Care Based On A Special Relationship.

[para345] In *Hercules Managements Ltd. v. Ernst & Young* [1997] 2 S.C.R. 165, Mr. Justice Laforest for the court held that there is not in principle any difference between the criteria used to establish a duty of care in negligent misrepresentation and the criteria applied in any other case. Canadian courts have consistently adopted the test first described in *Anns v. Merton London Borough Council* [1978] A.C. 728 (H.L.), which mandates that where there is a sufficient relationship of proximity between the parties, such that carelessness on the part of one may be likely to cause damage to the other, it will give rise to a prima facie duty of care. Once the court has found that such a duty of care exists, it is then necessary to consider whether there are any other considerations which ought to limit the scope of the duty or the class of persons to whom it is owed. This principle has more recently been confirmed by the Supreme Court in *Ingles v. Tutkaluk Construction Ltd.* [2000] S.C.J. No. 13. In looking at considerations which ought to limit the scope of duty or class of persons to whom it is owed, Mr. Justice LaForest held at page 197 that the court, in a claim of negligent misrepresentation, may look to such factors as "knowledge of the plaintiff (or an identifiable class of plaintiffs) on the part of the defendant" and "use of the statements at issue for the precise purpose or transaction for which they were prepared" in order to determine whether there are any policy considerations which should limit the scope of the duty, such as the potential for indeterminate liability on the part of the defendants.

[para346] I am satisfied that in a situation in which the Plaintiffs rely on an implied negligent misrepresentation in the face of an explicit contractual provision, that in the absence of fraud or other explicit conduct, the contract does provide a consideration which ought to limit the scope of the duty. One could posit a number of factual considerations in the situation of a vendor and purchaser of property and of which requirements of "sufficient relationship of proximity" have been met. Based on the facts as I have found them, I am satisfied that it does not exist here. Mr. Azman who represented the shareholders of the Plaintiff and was himself one, was an experienced real estate agent, who had the means to raise any concern that he had about the application of the contractual terms. He did not. I am unable to read those terms as capable of implying the representation that the Plaintiffs now urge.

(2) The Representation In Question Must Be Untrue, Inaccurate Or Misleading.

[para347] For the purpose of this analysis, I accept that a failure to divulge highly pertinent information may, in some circumstances, amount to negligent misrepresentation, as may silence. See *Cognos*, supra at page 653 and *Spinks v. Canada* (1996) 134 D.L.R. (4th) 223 (Fed.C.A.). On the evidence before me I am satisfied that even if the Plaintiffs had been explicitly told that depending on the use to the property might be put, further remediation might be required, based on the letter of the MOE, they would still have proceeded with the purchase. I therefore conclude that a misrepresentation, even if one could find one, "would probably" not have affected their decision.

(3) The Representor Must Have Acted Negligently In Making The Representation.

[para348] As the authorities referred to above note, considering whether or not a representor exercised reasonable care to ensure that representations were made accurately and not in a misleading fashion, the court must take into consideration all of the circumstances, including the nature of the occasion, the purpose for which the statement was made, the foreseeable use of the statement, and the probable damage that would result from an inaccurate statement.

[para349] Based on the facts before me, I am satisfied that Petro Canada was very careful in its representations. I am satisfied that Petro Canada and Arcturus did exercise reasonable care to ensure that that statement was accurate and not misleading to the best of their knowledge and belief at the time.

(4) The Representee Must Have Relied, In A Reasonable Manner, On The Negligent Misrepresentation.

[para350] As I found above, I am satisfied that the Plaintiffs did not rely on an implicit representation that the site was suitable for any use that they might put the property to. The Plaintiffs could rely on no more and no less than was contained in the letter from the MOE. I am satisfied that neither Mr. Azman nor the other shareholders of the Plaintiffs relied on any representation of Petro Canada that the land was suitable for any use, and I am also satisfied that even if they so thought, that would not be a reasonable conclusion to draw from the actions of Petro Canada. See *Leigh Instruments*, supra page 129.

[para351] The Plaintiffs sought no clarification from either Petro Canada or the MOE or any other consultant concerning what they could or could not take from the words set out in the MOE letter.

[para352] The Gasoline Handling Act, R.S.O. 1990 c. 185. The Plaintiffs suggest negligence on the part of Petro Canada, an alleged breach of the provisions of the Gasoline Handling Act. It is suggested that sections 18 and 24 of Regulation 439 passed pursuant to section 18 of this Act requires that the owner of an underground tank which will not again be used must, after removal of the tank, also remove soil and product around and under the tank if the same is contaminated, and that where property with storage tanks is sold, the owner shall inform the purchaser of the existence of the tank or tanks and shall assure him that all contamination has been removed.

[para353] Section 18 of Regulation 439 reads as follows:

"When it is known that an underground tank will not again be used, or where an underground tank has been out of use for five (5) years, whichever comes first, the owner of the tank shall

(a) remove any product (b) remove the tank (c) if the soil around the tank is contaminated with product, remove such contaminated soil and product."

[para354] I am satisfied that that section imposes a duty on an owner or other party who removes an underground tank to ensure that the requirements are met. There is no obligation on a succeeding vendor to advise a subsequent purchaser that "all contamination has been removed" after removal of underground storage tanks.

[para355] The tanks in question were removed by Gulf Oil Limited and not Petro Canada. There is nothing before me that suggests that if there were contamination as found at the time of removal, that there was any contamination left on the property.

[para356] Section 24 of Regulation 439 provides:

"Where a property having gasoline or associated products storage tanks is sold or leased, the owner of the property shall inform the purchaser or lessee of the existence of the tank or tanks and provide proof to the purchaser or lessee that the tank or tanks comply with the provisions of subsections 18()".

[para357] I read subsection 24 as referring only to the sale of a property that has tanks on it, not to the sale of a property where there were previously underground or aboveground storage tanks. I am not satisfied that the Plaintiffs can rely on Section 24 of the Regulations as establishing a duty on the part of Petro Canada to advise of the former removal of USTs.

[para358] Even there were a breach of the regulations, that only is insufficient to give rise to liability. In *McGeek Enterprises Ltd. v. Shell Canada Ltd.* (1991) 6 O.R. (3d) 216 (Gen.Div.), an action was brought against the former owner of a service station site for the costs incurred by the purchaser for expert services and other damages based on a breach of the regulations under the Gasoline Handling Act, requiring the contaminated soil around the tanks be removed when the tanks were removed.

[para359] The headnote sets in capsule form the reasoning of Mr. Justice Haines:

"The defendant is in breach of the regulations, but that alone was not enough to give rise to liability. The conduct of the defendant had to be considered in determining whether or not there was negligence. In doing so, reference could be had to the regulations to see whether they contained an appropriate or useful standard of reasonable care. The defendant removed the tanks in accordance with accepted procedures and did all that could be reasonably expected of it to ensure that the site posed no identifiable risk to subsequent users of the property. In the circumstances, it would be wrong to accept the apparent standard established by the regulations as the standard against which the defendant's conduct was to be measured in establishing civil liability. That standard was too onerous. The defendant's conduct did not fall short of the appropriate standard of reasonable conduct established by the evidence."

[para360] This reasoning is all the more appropriate when considering the situation of Petro Canada as the owner subsequent to the removal of the tanks. I am therefore satisfied that there was no negligence on the part of Petro Canada, either in its representation or any misrepresentation to the Plaintiffs, or in breach of any duty imposed under the Gasoline Handling Act.

[para361] A claim for fundamental breach of contract was also advanced. I have not dealt with at length because the factual assertions underlying that claim, being breach of representation, are themselves rejected.

(vi) The Experts on Standard of Care & Damages

[para362] I accept the submission of the Plaintiffs that "it is entirely appropriate for environmental consultants to refer to the legal provisions that apply to their work, without being deemed to be usurping the role of the court." The interpretation of the regulation that is used as an assumption by an expert affects the weight that attaches to the expert's opinion.

[para363] Even if I accepted the premise of Mr. Crutcher's opinion, that elimination of total odour was required under the 1987 guidelines, I would still conclude that his evidence tended to exaggerate the nature of the contamination on the subject site.

[para364] I accept the underlying premise of his evidence, that protection and preservation of human health is the goal of environmental regulation. However, as of November 15, 1989, that goal was very much subjective, rather than the much more objective criteria as are in place currently. Much of the subjective evaluation was under the supervision of the MOE in 1989 and I conclude that they were in fact satisfied with the extent of clean-up.

[para365] There are two aspects to the evidence of the environmental experts: first, dealing with the issue of liability and second, dealing with the issue of damages.

[para366] Much of the focus of the criticism of the evidence from Mr. Crutcher and indeed Mr. Ducharme focused on what was or was not done by Acres. Since neither Acres nor the MOE remained parties at this trial, there is simply no basis on which this Court could conclude that what Acres did nor did not do failed to meet the Guidelines in place in 1988, or that the MOE erred in

providing the letter of November 15, 1989 indicating that the areas identified as being contaminated had been successfully cleaned up in accordance with the Guidelines.

[para367] It was not suggested to Mr. Boehm of the MOE when he testified that there was anything inappropriate or improper with his letter or that he was in any way misled or misinformed with respect to the information on which it was based.

[para368] The Plaintiffs claim at this trial is against Petro Canada and Arcturus. As against Arcturus the opinion of Mr. Crutcher is that Arcturus failed to remove sufficient soil so as to eliminate odours, a requirement under the 1989 Guidelines.

[para369] I prefer the evidence of Messrs. Woeller and Phimister on this issue. Even assuming that Arcturus was under a duty that in the circumstances could be relied on by the Plaintiffs, I conclude that duty has been met.

[para370] Dr. Panko, even though he had been at Arcturus, was entitled to rely on the work done by Acres (of which he was a part), as being appropriate. The assignment of Arcturus was limited, namely to devise a work plan that would provide that degree of remediation which would satisfy the MOE. Arcturus did precisely that.

[para371] The reason for the preference of the opinions of Woeller and Phimister that Arcturus met an appropriate standard of care is based on the context of their opinions. I accept their views, which were in accord with Mr. Boehm of the MOE, that in November of 1989, the only precise criteria in the Guidelines related to oil and grease 1%. The Guidelines did not specifically deal with the lighter hydrocarbon ends (BTEXs). While the Guidelines did allow for reference to criteria from other jurisdictions, this was not mandatory. In 1989 the MOE was the entity that had to be satisfied with any decommissioning or clean-up.

[para372] This was done and I accept that Arcturus met the appropriate standard at that time.

[para373] The second aspect of the experts' evidence dealt with the issue of clean-up costs. There were a variety of estimates based on each consultant's view of the extent of contamination on the site to be cleaned up in accordance with the 1998 Guidelines.

[para374] Mr. Taves made a rough estimate in 1990 for Trow Dames & Moore on behalf of Southside based on removing one metre of soil from the entire site, at a cost of \$418,000 plus a 20% contingency. When his estimate was prepared he was unaware of the Arcturus work and removal of 157 tons of soil.

[para375] The CRA report of Anthony Crutcher for the Plaintiffs was based on the removal of some 22,257 tonnes of soil over an area of 10,011 m³ for a cost of \$1,535,736 including a 20% contingency allowance. Mr. Crutcher's estimate was based on his interpretation of the 1989 Guidelines that in effect odour from hydrocarbons was to be eliminated.

[para376] On behalf of Petro Canada Mr. Woeller of WESA estimated an excavation and stockpiling of 21,280 tonnes of soil from 11,200 m³ and a removal of impacted soils of some 13,870 tonnes. His estimate of a cost of \$857,590 was based on employing the same methodology as Mr. Crutcher to what he believed would be necessary to comply with 1998 Guidelines. His estimate included a 20% contingency cost.

[para377] Mr. Woeller's preferred opinion noted that with further definition and premedial investigation, this sum could be further reduced. His opinion provided an alternative estimate based on one of several alternative approaches to remediation. The one he focused on is called the risk-based corrective action (RBCA) approach, which removes from the site only those soils with high concentration of contamination. This approach in his view would cost approximately \$350,000.

[para378] The final estimate was that of Mr. Phimister for Arcturus. His opinion was based on remediation to the more objective criteria of the 1998 Guidelines. In addition, he would utilize an incremental approach only remediating as necessary based on on-site conditions. His methodology is called bio-remediation and employs microbes to stockpiled soils from affected areas which are then replaced when the hydrocarbons have been effectively broken down and evaporated. The cost of his proposal is estimated at \$88,000.

XIII DAMAGES

(i) The Plaintiff's Claim

[para379] In the event that another court should disagree with my factual conclusions or the law applicable to them, it is appropriate that I consider the damages to which the Plaintiffs might be otherwise entitled. For the purposes of this analysis I will make the assumption that the Defendants warranted to the Plaintiffs expressly or implicitly falsely that the land was suitable for any use to which the Plaintiffs intended.

[para380] The assessment of damages alleging fraudulent or negligent misrepresentation relating to the sale of land gives rise to a variety of possibilities. The Plaintiffs submit that in an action based on deceit, the measure of damages may be contractual, if fraud deprived the Plaintiff of an actual right. Damages from the deceit may be the same as the consequences of a breach of the obligation from which the rights and interests of the Plaintiffs arose, and may be determined on rules applicable to contractual defaults. For the purpose of this analysis, I accept that proposition. As noted in *The Law of Damages*, Looseleaf Ed., S.M. Waddams at page 5-20, paragraph 5.470:

"If, however, the plaintiff is deprived by the fraud of a contractual right, the plaintiff will recover the value of that right, for in that case the plaintiff would have enjoyed that value if the wrong had not been done."

[para381] It is urged that the Plaintiffs were induced to purchase the property and to grant the indemnity by the representation of Petro Canada, that the property could be re-developed for industrial or commercial purposes without hindrance arising from contamination. It is supposed that the representation as to the property's environmental condition was deceitful and formed a term of the contract. In accepting that characterization for the purpose of damage analysis, it is subject to qualification noted in *Waddams*, supra, at page 5-18, paragraph 5.430:

"But it is important to note that the test for determining when statements made to induce contracts are themselves contractual, is a very elusive one -- so elusive indeed that some commentators have concluded that there is no practical distinction at all."

[para382] I accept the submission that the case law indicates there is no consistent rule for the date of assessment of damages, and that each case is decided on its own facts, based on a fairness test. As well, I will accept for the purposes of this analysis the measure of damages submitted by the Plaintiffs being what would put the Plaintiffs into the position in which they would have been if the representation had been true.

[para383] The Plaintiffs submit in the alternative that if alleged deceit was tortious rather than a breach of contract, then at a minimum the Plaintiffs are entitled to be put into the position they would have been if the representation had not been made to them and urge that the measure of the damages in a negligence action involving the sale of land is the difference between the price paid and the actual value of the property purchased.

[para384] The following is a summary of the Plaintiffs' claim for damages for fraudulent or negligent misrepresentation against Petro Canada and Arcturus.

a) General Damages

[para385] The Plaintiffs submit that the value of the land equals the value after cleanup costs of \$1,535,736 to a 1989 standard to render it commercially usable (the land being worth \$880,000 being the purchase price). Since that would produce a negative value, the Plaintiffs claim the cost of cleanup at \$1,535,736.

b) Consequential Loss

[para386] The Plaintiffs add out-of-pocket expenses associated with Southside litigation of \$33,136, municipal taxes of \$211,715, and a loss on return of investment being compensation in lieu of return of capital for a total of \$752,000. The total sum is \$2,533,092, some \$200,000 less if one excludes a capital gain attribution from the sale of Southside. Alternatively the cost of remediation is sought to be recovered on the basis of breach of the Gasoline Handling Act.

(ii) The Value of the Land

a) The Real Estate Experts

[para387] Three individuals testified. Rosevear for the Plaintiffs, Atlin for the defendant Petro Canada and Edgerton for Arcturus. They were each accepted as qualified real estate appraisers for the purpose of valuation of the subject property.

[para388] The experts valued as of approximately the same time period. Rosevear as of November 30, 1999, Atlin as of December 29, 1999 and Edgerton as of May 14, 1999. There is no suggestion that the time would significantly affect the value of any of their opinions.

[para389] The experts valued using the comparable lands approach, accepting the common definitions of valuation and of market value. While Mr. Rosevear felt that the appraisal industry tended to confuse the terms "exposure" and "market time", Mr. Atlin felt these were distinct terms. I conclude that this issue does not affect any of the opinions.

[para390] The experts gave their opinions on the assumption that a sale would be free of any possible problems associated with environmental contamination. While there was some dispute as to whether a reduction for cleanup costs would be on a dollar-for-dollar basis, there was agreement that such costs would approach the dollar-for-dollar reduction. The site that was the subject of all three opinions did not include the London Marine property previously sold by the Plaintiffs in 1992.

[para391] The major difference between the experts was on the highest and best use of the property. Mr. Rosevear in his evidence restricted his opinion on valuation to what he was asked to do by his client (the Plaintiffs). While he stated that he was asked to estimate the current market value of the "commercial development" of the property, it appears that he looked mainly at the light industrial rather than commercial use, and considered the site as a whole, rather than the various parcels that resulted from a successful rezoning application by the Plaintiffs.

[para392] There can be little doubt that Rosevear's comparables are of the light industrial kind rather than the several parcels which would have included a Tim Horton's site, if the offer made by that company had been completed. The other two experts felt that a commercial use within the current zoning was the highest and best use of the property.

[para393] The major difference between the three experts was in the particular comparables chosen. Mr. Rosevear chose 8 sites for sales and 4 with listings, within a radius of the subject site of up to 3 miles. The radius chosen by Messrs Atlin and Edgerton was more or less the same. Atlin used 5 comparables and Edgerton 10, including two listings.

[para394] Rosevear's comparables, as noted, were all zoned for industrial use, the parcels ranging in size from 2.15 acres to 17 acres. He considered the site for use as one parcel.

[para395] Mr. Atlin's comparables were all zoned for commercial use. The size of each of the sites was expressed in square feet. While it is difficult to directly compare to the acreage in the Rosevear report, they are for the main substantially less in size than at least half of the Rosevear sites chosen.

[para396] While Mr. Atlin considered that the site had considerable flexibility, in that it might be sold in the four parcels into which it is currently sub-divided, or a small number of sites or even as one unit, for this reason he believed that a commercial use which is the current zoning, would be the highest and best use.

[para397] Mr. Edgerton looked at the property essentially as a whole, but usable by more than one tenant. There would appear to be little difference in the approaches of Messrs. Atlin and Edgerton. It should be noted that Edgerton did an appraisal for Petro Canada of the subject site in 1998 and the value placed at that time for the entire property, including the London Marine portion, was \$800,000, slightly less than the sale price to the Plaintiffs.

[para398] Of the comparables chosen by Edgerton, 4 of these were on Atlin's list. The major issue taken by the Plaintiffs with the opinions of Edgerton and Atlin, was the location in the area of the city of the comparables. The suggestion was that the location of the subject property was less desirable. The other issues related to the appropriateness of the comparables.

[para399] Atlin valued the 7.85 acre subject site at \$1.95 million, or a value of \$5.25 per square foot. Edgerton's valuation was at \$1.7 million, on the basis of \$215,000 per acre, or \$4.95 per square foot.

[para400] I am satisfied that the appraisal opinion of Mr. Rosevear reasonably sets the floor for the value of the subject property, if it were to be marketed as a single parcel for light industrial use.

[para401] It is significant, in my view, that the witness Rosevear paid little attention to the report of a colleague Lambert done in 1991 for London Marine, of which he was aware, that noted that the property had been re-zoned into 4 parcels, and at that time placed a value of \$1,050,000 for the entire site.

[para402] I have considered the evidence of all three witnesses. Taking into consideration what in my view is the highest and best use, accepting Messrs. Atlin and Edgerton of the commercial use within current zoning, their opinions are more likely to reflect current value than is that of Mr. Rosevear.

b) Conclusion on Land Value

[para403] Accepting that the opinions of Messrs. Atlin and Edgerton based on the comparables chosen may reflect the higher end of the range, given the neighbourhood chosen, I conclude that \$1.6 million is a fair figure to take into account for the purpose of establishing a base for damages.

[para404] The suggestion that the value of this property should take into account the stigma associated with its contamination is rejected. I accept the evidence that, assuming cleanup to the satisfaction of the MOE, there would likely not be any stigma.

(iii) The Cost of Remediation

a) The Plaintiffs' Expert

[para405] I have elsewhere dealt with the basis upon which Mr. Crutcher, the Plaintiffs' expert, opined that in his view for the amount of contaminated soil the cost of remediation would be \$1,535,736.

b) The Defendants' Expert

[para406] As referred to above, Mr. Woeller, on behalf of Petro Canada, employing the same methodology and area as that of Mr. Crutcher, including 20% contingency, gave an estimate of a cost of \$857,590, and on an alternative risk-based basis, would remove from the site only soils with high concentration of contamination. He estimated a cost of \$385,000. Mr. Phimister, for Arcturus, gave an estimate of \$88,000 based on bio-remediation methodology.

c) Conclusion on Clean-up Cost

[para407] Based on the evidence before me, I am satisfied that an allowance of \$400,000 for clean-up costs to be more than reasonable in the circumstances. I do so for the following reasons:

1. I reject the interpretation given by Mr. Crutcher of the 1988 Guidelines necessitating clean-up to the level of removal of all odours.
2. I reject the inference drawn by Messrs. Crutcher and Ducharme that evidence of sheen is necessarily evidence of free product.
3. I accept that much of the information on which the opinion of Mr. Crutcher is based is now more than 10 years old, and as Mr. Woeller testified, natural bio-degradation processes may have substantially reduced contaminants in that timeframe.
4. The program outlined by Mr. Crutcher would most likely result in a clean-up which would render the property suitable for residential use, and this would exceed the commercial / industrial standards and is not appropriate as Mr. Woeller testified in this case for this site, given its past use.
5. I am satisfied that a reasonable expert would use an incremental approach. Therefore an allowance of \$400,000 would strike a balance between the least possible and trying to reach an unreasonable standard.

[para408] It is difficult to accept the Plaintiffs' claim for consequential loss, since it seeks to apply a pre-judgment interest rate of 7.49% on capital from the time of the closing, making allowance for the rent received from London Marine, for a total of \$578,542.

[para409] The consequential loss claim of the Plaintiffs is deficient in at least three respects. One, it ignores totally the fact that the land has increased in value as I have found. Two, the calculation for return of capital does not take into account the mortgages, the details of which are not before me. Three, the capital calculation is not a consequential loss.

(iv) Mitigation

[para410] For the Defendants it is submitted that even if one accepts the Plaintiffs' submissions, the evidence remains that there was no loss. At the time of transfer there was an outstanding offer from Southside which, if one nets from the \$1,250,000 purchase price the \$250,000 later offered as a reduction by Southside, would still have yielded a profit. The Plaintiffs did not suffer any demonstrable loss. In the Defendants' submission the loss was that caused by the Plaintiffs' "unwise investment decision" to hold the property for anticipated higher sales prices, a risk they decided to run. For this reason the value of the property at a later date (i.e., current) is relevant for consideration, taking into account the obligation on the part of the Plaintiff to mitigate. Reference is made to "Waddams", supra paragraphs 5.52, 5.54 and 5.56.

[para411] I am satisfied that taken at its highest, in the above findings, \$250,000 being the difference between the Southside agreement and offer figure at which the transaction could be completed is the best measure of what the Plaintiffs could have achieved out of this process at the time. I come to that conclusion since, had the Plaintiffs accepted the Southside offer, they would have incurred no consequential loss. The decisions on the part of the Plaintiffs not to engage a consultant, not to do a study

for themselves to determine at that stage what would be the cost of remediation, not to remediate, and not to pursue any claim on a prompt basis, all support the arguments of the Defendants that the Plaintiffs have not properly mitigated.

XIV CONCLUSIONS

[para412] Even without taking into account the failure to mitigate, the Plaintiffs have not demonstrated a real loss. The land is now worth approximately \$1,600,000. The cost of clean-up is approximately \$400,000. The difference leaves a significant increase over the original purchase price of \$800,000 without taking into account the sale price of \$260,000 received from London Marine for its parcel.

[para413] I conclude that in any event the Plaintiffs have not established damages to which they would be entitled in the event of a finding of liability in their favour.

[para414] The claims of the Plaintiffs for damages for fraud, fraudulent misrepresentation and negligent misrepresentation are dismissed for the reasons given above. In these reasons I have made no distinction as between 590 and 628, as they are essentially the same parties. For the sake of completeness, I would conclude that I see no basis for a claim on behalf of 628. Accordingly, if necessary, its claims are also dismissed.

[para415] Counsel may make an appointment to speak to the issue of costs.

C. CAMPBELL J.

CBR# 842

O'Brien v. McNabb

Between John O'Brien, Constance O'Brien, Tony Petty and Barbara Petty, plaintiffs, and Donald Dennis McNabb, Bank of Nova Scotia, and Stanley Michael Malouf, defendants

O.J. No. 813 No. 99-0710

Ontario Superior Court of Justice Thunder Bay, Ontario Kozak J. Heard: February 2, 2000. Judgment: February 28, 2000. (49 paras.)

Counsel: John G. Illingworth, for the plaintiffs. Richard Forget, for Donald Dennis McNabb.

[para1] KOZAK J.:-- This is a motion brought on behalf of the defendant, Donald McNabb, for the determination before trial, of a question of law as follows:

Do the Agreements of Purchase and Sale, as entered into between the plaintiffs and Donald McNabb, dated October 23, 1985 and December 5, 1986, create a valid equitable interest in the land, or do the agreements violate Section 50 of the Planning Act with the result that they are null and void as to any interest in the land, other than as a long term tenancy?

[para2] The motion has been brought pursuant to Rule 20.04(4) as opposed to Rule 21.01. Affidavit materials have been filed and partial summary judgment is being sought with respect to the above question of law on the grounds that this matter represents the only real genuine issue for trial, and that the determination of this issue will result in a substantial saving of costs.

IMATERIAL FACTS

[para3] In 1982 Donald McNabb purchased Parcel 16578 TBF from Irma Olga Morton.

[para4] In and around 1985 McNabb entered into agreements to sell a portion of his parcel as shown on a draft plan of subdivision to the Brydges/Walker parties. The Brydges/Walker parties assigned the agreements to the O'Brien/Petty parties. The consent of Donald McNabb was not required to assign the agreements.

[para5] On October 23, 1985, McNabb and his wife, as vendors, entered into an Agreement of Purchase and Sale with William Scott and Carolyn Walker, as purchasers, for the whole of Lot 11 on a draft plan of subdivision dated May 15, 1985. The agreement was subject to subdivision approval and called for a purchase price of \$13,500.00 with a deposit of \$3,500.00 which was to be held in trust by McNabb's solicitor pending closing. There was no fixed date for the closing of the transaction, but rather, the closing date was established as being 60 days after the date the vendor notified the purchaser that he had obtained subdivision approval.

[para6] On or about May 29, 1986, the O'Briens entered into an Assignment agreement from William Scott and Carolyn Walker. The Agreement of Purchase and Sale, as assigned to the O'Briens, provided that the agreement was to be effective only if the provisions of Section 49 of the Planning Act are complied with.

[para7] The Scott/Walker agreement was captioned as follows:

Offer to Purchase And Rental Agreement Agreement of Purchase and Sale

It contained the following terms and conditions as agreed to by the parties:

(i) the vendor shall pursue, with due diligence, a subdivision application to the Ontario Ministry of Housing or other governmental agency or department for subdivision of the subject lands and is to pay all fees or costs in connection therewith; and in the event the purchaser is of the opinion that such application is not being proceeded with in a timely fashion (in excess of three years), the vendor shall provide the purchaser with a Power of Attorney or such other documents as may be required, to allow or permit the purchaser to make or pursue such application on his own; provided however, the vendor shall indemnify the purchaser for any and all costs or fees incurred in connection therewith and the purchaser shall be entitled to deduct such cost of (sic) fees from any monies owing to the vendor.

(ii) the vendor shall assist the purchaser in acquiring, from the Province of Ontario, the lake front shoreline reserve adjacent to the subject lands, and in the event the vendor acquires the said shoreline reserve, the vendor shall forthwith transfer or convey to the purchaser, at the vendor's costs (purchase price), all of the vendor's right, title, and interest in the said shoreline reserve.

(iii) in the event the subdivision as hereinbefore referred to, is for any reason not forthcoming (and without limiting the generality of the foregoing, any inactivity on the part of the purchaser may be construed so as to be included in the phrase "for any reason") the purchaser shall rent the subject lands and premises for a term of twenty years, calculated from the date hereof, and the monies paid by way of deposit by the purchaser to the vendor, shall be deemed to be prepaid rent for the entire term and, all terms and conditions herein contained pertaining to use, occupation and enjoyment of the subject lands and premises shall form the rental agreement between the parties, provided that the Short Form of Leases Act, R.S.O. 1980 Chapter 473, as amended, shall apply;

(iv) the vendor shall allow, without any charge or fee whatsoever, the purchaser uninterrupted utilization of the existing road or any other road access to the subject lands and premises and, when subdivision approval is obtained, shall provide a water connection to the purchaser's lot line;

(v) the vendor shall indemnify the purchaser for any and all costs or fees of every nature and kind incurred by the purchaser in connection with any litigation arising from this agreement and/or the purchaser's rights and obligations created thereby whether the vendor is party to such litigation or not;

(vi) the closing date of the within transaction shall be within 60 days of the date the vendor notifies the purchaser, in writing, that he has obtained subdivision approval, at which time the balance of the purchase monies shall be paid; it is acknowledged by the parties hereto that if the within transaction does not result in a conveyance of the fee simple of the subject lands, the balance of

the purchase price will not be paid and the deposit monies paid shall be deemed to be full payment of rent for the twenty year term aforesaid;

(vii) all terms and conditions of the within agreement pertaining to the use and occupation of the subject lands and premises shall, at the option of the purchaser, survive the closing of the within transaction;

(viii) every covenant, proviso and agreement herein shall ensure to the benefit of and be binding upon the parties hereto and their heirs, executors, administrators, successors and assigns and that when the context so requires or permits, the singular number shall be read as if the plural were expressed and the masculine gender as if the feminine or neuter as the case may be were expressed;

(x) the purchaser shall have the right to assign this agreement without the consent of the vendor.

[para8] On or about December 5, 1986, McNabb and his wife entered into an Agreement of Purchase and Sale with Douglas Brydges and Darcia Brydges as purchasers of Lot 10, as shown on the draft plan of subdivision dated May 15, 1985. The herein agreement contains essentially the same terms and conditions as the Scott/Walker agreement that was assigned to the O'Briens, except for the following:

(1) improvements hereinbefore made to the aforesaid lands have been made or will be made at the sole discretion and expense of the purchasers and the cost thereof shall not be recoverable by the purchasers from the vendor should this transaction not close, and

(2) the indemnity clause contained in paragraph (v) of the Walker agreement was not included in the Brydges' agreement.

[para9] On or about June 9, 1989, the Pettys took an assignment of the Agreement of Purchase and Sale from the Brydges.

[para10] McNabb proceeded in a timely fashion and with due diligence to obtain subdivision approval over several years, but was unable to obtain subdivision approval.

[para11] In paragraph 7 of his affidavit, sworn August 5, 1999, McNabb states that:

I allowed the renters to occupy my land pursuant to the understanding that they were in fact renters pursuant to the provisions of the 1985/86 Agreements of Purchase and Sale that provided that they would become renters in the event that a plan of subdivision was not approved or forthcoming (paragraph iii). The renters conducted themselves as if they were precisely merely renters and never proceeded with any actions which could be interpreted as if they were acting as owners of my land or purchasers that were anticipating the closing to take place shortly. Firstly, they failed to pay the balance price of their lots, despite my requests for additional monies to be deposited or placed in trust somewhere. Secondly, they failed to pay their portion of the property taxes and education taxes, despite my requests for compensation. I had to pay for such taxes even though I did not occupy the renter's land lots. The renters provided the reason that they did not have to pay taxes since they were merely tenants and not owners or even potential owners. Thirdly, the renters never tried themselves to pay for any application fee or make any application to the planning authorities for severance, even if they had such rights under clause (i) of the agreement. Rather, they accepted after several years that they were not the owners of the lands, but just renters since the potential for obtaining a subdivision agreement looked too remote. Fourthly, when I had the properties re-surveyed for a new subdivision application, the boundaries had to be altered and no renter objected that the 1999 boundaries were different than the 1985 boundaries. No renter objected that surveyors were present on their alleged lands when new monuments (posts) were erected in front of everyone. Fifthly, I declared and stated publicly at meetings and to the Town of Geraldton that I was the owner of all the lands and no one objected to this. Sixthly, no one took legal action of any form to assert themselves as owners of the land until just recently.

[para12] McNabb's evidence is that after 14 years of paying the renter's taxes on the land, he retained the services of a new solicitor and applied for a new plan of subdivision and was successful in having a new plan of subdivision approved by the Town of Geraldton in May of 1999, and was able to register the subdivision agreement and plan of subdivision in October 1999. McNabb points out that the 1999 plan of subdivision is different than the 1985 draft plan of subdivision and, in paragraphs 9 and 12 of his affidavit, he points out the various factors that distinguished the two plans and the additional costs involved, which were financed through a \$250,000.00 mortgage loan from the Bank of Nova Scotia.

[para13] In an affidavit sworn November 9, 1999, the plaintiff, John O'Brien, states that in the spring of 1987 he was aware that the plan of subdivision was still in progress and that the Town of Geraldton made its first attempt at this time to annex the outlying township where the lands in question were located. O'Brien says that he was part of a group that was formed to stop the annexation.

[para14] O'Brien states that in January 1989, he learned from the Town of Geraldton that McNabb's application for subdivision approval had lapsed and that upon contacting McNabb, was informed that a new application had been made and that he was awaiting the outcome. At the time McNabb was negotiating with Lac Minerals to acquire road access to the property over the Hardrock Road, which Lac Minerals were not prepared to dedicate.

[para15] On April 6, 1992, McNabb wrote to Lac Minerals in which he requested Lac Minerals to dedicate the existing road and right of way, known as Hardrock Road, pursuant to his application for subdivision status so that residents can receive their property deeds.

[para16] In 1993, when the Town of Geraldton again sought annexation of their Townships, the then solicitor for McNabb sent a questionnaire to the O'Briens asking what benefits they thought annexation would bring. O'Brien answered "Town assistance on selling subdivision agreement and getting deed to property."

[para17] In March of 1994, it was publicly announced that the Ontario Municipal Board had approved Geraldton's claim for annexation of Ashmore Township, where the land in question is located. Again on March 29, 1994, McNabb wrote to Lac Minerals requesting dedication of the Hardrock Road for the purpose of subdivision approval in order for the home owners to acquire their property deeds. O'Brien expresses the view that this letter clearly demonstrates that McNabb was proceeding in a diligent and timely fashion with his plans for subdivision and that in so doing, he continued to recognize the rights of the various home owners to ultimately get deeds for their lands.

[para18] After annexation, O'Brien states that he did not pay the municipal tax bills on the grounds that he was not the owner of the land, even though the municipal tax bills were being forwarded to him.

[para19] Following the approval of the subdivision in May of 1999, O'Brien states that he contacted McNabb in June of 1999 and was informed that his Agreement of Purchase and Sale was null and void and that he would not be receiving a deed to the land. As a result, O'Brien contacted his solicitor and caused a caution to be registered under Section 71 of the Land Titles Act on July 7, 1999.

[para20] On October 6, 1999, counsel for McNabb informed the O'Briens that their Agreement of Purchase and Sale had expired due to the Limitations Act and that the property described in the Agreement of Purchase and Sale was being offered for sale to the public for \$44,000.00, so that he could recover his expenses.

[para21] The affidavit of Tony Petty sworn November 5, 1999, is for the most part similar in content to the affidavit of John O'Brien and expresses the belief that notwithstanding the time period involved, that McNabb was proceeding in a diligent and timely fashion with his plans for subdivision approval and, that the road issue was the major stumbling block. Reference is made to an application for subdivision approval dated January 8, 1997, in which McNabb wrote to the Ministry of Municipal Affairs stating:

By and large, this is not a development proposal, rather it is a process to allow existing home owners to obtain deeds to property on which the homes have existed for 40 years.

It must be noted, however, that the document referred to was a 10 page Application for Approval of a plan of subdivision or Condominium Description under Section 51 of the Planning Act and contains information and details that reflect that it is predominantly a development proposal.

II POSITION OF THE PARTIES

[para22] Counsel for Donald McNabb argues that the Agreements of Purchase and Sale, as between himself and the plaintiffs, contained a true condition precedent (i.e. subdivision approval) before any estate in the land can vest in the purchasers, otherwise the agreement would be in contravention of Section 50 of the Planning Act, which governs land use. In this case, it is submitted that when approval of the initial draft plan of subdivision was not obtained within a reasonable period of time as specified in the agreements, that the agreements became null and void insofar as creating any fee interest in the lands in favour of the plaintiffs. Instead, it is argued that the agreements converted the potential purchasers into long term (20 year) tenants.

[para23] Counsel for the plaintiffs takes the position that the plaintiffs obtained an immediate equitable interest in the lands, subject to obtaining legal title on the performance of the contractual conditions, namely the obtaining of subdivision approval. In this case, the plaintiffs considered the efforts of McNabb to obtain subdivision approval to be ongoing from 1985 to 1999 when subdivision approval was ultimately obtained. Accordingly, they take the position that the conditional rights that were agreed upon in 1985-86 with respect to the purchase of the lands are enforceable today, notwithstanding the time period involved and the changed circumstances. In this regard, the plaintiffs place considerable reliance on correspondence from the defendant McNabb in which reference is made to existing home owners acquiring deeds.

III LEGAL CONSIDERATIONS

[para24] Section 50 of the Planning Act, R.S.O. 1990 c. P.13 imposes a scheme of subdivision control and provides that no title shall pass if property is sold contrary to the section. An Agreement of Purchase and Sale made in contravention of Section 50, does not create or convey any interest in land, however, Section 50 of the Planning Act does not affect an agreement made subject to the express condition that such agreement comply with the provisions of the Planning Act. In other words, Offers to Purchase that are entered into in contravention of the Act are null and void and therefore unenforceable, unless they are conditional upon obtaining severance approval.

[para25] A condition precedent in an Agreement of Purchase and Sale, for the sale of land, is a condition that must happen or be performed before an estate in land can vest or be enlarged or before a contract is performed. It remains for the Court to determine whether the condition is a true condition precedent.

[para26] In the case of *Turney et al v. Zhilka* (1959) 18 D.L.R. (2d) 447, S.C.C., the principle was set out as follows:

A contract of sale of land was made subject to a proviso that the property can be annexed to the village of Streetsville and a plan is approved by the village council for subdivision, and the date for completion was fixed at 60 days after plans are approved. Neither party undertook to fulfill this condition and neither reserved any power of waiver. Held: The condition was an external one, a true condition precedent upon which the existence of the obligation depended, and until it occurred, neither party had the right to performance. The parties had not promised that it would occur, and until it did, there could be no breach of contract. This was not a case where a party could waive or forego a promised advantage or dispense with part of the promised performance of the other party which was solely for the benefit of the first and was severable from the rest of the contract.

[para27] In *George Wimpey Canada Ltd. v. Focal Properties Ltd.* (1977) 78 D.L.R. (3d) 129, the Supreme Court of Canada held that the failure of the condition precedent resulted in the agreement, by its own terms, coming to an end. The headnote sets out the principle as follows:

The sale agreement placed the obligation on the plaintiff to obtain registration of the three plans of subdivision referred to in the agreement. The agreement established a definite closing date some five years from the date that the agreement was entered into. The agreement also provided that there could be no alternative closing date, if some other date would be mutually acceptable. No such date was mutually acceptable. The plaintiff was unable to obtain registration of the proposed plan of subdivision by the closing date. Since the parties were unable to agree on a new closing date, the plaintiff elected to treat the agreement as terminated and sought to return to the defendant the deposit it had paid.

The Ontario Court of Appeal in *Wimpey* found that the agreements were frustrated, whereas the Supreme Court of Canada held that the agreements had come to an end by their terms on the failure to obtain registration of the proposed plans of subdivision by the closing date. Houlden J.A., at the Court of Appeal, found that the length of time during which performance has been prevented, is an important factor in determining whether a contract has been frustrated.

[para28] Blair v. Crawford (1989) 70 O.R. (2d) 748 (Ont. H.C.) Saunders J., is a case where the defendants sold land to the plaintiff, subject to consent to sever being obtained by December 3, 1986. Although approval was granted to severance before December 3, 1986, it was not a final approval, but was subject to certain conditions, namely the submission of a survey and zoning, which conditions were not fulfilled on the stipulated date. The defendants notified the plaintiff that the agreement was at an end, following which the plaintiff brought an action for specific performance. The action was dismissed. It was held that the condition precedent was a true condition precedent since its fulfillment depended on the actions of third parties. The parties rights crystallized on the stipulated date and, since the condition was not fulfilled on that date and the defendant acted expeditiously in seeking to fulfill it, there was no agreement, and the defendants were entitled to treat the agreement as ended. The case of Aldercrest Developments Ltd. v. Hunter [1970] 2 O.R. 562 was distinguished in that in Aldercrest the vendor had undertaken to seek the consent and had not done so.

[para29] In Aldercrest Developments Ltd. v. Hunter, the defendant Hunter sold a six acre section of his larger farm to the plaintiff, subject to the provisions of the Planning Act with respect to land severance from the appropriate Planning Board and, the closing date to be 90 days after Planning Board approval. The defendant undertook the matter of severance but did not pursue his undertaking. It was the plaintiff's intention to pursue subdivision approval with respect to the severed six acre parcel, an area where the plaintiff encountered difficulties time-wise. The defendant cancelled the contract and the plaintiff brought an action for specific performance. The trial judge found that specific performance could not be granted but, in finding for the defendants on the merits, he fixed the damages claimed in the alternative against them. Laskin J.A. for the Ontario Court of Appeal, states at page 564:

Here on the execution of the contract of sale, the purchaser obtained an immediate equitable interest subject to perfection or defeasance of title on the performance or non-performance of contractual conditions; and in the absence of specified time limitations the standard of reasonableness is applicable.

In dealing with a perpetuity issue, Laskin J.A. had this to say at the top of page 564:

Upon execution of the contract herein, the purchaser acquired an interest in the particular land but, there is the argument (if I may spell it out for the respondents) that for an undeterminable time, extending possibly beyond the perpetuity period, it will not be known whether the purchaser's interest will be supplemented by a legal title in fee simple or whether Hunter's full interest will be restored.

And further down on page 564 Laskin J.A. states:

It is my view that the key to this case lies in understanding the necessary order of priorities in satisfying the conditions and, I am content in this respect to agree that conditions 1, 2 and 4 at least are true conditions precedent.

Condition 4 in particular reads as follows:

The contract constituted by the acceptance of this offer is subject to the provisions of Section 26 of the Planning Act which requires a land severance consent from the appropriate Planning Board.

The pursuit of severance was undertaken by the defendant vendor, whereas subdivision approval was the pursuit of the purchaser. The two matters became intertwined and the trial judge construed the closing date provisions of the contract as relating to Planning Board approval of the purchaser's proposed plan of subdivision and not to approval or consent to the land severance. At page 568 Laskin J.A. states:

I do not regard the present case as governed in its result by Turney and Turney v. Zhilka [1959] S.C.R. 578. The principle in that case is applicable here in that neither party promised the other to procure the consent to severance but, the similarity ends at this point. Having regard to the legislation which became effective on May 3, 1965, and to the correspondence between the solicitors, I am of the opinion that the defendants undertook to seek consent to severance apart entirely from any implication in the agreement to that effect, and that they cannot rely on their failure to do so as a ground for avoiding the contract. They had, through their solicitor, treated it as subsisting up to the time they suddenly purported to cancel it. The plaintiff had been exploring the necessary consents and approvals under the other conditions, but these depended ultimately on the consent to severance, which was the key to any successful conclusion of the transaction.

[para30] In Fenton v. Barbrook Mill Inc. et al (1987) 34 D.L.R. (4th) 683, Henry J. of the Ontario High Court was faced with the issue as to whether the condition agreed to was a true condition precedent, the failure of which would disentitle the plaintiffs to a decree of specific performance. In this case, the plaintiff agreed to purchase land from the vendor in a proposed subdivision conditional upon compliance with the Planning Act by the defendant and registration of the plan of subdivision by July 31, 1986. If the plan of subdivision was not registered by that date, the agreement was to be void. However, the defendant had the right to extend the agreement for three successive months, if the plan was not registered in time. The plan was not registered by July 31, 1986 but was, in fact, registered on August 12, 1986. On August 6, 1986, the defendant took the position that the plan of subdivision not being registered by July 31, 1986, that the agreement was null and void. It was held that the condition would normally be a true condition, in that control over its performance lay with third parties. However, it was not a true condition precedent in this case because:

(1) the defendant vendor was required to comply with the Act. Paragraph 10 of the agreement provided that:

This agreement is conditional upon compliance with the requirements of the Planning Act, R.S.O. 1980, as amended, which compliance shall be obtained by the vendor at its sole expense on or before closing.

(2) The vendor had the right to extend the agreement; and

(3) The final performance of the parties depended on the registration of the plan.

Henry J found that the vendor did not take reasonable steps to satisfy the condition and since it did not act bona fide, it could not rely on the condition.

[para31] The Fenton case was considered by Van Camp J in *Thorman v. Parnes et al* (1990) 73 O.R. (2d) 149 Ont. H.C., wherein she expressed the view that Henry J erred when he stated that a true condition precedent ceases to be so because there was a right of one party to extend closing. In *Thorman v. Parnes*, the vendor received draft approval of a plan of subdivision in June of 1987 and started to sell lots. The completion date was to be 30 days after notification by the vendor that he was in a position to provide title. If the agreement was not completed by June 30, 1988, it was to be null and void and that if the vendor had not arranged for registration by that date, he might extend closing by 60 days. The vendor was unable to obtain final approval by June 30, 1988. It was held that the agreements expired according to their terms on June 30, 1988 and were found to be null and void, with the defendants having no interest in the lands. The condition precedent had not been met and did not cease to be a true condition precedent because there was a right of one party to extend closing. The vendor used his best efforts to secure clearances and there were no misrepresentations or material promises that were relied on by the defendants that caused them loss. The condition was not that he would obtain any necessary consent or approval, but that he would proceed diligently to obtain such.

[para32] In *Breslau Heights Development Ltd. v. Grobe Nursery Ltd.* [1998] O.J. No. 2038, Ont. Ct. Gen. Div. Reilly J, it was held an agreement for the sale of land, in which registration of a plan of subdivision was a true condition precedent, that the agreement was rendered null and void when the draft approval lapsed. This was a case where, on September 18, 1978, the vendor obtained draft approval of a plan of subdivision subject to 18 conditions to be satisfied before final approval could be issued. The vendor continued with its development plans by working with at least two engineering consulting firms to deal with the conditions to be met prior to registration of the draft plan. The conditions were to be met after several extensions on December 24, 1986. The conditions not having been met, the draft approval lapsed and the plan of subdivision was never registered. The cost of meeting the conditions would have made the development uneconomical and the vendor shelved his plans. The closing date itself contemplated a registration of the plan of subdivision -- "the sale to be completed 90 days subsequent to the registration of a plan of subdivision". It was held that failing registration of a plan of subdivision, the subject property was incapable, in law, of being transferred. Thus, the intention of the parties being frustrated in law, the agreement would be null and void. The right to obtain registration of a plan of subdivision is uniquely that of the owner of the property. Thus, there was an onus on the part of the owner to seek, in good faith, the registration of the plan of subdivision. Failing such attempts, in good faith, to seek registration of the plan of subdivision, the owner could arguably be subject to a mandatory order to again apply for registration of a plan of subdivision or, in the alternative, be liable for damages. It was found that the owner did indeed pursue in good faith and with diligence for more than eight years, efforts to register a plan of subdivision. It would be contrary to common sense and good law to suggest that the vendor owner should now be required to pursue a plan of subdivision that would be economically unfeasible. Counsel for the purchasers submitted that the issue of good faith of the owner in pursuing the registration of a draft plan of subdivision should, at the very least, not be decided on this application, but should be the subject of an issue for trial. Reilly J, disagreed and found that the evidence available, albeit by affidavit, revealed clearly that the owner ultimately determined that it would be economically unfeasible to pursue the plan of subdivision and that a trial of the issue would be economically draining on the parties and the Court system.

[para33] In *Dynamic Transport Ltd. v. O.K. Detailing Ltd.* (1978), 85 D.L.R. (3d) 19, S.C.C., Dickson J, in dealing with which party was to obtain subdivision approval said:

Both parties were aware that subdivision approval, pursuant to the Planning Act, was required, but the agreement is silent as to whether vendor or purchaser would obtain this approval. The statutory prerequisite became an implied term of the agreement. The obtaining of subdivision approval was, in effect, a condition precedent to the performance of the obligations to sell and to buy. (See *Turney v. Zhilka* supra and *Barnett v. Harrison et al* (1975) 57 D.L.R. (3d) 225) The parties created a binding agreement. It is true that the performance of some of the provisions of that agreement was not due unless and until the condition was fulfilled, but that in no way negates or dilutes the force of the obligations imposed by those provisions, in particular the obligation of the vendor to sell and the obligation of the purchaser to buy. These obligations were merely in suspense pending the occurrence of the event constituting the condition precedent.

[para34] In *Re Yorkwood Homes (Georgetown) Inc. et al v. Law Development Group Georgetown (No. 2) Limited et al* (1999) 45 O.R. (3d) 257, Ont. C/A; the issue of termination of an agreement was dealt with and the manner of interpreting the termination clause was canvassed by the Court so as to establish the intent of the parties. In situations where the parties specifically deal with the subject matter of termination and provide for a limited right of termination, an interpretation that ignores the specific working of the provisions would not be correct, notwithstanding the reasons of Estey J in *Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.* [1980] 1 S.C.R. 888 at p. 901.

[para35] In *Re Pattison v. Sceviour* (1983), 43 Q.R. (2d) 229, Ont. H.C., where a vendor conveyed land to a purchaser upon terms that part would be held absolutely and part upon trust for the vendor, it was held that in the circumstances where the vendor retains the absolute right to deal with the abutting trust property, that this contravenes the Planning Act and renders the agreement and deed to be null and void.

IV DECISION

[para36] The herein action was started as an application by the vendor, Donald McNabb, on October 13, 1999 for an Order to declare the Agreements of Purchase and Sale, dated October 23, 1985 and December 5, 1986, null and void on the grounds that the condition precedent was not satisfied. The respondents filed a counter-application dated November 24, 1999 for an Order that the said agreements are valid and enforceable equitable rights to the lands in question, in priority to the Bank of Nova Scotia mortgage and the Stanley Malouf easement. By Order of Zelinski J, dated December 23, 1999, a trial of the issues was ordered in which the respondents O'Brien and Petty were to be plaintiffs, and the applicant, Donald McNabb, the Bank of Nova Scotia and Stanley Malouf, were to be the defendants.

[para37] It is most clear from the ordinary meaning of the words used in the Agreements of Purchase and Sale that the intention of the parties was to initially and primarily enter into a binding Agreement of Purchase and Sale for the lots in question, subject to subdivision approval, and then, if subdivision approval was not forthcoming for any reason, that the potential purchasers would acquire a leasehold interest to the said lands for a period of 20 years, at a prepaid rental of \$3,500.00. The terms and conditions of the agreements, as contractual documents, cannot be said to be void for uncertainty.

[para38] As can be seen on the map, which was filed as an exhibit to the affidavit of John O'Brien, the proposed subdivision fronted Lake Kenogamesis and would appear to be choice cottage or summer home property, which would be even more useful if the shoreline reserve, as referred to in the agreements, was to be acquired. The significance of the Hardrock Road, as an access route and, as a cost saving factor to the development, also becomes apparent from this plan.

[para39] The Agreements of Purchase and Sale, in describing the lands in question, refer to a draft plan of subdivision that was prepared by Philips Surveyors on May 15, 1985.

[para40] The Agreements of Purchase and Sale are conditional upon subdivision approval so as to comply with the provisions of Section 50 of the Planning Act. In this regard it must be noted that there is no promise or undertaking on the part of the vendor McNabb that he will satisfy the condition precedent, but only that he will pursue the matter with due diligence and in a timely fashion and, should any purchaser be of the opinion that he is not so proceeding, that he would provide them with a Power of Attorney to pursue the application at his expense. The evidence reveals that McNabb did in fact pursue the application with due diligence in a timely fashion.

[para41] As to the time period within which the condition precedent was to be met, a specified date was not established. Instead, paragraph (i) of the agreement mentions a period of three years as a timely and diligent period for McNabb to seek approval, following which the purchasers, if they so desired, could take over the pursuit of the application at McNabb's expense. And, at paragraph (iii) it further provides that: "in the event the subdivision, as hereinbefore referred to, is for any reason not forthcoming (and without limiting the generality of the foregoing, any inactivity on the part of the purchaser may be construed so as to be included in the phrase, for any reason), the purchaser shall rent the subject lands and premises for a term of 20 years calculated from the date hereof. Paragraph (vi) provides that a closing date of the within transaction shall be within 60 days of the date the vendor notifies the purchaser, in writing, that he has obtained subdivision approval, at which time the balance of the purchase monies shall be paid; it is acknowledged by the parties hereto that if the within transaction does not result in a conveyance of the fee simple of the subject lands, the balance of the purchase price will not be paid and that the deposit monies shall be deemed to be full payment of rent for the twenty year term aforesaid."

[para42] As was stated by Laskin J.A. in *Aldercrest*, in the absence of specified time limitations and, in situations such as this where the fulfillment date of the condition precedent was indeterminate, the standard of reasonableness is applicable. The herein case is a situation where the parties contemplated subdivision approval within a reasonable period of time and, if such approval is for any reason not forthcoming within a reasonable period of time, the equitable interests of the plaintiffs would be converted to a 20 year leasehold interest.

[para43] In his quest for subdivision approval of the draft plan prepared in 1985, McNabb was unable to obtain approval of his subdivision until March 9, 1999. During this period of time there was no activity on the part of the plaintiffs or any other potential purchasers to individually or collectively pursue the application or, to seek an extension of the time period for subdivision approval. The plaintiffs and the other potential purchasers continued to occupy the lands in accordance with the terms and conditions of the agreements.

[para44] Much has been made by the plaintiffs about the Hardrock Road and the nature of the correspondence as between McNabb and Lac Minerals with respect to the dedication of this road for subdivision purposes so that home owners could acquire deeds to the properties. (In this regard see the letters dated April 6, 1992 and May 29, 1994) The Court was also referred to similar correspondence dated January 8, 1997 from McNabb to the Ministry of Municipal Affairs in which reference was made to home owners obtaining the deeds to the properties. The plaintiffs, in referring to this correspondence in their affidavits, express the opinion that these statements by McNabb should be construed as a continued recognition by McNabb of the plaintiffs' equitable property rights to the lots in question right up to the final approval of the subdivision on May 9, 1999, which they submit is the fulfillment of the condition precedent.

[para45] Donald McNabb, in his affidavit, goes to considerable length to explain that the plan of subdivision that was approved on May 9, 1999, was not the same plan of subdivision that formed the basis of the agreements that was presented for approval in 1985. McNabb then goes on to describe the conduct and inactivity of the plaintiffs over the years subsequent to signing the agreements as being that of tenants and not potential purchasers.

[para46] As a motions Court Judge, under Rule 20, it is not my function to assess credibility, make findings of fact, or resolve issues of material facts. In this regard see *Aguonie v. Galion Solid Waste Materials Inc.* (1998) 156 D.L.R. 4th, 222 (Ont. C/A) and *Morellato v. Wood* (1999) 175 D.L.R. (4th) 753 (Ont. Sup. Ct. approved by C/A). A summary judgment ought not to deprive a litigant of his or her right to a trial, unless there is a clear demonstration that no genuine issue exists material to the claim or defence, which is within the traditional province of the trial judge to resolve. (*Meraw v. Curl Estate* [1998] O.J. No. 2115 (Ont. Ct. Gen. Div.)) Although precluded from assessing credibility or making findings of fact, this Court must nevertheless make an assessment as to whether a genuine issue for trial is raised by reason of competing or different versions of material facts. Rule 20.04(4) permits the motions Court Judge to determine a question of law and to grant judgment accordingly where he or she is satisfied that the only issue is a question of law. (*Irving Ungerman Ltd. v. Galanis* (1991) 4 O.R. (3d) 545 (C/A)). It is the view of this Court that the only genuine issue for trial is whether the condition precedent in this case was fulfilled within a reasonable period of time as contemplated by the parties according to the terms and conditions of the Agreements of Purchase and Sale and Rental. This Court finds that the condition precedent was not complied with in a reasonable period of time.

[para47] The condition precedent in this case was a true condition precedent in that its fulfillment was external and depended upon the activities of third parties. The defendant McNabb acted expeditiously in seeking to fulfill the condition, but was unable to fulfill the condition precedent within the reasonable time frame as contemplated by the Agreements of Purchase and Sale. That being the case, there being no compliance with the Planning Act, the agreements were simply terminated by their own terms insofar as any property rights to the fee simple are concerned. Under the circumstances, the plaintiffs property rights were subject to defeasance and, pursuant to the agreements they were left with a 20 year leasehold interest in the lands. In adopting a standard of reasonableness, this Court is of the view that the time frame involved, in light of the clear and unambiguous wording of the agreements, was inordinately long and permitted the defendant to consider the property rights as having been terminated when he applied for and received approval of his plan of subdivision on May 9, 1999.

[para48] Accordingly, it is hereby declared that the agreements dated October 23, 1985 and December 5, 1986 are null and void insofar as creating any valid enforceable equitable interest in the fee simple to the lands in question and that the plaintiffs have no interest in the said lots other than pursuant to their respective leasehold interests as contained in the agreements.

[para49] Summary judgment to issue accordingly. Costs may be spoken to.

KOZAK J.

CBR# 843

Bruvels v. Guindon

Between Denise Bruvels, and Bernard Guindon

Court File No. 99-FL-25302

Ontario Superior Court of Justice Family Court V. MacKinnon J. March 13, 2000. (21 paras.)

Counsel: Steven J. Greenberg, for the applicant Denise Bruvels. Marc Y. Simard, for the respondent, Bernard Guindon.

[para1] V. MacKINNON J. (endorsement):-- Respondent moves for summary judgment to dismiss the Applicant's claims against him which are for child support and for a declaration that he holds certain property in trust for her. Both parties filed affidavit evidence in the motion. These reasons will deal with each claim separately.

[para2] The children for whom support is sought are the Applicant's children from a prior relationship, now ages 18 and 15. The Applicant alleges that the Respondent stood in the place of a parent to these children and on this basis claims child support. The Respondent denies that he stood in the place of a parent, and asks that the claim be dismissed.

[para3] The parties did not marry. It is in dispute as to whether their period of cohabitation was for a brief period of three and one half months, as claimed by the Respondent, or whether it spread over three and one half years, with some interruptions, as claimed by the Applicant. The Respondent says the couple separated in January 1996. The Applicant says the couple separated in December 1997. Her action was commenced in May 1999. No child support has been paid since separation and a motion for interim child support was withdrawn.

[para4] The Supreme Court of Canada has, in *Chartier v. Chartier* (1998), 43 R.F.L. (4th) 1, at p. 22, set out the factors to be taken into account in determining whether a person stands in the place of a parent:

The relevant factors in defining the parental relationship include, but are not limited to, whether the child participates in the extended family in the same way as would a biological child; whether the person provides financially for the child (depending on ability to pay); whether the person disciplines the child as a parent; whether the person represents to the child, the family, the world, either explicitly or implicitly, that he or she is responsible as a parent to the child; the nature or existence of the child's relationship with the absent biological parent.

[para5] The court also states at p. 22, that the opinion of the child, and the intention of the adult, as to the nature of the relationship, are also factors to be considered.

[para6] In her affidavit filed in response to the motion for summary judgment, the Applicant repeats the allegation that the Respondent treated the children as his own when they lived together. The factual basis that she provides in her affidavit is as follows:

1. Family holidays were taken. The family went on picnics and skiing outings.
2. The Respondent provided limited support including gifts for the children and the occasional car repair for the Applicant's car.
3. Natalie worked with the Respondent doing a variety of types of yard work.
4. The Respondent attended Natalie's soccer games.
5. The children's biological father does not provide support and is permanently disabled.
6. The girls did call the Respondent to help with school projects that would require the use of his truck.
7. The Respondent told the girls he would always love them.

[para7] The Applicant's affidavit does not address the following factors set out in *Chartier* (supra):

1. The opinion of the 18 and 15 year old children as to whether the Respondent stood in the place of a parent to them.
2. The relationship between the children and their biological father.
3. Whether the Respondent disciplines the children.
4. Whether the Respondent represented to the child, the family or the world that he is responsible for these children as a parent.

[para8] The Ontario Court of Appeal has stated in *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 that on a motion for summary judgment, the motions judge:

will never assess credibility, weigh the evidence, or find the facts. Instead, the court's role is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial. Evaluating credibility, weighing evidence, and drawing factual inferences are all functions reserved for the trier of fact.

[para9] In an earlier decision of the Court of Appeal, *Morden A.C.J.O.*, speaking for the court, referred to a decision of one of the drafters of the United States Federal Rules of Civil Procedure:

But the history of the development of this procedure shows that it is intended to permit "a party to pierce the allegations of fact in the pleadings and to obtain relief by summary judgment where facts set forth in detail in affidavits, depositions, and admissions on file show that there are not genuine issues of fact to be tried".

[para10] Morden A.C.J.O. referred, in particular, to the intention of enabling "a party to pierce the allegations of fact in the other party's pleadings": *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.) at p. 550.

[para11] The intention in the summary judgment process, that a party must move beyond mere allegations and set forth facts in sufficient detail to show a genuine issue of trial, is confirmed in the cases which speak of the responding party to the motion putting its best foot forward. For example, in *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Company* (1996), 28 O.R. (3d) 423 (Gen. Div.), the court stated at p.p. 434-435:

It is clearly established that on a motion for summary judgment, a party is no longer entitled to sit back and rely on the possibility that more favourable facts may develop at trial. To avoid summary judgment, a party is required to put its best foot forward. The onus remains on the moving party to show that there is no genuine issue for trial, but the responding party must "lead trump or risk losing": *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225, 33 C.P.R. (3d) 515 (Gen. Div.); *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547, 43 R.P.R. (2d) 161 (C.A.). In my view, Transamerica has failed to present evidence to indicate that there is a triable issue on this point and Canada Life has met the onus of showing that it should be granted summary judgment on this issue.

[para12] This decision was upheld by the Ontario Court of Appeal, [1997] O.J. No. 3754, where Robins J.A. stated for the court:

We can find no error in [the motions judge's] assessment of the evidence or in the inferences he drew from the evidence. Nor can we find any error in his application of the relevant legal principles to the evidence in the case. We agree with the motions judge that the appellant has not produced evidence of specific facts showing a genuine issue for trial.

[para13] In *Lang v. Kligerman*, [1998] O.J. No. 3708, the Court of Appeal stated:

However, where the evidence presented by the moving party prima facie establishes that there is no genuine issue for trial, and the moving party is entitled to summary judgment as a matter of law, to preclude the granting of summary judgment the responding party assumes the evidentiary burden of presenting evidence which is capable of supporting the position advanced by the responding party in its pleading. On the basis of this evidence, when considered with all the evidence before the motions judge, it will then be for the motions judge to determine whether the evidentiary record raises a genuine issue for trial.

[para14] In three decisions subsequent to their decision in *Aguonie* (supra) the Ontario Court of Appeal has confirmed that the responding party to the motion for summary judgment must put its best foot forward. In *Kardish v. Kardish*, [1999] O.J. No. 676, the court again referred to the evidentiary record that should be placed before the motions judge:

In our view, it was open to the motions judge on the basis of this record to conclude that the appellant had no reasonable chance of success and that, consequently, there was no need for a trial on the question of the validity of the marriage contract. There were no contentious material facts to be determined.

The evidence advanced in support of the claim of undue duress, when viewed in the context of the whole evidence on the motion, would not suffice to make out the claim at trial. Further, there was no evidence of lack of disclosure that could justify an order setting aside the marriage contract.

[para15] See also *Grossman Holdings Ltd. v. York Condominium Corp. No. 75*, [1999] O.J. No. 3289 (C.A.); *DBM Financial Group Inc. v. Derivative Services Inc.*, [1999] O.J. No. 4266 (C.A.)

[para16] In my view, the Applicant mother has failed to set out an evidentiary basis that shows a genuine issue for trial as to whether the Respondent stood in the place of a parent to the children. The fact that she makes the allegation that he did stand in the place of a parent, and that he denies this allegation, does not raise a genuine issue of fact for trial. The Respondent's evidence has prima facie established that there is no genuine issue for trial. Following *Lang v. Kligerman* (supra) the Applicant must meet the evidentiary onus that is thus upon her to present evidence capable of supporting a finding that the Respondent did stand in the place of a parent to the children. To do so, she must go beyond allegations. She must "put her best foot forward". In this case, accepting the facts as set out in the mother's affidavit as true, she has not addressed or led evidence as to many of the factors that the court should consider before it could make such a finding. Lack of factual detail cannot be saved by a bald allegation.

[para17] Nor do I not accept her counsel's submission that the issue of intention and relationship to the children are matters of credibility that require a trial. The issue of credibility must be genuine and as to material facts. If, as I have found, assuming the truth of the facts in the Applicant's affidavit still does not establish legal entitlement, then there is no genuine issue of credibility for trial, even though those facts are actually in dispute. See *Irving Ungerman Ltd. v. Galanis* (supra) at p. 552.

[para18] For these reasons, on this issue of whether the Respondent stood in the place of a parent to the Applicant's children, the Respondent is entitled to summary judgement.

[para19] With respect to the claim for a declaration that the Respondent holds property in trust for the Applicant, the evidentiary record is different. Here there are material factual disputes between the parties. Based on the Respondent's evidence alone, I would have been persuaded that there is no genuine issue for trial. However, the evidence put forward by the Applicant demonstrates that there are issues as to material facts, credibility and weight that should be resolved by a trial judge, for example, as to the nature and extent of work she contributed to the Respondent's properties. In other words, this issue cannot be resolved without "evaluating credibility, weighing evidence, and drawing factual inferences" all of which are functions reserved for a trial judge according to the Court of Appeal in *Aguonie* (supra).

[para20] For these reasons, the Respondent's motion for summary judgment is allowed as to the claim for child support but not as to the claim for a declaration that the Respondent holds certain property in trust for the Applicant.

[para21] Should either counsel wish, written submissions as to costs may be made within two weeks of the release of these reasons, with a right of reply within five subsequent days. Submissions should not exceed two pages and should include or attach sufficient information so that costs, if awarded, may be fixed.

V. MacKINNON J.

CBR# 844

Barnes v. Blackfriar's Development Inc.

Between Frederick Barnes, David Drake, Thomas Drake, Alan Graff, Boris Homenock, Sharon Kelly, Richard Millson, Ken Sawchuk and Glen Schlotzhauer, plaintiffs, and Blackfriar's Development Inc., 646999 Ontario Limited, D.W. Smith & Associates Limited and David Smith, defendants

Court File No. 5719/91

Ontario Superior Court of Justice Donnelly J. Heard: June 14-16, 1999. Written submissions: July 15, August 15 and 22, 1999. Judgment: September 3, 1999. (41 paras.)

Counsel: Paul Linley, for the plaintiffs. David Smith, on his own behalf.

DONNELLY J.:--

BACKGROUND

[para1] The Plaintiffs, as limited partners in the development of a residential condominium building in London, seek:

- a) Rescission of the Limited Partnership Agreement with the return of each unit subscription price of (\$40,000.00) and of one capital call on each unit in the amount of (\$4,000.00)
- b) In the alternative damages for breach of contract and negligent misrepresentation,
- c) As against the defendant 646999 Ontario Limited, damages for breach of fiduciary obligation.

[para2] The defendant, Blackfriar's Development Inc. (Blackfriars) was the developer. Blackfriars was equally owned through separate corporations by:

- The Defendant, David Smith (Smith), a chartered accountant and real estate developer, who was responsible for finances.
- S. Buchanan, a Real Estate Broker, who was responsible for design and marketing.
- Wm. Patten, a contractor, who was responsible for construction.

[para3] The Defendant, 646999 Ontario Limited (646999) and the Defendant, D.W. Smith & Associates Limited (Smith Limited) were wholly owned by Smith. Smith Limited held Smith's one third interest in Blackfriars. 646999 was the general partner.

[para4] Neither Smith Limited nor 646999 had assets or employees. The Charters of the corporate defendants have been surrendered. The lawsuit continued with leave under the Ontario Business Corporations Act. Blackfriars and 646999 were noted in default triggering deemed admissions under Rule 19.02.

[para5] At earlier stages in these proceedings Smith was represented by one lawyer, and later by another. At the opening of the trial he advised that he was unrepresented by choice and was able to conduct his defence. He proceeded to do so. Although fully informed about his right to testify and to call other evidence, he declined the opportunity to do so. No limitation issue was mentioned at trial. The issue was not raised in the pleadings which were prepared when Smith was represented by counsel.

THE DEVELOPMENT

[para6] In or about August 1986 Blackfriars, and Smith distributed a promotional brochure and an offering memorandum for limited partnership units to raise equity capital. Representations in those documents included:

- a) The project would be nine floors with 58 residential units. The first six floors would contain 38 units owned and controlled by the limited partners. The balance would be owned and controlled by Blackfriars.
- b) Construction of the limited partnership portion of the building would be completed at a fixed price \$4,180,000.00. The peril of cost over run was to Blackfriars account. Thirty-eight limited partnership units at a unit price of \$40,000.00 would provide \$1,520,000.00.
- c) Subject to an inapplicable income tax related provision, no capital call would be made within three years of the turnover date.
- d) The closing date for the offering memorandum was Dec. 31/96, followed by an eighteen month construction period.
- e) Audited financial statements would be provided to limited partners.

[para7] The plaintiff, Glen Schlotzhauer, had participated as a limited partner in Smith's development of Victoria Towers in Stratford. Upon Smith's solicitation, in May or June/86 Mr. Schlotzhauer purchased two units in Blackfriars. For the first unit Mr. Schlotzhauer paid the full price. For the second unit he paid \$20,000.00. The balance of \$20,000.00 remains unpaid in reliance on Smith's letter as follows:

"As discussed and agreed, I, personally and my Company, Blackfriar's Development Inc. hereby agree to advance to you \$20,000.00 on a interest free basis if the 20,000 of funds from Victoria Towers partnership are not delivered to you during the first week of December, 1986. These funds will be advanced to you fill such time as the 20,000 of funds are available form Victoria Towers partnership."

[para8] Blackfriars sued Mr. Schlotzhauer in 1992 for the \$20,000.00 plus two unpaid capital calls. The action was dismissed for reasons undisclosed in this trial.

[para9] The Plaintiff, Barnes had participated as a limited partner with Smith in Victoria Towers. Upon Smith's solicitation Mr. Barnes purchased one unit in Blackfriars.

[para10] In May 1986, Smith represented to the plaintiff, Millson that an investment of \$40,000.00 would return \$60,000.00 by Christmas. Acting for himself and associates, Mr. Millson purchased one unit.

[para11] The plaintiffs, Alan Graff and Sharon Kelly were personally solicited by Smith and each purchased one unit.

[para12] The plaintiffs, with the exception of Mr. Schlotzhauer, paid \$40,000.00 for each unit plus one capital call of \$4,000.00 for the months of July, August, September and October 1988.

FINANCIAL DIFFICULTY

[para13] The Development encountered financial difficulty. The cost of the limited partnership interest in the building exceeded \$4,180,000.00. Smith, acting through the general partner 646999, added a tenth floor with the six additional units owned by Blackfriars. This was contrary to the offering memorandum and without authority from limited partners.

[para14] Additional engineering drawings were required for the structural change. The project was delayed by two or three months. The turnover date for the completed building was extended to July 1, 1988. Construction and carrying costs increased. Six additional condominiums were offered for sale in a declining market in competition with the units owned by the limited partnership. In result, each plaintiff lost his entire investment.

CORPORATE DEFENDANTS

[para15] The claim against Blackfriars and 646999 is founded upon deemed and actual admissions giving rise to rescission and restitution by reason of firstly, breach of the Securities Act and secondly, negligent misrepresentation. The claim against the general partner 646999 is founded upon breach of its duty of trust owed to limited partners.

[para16] No prospectus was filed with, or approved by, the Securities Commission as required by Section 52 of The Ontario Securities Act. The limited partnership offering was not exempted from filing by the seed capital exception in Section 71(p), because in excess of twenty-five units were sold. Section 130 provides civil remedies for breach of Section 52:

"A purchaser of a security to whom a prospectus was required to be sent or delivered but was not sent or delivered in compliance with subsection 70(1) has a right of action for rescission or damages against the dealer or offeror who failed to comply with the applicable requirement."

[para17] The claim for negligent misrepresentation is founded on representations recklessly and negligently made and maintained by Smith and Blackfriars. As provided in *Queen v. Cognos Inc.* 99 D.L.R. (4th) 626, a claim in misrepresentation is premised upon.

"a) There was a duty of care, based on a special relationship between the representor and representee, the representor having some special skill or knowledge;

b) A representation was made that was proved to be either inaccurate, untrue or misleading;

c) The representation was made by the representor with the intention of inducing the representee to adopt or take a course of action;

d) The representee in fact relied upon or placed reliance on the representation;

e) By placing reliance on the representation, the representee did so to its own prejudice."

[para18] The claim for breach of trust by the general partner 64699 is founded on the general partner's duty to represent the interests of the limited partners. Loyalty and fidelity in adhering to obligations under the offering memorandum are required. There should be no unauthorized departure from that duty. *337965 BC Ltd. v. Tackama Forest Products* 91 D.L.R. (4d) 129 and *94 D.L.R. 767 - Molecan v. Omega Oil & Gas* [1988] 1 S.C.R. 348. The trust relationship is founded on provisions in the offering memorandum as follows:

"Investors will be relying upon the judgment experience and ability of the general partner to finance and operate the project. Partners holding units are not entitled to take part in the control of the business of the partnership."

"No person dealing with the partnership is required to inquire into the authority of the general partner to take any action or make any decision on behalf of and in the name of the partnership."

SMITH'S LIABILITY

[para19] Judgments against corporate defendants, with neither charters nor assets would be a pyrrhic victory ("One more such victory and we are lost"). The practical issue is Smith's personal liability:

a) Whether his actions, personally and as the controlling mind of Blackfriars and the sole owner of 646999 and Smith Limited warrant piercing the Corporate veil in relation to 646999.

b) For his personal representations relating to the development.

[para20] The claim for piercing the corporate veil is founded on the true nature of Smith's relationship with 646999. The corporate veil will be pierced to permit damages against an individual where the circumstances are such that justice requires equitable intervention. In *T.L. Raymond Electric v. Idylwild* (1984), 7 C.L.R. 210, Justice Killeen states:

"What is clear, beyond question, in the modern cases interpreting the Solomon principle is that fraudulent or flagrantly manipulated misconduct on the part of the key owner or owners of the "one man" type of company will almost invariably lead to

an attribution of civil liability against such persons where such misconduct causes financial loss to others: the veil will be pierced because justice and equity demands that such will be done."

[para21] Justice Killeen quotes with approval from Justice Masten's article "One Man Companies and Their Controlling Share Holders" 1936 (14) Canadian Bar Review 663:

"If a company is formed for the express purpose of doing a wrongful act, or, if when formed those in control expressly direct a wrongful thing to be done, the individuals as well as the company are responsible. The mere machinery to do an illegal act will not purge its illegality."

"Where the evidence brings the case within (the quote above) or where it establishes that the company is a mere agent of the controlling shareholder, it may be appropriate to characterize the company as a paper sham, a simulacrum, cloak, alias, or alter ego".

FINDINGS

[para22] I accept and find as follows:

a) Smith produced the promotional brochure and the offering memorandum. The security of limited partners' investment was described in the brochure by terms "Positive cash flow return", and "Guarantees", with no further explanation.

b) In correspondence soliciting limited partners, some of which was on Smith Limited stationary, Smith confirmed his personal participation stating:

i) "I am seeking investors"

ii) "I am putting together a condominium project"

iii) "As I mentioned, I would like you to participate in our Blackfriars' Partnership because of the profit potential, small tax savings and the quality of the project. For your review, I am attaching a copy of a letter written to my friend Mr. John Thiel, who is personally buying one of the partnership units. Five of his friends are also participating. I believe this opportunity to be exceptional and I would appreciate it if you would give it some consideration."

[para23] The plaintiffs, Graff, Kelly, Millson, Barnes and Schlotzhauer were personally contacted by Smith. They considered they were dealing with him. He did nothing to disabuse them of that perception. They relied on his representations.

[para24] The plaintiffs, Millson and Barnes invested prior to seeing the offering memorandum and in reliance upon Smith's representations including a fixed price and a completion date within 18 months of August, 1986.

[para25] In addition to repeating representations in the brochure and offering memorandum Smith made false representations.

a) To the plaintiff, Millson, that a \$40,000.00 investment would yield a profit of \$20,000.00 in approximately six months.

b) Through sales before units were ready for occupancy, limited partners may receive the return of their investment together with profits before the building was completed.

[para26] The development concept was Smith's. He controlled the entire transaction. He was the operating mind of Blackfriars. His identification with Blackfriars was confirmed in his letter to Mr. Schlotzhauer "I, personally, and my company Blackfriars' Development Inc. ". In examination for discovery Smith referred to himself as the general partner - "And the general partner 646999 who is also myself". Smith was the only signatory to the Development Construction Agreement (between Blackfriars and 646999), the Initial Service Agreement (between Blackfriars, the Limited Partnership and 646999) and the Management Agreement (between Blackfriars, the limited partnership and 646999). He dealt with lawyers and accountants. He handled all financing. He attended all limited partnership meetings. He was the limited partners sole contact with Blackfriars.

[para27] Acting through 646999, he dispensed with audited statements.

[para28] His willful departures from authority include:

a) Execution of a variable price construction contract which provided:

"The owner agrees that should the possibility of trade related cost increase occur due to demand, product costs and market conditions, then the general partner and the developer shall at their discretion approve such increases on behalf of both the partnership and the developer "

b) Addition of the tenth floor,

c) Two unauthorized capital calls,

d) In June 1986 prior to solicitation of many of the limited partners and without subsequent notice to limited partners, Smith executed a management agreement which, contrary to the offering memorandum, provided 30 residential units and commercial space on the first floor for limited partners.

[para29] He failed or refused to provide an affidavit of documents in the course of this action. He resisted all attempts to trace Blackfriars' finances through recourse to records from his solicitors, his accountants or his companies. He has refused to disclose the construction costs for building, financial information relating to the tenth floor, whether he paid for his two limited partnership units, and even his address before filing his written argument insisting that service of documents be made at the Blackfriars' address although he does not live in London.

[para30] In some cases, contrary to the offering memorandum, cheques from limited partners were payable to Smith Limited. Absent financial records, tracing these funds was impossible.

CONCLUSIONS

[para31] Smith was 646999. Deviations from 646999's authority under the offering memorandum were unilaterally designed and exercised by Smith for his benefit. Through 646999's manipulative acts, Smith's interest prevailed over that of the limited partners. Absence of audited financial statements provided time for his manipulations. Limited partners had relied upon his representations. They were vulnerable to and suffered by those authorized actions.

[para32] Blackfriar and Smith owed a duty to limited partners. The terms of the offering memorandum presented by Blackfriar's and Smith were made with the intention that subscribers would rely upon them. The Plaintiffs did rely on them. Those representations were material to the risk undertaken by subscribers. They were rendered untrue by Smith's conduct. As a result the plaintiffs suffered losses. Those actions constitute the tort of misrepresentation within the definition in Queen v. Cognos.

[para33] Smith's manipulations, made nominally by 646999, constituted a breach of 646999's trust obligations owed to limited partners. Justice requires that Smith be held personally liable for the unauthorized actions of his corporate alter ego. The circumstances require that the corporate veil be pierced in relation to 646999. Thereby Smith is rendered liable for his actions.

[para34] The measure of damages for breach of trust is replacement of money lost through the breach. There may also be a right to trace and recover profits from improper use of the funds. It has not been demonstrated on a balance of probability that there were profits from this enterprise. The evidence is to the contrary. This litigation dating to events in 1986 and 1987 should not be extended absent good cause.

[para35] No order is made relating to tracing profits by a reference or otherwise. This is without prejudice to the Plaintiff's rights to pursue the matter further if so advised.

RESULT

[para36] The limitation issue premised on s. 138 of the Securities Act was not mentioned at trial. It was first raised in closing written submissions. No opportunity was given to the Plaintiffs to deal with the issue. No evidence was lead as to the timing of the Plaintiff's awareness of actions giving rise to this claim. Notwithstanding that Smith was self represented, it would be manifestly unfair to permit the limitation issue to proceed. In any event, that defence is limited to the Securities Act issue.

[para37] On the premise that the correspondence on Smith Limited stationary was Smith's correspondence and contained his representations, no basis exists for judgment against Smith Limited. That phase of the claim is dismissed. This is not a case for costs to Smith Limited. No order for costs in relation to that phase of the action is made.

[para38] The plaintiffs will have judgment against all defendants except Smith Limited:

- a) With respect to Blackfriars, for negligent misrepresentation.
- b) With respect to 646999, for breach of trust.
- c) With respect to Smith, for negligent misrepresentation and through his personal liability flowing from piercing the corporate veil.

[para39] Each of the plaintiffs, Frederick Barris, David Drake, Thomas Drake, Alan Graff, Boris Homenock, Sharon Kelly, Richard Millson and Ken Sawchuk will have judgment for their loss or damage being \$44,000.00 being the subscription price of \$40,000.00 and the capital call of \$4,000. The plaintiff Glen Schlotzhauer, will have judgment for \$60,000.00, being full payment for one unit and half payment for another unit. He did not make payment on the capital call.

[para40] There will be prejudgment interest as provided by the Courts of Justice Act.

- a) In relation to the unit prices of \$40,000.00 as follows:

On \$20,000.00 from September 1, 1986,

On \$10,000.00 from December 15, 1986.

On \$5,000.00 from June 30, 1987 and

On \$5,000.00 from October 30th, 1987.

- b) In relation to the capital calls of \$4,000.00 from October 31st, 1988.

[para41] If there are circumstances indicating other than party and party costs against Smith, Blackfriars and 646999, submissions may be made in writing within fifteen days. Thereafter the costs endorsement will be completed.

DONNELLY J.

CBR# 115

Eglinton Place Inc. v. Her Majesty the Queen in Right of Ontario (as represented by the Ministry of Consumer and Commercial Relations) et al.

Court File No. 99-CV-180938

Superior Court of Justice Rivard J. February 21, 2000

Harry Herskowitz, Robert M. Freedman and Richard P. Hoffman, for applicant. Jean C.H. Iu, for respondent, Her Majesty the Queen in Right of Ontario.

[1] RIVARD J.: -- This is an application brought under rule 14.05(3)(d) for the determination of the following issue:

[2] Does the Condominium Act, R.S.O. 1990, c. C.26, provide the necessary authority for a condominium corporation to release an easement?

[3] The facts are not in dispute.

[4] The applicant, Eglinton Place Inc. owns lands situated at 123 Eglinton Avenue East, in Toronto ("the 123 Lands"). These lands are being developed by the applicant as a multi-residential condominium project.

[5] A neighbouring condominium development owns the lands abutting the southerly boundary of the 123 Lands. I will refer to this property as the "MTCC 1128 Lands".

[6] The MTCC 128 Lands enjoy an easement over part of the 123 Lands for the purpose of facilitating access of garbage vehicles removing garbage from MTCC 1128. This easement is registered on title.

[7] Correspondingly, the 123 Lands have an easement for access over portions of the common elements of the MTCC 1128 Lands, to facilitate entry into the parking area on the 123 Lands. The easement is also registered on title.

[8] MTCC 1128 does not require or use the easement over the 123 Lands because it has its own garbage storage and removal area entirely within its own boundaries. MTCC 1128 has agreed to formally release the easement to and in favour of the applicant.

[9] Eglinton does not and will not require the easement over the MTCC 1128 Lands because its development plans for the 123 Lands provide for a separate and independent underground parking garage, with access to this parking located entirely within the boundaries of the 123 Lands. Eglinton has agreed to formally release the easement to and in favour of MTCC 1128.

[10] In pursuance of these agreements, Eglinton's solicitor submitted to the Land Registrar of the Land Titles Office in Toronto, for pre-approval, two forms of release of easement. One form was prepared pursuant to s. 13 of the Condominium Act and the second was prepared pursuant to s. 38 of the Act.

[11] The Land Registrar rejected both forms on the basis there exists no express statutory authority under the Condominium Act permitting a condominium corporation to release an easement.

[12] Eglinton then brought this application. The notice of application was served by ordinary mail upon all the condominium unit owners. The five major banks and Canada Trust were also served as the mortgagees of the lands in question.

[13] It was my view as well as the opinion of counsel that service in this manner was appropriate in light of the very large numbers of unit owners.

[14] I therefore granted an order permitting substituted service of the notice of application as set out in para. (d) of p. 4 of the notice of application. Pursuant to rules 1.05 and 2.03, I also allowed the applicant to describe the respondent unit owners and mortgagees of MTCC 1128 in the title of proceeding as appears in the notice of application, thereby dispensing with compliance with rule 14.06.

[15] Counsel for the applicant informs me that his law firm did receive calls from some unit owners who indicated they are not opposing this application. He also spoke to a legal representative of Canada Trust and of the Bank of Montreal who also stated they were not opposing the application. The only opposition to this application is from the Ministry.

[16] I must now consider whether the Condominium Act provides the authority to a condominium corporation to release an easement, or, whether, the consent of all unit owners is required. Counsel for the applicant submits it would be impossible to get 100 per cent of the unit owners to sign the release.

[17] The Ministry submits that these easements were not conveyed to the condominium corporation, but are part of the common elements, and are owned by the unit owners as tenants in common. The Ministry further submits the rights of real property owners should not be altered without clear statutory authority or without the express consent of the owners, neither of which exists or has been obtained.

[18] Section 1(1) of the Condominium Act defines the term "property" as constituting the land and interests appurtenant to the land described in the description, and includes any land and interests appurtenant to land that are added to the common elements.

[19] "Common elements" are defined at s. 1(1) of the Act as all the property except the units.

[20] The parties to this application agree that an easement is a real property interest and forms part of the common elements.

[21] There is some dispute as to whether or not an easement is an asset under the Condominium Act. Although the terms "property" and "common elements" are defined in the Act, no definition is provided for the term "asset". The Act does however distinguish "assets" from "property" and "common elements".

[22] Under s. 12(1) of the Condominium Act, the objects of the condominium corporation are to manage the property and any assets of the corporation.

[23] Under s. 12(2) of the Act, the corporation has a duty to control, manage and administer the common elements and the assets of the condominium corporation.

[24] Section 13(1) of the Act provides as follows:

13(1) The corporation may own, acquire, encumber and dispose of real and personal property for the use and enjoyment of the property.

[25] In *York Condominium Corp. No. 104 v. Supreme Automatic Working Machine Co.* (1978), 18 O.R. (2d) 596 (H.C.J.) ("the Supreme case") the applicant was in the same position under the Condominium Act, as it read then, as the applicant in this proceeding finds itself under the current legislation.

[26] In the Supreme case, the Condominium Act did not give a condominium corporation the power to lease the common elements.

[27] In this proceeding, the Condominium Act does not deal with the manner of releasing an easement.

[28] In the Supreme case, the condominium corporation purported to enter into a lease of the common elements. There was nothing in the Condominium Act to outline how this could be achieved. The court had to consider whether the Act empowered the condominium corporation to act as agent for the unit owners in leasing the common elements.

[29] In dealing with this issue, Mr. Justice Reid started from the proposition that there is no provision in the Condominium Act preventing the corporation from acting as agent. In fact, he was of the view that the tenor of the Act was to the contrary. He said at pp. 598-99:

For example, the corporation is made generally responsible for the performance functions of common concern. In carrying out these functions it is, in essence, acting on behalf of all the unit holders. The corporation may bring actions with respect to the common elements. In doing so, it is really acting as agent for the owners. The Act therefore contemplates the corporation acting as agent of the unit holders.

[30] Reid J. went on to say at p. 3:

Section 9(4) [now s. 12] states that the objects of the corporation are to manage the property and any assets of the corporation. While the applicant submits that the property and assets of the corporation do not include the common elements because they are owned by the members and not the corporation, in my opinion, "property" in s. 9(4) is not confined to what is owned by the corporation. A primary function of the corporation is the management of the undertaking. It could hardly carry out this function if it were restricted to property owned by the corporation. It thus appears to me that "property" in s. 9(4) should be construed as the term is defined in the Act [s. 1(1)(n)] . . .

[31] I agree with the comments of Reid J. in the Supreme case. The condominium corporation, in releasing and in obtaining a release of the easements in question, was "managing" the property and the assets of the corporation. In my view, the term "assets" in s. 12 of the Act, if given its plain and ordinary meaning, includes the easement.

[32] I agree with the opinion of Mark F. Freedman, an expert in the area of condominium law, to the effect that condominium corporations are in no different position today with respect to releasing an easement than condominium corporations were in prior to 1978 with respect to the issue of leasing common elements dealt with in the Supreme case. Mr. Freedman said at p. 6 of his report, found at tab 7 of the applicant's authorities:

The board of directors has the authority to manage the property consistent with the objects of the corporation, and accordingly, in my opinion, the board would (and should) have the authority to release and abandon easements, if the ratio of the Supreme case is to be followed.

[33] I add that s. 12(1) of the Condominium Act should not be given a narrow interpretation. It should be read as an empowering section, conferring broad powers on the condominium corporation. This was the approach taken by the court in *Metropolitan Toronto Condominium Corporation No. 539 v. Chapters Inc.* (1999), 24 R.P.R. (3d) 319, [1999] O.J. No. 2806 (S.C.J.), where the court recognized and accepted that the Condominium Act is remedial legislation and should not be rigidly or narrowly construed.

[34] For these reasons, there will be an order declaring that s. 13(1) of the Condominium Act, as amended, enables a condominium corporation to release an easement which is part of the common elements.

[35] It is further ordered that the Land Registrar for the Land Titles Division of Metropolitan Toronto (No. 66) forthwith register the applicant's form of release of easement as appended to the notice of application as schedule "A".

Order accordingly.

CBR# 847

Crawford v. Corporation of the City of London; Ruebsam Engineers Inc. et al., Third Parties

Court File No. 30707A/99

Superior Court of Justice Haines J. February 3, 2000

MOTION by defendant for an order dismissing an action.

C. Scott Ritchie, Q.C., and Charles M. Wright, for plaintiff. Brian S. McCall, for defendant. Joseph M. Dillon, Q.C., for Ruebsam Engineers Inc.

[1] HAINES J.: -- This is a motion brought by the defendant under Rule 20 for the following relief:

(a) an order declaring that the Class Proceedings Act, 1992, S.O. 1992, c. 6 ("CPA") does not apply to the special damages claim in this action;

(b) an order declaring that the CPA is not the preferable procedure in this action; and

(c) an order dismissing this action with costs.

[2] The issue is this: Is the plaintiff precluded from proceeding under the CPA by operation of s. 37 of that statute and s. 14 of the Condominium Act, R.S.O. 1990, c. C.26?

[3] The relevant portion of s. 37 of the CPA provides:

37. This Act does not apply to,

(a) a proceeding that may be brought in a representative capacity under another Act;

[4] Section 14(1) of the Condominium Act provides:

14(1) The Corporation after giving written notice to all owners and mortgagees may, on its own behalf and on behalf of any owner, sue for and recover damages and costs in respect of any damage to common elements, the assets of the corporation or individual units, and the legal and court costs in any such action brought in whole or in part on behalf of any owners in respect of their units shall be borne by those owners in the proportion in which their interests are affected.

[5] Thelma Crawford is acting as the proposed representative plaintiff of a class of condominium unit owners and former owners, whose condominium units were allegedly constructed with dangerous defective wood burning fireplaces that were subsequently replaced by gas insert fireplaces at a cost of approximately \$4,000 each. There are six separate condominium corporations and a total of 999 units that are affected. Certain components of the fireplaces and chimneys are the property of the individual unit owners and other components are part of the common elements of the respective condominium corporations.

[6] It is alleged that the defendant approved building plans which did not comply with the applicable building codes and then, following construction, determined that the fireplaces as installed were a fire hazard. The claim for special damages represents the cost of converting the fireplaces from wood to gas. The plaintiff also claims general damages for fear and anxiety, loss of use of wood burning fireplaces, loss of time and opportunity and diminution of property value.

[7] The defendant submits that a condominium corporation is, pursuant to s. 14 of the Condominium Act, empowered to commence action on behalf of the corporation and all of its unit owners to recover special damages in the nature of those claimed here. The defendant maintains that any such action constitutes "a proceeding that may be brought in a representative capacity under another Act" as provided for in s. 37(a) of the CPA and, consequently, the plaintiff is not entitled to make this claim under the CPA.

[8] The plaintiff acknowledges that s. 14(1) of the Condominium Act permits a condominium corporation to advance common claims on behalf of itself and the unit owners but submits that access to the CPA is not precluded. Counsel for the plaintiff points out that this proceeding involves a claim that has been initiated by a single unit owner and under s. 14(1) of the Condominium Act a unit owner cannot advance a representative action for other members of the condominium corporation or for former unit owners. Mr. Ritchie contends, therefore, that since this proceeding cannot be brought in a representative capacity under the Condominium Act, s. 37(a) of the CPA does not apply.

[9] Mr. McCall does not disagree with the observations but does dispute the conclusion. He submits that it is only under s. 14(1) of the Condominium Act that the full claim for special damages for the replacement of the fireplaces can be addressed since it is only the condominium corporation that can advance a claim for damages to the common elements. He concludes, therefore, that any claim that includes such damages must be pursued by the condominium corporation.

[10] A plain reading of s. 37(a) of the CPA seems to preclude the application of the CPA where it can be said that the proceeding the plaintiff is seeking to pursue under the CPA may be brought by the plaintiff in a representative capacity under another Act. In such circumstances, a plaintiff or applicant must proceed under the other Act. That is not the case here. The plaintiff, a unit owner, cannot maintain a representative action under any Act on behalf of current or former owners of any of the units in any of the subject condominium corporations. It may be that the unit owners will not be able to claim for damages to the common elements, but in my view that does not preclude the plaintiff from pursuing an action under the CPA for the damages the unit owners are entitled to claim.

[11] Both counsel made submissions as to why one procedure was preferable to the other. These submissions may be important on a motion for certification but, in my view, are not relevant to the inquiry required under s. 37(a) of the CPA where the question is whether the subject proceeding is one which a plaintiff or applicant is permitted to bring in a representative capacity under another statute. If the answer to the question is "yes", the CPA does not apply. But if the answer is "no", as is my finding here, the action may be commenced under the CPA.

[12] The defendant's motion for judgment is therefore dismissed. I will hear submissions as to costs on a convenient date to be arranged by counsel through the office of the Trial Co-ordinator.

[13] The issue raised on this motion is novel and I am grateful to counsel for their comprehensive facta and helpful submissions.

Motion dismissed.

CBR# 848

Strata Corp. LMS 509 v. Andresen

Between Strata Corporation LMS 509, plaintiff, and Bev Andresen, Gordon Antil, Bob Bowen, Ann Card, Peter Card, Marie Carter, Doreen Dartnell, Reg Dartnell, Jim Doerr, Jim Hansen, Judy Mortensen and Laurence Shindel, defendants

Vancouver Registry No. L001137

British Columbia Supreme Court Vancouver, British Columbia Skipp J. Heard: November 14 - 15, 2000. Judgment: February 7, 2001. (59 paras.)

Counsel: R.M. Shore, for the plaintiff. J. Mendes, for the defendants.

[para1] SKIPP J.:-- The plaintiff Strata Corporation applies for a declaration that all owners of units at the Chelsea Green condominium complex are responsible for payment of expenses required to rectify damage to the common property of Chelsea Green in proportion to each owner's unit entitlement in the property.

[para2] The plaintiff strata corporation is situated in Langley, British Columbia, and it consists of 224 residential units, and of those 224 units, 182 are attached low-rise buildings (townhouses). The remaining 42 are in a single contiguous, 3-storey block (apartments). There is a common building and pool which is available for use by all residents. There are two primary access gates to Chelsea Green which are locked and all residents have a common key which opens all entry points.

[para3] The Chelsea Green complex has sustained water ingress damage, which in lay terms is the leaky condo syndrome.

[para4] Predictably the fact that the estimated cost of rectification of the water ingress damage as of December 6, 1999, was \$636,000.00 plus GST and because all of the rectification repairs would be to the apartment building, there is a division of opinion between the townhouse unit holders and the apartment unit holders.

[para5] The townhouse unit holders submit that there are two types of strata lots within Chelsea Green, one type being the townhouse unit strata lots and the other type being the apartment unit strata lots. Their submission is that on a proper construction of the applicable legislation the costs of rectification should be directed to the apartment unit strata lots. The apartment unit strata lot owners do not agree and in their view all of the unit holders should contribute to the rectification costs on a unit entitlement basis.

[para6] The defendants, whom I will refer to as the townhouse owners, seek an order dismissing the plaintiff's application and declaring that:

a. the plaintiff strata corporation is comprised of two types of strata lots, namely, strata lots 1 - 182 (the "Townhomes") and strata lots 183 - 224 located in an apartment building (the "Apartment Units" and "Apartment Building", respectively);

b. the cost of repairing the construction deficiencies in the Apartment Units and Apartment Building (the "Repair Levy") is a contribution which relates to and benefits the owners of the Apartment Units alone (the "Apartment Owners"), and must be allocated to the Apartment Owners in accordance with Strata Property Regulation s. 6.4(2);

c. in the alternative, the cost of repairing the balconies and decks of the Apartment Units is a contribution which is attributable to the limited common property of the Apartment Units and must be allocated to the Apartment Owners in accordance with s. 128(3) of the Plaintiff's Bylaws.

WHAT LEGISLATION APPLIES THE CONDOMINIUM ACT, R.S.B.C. 1996, c. 64 OR THE STRATA PROPERTY ACT, R.S.B.C. 1998, c. 43

[para7] The plaintiff's submission is that the appropriate legislation is the Condominium Act and it further submits that at all times relevant to the dispute Chelsea Green operated pursuant to the provisions of the Condominium Act. The plaintiff observes that all the pleadings filed herein prior to July 1, 2000, relied upon and referred to sections of the Condominium Act which was repealed on July 1, 2000, when the Strata Property Act came into force. Significant regulations were also proclaimed with the new Act.

[para8] I refer to the transitional provisions set out in s. 293 of the Strata Property Act which provide, inter alia:

293(1) Except as otherwise provided by this Act and the Regulations, this Act and the Regulations apply to a strata plan deposited and a strata corporation created under the Condominium Act, R.S.B.C. 1996, c. 64 or any former Act.

It would appear on a plain reading of the now s. 293(1) of the Strata Property Act and bearing in mind the changes made to these sections prior to the Strata Property Act coming into force that the legislature intended that the Strata Property Act would apply except as otherwise provided in the Act itself.

[para9] The plaintiff in urging that the Condominium Act should be the governing Act to resolve the questions raised herein relies on *Butterfield v. Strata Plan NW 3214*, 2000 BCSC 1110, [2000] B.C.J. No. 1520. Shortly put, I find *Butterfield* to be distinguishable. The Strata Property Regulations contemplate expense allocations of the nature raised herein and they provide mechanisms for strata corporations operating under the Condominium Act. Given that the legislature has provided direction in these matters I find that the Strata Property Act and the Strata Property Regulations govern this dispute, although events prior to July 1, 2000, will be relevant in determining how the repair levy is to be treated as an expenditure.

DIVISION TWO - CONTRIBUTION TO EXPENSES

[para10] I refer to s. 99(1) of the Strata Property Act:

Subject to s. 100, owners must contribute to the strata corporation their strata lots' shares of the total contributions budgeted for the operating fund and contingency reserve fund by means of strata fees calculated in accordance with this section and the Regulations.

[para11] "Operating fund" is defined in s.1 of the Strata Property Act as meaning:

a fund for common expenses that usually occur either once a year or more often than once a year, as set out in s. 92(a).

"Contingency reserve fund" is defined as meaning:

a fund for common expenses that usually occur less often than once a year or that do not usually occur, as set out in s. 92(b).

[para12] Section 99 stipulates that all owners must contribute to the operating and contingency reserve funds in accordance with their unit entitlement, a requirement made subject to exceptions for types of strata lots and limited common property by s. 6.4 of the Strata Property Regulation. That section reads:

6.4(1) For the purposes of s. 99 of the Act, but subject to a resolution under s. 100 of the Act, if a contribution to the operating fund relates to and benefits only limited common property, the contribution is shared only by owners of the strata lots entitled to use the limited common property, and each strata lot's share of that contribution is to be calculated in accordance with the following formula and not in accordance with the formula set out in section 99(2) of the Act:

unit entitlement of strata lot _____ x contribution to operating fund total unit entitlement of all strata lots whose owners are entitled to use the limited common property to which the contribution relates

the result of which is that the cost is shared amongst those owners entitled to use the limited common property.

[para13] Section 6.4(2) sets out the following:

6.4(2) For the purposes of s. 99 of the Act, but subject to a resolution under s. 100 of the Act, if a contribution to the operating fund relates to and benefits only one type of strata lot, and that type is identified as a type of strata lot in the by-laws of the strata corporation, the contribution is shared only by owners of strata lots of that type, and each strata lot's share of that contribution is to be calculated in accordance with the following formula and not in accordance with the formula set out in s. 99(2) of the Act:

unit entitlement of strata lot _____ x contribution to operating fund total unit entitlement of all strata lots of the type to which the contribution relates

and s. 99(2) contains the provision where the cost is shared equally by all strata lots.

[para14] From the sections that I have referred to and for the formula set out in Regulation 6.4(2) to have reference to the repair levy, in this case the following facts must exist:

1. That there is more than one type of strata lot at Chelsea Green and the types are identified as types in the bylaws.
2. That the contribution being made is to the operating fund.
3. That the contribution relates to and benefits only one type of strata lot.

[para15] Is there more than one type of strata lot at Chelsea Green and if that is the case have the types been identified as types of strata lots in a bylaw?

[para16] In determining whether there are different types of strata lots at Chelsea Green one must refer to the Strata Property Act and to the Strata Property Regulation for guidance. Section 191(1)(c) of the Strata Property Act provides that a strata corporation can have "sections".

[para17] For the purpose of representing the different interests of "owners of different types of residential strata lots" s. 191(2) provides that,

For the purposes of ss. 1(c) strata lots are different types if they fall within the criteria set out in the Regulations.

[para18] Section 193 outlines the procedure for the creation of, or cancellation of sections. It provides, inter alia:

193(1) To create or cancel sections, the strata corporation must hold an annual or special general meeting to consider the creation or cancellation.

(2) The notice of meeting must include

(a) a resolution to amend the bylaws to provide for either the creation and administration of each section or the cancellation of the sections, and

(b) any resolutions to designate limited common property, in accordance with s. 74, for the exclusive use of all the strata lots in a section or to remove a designation in accordance with s. 75.

(3) The resolution referred to in ss. 2(a) must be passed:

(a) by a 3/4 vote by the eligible voters in the proposed or existing section, and

(b) by a 3/4 vote of all the eligible voters in the strata corporation.

[para19] Part 11 of the Strata Property Regulation deals with "sections". Section 11.1 provides:

For the purposes of s. 191(1)(c) of the Act, the following are the different types of residential strata lots:

- (a) apartment style strata lots;
- (b) townhouse style strata lots;
- (c) detached houses

[para20] Part 11 outlines formulas for sharing operating expenses for limited common property and types of strata lots in sections. Section 11.2(2) provides:

For the purposes of s. 195 of the Act, but subject to a resolution under s. 100 of the Act, if a contribution to the operating fund relates to and benefits only one type of strata lot in a section, and that type is identified as a type of strata lot in the bylaws of the section, the contribution is shared only by owners of strata lots of that type, and each strata lot's share of that contribution is to be calculated in accordance with the following formula and not in accordance with the formula as set out in s. 195 of the Act.

[para21] Part XVII of the Strata Property Regulation also deals with types of strata lots. Section 17.13 provides:

(1) Subject to the bylaws of the strata corporation, if a strata corporation's budget, in effect on the coming into force of this section, apportions any common expenses to one or more type of strata lot in accordance with s. 128(2) of the Condominium Act or a similar bylaw, the strata corporation may continue to use the type of strata lot identified in the budget as a type of strata lot for the purposes of sections 6.4(2) and 11.2(2) of this Regulation.

(3) Before January 1, 2002, a strata corporation may enact a bylaw that identifies the type of strata lot set out in the budget referred to in subsection (1) as a "type of strata lot" for the purposes of sections 6.4(2) and 11.2(2).

(4) Despite s. 128(1) of the Act, a bylaw under ss. (3) may be approved by a resolution passed by a majority vote at an annual or special general meeting.

[para22] Section 128 of the Condominium Act deals with common expenses and provides, inter alia,

(1) The strata lot owner's contribution to the common expenses of the strata corporation must be levied in accordance with this bylaw.

(2) If a strata plan consists of more than one type of strata lot, the common expenses must be apportioned in the following manner:

(a) common expenses attributable to one or more type of strata lot must be allocated to that type of strata lot and must be borne by the owners of that type of strata lot in the proportion that the unit entitlement of that strata lot bears to the aggregate unit entitlement of all types of strata lots concerned;

(b) common expenses not attributable to a particular type or types of strata lot must be allocated to all strata lots and must be borne by the owners in proportion to the unit entitlement of their strata lots.

(3) If a strata plan includes limited common property, expenses attributable to the limited common property which would not have been expended if the area had not been designated as limited common property must be borne by the owners of the strata lots entitled to use the limited common property in proportion to the unit entitlement of their strata lots.

[para23] It would appear that the legislators intended in s. 193 of the Strata Property Act to provide a mechanism for strata owners to form sections based on types of strata lots for the purpose of apportioning expenses. Chelsea Green has not invoked this mechanism. Even so, the legislature has provided a means in s. 17.13 of the Strata Property Regulation for strata corporations to continue to apportion expenses to one or more type of strata lot in accordance with s. 6.4(2) and 11.2(2) of the Strata Property Regulation, provided that the budget of the strata corporation in effect on July 1, 2000, apportioned common expenses to one or more type of strata lot in accordance with s. 128(2) of the Condominium Act.

[para24] The budget of Chelsea Green in place on July 1, 2000 does in fact apportion some expenses to the townhouse strata lots and some to the apartment strata lots. Section 17.13 of the Strata Property Regulation sets out that subject to the bylaws of the strata corporation, if the budget has apportioned any common expenses to one or more type of strata lot in accordance with s. 128(2) of the Condominium Act or similar bylaw the strata corporation may continue to use the type of strata lot identified in the budget as a type of strata lot for the purposes of s. 6.4(2) and 11.22 of this Regulation.

[para25] It is further noted that that option is permissive and not mandatory. This phrasing, together with the mechanisms set out in s. 193 of the Strata Property Act empowers the owners of strata corporations to make their own decisions with respect to the allocation of costs related to expenditures such as the repair levy.

[para26] Should the townhouse owners be required to contribute to the repair levy? Since the Strata Council levied all of the Chelsea Green unit holders, even assuming that the requirements of s. 17.13(1) of the Strata Property Regulation, with reference to s. 128(2) of the Condominium Act have been met, it is clear that the strata corporation has chosen not to continue to use the types of strata lot identified in the budget for the purposes of s. 6.4(2) and 11.2(2) of the Regulation at least with respect to the repair levy.

[para27] In my view the Strata Council, in opting not to use the types of strata lot identified in the budget, has acted within the discretion afforded to it by the legislation.

[para28] The Strata Council issued its repair levy in December 1999 and three months earlier on September 8, 1999, a Special Resolution was put forward at an Extraordinary General Meeting of Chelsea Green Strata Council. The resolution read:

BE IT RESOLVED as a Special Resolution of the owners, Strata Plan LMS 509, Chelsea Green, that under Chelsea Green's by-laws and the Condominium Act, S. 128, that Strata Plan LMS 509 consists of more than one type of Strata Lot, that is Apartment and Townhouses, and accordingly all expenses attributable to either Apartment or Townhouses shall be levied and borne by the owners of that type of Strata Lot.

This Resolution failed to attract the requisite approval.

[para29] Having concluded that the Strata Council were acting within their jurisdiction in concluding that there is only one type of strata lot, the owners' opportunity for redress is as set out in s. 17.13 of the Strata Property Regulation. That is, by the enactment of a bylaw pursuant to the provisions of s. 17.13(3), identifying the types of strata lot set out in the budget referred to in ss. (1) as "types of strata lot", for the purposes of sections 6.4(2) and 11.2(2).

[para30] Alternatively, the owners could put forward a Resolution pursuant to the provisions of s. 193 of the Strata Property Act which section deals with the creation or cancellation of sections by strata corporation.

[para31] It is the plaintiff's submission that regardless of what procedure could have been followed by townhouse unit owners, either procedure would have to have been accomplished prior to the water ingress damage having occurred. To create separate types of strata lots to effect retroactively the allocation of the repair levy would be unfair. The repair levy herein was assessed in December 1999, although the problem had manifested itself much earlier.

[para32] When the September 8, 1999, Resolution was moved, the costs of rectifying the water ingress damage had not been established and when it was, the Strata Council elected not to resort to the mechanism available to it via s. 17.13(1) of the Strata Property Regulation and I find their decision to be consistent with the condominium concept as enunciated by Bauman J. in the Royal Bank of Canada v. Holden (1996), 7 R.P.R. (3d) 80 (B.C.S.C.), wherein he referred to the condominium concept of people living together in individually owned units within a common shell.

[para33] If my conclusion that the Strata Council acted within its jurisdiction in electing not to invoke the provisions of s. 17.13(1) of the Strata Property Regulation to establish two types of strata units is deemed to be incorrect, then in order for a bylaw enacted pursuant to s. 17.13(3) of the Strata Property Regulation to achieve the effect of allowing the costs of the repair levy to be allocated in accordance with s. 6.4(2) and 11.2(2) of the Regulation, it would be necessary to comply with the remaining requirements set out in s. 99 of the Strata Property Act and s. 6.4(2) of the Strata Property Regulation.

[para34] A number of definitions in the Strata Property Act are pertinent in determining whether the contribution being sought is one that is appropriately characterized as a contribution to the operating fund. Operating fund is defined in s. (1) of the Strata Property Act to mean "a fund for common expenses that usually occur either once a year or more often than once a year, as set out in s. 92(a) [of the Strata Property Act]". Common expenses are defined in s. (1) of the Strata Property Act to mean expenses that are

- (a) relating to the common property and common assets of the strata corporation, or
- (b) required to meet any other purpose or obligation of the strata corporation.

[para35] Section 92 of the Strata Property Act sets out that to meet its expenses the strata corporation must establish, and the owners must contribute, by means of strata fees, to

- (a) an operating fund for common expenses that usually occur either once a year or more often than once a year, and
- (b) a contingency reserve fund for common expenses that usually occur less often than once a year or that do not usually occur.

[para36] It would appear to follow that in order for the repair levy to be properly characterized as a contribution to the operating fund, it necessarily must be

- (1) a common expense that
- (2) usually occurs once or more each year.

Conversely, if a levy can be properly characterized as a contribution to the contingency reserve fund then all of the owners, regardless of the type of strata they own, would pay on a unit entitlement basis. Such a finding would require that the contribution be

- (1) a common expense that
- (2) usually occurs less often than once a year or that does not usually occur.

[para37] The provisions of s. 128 of the Condominium Act, incorporated into the bylaws at Chelsea Green are helpful. The language employed in s. 128 of the Condominium Act suggests that one indication that an item is a common expense is that it is budgeted. This observation is consistent with the remarks of Bauman J. in Royal Bank of Canada v. Holden, supra, wherein he noted that common expenses in the context of s. 128 of the Condominium Act would be only those expenses levied under s. 128(10) as part of the annual budget.

[para38] I am of the view that this interpretation of the judgment is not correct. Bauman J. was clear in his finding that the repair levies arose because of the need to repair critical portions of the common property as is the case here. Prima facie this finding would fit within the definition of common expense in the Strata Property Act as outlined above,

Common expenses are also defined in s.(1) to mean expenses that are

- (a) relating to the common property and common assets of the strata corporation.

[para39] In Royal Bank of Canada v. Holden, supra, the issue was what constitutes common expenses for the purposes of statutory priority pursuant to the provisions of s. 37(2) of the Condominium Act, R.S.B.C. 1979 c. 61. Bauman J. observed that

the repair levies were not contemplated by the annual budget as the expenses arose unexpectedly during the year, between the budgets. Secondly, referring to s. 35(1)(b) and (d) the court noted that the levies were not intended to top up the contingency reserve fund.

[para40] Section 35 of the Condominium Act at that time contemplated a "reserve fund being established for extra-ordinary future expenses". It permitted "the levying of contributions on the individual owners". It also permitted the strata corporation to make expenditures out of the contingency reserve fund when necessary to meet extraordinary expenses, as they materialized. Noting that the levies were not made out of the contingency reserve fund it was assumed in the circumstances that there was simply not sufficient monies for the needed repairs. Thus, rather than rising out of the annual budget, the levies arose by special resolution.

[para41] The court concluded that the definition of common expenses in s. 37(7) of the Condominium Act was inclusive and not exclusive, and that given the strata corporation's duty to repair and maintain common property the expenses related to the repair levies were authorized and enjoyed priority. A repair levy, such as the one here at issue, is related to common property and I find constitutes a valid common expense.

[para42] The defendant submits that the cost of the rectification repairs is properly attributable to the operating fund. It was further submitted that the repair levy would be expected to form part of the administrative fund (now the operating fund) because expenses related to water ingress damage have occurred annually since at least 1995.

[para43] The defence submits further that the repairs to the apartment building's exterior were not random but were instead the result of significant construction defects for which Chelsea Green was financially responsible. Without enumerating these defects, in June 1997 Strata Council was made aware the developer would no longer assume responsibility for any future building envelope repairs.

[para44] In October 1997, the balconies and the stucco problems were apparent. In January 1998, Strata Council approved a contractor's quote to repair these defects. The work began shortly thereafter and by April 20, 1998, Strata Council had been advised that rot had been exposed in the apartment balcony soffits and finally the November 24, 1998, Spratt report set out that structural rot existed in the apartment building and that a complete rehabilitation of its exterior walls was required.

[para45] The submission that the defendant makes arising out of the foregoing facts is that by May 1, 2000, the commencement of the plaintiff's last annual budget under the Condominium Act expenses to repair the apartment building's envelope had become a normal, foreseeable and indeed inevitable feature confronting the Strata Council. The defendant submits these expenses could no longer be considered as unusual or extraordinary draws on the contingency reserve.

[para46] In *Marco Polo Properties Ltd. v. Strata Plan LMS 1328* (1999), 71 B.C.L.R. (3d) 188, Davies J. upheld the decision of a strata corporation to include the cost of its building envelope repairs in its administrative fund. He said at paras. 19 to 22,

I am satisfied that in the circumstances of this case the inclusion of the remedial cost to repair the waterproof envelopes of the buildings in this development was properly included in the respondent's annual budget under 35(1)(a). That section requires that a strata corporation must:

Establish a fund for administrative expenses sufficient for the control, management and administration of the common property, for the payment of premiums on policies of insurance and for the discharge of other obligations of the corporation.

[para47] The phrase "and for the discharge of other obligations of the corporation" as per Davies, J., as he then was in *Marco Polo*, included the strata corporation's duty to repair as mandated by s. 14, 34(1)(d) and 116(b), (d) and (f).

[para48] Further with respect to the strata corporation's duty to repair I refer again to *Royal Bank of Canada v. Holden*, supra, in which Bauman J. wrote at para. 17:

The strata corporation has certain essential duties under the Act to maintain common property, common facilities, and assets of the strata corporation. These are fundamental duties, and I perceive, their execution by the strata corporation is critical to the realization of the condominium concept - that is people living together in individually owned units within a common shell.

[para49] In *Marco Polo* the court referred to the fact that a \$2,467,000.00 levy to repair the defects related to water ingress damage could not be paid from the contingency reserve fund for both practical and legal reasons. Davies J. observed that in his view the use of funds from the contingency reserve fund for such purposes was not mandatory as s. 35(1)(b) of the Condominium Act mandates that those funds be used to create a fund for unusual or extraordinary future expenses.

[para50] Davies J. went on to observe that aside from the practical problem of the contingency reserve fund not having sufficient funds to pay for the repairs he found that the repairs then required were not future repairs but they were repairs required imminently and on an urgent basis, and that they had continued as such on an annual basis since the project was completed. Generally speaking I find that factual situation to be remarkably similar to the situation confronting Chelsea Green.

[para51] In my view the observations of Davies J. in *Marco Polo* and his characterization of the repair levy have not been diminished with the advent of the Strata Property Act. Expenses concerning interim and emergency repairs to the apartment building envelope, investigative work, design work and remedial work will continue to be incurred each year that the building is not repaired.

[para52] The townhouses will also require more modest envelope repairs as the time goes by. I find that the repair levy can therefore be correctly characterized as an operating fund expenditure. I have come to this conclusion notwithstanding the fact that similar repairs such as those undertaken to eight balconies of the apartment building in early 1998 were effected through the contingency fund.

[para53] Should the conclusion, that there is only one type of strata lot in Chelsea Green prove to be incorrect, the issue to then be addressed is can the repair levy be characterized as a contribution that relates to and benefits only one type of strata lot. In my view the repair levy would relate to and benefit the townhouse strata lots, as well as the apartment unit strata lots.

[para54] In that regard I refer to the evidence of Jeff Potoraka of Royal Appraisals, to the effect that there has been a diminution in the value of the townhouse units in Chelsea Green exceeding the average downturn in value of condominiums in Langley. As well, it would seem to be a defensible proposition that the repair levy will be of benefit to both the townhouse strata lots and to the apartment unit strata lots in terms of increased saleability.

[para55] The defendants submit in the further alternative that the balconies and decks of the apartment units are limited common property and thus according to s. 128(3) of the plaintiff's bylaws and 128(3) of the Condominium Act, expenses attributable to these areas should be borne by the owners of the strata lots entitled to use the limited common property in proportion to the unit entitlement of their strata lots.

[para56] Limited common property is defined in s. (1) of the Strata Property Act as:

common property designated for the exclusive use of the owners of one or more strata lots.

[para57] Although the balconies and decks in their daily use may be considered limited common property, as these areas relate to the structure of the apartment building, I find them to meet the definition of common property, as outlined above. As such, the repair of these areas falls under the obligations of Chelsea Green.

CONCLUSION

[para58] In conclusion I find that the Strata Property Act and the Strata Property Regulation are the relevant legislation. Through the operation of s. 99(1) of the Strata Property Act I find that the repair levy should be allocated to all strata lot owners on a unit entitlement basis with no exception arising under the Regulation. Accordingly, the application of the plaintiff is successful and the townhouse owners are required to share in the costs of the repair levy on a unit entitlement basis.

[para59] Counsel has agreed that there is to be no order as to costs.

SKIPP J.

CBR# 296

Singer v. Ontario New Home Warranty Program

Court File No. 372/98

Superior Court of Justice Divisional Court Blair R.S.J., Then and Co J. October 20, 2000

APPEAL from a decision of the Commercial Registration Appeal Tribunal denying a claim under s. 14 of the Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31.

Kevin D. Sherkin and Messod Boussidan, for applicants. James C. Tory and John Terry, for respondent.

R.A. BLAIR R.S.J. (THEN J. concurring): --

Background

[1] In 1987 Allen and Nancy Singer purchased two condominiums in a large condominium project in Scarborough, Ontario. The condominiums were bought and sold as tax sheltered investments. Subsequently, the developer/vendor, Reemark Sterling Club 1 Limited, was unable to convey title to the Singers, who sued and obtained judgment from the Honourable Mr. Justice White in May 1992. The judgment granted declaratory relief and a monetary award totaling approximately \$95,500 (inclusive of pre-judgment interest).

[2] Reemark has never paid the judgment, and the condominium project was sold under power of sale. The Singers applied to the Ontario New Home Warranty Program under s. 14(1)(a) of the Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31 for recovery under the guarantee provisions of that statute. The Warranty Program denied their claims. That denial was upheld by the Commercial Registration Appeal Tribunal.

[3] The Tribunal concluded the Warranty Program had been correct in determining it was only required under s. 14(1)(a) of the Act to compensate condominium purchasers in tax sheltered investment situations for payments made by the purchasers in respect of land and construction costs and not for the business/investment costs relating to the transaction. It also upheld the Warranty Program's decision that tax savings enjoyed by the purchaser/investor, and rental income received, should be deducted in determining the loss, if any, actually suffered by the appellants.

[4] The Singers now appeal to this court.

Issues

[5] The issues on the appeal are the following:

(a) Is a purchaser who acquires a new condominium unit as a tax sheltered investment entitled to look to the Warranty Program for reimbursement for payments made, not only in respect of lands and buildings purchased, but also in respect of condominium and business-related services provided to the purchaser pursuant to the investment package which forms an integral part of the condominium purchase?

(b) In calculating the financial loss for which a purchaser can look to the Warranty Program for compensation, should tax savings arising out of the investment be an offsetting deduction?

[6] In my opinion, the answer to both questions is "Yes". The Tribunal and the Warranty Program were incorrect in answering the first question in the negative.

Standard of Review

[7] The standard of review on an appeal from a decision of the Tribunal, in circumstances such as this, is that of correctness.

[8] There is no privative clause protecting decisions of the Tribunal, and the Ministry of Consumer and Commercial Relations Act, R.S.O. 1990, c. M.21 provides for a broad statutory right of appeal from such decisions. The relevant subsections state:

11(1) Any party to proceedings before the Tribunal may appeal from its decision or order to the Divisional Court in accordance with the rules of court.

(5) An appeal under this section may be made on questions of law or fact or both and the court may exercise all the powers of the Tribunal, and for such purpose the court may substitute its opinion for that of the Registrar or of the Tribunal, or the court may refer the matter back to the Tribunal for rehearing, in whole or in part, in accordance with such directions as the court considers proper.

(Emphasis added)

[9] These statutory provisions call for a standard of correctness in circumstances where, as here, what is involved is the interpretation of a statutory provision regarding which the Tribunal has no more expertise than does the court. In *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at p. 590, 92 B.C.L.R. (2d) 145, Iacobucci J. stated:

At the correctness end of the spectrum, where deference in terms of legal questions is at its lowest, are those cases where the issues concern the interpretation of a provision limiting the tribunal's jurisdiction . . . or where there is a statutory right of appeal which allows the reviewing court to substitute its opinion for that of the tribunal and where the tribunal has no greater expertise than the court on the issue in question as for example in the area of human rights.

[10] See also *Re Feingold and Discipline Committee of College of Optometrists of Ontario* (1981), 33 O.R. (2d) 169, 123 D.L.R. (3d) 667 (Div. Ct.); *Grudzinski v. Ontario New Home Warranty Program* (1997), 32 O.R. (3d) 376, 33 C.L.R. (2d) 315 (Div. Ct.).

[11] For the reasons set out below, I am of the view that the Tribunal was incorrect in holding that the Singers were not entitled to claim under the Warranty Program for the financial losses they sustained in relation to the condominium and business-related services provided as part of the purchase agreement, and which formed an integral part of the contract for the sale of the "homes" in question.

Law and Analysis

[12] The pertinent provisions of the Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O31 ("Act") are found in s. 14. Subsections (1) and (2) state:

14(1) Where,

(a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract,

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

(2) In assessing damages, the Corporation shall take into consideration any benefit, compensation or indemnity payable to the person or owner from any source.

[13] Section 6 of Ontario Regulation 892, R.R.O. 1990, Administration of the Plan, limits the amount of recovery under s. 14 of the Act to \$20,000 plus (in the case of a condominium unit) the amount of any interest owing on the amount to be paid out of the guarantee fund.

Damages for Financial Loss Resulting from the Vendor's Failure to Perform

[14] What is at issue, then, is the interpretation of the phrase "a cause of action for damages . . . for financial loss resulting from . . . the vendor's failure to perform the contract [for the provision of a home]."

[15] Counsel for the Warranty Program submits that the agreements between the Singers and Reemark Sterling fall into two separate and distinct categories. The first relates to the sale of land and construction of the condominium -- "the provision of a home", in the traditional sense. The second relates to certain services to be provided by the vendor, and paid for by the purchasers, which gave rise to tax deductions. The Warranty Program and the Tribunal held that only losses relating to the purchase of land and buildings were compensable under the Act, and that losses sustained as a result of the vendor's failure to provide the services purchased were not. The rationale for this position was that the latter losses did not arise from a contract for the provision of a home. Rather, they arose from a contract for business services associated with renting the condominium in order to generate revenue from the home, not as a "home" but as a "business investment". As such, the argument goes, they are not covered under the Act.

[16] Having regard to the tax sheltered nature of the scheme under which the Singers purchased the condominiums, the purchase price of each unit was divided between land and construction costs, and services, as follows:

Unit 1308 Unit 1201

Land and Construction \$84,044 \$114,040

Services \$18,946 \$23,950

Total Purchase Price \$102,990 \$137,990

[17] In its decision dated May 28, 1998, the Tribunal framed its approach to the determination of the issues before it (at p. 5) as follows:

The question to be decided is what compensation, if any, are the Applicants entitled to under the Act.

What losses and what benefits may be claimed is entirely governed by the Act. Damages in contract law involve different principles from claims by way of compensation under the Act. Allowable claims for compensation under the Act are narrower than damages based on a breach of contract at common law.

Damages in contract law flow from an agreement, whereas under the Act, consumer protection is being provided for people buying a new home. The Act is not devised to protect investors in a tax driven scheme although like others they are covered. The Act, a consumer driven statute, offers protection for what is directly necessary for the provision of a home. Remoteness for financial loss or damage is a vital consideration.

Financial losses under the Act, are dealt with in section 14:

[The Tribunal then cited the provisions of s. 14 set out above.]

With these statutory restrictions, the type of compensation contemplated focuses on the phrase "for the provision of a home". The Act provides funds by way of warranty, limited in amount by the regulations and in limited circumstances.

(Emphasis added)

[18] These reasons reflect the continuing legacy of a series of decisions in which the Warranty Program and the Tribunal have sought to narrow the application of the compensation provisions of s. 14 to financial losses arising from a vendor's failure to perform obligations regarding the acquisition of land and newly constructed buildings -- to new home purchasers in the traditional sense -- on the premise that the Act is "consumer protection. . . for people buying a new home". See, for example, Re Stenzler, [1995] O.C.R.A.T.D. No. 29 (QL); Re Templeton, [1994] O.C.R.A.T.D. No. 141 (QL); Sunforest Investment Corp. v. Ontario

New Home Warranty Program (1997), 32 O.R. (3d) 59, 12 R.P.R. (3d) 157 (C.A.); Ontario New Home Warranty Program v. Meadows of White Oaks II Ltd. (1988), 65 O.R. (2d) 362, 50 R.P.R. 186 (H.C.J.); Ontario New Home Warranty Program v. Marchant Building Corp. (1989), 68 O.R. (2d) 577, 4 R.P.R. (2d) 164 (H.C.J.).

[19] However, this approach has not fit easily with the purchase of condominium units. Condominiums are by nature multiple unit developments -- frequently quite large multiple unit developments -- with common elements in which the unit holders have a common interest and which require upkeep, maintenance, landscaping and servicing. These developments provide "homes" for the consuming public, but they often do so under the rubric of highly sophisticated financing, investment, and service packages. Some of these packages are tax driven investment purchases where the buyer does not intend to live in the premises -- indeed, to do so would jeopardize the tax sheltered nature of the investment -- but rather intends to rent the unit to others.

[20] In the circumstances of this case, for example, the Singers' purchases are reflected in a series of nine agreements. These included a General Agreement, a Unit Purchase Agreement, a Development Agreement, a Services Agreement, a Rental Management Agreement, and a Guarantee Agreement. In the litigation involving the Singers and Reemark Sterling, Mr. Justice White found that the agreements, taken together, constituted a condominium purchase. A review of the documents demonstrates that such is the case.

[21] The General Agreement, for instance, stipulates that the appended agreements "form integral parts of [the] General Agreement", and each of the vendor/developer and the purchasers agree to be bound by and carry out all of their terms and conditions. Under the Services Agreement the purchasers are to pay for, and the vendor is to provide, such things as legal and accounting services, landscaping, paving, the arrangement of financing, a buy-down of the interest rate, a guarantee of the first mortgage, and other guarantees pertaining to rentals and cash flows. The Guarantee Agreement, which deals particularly with these latter matters and provides protection to the purchasers pending occupancy by a tenant, clearly states (Art. 1.01) that:

in consideration of the Vendor providing the above guarantees, the Owner covenants and agrees that as part of the Purchase Price he will pay to the Vendor the amounts set out in . . . the Services Agreement.

(Emphasis added)

[22] Moreover, the recitals to the Services Agreement itself demonstrate the integral nature of all of these agreements. They state (in part):

WHEREAS pursuant to a Unit Purchase Agreement delivered contemporaneously herewith it is contemplated that the parties deliver this Services Agreement;

AND WHEREAS the Owner is purchasing an undivided prorata share of the Land with the intention that the Vendor will provide certain initial services to facilitate completion of the Project with the objective that upon substantial completion of the Proposed Unit and the registration of a Condominium Declaration, title to the Proposed Unit shall be transferred to the Owner.

(Emphasis added)

[23] I agree with counsel for the Warranty Program that the agreements encompass a variety of things, including the purchase of land and buildings and the purchase of services. In my opinion, however, the Agreements are all part of a single transaction -- albeit an investment transaction -- the essence of which is "a contract for the provision of a (condominium) home".

[24] Although the Warranty Program and the Tribunal resisted such an interpretation of the legislative scheme under the Act, it is now established that purchasers of new condominium units for investment purposes -- including tax-shelter driven investment purposes which preclude the purchaser from living in the premises -- are covered by the Act: see Sunforest Investment Corp. v. Ontario New Home Warranty Program, supra. At p. 63 of that decision, McKinlay J.A. stated on behalf of the court:

I agree with Holland J. in Ontario New Home Warranty Program v. Meadows of White Oaks II Ltd. (1988), 65 O.R. (2d) 362, 50 R.P.R. 186 (H.C.J.), that even where condominiums are purchased for tax shelters, they are purchased for occupancy and, therefore, the vendor of a condominium which has not been previously occupied must be registered and pay premiums under the Act. If that is so, the purchaser is protected by the provisions of the Act.

[25] The Tribunal recognized this when it observed:

What losses and what benefits may be claimed is entirely governed by the Act. Damages in contract law involve different principles from claims by way of compensation under the Act. Allowable claims for compensation under the Act are narrower than damages based on a breach of contract at common law.

Damages in contract law flow from an agreement, whereas under the Act, consumer protection is being provided for people buying a new home. The Act is not devised to protect investors in a tax driven scheme although like others they are covered. The Act, a consumer driven statute, offers protection for what is directly necessary for the provision of a home. Remoteness for financial loss or damage is a vital consideration.

(Emphasis added)

[26] In this respect, the Tribunal was drawn into error, in my opinion. It limited the scope of "damages" under subsection 14(1) in a fashion not warranted by the legislative scheme and the language of the Act. The Court of Appeal has confirmed, in Sunforest Investment Corp., supra, that investors in a tax-driven scheme are covered and entitled to be protected. It is not accurate to say that damages in contract law involve different, and narrower, principles than do compensation claims under the Act. Nor is it correct that damages in contract law flow from an agreement, whereas under the Act other considerations apply and protection is only offered "for what is directly necessary for the provision of a home". It is correct to say, as the Tribunal did recognize, that "what losses and what benefits may be claimed is entirely governed by the Act".

[27] Under the Act, entitlement to compensation under paragraph 14(1)(a) does flow from an agreement -- or, more accurately, from the vendor's failure to perform that agreement -- just as is the case in contract law. Compensation is payable where a person who has entered into a contract for the provision of a home "has a cause of action in damages against the vendor for financial loss resulting from . . . the vendor's failure to perform the contract [for the provision of the home]". The claimant is entitled to be paid

out of the guarantee fund "the amount of such damage", subject to the regulated limits. Had the legislature intended to introduce a concept other than that of damages for financial loss resulting from the failure to perform, it would not have used term of art language like "a cause of action in damages".

[28] The Tribunal expressed concern about the scope of such damages. That concern is met in two ways under the legislative scheme. The first is the limit of \$20,000 for compensation, as fixed by regulation. The second is the "other recovery" provision of subsection 14(2) of the Act. I turn now to a consideration of this latter provision, in the context of the deduction of tax benefits received by the Singers as a result of the transaction, and which the Warranty Program and the Tribunal ruled must be subtracted from any recovery to which the Singers might be entitled.

Tax savings as benefits

[29] Subsection 14(2) of the Act requires the Warranty Program, in assessing damages, to take into consideration any benefit, compensation or indemnity payable to the person or owner from any source.

[30] It is agreed that the Singers received income tax savings totaling \$49,056.66 as a result of the transaction, notwithstanding that title never passed and that the vendor defaulted. These amounts included tax deductions in respect of:

- (a) the amounts they paid for services;
- (b) the interest they paid on their promissory note;
- (c) rental losses they incurred on the units once tenants were in place; and,
- (d) terminal losses arising upon the disposal of the units in 1993.

[31] In my view the Warranty Program and the Tribunal correctly took these tax savings into consideration in calculating the financial loss for which the Singers could look to the Warranty Program for compensation. The tax deductions were real and -- unlike the situation at the time of the trial before White J. -- they had been realized by the time of the proceedings here in question. They are properly accounted for as "benefits . . . from any source", under subsection 14(2).

[32] The Tribunal had before it the expert report of Ms. Susan Glass. No expert evidence was tendered on behalf of the Singers. Ms. Glass reviewed and analyzed the Singers' relevant income tax returns, and concluded that they had received benefits by way of income tax savings as a result of entering into the contracts for the purchase of the two units. She broke down the savings into the four categories noted above, and testified that under either of two scenarios, offsetting the savings against the financial losses sustained in relation to "the provision of a home" -- that is, those losses pertaining to the cost of land and construction -- resulted in the Singers suffering no net damages. The first scenario involved offsetting all of the tax savings against land and construction costs. The second only offset those tax savings pertaining to land and construction.

[33] For the reasons articulated above, I do not agree that the tax savings should only be offset against the amounts paid in respect of land and construction. If such were the case, however, it would follow that only those tax savings arising from losses pertaining to the land and construction should be taken into account. The benefits from any source which are to be taken into consideration under subsection 14(2) must be benefits relating to the damages being assessed. If the purchasers are only entitled to be compensated for financial losses sustained in relation to land and construction, and not financial losses relating to the cost of services provided, tax savings arising out of the contract for those services are not a benefit to be accounted for in assessing damages for land and building costs. However, on the view I take of the situation, the Singers are entitled to be compensated for their financial losses suffered as a result of the vendor's failure to perform the contract for the provision of these condominium homes, including losses relating to the service contracts which formed an integral part of the purchase of the homes.

[34] The tax savings received must therefore be deducted from the total financial losses sustained.

[35] Mr. Singer claimed financial losses with respect to Unit 1308 in the amount of \$32,015.18, plus pre-judgment interest of \$8,775.70. For reasons I will explain momentarily, the Singers are entitled to include their claims for pre-judgment interest in their claims for compensation under s. 14 of the Act. Against his losses, Mr. Singer must account for net rentals received of \$6,084 and tax savings of \$21,334.77. He is therefore entitled to recover the sum of \$13,372.77 from the Warranty Program in respect of this Unit.

[36] Mr. and Mrs. Singer claimed financial losses with respect to Unit 1201 in the amount of \$42,984.55, plus pre-judgment interest in the amount of \$11,768.79. With respect to this Unit, they must account for net rentals received of \$8,152 and tax savings of \$27,721.89. They are therefore entitled to recover the sum of \$18,879.45 from the Warranty Program in respect of this Unit.

Other claims

[37] At trial before White J., the Singers obtained judgment for damages totaling \$74,999.73, plus pre-judgment interest in the aggregate amount of \$20,544.70. They were also awarded party and party costs of the action, which amount to \$8,833.69. In addition to the pure damage award, the Singers also claimed to be entitled to have the pre-judgment interest amount and the costs taken into account in determining their recovery from the Warranty Program, plus their costs of the proceedings before the Tribunal. The Tribunal rejected these contentions.

[38] I would not interfere with the Tribunal's decision not to allow the costs of the civil proceeding to be factored into the compensation calculation under s. 14. However, the Tribunal erred, in my opinion, in not taking into consideration the pre-judgment interest amounts. Pre-judgment interest is a concept designed to prevent a party's damages in terms of financial loss from eroding between the time a claim is made and judgment is obtained. It is therefore an aspect of "financial loss" sustained as a result of the defendant's failure to perform. To conclude otherwise would be to lessen the quantum of financial loss recoverable, in real terms.

[39] Consequently, the Tribunal should have taken into account the pre-judgment interest portion of the "damage" award by White J. in considering the Singers' entitlement to compensation. Instead, it treated pre-judgment interest as "interest paid [by the Singers] on their borrowings", and concluded both that the borrowings were too remote and that it would "not be equitable that a

borrower can claim interest whereas an investor who pays with his own resources cannot claim for lost interest". In doing so it misapprehended the nature of pre-judgment interest.

[40] I conclude, therefore, that the Singers are entitled to include their claim for pre-judgment interest in their claim for compensation under the Act, subject to the limits prescribed by regulation.

Disposition

[41] I would accordingly allow the appeal, set aside the decision of the Tribunal, and order that the Singers are entitled to be compensated pursuant to s. 14 of the Ontario New Home Warranties Plan Act in the following amounts:

(a) The sum of \$18,879.45 with respect to Unit 1201; and,

(b) The sum of \$13,372.77 with respect to Unit 1308.

[42] Both of these amounts are less than the \$20,000 limit for each claim under the Regulation.

[43] The Singers are also entitled to their costs of this appeal. We heard submissions as to costs at the conclusion of argument. Counsel agreed that costs should follow the event and that they should be fixed. There was a range between them as to quantum. I fix the costs of the appeal at \$5,500 plus GST.

[1] COO J. (dissenting): -- This is an appeal under s. 11(1) of the Ministry of Consumer and Commercial Relations Act, R.S.O. 1990, c. M.21, from the decision of the Commercial Registration Appeal Tribunal dismissing the appeal from a decision of the Program denying the appellants' claim for compensation.

[2] I have the misfortune to disagree with my brothers who have seen the matter differently. I express my reasons succinctly.

[3] In my view the Program and Tribunal decisions were correct and the appellants were not entitled to be awarded any sum to cover the cost of business services in fact provided to the appellants in connection with their investment purchase of two residential condominiums.

[4] In any event they were not entitled to avoid giving credit in respect of any allowable claim for the tax benefits claimed and received by them in connection with their condominium investments.

[5] A major portion of the amount claimed does not fall within the language of section 14(1) of the Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31, which provides a cause of action to a ". . . person who has entered into a contract with a vendor for the provision of a home [including a condominium] for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract." [Emphasis added]

[6] That description of cause of action and remedy excludes from consideration the claim for alleged failure to deliver services in regard to the apartment units involved in what was essentially a tax shelter investment. That aspect of the agreement with the vendor was in a quite calculated way segregated from the deal in regard to purchase of the units, for reasons that made good sense from the purchasers' perspective at the time.

[7] Section 14(2) of the Act requires that "In assessing damages, the [respondent] shall take into consideration any benefit, compensation or indemnity payable to the person . . . from any source." The tax savings received by the appellants fall within this description and are deductible, producing the result that there are no net damages payable in regard to the land and construction phase of the arrangements between the parties at the material time.

[8] I would have dismissed the appeal.

Appeal allowed with costs.

CBR# 026

Amberwood Investments Limited et al. v. Durham Condominium Corporation No. 123

Court File No. 99-CV-180197

Superior Court of Justice Stinson J. September 12, 2000

APPLICATION for a declaration.

Alan S. Price, for applicants. Patricia M. Conway, for respondent.

[1] STINSON J.: -- This application raises the question whether an obligation to pay certain expenses, that is contained in an agreement registered against the title of a parcel of land, can bind subsequent owners of the land. Put another way, can a positive covenant that requires money to be paid "run with the land" so as to bind successors in title?

Facts

[2] The applicants (whom I shall jointly describe as Amberwood), and the respondent, DCC 123, are the registered owners of adjoining parcels of land in Whitby. Originally, these two parcels were one parcel, owned by a developer called Whitby Harbour Development Corporation (WHDC).

[3] WHDC intended to build two condominium high-rise residential buildings on the land, in two phases. Phase I was to include the first high-rise building and a recreational complex and utility units whose use and ownership would ultimately be shared by the two condominium corporations. It was further intended that the two condominium corporations would have easements over the land of one another for purposes of access, structural support and the like, and would share certain expenses. Particulars of these various rights and responsibilities were contained in a so-called "reciprocal agreement," described below.

[4] WHDC completed the construction of Phase I and proceeded to register a declaration on March 20, 1992 by which DCC 123 was created. The registration of the declaration also divided WHDC's lands into two parcels, with DCC 123 becoming the owner of the Phase I lands (including the recreational complex and utility units) and WHDC remaining the owner of the Phase II lands. On the same date, WHDC and DCC 123 executed the reciprocal agreement, which was registered on the title of both parcels.

[5] The purpose of the reciprocal agreement was stated to be:

. . . [T]o provide . . . for the use, operation, maintenance, repair, service, reconstruction, if necessary, and the sharing of responsibilities and costs for mutual services within the Phase I Lands and the Phase II Lands and the Common Units, and for the sharing, if necessary, of realty taxes and other governmental municipal charges, the Easements required by each of the parties and to set forth certain other agreements of the parties relating to the Phase I Lands, the Phase II Lands and the Common Units, and the sharing of other responsibilities and costs.

[6] Article 8.4 provided for continuity of the reciprocal agreement as follows:

. . . This Agreement shall continue and remain in full force and effect upon any Person succeeding to the interest of any party hereto. . . .

[7] Article 13.1 provided, in part, as follows:

13.1 -- Provisions Run with the Land

.

(b) . . . The Easements, rights and provisions as set forth in this Agreement establish a basis for mutual and reciprocal use and enjoyment of such Easements, rights and provisions and as an integral and material consideration for the continuing right to such use and enjoyment, each party hereto does hereby accept, agree to assume the burden of, and to be bound by each and every of the covenants entered into by them in this Agreement.

(c) The provisions of this Agreement are intended to run with the real property benefited and burdened thereby, specifically, the Phase I Lands, the Phase II Lands and the Common Units and except as may otherwise be specifically provided, shall bind and enure to the benefit of the respective successors in title thereof.

[8] Among other things, the reciprocal agreement provided for the sharing by the two condominium corporations of the expenses of operating the recreational complex. The agreement also addressed the subject of interim costs, in Article 2.9, as follows:

The parties agree that until the completion of the building comprising Condominium 2, Phase I Condominium Corporation's share of certain operating expenses contained in its budget will be greater than they will be after completion of the building comprising Condominium 2. Accordingly, the Owner [WHDC] agrees until the date of registration of Condominium 2, to pay the Proportionate Share of the Phase II Condominium Corporation for the following items listed in the budget of the Phase I Condominium Corporation:

(a) Water Treatment; and

(b) Air Conditioner Maintenance.

The Owner further agrees, until the Transfer Date, to pay 35.417% of the costs of maintaining one full-time security guard on the site.

[9] WHDC started to build the Phase II Condominium, but then ran into financial difficulty. In due course, through a series of transactions I need not recite, Amberwood became the owner of the Phase II Lands. To date, no building has been constructed on the Phase II Lands.

[10] As a subsequent owner of the Phase II Lands, Amberwood has been asked by DCC 123 to pay its share of the interim costs provided for in Article 2.9 of the reciprocal agreement. For its part, Amberwood has denied liability for those costs, asserting that the obligation to pay is a restrictive covenant that cannot run with the land since it is a positive covenant. Matters came to a head when DCC 123 registered a lien and issued a notice of sale pursuant to the provisions of the reciprocal agreement, thus prompting Amberwood to commence these proceedings seeking a declaration that it is not bound to pay the interim costs.

Issue and Analysis

[11] It was common ground at the hearing that the only issue for determination was whether Amberwood is bound to pay the interim costs provided for in the reciprocal agreement. Counsel for the applicant conceded that Amberwood, as a subsequent owner of the vacant land who acquired title after the reciprocal agreement was registered, is bound by the negative covenant and easement provisions, and entitled to the benefit of an easement over the Phase I land. It was also common ground that the original parties clearly intended that all covenants should run with the land, including the interim costs provision.

[12] Put another way, the only issue in this application is whether the provision to pay interim costs should be treated differently from the other provisions in the reciprocal agreement.

[13] Amberwood submitted that this provision must be treated differently, since it is a positive covenant that cannot run with the land, and is unenforceable at law, regardless of party intention.

[14] DCC 123 submitted that the interim costs obligation falls into one of two exceptions to the general rule that positive covenants cannot run with the land. First, it submitted that Amberwood cannot take the benefit of the Phase II lands without also assuming the burden or obligations attached to them. Second, DCC 123 submitted that the grant of the easement over the Phase I lands was conditional on Amberwood paying these costs.

The rule that positive covenants do not run with the land

[15] It was conceded by DCC 123 and it is settled law that positive covenants do not run with the land: *Keppell v. Bailey* (1834), 39 E.R. 1042, [1824-34] All E.R. Rep. 10 (L.C.).

[16] Positive covenants have been defined to include obligations requiring the expenditure of money or the doing of some act, such as repairing or reconstructing property. They do not run with the land either at law or in equity: *Parkinson v. Reid*, [1966] S.C.R. 162 at p. 167, 56 D.L.R. (2d) 315. This principle was more recently affirmed by the Divisional Court in *Garnet Lane Developments Ltd. v. Webster* (1987), 43 R.P.R. 138 at p. 163, 20 O.A.C. 291.

[17] Positive covenants also include obligations to pay annual fees in return for the grant of an easement. Obligations of this kind do not run with the land, despite the contracting parties' express intentions to the contrary: *Metropolitan Toronto Condominium Corp. No. 979 v. Camrost York Development Corp.* (1995), 26 O.R. (3d) 238, 48 R.P.R. (2d) 109 (Gen. Div.).

[18] The obligation in the case at bar to pay interim operating costs is an affirmative obligation that falls within the definition of a positive covenant. The respondent did not submit that the obligation should be differently characterized.

[19] The 1989 Ontario Law Reform Commission Report on Covenants Affecting Freehold Land at p. 21 considered the rule against positive covenants flowing with title and the two reasons typically advanced for its existence. First, such covenants tended to render land inalienable. Second, persons dealing subsequently with the land would have great difficulty ascertaining the existence of such covenants, because they do not normally have a physical manifestation.

[20] The OLRC considered and rejected these rationales. The OLRC Report noted at p. 100 that it has now been generally recognized that such restrictions do not render land inalienable. Rather, both positive and negative covenants tend to enhance alienability, since they operate to protect the amenities of neighbourhoods and the competitiveness of businesses. The second rationale that gave rise to the ancient rule has never been an obstacle in Ontario, since a system of land registration has existed since the province was created. The OLRC Report recommended at p. 102 that the law of covenants be reformed to enable the burden of positive covenants to run with the land.

[21] Without going as far as to say that the rule that positive covenants do not run with the land should no longer be applied in Ontario, I note that there are policy issues raised by a rigid application of the rule. Often, as occurred in the case at bar, owners of adjacent lands fashion a scheme of mutual rights and obligations in order to permit and facilitate the orderly and productive development of a phased project, such as a condominium project. Economics and market conditions may well dictate that such developments proceed in phases, and it will often be undesirable to dismantle these complex and well-planned arrangements. Indeed, countless problems could arise if these types of arrangements are disturbed by an intervening transfer of title, whether voluntary or consequent on a default under a mortgage. The rationale of impeding the assignability of land, which underlies the ancient rule, does not apply to many modern cases, and impediments might well arise more often if the obligation did not flow to successors.

[22] In England, over time, methods have developed to avoid or circumvent the application of this potentially problematic rule. The respondent submits that two of those exceptions or methods are applicable in the case at bar. The first, outlined in the OLRC Report at pp. 22-24, involves reliance on the benefit/burden doctrine from *Halsall v. Brizell*, [1957] 1 All E.R. 371, [1957] Ch. 169. The second, described in *Megarry and Wade's Law of Real Property*, 5th ed. (London: Stevens & Sons, 1984), deals with conditional grants of benefits.

The benefit/burden doctrine from *Halsall v. Brizell*

[23] The doctrine from *Halsall v. Brizell* provides that a person who claims the benefit of a deed must also take it subject to its burdens. In that case, purchasers of lots in a subdivision were entitled to use private roads and amenities. In exchange, they agreed to pay a share of the maintenance costs. The positive covenants were held to apply to successors in title, on the grounds that the successors were continuing to claim the benefits.

[24] The doctrine has been clearly adopted by the English courts. In *E.R. Ives Investments (or Investment) Ltd. v. High*, [1967] 1 All E.R. 504, [1967] 2 Q.B. 379, Lord Denning M.R. held at p. 507 that the successor in title who claims the benefit of land that

has its foundation in an adjoining lot must also shoulder the burden to grant access over the land to the owner of the adjoining lot. The successor in title must observe the condition upon which the claimed benefit was granted, even if fulfillment of the condition involves undertaking a positive obligation.

[25] Similarly, in *Tito v. Waddell* (No. 2), [1977] 3 All E.R. 129 at p. 291, [1977] Ch. 106, the Chancery Division endorsed the idea that a pure principle of benefit and burden had become established in English law. According to that principle, when X grants a right to Y, and by the same instrument Y independently covenants to do some act, Y's successors may be bound by the covenant.

[26] While the benefit/burden principle has not been applied in Canadian law, *Halsall v. Brizell* was mentioned by the Supreme Court in *Parkinson v. Reid*, *supra*. In that case, the court held that the obligation to repair a stairway that had been damaged in a fire was a positive covenant that did not run with the land to bind successors in title. The original parties had agreed that a neighbour could use a wall as a party-wall so long as he agreed to keep the stairway in good repair. In obiter, Cartwright J. commented on the potential applicability of the benefit/burden doctrine to this type of scenario [at pp. 168-69 S.C.R.]:

Assuming that so long as the appellants [the successors] made use of the last-mentioned wall as a party-wall they were bound to keep the stairway in repair, they ceased to be under any such obligation when they no longer made use of the respondent's wall.

[27] I take from this that while the general proposition that positive covenants do not run with the land remains the law in Canada, the Supreme Court might be prepared to hold that a successor who claims a benefit must also shoulder the burden, whatever its form. However, if the successor abandons its claim to the benefit, or the benefit ceases to exist, as occurred in *Parkinson v. Reid*, the benefit/burden doctrine from *Halsall v. Brizell* would not apply. To date, however, the Supreme Court has not expressly addressed this point.

[28] In determining whether the benefit/burden doctrine could operate as an exception to the rule against positive covenants in this case, it is necessary to determine whether there is a benefit flowing from DCC 123 and the Phase I condominium to Amberwood's vacant lands.

[29] In my view, there are such benefits. First, Amberwood is part owner of the recreational and utility units in the Phase I building. Second, those units are maintained for Amberwood by DCC 123. Third, Amberwood has the benefit of security over those units. Fourth, Amberwood has the access benefits of the other easements provided for in the reciprocal agreement. Although I agree with Amberwood that these benefits may be somewhat remote or artificial and would certainly have more significance if a second condominium was actually built on the Phase II lands, I do not interpret the doctrine from *Halsall* as requiring a court to analyze the extent or nature of the benefit. If Amberwood chose to abandon its claim to these benefits, it would not be bound to shoulder the burden of the interim costs. In my view, the fact that Amberwood does not wish to abandon these entitlements confirms that they can be fairly and properly characterized as true benefits flowing to the successor/owner.

[30] Consequently, I conclude that the benefit/burden doctrine from *Halsall v. Brizell* could apply on the facts of this case.

[31] I will turn briefly to the second argument made by the respondent.

Conditional grants

[32] The respondent submitted that there is a second applicable exception to the rule that positive covenants do not run with the land. If the facts establish that the granting of a benefit or easement was conditional on assuming the positive obligation, then the obligation is binding. Where the obligation is framed so as to constitute a continuing obligation upon which the grant of the easement was conditional, the obligation can be imposed as an incident of the easement itself, and not merely a liability purporting to run with the land: *Halsbury's Laws of England*, 4th ed., Vol. 14 at p. 79.

[33] As Megarry and Wade, *supra*, discuss at p. 769:

... it is possible for acceptance of the burden to be made a condition of enjoyment of the benefit, and thus for the burden to pass. If A conveys land to B reserving the mining rights "so that compensation in money be made" for any damage done, the liability to pay compensation is a condition of the exercise of the mining rights and will run with them so as to bind A's successors in title, against whom B or his successors can claim both compensation under the condition and an injunction to forbid future mining unless compensation is paid.

[34] This concept was applied in *Re Ellenborough Park*, [1955] 3 All E.R. 667, [1956] Ch. 153. In that case, the land surrounding a park was sold in plots to purchasers in 1924. The purchasers obtained easements for roads and drains along with a right to full enjoyment of the park subject to the payment of a fair and just proportion of the costs of keeping the park in good condition. The court upheld the obligation for successors to pay the costs, finding that the obligation to pay was a condition of the enjoyment of the park.

[35] An instrument or easement may be framed so that it confers only a condition or qualified right, and the condition or qualification may be that certain restrictions shall be observed or certain burdens assumed, such as the making of payments. In those cases, the restrictions or qualifications are an intrinsic part of the right. Successors in title cannot take the right without also assuming the condition. In these cases, when a court enforces the positive covenant, it is merely enforcing the easement on the terms upon which it was conveyed.

[36] Even if the provision for compensation is expressed as a covenant separately from the grant or reservation of the covenantor's rights, it may still operate as a condition if it is held, as a matter of construction, that the benefit and the burden have been annexed to each other ab initio: *Tito v. Waddell* (No. 2), *supra*, at p. 281.

[37] Once again, this "conditional grant" approach to circumventing the rule against positive covenants flowing with the land is an English innovation. Although there does not seem to be any Canadian law which expressly recognizes or applies the conditional grant exception, such an exception is consistent with the benefit/burden doctrine. In my view, the conditional grant exception is essentially a form of the benefit/burden doctrine. The only difference is that the burden is directly annexed to the grant of the benefit, instead of the subject of an independent covenant. The notion of a conditional grant exception is also consistent with the recognition that the ancient rule against positive covenants flowing with title has many problematic implications. Such an exception would also function to protect legitimate party expectations.

[38] In determining whether the conditional grant exception could apply to the case at bar, I must consider whether the positive obligation to pay interim costs was annexed to another right or benefit that Amberwood received. The respondent pointed to para. 13.1(b) of the reciprocal agreement (previously quoted) in support of its submission that it was.

[39] In my view, the language of that section makes it clear that the payment of interim costs, as one of the covenants in the reciprocal agreement, was intended to be a condition upon which the other easements were conveyed. The provision does not support Amberwood's submission that the cost-sharing obligations should be viewed as distinct from the scheme for mutual easements. To the contrary, para. 13.1(b) seems to envision a building project in which the owners would share costs in exchange for shared access and ownership. To undermine this clear intention by severing the cost obligations from the overall deal would amount to dismantling part of an intricate, complex, and well-planned scheme, and defeating legitimate party expectations.

Conclusion

[40] Based upon the foregoing analysis of the law and the facts, under English law Amberwood would likely be held to be bound by the obligation to pay the interim costs, notwithstanding the general principle that positive covenants do not run with the land. The English exceptions to that general principle, however, have yet to take hold in Canadian law.

[41] The OLRC Report recommended reform of the law of covenants. Desirable as that reform may be for the reasons recited above and in the OLRC Report, until the legislature acts on that recommendation, or until an appellate court endorses the English exceptions as applicable in Ontario, at least, I am bound by the principles of stare decisis to follow the law as recited in *Parkinson v. Reid, Garnet Lane Developments Ltd. v. Webster, and Metropolitan Toronto Condominium Corp. No. 979 v. Camrost York Development Corp.* As was said by Ewaschuk J. in *R. v. Hummel* (1987), 60 O.R. (2d) 545 at p. 547, 60 C.R. (3d) 78 (H.C.J.):

Anglo-American courts have over the hoary centuries developed a fundamental common law doctrine known as stare decisis. This Latin phrase literally means "binding decision". It has come to be known as the doctrine of precedent. It is the glue that holds together the various levels of Canadian courts and it is the principle that elevates the rule of law above the rule of individual judges. The rule of law reflects the principle that law governs executive decision and that law enunciated by higher levels of courts binds lower levels of courts.

[42] It is plainly the law of Ontario that successors in title are not bound to perform positive covenants. That is what the respondent seeks to have Amberwood do in the case at bar. I therefore conclude that Amberwood is not bound to pay the interim costs provided for in s. 2.9 of the reciprocal agreement.

Disposition

[43] The application is granted, with costs. If the parties cannot agree on the amount of costs, I am prepared to fix them. If necessary, the parties may make costs submissions by conference telephone call.

Order accordingly.

CBR# 340

Ward-Price v. Mariners Haven Inc. et al.; Clement et al., Third Parties

Court File No. 96-CU-103518

MOTION for summary judgment.

J. Gardner Hodder, for plaintiff. Charles F. Scott and D. Michael Brown, for defendants. Jack B. Berkow and Alexandra Lev-Farrell, for Third Parties.

CUMMING J: --

The Issue

[1] At issue in this motion is the correct interpretation of s. 53(3) of the Condominium Act, R.S.O. 1980, c. 84 (the "Act"). It is an issue of first instance.

Introduction

[2] The plaintiff brings a class proceeding pursuant to the Class Proceedings Act, 1992, S.O. 1992, c. 6, as amended ("CPA"). The putative class alleges that the defendant Mariners Haven Inc. ("Mariners") failed to pay interest during interim occupancy on deposit moneys paid toward the purchase of residential condominium units. The plaintiff alleges, inter alia, that Mariners committed a breach of trust by failing to pay such interest to the class members. The class includes some 25 to 31 of the 32 purchasers of units.

[3] Mariners was the developer, vendor and declarant (hereinafter the "developer") of the condominium project in Collingwood, Ontario. The representative plaintiff, Wendy Ward- Price, entered into a purchase agreement on April 13, 1987, for unit no. 12 in the condominium project. The purchase price was \$340,000 payable by way of two deposits and the balance by monthly instalments.

[4] The plaintiff alleges Mariners was obliged to pay interest pursuant to trust obligations under s. 53 of the Act and s. 33 of its regulations: R.R.O. 1980, Reg. 121. The plaintiff also alleges misrepresentation and unjust enrichment.

[5] Section 53 of the Act provides:

53(1) All money received by or on behalf of a proposed declarant from a purchaser on account of a sale or an agreement for the purchase and sale of a proposed unit for residential purposes before the registration of the declaration and description, other than money paid as rent or as an occupancy charge, shall, despite the registration of the declaration and description thereafter, be held in trust by the person receiving such money for the person entitled thereto in respect of the agreement and such money shall be held in a separate account designated as a trust account at a bank listed in Schedule I or II to the Bank Act (Canada) or trust corporation or a loan corporation or credit union authorized by law to receive money on deposit or a Province of Ontario Savings Office until,

(a) its disposition to the person entitled thereto; or

(b) delivery of prescribed security to the purchaser for repayment.

(2) Where an agreement of purchase and sale referred to in subsection (1) is terminated and the purchaser is entitled to the return of any money paid under the agreement, the proposed declarant shall pay to the purchaser interest on such money at the prescribed rate.

(3) Subject to subsection (2), where a purchaser of a proposed unit under an agreement of purchase and sale referred to in subsection (1) enters into possession or occupation of the unit before a deed or transfer of the unit acceptable for registration is delivered to the purchaser, the proposed declarant shall pay interest at the prescribed rate on all money received by the proposed declarant on account of the purchase price from the day the purchaser enters into possession or occupation until the day a deed or transfer acceptable for registration is delivered to the purchaser.

(4) Subject to subsections (2) and (3), the proposed declarant is entitled to any interest earned on the money required to be held in trust under subsection (1).

[6] Mariners had an obligation pursuant to s. 53(1) of the Act to hold in trust the moneys paid by the plaintiff toward the purchase of her unit. The moneys were deposited into an interest bearing trust account. These funds were insured through so-called "deposit receipts" in October 1987 with the Ontario New Home Warranty Program for deposit funds in the amount of \$20,000, plus interest, and in January 1988, with the Mortgage Insurance Company of Canada ("MICC") for deposit funds in excess of \$20,000, plus interest (collectively the "insurance" and the "insurers").

[7] The declaration with respect to the condominium project was registered on June 27, 1989, thereby creating Simcoe Condominium Corporation No. 94.

[8] The purchase agreement did not permit the plaintiff to obtain possession prior to the completion of the purchase transaction. The class members each desired early possession of their units. The developer allowed early possession through interim occupancy agreements. Ms. Ward-Price took possession of her unit about July 15, 1988. She paid the balance of her purchase price and became the owner of her unit about August 16, 1989.

[9] The defendant William Kaufman ("Kaufman") was the director, officer and sole shareholder directly or indirectly of the corporate defendants. The defendant William H. Kaufman Inc. ("WHK Inc.") provided loans to Mariners to fund the development of the condominium project.

[10] The defendant Stuart Snyder ("Snyder") was an officer of both corporate defendants. The third parties Clement, Eastman, Dreger, Martin & Meunier and Sims Clement Eastman are law firms, the latter being a successor to the former (collectively the "third party law firm"). The third party law firm represented Mariners as solicitors in respect of the condominium unit sales. The defendants seek contribution and indemnity against the third party law firm for any amounts for which they may be found liable. The third party law firm has filed a statement of defence in the main action.

[11] The defendants claim that the purchasers of their units waived any entitlement to interest when they signed their "Interim Occupancy Agreements". Ms. Ward-Price executed one such agreement on July 15, 1988, when she took possession of her unit. The interim occupancy agreements assert that the deposit interest to which the purchaser would become entitled and interim occupancy fees to which the developer was entitled were offsetting amounts.

[12] Deposit funds received by Mariners from the purchasers were deposited into a separate trust account held in the name of the third party law firm, acting as agent for Mariners. Mr. Snyder gave the directions as to what was to be done with the trust funds. Pay-outs went to Mariners after delivery of the insurance.

[13] Ms. Ward-Price claims a deposit interest entitlement of \$36,761.50 and claims that her interim occupancy fee could not have amounted to more than \$8,302.76. None of the class members who entered into interim occupancy agreements received any credit for deposit interest on closing. The total claim for deposit interest by class members approximates \$1.6 million.

[14] If the purchasers had been credited with deposit interest on closing, WHK Inc. would have received less moneys from Mariners towards the repayment of its loans. Mr. Kaufman was the directing mind of the two defendant corporations and the plaintiff alleges that Messrs. Kaufman and Snyder knowingly assisted Mariners in its breach of trust and knowingly received trust funds flowing from the breach of trust. Hence, the plaintiffs claim they are entitled to an equitable tracing with respect to the moneys that went to WHK Inc.

[15] There have been numerous interlocutory motions and orders leading up to this point.

The Law

[16] The third party law firm submits that although Mariners had an obligation pursuant to s. 53(1) of the Act to hold the deposits in trust, that obligation ceased when Mariners obtained the prescribed security through the insurance. It is their position that the delivery to the purchasers of the insurance permitted the moneys held in trust to then be released and that the trust created by s. 53(1) thereby ceased to exist. The third party submits that the obligation to pay interest under s. 53(3) is not a trust obligation. Accordingly, the third party submits there is no genuine breach of trust issue for trial.

[17] The underlying policy of s. 53 is to protect consumer purchasers who generally are not in equal bargaining positions with developers.

[18] Section 53(1) provides for the creation of a trust by statute. Moneys paid towards the purchase price are to be held in the requisite trust account "until" one of the two events in s. 53(1)(a) and (b) occurs. Disposition of the trust moneys may be made to the developer at closing, upon completion of the developer's obligations under the purchase contract: s. 53(1) (a). However, if the developer was unable to close the transaction, the purchaser would be entitled to the return of the trust moneys.

[19] The developer is entitled to the interest that has been earned on the money in the trust account: s. 53(4). However, this entitlement is subject to the stipulations imposed by s. 53(2) and (3).

[20] Section 53(2) protects a purchaser who is entitled to the return of moneys paid by requiring the developer to pay interest at the prescribed rate on those moneys.

[21] Section 53(3) imposes an interest obligation upon the developer when the purchaser enters into possession of the unit before a final closing and a deed or transfer acceptable for registration is delivered to the purchaser.

[22] In the event of an interim occupancy prior to closing, a developer will charge rent to cover the developer's costs arising from interest on the developer builder's mortgage, the real property taxes, and the common maintenance costs pro-rated on a unit basis.

[23] The insurance constitutes "prescribed security" within the meaning of s. 53(1)(b) of the Act. The third party law firm submits that s. 53(1)(b) permitted Mariners to release the deposit funds from trust upon the delivery of the insurance to Ms. Ward-Price. The purpose of providing the deposit receipt is to permit the vendor developer to release deposit funds from trust prior to closing. It is undisputed that no funds were disbursed to Mariners from the trust account until the insurance was obtained and delivered to the plaintiff as "prescribed security".

[24] Accordingly, the third party submits there could not thereafter be, and was not, any breach of trust, as there was no longer any trust.

[25] Further, the defendants submit that to establish the claim for "knowing assistance" or "knowing receipt" to a breach of trust, a plaintiff must first establish the existence of a trust and a breach of it: see *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787, 108 D.L.R. (4th) 592.

[26] In *Counsel Holdings Canada Ltd. v. Chanel Club Ltd.* (1997), 33 O.R. (3d) 285 (Gen. Div.), affirmed (1999), 43 O.R. (3d) 319n, 27 R.P.R. (3d) 228 (C.A.), Adams J. dealt with the competing claims of condominium purchasers and a mortgagee for priority with respect to the funds of an insolvent developer in receivership. In that case, prescribed security through deposit receipts had been delivered to the purchasers. Adams J. found that ". . . there could be no breach of trust once deposit receipts were issued to the purchasers" (at p. 296).

[27] The plaintiff submits that the situation at hand differs from that seen in *Counsel*, since the case at bar involves an alleged breach of a statutory trust. The plaintiff asserts that the developer's obligation to pay interest during the period of interim occupancy pursuant to s. 53(3) is a trust obligation. The court in *Counsel* was only considering the statutory trust created by s. 53(1).

[28] The plaintiff relies upon the Court of Appeal's decision in *Ackland v. Yonge-Esplanade Enterprises Ltd.* (1992), 10 O.R. (3d) 97, 95 D.L.R. (4th) 560 (C.A.) which dealt with the obligation to pay interest under s. 53(3). Plaintiff's counsel submits that the Court of Appeal in *Ackland* found (at pp. 106-07) that, in addition to the trust obligations arising with respect to the trust corpus under s. 53(1), s. 53(3) imposes a further trust obligation to pay interest.

[29] The purpose of s. 53(3) is to provide an incentive to the developer to register the condominium corporation and transfer title to the purchaser of the condominium unit as soon as possible after the purchaser has taken occupancy: *Ackland*, at p. 105; *Berman v. Karleton Co.* (1982), 37 O.R. (2d) 176 at p. 184, 24 R.P.R. 8 (H.C.J.); *Lamb v. Costain Ltd.* (1985), 49 O.R. (2d) 657 at p. 660, 40 R.P.R. 83 (H.C.J.).

[30] The Court of Appeal in *Ackland* considered the proper application of the terms of s. 33 of then Reg. 121 (now R.R.O. 1990, Reg. 96) in determining the rate of interest to apply under s. 53(3). The court held that the developer was obliged to pay at the higher rate introduced by the Province of Ontario Savings Office after the enactment of the Regulation.

[31] A developer who holds money in trust pursuant to the statutory trust created by s. 53(1) will seek the highest rate of interest possible, because the developer may ultimately become entitled to any interest earned: s. 53(4). The interest that can be earned is not limited to the prescribed rate under s. 53(2) and (3) (which is now set at 2 per cent per annum below the minimum rate at which the Bank of Canada makes short-term advances to the chartered banks: s. 35(1) Reg. 96). Section 53(4) entitles the developer to retain interest earned on deposits which exceed the amount of interest prescribed by the Regulations. *Windisman v. Toronto College Park Ltd.* (1996), 28 O.R. (3d) 29 at p. 43, 132 D.L.R. (4th) 512 (Gen. Div.).

[32] *Ackland* dealt with a situation where s. 53(3) was operative. The developer was obliged to pay the purchaser interest during the period of interim occupancy. The developer's entitlement to interest under s. 53(4) is made subject to the obligation of the developer under s. 53(3).

[33] Morden A.C.J.O. stated at pp. 106-07:

. . . the trust obligation clearly extends to the duty to pay interest based on the higher rate [introduced by the Province of Ontario Savings Office], particularly where the proposed declarant may enjoy an increased personal benefit from paying . . . [the interest due under s. 53(3)] on the basis of the lower rate [being the historical rate set by the Province of Ontario Savings Office].

.

. . . while the basic relationship between a purchaser and a proposed declarant may be contractual, s. 53(1) clearly imposes on the proposed declarant, with respect to the money we are concerned with in this appeal, the duty of a trustee and it is with this particular aspect of the relationship only that we are concerned . . . this fiduciary relationship is of direct relevance in interpreting the scope of the obligation to pay interest on the money held in trust.

[34] Plaintiff's counsel in the case at hand submits that *Ackland* is authority for his submission that s. 53(3) in itself creates or recognizes a trust with respect to the interest payable to the purchaser under that provision.

[35] I do not agree with this submission as to the decision in *Ackland* which is, of course, binding on this court. In my view, Morden A.C.J.O.'s quoted statement recognizes the statutory trust which is clearly created by s. 53(1). The corpus of the moneys held in trust pursuant to s. 53(1) belongs beneficially to the purchaser, and not the developer, until one of the two circumstances contemplated by s. 53(1) occurs and terminates the trust.

[36] A trust involves a fiduciary relationship and imposes duties upon the trustee. This fiduciary relationship is relevant "in interpreting the scope of the obligation to pay interest on the money held in trust": *Ackland*, at p. 107. In interpreting the Regulation as to the prescribed rate intended to apply to s. 53(3), the statutory trust created by s. 53(1) provides an instructive backdrop.

[37] The result in *Ackland* is logical and fair, particularly when the declarant can earn interest on the corpus of the trust at a higher rate than the rate which the developer in *Ackland* proposed to pay to the purchaser.

[38] In my view, *Ackland* is not authority for the plaintiff's assertion that s. 53(3) creates a trust with respect to the interest entitlement. It is only s. 53(1) that creates a trust. The Court of Appeal in *Ackland* held that in interpreting the Regulations to determine the proper prescribed interest rate for the purpose of applying s. 53(3), the statutory trust created by s. 53(1) is relevant.

[39] In the case at hand, the trust created by s. 53(1) was terminated by reason of s. 53(1)(b) upon the purchase and delivery of the "prescribed security" through the deposit receipts. This was done prior to the interim occupancy by the purchasers and before the developer became obligated to pay interest during the occupancy period prior to final closing.

[40] In my view, and I so find, the obligation to pay interest under s. 53(3) is not a trust obligation. Rather, it is a debt obligation created by statute.

[41] It is noted that s. 36(2) of Reg. 96 defines a "prescribed security" as including a requirement to insure against ". . . loss of any interest payable by a declarant to an insured under [section 53] . . ." (my emphasis). The two deposit receipts in the case at hand appear to meet this requirement. For example, in section 1.1(d), the policy of MICC defines the "interest" for which protection is given from financial loss as "the interest, at the rate or rates prescribed by the Act to be paid by the Vendor to the Insured on the Deposits". Thus, the overall scheme of s. 53 provides that upon the termination of the trust created by s. 53(1) through the delivery of the prescribed security (and the release of the trust moneys to the developer), there is insurance in place to protect the purchaser in the event of a claim for interest under s. 53(3).

Disposition

[42] For the reasons given, in my view, there is no trust obligation under s. 53(3). Since there is no trust obligation, there is no genuine issue for trial with respect to breach of trust.

[43] Accordingly, the third party law firm's motion for summary judgment is granted and the plaintiffs' claim is dismissed to the extent it is based upon breach of trust.

[44] I may be spoken to as to costs.

Order accordingly.

CBR# 853**MacCulloch v. McInnes Cooper & Robertson**

Between McInnes Cooper & Robertson, a registered partnership, and Stewart McInnes, Q.C., (respondents on cross-appeal), appellants, and Patricia B. MacCulloch (appellant on cross-appeal), respondent

Docket: CA 165211

Nova Scotia Court of Appeal Halifax, Nova Scotia Freeman, Bateman and Cromwell J.J.A. Heard: November 29, 2000. Judgment: January 19, 2001. (121 paras.)

Counsel: John P. Merrick, Q.C., for the appellants. The respondent, on her own behalf.

THE COURT: Appeal and cross-appeal dismissed per reasons for judgment of Bateman J.A., Freeman and Cromwell J.J.A. concurring.

[para1] BATEMAN J.A.:-- This is an appeal from a decision of Justice Douglas MacLellan of the Supreme Court (reported as *MacCulloch v. McInnes, Cooper and Robertson* (2000), 184 N.S.R. (2d) 40). He found the appellants, Stewart McInnes, Q.C. and McInnes Cooper and Robertson (MCR), the firm of solicitors in which Mr. McInnes is a partner, negligent in the manner in which they provided legal services to the respondent, Patricia B. MacCulloch. Mrs. MacCulloch cross-appeals the damage award.

I. BACKGROUND:

[para2] The events that led to this matter began with the death on October 4, 1979 of Charles E. MacCulloch, husband of the respondent. An inventory of his Estate filed on October 17, 1979, showed that he had assets of more than 10 million dollars. The Estate consisted primarily of a farm property on Grand Lake known as Monte Vista Farm, a Toronto condominium known as Unit 819, an art collection, some accounts receivable, a mortgage on a Caribbean property and shares in several companies that Mr. MacCulloch had operated before his death, including MacCulloch & Company Ltd. and Oakwood Holdings Ltd. The Estate also claimed title to a second Toronto condominium property known as Terrace House. Mr. MacCulloch had made an agreement to buy this condominium before his death. Title was to have been taken in the names of both him and Mrs. MacCulloch as joint tenants. He had died before the transaction closing. The Estate completed the purchase, acquiring title to the property. It was Mrs. MacCulloch's belief that the condominium was hers and, therefore, not part of the Estate assets. Litigation about title between Mrs. MacCulloch and the executors had commenced but not concluded at the time relevant to this action.

[para3] Under Mr. MacCulloch's will, his widow, Patricia B. MacCulloch, Henry B. Rhude, Peter Gasson and Central and Eastern Trust Company were appointed executors. The will directed the payment of taxes and debts out of the capital of his Estate. Mr. MacCulloch then gave certain personal articles to Mrs. MacCulloch. He made bequests totaling \$850,000.00 to relatives, charities and churches, including a gift to Mrs. MacCulloch of \$300,000.00. As an additional bequest, Mrs. MacCulloch was to have the exclusive use of Monte Vista Farm, as her principal residence. The executors were to pay all taxes and upkeep to ensure that it was a suitable place for her to reside. A one million dollar trust fund was to be established and invested with the net income therefrom paid to Mrs. MacCulloch during her lifetime. If Mrs. MacCulloch were still alive on the tenth anniversary of Mr. MacCulloch's death she was to receive \$500,000.00. The residue of the Estate was left to the executors in trust to convert into cash and to divide between the children of his first marriage.

[para4] The executors administered the Estate, but by 1981 there were serious liquidity problems. Mr. MacCulloch and his companies owed a substantial amount of money to The Bank of Nova Scotia. Due in part to high interest rates, the Executors were finding it increasingly difficult to service the debt. Additionally, they were finding the maintenance of Monte Vista Farm, as had been directed in the will, a significant financial burden.

[para5] In the fall of 1981, Mrs. MacCulloch made a proposal to the Estate to purchase the farm property and to obtain uncontested title to the Toronto condominium, Terrace House, for a total price of \$500,000.00. As part of the consideration she relinquished her right to be maintained by the Estate in Monte Vista Farm. The Estate accepted her offer. The purchase was completed and Mrs. MacCulloch immediately resold the farm property to German purchasers for \$1,350,000.00. Both the purchase and sale transactions closed on December 30, 1981. In 1982 she sold Terrace House for \$485,000.00.

[para6] Mrs. MacCulloch retained Stewart McInnes, Q.C. of MCR to act for her on this transaction. He prepared the agreement with the Estate regarding the purchase of Monte Vista Farm and Terrace House. In addition he completed the purchase and resale of Monte Vista Farm. A Toronto solicitor was retained to act on the purchase of Terrace House. Mr. McInnes had acted for Mrs. MacCulloch in other matters which included providing independent legal advice on a pre-nuptial agreement and sorting out a customs duty claim in relation to her engagement ring. He acted for her, as well, in her ongoing dispute with the executors of the Estate concerning her maintenance at Monte Vista Farm.

[para7] On June 7, 1982, The Bank of Nova Scotia petitioned the Estate of the late Charles E. MacCulloch into bankruptcy. Price Waterhouse Limited was appointed trustee under the Bankruptcy Act, R.S.C. 1970, c. B-3. Although the Estate itself and the other beneficiaries had, to that point, made no objection to the purchase and resale of Monte Vista Farm and the Toronto condominium, the trustee in bankruptcy reviewed the transaction.

[para8] On June 28, 1984, the trustee brought action against Mrs. MacCulloch seeking an accounting for the proceeds from the resale of the properties. The matter was tried before Justice Richard who, by decision dated June 12, 1985 (reported as *Price Waterhouse Ltd. v. MacCulloch* (1985), 69 N.S.R. (2d) 167 (S.C.T.D.)), found that Mrs. MacCulloch had breached her duty as a trustee by purchasing Estate property. He concluded, however, that she owed no duty to creditors of the Estate, represented by the trustee and therefore dismissed the claim. The trustee appealed.

[para9] On January 20, 1986, the Nova Scotia Court of Appeal allowed the appeal from Justice Richard, found Mrs. MacCulloch liable to account for the proceeds on the resale of the properties and remitted the matter to the trial judge to quantify the accounting. (reported as *Price Waterhouse Ltd. v. MacCulloch* (1986), 72 N.S.R. (2d) 1 (C.A.)).

[para10] On August 19, 1986, Justice Richard fixed the sum for which Mrs. MacCulloch was to account at \$1,829,916.00, inclusive of prejudgment interest (reported as *Price Waterhouse Ltd. v. MacCulloch*, [1986] N.S.J. 540). This amount was not

paid by Mrs. MacCulloch. Upon the closing of the Estate in 1996 Mrs. MacCulloch received the Estate's interest in this unpaid judgment as part of her entitlement under the will.

[para11] Mrs. MacCulloch sued Mr. McInnes and his firm alleging that he was negligent in preparing the agreement by which she purchased the property from her late husband's estate and in completing the transaction in a manner that was voidable, without advising her of the risks and receiving her express instructions to proceed without court approval.

[para12] Justice MacLellan found the appellant, Mr. McInnes, negligent in the manner in which he provided counsel to Mrs. MacCulloch in relation to the assets purchased from the Estate. He awarded related damages totaling \$355,292.46, including prejudgment interest.

[para13] MCR and Mr. McInnes have appealed the trial judge's decision as to the finding of negligence and their resulting liability to pay damages. They have not appealed the quantum of the damages. Mrs. MacCulloch has cross-appealed on the damage award.

[para14] Mrs. MacCulloch was not represented by counsel at trial nor on the appeal.

II. ISSUES:

[para15] The appellants state the following grounds of appeal:

1. When dealing with the issue of whether the Appellants were negligent, the Trial Judge erred in deferring to previous decisions that were not findings of negligence in the particular circumstances and erred in failing to assess and make his own determination of whether there was such negligence.
2. The Trial Judge erred in finding that in the particular circumstances the Appellants had breached any tort duty of care owed to the Respondent.
3. The Trial Judge erred in failing to find that the Respondent was fully aware of her fiduciary obligations and that accordingly the Appellants were under no obligation to inform the Respondent and that any such failure by the Appellants to inform the Respondent did not cause the Respondent any loss.
4. The Trial Judge erred in finding that there was insufficient evidence on which to find that the Respondent would have rejected any advice given to her by the Appellants and that it would be necessary to speculate in order to make such a finding.
5. The Trial Judge erred in failing to find that the Respondent would have rejected any advice given to her by the Appellants and that accordingly any such failure by the Appellants to provide such advice did not cause the Respondent any loss.

[para16] They summarize the grounds as follows:

There are three basic issues raised by the parties on this appeal. First, was MCR negligent as found by the trial Judge? Second, if so, did that negligence cause the damages to Mrs. MacCulloch as calculated by the Judge? Third, is Mrs. MacCulloch entitled to any further damages than as awarded to her by the trial judge?

III. STANDARD OF REVIEW:

[para17] McLachlin J., as she then was, in *Toneguzzo- Norvell et al v. Savein and Burnaby Hospital* (1994), 162 N.R. 161, said at p. 167:

[13] It is by now well established that a Court of Appeal must not interfere with a trial judge's conclusions on matters of fact unless there is palpable or overriding error. In principle, a Court of Appeal will only intervene if the judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it: see *D.P. v. C.S.*, [1993] 4 S.C.R. 141; 159 N.R. 241; 58 Q.A.C. 1, at pp. 188-89 S.C.R. (per L'Heureux-Dubé J.), and all cases cited therein, as well as *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, 126 N.R. 241, at pp. 388-89 (per Wilson J.), and *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; 6 N.R. 359; 62 D.L.R. (3d) 1, at pp. 806-8 (per Ritchie J.). A Court of Appeal is clearly not entitled to interfere merely because it takes a different view of the evidence. The finding of facts and the drawing of the evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal.

I agree that the principle of non-intervention of a Court of Appeal in a trial judge's findings of facts does not apply with the same force to inferences drawn from conflicting testimony of expert witnesses where the credibility of these witnesses is not in issue. This does not however change the fact that the weight to be assigned to the various pieces of evidence is under our trial system essentially the province of the trier of fact, in this case the trial judge.

[para18] In *Canada (Attorney General) v. Dingle et al* (2000), 181 N.S.R. (2d) 302 Hallett J.A. explained this statement when applied in the context of a finding of negligence. At p. 313:

[48] This statement by McLachlin J. does not mean that a court of appeal can only interfere with conclusions of the trial judge that involve consideration of both facts and the application of law to the facts, such as a finding that a defendant was or was not negligent, if there is palpable and overriding error. The statement in *Burnaby Hospital* simply means an appeal court is not to interfere with evidentiary conclusions made by a trial judge unless there is palpable and overriding error. A mere error by a trial judge in concluding that a defendant was negligent in the circumstances would warrant an appellate court interfering with such a finding. (underlining in original)

IV. ANALYSIS:

[para19] Because any possible contractual remedies were statute barred by the time of commencement of the action, Mrs. MacCulloch's claims were based solely in negligence.

[para20] The trial judge characterized the claim as follows:

[80] The plaintiff here argues that she has suffered damages because Mr. McInnes prepared an agreement by which she purchased property from her late husband's estate and which was subsequently overturned because she did that while being an executor of the estate. She alleges that he was negligent in not advising her that such an agreement could be attacked on that basis and that his efforts in getting the beneficiaries to sign off did not protect her when the agreement was challenged by the Trustee in Bankruptcy. She also alleges that he never told her to disclose to the other executors the fact of the re-sale of the property.

[85] The issue before me in this trial can be put simply as whether it was negligence on Mr. McInnes' part to prepare and have executed an agreement whereby the plaintiff, who was an executor of the estate, purchase estate assets. Involved in that determination is whether the plaintiff already knew her legal position and therefore did not have to be advised by Mr. McInnes and also whether even if advised she would have instructed him to proceed in any regard.

[86] The second issue is if Mr. McInnes was negligent what are the plaintiff's damages.

(a) The Standard of Care:

[para21] Mr. McInnes' role in the 1981 purchase and resale of Monte Vista Farm and Terrace House was described in an Agreed Statement of Facts tendered in this proceeding. That document had originally been prepared for the earlier action by the trustee in bankruptcy seeking to have Mrs. MacCulloch account for the profits from that transaction. The parties had provided the Agreed Statement of Facts to the court in that proceeding in lieu of Mr. McInnes giving *vive voce* evidence. Mr. McInnes had approved the document before its submission to the court. Justice MacLellan found that it accurately represented the circumstances in 1981. It provided, as relevant here:

2. Stewart McInnes acted generally as solicitor for Mrs. MacCulloch since shortly after her husband's death until the Spring of 1983.

3. Specifically, Stewart McInnes acted as solicitor for Mrs. MacCulloch in the execution and closing of the agreement by which Monte Vista property was acquired by Mrs. MacCulloch, and on her behalf as Vendor in the sale of the Monte Vista property to M & M Developments Limited.

4. To the best of the knowledge of Stewart McInnes, Mrs. MacCulloch did not participate in any way in the decision making process by the other Executors in the settlement agreement or gain any advantage or opportunity by reason of her appointment as Executrix in the estate of her late husband.

5. Stewart McInnes at no time advised Mrs. MacCulloch to resign as Executrix by reason of her participation in the Monte Vista purchase transaction, this question or issue did not arise at any point in the course of the transaction and I did not direct my mind to this point.

6. Stewart McInnes at no time advised Mrs. MacCulloch to make any disclosure to the estate of the fact or terms of a potential or actual resale of the Monte Vista property, this question or issue did not arise at any point in the course of the transaction and I did not direct my mind to this point.

7. Stewart McInnes did not advise Mrs. MacCulloch at any time that her participation in the purchase transaction and resale might constitute a potential breach of a fiduciary duty or result in a liability to account for any profit shown to have been produced upon the resale, this question or issue did not arise at any point in the course of the transaction and I did not direct my mind to this point.

8. The agreement of settlement between the estate, the beneficiaries and Mrs. MacCulloch was executed by Mrs. MacCulloch in her capacity as Executrix solely as a matter of formality and not with the intention of giving rise to any fiduciary or trust obligations on the part of Mrs. MacCulloch.

9. To the best of the knowledge of Stewart McInnes throughout the transaction with respect to the conveyance of the Monte Vista property to Mrs. MacCulloch all parties, including the solicitors, were of the view that the settlement was in the best interests of all concerned. No question of any impropriety or disability on the part of Mrs. MacCulloch to acquire the property by reason of her appointment as Executrix was raised during the course of the transaction.

10. At no time from the involvement of Stewart McInnes in the transaction on behalf of Mrs. MacCulloch until he ceased to represent her in the matter in or about the Spring of 1983 was any complaint or objection brought to his attention from any party with respect to the sale of the Monte Vista property or its resale pertaining to the appointment of Mrs. MacCulloch as an Executrix.

[para22] The appellants say that Mr. McInnes did not breach the standard required of a lawyer in acting for Mrs. MacCulloch on the Monte Vista/Terrace House transactions. On the applicable standard of care, they cite *Spence v. Bell*, [1982] 6 W.W.R. 385 (C.A.) at p. 396 where Haddad J.A. adopted the following passage of Riley J. in *Tiffen v. Millican et al.* (1965), 49 D.L.R. (2d) 216 (S.C.):

The standard of care and skill which can be demanded from a lawyer is that of a reasonably competent and diligent solicitor. It is not enough to prove that the lawyer has made an error of judgment or shown ignorance of some particular part of the law; it must be shown that the error or ignorance was such that an ordinary competent lawyer would not have made or shown it.

[para23] The appellants refer, as well, to the following passage from *Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp*, [1978] 3 All E.R. (Ch. D.) 571 at p. 583:

the court must beware of imposing on solicitors, or on professional men in other spheres, duties which go beyond the scope of what they are requested and undertake to do. It may be that a particularly meticulous and conscientious practitioner would, in his

client's general interests, take it on himself to pursue a line of inquiry beyond the strict limits comprehended by his instructions. But that is not the test. The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession, and cases such as *Duchess of Argyll v. Beuselinck*, [1972] 2 Lloyd's Rep 172; *Griffiths v. Evans*, [1953] 1 W.L.R. 1424 and *Hall v. Meyrick*, [1957] 2 Q.B. 455 demonstrate that the duty is directly related to the confines of the retainer.

[para24] The appellants submit that Mrs. MacCulloch cannot succeed in her claim because she failed "to present sufficient evidence to permit the trial judge to find that MCR had not acted in accordance with the applicable standard of care."

[para25] In the earlier court actions resulting in the accounting for profits both Justice Richard in the Supreme Court and Justice Jones in the Appeal Division agreed that the law was clear. A person in the position of an executor cannot purchase assets from an estate to which they owe a fiduciary duty. The trial judge erred, say the appellants, by focusing upon the fact that the law in this regard was clearly established rather than considering whether a reasonably competent solicitor, in 1981, would know that law.

[para26] In assessing Mr. McInnes' conduct, it is necessary to consider the context of the 1981 transaction. It was upon Mrs. MacCulloch's initiative, in or around late 1979, that the Estate had agreed to sell to her the Toronto condominium known as Unit 819, 33 Harbour Square in Toronto. This property had been owned by Mr. MacCulloch. Mrs. MacCulloch engaged Mr. Rodney Hull, Q.C. of Toronto to act for her on that purchase. The price was set at the appraised value of \$120,000.00. The deal did not actually close until November 9, 1981. The lengthy delay was attributable to a difference of opinion between Mr. Hull and the representatives of the Estate about how the conveyance to Mrs. MacCulloch should be handled. Representing the Estate on that transaction was the Toronto firm of Smith, Lyons, Torrance, Stevenson & Mayer, their Halifax contact being lawyer David Stewart, Q.C., who was proctor for the Estate.

[para27] Mr. Hull was concerned that the purchase of this Estate asset by Mrs. MacCulloch was problematic because she was an executor. His concern was two-fold (i) that on resale by Mrs. MacCulloch a purchaser might object to the title acquired in this manner with Mrs. MacCulloch being unable to force title upon the purchaser, and (ii) the remaining beneficiaries might challenge the transaction. His research indicated that there was an absolute prohibition which prevents an executor from purchasing assets of the Estate. He recommended that extra precautions be taken. Initially it was his position that there should be a court order approving the sale.

[para28] The representatives of the Estate differed with Mr. Hull on this issue. There was a clause in the will which permitted the Estate to sell assets to a family member:

10 (u) my Executors shall have and may from time to time exercise the following powers: To sell to any member of my family any part or parts of my estate, real or personal, either at public auction or by private contract, and such sale shall be at such price or prices and subject to such terms and conditions, and either for cash or credit or for part cash or part credit, as my Executors consider fair and reasonable.

[para29] Mr. Stewart took the position that, because the price being paid was fair market value, the Estate could sell the asset to Mrs. MacCulloch without a court order. It was his view that the power of sale was sufficient to legitimize the transaction.

[para30] The trial judge referred to the many pieces of correspondence exchanged on this issue. Mr. McInnes, who was acting for Mrs. MacCulloch on other matters at that time, had received copies of some of the correspondence between Mr. Hull and the Toronto solicitors for the Estate outlining the problems with an executor purchasing an Estate asset. In addition, Mr. Hull, by letter dated May 22, 1980, asked Mr. McInnes, inter alia, to clarify the terms of the transaction with the representatives of the Estate. By letter dated July 8, 1980 Mr. Hull wrote to Mr. McInnes:

"Re: MacCulloch purchase from MacCulloch Estate

I confirm my telephone conversation with you on Monday, July 7, 1980, in which we discussed the current problem concerning the purchase of the condominium in Toronto.

You and I have discussed the problem of Mrs. MacCulloch as a fiduciary purchasing the property in her personal right.

As I have pointed out to you, I have always had some grave concern concerning this matter notwithstanding the provision in the will that the property can be purchased by a member of the family.

This clause does not go far enough, in my view and a subsequent purchaser might well requisition either a Judge's Order or the Consent of all beneficiaries.

I understand that all of the children are now over the age of 18 and accordingly could sign the document.

As it is obviously in the best interests of the parties for them to sign, any differences of opinion between the children and Mrs. MacCulloch should not be a concern.

I have notified the solicitors in Toronto of the problem and I would be pleased to hear how you have fared after having discussed the matter with Mr. Stewart.

I look forward to hearing from you.

(Emphasis added)

[para31] Mr. McInnes discussed the issue with Mr. Stewart who wrote to Mr. McInnes in reply on July 8, 1980:

I am not sure what Rodney Hull's concern is and I am also a little surprised that it comes to the surface at this rather late date. Clause 10(U) of the Will gives the executors the power to sell to members of the family and certainly Mrs. MacCulloch qualifies on that count.

As mentioned to you I do not think the children should be asked to sign any form of deed as that will raise the question as to whether any of the wives should also sign. If the children are to sign anything, I think it would be preferable for them to simply

join in the deed by way of evidencing their consent to the sale, rather than for the purpose of conveying any interest that they may have in the property. Title to the property is clearly vested in the executors and not only do the executors have a general power of sale but also a power to sell to the family members.

I suggest that Mr. Hull work out with Ms. Charlotte D. Sloan of Smith, Lyons, Torrance, Stevenson, Mayer in Toronto the form of consent to be signed by the children.

[para32] In the end, after protracted negotiation, and on the instructions of Mrs. MacCulloch, the Unit 819 purchase was concluded without a court order but with the residual beneficiaries consenting to the conveyance.

[para33] Mr. McInnes acknowledged in his evidence at trial that he was alerted through the correspondence and dealings with Mr. Hull to the potential problems arising when an executor purchases an Estate asset. He was aware that there were conflicting opinions on the issue. It was as a result of this knowledge that the trial judge found that Mr. McInnes, on the Monte Vista Farm/Terrace House transactions, was put to an inquiry and should have researched the point in order to ascertain the steps necessary to effect the transaction properly, or, at least, to have advised Mrs. MacCulloch of the risk and to take specific instructions to proceed with the transaction in any event.

[para34] Instead, Mr. McInnes elected to proceed by obtaining the consent of the beneficiaries to the transaction, which he wrongly concluded would protect it from challenge. This, he reasoned, was what Mr. Hull had eventually done on the Unit 819 transaction and thus should suffice here.

[para35] In my view, contrary to the submission of the appellants, Justice MacLellan did not err by focusing upon the ease with which Mr. McInnes could have found a definitive answer to the issue. Lawyers are not called to account for reasonably mistaken advice. Had the question of the purchase of an Estate asset by an executor been an obscure point of law upon which learned works did not agree and had Mr. McInnes, after advising his client of the difficulties, chosen the wrong path, he would not be liable in negligence. On this distinction the court in *Bannerman & Co. v. Murray & Anor*, [1972] N.Z.L.R. 411, at p. 421, approved the following statement from Halsbury's Laws of England, 3rd ed. 99:

A solicitor is not guilty of negligence if he has merely acted upon his client's instructions in the reasonable belief that they were correct, or if he has fully explained the position to his client and is nevertheless instructed to proceed; or merely because he has committed an error in judgment, whether on matters of discretion or of law such as, for instance, on points of new occurrence or of doubtful construction.

[para36] The problem here was not simply that Mr. McInnes chose a solution which provided no protection to Mrs. MacCulloch. It was that, although he was aware of a potential problem, he failed to research the issue and advise Mrs. MacCulloch of her options. Had he properly investigated the problem, he would not have chosen the course that he did, in the absence of explicit instructions from Mrs. MacCulloch to do so.

[para37] Mr. McInnes should have recognized that he could not rely upon Mr. Hull's solution for the Unit 819 purchase, or did so at his peril. That transaction did not involve a prearranged resale of the property at what appeared to be a substantial profit. Here, by contrast, Mrs. MacCulloch had agreed to resell Monte Vista Farm even before its purchase.

[para38] Even had Mr. McInnes been correct in concluding that the consent of the beneficiaries was sufficient to insulate the purchase of Terrace House and Monte Vista Farm and the resale of the farm property, the beneficiaries' consent could only afford protection if it was fully informed. Mr. McInnes knew that the other beneficiaries were not aware of the agreement to resell Monte Vista Farm.

[para39] The comments of the Supreme Court of Canada in *Central Trust Co. v. Rafuse* (1986), 75 N.S.R. (2d) 109 (S.C.C.), a case originating in the Supreme Court of Nova Scotia, are instructive. There, the principal issue was whether the liability of a solicitor could exist in both contract and in negligence. The Court confirmed that it could. In the course of that decision LeDain J., for the Court, described a solicitor's duty of care in terms that are particularly relevant here:

[58] A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken. See *Hett v. Pun Pong* (1890), 18 S.C.R. 290, at p. 292. The requisite standard of care has been variously referred to as that of the reasonably competent solicitor, the ordinary competent solicitor and the ordinary prudent solicitor. See Mahoney, "Lawyers -- Negligence -- Standard of Care" (1985), 63 Can. Bar Rev. 221. Hallett J., in referring to the standard of care as that of the "ordinary reasonably competent" solicitor, stressed the distinction between the standard of care required of the reasonably competent general practitioner and that which may be expected of the specialist .

[59] The requirement of professional competence that was particularly involved in this case was reasonable knowledge of the applicable or relevant law. A solicitor is not required to know all the law applicable to the performance of a particular legal service, in the sense that he must carry it around with him as part of his "working knowledge", without the need of further research, but he must have a sufficient knowledge of the fundamental issues or principles of law applicable to the particular work he has undertaken to enable him to perceive the need to ascertain the law on relevant points. The duty in respect of knowledge is stated in 7 Am Jur 2d, Attorneys at Law para. 200, in a passage that was quoted by Jones J.A., in the Appeal Division, as follows: "An attorney is expected to possess knowledge of those plain and elementary principles of law which are commonly known by well-informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques." See Charlesworth and Percy on Negligence (7th Ed. 1983), pp. 577-78 to similar effect, where it is said: "Although a solicitor is not bound to know the contents of every statute of the realm, there are some statutes, about which it is his duty to know. The test for deciding what he ought to know is to apply the standard of knowledge of a reasonably competent solicitor." The duty or requirement of professional competence in respect of knowledge is put by Jackson and Powell, *Professional Negligence* (1982), at pp. 145-46 as follows: "Although a solicitor is not 'bound to know all the law,' he ought generally to know where and how to find out the law in so far as it affects matters within his field of practice. However, before the solicitor is held liable for failing to look a point up, circumstances must be shown which would have alerted the reasonably prudent solicitor to the point which ought to be researched", citing *Bannerman Brydone Folster Co. v. Murray*, [1972] N.Z.L.R. 411. In that case, where a solicitor undertook on very short notice to prepare the necessary document to give effect to an oral agreement providing that a mortgagee would have an option to purchase, the New Zealand Court of Appeal held that it was not negligence to have failed to perceive that making the option to purchase a condition of the mortgage rendered it void or unenforceable as a clog on the equity of redemption. The point was referred to as a rather old and obscure principle which had not been the subject of judicial commentary for many years and was mainly a subject of academic interest. It is clear, however, that

the determining considerations in the Court's conclusion were the time available to the solicitor and the fact that the client was already committed to the transaction in the form that proved defective. See Turner J., at p. 427. The decision is nevertheless instructive concerning the duty of a solicitor to perceive problems and to warn the client of them. For a statement of the solicitor's duty "to identify problems and to bring their effect to the attention of the client", with reference to cases in which this duty has been applied, see Dugdale and Stanton, *Professional Negligence* (1982), p. 203.

(Emphasis added)

[para40] The appellants seem to suggest that in the absence of Mrs. MacCulloch calling expert evidence on the standard of practice, the trial judge erred in finding that Mr. McInnes had not met the standard. They say, as well, that there was expert evidence before the judge from which he should have concluded that Mr. McInnes did not fall short of the standard. They refer in particular to the evidence of David Stewart, Q.C.. They say that the fact that he took the position that even the consent of the beneficiaries was not needed, provided evidence that a practitioner in Halifax in 1981 would not have known that an executor could not purchase Estate assets.

[para41] On this issue the trial judge said:

[111] Mr. McInnes also argues that the proctor of the estate David Stewart and Mr. Harry Rhude, one of the executors, who he considered senior counsel and well versed in estate matters didn't raise with him the issue of an executor buying from the estate.

[112] In *Elcano Acceptance Ltd. et al. v. Richmond, Richmond, Stambler & Mills* (1991), 49 O.A.C. 17; et al 68 O.R. (2d) 165 (C.A.), the Court dealt with a claim of negligence against a lawyer. It was alleged by the plaintiff that the solicitor had drafted a number of promissory notes for the plaintiffs without taking into account the provisions of s. 4 of the Interest Act which mandated that the amount of interest on the note be stated as an annual amount. When the plaintiff attempted to collect on the notes he was restricted to a statutory amount of five percent instead of the intended 18 percent interest.

[113] The argument at trial was that the solicitor was not aware that the Interest Act applied to promissory notes because the statute only made reference to contracts and not specifically to promissory notes. The trial judge found that the Act did apply to promissory notes. He also dealt with an argument by the defendant's lawyer that he had relied on the wording used in an earlier promissory note used by the client which had been prepared by a respected practicing solicitor and that he was entitled to simply repeat the wording. The trial judge commented. O'Leary J. (p. 13).

"While a solicitor may be tempted to take a chance that the work of another solicitor has been done without error, he is not protected if in fact his gamble does not prove correct."

[114] I am not prepared to excuse Mr. McInnes from his obligations to the plaintiff because other counsel not dealing directly with the plaintiff didn't raise an objection to the proposal made to the estate.

[para42] The problem here was not that Mr. McInnes did not know the law, but that he did not clarify the law once put to his inquiry. In these circumstances, expert evidence on the standard of practice was unnecessary. On this issue Cordery on Solicitors, 10th ed., Vol. 1, London, Butterworths, at p. J/305 is instructive:

[274] An allegation of professional negligence against a solicitor is serious and 'the onus of proving professional negligence over and above errors of judgment is a heavy one'. In that the trial judge is a lawyer himself, often he will judge negligence by what he perceives to be the standard of an ordinary competent solicitor. Indeed calling solicitors as experts has been criticised, it having been said:

'I must say that I doubt the value, or even the admissibility, of this sort of evidence, which seems to be becoming customary in cases of this type. The extent of the legal duty in any given situation must, I think, be a question of fact for the court. Clearly, if there is some practice in a particular profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage, evidence of that can and ought to be received. But evidence which really amounts to no more than an expression of opinion by a particular practitioner of what he thinks that he would have done had he been placed in the position of the defendants, is of little assistance to the court; whilst evidence of the witnesses' view of what, as a matter of law, the solicitor's duty was in the particular circumstances of the case is, I should have thought, inadmissible, for that is the very question which it is the court's function to decide'.

It is submitted that only in cases where judgement must be based on material peculiarly within the knowledge of the solicitor's profession, as opposed to the knowledge and expectation of lawyers at large, would such expert evidence be either helpful or admissible.

[para43] The appellants did not call expert evidence suggesting that Mr. McInnes' failure to research the issue, in these circumstances, was consistent with his duty of care. At a minimum, Mr. McInnes should have been aware, as a result of the difference of opinion between solicitors Hull and Stewart, that caution was required. Had he looked he would have found, as did the courts on the later action attacking the transaction, that the law was not unsettled. I do not accept the appellants' argument that because Mr. Stewart, on behalf of the Estate, took the position that neither a court order nor the consent of the beneficiaries was required, it was reasonable for Mr. McInnes to have acted as he did. Mr. Stewart was not guarding Mrs. MacCulloch's interests as purchaser, but those of the executors qua executors. As is clear from his evidence, Mr. Stewart's concern was to protect the Estate on the transaction, not to protect Mrs. MacCulloch. On examination by counsel for the appellants he testified:

Q. Now, this view that was adopted by the executors that the estate had full power and authority to convey the property to Mrs. MacCulloch, do you know if that was the executors that had formulated that? Had they formulated it with advice from you? Had you participated in the formulation of the view? Whose view was it, and where did it come from?

A. I don't know where it emanated. I was certainly asked for my view. Whether Mr. Rhude had arrived at an opinion by himself before asking me, I don't recall, if I ever knew. But I know I was asked at one point if it was necessary for executors to get the consent and I gave the opinion that it was not necessary in the circumstances for them to get consent for this transfer in order to protect themselves.

(Emphasis added)

[para44] It has long been accepted that a solicitor's duty to a client includes a duty to advise on the risks in a transaction. The Court said in *Groom v. Crocker*, [1939] 1 K.B 194 (at p. 222):

The relationship is normally started by a retainer, but the retainer will be presumed if the conduct of the two parties shows that the relationship of solicitor and client has in fact been established between them. The retainer when given puts into operation the normal terms of the contractual relationship, including in particular the duty of the solicitor to protect the client's interest and carry out his instructions in the matters in which the retainer relates, by all proper means. It is an incident of that duty that the solicitor should consult with his client in all questions of doubt which do not fall within the express or implied discretion left him, and should keep the client informed to such an extent as may be reasonably necessary according to the same criteria.

(Emphasis added)

[para45] On the solicitor's duty to warn of the risks in a transaction see also *Major v. Buchanan* (1975), 61 D.L.R. (3d) 46 (Ont. H.C.) at p. 69.

[para46] The appellants further submit that Mr. McInnes was under no obligation to provide advice to Mrs. MacCulloch because she had negotiated the purchase of Monte Vista and Terrace House before retaining Mr. McInnes to complete the transaction. In this regard, they cite the New Zealand case *Boyce v. Mouat*, [1993] J.C.J. No. 33 (P.C.) which the appellants say is based on facts with close similarities to the present. There, in 1988 Mr. R.G. Mouat wished to raise \$100,000.00 to pay for alterations to his house and meet certain business expenses. Since his own house was fully mortgaged his mother agreed to mortgage hers for the required sum. Mrs. Mouat was the mortgagor, Mr. Mouat was the guarantor on the three year mortgage with interest of \$4,065.00 payable quarterly. Mr. Mouat undertook to pay the interest. Mr. Mouat asked Mr. Boyce to act for him and his mother. On 9th November, 1988, Mrs. Mouat was taken by her son to Mr. Boyce's office where Mrs. Mouat signed the mortgage and ancillary documents with her son signing as guarantor. In 1989 Mr. Mouat's business deteriorated, he fell into arrears on the payment of interest on his mother's mortgage and eventually he became bankrupt. Mrs. Mouat was left with a liability to repay the principal sum of \$110,250.00 together with arrears of interest. She sued the firm of solicitors alleging in her statement of claim that they were in breach of contract, inter alia, in the following respects: (a) failing to ensure that the Plaintiff had her own independent advice in respect of the transaction; and (b) failing to refuse to act for the Plaintiff in respect of the transaction when it was acting for R.G. Mouat.

[para47] The evidence was that the solicitor, upon meeting with Mrs. Mouat, pointed out to her that her position as mortgagor providing the security was substantially different to that of her son as guarantor and recipient of the loan. He advised her to obtain independent legal advice and offered to arrange for her to see a lawyer at one of the neighbouring law firms if she so wished. Mrs. Mouat declined. The trial judge, Holland J., was satisfied that "Mrs. Mouat knew at all times that the defendant was her son's solicitor, she knew the type of transaction that she was about to embark upon, and that having decided to support and trust her son she did not expect or require any legal advice as to the wisdom of her entering into the transaction." As to the claim that Mr. Boyce should have advised her that it was not in her interests to sign the mortgage, the trial judge concluded that:

It was made quite apparent to Mr. Boyce that Mrs. Mouat knew what a mortgage was and that if her son defaulted she stood the risk of losing her home. It was obvious to her, as it was to everyone else, that it was not in her financial interests to sign the mortgage, but nevertheless she wished to do so. The circumstances were not such as gave rise to any obligation on Mr. Boyce to advise her against signing the transaction.

[para48] Holland J. was satisfied that Mrs. Mouat was not concerned about the wisdom of the transaction and was "merely seeking the service of the solicitor to ensure that the transaction was given proper and full effect by way of ascertaining questions of title and ensuring that by appropriate documentation the parties achieved what they had contracted for". This finding of fact by the trial judge was supported by the evidence. The decision was reversed on appeal. On further appeal to the Privy Council, the Law Lords found that the intervention of the Court of Appeal was unwarranted and restored the trial decision finding Mr. Boyce not negligent. In so holding the Court said:

10 Their Lordships are accordingly satisfied that Mrs. Mouat required of Mr. Boyce no more than that he should carry out the necessary conveyancing on her behalf and explain to her the legal implications of the transaction. Since Mrs. Mouat was already aware of the consequences if her son defaulted Mr. Boyce did all that was reasonably required of him before accepting her instructions when he advised her to obtain and offered to arrange independent advice. As Mrs. Mouat was fully aware of what she was doing and had rejected independent advice, there was no duty on Mr. Boyce to refuse to act for her. Having accepted instructions he carried these out properly and was neither negligent nor in breach of contract in acting and continuing to act after Mrs. Mouat had rejected his suggestion that she obtain independent advice. Indeed not only did Mr. Boyce in carrying out these instructions repeat on two further occasions his advice that Mrs. Mouat should obtain independent advice but he told her in no uncertain terms that she would lose her house if Mr. R.G. Mouat defaulted. One might well ask what more he could reasonably have done.

11 When a client in full command of his faculties and apparently aware of what he is doing seeks the assistance of a solicitor in the carrying out of a particular transaction, that solicitor is under no duty whether before or after accepting instructions to go beyond those instructions by proffering unsought advice on the wisdom of the transaction. To hold otherwise could impose intolerable burdens on solicitors.

[para49] I do not agree with the appellants that the facts in *Boyce* are similar to those here. There, Mr. Boyce advised the client fully on her legal exposure and the fact that she should seek independent legal advice. He took the steps necessary to make the transaction effective according to his client's instructions. Here, Mr. McInnes gave Mrs. MacCulloch no advice on the risk of the transaction. He did not make her aware of her possible exposure and he authored an agreement and conveyancing documents that were ineffective to achieve their purpose.

[para50] The evidence does not support the appellant's assertion that Mrs. MacCulloch had retained Mr. McInnes for the limited purpose of carrying out the transaction. The appellants provided no documentation confirming that his retainer was circumscribed. Mr. McInnes acknowledged in his evidence that he did not know that the transaction was vulnerable. The tenor of his evidence was not that he was carrying out a conveyance which he knew to be faulty, but on the express direction of his client. It was that he protected the transaction from challenge by obtaining the "consent" of the beneficiaries and that in doing so he met the standard required of him. The fact that he arranged for the beneficiaries to consent to the purchase, which was not at the request of Mrs. MacCulloch, belies any suggestion that the retainer was a limited one.

[para51] The appellants say, in the alternative, that Mrs. MacCulloch did not require advice about the perils of an executor purchasing an Estate asset because she was already aware of the problem from the advice given by Mr. Hull on the Unit 819 purchase. The trial judge rejected that proposition. He said:

[104] Mr. McInnes argues that the plaintiff was already aware that she needed to get a court order and that if he suggested that to her she would not have consented to have him do so

[106] I reject the argument advanced by the defendants. While it is clear that the plaintiff instructed her lawyer in Toronto to proceed without Court approval or even without getting the beneficiaries to sign off on that agreement does not mean that she would have taken the same approach in regard to the agreement about the farm property. The Toronto apartment purchase handled by Mr. Hull was a much simpler transaction. She was simply paying the market value for the apartment in circumstances where the estate clearly wanted to dispose of the estate asset.

[107] It is also not clear in the evidence before me exactly what was said to the plaintiff by her lawyers in Toronto about getting court approval

[108] Mr. McInnes contends that since she was advised to get court approval about the first purchase that he did not have to explain to her to do that in regard to the purchase of the farm. I reject that argument. I find that Mr. McInnes had an obligation to give the plaintiff the option to reject his advice. He did not do so. I believe he had an obligation to make it very clear to her what the law was. I believe that Mr. McInnes did not do that because he obviously was not aware of the strict prohibition against her buying from the estate. I believe that while Mr. McInnes was somewhat aware of the issue, he never really directed his mind to the question because he felt that getting the beneficiaries to sign solved the problem. His evidence is that he didn't have to discuss that with her because he felt he was protecting her from attack by getting the beneficiaries to sign off.

(emphasis added)

[para52] The trial judge found that Mrs. MacCulloch was not sufficiently aware, from her dealings with the Toronto lawyer on Unit 819, of the risks of the Monte Vista Farm/Terrace House transaction. This factual inference is supported by the evidence. There were several factors distinguishing the two transactions. The Unit 819 purchase did not involve an immediate resale. Consequently, there was no high resale price which might cause the beneficiaries or the other executors to question the wisdom of the selling price. Unit 819 was located in Toronto. Some of the advice letters had referred to the particular requirements of the Ontario Trustee Act and of their Land Titles Office. From this Mrs. MacCulloch might have assumed that the advice was specific to that province. Most importantly, Mrs. MacCulloch was aware from the exchanges between Mr. Stewart and Mr. Hull that there were conflicting positions on the necessary precautions. She might well have concluded that no extra precautions were necessary. Finally, the correspondence from Mrs. MacCulloch to Mr. Hull on the purchase of Unit 819 reveals that she did not appreciate her position as a purchaser as distinct from that as an executor. For example, in a letter of October 22, 1980 to Mr. Hull she wrote in part:

We discussed the matter concerning the deeds of Apartment 819 Harbour square. We consider that we do not need to ask the permission of the children, the Executors have full power to act .

[para53] And on October 30, 1980:

At our last Executors' meeting, we discussed the question of your wanting the Childrens' [sic] signatures. We do not consider we need this and are not prepared to ask for it, also the lawyers for the estate are not prepared to ask for the signatures of the Children as they do not consider they are necessary. I do realise [sic] that you want to protect me but if we can't sort it out quickly and simply and soon, then I think I will seriously consider dropping the whole thing, I am becoming very weary of problems and just can't cope.

[para54] While Mr. McInnes may not have been privy to this correspondence, it supports the judge's view that Mrs. MacCulloch was not adequately aware of the difficulties.

(b) Reliance/Causation:

[para55] It was the further position of the appellants that Mrs. MacCulloch did not prove that if Mr. McInnes had given her the proper advice she would not have proceeded with the transaction without court approval. Accordingly, they say, his negligence was not causative of the damages. The trial judge rejected that submission as is clear from the passage quoted at [paragraph] 50 above. Repeating, in part, the trial judge's comments on this issue:

[106] I reject the argument advanced by the defendants. While it is clear that the plaintiff instructed her lawyer in Toronto to proceed without Court approval or even without getting the beneficiaries to sign off on that agreement does not mean that she would have taken the same approach in regard to the agreement about the farm property.

[107] It is also not clear in the evidence before me exactly what was said to the plaintiff by her lawyers in Toronto about getting Court approval. From the correspondence entered into evidence, it appears that she was being given two options, that is, either getting court approval or getting the beneficiaries to sign off.

[108] Mr. Clark [a solicitor working with Mr. Hull in Toronto] in his evidence indicated that he felt the best method was to get a Court order and that he explained the problem to the plaintiff. He said that the problem was that she was dealing with herself and that the beneficiaries might object later.

[109] If that was the advice given to her, it would seem to me that she could conclude that by getting the beneficiaries to sign the problem would be solved.

[115] I am not satisfied that if Mr. McInnes had advised the plaintiff to get a Court order that she would have rejected that advice. To suggest that is to speculate on what she might have done. Her decision I am sure would depend on how the problem was presented to her and how forcefully the argument was advanced. Since the problem was never clearly placed before her I am not prepared to speculate on what her reaction would be.

(Emphasis added)

[para56] A plaintiff suing for negligence must establish: (i) the existence of a duty of care; (ii) breach of that duty; and (iii) loss resulting from that breach. The appellants say that it was for Mrs. MacCulloch to affirmatively prove that she would not have proceeded with the transaction without court approval had the advice been given. The trial judge erred, they say, in reversing the onus on this issue. The appellants refer to the underlined portion in the latter part of the following paragraph from the decision:

[116] In summary I find that it was negligent on Mr. McInnes' part to arrange for the plaintiff to purchase estate assets without getting court approval. I believe he was not aware of the strict prohibition against that and was wrong to conclude that getting the beneficiaries to sign off would protect the plaintiff. I find that he has not shown that the plaintiff would have refused to follow his advice if he had given her advice in which he told her to get court approval. I find that he cannot rely on the advice given to the plaintiff by other counsel in regard to the Toronto apartment purchase.

(Emphasis added)

[para57] On this issue, the appellants cite *Canada Trust Co. v. Sorkos* (1992), 90 D.L.R. (4th) 265 (Ont. Gen. Div.). There, the real estate agents for Sorkos who was the vendor of the property concluded from descriptions of the 5 parcel piece of property that the acreage was 5.72. Sorkos had not mentioned that a part of the property had been expropriated. Sorkos accepted an offer based upon a per acre price. After acceptance of the offer a survey revealed that the actual acreage was less than the estimate of the agents, resulting in a lower selling price. Sorkos refused to pay the full real estate commission. The agents sued for the balance. Sorkos resisted payment, citing in defence the agents' negligent estimation of the size of the property. Granger J. found that the agents had negligently misrepresented the acreage of the property. He then said at p. 272:

Sorkos must establish that there is a causal link between the breach by Robinson and Simpson and the damage which he suffered. Sorkos suggests that due to the negligent misrepresentation of Canada Trust he failed to receive \$4,900,000 for the property, and as a result of the price abatement clause and the inaccuracy on the size of the property he only received \$4,850,314.65, amounting to a loss of \$49,685.35. The onus is on the vendors to show it was probable that if they had received the "proper advice" they would have done something differently: See *Sykes v. Midland Bank Executor and Trustee Co.*, [1970] 2 All E.R. 471 (Eng. C.A.); *Carieras v. Levy* [1970] E.G.D. 618 (Q.B.); *Canada Trustco Mortgage Co. v. Bartlett* (1991), 17 R.P.R. (2d) 190, 3 O.R. (3d) 642, 26 A.C.W.S. (3d) 1355 (Gen Div.).

[para58] Granger J. concluded that the vendors had contracted for a sale on a per acre price and got what they bargained for. He was not satisfied that the plaintiffs would not have accepted the offer had they known the true acreage. He commented that the plaintiffs may well have known that the acreage was less than 5.72. Additionally, it was plainly stated in the Agreement of Purchase and Sale, which had been fully explained to them, that if the acreage was less than stated the purchase price would be abated. He awarded no damages.

[para59] *Sykes v. Midland Bank Executor and Trustee Co.*, [1970] 2 All E.R. 471 (Eng. C.A.), referred to by Granger J. in *Sorkos*, is commonly cited for the proposition that, where negligent advice has been given by a solicitor, the clients who suffered damage must prove that had proper advice been given, they would not have entered into the transaction or would have entered it on different terms. In *Sykes*, the plaintiffs were partners in a firm of architects. In 1963 they entered into negotiations for a 10-year sublease of office premises in London. Rignall was their solicitor for this transaction. The lease contained a clause prohibiting further sublease without consent of the landlord. In 1965 the plaintiffs sought to sublease a part of their premises for the balance of the term. The landlord withheld consent. The plaintiffs sued Rignall. The court held that Rignall had been negligent in failing to advise the plaintiffs of the restriction on subletting. The plaintiffs sought damages equivalent to a percentage reduction in the rents that they had committed to pay over the term of the sublease. Their theory was that they would have negotiated lower rents had they known of the restriction. The trial court awarded only nominal damages. The plaintiffs had failed to prove that had they received proper advice they would not have entered into the subleases on the same terms. On appeal, Harman L.J. characterized the absence of a warning about the restriction on subletting as tantamount to a representation that there was no problem to consider. However, in upholding the award of only nominal damages he said, at p. 476:

Whether the plaintiffs are entitled to anything more than nominal damages remains to be considered. it seems to me, it is necessary for the plaintiffs to prove something more, namely, that the solicitor's omission did make a difference to them and was at least one of the elements, though there may be others, which influenced their minds to enter into the underlease.

[para60] Salmon L.J., commented that the "degree of blame [on the solicitors] in the present case was slight". He agreed that the onus was on the plaintiffs to prove that the breach caused substantial damage. At p. 478 he said:

It was for the plaintiffs to show that it was probable that if they had received proper advice they would not have entered into the underleases, at any rate not at the rents reserved. In my opinion they completely failed to prove anything of the kind. No doubt it would have taken very little evidence to establish this fact.

(Emphasis added)

[para61] The decision, however, turned upon the balancing of the evidence as to what the plaintiffs would have done on the correct advice. Salmon L.J. noted that one of the plaintiffs, although pressed by the judge to do so, would not say that it would have made any difference had the proper advice been given. The other plaintiff was not asked the question. Salmon L.J. concluded that the trial judge, in denying substantial damages, was of the view that it was as likely as not that the plaintiffs would have entered the leases even if advised of the restriction on subletting. He continued at p. 478:

In these circumstances, it seems to me impossible for a court to hold that the plaintiffs would probably not have taken the risk of entering the underleases. Mr. Ronald Sykes would not say so. It might be different if there were any facts or contemporaneous documents pointing in the plaintiff's favour - but there are none. On the contrary, all the known facts and documents strongly suggest that the plaintiffs would have taken the risk of entering into these underleases even if they had been properly advised by Mr. Rignall.

(Emphasis added)

[para62] Karminski L.J. agreed that the evidence supported the view that, even had they known of the requirement for the landlord's permission to sublet, the plaintiffs would have rented the premises. In this regard, he noted that because the premises were obviously very suitable in every way for the plaintiffs' London practice, the plaintiffs would have been very reluctant to lose these premises; that they occupied other premises the leases for which contained similar restrictive clauses; that they had no original intention of subletting; and, lastly, that even had they known of the restriction, the plaintiffs might have been prepared to take their chances that the landlord would ultimately consent should they wish to sublet. He was satisfied that there was evidence to support the trial judge's finding that the plaintiffs had not proved that they would not have leased the premises had they known of the restriction.

[para63] While it is not enough to show that the damage was possibly caused by the defendant's conduct, it has been said that causation need not be determined with scientific precision. In *Snell v. Farrell* (1990), 72 D.L.R. (4th) 289 (S.C.C.) Sopinka J. quoted with approval (at p. 300) the comment of Lord Salmon in *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475 (H.L.), at p. 490:

[causation is] essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory.

[para64] Causation, particularly in cases of negligence through advice not given, is primarily a question of inference by the trial judge as was recognized in *Allied Maples v. Simmons & Simmons*, [1995] 4 All E.R. 907. There Allied Maples acquired assets of the Gillow Group. They complained that in the course of the acquisition the defendant solicitors had insufficiently advised them as to the "first tenant liabilities" that might and did eventuate from leases originally held by the Gillow company. The judge held that Allied Maples must prove on balance of probability that, had it received proper advice, it would have taken steps to negotiate with Gillow to obtain protection. There was ample evidence to support the judge's findings on this. The Law Lords agreed that where the complaint is one of advice not given, the hypothetical question of what the plaintiff would have done requires that the judge draw an inference. While such inferences are not as insulated from review by appellate courts as are findings of primary fact, deference is nonetheless due given the advantage enjoyed by the trial judge.

[para65] Stuart-Smith L.J. said at pages 914 - 915:

1. What has to be proved to establish a causal link between the negligence of the defendants and the loss sustained by the Plaintiffs depends in the first instance on whether the negligence consists on some positive act or misfeasance, or an omission or non-feasance. In the former case, the question of causation is one of historical fact .

2. If the defendant's negligence consists of an omission, for example to provide proper equipment, or to give proper instructions or advice, causation depends, not upon a question of historical fact, but on the answer to the hypothetical question, what would the plaintiff have done if the equipment had been provided or the instruction or advice given. This can only be a matter of inference to be determined from all the circumstances. The plaintiff's own evidence that he would have acted to obtain the benefit or avoid the risk, while important, may not be believed by the judge, especially if there is compelling evidence that he would not. In the ordinary way, where the action required of the plaintiff is clearly for his benefit, the court has little difficulty in concluding that he would have taken it

Although the question is a hypothetical one, it is well established that the plaintiff must prove on balance of probability that he would have taken action to obtain the benefit or avoid the risk. But again, if he does establish that, there is no discount because the balance is only just tipped in his favour. In the present case the plaintiffs had to prove that, if they had been given the right advice, they would have sought to negotiate with Gillow to obtain protection. The judge held that they would have done so. I accept Mr Jackson's submission that since this is a matter of inference, this court will more readily interfere with a trial judge's findings than if it was one of primary fact. But even so, this finding depends to a considerable extent on the judge's assessment of Mr Harker and Mr Moore, both of whom he saw and heard give evidence for a considerable time. Moreover, in my judgment there was ample evidence to support the judge's conclusion. Mr Jackson's attack on this finding was, as I have explained, something of an afterthought and not, I think, undertaken with great enthusiasm. I am quite unable to accede to it.

(Emphasis added)

[para66] And Millett L.J. said at page 927:

[paragraph] 71 In order to obtain an order for the assessment of damages (in the Queen's Bench Division) or for an inquiry as to damages (in the Chancery Division), however, it is not sufficient for the plaintiff to establish a breach of duty on the part of the defendant. He must also identify some head of loss which is alleged to have resulted from the breach and, if it is not of a kind which would naturally result from the breach, establish a causal link between the breach and the loss. Only once he has done this is he entitled to have the loss quantified.

(Emphasis added)

[para67] The damage suffered by Mrs. MacCulloch arising from the challenge to the transaction was precisely the kind of damage which would result from Mr. McInnes' failure to advise her of the risk of purchasing an estate asset. There is a clear causal link.

[para68] Similarly in *Brown v. KMR Services Ltd.*, [1995] 4 All E.R. 598 (C.A.) Lord Justice Stuart-Smith referred to the deference to be accorded the trial judge's finding on this issue. He said at p. 617:

What the plaintiff would have done, if properly advised, can only be a matter of inference. The plaintiff may say what he would have done; but it does not follow that the judge will accept his evidence. In this case Mr Brown's evidence was that if properly advised he would not have been in any Category 3 syndicates. The judge did not accept that. There is therefore no acceptable evidence from Mr. Brown himself as to what he would have done. Where the advice which should have been tendered is clearly to the plaintiff's advantage, or the danger which should have been warned against is readily appreciated and understood once the warning is given, it is as a rule not difficult to infer that the advice would have been acted upon and the warning heeded. But in many cases it is not so clear. In the present case the benefits in the form of high profits on LMX syndicates were apparent. The risk of heavy loss may in 1987 have seemed very remote.

What should the approach of this court be to the judge's finding on such a matter? Since the conclusion is a matter of inference, the Court of Appeal can more readily interfere than in the case of a finding of primary fact based in part upon the judge's view of the credibility of the witnesses. Nevertheless, the judge's conclusion will no doubt have been based at least in part on his assessment of the character of the plaintiff. In this case the judge saw the plaintiff for more than two days in the witness box and clearly formed a view of him, a view which was by no means entirely favourable. Moreover, this court should be reluctant to interfere with a conclusion such as this, namely as to the proportion of premium income which would have been invested, unless it is satisfied that the judge's reasoning is in some significant respect erroneous. The situation is not unlike apportionment of liability between tortfeasors, or the assessment of the degree of contributory negligence.

(Emphasis added)

[para69] In her evidence Mrs. MacCulloch acknowledged that she could not say what path she would have taken had Mr. McInnes advised her of the risk associated with the transaction:

Q. Mrs. MacCulloch, based on all the information that we've just been going over I'm going to put it to you that if Mr. McInnes had said to you, in addition to getting the signatures of the beneficiaries, you should also get a court order, you would have told him, "Don't worry about it. I'm not interested in a court order." Is that not a fair conclusion?

A. No. The answer to that is, if I had been given advice, I would have had the opportunity to consider it and to make a decision.

Q. All right.

A. I was not afforded that opportunity.

Q. I'm putting it to you, though, that if you had been given the advice, you would have done exactly the same on the farm transaction as you did on Unit 819.

A. You're saying that. You have no basis upon which to state that.

Q. Well, let me ask you this. On the purchase of 819 for a year and a half your counsel gave you advice. That transaction closed within a month of the farm transaction closing. Do you have any evidence that you can give the court that would have suggested that if you had been given further advice by Mr. McInnes you would have acted differently?

A. I'm afraid I can't [inaudible]. I can only deal with the advice I was given.

[para70] As the trial judge said, Mrs. MacCulloch's response to the advice that there was risk to the transaction would depend upon the nature of the advice and the way in which the problem was presented to her.

[para71] A first step in answering the hypothetical question of what Mrs. MacCulloch would have done had she received proper advice is to establish what advice ought to have been given. In *Bristol and West Building Society v. Mothewe*, [1996] 4 All E.R. 698 Millett L.J. said at p. 705:

Where a client sues his solicitor for having negligently failed to give him proper advice, he must show what advice should have been given and (on a balance of probabilities) that if such advice had been given he would not have entered into the relevant transaction or would not have entered into it on the terms he did. The same applies where the client's complaint is that the solicitor failed in his duty to give him material information. In *Sykes v Midland Bank Executor and Trustee Co. Ltd.* [1970] 2 All E.R. 471, [1971] 1 QB 13, which was concerned with a failure to give proper advice, the plaintiff was unable to establish this and his claim to damages for negligence failed. In *Mortgage Express Ltd v Bowerman Partners* [1996] 2 All ER 836, which was concerned with a failure to convey information, the plaintiff was able to establish that if it had been given the information it would have withdrawn from the transaction and its claim succeeded.

[para72] In order to establish what advice would have been given had Mr. McInnes investigated the issue, I have referred to *Waters, Law of Trusts in Canada, 1974, Carswell Company Limited*. That text has been since revised. However, this is the version which would most probably have been available to Mr. McInnes at the time. That text says, in relevant part, commencing at p. 627:

The general principle was established in the seventeenth century that a trustee may not purchase any part of the trust property. The rubric is clear and beyond argument. Indeed, Lord Eldon's two famous judgments in *Ex parte Lacey* (1802), 6 Ves. J. 625, 31 E.R. 1228 and *Ex parte James* (1803), 8 Ves. J. 337, 32 E.R. 385 where he set out the deterrent rationale behind the conflict of interest and duty rule, were themselves concerned with purchases made by trustees. In *Ex p. James* he said, "the purchase is not permitted in any case, however honest the circumstances; the general interests of justice requiring it to be destroyed in every instance; as no court is equal to the examination and ascertainment of the truth in much the greater number of cases." This authority was recently invoked by Cooper J.A. in *Re Mitchell* (1970), 1 N.S.R. (2d) 922 at 941 where a will gave a right of pre-emption over certain shares held by a trust to two classes of persons. The shares constituted half the issued stock in a company which the deceased and another owned in equal shares. The first class of persons with the pre-emptive right was the deceased's children, and the second the other shareholder. The widow was one of the trustees, and, on it becoming clear that the only adult child had not the means to buy, the other shareholder made an offer. The widow then offered the sum which the other shareholder was prepared to pay, a fair and reasonable price. No doubt her intention was to maintain her family's interest in the company, but the Nova Scotia Court of Appeal ruled against her. Not only was she a stranger to the preference, but as a trustee she was barred under the rule in *Ex p. James*.

All manner of fiduciaries are excluded from purchasing the property under their control for the purpose of their tasks. Company directors, agents, agents to sell, executors and administrators, mortgagees acting as trustees, trustees for the benefit of creditors and in bankruptcy, and inspectors in liquidation proceedings have been required by Canadian courts to surrender the property they have thus acquired or the personal profit that they have thereby made. But it is the trustee who above all is held most strictly to the rule, as *Re Mitchell* shows.

A will or instrument may of course enable a trustee or fiduciary to make such purchases, but the court will strictly construe the power thus given him. In *Rountree v. Sydney Land and Loan Co.* (1907), 39 S.C.R. 614, for example, where a company secretary was involved, the secretary was permitted to have a 5% commission on a sale of the company's bonds. Without authority the

directors decided to convert certain preference shares into bonds, and to pay 5% to the secretary. The shareholders were later informed of the conversion, and ratified it, but, since they were not told of the interest the secretary had, he was required to surrender his gain. This was a case of consenting to a commission rather than a purchase, but the principle is the same.

There are also various ways in which the fiduciary may purchase, and the court will examine the transaction carefully in order to determine whether there has been a breach of the rule. Provided the trustee can show that a trust beneficiary knew all the facts and was at arm's length with the trustee, a trustee may purchase a trust beneficiary's interest. This avenue has been pursued by trustees in order to justify the acquisition of trust property, but the onus of proof on the trustee that that was indeed the character of the transaction is heavy. . .

[para73] And commencing at p. 628:

But where a third party is involved as a purchaser of the trust property for himself, another issue would normally arise. Was he a bona fide purchaser? If he was, and he still retains the trust property, then he is entitled to retain it, and the trust beneficiaries can only follow the trustee for the proceeds of the sale. A trustee is acting in breach of trust if he disposes of the property as part of a roundabout manner of securing it for himself, but he also breaches the terms of the relationship between himself and the beneficiaries. As between the beneficiaries and the innocent third party who has given value, the law follows its usual rule of preferring the third party. It was for this reason that in *Parker v. Thomas* (1893), 25 N.S.R. 398 (C.A.) the third party acquired an unassailable title. At a foreclosure sale an executor bought estate property subject to a mortgage, and subsequently mortgaged it to the plaintiffs who, having themselves foreclosed on the executor, now brought an action of ejectment against the executor, the legatees, and all other interested parties. The plaintiffs were successful. Nor is the law concerned with any incapacity or ignorance of the true facts in the trust beneficiary. In *Ricker v. Ricker* (1882), 7 O.A.R. 282 where the trustee had bought and then sold to a bona fide purchaser, the beneficiary was an infant. Yet the preference for the bona fide purchaser remained, and the infant was left with his recovery against the trustee for the proceeds of sale.

In other words, whether the trustee has sold to the innocent third party with the intention of buying the property back, or he purchases the trust property and sells it later to such a third party, the rule preferring the bona fide purchaser for value gives good title to the third party.

[para74] And at p. 630:

The purchase by a trustee of trust property, and the same applies to all fiduciaries, is not a void, but a voidable transaction. Until the beneficiaries or other interested parties succeed in obtaining an order setting the contract aside, the trustee can pass a valid title to the innocent third party who gives value. It was by this means that the third party acquired good title in *Parker v. Thomas* and *Ricker v. Ricker*. The onus of proof upon the trustee to show that his purchase of the property did not involve him in a conflict of interest and duty is heavy, and the great majority of trustees are not able to show that a possible conflict situation did not exist. Thereafter, if the contract is not to be set aside, the trustee must either show that the beneficiaries all knew of the full facts and understood the situation, or that he had earlier applied to the court and obtained its consent. As we have seen, if the trustee argues that he had the consent of the beneficiaries to the purchase, there is a heavy burden upon him to show that the beneficiaries were not only capacitated, but knew as much of the situation as he did. Reported cases suggest that few trustees succeed in this. If the trustee seeks proper court approval to the purchase, he will have to demonstrate that a sale is most necessary, that no other purchaser has been forthcoming or seems likely to come forward within a reasonable time, and that his own offer in the circumstances is a favourable one.

[para75] (See also *Weagle v. Weagle*, [1955] 3 D.L.R. 58 (N.S.S.C. en banc) and the many authorities to the same effect cited by the Court of Appeal in *Price Waterhouse Ltd. v. MacCulloch*, (1986) 72 N.S.R. (2d) 1 (C.A.) referred to above.)

[para76] In my view, Mr. McInnes should have advised Mrs. MacCulloch that in purchasing the properties she would be in breach of her duties as an executor. Mr. McInnes was aware that Mrs. MacCulloch took those duties seriously. He should have advised her that should she purchase the properties and there be objection, she would be called upon to account for the proceeds. He should have discussed with her the factors relevant to the risk that the transaction would be challenged. In this regard he would have advised her that, because the Estate was in poor financial shape, because she did not enjoy a good relationship with the beneficiaries, because she was often at odds with the other executors and because she was reselling at what appeared to be a substantial profit unbeknownst to the beneficiaries and other executors, the chances of an attack on the transaction were increased. He should have further advised her that it was at best doubtful that the will, by authorizing sale of an asset to a "family member", authorized her to purchase as an executor. He should have advised her that if the transaction were challenged, because the beneficiaries were unaware of the resale, she would not be able to satisfy the heavy burden upon her of establishing that in "consenting" to the transaction they were fully informed of all of the relevant circumstances. Finally, he should have advised her that, in these circumstances, the only way to proceed with the transaction was to obtain prior court approval.

[para77] Mrs. MacCulloch was told none of this. Instead, she was led to believe that by obtaining the "consent" of the beneficiaries to the sale Mr. McInnes had protected the transaction. A distinguishing element of this case, as compared to those discussed above, is that the appellants' negligence consisted of more than a failure to give advice. By obtaining the beneficiaries "consent" to the sale, Mr. McInnes purported to insulate the transaction from attack. The negligence, therefore, consisted of both the failure to give advice and the negligent performance of a service.

[para78] The appellants' arguments about causation are premised on negligence consisting simply of failure to give proper advice. In essence they argue that improper advice does not cause loss unless it is shown that proper advice would have been followed. In my view, this premise is incorrect. The trial judge did not find that the negligence here was simply failure to give proper advice, as is clear from his remarks at [paragraph] 56 above. He found that the appellants were negligent in the manner in which the transaction was carried out. As he put it, they were negligent in arranging " for the plaintiff to purchase estate assets without getting court approval."

[para79] Viewed in this way, Mr. McInnes' duty was to take the proper steps which a reasonably competent solicitor would have taken to effect the transaction so that it would not be voidable. In this he failed. What would otherwise have been a breach of duty would not be so if Mr. McInnes, after properly warning his client of the dangers of proceeding, had received express instructions to proceed as he did. He gave no such advice and received no such instructions. The manner in which he completed the transaction resulted in it being voidable. This breach of duty caused the client's loss. Had he taken proper steps to effect the transaction, it would not have been voidable. In short, Mr. McInnes was negligent in proceeding with the transaction in the manner that he did without express instructions from his client to do so, obtained after she had been properly advised. Causation

was established. Speculation about what his client would have instructed him to do had she been given proper advice and asked for instructions does not interrupt the causal link.

[para80] In any event, the trial judge inferred that Mrs. MacCulloch would have accepted Mr. McInnes' advice, had it been given. There was evidence from which he could make that inference. In this regard, the record reflects that Mrs. MacCulloch had previously retained Mr. McInnes to act on her behalf in other matters with no indication that she had not followed his advice; she had accepted his advice to obtain the consent of the beneficiaries to the Monte Vista Farm/Terrace House purchase; she had consulted him when she was asked to sign the 1981 Agreement in her capacity as executrix and had followed his advice to execute the Agreement. In drawing the inference the judge was entitled to consider, as discussed in *Allied Maples, supra*, and *Brown, supra*, that the advice which she was not given was for her benefit, easily understood and went to the root of the transaction. It was also relevant to drawing the inference that Mrs. MacCulloch's options were not limited to proceeding or abandoning the transaction. She might have been successful on an application for court approval. In this regard it is appropriate to consider the factors which would support her application: the Estate could not afford to maintain Monte Vista Farm as a residence for Mrs. MacCulloch; although the resale price of Monte Vista Farm negotiated by Mrs. MacCulloch was substantially higher than the purchase price, the Estate could not sell that property to a third party unless Mrs. MacCulloch released her life interest; the will expressly permitted sale of an estate asset to a family member. In these circumstances, it is reasonable to speculate that a court might have looked favourably upon approving the transaction.

[para81] As noted in *Toneguzzo-Norvell, supra*, although inferences are not entitled to the same level of deference as findings of primary fact, the weight of the evidence is for the trial judge. The trial judge's finding that Mrs. MacCulloch would have heeded the advice, although an inference, should be upheld by this Court unless we are satisfied that his reasoning was clearly erroneous. I am not persuaded that he erred in drawing the inference that he did.

[para82] In *Schloss v. Koehler* (1978), 4 Alta. L.R. (2d) 85, the plaintiff had undertaken to loan a farmer, Mr. Koehler, \$3,000.00 with interest at 30% per annum. The purpose of the loan was to enable Koehler to purchase more hogs to carry on a larger hog farming operation. After the parties had reached a verbal agreement with regard to the loan of \$3,000.00 and the payment of the 30% interest, the plaintiff instructed Mr. Burgess, a young lawyer in the law firm of Knaut, Rolf, Cochrane & Burgess, to prepare documentation on the matter so as to secure his loan. The plaintiff did not give Mr. Burgess any serial numbers or details of the chattels on which he was to obtain security nor did he give him at that time a location where the chattels could be found. Mr. Burgess prepared the chattel mortgage without such details. The defendant, Koehler, died on January 27, 1970. The plaintiff did not receive payment from the Estate of the monies due and, therefore, commenced action against the solicitors. The trial judge found that deficiencies in the chattel mortgage made the goods almost unascertainable and therefore the mortgage was unenforceable. There was, as well, a prior loan by the Canadian Imperial Bank of Commerce to the deceased, Koehler, which was covered by s. 88 security under the Bank Act, R.S.C. 1970, c. B-1 and on which a notice of intention to give security had been filed at the Bank of Canada in Calgary. The bank took possession of these chattels under its security. The judge was satisfied that Mr. Burgess' standard of conduct in preparing the chattel mortgage and in failing to discover the prior security did not meet that required of a barrister and solicitor.

[para83] Counsel for the law firm argued that even if the plaintiff had known of the deficiencies, he would still have gone ahead and extended the loan. In rejecting that submission the trial judge said at p. 92:

I do not think, in connection with the claim against the law firm, that this is the proper perspective from which to approach the problem. I think that the proper method would be that, by reason of the negligence of the law firm and Mr. Burgess the plaintiff was precluded from having the opportunity to decide whether to advance the moneys or not advance the moneys which he would have had had he known of the true situation with regard to the chattels. The actions of Mr. Burgess precluded the plaintiff from having the opportunity to make this decision.

[para84] In upholding the decision on appeal (reported as *Schloss v. Knaut* (1979), 71 Alta. L.R. (2d) 399) McDermid J.A. quoted the above remarks and said at p. 400:

We agree that any uncertainty as to whether he would have gone on with the investment must be construed against the solicitors.

(see also *285614 Alberta Ltd. v. Burnet, Duckworth & Palmer* (1993), 8 Alta.L.R. (3d) 212 (Q.B.))

[para85] Here, Mrs. MacCulloch completed the transaction in the manner in which Mr. McInnes advised. That transaction was successfully attacked for reasons that he ought to have foreseen and about which he ought to have given advice. Prima facie, the appellants' negligence was causative of the damages. It is my view that in stating the issue as he did, the trial judge was not shifting the burden to the appellants but found that, on all of the evidence, their negligence caused the loss. In this regard I would find that he did not err.

(c) Damages:

[para86] Mrs. MacCulloch claimed the following damages:

(a) Damages for unnecessary diminution of the value of the estate of Charles MacCulloch arising out of the litigation brought by the trustee-in-bankruptcy against the plaintiff;

(b) Damages for loss of benefits under the Last Will and Testament of Charles MacCulloch relinquished by the plaintiff under the Agreement;

(c) Damages for loss of benefits obtained by the plaintiff as a result of the Agreement;

(d) Damages for loss of personal assets and effect;

(e) Damages for emotional distress, mental anguish, physical illness, mental illness (including incarceration in the Nova Scotia Hospital), disruption of her life for 11 years, loss of income earning capacity, loss of enjoyment of life;

[para87] The trial judge awarded damages totalling \$355,292.46, including pre-judgment interest. This represented, in part, reimbursement of Mrs. MacCulloch's legal fees expended defending herself on the trustee's successful effort to have her account for the proceeds of resale of Monte Vista Farm and Terrace House. The balance of the damage amount was compensation for the

diminution in the value of the Estate as a result of the monies expended by the trustee in pursuit of the litigation against Mrs. MacCulloch. This is discussed more fully below. All other claims for damages were dismissed. The appellants do not challenge the award of damages if the finding of negligence is upheld.

[para88] Mrs. MacCulloch has cross-appealed alleging that the damage award is inadequate. She says:

the Respondent does appeal the lack of damages and certain legal costs NOT awarded in the decisions. AND the Respondent asks the Court to deal with items not addressed by the Trial Judge in his decisions.

[para89] It is Mrs. MacCulloch's submission that the trial judge erred in failing to grant adequate compensation for the effect of the negligence upon the Estate and damages for its effect upon her health and for the loss of her inheritance and future earning ability.

(i) Diminution of the Value of the Estate:

[para90] The judge accepted that the legal and trustees fees attributable to the trustee's pursuit of Mrs. MacCulloch to account for the proceeds on the resales of Monte Vista Farm and Terrace House represented a cost to the Estate, thereby diminishing its value. Mrs. MacCulloch as beneficiary, therefore, suffered a loss in an equivalent amount. He invited further submissions from the parties in fixing the amount of these damages.

[para91] By supplementary decision dated June 20, 2000 (unreported) the judge quantified this damage claim. He noted that Mrs. MacCulloch, in prior litigation, had objected to the trustees' account and had succeeded in having it reduced from \$356,028.00 to \$231,000.00 (see *MacCulloch (Bankrupt), Re* (1991), 108 N.S.R. (2d) 130 (N.S.C.A.)). In addition to the trustees fees was the disbursement by the trustees for legal services in the amount of \$219,000.00. The judge determined that of the disbursement for legal fees, \$169,385.00 was attributable to the action for the accounting. There were additional legal fees expended in attempts to enforce the judgment against Mrs. MacCulloch. The trial judge was not satisfied that Mrs. MacCulloch could not have responded to the judgment and, accordingly, concluded that she was not entitled to recover the amount necessitated by her refusal to pay the judgment. The total amount allowed by the court of appeal for trustees fees during the time of the litigation was \$115,000.00. The judge accepted Mrs. MacCulloch's estimate that 25% of that amount or \$28,750.00 would have been attributable to the conduct of the litigation. I would find no error by the trial judge on this account.

(ii) Lost Benefits Under the Will:

[para92] Pursuant to the 1981 Agreement to purchase Monte Vista Farm and Terrace House, Mrs. MacCulloch paid \$500,000.00 and gave up her rights under Clause 6 of the will. In this regard the Agreement provided:

9 (A) The Purchaser agrees to release and does hereby release all her right, title and interest to Monte Vista Farm pursuant to clause 6 of the Last Will and Testament of the late Charles E. MacCulloch and agrees to execute such documents as may be reasonably required by counsel for the Vendors to give effect thereto.

[para93] Clause 6 of the will granted Mrs. MacCulloch the right to be maintained in Monte Vista Farm for life, at the expense of the Estate. In addition to the Clause 6 bequest, pursuant to Clause 5(A) of the will, Mrs. MacCulloch was entitled to the sum of \$300,000.00 and, pursuant to Clause 7, the income from a \$1,000,000.00 fund for life and, if she survived for 10 years after Mr. MacCulloch's death, a payment of \$500,000.00. These latter bequests were not relinquished in the Monte Vista Farm/Terrace House Agreement.

[para94] When Mrs. MacCulloch was ordered to account for the proceeds from the resale of Monte Vista Farm she lost not only the benefit of that transaction, but could not regain the right to be maintained in the farm for life, because she had sold that property to a third party. Mrs. MacCulloch says that she should have received damages to compensate for that loss.

[para95] According to the trial record, in 1991 Mrs. MacCulloch had retained an actuary, Ron Fletcher of Morneau Coopers and Lybrand, to value her interest under the will. At the time of settlement of the Estate (1996), Mr. Fletcher was asked to update that value. He valued Mrs. MacCulloch's entitlement to be maintained in the farm at \$6,990,020.00 calculated by multiplying the estimated annual costs of maintenance of \$79,000.00 by the number of years that she would likely reside in the property. This, submits Mrs. MacCulloch, is the amount of her loss. That valuation is in dispute. On cross-examination by appellants' counsel, Mr. Fletcher agreed that another method of valuing this entitlement would be to fix a sum which, if invested in 1981, would generate sufficient annual income to pay the estimated expenses of the property. In a report prepared at the request of the executors of the Estate in October of 1981, the Clarkson Company Limited had estimated that the appropriate fund would be \$600,000.00. At trial Mr. Fletcher could not say whether that sum would have been sufficient to generate the necessary annual maintenance costs. The Clarkson and Company had assumed the annual maintenance costs to be \$60,000.00 not the \$79,000.00 used by Mr. Fletcher. Mr. Fletcher also agreed with counsel for the appellants that if the Estate was unable to pay the annual maintenance costs, the bequest would have no value. The contingency that the bequest was without value was relevant because the Estate, unable to meet its obligations, was petitioned into bankruptcy in 1982. Notwithstanding the question of valuation of the life interest, Mrs. MacCulloch submits that the judge should have compensated her for that loss based upon the \$6.9 million dollar value.

[para96] On the claim for lost benefits under the will the judge said:

[134] This claim appears to be based on the argument that when the plaintiff purchased the farm property she gave up her entitlement to a life interest in the farm along with the right to be maintained on the farm. The value of this item was estimated to be anything from sixty to \$80,000.00 per year.

[135] I reject this claim for damages. It is clear that following from the first trial decision, the Court of Appeal when dealing with this point raised by the plaintiff, indicated that it was not relevant to the accounting and would have to be addressed otherwise as against the estate itself. That was done when the estate was closed. Mr. Ronald A. Fletcher, an actuary hired by the plaintiff was asked to quantify the plaintiff's actual entitlement under the Will. He did so and his report (Exhibit 13) was accepted by the Court of Probate in its final decree (Exhibit 35). Mr. Fletcher in his report valued the plaintiff's right to be maintained on the farm at \$6,990,000. This figure included the value up to April 1st, 1996, and the value of future payments. Therefore, the plaintiff has had this claim recognized in the Court of Probate and cannot advance it here as a loss to her.

[para97] Mrs. MacCulloch in her notice of cross-appeal says that the judge misunderstood the nature of this damage claim. It is Mrs. MacCulloch's submission that because Mr. McInnes did not attribute a monetary value to her "life interest" in the 1981 Agreement, she lost the value of that asset when the subsequent courts refused to offset it on the accounting. In other words, says Mrs. MacCulloch, had Mr. McInnes placed a value on the life interest in the Agreement, the Appeal Court would have recognized that she gave up in value more than she got on the resale of the properties and, therefore, that there were no profits for which to account. I cannot accept this submission. The Appeal Court was aware that Mrs. MacCulloch had given up her life interest in the farm, whatever its value, and was not prepared to permit a set-off. Jones J.A. said in *Price Waterhouse v. MacCulloch* (1986), 72 N.S.R. (2d) 1 (N.S.C.A.) at pp. 10 - 11:

it seems to me that a calculation of the profits in this instance should be a relatively simple matter as I do not think that the respondent is entitled to offset any claims which she purportedly has against the estate as a beneficiary or otherwise. She used trust property which belonged to the estate and therefore any profit accumulating from the use of the property belongs to the estate.

[para98] Similarly the issue of the set-off of the value of the life interest was before Justice Richard on the accounting (reported as *MacCulloch Estate (Trustee of) v. MacCulloch* [1986] N.S.J. No. 540). Following the above direction of the Appeal Court, he declined to consider in the calculation of the "profits" the value of Mrs. MacCulloch's life interest in Monte Vista Farm. He said at p. 3:

This hearing concerning the accounting as ordered by the Appeal Division was held at Halifax on June 9, 1986. In spite of the fact that the defendant knew of this hearing at least two months in advance she appeared ill-prepared to deal with the matters in the manner directed by the Appeal Division. Much of the evidence which she gave on that day in no way related to the proving of her accounts but rather related to matters which were not properly before me. One could speculate that the defendant appeared unwilling to accept the rulings of the Appeal Division as being finally determinative of the matter. Indeed, counsel for the defendant in his post-hearing memorandum made the following and somewhat startling submission:

It will be argued in this Memorandum, with the greatest of respect to the learned judges on appeal, that the question of the manner in which the settlement agreement is to be set aside in the context of the accounting hearing is fully before this Honourable Court for adjudication. The jurisdiction of this Honourable Court would therefore include any allowance to be made for the capitalized value of the right to Mrs. MacCulloch to have been maintained for her lifetime and to occupancy (sic) the Monte Vista Farm property. The operation of the Canadian Charter of Rights and Freedoms is relied on in the preservation of those issues. This Memorandum is submitted expressly without prejudice, to the right of Mrs. MacCulloch to have adjudicated before a tribunal of competent jurisdiction, her right to ownership of the Harbour Square Condominium property and her absolute entitlement to the proceeds of resale of the condominium property. The adjudication of the ultimate ownership of the Harbour Square Property ought to be taken as a precondition of the entry of any judgment dealing with the proceeds and appropriate directions may be given by this Honourable Court in that respect.

It is submitted that the jurisdiction conferred upon this Honourable Court by the decision of the Appeal Division is a general one with respect to the determination of the amount, if any, of net proceeds of the resale of the two properties accountable to the Plaintiff Trustee in Bankruptcy, including allowances for evidence, improvements and interests in the subject properties by way of resulting or constructive trust, whether or not interest accruing on the proceeds of disposition is to be awarded in favour of the Plaintiff and including the terms upon which the Plaintiff may execute any judgment obtained herein. It should be noted that the question of a resulting or constructive trust in favour of Mrs. MacCulloch for her work on the Monte Vista Farm property is an alternative to the allowance of a set off claim to the value of benefits under the will pertaining to that property.

The above appears to run counter to the clear directive of the Appeal Division. Clearly, any consideration of a set-off claim based on services allegedly performed by the defendant would be directly contrary to the directive of the Appeal Court. Consideration of matters such as the capitalized value of the defendant's interest in Monte Vista farm or the application of the Canadian Charter of Rights and Freedoms could very well impinge upon the rights of others who are not parties to this action. The defendant holds the proceeds of the Monte Vista farm and the Toronto condominium in trust for the plaintiff/appellant. She must now account to the plaintiff/appellant for the profits made on the resale of these two properties. Whatever other rights the defendant may have against the plaintiff, the estate of the late Charles MacCulloch or any of the executors, trustees or beneficiaries will have to be dealt with in other proceedings .

(Emphasis added)

[para99] In late 1989 the trustee in bankruptcy was discharged. At that time the only significant asset remaining in the trustees' hands was the judgment against Mrs. MacCulloch, which was assigned to the executors. On the closing of the Estate the Probate Decree, dated February 26, 1996, recited in relevant part:

6. THAT the claim of Patricia B. MacCulloch as widow in lieu of dower takes priority over the claims of all other beneficiaries of the Estate;

7. THAT on the basis of the uncontradicted actuarial evidence presented to the Court (as prepared by Ronald Fletcher of Morneau Coopers & Lybrand Limited), the claim of Patricia B. MacCulloch as widow in lieu of dower exceeds the value of assets remaining in the Estate (including the present value of the Judgments), and she is entitled to set off her claim against the Judgments, such that they are paid and satisfied.

[para100] The Probate Court accepted 6.9 million dollars as representing the value of Mrs. MacCulloch's life interest. She was entitled to receive compensation for that foregone interest under the will. Accordingly, in satisfaction of that amount she was assigned the Estate's right to the judgment against her, which judgment was an asset of the Estate. In addition, she received all remaining Estate funds, which, according to the final decree, amounted to \$240,720.72. Therefore, as the trial judge found, she received credit for the value of her "life interest", to the extent that the Estate had assets to respond to the value of that interest.

[para101] Justice MacLellan had determined that Mr. McInnes was not negligent in failing to place a monetary value on the "life interest" in the 1981 Agreement. I would agree. Nor is the fact that he did not do so the cause of the Appeal Court subsequently deciding that Mrs. MacCulloch could not set off the relinquishment of that benefit as against the proceeds on the resale of Monte Vista Farm and Terrace House. I would agree with the trial judge that no compensable damages are attributable to the fact that the life interest was not quantified.

[para102] Mrs. MacCulloch is of the view, as well, that the Agreement should have reflected that Terrace House was, and always had been hers, not an Estate asset. She faults Mr. McInnes for not drafting the Agreement to so reflect. Had he done so, in her submission, she would not have been required to account for any profits on the resale of that asset.

[para103] It was a term of the 1981 Agreement that both parties agreed to end the legal dispute over the ownership of Terrace House. Mrs. MacCulloch would have title to that property as well as Monte Vista Farm. The record does not support Mrs. MacCulloch's assertion, however, that she had agreed with the Estate that they were to acknowledge that she had always had ownership of Terrace House. Accordingly, it was not negligent of Mr. McInnes not to include this as part of the agreement, and no damages flow.

(iii) Damages for loss of benefits obtained by Mrs. MacCulloch as a result of the purchase and resale:

[para104] On this claim the trial judge said:

[136] I reject this claim for damages. The plaintiff was ordered by courts to account for the profit it deemed she made on the two transactions involving the farm and the Toronto apartment. Once these amounts were determined and all appeals were either concluded or abandoned, the plaintiff refused to pay the trustee the amounts determined. As a result they filed judgments against her in the amounts of \$1,829,916. If the plaintiff had paid the judgment at that time, she clearly would be entitled at this point to claim these amounts against the defendants. Because she did not pay them, I find that she has suffered no loss of benefits as a result of the order to account for the deemed profits.

[para105] This claim overlaps with the damage claim discussed above. For the same reasons I find no error by the trial judge in declining to award damages under this head.

(iv) Loss of personal assets and effects:

[para106] As to this claim the judge said:

[137] I am not clear what this claim is about. The plaintiff did allege that when she sold the farm to M & M Development Limited she included some personal effects, furniture and vehicles which belonged to her at that time. No credit was given to her on the accounting for these items.

[138] It does not appear that these items were used by Mr. Fletcher in determining the plaintiff's entitlement under the Will, however, I have no evidence before me as to the value of these articles, therefore, I can make no finding about them.

[para107] Mrs. MacCulloch maintains that it was the judge's obligation to clarify the nature of this head of damages. Unfortunately, I am no clearer on the substance of this claim. In her written submission, Mrs. MacCulloch refers to personal possessions which were included in the Agreement. I can only presume that she is referring to some of the furnishings in Monte Vista Farm which were included in the sale to the third party. To these items Mrs. MacCulloch has assigned a value of \$234,000.00. I assume her submission is that because those furnishings were personally owned by her and not, therefore, Estate assets, the value should have been deducted from the "profit" for which she was called to account. This same claim for a set off was raised before Justice Richard on the accounting. He declined to allow a set-off. Again, I would find no negligence by Mr. McInnes in failing to reflect the value of these personal effects in the 1981 Agreement. It is Mrs. MacCulloch's submission that the Court of Appeal was wrong in directing that there be no set-off's on the accounting. Accordingly, she seeks to recover damages from the appellants for that alleged "judicial error". Putting her position in its best light, in legal terms, her claim is too remote.

(v) Mental Anguish:

[para108] The judge declined to award damages under this head. He said:

[139] I am not satisfied that the plaintiff has proven this claim. She did present to me a number of medical reports (Exhibits 38, 39, 40, 53) which referred to medical problems she has encountered over the last number of years. However, I am not able to conclude that the medical problems, and in particular the admission to the Nova Scotia Hospital, was because of the action taken against her by the Trustee in Bankruptcy. Obviously, the plaintiff has suffered great stress since her husband died. She has had the strain of dealing with the attempt by Revenue Canada to collect taxes they felt were owing because of the re-sale of the farm and the Toronto apartment. She had problems with Canada Customs about her wedding ring. She challenged the trustee's fees and attempted to have one executor removed. She attempted to sue officials of the bank and trust company.

[140] I simply cannot conclude that the medical problems she had during these years were caused by the litigation involved in the sale to her of the estate assets. To prove this claim, she would have to show a connection between the first action taken against her and her medical condition at the relevant time. I find she has not done so, therefore, I would reject her claim on this item.

[para109] The weight of the evidence is for the trial judge. While the reports filed by Mrs. MacCulloch confirmed that her physical and mental health have suffered over the many years of litigation, the judge could not conclude that Mrs. MacCulloch met the burden of proving that such consequences were attributable to the attack on the 1981 Agreement as opposed to the aftermath of losing her husband and finding his Estate in disarray. Over the years, Mrs. MacCulloch has expended considerable time and energy in attempting to demonstrate that the affairs of the Estate were mishandled. She asserts that the trustee in bankruptcy acted improperly. She has alleged in her submissions on this matter that it was the stated mission of certain of Mr. MacCulloch's children to see that she got nothing. In her view the executors of the Estate were continuously antagonistic to her and failed to properly guard the Estate assets. They allegedly sold personal possessions, such as the yacht, secretly. She notes that as late as 1982 the executor, Central Trust, told the trustee that the assets were "as yet undetermined". This, she says, amounted to handing the trustee a blank cheque. Additionally, there was conflict between Mrs. MacCulloch and the Estate over the ownership of Terrace House. Many of these events predated the 1981 Agreement. It is unnecessary for me to comment upon whether her many concerns were warranted. Some were the subject of litigation. Suffice to say, while I do not doubt Mrs. MacCulloch's conviction today that the appellants' negligence in handling the Monte Vista Farm/Terrace House transactions was the genesis of her problems, the record indicates that the Estate was in dire straits prior to that time. A significant factor motivating the Estate's agreement to sell the properties to Mrs. MacCulloch was its need for cash. It was thought, as well, that relieved of the requirement to maintain Monte Vista Farm, the Estate could better meet its ongoing financial obligations. Such was not the case, but not due to the challenge to the 1981 transaction. The bankruptcy of the Estate was unrelated to that action by the trustee. The Estate was

petitioned into bankruptcy by The Bank of Nova Scotia on June 7, 1982. It was not until August of 1984 that the trustee challenged the 1981 transaction. In these circumstances, I do not find it to be error that the trial judge, on the evidence before him, was unable to conclude that there was a connection between Mrs. MacCulloch's ill health and mental anguish and the negligence of the appellants.

(vi) Miscellaneous Damage Claims:

[para110] Mrs. MacCulloch maintains that she should have recovered damages on account of the negative tax ramifications of the 1981 transaction. In her pleadings Mrs. MacCulloch did not claim that Mr. McInnes was negligent in failing to give tax advice. There being no claim in this regard, the trial judge did not err in awarding no damages.

[para111] Mrs. MacCulloch seeks compensation for the stress caused by her pursuit of this claim against Mr. McInnes and MCR. That is not a compensable head of damages.

[para112] Mrs. MacCulloch's claim for loss of her professional career would be a part of the mental anguish head. The judge correctly decided that no damages were recoverable.

[para113] Mrs. MacCulloch says that the judge erred in denying her damages for the judgment against her because he wrongly concluded that her refusal to pay the judgment was voluntary. She maintains she was not in a financial position to respond. The evidence indicates, however, that over the course of many years, Mrs. MacCulloch was evasive and secretive when questioned on the state of her finances pursuant to the trustee's efforts to realize on the original judgment. There was evidence, for example, that she purchased property and put it in her sister's name yet professed to be without financial means. On the evidence, it was open to the judge to conclude that Mrs. MacCulloch had not established that she could not respond to the judgment. I would not find that the judge erred in refusing to award damages on this account.

[para114] Mrs. MacCulloch says that as a result of the judgment against her she lacked credibility and was, therefore, helpless to object to the continued mismanagement of the estate by Central Trust and Price Waterhouse. She seeks compensation in this regard. In my view, this proposition, even if established on the evidence, which it was not, would be too remote for recovery.

[para115] Mrs. MacCulloch further submits that certain of her legal fees were overlooked by the trial judge in calculating the damages payable. She refers to additional bills from her solicitor David Copp of \$6000.00 and \$6262.50 which were not referenced by the trial judge. According to the letter from Mr. Copp submitted as an exhibit in this proceeding, those charges relate to efforts to stay the execution by the trustee in bankruptcy against a motor vehicle and to the investigation of matters relating to the administration of the bankruptcy. Those fees are not referable to the negligence here and are not recoverable.

[para116] There is a further disbursement by the Estate to the law firm Stewart McKeen and Covert for \$62,992.12 for professional services running from January 18, 1988 to October 16, 1989. The timing of those fees occurs after the litigation surrounding the Monte Vista Farm/Terrace House transactions. Justice Richard's decision quantifying the accounting was dated August 19, 1986. The appeal from that decision was dismissed on April 15, 1987. I cannot relate that disbursement to this claim.

[para117] Mrs. MacCulloch asks that we indemnify her for the fees of lawyer Tim Matthews, Q.C. in the amount of \$50,942.25. Mr. Matthews represented Mrs. MacCulloch during parts of this legal proceeding. His fees in that regard are not separately recoverable. She has received compensation for those fees, to the extent allowed, in the award of party and party costs (\$13,676.96) by the trial judge.

[para118] I am not satisfied that Mrs. MacCulloch, either before Justice MacLellan or in the material she has submitted to this Court, has satisfied the burden of proving that she is entitled to additional damages.

[para119] In assessing the damages it is important to note that Mrs. MacCulloch did retain the proceeds from the resale of the two properties. Although she was called upon to account for the proceeds, and judgment was entered against her in that regard, she did not pay the judgment. The purpose of the damage award is to indemnify her for the foreseeable loss caused by the appellants' negligence. But for her legal fees expended in defending herself on the accounting and those trustee and legal fees spent by the Estate in that regard, she was in the same position, financially, as if there had been no negligence on the part of the appellants. I would note that the measure of damages for the negligence used by the trial judge was disputed only by Mrs. MacCulloch on the cross-appeal. The appellants not having appealed that aspect of the judge's decision. (in contrast see *Toronto Industrial Leaseholds Limited v. Posesorski et al*; (1994) 21 O.R. (3d) 1 (Ont. C.A.))

[para120] Mrs. MacCulloch has asked this Court to order a full inquiry into the conduct of Price Waterhouse in the management of the Estate. That issue has already been considered by the courts. (See *MacCulloch Estate (Re)* (1989), 93 N.S.R. (2d) 226 (N.S.S.C.) as varied on appeal by *Re MacCulloch (Bankrupt)*, (1992), 108 N.S.R. (2d) 130 at [paragraph] 89.) In any event, we are without jurisdiction to make such an order.

V. DISPOSITION:

[para121] I would dismiss the appeal and cross-appeal. Even though Mrs. MacCulloch was self-represented, I would order that the appellant pay costs of the appeal to her in the amount of \$5470.00, representing 40% of the costs allowed at trial, plus her allowable disbursements, to be taxed or as agreed. There shall be no costs on the cross-appeal.

BATEMAN J.A. Concurring in: FREEMAN J.A. CROMWELL J.A.

CBR# 322

Strata Plan VR 2733 v. Jensen

Between Lee Alexander Jensen and Debra Jensen, petitioners, and The Owners, Strata Plan VR 2733 and Sharon Kelly, respondents

Vancouver Registry No. L001355

British Columbia Supreme Court Vancouver, British Columbia R.D. Wilson J. Heard: September 27 - 29, 2000. Judgment: October 16, 2000. (22 paras.)

Counsel: B.W.F. McLoughlin, Q.C., for the petitioners. P.A. Williams, for the respondent, the Owners, Strata Plan VR 2733. J.A. Bleay, for the respondent, Sharon Kelly.

R.D. WILSON J.:--

I.

[para1] This proceeding is taken pursuant to the Judicial Review Procedure Act. The petitioners seek an order setting aside the award of a single arbitrator.

[para2] The relief is sought on the grounds of apprehension of bias, and errors of law on the face of the record. I have concluded that the award must be set aside on the first ground. Accordingly, I need not, and do not, address the questions raised by the second ground.

II.

[para3] I find the following to be the material facts on this disposition.

[para4] In or about 1990, what had been a British Columbia Hydro substation was converted into a condominium complex, containing 12 residential strata lots. On 24 July 1994, Mr. Jensen acquired title to Strata Lot No. 2 in that complex.

[para5] By 1996 and 1997, differences between members of the Strata Corporation had surfaced. By letter dated 3 June 1998, the Strata Council alerted Mr. Jensen to three options available to him to resolve complaints he was making. Mr. Jensen elected to proceed to arbitration as prescribed in s. 44 of the Condominium Act, the then current legislation. By letter dated 4 June 1998, Mr. Jensen informed the Strata Council of his decision. As well, he nominated Ms. Sharon Kelly as a single arbitrator. Mr. Jensen had been informed of Ms. Kelly's identity by a building consultant. By letter dated 18 June 1998, the Strata Council agreed upon Ms. Kelly as a single arbitrator.

[para6] Following the appointment of Ms. Kelly, it came to the attention of the Jensens that the Strata Council had retained the services of Mr. Williams, as their counsel for the arbitration. The petitioners objected to Mr. Williams' participation on the ground of conflict of interest. It was said by the petitioners that contact had been made, with Mr. Williams, by Ms. Jensen, prior to his retention by the Strata Council. Ms. Kelly was asked to resolve that preliminary issue. Written submissions were made to Ms. Kelly on the question of Mr. Williams' conflict of interest. All of the material appears to have been received by Ms. Kelly by 31 August 1998. On 30 September 1998, Ms. Kelly issued what is entitled a "Interim Arbitration Award". In that award, she dismissed the petitioners' objection, on the ground that there was not sufficient evidence to prove a conflict of interest.

[para7] What Ms. Kelly did not disclose to the Jensens, or to Mr. Williams, is that she, Ms. Kelly, had retained Mr. Williams' firm in March 1997 to act for her in a real estate transaction. Nor did she disclose that in July and August 1998, a solicitor in Mr. Williams' firm "assisted Ms. Kelly with a contract for the construction of a residence". [See Note 1 below]

Note 1: Affidavit of Bonnie Elster sworn 20 September 2000, paragraph 4(c).

[para8] Nor did she disclose to the petitioners that she was scheduled to participate in a course or event, with Mr. Williams, on 22 October 1998.

[para9] At the time Ms. Kelly issued her interim award, she knew, or must have known, that she was scheduled to participate in that event. Exhibit D to the affidavit of Ms. Jensen, sworn 6 September 2000, is a photocopy of an information page containing notification of the event. The page bears the date "August 98". The notice is under the head "ADR Professional Development - Courses and Events". One of the courses or events is described as "Arbitrating Condominium Disputes". The event is scheduled for 22 October 1998 at Robson Square Conference Centre from 9:00 a.m. to 4:30 p.m. The text of the notification reads as follows:

Pat Williams, C.Arb. and Sharon Kelly will conduct the course. Pat has been involved in many condominium arbitrations as an Arbitrator and legal Counsel. Sharon has acted as an Arbitrator in condominium disputes. Pat and Sharon have different views on some matters and similar views on other matters when conducting arbitrations.

Participants will learn how an arbitration regarding a condominium in (sic) invoked, how the arbitration panel is constituted, the procedure to be followed, and the application of law to arbitration decisions.

Included in the procedure discussion will be tips on views and the experience of arbitrators dealing with the very emotional issues that appear so common when resolving condominium disputes. The costs to the parties will be addressed.

Participants will observe a complete mock arbitration which will address the problems that typically arise in condominium arbitrations.

BCAMI members who complete the course should be better able to make themselves available to individual condominium owners and Strata corporations to assist in the resolution of disputes short of having to go to Court.

[para10] At the time Ms. Kelly accepted the appointment as the single arbitrator in the matter, she was an associate member of the British Columbia Arbitration and Mediation Institute. I am unable to reconcile Ms. Kelly's failure to disclose the foregoing information, to the petitioners, with s. 7 of her Institute's Code of Ethics, which counsels members that they " shall disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality or bias."

[para11] The course or event was held as scheduled. Mr. Williams and Ms. Kelly participated as advertised.

[para12] Ms. Kelly's failure to disclose this information to the petitioners denied them the opportunity to address the issue very early on in the arbitration proceedings.

[para13] A further opportunity to disclose that information arose in April 1999. Following a conference to deal with procedural matters in the arbitration, Ms. Kelly wrote a letter to the parties. Among other things, she said:

Lee Jensen also raised concerns respecting my treatment of Debra Jensen in the conference call today and questioned my neutrality on several matters. I am asking whether the complainant wishes to formally challenge my authority on the basis of an apprehension of bias, perceived unequal treatment of the parties or some other named reason. If so, I would request that a written letter be provided before the commencement of the hearing.

[para14] By the time of that letter, Mr. Williams' firm had provided further legal services to Ms. Kelly. In February 1999, a solicitor of the firm had acted for Ms. Kelly on the sale of real property. In March and April 1999, a solicitor in the firm reviewed a contract on behalf of Ms. Kelly and drafted a demand for payment.

[para15] Although Ms. Kelly was alert to the notion of "apprehension of bias", she did not disclose her previous involvement with Mr. Williams' firm, and Mr. Williams, nor her continuing involvement with that firm. Again, the petitioners were denied the opportunity to address this problem in a timely fashion prior to the commencement of the arbitration hearing.

[para16] A further opportunity to address this issue was presented in June 1999. By letter dated 2 June 1999, Ms. Kelly wrote to the parties and said, among other things:

In reference to Debra Jensen's letter that was faxed to my office today, I am not aware of any "arbitration act". There is a Commercial Arbitration Act, however that Act does not apply to condominium arbitrations. In respect to Debra Jensen's question regarding B.C.A.M.I., I am not aware of who governs the practices of associations. As to who governs myself, if this question relates to any challenge in respect (sic) to my arbitrating this dispute, I refer Debra Jensen to my letter dated April 21st that outlines a procedure.

[para17] The arbitrator's award was released 14 April 2000. The petitioners were unsuccessful in establishing their complaints.

[para18] The petitioners did not learn of Ms. Kelly's solicitor client relationship with Mr. Williams' firm nor of her participation in the event with Mr. Williams, until after the award had been released.

III.

[para19] Infinite and varied are the examples of human conduct attracting inquiries into the issue of "apprehension of bias". Not so the governing principles for the determination of the issue. They are finite and well-defined. All proceeding from the first premise that it " is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done". [See Note 2 below]

Note 2: *The King v. Sussex Justices*, [1924] 1 K.B. 256 at page 259 (K.B.).

[para20] "Seen" contemplates observation. " by a fair minded person"; [See Note 3 below] "by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information [the] test is 'what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly' "; [the observer is not she of the] "very sensitive or scrupulous conscience". [See Note 4 below]

Note 3: *Szilard v. Szasz*, [1955] S.C.R. 3, at page 4.

Note 4: *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, per De Grandpre J., in dissent at page 394; approved in, among others, *Valenente v. The Queen*, [1985] 2 S.C.R. 673; *R. v. Lippé* [1991] 2 S.C.R. 114; *Ruffo v. Conseil de la Magistrature*, [1995] 4 S.C.R. 267; *R. v. S.(R.D.)*, (1997), 151 D.L.R. (4th) 193 (S.C.C.); and *McQueen's Boatworks Ltd. v. Lanikai Holdings Ltd.*, [1996] B.C.J. No. 2063 (B.C.C.A.).

[para21] I find that Ms. Kelly's solicitor client relationship with Mr. Williams' firm, and her participation in the event of 22 October 1998 with Mr. Williams, neither of which were disclosed to the petitioners, would induce a perception of bias on the part of Ms. Kelly by such an observer as described above.

[para22] Accordingly, Ms. Kelly's award dated 21 April 2000 is set aside. Costs will follow the event.

R.D. WILSON J.

CBR# 855

Strata Plan LMS 1328 v. Marco Polo Properties

Between The Owners, Strata Plan LMS 1328, plaintiff, and Marco Polo Properties and Marco Polo Development Co. Ltd., defendants

Vancouver Registry No. C992293

British Columbia Supreme Court Vancouver, British Columbia Holmes J. (In Chambers) Heard: March 23, 2000. Written submissions received: April 12, 14 and 19, 2000. Judgment: May 15, 2000. (55 paras.)

Counsel: John G. Mendes, for the plaintiff. Herbert S. Silber, for the defendants.

[para1] HOLMES J.:-- The defendants' application is for an order pursuant to Rule 19(24)(a) and (d) and Rule 57 to strike out the Writ of Summons and Amended Statement of Claim in this action as disclosing no valid claim or cause of action, or otherwise being an abuse of court.

[para2] The plaintiff applies for an order to amend pleadings to add as parties the strata lot owners except the defendant Marco Polo Properties, and to amend generally as may be required to maintain a cause of action.

FACTS:

[para3] The defendant Marco Polo Properties ["MPP"] developed a residential condominium complex upon land in Surrey, B.C. it had purchased in 1993 ["Condominium"]. It retained ownership of an adjacent lot.

[para4] The Owners, Strata Plan LMS 1328, is the Strata Corporation of the Condominium complex MPP constructed.

[para5] The individual parties the plaintiff seeks to be added are individual purchasers of strata lots in the Condominium. The defendant MPP remains the owner of the balance of 24 strata lots comprising the condominium.

[para6] On October 26, 1998, the plaintiff notified MPP it considered it to be liable for construction deficiencies and that legal action would be taken if remediation of the deficiencies was not undertaken.

[para7] On February 1, 1999, MPP transferred title to the adjacent lot to the defendant Marco Polo Development Co. Ltd. ["MPD"]. MPP and MPD are companies with common officers and directors.

[para8] On February 22, 1999, MPP granted a mortgage to MPD for \$2,050,001 over the strata lots it owned in the Condominium complex and the mortgage has been registered against the title to each of the strata lots.

[para9] On February 24, 1999, the plaintiff issued its Statement of Claim in the faulty construction action.

[para10] On January 12, 2000, at their annual general meeting the owners of the Strata Corporation passed a special resolution authorizing the prosecution of Supreme Court of British Columbia action C991659 commenced March 30, 1999 claiming damages and other relief from MPP and other parties concerning the construction deficiencies.

[para11] The resolution also authorized the within action commenced May 5, 1999 seeking a declaration of invalidity concerning the transfer by MPP of the adjacent lot and the grant of mortgages by MPP to MPD of the units it owned in the Condominium.

FOUNDATION OF THE ACTION:

[para12] The foundation for the plaintiff's cause of action is the Fraudulent Preference Act, R.S.B.C. 1996, c. 163 and the Fraudulent Conveyance Act, R.S.B.C. 1996, c. 164.

[para13] The plaintiff alleges in its Amended Statement of Claim that the transfer of the adjacent lot and the creation of the mortgage on the strata lots owned by MPP was a fraudulent preference or a fraudulent conveyance. The plaintiff alleges the transactions were in order to hinder or delay creditors and others of MPP, including the plaintiff strata corporation and owners, in the exercise of their just and lawful rights and that the transactions in fact had that effect.

[para14] The plaintiff's claim against MPP in the underlying faulty construction action is for breach of contract and negligence. It is an unliquidated claim, and the pleadings are not yet closed.

FRAUDULENT PREFERENCE ACT:

[para15] Section 3 of the Act provides:

3 Subject to section 6, a disposition of property by a person at a time when the person is in insolvent circumstances, is unable to pay the person's debts in full, or knows that he or she is on the eve of insolvency, is void as against an injured creditor, if made

(a) with intent to defeat, hinder, delay or prejudice creditors or some of them, and

(b) to or for a creditor with intent to give the creditor preference over other creditors or some of them.

[emphasis added]

[para16] The defendants' position is that remedies under the Fraudulent Preference Act are available only to those who have a liquidated claim. That proposition is well supported at law [Re Skinner (1960), 27 D.L.R. (2d) 74 (B.C.S.C.) at p. 78].

[para17] The claims for breach of contract and negligence by the plaintiff against the defendants in the underlying faulty construction action do not qualify as liquidated damages and therefore neither the strata corporation nor any owner qualifies as a

creditor under the Fraudulent Preference Act [DeGraaf v. Staniszki Developments Ltd., [1988] B.C.J. No. 29, Huddart J., B.C.S.C. January 8, 1988].

[para18] Creditor is not a defined term under the Act. The Act does however provide that the term creditor includes:

S. 1(b) the beneficiary of a trust or other person to whom liability is equitable only.

[para19] The plaintiff argues that MPP owed the condominium corporation and the owners a fiduciary duty relying upon the decision of Owen-Flood J. in *Strata Plan 1229 v. Trivantor Investments International Ltd.* (1995), 4 B.C.L.R. (3d) 259 where he noted at p. 274:

It is true that the strata corporation is a separate legal entity from its members but, nevertheless, its members have a duty to the strata corporation to take reasonable steps to see that it complies with its statutory obligations.

[para20] The plaintiff alleges MPP breached its fiduciary duty by entering into a scheme to defeat or impair the corporation and the owners' ability to recover damages they claim for in the underlying faulty construction action.

[para21] The plaintiff argues they seek a declaration of constructive trust, which is a remedy for breach of a fiduciary duty, and they may therefore be said to be the beneficiaries of a trust.

[para22] On that reasoning the plaintiffs' claim they qualify both as the beneficiaries of a trust, and as a person to whom liability is equitable.

[para23] I find the plaintiff's reasoning inventive but not persuasive.

[para24] *Trivantor*, supra, involved a finding that owners have a duty to see that the corporation complies with statutory obligations. It was decided in the context of an owner who had title to all the units of a development, a parallel position to that of a developer prior to original sale of units in condominium development.

[para25] I do not see how MPP as but one of several owners in the condominium owed a duty to the plaintiff or other owners, who were suing it for breach of contract and negligence, to refrain from alienation or encumbrance of its assets pending judgment. It is not alleged that the impugned acts derive from or are related to its position as an owner, rather it appears they relate to its business or corporate aspect.

[para26] MPP never held specific property or an identifiable fund in trust for the plaintiff. It would not be a trustee of property or funds for the plaintiff even if the impugned transactions were set aside.

[para27] It is clear the base claims of the plaintiff corporation and owners sound in contract and tort. They are legal, not equitable claims.

[para28] I do accept that the beneficiary of a trust or other person to whom liability is equitable only is also exempt from the need for claims of creditors to be liquidated or readily ascertainable. The plaintiff and owners' claims here, regardless of how categorized, are not for liquidated or readily ascertainable amounts.

[para29] The extended meaning of "creditor" given in Section 1(b) was intended to extend to a trust relationship, or a similar equitable relationship, the protection accorded to that of a debtor-creditor. In my view, the circumstances here do not disclose either a trust or other equitable relationship between the plaintiff and the defendants.

[para30] I do not dismiss the plaintiffs' arguments because they are unique, I do so because I do not accept their validity.

[para31] Neither the plaintiff strata corporation, nor any owner, is a creditor within the meaning of the Fraudulent Preference Act and the action in that regard is not maintainable.

FRAUDULENT CONVEYANCE ACT:

[para32] Huddart J. in *DeGraaf*, supra, noted "The case law distinguishes carefully between the "creditor" of the Fraudulent Preference Act and the "creditors and others" of the Fraudulent Conveyance Act." This is an important distinction in respect of the requisite status of a person to bring action.

[para33] Mackenzie J. in *St. Gregor Mercantile Co. v. Halbach*, [1927] 1 D.L.R. 761 (Sask.K.B.) confirmed the requirement that action under the Fraudulent Conveyance Act be in representative form. He did so by adopting the following summary from *Halsbury's Laws of England*, Vol. 15, p. 89, para. 184:

In an action to set aside the alienation under the statute [i.e. the Fraudulent Conveyance Act] a creditor should sue on behalf of himself and all other creditors of the grantor, except where he has recovered judgment on his debt, in which case he can obtain an order declaring the alienation void as against him, and containing consequential directions for the satisfaction of his debt alone, without mention of any other creditors or their debts.

[para34] The plaintiff here is not, and may never become, a judgment creditor. The action commenced is not representative of all creditors of MPP. The action must be dismissed as clearly failing to disclose a cause of action unless it is appropriately reconstituted or amended.

[para35] In the Law Reform Commission of British Columbia Report on Fraudulent Conveyances and Preferences, January 1988 at p. 59, the following comment was made as to "common error" experienced in commencement of actions under the Fraudulent Conveyance Act:

The requirement that those who are not judgment creditors should issue their writs on behalf of all creditors is often ignored. The irregularity appears to be one of form only, which can be cured at trial or even on appeal. It is difficult to imagine circumstances in which the defendant would be prejudiced by a conversion of the action into a class action.

ISSUES AS TO RELIEF CLAIMED:

[para36] The Prayer for Relief indicates that what the plaintiff seeks in this action is execution on a judgment the plaintiff has yet to obtain. That is clearly wrong. As the action must be representative of all creditors any appropriate relief granted would be for creditors as a class and not individually to the plaintiff corporation and owners.

THE PLAINTIFF'S CAPACITY TO SUE AND SECTION 15 OF THE CONDOMINIUM ACT:

[para37] Section 15(1)(a) of the Condominium Act allows a strata corporation to bring an action as representative of the owners of the strata lots " for damages and costs for any damage or injury to the common property, common facilities and the assets of the strata corporation caused by any person ".

[para38] Section 15(7) provides:

15(7) A strata corporation may sue on its own behalf and

(a) on behalf of an owner about matters affecting the common property, common facilities and other assets of the strata corporation, and

(b) if authorized by special resolution of the strata corporation, on behalf of those owners who consent in writing to the strata corporation so doing, about matters affecting individual strata lots even though the strata corporation, in the case of a contractual claim, was not a party to the contract about which the proceeding is brought.

[para39] There is ample authority this empowers a strata corporation with the capacity to sue a developer for construction deficiencies, as is the case here in respect of the underlying faulty construction action brought by the plaintiff against, inter alia, MPP.

[para40] Counsel provided no direct authority that the strata corporation had a capacity under the Act to bring an action, as it has here, claiming relief under the Fraudulent Conveyance Act and the Fraudulent Preference Act.

[para41] I concur with the position of the defendants that the wording of Sections 15(1) and (7) of the Act cannot be interpreted to include actions whose object is an attempt to obtain security for a contingent future award of damages that might result from the underlying construction deficiencies action.

[para42] It appears the legislature intended Section 15 to provide only a limited and closely defined representative capacity of strata corporations. This view is supported by the newly defined capacity for strata corporations contained in Part 10, Division 2, of the provisions of the Strata Property Act, S.B.C. 1998, c. 43, not yet in force. It is proclaimed to come into effect July 1, 2000.

[para43] The unproclaimed Section 171 dealing with Suits by the Strata Corporation provides:

171(1) The strata corporation may sue as representative of all owners, except any who are being sued, about any matter affecting the strata corporation, including any of the following matters:

- (a) the interpretation or application of this Act, the regulations, the bylaws or the rules;
- (b) the common property or common assets;
- (c) the use or enjoyment of a strata lot;
- (d) money owing, including money owing as a fine, under this Act, the regulations, the bylaws or the rules.

[para44] The wider and more general capacity to sue in this section stands in stark contrast to the limited and specific capacity of the current Act.

[para45] The plaintiff however is prepared, and indeed has moved for leave to amend, to add the individual strata lot owners, except MPP, as parties plaintiff. I consider it appropriate to grant that application. The plaintiff also agrees to continue the action as representative of all creditors of MPP.

[para46] The defendants argue that continuation of the action for relief under the Fraudulent Conveyance Act requires it be on behalf of all creditors of MPP. The defendant MPD is a creditor of MPP and therefore the condition cannot be fulfilled as the plaintiff cannot represent a party with whom they are clearly in conflict. It would result in MPD being both plaintiff and defendant in the same suit.

[para47] The representative aspect of the action is procedural. It is intended all creditors will be present and represented in the proceeding. The presence of MPD as a defendant fulfills that necessary condition. All creditors will be before the court and their interests dealt with in the one action.

[para48] The representative action for all creditors contemplated for a Fraudulent Conveyance Act proceeding need not be a class action under the Class Proceedings Act, R.S.B.C. 1996, c. 50. It can be a representative action under the Rules of Court.

CONCLUSION:

[para49] The action in present form cannot be maintained. It is however capable of amendment. The plaintiff desires an opportunity to amend and it is appropriate they be allowed to do so.

[para50] The plaintiff has leave to add as parties plaintiff all strata lot owners except MPP.

[para51] The claims under the Fraudulent Preference Act are struck out and will be deleted in amended pleadings.

[para52] The pleadings will be amended to be representative of all creditors of MPP pursuant to the Fraudulent Conveyance Act, except MPD, an existing defendant.

[para53] Consequential amendments necessary to accord with the resulting re-cast pleadings by amendment are allowed. In particular, the Relief Claimed must accord with the cause of action.

[para54] I will allow the plaintiff 30 days to file and serve an Amended Writ and Statement of Claim in accordance with this Order. In the event the parties are in dispute as to the form of amendments allowed they are at liberty to apply.

COSTS:

[para55] Although success was divided it was appropriate for the defendants to bring the application and extensive amendments to pleadings are required. The defendants will have their costs on scale 3.

HOLMES J.

McDougall v. Collinson

Between Marilyn McDougall, plaintiff, and William Edward Collinson, Kenneth Umbarger, Dominion Depository Agency Inc., Imperial Capital Corporation, Imperial Mortgage Fund Inc., R 218 Enterprises Ltd., Imperial Mortgage Fund (3) Inc., Imperial Mortgage Fund (4), Dominion Mortgage Corporation, Metro-Sunlake Projects Ltd., Kenway Industries Ltd., Woodway Holdings Ltd., El Rancho Vista Farms Ltd., Sunlake Industries Ltd., Rancher Investments Corp., Vancorp Development Ltd., John Stringer, and Messer, Stringer & Company, defendants, and Valley First Credit Union, Gus Faller, Linda Piddocke, John Huber, Chris Jaegli, Hugh Jensen and Sheila Golley, third parties

Vernon Registry No. 22514

British Columbia Supreme Court Vernon, British Columbia D.M. Smith J. Heard: May 31, July 6 and December 13 - 16, 1999. Judgment: March 8, 2000. (132 paras.)

Counsel: G. Schroeder, for the plaintiff, M. McDougall. B. Cronquist and D.E. Spelliscy, for the defendant, Dominion Mortgage Corporation. K. Rogers, for the defendants, Rancher Investments Corp., Imperial Mortgage Fund Inc., R218 Enterprises Ltd., Imperial Mortgage Fund (3) and (4) Inc., Imperial Capital Corporation, Woodway Holdings Ltd., and Dominion Depository Agency Inc. D. Kermode, for the defendants, William Collinson, El Rancho Vista Farms Ltd., and Metro-Sunlake Projects Ltd. P.R. Miller, for the defendants, John Stringer and Messer, Stringer & Co. K. Umbarger, for the defendant, Kenway Industries Ltd.

[para1] D.M. SMITH J.:-- Marilyn McDougall is the proposed representative plaintiff for a class of one hundred and sixty investors, six of whom reside outside of British Columbia, and all of whom anticipate losing a significant portion of their investments in four syndicated mortgage funds. On behalf of the investors, Ms. McDougall has commenced an action pursuant to the Class Proceedings Act, R.S.B.C. 1996, c. 50. The action seeks damages for negligence, breach of trust and or fiduciary duty and breach of contract against a variety of defendants including the promoters, the contractors, a risk management advisor and a mortgagee. The allegations in the Statement of Claim are very general and few particulars have been provided.

[para2] In this application, Ms. McDougall seeks an order certifying the action as a class proceeding and appointing her as the representative plaintiff on behalf of the investors. Ancillary to that order she seeks an order pursuant to the Trustee Act, R.S.B.C. 1996, c. 464, appointing a judicial trustee for all of the properties and assets held by the defendants for the benefit of the investors.

THE INVESTMENT SCHEME

(i) the financing

[para3] The defendants William Edward Collinson ("Collinson"), and Kenneth Umbarger ("Umbarger"), collectively referred to as "the Promoters", implemented a plan to raise monies for the development of certain real estate projects in the Okanagan and Castlegar areas of British Columbia. They solicited funds through an umbrella company, Imperial Capital Corporation ("ICC") for investment in four companies ("the borrowing companies"): Imperial Mortgage Fund Inc. ("IMF1 Co"); R 218 Enterprises Ltd. ("IMF2 Co"); Imperial Mortgage Fund (3) Inc. ("IMF3 Co"); and Imperial Mortgage Fund (4) Inc. ("IMF4 Co"). The investment companies are collectively referred to as the "IMF Group". The IMF Group was created and controlled by the Promoters, although Umbarger was not a director of IMF2 Co.

[para4] Each of the borrowing companies raised monies pursuant to an offering memorandum. A minimum investment of \$25,000 was required. The offering memorandum also represented: the investment was eligible for RRSP or RRIF status; the investment would be secured by a mortgage on the project second only to construction financing; and, the total of all mortgages on a project would not exceed 75% of the appraised value of the project.

[para5] ICC marketed the RRSP investment as having a rate of return of 74.68% and the non-RRSP investment as having an effective rate of return of 24.68%. It offered basic interest payable at 12% per annum plus premium interest of 12% on the principal amount payable upon completion of the development project. Investors in IMF1 Co and IMF3 Co were to be paid on a first in, first out basis. Investors in IMF2 Co and IMF4 Co were to be paid on an equal basis when the projects were completed. Through ICC, the Promoters received commissions of 10% on the investment funds they raised for the IMF Group.

[para6] The investments being marketed were highly speculative and very risky. The offering memoranda identified a number of "Risk Factors". They specified there were no assets and there was no value in the borrowing companies to support their covenants. They also specified there was no market for the investment units and none was expected to develop. Furthermore, potential investors were cautioned about the adverse effect of a prolonged economic downturn and no assurances of economic growth in the region were provided. The success of the projects was dependent on the competence and integrity of the principals who were required to conduct the affairs of the companies for the benefit of all of the unitholders. A history of the principals' involvement in previous real estate developments was listed. It was noted the principals had been involved directly or indirectly in real estate investments which had resulted in disputes and/or were not profitable. In bold capital letters on the first page of the offering memoranda, investors were urged to consult with their professional advisors before making an investment in the offering.

[para7] The offering memorandum for IMF4 Co, unlike the other IMF's, also specified that any dispute between the parties had to be resolved by compulsory arbitration.

[para8] The Promoters were authorized to supervise the projects and to choose their professional advisors. The material contracts for each project were identified in the offering memoranda. They included a security agreement for the first mortgagee, a nominee agreement, an interest agreement with a company that had loaned monies for a project, a service agreement with the Promoters, and the construction agreements with the Promoters' related companies.

[para9] An investor in the IMF Group was defined as a sophisticated investor within the meaning of the Securities Act, R.S.B.C. 1996, c. 418: a person individually, or jointly with his or her spouse, who has a net worth of \$400,000, and in the last two calendar years had, and in the current calendar year has the expectation of having, a gross annual income of \$75,000 or \$125,000 jointly with his or her spouse.

[para10] The majority of the investments in the IMF Group were for the sum of \$25,000. The average amount invested was approximately \$39,000 per investor. I will refer to the investors in each borrowing company as: Investor Group one ("IG1"); Investor Group two ("IG2"); Investor Group three ("IG3"); and Investor Group four ("IG4").

[para11] The contract between an investor and the borrowing company was contained in two principal documents signed by the unitholder: a subscription agreement, and a mortgage and agreement of nominee ownership. The subscription agreement acknowledged the investor had carefully reviewed the offering memorandum, had been advised to seek professional advice regarding the investment, and understood the level of risk and lack of market for the investment. The unitholder gave a broad and unlimited indemnity in favour of past and future shareholders, directors and officers except for material misrepresentations by the issuer. The agreement for nominee ownership authorized a specified nominee to act as agent for the investor and outlined the rights and obligations of both the unitholder and the nominee. It also gave a broad and unlimited indemnity to the nominee except for acts of wilful default, gross negligence, and fraud.

(ii) the nominee

[para12] The investors' funds were received by a nominee. The nominee advanced the funds to the borrowing companies, issued mortgage unit certificates to the investors and held the mortgage security in its name.

[para13] Pursuant to the agreement of nominee ownership, the nominee had a duty to act honestly and in the best interests of the unitholders. It was required to exercise the care, diligence and skill of a reasonably prudent nominee. That duty would be met if the nominee, acting in good faith, relied on the written instructions of the officers of the borrowing companies.

[para14] The nominee had no duty to supervise or review the validity of the investments or the adequacy of the security provided for the investments. It had no discretion to interfere with the management of the companies unless requested to do so in writing by 25% of the unitholders in IMF1 Co, IMF2 Co, and IMF3 Co, or 51% of the unitholders in IMF4 Co.

[para15] The nominee agreements also prohibited the unitholders from commencing any action or having a trustee or receiver appointed unless the unitholders first requested the nominee to act on their behalf. Actions could only be commenced in the name of the nominee upon the written request of 25% of the unitholders in each of the first three funds and 51% of the unitholders in the fourth fund.

[para16] Initially, there were two nominees. Dominion Depository Agency Inc. ("DDAI") was the nominee for the investors in the first three funds. The sole shareholder, officer and director of DDAI was John Stringer ("Stringer"), a notary public with the firm of Messer, Stringer & Company ("Messer, Stringer") with an office in Kelowna, B.C. Valley First Credit Union ("Valley") was the nominee for the fourth fund but was later replaced by DDAI. The nominees held the registered second mortgages on the project lands for the benefit of the unitholders.

[para17] There are no allegations of wrongdoing against DDAI or Valley. In fact, Valley was not included as a defendant in the action. The allegations of breach of duty are against Stringer, and vicariously against Stringer's notary firm, Messer, Stringer, for notarial services allegedly provided by Stringer. However, there is no evidence that Stringer or his notary firm, Messer, Stringer, provided notarial services for DDAI. There is also no evidence that Stringer acted personally as a nominee, or that he was personally a party to any agreement.

[para18] In summary, the IMF Group marketed an alluring but highly speculative plan for investment in a variety of real estate developments. The investment scheme promised a substantial return on the purchase of second mortgage units. However, the offering memoranda also identified the high risk nature of the investment. It also alerted prospective investors to the significant commissions, fees and costs associated with the promotion and development of the projects. These monies would be paid out to the promoters, managers and contractors before any return would be realized by the investors. Furthermore, the subscription agreements and nominee agreements limited the individual actions of the unitholders. Broad immunity was provided for the officers and directors of the borrowing companies and the nominee company in the absence of wilful default, gross negligence or fraud.

THE PROJECTS

[para19] The IMF Group was involved in six real estate projects at Vernon, Kelowna and Castlegar, all communities in the B.C. interior.

1. Imperial Ridge

[para20] IMF1 Co purchased land in Vernon for the development and sale of a 44 condominium apartment building ("Imperial Ridge"). The monies for that project were solicited between December 30, 1993, and April 6, 1994. A total of \$1,073,000 was raised from IG1. The construction of Imperial Ridge was completed in July, 1995.

2. Heritage Hill and Erinmoore

[para21] R218 Enterprises Ltd. ("R218"), purchased land in both Vernon and Kelowna for the development and sale of two projects. For the sake of convenience I will refer to R218 as IMF2 Co. The Vernon project involved a three-phase development of 30 low-cost walk-up condominiums ("Heritage Hill"). Phase one of Heritage Hill, which included 8 condominiums, was completed by September, 1995. The Kelowna project involved the construction of 21 luxury townhouses ("Erinmoore"). Funds for these projects were solicited from December 8, 1995, to March 21, 1997. \$787,000 was raised from IG2.

[para22] Metro-Sunlake Projects Ltd. ("Metro") was the construction and management contractor for the Vernon and Kelowna projects. Metro is owned by Collinson and his company Sunlake Industries Ltd.

[para23] Initially, Vancorp Developments Ltd. ("Vancorp") was a 50% partner with ICC in the Heritage Hill and Erinmoore projects. It contributed about \$250,000 toward the purchase of the land. In December, 1995, Vancorp withdrew from the joint venture and sold its shares and interest in R218 to ICC. In satisfaction for its interest, it received five condominium units in the Heritage Hill project and promissory notes for about \$70,000. Vancorp alleges that R218 is in default on its promissory notes. Following Vancorp's buyout from R218, financing for the Heritage Hill and Erinmoore projects was obtained from IG2.

[para24] The offering memoranda for IMF1 Co and IMF2 Co did not permit an allocation of the investment funds outside of their designated projects. Therefore, funds raised by IMF1 Co were to be used solely in the Imperial Ridge project and funds raised by IMF2 Co were to be used solely in the Heritage Hill and Erinmoore projects.

3. Westbank (Gelattly)

[para25] The Westbank lands in the Kelowna area were originally purchased by El Rancho Vista Farms Ltd. ("El Rancho"), a related company of Collinson's. El Rancho sold its interest in the project to IMF3 Co before the syndication. Between November 1, 1994 and September 1, 1995, IMF3 Co raised \$2,515,069 for the construction of a 66 apartment style condominium complex ("Gelattly"), as well as for "other unnamed projects". The offering memorandum for IMF3 Co did not specify the other projects in which the investors' funds could be allocated.

[para26] In addition to Westbank, IMF3 Co funds were invested in the Imperial Ridge, Heritage Hill and Erinmoore projects. IMF3 Co funds also went to purchase the lands for the project at Castlegar. Investor funds loaned to IMF3 Co and allocated to the Imperial Ridge, Heritage Hill, Erinmoore, Westbank, and Castlegar projects were secured by second mortgages against those projects. As additional security, IMF3 Co received units in each of the other three investor groups to the extent of its loans to those groups.

4. Castlegar

[para27] R 263 enterprises Ltd. ("R263") purchased five acres of land in Castlegar with funds from IMF3 Co. DDAI held a second mortgage on the Castlegar lands for the benefit of the IG3.

[para28] R263 held the lands as a bare trustee for ICC and Vancorp who were joint venturers in the project. The lands were purchased for the development of a commercial property that would include a shopping centre and office building, as well as a 54 condominium complex. R263 is now in bankruptcy.

[para29] Vancorp contributed \$25,000 to the joint venture. Again, as with R218, Vancorp withdrew from the Castlegar project and received a promissory note for \$25,000 in satisfaction of its interest in the project. It also received an entitlement to one-half of the profits from the project, to a maximum of \$100,000, less up to 50% of the aggregate losses incurred by R218 in the Erinmoore and Heritage Hill projects.

[para30] IMF4 Co raised \$1,773,000 between December 8, 1995, and March 21, 1997. Its offering memorandum stated the fund was for the development and sale of several real estate projects in the B.C. interior over a five year period. Six projects were pre-approved for funding: Imperial Ridge, Heritage Hill, Erinmoore, Westbank, Castlegar commercial project (shopping center and office building), and Castlegar condominium complex.

[para31] IMF4 Co completed off-site work on the Castlegar project including rezoning of the property, preparation of fully engineered drawings, paving of a city street, construction of sidewalks and installation of street lights. It also excavated a portion of the property for the apartment building site.

[para32] Kenway Industries Ltd. ("Kenway") was the general contractor for the Castlegar projects and is a related company of Umbarger's.

[para33] In order to keep IG4 monies productive until they were ready to start construction at Castlegar, the Promoters invested those monies in IMF1 Co and IMF2 Co projects.

[para34] Initially, the Promoters expected the investment of IMF3 Co and IMF4 Co funds into the IMF1 Co and IMF2 Co projects would provide a safe, short-term haven for the IMF3 Co and IMF4 Co monies. It was anticipated that by applying those monies to the projects in Vernon and Kelowna already underway, the sale of those condominiums would allow pay down of the second mortgages held by IG3 and IG4 which by then, would be in a position to proceed with their projects.

[para35] Sudden changes in market conditions brought a halt to this plan. The downturn of the market kept the IMF3 Co and IMF4 Co funds tied up in the IMF1 Co and IMF2 Co projects. It was only after the market collapsed that IG3 and IG4 discovered no construction had commenced on the Westbank and Castlegar projects.

THE SETTLEMENTS

The Short-Fall Agreements

[para36] The real estate market took a sudden downturn in early 1996. By then, construction of Imperial Ridge was completed. However, only phase one of Heritage Hill was fully completed and phase two was only partially completed. Phase three had not yet started. As well, Erinmoore was only 60% completed. Revenue from sales in these projects had slowed. No construction had commenced on the Westbank or Castlegar projects. Mortgages went into default and were no longer secured or fully secured by the assets of the projects. The IMF Group faced insurmountable financial difficulties.

[para37] In March, 1996, the Promoters arranged meetings with IG1 and IG2. As a result of those meetings, extraordinary resolutions were passed that provided for settlements between IG1 and IG2 and their borrowing companies IMF1 Co and IMF2 Co. Similarly, in December, 1996, the IMF Group arranged a meeting with IG3 which also passed an extraordinary resolution approving a settlement with IMF3 Co ("the Short-Fall Agreements"). The large number of units held by IG3 in IG1 and IG2 assisted IG1 and IG2 in passing the extraordinary resolutions required for these settlements.

[para38] The Short-Fall Agreements amended IMF1 Co, IMF2 Co and IMF3 Co's original subscription agreements to include the compulsory arbitration clause like the one provided for in IMF4 Co's original subscription agreement.

[para39] They also changed the nature of IG1, IG2 and IG3's investments. The members of IG1, IG2 and IG3 exchanged their rights for repayment of the debt owed to them under the DDAI mortgages, with the Promoters' equity in the projects of the borrowing companies. In addition to giving up their equity in the three borrowing companies, the Promoters also agreed to give IG1 and IG2 equity of about 70% in the Castlegar projects. Thus, IG1, IG2 and IG3 became the owners of their borrowing companies' projects and agreed to terminate their entitlement under the DDAI second mortgages. Instead of receiving a sum

certain on their mortgage investment, they agreed to receive a share in the net proceeds from the projects of their respective borrowing companies. The DDAI mortgages were maintained in form to save the costs of foreclosure and to maintain the investments' RRSP and RRIF eligibility.

[para40] The settlements resulted in the following ownership changes in the projects: (i) IG1 received all of the equity in the Imperial Ridge project as well as some of the equity in the Castlegar projects; (ii) IG2 received all of the equity in the Heritage Hill and Erinmoore projects and some of the equity in the Castlegar projects; (iii) IG3 received all of the equity in the Westbank project and retained its existing investment in the IG1, IG2 and IG4 projects; and (iv) the Castlegar lands remained subject to mortgages from IG3 and IG4.

[para41] These changes, while assisting the various investor groups to address their significant financial difficulties, also created conflicting interests between IG1 and IG2 as borrowers and IG3 and IG4 as lenders.

[para42] After the Short-fall Agreements were made, the three investor groups asked the Promoters to continue managing the various projects. Umbarger and Collinson continued to sit, without compensation, as directors and officers of the borrowing companies even though they no longer held any interest or equity in the Imperial Ridge, Heritage Hill, Erinmoore or Westbank projects.

The Takeover Agreements

[para43] In the spring of 1997, the Promoters retained Woodway Holdings Ltd. ("Woodway") as a professional "Risk Management Advisor" in order to assist in the management of the projects in which IMF3 Co held an interest. Woodway is a company owned and operated by Kenneth Rogers ("Rogers"). Rogers had expertise in business management and had acted as a financial and development consultant in the past.

[para44] Woodway was hired on a fee for service basis. IG3 contracted with Woodway to manage, construct and market the Westbank project and IG3's interests in the other projects. In an agreement between IMF3 Co, IG3 and Woodway, Woodway became the sole registered shareholder of IMF3 Co for the benefit of IG3 except to the extent of the payments due to Woodway under its contracts ("the IMF3 Co Shares Agreement"). Woodway and two other unitholders also became IMF3 Co's authorized signatories. Broad indemnity agreements were signed for the benefit of all directors, officers, shareholders, authorized signatures, advisors and committee members. This arrangement provided security to Woodway for its fees and also assisted in preserving the RRSP and RRIF status of the investors' original mortgage units.

[para45] By 1997, all four investor groups were faced with threats of foreclosure from the first mortgagees on their projects. IG3 and IG4 in turn were demanding payment on their second mortgages from IG1 and IG2. All groups were desperately in need of new monies to refinance the first mortgages and to provide extra working capital for their projects.

[para46] Conventional lenders were reluctant to provide the additional funds needed. Another syndicated fund established under the Securities Act would take time, and because of amendments to the legislation would be facing higher costs than IMF4 Co. As a result, Umbarger decided to raise the necessary construction financing on his own by forming Dominion Mortgage Corporation ("Dominion").

[para47] Umbarger was the principal of Dominion. He arranged for investments from 160 individuals, two of whom were also investors in IMF4 Co. While Dominion may have had the appearance of being IMF5 Co, the investments were made pursuant to the Mortgage Brokers Act, R.S.B.C. 1996, c. 313, rather than the Securities Act. There was no offering memorandum or subscription agreements. As the principal of Dominion, Umbarger acted as a mortgage broker, in contrast to his role as Promoter of and owner in the IMF Group.

[para48] To avoid any conflict between his position in Dominion and his position in each of the four borrowing companies, Umbarger resigned as officer and director in each of the borrowing companies. This was followed by all four investor groups passing extraordinary resolutions to assume the management and control of their respective borrowing companies from the Promoters. Each of the groups also formed a committee from the members of their investor group to act on that group's behalf in the management of their borrowing company.

[para49] IG3 was the first investor group to assume management and control of IMF3 Co. In the spring of 1997, IG3 formed a committee that was given the authority to act on its behalf in the Westbank project and its interests in the other projects, except Castlegar. The committee also approved the IMF3 Co Shares Agreement.

[para50] In order to prevent foreclosure by the first mortgagee, the committee instructed Woodway to secure a new mortgage from Dominion to pay out the existing first mortgage and to provide some extra working capital. Dominion agreed to provide the new mortgage at an interest rate of 12% on the condition that its mortgage would take priority over the other mortgages. Dominion's loan was secured by a first mortgage over the Westbank lands.

[para51] IG3's committee was aware Dominion's loan would be costly but it also understood it had little choice in securing this financing if it wanted to avoid foreclosure. Before signing Dominion's mortgage, IG3 received independent legal advice.

[para52] In August, 1997, IG4 also formed a committee to represent the interests of its unitholders. The committee assumed the management and control of IMF4 Co and Ms. McDougall became a director. Initially, Ms. McDougall was an alternate member of the committee, but by September, 1998, she had become a full committee member. At her request, all of the documents and accounts relating to the IMF Group were delivered to her for review.

[para53] Shortly after IG4 formed a committee in August, 1997, IG1 and IG2 did the same. In September, 1997, they also formed committees which assumed the management and control of their respective borrowing companies. A term of IG1 and IG2's takeover agreements was that Woodway would receive the shares of IMF1 Co and IMF2 Co on the same terms as it received the shares of IMF3 Co. Woodway and two other unitholders became authorized signatories. As well, broad indemnity agreements were signed for the benefit of all directors, officers, shareholders, authorized signatories, advisors and committee members.

[para54] As with IG3, the IG1 and IG2 committees also decided to raise new monies through a mortgage with Dominion. Dominion advanced four loans that were secured by first mortgages over five condominiums in the Imperial Ridge project and one condominium in the Erinmoore project. The monies from Dominion's mortgages paid out the existing first mortgages, paid

down some of the IG3 and IG4 second mortgages, and paid some of the creditors. Dominion's mortgages ranked in priority to the other mortgages. IG1 and IG2 received independent legal advice before entering into Dominion's mortgage.

[para55] The takeover agreements also involved DDAI. In September, 1997, Stringer resigned as an officer and director of DDAI. In November, 1997, all four committees approved the takeover of DDAI. The shares of DDAI that had been held by Stringer were transferred to Woodway on the same terms as the shares held by Woodway in the borrowing companies. Similar indemnities were also provided. After the takeover, DDAI replaced Valley as the nominee for IG4.

THE FINAL SETTLEMENT

[para56] By November, 1997, all four committees were demanding answers as to what had happened to their investments. They requested Woodway to provide a cash accounting that would identify the costs connected to the development and sale of the projects, and address what monies were received by the Promoters, their related companies and Woodway.

[para57] A detailed accounting was prepared by Woodway. Ms. McDougall, who by then was actively involved in reviewing the details of this investment scheme, took Woodway's accounting and created her own tables and graphs of the accounting. Both Woodway's accounting and Ms. McDougall's table and graphs were forwarded to all of the investors. The accounting formed the basis upon which the final settlement of all the investor groups' interests was reached.

[para58] The accounting showed Woodway had received in excess of \$500,000 in fees with a further \$190,000 owed to it. Woodway's debt has since been secured by a judgment against the Imperial Ridge, Heritage Hill, Erinmoore and Westbank projects. Collinson and his related company Metro, and Umbarger and his related company Kenway, had received estimated costs and fees of approximately \$3,380,000.

[para59] In April, 1998, one of the investors filed a complaint about the investment scheme with the R.C.M.P. In response, representatives of each committee signed a letter to the R.C.M.P. Commercial Crime Unit. The letter stated that the investors were considering a class action against the Promoters. It emphasized that Woodway and Dominion were an important part of the investors' efforts to maximize the assets of the IMF Group and had not caused any of the losses. It also confirmed that the IMF Group had been under the investors' direction and control for the past year. The letter authorized Rogers to discuss the affairs of the IMF Group with the R.C.M.P.

[para60] The final settlement was approved by all four committees on October 15, 1998. It involved completion of construction on the Erinmoore and Heritage Hill projects, the sale of condominiums at fire-sale prices, the pay down of the first mortgages, and payment of the creditors' and contractors' fees. The remaining unsold condominiums would be transferred to a new company and rented out for a period of time until the market changed. Ultimately, the plan was to simplify management of the remaining assets so that Woodway's expensive consulting expertise could be eliminated. DDAI and any IMF companies not bankrupt, would continue to be managed by volunteers from the investor groups.

[para61] The unsold condominiums in the Imperial Ridge and Heritage Hill projects were transferred to a new company, Rancher Investment Corp. ("Rancher"). The shares of Rancher were registered in Woodway's name for the benefit of the interests of the investors in those projects and to preserve the RRSP and RRIF status of the investments. With a clean credit rating, Rancher qualified to replace the existing expensive short-term mortgages, including Dominion's, with less expensive rental mortgages. C.I.B.C. was prepared to offer first mortgages on the rental units at 5.99% interest.

[para62] Compromise agreements were negotiated on the distribution of the equity in the various projects. IG1 and IG2 would give up their interest in the Castlegar projects and the net proceeds from Castlegar would be split 62.5% to IG4 and 37.5% to IG3, to be shared equally within each investor group. IG3 would receive all of the net proceeds from the Westbank project which would be shared equally within its investor group. The investors' interests in Rancher would be allocated 8.8% to IG1, 8.9% to IG2, 47% to IG3 and 35.3% to IG4. Within each investor group, the split of Rancher shares would be based on the amount of the unitholders' initial investment.

[para63] Discounts were negotiated with creditors, subtrades and suppliers, Dominion on its first mortgages, and Woodway and Metro on their contracts. Kenway had agreed to waive its fees. Enough cash from the net sale proceeds was to be set aside in order to permit Rancher to hold the rental condominiums for several years.

[para64] Miscellaneous assets of the IMF Group and DDAI such as the construction trailer and show suite furniture would be sold to pay any remaining bills and any surplus would be divided as agreed by the committees. IMF1 Co and IMF2 Co would be petitioned into bankruptcy.

[para65] Positions for the directors, officers and authorized signatories of Rancher and DDAI, and any of the remaining IMF companies not in bankruptcy, would be filled by volunteer unitholders or their appointees.

[para66] Upon completion of the above, Woodway's involvement would end.

[para67] The final settlement was implemented and almost completed by December 24, 1998. The remaining assets of the IMF Group included real property, mortgages and some miscellaneous assets, together having a value of about \$1.5 million. The IMF Group retained 4 condominiums in Imperial Ridge and one in Erinmoore. Rancher was the registered owner of 15 condominiums in Heritage Hill and 5 condominiums in Imperial Ridge, all of which were rented out. It had listed 10 of the Heritage Hill condominiums for sale along with the 5 Imperial Ridge condominiums.

[para68] On December 24, 1998, Ms. McDougall and five members from the other committees ("the McDougall group") withdrew their consent to the final settlement and directed that Woodway, and the directors and officers working with Woodway, cease and desist any further actions on behalf of the IMF Group ("the freeze order"). In particular, Woodway was instructed to cease the final transfer of assets pursuant to the settlement. One of the reasons given for this action was to prevent any further monies being paid out to Woodway.

[para69] Several committee members resigned in protest alleging the McDougall Group had no authority from the four committees to implement the freeze order. The four committees had only approved a litigation policy to examine the feasibility of commencing a class action against the Promoters. IG2 was opposed to the freeze order and does not want to participate in the proposed class action.

[para70] Ms. McDougall commenced the class action on February 4, 1999. At that time, she was still a director of IMF4 Co, a defendant in this action. On February 9, 1999, she resigned as a director of IMF4 Co and Umbarger was reinstated.

[para71] In her affidavit filed in support of the certification application, Ms. McDougall did not mention any of the settlement agreements or the changes they imposed. Instead, she deposed in paragraph 27 of her affidavit of April 9, 1999, that:

I am not aware of any conflict between my interests in respect to the common issues in this action and the interests of the other members of the proposed Class.

[para72] After the action was commenced, certificates of pending litigation were filed against the remaining unsold properties which included about 29 parcels of real property. Of these parcels, approximately 20 condominiums were located in the Imperial Ridge and Heritage Hill projects in Vernon and were registered to Rancher.

[para73] The filing of the certificates of pending litigation prevented some condominium sales from completing. Several sales were lost. A prospective purchaser for the last Erinmoore condominium has since filed suit against IMF2 Co for failing to complete the sale.

[para74] As a result of the freeze order, Dominion has resiled from its agreement to accept a discount of about \$60,000 on the monies it was owed, as well as the advancing of about \$30,000 in new cash. Foreclosure proceedings on all of its mortgages are now in progress. There appears to be no equity in the Westbank and Erinmoore projects. Woodway has also resiled from its agreement to accept a discount on its judgment for about \$200,000 which is registered against the properties. However, as an unsecured creditor, it ranks well behind the first and second mortgagees.

[para75] After the class action was commenced, Rogers wrote a highly critical and threatening letter to the investors in the IMF Group. In it he stated the class action had been commenced contrary to his advice and the recommendations of the litigation committee. He also threatened a large countersuit which he said would make every person who joined the class action jointly and severally liable for significant damages and the legal costs of the action.

[para76] Since then, third party proceedings have been taken against the McDougall group and Valley, and a counterclaim has been filed against Ms. McDougall by the IMF Group and DDAI, all of which are now controlled by Woodway.

[para77] Ms. McDougall has prepared a very basic plan in support of the certification application. The plan does not address how the common issues in the class action would be advanced. If the application is granted and a judicial trustee appointed, Ms. McDougall proposes to request a contribution of 1% of the principal sum invested by each investor in order to secure a forensic accounting by the judicial trustee. She also proposes that the funds and assets recovered by the judicial trustee be distributed in proportion to the amount of each investor's principal investment.

SUBMISSIONS IN SUPPORT OF CERTIFICATION

[para78] The most compelling submission advanced in support of certification is the significant financial burden an individual investor will have to incur in order to pursue an action. As a class, the investors are able to spread the cost of the proceedings amongst all of the members. Economies of scale and access to the judicial system weigh heavily in favour of certification: *Harrington v. Dow Corning Corp.* (1996), 48 C.P.C. (3d) 28 (B.C.S.C.); *Campbell v. Flexwatt Corp.* (1997), 44 B.C.L.R. (3d) 343 (B.C.C.A.); *Endean v. Canadian Red Cross Society* (1997), 148 D.L.R. (4th) 158 (B.C.S.C.).

[para79] This concern is reflected in paragraph 7 of Ms. McDougall's affidavit sworn July 9, 1999, and filed December 14, 1999, where she deposed that if counsel for the class could not represent the McDougall group named in the third party proceedings because of a conflict, then the third parties have encouraged her to drop the class action.

[para80] Additionally, if a certification order is not granted, there will be no ancillary order appointing a judicial trustee to manage the assets. Rogers and Umbarger will continue to be in control of the realization of the assets. Any confidence the majority of the investors may have had in Rogers and Umbarger at one time, has long since disappeared.

SUBMISSIONS AGAINST CERTIFICATION

[para81] While all of the defendants oppose a certification order for different reasons, a common theme in their submissions is the inability of a class action to satisfactorily address the differing and often conflicting issues between the various defendants and investor groups. They submit the issues between the investor groups are significantly different because: (i) the investments were made at different times; (ii) there was different security given for the different investments; and, (iii) different settlements were reached with different investor groups.

[para82] The defendants submit a class action will not resolve any disputes between the parties in a manner that is fair not only to the plaintiffs but also to the defendants. In their view, the numerous defendants in this action reflects a "deep pockets" approach to litigation that may force settlements because of the very substantial legal costs that will be incurred by them. The plaintiffs in a class action are not exposed to the same costs. In support of their submission, the defendants cite the comments of Cumming J.A. in *Campbell v. Flexwatt Corp.* at paragraph 25:

Class proceedings are an efficient response to market demand only if they can resolve disputes fairly. Trial court judges must be free to make the new procedure work for plaintiffs and defendants.

[para83] Lastly, the defendants submit the essence of the plaintiffs' application is for an independent accounting. They state that Woodway has already provided this in great detail, at great cost and on the instructions of the committees. They submit the preferable procedure in which to resolve any of the outstanding issues between the various parties is through compulsory arbitration as required by the amended subscription agreements. Certification, in their view, would create an unmanageable action that would not advance any common issues, if there are any, because of the predominance of individual issues.

DISCUSSION

[para84] The purpose of a class action is to provide a procedural method for advancing common issues of fact or law between a group of claimants in an action, and one or more defendants. Class proceedings legislation does not create any new causes of action.

[para85] Section 1 of the Class Proceedings Act, R.S.B.C. 1996, c. 50, (the Act") defines common issues as:

- (a) common but not necessarily identical issues of fact, or
- (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

[para86] The essence of a class action is the commonality of the issues between the plaintiffs and one or more of the defendants. A resolution of the common issues does not have to be determinative of liability or supportive of the relief sought. It need not produce the same result for all members of the class. It must, however, advance the litigation forward. If it does not, then certification is inappropriate.

[para87] Equally important is the requirement that a class action be the preferable procedure to resolve the common issues. In determining if this requirement has been met, the court must consider whether common issues predominate over individual issues. A resolution of the common issues may still require further litigation to deal with individual issues. However, if resolution of the common issues will only assist a few members, then the issues will not be common to the majority of members and the preferred procedure will not be a class action.

The legislation

[para88] Section 4 of the Class Proceedings Act lists the five requirements for certification:

4(1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of 2 or more persons;
- (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
- (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
- (e) there is representative plaintiff who
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
 - (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

- (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
- (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
- (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
- (d) whether other means of resolving the claims are less practical or less efficient;
- (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[para89] All five requirements listed in s. 4(1) of the Act must be satisfied before certification of a class action will be granted. If all five are satisfied, then the court must certify the action.

[para90] Section 5(5) sets out the requirements for a person filing an affidavit in support of a certification application:

A person filing an affidavit under subsection (2) or (4) must

- (a) set out in the affidavit the material facts on which the person intends to rely at the hearing of the application,
- (b) swear that the person knows of no fact material to the application that has not been disclosed in the person's affidavit or in any affidavits previously filed in the proceeding, and
- (c) provide the person's best information on the number of members in the proposed class.

[para91] Section 6 permits the court to certify a subclass separately from the main class if it is of the view that the protection of the interests of the subclass requires that they be separately represented.

[para92] Section 7 provides that:

The court must not refuse to certify a proceeding as a class proceeding merely because of one or more of the following:

- (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
- (b) the relief claimed relates to separate contracts involving different class members;
- (c) different remedies are sought for different class members;
- (d) the number of class members or the identity of each class member is not known;
- (e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

[para93] For the reasons I will provide below, I am of the view the plaintiffs have not met at least four of the mandatory requirements in s. 4(1) of the Act to permit certification of this action.

ANALYSIS

1. The pleadings disclose a cause of action

[para94] This action involves the rights and obligations of parties to a contract, some of whom may have trust obligations by reason of their investment of other people's monies. It also involves a duty of care between the plaintiffs and defendants as set out in the first stage of the "two-step test" enunciated by Lord Wilberforce in *Anns v. Merton London Borough Council*, [1977] 2 All E.R. 492 (H.L.). In the present case there was a "sufficient relationship of proximity or neighbourhood" such that, in the reasonable contemplation of the defendants, carelessness on their part might be likely to cause damage to the plaintiffs. Therefore, a prima facie duty of care arises.

[para95] For the purposes of a certification application, the facts alleged in the Statement of Claim are assumed to be true provided the defendants do not establish they are "patently ridiculous or incapable of proof" or that it is "plain and obvious" that the claims could not succeed: *Peppiatt v. Nicol* (1993), 16 O.R. 133 (Ont. G.D.) at 140; *Endean v. Canadian Red Cross Society* (1997), 148 D.L.R. (4th) 158 (B.C.S.C.). Without determining the merits, the court must decide if there is sufficient evidence of the plaintiffs' claims to raise triable issues.

[para96] In determining if the pleadings disclose a cause of action under s. 4(1), the court must decide on the evidence before it whether the plaintiffs' claims are "ridiculous or incapable of proof" or "could not succeed"? The difficulty in this case, in assessing whether that requirement has been met, is identifying what is said to constitute the defendants' acts of alleged negligence, breach of fiduciary duty or trust, and breach of contract. The pleadings are very general and the extensive affidavit material filed in support of the certification application does not disclose any particulars of the alleged acts that might be said to give rise to the various causes of action. This is so despite the fact Ms. McDougall has had all of the relevant documents in her possession since September of 1998. This Court is left to speculate on how the defendants' acts lead to the causes of action claimed by the plaintiffs.

[para97] In *Bittner v. Louisiana-Pacific Corp.* (1997), 43 B.C.L.R. (3d) 324 (B.C.S.C.), Kirkpatrick J., at paragraph 23, briefly commented on the effect of a paucity of evidence to support a certification application in a products liability action:

Section 5(6) of the Act allows the court to adjourn the application to permit further evidence. The scarcity of evidence makes more difficult the determination of certification because the court is left to speculate as to the common and individual issues which may arise in the action. However, because I hold the view that certification is not appropriate for other reasons, it is not necessary to dismiss the application on this ground.

[para98] In the absence of any particulars about the defendants alleged negligence, breach of trust or fiduciary duty and breach of contract the plaintiffs' claims cannot be identified.

[para99] The plaintiffs submit the defendants had a duty of care to the investors arising from the nature of their relationship, which they submit was a trust and or fiduciary relationship. They also submit the defendants had a duty of care arising from the wording of the agreements signed with the investors. Specifically, they allege the defendants breached their duties and or contract by: (i) failing to provide realizable security; (ii) providing a minimal return of less than 20% of the principal amount invested by the members; (iii) inappropriately distributing funds and transferring of assets; (iv) receiving unauthorized financial gain and profit; (v) providing an incomplete accounting; and, (vi) intermingling the funds so that they cannot be traced.

[para100] Whether or not these claims arise in negligence, trust or contract, it seems clear from the wording of the offering memoranda that at least some of these allegations were authorized by the contracts signed by the unitholders. For example, the offering memoranda for IMF3 Co and IMF4 Co authorizes distribution of their funds to other projects. There does not appear to be an allegation that the IMF1 Co or the IMF2 Co funds were distributed outside of their respective projects as provided by the terms of their offering memoranda. As well, the agreement of nominee ownership authorized the nominee to transfer assets on the written instructions of the officers and directors of the borrowing companies. There is no allegation that the nominee did not have that written authorization before transferring the assets. In summary, there is no evidence to support an allegation that any of the defendants acted outside the scope of their authority or contract or terms of the offering memoranda.

[para101] A cash accounting of the funds was requested and provided at the direction of the committees. There is no allegation the accounting was not prepared in accordance with the committees' instructions. Presumably, if there were concerns over the accounting provided, the committees would not have accepted it as the basis for final settlement. Also, there is no evidence from the accounting to support an allegation that monies were inappropriately diverted by some or all of the defendants.

[para102] Furthermore, the Statement of Claim does not claim a cause of action against all of the defendants. For example, there is no cause of action claimed against Dominion. It is not disputed that monies were solicited by the investor groups on the terms agreed to by the parties, and then applied by the investors to pay out the existing first mortgagees who were threatening foreclosure. The plaintiffs' only claim against Dominion is for an accounting of the funds it advanced. However, there is no independent cause of action for an accounting in the absence of a legal duty to account. There is no claim advanced that

Dominion has such a duty. In any event, the plaintiffs already have the authority under the subscription agreements to obtain an independent accounting. Alternatively, they can request an accounting from Dominion through the less costly forum of the foreclosure proceedings.

[para103] There is also no evidence to support a cause of action against Stringer or Messer, Stringer. There is no evidence that these defendants provided notarial or nominee services. The only services provided by Stringer were through DDAI as a nominee. Furthermore, Stringer's notarial firm was never involved in DDAI nor did it provide notarial services. Valley was also a nominee for IMF4 Co, but no claims are made against it for the nominee services it provided.

[para104] The Court is left with evidence of the plaintiffs' general unhappiness over their losses and their suspicions of misconduct. These suspicions arose after learning of the large sums of money many of the defendants received under the terms of the offering memoranda and contracts with the IMF Group. That evidence alone, cannot provide the basis for certification of an action. There is no evidence to support an allegation that the defendants received any unauthorized monies.

[para105] It is "plain and obvious" the claims against Dominion, Stringer, and Messer, Stringer cannot succeed as there is no independent cause of action against Dominion and there is no evidence to support a cause of action against Stringer personally, and Messer, Stringer corporately. I have also concluded that in the absence of further particulars of alleged misconduct against the remaining defendants, it is impossible to identify a cause of action against the defendants in negligence, breach of trust, fiduciary duty or breach of contract let alone determine if the claims could be proved.

[para106] Although, prima facie, a contract, trust obligation and duty of care existed between the defendants and the plaintiffs, that alone does not meet the requirements of s. 4(1) that a cause of action be disclosed. There is no satisfactory evidentiary basis to suggest how the alleged breaches might have occurred. Without more than bare assertions of the alleged breaches, there is insufficient evidence to support the plaintiffs' claims. As such, it must be concluded that the plaintiffs would not succeed, and therefore, the requirement in s. 4(1) has not been met.

2. There must be an identifiable class of two or more persons

[para107] Although many of the plaintiffs registered their mortgage units in RRSP's or RRIF's, individually they still remain an identifiable class. The RRSPs and RRIFs are merely the legal trustees for the class, while the individuals remain the beneficial owners of the units. In the event of certification, it is acknowledged that the six non-resident investors would have to be certified as a separate class from the resident investors.

3. The claims of the class members must raise common issues

[para108] Again, because of the lack of particulars provided, it is difficult to identify what, if any, common issues exist between the plaintiffs and all or some of the defendants. The failure to particularize the alleged misconduct of the various defendants results in speculation as to what the common issues are and what the individual issues are between the defendants. In these circumstances it becomes impossible to identify the triable common issues.

[para109] Assuming common issues of fact or law could be identified, the court must then ascertain if they raise triable issues which if resolved would advance the litigation in the interests of the class.

[para110] The Statement of Claim and draft order attached to the plaintiffs' notice of motion identifies the following common issues which the plaintiffs submit predominate over any issues affecting the individual members of the class:

1. Determination as to the obligations of the defendants with respect to the funds received from the plaintiffs and the nominees;
2. The nature of the defendants obligations to the to the plaintiffs with respect to the funds received;
3. Whether there has been a breach of the duties and obligations of the defendants to the plaintiffs;
4. An accounting for the expenditure of the funds received by the defendants;
5. A tracing of the funds;
6. Realization on and preservation of assets and funds of the IMF Group, Dominion and Rancher, on behalf of the plaintiffs;
7. A determination of members of the class's entitlement to the remaining funds and assets of the IMF Group, Dominion and Rancher;
8. A determination of an aggregate amount of damages for the class in the event of a finding of liability against the defendants.

[para111] Leaving aside the issue of damages, these proposed common issues could be reduced to the following two questions:

1. Did the defendants breach their duties to the plaintiffs under the terms of the subscribing and nominee agreements or at common law?
2. Should there be an independent accounting, tracing and orderly realization of the remaining assets?

[para112] The latter question appears to be more of a remedy than a common issue between the members of the class. In any event, the committees on their own initiative can agree on this action without the need for a class action.

[para113] The former question is very broad and also ignores the settlement agreements and how those agreements changed the nature of the individuals' investments. As well, the settlements changed the forum in which disputes between the parties could be resolved. This issue goes to the very jurisdiction of this court to hear this action. Not surprisingly, the defendants submit that this dispute should be resolved through commercial arbitration and not by litigation.

[para114] It is unclear why Ms. McDougall did not refer to the settlements with IG1, IG2 and IG3. Only after they were disclosed by the defendants did she propose a further common issue be determined regarding the enforceability of the settlement agreements.

[para115] Even if the settlement agreements are ignored, there are a number of conflicts between the investor groups that affect the commonality of any proposed triable issue. There are also a number of individual issues including reliance and causation that arise from the allegations of misrepresentation by the Promoters in the offering memoranda and by Stringer in the nominee agreements, as well as any alleged oral misrepresentations by these defendants outside the scope of the agreements.

[para116] There are several identifiable conflicts between the investor groups. Different market conditions existed when each of the four funds were created. The majority of funds for IMF4 Co were raised after the market changed in the spring of 1996. IMF4 Co raised money for investment in six pre-approved projects and other projects to be developed over a five year period. IMF1 Co raised money for investment in the Imperial Ridge development that was expected to complete within a one year period. The maturity date for IG1's investments was one year from the date the investment was made. The maturity date for IG2's investments was one year from when the last investment was made. IG1, IG2 and IG3 were anticipating an effective rate of return of 24%. IG4 was anticipating an effective rate of return of 18%. The representation in the offering memorandum for IMF4 Co had changed with the downward shift in the market which had become evident by that time.

[para117] Secondly, IG3 and IG4 loaned monies to IMF1 Co and IMF2 Co and in that manner became unitholders in IG1 and IG2. The security for IG3's and IG4's interests as unitholders in IG1 and IG2, was different than the security for their respective units in IG3 and IG4. There is also a conflict between first in first out repayment provision for the investors of IG1 and IG3, and equal basis repayment provisions for the investors in IG2 and IG4.

[para118] The settlement agreements raised further conflicts between IG1, IG2 and IG3 who became owners and borrowers for their projects and IG4 who remained a lender and was never an owner of the Castlegar project. Furthermore, IG3 has a conflict within its group as it is not only an owner and borrower in the Westbank project, but it is also a unitholder and lender in the Imperial Ridge, Heritage Hill and Erinmoore projects. IG2 continues to be opposed to the freeze order and does not want to participate in the class action.

[para119] Before the settlements in 1997, the borrowing companies were managed and controlled by the Promoters. After the settlements, they were managed and controlled by the committees. Before the settlements, only the parties to the IMF4 Co agreements had to resolve their disputes through compulsory arbitration. After the settlements, all disputes had to be resolved through compulsory arbitration.

[para120] The compulsory arbitration clauses of the settlement agreements, however, do not affect all of the defendants. Creditors such as Woodway, Metro and Kenway, who are not parties to the subscription agreements, may only commence or have an action commenced against them through the nominee.

[para121] The Statements of Defence filed on behalf of almost all of the defendants also raise claims of contributory negligence. Such claims necessitate an examination of the following individual issues: (i) an investor's knowledge of the representations in the offering memorandum and the signed agreements, as well as any representations outside the documents; and, (ii) the extent to which those representations may have alerted the individual investor to the nature and risks associated with the investment, as well as to the costs of developing the projects and realizing on the investment. The plaintiffs' claim of negligence combined with the defendants' claim of contributory negligence would require an examination of individual issues of reliance and causation that would predominate over any common issues of the class. Such an examination would not be conducive to a class action.

[para122] Due to the difficulty in identifying the common issues, the numerous conflicts between the investor groups both before and after the settlements, and the predominant number of individual issues raised by the pleadings, I have concluded there are no identifiable common issues, that if resolved, would advance the litigation in the interests of the class.

4. The class proceeding must be the preferable procedure for the resolution of the common issues.

[para123] In comparing the predominancy requirement in the Act, with that of the Ontario legislation, Esson J. (as he then was), made the following comments in *Tiemstra v. Insurance Corp. of British Columbia* (1996), 49 C.P.C. (3d) 139 at paragraph 14, *aff'd* (1997), 12 C.P.C. (4th) 197 (B.C.C.A.):

But by requiring predominancy and four other matters to be considered in relation to the important question of "preferable procedure," it is more restrictive than the Ontario Act. Although the other four sub-sections of s. 4(2) may be less significant in this regard, they all tend in some degree to restrict the circumstances in which certification should be granted.

[para124] Although the Ontario legislation does not have a predominancy provision, in *Abdool v. Anaheim Management Ltd.* (1993), 15 O.R. (3d) 39, *Montgomery J.*, at first instance stated at 51:

[The Act] was not intended to be used in circumstances where the individual issues to be determined predominate those issues common to the proposed class.

[para125] On appeal to the Ontario Divisional Court, (1995), 121 D.L.R. (4th) 496, Justice Montgomery's refusal to certify the proceedings was upheld on the basis that the plaintiffs had failed to meet the onus of establishing that a class proceeding would be the preferable procedure for resolution of common issues. At pages 503 - 504, O'Brien J. comments:

I do not accept the submission that any complex, multiple-party lawsuit is entitled to certification merely because that is the "preferable procedure" for resolving common issues which may be involved in the litigation.

In my view, some consideration must be given to individual issues involved in the litigation, the purposes of the Act, and the rights of the parties seeking, and opposing certification.

While access to the courts is obviously a worthwhile aim of the Act, it is to be noted the law reform report commented on the concern that frivolous claims might be advanced and defendants "blackmailed" into settling them because of potential legal costs.

Under the Act, once certification is granted, class plaintiffs face little, if any, exposure to legal costs. Contingency fees are permitted for plaintiffs' counsel and s. 31 of the Act provides for the court to exercise its discretion regarding costs, and indicates class members are not liable for those costs except with respect to the determination of their own individual interests.

The relative weight to be given common and individual issues is a vexing matter.

[para126] In my view, these comments are apposite to this application.

[para127] The advantage of the economies of scale in certifying this action, in my view, are far outweighed by the unmanageability of such an action for many of the reasons already stated: the conflicts between the plaintiffs, the number of individual issues, the third party claims, the arbitration provisions of the settlement agreements, the requirements under the nominee agreement for commencing an action and the forum offered by the foreclosure proceedings for another accounting.

5. The adequacy of the representative plaintiff

[para128] The court must be satisfied that the proposed representative plaintiff will not only meet her interests, but also the interests of the class. It is difficult to see how a representative plaintiff who is also a third party can fairly and adequately represent the interests of the class. Furthermore, Ms. McDougall, as a director of IMF4 Co, was in a position of conflict at the time the action against IMF4 Co was commenced. The effect of the settlements with IG1, IG2 and IG3 also present conflicts in the resolution of the interests of the class. Lastly, it is difficult to see how the plan submitted by Ms. McDougall will advance the litigation on behalf of the class. It is my view that Ms. McDougall would not be an appropriate representative plaintiff in these proceedings.

CONCLUSION

[para129] For the reasons stated, I have concluded that four of the five requirements for certification have not been met by the plaintiffs. I am of the view that to certify this action as it now stands, in the words of Esson C.J. in *Tiemstra*, would be to create a "monster of litigation". The litigation would see no end in sight, it has little if any chance of success based on the existing evidence before the court, and it could financially destroy many of the defendants. Such an action would not be a fair resolution of the dispute for both the plaintiffs and the defendants.

[para130] The plaintiffs are not left without any remedy to pursue their concerns. Commercial arbitration is available, an accounting in the foreclosure actions will occur, the committees may decide to pursue their own independent accounting, the nominee may be instructed to take certain actions, or individuals might pursue an action on a test basis. Each of these options offer the plaintiffs an examination of the merits of their claims at a cost that is more balanced for all the parties involved.

[para131] The application for certification is dismissed.

[para132] Subject to submissions, in all of the circumstances, I am of the view that each party should bear their own costs.

D.M. SMITH

CBR# 857

Tin Amara Resorts v. British Columbia (Registrar of Homeowner Protection Office)

Between Tin Amara Resorts and Hirsch McLeod Construction Ltd., petitioners, and Her Majesty the Queen in Right of the Province of British Columbia as represented by the Registrar of the Homeowner Protection Office, respondents

Victoria Registry No. 00/4685

British Columbia Supreme Court Victoria, British Columbia E.R.A. Edwards J. Heard: January 4, 2001. Judgment: January 12, 2001. (26 paras.)

Counsel: John van Driesum, for the petitioners. Robert G. Kuhn and Kevin L. Boonstra, for the respondents.

[para1] E.R.A. EDWARDS J.:-- The petitioners apply under Rule 10(1)(b) for a declaration that the Homeowner Protection Act, S.B.C. 1998 Ch. 31 ["the Act"] and the Homeowner Protection Act Regulation ["the Regulation"] do not apply to condominium units ["the units"] the petitioners have built and propose to build at Parksville, on the basis "that the units are not 'residential' within the meaning of the Act".

[para2] The petitioners contend that the units are "resort accommodation", pointing to the facts that they are built on land which is not zoned "residential" and that purchasers of the units must put them into a "rental pool". The rental pool agreement can be ended if 75% of unit owners agree. However, a restrictive covenant registered under the Land Title Act provides that all units will be subject to the rental pool agreement or its replacement. Under the rental pool agreement, unit owners are entitled to occupy units they own, rent free, subject to paying unspecified expenses related to occupation and a \$5 per day booking fee. Owners occupying their own units do not share in pooled rental income if all the units in the resort are occupied.

[para3] The Parksville Zoning and Development Bylaw defines "resort condominium" as meaning "a development subdivided pursuant to the Condominium Act providing accommodation on a temporary basis, but not considered a hotel". Parksville RA-1 zoning applicable to the units prohibits occupancy by any person in any unit of over 180 days in a calendar year.

[para4] According to the submissions of the petitioners' counsel it is clear the petitioners do not anticipate that unit owners will occupy their units for more than a few days a year, if at all. The petitioners' counsel characterized unit owners as sophisticated investors who have been provided with a disclosure statement as required by the Securities Act. This statement describes the controversy respecting the applicability of the Homeowner Protection Act to the units.

[para5] If the Act applies to the units, there will be fees and levies payable totalling \$53,300 for the 68 proposed units. The constructor of the units will have to be licensed under the Act. The units will have to be covered by "home warranty insurance", akin to a performance bond, purchased from a third party at a cost estimated by counsel at \$300 per unit. This affords purchasers and subsequent owners protection against certain structural defects for up to 10 years. Units subject to the Act are also covered by a statutory warranty under s. 23 of the Act.

[para6] The applicability of the Act to the units rests in part on the definition of "new home" in s. 1 of the Act, which is as follows:

"new home" means a building, or portion of a building, that is newly constructed and intended for residential occupancy, and includes

- (a) a self-contained dwelling unit that is
 - (i) detached, or
 - (ii) attached to one or more self-contained dwelling units,
- (b) a building having 2 or more self-contained dwelling units under one ownership,
- (c) common property, common facilities and other assets of a strata corporation, and
- (d) any building or portion of a building of a class prescribed by the regulations as a new home to which this Act applies, but does not include a manufactured home unless otherwise prescribed;

[para7] Section 32 of the Act gives the Lieutenant Governor in Council powers to make regulations. These include:

32 (1) The Lieutenant Governor in Council may make regulations referred to in section 41 of the Interpretation Act.

(2) Without limiting subsection (1), the Lieutenant Governor in Council may make the following regulations:

(a) defining, for the purpose of paragraph (d) the definition of "new home" in section 1, a class of buildings or portion of a building, including a manufactured home, as a new home to which this Act applies;

(f) exempting

(ii) a building, a class of buildings, a portion of a building or the common property, common facilities and other assets of a strata corporation from the definition of "new home" in section 1.

(l) defining, for the purpose of this Act or the regulations, any word or expression not defined in this Act;

[para8] Pursuant to s. 32(2)(l) the following definition of "dwelling unit" appears in the Regulation:

"dwelling unit" means a class of new home which is a building, or a portion of a building, that

- (a) is newly constructed,
- (b) is intended for residential occupancy,
- (c) is a single, self-contained residence usually containing cooking, eating, living, sleeping and sanitary facilities, and
- (d) may contain a secondary suite if permitted by local bylaws;

[para9] Section 32 of the Act provides a word undefined by the Act may be defined for purposes of "this Act or Regulation" [my emphasis] by the Lieutenant Governor in Council. This definition is specifically stated in the opening words of s. 1 of the Regulation to apply "in this regulation". In light of the disjunctive regulation-making power in s. 32(2)(1), I infer the Lieutenant Governor in Council chose not to define "dwelling unit" for purposes of the Act.

[para10] Neither the Act nor the Regulation defines "residential occupancy".

[para11] The petitioners' position is that since the units are neither zoned nor intended for residential occupancy by their owners, they are not "new homes" as defined by the Act.

[para12] The respondent's position is that "residential occupancy" refers to the type of building or its use and not the intention or conduct of an owner or occupier and since the units provide "cooking, eating, living, sleeping and sanitary facilities" for use by temporary occupants they are intended for residential occupancy, as distinguished from, say, commercial or industrial use or occupancy. I find the units are residential because they provide residential type accommodation. Who occupies them and for how long are considerations which do not alter that fact.

[para13] In support of his submission respondent's counsel pointed to s. 2 of the Regulation which provides:

2 (1) The following classes of new homes, other than new homes that are strata titled, are exempt from the definition of "new home" in section 1 of the Act:

- (a) hotels and motels;
- (b) dormitories;
- (c) care facilities;
- (d) floating homes.

[para14] "Hotel" and "motel" are not defined by the Act or the Regulation.

[para15] Counsel for the respondent asked me to infer the Lieutenant Governor in Council in enacting s. 2(1) considered that hotels and motels came within the definition of "new home" in the Act, since it would otherwise have been unnecessary to enact s. 2(1) of the Regulation pursuant to s. 32(2)(f)(ii) of the Act, to exempt those sorts of buildings. Another explanation is that the Lieutenant Governor in Council deemed it prudent to make it clear the Act was not to apply to hotels and motels. Implicit in the exemption is the policy that the Act should not apply to hotels and motels with a single owner but should apply to those which are strata titled with (potentially) several owners.

[para16] The exemption, as worded, does not extend to hotels and motels which are strata titled, as the units in this case are. This indicates the Lieutenant Governor in Council did not intend to exempt all hotels and motels but only those which are not strata titled. In other words, the Lieutenant Governor in Council considered that strata titled hotels and motels were "new homes" as defined by the Act and ought to be covered by the Act notwithstanding the exemption of hotels and motels which are not strata titled.

[para17] The same type of building, that is, physical structure, could be either a strata titled or non strata titled hotel or motel. "Class of building" is the criterion upon which the Lieutenant Governor in Council is given regulation-making power by s. 32(2)(f)(ii) of the Act to exempt hotels and motels from the Act. Section 32(2)(f)(ii) refers to "common property, common facilities and other assets", that is physical aspects or uses of a strata property, not ownership interests in "a strata corporation." The power to exempt buildings is not limited to classifying them by their physical characteristics or use and does not preclude classifying them by the strata titled nature of their ownership.

[para18] Counsel for the petitioners did not accept a suggestion from the Court that the units were a part of a hotel, no doubt because, if so characterized, they would not be exempt under s. 2(1) of the Regulation. Nevertheless, the petitioners' whole submission is based on the proposition that the units are intended to provide transient "resort accommodation". From the perspectives of management of the units and their use by customers "resort accommodation" is the same as hotel or motel accommodation.

[para19] The Parksville zoning bylaw distinguishes a "resort condominium" from a hotel. This is not definitive for the purposes of the Act. Paragraphs 39 and 40 of the respondent's written submission effectively equate "transitory tourist occupancy" with "hotel or motel accommodation". It is fair to infer that if the units were not strata titled the petitioners would rely on the exemption provided by s. 2(1) of the Regulation. Counsel for both parties implicitly or explicitly acknowledged in their oral submissions that if the units were not strata titled they would be exempt from the Act by virtue of s. 2(1) of the Regulation.

[para20] The petitioners' counsel made the point that the Lieutenant Governor in Council has, under s. 32(2)(1) of the Act, regulation-making power to define "new home" or "residential occupancy" for the purpose of the Act so as to expressly include buildings like the units which are, to use his preferred terminology, used for "resort accommodation".

[para21] If that is so, and in light of the position taken by the respondent and the apparent intent of the Lieutenant Governor in Council reflected by the Regulation s. 2(1) that such units should be covered as "new homes" under the Act, it seems inevitable that the Regulation would be amended to include buildings like the units under the definition of "new homes", despite the fact they are used in the same manner as hotels and motels, if the court were to declare that the units are not residential.

[para22] I make the following findings. "New home", as defined by the Act, includes a building used for "residential occupancy" which may include transient occupancy such as hotel and motel use. The Lieutenant Governor in Council was correct in concluding that hotel and motel buildings provide "residential occupancy", in light of the definition of that term in the Dictionary of Canadian Law (Dukelow & Nuse, 1991):

The occupancy or use of a building or part thereof by persons for whom sleeping accommodation is provided but who are not harboured or detained to receive medical care or treatment or are not involuntarily detained.

[para23] The units provide essentially the same accommodation as a hotel or motel, although they are not so classified under the zoning bylaw and may not be so advertised to the public. The units are not, however, exempt from the Act pursuant to s. 2(1) of the Regulation, because they are strata titled.

[para24] The difficulty in this case stems from the ambiguity arising from the use of the passive voice in the phrase "intended for residential occupancy" in the definition of "new home" in s. 1 of the Act. Essentially, the petitioners' argument is that since neither the developer, owners or Parksville municipal councillors intend the units to be used as permanent residences or as a hotel or motel they are not intended for residential occupancy.

[para25] I am not persuaded by this argument. The units are intended by any one who has an interest in them, be it the developer, owners, municipal councillors or rental customers to provide the latter with a place of transient or temporary "residential occupancy", (including sleeping accommodation). The units therefore come within the definition of that phrase cited in paragraph 22 above.

[para26] The petitioners' application is dismissed. Since it was prompted by the ambiguous wording of the Act and the argument advanced by the petitioners was not spurious, I make no award of costs.

E.R.A. EDWARDS J.

* * * * *

CORRIGENDUM

Released: January 26, 2001

[1] My Reasons for Judgment dated January 12, 2001, are amended by deleting paragraph 24 thereof, and adding the following paragraphs to be numbered 24, 25, and 26.

[24] The difficulty in this case stems from the ambiguity arising from the use of the passive voice in the phrase "intended for residential occupancy" in the definition of "new home" in s. 1 of the Act. Essentially, the petitioners' argument is that since neither the developer, owners or Parksville municipal councillors intend the units to be used as permanent residences or as a hotel or motel they are not intended for residential occupancy.

[25] I am not persuaded by this argument. The units are intended by any one who has an interest in them, be it the developer, owners, municipal councillors or rental customers to provide the latter with a place of transient or temporary "residential occupancy", (including sleeping accommodation). The units therefore come within the definition of that phrase cited in paragraph 22 above.

[26] The petitioners' application is dismissed. Since it was prompted by the ambiguous wording of the Act and the argument advanced by the petitioners was not spurious, I make no award of costs.

E.R.A. EDWARDS J.

CBR# 858

Sask v. Brooke

Between Shirley Sask, plaintiff, and Michael Brooke and Ursula Wenzel, defendants

New Westminster Registry No. S050062

British Columbia Supreme Court New Westminster, British Columbia Collver J. Heard: November 3, 2000. Judgment: December 27, 2000. (25 paras.)

Counsel: Brian L. Gibbard, for the plaintiff. Christopher R. Bacon, for the defendants.

[para1] COLLVER J.:-- On February 24 1997, Shirley Sask paid \$133,000 for a condominium in Langley, but because her unit and others in the complex leak, the assessed value of her unit has plummeted to \$22,200. She also faces an assessment of more than \$60,000 as her share of the estimated costs of repairs to the entire complex.

[para2] Although the condominium owners have sued the builder, alleging defects in construction, Shirley Sask has commenced this action against Michael Brooke and Ursula Wenzel, who sold her unit #206. She alleges that she was induced to purchase by the false or negligent representations made in the sellers' "property condition disclosure statement".

[para3] In this summary trial application, counsel for the parties cannot agree on either the appropriateness of the summary trial process or the issues raised by the pleadings. However, I believe the following questions must be answered:

1. Did Michael Brooke and Ursula Wenzel misrepresent the condition of their condominium at the time of sale?
2. Was Shirley Sask induced to purchase the condominium by those misrepresentations?
3. What damages has Shirley Sask suffered?

[para4] Particulars of the parties' transaction are set out in what appears to be a standard Fraser Valley Real Estate Board "contract of purchase and sale" form, with addenda containing references to the purchaser's obtaining of financing, perusal of strata council minutes and, most important, the sellers' statement concerning the condition of the property.

[para5] The disclosure statement sets out questions under the following categories: "General"; "Structural"; "Strata Unit"; "Additional comments and/or explanations". Answers are to be checked off as either "Yes", "No", "Do not know" or, "Does not apply". Mr. Brooke and Ms. Wenzel answered "Yes" or "No" to all questions, ignoring "Do not know" or "Does not apply".

[para6] Under "General", the sellers answered "Yes" to:

- A. Are the premises connected to a public sewer system?
- B. Are the premises connected to a public water system?

They then answered "No" to:

- C. Are the premises connected to a private or a community water system?
- D. Are you aware of any problems re: quantity or quality of well water?
- E. Are you aware of any problems with the septic system?
- F. Do the premises contain unauthorized accommodation?
- G. Are you aware of any encroachments, unregistered easements or unregistered rights of way?
- H. Are you aware of, or have you been charged any local improvement levies/charges?
- I. Have you received any other notice or claim affecting the property from any person or public body?

[para7] Under "Structural", the sellers answered "Yes" to questions about the presence of insulation in ceilings and exterior walls, and "No" to questions concerning the use of asbestos or urea formaldehyde insulation. After confirming that inspection and occupancy permits had been obtained and that wood stove or fireplace installations had been approved, the sellers answered "No" to the following questions:

- G. Are you aware of any additions or alterations made without a required permit?
- H. Are you aware of any structural problems with the premises or other buildings on the property?
- I. Are you aware of any problems with the heating and/or central air conditioning?
- J. Are you aware of any moisture and/or water problems in the basement or crawl space?
- K. Are you aware of any damage due to wind, fire, water?
- L. Are you aware of any infestation by insects or rodents?
- M. Are you aware of any roof leakage or unrepaired damage?

(my emphasis)

[para8] The sellers also answered "No" to questions about any problems with the electrical or plumbing systems.

[para9] With respect to the third and fourth of the mentioned categories ("Strata Unit" and "Additional Comments"), the questions and answers concern special assessments, strata council policies and by-laws, and restrictions on pets, children, or rentals, none of which touch upon matters pertinent to Ms. Sask's claim.

[para10] The disclosure statement's preamble and conclusion are also important. The document begins as follows:

"The following is a statement made by the sellers concerning the condition of the property or strata unit located at #206 - 20680 - 56 Ave., Langley B.C.

THE SELLERS ARE RESPONSIBLE FOR THE ACCURACY OF THE ANSWERS ON THIS DISCLOSURE STATEMENT AND WHERE UNCERTAIN SHOULD REPLY "DO NOT KNOW". THIS DISCLOSURE STATEMENT CONSTITUTES A REPRESENTATION UNDER ANY CONTRACT OF PURCHASE AND SALE IF SO AGREED IN WRITING BY THE SELLERS AND BUYERS."

After the questions and answers I have listed, the following appears immediately above the sellers' signatures:

"The sellers state that the above information is true, based on the sellers' current actual knowledge as of the above date. Any important changes to this information made known to the sellers will be disclosed by sellers to buyers prior to closing. The sellers acknowledge receipt of a copy of this disclosure statement and agree that a copy may be given to prospective buyers."

Immediately above the space for the buyer's signature, the following appears:

"The buyers acknowledge that they have received and read a signed copy of this disclosure statement from the sellers or the sellers' agent on the 24th day of February, 1997. The prudent buyers will use this disclosure statement as the starting point for their own inquiries. The buyers are urged to carefully inspect the property and, if desired, to have the property inspected by an inspection service of their choice."

[para11] Shirley Sask deposes that she relied on the statement to disclose problems of which the vendors were aware with respect to "the building and the suite" (my emphasis) because she was also buying an interest in the common property and there were provisions under the "General" and "Structural" categories of questions dealing with connection to public water and sewers as well as other matters "which would apply to the building more than the suite" (again, my emphasis).

[para12] However, Michael Brooke deposes that the disclosure statement pertained only to unit #206, and that he did not intend Shirley Sask to treat the document as applying to the entire complex. Indeed, he suggested that that would be an unreasonable interpretation of the document, which he described as "a generic form for use by vendors of strata units, single family dwellings, farms, or bare land".

[para13] In this case the determination of liability does not depend solely upon whose interpretation of the disclosure statement is favoured. The more important questions concern the extent to which the sellers represented the condition of the property and the extent to which Shirley Sask relied upon their representations.

[para14] Since problems concerning the entire complex were obviously important at the time of the purchase, one would expect a prudent purchaser to inquire about the history of expenditures for maintenance of common areas such as the roof, exterior, sidewalks, sewers, heating, electrical and plumbing systems, and other items mentioned in the sellers' disclosure statement. In that regard, a copy of the disclosure statement, dated February 17, 1997, was given to Shirley Sask before she signed the contract of purchase and sale on February 24th, and the sale was subject to Ms. Sask "perusing & approving" the strata council's minutes, bylaws, and financial statements.

[para15] Michael Brooke was both chair of the strata council and a member of its building committee prior to the transaction, and had chaired meetings held on July 17, August 21, October 16 and November 20, 1996, and January 15, 1997. He conceded at his examination for discovery that he was the person to whom problems with the building were referred, but deposes that at the time of the sale to Ms. Sask he was not aware of any structural problems with unit #206 or the surrounding buildings in the complex apart from the deck at unit #311 (which he claimed Ms. Sask had inspected) and "various leaks which had been reported in the strata council minutes".

[para16] Minutes of the meetings of October 16 and November 20, 1996 and January 15, 1997 refer to water leaks affecting units other than unit #206, and Michael Brooke deposes that he did not believe that those problems were serious or would require repair "beyond the strata council's designated budget for maintenance and repair". He added:

"7. Prior to the summer of 1996, there had been leaks in various units within the Cassola Court condominium complex, including the Premises [unit #206], which necessitated the replacement of my carpet. However, in May, 1996 the strata council for Cassola Court resolved to fix the leaking problems throughout the complex 'once and for all' and agreed to a special assessment from owners totalling \$33,000.00 and a withdrawal from a contingency reserve fund of \$27,000.00 in order to pay for the application of an elastomeric coating for the entire building."

"8. I believed that the elastomeric coating had solved most of the water leak problems throughout the Cassola Court condominium complex, apart from continuing leaks around windows and miscellaneous leaks, as opposed to leaks that came straight through the exterior stucco prior to the summer of 1996. The Premises [unit #206] did not have any further leaks after the summer of 1996."

[para17] At his examination for discovery, Michael Brooke was asked about replacement of his living room carpet in the fall of 1996, but attributed the replacement to a water leak that had occurred the previous year. He said that the problem was not reported in the disclosure statement because the leak had been repaired.

[para18] With respect to water leaks in unit #205, next door, Mr. Brooke conceded in his examination for discovery that elastomeric coating of the exterior of the complex had not solved his neighbour's water leakage problems through the fall of 1996 and into 1997 (strata council minutes of October 16, 1996 refer to the problems in unit #205). Accordingly, counsel for Shirley

Sask cites *Zaenker v. Kirk*, [1999] B.C.J. No. 3033 (20 December 1999), Kamloops No. 24348 (B.C.S.C.), in submitting that, while the disclosure statement does not constitute a warranty, it contains positive representations amounting to negligent misrepresentations, and that because the sellers knew that Shirley Sask would rely upon those representations, they give rise to a claim for damages.

[para19] Counsel for the sellers submits that Ms. Sask has not proved reliance upon the disclosure statement in isolation from the strata council minutes which were provided to her at the time of sale. He further submits that Ms. Sask has failed to prove that the sellers intended to mislead her in any way, particularly when the disclosure statement is read in conjunction with the strata council minutes.

[para20] I believe the sellers' position is correct.

[para21] The tort of negligent misrepresentation is now an established principle of Canadian law: *Queen v. Cognos Inc.* (1993), 99 D.L.R.(4th) 626 (S.C.C.). Five requirements must be met:

- (1) there must be a duty of care based on a "special relationship" between the representor and the representee;
- (2) the representation in question must be untrue, inaccurate, or misleading;
- (3) the representor must have acted negligently in making said misrepresentation;
- (4) the representee must have relied, in a reasonable manner, on the said negligent misrepresentation;
- (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

[para22] In this case, the first three elements arguably support Shirley Sask's claim since the sellers obviously owed Shirley Sask a special duty of care with respect to the disclosure of patent defects that were within their knowledge, and if the representations contained in the property condition disclosure statement can reasonably be interpreted as applying to the entire condominium complex their effect is to mislead.

[para23] However, whether or not the sellers were negligent in purporting to confine their representations to the condition of their own unit is not, in my view, determinative of this claim. In light of their concurrent provision of minutes from strata council meetings where leakage problems were discussed, the sellers' disclosure obligations were fulfilled in a manner that should have alerted a prudent purchaser to the need to make further inquiries.

[para24] In my view, the fourth requirement of the mentioned test in *Queen v. Cognos Inc.* has not been met, as I cannot conclude that Shirley Sask acted in a reasonable manner by relying upon the property condition disclosure statement without reference to the information provided in the strata council minutes. The sale was subject to a condition precedent that contemplated perusal and approval of the strata council's minutes, bylaws and financial statements, and in complying with that condition the sellers were effectively providing Shirley Sask with the history of water leakage problems in the complex. In light of her opportunity to review those documents, Ms. Sask had the right to refuse to close the transaction as a consequence of that information, but chose not to do so.

[para25] On the whole of the evidence, it has not been proven that the sellers misrepresented the condition of unit #206, and the claim is dismissed, with costs to the defendants.

COLLVER J.

CBR# 860

Affirmed Mortgage Group Ltd. v. Montague House Development Corp.

Between Affirmed Mortgage Group Ltd., Laurentian Trust of Canada Inc. and Pacific Coast Savings Credit Union, petitioners, and Montague House Development Corp., Boss Development Ltd., Laurentian Trust of Canada Inc., Affirmed Mortgage Group Ltd., Patrick Guiney, Deep Cove Plumbing and Heating Ltd., Beacon Secure Systems Ltd., Christopher Robin Packard, the Owners, Strata Plan VIS4519, and Douglas M. Baird, respondents

Victoria Registry No. 982480

British Columbia Supreme Court Victoria, British Columbia Master Patterson (In Chambers) Heard: October 12 and 19, 2000. Judgment: November 7, 2000. (20 paras.)

Counsel: Allan R. Tryon, for the Receiver Manager. Gregory T. Rhone, for the Owners, Strata Plan VIS4519.

[para1] MASTER PATTERSON:-- The Receiver Manager seeks a determination of the amount owing by him to The Owners, Strata Plan VIS4519, and an order that certain funds held in trust by solicitors be paid out to The Owners, Strata Plan VIS4519 ("the strata council") and any balance be paid to the Receiver Manager.

[para2] On August 7, 1998, John Laughlin McKinnon was appointed Receiver Manager by order of Master McCallum in the context of foreclosure proceedings. The respondent Montague House Development Corp. was the developer of a condominium in the Municipality of Saanich, which catered to senior citizens. One of the requirements of such a development is that the owners of the individual units pay, in addition to the usual assessments, an amount to cover costs of extra services provided, including, for example, meals. At the time of his appointment, the Receiver Manager took control of 41 units which were unsold, and since that time he has sold all but seven.

[para3] Various sales were presented to the court and were approved by court order. A term of some of the orders for sale since March 2000 was that certain funds be held in trust, pending resolution of the issues between the Receiver Manager and the strata council. It is the disposition of those funds which is in issue between the Receiver Manager and the strata council.

[para4] A chronology of events is as follows:

February 12, The Owners, Strata Plan VIS4519 purport to 1998 enter into a management contract with Tara Hytes Inc. The agreement is executed by Peter Dembicki on behalf of both parties.

February 15, Strata Plan VIS4519 is registered in the 1998 Victoria Land Title Office.

August 7, The Receiver Manager is appointed by court 1998 order.

April 1, 1999 The Receiver Manager, on behalf of Strata Plan VIS4519 enters into a management contract with Kolyvan Residential Properties Services Ltd. ("Kolyvan"). The contract to be effective May 1, 1999 for a term of one year.

August 19, The first annual general meeting of the 1999 Owners, Strata Plan VIS4519. First strata council elected.

November 1, Kolyvan's contract is terminated by the 1999 strata council.

March 2000 Strata council refuses to provide necessary Form A to allow registration of transfer of strata lots from the Receiver Manager to the new purchaser, pursuant to court order, resulting in funds being set aside to secure the amounts allegedly owing.

March 16, President of the strata council informs 2000 the Receiver Manager that the strata council is owed \$141,917.44.

[para5] In order to try and resolve this matter, both the strata council and the Receiver Manager have retained chartered accountants to review the accounts between the parties. The accountant retained by the strata council determined that the sum of \$36,219.55 was owing by the Receiver Manager to the strata council as of July 31, 1999.

[para6] The accountant for the Receiver Manager accepting that figure makes certain deductions which have been agreed to by all parties, and adds in an amount paid by Kolyvan to the Receiver Manager. The calculation is as follows:

Balance owing from Receiver Manager according to Bloomfield Report \$36,219.55

Credits:

Don Nolin Accounting \$ 600.00 Dominion Insurance 3,835.01 Tara Hytes payment overlooked 6,317.50 Payment on account of strata fees 5,292.00

Subtotal \$16,044.51 \$16,044.51

\$20,175.04

Payment by Kolyvan to Receiver Manager 12,834.14

Total \$33,009.18

[para7] Both the Receiver Manager and the strata council agree on the amount due of \$33,009.18, but the strata council argues that there is an additional amount owing of \$20,024.55, and the Receiver Manager argues that there should be a further deduction of \$28,007.37.

[para8] The strata council argues that the sum of \$20,024.55, which represents the full amount of \$32,858.69 paid by the Receiver Manager to Kolyvan, less the accepted credits of \$12,834.14, was an improper expenditure. The reasons advanced

include the argument that the retainer was improper and not authorized by the strata council, that the strata council should not have to pay any of these expenses. The strata council concedes that possibly the management fee of \$9,533.70, including GST, may be justified.

[para9] The Receiver Manager argues that there should be two items deducted from the amount agreed to be due:

(a) The sum of \$9,978.37 which represents the balance in the strata corporation bank account at July 15, 1999, which was transferred to Kolyvan as property manager.

(b) The sum of \$18,029 paid by the Receiver Manager to Kolyvan as monthly assessments for units in the name of the owner developer, Montague House Development Corp. This amount makes up a large portion of the sum of \$20,024.55, claimed as an addition by the strata council.

[para10] It appears that it is not possible for the strata council to argue that there should be added on to the amount due to it the sum of \$20,024.55 for expenses paid by Kolyvan when those expenses have already been taken into account by their chartered accountant in determining the amount due. To allow that increase would, in my view, be a duplication.

[para11] The question then turns on whether the deductions suggested by the Receiver Manager should be made. To a great extent that hinges on the propriety of the retainer of Kolyvan.

[para12] At the time Kolyvan was retained, effective May 1, 1999, there was no strata council, as none had been elected, and the Receiver Manager therefore stood in place of the owner developer which de facto acts as strata council until there is an elected council.

[para13] Much was made of the fact that the annual general meeting was late, in violation of s. 123(1) of the Condominium Act, R.S.B.C. 1979, c. 61, which provides that the first annual general meeting is to be held within nine months of the registration of the strata plan, or when 60 percent of the units have been sold, whichever date is earlier. In this case, to comply with the Act, the first annual general meeting should have been held November 15, 1998.

[para14] A review of the Act does not disclose any penalty for the failure to hold the annual general meeting within the time allotted. There is a saving provision relating to the actions of the strata council, s. 122(3) of the Condominium Act provides:

All acts done in good faith by the council are, even if it is afterwards discovered that there was some defect in the appointment or continuance in office of a member of the council, as valid as if the member had been duly appointed or had duly continued in office.

[para15] A Receiver Manager appointed by court order, as in this case, is and remains throughout the term of his appointment an officer of the court, his actions are subject to the scrutiny of the court. Notwithstanding the fact that there appears to be a failure to comply with s. 123(1) of the Condominium Act, there may have been very good practical reasons why an annual general meeting could not have been held in November of 1998. The Receiver Manager swears that one of the reasons it was necessary to retain Kolyvan was to prepare the necessary materials for the annual general meeting. There is no evidence that the retainer was made otherwise than in good faith by the Receiver Manager, and consequently it would appear that s. 122(3) of the Act would apply and the retainer would be valid. Kolyvan is a professional property manager and would have had experience, for example, in the preparation of materials for the annual general meeting.

[para16] Another reason advanced by the strata council is that there was already a management company under contract, that is, Tara Hytes. That contract was purportedly executed by the strata council on February 12, 1998, which was several days before the strata council existed. Until the strata plan is registered in the Land Title Office, the strata corporation does not exist as an entity, and consequently has no ability to enter into a contract at that date. In my view, the Receiver Manager was entitled to consider that contract to be invalid, and hence entirely justified in retaining Kolyvan. It is possible that since August 1999 the strata council has adopted or ratified the Tara Hytes contract, but in my view that does not affect its initial invalidity.

[para17] It follows if the Receiver Manager was entitled to retain Kolyvan that he is obliged to pay monthly assessments to Kolyvan as property manager. Thus the sum of \$18,029 was properly paid to Kolyvan. During the course of argument, counsel for the strata council conceded that the amounts paid out by Kolyvan as expenses were acceptable without a detailed review. No further inquiry is therefore required.

[para18] The other amount in issue is \$9,978.37, which apparently was the balance in the strata council bank account transferred to Kolyvan on July 15, 1999. These funds were in a bank account apparently controlled by Mr. Dembicki at the time, and were made up of the balance of some assessments. This fund was properly transferred to the management company retained by the Receiver Manager, and no doubt used for various expenditures. It follows that this is not an amount which is repayable by the Receiver Manager to the strata council.

[para19] As a consequence, the Receiver Manager is entitled to an order that the sum of \$5,001.81, plus court order interest from July 31, 1999 to the date of this order be paid out to the strata council from the funds held in trust, and that the balance of the funds, including any accrued interest be paid out to the Receiver Manager.

[para20] Unless there are settlement offers of which the court is unaware, the Receiver Manager is entitled to his costs of this application, assessed on Scale 3, to be paid by the strata council forthwith after the assessment.

MASTER PATTERSON

CBR# 228

Parlett v. Strata Plan LMS 2706

Between Michael Gordon Parlett and Lorelea Jeanne Watson, petitioners, and The Owners, Strata Plan LMS 2706, respondents

New Westminster Registry No. S050470

British Columbia Supreme Court New Westminster, British Columbia Pitfield J. Heard: October 4, 2000. Judgment: October 25, 2000. (41 paras.)

Counsel: Jamie A. Bleay, for the petitioners. Gwendoline C. Allison, for the respondents.

[para1] PITFIELD J.:-- This petition is concerned with the question whether Mr. Parlett and Ms. Watson, the owners of a strata lot in the Mayberry condominium development, are entitled to park their half-ton, extended cab pick-up truck on common property which the strata corporation says is restricted for use by visitors.

[para2] The petitioners say that by-laws of the corporation permit them to park on the common property. Should that not be the case, they say that steps taken by the corporation to restrict the parking of vehicles owned by residents on common property designated for use only by visitors is oppressive or unfairly prejudicial to them and they are entitled to relief as a result.

[para3] The strata lot owned by the petitioners is comprised of living accommodation and a garage that ordinarily permits the parking of two vehicles, one behind the other. The corporation allows an owner to park a vehicle on the driveway in front of the owner's lot provided no portion of the vehicle encroaches on any portion of the adjacent roadway which is a fire lane.

[para4] The petitioners' vehicle is too long to be parked, together with their second vehicle, in the garage. It is too long to be parked in the driveway in front of the petitioners' lot without protruding into the fire lane. If it is to be parked on the site at all, the truck must be parked on common property designated for visitor parking.

[para5] The petitioners say the developer represented to them at the time they purchased their lot in the third phase of the Mayberry project that they would be permitted to park the truck on common property. Whether or not the representation was made, the petitioners do not base their case on it. They say, to the contrary, that the by-laws and rules of the corporation in place when they purchased their lot on August 27, 1997 permit them to park the vehicle on common property.

[para6] At the date of purchase the relevant by-laws provided as follows:

131(1) An owner shall not

(f) park any recreational vehicle, boat, trailer or other property, except passenger vehicles, on the common property or limited common property without approval of the strata council.

135.7 Parking stalls shall only be used for vehicles less than 4,000 kg G.V.W. owned or leased by persons who are residents of the building or visitors of such residents. A resident shall use only the parking spaces assigned to his strata lot, save and except for private arrangements with other owners for the use of parking spaces assigned to such other owners. Assigned space(s) shall not be leased or rented to a non-resident.

135.9 Parking is only permitted in a designated parking space, and shall not reduce the width of an access driveway. Any vehicle which does not comply with this paragraph may be removed at the owner's expense.

[para7] The rules and regulations adopted by the strata council with effect from July 1997, provided as follows:

VISITOR PARKING: Visitor Parking is for visitor's only. Residents parked in visitor parking will be towed with all costs born by the vehicle owner.

[para8] The petitioners say by-law 131(1)(f) permits them to park their truck, which is a passenger vehicle, on common property without approval of the strata council.

[para9] Although the truck is a passenger vehicle, it is my opinion that the by-laws cannot be construed in the manner suggested by the petitioners.

[para10] Admittedly, the parking by-laws are not a work of art. They represent a blend of the statutory form of by-laws (s. 131(1)(f)) and other terms (s. 135.7 and 135.9) that must have been gleaned from precedents without much thought being given to the suitability of those terms for the purpose.

[para11] Notwithstanding the able submissions of counsel, I am satisfied that s. 131(1)(f) of the by-laws has the effect of reserving available parking for passenger vehicles, as opposed to other kinds of property, but it does not authorize an owner to park a passenger vehicle on common property except as permitted by other by-laws related to parking.

[para12] Section 135.7 of the by-laws provides that an owner shall only park in a space assigned to the owner's lot. That provision must have been intended to apply to developments where owners' parking spaces were common property and not part of the strata lot. In the case of the Mayberry development, every owner owned a garage that accommodated two vehicles of most sizes. There was no need to assign parking places to any owner and none were so assigned. The effect of s. 135.7 of the by-laws was that no owner had a right to park in a parking place other than those comprising part of the strata lot itself.

[para13] Section 135.9 of the by-laws permits parking on common property in designated parking areas and not otherwise. The only common property designated for parking were the stalls designated for use as visitor parking. None of those was assigned to an owner within the meaning of s. 135.7 of the by-laws. A lawfully adopted rule of the corporation prohibited owners from parking in those spaces.

[para14] In my opinion, the by-laws and rules and regulations of the corporation in force when the petitioners purchased their property prohibited them from parking their truck on common property designated for visitor parking.

[para15] The remaining question is whether the corporation has acted, in relation to parking, in an oppressive or unfairly prejudicial manner towards the petitioners so as to justify relief as contemplated by s. 42 and 43 of the Condominium Act, R.S.B.C. 1996, c. 64 providing as follows:

Oppressive acts

42 An owner may refer to arbitration or may apply to the court to prevent or remedy a matter if the owner alleges

(a) that the affairs of the strata corporation are being conducted, or the powers of the corporation or strata council are being exercised, in a manner oppressive to one or more owners, including himself or herself, or

(b) that some act of the strata corporation has been done or is threatened, or that some resolution of the owners or a class of owners has been passed or is proposed that is unfairly prejudicial to one or more owners, including himself or herself.

Court order

43 On an application to court under section 42, the court may make the interim or final order it considers appropriate, and, without limiting that power, may

(a) direct or prohibit an act of council or vary a transaction or resolution, and

(b) regulate the conduct of the corporation's future affairs.

[para16] Action or conduct that is oppressive is that which is undertaken by the corporation in bad faith, that is burdensome, harsh or wrongful, or is lacking in probity or fair dealing (*Esteem Investments Ltd. v. Strata Plan No. VR 1513 (1987)*, 46 D.L.R. (4th) 577 at 579-80 (B.C.S.C.)). In determining whether conduct is oppressive, one is concerned with the nature and quality of the conduct of the corporation.

[para17] Action or conduct that is unfairly prejudicial is that which is unjust and inequitable as it pertains to the complainant (*Esteem Investments Ltd.*, supra at 580). In that determination, one is concerned with the effect of lawful action or conduct on the complainant and whether the effect is just and equitable. Another of the factors to be considered is the effect of the relief sought on other interested persons, in this case the other owners in the Mayberry condominium project (*Gray v. Strata Plan No. VR 840*, [1994] B.C.J. No. 2140 (B.C.S.C.) at para. 23).

[para18] Counsel for the petitioners relies on the case of *Alvarez et al v. Strata Plan NW927*, [1988] B.C.J. No. 1638 (B.C.S.C.) as support for the proposition that a finding of oppression or unfair prejudice is not a pre-condition to relief under s. 43 of the Condominium Act. To the extent the case stands for the proposition as stated, I do not consider myself bound by it for several reasons.

[para19] The principle enunciated in the case of *Esteem Investments Ltd.*, supra, that relief is dependent on a finding that conduct is unfairly prejudicial or unjust and inequitable, was not contradicted or modified by the Court of Appeal (see (1988), 53 D.L.R. (4th) 377) although on the question of whether the result in that case was unfairly prejudicial, the Court of Appeal's conclusion differed from that of the trial judge.

[para20] The claim in *Alvarez* was based on oppression rather than unfair prejudice. Any oppression that did exist had ended by the time the petition was heard and the issue was moot. The principle stated by the court did not form the basis of the court's decision. I am not bound to follow the principle were I inclined to the view that there were no oppression or unfair prejudice but an unjust result in any event.

[para21] In so far as unfair prejudice is concerned, the court in *Alvarez* appears to have adopted the "just and equitable" test saying as it did that the court could grant whatever remedy it deemed "just" in the circumstances. The imposition of a remedy that is just necessarily implies that the status quo is not just, which amounts to saying that the status quo is unjust and inequitable or unfairly prejudicial.

[para22] The view generally accepted by this court, and that which I will apply, is that the availability of a remedy under s. 43 is dependent upon a finding that conduct was oppressive or unfairly prejudicial. See, for example, *Barnes v. Strata Corp. NW3160*, [1997] B.C.J. No. 1081; *Gray v. Strata Plan No. VR840*, [1994] B.C.J. No. 2140; *Steinbrenner v. Strata Plan No. K768*, [1994] B.C.J. No. 463; and *Bond v. Strata Plan VR2538*, [1996] B.C.J. No. 2137.

[para23] The facts with respect to oppression and unfair prejudice in the case before me are the following.

[para24] The petitioners acquired their strata lot on August 27, 1997. At the time of purchase they knew their vehicles would not fit together in their garage. They had reviewed the by-laws of the corporation. It is unclear whether they had reviewed the rules and regulations. They must be taken to have reviewed or been aware of the disclosure statement pertaining to the project indicating that ten visitor stalls would be designated in Phase One, six would be designated in Phase Two and two would be designated in Phase Three of the Mayberry project.

[para25] The amended disclosure statement applicable to Phase 3 provided as follows:

Phase 3 of the Development will have 54 parking stalls including 2 visitor parking stalls. The 2 visitor parking stalls will be designated as common property on the strata plan. The other 52 parking stalls will be included within individual Lots.

[para26] Upon moving to their home, the petitioners began parking the truck in a parking place on common property. The space was not then marked as visitor parking. In September 1997, the strata council began receiving complaints about residents parking in visitor parking spaces. The minutes of the September 3, 1997 council meeting reminded owners that visitor parking was limited and restricted to visitors only.

[para27] The issue of parking in visitor spaces remained a contentious issue throughout the fall of 1997. At an extraordinary general meeting of the owners held December 6, 1997, those in attendance adopted a resolution permitting the petitioners to park in a visitor parking place on a temporary basis while the council reviewed the issue of permitting owners to park over-sized vehicles in visitor parking spaces.

[para28] On December 31, 1997 the petitioners wrote to the strata council asking for the adoption of a special resolution permitting them to park their truck in one of the visitor parking spaces. The council did not specifically respond to the request. However, at the annual general meeting of the strata corporation held April 27, 1998, a special resolution proposing that the petitioners have the exclusive use of a single visitor stall was defeated.

[para29] The corporation's review of the parking situation took place. On November 12, 1998, the property manager advised the petitioners that the temporary permission they had been granted to park in a visitor parking space had been rescinded. The manager advised the petitioners that if they did not cease to use the space, their vehicle would be towed.

[para30] On November 16, 1998 the strata council accepted the recommendations of the parking committee that all temporary permits allowing residents to use visitor parking stalls for personal use be cancelled, that each owner be issued two visitor parking passes, and that the parking by-law be enforced by towing.

[para31] In early December 1998, a notice regarding the intended enforcement of the parking rules and regulations was sent to all owners.

[para32] The petitioners filed their petition on December 7, 1998. They applied for an interim injunction restraining the council from towing their vehicle. The injunction was granted on December 14, 1998. No steps were taken by the petitioners to have their petition asserting oppressive conduct on the part of the council heard by the court.

[para33] On November 1, 1999 the by-laws of the corporation were amended. The prior rule restricting the use of visitor spaces to visitors and providing that offending vehicles would be towed was elevated to a by-law.

[para34] In February 2000 the strata corporation filed its own petition seeking a declaration with respect to the validity of the by-law adopted in November 1999, an order setting aside the injunction obtained by the petitioners in December 1999, and an injunction restraining the petitioners from parking in a visitor parking space. In July 2000 the petitioners took steps to have their petition heard. I declined to hear that petition as all matters could be considered in the course of hearing the Parlett/Watson petition.

[para35] The evidence does not support any finding that the corporation acted in bad faith, nor in a manner that is burdensome or harsh or lacking in probity and fair dealing as it pertains to the petitioners' parking rights. To the contrary, the strata council and the corporation have acted in a manner that resulted in the full and fair consideration of the issue before them. The by-laws reflect the will of a sufficient number of owners to permit the adoption of a special resolution. The corporation has not acted in a manner that is oppressive to any owner in so far as parking is concerned.

[para36] I cannot conclude that the parking policy is unjust and inequitable so as to be unfairly prejudicial to the petitioners. It is true that the petitioners are affected by a policy that has been in place from a point in time prior to their acquisition of their strata lot. So too are all other owners. Strata lot owners are not permitted to do with common property that which they might do were they sole owners of the common property. The inability to accommodate all individual wishes is the inevitable result of community living.

[para37] As suggested in *Gray v. Strata Plan No. VR840*, supra, I should consider the effect of any relief that could be granted to the petitioners upon other owners. All owners would suffer the loss of one of eighteen visitor parking spaces in a ninety-one lot strata project. They would also be required to endure the ongoing presence of an oversize vehicle parked on common property.

[para38] The owners have expressed their wish, through two special resolutions adopted in 1997 and 1999, that owners not be permitted to park in visitor parking areas.

[para39] It would be unjust and inequitable to require the owners collectively to absorb the effect of the loss of a single visitor parking space and its use for the accommodation of an over-size vehicle. The project was developed with limited visitor parking.

[para40] The parking policy that was suitable to the project has been in place from the outset. The petitioners are obliged to respect the policies of the project of which they are a part.

[para41] The Parlett and Watson petition is dismissed with costs. It follows that the interim injunction ceases to be of force and effect.

PITFIELD J.

CBR# 103

Di Cecco v. 733725 Ontario Inc.

Between

Alessandro Di Cecco, Ronald Meyer, Ronald C. Neil, Catherine O'Halloran, June Tarrant and Douglas Toombs, Plaintiffs, and 733725 Ontario Inc., Defendant

Action No. 15280/90

Ontario Court of Justice - General Division
Newmarket, Ontario
Fedak J.

Heard: November 22, 1990

Judgment: December 21, 1990

Application for interpretation of contracts. The applicants were purchasers of condominium units. The respondent vendor did not close the deal by the date fixed by the agreement. The parties sought direction of the court regarding extensions to the closing date. The agreement provided that the vendor, in the event of unavoidable delays, would be permitted reasonable extensions from time to time on notice to the purchasers, to a maximum of 15 months. The vendor argued that the provision allowing the vendor to terminate if the declaration and description were not registered within 12 months of the occupancy date allowed a further extension of the closing date.

Kathryn Boyd, for the Plaintiffs.

Thomas P. McIver, for the Defendant.

FEDAK J.:—

THE FACTS

The applicants are purchasers of various units of a condominium development at 115 Main Street, Newmarket Ontario from the Respondent Vendor - 733725 Ontario Inc.

Since the transactions did not close by the closing date as set out in paragraph 10 of the Agreement of Purchase and Sale, the parties now seek the assistance of the court in interpreting various clauses in this agreement so as to determine what extensions of closing dates each transaction provides.

At the outset, paragraph 1 of the Agreement of Purchase and Sale defines certain matters, but does not define "closing date".

Paragraph 10 of the Agreement between parties specifically sets out what the intended closing date should be.

In the agreements between the Vendor and Purchasers, Di Cecco, O'Halloran, Neil, Tarrant and Toombs, the closing date is set at October 16, 1989.

For the Purchasers Meyer and Tarrant, as well, a closing date of October 30, 1989 is prescribed in paragraph 10.

Several other paragraphs refer to closing dates and occupancy dates.

Paragraph 11(d) provides that:

"the closing date shall be extended to a date twenty (20) days after notice in writing is given by the Vendor's solicitor to the purchaser or his solicitor that the Declaration and Description have been registered. If the Purchaser fails to close the transaction as aforesaid, through no fault of the Vendor, the Purchaser shall be in default hereunder, and shall be required to deliver, vacant possession of the unit. The Vendor shall in that event, be entitled to retail all monies paid hereunder for damages and expenses and unpaid occupation charges. The Purchaser shall be responsible for the damages and expenses and the cost of re-decorating as may be determined by the Vendor at its sole discretion as a result of the possession herein."

In paragraph 17, it is provided that:

"If the completion of the Unit or the common elements is delayed by reasons of strikes, lock-outs, fire, lightning, tempest, riot, war and unusual delay by common carriers or unavoidable casualties or by any other cause of any kind whatsoever beyond the control of the Vendor the Vendor shall be permitted a reasonable extension of time from time to time for completion and the Closing Date shall be extended accordingly. In addition to or in lieu of the foregoing extension(s), if any, the Vendor shall be permitted to extend the Closing Date for a period not exceeding fifteen (15) months upon first giving, either directly or through its solicitors, to the Purchaser or his solicitors written notice thereof by prepaid registered post, which notice shall be deemed to have been received three (3) business days following the date of posting: If the Vendor is unable to complete the Unit and close this transaction within such extended time or times for closing, all monies paid hereunder by the Purchaser other than any occupancy fees, shall be returned to him and this Agreement shall be null and void. If the Unit is substantially completed by the Vendor on or before the Closing Date or any extension thereof as aforesaid, this transaction shall be completed on such date notwithstanding that the Vendor has not fully completed the Unit or the common elements and the Vendor shall complete such outstanding work within a reasonable time after closing, having regard to weather conditions and the availability of labour and materials. In any event, the Purchaser acknowledges that failure to complete the common elements on or before closing shall not be deemed to be a failure to complete the Unit.

It would appear therefore, that if these provisions are read as whole, that the closing date could be extended from time to time, or to a date 20 days after Registration, but in no event after 15 months of the original closing date as set out in Paragraph 10 of each Agreement of Purchase and Sale. For those transactions originally slated to close on October 15, 1989, the closings could be extended to no later than January 15, 1991 and for those transaction originally scheduled to close on October 30, 1989, the closings could be extended to January 31, 1991.

Mr. McIver on behalf of the Respondent argues that paragraph 11(j) provides yet a further set of closing dates open for the Vendor to utilize.

That paragraph provides:

"If the Declaration and Description have not been registered within 12 months after the occupancy date, the Purchaser hereby agrees to vacate the unit and deliver possession of the unit to the Vendor in its original state, subject only to reasonable wear and tear, shall be returned to the Purchaser, and the return of such monies shall be deemed to terminate the Agreement, and the Purchaser will deliver to the Vendor a Release in the Vendor's standard form."

This paragraph in my opinion does not provide further extension dates. It simply provides the Vendor with a procedure and remedy to recapture possession after 12 months of occupancy if the Declaration and Description are not yet registered. This paragraph therefore deals primarily with occupation and re-possession by the Vendor and not at all with extension of closing dates.

To hold this paragraph as a further right of extension would Create an ambiguous definition of closing dates. Under the Contra Proferentum Rule, such ambiguity could not be allowed to stand.

It is interesting to note as well that S. 51 of the Condominium Act provides implied covenants in Agreements of Purchase and Sale, but does to provide for a method to set or fix closing dates.

Accordingly, the latest closing date of January 15, 1991 applies to the following purchasers and units.

- 1) Alessandro DiCecco and Catherine O'Halloran Unit 31, Level 1

- 2) Ronald C. Neil
Unit 37, Level 1

- 3) June Tarrant
Unit 59, Level 2

- 4) Douglas Toombs
Unit 40, Level 1

Accordingly, the latest closing dates of January 30, 31, 1991 apply to the following purchasers and units.

- 5) Ronald Meyer
Unit 18, Level 2

- 6) Ronald Meyer
Unit 15, Level 1

- 7) June Tarrant
Unit 9, Level 1

FEDAK J.

CBR# 327

Taggart v. Condominium Corp. No. 339

Between

Harold Taggart and Muriel Mae Taggart, Plaintiffs, and
Pauline Bachtold and Carleton Condominium Corporation No. 339, Defendants

Action No. 30109/89

Ontario Court of Justice - General Division

Ottawa, Ontario

Sirois J.

March 16, 1992

(23 pp.)

The plaintiffs sought an injunction prohibiting the occupation or use of certain parking space by the defendant B, a declaration that they were entitled to use the parking space, or for rescission of the contract or damages. The defendant B moved to dismiss the part of the action dealing with the remedies sought against both defendants. The plaintiffs were interested in buying a condominium in Ottawa. They needed two parking spaces as they each owned a car. They were advised by an employee of Timberlay Developments Limited that they would have to buy two condo units. In February 1985, two agreements of purchase and sale were executed by HT in trust as purchaser and Timberlay Developments Limited in trust as vendor of two adjoining units. The Declaration creating the defendant Condominium Corporation stated that the owner of each unit would have the use of one underground parking space. A Resolution was passed to change the allotment of parking spaces by assigning two spaces to Unit 2, and none to Unit 3. The plaintiffs listed Unit 3 for sale, and instructed the agent to advertise it for sale without a parking space. Unit 3 was sold to the defendant B. In the agreement of purchase and sale, the word "parking" was crossed out and "locker" was substituted. A Resolution was passed taking away the extra parking space from Unit 2 and assigning it to Unit 3.

D. Nicholson, for the Plaintiffs.

D. Mayo, for the Defendant, Bachtold.

M. Citron, for the Defendant, Carleton Condominium Corporation 339.

SIROIS J. (orally):— At the opening of the trial, counsel indicated they had no agreed upon statement of facts, but that they had agreed to file a book of documents as Exhibit No. 1, as well as the amended Application Record of an application commenced in the District Court of Ontario on September 1, 1988. The style of cause in that matter is as follows:

"Court File No. 24746/88 DISTRICT COURT OF ONTARIO

B E T W E E N:

HAROLD TAGGART and
MURIEL MAE TAGGART

Applicants
-and-

CARLETON CONDOMINIUM CORPORATION NO. 339, et al.
Respondents.

AMENDED APPLICATION RECORD "

The plaintiffs herein were the applicants and the defendant, Carleton Condominium Corporation No. 339, et al., were the respondents, along with all the all the unit owners.

Reference also was made by counsel to an application in the same District Court of Ontario, but the record was not filed; only a copy of the Order made by the Honourable Mr. Justice Charles F. Doyle on August 29th, 1989 as submitted. The style of cause in that matter is as follows:

"Court File No. 28332/89

DISTRICT COURT OF ONTARIO
BEFORE THE HONOURABLE) TUESDAY, THE 29TH DAY OF
JUDGE DOYLE) AUGUST, 1989

BETWEEN:

CARLETON CONDOMINIUM CORPORATION NO. 339
(Applicant)

AND:

THOSE OWNERS AND MORTGAGEES MORE PARTICULARLY NOTED IN SCHEDULE "A" ATTACHED HERETO

(Respondents)"

In the latter application the applicant was the defendant, Carleton Condominium Corporation No. 339 and the respondents were all the unit owners as well as the mortgagees listed in the schedule. It is to be noted that the Order itself was filed as Exhibit No. 5, but it did not include the schedules referred to therein, although there was in explanatory letter from the firm of Nelligan/Power who were acting for the applicant. Schedule D of the Order purported to amend the Declaration to correct the error in the description as the result of the wall being moved.

The Court was informed also at the outset of the trial that the plaintiff, Mr. Harold Taggart, had passed away shortly before this matter came to trial.

SUMMARY OF THE FACTS:

In the fall of 1984, the Taggarts were interested in buying a condominium at 215 Somerset Street West, in the City of Ottawa. They were looking for a condominium with two parking spaces, as they each owned a car. They were advised by Robert E. McElligott of Timberlay Developments Limited that they would be required to purchase two condo units (see paragraphs 5 and 6 of their affidavit sworn on August 23, 1989, being part of the amended record in Application No. 24746/88).

It is to be noted that at the trial Mr. McElligott did not testify.

On February 7, 1985, two agreements of purchase and sale were executed by Harold Taggart "In Trust", described as purchaser, and Timberlay Developments Limited "In Trust", described as the vendor. These two agreements of purchase and sale are part of the material filed and are seen at tabs 4 and 5 of Exhibit Number One. Neither agreement refers to the parking arrangement nor to the moving of a common wall that was to be moved to increase the area of the master bedroom in unit 2 by 115 square feet, reducing the area in unit 3 by the same amount.

Each agreement, however, referred to the purchase from the vendor of "Suite No. 4C Modified**" and shortly below indicating "*** AS PER MODIFIED PLAN ATTACHED" No such plans were filed in court.

On June 18, 1986, the declaration and description of the Carleton Condominium Corporation No. 339 were filed in the proper registry office as Instrument No. 59738. A copy of the Declaration appears at Tab 1 of Exhibit No. 1. Parking is discussed in Article IV (6) and does not reflect the alleged agreement the purchasers claimed they had with Mr. McElligott. It is also to be noted that the owner in fee simple of lands" is corporation No. 607681 Ontario Limited.

Article IV (6) states:

Parking: The owner of each unit shall have the use subject to the provisions of this Declaration, the By-Laws of the Corporation and Rules and Regulation passed pursuant thereto of one (1) underground parking space, the location of which shall be assigned by the Board of Directors from time to time. Each parking space shall be used for the parking of one (1) motor vehicle.

It gives the right to each unit owner to use one underground parking space in the common area described as the "garage".

On July 22, 1986, by-laws were passed by 607681 Ontario Limited: By-Law No. 1 and then By-Law No. 2 concerning the borrowing powers of the board of directors, as well as the "Condominium Rules". Mr. Robert McElligott, as president of the 607681 Ontario Limited corporation, certifies that the said corporation or declarant owns 100 percent of the units at the time and, as such, confirms the by-laws and other condominium documents.

It is also to be noted that on the same date a parking resolution was passed which was filed at tab 3 of Exhibit No. 1. Again, the four paragraphs in the Resolution refer to Article IV (6) of the Declaration as providing for the owner of each unit to be entitled to the use of one parking space which will be assigned by the board as set out in Schedule "A". And, in Schedule "A" we have a full page of typewritten or printed numbers and a correction in ink which appears next to level 4-2 and 4-3, crossing out the parking area number six for number three, and adding parking area 6 to 402 (unit 2 on level 4).

We have no specific date as to when the majority of the condo units were sold at which time Section 26 provides for passing of the control of the new condo corporation to the unit owners and their representatives. Mr. Thomas G. Joseph was the first president of the Carleton Condominium Corporation 339 and his recollection is that his mandate started around June, 1986.

The transaction for the purchase of unit 2, level 4, was closed on the 27th day of August, 1986 by the registration of a transfer or deed bearing registration number 469698.

The closing of the other unit took place on December 22, 1986.

There was little evidence as to what transpired at the closing on either date. The only evidence is the undertaking filed at tab 6 of Exhibit No. 1. It is an Undertaking by the firm of Nelligan/Power addressed to Taggart Corporation and to Gowling and Henderson, solicitors for the purchasers. The reference is: "607681 Ontario Limited sale to Taggart Corporation Unit 3 Level 4, Carleton Condominium Plan No. 339 403-215 Somerset Street West, City of Ottawa".

It goes on to say:

IN CONSIDERATION OF and notwithstanding the closing of the above-noted transaction, we hereby undertake to provide a Resolution from the Board of Directors of Carleton Condominium Corporation No. 339 to amend their Resolution of July 22, 1986, with respect to parking and locker space allocation, by providing parking and locker space allocation according to the attached Schedule, within a reasonable time after closing."

The exhibit itself doesn't contain the copy of the schedule but I note that in the record of the Amended Application Record it (the schedule) appears and it is signed by Nelligan/Power presumably on behalf of the vendor corporation.

It is to be noted that the Undertaking goes so far as to undertaking to amend the Resolution. It doesn't go as far as specifying that it purports to amend Article IV (6) of the Declaration itself.

No reporting letter or Statement of Adjustments was filed for this transaction. All we know from the undertaking is that the firm of Nelligan/Power was acting for the vendor and the firm of Gowling and Henderson as solicitors for the purchaser, Taggart Corporation. Therefore, we cannot make any finding as we do not know whether the plaintiffs consulted a lawyer before or after the signing of the agreement of purchase and sale. By finding, I mean findings of negligence in law. I will come back to that aspect subsequently.

The court is not familiar with the instructions or, for that matter, any advice that was exchanged between clients and solicitors, and this applies to both closings; that is the one in August, 1986 and the one in December, 1986.

It is to be noted that on September 11, 1986 a Resolution was passed to change the allotment of the parking spaces. A mistake was made and another Resolution was passed. They are part of the record in Exhibit No. 1, Tabs 10, 11, and 12. A quick look at those Resolutions refers to the same language and deals or mentions the provisions or requirements of Article IV (6) of the Declaration and does not indicate that by the schedule the by-law or the Article in the declaration would be technically contradicted by allotting two spaces instead of one, like in the case of all the other units.

In the spring of 1987, the Taggarts listed unit 403 for sale, and the instructions to the agent was filed under Tab 13, and it mentions that it is advertised for sale without a parking space. On October 14, 1987 an agreement of purchase and sale was signed by the plaintiffs Mr. and Mrs. Taggart, and the defendant Pauline Bachtold. The transaction was closed on November 4, 1987 as required in the said agreement.

The agreement itself was filed also as an Exhibit under Tab 14, and it is on a standard printed form For condo unit sales.

Paragraph 8 thereof was amended by typing three xs over the printed word "parking" and by the insertion just above the word "parking" of the words "Locker #16 (403)".

At the bottom of the page, paragraph 14 appears and it is of interest to pay attention thereto:

"The Real Property is governed by the & Condominium Act 1980, and amendments thereto, and is subject to the terms and conditions of the Declaration, By laws, Rules and Regulations, Management Agreement and an Insurance Trust Agreement. The Purchaser hereby agrees to accept title to the Real Property subject to the terms of the said agreements."

Paragraph 26 of the said Agreement on page 2 gives the rules of interpretation of the document.

"Notwithstanding any terms or conditions outlined in the printed portion herein, any provisions written or typed into this Offer shall be the true terms and shall supersede the printed portion in respect to the parts affected thereby. This Agreement shall constitute the entire Agreement between the Purchaser and Vendor and there is no representation, warranty, collateral agreement or condition affecting this Agreement or the property or supported hereby other than as expressed herein in writing. This Agreement shall be read with all changes of gender or number required by the context."

The transaction was closed, as provided, on November 4th, 1987. The deed was not produced and no evidence was tendered as to what happened on closing. No reporting letter was filed, nor any statement of adjustments. The court was told, however, that the parties subsequently corrected an error or omission, resulting from the failure to amend the plans of the condominium unit to reflect the wall that had been moved, which had an effect on the proportion of the area occupied by each unit and, therefore, an effect on the condo fees payable by each unit.

The amended record before Mr. Justice Flanigan at page 103 of the record of the Application refers to a memorandum sent to all unit owners by the Board of Directors on December 29, 1988. In that memorandum the directors notify the unit owners that an application will be made to the court to the effect that the proportions of common interest and contribution to common expenses, expressed in percentages, would have to be amended. It specifically refers to units 2, level 4; and unit 3, level 4. That, in effect, resulted in the Order signed by the Honourable Mr. Justice Charles F. Doyle, which has been filed as Exhibit No. 5 in this action.

On or about July 19, 1988, the condominium corporation went full circle and passed a resolution, reproduced at Tab 15 of Exhibit No. 1, whereby the owner of each condominium unit was allowed one parking space and, in particular, allotting parking space No. 6 to unit 403. APPLICATION BEFORE JUSTICE FLANIGAN:

It was issued on September 1, 1988 and it was first to be heard on September 28, 1988. The Reasons of the Honourable Justice are dated January 19, 1989 and are endorsed on the Record:

"When Applicants bought they were told one parking space per unit but if they bought two units then two spaces would be assigned to one unit. On closing this had not been done so an undertaking was given by vendor to comply. Subsequently, resolutions of Directors were passed and by April 14/87, the undertaking had been complied with. Subsequently, the Directors revoked this resolution by a new resolution July 19/88 the Directors took away one parking space and assigned it to Unit 403. & The applicant claims expropriation without compensation and it may well be but that is not relevant here.

The Declaration specifies one parking space per unit. The parking spaces are common area.

Sec 3(8) of the Condominium Act permits the Court to amend the Declaration if it is necessary to correct an error or inconsistency in the Declaration. Article IV (6) of the Declaration provides for one parking space per unit.

In my view there is no error or inconsistency in the Declaration. Therefore I do not have authority under Sec. 3(8). What we have is a private arrangement between the Applicant and the Declarant which is illegal pursuant to Re Carleton Condominium #279 Rochon et al. 59 O.R. 545.

The resolution of April 14/87 was ultra vires the Directors as it was contrary to the Declaration. They had no authority to give two parking spaces on one unit.

This in my view is a grossly inequitable result because the only owner who is affected is Bachtold and she got exactly what she purchased and now gets an unearned advantage.

Motion dismissed.

No order as to costs."

The present action was started on May 9, 1989. The claims in this action are, firstly, against both defendants and, then, against the purchaser defendant, Pauline Bachtold.

I will give, firstly, a summary of the remedies sought in the application before Flanigan J. The Taggarts applied for:

- (1) an order amending Article IV (6) of the Declaration to provide for two parking spaces for unit 402; and
- (2) an order directing the directors to assign two parking areas to unit 402.

In this action, two remedies are sought by the plaintiff against both defendants:

- (1) an injunction prohibiting the occupation or use of space number 6,
- (2) a declaration that the plaintiffs are entitled to use of space number 6.

The other two remedies are against the defendant purchaser alone, and have to do with the rescission of the agreement of purchase and sale and reconveyance of the unit in question for the sum of \$100,000.00, or, in the alternative, damages for breach of contract in the amount of \$35,000.00.

Let us examine the first two remedies sought in this action as compared to the remedies in the application before Flanigan, J.:

At the opening of trial, both defendants moved for dismissal alleging that the matter was res judicata, having already been determined and decided by Flanigan, J., on January 19, 1989.

It is to be noted that in that amended (before Flanigan, J.) application record the grounds for moving for the amendment of the Declaration of Carleton Condominium Plan #339 was stated in paragraph 2 at page 2:

"The applicants entered into an agreement with the developer of the condominium whereby it purchased two condominium units. They would also be purchasing two parking spaces, which they could arrange to have assigned to either, or one of the units purchased by the applicants.

3. The applicants purchased two units in order to have two parking spaces and the spaces were assigned to one unit by resolution of the board of directors."

And at page 3, paragraph 6 the ground is quoted as being: "the fact that the Declaration of C.C.C. Plan No. 339 fails to reflect the agreement reached between the developers and the applicants/purchasers, and it is just, equitable, necessary and desirable that the Declaration be amended so that the applicant be provided with two parking spaces in order that an error or inconsistency in the Declaration, arising out of the carrying out of the intent and purpose of the Declaration be rectified."

Upon deliberating again on the nature of the remedies, at the opening of the trial, I granted the motion of the defendant Condominium Corporation that the action be dismissed as against it, but reserved on the motion by Pauline Bachtold's counsel until the end of trial and decided to proceed to hear the evidence.

THE LAW:

During the course of submissions by counsel, I did mention, though, that I agreed that the situation was very similar to the one described by the Ontario Court of Appeal in a judgment dated May 1, 1987, in the case of C.C. 279 v. ROCHON 59 O.R. (2d) 545. I also adopted then Justice Flanigan's reasons. In the aforementioned decision of the Court of Appeal, Finlayson, J., at pages 550 to 553 of the report, discusses the purposes and intent of the Condominium Act. Those pages can be summarized as follows:

1. The condominium corporation is created by the filing of the Declaration and Description by the declarant corporation. (Section 2)
2. Any offer to purchase a unit is made on the basis of the accuracy of the statements made in the registered documents. Not only the declarant, but all unit owners are bound by them.
3. The Declaration may be amended in only two ways: Firstly, under subsection 3(4) it requires the consent of all the owners; or secondly, under the authority of subsection 3(8) a judge is permitted to correct an error or inconsistency when it is discovered to exist.
4. In the case of inconsistency between the Declaration and the by-laws and the act, The Condominium Act prevails and the Declaration or by-laws are deemed amended to read like the Act requires (S. 3(5)).
5. It is contemplated that the original declarant or developer, once he has sold off the majority of the units, will withdraw from the management at a meeting which is to be set for a date within 21 days of the event. (Section 26).

6. The declarant developer cannot, unilaterally, change the Declaration. If an individual arrangement is made, it must be disclosed on the registered Declaration as amended, otherwise it is invalid. And, the Declaration amendment is valid only after the registration of the amended Declaration. (S. 3(9)).
7. Subsection 28(1) of the Condominium Act empowers the Board to pass by-laws, but they must not be contrary to the Declaration or the Act.
8. Subsection 29(1) stipulates that the rules shall be reasonable and consistent with the Act, the Declaration and the by-laws.

CONCLUSION:

Applying the law to our facts, I conclude that the developer corporation or the numbered corporation cannot and the condominium corporation created on June 18, 1986. It is not a party (and could not be a party) to that agreement at the time; the acceptance thereof, was dated the 7th of February, 1985.

Flanigan, J., decided that very issue and went on to say that under subsection 3(8) of the Condominium Act he was powerless to amend the Declaration because the act permits it only in the case of an error or inconsistency. Flanigan, J., further stated that the resolution of April 14 was ultra vires the directors, it being contrary to the declaration. That is in conformity with the wording of subsections 28(1) and 29(2) of the Condominium Act.

We turn now to the action that I am asked to judge. The plaintiffs are the same as in the application before Flanigan, J., and the defendant corporation is the same. That is, the Condominium unit created by the filing of the Declaration in June 1986. At the time this action was started on May 9, 1989, and also at the time of the application before Flanigan, J., the control of the condominium corporation had been turned over to the unit owners. The remedy that was sought before Flanigan, J., is identical. It is for a declaration that space No. 6 is for the use of the Taggarts and that the condominium corporation be prohibited from using or assigning it to any other person. That matter is res judicata.

JUDGMENT:

Today, therefore, I grant the motion for dismissal made by the defendant Pauline Bachtold for that part of the action dealing with the remedies sought against both defendants.

Dealing with the plaintiff's claim for decision of the contract or damages, the plaintiff Muriel Taggart testified as to what she understood were the facts. It is clear from her evidence that she had no direct dealings with the purchaser before the closing of the transaction. She and her husband went through the real estate agent and their lawyers, I presume, and were left to decide if they accepted the terms of the agreement of purchase and sale as printed or typed on the standard form presented for their acceptance. Therefore, the court must look to the agreement of purchase and sale that they signed in order to define and describe their respective rights.

As previously stated, the printed text in paragraph 8 of the agreement dealt with the parking but that was, however, the subject of a modification by the insertion, with a typewriter, of the words "Locker 816 (403)". According to paragraph 26 of the agreement of purchase and sale the typewritten words supersede the printed word, so that the paragraph now reads:

"The Vendor warrants the right to the following: Locker space (s) No. 16 (403) which space shall be included with the Real Property."

It does not say specifically that there will be no automobile space included with the property despite the clear wording of the terms of Article IV (6) of the Declaration.

As stated by the Court of Appeal, the purchasers or their solicitors, when searching the title are aware only of the terms of Article IV(6) of the Declaration/ The agreement of purchase and sale does not specify that there will be no parking space included with the property, despite the wording of the Declaration. It only says that the vendor warrants the right to a locker space, no. 16, which is to be included in the property.

To pursue my analysis of the interpretation of the Agreement of Purchase and Sale, paragraph 14 states that the offer is subject to the Declaration, and in the Declaration it is clear that each unit will be allocated the use of one space in the common area reserved for parking.

I might add by way of comment, that there was some misconception of the nature of the title to the parking space on the part of the Taggarts. Even in the Notice of Application before Flanigan, J., there is a reference to the purchase of parking spaces. In effect, the parking space is not part of the real estate title of the unit holder. It is part, as described in the Declaration, of the common area and subject to being divided for the use of the unit members as per the Declaration.

Turning to the allegation that there was a mistake of a fundamental nature that led to the closing of this transaction, I fail to find any evidence that the defendant purchaser was part of the mistake. I find that she made no representation. I conclude that there was no representation by the defendant that would prevent her from insisting upon the recognition of her rights as per the Declaration.

It is to be noted that the latter part of paragraph 26 of the said agreement of purchase and sale specifically states that the written agreement constitutes the whole agreement between the vendor and the purchaser and that there is no other representation, warranty, collateral agreement, or condition affecting this property or agreement, none "other than expressed herein in writing"

The apparent ambiguity resulting from the striking out of the word "parking" can be dissipated by the proper interpretation of paragraph 14, as already suggested. Since the Declaration defines the parking rights, the purchaser is entitled to rely upon same. The resolutions that were passed for the contrary are invalid, pursuant to subsections 28(1) and 29(2) of the Condominium Act.

Therefore, I must dismiss the plaintiff's claim against the defendant, Pauline Bachtold.

I might add that since the parties did agree to amend or correct the error about the area and the percentage of the common fees chargeable to each unit, in view of that partial adoption, if you like, of the transaction, I would not be prepared to exercise my discretion and grant rescission.

As to damages, the plaintiffs are not entitled to damages against the defendant Pauline Bachtold who is in no breach of the agreement of purchase and sale she signed. I was not asked to deal with anybody else's responsibility in either transaction, that is the purchase by the Taggarts from the developer or the sale to the defendant Bachtold, so I will refrain from doing so.

I assess the right to the parking area at \$10,000.00.

I will hear your submissions as to costs.

The action against Pauline Bachtold will be dismissed with costs on a party and party basis until November 13th, 1991 and thereafter on a solicitor client basis. I will reserve on costs with reference to the Condominium Corporation until we hear from Mr. Citron, and Mr. Nicholson will have the right to reply, if it is done in writing.

I might say, perhaps for a higher tribunal, that I found that the comment by Flanigan, J., about the inequitable result to be obiter to his decision.

I have endorsed the record: Action against CCC 339 dismissed, but reserved as to costs. Action against Pauline Bachtold dismissed with costs on a party and party basis until November 13, 1991 and on a solicitor-client scale thereafter.

I wish to thank both counsel for their assistance. I think you presented whatever evidence you thought could enlighten the tribunal. I realize the constraints of your retainer.

DATE: 20020320
DOCKET: C35155

COURT OF APPEAL FOR ONTARIO

CHARRON, MacPHERSON and CRONK J.J.A.

B E T W E E N :)	
)	
DURHAM CONDOMINIUM	)	Patricia M. Conway,
CORPORATION NO. 123	)	for the Appellant
)	
Appellant)	
(Respondent))	
)	
- and -	)	Alan S. Price and
	)	Peter A. Simm,
	)	for the Respondents
AMBERWOOD INVESTMENTS)	
LIMITED and 1018898 ONTARIO INC.)	
)	
Respondents	)	Heard: October 18 and 19, 2001
(Applicants))	
)	

On appeal from the decision of Justice David G. Stinson dated September 12, 2000 (reported at (2000), 50 O.R. (3d) 670).

CHARRON J.A.:

[1] The sole issue on this appeal is whether a covenant to pay certain interim expenses contained in a reciprocal easement and cost sharing agreement (the “Reciprocal Agreement”) between owners of adjoining parcels of land is enforceable against the successor in title to the covenantor. Stinson J. ruled that the covenant, being a positive covenant, does not run with the land and that, consequently, it was not enforceable against the respondents, Amberwood Investments Limited and 1018898 Ontario Inc. (“Amberwood”), as successors in title to the original covenantor. The appellant, Durham

Condominium Corporation No. 123 (“DCC 123”), who is the original covenantee under the Reciprocal Agreement, appeals from this decision.

A. THE FACTS

[2] Amberwood and DCC 123 are the registered owners of adjoining parcels of land in Whitby, Ontario. Originally, these two parcels were one, owned by a developer called WHDC Harbour Development Corporation (“WHDC”).

[3] WHDC intended to build two condominium high-rise residential buildings on the land, in two phases. The first phase, Phase 1, was completed and as a result, DCC 123 was registered on March 20, 1992. This registration divided the land into two parcels. WHDC started to build the Phase 2 condominium but, after putting in its foundation, ran into financial difficulties.

[4] It was WHDC’s intention that the two-phased project would share certain facilities and expenses, and that each Phase would have easements over the land of the other for the purposes of support and access. Particulars of these various rights and obligations were set out in the Reciprocal Agreement between WHDC and DCC 123, dated March 20, 1992, which applied to and was registered on the title of both parcels.

[5] The original lender for the project was the Royal Bank of Canada (“RBC”). It advanced \$50,000,000 in debenture financing to WHDC in May 1990, secured by a mortgage over both parcels of land. After DCC 123 was registered in 1992, RBC’s mortgage on DCC 123’s parcel was discharged. RBC retained the mortgage on the adjoining parcel. In 1995, RBC assigned this mortgage to Paarl Construction Inc. (“Paarl”), which later sold the second parcel under power of sale to The Shores of Whitby Land Corporation. This purchase was financed by Amberwood and secured by a first mortgage.

[6] In October 1998, The Shores of Whitby Land Corporation defaulted under the mortgage held by Amberwood and, in consequence, quitclaimed its interest in the second parcel to Amberwood. DCC 123 was informed of this transfer the following month. As of the date of this application, no building had been constructed on the Phase 2 lands.

[7] The developer’s plan was for both condominiums to share a recreational facility. That facility has been constructed and is located within DCC 123, and is owned by DCC 123 and Amberwood.

[8] The Reciprocal Agreement provides, amongst other things, for the sharing of the cost of maintaining certain shared services and facilities, including the recreational facility. It required WHDC to pay certain interim expenses until the second condominium was built and registered. These interim expenses are the subject-matter of this application. They are outlined in section 2.9:

Section 2.9 – Interim Costs

The parties agree that until completion of the building comprising Condominium 2, Phase I Condominium Corporation's [DCC 123's] share of certain operating expenses contained in its budget will be greater than they will be after completion of the building comprising Condominium 2. Accordingly, the owner [WHDC] agrees until the date of registration of Condominium 2, to pay the Proportionate Share of the Phase II Condominium Corporation for the following items listed in the budget of the Phase I Condominium Corporation:

- (a) Water Treatment; and
- (b) Air Conditioner Maintenance.

The Owner further agrees, until the Transfer Date, to pay 35.417% of the costs of maintaining one full time security guard on the site.

[9] The Reciprocal Agreement further contains general provisions that include the following:

Section 13.1 – Provisions Run with the Land

...

(b) The parties hereto hereby acknowledge and agree that the Easements, rights and provisions as set forth in this Agreement establish a basis for mutual and reciprocal use and enjoyment of such Easements, rights and provisions and as an integral and material consideration for the continuing right to such use and enjoyment each party hereto does hereby accept, agree to assume the burden of, and to be bound by each and every of the covenants entered into by them in this Agreement.

(c) The provisions of this Agreement are intended to run with the real property benefitted and burdened thereby, specifically, the Phase 1 Lands, the Phase 2 Lands and the Common Units and except as may otherwise be specifically provided shall bind and enure to the benefit of the respective successors in title thereof.

[10] After WHDC ran into financial difficulty, it stopped paying its proportionate share of the interim expenses. Arrears accumulated. Paarl, as assignee of the RBC mortgage, refused to make the payments and DCC 123 registered a lien against the Phase 2 lands. When The Shores of Whitby Land Corporation purchased the lands, the arrears were paid. However, when Amberwood assumed ownership of the lands through the quitclaim deed, it paid the interim expenses for a few months and then refused to continue the payments. Amberwood's share of the expenses is estimated at \$4,225 a month, or \$50,700 a year. When the expenses remained unpaid by October 1999, DCC 123 registered a caution and issued notice of sale proceedings in accordance with the Reciprocal Agreement.

B. THE DECISION UNDER APPEAL

[11] Amberwood ultimately brought this application pursuant to Rule 14.05 of the *Rules of Civil Procedure* seeking an order setting aside the caution registered by DCC 123 and a declaration that it was not bound by any of the terms of the Reciprocal Agreement. However, it was conceded at the hearing before Stinson J. and on this appeal that Amberwood, as subsequent owner of the Phase 2 lands who acquired title after the Reciprocal Agreement was registered, was bound by the negative covenants and the easements contained in the Reciprocal Agreement and was entitled to the benefit of the easements over the DCC 123's Phase 1 lands. It was also common ground between the parties that the original parties to the Reciprocal Agreement intended that all covenants should run with the land, including the interim expenses provision. The sole question on the application was whether the covenant to pay interim expenses should be treated differently, regardless of the original parties' intention.

[12] The applications judge held that the covenant to pay interim expenses is an affirmative obligation that falls within the definition of a positive covenant. Neither party takes issue with this finding. He also held that it was settled law that obligations of this kind do not run with the land either at law or in equity, despite the contracting parties' express intentions to the contrary. Hence, a successor in title to the original covenantor is not bound by the terms of any positive covenants contained in the original agreement to which he was not a party.

[13] The applications judge noted the well-recognized difficulties that may arise from a rigid application of this rule and the recommendations for reform made by the Ontario Law Reform Commission (“OLRC”) in its 1989 *Report on Covenants Affecting Freehold Land* (the “1989 Report”). The applications judge referred to the methods that have been developed over time in England to avoid or circumvent the application of this potentially problematic rule.

[14] It was DCC 123’s contention that two of those methods or exceptions to the rule that positive covenants do not run with the land were applicable to this case: first, the benefit and burden doctrine from *Halsall v. Brizell*, [1957] 1 All E.R. 371; and second, the conditional grant of easement. It was argued, with respect to the first “exception”, that a person who claims the benefit of a deed must also take it subject to its burdens. It was further argued, with respect to the second “exception”, that where the grant of a benefit or easement in a conveyance of land is conditional on assuming a positive obligation, the obligation is binding on the person who takes the grant. It was DCC 123’s position that, on the facts of this case, Amberwood was bound by the terms of the positive covenant under either exception.

[15] The applications judge agreed with DCC 123’s position. He held that the two methods relied upon by DCC 123 were clearly adopted in English law and that both of those exceptions would apply to the facts of this case. He concluded, however, that, absent legislative reform or endorsement of the English exceptions by an appellate court, he was bound by the principle of *stare decisis* to follow the established rule that positive covenants do not run with the land. Consequently, he granted Amberwood’s application, declared that it was not bound to pay the interim expenses, and set aside the caution and notice of sale registered against Amberwood’s title to the Phase 2 lands.

[16] DCC 123 appealed the decision on the sole ground that the applications judge erred in finding that he was precluded by the doctrine of *stare decisis* from adopting the applicable English law. In response, Amberwood conceded that no precedent, binding on Stinson J. or on this court, precludes the adoption of the English exceptions. However, Amberwood argued, first, that this court, for a number of reasons, should not adopt the English exceptions and second, that even if any such exception was adopted into Ontario common law, it was not applicable to the present case.

C. ANALYSIS

(1) Analysis in a nutshell

[17] The rule that positive covenants do not run with the land has been a settled principle of the English common law for well over a century and it is undisputed that it

has clearly been adopted in Canada: *Parkinson v. Reid*, [1966] S.C.R. 162. It appears to be equally undisputed that the rule at times causes inconvenience, that its application in some cases may even result in unfairness, and that the present state of the law should be modified to meet the needs of modern conveyancing. However, it is my view that the call for reform is not one for the courts to answer but for the Legislature. Any change in the law in this area could have complex and far-reaching effects that cannot be accurately assessed on a case by case basis. The need to preserve certainty in commercial and property transactions requires that any meaningful reform be achieved by legislation that can be drafted with careful regard to the consequences.

[18] Therefore, since positive covenants do not run with the land, Amberwood is not bound by the positive covenant to pay the interim expenses under the Reciprocal Agreement solely by virtue of having acquired the Phase 2 lands with notice of its terms. The question remains whether Amberwood is liable to pay the expenses under some other recognized legal principle.

[19] First, DCC 123 places reliance on the doctrine of benefit and burden in *Halsall v. Brizell* as a method of avoiding the application of the rule. The nature and scope of this doctrine will be discussed more fully later in these reasons. Suffice it to say for the purpose of this overview that, in my view, the benefit and burden doctrine is not as wide or as settled in English law as contended by DCC 123. Furthermore, the adoption of this doctrine as a recognized exception to the rule in the common law of this province, in much the same way as the abolition of the rule itself, would have complex, far-reaching and uncertain ramifications that cannot be adequately addressed on a case by case basis.

[20] The second method relied upon by DCC 123 is the conditional grant of easement. The question whether or not a provision in a conveyance is a conditional grant essentially turns on the construction of the relevant instrument, in this case the Reciprocal Agreement. In my view, there is no link between the easements conferred under the Reciprocal Agreement and the positive covenant to pay interim expenses so as to create a conditional grant within the meaning of this principle. The general clause of mutuality and reciprocity of easements, rights and provisions contained in the Reciprocal Agreement cannot be relied upon by DCC 123 to convert all positive obligations into conditional grants of easement so as to defeat the rule. As stated earlier, the rule that positive covenants do not run with the land applies despite the parties' express intention to the contrary. Hence, the applications judge erred in finding that, by virtue of section 13.1(b) of the Reciprocal Agreement, the grant of easements and benefits under section 2.3 and Article 3 was conditional upon payment of the interim expenses set out under section 2.9.

[21] In the result, for different reasons than those of the applications judge, I am of the view that he was nonetheless correct in granting Amberwood's application, and I would dismiss the appeal.

(2) Introduction

[22] In a relatively recent decision, *Rhone v. Stephens*, [1994] 2 All E.R. 65, the House of Lords considered the question of the enforceability of positive covenants between owners of freehold estates including, in particular, the rule that positive covenants do not run with the land. The rule is commonly referred to as the rule in *Austerberry v. Oldham Corp* (1885), 29 Ch. D. 750 (C.A.). It is unfortunate that this case was not brought to the attention of the applications judge because the judgment in *Rhone v. Stephens* provides a convenient framework for discussion of the issues raised in this case. Lord Templeman, in his reasons delivered on behalf of the court, set out a useful and succinct review of the law related to covenants, including the different rules governing restrictive and positive covenants, its historical development, and its underlying rationale. Lord Templeman also acknowledged the severe criticism of the present state of the law on positive covenants and the call for legislative reform made by the Law Commission in England. He also considered, and declined, the invitation to abolish the rule in *Austerberry*, finding that any need for reform was a matter for Parliament. Finally, he considered and rejected the argument that the rule in *Austerberry* had been blunted by the benefit and burden principle. Hence, many of the same issues that are raised by the parties in this case were before the House of Lords in *Rhone v. Stephens*. It may be useful to set out the facts in *Rhone v. Stephens* before reviewing the court's analysis of the legal issues.

[23] In 1960, the owner of a house and adjoining cottage, known as Walford House, sold the cottage, since known as Walford Cottage. Walford House and Walford Cottage were under the same roof. The vendor covenanted for himself and his successors in title as owners of Walford House to maintain that part of the roof which was above Walford Cottage in good condition to the reasonable satisfaction of the purchasers and their successors in title. The conveyance also had the effect of conferring and confirming on each property the right to be supported by the other. After 1960, both properties were sold: Walford Cottage to the plaintiffs and Walford House to the defendant.

[24] In 1986 the plaintiffs brought an action against the defendant claiming that the roof above Walford Cottage was leaking and that the defendant was in breach of the covenant to repair the roof. The trial judge found the defendant liable both in nuisance and on the covenant. He based his finding of liability on the covenant on the principle of benefit and burden. On appeal by the defendant, the Court of Appeal reversed the trial judge's decision on both grounds. The Court of Appeal found that, contrary to the finding of the trial judge, the plaintiffs were in fact owners of the roof over Walford Cottage and therefore had no cause of action in nuisance against the defendant owner of Walford

House. The Court of Appeal also rejected the plaintiffs' claim that the defendant was bound by the positive covenant to repair. On further appeal to the House of Lords by the plaintiffs, the appeal was dismissed. The reasons of the House of Lords, for the most part, are apposite to this case. Hence I will make extensive reference to the analysis in *Rhone v. Stephens*.

(3) The common law relating to covenants affecting land

[25] The House of Lords reiterated the foundational principle underlying the law relating to covenants affecting land (at p. 67):

At common law a person cannot be made liable upon a contract unless he was a party to it. In *Cox v. Bishop* (1857) 8 De GM & G 815, 44 ER 604 a lease was assigned to a man of straw and it was held that the covenants in the lease could not be enforced against an equitable assignee of the lease who had entered into possession. The covenants were not enforceable because there was no privity of contract or estate between the lessee and the assignee.

[26] The House of Lords then noted that the rigours of the common law, which do not allow covenants to be enforced by and against successors in title, were relaxed, first by the doctrines laid down in *Spencer's Case* (1583) 5 Co. Rep. 16a, [1558-1774] All E.R. Rep. 68, and subsequently by statutory extensions of those doctrines, resulting in different treatment being afforded at law to leaseholds. As a result of this relaxation of the rule, as between landlord and tenant, both the burden and the benefit of a covenant, which touches or concerns the land demised and is not merely collateral, run at law with the reversion and the term of the lease whether the covenant be positive or restrictive. However, as between persons interested in land other than as landlord and tenant, the law remained as established in *Austerberry*. At law, the benefit of a covenant may run with the land, but not the burden.

[27] The different treatment afforded to leaseholds over time was not relevant to the case in *Rhone v. Stephens*, hence the rationale behind it was not discussed by Lord Templeman. That aspect of the law also goes beyond the scope of the question to be decided by this court. However, for the sake of completeness, a brief reference may be made to the decision in *Keppell v. Bailey* (1834), 2 My. & K. 517, 39 E.R. 1042 (Ch.) where the court expressed the reasoning for the different treatment afforded to leasehold interests. This reasoning provides some insight into the rationale behind the rule relating to positive covenants. The court in *Keppell v. Bailey* expressed the view that while no harm arises from giving everyone the fullest latitude in binding themselves and their representatives in contract, "great detriment would arise and much confusion of rights if

parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote” (at p. 1049). The court was of the view, however, that the matter was very different in the case of covenants in a lease where the lessor or his assignees continue in the reversion while the term of the lease lasts and retain control over the land. Hence, in the case of leaseholds, as opposed to freeholds, the court held that it was not at all inconsistent with the nature of property that positive covenants affecting the land bind those who take the term of the leasehold by assignment.

[28] Hence, it would appear that the need for certainty in the ascertainment of title and its incidental rights served to maintain the traditional limits to the parties’ contractual freedom in the case of freehold estates. I now return to the analysis in *Rhone v. Stephens*.

[29] Despite this relaxation of the rigours of the common law with respect to leaseholds, Lord Templeman noted that the rule in *Austerberry* continued to apply with respect to freeholds. Hence, the rule had the following effect on the present owners of Walford House and Walford Cottage (at p. 68):

Thus cl 3 of the 1960 conveyance [the positive covenant], despite its express terms, did not confer on the owner for the time being of Walford Cottage the right at common law to compel the owner for the time being of Walford House to repair the roof or to obtain damages for breach of the covenant to repair.

[30] The plaintiffs in *Rhone v. Stephens* argued nonetheless that equity, if not the common law, compelled the owner of Walford House to comply with the covenant to repair the roof or to pay damages instead. This argument was rejected. Lord Templeman reiterated the principle that “equity supplements but does not contradict the common law” (at p. 68). He explained how this principle led to the enforcement of *restrictive* covenants in equity, in the seminal case of *Tulk v. Moxhay* (1848) 2 Ph 774, [1843-60] All E.R. Rep. 9, and why the equitable rule established in that case cannot be extended so as to enforce *positive* covenants (at pp. 68-69):

My Lords, equity supplements but does not contradict the common law. When freehold land is conveyed without restriction, the conveyance confers on the purchaser the right to do with the land as he pleases provided that he does not interfere with the rights of others or infringe statutory restrictions. The conveyance may however impose restrictions which, in favour of the covenantee, deprive the

purchaser of some of the rights inherent in the ownership of unrestricted land. In *Tulk v. Moxhay* (1848) 2 Ph 774, [1843-60] All ER Rep 9 a purchaser of land covenanted that no buildings would be erected on Leicester Square. A subsequent purchaser of Leicester Square was restrained from building. The conveyance to the original purchaser deprived him and every subsequent purchaser taking with notice of the covenant of the right, otherwise part and parcel of the freehold, to develop the square by the construction of buildings. Equity does not contradict the common law by enforcing a restrictive covenant against a successor in title of the covenantor but prevents the successor from exercising a right which he never acquired. Equity did not allow the owner of Leicester Square to build because the owner never acquired the right to build without the consent of the persons (if any) from time to time entitled to the benefit of the covenant against building. In *Tulk v Moxhay* 2 Ph 774 at 777-778, [1843-60] All ER Rep 9 at 11 the judgment of Lord Cottenham LC contained the following passage:

‘It is said, that the covenant being one which does not run with the land, this Court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased.’

Equity can thus prevent or punish the breach of a negative covenant which restricts the user of land or the exercise of other rights in connection with land. Restrictive covenants deprive an owner of a right which he could otherwise exercise. Equity cannot compel an owner to comply with a positive covenant entered into by his predecessors in title without flatly contradicting the common law rule that a person cannot be made liable upon a contract unless he was a party to it. *Enforcement of a positive covenant lies in contract; a positive covenant compels an owner to exercise his rights. Enforcement of a negative covenant lies in property; a negative covenant deprives the owner of a right over property.* [Emphasis added.]

[31] Hence, it was reasoned that the enforcement of a negative covenant in equity did not contravene the common law rule of privity of contract because, in essence, equity was simply giving effect to a legal right whose scope was restricted by the covenant. As Lord Templeman noted in *Rhone v. Stephens*, there was some suggestion in the jurisprudence following *Tulk v. Moxhay* that *any* covenant affecting land was likewise enforceable in equity provided that the owner of the land had notice of the covenant prior to his purchase. However, this extension of the principle did not survive the decision of the Court of Appeal in *Haywood v. Brunswick Permanent Benefit Building Society* (1881) 8 Q.B.D. 403 (Eng. Q.B.). The Court of Appeal in *Haywood* decided that, in the absence of privity of contract, it would not extend the doctrine of *Tulk v. Moxhay* to affirmative covenants compelling a man to lay out money or do any other act of an active character. Equity will intervene only where there is a negative covenant, expressed or implied.

[32] Lord Templeman concluded his review of the existing state of the law as follows (at p. 71):

For over 100 years it has been clear and accepted law that equity will enforce negative covenants against freehold land but has no power to enforce positive covenants against successors in title of the land. To enforce a positive covenant would be to enforce a personal obligation against a person who has not covenanted. To enforce negative covenants is only to treat the land as subject to a restriction.

[33] It is common ground between the parties that this is also the settled law in Ontario. Positive covenants do not run with freehold land, either at law or in equity. Hence, consonant with the result in *Rhone v. Stephens*, Amberwood is not bound to pay the interim expenses contained in the Reciprocal Agreement simply by reason of having acquired the land with notice of the covenant.

(4) The call for reform

[34] The need for reform in this area of the law, and the different approaches that should be adopted to effect it, informed much of the argument advanced by the parties on this appeal. The determinative issues on this appeal were framed by the parties in terms of the English “exceptions” to the rule in *Austerberry* and their potential application to this case. DCC 123 took the position that the English exceptions were well established and it urged this court to adopt these principles as an incremental and much needed change in the law. Amberwood, on the other hand, took the position that the existence and scope of each exception was a matter of much controversy in England and in other common law jurisdictions and that, even if either exception was found to apply to the

facts of this case, any reform in this area of the law was a matter for the Legislature and not the courts.

[35] Hence, before dealing with the particular issues raised by the parties, it may be useful to briefly describe the need for reform in this area of the law, as identified by the OLRC and like bodies in some other common law jurisdictions.

[36] In its 1989 *Report on Covenants Affecting Freehold Land*, the OLRC dealt with both positive and restrictive covenants affecting land, other than those between landlord and tenant. It defined a positive covenant as “one that requires a person to do something on his or her land.” (p.1 Executive Summary).

[37] In an attempt to determine the rationale behind the rule that positive covenants do not run with the land, the OLRC made reference to the decision in *Keppell v. Bailey*, referred to earlier, and deduced from this decision that there were two related rationales. First, “such covenants would tend to render land inalienable” and second, “persons dealing subsequently with the land would have great difficulty in ascertaining the existence of such covenants, because they do not normally have a physical manifestation” (at p. 21).

[38] The OLRC rejected both rationales as inapplicable to the reality of conveyancing in Ontario. With respect to the concern for inalienability, the OLRC observed that “it has now been generally recognized... that [positive covenants] do not tend to render land inalienable. On the contrary, positive and negative covenants tend to enhance alienability since they operate to protect the amenities of neighbourhoods and the competitiveness of businesses” (at pp.100-01). With respect to the concern for the difficulty in ascertaining the existence of such covenants, the OLRC stated that it “is not now, and was not then, an obstacle in Ontario” (at p.22) given Ontario’s land registration system, a system that did not generally exist in England at the time of the *Keppell* decision.

[39] The OLRC further commented on the relatively common use of affirmative covenants despite the existing rule, and on some of the difficulties that have arisen as a result. Indeed, this case provides an example of the kind of difficulty described by the OLRC (at p. 101):

As a practical matter, the use of affirmative covenants is relatively common, particularly in connection with land developments. Positive covenants, for example, are often contained in subdivision agreements, entered into between developers and municipalities. In this context, however, positive covenants create few problems, since they have the

sanction of statute. The situation is otherwise, however, with respect to covenants given by builders to the subdivider. Frequently these include positive obligations, for example, with respect to paving, sodding, and the installation of street lights. Even though builders' covenants are usually limited in time to ten or twelve years, the fact that the burden of a positive covenant does not survive an assignment of the land by the builder can cause difficulties. Similarly, covenants are often imposed upon the ultimate purchasers, either by the subdivider or by the builder. Again, they often contain positive as well as negative obligations. Once again, however, even though these obligations are usually restricted in time to ten or twelve years, the fact that the burden of a positive covenant cannot run with the land may create difficulties.

Finally, we note that the running of the burden of positive covenants is not a phenomenon entirely unknown to the law. Since privity of estate exists between a lessor and a lessee, and their respective assigns, the burden of certain leasehold covenants will run, either with the term of the lease or with the reversion, irrespective of whether the obligation is positive or negative.

In addition, the burden of positive covenants are permitted to run in the context of condominiums, which are governed in Ontario by specific legislation. However, there are many situations in which condominium legislation might not be appropriate – for example, in the case of a duplex, or other building having more than one owner, that is not large enough to be made into a statutory condominium. Like the owners of condominium units, the owners of the several units in such buildings might wish to enter into positive covenants that run with the land, particularly respecting such matters, for example, as the maintenance of common walls, decoration and landscaping.

[40] In light of the absence of any applicable rationale for the rule and of the difficulties it posed, the OLRC was of the view that the law required reform (at pp. 101-02):

We have reached the conclusion that the present law, which prohibits the running of the burden of positive covenants upon a transfer of freehold land, operates to defeat the legitimate expectations of the parties. In our view, there can be no principled rationale for a rule that would preclude neighbours from agreeing, for example, to maintain a boundary fence, or, to keep certain drains clear, such that the covenant would run with the land. Nor is it justifiable, in our view, that, in a property development providing for parks, open spaces, and other amenities, obligations to pay for the maintenance of these amenities cannot be enforced against the successors of the original contracting parties. In addition, to the extent that a variety of methods have been developed to circumvent the undesirable effect of the present law, it has been productive of much uncertainty and confusion. For the foregoing reasons, the Commission recommends that the law should be reformed to permit the burden of affirmative obligations to run upon a transfer of freehold land.

[41] The OLRC further concluded that the present law of restrictive covenants was also in need of reform because it is unduly complex and uncertain. Hence, the OLRC was of the view that the need for reform arose both from the uncertain and complex state of the law with respect to restrictive covenants, and the existing gap with respect to positive covenants.

[42] A similar need for reform has been identified in the United Kingdom and in New Zealand. Recommendations were made by the Committee on Positive Covenants Affecting Land in the United Kingdom in a Report presented to the British Parliament in 1965 and by the Law Commission in another Report laid before the British Parliament in 1984 entitled *Transfer of Land: The Law of Positive and Restrictive Covenants*. Recommendations for reform were made in New Zealand by the Property Law and Equity Reform Committee in a document named *Report on Positive Covenants Affecting Land* which was presented to the Minister of Justice in 1985.

[43] The OLRC proceeded to make specific recommendations for reform. It expressed the view that it would not be sufficient simply to import positive covenants into the common law of restrictive covenants because that law “is inherently incapable of providing adequately for positive obligations” (at p.104) and, in any event, the law on restrictive covenants itself is in need of reform. The OLRC therefore recommended that a new type of servitude should be created that would encompass both positive and negative

obligations and would provide for the differing requirements of each. A number of issues are then discussed in the 1989 Report.

[44] In my view, the sheer number and complexity of issues that would have to be considered in order to address the various concerns relating to such reform of the law make it abundantly clear that any significant change requires a legislative initiative. A case by case approach would create unmanageable confusion and uncertainty in the law. By way of illustration, I note some of the questions discussed in the OLRC 1989 Report:

- what should the new “land obligation” encompass
- whether land obligations should be divided into “neighbour obligations” and “development obligations” as recommended by the Law Commission in England
- whether a land obligation should be appurtenant to an estate in land or to the land itself and whether a statutory priority provision should be implemented
- whether land obligations should always be appurtenant to land or whether they should be permitted to exist “in gross” or independently of a dominant tenement, hence allowing for enforcement by a non owner (e.g. a homeowners’ association under a building scheme)
- whether specific provisions should be made for development schemes and building schemes
- who may enforce the benefit of the land obligation and who should bear the burden
- what remedies should be available
- what prescription period should apply
- how land obligations should be varied or extinguished

[45] The OLRC further noted a number of consequential changes that would have to be made in the law. It is clear from this discussion that a number of amendments would have to be made to existing legislation to give effect to any new scheme that would allow positive covenants to run with the land, including amendments to the *Land Titles Act*, R.S.O. 1980, c. 230 [now R.S.O. 1999, c. L.5], the *Registry Act*, R.S.O. 1980, c. 445 [now R.S.O. 1990, c. R.20], the *Conveyancing and Law of Property Act*, R.S.O. 1980, c. 51 [now R.S.O. 1990, c. C.34], and the *Perpetuities Act*, R.S.O. 1980, c. 374 [now R.S.O. 1990, c. P.8].

[46] It may be useful at this point to return to the analysis in *Rhone v. Stephens* because the House of Lords made reference to a similar call for reform in England. Lord Templeman made reference to the Reports submitted to Parliament by the Law Commission, and noted that nothing had been done in response to them. In these

circumstances, the court was invited to overrule the decision in *Austerberry*. Lord Templeman rejected this suggestion (at p. 72):

To do so would destroy the distinction between law and equity and to convert the rule of equity into a rule of notice. It is plain from the articles, reports and papers to which we were referred that judicial legislation to overrule the *Austerberry* case would create a number of difficulties, anomalies and uncertainties and affect the rights and liabilities of people who have for over 100 years bought and sold land in the knowledge, imparted at an elementary stage to every student of the law of real property, that positive covenants affecting freehold land are not directly enforceable except against the original covenantor. Parliamentary legislation to deal with the decision in the *Austerberry* case would require careful consideration of the consequences. Moreover, experience with leasehold tenure where positive covenants are enforceable by virtue of privity of estate has demonstrated that social injustice can be caused by logic. Parliament was obliged to intervene to prevent tenants losing their homes and being saddled with the costs of restoring to their original glory buildings which had languished through wars and economic depression for exactly 99 years.

[47] In my view, the wisdom of these observations is unassailable. Similar words of judicial restraint were echoed in *R. v. York Twp., Ex Parte 125 Varsity Rd. Ltd.*, [1960] O.R. 238 (Ont. C.A.) where this court was urged to extend the doctrine on restrictive covenants in *Tulk v. Moxhay* to covenants in gross, that is, to covenants existing independently of a dominant tenement. Morden J.A. stated as follows (at pp. 243-44):

... it is, not only undesirable but in my opinion, too late now for this Court to return to the position as it was in 1848 and give countenance to a development of the doctrine along such substantially different lines; we ought, I think, to adhere to the greatly restricted scope of the doctrine in *Tulk v. Moxhay* as evidenced by the numerous decisions subsequent to that case. A restrictive covenant enforceable between persons other than the original parties is, in effect, an equitable interest in property. It is well recognized that decisions affecting real property upon the basis of which titles are passed and accepted should not lightly be disturbed; this is one branch of law which requires stability. As

Middleton, J.A., said in *Re Hazell* (1925), 57 O.L.R. 290, at p. 294:

It is a well-established principle of real property law that questions such as this one, placed at rest, should not be again agitated, even if it should be shewn that the earlier decisions are not in all respects satisfactory.

[48] These principles of judicial restraint were also reiterated in *Friedmann Equity Developments Inc. v. Final Note Ltd.* (2000), 188 D.L.R. (4th) 269 (S.C.C.) where the Supreme Court of Canada considered whether the sealed contract rule should be abolished. Contrary to this case, the Supreme Court rejected the contention that the rule was in need of reform. Nonetheless, the general principles that govern judicial reform of the common law set out in the judgment of the Court are entirely apposite to this case. I note some of the more relevant excerpts from the judgment of Bastarache J., writing for a unanimous Court (at pp. 290-91):

Before examining whether the criticisms raised above merit the abolition of the sealed contract rule, it is necessary to understand the principles which govern judicial reform of the common law. In the past, this Court has considered the conditions which must be present to effect a change in the common law in several cases: see, e.g., *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811, 136 D.L.R. (3d) 89; *Watkins v. Olafson*, [1989] 2 S.C.R. 750, 61 D.L.R. (4th) 577; *R. v. Jobidon*, [1991] 2 S.C.R. 714; *R. v. Salituro*, [1991] 3 S.C.R. 654; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; *R. v. Robinson*, [1996] 1 S.C.R. 683, 133 D.L.R. (4th) 42; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, 153 D.L.R. (4th) 385. From these cases, some general principles have emerged. A change in the common law must be necessary to keep the common law in step with the evolution of society (see, e.g., *Salituro*, at p. 670; *Bow Valley*, at para. 93), to clarify a legal principle (see *Vetrovec*, at p. 819), or to resolve an inconsistency (see *Jobidon*, at p. 733). In addition, the change should be incremental, and its consequences must be capable of assessment.

. . .

On the other hand, courts will not intervene where the proposed change will have complex and far-reaching effects,

setting the law on an unknown course whose ramifications cannot be accurately measured: see *Bow Valley, supra*, at para. 93. The rationale for judicial restraint in making changes to the common law was expressed by McLachlin J. (as she then was) in *Watkins, supra*, as follows, at p. 760:

The court may not be in the best position to assess the deficiencies of the existing law, much less problems which may be associated with the changes it might make. The court has before it a single case; major changes in the law should be predicated on a wider view of how the rule will operate in the broad generality of cases. Moreover, the court may not be in a position to appreciate fully the economic and policy issues underlying the choice it is asked to make.

[49] For reasons set out earlier, it is my view that the law on positive covenants is one such area where courts should be wary of making changes to the common law. The Supreme Court of Canada also made a number of other observations that are of relevance to this case (at pp. 292-96):

Our common law is replete with artificial rules which, although they may appear to have no underlying rationale, promote efficiency or security in commercial transactions. Such rules, in the circumstances where they apply, must be followed to create a legally recognized and enforceable right or obligation. Parties, therefore, structure their relations with these rules in mind and the rules themselves become part of commercial reality. Commercial relations may evolve in such a way that a particular rule may become unjust and cumbersome, and may no longer serve its original purpose. When the hardship which a rule causes becomes so acute and widespread that it outweighs any purpose that it may have once served, it is certainly open to a court to make an incremental change in the law. However, there must be evidence of a change in commercial reality which makes such a change in the common law necessary.

...

Notwithstanding my view that there has been no change in commercial reality which makes the abolition of the sealed

contract rule necessary, to effect such a change could also have unwarranted, far-reaching and complex consequences both in the law of contract and in the law of property.

...

The abolition of the sealed contract rule would thus amount to a fundamental reform of the common law rather than an incremental change.

To abolish the sealed contract rule for the reasons that the appellant has suggested would also have the effect of creating great uncertainty both in commercial relations and in the law itself. There are many rules in contract and property law which are historical, technical and which no longer appear to have any modern day rationale. However, they remain a part of the law.

...

The abolition of the sealed contract rule could also have far-reaching effects on existing contractual relationships.

...

The abolition of the sealed contract rule would have the unfair result of creating uncertainty for those who had relied on the rule in executing their contracts. To avoid uncertainty and any unfairness to those parties who have structured their commercial relationships in accordance with the sealed contract rule, any change to the law should operate prospectively. Only the Legislature has the power to create a prospective change in the law.

...

In my view, the need to preserve certainty in commercial relations must be considered when a court is asked to make a change to the sealed contract rule. For example, a statement that the sealed contract rule does not apply to corporations would create uncertainty as to the potential liability of all those individuals who had corporate agents insulate them from any obligations under the contract by executing it under

seal. While such uncertainty may not be as widespread as that which would result from the outright abolition of the rule, such a change in the law could still have the effect of frustrating the intentions of those parties who entered into their agreements with the understanding that the rule applied. Courts should be loath to make even smaller modifications to the sealed contract rule without clear evidence that such a change is necessary to keep in step with evolving commercial reality and that it will not have unwarranted far-reaching effects.

[50] I therefore conclude that any modification to the rule that positive covenants do not run with the land should be made by the Legislature, and not by this court. Hence, Amberwood is not bound by the positive covenant to pay the interim expenses under the Reciprocal Agreement solely by virtue of having acquired the Phase 2 lands with notice of its terms. The question remains whether Amberwood is liable to pay the expenses under some other recognized legal principle.

(5) Statutory exceptions to the rule

[51] Although the Ontario Legislature has not adopted a comprehensive scheme to deal with covenants affecting freehold land, there are a number of statutory exceptions to the rule that positive covenants do not bind freehold successors in title. For example, the burden of certain positive covenants made in favour of public bodies can run with the land under the provisions of the *Planning Act*, R.S.O. 1990, c.P.13. Similarly, the *Condominium Act*, 1998, S.O. 1998, c. 19 permits the enforcement of such covenants for condominiums governed by the statute. For various examples of other specific statutory exceptions to the rule see the following: *Agricultural Research Institute of Ontario Act*, R.S.O. 1990, c. A.13, ss. 3(f)(i), 4.1 and 4.2; *Building Code Act*, 1992, S.O. 1992, c. 23, ss. 8(3)(c)(iv), and 8(5); *Conservation Land Act*, R.S.O. 1990, c. C.28, ss. 3(2)-(10); *Drainage Act*, R.S.O. 1990, c. D.17, ss. 2(1)-(4); *Forestry Act*, R.S.O. 1990, c. F.26, ss. 2(1) and 3; *Industrial and Mining Lands Compensation Act*, R.S.O. 1990, c. I.5, ss. 1-4; *Niagara Escarpment Planning and Development Act*, R.S.O. 1990, c. N.2, ss. 24(2.1), 27(1) and 27(7); *Ontario Heritage Act*, R.S.O. 1990, c. O.18, ss. 22 and 37; *Planning Act*, R.S.O. 1990, c. P.13, ss. 28(10)-(11), 37(3)-(4), 41(7)(c), 41(8), 41(10), 51(16), 51(25)-(27), 70.2(2), and 70.2(5); *Public Lands Act*, R.S.O. 1990, c. P.43, ss. 46(2)-(3); and *Surveys Act*, R.S.O. 1990, c. S.30, ss. 61(1) and 61(4).

[52] The statutory exceptions to the rule do alleviate some of the difficulties that could otherwise arise from a strict application of the common law rule. However, it is common ground between the parties that no statutory exception applies to this case so as to allow the positive covenant to run with the land.

(6) Non-statutory methods to circumvent the rule

[53] The inconvenience of the rule that the burden of a positive covenant cannot run with the land has resulted in the development of a number of methods by which its effect can be circumvented so as to obtain enforcement at law. The OLRC noted some of these methods in its 1989 Report and they are further described in Megarry and Wade, *The Law of Real Property*, 6th ed. (London: Sweet and Maxwell, 2000) at pp. 1006-1010.

[54] The simplest and most obvious way of avoiding the rule altogether is to use a chain of covenants so as to maintain privity of contract. Indeed, if the chain had not been broken in this case by WHDC's financial difficulties, resulting in power of sale proceedings, in all likelihood the terms of the Reciprocal Agreement would have been included in any sale of the Phase 2 lands to a subsequent purchaser. Other devices, not relevant to this case, include use of a right of entry annexed to rentcharge, rights of re-entry generally, and an enlarged long lease (a long lease which can be enlarged into a fee simple under statutory power).

[55] As stated earlier, DCC 123 relies on two exceptions or methods in this case: the principle of benefit and burden, referred to as the doctrine in *Halsall v. Brizell*, and the conditional grant. DCC 123 maintains that these two exceptions have been recognized by English courts, that they should be adopted in this province, and that Amberwood, as present owner of the Phase 2 lands, should be held liable on the covenant to pay the interim expenses under either or both of these exceptions. I will deal with each exception in turn.

(a) The doctrine in *Halsall v. Brizell*

[56] The applications judge described the doctrine in *Halsall v. Brizell* in terms of the general underlying principle that "a person who claims the benefit of a deed must also take it subject to its burdens." (at para. 23, p. 676) He held that this doctrine "has been clearly adopted by the English courts." (at para. 24, p. 676) In support of this conclusion, he relied on the decision of the English Court of Appeal in *E.R. Ives Investments Ltd. v. High*, [1967] 1 All E. R. 504 and on the decision of the Chancery Division in *Tito v. Waddell (No.2)*, [1977] 3 All E.R. 129. He then noted that while the principle of benefit and burden had not been applied in Canadian law, *Halsall v. Brizell* had been mentioned by the Supreme Court of Canada in *Parkinson v. Reid*. The applications judge stated as follows (at paras. 26-27, p. 677):

In that case the court held that the obligation to repair a stairway that had been damaged in a fire was a positive covenant that did not run with the land to bind successors in title. The original parties had agreed that a neighbour could use a wall as a party-wall so long as he agreed to keep the

stairway in good repair. In *obiter*, Cartwright J. commented on the potential applicability of the benefit/burden doctrine to this type of scenario:

Assuming that so long as the appellants [the successors] made use of the last-mentioned wall as a party wall they were bound to keep the stairway in repair, they ceased to be under any such obligation when they no longer made use of the respondent's wall.

I take from this that while the general proposition that positive covenants do not run with the land remains the law in Canada, the Supreme Court might be prepared to hold that a successor who claims a benefit must also shoulder the burden, whatever its form. However, if the successor abandons its claim to the benefit, or the benefit ceases to exist, as occurred in *Parkinson v. Reid*, the benefit/burden doctrine from *Halsall v. Brizell* would not apply. To date, however, the Supreme Court has not expressly addressed this point.

[57] The applications judge then considered whether the benefit and burden principle could apply to the facts of this case. He concluded that it could, for the following reasons (at paras. 28-30, pp. 677-78):

In determining whether the benefit/burden doctrine could operate as an exception to the rule against positive covenants in this case, it is necessary to determine whether there is a benefit flowing from DCC 123 and the Phase I condominium to Amberwood's vacant lands.

In my view, there are such benefits. First, Amberwood is part owner of the recreational and utility units in the Phase I building. Second, those units are maintained for Amberwood by DCC 123. Third, Amberwood has the benefit of security over those units. Fourth, Amberwood has the access benefits of the other easements provided for in the reciprocal agreement. Although I agree with Amberwood that these benefits may be somewhat remote or artificial and would certainly have more significance if a second condominium was actually built on the Phase II lands, I do not interpret the doctrine from *Halsall* as requiring a court to analyze the extent or nature of the benefit. If Amberwood chose to

abandon its claim to these benefits, it would not be bound to shoulder the burden of the interim costs. In my view, the fact that Amberwood does not wish to abandon these entitlements confirms that they can be fairly and properly characterized as true benefits flowing to the successor/owner.

Consequently, I conclude that the benefit/burden doctrine from *Halsall v. Brizell* could apply on the facts of this case.

[58] As stated earlier, the applications judge concluded, however, that it was not open to him to adopt the doctrine in *Halsall v. Brizell* given the present state of the law in Canada.

[59] It is important to determine with more precision the nature and scope of the doctrine in *Halsall v. Brizell* and to examine the extent to which it has been adopted in English law before deciding whether it should be imported into Ontario law and, if so, whether it applies to the facts of this case.

[60] In *Halsall v. Brizell*, purchasers of plots on a building estate were entitled under a trust deed to use private roads and other amenities, including sewers placed under the roads, and each, on purchasing a lot, covenanted to pay a just proportion of the cost of their maintenance. A question arose whether the purchasers' successors were liable for their due contribution while they made use of the roads.

[61] Upjohn J. of the Chancery Division stated first, that a covenant in the terms of the covenant to pay the maintenance cost does not run with the land. Second, he noted that the particular provisions infringed the rule against perpetuities. Notwithstanding these difficulties, he held as follows (at p. 377):

It is, however, conceded to be ancient law that a man cannot take benefit under a deed without subscribing to the obligations thereunder. If authority is required for that proposition, I refer to one sentence during the argument in *Elliston v. Reacher* (1) ([1908] 2 Ch. 665), where Sir Herbert Cozens-Hardy, M. R., said (*ibid.*, at p. 669):

“It is laid down in Coke on Littleton, 230b, that a man who takes the benefit of a deed is bound by a condition contained in it though he does not execute it.”

[62] Upjohn J. concluded that if the defendants did not desire to take the benefit of the deed, they could not be liable to contribute to the maintenance cost. However since they did desire to use the roads of the park and the other benefits created by the trust deed, they were liable to contribute to the maintenance cost pursuant to the covenant.

[63] The OLRC briefly referred to the doctrine in *Halsall v. Brizell* in its 1989 Report as a method of avoiding the rule (at p.23):

A third method of avoiding the rule is to rely upon the doctrine in *Halsall v. Brizell*, [1957] Ch. 169, [1957] All E.R. 371. See, also, *Tito v. Waddell No.2*), [1977] Ch. 106, at 292 and 310, [1977] 3 All E.R. 129. This doctrine is based upon the old rule, relating to deeds, that a person who claims the benefit of a deed must also take it subject to the burdens. In the *Halsall* case, the purchasers of lots in a subdivision were entitled, under a trust deed, to use private roads and other amenities. Each purchaser covenanted to pay a share of the cost to maintain the amenities. The court held that their successors were liable to pay their share of the cost. The usefulness of the doctrine, however, is somewhat limited. It will operate only if there is a benefit to be claimed under the deed, and further, it will operate only so long as the assignee of the covenantor continues to claim that benefit.

[64] The OLRC made further reference to the doctrine in *Halsall v. Brizell* later in its 1989 Report when it considered the future treatment of existing covenants after the adoption of the new recommended regime of land obligations. The OLRC recommended that the existing law continue to apply for covenants already in existence, stating in reference to this doctrine – “[w]e do not intend that this rule should be abolished” (at p.149). However, no mention is made of the fact that this doctrine has never been adopted in Canada and no further analysis of the doctrine was contained in the 1989 Report.

[65] I note from the outset what will become clear from a review of the relevant jurisprudence that the doctrine in *Halsall v. Brizell* cannot simply be defined by reference to the underlying general principle “that a person who claims the benefit of a deed must also take it subject to the burdens”. Indeed, if the doctrine were so wide as to obligate a successor in title to all the burdens contained in the deed simply by reason of his acceptance of the benefit of the deed, it would swallow the rule. Positive covenants *would* run with the land. Hence, while this general principle may have informed the reasoning underlying the concession of counsel in *Halsall v. Brizell*, reference must be made to later applications of the doctrine to further refine it.

[66] Before referring to the subsequent jurisprudence, it is noteworthy that the decision in *Halsall v. Brizell* has been the subject of much debate and criticism. A frequently

published commentator on English property law, F.R. Crane, has pointed out some of the weaknesses of the decision in a case comment at 21 [1957] *The Conveyancer & Property Lawyer* 160. He noted that the court in *Halsall v. Brizell* effectively by-passed both the decision in *Austerberry* and the rule against perpetuities, citing as only authority for doing so a brief remark by Lord Cozens-Hardy M.R. during argument in *Elliston v. Reacher*, [1908] 2 Ch. 665 which did not form part of the judgment. R. E. Megarry (as he then was) also pointed out the frail underpinnings of *Halsall* in a 1957 case comment (1957), 73 L.Q.R. 154 at 155-56. He noted that the observation of Lord Cozens-Hardy M.R. in *Elliston v. Reacher*, relied upon by Upjohn J., provided doubtful authority for the proposition since it was simply made during the address by counsel and did not form part of the judgment. Further, the passage relied upon from Coke on Littleton confined the operation of the benefit and burden rule to a party who is specifically named in a deed but who does not execute it.

[67] The subsequent case of *Tito v. Waddell (No. 2)* (“*Tito’s case*”), that has applied the doctrine in *Halsall v. Brizell*, is of particular relevance to DCC 123’s position. Indeed, the distinction sought to be made by DCC 123 between the benefit and burden principle on the one hand, and the conditional grant on the other, stems from the judgment of Vice-Chancellor Megarry in *Tito’s case*.

[68] *Tito’s case* was lengthy and complex, involving a multitude of issues. However, it is not necessary for the purpose of this appeal to discuss it in any detail. The only part of the decision that is relevant to this case is Megarry V-C’s discussion of the doctrine in *Halsall v. Brizell*. Ironically, the frailty of *Halsall v. Brizell* was the subject of substantial analysis in the judgment. However, of particular relevance to the appellant’s position is Megarry V-C’s identification of two aspects (amongst others) of the doctrine in *Halsall v. Brizell* - the conditional grant, and what Megarry V-C called the “pure principle of benefit and burden”. He described the first as a function of the creating instrument that in effect attaches conditions to the exercise of a right and thereby restricts the scope of the benefit itself, and the second as a general category where the benefit and burden, although arising under the same instrument, are independent of each other. He stated as follows (at p. 281):

(a) *Conditional benefits and independent obligations.* One of the most important distinctions is between what for brevity may be called conditional benefits, on the one hand, and on the other hand independent obligations. An instrument may be framed so that it confers only a conditional or qualified right, the condition or qualification being that certain restrictions shall be observed or certain burdens assumed, such as an obligation to make certain payments. Such

restrictions or qualifications are an intrinsic part of the right; you take the right as it stands, and you cannot pick out the good and reject the bad. In such cases it is not only the original grantee who is bound by the burden; his successors in title are unable to take the right without also assuming the burden. The benefit and the burden have been annexed to each other ab initio, and so the benefit is only a conditional benefit. In the other class of case the right and the burden, although arising under the same instrument, are independent of each other: X grants a right to Y, and by the same instrument Y independently covenants with X to do some act. In such cases, although Y is of course bound by his covenant, questions may arise whether successors in title to Y's right can take it free from the obligations of Y's covenant, or whether they are bound by them under what for want of a better name I shall call the pure principle of benefit and burden.

[69] The two aspects of the doctrine identified by Megarry V-C in *Tito's* case must be read in the light of the subsequent decision by the House of Lords in *Rhone v. Stephens*. While the House of Lords accepted that conditions could be attached to the exercise of a power or a right, thereby rendering the conditions enforceable upon the exercise of the power or right, it rejected any notion of a “pure principle of benefit and burden” that would bind successors to burdens that stood independently of the right. Lord Templeman stated as follows (at p.73):

Mr. Munby also sought to persuade your Lordships that the effect of the decision in the *Austerberry* case had been blunted by the 'pure principle of benefit and burden' distilled by Megarry V-C from the authorities in *Tito v. Waddell* (*No 2*) [1977] 3 All ER 129 at 291-292, [1977] Ch 106 at 301-303. I am not prepared to recognise the 'pure principle' that any party deriving any benefit from a conveyance must accept any burden in the same conveyance. Megarry V-C relied on the decision of Upjohn J. in *Halsall v. Brizell* [1957] 1 All ER 371, [1957] Ch 169. In that case the defendant's predecessor in title had been granted the right to use the estate roads and sewers and had covenanted to pay a due proportion for the maintenance of these facilities. It was held that the defendant could not exercise the rights without paying his costs of ensuring that they could be exercised. Conditions can be

attached to the exercise of a power in express terms or by implication. *Halsall v. Brizell* was just such a case and I have no difficulty in whole-heartedly agreeing with the decision. It does not follow that any condition can be rendered enforceable by attaching it to a right nor does it follow that every burden imposed by a conveyance may be enforced by depriving the covenantor's successor in title of every benefit which he enjoyed thereunder. The condition must be relevant to the exercise of the right. In *Halsall v. Brizell* there were reciprocal benefits and burdens enjoyed by the users of the roads and sewers. In the present case cl 2 of the 1960 conveyance imposes reciprocal benefits and burdens of support but cl 3 which imposed an obligation to repair the roof is an independent provision. In *Halsall v. Brizell* the defendant could, at least in theory, choose between enjoying the right and paying his proportion of the cost or alternatively giving up the right and saving his money. In the present case the owners of Walford House could not in theory or in practice be deprived of the benefit of the mutual rights of support if they failed to repair the roof.

[70] Megarry and Wade, in their text on *The Law of Real Property*, at pp.1008-1010, reviewed some of the relevant jurisprudence, including the decision of the English Court of Appeal in *E.R. Ives Investments Ltd.* relied upon by the applications judge and *Tito's* case, and concluded that there must now be some doubt as to their correctness and as to the precise extent of the benefit and burden principle given the subsequent decision of the House of Lords in *Rhone v. Stephens*. The authors comment as follows (at pp. 1009-1010):

The House of Lords has rejected any "pure" principle of benefit and burden, by which "any party deriving any benefit from a conveyance must accept any burden in the same conveyance". Although the House accepted that conditions could be attached expressly or impliedly to the exercise of a power, this was so only where the condition was "relevant to the exercise of the right". The party must, "at least in theory", be able to elect between enjoying the right and performing his obligation or renouncing the right and freeing himself of the burden. On that basis, the House held that the fact that A's roof was supported by B's property did not mean that B could enforce against A a positive covenant made by A's

predecessor in title with B's to repair the roof. This approach provides little guidance as to when a party will be regarded as having a genuine choice whether or not to renounce the benefits in order to be relieved of the burdens.

...

The policy underlying the decision of the House seems to be to restrict the ambit of the doctrine of benefit and burden as a means of circumventing the rule that the burden of positive covenants does not run. The intention would seem to be to prompt the abolition of the rule by legislation that had been drafted with careful regard to the consequences.

[71] In the subsequent case of *Thamesmead (Town) v. Allotey* (1998), 37 E.G. 161, Gibson L.J., writing for the unanimous English Court of Appeal, noted several difficulties with the reasoning in *Rhone v. Stephens* and concluded his judgment by expressing agreement with Professor Gravells' view expressed in an article on *Rhone v. Stephens* at (1994) 110 L.Q.R. 346, at p.350, that since the House of Lords has “clearly ruled out a judicial solution, it is for Parliament to provide a legislative solution.”

[72] In my view, the case law does not support the applications judge’s finding that the benefit and burden principle has been clearly adopted by the English courts as an exception to the rule that positive covenants do not run with the land. Indeed, had *Rhone v. Stephens* been brought to his attention, the applications judge undoubtedly would have held that the “pure” principle of benefit and burden, relied upon by DCC 123 in this case and identified as an aspect of the doctrine in *Halsall v. Brizell* by Megarry V-C in *Tito's* case, was later expressly rejected by the English courts.

[73] Further, the applications judge’s conclusion that the benefit and burden principle would apply to the facts of this case is not consonant with the English jurisprudence. He concluded that Amberwood was bound by the burden of the covenant because it had received the following benefits: part ownership of the recreational and utility units in the Phase 1 building; payment by DCC 123 for the maintenance of, and security over, those units; and easements over the Phase 1 lands. However, the simple fact that Amberwood received certain benefits upon obtaining title to the Phase 2 lands is clearly not sufficient, without more, under the English common law to render it liable under the positive covenant contained in the same instrument. In so far as the easements over the Phase 1 lands are concerned, DCC 123 has not established *any* correlation between those benefits and the burden of the positive covenant, so as to justify the application of the English

doctrine. In so far as the benefits related to the recreational facilities are concerned, DCC 123 has not shown any user or enjoyment of the benefit by Amberwood. While DCC 123 recognizes in its supplementary factum that those requirements cause difficulties in this case, it purports to resolve the issue by submitting that an “all or nothing” principle should be adopted in Ontario so as to bind Amberwood to all the terms of the Reciprocal Agreement, whether or not there is any direct link or any *de facto* use or enjoyment of the intended benefits. In my view, the adoption of such a wide exception would be tantamount to abolishing the rule itself. Any successor in title would be bound by the positive covenant by reason solely of its acceptance of the deed to the land.

[74] I note further, with respect to the findings of the applications judge, that whatever rights or obligations may flow from the fact that the parties are presently co-owners of the recreational facilities to which the costs are related are irrelevant to, and beyond the scope of, the present application. The co-ownership, created not by the Reciprocal Agreement but by a later conveyance between DCC 123 and one of Amberwood’s predecessors in title, may well give rise to other issues that relate to the same interim costs, but it has no bearing on the question whether Amberwood is liable on the covenant contained in the Reciprocal Agreement.

[75] Therefore, I conclude that, on proper consideration of the scope of the English doctrine in *Halsall v. Brizell*, Amberwood would not be liable to pay the interim expenses on that basis if the exception were adopted in Ontario law. In any event, it is my view that, having regard to the uncertainties and the many frailties of the existing common law in England in this area of the law, it would be inadvisable to adopt these principles in Ontario. Indeed, a review of the English experience with the doctrine of *Halsall v. Brizell*, lends further support to the conclusion that any reform to the rule in *Austerberry* is best left to the Legislature. It would appear from many of the commentaries that the English adoption of the benefit and burden exception may have created more problems than it has solved.

[76] Quite apart from the uncertainties that the adoption of the exception could create in other existing commercial relationships, it is my view that the application of the benefit and burden principle in this case could give rise to a multitude of other issues, particularly in the event of non-compliance. I pose but a few hypothetical questions by way of example. What benefits would Amberwood lose if it failed to pay the interim costs? Would it simply lose any right to use the shared facilities? Or would all the easements be extinguished? Could any or all of these benefits be revived upon paying the arrears? Could the benefits be revived at any time by payment of the arrears whether it be by Amberwood or a subsequent purchaser? Or would payment have to be made within a reasonable time? Would Amberwood be liable to lose the benefit of the land itself

because it did not pay the interim costs? Are these interim costs to be paid indefinitely, even if no second tower is ever built on the Phase 2 lands?

[77] While issues of this kind are not at all remarkable in the context of a contractual dispute between parties, they do create much uncertainty when they arise by reason of a covenant that runs with the land because they affect the certainty of title. Indeed, in this case, Amberwood has sold the Phase 2 lands. How then would the subsequent purchaser's title to the lands be affected by the answer to these hypothetical questions? These questions exemplify some of the issues identified by the OLRC in its 1989 Report as matters that would need to be addressed by the Legislature under any scheme allowing for positive covenants to run with the land.

[78] For these reasons, I would not give effect to this ground of appeal.

(b) The conditional grant

[79] The applications judge also considered whether the rule that positive covenants do not run with the land was subject to the conditional grant exception in English law and whether this exception would apply to this case. He described the exception by reference to *Halsbury's Laws of England* as follows (at para.32, p. 678):

If the facts establish that the granting of a benefit or easement was conditional on assuming the positive obligation, then the obligation is binding. Where the obligation is framed so as to constitute a continuing obligation upon which the grant of the easement was conditional, the obligation can be imposed as an incident of the easement itself, and not merely a liability purporting to run with the land: *Halsbury's Laws of England* 4th ed., Vol. 14 at 79.

[80] The applications judge relied on the decision of the English Court of Appeal in *Re Ellenborough Park*, [1955] 3 All E.R. 667 as authority for the proposition that a positive obligation runs with the land when it forms part of an easement or benefit that is made conditional on assuming it. He also referred to *Tito's* case. He concluded this review of the English common law with the following observations (at para. 37, p. 679):

Once again, this “conditional grant” approach to circumventing the rule against positive covenants flowing with the land, is an English innovation. Although there does not seem to be any Canadian law which expressly recognizes or applies the conditional grant exception, such an exception is consistent with the benefit/burden doctrine. In my view, the

conditional grant exception is essentially a form of the benefit/burden doctrine. The only difference is that the burden is directly annexed to the grant of the benefit, instead of the subject of an independent covenant. The notion of a conditional grant exception is also consistent with the recognition that the ancient rule against positive covenants flowing with title has many problematic implications. Such an exception would also function to protect legitimate party expectations.

[81] The applications judge then concluded that this exception would apply to this case on the basis of article 13.1(b) of the Reciprocal Agreement. I again reproduce this general provision for convenience:

Section 13.1 – Provisions Run with the Land

...

(b) The parties hereto hereby acknowledge and agree that the Easements, rights and provisions as set forth in this Agreement establish a basis for mutual and reciprocal use and enjoyment of such Easements, rights and provisions and as an integral and material consideration for the continuing right to such use and enjoyment each party hereto does hereby accept, agree to assume the burden of, and to be bound by each and every of the covenants entered into by them in this Agreement.

[82] The applications judge concluded as follows (at para. 39, p. 679):

In my view, the language of that section makes it clear that the payment of interim costs, as one of the covenants in the reciprocal agreement, was intended to be a condition upon which the other easements were conveyed. The provision does not support Amberwood's submission that the cost-sharing obligations should be viewed as distinct from the scheme for mutual easements. To the contrary, paragraph 13.1(b) seems to envision a building project in which the owners would share costs in exchange for shared access and ownership. To undermine this clear intention by severing the cost obligations from the overall deal would amount to

dismantling part of an intricate, complex, and well-planned scheme, and defeating legitimate party expectations.

[83] In the result, the applications judge held that the conditional grant exception would apply to this case but that its adoption was also barred by the present state of the jurisprudence.

[84] In my view, the applications judge's observation that the "conditional grant" exception "is essentially a form of the benefit/burden doctrine" accurately describes the position taken by DCC 123 in this case and, in turn, leads me to the conclusion that this second argument must fail, essentially for the same reasons that I have rejected the first exception.

[85] I note at the outset that the principle from *Halsbury's Laws of England* relied upon by the applications judge seems to me to be consonant with the rule in *Austerberry*. I repeat it here for convenience:

If the facts establish that the granting of a benefit or easement was conditional on assuming the positive obligation, then the obligation is binding. Where the obligation is framed so as to constitute a continuing obligation upon which the grant of the easement was conditional, *the obligation can be imposed as an incident of the easement itself, and not merely a liability purporting to run with the land.* [Emphasis added.]

[86] Hence, as a matter of construction of the creating instrument itself, if a grant of benefit or easement is framed as conditional upon the continuing performance of a positive obligation, the positive obligation may well be enforceable, not because it would run with the land, but because the condition would serve to limit the scope of the grant itself. In effect, the law would simply be giving effect to the grant. Indeed, as discussed earlier in this judgment at paragraphs 30 and 31, much the same reasoning underlies the law of restrictive covenants.

[87] However, none of the grants of benefit or easement contained in the Reciprocal Agreement are framed in this way. Neither section 2.3 nor Article 3 of the Reciprocal Agreement is expressed to be conditional or dependant upon performance of all obligations under section 2.9. Further, it is my view that section 13.1(b) is far too general to create a conditional grant within the meaning of the principle stated in *Halsbury's Laws of England*. At its highest, it can be said that the parties to the Reciprocal Agreement have attempted to write in, as a term of their agreement, essentially the same general benefit and burden principle, the adoption of which was urged upon this court as a first exception to the rule. In my view, section 13.1(b) achieves no more, and its application would give rise to the same difficulties that I have discussed earlier. The

attempt to create a contractual exception to the rule in *Austerberry*, while binding on the original parties to the Reciprocal Agreement, cannot displace the rule that positive covenants do not bind successors-in-title. It is undisputed in English and Canadian law that the rule that positive covenants do not run with the land governs despite any express intention to the contrary contained in the agreement. Indeed, if the applications judge was correct in his conclusion that section 13.1(b) effectively created an exception to the rule, it would be open to anyone to simply abolish the rule at the stroke of a pen. All that would be required would be a general statement of intent that the continuing right to the use and enjoyment of all the benefits in an agreement was conditional upon the acceptance of the burden contained in any of the covenants. The recognition of such a wide exception would constitute a profound change in the law.

[88] Hence, in the circumstances of this case, I would not give effect to this second ground of appeal. I would conclude that Amberwood is not bound to pay the interim expenses on the basis of the positive covenant contained in the Reciprocal Agreement.

DISPOSITION

[89] For these reasons, I would conclude that the applications judge was correct in granting Amberwood's application and I would dismiss the appeal with costs. In order to comply with the rule that now requires this court to fix costs, Amberwood is to file a bill of costs and written submissions with the court within 10 days from the release of this court's decision, DCC 123 is to respond in writing within a further 10 days after filing, and a reply may be submitted within 5 days thereafter.

RELEASED: March 20, 2002

“Charron J.A.”

“Cronk J.A.”

MACPHERSON J.A. (Dissenting):**(1) Introduction**

[90] I have had the benefit of reading the reasons of my colleague, Charron J.A. I agree with her that it would be inappropriate for this court to abolish the rule in *Austerberry v. Corporation of Oldham* (1885), 29 Ch.D. 750 (C.A.) (“*Austerberry*”). I also agree with her that the application judge, Stinson J., erred in holding that the doctrine of *stare decisis* precluded him from adopting the English ‘exceptions’ to the rule in *Austerberry*.

[91] However, with respect, I do not agree with my colleague’s analysis or conclusions relating to the benefit-burden and conditional grant exceptions to the rule in *Austerberry*. In my view, both exceptions should be adopted into the law of Ontario. Their application in this case would result in the appeal being allowed.

(2) Reform of common law principles and the role of the judiciary

[92] The application of the rule in *Austerberry* to the present case would require that the appeal be dismissed. Amberwood would have no obligation to pay its share of the interim costs relating to water treatment, air conditioner maintenance and an on site security guard set out in section 2.9 of the *Reciprocal Easement and Cost Sharing Agreement*.

[93] The question that arises, however, is whether the rule in *Austerberry* is, or should be, an absolute rule or whether it should admit of exceptions? In my view, it is important to address the topic of whether the law of real property in Ontario should recognize certain qualifications on, or exceptions to, the rule in *Austerberry*. I say this for several reasons.

[94] First, the original historical rationales for the rule in *Austerberry* are simply not as relevant in Ontario in 2002 as they may have been in the United Kingdom in 1885. This point was succinctly summarized by the application judge in the present case:

The 1989 Ontario Law Reform Commission *Report on Covenants Affecting Freehold Land* at 21 considered the rule against positive covenants flowing with title and the two reasons typically advanced for its existence. First, such covenants tended to render land inalienable. Second, persons dealing subsequently with the land would have great

difficulty ascertaining the existence of such covenants, because they do not normally have a physical manifestation.

The OLRC considered and rejected these rationales. The OLRC Report noted at 100 that it has now been generally recognized that such restrictions do not render land inalienable. Rather, both positive and negative covenants tend to enhance alienability, since they operate to protect the amenities of neighbourhoods and competitiveness of businesses. The second rationale that gave rise to the ancient rule has never been an obstacle in Ontario, since a system of land registration has existed since the province was created.

[95] A similar observation on the inalienability aspect of the rationale for the rule in *Austerberry* was made by Cambridge University law professor Kevin Gray in his text, *Elements of Land Law* (2nd. ed., 1993), at pp. 1133-34:

Although the principle of *Austerberry v. Oldham Corpn* was clearly motivated by a policy that land should remain unfettered for future generations, the implications of that decision are nowadays a matter of considerable disadvantage. It has been pointed out, for instance, that the principle ‘impedes transactions in land which have become socially desirable’. The anxiety of judges in the 19th century to limit the kinds of incumbrance which might be imposed upon the freehold estate is not particularly apposite under the vastly changed conditions of modern life where most people live in large cities. The property law of the 19th century was highly individualistic and made little provision for ‘freeholders living like battery hens in urban developments’ where much of the land area may consist of amenities which belong to none personally but which are socially necessary for all.

[96] Second, the rule in *Austerberry* is simply too harsh if it is applied in all cases. In a comprehensive study of all aspects of the law relating to covenants entitled *Transfer of Land: The Law of Positive and Restrictive Covenants* (1984), The Law Commission of the United Kingdom stated, at p. 19:

The greatest and clearest deficiency in the law . . . is that the burden of a positive covenant entered into between nearby landowners does not *in any circumstances* run with the land of the covenantor. [Emphasis added.]

In a similar vein, Professors Bradbrook, MacCallum and Moore, the authors of the leading text *Australian Real Property Law* (2nd. ed., 1997), have described the rule in *Austerberry* as “inflexible” and have documented a number of methods for “avoid[ing] the severity of the rule” (pp. 18-6 – 18-7).

[97] Third, in most common law jurisdictions where the rule in *Austerberry* applies there has been substantial modification of the rule by legislatures. This is particularly so in the relatively new and rapidly growing domain of condominiums: see Ziff, *Principles of Property Law* (3rd. ed., 2000) at p. 366. Indeed, in Ontario, as Charron J.A. points out in her reasons, there are now at least twelve statutes that derogate from the application of the rule in *Austerberry* in certain situations.

[98] Amberwood contends that the existence of these statutory exceptions implies that the legislature has endorsed the rule in *Austerberry* in all other situations, including the situation in this case. I disagree. The more logical interpretation, in my view, is that the legislature has on occasion dealt with discrete problems presented by the “inflexible” and “severe” rule. The legislature’s solutions to those problems are not a warning to the courts that they should abdicate their traditional role as interpreters and developers of the common law in this domain.

[99] Fourth, and related to the previous point, the rule in *Austerberry* is a common law rule *created by the courts* in the United Kingdom and *adopted by courts* in other jurisdictions, including Canada: see *Parkinson v. Reid*, [1966] S.C.R. 162. I see no reason why the courts should not regard it as their function to assess, in a principled way, whether the rule should apply in every case and to consider whether exceptions need to be developed to deal with unforeseen situations or cases where the strict application of the rule would lead to injustice. That process is the essence of the common law. As Justice Cardozo said in *The Nature of the Judicial Process* (1921), the book flowing from the Storrs Lectures delivered at Yale University: “There are gaps to be filled. There are doubts and ambiguities to be cleared. There are hardships and wrongs to be mitigated if not avoided” (p. 14).

[100] Having concluded that it is appropriate for the courts to address the issue of exceptions to the rule in *Austerberry*, the question becomes: what are the possible exceptions and should any of them be applied in the present case? In the last half-century, the case law in the United Kingdom has provided two possible exceptions – the benefit-burden exception and the conditional grant exception. I will consider them in turn.

(3) The benefit-burden exception

[101] The benefit–burden exception is easy to state – “he who takes the benefit of the transaction must also bear the burden”: see *Tito v. Waddell (No. 2)*, [1977] 1 Ch. 106 at 289, per Megarry V.-C. The benefits and burdens can arise out of entirely separate obligations. As explained by Professor Ziff in *Positive Covenants Running With Land: A Castaway on Ocean Island?*¹ (1989), 27 Alta. L. R. 354 at 356 (“*Positive Covenants*”):

The principle of benefit and burden applies where, as a matter of construction, the benefits and burdens are created as independent obligations, for a central feature of the doctrine is to tether previously separate promises.

[102] The first case in which the benefit-burden exception was applied was *Halsall v. Brizell*, [1957] 1 All E.R. 371 (Ch. D.) (“*Halsall*”). In that case, the purchasers of lots in a subdivision were entitled under a trust deed to use private roads and other amenities. Each purchaser covenanted to pay a share of the costs to maintain the amenities. This is a classic positive covenant squarely within the rule in *Austerberry*.

[103] The court held that the successors to the original covenantors were liable to pay their share of the costs. Upjohn J. was well aware that he was dealing with positive covenants. He observed that the successors could not be sued on the covenants in the original deed because “a positive covenant . . . does not run with the land” (p. 377). However, he continued, at p. 377:

It is, however, conceded to be ancient law that a man cannot take benefit under a deed without subscribing to the obligations thereunder. If authority is required for that proposition, I refer to one sentence during the argument in *Elliston v. Reacher*, [1908] 2 Ch. 665, where Sir Herbert Cozens-Hardy, M.R., said, at p. 669:

It is laid down in Coke on Littleton, 230b, that a man who takes the benefit of a deed is bound by a condition contained in it though he does not execute it.

If the defendants did not desire to take the benefit of this deed, for the reasons that I have given they could not be under

¹ *Ocean Island* is another name for *Tito v. Waddell (No. 2)*.

any liability to pay the obligations thereunder. They do desire, however, to take the benefit of this deed. They have no right to use the sewers which are vested in the plaintiffs, and I cannot see that they have any right, apart from the deed, to use the roads of the park which lead to their particular house, No. 22, Salisbury Road . . . Therefore, it seems to me that the defendants here cannot, if they desire to use their house, as they do, take advantage of the trusts concerning the user of the roads contained in the deed and the other benefits created by it without undertaking the obligations thereunder. On that principle it seems to me that they are bound by this deed, if they desire to take its benefits.

[104] The analysis and result in *Halsall* were almost immediately acclaimed in important quarters. An editorial note annexed to the report of the case in the All England Law Reports said that the conclusion was supported by two legal maxims, the Latin maxim *qui sentit commodum sentire debet et onus* (he who receives the advantage ought also to suffer the burden) and the Scottish rule that one cannot both approbate and reprobate (p. 372). Favourable case comments by Professor H.W.R. Wade and Robert Megarry appeared in, respectively, [1957] C.L.J. 35 and (1957), 73 L.Q.R. 154. Professor Wade wrote that “[i]n *Halsall v. Brizell* . . . a method seems to have been found for making the burden of a positive covenant run with land very effectively” (p. 35). In the latter comment, Mr. Megarry concluded, at p. 156:

What plainly would be unjust would be to allow the successors in title to rely on only those portions of the covenants which benefit them, and reject the rest, just as a legatee must accept or reject a legacy as a whole, and not accept the beneficial part and disclaim the remaining burdensome parts: see, *e.g. Re Joel*, [1943] Ch. 311. *Halsall v. Brizell* is plainly an important decision of which more will be heard. Those concerned with the development of estates, and perhaps especially those who frame schemes for freehold flats, now have at their disposal a flexible means of enforcing control against successors in title even in matters of positive obligation.

[105] *Halsall* was applied, and extended to parol agreements, in *E.R. Ives Investments Ltd. v. High*, [1967] 1 All E.R. 504 (C.A.) (“*Ives Investments*”). In that case, the plaintiffs’ predecessor in title, Mr. Westgate, and the defendant, Mr. High, bought adjacent building sites. The foundations of Westgate’s building trespassed under High’s

land. Because Westgate and High were, in Danckwert L.J.'s words, "sensible and reasonable neighbours" (p. 509), they discussed the situation and reached an agreement – Westgate's foundation could stay in place and High would have access across Westgate's yard to a side street. High used Westgate's yard for his car, built a garage on his property which could only be accessed from Westgate's yard, and even paid a portion of the costs of re-surfacing Westgate's yard. Eventually, Westgate's property passed into the hands of E.R. Ives Investments Ltd. which challenged High's right of way and sought an injunction restraining High from exercising his right of way across the passage. The trial judge refused the injunction.

[106] On appeal to the Court of Appeal, all three judges delivered reasons. All cited *Halsall* with approval. Lord Denning said, at p. 507:

When adjoining owners of land make an agreement to secure continuing rights and benefits for each of them in or over the land of the other, neither of them can take the benefit of the agreement and throw over the burden of it. This applies not only to the original parties, but also to their successors. The successor who takes the continuing benefit must take it subject to the continuing burden. This principle has been applied . . . to purchasers of houses on a building estate who had the benefit of using the roads and were subject to the burden of contributing to the upkeep (see *Halsall v. Brizell* . . .). The principle clearly applies in the present case. The owners of the block of flats have the benefit of having their foundations in the defendant's land. So long as they take that benefit, they must shoulder the burden. They must observe the condition on which the benefit was granted, namely, they must allow the defendant and his successors to have access over their yard Conversely, so long as the defendant takes the benefit of the access, he must permit the block of flats to keep their foundations in his land.

Leave to appeal to the House of Lords was refused.

[107] The third and, without question, the leading English case applying the benefit-burden principle is *Tito v. Waddell (No. 2)*, *supra*, ("*Tito*"). *Tito* is a case on a grand scale. The trial lasted 111 days in 1975, 98 days in 1976 and 3 days in 1977. The judgment written by Vice-Chancellor Megarry (who, as Mr. Megarry, had written the favourable case comment on *Halsall* 20 years earlier) was 241 pages in the law report and took four days to read in open court.

[108] The facts in *Tito* are from another age and reveal, in Professor Ziff's words, "a measure of corporate and imperial avarice" : see *Positive Covenants*, at p. 355. In 1900, phosphate was discovered on Ocean Island. The island was called Banaba by the inhabitants who were known as Banabans. In the same year, the island became a British settlement. The land on Ocean Island was divided up into a large number of small plots (most of them being less than one acre) owned by individual Banabans or groups of Banabans. A British company was given a licence to mine the phosphate on the island. In 1913, an agreement was reached among the mining company, the Colonial Office, the resident Commissioner and the landowners. The mining company acquired mining rights in return for the payment of certain sums to the landowners and royalties to the government. The agreement also provided that after all the phosphate was removed from the land, the worked-out lands would be returned to the original owners. The company was required by the agreement to "replant such lands – whenever possible – with coconuts and other food-bearing trees, both in the lands already worked out and in those to be worked out".

[109] In 1920, the governments of the United Kingdom, Australia and New Zealand purchased the undertakings of the mining company on Ocean Island and the rights over the mining operations were vested in three Phosphate Commissioners (one from each country). In 1971, a group of Banabans, including Rotan Tito, filed suit against the current Commissioners, seeking performance of the replanting obligation which had become due.

[110] The replanting obligation was a positive covenant; it would have required the Commissioners to spend more money to comply with it. Thus, if the rule in *Austerberry* applied, the Commissioners, successors to the original covenantors, could not be forced to fulfil the replanting obligation.

[111] Megarry V.-C. was not prepared to accept such a result. He engaged in an extensive analysis of "the principle that he who takes the benefit of a transaction must also bear the burden" (p. 289). He divided the principle into two categories, conditional benefits and "the pure principle of benefit and burden" (p. 290). He described, and differentiated between, these two categories in this fashion, at p. 290:

CONDITIONAL BENEFITS AND INDEPENDENT OBLIGATIONS. One of the most important distinctions is between what for brevity may be called conditional benefits, on the one hand, and on the other hand independent obligations. An instrument may be framed so that it confers only a conditional or qualified right, the condition or qualification being that certain restrictions shall be observed

or certain burdens assumed, such as an obligation to make certain payments. Such restrictions or qualifications are an intrinsic part of the right: you take the right as it stands, and you cannot pick out the good and reject the bad. In such cases it is not only the original grantee who is bound by the burden; his successors in title are unable to take the right without also assuming the burden. The benefit and the burden have been annexed to each other ab initio, and so the benefit is only a conditional benefit. In the other class of case the right and the burden, although arising under the same instrument, are independent of each other: X grants a right to Y, and by the same instrument Y independently covenants with X to do some act. In such cases, although Y is of course bound by his covenant, questions may arise whether successors in title to Y's right can take it free from the obligations of Y's covenant, or whether they are bound by them under what for want of a better name I shall call the pure principle of benefit and burden.

[112] Megarry V.-C. engaged in an extensive analysis of many authorities and dealt openly with the perceived problems of the benefit-burden principle in a real property context. In particular, he discussed at length *Halsall* which he regarded as the leading case in the pure principle of benefit and burden category. He was well aware of the criticisms that had been made of *Halsall* – that Upjohn J.'s conclusion on the benefit-burden issue was *obiter*, was based on a concession by counsel, and involved reliance on a comment during argument (not a decision) by a judge (Cozens-Hardy M.R.) in a previous case.

[113] In spite of these difficulties concerning *Halsall*, in the end Megarry V.-C. clearly approved of it. He concluded, at p. 295:

Let it be accepted that a degree of historical frailty can be detected in the forensic process in this sphere, and let it also be accepted that, at any rate on one view, what Upjohn J. said on the point was not necessary for his decision and forms no part of his ratio decidendi. Accept all that, and there still remains the fact that, quite apart from other authorities, the propositions enunciated by Cozens-Hardy M.R. and Upjohn J. seemed right to them. Couple that with the simple principle of fairness and consistency that I have mentioned, and it will be seen that there is good reason why I should be

ready to adopt and apply the broader proposition that has emerged from the technicalities of past ages.

[114] Applying “the broader proposition” or “the pure principle of benefit and burden”, Megarry V.-C. held that the current Commissioners had an obligation to comply with the replanting covenant. They had received, and exercised, the benefit of substantial mining rights. The burden of replanting needed, therefore, to be respected.

[115] The trilogy of *Halsall*, *Ives Investments* and *Tito* created a solid foundation in English law for a benefit-burden exception to the rule in *Austerberry*. However, blunt and strong judicial criticism of the trilogy, especially *Tito*, was not long in coming.

[116] By far the strongest criticism came in an Australian case, *Government Insurance Office (N.S.W.) v. K.A. Reed Services Pty. Ltd.*, [1988] V.R. 829 (Vict. S.C.) (“*Reed Services*”). Although that case could have been resolved on the basis that the successor to a positive covenant had no notice of it (“The appellant, being entirely ignorant of the agreement, could not be said to be taking its benefit”: p. 841), the full court, speaking through Brooking J., went out of its way to reject the benefit-burden exception. Brooking J. criticized the legal pedigree, namely *Halsall*, of the pure principle of benefit and burden, expressed concerns about the limits of the principle, called it “a mere maxim masquerading as a rule of law, false and misleading . . . when read literally” (p. 841) and concluded, at pp. 840-41:

I am, with the greatest respect, unable to accept that there exists a principle of benefit and burden, whether as formulated by Megarry V.-C. [*Tito*] or as laid down either by Lord Denning M.R. or by Danckwerts L.J. [*Ives Investments*] . . . It confounds the law relating to covenants affecting land.

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I have dealt at some length with the law on this subject because of my impression that the “pure principle” now bids fair to entrench itself in our jurisprudence and because of my clear view that it must, in the interests of certainty and sound doctrine, be repelled.

[117] A less lengthy (indeed it is only a single paragraph) but nevertheless important (because of its source) critique of *Tito* and the benefit-burden exception to the rule in *Austerberry* is contained in *Rhone v. Stephens*, [1994] 2 All E.R. 65 (H.L.) (“*Rhone*”). In that case, in 1960 the owners of a house and an adjoining cottage, which were under

the same roof, sold the cottage. In the conveyance, the vendor covenanted for himself and his successors in title as the owners of the house to maintain that part of the roof of the house which was above the cottage in good condition to the reasonable satisfaction of the purchasers and their successors in title. Since 1960 both properties had been sold. In 1986, the plaintiffs, who then owned the cottage, brought an action against the defendant claiming that the roof above the cottage was leaking and that the defendant was in breach of the covenant to repair the roof.

[118] The House of Lords rejected the plaintiffs' position. The law lords expressly affirmed the rule in *Austerberry*. In a single paragraph, the court, speaking through Lord Templeman, considered the plaintiffs' submission that the defendant, who had the benefit of the shared roof, should be required to bear the burden of repairing the roof pursuant to the covenant on the basis of the benefit-burden exception. Lord Templeman said, at p. 73:

Mr. Munby also sought to persuade your Lordships that the effect of the decision in the *Austerberry* case had been blunted by the 'pure principle of benefit and burden' distilled by Megarry V-C from the authorities in *Tito v Waddell (No 2)* [1977] 3 All ER 129 at 291-292, [1977] Ch 106 at 301-303. I am not prepared to recognise the 'pure principle' that any party deriving any benefit from a conveyance must accept any burden in the same conveyance. Megarry V-C relied on the decision of Upjohn J in *Halsall v. Brizell* [1957] 1 All ER 371, [1957] Ch 169. In that case the defendant's predecessor in title had been granted the right to use the estate roads and sewers and had covenanted to pay a due proportion for the maintenance of these facilities. It was held that the defendant could not exercise the rights without paying his costs of ensuring that they could be exercised. Conditions can be attached to the exercise of a power in express terms or by implication. *Halsall v. Brizell* was just such a case and I have no difficulty in whole-heartedly agreeing with the decision. It does not follow that any condition can be rendered enforceable by attaching it to a right nor does it follow that every burden imposed by a conveyance may be enforced by depriving the covenantor's successor in title of every benefit which he enjoyed thereunder. The condition must be relevant to the exercise of the right. In *Halsall v. Brizell* there were reciprocal benefits and burdens enjoyed by the users of the roads and sewers. In the present case cl 2 of the 1960 conveyance imposes reciprocal benefits and burdens of

support but cl 3 which imposed an obligation to repair the roof is an independent provision. In *Halsall v. Brizell* the defendant could, at least in theory, choose between enjoying the right and paying his proportion of the cost or alternatively giving up the right and saving his money. In the present case the owners of Walford House could not in theory or in practice be deprived of the benefit of the mutual rights of support if they failed to repair the roof.

[119] In my view, this is a surprising paragraph, for two reasons. First, it begins with a blunt rejection, without reasons, of the pure principle of benefit and burden. The lack of analysis by the House of Lords is surprising in light of the comprehensive, and fairly presented, discussion of the principle in *Tito*: see N. P. Gravells, *Enforcement of Positive Covenants Affecting Freehold Land* (1994), 110 L.Q.R. 346 at 349 (“[Lord Templeman’s] formulation of the pure principle does not fairly represent the extensive discussion in *Tito v. Waddell (No. 2)*”). Second, the House of Lords appears to expressly approve of the conditional grant exception to the rule in *Austerberry*. Moreover, the law lords’ approval flows directly from its “whole-hearted” agreement with *Halsall*. This is also surprising because in *Tito* Megarry V.-C. had described *Halsall* as the genesis of the pure principle of benefit and burden, not as an example of the conditional grant exception.

[120] Against this background of the case law, I turn to the academic commentary on the benefit-burden exception to the rule in *Austerberry*. The commentary has been recently, just as it was immediately after *Halsall* in 1957 (see comments by Megarry, *supra*, and Wade, *supra*), largely complimentary. Leading scholars express concerns about the antecedents of the exception (especially some of Upjohn J.’s reasoning in *Halsall*), the factors to be taken into account in analyzing benefit and burden, and the reach and implications of the exception. However, in the end most scholars think that the benefit-burden exception plays a useful role in real property law.

[121] Professor Bruce Ziff, a leading Canadian property law scholar, in his comprehensive and excellent article *Positive Covenants*, favoured the analysis in *Tito* to that in *Reed Services* and concluded, at p. 372:

[I]ncremental adjustments through the caselaw should not be regarded with surprise or dismay. There are no compelling reasons why the schemes sought in *Reed Services* and *Tito* should not be regarded as permissible as an ordinary incident of private property ownership. In both cases, allowing affirmative burdens to run with land would have enabled the

parties to meet their intended objectives in a straightforward and inexpensive fashion.

[122] Professor E.P. Aughterson, an Australian scholar who has written extensively on property law, also favoured the analysis in *Tito* to that in *Reed Services*. In the concluding section of his article *In Defence of the Benefit and Burden Principle* (1991), 65 A.L.J. 319 at 331, he said:

It has been suggested, above, that the scope of the benefit and burden principle is sufficiently clear to allow its application with a reasonable degree of precision and that other principles are not a bar to its adoption. Rather, various devices, such as chains of indemnities, restrictive covenants, estoppel and rent charges, as well as the benefit and burden principle, have evolved in order to meet the unsatisfactory consequences of the rule that the burden of positive covenants does not run with the land. None of these devices, in themselves, provide a comprehensive solution. The benefit and burden principle is no exception. It operates only where a benefit can be given and continues only while the benefit is sufficiently valuable for the covenantor's successor to continue to claim it. Nevertheless, it is another weapon in an armoury which might be used to militate against a common law rule which can operate unfairly in some instances.

[123] In the United Kingdom, Professor Christine Davis has recently written a thoughtful article, *The Principle of Benefit and Burden* (1998), 57 C.L.J. 522. The value of this article is that Professor Davis considers a wide variety of applications of the benefit-burden principle in several areas of private law, including real property. She deals extensively with objections to the pure principle of benefit and burden and concludes that they “relate largely to the fact that its limits are unclear and that it has potentially far-reaching effects” (p. 548). However, in the end Professor Davis emerges as a strong supporter of the principle of benefit and burden and of its leading case authorities in the real property domain, *Halsall* and *Tito*. She concludes, at pp. 552-53:

It is arguable that “benefit and burden” is a principle, reasonably clear in its application, that promotes fairness and, consequently, far greater use should be made of it. It seems only fair that a right or benefit originally granted subject to a condition or linked with a reciprocal right or obligation should remain conditional or linked. In recent years the courts have been keen to make use of other principles that can

be seen to achieve fairness in the circumstances and in the light of the conduct of the parties, such as constructive trusts and proprietary estoppel. For example, a purchaser of land may be bound by means of a constructive trust by a contractual licence or unregistered registrable interest where his conscience is affected because of the circumstances surrounding the assignment. Why should his conscience not also be affected by the circumstances of the grant, at least where he has knowledge of them, combined with his later conduct in taking the benefit? Perhaps the only justifiable distinction between the principle of benefit and burden on the one hand and the constructive trust and doctrine of proprietary estoppel on the other hand is that the latter are discretionary in their application or effects whereas the former is not. Nevertheless, provided that the courts reach a satisfactory conclusion in relation to issues such as the need for knowledge so as to ensure that the principle of benefit and burden is fair to all concerned, it is arguable that the principle of benefit and burden is a useful doctrine which should be invoked by the courts whenever the circumstances permit.

[124] Based on this review of the leading case authorities and some of the academic and professional commentary, the question becomes: should the principle of benefit and burden be adopted in Ontario as an exception to the rule in *Austerberry*?

[125] I begin by noting that, in my view, it is open to Canadian courts to adopt the benefit-burden exception if they think it has merit. In a real property context, the exception has not been rejected by any appellate court. Indeed, the exception and its originating case, *Halsall*, were mentioned by Cartwright J. in *Parkinson v. Reid*. In that case, the court affirmed the general rule that positive covenants do not run with the land. Accordingly, the successor in title to a covenant requiring repair of a stairway was not obligated to comply with the covenant. However, Cartwright J. observed, at pp. 168-69:

Assuming that so long as the appellants made use of the last-mentioned wall as a party wall they were bound to keep the stairway in repair, they ceased to be under any such obligation when they no longer made use of the respondent's wall. It is not suggested that the appellants have made any use of that wall since their building was destroyed by fire. A case in which this principle was applied is *Halsall v. Brizell*. . . .

[126] Turning to the fundamental question, I can state my view that the benefit-burden exception to the rule in *Austerberry* should be adopted. I believe that the analysis in *Halsall, Ives Investments* and *Tito* is preferable to the analysis in *Reed Services* and *Rhone*. I also find persuasive the strong academic and professional support for the exception, extending from Professor Wade and Mr. Megarry in 1957 to Professor Aughterson in Australia, Professor Davis in the United Kingdom and Professor Ziff in Canada in recent years.

[127] The final question then becomes: is the exception applicable in this case? I begin my answer to this question by noting that all of the judges and academics who favour the exception admit that there are problems with it. In *Tito*, Megarry V.-C. was particularly candid on this point. He began the summary of his conclusions with this sentence: “I emerge from a consideration of the authorities put before me with a number of conclusions and a number of uncertainties” (p. 302).

[128] In spite of problems and uncertainties, in my view it is possible, based on the case authorities and the academic commentary, to state the components of the benefit-burden exception with a reasonable degree of clarity.

[129] First, the assignee of a positive covenant must have notice of it. The burden of such a covenant cannot attach to a person who was not aware of it. That will rarely be an issue in Ontario where a wide variety of documents relating to land can be registered and are thus accessible.

[130] Second, a positive covenant which imposes a burden on an assignee must be accompanied by a benefit. The burden will not run in isolation.

[131] Third, it may be that there is some type of qualitative threshold in the benefit and burden analysis. Megarry V.-C. seemed to envisage one because in *Tito* he said, at p. 305:

I do not think that the pure benefit and burden principle is a technical doctrine, to be satisfied by what is technical and minimal. I regard it as being a broad principle of justice, to be satisfied by what is real and substantial.

See also: Ziff, *Positive Covenants*, at p. 357.

[132] Fourth, there need not be a direct relationship or linkage between the benefit and the burden. They are, as Megarry V.-C. said in *Tito*, “independent” (p. 290), which distinguishes them from conditional benefits (discussed below).

[133] Fifth, the assignee must be able to exercise a choice about assuming the benefits and burdens. This was one of the fundamental components of the exception described by Upjohn J. in *Halsall* (p. 377). It should be recalled that *Halsall* was specifically approved in *Rhone*, although the approval is surprising and confusing in light of the House of Lords' rejection of *Tito*; on the issue of choice or election, Lord Templeman said: "In *Halsall v. Brizell* the defendant could, at least in theory, choose between enjoying the right and paying his proportion of the cost or alternatively giving up the right and saving his money" (p. 73).

[134] Turning to the application of these factors in the present case, it is clear that they line up in favour of the appellant.

[135] Amberwood had clear notice of the burdens which it would be required to assume. Indeed, before the litigation was commenced, there were extensive negotiations about the burdens and, at one point, Amberwood's counsel informed DCC's counsel, in a letter dated October 1, 1999, "I have advised my clients and they have agreed with me to accept that they are bound by the terms of the agreement".

[136] In addition, there can be little question that Amberwood derived benefits from the agreement and that, on any standard, the benefits are "real and substantial". The recreational and utility units in DCC's building, which are partly owned by Amberwood, are maintained by DCC. There is 24 hour security for that building. Amberwood also has the benefit of 10 valuable easements provided for in section 3.1 of the agreement.

[137] Finally, Amberwood exercised a clear choice when it accepted the benefits under the agreement. It has never disclaimed its entitlement to the benefits; indeed it has openly asserted that entitlement and an intention to use the benefits, including "for [Amberwood's] future marketing program" (Price-Kilgour letter, September 24, 1999).

[138] In summary, I would apply the benefit-burden exception to the rule in *Austerberry* in the present case. Since Amberwood had notice of the burdens, since the benefits are "real and substantial", and since Amberwood elected to accept them, it must also accept the burden of paying its share of the interim costs.

[139] Before leaving this issue, which I acknowledge is a difficult one, I want to make two final observations.

[140] First, I do not think there is an inconsistency between the introduction of the benefit-burden exception into the law of Ontario and the continuation of the general rule that positive covenants do not run with the land. Put another way, I do not think that the

exception swallows the rule. Professor Davis, in her article *The Principle of Benefit and Burden*, stated that with respect to the “pure principle of benefit and burden . . . [e]nforcement is only possible in certain circumstances, not generally” (p. 552). The Ontario Law Reform Commission, in its *Report on Covenants Affecting Land (1989)*, said that the usefulness of the exception in *Halsall* “is somewhat limited. It will operate only if there is a benefit to be claimed under the deed, and further, it will operate only so long as the assignee of the covenantor continues to claim that benefit” (p. 23). Professor Eileen Gillese, in her text *Property Law* (2nd. ed., 1990), made a similar observation: “The doctrine in *Halsall v. Brizell* . . . is of limited application, however, since it only applies if the assignees claim or use the benefit” (p. 20:10).

[141] I agree with these comments. The exception will *not* apply if there is no notice of the burden or if there is no benefit for the assignee to receive or if the assignee elects not to accept the benefit. These are important factors; their presence will allow the general rule to continue to be applied in many appropriate cases.

[142] Second, I do not think that the benefit-burden exception will hinder the alienability of land. Market forces will deal with the exception, just as they deal with all other relevant factors in a purchase and sale context. As explained by Professor Ziff in *Positive Covenants*, “market forces will take account of, and respond to, the effect of positive covenants on alienation: if a covenant renders a property less desirable, its price will fall until it again becomes attractive to purchasers” (p. 369). Moreover, in many situations, especially large scale development projects, the exception will be viewed by the contracting parties as highly desirable because it will *promote* alienability: see Ontario Law Reform Commission, *Report on Covenants Affecting Freehold Land*, at p. 100, and Gray, *Elements of Land Law*, at pp. 1133-34.

(4) The conditional grant exception

[143] The conditional grant exception to the rule in *Austerberry* was succinctly explained by Megarry V.-C. in *Tito*, at p. 290. For ease of reference, I set out this passage again:

An instrument may be framed so that it confers only a conditional or qualified right, the condition or qualification being that certain restrictions shall be observed or certain burdens assumed, such as an obligation to make certain payments. Such restrictions or qualifications are an intrinsic part of the right: you take the right as it stands, and you cannot pick out the good and reject the bad. In such cases it is not only the original grantee who is bound by the burden:

his successors in title are unable to take the right without assuming the burden. The benefit and the burden have been annexed to each other ab initio, and so the benefit is only a conditional benefit.

[144] I begin by observing that I think the case for importing this exception into Ontario law is even stronger than the case for importing the benefit-burden exception. I acknowledge that there is uncertainty about the existence of the benefit-burden exception in English law in light of the House of Lords' terse disapproval of it in *Rhone*. Nevertheless, I would import it into Ontario law because I think it will make the law of real property more just.

[145] As for the conditional grant exception, on my reading of the cases, it is accepted in English law. There is no uncertainty concerning its existence. The reason for the certainty on this point is that in *Rhone* the law lords expressly approved of the result in *Halsall* and, perhaps surprisingly, explained *Halsall* as an example of the conditional grant category. Accordingly, the question in this aspect of the appeal is whether an accepted principle in English law should become part of the law of Ontario? For the reasons in the previous section, I would answer this question in the affirmative.

[146] It remains to determine whether the conditional grant exception applies in the present case. In my view, it does apply.

[147] I begin by noting the title of the governing document, the *Reciprocal Easement and Cost Sharing Agreement*. This title suggests, in my view, a direct linkage between the benefits of the easements and the burden of cost sharing.

[148] The preamble to the agreement also explicitly links easements and cost sharing:

AND WHEREAS the [owners] are entering into this Agreement to provide, without limitation, for . . . the sharing of responsibilities and costs for mutual services . . . and . . . the Easements required by each of the parties

[149] Sections 3.1 and 3.2 of the agreement then set out an extensive list of highly valuable easements – 10 in favour of Amberwood's predecessor and four in favour of DCC. Amberwood's easements include rights of access to permit construction of Phase 2, rights of access for purposes of maintenance, repair, installation and vehicular and pedestrian movement, and rights to tap into existing facilities in the Phase 1 building.

[150] Crucially, s. 13.1(b) of the agreement provides:

Section 13.1 – Provisions Run with the Land

.....

- (b) The parties hereto hereby acknowledge and agree that the Easements, rights and provisions as set forth in this Agreement establish a basis for mutual and reciprocal use and enjoyment of such Easements, rights and provisions and as an integral and material consideration for the continuing right to such use and enjoyment each party hereto does hereby accept, agree to assume the burden of, and to be bound by each and every of the covenants entered into by them in this Agreement.

[151] The application judge interpreted s. 13.1(b) in this fashion:

In my view, the language of that section makes it clear that the payment of interim costs, as one of the covenants in the reciprocal agreement, was intended to be a condition upon which the other easements were conveyed. The provision does not support Amberwood's submission that the cost-sharing obligations should be viewed as distinct from the scheme for mutual easements. To the contrary, paragraph 13.1(b) seems to envision a building project in which the owners would share costs in exchange for shared access and ownership. To undermine this clear intention by severing the cost obligations from the overall deal would amount to dismantling part of an intricate, complex, and well-planned scheme, and defeating legitimate party expectations.

[152] I agree with this analysis. In my view, it is clear from a reading of the entire agreement – its title, preamble and substantive provisions – that there is a direct and intentional linkage or reciprocity between the benefits of the easements, which are numerous and valuable, and the burden of the interim costs that are in issue in this appeal. Accordingly, since Amberwood had notice of the burdens and elected to accept the benefits (even though their full value will not be realized until Amberwood either builds Phase 2 or sells the land, presumably for a price that would reflect the benefits of the easements), it must also accept the linked burden of paying its share of the interim costs.

(5) Conclusions and Disposition

[153] This is a difficult case, in terms of both the proper role of the courts in changing the common law and the substantive law of real property.

[154] I agree with my colleague, Charron J.A., that abolition of the rule in *Austerberry* must come, if it comes at all, through legislation. I also agree with my colleague's thoughtful reasons in support of this conclusion.

[155] My colleague extends her reasoning to the question of whether the law of Ontario should admit of exceptions to the rule in *Austerberry*. I confess that there is much to be said for my colleague's reasoning on the question of exceptions.

[156] However, with respect, I have reached a different conclusion on the question of exceptions. In my view, there are recognized exceptions to the rule in *Austerberry* in English case law. The judicial reasoning in support of the exceptions and the academic and professional commentary about that reasoning persuade me that the exceptions should be adopted as part of the common law of Ontario.

[157] As to whether the courts can introduce the exceptions into the law of Ontario, I recall again what Justice Cardozo said about the role of the common law in *The Nature of the Judicial Process*: "There are gaps to be filled. There are doubts and ambiguities to be cleared. There are hardships and wrongs to be mitigated if not avoided" (p. 14).

[158] In a similar vein, Bastarache J. recently discussed judicial reform of the common law in *Friedmann Equity Developments Inc. v. Final Note Ltd.* (2000), 188 D.L.R. (4th) 269 at 290-91 ("*Friedmann Equity*"):

[I]t is necessary to understand the principles which govern judicial reform of the common law. In the past, this Court has considered the conditions which must be present to effect a change in the common law in several cases: [names and citations omitted]. From these cases, some general principles have emerged. *A change in the common law must be necessary to keep the common law in step with the evolution of society . . . to clarify a legal principle . . . or to resolve an inconsistency. In addition, the change should be incremental, and its consequences must be capable of assessment.*

[Emphasis added.]

[159] Canadian society and the patterns of property ownership in 2002 are very different from English society and land ownership in 1885 when *Austerberry* was decided. The Ontario legislature has recognized the differences and enacted laws mitigating the rigours of the rule in *Austerberry* – on 12 occasions.

[160] In my view, the benefit-burden and conditional grant exceptions to the rule in *Austerberry* can perform a similar role if introduced into the common law of Ontario. As I have tried to explain the exceptions, their adoption would, as required by Bastarache J. in *Friedmann Equity*, result in incremental change with consequences capable of assessment. They would also meet Justice Cardozo’s important objective of mitigating hardships or wrongs in appropriate cases. This is one of those cases. The intentions of the original contracting parties and the wording in the agreement they signed are both crystal clear: a regime of reciprocal easements and other benefits and cost sharing was established. Amberwood, a successor in title to one of the contracting parties, chose, with full knowledge of the clear terms of the original agreement, to accept and utilize the benefits of the agreement. In my view, it would be unjust to permit Amberwood to ignore the reciprocal burdens which the agreement so clearly imposes on it.

[161] For these reasons, I would allow the appeal with costs.

Signed: “MacPherson J.A.”

215 Glenridge Ave. Ltd. Partnership v. Waddington
Superior Court of Justice, Quinn J. February 18, 2005

APPLICATION for a compliance order under the *Condominium Act*, 1998, S.O. 1998, c. 19.

Joseph C. McCallum, for applicant.
Heather Waddington, respondent in person.

Endorsement by QUINN J.:

Introduction

[1] The applicant is the owner of a residential unit of Niagara North Condominium Corporation No. 125 ("Corporation"). The respondent rents the unit from the applicant pursuant to a written lease or tenancy agreement. The lease has a no-pets provision.

[2] The applicant seeks an order that the respondent is in breach of the declaration of the Corporation and its rules in that she has, in her unit, two cats. The applicant also asks for a compliance order for the removal of the cats.

[3] The respondent argues that s. 15 of the *Tenant Protection Act*, 1997, S.O. 1997, c. 24 renders void the provision in the lease prohibiting the presence of cats in the unit. However, the applicant does not rely upon the no-pets provision in the lease but, instead, looks for relief under its rights, and the obligations of the respondent, found in the *Condominium Act*, 1998, S.O. 1998, c. 19 ("*Condominium Act*"), and in the registered declaration and rules of the Corporation.

[4] The evidence on the application consists of three affidavits delivered on behalf of the applicant and one affidavit from the respondent. ¹

¹ I note that the materials of the applicant were served on the respondent by counsel for the applicant. This is a tacky practice. Additionally, had the respondent not appeared (by appearing she made proof of service a non-issue), I would not have allowed

Background facts and legislation

[5] Pursuant to s. 5(1) of the *Condominium Act*, the Corporation is a corporation without share capital whose members are the owners of a freehold interest in a residential unit in the building.

[6] The respondent entered into the lease of her unit in May 2003. Subparagraph 14(b) of the lease reads:

14. The Tenant(s) further agrees:

(b) The Tenant(s) will not keep any animal, bird, insect or reptile to disturb the neighbouring property owners.

[7] Paragraph 13 of the lease requires tenants to comply with the rules of the Corporation:

13. The tenant(s) agrees [*sic*] to comply with each of the rules and regulations attached as Schedule "A" and such other rules and regulations as may from time to time be amended, modified or added upon written or posted notice to the tenant(s) by the landlord.

The only copy of the lease with which I was provided was in the form of an exhibit to the affidavit of the respondent. Schedule "A" was not attached and so I do not know what "rules and regulations" it contained. Nevertheless, the evidence is that at the time the respondent signed her lease she was provided with a copy of a document summarizing some of the core rules of the Corporation. Rule #6 in the summary states:

6. PETS -no pet shall be permitted in the building

The factum of the applicant refers to the board of directors of the Corporation having passed "rule 12". A copy of that rule was not

counsel to argue the application. A lawyer should not be counsel in a matter where he relies on his own affidavit as part of the evidence.

included in the evidence. I gather that it reads the same as rule #6 in the summary.

[8] There is a policy (unwritten, I assume, as I was not shown anything in writing) that all those persons who occupied units in 1997 (when the building was converted from apartments to condominiums) and had a pet, are permitted to keep the pet until it is voluntarily removed from the unit by the occupant or it dies. And once either of those events occurs, no further pets are permitted in the unit.

[9] In accordance with s. 2 of the *Condominium Act*, a declaration was registered by the Corporation. Such a declaration, which binds each unit owner, may contain "conditions or restrictions with respect to the occupation and use of the units or common elements": see cl. 7(4)(b) of the *Condominium Act*. The declaration of the Corporation provides, in subsection 7, Article II, a prohibition against the keeping of pets:

No animal, livestock, fowl, fish, reptile or insect (a "pet") shall be permitted or kept in the building. Any owner shall, within two (2) weeks of receipt of a written notice from the Board or Manager requesting removal of any such animal, permanently remove such animal from the property. No breeding of animals for sale shall be carried on, in or around any unit.

[10] Letters were forwarded to the respondent on November 24, 2003, May 11, July 23, and October 26, 2004 demanding the removal of her cats. After the last letter, an inspection of her unit revealed the continued presence of the cats.

[11] Apart from s. 2, the power of the board of directors of the Corporation to make rules governing units in a residential complex is found in s. 58(1) of the *Condominium Act*: ~

58(1) The board may make, amend or repeal rules respecting the use of common elements and units to,

(a) promote the safety, security or welfare of the owners and of the property and assets of the corporation; or

(b) prevent unreasonable interference with the use and enjoyment of the common elements, the units or the assets of the corporation.

[12] Section 119(1) of the *Condominium Act* requires a tenant to comply with the declaration and the rules of a condominium corporation. It states, in part:

119(1) ...an occupier of a unit ...shall comply with this Act, the declaration, the by-laws² and the rules.

[13] Compliance with the rules of a condominium corporation is also addressed in s. 58(10):

58(10) All persons bound by the rules shall comply with them and the rules may be enforced in the same manner as the by-laws.

[14] This application is brought pursuant to subsection 134(1) of the *Condominium Act*, the operative part of which reads:

134(1) Subject to subsection (2),³ an owner. ..may make an application ...for an order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules....

[15] Section 15 of the *Tenant Protection Act*, relied upon by the respondent, states:

15. A provision in a tenancy agreement prohibiting the presence of animals in or about a residential complex is void.

Discussion

[16] Section 58(1) of the *Condominium Act* does not authorize a condominium corporation to make a blanket rule banning all pets. Only if pets compromise "the safety, security or welfare of the [unit] owners and of the property and assets of the [condominium] corporation" (cl. 58(1)(a)» or if they constitute an "unreasonable interference with the use and enjoyment of the common elements, the units or the assets of the [condominium] corporation" (cl. 58(1)(b)»,

² No by-laws were introduced into evidence.

³ Subsection 134(2) is not applicable at bar.

may the board of directors ban or prohibit their presence. There is no evidence that the cats of the respondent run afoul of cls. (a) or (b) of s. 58(1). And it cannot be said that the presence of all pets inherently constitutes a breach of those clauses.

[17] I also think that, if any part of a declaration conflicts with s. 58(1) it is void and unenforceable. In other words, where, pursuant to cl. 7(4)(b) of the *Condominium Act*, a declaration contains "conditions or restrictions with respect to the occupation and use of the units or common elements", a condominium corporation cannot go beyond that which is permitted in s. 58(1).

[18] Consequently, the declaration and rules of the Corporation are insufficient to prohibit the presence of the cats.

[19] As the applicant does not rely upon the lease, I will turn to it only briefly. I interpret subpara. 14(b) to prohibit only those animals that "disturb the neighbouring property owners". There is no evidence here of such a disturbance. As well, the applicant is unable to rely upon the phantom Schedule "A" because, to the extent that it contains a rule prohibiting the presence of all pets, I have already found that the Corporation has no authority under the *Condominium Act* to enact such a rule.

[20] In the circumstances, because the applicant does not seek to enforce the no-pets provision of the lease, I need not consider the question of whether s. 15 of the *Tenant Protection Act*, 1997 operates as a defence to the application.

Conclusion

[21] I find for the felines. The application is dismissed.

Order accordingly

COURT FILE NO.: 01-CV-216319CM

DATE: 20021004

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Apartments International Inc.

Plaintiff

- and -

Metropolitan Toronto Condominium Corporation No. 1170

Defendant

Michael A. Spears, for the Plaintiff/Respondent

Jonathan H. Fine, for the Defendant/Applicant

HEARD: September 11, 12 and 13, 2002

Lederman J.

Nature of the motion and action

[1] This is a motion brought by the defendant condominium corporation ("MTCC No. 1170"), pursuant to Rules 20, 21 and 51.06 of the *Rules of Civil Procedure* for summary judgment dismissing this action. The action is one for damages for intentional interference with economic relations.

[2] MTCC No. 1170 is a condominium corporation whose members own a luxury condominium building called the "Metropole", located at King and Victoria streets in downtown Toronto.

[3] The plaintiff, Apartment International Inc. ("API"), operates its business by leasing residential condominium units from some of MTCC No. 1170's unit owners and then marketing these units to members of the public as "furnished travel apartments" on a "pay per stay" basis.

[4] A central issue is the interpretation and application of Rules 7.01 and 7.07 passed by the Board of Directors of MTCC No. 1170 in April, 1999. They provide as follows:

7.01 A lease or tenancy of any unit shall be for a term not less than three months. No unit shall be occupied under a lease, sub-lease, contract or licence arrangements for transient or hotel purposes. All tenancies of units shall be in writing and a copy must be filed with the management office. No roomers or boarders are permitted.

7.07 Owners shall ensure that their tenants strictly comply with the provisions governing the use and occupation and leasing of residential units set forth in these Rules. ...If an owner ... fails to ensure his own compliance and that of the tenants with the requirements of the Condominium Act, the Declaration and the Rules, any person or persons intending to reside in the residential unit and use the common elements shall be considered an unauthorized person and entry to the buildings or any part of the common elements including the recreational amenities may be expressly denied to that person...until such person(s) and the owner have fully complied with the Act, the Declaration and the Rules.

[5] These rules were passed as a reaction to the use of units by commercial, hotel-like, operators. Such use had the detrimental effects of changing the character of the building, of increasing the number of strangers going in and out of the building thereby raising

security concerns, and of placing excessive demands and burdens on condominium staff.

[6] API takes the position in this action that it is in compliance with these rules, and that MTCC No. 1170 wrongfully interfered with its contractual relations and economic interests. MTCC No. 1170, on the other hand, submits that API is not in compliance and it has a legal right to demand that unit owners terminate their leases with API and to deny the tenants of API access to recreational amenities.

[7] The question is whether a genuine issue exists as to material facts in dispute which requires a trial.

The Related Application

[8] In a related case, *Metropolitan Toronto Condominium Corp. No. 1170 v. Zeidan and Glen Grove Residences Inc.* [2001] O.J. No. 2785, which was an application brought under s. 49 of the *Condominium Act*, R.S.O. 1990, c-26, Molloy J. found that Rule 7.01 was valid and enforceable. She also found that Glen Grove Residences Inc. ("Glen Grove") who leased units in the Metropole from unit owners, and then released them as short-term rentals to transient visitors, contravened Rule 7.01 both because it permitted tenancies of less than three months and because its units were occupied for transient use.

[9] API had entered into a legal fee cost-sharing arrangement with Glen Grove and Zeidan with respect to the proceeding before Molloy J. API did so because it felt that there were common issues of fact and law involved, the disposition of which would have an effect on API. API, however, did not seek intervention in that proceeding, although it had earlier brought an application against MTCC No. 1170 under s. 49 of the *Condominium Act* which was dismissed because of lack of standing.

[10] In paragraph [5] of the decision, Molloy J. described the nature of Glen Grove's business. In its advertising, it indicated that it provided a "unique alternative to staying in just an ordinary hotel" and provided accommodations to its guests on a "pay per stay basis". It

offered condominium residences with "weekly and monthly rates available". It offered a reservation and cancellation system, including prepayment by credit card, with stated check-in and check-out times. Fresh linens and weekly housekeeping and maid services were advertised and provided.

[11] At paragraph [6], Molloy J. stated "the records of the Metropole reveal that the length of occupancy of the Glen Grove units was frequently less than three months and often a matter of weeks, or even days". There may have been times when the occupancy was longer than three months, but the evidence in that case clearly established that the Glen Grove units at the Metropole had a frequent turnover rate and were routinely occupied on a short-term (less than three month) basis.

[12] Molloy J. accordingly found that the use of the subject units by Glen Grove contravened Rule 7.01 because it permitted tenancies of less than three months. In addition, she found contravention because these units were occupied for "transient use". Although Molloy J. did not define the phrase "transient or hotel purposes" in Rule 7.01 she did conclude that Glen Grove's business and the use of the units fell within this description.

[13] In the *Glen Grove* case, Molloy J. stated at paragraph [1]:

"This application is brought as a test case against one owner (Mr. Zeidan) and one business operator (Glen Grove). The principles established in this case are then expected to be applied to other owners and businesses in the same positions as the respondents in this case".

[14] MTCC No. 1170 submits that, given API's connection with the *Glen Grove* proceeding (including the fact that Mr. Spears acts for both Glen Grove and API), it is bound by the findings of Molloy J., including the finding that Glen Grove's use of the units in question, was improper for reasons including that the units were used for transient purposes contrary to Rule 7.01.

[15] *In House of Spring Gardens Limited v. Waite et al.*, [1990] 3 W.L.R. 347 (CA) at page 358, the English Court of Appeal stated that:

"The principle [of abuse of process] has recently been applied in this Court to analogous cases, where issues of fact have been litigated exhaustively in sample cases; it is an abuse of process for a litigant, who was not one of the sample cases, to re-litigate all the issues of fact on the same or substantially the same evidence."

MTCC No. 1170 submits that this principle should have application to this case.

API's Position

[16] Notwithstanding Molloy J's statement about the *Glen Grove* proceeding being a test case, API, which had a close interest and a cost sharing arrangement in that case, commenced this action for damages alleging intentional interference with contractual relations and economic interest. It submits that the facts surrounding its use of the units are different than that of Glen Grove and that it is in compliance with Rule 7.01 and that MTCC No. 1170 had no lawful right to deny its tenants access to recreational amenities, or to require its landlords to terminate leases.

The Three Month Tenancy Requirement

[17] Much argument on this motion was directed to whether some of the units under lease to API, after passage of Rule 7.01, were or were not in compliance with the three month part of Rule 7.01. In some cases, API argued that although the daily tenant list would show a tenant vacating a unit prior to the expiry of three months, such units were left vacant for the remainder of the three month period in order to comply with Rule 7.01. In other cases, API submitted that different corporate employees come and go from "corporate suites" which are rented by the corporation from API for more than three months, although such stays have been for as little as one night. API submits that these practices comply with the three month part of Rule 7.01.

[18] API submits that it has presented evidence on this motion which is clearly capable of supporting a finding with respect to the threshold issue, that it is in compliance with MTCC No. 1170's rules and that therefore, the condominium corporation has no lawful right to deny its tenants access to the recreational amenities or to require its landlords to terminate leases. API submits that the issue of compliance or non-compliance with Rule 7.01 requires findings of fact, weighing conflicting evidence, and drawing inferences from evidence not in conflict when more than one inference is reasonably available, none of which are properly done on a motion for summary judgment.

[19] It should be noted that in the *Glen Grove* case, the units were being rented by Glen Grove's guests for periods both more than, and less than, the three month period. It was Molloy J's conclusion that "...the evidence clearly establishes that its units at the Metropole have a frequent turnover rate and are routinely occupied on a short-term (i.e. less than three month) basis."

[20] The evidence on this motion establishes the very same pattern. API has demonstrated on the evidence, a lengthy, consistent and deliberate history of non-compliance with the three month tenancy requirement. It is not material that, on occasion, it may have honoured this part of the rule. In all material respects, the use of these units by API is the very same use made of units by Glen Grove. That is why API had such an interest in the outcome of that application and engaged in a cost sharing arrangement with Glen Grove.

Transient or Hotel Purposes Prohibition

[21] Moreover, and most importantly, the evidence on this motion creates an insurmountable problem for API in respect of the "transient or hotel purposes" prohibition in Rule 7.01.

[22] MTCC No. 1170's view of the transient/hotel prohibition rule was explained by Sylvia Furlong, the Director and Treasurer of the Condominium Corporation, as follows:

"To us there is a difference between someone who moves into The Metropole with it being their permanent residence, as opposed to someone else who as a permanent resident elsewhere and paying to live at the The Metropole on a temporary basis. The latter is what we consider to be a transient occupation of the unit, regardless of the length of stay".

[23] API's business is remarkably similar to Glen Grove's. By its own admission, API is a "rental agency" which competes with hotels for the business of the transient public. Its advertising material states: "we provide completely furnished travel apartments". Other advertising material indicates that it provides travel accommodation needs for travelers who are "away from home...no matter how long [they] wish to stay - whether it's a week, a month, or longer". Hotel-like terminology is used in their advertising materials including phrases such as "check-in/out", "reservations" and "cancellations". API quotes and charges daily rates and accepts payment by credit card which is automatically debited on check-in and then every thirty days thereafter. Full housekeeping service, including cleaning up the unit and new linens and towels, is included in the room rate and is provided weekly and also every time a short-term occupant moves out and another moves in. API, or its cleaning sub-contractor, uses storage lockers at MTCC No. 1170 to store cleaning materials, linens, cutlery and other supplies for the units.

[24] The Oxford English Dictionary defines "transient" as meaning "of short duration.... impermanent...temporary visitor". "Hotel" is defined as "an establishment...where paying visitors are provided with accommodation...and other services".

[25] API submits that the word "transient" as used in Rule 7.01 is not defined and it submits that this term requires a minimum stay of three months or more, based upon the fact that this is the minimum term for a lease of any unit which has previously been defined in Rule 7.01. Alternatively, API submits that "transient" means a rental period of less than one month based on the definition of "short-term accommodation" as set out in the GST tax guide published in April 1994 by Revenue Canada (as it was then known).

[26] API submits that the meaning of "transient" as it is used in Rule 7.01 is an issue to be determined by the trial judge.

[27] API has made a number of admissions in this proceeding including:

- a) Substantially all of its guests had permanent residences elsewhere during each such guest's stay at the Metropole;
- b) API had a long history of deliberate non-compliance with the requirement that leases or tenancies shall be for a term of not less than three months although it takes the position that at the time of the commencement of this action it was in compliance; and

c) API concedes that non-compliance with Rule 7.01 would permit the condominium corporation to refuse access to the recreational facilities.

[28] On any view of the evidence on this motion most favorable to API, the facts clearly demonstrate, as in the *Glen Grove* case, that notwithstanding any attempts by API to rent its units to longer term guests from time to time, its units at the Metropole have a frequent turnover rate and are routinely occupied on a short-term (being less than three months) basis. API's marketing, use of units and provision of services to occupants have all the hallmarks of a hotel business. Having regard to the mischief that Rule 7.01 was meant to address, and upon a simple consideration of dictionary definitions of "transient" and "hotel", the inescapable conclusion is the same as found by Molloy J. on the application before her, that these units are occupied for transient or hotel purposes and therefore run afoul of Rule 7.01. A trial is not required for this determination.

Elements of the Cause of Action

[29] API has pleaded the following in paragraph 10 of the Statement of Claim:

- 10. The plaintiff states that the defendant has undertaken a number of actions which were and are calculated to damage the economic interests of API and to prevent the plaintiff from leasing its units to its subtenants, including:
 - (i) passing house rules targeted directly at the operation of the plaintiff and the use being made of its units;
 - (ii) wrongfully denying the plaintiff and its subtenants access to the common elements, in particular to the recreational amenities, with a view to forcing the subtenants to terminate their leasing agreement with the plaintiff;
 - (iii) forwarding threatening letters to unit owners who have rental agreements with the plaintiff and to the plaintiff's subtenants falsely alleging breaches of the Act, the declaration and the house rules as well as breaches of the Tenant Protection Act and threatening legal action if the unit owner did not terminate the lease agreement with the plaintiff;
 - (iv) offering its own leasing services to any unit owner who terminated their lease agreement with the plaintiff; and
 - (v) recklessly providing false information concerning the plaintiff to the defendant's insurance broker with the object of putting unit owners who had contracted with the plaintiff, in breach of the declaration and again requiring termination of all leases entered into with the plaintiff.

[30] API's action is based upon the tort of intentional interference with contractual relations and economic interests which requires it to prove:

- a) An intention to injure the plaintiff;
- b) Interference with another's method of gaining his or her living or business by illegal means; and

c) Economic loss caused thereby.

(see *Lineal Group Inc. v. Atlantis Canadian Distributors List Inc.* (1998), 42 O.R. (3d) 157 (CA)).

[31] For the purposes of this motion, it is only necessary to consider b) and c). With respect to the former, there is nothing illegal or unlawful in MTCC No. 1170 taking steps to ensure compliance with Rule 7.01. In fact, under the *Condominium Act*, the Directors of MTCC No. 1170 have a legal duty to enforce the condominium corporation's declaration and rules. Accordingly, MTCC No. 1170 has a legal duty to effect compliance by API and its landlords and sub-tenants with the declaration and rules.

[32] Any actions taken by MTCC No. 1170 with respect to denying API's guests the use of recreational facilities were taken pursuant to Rule 7.07 because API was not in compliance and cannot comply with Rule 7.01, given its long history of non-compliance with the three month tenancy provision and the fact that API cannot overcome the transient/hotel purpose prohibition.

[33] Moreover, the letters sent to unit owners who have rental contracts with API containing allegations of breaches of the rules and the *Tenant Protection Act*, were justified. Further, the statement in one of the letters whereby MTCC No. 1170 offered its own leasing services to any unit owner who terminated his or her own lease with API was made only as a courtesy to the recipients. Moreover, as Molloy J. found with respect to the allegation that MTCC No. 1170 provided false information to its insurance broker, such inaccuracies were not material.

[34] Accordingly, the evidence presented on this motion clearly establishes that MTCC No. 1170 did not engage in any illegal or unlawful means and there is no genuine issue for trial with respect to this element of API's cause of action.

[35] As to the allegation of economic loss caused by the actions of MTCC No. 1170, the evidence indicates that the unit owners who did not renew their leases with API did so because either the existing

leases expired; API agreed to the termination thereof; or the unit owner terminated the tenancy in accordance with the *Tenant Protection Act* without objection by API. What is significant is that there is no direct evidence from any unit owner who terminated his or her lease with API or who did not renew the lease after it had expired, that such action was as a result of any act of MTCC No. 1170. All that API can offer is hearsay and sometimes double hearsay evidence pertaining to this element of the cause of action.

[36] API also admitted that in the case of sub-tenants that left the premises, in all cases, either alternative accommodation was found by API in one of its units, or, there is no claim being advanced with respect to such sub-tenant.

[37] API claims that it lost its investment in furnishings; however, API admitted that some of the furnishings had exceeded their life expectancy and the remainder were in storage and could and would be reused.

[38] In the end, there is no evidence of economic loss upon which there would be any real chance of success at trial.

Disposition

[39] For all of these reasons, there is no genuine issue as to material facts for trial in respect of the plaintiff's cause of action, and the defendant is therefore entitled to summary judgment dismissing this action.

[40] If the parties cannot agree as to costs, they may make written submissions.

Lederman J.

Released: October 4, 2002

COURT FILE NO.: 02-CV-22094

DATE: 2003/03/28

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: CARLETON CONDOMINIUM CORPORATION NO. 291
v. LEE WEEKS and EARLEEN CRAWFORD

BEFORE: Mr. Justice Robert J. Smith

COUNSEL: James Davidson, for the Applicant

Laurie A. Tucker, for the Respondents

ENDORSEMENT

Nature of the Proceedings:

[1] The Applicant ("CCC No. 291") seeks an order to restrain the owner of one of the units from conducting themselves in a manner which disturbs and threatens the owners and occupants of other units.

[2] The alleged conduct is denied by the Respondents.

[3] The court must decide the following issues:

(I) Is the alleged conduct likely to damage the property or cause injury to an individual? (if yes, the Applicant may bring the application);

(II) If issue (I) is decided in the negative, then are their issues of credibility to be determined which require a trial of an issue?

(III) If issue (II) is decided in the affirmative should an interim cease and desist order be made until the trial is heard?

Background:

[4] The Applicant ("CCC No. 291") seeks an order that the Respondents cease and desist from the following conduct:

(i) Engaging in conduct which necessitates police intervention;

(ii) Throwing objects within the boundaries of the common elements or neighbouring units;

(iii) Engaging in quarrelsome and threatening behaviour; and

(iv) Kicking and smashing the doors and windows of unit 6471 Natalie Way.

[5] Counsel for the Applicant further specified that the conduct which was "harmful" or could cause injury to an individual was the following:

(a) Having loud aggressive arguments which could be heard by owners of neighbouring condominiums;

(b) The use of vulgar offensive language by the Respondent, Lee Weeks;

(c) The glaring at other residents in a hostile manner; and

(d) Flipping the finger at other residents.

[6] The Applicant argues and the Respondents agree that if the Respondents permit a condition to exist or carry on an activity in their unit or in the common elements which is likely to damage the property or cause injury to an individual then, the Applicant can proceed to bring an application under s. 117 of the *Condominium Act 1998* (the "Act") without first proceeding under the mediation and arbitration provisions of the Act.

[7] The Respondents' position is as follows:

(a) They deny that they have committed the conduct alleged by the Applicant;

(b) They state that the resident who complained the most, Jackie Holt, and who recently moved out, was overly sensitive to noise levels;

(c) The conduct complained of will not damage the property or cause injury to an individual;

(d) The conduct complained of would constitute a nuisance and not conduct which would cause injury to an individual or damage to property; and

(e) The Applicant is not entitled to bring an application under s. 134(1) of the *Condominium Act* to enforce the provisions of the declaration and by-laws, which prohibit carrying on activities which constitute a nuisance, without first following the mediation and arbitration provisions in s. 132 of the Act and failing to obtain compliance.

[8] The Issues which have to be decided are as follows:

(I) Is the Conduct Complained of a Nuisance or Conduct, which is likely to Damage the Property or Cause Injury to an Individual?

(II) Are Findings of Credibility Required to Determine if the Alleged Harmful Conduct Occurred and, if so, should a Trial of an Issue be Directed?

(III) Should Interim Injunctive Relief be Granted Pending a Final Hearing on the Merits?

Issue (I) - Nuisance or Actions Injurious to Persons and Property

Police Visits

[9] The conduct, which necessitated numerous police visits to the unit, was explained by the problems created by a boarder who resided at the unit and who the Respondents evicted in December of 2001.

[10] Several further police visits related to a vehicle owned by Ms. Crawford, which was stolen.

[11] In early December of 2001, the boarder, Mr. Cordeiro, left and removed his belongings. The police were called on three or four occasions due to Mr. Cordeiro making harassing phone calls and re-attending at the premises.

[12] I do not find that the numerous police visits to the unit, which ceased in December of 2001 in any event, constitute conduct, which would justify proceeding with an application under s. 117 of the Act in October of

2002 without first proceeding with mediation and arbitration as required by s. 134(2) of the Act.

Door Slamming and Window Breaking

[13] During one incident, a door was slammed and some glass was broken, however, minimal evidence was presented that the Respondents were throwing objects within the boundaries of their unit or in the common elements. The Respondents admit that a guest threw a piece of broccoli onto a common area, which was subsequently picked up.

[14] Other than this one incident of the broken glass, there was minimal evidence that the Respondents were kicking and smashing doors and windows of unit 6471. This matter could also have been dealt with under the mediation arbitration provisions.

Playing Music at Excessive Levels

[15] Mrs. Holt complained that the Respondents played music at excessively high levels on many occasions.

[16] The by-law officers were called on nine occasions and only one charge was laid.

[17] The Respondent, Earleen Crawford, admitted to turning up the volume when she liked a particular song and then stated that she would turn the level back down to a normal range.

[18] I find that this type of conduct would be considered a nuisance and should have been dealt with under the mediation provisions of the Act prior to bringing an application.

Threatening Conduct

[19] The last allegation is that the Respondents have caused other unit owners and occupants, including Jackie Holt's twelve-year-old daughter, to feel threatened and to become fearful for their safety due to the following actions of the Respondents:

(a) The Respondent, Lee Weeks, is alleged to have "flipped" the finger at Mrs. Holt's 12-year-old daughter and glared aggressively at Mrs. Holt and her 12-year-old daughter; and

(b) The Respondents are alleged to have used extremely vulgar offensive and demeaning language, which can be heard by the occupants of other units, which included young children.

[20] Three separate witnesses for the Applicant complained about the Respondents' conduct and maintained their position under cross-examination.

[21] The evidence of Mrs. Pantalone is that she was frightened by loud yelling and cursing between the occupants of unit 6471 on August 16, 2002;

[22] Notwithstanding the letter from the solicitor for the Plaintiff and the Respondents' apology on August 23, 2002 and the Respondents' agreement to pay the sum of \$200.00 for legal fees, the conduct of loud, foul language continued on September 7, 2002 as evidenced by the affidavit of Dora Lee.

[23] The evidence of Dora Lee is that on September 7, 2002 between 10:00 p.m. and 12:00 a.m. she heard foul language, quarrelsome and belligerent voices and hysterical laughter at unit 6471.

[24] Mrs. Jackie Holt stated that the Respondents were drunk and engaged in loud and abusive dialogue and behaviour on many occasions during the weekends during the summer of 2002, including Friday nights.

[25] The Respondents are alleged to have repeatedly glared in an aggressive manner at Mrs. Holt and her 12-year-old daughter, flipping the finger at Mrs. Holt and her 12-year-old daughter and using vulgar obscene demeaning language, which can be heard by the adjoining occupants, which did include a young child.

[26] The Respondents claim they have only occasional normal arguments between spouses.

[27] I am satisfied that if it is proven that the Respondents acted in the threatening manner, as alleged, that the alleged conduct would likely cause injury to an individual, namely the occupants of the other units, which

would allow the Applicant to bring this application without first proceeding with the mediation provisions of the Act.

Issue II - Are Findings of Credibility Required?

[28] The Respondents have denied committing the threatening acts and, denied using loud obscene language, which can be heard by the adjoining residents. Owners of other condominium units have filed affidavits alleging such conduct.

[29] Rule 14.05(2) of the *Rules of Practice* allows a proceeding to be commenced by an application if a statute so authorizes.

[30] Section 117 of the *Condominium Act* authorizes a proceeding by way of application when the conduct complained of is likely to cause damage to property or harm to individuals.

[31] However, in the case of *Gordon Glaves Holdings Ltd. v. Care Corp. of Canada Ltd.* (1999), 170 D.L.R. (4th) 520 (Div.Ct.) affd 186 D.L.R. (4th) 577 (C.A.), the Ontario Court of Appeal held that when a proceeding may be commenced by application pursuant to a statute, such as an application for an oppression remedy pursuant to s. 248 of the *Business Corporations Act*, the matter was directed to proceed at trial, where issues of credibility had to be determined.

[32] I find that on the facts of this case issues of credibility must be determined to find on the balance of probabilities whether the Respondents have engaged in the threatening conduct and used loud obscene language as alleged by the Applicant, but denied by the Respondents.

[33] I order that the cross-examinations on the affidavits constitute discovery and the filing of affidavits of documents shall be dispensed with. I order that a settlement conference be held and if the matter is not resolved then, I order that it be immediately set down for a trial to determine if the conduct as alleged by the Applicant occurred and to determine the remedy, if any, to be granted.

[34] As a result, I order a trial of an issue on whether the Respondents engaged in conduct which is injurious to other residents namely;

(i) Have either of the Respondents glared aggressively at other unit residents? and

(ii) Have either of the Respondents flipped the finger at other unit residents?; and

(iii) Have either of the Respondents or other occupants of unit 6471, Natalie Way, used loud obscene demeaning language, which can be heard by other unit residents?

[35] I invite counsel to make submissions within seven (7) days of the release of this endorsement if they wish to further define the issues to be determined at trial.

Issue III - Interim Injunctive Relief

[36] In applying the test to determine whether an interim injunction or cease and desist order should be granted, the court must be satisfied that a serious issue has been raised, that harm which cannot be compensated in damages occurred and that the balance of convenience favours granting the injunction or cease and desist order.

[37] The Applicant is, in fact, seeking injunctive relief in its application by seeking a cease and desist order.

[38] I find that the Applicant has demonstrated a serious issue to be tried. If an injunction is not granted the other condominium owners, including children, would be subject to listening to loud vulgar obscene language and possibly being the subject of harassing glaring and subject to further obscene gestures.

[39] I find that being subject to such conduct could constitute irreparable harm, to young children in particular, which is not compensable in damages. I further find that the balance of convenience favours granting the interim relief as the Respondents would not be harmed by such an order and the residents of the condominium units would be protected from harmful conduct until a final hearing in this matter is held.

[40] By allowing the parties to have a hearing this will allow for a proper findings of credibility to be made to determine whether such conduct occurred and what remedy is appropriate.

[41] I, therefore, grant an interim injunction and order the Respondents not to glare aggressively at any other unit owners, occupants or guests, not to make rude gestures to other unit owners, occupants or guests, and not to use obscene, vulgar and offensive language at levels that can be heard by other unit owners, occupants or guests.

Costs:

[42] The costs of this application shall be dealt with by the judge hearing the evidence at the trial.

R. Smith J.

Released: March 28, 2003

COURT FILE NO.: 03-CV-24074

DATE: 2004/04/13

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: CARLETON CONDOMINIUM CORPORATION
NO. 555 v. GUY LAGACÉ, BARBARA STINSON-SHEA and
JOHN BOWMAN SPERO

BEFORE: Madam Justice C. D. Aitken

COUNSEL: James Davidson and Nancy Houle, for the Applicant

Patrick J. Lafrange, for the Respondents,
Barbara Stinson-Shea and John Bowman Spero

Guy Lagacé, Unrepresented

E N D O R S E M E N T

Nature of Proceedings

[1] Carleton Condominium Corporation No. 555 ("CCC 555") is seeking its costs of this Application against two of the three Respondents, Barbara Stinson-Shea and John Bowman Spero, who are the registered owners of Unit 11, Level 2, CCC 555 ("6034 Red Willow Drive"). The third Respondent, Guy Lagacé, was the tenant of these premises.

[2] On May 29, 2004, I heard and granted CCC 555's Application for an order requiring Lagacé to cease and desist from conduct contravening the Condominium Act, 1998, S.O. 1998, c. 19 and the Applicant's Declaration, By-laws and Rules, and more specifically, to conduct himself in a particular fashion regarding

parking spaces. If Lagacé breached the stipulated conditions, his tenancy was to be terminated. Stinson-Shea and Spero consented to this order being made. Subsequently, Lagacé abandoned the premises. The sole issue that I now have to decide is whether Stinson-Shea and Spero, as the owners and landlords of 6034 Red Willow Drive, should be responsible to pay CCC 555's costs in getting an order against their unruly tenant. If so, should those costs be on a partial or substantial indemnity basis?

Legal Framework

[3] CCC 555 relies on the following statutory provisions as establishing its right to have its costs against Stinson-Shea and Spero:

Condominium Act, 1998:

117. No person shall permit a condition to exist or carry on an activity in a unit or in the common elements if the condition or the activity is likely to damage the property or cause injury to an individual.

...

119. (1) A corporation, the directors, officers and employees of a corporation, a declarant, the lessor of a leasehold condominium corporation, an owner, an occupier of a unit and a person having an encumbrance against a unit and its appurtenant common interest shall comply with this Act, the declaration, the by-laws and the rules.

(2) An owner shall take all necessary steps to ensure that an occupier of the owner's unit and all invitees, agents and employees of the owner or occupier comply with this Act, the declaration, the by-laws and the rules.

...

134. (1) Subject to subsection (2), an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of a leasehold condominium corporation or a mortgagee of a unit may make an application to the Ontario Court (General Division) for an order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules or an agreement between two or more corporations for the mutual use, provision or maintenance or the cost-sharing of facilities or services of any of the parties to the agreement.

...

(3) On an application, the court may, subject to subsection (4),

- (a) grant the order applied for;
- (b) require the persons named in the order to pay,
 - (i) the damages incurred by the applicant as a result of the acts of non-compliance, and
 - (ii) the costs incurred by the applicant in obtaining the order; or
- (c) grant such other relief as is fair and equitable in the circumstances.

(4) The court shall not, under subsection (3), grant an order terminating a lease of a unit for residential purposes unless the court is satisfied that,

(a) the lessee is in contravention of an order that has been made under subsection (3); or

(b) the lessee has received a notice described in subsection 87 (1) and has not paid the amount required by that subsection.

(5) If a corporation obtains an award of damages or costs in an order made against an owner or occupier of a unit, the damages or costs, together with any additional actual costs to the corporation in obtaining the order, shall be added to the common expenses for the unit and the corporation may specify a time for payment by the owner of the unit.

[4] As well, CCC 555 relies on the following provisions in its Declaration, By-laws and Rules as establishing its rights to costs on a substantial indemnity basis:

Declaration

4. UNITS

4.1 Occupation and Use. The occupation and use of the units shall be in accordance with the following restrictions and stipulations:

...

(c) The owner of each unit shall comply and shall require all residents, occupants and visitors to his or her unit to comply with the Act, this Declaration, and the by-laws, and the rules and regulations passed pursuant thereto.

...

(f) Any owners leasing their unit shall not be relieved from any of their obligations with respect to the unit which shall be joint and several with their tenant.

...

8. INDEMNIFICATION

8.1 Indemnification. Each owner shall indemnify and save harmless the corporation from and against any loss, cost, damage, injury or liability whatsoever which the corporation may suffer or incur resulting from or caused by an act or omission of such owner, the owner's family or any member thereof, any other resident or occupant of that unit or any guests, invitees, licensees or agents of such owner or resident to or with respect to the common elements and/or all other units, except for any loss, cost, damages, injury or liability caused by an insured (as defined in any policy or policies of insurance) and insured against by the corporation.

All payments pursuant to this clause are deemed to be additional contributions toward the common expenses and recoverable as such or by such other procedure the corporation elects.

9. GENERAL MATTERS AND ADMINISTRATION

...

9.2 Units Subject to the Act, Declaration, By-laws, Rules and Regulations. All present and future owners, tenants and residents of units, their families, guests, invitees, licensees or agents shall be subject to and shall comply with the provisions of the Act, this Declaration, the by-laws, and any other rules and regulations of the corporation.

The acceptance of a transfer/deed of land, or the entering into a lease, or the entering into occupancy of any unit, shall constitute an agreement that the provisions of this Declaration, the by-laws, and any other rules and regulations, as they may be amended from time to time, are accepted by such owner, tenant or resident, and all of such provisions shall be deemed and taken to be covenants running with the unit and shall bind any person having, at any time, any interest or estate in such unit as though such provisions were recited and stipulated in full in each and every such transfer/deed of land or lease or occupancy agreement.

...

9.5 Notice. Except as hereinbefore set forth, any notice, direction or other instrument required or permitted may be given if served personally by delivering same to the party to be served, or to any officer of the party to be served, or may be given by ordinary mail, postage prepaid, addressed to the corporation at its address for service herein, to each owner at his or her respective unit or at such other address as is given by the owner to the Corporation for the purpose of notice, and to each mortgagee who has notified its interest to the corporation at such address as is given by each mortgagee to the corporation for the purpose of notice; and if mailed as aforesaid the same shall be deemed to have been received and to be effective on the first business day following the day on which it was mailed. Any owner or mortgagee may change its address for service by notice given to the corporation in the manner aforesaid.

By-law No. 1

13. RULES AND REGULATIONS

13.1 Rules and Regulations. The rules and regulations attached hereto as Schedule "A" shall be observed by the owners and occupants of the units. The Board may amend such rules

or may make such further and other rules as required to promote the safety, security, or welfare of the owners and of the property or for the purpose of preventing unreasonable interference with the use and enjoyment of the common elements and of the units.

Schedule "A" Rules and Regulations

... Any loss, cost or damages incurred by the Corporation by reason of a breach of any rules and regulations in force from time to time by any owner, the owner's family, guests, servants, agents or occupants of that unit, shall be borne by such owner and may be recovered by the Corporation against such owner in the same manner as common expenses.

1. GENERAL

...

(b) Rules as deemed necessary and altered from time to time by the Corporation shall be binding on all unit owners and occupants, their families, guests, visitors, servants or agents.

Background Facts

[5] Commencing in the summer of 1999, Lagacé engaged in various activities in and around 6034 Red Willow Drive that contravened the Condominium Act, 1998 and the Declaration, By-laws and Rules of CCC 555. These activities included:

- excessive noise past 11 pm,
- littering of the property,
- congregating and smoking in the stairwell at the building,

- violating the parking rules relating to CCC 555,
- using threatening, abusive and offensive language towards other owners, residents and employees of the property management firm of CCC 555,
- engaging in threatening conduct towards other owners, residents and employees of the property management firm of CCC 555,
- engaging in the use of marijuana,
- engaging in conduct which necessitated City of Ottawa by-law officer intervention, and
- engaging in conduct which necessitated police intervention.

[6] The property manager of CCC 555 at the time was Axia Property Management Inc. ("Axia"). The person assigned to CCC 555 was Michael Faulkner. Axia received numerous verbal and written complaints about Lagacé's conduct. Commencing in August 1999, various letters and notices were given to "The Occupants" of 6034 Red Willow Drive, advising them of the complaints and seeking their compliance with CCC 555's Rules and Regulations.

[7] On March 17, 2000, Axia contacted Stinson-Shea and Spero for the first time, advising them of the numerous complaints that had been received concerning their tenants at 6034 Red Willow Drive. This resulted in their being a site meeting on June 6, 2000, at which time Stinson-Shea, Spero, and Faulkner met with Lagacé, reviewed the various complaints with him, and obtained his undertaking to comply with the Condominium's Rules and Regulations.

[8] The evidence submitted on behalf of CCC 555 is that on October 6, 2000, Axia sent a second letter to Stinson-Shea and Spero advising that the problems with their tenants were continuing. Stinson-Shea denies that either she or Spero ever received this letter.

[9] Significantly fewer complaints were received by Axia concerning the occupants of 6034 Red Willow Drive, until October 2001, when Lagacé acquired what was described as a Pit Bull dog. On October 11, 2001, Faulkner sent a letter to Lagacé advising that the dog had to be removed from the property immediately. In December 2000, Stinson-Shea and Spero had retained Axia to act as their property manager in renting 6034 Red Willow Drive, and Shawn Paul was the employee at Axia responsible for their account. Faulkner's October 11 letter indicates that a copy was being provided to Paul. Neither Faulkner nor Paul sent a copy of the letter to Stinson-Shea or Spero.

[10] Further complaints regarding Lagacé resulted in a further letter being sent to him on May 31, 2002. This letter was also copied to Paul. Neither Faulkner nor Paul sent a copy of the letter to Stinson-Shea or Spero.

[11] On January 1, 2003, Megacorp Property Management Inc. ("Megacorp") took over management of CCC 555. Axia remained the property manager for Stinson-Shea and Spero.

[12] In April 2003, there were further problems with the occupants of 6034 Red Willow Drive using visitor parking spaces inappropriately. Tickets were issued against Lagacé. This, in turn, resulted in angry and aggressive confrontations on his part with representatives of Megacorp. Megacorp responded on May 1, 2003 with a letter to Lagacé stating that he could not enter or communicate with Megacorp's office at any time; instead all further communications had to be through his landlord, namely Stinson-Shea and Spero. A copy of this letter was sent to Stinson-Shea and Spero.

This was the first time since receipt of the June, 2000 letter (if the evidence of Stinson-Shea is accepted) or the October 6, 2000 letter (if the evidence proffered on behalf of CCC 555 is accepted) that Stinson-Shea and Spero received notification that their tenant, Lagacé, was causing problems at CCC 555.

[13] Stinson-Shea and Spero received a copy of the Application Record for these proceedings in May 2003. They immediately consulted a lawyer. Although they filed an Appearance, they did not contest the Application of CCC 555. Their only concern was the costs which CCC 555 were seeking from them.

Analysis

[14] Counsel for CCC 555 argued that CCC 555 is entitled to its costs on a substantial indemnity basis from Stinson-Shea and Spero as the owners of 6034 Red Willow Drive due to the wording of s. 134(5) of the Condominium Act, 1998, which is reproduced above. I do not accept this argument.

[15] Section 134(5) simply provides that if a corporation obtains an award of costs in an order made against an owner or occupier of a unit, the costs shall be added to the common expenses for the unit and collected accordingly. This subsection does not speak to the question of whether a costs order should be made in the first instance. Section 134(3)(b) confirms that the court, on an application by the condominium corporation for an order requiring someone to comply with the declaration, by-laws or rules of the corporation, may make an order requiring the persons named in the order to pay the costs incurred by the condominium corporation in obtaining the order. It does not require the court to do so.

[16] That being said, the relevant portions of the Declaration, By-laws and Rules of CCC 555, all reproduced above, make it clear that (1) the owner of each unit shall require any tenant of that unit to

comply with the Condominium Act, 1998, and CCC 555's Declaration, By-laws and Rules; (2) the unit owner continues to have all obligations with respect to the unit, even if the unit is leased to a tenant; (3) the obligations of the owner and those of the tenant are joint and several; (4) the unit owner is responsible to indemnify and save harmless CCC 555 from any cost which CCC 555 may incur resulting from an act or omission of a tenant or the owner with respect to the common elements and/or all other units; and (5) all payments required to be made as a result of that indemnification are to be considered additional contributions toward the common expenses and are recoverable as such by CCC 555.

[17] At first blush, these provisions should result in Stinson-Shea and Spero indemnifying CCC 555 for the costs incurred by the condominium corporation in bringing this Application against Lagacé. Certainly there is precedent for such an order being made (see *York Condominium Corp. No. 71 v. Sullivan*, [1990] O.J. No. 840 (Dist. Ct.)). Stinson-Shea and Spero argue that, despite the provisions of CCC 555's governing documents, they should not have to pay any costs to CCC 555 because they were not given appropriate notice of their tenant's contraventions of the condominium's Rules and Regulations. They argue that had they been given appropriate notice, they would have taken steps to correct the situation, and those steps would have been much cheaper and simpler than the proceedings brought by the corporation. As a supplementary argument, Stinson-Shea and Spero suggest that the corporation should have sought some costs against Lagacé, who was, after all, the person who actually breached the condominium's Rules and Regulations.

[18] Neither the Condominium Act, 1998, nor the Declaration or By-laws of CCC 555, explicitly requires CCC 555 to notify unit owners of contraventions of rules by their tenants before CCC 555 seeks to recover from the owners the costs associated with its litigation against tenants. Nevertheless, I find that implied in the

Declaration, By-laws and Rules of CCC 555 is a duty on the condominium corporation to provide an owner with notice of a tenant's contraventions before the corporation seeks legal costs against the owner for litigation against the tenant brought to enforce compliance with the condominium's governing documents.

[19] By virtue of the Condominium Act, 1998 and the governing documents of the condominium corporation, the party with whom the condominium corporation has a legal relationship is the unit owner, not the tenant. The unit owner also has a legal relationship with the tenant, by virtue of landlord and tenant law and the terms of the tenancy agreement between them. By virtue of the owner's legal position between the condominium corporation and the tenant, the owner is responsible for the tenant's behaviour while occupying the condominium unit. The condominium corporation looks to the owner to live up to the terms of the condominium declaration, by-laws, rules and regulations. The owner requires the tenant in the tenancy agreement to agree to comply with those condominium documents. In the case of a breach, the corporation demands compliance from the owner, who in turn, demands compliance from the tenant.

[20] The Condominium Act, 1998 does not establish the strict liability of unit owners for all infractions of tenants, even if they have had no notice of the infractions. The wording of s. 119(2) to the effect that an owner shall take "all reasonable steps" to ensure that an occupier of the owner's unit complies with the Act, the declaration, the by-laws and the rules, implies that the owner has to know what is going on at the unit so that he or she can take whatever steps would be reasonable to deal with any problems. Put another way, it only stands to reason that the owner has to be notified of any unacceptable conduct on the part of the tenant if it is the owner's responsibility to vouch for that conduct and to take reasonable steps to correct problems. In many, if not most, situations, the unit owner who is renting to a tenant does not live at the condominium complex. If the property manager of the complex does not inform the owner of

tenant infractions, how can the owner live up to his or her responsibility to ensure that the tenant abides by condominium rules? It would be contrary to public policy to expect unit owners to become private investigators checking up on their tenants to see if they are breaching any rules. It makes much more sense for the condominium's property manager to notify the unit owner of any significant or on-going breaches.

[21] The first question to consider is what notice was provided to Stinson-Shea and Spero. There is no dispute that Stinson-Shea and Spero received notice in March 2000 of certain problems being caused by Lagacé and his guests, primarily related to noise and general comportment. To their credit, Stinson-Shea and Spero took steps to deal with the complaints, meeting with Faulker and Lagacé in June 2000. They left the meeting assuming there would be no further contraventions by Lagacé.

[22] There is a letter authored by Faulker and dated October 6, 2000 that purportedly was sent to Stinson-Shea and Spero outlining continuing infractions by Lagacé. The sworn evidence of Stinson-Shea is that she and Spero never received this letter. I note that it was sent to the same address as the letter of March 17, 2000, which was received by Stinson-Shea and Spero. The onus is on Stinson-Shea and Spero to establish that they did not receive notice of Lagacé's contraventions. In regard to the letter of October 6, 2000, they have not met that onus.

[23] There is no dispute that letters to Lagacé dated October 11, 2001 and May 31, 2002 outlining on-going complaints and problems were copied to Paul, the employee at Axia acting as the property manager for Stinson-Shea and Spero. It is uncontroverted that Paul did not bring these letters to the attention of Stinson-Shea and Spero. The fact that Paul did not notify Stinson-Shea and Spero of the October 11, 2001 and May 31, 2002 letters from Faulkner is not an oversight that can be placed at the door of the condominium

corporation. Faulkner was acting as the corporation's agent in sending a copy of the letter to Paul. In receiving that letter, Paul was acting as the owners' agent, even though he was working for the same property management company as Faulkner. Paul may have breached his contractual obligations to Stinson-Shea and Spero as their property manager, or he may have breached his duty of care to them. However it is considered, Paul's neglect to bring the continuing problems regarding Lagacé to the attention of Stinson-Shea and Spero does not entail unreasonable conduct on the part of CCC 555. It is not a reason to deny CCC 555 any costs pursuant to the terms of its Declaration, By-laws and Rules.

[24] I find that CCC 555 took adequate steps from March 2000 to May 2002 to notify Stinson-Shea and Spero of Lagacé's continued contravention of condominium Rules and Regulations, and to give Stinson-Shea and Spero the opportunity to do something to rectify the situation. As far as CCC 555 was concerned, aside from the one meeting in June 2000, Stinson-Shea and Spero did not take any steps to deal with Lagacé's breaches. They had known that their tenant had caused significant problems at the condominium complex in 1999 and 2000, yet had simply taken their tenant's word in June 2000 that he would try harder. As far as CCC 555 was aware, on three subsequent occasions, Stinson-Shea and Spero received further information that problems persisted, and they did not intervene. By the time the corporation started the litigation, they had not heard from Stinson-Shea and Spero for almost three years. There is no evidence that, during this period, Stinson-Shea or Spero called or wrote to the condominium corporation to see if their tenant's behaviour had improved. There is no evidence that they instructed their property manager to keep on top of the problem. There is no evidence that they initiated any inquiries whatever from June 2000 forward.

[25] On the other hand, when Megacorp decided to issue an application on behalf of CCC 555 early in May 2003, it knew that no

one on behalf of CCC 555 had contacted the owners of 6034 Red Willow Drive since May 2002. Various incidents had occurred during the year which would have added fuel to any steps taken by the owners to end their tenancy agreement with Lagacé. The corporation did not know whether, once armed with this new evidence, the owners would take immediate steps to terminate the tenancy agreement, a step that could have been taken at far less cost to them than the costs now being sought by the corporation. From the documents available to me, it appears that CCC 555 chose to commence litigation at the same time that it sent a copy of its May 1, 2003 letter to Lagacé.

[26] Should CCC 555 be denied its costs because prior to actually commencing the Application against Lagacé, Stinson-Shea and Spero, it did not notify Stinson-Shea and Spero of the intended litigation? Without hesitation I find that it would have been prudent on the part of Megacorp, acting for CCC 555, to notify the owners directly of the condominium's intention to commence legal proceedings to deal with Lagacé if the owners did not immediately take the necessary steps to terminate Lagacé's tenancy through landlord and tenant proceedings. At the very least, it would have shown good judgment for Megacorp to write to Axia, as the owners' property managers. I contemplate that in certain factual circumstances, this absence of recent notice to the owners of continuing problems and impending litigation will result in the condominium corporation not being allowed to collect its litigation costs from the owners. In the factual circumstances of this case, I am not prepared to deny the corporation any costs based on the lack of recent notice to the owners. What I will do, however, is reduce the costs the corporation can recover.

[27] The evidence of Stinson-Shea is that had she and Spero known of the litany of breaches by Lagacé, they would have taken steps to terminate his tenancy. I accept their evidence that at least from October 2000 forward, they personally had no knowledge of the

continuing problems, and presumably that is why they did not do anything about them. I also accept their evidence that, had the corporation contacted them after the events of April 2003, and prior to commencing litigation, they would have taken legal steps to rectify the situation. They did consult a lawyer as soon as this litigation was commenced. Therefore, had CCC 555 provided reasonable notice to Stinson-Shea and Spero in advance of commencing this litigation, the legal fees associated with this litigation may have been avoided altogether, or could have been significantly reduced. In these circumstances, I cannot conclude that all of the fees and disbursements charged to CCC 555 by Nelligan O'Brien Payne are "costs ... incurred by the Corporation by reason of a breach of any rules and regulations in force from time to time by any owner, ... or occupants of that unit ..."

[28] In this respect, I differentiate this case from those such as Peel Condominium Corp. No. 338 v. Young, [1996] O.J. No. 1478 (Gen.Div.); Peel Condominium Corporation No. 449 v. Amy Elizabeth Frances Hogg, a decision of Carnwath J. dated March 13, 1997; Frontenac Condominium Corporation No. 7 v. Jim Gallant and Connie Armstrong, a decision of Ratushny J. dated September 27, 2001; and Carleton Condominium Corporation No. 66 v. Helena Brown, a decision of Polowin J. dated September 7, 2001. In all of those cases, costs were awarded on a solicitor-client or substantial indemnity scale. It is to be noted, however, that in each case, the judge stated that the person against whom the costs order was being made had been given specific notice of the problem that eventually necessitated the court application and had been given the opportunity of addressing the problem before the litigation was started.

Quantum of Costs

[29] The Bill of Costs presented by Nelligan O'Brien Payne is in the amount of \$7,137.02 inclusive of GST and disbursements. Of this sum \$3,000 represents legal fees for the original application

seeking an order for compliance against the tenant, \$2,701.25 represents costs attributable to preparation for the costs argument, and \$500 represents counsel fees when submissions on costs were heard. Disbursements totaled \$884.82.

C. Aitken J.

Released: April 13, 2004

[30] The hourly rates of the lawyers involved on the file are reasonable.

[31] I find the time, and therefore fees, attributable to the issue of costs to be excessive: it is greater than the time and costs associated with the Application itself.

[32] I also find the disbursements excessive. For example, I have difficulty understanding why \$178.35 would be incurred for courier expenses on such a simple file. Also I do not allow costs for such items as tabs and bindings, in that I consider these included in normal office overhead. The way the Bill of Costs is prepared lumps these disbursements in with photocopying charges, which I would allow.

[33] This was a relatively simple matter, with the Application being a chronology of events, largely documented with letters and notices. Minimal argument was required at the initial hearing. The Bill of Costs was easy to prepare and is only two pages in length. The case law was easy to assemble, being largely cases argued by Nelligan O'Brien Payne.

[34] In all of the circumstances, I conclude that the legal costs incurred by CCC 555 that can reasonably be considered "costs ... incurred by [CCC 555] by reason of a breach of any rules and regulations in force from time to time by [Stinson-Shea and Spero], ... or [Lagacé] ..." amount to \$3,600 inclusive of disbursements and GST. This sum shall be added to the common expenses of Unit 11, Level 2, CCC 555 in the amount of \$300 per month, until paid.

Citation: *Bahadoor v. York Condominium Corporation No. 82*, 2006 CanLII 40487 (ON S.C.)

COURT FILE NO.: 04-CV-264294CM2

DATE: 20061204

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:)
)
BRIDGE BAHADOOR) Appearing in person
Applicant)
)
- and -)
YORK CONDOMINIUM) M. Djurdjevac and M.
CORPORATION NO. 82) Gwynne, for the
Respondent) Respondent
and -)
)
SURENDRA LOCHAN,) D. Fulton and J. Strype,
BRIAN RITCHIE, SHEIKH) for the Added
KARRIM, ABDOOL) Respondents
WAHAB and BERNARD)
PICKETT)
Added Respondents)
)
) **HEARD:** November 29,
2006

D. Brown J.

A. Introduction

[1] In early 2004 the Board of Directors of York Condominium Corporation No. 82 (“YCC 82”) was dysfunctional. This state of affairs led the applicant, Mr. Bahadoor, a unit owner, to apply to Court under section 131 of the *Condominium Act, 1998* (the “Act”) for the appointment of an administrator for the corporation. On March 1, 2004 Hoilett J. appointed Fengate Property Management Ltd. (“Fengate”) as administrator of YCC 82 (the “Administrator”).

[2] Since its appointment the Administrator has filed four reports with the Court. The first three were approved. The fourth received conditional approval by Spence J. in June, 2006. In his order Spence J. put in place a mechanism to convene a meeting of the unit owners by October 25, 2006 in order to vote on four questions: (i) whether to authorize additional borrowing of \$5.9 million by YCC 82; (ii) whether to sell the corporation’s property; (iii) whether to continue the role of the Administrator or, if not; (iv) to elect a new Board of Directors. Spence J. stipulated that any vote to terminate the Administrator and elect a new Board of Directors would be subject to Court approval.

[3] A unit owner meeting was held on October 25, 2006. Of the 321 unit owners, 221 cast votes. The results were overwhelming: 215 units voted against the proposed borrowing, while 6 voted in favour; 215 voted against a sale of YCC 82, with 4 in favour; 215 voted to terminate the Administrator, with 4 in favour of it continuing; and five new directors were elected – Messrs. Lochan, Wahab, Sampat, Bahadoor and Sukdeo.

[4] Following the meeting the Added Respondents moved for an order approving the election of the new Board and discharging the Administrator. The Administrator vigorously opposed the motion; it submitted that it should not be discharged or, alternatively, it should not be discharged until May or October, 2007 by which time major repairs will be completed.

[5] I have concluded that the mandate of Fengate as the Administrator should be suspended and that governance of the YCC 82 should be turned over to the duly elected Board of Directors on an interim basis, subject to further reporting requirements and Court review.

B. Brief Background

[6] YCC 82 consists of 321 units, mainly apartment-style condominiums. It is located near Jane St. and Finch St., a low-income area of Toronto. The value of the units ranges between \$50,000 and \$75,000, and the owners are mostly low income or immigrant families, pensioners and seniors. Monthly common element fees run at about \$800.

[7] The circumstances facing YCC 82 in early 2004 were dire. As Hoilett J. recounted in his endorsement, the corporation had been without a property manager since August, 2003, the Board of Directors was in crisis and dysfunctional, and it was unclear whether insurance was in place for the corporation. Mr. Bahadoor applied for the appointment of an administrator. Although Hoilett J. recognized that resorting to section 131 of the *Act* was a last resort, under the circumstances then prevailing he had no hesitation in concluding that “this is a textbook case for invoking s. 131(1).”

[8] During the hearing before me the Administrator’s counsel seemed to labour under the impression that the appointment order of Hoillet J. required the Administrator to remain in place until all the major repairs needed by YCC 82 were completed. That is not a correct reading of the order. Hoilett J. appointed Fengate as Administrator “until further order of this Court”. The appointment was temporary and subject to termination by the Court under the appropriate circumstances – no long-term project mandate was given by this Court to the Administrator.

[9] The first three reports of the Administrator to the Court were approved. The Administrator also sought and received unit owner approval to borrow \$4 million to undertake major repairs and build up the reserve fund.

[10] Throughout early 2005 Mr. Bahadoor attempted to bring a motion before the Court to discharge the Administrator, but was not successful.

[11] On July 13, 2005 Somers J. directed the Administrator to file a fourth report by mid-February, 2006, which it did. At the same time as the Administrator sought court approval of its fourth report, a group of unit owners styling themselves as the “Y.C.C. #82 Advisory Committee” sought leave to intervene in the proceeding. Perell J. permitted them to intervene individually as “Added Respondents”, and these are the unit owners that have brought the present motion.

[12] The Added Respondents were dissatisfied with the Administrator’s management of YCC 82 and wished to hold an election for a new Board of Directors.

[13] Matters came to a head at a hearing before Spence J. on May 19, 2006. The Administrator sought approval of its fourth

report and directions to borrow a further \$5.9 million; the Added Respondents sought to terminate the Administrator. As I read the endorsement of Spence J. released on June 20, 2006, two major issues separated the Administrator and many of the unit owners: (i) how to finance additional necessary repairs to YCC 82; and (ii) whether the unit owners were competent to govern themselves. It is clear from paragraphs 22 and 25 of Spence J.'s endorsement that the Administrator did not think that the unit owners were capable of acting in their own best interests..

[14] Spence J. concluded that it was time to put a number of key questions to a vote of unit owners and he directed that a meeting of unit holders be held by October 25, 2006 to vote on four questions. His Honour conditionally approved the Administrator's fourth report. At the end of his endorsement he wrote, in para. 31:

If a decision is taken to terminate the administration and a board of directors is elected and if those decisions are approved by the Court, the further implementation of the Fourth Report after the assumption by the board of directors of its responsibilities would be for the board to decide, subject to contractual obligations then in place.

[15] One would have thought that following the release of Spence J.'s endorsement in late June both sides would have co-operated to convene a meeting of the unit holders. That did not happen. The record before me disclosed an inability (or unwillingness) to settle the terms of Spence J.'s order, and major disputes over the timing and location of the meeting. A meeting scheduled for September 12 was cancelled. Litigation, not co-operation, was the order of the day. Trips by the parties to Triage Court became frequent. Mr. David Morrison, of

Morrison Financial Services Limited, the corporation's lender, described the poor state of relations between the Administrator and many unit owners as follows:

"I think the parties are very polarized on personalities at this point, and there's been a lot of bad blood. I don't know how you get them together at this point in time."

[16] On August 25, 2006 the Administrator delivered a letter to all unit owners that gave them a stark choice: either approve additional borrowing of \$5.9 million at the unit owner meeting or face the prospect of an immediate special assessment. This last point is important. Instead of awaiting the results of the meeting and, in the event of a rejection of a by-law authorizing additional borrowing then levying a special assessment, the Administrator notified unit owners that payment of the assessment would start immediately, on September 8, 2006, and continue over 12 months. The special assessment would range from \$1,900 to \$2,900 per month per unit, in contrast to the mean monthly common element fee of \$800 per month. Given the demographics of YCC 82, enforcement of the special assessment could impose severe financial burdens on many of the unit holders.

[17] Shortly after the October 25 meeting that rejected the additional borrowing, the Administrator delivered notices of liens to unit owners in respect of the special assessment. At the hearing I was advised that the Administrator had authorized significant legal expenses to prepare for the registration of certificates of lien against unit owners who had not paid the special assessment. I stayed any further such work until the release of these reasons.

[18] The special assessment is another example of the antagonistic relationship that unfortunately has developed between the Administrator and unit owners. I am somewhat surprised that the Administrator pushed forward with the special assessment on September 8, 2006. I recognize the financial realities that the Administrator was trying to address and it is true that paragraph 12 of the 2004 appointment order authorized the Administrator to levy “a special assessment and/or deliver a revised budget for the purpose of obtaining additional funds for the proper operation of YCC 82...” But that was in 2004. Paragraph 5 of Spence J.’s 2006 order contemplated that the Administrator would proceed with a special assessment only if the unit owners failed to approve additional borrowing. The decision of the Administrator to enforce a special assessment on September 8, 2006 before the unit holders had even voted on additional borrowing was confrontational in nature, even if motivated by a hard-nosed sense of the financial realities facing the corporation. The move fostered further distrust between the Administrator and unit owners.

[19] In the result, the unit owner meeting was held on the last possible day, and I described above the outcome of the meeting.

C. Preliminary Objection by Administrator

[20] At the commencement of the hearing counsel for the Administrator objected to Mr. Fulton’s appearance as counsel for the Added Respondents. While submitting that his client did not want to delay the hearing, the Administrator’s counsel sought an order permitting the examination of Mr. Fulton as a witness on a pending motion. Pointing to portions of the affidavit of Mr. Wallace filed on behalf of the moving parties as being based on information provided to the deponent by Mr.

Fulton, counsel for the Administrator submitted that a lawyer cannot be both witness and counsel in a proceeding, and that Mr. Fulton should be examined on the information he provided to Mr. Wallace: *Trempe v. Reybroek* (2002), 57 O.R. (3d) 786 (S.C.J.).

[21] I reviewed the affidavit of Mr. Wallace in support of the moving parties and that of Mr. Endres in support of the Administrator. Both drew heavily on information from the respective counsel to provide the narrative background to this case. Each used a different style to present the material: Mr. Wallace deposed to information and belief provided by Mr. Fulton, whereas Mr. Endres simply described lawyers’ letters as “now shown to me”. None of the facts so presented seemed controversial, and Mr. Wallace offered many views in his affidavit that were clearly based on his own experience and training.

[22] I advised counsel for the Administrator that I did not regard Mr. Fulton as acting as both witness and counsel. If the moving parties relied on evidence in Mr. Wallace’s affidavit to which the Administrator took issue, I would consider any objection made to such evidence. None was made during the hearing. This incident highlighted the unnecessarily adversarial approach taken by the Administrator to this proceeding.

D. The Governing Test

[23] Under section 131(2) of the Act a court may order the appointment of an administrator for a condominium corporation “if the court is of the opinion that it would be just or convenient, having regard to the scheme and intent of this

Act and the best interests of the owners.” Section 131 does not contain any express provision addressing the termination of an administrator, and counsel were not able to direct me to a case on point.

[24] In my view it makes sense that the test found in section 131(2) of the Act for the appointment of an administrator should apply equally to its discharge. The question to be asked on this motion is: would it be just or convenient, having regard to the scheme and intent of the *Condominium Act* and the best interests of the owners, to terminate the Administrator?

[25] As to the scheme of the Act, the Court of Appeal observed in *Re Carlton Condominium Corp. No. 279 and Rochon* (1987), 59 O.R. (2d) 545 (C.A.) that:

The *Condominium Act* was passed to permit individuals to be owners of the freehold estate in residential units in a building as opposed to tenants in an apartment building.

In addition to the investment in their units, owners are tenants in common of the common elements: *Act*, s. 11(2). The objects of a condominium corporation are to manage the property and assets, if any, of the corporation on behalf of the owners, and to control, manage and administer the common elements and assets of the corporation: *Act*, s. 17(1)(2). Since the quiet enjoyment of a unit by its owner, and the value of the unit, depend heavily on the proper management of the common elements, it is no surprise that the Act vests the power to manage the affairs in the corporation in the unit owners through the board of directors that they elect: *Act*, s. 27 and 28. The Act establishes self-governance of the corporation by unit owners as the norm. As Hoilett J. noted, a court should utilize the administrator provisions of section 131 “only as a

last resort” for the very reason that the Act contemplates that unit owners should govern their own corporate affairs.

[26] When a court is considering either the appointment or termination of an administrator, good reason must be shown why unit owners should not manage their corporation’s affairs through an elected board of directors. Self-governance is the norm; administrators are the exception. Or, as put by Huddart J. in *Cook v. Strata Plan No. 50*, [1995] B.C.J. No. 2882 (B.C.S.C.): “...the democratic government of the strata community should not be overridden by the Court except where absolutely necessary.”

[27] Notwithstanding the centrality of the principle of self-governance, the scheme of the Act takes into account more than just the interests of unit owners. In *York Condominium Corporation No. 482 v. Christiansen*, [2003] O.J. No. 343 (S.C.J.), at para. 5, the Court stated:

...A principal object of the Act is to achieve fairness among the parties – owners, their tenants, their mortgagees, the corporation itself – in raising the money to keep the common enterprise solvent. Hence the Act provides for owners to contribute to the fund for common expenses in the proportions specified in the Declaration, which normally means in accordance with the number and size of the units which they own. This common expenses fund is the central financial mechanism of the corporation and the duty of contributing to it is the central mechanism to achieve financial fairness among the owners. If one owner fails to pay, the others must bear his burden; the expenses are not optional and they do not just go away.

From this I conclude that on a motion to terminate an administrator the Court must take into account the impact that the discharge might have on other interested persons, including the corporation's creditors and the relevant municipal agencies such as the fire services department and building inspection authorities.

[28] In *Skyline Executive Properties Inc. v. Metropolitan Toronto Condominium Corp. No. 1385*, [2002] O.J. No. 5117 (Sup.C.J.) Hoilett J. drew on jurisprudence from the British Columbia courts to conclude that when considering whether to appoint an administrator a court should consider (i) the ability of the unit owners to manage the affairs of the corporation, including whether they are divided into contending camps; (ii) the need to bring order to the corporation's affairs; (iii) whether only the appointment of an administrator has any reasonable prospect of bringing order to the corporation's affairs; and, (iv) the problem presented by the costs of involving an administrator. Each factor could apply, in reverse, to the question of whether the court should terminate an administrator.

[29] Against this statutory backdrop, in the specific circumstances of this case, I think two basic questions must be asked to determine whether it would be just or convenient, having regard to the scheme and intent of the *Condominium Act* and the best interests of the owners, to terminate the Administrator:

- (a) Is there now a reasonable prospect for the orderly self-governance of YCC 82?
- (b) Have the elected Board of Directors formulated an operating and project expenditure plan that presents a reasonable prospect of achieving the

orderly management of the affairs of the corporation?

E. Is there now a reasonable prospect for the orderly self-governance of YCC 82?

[30] Based on the evidence, the answer to this question is "Yes".

[31] The Honourable Mr. Justice Rosenberg chaired the unit owners meeting on October 25, 2006. Ten persons stood for election as directors and five were elected. The election was scrutinized. Detailed minutes were kept of the meeting. They do not contain any objections about the fairness of the election process. They do contain comments from a number of unit owners that are consistent with the results of the various votes – the unit owners want the opportunity to decide their own fate.

[32] The new Board of Directors includes a senior law clerk, a real estate broker, a marketing pricing specialist with Canadian Tire Corporation, an insurance underwriter and a financial services manager with the Bank of Montreal.

[33] After the election the new Board retained the services of Mr. Andrew Wallace, a condominium consultant. His credentials are impressive. A past President of the Association of Condominium Managers of Ontario, Mr. Wallace has spent over 34 years in the industry and in the past two years has been appointed by the Court as an administrator of two condominium corporations. The new Board wants Mr. Wallace to provide services as a facilitator and advisor.

[34] Mr. Morrison, from the mortgagee, confirmed on examination that Mr. Wallace is very experienced and enjoys an excellent reputation in the condominium industry.

[35] Mr. Wallace deposed that he is “confident that the affairs of YCC #82 can be efficiently conducted by the new Board of Directors”. Based on his experience in the industry, he regarded the results of the election as giving an “overwhelming mandate” to the new Board.

[36] The unit owners have elected a new board that possesses strong support amongst the owners. The new Board has secured the advisory services of an experienced condominium management expert. As a result, I am satisfied that the conditions have been established for the orderly self-governance of YCC 82.

F. Have the new Board of Directors formulated an operating and project expenditure plan that presents a reasonable prospect of achieving the orderly management of the affairs of the corporation?

[37] This is a more difficult question to answer.

[38] YCC 82 and its unit owners face significant challenges. Over the next few years major sums must be spent on needed repairs and improvements. The Administrator previously secured owner approval to borrow \$4 million and has spent those funds on repairs and other matters. More funds must be raised. Toronto Fires Services is demanding that a significant amount of work be done immediately to meet fire code standards and City of Toronto work orders remain outstanding.

[39] No unit owner should underestimate the work that must be done on the buildings and the hard decisions that they will have to make. It is unclear whether all the unit owners have

frankly acknowledged the significant financial challenges that face their corporation. Mr. Morrison, from the corporation’s lender, attended the October 25 meeting. In a subsequent letter to the counsel for the Added Respondents he voiced strong concerns about whether the unit owners truly understood the fiscal circumstances in which they found themselves. He commented:

“It was also clear that the owners do not understand the true cost of living in, and properly maintaining, their homes...At the end of the day, the costs are real and, eventually, the owners are going to be forced to recognize them.”

On his examination Mr. Morrison called for the emergence of strong, realistic leadership from amongst the unit owners.

[40] Whether such strong, realistic leadership has emerged in the form of the new Board of Directors remains to be seen. I have no doubt that an enthusiastic and dedicated new Board is now in place. I am not yet sure whether its plans are realistic.

[41] The new Board filed a document entitled “Mandate of the New Board of Directors Regarding York Condominium Corporation Plan No. 82.” It is a high-level road map.

[42] The ‘Mandate’ certainly identifies the key areas that a new Board will have to address: immediately deal with fire violations and City work orders; hire a professional property manager satisfactory to the corporation’s lender; formulate a budget, including a realistic reserve fund; and secure additional financing. However, the new Board did not file detailed plans for each item nor a timetable for their execution. The new Board provided some comments on the Administrator’s draft budget for the next year, suggesting that savings could be made

in the area of operational expenses. The new Board also filed some materials about on possible ‘hybrid’ forms of financing that the unit owners could consider. A meeting of unit owners is scheduled for December 20, 2006 to discuss and vote on additional borrowing.

[43] The new Board submitted that to date the Administrator has denied them access to the books and records of the corporation needed to develop a detailed financial plan. The Administrator’s counsel responded that voluminous materials were filed with each of the four reports and the unit owners, including the new Board members, always had access to that historical material.

[44] One aspect of this motion that troubles me is the lack of current financial information about the corporation before the Court. The last report filed with the Court this past spring contained financial information up to December 31, 2005. Such information would be of minimal use in preparing a budget for the forthcoming year. I asked the Administrator’s counsel whether audited financial statements of the corporation for the year ended May 31, 2006 were available. I was told they were not. Un-audited financials for that year end were not included in the materials; management *pro formas* showing year-to-date results for the current fiscal year were not filed; nor were any year-over-year comparisons of the corporation’s balance sheet or income and expenses statements. Simply put, the Court on this motion is operating in a virtual financial information vacuum. While there are ample materials before the Court showing the significant future expenditures that the corporation must make, there is no information that would enable the Court to assess the current financial health of the corporation.

[45] In April of this year the Added Respondents (some of whom are now new Directors) wrote to the Administrator requesting access to the financial records of the corporation. The April 26, 2006 response from the Administrator’s counsel was unduly legalistic and antagonistic. It basically said: “look at the court reports; you aren’t entitled to current financial information”.

[46] In light of that response I understand why the new Board has not been able to develop a detailed financial plan for the corporation.

[47] Mr. Wallace deposed that he had reviewed the new Board’s ‘Mandate’ and thinks that “it is reasonable and achievable and its implementation will ensure the smooth running and maintenance of YCC #82 while allowing any and all fire violations and work orders to be addressed and cleared.” He has been retained to assist the Board in executing the ‘Mandate’. His retainer gives me assurance that the new Board has access to the appropriate resources to put together more detailed budgets, reserve fund plans, project expenditure plans and financing plans, all of which must candidly recognize the obligations the corporation owes to its creditors, Toronto Fire Services and the City of Toronto.

G. Conclusion

[48] The polarized relationship existing between the current Administrator and the unit owners cannot continue. Although I have expressed some concerns about certain aspects of the Administrator’s conduct, it must be emphasized that the Court has approved prior reports of the Administrator and commented on the good faith manner in which the Administrator performed its duties. I have no doubt that conduct on both sides has contributed to the current breakdown

in relations between the Administrator and unit owners. I think the time has arrived to transition corporate governance from the Administrator to the new Board, as long as certain conditions are met.

[49] In his affidavit Mr. Wallace opined that it would be most effective and efficient in this case if the Administrator were terminated immediately. In principle that advice is sound; however, on the facts of this case I have some reservations in view of the absence of detailed plans from the new Board. Some transition process is required.

[50] I therefore make the following orders:

- (1) Effectively immediately the appointment of Fengate as Administrator to exercise all of the powers and discharge all of the duties of the Board of Directors of YCC 82 is suspended, subject to the reporting and court review requirements set out below;
- (2) Effective immediately the persons duly elected as Directors of the corporation at the meeting held on October 25, 2006, namely, Bridge Bahadoor, Irwin Sampat, Abdool Wahab, Surendra Lochan and Mark Sukhdeo, shall assume all of the powers and discharge all of the duties of the Board of Directors of YCC 82 **on an interim basis**, subject to the reporting requirements set out below and approval of the Board's plans by this Court on Wednesday, January 31, 2007;
- (3) Fengate shall continue as property manager of YCC 82 until January 31, 2007 or until

such earlier time as the Board of Directors puts in place another professional property manager who is approved by the corporation's lender in accordance with the provisions of the relevant loan or financing agreements between the parties. Until replaced by a new property manager, Fengate shall be compensated for its services by YCC 82 at the current level it receives as Administrator;

- (4) Effective immediately the Board of Directors shall have unrestricted access to all books and records of the corporation, but those records shall continue to be kept at their present location on the corporation's premises in order to ensure that the property manager can continue to perform its duties. To be clear, the corporation's books and records must be maintained at a location that permits the property manager to perform its duties and enables the Board of Directors to discharge its duties and prepare the plans described in paragraph 8 below;
- (5) Fengate and the new Board of Directors are to co-operate fully, professionally and politely with each other, and with their respective representatives or advisors, during this transition period. Each side must extend such assistance to the other as is necessary to effect a transition that is smooth and furthers the best interests of YCC 82;

- (6) Fengate and the new Board of Directors must co-operate to put in place immediately banking arrangements that are typical in the industry for a condominium corporation/property manager relationship and that ensure the uninterrupted receipt by the corporation of revenues to which it is entitled;
- (7) The special assessment commencing September 8, 2006 issued by the Administrator is rescinded, and any Notices of Lien delivered in furtherance of the special assessment are set aside;
- (8) By January 15, 2007 the Board of Directors must file with the Court a report that includes the following information:
- i. A Board-approved budget for the balance of the fiscal year ended May 31, 2007 and for the fiscal year ending May 31, 2008;
 - ii. A realistic Board-approved reserve fund plan;
 - iii. A realistic Board-approved project expenditure plan and construction program that ensures YCC 82 will satisfy any work requirements directed by the Toronto Fire Services and the City of Toronto within a time frame satisfactory to those agencies;
 - iv. A realistic Board-approved plan to finance the corporation's operating, reserve and project expenditure requirements, including proof of availability of any planned borrowing;
 - v. Evidence that the accounts payable of YCC 82 are in good standing;
 - vi. Evidence of the appointment of a new, professional property manager;
 - vii. A report on the results of the unit owners' meeting scheduled for December 20, 2006 to approve further borrowing; and,
 - viii. Confirmation that any work that the Toronto Fire Services or City of Toronto requires be completed by December 31, 2006 has been performed to the satisfaction of those two agencies or that the agencies have agreed to another timetable for completion of the work.
- (9) At the same time as it files its report, the Board of Directors must file a further affidavit from Mr. Wallace containing his professional opinion on whether the Board's filed plans are realistic and achievable in light of (i) the specific needs of the corporation; (ii) the work directions issued

by Toronto Fire Services and the City of Toronto; and (iii) the corporation's obligations to its creditors.

(10) By January 15, 2007 the Administrator shall file with the Court a report, in a form similar to that of its previous reports, for the period from January 1, 2006 until December 4, 2006. The report shall detail all legal expenses incurred by the Administrator during 2006 and shall indicate which legal expenses have been paid and which remain due and owing. The report should also contain an accounting of the Administrator's fees since January 1, 2006;

(11) The Administrator and the new Board of Directors shall schedule a motion before me returnable on Wednesday, January 31, 2007 at which time:

i. The Administrator shall present its report for approval and pass its accounts; and,

ii. The Board of Directors shall present for review the plans specified in paragraph 8 of this Order.

If the Court finds the plans to be realistic and achievable, the Court will grant final approval of the election of the Board of Directors and formally discharge the Administrator; and,

(11) The Board of Directors shall deliver to each unit owner a copy of these reasons by no later than 5 p.m. on Thursday, December 7, 2006. I want to ensure that each unit owner appreciates the need to implement immediately a realistic plan that addresses YCC 82's challenging financial situation. Costs of photocopying and delivery are to be borne by the corporation.

[51] If the parties cannot agree on any material, urgent transitional matter, they may make an appointment with the Motions Office to appear before me at 9 a.m. for one hour during the next two weeks. I strongly encourage the parties to work together in order to avoid the necessity of such an attendance. Co-operation and common sense must prevail during the transition period.

Costs

[52] The Added Respondents may file written cost submissions by December 15, 2006. The Administrator may file its written cost submissions by January 5, 2007. Each submission shall be no longer than 7 typed pages, including schedules.

[53] Since I was concerned about the costs of litigation involving a condominium corporation located in a low-income area of Toronto, at the end of the November 29 hearing I stayed payment by the Administrator of any legal expenses incurred, but not paid. I continue that stay until January 31, 2007 when I will review the Administrator's accounts. However, I recognize that the Administrator will incur legal expenses to prepare its next report and present it to the Court, so the Administrator will be permitted to recover its reasonable

legal expenses for such work once the report has been considered by the Court.

Final Comment to the Unit Owners and the new Board of Directors

[54] I must emphasize to the new Board of Directors and to all unit owners that they are not yet out of the woods. Major repair expenditures must be made and the pressing concerns of Toronto Fire Services and the City of Toronto must be addressed. Had the new Board not retained an experienced professional such as Mr. Wallace to provide them with advice and guidance, it is unlikely I would have made this order. If realistic and achievable plans are not placed before this Court for review on January 31, 2007, the corporation may find itself back under the management of an administrator. Mr. Morrison has stated that realistic leadership must emerge at YCC 82; it is time for this new Board to demonstrate that it can provide such leadership.

D. Brown J.

Released: December 4, 2006

This document: 2006 CanLII 27995 (ON S.C.)
Citation: *Little v. Metropolitan Toronto Condominium Corp. No. 590*, 2006 CanLII 27995 (ON S.C.)
Date: 2006-08-15
Docket: 06-CV-310928PD2

COURT FILE NO.: 06-CV-310928PD2
DATE: 20060815

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: R. MARCUS H. LITTLE (Applicant) v.
METROPOLITAN TORONTO
CONDOMINIUM CORP. NO. 590
(Respondent)

BEFORE: Justice Marrocco

COUNSEL: *Mark H. Arnold*, for the Applicant
Patricia M. Conway, for the Respondent

DATE HEARD: August 14, 2006

ENDORSEMENT

[1] This application is dismissed with costs.

[2] The applicant, a unit owner at Metropolitan Toronto Condominium Corp. No. 590, in essence seeks an order requiring the respondent to reimburse its (the Respondent's) Reserve Fund for \$230,000 that the applicant claims were wrongfully expended from that fund. The applicant argues that inappropriate Reserve Fund expenditures were made on the following items:

- (1) Security system upgrades,

- (2) the purchase of exercise equipment
- (3) replacement of the entrance canopy,
- (4) lobby renovations, and
- (5) design fees.

SECURITY SYSTEM UPGRADES

[3] The security system had a 15-year life cycle. It was scheduled for replacement in 2002. Security systems evolve over time. When systems are replaced, sometimes enhancements are affected. In this case new security cameras were installed in the front foyer. New lenses were installed in all cameras. The system was updated to record images using digital technology.

[4] Section 97(1) of the *Condominium Act*, 1998, S.O. 1998, c. 19 (the “Act”) provides that the corporation has an obligation to maintain the common elements. It is a notorious fact that technology becomes outdated and in order to be maintained must be replaced. Replacing a 15-year-old security system with a modern one clearly involves maintaining the security system and therefore the common elements. That is all that happened here.

[5] Section 97(2)(b) of the Act provides that the Board may make improvements or changes to the common elements to ensure the safety or security of persons using the property. Changing the security system by replacing it with a more modern version ensures the safety or security of persons using the property.

THE PURCHASE OF EXERCISE EQUIPMENT

[6] The expenditure on exercise equipment involved replacing a 1974 rowing machine with a newer used model.

The weight machine was replaced because no parts were available to put it back into safe operating condition. The word “maintain” as it appears in s. 97(1) of the Act is not defined. Furthermore the English language is not an instrument of mathematical precision. Determining that the exercise equipment was maintained by replacing old equipment with new equipment does no more than recognize the obvious, namely, that it is impossible for the Legislature to foresee the manifold sets of facts which can arise in any area which is the subject of legislation. Finally, I note that, according to the President's Report, the repairs were well received. The following appears in the Minutes of the Annual General Meeting (April 25,2002) "the renovation of the exercise facility had been completed. The area is larger and usage had increased." (Respondent's Record at p. 60)

REPLACEMENT OF THE ENTRANCE CANOPY

[7] The canvas canopy, at the entrance of the building, was scheduled for replacement in 2003. The Board determined to address the absence of eaves-troughs at the location of the canopy. The absence of eaves troughs led to water pouring onto the concrete at the front of the building thereby creating a hazard. The Board also determined to address the absence of handicapped access.

[8] A new glass and granite canopy, which updated the look of the front of the building, was installed to replace the old canvas canopy. Eaves-troughs were installed and handicapped access provided. During the course of the canopy replacement it was discovered that water had been entering the outer foyer of the lobby and that the concrete in that area was badly deteriorated. The front doors, threshold and outer foyer floor had to be taken up and replaced.

[9] The change from a canvas canopy to a glass and granite canopy was simply the substitution of a modern canopy

for what had once been a modern canopy. The canvas canopy was at one time stylish. Today, one modern equivalent is a canopy made of glass and granite. There is nothing in s. 97(1) of the Act that suggests that it was intended to be a cultural straitjacket. The canopy that was at the entrance was simply replaced by a more contemporary version.

[10] The decision to provide handicapped access reflects no more than a desire to ensure that persons under a physical disability will be able to safely use the property and is in accordance therefore with s. 97(2) of the Act.

[11] There's no suggestion that the repairs to the outer foyer were anything but an attempt to reverse the effects of years of water damage. The Corporation had an obligation to make such repairs and I find based on the evidence that the repairs were made using materials that were reasonably close in quality to the original and thus are deemed by s. 97(1) of the Act not to be an addition, alteration or improvement to the common elements or a change in the assets of the corporation.

LOBBY RENOVATIONS

[12] The Board determined that the owners wanted a lobby redesign, which would project the same high-end image for the building as, had existed when the building was first marketed and built. The owners were able to agree on a new design. The Board determined that of the total projected cost of \$70,000 constituted an improvement to be funded by an existing operating surplus of \$35,000 and a special assessment of \$35,000.

[13] The Corporation decided that a vote of the owners was required. Approval was sought at the Annual General Meeting to be held on April 25, 2002. At the meeting there were not enough unit owners present to obtain the consent of the necessary two-thirds of the unit owners (i.e. 80 unit owners).

There were 45 unit owners present 44 of whom voted in favour of the renovation. The meeting resolved to leave the vote open for a period of 120 days to allow the Board to solicit proxies and thereby get the approval of the required 80 unit owners. The Board obtained proxies from 36 unit owners who were not present at the Annual General Meeting. These 36 proxies plus the votes from the 44 unit owners who were present at the Annual General Meeting, in the Board's opinion, gave it the required approval from 80 unit owners.

[14] The Board conducted itself in a manner that contravened s. 97(5) of the Act. Specifically, the votes of 80 unit owners were not taken at a meeting duly called for the purpose of approving a substantial addition to the assets of the corporation.

[15] Section 134(1) of the Act provides that a unit owner may make an application for an order enforcing compliance with the Act. Section 134(3) provides me with the discretionary authority to make a compliance or other remedial order.

[16] I decline to make such an order. I based my decision upon the following factors:

- (1) the changes were fully disclosed to the unit owners prior to any construction taking place,
- (2) the required number of unit owners did approve the Lobby Renovations (i.e. "addition, alteration or improvement to the common elements or a change in assets of the corporation" to use the language of section 97(3)) albeit not at a meeting called for that purpose,
- (3) I find and the respondent agreed that the decision of the Annual General Meeting to

delay the vote and solicit proxies was taken in good faith,

- (4) the Lobby Renovations were carried out in a fiscally responsible way creating no deficiency in the Corporation's Reserve Fund or finances generally.

DESIGN FEES

[17] None of the evidence tendered on this application was directed to the appropriateness of Design Fees, in the amount of \$8,000, being paid out of the Reserve Fund. The issue was raised for the first time in argument. I am not persuaded that the payment of Design Fees out of the Reserve Fund was inappropriate.

[18] Accordingly this application is dismissed with costs.

Marrocco J.

DATE: August 15, 2006

2006 CanLII 40674 (ON S.C.)
COURT FILE NOS.: 05-CV-297935PD2 &
06-CV-309268PD1
DATE: 20061205

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: METROPOLITAN TORONTO
CONDOMINIUM CORPORATION
551
v. MANI ADAM

BEFORE: Justice Low

COUNSEL: *Carol A. Dirks*, for the applicant

Thomas McRae, for the respondent,
counter applicant

Heard October 17 and 18, 2006, costs submissions
in writing

COSTS ENDORSEMENT

[1] This application and counter-application was heard at some length over the course of two days but on the second day, counsel arrived at a negotiated result. The parties agreed to a protocol pursuant to which the parties would exercise their rights and fulfill their respective obligations as condominium unit owner and condominium corporation.

[2] There were, however, three additional terms that the parties wanted to be imposed which could not be agreed to and I was asked to make a ruling. The applicant sought an order

prohibiting the respondent from communicating with the condominium's directors except by letter; it sought an order prohibiting the respondent from communicating with third parties concerning the condominium; and the respondent sought an order that he be permitted to make copies of condominium documents using his own scanner.

[3] I declined to order the additional terms and gave oral reasons. Regrettably, the court reporter had departed for the day, a fact which escaped my attention until I had almost concluded oral reasons and I have attempted to reproduce them in somewhat edited form below as they have some bearing on my reasons for the costs disposition.

[4] I do not order the additional terms as I would dismiss the application and the counter-application. While the behaviour of Mr. Adam was annoying and at times ill-mannered and while his suggestions to management were in several instances unreasonable, I am not satisfied that his actions were oppressive or prejudicial or unfairly disregarded the interests of the applicant corporation. Likewise, although the behaviour of the corporation as expressed through its manager, Mr. Moshenberg, was at times uncooperative and disdainful and while Mr. Moshenberg did not appear to be fully conversant with the rights and obligations of owners and the condominium corporation, I am also not satisfied that the applicant's actions were oppressive or prejudicial or unfairly disregarded the interests of Mr. Adam in the totality of the circumstances.

[5] The case of the applicant breaks down into four main areas. The first concerns Mr. Adam's requests that there be posted greetings in the common areas in relation to religious holidays apart from those in Judaism. Mr. Adam is entitled to make such requests just as the board of directors is entitled, as an incident of management, to decline to accede to them.

Mr. Adam's suggestion that either there be postings in respect of no religious holidays or that there be postings relating to holidays of all religions was not a reasonable one and it was entirely within the powers of the Board to deny the request. That Mr. Adam made additional requests and that he expressed the ill-conceived view that the posting of a greeting of the kind on view in the common elements was contrary to the *Charter* was undoubtedly annoying, but the fact of the requests and the expression of opinion does not, in my view, amount to more than that — an annoyance. In any case, Mr. Adam stopped making the requests when asked to by the applicant's solicitors.

[6] The second area concerns the request for investigation and Mr. Adam's own investigation into the delay in response to a fire alarm. Mr. Adam, as an owner and as a resident, has what should be an obviously legitimate interest in knowing the reason or cause of delay in response to a fire alarm. He was entitled to ask the Board to investigate the issue, and I find that Mr. Moshenberg knowingly withheld from Mr. Adam the material information that the monitor was doing telephone verification with the site before it dispatched emergency services. The written response on behalf of the condominium corporation to Mr. Adam on the issue was misleading. Mr. Adam was, as it turned out, correct in thinking that there was something "fishy" and the conviction on Mr. Adam's part that there was something being hidden, and I find that there was, was the reason he wanted to see the records of the corporation.

[7] The third area of alleged oppression raised by the applicant is Mr. Adam's repeated requests for inspection of a number of the corporation's records. The statute confers on an owner the right to view the records and to have copies. It does not stipulate where and how, and these matters are left to the common sense and good manners of owners and managers. Regrettably, that was lacking here. Mr. Moshenberg was in error insofar as he demanded that Mr. Adam disclose his

motive or purpose in seeking to have inspection of the condominium corporation's records. There is some evidence before me upon which a finding could be made that Mr. Adam was given a runaround as to when and where and in whose presence and what he could and could not inspect but the issue of whether the applicant in fact denied the respondent's rights to inspect the corporation's records is the subject matter of a pending small claims court proceeding, as is the issue of whether s. 77 of the Act was breached. In the small claims court action, Mr. Adam claims that he was wrongfully denied access and he claims the statutory penalty of \$500.

[8] The applicant complains that Mr. Adam made repeated requests for the same documents. There is no admissible evidence before me that Mr. Adam was given meaningful inspection of records he requested. I am therefore not prepared to make the finding that his repeated requests were not legitimate. If Mr. Adam was denied access to the records which the statute entitles him to see, then his repeated requests, while annoying, are legitimate. Having said that however, I also decline to make the finding that he was denied access. That is a determination to be made in the Small Claims Court, the forum mandated under the statute for the determination of that issue.

[9] As for contravention of s. 77, Mr. Moshenberg's initial response to Mr. Adam's request for the addresses for service of the board members was neither appropriate nor adequate. While the applicant ultimately made the disclosure required by the statute, it was very slow in doing so. Mr. Adam's reason for seeking the addresses of the board members--to write them a letter--was reasonable. The statute does not, however, require a person to disclose his reasons for requesting the information as a condition of obtaining it.

[10] The fourth area of complaint raised by the applicant is essentially a complaint about bad manners on the part of Mr. Adam on several occasions.

[11] I have no doubt that Mr. Adam was an annoyance, in particular to Mr. Moshenberg. I am not prepared to find, however, on the totality of the evidence that his conduct was oppressive or that it was unfairly prejudicial or unfairly disregarded the interests of the corporation. To a significant degree, this dispute arises out of Mr. Adam seeking to exercise his statutory rights as an owner of a unit in the condominium. The management, and in particular, Mr. Moshenberg, was not as conversant with the obligations of the corporation and the rights of owners as ought to have been the case. And therein lay the source of friction and the need on the part of the applicant for what appears to have been an extraordinary amount of legal advice. That Mr. Adam was perseverant and impatient only fueled the fire.

[12] Mr. Adam's counter-application rests largely on the alleged refusal to permit him to have meaningful or any access to condominium documents. This was the subject matter of his Small Claims Court proceedings but the applicant put the question of access to records in issue in the application in the hopes, it appears, of achieving an end run around the Small Claims Court process. The denial of access is an issue to be decided in Mr. Adam's Small Claims Court application. If he is correct, there is a statutory remedy in the \$500 fine and the applicant cannot rely on the requests as evidence of oppression by Mr. Adam. If he is incorrect, he cannot rely on the alleged denial as a basis for arguing oppression.

[13] In any case, Mr. Adam launched a counter-application seeking an order the specifics of which is not supported by the legislation. The legislation is silent as to the manner in which disclosure is to be implemented. In the ordinary course, one

would expect that good sense and courtesy would prevail, that unreasonable requests would not be made and reasonable requests would not be denied. Regrettably, good sense and courtesy were in short supply here and it is fortunate for the parties that their respective counsel at trial (who were not their solicitors when the dispute commenced) were able to fashion a protocol that is mutually acceptable, an exercise that ought to have been undertaken many months earlier.

[14] Mr. Adam also claims discrimination arising out of the amounts that he was charged for photocopying. In respect of the latter, the amounts are *de minimus* and the evidence of discrimination was not persuasive.

[15] The applicant does not seek costs and argues that the parties should bear their own costs or, alternatively, if Mr. Adam is to be awarded costs, it should be on a partial indemnity basis and that the costs attributable to the counter-application should be taken out of the costs claimed. Mr. Adam argues that he should be awarded substantial indemnity costs of the proceeding.

[16] On the basis that costs should ordinarily follow the event, both parties would be *prima facie* obligated to pay the costs of the application upon which they were unsuccessful. The result would *prima facie* be a set-off or near complete set-off with the practical result that each party would bear his and its own costs.

[17] The argument made on Mr. Adam's behalf is that his legal expenses were necessitated wholly by the issues raised on the application and that his counter-application added either nothing or only negligibly to his costs. It is argued as well that his very early offer to settle on the basis that he would refrain from doing those things complained of in the application together with his later formal offer were both reasonable and

would suffice to attract substantial indemnity costs in his favour.

[18] I agree that although Mr. Adam asserted a counter-application, he did not greatly magnify the number or complexity of the issues to be litigated. Nevertheless I do not agree that the prosecution of the counter-application entailed no additional effort. It is suggested by counsel for the applicant that the proportion of time attributable to the counter-application is 35% to 40% of the whole. In my view, that estimate is overly high and I would estimate it at about 30%. Accordingly, if Mr. Adam is to be awarded costs of the application, it ought to be on the basis of 70% of his costs.

[19] I would agree with the submission on behalf of the applicant that the applicant has not conducted itself in a vexatious or reprehensible manner in the prosecution of the application. I do not view the offers made by Mr. Adam as warranting the imposition of substantial indemnity costs. I do, however, take into account and give significant weight to the offer made by Mr. Adam upon the launching of the application and before affidavits were filed with their attendant cross-examinations expanding legal costs. The offer is referred to in the November 3, 2005 letter from applicant's solicitor Mr. Natale to solicitor for Mr. Adam. Mr. Adam's offer was to resolve the matter by refraining from conducting himself in the manner objected to as set out in the application. It was a reasonable offer made promptly and ought reasonably to have been accepted. The applicant's counter-offer of resolution, particularly insofar as it demanded monetary compensation of \$10,000, was without foundation.

[20] In my view, this litigation ought to have been resolved as early as November 3, 2005, along the lines of Mr. Adam's offer and the parties would have been spared many thousands of dollars in legal expenses.

[21] I am therefore of the view that while substantial indemnity costs are not warranted, Mr. Adam ought to have his partial indemnity costs of the application which I would fix at \$32,000 all inclusive. In arriving at this amount, I have used the full substantial indemnity amount claimed, reduced it by the 30% reasonably attributable to the counter-application and used a ratio of 2/3 of the resulting substantial indemnity figure to arrive at the partial indemnity award of costs.

Low J.

DATE: December 5, 2006

COURT FILE NO.: 01-CV-215818CM3

DATE: 20070220

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:)
)
 METROPOLITAN) *Patricia M. Conway*
 TORONTO) *and Megan L. MacKey,*
 CONDOMINIUM) *for the Plaintiffs*
 CORPORATION #1250 on)
 its own behalf and on behalf)
 of ITS UNIT OWNERS)
)
 Plaintiffs)
)
- and -)
) *Bruce O’Toole* for the
 THE MASTERCRAFT) *Defendant, Lomico 188*
 GROUP INC. and 188) *Inc.*
 EGLINTON INC., 188)
 LOFTS INC. and LOMICO) *Allan Sternberg* for the
 188 INC., and BRUCE C.) *Defendants, The*
 GREENBERG, and S-99) *Mastercraft Group Inc.,*
 LIMITED) *and 188 Eglinton Inc.,*
) *188 Lofts Inc. Bruce C.*
 Defendants) *Greenberg*

AND
COURT FILE NO.: 00-CV-15962

B E T W E E N:)
)
 S-99 LIMITED) *Bruce O’Toole, for the*
) *Applicant*
)
- and -)
)
 METROPOLITAN)
 TORONTO) *Patricia M. Conway*
 CONDOMINIUM) *and Megan L MacKey,*
 CORPORATION #1250) *for the Respondent*
)
 Respondent)
)
) **HEARD:** October 10,
 11, 12, 13, 16, 17,
 18, 19, 20,
 and 23, 2006

Pitt J.

REASONS FOR JUDGMENT

[1] The disputes in these two consolidated proceedings involve the rights and obligations of parties having an “interest” in the building located at 188 Eglinton Avenue East, in the City of Toronto, where the plaintiff Condominium Corporation, Metropolitan Toronto Condominium Corporation No. 1250 (“MTCC 1250”) resides. The issues involved are complex. Their resolution involves, among other things: (1) the interpretation of some sections of the *Condominium*

Act, R.S.O. 1990, c. C.26 (the “1990 *Act*”) and *Condominium Act*, 1998, S.O. 1998, c. 19 (the “current *Act*”) [where it is unnecessary to specify the version of the *Act*, I will simply refer to “the *Act*”]; (2) the construction of certain provisions of the Declaration and the Disclosure Statement made pursuant to the *Act*, certain typical provisions in the Agreements of Purchase and Sale of units in the condominium, and the Lease of several items located in the condominium premises; and (3) other real property and corporate issues that arise only infrequently in dealing with condominiums. Fortunately, there are no significant factual disputes, except with respect to damages.

[2] For ease of reference, I shall set out the documentary material most frequently referred to in appendices:

- Appendix A – Sections of the *Act*;
- Appendix B – Excerpts from the Declaration and Description;
- Appendix C – Excerpts from the Disclosure Statement;
- Appendix D – Excerpts from a typical Agreement of Purchase and Sale of a unit in the condominium;
- Appendix E – Excerpts from the Lease.

BACKGROUND

[3] The subject building was constructed in the late 70’s, and was used as a commercial building until approximately 1998, with retail on the ground level, and two floors of underground parking for tenants and visitors.

[4] The defendant 188 Eglinton Inc. purchased the building in 1997. Following the purchase, the building was marketed to purchasers as a “substantially renovated building”. All of the building was renovated, except the retail level, which did not ultimately form part of the condominium corporation.

[5] Sales of residential units commenced in 1997 before the renovation work commenced. Prospective purchasers were able to view a model suite on the 4th floor of the building. They could not see the rest of the building, and in particular, they could not see the parking garage.

[6] When purchasers entered into an Agreement of Purchase and Sale, they were given a Disclosure Statement, including a budget, together with a draft Declaration, a draft Bylaw 1 (which is the general governance bylaw), and a draft Bylaw 4 (which is the Reciprocal Agreement, setting out the costs and facilities to be shared by the corporation with the first floor retail).

[7] The first unit owners took possession in November of 1998. At that point, work on the conversion was still ongoing. 188 Elginton Inc. registered the plaintiff MTCC 1250 on May 16, 1999. From that time until the turnover meeting in July 1999, the board of directors of MTCC 1250 consisted of the

defendant Bruce C. Greenberg (the Developer principal), Bruce McMahon, a C.A. who works for both the defendant The Mastercraft Group Inc. (the “Mastercraft Group”) and the Starwood Group (two businesses apparently controlled by Mr. Greenberg), and Volker Kirstein, the principal of Highcourt Properties Inc. (a property management company).

[8] Before the turnover meeting, the day-to-day management was carried out under a contract between MTCC 1250 and an affiliate company of the developer, Mega Landmark Inc., which subcontracted the work to the above-noted Highcourt Properties Inc.

[9] At the turnover meeting, a Board composed of three unit owners was elected. One of those three original directors was John Pozios, who gave evidence at the trial, along with two other subsequent unit owners, Debra Beland and Richard Cherniuk.

[10] Within a few months of turnover, the new Board terminated the property management contract with Mega Landmark Inc. pursuant to the *Act*, and hired Simerra Property Management Inc. (“Simerra”). Simerra commenced its duties as property manager in January 2000, and was the property manager at the time of trial. Disputes between the parties commenced shortly after the hiring of Simerra.

DIVISION OF INTERESTS IN THE PREMISES

[11] The condominium building is made up of eight floors. The 9th floor rooftop is a recreational facility. A notable feature of the project is that the “ownership” is divided. Floors two through seven

were owned at some point by 188 Eglinton Inc. in trust for the defendant 188 Lofts Inc. and finally transferred to approximately 77 residential owners. The 8th floor, parking garage, ground floor retail, the communications units and the storage units were transferred from 188 Eglinton Inc. to the defendant Lomico 188 Inc. for a consideration paid prior to the commencement of the disputes. Adding to the complexity was the involvement of 188 Lofts Inc. as the vendor in the Agreements of Purchase and Sale to the residential unit owners.

THE LEASE

[12] In respect of the application issued on December 22, 2000, the applicant S-99 Limited, a defendant in the action, seeks to have the lease of what it considers “personalty” situate in the subject premises, declared valid and its terms enforced. On the other hand, the respondent MTCC 1250, the plaintiff in the action, seeks to have the lease declared unenforceable, or at a minimum the liability under it drastically reduced.

RELIEF SOUGHT IN STATEMENT OF CLAIM

[13] The relief sought by the plaintiff MTCC 1250 in the statement of claim issued on August 14, 2001, is as follows:

- (a) Against the defendants, 188 Eglinton Inc., 188 Lofts Inc. and Lomico 188 Inc., payment of the first year budget deficiency of the plaintiff in the amount of \$88,255.00.

(b) Against 188 Elginton Inc. and 188 Lofts Inc. and Lomico 188 Inc.:

- (i) An order requiring them to comply with Section 51(1)(b) of the *Act* and specifically requiring Lomico 188 Inc. to immediately make bona fide efforts to sell all residential units on level 8 of the plaintiff to arms length purchasers, without delay;
- (ii) an order requiring the defendants to lease to the owners of residential units in the plaintiff all of the parking units of the plaintiff, at market rates;
- (iii) an order requiring the defendants to provide to the plaintiff, its directors, officers, agents, assigns and employees, any necessary keys to permit free and unfettered access to the storage and utility units of the plaintiff, for purposes of carrying out the plaintiff's duties under the *Act*;
- (iv) an order pursuant to section 109 of the current *Act* amending the Description for the 8th floor of the plaintiff to correct an inconsistency between said Description and the Declaration, Schedule C, and the as built structure.

(c) Against Lomico 188 Inc.:

- (i) If required, a declaration that the plaintiff and its residents from time to time are entitled to, and have, an easement over a corridor on the 8th floor of the plaintiff leading from the elevator to the stairwell to the rooftop facilities of the plaintiff, such easement in the nature of a right-of-way, permitting pedestrian traffic to and from the said elevator and the said stairwell, for purposes of accessing the plaintiff's rooftop recreational facilities;
- (ii) if required, an interlocutory, interim and permanent injunction restraining the defendant from interfering with the said right-of-way;
- (iii) payment to the plaintiff of utilities charges in respect of retail units registered in the name of Lomico 188 Inc., together with interest on all arrears from time to time at the rate of 15% per annum compounded monthly;
- (iv) payment to the plaintiff of cleaning, janitorial service and supply charges in respect of the residential units on the 8th floor registered in the name of Lomico 188 Inc. amounting to \$17,050.62 to June 30, 2001.

- (d) Against 188 Eglinton Inc., 188 Lofts Inc. and Lomico 188 Inc.;
- (i) damages for breach of implied or in the alternative express warranties in the amount of \$750,000.00;
- (ii) damages of \$400,000.00 pursuant to section 52(5) of the *Act*.
- (e) Against the defendant, The Mastercraft Group, damages for breach of collateral contract, or in the alternative, damages for negligent misrepresentation in the amount of \$750,000.00.
- (f) Against the defendants, Bruce C. Greenberg and Lomico 188 Inc., punitive damages in the amount of \$50,000.00.
- (g) Against all of the defendants:
- (i) interest on all amounts found owing by the in accordance with the by-laws of the plaintiff or the *Courts of Justice Act*;
- ...
- (h) In the alternative to paragraph 1(c)(i) and (ii), an order amending the Declaration and Description of the plaintiff, to create a common elements corridor on the 8th floor, leading from the elevator to the stairwell.

[14] For the reasons that follow, I find the following:

First Year Budget Deficiency

- (1) That 188 Eglinton Inc. is the Declarant and is obliged to repay the plaintiff MTCC 1250 the amount found owing by the Declarant for the first year deficit.

Interest Rate on Common Expenses

- (2) That the interest rate payable is the rate specified in Bylaw No. 1, which is prime plus four percent, or 10 percent.

Compliance with Section 51 of the 1990 Act – Proposed Declarant

- (3) That 188 Lofts Inc. and Lomico 188 Inc. were *bona fide* purchasers for value of the assets involved at fair market prices.

Parking Units

- (4) That a unit owner who is prepared to pay the market rate is entitled to a parking space at a rate to be either negotiated periodically between the owner of the garage and MTCC 1250, or to be settled by arbitration. The first step in the process must be a *bona fide* attempt by the owner of the parking

garage to provide evidence of the market rate.

That the Declarant breached the parking agreement. Lomico 188 Inc. purchased the parking spaces with notice of the agreement and shall be bound by this finding.

Access by the Plaintiff to Storage, Utility Units, and Communication Units

- (5) That keys must be made available to the property manager, as agent for MTCC 1250, at all times, for the storage and utility units, and to the communication unit where the card access system is located solely for the purposes set out in the Declaration and ss. 12, 17 and 19 of the current Act.

Amending the Description for the 8th Floor

- (6) That there is no need to amend the Declaration. However, this finding in no way derogates from the right of entry to the 8th floor provided by the Declaration and the statutory rights provided for in ss. 12, 17 and 19 of the current *Act*, and particularly in emergency situations.

Easement

- (7) That the plaintiff is not entitled to an easement other than that provided for

in the Declaration and ss. 12, 17 and 19 of the current *Act*.

Right-of-Way

- (8) That declaratory injunctive relief is hereby granted for the limited purposes set out in the Declaration and ss. 12, 17 and 19 the current *Act*.

Payment of Utility Charges together with Interest on Arrears

- (9) That the rate of 15 percent compounded monthly for the common expenses to be the most appropriate rate and, therefore, the proper rate in the circumstances.

Cleaning, Janitorial and Support Charges for 8th Floor

- (10) That MTCC 1250 and Lomico 188 Inc. shall each be responsible for 50 percent of the costs and Lomico 188 Inc. shall pay prejudgment interest on its share at the rate provided for in the *Courts of Justice Act*.

Damages for Breach of Implied or Express Warranties – Fire-Stopping Issue

- (11) That there shall be judgment for \$15,000.00 to the plaintiff for its installation of Horizontal Fire-Stopping.

Parking Garage Deficiencies – Breach of Contract

(12) That this portion of the claim is dismissed.

Damages against The Mastercraft Group

(13) That this portion of the claim is dismissed.

Punitive Damages aga inst Bruce C. Greenberg and Lomico 188 Inc.

(14) That this part of the claim is dismissed.

The HVAC Lease

(15) That the lease is valid. The plaintiff owes S-99 Limited the present value of the leasehold interest of \$413,545.53 plus interest from the date of default at 24 percent per annum.

THE REASONS

[15] I shall deal first with the action and outline the issues raised as I deal with each head of relief.

FIRST YEAR BUDGET DEFICIENCY

[16] Apart from which defendant (or defendants) is responsible to satisfy this claim, this issue is the least contentious of the issues raised in the proceeding. Subsections 52(8) and (9) of the 1990 *Act* imposes

liability on the Declarant (see also concordant s. 75 of the current *Act*). The company that registered the Declaration, 188 Eglinton Inc., has admitted liability for the deficit, subject to the resolution of the lease dispute referred to in paragraph 12 of these reasons. Subject to what I say at the end of these reasons, I see no connection between the two disputes.

[17] The plaintiff takes the position that 188 Eglinton Inc., 188 Lofts Inc. and Lomico 188 Inc. ought to be treated collectively as the Declarant. It takes that position on the basis that the principal of Mastercraft Group (being Mr. Greenberg, Sr.), which entered into the agreement in 1997 to purchase 188 Eglinton Avenue East (subsequently assigned to 188 Eglinton Inc.) and the principal of the defendant companies (the defendant, Mr. Greenberg), created these 3 companies and financed them, to the extent that they were financed, from a pool or pool of monies controlled by that principal, and that the financial transactions between those companies were, to put it plainly, mere paper shuffling, and should not be considered *bona fides* for the purposes of the determination of the identity of the Declarant.

[18] The current *Act* defines a Declarant as:

“declarant” means a person who owns the freehold or leasehold estate in the land described in the description and who registers a declaration and description under this Act, and includes a successor or assignee of that person but does not include a purchaser in good faith of a unit who pays fair market value or a

successor or assignee of the purchaser.
(emphasis added)

The definition in the 1990 *Act* is:

“declarant” means the owner or owners in fee simple of the land described in the description at the time of registration of a declaration and description of the land, and includes any successor or assignee of such owner or owners but not does not include a purchaser in good faith of a unit who actually pays fair market value or any success or assignee of such purchaser.
(emphasis added)

[19] For the purposes of this issue, the differences in the two *Acts* are of no significance.

[20] The evidence on fair market value was sketchy, perhaps because it was not a main focus of the trial. The plaintiff submits that 188 Lofts Inc. and Lomico 188 Inc. did not purchase for fair market value and were not *bona fide* purchasers.

[21] Counsel did not expressly address the issue of the burden of proof on these difficult two questions.

[22] The accountant, who structured the financial aspects of the transactions, testified that at the time of the registration of its purchase, Lomico 188 Inc. held an undivided interest in the subject property, which it exchanged for its interest in the condominium. The accountant considered that transaction to be at fair market value.

[23] The parties seem to agree that Lomico 188 Inc. paid approximately \$1,266,000.00 for the 8th floor and parking units. The 8th floor contained eight “units”. Counsel for the plaintiff submits, perhaps not unreasonably, that based on the prices that units on other floors were sold, the 8th floor had a market value of approximately \$1,696,000.00. That estimate excludes fair market value of the parking garage for which there was no evidence.

[24] With its far-reaching implications and, given the usual evidentiary burden on plaintiffs, it will be unnecessarily risky to consider the above as evidence that the transactions were not at fair market value. Quite apart from anything else, there was no evidence from which a determination could be made that a single purchase of an entire floor by one purchaser would be fairly compared with eight purchases on different floors by eight different purchasers at different times. Many other factors would come into play.

[25] The defendant Mr. Greenberg controlled, at the relevant period, 188 Eglinton Inc., 188 Lofts Inc. and Lomico 188 Inc. There was no authority offered for the proposition that such control necessarily renders a transaction between any of the three companies not *bona fide*. In fact, the professional advisors to the companies did not attempt to conceal such control. In my view, the accountant’s evidence was clear that while the parties may not have been at arm’s length, the transactions were conducted for valid legal, commercial and tax purposes. There was no contrary evidence.

[26] The following passage from *Carleton Condominium Corporation No. 347 v. Trendsetter*

Developments Ltd. (1992), 9. O.R. (3d) 481 at 488 (Ont. C.A.) [*Carleton Condominium*], quoted by Greer J. in *National Trust Co. v. Grey Condominium Corp. No. 26* (1995), 47 R.P.R. (2d) 60 at para. 15 (Ont. Ct. Gen. Div.), is the only judicial pronouncement brought to my attention that touches on the issue of *bona fides*. It is as follows, per McKinlay J.A.:

In my view, once the payment of fair market value is determined, s. 1(1)(l) of the Act requires a further determination of whether the transaction was a true sale rather than merely a transfer to a nominee, and whether there was any underlying intent which would be inimical to the purposes of the Act.

[27] In *Carleton Condominium, supra*, the Court of Appeal did not agree that Mr. Assaly, who was the president and controlling shareholder of the Developer Declarant Assaly Corp., and had personally owned 53 residential units, was not a *bona fide* purchaser from the corporation.

[28] Later in its reasons, the Court of Appeal per McKinlay J.A. at p. 488 said:

Thomas C. Assaly purchased his units for investment purposes, and for the tax advantage which he could derive personally from their purchase – the same reasons why most other owners purchased their units. The evidence indicates additional reasons for Mr. Assaly’s purchases, not necessarily shared by other unit owners. They were the

stabilization of prices of the units in the project, and the furthering of the interests of Asgo in maintaining its management contracts. There is no evidence that he acted as a mere nominee of Assaly Corp. in purchasing his units.

[29] It will be a great stretch to find that Lomico 188 Inc. and 188 Lofts Inc. were merely nominees of 188 Eglinton Inc. That they were controlled by the same person does not make them nominees of each other.

[30] The plaintiff has also argued that the impugned transactions render 188 Eglinton Inc. less capable of meeting its statutory financial obligations – for example, for payment of the first year’s deficit, and damages for nondisclosure – from which one may find an underlying intent that would be inimical to the purposes of the *Act*. No evidence to support this argument was offered. More importantly, there does not seem to be, or perhaps I should say there was not drawn to my attention, any provision in the *Act* that would lead to the inference that the legislature turned its mind to requiring a Declarant to take certain steps or refrain from taking certain steps that would secure the performance of those statutory financial obligations.

[31] On the evidence before me, and from the views expressed by the Court of Appeal in *Carleton Condominium, supra*, I would not be prepared to take the drastic step of finding that the transactions between 188 Lofts Inc. and 188 Eglinton Inc. and between Lomico 188 Inc. and 188 Eglinton Inc. were not *bona fides* or not at fair market value.

[32] In any event, 188 Eglinton Inc. is identified as the proposed Declarant in the Disclosure Statement and in the Declaration, both being documents upon which unit owners rely.

INTEREST

[33] In consequence of the Declarant's failure to forthwith pay to the plaintiff MTCC 1250 the first year's substantial deficit, an interest obligation has arisen.

[34] I can find no reasonable objection to the plaintiff's position that since the debt arises from the Declarant's failure to pay common expenses, the interest rate payable ought to be the rate specified in Bylaw No. 1, which is prime plus four percent, or 10 percent.

[35] What is more, I find the Declarant had no proper basis for its delay in making the required payment and thereby knowingly placed an unfair burden on MTCC 1250 and the unit owners.

REQUIRING 188 EGLINTON INC., LOFTS 188 INC. AND LOMICO 188 INC. TO COMPLY WITH S. 51 (1) (b) OF THE 1990 ACT BY SELLING ALL RESIDENTIAL UNITS OF LEVEL 8 TO ARM'S-LENGTH PURCHASERS, WITHOUT DELAY

[36] Clause 51 (1) (b) of the 1990 Act provides:

Every agreement of purchase and sale

entered into by a proposed declarant for a proposed unit for residential purposes shall be deemed to contain,

...

(b) a covenant by the vendor to take all reasonable steps to sell the other residential units included in the property without delay other than any units mentioned in a statement under clause 54(1)(c).

[37] Clause 54 (1) (c) is not relevant.

[38] Clause 54 (1) (d) provides:

(1) A declarant or proposed declarant shall not grant a lease of a unit or proposed unit for residential purposes unless,

(d) written notice of the lessor's intention to lease the unit has been given to every purchaser under an agreement of purchase and sale, registered owner and mortgagee entitled to vote, and the period referred to in subsection (2) has expired or, where an application is made under subsection (2), it is finally disposed of.

[39] Paragraph 38 of each Agreement of Purchase and Sale provides that:

The Purchaser acknowledges that the Vendor, as proposed declarant, may from time to time lease any and all unsold Units in the Condominium for residential purposes for a period not to exceed two (2) years and this paragraph shall also constitute notice to the Purchaser as registered owner of the Unit after Closing, pursuant to section 54(1)(d) of the Act.

[40] The plaintiff has argued that the retention of the residential portion of the 8th floor is inimical to the purposes of the *Act* and s. 51 was enacted specifically to prohibit such a practice. The 8th floor owned by Lomico 188 Inc. in the circumstances already discussed contains, in addition to office space (which I believe is used by the defendant Mr. Greenberg), some residential units. The 8th floor was never offered by the Declarant for sale, although the Disclosure documents did not specifically refer to the retention of units by the Declarant.

[41] The Declarant 188 Eglinton Inc. has already disposed of the units on the 8th floor to Lomico 188 Inc. The Declarant owns no “other residential units”. The section of the *Act* is designed to deal with developers who retain residential units, and do not attempt to promptly dispose of those units. Lomico 188 Inc. is not the proposed Declarant.

[42] 188 Lofts Inc. was described as the vendor in the Agreement of Purchase and Sale of units. 188 Elginton Inc. was in fact the registered owner. Paragraph 46 of every Agreement of Purchase and Sale provided as follows:

The Purchaser acknowledges that title to the Unit is registered in the name of 188 Elginton Inc., which is a bare trustee for the Vendor. The Purchaser hereby agrees to accept a Transfer/Deed of Land on Closing from 188 Eglinton Inc. and acknowledges that all other related documentation will be given to the Vendor.

[43] The question is whether either of 188 Lofts Inc. or Lomico 188 Inc. was a “proposed declarant”? The answer to that question has to be in the negative, as I have already found that 188 Lofts Inc. and Lomico 188 Inc. were *bona fide* purchasers for value of the assets involved at fair market prices. Finally, as noted earlier, 188 Eglinton Inc. is identified as the proposed Declarant in the Disclosure Statement on which the unit owners rely.

**AGAINST 188 EGLINTON INC., 188 LOFTS INC.
AND LOMICO 188 INC., AN ORDER
REQUIRING THEM TO LEASE TO THE
OWNERS OF RESIDENTIAL UNITS ALL
PARKING UNITS, AT MARKET RATES**

[44] As noted earlier, the parking facilities are owned by Lomico 188 Inc. However, they are maintained by MTCC 1250.

[45] The Disclosure Statement of the Declarant contain the following:

There is no restriction on the sale or lease of units. In particular, parking units, storage units or pylon sign units may be sold or

leased to any person or corporation and not limited to commercial/residential unit owners in the retail condominiums or the commercial condominiums and may be retained by the declarant. Ownership of a commercial/residential unit does not include a parking unit. Each owner of a commercial/residential unit shall be entitled to lease a parking unit from the declarant at market rates currently \$85.00 per month. (emphasis added)

Each parking unit shall be used only for the parking of motor vehicles and for no other purpose.... owners or lessees of parking units need not be owners of a commercial/residential unit, and there are no restrictions against leasing or selling a parking unit to any person or corporation.

[46] When the members of the Board of Directors of MTCC 1250 and Mr. Greenberg or his representatives got into disputes about rights and responsibilities within months of the turn-over meeting, Lomico 188 Inc. cancelled parking privileges of the Directors who were most involved in the disputes. Parking became and remained an issue for those few (at most four) Directors throughout. There is no evidence of a parking problem for other unit owners. The parking issue in this lawsuit is: What are the parking rights, if any, that inhere in ownership of a unit in the subject condominium?

[47] The original form of the Agreement of Purchase and Sale used for the transfer of units contained the following provision:

The Purchasers acknowledge that parking is not included in the purchase price. Parking is available at market rates, currently at \$85.00 per month, and may be leased from an affiliate of the vendor. (emphasis added.)

[48] The provision in the Disclosure Statement that causes difficulty in interpretation is:

Each owner of the commercial/residential unit shall be entitled to lease a parking unit from the Declarant at market rates, currently \$85.00 per month. (emphasis added.)

[49] There were three or four fewer parking spaces than there were residential units. Admittedly, there is no evidence that purchasers, other than the original purchasers, had any expectation of an entitlement to parking. In fact, the minimal available evidence was to the contrary.

[50] Clearly, however, the original purchasers were led by the Declarant to believe that they had an entitlement to lease a parking unit at market rates and that parking was available at market rates.

[51] This representation was made to them at the same time that they were told that the Declarant did not own the parking units or, at any rate, could sell or lease those units to whomsoever the Declarant chose.

[52] Lomico 188 Inc. owns the parking spaces. Lomico 188 Inc. was a purchaser for value as I have found, but it was also a purchaser with notice of the representation and obligations of the Declarant with regard to those parking spaces. The Declarant represented to the purchasers of units that on purchasing a unit a purchaser would have an “entitlement” to lease a parking space at market prices. That representation meant something. In view of the other modifying representations, for example that the parking units could be sold or leased to any person, and may be retained by the Declarant, it might seem that the entitlement was effectively limited to the rate at which the parking spaces would be leased. It may fairly be said that an entitlement to purchase a service at market rates is of little, if any, value, except where the supply of the service is severely limited.

[53] In the Agreement of Purchase and Sale to unit owners, the representation was that parking was “available at market rates”. In attempting to make sense of these provisions, the court is entitled to consider all the relevant circumstances.

[54] In order to obtain a building permit, the Developer (Declarant) was required to undertake to the City that a minimum of 82 parking spaces would be provided, 71 for residents and 11 for visitors of residents.

[55] The promotional “features sheet” given to prospective purchasers represented, under PARKING, “2 levels of secure 24 hours monitored underground parking are available at a monthly market rate (currently \$85.00 per month per space). Owners will be

given priority for reserved monthly parking in the underground garage.” (emphasis added)

[56] Lomico 188 Inc. improperly rented visitor parking spaces to purchasers. When this was brought to its attention, it terminated the leases and refunded the monies paid. The residents who lost their parking spaces were put on a waiting list. Lomico 188 Inc. had assigned parking spaces to the retail tenants, had allocated a parking spot to the superintendent of the next door unit and had retained parking units for the superintendent’s office employees. Those parking spaces were not made available for lease to the residents.

[57] The documentary material was sufficiently unclear to induce careful purchasers (lawyers by training if not by occupation, the Pozios) to include the following provision in their offer to purchase:

The Vendor guarantees the Purchaser shall have the right to rent a parking spot for \$85.00 per month for two years from the date of occupancy. The Purchaser shall furthermore have the option to purchase a parking spot if offered for sale by the Vendor.

[58] I interpret this last provision as primarily directed to guaranteeing the price of parking for at least two years.

[59] The plaintiff is entitled to the benefit of the *contra proferentum* rule. When all of the evidence is considered, the irresistible inference to be drawn is that

as long as they were prepared to pay market rates, a parking space would be available to unit owners.

Market Rate

[60] The evidence on “the market rate” was, in my view, unhelpful, in that it was all about parking generally in the area. There was no evidence of what condominium owners having parking rights, or privileges, in a parking garage maintained (but not owned) by their condominium, were paying. Mr. Pozios, from his personal research, thought \$65.00 to \$95.00 was the market rate, while the defendant expert testified that \$150.00 was the market rate and is the rate currently being charged.

[61] If the parking arrangements in these circumstances (i.e. parking space maintained but not owned by the condominium) were not unusual, proper evidence of market rates ought to have been available. And if the circumstances were unusual, that is to say, if the market were unique, then establishing the market rate would present some real difficulty calling for special treatment, negotiations, arbitration or other such mechanism – not unilateral decision making by the owner. For example, with commercial leases of real property, payments that are subject to change over time due to exogenous factors are rarely left solely to the landlord’s determination. At a minimum, in the circumstances of this case, there has to be put in place some appropriate and fair manner for determining the “market rate”. There is no evidence of anything of the sort.

[62] I conclude that the Declarant breached the parking agreement. Lomico 188 Inc. purchased the parking spaces with notice of the parking agreement and shall be bound by the order flowing from this finding.

ORDER REQUIRING THE DEFENDANTS TO PROVIDE TO THE PLAINTIFF, ITS DIRECTORS, OFFICERS, AGENTS, ASSIGNS AND EMPLOYEES, ANY NECESSARY KEYS TO PERMIT FREE AND UNFETTERED ACCESS TO THE STORAGE AND UTILITY UNITS OF THE PLAINTIFF, FOR PURPOSES OF CARRYING OUT THE PLAINTIFF’S DUTIES UNDER THE ACT.

[63] From a reading of the entire statement of claim, I believe the communications unit was intended to be included under this heading.

[64] The issue here is access by MTCC 1250 to property owned by Lomico 188 Inc.

[65] Like the parking issue, and passage through the 8th floor that I will deal with later, this is another of those problems that undermine the whole concept of shared accommodation, a concept based on the assumption of adult behaviour on the part of all parties.

[66] As the plaintiff submitted in closing argument:

The communication units contain the security system of the condominium corporation. They also contain the wiring

for telephone and cable television for the units.

The Board and property management were able to access the communication units and storage units without charge until the Condominium Corporation terminated the property contract with Mega Landmark Inc. in late 2000. The developer progressed thereafter from demanding payment for access to locking and alarming the doors (which are common elements).

[67] The Declaration provides that MTCC 1250 has a right of entry into all units to carry out its duties. MTCC 1250 has a statutory easement over all units to carry out those duties (see ss. 12, 17 and 19 of the current *Act* set out in Appendix A). In *York Condominium Corporation No. 336 v. Cheuk W. Kan and Betty Wai-Yin Kan, Rita Adams, Carla Vivian Hart, and Lorraine Ortofsky* (10 March 1986), Court File No. M125757/86, Lissaman J. ordered the respondent to supply the property manager with a key to her unit to carry out its management duties.

[68] To the extent that access to the storage, communication and utility rooms are necessary for the proper operation of the condominium and the safety of the unit owners, Lomico 188 Inc. is required to grant access to the condominium management for the purpose of performing those duties at all times.

AN ORDER PURSUANT TO S. 109 OF THE CURRENT ACT AMENDING THE DESCRIPTION FOR THE 8TH FLOOR TO

CORRECT AN INCONSISTENCY BETWEEN SAID DESCRIPTION AND THE DECLARATION, SCHEDULE C, AND THE EASEMENTS AS BUILT STRUCTURE

[69] Section 109 of the current *Act* confers on the court the jurisdiction to amend the Declaration and Description.

[70] This is one of the more unique aspects of the litigation and its resolution has far-reaching implications.

[71] The genesis of the dispute is again trivial, arising from personality clashes between the “principals”.

[72] As I indicated earlier, the Declarant did not offer the 8th floor for sale. The evidence of John Pozios is that purchasers were told that the units on the 8th floor were being retained by the Developer.

[73] In the Description attached as Schedule C to the Declaration, the boundaries of the units on the 8th floor were shown as identical to the boundaries of the units on floors two to seven. The description, however, shows the whole of the 8th floor as one unit, without any common areas.

[74] Schedule D to the Declaration ascribed percentage contributions to common expenses of the 8th floor units, on the same basis as the units on the other floors. Levels four through eight are all shown on that schedule as containing 13 units. The “description sheet” for the 8th floor was not provided to purchasers as part

of the package of documents at the time they entered into their Agreements of Purchase and Sale.

[75] The 8th floor units are, like others, reached from the corridor on the 8th floor that is served by the same elevator or elevators as the units on the other floors. There is no regular elevator access to the 9th floor (the roof top) where common area amenities are located, as that elevator service ends on the 8th floor. There is also a handicapped lift that goes from the 7th floor to the 9th floor.

[76] While the original property manager Mega Landmark Inc. managed the corporation's business and assets, the 8th floor corridors were treated as common elements, and were maintained at the expense of MTCC 1250.

[77] Until this action was commenced, unit owners used the 8th floor corridor to access the recreational amenities on the 9th floor rooftop. The developer posted signs on the walls of the 8th floor corridor directing owners to the stairwell to access the 9th floor.

[78] There was testimony that during that period, the plaintiff unfortunately gave an undetermined number of security cards to the recreational facilities to friends of a personal trainer who did not reside in the building.

[79] Lomico 188 Inc. has denied access to the 9th floor by unit owners alighting from the elevator on the 8th floor and walking up one flight of stairs. Unit owners are now required to access the 9th floor by

walking up two flights of stairs from the 7th floor on the basis that the entire 8th floor, including the corridor, is the private property of Lomico 188 Inc.

[80] The plaintiff takes the position that the corridor on the 8th floor is part of the common elements. If it is, then the expenditures made by the plaintiff for cleaning the 8th floor corridor was the plaintiff's obligation and need not be refunded. If the corridor is a common area, the unit owners also have a right under the *Act* to use it.

[81] Immediately prior to the institution of this lawsuit, the plaintiff knew or had reason to believe that:

- (1) Units on the 8th floor were not being sold to individual purchasers.
- (2) While unit owners had a "right" to use the 9th floor (roof top), the elevator service in the building ended on the 8th floor.
- (3) Unit owners had *de facto* access to the 9th floor by alighting from the elevator on the 8th floor and walking through the corridor to a staircase leading to the 9th floor. Signs showing the way to the staircase leading from the 8th floor to the 9th floor were placed by those in control of the 8th floor.
- (4) The units, including those on the 8th floor, were governed by the *Act*. The unit boundaries are set out in Schedule C

of the Declaration shown in Schedule B to these reasons.

- (5) Each unit on all floors, including the 8th floor, was attributed a certain percentage of the common expenses. Common elements excluded only the units which were described as “A part or part of the land included in the description and designated as a unit by the description and comprises the space enclosed by its boundaries and all material parts of the land within this space in accordance with the Declaration and description” and that “The monuments controlling the extent of the units are the physical surfaces mentioned in the boundaries of units.”
- (6) The 8th floor corridors were treated as common areas and maintained by and at the expense of MTCC 1250 during the period prior to the change in property managers, noted earlier.
- (7) The plaintiff paid for the maintenance of the 8th floor corridor until June 20, 2001.

[82] On the basis of the above, I conclude that until the unit owners were denied the use of the 8th floor corridor, they reasonably believed that it was a part of the common elements accessible to all unit owners for the purpose of accessing the 9th floor rooftop.

[83] Whether the 8th floor corridor is part of the common elements is not a question of the intention of the parties. It is to be determined by the language of the Declaration and the Description annexed thereto. It would have been helpful to have the evidence of a surveyor, but such evidence was not offered.

[84] Lomico 188 Inc. has been singularly unhelpful in making specific submissions on this issue. The plaintiff in its statement of claim admitted that in the Declaration the whole of the 8th floor is composed of units, with no common elements.

[85] Given the availability of access to the 9th floor by climbing two rather than one flight of stairs, the element of necessity required in a claim for an easement has not been met.

[86] There is no need to amend the Declaration.

**AS AGAINST LOMICO 188 INC., RE:
EASEMENT OVER CONDO MINIU ON 8TH
FLOOR**

[87] For the reasons outlined in the above paragraphs 69 to 86, this head of relief is denied.

**AS AGAINST LOMICO 188 INC., AN
INTERLOCUTORY, INTERIM AND
PERMANENT INJUNCTION RES TRAINING
THE DEFENDANT FROM INTERFERING WITH
THE SAID RIGHT-OF-WAY**

[88] For the reasons outlined in the above paragraphs 63 to 68, only declaratory relief is required

under this head to the limited extent necessary for the plaintiff MTCC 1250's compliance with the Declaration and with ss. 12, 17 and 19 of the current *Act*.

PAYMENT TO THE PLAINTIFF BY LOMICO 188 INC. OF UTILITIES CHARGES IN RESPECT OF RETAIL UNITS REGISTERED IN THE NAME OF LOMICO 188 INC., TOGETHER WITH INTEREST ON ALL ARREARS

[89] Lomico 188 Inc. acknowledges liability for utilities paid by the plaintiff in respect of the retail units. The dispute is about the rate of interest chargeable thereon. The acknowledged alternatives are:

- (1) Rates for chargebacks under the reciprocal agreement between the plaintiff MTCC 1250 and the Declarant, 188 Eglinton Inc.

Lomico 188 Inc. takes the position that since the payment of utilities is not a shared cost under the reciprocal agreement, the rate of 15 percent compounded monthly specified in that agreement, should not be applied. The plaintiff submits that such a rate would be eminently suitable given the similarities in the subject matter.

- (2) Interest rate for late payment of common elements fees set at four

percent above the minimum lending rate compounded monthly.

- (3) Simple prejudgment interest.

[90] The Reciprocal Agreement was prepared and executed by Mr. Greenberg, on behalf of both parties, in May 1999. The agreement was made for the purposes of "providing for the material use, maintenance and cost-sharing of the shared utility and service easements being those utilities and services which will serve and benefit the corporation and retail portion." The costs of operation were to be borne by both parties. The party defaulting in payment of its contribution was required to pay to the other party the aforesaid rate of 15 percent calculated and compounded monthly.

[91] It is appropriate to assume that Mr. Greenberg had considered carefully the cost of money in the context of the time and the existing relationship.

[92] No proper reason was given for failing to pay promptly, especially with the knowledge that such failure would impose a burden on a party most likely to be less equipped financially than the companies Mr. Greenberg controlled to pay such sums.

[93] It would also be fair to note the rate (24 percent) Mr. Greenberg used for default under the lease of chattels that will be dealt with later in these reasons in circumstances similar to those prevailing under the reciprocal agreement.

[94] Finally, I can see no reason for the court to be solicitous for Lomico 188 Inc.'s interest in these circumstances.

[95] Therefore, I conclude that the rate of 15 percent compounded monthly for the common expenses is the most appropriate rate in the circumstances.

PAYMENT TO THE PLAINTIFF BY LOMICO 188 INC. FOR CLEANING, JANITORIAL SERVICE AND SUPPORT CHARGES IN RESPECT OF RESIDENTIAL UNITS ON THE 8TH FLOOR

[96] As indicated earlier, the plaintiff had reasonable grounds to believe that the corridor on the 8th floor was a part of the common areas. For over two years, not only did Lomico 188 Inc. not alert the plaintiff to its misconception, but assisted the plaintiff in the use of the corridors by posting signs on the walls of the corridor directing owners to the stairwell access to the 9th floor.

[97] Lomico 188 Inc. submits that it did not ask for the cleaning services and that they were for the benefit of all the unit owners as the services were provided at a time when owners were given access to the 9th floor corridor.

[98] Pragmatically, there were no circumstances existing during the relevant period that would have led the plaintiff to doubt its obligation to clean. Lomico 188 Inc. never warned the plaintiff. But it is also true that the cleaning would have benefited both parties. There was no evidence of the amount of usage by either

party to assist the court in determining who benefited more. The fairest resolution is, therefore, to split the costs evenly and charge Lomico 188 Inc. prejudgment interest under the *Courts of Justice Act* on its 50 percent.

AGAINST 188 EGLINTON INC., 188 LOFTS INC. AND LOMICO 188 INC. DAMAGES FOR BREACH OF IMPLIED OR IN THE ALTERNATIVE EXPRESS WARRANTIES IN THE AMOUNT OF \$750,000.00; DAMAGES OF \$400,000.00 PURSUANT TO S. 52 (5) OF THE 1990 ACT REGARDING FAILURE TO DISCLOSE

[99] Subsection 52 (5) of the 1990 *Act* provides as follows:

Where any statement or material required under this Act to be provided by a declarant or proposed declarant to a purchaser of a unit or proposed unit for residential purposes contains any material statement or information that is false, deceptive or misleading or fails to contain any material statement or information, the corporation or any unit owner who relied on such statement or material is entitled, as against the declarant or the proposed declarant to damages for any loss sustained as a result of such a reliance.

[100] It is the position of the plaintiff that the vendor is in breach of its agreement with the unit owners to complete the common elements in a good and workable manner, free from material omissions or defects, in

accordance with the applicable codes and requirements, and in substantial compliance with the drawings and specifications.

[101] Specifically the plaintiff claims that:

- (1) Fire-Stopping has not been installed around the plumbing throughout the building.
- (2) The parking garage requires extensive repairs.

[102] Further, and in the alternative, the plaintiff alleges that the Declarant (all the defendants) had a statutory obligation to disclose to the plaintiff and all prospective purchasers of the units the absence of the Fire-Stopping and the need for garage repairs, which it failed to meet.

[103] The defendant Declarant's position, in summary is that:

- (1) Since the project was a "conversion" rather than a new building, the *Ontario New Home Warranties Plan Act* provided no coverage, and the purchasers accepted the developer warranty for workmanship and materials for a one-year period following the date of occupancy.

(The relevant provisions of the Developer's Warranty are set out in Appendix D of these reasons.)

- (2) The issuance of occupancy certificates by the municipality constituted complete and absolute acceptance by the purchasers of all construction matters, and qualify the sufficiency thereof including, without limitation, all mechanical, structural and architectural matters. (See also Appendix D.)

- (3) Nondisclosure is denied. However, the remedy for nondisclosure is either rescission, which has not been pleaded, or damages, which has neither been suffered nor proved.

Analysis of Fire-Stopping Issue

[104] It is the position of the plaintiff, and not seriously contested by the defendants, that the absence of Fire-Stopping was alleged within the first year. The developer refused to remedy the alleged defects that were identified in a technical audit by Enerplan Building Consultants ("Enerplan") in May 2000.

[105] While the absence of Fire-Stopping is a Building Code violation, and it may be argued that Occupancy Certificates are deemed to be evidence of compliance, in my view, such evidence may be rebutted, or else the warranty would be meaningless; the municipality is not infallible, and its fallibility would have been in the contemplation of the parties.

[106] Although entertaining some doubt, I am satisfied from the evidence that the expenditure of

\$15,000.00 made by the plaintiff in about 2001 to remedy the absence of Horizontal Fire-Stopping identified in the Enerplan Technical audit was an appropriate expenditure for which the plaintiff is entitled to be reimbursed. The lack of such Fire-Stopping was a serious safety issue, was promptly identified and promptly remedied at the plaintiff's expense.

[107] However, I am not satisfied that the additional claim for some \$53,000.00 for Vertical Fire-Stopping arising from the evidence of John Roberts, a witness for the plaintiff, is contractually supportable for the following reasons.

- (1) The plaintiff rejected Enerplan's proposal of January 31, 2001 for post-technical audit services which, as the defendant argued, would have identified and immediately rectified any items having a direct bearing on health and safety.
- (2) In addition, neither reserve fund studies dated September 17, 2001 and April 29, 2005 anticipate any funds being expended in the next 30 or 40 years for the installation of Vertical Fire-Stopping.
- (3) John Roberts' only examination of the premises was done in 2006.
- (4) I was not convinced on a balance of probability from Mr. Robert's evidence

that the Vertical Fire-Stopping was not in compliance with the Building Code. Among my reasons for this finding is Mr. Robert's failure to consider requesting the drawings from the building department.

Analysis of Parking Garage Deficiencies – Breach of Contract

[108] The plaintiff asks the court to find that the defendants were aware that P1 level of the garage and the entrance ramp required repairs. They argue that the defendants were obliged to either carry out the repairs, or to disclose to purchasers that these repairs were necessary and that the reserve fund turned over to the purchasers was inadequate to carry out those repairs. The plaintiff claims damages, being the cost of carrying out the repairs which the defendants knew had to be done to the P1 Slab and ramp: respectively, \$260,000.00 to \$320,000.00, plus \$103,000.00. The plaintiff argued that on the evidence, the plaintiff's decision to put off repairing the garage has not led to any increased deterioration in the garage, or increased cost.

[109] The evidence supports the plaintiff's contention that alleged deficiencies in the garage were noted during the first year in the Enerplan Technical Audit and the developer was asked to fix them. The developer did not respond.

[110] Purchasers were not able to see the garage before they entered into their agreement to purchase.

[111] When purchasers entered into possession in February 1999, they saw a newly painted white garage. The Developer painted the whole garage white during the course of the renovation. By May 2000, when the Technical Audit was done by Enerplan, the newly applied paint was peeling as a result of moisture in the slab.

[112] The Estoppel Certificate provided to purchasers in June 1999 stated that the corporation was not aware of any circumstance that would lead to an increase in common expenses, and that the reserve fund was adequate for expected repairs during the year.

[113] Neither at the turnover meeting nor afterward did the defendants provide the corporation with the statutorily required “list detailing current replacement costs/life expectancy ... of all major capital items in the property”.

[114] Specifications for renovation called for the installation of a new traffic topping on the P1 Slab and the ramp. The traffic topping was to have a five year warranty.

[115] Specifications prepared by Kremisco Engineering for the garage ramp called for substantial work to be done, including removal of existing topping, removal of deteriorated concrete, installation of new heating cables, and installation of a new waterproofing system.

[116] Mr. Greenberg in his discovery stated first that the repairs were done and the membrane was replaced. In his answers to the undertakings, however, he stated

that he did not carry out the replacement of the traffic topping because a report prepared by Construction Control Inc. stated that the membrane was in good condition and did not need replacement.

[117] However, the Construction Control report relied on does not deal with the traffic topping on the ramp and the P1 Slab; it deals only with the garage roof slab.

[118] Mr. Greenberg stated on discovery that he was aware that the garage was 20 years old, and had some salt damage and deterioration. He relied on his consultants to advise him what had to be done to repair the building, and he carried out what they advised him to do.

[119] Mr. Sarvinis of Reid Jones Christoffesen (“RJC”) was called as an expert by the defendants. He stated that he carried out a prepurchase inspection of the P1 Slab for the defendants in 1996.

[120] The first report of RJC identified leaking cracks in the suspended slab. Core samples were taken of the suspended slab and tested for chloride (salt) contamination. The results indicated that chloride content was 6.9 to 127 times the level required to initiate steel corrosion. RJC concluded that this might indicate that the membrane has failed.

[121] The second report submitted on the P1 Slab to Mr. Greenberg stated “additional testing (of the suspended parking slab) has revealed significant areas of top surface corrosion related deterioration”. RJC

estimated that the extent of surface repair required appeared to be in the order of 15 percent.

[122] The second report estimated the costs or repair of the suspended slab at \$130,000.00 to \$166,000.00 exclusive of G.S.T., professional fees and material testing costs. The report did not offer “doing nothing” as an option.

[123] The plaintiff’s arguments continued as follows:

- (a) The only person who could explain why the repairs were not carried out is Bruce Greenberg. He did not give evidence. The court should draw an adverse inference: Mr. Greenberg was aware of the need for repairs, he was advised to carry out repairs. He knew that if he did not do so, the corporation would be faced with the need to carry out expensive repairs and replacement of the membrane. He decided not to do the repairs, and not to tell the purchasers that the corporation would have to do so imminently. He decided to paint over the garage thereby disguising the problems until after purchasers closed.
- (b) In his evidence, Mr. Sarvinis stated that part of good routine maintenance practices to prolong the serviceability life of underground garages involves localized repairs of deteriorated concrete

and replacing failed portions of the membrane.

- (c) John Kosednar of Halsall Associates testified for the plaintiff as an expert in corrosion and repair of reinforced concrete structures. Halsall was retained by MTCC 1250 first to comment on a 2000 Technical Audit carried out by Enerplan and then to prepare a reserve fund study. The reserve fund study recommended immediate repairs to the garage. The Board of Directors wished to defer the repairs, and therefore instructed Halsall to carry out a garage condition assessment, to determine if putting off the repairs would affect the structural integrity of the garage.
- (d) Halsall was then retained and asked to prepare a report, stating whether the specifications for the repair of the garage prepared for the defendants at the time of the conversion had been followed. If they were not followed, Halsall was asked to state what the consequences of that failure were.
- (e) Halsall concluded that the specifications had not been followed. The membrane on the ramp and the P1 Slab were the original membrane, installed one to several years after the building was constructed. Mr. Kosednar

- further testified that there was no evidence of any repairs having been done to the top of the ramp, nor the P1 Slab.
- (f) In preparing their report, Halsall did not have RJC's 1996 report. They referred to the 2000 Technical Audit prepared by Enerplan, and attempted to compare the extent of cracking and delamination reported at that time with their own findings. Mr. Kosednar stated that this was not exact, but that he concluded that approximately 60 percent of the deterioration visible in 2006, had already taken place in 2000. (emphasis added)
- (g) However, after preparing his expert report, Halsall received RJC's 1996 reports and saw that the delamination, noted on the P1 level by RJC in 1996 was 10 to 15 percent. Mr. Kosednar stated in his evidence that with this additional important information, he revised his assessment of the deterioration which occurred between 2000 and 2006. The extent of delamination noted by RJC in 1996 was the same as that noted in 2006.
- (h) Mr. Kosednar stated that he was sure that there had been some deterioration during that time, but that

from the 2 reports, he could not say how much.

- (i) On the same issue, Mr. Sarvinis agreed that the percentage delamination of the P1 Slab was the same in his report as in the Halsall report. He also felt that some further deterioration had occurred between 2000 and 2006, as evidenced by some delamination of the soffit of the P1 Slab, and the increase in the number and length of cracks from those noted by Enerplan in 2000, to those measured by Halsall in 2005. Mr. Sarvinis agreed with Mr. Kosednar that the Enerplan Technical Audit represented the result of a fairly cursory visual inspection, so that its recording of numbers and lengths of cracks were not as reliable as reports prepared by RJC or Halsall.
- (j) Halsall estimated the cost of repairing the ramp at \$103,000.00. The costs of repairing the P1 Slab and replacing the membrane was estimated at \$320,000.00.
- (k) RJC felt that the estimates were high, and suggested a cost of \$260,000.00 for the P1 Slab. Both experts agreed that theirs were estimates, that actual costs would not be known until the work was tendered.

- (l) Both experts agreed that the work must be done to maintain the garage. Mr. Sarvinis admits that his report in 1996 called for the work to be carried out on the P1 Slab.

[124] The defendants' position is as follows:

- (a) The Declarant delivered a structurally sound and functional garage which would have lasted approximately 20 years before the anticipated repairs were required.
- (b) In any event, both experts agree that the consequences of not undertaking substantial garage repairs in 1996 and 1997 was marginal given the current state of the garage. It remains structurally sound and functional today.
- (c) The plaintiff MTCC 1250 was aware of the garage condition in May, 2000 as a consequence of the Enerplan Technical Audit. The Reserve Fund Study conducted by Enerplan anticipated the garage being repaired in the fiscal year ending May 2009. This belies the plaintiff's evidence that the garage required substantial repairs at the time of conversion.
- (d) The plaintiff had ample funds in the Reserve Fund to effect garage repairs if they were really required. They did not

effect the repairs because such repairs were not really required.

- (e) The Estoppel Certificates issued by the plaintiff consistently advised subsequent purchasers that the condominium corporation was "not presently considering any substantial addition, alterations or improvement to or renovation of the common elements or any substantial change in the assets of the corporation."
- (f) The plaintiff corporation did very little maintenance or repairs to the garage for the last 7 years.
- (g) The repairs to the P1 intermediate slab are anticipated to be effected in the fiscal year ending May 31, 2009. As such, the plaintiff would have had approximately 10 years use of the garage, that is, half of a membrane's expected life.
- (h) There is a dispute between the experts as to the anticipated cost of the repairs to the P1 intermediate slab – Halsall's total cost of \$364,000.00 versus the defendants' expert, Reed Jones Christoffersen's total cost of \$328,600.00.

While in May 2000, Enerplan anticipated that the cost of repairing all

identified deficiencies would have been approximately \$200,000.000.

- (i) Moreover, the plaintiff has had approximately 7 years usage of the garage to date and will have had another 3 years usage of the garage by May 30, 2009.

[125] In light of all of the evidence and especially the agreed currently structurally sound and functional nature of the garage, and Mr. Kosednar's evidence of the similarity of the delamination noted in 1996 to that in 2006, it would be difficult to justify a damage award against the defendants. When the nature of the representations made in the Estoppel Certificates to subsequent purchasers is added to the equation, the plaintiff's position becomes even less sustainable.

[126] In any event, the evidence does not demonstrate a breach of the construction warranty in the Agreements of Purchase and Sale when paragraph 26 of that document (see Appendix D of these reasons) is given its proper construction. There was nothing in the Agreements of Purchase and Sale requiring the defendant to complete renovations in accordance with any particular specifications.

[127] Finally the ownership of the garage by Lomico 188 Inc., with the plaintiff having the obligation to maintain and/or repair it, produces an anomaly that the parties have not focused upon. In this litigation, the owner, Lomico 188 Inc. denies that the property owned by it is in need of repairs. The corollary of the owner's position should be that MTCC 1250 has no duty or

obligation to repair while the owner maintains that position.

AGAINST THE DEFENDANT, THE MASTERCRAFT GROUP, FOR DAMAGES FOR BREACH OF COLLATERAL CONTRACT, OR IN THE ALTERNATIVE, DAMAGES FOR NEGLIGENT MISREPRESENTATION IN THE AMOUNT OF \$750,000.00

[128] The evidence does not support a finding of liability against The Mastercraft Group, which was neither a Declarant nor a contracting party. Nor, as I have found, does the evidence support a finding of breach of collateral contract or negligent misrepresentation.

AGAINST THE DEFENDANTS, BRUCE C. GREENBERG AND LOMICO 188 INC., PUNITIVE DAMAGES IN THE AMOUNT OF \$50,000.00

[129] In *Said v. Butt*, [1920] All E.R. 232 (Eng. C.A.), the English Court of Appeal held that a director or officer of a corporation acting within the scope of his authority cannot be personally liable for inducing the corporation to breach its contract. This case has been consistently followed in Canada.

[130] Lomico 188 Inc. was not the Declarant. However, as indicated earlier, it was a purchaser for value with notice of the parking lease agreement and is required to comply with the order in paragraph 14 (4) of these reasons. The defendant provided no proper explanation for the cancellation of parking privileges

for three Directors. There was, however, no evidence of damages. At worst, the defendant was wrong in its interpretation of the rights created in its own documentation dealing with parking.

[131] While not relevant to my legal conclusions, I feel obliged to observe from all the evidence (some of which was offered only collaterally, especially in regard to the continued increases in the price of units over the years) that I did not find that the unit owners (only about 18 of whom are “originals” in a financial sense) have anything of substance about which to complain with regard to the condition of the premises.

THE HVAC LEASE ISSUE

[132] When the Declarant “turned over” the condominium to MTCC 1250, there was in existence a lease between S-99 Limited as lessor and the plaintiff, MTCC 1250 as lessee, dated May 18, 1999, of what is described in the litigation as heating, ventilating and air conditioning equipment (“HVAC”) equipment situated on the 9th floor (roof top) of the building. The lease was for a term of 180 months and called for monthly payments of \$3,049.06 plus G.S.T. commencing June 1, 1999, and bore interest at the rate of 11 percent per annum.

[133] The plaintiff made the monthly payments from June 1, 1999 until March 1, 2000, when it ceased to make payment, purportedly on the misconceived basis that the Board of Directors had exercised its option to not ratify the lease agreement pursuant to s. 39 of the 1990 *Act*. The Directors had no such option.

[134] In this application, commenced before the main action, S-99 Limited seeks the following relief:

- (1) A declaration that S-99 Limited is entitled to immediate possession of certain heating, ventilating and air conditioning equipment (“HVAC”) on the premises of MTCC 1250.
- (2) A mandatory order requiring the respondent MTCC 1250 to deliver up the said HVAC equipment to the possession of S-99 Limited.
- (3) In the alternative, a declaration that the lease agreement (“the HVAC Agreement”) dated May 18, 1999 between S-99 Limited and MTCC 1250 is not subject to s. 39 of the 1990 *Act*, which provides as follows:

39. (1) The corporation may by by-law terminate, on giving sixty days notice in writing, any agreement between the corporation and any person for the management of the property entered into at the time when the majority of the members of the board were elected when the declarant was the registered owner of a majority of the units.

(2) Every agreement for the provision of services on a continuing basis, every lease of the common

elements or part thereof for business purposes and every agreement for the provision of recreational facilities to the corporation on other than a non-profit basis entered into by a corporation after the 1st day of June, 1979 and at a time when the majority of the members of the board were elected when the declarant was the registered owner of the majority of the units that does not expire within twelve months after its effective date shall be deemed to expire twelve months after its effective date unless, within the twelve month period, the agreement is ratified by the board at a time when the majority of the board members were elected after the declarant ceased to be the registered owner of a majority of the units.

- (4) In the further alternative, a declaration that the acceleration clause of paragraph 13 of the HVAC Agreement is valid and enforceable and an order for a reference to determine the amount that is owing.
- (5) In the further alternative, a declaration that MTCC 1250 must compensate S-99 Limited for the use of the HVAC equipment on the basis of *quantum meruit* and an order for a reference to determine the amount that is owing.

[135] MTCC 1250 resists the claims on substantially the following grounds:

- (1) The HVAC equipment is the property of the respondent because the equipment, qualify as “fixtures” and, therefore, are part of the real estate owned by MTCC 1250. Less clear is the alternative that MTCC 1250 is entitled to the equipment through an award of damages for the developer group’s failure to make adequate Disclosure.
- (2) If it is found that the equipment does not qualify as “fixtures”, the court should find the lease unenforceable on the grounds of unconscionability. In particular, the acceleration clause under which the respondent would be liable for \$1,714,000.00 is a penalty and therefore unenforceable.

Fixture or Chattel?

[136] The items involved are:

EQUIPMENT DESCRIPTION	MAKE/MODEL	SERIAL NUMBER	COST	USE
Heating Boilers:				Supply heat to the building.
No. 1	Raypak M#1239-WT	S#06790396	\$10,000.00	
No. 2	Raypak M#1239-WT	S#06790395	\$10,000.00	
Domestic Hot Water Boilers:				Supply hot water to the building.
No. 1	Raypak M#E724 WTB-N	S#980833667	\$ 7,099.00	
No. 2	Raypak M#E724 WTB-N	S#980837666	\$ 7,100.00	
Domestic Hot Water Tanks:				Store hot water for domestic use.
No. 1	AO Smith 200 Gallon M#GA 200V	S#98-6-H1155	\$ 3,818.00	
No. 2	AO Smith 200 Gallon M#GA 200V	S#98-6-1162	\$ 3,818.00	
No. 3	AO Smith 200 Gallon M#GA 200V	S#98-6-H1170	\$ 3,818.00	
Air Cooled Chiller:	York M#YCAZBBCDV3-46TA	S#YKGM6037AA	\$47,573.00	Supplies cool air to rooftop air conditioning units
Engineered Air Make-up Air Unit	M#FWB-252/DJI40-0	S#27262-MUA	\$37,558.00	Supplies air to all floors of the building in order to offset suite exhaust (fans and driers).
Rooftop Heating Units:	York M#DINA030N05606C	S#NH6M098403	\$ 8,949.00	
RTU# 1 Penthouse	York M#D7CG036N07925A	S#NEGM062935	\$ 9,784.00	
RTU# 1 Penthouse				
Elevator Pressurizing Fan	Twin City M#980595DV	S#98-13789244	\$ 6,563.00	Supply air to the elevator shaft in the event of fire –Ontario Building Code
Generator	M#98A02182	S#2041356	\$40,835.00	Supplies emergency power to all equipment and systems in a power failure
Individual suite metering system			\$75,000.00	Meters electricity use of each suite.

[137] Paragraph 12 of the Lease provides as follows:

TITLE. Customer acknowledges that the Equipment remains the property of the Lessor, and Customer shall have no right, title or interest in the Equipment other than, conditional upon Customer's compliance with and fulfillment of the terms and conditions of this Agreement, the right to maintain possession and use of the Equipment for the full Term. Lessor may require plates or markings to be affixed to or placed on the Equipment indicating Lessor is the owner. Lessor and Customer hereby confirm their intent that the Equipment shall always remain and be deemed personal or moveable property even though said Equipment may hereinafter become attached or affixed to realty.

[138] Unless the items were of such a nature as would stretch the definition of "chattel" beyond recognition, and would not normally be the subject matter of a lease (neither of which the respondent has demonstrated), it would be inappropriate to ignore such a precise contractual provision, and I am not prepared to do so.

Disclosure

[139] As submitted by the respondent MTCC 1250:

The only disclosure made by Developer Group with respect to the leasing and maintenance of the HVAC equipment is at page 4 of the Disclosure statement:

Each unit will be equipped with a fan coil system which will provide both heating and air-conditioning services. The system will be served by a "supply" pipe and a "return" pipe which will carry or conduct either hot water or chilled water depending on the season. Accordingly, while the in-suite climate can be individually modified, it is dependent upon the building's overall heating /cooling system. Therefore, each unit will be heated or cooled only if, and to the extent that the building supplying hot or cold water to the individual fan coil units or air-handling systems. The air-cooled chiller will be located on the roof and will be leased by the Commercial Condominium corporation (the "Corporation") from the gas company.

The only disclosure made by the Developer Group as to the cost of leasing the air-cooled chiller and servicing HVAC equipment was in the first year budget, as follows:

12. Rental of Equipment (\$21,600)

The estimated annual leasing costs from Consumers Gas or other third parties including regular servicing and parts

replacement or mechanical systems in the building including the chiller, cooling tower, the generator, pumps, motors, fans and other equipment.

The disclosure statement was updated to indicate that the costs of “Rental of Equipment” would be \$27,552. However, the Developer Group could not identify which, if any, purchasers had been provided with the updated disclosure statement. ...

The equipment covered by the HVAC lease includes many pieces of equipment, only one of which is identified in the Disclosure Statement as an item of equipment that MTCC 1250 would be required to lease.

The fact that the HVAC equipment would not be owned but would be leased by MTCC 1250 was not disclosed to prospective purchasers. The cost of maintaining the HVAC equipment is more than \$21,600 per year. An expert, Gene Abe testified that \$25,000 per annum was not unreasonable to service this HVAC equipment. The lease payments are \$3,049.46 monthly plus GST (\$213.43), for a total of \$3,262.49 per month or \$39,149.88 per annum. Clearly the lease was not disclosed to purchasers since the cost of leasing the chiller *and maintaining all HVAC equipment* was budgeted at \$21,600 for the first year. \$21,600 can only realistically cover the cost of maintaining this equipment and certainly does not

include the \$39,149.88 per annum in lease payments that the Developer Group is attempting to charge MTCC 1250.

[140] The relevant disclosure provisions of the 1990 *Act* are set out in ss. 52 (5) and (6) as follows:

(5) Where any statement or material required under this Act to be provided by a declarant or proposed declarant to a purchaser of a unit or proposed unit for residential purposes contains any material statement or information that is false, deceptive or misleading or fails to contain any material statement or information, the corporation or any unit owner who relied on such statement or material is entitled, as against the declarant or the proposed declarant to damages for any loss sustained as a result of such reliance

(6) The disclosure statement referred to in subsection (1) shall contain and fully and accurately disclose,

...

(d) a brief narrative description of the significant features of the existing or proposed declaration, by-laws and rules governing the use of common elements and units, and of any contracts or leases that may be subject to termination or expiration under section 39. (emphasis added)

[141] The disclosure issue is between MTCC 1250 and the Declarant. As between MTCC 1250 and S-99 Limited, there is no issue of notice as there is privity of contract. The disclosure issue has no bearing on the dispute between S-99 and the respondent.

[142] I shall return later to the disclosure issue.

[143] Paragraph 13 of the lease provides that in the event of default, which has clearly been made out on the evidence,

... Lessor in its absolute discretion may: (a) enter upon the premises (sic) where such Equipment is located and take immediate possession thereof, whether it is affixed to realty or not, and remove the same, without liability to Lessor for or by reason of such entry or taking possession, whether for damage to property or otherwise, and sell, rent or otherwise dispose of the same for such consideration and upon such terms and conditions as Lessor may reasonably deem fit; (b) in the name of and as the irrevocably appointed agent and attorney for Customer and without terminating or being deemed to have terminated this Agreement, take possession of the Equipment and proceed to rent the Equipment to any other person, firm or corporation on such terms and conditions, for such rental and for such period of time as Lessor may deem fit and receive, hold and apply the same against any monies expressed to be payable from time to time by Customer hereunder; (c) terminate this

Agreement, and by written notice to Customer specifying a payment date not earlier than five (5) days from the date of such notice, require Customer to pay Lessor as its financial obligation (“Financial Obligation”) on the date specified in such notice the sum of (i) any Rental and other amounts due and unpaid, and (ii) an anticipated assessment of liquidated damages for loss of a bargain and not as a penalty, an amount equal to the present value of the aggregate of all Rental payable to the expiration of the Term calculated by discounting such amounts at four percent (4%) per annum, and (iii) the amount of any residual interest which Lessor may have in the Equipment and which was used in the establishment of the Rental and Term; (d) as a late charge, require the payment of interest at the rate of 24% per annum on any overdue payment until paid. Upon payment by Customer of its Financial Obligation, Lessor shall refund to Customer the net amount received by Lessor on any sale, lease or disposition of the Equipment after deducting all costs and expenses incurred by reason of the occurrence of the event of default or the exercise of Lessor’s remedies in respect thereof, including selling commissions and expenses and legal fees and disbursements on a solicitor/client basis. Except as otherwise expressly provided above, no remedy referred to in this section is intended to be exclusive, but each shall be cumulative and in addition to

any other remedy referred to above or otherwise available to Lessor at law or in equity.

[144] The respondent MTCC 1250 has argued that the lease is unenforceable because Mr. Greenberg, as President of both the lessor and lessee at the time of signing, was in a conflict of interest. There is no merit to this argument as it fails to acknowledge the long line of cases starting with *Salomon v. Salomon*, [1897] A.C. 22 (Eng. H.L.) that recognize the separate identity of a corporation from its shareholders or directors, except in special circumstances.

Is Paragraph 13 of the Lease a Penalty Clause?

[145] The only argument offered by the respondent for its assertion that paragraph 13 should not be enforced is that if it is held to be enforceable, MTCC 1250 will be liable for approximately \$1,714,000.00. The present value calculated with some difficulty by S-99 Limited and, therefore, estimated on the low side, is \$413,545.53. It is the Default rate of interest (24%) that accounts for the balloon effect. MTCC 1250 did not question S-99 Limited's calculations.

[146] Although default occurred in April 2000, the first demand for a specific figure was in October 2000.

[147] The equipment was valued at approximately \$272,000.00.

[148] It is not uncommon for lessors to pass on the responsibility for maintenance and service to lessees. I did not hear the kind of evidence that could lead me to

properly come to the conclusion that paragraph 13 was a penalty clause. The interest rate appears exorbitant to me, but I was offered no evidence that provided a foundation for my sentiment.

[149] I do have some concern that the interest will accrue over a period of 6 years since the trial began in circumstances in which neither party appears to have caused delay, but it is not an issue that was canvassed at trial. It has an impact on all the liability that has been found, but particularly in this aspect of the case.

[150] I return to the lease disclosure issue as it relates to the dispute between MTCC 1250 and the Declarant.

[151] MTCC 1250 submitted that the new Board first found out that the lease existed at the turnover meeting on July 22, 1999. It is not clear why they would have known much before that date. The plaintiff initiated unsuccessful negotiations for a buyout of the lease in the spring of 2000.

[152] The lease was registered on June 7, 1999, in which case there was notice to the world, not the least of which would be purchasers of units subsequent to that date.

[153] The lease was not subject to termination or expiration under s. 39 of the 1990 *Act* and accordingly only a brief narrative description of its significant features was required to be disclosed under s. 52 (6).

[154] However, the costs of maintenance and payments under the lease were clearly underestimated

in the Disclosure Statement, and may well have been a proper basis for a cross-claim against the Declarant. There is no cross-claim in this proceeding. The plaintiff's claim for damages for nondisclosure was limited to damages arising from failure to disclose the lack of Fire-Stopping, and the condition of the garage.

ARITHMETIC

[155] I understand that the parties have no dispute about the amounts found to be owed. If I am wrong, they may address me in writing promptly, and not later than February 28, 2007.

COSTS

[156] Subject to any agreement between the parties, brief written submissions on costs are to be made to me by February 28, 2007.

Pitt J.

Released: February 20, 2007

APPENDIX A

Excerpts from the *Condominium Act, R.S.O. 1990, c. C.26*

1. (1) In this Act,

“common elements” means all the property except the units; (“parties communes”)

“common expenses” means the expenses of the objects and duties of a corporation and all expenses specified as common expenses in this Act or in a declaration; (“dépenses communes”)

“common interest” means the interest in the common elements appurtenant to a unit.

“corporation” means a corporation created by this Act; (“association”)

“declarant” means the owner or owners in fee simple of the land described in the description at the time of registration of a declaration and description of the land, and includes an successor or assignee of such owner or owners but does not include a purchaser in good faith of a unit who actually pays fair market value or any successor or assignee of such purchaser; (“déclarant”)

“declaration” means a declaration specified in section 3 and includes any amendments; (“déclaration”)

“description” means the description specified in section 4; (“description”)

“owner” means the owner or owners of the freehold estate or estates in a unit and common interest, but does not include a mortgagee unless in possession (“propriétaire”)

“proposed unit” means land described in an agreement of purchase and sale that provides for delivery to the purchaser of a deed or transfer capable of registration after a declaration and description have been registered in respect of the land; (“partie privative projetée”)

“registered” means registered under the *Land Titles Act* or the *Registry Act* (“enregistré”)

“unit” means a part or parts of the land included in the description and designated as a unit by the description, and comprises the space enclosed by its boundaries and all the material parts of the land within this space in accordance with the declaration and description. (“partie privative”)

9. (1) The corporation may, by special by-law,

- (a) lease any part of the common elements, except any part that the declaration specifies is to be used by the owners of one or more designated units and not be all the owners; and
- (b) grant or transfer an easement or licence though the common elements.

(2) A lease or a grant or a transfer of an easement or licence mentioned in subsection (1), signed by the authorized officers of the corporation under its

seal, affects the interest of every owner in the common elements as if the lease, grant or transfer had been executed by the owner, and shall have attached thereto an affidavit of one of the officers stating that the lease, grant or transfer was authorized by a special by-law of the corporation.

39. (1) The corporation may by by-law terminate, on giving sixty days notice in writing, any agreement between the corporation and any person for the management of the property entered into at a time when the majority of the members of the board were elected when the declarant was registered owner of a majority of the units.

(2) Every agreement for the provision of services on a continuing basis, every lease of the common elements or part thereof for business purposes and every agreement for the provision of recreational facilities to the corporation on other than a non-profit basis entered into by a corporation after the 1st day of June, 1979 and at a time when the majority of the members of the board were elected when the declarant was registered owner of a majority of the units that does not expire within twelve months after its effective date unless, within the twelve months period, the agreement is ratified by the board at a time when the majority of the board members were elected after the declarant ceased to be the registered owner of the a majority of the units.

51. (1) Every agreement of purchase and sale entered into by a proposed declarant for a proposed unit for residential purposes shall be deemed to contain,

(b) a covenant by the vendor to take all reasonable steps to sell the other residential units included on the property without delay other than any units mentioned in a statement under clause 54 (1) (c).

52. (5) Where any statement or material required under this Act to be provided by a declarant or proposed declarant to a purchaser of a unit or proposed unit for residential purposes contains any material statement or information that is false, deceptive or misleading or fails to contain any material statement or information, the corporation or any unit owner who relied on such statement or material is entitled, as against the declarant or the proposed declarant to damages for any loss sustained as a result of such reliance.

(6) The disclosure statement referred to in subsection (1) shall contain and fully and accurately disclose,

(d) a brief narrative description of the significant features of the existing or proposed declaration, by-laws and rules governing the use of common elements and units, and of any contracts or leases that may be subject to termination or expiration under section 29;

(8) Where the total amount incurred for the common expenses provided for in the budget statement exceeds the total of the proposed amounts set out in the statement, for the period covered by the budget statement mentioned in clause (6) (e), the declarant shall forthwith pay to the corporation the amount of the excess except in respect of increased expenses attributable to the termination of an agreement under section 39.

(9) Where the declarant shows any expected fees, charges, rents or other revenue to be paid to the corporation for the use of the common elements or assets or any part thereof or any other facilities related to the property and,

- (a) where the total amount received is less than the expected fees, charges, rents or other revenue, the declarant shall forthwith pay to the corporation the amount of the deficiency less the amount, if any, that the total of the proposed amounts for common expenses set out in the budget statement mentioned in clause (6) (e) exceeds the total amount incurred for common expenses for the period covered by the budget statement; or
- (b) where the total amount received is more than the expected fees, charges, rents or other revenue, the declarant may set off the amount of the excess against any amount he may be required to pay under subsection (8).

54. (1) A declarant or proposed declarant shall not grant a lease of a unit or proposed unit for residential purposes unless,

(d) written notice of the lessor's intention to lease the unit has been given to every purchaser under an agreement of purchase and sale, registered owner and mortgagee entitled to vote, and the period referred to in subsection (2) has expired or, where an application is made under subsection (2), it is finally disposed of.

Excerpts from the *Condominium Act, 1998, S.O. 1998, c. 19*

1. (1) In this Act,

“declarant” means a person who owns the freehold or leasehold estate in the land described in the description and who registers a declaration and description under this Act, and includes a successor or assignee of that person but does not include a purchaser in good faith of a unit who pays fair market value or a successor or assignee of the purchaser; (“déclarant”)

12. (1) The following easements are appurtenant to each unit and shall be for the benefit of the owner of the unit and the corporation:

- 1. An easement for the provision of a service through the common elements or any other unit.

2. An easement for support by all buildings and structures necessary for providing support to the unit.
3. If a building or part of a building moves after registration of the declaration and description or after having been damaged and repaired but has not been restored to the position occupied at the time of registration of the declaration, an easement for exclusive use and occupation over the space of the other units and common elements that would be space included in the unit if the boundaries of the unit were determined by the position of the buildings from time to time after registration of the description and not at the time of registration.
4. If a corporation is entitled to use a service or facility in common with another corporation, an easement for access to and for the installation and maintenance of the service or facility over the land of the other corporation, described in accordance with the regulations made under this Act.
 - (2) The following easements are appurtenant to the common elements:
 1. An easement for the provision of a service through a unit or through part of

the common elements of which an owner has exclusive use.

2. An easement for support of all units necessary for providing support.

17. (1) The objects of the corporation are to manage the property and the assets, if any, of the corporation on behalf of the owners.

(2) The corporation has a duty to control, manage and administer the common elements and the assets of the corporation.

(3) The corporation has a duty to take all reasonable steps to ensure that the owners, the occupiers of units, the lessees of the common elements and the agents and employees of the corporation comply with this Act, the declaration, the by-laws and the rules.

19. On giving reasonable notice, the corporation or a person authorized by the corporation may enter a unit or a part of the common elements of which an owner has exclusive use at any reasonable time to perform the objects and duties of the corporation or to exercise the powers of the corporation.

75. (1) The declarant is accountable to the corporation under this section for the budget statement that covers the one-year period immediately following the registration of the declaration and description.

(2) The declarant shall pay to the corporation the amount by which the total actual amount of common

expenses incurred for the period covered by the budget statement, except for those attributable to the termination of an agreement under section 111 or 112, exceeds the total budgeted amount.

(3) The declarant shall pay to the corporation the amount by which the total actual amount of fees, charges, rents and other revenue paid or to be paid to the corporation, during the period covered by the budget statement, for the use of any part of the common elements or assets or of any other facilities related to the property, is less than the total budgeted amount.

(4) If the total actual amount of revenue described in subsection (3) exceeds the total budgeted amount, the declarant may deduct the excess from any amount payable under subsection (2).

(5) After receiving the audited financial statements for the period covered by the budget statement, the board shall compare the actual amount of common expenses and revenue described in subsections (2) and (3) for the period covered by the budget statement with the budgeted amounts and shall, within 30 days of receiving the audited financial statements, give written notice to the declarant of the amount that the declarant is required to pay to the corporation under this section.

(6) Within 30 days of receiving the notice, the declarant shall pay the corporation the amount that it is required to pay under this section.

109. (1) The corporation or an owner may make an application to the Superior Court of Justice for an order to amend the declaration or description.

(2) The applicant shall give at least 15 days notice of an application to the corporation and to every owner and mortgagee who, on the 30th day before the application is made, is listed in the record of the corporation maintained under subsection 47 (2), but the applicant is not required to give notice to the applicant.

(3) The court may make an order to amend the declaration or description if satisfied that the amendment is necessary or desirable to correct an error or inconsistency that appears in the declaration or description or that arises out of the carrying out of the intent and purpose of the declaration or description.

(4) An amendment under this section is ineffective until a certified copy of the order has been registered.

APPENDIX B

Excerpts From the Declaration And Description

SCHEDULE "C"

UNIT BOUNDARIES

1. COMMERCIAL UNITS (being Units located on Levels 2 to 8)

- a. Horizontally

From the backside face of the drywall sheeting of the exterior walls of the building to the backside face of the

drywall sheeting on the walls and partitions separating such units from other units or from the Common Elements and, to the interior surfaces of windows and exterior doors and the interior surfaces of the frames of such windows and doors.

b. Vertically

From the unfinished upper surface of the concrete floor slab to the unfinished lower surface of the concrete ceiling slab.

c. Notwithstanding the foregoing, the unit shall not include:

I. Water or hydro meters and such pipes, cable, conduits, ducts or public utility lines used for power, cable-TV, water, drainage or other services which are within or mounted upon any walls, floors or ceilings;

II. All doors leading out of the unit;

III. Any load bearing column structural member or any load bearing partitions contained within the unit.

d. The unit shall include:

The locks (and any appurtenant locking mechanism) located within (or affixed to) any door(s) leading to the said unit, the fixtures and outlets and other facilities with respect to such service outlets which are within the boundaries of the unit and which service the unit only.

2.

STORAGE UNITS

a. Horizontally

The backside face of the drywall sheeting on walls and partitions separating such units from other units or the Common Elements and, to the interior surfaces of exterior doors and the interior surfaces of the frames of such doors.

b. Vertically

From the unfinished upper surface of the concrete floor slab to the unfinished lower surface of the concrete ceiling slab.

c. Notwithstanding the foregoing, the unit shall not include:

a. Water, hydro meters and such pipes, wires, cable, conduits, ducts, or public utility lines used for power, cable-TV, water, drainage or other services which

are within or mounted upon any walls, floors, ceilings;

- b. all doors leading out of the unit;
- c. any load bearing column or structural member or any load bearing partitions contained within the unit.
- d. The unit shall include:

The locks (and any appurtenant locking mechanism) located within (or affixed to) any door(s) leading to the said unit, the fixtures and outlets and other facilities with respect to such service outlets which are within the boundaries of the unit and which service the unit only.

3. COMMUNICATION UNITS

a. Horizontally

The backside face of the drywall sheeting on walls and partitions separating such units from other units and the Common Elements and, to the interior surfaces of the exterior doors and the interior surfaces of the frames of such doors.

b. Vertically

From the unfinished upper surfaces of the concrete floor slab to the unfinished lower surface of the concrete ceiling slab.

- c. Notwithstanding the foregoing, the unit shall not include:
 - I. Water, hydro meters and such pipes, wires, cable, conduits, ducts, or public utility lines used for power, cable-TV, water, drainage or other services which are within or mounted upon any walls, floors, ceilings;
 - II. all doors leading out of the unit;
 - III. any load bearing column or structural member or any load bearing partitions contained within the unit.
- d. The unit shall include:

The locks (and any appurtenant locking mechanism) located within (or affixed to) any door(s) leading to the said unit, the fixtures and outlets and other facilities with respect to such service outlets which are within the boundaries of the unit and which service the unit only.

APPENDIX C

Excerpts from the Disclosure Statement

The Property is a proposed condominium conversion of any existing eight-storey commercial building currently situate on the Property to a commercial/residential condominium (the “Property” or the “Commercial Condominium”) to contain approximately 90 units. ... There will be approximately 57 parking units and 23 visitors’ parking spaces, all to be located in the existing underground parking garage, ...

Approximately 9,000 square feet of the ground floor of the building will not form part of the Commercial Condominium but rather is intended to form a separate retail condominium of approximately five (5) retail units (the “Retail Condominium”). While it is presently the Declarant’s intention to register the ground floor of the building as a commercial condominium, the Declarant reserves the right to not register the ground floor as a condominium but to retain it as freehold. ...

There is no restriction on the sale or lease of units. In particular, parking units, storage units or pylon sign units may be sold or leased to any person or corporation and not limited to commercial/residential unit owners in the Retail Condominiums or the Commercial Condominiums and may be retained by the Declarant. Ownership of a commercial/residential unit does not include a parking unit. Each owner of a commercial/residential unit shall be entitled to lease a parking unit from the Declarant at market rates currently \$85.00 per month.

Shared Facilities and Reciprocal Agreement

The Retail Condominium and the Commercial Condominium (and prior to the respective condominium registrations, the owner(s) of such properties) may be required to grant and receive easements to and from each other with respect to such matters as structural support, maintenance, repair and access to certain shared facilities, such as the emergency generator, the transformer vault, the electrical room, the sprinkler room, and the garbage pickup area and for repair, maintenance and access to various utilities and services. All utility services to the Commercial Condominium and the Retail Condominium will be separately metered to the respective properties and there will be no sharing of utility services between the same. The parties will enter into a reciprocal agreement to deal with the aforesaid matters as more particularly set out herein.

RECREATIONAL AND OTHER AMENITIES

... There will also be a fitness centre equipped with exercise equipment, and a party room with a party kitchen, pool table and furniture all of which will be leased by the Condominium Corporation.

HEATING /AIR-CONDITIONING

Each unit will be equipped with a fan coil system which will provide both heating and air-conditioning services. The system will be served by a “supply” pipe and a “return” pipe which will carry or conduct either hot water or chilled water depending on the season. Accordingly, while the in-suite climate can be

individually modified, it is dependent upon the building's overall heating/cooling system. Therefore, each unit will be heated or cooled only if, and to the extent that the building is supplying hot or cold water to the individual fan coil units or air-handling systems. The air-cooled chiller will be located on the roof and will be leased by the Commercial Condominium corporation (the "Corporation") from the gas company.

(c) **Common Interest and Common Expense Allocation**

The owner of each unit shall have a proportionate undivided interest in the common elements as a tenant-in-common with all other owners and a similar proportionate interest or share in the assets of the Corporation, and shall contribute to the common expenses in the proportions set forth opposite each unit number in Schedule "D" of the Declaration.

(d) **Common Expenses**

Common expenses are the costs of performing the objects and duties of the Condominium. Many of these are set out in Schedule "E" of the Declaration and include among other things, the cost of all professional services to the Corporation such as legal, accounting and management services; insurance trustee fees; insurance premiums (other than the unit owner's insurance); the cost of repairing and maintaining the common elements including maintenance, exterior window cleaning, elevator maintenance, snow removal of common areas, cleaning visitors' parking spaces, utility consumption for common elements and other similar costs and expenses; and the cost of borrowing

money for the purpose of carrying out the objects of the Corporation and its share of the costs of the Shared Facilities as set out in the Reciprocal Agreement. In addition, common expenses also establish each owner's required contribution to a reserve fund, to be established for the major repair and replacement of the common elements and other assets.

The units are bulk metered for water and gas and the cost of same will form part of the common expenses. Each unit is individually metered for hydro and will be paid for directly by each owner, and not as part of the common expenses. Each unit owner will be responsible for payment of Bell telephone and cable television service to their units, in addition to the common expenses. Each suite will be pre-wired for DSS satellite service and category 5 wiring for high speed internet connectivity, the monthly charge will not form part of the common expenses but will be payable to each owner who wishes to use such services.

Parking Units

Each parking unit shall be used only for the parking of motor vehicles and for no other purpose and no boats, trailers, snowmobiles, campers or recreational vehicles shall be parked on a parking unit. Owners or lessees of parking units need not be owners of a commercial/residential unit, and there are no restrictions against leasing or selling a parking unit to any person or corporation.

Storage Units

Storage units shall be used for storage of personal or business items and subject to the condominium rules. Storage units which contain washroom facilities may be used as washrooms. Owners or lessees of storage units need not be owners or lessees of a commercial/residential unit and there are no restrictions against leasing or selling a storage unit to any person or corporation.

Communications Units

Each communication unit shall be used to contain wires, cable and equipment necessary for the distribution of all forms of communication. Owners or lessees of communication units need not be owners or lessees of a commercial/residential unit and there is no restriction against leasing or selling a communication unit to any person or corporation.

Pylon Sign Units

Each pylon sign unit shall be used for the purpose of displaying tenant-identification signs, advertising, marketing and/or sales signs with respect to the Commercial Condominium and/or the Retail Condominium.

Owners or lessees of pylon sign units need not be owners or lessees of a commercial/residential unit and there is no restriction against leasing or selling a pylon sign unit to any person or corporation.

The Declarant shall be entitled to use and allow its sales staff, authorized personnel or prospective purchasers or tenants to use any unsold parking or storage units until all units in the Retail and Commercial Condominium have been sold.

The parking, storage and communication units are subject to a right of access in favour of the Corporation for ingress and egress to mechanical, electrical and service areas.

(a) Management Agreement

The Corporation will enter into a management agreement (the “Agreement”) with Mega Landmark Limited (a corporation affiliated with the Declarant) (the “Manager”) pursuant to which the Manager will be the exclusive representative and managing agent of the Corporation, for a period five (5) years from the date of creation of the Corporation. ...

APPENDIX D

Excerpts from a Typical Agreement Of Purchase

and Sale of a Unit in a Condominium

CONSTRUCTION WARRANTY

5. (a) The Purchaser covenants and agrees to meet with the Vendor’s representative, as set out in Paragraph 6(a), to inspect the Unit and executed and deliver to the Vendor before taking possession, the Vendor’s form of

Certificate of Completion and Possession, prepared by the Vendor. On Closing, the Vendor agrees to provide to the Purchaser the Vendor's Warranty for workmanship and materials, in the Vendor's form, such warranty to extend for period of ~~one (1)~~ two (2) year (sic) following the date of occupancy.

- (b) The Purchaser acknowledges and confirms that the Unit and the building are not covered by the Ontario New Home Warranties Plan Act ("ONHWP") and accordingly ONHWP provides no warranty coverage to the Unit, building or deposits and does not apply to any provisions of this Agreement, including without limitation, extensions to the Confirmed Occupancy Date or Closing Date.
- (c) The Purchaser acknowledges and agrees that the filing of the consulting engineers certificate with the municipality, or the issuance by the municipality of an occupancy certificate or such other confirmation that the Unit may be occupied shall, subject to the provisions of Subparagraph (a) above, constitute complete and absolute acceptance by the Purchaser of all construction matters, and the quality and sufficiency thereof including, without limitation, all mechanical, structural and architectural matters.

CERTIFICATE OF COMPLETION

- 6. (a) The Purchaser agrees to meet the Vendor's representative at least seven (7) days prior to the Confirmed Occupancy Date to inspect and to list all items remaining uncompleted at the time of such inspection and mutually agreed deficiencies in the Unit, on the Vendor's certificate, which certificate shall be executed by both the Purchaser and the Vendor's representative forthwith after such inspection, and shall constitute the Vendor's only undertaking with respect to incomplete or deficient work, and such work shall be completed by the Vendor within a reasonable time after closing having regard to weather conditions and the availability of supplies and labour. The Purchaser acknowledges and agrees that no further request for completion or correction of items may be maintained by the Purchaser, and this shall serve as good and sufficient release of the Vendor in that regard. The Vendor indemnifies and saves the Purchaser harmless from any lien claims pursuant to the *Construction Lien Act* which are the responsibility of the Vendor, its trades and suppliers in full satisfaction of the Purchaser's rights under the *Construction Lien Act* and the Purchaser shall not be entitled to any lien holdback on Closing.
- (b) The Purchaser agrees that in no event shall the Purchaser be entitled to obtain possession of the Unit unless and until the Purchaser has executed a certificate referred to in subparagraph (a) above. If the

Purchaser has omitted to executed the said certificate prior to the Confirmed Occupancy Date and the Vendor has duly attended at the Unit for the purposes of signing the certificate and to inspect the Unit, the Vendor shall have the unilateral right and option of either completing this transaction or refusing to allow possession of the Unit by the Purchaser, without extending the adjustment date of this transaction, until the said certificate has been duly executed or of terminating this Agreement, whereupon all monies paid hereunder as deposits or otherwise shall be forfeited to the Vendor as liquidated damages and not as a penalty, without prejudice to the Vendor's rights to being such further or other action as may be available to it as a result of such breach.

CONSTRUCTION

26. The Purchaser acknowledges that the Building is a substantial renovation of an existing building and that the base building remains as originally constructed. The foregoing shall constitute complete and absolute acceptance by the Purchaser of all construction matters, and the quality and sufficiency thereof, including, without limitation, all mechanical, structural and architectural matters. The Purchaser agrees that the foregoing may be pleaded by the Vendor as an estoppel in any action brought by the Purchaser or his successors in title against the Vendor. The Vendor reserves the right, in its sole and unfettered discretion, to make changes to the plans and specifications and/or alter the

design or layout of the Units or common elements and/or substitute materials provided that such materials are substantially equal in quality to the materials so replaced, and the Purchaser shall have absolutely no claim or cause of action against the Vendor for any such changes variances or modifications, nor shall the Purchaser be entitled to any notice thereof.

It is acknowledged and agreed that the Vendor shall have the unilateral right to change the number of units in the Condominium by combining one or more proposed units and/or changing the style or type of units and their configuration or adding additional units on lands at its sole and absolute discretion; provided that the Purchaser's Unit herein shall not be altered except as provided by this Agreement. In the event of such changes, the proposed Condominium documents will be amended accordingly and the Purchaser hereby consents to any such alterations, changes or modifications, acknowledges that same do not constitute a material amendment as contemplated by section 52 of the Act provided same does not result in an increase in the monthly common expenses payable by the Purchaser as set out in the budget and agrees to complete the transaction of purchase and sale contemplated by the Agreement, notwithstanding such alterations, changes or modifications.

Any alterations, modifications, or changes from the original plans and specifications desired by the Purchaser shall be requested in writing and shall be an extra to the Purchase Price, to be paid in full when if accepted in writing by the Vendor. Any changes from original plans shall include a supervision fee of 15% of the value of all changes. The Vendor reserves the right

to refuse to honour any request in its sole discretion. Further the Purchaser shall select colours, if applicable, within the time period specified in a notice, to be sent to the Vendor. Failure by the Purchaser to select, or to do so in a timely fashion shall mean that the Vendor may use colours of its choice. The Purchaser agrees that the unit interiors, including without limitation, marble, tile, carpet and cabinets, formica, laminates, mica, painted surfaces, appliance, etc. are subject to colour shading and gradation and may vary from samples, models or colour charts. Therefore no claim may be made against the Vendor on account thereof, nor shall such condition delay closing. The Vendor reserves the right to make changes and substitutions on materials or appliances of equal value (as determined by the Vendor) from those materials or appliances contained in the model and/or as shown on the plans and specifications or described in this Agreement. Any item of furniture or furnishings, including wall coverings and decorator items indicated on any plan or shown in any model unit, is merely by way of suggested use, and no such items are furnished with the Unit.

In the event the Purchaser requires design services, such design services shall be provided by the Vendor's consultants and shall be charged to the Purchaser at the rate of \$80 per hour for architects/draftsmen/designers, and \$100 per hour for any engineering services required, and the Purchaser agrees to pay such amounts as an extra to the Purchase Price to be paid upon presentation of invoices, and if not paid within five (5) business days the Purchaser further authorizes the Vendor to deduct such amounts from the deposit(s).

The Vendor reserves the right to make reasonable architectural, structural or design specifications or changes in the building and or the Unit as it deems necessary or desirable, and the Purchaser agrees to close with said modifications and changes.

32. The Purchasers acknowledge that parking is not included in the purchase price. Parking is available at market rates, currently at \$85.00 per month, and may be leased from an affiliate of the vendor. *The Vendor guarantees the Purchaser shall have the right to rent a parking spot for \$85.00 per month for two years from the date of occupancy. The Purchaser shall furthermore have the option to purchase a parking spot if offered for sale by the Vendor.*
38. The Purchaser acknowledges that the Vendor, as proposed declarant, may from time to time lease any and all unsold Units in the Condominium for residential purposes for a period not to exceed two (2) years and this paragraph shall also constitute notice to the Purchaser as registered owner of the Unit after Closing, pursuant to section 54(1)(d) of the Act.
46. The Purchaser acknowledges that title to the Unit is registered in the name of 188 Elginton Inc., which is a bare trustee for the Vendor. The Purchaser hereby agrees to accept a Transfer/Deed of Land on Closing from 188 Eglinton Inc. and acknowledges that all other related documentation will be given to the Vendor.

APPENDIX E

Excerpts from the Lease

12. TITLE. Customer acknowledges that the Equipment remains the property of the Lessor, and Customer shall have no right, title or interest in the Equipment other than, conditional upon Customer's compliance with and fulfillment of the terms and conditions of this Agreement, the right to maintain possession and use of the Equipment for the full Term. Lessor may require plates or markings to be affixed to or placed on the Equipment indicating Lessor is the owner. Lessor and Customer hereby confirm their intent that the Equipment shall always remain and be deemed personal or moveable property even though said Equipment may hereinafter become attached or affixed to realty.

13. DEFAULT. The occurrence or happening of any one or more of the following events shall constitute an event of default: (i) failure by Customer to pay any Rental or other amounts payable hereunder within five (5) days of the due date thereof, (ii) failure by Customer to perform or observe any covenant, condition or agreement to be performed or observed hereunder and such failure shall continue for a period of 20 days, (iii) any representation or warranty made by Customer herein or in any document or certificate furnished to Lessor in connection herewith or pursuant hereto shall provide to be incorrect at any time in my material respect; (iv) if Customer enters into a transaction involving the sale of its assets in bulk or if Customer

attempts to sell or dispose of, or in any way part with possession of any of its assets outside the ordinary course of its business; (v) if Customer becomes insolvent or bankrupt or makes an assignment for the benefit of creditors or consents to the appointment of a trustee or receiver, or trustee or receiver be appointed for Customer or for a substantial part of its property; (vi) if bankruptcy, reorganization or insolvency proceedings be instituted by or against Customer; (vii) a writ, execution, attachment or similar process be issued or levied against the Equipment; (viii) the property management agreement between the Customer and S-99 Limited has been terminated by the Customer. The Customer shall be in default by the mere lapse of the above delays and none of the events of default require a notice on the part of the Lessor. Upon the happening of any event of default, Lessor in its absolute discretion may: (a) enter upon the premises (sic) where such Equipment is located and take immediate possession thereof, whether it is affixed to realty or not, and remove the same, without liability to Lessor for or by reason of such entry or taking possession, whether for damage to property or otherwise, and sell, rent or otherwise dispose of the same for such consideration and upon such terms and conditions as Lessor may reasonably deem fit; (b) in the name of and as the irrevocably appointed agent and attorney for Customer and without terminating or being deemed to have terminated this Agreement, take possession of the Equipment and proceed to rent the Equipment to any other person, firm or corporation on such terms and conditions, for such rental and for such period of time as Lessor may deem fit and receive, hold and apply the same against any monies expressed to be payable from time to time by Customer hereunder; (e) terminate this

Agreement, and by written notice to Customer specifying a payment date not earlier than five (5) days from the date of such notice, require Customer to pay Lessor as its financial obligation (“Financial Obligation”) on the date specified in such notice the sum of (i) any Rental and other amounts due and unpaid, and (ii) an anticipated assessment of liquidated damages for loss of a bargain and not as a penalty, an amount equal to the present value of the aggregate of all Rental payable to the expiration of the Term calculated by discounting such amounts at four percent (4%) per annum, and (iii) the amount of any residual interest which Lessor may have in the Equipment and which was used in the establishment of the Rental and Term; (d) as a late charge, require the payment of interest at the rate of 24% per annum on any overdue payment until paid. Upon payment by Customer of its Financial Obligation, Lessor shall refund to Customer the net amount received by Lessor on any sale, lease or disposition of the Equipment after deducting all costs and expenses incurred by reason of the occurrence of the event of default or the exercise of Lessor’s remedies in respect thereof, including selling commissions and expenses and legal fees and disbursements on a solicitor/client basis. Except as otherwise expressly provided above, no remedy referred to in this section is intended to be exclusive, but each shall be cumulative and in addition to any other remedy referred to above or otherwise available to Lessor at law or in equity.

**CITATION: Niagara North Condominium Corp. No.
125 v. Waddington, 2007 ONCA 184
DATE: 20070316
DOCKET: C44800**

COURT OF APPEAL FOR ONTARIO

LASKIN, LaFORME and ARMSTRONG J.J.A.

B E T W E E N :

NIAGARA NORTH CONDOMINIUM CORP. No. 125
Applicant (Appellant)

Derek A. Schmuck,
for the appellant

- and -

HEATHER WADDINGTON
Respondent (Respondent in Appeal)

Robert J. Hooper and Kelly Buffett,
for the respondent

Heard: October 4, 2006

**Application under section 134 of the *Condominium Act*,
R.S.O. 1990, c. C. 26.**

**On appeal from the judgment of Justice L. M. Walters of
the Superior Court of Justice dated January 5, 2006.**

ARMSTRONG J.A.:

[1] Ms. Heather Waddington is the owner of two cats. She is also the tenant of a condominium unit at 215

Glenridge Avenue in the City of St. Catharines. The owner of the condominium unit brought an application in the Superior Court of Justice to have Ms. Waddington's cats removed from the building. The application was dismissed by Justice J. W. Quinn of the Superior Court of Justice. The condominium owner did not appeal the dismissal of the application. However, Niagara North Condominium Corp. No. 125, the appellant, brought a subsequent application for the same relief. Justice L. Waters of the Superior Court of Justice dismissed the subsequent application as an abuse of process. The appellant now appeals the judgment of Walters J.

[2] For the reasons which follow, I would dismiss the appeal.

THE FACTS

[3] The appellant, Niagara North Condominium Corp. No. 125, is located at 215 Glenridge Avenue in the City of St. Catharines. The condominium complex contains 135 units. It was originally an apartment building which was converted to a condominium complex in June 1997.

[4] The respondent, Ms. Heather Waddington, is the tenant of unit 410. Unit 410 is owned by 669758 Ontario Ltd., the shares of which are owned by 215 Glenridge Avenue Ltd. Partnership. 215 Glenridge Avenue Ltd. Partnership is also referred to as the owner of unit 410 in these proceedings and no issue appears to be taken with that designation. Ms. Waddington entered into a lease with the owner of the unit on May 5, 2003. When she

moved into unit 410, she brought her two cats with her. The cats continue to live in unit 410.

[5] Article 11, subsection 7 of the appellant's Declaration provides:

No animal, livestock, fowl, fish, reptile or insect (a "Pet") shall be permitted or kept in the building. Any owner shall, within two (2) weeks of receipt of written notice from a Board or Manager requesting removal of any such animal, permanently remove such animal from the property.

[6] Rule 12 of the rules and regulations of the corporation provides:

No pets shall be permitted in the building.

[7] The evidence before the court indicated that before the building was converted to a condominium complex the occupants of the building were permitted to have pets in their apartments. After the building was converted to a condominium complex, the persons who had pets in their apartments were permitted to keep them there until the pets either left or died.

[8] The property manager of the appellant sent a letter to Ms. Waddington on November 24, 2003 demanding that she remove her cats from the building by December 8, 2003. A second letter dated May 11, 2004 demanded that the cats be removed by May 25, 2004. A third letter dated July 23, 2004 advised that an inspection of the condominium unit would take place on August 7, 2004 "to confirm there are no pets living in the unit and you are

complying with Article 11 subsection 7 of the Declaration". Finally, a letter dated October 26, 2004 addressed to Ms. Waddington from the property manager demanded that the cats be removed by November 15, 2004 and advised that an inspection would be carried out on November 16, 2004. The letter of October 26, 2004 also indicated that failure to comply with the demand to remove the cats would result in litigation commenced by the appellant condominium corporation. In particular, the letter said:

If the pet(s) have not been permanently removed, this matter will be referred to the Corporation's solicitor to obtain a court order to have the pet(s) permanently removed from the prop-erty.

[9] Ms. Waddington did not remove her cats from unit 410.

[10] Litigation followed. However, it was the owner of the unit and not the appellant condominium corporation that commenced the proceedings. On January 4, 2005, 215 Glenridge Avenue Ltd. Partnership, commenced its application ("the first application") against Ms. Waddington for:

- (i) a declaratory order stating that Ms. Waddington is in breach of the Declaration of the Niagara North Condominium Corp. No. 125; and,
- (ii) a compliance order for the removal of the cats.

[11] The first application was supported by an affidavit of Richard Rosenman. Attached to his affidavit are the

four letters sent by the property manager of the appellant to Ms. Waddington dated November 24, 2003; May 11, 2004; July 23, 2004; and October 26, 2004. An affidavit of Peter Greco, the property manager of the appellant, was also filed in support of the first application. Finally, an affidavit of Lynn Berthiaume, the building superintendent of the appellant, was filed in support of the first application.

[12] The first application proceeded before Justice J. W. Quinn of the Superior Court of Justice in St. Catharines on January 20, 2005. Judgment was reserved to February 18, 2005 when Justice Quinn released a six page endorsement in which he gave his reasons for dismissing the application.

[13] Quinn J. found that the provisions banning pets in the Declaration and the rules of the appellant condominium corporation failed to comply with the provisions of the *Condominium Act*, R.S.O. 1990, c. C. 26. In paragraphs 16, 17 and 18 of his reasons, Quinn J. said:

[16] Subsection 58(1) of the *Condominium Act* does not authorize a condominium corporation to make a blanket rule banning all pets. Only if pets compromise “the safety, security or welfare of the [unit] owners and of the property and assets of the [condominium] corporation” (clause 58(1)(a)) or if they constitute an “unreasonable interference with the use and enjoyment of the common elements, the units or the assets of the [condominium] corporation (clause 58(1)(b)), may the board of directors ban or

prohibit their presence. There is no evidence that the cats of the respondent run afoul of clauses (a) or (b) of subsection 58(1). And it cannot be said that the presence of all pets inherently constitutes a breach of those clauses.

[17] I also think that, if any part of a declaration conflicts with subsection 58(1) it is void and unenforceable. In other words, where, pursuant to clause 7(4)(b) of the *Condominium Act*, a declaration contains “conditions or restrictions with respect to the occupation and use of the units or common elements,” a condominium corporation cannot go beyond that which is permitted in subsection 58(1).

[18] Consequently, the declaration and rules of the Corporation are insufficient to prohibit the presence of the cats.

[14] The owner of unit 410 did not appeal the decision of Quinn J.

[15] On September 20, 2005, seven months after the decision of Quinn J. was released, the appellant issued a notice of application (“the second application”) in the Superior Court against Ms. Waddington, in which it sought the same relief as had been sought by the owner of the condominium unit in the first application, i.e. the removal of the two cats from the condominium unit.

[16] The appellant filed an affidavit of its property manager, Peter Greco, in support of the second application. The Greco affidavit contained essentially the

same evidence that had been placed before the judge in the first application, including the letters dated November 24, 2003; May 11, 2004; July 23, 2004; and October 26, 2004 addressed to Ms. Waddington demanding the removal of her two cats from the building.

[17] Ms. Waddington filed two affidavits in opposition to the second application. She deposed that she suffers from a brain injury and is disabled. She receives Ontario disability support and lives on a limited income. She deposed that she had never received any complaints about her cats. She attached a report to her affidavit from her psychologist who opined that Ms. Waddington's cats are an important focus in her life and that they make a significant contribution to her health and well-being. Her psychologist further said that she would suffer an unreasonable and unnecessary hardship if she were required to give up her cats. Ms. Waddington's family physician also provided a report in which she said that, "her cats are a vital part of her life and I know that the loss of her treasured pets would set her back considerably".

[18] The second application was heard by Walters J. on January 5, 2006. She dismissed the second application. Her endorsement reads as follows:

Last year the owner of the unit in question brought an application against the same Resp. requesting the exact same relief in this application. Justice Quinn denied the application. No appeal was taken. The Cond. Corpn. which knew all the particulars of the first application – in fact it's employee swore the affid. used in the appln. never

asked to be joined in the action to be heard either in front of Quinn J. or at a subsequent appeal. The exact same facts + issues are before me as were in front of Quinn J. last year. Although technically this may not be *res judicata*, as the applicant is a different party, the issues are identical. In these circumstances proceeding with the appln. would be an abuse of process. The applicant wants an appeal of Quinn J.'s order without going through the appeal process.

Appl. also asked that motion be adj so that this matter could be placed back before Quinn J. With respect, all that would do is ask Quinn J. to sit on appeal of his earlier decision. This is prejudicial to the Resp. Accordingly, the Appln is dismissed.

The Resp. is entitled to costs fixed in the amount of \$2,500, incl of GST & disb.

THE APPEAL

[19] The appellant alleges that the application judge made several errors including:

- she failed to apply the correct test for abuse of process;
- she failed to consider the relevant factors for the exercise of her discretion including:
 - the scheme of the *Condominium Act* and the merits;

- the prejudice to the appellant and the owners of the units;
- the failure to join the appellant in the first application;
- the importance, relative ease and practicality of the appellant intervening in the first application;
- the inability of the appellant to appeal the decision in the first application; and
- the lack of opportunity for the appellant to make submissions in the first application.

ANALYSIS

Did the application judge err in failing to apply the correct test for abuse of process?

[20] The appellant submits that the application judge erred in law when she failed to articulate and apply the legal test for abuse of process. In particular, the appellant asserts that the application judge was required to ensure that her decision on the issue of whether the second application constituted an abuse of process resulted in fairness and justice to the parties.

[21] The application judge did not articulate a test for abuse of process. Abuse of process is a doctrine designed to provide a remedy in a variety of situations including a remedy for the unfairness of relitigating the same issue against the same party in circumstances where issue estoppel does not apply. Abuse of process is essentially a fairness doctrine. In *Toronto (City) v. Canadian Union of*

Public Employees (C.U.P.E.), Local 79, [2003] 3 S.C.R. 77, Arbour J. engaged in a thorough review of the doctrine. She cited with approval at para. 37 the dissenting judgment of Goudge J.A. in *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.) at paras. 55-56:

The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).

One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.

[22] Arbour J. in the *City of Toronto* also cited, with approval at para. 38, D.J. Lange, *The Doctrine of Res Judicata in Canada* (2000) at pp. 347-48 in support of the policy grounds which underlie abuse of process in these circumstances:

The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and

the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

[23] While the application judge's very brief endorsement does not provide a fulsome analysis of the issues to be decided by her, it is clear that she concluded that to permit the second application to proceed would be unfair and unjust given that the identical claim was disposed of in the first application and considering the appellant's apparent involvement in the initiation of the first application. While one might have preferred a more fulsome set of reasons from the application judge, I do not find her endorsement to be so bereft of analysis that it does not explain why she reached her conclusion. Her endorsement taken together with the application record provides this court with a basis to engage in meaningful appellate review.

Did the application judge err in failing to consider the statutory scheme of the *Condominium Act* and the merits of the case?

[24] The application judge did not consider the relevant sections of the *Condominium Act* and the merits of the case. Since she dealt with the application before her on the basis of abuse of process she did not go further. Indeed she expressly told counsel for the appellant that she did not intend to consider the merits.

[25] But, what if the decision in the first application was simply wrong in law?¹ Would that be a decisive factor

in favour of the appellant? In other circumstances, an erroneous decision on the merits in the initial proceeding might make a difference although we were not cited any authority in support of that proposition. In any event, in these circumstances, where the unit owner (the first applicant) and the appellant (the second applicant) were so inextricably connected to the identical claim against the same respondent, I think an erroneous decision, if there be one, is not a decisive factor. The unit owner could have exercised his right of appeal to the Court of Appeal but did not.

Did the application judge err in failing to consider the prejudice to the appellant and the owners?

[26] The appellant submits that the application judge failed to consider the prejudice to the appellant in not being able to enforce the no pets prohibition and the uncertainty caused in the building with respect to the housing of pets as a result of the decision in the first application. It seems to me that if there was any such prejudice, it was not of such a degree that would justify setting aside the application judge's exercise of discretion in this case.

Did the application judge err in failing to consider that the owner of the condominium unit and Ms. Waddington should have taken steps to join the appellant in the first application?

[27] The appellant submits that the application judge should have considered that neither the owner of the condominium unit nor Ms. Waddington took any steps to

add the appellant as a party to the first application to ensure that the result would be binding on the appellant. The appellant cites rule 5.03(1) and rule 5.03(4) of the Rules of Civil Procedure, which deal with the joinder of necessary parties.

[28] In my view, there was no obligation on Ms. Waddington to move to add the appellant as a party to the application. In all probability, counsel for Ms. Waddington, if he put his mind to it, would have assumed that the appellant made a conscious decision not to join in the application. In any event, the fact that the appellant was not a party to the first application, was likely the subject of some discussion between it and the unit owner. If they concluded that the unit owner alone would proceed in order to avoid potential costs or other consequences so be it.

Did the application judge err in failing to consider the importance, relative ease and practicality of intervening?

[29] During a dialogue, at the hearing of the second application, between the application judge and counsel for the appellant, the application judge suggested that the appellant could have sought to be added as a party in the first application. The appellant submits that this would not have been practical. First, the appellant argues that on such a motion, the unit owner would likely have opposed the motion because the appellant would have sought its costs against the unit owner which are provided for in the condominium declaration. This argument is pure speculation. Given the co-operation that existed between

the unit holder and the appellant, I think this is an unlikely scenario. Second, the appellant argues that it would have had no reason to believe that there was any risk of the unit owner not succeeding in his claim and therefore presumably had no reason to seek to be added as a party. If that is so, then the appellant made a tactical decision and must accept the consequences.

Did the trial judge err in failing to understand that the appellant had no right of appeal from the decision in the first application?

[30] When the application judge's endorsement is read as a whole, I believe it is clear that she fully understood that the appellant could not appeal the decision in the first application. Her words: "the applicant wants an appeal of Quinn J.'s order without going through the appeal process" must be read in context. The gist of her reasoning is that the appellant in the second application was, in effect, attempting to appeal the first decision. Although there was considerable discussion between the application judge and counsel for the appellant concerning the possibility of the appellant becoming involved in an appeal on the first application, I do not accept that any of that discussion would lead this court to reverse her decision on abuse of process.

Did the application judge err in failing to consider that the appellant had no opportunity to make submissions to the court in the first application?

[31] The appellant argues that the application judge failed to consider the unfairness of the first application

judge's decision in light of the fact that before Quinn J. determined the appellant's pet prohibitions to be unenforceable, he did not accord the appellant the opportunity to make submissions on the issue. I see no merit in this argument. As already observed, the appellant obviously made a conscious decision not to join in the first application as a party.

CONCLUSION

[32] I accept that the application judge was entitled, in the circumstances of this case, to invoke the doctrine of abuse of process. Here we have the relitigation of an identical claim against Ms. Waddington. Although the appellant was not a party to the first application, the appellant took the initiative in making the demands on Ms. Waddington to remove her cats and threatened litigation against her. When she did not comply with the demands to remove the cats, the unit owner was the named applicant in the first application. However, the appellant provided virtually all of the evidence in respect of the application. Although not a party in the formal sense, the appellant was an active participant in promoting the first application.

[33] The application judge's use of the doctrine of abuse of process terminated the second proceeding and prevented the unfairness to Ms. Waddington of being twice vexed by the same cause.

[34] In the result, I would dismiss the appeal. I would award the respondent her costs of the appeal on a partial

indemnity basis fixed in the amount of \$10,000 including disbursements and GST.

RELEASED:

"RPA"
J.A."

"Robert P. Armstrong

"MAR 16 2007"
Laskin J.A."

"I agree John

LaForme J.A."

"I agree H.S.

2006 CanLII 3661 (ON S.C.)

COURT FILE NO.: 04-CV-269334

DATE: 20060209

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

PEEL STANDARD CONDOMINIUM CORPORATION NO.
668

Plaintiff

- and -

DAYSPRING PHASE I LIMITED, BRAMPTON
PENTECOSTAL CHURCH INCORPORATED,
CORPFINANCE INTERNATIONAL LIMITED, MERVYN
OWEN THOMAS, LLOYD WISEMAN, ARNOLD
NYHOLT, RICHARD MacKENZIE, LYNN YOUNGBLUT
and 695598 ONTARIO LIMITED operating as MAPLE
RIDGE PROPERTY MANAGEMENT

Defendants

- and -

MILLER THOMSON LLP

Third Party

COUNSEL:

Carol A. Dirks for the plaintiff

Geoff R. Hall and Helen Gray for the defendant Corpfinance
International Limited

HEARING DATE: January 31, 2006

REASONS FOR DECISION

PERELL, J.

Introduction and Overview

[1] The plaintiff Peel Standard Condominium Corporation No. 668 (“Peel 668”) is part of a “Christian Lifestyle” condominium project in Brampton, Ontario. Peel 668 sues: (a) Dayspring Phase I Limited (“Dayspring”), which was the declarant of the condominium project that established Peel 668; (b) Brampton Pentecostal Church Incorporated (“BP Church”), which had been the owner of the lands upon which the condominium project was constructed; (c) six individuals who had been appointed by Dayspring to be the original members of the Board of Directors of Peel 668 (“Declarant Board Members”); (d) 695598 Ontario Limited, operating as Maple Ridge Property Management (“Maple Ridge”), which provided property management services for the project; (e) and Corpfinance International Limited (“Corpfinance”), which entered into a \$1.7 million loan agreement with Dayspring, which loan agreement was assumed by Peel 668.

[2] The defendants Dayspring, BP Church, and the Declarant Board Members, bring third party proceedings against Miller Thomson LLP, which had been the solicitors for Dayspring for, amongst other things, the \$1.7 million loan agreement.

[3] Pursuant to Rule 20, the defendant Corpfinance moves for a summary judgment dismissing Peel 668’s action as against it. Corpfinance argues that there is no genuine issue to be tried that Peel 668 has no claim against it. Corpfinance relies on the principle that on a motion for summary judgment, the motions judge is entitled to assume that the record contains all the evidence that the party will present at trial: *Dawson v. Rexcraft Storage & Warehouse Inc.* 1998 CanLII 4831 (ON

C.A.), (1998), 164 D.L.R. (4th) 257 (Ont. C.A.); *Bluestone v. Enroute Restaurants Inc.* 1994 CanLII 814 (ON C.A.), (1994), 18 O.R. (3d) 481 (C.A.). Corpfinance argues that Peel 668 has not been shown Corpfinance to have done anything wrong.

[4] Having reviewed the material filed on this motion, I agree with the argument of Corpfinance. It has satisfied the onus on it of establishing that there is no genuine issue for trial, and, therefore, I grant its motion for summary judgment.

[5] I will explain this conclusion below, but at the outset it is helpful to summarize the analysis that leads me to the conclusion that Peel 668 cannot succeed in its action against Corpfinance. The analysis proceeds along the following line of argument. Peel 668 alleges that the \$1.7 million loan should not be enforced for five reasons: (1) the loan is *ultra vires*; (2) there was a breach of the disclosure requirements of the *Condominium Act, 1998*, S.O. 1998, c. 19 with respect to the loan; (3) there was oppression of Peel 668 as defined by the *Condominium Act, 1998* with respect to the loan; (4) equitable relief is available with respect to the loan; and (5) Corpfinance knew or ought to have known that full and proper disclosure had not been made with respect to the loan.

[6] The first reason, however, is unsound because the loan is not *ultra vires*. The remaining reasons are unsound because Corpfinance did nothing that would bring it within the remedial jurisdiction of the *Condominium Act, 1998* or of equity. Put shortly, whatever other defendants may have done to Peel 668, it has not been shown that Corpfinance did anything wrong nor has it been shown that it should be held responsible for the wrongdoing of others.

[7] In arriving at the conclusion that the \$1.7 million was not *ultra vires*, that is, it was *infra vires*, I accept that condominium corporations are creatures of statute, and they have not been given the capacity to contract of a natural

person. Condominium corporations are subject to the doctrine of *ultra vires*, and they cannot enter into a contract that is beyond the authority conferred by their enabling statute. Further, condominium corporations must comply with the formalities of contract formation stipulated by the enabling legislation. If a condominium corporation enters into a contract that does not comply in form and substance with the requirements of the enabling legislation, then the contract is void. See: *Noldon Investments Ltd.* (1977), 1 R.P.R. 236 (Ont. H.C.J.); *Condominium Plan No. 8222909 v. Francis*, [2003] A.J. No. 976 (C.A.); *Strata Plan 1261 v. 360204 B.C. Ltd.*, [1995] B.C.J. No. 2761 (B.C.S.C.).

[8] I rely, however, on the principle that there is a distinction between agreements that are intrinsically illegal and agreements that are tainted by illegality, if at all, in how they are performed. This principle was recognized by the Court of Appeal in *Beer v. Townsgate I Limited* (1997), 36 O.R. (3d) 137 (C.A.).

[9] In *Beer v. Townsgate I Limited*, the trial judge ruled that agreements for the purchase of condominium units were illegal and unenforceable because at the time of their signing, the vendor was not registered and therefore the vendor had contravened the *Ontario New Home Warranties Plan Act* (“ONHWPA”). However, at the time the vendor entered into the agreements, the vendor had complied with all of the requirements for registration, and the agreements contained reference to the ONHWPA and made clear that the vendor intended to comply with the legislation. The Court noted that the agreements were not “inherently illegal” and that it was the intention of the parties to make a legal contract.

[10] In *Beer v. Townsgate I Limited*, the Court of Appeal held that the trial judge failed to appreciate that illegality as to contractual formation must be distinguished from illegality as

to the performance of the contract. The Court of Appeal referred to *Maschinenfabrik Seydelmann K.-G. v. Presswood Brothers Ltd.*, [1966] 1 O.R. 316, where Schroeder J.A. said at pp. 321-22:

What is forbidden by the statute and the Regulations under review is not *malum per se* but *malum prohibitum*, and in every case it becomes a crucial question whether the contract is capable or incapable of lawful performance. In the latter case, e.g., if the parties should agree to commit a crime, or if they should clearly agree to commit an act prohibited by statute, such a contract is intrinsically illegal since it necessarily involves an offence or a violation of the law. With much deference to the opinion of the learned trial Judge who decided against the plaintiff with some reluctance, he has failed to take into account the well-settled presumption of law in favour of the legality of a contract; that if a contract can be reasonably susceptible of two meanings or modes of performance, one legal and the other not, that interpretation is to be put upon it which will support it and give it operation.

[11] In the immediate case, the proper formalities were followed, and the \$1.7 million loan was not intrinsically *ultra vires*, and it cannot become *ultra vires* after the fact because of the alleged misconduct, if any, of Dayspring, BP Church, the Declarant Board Members, Maple Ridge, or Miller Thomson, LLP.

[12] In arriving at my conclusion that Corpfinance did not do anything wrong, I have also rejected what I view as a logical fallacy in Peel 668's argument to resist the motion for summary judgment. As will be seen from the review of the facts below, in several instances, in negotiating and in implementing the \$1.7 million loan, Corpfinance required compliance with provisions of the *Condominium Act, 1998* (and for that matter it required compliance with other laws and regulations). For example, Corpfinance required that there be proper disclosure under the Act, and from this fact, Peel 668 then argues that there is a genuine issue for trial about whether there was proper disclosure, and accordingly, Corpfinance's motion for summary judgment should be dismissed.

[13] The logical fallacy in this argument, is that assuming the \$1.7 million loan was *infra vires*, and assuming that there is a genuine issue for trial about the failure of some defendants to comply with the Act, their misconduct, if found to exist, would not nullify the legality of the loan. Corpfinance is not privy or responsible for the misconduct of other defendants and indeed sought compliance with the Act. Put simply, Corpfinance certainly did not do anything wrong in requiring compliance with the *Condominium Act, 1998* (or other legislation), and Corpfinance cannot itself be faulted if others breached their obligations or acted wrongfully.

[14] Before concluding this introduction and overview, I note that in support of its motion for a summary judgment, Corpfinance made the additional argument that even if the \$1.7 million loan was *ultra vires*, then, nevertheless, the loan would still be repayable in whole or in part, by Peel 668, as a matter of the law of restitution. Because of the conclusion I have reached that the loan was *infra vires*, I make no ruling on the merits of this alternative argument.

[15] My Reasons for Decision will now proceed by setting out the facts together with my analysis of the claim against Corpfinance.

The Factual Background and the Analysis of the Case against Corpfinance

[16] For the purposes of this motion for summary judgment, it is not necessary to detail much of the history of the condominium project that led to Peel 668, which history begins in 1991 with plans for the Christian Lifestyle community in the City of Brampton.

[17] A description of the factual background may begin in May 2001, when Dayspring began negotiations with Corpfinance to obtain a loan. At that time, Dayspring was the developer of the condominium project for a Christian Lifestyle community in Brampton, Ontario that was to have several phases, including a phase of 24 bungalows, which phase constituted Peel Condominium Corporation No. 650 (“Peel 650”) and a phase of mid-rise condominium apartment buildings, which was to become the plaintiff, Peel 668.

[18] On September 4, 2001, Peel 650 and Dayspring on its own behalf and on behalf of the as yet uncreated Peel 668 signed a commitment letter for the \$1.7 million loan that is the subject of this action. This was followed on December 10, 2001 by the signing of a formal loan agreement by Corpfinance, Peel 650, and Dayspring on its own behalf and on behalf of the as yet uncreated Peel 668.

[19] Corpfinance’s role was only as a lender. It is convenient to note here that it was conceded during argument that Corpfinance was not a declarant under the *Condominium Act, 1998*.

[20] On July 19, 2002, Peel 668 was officially created, and Dayspring appointed the Declarant Board Members on July 25, 2002. The previous day, the solicitors for Corpfinance requested confirmation that each purchaser had been advised of the financing in the disclosure required by the *Condominium Act, 1998*.

[21] On August 9, 2002, the Declarant Board Members approved By-law No. 4, which authorized Peel 668 to enter into the loan agreement, and By-law No. 4 was registered. On September 5, 2002, the loan was assumed by Peel 668 pursuant to an assignment agreement. On or about September 30, 2002, the Declarant Board Members directed Corpfinance to disburse the proceeds of the loan.

[22] On October 9, 2002, there was a “turnover meeting” and the Declarant Board Members were replaced by a new Board of Directors. Peel 668 pleads that Dayspring, BP Church, and the Declarant Board Members intentionally delayed the holding of the turnover meeting until the loan monies could be advanced.

[23] The new Board of Directors reviewed the disbursement of the monies, and in this action Peel 668 takes the position that there were a number of items that had never been disclosed as part of the common elements or there were items that unit owners already paid for as part of the purchase price for their unit.

[24] Peel 668 pleads in paragraphs 44 and 49 of its statement of claim that not all of the items were previously or properly disclosed to the purchasers of the units in the condominium development. In paragraphs 69 to 71, it pleads that loan monies in the amount of \$974,627.28 were for items that were improperly or never disclosed to the purchasers as being a cost in addition to the purchase price in accordance with the original disclosure statement for the condominium

project. (It may be noted that as an alternative to the plea that the \$1.7 million loan is not binding, Peel 668 pleads that it is only liable to repay \$680,000.)

[25] Mr. Richard Francis, who is a current director of Peel 668, in paragraph 69 of his affidavit provides a somewhat smaller list of disputed items. The following chart sets out these items and their value, which in the aggregate totals \$450,362.95:

46 fan coil units	\$ 67,312.22
3 rooftop HVAC units	\$ 6,652.00
3 make up air units for circulation to the building corridors	\$121,857.00
137 apartment "B" vents and gas lines	\$ 60,195.24
Bell phone wiring	\$113,600.49
24 draft inducers for apartment "B" vents	\$ 65,595.00
Main lobby furnishings	\$ 15,151.00

[26] Mr. Francis also deposes that furnishings with a value of \$70,000 were purchased but not paid for and that several items of Equipment that were described in the disclosure documents were never purchased.

[27] In paragraph 94 of its statement of claim, Peel 668 states that the loan is *ultra vires* as it is contrary to s. 56 (1)(e) of the *Condominium Act, 1998* as the monies advanced were not for the purpose of carrying out the objects and duties of Peel 668. In particular, it was not proper to borrow money to pay construction costs to be borne by the developers of the project. Relying on s. 135 of the Act (the oppression remedy), in paragraph 95, Peel 668 alleges that this conduct is oppressive and unfairly prejudicial to Peel 668 and to the unit owners.

[28] It is, in effect, because a portion of the \$1.7 million of loan monies were used to purchase certain items and not other items and because there was not proper disclosure of the items that were to be purchased from the loan proceeds that Peel 668 argues that loan from Corpfinance is *ultra vires*. As I have already noted above, I disagree with this argument, and I prefer the argument made by Corpfinance.

[29] Section 17 (2) of the *Condominium Act, 1998* provides that the condominium corporation has the duty to control and administer the common elements and the assets of the corporation. Subsection 56 (1) of the Act requires that a by-law enacted by the board of directors of a condominium corporation must not be contrary to the Act or the declaration. Subsection 56 (6) provides that the by-laws shall be reasonable and consistent with the Act and the declaration. In the case at bar, the purpose of the loan was to cover the financing of common elements of Peel 650 and Peel 668.

[30] Under s. 1 (1) of the *Condominium Act, 1998*, "common elements" are defined to mean "all the property except the units" and "units" is defined to mean "a part of the property designated as a unit by the description and includes the space enclosed by its boundaries and all of the land, structures and fixtures within this space in accordance with the declaration and description." Thus, what items of property constitute the common elements of a particular condominium is a matter to be determined by the declaration and description of the particular condominium. In response to a question that I asked during argument, it was conceded that, generally speaking, the items that constitute the common elements are a variable for each condominium project.

[31] In the immediate case, the commitment letter and the loan agreement that was authorized by Bylaw No. 4 set out the items that were to be acquired with the proceeds of the loan

and that were to become part of the common elements. There is nothing in these items that could not be a common element and, more significantly, there is nothing intrinsically illegal about a condominium corporation borrowing money for its common elements as they may be defined for that particular condominium project.

[32] The expressed purpose of the loan in the immediate case was to finance the purchase of “Equipment” to be part of the common elements. In reference to the purpose of the loan in the immediate case, several sections of the loan agreement should be noted:

- (a) The preamble to the agreement states: “Whereas pursuant to a commitment letter dated September 4, 2001, the Lender agreed to provide the Loan to the Phase Ia Corporation [Peel 650] and Dayspring on its own behalf and on behalf of the Phase Ib Corporation [Peel 668] (collectively, the “Borrowers” to finance the Equipment on the terms and conditions herein set forth;”
- (b) The loan agreement defines “common elements” as follows: “Common elements” means, together, the land building, fixtures, Equipment and structures and improvements of the Condominium, other than the Units, including without limitation, exterior landscaped areas, recreational facilities, parking facilities, hallways, elevators, and foyers and the Equipment.
- (c) Included in the definition of “common elements” is “the Equipment” which is defined as follows: “Equipment” means the Equipment forming part of the Common Elements of the Condominiums as set out in Schedule A, of which that Equipment described in Part A of Schedule A is installed in and

forms part of the Common Elements of Peel Condominium Plan No. 650, and the Equipment described in Part B of Schedule A is installed in and forms part of the Common Elements and/or units of a condominium project located at 3, 7 and 10 Dayspring Circle, Brampton, Ontario and known as the Phase Ib Project [Peel 668].

(d) Schedule A states:

PART A

Phase 1a Corporation

1. 24 Gas Furnace and Venting Systems serving each residential unit

PART B

Phase 1b Corporation

1. 176 gas furnace/ hot water tank systems, including rooftop HVAC Units

2. Enterphone system for Gatehouse (shared with Phase Ia Corporation)

3. Furnishings for Quest Suites (shared with Phase Ia Corporation)

4. Law Sprinkler System (shared with Phase Ia Corporation)

5. Village Hall Furnishings and Appliances (shared with Phase Ia Corporation)

- (e) Article 2.02 provides that the Credit Facility is being made available to enable the Borrowers to finance the cost of the Equipment.
- (f) Article 9.01 (j) is an affirmative covenant from the Borrowers that “the Borrowers shall use all Loans for financing of the Equipment.”

[33] Pausing here, in my opinion, there is a contract here capable of lawful performance. Further, there is the intention of the parties to make a legal contract; provisions of the loan agreement require compliance with the *Condominium Act, 1998* (and other legislation). For example:

- (a) Article 3.01 (c) requires as a condition for an advance under the loan that: “the Borrowers and Phase Ib Corporation [Peel 668] shall have delivered to the Lender certified copies of the Constitutional Documents and of the resolutions authorizing the borrowings hereunder and of the incumbency of the officers or the Borrowers and the Phase Ib Corporation signing this Agreement and any documents to be provided pursuant to the provisions hereof;
- (b) Article 3.01 (g)(i) requires as a condition for an advance under the loan that: “the Condominiums have been completed and constructed in accordance with all relevant federal, provincial and municipal laws, requirements, standards, bylaws and codes, that the Units may be legally occupied, and that the Equipment has been installed in a good and workmanlike manner and is in good condition and working order;”
- (c) Article 3.01 (i) requires as a condition for an advance under the loan that disclosure be made to

unit purchasers about the loan. The article states: “the Lender shall have been provided with evidence satisfactory to the Lender that all of the Units have been sold to *bona fide* purchasers for value who are at arm’s length to the builder and/or vendor of the Condominiums and that the financing constituted hereby has been disclosed to all such purchasers in the disclosure documentation required under the Act.”

- (d) Article 8.01 (a) is a warranty from the Borrowers that there is corporate authority. The warranty states that: “Each of the Borrowers has full corporate power and authority to enter into this Agreement and the Documents and to do all acts and execute and deliver all other documents as required hereunder or thereunder to be done, observed or performed by it in accordance with their terms.”
- (e) Article 8.01 (b) is a warranty from the Borrowers of valid authorization. This warranty provides that: “Each of the Borrowers has taken all necessary corporate action to authorize the creation, execution, delivery and performance of this Agreement and the Documents and to observe and perform the provisions of each in accordance with its terms.
- (f) Article 8.01 (c) is a warranty from the Borrowers of the validity of documents and enforceability. This warranty includes the provision that: “Neither the execution and delivery of this Agreement or any Document, nor compliance with the terms and conditions of any of them, (i) has resulted or will result in a violation of the Constitutional Documents of the Borrowers or any resolutions

passed by the Board of Directors of each of the Borrowers or any applicable law, rule, regulation, order, judgment, injunction, award or decree, including without limitation the Act [defined to mean the *Condominium Act, 1998*, of Ontario, as amended, supplemented or replaced from time to time].”

- (g) Article 9.01 (c) is an affirmative covenant from the Borrowers of compliance with Legislation that states: “The Borrowers shall do or cause to be done all acts necessary or desirable to comply with all material applicable federal, provincial and municipal laws requirements or standards including without limitation, the requirements of the Act [defined to mean the *Condominium Act, 1998*, of Ontario, as amended, supplemented or replaced from time to time] and all requirements of Environmental Law . . .”

[34] Thus, in my opinion, Corpfinance made a loan that had a lawful purpose that was consistent with the condominium corporation’s enabling legislation and for which the proper formalities were followed. Further, Corpfinance intended that the loan comply with all legal requirements and indeed imposed legality as a term of the loan agreement.

[35] Upon analysis, it would appear that Peel 668’s complaint is not so much that the loan is *ultra vires*, but rather that Dayspring failed to properly appropriate the funds to purchase the Equipment that was to be part of the common elements and that certain purchasers should not have to pay part of their purchase price for items that they would be charged for again as part of the common element expense. These may be legitimate complaints against Dayspring but, in my opinion, they do not make the loan itself *ultra vires*.

[36] An illustration of my analysis may be helpful. Peel 668 complains that the loan proceeds were used to pay for Bell phone wiring with a value of \$113,600.00. There is nothing inherently illegal or inconsistent with the *Condominium Act, 1998* about phone wiring equipment being part of the common elements. However, under the loan agreement’s definition of “Equipment,” it is arguable that phone wiring does not fall within the particular definition of Equipment described in Part B of Schedule A, which is to be installed in and to form part of the common elements of Peel 668. If this is correct, then using the loan monies for this purpose would be an illegal performance of a contract otherwise capable of being performed lawfully. As I view the result, this would be a *malum prohibitum* but it would not be a *malum per se* that would vitiate the contract. Similar arguments may be made about other items in the list of disputed items and there is also the argument that the financing of the item for inclusion in the common elements was proper in any event.

[37] In this regard, it is, interesting to note that it was conceded during argument by counsel for Peel 668 that a portion of the loan proceeds would have to be repaid to Corpfinance, but she submitted that this was a matter that should be left for the trial judge. I see it differently. In *Hongkong Bank of Canada v. Wheeler Hldg Ltd.*, 1993 CanLII 148 (S.C.C.), [1993] 1 S.C.R. 167, Sopinka, J. for the Court noted that the *ultra vires* doctrine to the extent that it still applies in Canada should be applied narrowly. He stated at p. 202:

As is noted in *Palmer’s Company Law* (24th ed. 1987), vol. 1, at pp. 143-44, “in modern law the courts are unlikely to hold a contract to be *ultra vires* the company unless, on a reasonable construction of the objects clause and the

other clauses of the memorandum and articles, there are compelling grounds to arrive at that result.”

[38] The case at bar is not a case such as *Strata Plan 1261 v. 360204 B.C. Ltd.*, *supra*, where the condominium corporation entered into a agreement allowing the defendant the exclusive use of all parking spaces in the parking garage, which was an arrangement where the condominium would lose the benefit of property that belonged to the common elements. The agreement in that case was inherently contrary to the provisions of the British Columbia condominium legislation. It was *malum per se*. In the immediate case, as I have already said there is nothing inherently illegal in a condominium corporation financing the purchase of equipment to be included in the common elements that it is to manage.

[39] Based on the evidence submitted on this motion for summary judgment, the \$1.7 million loan was not *ultra vires*. The loan was *infra vires*, and if Dayspring performed the lawful loan improperly by failing to properly appropriate or by misappropriating loan monies, then Peel 668’s remedy is against Dayspring.

[40] Similarly, in my opinion, Peel 668’s allegations that that was a violation of the provisions of the *Condominium Act, 1998* that prohibit a declarant from making false and misleading statements and that there was inadequate and improper disclosure made to the unit purchasers do not make the \$1.7 loan *ultra vires*. That there was inadequate disclosure of an *infra vires* loan would not nullify the loan. Although I obviously cannot and do not make any finding, the allegations against Dayspring and others about improper disclosure may be true, but Corpfinance is not the perpetrator of the wrongs and rather required that there be compliance with the Act.

[41] Peel 668 alleges that it has been the victim of oppressive or unfairly prejudicial conduct or conduct that unfairly disregards its interests. Once again, I cannot and do not make any finding apart from concluding that there is no genuine issue for trial that Corporate was not a party to any misconduct and its only role was a lender to the condominium project that sought compliance with the Act.

[42] The case of *Thomson v. Quality Mechanical Service Inc.*, (2001) 56 O.R. (3d) 234 (S.C.J.) provides an analogy. In that case, C. Campbell, J. granted a motion for summary judgment brought by the Royal Bank against a shareholder who sought a remedy against a corporation and against the Royal Bank under the oppression remedy provisions of the *Ontario Business Corporation Act*, which are comparable to the oppression remedy provisions of the *Condominium Act, 1998*. The shareholder had a legitimate complaint against the corporation for oppression but did not have a claim against the Royal Bank because the acts of oppressive conduct must be the acts of those who control the corporation. C Campbell, J. held that the oppression remedy was available against those responsible for the corporation but not against third parties, who had no role in the control or operation of the corporation.

[43] In the *Thomson* case, the Royal Bank had committed a wrong to the corporation and the oppression remedy was still not available. The position of Corpfinance is stronger in the immediate case because it was not a declarant under the Act and had no disclosure obligations to the unit holders and it was not a privy to any misconduct if any by the other defendants. If there has been non-compliance with the provisions of the *Condominium Act, 1998* then Corpfinance is also a victim in the sense that the non-compliance would be a breach of the loan agreement, which required compliance with the Act.

[44] This last comment brings me to Peel 668's reliance on equity and on its submission that Corpfinance knew or ought to have known that full and proper disclosure had not been made with respect to the loan as the grounds for relief against Corpfinance. In paragraphs 84 and 85 of its factum, Peel 668 states:

84. Courts are often faced with a situation wherein they must decide which one of two innocent parties is to bear the loss occasioned by a third. In this regard, the law has held that the loss should fall upon the party who could have prevented the loss through the exercise of reasonable care, or who has enabled the third party to occasion the loss.

85. A Court could find as between [Peel 668] and Corpfinance, it is Corpfinance who should bear any loss occasioned on the basis that;

(a) Corpfinance is a sophisticated commercial lender;

(b) Corpfinance was in a position to protect its interest unlike [Peel 668] who was vulnerable and had no party representing its interests;

(c) Corpfinance knew or ought to have known the inherent risks in lending money in this type of arrangement whereby a developer causes a condominium corporation to become

liable under a loan which it had no involvement in the structure thereof; and

(d) Corpfinance's lack of due diligence in protecting its own interest under the Loan.

[45] With respect, once it is determined that the loan is *infra vires*, I do not see these submissions as the basis for equitable or other relief against Corpfinance. There must be some tether for equity's intervention, and a submission that equity should favour the weaker party is not a reason to deny Corpfinance's legal right to enforce its loan agreement.

[46] For these reasons I grant Corpfinance's motion for summary judgment. The parties may make written submissions with respect to costs within one month of the release of these Reasons for Decision.

Perell, J.

Released: February 9, 2006

**CITATION: York Condominium Corporation No. 382 v.
Jay-M Holdings Limited, 2007 ONCA 49
DATE: 20070129
DOCKET: C44875**

COURT OF APPEAL FOR ONTARIO

WEILER, LANG and ROULEAU JJ.A.

B E T W E E N :

**YORK CONDOMINIUM
CORPORATION NO. 382
(Plaintiff/Appellant)**

**Warren H. O. Mueller, Q.C.
for the appellant**

- and -

**JAY-M HOLDINGS
LIMITED and THE CITY
OF TORONTO
(Defendants/Respondent)**

**Susan Ungar and
Christina Pangos
for the respondent**

Heard: October 17, 2006

**On appeal from the order of Justice John D. Ground of the
Superior Court of Justice dated January 20, 2006.**

WEILER J.A.:

A. Overview

[1] Is the claim of York Condominium Corporation #382 (“York”) against the City of Toronto (the “City”) for an alleged act of negligence that took place over 15 years

ago, but which it pleads that it only discovered in May 2004, barred under the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B (the “Act”)?

[2] Previously, time for bringing a claim for general negligence did not begin to run until the claimant knew or ought to have known that he or she had a claim. This was known as “the discoverability rule”. See *Kamloops (City) v. Nielson*, [1984] 2 S.C.R. 2; *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147; *Peixeiro v. Haberman* (1995), 25 O.R. (3d) 1 (C.A.), aff’d [1997] 3 S.C.R. 549. The rule subjected a defendant to potential liability indefinitely. The current Act seeks to balance the right of claimants to sue with the right of defendants to have some certainty and finality in managing their affairs. Subject to certain exceptions that are not relevant to this appeal, the Act provides for a fifteen-year ultimate limitation period dating from the act or omission giving rise to a claim. Regard for this provision in isolation would automatically bar York’s claim. However, the transition provision in s. 24(5) Rule 1 states: “If the claim was not discovered before [January 1, 2004], the Act applies as if the act or omission had taken place on [January 1, 2004].” As I would interpret this transition provision, if a claim is not discovered until after January 1, 2004, but the act or omission took place before that date, the ultimate limitation period of fifteen years starts to run as if the act or omission had taken place on January 1, 2004 and York’s claim is not barred.

B. The Facts and the Relevant Provisions of the Limitations Act

[3] In May 2004, York discovered that the condominium building's demising walls were not fire-rated in accordance with the Building Code. It brought an action in June 2005 against the condominium developer, Jay-M Holdings Limited, and the City, alleging the former was negligent in its construction of the building and the latter was negligent in its inspection of the building. The parties agree that the last act by the City with respect to its alleged negligence took place in February 1978.

[4] Pursuant to s. 4 of the Act, which came into force on January 1, 2004, the basic limitation period expires two years from the day on which the claim is discovered.^[1] York brought its claim within this time limit. However, the Act also contains a 15-year ultimate limitation period. Section 15 of the Act provides:

(1) Even if the limitation period established by any other section of this Act in respect of a claim has not expired, no proceeding shall be commenced in respect of the claim after the expiry of a limitation period established by this section.

(2) No proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place.

[5] Thus, pursuant to s. 15, if a negligent act or omission occurred on January 2, 2004, but remained undiscovered until January 6, 2019, no action could be

brought although the basic limitation period of two years from the date of discovery had not expired.

[6] The City pleaded that on its face s. 15 barred York's action since the alleged negligent act took place over 27 years ago. The City then brought a motion under Rule 21 to strike York's claim. The motions judge ruled in favour of the City and struck York's claim as being statute-barred.

[7] York appeals the dismissal of its action against the City on the basis that the ultimate limitation period in s. 15 must be read in light of the Act's transition provision in s. 24(5) Rule 1 and that the motions judge erred in his interpretation of this provision.

[8] Section 24(5) provides:

If the former limitation^[2] period did not expire before the effective date and if a limitation period under this Act would apply were the claim based on an act or omission that took place on or after the effective date, the following rules apply:

1. If the claim was not discovered before the effective date, this Act applies as if the act or omission had taken place on the effective date.

The effective date of the Act is defined in s. 24(1) as January 1, 2004.

C. The Reasons of the Motions Judge

[9] The motions judge held:

- The wording of s. 24(5) is ambiguous. Able submissions on two conflicting interpretations of the transitional provisions was evidence of ambiguity when viewed with s. 15.
- Subsection 24(5) cannot be looked at in isolation. The structure and purpose of the legislation incorporates a balancing between the discovery principle and a cut-off date for bringing an action.
- All external sources cited to the court are consistent with an ultimate limitation period to counterbalance the codification of the discovery principle. No authorities on the interpretation of the ultimate limitation provision or the transitional provisions of the new Act were cited to the court.
- To interpret the transitional provisions as submitted by York could lead to an absurd result and absurd results are to be avoided whenever possible.
- Regard for the analogous limitations provisions of British Columbia and Alberta and the need to have regard for the policy considerations behind a statute of limitations leads to the conclusion that York's position must be rejected.

As a result of his interpretation of the Act, the motions judge dismissed the action as against the City.

D. Standard of Review

[10] The interpretation of section 24(5) of the *Act* is a question of law and thus review of the motions judge's

decision is on a standard of correctness. See: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at para. 8.

E. The Modern Approach to Statutory Interpretation

[11] The prevailing approach to statutory interpretation is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." See Elmer A. Driedger, *The Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87. This approach has been widely endorsed by the Supreme Court. See *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at para. 26. The interpretive factors set out by Driedger, need not be canvassed separately in every case: *Bell ExpressVu, supra*, at para. 31.

[12] The different interpretations of a provision by counsel engaged in litigation are not an appropriate starting point from which to conclude that legislation is ambiguous. *Bell ExpressVu, supra*, at paras. 29- 30.

[13] The ordinary meaning of legislation is "the natural meaning which appears when the provision is simply read through". See Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, Ont.: Butterworths Canada, 2002) at 21, where Sullivan quotes Gonthier J. from *Canadian Pacific Airlines v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724 at 735. Having determined the ordinary meaning, the court must go on to consider the context of the provision, the purpose and scheme of the legislation as well as the consequences of

adopting the ordinary meaning and any other relevant indicators of legislative meaning. If, after undertaking this analysis, the words of the provision are reasonably capable of more than one meaning, a real ambiguity exists. *Bell ExpressVu, supra*, at paras 29- 30.

[14] The court must adopt an interpretation that best fulfills the objects of the legislation. Having regard to this broader context, the court may modify or reject the application of the presumption that favours an interpretation in accordance with the ordinary meaning. However, the interpretation adopted must be plausible in the sense that it is one that the words are reasonably capable of bearing.

[15] A statute, should, if possible, be construed so as to avoid any inconsistency between its different provisions. One way of reconciling an inconsistency is through the “implied exception” rule of statutory interpretation, which holds that a special provision prevails over a more general provision. See Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, Ont.: Butterworths, 2002) at 273.

F. Application to this Case

[16] The motions judge erred in concluding that simply because counsel had put forward two conflicting interpretations respecting the interpretation of the transitional provisions, s. 24(5) was ambiguous when viewed alongside the provisions of s. 15: *Bell Expressvu, supra*.

[17] To determine whether the legislation should be given its ordinary meaning, a contextual and purposive approach is required. The same approach is used to resolve a true ambiguity in legislation. While the motions judge undertook a contextual and purposive analysis, I conclude that his analysis was not correct. Rather, the adoption of a contextual and purposive approach leads me to conclude that the transition provisions postpone the starting date for the running of the ultimate limitation period to January 1, 2004.

[18] For the purposes of this appeal, I have grouped the discussion under two broad headings: a) Grammatical and Ordinary Sense, and b) Legislative and Broader Context.

a) Grammatical and Ordinary Sense

[19] For ease of reference I will repeat s. 24(5) Rule 1:

If the former limitation^[3] period did not expire before the effective date^[4] and if a limitation period under this Act would apply were the claim based on an act or omission that took place on or after the effective date, the following rules apply:

1. If the claim was not discovered before the effective date, this Act applies as if the act or omission had taken place on the effective date.

[20] The ordinary grammatical meaning of s. 24(5) Rule 1 is that where an act or omission occurred prior to the current Act coming into force, if the limitation period under the former Act had not expired, and the claim was discovered after the current Act came into force, the

calculation of the fifteen-year ultimate limitation period will commence from January 1, 2004.

[21] Under the now-repealed *Limitations Act*, York had six years from the time of discovery of the omission to bring its claim. The limitation period had not expired under the former *Limitations Act* before the effective date of the current Act on January 1, 2004 because York had not discovered the alleged negligence by that date. If the act or omission had taken place after January 1, 2004, York would be subject to a limitation period under the current Act. That limitation period is “the second anniversary of the day on which the claim was discovered.” For the purposes of this motion, it is accepted that York did not discover its claim until after the effective date of the Act or until May 2004, and that it brought its claim within the two-year limitation period. Insofar as the ultimate limitation period is concerned, York submits that under Rule 1, the Act applies as if the negligent act or omission took place on January 1, 2004. Thus, the ultimate fifteen-year limitation period begins to run from January 1, 2004, not from the actual date of the negligent Act or omission as prescribed in s. 15.

[22] Rule 1 provides that, “If the claim was not discovered before the effective date, this Act applies as if the act or omission had taken place on the effective date.” The City submits that Rule 1 ought to mean that, if the claim was not discovered before the effective date, the Act applies. This interpretation gives no meaning to the concluding words of Rule 1, “as if the act or omission had taken place on the effective date.”

[23] It is certainly arguable that s. 15(1) is not in harmony with the transitional provision of s. 24(5) Rule 1. Again, section 15(1) states:

Even if the limitation period established by any other section of this Act in respect of a claim has not expired, no proceeding shall be commenced in respect of the claim after the expiry of a limitation period established by this section.

However, in keeping with the rule that, if possible, disharmony should be avoided, I would hold that disharmony can be avoided by treating s. 24(5) as a special provision that applies to the limited number of transitional situations and by treating s. 15(1) as a general provision.

[24] The City argues that because s. 24(5) does not specifically say that it applies despite s. 15, it cannot be read in the manner York submits. In support of its position, the City points to other sections of the Act where s. 15 is specifically made subject to another section. For example, s. 16(4) states that ss. 16 and 17 prevail over anything in s. 15. However, neither of those sections deals with a transitional context. Section 16 deals with general situations where there is no limitation period and s. 17 deals with environmental claims. These sections apply indefinitely for the foreseeable future until the Act is amended. Section 24(5) is transitory and the situations to which it applies will run their course. There would be little point in enacting this transition provision if it were not intended to apply to s. 15.

[25] Although the motions judge and this Court were not provided with any scholarly writing or educational material concerning the new Act, it does exist and supports the position I have taken. For example, John Lee, counsel for the Ministry of the Attorney General for Ontario, wrote an article entitled, “Developing a New Uniform Limitations Act: A survey of Canada’s Emerging Limitations Regimes” in Melissa Krishna, executive ed., and Jacob Ziegel *et al.*, co-ordinating eds., *The New Ontario Limitations Regime: Exposition and Analysis* (Toronto: Ontario Bar Association, 2005) at 165 and an article entitled “An Overview of the Ontario *Limitations Act, 2002*” (2004) 28 *Advocates’ Q.* 29. In his articles (at 189 and 34, respectively) Lee discussed the meaning of s. 24(5) Rule 1. Lee’s interpretation of s. 24(5) Rule 1 is that if a claim is not discovered until after the Act’s effective date, but the act or omission took place before the effective date, “for purposes of calculating the ultimate limitations period, the period will commence from January 1, 2004.” This is precisely York’s position. In addition, an application of the facts of this case as answers to the questions derived from the flowchart of Rosemary Bocksa yields the same interpretation.^[51] See *Ontario Limitations Manual*, 3d ed., looseleaf (Markham, Ont.: LexisNexis Canada, 2006) at Appendix-2.

[26] Driedger articulates the common-sense proposition that effect should be given to the ordinary meaning of a legislative provision unless there is a good reason not to do so. The court is therefore required to consider the purpose and scheme of the legislation, the consequences of adopting the ordinary meaning and all other relevant indicators of legislative meaning. In light of these additional considerations, the court may adopt an

interpretation that modifies or rejects the ordinary meaning provided that the words can bear the proposed alternative meaning. The interpretation of the motions judge can be viewed as a marked departure from previous limitations act jurisprudence that when the provisions of a statute of limitations are in issue, “[they] should be liberally construed in favour of the individual whose right to sue for compensation is in question.” *Papamonolopoulos v. Toronto (Board of Education)* (1986), 56 O.R. (2d) 1 at 7 (C.A.), *aff’d*, [1987] 1 S.C.R. v, 58 O.R. (2d) 528n. While an evolution respecting statutory construction has occurred in the past two decades, the broader principle, that access to justice should not be frustrated except in clear cases, has not changed and informs the legislative and broader context discussed below.

b) Legislative and Broader Context

[27] The Act is the culmination of several earlier attempts since the late 1960s to reform the law of limitations. In 1969, the Ontario Law Reform Commission (OLRC) called for a simplification of the law of limitations in its *Report of the Ontario Law Reform Commission on Limitation of Actions* (Toronto: Department of the Attorney General, 1969). The Attorney General released a discussion paper in 1977, comprising a draft bill, which largely borrowed from the OLRC report. See Ontario Ministry of the Attorney General, *Discussion Paper on Proposed Limitations Act* (Toronto: Ministry of the Attorney General, 1977). Much of the draft bill from 1977 was reflected in Bill 160 (*An Act to revise the Limitations Act*, 3rd Sess., 32nd Leg., Ontario), introduced in 1983, which did not proceed beyond first reading. Bill

160 would have introduced a knowledge requirement into the law of limitations. For certain actions, s. 10 of the Bill provided that the limitation period would not start to run until the plaintiff had knowledge of the identity of the defendant and knowledge of sufficient facts to indicate that he had a cause of action.

[28] In 1991, a consultation group produced a paper for the Attorney General on the proposed *Limitations Act*. See Limitations Act Consultation Group, *Recommendations for a New Limitations Act: Report of the Limitations Act Consultation Group* (Toronto: Ministry of the Attorney General, 1991). The consultation group recommended an ultimate limitation period of thirty years and, in exceptional cases, ten years. With respect to when to enact the shorter ultimate limitation period, at page 5 the consultation group asked the government to weigh, “the availability of evidence to the defendant, the cost of maintaining records, and the cost and availability of insurance against the likelihood of meritorious claims after ten years”. Under the heading “Transition” in the consultation paper, the following is found:

The new scheme would apply to any act or omission that occurred before the effective date of the new legislation provided that the old limitation period had not expired. This will result in the extension of some limitation periods to a maximum of two years and the shortening of others to two years if a longer period would otherwise have applied.

Under the heading, “Summary of recommendations for a New Limitations Act”, recommendation 27 suggests that where the application of the new act would shorten the

limitation period that would otherwise apply, the limitation period should be the shorter of the limitation period under the then existing legislation or two years from the coming into force of the new legislation. No mention is made of the ultimate limitation period in that recommendation.

[29] The consultation paper led to the introduction of Bill 99 (*An Act to revise the Limitations Act*, 2nd Sess., 35th Leg., Ontario) in 1992. As recommended in the consultation paper, Bill 99 contained a basic two-year limitation period, codification of the discoverability principle and a thirty-year limitation period with a shorter ultimate limitation period of ten years for some cases. As with Bill 160, Bill 99 did not go beyond first reading.

[30] The next proposed reform came in 2000, with the introduction of Bill 163 (*An Act to revise the Limitations Act*, 1st Sess., 37th Leg., Ontario), which contained a codification of the discoverability principle but which also introduced a general fifteen-year ultimate limitation period. After prorogation of the legislature, Bill 163 was reintroduced in 2001 as Bill 10 (*An Act to revise the Limitations Act*, 2nd Sess., 37th Leg., Ontario) and was later reintroduced in 2002 as Schedule B to Bill 213, the *Justice Statute Law Amendment Act, 2002* (3rd Sess., 37th Leg., Ontario). Bill 213 was an omnibus bill that was introduced on November 26, 2002 and never went to committee for debate. The Bill went through second and third readings with limited debate in the legislature and received Royal Assent as the *Justice Statute Law Amendment Act, 2002*, S.O. 2002, c. 24, on December 9.

[31] An explanatory note respecting the ultimate limitation period contained in Bill 213 simply confirms that the Act establishes an ultimate limitation period of fifteen years. The limitation period runs from the day of the act or omission irrespective of when the claim is discovered. The note adds that the ultimate limitation period does not run in certain circumstances. With respect to s. 24, the note says, “[t]he Act contains a number of general provisions dealing with technical matters (sections 18 to 24)” and “[d]etailed rules are provided for the treatment of claims that arose before the coming into force of the new Act (section 24)”. The explanatory note does not form part of the law and, since it does not discuss the effect of the transition rules, does not assist in the interpretation of s. 24(5) Rule 1.

[32] The purpose of the Act as a whole is to balance the right to access to justice by bringing a lawsuit with the right to certainty and finality in the organization of one’s affairs. The purpose of the ultimate limitation period is to balance the concern for plaintiffs with undiscovered causes of action with the need to prevent the indefinite postponement of a limitation period and the associated costs relating to record-keeping and insurance resulting from continuous exposure to liability. While the motions judge considered the purpose of the Act and of the ultimate limitation period, he did not consider the purpose of the transitional provisions. The purpose of transitional provisions in general is to provide when a new Act applies and when it does not apply, or to provide for how it applies to situations that arose before the coming into force of the Act that are affected by its passage.

[33] From the legislative history of the Act one can deduce that the time chosen for the ultimate limitation period, fifteen years, represented a compromise between the thirty-year period proposed for most claims and the ten-year period proposed for others. Interestingly, in *Hansard*, the Attorney General at the time the Act was passed also suggested that the fifteen-year period was chosen as a compromise, but referred to it as a compromise between ten-year and twenty-year periods that exist for ultimate limitation periods in other jurisdictions. See Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, Vol. 5, No. 65 (2 December 2002) at 1550 (David Young). The transitional provision furthers that compromise approach. Although the common law rule of discoverability is modified by s. 15, section 24(5) operates to mitigate the effect of the new legislation on pre-existing but undiscovered claims.

[34] The motions judge looked to the interpretation of the ultimate limitation period and its relationship to the discoverability principle in the British Columbia *Limitation Act* passed in 1975, and the decision of *Armstrong v. West Vancouver (District)* (2003), 223 D.L.R. (4th) 102 (B.C.C.A.). That case held that the ultimate limitation period of thirty years applied from the date the damage occurred. The ultimate limitation period did not run from the date the evidence of the negligence in issue was discovered. Further, in *410727 B.C. Ltd. v. Dayhu Investments Ltd.* (2004), 241 D.L.R. (4th) 467 (B.C.C.A.), the court confirmed that the ultimate thirty-year limitation period began to run from the time that the action accrued, whether or not the cause of action was discoverable.

[35] The motions judge accepted the City's submission that the same interpretation the courts arrived at in *Armstrong* and *Dayhu* should be given to section 24(5) Rule 1 here. However, the City's submission ignores the fact that, while the wording of the ultimate limitation provision in s. 15 of Ontario's legislation is similar to the British Columbia statute, the wording of Ontario's transition provisions in s. 24 is significantly different.

[36] The transition provision in the British Columbia statute, s. 14, provides, that if the cause of action arose before the new *Limitations Act* comes into force and the limitation period provided under the former legislation is longer than the limitation period provided under the new Act, the limitation period expires two years after the new Act comes into force or pursuant to the limitation period under the former Act, whichever is shorter. The Alberta *Limitations Act*, R.S.A. 2000 c. L-12, which came into force on March 1, 1999, contains a similarly worded transition provision and a ten-year ultimate limitation period. In *Bowes v. Edmonton (City)* (2005), 386 A.R. 1 (Q.B.), Clarkson J. concluded that the ultimate limitation period was intended to have retrospective effect and, as a result, the plaintiffs' action against the City of Edmonton was statute-barred because the City's negligent act of issuing building permits to the plaintiffs, notwithstanding the geological reports it had concerning the instability of the land on which their homes were built, occurred more than ten years before the land collapsed in 1999 (after the new Act had come into force).

[37] Neither the British Columbia statute nor the Alberta statute has a transition provision that provides, as does s. 24(5) Rule 1, that "If the claim was not discovered

before the effective date, this Act applies as if the act or omission had taken place on the effective date." If the claim was not discovered before the coming into force of the Act, the Act in effect triggers the start of the new fifteen-year ultimate limitation period. Such a provision does not seem to me to do violence to the intention of the legislators or to the policy of the Act.

[38] The motions judge was also concerned that interpreting the transitional provision as submitted by York would lead to an absurd result. As an example, he stated that a proceeding based on an act that occurred in 1978 but discovered in 2003 could not proceed, whereas a proceeding based on the same 1978 act discovered in 2018 could proceed. The example given by the motions judge was flawed. If the 1978 act was discovered in 2003, the claim was discovered before the effective date of the new Act on January 1, 2004, and, pursuant to s. 24(5) Rule 2, the limitation period under the former Act would apply. That limitation period would ordinarily be six years. Thus, the claimant would have until 2009 to bring a claim.

[39] In this case, the effect of my proposed interpretation is to allow a twenty-seven-year-old claim that was not discovered until shortly after the new Act had come into force to go forward. This time frame is within thirty years from the date of the act or omission, the ultimate time recommended in the Ontario consultation paper for most claims, as well as that contained in the earlier Bill, and the same time as provided in the B.C. legislation for all claims. It cannot be said to be an absurd result particularly when one recalls that, prior to the passage of the new Act, there was unlimited liability for as-yet-undiscovered claims (i.e. there was no ultimate

limitation period). In moving to a new regime with an ultimate limitations period, s. 24(5) Rule 1 effectively creates a 15-year transition period for undiscovered claims. Although such a transition provision may be regarded as generous, it is part of the Act's attempt to ensure that, with respect to pre-existing situations, access to justice be preserved while limiting liability on a go-forward basis.

[40] In view of my conclusion I need not address York's argument on retrospectivity. I also need not comment on the effect of any subsequent amendment.

G. Disposition

[41] For the reasons given, I would allow the appeal and set aside the order dismissing York's action.

H. Costs

[42] The parties may make submissions as to costs. Counsel for York shall deliver a bill of costs together with any submissions, in writing, in support of any requested order for costs within seven (7) days of the release of the decision. Counsel for the City may deliver a response, in writing, within fourteen (14) days of the release of the decision. Counsel for York may deliver a brief reply within seventeen (17) days of the release of the decision. The submissions of the parties should be delivered to the attention of the Senior Legal Officer of the court.

RELEASED: January 29, 2007 ("SEL")

"Karen M. Weiler J.A."

"I agree S. E. Lang J.A."

"I agree Paul Rouleau J.A."

^[1] The basic limitation period in s. 4 is not at issue in this appeal.

^[2] The former limitation period is defined in s. 24(1) as "the limitation period that applied in respect of the claim before the coming into force of this Act."

^[3] See note 2, *supra*.

^[4] See paragraph 8, *supra*.

^[5] The flowchart asks the following questions: 1) Is the claim based on an assault or sexual assault? (No.) 2) Did the act or omission take place before January 1, 2004? (Yes.) 3) Was the proceeding commenced before January 1, 2004? (No.) 4) Was there a former limitation period that applied? (Yes.) 5) Did the former limitation period expire before January 1, 2004? (No.) 6) If the claim were to be based on an act or omission that took place after January 1, 2004, would a *Limitations Act, 2002* limitation period apply? (Yes.) 7) Was the claim discovered before January 1, 2004? (No.) Result: The *Limitations Act, 2002* applies as if the act or omission took place on January 1, 2004.

COURT FILE NO.: 05-CV-299685 SR

DATE: 20070223

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:)
)
JUDY ZAFIR) *Patrick Summers*, for
Plaintiff) the Plaintiff
)
- and -)
) *Christopher J.*
YORK REGION) *Jaglowitz*, for the
CONDOMINIUM) Defendant
CORPORATION NO. 632)

Defendant)

HEARD: February 21,
2007

Conway J.

REASONS FOR JUDGMENT

Introduction

[1] On January 8, 2005, the plaintiff and her husband went away on vacation. Before they left, they turned off the shut-off valve on the pipe below the kitchen sink in their condominium unit 811 (“811”), which all unit owners had been

asked to do before leaving on vacation. On January 10, 2005, the superintendent of the building was told that water was leaking into condominium unit 712 (“712”) which was located one floor beneath 811. It was determined that the leak emanated from 811 and specifically from the pipe in 811 on which the shut-off valve was mounted.

[2] The defendant arranged for the repair of the damages sustained to 712 and replacement of the valve in 811 from which the leak had originated. When the plaintiff was charged for these amounts, she claimed that she was not responsible for them and that they were to be paid by all of the condominium owners in the building as a common expense. Ultimately, the defendant registered a Certificate of Lien (the “Lien”) against 811 under the *Condominium Act*, 1998, S.O. 1998, c.19 (the “Act”). The plaintiff is seeking a declaration that the Lien is invalid, that it be discharged, and that the defendant be restrained from enforcing the Lien.

[3] This case raises several issues. At the simplest level, the question is who should bear the responsibility for the repair costs for the damage arising from the leak in 811- the owner of 811 alone or all of the condominium owners in the building together as a common expense?

[4] For the reasons that follow, I find that on the particular facts of this case, the plaintiff should not have been charged for these amounts and accordingly the defendant was not entitled to register the Lien, the Lien is invalid and should be discharged, and the defendant is to be restrained from enforcing its rights under the Lien.

The Shut-Off Valve

[5] The defendant acknowledges that it posted notices to owners in the building requesting them to turn off the shut-off

valve in their units before leaving on vacation. This was intended to minimize the risk of water leakage in the building while people are away.

[6] The plaintiff's husband turned off the valve the day they left, January 8, 2005. He testified that he reached under the kitchen sink, turned the valve a few times, did not notice anything amiss, and then they left on vacation.

[7] The defendant states that it was the responsibility of the plaintiff to maintain the valve in good repair and that unit owners are required to do so under Article V, clause 1, of the declaration of the condominium corporation.

[8] However, there are practical problems here. The defendant's plumber, Mr. Melanson, testified that these types of valves (EMCO valves) can start to drip when they are being opened or closed. There is an O-ring in the valve which can become brittle and drip if it is disturbed. It is the wear and tear of opening and closing these valves that causes them to drip - the likelihood of leakage is much less when they are not being touched.

[9] This puts the condominium owners in a bind. They are asked by the corporation to turn off the valves when they leave, but this is precisely what increases the risk that the valves will start to drip.

[10] Mr. Melanson further acknowledged that it is difficult to know when these valves need to be replaced – you would not know unless you actually saw them leaking. The only way to avoid this situation would be to conduct preventative maintenance. However, he conceded that this would be impractical for an owner to do that, since the pipes in approximately 10 units in the building would have to be turned off in order to do the work. The replacement would have to be

done by a licensed plumber and the coordination of the units involved would have to be done by the condominium corporation.

[11] Mr. Melanson also stated that if the valve was going to leak it would occur right after it was turned off. This was disputed by Mr. Brown, a plumber who testified for the plaintiff and who stated that a leak might not be observed until some time afterwards. The defendant is suggesting that Mr. Zafir should have seen the leak right away – or should have looked for it to occur as soon as he turned off the valve. This would have required Mr. Zafir to look under the sink cupboard since the leak would not otherwise have been visible.

[12] Clearly if there had been a leak right away, Mr. Zafir would not have left the unit. Whether he should have looked for it will be addressed below.

Act or Omission

[13] The defendant states that the water leakage was caused by an “act or omission” of the plaintiff, being one or more of the following: (a) the act of the plaintiff's husband in turning off the valve; (b) the plaintiff's husband not observing or looking to see if there was a leak once the valve was turned off; (c) the plaintiff failing to keep the valve in a good state of repair; or (d) the plaintiff failing to provide a key to the defendant which would provide immediate access to 811 once the leaked was discovered.

[14] The concept of an “act or omission” is relevant to this case as the wording appears in Section 105 of the Act and in the defendant's bylaws, as follows:

Section 105(2): “If an owner, a lessee of an owner or a person residing in the owner's unit with the permission or knowledge of the owner *through an act or omission* causes

damage to the owner's unit, the amount that is the lesser of the cost of repairing the damage and the deductible limit of the insurance policy obtained by the corporation shall be added to the common expenses payable for the owner's unit".

Section 105(3): "The corporation may pass a by-law to extend the circumstances in subsection (2) under which an amount shall be added to the common expenses payable for an owner's unit if the damage to the unit was not caused by *an act or omission* of the corporation or its directors, officers, agents or employees".

Bylaw No. 10: Pursuant to Section 105(3), the defendant corporation unit passed Bylaw No. 10 ("**Bylaw 10**") which in Article III entitles the defendant to claim from an owner losses (up to the insurance deductible) for damage caused to the common elements or another unit, "where the damage is caused by the *act or omission* of an owner...". Bylaw 10 states that "Without limitation, "*act or omission*" shall be deemed to include failure of the owner to properly maintain and repair the unit and improvements...".

Bylaw No. 1: In Article XIII of Bylaw No. 1, the defendant corporation also has an indemnity from each owner for losses and damages "resulting from or caused by an *act or omission* of such owner".

[emphasis added]

[15] The interplay of these sections of the statute and bylaws, according to the defendant, entitles the defendant to add the cost of the repairs arising from the damage caused by the leak, up to the limit of the insurance deductible, to the common expenses payable by the owner of 811. However, it is clear from the language above that the defendant's position can

only come into play if the damage arose from the "act or omission" of the plaintiff.

[16] The plaintiff's counsel argued that the term "act or omission" imports an element of negligence, relying on the case of *Reilly v. Freedom Gardens Condominium Assn*, [2001] A.J. No. 1703 (Q.B.), and that the rule of *contra proferentum* applies to preclude the defendant from relying on a strict liability interpretation of the bylaws. I note, however, that the *Reilly* case states in paragraph 34 only that these words are "usually descriptive of a tort action", and "generally indicate negligence". I do not take the case as authority for the proposition that these words must require negligence.

[17] The defendant distinguished the *Reilly* case, *supra*, on the basis that it was decided in Alberta under a different statute than the Act. Further, the defendant argued that the "without limitation" words in Article III of Bylaw 10 qualify the "act or omission" language in that Article and that those latter words should therefore be read more expansively.

[18] I am not persuaded by the plaintiff that the term "act or omission" necessarily requires a finding of negligence. If the drafters of the Act and the defendant's bylaws had intended the higher standard of negligence to apply, they could have said so and referred to "negligent acts or omissions".

[19] On the other hand, the language of the Act and the bylaws is not strict liability language either. Strict liability language would have provided that the owner is responsible for any damage arising from its unit, however caused.

[20] As such, the wording "act or omission" appears to be more favourable to an owner than if strict liability language had been used. In my opinion, whether damage occurs from an "act

or omission” of an owner in any particular case will depend on the facts of the case at hand.

[21] In this case, I find it difficult to see how the defendant can argue that the “act or omission” for which the plaintiff is responsible is the very act that the defendant required the plaintiff to take. The defendant posted notices requesting the owners to turn off their shutoff valves before leaving on vacation. If this involved a risk that the valves would leak, shouldn’t the defendant have alerted the owners of this risk? The defendants could have:

(a) told the owners that there was a risk of leaking by shutting off these valves. The owners could then have assessed the risk of doing so before turning them off;

(b) advised the owners what procedure to take in turning off the valves – for example, looking under the cupboard and watching for a certain period of time to see if there was a leak (assuming Mr. Melanson is right that the leak would have appeared right away). It is not reasonable to think that a layperson would check for leaks underneath a kitchen sink after shutting off a valve without being told to do so;

(c) coordinated regular inspection programs for shutoff valves in the units and regular replacements of older valves that might be more likely to leak. This is particularly applicable since only licensed plumbers can do this work and it involves many units in the building, as described above; and/or

(d) advised the owners that they needed to have their valves inspected and repaired regularly.

[22] Under the circumstances, I find that the plaintiff’s turning off the valve or not waiting to see if a leak developed

cannot be construed as an “act or omission” causing the damage for which the plaintiff should be held responsible.

[23] Whether the failure of the plaintiff to repair the valve is an “act or omission” is another question. Clearly, Bylaw 10 provides that failure to properly maintain and repair the unit is an “act or omission”. However, given the evidence of Mr. Melanson that these valves are less likely to leak if they are not touched than if they are turned on and off, and since the defendant was the one requiring that they be shut off, the valve may not have required repair but for the defendant’s requirements. It would be inequitable to hold the plaintiff responsible for repairing the valve when by Mr. Melanson’s own testimony, a leak was more likely to occur due to turning on and off the valve – which was the defendant’s requirement.

[24] Further, since preventative maintenance could only be done with the coordination of many other units, then even if the plaintiff had wanted to do so, the defendant would have had to arrange the maintenance. I have trouble holding a unit owner responsible for failure to do preventative work which it could not possibly arrange on its own.

[25] The defendant argued that the delay by the plaintiff in providing access to 811 was an “act or omission” since it took some additional time for the key to the 811 to be brought to the building and the plaintiff’s daughter prevented entry to 811 during that time. It is not entirely clear how much time elapsed before the plumber arrived at the building and entry to 811 was obtained, although it appears to have been in the range of 2 hours.

[26] However, the evidence of Ms. Schlosser, the superintendent for the building, was that the significant water damage to 712 had already occurred by the time she entered 712 on the morning of January 10th – for example, the floors were

soaked and had started to buckle and lift. There was no evidence that any additional damage occurred to 712 during the period of time that keys were being obtained for entry to 811.

[27] While it may be that the plaintiff should have provided keys and entry to her unit to the defendant, I do not find that this is an “act or omission” that caused the damage in this case.

[28] Since any claim by the defendant supporting the Lien, whether under Bylaw 10 or the indemnification clause X111 in Bylaw number 1, is predicated on there being an “act or omission” of the plaintiff causing damage, I find that there is nothing to support the Lien registered by the defendant.

Validity of Bylaw 10

[29] Given my conclusion that there was no act or omission for which the plaintiff should be responsible in this case, I do not need to decide whether the enactment of Bylaw 10 pursuant to Section 105(3) of the Act was valid. The plaintiff had challenged the validity of Bylaw 10 which entitles the defendant to add the cost of repairs (up to the deductible) as a common expense payable by an owner where there is damage to another unit or common elements caused by the act or omission of the owner.

[30] I understand that there is conflicting commentary, but no caselaw, on whether Section 105(3) permits a condominium corporation to extend the circumstances under which the lesser of repair costs and the insurance deductible can be charged back to an owner as a common expense for damage caused to other units or common elements, or whether that Section merely permits the condominium corporation to extend the circumstances under which the owner is responsible for repair costs or the deductible arising from damage to its own unit.

[31] While this case does not turn on this issue in light of my analysis above, I do think there is a good argument to be made that Section 105(3) is intended to enable a condominium corporation to establish a regime whereby owners can be held responsible for damages (up to the insurance deductible) to other units and common elements, even where the owner’s unit has not been damaged. This would appear to be consistent with the case of *Stevens v. Simcoe Condominium Corporation No. 60*, [1998] O.J. No. 5843 (Div. Ct), which was decided before the new Act came into force and recognized the desirability for condominium owners to be able to apportion liability for the insurance deductibles by making provision to that effect in the declaration, bylaws or rules of the condominium corporation.

[32] I also prefer the reasoning in the commentaries provided by the defendant (Harry Herskowitz and Mark F. Freedman, *Condominiums in Ontario: A Practical Analysis of the New Legislation*; J. Robert Gardiner, *The Condominium Act, 1998: A Practical Guide*) that a more liberal interpretation of Section 105(3) should be allowed - which would enable a condominium corporation to customize a program of allocating responsibility among owners for insurance deductibles – as it would promote fairness among the unit owners and address the unique and individual requirements of each condominium corporation.

[33] I note the qualifying language at the end of Section 105(3) which restricts the ability of the corporation under a bylaw to add amounts to the owner’s common expenses - it can only do so “if the damage to the unit was not caused by the corporation or its directors, officers, agent or employees”. The plaintiff states that these words require that there be damage to the owner’s unit before the circumstances can be extended.

[34] Again, I prefer the reasoning of Messrs. Herskowitz and Freedman that this language should not be seen as establishing a prerequisite that the damage be caused to the owner’s unit before

there can be a chargeback to the owner. These words appear only to restrict the corporation from charging an owner for any damage caused by the corporation and its directors, officers, agents or employees, and refer back to the damage first described in Section 105(2) - presumably the owner should never be held responsible for damage caused by the corporation *et al.* However, it does not necessarily follow that there must be damage to the owner's unit before the owner is made responsible for the additional common expenses arising from damage to another unit or common elements.

Other Claims by the Parties

[35] The plaintiff had a claim for damages but withdrew this claim at the commencement of the trial.

[36] The plaintiff further seeks an order under Section 135 of the Act that the conduct of the defendant is oppressive and unfairly prejudicial towards the plaintiff, and unfairly disregards the interest of the plaintiff. The plaintiff has led no evidence on this point. While I have concluded that the registration of the Lien by the defendant may not have been well founded, the higher standard of oppression has not been made out in this case.

[37] The defendant submitted that this action should be stayed and the plaintiff was required to exhaust the mediation and arbitration proceedings of the Act. There was no evidence that the defendant suggested proceeding in this fashion. Further, since the defendant was the one that initiated this by registering the Lien, I see no reason that the plaintiff needed to submit to mediation or arbitration - she was certainly within her rights to pursue this case through legal action.

Decision

[38] For the reasons set forth above, Judgment is granted to the plaintiff as follows:

(a) the Lien registered against 811 is declared to be invalid;

(b) the defendant is ordered to discharge the Lien forthwith; and

(c) the defendant is restrained from taking any steps to enforce the Lien.

[39] If the parties are unable to agree upon costs, I will receive written submissions which are to be no longer than 3 pages, double spaced, per party. The plaintiff's submissions are to be received by no later than March 5th and the defendant's by no later than March 12th.

Conway J.

Released: February 23, 2007

COURT FILE NO.: 756/02

DATE: 20031217

SUPERIOR COURT OF JUSTICE - ONTARIO

(DIVISIONAL COURT)

RE: METROPOLITAN TORONTO CONDOMINIUM
corporation #1101 and METROPOLITAN TORONTO
CONDOMINIUM corporation #1120 (Applicants/Appellants) v.
ONTARIO NEW HOME WARRANTY PROGRAM
(Respondent/Respondent) v. CONCORD SQUARE LIMITED
(Added Party/Respondent)

BEFORE: DUNNET, JENNINGS and C. CAMPBELL JJ.

COUNSEL: Irving Marks and Laurence A. Pattillo
and Lloyd Cadsby

Outerbridge	Barbara Green for the Added Party	David
Respondent	for the Applicants (Respondent)	for the
	(Appellants)	(Respondent)

HEARD: DECEMBER 15, 2003

ENDORSEMENT

BY THE COURT:

[1] The condominium corporations appeal to the Divisional Court from the order of the Licence Appeal Tribunal, dated November 28, 2002, disallowing their claims.

[2] The appellants submit that the Tribunal erred by failing to hold that they are entitled to enforce the warranty claims against the Ontario New Home Warranty Program, despite the releases they executed with the builder, Concord Square Limited.

[3] The appellants also raise issues with respect to the Tribunal's interpretation of the releases, the May 28, 1998 letter signed by the builder, and issue estoppel. They submit, however, that if the releases are enforceable, there is no need for this Court to deal with the other issues.

[4] The parties concede that the claim was made within the two-year common element warranty period.

[5] The appellants submit that in *Mandos v. Ontario New Home Warranty Program*, [1995] O.J. No. 3647, the Court of Appeal determined that warranties within the meaning of s. 13(1) of the Ontario New Home Warranties Plan Act, R.S.O. 1990, c.O-31 continue in force, irrespective of any agreement by the parties to the contrary.

[6] The oral endorsement of the Court of Appeal in *Mandos* is as follows:

The Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O-31 is remedial legislation and should be given a fair and liberal interpretation. Subsection 13(6) of the Act is a difficult subsection to construe. However, we believe that the interpretation given to it by counsel for the respondents is a proper one, i.e., that the warranties contained in s. 13(1) continue in force, irrespective of

any agreement by the parties to the contrary. This interpretation, in our opinion, achieves a fair and just result. The Corporation is desirous that builders and owners should settle their differences, and s. 13(1) of the Regulations contemplates that if such a settlement is made, it will not affect the Corporation's rights of subrogation. When a mutual release is executed between an owner and a builder, it is quite possible, as in the present case, that there may be defects which could not be discovered by reasonable inspection. If it is the intention of the legislature that a release should be a bar to any action by an owner for breach of the warranties in s. 13(1), then, in our opinion, the legislation should clearly so provide and owners should be warned of the dangers of entering into a release.

For these reasons, the appeal will be dismissed. The costs of the respondents will be fixed at \$4,000.

[7] The appellants assert that in *Mandos*, the Court was interpreting the meaning of the statute and any factual differences between that case and the present case are irrelevant.

[8] We respectfully disagree. In its decision, the Court refers to the possibility that there may be defects, as was the case with Mr. and Mrs. *Mandos*, which were not discoverable at the time the releases were executed. In *Mandos*, a settlement was made with an owner by a contractor, not in pursuit of a warranty claim, but in the context of the settlement of a construction lien debt action. The release was executed before a warranty claim was made and before the expiration of the statutory warranties prescribed by the Act.

[9] The situation here is significantly different. The Program was advised of the warranties raised by the claim based upon a detailed engineering report and within the limitation period. Discussions followed between the builder and the appellants concerning repairs. Ten months after the claim was filed, the

appellants and the builder entered into a letter of understanding where the issue of the releases was addressed.

[10] Several months later, the releases were executed by sophisticated and informed members of the corporations' boards, in exchange for financial consideration and the remedying of deficiencies. They were advised throughout by their solicitor, who participated in the drafting of the releases. We conclude, therefore, that s. 13(6) of the Act does not apply in this case.

[11] We agree with the comments of the Tribunal in *Darling (Re)*, [1994] O.C.R.A.T.D. No. 5 at para. 27:

The facts in the case of Mr. *Darling* are exactly the opposite. He knew his rights, had received all required documentation, and was paid a substantial amount to satisfy his claim. If this Tribunal were to find that the *Mandos* case holds that under Section 13(6) of the Act, parties may not pursue amicable settlements which included waiving any further rights under the Ontario New Home Warranties Plan Act, the unacceptable result would be that every single dispute between a homeowner and builder would have to [be] resolved by this Tribunal. It goes without saying that if parties could [not] reach settlements whereby one party is indemnified and the other party receives a Release, that [sic] no amicable settlements would be possible. The whole thrust of our judicial process, however, is one which allows the parties to freely settle disputes where they can. Were it to be otherwise, every man, woman and child in Canada would have to be a judge to settle all the disputes that arose. That plainly is not the intention of *Mandos* and of the Act. The Act itself speaks often of settlements as something to be encouraged.

[12] As the statute is consumer protection legislation, one of its aims is to reduce the burden of litigation on the consumer by

providing a quick, summary procedure for resolving warranty claims at less expense than litigation.

[13] The overarching goal of the Act is to encourage the resolution of disputes and to streamline the process for achieving such resolution. Discussions leading to the settlements of claims are an inherent part of that process.

[14] It would, therefore, be contrary to the purposes of the Act to construe s. 13(6) as barring settlements by denying effect to the releases that form an essential part of settlement agreements.

[15] There is no issue that the statutory granting of the warranties themselves cannot be waived. There is nothing in the legislative scheme created by the Act, however, that limits the ability of a vendor and a warranty claimant from settling a properly filed warranty claim in exchange for a release and such a release should be enforceable, unless it would be unconscionable due to the existence of some vitiating factor.

[16] Accordingly, we find that the decision of the Tribunal as to the enforceability of the warranty claims against the Program was correct. In view of this finding, it is not necessary for us to deal with the other issues raised by the appellants.

[17] The appeal is dismissed with costs fixed at \$15,000 payable to the Program and \$15,000 payable to Concord Square Limited, inclusive of disbursements and GST.

RELEASED:

DUNNET J.

JENNINGS J.

C. CAMPBELL J.

DATE: 20050428
DOCKET: C42382

COURT OF APPEAL FOR ONTARIO

DOHERTY, LASKIN and MACFARLAND JJ.A.

B E T W E E N:

METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 1385, FARHAR AMEERAR, TOM BAKER, PETER BENUM, RAMONA BERNDT, PEARL BOTBOL, JOAN BOWSER, JOHN BOWSER, ALICE E. BRIESMASTER, EVA BRYAN, JOSEPH CABELL, ROSE CALLA, MARIA-CARLA CARRARA, KIM T.R. CARTER, DAVID CHIN, NICHOLAS CHOO-SON, PENELOPE COOKSON, RENATA D'ALIESIO, CLEM D'SOUZA, TERESA D'SOUZA, JUVEN DUARTE, WALTER ETNA, TONCI FARAC, JANE FARNAN, JAMIE FEEHELY, ROY FORRESTER, MARLA FRIEDMAN, JOAN FRIEL, IVY FUNG, JEREMY GAYTON, STEPHEN S. GRASSET, ANNETTE GRATTON-FIRESTONE, MICHAEL GRODEN, ROBIN GUINNESS, SANDRA GUINNESS, CARRIE HACKETT, IAN R. HACKETT, DANIEL HANEQUAND, DAVID W. HANSEN, KATE HELLIN, RONALD S. HIKEL, HOLGER HULS, ILKA HULS, JUDY IMM, JANET JACK, RICHARD JAMES, JANET KENT, JOHN KENT, TUSHAR KITTUR, PATRICK S. LALL, ROXANNE LALL, JOHN LAWSON, DELFIN LAZARO, PILAR LAZARO, HELEN LARSSON, JACQUES LE BLANC, JACOB LEVMAN, TOM LONGHURST, PATRICIA MACDONALD, NORA MADLANGBAYAN, GINA MANI, SEAN MANI, ZELJKO MARCAN, HELEN MATSOS, ALEXANDER MCINTOSH, KELLY MCISAAC, COLLEEN MCLEOD, ELLEN JOANNE MILLARD, SUZANNA NG, PATRICIA O'MALLEY,

JANICE PAUL, LORRAINE PAULS, MOLLY PEACOCK, TERRY PENNOCK, ALEKSANDAR POPOVIC, TIMOTHY REDMANN, ASTRA RENWICK, RACHEL B. ROMERO, KATE ROSSI, LAWRENCE ROSSI, KAREN ROYCROFT, WILMA SARMIENTO, AMY SEDGWICK, SANJIV SHAH, MARINA SILOV-MARCAN, THANYAPORN SOMBATI, JOHN H. SKYE, RITA SKYE, THANYAPORN SOMBATI, NORBERT L. STEPIEN, ALENKA STIGLIC-FARAC, HELEN TAVARES, JULIO TAVARES, GREG THIEL, STEPHEN TINLING, CARLO TOSTI, MARIA TOSTI, CLARITA B. UMALI, LAVINIA VASILACHE, IAN WALDRON, MICHAEL WARING, NANCY WARING, CHARLES WASILEWSKI, MARGARET MARY WASILEWSKI, NANCY WATKINS, CHARLYN WEE, DAN WILSON, LOUISE WILSON, ANNA CACCAMO DAVIES, TOM DAVIES, ELIZABETH M. DE LORY, JAMES W. DE LORY, ANN FOSTER, KATHY GARVIN, JANE GLATT, HELEN KEENAN, DONNA LEWIS, ELAINE MARTINOVIC, DOUGLAS MCINTOSH, DENIS MICHAUD, GENE SCHMIDT, KAREN SPARKS, LEENDERT STOLK, CHRISTINE VAN DUELMEN, ROBERT VIENNEAU, and ALICE WONG
Applicants by Counter-Application (Appellants)

- and -

SKYLINE EXECUTIVE PROPERTIES INC., FRONT STREET PROPERTIES INC., JACOB ABOUDI, EZRA AHARON, AMPAYER PROPERTIES INC., DANIEL AVIDOR, OREN BALABAN, MOSHE BECHER, MORDECHAI BEN-AMI, SHOLMIT BEN SHAHAR, DAVID BEN SHAHAR, MICHAEL BURDIN, BORIS BURDIN, MALKA CHESNER, YECHESKEL CHESNER, AVRAHAM COHEN, AVIRAM COHEN, MORDECHAI

COHEN, MIRIAM COHEN, TSION ELYASAF, COHAVA ELYASAF, VARDIA FELDMAN, MORDECHAI GIVON, YOAV HAMMER, CHANITA JACKSON, JOSEPH JACKSON, DAVID KARNY, RONI KARNY, MARCO LIBSKER, YANA MANELIS, YA'ACOV MANELIS, DALHIA MARTIN, MOSHE MOLCHO, ATALIA MOLCHO, YAFFE MONEFA, LEVIA MOORE, MORDECHAI MOORE, DALIA MUNZ, DAVID MUNZ, MIRIAM PERL, ASHER PERL, NOA RENERT, ADAM RENERT, DINA ROLEL, IGOR DYAKOV, MENASHE ROSENFELD, AMIT ROTEM, HENRYK ROTTENBERG, DRORA ROTTENBERG, YEHUDITH SHAPIR, ILANA SHNABEL, JACOB TAJTELBAUM, NAOMI TAJTELBAUM, MICHAELI URI, YEHEZKEI YEHUDA, DINA YEHUDA, AMOS WOLFSON, and ODED ZUCKER Respondents by Counter-Claim (Respondents)

Mark H. Arnold for the appellants

Michael A. Spears for the respondents

Heard: March 10, 2005

On appeal from the order of Justice J.L. Lax of the Superior Court of Justice dated August 16, 2004: [2004] O.J. No. 3360.

DOHERTY J.A.:

[1] This appeal raises a question of statutory interpretation of first impression. Section 134(5) of the *Condominium Act, 1998*, S.O. 1998, c. 19 (the “Act”) provides:

If a corporation obtains an award of damages or costs in an order made against an owner or occupier of a unit, the damages or costs, together

with any additional actual costs to the corporation in obtaining the order, shall be added to the common expenses for the unit and the corporation may specify a time for payment by the owner of the unit [emphasis added].

[2] The focus of the appeal is the words:

Any additional actual costs to the corporation in obtaining the order.

[3] The appellant, Metropolitan Toronto Condominium Corporation No. 1385 (“MTCC”), operates a 189 unit residential condominium. The respondent, Skyline Executive Properties Inc. (“Skyline”), owns or manages numerous units in the condominium. MTCC and Skyline have been involved in a longstanding dispute over Skyline’s use of its units. MTCC claimed that Skyline rented out its units on a short-term basis and operated a hotel-like business in contravention of the condominium Declaration and the rules of the condominium.

[4] In December 2002, MTCC obtained a judgment from Hoillet J. of the Superior Court declaring that Skyline was in breach of the condominium Declaration and the rules of the condominium: [2002] O.J. No. 5117. The judgment also required Skyline to comply with the Declaration and the rules. This court affirmed that judgment in December 2003, although it varied the cost order made against Skyline: [2003] O.J. No. 5116.

[5] Early in 2004, MTCC advised Skyline that pursuant to s. 134(5) of the Act, MTCC had added about \$205,000 to the common expenses of the units owned or managed by Skyline. MTCC placed a lien in that amount on the units pursuant to s. 85(1) of the Act. MTCC advised

Skyline that if payment was not forthcoming, it would institute power of sale proceedings.

[6] Skyline brought a motion for a declaration that the lien was invalid and for an order requiring MTCC to discharge the lien. Skyline contended that it had paid the costs ordered against it in the proceedings in the Superior Court and the Court of Appeal, and that none of the amounts liened by MTCC were additional actual costs incurred by MTCC in obtaining the judgment from Hoillet J.

[7] The motion judge declared the lien invalid and ordered it discharged. In her reasons she held that the phrase “additional actual costs ... in obtaining the order” in s. 134(5) of the Act did not include:

costs beyond assessed costs for any legal work for which the court did, or could have awarded costs to MTCC pursuant to the costs grid in the *Rules of Civil Procedure*;

costs incurred in responding to an appeal from the order;

costs expended on the enforcement of the order;

costs expended on legal matters unrelated to the obtaining of the order; and

administrative and managerial costs that MTCC had failed to demonstrate were “additional” costs incurred in “obtaining the order”.

[8] I would allow the appeal. My interpretation of s. 134(5) differs from that of the motion judge in two respects. First, I think s. 134(5) speaks separately to “an award of costs” on the one hand, and “additional actual costs” on the other hand. “An award of costs” refers to the costs that the court orders one litigant to pay to another litigant. “Additional actual costs” can encompass those legal costs owing as between the client and its own lawyer beyond the costs that the court had

ordered paid by an opposing party. To the extent that the legal bills owed by MTCC to its own lawyers exceeded the costs awarded against Skyline, MTCC could properly add those amounts to the common expenses of the Skyline units as long as MTCC could demonstrate that those additional legal costs were incurred in obtaining the compliance order.

[9] I also do not agree that the costs associated with the defence of a compliance order from attack on appeal are not costs associated with “obtaining the order”. The phrase “obtaining the order” should be read as including the maintaining of that order on appeal.

[10] I do agree, however, with the motion judge that the enforcement of a compliance order is properly distinguished from the obtaining of that order and that costs incurred in the enforcement of a compliance order are not covered by s. 134(5). I also agree with the motion judge that costs that are not related to the obtaining of the compliance order, but instead relate to other legal matters involving the same units, cannot be added to the common expenses under s. 134(5). Lastly, I agree with the motion judge that while administrative or managerial expenses could potentially be captured by s. 134(5), MTCC failed to demonstrate that the claimed administrative and managerial expenses were “additional actual costs” that were incurred in “obtaining the order”.

II

The Procedural History

[11] The condominium developer turned over control of the condominium corporation to the elected board of directors in September 2001. At that time, Skyline owned or managed 54 of the 189 units. Skyline rented out fully furnished and serviced units on a short-term basis. Some of the rentals were for the weekend, others for the week, and still others for a month or longer. MTCC claimed that Skyline's operation contravened Article III(1)(a) of the condominium Declaration, which provided that units should be used only as private single family residences. In March 2002, the board of directors passed a rule prohibiting commercial and transient use of the units, and specifically prohibiting leases for less than six months. That rule, referred to as Rule E, reflected concerns expressed by the condominium board and many unit owners that Skyline's business compromised building security and undermined attempts to develop a sense of community within the condominium.

[12] In May 2002, Skyline commenced an application in the Superior Court seeking, among other things, an interlocutory injunction to prevent the enforcement of Rule E. The motion for an interlocutory injunction was refused. Skyline continued to acquire ownership or control of units in the condominium and initiated attempts to force a meeting of the unit holders for the purpose of repealing Rule E.

[13] MTCC brought a counter application under s. 134(1) of the Act in October 2002, seeking an order directing Skyline to comply with the condominium Declaration and rules. By this date, Skyline owned or controlled about 94 units. MTCC was successful on the counter application. By judgment dated December 20, 2002, Hoillet J. upheld the validity of Rule E, and declared that the rental of units for commercial and/or transient use breached that rule and also breached the condominium Declaration. He further prohibited Skyline from leasing or renting the units for commercial and/or transient use and appointed an administrator under s. 131 of the Act to enforce his judgment.

[14] Hoillet J. ordered costs of the application to MTCC on a substantial indemnity basis and subsequently fixed those costs at \$58,000.00.

[15] Skyline appealed. By endorsement dated December 12, 2003, this court dismissed the appeal except as it related to costs. The court varied the costs order and directed that MTCC should have its costs assessed on a partial indemnity basis. In June 2004, an assessment officer fixed those costs at \$38,000.00.

[16] This court awarded costs of the appeal to MTCC in the amount of \$10,000.00.

[17] Skyline has paid the \$38,000.00 assessed as the costs of the proceedings before Hoillet J., and the \$10,000.00 awarded as costs by this court.

[18] In February 2004, MTCC advised Skyline that it would add all additional costs "incurred in this enforcement process" to the common expenses of all of the units owned or managed by Skyline. MTCC took the position that the additional costs began in September 2001 with the election of the condominium board of directors and continued through until the order of the Court of Appeal in December 2003.

[19] On April 12, 2004, MTCC advised Skyline that it had registered a lien against all of the Skyline units in the amount of some \$205,000.00, and that if the funds were not promptly paid, MTCC would commence power of sale proceedings.

[20] In response to inquiries by Skyline, MTCC provided the following break down of the amount claimed:

Mr. Arnold's legal fees – \$108,524.00;

Mr. Elia's legal fees – \$41,164.59;

other legal costs – \$11,391.74;

administrative costs – \$20,502.22; and

managerial services – \$28,167.00.

[21] Mr. Arnold and others in his firm acted for MTCC in its dispute with Skyline. Accounts submitted by Mr. Arnold totalled \$147,102.00. MTCC deducted the amount which it said Skyline had paid by way of costs (\$38,578.00), yielding a net amount owing of \$108,524.00. Mr. Arnold's accounts for work done prior to the judgment of Hoillet J. in December 2002 totalled \$61,991.00. Accounts submitted by him for work done after the judgment was obtained totalled \$72,388.00.^{1 [1]}

[22] Mr. Elia did solicitor's work for MTCC and assisted Mr. Arnold in the dispute with Skyline. Mr. Elia's accounts that were provided to support the claim of \$41,164.59 covered work done between December 1, 2001 and November 30, 2003. Accounts totalling about \$30,000.00 referred to work done after the judgment was obtained from Hoillet J. in December 2002.

[23] The "other legal costs" totalling \$11,391.74 referred to costs arising out of three legal matters, and costs paid to the administrator appointed under the judgment of Hoilet J. The three identified legal matters were distinct from and had no connection with MTCC's efforts to obtain the compliance order under s. 134(1). For example, one of those matters involved a trademark issue. The judgment of Hoilet J. required MTCC to pay the administrator's fees.

[24] The \$20,052.22 described as administrative costs consisted of the costs arising out of conducting certain unit owners' meetings, as well

as printing, telephone, mailing and courier costs. The amount also included borrowing costs arising out of a loan that MTCC claimed was necessitated by the ongoing dispute with Skyline.

[25] The managerial services totalling \$28,167.00 referred to work done by two employees of the property management company employed by MTCC. To support this claim, MTCC provided time sheets for these employees for 2003. It also indicated that it had doubled the amount reflected in these time sheets to account for "two and a half years worth of time stolen from the Corporation".

III

MTCC's Arguments

[26] Most of the argument in this court and all of the reasons of the motion judge addressed s. 134(5) of the Act. Before turning to those submissions, I will dispose of two other arguments advanced by MTCC in its factum.

(i) The Collateral Attack Argument

[27] MTCC argued that Skyline's motion challenging the lien registered by MTCC constituted an impermissible collateral attack on paragraph 10 of the judgment of Hoilet J. That paragraph reads:

Orders that the condominium corporation may add to the common expenses of the units owned by the Respondents by Counter-Application, any costs awarded to the condominium corporation pursuant to this Judgment, together with any additional costs to the condominium corporation in obtaining

the Judgment pursuant to s. 134(5) of the *Condominium Act*, R.S.O. 1998, c.19.

[28] Paragraph 10 parrots the language of s. 134(5) and adds nothing to the rights bestowed on MTCC by that section. Skyline's motion did not challenge paragraph 10 of Hoilett J.'s judgment or in any way seek to vary that judgment. Instead Skyline attacked the lien on the basis that no amount should have been added to the common expenses owed by Skyline since it had paid the costs orders and MTCC had incurred no additional actual costs in obtaining the compliance order.

[29] Skyline's motion was not a collateral attack on the judgment of Hoilett J. It was properly brought as a motion within the application that led to the judgment of Hoilett J.

(ii) **The Indemnity Argument**

[30] MTCC argued in its factum that the lien registered against the Skyline units could be justified under Article VIII(5) of the condominium Declaration. That article required unit owners to indemnify MTCC for "any costs" suffered by it as a result of a breach of the condominium rules by the unit owner.

[31] The lien registered by MTCC is a creature of statute created by s. 85(1) of the Act. That section reads:

If an owner defaults in the obligation to contribute to the common expenses, the corporation has a lien against the owner's unit and its appurtenant common interest for the unpaid amount together with all interest owing and all reasonable legal costs and reasonable expenses incurred by the corporation in connection with the collection or attempted collection of the unpaid amount [emphasis added].

[32] A s. 85(1) lien is triggered by a default on an obligation to contribute to common expenses. The indemnification right created by Article VIII(5) of the condominium Declaration does not affect the unit owners' obligation to contribute to common expenses, and a failure to meet the indemnification obligation does not constitute a default on an obligation to pay common expenses.

[33] The indemnification provision in the condominium Declaration offers no support for the lien registered by MTCC.

(iii) **The Interpretation of s. 134(5)**

[34] Section 134(1) provides for an order enforcing compliance with the Act, the condominium Declaration or the rules of the condominium. The order may be sought by the condominium corporation or an owner, occupier or tenant of a unit. If the court makes a compliance order, it may direct that the offending party pay "the costs incurred by the applicant in obtaining the order" (s. 134(3)(b)(ii)).

[35] Section 134(5), the section in issue here, applies only to condominium corporations and only where the condominium corporation has obtained an award of damages or costs under s. 134(3). For convenience I repeat s. 134(5):

If a corporation obtains an award of damages or costs in an order made against an owner or occupier of a unit, the damages or costs, together with any additional actual costs to the corporation in obtaining the order, shall be added to the common expenses for the unit and the corporation may specify a time for payment by the owner of the unit [emphasis added].

[36] Section 134(5) had no equivalent in the predecessor legislation. Section 49 of that legislation, *The Condominium Act*, R.S.O. 1990 c. C.26 did provide for compliance orders but

did not specifically address the payment of costs incurred by condominium corporations in obtaining and enforcing compliance orders.

[37] The affidavit material filed by MTCC and Skyline reveals that during the consultative process leading up to the enactment of the present legislation in December 1998, various groups addressed what they saw as the need to provide for the recovery by condominium corporations of any costs associated with the obtaining and enforcing of compliance orders against unit owners. These groups submitted that since condominium corporations were duty-bound to enforce compliance with their declarations and rules for the benefit of all unit owners, they should not bear any of the costs associated with obtaining and enforcing court orders requiring such compliance. These groups argued that the offending unit owners should have to compensate the condominium corporation for all costs incurred in obtaining and enforcing compliance orders against those unit owners.

[38] Section 134(5) went some way towards addressing the concerns expressed in these submissions. The section declares that the corporation may recover both “an award of costs” and “any additional actual costs”. Clearly, the language of s. 134(5) contemplates recovery by the condominium corporation of costs beyond those that are addressed in a court order so long as those costs were actually incurred by the condominium corporation and were incurred in obtaining the compliance order.

[39] Not only does s. 134(5) give a condominium corporation a broad right of recovery for costs incurred in obtaining compliance orders, it also provides an effective enforcement mechanism for the collection of those costs. The section declares that the “award of costs” and the “additional actual costs” may both be added to the common expenses for the unit. If the amounts are not paid, the condominium corporation may register a lien against the unit. The lien is enforceable in the same way as a mortgage (s. 85(2), s. 86(6)). Section 86 of the Act gives a s. 85(1) lien priority over almost all other encumbrances including mortgages. Consequently, if the costs described in s. 134(5)

are not paid, the condominium corporation can recover that amount through the sale of the unit.

[40] My review of the terms of s. 134(5) leads me to agree with counsel for MTCC’s submission that the section was intended to shift the financial burden of obtaining compliance orders from the condominium corporation and ultimately, the innocent unit owners, to the unit owners whose conduct necessitated the obtaining of the order. Furthermore, the section was enacted to provide a means whereby the condominium corporation could, if necessary, recover those costs from the unit owner through the sale of the unit.

[41] Recognition of the remedial purpose behind s. 134(5) does not however answer all questions of statutory interpretation. The legislature chose to implement its purpose using certain words. Those words described the scope of the claim that can properly be made by MTCC. As recently observed by Bastarache J. in dissent in *Marche v. The Halifax Insurance Co.*, 2005 SCC 6 at para. 59-60: the interpretative process begins with the determination of the ordinary meaning of the words used. The ordinary meaning refers to the meaning, if any, that is apparent after a first, but careful reading of the provision.

[42] Section 134(5) distinguishes between “an award of costs” and “additional actual costs”. The latter is to be added to the former to arrive at the total amount that shall be added to the common expenses owed by the offending unit owner. There is no difficulty with the ordinary meaning of “an award of costs”. The phrase refers to costs orders made by a court or made after a court ordered assessment. MTCC has two awards of costs, \$38,000.00 awarded after the assessment of costs on the application, and \$10,000.00 in costs awarded by the Court of Appeal.

[43] As the motion judge observed, the phrase “additional actual costs” in s. 134(5) can encompass costs, legal and non-legal, that are not assessable. The more difficult question is whether those words can also capture actual legal costs to MTCC referable to legal work that was the subject of a court ordered assessment of costs or a cost order made by a court.

[44] In determining how to read the phrases “award of costs” and “additional actual costs” in s. 134(5), it is appropriate to consider how those words would be read by those familiar with those terms. As all lawyers know, a costs award in favour of a party, even when made on a substantial indemnity scale, will not necessarily reflect the actual amount of fees properly billed to that party by his or her own lawyer. Usually, there will be a significant difference between the amount of a costs award made to a party and the actual legal costs incurred by that party. As Armstrong J.A. recently observed in *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 at para. 26 (C.A.) when discussing the assessment of costs as between parties to litigation:

Overall, as this court has said, the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant [emphasis added].

[45] Reading the words of s. 134(5) as informed by the well-recognized distinction between costs that are awarded between parties and costs that are payable as between a party and its own lawyer makes the meaning clear to me. “Additional actual costs” will refer to those legal costs properly owed by MTCC to its lawyers above and beyond the amounts awarded for costs by the court or in a court ordered assessment. Those “additional legal costs” are properly added to the common expenses of the unit pursuant to s. 134(5) so long as they were incurred “in obtaining the order”. As actual legal costs refers to those costs properly claimed by a lawyer against his or her own client, the principles

governing the assessment of legal bills as between a lawyer and his or her client, should govern any dispute between MTCC and Skyline as to the propriety of any part of the legal bills relied on by MTCC in support of a claim for “additional legal costs” under s. 134(5): see Mark M. Orkin, *The Law of Costs*, 2nd ed., looseleaf (Aurora, Ont: Canada Law Book Inc., 2004) at 602ff.²[21]

[46] A reading of s. 134(5) that allows MTCC to claim its actual legal costs in obtaining the compliance order as part of the common expenses of the Skyline units is consistent with the remedial purpose of s. 134(5). That reading effectively shifts the financial burden associated with obtaining a compliance order from the “innocent” condominium corporation and unit owners to the “guilty” unit owner who necessitated the obtaining of the compliance order.

[47] My interpretation of s. 134(5) can be demonstrated by reference to MTCC’s claim as it related to Mr. Arnold’s legal bills up to the date MTCC obtained the compliance order from Hoilett J. in December 2002. Mr. Arnold’s bills for that period totalled \$61,991.00. Costs for the application were assessed against Skyline on a partial indemnity basis at \$38,000.00. Applying s. 134(5) to this component of Mr. Arnold’s bills, MTCC would be entitled to add to the common expenses of the Skyline units, \$38,000.00 (the costs award) plus as additional actual costs whatever part of the \$23,991.00 (\$61,991.00 minus \$38,000.00) it was determined was both expended in obtaining the compliance order and would be properly payable to Mr. Arnold on an assessment of his bills by MTCC. MTCC would of course have to deduct from that amount whatever amount had already been paid by Skyline.

[48] The motion judge rejected the interpretation I place on s. 134(5) primarily because, in her view, including costs for legal services that had been the subject of court assessed costs beyond the amount ordered by the court, would render the court's authority to determine costs meaningless. She said at paragraph 30:

In view of this, “additional actual costs” cannot include any amount for legal costs that could have been awarded by the court under the costs grid and the *Rules of Civil Procedure*. This would render meaningless the court's jurisdiction to award costs, which is a precondition to the operation of the subsection. Accordingly, once costs are awarded, a condominium corporation may not add to the common expenses of a unit-owner as additional actual costs under section 134(5), assessable legal costs that were sought, but not awarded [emphasis added].

[49] With respect, this analysis misses the distinction made in *Boucher, supra*, between costs as fixed or assessed between parties to litigation and a litigant's actual legal costs. In assessing MTCC's costs of the application or fixing its costs of the appeal, the court looked to what was fair and reasonable as between the parties and not to the legal costs actually incurred by MTCC. In determining what amounts MTCC could add to the common expenses of the Skyline units, the Legislature recognized the difference between the two measures of costs described in *Boucher, supra*. The Legislature declared that both assessed costs and actual costs could be added to the common expenses. By providing that costs beyond assessed costs could be added to common expenses, the Legislature did not interfere with the court's jurisdiction to assess costs as between the litigants.

[50] It is true that by virtue of s. 134(5), MTCC could resort to the s. 85 lien enforcement mechanism to collect both the costs awarded and its additional actual legal costs. I do not accept however, that the availability of this enforcement mechanism in any way derogates from the court's jurisdiction to determine the appropriate award of costs as

between the parties. The costs awarded to MTCC are what costs are in any case, the measure of the costs properly payable by one litigant to the other, and are enforceable by MTCC against Skyline in the same manner as any other money judgment.

[51] My conclusion that “additional actual costs” in s. 134(5) can include legal costs beyond those ordered or assessed by the court does not mean that all legal costs properly owed by MTCC to its lawyers can be added to the common expenses of the Skyline unit. As the motion judge held, the section refers only to costs incurred “in obtaining the order”. Those who made the case for an enforcement provision like that contained in s. 134(5) before the enactment of the present Act, argued that it should include costs associated with either obtaining or enforcing the compliance order. However, the Legislature chose to include only the word “obtaining” in s. 134(5). The process of obtaining a court order is distinct from the process of enforcing that order. On a plain reading of s. 134(5), it does not extend to costs associated with the enforcement of the compliance order. MTCC's legal costs are recoverable only if properly charged by its lawyers and incurred in obtaining the order.

[52] Although enforcement costs are not part of the costs referred to in s. 134(5), they may come into play in determining the proper amount of the s. 85(1) lien. That section provides that where an owner has defaulted on an obligation to pay common expenses, the condominium corporation may register a lien against the unit in the amount of the unpaid common expenses plus:

[A]ll reasonable legal costs and reasonable expenses incurred by the corporation in connection with the collection or attempted collection of the unpaid amount.

[53] Consequently, if a unit owner defaults on the common expenses, the s. 85(1) lien can include enforcement costs that fall within the language of the section. The motion judge did not have to address this issue as she found that no amount was properly added to the Skyline common expenses pursuant to s. 134(5). There was, therefore, no default by Skyline on its obligation to pay common expenses capable of triggering the s. 85(1) lien.

[54] I turn next to the motion judge's treatment of the appeal costs. She held that none of MTCC's costs of the appeal taken by Skyline from the compliance order could be included in s. 134(5). She reached that conclusion for two reasons. First, she held that because the Court of Appeal had assessed costs at \$10,00.00, no additional legal costs could be charged under s. 134(5). For reasons already stated, I would reject this reasoning.

[55] The trial judge also appears to have rejected claims for costs associated with the appeal because these costs were incurred after the order was obtained and therefore, could not be said to be costs "in obtaining the order". The phrase "in obtaining the order" describes a process that culminates in a valid, enforceable, final compliance order. As long as the validity of the order is in issue, I think that the relevant proceedings before the court are all part of the process of "obtaining the order". For example, had Hoilett J. refused to grant the compliance order and had MTCC successfully appealed that refusal, there could be no doubt that MTCC's costs of the appeal would be costs incurred "in obtaining the order". I see no reason why the consequences should be different for MTCC where it was successful on the initial application and Skyline chose to put the validity of the order in issue by way of appeal.

[56] I can deal briefly with the motion judge's treatment of administrative and managerial costs. She correctly held that the words "additional actual costs" in s. 134(5) could extend to non-legal costs so long as those costs were incurred in obtaining the order. She also correctly held that MTCC had the burden of demonstrating that the administrative and managerial costs claimed by it were actually incurred

in the obtaining of the order. The motion judge also held that MTCC had not met that burden. Again, I agree with her conclusion.

[57] I must also reject the submission made on appeal by counsel for MTCC to the effect that only the validity of the lien and not the amount of the lien claimed by MTCC was in issue on the motion. The notice of motion and the material filed by Skyline in support of its motion made it clear that Skyline contended that none of the amounts said by MTCC to make up the total amount of the lien claimed were properly added to common expenses under s. 135(4). MTCC had ample notice that all of the amounts it relied on to make up that claim, including those referable to administrative and managerial costs were disputed by Skyline. MTCC had a full opportunity to make its case that those expenses were properly "additional actual costs to the corporation in obtaining the order". It failed to make that case.

IV

The Appropriate Order

[58] For the reasons set out above, the motion judge erred in declaring that the lien was invalid and ordering it discharged. I would set aside that order and direct a reference pursuant to rule 54.02 to determine first what amount, if any, is properly added to common expenses under s. 134(5) and second, if some amount is properly added, the amount of the lien under s. 85(1) of the Act.

[59] The reference should proceed on the following terms:

MTCC cannot reassert its failed claim to amounts described as “other legal costs”, “administrative costs and “managerial services”.

in deciding what part, if any, of Mr. Arnold’s and Mr. Elia’s legal fees are properly added to the common expenses of the Skyline units, the referee shall determine the amount, if any, beyond the \$48,000.00 paid by Skyline in costs is properly charged to MTCC by Mr. Arnold and Mr. Elia for legal work done in obtaining the compliance order.

in determining whether there are any properly charged additional legal costs, the principles governing an assessment of legal fees as between a lawyer and his or her own client shall govern.

if it is determined that an amount was properly added to the common expenses of the Skyline units, and that Skyline has defaulted in payment of that amount, the amount of the lien shall be determined by adding to that amount, all reasonable legal costs and reasonable expenses incurred by MTCC in connection with the collection or attempted collection of the amount owing under s. 134(5).

[60] If the parties cannot agree on the referee, the court will name one.

V

Costs

[61] MTCC has been successful on the appeal. However, it is clear that the amount of the lien registered by MTCC against the Skyline units is far in excess of the lien MTCC is entitled to under the Act. Some of the claims made by MTCC are obviously beyond the scope of s. 134(5). By proceeding as it did, MTCC virtually forced Skyline to go to court to challenge the lien. Had the motion judge made the order which I would now make, I think Skyline would still have recovered its costs of the motion on a partial indemnity basis. I would not interfere with the costs order made on the motion.

[62] MTCC is entitled to its costs on the appeal on a partial indemnity basis. I would fix those costs at \$11,000.00 including GST and disbursements. That amount may be set off against the costs awarded in Skyline’s favour by the motion judge.

RELEASED: APR 28 2005

“Doherty J.A.”

“I agree John I. Laskin J.A.”

“I agree J. MacFarland J.A.”

DATE: 20060621
DOCKET: C43908

COURT OF APPEAL FOR ONTARIO

WEILER, BLAIR and ROULEAU J.J.A.

B E T W E E N :

**METRO TORONTO
 CONDOMINIUM
 CORPORATION NO. 545**
 Applicant (Appellant)

**Jonathan H. Fine for the
 appellant**

- and -

**BEULAH STEIN, DAVID
 STEIN, SUZANNE DRUKER
 AND SYED RISWAN WARSI**
 Respondents (Respondents in
 Appeal)

**Robert A. Spence for the
 respondents**

Heard: March 8, 2005

**On appeal from the judgment of Justice Nancy J. Spies of the
 Superior Court of Justice dated June 29, 2005.**

ROULEAU J.A.:

OVERVIEW

[1] This is an appeal by Metropolitan Toronto Condominium Corporation No. 545 (the Corporation) from the dismissal of its application for an order permitting it to enter the respondents' dwelling units to carry out certain repairs or maintenance.

[2] The Corporation maintains that the manner in which the respondents carried out remediation work on the fan coil units (FCUs) located in their condominium units left their units in a condition that was "likely to damage the property^[1] or cause injury to an individual."^[2] As a result, the Corporation argues that it was entitled to the order sought pursuant to ss. 19, 117, 119 and 134 of the *Condominium Act, 1998*, S.O. 1998, c. 19 (the *Condominium Act*). The Corporation further argues that the application judge made palpable and overriding errors of fact in reaching her decision to dismiss the application. Finally, it submits that, by failing to afford the appropriate degree of deference to decisions of the Corporation, the application judge committed a reversible error.

[3] For the reasons that follow, I would dismiss the appeal. The application judge made no palpable and overriding error of fact nor did she fail to afford the Corporation's decision the appropriate degree of deference.

SUMMARY OF THE RELEVANT FACTS

The parties

[4] The Corporation manages a 231 unit condominium at 55 Skymark Drive in Toronto. The respondents are unit holders in this condominium.

The dispute

[5] In May 2004, the Corporation commissioned an investigation of possible mould contamination in the heating and air conditioning FCUs located in the various condominium units of the building. The report provided to the Corporation by George White, a mycologist, confirmed that there was mould contamination in the FCUs. Substantial mould contamination was found in ten of the thirteen FCUs that he examined.

[6] The report stated that it is difficult to actually assess the risk related to mould exposure, but that it could safely be assumed that there is an increased risk associated with any increase in exposure. The risk identified was an “occupant risk”. Although the report did not suggest that mould from the FCUs in one residential unit would disperse to another unit, the report noted that there would be risks to the property value and reputation if the issues were not handled in a sensible and timely manner.

[7] White opined that it was more prudent to eliminate the risk factor than to determine what the acceptable level of risk

actually was. He cautioned that this approach, however, was not always cost-effective and ran the risk of overreacting in some settings. He then suggested that, in response to mould contamination, three different remedial options were available. The first, and most expensive, involved removing the contaminated insulation, replacing it with a different insulation and modifying the FCUs to minimize the recurrence of mould contamination. The second involved removing most of the contamination by HEPA vacuums and disinfectants. The third was a combination of the first and second options.

[8] On June 28, 2004, the Corporation held a special meeting of residents. White was present at this meeting and the issue of mould contamination was discussed.

[9] Having previously determined that the repair and maintenance of FCUs was a unit holder responsibility, the Corporation advised the residents, by August 26, 2004 letter, of their responsibility and gave residents a list of contractors who carry out this type of repair. The letter indicated that this list was neither a referral nor a recommendation.

[10] The Corporation then retained Construction Control Inc., consulting engineers and building scientists, to research and investigate the problem and to prepare specifications for mould remediation. In September 28, 2004, another meeting of unit holders was held. The President of the Corporation advised those in attendance that the unit holders were free to make their own arrangements for mould remediation. However, he indicated that they would have to comply with

the protocol for remediation set by the Corporation's engineers.

[11] In October 2004, the Corporation reiterated that the remediation was the responsibility of the unit holders and advised that the Corporation had approved Dry Coil Limited (Dry Coil) as the authorized contractor after the usual tendering process.

[12] Each of the respondents chose not to use the pre-approved contractor and made this intention known to the Corporation. In response, the Corporation wrote to the respondents, requiring that they comply with a list of conditions at their own expense. These conditions included pre and post remediation air quality tests and that the remediation be done in accordance with the New York Protocol, Level 5. The letter also advised that a note would be placed in the file for each of the units, indicating that periodic inspections of the FCUs were required.

[13] The respondents formally advised the Corporation that they did not consider that they were required to comply with these conditions. Despite the Corporation's continuing insistence that its listed conditions be complied with, the respondents ignored them and proceeded to have the remediation carried out by their own contractor, Reliable Fan Coil Maintenance (Reliable).

[14] Reliable was one of the contractors mentioned in the August 26, 2004 list of contractors provided by the Corporation. The remediation by Reliable was done at a cost of about \$100 per FCU, as compared to approximately \$1500

per FCU if done by the Corporation's contractor. The remediation done by Reliable was completed to the New York Protocol, Level 1 standard. In Reliable's view, the Level 1 standard was sufficient.

[15] The respondents did not provide the Corporation with reports following the remediation. They did, however, advise the Corporation that it could, at its expense, have its engineer and contractor inspect the work done by Reliable. The Corporation maintained its position that a Level 5 remediation was required. Since the respondents had readily admitted that only a Level 1 remediation was carried out, the Corporation felt that there was no point in inspecting the work. The Corporation then brought an application under s. 134 of the *Condominium Act*. It is the dismissal of that application that is the subject of this appeal.

The decision under appeal

[16] At the hearing of the application, the respondents took the position that the application could not proceed on the merits because s. 134(2) of the *Condominium Act* required that the dispute be submitted to mediation and arbitration before resorting to the courts. The Corporation responded that s. 134(2) of the *Condominium Act* applied to disputes regarding the declaration, by-laws and rules of a condominium but did not apply to an application seeking the interpretation of the Act itself.

[17] The application judge rejected the respondents' objection and allowed the application to proceed on the basis

that “the Corporation has very carefully limited its relief to sections 117 and 19 of the Act”. By limiting its dispute to the interpretation of the Act itself, the failure to proceed to mediation and arbitration was not a legal impediment to the bringing of the application.

[18] In her reasons, the application judge made the following relevant findings of fact:

- a) there was no evidence that mould contamination in the FCUs of a specific unit created a risk to other residential units;
- b) the work done by Reliable had effectively remediated the mould contamination in the respondents’ units and, in any event, mould in an FCU was only an issue for the residents of the unit with the contaminated FCU;
- c) the Corporation’s evidence went no further than to show that the work done by Reliable was “not as careful or complete” as the work done by Dry Coil; it did not go so far as to say that the Level 1 remediation carried out by Reliable was insufficient to deal with the problem;
- d) with respect to the Corporation’s concern that Reliable’s work had not included changes to the slope of the drain pan, there was no evidence that the drain pans had ever overflowed in the respondents’ units nor was there evidence that overflowing pans pose a risk for mould contamination to other units as opposed to water damage;
- e) there was no evidence that the Board of the Corporation had considered the less expensive options suggested by White; and

f) there was no evidence that the way in which the respondents had remediated their units would affect the sales of units other than those of the respondents.

[19] The application judge rejected the Corporation’s submission that, by remediating to a Level 1 rather than a Level 5 standard, the respondents had created a dangerous situation as contemplated by s. 117 of the *Condominium Act*. She went on to find that this section of the Act did not empower the Board of the Corporation to impose a particular method of remediation where it could not establish that the method chosen by the respondents had not reasonably dealt with the problem.

[20] The application judge concluded that the Corporation failed to meet its onus of proving that a condition currently existed that was “likely to damage the property or cause injury to an individual”.^[31] In the event that she was wrong on this point, and that the Corporation had in fact established the existence of such a condition, she went on to consider whether the Corporation was acting reasonably so as to justify the court granting the discretionary relief being sought. On this latter issue the application judge concluded that the Corporation had not acted reasonably in imposing its standard of remediation. Central to this conclusion was her finding that the Board of the Corporation had failed to consider reasonable alternatives to the requirement that all units carry out a Level 5 remediation. Reasonable lower cost alternatives ought to have been considered, especially in light of there being no evidence of harm to other units.

The position of the parties

[21] The Corporation submits that the application judge disregarded important parts of the evidence relevant to the issues being determined and made palpable and overriding errors in respect of several findings of fact. Further, the Corporation maintains that, even on the facts as found, the application judge committed reversible error in failing to show the appropriate level of deference to decisions of the board of a condominium corporation in accordance with this court's decision in *York Condominium Corp. No. 382 v. Dvorchik* (1997), 12 R.P.R. (3d) 148 (Ont. C.A.).

[22] The respondents submit that the application judge made no palpable or overriding errors of fact. On the *Dvorchik* issue, they submit that *Dvorchik* has no application to the present case. *Dvorchik* was dealing with the reasonableness of condominium rules and not with an attempt by the Corporation to obtain forcible entry into the respondents' units to remedy a situation that was internal to the units.

STATUTORY PROVISIONS

[23] The relevant sections of the *Condominium Act* are as follows:

Right of Entry

Droit d'entrée

19. On giving reasonable notice, the corporation or a person authorized by the corporation may enter a unit or a part of the common elements of which an owner has exclusive use at any reasonable time to perform the objects and duties of the corporation or to exercise the powers of the corporation

Dangerous activities

117. No person shall permit a condition to exist or carry on an activity in a unit or in the common elements if the condition or the activity is likely to damage the property or cause injury to an individual.

Compliance with Act

119. (1) A corporation, the directors, officers and employees of a corporation, a declarant, the lessor of a leasehold condominium corporation, an owner, an occupier of a unit and a person

19. Sur préavis raisonnable, l'association ou la personne qu'elle autorise peut entrer dans une partie privative ou dans les parties communes dont le propriétaire a l'usage exclusif à toute heure raisonnable pour réaliser la mission de l'association et accomplir les devoirs de celle-ci ou pour en exercer les pouvoirs.

Activités dangereuses

117. Dans une partie privative ou dans les parties communes, nul ne doit tolérer une situation de fait ni exercer une activité susceptibles d'endommager la propriété ou de causer des blessures à un particulier.

Observation de la Loi

119. (1) L'association, les administrateurs, dirigeants employés de celle-ci, le déclarant, le bailleur d'une association condominiale de propriété à bail, les propriétaires, les occupants de

having an encumbrance against a unit and its appurtenant common interest shall comply with this Act, the declaration, the by-laws and the rules.

Responsibility for occupier

(2) An owner shall take all reasonable steps to ensure that an occupier of the owner's unit and all invitees, agents and employees of the owner or occupier comply with this Act, the declaration, the by-laws and the rules.

Right against owner

(3) A corporation, an owner and every person having a registered mortgage against a unit and its appurtenant common interest have the right to require the owners and the occupiers of units to comply with this Act, the declaration, the by-laws and the rules.

parties privatives et quiconque est titulaire d'une sûreté réelle sur une partie privative et l'intérêt commun qui s'y rattache sont tenus d'observer la présente loi, la déclaration, les règlements administratifs et les règles.

Responsabilité pour l'occupant

(2) Le propriétaire prend toutes les mesures raisonnables pour veiller à ce que l'occupant de sa partie privative ainsi que tous ses invités, mandataires et employés ou ceux de l'occupant observent la présente loi, la déclaration, les règlements administratifs et les règles.

Droit par rapport aux propriétaires

(3) L'association, les propriétaires et quiconque est titulaire d'une hypothèque enregistrée sur une partie privative et l'intérêt commun qui s'y rattache ont le droit d'exiger que les propriétaires et les

occupants de parties privatives observent la présente loi, la déclaration, les règlements administratifs et les règles.

Ordonnance de conformité

134. (1) Sous réserve du paragraphe (2), un propriétaire, l'occupant d'une partie privative projetée, une association, un déclarant, un bailleur d'une association condominiale de propriété à bail ou le créancier hypothécaire d'une partie privative peut, par voie de requête, demander à la Cour supérieure de justice de rendre une ordonnance exigeant la conformité aux dispositions de la présente loi, de la déclaration, des règlements administratifs, des règles ou d'une convention intervenue entre deux associations ou plus en vue de l'utilisation, de la fourniture ou de l'entretien en commun ou du partage des frais des installations ou des services des parties à la

Compliance order

134. (1) Subject to subsection (2), an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of a leasehold condominium corporation or a mortgagee of a unit may make an application to the Superior Court of Justice for an order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules or an agreement between two or more corporations for the mutual use, provision or maintenance or the cost-sharing of facilities or services of any of the parties to the agreement.

Pre-condition for application

(2) If the mediation and arbitration processes described in section 132 are available, a person is not entitled to apply for an order under subsection (1) until the person has failed to obtain compliance through using those processes.

Contents of order

(3) On an application, the court may, subject to subsection (4),

- (a) grant the order applied for;
- (b) require the persons named in the order to pay,
- (i) the damages incurred by the

convention.

Condition préalable à la requête

(2) Si les processus de médiation et d'arbitrage visés à l'article 132 sont disponibles, aucune personne n'a le droit de demander, par voie de requête, que soit rendue une ordonnance en vertu du paragraphe (1) à moins que n'aient échoué ses tentatives au moyen de ces processus pour qu'il y ait conformité aux dispositions concernées.

Contenu de l'ordonnance

(3) Sur requête et sous réserve du paragraphe (4), le tribunal peut, selon le cas:

- a) rendre l'ordonnance demandée;
- b) exiger des personnes nommées dans l'ordonnance qu'elles paient :
- (i) le montant des dommages-

applicant as a result of the acts of non-compliance, and

(ii) the costs incurred by the applicant in obtaining the order; or

(c) grant such other relief as is fair and equitable in the circumstances.

intérêts accordés au requérant du fait de la non-conformité,

(ii) les frais engagés par le requérant en vue d'obtenir l'ordonnance;

c) accorder les autres mesures de redressement justes et équitables dans les circonstances.

ANALYSIS

[24] I will deal first with the Corporation's submission regarding the application judge's findings of fact. Second, I will deal with the submission that this court's decision in *Dvorchik* applies to the case at bar and that the application judge erred in failing to show deference to the Corporation's decision to require Level 5 remediation.

The findings of fact

[25] The application was decided based on affidavit evidence and the accompanying cross-examinations. Notwithstanding the fact that there existed factual disputes, the parties agreed that the court should proceed to hear and decide the matter on the record before it without the benefit *viva voce* evidence.

[26] The Corporation challenges several findings of fact made by the application judge. In oral argument it focussed on the following findings:

- a) there was no evidence that a Level 5 remediation was required in this specific case;
- b) Peter Adams, the engineer hired by the Corporation, did not report that such a high level of remediation was necessary because of the potential for mould dispersion from one unit to another nor did he say that overflowing drip pans pose a risk for mould contamination to other units;
- c) the Corporation's concern that mould would spread throughout the building was not supported by the Corporation's experts; and
- d) the Corporation did not act reasonably or keep an open mind concerning other less expensive ways of dealing with the problem.

[27] The Corporation submits that each of these findings is in error and discloses a misapprehension of the evidence. I disagree. The application judge's reasons provide a comprehensive review of the extensive materials filed. They outline the evidentiary basis for the various findings of fact made and, in my view, disclose no palpable and overriding error. I will address each of the four challenged findings in turn.

a) The need for a high level of remediation

[28] In challenging the application judge's finding that there was no evidence that a Level 5 remediation was required, the Corporation referred to various portions of the evidence that, it says, demonstrate the need for a high level of remediation. For example, the Corporation pointed to the evidence of Janet Valianes who testified that, although no report was prepared assessing the various options, she assumed from the fact that the consulting engineers had selected the high level of remediation option that they considered this level of remediation to be necessary. Although such an inference could be drawn from this evidence, it was up to the application judge to decide. She chose not to draw it. Further, even if the application judge had drawn that inference, it would not necessarily translate into evidence that this high level of remediation was required specifically for the FCUs in the respondents' units.

[29] All of the other evidence referred to by the Corporation in support of its submission on this point addresses the mould issue in a similarly global or generic way. I took the application judge's findings as applying specifically to the FCUs at issue in these proceedings: the FCUs located in the respondents' units. None of the evidence cited by the Corporation says that a high level of remediation is required for every FCU in the building nor does it specifically address the FCUs in the respondents' units. The application judge considered all of the evidence and chose not to draw the inference urged on her by the Corporation.

b) Peter Adams' report

[30] The Corporation submits that, contrary to what the application judge found, the Adams report concludes that the Level 5 remediation was required to prevent the spread of mould from one unit to another. In making this submission it relies principally on a statement made in his report regarding poorly functioning drip pans. That statement is as follows:

Poorly functioning drip pans are of a concern, as they can contribute large volumes of water to hidden areas within common elements or to other unit owners' spaces. Water from the drip pans can lead to damage at other locations and possible mould growth, putting other owners at risk of damage.

Later in his report, Adams concluded that the Reliable procedure "resulted in a partial solution that covered the problem and did not address the significant issue of overflowing drip pans."

[31] The Corporation submits that these excerpts are at odds with the application judge's finding that, although an overflowing drip pan can contribute to mould growth in the vicinity of the FCU in question, nothing in Peter Adams' report says that "this can pose a risk for mould contamination to other residential units in the building, as opposed to water damage."

[32] I disagree. The quotes from the Adams' report are ambiguous. They can reasonably support both the interpretation advanced by the Corporation and the interpretation made by the application judge. The application judge understood that the failure to correct the slope of the drip pans could lead to water damage in other units. She interpreted

the statements in Adam's report as indicating that, if other units suffered water damage as a result of overflowing drip pans, this, in turn, could lead to mould forming in those units. This, however, is different from mould contamination transferring from one unit to another. The application judge was focussed on the suggestion that mould can be transferred from unit to unit. She concluded that the report made no allegation in that regard. That was a finding open to her on the record.

c) The Corporation's concern that mould would spread throughout the building was not supported by the Corporation's experts

[33] Because the application had been brought pursuant to s. 117 of the Act, the application judge focussed on the Corporation's concern that the presence of mould in the respondents' units might affect the units of other residents or the common elements. In reaching the conclusion that mould is not transferred from one unit to another, the application judge relied in part on a statement to that effect. That statement was attributed to one of the Corporation's experts, Mr. White and was contained in the unsigned minutes of a special meeting of unit owners produced in the course of the litigation from the managers' files.

[34] The Corporation submits that the weight of the evidence is to the contrary and that it was inappropriate for the application judge to rely on this evidence rather than the evidence of another expert, Mr. Adams.

[35] I have dealt with the evidence of Mr. Adams in the previous section and found that it does not contradict the application judge's finding. With respect to the statement attributed to Mr. White, I find no error in the application judge having referred to the statement contained in the unsigned minutes. A business' records are admissible where they were made, and usually are made, in the ordinary course of business.^[4] As stated by the application judge, the minutes were prepared for the Corporation. They were produced by the Corporation from the manager's files and appended to her affidavit filed in the proceedings. The *Condominium Act* requires the Corporation to keep minutes of its meetings,^[5] and there was no suggestion that the statement contained therein was not made, was not accurate or was not consistent with his report filed in the proceedings.

d) The Corporation did not act reasonably

[36] The application judge also found that even if there were a basis for finding that a condition existed in the respondents' units that was "likely to damage the property or cause injury to an individual", she would have exercised her discretion and would have refused to grant the relief sought. This was because the Corporation had not considered less expensive alternatives than the one it imposed on all owners. She found this to be unreasonable, particularly in light of the Corporation's inability to show the existence of a risk that the mould could spread from one unit to another.

[37] Section 134 of the *Condominium Act* provides that compliance orders "may" be granted. The application judge

therefore retains a discretion and, on the evidentiary record and findings made, I see no basis to interfere with the exercise of her discretion on this point.

The Dvorchik Issue

a) The position of the parties

[38] According to the Corporation, the application judge ran afoul of the principles established by this court in *Dvorchik*. The Corporation submits that *Dvorchik* stands for the proposition that rules are only considered to be unreasonable where they are contrary to the legislative scheme of the *Condominium Act* or are clearly unreasonable. Unless the rule has been found to be unreasonable, trial judges are not entitled to substitute their opinion for that of the condominium corporation.

[39] The Corporation argues that, in the present case, it reached the decision that unit owners had to carry out Level 5 remediation based on the advice of experts. It was, therefore, clearly reasonable. This decision was in substance, if not in form, a rule and the application judge failed to apply the requisite deferential approach when evaluating this decision. Deference was required by *Dvorchik* and the application judge's decision should be set aside.

[40] The respondents submit that *Dvorchik* was a case about rules adopted by a condominium corporation pursuant to the *Condominium Act*. That decision has no application to the case at bar. In the present case the Corporation was

attempting to obtain forcible entry into the respondents' units to remedy a situation that was internal to the units.

b) The decision in *Dvorchik*

[41] In *Dvorchik*, the Corporation applied under s. 49(1) of the then *Condominium Act*, R.S.O. 1990, c. C.26, for an order directing the respondent to comply with a corporation rule that prohibited unit holders from having pets weighing more than twenty-five pounds. Section 49(1) is similar to s. 134(1) of the current *Condominium Act*.

[42] At first instance, Keenan J. found the rule restricting pet size to be invalid and unenforceable. He did so because the Condominium Corporation had failed to provide evidence proving that the twenty-five pound limit was reasonable.

[43] In allowing the appeal, the Court of Appeal made the following statement about the deference to be paid to condominium corporations:

The condominium board was not obliged to hear evidence in reaching its conclusion that larger pets be prohibited. In making its rules, the Board is not performing a judicial role, and no judicialization should be attributed either to its function or its process. In an application brought under s. 49(1), a court should not substitute its own opinion about the propriety of a rule enacted by a condominium board unless the rule is clearly unreasonable or contrary to the legislative scheme. In the absence of such unreasonableness, deference should be paid to rules deemed appropriate by a board charged with

responsibility for balancing the private and communal interests of the unit owners (para. 5).

c) Does *Dvorchik* apply?

[44] The court in *Dvorchik* was considering the enforcement of a rule adopted by a condominium corporation pursuant to s. 29(1) of the previous *Condominium Act* (s. 58 of the current *Condominium Act*). The rule adopted in that case clearly fell within the scope of the rule-making authority of the condominium board. The operative section of the Act specified that the condominium corporation's rule-making power was only limited by the requirements that the rules be "reasonable" and "consistent" with the *Condominium Act*.

[45] The case at bar does not involve a rule, and the sections relied on by the Corporation do not contain language similar to s. 29 of the previous Act. The *Dvorchik* decision is, therefore, clearly distinguishable on its facts.

d) Should the principles in *Dvorchik* be extended to apply in the present case?

[46] The Corporation argues that its judgment that, absent a Level 5 remediation, a dangerous situation will be allowed to exist in those units is a reasonable one made with the benefit of expert advice. As a result this decision should be given the same deference as provided in *Dvorchik* without regard to the fact that it is not a "rule" or "by-law" of the Corporation.

[47] In my view, *Dvorchik* should not be extended to the present case. I say this for two reasons. First, the decision by the Corporation that it would not seek to structure the remediation requirement as a rule creates an important distinction from *Dvorchik*. Second, this case raises both different and competing rights and duties under the *Condominium Act*.

[48] It is important not to lose sight of the fact that the Corporation chose to frame its application as a dispute with respect to the interpretation of ss. 117, 119 and 134 of the *Condominium Act* and not as “a disagreement between the parties with respect to the declaration, by-laws or rules” of the corporation (see s. 132(4) of the *Condominium Act*). Whether or not the remediation requirement could be made into a rule, the Corporation appears to have chosen not to make it a rule so as to avoid the s. 134(2) requirement to go to mediation or arbitration as a precondition to any court application. Thus, the Corporation’s failure to adopt the requirement for Level 5 remediation as a “rule” is more than semantics. It reflects a strategic decision by the Corporation. By choosing this route, the Corporation cannot benefit from the statutory provision relied on in *Dvorchik*.

[49] More importantly, in the present case, the court is being called upon to enforce a decision of the Corporation that, unlike *Dvorchik*, is not within the Corporation’s exclusive area of responsibility. Here there are competing obligations and duties. The *Condominium Act* provides that unit holders are responsible for the maintenance of their units.^[6] The Corporation only has authority to interfere with and override

these unit holders’ responsibilities and obligations where the unit holder has failed in his obligation to such a degree that a risk outlined in s. 92(3) or a condition likely to damage the property or cause injury to an individual as described in s. 117 is allowed to exist and continue.^[7]

[50] As the statutory rights and obligations of both parties are engaged, a careful balancing is required. There is no statutory or principled reason why deference should be afforded to the Corporation’s decision on the facts of this case.

CONCLUSION

[51] For these reasons, I would dismiss the appeal. I would award the respondents their costs on a partial indemnity basis fixed at \$10,000 inclusive of GST and disbursements.

“Paul S. Rouleau J.A.”

“I agree R.A. Blair J.A.”

“I agree K.M. Weiler J.A.”

RELEASED: June 21, 2006

^[1] Property is defined in the *Condominium Act*, 1998, S.O. 1998 c. 19 as follows: “‘Property’ means the land, including the buildings on it, and interests appurtenant to the land, as the land and interests are described in the description and includes all land and interests appurtenant to land that are added to the common elements”.

^[2] The *Condominium Act*, 1998, s. 117.

^[3] The *Condominium Act*, 1998, s. 117.

^[4] *Evidence Act*, R.S.O. 1990, c. E23, s. 35.

^[5] *The Condominium Act*, 1998, s. 55(1).

^[6] The *Condominium Act*, 1998, s. 90(1).

^[7] Section 92(3) of the *Condominium Act*, 1998 provides that if an owner fails to carry out his or her maintenance obligations within a reasonable time and “if the failure presents a potential risk of damage to the property or the assets of the corporation or a potential risk of personal injury to persons on the property, the corporation may do the work necessary to carry out the obligation.” This is substantially the same as the combined effect of ss. 19, 117 and 119.

(1) An owner, a corporation, a declarant or a mortgagee of a unit may make an application to the Superior Court of Justice for an order under this section.

Grounds for order

(2) On an application, if the court determines that the conduct of an owner, a corporation, a declarant or a mortgagee of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant, it may make an order to rectify the matter.

Contents of order

(3) On an application, the judge may make any order the judge deems proper including,

(a) an order prohibiting the conduct referred to in the application; and

(b) an order requiring the payment of compensation. 1998, c. 19, s. 135 (3).

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

categories. Unfair prejudice and unfair disregard are less rigorous tests than oppression.

[5] The following discussion of the law of oppression in a company law context is taken from Markus Koehnen “*Oppression and Related Remedies*”, 1st ed. (Toronto: Caswell, 2004), at pp. 79-84.

[6] Oppression is conduct that is coercive or abusive. Oppression has also been described as conduct that is burdensome, harsh and wrongful, or an abuse of power which results in an impairment of confidence in the probity with which the company’s affairs are being conducted.

[7] Unfair prejudice has been found to mean a limitation on or injury to a complainant’s rights or interests that is unfair or inequitable. Koehnen cites examples of unfair prejudice from corporate cases, including:

- squeezing out a minority shareholder because of a personal desire to exclude her;
- failing to disclose related party transactions in financial statements;
- amalgamating two corporations and thereby transferring the minority’s interest from a corporation with a very low debt equity ratio to a very high debt equity ratio;
- paying management fees to certain shareholders to the exclusion of others;
- paying dividends without formal declaration.

[8] Unfair disregard means to ignore or treat the interests of the complainant as being of no importance. Examples cited by Koehnen include:

- failing to prosecute the claims of a corporation diligently where one of the directors benefited from the improper prosecution;
- reducing a shareholder's dividend by setting off the value of other benefits against it when this had not been done in the past;
- failing to deliver property that belonged to the complainant.

[9] Koehnen comments that courts in Ontario have held that the use of the word “unfairly”, to qualify the words “prejudice” and “disregard”, suggest that some prejudice or disregard is acceptable provided that it is not unfair.

Governance of the Corporation:

[10] The affairs of this Corporation are subject to the provisions of the *Act* and of the Corporation's registered declaration, by-laws and rules.

[11] Section 17 of the *Act* imposes a duty on a corporation to manage the property of the corporation on behalf of the owners and to take all reasonable steps to ensure that owners comply with the *Act*, the declaration, the by-laws and the rules.

[12] Section 119 of the *Act* imposes a duty on, among others, a corporation, the directors and owners to comply with the *Act*, the declaration, the by-laws and the rules.

[13] Section 115 of the *Act* imposes a trust on monies received for the benefit of a corporation.

[14] Section 58 of the *Act* empowers the directors to make rules respecting the use of the common elements and units, (a) to promote the safety of the owners and the assets of the corporation and (b) to prevent unreasonable interference with the use and enjoyment of the common elements and units.

[15] The declaration, the rules and the by-laws each contain indemnification provisions, obligating unit owners to indemnify the Corporation for damage caused by the owners to the common elements. Unit owners are required to pay for repairs within the boundaries of their units.

[16] The Corporation enacted By-law Number 5 in June 2002. This widened the indemnification provisions to include indemnification by unit owners of legal costs incurred by the Corporation, including the cost of legal advice given to the Corporation.

[17] The affairs of the Corporation are managed by the board of directors, pursuant to s. 27 of the *Act*. The board, which is made up of volunteers, is elected by the owners. The board hires a management company to deal with day-to-day matters.

[18] The Ontario Court of Appeal, in *York Condominium Corp. No. 382 v. Dvorchik* (1997), CarswellOnt 219 (C.A.) held that the only limitation on the authority of the board of directors to make rules was that the rules be reasonable and consistent with the *Act*. In making the rules, the board is not performing a judicial role. The board is not obliged to hear evidence in reaching its conclusion and setting down its rules. The courts are to pay deference to the rules deemed appropriate by a board, which the Court of Appeal recognized is charged with the responsibility of balancing the private and communal interests of the unit owners.

[19] I will deal with the claims of Mr. Niedermeier for compensation, following the categories enumerated above.

(1) *Reimbursement of common expenses as compensation for denial of access to the common elements of the Corporation:*

[20] In 2000, Mr. Niedermeier was directing a cube van under the canopy of the Corporation's building. The van scraped the canopy. The Corporation incurred a cost of \$53.50 to repair the damage. In 2000, Mr. Niedermeier brought a used washing machine from the garbage area of the Corporation's building to his unit. Fluid spilled from the machine, staining the carpet of the corridor of the building. The Corporation incurred a cost of \$88.10 to clean the carpet. The Corporation requested Mr. Niedermeier to indemnify it for the costs for repair of the canopy and for cleaning the carpet, totalling \$141.60. Mr. Niedermeier took the position that the repair costs of \$53.50 for the canopy were excessive and that he should not pay the cleaning cost of \$88.10 because he was paying monthly maintenance fees to the Corporation. Mr. Niedermeier did not deny that he was responsible for the damage to the canopy and the staining of the carpet.

[21] As previously noted, the declaration, rules and the by-laws of each contain indemnification provisions, which obligated Mr. Niedermeier to indemnify the Corporation for the damage he caused to the common elements, i.e. the damage to the canopy and the staining of the carpet.

[22] The costs claimed by the Corporation for each of these incidents were paid by the Corporation to third parties. Invoices for the costs are included in the motion materials. Mr. Niedermeier acknowledges that the damage occurred. There is nothing to indicate that the Corporation should not have paid the invoices of \$53.50 and \$88.10. Mr. Niedermeier admits that he "elected not to pay" the \$141.60 when he was asked to do so

in 2000. The Corporation wrote to Mr. Niedermeier on March 17, 2000, requesting indemnification. A second letter was sent June 30, 2000. On January 16, 2001, Mr. Niedermeier met with the President of the board of directors to discuss the issue. Mr. Niedermeier did not make any offer as to what he was willing to pay. A third letter was sent May 1, 2001, at which time the Property Manager, Rick Allan, on behalf of the Corporation indicated that if the amount was not paid by May 15, 2001, Mr. Niedermeier's access to the lounge, library, exercise room, and sauna would be cancelled, and a charge back of \$141.60 would be filed against his unit.

[23] Mr. Niedermeier did not pay the account. On May 15, 2001, Mr. Niedermeier's striker card was cancelled to deny him access to the above-mentioned rooms.

[24] The Corporation again wrote to Mr. Niedermeier on August 28, 2001, requesting payment and confirming that his access to the rooms would remain cut off until payment was received. Another letter was written by the Corporation on November 27, 2001. The letter confirmed a meeting on that date between Mr. Allan and Mr. Niedermeier, at which time Mr. Allan suggested that if \$141.60 was too much to pay in one payment, Mr. Niedermeier could make monthly payments, even as low as \$5.00 per month. Mr. Niedermeier stated that the costs were excessive. Mr. Allan suggested that Mr. Niedermeier write to the board to advise what he thought would be a reasonable cost that he would be willing to pay. In anticipation of Mr. Niedermeier's letter to the board, his access to the areas was reinstated. The letter indicates that although Mr. Niedermeier's access to the rooms had been cut off since May 15, 2001, the building superintendent had in fact observed Mr. Niedermeier using the rooms.

[25] On August 19, 2002, Mr. Niedermeier sent the board a letter requesting a meeting to talk about the outstanding payments. The board invited Mr. Niedermeier to a meeting on

October 8, 2002. Mr. Niedermeier met with the board on October 8, 2002, and stated his position. The board then offered to reduce the amount of \$120.00, if paid within 10 days. On October 25, 2002, Mr. Niedermeier paid the Corporation \$100.00. He wrote the board on January 21, 2003 and stated that:

this amount represents more than an overpayment of the matters in question. After all, the damages that happened to the canopy and the rug in the corridor were accidental and were not willfully caused by me. After all, I am a homeowner in this condominium complex and am paying my monthly maintenance fees and should not be required to pay for repairs and cleaning in addition to those fees.

Mr. Niedermeier refused to pay the remaining \$20.00 and stated that “Mr. Allan should pay it out of his own pocket and call the matter closed.” The board responded by letter dated February 12, 2003, indicating that the \$120.00 was for repairs caused by Mr. Niedermeier’s negligence and that repairs were not covered by the monthly maintenance fee. The \$20.00 remains outstanding.

[26] It is acknowledged by the Corporation that it did not have a written rule with respect to termination of access to the rooms for failure to pay an outstanding account. Mr. Allan testified in cross-examination that the property managers and the board had decided after discussing Mr. Niedermeier’s situation, to terminate his access to the rooms, “out of frustration”, to hopefully get Mr. Niedermeier to pay the bill. He further testified that this decision to cut off access to common rooms was implemented in “extreme cases”. He cited as an example someone leaving the party room in a mess, resulting in a clean up fee which, if not paid, would result in that room being cut off for a month or so.

[27] Mr. Niedermeier submits that the termination of his access to the rooms for a period of 6 months was “oppressive”. He describes the conduct of the Corporation in this regard as harsh, burdensome, an abuse of power, vindictive, high-handed and malicious. It was conduct, he submits, which is not authorized by the *Act*. Mr. Niedermeier contends that the Corporation should have sued him in Small Claims Court instead.

[28] Mr. Niedermeier submits that as a remedy, he should receive reimbursement of his common expenses of \$414.00 per month.

[29] The Corporation acknowledges that termination of access to the rooms was a self-help remedy which, although not authorized by the *Act*, was the most practical way of setting the matter right. The Corporation takes issue with Mr. Niedermeier’s submission that he had an absolute right to use of the common elements. The Corporation refers to s. 116 of the *Act*, which provides that the owner may make “reasonable use” of the common elements, subject to the *Act*, the declaration, the by-laws and the rules. The Corporation submits that if Mr. Niedermeier’s access to the rooms had been cut off for no reason, that would probably amount to oppression. But the Corporation contends this issue was about \$141.60 that Mr. Niedermeier was obligated to pay.

[30] I am not satisfied, in the circumstances of this case, that Mr. Niedermeier has established that the action of the Corporation in terminating his access to the common rooms was oppressive within the meaning of the *Act*.

[31] I am satisfied that Mr. Niedermeier did owe the Corporation \$141.60 by way of indemnification for damages caused to him to the common elements. He admits he did the damage. The declaration, by-laws and rules require him to reimburse the Corporation. The expenses of \$53.50 and \$88.10

appear reasonable. They are not arbitrary numbers. They were invoices rendered by third parties retained by the Corporation to remedy the damage caused by Mr. Niedermeier. Mr. Niedermeier was given ample opportunity to indemnify the Corporation before his access was terminated. The Corporation sent four letters over the course of more than a year, requesting payment before terminating Mr. Niedermeier's access. Mr. Niedermeier had a meeting with the President of the board four months before the board took action. He made no offer to pay for approximately 1½ years. In these circumstances, I do not find the Corporation's actions to be abusive, burdensome or harsh. Those words denote mistreatment, injury, conduct which is excessively severe, hard to bear. Although the Corporation acted without authorization from the *Act*, or an express rule or policy, I am not satisfied that there was the requisite abuse of power or harsh and wrongful conduct to bring the oppression remedy into play. Although Mr. Niedermeier did not argue that the Corporation's conduct amounted to "unfair prejudice" or "unfair disregard", I do not find that the Corporation's conduct met those lesser tests of the oppression remedy having regard by way of analogy to the examples cited by Koehnen from company cases. This is not a situation where an innocent party has been taken advantage of in an unfair way by a dominant party. This is not to say that termination of an owner's access to common elements cannot constitute oppression. However, on the facts of this case, Mr. Niedermeier has not persuaded me that he was oppressed. While the steps chosen by the Corporation may be subject to criticism for not following written policy, Mr. Niedermeier's conduct in this matter is not above reproach, for failing to pay a debt that was, by written policy, due to the Corporation.

[32] With respect to the compensation claimed, there is no evidence before me to support the claim that Mr. Niedermeier should be refunded his common expenses for six months. The common expenses include many matters, other than the 5 rooms in question, for example, utilities, insurance,

maintenance, repairs, a reserve fund, waste disposal, cable television, snow removal, landscaping, management fees. There is no estimate provided as to what portion of the common expenses can be attributed to the rooms. Moreover, it appears that Mr. Niedermeier did in fact have some access to at least the lounge during the six months.

2. *Reimbursement of legal fees incurred by Mr. Niedermeier arising out of a parking space incident at the Corporation:*

[33] On June 12, 2003, Ms. Shoales, a unit owner at the Corporation, advertised a parking space for rent. Mr. Niedermeier left a message for Ms. Shoales that he was interested in renting the parking space. On June 13, 2003, Ms. Shoales attended at the management office and stated she did not want to rent her space to Mr. Niedermeier. Later that afternoon Ms. Shoales re-attended and told Mr. Allan of the management office that Mr. Niedermeier had parked his car in her space and she wanted it removed. Mr. Allan left a message on Mr. Niedermeier's telephone and told him to remove his vehicle. Mr. Niedermeier called Mr. Allan the next day and told him it was not his vehicle. He says he was called an idiot and told he had committed a criminal offence. Mr. Allan explained that he had been called by Ms. Shoales and had acted on her information. Mr. Allan apologized twice for the inconvenience. Mr. Allan indicates that Mr. Niedermeier then left a series of threatening telephone messages. Mr. Allan wrote to Mr. Niedermeier on July 3, 2003, explaining how he had come to contact Mr. Niedermeier on the complaint by Ms. Shoales. On July 15, 2003, Mr. Niedermeier wrote to the board, requesting a meeting. On that day, July 15, 2003, Mr. Niedermeier met with the President of the board after Mr. Niedermeier, by telephone, requested a meeting. On July 16, 2003, the board wrote a letter of apology to Mr. Niedermeier. Mr. Niedermeier testified in cross-examination that he understood that the board was apologizing to him for any

inconvenience as a result of the mistake concerning the car parked in Ms. Shoales' spot. Mr. Niedermeier wrote a letter on July 19, 2003, again asking for a meeting with the board, having received the July 16, 2003, letter of apology. He wrote, in part:

Mr. President; once more I have to waste my precious time, begging you again for a serious Collective Board of Directors discussion.

How on earth can the Board of Directors reach a conclusive resolution without my presence?

Quite frankly, It speaks for itself that there is a huge Pattern of serious ill decisions, Cover up, Brain wash, Fabrications, Not to mention illicit activities throughout some time on a Army of Egomaniacs in this Corporation.

[34] On August 14, 2003, the board replied by letter to Mr. Niedermeier. The letter stated:

Dear Mr. Niedermeier:

Your letter dated July 19th to Bob Girard was addressed at our board meeting last week. It would appear that you do not believe the Board of Directors had all the facts concerning the incident of the indoor parking space. Such is not the case.

Your meeting with Mr. Girard on July 15th confirmed the facts that led to a false assumption concerning the car parked in 1350 parking garage. There was certainly no “cover-

up” or “fabrication”. We acknowledge that an error was made.

We apologized for any inconvenience that this situation caused. More we cannot do. We now consider this matter closed and trust you will do so too.

Yours sincerely,

[35] By letter dated September 19, the board wrote to Mr. Niedermeier, again acknowledging and apologizing for the error over the parking issue. The letter advised him that the issue was closed and that a meeting with the board would serve no purpose. Mr. Niedermeier responded with a letter dated September 29, 2003, threatening litigation against the Corporation “for their actions of cruelty and illicit action”. The Corporation responded by letter dated October 29, 2003, stating that the parking space incident was no longer open to discussion; but if there were other issues, Mr. Niedermeier could submit those in writing. A director of the Corporation, Mr. Fuller, met with Mr. Niedermeier on November 12, 2003.

[36] In December 2003, Mr. Niedermeier hired a paralegal, Legal Concepts Inc., who raised the parking issue again, and among other things, renewed the request to meet with the board.

[37] Mr. Niedermeier again wrote the board on September 30, 2004 requesting an opportunity to present his version of the parking incident in person.

[38] The board agreed by letter dated October 6, 2004, to have Mr. Niedermeier attend the meeting of the board on November 3, 2004. On October 7, 2004 Mr. Niedermeier advised that he intended to bring legal counsel to the directors’

meeting. The board decided that it would not meet with Mr. Niedermeier and his counsel unless the board also had its lawyer present, and unless Mr. Niedermeier advised the board in writing of the specific issues he wanted to address at the meeting. The board so informed Mr. Niedermeier by letter dated October 13, 2004. On November 2, 2004, Legal Concepts Inc. wrote to the board, advising that Mr. Niedermeier no longer required a lawyer at the board meeting, but would have a paralegal present. The board replied November 2, 2004, advising it was too late for the board to reconsider its decision not to invite Mr. Niedermeier to its November 2, 2004 meeting.

[39] On November 2, 2004, the board commenced its meeting. Mr. Niedermeier appeared at the door of the room and began pounding on the door, demanding access. After approximately 15 minutes, Mr. Niedermeier left the area.

[40] I recite this lengthy background regarding the parking space incident to give context to the claim by Mr. Niedermeier for reimbursement for legal fees which he states were incurred by him arising out of the incident.

[41] On August 21, 2003, the Corporation sent to Mr. Niedermeier an account from the Corporation's lawyer, Fine & Deo, for \$429.47, rendered by the solicitors to the Corporation on July 31, 2003. The services were stated by the Corporation to have been rendered due to harassment of Mr. Allan and a unit owner (Ms. Shoales). The amount was described as a charge back fee to Mr. Niedermeier's unit. On February 26, 2004 the Corporation sent another letter to Mr. Niedermeier, this time with an account from the solicitors for the Corporation for \$338.66, regarding Mr. Niedermeier's request for a meeting.

[42] Mr. Niedermeier had retained his own solicitor, Sara Zakir, who wrote the Corporation on March 24, 2004, denying

Mr. Niedermeier's responsibility for the two accounts. She ended her letter by stating:

Because of the position taken by the Board and Management, Mr. Niedermeier has had to incur legal fees of his own. Should the Corporation and Management continue to take the position that Mr. Niedermeier is liable for the aforementioned chargeback, Mr. Niedermeier will be seeking to recover his legal costs from the Corporation.

[43] On April 29, 2004, the Corporation wrote to Mr. Niedermeier, referring to Ms. Zakir's letter. The Corporation stated:

We have sought counsel and it is their opinion that these costs do not fall within the areas recoverable by placing a lien. Therefore, we are placing them in abeyance and not proceeding with the legal action.

[44] Mr. Niedermeier submits that the Corporation has been guilty of oppressive conduct and unfair disregard of his interests in trying to levy as charge-backs the Corporation's legal fees arising out of the parking lot issue. He seeks \$1,735.00 for the account of Legal Concepts Inc. and \$2,475.00 for the account of Sarah Zakir, as compensation under the oppression remedy. Mr. Niedermeier submits that the oppression remedy can be used as a tool to bring back balance where one party has been able to leverage its position.

[45] The Corporation submits that there is no obligation on the board to meet with unit owners. In fact, the President and a Director met with Mr. Niedermeier on this issue and there were

several letters of apology from the board. The Corporation also refers to Mr. Niedermeier harassing Ms. Shoales, including multiple messages left by Mr. Niedermeier on her answering machine, together with four to five occasions when Mr. Niedermeier attended at her unit and knocked on her door, and a strongly worded letter of April 22, 2004, where Mr. Niedermeier demanded that Ms. Shoales pay his legal fees for wrongly accusing him (of parking in her parking space), failing which he would commence action against her for libel and slander.

[46] The Corporation submits that it was reasonable for the Corporation to seek legal advice within the context of Mr. Niedermeier's conduct over this issue. The Corporation contends that it would be remiss in its duties if it did not seek legal advice on the question of harassment of Ms. Shoales. The Corporation submits that it is beyond dispute that it had a right under the by-laws to claim indemnification for its legal costs. The only issue was whether it could impose a charge-back or lien for those costs. The Corporation in fact could not lien those costs.

[47] I am of the opinion that Mr. Niedermeier's claim for reimbursement for his legal and paralegal fees as compensation for oppressive conduct and unfair disregard cannot succeed. Mr. Niedermeier submits that the oppression complained of consisted of the attempt to charge back to his unit the amounts of the two accounts of the solicitors for the Corporation. Given the tortured history of the parking space issue and Mr. Niedermeier's unrelenting demands, it was reasonable for the Corporation to seek legal advice. It was also within the rights of the Corporation to seek indemnification for its costs, as provided for by By-law No. 5. The fact that the indemnification could not be enforced by a charge-back, as it had once claimed, does not mean that it therefore acted in an abusive, burdensome or harsh manner, or that it unfairly disregarded the rights of Mr. Niedermeier. There is no reasonable parallel here to the

examples of oppressive conduct and unfair disregard from the company law cases.

[48] The accounts of Legal Concepts Inc., for which Mr. Niedermeier claims compensation are almost entirely devoid of detail. One cannot determine what the charges relate to, even to the extent of determining whether they relate to Mr. Niedermeier's dealings with the Corporation. The account of Ms. Zakir which is presented by Mr. Niedermeier for reimbursement under the oppression remedy consists in large part of entries regarding one Marc Richard and litigation in which he was involved, none of which has been related to the matters in issue here. There is one reference in Ms. Zakir's account, to a meeting of 1.3 hours on March 23, 2004, with Mr. Niedermeier, at which Mr. Richard's case was discussed and at which Ms. Zakir reviewed the issue of the charge-back and received instructions to write to the Corporation. There is no breakdown of how much of the 1.3 hour meeting concerned itself with the issues here. I also note that Ms. Zakir's letter of March 24, 2003 indicated that if the Corporation continued with the charge-back, Mr. Niedermeier would seek to recover his legal costs. The Corporation responded that it would not pursue the charge-back.

3. *Reimbursement of legal fees incurred by Mr. Niedermeier with respect to a criminal charge on which he was found guilty:*

[49] On November 18, 2004, at about 6:45 a.m., Mr. Girard, the President of the Corporation, went to the Corporation's underground garage to pick up a box from his car. While he was picking up the box from the back seat of the car, Mr. Niedermeier approached him. Mr. Niedermeier stood less than a meter away and yelled at Mr. Girard. Mr. Niedermeier then said "How much longer you want to live for?" Mr. Girard yelled for help. Mr. Niedermeier then called him a coward, spit in Mr. Girard's face and headed towards his own vehicle. Mr.

Girard, who was fearful for his safety, reported the incident to the police. The police charged Mr. Niedermeier with assault. Mr. Niedermeier was convicted of assault on December 1, 2005.

[50] Mr. Niedermeier now claims that he should be compensated by the Corporation for his legal fees of \$930.00, incurred with P.A.I.N.S. and Associates Inc., for his criminal charge, on the basis that he has been oppressed. As I understand the submission, it is this:

1. After the police charged Mr. Niedermeier, Mr. Girard did not show sufficient interest in the charge to follow-up with the police (although he attended at the trial and Mr. Niedermeier was convicted).
2. The Corporation brought a civil action against Mr. Niedermeier about one month after the criminal charge, for a restraining order.
3. Mr. Niedermeier consented to an order in that civil action on April 8, 2005, restraining him from contacting Mr. Guard and his wife.
4. Therefore it was not necessary to proceed with the criminal charge and Mr. Niedermeier should not have had to incur legal fees in relation to the charge.

[51] I am at a loss to understand the merits of this submission. The police, not Mr. Girard and not the Corporation, charged Mr. Niedermeier with assault. Mr. Niedermeier was convicted of the offence. Mr. Niedermeier consented to the restraining order. There is nothing to indicate he did so on some understanding that the criminal charge

would not proceed. Because the charge was laid by the police, and not by private information, any decision to withdraw the charge was for the police and the Crown to make. The Corporation had no authority to “withdraw” the charge. There is nothing remotely suggestive of oppression by the Corporation as regards this issue.

4. *Reimbursement of legal fees incurred by Mr. Niedermeier with respect to a civil action brought against him by the Corporation which was settled by a consent order:*

[52] This pertains to the restraining order referred to immediately above. The Corporation brought an application against Mr. Niedermeier, for an order that he comply with s. 117 of the *Condominium Act*. Section 117 provides:

No person shall permit a condition to exist or carry on an activity in a unit or in the common element ... if the condition or the activity is likely to damage the property of or cause injury to the individual.

[53] On consent, the Corporation and Mr. Niedermeier agreed to an order, granted by Klowak J. on April 8, 2005, restraining Mr. Niedermeier from harassing or intimidating the staff and directors of the Corporation, and in particular Mr. Girard and his wife. Mr. Niedermeier was prohibited for a period of 24 months from coming within 5 meters of those individuals or talking to them. Of particular significance to the claim before me, the order provided that the parties would bear their own legal costs.

[54] It is unclear to me how Mr. Niedermeier can now claim his costs of that application, incurred with one Jennifer Morgan, Law Clerk, apparently in the sum of \$3,860.00. The

matter is *res judicata*. In any event, I can find no oppressive conduct by the Corporation related to that application.

5. *Compensation for mental anguish and stress:*

[55] Mr. Niedermeier submits that the Corporation engaged in a pattern of conduct, beginning in 2000 with the Corporation's attempts to recover the \$141.60 for the damage to the canopy and the staining of the carpet, termination of access to the 5 rooms, progressing through the parking incident, and ending with the civil and criminal proceedings, as a result of which he has suffered stress and anguish and for which he wants compensation in addition to reimbursement of his legal fees. Mr. Niedermeier submits he should recover \$5,000.00 to \$10,000.00 under the oppression remedy, for what he says has been "a difficult situation".

[56] No medical or psychological evidence was presented. The only evidence appears to be the allegations by Mr. Niedermeier that this was all very stressful for him and that anger and resentment built up in him over the failure or refusal of the board and management to respond as he believed they should.

[57] By reason of the fact that I have found that Mr. Niedermeier has not proven oppressive conduct on the part of the Corporation, there is no basis for me to award compensation or damages for stress and anguish.

6. *Compensation for personal expenses incurred by Mr. Niedermeier.*

[58] Mr. Niedermeier had sought \$1,500.00 on May 6, 2005 for loss of four days work, plus correspondence and typing services in connection with these matters. He now claims to have missed another two days of work, which he says brings his claim to \$2,000.00.

[59] This claim must fail because I have found no oppressive conduct by the Corporation.

Conclusion:

[60] For the reasons given, I dismiss the application of Mr. Niedermeier.

[61] If the parties are unable to agree upon costs, I will receive written submissions by July 15, 2006, delivered to Thunder Bay.

The Hon. Mr. Justice D. C. Shaw

Released: June 23, 2006

Citation: 2004TCC406
Date: 20040610
Docket: 2003-2489(GST)|
BETWEEN:
THE OWNERS: CONDOMINIUM PLAN NO. 9422336,
Appellant,
and

HER MAJESTY THE QUEEN,
Respondent.

REASONS FOR JUDGMENT

McArthur J.

[1] This is an appeal from an assessment of goods and services tax (GST) by the Minister of National Revenue (the Minister) under the *Excise Tax Act* (the *Act*) for \$19,860 tax, \$3,193 penalty and \$2,478 interest for the period May 1, 1998 to April 1, 2000. The Appellant was represented by a unit owner, Mr. Gordon McIntosh, who was also a director of the condominium board.

[2] The Appellant is a corporation constituted according to the *Condominium Property Act (CPA)*^[1] of Alberta. It managed a commercial condominium in the Strathcona Business Park in Edmonton. It collected condominium fees from the 132 unit-owners including \$136,058 for the one-year period ending April 30, 1999 and \$147,666 for the period ending April 30, 2000, for a total of \$283,724. Residential condominiums are specifically exempt from GST under the *Act*, but commercial condominiums are not.

[3] At the outset of trial, the Respondent requested that an adjournment be granted to permit the Respondent to review the Appellant's documentation with respect to an application for input tax credits (ITCs) pursuant to subsection 169(4) of the *Act*. The Appellant's agent was not interested in that approach and at his request the hearing proceeded. Further, the Respondent asked for an adjournment to permit

the Appellant to notify the Attorney General of each province with respect to a possible constitutional challenge in that it appeared the Appellant is stating that the *CPA*, Alberta legislation (section 65), takes precedence over the *Excise Tax Act*. Again, I decided not to grant such adjournment before hearing the Appellant's argument.

[4] The Appellant made taxable supplies of administrative and management services to the owners of the units in the condominium complex for consideration equal to at least the amount of the condominium fees it received of \$136,058 for the reporting period ending April 30, 1999 and \$147,666 for the reporting period ending April 30, 2000. The Appellant was required to collect and report 7% of both amounts being \$9,524 for the period ending April 30, 1999 and \$10,336 for the period ending April 30, 2000 pursuant to subsection 165(1) and insufficient information was provided for ITCs in accordance with subsection 169(4).

[5] The Appellant's primary position is that it is strictly an agent for the owners, its principals, and acted as such at all times and was never engaged in a "commercial activity". It adds that it provides administrative services as directed by the owners in helping with the *CPA* and its own by-laws. In this vein, the Appellant's principal (the owners) can by resolution, dissolve the Appellant (section 60 of the *CPA*) and can acquire or dispose of any of the Appellant's interest in real property. Upon terminating the Appellant condominium corporation, the owners can transfer ownership of the real property previously retained by the Appellant.

[6] Mr. McIntosh presented secondary arguments including: (a) pursuant to section 65 of the *CPA*, the Appellant is not liable for GST; and (b) the Appellant did not provide "taxable supplies" as defined in the *Act* and does not meet the definition of "commercial activity" (section 123).

Analysis

[7] The Appellant's agency argument is, by far, its strongest position and I will deal with it first. If the Appellant can establish that its relationship with the owners was one at law of principal and agent then the payment of condominium fees does not attract GST because the owners remained the beneficial owners of the condominium fees simply directing their agent (the Appellant) to pay for the maintenance of their units and their common elements.

[8] Mr. James Thomas Clarke was the only witness and he represented himself together with all the other owners. Through him several documents were entered including the Appellant's by-laws, correspondence with Canada Customs and Revenue Agency (CCRA), the Appellant's financial statements for the years in question, and title documents. I allowed these documents over counsel for the Respondent's objections. As an owner and director of the Appellant, he had personal knowledge of all entries. Mr. Clarke testified that the Appellant managed the real property, keeping its own separate bank account, repairing and maintaining the real property and paying the maintenance bills. He admitted the Appellant could borrow funds, employ personnel, hire a management firm and generally take all the actions necessary to manage and maintain the common elements. For practical purposes, what the owners maintained exclusively was the interior of their unit from the paint inward.

[9] Pursuant to subsection 6(2) of the *CPA* title to the common property is held by the owners. Subsections 6(1) and (2) provide:

6(1) The Registrar, in issuing a certificate of title for a unit, shall certify on it the owner's share in the common property.

6(2) The common property comprised in a registered condominium plan is held by the owners of all the units as tenants in common in shares proportional to the unit factors for their respective units.

(emphasis added)

Subsections 25(1), (2) and (3) provide:

25(1) On the registration of a condominium plan, there is constituted a corporation under the name "Condominium Corporation No. ___" and the number to be specified is the number given to the plan registration.

25(2) A corporation consists of all those persons

(a) who are owners of units in the parcel to which the condominium plan applies, or

(b) who are entitled to the parcel when the condominium arrangement is terminated pursuant to section 60 or 61.

25(3) Without limiting the powers of the corporation under this or any other Act, a corporation may

(a) sue for and in respect of any damage or injury to the common property caused by any person, whether an owner or not, and

(b) be sued in respect of any matter connected with the parcel for which the owners are jointly liable.

(emphasis added)

Subsection 28 provides:

28(1) A corporation shall have a board of directors that is to be constituted as provided by the bylaws of the corporation.

28(2) Every member of a board shall exercise the powers and discharge the duties of the office of member of the board honestly and in good faith.

28(3) Where a member of the board has a material interest in any agreement, arrangement or transaction to which the corporation is or is to become a party, that person

(a) shall declare to the board that person's interest in the agreement, arrangement or transaction,

(b) shall not vote in respect of any matter respecting that agreement, arrangement or transaction, and

(c) shall not be counted when determining whether a quorum exists when a vote or other action is taken in respect of the agreement, arrangement or transaction.

28(4) Subsection (3) does not apply to an agreement, arrangement or transaction in which the member of the board has a material interest if that material interest exists only by virtue of that member of the board owning a unit.

28(5) A corporation shall, within 30 days from the conclusion of the corporation's annual general meeting, file at the land titles office a notice in the prescribed form stating the names and addresses of the members of the board.

28(6) Notwithstanding subsection (5), a corporation may at any time following a change in

(a) the membership of the board,

(b) the name of a member of the board, or

(c) the address of a member of the board,

file at the land titles office a notice in the prescribed form stating the change.

28(7) The powers and duties of a corporation shall, subject to any restriction imposed or direction given in a resolution passed at a general meeting, be exercised and performed by the board of the corporation.

28(8) A person who

(a) is a bona fide third party dealing at arm's length with the corporation, and

(b) does not have notice of a restriction or direction referred to in subsection (7),

is not liable for or otherwise affected or bound by any breach of or failure to follow that restriction or direction by the corporation.

28(9) All acts done in good faith by a board are, notwithstanding that it is afterwards discovered that there was some defect in the election or appointment or continuance in office of any member of the board, as valid as if the member had been properly elected or appointed or had properly continued in office.

28(10) At least $\frac{2}{3}$ of the membership of the board of directors of the corporation shall be unit owners or mortgagees unless the bylaws provide otherwise.

Subsections 32(1) and (2) provide:

32(1) The bylaws shall regulate the corporation and provide for the control, management and administration of the units, the real and personal property of the corporation and the common property.

32(2) The owners of the units and anyone in possession of a unit are bound by the bylaws.

Subsections 37 and 65 provides:

37(1) A corporation is responsible for the enforcement of its bylaws and the control, management and administration of its real and personal property and the common property.

37(2) Without restricting the generality of subsection (1), the duties of a corporation include the following:

(a) to keep in a state of good and serviceable repair and properly maintain the real and personal property of the corporation and the common property;

(b) to comply with notices or orders by any municipal authority or public authority requiring repairs to or work to be done in respect of the parcel.

37(3) A corporation may by a special resolution acquire or dispose of an interest in real property.

65 The corporation is not liable in relation to a unit and the share in the common property assigned to the unit for any rate, charge or tax levied by the Crown, a local authority as defined in the *Municipal Government Act* or any other authority that has the power to assess and levy rates, charges or taxes on land or in respect of the ownership of land.

[10] The Appellant had the onus of establishing, on a balance of probabilities, that it was an agent for the individual owners. CCRA, in the GST/HST Policy Statement,^[2] sets out a range of tests to assist in determining whether an agency relationship exists. I find these helpful and in keeping with established case law. The essential qualities of an agency relationship include the following: (i) consent of both the principal and the agent; (ii) authority of the agent to affect the principal's legal position; and (iii) the principal's control of the agent's actions. I

will apply some of these tests to the present situation starting with the first three "essential qualities".

[11] Consent of both the principal and the agent. The condominium corporation consists of all the unit owners (subsection 25(2) of *CPA*). They appoint or elect a Board of Directors that is answerable to all the owners. The directors operate the condominium corporation as the owners' representatives or agents. They report directly to the owners. They are not in business for themselves. I find nothing in the documentation that provides for compensation for their efforts other than being reimbursed for their out-of-pocket expenses. Paragraph 28(1)(7) of the *CPA* provides that the directors are subject to restrictions or directions imposed by the owners at an annual general meeting. I infer that the owners and the Appellant (which operates through the directors) consented to a principal and agent relationship. The first essential quality is answered in favour of the Appellant's position.

[12] Authority of the agent to affect the principal's legal position. The by-laws of the Appellant provide for the control, management of all the property and the owners are bound by these by-laws (subsections 32(1) and (2) of the *CPA*). The Appellant has consent and authority to legally bind the owners. Section 25 of the *CPA* states that the owners are jointly liable. This indicates that the owners are responsible for the acts of the Appellant and that the owners are exposed to potential risks. In addition, the Appellant can enter into contracts with third parties on behalf of the owners. Counsel for the Respondent points out that the corporation can sue or be sued (subsection 25(3)) but the condominium corporation is made up of the owners. The corporation cannot be separated from the owners. It is not an independent legal entity. Paragraph 25(3)(b) states that the corporation can be sued with respect to the parcel of land and the owners are jointly liable. This second essential quality of an agency relationship exists.

[13] The principal's control of the agent's actions. The powers of the Appellant are vested in the board and subject to restrictions and directions imposed at general meetings of the owners. Further, several sections of the Bylaws and the CPA place requirements on the Appellant. For example, By-law 3.02(b) requires the owners' consent to borrow monies; subsection 37(3) requires a special resolution of the owners in order for the Appellant to acquire an interest or dispose of an interest in real property; section 63 of the CPA provides that the owners, by special resolution, can transfer the ownership of the Appellant's bare land units; and section 78 of the CPA states that contractors retained by the Appellant can register a lien against units in the complex.

[15] The condominium corporation is not an independent entity. It exists because of the owners and on behalf of the owners. It does not carry on business on its own. It is a creature of the owner who, for expediency and efficiency, elect a board of directors at the pleasure and under the control of the owners. The owners, by majority vote, have complete control over the corporation. The corporation assumes no risks, it can effect the liability of the owners in respect of strangers to the relationship by the making of contracts or the disposition of property. The following is the classic definition of agency found in *The Law of Agency*:^[3]

Agency is the relationship that exists between two persons when one, called the *agent*, is considered in law to represent the other, called the *principal*, in such a way as to be able affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property.

The relationship between the Appellant and the unit owners easily fits within this definition. The corporation (agent) exists for the owners (principal) and the owners' legal position in the respect of strangers is affected by the Appellant entering into contracts.

[17] The Federal Court of Appeal in *Glengarry Bingo Assn. v. R.*^[4] held that risk is a significant factor in determining whether an agency relationship exists. The Court further sets out three essential qualities of agency:

P-182 identified three essential qualities of agency. These are the consent of both the Principal and Agent, the authority of the Agent to Affect the Principal's Legal Position and the Principal's Control of the Agent's Action. Since I find that GBA did not have the capacity to affect the legal position of its Members, I find it unnecessary to address the other factors which Revenue Canada has indicated are required for a finding of agency.

In contrast to this, I have no difficulty concluding that the present Appellant corporation had the capacity to affect the legal position of the unit owners. Another indication of an agency relationship is that a portion of the condominium fees is held by the Appellant in a reserve or trust fund for the owners. Clearly, the corporation was the unit owners' agent. The corporation is not a separate entity from the owners. Pursuant to the CPA, the owners are obligated to operate through a corporation which exists solely because of them and for them. The Appellant being an agent of the owners, no GST is payable unless the *Act* provides differently.

[18] A brief review of the relevant sections follows. Subsection 221(1) of the *Act* provides that every person who makes a taxable supply shall collect GST. The definition of "taxable supply" in subsection 123(1) includes "... a supply that is made in the course of a commercial activity".

[19] Subsection 123(1) of the *Act* defines "commercial activity" to include "a business carried on ... other than a business carried on without a reasonable expectation of profit ...". The corporation carried on a non-profit business and does not meet the definition of commercial activity because it had no expectation of profit. Counsel

for the Respondent argues that the Minister gets over this hurdle by the definition of "business" in subsection 123(1), which is very broad and states:

"business" includes ... undertaking of any kind whatever, whether the activity or undertaking is engaged in for profit, and any activity engaged in on a regular or continuous basis that involves the supply of property by way of lease, licence or similar arrangement, but does not include an office or employment;

[20] The brief reference by both parties to ITCs is not sufficient to make a finding. Finally, it is not necessary to consider the Appellant's section 65 submission but I have no difficulty in agreeing with the Respondent's position and it was unnecessary to notify the Attorneys General of the provinces.

[21] The appeal is allowed.

Signed at Ottawa, Canada, this 10th day of June, 2004.

"C.H. McArthur"
McArthur J.

2006 CanLII 3661 (ON S.C.)

COURT FILE NO.: 04-CV-269334

DATE: 20060209

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

PEEL STANDARD CONDOMINIUM CORPORATION NO. 668
Plaintiff

- and -

DAYSPRING PHASE I LIMITED, BRAMPTON PENTECOSTAL
CHURCH INCORPORATED, CORPFINANCE INTERNATIONAL
LIMITED, MERVYN OWEN THOMAS, LLOYD WISEMAN,
ARNOLD NYHOLT, RICHARD MacKENZIE, LYNN
YOUNGBLUT and 695598 ONTARIO LIMITED operating as
MAPLE RIDGE PROPERTY MANAGEMENT

Defendants

- and -

MILLER THOMSON LLP

Third Party

COUNSEL:

Carol A. Dirks for the plaintiff

Geoff R. Hall and Helen Gray for the defendant Corpfinance
International Limited

HEARING DATE: January 31, 2006

REASONS FOR DECISION

PERELL, J.

Introduction and Overview

[1] The plaintiff Peel Standard Condominium Corporation No. 668 (“Peel 668”) is part of a “Christian Lifestyle” condominium project in Brampton, Ontario. Peel 668 sues: (a) Dayspring Phase I Limited (“Dayspring”), which was the declarant of the condominium project that established Peel 668; (b) Brampton Pentecostal Church Incorporated (“BP Church”), which had been the owner of the lands upon which the condominium project was constructed; (c) six individuals who had been appointed by Dayspring to be the original members of the Board of Directors of Peel 668 (“Declarant Board Members”); (d) 695598 Ontario Limited, operating as Maple Ridge Property Management (“Maple Ridge”), which provided property management services for the project; (e) and Corpfinance International Limited (“Corpfinance”), which entered into a \$1.7 million loan agreement with Dayspring, which loan agreement was assumed by Peel 668.

[2] The defendants Dayspring, BP Church, and the Declarant Board Members, bring third party proceedings against Miller Thomson LLP, which had been the solicitors for Dayspring for, amongst other things, the \$1.7 million loan agreement.

[3] Pursuant to Rule 20, the defendant Corpfinance moves for a summary judgment dismissing Peel 668’s action as against it. Corpfinance argues that there is no genuine issue to be tried that Peel 668 has no claim against it. Corpfinance relies on the principle that on a motion for summary judgment, the motions judge is entitled to assume that the record contains all the evidence that the party will present at trial: Dawson v. Rexcraft Storage & Warehouse Inc. 1998 CanLII 4831 (ON C.A.), (1998), 164 D.L.R. (4th) 257 (Ont. C.A.); Bluestone v. Enroute Restaurants Inc. 1994 CanLII 814 (ON C.A.),

(1994), 18 O.R. (3d) 481 (C.A.). Corpfinance argues that Peel 668 has not been shown Corpfinance to have done anything wrong.

[4] Having reviewed the material filed on this motion, I agree with the argument of Corpfinance. It has satisfied the onus on it of establishing that there is no genuine issue for trial, and, therefore, I grant its motion for summary judgment.

[5] I will explain this conclusion below, but at the outset it is helpful to summarize the analysis that leads me to the conclusion that Peel 668 cannot succeed in its action against Corpfinance. The analysis proceeds along the following line of argument. Peel 668 alleges that the \$1.7 million loan should not be enforced for five reasons: (1) the loan is ultra vires; (2) there was a breach of the disclosure requirements of the Condominium Act, 1998, S.O. 1998, c. 19 with respect to the loan; (3) there was oppression of Peel 668 as defined by the Condominium Act, 1998 with respect to the loan; (4) equitable relief is available with respect to the loan; and (5) Corpfinance knew or ought to have known that full and proper disclosure had not been made with respect to the loan.

[6] The first reason, however, is unsound because the loan is not ultra vires. The remaining reasons are unsound because Corpfinance did nothing that would bring it within the remedial jurisdiction of the Condominium Act, 1998 or of equity. Put shortly, whatever other defendants may have done to Peel 668, it has not been shown that Corpfinance did anything wrong nor has it been shown that it should be held responsible for the wrongdoing of others.

[7] In arriving at the conclusion that the \$1.7 million was not ultra vires, that is, it was infra vires, I accept that condominium corporations are creatures of statute, and they have not been given the capacity to contract of a natural person. Condominium corporations are subject to the doctrine of ultra vires, and they cannot enter into a contract that is beyond the authority conferred by their enabling statute. Further, condominium corporations must comply with the formalities of contract formation stipulated by the enabling

legislation. If a condominium corporation enters into a contract that does not comply in form and substance with the requirements of the enabling legislation, then the contract is void. See: Noldon Investments Ltd. (1977), 1 R.P.R. 236 (Ont. H.C.J.); Condominium Plan No. 8222909 v. Francis, [2003] A.J. No. 976 (C.A.); Strata Plan 1261 v. 360204 B.C. Ltd., [1995] B.C.J. No. 2761 (B.C.S.C.).

[8] I rely, however, on the principle that there is a distinction between agreements that are intrinsically illegal and agreements that are tainted by illegality, if at all, in how they are performed. This principle was recognized by the Court of Appeal in Beer v. Townsgate I Limited (1997), 36 O.R. (3d) 137 (C.A.).

[9] In Beer v. Townsgate I Limited, the trial judge ruled that agreements for the purchase of condominium units were illegal and unenforceable because at the time of their signing, the vendor was not registered and therefore the vendor had contravened the Ontario New Home Warranties Plan Act “(ONHWPA)”. However, at the time the vendor entered into the agreements, the vendor had complied with all of the requirements for registration, and the agreements contained reference to the ONHWPA and made clear that the vendor intended to comply with the legislation. The Court noted that the agreements were not “inherently illegal” and that it was the intention of the parties to make a legal contract.

[10] In Beer v. Townsgate I Limited, the Court of Appeal held that the trial judge failed to appreciate that illegality as to contractual formation must be distinguished from illegality as to the performance of the contract. The Court of Appeal referred to Maschinenfabrik Seydelmann K.-G. v. Presswood Brothers Ltd., [1966] 1 O.R. 316, where Schroeder J.A. said at pp. 321-22:

What is forbidden by the statute and the Regulations under review is not malum per se but malum prohibitum, and in every case it becomes a crucial question whether the contract is capable or incapable of lawful

performance. In the latter case, e.g., if the parties should agree to commit a crime, or if they should clearly agree to commit an act prohibited by statute, such a contract is intrinsically illegal since it necessarily involves an offence or a violation of the law. With much deference to the opinion of the learned trial Judge who decided against the plaintiff with some reluctance, he has failed to take into account the well-settled presumption of law in favour of the legality of a contract; that if a contract can be reasonably susceptible of two meanings or modes of performance, one legal and the other not, that interpretation is to be put upon it which will support it and give it operation.

[11] In the immediate case, the proper formalities were followed, and the \$1.7 million loan was not intrinsically ultra vires, and it cannot become ultra vires after the fact because of the alleged misconduct, if any, of Dayspring, BP Church, the Declarant Board Members, Maple Ridge, or Miller Thomson, LLP.

[12] In arriving at my conclusion that Corpfinance did not do anything wrong, I have also rejected what I view as a logical fallacy in Peel 668's argument to resist the motion for summary judgment. As will be seen from the review of the facts below, in several instances, in negotiating and in implementing the \$1.7 million loan, Corpfinance required compliance with provisions of the Condominium Act, 1998 (and for that matter it required compliance with other laws and regulations). For example, Corpfinance required that there be proper disclosure under the Act, and from this fact, Peel 668 then argues that there is a genuine issue for trial about whether there was proper disclosure, and accordingly, Corpfinance's motion for summary judgment should be dismissed.

[13] The logical fallacy in this argument, is that assuming the \$1.7 million loan was infra vires, and assuming that there is a genuine issue for trial about the failure of some defendants to comply with the Act, their misconduct, if found to exist, would not nullify the legality of the loan. Corpfinance is not privy or responsible for the misconduct of other defendants and indeed sought compliance with the Act. Put simply, Corpfinance certainly did not do anything wrong in requiring compliance with the Condominium Act, 1998 (or other legislation), and Corpfinance cannot itself be faulted if others breached their obligations or acted wrongfully.

[14] Before concluding this introduction and overview, I note that in support of its motion for a summary judgment, Corpfinance made the additional argument that even if the \$1.7 million loan was ultra vires, then, nevertheless, the loan would still be repayable in whole or in part, by Peel 668, as a matter of the law of restitution. Because of the conclusion I have reached that the loan was infra vires, I make no ruling on the merits of this alternative argument.

[15] My Reasons for Decision will now proceed by setting out the facts together with my analysis of the claim against Corpfinance.

The Factual Background and the Analysis of the Case against Corpfinance

[16] For the purposes of this motion for summary judgment, it is not necessary to detail much of the history of the condominium project that led to Peel 668, which history begins in 1991 with plans for the Christian Lifestyle community in the City of Brampton.

[17] A description of the factual background may begin in May 2001, when Dayspring began negotiations with Corpfinance to obtain a loan. At that time, Dayspring was the developer of the condominium project for a Christian Lifestyle community in Brampton, Ontario that was to have several phases, including a phase of 24 bungalows, which phase constituted Peel Condominium Corporation No. 650 ("Peel 650") and a phase of mid-rise

condominium apartment buildings, which was to become the plaintiff, Peel 668.

[18] On September 4, 2001, Peel 650 and Dayspring on its own behalf and on behalf of the as yet uncreated Peel 668 signed a commitment letter for the \$1.7 million loan that is the subject of this action. This was followed on December 10, 2001 by the signing of a formal loan agreement by Corpfinance, Peel 650, and Dayspring on its own behalf and on behalf of the as yet uncreated Peel 668.

[19] Corpfinance's role was only as a lender. It is convenient to note here that it was conceded during argument that Corpfinance was not a declarant under the Condominium Act, 1998.

[20] On July 19, 2002, Peel 668 was officially created, and Dayspring appointed the Declarant Board Members on July 25, 2002. The previous day, the solicitors for Corpfinance requested confirmation that each purchaser had been advised of the financing in the disclosure required by the Condominium Act, 1998.

[21] On August 9, 2002, the Declarant Board Members approved By-law No. 4, which authorized Peel 668 to enter into the loan agreement, and By-law No. 4 was registered. On September 5, 2002, the loan was assumed by Peel 668 pursuant to an assignment agreement. On or about September 30, 2002, the Declarant Board Members directed Corpfinance to disburse the proceeds of the loan.

[22] On October 9, 2002, there was a "turnover meeting" and the Declarant Board Members were replaced by a new Board of Directors. Peel 668 pleads that Dayspring, BP Church, and the Declarant Board Members intentionally delayed the holding of the turnover meeting until the loan monies could be advanced.

[23] The new Board of Directors reviewed the disbursement of the monies, and in this action Peel 668 takes the position that there were a number of items that had never been disclosed as part of the

common elements or there were items that unit owners already paid for as part of the purchase price for their unit.

[24] Peel 668 pleads in paragraphs 44 and 49 of its statement of claim that not all of the items were previously or properly disclosed to the purchasers of the units in the condominium development. In paragraphs 69 to 71, it pleads that loan monies in the amount of \$974,627.28 were for items that were improperly or never disclosed to the purchasers as being a cost in addition to the purchase price in accordance with the original disclosure statement for the condominium project. (It may be noted that as an alternative to the plea that the \$1.7 million loan is not binding, Peel 668 pleads that it is only liable to repay \$680,000.)

[25] Mr. Richard Francis, who is a current director of Peel 668, in paragraph 69 of his affidavit provides a somewhat smaller list of disputed items. The following chart sets out these items and their value, which in the aggregate totals \$450,362.95:

46 fan coil units	\$ 67,312.22
3 rooftop HVAC units	\$ 6,652.00
3 make up air units for circulation to the building corridors	\$121,857.00
137 apartment "B" vents and gas lines	\$ 60,195.24
Bell phone wiring	\$113,600.49
24 draft inducers for apartment "B" vents	\$ 65,595.00
Main lobby furnishings	\$ 15,151.00

[26] Mr. Francis also deposes that furnishings with a value of \$70,000 were purchased but not paid for and that several items of Equipment that were described in the disclosure documents were never purchased.

[27] In paragraph 94 of its statement of claim, Peel 668 states that the loan is ultra vires as it is contrary to s. 56 (1)(e) of the Condominium Act, 1998 as the monies advanced were not for the purpose of carrying out the objects and duties of Peel 668. In particular, it was not proper to borrow money to pay construction costs to be borne by the developers of the project. Relying on s. 135 of the Act (the oppression remedy), in paragraph 95, Peel 668 alleges that this conduct is oppressive and unfairly prejudicial to Peel 668 and to the unit owners.

[28] It is, in effect, because a portion of the \$1.7 million of loan monies were used to purchase certain items and not other items and because there was not proper disclosure of the items that were to be purchased from the loan proceeds that Peel 668 argues that loan from Corpfinance is ultra vires. As I have already noted above, I disagree with this argument, and I prefer the argument made by Corpfinance.

[29] Section 17 (2) of the Condominium Act, 1998 provides that the condominium corporation has the duty to control and administer the common elements and the assets of the corporation. Subsection 56 (1) of the Act requires that a by-law enacted by the board of directors of a condominium corporation must not be contrary to the Act or the declaration. Subsection 56 (6) provides that the by-laws shall be reasonable and consistent with the Act and the declaration. In the case at bar, the purpose of the loan was to cover the financing of common elements of Peel 650 and Peel 668.

[30] Under s. 1 (1) of the Condominium Act, 1998, “common elements” are defined to mean “all the property except the units” and “units” is defined to mean “a part of the property designated as a unit by the description and includes the space enclosed by its boundaries and all of the land, structures and fixtures within this space in accordance with the declaration and description.” Thus, what items of property constitute the common elements of a particular condominium is a matter to be determined by the declaration and description of the particular condominium. In response to a question that I asked during argument, it was conceded that, generally

speaking, the items that constitute the common elements are a variable for each condominium project.

[31] In the immediate case, the commitment letter and the loan agreement that was authorized by Bylaw No. 4 set out the items that were to be acquired with the proceeds of the loan and that were to become part of the common elements. There is nothing in these items that could not be a common element and, more significantly, there is nothing intrinsically illegal about a condominium corporation borrowing money for its common elements as they may be defined for that particular condominium project.

[32] The expressed purpose of the loan in the immediate case was to finance the purchase of “Equipment” to be part of the common elements. In reference to the purpose of the loan in the immediate case, several sections of the loan agreement should be noted:

- (a) The preamble to the agreement states: “Whereas pursuant to a commitment letter dated September 4, 2001, the Lender agreed to provide the Loan to the Phase Ia Corporation [Peel 650] and Dayspring on its own behalf and on behalf of the Phase Ib Corporation [Peel 668] (collectively, the “Borrowers” to finance the Equipment on the terms and conditions herein set forth;”
- (b) The loan agreement defines “common elements” as follows: “Common elements” means, together, the land building, fixtures, Equipment and structures and improvements of the Condominium, other than the Units, including without limitation, exterior landscaped areas, recreational facilities, parking facilities, hallways, elevators, and foyers and the Equipment.
- (c) Included in the definition of “common elements” is “the Equipment” which is defined as follows: “Equipment” means the Equipment forming part of the Common Elements of the Condominiums as set out in Schedule A,

of which that Equipment described in Part A of Schedule A is installed in and forms part of the Common Elements of Peel Condominium Plan No. 650, and the Equipment described in Part B of Schedule A is installed in and forms part of the Common Elements and/or units of a condominium project located at 3, 7 and 10 Dayspring Circle, Brampton, Ontario and known as the Phase Ib Project [Peel 668].

(d) Schedule A states:

PART A

Phase 1a Corporation

1. 24 Gas Furnace and Venting Systems serving each residential unit

PART B

Phase 1b Corporation

1. 176 gas furnace/ hot water tank systems, including rooftop HVAC Units

2. Enterphone system for Gatehouse (shared with Phase Ia Corporation)

3. Furnishings for Quest Suites (shared with Phase Ia Corporation)

4. Law Sprinkler System (shared with Phase Ia Corporation)

5. Village Hall Furnishings and Appliances (shared with Phase Ia Corporation)

(e) Article 2.02 provides that the Credit Facility is being made available to enable the Borrowers to finance the cost of the Equipment.

(f) Article 9.01 (j) is an affirmative covenant from the Borrowers that “the Borrowers shall use all Loans for financing of the Equipment.”

[33] Pausing here, in my opinion, there is a contract here capable of lawful performance. Further, there is the intention of the parties to make a legal contract; provisions of the loan agreement require compliance with the Condominium Act, 1998 (and other legislation). For example:

(a) Article 3.01 (c) requires as a condition for an advance under the loan that: “the Borrowers and Phase Ib Corporation [Peel 668] shall have delivered to the Lender certified copies of the Constitutional Documents and of the resolutions authorizing the borrowings hereunder and of the incumbency of the officers or the Borrowers and the Phase Ib Corporation signing this Agreement and any documents to be provided pursuant to the provisions hereof;

(b) Article 3.01 (g)(i) requires as a condition for an advance under the loan that: “the Condominiums have been completed and constructed in accordance with all relevant federal, provincial and municipal laws, requirements, standards, bylaws and codes, that the Units may be legally occupied, and that the Equipment has been installed in a good and workmanlike manner and is in good condition and working order;”

(c) Article 3.01 (i) requires as a condition for an advance under the loan that disclosure be made to unit purchasers about the loan. The article states: “the Lender shall have been provided with evidence satisfactory to the Lender

that all of the Units have been sold to bona fide purchasers for value who are at arm's length to the builder and/or vendor of the Condominiums and that the financing constituted hereby has been disclosed to all such purchasers in the disclosure documentation required under the Act.”

- (d) Article 8.01 (a) is a warranty from the Borrowers that there is corporate authority. The warranty states that: “Each of the Borrowers has full corporate power and authority to enter into this Agreement and the Documents and to do all acts and execute and deliver all other documents as required hereunder or thereunder to be done, observed or performed by it in accordance with their terms.”
- (e) Article 8.01 (b) is a warranty from the Borrowers of valid authorization. This warranty provides that: “Each of the Borrowers has taken all necessary corporate action to authorize the creation, execution, delivery and performance of this Agreement and the Documents and to observe and perform the provisions of each in accordance with its terms.
- (f) Article 8.01 (c) is a warranty from the Borrowers of the validity of documents and enforceability. This warranty includes the provision that: “Neither the execution and delivery of this Agreement or any Document, nor compliance with the terms and conditions of any of them, (i) has resulted or will result in a violation of the Constitutional Documents of the Borrowers or any resolutions passed by the Board of Directors of each of the Borrowers or any applicable law, rule, regulation, order, judgment, injunction, award or decree, including without limitation the Act [defined to mean the Condominium Act, 1998, of Ontario, as amended, supplemented or replaced from time to time].”

- (g) Article 9.01 (c) is an affirmative covenant from the Borrowers of compliance with Legislation that states: “The Borrowers shall do or cause to be done all acts necessary or desirable to comply with all material applicable federal, provincial and municipal laws requirements or standards including without limitation, the requirements of the Act [defined to mean the Condominium Act, 1998, of Ontario, as amended, supplemented or replaced from time to time] and all requirements of Environmental Law . . .”

[34] Thus, in my opinion, Corpfinance made a loan that had a lawful purpose that was consistent with the condominium corporation's enabling legislation and for which the proper formalities were followed. Further, Corpfinance intended that the loan comply with all legal requirements and indeed imposed legality as a term of the loan agreement.

[35] Upon analysis, it would appear that Peel 668's complaint is not so much that the loan is ultra vires, but rather that Dayspring failed to properly appropriate the funds to purchase the Equipment that was to be part of the common elements and that certain purchasers should not have to pay part of their purchase price for items that they would be charged for again as part of the common element expense. These may be legitimate complaints against Dayspring but, in my opinion, they do not make the loan itself ultra vires.

[36] An illustration of my analysis may be helpful. Peel 668 complains that the loan proceeds were used to pay for Bell phone wiring with a value of \$113,600.00. There is nothing inherently illegal or inconsistent with the Condominium Act, 1998 about phone wiring equipment being part of the common elements. However, under the loan agreement's definition of “Equipment,” it is arguable that phone wiring does not fall within the particular definition of Equipment described in Part B of Schedule A, which is to be installed in and to form part of the common elements of Peel 668. If this is

correct, then using the loan monies for this purpose would be an illegal performance of a contract otherwise capable of being performed lawfully. As I view the result, this would be a *malum prohibitum* but it would not be a *malum per se* that would vitiate the contract. Similar arguments may be made about other items in the list of disputed items and there is also the argument that the financing of the item for inclusion in the common elements was proper in any event.

[37] In this regard, it is, interesting to note that it was conceded during argument by counsel for Peel 668 that a portion of the loan proceeds would have to be repaid to Corpfinance, but she submitted that this was a matter that should be left for the trial judge. I see it differently. In *Hongkong Bank of Canada v. Wheeler Hldg Ltd.*, 1993 CanLII 148 (S.C.C.), [1993] 1 S.C.R. 167, Sopinka, J. for the Court noted that the *ultra vires* doctrine to the extent that it still applies in Canada should be applied narrowly. He stated at p. 202:

As is noted in *Palmer's Company Law* (24th ed. 1987), vol. 1, at pp. 143-44, "in modern law the courts are unlikely to hold a contract to be *ultra vires* the company unless, on a reasonable construction of the objects clause and the other clauses of the memorandum and articles, there are compelling grounds to arrive at that result."

[38] The case at bar is not a case such as *Strata Plan 1261 v. 360204 B.C. Ltd.*, *supra*, where the condominium corporation entered into an agreement allowing the defendant the exclusive use of all parking spaces in the parking garage, which was an arrangement where the condominium would lose the benefit of property that belonged to the common elements. The agreement in that case was inherently contrary to the provisions of the British Columbia condominium legislation. It was *malum per se*. In the immediate case, as I have already said there is nothing inherently illegal in a condominium corporation financing the purchase of equipment to be included in the common elements that it is to manage.

[39] Based on the evidence submitted on this motion for summary judgment, the \$1.7 million loan was not *ultra vires*. The loan was *infra vires*, and if Dayspring performed the lawful loan improperly by failing to properly appropriate or by misappropriating loan monies, then Peel 668's remedy is against Dayspring.

[40] Similarly, in my opinion, Peel 668's allegations that that was a violation of the provisions of the Condominium Act, 1998 that prohibit a declarant from making false and misleading statements and that there was inadequate and improper disclosure made to the unit purchasers do not make the \$1.7 loan *ultra vires*. That there was inadequate disclosure of an *infra vires* loan would not nullify the loan. Although I obviously cannot and do not make any finding, the allegations against Dayspring and others about improper disclosure may be true, but Corpfinance is not the perpetrator of the wrongs and rather required that there be compliance with the Act.

[41] Peel 668 alleges that it has been the victim of oppressive or unfairly prejudicial conduct or conduct that unfairly disregards its interests. Once again, I cannot and do not make any finding apart from concluding that there is no genuine issue for trial that Corporate was not a party to any misconduct and its only role was a lender to the condominium project that sought compliance with the Act.

[42] The case of *Thomson v. Quality Mechanical Service Inc.* (2001) 56 O.R. (3d) 234 (S.C.J.) provides an analogy. In that case, C. Campbell, J. granted a motion for summary judgment brought by the Royal Bank against a shareholder who sought a remedy against a corporation and against the Royal Bank under the oppression remedy provisions of the Ontario Business Corporation Act, which are comparable to the oppression remedy provisions of the Condominium Act, 1998. The shareholder had a legitimate complaint against the corporation for oppression but did not have a claim against the Royal Bank because the acts of oppressive conduct must be the acts of those who control the corporation. C Campbell, J. held that the oppression remedy was available against those

responsible for the corporation but not against third parties, who had no role in the control or operation of the corporation.

[43] In the Thomson case, the Royal Bank had committed a wrong to the corporation and the oppression remedy was still not available. The position of Corpfinance is stronger in the immediate case because it was not a declarant under the Act and had no disclosure obligations to the unit holders and it was not a privy to any misconduct if any by the other defendants. If there has been non-compliance with the provisions of the Condominium Act, 1998 then Corpfinance is also a victim in the sense that the non-compliance would be a breach of the loan agreement, which required compliance with the Act.

[44] This last comment brings me to Peel 668's reliance on equity and on its submission that Corpfinance knew or ought to have known that full and proper disclosure had not been made with respect to the loan as the grounds for relief against Corpfinance. In paragraphs 84 and 85 of its factum, Peel 668 states:

84. Courts are often faced with a situation wherein they must decide which one of two innocent parties is to bear the loss occasioned by a third. In this regard, the law has held that the loss should fall upon the party who could have prevented the loss through the exercise of reasonable care, or who has enabled the third party to occasion the loss.

85. A Court could find as between [Peel 668] and Corpfinance, it is Corpfinance who should bear any loss occasioned on the basis that;

(a) Corpfinance is a sophisticated commercial lender;

(b) Corpfinance was in a position to protect its interest unlike [Peel 668] who was vulnerable and had no party representing its interests;

(c) Corpfinance knew or ought to have known the inherent risks in lending money in this type of arrangement whereby a developer causes a condominium corporation to become liable under a loan which it had no involvement in the structure thereof; and

(d) Corpfinance's lack of due diligence in protecting its own interest under the Loan.

[45] With respect, once it is determined that the loan is *infra vires*, I do not see these submissions as the basis for equitable or other relief against Corpfinance. There must be some tether for equity's intervention, and a submission that equity should favour the weaker party is not a reason to deny Corpfinance's legal right to enforce its loan agreement.

[46] For these reasons I grant Corpfinance's motion for summary judgment. The parties may make written submissions with respect to costs within one month of the release of these Reasons for Decision.

Perell, J.

Released: February 9, 2006

2006 CanLII 4510 (ON S.C.)

DATE: 20060216
DOCKET: 05-CV-302743 PD2
05-CV-288699 PD3

ONTARIO
SUPERIOR COURT OF JUSTICE

Application under the *Arbitration Act, 1991, S.O. 1991, c. 17, ss.*
45 & 46

Counter-application under the *Arbitration Act, 1991, s. 50*

B E T W E E N:)

SIMCOE CONDOMINIUM)
CORPORATION NO. 78)

Applicant)

- and -)

SIMCOE CONDOMINIUM)
CORPORATION NOS. 50, 52, 53,)
56, 59, 63 and 64)

Respondents)

- and -)

BRUCE LYONS, MARGARET)
LYONS, BARRY ALTBAUM,)
MARLENA ALTBAUM, WEI)
FU, PAULA SHEA, GOLDWYN)
CHAN, JACKY MARROCCO,)
DENA HANSEN and DONALD)
BARR)

Intervenors)

- and -)

PATRICK HULL, PATRICIA)
CAULFIELD, BRENDA)
SZWENGLER and IZABELLA)
PERLON)

Mark H. Arnold
For the Applicant)

Bruce S. Batist and Lou Natale
For the Respondents)

Benjamin J. Rutherford
For the Intervenors, Bruce
Lyons et al.)

Ivan Marini and A. Stephen
For the Intervenors, Patrick
Hull et al.)

Intervenors)

A N D B E T W E E N:)

SIMCOE CONDOMINIUM)
CORPORATION NOS. 50, 52, 53,)
56, 59, 63 and 64)
Applicants)

- and -)

SIMCOE CONDOMINIUM)
CORPORATION NO. 78)

Respondent)

Bruce S. Batist and Lou Natale
For the Applicants)

Mark H. Arnold
For the Respondent)

HEARD: January 27,
2006

BELOBABA J.:

[1] These applications arise out of a dispute between eight condominium corporations over the management and operation of their shared recreational facilities and the jurisdiction of the shared facilities committee. The dispute proceeded to arbitration. The Applicant now seeks to set aside the arbitral award under sections 45 and 46 of the *Arbitration Act 1991, S.O. 1991, c. 17*, on the basis of error of law and reasonable apprehension of bias. In a counter-application, the Respondents seek to enforce the arbitral award under section 50 of the *Arbitration Act*.

Background

[2] The Applicant and Respondent condominium corporations (“SCC”) comprise the Ruperts Landing residential community, located on Georgian Bay, just west of Collingwood, Ontario. The Applicant, SCC 78, is a multi-level high-rise building; the seven Respondents, SCC 50, 52, 53, 56, 59, 63 and 64, are lower-level townhouse buildings. The shared recreational facilities consist of a

recreation centre, a swimming pool, tennis courts and a marina (“the Shared Facilities”).)

[3] In 1988, the parties entered into a Shared Facilities Agreement “to provide for the mutual use and sharing of the total costs of operation, maintenance and repair of the shared facilities.” In 1997, the parties amended the agreement to deal with issues relating to the operation of the marina. All further references will be to the 1997 Shared Facilities Agreement or “SFA”.

[4] The SFA provides that the Shared Facilities are owned by the parties on a pro rata basis as tenants-in-common. The responsibility for operation, maintenance and repair is delegated to an eight-member Committee (“the Shared Facilities Committee” or “Committee”). The Committee consists of one representative from each of the condominium corporations. Five members constitute a quorum and all decisions are made by majority vote.

[5] Each year, the Committee is required to submit a Shared Facilities Budget setting out its cost estimates for the upcoming year under specific categories such as heat, hydro, water, staffing, equipment, maintenance and repairs. The Committee is also required to provide an annual estimate of the reserve funds that are needed for major repair or replacement. The eight condominium corporations, in turn, are required to remit their proportionate share to cover both the estimated operating costs and the required reserve. Typically, the condominium corporations remit these payments to the Committee on a monthly basis. The Committee spends the money as it deems necessary within the budgeted categories.

[6] The Committee’s management of the Shared Facilities under the 1997 SFA was uneventful for several years. Disagreements began in the year 2000. Concerns were voiced about the Committee’s handling of certain financial matters, alleged procedural irregularities, the proper allocation of costs between the Applicant and the Respondents and the power, authority and mandate of the Committee.

[7] Many of the disputes were between the Applicant’s residents, who are generally older and retired, and the Respondents’ residents who are generally younger and make more use of some of the recreational facilities. The differing perspectives on how the Committee should spend its budget, or whether, for example, a full-time recreation director was needed, often resulted in heated exchanges and disrupted Committee meetings.

[8] The dispute at its root is whether the Committee’s decisions require ratification by each condominium’s board of directors before they become binding, or are simply binding on their own. The Applicant endorses the former point of view, the Respondents the latter.

[9] Following an unsuccessful mediation, the matter proceeded to arbitration. The arbitrator initially suggested by the Applicant and eventually appointed by court order was Brian H. Somers.

[10] Mr. Somers held hearings on September 1, 2 and 3, 2004. Strictly speaking, only seven of the eight parties were made parties to the arbitration – SCC 64 did not participate, but agreed to be bound by the arbitrator’s decision.

[11] On September 1, 2004, prior to the commencement of the arbitration, the Applicant’s representative deposited affidavit and other materials with the arbitrator objecting to the Respondents’ counsel on the basis of conflict of interest, and to the arbitrator on the basis of reasonable apprehension of bias. The Applicant’s representative advised the arbitrator that if he did not step down, or if the Respondents’ counsel remained on the record, it would appeal the arbitration decision. The Applicant further advised the arbitrator that it would continue to attend as an observer but would not present oral evidence. The arbitrator proceeded with the arbitration.

[12] The arbitrator released his Reasons for Decision on April 6, 2005, a Supplementary Decision on September 30, 2005 and an

Addendum on November 25, 2005. He also released his Arbitration Award on November 25, 2005 (“the Award.”)

[13] In his Award the arbitrator, in essence, agreed with the Respondents and found that the decisions of the Committee need not be ratified and confirmed by all eight Boards of Directors before the decisions took effect. The Award consists of 30 paragraphs. The paragraphs that provide the basis for the Applicant’s challenge herein are set out below:

ARBITRATION AWARD

1. That the basic tenet of the Shared Facilities Agreement is valid and in the context of this case the *Condominium Act 1998* does not supersede, replace or negate the provisions of that agreement.

4. That decisions of the Shared Facilities Committee need not be ratified and confirmed by all eight Boards of Directors of the Corporations in Ruperts Landing before the decision can be acted upon.

5. That the original Shared Facilities Agreement and the amended Shared Facilities Agreement reflect an intent that the Shared Facilities Committee, rather than the individual corporations, have the authority to make decisions on matters affecting the Shared Facilities. The alternative, i.e. requiring the unanimous approval of the Boards of Directors of all eight corporations to make decisions regarding the Shared Facilities would create an unworkable, if not chaotic, environment. One board would have a veto power over the rest of the Ruperts Landing Community. Indeed, the wording and orientation of the original and amended Shared Facilities Agreement is directed against the development of such a situation.

14. That the Shared Facilities Committee has the authority to manage the Shared Facilities, (independent of Article 6 of the Shared Facilities Agreement) and is authorized to enter into contracts for supplies, materials and services related to the Shared Facilities including the right to renew the Collingwood Recreational Company Contract.

17. That decisions of the Marina Club Committee need not be ratified and confirmed by all eight boards of directors of the condominium corporation’s of Rupert’s Landing.

27. That the Respondent and the Applicants (except SCC 64) shall each pay one half of the cost of arbitration.

29. That the Respondent shall pay costs to the Applicants in the amount of \$67,526.41 together with interest at 4% per annum from September 30, 2005.

30. That the Respondent shall pay to the Shared Facilities Committee \$22,552.01 representing outstanding arrears together with interest on arrears of \$4,017.97 as of August 1, 2005 together with interest at bank prime rate plus 2% from August 1, 2005.

[14] The Applicant seeks to set aside the Award under s. 45 of the *Arbitration Act*, on the basis of error of law, and under s. 46 for reasonable apprehension of bias. The Respondents bring a counter-application under section 50 of the *Arbitration Act* for an order enforcing the Award

[15] Two groups of intervenors also made submissions - the Hull group, which had commenced an earlier proceeding in Hamilton, Ontario, and were supporting the Applicant; and the Lyons group, consisting of residents of the Applicant condominium, supporting the Respondents.

Position of the Parties

[16] The Applicant submits that the arbitrator erred in law and the Award should be set aside in its entirety. The Applicant argues that the Committee is only an advisory committee and has no power to make binding decisions; that its decisions must be ratified and approved by the board of directors of each of the condominium corporations before they can take effect; that the *Condominium Act, 1998*, S.O. 1998, c. 19, requires the corporation's board of directors to manage the property and assets of the corporation, including its common elements and shared facilities; that this requirement cannot be delegated and supersedes any agreement to the contrary; and, that the proper way to manage shared facilities is not via an SFA but through the promulgation of joint bylaws as now permitted under s. 59 the *Condominium Act*.

[17] The Respondents submit that the arbitrator was right and that the Award should be upheld. They argue that the management of the shared recreational facilities by means of an SFA and a representative Shared Facilities Committee is not only the most sensible way to operate such facilities, it is completely consistent with the *Condominium Act*. To now require that all of the Committee's decisions be ratified and approved by each of the individual condominium corporations would not only give one corporation a veto power over the wishes of the other seven, it would defeat the reasonable expectations of unit-owners who had purchased their condominium on the representation that the shared facilities would be available and operated by a shared facilities committee pursuant to the SFA. They further argue that setting aside the Award and in effect vitiating an SFA that has been in place for almost 18 years is unreasonable and will result in confusion and chaos.

[18] The Applicant submits, in the alternative, that the Award should be set aside on the basis of reasonable apprehension of bias pursuant to s. 46 of the *Arbitration Act*. The Applicant argues that the arbitrator's prior professional connections, his actions before the hearing began and the comments he made in his Supplementary

Decision issued on September 30, 2005 provide support for this submission.

[19] The Respondents submit that there is no basis for finding a reasonable apprehension of bias. In any event, they say this ground was not raised in a timely manner and is now barred by s. 13(6) of the *Arbitration Act*.

[20] The Respondents ask that the application be dismissed and, by way of counter-application, that the Award be enforced under s. 50 of the *Arbitration Act*.

Preliminary Issues

[21] Before turning to the substance of the first submission, error of law, several preliminary issues must be resolved: (1) is this an appeal on a question of law; (2) does the arbitration agreement preclude such an appeal; (3) should leave be granted under s. 45(1) of the *Arbitration Act*, and (4) what is the appropriate standard of review. I will deal with each in turn.

[22] In my view, this appeal clearly involves a question of law. Whether or not the delegation by condominium boards of binding decision-making authority over the operation and management of shared recreational facilities to a representative committee is contrary to the *Condominium Act* is a question that requires careful consideration of the provisions of legislation and the terms of a contractual agreement. This is not a question of mixed fact and law; it is a question of law: *Canada (Director of Investigation and Research) v. Southam Inc.* 1997 CanLII 385 (S.C.C.), [1997] 1 S.C.R. 748 at 766-67.

[23] The arbitration agreement does not preclude an appeal. The only arbitration agreement that exists between the parties is Article 10 of the SFA which provides as follows:

10.1 In the event of any dispute between the parties hereto with respect to this Agreement or any matters arising therefrom or

pertaining thereto, and such matter cannot be resolved among or between any parties hereto, the matter in dispute, upon notice by one party to the other(s) stipulating that it requires the matter to be submitted to arbitration, shall be submitted to arbitration and the decision of the arbitrator shall be binding upon the parties hereto and upon submitting such matter to arbitration no legal recourse shall be exercised by any party hereto.

10.2 In the event the parties to such dispute are unable to agree upon a single arbitrator each party shall appoint one arbitrator within seven (7) days of notice by another party requiring submission of the dispute to arbitration. The arbitrators so appointed shall, within seven (7) days of the appointment of the last arbitrator so appointed, choose a single arbitrator. If any party neglects or refuses to name its arbitrator within seven (7) days of being requested to do so by any other party or parties or to proceed with the arbitration, the arbitrator named by any other party or parties shall proceed and settle the dispute and his decision shall be final.

10.3 The arbitration shall be conducted in accordance with the provisions of the *Arbitration Act* of Ontario.

10.4 The costs of any arbitration shall be borne equally by the parties thereto.

[24] There is nothing in Article 10 that amounts to a privative clause prohibiting judicial review. There is no provision that makes the decision of the arbitrator “final and binding” or that otherwise and unequivocally precludes an appeal for error of law. The use of the word “binding” in Article 10(1) by itself is insufficient; and the use of the word “final” in Article 10.2 does not assist – this latter provision is limited to circumstances and to a selection procedure that does not apply here. The “no legal recourse” phrase at the end of Article 10(1) speaks to what happens when the matter is submitted to arbitration, not what happens after the decision

is released. In any event, “no legal recourse” by itself is at best ambiguous and equivocal. I therefore interpret the agreement as not excluding the right to seek leave to appeal a question of law under s. 45(1) of the *Arbitration Act*: see *National Ballet of Canada v. Glasco* reflex, (2000), 49 O.R. (3d) 230 (SCJ), at 243-44.

[25] The requirements for leave to appeal under s. 45(1)(a) and (b) have been satisfied. Whether or not the Shared Facilities Committee can make decisions that are binding on the condominium boards and the financial implications of these decisions for unit-owners are important matters that will significantly affect the rights of the parties. Leave to appeal is therefore granted.

[26] The appropriate standard of review is correctness. Because the appeal concerns a question of law and there is no greater expertise in the arbitrator than the court in the interpretation of the *Condominium Act* and related caselaw, the standard of review is correctness: *National Ballet of Canada, supra*, at 245. Also see *AWS Engineers and Planners Corp. v. Deep River*, (2005) 249 D.L.R. (4th) 478 (S.C.J.) at 506-08 and cases cited therein.

Issues

[27] The substantive issues that need to be addressed are as follows:

1. Did the arbitrator err in law in holding that “decisions of the Shared Facilities Committee need not be ratified and confirmed by all eight Boards of Directors of the Corporations...before the decision can be acted upon?”
2. Should the Award be set aside on the basis of reasonable apprehension of bias?
3. Did the arbitrator err in holding that the costs of the arbitration should be divided between the Applicant on the one hand, and the six Respondents on the other; and that the Applicant should pay costs to the

Respondents in the amount of \$67,526.41 together with interest at 4% per annum from September 30, 2005?

4. Should the Respondents' counter-application be allowed? If so, what provisions of the Award should be enforced?

Analysis

1. Did the arbitrator err in law in holding that the Committee's decisions need not be ratified or confirmed by the Boards of Directors of each of the condominium corporations?

[28] The arbitrator found in paras. 4 and 17 of his Award that the "decisions" of the SFC and Marina Club Committee "need not be ratified...by all eight boards of directors." On its face, this finding is ambiguous. Does the arbitrator mean all decisions, or just the decisions that the Committee is permitted to make under the provisions of the SFA?

[29] Further, in para. 14 of the Award, the arbitrator found that the Committee "is authorized to enter into contracts for supplies, materials and services related to the Shared Facilities." Here again, does the arbitrator mean all contracts for supplies, materials and services or just the contracts that the Committee is permitted to enter under the provisions of the SFA?

[30] The SFA makes clear that some decisions and some contracts require board approval before they can take effect. For example, under Article 4.3 any non-emergency expenditure that is greater than \$5000 and that exceeds the budget provision for that particular category requires the approval of each of the condominium corporations. Also, under Article 5.5 the approval of the condominium corporations is needed for any "substantial" alteration, improvement or renovation of the Shared Facilities.

[31] Therefore, it is incorrect to say that none of the decisions of the SFC need to be ratified or approved by the boards of

the eight condominium corporations. If this is what the arbitrator meant to say, then he erred in law.

[32] The Respondents submit that the findings in paras. 4, 17 and 14 should not be taken literally; that the arbitrator understood that the Committee was bound by the provisions of the SFA and intended that only the decisions that the Committee is permitted to make under the SFA are the ones that need not be ratified by the boards of the condominium corporations. The Respondents ask that I simply clarify this obvious point by adding the phrase "except as otherwise provided in the SFA" to paras. 4, 17 and 14 and by adding the words "certain" and "all" to para. 5 so that the latter reads "have the authority to make certain decisions" and "all eight corporations to make all decisions."

[33] I am persuaded that this is probably what the arbitrator intended, and if not, then there is all the more reason to clarify the ambiguity by adding this qualifying language. Paragraphs 4, 5, 14 and 17 will therefore be varied as follows (the changes are underlined):

4. Except as otherwise provided in the Shared Facilities Agreement, the decisions of the Shared Facilities Committee need not be ratified and confirmed by all eight Boards of Directors of the Corporations in Ruperts Landing before the decision can be acted upon.

5. That the original Shared Facilities Agreement and the amended Shared Facilities Agreement reflect an intent that the Shared Facilities Committee, rather than the individual corporations, have the authority to make certain decisions on matters affecting the Shared Facilities. The alternative, i.e. requiring the unanimous approval of the Boards of Directors of all eight corporations to make all decisions regarding the Shared Facilities would create an unworkable, if not chaotic, environment. One board would have a veto power over the rest of the Ruperts Landing Community. Indeed, the wording and orientation of the original and amended

Shared Facilities Agreement is directed against the development of such a situation.

14. Except as otherwise provided in the Shared Facilities Agreement, the Shared Facilities Committee has the authority to manage the Shared Facilities, (independent of Article 6 of the Shared Facilities Agreement) and is authorized to enter into contracts for supplies, materials and services related to the Shared Facilities including the right to renew the Collingwood Recreational Company Contract.

17. Except as otherwise provided in the Shared Facilities Agreement, the decisions of the Marina Club Committee need not be ratified and confirmed by all eight boards of directors of the condominium corporation's of Ruperts Landing.

[34] The Applicant, however, argues that even if the above paragraphs were varied as indicated, the arbitrator's findings would still be wrong. The Applicant submits that even Committee decisions that are fully in accord with the provisions of the SFA and deal only with day-to-day operational matters must still be ratified by each of the eight boards. In essence, the Applicant argues that the delegation by the SFA to the Committee of even day-to-day operational powers is in violation of the *Condominium Act*.

[35] A condominium corporation, says the Applicant, is entirely the creature of statute. It can only do what is legislatively permitted. Section 17 provides that "the corporation has a duty to control, manage and administer the common elements and the assets of the corporation." Section 27 provides that the board of directors "shall manage the affairs of the corporation," and section 176 makes clear that these provisions apply "despite any agreement to the contrary."

[36] In other words, says the Applicant, the obligation to manage the Shared Facilities, an asset of the corporations, even on a day-to-day basis, cannot be delegated to a shared facilities

committee. The boards of each of the eight condominium corporations cannot be bound by the decisions of the Committee. To the extent that the SFA provides otherwise, it is inconsistent with the *Condominium Act* and therefore invalid.

[37] The Applicant points to the expert commentary of Harry Herskowitz and Mark F. Freedman, the authors of a leading text on condominium law, *Condominiums in Ontario: A Practical Analysis of the New Legislation*, (2001). In comparing the "old" *Condominium Act* with the "new Act" that took effect on May 5, 2001, Herskowitz and Freedman say this at 185 and 188:

Under the old Act... decisions of the shared facilities committee ...are subject to confirmation and ratification by the respective boards of directors...[Under the new Act] declarants may continue to enshrine the concept of a shared facilities committee (with the attendant powers conferred upon it) in reciprocal agreements governing the operation and use of such facilities, provided all decisions of the committee are ratified or confirmed by the respective boards of directors, reflective of current practice." (Emphasis added.)

[38] But here again, does this mean all decisions, even the day-to-day operational decisions? I note that the Applicant's own expert, Gerry Hyman Q.C., suggested that "day to day management/operational decisions" would not require board approval to take effect. And what about the validity of the many cost-sharing agreements that condominium corporations have entered into throughout Ontario governing the use and operation of shared recreational facilities? Are all of these shared facility agreements invalid?

[39] In my view, the Court of Appeal has ruled on this very point. In *Carleton Condominium Corp. No. 441 v. Carleton Condominium Corp. No. 441 (Owners and Mortgagees)*, 1998 CanLII 4565 (ON C.A.), (1998) 42 O.R. (3d) 62, the Court of Appeal considered a similar challenge to an SFA that delegated certain

decision-making powers to a shared facilities committee. The provisions of the SFA that were challenged in *Carleton Condominium* were very similar to the ones being challenged herein.

[40] The Court of Appeal concluded that the challenged provisions established a reasonable structure for the management of the shared facility and were not inconsistent with the requirements of the *Condominium Act*. The following passage is in my view determinative of the issues being raised by the Applicant. The Court of Appeal said this at 68:

There is nothing in the *Act* that prohibits the sharing of facilities among different condominiums or prohibits a declarant from giving the corporation an ownership interest in the shared facility. Such an arrangement may, in fact, be beneficial to the unit owners by giving them access to, and interest in, a facility that could not be supported if owned only by a single corporation.

In my view, it is not improper for the declarant to specify the corporation's responsibilities so that co-tenants or others with an interest in the shared facility can make fair use of it. The impugned provisions attempt to set up a reasonable structure for the management of the shared facility. Those provisions are thus well within the permissible objects of the corporation and are not inconsistent with the consumer protection objects of the Act. (Emphasis added.)

[41] The Court of Appeal also noted that it would be “unreasonable and unfair “ to now void these provisions because unit-owners had relied on them when they purchased their condominiums.

[42] The Applicant attempts to distinguish the *Carleton Condominium* decision on the basis that it was decided in 1998, under the provisions of the “old Act.” It argues that the new *Act*, which took effect in 2001, sets out a clear regime for the management of

shared facilities. Section 59 now explicitly provides that “the boards of two or more corporations may make, amend or repeal joint by-laws or rules governing the use and maintenance of shared facilities and services.”

[43] The Applicant says that the proper way for condominium corporations to enter into shared facility agreements that delegate binding decision-making power to a shared facilities committee is via the enactment of joint bylaws. If the current SFA is set aside, the available remedy, says the Applicant, is s. 59.

[44] I do not agree. It is true that the new *Act* addresses the concept of shared facilities and “mutual use agreements” in a number of sections - see ss. 59, 113(1), 134, and 154(5). Clearly, in enacting the new *Act* the legislature was attuned to the reality of multi-phased condominium projects and the need for shared facilities agreements. If the legislature had intended to invalidate all existing SFA's and require that they all be replaced through the mandatory use of the joint bylaw power provided in s. 59, it could have done so. As it is, s. 59 is permissive not mandatory – no condominium corporation is compelled to enact joint bylaws to deal with the management and maintenance of shared facilities.

[45] The fact that s. 59 is permissive, not mandatory, is seen by legal experts as a good thing. According to Herskowitz and Freedman, *supra*, at 186 and 188, the joint bylaw methodology is “a very complex and impractical procedure” and “is not the exclusive methodology by which shared facilities or service can be governed.” The authors conclude at 188 – 89:

...it is likely that any existing provisions regarding the use and maintenance of shared facilities or services will endure, unamended by the joint bylaw/rule provisions of the new Act...

Any other interpretation would result in chaos by virtue of the fact that a vacuum would be created with

respect to the governance of the facilities pending the enactment of such a joint bylaw or rule under the new Act.

[46] I therefore agree with the Respondents that the s. 59 of the new Act does not undermine the decision of the Court of Appeal in *Carleton Condominium*. This decision cannot be distinguished and remains determinative.

[47] In my opinion, the SFA and its delegation of limited management and decision-making power over the Shared Facilities to the Committee is not contrary to the *Condominium Act*. The Application to set aside the entire Award on the basis of error of law does not succeed.

[48] However, paras. 4, 5, 14 and 17 of the Award must be varied, as noted above, to make clear that the Committee's jurisdiction to make binding decisions is subject to and limited by the provisions of the SFA.

2. Should the Award be set aside on the basis that there was a reasonable apprehension of bias on the part of the arbitrator?

[49] Section 13 of the *Arbitration Act* sets out the procedure for challenging an arbitrator on the basis of reasonable apprehension of bias. Section 13(3) requires the challenging party to send the arbitral tribunal a statement of the grounds for the challenge within fifteen days of becoming aware of them. If the arbitrator is not removed by the parties or does not resign, he or she must decide the issue and notify the parties of the decision. Section 13(6) of the *Arbitration Act* provides that a party may make an application to the court to remove an arbitrator "within ten days of being notified of the arbitral tribunal's decision."

[50] Here, as already discussed, the Applicant advised the arbitrator in a letter dated August 31, 2004, that it was challenging him on the basis of reasonable apprehension of bias. This letter together with several affidavits were delivered to the arbitrator by

Ellen Morin, the Applicant's representative, at the commencement of the hearing on September 1, 2004. The arbitrator considered the letter and the affidavits and advised the parties that he was proceeding with the arbitration. According to the hearing transcript of September 1, 2004, the arbitrator made these remarks at page 17:

While we were off the record, I heard lengthy submissions from [the Respondents' legal counsel]. I also invited any additional submissions or response from Ellen Morin. There was nothing forthcoming from Ellen Morin. I have decided based on the submissions and reaffirmation by [the Respondents] that they want to proceed today, and that's what we're doing. I don't think there's any other preliminaries. We should proceed with the evidence.

[51] The arbitrator then invited the parties to give their opening statements. He turned to the Applicant's representative and said at page 19: "Ellen, you've told me that you're not participating. I don't anticipate an opening statement from you? Okay, then you [Mr. Natale] can go ahead." Following the completion of the opening statement by counsel for the Respondents, the arbitrator again asked Ms. Morin at page 32: "Ellen, do you want to say anything in reply." Ms. Morin responded: "I think we've made our position clear that we are not participating." The arbitrator then proceeded with the hearing.

[52] The Applicant submits that the ten-day limitation period under section 13(6) begins running from the date that the party is "notified of the arbitral tribunal's decision." The comments made by the arbitrator on September 1, 2004, says the Applicant, do not constitute notice of his decision to reject the challenge and proceed with the arbitration. This decision was not made clear until the release of his Reasons for Decision on April 6, 2005. The Applicant submits that this is the operative date and the limitation period only begins to run as of the release of the arbitrator's decision. The challenge on the ground of reasonable apprehension of bias is therefore not time-barred by section 13(6).

[53] In my view, the operative date is September 1, 2004. On the first day of the hearing, the arbitrator decided to proceed and so notified the parties. For me, there is little if any doubt that by continuing with the hearing, the arbitrator was telling the parties that he was rejecting the bias allegation. The words spoken at page 17 of the transcript, as noted above, are plainly a decision by the arbitrator that he is proceeding with the hearing, and is rejecting the accusation of bias.

[54] I also note from its letter of August 31, 2004, that the Applicant was advised by legal counsel as to what to say and do at the hearing and, if the arbitrator did not step down, what legal steps could then be pursued. I find it difficult if not impossible to accept the Applicant's submission that the arbitrator's decision to proceed with the hearing was ambiguous in its meaning or intent. I am satisfied that that the Applicant fully understood that the arbitrator was proceeding with the hearing, and in doing so was rejecting the challenge of bias. I am satisfied that the Applicant was so notified on September 1, 2004.

[55] The challenge on the basis of reasonable apprehension of bias is therefore time-barred by s. 13(6) of the *Arbitration Act* and cannot succeed.

[56] I hasten to add, however, that even if I had found that the challenge for reasonable apprehension of bias was brought in time, I would not, on the evidence, have found for the Applicant. Let me explain.

[57] The basic legal principles relating to reasonable apprehension of bias can be summarized as follows. The test of reasonable apprehension of bias applies to arbitrators in the same manner as it applies to courts. The threshold for a finding of real or perceived bias is high because it calls into question both the personal integrity of the adjudicator and the integrity of the administration of justice. The grounds must be substantial and the onus is on the party alleging bias to bring forward the evidence. The inquiry is highly

fact-specific. The test for showing reasonable apprehension of bias is an objective test. A real likelihood of bias must be demonstrated; mere suspicion is not enough. The test is "what would an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude?" *R. v. R.D.S.*, 1997 CanLII 324 (S.C.C.), [1997] 3 S.C.R. 484 at 530-32; *A.T. Kearney Ltd. v. Harrison*, [2003] O.J. No. 438 (S.C.J.), at para. 6-7; *McQueen's Boat Works Ltd. v. Lanikai Holdings Ltd.*, [1996] B.C.J. No. 2063 (C.A.)

[58] The Applicant says that a real likelihood of bias arose out of several issues that were before the arbitrator when the hearing began, and out of what he said after the hearing was concluded in his Supplementary Decision dated September 30, 2005.

[59] I will deal first with the allegations that were put before the arbitrator when the hearing began. The affidavit of the Applicant's representative alleged the following:

- That the arbitrator had been professionally associated and at one point had discussed sharing office space with a lawyer that had been dismissed as legal counsel to the Applicant;
- That certain inflammatory correspondence questioning the ethics of the Applicant's lawyer had been copied to the arbitrator;
- That the arbitrator had communicated unilaterally with the other side on a number of occasions;
- That the arbitrator arranged some scheduling and procedural matters without seeking input from the Applicant.

[60] The Respondents submit that none of these allegations when examined objectively provide any basis for a finding that the

arbitrator was likely to be biased against the Applicant. I agree. To apply the test articulated by the Supreme Court of Canada, above, would an informed person, having thought the matter through, conclude that a prior association, or even a discussion about sharing office space with a lawyer who had been dismissed by the Applicant was likely to bias the arbitrator against the Applicant? Or, the receipt of a copy of a letter from one side's legal counsel criticizing the ethics of the other side's legal counsel? Or, on occasion, the communication with only one side on totally innocuous matters? Or, handling some scheduling matters without input from the one of the parties? I think not. None of these allegations, objectively examined, and standing alone or even aggregated, constitute grounds for finding a real likelihood of bias.

[61] The Applicant also argues that a reasonable apprehension of bias arises out of comments that were made by the arbitrator in his Supplementary Decision dated September 30, 2005. In this decision the arbitrator explained his costs award. In doing so, the arbitrator made the comment that the Applicant's decision not to participate in the hearing was "imprudent if not irresponsible" and that their overall position was "ill-advised and contrary to the SFA and condominium standards." The arbitrator also recognized that his costs award would mean that some unit-owners who lived in the Applicant's building and who were opposed to the Applicant's position would nonetheless be required to contribute to the costs order made against the Applicant. The arbitrator then noted that "while there may be another forum for the SCC 78 unit-owners to seek redress against their directors, such an award will not be granted in this arbitration."

[62] The Applicant argues that these comments were highly prejudicial and reveal bias on the part of the arbitrator. These comments, say the Applicant, show that the arbitrator was annoyed with the fact that the Applicant had accused him of bias and had not participated in the hearing and this biased him against the Applicant on everything that followed after the bias challenge was made. Even though the comments were made as part of the decision on costs, the

Applicant argues that they show a pervasive bias which tainted the entire arbitration hearing, the Reasons for Decision and the Award.

[63] I do not agree. The comments being complained about were made more than a year after the hearing was completed, and more than five months after the release of the arbitrator's Decision. The comments were made not in the main Decision but as part of the Supplementary Decision on costs. Comments about the merits of a particular position advanced by one of the parties, or about the conduct of a party, or whether certain unit-owners can claim over and against their board of directors for the costs payable, although arguably intemperate, are not in and of themselves evidence that the arbitrator was likely biased against the Applicant when he wrote his Decision and drafted his Award. This is not what an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude. More is needed to show a real likelihood of bias on the part of the arbitrator.

[64] I therefore conclude that the Application to set aside the Award on the basis of reasonable apprehension of bias cannot succeed for two reasons – the Application was not commenced within the required ten-day limitation period, and even if it had been, I would not have been persuaded on the evidence submitted.

3. The costs award

[65] I do, however, question the validity of the costs award. In paras. 27 and 29 of the Award, the arbitrator ordered that the costs of the arbitration, approximately \$135,000, be divided equally between the Applicant on the one hand, and all the Respondents (except SCC 64) on the other. The Applicant was ordered to pay one-half of the costs or \$67,526.41, together with interest at 4% per annum, to the Respondents.

[66] The arbitrator explained his costs award by noting that s. 54 of the *Arbitration Act* gave him "a broad discretion with respect to the allocation of costs." Section 54 does indeed provide that "an arbitral tribunal may award the costs of an arbitration." And, traditionally, the

exercise of such discretion will often result in the awarding of costs to the successful party.

[67] However, the *Arbitration Act* also provides in s. 3 that “the parties to an arbitration agreement may agree, expressly or by implication, to vary or exclude any provision of this Act, except for [ss. 5(4), 19, 39, 46, 48 and 50.]” The costs provision that was relied on by the arbitrator, s. 54, is one of the provisions that may be varied or excluded by an arbitration agreement.

[68] In my view, the parties herein have varied or excluded the discretion provided to the arbitrator under s. 54, by specifically providing in their arbitration agreement, Article 10.4 of the SFA, that “the costs of any arbitration shall be borne equally by the parties thereto.” This specific costs provision, as set out in the arbitration agreement, displaces the discretion under s. 54, and requires the arbitrator to award costs as directed. Article 10.4 is not a directive that the arbitrator can “consider” and then discard; it is a requirement that must be applied according to its plain meaning.

[69] In my view, the plain meaning of Article 10.4 is that the costs of an arbitration shall be shared and borne equally by each of the parties to the arbitration. If the intention was to divide the costs according to the success achieved; or divide the costs equally between the winning side and the losing side, this could have been stated. Instead, the arbitration agreement provides that the costs of the arbitration shall be “borne equally by the parties thereto.”

[70] One can understand some possible rationales for such a cost-sharing provision. The arbitration of a dispute between two or more of the eight condominium corporations at Ruperts Landing may have been seen as a cost that should be shared equally by all of the parties involved in order to preserve the overall harmony and sense of community. Or maybe the directive was intended to reflect the reality that some disputes may not split cleanly along corporation lines; there may be, as there was here, unit-owners on both sides of an issue in the same condominium corporation – better then to share

the costs equally between all the parties, rather than dividing the costs based on who won or who lost. In any event, I am satisfied that the costs awarded by the arbitrator are contrary to what is required by the plain reading of Article 10.4.

[71] In my view, the arbitrator should have applied Article 10.4 as written and should have divided the total cost of the arbitration equally among each of the seven participating parties (i.e. all but SCC 64.) I recognize that the Applicant did not participate in the hearing after its bias challenge was rejected, but it deposited correspondence and affidavits with the arbitrator, maintained a watching brief and reserved its right of appeal. In these circumstances, the Applicant cannot avoid the obligation of paying one-seventh of the costs award.

[72] I therefore conclude that the costs award in paras. 27 and 29 should be set aside. Instead, and in accordance with Article 10.4 of the arbitration agreement, the costs of the arbitration shall be divided equally among the seven parties, with each party, including the Applicant, paying no more than one-seventh of the total amount.

4. The counter-application to enforce the Award

[73] The Respondents’ counter-application to enforce the Award is granted but only to the following extent: paragraphs 1 to 26 inclusive, as varied herein, shall be enforced. Paragraph 30 shall also be enforced. However, paragraphs 27, 28 and 29, dealing with the costs award have been set aside and may not be enforced.

Disposition

[74] The Application by SCC 78 to set aside the arbitral Award in its entirety under ss. 45 and 46 of the *Arbitration Act* for error of law or reasonable apprehension of bias is dismissed.

[75] Paragraphs 4, 5, 14 and 17 of the Award are varied by adding the language as noted above in para. 33 of these Reasons for Judgment.

[76] The Application by SCC 78 to set aside the costs awarded in paras. 27 and 29 of the Award is allowed. The costs of the arbitration in the amount of \$135,052.82 shall be borne equally by each of the seven parties (not SCC 64) with each party contributing one-seventh or \$19,293.26.

[77] The Application by SCC 50, 52, 53, 56, 59 and 63 to enforce the Award, as varied herein, is allowed, with the exception of the costs award as noted above.

Costs of these proceedings

[78] If the parties cannot agree on the costs of these proceedings, counsel may make written submissions not exceeding three typed pages within 30 days of the release of these Reasons for Judgment.

[79] I am grateful to counsel for their assistance.

Released: February 16, 2006.

COURT FILE NO.: C-1011-02

DATE: 20030603

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

WATERLOO NORTH CONDOMINIUM
CORPORATION NO. 186

Applicant

- and -

JOHANNA THERESA WEIDNER, JOHN
RICHARD WEIDNER and ELIZABETH
MARY WEIDNER

Respondents

)

)Edward L.
D'Agostino, for the
)Applicant

)

)

)

)R. Sandy Bruce, for
the Respondents

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)

)

)**HEARD:** March 17,
2003

THE HONOURABLE MR. JUSTICE P.J. FLYNN

[1] This is an Application by the applicant Condominium Corporation ("the Corporation") for an order:

(a) requiring the Respondent Johanna Theresa Weidner ("Johanna") to permanently remove the Greyhound dog, Simon ("the dog") from Unit #306, 30 Hugo Crescent, Kitchener, Ontario ("the Unit"), more particularly described as Unit 6, Level 3, Waterloo Condominium Plan No. 186, which is owned by all of the Respondents and occupied by Johanna; and

(b) requiring the Respondents to forthwith comply with two specific paragraphs of the Declaration of the Corporation which forbid pets on the Corporation's common elements and which forbid pets from being kept or allowed in any of the units.

[2] The Corporation was created by the registration of a Declaration on

February 1, 1991. That Declaration provides at Article III, paragraph 7:

"Pets

No animal, livestock or fowl of any kind whatsoever, including those usually considered pets, shall be allowed upon the Common Elements, including the Exclusive Use Common Elements."

[3] At Article IV, paragraph 2(d), the same Declaration provides:

"2. Residential Units

...

(d) No animal, livestock or fowl of any kind whatsoever, including those usually considered pets, shall be kept or allowed in the Units."

[4] Prior to April, 2000, these prohibitions against pets had not been enforced by the Corporation for some time and some of the residents of the units kept pets.

[5] On April 20, 2000, the Corporation passed a Resolution authorizing the Board of Directors to enforce the Corporation's Declaration, Bylaws, Rules and Regulations, particularly the prohibition against pets in the units and set out that as at April 21, 2000, there would be strict enforcement, save for pets then on the property registered with the property manager. That Resolution went on to specify that:

"Owners failing to register their dog(s) by April 21, 2000 will be asked to permanently remove their dog(s) from the premises."

[6] Months after the passing of this Resolution, in February, 2001, Johanna entered into an agreement of purchase and sale for the purchase of the Unit. She had the assistance of a real estate agent who knew of her ownership of the dog. She advised the agent that she wanted to purchase in a condominium that allowed pets.

[7] The agreement of Purchase and Sale made no specific mention of the prohibition against pets. It was on a standard form agreement in which Johanna as purchaser agreed to accept title to the real property subject to the provisions of the *Condominium Act* and the Terms, Conditions and Provisions of the Declaration and Bylaw and the Common Element Rules and Regulations.

[8] Johanna viewed the property twice before entering into the agreement and said that she saw cats in the windows and on one occasion believed she saw a dog being walked on the common elements. However, after seeing these animals, Johanna did not make any inquiries as to whether her dog would be permitted in the unit.

[9] The agreement was not made conditional upon her satisfying herself that her dog would be permitted.

[10] Prior to the completion of the purchase transaction, Johanna, as a result of her solicitor's request, was provided with and reviewed with her solicitor an Estoppel Certificate, which set out the following, most of it in bold letters:

"(c) Please make certain that your client is aware that pursuant to WNCC No. 186's Declaration, which states in part, '**no animal, livestock or fowl of any kind (sic) whatsoever, including those usually considered pets, shall be kept or allowed in the units**'. **The Corporation, through its Board of Directors has Resolved to strictly enforce said Declaration.**"

[11] The purchase transaction was completed by Transfer to the Respondents on May 1, 2001, and Johanna moved in about a week later, bringing her dog with her.

[12] On May 15, 2001, the Corporation's solicitors wrote to Johanna and reminded her that having her dog there was contrary to the provisions of the Declaration and asked her to remove it within 14 days. She did. She took the dog to the home of her parents -- the other respondents -- where it remained until the middle of September, 2001, before Johanna brought it back to the Unit. It has remained with her in the Unit since then. In June, 2001, the Corporation's solicitor advised Johanna's solicitor that the Corporation was considering an amendment to its Declaration so as to permit pets and was holding the determination of the matter of Johanna's dog in abeyance while reserving its right to continue enforcement proceedings.

[13] At the end of August, 2001, the Corporation's solicitors wrote again to Johanna's solicitors indicating that the matter of pets would be on the September 6, 2001, Unit owner's meeting agenda, again reserving the right to enforce. In September, 2001, it was determined that the Corporation would poll the owners to determine whether there was sufficient support to amend the Declaration and that until that was determined the Corporation would not take any action against pet owners.

[14] Johanna and another resident lobbied the residents of the corporation to conduct that survey of Unit owners to determine whether there was the sufficient support required to amend the Declaration to allow pets. They also lobbied other residents during the polling process.

[15] In accordance with the provisions of the *Condominium Act*, the vote of 80 percent of the Unit owners is required to amend a Corporation's Declaration.

[16] By late November, 2001, a poll had been taken. Owners representing 22 of the 33 units responded (about 63 percent). Thirteen owners supported the amendment (about 37 percent). Nine unit owners were against the amendment (about 26 percent). The Corporation therefore determined that the amendment would not carry by the required 80 percent vote of owners and put all on notice that it would commence on January 1, 2002, to enforce the pet restriction provisions against all whom had not been registered by April 20, 2000.

[17] On March 20, 2002, the Corporation's solicitor wrote to Johanna's solicitor to advise that they had learned that Johanna's dog was back in the unit. That letter warned of legal action if the dog was not permanently removed by May 1, 2002. This Application was commenced on September 26, 2002. It was first returnable on October 9, 2002, was thereafter thrice adjourned on consent, then examinations were conducted. It proceeded as a long Application on March 17, 2003.

[18] In answer to the Application the Respondents ask that this Court:

(a) exercise its discretion under the *Condominium Act* and its inherent jurisdiction to dismiss the application; or,

(b) exercise its discretion to "grandfather" the dog and exempt the dog from the operation of the Declaration so that the respondents will not be required to move the dog.

[19] The Respondents say that the prohibition against the pet in this case is unreasonable; that the Corporation acquiesced or slept on its rights and must not succeed on the basis of *laches*; and that condominium Declarations are subject to the Ontario Human Rights Code and enforcement of this prohibition against pets would be an act of discrimination within the meaning of that Code.

[20] Counsel have been very able in their argument and their facts and authorities have been helpful. There has been found no binding appellate decision directly on point.

[21] Moving out from under her parents, finishing school and starting a new career caused Johanna stress. So did the issue of removing the dog from the Unit. In August, 2001, she was first diagnosed with depression and her doctor prescribed medication. That medication eliminated the migraine headaches she was suffering and resulted in an improvement in her condition such that she could function very well. Her doctor recommended counseling several times. She declined. Johanna has seen no specialist for her depression. Her family physician is of the view that *one* of the "stressors related to [her] depression" was having to give up the dog, a stressor which, he says, would adversely affect her mental health.

[22] The Respondents concede that the Declaration cannot be attacked as being unreasonable **unless** there is a human rights violation. They say that their path to that attack here is the fact that Johanna suffers from an identified mental disorder and that this Court has the discretion not to apply the full force of a Declaration which is presumptively valid.

[23] A prohibition against pets in a Declaration would be reasonable, the Respondents argue, if it were flexible enough to accommodate identified disabilities.

[24] In the main, the Respondents rely on the reasoning of my sister, McDonald J., in *Niagara North Condominium Corp. No. 46 v. Chassie* [1999] O.J. No. 1201 Ontario Court of Justice (Gen. Div.), as set out in her conclusions at paragraph 94 of that judgment:

"I agree with counsel for the Applicant that the residence of the Chassie's cats in the NNCC complex is contrary to the Condominium Declaration and Rules, that there is a strong presumption as to the validity of the Declaration and that the Board of Directors has a statutory obligation to enforce the Declaration and Rules. However, for the reasons set out above, I am of the opinion that the pet prohibition is not a reasonable one. On the other hand, while the provisions in the Declaration may not be reasonable, it is not necessarily invalid given the strong presumption in favour of the validity of Declarations. Nevertheless, I think it would not be fair to enforce it given that it is not reasonable and given the circumstances of the present case. The Chassies were put in a position of disadvantage in purchasing the unit that they would not have placed themselves in had they known, before they purchased their unit, of the cat prohibition and that an attempt to enforce it might be made. Their lack of comprehension of the situation is the fault of the Board of Directors. The Board has acquiesced in the presence of cats in the building over a number of years and has not provided any explanation to justify the delay in enforcement and lead the court to find that the equities favour the Applicant. Finally, I have found that Mrs. Chassie suffers from a handicap within the meaning of the Human Rights Code and that to enforce the Declaration would constitute discrimination against her because of her handicap. On the totality of all three grounds of defence, I find that this is a proper case in which to exercise my judicial discretion in favour of the Respondents and to dismiss the application."

[25] *The Condominium Act*, 1998 S.O. 1998, c. 19 is the operative statute here.

[26] A Declaration may contain conditions or restrictions with respect to the occupation and use of the Units or Common Elements.

[27] The Condominium Corporation has a duty to take all reasonable steps to ensure that the owners and occupiers of units comply with the Declaration. The Board of Directors of a Condominium Corporation has a statutory obligation to enforce the Declaration.

[28] A Declaration cannot be amended unless 80 percent of the owners of the Units have consented to the amendment in writing.

[29] An owner of a Unit may make an Application to the Superior Court of Justice for an order to amend a Declaration.

[30] A Condominium Corporation, its Directors, as well as the owners and occupiers of the Unit, are required to comply with a Declaration as well as the *Condominium Act*. A Condominium Corporation not only has a duty to require compliance but where compliance is not forthcoming, the Condominium Corporation has the right to apply to court for an order directing compliance.

[31] There is a strong presumption as to the validity of a Declaration of a Condominium Corporation. The Declaration is vital to the integrity of the title acquired by the Unit owner. She is not only bound by the terms and provisions of the Declaration but she is entitled to insist that the other Unit owners are similarly bound. The revised *Condominium Act*, as aforesaid, was proclaimed into force on December 18, 1998, after the *Chassie* case was heard, but before judgment was rendered. In fact, Justice McDonald refers to the draft legislation in her discussion and analysis of the circumstances of the *Chassie* case. The new Act did not reflect the kind of treatment for pet owners envisaged by Justice McDonald's analogies to the rules permissible under the provisions of the *Tenants Protection Act*, 1997.

[32] The *Condominium Act* requires Bylaws and Rules to be reasonable, if they are to be enforced. But the same is not required of a provision in a Declaration, which will be presumed valid.

[33] Here, in the ordinary course of the transaction, the Respondent Johanna agreed in writing to comply with the Declaration. The Corporation properly brought the salient prohibition provision of the Declaration to Johanna's attention before closing. Johanna not only had a real estate agent assisting her in the transaction, she had a qualified and competent real estate solicitor whose duty it was to review the declaration and other documents, including the Estoppel Certificate and to advise her in respect thereof.

[34] Moreover, as must be done, the Declaration and Bylaws were registered on the title to the property as notice to all the world, including the Respondents, of their provisions.

[35] The Respondents, in written argument, rely upon s. 2(1) of the *Ontario Human Rights Code*, [R.S.O. 1990, c. H-19](#):

"Accommodation

2.1 Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status, disability or the receipt of public assistance."

[36] It seems to me that in reality the Respondents derive much of their argument from a consideration of s. 2(2) of that Act:

"Harassment in Accommodation

(2) Every person who occupies accommodation has a right to freedom from harassment by the landlord or agent of the landlord or by an occupant of the same building because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, marital status, same-sex partnership status, family status, disability or the receipt of public assistance."

[37] It is clear that this latter subsection prohibiting harassment in accommodation is restricted to the freedom enjoyed by tenants. It can have no application in this case, where the prohibition against pets is in effect an appurtenance ancillary to the purchase of any unit in this condominium plan.

[38] The answers of the Respondent Johanna on her examination for discovery conducted on January 15, 2003 are informative:

"205 Q: Would your parents be willing to take the dog back if the court ordered that he was not to return to the condominium:

A: Of course.

206 Q: And would you then go down and visit your dog on a regular basis as you did during the time that he wasn't there?

A: Well I don't know what I would do if I had to get rid of him.

207 Q: Would you visit your dog regularly?

A: Well yes, if I didn't move."

[39] In my view it is important to note that the sentiment expressed in these answers was not: "I cannot live without that dog - I'll have to move!" While it is clear that Johanna loves this dog and wants to keep it, it is not at all evident to me that she needs it. In the case of *Waterloo North Condominium Corp. No. 198 v. Donner*(1997), 36 O.R. (3d) 243, Justice Salhany was dealing with a hearing ear dog, one that the learned justice found, if removed, would prohibit the owner from living in the building. Salhany J. tackled that issue on the basis of an attack on the "no pet restriction" as unreasonable or failing that as a contravention of the *Human Rights Code*. In the end, Salhany J. decided that enforcement of the Declaration would effectively prohibit Ms. Donner from living in the condominium.

[40] In this case there is no evidence that Johanna is dependent on the dog or needs the dog to be able to live in the unit. Her doctor's report indicated that the removal of the dog was but *one* of the stressors she suffered which related to her depression. While there is no evidence before me that depression is a "mental disorder" such as would make it a "disability" within the meaning of s. 10(1) of the *Human Rights Code*, I accept Dr. Ashton's opinion that having to give up the dog would adversely affect Johanna's mental health.

[41] The facts of this case, in any event, can be distinguished from *Donner*; but the principles relied upon by Salhany J. are very persuasive.

[42] While the *Condominium Act* does require rules governing the use of common elements and units to be reasonable, the question of the "reasonableness" of the Declaration is not an issue that may be attacked. The law presumes Declarations to be valid.

[43] In the *Chassie* case, McDonald J. recites a passage from John Mascarin in his case comment on the trial decision of *York Condominium Corp. No. 382 v. Dvorchik* (1992), 24 R.P.R. (2d) 19, wherein Mr. Mascarin sets out very clearly that there is a difference in the case law treatment of the "no pet" clauses, depending upon the nature of the condominium documents in which they are found, that is to say, whether in part of the Declaration or merely in a rule or regulation. Then McDonald J. goes on at length to analogize the law of residential tenancy in Ontario and bases her decision largely on her conclusion that "the law and societal attitudes have also evolved to give rise to new concepts as to what are reasonable rules for community living and to a greater appreciation as to how pets can appropriately fit into a closely knit community".

[44] I am unable to make that leap, nor am I able to accept McDonald J.'s conclusion that a total prohibition of animals is not reasonable.

[45] In this I must agree with Salhany J. in *Donner*: "We are dealing with a Declaration. Surely those purchasers of a unit who understood they were buying into a 'no pet' building are entitled to have that understanding protected".

[46] Salhany J. went on in the circumstances of that case to refuse to enforce the "no pet" provision of the Declaration because the strict application in that case would amount to a breach of the *Human Rights Code* against a wholly dependent 85-year-old hearing impaired woman with a disability and the effect of that enforcement would effectively prohibit her from living in the building. That is not the case here.

[47] That leaves only the question of *laches* or the applicant "sleeping on its rights".

[48] In my view that complaint cannot succeed. Johanna employed both a real estate agent and a real estate lawyer. She (and all the world) had notice of the Declaration. Prior to closing her lawyer received the Estoppel Certificate which highlighted the restriction and reviewed it with her. Whether or not she remembers that specific review is not material. She made no inquiries as to the enforcement of that pet prohibition. While she took the view on examination that had she known about the enforcement of the pet prohibition she would not have moved into the building, perhaps her quarrel is with one of the professionals advising her.

Conclusion

[49] While the Condominium Corporation had not enforced the restrictions against pets for some years prior to the making and delivery of that Estoppel Certificate, the certificate made it clear that the provision was to be strictly enforced from that point. The conduct and actions of the corporation, its board and solicitors after that, in conducting the survey and holding enforcement in abeyance while that was done and in giving the Respondent Johanna time to deal with the consequences of enforcement, were entirely reasonable.

[50] In summary I find that:

- (a) the Declaration provision complained of is reasonable and, in any event, cannot be assailed on that basis;
- (b) there is no violation of the *Ontario Human Rights Code* such as would compel me to exercise my discretion in refusing to allow enforcement of the provisions; and,
- (c) the Applicant has not slept on its rights and is not to be refused the right to enforce its Declaration's restrictions because of laches.

[51] Therefore I grant the Application and order that the Respondent forthwith comply with the Declaration of Waterloo North Condominium Corporation No. 186 and permanently remove the Greyhound dog, "Simon" from unit 306, 30 Hugo Crescent, Kitchener, Ontario, being Unit 6, level 3, Waterloo Condominium Plan No. 186, and from the common elements of that condominium plan.

Costs

[52] I see no reason to depart from the usual rule that costs follow the event. The Applicant, unless I am shown a relevant offer, shall have its costs on a partial indemnity basis in an amount to be fixed by me after receiving the parties' written submissions.

[53] The Applicant shall deliver its submissions on or before June 13, 2003 and the Respondent shall deliver their submissions on or before June 27, 2003.

COURT FILE NO.: 03-CV-249538CM2

DATE: 20030604

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: DAVID WEBB and DIANN WEBB v.
METROPOLITAN TORONTO CONDOMINIUM CORPORATION
NO. 979

BEFORE: NORDHEIMER J.

COUNSEL: *Timothy Pinos* for applicants

Patricia M. Conway for respondent

HEARD: June 3, 2003

E N D O R S E M E N T

[1] The applicants, who are unit owners in the respondent, seek an interlocutory injunction restraining the respondent from making a change to the television service provided to the unit owners in the condominium pending the hearing of the underlying application which challenges the process by which the respondent, or more specifically its Board of Directors, has pursued such a change.

[2] The respondent is one of three condominium buildings in a complex known as Marina Del Ray located on Lakeshore Boulevard West in the City of Toronto. The respondent had a contract with Rogers Cable for the provision of television services to the building. That contract was due to expire on May 31, 2003. The Board of Directors, in anticipation of the end of that contract, asked Rogers Cable and Bell ExpressVu to make proposals for a new contract. As a result of those proposals, the respondent entered into discussions with Bell ExpressVu which it viewed as having made the better proposal. Eventually, the respondent entered into a letter of intent with Bell ExpressVu to provide the service.

[3] A notice was sent to all unit owners in April 2003 advising of this proposed change. This notice was sent in purported compliance with section 97(3) of the *Condominium Act, 1998*, S.O. 1998, c. 19. However, it is the respondent's position that the change in the television service provider does not in fact fall within the matters covered by section 97(3).

[4] Subsequent to this notice, a meeting was held with the unit owners. It is contended that at this meeting, the proposed service being offered by Bell ExpressVu was altered to address certain complaints that had been made regarding the loss of channels that would have arisen if the original Bell ExpressVu proposal had been accepted. The applicants contend that the change in the proposed service then took the matter outside of the scope of the original notice and that a new notice was then necessary under section 97(3). No fresh notice having been made, the applicants contend that the respondent has failed to honour its obligations under the Act.

[5] The applicants launched the application which seeks an order under section 134 of the Act requiring the respondent to honour its obligations under the Act, specifically its obligations under sections 22(1) and 97(3). In the time period pending the hearing of the application, the applicants seek the aforementioned injunction.

[6] Certain provisions of the Act are relevant to this motion. Sections 22(2) and 22(3) state:

"(2) Despite subsection 21 (1), a corporation may, by resolution of the board without a by-law,

(a) make an agreement for a network upgrade to a telecommunications system that services the units of the corporation;

(b) make an agreement for a telecommunications system that is not connected to a telecommunications system that services the units of the corporation; or

(c) amend an agreement for a telecommunications system that services the units of the corporation to permit the other party to the agreement to supply and invoice part or all of the services directly to the unit owners.

(3) Subsections 97 (3), (4), (5) and (6) apply to an agreement described in subsection (2) as if it were a change in a service that a corporation provides to the owners."

[7] Section 97(3) of the Act states:

"A corporation may make an addition, alteration or improvement to the common elements, a change in the assets of the corporation or a change in a service that the corporation provides to the owners if,

(a) the corporation has sent a notice to the owners that,

(i) describes the proposed addition, alteration, improvement or change,

(ii) contains a statement of the estimated cost of the proposed addition, alteration, improvement or change indicating the manner in which the corporation proposes to pay the cost,

(iii) specifies that the owners have the right, in accordance with section 46 and within 30 days of receiving the notice, to requisition a meeting of owners, and

(iv) contains a copy of section 46 and this section; and

(b) one of the following conditions has been met:

1. The owners have not requisitioned a meeting in accordance with section 46 within 30 days of receiving a notice under clause (a).

2. The owners have requisitioned a meeting in accordance with section 46 within 30 days of receiving a notice under clause (a) but have not voted against the proposed addition, alteration, improvement or change at the meeting."

[8] Finally, section 97(4) states:

"Despite subsection (3), the corporation shall not make a substantial addition, alteration, improvement to the common elements, a substantial change in the assets of the corporation or a substantial change in a service that the corporation provides to the owners unless the owners who own at least 66 2/3 per cent of the units of the corporation vote in favour of approving it."

[9] The principles to be applied in determining whether an interlocutory injunction should be granted are well-established. As set out in the decision of the Supreme Court of Canada in *RJR-Macdonald Inc. v. Canada (Attorney General)*, [\[1994\] 1 S.C.R. 311](#), it involves a three part test: (i) there must be a serious issue to be tried; (ii) there must be irreparable harm occasioned to the applicant, and (iii) the balance of convenience must favour the applicant.

[10] Contrary to the respondent's submission, I do not accept that there are no material facts in dispute in this matter and therefore that the applicants must establish a strong *prima facie* case in order to obtain the relief which they seek. It seems evident that there are a number of material facts in dispute. Consequently, I consider the *RJR*

test to be the proper test to apply to this motion. It is recognized that the threshold for establishing that there is a serious issue to be tried is a low one. It was also noted by Justices Sopinka and Cory in *RJR-Macdonald Inc. v. Canada (Attorney General)*, *supra*, at p. 338:

"A prolonged examination of the merits is generally neither necessary nor desirable."

[11] In my view the applicants have established that there is a serious issue to be tried. It is not my role on this motion to determine that issue. I need simply find, as I do, that there is a serious issue as to whether the proposed change in the television service to the building involves a "network upgrade to a telecommunications system" such that the requirements of section 22 of the Act are triggered. I also find that there is an issue as to whether the notice provided in April 2003 is sufficient to comply with the requirements of section 97(3) given the subsequent change in the proposal offered by Bell ExpressVu as revealed in the meeting of May 7, 2003. Finally on this point, there is an issue as to whether the change being proposed can reasonably be characterized as "a substantial change in a service that the corporation provides to the owners" such as to fall within the requirements of section 97(4) given that the respondent itself, in communicating to the unit owners, referred to the change in service as a "significant change" and a matter that "has far reaching implications". If the requirements of section 97(4) are invoked, then a two-thirds vote of the unit owners is necessary to approve the change and, of course, no such vote has been held.

[12] It is on the second and third factors in the test where I find that the applicants' motion flounders. I fail to see that there is any irreparable harm that will be occasioned to the applicants if the injunction is not granted. The Supreme Court in *RJR-Macdonald Inc. v. Canada (Attorney General)*, *supra*, defined irreparable harm in the following terms, at p. 341 (per Sopinka and Cory JJ.):

" 'Irreparable' refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228, 67 Sask. R. 123, 8 A.C.W.S. (3d) 380 (Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid, supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577, 61 B.C.L.R. 145 (C.A.)."

[13] I do not accept the contention of the applicants that the inconvenience that will be suffered by them from having a new television system installed in their unit and the time spent learning how to operate that system constitutes irreparable harm simply because it is asserted that such damage cannot be quantified in monetary terms. In my view those problems are *de minimis* and cannot rise to the level required to sustain a finding of irreparable harm.

[14] I am also not satisfied that the balance of convenience favours the applicants. The Board of Directors is, at this stage, presumed to be operating in good faith and in furtherance of its statutory duties and its decision is entitled to deference - see *York Condominium Corp. No. 382 v. Dvorchik* (1997), 12 R.P.R. (3d) 148 (Ont. C.A.). It may be, in the end result, that the Board will be found to have acted improperly but the court should not approach this motion assuming that result. Rather, the court should proceed on the basis that the decision of the Board is valid. The court should, consequently, be loathe to grant an order which would interfere with that decision unless it is clearly necessary to do so. If, at the end of the matter, the Board is found to have acted in contravention of its duties and obligations then there is nothing in the record before me that would suggest that the process by which Bell ExpressVu has gotten into the building to provide its

service cannot be reversed and replaced with the service by Rogers Cable, or any other supplier, which the unit owners may decide to engage. While that would admittedly cause further inconvenience to the unit owners, that inconvenience is less substantial than the inconvenience that would be caused by the court interfering with the going operation of the building as determined by the Board of Directors.

[15] For these reasons, the applicants' motion is dismissed. The applicants will pay to the respondent the costs of the motion fixed at \$2,500, being the amount agreed upon by counsel, within 30 days.

NORDHEIMER J.

DATE: June 4, 2003

COURT FILE NO.: 212/04

DATE: 20041005

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:)
)
WELLINGTON) Edward L. D'Agostino,
CONDOMINIUM) for the Applicant
CORPORATION NO. 7)

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Applicant)
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- and -)
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PAMELA HUGHES ET) No appearances for
AL.) the Respondents
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Respondents)

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) **HEARD:** June 1, 2004

REASONS FOR JUDGMENT

MacKENZIE J.

The Issue

[1] Does Wellington Condominium Corporation No. 7 (WCC No. 7) or the unit owners therein (the Owners), have the obligation to replace windows and exterior doors servicing each unit that have worn out through normal wear and tear? This is the question for the determination of the court on the application by WCC No. 7 under Rule 14.05(3)(d) of the *Rules of Civil Procedure*.

Overview

[2] The answer to the question will depend on the interpretation of the pertinent sections of the *Condominium Act 1998*, S.O. 1998, c. 19 Part VI, ss. 89-95 and ss. 11, 12 and 17 of the Declaration of WCC No. 7, together with the evidence and submissions in the application.

[3] The position of WCC No. 7 is that the obligation to replace windows and exterior doors which have worn out from normal wear and tear is on WCC No. 7 and not on the Owners in respect of the windows and exterior doors which service their individual units.

[4] Although the Owners have been duly served with Notice of the Application, none of them has filed a Notice of Appearance to the Application. In the result, there is no material nor submissions based on such material in opposition to the position being taken by WCC No. 7.

Analysis

[5] The *Condominium Act, 1998* (the *Act*) deals with the obligations of maintenance and repair of the units and common elements of a condominium's real property. In this regard, s. 90 of the *Act* places an obligation on condominium corporations to maintain the common elements and an obligation on unit owners to maintain their respective units. Section 91 of the *Act* however allows for alteration of the obligations by the declaration of the condominium corporation. In particular, a declaration may alter the obligation to maintain or repair after damage by providing that unit owners shall maintain and repair those parts of the common elements of which the owner has the exclusive use. Section 91 provides as follows:

91. The declaration may alter the obligation to maintain or to repair after damage as set out in this *Act* by providing that:

- (a) subject to s. 123, each owner shall repair the owner's unit after damage;
- (b) the owners shall maintain the common elements or any part of them;
- (c) each owner shall maintain and repair after damage those parts of the common elements of which the owner has exclusive use; and
- (d) the corporation shall maintain the units or any part of them.

[6] Section 7(5) of the *Act* provides:

7(5) If any provision in a declaration is inconsistent with the provisions of this *Act*, the provisions of this *Act* prevail and the declaration shall be deemed to be amended accordingly.

[7] Section 89 sets out the obligations on the condominium corporation and on unit owners to repair and maintain the condominium property. The pertinent parts of s.89 provide as follows:

89(1) Subject to ss. 91 and 123, the corporation shall repair the units and common elements after damage.

(2) The obligation to repair after damage includes the obligation to repair and replace after damage or failure but, subject to subsection (5), does not include the obligation to repair after damage improvements made to a unit. [my emphasis]

[8] The foregoing provisions set out the general legislative framework for the issues raised in the question before the court.

[9] Regard must now be had to the Declaration of WCC No. 7 (the Declaration) regarding the repair obligations of the condominium corporation and unit owners. Part IV of the Declaration entitled "maintenance" provides as follows:

s. 11 By the corporation

Subject to Clause 12 hereof, the corporation shall maintain all of the common elements including without limiting the foregoing:

- (a) all outside surfaces of the building including painted surfaces, roofs, eavestroughs that are constructed or installed at the date of registration of this Declaration and the description; [sic]
- (b) the partition walls between the units;

(c) all lawns, shrubs and landscaped areas, sidewalks, walkways, driveways, parking spaces, all electrical wiring circuits and lighting fixtures and light bulbs, sewer and water pipes in the common elements, notwithstanding such maintenance may be required as a result of reasonable wear and tear or otherwise.

s. 12 By the unit owner

Each unit owner shall maintain his unit or units (which shall include exterior windows and doors servicing his unit or units) and that portion of the common elements, if any, of which he has exclusive use pursuant to clause 8 hereof. [my emphasis]

[10] The Declaration creates an obligation on WCC No. 7 to repair after damage, in the following terms:

s. 17 Subject to the provisions of the *Act* and the Declaration, the corporation shall repair the units and common elements after damage.

[11] It is therefore necessary to determine the boundaries of the units and the description of the common elements in WCC No. 7.

[12] The unit boundaries are described in Schedule C of the Declaration as follows:

(a) Units 1 to 60, inclusive

Vertical [not applicable here]

Horizontal

All such units are bounded by the interior faces of the structural walls and their projections, the unfinished interior surfaces of the exterior doors (including garage doors in a closed position if garage is part of the unit), windows and window frames. [my emphasis]

...

(b) Units 61 to 98, inclusive

[the horizontal boundaries for these units do not refer to windows and are accordingly not pertinent in this application.

[13] The definitions of "unit" and "common elements" are found in the *Act*. Section 1(1) of the *Act* defines "unit" as follows:

"Unit" means a part of the property designated as a unit by the description and includes the space enclosed by its boundaries and all of the land, structures and fixtures within this space in accordance with the declaration and description. [my emphasis].

S. 1(1) of the *Act* defines "common elements" as meaning "all the property except the units".

[14] As noted above, the owners of units are responsible for maintaining their units and the condominium corporation is responsible for maintaining the common elements: s. 90(1) of the *Act*.

[15] The obligation to maintain or to repair after damage may be altered by and tear but does not include the obligation to repair after damage: s. 90(2) of the *Act*.

[16] The obligations to maintain or to repair after damage may be altered by the declaration. The declaration may also provide that unit owners maintain common elements or any part of them and maintain and repair after damage those parts of the common elements of which the owner has the exclusive use: See s.91(a), (b) and (c). In this case, the common elements of which the owner has the exclusive use are the windows and exterior doors servicing the owner's unit.

[17] The Declaration in s.12 has altered the owners' maintenance obligations. Section 12 states, in part, that the unit owner shall "maintain his unit or units (which shall include the exterior window and doors [sic] servicing his unit or units) and that portion of the common elements (if any) of which he has exclusive use..."

[18] It may be seen from the above provisions in the *Act* and Declaration that there is a distinction drawn between repair and maintenance, repair after normal wear and tear and repair after damage.

[19] It is not in dispute that the windows and exterior doors servicing the units are exclusive use common elements and not part of the common elements and that the Owners have the obligation to repair windows and exterior doors after normal wear and tear. However, the gist of the position of the WCC No. 7 is that the terms "repair after damage" and "maintain" as used in the above sections and Declarations have different meanings. Counsel submits that "maintain" or "maintenance" includes the obligation to repair windows and exterior doors after normal wear and tear but falls short of and does not include the obligation to replace windows and exterior doors in any circumstance, including after normal wear and tear. He contends that under s.89(2) of the *Act*, the obligation to repair after damage

expressly includes the obligation to repair and replace after damage or failure but, subject to subsection 5, does not include the obligation to repair after damage improvements made to a unit [my emphasis]. (Sub-section 5 is a transitional provision which has no effect on the issue herein).

[20] Counsel submits that the term "failure" in the context of s. 89(2) and the *Act* as a whole should be interpreted as a state where the article ceases to be operative as originally designed or intended and has no residual value, in terms of its repair costs being equivalent to or exceeding its replacement cost. On this interpretation, it is submitted that:

(a) an item that has not yet failed would be maintained or repaired and covered under the heading of "maintenance"; and

(b) an item that has failed and no longer performs its normal function could either be repaired or replaced and is covered under the heading of "repair after damage".

In other words, whether an item is to be "maintained" or "repaired after damage" would be determined whether there has been failure of the item according to the above interpretation.

[21] I have not been referred to any authorities dealing with the issue arising in this application: counsel has informed me that as this is relatively new legislation, he is unaware of any authorities dealing with the question.

[22] I am unable to give effect to the submission that "failure" as the term is used in s. 89 should be given the interpretation contended for, namely, that the item ceases to be operative as originally designed and has no residual value. In my view, the word "failure" used in s. 89(2) is equally susceptible of being interpreted as a cessation of function due to manufacturing or installation defects

as it is to a cessation of function without residual value in terms of repair costs being equivalent to or exceeding replacement costs.

[23] It remains open to WCC No. 7 (or any condominium corporation), to provide in its declaration to have WCC No. 7 (or any condominium corporation) assume the obligation to replace windows and exterior doors as a result of failure through normal wear and tear. In so doing, WCC No. 7 (or any condominium corporation) will be able to articulate the standard for "normal wear and tear" in context.

Disposition

[24] In the result, I find that the Owners have the obligation to replace windows and exterior doors servicing their units where such windows and exterior doors have worn out through normal wear and tear.

[25] As this is a novel point of law and no costs were sought by the applicant, no award shall be made.

MacKENZIE J.

Released: October 5, 2004

COURT FILE NO.: 212/04

affairs of a corporation except in very exceptional circumstances.

[15] For the above reasons, order to go as requested by the respondents, as follows:

- (1) a mandatory order directing David Thiel, the Chairman, to disclose and reveal the results of the election of the Board of Directors at a meeting held on October 13, 2005 at 7:00 p.m.; and
- (2) an order that all proxies and ballots currently being held by David Thiel be released to the new Board of Directors, and that David Thiel attend and complete the remainder of the Annual General Meeting.

Certain other matters are adjourned as set forth above.

[16] Counsel may make submissions as to costs, if necessary.

Spence J.

DATE: December 21, 2005

15. (1) Even if the limitation period established by any other section of this Act in respect of a claim has not expired, no proceeding shall be commenced in respect of the claim after the expiry of a limitation period established by this section.

(2) No proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place. (Emphasis added.)

[5] The New Act also contains certain transitional provisions in Section 24, the relevant portions of which are as follows:

24. (1) In this section, “effective date” means the day on which this Act comes into force; (“date de l’entrée en vigueur”)

“former limitation period” means the limitation period that applied in respect of the claim before the coming into force of this Act. (“ancien délai de prescription) 2002, c.24, Sched. B, s. 24 (1).

Application

(2) This section applies to claims based on acts or omissions that took place before the effective date and in respect of which no proceeding has been commenced before the effective date. 2002, c. 24, Sched. B, s.24 (2).

Former limitation period expired

(3) If the former limitation period expired before the effective date, no proceeding shall be commenced in respect of the claim. 2002, c. 24, Sched. B, s.24 (3).

Former limitation period unexpired

(4) If the former limitation period did not expire before the effective date and if no limitation period under this Act would apply were the claims based on an act or omission that took place on or

after the effective date, there is no limitation period. 2002, c.24, Sched. B, s. 24 (4).

Same

(5) If the former limitation period did not expire before the effective date and if a limitation period under this Act would apply were the claim based on an act or omission that took place on or after the effective date, the following rules apply:

1. If the claim was not discovered before the effective date, this Act applies as if the act or omission had taken place on the effective date.

2. If the claim was discovered before the effective date, the former limitation period applies. 2002, c. 24, Sched. B, s. 24 (5).

No former limitation period

(6) If there was no former limitation period and if a limitation period under this Act would apply were the claim based on an act or omission that took place on or after the effective date, the following rules apply:

1. If the claim was not discovered before the effective date, this Act applies as if the act or omission had taken place on the effective date.

2. If the claim was discovered before the effective date, there is no limitation period. 2002, c. 24, Sched. B, s. 24 (6).

[6] Subsection 24(2) states that the transitional provisions apply to claims based on acts or omissions that took place prior to January 1, 2004 and in respect of which no proceeding had been commenced before that date. The transitional provisions, therefore, are clearly applicable to the case at bar. The transitional periods which could apply to the case at bar are contained in Subsections 24(5) and 24(6). It is to be noted that Section 15 of the New Act establishing the

ultimate limitation period makes no reference to discoverability but measures the 15-year period from the date on which the act or omission actually took place. There is no cross reference between Section 15 and Section 24 to assist in interpreting the statute as to which provision would apply in the event of conflict.

Submissions of the City

[7] It is the submission of the City that the ultimate limitation period contained in Section 15 of the New Act overrides the transitional provisions contained in Section 24 and that, regardless which limitation period applies under the transitional provisions, no proceeding can commence more than 15 years after the date on which the act or omission actually took place. It is the City's position that, on the basis of principles of statutory interpretation, each provision of a statute must be looked at in the context of the total statute, the purpose of the legislation and the intent of the legislature. The City submits that the inclusion of the ultimate limitation period in the New Act is necessary to counterbalance the codification of the discovery principle in the New Act and to impose some outside arbitrary date by which proceedings must be commenced regardless of the discovery date. They submit that to interpret the New Act so as to be exempt from the ultimate limitation period claims based on acts or omissions which occurred prior to January 1, 2004 but were not discovered until after that date would be inconsistent with the theme and purpose of the legislation and the intention of the legislature. They point out that there is no reference in any of the explanatory notes to the New Act, the Report prepared by the Limitations Act Consulting Group appointed by the Attorney General for the purposes of the New Act or in any of the texts commenting on the New Act to the ultimate limitation period being anything other than 15 years from the date on which the act or omission actually took place and no indication that that would not be applicable in the case of proceedings to which the transitional provisions are applicable. They further submit that an ultimate limitation period is a practical necessity because witnesses die or can no longer be located, documents are destroyed or lost and standards of practice and behaviour change, all of which are equally

applicable to claims based on very old acts or omissions whether the discovery date is after January 1, 2004 or prior to January 1, 2004 and there is no principle reason why the ultimate limitation period should not apply to claims where the date of the act or omission and the date of commencement of the proceeding straddle the effective date of the New Act.

[8] On the interpretation of the New Act, it is the position of the City that the purpose of Section 24 is to establish which limitation period is applicable where the act or omission took place before the New Act came into force but the proceeding was commenced after the New Act came into force. They submit that it is illogical to interpret Section 24 as providing that a new ultimate limitation period applies to cases which happen to straddle the effective date and that such an interpretation would be inconsistent with Subsection 15 of the New Act which states:

15. (1) Even if the limitation period established by any other section of this Act in respect of a claim has not expired, no proceeding shall be commenced in respect of the claim after the expiry of a limitation period established by this section. 2002, c.24, Sched. B, s.15 (1).

[9] The City submits that to interpret the phrase "this Act applies as if the act or omission had taken place on the effective date" in paragraph 1 of Subsection 24(5) and in paragraph 1 of Subsection 24(6) to mean that, in the straddle cases, the ultimate limitation period would not commence until January 1, 2004 would lead to the absurd result that, if a claim based on a 1978 act was discovered on December 31, 2003, it would be barred by the ultimate limitation period but, if discovered at any time between January 1, 2004 and December 31, 2018 a proceeding could be commenced at any time within two years from the discovery date. The City submits that this could not have been the intention of the legislature in enacting the ultimate limitation period and, if this had been the intent of the legislature, it would have specifically so provided either in Section 15 or in Section 24. The City further submits that, in cases where the

ultimate limitation period is not applicable, it is specifically so provided in the New Act. For example, Subsection 15(3) of the New Act provides that “despite Subsection 15(2) no proceedings against a purchaser of personal property for value acting in good faith shall be commenced in respect of conversion of the property after the second anniversary of the date on which the property was converted” and Subsection 16(4) of the New Act expressly states that the limitation provisions set out in Section 16 with respect to proceedings referred to in Section 16 prevail over anything contained in Section 15.

Submissions of YCC

[10] The principle submission of YCC is that there is no ambiguity in the wording of clause 1 of Subsection 24(5) of the New Act looked at alone or in a juxtaposition with Section 15 of the New Act and that the words “this Act applies as if the act or omission had taken place on the effective date” applies for all purposes of the New Act including Section 15. YCC points out that under the prior regime the applicable limitation period would be measured from the date of discovery and, as the act in our case was not discovered until January 1, 2004, there was no limitation period that had expired pursuant to the old regime. Accordingly, the applicable transition provision in the New Act is clause 1 of Subsection 24(5), which states “this Act applies as if the act or omission had taken place on the effective date”. YCC submits that Subsection 24(5) does not specify a limitation period; it provides a method for determining a limitation period and accordingly, the introductory phrase of Subsection 15 “even if the limitation period established by any other section of this Act in respect of a claim had not expired ...” is not applicable to the case at bar. Accordingly, YCC submits that the only applicable limitation period for the commencement of a proceeding based upon the negligence of the City in 1978 is a limitation period running for two years from the date of discovery in May 2004 and, this action having been commenced on June 22, 2005, it is within the limitation period established by the New Act. YCC submits that the only effect of Section 15 is that its proceeding could not be commenced after January 1, 2019 if the negligence of the City had remained

undiscovered because it is deemed to have occurred as of January 1, 2004. This is because Subsection 24(5) deems the negligence of the City to have occurred as of January 1, 2004 for all purposes of the New Act and “resets the clock” for the determination of the commencement of the limitation period.

Analysis

[11] I am unable to accept the submission of YCC that there is no ambiguity in the meaning of the words “this Act applies as if the act or omission had taken place on the effective date” in subparagraph 24(5) and that the court must therefore give those words their plain meaning, that is that all provisions of the New Act apply as if the act or omission had occurred on January 1, 2004.

[12] The fact that I have received very able submission from counsel on two conflicting interpretations of the transitional provisions is of itself compelling evidence of ambiguity particularly when viewed alongside the provisions of Section 15.

In any event, those words used in Subsection 24(5) cannot be looked at in isolation and must be interpreted in the context of the New Act as a whole, the structure and purpose of such legislation and the intent of the legislature. This requires a purposive analysis. In my view the structure and purpose of the legislation incorporates the balancing referred to by the City between the discovery principle and the need for some cut-off date beyond which proceedings cannot be brought.

With respect to the intent of the legislature in “Sullivan and Driedger “The Construction of Statutes”, 4th edition, the authors state at page 216:

.... legislative purpose is often thought of in terms of the mischief or social ill it is designed to remedy or the problem it is meant to

address. This problem may be identified in an authoritative source such as the preamble to legislation, a Commission report or a scholarly text. It may also be inferred by matching provisions in the legislation to conditions which existed at the time of enactment and to which the provisions are a plausible response.

[13] In our case, all of the external sources cited to the court are consistent in establishing that it was the intention of the legislature to enact an ultimate limitation period to counterbalance the codification of the discovery principle in the New Act and to provide an outside arbitrary date after which proceedings could not be brought, regardless of the discoverability date. In view of the practical and evidentiary problems referred to in the explanatory notes to the legislation, the Report and the texts commenting on the new legislation, and the absence of any reference in any of those sources to the ultimate limitation period not being applicable to proceedings based on an act or omission which occurred prior to the effective date but is discovered after the effective date is, in my view, compelling evidence that this was not the intention of the legislature.

[14] I am also concerned that, to interpret the transitional provisions as submitted by YCC, could lead to an absurd result in that a proceeding based on an act which occurred in 1978 where the claim was discovered in 2003 could not proceed whereas a proceeding based on the same 1978 act where the claim was discovered in 2018 could proceed. As stated by Iacobucci J. in *Re Rizzo and Rizzo Shoes Ltd.* 1998 CanLII 837 (S.C.C.), (1998) 1 S.C.R. 27 at page 43, “it is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences”.

[15] In *Sullivan and Driedger, supra*, the authors state at page 236:

The modern understanding of the “golden rule” or the presumption against absurdity includes the following propositions.

(1) It is presumed that the legislature does not intend its legislation to have absurd consequences.

(2) Absurd consequences are not limited to logical contradictions or internal incoherence but include violations of established legal norms such as rule of law; they also include violations of widely accepted standards of justice and reasonableness.

(3) Whenever possible, an interpretation that leads to absurd consequences is rejected in favour of one that avoids absurdity.

(4) The more compelling the absurdity, the greater the departure from ordinary meaning that is tolerated.

[16] I have been cited no authorities on the interpretation of the ultimate limitation period provision or the transitional provisions of the New Act. Counsel for the City have, however, made reference to decisions of the British Columbia courts with reference to a 30-year ultimate limitation provision incorporated in the *British Columbia Limitation Act* in 1975. In *Armstrong v. West Vancouver (District)* (2003) B.C.J. No. 303 (BCCA), in commenting on the interrelation between the discovery principle contained in Section 6 of the Act and the ultimate limitation period provided in Section 8 of the Act, MacKenzie J.A. after referring to certain earlier authorities stated at paragraph 16:

As Wallace J.A. noted in *Wittman v. Emmott et al* 1991 CanLII 1119 (BC C.A.), (1991), 53 B.C.L.R. (2d) 228 (C.A.) Wilson J. also commented:

It seems to me that the purpose of ss. 3(1)(a) and 6(3) was to give legislative effect to the reasoning in *Sparham-Souter* by postponing the running of time until the acquisition of knowledge or means of knowledge of the facts giving rise to the cause of action. The Act has also resolved the problem of stale claims which was the major criticism of the principle. Section 8(1) reads in relevant part:

8. (1) Subject to section 3(3), but notwithstanding a confirmation made under section 5 or a postponement or suspension

of the running of time under section 6, 7 or 12, no action to which this Act applies shall be brought after the expiration of 30 years from the date on which the right to do so arose.....

This passage implies that the postponement provision in s. 6 has supplanted the common law rule. Under the Act, the cause of action arises when the damage occurs. This applies to both s. 3 and s. 8, but only the running of s. 3 time can be postponed under s. 6. Postponement is explicitly excluded from the ultimate limitation period in s. 8(1), and the outer limit for hidden damage claims is 30 years from the date that damage occurs.

[17] In *410727 B.C. Ltd. et al v. Dayhu Investments Ltd. et al* 2004 BCCA 379 (CanLII), (2004) 241 D.L.R. (4th) 467 (BCCA) Newbury J.A., with reference to the policy considerations in the enactment of an ultimate limitation period, stated at paragraph 21:

Balancing the concern for plaintiffs with undiscovered causes of action was the concern that the new discoverability rules could result in limitation periods being postponed indefinitely.

Referring to the broad policy reasons for limitation statutes, the Commission noted in this regard:

Applied in isolation, a discoverability rules does not serve the purpose of freeing defendants, after an appropriate length of time, from the economic and psychological burdens of potential litigation and the practical difficulties of defending stale claims. It does not take into account broader social interests in seeking finality to litigation, such as the economic impact of increased liability insurance costs passed on the consumers of goods and services.

Once it is accepted that the goals of certainty and finality should yield to the unknowing plaintiffs' right to present a claim when the facts come to light, it does not necessarily follow that they should be abandoned entirely. Replacing the traditional one-

sidedness of limitations law favouring defendants with an equally one-sided regime favouring plaintiffs fails to achieve the necessary balance.

Some protection is needed against the injustice which may result where a plaintiff succeeds because the defendant is not able to present any evidence due to the lapse of time and lack of notice that a claim exists. [At 21-22.]

The “balance” struck by the Commission and by the *Limitation Act* was the 30-year limitations period established by s. 8. It provides in material part:

8(1) Subject to section 3(4) and subsection (2) of this section but despite a confirmation made under section 5, a postponement or suspension of the running of time under section 6 or 11(2) or a postponement or suspension of the running of time under section 7 in respect of a person who is not a minor, no action to which this Act applies may be brought

.....

(c) in any other case, after the expiration of 30 years from the date on which the right to do so arose. [Emphasis added.]

As I have attempted to explain (in this case and at greater length in *Arishenkoff*), s. 8 was intended to act as a “longstop” on the indefinite postponement of actions by the operation of the statutory discoverability rules, and represents a “balance” between the interests of society in finality on the one hand, and on the other hand, the interests of plaintiffs in being able to pursue longstanding claims only recently discovered. If the fire were regarded as giving rise to a new cause of action in this case, the intention of s. 8 would surely be frustrated: new claims could arise against designers, contractors, builders, and local governments indefinitely into the future after the completion of construction whenever a fire, flood or other external

event occurred, and could arise repeatedly. The 30-year “ultimate limitation, which applies expressly notwithstanding the fact that the cause of action in question may not be discoverable, mandates that there be a point after which such prospective defendants may not be sued. In the case at bar, that point was reached, at the latest, in 1998 – four years before the issuance of the plaintiffs’ writ.

[18] I adopt the statements of the BC Court of Appeal in *Armstrong, supra*, and *Dayhu, supra*, which cases considered legislation and fact situations analogous to those in the case at bar.

[19] Accordingly, on the basis of principles of statutory interpretation, a purposive analysis of the New Act, a review of source of materials related to the enactment of the New Act and the authorities cited above, I am of the view that Section 15 of the New Act is a bar to this action and an order will issue dismissing the action as against the City of Toronto.

[20] Counsel may make brief written submissions to me with respect to the costs of this proceeding on or before January 30, 2006.

Ground J.

Released: January 20, 2006

COURT FILE NO.: 02-CV-231437CM2

DATE: 20030131

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: York Condominium Corporation No. 482, Applicant;
and

Ken Christiansen, Michael Christiansen, Wendy Christiansen, Penny Ible, 135
Marlee Holdings Inc., RPM Management Inc., Jim Rushton and Rainbow
International Real Estate Developments Ltd., Respondents;

HEARD: December 12, 17; 2002.

BEFORE: Lane J.

COUNSEL: Jonathan Fine, for the Respondents (except RPM and
Rushton), moving parties;

Patricia M. Conway, for the Applicant, responding on the motion;

M. Speirs for unit owners in Alberta.

REASONS FOR JUDGMENT

[1] This is a motion within this Application for an order that certain certificates of lien registered by the applicant against the condominium units owned by the moving parties are invalid and should be discharged. The central issue is whether the applicant can properly impose a lien upon all of the units owned by a particular owner to secure payment of overdue common expenses, even though some of that owner's units are not in arrears. The applicant alleges that the moving parties, who own a large number of units within the condominium, are in arrears of common expenses as to their units. To enforce payment, the applicant has registered liens under the Condominium Act, 1998, (Act) against all of the units owned by the moving parties. The moving parties maintain that they are in arrears as to some, but not all, of their units and that liens can only be registered against the units in

default. They move to discharge the liens from those of their units in respect of which they are not in default.

[2] There are similar issues relating to notices of attornment served by the applicant upon the tenants of units owned by the moving parties requiring the tenants to pay their rent to the applicant and not to the owner. The moving parties say that not all such units are in default and such notices cannot be delivered in respect of units where there is no default. In some cases, these notices also conflict with similar notices served upon the tenants by the mortgagees of the relevant units.

Principles of Statutory Interpretation:

[3] The modern Canadian law as to the interpretation of statutes was enunciated by Iacobucci J., for the court, in Rizzo & Rizzo Shoes Ltd. (Re) [1998] 1 S.C.R. 27. The case involved whether employees whose employment was terminated by the bankruptcy of their employer were entitled to the benefits given by Ontario law to employees whose employment was terminated by the active decision of the employer. The plain meaning of the language of the legislation (Employment Standards Act - Ontario) was to so confine it, and the Court of Appeal for Ontario did so. However, the Supreme Court reversed even though it did not disagree with the Court of Appeal on the plain meaning. At page 41, Iacobucci J. referred to page 87 of the text written by Elmer Driedger: Construction of Statutes (2nd ed. 1983) [see now Sullivan and Driedger: Construction of Statutes 4th ed., page 1] as best encapsulating the correct approach, recognizing that "statutory interpretation cannot be founded on the wording of the legislation alone":

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

[4] Iacobucci J. continued by referring to the Interpretation Act section 10, providing that every Act is "deemed to be remedial" and shall receive "...such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit." It is therefore clear that context and purpose are better guides to statutory interpretation than a narrow focus on the words alone.

[5] I turn to consider general purposes of the Act. It creates a way of holding an interest in residential land quite unlike anything at common law, but with individual features that are familiar, such as mortgages, priorities, tenancies, liens, attachment of rents and so on. Peculiar to the condominium are such features as common expenses, a central aspect of this case, and the power of the Board to make rules affecting an individual's residence, the very castle of which he is king at common law. A principal object of the Act is to achieve fairness among the parties - owners, their tenants, their mortgagees, the corporation itself - in raising the money to keep the common enterprise solvent. Hence the Act provides for owners to contribute to the fund for common expenses in the proportions specified in the Declaration, which normally means in accordance with the number and size of the units which they own. This common expenses fund is the central financial mechanism of the corporation and the duty of contributing to it is the central mechanism to achieve financial fairness among the owners. If one owner fails to pay, the others must bear his burden; the expenses are not optional and they do not just go away.

[6] Because of the importance of the common expenses, the Act provides the corporation with some tools to compel payment. Two such tools are at the heart of the dispute before me: a lien upon the unit and a right to attach the rents from a leased unit. The language of the sections creating these rights of the corporation is parallel in one aspect on which the moving parties place great emphasis. The sections invariably refer to unit in the singular. This is said to show that the remedies are applicable only on a 'unit by unit' basis. Nowhere does the Act deal expressly with the consequences of the ownership of more than one unit by an owner. Sections 85 and 87, creating the lien and the attachment, consistently use the singular 'unit'. However, the Interpretation Act imports the plural into the singular, albeit only "unless the contrary intention appears" (section 28 (j)). Therefore, the reader begins with the understanding that the singular includes the plural, and seeks to find any reason to infer a contrary intention.

[7] In approaching the above question, it is vital to remember that the two rights in question are tools to achieve the purpose of equity among the owners by enforcing their obligations to pay the common expenses. It is unlikely that the Legislature intended a narrow reading of rights enacted for such a purpose.

Lien Rights:

[8] The relevant sections of the Act as to the lien rights of the applicant are:

Contribution of owners

84.(1) Subject to the other provisions of this Act, the owners shall contribute to the common expenses in the proportions specified in the declaration.

Lien upon default

85. (1) If an owner defaults in the obligation to contribute to the common expenses, the corporation has a lien against the owner's unit and its appurtenant common interest for the unpaid amount together with all interest owing and all reasonable legal costs and reasonable expenses incurred by the corporation in connection with the collection or attempted collection of the unpaid amount.

Expiration of lien

(2) The lien expires three months after the default that gave rise to the lien occurred unless the corporation within that time registers a certificate of lien in a form prescribed by the Minister.

Certificate of lien

(3) A certificate of lien when registered covers,

- (a) the amount owing under all of the corporation's liens against the owner's unit that have not expired at the time of registration of the certificate;
- (b) the amount by which the owner defaults in the obligation to contribute to the common expenses after the registration of the certificate; and
- (c) all interest owing and all reasonable legal costs and reasonable expenses that the corporation incurs in connection with the collection or attempted collection of the amounts described in

clauses (a) and (b), including the costs of preparing and registering the certificate of lien and a discharge of it.

Notice to owner

(4) At least 10 days before the day a certificate of lien is registered, the corporation shall give written notice of the lien to the owner whose unit is affected by the lien.

Lien enforcement

(6) The lien may be enforced in the same manner as a mortgage.

Discharge of lien

(7) Upon payment of the amounts described in subsection (3), the corporation shall prepare and register a discharge of the certificate of lien in the form prescribed by the Minister and shall advise the owner in writing of the particulars of the registration.

Priority of lien

86. (1) Subject to subsection (2), a lien mentioned in subsection 85(1) has priority over every registered and unregistered encumbrance even though the encumbrance existed before the lien arose but does not have priority over,

- (a) a claim of the Crown other than by way of a mortgage;
- (b) a claim for taxes, charges, rates or assessments levied or recoverable under the *Municipal Act*, the *Education Act*, the *Local Roads Boards Act*, the *Statute Labour Act* or the *Local Improvement Act*; or
- (c) a lien or claim that is prescribed.

Notice of lien

(3) The corporation shall, on or before the day a certificate of lien is registered, give written notice of the lien to every encumbrancer whose encumbrance is registered against the title of the unit affected by the lien.

Service of notice

(4) The corporation shall give the notice by personal service or by sending it by registered prepaid mail addressed to the encumbrancer at the encumbrancer's last known address.

Effect of no notice

(5) Subject to subsection (6), the lien loses its priority over an encumbrance unless the corporation gives the required notice to the encumbrancer.

Mortgagee's rights

88. (1) Every mortgage of a unit shall be deemed to contain a provision that,

- (a) the mortgage has the right to collect the owner's contribution to the common expenses and shall promptly pay the amount so collected to the corporation on behalf of the owner;
- (b) the owner's default in the obligation to contribute to the common expenses constitutes default under the mortgage;
- (c) the mortgagee has the right to pay,
 - (i) the amounts of the owner's contribution to the common expenses that from time to time fall due and are unpaid in respect of the mortgaged premises,
 - (ii) all interest owing and all reasonable legal costs and reasonable expenses that the corporation incurs in connection with the collection or attempted collection of the amounts described in subclause (i), including, where applicable, the costs of preparing and registering a certificate of lien and a discharge of it;
- (d) payments made by the mortgagee under clause (c), together with interest and all reasonable costs, charges and expenses incurred in respect of the payments, are to be added to the debt secured by the mortgage and to be payable, with interest at the rate payable on the mortgage; and
- (e) if after demand the owner fails to fully reimburse the mortgagee, the mortgage immediately becomes due and payable at the option of the mortgagee.

Statement of common expenses

(2) A corporation shall, on request and free of charge, provide to the mortgagee of a unit a written statement setting out the common expenses in respect of the unit and, if there is a default in the payment of them, the amounts described in subsection 85(3) in respect of the unit.

[9] Counsel for the moving parties submitted that the language of these sections implied a unit by unit approach rather than the liability of an owner being secured upon all of its units. He noted that in section 85, the word used consistently was "unit" and not "units" or "unit or units". Section 85(6) provides for the enforcement of the lien in the same manner as a mortgage, that is by sale of a unit and it would make no sense, he submitted, that the applicant could sell one unit for the debt of another, even when owned by the same owner.

[10] Counsel placed particular emphasis upon section 86(1) which grants the lien priority over prior encumbrances, submitting that this priority ensured the collection of whatever was owed on each unit and rendered unnecessary any lien rights over other units of the same owner. If the applicant's position were correct, so that all an owner's units could be lined for the debt owed on only one, this priority could place a mortgagee in an impossible position. Where there were several units owned by one mortgagor, each with a different mortgagee, a mortgagee might be required to pay the arrears on another unit to obtain a discharge of the lien on the unit that is its security. In an extreme case, the arrears on several units could exceed the equity in a unit, leaving the mortgagee with a deficit caused by debt on other units against which it holds no security.

[11] Counsel also pointed to section 86(3) requiring the lienor to give notice to "every encumbrancer whose encumbrance is registered against the title of the unit affected by the lien". This language was only consistent with a unit by unit approach: there was a unit and it had an encumbrancer to whom notice had to be given.

[12] The moving parties also rely upon section 88 of the Act *regarding* mortgagees' rights. They submit that it too provides for a unit by unit framework, (factum paragraph 78):

a. Under s. 88(1)(a), a "*mortgagee has the right to collect the owner's contribution to the common expenses.*" It is submitted that "the owner's contribution to the common expenses" must mean in relation to the mortgaged unit only;

b. Under s. 88(1)(b), "*Every mortgage of a unit shall be deemed to contain a provision that .. the owner's default in the obligation to contribute to the common expenses constitutes default under the mortgage.*" It is submitted that it would be illogical that an owner's default in the obligation to contribute to the common expenses in respect of unit B would be a default under [another] mortgagee's mortgage on Unit A. Therefore, again, the default in question must be in relation to the mortgaged unit only.

c. Sec. 88(1)(c)(i) permits a mortgagee to protect its security by paying to the condominium corporation, "*the amounts of the owner's contribution to the common expenses that from time to time fall due and are unpaid in respect of the mortgaged premises.*" Not only does s. 88(1)(c)(i) specifically refer to the "*mortgaged premises*", it would be an absurd interpretation to suggest that a mortgagee AA would be required to, or would have the right to, pay mortgagor A's default in contribution to common expenses in relation to another unit not mortgaged to mortgagee AA. Therefore, the words "*the owner's contribution to the common expenses*" must be in relation to the mortgaged unit only.

d. s. 88(2) obliges a condominium corporation "*to provide to the mortgagee of a unit a written statement setting out the common expenses in respect of the unit and, if there is a default in the payment of them, the amounts described in subsection 85 (3) in respect of the unit.*" If a mortgagee had the obligation or the right to pay or collect arrears of common expenses in relation to a unit not mortgaged to it by the mortgagor, then the mortgagee would not have the right to obtain such statement in respect of such unit.

[13] Before moving on, I pause to observe that the above clauses from section 88 might be expected to focus, as they do, on the individual units, since they are establishing the minimum provisions of a mortgage of a unit and units are mortgaged one at a time. I do not think that these provisions cast much light on the problem before me.

[14] The moving parties submitted that the statutory framework of the lien works only on a unit by unit basis. Such an interpretation balances the rights of the parties in the best way. The corporation can collect the common

expenses in priority to the encumbrancer, but the priority is limited to the unit in arrears. The mortgagee suffers a diminution of its priority, but it is limited to the unit against which it has security and it has the right to protect itself by requiring the mortgagor to pay the common expenses to it as part of the mortgage payments.

[15] The applicant, in response, provided some background in support of a different view. The moving party Ken Christiansen, through a company, was the property manager, but had delegated the actual work to the respondent Jim Rushton who permitted Mr. Christiansen and the other moving parties to fall into arrears of common expenses. Mr. Ken Christiansen's 11 units are shown in the applicant's records as owing a total of over \$29,000 at August 2002, reduced somewhat by the attornment of rents by the time of the hearing. (There is an accounting dispute between the parties, and I cite these figures merely as background and not as a finding). The cumulative effect of the arrears of common expenses, which were allowed to build up to more than \$150,000 by June 2002 in respect of over 50 units (not all belonging to the moving parties), was that the corporation could not pay its bills.

[16] This background illustrates, says the applicant, the reason why the payment of common expenses has been given a form of super-priority in the Act: these expenses are the life blood of the corporation. To the extent that some owners do not pay, the rest will suffer directly. That is why the Act gives these expenses priority over the individual debts of the owners to their mortgagees. Mortgagees understand this scheme and there is no unfairness to them in enforcing it.

[17] Turning to the lien issue, the applicant first submitted that all of the liened units were in arrears because all of the relevant owners owed common expenses to the corporation and the lien is simply a means of collecting debts owed by owners. There was no reason why the debt could not accrue unit by unit but be collectible against any property owned by the relevant owner. Counsel submitted that it was open to the corporation to attorn rents from any unit owned by A and apply them to any debt owed to the corporation by A. Since that was possible, it followed that all units owned by A owed money and would be subject to a lien under sec. 85(1).

[18] At paragraph 16 of its Supplementary Factum, the applicant refers to the provisions of sec. 85(1)(7) and whether the defaulting owner could obtain a partial discharge of the corporation's lien:

The issue of whether an owner is entitled to a partial discharge if he or she pays the arrears on an individual unit has not arisen and has not been determined. Section 85 speaks of an owner's default and obligation to contribute to common expenses. However, subsection 7 requires discharge "upon payments of the amounts described in subsection 3", without differentiating a payment made by the mortgagee and one made by the owner. It appears therefore that an owner would be entitled to a partial discharge with respect to a particular unit on payment of the arrears owing for that unit.

Analysis of the Lien Issue:

[19] I begin with the applicant's submission that the wide power of attachment of rents creates a debt against each unit of the defaulting owner and thereby renders each unit subject to the statutory lien. Even accepting (as I do later in these reasons) the applicant's submission that the corporation can attorn the rents of one unit owned by A for the arrears of another unit owned by him, does not provide a basis for extending the lien right in the same manner. The applicant conceded that no lien could arise against a unit if there was no money owing in respect of that unit, but argued that the attornment right meant that all of an owner's units would owe money if one did. I cannot agree that the analogy is apt. Lien rights and attachment rights are very different tools. The right to attach the rents does not arise because the tenanted unit is in default, but because the tenant owes money to the owner and the corporation is intercepting it. The basis for enforcing a lien upon a unit as to which there is no default cannot be found in the rent attachment provisions.

[20] The statutory lien under section 85 arises upon the owner defaulting in "the obligation to contribute to the common expenses". The lien arises by operation of law, without any notice or other step by the corporation to bring it into existence. The function of the notice is to prevent the expiration of the lien after the three month period in sec. 85(2). The section gives a lien upon the "owner's unit" which includes the plural

according to the Interpretation Act. If the plural is substituted, the language works perfectly well in section 85. No notices are given to anyone until the corporation decides to preserve the lien by registration, presumably because normal requests for payment have not succeeded. At that point, the corporation gives notice to the owner under section 85 (4) and thereafter registers the certificate under section 85(3) setting out the whole of the amount owing.

[21] However, at this point, section 86 grants the lien priority over every encumbrance. If the section means that a lien on unit A, on which nothing is owed, for the owner's debt in respect of unit B which it also owns, has priority over the encumbrance on Unit A, there is a possibility of unfairness to the mortgagee of Unit A. The applicant disposes of this problem by finding in section 85(7) a basis for a partial discharge of Unit A upon payment of the amount owing relating to that unit. In the example given, the mortgagee of Unit A could obtain a discharge of the lien on that unit by paying nothing.

[22] The difficulty with the applicant's analysis is that it leads to a dead end. In the example above, if the lien on Unit A can be discharged by the owner or the mortgagee paying only what is owing on that Unit, then liens on all of an owner's units add no security that is not achieved by liens on defaulting units only. If, however, a blanket lien on all of an owner's units cannot be discharged without the payment of all sums owing for all units, then the position of a mortgagee of any one of a group of units is potentially very difficult. Either way, the lack of utility or the lack of fairness of the blanket lien speak against that interpretation.

[23] The moving parties' analysis of the scheme of the section regarding the corporation's lien for common expenses is persuasive. The jeopardy to mortgagees inherent in the applicant's reading is significant and, if intended by the Legislature would surely have been dealt with expressly. As noted, the Interpretation Act imports the plural into the singular, but only "unless the contrary intention appears" (section 28 (j)), and the moving parties' analysis provides support for a contrary intention so far as the imposition of a lien by operation of law beyond the unit in default is concerned. To permit the lien to extend beyond the very unit in default or to enforce a lien upon unit A for the default of the same owner on Unit B risks upsetting the balance of fairness among the parties, particularly the mortgagees. It should be noted, however, that there would be no element of unfairness to the defaulting owner in

permitting a broader lien; the narrowness of the lien right is not intended to enable the owner to escape payment.

[24] The applicant's own analysis of section 85(7), supra, indicates that the lien is confined to the arrears on the liened unit. If a discharge can be obtained by paying only those arrears, the lien is only effective for arrears on that unit. If it is limited in that way, the fear that the equity will be wiped out by accumulated arrears on other units disappears, but there is no utility in reading the Act as permitting the imposition of a lien upon a unit other than the unit in arrears as it will not gain the lienor any additional funds.

[25] For these reasons, I read section 85 of the Act as imposing a lien only against a unit actually in arrears and not against units belonging to the same owner but not in arrears.

Attornment Rights:

[26] The question of the ability of a condominium corporation to attach rents to recoup all of the owner's default in payment of common expenses, not just the debt arising in relation to the unit whose rents are attached, raises different issues than those just discussed. There is no inherent reason why the two collection rights given to the corporation should be identical in their scope. The debt may well accrue and be calculated unit by unit but be collectible by attaching the rent from any or all units owned by one owner. After all it is the owner who defaults, not the unit. As noted, attachment is not a remedy which intrudes into the mortgagee's rights so far as to jeopardize its security. The tenant is fully protected because the rent taken by the corporation is deemed to have been paid to the owner. There is no unfairness to the owner. It was submitted that there was unfairness because many owners depended on the rent to pay the mortgage. This amounts to arguing that the corporation should in effect pay the owner's mortgages by foregoing the common expenses. The scheme of the Act is the exact reverse: priority is given to the common expenses.

[27] The sections relevant to the attornment rights of the applicant are:

Default with respect to leased unit

87. (1) If an owner who has leased a unit defaults in the owner's obligation to contribute to the common expenses, the corporation may, by written notice to the lessee, require the lessee to pay to the corporation the lesser of the amount of the default and the amount of the rent due under the lease.

Service on lessee

(2) The corporation shall give the notice to the lessee by personal service or by sending it by prepaid mail addressed to the lessee at the address of the unit.

Notice to owner

(3) If the corporation gives a notice to a lessee, it shall give a copy of the notice to the owner of the unit that the lessee has leased.

Rent paid to corporation

is not on its face confined to default in respect of the leased unit

(5) Upon receiving a notice under subsection (1), the lessee shall make the required payment to the corporation even if an encumbrancer of the unit has acquired the right of the lessor to receive rent under the lease.

No default in lease

(6) The payment to the corporation shall constitute payment towards rent under the lease and the lessee shall not by reason only of the payment to the corporation be considered to be in default of an obligation in the lease.

[28] The language of section 87(1) is not on its face expressly restricted to default in respect of the very unit leased, but refers generally to the owner's obligation. Considering the objects of the Act, should such a restriction be read in?

[29] The moving parties submitted that section 87 should be read as requiring the corporation to attach rents from Unit A only to pay arrears on payments for Unit A, whereas the corporation here has done so in order to recoup arrears on other units of the same owner. To allow this would be unfair to the mortgagee of the unit not in default. That mortgagee would be deprived of the right to attach the rent itself to pay its mortgage.

[30] The moving parties further submitted that the mortgagee would also lose the benefit of the right to pay the amount owing for common expenses in order to keep the unit in good standing. I do not think that this is so. If the unit owner owes arrears on a unit, the mortgagee can pay them itself, add them to the mortgage and keep the unit which is its security in good standing. Its only loss is the ability to take the rent for that purpose. There is no unfairness. The security interest of the mortgagee is not in any jeopardy. The scheme of the Act, particularly its super-priority for the common expenses, is well-known to mortgagees, who can, and do, protect their security by appropriate terms.

[31] The applicant submitted that it is important to understand the centrality of the common expenses in the operation of the condominium corporation for the benefit of all of the owners. This is a joint living enterprise in which whatever is left unpaid by one must be paid by the others. It makes sense that one of the objectives of the legislation is to achieve equity among the owners. Both the lien and the right to attach are designed to achieve this end. Even if, in the case of the lien, there are compelling reasons to confine its impact to the unit in arrears, given that virtually all units will have a mortgagee involved, there are no such reasons affecting the right to attach. The impact upon the mortgagee is limited and can be recouped by the mortgagee. It is a matter of the corporation as creditor intercepting cash owed to the debtor by a third party, a process which primarily affects the debtor, as the statute intends. This kind of situation occurs daily in the operation of debtor-creditor law, in which there need not be any relationship at all between the source of the debt and the source of the cash being seized. It would be an unjustified limitation on the effect of section 87 to confine it as the moving parties propose.

[32] I find this reasoning by the applicant persuasive. The attornment is much less drastic and intrusive into the rights of the mortgagee. It does not affect the mortgagee's security. It does not carry with it the possibility that an accumulation of the debts of other units may wipe out the equity and leave the mortgagee with a deficit. There are not the same reasons to confine the right to the very unit in respect of which the owner is in default as exist in the case of the lien. Given the statutory priority of the common expenses over the mortgage, there is every reason to read the section so as to enable the corporation to recover what is due to it.

[33] The applicant also relied upon the decision of Nordheimer J. of this court in MTCC 1175 v. Irving A. Burton Ltd. (1999) 25 R.P.R. (3rd) 268. This case involved section 49(3) of the previous Condominium Act, which provided for the attachment of rent in similar language as is found in section 87(1) of the Act. The contest was between the Construction Lien Act trustee of the original developer, Dynasty Executive Suites Ltd., and the condominium corporation. Both had served notices to attorn upon the tenants of the units still owned by Dynasty. One issue was the same as ours: could the corporation attach rents beyond the amounts owing by each unit? Nordheimer J. said, at paragraph 22:

Finally, I mention that the wording of section 49 refers to the obligations of the owner to contribute to the common expenses. That wording would suggest that it is the entirety of the owner's obligations that are covered by the section and not just that portion of the default attributable to a particular unit. It would follow, therefore, that the condominium corporation can attach the rents to recoup all of the owner's default in its obligations for common expenses.

[34] The moving parties submitted that the case was wrongly decided on this point. I do not agree. The Act is remedial legislation, opening up a means of shared ownership not previously available, and as such, should be interpreted so as to best achieve its objects. As noted, the attachment of rents creates no unfair impact upon the mortgagees as may occur in the case of the lien. There is no unfairness to the tenants and certainly none to the defaulting owners who are seeking to live off their neighbours. Why should unnecessary barriers be placed in the way of achieving fairness in the bearing of the burden of the common expenses?

[35] By reason of the Interpretation Act, supra, the singular 'unit' includes the plural and there is no contrary intention to be found in an analysis of the Act. Section 87, read using the plurals 'units' and 'lessees' readily affords authority for the corporation to recover the shortfall in common expenses from the defaulting owner through attaching its flow of rents from all of its units. It is significant that the obligation is described consistently as that of the 'owner', not that of the 'unit'.

[36] It was urged that the Act could not be read to require the lien to be confined to the one unit, but to give the corporation broader rights against the

rent flow; it was inconsistent. But, as counsel for the applicant submitted, the lien and the attachment of rents are two very different ways to collect what the defaulting unit owner owes and there is no reason why they should approach the matter in lock-step. The true inconsistency occurs when the Act is read in a manner inconsistent with its purpose: the achievement of equity among the various parties involved. It is contrary to the spirit, purpose and objects of the Act to protect a defaulting owner from having to pay his share by a narrow reading of the language relating to a tool for the collection of what is owing.

[37] If that were not enough, it would take a very strong argument to persuade me to differ from the considered opinion of another judge of this court upon the very point at issue before me. It was not even submitted that the language before me differs in any material way from that before my brother Nordheimer in 1999.

[38] I therefore hold that the corporation had the right to attach the rents payable to the moving parties by the tenants of their units regardless of whether any arrears existed in respect of a particular unit, so long as there were arrears owing by that owner in respect of any unit.

Application of the Rents after Seizure:

[39] The moving parties submitted that the corporation was bound to apply the rents attached by it first to the debt owing on the unit which generated the rent. The granting of priority over the mortgage made this the only fair way to allocate the funds. This was apparently based on the assumption that the rent was the only available source of funds for the owner to pay the mortgage. This may or may not be so, but even if it is so in a particular case it is quite irrelevant. The Act clearly intends to give the payment of the common expenses priority over the payment of the mortgage. The owner has the obligation to pay both common expenses and mortgage and neither the mortgagee nor the corporation have any concern over where the owner gets the money to pay or any duty to act in any interest but their own.

[40] Is there any reason why the normal rules as to the allocation of payments should not prevail? At common law, a debtor making payments to a creditor can state at the time of payment which of several accounts he is paying. If he makes no timely allocation, the creditor may do so, even long

after the receipt. If neither makes an allocation, the rule is that the earliest debt is paid first.

[41] The corporation received no allocation instructions from the owner/debtor at the time of payment and has applied the attached amounts to the oldest debts. It was submitted that, because the tenants would normally describe the payment as rent for a particular month, there had been an allocation to that month. There is however no evidence that the tenants were acting as agents of the debtor to make such an allocation. Conceptually, the funds are not rent in the hands of the corporation, that is only the case between owner and tenant. In the hands of the corporation they are simply funds owing to the owner which the corporation has the right to seize.

[42] In any event, there is no right in a debtor to allocate the application of funds not 'paid' by him but seized from his own debtor. In my view, where, as here, the owner did not 'make a payment' but forced the corporation to use the collection procedures in the Act, it does not lie in the owner's mouth to complain that he did not have the opportunity to allocate the funds as best suited him.

[43] This was the result reached in 464734 Ontario Inc. v. Canada [1990] F.C.J. No. 218 where it was held that funds received by Revenue as a result of a garnishee served upon a judgment debtor of the taxpayer were not a payment by the taxpayer, but a payment by the third party to satisfy its obligation under the notice of garnishee. The debtor could not make an appropriation to a specific portion of its tax debt and the Minister was free to allocate it as best suited the interests of the revenue.

[44] The moving parties assert that the attached sums must be allocated first to the 'liened arrears' and not to the oldest arrears. This would be to their advantage because it would see the basis for the liens (limited to three months in many cases) paid off quickly. In my view, this submission confuses the two quite different tools for collection. There is no reason in the Act why the existence of a lien on a unit should affect how the corporation allocates the funds it receives. There is no restriction on the age of debts for which the corporation can attach rents, whereas the lien expires after three months unless a certificate is registered. It would be contrary to the scheme of the Act to prefer the interests of the owner in ridding itself of the lien to the interest of

the corporation in getting paid. The corporation is free to allocate these funds in its interest, not in the debtor/owner's interest.

Status of the Liens:

[45] It follows from my finding that the Act does not authorize the registration of liens against units as to which there are no arrears, that Certificates of Lien registered against any such units must be discharged in respect of those units. I see no reason why the present Certificates of Lien should not remain in place against those units where there are arrears. A problem could arise where the amounts owing on more than one unit have been lumped together in the Certificate, which does not therefore disclose what is claimed against which unit.

[46] That problem is more apparent than real because of the requirement that the owner be given a Notice of Lien. Those Notices that are in the moving parties' Factum/Compendium as examples, and those that are exhibits to the cross-examination of Margarita Diaz, are done on a single unit basis and therefore provide the required information. As well, the information can readily be ascertained from the corporation and the evidence does not disclose any prejudice to the moving parties. If, as alleged, mortgagees got inadequate information in the notices sent to them, that is not a matter of which the moving parties can properly complain.

[47] It was submitted by the moving parties that these liens should be treated in the same fashion as Notices of Sale under Power of Sale in the Mortgages Act; that is strict compliance should be required. Both, it was said, are self-help remedies with preconditions established by the governing Act. Form 14, Notice of Lien to Owner, prescribed by Ontario Regulation 48/01 provides for the giving of full particulars. Therefore, in the absence of full particulars as to each unit, the notices of lien were invalid. But the evidence before me is that the Notices of Lien to Owner, Form 14, were actually in compliance with that Form being on a single unit basis. If anything was not in compliance, it was the Certificate which lumped the amounts owing by the several units of the same owner.

[48] The form of the Certificate of Lien is prescribed by Ontario Regulation 49/01, Form 6, and it has been followed by the corporation with the one problem that there are claims for lien over units which I have held are not lienable in the circumstances and the amounts are lumped together. There

is nothing in the Form itself to confine it expressly to one unit. Assuming that there is a failure to include all relevant information called for by the Form, it must still be read together with the Notice to Owner which does give all the data. Even if strict compliance is required, the documents taken together fully comply.

[49] More fundamentally, the applicant responded that the entire analogy was wrong. The strict compliance of the Notice of Sale under the Mortgages Act was imposed because it was the basic step in the process of actually selling the security; but the lien is not the equivalent step. The Act provides that the lien may be enforced "in the same manner as a mortgage", thus a Notice of Sale would issue at a later stage and the strict compliance rules would apply at that stage. Further, if the Notice of Sale is faulty, all that is lost to the mortgagee is the time to issue a new one. In the case of the lien, if it is set aside, the three months of lienable arrears must be recalculated and some lien rights will be forever gone. This is a serious penalty for want of precise compliance at so early a stage, and should not be read in to the Act unless it is necessary for its operation, which is not the case.

[50] In my view this is a sensible analysis. Importing the strict compliance requirement at the Certificate of Lien stage, when it will have to be met at a later stage if sale is actually contemplated, is adding an extra hurdle for the condominium administrator and giving defaulting owners a protection that they do not need since they will be sent a Notice of Lien with those particulars. Owners will normally know perfectly well that they are in arrears and how much and if they don't, the information is readily available from the corporation office. At this stage some showing of prejudice should be a requirement for setting aside a certificate of lien for non-compliance with the requirements in section 85 and the Forms at the instance of an owner. No prejudice has been shown.

[51] For these reasons, I do not set aside the Certificates of Lien. Rather, I direct that the applicant register discharges of its lien against all units as to which there were no arrears of common expenses at the date of registration.

Reasonable Costs and Expenses:

[52] There were disputes about the reasonableness of certain costs and expenses raised in the material and summarized in paragraph 83 d of the Factum/Compendium of the moving parties. The reasonableness of a \$100

charge per Notice requires evidence and possibly credibility findings. The court is not equipped on a motion to deal with such matters. In my view, a cost can be incurred even where the work is done by an employee within the organization, not only where a payment is made to a third party. Employees do not come for nothing. But evidence would be required in support of the reasonableness of the portion of the employee's salary allocated to the task.

[53] The legal costs charged to the corporation and passed on to the defaulting owners can always be assessed under the Solicitors Act. The garbage removal charge objected to was abandoned in argument. The cost of a notice to attorn is surely within the words of section 85(1) 'collection or attempted collection of the unpaid amount' and so lienable. Similarly, incidental costs such as bank charges for returned cheques and the like also fall into those words. There can be no lien for interest on arrears which are not themselves lienable, but interest is a normal and proper charge and could be charged on the expenses due and deducted from the sums attached since there is no time restriction on that collection method.

Disposition:

- [54] The moving parties sought substantive relief under four headings:
- a. a declaration that the Notices of Lien are invalid and discharging them.
 - b. an order requiring the corporation to account for the attached rent by applying it to lienated amounts and for consequential relief;
 - c. an order for repayment by the corporation of attached rents above the lienated amounts;
 - d. an order disentitling the corporation from requiring certain expenses to be paid to discharge a lien.

[55] The declaration sought under item a. is refused for the reasons set out above. An order will go requiring the corporation to discharge those liens against the units not actually in default as set out above, but the certificates of lien may remain on the register as to the units in default at the time of registration.

[56] The order sought in item b. is refused for the reasons set out above. There is no obligation on the corporation to apply attached amounts to particular debts or to confine the attachment of rents to units in default.

[57] The order sought in item c. is refused for the reasons set out above.

[58] The relief sought in item d. has been dealt with above so far as is presently possible.

[59] Costs submissions may be made in writing, those of the applicant within 20 days; those of the moving parties in a further 20 days and reply in a further 5 days.

Lane J.

DATE: January 31, 2003.

COURT FILE NO.: 75882/05

DATE: Dec. 15, 2005

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

YORK REGION CONDOMINIUM CORPORATION NO. 968 and
YORK REGION CONDOMINIUM CORPORATION NO. 1002,
Applicants

Jonathan H. Fine, for the Applicants

- and -

SCHICKENDANZ BROS. LIMITED and
YORK REGION COMMON ELEMENT CONDOMINIUM
CORPORATION NO. 967, Respondents

Irving Marks and Shawn Pulver, for the Respondents

HEARD: November 2, 2005

JUSTICE E. LOUKIDELIS

REASONS FOR JUDGMENT

[1] The applicants are the owners of the developed portion of a much larger subdivision area owned by Schickendanz. Condominium Corporation 967 owns the common elements of the subdivision consisting of a roadway referred to as a ring road.

[2] The applicants seek from Schickendanz a proportionate share of the common element expenses notwithstanding the latter wording contained in clause 1.6 of the Declaration which reads:

“Notwithstanding the foregoing, until the Common Expense Threshold Payment Date for a Future Residential

POTL is established, such Future Residential POTL shall not contribute to the payment of common expenses....”

[3] The Common Expense Threshold Date is then defined as:

“....the date that at least fifty per cent of the dwellings in such Future Residential POTL become Developed Dwellings.”

[4] The effect then it to exempt the developer from common expenses until the fifty per cent threshold is passed.

[5] There is no defined date for the passing of such threshold. Further it is entirely in the developer’s hands when that date might be reached.

[6] Although the applicants were clearly aware and accepted the exclusionary clause, such clause is contrary to the provisions of subsections 7(5) and 84 (3) of the Condominium Act 1998.

[7] The former subsection establishes the paramountcy of the Act over any Declaration. The latter subsection prohibits the exemption of an owner from its obligations.

[8] In acting as it did, Schickendanz avoided its statutory duty thereby placing an unfair burden on the applicants. If not oppressive, it was highly prejudicial.

[9] The evidence appears clear that Schickendanz at least to some degree made use of the ring road. Even if that were not so, non-usage does not exempt an owner from paying its proper share. In that regard I agree with the reasoning of Rosenberg J. set out in *York Region Condominium Corporation No. 771 v. Year Full Investment (Canada) Inc.* 10 OR(3d) 670.

[10] Respondents rightly argue that in some limited circumstances a zero percent allocation is valid, as was found in the Ontario Court of

Appeal decision in *Peel Condominium Corporation No. 417 v. Tedley Homes Ltd. et al* 1997 CanLII 1585 (ON C.A.), (1997) 35 OR (3d) 257.

[11] In that case the Court found that certain suites within the condominium buildings would immediately form part of the common elements and title was to be transferred to the condominium corporation upon payment of the purchase price.

[12] That case is easily distinguished from the facts here as the zero allocation simply confirmed the reality that the developer only held title temporarily for the corporation which was the equitable owner.

[13] In the case of *Abdool et al v. Somerset Place Developments* (1992) 27 RPR (2d) 157 the Ontario Court of Appeal placed the onus on a purchaser who sought to resile from a contract for non-disclosure, to show that such non-disclosure was material and would have altered his decision. In my view that is not the issue here.

[14] I am satisfied that notwithstanding notice given by Schickendanz of the terms of clause 1.6 of the Declaration the provisions of the Act must prevail.

[15] A declaration should issue as claimed by the applicants and the offending clause in the Declaration should be deleted.

[16] Further that the owner's of all POTL's associated with York Region Element Condominium Corporation No. 967 be obliged to contribute to the common expenses in accordance with the percentages set out in Schedule "D" of the Declaration.

[17] Further that the respondents pay their past share of the common expenses owing to each applicant.

[18] The draft order appears to be in order and I have signed same.

[19] The applicants shall have their costs fixed at \$10,000.00 plus applicable GST.

JUSTICE E. LOUKIDELIS

Released: December 15, 2005

DATE: 20060925
DOCKET: C44760

COURT OF APPEAL FOR ONTARIO

**RE: YORK REGION VACANT LAND
CONDOMINIUM CORPORATION NO. 968 and
YORK REGION VACANT LAND
CONDOMINIUM CORPORATION NO. 1002,
Applicants (Respondents in Appeal) – and -
SCHICKEDANZ BROS. LIMITED and YORK
REGION COMMON ELEMENT
CONDOMINIUM CORPORATION NO. 967,
Respondents (Appellants in Appeal)**

**BEFORE: McMURTRY C.J.O.; BLAIR J.A. and
CUNNINGHAM A.C.J.S.C. (ad hoc)**

**COUNSEL: Jonathan H. Fine,
for the applicants(s) (respondents in
appeal)**

**Irving Marks, Shawn Pulver,
for the respondent(s) (appellants in
appeal)**

HEARD: Monday, September 18, 2006

On appeal from the order of Mr. Justice E. Loukidelis dated December 15, 2005 made in Newmarket, Ontario.

ENDORSEMENT

[1] Schickedanz Bros. Limited (“Schickedanz”) and York Region Common Element Condominium Corporation No. 967 (“YRCECC”) appeal the decision of Loukidelis J. dated December 15, 2005 asking that his order be set aside.

[2] The respondents herein sought a declaration before Loukidelis J. that the conduct of Schickedanz, in registering a declaration in February 2002, was oppressive, unfairly prejudicial to the respondents, and entirely disregarded their interests. The impugned declaration created a Common Elements Condominium Corporation (“CECC”) which is a type of condominium corporation authorized by the *Condominium Act* (“the Act”). A CECC contains common elements, but no units. Rather, parcels of land are “tied” to the CECC and these parcels are called “Potls” which are responsible for the common expenses related to the CECC. In the present case, the CECC was created in order to facilitate the maintenance and management of the ring road within the development.

[3] Essentially, Schickedanz did not want the undeveloped Potls to contribute to common expenses related to the CECC because these were vacant parcels and hence there was no reason for them to contribute to the maintenance of a ring road they were not using. The result was the declaration creating a bifurcated expense formula which had the effect of saddling the developed phase with over 75% of the common expenses in 2002-03 and over 48% of the expenses thereafter. Phase 2,

when it was registered, would have to pay approximately 34% of the expenses and it was the two vacant land condominium corporations (VLCC's) who objected to this disproportionate sharing of expenses and who commenced the application before Loukidelis J.

[4] It is important to note that the bifurcated expense formula outlined in the declaration was disclosed to all prospective purchasers of units in the two respondent corporations. Non-disclosure is not the issue for the respondents herein, but rather that the bifurcated formula set out in the declaration was contrary to the Act.

[5] There are three issues before us. First, are the disputed sections of the declaration inconsistent with the Act? Second, did Schickedanz act in a manner oppressive or unfairly prejudicial to the respondents? And, third, if the appeal were to be dismissed on the first two issues, should Schickedanz be given credit for payments it made to YRCECC No. 967 while it owned units of the respondents?

[6] In our view, the application judge erred in his interpretation of the requirements mandated by the Act, which requires the declaration to set out the proportionate contribution of each Potl to the common expenses. We conclude that the appellants' declaration clearly did so and the provision in the Act prohibiting an owner from being exempt from its common expense obligations is irrelevant as the obligations are determined by the terms found in the declaration. We conclude there is no conflict between the declaration and the Act and therefore the formula ought to stand. The proper time for unit holders of the VLCC's to

complain about the common expense formula would be at the time they were presented with the declaration. The Act provides purchasers with a ten-day window in which to rescind any offer to purchase granting purchasers a period of time to consider the terms and determine whether or not they think they are fair. If purchasers disagreed with the bifurcated formula set out in the declaration, they were free within that window of opportunity to walk away and rescind their offer.

[7] Without question, the Act is to prevail over the declaration in situations where the declaration conflicts with the Act. In such a case, an impugned declaration would be void. In the present case, however, we cannot see how the impugned sections of the declaration in any way conflict with the Act. Section 84(1) of the Act states,

84.(1) Subject to the other provisions of this Act, the owners shall contribute to the common expenses in the proportions specified in the declaration.

[8] Section 84(3) states,

84.(3) An owner is not exempt from the obligation to contribute to the common expenses even if,

(a) the owner has waived or abandoned the right to use the common elements or part of them;

(b) the owner is making a claim against the corporation;
or

(c) the declaration, by-laws or rules restrict the owner from using the common elements or part of them.

[9] The purpose of the latter subsection is not to prevent a 0% allocation in the declaration, but rather to prevent a unit owner or a Potl owner in the context of a CECC from resiling from his or her obligation to contribute to common expenses as apportioned by the declaration. We recognize, as did the Court in *York Region Condominium Corp. No. 771 v. Year Full Investment (Canada) Inc.*, [1993] O.J. no. 769 [Q.L.] (O.C.A.) 5, that non-usage is not a reason for non-payment of common expenses. However, in the present case, it is not the appellants' non-usage of the common element (the ring road) that is the source of their refusal to contribute, but rather the absence of any obligation pursuant to the declaration. Clearly, the appellants set up the bifurcated formula so that only users of the ring road should pay for its upkeep. That was clearly spelled out in the declaration, which was fully disclosed to purchasers.

[10] As to the second issue, we recognize that the bifurcated formula clearly favoured the interests of Schickedanz at the expense of the unit holders, but in our view, it does not necessarily follow that this conduct was either oppressive or highly prejudicial. This formula was created before the unit holders purchased their property and since the impugned provisions of the declaration do not violate the Act, there can be no grounds for finding that Schickedanz acted oppressively. We recognize that in *Mckinstry v. York Condominium Corp. 472*, (2003), 68 O.R. (3d) 557 9 (O.S.C.J.), Jurianz J. (as he then was) noted that the oppression remedy could be used to protect

stakeholders from unlawful conduct, as well as from conduct that, while technically legal, could be oppressive. That is not the situation here. The appellants fully complied with s. 84 of the Act by collecting, pursuant to the declaration, the common expenses owed by the Polts. Just as in *Peel Condominium Corp. No. 417 v. Tedley Homes* [1997] Carswell No. 2998 (O.C.A.), the allocation of common expenses in this case by Schickedanz was not for a devious purpose, but rather for a reasonable and legitimate business purpose which related to the staged nature of this development.

[11] One final word. In *Abdool v. Somerset Place Developments of Georgetown Ltd.*, [1992] Carswell No. 620 (O.C.A.) this court, in interpreting s. 52 of the Act, held,

While I may generally agree with the learned judge's critique of legislation, I am unable to accept his approach to the current disclosure statements. In my respectful opinion, this approach fails to construe s. 52 in a manner that properly balances consumer protection and the commercial realities of the condominium industry and, if adopted, would require a disclosure document incompatible with the underlying aim of the section.

[12] In our view, s. 7(2)(c) and (d) of the Act and s. 40(6)(c) and (d) of the regulations ought to be interpreted in light of the commercial realities of the condominium industry. As noted, in this case, each purchaser in this development had the option of deciding whether or not to purchase based upon the terms disclosed in the declaration. It is not oppressive for a developer declarant

to register and implement a properly disclosed declaration so long as it is in compliance with the Act and its regulations. If declarants could not rely upon the terms of a declaration which fully complied with the Act and was fully disclosed to purchasers, there would be shocking implications for the industry.

[13] Because we allow this appeal in respect of the first two grounds, it is unnecessary for us to deal with the issue of payment credits.

[14] Accordingly, the appeal is allowed with costs, which we fix at \$14,000 all inclusive.

BUILDER BULLETIN 10

CONCILIATION FEES

Effective: April 1, 1983

In this Warranty Program, registration fees, enrolment fees, and renewal fees are established at the same level for all builders. This revenue is then used to run the Program and pay claims on behalf of those builders who cannot or will not meet their responsibilities with respect to complaints and claims.

A large element of Program expense, which has increased substantially within the last year, relates to the number of conciliations undertaken in response to complaints. It is becoming increasingly obvious that a few builders are taking months to rectify work that should be repaired in weeks, and then only after conciliation by the Program. Indeed, we have learned of cases in which builders will not respond until the homeowner requests a conciliation.

Good builders, who comprise a very high percentage of the industry, expected that, with the advent of warranty, they would have to pay a price. However, it is doubtful that they expected the kind of situation where, increasingly, this vast majority of the industry, many of whom are small, would be literally picking up the tab for the few who are unable or unwilling to deal satisfactorily with their purchasers without Program intervention.

Consequently, each year, effective April 1, 1983, builders will be allowed one free conciliation for every twenty-five homes or less sold during the ensuing twelve months. A fee of \$500 will be charged for each conciliation in excess of this allowance. Builders selling less than twenty-five homes will be allowed a maximum of one conciliation. For example:

- A builder of 10 homes with 2 conciliations must pay a fee of \$500.
- A builder of 26 homes with 4 conciliations must pay a fee of \$1000.
- A builder of 21 homes with 1 conciliations will not pay a fee.

Complaints must be determined as valid by the Program, for while the objective of the fee to reduce the number of conciliations, it is not the intention that the builders be invoiced for unreasonable or frivolous requests for conciliations. Generally, the builder who does the job properly will not have to pay. many builders have never had a conciliation.

For more information regarding this Bulletin, please contact the [ONHWP office](#) in your area.

Issue Date: March, 1983



Builder Bulletin 14 (Reissued)

Dated: October 27, 2000

Effective: November 1, 2000

Addendum to Agreements of Purchase and Sale

This Bulletin replaces Bulletin 14 (Revised) issued on September 25, 2000. It applies to all Agreements of Purchase and Sale for new homes (except condominiums) dated on or after November 1, 2000.

BACKGROUND

All Vendors are required to add the Addendum to all Agreements of Purchase and Sale for new homes (except condominiums) enrolled under the Ontario New Home Warranty Program (ONHWP).

The Addendum provides Purchasers with information about the Agreement (s. 1), planning status of the property (s. 2), the Builder (s. 3-4), and the home's enrolment number, if available (s. 3). The Addendum also gives Purchasers the right to terminate the Agreement if construction is delayed for 120 days beyond the agreed upon closing date (s. 5). The Purchaser may exercise this optional termination right in the 10-day window immediately following the first 120 days of delay. If the Purchaser does not terminate the Agreement in this window, then the closing date is automatically extended for a further 120-day period (for a total extension of 240 days). If construction is still not complete after this further 120-day period (i.e., a total of 240 days' delay), then the Agreement is at an end unless the parties agree otherwise. Upon such termination, the Purchaser is then entitled to a refund of all money paid on account of the purchase, plus interest at the prescribed rate for the second 120 days of delay.

HERE'S WHAT HAS CHANGED

1. Events may be excluded from the 120-day calculation: For all Agreements entered into on or after November 1, 2000, the Vendor may exclude extensions of the closing date reasonably required as a result of a strike, fire, flood, act of God or civil insurrection (an 'Event') when calculating either of the 120-day extensions. Before this amendment to the Addendum the "clock" continued to "tick" regardless of the source of the delay in construction.

2. Notice by a Vendor: In order to exclude reasonable delays caused by an Event from the

calculation of the first or second 120 days, a Vendor must send the Purchaser *both* of the following notices:

- A. First written Notice: no later than 20 days from the *beginning* of the Event, outlining the nature of the Event and providing an estimate, if available, of the length of the delay; *AND*
- B. Second written Notice: as soon as reasonably possible but no later than 20 days after the *conclusion* of the Event, describing the Event, providing the exact length of the delay and the new closing date. When necessary, this Second Notice may be provided to the Purchaser before the conclusion of the Event, e.g., when Day 120 or Day 240 is approaching prior to the conclusion of the Event, and the Vendor wishes to "stop the clock".

3. Notice by a Purchaser: If the Vendor has not provided the two required notices to the Purchaser, the Purchaser may provide written notice to the Vendor and to ONHWP, requesting a formal extension of the closing date as a result of the Event. This notice must be sent no later than 40 days after the conclusion of the Event. ONHWP will then determine the reasonable length of extension, and will notify the Purchaser and the Vendor accordingly.

4. No Statutory Declaration: A statutory declaration by Vendors is no longer required.

5. New Addendum: The new Addendum (which is identical to the one that was appended to Bulletin 14 (Revised) that was issued on September 25, 2000) is appended to this Bulletin for use on all applicable Agreements entered into **on or after November 1, 2000 (except condominiums).**

PLEASE NOTE that consultations are underway to further revise the Addendum in the coming months. Therefore, you are advised to make a limited amount of copies of the new Addendum.

REASONS FOR THE CHANGE

This change represents a balanced approach, aimed at providing increased protection to Vendors, Purchasers and ONHWP at different times in the economic cycle of the construction industry:

- *Vendors are protected in a declining market:* Strikes and other Events can seriously impede the Vendor's efforts to close the purchase of a new home on time. Such Events may even prevent the Vendor from completing the home within the permitted maximum 240-day extension of the original closing date. This change to the Addendum will reduce the risk of a Vendor losing a closing due to an Event outside of the Vendor's control. This is particularly the case in a declining market, when Purchasers may be more likely to "walk away" from a closing during the 10-day "walk away" period following the first 120 days' delay.
- *Purchasers are protected in an escalating market:* This change to the Addendum also benefits Purchasers, especially in times of an escalating market. The Purchaser may now trigger the Event exclusion, if the Vendor elects not to do so. The notice provisions granted to Purchasers will prevent Vendors from relying on the delay caused by an Event as the reason to terminate an Agreement, in circumstances when it is in the Vendor's interest to terminate rather than extend the closing.
- *ONHWP Guarantee Fund risk is reduced:* The risk of Builders losing multiple closings and facing the potential inability to refund Purchasers' deposit monies on cancelled Agreements is now reduced. If Builders are faced with significant delays in construction due to strikes or other Events, they can now "stop the clock" to prevent contracts being terminated during the 10-day window. This reduces the risk that ONHWP's Guarantee Fund would be called upon to refund Purchasers walking away from Agreements with Builders who have faced delays in construction due to Events, and who have become insolvent (and therefore unable to refund the Purchaser's deposit upon termination of the Agreement).

THE DETAILS

1. Three new clauses have been added to Section 5 of the Addendum:

- 5(vi) – **Events may be excluded from the 120-day calculation:** The Vendor may exclude days reasonably lost as a result of an Event when calculating the first and the second 120-day periods referred to in Sections 5(i) and 5(iii) of the Addendum, if the Vendor provides the Purchaser with the two required notices listed in s. 5(vii). This change to the Addendum affects the calculation of the first or the second 120-day periods, but does not permit the Vendor to interrupt the Purchaser's 10-day "walk-away window" (normally Days 121-130) once it has started to run. This exclusion applies for delays reasonably resulting from each Event that occurs.

Note: The 10-day window when Purchasers may terminate the Agreement (normally at days 121-130 after the original closing date) continues to apply. If the Purchaser receives from the Vendor both required notices (including the Second Notice providing a new closing date) BEFORE the first 120-day mark, then the "clock stops" and the 10-day window is deferred or pushed back by the length of the delay caused by the Event. Once the window opens, it stays open until the full 10 days have elapsed.

- 5(vii) – **Notice by a Vendor:** A Vendor who wishes to exclude days reasonably lost because of an Event must satisfy the following **two** notice requirements for each Event:
 - a. **Vendor's First Notice as soon as reasonably possible but no later than 20 days after an Event has begun must:**
 - Be in writing.
 - Go to the Purchaser.
 - Include a brief description of the Event *e.g.*, large fire at the construction site, and an estimate (if available) of the possible length of extension to the closing date.
 - b. **Vendor's Second Notice as soon as reasonably possible but no later than 20 days after the end of an Event must:**
 - Be in writing.
 - Go to the Purchaser.

- Include a brief description of the Event, and provide the number of days extension to the closing date caused by the Event and the new closing date.

Note: The “clock stops” when the Purchaser receives the Second Notice. For example, if the Purchaser receives the Second Notice from the Vendor on day 112 after the original closing date, stating that the closing will be delayed by 15 days due to an Event, then the 10-day window is moved by 15 days, to days 136-145 after the original closing date. However, if the Purchaser receives the Second Notice of a 15-day delay on or after day 120, then the 10-day window will remain on days 121-130. The Second Notice will extend the end of the second 120 days (i.e., day 240) by 15 days, to day 255, if the Purchaser chooses not to exercise the walk-away right at days 121-130.

If an Event is ongoing and Day 120 or 240 is approaching: However, if an Event, such as a strike, begins during the first 120 days and is still ongoing as Day 120 approaches, and if the Vendor wants to “stop the clock” before Day 120, then the Vendor must ensure that the Second Notice to the Purchaser arrives before the end of Day 119. In this situation, the Second Notice will provide the best reasonable estimate of the end of the Event, and set a new, FIRM closing date based upon that estimate. If the Second Notice is received before the end of Day 119, it “stops the clock” before the 10-day window, which would have otherwise commenced at day 120.

Similarly, if an Event is still ongoing and Day 240 is approaching, and if the Vendor does not want the Agreement to end at Day 240, the Vendor may send the Second Notice to the Purchaser, estimating the number of days’ extension reasonably required and providing a FIRM closing date based upon this estimate. The Second Notice must be received by the Purchaser by the end of Day 239, in order to “stop the clock” for the second period of 120 days. **ONHWP will provide reasonable leeway to Vendors in their estimation of the extensions required in both circumstances, i.e., Events that have not ended when Day 120 or Day 240 is approaching.**

- 5(viii) – **Notice by a Purchaser:** The Purchaser can request to exclude days lost because of an Event if the Vendor has failed to serve the required notices according to s. 5(vii).

Purchaser’s notice no later than 40 days after the end of an Event must:

- Be in writing.
- Be sent to ONHWP and to the Vendor.
- Briefly describe the Event, and request a formal extension of the closing date. ONHWP will then determine a reasonable extension and notify the Purchaser and the Vendor in writing.

Note: If an Event is still ongoing, Day 120 or 240 is approaching, the Vendor has not delivered the required notices to the Purchaser, and the Purchaser does not wish to terminate the Agreement, then the Purchaser may send the required notice to ONHWP and to the Vendor before the conclusion of the Event. ONHWP will act reasonably in estimating the required extension.

2. These new Event notice provisions in the Addendum are **in addition to** the Vendor’s notices required under the delayed closing and occupancy warranty provisions in the Regulations, (i.e., the 35-day and 65-day notices). Also, the Purchaser’s Event notice is solely for purposes of exclusion of delays caused by an Event: it is not a Purchaser’s extension of the closing/occupancy date as it relates to delayed closing/occupancy compensation. For details of the notices required under the delayed closing/occupancy warranty please refer to Builder Bulletin 20 (Freeholds) and Builder Bulletin 25 (Condominiums).
3. A new section 6 has been created, which recommends to Purchasers that they consult their lawyer and ONHWP for further information on the Addendum and other warranties available under the *Ontario New Home Warranties Plan Act*. A toll-free telephone number is provided for Purchasers’ use. Vendors are requested to contact their regional offices for further information.

FOR MORE INFORMATION

If you have any questions about the Addendum to Agreements of Purchase and Sale please contact the regional ONHWP office in your area. A list of offices is included at the end of this Bulletin.

Offices of the Ontario New Home Warranty Program

CORPORATE OFFICE

5160 Yonge Street, 6th Floor
TORONTO ON M2N 6L9
(416) 229-9200
Toll Free: 1-800-668-0124
Fax: (416) 229-3800
E-mail: info@newhome.on.ca
Web site: www.newhome.on.ca

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Simcoe; Victoria; York)

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(905) 836-5700
Toll Free: 1-800-263-1299
Fax: (905) 836-5666

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Fax: (705) 560-7111

CONDOMINIUM OFFICE

(Serving all of Ontario)

1091 Gorham Street, Unit B
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Fax: (905) 836-0314

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(905) 455-0500
Toll Free: 1-800-455-4484
Fax: (905) 455-0169

It is recommended that the Purchaser contact the Vendor prior to the closing date to determine that construction is proceeding on schedule and that closing may occur on time.

EXTENSION AND TERMINATION

5. (i) If the Vendor cannot close the transaction by the closing date in the Agreement because additional time is required for construction of the dwelling, the Vendor shall extend the closing date one or more times as may be required by the Vendor by notice in writing to the Purchaser as soon as reasonably possible and in any event prior to the closing date or extended closing date, all extensions in the aggregate not to exceed 120 days. However, the Vendor shall not extend closing if the parties have specifically agreed in writing that the Vendor cannot, and the Purchaser does not waive this covenant.
- (ii) The Vendor shall take all reasonable steps to construct the dwelling without delay.
- (iii) If the closing date in the Agreement has been extended for 120 days and the Vendor still requires further time for construction of the dwelling, unless subsequent to the closing date in the Agreement the parties otherwise agree, the Purchaser may terminate the Agreement within the 10 days immediately after the 120 days have elapsed by delivering or mailing notice in writing to the Vendor at the address shown above (which notice may also be given between solicitors), and upon the giving of such notice this Agreement shall be at an end and all sums paid by the Purchaser shall be returned without interest or deduction. However, if the Purchaser does not terminate as above, closing shall be deemed to be extended to a date 5 days following completion of the dwelling as required by the Agreement but, unless the parties otherwise agree, not later than a further 120 days after the initial 120 day period. If by this further time the dwelling is not constructed in accordance with the Agreement and if the parties do not otherwise agree, the Agreement shall be at an end and all sums paid by the Purchaser shall be returned without deduction and there shall be no further rights between the parties unless the Vendor is in breach of the Vendor's covenant in 5(ii) above to construct without delay. If the Agreement is so ended, interest shall be payable on all sums paid by the Purchaser, for the period commencing 120 days after the closing date in the Agreement at a rate 1% below the rate paid by the Province of Ontario Savings Office savings accounts as of the date on which the Agreement ended.
- (iv) Despite any provision to the contrary contained in it, the Agreement shall not be terminated by the Vendor by reason of failure to complete the dwelling as specified in the Agreement within a period of time or by a date specified in the Agreement, extended as above, unless the Purchaser consents to the termination in writing or the Agreement is ended pursuant to 5(iii) above.
- (v) Where there is conflict or ambiguity between the Agreement and this Addendum this Addendum shall prevail.
- (vi) The Vendor may exclude extensions of the closing date reasonably required as a result of a strike, a fire, a flood, an act of God or a civil insurrection (an "Event") when calculating the 120 days referred to in 5(i) and 5(iii) only if the Vendor delivers the notices described in 5(vii) to the Purchaser.
- (vii) If an extension of the closing date referred to in 5(i) or 5(iii) above is reasonably required as a result of an Event, then the Vendor shall provide the following notices to the Purchaser:
 - A) As soon as reasonably possible but not later than 20 days after the Vendor knows or ought reasonably to have known that the Event has commenced, the Vendor shall provide written notice to the

Purchaser setting out a brief description of the Event and an estimate, if available, of the possible length of extension that may be required as a result of the Event; and

B) As soon as reasonably possible but not later than 20 days after the conclusion of the Event, the Vendor shall provide written notice to the Purchaser setting out a brief description of the particular Event that was the cause of the extension, the number of days by which the closing date is extended as a consequence of the Event, and the new closing date now in effect as a result of the Event.

(viii) If an Event occurs and the closing date is reasonably required to be extended as a result of the Event, but the Vendor has failed to provide the notices described in 5(vii), then the Purchaser shall have the option of sending written notice to both the Ontario New Home Warranty Program and the Vendor. The notice shall contain a request for a formal extension of the closing date to accommodate the delay in completing the dwelling caused by the Event. The Purchaser shall send this notice no later than 40 days after the conclusion of the Event. Following receipt of the notice, the Ontario New Home Warranty Program shall determine the length of a reasonable extension period that the Vendor ought reasonably to have implemented, and shall confirm its determination by notice in writing to both the Vendor and the Purchaser. The extension period as so determined shall be deemed to be excluded from the calculation of the 120 days referred to in 5(i) and 5(iii) above, and the Agreement shall be deemed to be extended accordingly.

(ix) 5(vi), (vii) and (viii) apply to all Agreements entered into on or after November 1, 2000.

6. For further information about anything contained in this Addendum or about the warranties available to purchasers under the *Ontario New Home Warranties Plan Act*, please contact your lawyer and the Ontario New Home Warranty Program, toll free, at 1-888-463-6466 during regular business hours, Monday through Friday.

Condominium Projects: Design and Field Review Reporting

This bulletin and its related documents replace Builder Bulletin 19 (Revised) that was in effect from March 1, 1995 until June 30,2001.

WHAT THIS BULLETIN IS ABOUT

This bulletin lays out the requirements for reports and information that must be provided to the Ontario New Home Warranty Program (ONHWP) by Field Review Consultants and the builders/vendors of ‘Designated Condominiums’ enrolled under the *Ontario New Home Warranties Plan Act*. Designated condominiums are those

condominiums described in the table on page 2 of this introduction as Types C and D.

Provision of information, certificates and reports relating to the design and field review phases of a condominium project are conditions of continued registration of the vendor/builder.

This Bulletin contains a number of changes and additions to the previous Bulletin 19 that was effective from March 1, 1995. The changes seek to bring more clarity and greater consistency to the nature and scope of reports supplied to ONHWP by Field Review Consultants (FRCs) acting on behalf of builders and/or vendors.

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The Final Report	4d

HERE'S WHAT'S CHANGED

Steps have been taken to provide more structure to the FRC reporting requirements by establishing consistent reporting formats and by employing objective quality assessment standards.

FRC Bulletin 19 Qualification Status (BQS)

From the date of this Bulletin consultants wishing to undertake field review work for builders/vendors engaged in the construction of designated condominiums need to be qualified within the terms of Bulletin 19 (*see* Module 1). When a builder or vendor uses an FRC that does not hold BQS, ONHWP will take that factor into consideration when assessing the release of security.

Scope of Work

A 'Scope of Work' submission will replace the former field review contract. It details the level of effort and areas of review Field Review Consultants commit to. (*The Scope of Work is explained in* Module 2.)

Reporting Requirements

The requirement for the submission of monthly reports to ONHWP has been removed. The main reporting requirement now falls within the Milestone Reports. (*Milestone Reports are explained in* Module 4.)

Milestone Reports will be supplemented by briefer reports giving outline information. They will be submitted every 60 days. (*60 Day Reports are explained in* Module 4.) The requirement for a Design Review and the submission of a Bulletin 19 Final Report remains.

GENERAL

The provisions of Builder Bulletin 19 apply equally to both vendors and builders of condominiums described as Type C and Type D in the following table. Such condominiums are required, under the Ontario Building Code (OBC), to be designed by an architect and professional engineer. The Registrar reserves the right to designate any condominium project as being subject to the provisions of this bulletin.

DESCRIPTION OF CONDOMINIUM TYPES

Requirements for Receipt and Release of Security'.)
(extract from Builder Bulletin 28 (Revised 2001) 'ONHWP

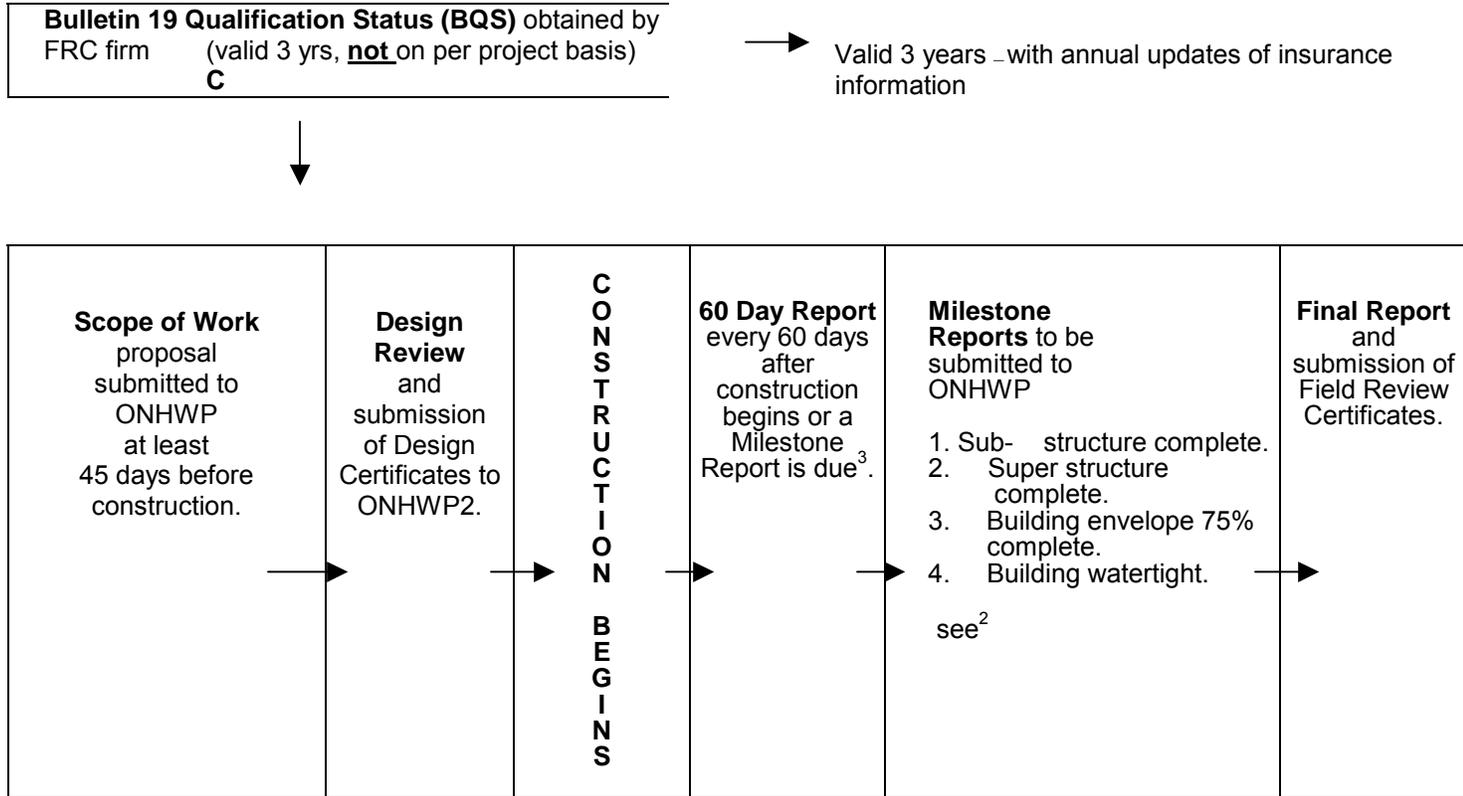
Category	Description
Condo: Type A	Project has only Part 9 OBC construction requirements and is a lot-line condominium.
Condo: Type B	Project has only Part 9 OBC construction requirements and is NOT a lot-line condominium.
Condo: Type C	Project has both; Part 9 and Part 3 OBC construction requirements.
Condo: Type D	Project has only Part 3 OBC construction requirements.

For the purposes of this bulletin, the term "vendor/builder" applies to vendors, builders, and those persons who are both. The terms "vendor" and "builder" are both defined in the *Ontario New Home Warranties Plan Act*.

Voluntary submissions for Type A and Type B condominiums

ONHWP is prepared to receive and process applications from vendors/builders of Type A and Type B condominiums that wish to voluntarily **follow the provisions of Builder Bulletin 19**. For further information on this matter contact the Manager of ONHWP's Condominium Office.

THE BULLETIN 19 PROCESS



It is assumed that FRCs observing the terms of this bulletin have attained BQS. (BQS is explained in Module 1.) The following documents must be completed and submitted to ONHWP throughout the design and construction phases of the condominium:

Scope of Work Proposal

As the first stage of the Bulletin 19 process the Scope of Work Proposal outlines the level of effort and number of visits an FRC commits to as part of monitoring identified risk areas. It must be submitted at least 45 days in advance of the start of construction and is subject to review and approval by ONHWP. ONHWP will respond to submitted Scope of Work proposals within 30 days of receipt. (The Scope of Work proposal is explained in Module 2.)

Risk areas and factors within the Scope of Work were identified following examination of ONHWP's complaints, claims, dispute resolution history and practical experience within the industry and the contributions of representatives of the FRC community

1 ONHWP will review and respond to proposal within 30 days.

2 Design certificates may be submitted on a phased basis - see Module 4a.

3 No 60 Day Report will be required where a Milestone Report is completed within that 60 day period.

Design Review and Certificates

Design Certificates confirm that the design complies with the Ontario Building Code and good architectural and engineering practice. Individual certificates must be completed by each of the various design professionals who produce the construction documents as they relate to the identified risk areas laid out in the Scope of Work. The vendor/builder must submit each certificate to ONHWP at least 30 days prior to the commencement of the work covered by that portion of the design. *(A sample Design Certificate can be found in Module 4a.)*

60 Day Reports

The 60 Day Reports provide a tracking mechanism designed to assist ONHWP in assessing the progress of a project's construction without placing too large an administrative workload on the FRC. The reports are to be completed according to instructions found at the head of the report template. *(A sample report template can be found in Module 4b.)*

Milestone Reports

Comprehensive reports must be completed and submitted to ONHWP as soon as possible and, in any event, within 30 days of specified stages (milestones) of construction being completed. The reports will contain information on all outstanding deficiencies in existence at that point in time. An initial Milestone Report will be in two parts. The first part is a form giving deficiency tracking information and a summary of the issues. The second part, appended to the first, will be a narrative section giving general information about the construction as it relates to the element of the project in question. It will give full details of any deficiencies relating to it and list recommendations for their correction. *(The definition of 'deficiency' as it relates to Bulletin 19 is appended to Module 4.)* Subsequent Milestone Reports will have an additional tracking sheet that provides information on progress made to rectify previously identified deficiencies. ONHWP will review each Milestone Report and report back to the FRC and vendor within 30 days if further information is required.

Milestone Reports form the basis for establishing consistency in FRC reporting. The quality and content of reports will be scrutinized by ONHWP and FRCs will be advised if shortfalls in reporting standards are identified. *(For a fuller explanation of an ERG'S responsibilities regarding the quality of reports please refer to the sections entitled 'FRC Bulletin 19 Qualification Status' and 2tpplication for Bulletin 19 Qualification Status' in Module 1.)*

All work required to correct deficiencies noted in any of the reports will be the responsibility of the vendor/builder and may influence the amount of security released following submission of the Bulletin 19 Final Report. Satisfactory repairs must be confirmed as complete by the FRC and referenced in the next Milestone Report(s) that falls due.

The Final Report

The FRC submits this report to the vendor/builder in the first instance and must notify ONHWP as soon as this has occurred. The vendor/builder then submits this report to ONHWP once construction of the condominium has been completed, the condominium declaration and description have been registered and all reports and information due to ONHWP have been received.

Field Review Declarations form a part of the Final Report and verify that review of the identified risk areas contained in the Scope of Work as they relate to the construction project have been completed to the satisfaction of the FRC. *(A sample Final Field Review Declaration is appended to Module 4d.)*

The vendor/builder must deliver a copy of the Bulletin 19 Final Report to the owner-elected condominium board of directors at the turnover meeting and the report may be referred to at a later date if warranty problems arise.

The final report must be a bound copy of the following documents:

- A copy of all Milestone Reports associated with the project
- Copy of the Condominium Declaration as filed with the Land Titles Office
- All Design Certificates
- Field Review Declaration

and the following documents as applicable:

- Design Architect's final clearance
- Site Work Engineer's final clearance
- Structural Engineer's final clearance
- Mechanical Engineer's final clearance
- Electrical Engineer's final clearance
- Occupancy permit if available

BUILDER BULLETIN 19 AND THE RELEASE OF SECURITY

All information, reports, and certificates must be submitted to ONHWP within the time periods specified. The release of security is conditional upon ONHWP receiving the documentation as specified in this bulletin and in Builder Bulletin 28 (which deals with such matters as unsold units and evidence of transfer of title for sold units, etc.) and is further conditional upon ONHWP accepting that the contents of those documents accurately reflect the actual conditions on site.

ONHWP will review the Bulletin 19 Final Report within 30 days of receipt and notify the vendor/builder of any further technical requirements or adjustments to the required security depending on the extent of any outstanding deficiencies as well as any outstanding administrative or non-technical matters. If ONHWP is satisfied there are no outstanding deficiencies, the release of security, subject to the requirements in Builder Bulletin 28, will be completed within 45 days of receipt of all the required documentation.

The FRC will assess the likely costs of rectifying outstanding matters based on current sub-trade prices for such rectification and provide them to ONHWP. ONHWP will then review the costs provided and retain an appropriate amount of the security. The amount retained will reflect the likely cost of rectification in the event that ONHWP was required to give effect to any remediation and will also take into account any outstanding administrative and non-technical costs.

If ONHWP does not receive the Bulletin 19 Final Report, it will continue to hold the vendor/builder's security for a maximum of seven years or until such time as ONHWP is satisfied that the building is constructed in accordance with the vendor/builder's warranty obligations under Section 13, *Ontario New Home Warranties Plan Act*.

For full information regarding ONHWP's requirements for the receipt and release of security, please refer to Builder Bulletin 28 (Revised, 2001).

ONHWP reserves the right to use the vendor/builder's security to ensure that the requirements of this bulletin are met on a continuing basis. With appropriate notice ONHWP may, at its sole discretion and dependent on the situation, either recognize the original Scope of Work submission or secure the services of another qualified FRC.

ONHWP UNDERTAKINGS

This bulletin places a number of time based performance requirements on FRCs. In return ONHWP is committed to completing elements of its administrative functions within specified periods of time. Generally, these functions relate to the processing and review of applications and submitted reports.

WHERE TO FIND THE FORMS FOR BULLETIN 19

Standardized reporting formats are crucial to consistent reporting. ONHWP has developed templates for all required reports and a link to these can be found on our web site at:

<http://www.newhome.on.ca/industry/otherprofessionals/>

Practitioners are welcome to download and save these forms as required. If preferred, the forms can be filled out while they are on the computer screen. According to need, the forms can be completed, printed and signed before being sent to the Condominium Office.

The forms are currently in a Microsoft Word Template format. If your office does not support Microsoft WORD it may be possible to convert them. However, functionality of the forms may be lost. Offices without Microsoft Word may recreate the forms in the application of choice but should endeavour to ensure that the content of the forms follows the format established in the ONHWP produced versions.

IF YOU DO NOT HAVE ACCESS TO THE WEB BASED FORMS please contact the Condominium Office Clerk on 1-800-803-9913 ext. 307 and a copy of the forms will be sent to you on request.

FOR MORE INFORMATION

For more information on this bulletin **please contact the Condominium Office** of ONHWP. A list of all ONHWP offices can be found on the next page.

(President/Registrar)

ONTARIO NEW HOME WARRANTY PROGRAM

Offices of the Ontario New Home Warranty Program

CORPORATE OFFICE

5160 Yonge Street, 6th Floor
TORONTO ON M2N 6L9
(416) 229-9200
Toll Free: 1-800-668-0124
Fax: (416) 229-3800
E-mail: info@newhome.on.ca
Web site: www.newhome.on.ca

EAST CENTRAL REGION

(Serving the areas of Durham; Haliburton;
Muskoka; Northumberland; Peterborough;
Simcoe; Victoria; York)

1091 Gorham Street, Unit A
NEWMARKET ON L3Y 7V1
(905) 836-5700
Toll Free: 1-800-263-1299
Fax: (905) 836-5666

EASTERN REGION

(Serving the areas of Frontenac; Hastings;
Lanark; Leeds & Grenville; Lennox &
Addington; Ottawa; Prescott & Russell;
Prince Edward; Renfrew; Stormont,
Dundas & Glengarry)

1600 Scott Street, Suite 400
OTTAWA ON K1Y 4N7
(613) 724-4882
Toll Free: 1-800-688-4345
Fax: (613) 724- 3669

NORTHEAST REGION

(Serving the areas of Algoma; Cochrane;
Manitoulin; Nipissing; Parry Sound;
Sudbury; Timiskaming)

1895 LaSalle Blvd.
SUDBURY ON P3A 2A3
(705) 560-7100
Toll Free: 1-800-387-7861
Fax: (705) 560-7111

CONDOMINIUM OFFICE (Serving all of Ontario)

1091 Gorham Street, Unit B
NEWMARKET ON L3Y 7V1
(905) 836-6715
Toll Free: 1-888-803-9913
Fax: (905) 836- 0314

NORTHWEST REGION

(Serving the areas of Kenora;
Rainy River; Thunder Bay)

1205 Amber Drive, Suite 206
THUNDER BAY ON P7B 6M4
(807) 345-2026
Fax: (807) 345-2014

SOUTHWEST REGION

(Serving the areas of Brant; Chatham;
Elgin; Essex; Haldimand-Norfolk;
Huron; Kent; Lambton; Middlesex;
Oxford; Perth; Waterloo; Wellington)

140 Fullarton Street, Ground Floor
LONDON ON N6A 5P2
(519) 660-4401
Toll Free: 1-800-520-HOME (4663)
Fax: (519) 660-3556

WEST CENTRAL REGION

(Serving the areas of Bruce; Dufferin;
Grey; Halton; Hamilton; Niagara; Peel;
Toronto)

2 County Court Blvd., Suite 435
BRAMPTON ON L6W 3W8
(905) 455-0500
Toll Free: 1-800-455-4484
Fax: (905) 455- 0169

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WHO NEEDS BULLETIN QUALIFICATION STATUS?

The requirement for Bulletin 19 Qualification Status (BQS) will apply to consultancy firms providing field review services for projects subject to the provisions of Builder Bulletin 19 *i.e.* Type C or Type D' condominium projects.

A consulting firm *will not* be required to qualify on a per project basis. Once awarded, BQS will remain valid for a period of three years (renewable) subject to the provisions below. Appropriate levels of insurance coverage must be maintained throughout the period of qualification.

BQS will ensure Field Review Consultant firms (FRCs) working on Bulletin 19 condominium projects have the capacity to undertake such work and meet the requirements of Builder Bulletin 19. To this end, firms will need to show they retain or have access to technically and professionally qualified personnel certified to practice in the Province of Ontario.

OBJECTIVE APPLICATION CRITERIA

The full criteria for achieving and retaining BQS is detailed on the application form following this introduction. For ease of reading, the main areas in which FRCs must show capacity and competence are summarized below:

- Employ or have access to the necessary professional resources to conduct Bulletin 19 work.²
- Carry sufficient insurance coverage.³
- Properly sign off on each Bulletin 19 report.⁴
- Undertake to use only qualified agencies to conduct required testing unless qualified personnel and facilities are retained in-house.

Where an FRC initially falls short of submitting the level of information required to achieve or maintain BQS, ONHWP will work with the applicant to overcome any difficulties as soon as possible.

¹ Table extracted from Builder Bulletin 28

Category D	escription
Condo: Type A	Project has only Part 9 OBC construction requirements and is a lot-line condominium.
Condo: Type B	Project has only Part 9 OBC construction requirements and is NOT a lot-line condominium.
Condo: Type C	Project has both; Part 9 and Part 3 OBC construction requirements.
Condo: Type D	Project has only Part 3 OBC construction requirements.

² For Engineers this is a Certificate of Authorization issued by Professional Engineers of Ontario and for Architects, a current Certificate of Practice issued by Ontario Association of Architects. (FRCS may be required to produce evidence of an established relationship between them and any sub-consultant and that sub-consultant's availability to the FRC.)

³ The minimum level of liability cover should be consistent with the minimum limits laid out for the members of Professional Engineers of Ontario or Ontario Association of Architects as appropriate. Liability coverage should extend to sub-consultants. Alternatively, it will be acceptable to show that sub-consultants carry the same level of liability cover.

⁴ The individual consultant with overall responsibility for a project and who is in a position to legally bind the FRC firm must sign off on completed reports. Where day-to-day responsibility has been delegated to some other consultant this signature must be in addition to that of the delegated person's.

Supplying inadequate, false or misleading information may result in BQS being denied, suspended or cancelled. Where BQS is withdrawn from an FRC and that firm is then retained to provide FRC services on Type C or Type D construction, ONHWP will examine each project on a case-by-case basis and the release of security may be affected. If dequalification takes place during an ongoing project, ONHWP will work with the vendor/builder to find the best solution to the shortfall in FRC construction review. Every possible effort will be made to ensure that the release of security will not be affected by such action.

It is acknowledged that circumstances within FRC firms alter over time. FRCs must notify ONHWP of material changes to the information supplied in their current application for BQS.

The Condominium Office of ONHWP will administer application and renewal procedures for BQS. *(The address of the Condominium Office can be found on the last page of the introduction section of this bulletin.)*

THE PROCESS

Under the provisions of this bulletin the FRC has a responsibility to comprehensively review various aspects of the construction project. Areas of responsibility include:

- Assessing site inspection reports (including primary design team reports) as they relate to identified risk areas.
- Verifying specialist inspection and testing reports are in order and appropriately comment on identified issues in those reports.⁵
- Providing documentation that confirms other consultants and agencies evaluating the quality of construction are appropriately certified in their area of expertise.⁶
- Conducting field reviews to monitor performance and quality of workmanship in identified risk areas.

THE PROCESS OF APPLICATION

Once an application form has been completed and submitted, the Condominium Office of ONHWP will process it. Initial stages of the processing may result in contact with the applicant to elicit further information or clarification of ambiguities. Additionally, interviews may be set up between representatives of the Condominium Office and the applicant to gather further information and to disseminate information about the nature of the Bulletin 19 provisions.

If, following attempts to overcome misunderstandings or shortfalls in supplied information, a decision goes against the FRC and BQS is denied, written notification giving the reasons for such a decision will be provided. The decision may be challenged by giving written notice to the ONHWP Condominium Office. Any challenge must contain written details of how identified difficulties will be addressed. An appeal/review process will then be set into motion.

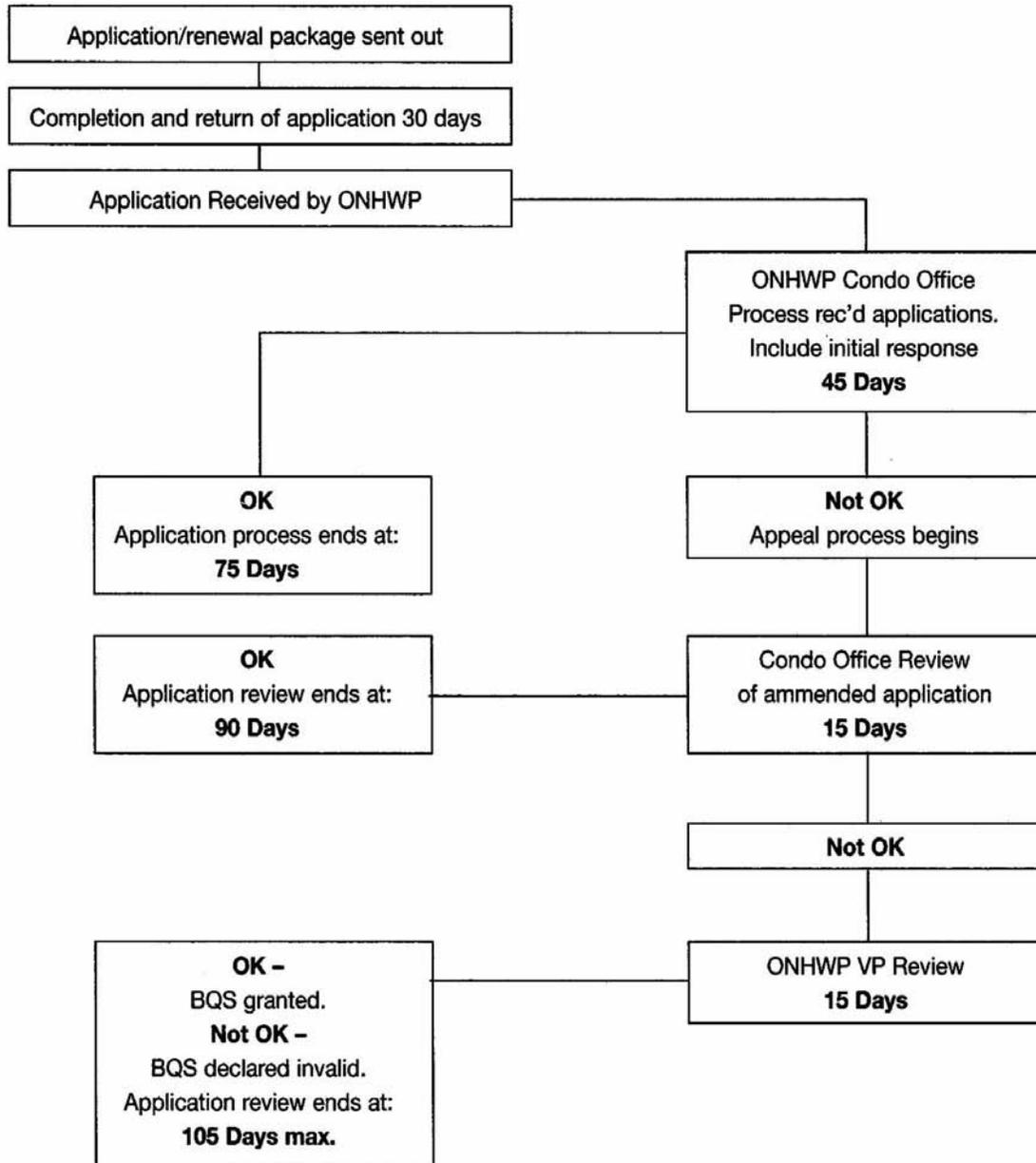
⁵ Where concerns exist regarding the reports of others, the FRC will be expected to bring them to the attention of ONHWP if the matter cannot be rectified in discussion with the report's authors. Also, any construction deficiencies noted in the reports generated by others must be brought to ONHWP's attention.

⁶ For testing agencies it is suggested that they abide by certified or registered standards e.g. Dffi.O1 1-98, a list of CSA international certified concrete testing laboratories.

The process gives FRCs every opportunity to discuss and rectify perceived shortcomings in meeting BQS criteria. The design of the process means that, whenever possible, the elements of the appeal/review process will be completed before a current BQS expires or is lost. In this way an FRC's ability to continue Bulletin 19 work is not compromised during the review process.

The process and time line for first applications and renewals is set out in the following chart:

FRC BULLETIN 19 QUALIFICATION PROCESS



7. Please supply information about your insurance arrangements.

Name of carrier: _____ Professional liability policy: YES NO

Policy Number(s): _____ Expiry date: _____

PLEASE NOTE: The applicant must have professional liability coverage. Arrangements must be made for the insurance carrier to send the relevant information e.g. the Policy Binder to ONHWP. **The applicant must make these arrangements.** The documentation must show:

- Name of carrier
- Limit of liability (per occurrence and aggregate limits)
- Type of policy
- Policy period

Please confirm you have made the above arrangements (check box):

SECTION TWO: PROJECT INFORMATION

8. How many projects is your firm involved with at the present time?

(Where projects consist of multiple units being constructed under one development name, this will be considered one project.)

No. of residential: No. of mixed use:

9. Please list current and/or past projects according to the variables below.

(Details of last 6 projects. Use additional paper if required.)

Project name	City, Province/ State	Project gross floor area (ft. ²)	Time and duration of involvement	Applicant's role e.g. Architect, FRC, etc.	Project type e.g. Low rise, commercial, B19, etc.

Note: If there are other projects that you feel would be relevant to ONHWP's consideration of this application that are not covered in the list above please enclose the information with this form.

10. We would like to know more about your experience as an FRC working on condominium projects.

(If you are new to this area of construction and as a result cannot provide the full information requested below please provide ONHWP with five construction related, professional references. These should be attached on separate sheets.)

Number of condominium projects applicant has worked on the last five years:

11. How do you structure your project teams?

Use a separate sheet of paper to outline any established process your firm will use to structure Bulletin 19 project teams and how quality assurance/control mechanisms are used to mitigate the firm's risk.

Project team information attached (check box):

12. List key personnel to be employed on high rise projects? (Continue on a separate sheet if necessary.)

Name P	osition/Title	Focus Area

(Please read and complete certification on next page.)

CERTIFICATION

I understand that this information does not guarantee the availability or award of Bulletin 19 contracts. Subject to my right to exercise all available review and/or appeal rights I hereby waive all claims resulting from any errors or omissions by ONHWP through this process. I undertake to complete all of the work and services contemplated to be performed and to submit all reports, forms and other required information at the times and in the manner laid out in the current Builder Bulletin 19 and Scope of Work proposals submitted by this firm and approved by ONHWP I undertake to contract and employ only those consultants and other professionals in relation to Bulletin 19 work who are certified to practice in the Province of Ontario and are members in good standing with their respective certifying authorities. Through the exercise of due diligence I undertake to ascertain that testing agencies retained by this firm in relation to Bulletin 19 projects use testing standards established by CSA International or other appropriate professional bodies.

I will maintain all records of construction field review including correspondence with the Vendor/Builder, the Design Architect and all other consultants and authorized persons concerned with designated Type C and Type D condominium projects for a period of seven years following the registration of the condominium corporation. I will make these records available to ONHWP at their request.

I will inform ONHWP of material changes to information provided in this application that may affect the award or retention of FRC Bulletin 19 Qualification Status. Notification will be made within 30 days of becoming aware (or 30 days of the date when the undersigned ought to reasonably have become aware) of any such changes having taken place.

I certify that to the best of my knowledge the information contained in this application is complete and accurate. I have authority to bind the applicant.

Authorized Officer's Signature

Pr

Print Name

Date

Position

Telephone

Witness' signature

Pr

Print Name

Date

Telephone

Field Review Consultants (FRCs) provide a layer of quality review that augments the process of ensuring that the spirit and intent of the construction documents are realized. Components of this work include the monitoring of identified risk areas for adequate component performance and checking that the quality of the finished project meets or exceeds current construction standards.

FRCs also collect and review the relevant sections of reports submitted to them and confirm that identified risk areas for which they are not directly responsible have been reviewed by Prime Consultants or other agencies. (*For an explanation of reporting requirements please see Module 4.*)

WHEN TO SUBMIT A SCOPE OF WORK PROPOSAL

A Scope of Work proposal is to be submitted to the Ontario New Home Warranty Program (ONHWP) for each designated condominium construction project. The submission must be received by ONHWP no later than 45 days prior to the beginning of construction.

HOW TO COMPLETE A SCOPE OF WORK PROPOSAL

When completing a Scope of Work proposal the FRC should be mindful of the number of visits necessary to evaluate a representative sample of a building's components and its overall construction. Review sampling will need to be randomly selected and evenly distributed *e.g.* if the guidelines suggest a 30% level of review of traffic coating and there are three parkades in a building, it would not be appropriate to review only one of the three floors. Examination of a percentage of each floor would be expected.

In determining what level of review is necessary for an individual project, ONHWP will be relying on the professionalism of the FRC firm. The FRC has to commit to a level of effort that allows them comfort in commenting on identified risk areas. Comfort levels may be derived from observation of statistically valid samples based on square footage, a percentage of components, a number of tests or some other industry standard.

A set of guidelines designed to assist the FRC and the vendor/builder to better understand the typical level of effort in percentage terms and the number of visits ONHWP expects to be proposed in relation to various building types can be found in Modules 3a and 3b. The guidelines should be used to establish the proposed number of visits and extent of review. The guidelines feature *notional* buildings and suggest target review levels for them. It is unlikely that the notional buildings will accurately reflect real projects but they provide FRCs with baselines from which appropriate levels of review can be determined and proposed.

Once the FRC is satisfied as to the number of visits and level of review to propose, the information should be entered in the appropriate sections of the Scope of Work form. The **vendor/builder should then submit the completed form** to the Condominium Office of ONHWP. *(A list giving the locations of ONHWP offices can be found at the end of the introduction to this bulletin.)*

Note: Vendors/builders are strongly advised to work with an FRC before going out to tender for the submission of Scope of Work proposals. Knowing in advance what level of review ONHWP will expect of an FRC retained by a vendor/builder in relation to a particular project will minimize the later possibility of the chosen proposal being refused.

ONHWP'S EXPECTATIONS AND COMMITMENTS

Each Scope of Work proposal must be received by ONHWP no later than 45 days prior to the beginning of construction.

Where circumstances dictate that a change in the level of an FRC's effort in reviewing a project is necessary to properly monitor the performance of a building's components *e.g.* originally proposed concrete cladding is substituted with EIFS, ONHWP must be notified of the changes at the earliest opportunity.

Once a Scope of Work proposal has been submitted the Condominium Office will review it. A determination as to the adequacy of the level of review proposed shall be made and the outcome notified to the vendor/builder and FRC within 30 days of receipt. Should ONHWP fail to notify the vendor/builder and FRC within this time the proposed Scope of Work will be deemed to have been accepted.

If a submitted Scope of Work falls short of ONHWP's expectations the vendor/builder and FRC will be contacted. Given the time constraints that surround Scope of Work submissions, a telephone call or meeting will be set up at the earliest opportunity and every effort made to resolve any issues.

HOW THE SCOPE OF WORK FITS IN WITH THE REST OF BUILDER BULLETIN 19

The Scope of Work precedes, and forms the framework for the FRC reports that keep ONHWP informed about the progress of each condominium project. It lays out the target level of review to which the FRC commits, subject to necessary changes, in the early stages of the project. ONHWP will use the Scope of Work as a point of reference when reviewing the subsequent 60 Day, Milestone and Final reports.

THE SCOPE OF WORK FORM EXPLAINED

(See Fig. 1 on next page)

The Scope of Work form provides guidance notes in relation to 'Documentation review' *i.e.* the collection and reviewing of reports created by other agencies or consultants, and 'Field review' *i.e.* those elements of review undertaken by the FRC or their agents.

Where an FRC provides a service 'in house' *e.g.* concrete testing, such activity should be dealt with as though it were provided by an outside agency or consultant and as such should be subject to 'documentation review'. The fact that a documentation review will take place with respect to particular risk areas should be noted in general terms on Scope of Work Proposals.

The guidance notes within the form do not require the FRC or other agencies to comment specifically on those elements of the identified risk areas. The notes are representative of previously identified, problematic issues. In undertaking Documentation or Field Reviews, FRCs are asked to be vigilant for evidence of problems in these areas.

Additional guidance notes precede some risk areas. These are intended to alert FRCs and vendor/builders to areas that are particularly problematic to ONHWP in terms of its complaints, claims and dispute resolution history.

The target level of review proposed by FRCs for the main category of each risk area is to be entered below the box marked 'Level of review'. Levels for the notional buildings have been entered for guidance. The 'level of review' figure **relates to 'Field Review' activity only. 'Documentation Review' requires that** ONHWP be notified only of specific problem areas reported by a Prime Consultant. Where nothing of concern has been identified in such a report a note to that effect shall be provided at the relevant Milestone report stage.

ONHWP will continuously monitor the relationship between review levels and construction problems and make adjustments to its requirements as necessary FRCs will be notified of any such changes.

Fig. 1 The Scope of Work table explained.

ITEM	RISK AREAS	RISK FACTORS			Level of review as %
		Documentation Review	Field Review		
1	BELOW GRADE/ FOUNDATIONS				(30%)
1.1	Earth bearing.	As required by design; adequate bearing capacity.			
1.2	Substructure.	Reinforcing; concrete cover over steel.			
1.3	Drainage systems.	Materials; coverage; connection to drain; clean outs.	Materials.		
1.4	Damp proofing or waterproofing.		Materials; surface preparation; continuity; thickness; joint detailing/reinforcing; protection.		
Proposed number of visits:					

Builder Bulletin 19 Module 2a

Scope of Work Proposal

PROJECT DETAILS

Project name: _____

Common element number (if available): _____

Address: _____

Vendor/Builder: _____ Vendor/Builder Ref. N°: _____

Start date (estimate): _____ Completion date (estimate): _____

Number of stories: _____ Levels of garage parking: _____

Building area(ft²) Gross floor area (ft²)

Total exterior cladding in approx. ft² (incl. windows and doors)

Exterior cladding - breakdown of type by %

1. 2. 3.

Number of: window systems assemblies (if available)

Number of exterior door systems including patio doors: (if available)

Balconies: YES NO Number of balconies/terraces directly above residential units:

Roofing assembly type: _____

Anchor systems: _____

Number of towers/buildings: Town houses: YES NO

Special features e.g. atrium: _____

PROJECT TEAM PERSONNEL

Field Review Consultant: _____

Address: _____ / _____ / _____ / _____
NUMBER AND STREET UNIT/SUITE CITY PROVINCE POSTAL CODE

Telephone Number: _____ Fax Number: _____

E-mail: _____

Architect: _____

Address: _____ / _____ / _____ / _____
NUMBER AND STREET UNIT/SUITE CITY PROVINCE POSTAL CODE

Telephone Number: _____ Fax Number: _____

E-mail: _____

Mechanical Consultant: _____

Address: _____ / _____ / _____ / _____
NUMBER AND STREET UNIT/SUITE CITY PROVINCE POSTAL CODE

Telephone Number: _____ Fax Number: _____

E-mail: _____

Electrical Consultant: _____

Address: _____ / _____ / _____ / _____
NUMBER AND STREET UNIT/SUITE CITY PROVINCE POSTAL CODE

Telephone Number: _____ Fax Number: _____

E-mail: _____

Structural Consultant: _____

Address: _____ / _____ / _____ / _____
NUMBER AND STREET UNIT/SUITE CITY PROVINCE POSTAL CODE

Telephone Number: _____ Fax Number: _____

E-mail: _____

Landscape Architect: _____

Address: _____ / _____ / _____ / _____
NUMBER AND STREET UNIT/SUITE CITY PROVINCE POSTAL CODE

Telephone Number: _____ Fax Number: _____

E-mail: _____

Interior design Consultant: _____

Address: _____ / _____ / _____ / _____
NUMBER AND STREET UNIT/SUITE CITY PROVINCE POSTAL CODE

Telephone Number: _____ Fax Number: _____

E-mail: _____

TESTING

List testing operations to be undertaken as appropriate.

Type of test	In house?	If no, name of company conducting test	Tel. No.
Soil	<input type="checkbox"/> Y <input type="checkbox"/> N		
Hydro-geological	<input type="checkbox"/> Y <input type="checkbox"/> N		
Environmental	<input type="checkbox"/> Y <input type="checkbox"/> N		
Concrete	<input type="checkbox"/> Y <input type="checkbox"/> N		
Steel	<input type="checkbox"/> Y <input type="checkbox"/> N		
Windows/Doors	<input type="checkbox"/> Y <input type="checkbox"/> N		
Membranes	<input type="checkbox"/> Y <input type="checkbox"/> N		
Other	<input type="checkbox"/> Y <input type="checkbox"/> N	If other, please include details on a separate sheet.	

Please continue to the Scope of Work Proposal tables that follow.

High-rise project forms follow on the next page. Townhouse projects start on page 31 of this Module.

SCOPE OF WORK PROPOSAL – HIGH-RISE PROJECTS

ITEM	RISK AREAS	RISK FACTORS		
		Documentation Review	Field Review	Level of review as %
1	BELOW GRADE/ FOUNDATIONS			(30%)
1.1	Earth bearing.	As required by design; adequate bearing capacity.		
1.2	Substructure.	Reinforcing; concrete cover over steel.		
1.3	Drainage systems.	Materials; coverage; connection to drain; clean outs.	Materials.	
1.4	Damp proofing or waterproofing.		Materials; surface preparation; continuity; thickness; joint detailing/reinforcing; protection.	
1.5	Insulation.		Materials; continuity; protection.	
1.6	Elevator sump pits.	Drainage; access; appropriate certification.		
			Proposed number of visits:	

ITEM	RISK AREAS	RISK FACTORS		
		Documentation Review	Field Review	Level of review as %
2	STRUCTURE			(40%)
2.1	Slabs; decks; beams; columns; walls.	Post-tensioning; protection from moisture.	Column finish.	
2.2	Expansion joints.	Continuity; unimpeded movement; no binding.	Materials; placement; installation.	
2.3	Slab protection systems: <ul style="list-style-type: none"> • Parking garage. • Surface. 	Concrete mix/admixtures; reinforcing steel coatings; slope to drains; slope of slab-on-grade away from structural elements.	Protection from corrosion problems related to de-icing salts; protection against leakage. Traffic deck waterproofing system; upturns at terminations; seals at penetrations; joint sealing details; exterior ramp waterproofing /de-icing system; trench drain waterproofing; column/wall base protection at slab-on-grade.	

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ITEM	RISK AREAS	RISK FACTORS		
		Documentation Review	Field Review	Level of review as %
2.4 Bal	cony protection systems.	Concrete cover over reinforcing.	Appropriate concrete mix; drainage; toppings or mortar repair; surface preparation; materials and application; sealer or waterproofing.	
2.4.1	Balcony guards.	Correct materials; anchorage; anchor corrosion protection; height; maximum openings, etc.	Securement.	
			Proposed number of visits:	

Section 3—Exterior Closure				
<u>Cladding</u> - Levels of effort will depend on the type and degree of occurrence of different types of cladding. For example, areas clad in EIFS will be more demanding of attention than areas clad in pre-cast concrete.				
<u>Windows</u> - Tests shall be conducted on a representative sample of each window system type installed in the building. Testing of window systems will include patio doors.				
ITEM	RISK AREAS	RISK FACTORS		
		Documentation Review	Field Review	Level of review as %
3 EXT	ERIOR CLOSURE		(50%)
3.1	Back-up wall; substrate.		Materials; thicknesses; dimensions; corrosion protection; anchorage to structure; deflection /expansion/control joint details; clear widths.	
3.2	Masonry veneer.	Shelf angles; corrosion protection.	Shelf angles; corrosion protection; securement; masonry units; connectors; control joints; locations; clear widths.	
3.2.1	Precast concrete. (See Module 3a - Level of Review Guideline Tables re shop and site reviews)	Embedded anchors; corrosion protection; concrete quality.	Anchorage; corrosion protection; joint widths; repairs.	
3.2.2	Cast-in-place concrete.	Control and expansion joints; concrete quality; concrete placement; curing; freeze protection; application.	Treatment of honeycombing, cracks and form tie holes.	
3.2.3	Siding (non-decorative).	Finishes; coatings; substrate; fasteners; corrosion protection.	Materials; movement allowances.	
3.2.4	Exterior Insulated Finish System (EIFS). (See Module 3a re shop and site reviews)		Adhesives; fasteners; surface preparation; reinforcing; detailing; joint details; finish materials; application.	

ITEM	RISK AREAS	RISK FACTORS		
		Documentation Review	Field Review	Level of review as

ONHWP BUILDERS BULLETINS

3.2.5 L	oad bearing masonry.	Shelf angles; corrosion protection.	Shelf angles; corrosion protection; securement; connectors; control joints; locations; clear widths.	%
3.2.6 Cur	tain wall.	Manufacturer's performance and installation specifications.	Shelf angles; corrosion protection; securement; connectors; control joints; locations.	
3.2.7 O	ther cladding systems.	Contact ONHWP.		
3.3 C	oncealed protections.		External flashings; sills. Impermeable exterior components; continuity of external seals between components and at all joints. Internal flashings; joint seals; end dams; moisture barriers; clear drainage to exterior; venting.	
3.3.1	External sealants.		Materials; surface preparation.	
3.3.2	Soffits.		Materials; thicknesses; dimensions; corrosion protection; anchorage to structure; deflection /expansion/control joint details.	
3.3.1 A	rchitectural coatings, finishes, paint.	Materials; surface preparation; priming; application.	Materials; surface preparation; priming; application.	
3.4 W	ndows, glazing and exterior doors,		Wind, air and water load testing; anchorage; operation; hardware.	
3.4.1	External sealants — as related to 3.4		Materials; surface preparation.	
3.5	Thermal insulation.		Materials; securement; continuity; limit thermal bridges.	
3.6	Air barrier; vapour retarder		Materials; securement; continuity; seals at slabs; interior walls; seals at all penetrations; windows; doors.	
			Proposed Number of Visits	

ITEM	RISK AREAS	RISK FACTORS		
		Documentation Review	Field Review	Level of review as %
4 ROOFING				(50%)
4.1	Membrane; shingles or sloped metal.	Ventilation (if provided).	Materials; joint details/reinforcing; securement/adhesion; underlayment; ice damming protection; flashings; penetration seals.	
4.2	Insulation; ballast.		Materials; installation; continuity.	
4.3	Vapour retarder; air barrier; ventilation.		Materials; adhesion (if required); continuity, seals at walls and penetrations; ventilation (if provided).	
4.4	Drainage.		Slope to drain.	
4.5	Snow and ice control.		Snow/ice guards.	
4.6	Safety tie-back anchors for building maintenance,	Locations; anchorage; corrosion protection; rope steps; sleeves.	Pitch pockets - materials and application.	
			Proposed number of visits:	

ITEM	RISK AREAS	RISK FACTORS		
		Documentation Review	Field Review	Level of review as

ONHWP BUILDERS BULLETINS

				%
5	FIRE SAFETY SYSTEMS			(75%)
5.1	Containment.	Acoustics between suites.	Fire separations; materials; thicknesses; assembly; fastening; continuity; fire stopping; smoke seals; closures.	
5.2	Egress.	Corridors; stairwells; stairwell guards; pressurization systems (lighting - see 9.2).		
5.3	Suppression.	Stand pipes; fire hose cabinets; booster pumps; sprinkler systems.		
5.4	Detection and alarm.	Control panel and annunciator; heat, smoke and flow detectors; bells and horns; emergency voice communication.		
			Proposed number of visits:	

ITEM	RISK AREAS	RISK FACTORS		
		Documentation Review	Field Review	Level of review as %
6 INT	ERIOR FINISHES, COMMON AREAS			All common elements - visual review.
6.1	Corridors and stairwells.		Condition of flooring and walls, lighting fixtures and ceilings.	
6.2	Party/common rooms.		Condition of flooring, walls, ceilings, lighting fixtures and cabinetry.	
6.3	Sauna/whirlpool/fitness barrier; ventilation,	Function; equipment.	Condition of finishes; function; equipment.	
6.4	Swimming pool.	Function; equipment.	Condition of finishes; function; equipment.	
			Proposed number of visits:	

ITEM	RISK AREAS	RISK FACTORS		
		Documentation Review	Field Review	Level of review as %
7 CONVEYING SYSTEMS (ELEVATORS)		Condition of finishes; appropriate certification.	Condition of finishes.	Each unit.
			Proposed number of visits:	

Section 8— Mechanical

Acoustics and labelling. At this time appropriate labelling and acoustical performance is reliant on the reports of the Primes associated with the project. However, acoustical performance and labelling are sources of regular complaint. Special attention should be paid to the reports relating to these issues.

ITEM	RISK AREAS	RISK FACTORS		
		Documentation Review	Field Review	Level of review as %
8 MEC	HANICAL			(10%)
8.1	Heating; ventilation; air conditioning.	Central boilers; heat pumps; chiller; cooling tower; make-up air units; distribution piping; ductwork;	Labelling.	

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ITEM	RISK AREAS ~	RISK FACTORS		
		Documentation Review	Field Review	Level of review as %
		insulation; acoustic isolation; exhaust systems; suite distribution; controls. Acoustics; labelling.		
8.2 PI	umbing .supply.	Water service; metering; booster pumps; distribution piping; expansion joints; valves; securement; insulation; boilers; storage tanks; re-circulation pumps. Acoustics; labelling.	Labelling.	
8.3 PI	umbing .drainage. St	orm and sanitary drains; sump pumps; clean-outs. Acoustics; labelling.	Labelling.	
8.4	Waste disposal.	Garbage chutes; chute doors; wash-down facilities; compactor. Acoustics; labelling.	Labelling.	
8.5	Insulation.	Materials; acoustics; firestopping.	Material; firestopping.	
			Proposed number of visits:	

Section 9— Electrical
 Labelling .Incomplete labelling is a regular source of complaint. Special attention should be paid to this area of review.

ITEM	RISK AREAS	RISK FACTORS		
		Documentation Review	Field Review	Level of review as %
9	ELECTRICAL			(10%)
9.1	Distribution systems.	Switchgear; transformers; labelling.	Labelling.	
9.2	Lighting.	Corridor; lobby; stairwells; parking garage; intensity levels; emergency power supply; labelling.	Labelling.	
9.3	Emergency power.	Generator; fuel storage; controls; ventilation; acoustic isolation; labelling.	Labelling.	
9.4	Intercom and security systems.	Installation; function.	Function.	
9.5	Insulation.	Material; acoustics; firestopping and smoke seals.	Material; firestopping. ~	
			Proposed number of visits:	

ITEM	RISK AREAS	RISK FACTORS		
		Documentation Review	Field Review	Level of review as %
10	SITE WORK			(10%)
10.1	Pavements; curbs.	Materials; sub-base materials; thicknesses; compaction; drainage,	Materials; sub-base materials; thicknesses; compaction; drainage.	
10.2	Retaining walls.	In conformance with design or manufacturer's drawings,		
10.3	Landscape structures (gazebos, decks).	Materials; foundations; construction; moisture protection; corrosion protection.		
10.4	Fences,	Materials; frost protection.	Materials; frost protection.	
10.5	Irrigation systems.	In conformance with design and drawings.		

ONHWP BUILDERS BULLETINS

10.6	Sod, trees and shrubs.	Top soil.	Top soil.	
			Proposed number of visits:	

I undertake to carry out the documentation and field reviews at the time and in the manner outlined above. I will provide all documents and reports to ONHWP in accordance with the terms attached to this firm's application for Bulletin 19 Qualification Status submitted to and approved by Ontario New Home Warranty Program on _____/_____/_____(enter date).

Signature of FRC Authorized to Bind Firm

Print Name

Date

Position

Vendor/Builder's Signature

Print Name

Date

Company

Telephone

Fax

Email

SCOPE OF WORK PROPOSAL – TOWNHOUSE PROJECTS

ITEM	RISK AREAS	RISK FACTORS		
		Documentation Review	Field Review	Level of review as %
1 BEL	OW GRADE! FOUNDATIONS (For Those over parkade)			(30%)
1.1	Earth bearing.	As required by design; adequate bearing capacity.		
1.2	Substructure.	Reinforcing; concrete cover over steel.		
1.3 Dr	ainage systems . parkade.	Materials; coverage; connection to drain; clean outs.	Materials.	
1.4	Damp proofing or waterproofing and		Materials; surface preparation; continuity; thickness; joint detailing/reinforcing; protection.	
1.5	Insulation .parkade.			
			Materials; continuity; protection.	
1.5.1	Damp proofing or waterproofing and		Materials; surface preparation; continuity; thickness; joint detailing/reinforcing; protection.	
1.5.2	Insulation .on grade.			
			Materials; continuity; protection.	
1.6	Elevator sump pits.	Drainage; access; appropriate certification.		
			Proposed number of visits:	

ITEM	RISK AREAS	RISK FACTORS		
		Documentation Review	Field Review	Level of review as %
ST	RUCTURE			(40%)
2.1	Slabs; decks; beams; columns; walls.	Post-tensioning; protection from moisture.	Column finish.	
2.2	Expansion joints.	Continuity; unimpeded movement; no binding.	Materials; placement; installation.	
2.3	Slab protection systems: • Parking garage • Su rface	Concrete mix/admixtures; reinforcing steel coatings; slope to drains; slope of slab-on-grade away from structural elements.	Protection from corrosion problems related to de-icing salts; protection against leakage. Traffic deck waterproofing system (if applicable); upturns at terminations; seals at penetrations; joint sealing details; exterior ramp waterproofing de-icing system; trench drain waterproofing; column/wall base protection at slab-on-grade.	
2.4 Bal	cony protection systems.	Concrete over reinforcing.	Appropriate concrete mix; drainage; toppings or mortar repair; surface preparation; materials and application;	

ONHWP BUILDERS BULLETINS

			sealer or waterproofing.	
2.4.1	Balcony guards.	Correct materials; anchorage; anchor corrosion protection; height; maximum openings, etc.	Securement.	
2.5	Wood/Steel Framing.	Headers, built up beams and columns, spacing, grading of materials,	Securement and conformance with construction documents.	
			Proposed number of visits:	

Section 3—Exterior Closure

Cladding .Levels of effort will depend on the type and degree of occurrence of different types of cladding. For example, areas clad in EIFS will be more demanding of attention than areas clad in pre-cast concrete.

Windows .Tests shall be conducted on a representative sample of each window system type installed in the building. Testing of window systems will include patio doors.

ITEM	RISK AREAS	RISK FACTORS		
		Documentation Review	Field Review	Level of review as %
3 EXT	ERIOR CLOSURE			(50%)
3.1	Back-up wall; substrate.		Materials; thicknesses; dimensions; corrosion protection; anchorage to structure; deflection /expansion/control joint details; clear widths.	
3.2	Masonry veneer.	Shelf angles; corrosion protection.	Shelf angles; corrosion protection; securement; masonry units; connectors; control joints; locations; clear widths.	
3.2.1 P	recast concrete (see Module 3a re shop and site reviews.).	Embedded anchors; corrosion protection; concrete quality	Anchorage; corrosion protection; joint widths; repairs.	
3.2.2	Cast-in-place concrete.	Control and expansion joints; concrete quality; concrete placement; curing; freeze protection; application.	Treatment of honeycombing, cracks and form tie holes.	
3.2.3	Siding (non-decorative).	Finishes; coatings; substrate; fasteners; corrosion protection.	Materials; movement allowances.	
3.2.4	Exterior Insulated Finish System (EIFS) (see Module 3a re shop and site reviews.)		Adhesives; fasteners; surface preparation; reinforcing; detailing; joint details; finish materials; application.	
3.2.5	Load bearing masonry.	Shelf angles; corrosion protection.	Shelf angles; corrosion protection; securement; masonry units; connectors; control joints; locations; clear widths.	
3.2.6	Curtain wall.	Manufacturer's performance and installation specifications.	Shelf angles; corrosion protection; securement; connectors; control joints; locations.	
3.2.7	Other cladding systems.	Contact ONHWP		
3.3	Concealed protections.		External flashings; sills. Impermeable exterior components; continuity of external seals between components and at all joints. Internal flashings; joint seals; end dams; moisture barriers; clear drainage to exterior; venting.	
3.3.1	External sealants.		Materials; surface preparation.	
3.3.2	Soffits.		Materials; thicknesses; dimensions; corrosion protection; anchorage to structure; deflection /expansion/control joint details.	
3.3.3 A	rchitectural coatings, finishes, paint.	Materials surface preparation; priming; application.	Materials; surface preparation; priming; application.	

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3.4	Windows, glazing and exterior doors,		Wind, air and water load testing; anchorage; operation; hardware.	
3.4.1	External sealants,		Materials; surface preparation.	
3.5	Thermal insulation.		Materials; securement; continuity; limit thermal bridges.	
3.6	Air barrier; vapour retarder.		Materials; securement; continuity; seals at slabs; interior walls; seals at all penetrations; windows; doors.	
			Proposed number of visits:	

ITEM	RISK AREAS	RISK FACTORS		
		Documentation Review	Field Review	Level of review as %
4	ROOFING		(50%)
4.1	Membrane; shingles or sloped metal.	Ventilation (if provided).	Materials; joint details/reinforcing; securement/adhesion; underlayment; ice damming protection; flashings; penetration seals.	
4.2	Insulation; ballast.		Materials; installation; continuity.	
4.3	Vapour retarder; air barrier; ventilation,		Materials; adhesion (if required); continuity, seals at walls and penetrations; ventilation (if provided).	
4.4	Drainage.		Slope to drain.	
4.5	Snow and ice control.		Snow/ice guards.	
4.6	Safety tie-back anchors for building maintenance.	Locations; anchorage; corrosion protection; rope steps; sleeves,	Pitch pockets - materials and application.	
			Proposed number of visits:	

ITEM	RISK AREAS	RISK FACTORS		
		Documentation Review	Field Review	Level of review as %
5 FI	RE SAFETY SYSTEMS			(75%)
5.1	Containment.	Acoustics between suites.	Fire separations; materials; thicknesses; assembly; fastening; continuity; fire stopping; smoke seals; closures.	
5.2 In	Insulation; ballast.			
5.3	Suppression.	Stand pipes; fire hose cabinets; booster pumps; sprinkler systems in parking garage and as appropriate.		
5.4	Detection and alarm.	Control panel and annunciator; heat, smoke and flow detectors; bells and horns; emergency voice communication.		
			Proposed number of visits:	

ITEM	RISK AREAS	RISK FACTORS		
		Documentation Review	Field Review	Level of review as %
6 INT	INTERIOR FINISHES, COMMON AREAS			All common elements - visual

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				review.
6.1 C	corridors and stairwells.		Condition of flooring and walls, lighting fixtures and ceilings.	
6.2	Party/common rooms.		Condition of flooring, walls, ceilings, lighting fixtures and cabinetry.	
6.3 Sau	na/whirlpool/fitness	Function; equipment.	Condition of finishes; function; equipment.	
6.4	Swimming pool.	Function; equipment.	Condition of finishes; function; equipment.	
			Proposed number of visits:	

ITEM	RISK AREAS	RISK FACTORS		
		Documentation Review	Field Review	Level of review as %
7	CONVEYING SYSTEMS (ELEVATORS)	Condition of finishes; appropriate certification.	Condition of finishes.	Each unit.
			Proposed number of visits:	

Section 8— Mechanical

Acoustics and labelling - At this time appropriate labelling and acoustical performance is reliant on the reports of the Primes associated with the project. However, acoustical performance and labelling are sources of regular complaint. Special attention should be paid to the reports relating to these issues.

ITEM	RISK AREAS	RISK FACTORS		
		Documentation Review	Field Review	Level of review as %
8 MEC	Mechanical			(10%)
8.1	Heating; ventilation; air conditioning.	All-in-ones; heat pumps; make-up air units; distribution piping; ductwork; insulation; acoustic isolation; exhaust systems; suite distribution; controls. Acoustics; labelling.	Labelling.	
8.2 Pl	Water supply.	Water service; metering; booster pumps; distribution piping; expansion joints; valves; securement; insulation; boilers; storage tanks; re-circulation pumps. Acoustics; labelling.	Labelling.	
8.3 Pl	Water install.			
8.4 Was	Waste disposal where applicable,	Garbage chutes; chute doors; wash-down facilities; compactor. Acoustics; labelling.	Labelling.	
8.5	Insulation.	Materials; acoustics; fire stopping.	Material; fire stopping.	
			Proposed number of visits:	

Section 9— Electrical

Labelling - Incomplete labelling is a regular source of complaint. Special attention should be paid to this area of review.

ITEM	RISK AREAS	RISK FACTORS		
		Documentation Review	Field Review	Level of review as %
9	ELECTRICAL			(10%)
9.1	Distribution systems.	Switchgear; transformers; labelling.	Labelling.	

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9.2	Lighting.	Corridor; lobby; stairwells; parking garage; intensity levels; emergency power supply; labelling.	Labelling.	
9.3	Emergency power.	Generator; fuel storage; controls; ventilation; acoustic isolation; labelling.	Labelling.	
9.4	Intercom and security systems.	Installation; function.	Function.	
9.5	Insulation	Material; acoustics; fire stopping and smoke seals.	Material; fire stopping.	
			Proposed number of visits:	

ITEM	RISK AREAS	RISK FACTORS		
		Documentation Review	Field Review	Level of review as %
10 S	ITE WORK			(10%)
10.1	Pavements; curbs.	Materials; sub-base materials; thicknesses; compaction; drainage,	Materials; sub-base materials; thicknesses; compaction; drainage.	
10.2	Retaining walls.	In conformance with design or manufacturer's drawings.		
10.3 L	andscape structures (gazebos, decks).	Materials; foundations; construction; moisture protection; corrosion protection.		
10.4	Fences.	Materials; frost protection.	Materials; frost protection.	
10.5	Irrigation systems.	In conformance with design and drawings.		
10.6	Sod, trees and shrubs.	Top soil,	Top soil.	
			Proposed number of visits:	

(Please read and complete certification on next page.)

ONHWP BUILDERS BULLETINS

I undertake to carry out the documentation and field reviews at the time and in the manner outlined above. I will provide all documents and reports to ONHWP in accordance with the terms attached to this firm's application for Bulletin 19 Qualification Status submitted to and approved by Ontario New Home Warranty Program on

_____/_____/_____
(enter date).

_____ SIGNATURE OF FRC AUTHORIZED TO BIND FIRM	_____ PRINT NAME
_____ DATE	_____ POSITION
_____ VENDOR/BUILDERS SIGNATURE P	_____ PRINT NAME
_____ DATE	_____ COMPANY
_____ TELEPHONE	_____ FAX
_____ 	_____ EMAIL

Builder Bulletin 19 Module 3 Scope of Work - Description of Notional Buildings

(For use in connection with Module 3a - Level of Review Guideline Tables)

To assist FRCs in assessing the appropriate level of effort to employ on high-rise condominium projects, ONHWP has established an illustration of its expectations. This has been achieved by describing five notional buildings. While ONHWP does not consider the notional buildings to be typical of construction projects falling within Bulletin 19, they are intended to provide baselines from which appropriate levels of effort can be extrapolated and proposed.

ONHWP has defined the notional buildings as having the following characteristics:

10-STOREY BUILDING

- Typical 6,000 ft² floor plate plus a 1,000 ft² mechanical/elevator room on the roof level.
- 2 levels of underground parking with 9,000 ft² per level.
- 6 units per typical floor and 5 units on the main floor for a total of 59 residential units.
- Building height is approx. 95 feet from ground level based on a floor-to-floor height of 8.5 ft and a 9 ft mechanical room. (Floor to floor height is the same for all buildings.)
- Concrete structure with light gauge steel framing for exterior wall and partitions.

20-STOREY BUILDING

- Typical 6,000 ft² floor plate plus a 1,000 ft² mechanical/elevator room on the roof level.
- 3 levels of underground parking with 9,000 ft² per level.
- 6 units per typical floor and 5 units on the main floor for a total of 119 residential units.
- Building height is 180 feet from ground level.
- Concrete structure with light gauge steel framing for exterior wall and partitions.

30-STOREY BUILDING

- Typical 6,000 ft² floor plate plus a 1,000 ft² mechanical/elevator room on the roof level.
- 4 levels of underground parking with 9,000 ft² per level.
- 6 units per floor 5 units on the main floor for a total of 179 residential units.
- Building height is 270 feet from ground level.
- Concrete structure with light gauge steel framing for exterior wall and partitions.

STACKED MULTI-TOWNHOUSE

Each structure contains eight townhouse units of approximately 1,500 ft² each. The townhouse units are accessible from grade level and have an integral garage. The structural system for each building consists of Part 9 OBC stick construction with concrete foundations. Building envelope consists of masonry veneer with punched windows and a deck balcony for each unit.

MULTI-TOWNHOUSE OVER PARKADE

Consists of a townhouse building sitting atop an underground parkade. The townhouse building contains eight units. Each townhouse unit is approximately 1,500 ft² in size. The underground parkade is on one level and approximately 5,000 ft² in size. The residential buildings utilize Part 9 OBC stick construction for the structure. The parkade structure consists of concrete foundation walls and a concrete slab supporting the residential units above. Building envelope consists of masonry veneer with punched windows and a deck or balcony for each unit.

Builder Bulletin 19 Module 3a Scope of Work 'Level of Effort' Guideline Tables

HIGH RISE PROJECTS

(Separate tables for LOWRISE DEVELOPMENTS START ON PAGE 46 of this Module)

ITEM	RISK AREAS	REQUIREMENT FOR TOTAL NUMBER OF VISITS	TYPICAL BUILDING EXAMPLE		
			10 STY	20 STY	30 STY
1 BEL	LOW GRADE/ FOUNDATIONS		10 STY	20 STY	30 STY
1.1	Earth bearing.	Documentation review.			
1.2	Sub structure.	Documentation review.			
1.3	Drainage systems.	Documentation review PLUS	4	6	8
		Two visits per underground parkade. One visit to ensure structure adequately sloped and one to visit to confirm drainage after all appliances installed.			
1.4	Damp proofing or waterproofing.	Two visits per 6,000 ft ² . 6	8		
1.5	Insulation.				
1,6 E	levator sump pits.	Documentation review.			

ITEM	RISK AREAS	REQUIREMENT FOR TOTAL NUMBER OF VISITS	TYPICAL BUILDING EXAMPLE		
			10 STY	20 STY	30 STY
2 ST	STRUCTURE		10 STY	20 STY	30 STY
2.1	Slabs; decks; beams; columns; walls.	Documentation review PLUS 1 visit per project for review of finish.	1	1	1
2.2	Expansion joints.	Documentation review PLUS Two visits per underground parkade. One visit to review prep-work and one visit to review application.	4	6	8
2.3	Slab protection systems: •Parking garage. •Surface.	Documentation review PLUS Two visits per 20,000 ft ² of traffic coating. One visit to review slab prep and one visit to review application. (See note 2.)	2	3	4
2.4	Balcony protection systems. Balcony guards.	Documentation review PLUS Greater of one visit per 4 floors to review preparation work PLUS greater of one visit per 4 floors to review finish work.	4	8	12
2.4.1					

ITEM	RISK AREAS	REQUIREMENT FOR TOTAL NUMBER OF VISITS	TYPICAL BUILDING EXAMPLE		
			10 STY	20 STY	30 STY
3 EXT	ERIOR CLOSURE		10 STY	20 STY	30 STY
3.1	Back up wall; substrate.	1 visit per two floors.	5	10	15
3.2	Masonry veneer,	Documentation review PLUS Greater of one visit per every two floors or one visit per 8,000 ft ²	4	8	12

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		masonry area. This will give the inspector the ability to review each of the required items simultaneously.			
3.2.1	Precast concrete.	Documentation review PLUS Shop review - greater of 1 visit per 5 floors of pre-cast or 1 visit per 17,500 ft ² of pre-cast. This is based on assumption that the plant produces one floor of panels every two days. Site review - greater of 1 visit per 2 floors of pre-cast or 8,000 ft ² of pre-cast (see note 1). Based on the assumption that the typical construction cycle of a tower will leave the panels exposed for inspection from within the building for two to three successor activities.	2 4	4 8	6 12
3.2.2	Cast-in-place concrete.	Documentation review PLUS Greater of one visit per every 5 floors or one visit per 16,000 ft ² of cast-in-place concrete. This will provide the inspector the ability to review each of the required items simultaneously. (See note 2.)	2	4	6
3.2.3	Siding. (non-decorative).	Documentation review PLUS 1 visit per 1,000 ft ² to examine preparation PLUS 1 visit to examine finish. (See note 2.)	As required		
3.2.4	Exterior Insulated Finish System (EIFS).	Site review - greater of 1 visit per 1.5 floors of EIFS or 5,000 ft ² of EIFS (see note 1). This is based on an assumption that the typical construction cycle of a tower will leave the panels exposed for inspection from within the building for two to three successor activities. Additionally, this will permit the simultaneous inspection of in-situ works. Shop review - greater of 1 visit per 5 floors of EIFS or 1 visit per 17,500 ft ² of EIFS (see note 1). This is based on an assumption that the plant produces one floor of panels every two days.	7	14	21
			2	4	6
3.2.5	Load bearing masonry.	Documentation review PLUS Greater of one visit per every second floor or one visit per 8,000 ft ² of load bearing veneer. This will provide the inspector the ability to review each of the required items simultaneously.		8	12
3.2.6	Curtain wall.	Documentation review PLUS Erection - greater of 1 visit per 2 floors or 7,000 ft ² of curtain wall. This is based on an assumption that the typical construction cycle will leave the curtain wall exposed for inspection from within the building for two to three success or activities. Finishing - 1 visit per 50,000 ft ² of curtain wall building envelope area. This is the maximum amount of building envelope area that can be reviewed in one visit. (See note 2.)	5	10	15
			As required		
3.2.7	Other cladding systems.	Contact ONHWP			
3.3	Concealed protections.	1 visit per 2 floors.	5	10	15
3.3.1	External sealants.	For EIFS - 1 visit per 50,000 ft ² . Other systems - 1 visit per 75,000 ft ² . (See note 2 for both,)	6	4	12
			8	18	12
3.3.2	Soffits.	1 visit per 500 ft ² to examine preparation PLUS one visit per 500 ft ² to examine finish. (See note 2.)	As required		
3.3.3	Architectural coatings, finishes, paint.	Documentation review PLUS 1 visit per 1,000 ft ² for preparation PLUS 1 visit per 1,000 ft ² for finish. (See note 2.)	As required		
3.4	Windows, glazing and exterior doors.	Documentation review of shop test report PLUS Greater of one visit per two floors or one visit per 15,000 ft ² of floor area. Based on the assumption that the construction cycle of a tower will leave the window and patio door fastening method exposed for inspection for two successor activities.	5	10	15
3.4.1	External sealants (as related to 3.4).	1 visit per two floors to review sealant finish for 1 of each window type.	5	10	15

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3.5	Thermal insulation.	1 visit per every three floors.	3	7	10
3.6	Air barrier; vapour retarder.				
3.2.7	Other cladding systems.	Contact ONHWP			

ITEM	RISK AREAS	REQUIREMENT FOR TOTAL NUMBER OF VISITS	TYPICAL BUILDING EXAMPLE		
			10 STY	20 STY	30 STY
4	ROOFING				
4.1	Membrane; shingles or sloped metal.	Documentation review (ventilation) PLUS 1 pre-application and flashing visit PLUS 1 visit per 1,500 ft ² . Assumptions based on daily inspections for a roofing crew completing 1,500 ft ² per day. (See note 2.)	5	5	5
4.2	Insulation; ballast.	1 visit per 6,000 ft ² of roof. Based on a roofing crew undertaking 6,000 ft ² per day. (See note 2.)	1	1	1
4.3	Vapour retarder; air barrier; ventilation.	1 visit per 3,000 ft ² . (See note 2.)	2	2	2
4.4	Drainage.	1 visit per project.	1	1	1
4.5	Snow and ice control.	1 visit per project.	1	1	1
4.6	Safety tie-back anchors for building maintenance.	Documentation review PLUS 1 visit to review materials and application for pitch pockets.	1	1	1

ITEM	RISK AREAS	REQUIREMENT FOR TOTAL NUMBER OF VISITS	TYPICAL BUILDING EXAMPLE		
			10 STY	20 STY	30 STY
5	FIRE SAFETY SYSTEMS				
5.1	Containment.	Documentation review PLUS The greater of 1 visit per every two floors or 20,000 ft ² . (See note 2.)	5	10	15
5.2	Egress.	Documentation review.			
5.3	Suppression.				
5.4	Detection and alarm.				

ITEM	RISK AREAS	REQUIREMENT FOR TOTAL NUMBER OF VISITS	TYPICAL BUILDING EXAMPLE		
			10 STY	20 STY	30 STY
6	INTERIOR FINISHES, COMMON AREAS				
6.1	Corridors and stairwells.	Documentation review for 6.3 and 6.4 PLUS Number of visits required to complete walk through of all areas.	As required		
6.2	Party/common rooms.				
6.3	Sauna/whirlpool/fitness.				
6.4	Swimming pool.				

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ITEM	RISK AREAS	REQUIREMENT FOR TOTAL NUMBER OF VISITS	TYPICAL BUILDING EXAMPLE		
7	CONVEYING SYSTEMS (ELEVATORS)		10 STY	20 STY	30 STY
		Documentation review PLUS 1 visit for inspection of finishes.	1	1	1

ITEM	RISK AREAS	REQUIREMENT FOR TOTAL NUMBER OF VISITS	TYPICAL BUILDING EXAMPLE		
8	MECHANICAL		10 STY	20 STY	30 STY
8.1	Heating; ventilation; air conditioning.	Documentation review PLUS 1 visit per parkade and 1 visit per every 4 floors to confirm placement of labelling.	4	8	12
8.2	Plumbing .supply.				
8.3	Plumbing .drainage.				
8.4	Waste disposal.				
8.5	Insulation.				

ITEM	RISK AREAS	REQUIREMENT FOR TOTAL NUMBER OF VISITS	TYPICAL BUILDING EXAMPLE		
9 EL	ELECTRICAL		10 STY	20 STY	30 STY
9.1	Distribution systems.	Documentation review PLUS 1 visit per parkade and 1 visit per every 4 floors to confirm placement of labelling.	4	8	12
9.2	Lighting.				
9.3	Emergency power.				
9.4	Intercom and security systems.				
9.5	Insulation.				

ITEM	RISK AREAS	REQUIREMENT FOR TOTAL NUMBER OF VISITS	TYPICAL BUILDING EXAMPLE		
10 S	ITE WORK	10		20 STY	30 STY
10.1	Pavements; curbs,	Documentation review PLUS 1 visit to confirm sub-grade preparation PLUS 1 visit during installation PLUS one visit upon completion.	3	3	3
10.2	Retaining walls.				

10.3	Landscape structures (gazebos, decks). Fences.				
10.4					
10.5	Irrigation systems.	Documentation review.			
10.8	Sod, trees and shrubs.	Documentation review PLUS 1 visit to confirm top-soil.	1	1	1

Note 1: Wall cladding area excludes deductions for window openings, etc.

Note 2: Where visit numbers within these guidelines are determined by area and a real project's floor or cladding area is less than the figure quoted for a particular risk sub-category, the FRC should assume the minimal level of effort to be equivalent to the number of visits given for a ten storey, notional building. Where visit levels are still felt to be too high as a result of applying this rule the FRC should contact the Condominium Office of ONHWP

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TOWNHOUSE PROJECTS

The recommended visit levels for townhouses have been calculated on the basis that construction consists of a single block. Where multiple blocks are being constructed one visit can be used to review a representative sample of the same risk area in multiple blocks. The representative sample must provide a level of review that is sufficient to ensure the spirit and intent of the construction documents is being realized and that component performance meets or exceeds current construction standards. **if you require further guidance please contact ONHWP's Condominium Office** (contact details can be found on the last page of the introduction section of this bulletin).

ITEM	RISK AREAS	REQUIREMENT FOR TOTAL NUMBER OF VISITS	TYPICAL BUILDING EXAMPLE	
			STACKED MULTI-T/H	MULTI-T/H OVER PARKADE
1	BELOW GRADE/ FOUNDATIONS			
1.1 Earth bearing.		Documentation Review.	N/A	N/A
1.2 Substructure.		Documentation Review.	N/A	N/A
1.3	Drainage systems - parkade.	Two visits to underground parkade. One visit to ensure structure adequately sloped and one visit to confirm drainage after all appliances installed.	N/A 2	
1.3.1	Drainage systems - on grade.	One visit to review foundation drains.	1	N/A
1.4	Damproofing or waterproofing and insulation - parkade.	Two visits per 6,000 ft ² . N/A		2
1.5				
1.5.1	Damproofing or waterproofing and insulation - on grade.	One visit per block.	1	N/A
1.5.2				
1.6	Elevator sump pits.	Documentation review.	N/A	N/A

ITEM	RISK AREAS	REQUIREMENT FOR TOTAL NUMBER OF VISITS	TYPICAL BUILDING EXAMPLE	
			STACKED MULTI-T/H	MULTI-T/H OVER PARKADE
2	STRUCTURE			
2.1	Slabs; decks; beams; columns; walls.	Documentation review PLUS one visit per project for review of finish.	N/A 1	
2.2	Expansion joints.	Two visits to underground parkade. One visit to review prep-work and one visit to review application.	N/A 2	
2.3	Slab protection systems: • Parking garage. • Surface.	Two visits per 5,000 ft ² of traffic coating. One visit to review slab prep and one visit to review application.	N/A 2	
2.4	Balcony protection systems.	Documentation review PLUS one visit to review preparation work PLUS one visit to review finish work.	2 2	
2.4.1	Balcony guards.			
2.5	Wood framing,	Documentation review PLUS two visits to review installation.	2 2	

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ITEM	RISK AREAS	REQUIREMENT FOR TOTAL NUMBER OF VISITS	TYPICAL BUILDING EXAMPLE	
			STACKED MULTI-T/H	MULTI-T/H OVER PARKADE
3	EXTERIOR CLOSURE			
3.1	Back-up wall; substrate.	One visit.	1	1
3.2 M	Masonry veneer.	Documentation review PLUS one visit.	1	1
3.2.1	Precast concrete.	Documentation review PLUS Shop Review .one visit per block. Site Review .one visit per block.	2 2	
3.2.2	Cast-in-place concrete.	One visit per block.	1	1
3.2.3	Siding (non-decorative).	One visit per block.	1	1
3.2.4	Exterior Insulated Finish System (E.I.E.S.).	Shop Review .one visit per block. Site Review .two visits per block.	1 2	1 2
3.2.5	Load bearing masonry	Documentation review PLUS one visit per block.	1	1
3.2.6	Curtain wall.	Documentation review PLUS Erection .One visit per block. Finishing .One visit per block.	1 1	1 1
3.2.7	Other cladding systems.	Contact ONHWP	N/A	N/A
3.3	Concealed protections.	One visit per block.	1	1
3.3.1	External sealants.	EIFS .two visits per block. Other Systems .one visit per block.	2 1	2 1
3.3.2	Soffits.	One visit per 1,000 ft ² of soffit to allow a viewing of ongoing installation and finishing.	As required	As required
3.4	Windows, glazing and exterior doors,	Documentation review of shop test reports PLUS one visit per block.	1 1	
3.4.1	External sealants (as related to 3.4).	One visit per block.	1	1
3.5 T	Thermal insulation.	One visit per block.	1	1
3.6	Air barrier, vapour retarder.			

ITEM	RISK AREAS	REQUIREMENT FOR TOTAL NUMBER OF VISITS	TYPICAL BUILDING EXAMPLE	
			STACKED MULTI-I/H	MULTI-T/H OVER PARKADE
4	ROOFING			
4.1	Membrane, shingles or sloped metal.	Documentation review PLUS three visits per block. One visit each for review of preparation, application and finishing/flashing.	3 3	
4.2	Insulation; ballast,	One visit per block.	1	1
4.3	Vapour retarder; air barrier; ventilation.	One visit per block.	1	1
4.4	Drainage.	One visit per block.	1	1
4.5	Snow and ice control.	One visit per project.	1	1
4.6	Safety tie-back anchor for building maintenance.	Documentation review plus one visit to review installation (if applicable).	1 1	

ITEM	RISK AREAS	REQUIREMENT FOR TOTAL NUMBER OF VISITS	TYPICAL BUILDING EXAMPLE	
			STACKED MULTI-T/H	MULTI-I/H OVER PARKADE
5	FIRE SAFETY SYSTEMS			
5.1 C	Containment.	Documentation Review PLUS one visit per block.	1	1
5.2 In	Insulation.			

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5.3 S	uppression.	Documentation Review PLUS one visit per project to review testing of systems.	1 1	
5.4	Detection & alarm.			

ITEM	RISK AREAS	REQUIREMENT FOR TOTAL NUMBER OF VISITS	TYPICAL BUILDING EXAMPLE	
			STACKED MULTI-I/H	MULTI-I/H OVER PARKADE
6	INTERIOR FINISHES, COMMON AREAS			
6.1	Corridors & Stairwells.	Documentation Review of 6.3 and 6.4 PLUS number of visits required to complete walkthrough of all areas.	As required	
6.2 Part	y/common rooms.			
6.3 Sau	na/whirlpool/fitness.			
6.4 S	wimming pool.			

ITEM	RISK AREAS	REQUIREMENT FOR TOTAL NUMBER OF VISITS	TYPICAL BUILDING EXAMPLE	
			STACKED MULTI-I/H	MULTI-I/H OVER PARKADE
7 CON	VEYING SYSTEMS			
		Documentation review PLUS one visit for inspection of finishes.	N/A 1	

ITEM	RISK AREAS	REQUIREMENT FOR TOTAL NUMBER OF VISITS	TYPICAL BUILDING EXAMPLE	
			STACKED MULTI-T/H	MULTI-T/H OVER PARKADE
8	MECHANICAL			
8.1 Heat	ing ventilation & air conditioning.	Documentation review PLUS one visit to parkade and one visit per block to review labeling.	1 2	
8.2 Pl	umbing supply.			
8.3 Pl	umbing install.			
8.4 Was	te disposal.			
8.5 In	sulation.			

ITEM	RISK AREAS	REQUIREMENT FOR TOTAL NUMBER OF VISITS	TYPICAL Building EXAMPLE	
			STACKED MULTI-T/H	MULTI-I/H OVER PARKADE
9 EL	ELECTRICAL			
9.1 Distr	ibution systems.	Documentation review PLUS one visit to parkade and one visit per block to review labeling.	1 2	
9.2 Li	ghting.			
9.3	Emergency power.			
9.4	Intercom and security systems,			
9.5 In	sulation.			

ITEM	RISK AREAS	REQUIREMENT FOR TOTAL NUMBER OF VISITS	TYPICAL BUILDING EXAMPLE
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			STACKED MULTI- T/H	MULTI/TH OVER PARKADE
10 S	ITE WORK			
10.1	Pavement; Curbs.	One visit to confirm sub-grade preparation PLUS one visit during installation PLUS one visit upon completion.	3 3	
10.2	Retaining walls.			
10.3	Landscape structures (gazebos, decks).			
10.4	Fences.			
10.5	Irrigation systems.	Documentation review.	N/A	N/A
10.6	Sod, trees and shrubs.	Documentation review PLUS one visit to confirm top soil.	1	1
10.7	Site services.	Documentation review PLUS one visit for review of installation including labeling/accessibility of valve and other relevant fixtures.	1	N/A

Builder Bulletin 19 – MODULE 19

Field Review Consultant Reporting Requirements

This module of Bulletin 19 contains information about 60 Day and Milestone Reports. Information about other reporting requirements and a full set of report templates will be found in the subsequent sub-modules 4a through 4d. The use of standardized report templates will establish greater consistency in the quality and content of reports received by the Ontario New Home Warranty Program (ONHWP).

60 DAY REPORTS

These reports provide ONHWP with skeleton information about the ongoing progress of a construction project. They help assess whether or not a project is on schedule and provide FRCs with an early opportunity to bring any project issues to the attention of ONHWP if it is felt necessary to do so.

An explanation of due dates and submission of 60 Day Reports is given at the top of the template found in Module 4b.

MILESTONE REPORTS

Milestone Reports provide ONTIWP with detailed information about the progress of a project, a mechanism that shows risk areas are being monitored and that deficiencies are being appropriately dealt with.

ONHWP acknowledges that vendors/builders and FRCs often work together to rectify outstanding issues without the need to resort to formal reporting procedures. Outstanding issues/deficiencies will remain matters for practical resolution by agreement between the FRC and vendor/builder until such time as they cannot or have not been rectified and a Milestone Report falls due. Every effort should be made to rectify reported deficiencies before the next Milestone Report due date. *(For an explanation of deficiencies as they relate to Bulletin 19 and when they become reportable please see the explanation entitled ‘Deficiency: How it’s defined and when to report are appended to the end of this module.)*

WHEN TO SUBMIT A MILESTONE REPORT

Milestone Reports become due at specified stages of construction. The Condominium Office of ONHWP must receive the reports no later than 30 days after the described milestone is reached (see below). The milestone trigger points are:

- 1. **Sub-structure complete** i.e. completion of the at grade slab over the underground parking (if applicable).
- 2. **Super structure complete** (self explanatory).
- 3. **Building envelope 75% complete** i.e. completion of cladding and roofing.
- 4. **Building watertight and complete** i.e. completion of finishes and external sealing/weather protection systems. To include completion of all common elements.
- 5. **Bulletin 19 Final Report** (submitted by the vendor/builder). Refer to Module 4d for a full explanation of the Final Report.

Note: For these purposes, ONHWP will consider a construction milestone to be reached when work relating to the milestone has been substantially completed/performed.

Where the event based milestone trigger points fail to provide a sufficient flow of information, ONHWP reserves the right to request time based Milestone Reports. An example of where such a request might be made is where long construction delays lead to a marked extension of the construction schedule. In determining when it is appropriate to request a time based Milestone Report ONHWP will consider each case on its merits.

ONHWP will review the Milestone Report within 30 days of receipt and notify the FRC and vendor/builder of anything that warrants further discussion or investigation.

Nothing in the Milestone Reporting mechanism is intended to replace the FRC's internal project tracking systems. ONHWP will continue to expect full access to these records when necessary although such requests are likely to be rare.

HOW TO SUBMIT A MILESTONE REPORT

The Initial Milestone report is a two part report. The first part is a Milestone Report Tracking Summary This gives summary information about new deficiencies that are in existence at the time the Milestone Report falls due.

The second part is the Narrative Report Sheet. This provides FRCs with additional space to enter free-text narrative relating to any issue already referenced on the Tracking Summary.

On subsequent Milestone Reports a third sheet is required. This is the Deficiency Resolution Tracking Sheet. This lists all deficiencies that were outstanding at the previous Milestone Report and provides information about progress made in dealing with the previously identified deficiencies. It too may be used in conjunction with Narrative Report Sheets.

Copies of the sheets are attached to this module.

Builder Bulletin 19 – Appendix to Module 4 'Deficiency' : How it's Defined and When to Report One

OUTLINE

These guidelines provide an objective method to help FRCs and vendors/builders decide when an outstanding construction issue becomes reportable as a deficiency. The process uses a number of trigger points that convert outstanding issues or defects into 'reportable deficiencies'. In this way the subjective element associated with making 'report' or 'not to report' decisions is removed. Reporting of deficiencies will be done at the Milestone Report stages.

STANDARDIZING TERMINOLOGY

What term is used to describe an outstanding issue, defect or deficiency before the trigger points take effect will not impact upon ONHWP's view of the project.

The generally accepted term in the construction industry for quality and conformance problems is 'deficiency'. Use of the term appears to have been avoided in dealings with ONHWP because of the perceived potential for creating delays in the release of security. This system addresses such concerns and should remove the understandable reluctance of builders/vendors to have day-to-day construction problems called deficiencies.

ONHWP encourages the use of standardized language to remove potentials for confusion between agencies concerned with monitoring of identified risk areas. However, ONHWP respects the right of FRC firms to use whatever terms they wish when recording construction problems for internal tracking purposes.

'DEFICIENCY' FOR THE PURPOSES OF BULLETIN 19

A deficiency can exist in functional performance or in physical characteristics; it can arise from design, faulty manufacture, assembly or installation.

The existence of a deficiency may be established by physical evidence, from proof of a functional failure of a product while in use or, in the professional opinion of an FRC, the likely functional failure of a product at some future date or any other matter which exposes ONHWP to a potential claim under the warranty provisions of the Ontario New Home Warranties Plan Act.

TRIGGER POINTS

All deficiencies/outstanding issues/defects (see ‘Standardizing Terminology’ above) become reportable in any of the following circumstances:

1/When a Milestone Report becomes due.

2/When the Final Report comes due.

3/When a member of the Primary Design Team reports something they describe as a deficiency.

4/When an FRC has reason to believe that a contractor responsible for completion of a given task has permanently left the site and work on that task remains to be done.

5/When a contractor claims completion of a task but, in the opinion of the FRC, that task is not satisfactorily completed.

6/When a deviation from the approved construction documents (including supplementary documents *e.g.* site instructions, change notices, etc.) or intent of the Architect or Engineer is noted and the change has not been properly approved.

7/When a contractor accepts work done on a sub-strate by another contractor and that person knew or ought reasonably to have known that the quality of the sub-strate work may adversely affect the performance of his or her own work.

8/Any other event or issue that, in the opinion of the FRC, is embraced by the description of the term ‘deficiency’ and should be reported because of the potential exposure of ONHWP to a claim under the warranty provisions.

Builder Bulletin 19 – Module 4a Design Review

TIMING

Not less than 30 days prior to the commencement of construction of the condominium project the vendor/builder must deliver copies of each of the Design Certificates to ONHWP. Completed certificates may be provided on a phased basis but each must be submitted by the vendor/builder to ONHWP at least 30 days prior to the commencement of the work covered by that portion of the design. A sample Design Certificate is appended to this module.

These certificates verify that the design of the condominium project has been reviewed by the professionals responsible for the design of those elements of the construction for which they are responsible. Design Certificates should relate to the identified risk areas laid out in the Scope of Work:

- Below grade / foundations
- Structure
- Exterior closure
- Roofing
- Fire safety systems
- Interior finishes
- Conveying systems
- Mechanical systems
- Electrical systems
- Site work

Unlike the Field Review Consultant, the design team professionals are not required to provide ongoing reports to ONHWP. However, the Field Review Consultant may require continuing assistance from the design team during the construction phase to ensure a clear understanding and interpretation of the design documents is maintained.

This bulletin is in no way intended to replace or set off the requirements of Part 2 of the Ontario Building Code which sets out specific requirements for design general review by architects and professional engineers. The provisions of this bulletin are in addition to those requirements. Architects and Engineers are still obligated under the Ontario Building Code and should continue to work with the Municipal Building Department in honouring that obligation.



Builder Bulletin 19 – Design Certificate

(For use in connection with Bulletin 19 Design Review)

This form must be submitted to the Ontario New Home Warranty Program Condominium Office not less than 30 days prior to the commencement of construction of the relevant part(s) of the project and must be accompanied by:

1. A copy of the professional's Certificate of Authorization or Practice as applicable
AND
2. Proof of current professional liability insurance in keeping with the requirements of his/her professional association.

Name of project _____ Enrolment N° _____

Project address _____

Vendor/Builder name _____ Vendor/Builder Reference N° _____

RISK AREAS

Initial those areas that have been designed by the Professional Engineer or Architect identified overleaf and that are the subject of this declaration. Cross out risk areas that are the responsibility of others.

ITEM	RISK AREAS	DESIGN PROFESSIONAL'S INITIALS WHERE WORK MEETS TERMS OF THE DECLARATION		
			2	STRUCTURE
			2.1	Slabs; decks; beams; columns; walls.
			2.2	Expansion joints.
1	BELOW GRADE/FOUNDATIONS		2.3	Slab protection systems: <ul style="list-style-type: none"> • Parking garage. • Surface.
1.1	Earth bearing.		2.4	Balcony protection systems.
1.2	Substructure.		2.4.1	Balcony guards.
1.3	Drainage systems.		3	EXTERIOR CLOSURE
1.4	Damp proofing or waterproofing.		3.1	Back-up wall; substrate.
1.5	Insulation.		3.2	Masonry veneer.
1.6	Elevator sump pits.			

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3.2.1	Precast concrete.
3.2.2	Cast-in-place concrete.
3.2.3	Siding (non-decorative).
3.2.4	Exterior Insulated Finish System (EIFS).
3.2.5	Load bearing masonry.
3.2.6	Curtain wall
3.2.7	Other cladding systems.
3.3	Concealed protections.
3.3.1	External sealants.
3.3.2	Soffits.
3.3.3	Architectural coatings, finishes, paint.
3.4	Windows, glazing and exterior doors.
3.4.1	External sealants.
3.5	Thermal insulation.
3.6	Air barrier; vapour retarder.
4	ROOFING
4.1	Membrane; shingles or sloped metal.
4.2	Insulation; ballast.
4.3	Vapour retarder; air barrier; ventilation.
4.4	Drainage.
4.5	Snow and ice control.
4.6	Safety tie-back anchors for building
5	FIRE SAFETY SYSTEMS
5.1	Containment.
5.2	Extinguishers.
5.3	Suppression.
5.4	Detection and alarm.

6	INTERIOR FINISHES, COMMON AREAS
6.1	Corridors and stairwells.
6.2	Party /common rooms.
6.3	Sauna/whirlpool/fitness.
6.4	Swimming pool.
7	CONVEYING SYSTEMS (ELEVATORS)
8	MECHANICAL
8.1	Heating; ventilation; air conditioning.
8.2	Plumbing - supply.
8.3	Plumbing - drainage.
8.4	Waste disposal.
8.5	Insulation.
9	ELECTRICAL
9.1	Distribution systems.
9.2	Lighting.
9.3	Emergency power.
9.4	Intercom and security systems.
9.5	Insulation.
10	SITE WORK
10.1	Pavements; curbs.
10.2	Retaining walls.
10.3	Landscape structures (gazebos, decks).
10.4	Fences.
10.5	Irrigation systems.
10.6	Sod, trees and shrubs.

I, _____, the undersigned, being authorized in the Province of Ontario to provide professional services by virtue of a Certificate of Authorization (as issued by the Professional Engineers of Ontario) or a Certificate of Practice (as issued by the Ontario Architects Association) hereby declare that I have read and understand the requirements under Builder Bulletin 19 for the design review and certification and, with specific reference to the risk areas, that I have initialed above I have been engaged by the above referenced vendor/builder to provide my professional services in connection with the condominium project also identified above. Specifically, I am responsible for the production of all relevant construction documents for the above mentioned condominium project. I further declare that my portion of the design substantially complies with the Ontario Building Code and good design practice and in my view contains sufficient detail to enable work to be completed in keeping with the intention of my design. I am in a position to bind this firm.

SIGNATURE

PRINT NAME

Design firm: _____

Address: _____

Telephone: () _____

Builder Bulletin 19 Module 4b

60 Day Report

60 Day Report No.

For the period: From: _____ To: _____

The Condominium Office of the Ontario New Home Warranty Program must receive this report no later than 14 days after the due date. Initial due dates fall at the end of every 60 day period following the start of construction until the first Milestone Report is completed. Subsequent 60 Day Reports will be submitted 60 days after each Milestone Report becomes due and every 60 days thereafter. No 60 Day Report will be required where a Milestone Report falls due during a 60 day period.

Project Address: _____

FRC name and contact N°: _____

Common Element N°:

Vendor/Builder Reference N°:

Consultant's project reference N°:

Risk Area	Checked Y / N		Ref. No. of items requiring follow up review	Visits to Date	% complete.	On sched?
Below Grade	<input type="checkbox"/>	<input type="checkbox"/>				
Structure	<input type="checkbox"/>	<input type="checkbox"/>				
Exterior Closure	<input type="checkbox"/>	<input type="checkbox"/>				
Roofing	<input type="checkbox"/>	<input type="checkbox"/>				

MODULE 4C



Milestone Report – Deficiency resolution tracking sheet (append to narrative report)

Project name: _____ Common element no. _____
 Milestone Report no. _____ Dated: _____
 Vendor/Builder: _____ Vendor/Builder Ref. N° _____

List by reference number all deficiencies that were outstanding at the last Milestone Report. Where the deficiency has been rectified give a brief statement as to how this was done. If the deficiency is still not resolved please indicate the reason. Please indicate if matter was subject to any of the following: a construction anomaly, a site corrective measure and/or a Change Order. Please give references as appropriate.

Ref. no. from earlier Milestone	Risk area	Has deficiency been resolved?		If YES, enter what action was taken OR enter Milestone Report Narrative reference no. that deals with this issue.	If NO, state reason OR enter Milestone Report Narrative reference no. that deals with this issue	Re-inspect?	
		Y	N			Y	N
		<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	<input type="checkbox"/>
		<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	<input type="checkbox"/>
		<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	<input type="checkbox"/>
		<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	<input type="checkbox"/>
		<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	<input type="checkbox"/>
		<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	<input type="checkbox"/>
		<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	<input type="checkbox"/>

FRC (firm name): _____
 Signature and name of person completing report: _____

MODULE 4C



Milestone Report – Tracking summary (append to narrative report)

Project name: _____ Common element no. _____

Milestone Report no. _____ Dated: _____

Vendor/Builder: _____ Vendor/Builder Ref. N° _____

Milestone ref. no.	FRC ref. no.	Risk area	O/S at previous Milestone? resolved?		Deficiency location	Description of deficiency and any recommendation made for remediation OR Enter Milestone Report Narrative reference no. that deals with this issue
			Y	N		
			<input type="checkbox"/>	<input type="checkbox"/>		
			<input type="checkbox"/>	<input type="checkbox"/>		
			<input type="checkbox"/>	<input type="checkbox"/>		
			<input type="checkbox"/>	<input type="checkbox"/>		
			<input type="checkbox"/>	<input type="checkbox"/>		
			<input type="checkbox"/>	<input type="checkbox"/>		
			<input type="checkbox"/>	<input type="checkbox"/>		
			<input type="checkbox"/>	<input type="checkbox"/>		
			<input type="checkbox"/>	<input type="checkbox"/>		

FRC (firm name): _____

Signature and name of person completing report: _____

**MILESTONE REPORT –
Tracking summary (append to narrative report)**

Project name: _____ **Common element no.** _____
Milestone Report no. _____ **Dated:** _____

Milestone reference No.	Risk Area:
-------------------------	------------

Narrative: (Continue into next box if necessary)

Milestone reference No.	Risk Area:
-------------------------	------------

Narrative: (Continue into next box if necessary)

Person completing narrative report:

Builder Bulletin 19 The Final Report

Module 4d

EFFECT OF SUBMISSION

Submission of the Final Report represents notice to ONHWP that the project has been properly completed with the possible exception of minor, outstanding deficiencies. FRCs must inform ONHWP when the Final Report has been submitted to the vendor/builder.

The Bulletin 19 Final Report follows the submission of all required 60 Day and other Milestone Reports. It must be submitted to ONHWP by the vendor/builder at the completion of the project but not before the registration of the condominium corporation. The Bulletin 19 Final Report forms part of the consideration for release of security

CONTENT

The final report must be a bound copy of the following documents:

- A copy of all Milestone Reports associated with the project
- Copy of the Condominium Declaration as filed with the Land Titles Office
- All Design Certificates
- Field Review Declaration

and the following documents as applicable:

- Design Architect's final clearance
- Site Work Engineer's final clearance
- Structural Engineer's final clearance
- Mechanical Engineer's final clearance
- Electrical Engineer's final clearance
- Occupancy permit .if available

REPORT REVIEW

ONHWP will review the Bulletin 19 Final Report within 30 days of receipt and then notify the vendor/builder of any further technical requirements or adjustments to the required security, depending on the extent of any outstanding defects or deficiencies, and any outstanding administrative or non-technical matters. If everything is in order from a technical perspective, the release of security, subject to the requirements in Builder Bulletin 28, will be completed within 45 days of receipt of all the required documentation.

The FRC will assess the likely costs of rectifying outstanding matters based on current sub-trade prices for such rectification and provide them to ONHWP. ONHWP will then review the costs provided and retain an appropriate amount of the security. The amount retained will reflect the likely cost of rectification in the event that ONHWP was required to give effect to any remediation and will also take into account any outstanding administrative and non-technical costs.

Builder Bulletin 19— Field Review Declaration (For use in connection with Bulletin 19 Final Report)

This form must be submitted by the Vendor/Builder to the Ontario New Home Warranty Program Condominium Office as part of the Bulletin 19 Final Report (see Module 4d).

Name of Project

Enrolment N°

Project address

Vendor/Builder name

Vendor/Builder Reference

No.

Please complete the following tables. Report references should be derived from the Milestone Report number followed by the item number in that report e.g. if the deficiency is noted in the second Milestone Report and the item number is 374 the annotation would appear as M2/374. Delete any risk areas that are non-applicable.

ITEM	RISK AREAS	DEFICIENCY O/S? (Check box)	IF O/S REPORT REFERENCES	COST TO CORRECT	INITIAL IF CLEAR
1 B	ELOW GRADE/FOUNDATIONS				
1.1	Eart h bearing.				
1.2	S ubstructure.				
1.3	Dr ainage systems.				
1.4	Damp proofing or waterproofing.				
1.5	Insulation.				
1.6	Elevator sump pits.				
2	STRUC TURE				
2.1	Slabs; decks; beams; columns; wails.				
2.2	Expansion joints.				
2.3	Slab protection systems: • Parking garage. • Su rface.				

ONHWP BUILDERS BULLETINS

ITEM	RISK AREAS	DEFICIENCY O/S? (Check box)	IF O/S - REPORT REFERENCES	COST TO CORRECT	INITIAL IF CLEAR
2.4	Balcony protection systems.				
2.4.1	Balcony guards.				
3 EX	TERIOR CLOSURE				
3.1	Back-up wall; substrate.				
3.2	Masonry veneer.				
3.2.1	Precast concrete.				
3.2.2	Cast- in-place concrete,				
3.2.3	Siding (non-decorative).				
3.2.4	Exterior Insulated Finish System (EIFS).				
3.2.5	Load bearing masonry				
3.2.6	Curtain wall.				
3.2.7	Other cladding systems.				
3.3	Concealed protections.				
3.3.1	External sealants.				
3.3.2	Soffits.				
3.3.3	Architectural coatings, finishes, paint.				
3.4	Windows, glazing and exterior doors,				
3.4.1	External sealants.				
3.5	Thermal insulation.				
3.6	Air barrier; vapour retarder.				
4 ROOFI NG					
4.1	Membrane; shingles or sloped metal.				
4.2	Insulation; ballast.				
4.3	Vapour retarder; air barrier; ventilation.				
4.4	Drainage.				
4.5	Snow and ice control.				
4,6	Safety tie-back anchors for				

ONHWP BUILDERS BULLETINS

	building maintenance.				
5	FIRE SAFETY SYSTEMS				
5.1	Containment.				
5.2	Egress.				
5.3	Suppression.				
5.4	Detection and alarm.				
6	INTERIOR FINISHES, COMMON AREAS				
6.1	Corridors and stairwells.				
6.2	Party /common rooms.				
6.3	Sauna/whirlpool/fitness.				
6.4	Swimming pool.				
7	CONVEYING SYSTEMS (ELEVATORS)				
8	MECHANICAL				
8.1	Heating; ventilation; air conditioning.				
8.2	Plumbing supply.				
8.3	Plumbing drainage.				
8.4	Waste disposal.				
8.5	Insulation.				
9	ELECTRICAL				
9.1	Distribution systems.				
9.2	Lighting.				
9.3	Emergency power.				
9.4	Intercom and security systems.				
9.5	Insulation.				
10	SITE WORK				
10.1	Pavements; curbs.				
10.2	Retaining walls.				
10.3	Landscape structures (gazebos, decks).				
10.4	Fences.				

ONHWP BUILDERS BULLETINS

10.5	Irrigation systems.				
10.6	Sod, trees and shrubs.				
			TOTAL OF ESTIMATED CORRECTION COSTS:		

I, _____, the undersigned, being authorized in the Province of Ontario to provide professional services by virtue of a Certificate of Authorization (as issued by the Professional Engineers of Ontario) or a Certificate of Practice (as issued by the Ontario Architects Association) hereby declare that I have read and understand the requirements of Builder Bulletin 19 and, with reference to the identified risk areas contained in the approved Scope of Work proposal for this project, declare that I have performed field and documentation reviews as required by the Bulletin and the Scope of Work Proposal dated _____. I declare that I have sent the necessary reports to both the vendor/builder and Ontario New Home Warranty Program as required and indicated above. I further certify that to the best of my knowledge the condominium project has been constructed in a workmanlike manner, in general conformity with the construction documents, the relevant sections of the governing Ontario Building Code and good construction practice. I am in a position to bind this firm.

SIGNATURE PR
INT NAME

FRC firm: _____

Address: _____

Telephone: (_____) _____

BUILDER BULLETIN 22

FLOOR AREA CALCULATIONS

Effective Date: April 1, 1990

Further to [Builder Bulletin 20](#) and in response to industry requests, the Ontario New Home Warranty Program has developed a set of requirements for the uniform calculation of unit floor area.

The requirement only apply when the floor area is used in the advertising and sales material, or in the Agreement of Purchase and Sale (or construction contract). In other words any printed or advertised reference to a unit's floor area must be calculated in accordance with this Bulletin.

The details of the approval method of floor area calculations vary slightly depending on the type of home to be constructed, and the attached detail sheets describe the approved methods for each of the following:

- » [detached houses](#)
- » [semi-detached houses](#)
- » [row houses](#)
- » [high-rise units](#)

The requirements of this Bulletin come into effect April 1, 1990 for homes and condominium units enrolled with the Program after that date.

We would like to thank the Ontario Home Builders Association's Technical Committee, the Toronto Home Builders Association and the many other industry members who assisted the Program in preparing this Bulletin.

Floor Area Calculations

Detached Houses

Application of Calculation

For **any reference** to area measurement of a detached house, the measurement **must be calculated** using the following **approved method**. This includes references in:

- Agreement of Purchase and Sale
- Media advertising and
- Sales materials.

That is to say, if in the course of selling detached houses, reference is made to an area measurement, then the following method must be used.

However, there is no requirement to specify an area measurement, so if none is mentioned then this definition need not be used.

Either **metric** or **imperial** measurements may be used.

The following notation to purchasers must be included in any materials which specify an area measurement: "*Note: Actual usable floor space may vary from the stated floor area.*"

Calculation

For detached houses, the floor area of the house is the **total area of each floor above grade measured to the exterior face of the outside walls**, less openings to the floor below which are not associated with stairs. Stairs may be included (the area of treads and landings). However, if the opening in the floor is oversized (larger than the actual area of the stairs), that extra open area (outside the limits of the treads and landings) must be deducted from the floor area calculation.

A tolerance of 2.0% on the total area measurement is acceptable.

The area of the garage is excluded from the floor area calculation, but any finished year-round habitable space above the garage is included. Finished are enclosed atrium or sunroom areas meant for year-round use may be included in the calculation. The area of any open balconies or enclosed balconies (such as Florida rooms) are not to be included in the calculation, **unless these areas are designed to be used as year-round habitable space, and are heated and insulated to Code**. These areas may be shown separately. Example: 2,000 square foot house plus 150 square foot Florida room.

Finished area, where all or part of the area is below the first storey (including walk-outs), may be included in the total floor area figure, but must also be specified separately. Example: 2,000 square foot house **which includes** 800 square foot finished area below the first story. Measurements for this space below the first storey are to the exterior surfaces of foundation walls.

Floor Area Calculations

Semi-Detached Houses

Application of Calculation

For **any reference** to area measurement of a semi-detached house, the measurement **must be calculated** using the following **approved method**. This includes references in:

- Agreement of Purchase and Sale
- Media advertising and
- Sales materials.

That is to say, if in the course of selling semi-detached houses, reference is made to an area measurement, then the following method must be used. However, there is no requirement to specify an area measurement, so if none is mentioned then this definition need not be used.

However, there is no requirement to specify an area measurement, so if none is mentioned then this definition need not be used.

Either **metric** or **imperial** measurements may be used.

The following notation to purchasers must be included in any materials which specify an area measurement: "*Note: Actual usable floor space may vary from the stated floor area.*"

Calculation

For semi-detached houses, the floor area of the house is the total area of each floor above grade measured from the centerline of the common wall to the exterior face of the outside wall, less any openings to the floor below which are not associated with stairs. Stairs may be included (the area of treads and landings). However, if the opening in the floor is oversized (larger than the actual area of the stairs), that extra open area (outside the limits of the treads and landings) must be deducted from the floor area calculation.

A tolerance of 2.0% on the total area measurement is acceptable.

The area of the garage is excluded from the floor area calculation, but any finished year-round habitable space above the garage is included. Finished are enclosed atrium or sunroom areas meant for year-round use may be included in the calculation. The area of any open balconies or enclosed balconies (such as Florida rooms) are not to be included in the calculation, **unless these areas are designed to be used as year-round habitable space, and are heated and insulated to Code**. These areas may be shown separately. Example: 2,000 square foot house plus 150 square foot Florida room.

Finished area, where all or part of the area is below the first storey (including walk-outs), may be included in the total floor area figure, but must also be specified separately. Example: 2,000 square foot house **which includes** 800 square foot finished area below the first story. Measurements for this space below the first storey are to the exterior surfaces of foundation walls, and to the center lines of demising walls.

Floor Area Calculations

Row Houses

Application of Calculation

For **any reference** to area measurement of a row house, the measurement **must be calculated** using the following **approved method**. This includes references in:

- Agreement of Purchase and Sale
- Media advertising and
- Sales materials.

That is to say, if in the course of selling row houses, reference is made to an area measurement, then the following method must be used. However, there is no requirement to specify an area measurement, so if none is mentioned then this definition need not be used.

However, there is no requirement to specify an area measurement, so if none is mentioned then this definition need not be used.

Either **metric** or **imperial** measurements may be used.

The following notation to purchasers must be included in any materials which specify an area measurement: "*Note: Actual usable floor space may vary from the stated floor area.*"

Calculation

For row houses, the floor area of the house is the total area of each floor above grade measured from the centerline of the common wall to the centerline of the common wall or to the exterior face of the outside wall, where appropriate, less any openings to the floor below which are not associated with stairs. Stairs may be included (the area of treads and landings). However, if the opening in the floor is oversized (larger than the actual area of the stairs), that extra open area (outside the limits of the treads and landings) must be deducted from the floor area calculation.

A tolerance of 2.0% on the total area measurement is acceptable.

The area of the garage is excluded from the floor area calculation, but any finished year-round habitable space above the garage is included. Finished and enclosed atrium or sunroom areas meant for year-round use may be included in the calculation. The area of any open balconies or enclosed balconies (such as Florida rooms) are not to be included in the calculation, **unless these areas are designed to be used as year-round habitable space, and are heated and insulated to Code**. These areas may be shown separately. Example: 2,000 square foot house plus 150 square foot Florida room.

Finished area, where all or part of the area is below the first storey (including walk-outs), may be included in the total floor area figure, but must also be specified separately. Example: 2,000 square foot house **which includes** 800 square foot finished area below the first storey. Measurements for this space below the first storey are to the exterior surfaces of foundation walls, and to the center lines of demising walls.

Floor Area Calculations

High-Rise Units

Application of Calculation

For **any reference** to area measurement of a high-rise house, the measurement **must be calculated** using the following **approved method**. This includes references in:

- Agreement of Purchase and Sale
- Media advertising and

- Sales materials.

That is to say, if in the course of selling high-rise units, reference is made to an area measurement, then the following method must be used. However, there is no requirement to specify an area measurement, so if none is mentioned then this definition need not be used.

However, there is no requirement to specify an area measurement, so if none is mentioned then this definition need not be used.

Either **metric** or **imperial** measurements may be used.

The following notation to purchasers must be included in any materials which specify an area measurement: "*Note: Actual usable floor space may vary from the stated floor area.*"

Calculation

For high-rise units, the floor area of the house is the **total area of each floor measured as the area bounded by the center lines of demising or party walls separating one unit from another unit, the exterior surface of all exterior walls, and the exterior surface of the corridor wall enclosing and abutting the unit**, less any openings to the floor below which are not associated with stairs. Stairs may be included (the area of treads and landings). However, if the opening in the floor is oversized (larger than the actual area of the stairs), that extra open area (outside the limits of the treads and landings) must be deducted from the floor area calculation. Mechanical shafts or chases directly servicing the unit will be included in the total area of the unit.

A tolerance of 2.0% on the total area measurement is acceptable.

Finished and enclosed atrium or sunroom areas meant for year-round use may be included in the calculation. The area of any open balconies or enclosed balconies (such as Florida rooms) are not to be included in the calculation, **unless these areas are designed to be used as year-round habitable space, and are heated and insulated to Code**. These areas may be shown separately. Example: 2,000 square foot house plus 150 square foot Florida room.

For high-rise units, measurements may be specified for typical units for each model on the middle floor (mid-way between ground and top floor). If this middle floor method is used (rather than calculating measurements of units on each floor) then the following **notation to purchasers** must be included: "*Note: Floor area measurements were calculated on the middle floor, such that units on lower floors may have less floor space due to thicker structural members, mechanical rooms, etc., while units on higher floors may have more floor space.*"

For more information regarding this Bulletin, please contact the [ONHWP office](#) in your area.

Issue Date: November 15, 1989

BUILDER BULLETIN 23

THE WARRANTY PROGRAM AND THE GST

Effective Date: January 1, 1991

This Bulletin will acquaint builders with impact of the new Goods and Services Tax, scheduled to be added to the cost of all Canadian commerce effective January 1, 1991. The effect of the GST on builders' dealings with Ontario New Home Warranty Program will be as follows:

The Program will be required to add the 7 per cent tax to all fees:

- Registration and Renewal fees
- Enrolment fees including subsequent adjustments (called EFD)
- Excess conciliation fees

The Program will be required to add the 7 per cent tax to the cost of all products:

- Publications
- Videos
- Manuals and course materials
- Tuition for training courses and seminars

The 7 per cent tax will be accounted for in all payments of claims, other than for deposit refunds, such as:

- Payments to contractors for work done
- Payments to homeowners for work done or about to be done
- Reimbursement of homeowner expenses arising from delayed closings.

It will NOT be necessary to add the new tax to the following:

- Payment and subsequent repayment of funds held in trust by the Program.
- Claims payments made as refunds of deposits to purchasers.

This summary is complete at this time, but as experience with the GST mounts in 1991, there could be revisions to the list of taxable goods and services.

For more information regarding this Bulletin, please contact the [ONHWP office](#) in your area.

Issue Date: August 7, 1990

BUILDER BULLETIN 24 (Revised) EXTENDED TWO-YEAR WARRANTY COVERAGE MAJOR STRUCTURAL DEFECTS COVERAGE

Effective Date: January 1, 1991

This Bulletin has been prepared to advise builders of new warranty coverage to become effective for **all new homes enrolled with the Program after December 31, 1990.**

After extensive consultation with industry and an examination of warranty coverage outside Ontario, the board of Directors decided to enhance warranty protection for home purchasers. These enhancements will provide the consumer with a greater sense of security when purchasing a new home in Ontario.

Warranty enhancements in the area of Major or Structural Defects (MS D) include new responsibilities for the Program as well as the builder.

These changes do not constitute a change in the Ontario Building Code nor an extension of Code requirements.

1. Warranty Coverage

Warranty coverage is extended from one year to two years for the following items. The builder warrants to the purchaser:

- That the home is constructed a workmanlike manner and is free of defects in materials including caulking, windows and doors such that the building envelope of the home prevents water penetration. The "building envelope" means the wall and roof assemblies that contain building space, separation of the outdoor and indoor environments so that the indoor environment can be controlled within acceptable limits
- That the electrical, plumbing and heating delivery and distribution systems are free from defects in materials and workmanship. "Delivery and distribution systems" includes all wires, conduits, pipes, junctions, switches, receptacles and seals, but does not include appliances, fixtures and fittings.
- That all exterior cladding is free from defects in materials and workmanship resulting in detachment, displacement or physical deteriorations.
- That the home is free from violations of those provisions of Ontario Building Code regulations under which the Building Permit was issued, affecting health and safety. This includes but is not limited to fire safety, insulation, air and vapor barriers, ventilation, heating and structural adequacy.

This means that for a period of two years after possession the builder's warranty will apply to the items set out above.

2. Major Structural Defects Coverage

The period of coverage for Major Structural Defects is being extended from five to seven years. The total amount of liability for all warranties on any home or condominium unit, including Major Structural Defects, continues to be \$100,000.

The builder will be responsible for Major Structural Defects for the first two years after possession.

If a Major Structural Defect claim during years three to seven is determined to be the result of builder negligence, the builder will be held financially responsible.

The Ontario New Home Warranty Program (ONHWP) assumes full responsibility for Major Structural Defects for years three to seven, however, ONHWP will advise the builder of any MSD complaints.

The complete warranty and Major Structural Defect coverage as revised will apply to all new housing units enrolled with ONHWP after December 31, 1990.

In this Warranty Program, registration fees, enrolment fees, and renewal fees are established at the

For more information regarding this Bulletin, please contact the ONHWP office in your area.

For more information regarding this Bulletin, please contact the [ONHWP office](#) in your area.

**DELAYED CLOSING AND
 DELAYED CONDOMINIUM OCCUPANCY**

This Bulletin replaces Bulletin 20, in effect as of June 3, 1988 (and cancelled as of May 1, 2004)¹ and Builder Bulletin 25, in effect as of March 1, 1991 (and replaced as of May 1, 2004).

WHAT IS NEW IN THIS BULLETIN

The following changes apply to homes with a date of possession on or after May 1, 2004

- The *Warranty Service Rules* of Builder Bulletin 42 as they apply to delayed closing/occupancy claims will not apply and claims will be processed in accordance with the rules explained in this Bulletin. A new administrative fee will be introduced and charged to any builder against whom a purchaser makes a valid delayed closing/occupancy claim to Tarion Warranty Corporation (“Tarion”, formerly the Ontario New Home Warranty Program). See details in the section entitled “Compensation for Delays in Closing and Occupancy”.
- Purchasers will be able to make claims for living expenses incurred as a result of the delay, without submitting receipts or any other proof of payment, for up to \$60 per day in 2004, \$80 per day in 2005, and \$100 per day in 2006. Claims for living expenses without receipts may be contested by builders; however, Tarion will charge builders an upfront non-refundable fee of \$350 to re-assess the claim. See details in the section entitled “Re-assessment of a Delayed Closing/Occupancy Claim”.

WHAT THIS BULLETIN IS ABOUT

Section 17 of Regulation 892 creates a one-year warranty to compensate homeowners² or purchasers³ (referred to collectively as “purchasers”) for direct costs incurred as a result of a delay in closing or a delay in occupancy which occurs without the prescribed notice to the purchaser. This bulletin explains to you, as a vendor or as a vendor/builder (referred to collectively as “builder”) of freehold homes and condominium units (referred to collectively as “homes”), the rules governing delayed closing and delayed occupancy protection; how purchasers must submit delayed closing/occupancy claims and the timelines within which builders must respond to these claims. It also introduces a new administrative fee to help pay for Tarion’s costs of processing delayed closing and delayed occupancy claims. All builders are encouraged to provide purchasers with sufficient notice of delays to avoid a claim under section 17 and, where sufficient notice is not provided, to use best efforts to resolve delayed closing/occupancy claims directly with their purchasers.

¹ For that portion of cancelled Bulletin 20 dealing with “substitutions”, please refer to sections 18 and 19 of Regulation 892 under the *Ontario New Home Warranties Plan Act*.

² A freehold purchaser can make a delayed closing claim after he or she has obtained title to the freehold home.

³ A condominium unit purchaser can make a delayed occupancy claim once he or she has obtained “interim occupancy”, prior to closing of the transaction when that purchaser obtains title to the unit.

DELAYED CLOSING AND DELAYED OCCUPANCY PROTECTION

The “delayed closing warranty” applies to freehold homes, and the “delayed occupancy warranty” applies to condominium units.

This warranty protects purchasers against closing/occupancy delays where the builder does not provide the prescribed notice of delay, and against builder delays that exceed the maximum delay permitted by the Regulations under the *Ontario New Home Warranties Plan Act* (the “Act”). In other words, a builder can unilaterally (without the purchaser’s consent and without compensation) extend closing of a freehold home, or the confirmed occupancy date⁴ of a condominium unit, only if adequate notice of the delay is given to the purchaser, and if the delay does not exceed the maximum permitted.

Adequate Notice

A total of 2 unilateral delays are permitted.

- A one-time major delay of up to 120 days, when at least 65 days notice is given in advance of the “original closing date” (or confirmed occupancy date) to the purchaser; and
- A one-time minor delay of up to 15 days, when at least 35 days notice is given in advance of the original or extended closing/occupancy date to the purchaser.

Notice of the delay must always be written. It may either be given personally or sent by mail. If sent by mail, notice of the delay is deemed to be received 5 business days after mailing. This means that if builders mail their notice, they must do so at least 35 days plus 5 business days in advance for a minor extension, and at least 65 days plus 5 business days in advance for a major extension. In the event of a postal interruption, all notices must be given personally.

A notice must always state a new closing or occupancy date, which becomes the “extended closing/occupancy date.”

Maximum Delay Permitted

Both delays (the one-time major delay of up to 120 days and/or the one-time minor delay of up to 15 days) cannot exceed a total of 120 days for freehold homes, and a total of 135 days for condominium units.

Builders also have a 5-day “grace period” to extend the closing or the confirmed occupancy date unilaterally (the original or the extended date) without compensation, and without providing written notice. For example, if a builder extends the confirmed occupancy date of a condominium unit for 135 days and the unit is occupied between day 136 and 140, the “grace period” applies, and the builder is not required to pay compensation to the purchaser. Builders are encouraged to provide purchasers with as much notice as possible if they intend to rely on this “grace period”, since last minute postponements of closing can be costly and inconvenient for purchasers and do not constitute good customer service.

⁴ To calculate compensation for delays in occupancy, Tarion will use the confirmed occupancy date, as opposed to the tentative occupancy date in the Agreement of Purchase and Sale. For details, see the section entitled “Special Provisions Related to Delayed Occupancy”.

PLEASE NOTE

By giving adequate notice, a builder can unilaterally delay the closing date on a freehold home, or the confirmed occupancy date on a condominium unit twice: a major delay of up to 120 days and a minor delay of up to 15 days, the total not to exceed 120 days for freehold homes and 135 days for condominium units.

If the purchaser agrees in writing to an amendment of the Agreement of Purchase and Sale that extends the original closing/occupancy date set out in that Agreement, then the amended closing/occupancy date becomes the original closing/occupancy date for the purposes of the delayed closing/occupancy warranty. An acknowledgement by the purchaser of a unilateral extension by the builder of the original closing/occupancy date is not an amendment to the Agreement of Purchase and Sale.

Example

1. The original closing date is Monday, August 1, 2005.
2. The builder sends notice by mail to the purchaser on Wednesday, May 18, 2005 that closing will be delayed for 61 days.
3. The notice of the delay is deemed to be received on Thursday, May 26, 2005 (the 5th business day following its mailing⁵; and 67 days before the original closing date).
4. The notice of extension sets Thursday, October 1, 2005 as the new revised extended closing date.
5. On Thursday, August 25, 2005 (37 days before the extended closing date) the builder gives written notice in person to the purchaser that the extended closing date will be delayed by an additional 11 days, and sets Wednesday, October 12, 2005 as the new extended closing date.
6. The total delay was 72 days (did not exceed 120 days).
7. On Monday, October 5, 2005, the builder advises the purchaser that there will be a further two day delay in closing to Friday, October 14, 2005. This additional 2 days is within the 5 day “grace period” permitted under the Act.
8. If by Monday, October 17, 2005 (the new extended closing date plus the 5-day grace period), closing does not occur, the purchaser may claim compensation for delayed closing following the procedure explained below under the heading “Delayed Closing/Occupancy Claims for Compensation”.

SPECIAL PROVISIONS RELATED TO DELAYED OCCUPANCY (Condominiums)

- Every Agreement of Purchase and Sale for a condominium unit must contain either a confirmed occupancy date, or a tentative occupancy date that is clearly identified as tentative.
- If the occupancy date in the Agreement of Purchase and Sale is merely “tentative”, the builder must ensure that the purchaser receives written notice of the confirmed occupancy date not more than 30 days from completion of the roof slab (or another specific stage of construction as specified in the Agreement of Purchase and Sale), or at least 90 days before the tentative occupancy date. If not, the tentative occupancy date automatically becomes the confirmed occupancy date for purposes of calculating delayed occupancy compensation under the *Act*.⁶
- Any written notice to the purchaser of the confirmed occupancy date must also be sent at least 120 days in advance of that confirmed occupancy date.

⁵ Monday, May 23, 2005 is a holiday: Victoria Day.

⁶ See Regulation 892, sections 17(5)-(13).

- Tarion will use the confirmed occupancy date to calculate compensation for delays in occupancy.
- The purchaser cannot be compelled to take occupancy of the unit before the confirmed occupancy date, unless he/she consents to it in writing.

Note that a condominium unit purchaser can file a delayed occupancy claim once he or she has obtained “interim occupancy”⁷, prior to closing of the transaction when that purchaser obtains title to the unit.

Example

1. The Agreement of Purchase and Sale establishes Friday, September 1, 2006 as the tentative occupancy date.
2. The builder sends written notice by mail to the purchaser on Monday, May 15, 2006 that the confirmed occupancy date will be Friday, December 1, 2006.
3. The notice is deemed to be received on Tuesday, May 23, 2006, the fifth business day thereafter⁸; 101 days before the tentative occupancy date (more than the minimum required, which is 90 days) and 192 days in advance of the confirmed occupancy date (more than the minimum required, which is 120 days).
4. The builder sends written notice by mail to the purchaser on Tuesday, October 10, 2006 that occupancy will be delayed for 14 days.
5. The notice of the (minor) delay is deemed to be received on Tuesday, October 17, 2006 (5 business days after mailing and 45 days before original confirmed occupancy date).
6. The notice of extension sets December 15, 2006 as the new revised extended occupancy date.
7. The total delay was 14 days, and written notice was given not less than 35 days before the confirmed occupancy date.
8. If by December 20, 2006 (the new extended occupancy date plus the 5-day grace period), the unit is not ready for occupancy, the purchaser may claim for compensation for delayed occupancy for each day of delay thereafter, following the procedure explained below under the heading “Warranty Service Rules for Delayed Closing/Occupancy Claims”.

EXCEPTION

No compensation will be paid if the delay is the result of strike, fire, flood, acts of God or civil insurrection. Strikes may result in delays longer than the actual duration of the strike, in the event that supplies are affected because of the strike. At the end of a delay occasioned by a strike, the builder is required to establish a new closing/occupancy date.

WARRANTY SERVICE RULES FOR DELAYED CLOSING/OCCUPANCY CLAIMS

The *Warranty Service Rules* of Builder Bulletin 42 as they apply to delayed closing/occupancy claims have been amended and will only apply to homes with dates of possession between October 1, 2003 and April 30, 2004, inclusive. Please refer to Builder Bulletin 42 (Revised, March 15, 2004) for delayed closing/occupancy claims related to homes with a date of possession between October 1, 2003 and April 30, 2004.

⁷ “Interim Occupancy” and “Interim Closing” refer to the occupancy of a proposed unit before a purchaser receives title to it. Generally, condominium purchasers will be required to occupy their unit before the developer is able to transfer legal ownership to it, and the warranties under the *Act* commence at the date of occupancy.

⁸ Monday, May 22, 2006 is a holiday: Victoria Day.

For homes with a date of possession on or after May 1, 2004, the following Warranty Service Rules apply:

- The purchaser will have one year from the date of possession, or from the date of “occupancy closing” in condominium units, to make a delayed closing/occupancy claim.
- Builders who have not provided the proper notice of a delay (or where the delay exceeds the maximum permitted) should contact their affected purchasers and try to resolve their claims directly.
- If the builder fails to resolve the delayed closing/occupancy claim, the purchaser may submit⁹, to both Tarion and the builder, a completed *Delayed Closing/Occupancy Form* with copies of all documents required in that Form. A *Delayed Closing/Occupancy Form* can be obtained by calling Tarion at 1-800-668-0124 or online at www.tarion.com
- Only one complete *Delayed Closing/Occupancy Form* will be accepted.
- The builder has 30 days from the date the purchaser submits a *Delayed Closing/Occupancy Form* to compensate the purchaser or otherwise settle the claim.
- If by day 30 following submission of a *Delayed Closing/Occupancy Form* the builder has not compensated the purchaser, or otherwise resolved the claim, the purchaser may contact Tarion to request an assessment of the claim (conciliation) between day 31 and 60 following submission of the Form. The purchaser will be charged a \$50 conciliation fee when the assessment is requested, but the fee will be refunded if the delayed closing/occupancy claim is determined to be valid.
- If the purchaser does not request an assessment during this period, the claim will be considered resolved and the matter closed.
- The builder has a further 30 days from the date the purchaser requests an assessment of the claim to compensate the purchaser, or otherwise resolve the claim. If the purchaser notifies Tarion that the claim has not been resolved by the end of the 30 days, Tarion will conduct an assessment (conciliation) and issue a Warranty Assessment Report¹⁰ (“Report”) to the purchaser and to the builder within 10 days of the receipt of notice after the expiry of the 30-day period.
- An administrative fee of \$600 payable by cheque, money order, or other approved payment method, will be charged to the builder if Tarion determines, after conducting an assessment, that the claim is valid. The administrative fee will increase to \$1200 for homes with a date of possession on or after January 1, 2005, and will be \$600 for all homes with a date of possession on or after January 1, 2006. This fee will serve to offset the administrative costs incurred by Tarion in processing delayed closing/occupancy claims.
- If Tarion determines that the claim is valid, the conciliation (assessment) will be considered to be “chargeable” to the builder, and will be noted against the builder’s record with Tarion.
- Tarion will settle directly with the purchaser if the builder does not resolve the claim within 30 days from the date when Tarion issues the Warranty Assessment Report.

⁹ A *Delayed Closing/Occupancy Form* may be submitted by hand, courier or facsimile transmission or, except during a general interruption of postal service, by regular mail or registered mail. In the case of regular mail, submission is effective on the post-mark date if received by Tarion within 5 days of the expiry of the first year warranty period. In the case of registered mail, submission is effective on the day the *Form* is mailed as indicated by the postmark date or the registered mail receipt. Submission by facsimile transmission is effective on the day sent regardless of whether or not the day is a business day. Submission by hand or courier is effective on the business day received, if received by Tarion before 5:00 p.m., and otherwise on the next business day.

¹⁰ A Warranty Assessment Report is a written report issued by Tarion, detailing its assessment of a delayed closing/occupancy claim.

COMPENSATION FOR DELAYS IN CLOSING AND OCCUPANCY

If the builder breaches the delayed closing/occupancy warranty, compensation must be paid to the purchaser for living expenses, plus other direct costs, to a total maximum of \$5,000.

Living Expenses

Living expenses are direct living costs such as accommodation, meals (when kitchen facilities are not available), laundry and transportation (may include mileage and parking), incurred by purchasers as a result of the delay. The living expenses portion of the delayed closing/occupancy compensation cap (\$5000) has a maximum of \$100 per day.

The maximum amount a purchaser may claim for living expenses incurred as a result of the delay will vary depending on whether supporting receipts or other proof of direct costs has been provided:

- Without supporting receipts or other proof of expenses, the purchaser may claim \$60 per day for homes with a date of possession between May 1, 2004 and December 31, 2004, inclusive, increasing to \$80 per day for homes with a date of possession on or after January 1, 2005.
- With supporting receipts or other proof of expenses, the purchaser may continue to claim up to \$100 per day for homes with a date of possession between May 1, 2004 and December 31, 2005, both inclusive.
- For homes with a date of possession on or after January 1, 2006, the purchaser will be allowed to claim up to \$100 per day without receipts or other proof of expenses incurred.

Note that to submit a claim without supporting receipts, purchasers must first prove that they did not receive adequate notice of the delay, or that the delay exceeded the maximum allowed. Purchasers will be advised to keep a copy of their receipts or any other proof of claim as these may be required to support a claim if the builder requests a re-assessment following the procedure explained below under the heading “Re-Assessment of a Delayed Closing/Occupancy Claim”.

Other Direct Costs

In addition to living expenses, a purchaser may also claim other direct costs caused by the delay, such as:

- moving costs, including moving company costs or vehicle rental and packing materials for do-it-yourself moves;
- storage costs for storage of furniture, clothing and personal belongings;
- kennel costs for pets; and
- Canada Post charges to hold mail.

Such other direct costs must be additional costs over and above what the purchaser would have otherwise incurred if the closing had not been delayed. The onus is on the purchaser to prove that other direct costs are directly related to the delay. A claim for “other direct costs” must always be substantiated with receipts, or other acceptable form of proof. A delayed closing/occupancy claim may only be made after closing, or after “occupancy closing” (in the case of condominium units) of the purchase transaction.

The maximum claim amount, including both living expenses and other direct costs is \$5000.

The delayed closing warranty will apply to contract homes only if there is a specific occupancy date stated in writing between the owner and the contractor in the original agreement, and the home is substantially completed by the same contractor.

RE-ASSESSMENT OF A DELAYED CLOSING/OCCUPANCY CLAIM

Option 1: Claim with supporting receipts or other proof of expenses

If a purchaser chooses to claim the living expenses portion of his/her delayed closing/occupancy claim with supporting receipts, and Tarion determines that the claim is valid, the builder will be charged the applicable administration fee (e.g. \$600¹¹), and the conciliation will be “chargeable” to the builder. The builder may contest the validity of the claim by using the Builder Arbitration Forum (BAF).¹²

Option 2: Claim without supporting receipts or other proof of expenses

- If a purchaser chooses to claim the living expenses portion of his/her delayed closing/occupancy claim without receipts or other supporting documentation, and Tarion determines that the claim is valid, the builder may contest the amount of living expenses claimed without receipts by requesting a re-assessment of the claim within 30 days after Tarion issues the Warranty Assessment Report.
- Tarion will charge the builder an upfront non-refundable fee of \$350 to re-assess the amount of living expenses claimed without receipts.
- If the builder chooses to request a re-assessment, the burden of proving that the purchaser incurred lower costs, and that the difference between costs claimed and costs incurred is material (i.e. at least 25% lower than the claim amount), will rest on the builder. The builder must provide Tarion, when filing the request for re-assessment, evidence that the purchaser incurred materially lower living expenses and/or evidence of any direct benefit received by the purchaser. For example:
 - (a) Builders may rely on their own information concerning any direct benefits given to purchasers, such as provision of alternate accommodation by the builder or a credit on the statement of adjustments;
 - (b) Builders may also rely upon information provided directly to them by purchasers during initial negotiations surrounding a delayed closing/occupancy claim. Tarion expects in all cases that the builder will first attempt to resolve delayed closing/occupancy disputes directly with a purchaser before a claim is filed. During this initial attempt at resolution, the builder should request information and documentation concerning the amounts claimed by the purchaser if the builder has doubts concerning the amounts in issue;
 - (c) Builders may rely upon third party information. For example, where a purchaser claims amounts relating to a hotel stay, the builder could obtain actual rate information from the hotel; and

¹¹ See applicable administration fee under the section entitled “Warranty Service Rules for Delayed Closing/Occupancy Claims”.

¹² For details on eligibility and timelines to access the Builder Arbitration Forum, please refer to Builder Bulletin 41, available at www.tarion.com.

- (d) Finally, in rare cases, the builder may seek a negative inference to be drawn by Tarion based on the failure of a purchaser to co-operate. In such a situation, the builder would have to provide documented evidence of reasonable efforts on its part to obtain information from the purchaser as well as evidence of the purchaser's refusal to co-operate.
- If Tarion determines, based on the information submitted by the builder, that there is enough evidence to justify a re-assessment, the purchaser will be notified that he/she has 30 days to back-up the amount of living expenses claimed without receipts, and provide their responding position to both the builder and Tarion. Note that a request for re-assessment will not be processed until the builder pays any outstanding delayed closing/occupancy administration fees.
 - Based on the evidence submitted by both the purchaser and the builder, Tarion will re-issue a Warranty Assessment Report, which may be further contested by the builder at the Builder Arbitration Forum.¹³
 - The initial administration fee will be reimbursed to the builder, and the conciliation will be "not chargeable" to the builder, if the delayed closing/occupancy claim consisted solely of living expenses, and Tarion determines after re-assessing the claim, that there is insufficient evidence of at least 75% of the amount of living expenses claimed without receipts.
 - Tarion will settle directly with the purchaser if the builder does not resolve the claim within 30 days from the date when Tarion re-issues the Warranty Assessment Report, and will invoice the builder for the amount of the compensation, plus an administration fee of 15 per cent and applicable taxes.
 - If the builder chooses not to request a re-assessment under Option 2, the portion of the Warranty Assessment Report dealing with living expenses will be considered accurate and final, and may not be contested by the builder at the Builder Arbitration Forum.



Gregory W. Gee
Registrar

¹³ See footnote 10 above.

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BUILDER BULLETIN 26

INCREASED REGISTRATION & RENEWAL FEES

Effective: July 1, 1991

This Bulletin has been prepared to advise builders of a new fee structure effective July 1, 1991. The present fee structure has been in place since the inception of the Program in 1976. At that time, 15 years ago, fees were set at \$350 for registration and \$100 for renewal.

Recently, the Program analyzed its costs in the administration of the registration and renewal processes. The analysis revealed that the Program's costs were not being met. Therefore the Board of Directors of the Program decided to increase those fees to recover a portion of the cost of administration.

Regulations to the Ontario New Home Warranties Plan Act have therefore been amended to reflect the revised fees. Future amendments will be made on a more frequent basis, to keep fees in line with changing conditions.

For registrations with renewal dates of July 1, 1991 or later, and for new or lapsed registration applications received and Program-stamped on or after that date, the new fees will be as follows:

- **Registration: \$600** (new builders or re-registration of expired builders)
- **Renewal: \$300** (registered builders who wish to maintain registration)

(Goods and Services Tax must be added to these fees by the applicant.)

Builders should be aware that if their renewal application form, together with the prescribed fee, is not received by the Program by their renewal date, their registration will expire and any subsequent application will be treated as a *new* application, and the prescribed fee for a *new* registration will be required.

All existing procedures for making application for registration or renewal, including requirements for supporting documentation, remain unchanged.

For more information regarding this Bulletin, please contact the [ONHWP office](#) in your area.

Issue Date: March 19, 1991



Builder Bulletin 27 (Revised)

Effective: May 1, 2001

Home Enrolment Fees

This bulletin replaces Builder Bulletin 27 (Revised) that was in effect beginning October 1, 2000.

HERE'S WHAT THIS BULLETIN IS ABOUT

This bulletin lays out the enrolment fees for all homes enrolled on or after **May 1, 2001**. It provides an explanation of why a further \$55 DECREASE in the fees has been approved along with the removal of common element fees for condominium units.

HERE'S WHAT HAS CHANGED

Following a decrease in enrolment fees in October, 2000, a further reduction of \$55 will apply to *all homes* enrolled on or after May 1 2001.

All homes means freehold homes and both low and high-rise condominium units.

Additionally, in previous years the enrolment of low and high-rise condominium units has attracted an additional common element fee of \$100 and \$150 respectively. Effective May 1, 2001 these fees will be eliminated.

ENROLMENT FEE STRUCTURE

Enrolment fees (see Schedules A) continue to be calculated on sale price ranges. This method reduces the need for adjustments of after sale enrolment fees

because, in most cases, a unit's selling price will remain within its sale price range. As a result, the enrolment fee structure reduces administrative work for both builders/vendors and the Ontario New Home Warranty Program (ONHWP).

Enrolment and payment of fees for freehold homes must occur when their building permits are issued.

Enrolment and payment of fees for condominium projects must occur at least 30 days before construction begins.

For the purposes of this bulletin "sale price" means all monies paid by the owner under the Agreement of Purchase and Sale or the construction contract. GST, land transfer taxes, legal fees and warranty fees are excluded from the enrolment fee calculation.

REASONS FOR THE CHANGES

ONHWP is presently in a solid financial position and continues to see and share with its stakeholders the benefits of management strategies that reduce the exposure of the corporation to claims.

The Board of Directors of ONHWP utilizes a financial modeling framework that allows the financial health of the

REASONS FOR THE CHANGES – continued.

organization to be monitored. The model tests the level of the Guarantee fund and the provision for adverse deviation from predicted claims exposures. Use of the model is fundamental to ONHWP's overall risk strategy and the determination of fee levels.

All of these activities are carried out against a backdrop of successfully maintaining adequate capital to protect new home buyers and owners.

ADDITIONAL FACTORS

Factors that continue to contribute to ONHWP's ability and willingness to implement the latest reduction in fees are:

- Enrolment levels in 2001 remain at high levels.
- ONHWP has finally realized a settlement on the long-standing, class action, law suit concerning the claims paid out by ONHWP on plastic venting.
- The revisions to Builder Bulletin 19 will enhance the quality assurance process associated with condominium construction and are thereby expected to reduce ONHWP's claims exposure.
- The normalization of fees across the board is reflective of actual claim activity (especially reduced claims for condominiums) and is a continuation of ONHWP's commitment to keep fee structures equitable and reasonable.
- ONHWP continues to pursue initiatives to increase efficiency, reduce claim costs and control liabilities, all of which can be expected to positively affect the bottom line on a going forward basis.

FOR MORE INFORMATION

To calculate enrolment fees please refer to the table in Schedule A (overleaf).

If you have any questions about the revised enrolment fees please contact the ONHWP Regional Office in your area. A list of offices is included on the back of this bulletin.



Aubrey L. LeBlanc
President/Registrar

SCHEDULE A: Enrolment Fee Calculation Table - All Homes (Freehold and Condominium Units)

Sale Price Range (not including GST)		Unit Enrolment Fee	+	7% GST	+	8% RST	=	Total
Up to	\$100,000.00	\$325.00	+	\$22.75	+	\$26.00	=	\$373.75
\$100,000.01 -	150,000.00	350.00	+	24.50	+	28.00	=	402.50
\$150,000.01 -	200,000.00	400.00	+	28.00	+	32.00	=	460.00
\$200,000.01 -	250,000.00	450.00	+	31.50	+	36.00	=	517.50
\$250,000.01 -	300,000.00	500.00	+	35.00	+	40.00	=	575.00
\$300,000.01 -	350,000.00	550.00	+	38.50	+	44.00	=	632.50
\$350,000.01 -	400,000.00	600.00	+	42.00	+	48.00	=	690.00
\$400,000.01 -	450,000.00	650.00	+	45.50	+	52.00	=	747.50
\$450,000.01 -	500,000.00	700.00	+	49.00	+	56.00	=	805.00
\$500,000.01	or more	750.00	+	52.50	+	60.00	=	862.50

ONHWP's GST Number: 12154 6931 RT0001

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ONHWP Requirements for Receipt and Release of Security

EFFECTIVE: February 1, 2003

This bulletin replaces Builder Bulletin 28 (Revised), which became effective on July 1, 2001.

What the Bulletin is About

The Ontario New Home Warranty Program (ONHWP) carries out assessments of builders to ensure that registered builders are able to meet all financial and warranty obligations. Builder Bulletin 28 defines the parameters of that process and the amounts and conditions for the security, which may be required of builders as a condition of registration.

Security is used by ONHWP to mitigate losses resulting from builder failures so that funds from registration and enrolment fees are available to pay for ongoing warranty claims and those caused by unforeseen circumstances. The bulletin is revised periodically to ensure it is current, fair to builders and consistent with other ONHWP policy.

Reasons for the February, 2003 Revision

As of February 1, 2003, new home buyers will be protected for up to \$40,000 under the *Ontario New Home Warranties Plan Act* for the refund or loss of a deposit on a freehold home or for financial loss on a contract home. Freehold security requirements, for those builders who are required to post security with ONHWP, and who take deposits in excess of \$20,000, have been adjusted based on the increase in deposit coverage above.

Impact of the July, 2001 Revision

The primary goal of the July, 2001 revision was to have a more open, accurate process for assessing builders. The results have been lower but better-targeted security for ONHWP and a fairer process for builders. The current process is more precise but flexible for assessing builders and administering the potential security requirement. The revisions also introduced updated criteria for evaluating a builder's demographic traits and more standard procedures for analyzing a builder's financial information. As a result, these enhancements have facilitated a reduction in the security required of many average and low risk builders.

Specifically, the revised Bulletin has refined the criteria for builder size and tenure. It has reduced the weight of the business/technical evaluation and has increased the weight of the builder's tenure. It more openly defines the review of the builder's financial information and introduces additional

segmentation of condominium builders. This has allowed a reduction in the warranty security required of most average and low risk builders. The revisions also introduced additional instruments to help low risk builders further reduce the cost of providing security to ONHWP.

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BACKGROUND

In 1995, Ontario New Home Warranty Program (ONHWP) undertook a thorough review of its security policy to incorporate the security requirements set out in:

- Builder Bulletin 19 – High-Rise Condominium Projects: Design & Site Review Reporting
- Builder Bulletin 30 – Expanded Registration Requirements
- Builder Bulletin 33 – Certification of Private Sewage Disposal Systems

At the request of builders, ONHWP also established objective requirements for the type, amount, taking and release of security; to take the performance of builders into account.

In 2000, ONHWP undertook a further review to enhance the mechanisms used for assessing builders and to adjust security requirements based on updated analysis of claim trends and risks associated with various market segments. The Bulletin issued in July, 2001, as well as the current Bulletin, incorporate the revisions that came out of that review.

ONHWP wishes to extend its thanks to the Ontario Home Builders' Association (OHBA) for its extensive input into the recent revisions. The requirements of this bulletin do not necessarily represent the consensus of all groups. However, the comments and ideas of all who participated were considered carefully during the review. In particular we wish to thank the ONHWP Board's Risk Advisory Committee and the OHBA/ONHWP Liaison Committee's Bulletin 28/Indemnity Sub-Committee for its extensive work related to the revisions.

All references to "vendor/builder" in this Bulletin may refer to a vendor or a builder of new homes. Nothing in this Bulletin shall be construed to limit the authority of the Registrar to increase or decrease security requirements.

RISK ASSESSMENT FOR ALL BUILDERS

ONHWP's security requirements for all vendor/builders will be assessed on registration and renewal and when appropriate under the stipulations outlined in the Vendor and Builder Agreements, between periods of renewal. With respect to vendor/builders of multiple condominium projects under a single registered company, each project will be assessed 60 days prior to the signing of the Agreements of Purchase and Sale and/or the taking of deposits for each project. All assessments will be based on a detailed review of the vendor/builder's history according to the following criteria:

- **Size** (the annual average number of possessions over the last 5 years, including associated companies)
- **Tenure** (the number of consecutive years of registration, including associated companies)
- **Business and Technical skills** (based on the "new" and "problem builder" definitions set out in Builder Bulletin 31 and Builder Bulletin 36 (Revised) – Rating Criteria for After Sales Service)
- **Financial information** (review of financial statements, credit rating and payment history)
- **Project type** (proposed freehold and condominium types)

Points out of a total of 100 will be assigned to these criteria as follows:

SIZE (0 - 10 Points) CONDOMINIUM Construction ²		
Small (1 to 24 units per year) ¹	Medium (25 to 99 units per year) ¹	Large (100+ units per year) ¹
3 Points	6 Points	10 Points

- 1 Based on average annual possessions over the past 5 years. If no possessions, 0 points will be assigned. Economic considerations will be applied when appropriate.
- 2 Applicants building condominium Type A or B (see page 9) and building in excess of 49 units may seek review of points allotted for "size" with ONHWP's Licensing and Underwriting Department.

Or

SIZE (0 - 10 Points) FREEHOLD Construction		
Small (1 to 19 units per year) ¹	Medium (20 to 49 units per year) ¹	Large (50+ units per year) ¹
3 Points	6 Points	10 Points

- 1 Based on average annual possessions over the past 5 years. If no possessions, 0 points will be assigned. Economic considerations will be applied when appropriate.

TENURE (0 - 20 Points)			
New builders	1 to 3 years	4 to 5 years	6 years +
0 points	6 points	12 points	20 points

BUSINESS/TECHNICAL SKILLS (0 - 20 Points)				
Rating Criteria for After Sales Service ¹		New Builder		Problem Builder
Excellent (10 or more years)	20 points			
Excellent (5 to 9 years)	18 points			
Excellent (less than 5 years)	16 points	Assessment Rating When Registered		
Above Average	13 points	High Skill	10 points	
Average	10 points	Average Skill	7 points	
Below Average	0 points	Low Skill	0 points	0 points

- 1 The Business/Technical Skills score for new builders is based on the Assessment Rating when registered. On renewal, the Rating Criteria for After Sales Service will apply, if available (see Builder Bulletin 36).

FINANCIAL INFORMATION (0 - 50 Points)			
High Risk ¹	Above Average Risk	Average Risk	Low Risk
0 - 9 points	10 - 15 points	16 - 35 points	36 - 50 points

Vendor/builders who obtain a High Risk Financial Information score are refused registration or revoked.

The points for a builder's financial information are based on a two-step analysis of the available information. Builders with assets in excess of \$5 million or annual revenues in excess of \$10 million are required to provide reviewed financial statements. ONHWP may waive this requirement where appropriate.

The determination of points is based on the following:

- ◆ Equity per unit (0 – 30 points)
- ◆ Financial assessment and/or credit history (0 – 20 points)

A detailed example of how each of these components or calculations would apply is presented on page 7 of this Bulletin.

Equity Per Unit

The points for equity are based on the extent to which the builder meets or exceeds the average suggested minimum equity (per unit) (see Fig. 1). This is determined by a detailed analysis of the builder's equity and the units, which the builder's financial capacity would need to support.

First, ONHWP analyzes the builder's equity and translates it to equity per unit. Builder equity consists of the equity of the registrant and that of individuals or companies providing an Indemnity. The units represent all homes the builder intends to sell, close or build during the coming year plus those that are under the first year of warranty at the time of assessment. Note: the homes under warranty are counted on a ¼ basis (i.e., 4 homes are counted as 1 unit).

The equity per unit is then compared to the average suggested minimum equity (per unit) for this builder. It is calculated using 3 important criteria: the number of units, the average sale price of all homes and a diminishing scale of equity requirement (as outlined in column 1 of Fig. 1). Minimum and maximum sale price caps are in place to ensure fairness for all builders.¹

Fig. 1

Suggested MINIMUM Equity (per unit)	% of Average Sale Price ¹
1 st to 5 th unit	15.0
6 th to 20 th unit	11.5
21 st to 50 th unit	9.5
51 st to 100 th unit	7.5
Greater than 100 units	4.5

¹ Homes sold for less than \$100,000 will be counted as \$100,000. Those sold for more than \$250,000 will be counted as \$250,000.

Once the builder's equity (per unit) and their suggested minimum equity (per unit) are calculated, the two are compared. The result is a ratio, which is measured against the following table (Fig. 2). This will determine the points the builder will receive for the equity component of this analysis.

An Indemnity is required if the registrant does not meet the Suggested Minimum Equity or has not been registered for 5 years or more. Note that the builder's equity consists of the equity of the registrant and that of individuals or companies providing an Indemnity. A builder who is unable to produce half the suggested minimum equity is refused registration or has it revoked. Any builder may substitute the requirement for an Indemnity by providing security of \$20,000 to \$40,000 per unit, depending on the amount of deposit to be taken. The amount would be reduced as the unit progresses through the warranty periods. This reduction would be determined on a case-by-case basis.

Fig. 2

Ratio to Suggested Minimum Equity	Financial Points
Less than 0.50	0
0.50 to 0.74	6
0.75 to 0.99	9
1.00 to 1.24	12
1.25 to 1.49	15
1.50 to 1.74	18
1.75 to 2.00	21
2.00 to 2.99	24
3.00 to 4.99	27
5.00 plus	30

Financial Status and/or Credit History

Up to 20 points will be assigned to builders based on careful analysis of their financial statements and/or their credit history, although it may be a combination of both. Generally, builders who are corporations, joint ventures or partnerships will be assessed through careful analysis of their financial statements. Builders who are sole proprietors or who have personal indemnitors or guarantors will generally be assessed by their credit history.

To convert financial information into points ONHWP utilizes standard financial analysis tools (i.e., ratios) and/or the scores assigned by independent credit bureaus. Analysis of financial statements may include various financial tests to determine debt load, liquidity, profitability, sales growth and other changes in financial position or status. The result of ONHWP's analysis is available to the builder.

Here is an example of how the Risk Assessment scoring works:

Fig. 3

SAMPLE BUILDER PROFILE			Score
Type of Construction	Freehold		
Size of Builder	Small	12 possessions per year (average of last 5 years)	3
Tenure of Builder	5 Years	Number of years registered with ONHWP	12
Business/ Technical Skills	Excellent Rating for After Sales Service		16
Financial Information	Calculated units ¹	+ 15 proposed units for year + 12 in 1 st year warranty (@25%) = 18 calculated units	
	Average Sale price	\$175,000	
	Suggested Minimum Equity (SME)	First 5 units at 15% = \$26,250 next 13 units at 11.5% = \$20,125 = ((5x\$26,250)+(13x\$20,125))÷18 = average of \$21,826 per unit	
	Builder's equity	\$250,000 divided by 18 units = \$13,889	
	Ratio to SME	\$13,889 divided by \$21,826 = 0.64	
	Financial Points (for equity)	Ratio of 0.64 = 6 pts. (see Fig. 1)	
	Financial Points (for other info) ²	Excellent credit history & strong financials = 20 pts.	
Total Financial Score			26
Risk Assessment Score A freehold builder who scores between 51 and 75 points is rated <u>average</u> risk and is not required to post security (see page 8, Fig. 5).			57

- 1 The units represent all homes the builder intends to sell, close or build during the coming year plus those that are under the first year of warranty at the time of assessment. Note: the homes under warranty are counted on a ¼ basis (i.e., 4 homes are counted as 1 unit).
- 2 This may include various financial tests to determine credit history, debt load, liquidity, profitability, sales growth and other changes in financial position or status.

SECURITY REQUIREMENTS

Security Requirements for all vendor/builders are based on their total score for Size, Tenure, Business/Technical Skills and Financial Information. Depending on the unit type proposed, vendor/builders are assessed a security amount from \$0 to \$20,000 per unit or are refused registration or revoked based on their total score.

In order to ensure fairness and to match the risk of products to security requirements, the following categories will apply to all condominiums:

Fig. 4

Category	Description
Condo: Type A	Project has only Part 9 OBC construction requirements and is a lot-line condominium.
Condo: Type B	Project has only Part 9 OBC construction requirements and is NOT a lot-line condominium.
Condo: Type C	Project has both; Part 9 and Part 3 OBC construction requirements.
Condo: Type D	Project has only Part 3 OBC construction requirements.

Note: If a project has a risk profile that is unique, meaning it does not reflect the characteristics of other projects in the identified category (Fig. 4) ONHWP will assign it to an appropriate category.

The following table outlines the security requirements for freehold and condominium builders:

Fig. 5

		SECURITY REQUIREMENTS (MAXIMUM 100 POINTS)				
		Very High Risk	High Risk	Average Risk		Low Risk
		0 - 12 points	13 - 25 points ²	26 - 50 points ²	51 - 75 points ³	76 - 100 points ³
	FREEHOLD	Refuse/Revoke	\$10,000 ⁵	\$5,000 ⁴	\$0	\$0
CONDOMINIUM	Type A	Refuse/Revoke	\$10,000	\$5,000	\$0	\$0
	Type B	Refuse/Revoke	\$15,000	\$7,500	\$2,500	\$0
	Type C	Refuse/Revoke	\$20,000	\$10,000	\$5,000	\$0
	Type D	Refuse/Revoke	\$20,000	\$15,000	\$7,500	\$2,500

- 1 For condominiums this chart represents security requirements for warranty coverage; the greater of the value of the deposits taken or security to the level outlined in this chart is required to cover deposits if the DTA is not used.
- 2 Deposit Trust Agreement (DTA) is not an option for condominium builders included in this category. ONHWP may waive that stipulation where appropriate.
- 3 DTA is an available option for condominium builders included in these categories.
- 4 For freehold builders taking deposits in excess of \$20,000, this number is increased to \$10,000 per unit.
- 5 For freehold builders taking deposits in excess of \$20,000, this number is increased to \$15,000 per unit.

The requirements outlined in Fig. 5 cover all security required during the marketing, construction and warranty phases in freehold construction. For condominiums, Fig. 5 reflects only the construction and warranty phases. Security to fully cover the deposits taken by the builder, to a maximum of \$20,000 per unit, is required for all condominiums (or use of the Deposit Trust Agreement).

BLANKET SECURITY

All security instruments are specific to a registration unless otherwise determined. This means that it covers any obligation of the registrant and is not specific to individual units. The concept is called blanket security and applies to both freehold and condominium builders. Additional blanketing of security to the umbrella level or to groups of registrations, which are not part of an umbrella but which have common principles, officers or directors will be considered by ONHWP, at the request of the registrant. Consolidating security in this manner may result in a reduction of the standard security requirements (up to 30%) if the builder is an average or low risk builder. Reductions will be considered on a case-by-case basis by ONHWP, who will base its decision on the builder's performance (scores) in each area of the risk assessment and the companies or projects included in the blanketed group.

Reviews for the release of blanket security for freehold builders will be done annually, at the time of renewal. It will be based on the ongoing risk assessment for the individual registration, associated group of companies or Umbrella Company. For individual condominium projects the release of warranty security will be tied to the Builder Bulletin 19 Final Report (as outlined in Builder Bulletin 19) or to the end of the first year warranty period (as outlined in Builder Bulletin 38).

COLLATERAL SECURITY

Mortgages are an acceptable form of security, provided the builder is assessed as a low risk builder and the asset under consideration meets all the requirements of ONHWP collateral security terms. All costs for establishing this security will be assumed by the builder.

Assets, which qualify for collateral security, must be real property. Assets like automobiles, equipment or recreational vehicles are NOT acceptable assets for collateral security.

ONHWP reserves the right to limit this option in any specific instance. Applicants interested in this option must contact ONHWP's Licensing & Underwriting Department for further details.

CONDOMINIUM PROJECTS

The following chart outlines ONHWP's requirements for the taking of security for condominium projects:

Fig. 6

SECURITY REQUIREMENTS FOR CONDOMINIUM PROJECTS
Security Requirements are Determined <ul style="list-style-type: none">• On initial registration• Annually on renewal of registration• When any new condominium project is proposed• When there is a change in principals or history
Types of Security <ul style="list-style-type: none">• Deposit Trust Agreement (DTA)• Standard project security instrument• Standard blanket security instrument• Type of security required is determined by Risk Assessment
Standard Security <ul style="list-style-type: none">• Available to vendor/builders who do not wish to use or do not qualify for DTA• All vendor/builders must post a standard security instrument equal to the greater of the average deposit received per unit and the security amount per unit determined by Risk Assessment.
Deposit Trust Agreement (DTA)¹ <ul style="list-style-type: none">• Available to all vendor/builders with scores of 51 points or more (see Deposit Trust Agreement and Escrow Agents on page 11).
Conversion of DTA to Standard Security <ul style="list-style-type: none">• The DTA may be replaced by standard security at any point during the marketing or construction phases (see Conversion of DTA to Standard Security on page 12).
Deadline <ul style="list-style-type: none">• At the start of the Project's marketing (the taking of deposits and/or the signing of Agreements of Purchase and Sale) the vendor/builders must submit either a DTA or standard security.

¹ Fairness and accuracy are paramount to ONHWP's underwriting process. Tenure is an important consideration. To this extent ONHWP will apply discretion where required to ensure that the requirements properly reflect the underwriting risk present in each assessment.

Deposit Trust Agreement and Escrow Agents

A Deposit Trust Agreement (DTA) is an agreement between the vendor/builder, the escrow agent and ONHWP that sets out how purchasers' deposits will be held in trust. The escrow agent administers the trust.

DTAs are available to condominium builders except those with overall Risk Assessment points of 50 points or less. ONHWP may waive this stipulation where appropriate. ONHWP will advise condominium builders if they qualify for a DTA and will provide the appropriate documentation for the builder to complete.

The DTA must be in place before the taking of deposits and/or the signing of Agreements of Purchase and Sale. In order to enter into a DTA a vendor/builder must select an escrow agent (usually a law firm) which is comprised of 3 partners or more or which meets ONHWP's requirements for insurance of firms acting as an escrow agent. The escrow agent reports to ONHWP but is paid by the vendor/builder.

All monies received (up to \$20,000 per unit) by the vendor/builder from the purchase under an Agreement of Purchase and Sale must be held in trust by the escrow agent. All these monies must be made payable to the escrow agent in trust. This requirement must be set out in the Agreement of Purchase and Sale.

Vendor/builders must comply with the *Condominium Act* (as amended from time to time) by placing excess deposits over \$20,000 per unit in either:

- a separate trust account, or
- the trust account administered by the escrow agent, or
- obtain excess deposit insurance

Any excess deposits over \$20,000 per unit, which have been placed in the trust account administered by the escrow agent, will only be released once the agent has received proof that Excess Condominium Deposit Insurance has been obtained or that it will be held in trust.

Vendor/builders and escrow agents will each submit monthly reports to ONHWP 15 (fifteen) business days after month end. ONHWP may waive this condition where appropriate. The reports will detail the following information for the preceding month:

- unit number
- purchaser(s) name(s)
- date of Agreement of Purchase and Sale
- date and amount of each deposit
- date and amount of each deposit refunded, if applicable. (Deposits refunded by the escrow agent within the same month should appear as an inflow or outflow).
- total amount of deposits received to-date
- total amount of deposits required under Agreement(s) of Purchase and Sale
- total units sold in the month
- total unit sales terminated in the month
- total net unit sales to-date
- grand total deposits received to-date and remitted to the escrow agent

Two statutory declarations must accompany the vendor/builder's monthly report. One statutory declaration made by the vendor/builder's senior officer will state the information included in the report is true. All refunds to purchasers made prior to the delivery of funds to the escrow agent must be noted in the vendor/builder's monthly report and confirmed in the statutory declaration. The second statutory declaration made by the vendor/builder's lawyer will state that he or she has no knowledge of any facts that would make the senior officer's declaration untrue.

The escrow agent must receive all deposits within 15 (fifteen) business days after they are received by the vendor/builder. The escrow agent may refund deposits, without authorization from ONHWP, on receiving written direction from the vendor/builder and a Mutual Release and Termination Agreement signed by both the purchaser(s) and the vendor/builder. A Mutual Release and Termination Agreement is not required for purchaser(s) who rescind their Agreement of Purchase and Sale within the ten-day cooling off period granted by the *Condominium Act* (as amended from time to time).

Conversion of DTA to Standard Security

The DTA may be converted at any point to one of the forms of standard security listed below. All units must be enrolled and the enrolment fees paid before construction begins.

The amount of security required at the time of conversion will be the greater of:

1. the average deposit per unit required under the signed Agreements of Purchase and Sale and not including monies paid at interim occupancy, or
2. the security amount per unit determined by Risk Assessment. This amount will not exceed \$20,000 per unit. The security will remain in place during the construction period and will be available initially for all the vendor/builders' obligations, in addition to deposit and warranty liability.

Standard Security

Standard security can be posted as follows:

- a) Irrevocable Letter of Credit (ONHWP format)
- b) Surety Bond (ONHWP format)
- c) Letter of Guarantee (ONHWP format)
- d) Cash or certified cheque
- e) Other acceptable security as required by the Registrar

Vendor/builders who either do not wish to use a DTA or who do not qualify for a DTA must post one of the above forms of standard security at the start of marketing (i.e., the taking of deposits and/or the signing of Agreements of Purchase and Sale). The security amount per unit is the greater of the average deposit per unit or the amount determined by Risk Assessment.

Release of Security

The security amount per unit determined by Risk Assessment compared to the average or maximum deposit per unit will determine how security is released.

The following example sets out how security is released if the security amount assessed per unit is greater than the average deposit per unit taken:

If the security amount assessed is \$15,000 per unit and the average deposit per unit is \$5,000 then the full security amount of \$15,000 per unit will remain in place to cover warranty claims.

The following example sets out how security is released if the security amount assessed per unit is less than the average deposit per unit taken:

If the security amount assessed is \$5,000 per unit and the average deposit per unit is \$15,000, then \$10,000 per unit will be released following condominium registration, and title transfer. The remaining \$5,000 per unit will be available for use against warranty obligations. Once 50% of the available units are closed (i.e., title transfer) or 60 days after registration of the condominium corporation, the remainder of the difference between the Risk Assessment amount and the average deposit amount will be released for all units. Whichever event occurs first shall initiate the release of the security, provided there are no outstanding closing or other issues with the project.

Release Timelines (Condominiums - Types A & B) (Including Builder Bulletin 38 Projects)

Security, as determined by Fig. 5, for condominium Types A and B will remain in place for one year after the condominium has been registered unless the condominium corporation has submitted an acceptable pre-approved Bulletin 19-type audit and all issues have been resolved to the satisfaction of ONHWP. If all issues are resolved, security will be released within 45 days of the acceptance of the Bulletin 19-type audit or the end of the first year after condo registration. If issues remain unresolved security will remain in place for longer, as determined by the Registrar.

Release Timelines for Builder Bulletin 19 Projects (Condominiums - Types C & D)

Security related to Builder Bulletin 19 projects will remain in place until the Builder Bulletin 19 Final Report has been received and accepted by ONHWP. ONHWP will then release security as outlined in Builder Bulletin 19.

Cancelled Condominium Projects

The following documentation is required for the termination of the DTA or the release of security on cancelled condominium projects:

- a) Statutory Declaration by the vendor/builder that all deposits have been refunded
- b) Mutual Release and Termination Agreements signed by each purchaser and the vendor/builder (ONHWP format)
- c) Statutory Declaration from the escrow agent confirming that all deposits have been refunded under the DTA
- d) Return of any unused ONHWP Deposit Receipts for unsold units
- e) Signed Condition of Registration letter by the vendor/builder stating that he or she will not sell or construct condominium units without ONHWP's knowledge and approval

If enrolment fees are refunded, ONHWP will retain an administration fee of \$50 per enrolment to a maximum of \$1,000 per project, plus applicable tax.

FREEHOLD CONSTRUCTION

Fig. 7

SECURITY REQUIREMENTS FOR FREEHOLD UNITS
Security Requirements are Determined <ul style="list-style-type: none">• On initial registration• Annually on renewal of registration• When there is a change in principals or history
Types of Security <ul style="list-style-type: none">• Standard blanket security
Standard Security <ul style="list-style-type: none">• All vendor/builders must post standard security equal to the security amount per unit as determined by Risk Assessment
Deadline <ul style="list-style-type: none">• The requirement for Security will be determined upon registration or renewal of the builder. The full required security must be posted as a condition of registration or renewal if the builder is determined to be high risk or very high risk. It may be phased over the course of the year if the builder falls into the average risk category.

Amount of Security

Security required will not exceed \$15,000 per unit based on Risk Assessment (see Risk Assessment for all Builders on page 3) and is applicable to any obligations of the builder. However, security assessments for private sewage disposal systems and Unenrolled Homes may increase this requirement (see Private Sewage Disposal Systems on page 16 and Unenrolled Homes on page 16).

Standard Blanket Security

Standard blanket security can be posted as follows:

- a) Irrevocable Letter of Credit (ONHWP format)
- b) Surety Bond (ONHWP format)
- c) Letter of Guarantee (ONHWP format)
- d) Cash or certified cheque
- e) Other acceptable security as required by the Registrar

Release of Security

Security will remain in place for one year after the date of possession and be released within 45 days of this date if all issues are resolved or depending on the Risk Assessment, vendor/builder complaint history and other factors, ONHWP may determine an appropriate time to release security before the first year anniversary of the date of possession.

At the builder's renewal date, ONHWP will undertake a review of the builder's security requirement. If there are no outstanding issues and the builder's security exceeds the blanket security requirements, all excess security will be released by ONHWP within 45 days of the completed renewal.

Cancelled Freehold Projects

The following documentation is required for the release of security on cancelled freehold projects:

- a) Statutory Declaration by the vendor/builder that all deposits have been refunded
- b) Mutual Release and Termination Agreements signed by purchasers and the vendor/builder
- c) Copies of the front and back of negotiated refund cheques paid by the vendor/builder to all purchasers

If enrolment fees are refunded, ONHWP will retain an administration fee of \$50 per enrolment, plus applicable tax.

PRIVATE SE WAGE DISPOSAL SYSTEMS

Vendor/builders may be required to post security of \$5,000 per unit for all homes enrolled with a private sewage disposal system, in addition to any other security requirements. Consult Builder Bulletin 33 for complete details.

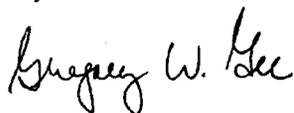
UNENROLLED HOMES

Unenrolled homes are defined as those homes on which the construction has begun before the unit was enrolled. This is in direct violation of the requirements of the *Ontario New Home Warranties Plan Act* (as amended from time to time). A builder must be registered to apply for the building permit and homes must be enrolled forthwith upon the issuance of a building permit. Unenrolled homes are subject to security of \$5,000 per unit in addition to any other security requirement. This additional security will not be released prior to the second anniversary of the date of possession. This security is levied because such activity is illegal and as such has prevented ONHWP from evaluating the builder and the project before construction.

FOR MORE INFORMATION

We encourage you to become familiar with the terms and conditions of registration and enrolment early in your project planning process. In this way ONHWP will be able to provide you with the highest level of service.

If you have any questions regarding security requirements, please contact the Licensing & Underwriting Department at (416) 229-9200 or toll free at 1-800-668-0124 or the ONHWP Office in your area. A list of offices is included on the back of this Bulletin.



Gregory W. Gee
President & CEO/Registrar

BUILDER BULLETIN 29

ENROLMENT FEES SUBJECT TO 8 PER CENT RETAIL SALES TAX

Effective Date: July 1, 1993

As announced by Floyd Laughren, Minister of Finance, in the Ontario Budget of May 19, 1993, and as set out in the amendments to the Retail Sales Act (Bill 30) introduced on June 1, 1993:

Every person who carries on business in Ontario and is required to contribute to an insurance scheme or a compensation fund established by or under any Act of the Parliament of Canada or the Legislature of Ontario shall pay a Retail Sales Tax at the rate of 8 per cent of the premium payable.

Since all builders of new homes built for sale are required to pay an enrolment or re-enrolment fee (or premium) for each unit enrolled in the Ontario New Home Warranty Program, all fees submitted to the Ontario New Home Warranty Program on or after July 1, 1993, must include Retail Sales Tax.

The following example shows how the total enrolment fee will be calculated for a new home with a purchase price of \$200,000.

Base enrolment fee:	$\$2/\$1,000 \times \$200,000$	\$400.
GST	$7\% \times \$400.$	\$28.
PST	$8\% \times \$400.$	\$32.
TOTAL ENROLMENT FEE		\$460.

For more information regarding this Bulletin, please contact the [ONHWP office](#) in your area.

Issue Date: June 15, 1993



BUILDER BULLETIN 30

EXPANDED REGISTRATION REQUIREMENTS

Effective: October 1, 1993

Effective October 1, 1993, the Ontario New Home Warranty Program is implementing expanded registration requirements for new and re-entering builders/vendors. The expanded registration requirements, composed of an interview and a construction technical test, have been developed as part of ONHWP's prevention strategy to help minimize claims in a new builder's first years of registration.

As a self-funding, non-profit corporation, the Warranty Program must exercise due diligence in assessing the risk when registering new applicants. The purpose of the expanded review is not to exclude applicants from residential construction but to know the business and construction capabilities of the applicant better so that ONHWP can provide the new builder or vendor with technical training and support.

The expanded registration requirements are **mandatory**. Failure to comply with either a request for an interview or a construction technical test will result in the Registrar issuing a Notice of Proposal to Refuse Registration.

Note: The expanded registration procedure does NOT apply to:

- registered builders registering another company
- builders in good standing who have canceled or allowed their registration to lapse within the previous three years

Applicant Criteria

- new applicants who have never registered with the Program
- applicants whose registration has been expired for three years or more
- previously-registered applicants who have unsettled claims outstanding
- applicants who have been previously refused or revoked by the Registrar but have satisfied the Program that their circumstances have changed materially
- applicants who are re-registering and changing their status from "Vendor Only" to "Vendor/Builder", and
- previously-registered applicants who have made a significant change in principals, including those responsible for construction or the day-to-day operations of the company

What's Involved

An interview and a construction technical test have been developed to obtain more information on the organization and business plans of companies who fall into any of the above categories as well as to evaluate construction practices and problem solving skills.

Interview

In addition to completing the application form and providing the required documentation, the Regional Client Services Representative will meet with a principal holding a decision-making position in the applicant company to discuss the firm's business and construction experience, marketing strategy, contractual documents, customer service plan and anticipated construction.

During the interview the Client Services Representative will also outline the obligations of the applicant under the Ontario New Home Warranties Plan Act and the consequences and benefits

of meeting those obligations. Regional staff will also introduce the types of technical support that are available to the new builder or vendor.

Technical Test

The construction technical test, based on Part 9 of the Ontario Building Code, will be completed by the principal or most senior employee directly supervising construction. The test is comprised of 30 multiple choice questions covering the most common and costly ONHWP claim defects and the most common construction problems that builders experience. Both the Ontario Building Code and the Code and Construction Guide for Housing may be referred to during the test.

Terms And Conditions of Registration

The Builder Services Department will continue to perform a financial and document analysis and a review of past performance and linkages with other companies, if appropriate, prior to the registration of an applicant.

The results of these two new evaluations, the business skills review (interview) and the technical review (test), will be considered along with the financial analysis and review of past performance to determine the appropriate terms and conditions of registration. These may include security requirements, enrolment limitations and a targeted inspection plan and successful completion of an approved course or courses of study. See Builder Bulletin 31 for more information about targeted inspection.

For more information regarding this Bulletin, please contact the ONHWP office in your area.

Issue Date: September 27, 1993

Offices of the Ontario New Home Warranty Program

CORPORATE OFFICE

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Toll Free: 1-800-668-0124
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E-mail: info@newhome.on.ca
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CONDOMINIUM OFFICE

(Serving all of Ontario)

1091 Gorham Street
NEWMARKET ON L3Y 7V1
(905) 836-6715
Toll Free: 1-888-803-9913
Fax: (905) 836-0314

EAST CENTRAL REGION

(Serving the areas of Durham; Haliburton;
Kawartha Lakes; Muskoka;
Northumberland; Peterborough; Simcoe;
York)

1091 Gorham Street
NEWMARKET ON L3Y 7V1
(905) 836-5700
Toll Free: 1-800-263-1299
Fax: (905) 836-5666

NORTHWEST REGION

(Serving the areas of Kenora; Rainy River;
Thunder Bay)

1205 Amber Drive, Suite 206
THUNDER BAY ON P7B 6M4
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Fax: (807) 345-2014

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Prince Edward; Renfrew; Stormont,
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1600 Scott Street, Suite 400
OTTAWA ON K1Y 4N7
(613) 724-4882
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Fax: (613) 724-3669

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140 Fullarton Street, Ground Floor
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(519) 660-4401
Toll Free: 1-800-520-HOME (4663)
Fax: (519) 660-3556

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Manitoulin; Nipissing; Parry Sound;
Sudbury; Timiskaming)

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(705) 560-7100
Toll Free: 1-800-387-7861
Fax: (705) 560-7111

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Halton; Hamilton; Niagara; Peel; Toronto)

2 County Court Blvd., Suite 435
BRAMPTON ON L6W 3W8
(905) 455-0500
Toll Free: 1-800-455-4484
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BUILDER BULLETIN 31

TARGETED INSPECTION PROGRAM

Effective: October 1, 1993

Effective October 1, 1993, the Ontario New Home Warranty Program will be implementing the Targeted Inspection Program to provide on-site technical coaching and training at benchmark stages of construction to help new and problem builders make informed decisions on good construction practice.

Developed as an element of ONHWP's prevention strategy, the focus of the Targeted Inspection Program is not as much on the project as it is on the builder's performance over the long term. It enables ONHWP both to monitor and assess the technical competence of new builders joining the Program and to monitor and correct the construction practices of problem builders.

The Targeted Inspection Program is mandatory for new and problem builders. In addition to the criteria listed below, any builder may be considered a problem builder at the discretion of the Registrar. Failure to comply with Targeted Inspection Program requirements will result in the Registrar issuing a Notice of Proposal to Refuse or Revoke Registration.

Note: The Targeted Inspection Program does not apply to high-rise condominium projects required to meet the provisions of Builder Bulletin 19.

What's Involved

Based on the information gained through the expanded registration interview and construction technical test (see Builder Bulletin 30), a Client Services Representative may recommend that a Targeted Inspection Plan be one of the terms and conditions of registration for a new or re-entering builder. If an inspection plan is required the applicant will receive notification from the Registrar. Some new builders will be exempt because they have demonstrated a high level of business skill and construction knowledge in their interviews and technical tests. A Technical Representative will initiate the Inspection Plan and will either conduct the inspections personally or hire a fee for service inspector. Targeted Inspection Plan fees for the total number of inspections required for a specific unit are payable at the time of its enrolment.

For problem builders, the Targeted Inspection Plan development process is more complex. The Technical Representative will thoroughly research and analyze the builder's file to pinpoint past performance issues. An appropriate inspection plan will be implemented or, in some cases, custom designed, depending on the builder's past performance. Participation in the Targeted Inspection Program becomes an amendment to the terms and conditions of registration. The inspection plan will begin on the next enrolment submitted to ONHWP or, if a number of enrolments has been submitted but construction not yet begun, the next home to be built. The Regional Manager and Technical Representative will meet with the builder to outline the reasons for the implementation and to review the inspection plan requirements. Inspections will be conducted by the Technical Representative.

In all instances, ONHWP will make every effort to respond within 24 hours to inspection or re-inspection requests. However, responsibility lies with the builder to ensure that staff are present on-site at the pre-arranged time. If ONHWP fails to meet the appointment the fee for that inspection will be waived or applied against an inspection at a later time.

Definition of NEW Builder

- new applicants who have never registered with the Program
- applicants whose registration has been expired for three years or more
- previously-registered applicants who have unsettled claims outstanding
- applicants who have been previously refused or revoked by the Registrar but have satisfied the Program that their circumstances have changed materially
- applicants who are re-registering and changing their status from "Vendor Only" to "Vendor/Builder", and
- previously-registered applicants who have made a significant change in principals, including those responsible for construction or the day-to-day operations of the company

Definition of Problem Builder

Builders whose performance with ONHWP during the previous 12 months demonstrates one or more of the following are classified as problem builders:

- Any paid warranty claim. Regional Managers will have the discretionary power to deal with certain inequitable situations, e.g., if a homeowner has refused an attempt by the builder, and, with the builder's agreement, ONHWP makes the repair and charges back the builder.
- Unacceptable ratio of chargeable conciliations to possessions using the rating system in the Home Buyer's Guide to After Sales Service. The current formula for the "below average" rating, i.e., a ratio of two or more chargeable conciliations in 25 possessions or fewer will also apply to builders who are not rated in the Home Buyer's Guide.

The Registrar may target any builder as a problem builder if, for example, there is an unacceptable ratio of complaints to possessions or if a builder receives consistently unfavourable results in field inspections carried out by ONHWP staff.

Inspection Plans

Building on the experience of the Mandatory Inspection Program, targeted inspections will focus on ONHWP's most costly and frequent claims.

Inspections can be held at the five key stages in the construction process: excavation, foundation, framing, prior to drywall and completion.

Depending on the builder's level of technical knowledge or track record with ONHWP, regional staff will select one of the following four levels of inspection:

Level	Number	Stages
Minimum	3 Inspections 2 Homes	1. Foundation

		<ol style="list-style-type: none"> 2. Prior to drywall 3. Completion
Moderate	4 In 3 Homes	<ol style="list-style-type: none"> 1. Excavation 2. Foundation 3. Prior to drywall 4. Completion
Maximum	5 In 3 Homes	<ol style="list-style-type: none"> 1. Excavation 2. Foundation 3. Prior to drywall 4. Completion
Custom	1 to 5 2 to 5 Homes	<ol style="list-style-type: none"> 1. Designed to address specific concerns based on builder's claims history.

Timing of Inspections

The following guidelines have been established for the timing of the inspection at each benchmark stage in the construction process:

Stage	Timing
Excavation	After footing formwork completed but prior to pouring concrete.
Foundation	Prior to backfill, with dampproofing applied.
Framing	After roof framing complete and sheathing installed but prior to insulation and/or vapour barrier being installed.
Prior to drywall	Prior to drywall being applied but with insulation and air/vapour barrier installed.
Completion	When the home is ready for occupancy and exterior grading has been completed.

Note: Incomplete seasonal work is exempted from the completion inspection.

Inspections

The single most important purpose of the Targeted Inspection Program is the teaching or coaching opportunity that the inspection provides. The Technical Representative, or other trained inspector, will use the review to provide appropriate technical information for the builder to make an informed decision on good building practices. In other words, the inspector focuses on the "builder" not the "unit" for the long-term improvement of the builder's performance.

Each inspection has its own checklist which is based on ONHWP's claims experience and includes the most common construction defects. By keeping track of recurring defects ONHWP will be able to revise the checklists and adjust the focus of the inspections accordingly.

Checklists will also include appropriate diagrams from the Code and Construction Guide for Housing to help the inspector explain good construction practice to the builder, as well reference the Ontario Building Code (OBC). Although warranty defects are not always specific OBC infractions, they may have their origins there. Copies of the checklists will be distributed to the builder's site representative and to the person managing the construction supervision.

When the builder's construction performance improves to an appropriate level, targeted inspections will be discontinued. If a problem builder fails to improve, the documentation from the targeted inspections will be added to the case for revocation of registration.

Fee Structure

The Targeted Inspection Plan will be stipulated as a term and condition of registration. Targeted Inspection Plan fees for the total number of inspections required for a specific unit are payable at the time of its enrolment, or, will be invoiced if units are already enrolled but construction has not yet begun. GST must be added to the fees.

The following chart sets out the Targeted Inspection Fees for new and problem builders:

Builder Category	Fee/Inspection	Plan	Number of Inspections	Fee/Home (GST)	Number of Houses	Total Inspection Fees
New Builder						
	\$125.	Minimum	3	\$375.	2	\$750.
	\$125.	Moderate	4	\$500.	3	\$1,500.
	\$125.	Maximum	5	\$625.	3	\$1,875.
Problem Builder						
	\$225.	Minimum	3	\$675.	2	\$1,350.
	\$225.	Moderate	4	\$900.	3	\$2,700.
	\$225.	Maximum	5	\$1,125.	3	\$5,625.

Targeted Inspection Plan fees for the total number of inspections required for a specific unit are payable at the time of its enrolment, or, will be invoiced if units are already enrolled but construction has not yet begun. GST must be added to the fees.

Notes

If an Inspection Plan is required, a new applicant will receive notification from the Registrar. Some new builders will be exempt because they have demonstrated a high level of business skill and construction knowledge in their interviews and technical tests. (See Builder Bulletin 30 for new applicant registration requirements.)

Once an Inspection Plan is required for either a new or problem builder, ONHWP will make every effort to respond within 24 hours to inspection or re-inspection requests. However, responsibility lies with the builder to ensure that staff are present on-site at the pre-arranged time. If ONHWP fails to meet the appointment the fee for that inspection will be waived or applied against an inspection at a later time.

For more information regarding this Bulletin, please contact the [ONHWP office](#) in your area.

Issue Date: November 19 and 24, 1993

BUILDER BULLETIN 32

CAP LIABILITY ON PRIVATE SEWAGE DISPOSAL SYSTEMS

Effective July 1, 1993

Effective July 1, 1993, private sewage disposal systems claims, payable by the Ontario New Home Warranty Program (ONHWP) are limited to a maximum of \$25,000 on new homes enrolled on or after that date. This limit applies only to claims paid by ONHWP and does not limit the liability of any other party to the homeowner.

The \$25,000 cap is subject to other warranty limits and is included in the overall maximum limit of \$100,000 per home. The limit was set at \$25,000 based on the fact that ONHWP's liability is restricted to the repair of defects of the system supplied by the builder and is not intended to address common problems found in subdivisions and larger developments. According to past claims experience, this limit is more than sufficient to compensate or to repair a defective private sewage disposal system effectively.

Section 14 of the Ontario New Home Warranties Plan Act states that a homeowner is entitled to be paid by ONHWP the amount of the damages they have suffered, subject to limits fixed by the corporation's regulations. ONHWP's Board of Directors may, by by-law, set claims limits.

In April, 1993, the Board of Directors passed a by-law, later filed as Ontario Regulation 334/93, capping the liability of private sewage disposal systems claims to \$25,000 on new homes enrolled on, or after, July 1, 1993.

For more information regarding this Bulletin, please contact the [ONHWP office](#) in your area.

Issue Date: November 19, 1993

BUILDER BULLETIN 33 (Revision 3)

CERTIFICATION OF PRIVATE SEWAGE DISPOSAL SYSTEMS

Effective: December 1, 1999

This bulletin replaces Builder Bulletin 33 (Revised) and its attachments that were in effect beginning September 15, 1996.

Here's What This Bulletin Is About

Builders/vendors who enrol homes with private sewage disposal systems on or after September 15, 1996 must submit proof that the design and installation have been certified by a qualified professional if:

- the builder/vendor is building on a lot under two acres and has had an ONHWP claim on a private sewage disposal system within the past three years
- the builder/vendor is building on a lot under two acres in Halton, Ottawa-Carleton, Peel or Wellington (counties or regions where ONHWP has had an above average claim record over the past five years)

Certification will include but may not be limited to completion of:

- the Certificate of Professional Design and Commitment, Forms A-1 and A-2, prior to issue of a building permit
- the Certificate of Professional Field Review and Compliance, Forms B-1 and B-2, completed before occupancy

If certification is required then:

- security required is a minimum of \$5,000 per unit
- security will be released as soon as satisfactory proof of certification on ONHWP forms has been received

These requirements do not limit the Registrar's authority to evaluate and decide on individual situations.

Here's What Has Changed

- Bodies to approve and inspect private sewage disposal systems have changed under Ontario provincial legislation. The attached forms (A1, A2, B1, B2) have been amended to reflect the changes in reporting requirements by quoting the proper legislation.

This is a capsule version of the bulletin's requirements for convenience only. Read the details on the following pages for full information to meet the bulletin's requirements.

Background

The Ontario New Home Warranty Program (ONHWP) has been monitoring the claims history of private sewage disposal systems for several years. Based on a review of claims from 1990 to 1995, Builder Bulletin 33 was revised to require Private Sewage Disposal System Certification, prepared and certified by a qualified professional depending on the following factors:

- builder/vendor performance
- lot size
- claims record in the geographic location

Since Private Sewage Disposal System Certification was implemented in 1994 there has been an improvement in the design and installation of these systems in many parts of Ontario, based on ONHWP's claims data. Where problems continue to occur their causes could be prevented. In some cases the systems were designed and installed improperly; in others, inaccurate soils information was responsible. Overall, however, claims frequency and costs have declined since the bulletin's implementation.

The bulletin was revised to target the problematic conditions and factors that continue to lead to claims. In revising Builder Bulletin 33 ONHWP continues to take the necessary steps to protect the guarantee fund while balancing the entrepreneurial needs of the home building industry with consumer protection rights and the need for environmental protection.

Private Sewage Disposal System Certification

From September 15, 1996, homes or projects enrolled which incorporate a private sewage disposal system may be required to have Private Sewage Disposal System Certification, prepared and certified by a qualified professional according to the criteria outlined on page 3 of this bulletin.

Builder/vendors shall provide proof of certification of the design and installation of private sewage disposal systems and post security for homes enrolled with private sewage disposal systems under the following conditions:

1. Any builder/vendor who has had a claim on a private sewage disposal system during the previous three-year period is required to provide proof of certification and security equal to a minimum of \$5,000 per unit when building on lots under two acres anywhere in the province. The security will be released once ONHWP receives duly completed Private Sewage Disposal System Certification.
1. Any builder/vendor who is building a home on a lot under two acres in counties where ONHWP has had claims above the average failure rate during the previous five-year period is required to provide proof of certification and security equal to a minimum of \$5,000 per unit. The security will be released once ONHWP receives duly completed Private Sewage Disposal System Certification. Currently, this affects only homes on lots under two acres enrolled in the regions of Ottawa-Carleton, Peel, Halton and Wellington.

Private Sewage Disposal System Certification is not required for homes enrolled on lots two acres or larger because current ONHWP data indicate failures leading to claims are rare.

These criteria are guidelines and do not limit the authority of the Registrar to evaluate and decide on individual situations.

Certification Process

Certification will include but may not be limited to the Certificate of Professional Design and Commitment for Field Review of Private Sewage Disposal Systems (Forms A-1, A-2) and the Certificate of Professional Field Review and Compliance of Private Sewage Disposal Systems (Forms B-1, B-2). These forms are attached for your reference. Additional copies are available from the ONHWP Office in your area. A list of ONHWP Offices is included on the back of this bulletin.

Criteria Considerations

The design and installation of the private sewage disposal system will take into consideration the following criteria:

- conditions of all native and imported soils (including backfill) to be used for the private sewage bed
- characteristics of the subgrade of the proposed system
- size and number of units to be serviced by the system
- all other burdens on the system that may result from or are caused by ancillary services
- local hydrogeological and ground water conditions

Design and installation of the private sewage disposal system must be consistent with the expected waste requirements of all units serviced by the system, as set out in the *Building Code Act, 1992* and its Regulations (O. Reg. 403/97, as amended by O. Reg. 102/98, 122/98, 152/99, 278/99), any amendments*, and all other applicable standards.

* It is the policy of ONHWP to recognize the standard in place at the time of approval by the appropriate jurisdiction although actual construction may take place at a later date when standards may have changed.

The Certificate of Professional Design and Commitment for Field Review of Private Sewage Disposal Systems (Forms A-1, A-2) must be completed prior to the issue of a building permit and submitted with the enrolment of the home to the Licensing and Underwriting Department at ONHWP's head office.

The Certificate of Professional Field Review and Compliance of Private Sewage Disposal Systems (Forms B-1, B-2) must be completed before occupancy of the dwelling and issue of the Certificate of Completion and Possession (CCP) and submitted immediately to the ONHWP Regional Office.

Description of Qualified Professional

ONHWP will accept Private Sewage Disposal System Certification completed and certified by:

- a. an Ontario-licensed Professional Engineer with professional liability insurance in accordance with the requirements of the *Professional Engineers Act* (a minimum of \$250,000);

or

- b. only in remote areas where it can be proven that a Professional Engineer cannot be readily or economically contracted by the builder/vendor:

the local or regional health department or the conservation authority ; or the regional office of the Ministry of the Environment and Energy (only where the local or regional health department or the conservation authority has not assumed the authority of design and installation approval of private sewage disposal systems).

The regional managers for ONHWP's Northeast and Northwest Regions shall have discretion to accept certification for Northern Ontario.

Upon receipt of a properly completed Certification, ONHWP will release any security being held for potential claim exposure related to the Project.

For More Information

If you have any questions about Private Sewage Disposal System Certification please contact the [ONHWP Office](#) in your area.

BUILDER BULLETIN 34

NEW COMBINED CCP/WARRANTY CERTIFICATES FOR FREEHOLD AND CONDOMINIUM

Effective: June 1, 1994

Effective June 1, 1994, the Ontario New Home Warranty Program is instituting a combined Certificate of Completion and Possession (CCP) and Warranty Certificate for freehold and condominium units. The Confirmation of Enrolment Form will no longer be used as of that date. No change has been made to the Warranty Certificate for condominium common elements.

The combined form has been developed to facilitate the delivery of the Warranty Certificate to homeowners. Completed by the purchaser and the builder at the pre-delivery inspection, builders are asked to give the copy of the form which includes the Warranty Certificate to the homeowner after the CCP has been signed. A simple-language explanation of warranty coverage is included on the reverse side of the form. A sample photocopy is attached for your reference.

Builders will receive the new combined form after ONHWP has received the Enrolment Form and fees for each unit. Builders are still required to submit a copy of the CCP to ONHWP within 15 days from the date of possession.

New Form Features

The combined form contains important information such as enrolment details and warranty coverage. It also permits corrections to be made to the address or legal description of the home.

To help clarify the condition of the home at delivery, the comments section of the form has been made more specific to highlight Unfinished Work and Surface Defects Not Accepted by Owner(s). Both builders and homeowners can detail work to be completed in the Unfinished Work section. Surface defects that will be remedied by the builder should be listed in the Surface Defects Not Accepted by Owner(s) section. Examples of information to be included in the Other Comments section are items that are accepted as is and items for which there has been an adjustment to the sale price of the unit or for which other consideration has been made.

Purchasers should be reminded that items listed on the CCP do not constitute a formal complaint. Also, home buyers do not lose warranty coverage if they have not listed all deficiencies on the CCP. They must report complaints in writing to both the builder/vendor and ONHWP within the warranty time period.

For more information regarding this Bulletin, please contact the [ONHWP office](#) in your area.

Issue Date: May 2, 1994

BUILDER BULLETIN 35

REGISTRATION AND ENROLMENT OF HIGH-RISE AND LOW-RISE CONDOMINIUM PROJECTS

Builder Bulletin 35 has been prepared to ensure that condominium developers are fully aware of typical terms and conditions of registration and enrolment of both high-rise and low-rise condominium projects.

Vendor/Builder Registration Requirements

Vendor/builders should allow between four to six weeks for their Registration to be processed. The following is an outline of typical registration requirements for condominium projects:

- Completed Application and registration fee
- Vendor/Builder Agreement (2 copies)
- Bank or Trust Company Reference Letter
- Condominium General Review Form
- Financial Information
 - Financial Statements
 - Personal Guarantee and Notarized Net Worth Statement
 - Corporate Guarantee
 - Equity Requirements: Financial information must meet ONHWP's urban or rural equity requirements
- Contract Between the Vendor and Builder, if applicable
- Security (\$20,000 per proposed unit) submitted 30 days prior to the taking of deposits or the execution of Agreements of Purchase and Sale

Enrolment Requirements

- The Condominium Enrolment Form and enrolment fees must be received 30 days prior to the commencement of construction. However, security must be posted prior to the taking of deposits or the execution of Agreements of Purchase and Sale. This typically takes place concurrently with vendor/builder registration.
- Deposit receipts will be issued with the Certificates of Completion and Possession for individual units and the common elements.
- Enrolment need not take place until 30 days prior to the commencement of construction.

NOTE: When calculating the enrolment fee, do not include GST in the estimated sale price. GST is, however, included in the total enrolment fee calculation. Please refer to Enrolment Fee Calculation Tables included in [Builder Bulletin 27](#) (Revised).

For more information regarding this Bulletin, please contact the [ONHWP office](#) in your area.

Issue Date: May 2, 1994



BUILDER BULLETIN 36 (Revised)

RATING CRITERIA FOR AFTER SALES SERVICE

Effective April 2, 2003 ONHWP is suspending the Builder Ratings program. There are no Builder Ratings (e.g., "Excellent") for 2003 and until further notice. Builder Bulletin 36 is suspended, except for the definitions section. We will continue to collect data related to chargeable conciliations (as defined in Bulletin 36) for internal purposes, to be used in determining builders' terms and conditions of registration (e.g., security requirements under Builder Bulletin 28).

Effective: January 01, 2000

This bulletin replaces Builder Bulletin (36 Revised) issued and effective September 03, 1996

BACKGROUND

Builder Bulletin 36 (Revised) sets out the rating criteria for after sales service. In 1999, the Ontario New Home Warranty Program (ONHWP) consulted with the home building industry and consumer groups concerning ways to improve the rating system.

Particular attention was given to devising a better way to recognize builders with a long-term history of Excellent ratings for after sales service. ONHWP supports these builders/vendors with advertising materials to help them promote their success. This continues to be an easy and popular way to help consumers choose a builder and to promote the purchase of a new home.

WHAT HAS CHANGED?

Beginning in 2000, ONHWP will no longer publish a printed version of the Home Buyer's Guide to After Sales Service. Rather, ratings will be available from our web site at www.newhome.on.ca and through a toll free telephone service.

Also beginning in 2000, ONHWP will recognize the builder/vendor's rating history by featuring their total consecutive years of Excellent ratings on the web site, on their Certificate of Excellence and through the toll free telephone service. This will replace the previous practice whereby builders who maintained an Excellent rating for five or ten years were recognized with a one-star or two-star Seal of Excellence respectively. In addition, the distinctive symbol for zero chargeable conciliations is being dropped. Consequently, the title of this bulletin has been changed to Rating Criteria for After Sales Service.

This is a capsule version of the bulletin's requirements for convenience only. Read the details on the following pages for full information to meet the bulletin's requirements.

RATING CRITERIA FOR AFTER SALES SERVICE

Ratings will continue to be based on the ratio of chargeable conciliations to possessions (see Definitions section). Delayed closing and occupancy claims and major structural defect claims were phased into the ratings beginning in 1997. Chargeable conciliations relate only to the possessions of the three-year rating period. For example, a chargeable conciliation which occurred during the 1996 to 1998 rating period but related to a possession in 1995, did not

affect a builder's rating in the 1999 Home Buyer's Guide to After Sales Service since it did not relate to a possession accumulated in the three-year rating period.

All active builders/vendors, i.e., those who have had at least one possession during the three-year rating period are rated. Registered builders/vendors with no possessions in the three-year rating period are given a **Rating Pending** notation if they had homes enrolled or Not Rated if they had no enrolments and no possessions.

Builders/Vendors Registered for Less than 36 Months

Active builders/vendors who have been registered for less than 36 months will be rated **New** unless their ratio of chargeable conciliations to possessions classifies them as **Below Average**.

Builders/Vendors will have a **Below Average** rating if they have:

- Fewer than 25 possessions and two or more chargeable conciliations or
- 25 or more possessions and more than one chargeable conciliation for every 25 possessions.

Here's how the rating system works:

Ratings For Builders/Vendors Registered Less Than 36 Months	
Number of Chargeable Conciliations	Number of Possessions 1 to 24
0 or 1	New
2 or more	Below Average
Number of Chargeable Conciliations	Number of Possessions 25 or More
0	New
No more than 1 Chargeable for every 25 possessions	New
More than 1 Chargeable for every 25 possessions	Below Average

For example, a builder/vendor who has been registered less than 36 months and has:

- 30 possessions and two chargeable conciliations will have a Below Average rating (more than one chargeable conciliation for every 25 or more possessions)
- 55 possessions and two chargeable conciliations will have a New rating (no more than one chargeable conciliation for every 25 or more possessions)
- 55 possessions and three chargeable conciliations will have a Below Average rating (more than one chargeable conciliation for every 25 or more possessions)

Builders/Vendors Registered for 36 Months or More

The rating for builders/vendors registered for 36 months or more is grouped according to the number of possessions accumulated during the three-year rating period.

Ratings for active builders/vendors are assigned according to the following levels of builder performance:

25 or More Possessions:

Excellent: no more than one chargeable conciliation for every 75 possessions

Above Average: no more than one chargeable conciliation for every 50-74 possessions

Good: no more than one chargeable conciliation for every 25-49 possessions

Below Average: more than one chargeable conciliation for every 25 possessions

Fewer Than 25 Possessions:

Low volume builders/vendors registered for 36 months or more and with between three and nine possessions can achieve a better than **Good** rating as follows:

Excellent: registered for at least five years with no chargeable conciliations over the past three years and a minimum of three possessions spread over at least two years out of the three-year rating period

Above Average: registered between three and five years with no chargeable conciliations over the past three years and a minimum of three possessions spread over at least two years out of the three-year rating period

Low volume builders/vendors with possessions in one year only of the three-year rating period will be rated **Good** unless the Economic Climate Provision (described on page 5) applies.

Builders/vendors registered for 36 months or more and with between 10 and 24 possessions can achieve an **Excellent** rating as follows:

Excellent: no chargeable conciliations

Builders/vendors registered for 36 months or more and with fewer than 25 possessions and two or more chargeable conciliations will be rated **Below Average**.

All other builders/vendors registered for 36 months or more and with fewer than 25 possessions and one chargeable conciliation will be rated **Good**.

Here's how the rating system works:

Builders/Vendors Registered for 36 Months or More	
Number of Chargeable Conciliations	Number of Possessions 3 to 9 (Low Volume) during the three-year rating period
0	Excellent (if registered at least 5 years and has at least three possessions spread over two years of the three-year rating period)
0	Above Average (if registered for 3 to 5 years and has at least three possessions spread over two years of the three-year rating period)

TARION BUILDERS BULLETINS & OTHER

0	Good (if registered at least 36 months and has had 3-9 possessions all in the same year)
0	Good (if only 1 or 2 possessions)
1	Good
2 or more	Below Average
Number of Chargeable Conciliations	Number of Possessions 10 to 24 (during the three-year rating period)
0	Excellent
1	Good
2 or more	Below Average
Number of Chargeable Conciliations	Number of Possessions 25 or more (during the three-year rating period)
0	Excellent
No more than 1:	
For every 75 possessions	Excellent
For every 50-74 possessions	Above Average
For every 25-49 possessions	Good
More than 1 for every 25 possessions	Below Average

For example, a builder/vendor who has been registered at least 36 months and has:

- 100 possessions and one chargeable conciliation will have an **Excellent** rating (no more than one chargeable conciliation for every 75 possessions)
- 55 possessions and one chargeable conciliation will have an **Above Average** rating (no more than one chargeable conciliation for every 50 possessions)
- 15 possessions and one chargeable conciliation will have a **Good** rating
- 7 possessions and two chargeable conciliations will have a **Below Average** rating
- 7 possessions and no chargeable conciliations over the past 3 years will have an **Excellent** rating if the builder/vendor has been registered at least 5 years and has at least three possessions spread over two years of the three-year rating period
- 7 possessions and no chargeable conciliations will have an **Above Average** rating if the builder/vendor has been registered for at least 36 months but less than 5 years (see

example above) and has at least three possessions spread over two years of the three-year rating period

- only 1 or 2 possessions and no chargeable conciliations, the builder/vendor will be rated as **Good** (unless qualifies for **Excellent** rating by the Economic Climate Provision as listed below)

Economic Climate Provision

Builders/vendors with either one or two possessions, or those with three to nine possessions – all in the same year of the three-year rating period, do not qualify for an **Excellent** rating.

However, builders/vendors can receive an **Excellent** rating if they have:

- an Excellent rating in the previous year and
- between one and nine possessions – all in the same year of the current three-year rating period and
- no chargeable conciliations during the current three-year rating period.

Recognition of Sustained Excellence

Beginning with the 2000 ratings for After Sales Service, builders/vendors will be informed about how many consecutive years of **Excellent** ratings they have had since the first Home Buyer's Guide to After Sales Service in 1988. The total number of consecutive years with an Excellent rating will be featured on each Certificate of **Excellence** and on the ONHWP web site at www.newhome.on.ca.

DEFINITIONS

- a. "Chargeable conciliation" means any conciliation where there are warrantable items identified by ONHWP staff and the vendor was not denied access and could have avoided the conciliation by attending to the homeowner's complaints.

All conciliations are deemed to be chargeable conciliations to the vendor unless there are no warrantable items identified by ONHWP staff during the conciliation process. Even if only one warrantable item is assessed, whether major or minor in nature, the conciliation will be chargeable to the vendor.

Exceptions:

- i. Where the homeowner identifies new complaint items for the first time during a conciliation inspection, these items will not be considered when determining if the conciliation is chargeable to the vendor.
 - ii. Where the vendor can demonstrate that the homeowner refused reasonable access to rectify the complaints prior to the conciliation, then the conciliation is not chargeable to the vendor.
 - iii. Where the vendor and the homeowner disagree about the method or timing of repair and seek ONHWP's intervention, and ONHWP supports the vendor's recommendation, then the conciliation is not chargeable to the vendor.
- a. "Conciliation" means a process where ONHWP attempts to resolve a dispute between a homeowner and a vendor; the conciliation process may consist of a site visit, a single or series of telephone meetings, a review of documentation, or combinations of these.
 - b. "Possession" means a home that was completed for occupancy and for which ONHWP has received a copy of the Certificate of Completion and Possession (CCP).

- c. "Warrantable items" means items that fall within the provisions of Section 13 of the *Ontario New Home Warranties Plan Act (the Act)* and Part VI of Regulation 892 under the Act.

FOR MORE INFORMATION

If you have any questions about the rating criteria for After Sales Service please contact the Corporate Affairs Department at (416) 229-9200 or toll free at 1-800-668-0124 or the ONHWP Office in your area.

BUILDER BULLETIN 37

WARRANTY COVERAGE ON LEASE TO OWN HOMES

Effective: September 15, 1996

Background

Vendors and purchasers of new homes have entered from time to time into lease to own agreements which satisfy the requirements of mortgage insurers and make home ownership available to more and more individuals. The Ontario New Home Warranty Program (ONHWP) has examined these agreements and determined that subject to certain provisions these homes qualify for warranty protection and must be enrolled.

Lease to Own Agreements

Where a lease to own agreement is determined to be a bona fide agreement of purchase and sale, the freehold home or condominium unit is subject to warranty coverage and must be enrolled at the time of construction by its vendor. To be a bona fide agreement of purchase and sale the lease to own agreement would include the following:

- state the total purchase price
- detail the terms of the lease portion of the agreement (e.g., the lease payment, the future value of the accrued down payment, and when the sale transaction closes and title transfers to the lessee)
- contain no provision for the lessee to opt out of the purchase of the unit
- contain no uncertain or ambiguous terms

The lessee is a person or persons who has entered into a lease to own agreement, has occupied the unit, but has not yet purchased or taken title to the unit.

Warranty coverage begins on the date of possession which is the date on which the home is completed for possession as specified in the Certificate of Completion and Possession (CCP). In the case of a lease to own agreement, it is the date that the unit is first occupied by the lessee.

Warranty issues will be dealt with in the same way as any home or unit obtained through a standard agreement of purchase and sale. Complaints to ONHWP will be referred to the builder/vendor as always. If the lessee and the builder/vendor cannot resolve the dispute ONHWP may conciliate. However, if the builder/vendor will not or cannot address any warranted complaints ONHWP will not satisfy the claim until the lessee becomes the owner.

Condominium common element warranty issues in a project where some units were obtained through lease to own agreements shall be handled as if all units were obtained through standard agreements of purchase and sale to promote a fair balance between unit owners and buyers and condominium corporations.

For More Information

If you have any questions regarding the enrolment and warranty coverage for lease to own homes please contact the [ONHWP Office](#) in your area.

Issue Date: September 3, 1996

BUILDER BULLETIN 38

LOW-RISE CONDOMINIUMS INSPECTION PROGRAM

Effective: January 01, 1995

Background

Effective January 1, 1995, the Ontario New Home Warranty Program (ONHWP) will be implementing the Low-Rise Condominium Inspection Program to provide on-site technical coaching and training at benchmark stages of construction to help new and problem builders make informed decisions on good construction practice.

Developed as an element of ONHWP's prevention strategy, the focus of the Low-Rise Condominium Inspection Program is not as much on the project as it is on the builder's performance over the long term. It enables ONHWP both to monitor and assess the technical competence of new builders joining ONHWP and to monitor and correct the construction practices of problem builders.

Builders planning to build low-rise condominium projects who, after evaluation by ONHWP, are assessed as "new" or "problem" builders must participate in the Low-Rise Condominium Inspection Program. In addition to the criteria listed below, any builder may be considered a problem builder at the discretion of the Registrar. Failure to comply with Low-Rise Condominium Inspection Program requirements will result in the Registrar issuing a Notice of Proposal to Refuse or Revoke Registration.

Note: Low-rise condominium means a project where all of the units and all of the common elements are designed and constructed under Part 9 of the Ontario Building Code (OBC).

The Low-Rise Condominium Inspection Program does not apply to high-rise condominium projects required to meet the provisions of [Builder Bulletin 19](#), nor freehold units, required to meet the provisions of [Builder Bulletin 31](#).

What's Involved

"New" Builder Requirements

Based on the information gained through the registration interview and technical test (see [Builder Bulletin 30, Revised](#)), ONHWP may decide that a Low-Rise Condominium Inspection Plan is one of the terms and conditions of registration for a builder new to or re-entering the low-rise condominium construction industry. If an inspection plan is required, the applicant will receive notification from the Registrar. Some new builders will be exempt because they have demonstrated a high level of business skill and construction knowledge in their interviews and technical tests. A Technical Representative will initiate the Inspection Plan and may conduct the inspections personally. ONHWP reserves the right to employ a qualified fee-for-service inspector to conduct the inspections under the supervision of the Technical Representative. Low-Rise Condominium Inspection Plan fees for the total number of inspections required for the entire condominium project are payable at the time of its enrolment.

"Problem" Builder Requirements

For problem builders, the Low-Rise Condominium Inspection Plan development process is more complex. The Technical Representative will thoroughly research and analyze the builder's file to pinpoint past performance issues. An appropriate inspection plan will be implemented or, in some cases, custom designed, depending on the builder's past performance. Participation in the Low-Rise Condominium Inspection Program becomes an amendment to the terms and conditions of registration. The inspection plan will begin on the next condominium project submitted to ONHWP for enrolment. The Regional Manager and Technical Representative will meet with the builder to outline the reasons for implementation and to review the inspection plan requirements. Inspections will be conducted by the Technical Representative.

In all instances, ONHWP will make every effort to respond within 24 hours to inspection or re-inspection requests. However, responsibility lies with builders to ensure that their staff are present on-site at the prearranged time.

Definition Of A New Builder

Applicants to ONHWP who meet any of the following conditions are defined as "new" builders:

- New applicants who have never registered with ONHWP.
- Applicants whose registration has been expired for three years or more.
- Previously-registered applicants who have unsettled claims outstanding.
- Applicants who have been previously refused or revoked by the Registrar but have satisfied ONHWP that their circumstances have changed materially.
- Applicants who are re-registering and changing their status from "Vendor Only" to "Vendor/Builder".
- Previously-registered applicants who have made a significant change in principals, including those responsible for construction or the day-to-day operations of the company.
- Applicants who are presently registered with ONHWP but have no experience in the low-rise condominium construction industry.

Definition Of Problem Builder

Builders whose track record with ONHWP demonstrates either of the following criteria during the previous 12 months are classified as problem builders:

- Any paid warranty claim. Regional Managers have discretionary power to waive the problem builder classification in certain situations, e.g., if a homeowner has refused entry to the builder, and, with the builder's agreement, ONHWP makes the repair and charges back to the builder.
- Unacceptable ratio of chargeable conciliations to possessions according to the builder rating system in the Home Buyer's Guide to After Sales Service. The current formula for the "below average" rating, i.e., a ratio of two or more chargeable conciliations in 25 possessions or fewer will also apply to builders who are not rated in the Home Buyer's Guide.

The Registrar may also target any builder as a problem builder if, for example, there is an unacceptable ratio of complaints to possessions or if a builder receives consistently unfavourable results in field inspections carried out by ONHWP staff.

Inspection Plans

Building on the experience of the Targeted Inspection Program for freehold homes, low-rise condominium inspections will focus on ONHWP's most costly and frequent claims.

Inspections can be held at the five key stages in the construction process: excavation, foundation, framing, prior to dry wall and completion. Depending on the builder's level of technical knowledge or track record with ONHWP, Regional staff will select one of the following four levels of inspection:

Level	Stages For Project
Minimum	<ul style="list-style-type: none"> • Foundation • Prior to drywall • Completion
Moderate	<ul style="list-style-type: none"> • Excavation • Foundation • Prior to drywall • Completion
Maximum	<ul style="list-style-type: none"> • Excavation • Foundation • Framing • Prior to drywall • Completion
Custom	<ul style="list-style-type: none"> • Designed to address specific concerns based on the builder's claims history.

Timing Of Inspections

The following guidelines have been established for the timing of the inspection at each benchmark stage in the construction process:

Stage	Timing
Excavation	After excavation is completed but prior to the erection of foundation walls.
Foundation	Prior to backfill, with dampproofing applied.
Framing	After roof framing is completed and sheathing installed but prior to insulation and/or vapour barrier being installed.
Prior to Drywall	Prior to drywall being applied but with insulation and air/vapour barrier installed.
Completion	When the home is ready for occupancy and exterior grading has been completed.

Note: Incomplete seasonal work may be exempt from the completion inspection.

Inspections

The single most important purpose of the Low-Rise Condominium Inspection Program is the teaching or coaching opportunity that the inspection provides. The Technical Representative will use the review to provide appropriate technical information for the builder to make an informed decision on good building practice. In other words, the inspector focuses on the "builder" not the "project" for the long-term improvement of the builder's performance.

Each inspection has its own checklist which is based on ONHWP's claims experience and includes the most common construction defects. By keeping track of recurring defects ONHWP will be able to revise the checklists and adjust the focus of the inspections accordingly.

Checklists will also include appropriate diagrams to help the Technical Representative explain good construction practice to the builder as well as reference the Ontario Building Code (OBC). Although warranty defects are not always specific OBC infractions, they may have their origins there. Copies of the checklists will be distributed to the builder's site representative and to the person managing the construction supervision.

When the builder's construction performance improves to an appropriate level, low-rise condominium inspections will be discontinued. If a problem builder fails to improve, the documentation gathered through the Low-Rise Condominium Inspection Program will be added to the case for revocation of registration.

Fee Structure

Builder Category	Inspection Plan		Inspection Fees / <u>Project</u> (plus GST)
New Builder	Minimum	at least 6 inspections (3 inspections X 2 units + common elements)	\$ 750.
	Moderate	at least 12 inspections (4 inspections X 3 units + common elements)	\$1,500.
	Maximum	at least 15 inspections (5 inspections X 3 units + common elements)	\$1,875.
Problem Builder	Minimum	at least 6 inspections (3 inspections X 2 units + common elements)	\$1,350.
	Moderate	at least 12 inspections (4 inspections X 3 units + common elements)	\$2,700.
	Maximum	at least 25 inspections (5 inspections X 5 units + common elements)	\$5,625.

***Note:** Low-rise Condominium Inspection Plan fees are comparable to total inspection fees by both category and plan required under the Targeted Inspection Program for freehold homes (see Builder Bulletin 31).

Low-Rise Condominium Inspection Plan fees for the total number of inspections required for a project are payable at the time of its enrolment, or, will be invoiced if the project is already enrolled but construction has not yet begun. GST must be added to the fees.

For more information regarding this Bulletin, please contact the [ONHWP office](#) in your area.

Addendum Date: April 20, 1995

(original October 3, 1994)

BUILDER BULLETIN 38

LOW-RISE CONDOMINIUMS INSPECTION PROGRAM

Effective: January 01, 1995

Background

Effective January 1, 1995, the Ontario New Home Warranty Program (ONHWP) will be implementing the Low-Rise Condominium Inspection Program to provide on-site technical coaching and training at benchmark stages of construction to help new and problem builders make informed decisions on good construction practice.

Developed as an element of ONHWP's prevention strategy, the focus of the Low-Rise Condominium Inspection Program is not as much on the project as it is on the builder's performance over the long term. It enables ONHWP both to monitor and assess the technical competence of new builders joining ONHWP and to monitor and correct the construction practices of problem builders.

Builders planning to build low-rise condominium projects who, after evaluation by ONHWP, are assessed as "new" or "problem" builders must participate in the Low-Rise Condominium Inspection Program. In addition to the criteria listed below, any builder may be considered a problem builder at the discretion of the Registrar. Failure to comply with Low-Rise Condominium Inspection Program requirements will result in the Registrar issuing a Notice of Proposal to Refuse or Revoke Registration.

Note: Low-rise condominium means a project where all of the units and all of the common elements are designed and constructed under Part 9 of the Ontario Building Code (OBC).

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For problem builders, the Low-Rise Condominium Inspection Plan development process is more complex. The Technical Representative will thoroughly research and analyze the builder's file to pinpoint past performance issues. An appropriate inspection plan will be implemented or, in some cases, custom

designed, depending on the builder's past performance. Participation in the Low-Rise Condominium Inspection Program becomes an amendment to the terms and conditions of registration. The inspection plan will begin on the next condominium project submitted to ONHWP for enrolment. The Regional Manager and Technical Representative will meet with the builder to outline the reasons for implementation and to review the inspection plan requirements. Inspections will be conducted by the Technical Representative.

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Building on the experience of the Targeted Inspection Program for freehold homes, low-rise condominium inspections will focus on ONHWP's most costly and frequent claims.

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Inspections

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Checklists will also include appropriate diagrams to help the Technical Representative explain good construction practice to the builder as well as reference the Ontario Building Code (OBC). Although warranty defects are not always specific OBC infractions, they may have their origins there. Copies of the checklists will be distributed to the builder's site representative and to the person managing the construction supervision.

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Fee Structure

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***Note:** Low-rise Condominium Inspection Plan fees are comparable to total inspection fees by both category and plan required under the Targeted Inspection Program for freehold homes (see Builder Bulletin 31).

Low-Rise Condominium Inspection Plan fees for the total number of inspections required for a project are payable at the time of its enrolment, or, will be invoiced if the project is already enrolled but construction has not yet begun. GST must be added to the fees.

For more information regarding this Bulletin, please contact the [ONHWP office](#) in your area.

Addendum Date: April 20, 1995 (original October 3, 1994)
Excavation Inspection Forms not included with online version

INCREASED DEPOSIT COVERAGE FOR FREEHOLD HOMES AND FINANCIAL LOSS COVERAGE FOR CONTRACT HOMES

WHAT THIS BULLETIN IS ABOUT

This bulletin introduces a change to the Ontario New Home Warranties Plan.

Until now, new home buyers have been protected for up to \$20,000 under the *Ontario New Home Warranties Plan Act* for the loss of a deposit on a freehold home or for financial loss on a contract home. That amount was set 26 years ago, when the *Act* came into effect. During that time, the consumer price index has tripled. In an effort to keep up with these rising costs, a buyer will now be able to receive up to \$40,000 in compensation from the Ontario New Home Warranty Program (ONHWP).

Note: Deposit coverage will remain at \$20,000 for condominium units. Condominium purchasers are already protected for deposits over \$20,000 by the trust and excess deposit insurance provisions of the *Condominium Act, 1998*.

WHEN DOES THE CHANGE COME INTO EFFECT?

Freehold Homes – affects buyers who enter into a purchase agreement on or after February 1, 2003.

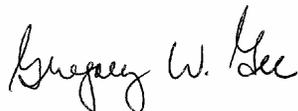
Contract Homes – affects buyers who enter into a construction contract on or after February 1, 2003.

ARE ANY OTHER ONHWP POLICIES IMPACTED?

Bulletin 28 *ONHWP Requirements for Receipt and Release of Security* specifies that some freehold builders must post security. It is being revised and re-issued to adjust freehold security requirements based on the increase in deposit coverage above.

FOR MORE INFORMATION

If you have any questions, please contact the ONHWP Regional Office in your area. See attached list for contact information.



Gregory W. Gee
President & CEO/Registrar

CONSTRUCTION PERFORMANCE GUIDELINES FOR THE ONTARIO HOME BUILDING INDUSTRY

This bulletin replaces Builder Bulletin 40, which introduced the first edition of the Construction Performance Guidelines (the “Guidelines”) on April 2, 2003. This revised Builder Bulletin 40 is being issued in conjunction with the publication of the second edition of the Guidelines.

WHAT THIS BULLETIN IS ABOUT

The Guidelines provide information on the requirements of the warranties described in the *Ontario New Home Warranties Plan Act* (the “statutory warranty”). The Guidelines are intended to be a communication tool in the form of a handy reference guide for builders and homeowners. The purpose of the Guidelines is not to set new standards, but to provide advance information as to how the Ontario New Home Warranty Program (the “Warranty Program”) will render decisions regarding disputes between builders and homeowners about work or materials.

The Guidelines were developed in consultation with various industry experts and following extensive research into the construction performance standards used by other North American new home warranty programs. The proposed Guidelines were then scrutinized by a sub-committee of Ontario Home Builders’ Association (“OHBA”) members, various technical experts, Warranty Program Board members and staff to ensure they were appropriate for Ontario.

A MORE OBJECTIVE WAY TO RESOLVE WARRANTY DISPUTES

When it comes to home construction, builders and homeowners approach matters from different perspectives, so they don’t always see eye to eye. In most cases, a builder and a homeowner can work together and resolve warranty problems in a friendly, professional way. When issues can’t be resolved, the Warranty Program, at the request of a homeowner or builder, will step in to settle the matter. (A homeowner can ask the Warranty Program to investigate a dispute which the Warranty Program may decide requires conciliation, or a builder may request a warranty review.)

The Guidelines have been published and made accessible to both builders and homeowners to provide a clear understanding of how Warranty Program representatives make decisions about warranty disputes. Until publication of the Guidelines, these decisions were based on their expertise and knowledge of industry standards including those in the Ontario Building Code (the “Code”).

HOW THE GUIDELINES CAN HELP BUILDERS AND HOMEOWNERS

The Guidelines can help a builder and a homeowner understand how the Warranty Program evaluates warranty disputes as well as assist in other ways.

The Guidelines can help builders:

- establish the construction standard that their trades must adhere to (builders can reference the Guidelines in their contracts with their trades);
- assess their own work, and that of their trades; and,
- answer queries from homeowners in a way that is seen to be objective.

The Guidelines can help homeowners:

- understand what is and is not covered under the statutory warranty in their new home; and,
- determine if items in their home have been installed and are working properly.

STANDARDS IN THE GUIDELINES

The Guidelines contain two types of standards for assessing components of the home:

1. Standards Based on Measurement

These apply to anything that can be measured. For example:

12.2

Condition: Floor is Uneven

Acceptable Performance/Condition

Applied finished flooring shall be installed without *visible* ridges or depressions. Where visible ridges or depressions occur, the variation from the *specified plane* shall not exceed +/- 6 mm.

Warranty

One Year – Work and Material

- Ridges and depressions caused by *normal* shrinkage of materials are excluded from the statutory warranty

Action

Visible ridges or depressions exceeding the acceptable condition shall be *repaired*.

Remarks

The *homeowner* must maintain finished flooring in accordance with manufacturer's recommendations and prevent the accumulation of water on flooring.

2. Standard Based on Construction Performance

These apply to items that cannot be measured. For example:

1.14

Condition: Foundation Wall Leaks

Acceptable Performance/Condition

Foundation walls shall allow no water penetration.

Warranty

Two Year – Basement Water Penetration

- Water leakage resulting from improper maintenance, exterior grade alterations made by the *homeowner*, an act of God or failure of municipal services or other utilities is excluded from the statutory warranty. Secondary damage to property or any personal injury resulting from the water penetration is also excluded from the statutory warranty.

Action

Water penetration through the basement or foundation shall be *repaired*.

Remarks

Only actual water penetration through the foundation is warranted; dampness caused by condensation or other causes is not considered to be water penetration and is not covered by the statutory warranty. The *homeowner* must take immediate steps to prevent damage to their property and report any losses to their *home* insurance provider.

HOW THE GUIDELINES ARE USED IN WARRANTY DISPUTES

When the Warranty Program becomes involved in a warranty dispute between the builder and the homeowner, the Guidelines will be consulted.

If the dispute relates to something that is found not to meet the standards laid out in the Guidelines, the Warranty Program will decide that remedial work needs to be done. In such case, the builder is responsible for making repairs.

If the dispute relates to something that is found to meet or exceed the standards laid out in the Guidelines, the Warranty Program will decide that no remedial work needs to be done. In such case, the builder is not responsible for making repairs.

On those occasions where a standard does not apply, the Warranty Program, using good industry practice will decide if something is covered under the statutory warranty.

The Guidelines contain standards that apply to most new homes in Ontario, but given the wide variety of homes that are built, it would be impossible for standards to apply to every type of home or every component of construction.

WHEN THE GUIDELINES WILL BE APPLIED

The Guidelines apply to conciliations (including warranty reviews) and claim inspections related to deficiencies in work and material conducted by the Warranty Program on or after April 2, 2003. The first edition of the Guidelines will apply to a conciliation or claim inspection conducted between April 2, 2003 and November 30, 2003 and the second edition will apply to a conciliation or claim inspection conducted on or after December 1, 2003 until the effective date of the next edition of the Guidelines.

THE GUIDELINES WILL CHANGE OVER TIME

The Guidelines will be reviewed periodically and expanded or updated to reflect legislative changes and/or changes in construction materials and technologies. Over the years, new editions of the Guidelines will be published. The Warranty Program will base its decisions on the most recent edition of the Guidelines in effect at the time that a conciliation (including a warranty review) or claim inspection is conducted.

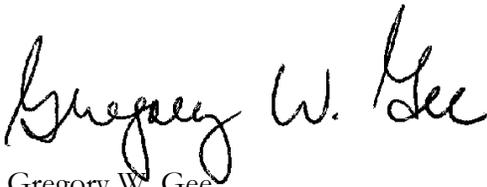
The effective date of each edition is set out on both the front cover and on the bottom of every page in the Guidelines. For example, the front cover of the first edition states that it is effective April 2, 2003, and the front cover of the second edition states that it is effective December 1, 2003.

MAKE SURE YOU HAVE THE CORRECT EDITION

The most recent edition of the Guidelines is available on the Warranty Program Web site at www.newhome.on.ca or by calling 1-800-668-0124.

FOR MORE INFORMATION

If you have any questions about the Guidelines, please contact the Warranty Program at 1-800-668-0124. A member of our staff will be happy to assist you.



Gregory W. Gee
Registrar

ONTARIO NEW HOME WARRANTY PROGRAM

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THE BUILDER ARBITRATION FORUM

WHAT THIS BULLETIN IS ABOUT

This Bulletin is about the Builder Arbitration Forum. A builder¹ who disagrees with what the Ontario New Home Warranty Program (“ONHWP”) has found “warrantable”² in a Conciliation Report³, or that a conciliation is “chargeable”⁴, can now dispute ONHWP’s findings at the Builder Arbitration Forum. The Forum is a fast, fair and affordable way to have ONHWP’s decision reviewed. An Arbitrator will conduct a hearing and, after listening to both sides, will reach a final and binding decision. This Bulletin explains the Arbitration process – how it works and how the builder can use it most effectively.

The Builder Arbitration Forum and this Bulletin come into effect on April 2, 2003, and apply to Conciliation Reports issued on or after that date.

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¹ “Builder” refers to a builder or vendor as defined in the *Ontario New Home Warranties Plan Act*.

² In a Conciliation Report, “warrantable” means an item is covered under warranty as specified in the *Ontario New Home Warranties Plan Act*.

³ A Conciliation Report is written after an ONHWP staff member has conducted a site visit or a desk assessment, or a combination of both. This Bulletin refers to Conciliation Reports but will also apply to Warranty Review Reports which will be introduced in a future Bulletin.

⁴ A conciliation is “chargeable” to the builder if an item in the Conciliation Report is warrantable and the builder had the ability and opportunity to resolve the dispute before it came to conciliation. (See Builder Bulletin 36.)

THE NEED FOR THE BUILDER ARBITRATION FORUM

Currently, a builder who disagrees with a Conciliation Report can ask ONHWP to have a Warranty Service Manager conduct an informal review. Until now, however, if the ONHWP manager confirmed the findings in the Conciliation Report, the builder's only other recourse was to refuse to do the work. ONHWP would then issue a Notice of Proposal ("NOP") to revoke the builder's Registration, which the builder could then appeal to the Licence Appeal Tribunal (the "LAT"). The LAT is an independent administrative tribunal established under the Ministry of Consumer and Business Services. Many builders find this process of challenging a Conciliation Report unsatisfactory because the builder risks having his or her Registration revoked if the LAT upholds the findings in the Conciliation Report.

For this reason, a sub-committee comprised of members of ONHWP and the Ontario Home Builders' Association ("OHBA") recommended the establishment of a Builder Arbitration Forum. **The Forum will enable a builder to dispute the decisions in a Conciliation Report without risking having his or her Registration revoked.** The Conciliation Report will be reviewed before an independent arbitrator in a manner that is quick and fair.

THE BUILDER ARBITRATION FORUM AND THE LICENCE APPEAL TRIBUNAL

The Builder Arbitration Forum is optional. A builder who disagrees with a Conciliation Report can – **but does not have to** – request an Arbitration hearing.

If the builder chooses *not* to arbitrate, the Conciliation Report will be considered accurate and final unless the homeowner requests a hearing before the LAT or the builder requests a hearing before the LAT after receiving a NOP. In those cases, the LAT will make the final decision about the Report's accuracy.

THE BUILDER ARBITRATION FORUM AND A NOTICE OF PROPOSAL

A builder who fails to meet his or her warranty obligations can be issued a NOP by ONHWP to revoke the builder's Registration. If a builder decides to challenge a Conciliation Report by using the Builder Arbitration Forum, a NOP **cannot** be issued for anything in that Report during the Arbitration process, as long as the builder remains a registrant in good standing⁵.

An NOP *can* be issued during the Arbitration process for an unrelated matter. Should that occur, the Arbitration will be suspended until the issue has been decided by the LAT⁶.

⁵ "Registrant in good standing" means the builder is in full compliance with: the *Ontario New Home Warranties Plan Act* and its Regulations; ONHWP Bulletins; and any agreement between ONHWP and the builder. The builder will be presumed to be a registrant in good standing unless the Registrar or Deputy Registrar issues a notice to the contrary.

⁶ No suspension will occur where the Arbitration hearing has taken place but the Arbitrator's written decision has not yet been delivered.

- **If the LAT upholds the NOP**, the builder *cannot* return to Arbitration.
- **If the LAT dismisses the NOP**, the builder can ask to resume Arbitration. To do so, the builder must deliver a written request to ONHWP within 10 days of the LAT's decision. Otherwise, the Arbitration will be considered abandoned.

An NOP *can* be issued at the conclusion of the Arbitration process if the Conciliation Report is upheld and the builder fails to comply with it.

ARBITRATION AND THE IMPACT ON THE HOMEOWNER

An arbitration under the Builder Arbitration Forum is between the builder and ONHWP. It will have no impact on the homeowner's rights for repairs or compensation. If items have been found warrantable in a Conciliation Report, the homeowner can still expect repairs or compensation, even if the builder decides to challenge the Report using the Builder Arbitration Forum. This can occur in one of two ways:

- **ONHWP can arrange for repairs or can compensate the homeowner.** The homeowner will not have to wait until the Arbitration is completed for this to happen.
- **The builder can make the repairs "under protest" and let the Arbitrator decide if the items are warrantable.**

If the builder decides to make the repairs "under protest" and to seek reimbursement through Arbitration, the builder must:

- Warrant that repairs have been done in a workmanlike manner and materials are free from defects for at least one year; and
- Provide proof of the cost of labour and materials and show that these costs are reasonable.

The only way Arbitration might possibly involve the homeowner is if the Arbitrator decides that a site visit is desirable in connection with an Arbitration hearing. If so, ONHWP will contact the homeowner to seek permission for the builder, ONHWP and the Arbitrator to visit the home.

The Arbitrator will decide if the items that were repaired and compensated – whether by ONHWP or by the builder "under protest" – were properly held to be warrantable in a Report. If the builder is successful in disputing the warrantability of items in a Report, ONHWP will reimburse the builder for the costs of such repairs.

THE CRITERIA FOR USING THE BUILDER ARBITRATION FORUM

The Builder Arbitration Forum is available to any builder who:

- has participated in the conciliation that the builder wants the Arbitration Forum to review;
- has notified ONHWP in writing of any issue that the builder believes negates the conciliation from being “chargeable”, for example if the builder was denied access to the home to make repairs;
- is not the subject of a pending NOP for an unrelated matter; and
- is a registrant in good standing⁷ throughout the Arbitration process.

THE ARBITRATION PACKAGE

If a builder opts for Arbitration, he or she will need an Arbitration Package. The package contains the forms and documents that a builder will use for the Arbitration Forum process. It includes:

- **A Notice of Arbitration form.** This form notifies ONHWP that the builder intends to challenge a Conciliation Report. The builder must complete the form in writing and submit it to ONHWP within 28 days of the Report’s release. The builder must pay a non-refundable fee of \$750 to help defray the administration costs of the Arbitration Forum.
- **An Arbitration Agreement.** This is the agreement that the builder must sign for the Arbitration hearing to take place. By signing it, the builder agrees to pay a deposit for the estimated costs of the Arbitrator; follow the Procedural Rules for the Arbitration Forum; comply with the Arbitrator’s decision; and, if unsuccessful, pay the balance of the Arbitrator’s costs immediately after the Arbitration hearing. This agreement is submitted along with the Notice of Arbitration.
- **An updated Roster of Arbitrators.** This is a list of the Arbitrators’ names and addresses. (See the next two sections of this Bulletin.)
- **The Builder Arbitration Forum Rules: including the Procedural Rules, the Roster Rules, the Code of Conduct and the Arbitrators’ Fee and Disbursement Tariff.** This document explains the rules for the Arbitration hearing; the rules for establishing and maintaining the Roster of Arbitrators; the Code of Conduct that the Arbitrators must follow; and the fees and disbursements that an Arbitrator may charge.

The Arbitration Package will be available April 2, 2003 from ONHWP Regional Offices or online at www.newhome.on.ca. **In case of a conflict between this Bulletin and the Builder Arbitration Forum Rules, the Builder Arbitration Forum Rules will prevail.**

THE ROSTER OF ARBITRATORS

ONHWP, with the assistance of the OHBA, is responsible to appoint a roster of independent Arbitrators for the Builder Arbitration Forum. An individual who wants to be included on the Roster of Arbitrators must apply for the position. To be selected, the candidate must have some minimum qualifications and, preferably, exceed this minimum. At the very least the candidate must:

⁷ See “Registrant in good standing” definition at footnote 5 at Page 3.

- know and understand the *Ontario New Home Warranties Plan Act*;
- have arbitration training and experience;
- be involved in the new home construction industry; and
- provide the appropriate references.

SELECTING AN ARBITRATOR FOR A BUILDER ARBITRATION HEARING

A builder who opts for Arbitration will be able to select three names from the Roster of Arbitrators. The Builder must inform these individuals in writing that they have been chosen. They, in turn, must confirm to the builder in writing that they are available to be an Arbitrator within the time periods applicable to the Arbitration hearing and that there is no conflict of interest that would disqualify them. If someone is not available or has a conflict of interest, the builder must contact another person on the Roster.

Once the builder has written confirmation from three individuals on the Roster, the information must be submitted along with the Notice of Arbitration to ONHWP. Then ONHWP will select one of those individuals to be the Arbitrator for the Arbitration hearing.

THE ARBITRATION PROCESS

The Arbitration process is set in motion when ONHWP releases a Conciliation Report. If a builder decides to challenge the Report, he or she can expect the entire process to be completed in 84 days from the date the Report is issued. In unusual cases, where the issues are particularly complicated, additional time may be required.

The following table shows the sequence of events in the Arbitration Process - what happens and when it will happen:

TIME PERIOD	ACTION TAKEN BY ONHWP	ACTION TAKEN BY THE BUILDER
ONHWP issues a Conciliation Report setting out the items found warrantable and if the conciliation is chargeable to the builder. ONHWP notifies the builder of the right to challenge the Report using the Builder Arbitration Forum.		
Within 28 days of the release of the Conciliation Report		The builder decides to challenge the Conciliation Report. The builder delivers to ONHWP in writing a Notice of Arbitration containing: <ul style="list-style-type: none"> • the builder's address, phone number and fax number; • a copy of the Conciliation Report that the builder wants to arbitrate; • the reason(s) the Report is being challenged; • a signed copy of the Arbitration Agreement;

TIME PERIOD	ACTION TAKEN BY ONHWP	ACTION TAKEN BY THE BUILDER
		<ul style="list-style-type: none"> • the names of three people on the Arbitrator Roster and their written confirmation that they are available for the Arbitration hearing and have no conflict of interest that would disqualify them; and • a certified cheque or money order for \$750 payable to ONHWP as a non-refundable administration fee.
<p>Within 7 days of receiving the Notice of Arbitration</p>	<p>ONHWP delivers a Notice of Response to the builder containing:</p> <ul style="list-style-type: none"> • the name of the person ONHWP has selected to be the Arbitrator; and • the amount the builder must pay as a deposit for the Arbitrator’s fees and disbursements, based on the standard fee for a one day hearing.⁸ 	
<p>Within 14 days of receiving the Notice of Response</p>		<p>The builder delivers to ONHWP:</p> <ul style="list-style-type: none"> • a certified cheque or money order payable to “in trust to ONHWP” as the deposit for the Arbitrator’s fees and disbursements as specified in the Notice of Response; and • a copy of the builder’s Case Material. The Case Material should include: a table of contents; a written statement of the issues and the builder’s position; written statements from any witnesses; exhibits; and any expert reports. If applicable, it should also contain written proof of the costs of repairs done “under protest”. <p>The builder delivers to the Arbitrator a</p>

⁸ If, after reading the Case Material, the Arbitrator decides that the case is too complicated to be resolved in one day, the Arbitrator will estimate the number of additional days required. The builder’s deposit “in trust to ONHWP” will be increased to cover the additional days, again based on the standard fee.

TIME PERIOD	ACTION TAKEN BY ONHWP	ACTION TAKEN BY THE BUILDER
		copy of the builder's Case Material .
Within 14 days of receiving the builder's Case Material	ONHWP delivers a copy of ONHWP's Case Material to the builder and a copy of ONHWP's Case Material and the builder's Case Material to the Arbitrator.	
ACTION TAKEN BY ARBITRATOR		
Within 14 days of receiving ONHWP's Case Material	The Arbitrator conducts the hearing.	
Within 7 days of the Hearing	The Arbitrator issues and delivers a written decision that is <u>final</u> and <u>binding</u> on ONHWP and the builder.	

THE COSTS OF ARBITRATION AND WHO PAYS FOR THEM

There are three costs associated with an arbitration under the Builder Arbitration Forum.

- 1. The Administration Fee:** The builder always pays this non-refundable fee of \$750 to help pay for the administrative costs of the Arbitration Forum.
- 2. The costs of preparing for and attending the Arbitration Forum:** ONHWP and the builder are each responsible for their own costs, including legal fees, witness fees and transportation.
- 3. The Arbitrator's Fees and Disbursements:** The Arbitrator's costs are based on the Arbitrators' Fee and Disbursement Tariff which will be posted online at www.newhome.on.ca and included in the Arbitration Package. The basic rule is that the losing party pays the Arbitrator's costs. If success is divided then the costs will be divided. Examples of how costs will be allocated are shown in the following table:

SITUATION	WHO PAYS?
The Arbitrator decides that the builder's case is completely valid.	ONHWP will pay the Arbitrator's costs and will return to the builder the deposit paid "in trust to ONHWP".
The Arbitrator decides that ONHWP's case is completely valid.	The builder's deposit paid "in trust to ONHWP" is used to pay the Arbitrator's costs. <ul style="list-style-type: none"> • If the deposit is <i>less</i> than the amount required, the builder will have to pay the

SITUATION	WHO PAYS?
	<p>difference immediately.</p> <ul style="list-style-type: none"> If the deposit is <i>more</i> than the amount required, ONHWP will refund the balance to the builder without interest or penalty.
<p>The Arbitrator decides that each side has some validity.</p>	<p>The Arbitrator decides how the costs should be divided. The builder's amount will be deducted from the deposit paid "in trust to ONHWP".</p> <ul style="list-style-type: none"> If the deposit is <i>less</i> than the amount required, the builder will have to pay the difference immediately. If the deposit is <i>more</i> than the amount required, ONHWP will refund the balance to the builder without interest or penalty.
<p>ONHWP and the builder agree to settle before an Arbitration hearing takes place.</p>	<p>The Arbitrator's costs, if any, are split between the builder and ONHWP unless the terms of the settlement call for something different.</p>
<p>The builder terminates or abandons the Arbitration process.</p>	<p>The builder's deposit paid "in trust to ONHWP" is used to pay the Arbitrator's costs, if any.</p> <ul style="list-style-type: none"> If the deposit is <i>less</i> than the amount required, the builder will have to pay the difference immediately. If the deposit is <i>more</i> than the amount required, ONHWP will refund the balance to the builder without interest or penalty.
<p>The builder is issued a Notice of Proposal (NOP) for an unrelated matter during the Arbitration process.</p>	<p>The builder's deposit paid "in trust to ONHWP" is used to pay the Arbitrator's costs, if any.</p> <ul style="list-style-type: none"> If the deposit is <i>less</i> than the amount required, the builder will have to pay the difference immediately. If the deposit is <i>more</i> than the amount required, ONHWP will refund the balance to the builder without interest or penalty once any appeal to the LAT of the NOP is completed and the

SITUATION	WHO PAYS?
	Arbitration is either completed or abandoned.

PREPARING FOR AN ARBITRATION FORUM HEARING

An Arbitration hearing is less formal than a court hearing. Nonetheless, it is a good idea for the builder to be well-prepared beforehand. The builder (or the proprietor or an officer, director or employee of the builder) will have to present his or her own case at the Arbitration hearing. The builder should present his or her case in a clear and well-organized manner. To prepare for an Arbitration hearing, the builder can do the following:

- **Read and become familiar with the Builder Arbitration Forum Rules.** This will give you a good grounding in the Arbitration process and an understanding of what actually happens during an Arbitration hearing.
- **Consult a lawyer.** You do not have to consult one, but a lawyer can help you prepare your Case Material and may provide a better understanding of the issues and laws involved. The lawyer will not be allowed to participate in the Arbitration hearing without special permission from the Arbitrator but may, if desired, attend as an observer.
- **Consult previous Builder Arbitration Forum decisions.** Arbitration decisions (minus the names of builders and homeowners to protect their privacy) will be posted online at www.newhome.on.ca. You can consult these decisions to see if any pertain to your case. Initially there may be few, if any, decisions to consult, but as more Arbitration hearings take place and the results are posted online, there will be a greater chance of finding a case similar to yours. Finding a previous decision for a similar case may be very important because, even though the decision does not set a binding legal precedent, the Arbitrator may find it persuasive in determining the outcome of your case.
- **Know your own case.** If you have a clear grasp of the details of your case you will probably be able to present it more effectively.
- **Know ONHWP's case.** You will receive a copy of ONHWP's Case Material within 14 days of issuing your own Case Material. If you are familiar with ONHWP's material, you can be better prepared to rebut it during the Arbitration hearing.

THE ARBITRATION FORUM AND THE ISSUES TO BE DECIDED

The Arbitration Forum hearing is held in private, and is open only to the builder (or the officer, director, employee or proprietor representing the builder); the ONHWP staff member presenting ONHWP's case; lawyers for the builder and ONHWP, attending as observers; and any expert witnesses the Arbitrator has decided should give evidence.

The hearing will generally be conducted in person, in the city in which the responsible ONHWP Regional Office is located.

During the hearing, each side will present its case and may call upon experts to present evidence in support of their case.

If the hearing is proving more complicated than expected, the Arbitrator can decide to extend it. Should that occur, the Arbitrator's fees and disbursements will be increased, based on the general standard one day fee, to cover the cost of the additional days.

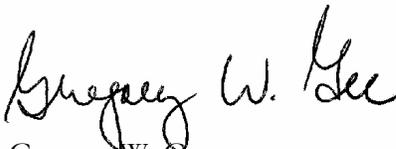
After listening to both sides and any experts, the arbitrator will determine:

- whether the conciliation is chargeable to the builder;
- whether any compensation or repair costs ONHWP has paid to the homeowner are reasonable;
- whether the builder should be reimbursed for repairs done "under protest" and, if so, in what amount;
- the amount the builder must pay for item(s) the Arbitrator has found to be warrantable; and
- who should pay for the Arbitrator's costs and in what amount.

The Arbitrator's decision is final and binding. It cannot be appealed to any court or tribunal, and may only be open to judicial review under very limited circumstances as set out in the Arbitration Act, 1991.

FOR MORE INFORMATION

For more information on this bulletin or for an Arbitration Package, please visit our web site at www.newhome.on.ca, or contact the ONHWP Corporate Office. A list of the ONHWP Corporate Office and Regional Offices is included at the back of this Bulletin.


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CUSTOMER SERVICE STANDARD

This Bulletin replaces Bulletin 42 (Revised) issued on March 15, 2004.

BACKGROUND

On March 15, 2004, Tarion Warranty Corporation (“Tarion”) introduced Bulletin 42 (Revised) which revised the minimum after-sales warranty service standard (the *Customer Service Standard*) for builders. Bulletin 42 (Revised) provided vendors and builders (collectively, “builders”) of new freehold homes (including contract homes) and condominium units (collectively, “homes”), with details of the *Customer Service Standard*.

The *Customer Service Standard* applies to claims relating to homes but does not apply to claims made in respect of the common elements of a condominium project.

Tarion engages in ongoing review of the *Customer Service Standard* to improve it over time.

WHAT THIS BULLETIN IS ABOUT

This Bulletin restates the *Customer Service Standard* and incorporates certain changes based on the ongoing review of its application by Tarion.

The following parts make up the *Customer Service Standard*:

- Part A: *The Homeowner Information Package*: A document published by Tarion that provides purchasers with an outline of the responsibilities of the homeowner, Tarion and the builder;
- Part B: *The Pre-Delivery Inspection (PDI)*: A mandatory home inspection that builders are required to conduct with purchasers on or before the date of possession;
- Part C: *The Statutory Warranty Claims Process*: The process governing how homeowners must submit Statutory Warranty Forms for warranty claims; timelines within which builders must respond to and resolve claims; and the role of Tarion in the process; and
- Part D: *Warranty Review*: A builder-requested conciliation.

The *Customer Service Standard* was developed following consultation with builders, the Ontario Home Builders’ Association (OHBA), consumers and government. It sets out the minimum standards required by Tarion. Builders are encouraged to exceed these standards.

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DEFINITIONS

In this Bulletin, the following terms have the meanings described below:

Act

The Act is the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31 and Regulations, as amended.

Conciliation

A conciliation is a process in which Tarion assesses whether a disputed item is warranted (i.e. covered by statutory warranty) and/or whether Tarion supports the way a repair was done. Where possible, Tarion will base its conciliation decisions on the *Construction Performance Guidelines*. A conciliation may include an inspection at the home (if items that require repair are involved) or a desk assessment (if items can be assessed based on a paper record, e.g., delayed closing/occupancy compensation claim) and may also include a review of the purchase agreement, the completed PDI Form and other relevant documentation. A Warranty Review is also a type of conciliation. A Warranty Assessment Report is issued by Tarion following a conciliation. The builder is expected to fully comply with any direction that has been provided by Tarion in the Warranty Assessment Report.

PLEASE NOTE

Only items identified in a properly submitted Statutory Warranty Form will be reviewed during the related conciliation. Items raised for the first time by a homeowner during a conciliation will not be addressed at that conciliation. Homeowners will be directed to add these new items to their next Statutory Warranty Form as appropriate.

Chargeable Conciliation

A chargeable conciliation means a conciliation in which:

- there are items identified as warranted by Tarion in a Warranty Assessment Report;
- the builder was not denied reasonable access by the homeowner to rectify the problem (see “Reasonable Access For Repair” on p. 11 of this Bulletin); and
- the builder could have avoided the conciliation by attending to the items raised in the homeowner’s Statutory Warranty Form.

Even if only one item is confirmed through the conciliation process by Tarion to be warranted, whether major or minor in nature, the conciliation will be considered chargeable to the builder.

A conciliation may be deemed “not chargeable”, if one or more of the following exceptions apply to every item determined to be warranted in the Warranty Assessment Report:

1. The builder can demonstrate that the homeowner denied reasonable access to repair or resolve the warranted item before the conciliation; or
2. A conciliation is conducted by Tarion because the builder and the homeowner disagree about the method or timing of the repair to an item that the builder has previously agreed is warranted, and Tarion supports the builder’s recommendation; or
3. The builder can show (a) that it has a history of satisfactory after-sales service to homeowners; and (b) by way of a written acknowledgement from the homeowner, that the homeowner had previously confirmed they were satisfied with the state of the item based on the builder’s repair or that the dispute relating to the item was otherwise resolved by the builder. As a result, the builder was completely satisfied that the item had been resolved and took no further action in respect of the item prior to the conciliation.

In addition to the above exceptions, Tarion maintains sole discretion to consider changing a finding of chargeability where the finding relates to an “Extraordinary Situation” as described in Appendix A to this Bulletin.

Deliver

For the purpose of this Bulletin, deliver includes delivery by hand, courier, facsimile transmission, regular mail or registered mail. In the case of regular mail, delivery is effective on the date of receipt. In the case of registered mail, delivery is effective five business days after the day of mailing or on the date of receipt, if earlier. Delivery by facsimile transmission is effective on the day sent regardless of whether or not the day is a business day. Delivery by hand or courier to Tarion is effective on the business day received, if received during Tarion’s office hours. Builders should check the Tarion website for our regular office hours and for office hours during holidays.

PROOF OF DELIVERY

If there is a dispute concerning delivery, the onus is on the builder to establish when delivery occurred. To avoid confusion, builders are encouraged to use methods of delivery (such as registered mail or courier) which will ensure that the builder will have proof of delivery.

Purchase Agreement

An agreement between a vendor and any person providing for the purchase by such person of a home and, for the purpose of this Bulletin, includes a construction contract for the construction of a new home.

Purchaser

Purchaser means a person (or persons) who enters into a purchase agreement and includes an assignee of the purchaser’s interest in a purchase agreement.

Regulations

The Regulations under the Act are R.S.O. 1990, Regulations 892, 893 and 894, as amended.

Statutory Warranty Claim

A Statutory Warranty Claim is a claim made by a homeowner to Tarion concerning a breach of any builder warranty prescribed by the Act and Regulations.

Statutory Warranty Form

A Statutory Warranty Form is the form required by Tarion to be completed and submitted to Tarion in order for a homeowner to make a valid claim for a breach of a statutory warranty, or in the case of an emergency situation, a claim for reimbursement. Tarion reserves the right to determine whether a homeowner complies substantially with the requirements of a Statutory Warranty Form. The Tarion Statutory Warranty Forms (either included in the *Homeowner Information Package*, or available upon request) include:

- 30-Day Form;
- Year-End Form;
- Second-Year Form;
- MSD Form;
- Emergency Form;
- Air Conditioning Form;
- Delayed Closing Form (for freehold homes); and
- Delayed Occupancy Form (for condominium units).

Submit

Submission, submit and submitted, when used in relation to a Statutory Warranty Form, mean to submit in accordance with the Regulations.

Warranty Assessment Report

A Warranty Assessment Report is a written report issued by Tarion, detailing whether any items listed in a Statutory Warranty Form are warranted and/or whether Tarion supports the way any disputed repair was done or the method or timing of the repair. A Warranty Assessment Report may indicate that further investigation is needed.

PART A. THE HOMEOWNER INFORMATION PACKAGE

The *Homeowner Information Package* is a document developed by Tarion that builders are required to give to purchasers of new homes. It provides information about the warranty rights of new home purchasers under the Act. The *Homeowner Information Package* contains:

- Information about what is covered by warranty, what is excluded from coverage and how to use the Statutory Warranty Forms;
- Information about the Statutory Warranty Claims Process (Part C of this Bulletin), including the responsibilities of the builder, the homeowner and Tarion;
- A form for the Appointment of Designate for Pre-Delivery Inspection (“PDI”) that builders may request purchasers use when they intend to send a designate, in their place, to the PDI. If the purchaser is attending the PDI with their designate and is intending to sign the documents, then no Appointment of Designate Form is required;
- The 30-Day Form, Year-End Form and Second-Year Form; and
- A Confirmation of Receipt of the *Homeowner Information Package* form.

Builder Responsibilities

Builders are required to:

1. Include a provision in every purchase agreement, stating that a *Homeowner Information Package* is available from Tarion and that the builder will deliver one to the purchaser at or before the PDI;
2. Add to the *Homeowner Information Package* their contact information for customer service and emergency situations (e.g., in the form of a covering letter or on a business card inserted in the appropriate place inside the booklet);
3. Deliver to each home purchaser the complete and current edition of the *Homeowner Information Package* no later than the PDI but preferably well before that date, such as at the time of colour selection, in order to provide the information to the purchaser in a timely manner;
4. Complete the Builder portion of the Confirmation of Receipt of the *Homeowner Information Package* (including the enrolment number). Ask the homeowner(s) or their designate to complete and sign their portion, and return the Confirmation of Receipt of the *Homeowner Information Package* as soon as the *Homeowner Information Package* is delivered to them. If the *Homeowner Information Package* is delivered at the PDI, the builder may instead check off the Confirmation of Receipt of the *Homeowner Information Package* box on the Certificate of Completion and Possession (“CCP”) and ask the purchaser to sign that form; and
5. Deliver the Confirmation of Receipt of the *Homeowner Information Package* to Tarion as soon as it is completed.
6. Deliver the completed CCP to Tarion after the PDI and no later than 15 days after the date of possession.

Tarion will ensure that a *Homeowner Information Package* for each home enrolled is available for distribution by the builder to the homeowner. Additional copies are available from Tarion at a fee and can be ordered on Tarion’s website at www.tarion.com or by calling Tarion at 1-877-982-7466.

PART B: THE PRE-DELIVERY INSPECTION (PDI)

On or before the date of possession, the builder is required to conduct a PDI of the home with (at the purchaser’s option): (i) the purchaser; or (ii) the purchaser’s designate; or (iii) both the purchaser and his/her designate, and to complete the CCP (and Warranty Certificate) and the PDI Form with the purchaser, or with the purchaser’s designate if the purchaser is not attending the PDI.

The PDI Form is designed to capture deficiencies in the home at the time of possession, including items inside and outside the home that are incomplete, damaged, missing, or not operational, or items that cannot be assessed because they are obscured from view or are inaccessible. Builders may use their own PDI form, instead of Tarion’s standard PDI Form, provided that it contains, at minimum, all of the information that is contained in Tarion’s standard PDI Form.

The PDI itself should be as thorough as reasonably possible. The builder should take this opportunity to explain how the home and its systems work, which may prevent some customer service calls in the future.

PDI AND DESIGNATE

Who may be a “designate”?

The purchaser may put forward any person as a designate. The designate may be another member of the family or a friend, or may be, for example, a home inspector or engineer. The designate is there either to be a proxy for the homeowner or to provide the homeowner with advice or both.

What should I do if a purchaser and/or their designate does not attend the PDI?

Tarion’s expectation is that every builder will use their best efforts to arrange with each purchaser a mutually convenient time to conduct the PDI with the purchaser and/or the purchaser’s designate.

The builder's best efforts should include:

- Contacting the purchaser well in advance to set up a mutually convenient time to conduct the PDI;
- Providing the purchaser with a few reasonable choices of date and time for the PDI; and
- Explaining to the purchaser that he/she can send a designate instead of attending the PDI personally or bring a designate with him/her.

If, despite these efforts, the purchaser does not attend the PDI or send a designate in his/her place, the builder should conduct the PDI on their own. The PDI Form and the CCP should be completed as usual except that the builder should note on them “Purchaser did not attend”, and the builder should forward the *Homeowner Information Package* to the purchaser by registered mail if it has not yet been provided.

Copies of the completed PDI Form and the completed CCP should be sent to Tarion as usual and should be provided to the purchaser.

Builders may wish to include in their purchase agreements a specific provision about how the PDI date will be arranged. Builders should seek their own legal advice about the provisions in their purchase agreements.

Builder Responsibilities

Builders are required to:

1. Include a provision in every purchase agreement, whereby the parties agree that the builder and either one or both of the purchaser and the purchaser’s designate (at the purchaser’s option) will meet at the home on or before the date of possession to conduct the PDI;
2. Make an appointment with the purchaser well in advance to conduct the PDI at a time that is mutually convenient. Purchasers may attend in person, send a designate to conduct the PDI on their behalf or attend with their designate;

3. Complete the standard PDI Form provided by Tarion or the builder's own PDI form if appropriate;
4. During the PDI, go through the PDI Form with the purchaser, or with the purchaser's designate, and ensure that any deficiencies, unauthorized substitutions, or any items that cannot be inspected because they are obscured from view or inaccessible, incomplete or missing are noted on the PDI Form;
5. Confirm the date of possession with the purchaser or with the purchaser's designate, and fill in the date of possession on the CCP and the PDI Form. The date of possession is the date when the builder transfers the control and right to occupy the home to the purchaser. (This is not the date of the PDI, unless the purchaser will be assuming possession and/or occupancy on the same day that the PDI is conducted.);
6. Confirm the enrolment number on the CCP. Complete and sign the CCP and the PDI Form with the purchaser or the purchaser's designate, and give him/her the purchaser's copy of the completed CCP and PDI Form. If the purchaser is not attending the PDI with the designate, and the designate is signing documents on the purchaser's behalf, the builder should ask the purchaser to provide a written document confirming that the designate is appointed as designate. For this purpose, Tarion has designed a standard form called "Appointment of Designate", which is included in the *Homeowner Information Package*. The purchase agreement should specify which form of written authorization is satisfactory when appointing a designate; and
7. Deliver copies of the completed CCP, PDI Form and/or the Confirmation of Receipt of the *Homeowner Information Package* to Tarion no later than 15 days from the date of possession.

If a builder fails to deliver completed CCPs, PDI Forms and/or Confirmation of Receipt of the *Homeowner Information Package* forms to Tarion in time, this will be considered in Tarion's risk assessment of the builder, conducted as part of the builder's annual renewal of registration. Also, if the builder has not delivered a completed CCP, Tarion will not know the date of possession of that home. In such circumstances Tarion will use the date of possession provided by the homeowner when applying the customer service standard rules, unless there is clear evidence to contradict the homeowner's date.

HOW TO GET COPIES

Tarion will provide the builder with a CCP for each home enrolled. Copies of the standard PDI Form are available on request. For reference, an electronic version of the standard PDI Form is available on www.tarion.com

PART C: THE STATUTORY WARRANTY CLAIMS PROCESS

The Statutory Warranty Claims Process (the Claims Process) involves specific steps - steps homeowners must take to submit Statutory Warranty Forms; repair periods for builders to complete warranty repairs; and steps Tarion will take to become involved if necessary. Tarion becomes involved in claims only at the times described. However, homeowners may contact their builders at any time. Tarion is also available on an informal basis to provide information to the builder and to homeowners at any time.

The time periods in the Claims Process are generally fixed in Regulation 892 of the Act, and they may be adjusted in the following two sets of circumstances. In recognition of difficulties which builders

may face in scheduling appointments with homeowners and/or performing work in the holiday period between December 24th and January 1st (inclusive) every year, any time period fixed in the Claims Process will be extended if any portion of the time period occurs during this holiday period. Time periods which would span, or would start or end during this holiday period will be extended by nine days and all related subsequent time periods will be adjusted so that they remain consecutive. An example of this is shown on page 13.

In addition, where a time period ends on a weekend or holiday, the time period is extended to end on the next business day which is not a holiday (i.e., where the time period to submit a 30 Day-Form ends on a Sunday, the time period will be extended to end on the next Monday where Monday is not a holiday). An example of this is also shown on page 13.

EXCEPTIONS TO THE CLAIMS PROCESS

Exceptions are certain situations where the Claims Process is modified to take into account special circumstances (i.e., Emergencies, Seasonal Items, Special Seasonal Items, Air Conditioning between May 15 and September 15, and Extraordinary Situations) that apply either to individual builders or are industry-wide. See Appendix A for a detailed explanation of the Exceptions to the Claims Process.

Note that Tarion may in its sole discretion, extend or shorten any times set out in the Claims Process (including those described in Appendix A) if it determines that a builder is unable or unwilling to repair or resolve the claim items covered by a warranty.

The Claims Process differs slightly depending on whether the date of possession of the home is before or after September 1, 2005.

STEP 1: Homeowner Statutory Warranty Claim

The homeowner is entitled to make a Statutory Warranty Claim with respect to a statutory warranty by submitting the applicable Statutory Warranty Form to Tarion at certain times.

First Year Process for homes with a date of possession on or after October 1, 2003 and before September 1, 2005

There are two opportunities for homeowners to submit Statutory Warranty Forms to Tarion in the first year of possession:

- (a) Within the first 30 days after the date of possession: Once within the first 30 days after the date of possession, the homeowner is entitled to submit a 30-Day Form listing any items that are believed to be covered by a statutory warranty. The homeowner may submit only one 30-Day Form.
- (b) Within the 30 days before the first year anniversary of the date of possession: Any time within the 30 days before the first anniversary of the date of possession, the homeowner is entitled to submit a Year-End Form, listing any items that are believed to be covered by a statutory warranty. If the homeowner submits more than one Year-End Form to Tarion before the end of the first year of possession, the items listed on the last Year-End Form submitted will *replace* the items on all Year-End Forms that were submitted earlier.

First Year Process for homes with a date of possession on or after September 1, 2005

There are two opportunities for homeowners to submit Statutory Warranty Forms to Tarion in the first year of possession:

- (a) Within the first 30 days after the date of possession: Once within the first 30 days after the date of possession, the homeowner is entitled to submit a 30-Day Form listing any items that are believed to be covered by a statutory warranty. The homeowner may submit only one 30-Day Form.
- (b) Within the 30 days before the first year anniversary of the date of possession: Once within the 30 days before the first anniversary of the date of possession, the homeowner is entitled to submit a Year-End Form, listing any items that are believed to be covered by a statutory warranty. The homeowner may submit only one Year-End Form.

Regardless of the date of possession, the homeowner is required to use either the 30-Day or Year-End Form, as appropriate, for any Statutory Warranty Claim made in the first year of possession. This includes Statutory Warranty Claims for one-year warranty items, as well as items covered under the two-year and seven-year (Major Structural Defect) warranties.

If the homeowner does not submit either a 30-Day Form or a Year-End Form within the first year of possession, then Tarion will consider no further claims regarding one-year warranty items.

FIRST YEAR EXAMPLE

For a home with a date of possession of June 6, 2005, the first day the 30-Day Form could be submitted is June 7, 2005 (the first day after the date of possession). The last day the 30-Day Form could be submitted is July 6, 2005 (the 30th day after the date of possession). Only one 30-Day Form will be accepted by Tarion.

For a home with a date of possession of June 6, 2005, the first day that the Year-End Form could be submitted is May 7, 2006. The last day the Year-End Form could be submitted is June 5, 2006.

Second Year Process (all dates of possession on or after October 1, 2003)

At any time, and as often as required, during the second year of possession, the homeowner may make a Statutory Warranty Claim for items under the two year warranty or under the Major Structural Defect warranty. To do so, the homeowner must submit to Tarion a completed Second-Year Form.

If the homeowner does not submit a Second-Year Form by the end of the second year of possession, then Tarion will consider no further claims regarding two-year warranty items (unless the appropriate Statutory Warranty Form has been submitted in respect of those items in the first year of possession, and the claim has not been withdrawn).

Years Three to Seven Process (all dates of possession on or after October 1, 2003): Major Structural Defect (MSD)

Any time after the end of the second year, but no later than the expiry of the seventh year of possession, the homeowner may make a Statutory Warranty Claim in respect of the MSD warranty. To do so, the homeowner must submit a completed MSD Form to Tarion.

MSD claims made on or after the second anniversary of the date of possession are handled directly by Tarion. Tarion will schedule and conduct an assessment, and issue a Warranty Assessment Report to the homeowner within 30 days of receipt of the homeowner's Statutory Warranty Form. If the defect is determined to be a valid MSD, Tarion will either provide direct compensation from the guarantee fund or arrange for the repair.

The MSD warranty in these years is provided by Tarion not the builder. However, if Tarion receives an MSD Form for a warranted MSD item during years three through seven of possession, Tarion reserves the right to involve the builder in the process, and to treat it as an MSD Form submitted in the first two years of possession, if:

- The MSD is the result of a defect that was reported in writing to Tarion in the first two years after the date of possession;
- The defect was not remedied (or was remedied improperly) by the builder; and
- The defect ultimately led to or became the subject of the MSD Form received in years three through seven.

If the homeowner does not submit an MSD Form by the end of the seventh year of possession, then Tarion will consider no further claims regarding MSD warranty items (unless the MSD has been previously identified in either a 30-Day, Year-End or Second-Year Form and the claim has not been withdrawn).

STEP 2: Initial Builder Repair Period

The initial builder repair period differs slightly depending on whether the date of possession of the home is before or after September 1, 2005.

Initial Builder Repair Period for Homes with Dates of Possession on or after October 1, 2003 and before September 1, 2005:

The builder has an initial builder repair period of up to 120 days to repair or otherwise resolve warranted items. For all Statutory Warranty Forms other than the Year-End Form, the builder repair period starts on the day after Tarion receives a properly submitted Statutory Warranty Form. For a Year-End Form, the builder repair period starts on the later of:

- the first anniversary of the date of possession; or
- the day after the date that Tarion receives the Year-End Form.

Initial Builder Repair Period for Homes with Dates of Possession on or after September 1, 2005:

The builder has an initial builder repair period of up to 120 days to repair or otherwise resolve warranted items in the following circumstances:

- For items listed on a 30-Day Form, the initial builder repair period starts on the 31st day from the date of possession (i.e., the day after the last day for a homeowner to submit a 30-Day Form) and goes until the 120th day after that date (i.e., the 150th day from the date of possession);

- For items listed on a Year-End Form, the initial builder repair period starts on the first year anniversary of possession (i.e., day 366) and goes until the 120th day after that date; and
- For items listed on a Second-Year Form, the initial builder repair period starts on the day after the day that Tarion receives the Second-Year Form and goes until the 120th day after that date.

REASONABLE ACCESS FOR REPAIRS

The homeowner is required to provide the builder with reasonable access during regular business hours, arranged at least 24 hours in advance at a time mutually convenient to the homeowner and the builder, to complete the repairs.

Builders who seek to rely on a refusal to grant access as a basis for failing to repair must be able to show that they worked in good faith to arrange a mutually convenient date for repairs with the homeowner. Builders must make reasonable efforts to accommodate homeowners in scheduling repairs. This will include making at least three attempts to schedule repair work during the repair period with sufficient notice to the homeowner. Builders are expected to give at least 24 hours notice prior to a scheduled repair. Notice should be in writing and builders should document their efforts to schedule repairs.

STEP 3: Homeowner Request for Conciliation

If the builder does not repair or resolve all of the warranted items listed on the Statutory Warranty Form during the initial builder repair period, a homeowner may request a conciliation by contacting Tarion at any time within the 30 days following that period.

When the homeowner requests a conciliation, Tarion will schedule a conciliation inspection appointment with the homeowner and notify the builder. The conciliation inspection will be scheduled within the 30 day period that begins on the 31st day after the date on which the request for conciliation was made.

If the homeowner does not request a conciliation during the applicable conciliation request period, the homeowner will be deemed to have withdrawn all claim items listed on the applicable Statutory Warranty Form. The homeowner may resubmit a Statutory Warranty Form at the applicable times for any items deemed to have been withdrawn if those items are still covered by warranty at the date of re-submission.

STEP 4: Pre-Conciliation Repair Period

The builder has 30 days after the date the homeowner requests the conciliation to repair or resolve all of the claim items listed on the Statutory Warranty Form that are covered by a warranty.

STEP 5: Conciliation Process

Unless the homeowner requests that the conciliation inspection be cancelled, Tarion will conduct the conciliation at the scheduled appointment date and time.

Tarion will conduct the conciliation inspection and issue a Warranty Assessment Report to the homeowner and to the builder within the 30 day period that begins on the 31st day after the date on

which the request for conciliation was made. The Warranty Assessment Report will outline any items on the Statutory Warranty Form that were not resolved by the time of the conciliation, are covered by warranty under the Act, and are therefore still the builder's responsibility to correct. In some cases the Warranty Assessment Report may indicate that further investigation is needed.

If Tarion determines that at least one item in the Warranty Assessment Report is warranted, the conciliation will be considered to be "chargeable" to the builder (unless one of the exceptions set out on page 3 of this Bulletin apply).

The purpose of a conciliation inspection is to allow Tarion to observe the condition of items listed on the relevant Statutory Warranty Form and in some cases to gather relevant documentation that the homeowner and builder may wish to provide so that an assessment of warrantability can be made. Builders are invited to attend conciliation inspections to assist with the purpose of such inspections.

CONDUCT AT CONCILIATION OR CLAIM INSPECTION

All parties at a conciliation or claim inspection are expected to act in a respectful, courteous and cooperative manner. Builders are expected to follow the direction of Tarion staff and be mindful of requests made by homeowners. Tarion staff have full discretion to end a conciliation inspection in the event of disruptive activity by a participant (homeowner or builder).

To participate in the conciliation or claim inspection process, builders and homeowners must abide by any policies issued by Tarion from time to time that relate to the conduct of these inspections, including policies relating to the taking of photographs and video or audio recordings.

STEP 6: Post-Conciliation Repair Period

If the Warranty Assessment Report identifies any items that are warranted, the builder will be given one final opportunity to repair or resolve the items, within a maximum of 30 days from the date when Tarion issues the Warranty Assessment Report, unless at Tarion's discretion (and in consultation with the homeowner) there is a valid reason why additional time ought to be provided in order to effect a particular repair (for example, the item involves an Extraordinary Situation as described in Appendix A to this Bulletin).

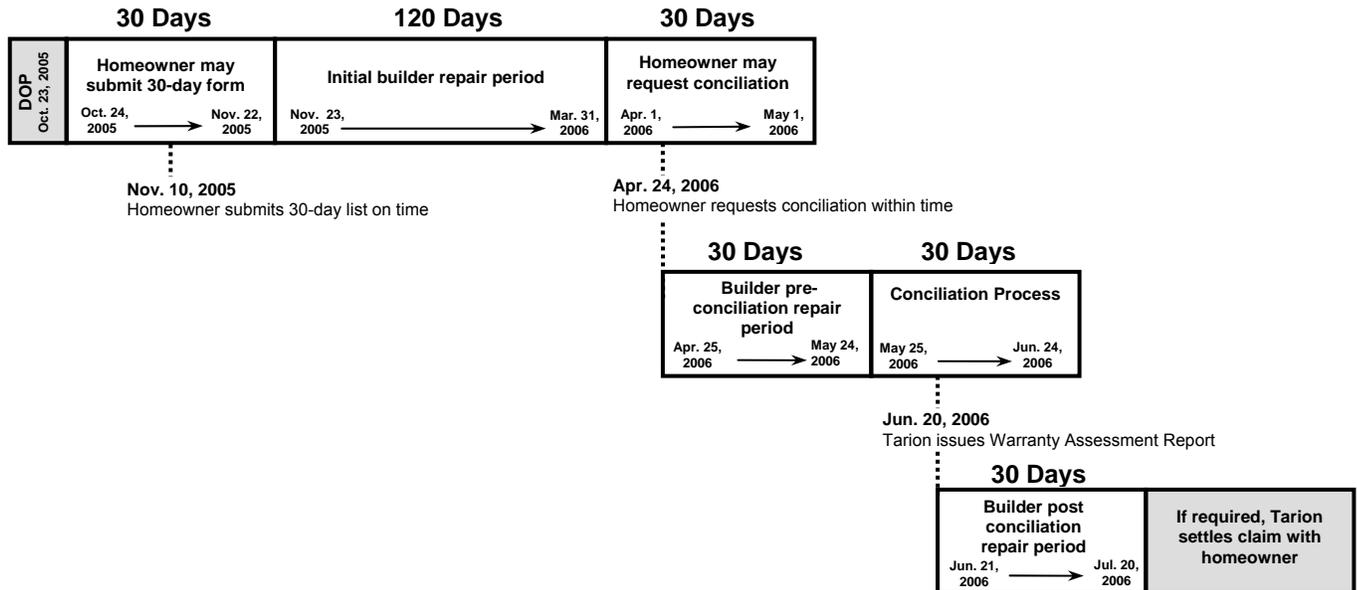
If the builder is unable to effect a repair due to a denial of access or due to a disagreement with the homeowner as to proper method of repair, the builder must notify Tarion in writing of the issue prior to the expiry of the post-conciliation repair period. If the builder fails to so notify Tarion, the builder's ability to rely upon the issue as a defence to the conciliation being chargeable may be prejudiced.

STEP 7: Tarion Settles the Claim

If the builder has not corrected or otherwise resolved all items covered by the warranty within 30 days of the date when Tarion issues the Warranty Assessment Report (or otherwise in accordance with the Warranty Assessment Report), Tarion will settle the remaining warranted items directly with the homeowner. This may involve a claim inspection at the home, and if so, the builder will be notified in writing of the date and time of the claim inspection. Tarion will pay compensation to the homeowner from the guarantee fund, or will arrange for the repairs, and invoice the builder for the amount of the compensation or repair costs, plus an administration fee of 15 per cent and applicable taxes.

EXAMPLE – STATUTORY WARRANTY CLAIM PROCESS

This example illustrates the Statutory Warranty Claims Process that would apply for the warranted items on a 30-Day Form submitted by a homeowner who took possession of their home on October 23, 2005.



1. The homeowner may submit a 30-Day Form in the 30 day period following the date of possession which is anytime between October 24, 2005 and November 22, 2005 inclusive. The homeowner in our example submits the 30-Day Form on November 10, 2005.
2. The initial builder repair period starts 31 days after the date of possession on November 23, 2005. It lasts for 120 days, but excludes the December 24th to January 1st Holiday Period, so it ends on March 31, 2006. (The 120 days would otherwise end on March 22, 2006.)
3. The homeowner may request a conciliation at any time in the 30 day period that begins on April 1, 2006. However, because that 30 days ends on April 30, 2006 which is a Sunday, the homeowner's request for conciliation period would actually end on May 1, 2006. In this example, the homeowner requests a conciliation on April 24, 2006 and Tarion schedules the conciliation inspection on May 31, 2006.
4. The builder has 30 days after the date of the homeowner's request for conciliation (from April 25, 2006 to May 24, 2006 inclusive) to resolve any outstanding warranty items listed on the 30-Day Form before the conciliation inspection takes place.
5. Tarion conducts the conciliation inspection on May 31, 2006 and issues a Warranty Assessment Report on June 20, 2006.
6. The builder has a final repair period of 30 days from the date of the Warranty Assessment Report (June 21, 2006 to July 20, 2006 inclusive) to resolve all warranted items on the report.

PART D. WARRANTY REVIEW: BUILDER-REQUESTED CONCILIATION

A Warranty Review, available to all registered builders, is a builder-requested conciliation to assess a warranty dispute between a builder and a homeowner. A Warranty Review can only take place if Tarion has either already received a Statutory Warranty Form from a homeowner relating to the item(s) in question, or the homeowner consents to the Warranty Review.

A Warranty Review must be requested between Day 30 and Day 110 of the initial builder repair period, however, this will not extend the normal 120-day initial builder repair period under the Claims Process for warranty repairs.

A Warranty Review is limited to assessing disputes between builders and homeowners about whether an item is warranted, and the correct method or timing of repair required to fix the items. Warranty Reviews are not available for measurement-based items found in the Tarion *Construction Performance Guidelines*.

A Warranty Review has the same force and effect on all parties as a homeowner-requested conciliation. Builders are required to repair those items determined by Tarion to be warranted, or they will be found to be in breach of warranty.

Procedure and Fee

1. Builder Requests the Warranty Review

- A builder may request a Warranty Review no earlier than 30 days and no later than 110 days within the initial builder repair period.
- Builders are required to deliver the request for a Warranty Review to Tarion in writing. In support of the request, a builder is required to indicate the items for review (from the applicable Statutory Warranty Form submitted by the homeowner), and what the builder's position is on each item.
- There is a \$550 fee, payable in advance by cheque, money order, or other Tarion-approved payment method, for each Warranty Review. Payment must accompany each Warranty Review request. If Tarion's Warranty Assessment Report states that the conciliation is not a chargeable conciliation, the fee will be refunded to the builder.

2. Assessment by Tarion and Warranty Assessment Report

- Tarion will conduct an on-site inspection or a desk assessment and issue a Warranty Assessment Report to the builder and the homeowner within 30 days of the builder's delivery of a complete request for Warranty Review.

3. Repairs by Builder

- If any warranted items are identified, the builder is required to complete any necessary repairs no later than 30 days after the expiry of the 120-day initial builder repair period.

4. Tarion Settles the Claim

- If the builder has not completed the repairs or otherwise resolved the warranted items within the 30 day period described in 3. above, then Tarion will settle directly with the homeowner and pay compensation to the homeowner from the guarantee fund or arrange the repairs. Tarion will invoice the builder for the amount of the compensation or repair costs, plus an administration fee of 15 per cent and applicable taxes.

5. A Warranty Review is not considered a chargeable conciliation and the fee is refunded if:
- Tarion determines that there are no warranted items; or
 - there are warranted items and Tarion agrees with the builder's method or timing of repair for all items in question.

BUILDER ARBITRATION FORUM

A builder who disagrees with Tarion's determination of warrantability or chargeability in a Warranty Assessment Report may be eligible to request an arbitration under the Builder Arbitration Forum. An arbitration request may only be made by registered builders who attend the conciliation inspections and must be made within 28 days of receipt of the Warranty Assessment Report. For full eligibility requirements and other information, please refer to *Builder Bulletin 41: Builder Arbitration Forum*.

APPENDIX A: EXCEPTIONS TO THE CLAIMS PROCESS

The Claims Process applies to typical warranty situations. Under the Exceptions, the Claims Process will be adjusted for the following situations.

1. Emergencies

An emergency warranty situation is any situation that occurs within the warranty period and involves a warranted item that if not attended to immediately, in the opinion of Tarion, would likely result in substantial damage to the dwelling or would likely represent a substantial risk to the health and safety of the occupants or means the home is uninhabitable.

An emergency includes the following situations:

- Complete loss of heat, between September 15 and May 15;
- Gas leak;
- Complete loss of electricity;
- Complete loss of water;
- Complete stoppage of sewage disposal;
- Plumbing leak that requires the entire water supply to be shut off;
- Major collapse of any part of the home's exterior or interior structure;
- Major water penetration on the interior walls or ceiling; and/or
- A large pool of standing water inside the home.

Damage caused by forces beyond a builder's control (for example, municipal or utility service failures or 'acts of God') is not warranted under the Act, and therefore is not an "emergency" warranty situation.

Emergency Procedure

1. A homeowner who believes there is an emergency warranty situation should contact the builder first, using the emergency service contact information that the builder is required to provide in the *Homeowner Information Package*. The homeowner should follow the builder's instructions in attempting to handle the emergency situation.
2. The builder is permitted up to 24 hours to resolve the emergency, to ensure that the situation has been made safe and secure, and to prevent any further damage from occurring. Full repair of the defect in accordance with the builder's warranty obligations may take longer to complete once the

initial emergency has been dealt with. Builders are required to complete the full repair (including repairing any damage to builder installed materials) in accordance with their warranty obligations as soon as possible and no later than 30 days from the date that the homeowner reported the emergency.

3. If the builder cannot be reached within 24 hours using the emergency contact information provided in the *Homeowner Information Package*, or if the builder has been contacted but has not resolved the emergency within 24 hours, the homeowner is entitled to contact Tarion for further direction. Tarion will determine (usually by phone) if this is an emergency or if the item should be added to the homeowner's next Statutory Warranty Form. If the homeowner satisfies Tarion that this is an emergency warranty situation, Tarion will first try to contact the builder. If Tarion is unable to contact the builder, or the builder is unwilling to resolve the emergency, Tarion will instruct the homeowner to make or contract for the necessary repairs to correct the emergency, i.e., any repairs necessary to make the home safe and secure, and to prevent any further damage in the near future.
4. If the homeowner is unable to contact the builder and Tarion, the homeowner may, without jeopardizing their warranty rights, do or contract for the necessary repair work to correct the emergency only.
5. If the homeowner has arranged to have the emergency repairs done and wishes to be reimbursed, the homeowner is required to obtain an Emergency Form (available from Tarion by calling 1-877-982-7466 or from the Tarion website), and to submit to Tarion and the builder the completed Emergency Form along with all required supporting documents (i.e., receipts, photographs of the damage and repair if available).
6. Within 10 days of receipt of the completed Emergency Form, Tarion will contact the builder to determine whether the builder has reimbursed the homeowner, and if not, will conduct a conciliation, and issue a Warranty Assessment Report to the homeowner and the builder. If Tarion identifies any emergency item as warranted in the Warranty Assessment Report, the conciliation will be considered chargeable.
7. Tarion will notify the builder that the builder has 30 days to reimburse the homeowner for their reasonable costs associated with the warranted repairs undertaken and to complete repairs to damaged builder installed materials, as documented in the Emergency Form and confirmed by Tarion in the Warranty Assessment Report.
8. If the builder fails to reimburse the homeowner, Tarion will settle directly with the homeowner, and pay compensation to the homeowner from the guarantee fund or arrange for the repairs. The builder will be invoiced for the amount of the compensation paid and for repair costs, plus an administration fee of 15 per cent and any applicable taxes.

EXTREME EMERGENCIES

An extreme emergency is a situation that, in the opinion of Tarion, requires an immediate response in order to preserve the integrity of the home, and/or prevent serious personal injury or warranted damage. The Claims Process may be accelerated in extreme emergency situations. Tarion will make reasonable attempts to inform the builder if an accelerated process is required.

2. Seasonal Items

A seasonal item is any warranted item listed on a Statutory Warranty Form submitted to Tarion between November 16 and April 30 (inclusive), involving the exterior of the home, which cannot be repaired effectively within the normal Claims Process due to weather constraints. A seasonal item includes a warranted item related to:

- Exterior painting;
- Exterior cement/concrete work (e.g., parging application/repairs);
- Exterior mortar work (e.g., brick installation/repairs);
- Exterior stucco work/repairs, including repairs to exterior insulation finishing systems;
- Exterior caulking;
- In-ground supports for decks; or
- Any other exterior work deemed appropriate by Tarion, excluding air conditioning, grading, sod, driveways and walkways, which are covered separately below.

If the item is submitted on a Statutory Warranty Form to Tarion between May 1 and November 15 inclusive, the normal Claims Process applies. A builder who needs more time due to unsuitable weather conditions may apply to Tarion for an extension under the “Extraordinary Situations” provisions of this Bulletin (see page 20).

Seasonal Items

If a Seasonal Item is submitted on a Statutory Warranty Form between November 16 and April 30 inclusive, the following procedure applies:

1. The builder is required to complete the repairs as soon as possible after the return of suitable weather conditions, but no later than September 1;
2. If the item has not been repaired by September 1, the homeowner may contact Tarion in the 30-day period between and including September 2 and October 1 to schedule a conciliation inspection. Tarion will advise the builder in writing of the scheduled date of the conciliation inspection;
3. The builder has 30 days from the date when the homeowner requests a conciliation to complete the repairs;
4. If the builder has not completed the repairs within 30 days, Tarion will conduct a conciliation inspection and issue a Warranty Assessment Report to the builder and the homeowner within the following 30 days;
5. The builder has up to 30 days from the date when Tarion issues the Warranty Assessment Report to complete the repairs, as long as the repairs are completed by November 15; and
6. If the builder does not complete the repairs within 30 days or by November 15, if earlier, Tarion will settle directly with the homeowner and pay compensation to the homeowner from the guarantee fund or arrange for the repairs. Tarion will invoice the builder for the amount of the compensation or repair costs, plus an administration fee of 15 per cent and applicable taxes.

3. Special Seasonal Items: Final Grading, Sod, Driveways and Walkways

A Special Seasonal Item is any warranted item listed on a Statutory Warranty Form involving final grading, sod, driveways or walkways.

Special Seasonal Items Procedure

The Special Seasonal Items Procedure is as follows:

1. The homeowner requests the repair or installation of final grading, sod, driveways and walkways by listing the item and submitting the 30-Day or Year-End Form to Tarion;
2. (a) For homes with a date of possession between October 1, 2003 and April 30, 2004, inclusive, the builder has up to one year from the date of possession to complete the installation or repair (subject to consideration by Tarion of any specific agreement between the homeowner and the builder in a relevant purchase agreement, and any limitations on installation due to the developer and/or subdivision agreement or relevant municipal agreement); and
(b) For homes with a date of possession on or after May 1, 2004, the builder must install or repair the item(s) within 270 days of “seasonable weather” from the date of possession (subject to consideration by Tarion of any specific agreement between the homeowner and the builder in the purchase agreement, and any limitations on installation due to the developer and/or subdivision agreement or relevant municipal agreement). “Seasonable weather” for this type of work is the period between May 1 and November 15, inclusive, in any given calendar year. There are 199 days of seasonable weather in one calendar year.

Examples:

If a homeowner takes possession of the home on June 30, 2004, the deadline for installation or repair of special seasonal items is September 9, 2005. The “seasonable weather” days are calculated as follows:

	Number of “Seasonable Weather” Days
July 1, 2004 to November 15, 2004	138
November 16, 2004 to April 30, 2005	0
<u>May 1, 2005 to September 9, 2005</u>	<u>132</u>
Total	270 days

If a homeowner takes possession of the home on November 30, 2004, the deadline for installation or repair of special seasonal items is July 10, 2006. The “seasonable weather” days are calculated as follows:

	Number of “Seasonable Weather” Days
December 1, 2004 to April 30, 2005	0
May 1, 2005 to November 15, 2005	199
November 16, 2005 to April 30, 2006	0
<u>May 1, 2006 to July 10, 2006</u>	<u>71</u>
Total	270 days

3. If the repair or installation of a special seasonal item is not completed within the builder repair period described in 2. above, the homeowner may contact Tarion within the 30 days following the builder repair period to request a conciliation.
4. Tarion will conduct a conciliation inspection and issue a Warranty Assessment Report to the builder and the homeowner within 30 days after the homeowner notifies Tarion.
5. If the Warranty Assessment Report states that any of the final grading, sod, driveway and walkway items are warranted, Tarion will then (subject to consideration by Tarion of any specific agreement between the homeowner and the builder in the relevant purchase agreement, and any limitations on installation due to the developer and/or subdivision agreement or relevant municipal agreement) settle directly with the homeowner and pay compensation to the homeowner from the guarantee fund or arrange the repair. Tarion will invoice the builder for the amount of the compensation or repair costs, plus an administration fee of 15 per cent and applicable taxes.

4. Air Conditioning between May 15 and September 15

Air conditioning defects are covered under the one year warranty only. The warranty applies if the builder installed the system, or undertook to install it but did not complete the installation. A warranted air conditioning defect that results in a complete lack of cooling between May 15 and September 15 inclusive will be dealt with outside the standard Claims Process, in accordance with the following procedure.

Procedure for Air Conditioning: May 15 to September 15

The Procedure is as follows:

1. The homeowner contacts Tarion to report a complete lack of cooling during the period from May 15 to September 15 inclusive, and during the first year of possession;
2. Tarion requests the homeowner to complete and submit an Air Conditioning Form;
3. The builder is required to complete the repairs as soon as possible and no later than 30 days from the day Tarion receives the Air Conditioning Form;
4. The homeowner can request a conciliation by Tarion if the builder has not completed the repairs by the end of the 30-day period;
5. Tarion will conduct a conciliation inspection and issue a Warranty Assessment Report to the builder and the homeowner within 10 days of the homeowner's request; and
6. If the Warranty Assessment Report states that the air conditioning item is warranted, the conciliation will be considered chargeable and Tarion will settle directly with the homeowner, and will pay compensation to the homeowner from the guarantee fund or arrange the repairs. The builder will be invoiced for the amount of the compensation or repair costs, plus an administration fee of 15 per cent and applicable taxes.

5. Extraordinary Situations

Builder Extraordinary Situations

A builder Extraordinary Situation is where a builder requires additional time beyond the applicable builder repair period to complete the necessary repairs to items listed on a Statutory Warranty Form, due to special circumstances affecting the builder or one of the homes the builder is servicing. For example, a repair may require the special order of a part that will take more time to arrive than the initial builder repair period permitted under the Claims Process or the repair may be delayed due to unusual and unsuitable weather conditions.

The special circumstance must result in the builder being unable to complete a repair, as opposed to the repair being inconvenient. Increased cost of the repair, for example, as a result of the original installer being unavailable is not an acceptable reason on its own for a builder to delay repairs beyond the time set out in the standard Claims Process.

Procedure for Builder Extraordinary Situations

The Procedure for Builder Extraordinary Situations is as follows:

1. A builder who encounters an Extraordinary Situation regarding an item listed on a Statutory Warranty Form is required to notify Tarion and the homeowner, in writing, prior to the date of a conciliation inspection and no later than 10 days before the end of the applicable builder repair period. The written notice must:
 - a. State which item cannot be repaired within the applicable timeframe and why, including written proof of the builder's situation;
 - b. Acknowledge that the item is warranted and that the builder undertakes to repair it; and
 - c. State the proposed extension needed to complete the repair(s) in question.
2. Tarion will then review the situation, and may require the builder to produce additional proof of the circumstances in question.
3. Tarion will inform the builder and the homeowner after receipt of the written notice with sufficient proof from the builder, if an extension of time is justified, and if so, the number of days by which the builder repair period may be extended to complete the repair(s) in question.

Industry/Regional Extraordinary Situations

Industry/Regional Extraordinary Situations may require an extension of the applicable builder repair period for a part of the construction industry, a region, or the entire province. Examples include:

- An irregular (i.e., not ongoing or “normal”) labour or trade shortage;
- An irregular (i.e., not ongoing or “normal”) shortage of work material;
- Strikes or other serious labour disruptions; and
- Severe weather or other ‘acts of God’.

Procedure for Industry/Regional Extraordinary Situations

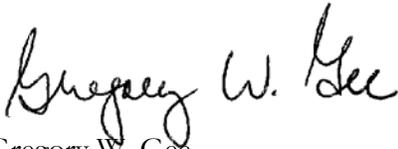
The Procedure for Industry/Regional Extraordinary Situations is as follows:

1. A potential Industry/Regional Extraordinary Situation may be brought to the attention of Tarion's Vice President of Claims by a written notice from a builder, from the OHBA or from a local Home Builders' Association;

2. Tarion will thoroughly review the information, and may require additional documentation to assess the situation;
3. If Tarion confirms that an Industry/Regional Extraordinary Situation exists or is about to happen, Tarion will issue a written Warranty Alert to all builders affected. The Alert will describe the nature of the event; which regions, industries, or types of warranties are affected; and in what circumstances the permitted extension will apply to the relevant builder repair periods; and
4. A builder who is affected by the Industry/Regional Extraordinary Situation and wishes to apply the extended builder repair period provided in the Warranty Alert is required to provide written notice to the affected homeowners as soon as possible. The notice must be delivered before the expiry of the applicable builder repair periods, and no later than 10 days from receipt of the Alert. The notice must include an explanation of why the extension is required for the home, and the number of days that the builder repair period has been extended due to the Alert. The standard builder repair periods in the Claims Process will continue to apply to builders who do not provide this notice to their homeowners.

APPENDIX B: ONGOING REVIEW OF THIS BULLETIN

Tarion continues to collect and review input from all stakeholders, including builders and homeowners, and to monitor the appropriate data regarding the implementation of the Customer Service Standard. Once sufficient data has been collected and reviewed, Tarion will decide whether to reduce the initial builder repair period from 120 to 90 days.



Gregory W. Gee
Registrar

ESCALATING CONSEQUENCES

WHAT THIS BULLETIN IS ABOUT

This Builder Bulletin applies to you as a vendor or vendor/builder (builder) as defined in the *Ontario New Home Warranties Plan Act* (the Act). This Bulletin provides details of the repercussions (Escalating Consequences) for builders who fail to comply with the minimum Customer Service Standard contained in *Builder Bulletin 42: Customer Service Standard*.

The Escalating Consequences apply to builders who fail to comply with the Customer Service Standard and will affect the terms and conditions of registration that are imposed by the Ontario New Home Warranty Program (ONHWP) on those builders. They come into effect and will be based on all Conciliation Reports, including Warranty Review Reports, dated on or after October 1, 2004, one year after the implementation of the Customer Service Standard. The purpose of this delayed implementation is to ensure that builders have an opportunity to adjust their customer service to the new system.

The Escalating Consequences described here are already imposed by ONHWP when any builder's performance deteriorates and the associated risk to ONHWP increases.

This Bulletin was developed following consultation with builders, the Ontario Home Builders' Association, consumers and government. Nothing in this Bulletin should be construed to limit the authority of the Registrar to impose terms and conditions of builders' registration or renewal.

RATIO OF CHARGEABLE CONCILIATIONS TO NUMBER OF POSSESSIONS

If a builder fails to complete the necessary warranty repairs within the required Builder Repair Periods under the Customer Service Standard, the builder will have a chargeable conciliation, as defined in *Builder Bulletin 42*. The builder's ratio of the number of such chargeable conciliations to the number of possessions over the past three years provides an objective indicator of whether the builder is complying with the Customer Service Standard.

A builder's record will trigger the Escalating Consequences if:

- The calculation of the builder's ratio results in a ratio that is greater than 0.04, and
- The builder has at least two chargeable conciliations (including chargeable conciliations arising from Warranty Review Reports) over the past three years.

Examples

A builder who has two chargeable conciliations and 50 possessions (calculated using the number of possessions in the past three years) will have a ratio of 0.04.

1. No. of chargeable conciliations = 3
No. of possessions in the past three years = 54
Ratio = $3/54 = 0.06$ (i.e., greater than 0.04)
Builder is subject to Interview/Audit (preliminary to Escalating Consequences)
2. No. of chargeable conciliations = 4
No. of possessions in the past three years = 100
Ratio = $4/100 = 0.04$
Builder is not subject to Interview/Audit or Escalating Consequences
3. No. of chargeable conciliations = 1
No. of possessions in the past three years = 12
Ratio = $1/12 = 0.08$
Builder is not subject to Interview/Audit or Escalating Consequences: although the ratio is greater than 0.04, the builder has fewer than two chargeable conciliations.

CALCULATE YOUR CHARGEABLE CONCILIATION RATIO

- (1) Number of chargeable conciliations (including chargeable conciliations arising from Warranty Review Reports) in the past three years = _____. If this number is 1 or 0, a builder will not be subject to the Interview/Audit or the Escalating Consequences. If this number is 2 or more, continue to calculate:
- (2) Number of possessions in the past three years = _____
- (3) Ratio: (1) divided by (2) = _____

If this ratio is higher than 0.04, i.e., 0.05 or 0.06 or higher, then a builder has crossed the “unacceptable” threshold, and is subject to the Interview/Audit (preliminary stage before Escalating Consequences).
If this ratio is 0.04 or lower, i.e., 0.04 or 0.03 or less, the builder’s ratio is acceptable and the builder is NOT subject to the Interview/Audit or the Escalating Consequences.

INTERVIEW/AUDIT: PRELIMINARY STAGE BEFORE ESCALATING CONSEQUENCES

A builder’s chargeable conciliation Ratio will be reviewed monthly by ONHWP. If the ratio of chargeable conciliations to number of possessions is higher than the threshold ratio of 0.04 and the builder has accumulated two or more chargeable conciliations in the past three years, the builder’s compliance with the Customer Service Standard will be subject to a review by ONHWP. If the review reveals that the builder’s level of compliance with the Customer Service Standard is unsatisfactory, ONHWP will require the builder to:

- Attend a meeting with ONHWP to review the builder’s current customer service practices and how they can be improved, and to review ONHWP statistics/records about the builder; and/or
- Undergo an audit of the builder’s customer service practices, including a construction review of at least one home prior to the pre-delivery inspection.

If the outcome of an interview and/or audit is satisfactory, then no further action will be taken. If the outcome is not satisfactory, then the builder will be placed in Level 1 of Escalating Consequences.

THREE LEVELS OF ESCALATING CONSEQUENCES

Level 1

If a builder is placed in Level 1, the builder will be required to:

1. Provide a written commitment to improve the builder's service to meet the minimum Customer Service Standard, including the Warranty Service Rules, with an appropriate action plan to accomplish that goal;
2. Where appropriate, attend a course(s) for improving warranty service (e.g., customer service, construction practices, business skills); and
3. Carry out their warranty service within the provisions of the minimum Customer Service Standard.

If the builder demonstrates sustained compliance with the Customer Service Standard and incurs no further chargeable conciliations, no further action will be taken.

A builder placed in Level 1 will be moved to Level 2:

- In 90 days, if the builder clearly demonstrates an unwillingness to cooperate with ONHWP requirements (e.g., refusal to provide written commitment or to attend training);
- In one year, if monitoring reveals that the builder's compliance with the Customer Service Standard does not improve; or
- At any time, if the builder's warranty service delivery significantly worsens, e.g., if the ratio of chargeable conciliations to possessions increases significantly.

Level 2

Builders in Level 2 will be required to carry out their warranty service within the provisions of the *Restricted Warranty Service Rules*. Under the *Restricted Warranty Service Rules*, the builder Repair Period after Conciliation, as described in *Builder Bulletin 42*, is not available to the builder. Once ONHWP has delivered the Conciliation Report to the homeowner and to the builder, the builder will no longer have the additional 30 days to make the necessary repairs. Instead, ONHWP will settle the warranty claim directly with the homeowner. The claim will be made against the ONHWP guarantee fund and the builder will be invoiced for the value of the claim, plus a 15 per cent administration fee and applicable taxes.

At the discretion of the Registrar, a builder placed in Level 2 *may* also be subject to:

- Security requirements in addition to any security already required according to the builder's risk assessment (see *Builder Bulletin 28* for details on ONHWP's builder risk assessment process); and/or
- Restrictions on the number of future enrolments that will be approved by ONHWP (i.e., restriction on the number of homes the builder may build), in addition to any current enrolment limits imposed by ONHWP on that builder.

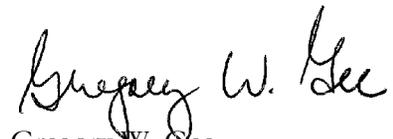
A builder who demonstrates sustained compliance with the Customer Service Standard over a period of at least one year will be moved back to Level 1. A builder will be moved to Level 3 if any warranty Claim (as defined in *Builder Bulletin 42*) is paid by ONHWP on the builder's behalf while the builder is in Level 2.

Level 3

A builder placed in Level 3 will be subject to a Notice of Proposal (NOP) to revoke or suspend their registration. The NOP will be based on the builder's demonstrated failure to perform their obligation to meet the minimum Customer Service Standard. The NOP is in addition to any other remedies available to the Registrar, and other circumstances in which the Registrar may issue a Notice of Proposal under the Act or Regulations. Under the Act, a builder has the right to appeal an NOP to the License Appeal Tribunal (LAT).

FOR MORE INFORMATION

A list of ONHWP Offices is included on the back of this Bulletin.



Gregory W. Gee
Registrar

OFFICES OF THE ONTARIO NEW HOME WARRANTY PROGRAM

CORPORATE OFFICE

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TORONTO ON M2N 6L9
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Toll Free: 1-800-668-0124
Fax: (416) 229-3800
E-mail: info@newhome.on.ca
Web site: www.newhome.on.ca

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Toll Free: 1-800-263-1299
Fax: (905) 836-5666

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Toll Free: 1-800-688-4345
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Toll Free: 1-800-387-7861
Fax: (705) 560-7111

CONDOMINIUM OFFICE

(Serving all of Ontario)

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(905) 836-6715
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Fax: (807) 345-2014

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Toll Free: 1-800-455-4484
Fax: (905) 455-0169

WAIVER OF INDEMNITY FROM BUILDERS

WHAT THIS BULLETIN IS ABOUT

Tarion Warranty Corporation (“Tarion”) is entitled to recover from builders¹ amounts paid out of the Guarantee Fund in respect of warranted claims made by homeowners. In certain circumstances where a claim has been originally deemed “not warranted” by Tarion but the Licence Appeal Tribunal (“LAT”) reverses Tarion’s finding and holds that the item is warranted, the Registrar has the discretion to waive Tarion’s statutory and contractual rights of indemnity against a builder. This Bulletin sets out the guidelines under which Tarion’s Registrar shall exercise his or her discretion in such cases.

BACKGROUND

Builders are obligated, under the *Ontario New Home Warranties Plan Act* (the “Act”) and under their Vendor and Builder Agreements with Tarion, to indemnify Tarion for losses resulting from the builder’s breach of warranty. This indemnification obligation includes situations where Tarion initially determines that a homeowner claim is “not warranted”, but its decision is reversed by LAT on appeal by the homeowner.

On January 24, 2002, the Board of Directors of Tarion approved a pilot project to test a formal framework under which Tarion would exercise its discretion to waive, in certain circumstances, its right to recover from a builder where LAT overturned Tarion’s ruling in favour of the builder. The pilot project was subject to certain conditions: it applied to claims related primarily to workmanship; builders had to be in good standing with Tarion, cooperate with Tarion and provide full disclosure during the conciliation and appeals process. Recovery would not be waived where the builder’s conduct in the conciliation and appeal process was not fully co-operative, and for common elements claims, the waiver was capped at \$20,000 for claims relating to a condominium’s common elements.

The pilot project applied to conciliations conducted between May 1, 2002 and April 30, 2003. On April 8, 2004, the Board decided to make the framework a permanent policy by amending the Regulations under the Act and creating this Builder Bulletin.

¹ In this Bulletin “builder” refers to a builder or vendor as defined in the *Ontario New Home Warranties Plan Act*.

GUIDELINES FOR EXERCISE OF REGISTRAR'S DISCRETION

The Registrar shall exercise his or her discretion to grant a waiver of indemnity if (a) the builder meets the criteria set out in this Bulletin and if (b) the item or condition in issue also meets the criteria set out in this Bulletin:

A) A builder is eligible for the application of the Registrar's discretion to waive indemnity when:

1. The builder, as well as any associated builder², is in full compliance with the Act and its Regulations, Builder Bulletins and any agreement between Tarion and the builder from the date of the conciliation that gave rise to the LAT decision to the later of the date of the LAT decision overturning Tarion's ruling and the decision of the court on appeal of the LAT decision, if appealed.
2. The conciliation that led to the LAT appeal was designated as "non-chargeable"³ by Tarion.
3. The LAT decision is not attributable in whole or in part to the builder's conduct towards the homeowner (for example, conduct such as a lack of communication, misrepresentation or other unreasonable activity).
4. The builder has fully and completely co-operated with Tarion throughout the conciliation and appeal process and has participated in the conciliation and appeal process as required by Tarion. For example, the builder must have:
 - provided full disclosure to Tarion of all information and documents relevant to determining whether the contested item should be warranted. The disclosure obligation begins before conciliation and continues throughout the appeal process, including the LAT hearing itself.
 - attended the conciliation inspection (or cooperated with the desk assessment) that gave rise to the LAT appeal. If unable to attend for reasons beyond his or her control, the builder must have given advance written notice to Tarion, with an explanation of why attendance was not possible, the builder's position on each of the items to be conciliated, and all reasonable supporting documentation and information.

² An "associated builder" is a builder that has a common controlling principal. A controlling principal is a person or combination of persons that either alone or together have a direct or indirect controlling interest in a builder such that the person or persons can be characterized as the operating or controlling mind of the builder.

³ Please refer to Builder Bulletin 42 (Revised) for a definition of "conciliation", "chargeable conciliation" and exceptions to chargeability.

- cooperated with Tarion’s counsel in preparation for the LAT proceeding, by providing information and documents as requested and by assisting in securing the attendance of sub-trades, real estate agents or other persons associated with the builder who might be required to testify.
- attended and participated in the LAT proceedings and complied with the LAT rules, once the builder is added as a party to the LAT proceedings.

B) An item or condition is eligible for the application of the Registrar’s discretion to waive indemnity when:

1. Either,
 - (i) the item or condition was determined by Tarion to be “not warranted” or,
 - (ii) the item or condition was determined by Tarion to be “warranted”, but the claim is denied by Tarion on the grounds that the homeowner refused access to the builder to do the repairs because the homeowner disagreed with the method proposed by the builder and approved by Tarion. If LAT accepts the homeowner’s repair method over the builder’s repair method, the amount of the waiver will be the difference between the repair method ordered by LAT and the builder’s repair method, if any; and
2. The item or condition was found to be warranted by LAT (and LAT’s decision in this regard is upheld by Divisional Court if there is a further appeal); and
3. LAT rules that the item or condition falls under one of the following warranties:
 - One year warranty for work and materials and fitness for habitation;
 - One year warranty for constructing in accordance with the *Ontario Building Code* (“OBC”);
 - Two year warranty that construction is free from violations of the OBC affecting health and safety;
 - Two year warranty against water penetration in the basement, foundation or building envelope;
 - Two year warranty against defects in the electrical, plumbing, and heating delivery and distribution systems; exterior cladding; and
 - Major structural defect warranty.

An item or condition is not eligible for the application of the Registrar's discretion to waive indemnity when:

1. The item does not meet all of the requirements in (B) above; or
2. Additional information is disclosed to Tarion after conciliation which materially impacts the determination of warranty coverage⁴; or
3. The item involves the substitution warranty, the delayed closing and occupancy warranty, disputes about compliance with the statutory definitions of "vendor", "builder" "owner" and "home", and compliance with statutory notice requirements and warranty periods; or
4. The item involves a claim for deposit protection or damages arising from the builder's failure to perform a construction contract; or
5. The item involves a dispute related to a holdback or other monies owed or allegedly owed by the homeowner to the builder; or
6. The application of the waiver to the item in issue will result in a material and adverse impact on the Guarantee Fund administered by Tarion.

CONDOMINIUM COMMON ELEMENTS

An item or condition in a decision dealing with condominium common elements shall be eligible for the application of the Registrar's discretion to waive indemnity if it meets all the requirements as set out in this Bulletin, subject to an aggregate maximum waiver of \$20,000 for claims relating to the condominium's common elements.

NOTIFICATION TO BUILDER OF TARION'S DETERMINATION TO GRANT OR NOT TO GRANT WAIVER

After receipt of a LAT decision to which this Bulletin applies, the Registrar shall determine, using the guidelines set out in this Bulletin, whether or not to waive Tarion's right to indemnity and will notify the builder in writing of the decision. The waiver will not be finalized until all applicable appeal periods have expired, and the application of the waiver will be conditional upon the builder's continued compliance with this Bulletin's requirements throughout any appeals.

⁴ This exclusion applies, for example, where a defect that was reported and ruled by Tarion to be not warranted based on workmanship, is later shown to be warranted based on an OBC violation that was not apparent at the time of the conciliation; or where a latent defect is ruled by Tarion to be not warranted, but is later shown to be a valid warranty claim based upon an acceptable expert report not available at the time of the conciliation.



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If the waiver is not granted, the builder will be required to comply with the LAT decision. If the builder fails to comply, Tarion will compensate the homeowner according to LAT's order, or perform the repairs, and invoice the builder.

If the waiver is granted, Tarion will proceed directly to comply with the LAT decision by arranging for repairs or otherwise compensating the homeowner. The builder will not be invoiced for any amounts to which the waiver of indemnity applies.

Builder Bulletin 46

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FREEHOLD DELAYED CLOSING WARRANTY
 (AGREEMENTS OF PURCHASE AND SALE FOR FREEHOLD ON OR AFTER JULY 1, 2008)

WHAT THIS BULLETIN IS ABOUT

This Bulletin explains how the Delayed Closing Warranty applies to agreements of purchase and sale (“purchase agreements”) dated on or after July 1, 2008, and supersedes Builder Bulletin 25 (Revised) for the purchase of a new freehold house. If your agreement of purchase and sale is dated before July 1, 2008 please see Builder Bulletin 25 (Revised) for details of the applicable Delayed Closing Warranty. However, please note that: the Delayed Closing Warranty does not apply to contract homes; and the 5-day grace period for transactions under the old regime will not apply to freehold homes where the date of Closing occurs after June 30, 2009. In this Bulletin “builder” refers to a builder or vendor, as applicable, as defined in the Ontario New Home Warranties Plan Act. Tarion has also prepared a document entitled “Delayed Closing Warranty for Freehold Homes – Reference Guide for Freehold Home Builders.” This guide will assist builders in arranging their building and business practices to address the new Delayed Closing Warranty.

Note: Capitalized terms in this Bulletin have the meanings given to them in the freehold Addendums referred to in Section 2 below.

The Bulletin is divided into the following sections:

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The Bulletin also contains the following appendices:

1. Appendix “A”: Firm Closing Date Timeline Schematic
2. Appendix “B”: Tentative Closing Date Timeline Schematic

1. OVERVIEW OF DELAYED CLOSING WARRANTY FOR FREEHOLD HOMES

The Delayed Closing Warranty is set out in a new Regulation under the *Ontario New Home Warranties Plan Act* a copy of which is available on the Tarion website. The obligations of builders are set out in an Addendum that must form part of each agreement of purchase and sale (“purchase agreement”), as described below.

The Delayed Closing Warranty is intended to protect purchasers from the impact of delays in the Closing of their purchase agreement. This objective is achieved by, among other things:

- Making clear the firm or tentative nature of the Closing date being promised. Builders must provide a specific Closing date in the purchase agreement, and must expressly tell the purchaser whether the date is firm or tentative (so the purchaser knows up front that the date may be changed);
- Limiting the builder’s use of Early Termination Conditions in the purchase agreement;
- Disclosing in the purchase agreement the status of development approvals and the status of construction so the purchaser can better assess the risk that a delay may occur;
- Providing adequate notice to the purchaser when Closing is to be delayed;
- Compensating purchasers where a delay in excess of permitted delay has occurred; and
- Setting an Outside Closing Date beyond which the purchaser has a right to terminate the transaction.

The Delayed Closing Warranty is in addition to the basic obligation of a builder to take all reasonable steps to complete the construction of a home and to close the purchase and sale transaction without delay.

2. THE FREEHOLD ADDENDUMS

The Addendums for freehold homes set out standard contract provisions relating to delayed Closing that must be included in all purchase agreements for new homes in Ontario. There are two forms of the freehold Addendums available – one for purchase agreements offering a Firm Closing Date from the outset, and a second for purchase agreements which set a tentative Closing date and allow the builder to extend as of right. The builder must choose one or the other of the Addendums to include as part of the purchase agreement.

A copy of the Addendum for the Firm Closing Date option is attached as Appendix “A”, and a copy of the Addendum for the Tentative Closing Date option is attached as Appendix “B”. Both are available in electronic format from the Tarion website at www.tarion.com.

The Addendums set out important obligations of a builder in respect of delays and should be read carefully.

The builder is required to complete all blanks in the Addendums.

Failure to include an Addendum in a purchase agreement, or to fill in all applicable blanks, is contrary to the terms and conditions of registration. It may result in the purchaser being able to terminate the purchase agreement, and may result in sanctions by Tarion up to and including the revocation of the builder’s registration and thus of the ability to build new homes.

3. STATEMENT OF CRITICAL DATES

The first page of the Addendum is the *Statement of Critical Dates*. This document sets out Critical Dates related to Closing. The builder must complete the blanks in the Statement of Critical Dates or else the purchase agreement is not enforceable by the builder.

Tarion has provided a web-based calculator which can be found on the Builder Portal, to assist in calculating these dates as per the Reference Guide. Tarion will also publish, from time to time, monthly paper calendars for builders and their staff without access to the Internet.

Firm Closing Date Option

For the Firm Closing Date Option, the builder must specify a calendar date for each of the:

- *Firm Closing Date* – the date by which the builder agrees to complete the home and have it ready to move in.
- *Outside Closing Date* – the date which is 365 days after the Firm Closing Date. If Closing has not occurred by that date, the purchaser can elect to terminate the deal, all monies paid by the purchaser are to be returned with interest and the purchaser will be entitled to Delayed Closing Compensation.
- *End of the Purchaser's Termination Period* – this date is the end of the 30-day period during which the purchaser may terminate the transaction if the home is not ready by the Outside Closing Date.

Tentative Closing Date Option

For the Tentative Closing Date Option, the builder must specify a calendar date for each of the:

- *First Tentative Closing Date* – the date the builder expects that the home will be completed and ready to move in.
- *Second Tentative Closing Date* – the date 120 days after the First Tentative Closing Date, which is the outside date to which the builder can initially extend Closing without the purchaser's consent.
- *Firm Closing Date* – the date 120 days after the Second Tentative Closing Date, which is the outside date to which the builder can further extend Closing without the purchaser's consent or without setting a Delayed Closing Date and paying Delayed Closing Compensation.
- *Outside Closing Date* – the date which is 365 days after the earlier of the Second Tentative Closing Date and the Firm Closing Date. If Closing has not occurred by that date, the purchaser can elect to terminate the deal, all monies paid by the purchaser are to be returned with interest and the purchaser will be entitled to Delayed Closing Compensation.
- *Notice of Delay beyond the First Tentative Closing Date* – this date is 90 days before the First Tentative Closing Date and is the last day by which notice must be given if a delay beyond the First Tentative Closing Date is expected.
- *End of the Purchaser's Termination Period* – this date is the end of the 30-day period during which the purchaser may terminate the transaction if the home is not ready by the Outside Closing Date.

Schematics illustrating the timelines under each option of the freehold delayed Closing regimes are attached as Appendix "A" and "B".

4. DISCLOSURE OBLIGATIONS**When the Purchase Agreement is Signed**

Builders must complete the blanks in the section of the Addendum titled "Information Regarding the Property".

Development Approvals

The first portion of the disclosure section of the Addendums requires the builder to disclose the following information relating to the status of development approvals:

- Whether the property is within a plan of subdivision or proposed plan of subdivision;
- Whether the plan of subdivision is registered or draft;
- Whether the builder has received confirmation from the relevant government authorities that there is sufficient water capacity; and
- Whether the builder has received confirmation from the relevant government authorities that there is sufficient sewage capacity.

The builder must also disclose the nature of the confirmation that has been received (if there has been confirmation). For example, confirmation may be in writing, by email or by conversation with a particular person.

If the availability of water or sewage capacity is uncertain the builder must disclose to the best of its ability the issues that need to be resolved.

Construction Status

Builders must also disclose the following information relating to the status of construction:

- Whether a building permit has been issued in respect of the property; and
- Whether Commencement of Construction of the home has occurred, and if not, the date that Commencement of Construction is expected to occur.

If construction has not yet begun at the time the purchase agreement is signed, the builder must give written notice to the purchaser within ten (10) days after The Actual date of Commencement of Construction.

“Commencement of Construction” means the start of construction of foundation components or elements (such as footings, rafts or piles) of the home.

Other Disclosure

There are other ongoing disclosure obligations set out in the balance of each Addendum. For example, there are specified informational requirements for: extending or accelerating any Critical Dates by mutual agreement; setting a new Closing date in cases of Unavoidable Delay; and setting Delayed Closing Dates.

5. CONDITIONS OF SALE

General

A condition is a term in a purchase agreement that sets out a situation in which the purchase agreement may terminate if a specified event either happens or does not happen.

The use of conditions of sale is regulated under the Delayed Closing Warranty. Builders are permitted to include only certain specified types of conditions in their purchase agreement. These permissible types of conditions fall into four general categories:

- *Early Termination Conditions* – discussed in detail below;
- The usual condition regarding compliance with Planning Act subdivision control provisions;
- Conditions which are rights of termination in a favour of a party due to the default of the other; and
- Purchaser conditions – conditions for the sole benefit of the purchaser.

Early Termination Conditions

Non-waivable Conditions

The builder is permitted to make the purchase agreement conditional upon receipt of approval for:

- A change to the official plan, other governmental development plan or zoning by-law (including a minor variance);
- A consent to creation of a lot(s) or part-lot(s);
- A certificate of water potability or other measure relating to domestic water supply to the home;

- A certificate of approval of septic system or other measure relating to waste disposal from the home;
- Completion of hard services for the property or surrounding area (e.g. roads, rail crossings, water lines, sewage lines, other utilities);
- Allocation of domestic water or storm or sanitary sewage capacity;
- Easements or similar rights serving the property or surrounding area;
- Site plan agreements, density agreements, shared facilities agreements or other development agreements with a approving authorities or nearby land owners and/or any development approvals required from a approving authority; and/or
- Site plans, plans, elevations and/or specifications under architectural controls imposed by an approving authority.

These conditions are for the benefit of both the builder and the purchaser and cannot be waived by either party. In addition:

- The builder must provide written notice not later than 5 Business Days after the date specified for satisfaction of a condition that: (i) the condition has been satisfied; or (ii) the condition has not been satisfied (together with reasonable details and backup materials), and that as a result the purchase agreement is terminated; and
- If notice is not provided as set out above, then the condition is deemed not satisfied and the purchase agreement is terminated.

Waivable Conditions

The builder is also permitted to make the purchase agreement conditional upon:

- Receipt of approval for a basement walkout; and/or
- Confirmation the builder is satisfied that the purchaser has adequate financial resources to complete the transaction.

These conditions are for the benefit of the builder and may be waived by the builder in its sole discretion.

- The builder must provide written notice on or before the date specified for satisfaction of the condition that: (i) the condition has been satisfied or waived; or (ii) the condition has not been satisfied or waived, and that as a result the purchase agreement is terminated; and
- If notice is not provided as set out above, then the condition is deemed waived and the purchase agreement will continue to be binding on both parties.

The Non-waivable Conditions and Waivable Conditions referred to above are together called the *Early Termination Conditions*.

Set Out in the Addendum

To ensure that any Early Termination Conditions required by the builder are clearly communicated to the purchaser, all Early Termination Conditions must be listed in Section 2 of each Addendum. Details of the Early Termination Conditions must also be included. For example, each Early Termination Condition must be set out separately, be reasonably specific as to the type of approval which is needed, and identify generally the approving authority. The builder is required to take all commercially reasonable steps to satisfy any Early Termination Conditions included in the purchase agreement.

Date for Satisfaction

The date for satisfaction of any Early Termination Condition must be no later than 90 days before the Firm Closing Date with one exception: the condition regarding builder confirmation that the purchaser has the financial resources to complete the transaction must be satisfied within 60 days after signing the purchase agreement.

Three Day Review Period

If the builder includes one or more Early Termination Conditions, then the purchaser has a three Business Day time period after receiving a true and complete copy of: the signed purchase agreement; or proposed purchase agreement to, review the conditions that have been listed. If the purchaser is not satisfied with any such condition, the purchaser has the right to terminate the purchase agreement without penalty and the builder must return to the purchaser all monies paid by the purchaser together with interest (see Section 11 below).

Other Builder Conditions

A purchase agreement may also be conditional upon the compliance with the subdivision control provisions (Section 50) of the Planning Act, which compliance shall be obtained by the builder at its sole expense, on or before Closing.

A purchase agreement may also contain rights of termination where one or the other of the parties is at fault.

Prohibited Conditions of Sale

For greater certainty, the builder is not permitted to make the purchase agreement conditional upon:

- Receipt of a building permit;
- Receipt of an occupancy permit; and
- Completion of the dwelling.

Only conditions expressly permitted by the Addendum are enforceable by the builder. Any other conditions will be deemed void and unenforceable by the builder but will not affect the validity of the balance of the purchase agreement.

Purchaser Conditions

The purchase agreement may include any condition that is for the sole benefit of the purchaser which the parties may agree upon. Examples might include conditions in favour of the purchaser relating to: the sale of an existing dwelling; obtaining purchaser mortgage financing; or approval of a basement walkout.

6. FIRM OR A TENTATIVE CLOSING DATE OPTION**Firm or Tentative Closing Transaction**

Builders must elect to offer either: a Firm Closing Date from the outset; or a Tentative Closing Date, i.e., specify an anticipated Closing date which is tentative and which may be extended for up to 120 days on two occasions without the purchaser's consent.

Firm Closing Date Option

A builder may choose to offer a Firm Closing Date. Where the Firm Closing Date option is chosen, the builder cannot extend the Firm Closing Date without paying compensation to the purchaser, except in cases of *Unavoidable Delay* or where the builder and purchaser mutually agree to amend the purchase agreement (see Section 7 below).

Builders who offer a Firm Closing Date must use the Firm Closing Date version of the Addendum which is simpler as it does not contain information concerning tentative dates or multiple extensions of such dates.

Tentative Closing Date Option

A builder may choose the Tentative Closing Date option. Builders who offer Tentative Closing Dates must use the Tentative Closing Date version of the Addendum. This version of the Addendum contains terms relating to extensions of the tentative Closing dates, provision for notice of such extensions, and requirements for setting the Firm Closing Date.

Setting New Closing Dates Under the Tentative Closing Date Option

With the Tentative Closing Date option, you start by agreeing upon a First Tentative Closing Date with your purchaser. If the home will not be ready by this time, you can extend the Closing Date by up to 120 days. You can do so by either setting a Second Tentative Closing Date or setting a Firm Closing Date. If you need to exercise this right to extend, you will need to inform your purchaser at least 90 days before the First Tentative Closing Date.

If you have set a Second Tentative Closing Date and the home will still not be ready by this date, you are entitled to extend up to an additional 120 days by setting a Firm Closing Date. Again, at least 90 days prior written notice is required.

These first two extensions of up to 120 days each are available to you and you need not pay Delayed Closing Compensation. However, once you have set a Firm Closing Date, your only right to extend is to set a Delayed Closing Date and Delayed Closing Compensation will be payable.

Notice for Setting a Second Tentative Closing Date

To set a Second Tentative Closing Date, you must:

- Give written notice to your purchaser at least 90 days before the First Tentative Closing Date; and
- Choose a Second Tentative Closing Date that is 120 days or less after the First Tentative Closing Date. If you are confident a full 120 days is not needed, then you can set an earlier Second Tentative Closing Date – for example, 30, 60 or 85 days after the First Tentative Closing Date – or go straight to setting a Firm Closing Date.

Notice for Setting a Firm Closing Date

If you have given proper notice of a Second Tentative Closing Date but still cannot complete the home by this date, you may further extend Closing by up to an additional 120 days by setting a Firm Closing Date.

To set a Firm Closing Date at this stage, you must:

- Give written notice at least 90 days before the Second Tentative Closing Date you have set; and
- Choose a Firm Closing Date that is 120 days or less after the Second Tentative Closing Date you have set.

Possible Automatic Firm Closing Date

A Firm Closing Date may also be set automatically in two circumstances:

- If you fail to give a full 90 days written notice for the first extension, then the First Tentative Closing Date becomes the Firm Closing Date; and
- If you exercise the first extension properly but fail to give a full 90 days written notice for the second extension, then the Second Tentative Closing Date becomes the Firm Closing Date.

Setting a Delayed Closing Date

In connection with either the Firm Closing Date Option or the Tentative Closing Date Option, if you cannot complete construction by the Firm Closing Date, and your purchaser does not want to extend the Firm Closing Date by mutual agreement, you can still set a Delayed Closing Date despite your purchaser's wishes. You can do this because, by the terms of the Addendum, your purchaser was made aware that this could be necessary. However, if you delay the Closing this way, your purchaser is entitled to Delayed Closing Compensation.

To achieve this further extension you are required to:

- Choose a Delayed Closing Date; and
- Give at least 10 days written notice. If you do not provide 10 days prior written notice as required, Delayed Closing Compensation is payable for an additional 10 days (i.e., from the date the notice should have been given).

If you choose a Delayed Closing Date that is beyond the Outside Closing Date, then your written notice setting the Delayed Closing Date must include a statement explaining that your purchaser need not accept the full delay and will have the right to terminate the purchase agreement during a 30-day period after the 365 days has elapsed. This right to terminate is further described in Section 11.

As explained earlier, the Outside Closing Date is 365 days after:

- The Firm Closing Date when using the Firm Closing Date option for the transaction; and
- The earlier of the Second Tentative Closing Date or the Firm Closing Date when using the Tentative Closing Date option for the transaction.

In many cases, this date will be earlier than the "latest possible" Outside Closing Date given on the Statement of Critical Dates.

7. CHANGING CRITICAL DATES BY MUTUAL AGREEMENT

The Addendum sets out a structure for setting, extending and/or accelerating Closing dates which cannot be altered contractually except as follows:

- The builder and purchaser may at any time, after signing the purchase agreement, agree in writing to extend or accelerate a Firm Closing Date or Delayed Closing Date to a new specified calendar date. The amendment must state whether the Outside Closing Date has changed. Also, as this change may affect the Delayed Closing Warranty, any request by the builder to extend a Firm Closing Date or Delayed Closing Date to a later date must include a written statement that:
- Discloses to the purchaser that the signing of the amendment may result in the loss of Delayed Closing Compensation, as described in Section 9 of the Addendum;
- Unless there is an express waiver of compensation, describes in reasonable detail the cash amount, goods, services or other consideration which the purchaser accepts as compensation (the "Compensation"), and
- Contains a statement that the purchaser waives compensation or accepts the above noted Compensation, in either case, in full satisfaction of any delayed Closing compensation payable by the builder for the period up to the new Firm Closing Date or Delayed Closing Date.

These last three requirements do not apply if the purchaser, for his or her own purposes requests the change in date.

The builder and purchaser may in connection with a tentative Closing date transaction agree to accelerate the First Tentative Closing Date and correspondingly reset all the Critical Dates provided:

- The mutual amendment is signed at least 180 days before the First Tentative Closing Date;
- All of the Critical Dates, including the Outside Closing Date are moved forward the same number of days (subject to adjustment so that the Critical Dates fall on Business Days);
- A new Statement of Critical Dates is provided with the amendment; and
- The purchaser has a 3 day period to review the amendment and decide whether or not to accept it.
- The acceleration of dates by mutual agreement discussed under the Paragraph 7 (c) of the Addendum (regarding Unavoidable Delay) is permitted.
- A builder is permitted to include a provision in a purchase agreement allowing the builder a one-time unilateral right to extend a Firm Closing Date or Delayed Closing Date, as the case may be, one (1) Business Day to avoid the necessity of tender where a purchaser is not ready to close the transaction on the Firm Closing Date or Delayed Closing Date, as the case may be. Delayed Closing Compensation will not be payable for such period and the builder may not impose any penalty or interest charge on the purchaser.
- The purchaser and builder may agree in the purchase agreement to any unilateral extension or acceleration rights that unilaterally exercisable by the purchaser.

8. UNAVOIDABLE DELAY

The builder may extend a First Tentative Closing Date, a Second Tentative Closing Date, a Firm Closing Date and/or a Delayed Closing Date, as the case may be, without penalty in certain circumstances if there is an Unavoidable Delay.

An Unavoidable Delay means a strike, fire, explosion, flood, act of God, civil insurrection, act of war, act of terrorism or pandemic, plus any period of delay directly caused by the event, which is beyond the reasonable control of the builder and is not caused or contributed to by the fault of the builder.

If Unavoidable Delay occurs, the builder may extend the relevant dates by no more than the length of the Unavoidable Delay Period. The builder can implement this extension without the approval of the purchaser and without the requirement to pay Delayed Closing Compensation in connection with the Unavoidable Delay, provided the requirements of the Addendum are met.

When an Unavoidable Delay arises, the builder must provide the purchaser with written notice describing the delay along with an estimate of the duration of the delay. The builder must advise the purchaser as soon as possible when the delay has ended.

When the delay has ended, the builder must provide written notice to the purchaser setting out a brief description of the Unavoidable Delay, identifying the date of conclusion of the Unavoidable Delay Period, and setting new future Critical Dates (i.e., First Tentative Closing Date, Second Tentative Closing Date, Firm Closing Date, Delayed Closing Date, Outside Closing Date and the last day of the Purchaser's Termination Period, as the case may be). The new dates are calculated by adding to the existing Critical Dates the number of days of the Unavoidable Delay Period, provided that the new Firm Closing Date or Delayed Closing Date (if applicable) must be at least 10 days after the giving of notice, unless the builder and purchaser agree otherwise. The notice must set out as calendar dates all the new or confirmed Critical Dates.

In the context of an Unavoidable Delay, either the builder or the purchaser may request in writing earlier new dates, and the other party's consent to the earlier dates shall not be unreasonably withheld.

If an Unavoidable Delay occurs, the builder should review carefully the sections of the Addendum to ensure that all obligations are complied with. Failure to comply with the Addendum requirements may result in the builder having to pay Delayed Closing Compensation for the period for which an Unavoidable Delay is claimed.

9. BUILDING CODE - CONDITIONS OF OCCUPANCY

On or before the date of Closing, the builder is required to deliver to the purchaser:

- Where a registered code agency has been appointed for the building or part of the building under the *Building Code Act* (Ontario), a final certificate with respect to the home that contains the prescribed information as required by s. 11(3) of the *Building Code Act*; or
- Where a registered code agency has not been so appointed, either:
 - An occupancy permit (as defined in the Addendum); or
 - A signed written confirmation by the builder that: (i) provisional or temporary occupancy of the home has been authorized under Article 1.3.3.1 of Division C of the Building Code; or (ii) the conditions for residential occupancy of the home as set out in s. 11 of the *Building Code Act* or Article 1.3.3.2 of Division C of the Building Code, as the case may be (the “Conditions of Occupancy”) have been fulfilled.

However, if the builder and the purchaser agree that the purchaser shall be responsible for certain Conditions of Occupancy, then the purchaser is not permitted to refuse to close on the basis that such conditions have not been completed. Also, the builder is required to deliver a modified form of written confirmation which confirms completion of the Conditions of Occupancy but excluding any conditions which the purchaser has agreed to complete.

If the builder cannot satisfy these requirements, the builder is required to set a Delayed Closing Date (or new Delayed Closing Date) on a date that the builder reasonably expects to have satisfied the requirements, and to comply with the provisions of the Addendum dealing with setting Delayed Closing Dates and paying Delayed Closing Compensation. Delayed Closing Compensation is not payable, however, if the inability to provide occupancy is caused by the failure of a purchaser to fulfill any Conditions of Occupancy for which the purchaser is contractually responsible.

10. DELAYED CLOSING COMPENSATION

The builder warrants to the purchaser that, if the Closing is delayed beyond the Firm Closing Date (other than by mutual agreement in writing as described in Section 7 of this Bulletin) or as a result of Unavoidable Delay), then the builder must compensate the purchaser for all costs incurred by the purchaser as a result of the delay up to a total amount of \$7,500, which amount includes payment to the purchaser of \$150 a day for living expenses for each day of delay until the date of Closing or the date of termination of the purchase agreement.

Delayed Closing Compensation is payable only if:

- Closing occurs or the purchase agreement is terminated under specified circumstances (see Section 11 below); and
- The purchaser’s claim is made within one (1) year after Closing, or after termination of the purchase agreement, as the case may be. (See Section 12 below.)

If the builder gives written notice of a Delayed Closing Date to the purchaser less than 10 days before the Firm Closing Date, Delayed Closing Compensation is payable from 10 days before the Firm Closing Date.

If the builder gives written notice of a Delayed Closing Date to the purchaser more than 90 days before the First Tentative Closing Date instead of setting a Second Tentative Closing Date, Delayed Closing Compensation is payable from the date that is 240 days after the First Tentative Closing Date. Similarly, if the builder gives written notice of a Delayed Closing Date to the purchaser more than 90 days before the Second Tentative Closing Date instead of setting a Firm Closing Date, Delayed Closing Compensation is payable from the date that is 120 days after the Second Tentative Closing Date.

Living expenses are direct living costs such as costs for accommodation and meals. A set daily amount of \$150 per day for living expenses is payable and receipts are not required. The purchaser must, however, provide receipts in support of any claim for other Delayed Closing Compensation, such as for moving and storage costs. Submission of false receipts may disentitle the purchaser to any Delayed Closing Compensation in connection with a claim.

11. TERMINATION OF THE PURCHASE AGREEMENT**Termination On Consent**

The builder and the purchaser may terminate the purchase agreement at any time by mutual written consent.

Termination After 365 Days

If for any reason (other than breach of contract by the purchaser) Closing has not occurred:

- Within 365 days after the Firm Closing Date (in connection with the Firm Closing Date option); or
- Within 365 days after the earlier of the Second Tentative Closing Date or the Firm Closing Date (in connection with the tentative Closing date option);

Then the purchaser has 30 days to terminate the purchase agreement by written notice to the builder. If the purchaser does not provide written notice of termination, then the Delayed Closing Date is the date set by the builder in the written notice.

Termination for Failure to Specify Dates

The purchaser may terminate the purchase agreement by written notice to the builder if all applicable Critical Dates in the Statement of Critical Dates (i.e. the First Tentative Closing Date, the notice deadline for extension beyond the First Tentative Closing Date, the Second Tentative Closing Date, the Firm Closing Date, the Outside Closing Date and the last day of the Purchaser's Termination Period) are not completed with calendar dates; or any Critical Date is expressed as being subject to change depending upon the happening of an event.

Termination Relating to Conditions of Sale

If the purchase agreement is subject to Early Termination Conditions the purchase agreement may terminate if an Early Termination Condition is not satisfied (and is not waived in the limited instances where the Addendum permits a condition to be waived), by the required date. The builder is obliged to take all commercially reasonable steps within the builder's power to satisfy such Early Termination Conditions.

Return Of Monies On Termination

If the purchase agreement is terminated (other than as a result of breach of contract by the purchaser), the builder must return all monies paid by the purchaser, including deposits and monies for extras and upgrades, within 10 days with interest from the date each amount was paid to the builder to the date of return of the amount.

12. HOW A HOMEOWNER MAKES A CLAIM**Compensation where there is Mutual Agreement**

Delayed Closing Compensation may be payable in at least two circumstances. First, if a builder knows the Firm Closing Date cannot be met, the builder may speak to the purchaser and mutually agree upon a new Firm Closing Date. In this scenario compensation may be waived or payable in accordance with the amending agreement referred to in Section 7 above.

Second, the builder may miss the Firm Closing Date, without amending the purchase agreement. Closing would occur on a Delayed Closing Date set by the builder. In this scenario, the purchaser is asked to make a claim to the builder for compensation within a 180-day time period after Closing and must include any receipts which evidence any part of the purchaser's claim except daily living expenses for which receipts should not be received. The builder is required to assess the purchaser's claim by determining the amount of Delayed Closing Compensation payable based on the rules set out in the Addendum and the receipts provided by the purchaser,

and the builder must promptly provide that assessment to the purchaser. The purchaser and the builder are required to use reasonable efforts to settle the claim and when the claim is settled, the builder must complete an acknowledgement provided by Tarion and signed by both parties which:

- Includes the builder's calculation of the Delayed Closing Compensation payable;
- Describes in reasonable detail the cash amount, goods, services, or other consideration which the purchaser accepts as compensation (the "Compensation"), if any; and
- Contains a statement by the purchaser that the purchaser accepts the Compensation in full satisfaction of any Delayed Closing Compensation payable by the builder.

A true copy of the acknowledgement must be provided to Tarion by the builder within 30 days after the acknowledgement is signed by both parties.

When the Parties Cannot Agree

If the builder and purchaser cannot come to terms, the purchaser may submit a claim to Tarion, up to one (1) year after Closing (or termination of the purchase agreement, if applicable). Tarion will process the claim in accordance with the rules and regulations relating to Delayed Closing Compensation set out in the Regulations and the Addendums and generally described as follows.

Upon receipt of delayed Closing claim from a purchaser, Tarion will advise the builder of the claim and ask for the builder's input. Tarion will also ask the builder to resolve the claim within 30 days. If the claim is not resolved within such 30-day period Tarion will conduct a conciliation (i.e. a desk assessment) to assess the claim and thereafter issue a Warranty Assessment Report to the builder and the purchaser. If the claim is valid, Tarion will pay the compensation due to the purchaser. Tarion will then invoice the builder for such amount plus an administrative fee of \$500 and applicable taxes. If applicable, the conciliation may be deemed "chargeable" and if so, will be noted on the builder's record and Tarion's web site.

Chargeable Conciliation

A conciliation will be deemed "chargeable" if Delayed Closing Compensation is payable and was not paid within the above-noted 30-day period.

A conciliation may be deemed "not chargeable" if one of the following applies:

- The builder offers proper compensation in a timely manner but the purchaser rejects the offer.
- The builder and purchaser make an agreement for compensation but the purchaser refuses to sign an acknowledgement.

Appeal Rights

If a purchaser does not agree with a Delayed Closing Warranty Assessment Report, he or she may request a Decision Letter and a right of appeal to the Licence Appeal Tribunal is available thereafter.

A builder who disputes a Delayed Closing Warranty Assessment Report and/or the chargeability of the conciliation may request an arbitration according to the rules and criteria of Builder Bulletin 41 "Builder Arbitration Forum".

13. WHICH DELAYED CLOSING WARRANTY APPLIES?

Timing Transition Rules

The new Delayed Closing Warranty applies to purchase agreements for freehold homes that are entered into on or after July 1, 2008.

Type of Home

Subject to the timing rules noted above, the new Delayed Closing Warranty applies to:

- Free hold homes;
- Freehold homes associated with common element condominiums, sometimes called “parcels of tied land” or “POTLs”; and
- A vacant land condominium where the builder builds on the vacant land, sells the parcel and freehold home together, and Closing and occupancy occur at the same time.

The new Delayed Closing Warranty does not apply to contract homes.



Howard Bogach
Registrar

Attention Purchaser

The following changes to the contents of this Homeowner Information Package apply to condominium units with an occupancy date on or after May 1, 2004.

1. Delayed Occupancy Compensation

Page 4 – When can I claim compensation?

The text on page 4 in the section “When can I claim compensation?” is replaced with the following:

Once you take occupancy of your unit, you may be able to claim up to \$100 per day in living expenses, plus all direct costs caused by the delay (for example, extra moving and storage costs) up to a maximum of \$5,000. In order to be compensated, you must take occupancy and then submit a Delayed Occupancy Form (along with copies of all receipts) to both our office and the Warranty Program, at any time during the first year of possession.

In addition, the Warranty Service Rules described on page 7 do not apply to Delayed Occupancy claims. The service rules that do apply are described in the Delayed Occupancy Form package which can be obtained by calling the Warranty Program at 1-800-668-0124 or by visiting their Web site at www.newhome.on.ca

If you are unsure about your rights regarding delayed occupancy, you may wish to seek the advice of a lawyer.

2. Submission of a Warranty Service Request by Fax

Page 5 – Footnote

Faxed submissions of Warranty Service forms will be deemed to be received on the day they are sent, regardless of whether that is a business day or not.

Over...

3. Special Seasonal Warranty Items

Page 10

The text in this section is replaced with the following:

The completion of your home's final grading, landscaping (laying sod, etc.) and the installation of driveways, patios and walkways are considered special seasonal warranty items and are not subject to the Warranty Service Rules. In high-rise and low-rise condominium projects, these items are more likely to affect the common elements warranty and will be handled by the condominium corporation's Board of Directors.

We have 270 days of "seasonable weather" from your home's date of possession to complete any special seasonal warranty items reported on your 30-Day or Year-End Form (unless a longer period within the time limits permitted under applicable municipal agreements was negotiated between us).

Seasonable weather for this type of work is the period from May 1 to November 15 of any given year. For example, if your home's date of possession is June 30, 2004, we have until September 9, 2005 to complete the necessary work.

The seasonable weather days in this example are calculated as follows:

	NUMBER OF SEASONABLE WEATHER DAYS
July 1, 2004 to November 15, 2004	138
November 16, 2004 to April 30, 2005	0
May 1, 2005 to September 9, 2005	132
TOTAL	270

If for any reason we do not complete the required work to your satisfaction within this 270 day period, you have 30 days (which in the example above would be from September 10, 2005 to October 10, 2005) to contact the Warranty Program and request their assistance.

If the item is determined to be warrantable, the Warranty Program will work with you directly to settle the matter. If you do not contact the Warranty Program within this 30-day period, the special seasonal warranty items listed on your 30-Day or Year-End Form will be considered resolved and the matter closed. Please note that the Warranty Program cannot complete the settlement until you have title to your unit.

Attention Purchaser

The following changes to this Homeowner Information Package apply to freehold homes with a date of possession on or after May 1, 2004.

1. Delayed Closing Compensation

Page 4 – When can I claim compensation?

The text on page 4 in the section “When can I claim compensation?” is replaced with the following:

To be eligible for compensation, you must complete the purchase of your new home and then submit a Delayed Closing Form (along with copies of all receipts) to both our office and the Warranty Program, at any time during the first year of possession.

In addition, The Warranty Service Rules described on page 7 do not apply to Delayed Closing claims. The service rules that do apply are described in the Delayed Closing Form package which can be obtained by calling the Warranty Program at 1-800-668-0124 or by visiting their Web site at www.newhome.on.ca

2. Submission of a Warranty Service Request by Fax

Page 5 – Footnote

Faxed submissions of Warranty Service forms will be deemed to be received on the day they are sent, regardless of whether that is a business day or not.

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If the item is determined to be warrantable, the Warranty Program will work with you directly to settle the matter. If you do not contact the Warranty Program within this 30-day period, the special seasonal warranty items listed on your 30-Day or Year-End Form will be considered resolved and the matter closed.

DELAYED CLOSING/OCCUPANCY WARRANTY ACCOMMODATION COSTS: INTERIM MEASURE

April 19, 2004

I. The Current Interim Measure

The current *Interim Measure* introduced in a Special Announcement dated May 31, 2000 expires on April 30, 2004. The current *Interim Measure* will continue to be available for freehold closings and condominium occupancies with dates of possession on or before April 30, 2004 and the rules and procedures set out in the Special Announcement dated May 31, 2000 will apply. In addition, the Board of Directors of Tarion Warranty Corporation (“Tarion”, formerly Ontario New Home Warranty Program) has decided not to re-assess the amounts paid under the *Interim Measure* and as such, Tarion will no longer be advising vendors or vendor/builders (referred to collectively as “builders”) in its correspondence that claims under the *Interim Measure* may be re-assessed in the future.

II. New Interim Measure

A new *Interim Measure* (the “*New Interim Measure*”) will apply to freehold closings and condominium occupancies with dates of possession between May 1, 2004 and December 31, 2005 (both inclusive). In order for a builder to qualify for the *New Interim Measure*, a Delayed Closing/Occupancy Form must be completed by the homeowner and submitted to Tarion. This form may be obtained by calling Tarion at 1-800-668-0124 or online at www.tarion.com.

The *New Interim Measure* will provide rebates to builders solely for set-offs related to accommodation costs. Accommodation cost set-offs which will be considered include:

- For freehold purchases - mortgage amounts and realty taxes that would have been paid on the home in question had the delay not occurred *or* daily accommodation costs paid by the homeowner before the delay;
- For condominium purchases - mortgage, realty tax, and common elements fees on the condominium unit in question *or* daily accommodation costs paid by the homeowner before the delay.

Note: Tarion is not required to set-off these amounts, which is why homeowner compensation will not change under the *New Interim Measure*. The set-off rebate contemplated under the *New Interim Measure* will be discontinued after December 31, 2005.

Under the *New Interim Measure*, Tarion will charge the builder an upfront administrative fee if the builder requests that Tarion perform a pre-claim calculation of the total delayed closing/occupancy compensation payable to a homeowner (a “Pre-Claim Calculation”). This fee will serve to reduce the high costs incurred by Tarion in processing these claims. The administrative fee will be charged even if the builder does not make a subsequent request for reimbursement under the *New Interim Measure*.

The administrative fee will also be charged if the builder does not request a Pre-Claim Calculation but makes a claim for reimbursement after paying compensation directly to the homeowner. The amount of the administrative fee varies according to the date of possession or occupancy and is set out in the chart at the end of this Special Announcement.

The *New Interim Measure* reimbursement will be available to builders in the following circumstances:

1. if the builder requests that Tarion conduct a Pre-Claim Calculation and pays the full amount of the claim as assessed by Tarion within 30 days of the date of the Pre-Claim Calculation, in accordance with the Pre-Claim Procedure set-out below; or
2. if, within 30 days after the builder has settled the delayed closing/occupancy claim by paying compensation directly to the homeowner without any involvement by Tarion, the builder submits proof of that payment to Tarion in accordance with the Reimbursement Procedure after Direct Payment to Homeowner set-out below. The *New Interim Measure* reimbursement will not be available, however, if the builder pays compensation to the homeowner after Tarion conducts an assessment.

All requests for reimbursement must be made by the builder sending a completed Interim Measure Form to Tarion. This form can be obtained by calling Tarion at 1-800-668-0124 or online at www.tarion.com.

Pre-Claim Procedure

1. The builder may ask Tarion to do a Pre-Claim Calculation within 10 days of the date Tarion receives the completed Delayed Closing/Occupancy Form and notifies the builder that the form has been received. Tarion must be in receipt of a Delayed Closing/Occupancy Form completed by a homeowner before the Pre-Claim Calculation will be done. The builder must also include the appropriate administrative fee with this request.
2. Tarion will then provide the builder with a written Pre-Claim Calculation setting out the length of the delay and the compensation owing to the homeowner. The Pre-Claim Calculation will also set out the amount claimed for accommodation costs and its proportion to the total direct costs claimed by the homeowner.
3. Within 30 days of the Pre-Claim Calculation issue date, the builder is required to pay to the homeowner the full amount of the compensation determined by Tarion to be

owed. If the builder pays the full amount of the compensation within the 30 day period, the Pre-Claim Calculation will not be considered a chargeable conciliation.

4. Within 30 days after the payment is made to the homeowner by the builder, the builder can send proof that the payment was paid in time and make a claim under the *New Interim Measure* by completing an Interim Measure Form. Once the required information has been received by Tarion, the amount of the reimbursement for accommodation set-off costs will be calculated. This step is further explained under the heading “Calculating the Reimbursement” below.

Reimbursement Procedure after Direct Payment to Homeowner without Tarion’s Involvement

1. If the builder has settled a delayed closing/occupancy claim by paying compensation directly to the homeowner without involving Tarion, the builder may request reimbursement of accommodation set-off costs under the *New Interim Measure*. The builder’s request must be made within 30 days of final payment to the homeowner.
2. The builder must complete the Interim Measure Form and provide proof that full payment of the settlement amount has been made to the homeowner. The builder must also deliver a Delayed Closing/Occupancy Form completed by the homeowner if Tarion does not have the form in its possession. The administrative fee must be included with the Interim Measure Form.
3. Once Tarion is in receipt of all required documents, it will review the information provided and calculate the reimbursement for accommodation set-off costs as set out below.

Calculating the Reimbursement

The reimbursement will be limited to the accommodation cost set-offs permitted under the *New Interim Measure*. It will be pro-rated to reflect the ratio of accommodation cost to total direct costs incurred by the homeowner.

The reimbursement will be calculated by Tarion using the 10 step process described below. Three specific examples using sample information are attached in Appendix 1.

10 Step Process:

1. Calculate the total number of days delay (this will be set out on the Delayed Closing/Occupancy Form and verified by Tarion as appropriate).
2. Calculate the total costs incurred by the homeowner (the “**Total Cost**”, this will be set out on the Delayed Closing/Occupancy Form and verified by Tarion as appropriate).

3. Calculate the costs incurred by the homeowner for accommodation (the **“Actual Accommodation Cost”**, this will be set out on the Delayed Closing/Occupancy Form and verified by Tarion as appropriate).
4. Calculate the ratio of Actual Accommodation Cost to Total Cost (the **“Accommodation Percentage”**) by taking the Actual Accommodation Cost (line 3), dividing it by the Total Cost (line 2) and multiplying by 100.
5. Calculate the amount actually paid to the homeowner by the builder (the **“Delayed Closing Payment”**, this will be an amount up to \$5,000).
6. Calculate what part of the Delayed Closing Payment relates to accommodation cost (the **“Accommodation Payment”**) by applying the Accommodation Percentage (line 4) to the Delayed Closing Payment (line 5).
7. Calculate the amount which the homeowner would have paid per day had the delay not occurred based on acceptable evidence provided by the builder (e.g. evidence of deferred mortgage payments and realty tax), *or* the amount that the homeowner was paying for accommodation per day before the delay (this is the **“Daily Set-Off”**).
8. Calculate the total set-off (the **“Total Set-Off”**) by multiplying the Daily Set-Off by the number of days delay.
9. Calculate the difference between the Actual Accommodation Cost and the Total Set-Off. This is the **“Adjusted Accommodation Payment”**. **Note:** if the Adjusted Accommodation Payment is negative, it is deemed to be zero.
10. **Reimbursement:** The builder is reimbursed the amount by which the Accommodation Payment (line 6) exceeds the Adjusted Accommodation Payment (line 9).

III. Expiry of the New Interim Measure

The *New Interim Measure* will expire and will no longer be available for homes with dates of possession on or after January 1, 2006. From that time onwards, Tarion will no longer set-off and rebate to the builder a homeowner’s deferred mortgage payments and other deferred costs or prior rent against delayed closing/occupancy claims. Once the *New Interim Measure* expires, the builder will be responsible for all direct costs properly claimed by a homeowner.

Tarion encourages builders to avoid delayed closing/occupancy claims by establishing realistic possession dates in sale agreements, maintaining control of construction schedules and providing proper notice to homeowners where delays are encountered. Where the required amount of notice is not provided, builders should use their best efforts to resolve delayed closing claims directly with their purchasers.

Dates of Possession / Occupancy	Administrative Fee
May 1/04 - Dec. 31/04	\$600
Jan. 1/05 – Dec. 31/05	\$1200

SPECIAL ANNOUNCEMENT

Delayed Closing/Occupancy Warranty Accommodation Costs: Interim Measure

April 19, 2004

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Appendix 1

Example A:

1. Total number of days delay = 83 days.
2. Total costs incurred by the homeowner (**“Total Cost”**) = \$10,000.
3. Total costs incurred by the homeowner for accommodation (**Actual Accommodation Cost**) = \$7,470.
4. Ratio of Actual Accommodation Cost to Total Cost (**“Accommodation Percentage”**) = 75% (i.e. \$7,470 divided by \$10,000 multiplied by 100).
5. Amount actually paid to the homeowner by the builder (**“Delayed Closing Payment”**) = \$5,000 (because of the \$5,000 cap).
6. Part of the Delayed Closing Payment that relates to accommodation cost (**“Accommodation Payment”**) by applying the Accommodation Percentage to the Delayed Closing Payment = \$3,750 (i.e. 75% of \$5,000).
7. Amount which the homeowner would have paid per day had the delay not occurred based on acceptable evidence provided by the builder (e.g. evidence of deferred mortgage payments and realty tax) (the **“Daily Set-Off”**) = \$40.
8. The total set-off (**“Total Set-Off”**) is the Daily Set-Off multiplied by the number of days delay = \$3,320 (i.e. \$40 multiplied by 83 days).
9. The difference between the Actual Accommodation Cost (line 3) and the Total Set-Off (line 8) = \$4,150 (i.e. \$7,470-\$3,320). This is the **“Adjusted Accommodation Payment”**. Note: if the Adjusted Accommodation Payment is negative it is deemed to be zero.
10. **Reimbursement**: The builder is reimbursed the amount by which the Accommodation Payment (line 6) exceeds the Adjusted Accommodation Payment (line 9).

In this example, the Reimbursement would be zero, as the Accommodation Payment (\$3,750) does not exceed the Adjusted Accommodation Payment (\$4,150).

Example B:

1. Total number of days delay = 30 days
2. Total costs incurred by the homeowner (**“Total Cost”**) = \$4,990.
3. Total costs incurred by the homeowner for accommodation (**Actual Accommodation Cost**) = \$3,000.
4. Ratio of Actual Accommodation Cost to Total Cost (**“Accommodation Percentage”**) = 60% (i.e. \$3,000 divided by \$4,990 multiplied by 100).
5. Amount actually paid to the homeowner by the builder (**“Delayed Closing Payment”**) = \$4,990.
6. Part of the Delayed Closing Payment that relates to accommodation cost (**“Accommodation Payment”**) by applying the Accommodation Percentage to the Total Cost = \$3,000 (i.e. 60% of \$4,990).
7. Amount which the homeowner would have paid per day had the delay not occurred based on acceptable evidence provided by the builder (e.g. evidence of deferred mortgage payments and realty tax) (the **“Daily Set-Off”**) = \$60.
8. The total set-off (**“Total Set-Off”**) is the Daily Set-Off multiplied by the number of days delay, = \$1,800 (i.e. \$60 multiplied by 30 days).
9. The difference between the Actual Accommodation Cost (line 3) and the Total Set-Off (line 8) = \$1,200 (i.e. \$3,000-\$1,800). This is the **“Adjusted Accommodation Payment”**. Note: if the Adjusted Accommodation Payment is negative it is deemed to be zero.
10. **Reimbursement**: The builder is reimbursed the amount by which the Accommodation Payment (line 6) exceeds the Adjusted Accommodation Payment (line 9).

In this example, the Reimbursement would be \$1,800, as the Accommodation Payment (\$3,000) exceeds the Adjusted Accommodation Payment (\$1,200) by that amount.

Example C:

1. Total number of days delay = 83 days.
2. Total costs incurred by the homeowner (**“Total Cost”**) = \$6,000.
3. Total costs incurred by the homeowner for accommodation (**Actual Accommodation Cost**) = \$3,100.
4. Ratio of Actual Accommodation Cost to Total Cost (**“Accommodation Percentage”**)= 52% (i.e. \$3,100 divided by \$6,000 multiplied by 100).
5. Amount actually paid to the homeowner by the builder (**“Delayed Closing Payment”**) = \$5,000 (because of the \$5,000 cap).
6. Part of the Delayed Closing Payment that relates to accommodation cost (**“Accommodation Payment”**) by applying the Accommodation Percentage to the Total Cost = \$2,583 (i.e. 52% of \$5,000).
7. Amount which the homeowner would have paid per day had the delay not occurred based on acceptable evidence provided by the builder (e.g. evidence of deferred mortgage payments and realty tax) (the **“Daily Set-Off”**)= \$37.70.
8. The total set-off (**“Total Set-Off”**) is the Daily Set-Off multiplied by the number of days delay = \$3,129.10 (i.e. \$37.70 multiplied by 83 days).
9. The difference between the Actual Accommodation Cost (line 3) and the Total Set-Off (line 8) = -\$29.10 (i.e. \$3,100-\$3,129.10). This is the **“Adjusted Accommodation Payment”**. Since it is negative, it is deemed to be zero.
10. **Reimbursement:** The builder is reimbursed the amount by which the Accommodation Payment (line 6) exceeds the Adjusted Accommodation Payment (line 9).

In this example, the Reimbursement would be \$2,583, as the Accommodation Payment (\$2,583) exceeds the Adjusted Accommodation Payment (deemed to be \$0) by this amount.

Note: in each of these examples the set-off was based on documented daily post closing/occupancy costs (e.g. deferred mortgage payments). If the set-off used was based on documented daily accommodation costs before the delay (e.g. the rent paid by a homeowner before the delay), these costs would form the basis of the Daily Set-Off used in line 7.

SPECIAL ANNOUNCEMENT

Delayed Closing/Occupancy Warranty Accommodation Costs: Interim Measure

April 19, 2004

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ONTARIO NEW HOME WARRANTY PROGRAM

BUILDER ARBITRATION FORUM

INSTRUCTION SHEET FOR ARBITRATION APPLICATION PACKAGE

1. Read the Procedural Rules and the appended forms carefully.
2. Refer to the ONHWP Report to find out the deadline for delivery of your Arbitration Application Package to ONHWP.
3. Complete the Notice of Arbitration (Form 1). For paragraph 5 of the Notice, see instruction #4 below.
4. Before completing paragraph 5 of the Notice of Arbitration, review the Roster List and select three persons who you would like to propose as the arbitrator. Fill in Section A of the Nominee Confirmation form (Form 3) for each of your nominees and send it to each nominee for completion. We recommend that you send it to your nominees by fax or courier, to ensure prompt delivery.
5. Once your nominees return the Nominee Confirmation forms back to you, read each one to ensure that they are available and have no conflict of interest. If a nominee indicates that he/she is not available or has a conflict, then you must select another nominee from the Roster List and send a Nominee Confirmation form to him/her for completion.
6. Once you have received Nominee Confirmation forms from three nominees who are available and have no conflict, list their names in paragraph 5 of the Notice of Arbitration and attach the Nominee Confirmation forms to your Notice.
7. Sign the Notice of Arbitration and the Arbitration Agreement (Form 2).
8. Make two photocopies of your signed Arbitration Application Package (which includes: the Notice of Arbitration, the Nominee Confirmations, the Arbitration Agreement, and a copy of the ONHWP Report that you wish to arbitrate). Keep one photocopy for yourself.
9. Obtain a certified cheque or money order for \$802.50 (\$750.00 plus GST) for the administration fee.
10. Send the original and one copy of the Arbitration Application Package to the ONHWP Corporate Office by the deadline (see instruction #2 above). The following must be included:
 - i. Notice of Arbitration
 - ii. Arbitration Agreement
 - iii. Copy of the ONHWP Report you wish to arbitrate
 - iv. Nominee Confirmation forms (from 3 nominees)
 - v. Certified cheque or money order for \$802.50 (\$750.00 plus GST)

To ensure prompt delivery before the deadline, we recommend that you use a same-day or overnight courier service to deliver your Package. Applications sent by regular mail must be postmarked 5 business days before the deadline.

ONTARIO NEW HOME WARRANTY PROGRAM

BUILDER ARBITRATION FORUM

PROCEDURAL RULES

(effective: April 2, 2003)

1. GENERAL

1.1 Application and Purpose

These Rules apply to arbitrations under the Builder Arbitration Forum, conducted under an Arbitration Agreement between ONHWP and a Builder. The purpose of these Rules is to promote the fairness, timeliness, accessibility and affordability of the Builder Arbitration Forum. These rules cover most situations that will arise in an arbitration. Any dispute about the interpretation of these Rules or about a situation not covered under these Rules will be resolved by the appointed Arbitrator unless stated otherwise in these Rules.

1.2 Definitions

In these Rules,

- (a) “Act” means the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31 as amended from time to time, and the Regulations thereunder;
- (b) “arbitration” means a proceeding under the Builder Arbitration Forum;
- (c) “Arbitration Application Package” has the meaning attributed to it as in Rule 4.2;
- (d) “Arbitrator” means the person appointed to arbitrate the dispute under these Rules;
- (e) “Arbitrator’s costs” means the Arbitrator’s fees and disbursements, calculated in accordance with the Builder Arbitration Forum Tariff;
- (f) “Builder” means a person who is a “vendor” or “builder” as defined in the Act and who commences an arbitration under these Rules;
- (g) “Builder Arbitration Forum” means the procedure for arbitration of disputes between a Builder and ONHWP arising from a Warranty Assessment Report;
- (h) “Builder Bulletin” means a bulletin issued by ONHWP to Builders;
- (i) “business day” means any day other than Saturday, Sunday or a statutory holiday in the Province of Ontario;
- (j) “chargeability” means the criteria used to determine whether a conciliation is chargeable;

- (k) “chargeable conciliation” means any conciliation where there are warrantable items identified by ONHWP staff and the Builder was not denied access and could have avoided the conciliation by attending to the owner’s complaints. All conciliations are deemed to be chargeable conciliations to the Builder unless there are no warrantable items identified by ONHWP staff during the conciliation process. Even if only one warrantable item is assessed, whether major or minor in nature, the conciliation will be chargeable to the Builder. Exceptions:
- (i) Where the owner identifies new complaint items for the first time during a conciliation inspection, these items will not be considered when determining if the conciliation is chargeable to the Builder;
 - (ii) Where the Builder can demonstrate that the owner refused reasonable access to rectify the complaints prior to the conciliation, then the conciliation is not chargeable to the Builder; or
 - (iii) Where the Builder and the owner disagree about the method and timing of repair and seek ONHWP’s intervention, and ONHWP supports the Builder’s recommendation, then the conciliation is not chargeable to the Builder;
- (l) “conciliation” means a process where ONHWP attempts to resolve a dispute between an owner and a Builder; the conciliation process may consist of a site visit, a single or series of telephone meetings, a review of documentation, or combinations of these;
- (m) “conflict of interest” has the same definition as set out in the Roster Agreement between the Arbitrator and ONHWP established under the Builder Arbitration Forum;
- (n) “Customer Service Standard” means the Customer Service Standard prescribed by ONHWP from time to time for homes completed for possession on or after October 1, 2003;
- (o) “deliver” or “delivery” means delivery by hand or by regular mail, registered mail, courier or facsimile transmission, unless expressly stated otherwise. In the case of regular and registered mail, delivery will be deemed to occur 5 business days after the day of mailing other than during a general discontinuance of postal service due to strike, lock-out or otherwise. If sent by facsimile, delivery shall be deemed to occur on the business day sent, if sent before 5:00 p.m. and otherwise on the next business day, provided that the transmitting party receives a confirmation of transmission at the time of the transmission. If sent by courier, delivery shall be deemed to occur on the business day received, if received before 5:00 p.m. and otherwise on the next business day.
- (p) “good standing” means full and timely compliance with the Act, Builder Bulletins and any agreements between ONHWP and the Builder, including up-to-date filing of applications for renewal and supporting documents, payment of renewal fees and enrolment fees, compliance with any security requirements and other terms and conditions of registration, and payment of any invoices issued by ONHWP to the Builder for indemnity of items which have been found by ONHWP to be a breach of warranty;
- (q) “ONHWP” means Ontario New Home Warranty Program, being the corporation designated to administer the Act;

- (r) “Registrar” means the Registrar appointed by ONHWP under section 3 of the Act;
- (s) “Roster” means the list of arbitrators established under the Builder Arbitration Forum;
- (t) “warrantability” and “warranted” and “warranty” refer to the warranties set out in the Act and their application to items in dispute between a Builder and owner;
- (u) “Warranty Assessment Report” means a report by ONHWP setting out ONHWP’s findings of warrantability and chargeability after a conciliation; and
- (v) any terms not defined in these Rules shall be interpreted in accordance with the Act, the *Arbitration Act*, and the *Interpretation Act*.

1.3 Gender and Number

In these Rules,

- (a) the male gender includes the female gender;
- (b) except where the context otherwise requires, the singular includes the plural and the plural the singular.

1.4 Language and Interpretation

The language of arbitration will be English, unless the parties and the Arbitrator agree otherwise. Any party who requires an interpreter must arrange for an interpreter at his own cost.

1.5 Computation of Time

Time limits under these Rules will be computed by including all calendar days, unless expressly stated otherwise. Where there is a reference to a number of days between two events, they will be counted by excluding the day on which the first event happens and including the day on which the second event happens. Where the time for performing an act falls or expires on a day which is not a business day, the time is extended to the next business day.

1.6 Extension and Abridgement of Time

Unless expressly stated otherwise, a time prescribed by these Rules may be extended or abridged by the written consent of the parties or by an order of the Arbitrator.

1.7 Communication Between Parties and Arbitrator

Any communication between a party and the Arbitrator must occur in the presence of, or on written notice to the other party, except for administrative or other non-contentious matters.

1.8 Forms

The forms referred to herein and appended hereto, as amended from time to time by ONHWP, form part of these Rules.

1.9 No Effect on Owner

An arbitration will not delay any remedy otherwise available to an owner and will not otherwise adversely affect an owner. ONHWP may pay compensation to an owner or arrange for repairs in lieu, regardless of an arbitration by the Builder and without prejudice to the rights of the Builder or ONHWP in the arbitration.

1.10 Repair Under Protest

The Builder may, at his option, repair an item deemed to be a breach of warranty in a Warranty Assessment Report under protest and without prejudice to his rights to arbitrate the Warranty Assessment Report, and may request the Arbitrator to order ONHWP to reimburse the Builder for his reasonable repair costs, provided:

- (a) the Builder performs the repairs within:
 - (i) the time period required in the Warranty Assessment Report, if the home was completed for possession before October 1, 2003; or
 - (ii) the time period prescribed by the Customer Service Standard, if the home was completed for possession on or after October 1, 2003; and
- (b) the Builder provides a written warranty to ONHWP that the repairs are done in a workmanlike manner and are free of defects in materials, for a period of one year from the completion of the repairs or the balance of the applicable warranty period under the Act, whichever is longer; and
- (c) the Builder demonstrates actual and reasonable out-of-pocket expenses for labour and materials as the result of the repair. The Builder may also add a mark-up of up to 15% for administration and overhead to its actual out-of-pocket expenses, provided that ONHWP may object to the mark-up if it is above the market rate or not actually incurred.

2. ELIGIBILITY AND SCOPE

2.1 Eligibility

A Builder is eligible to commence an arbitration if he meets all of the following conditions:

- (a) the Builder is in good standing at the start of, and throughout the duration, of the arbitration;
- (b) the Builder is not the subject of a Notice of Proposal under the Act;
- (c) in the case of an arbitration from a conciliation involving an on-site inspection, the Builder must have attended at the inspection;

- (d) in the case of an arbitration from a conciliation involving only documentary review, the Builder must have complied with all written requests by ONHWP for information or documentation; and
- (e) if the Builder is disputing the chargeability of a conciliation and is relying on an exception set out in Rule 1.2(k) (ii) or (iii), the Builder must have given written notice to ONHWP, prior to the conciliation, of any facts that would entitle the Builder to rely on the exception.

2.2 Registrar to Determine Eligibility

The Registrar has the sole discretion to determine whether a Builder is eligible to commence an arbitration, and his/her determination is not subject to review by the Arbitrator.

2.3 Issues that may be Raised

A Builder may raise the following issues in the arbitration:

- (a) whether an item in a Warranty Assessment Report is or is not a breach of warranty;
- (b) whether the amount invoiced by ONHWP is reasonable or not reasonable;
- (c) whether ONHWP should reimburse the Builder for repairs done by the Builder under Rule 1.10, and if so, in what amount; or
- (d) whether the conciliation giving rise to the Warranty Assessment Report is chargeable or not chargeable, provided that, if the Builder is relying on an exception set out in Rule 1.2(k)(ii) or (iii), the Builder must have given written notice to ONHWP, prior to the conciliation, of any facts that would entitle the Builder to rely on the exception.

3. APPOINTMENT OF ARBITRATOR

3.1 Number of Arbitrators

The arbitration will be conducted by a single Arbitrator appointed under these Rules.

3.2 Nomination by Builder

The Builder shall nominate three persons from the Roster, after obtaining written confirmation (using Form 3 in the Appendix) from each nominee that the nominee has no conflict of interest and is available to conduct an arbitration within the time limits established by these Rules. The Builder must notify ONHWP of the names of the Builder's nominees and provide copies of the nominees' written confirmations at the time of delivery of the Builder's Application Package within the time set out in Rule 4.2.

3.3 Appointment by ONHWP

ONHWP shall appoint one of the Builder's nominees as the Arbitrator, and shall notify the Builder and the Arbitrator of the appointment (using Form 5 in the Appendix), within the time set out in Rules 4.3 and 4.4.

3.4 Communication with Nominees

Despite Rule 1.7, during the nomination process, the Builder may communicate with the Builder's nominees for the purpose of inquiring about their availability and requesting their written confirmation, but the Builder shall not communicate with any of the nominees about any issues that have been or will be raised in the arbitration.

3.5 Termination of Arbitrator

ONHWP shall terminate the appointment of the Arbitrator if:

- (a) the Arbitrator resigns, dies, is in a conflict of interest position, or otherwise becomes incapable of acting; or
- (b) the parties agree in writing that the appointment of the Arbitrator must be terminated;

and in such circumstances, the parties shall pay, in equal shares, the Arbitrator's reasonable costs in accordance with the Tariff. ONHWP may apply the Builder's deposit to satisfy the Builder's share.

3.6 Replacement of Terminated Arbitrator

Upon termination of an Arbitrator under Rule 3.5, the parties shall nominate and appoint another Arbitrator in the manner provided under Rules 3.2 and 3.3. The time limit for the Builder's notice of nominees under Rule 4.2 will be calculated from the date of termination of the previous Arbitrator.

4. STARTING THE ARBITRATION

4.1 Notification of Option to Arbitrate

Every Warranty Assessment Report shall notify the Builder that the Builder may commence an arbitration to dispute the ONHWP Report if the builder delivers an Arbitration Application Package to ONHWP within 28 days of delivery of the Warranty Assessment Report.

4.2 Builder's Arbitration Application Package

A Builder may commence an arbitration by delivering to ONHWP (facsimile excluded), within 28 days of delivery of the Warranty Assessment Report, an Arbitration Application Package consisting of:

- (a) a signed Notice of Arbitration (using Form 1 in the Appendix), setting out:
 - (i) the Builder's address, phone number and fax number;
 - (ii) identification of the Warranty Assessment Report to be arbitrated;
 - (iii) identification of any of the items in the Warranty Assessment Report that the Builder disputes are a breach of warranty;

- (iv) an estimate of the value of the dispute, the amount of time required to present the case at the hearing and the number of witnesses;
 - (v) whether the Builder disputes the chargeability of the conciliation giving rise to the Warranty Assessment Report, and the Builder's reasons;
 - (vi) whether the Builder is seeking reimbursement for repairs under Rules 1.10 and the amount; and
 - (vii) the names of three persons from the Roster nominated by the Builder for appointment by ONHWP under Rule 3; and
- (b) a signed Arbitration Agreement (using Form 2 in the Appendix);
 - (c) a copy of the Warranty Assessment Report that the Builder seeks to arbitrate;
 - (d) a Nominee Confirmation (using Form 3 in the Appendix) signed by each of the three persons nominated by the Builder from the Roster, as set out in Rule 3; and
 - (e) an administration fee of \$802.50 (\$750.00 plus GST) in the form of a certified cheque or money order payable to ONHWP.

4.3 ONHWP Notice of Response

If the Builder is eligible under Rule 2 and has complied with Rule 4.2, ONHWP shall deliver to the Builder a Notice of Response (using Form 4 in the Appendix) within 7 days of delivery of the Builder's Arbitration Application Package. ONHWP's Notice of Response must contain:

- (a) confirmation by the Registrar that the Builder is eligible to commence an arbitration;
- (b) the amount to be paid by the Builder to ONHWP, in trust, as a deposit for the Arbitrator's costs; and
- (c) ONHWP's response to the Notice of Arbitration.

4.4 Notice of Appointment of Arbitrator and Acceptance of Appointment

Concurrently with the Notice of Response, ONHWP shall deliver an Appointment of Arbitrator and Acceptance of Appointment (using Form 5 in the Appendix) to the Arbitrator and the Builder.

Within 2 business days of delivery of the Appointment of Arbitrator and Acceptance of Appointment, the Arbitrator shall confirm acceptance of the appointment by signing and delivering the Appointment of Arbitrator and Acceptance of Appointment to ONHWP and the Builder.

4.5 If Builder is Not Eligible

If the Registrar determines that the Builder is not eligible to commence an arbitration under Rule 2, the Registrar shall give written notice to the Builder that he is not eligible within 7 days of delivery of the Builder's Application Package to ONHWP. The Registrar's notice shall specify the reasons why the Builder is not eligible.

If the Registrar's notice states that the Builder is not eligible because he is not in good standing, it shall also state that the Builder has 7 days to comply with the specified requirements in order to be considered in good standing. If the Builder complies with the notice, ONHWP shall deliver

ONHWP's Notice of Response within 7 days of the compliance, and the arbitration will proceed. If the Builder fails to comply with the Registrar's notice, the arbitration is deemed not to commence, and ONHWP will notify the Builder accordingly and refund the administration fee. The Arbitrator may not extend the time for the Builder to comply with the Registrar's notice under this Rule.

If the Registrar's notice states that the Builder is not eligible for any reason under Rule 2.1 other than lack of good standing, the arbitration shall be deemed not to have commenced.

4.6 Non-Compliance with Rule 4.2

If a Builder fails to comply with Rule 4.2, the arbitration shall be deemed not to have commenced, except as set out in Rule 4.7. ONHWP will notify the Builder in writing of the Builder's non-compliance within a reasonable time after receipt of all or part of the Builder's Arbitration Application Package.

4.7 Dispute about Non-Compliance with Rule 4.2

A Builder may dispute ONHWP's notice under Rule 4.6 by delivering to ONHWP within 7 days of delivery of ONHWP's notice:

- (a) a Written Request for an order by an Arbitrator determining whether the Builder has complied with Rule 4.2 or whether the time for compliance should be extended;
- (b) a completed Arbitration Application Package, together with the administration fee required by Rule 4.2;
- (c) the Builder's reasons for disputing the non-compliance or for requesting an extension of time; and
- (d) a deposit to cover the Arbitrator's costs to hear the request, in accordance with the Tariff.

Delivery by the Builder in this section shall not include facsimile transmission.

4.8 ONHWP Delivery of Materials

Within 7 days of delivery of the Builder's documents and payments under Rule 4.7, ONHWP will:

- (a) appoint an Arbitrator from the Builder's nominees;
- (b) deliver a copy of the Builder's documents set out in Rule 4.7 to the Arbitrator; and
- (c) deliver ONHWP's response to the Builder's request, to both the Builder and the Arbitrator.

4.9 Arbitrator Ruling on Compliance with Rule 4.2

Within 7 days of receipt of the documents set out in Rule 4.8, the Arbitrator will issue an order or award, after reviewing the documents and, if the Arbitrator deems necessary, hold a teleconference with the parties. The Arbitrator shall:

- (a) decide whether the Builder has complied with Rule 4.2;
- (b) if the Builder has not complied with Rule 4.2, decide whether to terminate the arbitration or to extend the time for compliance, on such terms as are just, having regard to whether it is in the interest of justice to do so, after considering the following factors:
 - (i) whether the Builder intended to arbitrate within the time limit;
 - (ii) the seriousness of the non-compliance and the Builder's reasons for non-compliance;
 - (iii) whether there is any prejudice to ONHWP as the result of the Builder's non-compliance;
 - (iv) whether there is a substantial issue to be arbitrated and whether the Builder has a reasonable chance of success; and
- (c) decide which party shall pay the Arbitrator's costs under the order, including the amount and the time for payment.

The Arbitrator's order or award shall be final and binding on the parties as if it was a final award under Rule 9.4.

5. PREPARING THE CASE AND PAYMENT OF DEPOSIT

5.1 Builder's Case Material and Deposit

Within 14 days of delivery of ONHWP's Notice of Response, the Builder shall:

- (a) deliver to ONHWP, a certified cheque or money order in the amount specified in the Notice of Response, payable to "ONHWP in trust", as a deposit for the Arbitrator's costs; and
- (b) deliver to ONHWP two copies of the Builder's Case Material.

Delivery by the Builder in this section shall not include facsimile transmission.

5.2 Non-Compliance with Rules 5.1

If the Builder fails to comply with Rule 5.1, the Arbitrator shall terminate the arbitration.

5.3 ONHWP Case Material

Within 14 days of delivery of the Builder's Case Material, ONHWP shall deliver one copy of its Case Material to the Builder and one copy of its Case Material and the Builder's Case Material to the Arbitrator.

5.4 Contents of Case Material

Each party's Case Material must include:

- (a) a table of contents;
- (b) a copy of the party's Notice of Arbitration or Notice of Response;

- (c) a written statement of reasons;
- (d) copies of all documents that the party intends to rely on at the hearing;
- (e) a list of the party's witnesses, including their name, titles or positions, and qualifications, if any; and
- (f) if a party intends to call an expert witness or rely on an expert report, a copy of the report, together with the expert's qualifications.

5.5 Additional Material for Written Hearings

If the hearing is in writing pursuant to Rule 6.13, each party's Case Material shall also contain:

- (a) a written statement from each witness, which must be typed with numbered paragraphs, signed, dated and sworn, setting out their occupation, qualifications and relationship to the tendering party or the dispute, and must attach any documents referred to in the statement; and
- (b) a written argument, which must be typed with numbered paragraphs, and must attach any legal authorities referred to in the argument.

5.6 Physical Requirements for Case Material

Case Material must be contained in bound document books or loose-leaf binders, with numbered tabs separating the various sections and documents, and with numbered pages. Any legal authorities may be filed in separate books or binders.

5.7 Substantial Compliance with Rule

Substantial compliance with this Rule, except for the time requirements, will be sufficient for the hearing. The parties must strictly comply with the time requirements unless they are extended or abridged on consent of the parties or at the discretion of the Arbitrator.

6. THE HEARING: MODE, DATES, LOCATION, REPRESENTATION

6.1 Agreement to Proceed

At any time before the commencement of the hearing, the Arbitrator shall require the parties to sign an Agreement to Proceed (using Form 6 in the Appendix).

6.2 Mode of Hearing

The hearing of the arbitration will be oral, except as provided in Rule 6.13. An oral hearing may be conducted in person or by teleconference, at the discretion of the Arbitrator.

6.3 Conduct of Hearing

The hearing is intended to be informal in nature. The Arbitrator is not bound by strict rules of evidence or procedure as long as the hearing complies with the rules of natural justice and procedural fairness.

6.4 Date of Hearing

The Arbitrator shall schedule the hearing for a date that is no more than 14 days after delivery of ONHWP's Case Material. The Arbitrator can decide that additional time is required due to the complexity of the issues and/or the availability of the parties, the Arbitrator or the hearing facilities.

6.5 Location of Hearing

If the hearing is to be conducted orally and in person, the hearing must occur in the city or greater metropolitan area in which the responsible ONHWP Regional Office is located, unless the parties and the Arbitrator agree otherwise.

6.6 Notice of Mode, Date and Location

The Arbitrator must deliver written notice of the mode, date, time and location (if in-person) of the hearing to the parties at least 7 days in advance of the hearing date, unless the parties agree to abridge the notice period.

6.7 Arbitration to be Private and Confidential

The hearing is open only to the Arbitrator and the parties and their lawyers and witnesses, unless the parties otherwise agree. The Arbitrator, parties, lawyers and witness shall treat all communications, evidence, arguments, orders and the award as confidential, except in connection with a judicial challenge to, or enforcement of an order or award, or unless otherwise required by law. Nothing in this Rule precludes disclosure of such information to a party's insurer, auditor, lawyer or other person with a direct financial interest in the arbitration. Nothing in this Rule precludes ONHWP from publishing the award without identification of the Builder.

6.8 Oath or Affirmation

Witnesses who testify in person or by teleconference shall do so under oath or affirmation.

6.9 Exhibits

The Arbitrator shall:

- (a) identify all exhibits received by him in the course of the arbitration; and
- (b) retain the exhibits and all other documents received by him in the course of the proceedings until 60 days after the date of delivery of the award to the parties and then dispose of the exhibits and documents unless:

- (i) the Arbitrator is advised in writing that a judicial review of the award has been commenced, in which case the Arbitrator shall forward the exhibits and documents to the court as directed by the reviewing party; or
- (ii) a party provides written notice to the Arbitrator prior to the expiry of the 60 day period that he wishes to retrieve his exhibits and documents at his expense.

6.10 Recording of Hearing

The hearing will not be recorded unless the parties and the Arbitrator agree otherwise.

6.11 Representation at Hearing

The Builder shall be represented at the hearing by an officer, director, employee, sole proprietor or partner of the Builder. ONHWP must be represented at the hearing by an employee. Lawyers may assist the parties in the preparation of written materials and may attend the hearing as observers, but may not conduct examinations or make submissions except with leave of the Arbitrator.

6.12 Failure to Attend Hearing

If a party fails to attend a hearing, the Arbitrator may proceed in the party's absence.

6.13 Written Hearings

The hearing may be conducted in writing, rather than orally, if the parties and the Arbitrator agree that it is appropriate to do so. The Arbitrator will notify the parties of any modifications to the Rules required to facilitate the written hearing.

7. ARBITRATOR'S JURISDICTION AND POWERS

7.1 Jurisdiction

The Arbitrator has the jurisdiction to:

- (a) decide whether disputed items in the Warranty Assessment Report are or are not a breach of warranty;
- (b) decide whether the amount invoiced by ONHWP is reasonable or not reasonable;
- (c) order the Builder to indemnify ONHWP for reasonable amounts invoiced for items found to be a breach of warranty;
- (d) decide whether the Builder is entitled to reimbursement for repairs done by the Builder under Rule 1.10 to a disputed item found not to be a breach of warranty, and whether the amount claimed by the Builder is reasonable or not reasonable;
- (e) order ONHWP to reimburse the Builder for repairs done by the Builder under Rule 1.10 for items found not to be a breach of warranty;
- (f) decide whether the conciliation giving rise to the Warranty Assessment Report is chargeable or not chargeable, provided that the Builder may only rely on the grounds or reasons raised

- in a written notice prior to the conciliation and recognized as an exception in the definition of chargeable conciliation;
- (g) order a party or parties to pay the Arbitrator's costs, and in what amount, in accordance with Rule 8 and the Tariff; and
 - (h) decide whether an issue or matter raised in the arbitration is within the Arbitrator's jurisdiction.

7.2 Procedural Powers

In the course of an arbitration, an Arbitrator may determine all evidentiary and procedural issues regarding the conduct of the hearing and exercise all the powers that the Arbitrator considers necessary to make the arbitration as effective and as efficient as possible. Without in any way limiting any of the foregoing, the Arbitrator may:

- (a) set the date and time of the hearing, and, subject to Rule 6.4, the location of the hearing;
- (b) adjourn a hearing to a specific date, place and time; on such terms as are just, including payment of any additional costs incurred by the Arbitrator as the result of the adjournment;
- (c) if necessary, conduct one or more pre-hearing conferences with the parties to clarify or narrow the issues in dispute, to review the procedure to be followed in the arbitration, and to deal with any other matter that will assist the conduct of the arbitration;
- (d) vary the amount of the Builder's deposit, with or without a pre-hearing conference, and set the time for additional payment or partial refund accordingly;
- (e) make an interim order on any matter for which the Arbitrator may make a final award;
- (f) administer oaths or take the affirmations of the parties and witnesses;
- (g) require a witness, other than a party or the party's representative, to absent himself from the hearing during the testimony of another witness;
- (h) at the written request of a party, issue a notice requiring a person to attend and give evidence at the hearing, for the party to serve on the person;
- (i) order the taking of a view of the subject home with the owner's consent;
- (j) rely on his own expert knowledge;
- (k) waive or vary time limits or the strict requirement of these Rules except where these Rules expressly provide otherwise; and
- (l) use telecommunications, including conference calls and facsimile transmission, for communication with and delivery of documents by or among the Arbitrator and the parties.

7.3 Applicable Principles and Law

The Arbitrator shall consider each case on its merits and shall comply with the Act, the Construction Performance Guidelines established by ONHWP under Builder Bulletin #40, any other applicable Builder Bulletins and the laws of the Province of Ontario. The Arbitrator is not bound by previous awards in other arbitrations under the Builder Arbitration Forum.

8. COSTS OF THE ARBITRATION

8.1 Administration Costs

The administration fee paid by the Builder under Rule 4.2 is non-refundable, except as expressly provided in these Rules. ONHWP will bear the costs of administering the Builder Arbitration Forum and will apply the administration fee to defray such costs.

8.2 Parties' Own Costs

Parties must bear their own costs of preparation, presentation and attendance regardless of the outcome of the hearing.

8.3 Arbitrator's Costs

The unsuccessful party shall pay the Arbitrator's costs. If success is divided, the Arbitrator will allocate the costs between the parties.

8.4 Refund of Builder's Deposit

If the Builder is wholly successful, ONHWP shall refund the Builder's deposit without interest or penalty immediately after delivery of the award.

8.5 Application of Builder's Deposit to Costs

If the Builder is wholly or partially unsuccessful, ONHWP is entitled to apply the Builder's deposit to satisfy the Arbitrator's costs awarded against the Builder by the Arbitrator. If the Arbitrator's costs and charges awarded against the Builder are less than the deposit, ONHWP shall either refund the balance from the deposit without interest or retain the balance and apply it as a credit against any amounts owing to ONHWP by the Builder as a result of any award arising from the Arbitration. If the Arbitrator's costs exceed the deposit, the Builder shall pay any additional amount owing to the Arbitrator within 14 days of delivery of the award, failing which ONHWP will pay the Arbitrator on the Builder's behalf and will be entitled to indemnity from the Builder.

8.6 Cost of Abandoned or Dismissed Arbitration

If the Builder abandons the arbitration or if the arbitration is terminated due to the Builder's failure to comply with the Rules or an interim award, the Builder's deposit shall be forfeited. ONHWP must apply the forfeited deposit to payment of the Arbitrator's fees in accordance with the Tariff and will refund any remaining deposit to the Builder without interest.

8.7 Costs of Settled Arbitration

If ONHWP and the Builder agree to settle an arbitration before or at the hearing, the Arbitrator's costs will be allocated evenly between the parties, unless the terms of the settlement provide otherwise, and ONHWP will apply the Builder's deposit in payment of the Builder's share of costs, to the Arbitrator.

9. ARBITRATOR'S AWARD

9.1 Delivery of Award

In the case of an oral hearing, the Arbitrator shall deliver the award to each of the parties within 7 days of the conclusion of the hearing. In the case of a written hearing, the Arbitrator shall deliver a final award within 14 days after delivery of ONHWP's Case Material.

9.2 Form and Content of Award

The award of an Arbitrator shall be in writing, dated and signed by the Arbitrator and shall:

- (a) set out a summary of the evidence and the facts as found by the Arbitrator;
- (b) set out the Arbitrator's conclusions and reasons as to whether the disputed items are or are not a breach of warranty;
- (c) set out the Arbitrator's conclusions and reasons as to whether the conciliation giving rise to the Warranty Assessment Report is chargeable or not chargeable;
- (d) specify whether either party is required to pay an amount to the other party, and if so, the amount;
- (e) specify which party or parties shall pay the Arbitrator's costs and in what amount or amounts, and shall attach an account from the Arbitrator;
- (f) contain a declaration that the Arbitrator has no conflict of interest with any party or witness; and
- (g) contain a declaration that the award is final and binding on the parties.

9.3 Corrections and Amendments to Award

The Arbitrator may, on his own initiative, within 30 days after making an award or at a party's written request made within 30 days after receiving the award:

- (a) correct typographical errors, errors of calculation and similar errors in the Award; or
- (b) amend the Award so as to correct an injustice caused by an oversight on the part of the Arbitrator.

9.4 Finality of Award

The Arbitrator's award shall be final and binding on the parties, and there shall be no right of appeal on questions of law, fact or mixed law and fact. However, the parties may apply to set aside an award on the grounds set out in section 46 of the *Arbitration Act, 1991*.

9.5 Enforcement of Award

If either party fails to comply with all or part of an award, the other party may enforce the award by court application. ONHWP may enforce an award by court application or Notice of Proposal, or both, and may invoke such processes simultaneously or consecutively, without the need to exhaust one remedy before the other.

10. TERMINATION OF ARBITRATION

10.1 Termination of Arbitration

An arbitration is terminated when:

- (a) the Arbitrator issues a final award, disposing of all matters referred to in arbitration; or,
- (b) the Arbitrator terminates the arbitration under Rule 10.2, 10.3 or 10.4.

10.2 Termination on Withdrawal by Builder

The Arbitrator shall make an order terminating the arbitration if the Builder withdraws from the arbitration, unless ONHWP objects to the termination and the Arbitrator agrees that ONHWP is entitled to obtain a final disposition of the dispute.

10.3 Termination for other Reasons

The Arbitrator shall make an order terminating the arbitration if:

- (a) the parties agree that the arbitration should be terminated;
- (b) the Arbitrator finds that the continuation of the arbitration has become unnecessary or impossible; or,
- (c) the arbitration is terminated or abandoned under Rule 12.

10.4 Non-Compliance – Builder

If the Builder fails to substantially comply with any Rule or with an interim order or award, the Arbitrator may, in his discretion, make an award dismissing the claim.

10.5 Non-Compliance – ONHWP

If ONHWP fails to substantially comply with any Rule or with an interim order or award, the Arbitrator may, in his discretion, continue the arbitration, but shall not treat the non-compliance as an admission of the Builder's allegations.

11. ARBITRATOR IMMUNITY & NON-COMPELLABILITY

11.1 Arbitrator Immunity

The Arbitrator shall not be liable to any party for any act or omission in connection with any arbitration conducted under the Rules.

11.2 Non-Compellability of Arbitrator

The Arbitrator shall not be compelled to testify at, or produce his notes in any legal proceeding.

12. PRIORITIES AND OTHER PROCEEDINGS

12.1 Appeals by Owner to LAT

If an owner requests a hearing before the Licence Appeal Tribunal ("LAT") under section 16 of the Act at any time before or during an arbitration regarding any items raised in the arbitration (hereinafter referred to as a "LAT Item"), the following rules will apply:

- (a) the arbitration of the LAT Item will be suspended until LAT issues its decision;
- (b) after LAT issues its decision, the Builder may recommence the arbitration of the LAT Item by delivering a written notice to ONHWP and the Arbitrator within 14 days after the issuance of the LAT decision. The LAT decision will be binding on the Builder, ONHWP and the Arbitrator regarding any issues addressed in the LAT decision that are also raised in the Builder Arbitration Forum; or
- (c) if the owner withdraws his request for a hearing before LAT, or if LAT dismisses the request for hearing on consent or for delay or otherwise without deciding the merits of the LAT Item, the Builder may recommence the arbitration of the LAT Item by delivering a written notice to ONHWP and to the Arbitrator within 14 days of receiving notice of the owner's withdrawal or the LAT dismissal.

12.2 Adding Builder to Owner Appeals to LAT

In all LAT hearings requested by an owner, ONHWP will request LAT to add the Builder as a party to the LAT hearing, unless the Builder is no longer registered, or is bankrupt or insolvent, or unless the claim is solely in respect of a major structural defect reported after the Builder's two year warranty under the Act.

12.3 Notice of Proposal

Where a Builder has commenced an arbitration, and while such an arbitration is still pending, ONHWP will not issue a Notice of Proposal against the Builder under section 9(1) of the Act based upon any grounds involving issues that are the subject of the arbitration unless the Registrar determines that the Builder has ceased to be in good standing on other grounds. ONHWP may issue a Notice of Proposal against the Builder for any other grounds, at any time while an arbitration is pending. If ONHWP does so, the following rules will apply:

- (a) if the Builder does not request a hearing before LAT from the Notice of Proposal under section 9 of the Act, the arbitration will terminate upon the issuance of a Final Notice of Refusal to Renew, Revocation or Suspension by ONHWP's Registrar; or
- (b) if the Builder requests a hearing before LAT from the Notice of Proposal under section 9 of the Act, then the arbitration will be suspended until LAT issues its decision and:
 - (i) if LAT directs the Registrar to refuse to renew the Builder's registration, to revoke the registration or to suspend the registration, and the Registrar does so, then the arbitration will terminate upon issuance of a Final Notice by the Registrar;
 - (ii) subject to subsection (iii), if LAT directs the Registrar to renew the Builder's registration or to refrain from revoking or suspending the registration, then the Builder may recommence the arbitration by delivering a written notice of recommencement to ONHWP and to the Arbitrator, within 10 days of the issuance of the LAT decision, failing which the arbitration will be deemed to be abandoned;
 - (iii) if LAT imposes terms and conditions of registration, the Builder must comply with the terms and conditions before recommencing the arbitration;
 - (iv) if the LAT proceeding is terminated on consent, or for delay, or otherwise without any decision by LAT on the merits and if the Registrar issues a Final Notice confirming the Notice of Proposal, then the arbitration will terminate upon issuance of such Final Notice; and
 - (v) if at anytime ONHWP withdraws the Notice of Proposal, then the Builder may recommence the arbitration by delivering a written notice of recommencement to ONHWP and to the Arbitrator, within 10 days of ONHWP's written notice of withdrawal; and
- (c) if the arbitration is terminated or abandoned under Rule 12.3 (a) or (b), payment of the Arbitrator's costs shall be in accordance with Rule 8.6; and
- (d) if the arbitration is recommenced under Rule 12.3, the original Arbitrator will retain jurisdiction and the proceeding shall continue with such modifications to the time periods as may be directed by the Arbitrator.

13. APPOINTMENT AND RELATED MATTERS

13.1 ONHWP Responsibilities

ONHWP shall have the responsibility for:

- (a) appointing arbitrators to the Roster;
- (b) compiling and keeping current the Roster of arbitrators;

- (c) monitoring and evaluating the performance of the arbitrators named in the Roster; and
- (d) creating and updating the Procedural Rules (including the forms and agreements in the Appendix), the Roster Agreement, the Tariff and other documents and agreements used in the Builder Arbitration Forum.

ONHWP will apply the Procedural Rules and the Roster Agreement for the purpose of such appointing, monitoring and evaluation.

13.2 Term of Roster Appointment

Roster appointments are effective for one year, unless terminated earlier or renewed for a further term.

13.3 Renewal

ONHWP may renew or not renew an appointment for a further term or terms, at its discretion. ONHWP will consider the arbitrator's compliance with the Roster Agreement and Procedural Rules in exercising its discretion.

13.4 Termination

ONHWP may terminate a Roster appointment if the Arbitrator breaches the Roster Agreement or the Procedural Rules.

14. OBLIGATIONS OF ARBITRATORS

14.1 Compliance with Rules and Policies

Arbitrators shall conduct themselves in a manner consistent with the principles of the Builder Arbitration Forum, including compliance with these Procedural Rules, the Roster Agreement, the Tariff and any other policies under the Builder Arbitration Forum.

14.2 Competence

Arbitrators shall ensure that they are competent to conduct an arbitration having regard to the nature of the dispute.

14.3 Timeliness

Arbitrators shall not knowingly agree to provide arbitration services which cannot be delivered or completed in a timely manner, having regard for the timeliness prescribed in these Procedural Rules.

15. CHANGES TO RULES

ONHWP may, at its sole discretion, add to, amend, or delete anything contained in these Rules. However, the Procedural Rules that shall apply to an arbitration are the Procedural Rules that were in force when the arbitration was commenced.

APPENDIX OF FORMS

Index:

- Form 1: Notice of Arbitration
- Form 2: Arbitration Agreement
- Form 3: Nominee Confirmation Form
- Form 4: Notice of Response
- Form 5: Appointment of Arbitrator & Acceptance of Appointment
- Form 6: Agreement to Proceed
- Form 7: Request for Interim Order
- Form 8: Notice to Witness

Form 1

**IN THE MATTER OF AN ARBITRATION
under the Builder Arbitration Forum**

BETWEEN:

(the "Builder")

-and-

**ONTARIO NEW HOME WARRANTY PROGRAM
("ONHWP")**

NOTICE OF ARBITRATION

ONHWP Registration Number: _____

Builder Contact Name: _____

Builder Address: _____

Builder Phone Number: _____

Builder Fax Number: _____

Warranty Assessment Report Reference Number: _____

Address of Home Identified in
Warranty Assessment Report: _____

Date of Warranty Assessment Report: _____

2. The remedy sought is:
(check all applicable boxes)
 - ? A declaration that the disputed item or items in the Warranty Assessment Report is/are not warrantable;
 - ? A declaration that the Warranty Assessment Report is not chargeable;
 - ? A declaration that the Builder is not required to indemnify ONHWP for repairs or compensation paid by ONHWP to the owner under the Warranty Assessment Report;
 - ? A declaration that ONHWP is required to reimburse the Builder for repairs done by the Builder pursuant to the Warranty Assessment Report.

3. The Builder estimates that the total value of the matters in dispute is approximately \$_____.

4. The Builder plans to have ____ witness(es) at the arbitration hearing and expects that it will take _____ hours to present the Builder’s case.

5. The Builder nominates the following three persons from the Roster and agrees that ONHWP may appoint one of them as the sole Arbitrator: *(Note to Builder: Before completing this section, you must obtain written confirmation (using Form 3 to the Procedural Rules) from each of the nominees that he/ she has no conflict of interest and is available to proceed within the time limits in the Builder Arbitration Forum Procedural Rules. Remember to attach the written confirmation to this Notice.)*

Nominee #1: _____

Nominee #2: _____

Nominee #3: _____

6. The Builder understands and agrees that the arbitration will be conducted in accordance with the Builder Arbitration Forum Procedural Rules adopted by ONHWP, a copy of which has been received and read.

7. The Builder understands and agrees that the Builder may be required to pay all or part of the Arbitrator’s fees and disbursements, if and as directed in the Arbitrator’s award pursuant to the Procedural Rules. The Builder further understands and agrees that it will be required to pay a deposit to ONHWP for the Arbitrator’s fees and disbursements, and that the Arbitrator may require the Builder to pay an additional deposit to cover additional estimated fees and disbursements. If the award directs ONHWP to pay the Arbitrator’s fees and disbursements, ONHWP will promptly pay the Arbitrator from its own funds and will refund the Builder’s deposit and will either refund the balance to the Builder without interest or retain the balance and apply it as a credit against any amounts owing to ONHWP by the Builder as a result of any award arising from the Arbitration. If the Builder’s deposit is insufficient, the Builder shall promptly pay the shortfall to the Arbitrator. If the Builder fails to do so within 14 days of the delivery of the award, ONHWP will pay the shortfall to the Arbitrator on behalf of the Builder from its own funds and will be entitled to indemnity from the Builder.

- 8. The Builder confirms:
 - (a) his/her/its agreement to proceed to arbitrate the issues referred to in this Notice;
 - (b) that the appointed Arbitrator shall have jurisdiction for this arbitration; and
 - (c) that the Arbitrator’s award shall be final and binding upon all parties.

- 9. Enclosed are:
 - ? a copy of the Arbitration Agreement referred to in paragraph 1 above;
 - ? a copy of the Warranty Assessment Report;
 - ? a non-refundable administration fee in the amount of \$802.50 (\$750.00 plus GST) by certified cheque or money order payable to “Ontario New Home Warranty Program”;
 - ? a written confirmation from each of the Builder’s three nominees that such nominee has no conflict of interest and is available to proceed within the time limits in the Procedural Rules;
 - ? any additional documents (*list the name, date, and number of pages of each document below*)

- 10. The Builder confirms: (*Check one box only. Read Rule 6.11 before completing this section.*)
 - ? the Builder will be self-represented by an officer, director, employee, sole proprietor or partner; *or*
 - ? the Builder intends to seek the permission of the Arbitrator to be represented by a lawyer at the arbitration hearing.

_____ Date: _____
 Print Name:

Per: _____
 Signature of Authorized Signing Officer
 Print Name:
 Print Title:

I have authority to bind the Corporation.

To: Builder Arbitration Forum Coordinator
 Ontario New Home Warranty Program
 5160 Yonge Street, 6 Floor
 TORONTO ON M2N 6L9

NOTE TO BUILDER: You must deliver** this Notice and all attached documents plus the administration fee of \$802.50 (\$750.00 plus GST) to Ontario New Home Warranty Program at the above address by the date specified in the Warranty Assessment Report. **To ensure that you meet the delivery date, we recommend that you use a reputable, same-day or overnight courier service.**

** “Deliver” and “delivery” mean delivery by hand, regular mail, registered mail, courier or facsimile transmission. In the situation where original documentation such as certified cheques or money orders must be delivered, “deliver” and “delivery” will exclude facsimile transmission. Delivery by regular mail is deemed to occur 5 business days after the date of mailing other than during a general discontinuance of postal service due to strike, lock-out or otherwise. If sent by facsimile, delivery will be deemed to occur on the business day sent, if sent before 5:00 p.m. and otherwise on the next business day, provided that the transmitting party receives a confirmation of transmission at the time of the transmission. If sent by courier, delivery shall be deemed to occur on the business day received, if received before 5:00 p.m. and otherwise on the next business day.

Form 2**IN THE MATTER OF AN ARBITRATION
under the Builder Arbitration Forum**

BETWEEN:

(the “Builder”)

-and-

**ONTARIO NEW HOME WARRANTY PROGRAM
 (“ONHWP”)****ARBITRATION AGREEMENT****The Builder and ONHWP agree:**

1. to arbitrate the issues identified in the Builder’s Notice of Arbitration arising from the Warranty Assessment Report;
2. to submit the issues identified in the Builder’s Notice of Arbitration to an Arbitrator appointed by ONHWP from a list of three nominees selected by the Builder from the Builder Arbitration Forum Roster of Arbitrators;
3. that the place of arbitration will be the city or metropolitan area in which the responsible ONHWP Regional Office is located, unless the parties agree otherwise;
4. that the language of arbitration will be English;
5. to comply with and be bound by the Builder Arbitration Forum Procedural Rules;
6. to accept the Arbitrator’s award as final and binding, and to waive all rights of appeal to any court on any matters of fact or law, or mixed fact and law;
7. to pay the fees, disbursements, and GST of the Arbitrator in accordance with the Builder Arbitration Forum Procedural Rules, the Tariff and the Arbitrator’s award;
8. that neither of them will litigate any issues decided by the Arbitrator at any subsequent hearing before the License Appeal Tribunal (“LAT”) or in a subsequent court proceeding;
9. that ONHWP may post the Arbitrator’s award on ONHWP’s website, omitting the name of the Builder and its officers and directors;
10. that each of the parties will forthwith complete and submit to the ONHWP Builder Arbitration Forum Coordinator the Party Evaluation Form provided by the Arbitrator upon completion of the arbitration; and
11. the Builder hereby acknowledges that by signing this Arbitration Agreement it agrees to comply with each of the foregoing provisions and that failure to do so will be a breach of a term and condition of the Builder’s registration under Regulation 894 Section 1.3 under the *Ontario New Home Warranties Plan Act*.

This agreement shall enure to the benefit of and be binding upon the parties and their respective successors and assigns.

IN WITNESS WHEREOF, the undersigned parties have hereunto affixed their hand and seal, or corporate seal, as the case may be, this _____ day of _____, 200__.

SIGNED, SEALED AND DELIVERED

In the presence of

Signature of Witness*

Print Name: Date:_____

Print Name of Witness

Per:_____ Date:_____
Signature of Authorized Signing Officer
Print Name:
Print Title:

I have authority to bind the Corporation.

*Witness signature is required unless Corporate Seal is affixed.

ONTARIO NEW HOME WARRANTY PROGRAM

Per:_____ Date:_____
Print Name:
Print Title:

I have the authority to bind the Corporation.

Form 3

**IN THE MATTER OF AN ARBITRATION
under the Builder Arbitration Forum**

BETWEEN:

(the “Builder”)

-and-

**ONTARIO NEW HOME WARRANTY PROGRAM
 (“ONHWP”)**

NOMINEE CONFIRMATION FORM

SECTION A: To be completed by the Builder

To: _____
(Insert name of person nominated by Builder)

The Builder wishes to nominate you as one of three nominees for arbitrator and asks you to complete, sign and return this form to the Builder before _____, 200__ at the following address or fax number:

Address: _____

Fax Number: _____

So that you can determine if you have a conflict of interest, the names and affiliations of the persons involved in the dispute and the names of the Builder’s intended witnesses are set out below:

Builder’s officers and directors *(if Builder is a corporation)*:

Name(s) of any corporation(s) related to or associated with the Builder:

Name of ONHWP Representative who wrote the Warranty Assessment Report:

Name(s) of owner(s) of the home identified in the Warranty Assessment Report:

Name(s) of Builder's intended witness(es) and the corporation he/she is employed by:

The Builder's Notice of Arbitration, including this Nominee Confirmation Form must be delivered to ONHWP on _____, 200__.

Date: _____, 200__.

Print Name:

Per: _____
Signature of Authorized Signing Officer
Print Name:
Print Title:

I have the authority to bind the Corporation.

SECTION B: *To be completed by the Nominee:*

Insert Name: _____

- ? I confirm that if I am appointed as the Arbitrator in this matter:
 - (a) I am not aware of any circumstances, based on the information in this form, that would create a conflict of interest, as defined in the Roster Agreement I have entered into with ONHWP; and
 - (b) I am available to proceed with an arbitration within the time limits in the Procedural Rules.

? I cannot confirm (a) and/or (b) above.

Dated: _____, 200__

Nominee's Signature

Form 4

ONHWP Reference Number: _____

**IN THE MATTER OF AN ARBITRATION
under the Builder Arbitration Forum****BETWEEN:**_____
(the “Builder”)**-and-****ONTARIO NEW HOME WARRANTY PROGRAM
 (“ONHWP”)****NOTICE OF RESPONSE**

1. ONHWP acknowledges receipt of the Builder’s Notice of Arbitration relating to Warranty Assessment Report Reference Number _____ and confirms that the Builder is eligible to commence the arbitration pursuant to an Arbitration Agreement between the Builder and ONHWP.
2. ONHWP responds to the Builder’s Notice of Arbitration as follows:
 - ? ONHWP submits that the disputed item(s) identified in the Notice of Arbitration is/are warrantable;
 - ? ONHWP submits that the Warranty Assessment Report is chargeable
3. ONHWP requests the following award:
 - ? A declaration that the disputed item or items in the Warranty Assessment Report is/are warrantable;
 - ? A declaration that the Warranty Assessment Report is chargeable;
 - ? A declaration that the Builder is required to indemnify ONHWP for repairs or compensation paid by ONHWP to the owner under the Warranty Assessment Report;
 - ? A declaration that ONHWP is not required to reimburse the Builder for repairs done by the Builder pursuant to the Warranty Assessment Report

4. ONHWP plans to have _____ witness(es) at the hearing and expects that it will take _____ hours to present its case.
5. ONHWP appoints the following person from the Builder’s nominees as the Arbitrator in this matter:

Name: _____
 Address: _____

6. It is understood and agreed that the arbitration shall be conducted in accordance with the Builder Arbitration Forum Procedural Rules adopted by ONHWP.
7. It is understood and agreed that as a condition to the arbitration proceeding, the Builder will be required to pay ONHWP in trust, a deposit for the estimated fees, disbursements and GST of the Arbitrator (the “Arbitrator’s costs”) pursuant to the Builder Arbitration Forum Tariff. If the Builder is successful, the deposit will be refunded and ONHWP will pay the Arbitrator’s costs. If the Builder is unsuccessful, the deposit will be used to pay both the Arbitrator’s costs and any amounts owing to ONHWP by the Builder as a result of any award arising from the Arbitration. If the Builder is partially successful and partially unsuccessful, the Arbitrator will allocate the costs between the parties, and the deposit will be used to pay both the Builder’s portion of the costs and any amounts owing to ONHWP by the Builder as a result of any award arising from the Arbitration. ONHWP hereby agrees to indemnify the Arbitrator for any default by the Builder in payment of the Arbitrator’s costs.
8. ONHWP hereby notifies the Builder that the Builder must deliver a certified cheque or money order payable to “Ontario New Home Warranty Program in trust” in the amount of \$_____, as a deposit for the Arbitrator’s costs. The deposit must be delivered (facsimile delivery excluded) **within 14 days** of delivery of this Notice of Response. The deposit is calculated according to the Tariff as follows:

Daily Rate x ___ day(s) of hearing:	\$ _____
Arbitrator’s estimated travel disbursements:	\$ _____
TOTAL	\$ _____

9. ONHWP confirms:
 - (a) its agreement to proceed to arbitrate the issues referred to in the Notice of Arbitration and this Notice of Response;
 - (b) that the appointed Arbitrator shall have jurisdiction for this arbitration; and
 - (c) that the Arbitrator’s award shall be final and binding upon all parties.

10. Enclosed are:

- ? One signed original Arbitration Agreement, referred to in paragraph 1;
- ? Other documents (*list the name, date and number of pages of the document below.*)

11. ONHWP confirms that:

- ? ONHWP will be self-represented by an officer, director, or employee; *or*
- ? ONHWP will seek the permission of the Arbitrator to be represented by a lawyer at the arbitration hearing.

ONTARIO NEW HOME WARRANTY PROGRAM

Date: _____

Per: _____

Print Name:

Print Title:

I have the authority to bind the Corporation.

To: The Builder

NOTE TO BUILDER: Within **14 days** of delivery* of this Notice of Response, you must deliver*:

- i. a certified cheque or money order payable to “Ontario New Home Warranty Program in trust”, in the amount specified above; and
- ii. your Case Material (for details, see Rule 5 of the Procedural Rules)

To:

Ontario New Home Warranty Program -and- [Insert Arbitrator Name and Address]
 Corporate Office
 Builder Arbitration Forum Coordinator
 5160 Yonge Street, 6 Floor
 TORONTO ON M2N 6L9

To ensure that you meet the delivery date, we recommend that you use a reputable, same-day or overnight courier service.

* “Deliver” and “delivery” mean delivery by hand, regular mail, registered mail, courier or facsimile transmission. In the situation where original documentation such as certified cheques or money orders must be delivered, “deliver” and “delivery” will exclude facsimile transmission. Delivery by regular mail is deemed to occur 5 business days after the date of mailing other than during a general discontinuance of postal service due to strike, lock-out or otherwise. If sent by facsimile, delivery will be deemed to occur on the business day sent if sent before 5:00 p.m. and otherwise on the next business day, provided that the transmitting party receives a confirmation of transmission at the time of the transmission. If sent by courier, delivery shall be deemed to occur on the business day received, if received before 5:00 p.m. and otherwise on the next business day.

Form 5

**IN THE MATTER OF AN ARBITRATION
under the Builder Arbitration Forum**

BETWEEN:

(the “Builder”)

-and-

**ONTARIO NEW HOME WARRANTY PROGRAM
 (“ONHWP”)**

**APPOINTMENT OF ARBITRATOR
& ACCEPTANCE OF APPOINTMENT**

SECTION A: *To be completed by ONHWP.*

To: the Arbitrator
And to: the Builder

Pursuant to Rules 3 and 4 of the Builder Arbitration Forum Procedural Rules, ONHWP appoints the following person as the Arbitrator for this arbitration: _____.

Date: _____, 200__ _____
Manager, Dispute Resolution
Ontario New Home Warranty Program

SECTION B: *To be completed by the Arbitrator and returned to ONHWP and the Builder within 2 business days of delivery of this Appointment.*

To: ONHWP
And to: the Builder

- ? I accept the appointment as Arbitrator.
- ? I do not accept the appointment as Arbitrator.

Dated: _____, 200__ _____
Arbitrator’s Signature

Note to Arbitrator: For an up-to-date copy of the *Ontario New Home Warranties Plan Act*, Regulations, Bulletins, Procedural Rules, and Tariff, please consult the ONHWP website at www.newhome.on.ca.

Form 6**IN THE MATTER OF AN ARBITRATION
under the Builder Arbitration Forum**

BETWEEN:

(the "Builder")

-and-

**ONTARIO NEW HOME WARRANTY PROGRAM
("ONHWP")****AGREEMENT TO PROCEED**

The Builder, ONHWP and Arbitrator agree to proceed with the arbitration and confirm as follows:

1. The Builder and ONHWP confirm:
 - (a) their agreement to proceed to arbitrate the issues referred to in paragraph 2;
 - (b) that the Arbitrator shall have jurisdiction for this arbitration; and
 - (c) that the Arbitrator's award shall be final and binding upon all parties.

2. The issues to be arbitrated are:
 - ? as set out in the Notice of Arbitration; or
 - ? as set out below:

3. The hearing is estimated to require ____ days.

4. The Builder and ONHWP confirm that they have read and will comply with and be bound by the Procedural Rules, including but not limited to the rules governing:
 - (a) the confidentiality of the arbitration;
 - (b) the non-compellability of the Arbitrator as a witness in any legal proceeding;
 - (c) the immunity of the Arbitrator for any act or omission in connection with the arbitration; and
 - (d) payment of the Arbitrator's fees and disbursements.

5. The Arbitrator's fees and disbursements, as permitted by the Tariff, plus GST are estimated to be \$_____.

6. ONHWP and the Builder acknowledge and understand that either or both of them may be required to pay the Arbitrator’s fees and disbursements, if and as directed in the Arbitrator’s award pursuant to the Procedural Rules. If the award directs ONHWP to pay the Arbitrator’s fees and disbursements, ONHWP will promptly pay the Arbitrator from its own funds and will refund the Builder’s deposit. If the award directs the Builder to pay all or a portion of the Arbitrator’s fees and disbursements, ONHWP will pay the Arbitrator on the Builder’s behalf from the Builder’s deposit and if the Builder’s deposit is insufficient, the Builder shall promptly pay the shortfall to the Arbitrator. If the Builder fails to do so within 14 days of the delivery of the award, ONHWP will pay the shortfall to the Arbitrator on behalf of the Builder from its own funds and will be entitled to indemnity from the Builder.

7. The Builder has paid a deposit of \$_____ to “Ontario New Home Warranty Program in trust” for the Arbitrator’s fees and disbursements, and
 - ? is not required to pay an additional deposit;
 - ? is required to pay an additional deposit of \$_____ to “Ontario New Home Warranty Program in trust” by certified cheque or money order before the commencement of the hearing.

BUILDER

Per:_____ Date:_____

Print Name:

Print Title:

I have the authority to bind the Corporation.

ONTARIO NEW HOME WARRANTY PROGRAM

Per:_____ Date:_____

Print Name:

Print Title:

I have the authority to bind the Corporation.

ARBITRATOR

Per:_____ Date:_____

Print Name:

Form 7

**IN THE MATTER OF AN ARBITRATION
under the Builder Arbitration Forum**

BETWEEN:

(the “Builder”)

-and-

**ONTARIO NEW HOME WARRANTY PROGRAM
 (“ONHWP”)**

REQUEST FOR INTERIM ORDER

1. The requesting party requests an interim order for the following relief:
 - ? extension of time
 - ? other: *Specify:*

2. The requesting party’s reasons for requesting the order are:

3. The requesting party intends to rely on the following documents: *(Specify below and attach copies.)*

REQUESTING PARTY:

Per: _____ Date: _____

Signature of Authorized Signing Officer

Print Name:

Print Title:

I have authority to bind the Corporation.

To: **RESPONDING PARTY**
(Insert name and address of the responding party)

Form 8

**IN THE MATTER OF AN ARBITRATION
under the Builder Arbitration Forum**

BETWEEN:

(the "Builder")

-and-

**ONTARIO NEW HOME WARRANTY PROGRAM
("ONHWP")**

NOTICE TO WITNESS

To: *(insert name and address of witness)*

The Arbitrator appointed by the parties hereby gives notice to you that you are required to attend and give evidence as a witness in an arbitration hearing, at the following date, time and place *(insert date, time and place of the arbitration hearing)*:

This Notice is issued pursuant to section 29(1) of the *Arbitration Act, 1991*.

Date: _____

Arbitrator's signature
Print name:

ONTARIO NEW HOME WARRANTY PROGRAM

BUILDER ARBITRATION FORUM

ARBITRATOR'S TARIFF

(effective: April 2, 2003)

PART A – FEE GRID (amounts are exclusive of tax)

Task(s)/Circumstance(s) Covered by Fee	Maximum Fee for Half Day Hearing (up to 4 Hours of Hearing Time)*	Maximum Fee for Full Day Hearing (between 4 and 8 Hours of Hearing Time)*
1. Arbitration hearing, including: <ul style="list-style-type: none">• preparation for the hearing, including documentary review and related tasks• arranging and conducting the hearing• preparation of the final award• corrections to the final award	\$1250.00	\$2500.00
2. Pre-hearing conference, including: <ul style="list-style-type: none">• preparing for and• conducting the conference	\$125.00	\$125.00
3. Interim motion, including: <ul style="list-style-type: none">• preparation for;• conducting the motion• preparing the interim order or award	\$250.00	\$250.00
4. Adjourned hearing: <ul style="list-style-type: none">• where adjournment is requested on the hearing date	\$500.00	\$1000.00

Instructions to Builders regarding the Standard Pre-Delivery Inspection Form

Under Builder Bulletin 42, the *Customer Service Standard* issued on August 15, 2003, vendors/builders ("builders") are required to conduct a Pre-Delivery Inspection (PDI) of all freehold homes and condominium units with dates of possession (DOP) on or after October 1, 2003. Please refer to Part B of Builder Bulletin 42 for further details. Note: This requirement applies to homes that are currently enrolled but will not close until October 1st or later.

At the pre-delivery inspection, builders must either complete Tarion's standard Pre-Delivery Inspection Form, or they may use their own PDI Form, if it has been pre-approved by Tarion.

How will I get copies of the standard PDI Form?

Enclosed in this mailing are a sample of the new PDI Form and four additional copies to be used with purchasers. Builders with more than four homes enrolled will receive a subsequent mailing with enough additional copies to cover possessions through December 31, 2003 (based on Tarion records), unless they have a PDI Form that has been pre-approved by Tarion (see below). If you do not receive enough copies to cover all expected possessions through December, please contact Tarion at 1-800-668-0124.

If I already have a PDI Form, can I use it instead?

Yes, provided it has been approved in advance by Tarion. Although the new PDI Form is a standard document, Tarion recognizes that some builders have developed their own PDI Form or checklist and have used them successfully over the years.

To have your PDI Form approved, please send an original blank copy to:

Contact Centre Manager
Tarion
5160 Yonge Street
Toronto, ON
M2N 6L9

The review and approval process will take approximately three weeks, so we suggest that you send us a copy of your company's form as soon as possible, if you would like to use it for homes with a date of possession on or after October 1, 2003. Note: In order to be approved, a builder's PDI Form must contain at least the same information as shown on the standard PDI Form.

Please note that Tarion will not accept any builder (i.e. "non-standard") PDI Forms that have been used with purchasers unless they have been pre-approved.

How do I conduct the PDI and use the PDI Form?

1. Begin the inspection at either the highest or lowest point of the home (i.e., attic or basement) and work systematically from room to room until every area of the home has been inspected. Devote as much time to inspecting the exterior as the interior, assessing the exterior finishes and the driveway, walkways, decks and patios, as well as landscaping. Test and demonstrate all of the home's features and systems. (As a general rule, the inspection may take up to one hour for every 1,000 square feet.)
2. Note on the PDI Form anything damaged, missing, incomplete or not in good operating condition. Also note items that cannot be inspected, because for example they are dirty or inaccessible.
3. Be sure to note any "substitutions" of items referred to in, or to be selected under, the Agreement of Purchase and Sale.
4. Condominium builders should remind purchasers which parts of their unit are covered under the common elements warranty for the condominium project and, therefore, are not part of the PDI for their unit. This can include, for example, the heating system and even some of the exterior items in the unit like the windows. The condominium Board of Directors will complete a separate PDI for the common elements.
5. Confirm the Date of Possession with the purchaser/designate, and write it on the PDI Form.
6. Sign the completed PDI Form and ensure the purchaser (or the purchaser's designate) also signs it. Purchasers who intend to designate someone to conduct the PDI in their place should ensure they provide written authority allowing the designate to sign the PDI Form on their behalf.
7. Deliver the original completed PDI Form to Tarion with the Certificate of Completion and Possession (CCP), within 15 days of the date of possession. Provide a copy of the completed PDI Form and CCP to the purchaser(s) on the pre-delivery inspection date and retain a copy for your files.

THE COMPLETED PRE-DELIVERY INSPECTION FORM IS A FORMAL RECORD OF THE HOME'S CONDITION BEFORE THE PURCHASER TAKES POSSESSION. IT WILL BE USED AS A REFERENCE FOR FUTURE WARRANTY SERVICE REQUESTS.

BE SURE TO COMPLETE THE PDI FORM CLEARLY AND ENSURE THAT THE PURCHASER INITIALS ALL CHANGES.

What happens if I don't deliver the completed CCP and PDI Form on time?

Builders who fail to deliver completed CCPs and PDI Forms, and Confirmation of Receipt of the *Homeowner Information Package* forms, to Tarion within 15 days of a home's possession may see a change in their terms and conditions of Registration.

Unit Enrolment #

List here anything that can't be assessed, because for example it is obscured from view or inaccessible.

Item #	Room/Location	Description

Vendor/Builder and Home Address Information:

_____ / _____ / _____ _____
 Date of possession (YYYY/MM/DD) Vendor/Builder Reference #

Lot _____ Plan _____ Municipality _____

Condominium Project name _____ Level _____ Unit _____

Home/Civic address _____
 (please print) _____

Vendor/Builder name (please print) _____

 Representative's name (please print) Representative's signature

This section should be completed and signed by all persons who are shown as purchasers on the APS for the home, or as owners of land in a construction contract (and/or by their designate*).

I have inspected my new home and I agree that the descriptions of the items listed on this form are accurate.

 Purchaser's name (please print) Purchaser's signature

 Purchaser's name (please print) Purchaser's signature

 Designate's* name (please print) Designate's* signature

_____ / _____ / _____
 Date (YYYY/MM/DD)

** Purchasers or owners who intend to designate someone to conduct the PDI in their place should ensure they provide written authority to the vendor/builder authorizing the designate to sign this form on their behalf.*

THE COMPLETED PRE-DELIVERY INSPECTION FORM IS A FORMAL RECORD OF THE HOME'S CONDITION BEFORE THE PURCHASER TAKES POSSESSION. IT WILL BE USED AS A REFERENCE FOR FUTURE WARRANTY SERVICE REQUESTS.

Instructions to Builders Regarding Appointment of Designate for Pre-Delivery Inspection Form

Regulation 894 of the *Ontario New Home Warranties Plan Act* has recently been revised to incorporate the new Customer Service Standard rules.

For every home with a date of possession on or after October 1, 2003, section 1.11.1 of Regulation 894 requires vendors/builders ("builders") to conduct a Pre-Delivery Inspection (PDI) of the home with either or both of the purchaser's designate on or before the date of possession, without charging a fee.

If the purchaser(s) choose to send a designate to the PDI in his/her place, the builder may wish to ask the purchaser(s) to provide written authorization indicating the identity of the designate, and that the purchaser has given the designate authority to:

- Attend the PDI on his/ her behalf; and
- Sign and deliver on his/her behalf the Pre-Delivery Inspection (PDI) Form, the Certificate of Completion and Possession (CCP), and the Confirmation of Receipt of the Homeowner Information Package (if the purchaser has not already signed it).

Evidence of designate authorization should be requested by the builder in advance of the scheduled PDI.

Note: If the purchaser wishes to attend the PDI and sign documents on his/ her own behalf, he/she may also bring a designate, but evidence of designate authorization will not be necessary.

Please note that the purchaser can revoke or replace the appointment of designate at any time prior to the PDI.

Appointment of Designate for Pre-Delivery Inspection

This form may be filled out by a purchaser indicated on an Agreement of Purchase and Sale (APS), or an owner of land in a construction contract.

By completing and signing this form, a purchaser is indicating that they intend to send a designate, in their place, to the pre-delivery inspection (PDI) of their home. This form authorizes the designate to sign and deliver certain documents on the purchaser's behalf. Please check your APS to determine whether you are required to use this particular form.

The completed authorization form should be provided to the vendor/builder at the PDI or in advance. Note: Purchasers who wish to attend the PDI and sign documents on their own behalf may also bring a designate and, evidence of designate authorization will not be necessary.

To: _____
Builder's Name

I/we will *not* personally attend the Pre-Delivery Inspection (PDI). I/we appoint the designate named below to attend the PDI and authorize that designate to sign the following forms on my/our behalf:

1. Pre-Delivery Inspection (PDI) Form
2. Certificate of Completion and Possession (CCP)
3. Confirmation of Receipt of the *Homeowner Information Package*, if I/we have not already signed it.

Name of Purchaser

Name of Purchaser

Signature of Purchaser

Signature of Purchaser

Date

Date

Home Address or Legal Description

Name of Designate

Daytime phone number for Designate

**TO MAKE A WARRANTY SERVICE REQUEST, PLEASE COMPLETE AND SUBMIT THIS FORM
 BEFORE THE END OF THE FIRST 30 DAYS OF POSSESSION.**

YOU MAY SUBMIT ONLY ONE 30-DAY FORM.

You must submit a copy to both your builder and to Tarion at 5160 Yonge Street, Toronto, ON M2N 6L9 or fax: 1-877-664-9710, within the first 30 days of possession (see page 5 of your *Homeowner Information Package* for details about submitting this form). To report a Delayed Closing or Delayed Occupancy, please obtain the correct form by contacting Tarion at 1-800-668-0124 or by visiting our Web site at www.tarion.com

Home Identification Information *(Refer to your Certificate of Completion and Possession to complete this box.)*

Date of possession ____/____/____ Vendor/Builder Ref. # _____ Unit enrolment # _____
 (YYYY/MM/DD)

Civic Address *(address of home under warranty):*

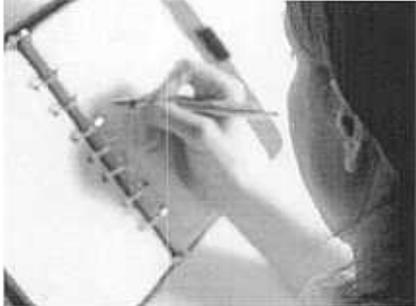
Lot# *(where applicable):* _____

Homeowner Contact Information

Mailing address for correspondence with homeowner *(if different from above):*

Homeowner's* name (please print)	Homeowner's* name (please print)
_____	_____
Daytime phone number	Daytime phone number
_____	_____
Evening phone number	Evening phone number
_____	_____
Fax number	Fax number
_____	_____
Email address	Email address
_____	_____

* If you are not the original registered owner, please check this box.



Important Year-End Deadline

Your home's one year statutory warranty coverage ends on the day before the first anniversary of your home's possession. During the last 30 days of your first year of warranty coverage, you have a final opportunity to report outstanding one year warranty items to Tarion. **Be sure to note this important year-end deadline and submit the Year-End Form on time.**

What is the purpose of the Year-End Form?

The Year-End Form is used to report any new or outstanding warranty items, covered by the first year warranty under the *Ontario New Home Warranties Plan Act*, during the last 30 days of the first year of possession of your new home. It is essential that you use the Year-End Form to report one year warranty items and that you submit it on time.

Condominium owners should use the Year-End Form to report items in their units. Damage or defects in the condominium's common elements should be reported as indicated below.

When does the Year-End Form have to be submitted?

The Year-End Form must be submitted within the last 30 days of the first year of possession of your new home. This is your last opportunity to report outstanding one year warranty items.

What should I do if I forget to include something on the Year-End Form or discover a new item after I submit it?

You may submit more than one Year-End Form, as long as you do so within the last 30 days of the first year of possession of your home. If you find that you need to report additional items after you have submitted a Year-End Form, then you should complete and submit another Year-End Form.

Be sure to list all outstanding items on every Year-End Form you submit, even if some of them have been reported on prior Year-End Forms. If you submit more than one Year-End Form, you may include items reported previously by attaching a photocopy of the relevant pages from any prior Year-End Form.

If I submit more than one Year-End Form on time, will Tarion consider all of them as valid warranty service requests?

No. Each Year-End Form you properly submit on time will completely replace all Year-End Forms previously submitted with respect to your home. Every Year-End Form you submit must be complete, as Tarion will only act on the last properly submitted Year-End Form that is on time.

How do I know which items are covered by the statutory warranty?

For more information about items covered under the statutory warranty, please refer to the *Homeowner Information Package* and visit our website at www.tarion.com to consult the *Construction Performance Guidelines*. The *Guidelines* describe many of the most commonly reported warranty service requests and indicate which are covered by the statutory warranty.

How should I report condominium common element items? Should I report them on the Year-End Form?

If you see any damage or defects in the shared areas of the building, referred to as the common elements, you should notify your condominium corporation's Board of Directors in writing. Do not report such items on the Year-End Form, since condominium common elements are not covered by your unit's statutory warranty. (For a complete description of your unit's boundaries, refer to Schedule "C" of the declaration of your condominium, which should be included with your Disclosure Statement.)

If I have other questions about the Year-End Form, where can I get answers?

For additional information about new home warranty protection or about the Year-End Form specifically, visit our web site at www.tarion.com or call us at 1-877-9TARION (1-877-982-7466).

When completing a Year-End Form, remember to:

1. Complete all sections of the Form.
2. Sign the Form.
3. Number the pages in the bottom right corner of the Form and number any additional pages you are sending.

Once a Year-End Form is completed, remember to:

1. Keep a copy of the completed Form for your files.
2. Send a copy of the completed Form to your Builder.
3. Send a copy of the completed Form to Tarion.

**TO MAKE A WARRANTY SERVICE REQUEST, PLEASE COMPLETE AND SUBMIT THIS FORM
IN THE FINAL 30 DAYS OF THE FIRST YEAR OF POSSESSION OF YOUR HOME.**

**YOU MAY SUBMIT MORE THAN ONE YEAR-END FORM, HOWEVER TARION WILL ONLY ACT ON THE LAST
FORM PROPERLY SUBMITTED ON TIME.**

Submit a copy of this Form to your Builder and to Tarion, and remember to keep a copy for yourself. Submit a copy to Tarion at 5160 Yonge Street, Toronto ON M2N 6L9 or by fax to 1-877-664-9710 (see page 5 of your *Homeowner Information Package* for details about submitting this Form). Please refer to the accompanying Year-End Form Information sheet for additional information about this Form. Please print all information.

Home Identification Information (Refer to your Certificate of Completion and Possession to complete this box.)

/ /			
Date of Possession (YYYY/MM/DD)		Vendor/Builder #	Enrolment #
Civic Address (address of your home under warranty):			
Street Number	Street Name		Condo Suite # (if applicable)
City/Town	Postal Code	Lot #	
Contact Information of Homeowner(s):			
Homeowner's Name		Homeowner's Name (if applicable)	
() -		() -	
Daytime Phone Number		Daytime Phone Number	
() -		() -	
Evening Phone Number		Evening Phone Number	
() -		() -	
Fax Number		Fax Number	
Email Address		Email Address	
<input type="checkbox"/> Check this box if you are not the original registered homeowner.		<input type="checkbox"/> Check this box if you are not the original registered homeowner.	

Mailing Address for Correspondence to Homeowner (if different from Civic Address above)

Street Number	Street Name		Condo Suite # (if applicable)
City/Town	Province	Postal Code	

For additional information about new home warranty protection, visit our website at www.tarion.com or call us at 1-877-9TARION (1-877-982-7466).

TO MAKE A WARRANTY SERVICE REQUEST DURING THE SECOND YEAR OF POSSESSION OF YOUR HOME, PLEASE COMPLETE AND SUBMIT THIS FORM.

YOU MAY SUBMIT MORE THAN ONE SECOND-YEAR FORM IF NEW ITEMS ARISE.

Submit a copy of this Form to your Builder and to Tarion, and remember to keep a copy for yourself. Submit a copy to Tarion at 5160 Yonge Street, Toronto ON M2N 6L9 or by fax to 1-877-664-9710 (see page 5 of your Homeowner Information Package for details about submitting this Form). Please print all information.

Home Identification Information (Refer to your Certificate of Completion and Possession to complete this box.)

/ /			
Date of Possession (YYYY/MM/DD)		Vendor/Builder #	Enrolment #
Civic Address (address of your home under warranty):			
Street Number		Street Name	Condo Suite # (if applicable)
City/Town		Postal Code	Lot #
Contact Information of Homeowner(s):			
Homeowner's Name		Homeowner's Name (if applicable)	
() -		() -	
Daytime Phone Number		Daytime Phone Number	
() -		() -	
Evening Phone Number		Evening Phone Number	
() -		() -	
Fax Number		Fax Number	
Email Address		Email Address	
<input type="checkbox"/> Check this box if you are not the original registered homeowner.		<input type="checkbox"/> Check this box if you are not the original registered homeowner.	

Mailing Address for Correspondence to Homeowner (if different from Civic Address above)

Street Number		Street Name	Condo Suite # (if applicable)
City/Town		Province	Postal Code

For additional information about new home warranty protection, visit our website at www.tarion.com or call us at 1-877-91TARION (1-877-982-7466).

Outstanding Items

Check the applicable boxes and describe within the appropriate categories below, any second year warranty items that you wish to report. If you require more space, please supply additional pages and reference the numbered items in this table.

<input type="checkbox"/>	1. Water penetration of basement or foundation	
<input type="checkbox"/>	2. Water penetration of the rest of your building envelope (e.g. windows, doors, roof, exterior walls)	
<input type="checkbox"/>	3. Electrical system defects (e.g. wires, conduits, pipes, junctions, switches, receptacles and seals)	
<input type="checkbox"/>	4. Plumbing system defects (e.g. wires, conduits, pipes, junctions, switches, receptacles and seals)	
<input type="checkbox"/>	5. Heating system defects (e.g. wires, conduits, pipes, junctions, switches, receptacles and seals)	
<input type="checkbox"/>	6. Exterior cladding defects (e.g. exterior wall coverings, including siding and above grade masonry)	
<input type="checkbox"/>	7. Major structural defects	
<input type="checkbox"/>	8. Violations of the Ontario Building Code's health and safety provisions	

For additional information about new home warranty for

The items specified on this Form constitute a complete list of all known two year warranty items which are outstanding and have not been resolved by my Builder to date.

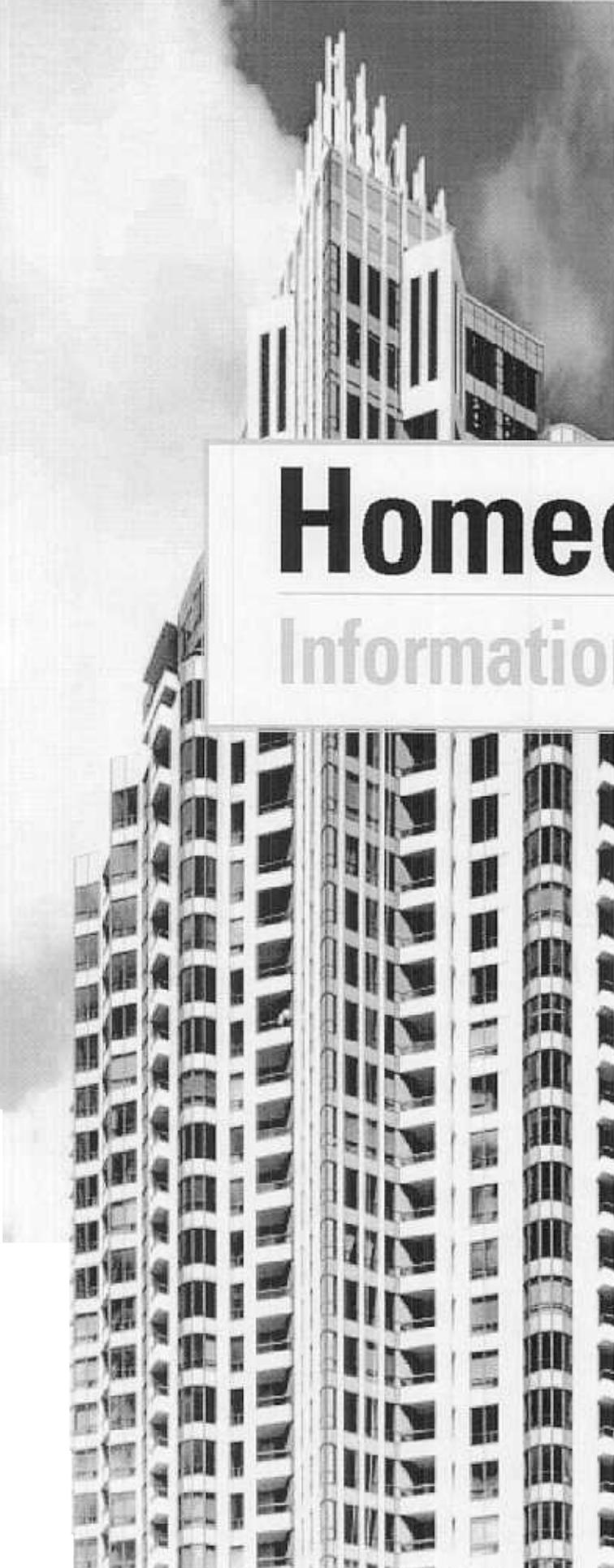
Homeowner's Signature _____

Homeowner's Signature (if applicable) _____

/ /
Date of Signature (YYYY/MM/DD)

Remember to send a copy of this completed Form to your Builder.

Please note that you should allow your Builder's representatives or subcontractors access to your home during regular business hours, at a mutually acceptable time arranged in advance, in order to complete the necessary work. Failure to do so may jeopardize your warranty rights.



Homeowner Information Package

CONDOMINIUM EDITION

Please take a few minutes to read this booklet. It explains your rights and responsibilities under the *Ontario New Home Warranties Plan Act*, particularly what you need to do within the first 30 days after you get possession of your new home.

Introduction

We want you to feel at home from the moment you open the door!

Every new home in Ontario comes with warranty coverage provided by your builder and guaranteed by the Ontario New Home Warranty Program (the "Warranty Program"), a private corporation that protects the statutory warranty rights of new home buyers under the *Ontario New Home Warranties Plan Act*.*

Your home was designed to meet or surpass both the structural requirements and the health and safety standards of the Ontario Building Code. While we anticipate that you will have a trouble-free experience with your new home, we want you to know that it is not unusual for adjustments to be required. In the event that you do require warranty service, this booklet will explain the steps you need to take.

This booklet refers only to your warranty rights under the *Ontario New Home Warranties Plan Act* and outlines our statutory responsibilities as well as yours. It does not describe any additional builder-supplied warranties (not covered by the Warranty Program).

This booklet explains the specific opportunities you have to request service on warranty-related items (warranty service), and describes the minimum customer service standard we will follow to handle your requests.

We urge you to read this document carefully, particularly your responsibilities during the first 30 days of possession as described in the "One Year Warranty" section of this booklet.

Please do not hesitate to contact us if you have any questions about the material covered in this booklet.

IMPORTANT –

When you need warranty service, you are responsible for completing all Warranty Service Forms and for submitting copies, to both your builder and the Warranty Program, by the deadlines indicated. Failure to submit your forms as described in this booklet will jeopardize your warranty rights under the *Ontario New Home Warranties Plan Act*.



THIS BOOKLET CONTAINS IMPORTANT WARRANTY INFORMATION

Please read it thoroughly to ensure you get the full statutory warranty benefits you are entitled to.

You should review this booklet again within the first 30 days after you take possession of your new home and at least 30 days prior to the first anniversary of your date of possession.

If you are in doubt about your legal rights under the *Ontario New Home Warranties Plan Act*, you may wish to seek the advice of a lawyer.

* This publication provides a general overview of the coverages and procedures set out in the *Ontario New Home Warranties Plan Act* and Regulations. If there is any conflict between this publication or the Act and Regulations, the latter prevails. The Warranty Program and your builder assume no liability for any omission or error in this publication. To view the full text of the Act and Regulations, you may wish to visit the Warranty Program Web site at www.newhome.on.ca

Your Pre-Delivery Inspection (PDI)

Approximately one week prior to the date of possession, our representative will guide you (or your designate) through an inspection of your new home. At this time you will be asked to identify any damaged, incomplete or missing items, or anything which is not operating properly.*

During the Pre-Delivery Inspection (PDI), our representative will record the items that you find on a PDI Form. When this form is complete, you will be asked to review and sign it to confirm that the listed items are accurate.

We will also ask you or your designate to review and sign a Certificate of Completion and Possession and Warranty Certificate (CCP). The CCP lists your home's Warranty Program enrolment number as well as the date of possession (which is also the start date of your statutory warranty). We will give you a signed copy of the CCP for your records and we will also forward a copy to the Warranty Program.

If you have not already done so, please complete and sign (or have your designate complete and sign) the form included in this package that confirms we provided you with a copy of this booklet prior to or during the PDI. Please give the form to our representative at the PDI.

Why do a PDI?

The inspection will likely be your first opportunity to view your new condominium unit (unit) in its completed state. It is your best opportunity to learn from our representative how to operate your unit's systems (such as ventilation, plumbing, heating or electrical). We suggest that you choose a different time to show your new home to family and friends.

Please ask as many questions as you like about the features and systems of your new home. That's why we're there. If you are unable to assess something because it has not been installed, completed or cleaned, please have this noted on the PDI Form as well.

What about the common elements?

Common elements are the shared areas of your condominium project, and they will vary depending on the type of project, for example, townhouse, high-rise or fully detached.

Things like the heating system and even some of the exterior items in your unit, like the windows, may be covered under the common elements warranty for your condominium project, and may not be part of the unit PDI.

To find out the boundaries between your unit and the project's common elements, refer to "Schedule C" of the declaration of your condominium, which should be included with your Disclosure Statement (delivered to you when you entered into your purchase agreement).

The condominium Board of Directors will complete a separate PDI with the builder for all of the common elements. If you see any damage or defects in the common elements, you should notify the Board of Directors so that the Board can decide whether to record them during the common elements PDI or take other action under the common elements warranty.



* If you intend to send a designate to conduct the PDI in your place, please ensure that you provide us with written authority from you as purchaser authorizing the designate to sign the PDI Form, the CCP and the Confirmation of Receipt of the *Homeowner Information Package* on your behalf. You can provide your written authority by completing and signing the "Appointment of Designate for Pre-Delivery Inspection" form provided with this booklet. (Check your purchase agreement to determine whether you are required to use this particular form.) However, you do not need to provide any written authority if you are attending with your designate and if you will be signing documents on your own behalf.

IMPORTANT –

The PDI Form does not constitute a request for warranty service and items listed on this form are not subject to the Warranty Service Rules for handling service requests as described on page 7. The PDI Form is simply a formal record of your new home's condition before you moved in and will be used by the Warranty Program as a reference for future warranty service requests. If you find that any of the items listed on the form have not been corrected by the time you move in, you should include them on your 30-Day Form included with this booklet (see "Warranty Service Requests" on page 5).

What kinds of things should I be looking for?

You should identify any damaged, incomplete, or missing items, as well as anything that is not operating properly or cannot be assessed because it is obscured from view or inaccessible, and have these items noted on the PDI Form.

You should be looking for things like chips in the porcelain or vanity tops, damage to floors or walls, and doors and windows that are not secure or do not open and close easily. You should check the exterior as well as the interior.

You should also note on the PDI Form any "substitutions" of items referred to in, or to be selected under, your Agreement of Purchase and Sale (purchase agreement). You may want to bring a copy of your purchase agreement with you to the PDI for reference.

What are substitutions?

If your purchase agreement gave you the right to select certain items of construction or finishing, such as colours and styles, these usually cannot be substituted without your written consent. In addition, if your purchase agreement states that your new home will include a particular item (such as a certain model of appliance, or a particular brand of window), but does not give you the right to make a selection, these items can only be substituted with items of equal or greater quality.

Please contact us if you feel that an unauthorized substitution has occurred (such as an obviously different colour or type of bath fixture). If you are unsure about your rights regarding unauthorized substitutions, you may wish to seek the advice of a lawyer.

What happens to the PDI Form?

Once the PDI Form has been completed and signed, our representative will give you a copy for your records. We will submit the original form to the Warranty Program within 15 days after possession and complete the necessary adjustments to the items covered by the warranty in a timely manner.

Your Other Pre-Move Protections

The following broadly outlines the additional benefits and protections guaranteed to new homeowners under the Ontario New Home Warranties Plan Act. If you need more detail about any of these pre-move protections, you can call the Warranty Program at 1-800-668-0124 or visit their Web site at www.newhome.on.ca

Deposit Protection

From the moment we received your deposit, it was guaranteed by the Warranty Program up to a maximum of \$20,000 in the event the sale is not completed through no fault of your own. Deposits in excess of \$20,000 are protected separately by the trust and excess deposit provisions of the *Condominium Act*.

Delayed Occupancy: Compensation

A builder is permitted to extend the occupancy date of your unit if we give you proper written notice of the extension. However, if you are not properly notified of a delay to your confirmed occupancy date, you are entitled to seek compensation under the terms of the *Ontario New Home Warranties Plan Act*.

What's the difference between "confirmed" and "tentative" occupancy dates?

Every purchase agreement for a condominium unit will include either a confirmed occupancy date or a tentative occupancy date.

If the purchase agreement gives a tentative occupancy date, we are required to inform you in writing of the confirmed occupancy date no later than 30 days after the roof assembly is completed (or another specific stage of construction as specified in the purchase agreement).

If you are not given notice of the confirmed occupancy date 90 days before the tentative occupancy date, then the tentative date automatically becomes the confirmed date for the purpose of calculating compensation for the delay.

Once the confirmed occupancy date is established, we are allowed to extend it once by up to 120 days. In this situation, we must give you at least 65 days written notice. We can also extend the date by up to 15 days if we give you at least 35 days written notice. We are permitted to use both of these extensions as long as we give you the required notices and the total of the two extensions does not exceed 135 days.

IMPORTANT –
A builder can delay occupancy of a new condominium unit for up to five days without giving notice or compensation. Also, please note that compensation will not be paid for delays caused by events beyond our control, such as strikes or floods, or delays which you cause.



Do I have to agree to an earlier occupancy date?

We may offer you occupancy of your unit earlier than the confirmed occupancy date, but we cannot require that you accept it. We must obtain your consent in writing to an earlier date.

When can I claim compensation?

Once you get occupancy of your unit, you may be able to claim up to \$100 per day in living expenses (such as temporary accommodation costs), plus other direct costs caused by the delay (such as extra moving and storage costs), up to a maximum of \$5,000. In order to be compensated, you must get occupancy and then submit a Delayed Occupancy Form (along with all receipts) to both our office and the Warranty Program within the first 30 days of possession or during the final 30 days of the first year of possession.

The form can be obtained by calling the Warranty Program at 1-800-668-0124 or by visiting their Web site at www.newhome.on.ca

If you are unsure about your rights regarding delayed occupancy, you may wish to seek the advice of a lawyer.

The One Year Warranty

Your home's one year warranty coverage begins on the date of possession and remains in effect even if your unit is sold before the warranty expires. In addition to the warranties regarding delayed occupancy and substitutions, during the first year of possession, we warrant that your home:

- is free from defects in work and materials;
- is fit to live in; and
- meets Ontario Building Code requirements.

IMPORTANT –

Only forms submitted on time will be accepted. They will be handled according to the timelines set out in the Warranty Service Rules described on page 7 of this booklet. To protect your warranty rights, you should obtain proof of your warranty service request submission to the Warranty Program (such as a fax confirmation sheet or registered mail receipt).

Are the common elements included?

For most condominiums, warranty coverage also includes the shared areas of the building, referred to as the common elements. Coverage for common elements as well as some spaces that may be for your exclusive use, known as "exclusive use common elements," begins on the day the condominium corporation is registered. See "Schedule F" of the declaration of your condominium for details (it should be included with your Disclosure Statement delivered to you when you entered into your purchase agreement).

If you see any damage or defects in the common elements, you should notify your condominium corporation's Board of Directors so that the Board can decide what action to take under the common elements warranty.

Please note – there is no warranty coverage for Common Elements Condominiums, or for the common elements of Vacant Land Condominiums.

WARRANTY SERVICE REQUESTS

During the first year of possession of your new home, you will have two opportunities to report warranty items covered by the *Ontario New Home Warranties Plan Act**. It is essential that you use the standard forms (available from the Warranty Program) and submit* them, when necessary, to both our office and to the Warranty Program. Follow the instructions on the forms to ensure that your forms are complete and are submitted on time.

The 30-Day Form (provided with this booklet)

After moving into your new home, you may notice that one or more of the items that you listed on the PDI Form have yet to be corrected to your satisfaction. In addition, you may find other items within the first 30 days that were missed during your Pre-Delivery Inspection or have become apparent since taking possession.

At any time within the first 30 days after possession, you may submit a 30-Day Form listing outstanding PDI items and any new items discovered since you took possession of your home. Please note that you can only submit one 30-Day Form and copies must be sent to both our office and to the Warranty Program.

DON'T MISS OUT

We recommend that you fill out and submit the 30-Day Form on or about the 25th day after your date of possession. If you don't submit a 30-Day Form on time you will have to wait until the final 30 days of the first year of possession to make a warranty service request.

† The maximum you may claim from the Warranty Program in damages for breach of warranty is \$100,000. Lower limits may apply for certain kinds of claims.

* Submit means submit by hand, courier, fax or, except during a general interruption of postal service, by regular or registered mail. In the case of regular mail, submission is effective on the postmark date and must be received by the Warranty Program on or before 5 days after the expiry of the time provided herein for the submission of the Warranty Service Form. In the case of registered mail, submission is effective on the date of mailing and will be deemed to be made on the postmark date as it appears on the envelope received by the Warranty Program, or, if the postmark date is missing or illegible, on the date shown on the registered mail receipt given to you by the Post Office. Submission by regular or registered mail is not effective during a general interruption of postal service (for example, a strike or lockout).

In the case of a fax, submission is effective on the business day it is sent to the Warranty Program, if sent before 12:00 midnight, and otherwise on the next business day. If sent by hand or courier, submission is effective on the business day it is received by the Warranty Program, if received before 5:00 p.m., and otherwise on the next business day.

The Year-End Form

The 30-Day Form is intended to catch most warranty items and allow for timely repairs. However, it takes several months for the natural materials in a new home to dry and settle. After your new home has weathered an Ontario winter, new one year warranty items may emerge.

At any time within the last 30 days before the expiry of year one of your warranty, you may submit a Year-End Form to both our office and the Warranty Program listing any new or outstanding items. Only forms submitted on time will be accepted (see the footnote on page 5 for how to effectively "submit" your forms). The Year-End Form can be obtained by calling the Warranty Program at 1-800-668-0124 or by visiting their Web site at www.newhome.on.ca

When does year-end warranty service begin?

The start date of our responsibility to service the items covered by warranty depends on the method you use to submit your Year-End Form. If you submit your Year-End Form:

- By fax, courier or hand, the start date is the first anniversary of the date of possession;
- By regular or registered mail, the start date is the later of the day after the form is received by the Warranty Program or the first anniversary of your date of possession.

Our responsibility to service the items follows the timelines set out in the Warranty Service Rules (see page 7).

IMPORTANT –
It is important that you list ALL outstanding items any time you submit a Warranty Service Form. If you submit more than one Year-End Form, the Warranty Program will only act on the last properly submitted form.

CHECK IT OUT – If you are in doubt as to whether an item is covered by the warranty, we suggest you consult the *Construction Performance Guidelines* published by the Warranty Program. The *Guidelines* describe many of the most commonly reported warranty service requests and indicate which are covered by the warranty and which are not. Visit www.newhome.on.ca to search or browse the *Guidelines*.

The Two Year Warranty

Your home's two year warranty coverage begins on the date of possession and remains in effect even if your unit is sold before the warranty expires. Your warranty provides coverage for the following for a period of two years from the date of possession:

- *Water penetration through the basement or foundation walls;*
- *Defects in our materials or work (caulking, windows, doors, etc.) resulting in water penetration into the building envelope;*
- *Defects in our materials or work in the electrical, plumbing and heating delivery and distribution systems;*
- *Defects in our materials or work which result in the detachment, displacement or deterioration of exterior cladding (such as brickwork, aluminum or vinyl siding);*
- *Major structural defects;*
- *Violations of the Ontario Building Code's health and safety provisions.*

During the first year of possession, you should report items in your unit covered by the two year warranty to our office and the Warranty Program on either the 30-Day or the Year-End Form.

At any time during the second year of possession you may submit a Second-Year Form to both our office and the Warranty Program for any of the above noted two year warranty items in your unit. (The form can be obtained from the Warranty Program by calling 1-800-668-0124 or by visiting their Web site at www.newhome.on.ca). Our responsibility to service these items begins on the day after the Warranty Program receives the form and follows the timelines set out in the Warranty Service Rules.

You should notify your condominium corporation's Board of Directors if you see damage or defects in the common elements so that the Board can decide what action to take under the common elements warranty.

How Are My Warranty Service Requests Handled During The First Two Years?

The Warranty Service Rules

1. For all Warranty Service Forms you submit, except the Year-End Form, we have a maximum of 120 days after the Warranty Program receives your form to repair or otherwise correct items covered by the warranty. The Warranty Program will confirm submission of your form.

For the Year-End Form, we have a maximum of 120 days from the start date described on page 6 ("When does year-end warranty service begin?") to repair or otherwise correct items covered by the warranty. The Warranty Program will confirm submission of your Year-End Form.

2. If for any reason we do not complete the repairs to your satisfaction by the end of the 120-day period, you have 30 days to contact the Warranty Program and request that they schedule an inspection.* If you do not do so, all the items listed on your Warranty Service Form will be considered resolved and the matter closed. (You may resubmit the item(s) at a later date if the warranty covering those item(s) is still in effect.)
3. We then have 30 days from the day you requested the inspection to complete the corrections to the remaining items described on the Warranty Service Form.
4. If the repairs are not completed by the end of those 30 days, the Warranty Program will conduct the scheduled inspection with both you (or your designate) and one of our representatives present, and will send out a report within 10 days. The report will outline which outstanding items we must resolve under the terms of the warranty, and we will have 30 days following the date of the report to do so.
5. The Warranty Program will contact you 30 days after the date of the report to confirm that we have corrected all the items listed in the report. If the items have not been corrected, the Warranty Program will work directly with you to settle the matter. Note that, except in the case of a claim for Delayed Occupancy, the Warranty Program cannot complete the settlement until you have title to your unit.

You should allow our representatives and/or subcontractors (also known as "trades") access to your home during regular business hours, at a mutually acceptable time arranged in advance, in order to complete the necessary work. Failure to do so will jeopardize your warranty rights.

IMPORTANT –
There are several specific situations – including emergencies – where the timelines set out in the Warranty Service Rules may not apply. A full list of these can be found beginning on page 9 of this booklet.

* In some cases, such as claims for delayed occupancy, the Warranty Program may do a desk assessment (a review of documents) rather than an inspection of the home. The Warranty Program will charge a \$50 fee when you request an inspection or desk assessment. However the fee will be refunded to you, after the inspection or desk assessment is conducted, if the Warranty Program's report contains any outstanding items that we must resolve under the terms of the warranty.

Seven Year Major Structural Defect Coverage

Your home's seven year major structural defect (MSD) coverage begins on the date of possession and remains in effect even if the home is sold before the coverage expires. An MSD is defined in the Ontario New Home Warranties Plan Act as:

- * Any defect in materials or work that results in the failure of a load-bearing part of the home's structure or materially and adversely affects its load-bearing function; or
- * Any defect in materials or work that significantly and adversely affects the use of the building as a home.

During the first two years of possession, you should report MSD items in your unit to both our company and the Warranty Program on the 30-Day, Year-End or Second-Year Form, as applicable. If it is an emergency, please see page 9 for what to do in emergency situations.

At any time after your second year of possession, but no later than the expiry of the seventh year of your warranty, you may report any MSD items in your unit directly to the Warranty Program using an MSD Form. The form can be obtained from the Warranty Program by calling 1-800-668-0124 or by visiting their Web site at www.newhome.on.ca

After your second year of possession, the Warranty Program, not the builder, is responsible for any new MSD warranty service requests.

During years three through seven, the Warranty Program will schedule and conduct an inspection, and issue a decision to you within 10 days of the date the Warranty Program received your MSD Form. If the item is found to be covered by the warranty, the Warranty Program will work directly with you to settle the claim. Please note that the Warranty Program cannot complete the settlement until you have title to your unit.

If you wish to report an MSD in the common elements, you should notify your condominium corporation's Board of Directors so that the Board can decide what action to take under the common elements warranty.



CHECK IT OUT - If you are in doubt as to whether an item is covered by the seven year MSD coverage, we suggest you consult the *Construction Performance Guidelines* published by the Warranty Program. The *Guidelines* describe many of the most commonly reported warranty service requests and indicate which are covered by the warranty and which are not. Visit www.newhome.on.ca to search or browse the *Guidelines*.

Exceptions To The Warranty Service Rules

There are circumstances that may affect our ability to make adjustments and/or corrections according to the timelines set out in the Warranty Service Rules. While these are rare, it is important that you understand what they are.

Exceptions In Case Of Emergency

Certain severe conditions constitute an emergency situation. An emergency is defined as any warrantable deficiency within the control of the builder that, if not attended to immediately, would likely result in imminent and substantial damage to your home, or would likely represent an imminent and substantial risk to the health and safety of its occupants. Examples of emergency situations include:

1. Total loss of heat between September 15 and May 15;* 2. Gas leak;* 3. Total loss of electricity;* 4. Total loss of water supply;* 5. Total sewage stoppage;* 6. Plumbing leakage that requires complete water shut-off; 7. Major collapse of any part of the home's exterior or interior structure; 8. Major water penetration on the interior walls or ceiling; 9. A large pool of standing water inside the home; or 10. Any situation where, in the opinion of the Warranty Program, the home is uninhabitable for health or safety reasons.

*Emergency situations due to the failure of a municipality or utility to provide the service are not within our control.

What To Do In An Emergency Situation

1. You should immediately call the emergency contact telephone number we provided when we gave you this booklet. You should also contact the condominium corporation's Board of Directors and/or the Property Manager.
2. If you are unable to reach our office or if we do not correct the situation within 24 hours, you should contact the Warranty Program at 1-800-668-0124 for further assistance.
3. If you cannot reach us or the Warranty Program, and have no other option but to have the work completed, you or your contractors, in consultation with your Board of Directors, should correct the situation. However, only the emergency condition should be corrected and the problem should be documented with pictures, both before and after (if possible).
4. You should not repair consequential damage to builder-installed materials. If we are responsible for the emergency item, we will handle any such consequential damage within 30 days of your notice to us and the Warranty Program. If we fail to do so, the Warranty Program will work directly with you to settle the matter. Please note that the Warranty Program cannot complete the settlement until you have title to your unit.
5. In the circumstances set out in part 3 above, to recover your costs you will need to submit an Emergency Form (available from the Warranty Program at 1-800-668-0124 or www.newhome.on.ca) as soon as possible after completing the repair. On the form, you must describe the problem in detail as well as the repair methods used by your contractor. Send the Emergency Form, along with all receipts and invoices received for work and materials, to the Warranty Program. Please also send a copy of the Form and related receipts/invoices to our office.

Apart from taking steps to protect your property or safety, you should not undertake any repair work without giving us 24 hours to assess the problem and take corrective measures. You will not automatically receive reimbursement for emergency repairs and, in addition, completing the work without our assessment may jeopardize your warranty coverage.

Seasonal Warranty Items

Seasonal warranty items involve service requests regarding the exterior of your home which cannot be repaired effectively within the timelines set out in the Warranty Service Rules due to regular seasonal conditions and/or severe sustained weather. The period from May 1 to November 15 is generally considered to have suitable weather conditions for making such repairs. In high-rise and low-rise condominium projects, these items are more likely to affect the common elements warranty and if so, would be handled by the condominium corporation's Board of Directors. These items include:

- * Exterior painting;
- * Exterior cement/concrete work (including parging application/repair);
- * Exterior mortar work (including brick installation/repair);
- * Exterior stucco work/repairs (including repairs to exterior insulation finishing systems [EIFS]);
- * Exterior caulking;
- * In-ground support for decks; and
- * Any other exterior work deemed appropriate by the Warranty Program (but not including air conditioning, grading, sod, driveways and walkways which are covered separately below).

Seasonal warranty items should be reported on your 30-Day, Year-End or Second-Year Form, as appropriate. They will be dealt with according to the timelines set out in the Warranty Service Rules (see page 7), subject to suitable weather conditions as described above. If we cannot correct a seasonal warranty item within the required timelines due to unsuitable weather conditions, we must complete the repairs as soon as possible after the return of suitable weather conditions and in any event between the following April 30 and September 1.

If for any reason we do not complete the repairs to your satisfaction, you have 30 days (until October 1) to contact the Warranty Program and request their assistance. If you do not do so, the seasonal warranty items listed on your Warranty Service Form will be considered resolved and the matter will be closed. (Note that you may resubmit the item at a later date if the warranty covering the item is still in effect.)

Special Seasonal Warranty Items

The completion of your new home's final grading, landscaping (laying sod, etc.) and the installation of driveways, patios and walkways are considered special seasonal warranty items. In high-rise and low-rise condominium projects, these items are more likely to affect the common elements warranty and if so, would be handled by your condominium corporation's Board of Directors.

What if I report a special seasonal warranty item on my 30-Day Form?

We have one year from the date of possession to complete any warrantable special seasonal items reported on your 30-Day Form. If you notice one of these items during your unit PDI, we ask that you include it on your 30-Day Form as well.

If the item is determined to be warrantable and is not corrected by the first anniversary of possession, you should contact the Warranty Program directly to request an assessment.

What if I report a special seasonal warranty item on my Year-End Form?

If a warrantable special seasonal item is reported on your Year-End Form and the item remains outstanding after the first anniversary of possession, the Warranty Program will assess your request. If the item is determined to be warrantable the Warranty Program will work directly with you to settle the matter. Please note that the Warranty Program cannot complete the settlement until you have title to your unit.

Air Conditioning

Problems with your builder-supplied air conditioner are covered by the one year warranty. A complete loss of cooling due to the failure of a builder-supplied air conditioner between May 15 and September 15 (during the first year of possession) is considered undue hardship and can be dealt with outside the timelines set out in the Warranty Service Rules.

You should report an air conditioning issue affecting your unit on either your 30-Day or Year-End Form. It will be dealt with according to the timelines set out in the Warranty Service Rules (see page 7).

However, if your air conditioning is not working between May 15 and September 15, please contact our office and the Warranty Program and we will arrange an assessment. If we assess the condition to be covered by the one year warranty, we will arrange repair or complete the installation within 30 days of your initial request. If your air conditioning has not been restored within 30 days of contacting us, you should contact the Warranty Program directly at 1-800-668-0124 for further assistance.

IMPORTANT –

Your air conditioning may be part of your condominium project's common elements and therefore not covered by your unit's one year warranty. If the air conditioning is part of the common elements, report the issue to your condominium corporation's Board of Directors.

Extraordinary Situations

The final exception to the timelines set out in the Warranty Service Rules is in the case of an extraordinary situation. An extraordinary situation exists when it is not possible for a builder to complete a repair for reasons not related to seasonality.

There are two types of extraordinary situations that could cause us to seek an extension of the timelines set out in the Warranty Service Rules:

1. An industry or regional event that affects a segment of the construction industry or region of the province (such as labour, trade or materials shortages, strikes or other labour disputes, and severe weather or other acts of nature); or
2. Special circumstances affecting a particular builder or home, such as the special order of a part that will take more time to arrive than the Warranty Service Rules allow.

If we apply to the Warranty Program for this type of extension on any of your outstanding items, we will notify you in writing. If the extension is granted, the Warranty Program will set a new timeline and confirm it with you.

Contact us or call the Warranty Program directly at 1-800-668-0124 if you require a more detailed account of the process for resolving items affected by extraordinary situations.

What's Not Covered By The Warranty?

We are happy to repair or otherwise correct any item in your new home that is covered by the statutory warranties described in this booklet. However, there are conditions and/or circumstances under which we cannot be held responsible for a damaged or defective item.

In order to avoid misunderstandings or miscommunication, please review the following conditions under which items are not covered by the warranty:

1. Damage resulting from improper maintenance, such as dampness or condensation caused by the homeowner's failure to maintain proper ventilation levels or improper operation of a humidifier, hot tub, or any other moisture-producing device.
2. Alterations, deletions or additions made by the homeowner (such as changes to the direction of the downspouts, grading or slope away from the house).
3. Defects in materials, design and work supplied or installed by the homeowner/purchaser.
4. Secondary damage caused by defects under warranty. While the defects themselves are covered, the personal or property damage they cause is not. Often, your homeowners' insurance covers secondary damage.
5. Normal wear and tear, such as scuffs and scratches to floor and wall surfaces caused by homeowners moving, decorating, and/or day-to-day use of the home.
6. Normal shrinkage of materials that dry out after construction (such as nail "pops" or minor concrete cracking).
7. Settling soil around the house or along utility lines.
8. Damage from floods, "acts of God", wars, riots, or vandalism.
9. Damage from insects or rodents, unless the result of construction that does not meet the Ontario Building Code.
10. Damage caused by municipal services or other utilities.
11. Surface defects in work and materials noted and accepted in writing by the homeowner at the time of possession.
12. Damage caused by the homeowner or visitors.
13. Contractual warranties which lie outside the *Ontario New Home Warranties Plan Act*. You may have recourse for these warranties under your purchase agreement.



CHECK IT OUT – If you are in doubt as to whether an item is covered by the statutory warranty, we suggest you consult the *Construction Performance Guidelines* published by the Warranty Program. The *Guidelines* describe many of the most commonly reported warranty service requests and indicate which are covered by the warranty and which are not. Visit www.newhome.on.ca to search or browse the *Guidelines*.

Maintaining Your New Home

No one needs to tell you that home ownership is a big responsibility, one that demands a significant investment both financially and in time and effort spent keeping your home in top shape.

Today's advanced building products have eliminated much of the time-consuming and often tedious work involved in home maintenance, and, although your new home contains many of these leading-edge materials, no home is maintenance-free.

Energy-efficient homes are built tightly to seal out the cold weather in winter and seal in the air conditioning in summer. Because of this it is possible that a new home can be severely damaged by lack of ventilation or excess moisture.

What causes moisture damage?

Your home can be damaged when weather-related water is allowed to enter and remain in the structure. Water from leaking pipes or fixtures that is not immediately cleaned up, and indoor humidity levels that are not properly controlled, can have serious consequences.

Sometimes this damage is easily seen; at other times the damage is hidden inside wall and roof spaces. Regardless of where it occurs, moisture damage can lead to serious problems, such as rot and structural failure.

How can I control moisture?

The Warranty Program recommends that all new homeowners always use their unit's ventilation system to control moisture. In a typical home, up to 20 litres of water can be added to the indoor environment per day. That's 7,300 litres in a year, enough to fill a medium-sized swimming pool.

Bathroom fans, kitchen range hoods and packaged ventilators such as heat-recovery ventilators are specifically installed in your unit to help you control moisture and contaminants. Regular use of your unit's ventilation system will exhaust excess airborne moisture caused by bathing, showering, doing laundry and cooking.

What else can I do to control moisture?

Here are some extra tips you can follow to help prevent moisture damage to your home.

Outside the home

1. Keep flowerbeds or landscaping at least six inches or 150 mm away from the top of the foundation. Placing soil near or above the top of the foundation allows moisture to come into direct contact with the structure of the building.
2. Clear eavestroughs of debris regularly and extend downspouts so that water is directed away from the building. Water flow can erode the ground near the foundation and create depressions where water collects. Standing water near the foundation can force its way into the basement.
3. Fix the caulking around windows and doors and on the roof if it becomes cracked or separated.
4. Have your roof inspected regularly to ensure shingles, flashing and chimney caps are in place and sealed properly.

IMPORTANT – Moisture damage to your home caused by the improper or inadequate use of your home ventilation system, or other kinds of preventative maintenance, is not covered by the new home warranty.

Inside the home

1. In the winter, keep the relative humidity in your home in the range of 30-45%. Lower humidity levels may affect your health and cause things made of wood to shrink. Excess humidity can cause condensation on windows and damage the surrounding wall. When using a humidifier, follow the manufacturer's instructions.
2. In the summer, dehumidify the basement to avoid condensation buildup on the cool foundation walls. Relative humidity levels should not exceed 60%.
3. Repair leaky pipes and fixtures immediately. Clean and completely dry any areas that are dampened or wet within 48 hours.
4. Store organic materials such as newspapers and clothes away from cool, damp areas. Keep storage areas tidy so that air circulates freely.
5. Purchase a "hygrometer" to monitor the relative humidity in your home.
6. If you are adding a hot tub to your home, or have a large collection of plants, consider the amount of moisture they will add to your indoor air and ventilate accordingly.
7. Never vent your clothes dryer inside your home. If you have a gas- or propane-fired dryer you may also be venting carbon monoxide inside your home!
8. Investigate and identify any musty smells and odours. They are often an indicator that there is a hidden moisture problem.

As an additional service to our new homeowners, we have included a Home Maintenance Checklist in this booklet (see page 15) to guide you through your annual maintenance routine. The checklist provides a monthly breakdown of items for inspection, and is intended to help you set up a regular schedule of checkups and cleanups.



Enjoy Your New Home!

We look forward to a lasting and mutually satisfactory relationship with you. In providing you with this information booklet, our goal is to keep the lines of communication open between us. Please feel free to contact us at any time if you have any questions regarding the information contained in this booklet.

Welcome home!

Home Maintenance Checklist

Please note that some of the following items may be part of your condominium's common elements and therefore not your responsibility to maintain. For information on common elements, please refer to "Schedule C" and "Schedule F" of the declaration of your condominium, which should be included with the Disclosure Statement delivered to you when you entered into your purchase agreement.

SPRING

March

- Clean furnace filter and Heat Recovery Ventilator (HRV) – if applicable
- Check attic
- Check sump pump (if installed)
- Clean humidifier
- Remove snow and ice from roof overhang/vents
- Check and reset ground fault circuit interrupter (GFCI)
- Test smoke alarms and carbon monoxide detectors

April

- Check eavestroughs and downspouts
- Clean furnace filter and HRV
- Clean humidifier
- Inspect basement or crawl spaces
- Check roof for loose or cracked shingles
- Check driveways and walks for frost damage
- Check water heater for leaks, etc.
- Plan landscaping to avoid soil settlement and water ponding
- Check and reset GFCI
- Test smoke alarms and carbon monoxide detectors

May

- Check caulking for air and water leaks
- Lubricate weatherstripping
- Check exterior finishes
- Check windows and screens
- Check and reset GFCI
- Test smoke alarms and carbon monoxide detectors

SUMMER

June

- Inspect air conditioning
- Check roof
- Check sheds and garages
- Check sealing around doors and windows
- Check septic system and clean if necessary
- Check water heater for leaks, etc.
- Check and reset GFCI
- Test smoke alarms and carbon monoxide detectors

July

- Air out damp basements on dry, sunny days
- Clean air conditioner filter
- Test exhaust fans
- Check water heater for leaks, etc.
- Check and reset GFCI
- Test smoke alarms and carbon monoxide detectors

August

- Clean air conditioner filter
- Air out damp basements on dry, sunny days
- Inspect driveways and walks
- Inspect doors and locks
- Check and reset GFCI
- Test smoke alarms and carbon monoxide detectors

FALL

September

- Check exterior finishes
- Check garage door tracks and lubricate bearings
- Check caulking for air and water leaks
- Check fireplace and chimney
- Check basement or crawl spaces
- Have humidifier, furnace and HRV serviced
- Check clothes dryer vent
- Check and reset GFCI
- Test smoke alarms and carbon monoxide detectors

October

- Check windows and screens
- Drain exterior water lines
- Check roof including shingles, flashing and vents
- Check weatherstripping and lubricate
- Check sealing around doors and windows
- Check septic system
- Winterize landscaping and remove leaves
- Clean furnace filter and HRV
- Check water heater for leaks, etc.
- Shut off exterior water supply
- Check eavestroughs and downspouts
- Clean humidifier
- Check and reset GFCI
- Test smoke alarms and carbon monoxide detectors

November

- Check attic
- Inspect floor drains to ensure trap is filled with water
- Clean furnace filter and HRV
- Check for condensation and humidity
- Check and reset GFCI
- Test smoke alarms and carbon monoxide detectors

WINTER

December

- Check air ducts
- Check for excessive snow on roof
- Clean furnace filter and HRV
- Clean humidifier
- Check and reset GFCI
- Test smoke alarms and carbon monoxide detectors

January

- Clean furnace filter and HRV
- Check furnace fan belt
- Check water heater for leaks, etc.
- Test exhaust fans
- Clean humidifier
- Remove snow and ice from roof overhang/vents
- Check and reset GFCI
- Test smoke alarms and carbon monoxide detectors

February

- Clean furnace filter and HRV
- Remove snow and ice from roof overhang/vents
- Check and reset GFCI

<p>5. Cancellation fee:</p> <ul style="list-style-type: none"> where the arbitration is cancelled within 7 days of the scheduled arbitration date 	<p>\$375.00</p>	<p>\$750.00</p>
<p>6. Cancellation fee:</p> <ul style="list-style-type: none"> where the arbitration is cancelled within 24 hours of the scheduled arbitration date 	<p>\$750.00</p>	<p>\$1500.00</p>
<p>7. Travel time:</p> <ul style="list-style-type: none"> where travel time from arbitrator's place of business to the hearing location exceeds 2 hours for the round-trip, the arbitrator may charge the excess time at the rate shown 	<p>\$50.00 per hour</p>	<p>\$50.00 per hour</p>

* For hearings lasting more than one day, add the fees for half-day and/or full day.

Examples:

- if the hearing lasts 1 ½ days, the fee would be \$3750.00 (\$2500.00 + \$1250.00)
- if the hearing lasts 2 days, the fee would be \$5000 (\$2500.00 + \$2500.00)

PART B – ARBITRATOR'S DISBURSEMENTS TO BE PAID BY UNSUCCESSFUL PARTY

1. For **automobile travel**, where the arbitration is held more than 25 kilometres from the arbitrator's place of business, 30 cents per kilometre traveled between the arbitrator's place of business and the place where the arbitration is held.
2. For **air, train or bus travel**, the amount of actual cost incurred to purchase an economy class ticket.
3. For **accommodation** costs where the arbitration exceeds one day and the arbitration is held more than 100 kilometres from the arbitrator's place of business, a reasonable amount not to exceed \$150.00 per night, exclusive of tax.
4. For afternoon and evening **meals** where the arbitration exceeds one day and the arbitration is held more than 100 kilometres from the arbitrator's place of business, reasonable amounts not to exceed \$15.00 for lunch and \$25.00 for dinner, exclusive of tax.

5. For **parking**, the amount of actual costs incurred.
6. For **courier** deliveries, the amount of actual costs incurred.
7. For **postage**, the amount of actual costs incurred.
8. For **long distance calls**, the amount of actual costs incurred.
9. For **copies** of documents, a reasonable amount not to exceed 25 cents per page, exclusive of tax.
10. For **facsimile transmissions**, a reasonable amount not to exceed 25 cents per page, exclusive of tax.

PART C – ARBITRATOR'S DISBURSEMENTS TO BE PAID BY ONHWP

1. For arbitration room rental from a third party provider (not the Arbitrator's own premises), a reasonable amount not to exceed \$175 for a half day arbitration or \$350 for a full day arbitration, exclusive of tax.
2. For teleconference charges where the arbitration is held by teleconference, the amount of actual costs incurred.



REGISTRATION

PACKAGE

REGISTRATION PACKAGE

This application for Registration should be submitted to our Corporate Office at:
5160 Yonge Street
6th Floor
Toronto, Ontario M2N 6L9

Enclosed in this application package are several Builder Bulletins which we encourage you to read and familiarize yourself with prior to scheduling a meeting.

Definition: A New Applicant as outlined in Builder Bulletin 30 (Revised). New Applicants who have not been registered before with Tarion, applicants whose registration has been expired for three or more years, previously registered applicants who have unsettled outstanding claims, applicants changing their status from Vendor only to Vendor/Builder, previously registered applicants who have made a significant change in principals, including those responsible for the day-to-day operation of the company and applicants registered with Tarion but who have no experience in the free hold or low-rise condominium construction industry.

All Type C and D condominium applicants will adhere to the guidelines outlined in Builder Bulletin # 19.

Documents required for Registration:

“New Applicants” must provide the following Documents for Registration:

1. The New Vendor/Builder Registration Application (red and white form).
2. Personal Net Worth Statement (including back up documentation for assets, i.e. bank statements, property assessment etc.).
3. Two (2) copies of the Vendor agreement.
4. Two (2) copies of the Builder agreement.
5. A completed copy of the Indemnity Agreement.
6. Registration fee of \$642.00 (\$600 + \$42 GST) payable to Tarion.
7. Letter of Reference from your bank outlining the duration and standing of your accounts.
8. Copies of the Articles of Incorporation (if you are applying as an incorporated company).
9. Copy of the Registered Marketing Name for Corporations and Sole Proprietors.
10. Cash flow and break-even analysis. Source of funding for project.

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“New Applicants” are required to attend an interview and to complete a technical test.

The purpose of this interview is to: exchange information and establish an understanding of the expectations of each party; and review the applicant's planned business venture and their background. An open book technical test based on the Ontario Building Code must be completed by the applicant or designate (a principal of the company and or the person in charge of the day-to-day construction).

Tarion is established as an underwriter to the industry and it is our desire to understand your business proposal and your plans for its success. **Please prepare and submit the following information** in order that we may complete your review effectively and efficiently.

1. Executive summary outlining the history of the applicant company. Include Contractor's Principal and management resume/credentials (in detail).
2. Project Economics: budget/cash flow proforma, overhead costs, deposit schedule, assumptions and equity.
3. Architectural plans or renderings with specifications.
4. Sample contract documents and forms, including Agreement of Purchase and Sale, Schedule "A" or list of features, construction budget, sub-contractors construction contract.
5. Market absorption/supply stats for applicable product/location.
6. Target Buyer Profile: Who is your customer and what niche are you going to fill?
7. Marketing material or marketing plan outlining target market, business positioning and marketing strategy.
8. After sales service policy.

Should you have any questions or require assistance on completing this registration application please contact a representative in Licensing and Underwriting toll free at 1-877-696-6497 ext. 229 or (416) 229-3844 ext. 229. As well, Mr. Harry Doering at 1-800-520-4663 or Mr. Andy Ferguson at 1-888-492-7858 ext. 127 are available to answer any questions you may have.

Approval takes **approximately thirty days**, including the interview, from the date we receive the **completed** registration kit and fee at our Corporate Office, providing that all the required documents and supporting documentation are included.

APPLICATION FOR REGISTRATION FEE

Effective July 1, 1991, the fee for submitting an application to Tarion Warranty Corporation is \$642.00. Please note that this fee includes the 7% GST.

Tarion reminds you at this time to retain, for your records, a photocopy of all documents that you forward to us.

Should an interview be required with one of our Client Service Representative, we ask that you bring copies of the documents you have submitted to the interview. This will greatly assist the Client Services Representative in his/her interview assessment. Thank you for your co-operation.

If you have any questions or concerns please do not hesitate to contact Licensing and Underwriting at (416) 229-3844 ext. 229 or 1-877-696-6497 ext. 229.



ONTARIO NEW HOME WARRANTY PROGRAM

NORTH YORK CITY CENTRE, NORTH EAST TOWER, 6TH FLOOR, 5160 YONGE STREET
NORTH YORK, ONTARIO M2N 6L9 PHONE (416) 229-9200 FAX (416) 229-3800

NOTICE OF PENALTIES TO VENDOR/BUILDER

PLEASE NOTE THAT THE FOLLOWING PENALTIES WILL BE APPLIED AND ENFORCED UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT AND THE BUILDING CODE ACT.

**FOR FAILURE TO REGISTER
AND/OR ENROL RESIDENTIAL
UNITS UNDER THE ONTARIO
NEW HOME WARRANTIES
PLAN ACT:**

INDIVIDUAL	\$ 25,000/Charge
CORPORATION	\$100,000/Charge

**FOR CONSTRUCTION OF
RESIDENTIAL UNITS
WITHOUT A BUILDING
PERMIT UNDER THE
BUILDING CODE ACT:**

	<u>1ST OFFENCE</u>	<u>SUBSEQUENT OFFENCE</u>
INDIVIDUAL	\$25,000	\$ 50,000
CORPORATION	\$50,000	\$100,000



APPLICATION FOR REGISTRATION WITH ONTARIO NEW HOME WARRANTY PROGRAM (ONHWP)

DATE OF APPLICATION: ____ / ____ / ____

Submission of an incomplete Application for Registration will result in delaying the processing and final approval for your project. Applications for freehold projects require approximately three weeks to be approved. Applications for condominium projects require approximately four weeks to be approved. Submit your Application for Registration well ahead of the date you want to start marketing or construction. Under the *Ontario Building Code Act*, you won't be granted a building permit until you are registered with ONHWP. Please note that every new company you form that is acting as a vendor, builder or vendor/builder must be registered separately with ONHWP.

If you require additional space to answer any of the questions in this Application form, please attach a separate sheet of paper using your company's letterhead, clearly labeled and numbered.

PANEL No. 1 – STATUS OF APPLICANT (check only one category)

a. Vendor

If you have entered into an agreement with a builder, whereby the builder agrees to construct a project for you, you fall into this category. As a vendor, you will be transferring title of the units to the purchaser and assuming responsibility for the proposed project. While ONHWP may register vendors separately from builders, their applications are reviewed and approved together when they are both complete and meet ONHWP's documentation requirements. **A copy of the agreement between vendor and builder must be provided.**

b. Builder

If you have entered into an agreement with a vendor to construct a home or homes, you fall into this category. If you register as a builder, the vendor (who **MUST** also be registered with ONHWP), and not you, will transfer title of the units, but you will both be jointly responsible for the proposed project. While ONHWP may register builders separately from vendors, their applications are reviewed together and approved when they are both complete and meet ONHWP's documentation requirements. **A copy of the agreement between vendor and builder must be provided.**

c. Vendor/Builder

If you meet the conditions of both a builder and a vendor (you will construct the home(s) and transfer title), or if you build a home or homes pursuant to a construction contract with the owner of the land, you fall into this category. To be a vendor/builder you are required to have both the technical competence to construct a home or homes and the financial competence to complete the proposed residential project.

Note: All references to a vendor/builder in this Application may refer to a builder, a vendor, or a vendor/builder, as defined above.

PANEL No. 2 – APPLICANT INFORMATION

a. Full Legal Name of Applicant (as it appears in the Agreement of Purchase and Sale, or in the construction contract):

b. Marketing name: _____

(Please provide a copy of the name style registration filed with the Ministry of Consumer and Business Services [MCBS], if applicable.)

c. Is the Applicant a bare trustee (e.g., a holding company)? Yes No

If "YES", indicate the name of the company or companies for which the Applicant is a bare trustee:

d. Do you currently have an umbrella name registered with ONHWP? Yes No

If "YES", please indicate name: _____

If you wish to apply for a new umbrella name, please complete the attached *Application for Umbrella Group Listing* form.

PANEL No. 3 – ADDRESS OF APPLICANT

a. Business Address (main)

NUMBER AND STREET / UNIT/SUITE

CITY / PROVINCE / POSTAL CODE

AREA CODE AND PHONE / FAX

E-MAIL

WEB SITE

b. Mailing Address (Where all correspondence from ONHWP's Licensing & Underwriting Department to the Applicant will be directed)

same as Business Address

NUMBER AND STREET / UNIT/SUITE

CITY / PROVINCE / POSTAL CODE

AREA CODE AND PHONE / FAX

E-MAIL

PANEL No. 4 – CONTACT PERSON

Please identify the individual to whom all communications (including confidential correspondence) from ONHWP will be directed at the mailing address above.

Name: _____ Phone (include area code): _____

PANEL No. 5 – BUSINESS ORGANIZATION (Fill in only one option)

- | | | | |
|--|----------------|--------------------------------------|----------------|
| a. Sole Proprietor commenced business on | ____/____/____ | d. Limited Partnership was formed on | ____/____/____ |
| b. Corporation was incorporated on | ____/____/____ | e. Joint venture was formed on | ____/____/____ |
| c. Partnership was formed on | ____/____/____ | | |

Please include a copy of the relevant document evidencing the date of commencement of your business, e.g., Articles of Incorporation, Partnership Agreement, or Joint Venture Agreement.

PANEL No. 6 (continued) – DIRECTORS AND OFFICERS

2. If the Applicant is a corporation, please identify the Directors and Officers:

Directors:

Name	Address	Phone (include area code)	Fax (include area code)	E-mail	Social Insurance Number*	Ontario Driver's License*

Officers:

Name	Address	Phone (include area code)	Fax (include area code)	E-mail	Social Insurance Number*	Ontario Driver's License*

*This data is used for the purpose of properly verifying and linking the information submitted by the Applicant with the information contained in our records. Note that an inaccurate matching of the Applicant's name (or the names of Directors and Officers of the Applicant) with that of another Registrant with an identical name may affect your Application for Registration with ONHWP, your security requirements and the acceptance of umbrella listings.

PANEL No. 7

(Note: If you answer "YES" to any of the questions below, please include a letter of explanation and supporting documentation.)

Has the Applicant, its principals, partners, directors, officers or affiliated firms:	Yes	No
a. Ever filed for bankruptcy under the <i>Bankruptcy Act</i> ?	<input type="checkbox"/>	<input type="checkbox"/>
b. Ever been discharged from bankruptcy? (If "YES", please include bankruptcy discharge papers)	<input type="checkbox"/>	<input type="checkbox"/>
c. Ever been granted an Arrangement under the <i>Companies Credit Arrangement Act</i> ?	<input type="checkbox"/>	<input type="checkbox"/>
d. Ever been party to a Consumer Proposal or to a Business Proposal under the <i>Bankruptcy Act</i> ?	<input type="checkbox"/>	<input type="checkbox"/>
e. Ever been registered with ONHWP? If "YES", indicate former registration number. _____	<input type="checkbox"/>	<input type="checkbox"/>
f. Ever been revoked or refused registration by a new home warranty program in another province?	<input type="checkbox"/>	<input type="checkbox"/>

PANEL No. 8 – LEGAL COUNSEL

- a. Name of lawyer representing the Applicant: _____
- b. Law firm: _____
- c. Address: _____
- d. Phone: _____
- e. Fax: _____
- f. E-mail: _____

PANEL No. 9 – FINANCIAL INFORMATION

a. Bank or other financial institution

Name: _____
 Address: _____
 Phone: _____ Fax: _____

Please supply financial statements (of the Applicant) and a letter of reference from your Bank outlining your banking history and credit arrangements.

b. How do you plan to finance this project?

- Own funds
- Lending institution
- Private funds
- Other (explain) _____

Please enclose a copy of the Offer to Finance your project, if applicable.

c. Deposits (freehold construction only)

(i) Who will be holding the deposits taken from purchasers?

- Applicant
- Real estate agent (in trust)
- Applicant's lawyer (in trust)
- Other _____

(ii) Average total deposit(s) to be taken per unit: \$ _____

(iii) Maximum total deposit(s) to be taken per unit: \$ _____

d. Does the Applicant have units currently under construction or completed?

- Yes
 - No
- If "YES", please identify them and provide the location for each unit.

PANEL No. 10 – RESIDENTIAL HOMES EXPECTED TO BE BUILT/SOLD OVER THE NEXT TWELVE MONTHS FOLLOWING THIS APPLICATION

Type of Unit

1. Freehold Construction

A. Freehold construction – land not owned by purchaser

a. Total number of units:

b. Unit value/range:

c. Average sale price:

d. Municipality:

e. Estimated starting date of construction:

f. Estimated closing date:

B. Contract homes – land owned by purchaser

a. Total number of units:

b. Unit value/range:

c. Municipality:

d. Average contract price:

e. Estimated starting date of construction:

f. Estimated date for finishing construction:

2. Condominium construction

a. Total number of units:

b. Number of condominium corporations and number of units per corporation:

c. Average sale price per condominium unit:

d. Municipality:

Please complete a *Condominium Project Profile and General Review* form for each condominium project and attach it to your *Application for Registration*.

PANEL No. 11 – BUSINESS AND TECHNICAL SKILLS OF APPLICANT

(Do not answer if the Applicant through its associated companies is currently a Registrant.)

a. Indicate any industry related courses (business or technical) you have completed over the past 10 years.

(Please provide a photocopy of Diploma or Certificate).

b. Name the construction projects you have been involved with over the past 10 years, and describe your role in them.

PANEL No. 12 – CREDIT INVESTIGATIONS

The Applicant hereby authorizes the Ontario New Home Warranty Program to conduct such investigations of the Applicant's activities and make such inquiries and obtain credit reports as may be necessary for its determination of the Applicant's ability to meet its obligations.

I declare that the preceding information is correct and accurate. If registered, I accept and agree to abide by the provisions of the *Ontario New Home Warranties Plan Act*, the Regulations thereunder, the Builder Bulletins, the Vendor/Builder Agreements, and any written policies of ONHWP presently in force, or that may hereafter be adopted.

Date: / /
 YEAR/MONTH/DAY

SIGNATURE OF APPLICANT (IF SOLE PROPRIETOR)

PRINT NAME OF APPLICANT

I am legally authorized to bind the Corporation,

SIGNATURE OF AUTHORIZED SIGNING OFFICER

PRINT NAME OF AUTHORIZED SIGNING OFFICER

Signatures of all partners
(if Applicant is a partnership)

Print names of all partners

Checklist

Make sure you have enclosed the following documents required by ONHWP to process your Application:

- Completed Application for Registration*
- Registration fee (Cheque payable to Ontario New Home Warranty Program)
- Completed Indemnity Agreement*
- If a vendor only, completed Vendor Agreement (two copies)*
- If a builder only, completed Builder Agreement (two copies)*
- If both a builder and a vendor, or if building under a construction contract, completed Builder Agreement and completed Vendor Agreement (two copies of each)*
- If vendor and builder are different entities, a copy of the agreement between builder and vendor
- A copy of the name style registration filed with the Ministry of Consumer and Business Services (MCBS), if applicable
- Articles of Incorporation, if applicable
- Letter of Reference from your bank or financial institution
- Current financial statement of Applicant and any corporate indemnifiers
- Updated Personal Net Worth Statement(s) and supporting documentation*
- For condominium projects, completed Condominium Project Profile and General Review form*
- Application for Umbrella Group Listing form, if applicable*
- Bankruptcy discharge papers, if applicable
- Copy of Diploma or Certificate for completed industry related courses, if applicable

*These forms are enclosed in the Registration Package.

Additional Information

For information on security requirements or the release of security, please consult Builder Bulletin 28 (Revised, 2001). If you have difficulties in completing this Application, please contact our Head Office, Licensing and Underwriting Department, or your local Ontario New Home Warranty Regional Office, for assistance.

Offices of the Ontario New Home Warranty Program

CORPORATE OFFICE

5160 Yonge Street, 6th Floor
TORONTO ON M2N 6L9
(416) 229-9200
Toll Free: 1-800-668-0124
Fax: (416) 229-3800
E-mail: info@newhome.on.ca
Web site: www.newhome.on.ca

EAST CENTRAL REGION

(Serving the areas of Durham; Haliburton;
Muskoka; Northumberland; Peterborough;
Simcoe; Victoria; York)

1091 Gorham Street, Unit A
NEWMARKET ON L3Y 7V1
(905) 836-5700
Toll Free: 1-800-263-1299
Fax: (905) 836-5666

EASTERN REGION

(Serving the areas of Frontenac; Hastings; Lanark;
Leeds & Grenville; Lennox & Addington; Ottawa-
Carleton; Prescott & Russell; Prince Edward;
Renfrew; Stormont, Dundas & Glengarry)

1600 Scott Street, Suite 400
OTTAWA ON K1Y 4N7
(613) 724-4882
Toll Free: 1-800-688-4345
Fax: (613) 724-3669

NORTHEAST REGION

(Serving the areas of Algoma; Cochrane;
Manitoulin; Nipissing; Parry Sound; Sudbury;
Timiskaming)

1895 LaSalle Blvd.
SUDBURY ON P3A 2A3
(705) 560-7100
Toll Free: 1-800-387-7861
Fax: (705) 560-7111

CONDOMINIUM OFFICE

(Serving all of Ontario)

1091 Gorham Street, Unit B
NEWMARKET ON L3Y 7V1
(905) 836-6715
Toll Free: 1-888-803-9913
Fax: (905) 836-0314

NORTHWEST REGION

(Serving the areas of Kenora;
Rainy River; Thunder Bay)

1205 Amber Drive, Suite 206
THUNDER BAY ON P7B 6M4
(807) 345-2026
Toll Free: 1-888-999-6649
Fax: (807) 345-2014

SOUTHWEST REGION

(Serving the areas of Brant; Elgin; Essex;
Haldimand-Norfolk; Huron; Kent;
Lambton; Middlesex; Oxford; Perth;
Waterloo; Wellington)

140 Fullarton Street, Ground Floor
LONDON ON N6A 5P2
(519) 660-4401
Toll Free: 1-800-520-HOME (4663)
Fax: (519) 660-3556

WEST CENTRAL REGION

(Serving the areas of Bruce; Dufferin,
Grey; Halton; Hamilton-Wentworth;
Niagara; Peel; Toronto)

2 County Court Blvd., Suite 435
BRAMPTON ON L6W 3W8
(905) 455-0500
Toll Free: 1-800-455-4484
Fax: (905) 455-0169

PERSONAL NET WORTH STATEMENT AS AT

Name		Date of Birth	SIN #	Driver License #
Home Address		City	Province	Postal Code
Employer Address		Employer Tel. #		
Personal Property (Name of Registered Owner)		How Long Lived there	Home Tel. #	Bus. Tel.
Spouse's Name		Date of Birth	SIN #	
Spouse's Employer		Spouse's Occupation	Spouse's Business Tel. #	

PERSONAL FINANCIAL INSTITUTION

Name	Address
Account Numbers	

FINANCIAL INFORMATION (Supporting documents such as RRSP statements, Tax assessments, company financial statements, bank statements etc.... should accompany the information, otherwise they may be discounted from the total assets)

ASSETS		LIABILITIES	
	Value		Balance Owing
Residence <i>(attach either, tax assessment/bill or Transfer of Deed)</i>		Mortgage	
Cash <i>(provide bank statement)</i>		Loan/Lines of Credit <i>(provide details)</i>	
RRSP <i>(attach annual statements)</i>		Real Estate Mortgage <i>if there is more than 1 property please identify separately</i>	
Stocks & Bonds <i>(attach annual statements)</i>		Personal Guarantees or Co-Signed Loans	
Real Estate <i>(attach either, tax assessment/bill, or Transfer of Deed) if there is more than 1 property please identify separately</i>		Income Tax	
Business Interests <i>(attach complete Financials & advise % of ownership)</i>		Other <i>(give details)</i>	
Automobiles			
Total Assets		Total Liabilities	

Total Personal Net Worth	Total
---------------------------------	--------------

Income	
Employment Income	\$
Investment Income	\$
Net Rental Income	\$
Total Personal Income	\$

The undersigned declare(s) that the statements herein are for the purpose of obtaining registration/renewal and are to the best of my/our knowledge true and correct. The applicant(s) consent(s) to Tarion Warranty Corporation making any inquires it deems necessary to reach a decision on the application, and consent(s) to the irrevocable disclosure at any time of any credit information about me/us to any credit reporting agency or to any one with whom I/we have financial relations.

Signature of Applicant(s)	Date	x	Date
---------------------------	------	---	------

**STANDARD FORMAT FOR LETTER OF CREDIT
(BLANKET COVERAGE)**

Name of Issuing Institution: _____

Date of Issuance: _____

Irrevocable Stand-By Letter of Credit No: _____

Applicant: _____

Registrant: (entity registered with Ontario _____
New Home Warranty Program)

Beneficiary: **Tarion Warranty Corporation**
5160 Yonge Street, Suite 600
NORTH YORK, ON M2N 6L9

Pursuant to the Registrant's request, we hereby establish our Irrevocable Stand-By Letter of Credit No. _____ in the amount of _____ Dollars (\$ _____) in favour of the Beneficiary. This Letter of Credit may be drawn upon at any time by the Beneficiary upon written demand for payment, and such demand will be honoured in full by [*name of the Issuing Institution*] without inquiry as to whether the Beneficiary has any right or claim against the Applicant or the Registrant.

Provided, however, that the Beneficiary will deliver to the Issuing Institution at such time as written demand for payment is made, a certificate signed by the Beneficiary indicating that the moneys being drawn under this Letter of Credit are being drawn in respect of obligations owed or which will be owed by the Registrant to the Beneficiary.

The amount of this Letter of Credit shall be reduced from time to time as advised by notice in writing given to the Issuing Institution by the Beneficiary. This Letter for Credit will expire on the _____ day of _____, which termination date is subject to the following:

It is a condition of this Letter of Credit that it shall be deemed to be automatically extended without amendment for one year from the present or any future expiry date hereof, and so from year to year thereafter, unless thirty (30) days prior to such expiry date the Issuing Institution notifies the Beneficiary in writing by registered mail that the Issuing Institution elects not to consider this Letter of Credit renewed for any such additional period.

Partial drawings are permitted on this Letter of Credit.

All drafts and other documents must be marked "Drawn under [*name and address of the Issuing Institution*], Letter of Credit No. _____ dated _____ .

[Issuing Institution Signature]

Condominium Project Profile and General Review Form

To be completed, signed and returned to Tarion Warranty Corporation (Tarion), Licensing and Underwriting Department by a vendor/builder proposing to market/build a condominium project in the next 12 months. Prior to marketing of the condominium project, the vendor/builder must be registered with Tarion and submit to Tarion the required security.

Note: All references to a vendor/builder in this Application may refer to a builder, a vendor or a vendor/builder.

VENDOR/BUILDER INFORMATION

Vendor Name:

Registration Number:

Phone:

Fax:

E-mail:

Lawyer representing the vendor/builder:

Name and law firm:

Address:

Phone

Fax:

Builder Name (if different from vendor)

Registration Number:

Phone:

Fax:

E-mail:

DECLARANT INFORMATION

If the Declarant is different from the vendor/builder, please specify:

Declarant Name

Address:

Phone

Fax:

E-Mail:

Specify, if any, the connection between the Declarant and the vendor/builder.

CONDOMINIUM TYPE

Please select the option that best reflects the characteristics of your proposed condominium project:

Extracted from Builder Bulletin 28 (Revised), 2001

CATEGORY	DESCRIPTION	SELECT ONE
Condominium Type A	Project has only Part 9 OBC construction requirements and is a lot-line condominium	<input type="checkbox"/>
Condominium Type B	Project has only Part 9 OBC construction requirements and is NOT a lot-line condominium	<input type="checkbox"/>
Condominium Type C	Project has both Part 9 and Part 3 OBC construction requirements	<input type="checkbox"/>
Condominium Type D	Project has only Part 3 OBC construction requirements	<input type="checkbox"/>

If you think your project has a unique profile, meaning it does NOT reflect the characteristics of the condominium categories described above, or if you are uncertain which category your proposed project falls under, Tarion will assign an appropriate category to your project based on your description. The Registrar reserves the right to designate the category of any condominium project.

PROJECT PROFILE

Estimated marketing date (taking of deposits and/or signing of Agreements of Purchase and Sale): _____

Project name: _____

Marketing name (if different from project name): _____

Municipality and address of proposed condominium project: _____

Supervisor at construction site and contact telephone numbers: _____

Project legal description

Lot: _____

Plan: _____

Block: _____

Concession: _____

Construction Start Date: _____

Estimated closing date: _____

Number of units: _____

Average sale price of units: _____

Average deposit to be taken per unit: _____

Building Permit number and date issued

Number: _____

Date: _____

PROJECT LAYOUT

Approximate square footage of Project: _____

Number of stories: _____

List of common elements (e.g. streets, parking etc.):

List of recreation facilities (indoor pool, squash etc.):

Brief description of exterior cladding proposed: _____

Brief description of mechanical system proposed: _____

Brief description of structural frame proposed: _____

Parking

Private driveway	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Garage	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Is garage attached to unit?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Common parking lot:	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Underground <input type="checkbox"/>	Above ground <input type="checkbox"/>	Number of levels: _____

SECURITY

Has security been posted with Tarion for this project? Yes No

If 'Yes', type of security posted:

Deposit Trust Agreement (DTA)

Standard project security instrument

Standard blanket security instrument

Please specify amount of security held: _____

If a DTA is in place, please identify escrow agent holding the deposits in trust:

Name: _____ Phone: _____

Has excess deposit insurance (for deposits over \$20,000) been obtained?

Yes No

Policy Number: _____ Name of Insurer: _____

PROFESSIONAL INFORMATION

Please provide the following information, if applicable. For type C and type D condominiums, the information requested below is mandatory:

Architect:	Structural Engineer:
_____	_____
Phone: _____	Phone: _____
Fax: _____	Fax: _____
Email: _____	Email: _____

Mechanical Engineer:

Phone: _____

Fax: _____

Email: _____

Field Review Consultant(s):

Phone: _____

Fax: _____

Email: _____

Electrical Engineer:

Phone: _____

Fax: _____

Email: _____

Additional Consultant(s):

Phone: _____

Fax: _____

Email: _____

(For additional Consultants, please attach a separate sheet of paper, using your company's letterhead, properly labeled and numbered.)

UNDERTAKING

The vendor/builder named below hereby undertakes to retain the above named professionals for the purpose of performing a General Review in keeping with the requirements of the Ontario Building Code (OBC) where the building is of a type required to be designed by an engineer or an architect in accordance with performance standards of the Ontario Association of Architects or the Professional Engineers of Ontario, as applicable. The vendor/builder named below also undertakes to engage a Field Review Consultancy to fulfill all monitoring and reporting requirements under the terms of Builder Bulletin 19 (Revised, 2001), as amended from time to time. It is acknowledged that the submission to Tarrion of the Bulletin 19 Final Report is the responsibility of the vendor/builder named below.

Date: _____

I/We have the authority to bind the vendor/builder.

Vendor/Builder Name _____
Print Name

Vendor/Builder Signature(s) _____

SCHEDULE A: Enrolment Fee Calculation Table - All Homes (Freehold and Condominium Units)

Sale Price Range (not including GST)		Unit Enrolment Fee	+	7% GST	+	8% RST	=	Total
Up to	\$100,000.00	\$325.00	+	\$22.75	+	\$26.00	=	\$373.75
\$100,000.01 -	150,000.00	350.00	+	24.50	+	28.00	=	402.50
\$150,000.01 -	200,000.00	400.00	+	28.00	+	32.00	=	460.00
\$200,000.01 -	250,000.00	450.00	+	31.50	+	36.00	=	517.50
\$250,000.01 -	300,000.00	500.00	+	35.00	+	40.00	=	575.00
\$300,000.01 -	350,000.00	550.00	+	38.50	+	44.00	=	632.50
\$350,000.01 -	400,000.00	600.00	+	42.00	+	48.00	=	690.00
\$400,000.01 -	450,000.00	650.00	+	45.50	+	52.00	=	747.50
\$450,000.01 -	500,000.00	700.00	+	49.00	+	56.00	=	805.00
\$500,000.01	or more	750.00	+	52.50	+	60.00	=	862.50

ONHWP's GST Number: 12154 6931 RT0001

INSTRUCTIONS FOR COMPLETING THE BUILDER AND/OR VENDOR AGREEMENTS

STEP ONE: DETERMINE WHICH AGREEMENT(S) TO COMPLETE

- ❑ If your company builds and sells, complete two copies of both the Builder Agreement and the Vendor Agreement; or
- ❑ If your company only builds, complete two copies of the Builder Agreement; or
- ❑ If your company only sells, complete two copies of the Vendor Agreement.

STEP TWO: COMPLETE PAGE 1 OF ALL AGREEMENTS

- ❑ On the first line enter the date;
- ❑ On the second line enter the legal name of your company; and
- ❑ On the third line enter the city where your company resides.

STEP THREE: SIGN THE DOCUMENTS IN THE PRESENCE OF A WITNESS

- ❑ Turn to page 12 of the Vendor Agreement or page 11 of the Builder Agreement.
- ❑ A signing officer must sign on the line where indicated, "Signature of Registrant" and this signature must be witnessed. If a corporation the signing officer must write, "I have authority to bind the corporation," underneath his/her signature. If a corporation, you may affix a seal in lieu of a witness.
- ❑ If Registrant is a partnership, then ensure that all partners print and sign their names in the presence of a witness. If additional lines are needed, use the blank space on the right-hand side.
- ❑ Have the witness sign the documents and print name and address.

STEP FOUR: RETURN THE COMPLETED DOCUMENTS TO ONHWP

- ❑ Return all copies of the completed documents with your renewal.
- ❑ ONHWP will return an original copy of each Agreement with the Registrar's signature upon approval of your renewal registration.



Vendor Agreement

THIS AGREEMENT made the _____ day of _____, 20____,

B E T W E E N:

(Print the exact legal name of the Vendor)

of the City of _____, in the Province of Ontario

(hereinafter referred to as the "Registrant");

Tarion Warranty Corporation, a private, non-profit corporation, incorporated without share capital, pursuant to the laws of the Province of Ontario

(hereinafter referred to as "Tarion")

VENDOR AGREEMENT

WHEREAS:

1. Tarion is a private, non-profit corporation designated by the Lieutenant Governor in Council to administer the *Ontario New Home Warranties Plan Act*, as amended from time to time (the "Act");
2. the Registrant applied to Tarion for registration as a vendor under the Act;
3. Tarion grants registration conditional upon the Registrant executing this Vendor Agreement (the "Agreement"), which Agreement deals with the Registrant's rights and obligations as a vendor under the Act, the regulations enacted thereunder, as amended from time to time (the "Regulations") and all applicable builder bulletins issued by Tarion from time to time (the "Bulletins");

NOW THEREFORE IN CONSIDERATION OF the registration of the Registrant under the Act, and for other good and valuable consideration (the receipt and sufficiency of which is hereby expressly acknowledged), Tarion and the Registrant hereby confirm the veracity of the foregoing recitals and that same comprise an integral part of this Agreement, and agree with each other as follows:

VENDOR AGREEMENT

ARTICLE 1.0 – APPLICATION AND REGISTRATION

- Authority of the Registrant to enter into the Agreement 1.1 The Registrant represents and warrants to Tarion that the Registrant has full capacity, power and authority to enter into this Agreement, holds all necessary licenses and permits required to carry on the business of selling homes in the Province of Ontario and, if a corporation, is a duly organized and validly subsisting corporation under the laws of the Province of Ontario (or alternatively is a duly organized and validly subsisting extra-provincial corporation or federal corporation, and licensed to carry on business in the Province of Ontario).
- Commitment to true and accurate disclosure 1.2 The Registrant further represents and warrants to Tarion that the information set forth in the application for registration of the Registrant under the Act, and in other documents furnished by the Registrant to Tarion in connection with such application, is true and correct in all material respects and does not omit to communicate any fact, circumstance or information that may have a material adverse impact on the Registrant's ability to fulfill its obligations under this Agreement, or that may reasonably have a material affect on the risk assessment undertaken (or to be undertaken), in connection with the registration (or continued registration) of the Registrant under the Act.
- Commitment to submission of security, financial information and other documentation 1.3 The Registrant shall, upon the request of Tarion and at the expense of the Registrant, furnish Tarion with such guarantees, indemnities, surety bonds, letters of credit, deposit trust agreements, undertakings, collateral charges and/or other security instruments as Tarion may reasonably require in accordance with the Act and the Regulations, together with statements of personal net worth, bank statements, drivers' licenses, birth certificates, articles of incorporation, sample signatures, corporate by-laws, financial statements, and/or such other documentation, records and security as Tarion may reasonably require for the purpose of initial registration, renewal of registration and/or securing the obligations imposed upon the Registrant by the Act, the Regulations, this Agreement and/or the Bulletins. Between renewal dates, Tarion shall not require additional documentation or security from or on behalf of the Registrant, unless Tarion reasonably believes that intervening circumstances have arisen which may impair the Registrant's ability to sell homes and/or carry out any requisite after sales service and warranty work.
- Use of credit information 1.4 The Registrant hereby authorizes Tarion to procure and utilize, from time to time, credit information in respect of the Registrant, and agrees that no action, claim or other proceeding shall be instituted or pursued against Tarion in respect of any damages incurred by the Registrant thereby, provided such credit information is not disclosed to any third party, except for credit reporting agencies to whom Tarion owes a duty of disclosure, and

except as otherwise required by law.

- | | | |
|--|------|--|
| Vendor's ongoing disclosure obligation | 1.5 | The Registrant shall be obliged to communicate to Tarion any fact, circumstance or information that may have a material adverse impact on the Registrant's ability to sell homes and/or carry out any requisite after sales service and warranty work. |
| Tarion's disclosure obligation | 1.6 | Tarion agrees to advise the Registrant, in writing, of all notices of claims or potential claims that Tarion receives from any purchaser(s) or homeowner(s) relating to any home(s) in respect of which the Registrant acted as Vendor (or that were enrolled by the Registrant). Tarion also agrees to provide the Registrant with a reasonable opportunity (as may be specified by the Act, and/or the Regulations from time to time) to rectify or remedy any warrantable work or financial loss claim(s) prior to Tarion initiating any enforcement proceedings or remedial work. |
| Termination of the Registrant's obligations | 1.7 | <p>This Agreement, and all obligations of the Registrant hereunder may not be unilaterally terminated by the Registrant, but rather, shall remain in full force and effect and continue to bind the Registrant, notwithstanding any expiry or revocation of the registration of the Registrant under the Act and notwithstanding any amendment, alteration or modification of the Act or the Regulations, until the earlier of the date that:</p> <ul style="list-style-type: none">(i) all obligations and liabilities of the Registrant to Tarion have been fulfilled or complied with; or(ii) all applicable warranty or limitation periods have expired, with no claims having been filed with Tarion prior thereto; <p>relating to any homes in respect of which the Registrant acted as Vendor (or that were enrolled by the Registrant).</p> |
| Consent to transfer or assign the registration | 1.8 | The registration of the Registrant under the Act is not transferable or assignable by the Registrant, whether by way of power of attorney, sale, amalgamation or otherwise, without the prior written consent of Tarion. |
| No unauthorized use of the registration number | 1.9 | The Registrant shall not permit the use of the Registrant's registration number by any other party, and without limiting the generality of the foregoing, the Registrant shall immediately report the use of the Registrant's registration number by any other party to Tarion upon becoming aware of same. |
| Designation as "Registered Vendor" | 1.10 | During the term of the registration of the Registrant under the Act, the Registrant shall be entitled to hold itself out as a "Registered Vendor". |

ARTICLE 2.0 – LIABILITY AND INDEMNITY

- Warranty obligations during the warranty periods 2.1 The Registrant shall diligently perform the obligations heretofore or hereafter imposed upon the Registrant by the Act, the Regulations, this Agreement and/or the Bulletins and shall indemnify and save Tarion harmless from and against all losses, claims, costs, damages and/or liabilities whatsoever heretofore or hereafter suffered or incurred by Tarion resulting from (or arising out of) any non-performance or inadequate performance of such obligations, in whole or in part, at the times, (and in the manner) as may be provided or contemplated by the Act, the Regulations, this Agreement and/or the Bulletins, provided written notice of a claim against the Registrant, or relating to any homes in respect of which the Registrant acted as Vendor (or that were enrolled by the Registrant) has been given to Tarion within the relevant warranty period(s).
- Obligations for financial losses of purchasers 2.2 The Registrant shall diligently perform the obligations of the Registrant under each purchase agreement heretofore or hereafter entered into by the Registrant relating to any home in respect of which the Registrant acted as Vendor (or that was enrolled by the Registrant). In the event of the failure of the Registrant to perform such obligations, the Registrant shall pay to each purchaser who has made a written claim to Tarion (in respect of his or her purchase agreement with the Registrant) prior to the expiration of the applicable limitation period, the amount of the financial loss suffered by such purchaser plus, in the case of a condominium unit, deposit interest which is owing by the Registrant to the purchaser pursuant to the *Condominium Act*, and shall indemnify and save Tarion harmless from and against all losses, claims, costs, damages and/or liabilities whatsoever heretofore or hereafter suffered or incurred by Tarion resulting from (or arising out of) any non-payment of such financial loss amount and interest.
- Obligations of Registrant and Tarion for major structural defects 2.3 Without limiting the obligations of the Registrant to Tarion arising under 2.1 and 2.2 hereof, it is understood and agreed that the Registrant shall indemnify and save Tarion harmless from and against all losses, claims, costs, damages and/or liabilities whatsoever heretofore or hereafter suffered or incurred by Tarion resulting from (or arising out of) any major structural defect in any home in respect of which the Registrant acted as Vendor (or that was enrolled by the Registrant), provided written notice of such defect (or any other defect which, if left unattended, would ultimately lead to or become a major structural defect) is given to Tarion within two years from the effective commencement date of the warranty period applicable to major structural defects. In turn, Tarion covenants and agrees to be solely responsible for major structural defects in respect of such home(s) from years three to seven inclusive, from and after the effective commencement date of the warranty period applicable thereto.

- Enforcement of obligations 2.4 Tarion shall not be obliged to proceed against the builder of any home in respect of which the Registrant acted as Vendor (or that was enrolled by the Registrant), prior to proceeding to enforce the obligations of the Registrant under this Agreement.
- Vendor obligation to retain Registered Builder 2.5 Where the Registrant does not build homes in the ordinary course of the Registrant's business, the Registrant shall at all times maintain in full force and effect an agreement with a builder registered under the Act who does build homes in the ordinary course of its business, whereby such builder agrees to diligently perform the work required to fulfill each and every obligation imposed upon the Registrant by the Act, the Regulations, this Agreement and any Bulletins, in respect of the construction of such home (and completion items) for which the builder has received payment and to maintain its agreement with Tarion to indemnify and save Tarion harmless from and against all losses, claims, costs, damages and/or liabilities heretofore or hereafter suffered or incurred by Tarion resulting from (or arising out of) any non-performance or non-fulfillment of such obligations, in whole or in part. The Registrant shall provide Tarion with a copy of such agreement upon applying for registration under the Act, and shall forthwith advise Tarion should such agreement be terminated, substantially modified or replaced with a similar agreement with another builder.
- Preservation of rights and claims against others 2.6 The Registrant shall preserve all assignable rights and claims that the Registrant may have against manufacturers, suppliers, vendors, builders, contractors, sub-contractors and others in respect of any major structural or other construction defect(s), or with respect to any contravention of the Ontario Building Code, relating to any homes in respect of which the Registrant acted as Vendor (or that were enrolled by the Registrant), and in those circumstances where the Registrant is not diligently enforcing or pursuing such rights and claims, and to the extent permitted by law, the Registrant shall, forthwith upon the request of Tarion, assign and transfer all such rights and claims to and in favour of Tarion, and shall execute and deliver such assignments and other instruments and do such acts and things as Tarion may reasonably require in order to enable Tarion to prosecute and enforce such rights and claims as fully and effectually as the same could be prosecuted and enforced by the Registrant.
- Administration fee 2.7 The Registrant shall pay to Tarion an administration fee equivalent to fifteen (15%) per cent (or such other per cent as may be stipulated from time to time by the Regulations) of each amount paid out by Tarion to any purchaser(s), homeowner(s) or third party contractor(s)/consultant(s) in respect of the obligations imposed upon the Registrant by the Act, the Regulations, this Agreement and/or the Bulletins.

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| Interest on debt | 2.8 | The Registrant shall pay to Tarion interest on any amounts owed to Tarion by the Registrant by virtue of the Act, the Regulations, this Agreement and/or the Bulletins, which interest shall accrue at the rate of eighteen (18%) per cent per annum, calculated annually, not in advance (or such other interest rate as may be stipulated from time to time by the Regulations) and accruing from and after the respective date(s) that any amount(s) is/are so due or owing to Tarion, to and until the date that all such amounts (together with all interest accrued thereon as aforesaid) have been fully paid or remitted to Tarion. |
| Binding nature of the Agreement | 2.9 | This Agreement shall extend and enure to the benefit of the successors and assigns of Tarion and shall be binding upon the Registrant and the heirs, estate trustees, legal representatives, successors and permitted assigns of the Registrant. |

ARTICLE 3.0 – ONGOING TERMS AND CONDITIONS OF REGISTRATION

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| Access to inspect and copy relevant books and records | 3.1 | Upon reasonable prior notice the Registrant shall allow Tarion free access, during normal business hours, to inspect (and make copies of all relevant portions of) the Registrant's books and records relating to the construction and/or sale of any homes in respect of which the Registrant acted as Vendor (or that were enrolled by the Registrant), to ensure compliance with the Act, the Regulations, this Agreement and/or the Bulletins. |
| Provision of documents | 3.2 | The Registrant shall, at the Registrant's expense and upon the request of Tarion, furnish to Tarion copies of all purchase agreements, construction contracts, insurance contracts, construction reports and such other documents relating to any homes in respect of which the Registrant acted as Vendor (or that were enrolled by the Registrant), and which are in the Registrant's possession or control, as Tarion may reasonably require from time to time. |
| Limits on selling or collecting deposits | 3.3 | The Registrant shall not sell and/or collect deposits on homes sold exceeding the maximum number of homes (if any) permitted to be sold by Tarion, without obtaining the prior written consent of Tarion thereto. |
| Written notice in advance of inspections | 3.4 | The Registrant shall provide to Tarion written notice of the completion of any stage of construction of any homes in respect of which the Registrant acted as Vendor (or that were enrolled by the Registrant), as specified by Tarion as a condition of the registration of the Registrant, in order to allow for whatever inspections Tarion may wish to have carried out with respect to same. |

Obligation for annual renewal of registration	3.5	The Registrant shall annually apply for the renewal of its registration under the Act and shall pay the renewal fee as prescribed from time to time by Tarion, notwithstanding the delivery or non-delivery to the Registrant of the prescribed renewal application form.
Provision of documents prior to selling condominium units	3.6	Without limiting the obligations of the Registrant to Tarion arising under section 1.3 hereof, the Registrant shall, prior to selling any units in a condominium project, furnish to Tarion such documentation, agreements and security as Tarion may require in order to secure the performance and fulfillment of the Registrant's obligations and liabilities to Tarion arising under the Act, the Regulations, this Agreement and/or the Bulletins provided, however, that no security shall be required to be posted or given to Tarion by the Registrant in respect of reservation agreements only.
Exclusion of reservation agreements		
Delivery of deposit receipt to Registrant	3.7	Following the enrolment of the common elements of a condominium project in respect of which the Registrant acted as Vendor (or that was enrolled by the Registrant), and the provision of any required security acceptable to Tarion in connection therewith, Tarion shall furnish the Registrant with a deposit receipt for every dwelling unit for which deposit security has been provided.
Delivery of Certificate of Completion and Possession to owners and Tarion	3.8	The Registrant shall properly complete, execute and deliver to the owner of each home, in respect of which the Registrant acted as Vendor, a Certificate of Completion and Possession in the form provided from time to time by Tarion, setting forth the date upon which the home is completed for possession, and shall furnish Tarion with a copy of same within fifteen (15) days after said date.
Delivery of duplicate registered declaration of condominium project to Tarion	3.9	In the case of a condominium project developed and/or registered by the Registrant, the Registrant shall forward a copy of the duplicate registered condominium declaration to Tarion within fifteen (15) days after the registration of such declaration.
Compliance with Builder Bulletins	3.10	The Registrant shall diligently comply with the provisions of the Bulletins, issued by Tarion from time to time in accordance with the Act and the Regulations, where applicable to the Registrant, provided Tarion has given the Registrant reasonable prior notice of the provisions of the Bulletins. Tarion confirms and agrees that any Bulletins issued shall not have retroactive effect with respect to any home(s) under construction as at their respective issue dates, unless otherwise required pursuant to any applicable judicial ruling or statutory provision.
Notification of business changes to Tarion	3.11	The Registrant shall notify Tarion in writing of any change in the mailing address or facsimile number of the Registrant, any change in the members of (or partners in) the Registrant, and/or any change in the officers, directors or shareholders of the outstanding

voting shares of the Registrant, within fifteen (15) days after the date of any such change.

- Inclusion of addendum in purchase agreements 3.12 The Registrant shall include in each purchase agreement entered into by the Registrant, relating to any home in respect of which the Registrant acted as Vendor (or that was enrolled by the Registrant), all addenda prescribed by Tarion, from time to time, provided Tarion has given reasonable prior notice of same to the Registrant.
- Term and condition of registration 3.13 Compliance with the provisions of this Agreement shall form a term and condition of the registration of the Registrant under the Act.

ARTICLE 4.0 – ADMINISTRATIVE MATTERS

- 4.1 *Reserved*
- Notice by Registrant or Tarion 4.2 Any notice desired or required to be given by either of the parties hereto to the other shall be conclusively deemed to have been sufficiently given if delivered by ordinary mail, hand/courier or by telefax only on business days (excluding Saturdays, Sundays and statutory holidays), and shall be deemed to have been received on the fifth business day after any such notice has been mailed/posted, or on the day that same has been delivered by hand/courier or telefaxed, on the express understanding that any notice delivered by hand/courier or telefaxed after 4:30 p.m. shall be deemed to have been received on the next business day following the date of such delivery or such telefax transmission (as the case may be), and provided further that if telefaxed, a confirmation of such telefax transmission must be received by the transmitting party at the time of such transmission, otherwise same shall be deemed not to have been properly or sufficiently telefaxed to the intended party. In the case of the Registrant, any notice given by Tarion shall be delivered to the Registrant's address or telefax number as specified in this Agreement or at such other address or telefax number as the Registrant may, from time to time, designate by way of written notice received by Tarion.
- Tarion reporting of Registrant's performance 4.3 The Registrant hereby authorizes Tarion to report on the Registrant's performance and/or compliance status relating to homes in respect of which the Registrant acted as Vendor (or that were enrolled by the Registrant) in any publication (whether print, electronic or otherwise). Prior to Tarion reporting such information in any such publication, Tarion shall provide the Registrant with prior notice of same and the Registrant shall have fifteen (15) days thereafter within which to challenge, question, rectify or supplement the subject matter of such report. Tarion hereby undertakes and agrees to exercise due diligence in order to ensure the veracity and accuracy of all information so reported and/or published. Tarion shall be entitled to proceed with such
- Due diligence by Tarion to ensure notice and accurate reporting

reporting or publication notwithstanding any challenge or question, after having thoroughly investigated the matter.

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| Tarion disclosure of Registrant's ability to sell and provide after sales service | 4.4 | The Registrant further authorizes the disclosure of information by Tarion to the general public (and/or any credit reporting agency to whom Tarion owes a duty of disclosure) concerning the Registrant's ability to sell homes and carry out any requisite after sales service and warranty work, where the Registrar of Tarion believes it advisable to do so for the protection of the public. Prior to Tarion disclosing such information, Tarion shall provide the Registrant with prior notice of same and the Registrant shall have fifteen (15) days thereafter within which to challenge, question, rectify or supplement such information. Tarion shall be entitled to proceed with such disclosure, notwithstanding any challenge or question, after having reasonably considered same, provided Tarion honestly believes that the information disclosed is accurate in all material respects. |
| Misleading advertising | 4.5 | The Registrant covenants and agrees that it shall not advertise or publish a registration or enrolment number that the Registrant does not have (or that does not exist), and the Registrant shall not promote, publish or advertise a rating or qualification that the Registrant does not have. The Registrant further acknowledges and agrees that a breach of this provision shall entitle the Registrar to obtain and enforce a court order to enjoin and/or restrain such activities. |
| Provision of Registrant's name, address, telephone and telefax to contact Registrant | 4.6 | The Registrant authorizes the provision by Tarion of its database containing only the names, business addresses, telephone and telefax numbers of all Registrants, from time to time, to recognized builder associations. In addition, the Registrant authorizes Tarion to provide the name, business address, telephone and telefax number of the Registrant in the <i>Rating for After Sales Service</i> and to anyone desiring to contact the Registrant. |
| Governance by the laws of Ontario and Canada | 4.7 | This Agreement shall be construed in accordance with (and be governed by) the laws of the Province of Ontario and the laws of Canada applicable thereto. |
| Jurisdiction of legal proceedings | 4.8 | The parties hereto shall attorn to the jurisdiction of the courts of the Province of Ontario, and confirm that any legal proceedings in respect of this Agreement shall be tried at Toronto or such other venue as is proposed by Tarion in any application or originating process initiated by Tarion in respect of this Agreement. |
| Severability of invalid provisions | 4.9 | Any provision of this Agreement which is finally determined to be illegal, void or unenforceable in any relevant jurisdiction by a court of competent jurisdiction shall, as to such jurisdiction only, be ineffective to the extent of such illegality, voidness or unenforceability without invalidating or in any way impairing the |

enforceability of the remaining provisions hereof.

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| Definition of words and expressions | 4.10 | The words and expressions used in this Agreement shall, unless otherwise defined in this Agreement, have the meanings ascribed to them in the Act and the Regulations. |
| Headings and margin notes | 4.11 | The insertion of headings and margin notes in this Agreement is for the purpose of convenience of reference only, and shall not affect the construction or interpretation of this Agreement. |
| English language | 4.12 | The parties have requested that this Agreement and all related documents and instruments be drawn up in the English language. Les parties confirment leur volonté que la présente convention et tous les documents qui s'y rattachent soient rédigés en anglais. |
| Gender and number | 4.13 | This Agreement shall be read and construed with all changes in gender and/or number as may be required by the context. |
| Receipt of true copy | 4.14 | The Registrant hereby acknowledges having read and understood this Agreement and having received a true completed copy of this Agreement. |

IN WITNESS WHEREOF the Registrant has executed this Agreement, under seal, as of the date first above-mentioned.

SIGNED, SEALED AND DELIVERED)

in the presence of)

Witness Signature)

Print Name of Witness)

Street Address)

City, Province, Postal Code)

Witness signature is required *unless*
Corporate Seal is affixed.

Print Name of Registrant (Vendor)

Per: _____ (seal)
Signature of Registrant (Vendor)

Print Name of Signing Officer

TARION WARRANTY CORPORATION

Per: _____ (seal)
The Registrar

Registration effective this _____ day of _____, _____.

Recommended Covenants Between a Registered Vendor and Registered Builder

Paragraph 2.5 of the Vendor Agreement requires a Vendor which does not build homes in the ordinary course of its business to retain a Registered Builder. Tarion advises Registered Vendors to ensure the following covenants are included in their contracts with Registered Builders:

- an agreement (covenant) by the Registered Builder to diligently perform all work required to fulfill every obligation of a “builder” under the Act, the Regulations and the bulletins in respect of each home intended to be constructed by such party.
- an agreement (covenant) by the Registered Builder to indemnify Tarion against all losses, claims, costs, damages and/or liabilities suffered or incurred by Tarion resulting from (or arising out of) any non-performance or non-fulfillment of such party's obligations.

Recommended Covenants Between a Registered Vendor and Registered Builder

Paragraph 2.5 of the Vendor Agreement requires a Vendor which does not build homes in the ordinary course of its business to retain a Registered Builder. ONHWP advises Registered Vendors to ensure the following covenants are included in their contracts with Registered Builders:

- an agreement (covenant) by the Registered Builder to diligently perform all work required to fulfill every obligation of a “builder” under the Act, the Regulations and the bulletins in respect of each home intended to be constructed by such party.
- an agreement (covenant) by the Registered Builder to indemnify ONHWP against all losses, claims, costs, damages and/or liabilities suffered or incurred by ONHWP resulting from (or arising out of) any non-performance or non-fulfillment of such party’s obligations.



Builder Agreement

THIS AGREEMENT made the _____ day of _____, 20____,

B E T W E E N:

(Print the exact legal name of the Builder)

of the City of _____, in the Province of Ontario

(hereinafter referred to as the "Registrant");

Tarion Warranty Corporation, a private, non-profit corporation,
incorporated without share capital, pursuant to the laws of the Province
of Ontario

(hereinafter referred to as "Tarion")

BUILDER AGREEMENT

WHEREAS:

1. Tarion is a private, non-profit corporation designated by the Lieutenant Governor in Council to administer the *Ontario New Home Warranties Plan Act*, as amended from time to time (the "Act");
2. the Registrant applied to Tarion for registration as a builder under the Act;
3. Tarion grants registration conditional upon the Registrant executing this Builder Agreement (the "Agreement"), which Agreement deals with the Registrant's rights and obligations as a builder under the Act, the regulations enacted thereunder, as amended from time to time (the "Regulations") and all applicable builder bulletins issued by Tarion from time to time (the "Bulletins");

NOW THEREFORE IN CONSIDERATION OF the registration of the Registrant under the Act, and for other good and valuable consideration (the receipt and sufficiency of which is hereby expressly acknowledged), Tarion and the Registrant hereby confirm the veracity of the foregoing recitals and that same comprise an integral part of this Agreement, and agree with each other as follows:

ARTICLE 1.0 – APPLICATION AND REGISTRATION

- Authority of the Registrant to enter into the Agreement 1.1 The Registrant represents and warrants to Tarion that the Registrant has full capacity, power and authority to enter into this Agreement, holds all necessary licenses and permits required to carry on the business of constructing homes in the Province of Ontario and, if a corporation, is a duly organized and validly subsisting corporation under the laws of the Province of Ontario (or alternatively is a duly organized and validly subsisting extra-provincial corporation or federal corporation, and licensed to carry on business in the Province of Ontario).
- Commitment to act as a Builder only 1.2 The Registrant represents and warrants to Tarion that the Registrant will not act as a vendor unless the Registrant registers as a vendor and executes a Vendor Agreement with Tarion.
- Commitment to true and accurate disclosure 1.3 The Registrant further represents and warrants to Tarion that the information set forth in the application for registration of the Registrant under the Act, and in other documents furnished by the Registrant to Tarion in connection with such application, is true and correct in all material respects and does not omit to communicate any fact, circumstance or information that may have a material adverse impact on the Registrant's ability to fulfill its obligations under this Agreement, or that may reasonably have a material affect on the risk assessment undertaken (or to be undertaken) in connection with the registration (or continued registration) of the Registrant under the Act.
- Commitment to submission of security, financial information and other documentation 1.4 The Registrant shall, upon the request of Tarion and at the expense of the Registrant, furnish Tarion with such guarantees, indemnities, surety bonds, letters of credit, deposit trust agreements, undertakings, collateral charges and/or other security instruments, as Tarion may reasonably require in accordance with the Act and the Regulations, together with statements of personal net worth, bank statements, drivers' licenses, birth certificates, articles of incorporation, sample signatures, corporate by-laws, financial statements and/or such other documentation, records and security as Tarion may reasonably require for the purpose of initial registration, renewal of registration and/or securing the obligations imposed upon the Registrant by the Act, the Regulations, this Agreement and/or the Bulletins. Between renewal dates, Tarion shall not require additional documentation or security from or on behalf of the Registrant, unless Tarion reasonably believes that intervening circumstances have arisen which may impair the Registrant's ability to build homes and/or carry out any warranty work.
- Use of credit information 1.5 The Registrant hereby authorizes Tarion to procure and utilize, from time to time, credit information in respect of the Registrant, and agrees that no action, claim or other proceeding shall be instituted or pursued against Tarion in respect of any damages

incurred by the Registrant thereby, provided such credit information is not disclosed to any third party, except for credit reporting agencies to whom Tarion owes a duty of disclosure, and except as otherwise required by law.

- Builder's ongoing disclosure obligation 1.6 The Registrant shall be obliged to communicate to Tarion any fact, circumstance or information that may have a material adverse impact on the Registrant's ability to build homes and/or carry out any warranty work.
- Tarion's disclosure obligation 1.7 Tarion agrees to advise the Registrant, in writing, of all notices of claims or potential claims that Tarion receives from any purchaser(s) or homeowner(s) in respect of any home(s) constructed by or on behalf of the Registrant, in those circumstances where the Vendor of such home(s) is unable or unwilling to satisfy its warranty obligations. Tarion also agrees to provide the Registrant with a reasonable opportunity (as may be specified by the Act and/or the Regulations from time to time) to rectify or remedy any warrantable work prior to Tarion initiating any enforcement proceedings or remedial work.
- Termination of the Registrant's obligations 1.8 This Agreement and all obligations of the Registrant hereunder may not be unilaterally terminated by the Registrant, but rather, shall remain in full force and effect and continue to bind the Registrant, notwithstanding any expiry or revocation of the registration of the Registrant under the Act and notwithstanding any amendment, alteration or modification of the Act or the Regulations until the earlier of the date that:
- (i) all obligations and liabilities of the Registrant to Tarion have been fulfilled or complied with; or
 - (ii) all applicable warranty or limitation periods have expired, with no claims having been filed with Tarion prior thereto;
- in respect of any homes enrolled (or that ought to have been enrolled) by the Registrant.
- Consent to transfer or assign the registration 1.9 The registration of the Registrant under the Act is not transferable or assignable by the Registrant, whether by way of power of attorney, sale, amalgamation or otherwise, without prior written consent of Tarion.
- No unauthorized use of the registration number 1.10 The Registrant shall not permit the use of the Registrant's registration number by any other party save and except by a registered vendor who has entered into a Vendor Agreement with Tarion, and without limiting the generality of the foregoing, the Registrant shall immediately report the use of the Registrant's registration number by any other party to Tarion upon becoming aware of same.

Designation as "Registered Builder" 1.11 During the term of the registration of the Registrant under the Act, the Registrant shall be entitled to hold itself out as a "Registered Builder".

ARTICLE 2.0 – LIABILITY AND INDEMNITY

Warranty obligations during the warranty periods 2.1 It is understood and agreed that where the Registrant builds a home for or on behalf of a vendor, whether or not such vendor is registered under the Act, then the Registrant shall be responsible for fulfilling each and every obligation imposed upon the Registrant by the Act, the Regulations, this Agreement and any Bulletins, in respect of the construction of such home (and completion items) for which the Registrant has received payment, and the Registrant shall indemnify and save Tarion harmless from and against all losses, claims, costs, damages and/or liabilities whatsoever heretofore or hereafter suffered or incurred by Tarion resulting from (or arising out of) non-performance or inadequate performance of such work, in whole or in part, provided written notice of a claim against the Registrant (or in respect of any home enrolled or that ought to have been enrolled by the Registrant) has been given to Tarion within the relevant warranty period(s). This paragraph shall not limit the right of Tarion to enforce obligations owed by the vendor of such home to Tarion.

Obligations of Registrant and Tarion for major structural defects 2.2 Without limiting the generality of the foregoing, it is understood and agreed that the Registrant shall indemnify and save Tarion harmless from and against all losses, claims, costs, damages and/or liabilities whatsoever heretofore or hereafter suffered or incurred by Tarion resulting from (or arising out of) any major structural defect in any home enrolled (or that ought to have been enrolled) by the Registrant, provided written notice of such defect (or any other defect which, if left unattended, would ultimately lead to or become a major structural defect) is given to Tarion within two years from the effective commencement date of the warranty period applicable to major structural defects. In turn, Tarion covenants and agrees to be solely responsible for major structural defects in respect of such home(s) from years three to seven inclusive, from and after the effective commencement date of the warranty period applicable thereto.

Obligations of Registrant if acting as a vendor 2.3 It is further understood and agreed that in the event the Registrant acts as a vendor without registering with Tarion as a vendor (and without executing a Vendor Agreement) then the Registrant shall indemnify and save Tarion harmless from and against all losses, claims, costs, damages and/or liabilities whatsoever heretofore or hereafter suffered or incurred by Tarion resulting from (or arising out of) any failure to perform or fulfil the obligations that the Registrant would have been obliged to fulfil had the Registrant registered as a vendor with Tarion and executed a Vendor Agreement with Tarion.

- Enforcement of obligations 2.4 Tarion shall not be obliged to proceed against the vendor of any home enrolled (or that ought to have been enrolled) in respect of which the Registrant acted as a builder, prior to proceeding to enforce the obligations of the Registrant under this Agreement.
- Preservation of rights and claims against others 2.5 The Registrant shall preserve all assignable rights and claims that the Registrant may have against manufacturers, suppliers, vendors, builders, contractors, sub-contractors and others in respect of any major structural or other construction defect(s), or with respect to any contravention of the Ontario Building Code, in respect of any homes enrolled (or that ought to have been enrolled) by the Registrant, and in those circumstances where the Registrant is not diligently enforcing or pursuing such rights and claims, and to the extent permitted by law, the Registrant shall, forthwith upon the request of Tarion, assign and transfer all such rights and claims to and in favour of Tarion, and shall execute and deliver such assignments and other instruments and do such acts and things as Tarion may reasonably require in order to enable Tarion to prosecute and enforce such rights and claims as fully and effectually as the same could be prosecuted and enforced by the Registrant.
- Administration fee 2.6 The Registrant shall pay to Tarion an administration fee equivalent to fifteen (15%) per cent (or such other per cent as may be stipulated from time to time by the Regulations) of each amount paid out by Tarion to any purchaser(s), homeowner(s) or third party contractor(s)/consultant(s) in respect of the obligations imposed upon the Registrant by the Act, the Regulations, this Agreement and/or the Bulletins.
- Interest on debt 2.7 The Registrant shall pay to Tarion interest on any amounts owed to Tarion by the Registrant by virtue of the Act, the Regulations, this Agreement and/or the Bulletins, which interest shall accrue at the rate of eighteen (18%) per cent per annum, calculated annually, not in advance (or such other interest rate as may be stipulated from time to time by the Regulations) and accruing from and after the respective date(s) that any amount(s) is/are so due or owing to Tarion, to and until the date that all such amounts (together with all interest accrued thereon as aforesaid) have been fully paid or remitted to Tarion.
- Binding nature of the Agreement 2.8 This Agreement shall extend and enure to the benefit of the successors and assigns of Tarion and shall be binding upon the Registrant and the heirs, estate trustees, legal representatives, successors and permitted assigns of the Registrant.

ARTICLE 3.0 – ONGOING TERMS AND CONDITIONS OF REGISTRATION

- Access to inspect and copy relevant books and records 3.1 Upon reasonable prior notice the Registrant shall allow Tarion free access, during normal business hours, to inspect (and make copies of all relevant portions of) the Registrant's books and records in respect of the construction of homes enrolled (or that ought to

have been enrolled) by the Registrant to ensure compliance with the Act, the Regulations, this Agreement and/or the Bulletins.

- Provision of documents 3.2 The Registrant shall, at the Registrant's expense and upon the request of Tarion, furnish to Tarion copies of all purchase agreements, construction contracts, insurance contracts, construction reports and such other documents in respect of any homes enrolled (or that ought to have been enrolled) by the Registrant and which are in the Registrant's possession or control, as Tarion may reasonably require from time to time.
- Limits on construction 3.3 The Registrant shall not commence (or cause to be commenced) the construction of:
- (i) any home in excess of the maximum number permitted by Tarion, (if any) to be constructed by the Registrant; or
 - (ii) any home of any class the construction of which has been restricted by Tarion;
- without obtaining the prior written consent of Tarion.
- Written notice in advance of inspections 3.4 The Registrant shall provide to Tarion written notice of the completion of any stage of construction in respect of any homes enrolled (or that ought to have been enrolled) by the Registrant, as specified by Tarion as a condition of the registration of the Registrant, in order to allow for whatever inspections Tarion may wish to have carried out with respect to same.
- Obligation for annual renewal of registration 3.5 The Registrant shall annually apply for the renewal of its registration under the Act and shall pay the renewal fee as prescribed from time to time by Tarion, notwithstanding the delivery or non-delivery to the Registrant of the prescribed renewal application form.
- Obligation to enrol freehold homes 3.6 The Registrant shall enrol each home to be constructed by the Registrant, other than condominium dwelling units, by submitting a completed enrolment form and paying the enrolment fee as prescribed from time to time by Tarion forthwith upon issuance of a building permit in respect of such home.
- Obligation to enrol condominium units 3.7 If the Vendor has not already done so, the Registrant shall enrol each condominium project and each condominium dwelling unit therein to be constructed by the Registrant by submitting a completed enrolment form and paying the enrolment fee as prescribed from time to time by Tarion not less than thirty (30) days prior to the earlier of:
- (i) commencement of construction of such condominium project; or

- (ii) the issuance of a full or partial building permit in respect of such condominium project.

Provision of documents prior to construction	3.8	Without limiting the obligations of the Registrant to Tarion arising under section 1.4 hereof, the Registrant shall, prior to commencing construction of any home, furnish to Tarion such documentation, agreements and security as Tarion may require in order to secure the performance and fulfillment of the Registrant's obligations and liabilities to Tarion arising under the Act, the Regulations, this Agreement and/or the Bulletins.
Compliance with Builder Bulletins	3.9	The Registrant shall diligently comply with the provisions of the Bulletins issued by Tarion from time to time in accordance with the Act and the Regulations, where applicable to the Registrant, provided Tarion has given the Registrant reasonable prior notice of the provisions of the Bulletins. Tarion confirms and agrees that any Bulletins issued shall not have retroactive effect with respect to any home(s) under construction as at their respective issue dates, unless otherwise required pursuant to any applicable judicial ruling or statutory provision.
Notification of business changes to Tarion	3.10	The Registrant shall notify Tarion in writing of any change in the mailing address or facsimile number of the Registrant, any change in the members of (or partners in) the Registrant, and/or any change in the officers, directors or shareholders of the outstanding voting shares of the Registrant, within fifteen (15) days after the date of any such change.
Term and condition of registration	3.11	Compliance with the provisions of this Agreement shall form a term and condition of the registration of the Registrant under the Act.

ARTICLE 4.0 – ADMINISTRATIVE MATTERS

	4.1	<i>Reserved</i>
Notice by Registrant or Tarion	4.2	Any notice desired or required to be given by either of the parties hereto to the other shall be conclusively deemed to have been sufficiently given if delivered by ordinary mail, hand/courier or by telefax only on business days (excluding Saturdays, Sundays and statutory holidays), and shall be deemed to have been received on the fifth business day after any such notice has been mailed/posted, or on the day that same has been delivered by hand/courier or telefaxed, on the express understanding that any notice delivered by hand/courier or telefaxed after 4:30 p.m. shall be deemed to have been received on the next business day following the date of such delivery or such telefax transmission (as the case may be), and provided further that if telefaxed, a confirmation of such telefax transmission must be received by the transmitting party at the time of such transmission, otherwise same shall be deemed not to have been properly or sufficiently telefaxed to the intended party. In the

case of the Registrant, any notice given by Tarion shall be delivered to the Registrant's address or telefax number as specified in this Agreement or at such other address or telefax number as the Registrant may, from time to time, designate by way of written notice received by Tarion.

Tarion reporting of Registrant's performance

- 4.3 The Registrant hereby authorizes Tarion to report on the Registrant's performance and/or compliance status in respect of homes enrolled (or that ought to have been enrolled) by the Registrant in any publication (whether print, electronic or otherwise). Prior to Tarion reporting such information in any such publication, Tarion shall provide the Registrant with prior notice of same and the Registrant shall have fifteen (15) days thereafter within which to challenge, question, rectify or supplement the subject matter of such report. Tarion hereby undertakes and agrees to exercise due diligence in order to ensure the veracity and accuracy of all information so reported and/or published. Tarion shall be entitled to proceed with such reporting or publication notwithstanding any challenge or question, after having thoroughly investigated the matter.

Due diligence by Tarion to ensure notice and accurate reporting

Tarion disclosure of Registrant's ability to construct homes and carry out warranty work

- 4.4 The Registrant further authorizes the disclosure of information by Tarion to the general public (and/or any credit reporting agency to whom Tarion owes a duty of disclosure) concerning the Registrant's ability to build homes and/or carry out any warranty work, where the Registrar of Tarion believes it advisable to do so for the protection of the public. Prior to Tarion disclosing such information, Tarion shall provide the Registrant with prior notice of same and the Registrant shall have fifteen (15) days thereafter within which to challenge, question, rectify or supplement such information. Tarion shall be entitled to proceed with such disclosure, notwithstanding any challenge or question, after having reasonably considered same, provided Tarion honestly believes that the information disclosed is accurate in all material respects.

Misleading advertising

- 4.5 The Registrant covenants and agrees that it shall not advertise or publish a registration or enrolment number which the Registrant does not have (or which does not exist), and the Registrant shall not promote, publish or advertise a rating or qualification that the Registrant does not have. The Registrant further acknowledges and agrees that a breach of this provision shall entitle the Registrar to obtain and enforce a court order to enjoin and/or restrain such activities.

Provision of Registrant's name, address, telephone and telefax to contact Registrant

- 4.6 The Registrant authorizes the provision by Tarion of its database containing only the names, business addresses, telephone and telefax numbers of all Registrants, from time to time, to recognized builder associations. In addition, the Registrant authorizes Tarion to provide the name, business address, telephone and telefax number of the Registrant in the *Rating for After Sales Service* and to anyone desiring to contact the Registrant.

Governance by the laws of Ontario and Canada	4.7	This Agreement shall be construed in accordance with (and be governed by) the laws of the Province of Ontario and the laws of Canada applicable thereto.
Jurisdiction of legal proceedings	4.8	The parties hereto shall attorn to the jurisdiction of the courts of the Province of Ontario, and confirm that any legal proceedings in respect of this Agreement shall be tried at Toronto or such other venue as is proposed by Tarion in any application or originating process initiated by Tarion in respect of this Agreement.
Severability of invalid provisions	4.9	Any provision of this Agreement which is finally determined to be illegal, void or unenforceable in any relevant jurisdiction by a court of competent jurisdiction shall, as to such jurisdiction only, be ineffective to the extent of such illegality, voidness or unenforceability without invalidating or in any way impairing the enforceability of the remaining provisions hereof.
Definition of words and expressions	4.10	The words and expressions used in this Agreement shall, unless otherwise defined in this Agreement, have the meanings ascribed to them in the Act and the Regulations.
Headings and margin notes	4.11	The insertion of headings and margin notes in this Agreement is for the purpose of convenience of reference only, and shall not affect the construction or interpretation of this Agreement.
English language	4.12	The parties have requested that this Agreement and all related documents and instruments be drawn up in the English language. Les parties confirment leur volonté que la présente convention et tous les documents qui s'y rattachent soient rédigés en anglais.
Gender and number	4.13	This Agreement shall be read and construed with all changes in gender and/or number as may be required by the context.
Receipt of true copy	4.14	The Registrant hereby acknowledges having read and understood this Agreement and having received a true completed copy of this Agreement.

IN WITNESS WHEREOF the Registrant has executed this Agreement, under seal, as of the date first above-mentioned.

SIGNED, SEALED AND DELIVERED)

in the presence of)

Witness Signature)

Print Name of Witness)

Street Address)

City, Province, Postal Code)

Print Name of Registrant (Builder)

Per: _____ (seal)
Signature of Registrant (Builder)

Print Name of Signing Officer

Witness signature is required *unless*
Corporate Seal is affixed.

TARION WARRANTY CORPORATION

Per: _____ (seal)
The Registrar

Registration effective this _____ day of _____, 20____

IN WITNESS WHEREOF the Registrant has executed this Agreement, under seal, as of the date first above-mentioned.

SIGNED, SEALED AND DELIVERED)

in the presence of)

Witness Signature)

Print Name of Witness)

Street Address)

City, Province, Postal Code)

Print Name of Registrant (Builder)

Per: _____ (seal)
Signature of Registrant (Builder)

Print Name of Signing Officer

Witness signature is required *unless*
Corporate Seal is affixed.

ONTARIO NEW HOME WARRANTY PROGRAM

Per: _____ (seal)
The Registrar

Registration effective this _____ day of _____

INSTRUCTIONS FOR COMPLETING THE INDEMNITY

1. Page 1 – On the blank line(s) after the word “From:” type or print the name(s) and address(es), including fax number, of the person(s) signing as Indemnitor(s).
2. Page 1 – On the blank line(s) after the word “Re:” type or print the name of the applicant or Registrant whose obligations you are indemnifying. Be sure to include the Registrant’s registration number.
3. Page 3 – Under paragraph (d) multiply the number of units that the applicant or Registrant is proposing to build by \$20,000 and write that figure in the first blank, then write the number of proposed units in the blank three lines below.

(Example: If 4 units are proposed = 4 x \$20,000 = \$80,000, write \$80,000 in the first blank, and write 4 in the blank three lines below.)

After the blanks are filled in, the person(s) signing as Indemnitor(s) write their initials in the box beside paragraph (d).

4. Page 8 – Fill in the date that you are signing the Indemnity, and sign on the line where it indicates “Indemnitor Signature” then print your name underneath where it indicates “Print Name of Indemnitor.” If an Indemnitor is a corporation, the signing officer must write, “I have authority to bind the corporation” underneath his/her signature. Signatures must be witnessed.
5. The witness must sign their name where it indicates “Witness Signature” then print their name and address on the lines underneath. A family member should not sign as a witness.
6. A corporate Indemnitor **must** receive prior approval from Ontario New Home Warranty Program (ONHWP). A corporate Indemnitor should affix its corporate seal.
7. A corporate seal should not be affixed where the Indemnitor is an individual.
8. Submit the completed Indemnity to ONHWP as soon as possible.

Note: If the Indemnity is not completed according to these instructions it will be returned to you, resulting in the delay of your registration or renewal.

INDEMNITY
(the "INDEMNITY")

ONTARIO NEW HOME WARRANTY PROGRAM ("ONHWP")

FROM:

A.

[Redacted Name Field]
(Name)

[Redacted Address and Fax Number Field]
(Address and fax number)

B.

[Redacted Name Field]
(Name)

[Redacted Address and Fax Number Field]
(Address and fax number)

C.

[Redacted Name Field]
(Name)

[Redacted Address and Fax Number Field]
(Address and fax number)

D.

[Redacted Name Field]
(Name)

[Redacted Address and Fax Number Field]
(Address and fax number)

(the "Indemnitor(s)") 

[Redacted Name Field] (Name) [Redacted ONHWP Registration No. Field] (ONHWP Registration No.)

[Redacted Address Field]
(Address)

(the "Registrant") 

WHEREAS:

1. ONHWP is a private, non-profit corporation designated by the Lieutenant Governor in Council to administer the *Ontario New Home Warranties Plan Act*, as amended from time to time (the "Act");
2. The Registrant has applied to ONHWP for registration as a vendor or builder under the Act;

3. The Indemnitor(s) have/has executed this Indemnity in order to secure the due performance and fulfillment of all obligations and liabilities of the Registrant to ONHWP (and not specific to any particular home(s) or project(s) of the Registrant), subject to the terms of this Indemnity;

NOW THEREFORE THESE PRESENTS WITNESSETH that for good and valuable consideration and the sum of Two (\$2.00) Dollars of lawful money of Canada paid by ONHWP to the Indemnitor(s) (the receipt and sufficiency of which is hereby expressly acknowledged), and in consideration of the registration of the Registrant under the Act, the Indemnitor(s) hereby:

General Indemnity (a) unconditionally and irrevocably agree(s) to indemnify, defend, protect and save ONHWP harmless from and against all losses, costs, claims, damages and/or liabilities whatsoever heretofore or hereafter suffered or incurred by ONHWP resulting from (or arising out of):

(i) the failure of the Registrant to perform all obligations heretofore or hereafter undertaken, incurred or binding upon the Registrant arising under the Act, the regulations enacted thereunder, as amended from time to time (the "Regulations"), any agreement between ONHWP and the Registrant and/or any builder bulletins issued by ONHWP from time to time which are applicable to the Registrant (the "Bulletins"), and which are binding upon the Registrant in accordance with the Act or the Regulations; and/or

(ii) the payment or satisfaction by ONHWP in whole or in part of any claim asserted by any party pursuant to the Act in respect of, or otherwise related in any manner to any home enrolled (or which ought to have been enrolled), constructed and/or sold by or on behalf of the Registrant;

and this Indemnity shall extend to all amounts paid by ONHWP in its sole judgment, acting reasonably, to satisfy any claim(s) made against it under the Act in respect of the Registrant, provided however that the Indemnitor(s) shall not be required to indemnify ONHWP in respect of any payment made towards the satisfaction of a major structural defect claim, where such claim is made at any time after the expiry of two years from the effective commencement date of the warranty period applicable to major structural defects, relating to the home or condominium unit or common element which is the subject of such claim;

Indemnity for other costs incurred by ONHWP (b) unconditionally and irrevocably agree(s) to indemnify and save ONHWP harmless from and against all costs or expenses incurred by or on behalf of ONHWP in protecting or enforcing its rights and/or remedies under this Indemnity, including without limitation, all reasonable legal costs incurred on a solicitor and his or her own client basis (excluding ONHWP's own in-house counsel charges);

Monies owing by the Indemnitor(s) to ONHWP payable on demand, with interest accruing thereon

(c) agree(s) that all amounts payable under this Indemnity are payable on demand, and that interest shall accrue and be due, owing and payable by the Indemnitor(s) on all amounts in respect of which the Indemnitor(s) is/are obliged to pay to ONHWP pursuant to the provisions of this Indemnity, at the rate of eighteen per cent (18%) per annum, calculated annually not in advance (or at such other interest rate as may be stipulated from time to time by the Regulations), and accruing from and after the respective date(s) that any amount(s) is/are so demanded and correspondingly due and owing to ONHWP, to and until the date that all such amounts (together with all interest accrued thereon as aforesaid) have been fully paid or remitted to ONHWP;

Limitation of liability

Indemnitor(s) Initials:	
_____	_____
_____	_____

(d) agree(s) that subject to paragraph (e) below, the maximum liability of the Indemnitor(s) to ONHWP arising under this Indemnity, shall not exceed the sum of \$ _____ dollars in Canadian funds in the aggregate, with such figure being predicated on the Registrant constructing and/or selling no more than _____ homes during the term of this Indemnity in any annual registration period of the Registrant (hereinafter referred to as the "Unit Limit"), on the express understanding that in the event the Registrant constructs and/or sells any home in excess of the Unit Limit, then the maximum liability of the Indemnitor(s) hereunder shall increase by \$30,000 increments in Canadian funds for each home constructed and/or sold in excess of the Unit Limit;

Maximum liability for condominium projects

(e) agree(s) that if the Registrant provides written notice and such documentation, agreements and security as ONHWP may require concerning a proposed condominium project prior to the marketing of the condominium project, then the maximum liability for each condominium project constructed and/or sold will not exceed \$1 million dollars in Canadian funds in the aggregate;

Expiration of Indemnity

(f) agree(s) that the obligations and liabilities of the Indemnitor(s) to ONHWP arising under this Indemnity shall automatically expire (and be of no further force or effect) upon the expiry of five (5) years from the date this Indemnity is executed (hereinafter referred to as the "Expiry Date"), unless written notice of a demand or claim under this Indemnity, or of any default by the Registrant which, if left unrectified, might ultimately lead to a claim against the Registrant, is given to the Indemnitor(s) by ONHWP prior to the Expiry Date;

Enforcement of Indemnity

(g) agree(s) that ONHWP shall not be obliged to proceed against the Registrant before proceeding to enforce the liabilities or obligations of the Indemnitor(s) under this Indemnity, and further expressly agree(s) that ONHWP need not pursue or exhaust its rights, remedies or recourse against or in respect of any guarantees, indemnities or securities provided or posted by the Registrant or any other party or parties in connection with the Registrant's obligations, prior to ONHWP proceeding against the Indemnitor(s);

Release, diminution or termination of liability under this Indemnity

(h) agree(s) that save and except as provided for under subparagraph (d) hereof, the liabilities and obligations of the Indemnitor(s) arising under this Indemnity may be:

- (i) released or diminished (in whole or in part) only by a written instrument executed by ONHWP evidencing or confirming same; and/or
 - (ii) terminated and fully discharged only upon the outstanding obligations, indebtedness and/or liabilities of the Registrant to ONHWP being fully paid and/or satisfied;

- Settlement by ONHWP with the Registrant and/or other parties

(i) agree(s) that ONHWP may, without notice to and without the consent of the Indemnitor(s), make any settlement with the Registrant and/or any party or parties asserting a claim in respect of which ONHWP shall be entitled to indemnification under the Indemnity, without releasing or diminishing the liabilities or obligations of the Indemnitor(s) to ONHWP arising under this Indemnity;

- Other indemnities or security

(j) agree(s) that this Indemnity is in addition and supplemental to all other indemnities, guarantees and/or any other security heretofore or hereafter held or taken by ONHWP in connection with the Registrant's obligations, and further agree(s) that the liability of the Indemnitor(s) hereunder shall not be reduced, eliminated or otherwise effected by the manner in which ONHWP deals with, or purports to enforce, release or discharge such other indemnities, guarantees or security;

- No inducements to the Indemnitor(s) to provide this Indemnity

(k) confirm(s) and agree(s) that there are no representations, warranties, collateral agreements or conditions with respect to this Indemnity, or which may have induced the Indemnitor(s) to execute this Indemnity, or affecting the liabilities or obligations of the Indemnitor(s) to ONHWP arising under this Indemnity, other than as expressly set forth herein;

- Primary liability under this Indemnity

(l) agree(s) that the liability of the Indemnitor(s) to ONHWP under this Indemnity is as a principal debtor, and not as a surety, and the Indemnitor(s) shall not plead or assert the contrary in any legal proceeding(s) commenced by ONHWP in respect of this Indemnity;

- Indemnity joint and several

(m) agree(s) that, in the case where more than one person is liable to ONHWP under this Indemnity, the liability of each of the Indemnitor(s) under this Indemnity shall be joint and several;

- Waiver of certain defences

(n) agree(s) that ONHWP may, in its sole and unfettered discretion, acting reasonably, and without notice to and without the consent of the Indemnitor(s), do any one or more of the following acts or things, without releasing or diminishing the liabilities or obligations of the Indemnitor(s) to ONHWP arising under this Indemnity, namely:

- Release, reduce or discharge the liability of the Registrant or others

(i) release, reduce or discharge in whole or in part, or otherwise enter into any settlement in respect of, the liabilities and obligations of the Registrant to ONHWP, and/or the liabilities and obligations of any other indemnitor, guarantor, surety or other person liable to ONHWP for any or all of the obligations of the Registrant to ONHWP;

- Revise the Registrant's liabilities
- (ii) increase, decrease, or otherwise revise the nature, extent or quantum of the obligations and liabilities of the Registrant to ONHWP;
- Extend or renew the Registrant's obligations
- (iii) extend or renew the obligations of the Registrant to ONHWP;
- Release, reduce or discharge other security held by ONHWP
- (iv) release, reduce or discharge in whole or in part, any security heretofore or hereafter held or taken by ONHWP in connection with the Registrant's obligations; or
- Other indulgences, extensions, etc.
- (v) grant any indulgences, extensions of time, rectification periods and/or waivers of default, to or for the benefit of the Registrant or any other indemnitor, guarantor, surety or other person liable to ONHWP for any or all of the obligations of the Registrant to ONHWP;
- No change in liability due to bankruptcy or other changes associated with Registrant
- (o) acknowledge(s) and agree(s) that the liabilities and obligations of the Indemnitor(s) under this Indemnity shall not be released or diminished by reason of the death, loss of capacity, insolvency or bankruptcy of the Registrant, nor by reason of any change in the officers, directors, shareholders, joint venture members or partners of the Registrant, nor by reason of the expiry or revocation of the registration of the Registrant under the Act, nor by reason of any amendment, alteration or modification of the Act, the Regulations, any agreement between ONHWP and the Registrant and/or any Bulletins, nor by reason of any agreement entered into between ONHWP and the Registrant being released or discharged by operation of law, or being judicially determined to be invalid or ineffective (in whole or in part), or unenforceable by ONHWP against the Registrant or the Registrant's trustee in bankruptcy;
- Waiver of all other defences
- (p) waive(s) any defense arising by reason of any incapacity, disability and/or lack of power (or any other limitation with respect to the status, capacity or power) of the Indemnitor(s) and/or the Registrant (or of the directors, officers, partners or agents of the Indemnitor(s) and/or the Registrant, as the case may be), or by reason of any irregularity, defect or informality in the entering into or execution of this Indemnity and/or any agreement between ONHWP and the Registrant, and hereby further waive(s) any and all other defences that may otherwise be lawfully alleged, pleaded or asserted by the Indemnitor(s) in defence of any legal proceedings commenced by ONHWP in respect of this Indemnity;
- Effect of other agreements
- (q) agree(s) that the Indemnitor(s) shall be and remain bound to perform the obligations and liabilities of the Indemnitor(s) arising under this Indemnity notwithstanding the contents or provisions of any agreement(s) heretofore or hereafter entered into between the Registrant and ONHWP, and notwithstanding that any such agreement(s) may be void or voidable as against the Registrant (or the Registrant's trustee in bankruptcy), and notwithstanding that the Indemnitor(s) may not have received or reviewed any such agreement(s);

Waiver of notice of Registrant's default and demand for performance or payment by Registrant	(r) waive(s) any notice of any neglect or failure on the part of the Registrant to perform or fulfill any or all of the Registrant's obligations to ONHWP, or to pay any or all of the liabilities incurred or owing by the Registrant to ONHWP, and further waive(s) the requirement to be notified of any demand for performance and/or payment made by ONHWP against the Registrant;
Indemnity governed by the laws of Ontario and Canada	(s) confirm(s) and agree(s) that this Indemnity: (i) shall be construed in accordance with (and be governed by) the laws of the province of Ontario and the laws of Canada, applicable thereto; and (ii) shall extend and enure to the benefit of the successors and assigns of ONHWP, and shall correspondingly be binding upon the Indemnitor(s) and the heirs, estate trustees, legal representatives and successors of the Indemnitor(s);
Binding nature of the Indemnity	(ii) shall extend and enure to the benefit of the successors and assigns of ONHWP, and shall correspondingly be binding upon the Indemnitor(s) and the heirs, estate trustees, legal representatives and successors of the Indemnitor(s);
Jurisdiction of legal proceedings	(t) agree(s) to attorn to the jurisdiction of the courts of the province of Ontario, and confirm(s) that any legal proceeding in respect of this Indemnity shall be tried at Toronto or such other venue as is proposed by ONHWP in any application or originating process initiated by ONHWP in respect of this Indemnity;
Validity of Indemnity despite timing of Registrant's registration and/or absence of existing vendor/builder agreement	(u) acknowledge(s) and agree(s) that notwithstanding anything hereinbefore provided to the contrary, this Indemnity shall be valid, binding upon and enforceable against the Indemnitor(s), whether or not the Registrant is registered under the Act before or after the date of this Indemnity, and whether or not any agreement between ONHWP and the Registrant is entered into before or after the date of this Indemnity;
Financial and credit information	(v) agree(s) to provide ONHWP with any financial information in respect of the Indemnitor(s) relevant to this Indemnity and authorize(s) ONHWP to procure and utilize, from time to time, credit information in respect of the Indemnitor(s), and agree(s) that no action, claim or proceeding will be instituted against ONHWP in respect of any damages incurred by the Indemnitor(s) as a consequence thereof provided such information is not disclosed to any third party, except credit reporting agencies to whom ONHWP owes a duty of disclosure, and except as otherwise required by law;
Indemnity prepared in the English language	(w) acknowledge(s) and confirm(s) that this Indemnity has been requested by the Indemnitor(s) to be written or drawn up in the English language;
Gender and number	(x) agree(s) that this Indemnity shall be construed with all changes in gender and/or number as may be required by the context;
Severability of invalid provisions	(y) agree(s) that any provision of this Indemnity which is judicially determined to be illegal or unenforceable by a court of competent jurisdiction, shall be ineffective and inapplicable to the extent of such illegality or unenforceability, without invalidating or in any way impairing the enforceability and effectiveness of the remaining provisions hereof;

- Condition precedent (z) acknowledge(s) and agree(s) that without the Indemnitor(s) executing and delivering this Indemnity to and in favour of ONHWP, ONHWP would not have registered (or will not register, or permit the continued registration of) the Registrant under the Act;
- Notice of claim by ONHWP under this Indemnity (aa) acknowledge(s) and agree(s) that notice of any claim being made by ONHWP against the Indemnitor(s) in respect of this Indemnity (as well as any other notice desired to be given by ONHWP to the Indemnitor(s)) shall be conclusively deemed to have been sufficiently given if such notice is in writing and delivered by ordinary mail, hand/courier, or by fax at the address set out above for the Indemnitor(s), only on business days (excluding Saturday, Sundays and statutory holidays), and shall be deemed to have been received by the Indemnitor(s) on the third business day after any such notice has been mailed/posted, or on the day that same has been delivered by hand/courier or fax, on the express understanding that any notice delivered by hand/courier or fax after 4:30 p.m. shall be deemed to have been received on the next business day following the date of such delivery or such fax transmission (as the case may be), and provided further that if faxed, a confirmation of such faxed transmission must be received by ONHWP at the time of such transmission, otherwise same shall be deemed not to have been properly or sufficiently faxed to the Indemnitor(s);
- Independent legal advice (bb) acknowledge(s) having received **INDEPENDENT LEGAL ADVICE** with respect to this Indemnity, and confirm(s) that the Indemnitor(s) and its/their legal counsel have been given an opportunity by ONHWP to review the Act, the Regulations, and the Bulletins issued by ONHWP to the date hereof (as well as any agreement(s) between the Registrant and ONHWP in existence as of the date hereof), and expressly acknowledge(s) and confirm(s) having read and understood the terms and provisions hereof before having executed this Indemnity;
- Receipt of true copy (cc) acknowledge(s) having received a true and completed copy of this Indemnity;
- Further assurances (dd) agree(s) that the Indemnitor(s) shall, if so required by ONHWP at any time prior to the Expiry Date, execute and deliver any acknowledgments and confirmations of this Indemnity as ONHWP may require in order to evidence or confirm the continuing liability of the Indemnitor(s) hereunder;
- Margin notes (ee) agree(s) that the insertion of margin notes in this Indemnity is for the purpose of convenience of reference only, and shall not affect the construction or interpretation of this Indemnity.

EXECUTED this day of _____ 200

SIGNED, SEALED AND DELIVERED
in the presence of:

_____	) _____ (seal)
Witness Signature	) Indemnitor Signature
_____) _____
Print Name	) Print Name of Indemnitor
_____) _____
Address) _____

_____	) _____ (seal)
Witness Signature	) Indemnitor Signature
_____) _____
Print Name	) Print Name of Indemnitor
_____) _____
Address) _____

_____	) _____ (seal)
Witness Signature	) Indemnitor Signature
_____) _____
Print Name	) Print Name of Indemnitor
_____) _____
Address) _____

_____	) _____ (seal)
Witness Signature	) Indemnitor Signature
_____) _____
Print Name	) Print Name of Indemnitor
_____) _____
Address) _____

5160 Yonge Street, 6th Floor
TORONTO ON M2N 6L9

Tel: (416) 229-9200 Fax: (416) 229-3800
www.newhome.on.ca



Application for Umbrella Group Listing

Only Registrants may be included in an umbrella listing. There must be at least two Registrants to be able to form an umbrella group.

RATINGS

Registrants listed under an umbrella group are always rated as one collective company to show a more accurate picture of how long you have been a vendor/builder in Ontario. The earliest registration date will be applied to your Umbrella Group even if that registration expires at some point in the future. Generally, the names of expired Registrants will not be taken included in the *Builder Rating for After Sales Service*. However, the building activities of expired Registrants will be used to calculate the rating if there are possessions or chargeable conciliations related to those Registrants within the three-year rating period.

Print the marketing name (not the corporate or legally registered name), full address and contact person that you want to appear on our web site as part of your *Builder Rating for After Sales Service*.

Umbrella Group Marketing Name:

Contact Person and Title:

Address:

City:

Postal Code:

Telephone Number (incl. area code):

Fax:

E-mail:

Web site:

Note: All references to a vendor/builder in this Application may refer to a builder, a vendor, or a vendor/builder.

BENEFITS OF AN UMBRELLA GROUP LISTING

- It will show potential home buyers a more accurate picture of your building activity, and a true reflection of the size and scope of your business.
- Your rating will be based on the sum of building activities, possessions and chargeable conciliations of all companies under the Umbrella Group.
- It will allow you to add new companies without being considered a new builder.
- Your rating history as part of the *Builder Rating for After Sales Service* will take into consideration all companies in the Umbrella Group regardless of how long each one has been registered individually. This is a tremendous benefit once you have achieved an excellent rating.

PLEASE NOTE THAT UMBRELLA LISTINGS ARE IRREVOCABLE.

I declare that the preceding information is correct and accurate.

I have authority to bind the Applicant.

Date _____
Year/Month/ Day

Name of Applicant

Signature of Applicant

1.1 STANDARD CONDOMINIUM CORPORATIONS

1.1. STANDARD CONDOMINIUM CORPORATIONS

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1.1.1. What is a Standard Condominium Corporation?

There are two types of condominiums (freehold and leasehold) and four types of freehold condominiums (common elements, vacant land, phased, and ‘standard’) (*section 6(1) and (2)*). An examination of the first page of the declaration of any condominium registered on or after May 5, 2001 will tell the interested what type it is (*section 6(4)*). The declarations of condominiums registered before May 5, 2001 will not state the applicable type for the condominium (unless amended); however, the unwavering rule is that every condominium in Ontario which existed when the *Condominium Act* was brought into force on May 5, 2001 is of the standard type (*section 178 and section 3 of 48 of 01*).

The following describes aspects of the standard type and significant operative differences between standard condominiums and other types:

- since the essence of a leasehold condominium is that it’s interest in the land is founded on a lease (and, at some point, will (along with the lessees interests) come to an end) a standard condominium can never be of the leasehold type. By definition they are in different classes (*section 6(1)*).
- A standard condominium is always ‘freehold’. The owner’s interests in their units and common interests (or common interests alone in the case of a common elements condominium) is unlimited by time, and it’s quality is verified to it’s root, the original grant from the Crown (this is not to say there may not be encumbrances on the owner’s title, but these will be disclosed by the public register). If the corporation is ever terminated, each owner will share in the net assets remaining (in gist, the net value of the land and buildings and any reserve funds).
- unlike a vacant land condominium corporation:
 - units in a standard condominium may offered for sale and sold before conditional approval is given under the Planning Act (*section 9(12)*)
 - units in a standard condominium may be part of a building, and a unit may contain part of a building. For example, semi-detached housing could not be pre-built on a proposed vacant land condominium corporation property, with each half on a separate unit. This can be done through a standard condominium.

- if the units in the standard condominium are for residential purposes then each unit must be included in a building or be part of a building (*section 8(3)*). A unit cannot simply be land without building. Accordingly, vacant land cannot be divided by a standard condominium in anticipation of future construction for residential use¹. Only a vacant land condominium corporation can accommodate this.
- a unit in a standard condominium can be above or below another unit (horizontal as well as vertical subdivision is possible). If one wanted to subdivide the side of a mountain by slicing it into horizontal layers, a standard condominium could be used. A vacant land condominium corporation could not be used to effect such a division as no unit in a vacant land condominium can be above or below another unit (*section 155(b)*).
- a common elements condominium contains no units, only common elements. A standard condominium must include units, i.e. part of the land/building for which an owner has (subject to the declaration and bylaws) exclusive ownership and use (*section 11(1)*), as well as common elements. The latter are for the benefit of the units. In a common elements condominium the common elements benefit lands which are external to the plan of condominium (and outside of the condominiums governance except for the purposes of collecting common expenses).
- the premise of a phased condominium is that its first registration will create a condominium (land and buildings) which may (but not must) be enlarged/added to before it settles into its final form. When all phases are complete, or ten years have passed since the first registration, a phased condominium is functionally the same as a standard condominium. However, until that time it is planned to be in a state of flux. A standard condominium generally has a final form, both physically and constitutionally, in place on registration.

1.1.2. Conditions on the Creation of Standard Condominium Corporation

- the documentation must be registered by the person who owns the freehold estate in the land (*section 2(1) and (2)*)
- one of the following situations must apply:
 1. The property described in the description must be situated entirely within the boundaries of one land titles division, the *Land Titles Act* must apply to all the property, the declarant must be the registered owner of the property with an absolute title under that Act.

OR

 2. The property described in the description is situated entirely within the boundaries of one registry division, the *Registry Act* must apply to all the property and the declarant must hold a certificate of title to the property issued under Part I of the *Certification of Titles Act* within 10 years before the registration (*section 4 of 48 of 01*).
- it must contain common elements (*section 8(3)(a)*)
- each unit for residential purposes must include one or more buildings or must be included in a building (*section 8(3)(b)*)

¹ 260-Lambert Island Ltd. and Attorney-General of Ontario (1972)

1.1.3. Contents of a Declaration for a Standard Condominium Corporation

1.1.3.1. Prohibitions

A declaration shall not,

- contain provisions requiring an owner, a future owner or anyone on the owner’s or future owner’s behalf to consent in writing to an amalgamation; or
- contain provisions relating to an amalgamation. (*section 7(1)*).

1.1.3.2. Requirements

A declaration must:

- satisfy the requirements of *section 7(2)* , by containing the following:
 - a statement that the *Condominium Act* governs the land and interests appurtenant to the land, as the land and the interests are described in the description;
 - the consent of every person having a registered mortgage against the land or interests appurtenant to the land, as the land and the interests are described in the description;
 - a statement of the proportions, expressed in percentages, of the common interests appurtenant to the owner’s parcel of land;
 - a statement of the proportions, expressed in percentages allocated to the owner’s parcel of land, in which the owners are to contribute to the common expenses;
 - an address for service, a municipal address for the corporation, if available, and the mailing address of the corporation if it differs from its address for service or municipal address;
 - a specification of all parts of the common elements that are to be used by the owners of one or more designated owner’s parcel of land and not by all the owners;
 - a statement of all conditions that the approval authority, in approving or exempting the description under *section 9 (Planning Act approval)*, requires the declaration to mention.

It must also:

- be executed by the declarant (*section 7(1)* and *5(1)(a)*);
- meet the execution requirements for registration of a transfer/deed of land under the *Land Titles Act* or the *Registry Act*, as the case may be (*5(1)(b)*);
- have the statements on the first page of the declaration that the registration of the declaration and description will create a standard condominium corporation (*section 5(1)(c)*)
- contain schedules known as Schedules A, B, D, E, F, and G (*section 5(1)(d)*).

1.1.3.3. Contents of Schedules

Contents of Schedule A

This schedule must contain:

- a description of the land and interests appurtenant to the land intended to be governed by the Act, including a description of every easement, as shown on the description that, upon the registration of the declaration and description, will be appurtenant to the land or to which the land will be subject (*5(2)(a)*); and

- a statement signed by the solicitor registering the declaration that, in his or her opinion, based on the parcel register or abstract index and the plans and documents recorded in them, that
 - (i) the legal description is correct,
 - (ii) the easements mentioned in the description will exist in law upon the registration of the declaration and description, and
 - (iii) the declarant is the registered owner of the land and appurtenant interests (5(2)(b)).

Contents of Schedule B

This schedule must contain:

- the consent under *section 7(2)(b)* of the Act, in Form 1 to 48 of 01, of every person having a registered mortgage against the land or interests appurtenant to the land, as the land and the interests are described in the description (5(3)).

Contents of Schedule C

This schedule must:

- specify the boundaries of each unit by reference to the buildings or monuments mentioned in subsections 6(4), (5) and (6) of Regulation 49 of 01;
- fully describe the monuments mentioned in subsections 6 (4), (5) and (6) of Regulation 49/01 and the relationship of the boundaries of the units to them;
- contain a statement signed by an Ontario land surveyor licensed under the *Surveyors Act* certifying that the written description of the monuments and boundaries of the units accurately corresponds with the diagrams of the units described in *section 8(1)(d)* of the *Condominium Act* and shown on the plans of survey of the description prepared in accordance with *Regulation 49/01 (section 5(4))*.

Contents of Schedule D

This schedule must contain:

- a statement of the proportions, expressed in percentages totalling 100 per cent, of the common interests appurtenant to the units; and
- a statement of the proportions, expressed in percentages totalling 100 per cent, allocated to the units, in which the owners are to contribute to the common expenses (section 5(5)).

Contents of Schedule E

This schedule must contain:

- a statement specifying the common expenses of the corporation or may be left blank if the declarant so elects (section 5(6)).

Contents of Schedule F

This schedule must contain:

- a specification of all parts of the common elements that are to be used by the owners of one or more designated units and not by all the owners or shall indicate that there are no such parts if that is the case (section 5(7)).

Contents of Schedule G

This schedule must contain:

- a certificate, in Form 2, of an architect certifying that all buildings on the property have been constructed in accordance with the regulations made under the Act, with respect to all or some matters listed in the paragraphs of the definition of “has been constructed” in *subsection 6(1)* (see below); or
- one or more certificates of an engineer, in Form 2, certifying that all buildings on the property have been constructed in accordance with the regulations made under the Act, with respect to all or some matters listed in the paragraphs of the definition of “has been constructed” in *subsection 6(1)* (see below).

(Section 5(8))

Definition of ‘Has Been Constructed’

“has been constructed” means, with respect to each building on the property, constructed at least to the following state:

- The exterior building envelope, including roofing assembly, exterior wall cladding, doors and windows, caulking and sealants, is weather resistant if required by the construction documents and has been completed in general conformity with the construction documents.
- Floor assemblies are constructed to the sub-floor except where the units are intended for non-residential purposes that are not ancillary to units intended for residential purposes, the lowermost floor does not have to be in place if it is at grade.
- Walls and ceilings of the common elements, excluding interior structural walls and columns in a unit, are completed to the drywall (including taping and sanding), plaster or other final covering except where the units are intended for non-residential purposes that are not ancillary to units intended for residential purposes, wall or ceiling coverings, interior perimeter doors, interior partitions or walls between units or between units and common elements do not have to be in place
- All underground garages, if any, have walls and floor assemblies in place.
- All elevating devices, if any, as defined in the *Elevating Devices Act*, are licensed under that Act if it requires a licence, except for elevating devices contained wholly in a unit and designed for use only within the unit.
- All installations with respect to the provision of water and sewage services are in place.
- All installations with respect to the provision of heat and ventilation are in place and heat and ventilation can be provided.
- All installations with respect to the provision of air conditioning, if any, are in place.
- All installations with respect to the provision of electricity are in place.
- All indoor and outdoor swimming pools, if any, are roughed in to the extent that they are ready to receive finishes, equipment and accessories.
- The boundaries of the units are completed to the drywall (not including taping and sanding), plaster or other final covering, and perimeter doors are in place except where the units are intended for non-residential purposes that are not ancillary to units intended for residential purposes, wall or ceiling coverings, interior perimeter doors, interior partitions or walls between units or between units and common elements do not have to be in place

Section 6 of 48 of 01

Status of Construction - Special Case for Non-Residential Units

Construction does not have to be fully completed in the case of units intended for non-residential purposes (unless such units are ancillary to residential units i.e. a locker unit):

- the lowermost floor does not have to be in place if it is at grade; and,
- wall or ceiling coverings, interior perimeter doors, interior partitions or walls between units or between units and common elements do not have to be in place (*section 6(2) and (3)*).

1.1.3.4. Other Contents of the Declaration

A declaration may contain,

- (a) a statement specifying the common expenses of the corporation;
- (b) conditions or restrictions with respect to the occupation and use of the units or common elements²;
- (c) conditions or restrictions with respect to gifts, leases and sales of the units and common interests³;
- (d) a list of the responsibilities of the corporation consistent with its objects and duties⁴; and
- (e) a description of the allocation of obligations to maintain the units and common elements and to repair them after damage, which allocation has been done in accordance with the *Condominium Act (section 7(4))*;
- (f) schedules in addition to the schedules required by *regulation 48 of 01 (section 5(10))*. These additional schedules would be prepared and inserted by the declarant to contain information and other, specific to the particular condominium (including any of the above items).

1.1.4. Contents of a Description for a Standard Condominium Corporation

The description of a standard condominium corporation shall contain:

- a plan of survey showing the perimeter of the horizontal surface of the land and the perimeter of the buildings (*section 8(1)(a)*);
- structural plans of the building provided that if the description contains the structural plans described in *section 8(1)(b)* of the *Condominium Act* and Schedule G to the declaration does not contain the certificate of the architect under *section 5(8)(a)* (certifying completion), the description shall not contain the architectural plans referred to in *section 8(1)(b) (section 9(2))*.

²**266** Peel Condominium Corporation No. 11 and Caroe et al. (1974) [declaration cannot prohibit renting of unit to third party-note this decision is modified by legislation]

360-York Condominium Corp. No. 216 v. Borsodi et al. (1983) (age restriction valid)

189-Metropolitan Toronto Condominium Corp. No. 624 v. Ramdial and Salmon (1988) [age restriction valid]

377 York Condominium Corporation No. 216 v. Dudnik (Div. Ct.) (1991) [provision restricting occupant’s age invalid, discrimination on the basis of family status]

214 Niagara North Condominium Corp. No. 7 v. Goodhew (1997) [requirement to obtain approval for changes to units which impair value of other property has no application to air-conditioner unit]

207 Metropolitan Condominium Corp. No. 699 and 1177 Yonge Street Inc.(Re) (1998) [provision in declaration prohibiting conveyance of parking unit to non-unit owner does not prevent leasing to others]

400-215 Glenridge Ave. Ltd. Partnership v. Waddington [Conditions or restrictions contained in the declaration respecting the occupancy of a unit are subject to the same constraint governing the scope of condominium rules found in section 58(1), namely, they are to promote the safety, security of the owners/property or prevent unreasonable interference with the use/enjoyment of the property.]

413- Waterloo North Condominium Corp. No.186 v. Weidner (2003) [A ‘no pets’ clause in a declaration is enforceable in the absence of evidence of a violation of the Ontario Human Rights Code.]

³ **266**-Peel Condominium Corporation No. 11 and Caroe et al. (1974) [a declaration cannot prohibit the renting of a unit by an owner-see footnote 2 above].

207 Metropolitan Condominium Corp. No. 699 and 1177 Yonge Street Inc.(Re) (1998) [provision in declaration prohibiting conveyance of parking unit to non-unit owner does not prevent leasing to others]

⁴ **065 and 070** Carleton Condominium Corp. No. 441 v. Owners et al. of Carleton Condominium Plan No. 441(1997/1998) [declaration provisions dealing with shared facilities on external lands proper, court will not order amendment to delete same]

- a specification of the boundaries of each unit by reference to the buildings or other monuments (*section 8(1)(c)*).
- diagrams showing the shape and dimensions of each unit and the approximate location of each unit in relation to the other units and the building (*section 8(1)(d)*).
- a certificate signed by an Ontario land surveyor licensed under the *Surveyors Act* stating that the diagrams of the units are substantially accurate (*section 8(1)(f)*).
- in addition to all other material that it is required to contain, a description shall contain a description of all easements and similar interests to which the property is subject and a description of the interests appurtenant to the property. These descriptions shall be combined and shall be in Form 3 (*section 9(4) and 9(5) of 48 of 01* and *section 8(1)(g)*).

1.2 LEASEHOLD CONDOMINIUM CORPORATIONS

1.2 LEASEHOLD CONDOMINIUM CORPORATIONS

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1.2.1. What is a Leasehold Condominium Corporation?

A simple way to conceptualize a leasehold condominium corporation is to put aside the term ‘leasehold’ and think ‘standard’ condominium (a division of land, buildings and structures into units and common elements). That is exactly what a leasehold condominium corporation is in terms of its purpose and effect.

The attribute that sets a leasehold condominium corporation apart from a standard condominium is that the unit owner’s title in the property is based on a leasehold interest and not ownership through full title. Unlike a freehold condominium, which continues indefinitely and only comes to an end if terminated on consent (*section 122*), owner’s vote after substantial damage (*section 123*), authorized sale (*section 124*), expropriation (*section 126*), or court order (*section 128*), a leasehold condominium corporation will certainly come to a functional end when the term of the underlying lease expires. The term of the underlying lease must be at least 40 years and no more than 99 years (*section 165(3)*). On expiration of the lease, the owner’s interest in the units and common elements, indeed the entire property, will evaporate, and the lessor will once again hold title to the lands and buildings free of the former leasehold interest. While there is provision for renewal of the lease (*section 174*), there is no obligation on the side of the lessor or the owners to agree to a renewal (although lack of action by both parties could result in renewal by default⁵). Upon expiry of the lease term the *Condominium Act* ceases to govern the property (*section 175*).

⁵ See chapter 1.2.9.2.

A leasehold condominium cannot be a vacant land or common elements condominium corporation (*section 155(3)* and *section 138(3)*) and cannot be a phased condominium since such must be freehold (*section 145*).

The question might be asked why anyone would create a leasehold condominium? Why would a person purchase a unit when the interest has a finite lifespan? Why rent rather than own? There is no simple answer to any of these questions. It may be that the leasehold condominium vehicle will be rarely if ever used in Ontario; however, there is no doubt that the availability of this vehicle provides an important alternative to standard condominiums, and in the right circumstances it will be the preferred choice.

Situations can exist where a leasehold condominium is the only option if condominium governance is to be introduced to a property. An example of the latter would be the development of a building for fractional occupancy on a parcel of land that is owned by a person who is not willing to part with ownership, such as a well-funded institution which has a policy of preserving its assets for the long haul (whether decades or centuries), or which is legally unable to convey title due, for example, to trust terms.

Motivation to create leasehold condominiums may be found in the economics of the concept which allows the land value on acquisition to be discounted. Such discounting will relate to the fact the leasehold has a finite life, or because annual rent is paid (which, in economic terms, could be seen to be a substitute for mortgage interest on purchase monies that would have been paid for a fee simple interest). This can make acquisition more 'affordable' to the marketplace. Clearly the value of a leasehold unit will decline over the term of the underlying lease; however, in a simple model, if the economic life of the building was synonymous with the lease term, the unit owner would derive full economic value from the purchase. Any inflationary or other increase in the land to the end of the term would accrue to the lessor. The latter opportunity, foregone by the unit owner, is significant to the positives and negatives of leasehold condominium ownership.

Examples of situations in which a leasehold condominium may 'fit' may be readily drawn from the non-residential sector. Office (both low and hi-rise) and multi-unit industrial condominiums have been a familiar presence in Ontario's urban areas for many years. These have always been of the freehold type in keeping with the old legislation. On the other hand, five, ten, fifteen or more, year terms are common in the non-residential sector. The non-residential market is comfortable with 'rent' rather than 'own'. The ability to subdivide and, in effect, sell parts of a leasehold can cater to a market which accepts security of tenure which falls short of ownership. The Empire State building in New York City was constructed on leased land, and that lease continues in force today (and for years to come). This came to be because a builder/developer concluded (correctly) that the revenue that could be drawn from the construction and leasing of the building exceeded the opportunity value of the construction costs and the rent paid to the land owner over the term of the lease. Consider the same situation in the context of a leasehold condominium, only one notch down the ladder. A small investor may consider that the rental revenue from a leasehold unit will exceed the opportunity value of the acquisition costs and the rent paid to the lessor over the term of the lease. The validity of this example comes down to economics, and the variables of this aspect will always be very much the essence of what will drive leasehold condominiums.

1.2.2. Conditions on the Creation of a Leasehold Condominium Corporation

To be approved and registered a leasehold condominium corporation must meet the following criteria:

1. (a) the term of the leasehold interests in the units in the corporation and their appurtenant common interests must be the same as, or less than, the unexpired term of the leasehold interest affecting the property;
- (b) the owners of the leasehold interests in the units in the corporation are the owners, as tenants in common, of the leasehold estate in the property under a lease with the lessor; and
- (c) one of the following situations applies:
 1. the property described in the description is situated entirely within the boundaries of one land titles division, the *Land Titles Act* applies to all the property, the lessor is the registered owner of the property with an absolute title under that Act and the declarant is the registered owner of a leasehold parcel of land that consists of or includes the property.

2. the property described in the description is situated entirely within the boundaries of one registry division, the *Registry Act* applies to all the property and the lessor holds a certificate of title to the property issued under Part I of the *Certification of Titles Act* within 10 years before the registration (*section 59 of 48 of 01*);
2. all leasehold interests in units in a leasehold condominium corporation and their appurtenant common interests must be for the same term (*section 165(2)*); and,
3. the term of the leasehold interests before a renewal under *section 174* shall be not less than 40 years less a day and not more than 99 years as specified in the declaration (*section 165(3)*).

1.1.3. Contents of Declaration for a Leasehold Condominium Corporation

1.1.3.1. Prohibitions

A declaration shall not,

- contain provisions requiring an owner, a future owner or anyone on the owner’s or future owner’s behalf to consent in writing to an amalgamation; or
- contain provisions relating to an amalgamation. (*section 7(1)*).

1.1.3.2. Requirements

A declaration must:

- satisfy the requirements of *section 7(2)* , by containing the following:
 - a statement that the *Condominium Act* governs the land and interests appurtenant to the land, as the land and the interests are described in the description;
 - the consent of every person having a registered mortgage against the land or interests appurtenant to the land, as the land and the interests are described in the description;
 - a statement of the proportions, expressed in percentages, of the common interests appurtenant to the owner’s parcel of land;
 - a statement of the proportions, expressed in percentages allocated to the owner’s parcel of land, in which the owners are to contribute to the common expenses;
 - an address for service, a municipal address for the corporation, if available, and the mailing address of the corporation if it differs from its address for service or municipal address;
 - a specification of all parts of the common elements that are to be used by the owners of one or more designated owner’s parcel of land and not by all the owners;
 - a statement of all conditions that the approval authority, in approving or exempting the description under *section 9*, requires the declaration to mention.

Section 166

- contain a statement of the term of the leasehold interests of the owners (*section 166(2(a))*);

- contain a schedule setting out the amount of rent for the property payable by the corporation on behalf of the owners to the lessor and the times at which the rent is payable for at least the first five years immediately following the registration of the declaration and description (*section 166(2(b))*);
- contain a formula to determine the amount of rent for the property payable by the corporation on behalf of the owners to the lessor and the times at which the rent is payable during the remainder of the term of the owners' leasehold interests following the time for which the schedule described in clause (b) states the amount of rent payable (*section 166(2(c))*);
- contain a schedule of all provisions of the leasehold interests that affect the property, the corporation and the owners (*section 166(2(d))*);
- be executed by the declarant (*5(1)(a)*);
- be executed by the lessor (*section 60(1)(a)*);
- meet the execution requirements for registration of a transfer/deed of land under the *Land Titles Act* or the *Registry Act*, as the case may be (*5(1)(b)*);
- have the statements on the first page of the declaration:
 - a) that the registration of the declaration and description will create a leasehold condominium corporation (*section 60(1)(b)(i)*),
 - b) that the building and improvements to the property form part of the property (*section 60(1)(b)(ii)*);
- contain schedules known as Schedules A, B, D, E, F, G, L, and M (*section 5(1)(d)*, and *section 60(1)(c)*);
- contains the statement that no person shall terminate the leasehold interest in the units and their appurtenant common interests except in accordance with the *Condominium Act* (*section 60(1)d*).

1.2.3.3. Contents of Schedules

Contents of Schedule A

This schedule must contain:

- a description of the land and interests appurtenant to the land intended to be governed by the *Condominium Act*, including a description of every easement as shown on the description that, upon the registration of the declaration and description, will be appurtenant to the land or to which the land will be subject; and
- a statement signed by the solicitor registering the declaration that, in his or her opinion, based on the parcel register or abstract index and the plans and documents recorded in them, that
 - (i) the legal description is correct,
 - (ii) the easements mentioned in the description will exist in law upon the registration of the declaration and description, and
 - (iii) the declarant is the registered lessee of the land and appurtenant interests (*5(2)*).

Contents of Schedule B

This schedule must contain:

- the consent under *section 7(2)(b)* of the Act, in Form 1 to 48 of 01, of every person having a registered mortgage against the land or interests appurtenant to the land, as the land and the interests are described in the description (*5(3)*).

Contents of Schedule C

This schedule must:

- specify the boundaries of each unit by reference to the buildings or monuments mentioned in subsections 6(4), (5) and (6) of *Regulation 49 of 01*;
- fully describe the monuments mentioned in subsections 6(4), (5) and (6) of *Regulation 49 of 01* and the relationship of the boundaries of the units to them;
- contain a statement signed by an Ontario land surveyor licensed under the *Surveyors Act* certifying that the written description of the monuments and boundaries of the units accurately corresponds with the diagrams of the units described in *section 8(1)(d)* of the *Condominium Act* and shown on the plans of survey of the description prepared in accordance with *Regulation 49/01 (section 5(4))*.

Contents of Schedule D

This schedule must contain:

- a statement of the proportions, expressed in percentages totalling 100 per cent, of the common interests appurtenant to the units; and
- a statement of the proportions, expressed in percentages totalling 100 per cent, allocated to the units, in which the owners are to contribute to the common expenses (section 5(5)).

Contents of Schedule E

This schedule must contain:

- a statement specifying the common expenses of the corporation or may be left blank if the declarant so elects (section 5(6)).

Contents of Schedule F

This schedule must contain:

- a specification of all parts of the common elements that are to be used by the owners of one or more designated units and not by all the owners or shall indicate that there are no such parts if that is the case (section 5(7)).

Contents of Schedule G

This schedule must contain:

- a certificate, in **Form 2**, of an architect certifying that all buildings on the property have been constructed in accordance with the regulations made under the Act, with respect to all or some matters listed in the paragraphs of the definition of “has been constructed” in subsection 6 (1); or
- one or more certificates of an engineer, in **Form 2**, certifying that all buildings on the property have been constructed in accordance with the regulations made under the Act, with respect to all or some matters listed in the paragraphs of the definition of “has been constructed” in subsection 6 (1).

Definition of ‘Has Been Constructed’

“has been constructed” means, with respect to each building on the property, constructed at least to the following state:

- The exterior building envelope, including roofing assembly, exterior wall cladding, doors and windows, caulking and sealants, is weather resistant if required by the construction documents and has been completed in general conformity with the construction documents.
- Floor assemblies are constructed to the sub-floor except where the units are intended for non-residential purposes that are not ancillary to units intended for residential purposes, the lowermost floor does not have to be in place if it is at grade.
- Walls and ceilings of the common elements, excluding interior structural walls and columns in a unit, are completed to the drywall (including taping and sanding), plaster or other final covering except where the units are intended for non-residential purposes that are not ancillary to units intended for residential purposes, wall or ceiling coverings, interior perimeter doors, interior partitions or walls between units or between units and common elements do not have to be in place.
- All underground garages, if any, have walls and floor assemblies in place.
- All elevating devices, if any, as defined in the *Elevating Devices Act*, are licensed under that Act if it requires a licence, except for elevating devices contained wholly in a unit and designed for use only within the unit.
- All installations with respect to the provision of water and sewage services are in place.
- All installations with respect to the provision of heat and ventilation are in place and heat and ventilation can be provided.
- All installations with respect to the provision of air conditioning, if any, are in place.
- All installations with respect to the provision of electricity are in place.
- All indoor and outdoor swimming pools, if any, are roughed in to the extent that they are ready to receive finishes, equipment and accessories.
- The boundaries of the units are completed to the drywall (not including taping and sanding), plaster or other final covering, and perimeter doors are in place except where the units are intended for non-residential purposes that are not ancillary to units intended for residential purposes, wall or ceiling coverings, interior perimeter doors, interior partitions or walls between units or between units and common elements do not have to be in place

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Contents of Schedule L

This schedule must contain:

- all provisions of the leasehold interests that affect the property, the corporation and the owners and that are binding on them, and shall include,
 - a statement that the provisions of the leasehold interests set out in the schedule are binding on the property, the corporation and the owners;
 - a statement of the term of the leasehold interests of the owners;
 - a schedule setting out the amount of rent for the property payable by the corporation on behalf of the owners to the lessor and the times at which the rent is payable for at least the first five years immediately following the registration of the declaration and description; and
 - a formula to determine the amount of rent for the property payable by the corporation on behalf of the owners to the lessor and the times at which the rent is payable during the

remainder of the term of the owners' leasehold interests following the time for which the schedule described in clause (c) states the amount of rent payable (Section 60(3)).

Contents of Schedule M

This schedule must contain:

- a statement signed by the solicitor registering the declaration that, in his or her opinion, based on the parcel register or abstract index and the plans and documents recorded in them,
 - the lessor is the registered owner of the freehold estate in the land and appurtenant interests;
 - the declarant is the registered owner of the leasehold estate in the land and appurtenant interests; and
 - the lease of the declarant in the land and appurtenant interests is a valid and subsisting lease for a term, for which the statement specifies the length (Section 60 (4)).

Other Contents of the Declaration

A declaration may contain,

- (a) a statement specifying the common expenses of the corporation;
- (b) conditions or restrictions with respect to the occupation and use of the units or common elements⁶;
- (c) conditions or restrictions with respect to gifts, leases and sales of the units and common interests⁷;
- (d) a list of the responsibilities of the corporation consistent with its objects and duties⁸; and
- (e) a description of the allocation of obligations to maintain the units and common elements and to repair them after damage, which allocation has been done in accordance with the *Condominium Act* (section 7(4));
- (f) schedules in addition to the schedules required by *regulation 48 of 01* (section 5(10)). These additional schedules would be prepared and inserted by the declarant to contain information and other, specific to the particular condominium (including any of the above items).

⁶ **266** Peel Condominium Corporation No. 11 and Caroe et al. (1974) [declaration cannot prohibit renting of unit to third party-note this decision has been modified by legislation]

360-York Condominium Corp. No. 216 v. Borsodi et al. (1983) (age restriction valid)

189-Metropolitan Toronto Condominium Corp. No. 624 v. Ramdial and Salmon (1988) [age restriction valid]

377 York Condominium Corporation No. 216 v. Dudnik (Div. Ct.) (1991) [provision restricting occupant's age invalid, discrimination on the basis of family status]

214 Niagara North Condominium Corp. No. 7 v. Goodhew (1997) [requirement to obtain approval for changes to units which impair value of other property has no application to air-conditioner unit]

207 Metropolitan Condominium Corp. No. 699 and 1177 Yonge Street Inc.(Re) (1998) [provision in declaration prohibiting conveyance of parking unit to non-unit owner does not prevent leasing to others]

⁷ **266**-Peel Condominium Corporation No. 11 and Caroe et al. (1974) [a declaration cannot prohibit the renting of a unit by an owner].

207 Metropolitan Condominium Corp. No. 699 and 1177 Yonge Street Inc.(Re) (1998) [provision in declaration prohibiting conveyance of parking unit to non-unit owner does not prevent leasing to others]

⁸ **065 and 070** Carleton Condominium Corp. No. 441 v. Owners et al. of Carleton Condominium Plan No. 441(1997/1998) [declaration provisions dealing with shared facilities on external lands proper, court will not order amendment to delete same]

A declaration must set out the provisions of the leasehold interests in the property and state they are binding on the property, failing which they will not be binding on the property (*section 166(3)*).

1.2.4. Contents of a Description for a Leasehold Condominium Corporation

A description shall not be registered unless the property includes common elements (*section 8(3)(a)*) and each unit for residential purposes includes one or more buildings or is included in a building (*section 8(3)(b)*).

A description of a leasehold condominium corporation shall contain:

- a. a plan of survey showing the perimeter of the horizontal surface of the land and the perimeter of the buildings (*section 8(1)(a)*);
- b. structural plans of the building provided that if the description contains the structural plans described in *section 8(1)(b)* of the *Condominium Act* and Schedule G to the declaration does not contain the certificate of the architect under *section 5(8)(a)* (certifying completion), the description shall not contain the architectural plans referred to in *section 8(1)(b)* (*section 9(2)*).
- c. a specification of the boundaries of each unit by reference to the buildings or other monuments (*section 8(1)(c)*).
- d. diagrams showing the shape and dimensions of each unit and the approximate location of each unit in relation to the other units and the building (*section 8(1)(d)*).
- e. a certificate signed by an Ontario land surveyor licensed under the Surveyors Act stating that the diagrams of the units are substantially accurate (*section 8(1)(f)*).
- f. a description of all easements and similar interests to which the property is subject and a description of the interests appurtenant to the property. These descriptions shall be combined and shall be in Form 3 (*section 9(4)* and *9(5)* and *section 8(1)(g)*).

1.2.5. Buildings and Improvements to the Property Must Form Part of the Property

A description for a leasehold condominium corporation cannot be registered unless the buildings and improvements to the property form part of the property (*section 167(2)*).

This directive appears to rule out the circumstance of the underlying leasehold being a ground lease only with a separate lease for the buildings and other improvements/fixtures.

1.2.6. General

The lessor may also be the/an owner of a leasehold interest in a unit and related common interest. In such a case the *Condominium Act* makes it clear that the legal title and the leasehold interest do not merge (as would be the case if the lands were held in fee simple) (*section 165(1)*) and so the lessor/owner may subsequently convey the unit with all rights attached.

All of the standard provisions of the *Condominium Act* dealing with insurance (*section 99* et seq.), repair and maintenance (*section 89* et seq), and the consequences of substantial damage to a building (*section 123* et seq.) apply without variation to leasehold condominium corporations.

An owner may transfer, mortgage, lease or otherwise deal with the leasehold interest in the unit without the consent of the lessor (*section 165(4)*). A transfer must be the owner's entire leasehold interest in the unit and common interest (*section 165(5)*).

All of the rights and obligations with respect to the leasehold estate are to be exercised and performed by the corporation and not by the owners (*section 168*).

1.2.7. Rent

The rent that the corporation is required to pay the lessor on behalf of the owners and all other amounts necessary to comply with the provisions of the leasehold interest are a common expense (*section 171(1)* of the *Condominium Act*). The rent and other amounts are collected on the basis of the proportion of the contributions to the common expenses set out in the declaration for the respective unit (*section 171(2)*).

1.2.8. Application of the Residential Tenancies Act, 2006

Once a leasehold condominium corporation is registered, the relations between the lessor and the unit owners are governed by the *Condominium Act*. To avoid any confusion, the *Condominium Act* makes it clear that the leasehold interests are not subject to the *Residential Tenancies Act, 2006* (which governs residential tenancies) in any way (*section 165(7)*). A lease of a residential leasehold unit (in effect, an arrangement identical in substance to the lease of a unit in a standard condominium) is subject to the *Residential Tenancies Act, 2006*.

1.2.9. Termination and Expiry

1.2.9.1. Termination

The corporation shall not register a notice of termination of the *Condominium Act*'s governance of the property (whether after a vote of the owners under *section 122*, or in the event of substantial damage under *section 123*) or sell the property or a part of the common elements under *section 124*, unless the lessor has consented to and executed the notice or agreement of purchase and sale as the case may be (*section 172* of the *Condominium Act*).

A lessor cannot terminate anything short of all of the leasehold interests in all of the units (*section 173(1)* of the *Condominium Act*). In order to terminate all of the leasehold interests, the lessor must make an application to court for an order terminating the interests on one of the following grounds:

1. the corporation has failed to remit the amounts to which the lessor is entitled under the provisions of the leasehold interest affecting the property (*section 173(2)(a)*), or
2. the corporation has failed to comply with a court order (*section 173(2)(b)*).

1.2.9.2. Expiry Of Lease and Renewal

At least five years before the end of the term of the leasehold interests in the units, the lessor is obliged to give notice to the corporation of its intention to renew and the terms thereof, or give notice of intention not to renew (*section 174(1)*)⁹. A renewal must be for at least 10 years (*section 174(2)*). If the lessor does not give either notice it is deemed to have given notice to renew for 10 years subject to the same provisions that govern the leasehold interests before the renewal (*section 174(4)*). The owners have one year to cast a vote against renewal (owners of 80% of the units casting votes must vote against) failing which the renewal is locked in on the 'deemed

⁹ See chapter 1.2.13.2. for detail.

terms' (*section 174(5)*). Renewals on revised terms shall be incorporated into an amendment to the description and registered (*section 174(8)*). The amendment procedures set out in *section 107* of the *Condominium Act* are inapplicable to this amendment (*section 174(9)*).

Whether the leasehold interests are renewed or not, it is the responsibility of the lessor to register notice of the applicable fact (*section 174(7)*).

1.2.9.3. Effect of Termination or Expiry

In the event the leasehold interests come to an end by one of the several possible means by which this may take place (registration of notice of termination by vote of the owners or in the event of substantial damage (*section 122 and 123*), expropriation (*section 126*), termination by order of the court by application by a unit encumbrancer (*section 128*), or termination by court order for failing to pay rent or comply with a court order (*section 173(2)*), on registration of the lessor's notice of termination (*section 174(7)*) :

- the *Condominium Act* ceases to govern the property;
- the leasehold interests in the units are terminated;
- claims against the leasehold interests that do not secure the payment of money are extinguished, unless the lessor consented to their registration (in which case they are continued against the lessor's interest); and,
- claims against the leasehold interests that secure the payment of money (i.e. a construction lien claim) are claims against the persons who were owners of the leasehold interests immediately before the termination, and not against the land.

Section 175

1.2.9.4. Trustee

Prior to the date a leasehold corporation ceases to be governed by the *Condominium Act* the corporation must appoint a trustee to pay out any monies remaining the corporations' reserve fund (*section 175(3)*).

Following the termination of the *Condominium Act's* governance, the trustee must pay out any remaining reserve funds in the following priorities:

- a) to the lessor must be paid the amount required to repair damage to the property that has not been repaired;
- b) the balance is paid to owners in accordance with the proportions of their respective common interests (*section 175(4)*). In the latter case, the trustee must deduct from the owner's share the amount of any claims against the owner that secure the payment of money (i.e. an execution registered on title to collect on a judgment) and remit the deduction to the persons entitled to the claims (*section 175(5)*).

1.2.10. Arbitration Between the Lessor and the Corporation

Whether or not expressly agreed to between the lessor and the corporation, *section 168(3)* of the *Condominium Act* deems the parties to the lease to have agreed that either party may submit to mediation a disagreement on the interpretation of the provisions of the leasehold interests in the property. In the event of such a submission the standard provisions of the *Condominium Act* dealing with such process (*section 132*) apply (*section 168(3)* and *168(4)*) including a result which is binding on the parties.

1.2.11. Disclosure Statement

Along with the otherwise mandated contents of a disclosure statement (*section 72(3)* and *section 17* of *48 of 01*), *Section 169(a)* of the *Condominium Act* requires the inclusion of a statement by the declarant as to whether the provisions of the leasehold interests in the property are in good standing and have not been breached.

1.2.12. Status Certificate

In addition to the material required by *section 76(1)* of the *Condominium Act* and *section 18* of *regulation 48 of 01*¹⁰, a leasehold condominium corporation's status certificate must include:

- whether the provisions of the leasehold interests in the property are in good standing and have not been breached; and,
- a statement by the corporation whether the lessor has applied for a termination order under *section 173* (termination by lessor) (*section 170(a)* and *170(b)*).

1.2.13. Forms

1.2.13.1. General

- Each sheet of the plans of survey, except the exclusive use portions survey, which are registered as part of the description is required to have a certificate of registration signed by the land registrar in the upper right corner (*sections 2(1)* and *11(1)* of *49 of 01*). The form of this certificate is Form 4 to *48 of 01*.
- Immediately below the registrar's certificate referred to above is the certificate of an Ontario land surveyor stating that the diagrams of the units are accurate (*section 8(1)(f)* of the *Condominium Act* and *11(1)(c)* of *49 of 01*). This certificate is Form 5 to *48 of 01* (*section 10(2)* of *48 of 01*).
- At some location on the each sheet of the plans referred to above is to be a certificate of the declarant stating that the property has been laid out into units and common elements (*section 11(1)(e)* of *48 of 01*). The form of this certificate is Form 6 to *48 of 01*.
- At some location on the sheets of the exclusive use portions survey shall be a certificate of a surveyor stating that the survey accurately shows the extent and location of the portions (*section 11(3)(b)* of *48 of 01*). The form of this certificate is Form 7 to *48 of 01*).

1.2.13.1. Specific to Leasehold Condominium Corporations

If the leasehold interests are renewed (i.e. the lease does not terminate by expiration of the term) the lessor must register a notice (*section 174(7)*) stating that the leasehold interests in the units have been renewed. The form for this notice is Form 11 to *49 of 01* (*section 44(1)* of *49 of 01*).

If the leasehold interests are not renewed the lessor must register a notice stating the leasehold interests have not been renewed. The form for this notice is Form 12 to *49 of 01* (*section 44(2)* to *49 of 01*).

If the leasehold interests are renewed subject to provisions that are different from those that applied before the renewal, the corporation must register a copy of the provisions as an amendment to the declaration. The form for this amendment is Form 22 to *48 of 01* (*section 1* of *48 of 01*). Note: an amendment for this purpose is not subject to the amendment procedure in *section 107* provided the form is followed (*section 174(8)* of the *Condominium Act*).

¹⁰ See chapter 3.1.6.4.

At least five years before the end of the term of the leasehold interests in the units the lessor must give the corporation a written notice of intention to renew all the leasehold interests and the terms of renewal or, alternatively, a written notice of intention not to renew all leasehold interests (*section 174(1)*). The form of notice of intention to renew is Form 23 to 48 of 01 (*section 62(1)* of 48 of 01). The form of notice of intention not to renew is Form 24 to 48 of 01 (*section 62(2)* of 48 of 01).

If the lessor fails to give the notice(s) referred to above the lessor is deemed to have given notice to renew for 10 years subject to the same provisions that govern before the renewal. The corporation is required to give notice of this fact to the owners. The form of notice for the corporation's notice to the owners is Form 25 to 48 of 01 (*section 62(3)* of 48 of 01).

The renewal by default referred to immediately above is locked into place unless, within one year after the deemed notice or notice, the owners of at least 80% of the units cast a vote against renewal (*section 174(5)* of the *Condominium Act*). Should the owners vote against renewal within the one year time frame, the corporation must give notice of the contrary vote to the lessor (*section 174(6)* of the *Condominium Act*). The form for this notice is Form 26 to 48 of 01 (*section 62(4)* of 48 of 01).

1.2.14. Amendments to Declarations and Descriptions

An amendment to the declaration or description that affects the leasehold interests in the property must have the written consent of the lessor before it is effective (*Section 166(4)* and *167(3)*).

Amendments of the declaration or description are exempt from *section 7(1)* of the *Condominium Act* (which requires a declarant to execute the declaration) and *section 7(2)(b)* (which requires the consent of registered mortgagees) and is not required to contain any statements or schedules described in *section 5* of 48 of 01 (see above regarding schedules to the initial declaration) (*section 8* of 48 of 01).

1.3 VACANT LAND CONDOMINIUM CORPORATIONS

1.3 VACANT LAND CONDOMINIUM CORPORATIONS

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1.3.1. What is a Vacant Land Condominium Corporation?

A simple way to conceptualize the land division function of a vacant land condominium corporation is to compare it to Ontario’s long-standing vehicle for dividing land, namely by plan of subdivision approved under section 51 of the *Planning Act*. A vacant land condominium corporation is, from the perspective of the pure act of land division, identical in effect and purpose to a plan of subdivision. Both divide up land into separate parcels (which may be freely conveyed ad infinitum), in one case called lots (on a plan of subdivision), and in the other, units (on a vacant land condominium corporation). Each lot/unit carries with it the ownership of the surface of the land it relates to, as well as the ground beneath and the sky above, (in both cases, perhaps subject to easements and other encumbrances). Either plan may involve the dedication of public highways, and may include communal facilities, the on-going expense of which is shared by the lot/unit owners (whether by municipal taxation alone in the case of a plan of subdivision, or by common expense, in the case of a vacant land condominium corporation).

While the principle of land division may be common to the plan of subdivision and vacant land condominium corporation, the similarity ends when consideration is given to the fundamental difference that lands divided by plan of subdivision are governed by laws of real property which are founded on the rights and obligations of individual parcel owners. Vacant land condominium corporation’s have the special governance directions of the *Condominium Act* which place individual owner’s rights and obligations within a constitutional framework connecting all the owners in the corporation. In particular, the lands within a vacant land condominium corporation have the additional and significant governance of the *Condominium Act*, a declaration, the by-laws and rules, and the overall management by the corporation¹¹. Clear powers are available to vacant land condominium corporation’s to

¹¹ **249 and 045-Berry et al.** and Indian Park Association (1997 and 1999) [example of the difficulty of attempting a similar communal governance structure without using the condominium vehicle]

ensure, among other things, that buildings in the units are maintained to specified standards (exacting or otherwise), that proportionate contributions are made to pay common expenses, and that building design, appearance, and construction timing, are restricted (see *section 156(1)*). When exercised, the enforcement of these powers is equally clear and conclusive¹².

A critical constraint on the conditions under which a vacant land condominium corporation may be created is that no unit can be part of a building or structure, and none of the units may include part of a building or structure unless the entirety of the building or structure is within the boundaries of the unit (*section 155(1)* and *section 56(1(a) of 48 of 01*). The effect of this is to make a vacant land condominium corporation an antithesis of the traditional condominium created under the old Condominium Act (as the latter’s entire premise was to serve as a vehicle to divide up a building or buildings) or a standard condominium under the *Condominium Act*. Vacant land condominium corporation’s are specifically addressed to dividing up land, upon which whole buildings or structures may stand (at or after the registration of the condominium). It should be noted that there is no general restriction against part of a building being subsequently (post-registration) constructed on a unit (the *Condominium Act* makes it clear in *section 159(1)* that such part of the building forms part of the unit). Prior to the *Condominium Act* a vacant land type condominium was not possible¹³.

Examples of forms of residential development which may take advantage of a vacant land condominium corporation form of governance include:

- gated communities of single family homes
- developments which entail the provision of communal facilities (recreational such as a ski hill or marina, or other such as a pool, recreational/meeting building and facilities) available only to vacant land condominium corporation owners
- tent and trailer parks
- ‘dockominiums’ (privately owned docks on waterlots with communal on-shore facilities).

and so on.

From a commercial perspective a vacant land condominium corporation may be used to accommodate multiple ownership in, for example, a power center type setting, with the units sitting under the individual buildings, and the common parking, driveways, landscaping, and the like, within the common elements. Even an outdoor farmer’s market could conceivably be a candidate for a vacant land condominium corporation. Any circumstance which involves the separate ownership of land parcels together with common interests, and can benefit from the governance of the *Condominium Act*, is a candidate. The desire to have a communal control over aspects of the units(lots) will be the deciding factor. In the latter regard, a vacant land condominium corporation will satisfy the objective of connecting the ownership and maintenance of common facilities while bringing the benefiting ‘lots’ (units) under condominium governance (putting, for example, the standards of maintenance under the purview of the condominium).

1.3.2. Conditions on the Creation of Vacant Land Condominium Corporations

To be approved and registered a vacant land condominium corporation must meet the following criteria:

1. The property must be located entirely within the boundaries of one land titles division, the *Land Titles Act* must be applicable to the entire property, and the declarant must be registered as owner with absolute title; or, the property must be located entirely within the boundaries of one registry division, the *Registry Act* must be applicable to the entire property, and the declarant must hold a certificate of title issued within the previous ten years under Part 1 of the *Certification of Titles Act (section 4)*.
2. It cannot be a leasehold condominium (*section 155(3)*).
3. It cannot be a common elements condominium (*section 155(3)*).

¹² See chapter 2.6

¹³ 260-Lambert Island Ltd. and Attorney-General of Ontario (1972)

4. It cannot be a phased condominium (*section 155(3)* and *Regulation 48/01 section 49(2)* which requires a phased condominium to be of the standard type).
5. No unit can be part of a building (*section 155(1(a))*).
6. No unit can include part of a building (unless all parts of the building are within the boundaries of the unit) (*section 155(1(a))* and *Regulation 48/01 section 56(1)(a)*).
7. No unit is located above or below any unit (this does not exclude a unit from being above or below a common element, should such be necessary) (*section 155(1(b))*).
8. All buildings, structures, facilities and services to be included in the common elements must be completed and installed in accordance with the regulations, or bonding is provided to ensure completion (*section 158(1)(a) and (b)*).

1.3.3. Special Regulatory Control in a Vacant Land Condominium Corporation’s Declaration

A unique control that may be introduced into a vacant land condominium corporation which is to include building or structures constructed after registration are restrictions, contained in it’s declaration, concerning the following:

- (a) the size, location, construction standards, quality of materials and appearance of the building or structure;
- (b) architectural standards and construction design standards of the building or structure;
- (c) the time of commencement and completion of construction of the building or structure; and
- (d) the minimum maintenance requirements for the building or structure. (*Section 156(1)*)

The restrictions imposed in the declaration must be ‘consistent’ with the conditions imposed by the approval authority in approving or exempting the description (*section 156(2)*). It is a moot question whether the approval conditions must give rise to any and all restrictions in the declaration, or whether a restriction can be introduced in the declaration which is wholly the choice of the declarant. In the latter case, provided the restriction is not ‘at odds’ with the conditions, it appears that the intent of *section 156(2)* would be met.

It should be noted that the vacant land condominium board may pass by-laws to govern minimum maintenance standards for a unit or buildings/structures on a unit (*section 160*). Such a vehicle of setting maintenance standards would be preferred where it is desired that changes to the standards can be made with the endorsement of fewer of the owners than would be required for an amendment to the declaration (as little as 13% vs. 80 % written consent for a declaration amendment).

1.3.4. Contents of a Declaration for a Vacant Land Condominium Corporation

1.3.4.1. Prohibitions

A declaration shall not,

- contain provisions requiring an owner, a future owner or anyone on the owner’s or future owner’s behalf to consent in writing to an amalgamation; or
- contain provisions relating to an amalgamation. (*section 7(1)*)

A vacant land condominium corporation’s declaration shall not provide for units which are part of a building or structure or which include part of a building or structure, except if a building or structure is located entirely within the boundaries of the unit (*Section 155(1)(a)* and *section 56(1)(a)*).

1.3.4.2. Requirements

A declaration must:

- contain the information required by *section 7(2)*, namely:
 - a statement that this Act governs the land and interests appurtenant to the land, as the land and the interests are described in the description;
 - the consent of every person having a registered mortgage against the land or interests appurtenant to the land, as the land and the interests are described in the description;
 - a statement of the proportions, expressed in percentages, of the common interests appurtenant to the units;
 - a statement of the proportions, expressed in percentages allocated to the units, in which the owners are to contribute to the common expenses;
 - an address for service, a municipal address for the corporation, if available, and the mailing address of the corporation if it differs from its address for service or municipal address;
 - a specification of all parts of the common elements that are to be used by the owners of one or more designated units and not by all the owners;
 - a statement of all conditions that the approval authority, in approving or exempting the description under section 9, requires the declaration to mention;

It must also:

- be executed by the declarant (*5(1)(a)*);
- meet the execution requirements for registration of a transfer/deed of land under the *Land Titles Act* or the *Registry Act*, as the case may be (*5(1)(b)*);
- have the statement on the first page of the declaration that the registration of the declaration and description will create a vacant land condominium corporation: (*section 56(1)(b)*);
- contain schedules known as Schedules A, B, C, D, E, F, G (schedule G is included only if the declaration and description show that there are buildings, structures, facilities or services included in the common elements (*section 5(1)(d)* and *section 56(5)*), and H (*56(1)(c)*);

1.3.4.3. Contents of Schedules

Contents of Schedule A

This schedule must contain:

- a description of the land and interests appurtenant to the land intended to be governed by the Act, including a description of every easement, as shown on the description that, upon the registration of the declaration and description, will be appurtenant to the land or to which the land will be subject; and
- a statement signed by the solicitor registering the declaration that, in his or her opinion, based on the parcel register or abstract index and the plans and documents recorded in them, that
 - (i) the legal description is correct,
 - (ii) the easements mentioned in the description will exist in law upon the registration of the declaration and description, and

- (iii) the declarant is the registered owner of the land and appurtenant interests (5(2)).

Contents of Schedule B

This schedule must contain:

- The consent under *section 7(2)(b)* of the Act, in Form 1, of every person having a registered mortgage against the land or interests appurtenant to the land, as the land and the interests are described in the description (5(3)).

Contents of Schedule C

This schedule must contain:

- a statement signed by an Ontario land surveyor licensed under the *Surveyors Act* certifying that the boundaries of the units are controlled by the monuments illustrated on the plan of survey described in *section 157 (1) (a)* of the *Condominium Act* (*section 56(4)*).

Contents of Schedule D

This schedule must contain:

- a statement of the proportions, expressed in percentages totalling 100 per cent, of the common interests appurtenant to the units; and
- a statement of the proportions, expressed in percentages totalling 100 per cent, allocated to the units, in which the owners are to contribute to the common expenses (*section 5(5)*).

Contents of Schedule E

This schedule must contain:

- a statement specifying the common expenses of the corporation or may be left blank if the declarant so elects (*section 5(6)*).

Contents of Schedule F

This schedule must contain:

- a specification of all parts of the common elements that are to be used by the owners of one or more designated units and not by all the owners or shall indicate that there are no such parts if that is the case (*section 5(7)*).

Contents of Schedule G

This schedule must contain:

1. One of either a certificate, in Form 17, of an architect certifying that,
 - (i) all buildings and structures that the declaration and description show are included in the common elements have been completed and installed in accordance with the regulations made under the Act, with respect to all or some matters listed in the paragraphs of the definition of “has been completed and installed” in *section 41*, and
 - (ii) some or all of the facilities and services that the declaration and description show are included in the common elements have been installed and provided in

accordance with the definition of “has been installed and provided” in section 41;¹⁴

OR

one or more certificates of an engineer, in Form 17, certifying that,

- (i) all buildings and structures that the declaration and description show are included in the common elements have been completed and installed in accordance with the regulations made under the Act, with respect to some matters listed in the paragraphs of the definition of “has been completed and installed” in section 41, and
- (ii) some or all of the facilities and services that the declaration and description show are included in the common elements have been installed and provided in accordance with the definition of “has been installed and provided” in section 41.¹⁵

OR

- 2. (a) a statement by the declarant that the certificates will be included in an amendment to the description; and
- (b) a statement from any of the municipalities in which the land is situated, or the Minister of Municipal Affairs and Housing if the land is not situated in a municipality, signed by a person authorized to bind the municipality or Minister (section 56(9)), stating that a bond or other security that is acceptable to the municipalities in which the land is situated or the Minister, as the case may be, has been posted that is sufficient to ensure that,
 - (a) the buildings and structures that the declaration and description show are included in the common elements will be completed and installed in accordance with the regulations made under the Act,
 - (b) the facilities and services that the declaration and description show are included in the common elements will be installed and provided in accordance with the regulations made under the Act,
 - (c) the items described in clause *158 (3) (b)* of the *Condominium Act* will be included in an amendment to the description. (section 56(7) and 56(8))

Definition of ‘Has Been Completed and Installed’

‘Completed and Installed’ does not mean 100% completion of all work. The work must relate to one of the matters listed in section 41 (section 56(7) of 48 of 01); however, generally speaking the work left to be done will be minor (i.e. wall paint). The matters to be certified complete and installed, and the state of completion are as follows:

“has been completed and installed” means, with respect to each building and structure that the declaration and description show are included in the common elements, constructed at least to the following state:

¹⁴ Note: If the declaration and description show there are no buildings or structures included in the common elements this certificate shall not contain the certifications of completion/installation/provision of buildings, structures, (section 56(11))

¹⁵ Note: If the declaration and description show there are no facilities and services included in the common elements this certificate shall not contain the certifications of completion/installation/provision of facilities and services (section 56(12))

1. The exterior building envelope, including roofing assembly, exterior wall cladding, doors and windows, caulking and sealants, is weather resistant if required by the construction documents and has been completed in general conformity with the construction documents.
2. Floor assemblies are constructed and completed to the final covering.
3. Walls and ceilings of the common elements, excluding interior structural walls and columns in a unit, are completed to the drywall (including taping and sanding), plaster or other final covering except where the units are intended for non-residential purposes that are not ancillary to units intended for residential purposes, wall or ceiling coverings, interior perimeter doors, interior partitions or walls between units or between units and common elements do not have to be in place.
4. All underground garages, if any, have walls and floor assemblies in place.
5. All elevating devices, if any, as defined in the *Elevating Devices Act*, are licensed under that Act if it requires a licence.
6. All installations with respect to the provision of water and sewage services, if any, are in place and operable.
7. All installations with respect to the provision of heat and ventilation, if any, are in place and heat and ventilation can be provided.
8. All installations with respect to the provision of air conditioning, if any, are in place and operable.
9. All installations with respect to the provision of electricity, if any, are in place and operable.
10. All indoor and outdoor swimming pools, if any, are completed and operable;

“has been installed and provided” means, with respect to the facilities and services that the declaration and description show are included in the common elements, installed and provided in accordance with the requirements of the municipalities in which the land is situated or the requirements of the Minister of Municipal Affairs and Housing, if the land is not situated in a municipality.

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Contents of Schedule H

This schedule must contain:

- a list, in individual items numbered consecutively beginning with the number “1”, of all buildings, structures, facilities and services that are included in the common elements with each of the items identified under one of the following headings as appropriate:
 1. Buildings and structures;
 2. Facilities and services; and,
- a brief description of each item sufficient to identify it.

(section 56(1)(c) and section 40 (15) and (16));

1.3.4.4. Other Contents of the Declaration

A declaration may contain,

- (a) a statement specifying the common expenses of the corporation (in default of which the general provisions of the *Condominium Act* will apply with the result that common expenses will be “the expenses related to the performance of the objects and duties of a

- corporation and all expenses in the *Condominium Act* (definition of ‘common expenses’, *section 1(1)*);
- (b) conditions or restrictions with respect to the occupation and use of the units or common elements¹⁶;
 - (c) conditions or restrictions with respect to gifts, leases and sales of the units and common interests¹⁷;
 - (d) a list of the responsibilities of the corporation consistent with its objects and duties¹⁸; and
 - (f) a description of the allocation of obligations to maintain the units and common elements and to repair them after damage, which allocation has been done in accordance with this Act (*section 7(4)*)
 - (g) schedules in addition to the schedules, listed above, required by *regulation 48 of 01 (section 5(10))*. These additional schedules would be prepared and inserted by the declarant to contain information and other, specific to the particular condominium.

The declaration may contain the following restrictions pertaining to the following if the vacant land condominium corporation is to include a building or structure constructed after the registration of the declaration and description:

- the size, location, construction standards, quality of materials and appearance of the building or structure;
- architectural standards and construction design standards of the building or structure;
- the time of commencement and completion of construction of the building or structure; and
- the minimum maintenance requirements for the building or structure. (*section 156(1)*)

1.3.5. Contents of a Description for a Vacant Land Condominium Corporation

A description shall include common elements (*section 8(3)(a)*).

A description of a vacant land condominium corporation shall contain:

¹⁶ **266** Peel Condominium Corporation No. 11 and Caroe et al. (1974) [declaration cannot prohibit renting of unit to third party]

360-York Condominium Corp. No. 216 v. Borsodi et al. (1983) (age restriction valid)

189-Metropolitan Toronto Condominium Corp. No. 624 v. Ramdial and Salmon (1988) [age restriction valid]

377 York Condominium Corporation No. 216 v. Dudnik (Div. Ct.) (1991) [provision restricting occupant’s age invalid, discrimination on the basis of family status]

214 Niagara North Condominium Corp. No. 7 v. Goodhew (1997) [requirement to obtain approval for changes to units which impair value of other property has no application to air-conditioner unit]

207 Metropolitan Condominium Corp. No. 699 and 1177 Yonge Street Inc.(Re) (1998) [provision in declaration prohibiting conveyance of parking unit to non-unit owner does not prevent leasing to others]

¹⁷ **266**-Peel Condominium Corporation No. 11 and Caroe et al. (1974) [a declaration cannot prohibit the renting of a unit by an owner].

207 Metropolitan Condominium Corp. No. 699 and 1177 Yonge Street Inc.(Re) (1998) [provision in declaration prohibiting conveyance of parking unit to non-unit owner does not prevent leasing to others]

¹⁸ **065 and 070** Carleton Condominium Corp. No. 441 v. Owners et al. of Carleton Condominium Plan No. 441(1997/1998) [declaration provisions dealing with shared facilities on external lands proper, court will not order amendment to delete same]

- (a) a plan of survey showing the perimeter of the horizontal surface of the land, the perimeter of the buildings and structures on the common elements and the boundaries of each unit;
- (b) unless all buildings and structures are completed and the bonding for uncompleted works is not required, architectural plans of the buildings and structures included in the common elements and, if there are any, structural plans of them, but architectural plans shall not be included if either:
 - the description contains the structural plans and, and Schedule G to the declaration includes the engineer’s certificate and not the architects certificate

or

 - the declaration and description for the corporation show that there are no buildings, structures, facilities or services included in the common elements. (*section 57(2)*)
- (c) In addition to all other material that it is required to contain, a description shall contain a description of all easements and similar interests to which the property is subject and a description of the interests appurtenant to the property. These descriptions shall be combined and shall be in Form 3 (*section 9(4)* and *section 57(4)*);

1.3.6. Buildings on the Common Elements

As outlined above, it is a pre-condition to the registration of a vacant land condominium corporation that no proposed unit contain part of a building or structure; either the unit is vacant, or whatever buildings and structures exist are located entirely with the boundaries of the unit (*section 155(1)(a)* and *regulation 48/01 section 56(1)(a)*).

In respect of construction on the common elements, should a vacant land condominium corporation declaration and description show buildings, structures, facilities, or services to be included in the common elements, it is a pre-condition of the vacant land condominium corporation’s registration that either:

- 1. All such buildings, structures, facilities, or services, be completed, installed and provided in accordance with the regulations (*section 158(1)(a)*);

OR

- 2. the declarant provides a bond, or other security sufficient to ensure that such completion, installation, and provision is done, and that the description is consequently amended (*section 158(1)(b)*).

The intent of this directive is to ensure that that commonly used facilities are put in place (either before or after registration), and new owners are not presented with the situation of having to complete the works themselves due to default by the proponent.

1.3.7. Buildings, Structures, Facilities, or Services on the Common Elements Remaining to be Completed

In the event a bond or security must be posted the following outlines the essential considerations and rules:

- 1. The municipality in which the land is situate (or the Minister of Municipal Affairs in the event the land is not in a municipality) must specify to whom the security is to be provided. It may be a person or a body, including the approval authority. The *Condominium Act* is not specific on which municipality makes the specification in the case of land which is in more than one

2. municipality (for example, land in an local area municipality within a regional municipality). Presumably a specification by either would be reliable, although it is a moot question how the unlikely situation of two qualified municipalities designating two different security holders would be resolved.
3. The *Condominium Act* and regulations do not limit the identity or class of persons who may be specified to hold the security, and so the specification is essentially entirely within the discretion of the specifying municipality. Besides the approval authority, the holder could be a municipal official or an outside third party.
4. The bond or security must be ‘acceptable’ to the municipality (or Minister, if applicable). This provides flexibility in the form the security may take. For example, it could be simply in a cash amount which may drawn on by the holder to complete the work, or it may take the form of a construction bond which allows the bonding company to complete the work in the event of default. The security may also be a cash deposit, a letter of credit or guarantee, or a security backed by a mortgage on the property. The decision on the form is left to the discretion of the municipality which will, understandably, prefer a form which will be easy to administer, particularly in the event of default.
5. The security must be ‘sufficient to ensure’ completion, installation, and provision of the uncompleted construction. This directive implies a minimum amount for the security (for example, if the estimated cost of completion is \$100,000.00, the security can/should never be less than \$100,000.00) but the ceiling is a gray area. Practically speaking it will be up to the municipality, in consultation with, among others, the declarant, to set an amount which ensures ‘sufficiency’. The amount could reflect the possibility of labour or materials cost increases, ‘extras’ in the construction process, the additional costs which will arise in the event of default and a new party having to pick up the direction of the work, and so forth. Given that the municipality, in setting the amount, owes a duty of care to the unit purchasers and corporation to ensure the amount is sufficient to ensure completion, prudence dictates that any error should be on the side of caution.
6. The existence of the bond/security will, among other means, be disclosed in Schedule ‘G’ to the vacant land condominium corporation’s declaration. In this regard, schedule ‘G’ must include a statement by the declarant that the architect/engineer’s certificate will be included in an amendment to the description, and a statement from any of the municipalities in which the land is situated (or the Minister if applicable) stating the acceptability and sufficiency of the security and the fact an amendment to the description will include the architect/engineer’s certificate (section 56(7)(b)). The latter statement must be signed by a person authorized to bind the municipality/minister (section 56(9)).
7. Although *section 158* speaks of ‘bond or security’ in the singular, the security for a particular proposed condominium can be provided through two or more bonds/securities (*Interpretation Act Section 28 (j)*). It is also possible for different securities relating to the same proposal to be held by different persons/bodies.
8. A bond or security may be released in stages with the consent of the municipality/minister (*section 158(2)*). Such partial releases would be appropriate as work progresses on completing the construction. The reduced security amount must, in all cases, be sufficient to ensure completion.
9. The security shall not be released in full until all buildings, structures, facilities, or services, be completed, installed and provided in accordance with the regulations (*section 158(3)(a)*) and the description has been amended to include the up to date plans and related certificate of completion by the architect/engineer (*section 158(3)(b)*).

1.3.8. Actions Upon Completion of Buildings, Structures, Facilities, or Services on the Common Elements

A vacant land condominium that is registered before all buildings, structures, facilities or services in the common elements are completed will require an amendment to the description to be registered after the work is completed (*section 158(1)(iii)* and *158(3)(b)*). This amendment to the description is exempt from *section 9(2)* and *9(3)* of the *Condominium Act* which make the subdivision application and approval sections of the *Planning Act* applicable to descriptions (*section 58(2)*) and so may be registered directly after the work is complete. The amendment to the description must be in *Form 21* (to which will be attached certificates of an architect or an engineer in *Form 17* and the revised/addition sheets for including architectural or structural plans) (*section 58(1)* and *58(3)*).

1.3.9. Insurance

Unlike all other types of condominiums, vacant land condominium corporation's are not fully bound by the provisions of *section 99* of the *Condominium Act* which mandates that the corporation maintain insurance on the units and common elements on behalf of itself and the owners for damage caused by major and other perils. *Section 159(2)* provides an exemption from this section 'for buildings and structures located on a unit'. *Section 159(3)* of the *Condominium Act* imposes the obligation on the unit owner(s) to obtain and maintain the insurance for damage to the unit that, but for *section 159(2)*, would have had to be obtained by the corporation in respect of the unit.

It should be noted that the obligation to insure against damage to the common elements remains with the vacant land condominium corporation.

1.3.10. Repair and Maintenance

Sections 89 to 92 inclusive of the *Condominium Act*, which generally impose the obligation to repair and maintain the units on the corporation, are inapplicable to vacant land condominium corporations (*section 162(1)*). In substitution, the *Condominium Act* imposes the responsibility of maintenance and repair after damage of the common elements on the corporation, and imposes the responsibility of maintenance and repair the units after damage on the owner of the respective unit (*section 162(3)* and *162(4)*).

In the event an owner fails to maintain a unit within a reasonable time or fails to repair within a reasonable time after damage, the vacant land condominium corporation is entitled to maintain and repair the unit, as the case may be (*section 162(5)*). The cost of the work is charged to the owner as part of the owner's common expense contribution (*section 162(6)*).

1.3.11. Substantial Damage to a Building Located on a Unit

The general obligation on an owner to repair a unit after damage (*section 162(3)*) is given relief in the situation of 'substantial damage' occurring to the unit (*section 163(1)*). If substantial damage occurs (and by reference to *section 123(2)* this is defined to mean damage for which the cost of repair is estimated to equal or exceed 25 percent of the replacement cost of the building) and the owners do not vote to terminate the vacant land condominium corporation under *section 123* (as would almost certainly be the case for vacant land condominium corporation involving numerous units of which only one, for example, has substantially damage), the owner of the damaged unit has the option to either:

1. Not repair the damage.

Or

2. Replace the building with a different building (subject to the *Condominium Act*, the declaration, and the bylaws; for example, the replacement building would have to meet any established architectural and design restrictions set out in the declaration pursuant to *section 156*).

If the owner elects not to rebuild, the land on which the building was located must be restored by the owner to the state it was in before construction of the building (*section 163(2)*). If the restoration work is not done within a reasonable time the vacant land condominium corporation may do the work and the cost is added to the owner's contribution to the common expenses (*section 163(3)*).

1.3.12. Disclosure Statement

Along with the otherwise mandated contents of a disclosure statement (*section 72(3)* of the *Condominium Act* and *section 17* of *regulation 48 of 01¹⁹*), *Section 161* of the *Condominium Act* requires a special addition to disclosure statements for vacant land condominium corporations. This addition is a statement from the municipality in which the land is situate (there may be more than one, in which case a certificate from either should suffice), or the Minister of Municipal Affairs where the land is not in a municipality, of the services provided by the municipality/Minister, including construction and maintenance of roads. The obligation is on the declarant to request this statement from the municipality/Minister (*section 161(1)*). If the municipality/minister fails to respond within 30 days of the request, the declarant may finalize the disclosure statement without the services statement but include, in lieu thereof, a statement that the declarant has requested the statement but has not received any response (*section 161(3)*).

The *Condominium Act* does not limit the scope of the list of municipally/ministry supplied 'services'. In particular, it does not limit these to services provided exclusively to the vacant land condominium corporation (such as a package sewage effluent treatment facility owned and operated by a municipality), or even to services which have a physical connection to the vacant land condominium corporation (such as piped municipal water supply). Both 'hard' and 'soft' services could fall within the class. Accordingly, a municipally/ministerially prepared list of services could include as diverse as:

- Water supply
- Sewage reception and treatment
- Storm water reception and disposal
- Publicly assumed highways
- Community meeting/recreation/ etc. centers
- Parks
- Garbage collection and disposal (on or off site)
- Recycling programs
- Street lighting
- Community advisory agencies (i.e. planning and building, small business)
- Libraries
- Fire protection
- Policing
- Emergency services
- Bylaw enforcement (i.e. noise, property standards, and others)
- Social support services

In each case it will be up to the responding municipality (or the Ministry) to settle the inclusions on the list of 'services provided'.

The *Condominium Act* sets out no penalty or consequence to the declarant if the statement is inaccurate or incomplete. This is to be expected as the declarant's responsibilities are purely mechanical. It makes a request for a

¹⁹ See chapter 3.1.2.

statement, and either includes the received statement in the disclosure statement (without editorializing) or includes the statement that the request was unfulfilled by the end of the thirty day period.

While the *Condominium Act* likewise sets out no penalty or consequence to the municipality/minister if the statement is inaccurate or incomplete, clearly the municipality/minister owes a duty of care to purchasers. Negligence in the discharge of that duty will give rise to civil liability to persons suffering damages as a consequence. Services which may or not be sustained should not appear on the list, at least without appropriate qualifiers. Erring on the side of caution would encourage a short list, on the premise that ‘undeclared services’ should not give rise to detrimental reliance.

1.3.13. Special Restriction on Selling Before Approval

Unlike all other forms of condominium, section 52 of the *Planning Act*, which prohibits the subdivision and offering for sale, agreement to sell or selling land before draft approval is given under section 51 of the *Planning Act*, applies to vacant land condominium corporations (*section 9(12)*). Since a vacant land condominium corporation is akin to a land subdivision concept, putting it in the same class as a plan of subdivision for the purposes of pre-sales is arguably equitable.

1.3.14. Bylaws Specifying Minimum Maintenance Standards

Although the maintenance of units is the responsibility of the owner(s), an element of corporate control over the standards of maintenance is available to vacant land condominium corporations through *section 160* which allows vacant land condominium corporation boards to pass by-laws, not contrary to the declaration, specifying minimum maintenance standards for a unit or a building or structure located on a unit. Such bylaws are subject to the passage and approval process set out in *section 56*.

It should be noted that if a unit in a vacant land condominium corporation is to include a building or structure constructed after registration, the declaration may contain, among other things, “minimum maintenance requirements for the building or structure”. Should a declaration contain such standards, it is likely that no bylaw could subsequently be passed dealing with the same subject (maintenance of a building or structure constructed after registration). However, it would still be open to the vacant land condominium corporation board to pass bylaws dealing with the maintenance standards of buildings and structures constructed on units at the time of registration and with the units exclusive of buildings and structures. Lawn cutting and other grounds work (in a developed setting) would be an example of unit maintenance that stands apart from building/structure maintenance.

1.4 COMMON ELEMENTS CONDOMINIUM CORPORATION

1.4 COMMON ELEMENTS CONDOMINIUM CORPORATION

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1.4.1. What is a Common Elements Condominium Corporation?

While the vacant land condominium corporation is a novel use of the condominium concept (the division of land parcels and not, as under the old legislation, the division of buildings), the common elements condominium corporation type takes novelty in a different direction by providing for the creation of a condominium that has no units, but only common elements (*section 138(1)*). The ownership of the common interests in the common elements is, and must be, associated with the ownership of another parcel of land outside the boundaries of the common elements condominium corporation. It is that parcel external to the condominium (which *regulation 48 of OI* describes as ‘tied land’) which is to notionally benefit from the related common interest in the common elements condominium corporation. All of the general provisions of the *Condominium Act* apply to common elements condominium corporations with the term ‘unit’ or ‘proposed unit’ being read throughout the *Condominium Act* as ‘common interests’ or ‘proposed common interest’ (*section 138(4)*).

A common elements condominium corporation may be used to accomplish the same purpose as a vacant land condominium corporation, namely to provide for communal facilities and the like for the benefit of the owners at the owner’s expense, but without the feature of including the owner’s tied land in the condominium governance.

Matters such as the maintenance of the tied land (which in a vacant land condominium corporation would be comparable to units and can be governed by the declaration or by-laws) will not be a relevant or authorized objective for a common elements condominium corporation. The key feature of the common elements condominium corporation is the ability to have communal land/facilities governed by statutory mandate with the ability to collect contributions to the expenses associated with the common elements and enforce the collection through lien(s) on the tied lands.

Where the objective of controlling the tied lands in one way or another is not relevant the common elements condominium corporation is the vehicle in Ontario for sharing land and facilities ownership and long term use for purposes which are adjunct to activities on separate parcels of land.

Examples of forms of development and land use which may take advantage of a common elements condominium corporation form of governance are:

- residential development created by plan of subdivision in which the lots cluster around a facility (for example a communal pool/tennis court) which is held under a common elements condominium corporation;
- lifestyle developments which entail the provision of communal facilities (a ski hill or marina, a pool/exercise facility, tennis courts, recreational/meeting buildings, marina, jogging trails, garden plots) available only to common elements condominium corporation owners;
- lands used to supply electric power, drinking water, sewage treatment, communications, and such, to certain properties, where it is important to have the security of the tied lands for payment of common expenses;
- a parking lot or driveway system dedicated to shared use by adjacent (whether residential or commercial or other) property owners;
- multiple ownership in, for example, a power center type setting, with the tied lands sitting under the individual buildings, and the common parking, driveways, landscaping, and the like, within the common elements condominium corporation.

It should be noted that since only the communal facilities/land form the property of the common elements condominium corporation, the tied lands must exist, or be created, through some other vehicle.

1.4.2. Subdivision Application Process

Section 142 of the *Condominium Act* makes section 50 of the *Planning Act* inapplicable to dealings with the common interests in a common elements condominium corporation. Why this declaration is introduced in *Section 142* is not entirely clear, as *section 9(1)(a)* of the *Condominium Act* seems to be applicable and provides the same exemption. The fact *section 9(1)(b)* of the *Condominium Act* also refers to easements transferred by or reserved to the corporation as being free of section 50 of the *Planning Act*, and that *section 142* does not refer to easements being relieved of section 50, suggests that such easements must be created through consent or other land division process.

1.4.3. Conditions on the Creation of Common Element Condominium Corporations

To be approved and registered a common elements condominium corporation must meet, among others, the following criteria:

1. It cannot be a vacant land condominium (*section 138(3)*).
2. It cannot be a leasehold condominium (*section 138(3)*).
3. It cannot be a phased condominium (*section 138(3)* and *Regulation 48/01 section 49(2)* which requires a phased condominium to be of the standard type).
4. The property must be located entirely within the boundaries of one land titles division, the Land Titles Act must be applicable to the entire property, and the declarant must be registered as owner with absolute title;

or.

 the property must be located entirely within the boundaries of one registry division, the Registry Act must be applicable to the entire property, and the declarant must hold a

certificate of title issued within the previous ten years under Part I of the Certification of Titles Act (section 4).

5. Each of the owners (of a common interest) must own the freehold estate in a parcel of land (the tied land) that
 - is not included in the description of the condominium (i.e. it is physically outside the boundaries of the condominium);
 - is entirely within the same land titles or registry division as the property; and to which the Land Titles Act applies and for which the owner holds absolute title;
 - or
 - for which a certificate of titles has been registered under the Certification of Titles Act within the previous ten years (section 139(1(a) and section 39)).
6. Each of the owners of tied land (except the declarant (section 42 of 48 of 01)) has signed a certificate in Form 9 (Regulation 49 of 01) stating the owners consent to the registration and attaching the common interest to their respective parcel (section 139(1)(b))
7. At the time of registration, each parcel of tied land must be capable of being individually conveyed, or otherwise dealt with, without contravening section 50 of the Planning Act (Section 39.1 of 48 of 01).

1.4.4. Special Registration Not Required

When the common elements condominium corporation’s declaration and description are registered the common interest of an owner attaches to the owner’s tied land. While the *Condominium Act* specifies that notice of this is effected by the declarant registering of a notice on title to the tied land (section 139(2)), and the form of notice is provided by *regulation 49 of 01* in Form 10, section 42 of regulation 48 of 01 relieves the declarant from this task.

Had the exemption not been provided, the notice would have included the common elements condominium corporation declaration and description, state the fact of the association of the common interest to the tied land and the fact that the common interest cannot be severed from title to the tied land (section 139(4)), and have attached the owners consent to the registration (in Form 9).

1.4.5. Lien for Common Expenses

Should an owner default in payment of common expenses, the corporation has a lien against the tied parcel for the amount owed (section 139(5)). The lien procedures and rules set out in *sections 85 and 86* of the *Condominium Act* apply (section 139(6)) with the exception that the lien does not have priority over an encumbrance registered before registration, unless the encumbrancer agrees in writing (section 139(7)).

1.4.6. Division of Tied Land

The *Condominium Act* makes provision for tied land to be divided, with the common interest running with each. However, this is subject to the regulations (section 138(3)). Section 42(3) of 48 of 01 provides that tied land cannot be divided into two or more new parcels unless an amendment to the declaration is registered that takes into account the division of the tied land. In such event the amendments will be subject to the directions of section 107 (which governs such amendments), including the requirement of securing the written consent of 90% of the owners of the tied parcels if, as may be likely, it involves a change to the contribution to the common elements or the redistribution of the common interests, and 80% in all other cases. Clearly, there is a drawback to making lands with subdivision potential part of the tied lands. The ability to further subdivide would be uncertain due to the need to secure consent of the other owners of the common interests. This may be ensured by an agreement entered into with the purchaser/unit owner at the time of purchase or through a provision in the declaration (there are no provisions expressly prohibiting such).

1.4.7. Special Exceptions

Since there are no owner-occupied units in a common elements condominium corporation the provisions of the *Condominium Act* dealing with the directors of the corporation voted into office by owner-occupants of units (*section 28(3)*, *46(3)*, and *51(5) to 51(8)*) do not apply to common elements condominium corporations (*section 44 of 48 01*).

As a common elements condominium corporation will not contain any units which could be covered by the Ontario New Home Warranty Plan, *section 22 of 48 of 01* governing contents and rules relating to deposit receipts is inapplicable (*section 45(1)*). In the case of a common elements condominium corporation the only prescribed security for deposits and the like is a policy of insurance against loss (see below). The evidence of compliance with *section 81* (monies delivered to trustee) required by *section 81(6)* is the standard Form 4 under *49 of 01*.

For the purposes of a common elements condominium corporation the qualifying security must be policies that insure against the loss of payments described in *section 81(1)* of the *Condominium Act* and the interest payable by the declarant on the payments. The policy(s) must be executed by the insurer and declarant and delivered to the trustee/declarant's solicitor (*section 45(1) and 45(2) and section 21(1) of 48 of 01*). The policy shall be held in trust for the beneficiary until:

- (a) the declarant delivers to the beneficiary a deed in registerable form to the common interest in the corporation, in respect of which the beneficiary or a person on the beneficiary's behalf has made a payment described in *subsection 81(1)* of the *Condominium Act*;
- (b) the declarant pays the beneficiary all money paid under *subsection 81(1)* of the *Condominium Act* and interest on it payable by the declarant under the *Condominium Act*;
- (c) the insurer pays the beneficiary the amount of the loss;
- (d) the common interest, in respect of which the beneficiary or a person on the beneficiary's behalf has made a payment described in *subsection 81(1)* of the *Condominium Act*, has attached to the beneficiary's tied land;
- (e) the beneficiary acknowledges in writing that,
 - (i) the beneficiary is not entitled to the payments made by or on behalf of the beneficiary under *section 81(1)* of the Act in respect of a proposed common interest in the corporation and the interest payable on the payments by the declarant, and
 - (ii) the insurer is no longer liable under the policy; or
- (f) a court of competent jurisdiction has made a final determination that the beneficiary is not entitled to the payments made by or on behalf of the beneficiary under *section 81(1)* of the *Condominium Act* in respect of a proposed common interest in the corporation and the interest payable on the payments by the declarant;

at which time the insurer will no longer be liable under the policy (*section 46*).

1.4.8. Contents of a Declaration for a Common Elements Condominium Corporation

1.4.8.1. Prohibitions

A declaration shall not,

- contain provisions requiring an owner, a future owner or anyone on the owner’s or future owner’s behalf to consent in writing to an amalgamation; or
- contain provisions relating to an amalgamation. (section 7(1)).

1.4.8.2. Requirements

A declaration must:

- satisfy the requirements of *section 7(2)* , by containing the following:
 - a statement that the *Condominium Act* governs the land and interests appurtenant to the land, as the land and the interests are described in the description;
 - the consent of every person having a registered mortgage against the land or interests appurtenant to the land, as the land and the interests are described in the description;
 - a statement of the proportions, expressed in percentages, of the common interests appurtenant to the owner’s parcel of land;
 - a statement of the proportions, expressed in percentages allocated to the owner’s parcel of land, in which the owners are to contribute to the common expenses¹;
 - an address for service, a municipal address for the corporation, if available, and the mailing address of the corporation if it differs from its address for service or municipal address;
 - a specification of all parts of the common elements that are to be used by the owners of one or more designated owner’s parcel of land and not by all the owners;
 - a statement of all conditions that the approval authority, in approving or exempting the description under *section 9 (Planning Act approval)*, requires the declaration to mention.

Section 140

It must also:

- contain a statement that the common elements are intended for the use and enjoyment of the owners (*section 140(a)*);
- contain a legal description of the parcels of tied lands (*section 140(b)*);
- be executed by the declarant (5(1)(a));
- meet the execution requirements for registration of a transfer/deed of land under the *Land Titles Act* or the *Registry Act*, as the case may be (5(1)(b));
- have the statement on the first page of the declaration that the registration of the declaration and description will create a common elements condominium corporation (*section 40(1)(a)(i)*);
- have the statement on the first page that a tied land may not be divided into two or more parcels unless an amendment is registered to the declaration that takes into account the division (*section 40(1)(a)(ii)*);
- contain schedules known as Schedules A, B, D, E, F, G (to be included only if the declaration and description show that there are buildings, structures, facilities or services included in the common elements (*section 40(9) of 48 of 01*), H, I and J (section 5(1)(d), section 40(4) and section 41(1)(b) of 48 of 01))

¹ **418-** York Condominium Corp. Nos. 968 and 1002 v Schickendanz Bros. Limited and York Region Common Element Condo Corp. No. 967 (2006) [A provision in a declaration exempting certain POTL from the payment of common expenses pending the happening of a specified event is not contrary to the Act and is valid and enforceable.]

1.4.8.3. Contents of Schedules

Each of the 9 (or less) schedules must contain prescribed information. This is set out below in the context of a common elements condominium corporation:

Contents of Schedule A

This schedule will contain:

- a description of the land and interests appurtenant to the land intended to be governed by the Act, including a description of every easement, as shown on the description that, upon the registration of the declaration and description, will be appurtenant to the land or to which the land will be subject; and
- a statement signed by the solicitor registering the declaration that, in his or her opinion, based on the parcel register or abstract index and the plans and documents recorded in them, that
 - (i) the legal description is correct,
 - (ii) the easements described in the description will exist in law upon the registration of the declaration and description, and
 - (iii) the declarant is the registered owner of the land and appurtenant interests (5(2)).

Contents of Schedule B

This schedule will contain:

- The consent under *section 7(2)(b)* of the Act, in Form 1, of every person having a registered mortgage against the land or interests appurtenant to the land, as the land and the interests are described in the description (5(3)).
- The consent, in Form 16, of every person having a registered mortgage against a tied land (*section 40(3)*).

[Schedule C (which deals with unit boundaries) is not included in common element condominium corporation declaration (*section 40(4)*).]

Contents of Schedule D

This schedule will contain:

- a statement that the common elements are intended for the use and enjoyment of the owners for the purpose of *section 140(a)* of the *Condominium Act* (*section 40(6)(a)*);
- a legal description of the parcels of tied land for the purpose of *section 140(b)* of the *Condominium Act* (*section 40(6)(b)*);
- a statement of the proportions, expressed in percentages totalling 100 per cent, of the common interests that will attach to each tied land (*section 40(6)(c)*); and
- a statement of the proportions, expressed in percentages totalling 100 per cent, allocated to the tied lands, in which the owners are to contribute to the common expenses (*section 40(6)(d)*).

Contents of Schedule E

This schedule will contain:

- a statement specifying the common expenses of the corporation or may be left blank if the declarant so elects (*section 5(6)*).

Contents of Schedule F

This schedule will contain:

- a statement specifying all parts of the common elements that are to be used by the owners of one or more designated common interests and not by all the owners or shall indicate that there are no such parts if that is the case (*section 40(8)*).

Contents of Schedule G

This schedule is not to be included if the declaration and description show that there are no buildings, structures, facilities or services included in the common elements (*section 40(9)*).

Unlike a vacant land condominium corporation which can be registered without all buildings, structures, facilities and services being in place on the common elements (*section 158(1)*), there is no option in the case of a common elements condominium corporation (reference *section 40(12(b))*). Such matters must be completed before registration.

If the schedule is required it shall contain either²¹:

1. A certificate, in Form 17, of an architect certifying that,
 - (i) all buildings and structures that the declaration and description show are included in the common elements have been completed and installed in accordance with the regulations made under the Act, with respect to all or some matters listed in the paragraphs of the definition of “has been completed and installed” in *section 41*, and
 - (iii) some or all of the facilities and services that the declaration and description show are included in the common elements have been installed and provided in accordance with the definition of “has been installed and provided” in *section 41*,²²

OR

2. one or more certificates of an engineer, in Form 17, certifying that,
 - (i) all buildings and structures that the declaration and description show are included in the common elements have been completed and installed in accordance with the regulations made under the Act, with respect to some matters listed in the paragraphs of the definition of “has been completed and installed” in *section 41*, and
 - (iii) some or all of the facilities and services that the declaration and description show are included in the common elements have been installed and provided in accordance with the definition of “has been installed and provided” in *section 41*.²³

(*section 40(11)*)

Definition of ‘Has Been Completed and Installed’

²¹ These contents are identical to that of a vacant land condominium corporation which has no buildings etc. in the common elements, or which has buildings etc. in the common elements and all of such are completed.

²² Note: If the declaration and description show there are no buildings or structures included in the common elements this certificate shall not contain the certifications of completion/installation/provision of buildings, structures, (*section 40(13)*)

²³ Note: If the declaration and description show there are no facilities and services included in the common elements this certificate shall not contain the certifications of completion/installation/provision of facilities and services (*section 40(14)*)

‘Completed and Installed’ does not mean 100% completion of all work. The work must relate to one of the matters listed in section 41 (section 40(12) of 48 of 01); however, generally speaking the work left to be done will be minor (i.e. wall paint). The matters to be certified complete and installed, and the state of completion are as follows:

“has been completed and installed” means, with respect to each building and structure that the declaration and description show are included in the common elements, constructed at least to the following state:

1. The exterior building envelope, including roofing assembly, exterior wall cladding, doors and windows, caulking and sealants, is weather resistant if required by the construction documents and has been completed in general conformity with the construction documents.
2. Floor assemblies are constructed and completed to the final covering.
3. Walls and ceilings are completed to the drywall (including taping and sanding), plaster or other final covering.
4. All underground garages, if any, have walls and floor assemblies in place.
5. All elevating devices, if any, as defined in the *Elevating Devices Act*, are licensed under that Act if it requires a licence.
6. All installations with respect to the provision of water and sewage services, if any, are in place and operable.
7. All installations with respect to the provision of heat and ventilation, if any, are in place and heat and ventilation can be provided.
8. All installations with respect to the provision of air conditioning, if any, are in place and operable.
9. All installations with respect to the provision of electricity, if any, are in place and operable.
10. All indoor and outdoor swimming pools, if any, are completed and operable;

“has been installed and provided” means, with respect to the facilities and services that the declaration and description show are included in the common elements, installed and provided in accordance with the requirements of the municipalities in which the land is situated or the requirements of the Minister of Municipal Affairs and Housing, if the land is not situated in a municipality.

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Contents of Schedule H

This schedule will contain:

- a list, in individual items numbered consecutively beginning with the number “1”, of all buildings, structures, facilities and services that are included in the common elements with each of the items identified under one of the following headings as appropriate:
 1. Buildings and structures.
 2. Facilities and services and,
- a brief description of each item sufficient to identify it.

(section 40 (15) and 40(16));

Contents of Schedule I

This schedule will contain:

- the certificate in *Form 9 to 49 of 01*, signed by each of the owners of a common interest in the corporation (as required by *section 139(1)(b)*), stating the owner(s) consents to the registration of the declaration and the registration of the notice (contained in Schedule J referred to below (*section 40(17)*) to be registered pursuant to *section 139(2)(b)*).

Contents of Schedule J

This schedule will contain:

- the notice in *Form 10 to 49 of 01*, that notifies that the common interest of an owner in the corporation attaches to the owner’s parcel of land, and contains a copy of the certificate (also contained in Schedule G) signed by the owner(s) consenting to the registration of the declaration and the notice under *section 139(2)(b)* as required by *section 139(2)(b)*, (*section 40(18)*)

1.4.8.4. Other Contents of a Declaration

A declaration may contain,

- (a) a statement specifying the common expenses of the corporation;
- (b) conditions or restrictions with respect to the occupation and use of the units or common elements²⁴;
- (c) conditions or restrictions with respect to gifts, leases and sales of the units and common interests²⁵;
- (d) a list of the responsibilities of the corporation consistent with its objects and duties²⁶; and
- (e) a description of the allocation of obligations to maintain the units and common elements and to repair them after damage, which allocation has been done in accordance with the *Condominium Act (section 7(4))*
- (f) Schedules in addition to the schedules required by *regulation 48 of 01 (section 5(10))*. These additional schedules would be prepared and inserted by the declarant to contain information and other, specific to the particular condominium.

²⁴ **266** Peel Condominium Corporation No. 11 and Caroe et al. (1974) [declaration cannot prohibit renting of unit to third party]

360-York Condominium Corp. No. 216 v. Borsodi et al. (1983) (age restriction valid)

189-Metropolitan Toronto Condominium Corp. No. 624 v. Ramdial and Salmon (1988) [age restriction valid]

377 York Condominium Corporation No. 216 v. Dudnik (Div. Ct.) (1991) [provision restricting occupant’s age invalid, discrimination on the basis of family status]

214 Niagara North Condominium Corp. No. 7 v. Goodhew (1997) [requirement to obtain approval for changes to units which impair value of other property has no application to air-conditioner unit]

207 Metropolitan Condominium Corp. No. 699 and 1177 Yonge Street Inc.(Re) (1998) [provision in declaration prohibiting conveyance of parking unit to non-unit owner does not prevent leasing to others]

²⁵ **266**-Peel Condominium Corporation No. 11 and Caroe et al. (1974) [a declaration cannot prohibit the renting of a unit by an owner].

207 Metropolitan Condominium Corp. No. 699 and 1177 Yonge Street Inc.(Re) (1998) [provision in declaration prohibiting conveyance of parking unit to non-unit owner does not prevent leasing to others]

²⁶ **065 and 070** Carleton Condominium Corp. No. 441 v. Owners et al. of Carleton Condominium Plan No. 441(1997/1998) [declaration provisions dealing with shared facilities on external lands proper, court will not order amendment to delete same]

1.4.9. Contents of a Description for a Common Elements Condominium Corporation

A description shall include common elements (*section 8(3)(a)*).

A description of a common elements condominium corporation shall contain:

- b. a plan of survey showing the perimeter of the horizontal surface of the land and the perimeter of the buildings (*section 8(1)(a)*);
- c. unless the description contains the structural plans described in *section 8(1)(b)* of the *Condominium Act*, or in the event that the declaration and description show that there are no buildings, structures, facilities or services included in the common elements, the description shall contain the architectural plans referred to in *section 8(1)(b) (section 43(2))*.
- d. a description of all interests appurtenant to the land that are included in the property (*section*
- e. In addition to all other material that it is required to contain, a description shall contain a description of all easements and similar interests to which the property is subject and a description of the interests appurtenant to the property. These descriptions shall be combined and shall be in Form 3 (*section 9(4) and 9(5) of 48 of 01 and 8(1)(g)* of the *Condominium Act*).

1.4.10. Disclosure Statement

Along with the otherwise mandated contents of a disclosure statement (*section 72(3)* of the *Condominium Act* and *section 17 of 48 of 01*²⁷), *Section 143(a)* of the *Condominium Act* requires the inclusion of a statement that the common interest attaches to the owner’s parcel of land described in the declaration and cannot be severed from the parcel upon the sale of the parcel or the enforcement of an encumbrance registered against the parcel.

1.4.11. Repair After Damage

Section 89 of the *Condominium Act* (which imposes the responsibility for repair after damage on the corporation) and *section 90* (which imposes the responsibility for maintenance of the common elements on the corporation and the maintenance of units on the respective owner) are inapplicable to common elements condominium corporations. Subject to a provision in the declaration imposing responsibility for maintenance of the common elements and exclusive use common elements on the owners (*section 91(b)* and *91(c)* and *section 144* of the *Condominium Act*), or termination on substantial damage (*section 144*), the corporation is responsible for repair and replacing the common elements after damage or failure and shall maintain them (*section 144(2)*).

1.4.12. Insurance

As a common elements condominium corporation has no units, *section 144(3)* makes it clear that the insurance provisions of the *Condominium Act (sections 99 to 105)* are to be read without reference to the term ‘unit’.

1.4.13. Property Taxes

²⁷ see chapter 3.1.2.

The common elements of a common elements condominium corporation are a separate parcel for the purposes of municipal assessment and taxation. The taxes levied form part of the common expenses (*section 15(4)*).

1.5 PHASED CONDOMINIUM CORPORATIONS

- 1.5 Phased Condominium Corporations
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 - 1.5.16. Termination of Agreements
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1.5.1. What is a Phased Condominium Corporation?

A phased condominium corporation is, in essence, a special type of freehold condominium of the standard type (*section 6(1) and (2)*) and (*section 49(2) of regulation 48/01*). What sets it apart from standard condominiums (other than the nomenclature) is that the property of the corporation is anticipated to change subsequent to the initial registration to encompass new units and/or common elements developed in a subsequent phase or phases. Should such actual enlargement not occur (with the result that the property remains in the form in which it was originally registered) the corporation remains known as a phased condominium.

A phased condominium corporation cannot be a vacant land or common elements condominium or, for the obvious reason that the title must be freehold, a leasehold condominium corporation (*section 145(1)(a) and (b)*).

The phased condominium corporation overcomes a shortcoming in the old condominium regime in Ontario caused by the requirement in the old Act that all buildings and structures in the condominium property be completed before the condominium could be created/registered. The conundrum presented by this requirement is illustrated by the hypothetical example of a development consisting of thirty separate buildings each containing eight townhouse style dwellings/units. The market for these units would allow them to be absorbed at the rate of 40 units per year.

The developer can economically construct the buildings one at a time (i.e. eight units) and, accordingly, the construction could proceed at the pace of 5 buildings per year (40 units) for six years in order to complete development. If this phased construction was intended to result in an project under the umbrella of a single condominium corporation, final closings of units could not take place for, in the case of the initial units for example, five to six years after the purchasers took up interim occupancy. A work around to this conundrum was available, but it was complicated and cumbersome, with legal frailties associated with it²⁸ and, in any event, required the eventual creation of more than one condominium corporation. While it served the purpose of allowing final closings to take place before construction was complete, it left an administration that was unduly (in light of the present legislation) burdensome.

The *Condominium Act* specifically relieves a declarant from constructing phases subsequent to the first and this must be stated in the disclosure statement (*section 147(1)(b)*). To avoid ‘stranding’ an early phase without necessary services and facilities planned for a later (unimplemented) phase, the *Condominium Act* requires that each phase have all facilities and services in place to ensure the independent operation of the corporation if no subsequent phases are created (*section 146(8)*). As an alternative, the declarant can post a bond or other security sufficient to ensure the installation or provision of the uncompleted work (*section 146(9)*) in the event subsequent phases do not proceed.

It is to be noted that phases subsequent to the first are not subject to the process set out in *section 107* of the *Condominium Act* (declaration amendment) (*section 146(7)*).

Phases subsequent to the first must be registered within 10 years of the creation of the corporation (*section 55 of 48 of 01*).

1.5.2. Conditions on the Creation of Phased Condominium Corporation

To be approved and registered a phased condominium corporation must meet the following criteria:

1. It cannot be a vacant land or common elements condominium (*section 145(1)(b)*);
2. It must be a freehold condominium (*section 145(1)(a)*) of the standard type(*section 49(2) of regulation 48/01*);
3. Both the condominium property and the land which will, or may, be brought into it in subsequent phases (referred to as the ‘servient lands’ (*section 47 of 48 of 01*)) must be located entirely within the boundaries of one land titles division, the *Land Titles Act* must be applicable to both, and the declarant must be registered as owner of both with absolute title;

or,

the property must be located entirely within the boundaries of one registry division, the *Registry Act* must be applicable to the entire property, and the declarant must hold a certificate of title issued within the previous ten years under Part 1 of the Certification of Titles Act (*section 48(2)(a) and (b)*).

1.5.3. Contents of Initial Declaration for a Phased Condominium Corporation

As with all condominiums, a phased condominium corporation is created with the registration of a declaration and description that applies to certain lands. These initial condominium documents will anticipate subsequent phase(s), but otherwise will have the contents required of any declaration. As set out below, additional requirements and criteria apply to registrations related to phases subsequent to the first.

In the case of the initial declaration the following applies:

1.5.3.1. Prohibitions

²⁸ **026**-Amberwood Investments Limited et al. v. Durham Condominium Corporation No. 123 (2000) [mutual use agreement, positive covenants do not run with land]

A declaration shall not,

- contain provisions requiring an owner, a future owner or anyone on the owner’s or future owner’s behalf to consent in writing to an amalgamation; or
- contain provisions relating to an amalgamation. (section 7(1)).

1.5.3.2. Requirements

A declaration must:

- contain the information required by *section 7(2)* , namely:
 - a statement that the *Condominium Act* governs the land and interests appurtenant to the land, as the land and the interests are described in the description;
 - the consent of every person having a registered mortgage against the land or interests appurtenant to the land, as the land and the interests are described in the description;
 - a statement of the proportions, expressed in percentages, of the common interests appurtenant to the units;
 - a statement of the proportions, expressed in percentages allocated to the units, in which the owners are to contribute to the common expenses;
 - an address for service, a municipal address for the corporation, if available, and the mailing address of the corporation if it differs from its address for service or municipal address;
 - a specification of all parts of the common elements that are to be used by the owners of one or more designated units and not by all the owners;
 - a statement of all conditions that the approval authority, in approving or exempting the description under section 9, requires the declaration to mention;

It must also:

- be executed by the declarant (5(1)(a));
- meet the execution requirements for registration of a transfer/deed of land under the *Land Titles Act* or the *Registry Act*, as the case may be (5(1)(b));
- have the statement on the first page of the declaration that the registration of the declaration and description will create a standard condominium corporation that is a phased condominium corporation; (section 49(2));
- contain schedules known as Schedules A, B, C, D, E, F, G (schedule G is included only if the declaration and description show that there are buildings, structures, facilities or services included in the common elements (section 5(1)(d) and section 56(5)), and H (56(1)(c)).

1.5.3.3. Contents of Schedules

Contents of Schedule A

This schedule must contain:

- a description of the land and interests appurtenant to the land intended to be governed by the *Condominium Act*, including a description of every easement, as shown on the description that, upon the registration of the declaration and description, will be appurtenant to the land or to which the land will be subject (5(2)(a)); and

- a statement signed by the solicitor registering the declaration:
 1. that in his or her opinion, based on the parcel register or abstract index and the plans and documents recorded in them, that
 - (i) the legal description is correct,
 - (ii) the easements mentioned in the description will exist in law upon the registration of the declaration and description, and
 - (iii) the declarant is the registered lessee of the land and appurtenant interests (5(2)(b)).
 2. setting out a legal description of the lands that will be the servient lands and stating that the legal description is a legal description of the servient lands (section 49(3)).

Contents of Schedule B

This schedule must contain:

- the consent under *section 7(2)(b)* of the *Condominium Act*, in Form 1 to 48 of 01, of every person having a registered mortgage against the land or interests appurtenant to the land, or the servient lands, as the land and the interests and the servient lands are described in the description (5(3) and section 49(4)).

Contents of Schedule C

This schedule must:

- specify the boundaries of each unit by reference to the buildings or monuments mentioned in sections 6(4), (5) and (6) of *Regulation 49/01*;
- fully describe the monuments mentioned in sections 6(4), (5) and (6) of *Regulation 49/01* and the relationship of the boundaries of the units to them;
- contain a statement signed by an Ontario land surveyor licensed under the *Surveyors Act* certifying that the written description of the monuments and boundaries of the units accurately corresponds with the diagrams of the units described in *section 8(1)(d)* of the *Condominium Act* and shown on the plans of survey of the description prepared in accordance with *Regulation 49/01*. (section 5(4)).

Contents of Schedule D

This schedule must contain:

- a statement of the proportions, expressed in percentages totalling 100 per cent, of the common interests appurtenant to the units; and
- a statement of the proportions, expressed in percentages totalling 100 per cent, allocated to the units, in which the owners are to contribute to the common expenses (section 5(5)).

Contents of Schedule E

This schedule must contain:

- a statement specifying the common expenses of the corporation or may be left blank if the declarant so elects (section 5(6)).

Contents of Schedule F

This schedule must contain:

- a specification of all parts of the common elements that are to be used by the owners of one or more designated units and not by all the owners or shall indicate that there are no such parts if that is the case (section 5(7)).

Contents of Schedule G

This schedule must contain:

- a certificate, in **Form 2**, of an architect certifying that all buildings on the property have been constructed in accordance with the regulations made under the Act, with respect to all or some matters listed in the paragraphs of the definition of “has been constructed” in section 6(1);

or

- one or more certificates of an engineer, in **Form 2**, certifying that all buildings on the property have been constructed in accordance with the regulations made under the Act, with respect to all or some matters listed in the paragraphs of the definition of “has been constructed” in section 6(1).

Definition of ‘Has Been Constructed’

“has been constructed” means, with respect to each building on the property, constructed at least to the following state:

- The exterior building envelope, including roofing assembly, exterior wall cladding, doors and windows, caulking and sealants, is weather resistant if required by the construction documents and has been completed in general conformity with the construction documents.
- Floor assemblies are constructed to the sub-floor except where the units are intended for non-residential purposes that are not ancillary to units intended for residential purposes, the lowermost floor does not have to be in place if it is at grade.
- Walls and ceilings of the common elements, excluding interior structural walls and columns in a unit, are completed to the drywall (including taping and sanding), plaster or other final covering except where the units are intended for non-residential purposes that are not ancillary to units intended for residential purposes, wall or ceiling coverings, interior perimeter doors, interior partitions or walls between units or between units and common elements do not have to be in place
- All underground garages, if any, have walls and floor assemblies in place.
- All elevating devices, if any, as defined in the *Elevating Devices Act*, are licensed under that Act if it requires a licence, except for elevating devices contained wholly in a unit and designed for use only within the unit.
- All installations with respect to the provision of water and sewage services are in place.
- All installations with respect to the provision of heat and ventilation are in place and heat and ventilation can be provided.
- All installations with respect to the provision of air conditioning, if any, are in place.
- All installations with respect to the provision of electricity are in place.
- All indoor and outdoor swimming pools, if any, are roughed in to the extent that they are ready to receive finishes, equipment and accessories.
- The boundaries of the units are completed to the drywall (not including taping and sanding), plaster or other final covering, and perimeter doors are in place except where the units are intended for non-residential purposes that are not ancillary to units intended for residential purposes, wall or ceiling coverings, interior perimeter doors, interior partitions or walls between units or between units and common elements do not have to be in place

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1.5.3.4. Other Contents of the Declaration

A declaration may contain,

- (a) a statement specifying the common expenses of the corporation;
- (b) conditions or restrictions with respect to the occupation and use of the units or common elements²⁹;
- (c) conditions or restrictions with respect to gifts, leases and sales of the units and common interests³⁰;
- (c) a list of the responsibilities of the corporation consistent with its objects and duties³¹;
- (d) a description of the allocation of obligations to maintain the units and common elements and to repair them after damage, which allocation has been done in accordance with the *Condominium Act* (section 7(4)); and
- (e) schedules in addition to the schedules required by *regulation 48 of 01* (section 5(10)), for example dealing with any of the above matters.

1.5.4. Contents of a Description for a Phased Condominium Corporation

A description of a phased condominium shall not be registered unless the property includes common elements (section 8(3)(a)) and each unit for residential purposes includes one or more buildings or is included in a building (section 8(3)(b)).

The description of a phased condominium corporation shall contain:

- a plan of survey showing the perimeter of the horizontal surface of the land and the perimeter of the buildings (section 8(1)(a));
- structural plans of the building provided that if the description contains the structural plans described in section 8(1)(b) of the *Condominium Act* and Schedule G to the declaration does not contain the certificate of the architect under section 5(8)(a) (certifying completion), the description shall not contain the architectural plans referred to in section 8(1)(b) (section 9(2)).

²⁹ **266** Peel Condominium Corporation No. 11 and Caroe et al. (1974) [declaration cannot prohibit renting of unit to third party]

360-York Condominium Corp. No. 216 v. Borsodi et al. (1983) (age restriction valid)

189-Metropolitan Toronto Condominium Corp. No. 624 v. Ramdial and Salmon (1988) [age restriction valid]

377 York Condominium Corporation No. 216 v. Dudnik (Div. Ct.) (1991) [provision restricting occupant's age invalid, discrimination on the basis of family status]

214 Niagara North Condominium Corp. No. 7 v. Goodhew (1997) [requirement to obtain approval for changes to units which impair value of other property has no application to air-conditioner unit]

207 Metropolitan Condominium Corp. No. 699 and 1177 Yonge Street Inc.(Re) (1998) [provision in declaration prohibiting conveyance of parking unit to non-unit owner does not prevent leasing to others]

³⁰ **266**-Peel Condominium Corporation No. 11 and Caroe et al. (1974) [a declaration cannot prohibit the renting of a unit by an owner].

207 Metropolitan Condominium Corp. No. 699 and 1177 Yonge Street Inc.(Re) (1998) [provision in declaration prohibiting conveyance of parking unit to non-unit owner does not prevent leasing to others]

³¹ **065 and 070** Carleton Condominium Corp. No. 441 v. Owners et al. of Carleton Condominium Plan No. 441(1997/1998) [declaration provisions dealing with shared facilities on external lands proper, court will not order amendment to delete same]

- a specification of the boundaries of each unit by reference to the buildings or other monuments (*section 8(1)(c)*).
- Diagrams showing the shape and dimensions of each unit and the approximate location of each unit in relation to the other units and the building (*section 8(1)(d)*).
- a certificate signed by an Ontario land surveyor licensed under the Surveyors Act stating that the diagrams of the units are substantially accurate (*section 8(1)(f)*).
- In addition to all other material that it is required to contain, a description shall contain a description of all easements and similar interests to which the property is subject and a description of the interests appurtenant to the property. These descriptions shall be combined and shall be in Form 3 (*section 9(4)* and *9(5)* and *section 8(1)(g)*).

The description shall not (despite *section 145(1)(d)* of the *Condominium Act*) contain a description of the servient lands (*section 50 of 48 of 01*).

1.5.6. Disclosure Statement

In addition to the usual requirements of the *Condominium Act* for the contents of disclosure statements³²(as set out in *section 72(3)*), a phased condominium’s disclosure statement (whether for the first or subsequent phases) must include:

- 1) the statement that no amendments creating a phase will be registered more than 10 years after the date of the original registrations that created the corporation (*section 55 of 48 01*).
- 2) a statement whether the declarant intends to create one or more phases after the creation of the unit or proposed unit;
- 3) a statement that the declarant is not required to create a phase after the creation of the unit or proposed unit;
- 4) a statement that sets out the projected year of registration of the amendments to the declaration and description required for creating each phase that the declarant intends to create after the creation of the unit or proposed unit;
- 5) a statement that sets out, for each phase that the declarant intends to create after the creation of the unit or proposed unit,
 - (i) the approximate number of the units included in the phase and a legal description of the land included in the phase,
 - (ii) the approximate location of the buildings and structures to be contained in the phase and a description of the facilities and services to be contained in the phase,
 - (iii) a statement of the proportions, expressed in percentages, of the common interests and common expenses attributable to the units after the creation of the phase,
 - (iv) a statement of the facilities and services that the owners will share after the creation of the phase, and
 - (v) a statement that there are no representations with respect to the quality of materials or appearance of buildings other than those specifically set out as representations in the disclosure statement (*section 147*).

1.5.6. Special Allowance for Variance in Size of Phase

Flexibility is provided for the magnitude of phases by stipulating that a change in the number of units/legal description in a phase (and a consequential change in the proportions of common interests and expenses) is not a

³²See chapter 3.1.2.

‘material change’ under *section 74* of the *Condominium Act*. Accordingly, there is no obligation on the declarant to provide notice of changes and no right of rescission to purchasers (*section 147(2)*).

1.5.7. Creating a Second and Subsequent Phases

Although as a general matter it is in the declarant’s discretion to time the registration of subsequent phases, there are procedural steps which must be followed which ensure that the enlargement of the phased condominium is on due notice to the corporation. Amendments to descriptions are subject to the provisions of the *Planning Act* regarding application and approval (*section 9(2)*).

The following essential criteria must be satisfied before a phase subsequent to the first can be registered:

- no more than 10 years shall have passed since the original declaration was registered (*section 51(h)*);
- the phase must contain at least one unit (*section 51(d)*);
- at least 60 days shall have passed since the original declaration, or last amendment thereto, was registered (*section 51(f)*);
- at least 60 days shall have passed since the declarant delivered to the corporation the following:
 1. a copy of the disclosure statement last delivered to a purchaser of a unit;
 2. a copy of the proposed amendments to the declaration and description for creating a phase; and,
 3. a statement specifying all differences between the proposed amendments to the declaration and description required for creating the phase and the following matters with respect to the phase that were described in the disclosure statement (item 1 above):
 - the location of buildings and structures and facilities and services in a phase (*section 147(1)(d)(ii)*) and facilities and services shared after a phase (*section 147(1)(d)(iv)*).
 - the proportions of common interests and common expenses after the phase (*section 147(1)(d)(iii)*) if they differ from the proposed amendments to the declaration and description required for creating the phase for a reason other than a change in the number of units included in the phase. (*Section 149(1)(c)*)
- 60 days must have passed since the documents described above were delivered to the corporation and the corporation must not, in the meantime, have made an application to court to enjoin the new phase (an application which is permitted if the differences described in item 3 above are material and detrimentally affect the corporation or the use and enjoyment of the property by the owners (*section 149(2)*))
- All facilities and services have been installed or provided as the municipality/Minister determines are necessary to ensure the independent operation of the corporation if no subsequent phases are created (*section 146(8)*), unless the municipality/Minister agree to accept a bond or other security that is sufficient to ensure the installation or provision of the facilities and services (*section 146(9)*).

1.5.7.1. Contents of Amendment to Declaration

Since the registration of a subsequent phase will involve the enlargement of the property, the addition of architectural and/or structural plans of the new buildings, and so forth, an amendment to the declaration to create/incorporate a new phase will involve replacing or amending all or some of the seven schedules to the declaration and the addition of a new schedule (‘K’). Form 19 to *regulation 48 of 01* is the prescribed form for such an amendment and provides for the inclusion/addressing of the following as made mandatory by *section 52 of 48 of 01*.

- 1) it is to be executed by the declarant;
- 2) it must meet the execution requirements for registration of a transfer/deed of land under the *Land Titles Act* or the *Registry Act*, as the case may be;
- 3) it must contain a statement that at least 60 days have passed since the declarant delivered to the corporation the documents described in *section 149(1)(a), (b), and (c)* of the Condominium Act;
- 4) it must contain a statement setting out the date on which the board was elected at a meeting of owners and stating that,
 - i. the meeting was held at a time when the declarant did not own the majority of the units,
 - ii. more than 60 days have passed since the registration of the declaration and description that created the corporation or the registration of the latest amendments to the declaration and description creating a phase, whichever is the later, and
 - iii. there is no outstanding application to the Superior Court of Justice for an injunction under *section 149 (2)* of the *Condominium Act* and the Superior Court has not issued an injunction to prevent the registration of the amendments creating the phase;
- 5) it provides for the replacement/amendment/addition of schedules.

The following describes the contents of the schedules for the amendment to the description:

Contents of Schedule A

The required contents of the replacement to Schedule A to the existing declaration (to be attached to Form 19 – The Amendment) are:

- (a) the description of the property that was included in Schedule A to the declaration, as originally registered, except for the easements that will merge and no longer exist in law upon the registration of the amendment to the declaration and that are described in the Schedule as required by *section 52 (e)(i)*, and the description shall be identified as “FIRSTLY” or “PREMIÈREMENT”;
- (b) the descriptions, in order of their registration, of all phases that have already been created, as described in amendments to Schedule A to the declaration, except for the easements that will merge and no longer exist in law upon the registration of the amendment to the declaration and that are described in the Schedule as required by *section 52 (e)(i)*, and the descriptions shall be identified consecutively starting with “SECONDLY” or “DEUXIÈMEMENT”;
- (c) a legal description, identified with the next consecutive ordinal number, of the land included in the phase and interests appurtenant to the land intended to be governed by the Act, including a description of every easement, as shown on the amendment to the description that, upon the registration of the amendments to the declaration and description, will be appurtenant to the phase or to which the phase will be subject;
- (d) a statement signed by the solicitor registering the amendment to the declaration that sets out a legal description of the lands that will be the servient lands, if any, and that states that, in his or her opinion, based on the parcel register or abstract index and the plans and documents recorded in them,
 - (i) the legal description mentioned in above is correct,

- (ii) the easements mentioned in the legal description will exist in law upon the registration of the amendment to the declaration and description creating the phase,
- (iii) the legal description of the land that will be the servient lands is set out in the solicitor’s statement, and
- (iv) the declarant is the registered owner of the land included in the phase and interests appurtenant to the land; and
- (e) if there are easements that will merge and no longer exist in law upon the registration of the amendment to the declaration, a statement signed by the solicitor registering the amendment to the declaration that,
 - (i) sets out a legal description of the easements and the most recent registered instrument number in which they are fully described, and
 - (ii) states that, in his or her opinion, based on the parcel register or abstract index and the plans and documents recorded in them, the easements will merge and no longer exist in law upon the registration of the amendment to the declaration. (*section 52(3)*)

Contents of Schedule B

This schedule must contain:

- the written consent, in Form 18 to 48 of 01, of all registered mortgages, consenting to the registration of the phase, and postponing the mortgage interest to the declaration and easements (*section 52(f)*).

Contents of Schedule C

This schedule must append/amend:

- the existing Schedule C, to add the material regarding unit boundaries, monumentation, and Ontario Land Surveyors certificate, respecting the lands in the phase (*section 52(g)*).

Contents of Schedule D

This schedule must contain:

- a statement of the proportions, expressed in percentages totalling 100 per cent, of the common interests appurtenant to the units in the corporation after the creation of the phase; and
- (b) a statement of the proportions, expressed in percentages totalling 100 per cent, allocated to the units in the corporation, in which the owners after the creation of the phase are to contribute to the common expenses.

Contents of Schedule E

This schedule must contain:

- any amendment to Schedule E (common expense allocation) consequent on the registration of the phase (*section 52(9(a))* and *(b)*).

Contents of Schedule F

This schedule amends Schedule F to the declaration to include:

- a specification of all parts of the common elements contained in the phase that are to be used by the owners of one or more designated units and not by all the owners or,

- a statement that there are no parts that are to be used by the owners of one or more designated units , and not by all, if that is the case;

Contents of Schedule G

This Schedule adds the following to the declaration,

- (a) the certificates, with respect to the land included in the phase, that sections 5(8) and 5(9) (certificates of the architect/engineer in Form 2, certifying the completion of construction of buildings) and section 6 (definition of ‘has been constructed’) require; and
- (b) a statement from any of the municipalities in which the land included in the phase is situated, or from the Minister of Municipal Affairs and Housing if the land is not situated in a municipality (or signed by a person authorized to bind the municipality or the Minister (section 52(6))), that,
 - (i) all facilities and services have been installed or provided as the person making the statement determines are necessary to ensure the independent operation of the corporation if no subsequent phases are created or
 - (ii) a bond or other security has been posted that is sufficient to ensure the independent operation of the corporation if no subsequent phases are created (section 52(5)).

Contents of Schedule K

Schedule K is added to the declaration and contains the following:

- (a) a statement of all conditions that the approval authority, in approving or exempting under section 9 of the Act the amendment to the description creating the phase, requires the amendment to the declaration to mention; or
- (b) a statement that there are no conditions described in clause (a), if that is the case (section 52(8)).

1.5.8. Contents of Amendment to Description

The amendment to the description of a phased condominium corporation required to accommodate a phase subsequent to the first, shall contain the following material prepared with respect to the phase:

1. a plan of survey showing the perimeter of the horizontal surface of the land and the perimeter of the buildings (section 8(1)(a));
2. structural plans of the building provided that if the description contains the structural plans described in section 8(1)(b) of the *Condominium Act* and Schedule G to the declaration does not contain the certificate of the architect under section 5(8)(a) (certifying completion), the description shall not contain the architectural plans referred to in section 8(1)(b) (section 9(2)).
3. a specification of the boundaries of each unit by reference to the buildings or other monuments (section 8(1)(c)).
4. diagrams showing the shape and dimensions of each unit and the approximate location of each unit in relation to the other units and the building (section 8(1)(d)).

5. a certificate signed by an Ontario land surveyor licensed under the Surveyors Act stating that the diagrams of the units are substantially accurate (*section 8(1)(f)*).
6. a description of all easements and similar interests to which the land included in the phase is subject (*section 53(3) of 48 of 01*) combined with a description of all interests appurtenant to the land (*section 53(4) of 48 of 01*)

Amendments to declarations descriptions to create phases are not subject to the process set out in *section 107* (owners vote etc.).

Amendments to the description are to be in Form 19 to *48 of 01* (*section 54(1)*).

1.5.9. Facilities and Services – Bonding for Uncompleted Work

As with the original phase it is a condition of registration of a subsequent phase that all facilities and services be installed or provided are determined to be necessary to ensure the independent operation of the corporation if no subsequent phases are developed (*section 146(8)*). Alternatively, a declarant may provide a bond or other security sufficient to ensure the installation of the facilities and services (*section 146 (9)*).

In the event a bond or security must be posted the following outlines the essential considerations and rules:

1. The municipality in which the land is situate (or the Minister of Municipal Affairs in the event the land is not in a municipality) must specify to whom the security is to be provided. It may be a person or a body, including the approval authority. The *Condominium Act* is not specific on which municipality makes the specification in the case of land which is in more than one municipality (for example, land in an local area municipality within a regional municipality). Presumably a specification by either would be reliable, although it is a moot question how the unlikely situation of two qualified municipalities designating two different security holders would be resolved.
2. The *Condominium Act* and regulations do not limit the identity or class of persons who may be specified to hold the security, and so the specification is essentially entirely within the discretion of the specifying municipality. Besides the approval authority, the holder could be a municipal official or an outside third party.
3. The bond or security must be ‘acceptable’ to the municipality (or Minister, if applicable). This provides flexibility in the form the security may take. For example, it could be simply in a cash amount which may drawn on by the holder to complete the work, or it may take the form of a construction bond which allows the bonding company to complete the work in the event of default. The security may also be a cash deposit, a letter of credit or guarantee, or a security backed by a mortgage on the property. The decision on the form is left to the discretion of the municipality which will, understandably, prefer a form which will be easy to administer, particularly in the event of default.
4. The security must be ‘sufficient to ensure’ completion, installation, and provision of the uncompleted work. This directive implies a minimum amount for the security (for example, if the estimated cost of completion is \$100,000.00, the security can/should never be less than \$100,000.00) but the ceiling is a gray area. Practically speaking it will be up to the municipality, in consultation with, among others, the declarant, to set an amount which ensures ‘sufficiency’. The amount could reflect the possibility of labour or materials cost increases, ‘extras’ in the completion process, the additional costs which will arise in the event of default and a new party having to pick up the direction of the work, and so forth. Given that the municipality, in setting the amount, owes a duty of care to the unit purchasers and corporation to ensure the amount is sufficient to ensure completion, prudence dictates that any error should be on the side of caution.
5. Although *section 146(9)* speaks of ‘bond or security’ in the singular, the security for a particular proposed condominium can be provided through two or more bonds/securities (*Interpretation Act*

Section 28 (j). It is also possible for different securities relating to the same proposal to be held by different persons/bodies.

6. A bond or security may be released in stages with the consent of the municipality/minister (*section 146(10)*). Such partial releases would be appropriate as work progresses on completing the construction. The reduced security amount must, in all cases, be sufficient to ensure completion.
7. The security shall not be released in full until all buildings, structures, facilities, or services, be completed, installed and provided in accordance with the regulations (*section 146(11)*) and the municipality/minister consents.

1.5.10. Deliveries Following on Registration of a Second or Subsequent Phase

Within fifteen days of registering the amendments to the declaration and description creating a phase the declarant must:

1. Send to the corporation a copy of the most current disclosure statement delivered to a purchaser (*section 147(5)*) and a copy of the amendments (*section 150(1)*);
2. Send to each owner (i.e. not only the owners in the new phase) a copy of the amendments (*section 150(1)*).

1.5.11. Declarant’s Liability to Owners

Any person who purchased a unit or proposed unit before registration of the amendments is given a statutory right to damages if there are any material differences, which detrimentally affect the use and enjoyment of the person’s unit, between the following matters as disclosed in the disclosure statement they received and the registered amendments:

- (a) the approximate location of the buildings and structures in the phase and the facilities and services in the phase;
- (b) the facilities and services that the owners share after the creation of the phase (*section 150(2)1.*)
- (c) the proportions of the common interests and common expenses attributable to the units after the creation of the phase (provided the difference is not due to a change in the number of units in a phase (*section 150(2)*)).

The right to damages may be ordered by the court on application of the entitled owner (*section 150(3)*).

1.5.12. Easements Over Servient Lands

The *Condominium Act* imposes certain easements, where necessary, on the servient lands for the benefit of the units and common elements, upon registration of the first phase (*section 151*). These easements must be necessary (i.e. an easement for access to public roads would not imposed on servient lands if the corporation gains access to public roads directly from the condominium property; although access to a public road over the servient lands may be useful, in such a case it is not necessary) and must be included in the following description:

1. An easement for the provision of services over the servient tenement.
2. An easement for support from the servient tenement.
3. An easement for access to and for the installation and maintenance of the services and facilities that the corporation is entitled to use over the servient tenement.
4. An easement for access to public roads over the servient tenement.

These easements continue on the servient lands (as they exist after registration of each phase) until all phases are registered.

1.5.13. Turn-over Obligations

The requirement that the Board of Directors elected/appointed by the Declarant call a meeting within 21 days (and hold it within 21 days thereafter) after the declarant ceases to own a majority of units (in order to elect a new board) applies to phased condominiums. The turnover obligations in *section 43(4)* (turning over the seal, minute books, records etc.) also apply with the additional requirement that a copy of the statements described in *section 147(1)* (i.e. timing of creation of phases, approximate number of units in the phases etc.) is to be provided (*section 152(1(a))*).

On registration of each subsequent phase, the declarant must provide to the Board all of the items mentioned in *section 43(4)*, the statements described in *section 147(1)*, and the material in *section 43(5)* (i.e. warranties, as-built specifications, site servicing plans etc.) that relate to the phase (*section 152(2)*). Should the declarant fail to comply with this turnover obligation for a phase, on application of the corporation the court can order compliance and, in addition, award damages, costs, and a penalty of up to \$10,000.00 (*section 152(5)*).

1.5.14. Change of Board Consequent on Registration of a New Phase

The Board of Directors appointed by a declarant on registration of a condominium must call a meeting to replace the Board after the declarant ceases to own a majority of the units (*section 43*). In the case of a phased condominium corporation it is possible, depending on the number of units in successive phases, for a new board to be elected and, due to the registration of a new phase, the declarant once again comes to own a majority of units in the condominium. In order to allow the declarant to again have its directors on the board, *section 152(6)* obliges the board, on request of the declarant, to call a meeting of owners to elect a new board until, once again, the declarant ceases to own a majority of units and a new board is elected under *section 43*.

1.5.15. Performance Audit, Financial Statements, and Reserve Fund Study

A performance audit of the common elements contained in a (each) phase must be carried out by the board if the respective phase contains one or more units for residential purposes (*section 153(1)*).

The financial statements required by *section 66(2)* must be prepared within 90 days of the registration of a phase (*section 153(3)*).

A reserve fund study must be conducted on each phase within the usual time frames and otherwise in accordance with *section 94 (section 153(4))*.

1.5.16. Termination of Agreements

Agreements affecting property in a phase may be terminated subject to the following:

- termination of a property management agreement entered into by the declarant on the corporation's behalf and relating to a phase requires 60 days notice of termination (*section 154(1) and (2)*);
- termination of any of the following agreements entered into by the declarant on the corporation's behalf and relating to a phase require 60 days notice of termination and must be terminated within 12 months following the first election of an owner's board under *section 43 (section 154(3) and (4))*:
 1. An agreement for the provision of goods or services on a continuing basis.

2. An agreement for the provision of facilities to the corporation on other than a non-profit basis.
 3. A lease of all or part of the common elements for business purposes;
- termination of an agreement with the declarant for the mutual use, provision or maintenance or cost-sharing of facilities or services must be terminated by court order made within 12 months following the first election of an owner's board under *section 43 (section 154(5))* on application of the corporation. The court may only order termination of such as agreement if there was inadequate disclosure of the agreement or the agreement is oppressive or unconscionable (*section 154(5) and (6)*).

1.5.17. Status Certificate

In addition to the usual requirements of *section 76(1)* of the *Condominium Act* dealing with the contents of status certificates, in the case of a phased condominium until such time as all of the phases are complete and the declarant has disposed of ownership of all units (except a telecommunications unit), a phased condominium's disclosure statement must include a copy of the disclosure statement relating to the last phase registered (*section 148*).

1.6 AMALGAMATING CONDOMINIUM CORPORATIONS

1.6 AMALGAMATING CONDOMINIUM CORPORATIONS

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The ability to amalgamate condominium corporations was not available under the old legislative regime and its introduction in the new *Condominium Act* provides flexibility that will prove advantageous in the appropriate circumstances.

The result of a corporate amalgamation in the business world is similar to the condominium amalgamation process: Two (or more) business corporations merge to become one, with the shareholders of both becoming shareholders in the amalgamated corporation based on agreed ratios of value. The assets and liabilities of the original corporations become the assets and liabilities of the amalgamated corporation. The principle is the same with condominium amalgamations. Two (or more) condominium corporations amalgamate to become one, with the unit owners in both becoming unit owners in the amalgamated condominium corporations, with fixed proportional interests in the common elements and common expense obligations. While the reasons and purposes behind amalgamations may be myriad in the business corporate world, for condominium corporations amalgamations will likely be spurred by the objectives of achieving economies of scale and efficiencies of administration, whether through sharing facilities or otherwise.

It should be emphasized that amalgamations are not a device that a declarant/developer will find to be of unqualified use (at least with any reliability of outcome) in a project setting. Declarations cannot contain provisions requiring a unit owner or future owner to consent to an amalgamation, or any other amalgamation provisions (*section 7(1)* of the *Condominium Act*). Amalgamations must be consented to in writing by at least 90% of the owners of each amalgamating corporation. These consents must be obtained during (and not before) the 90 days of the happening of a meeting called to consider the draft amalgamation documents. While a declarant may conceivably contract with a unit purchaser to oblige the owner to consent, the obligation would not extend to a successor in title unless the latter personally joins in the contract.

1.6.1. Conditions to the Amalgamation of Two or More Condominium Corporations

Although the *Condominium Act* authorizes two or more leasehold condominium corporations, or two or more freehold condominium corporations of the same type, to amalgamate (*section 120(1)*), *regulation 48 of 01* limits amalgamations to standard freehold condominiums only; this includes both standard freehold corporations created as such, or condominium corporations created as phased condominium corporations (*section 34(1)(a)*). In addition, the following criteria must be satisfied:

- If any or all of the amalgamating corporations is a phased condominium corporation, all phases must be completed or more than ten years must have passed since the first registration (in which case no further phases are possible (*section 34(1)(b)*);

- All amalgamating corporations must have held their respective turnover meeting under *section 43* of the *Condominium Act* (with the resulting implication that the declarant owns less than 50% of the units in the respective corporation) (*section 34(1)(c)*);
- All amalgamating corporations must have conducted a comprehensive reserve fund study or updated study based on site inspection in the year previous to the calling of the owners meeting (*section 120(3)*) to consider the amalgamation documents (*section 34(1)(d)*);
- The amalgamating corporations must have entered into an interim agreement with each other dealing with the conduct of the affairs of each corporation from the calling of the owners meeting until amalgamation or the decision not to proceed with the amalgamation (*section 34(1)(e)*);
- Within 90 days of calling a meeting of owners to consider the amalgamation documents, 90% of the owners of each amalgamating condominium must consent in writing to the amalgamation (*section 120(1)(b)*).
- The property of the amalgamated corporation must be within the boundaries of one land titles division and the *Land Titles Act* must be applicable to the property; or, the property must be entirely within the boundaries of one registry division and the *Registry Act* applies to the entire property (*section 35(2)*);
- The property after amalgamation shall consist only of the property of each of the amalgamating corporations and there is to be no change in the boundaries of the units of each of the amalgamating corporations (*section 36(3)(b)*).

1.6.2. The Amalgamation Agreement

The interim agreement dealing with the conduct of the affairs of each corporation pending the outcome of the amalgamation must deal with matters including:

- expenditures from the reserve fund;
- borrowing of funds;
- making, amending or repealing by-laws;
- entering into new contracts;
- initiation of any legal proceedings;
- any substantial addition, alteration, or improvement to the common elements;
- any substantial change in the assets of the corporation; and,
- any substantial change in a service that the corporation provides to the owners (*section 34(2)*).

While the *Condominium Act* does not specify whether the agreement must be entered into before or after the owners have voted on the amalgamation, *regulation 48 of 01, section 34(4)* requires the notice of the owner's meeting to include a copy of the agreement. Accordingly, by default the agreement must be settled before the owners approval process is set in motion. The contents of an amalgamation agreement between corporations will require careful consideration. An objective will be to ensure that the conditions, financial and otherwise, which existed or could be predicted to exist at the time the agreement is settled, are unchanged at the time of amalgamation (or, if changed, are changed in a predictable way), so that the premises behind the amalgamation are constant to the date amalgamation takes place. The agreement need not be complicated and, considering that the factors which are to be addressed may, at least in the case of a standard condominium, be relatively straightforward. Caution must be taken to consider the agreements provisions in light of the legislation and the condominium documents and ensure there are no conflicts as the agreement must not contravene the legislation or the declaration, by-laws, or rules of each of the amalgamating corporations (*section 34(3)*). Promises received and given must be within corporate authority.

The agreement may be authorized by board resolution and should express the condition that it is subject to owner's approval.

1.6.3. Owners Meeting

Prior to amalgamation each corporation must call a meeting of owners for the purpose of considering a declaration and description amalgamating the corporations (*section 120(2)*). The notice requirements of *section 47*, including the 15 day notice period will apply, while the contents of the notice must include the following:

1. a copy of the proposed declaration and description of the amalgamated corporation and a copy of the proposed budget for the corporation’s first year of operation;
2. a copy of all proposed by-laws and rules of the amalgamated corporation;
3. a certificate as to the status for each amalgamating corporation in the form prescribed by the Minister;
4. for each amalgamating corporation, the auditor’s report on the last annual financial statements of the corporation, if it is not included in the certificate of status described above; and
5. a copy of the comprehensive reserve fund study or the updated study based on a site inspection that the corporation is required to conduct under *section 34(1)(d)* of *48 of 01*;
6. a copy of the interim agreement between the corporations;
7. an estimate of the costs of carrying out the proposed amalgamation for each of the amalgamating corporations (*section 34(4)(c)*); and
8. one of the following statements:
 - a) A statement describing the provisions of the proposed declaration, description, by-laws and rules that, in the opinion of the board giving the notice, differ significantly from those contained in the declaration, description, by-laws and rules of the amalgamating corporation.
 - b) A statement that there are no provisions in the proposed declaration, description, by-laws and rules that, in the opinion of the board giving the notice, differ significantly from those contained in the declaration, description, by-laws and rules of the amalgamating corporation (*section 34(4)(a) to (d)*).

1.6.4. Owner’s Consent

At least 90% of the unit owners of each corporation must consent in writing to the amalgamation within 90 days of the holding of the meeting referred to above (*section 120(1)(b)*). *Section 34(5)(a)* of *48 of 01* prohibits the consents from being executed prior to the meeting, although there is no restriction against canvassing for future support. If the required votes are not obtained the amalgamation must fail (and either be abandoned or be the subject of a fresh amalgamation process).

The consent must be executed by:

- a) if the owner is an individual, the owner,
- b) if the owner is a corporation, the persons authorized to bind the corporation, or
- c) if a mortgagee is entitled to execute the consent in the place of the owner under *section 48* of the *Condominium Act*, the individual mortgagee or, if the mortgagee is a corporation, the persons authorized to bind the corporation (*section 34(5)(b)*).

1.6.5. Contents of a New Declaration for an Amalgamated Condominium Corporation

1.6.5.1. Prohibitions

A declaration shall not,

- contain provisions requiring an owner, a future owner or anyone on the owner’s or future owner’s behalf to consent in writing to an amalgamation (section 7(1)(a) and 36(13)).

1.6.5.2. Requirements

A declaration must;

- Contain the information required by *section 7(2)* (except 7(2)(b), see 36(6)), namely:
 - a statement that this Act governs the land and interests appurtenant to the land, as the land and the interests are described in the description;
 - a statement of the proportions, expressed in percentages, of the common interests appurtenant to the units;
 - a statement of the proportions, expressed in percentages allocated to the units, in which the owners are to contribute to the common expenses;
 - an address for service, a municipal address for the corporation, if available, and the mailing address of the corporation if it differs from its address for service or municipal address;
 - a specification of all parts of the common elements that are to be used by the owners of one or more designated units and not by all the owners;
 - a statement of all conditions that the approval authority, in approving or exempting the description under section 9, requires the declaration to mention (*section 7(2)(a), (c) to (g)*);

It must also:

- be executed by the officers of each amalgamating corporation who are duly authorized to sign on behalf of the corporation (section 36(3)(a) and *section 120(4)*);
- contain only the property of the amalgamating corporations and there must be no change in the unit boundaries (section 36(3)(b));
- contain a statement on it’s first page that the registration of the declaration and description will create a standard condominium corporation (section 5(1)(c)) (it must in no case describe the amalgamated corporation as a phased condominium corporation (section 36(4));
- meet the execution requirements for registration of a transfer/deed of land under the *Land Titles Act* or the *Registry Act*, as the case may be (5(1)(b));
- contain schedules known as Schedules A, C, D, E, and F (*section 5(1)(d)*) (there is no schedule B (section 36(6)) and schedule G is not applicable (section 36(11));
- contain a statement by the persons authorized to bind each of the amalgamating corporations that their corporation has complied with section 120 of the Act and the regulations made under the Act (section 36(12)); and
- contain a statement by the persons authorized to bind each of the amalgamating corporations that is a phased condominium corporation, that all phases have been completed or more than 10 years have passed since the registration of the declaration and description that created the amalgamating corporation (section 36(12)).

1.6.5.3. Contents of Schedules

Contents of Schedule A

This schedule must contain:

- a description of the land and interests appurtenant to the land intended to be governed by the Act, including a description of every easement, as shown on the description that, upon the registration of the declaration and description, will be appurtenant to the land or to which the land will be subject; and
- a statement signed by the solicitor registering the declaration that, in his or her opinion, based on the parcel register or abstract index and the plans and documents recorded in them, that
 - (i) the legal description is correct,
 - (ii) the easements mentioned in the description will exist in law upon the registration of the declaration and description,

and

in the event there are easements that merge and no longer exist in law upon the registration of the declaration and description, the statement of the solicitor shall:

- set out a legal description of the easements and the most recent registered instrument number in which they are fully described and shall contain a statement that the easements will merge and no longer exist in law upon the registration of the declaration and description (section 36(5))

Contents of Schedule B

[Schedule B is not required (section 36(6))]

Contents of Schedule C

This schedule must:

- specify the boundaries of each unit by reference to the buildings or monuments mentioned in subsections 6 (4), (5) and (6) of Ontario Regulation 49/01;
- fully describe the monuments mentioned in subsections 6 (4), (5) and (6) of Ontario Regulation 49/01 and the relationship of the boundaries of the units to them;
- contain a statement signed by an Ontario land surveyor licensed under the *Surveyors Act* certifying that the written description of the monuments and boundaries of the units accurately corresponds with the diagrams of the units described in clause 8 (1) (d) of the Act and shown on the plans of survey of the description prepared in accordance with Ontario Regulation 49/01 and shall certify that that the lists described in clauses (7) (a) and (b) are accurate and complete (section 36(8));
- contain a list indicating all units in the amalgamating corporations and what units they will become in the amalgamated corporation (section 5(4)); and
- contain a list indicating all units in the amalgamated corporation and what units they were in the amalgamating corporations. and shown on the plans of survey of the description prepared in accordance with Ontario Regulation 49/01 (section 36(7)(a) and (b))

Contents of Schedule D

This schedule must contain:

- a statement of the proportions, expressed in percentages totalling 100 per cent, of the common interests appurtenant to the units; and
- a statement of the proportions, expressed in percentages totalling 100 per cent, allocated to the units, in which the owners are to contribute to the common expenses (section 5(5)).

Contents of Schedule E

This schedule must contain:

- a statement specifying the common expenses of the corporation or may be left blank if the declarant so elects (*section 5(6)* and *section 36(9) and (10)*).

Contents of Schedule F

This schedule must contain:

- a specification of all parts of the common elements that are to be used by the owners of one or more designated units and not by all the owners or shall indicate that there are no such parts if that is the case (*section 5(7)*).

1.6.5.4. Other Contents of a Declaration

In addition to the material mentioned above a declaration may contain,

- a statement specifying the common expenses of the corporation;
- conditions or restrictions with respect to the occupation and use of the units or common elements³³;
- conditions or restrictions with respect to gifts, leases and sales of the units and common interests³⁴;
- a list of the responsibilities of the corporation consistent with its objects and duties³⁵; and
- a description of the allocation of obligations to maintain the units and common elements and to repair them after damage, which allocation has been done in accordance with the *Condominium Act (section 7(4))*.

1.6.6. Contents of a Description for an Amalgamated Corporation

A description shall contain:

- a plan of survey showing the perimeter of the horizontal surface of the land and the perimeter of the buildings;
- a specification of the boundaries of each unit by reference to the buildings or other monuments;
- diagrams showing the shape and dimensions of each unit and the approximate location of each unit in relation to the other units and the buildings;

³³ **266** Peel Condominium Corporation No. 11 and Caroe et al. (1974) [declaration cannot prohibit renting of unit to third party]

360-York Condominium Corp. No. 216 v. Borsodi et al. (1983) (age restriction valid)

189-Metropolitan Toronto Condominium Corp. No. 624 v. Ramdial and Salmon (1988) [age restriction valid]

377 York Condominium Corporation No. 216 v. Dudnik (Div. Ct.) (1991) [provision restricting occupant’s age invalid, discrimination on the basis of family status]

214 Niagara North Condominium Corp. No. 7 v. Goodhew (1997) [requirement to obtain approval for changes to units which impair value of other property has no application to air-conditioner unit]

207 Metropolitan Condominium Corp. No. 699 and 1177 Yonge Street Inc.(Re) (1998) [provision in declaration prohibiting conveyance of parking unit to non-unit owner does not prevent leasing to others]

³⁴ **266**-Peel Condominium Corporation No. 11 and Caroe et al. (1974) [a declaration cannot prohibit the renting of a unit by an owner].

207 Metropolitan Condominium Corp. No. 699 and 1177 Yonge Street Inc.(Re) (1998) [provision in declaration prohibiting conveyance of parking unit to non-unit owner does not prevent leasing to others]

³⁵ **065 and 070** Carleton Condominium Corp. No. 441 v. Owners et al. of Carleton Condominium Plan No. 441(1997/1998) [declaration provisions dealing with shared facilities on external lands proper, court will not order amendment to delete same]

- a certificate signed by an Ontario land surveyor licensed under the *Surveyors Act* stating that the diagrams of the units are substantially accurate;
- a description shall contain a description of all easements and similar interests to which the property is subject and a description of the interests appurtenant to the property. These descriptions shall be combined and shall be in Form 3 (section 9(4) and 9(5)).

1.6.7. Legal Consequences of Amalgamation

In a nutshell, the effect of registering the declaration and description of an amalgamated corporation is to merge the assets and liabilities of the amalgamating corporations into a new corporation and provide corporate continuance under the umbrella of one corporation. The former corporate bylaws and rules lose force and the by-laws and rules proposed to the owners before amalgamation apply until replaced. In addition to the foregoing, the full consequences of this continuance are set out in *section 121* of the *Condominium Act* and include the provisions that:

- the units and common interests of the amalgamating corporations are continued as units and common interests in the amalgamated corporation;
- all encumbrances, easements and leases that affected the units or common elements of the amalgamating corporations are continued as encumbrances, easements and leases respectively that affect the units or common elements, as the case may be, of the amalgamated corporation;
- the directors of the amalgamating corporations constitute the first directors of the amalgamated corporation;
- the proposed by-laws and rules mentioned in *section 120(3)(b)* shall be the by-laws and rules respectively of the amalgamated corporation until the corporation amends or replaces them;
- the amalgamated corporation possesses all the assets, rights and privileges and is subject to all liabilities, including civil, criminal and quasi-criminal, and all contracts, agreements, warranties and debts of each of the amalgamating corporations;
- a conviction against, or ruling, order or judgment in favour of or against an amalgamating corporation may be enforced by or against the amalgamated corporation; and
- the amalgamated corporation shall be deemed to be the party plaintiff or the party defendant, as the case may be, in all civil actions commenced by or against an amalgamating corporation before the amalgamation becomes effective.

1.6.8. Corporate Action Following Amalgamation

The following actions are specified to be addressed following the registration:

1. The directors shall immediately appoint one or more auditors to hold office until the meeting of the owners described below (*section 121(2)*).
2. The directors shall call and hold within 60 days following registration a meeting of the owners to elect successor directors and appoint successor auditors (*section 121(3) and (4)*).

1.6.9. Reserve Fund Studies

Since the amalgamating corporations will have carried out reserve fund studies in the year prior to amalgamation (*section 34(1(d))* the *Condominium Act* makes special provision for the subsequent period. In brief, an amalgamated corporation must conduct a reserve fund study within three years of the date of the last of the pre-amalgamation studies (*section 38(2)*), and thereafter no more than three years after each succeeding study (*section 38(3)*).

The reserve fund study must be:

- a comprehensive study;
- an updated study not based on a site inspection, if the immediately preceding reserve fund study for the corporation was a comprehensive study or an updated study based on a site inspection; or
- an updated study based on a site inspection, if the immediately preceding reserve fund study for the corporation was an updated study not based on a site inspection (section 38(4)).

The plan of future funding for the reserve fund (section 98(4)) shall provide adequate funding within ten years from the date of the earliest reserve fund study conducted by the amalgamating corporations, if they were originally created before May 5, 2001. If any or all of the amalgamating corporations were created after that date the funding shall be in place in the fiscal year following the year in which the reserve fund study is completed (section 38(5)).

2.1 APPLICATION OF THE PLANNING ACT - SUBDIVISION CONTROL, PLAN APPROVAL, PARKLAND

2.1 APPLICATION OF THE PLANNING ACT – SUBDIVISION CONTROL, PLAN APPROVAL, PARKLAND

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Section 9 of the Condominium Act provides:

1. There is no subdivision control over whole units and [related] common interests;
2. There is no subdivision control over easements transferred by or reserved to the corporation³⁶;
3. That Sections 51 [Application and approval of plans of subdivision], 51.1 [Parkland dedication], and 51.2 [Delegations of approval authority] of the *Planning Act*, apply, with necessary modification, to descriptions. Approval of the description must, unless an exemption is granted (see below), be given by the approval authority before it is registered; and,
4. That Section 52 of the *Planning Act* [prohibiting sales of lots on subdivision plans which have not received draft approval] applies to Vacant Land Condominium Corporations [but by implication not to any other type].

2.1.1. Subdivision Control

Section 50 of the *Planning Act* controls the subdivision of land in Ontario. Section 50 generally prohibits any person from transferring, mortgaging, and the like, any land owned by that person if that person owns abutting lands. Section 50 provides exceptions to the prohibition, however none of these address the kind of ‘land

³⁶ These may be described in the description [*Section 8(1)(g)*] but also include the easements mandated by *Section 12*, easements over the common elements created by by-law (*Section 2*), a telecommunications easement (*Section 22*) and easements required by public authorities (*Section 20(2)(b)*), easements benefiting or burdening other lands of the Declarant (*Section 20(2)(a)*), and easements peculiar to Phased Condominium Corporations (*Section 151(1)*).

division' inherent in condominium plans.

Section 9(1) of the *Condominium Act* makes section 50 of the *Planning Act* inapplicable to dealings in whole units and common interests, as well as easements to and from a corporation (although until registration a proposed unit is subject to subdivision control and any agreement of purchase and sale must be conditional on *Planning Act* compliance³⁷). The effect of this is that, like a lot on a plan of subdivision, a unit in a condominium is freely transferable, mortgageable, and the like, regardless of the ownership of abutting units and lands. A unit's related common interest, like 'off the lot' easements relating to a lot as described on a plan of subdivision, is likewise freely transferable, mortgageable, and the like, regardless of abutting ownerships [subject to the constraint that the ownership interest in the common elements cannot be separated from the ownership of the unit [*section 11(4)*]].

Practically speaking, the most significant effect of *section 9(1)* is that, in the case of a declarant/owner, a declarant may transfer a unit (with related common interest) to a purchaser, even though the declarant owns one or more other units, or owns lands abutting the condominium's property, and, in the case of a purchaser, a purchaser may purchase two or more units with the knowledge that Ontario's subdivision control law will not be an obstacle should the purchaser subsequently wish to convey one, but not all, of the units to a new owner.

It should be noted that *section 9(1)* addresses section 50 of the *Planning Act* as it applies to dealings in whole units/interests. Subsection 50 (3), which prohibits dealings in part of a land ownership, is nullified; however, other subsections of section 50 are not addressed and remain applicable if the context allows. For example:

1. the declarant of a condominium on property which is a whole lot on a plan of subdivision, or within a part lot control area (section 50 (5) of the *Planning Act*), may deal with abutting lands while it owns units in the condominium.
2. part of a unit in a building may (as far as the *Planning Act* is concerned) be leased for any terms of years (section 50 (9) of the *Planning Act*).
3. an agreement purporting to convey or mortgage part of a unit is ineffective (section 50 (21) of the *Planning Act*; see also *section 11 (4)* of the *Condominium Act*).
4. even such an arcane application such as the freedom to deal in a property's mining rights (section 50 (2.1) of the *Planning Act*) remains applicable.

2.1.1.2. Approval of Descriptions

Section 9(2) of the *Condominium Act* makes Sections 51 [Application and approval of plans of subdivision], 51.1 [Parkland dedication], and 51.2 [Delegations of approval authority] of the *Planning Act* applicable (with 'necessary modification') to the approval of condominium descriptions and amendments to descriptions. A description shall not be registered without an approval (*section 9(3)(a)*), or an exemption from approval (*section 9(3)(b)*). The only exception to this general rule are amendments to a vacant land condominium corporation's description which are required to address the post-registration completion of construction of buildings , structures, and facilities in the common elements ((regulation 48/01 section 58(2))). In the latter case, such completed construction is contemplated before registration and, accordingly, another approval application and review would be redundant.

³⁷ 253-Crossroads Apartments Ltd. and Phillips (1974)

2.1.1.3. Special Case for Common Elements Condominium Corporation

The tied lands (land parcels external to the condominium to which are related the common interests in the common elements condominium corporation) must be created independently of the condominium and must exist before the condominium is registered (see section 39.1 of 48/01), and so will be subject to subdivision control and review. *Section 142* makes it clear that section 50 of the *Planning Act* does not apply in respect of dealings with common interests in a common elements condominium corporation.

2.1.2. Section 51

2.1.2.2. General

All procedures, protocols, forms, times periods, notices, criteria, constraints, allowances, and, globally, the entire substance of the process of approvals of condominium descriptions which prevailed up to the date (May 5, 2001) the *Condominium Act* came into force, is unchanged by the *Condominium Act*. In the result, to give an example, none of the preparation, content, review, or disposition of an application for approval of a standard condominium of the freehold type should, from the *Planning Act* perspective, differ from that experienced with condominium applications under the old Act. Applications dealing with the new forms of condominiums will be accompanied by application information related to their unique circumstances (note that section 51(18) of the *Planning Act* authorizes an approval authority to require an applicant to provide such other information or material that the approval authority considers it may need-provided the official plan contains provisions for such requirements) and be subject to consideration and conditions which may arise, again, from their unique circumstance; however, the structure of the process has been passed intact from the old Act.

The following summarizes the key aspects of the process dealing with applications for approval of a condominium.

2.1.2.3. Who is the Approval Authority

The identity of the approval authority in a each geographic area of Ontario is prescribed by Section 51 subsections (1) to (15) of the *Planning Act*. Generally, the Minister of Municipal Affairs and Housing will be the approval authority unless otherwise provided for (section 51(3) of the *Planning Act*). Exceptions to this general rule are numerous and are set out in subsections 51(4) to (7). They are:

Location	Approval Authority
Land in an upper-tier municipality with an approved official plan	The upper-tier municipality (<u>section 51(5)</u>) unless the land is in a prescribed lower-tier municipality in which case the specified lower-tier municipality is the approval authority (<u>section 51(6)</u>).
Land in a single-tier municipality that is not in a territorial district	The single-tier municipality unless otherwise prescribed (<u>section 51(4)</u>).
Land in a single-tier municipality that is in a territorial district	The single-tier municipality if prescribed (<u>section 51(7)</u>).
It is open to the Minister of Municipal Affairs to remove the authority described above, in which case the Minister will exercise the authority or may delegate it to a municipal planning authority. (<u>section 51(11)</u>).	

Section 51.2 of the *Planning Act* allows a council which has approval authority under section 51 to delegate its approval powers in whole or in part to a lower-tier municipality in which the lands are located (section 51.2(2) of the *Planning Act*) (if applicable), a committee of council or an appointed officer (section 51.2(1) of the *Planning Act*), or to a municipal planning authority (section 51.2(3) of the *Planning Act*). Authority delegated to a lower-tier municipality or municipal planning authority may, in turn, be sub-delegated in whole or in part to a committee of council or to an appointed officer (section 51.2(4) and (5) of the *Planning Act*). Accordingly, the de jure approval authority in a particular case could lie with a number of alternative entities, and may even vary depending on the nature of the condominium application (i.e. approval authority may lie with an upper-tier municipality for a particular type of condominium while delegated to a lower-tier municipality for other types). Applicants must check with the planning or clerk's department of the municipality in which the lands are situated to determine the local situation.

2.1.2.4. The Application

The form of application for approval of a condominium description is not prescribed by the *Condominium Act* or the *Planning Act*. It is up to the respective approval authority to provide their form. The *Planning Act* does prescribe certain minimum inclusions in all applications and, in this regard, a complete application must:

1. Be made (i.e. signed) by the owner of the land or an agent of the owner duly authorized in writing as directed by section 51(16).
2. Be accompanied by as many copies of the draft condominium plans as the approval authority requires, drawn to scale and showing:
 - (a) the boundaries of the land in the plan, certified by an Ontario land surveyor;
 - (b) the locations, widths and names of the proposed highways within the proposed plan and of existing highways on which the proposed condominium abuts;
 - (c) on a small key plan, on a scale of not less than one centimetre to 100 metres, all of the land adjacent to the proposed condominium that is owned by the applicant or in which the applicant has an interest, every subdivision adjacent to the proposed subdivision and the relationship of the boundaries of the land in the plan to the boundaries of the township lot or other original grant of which the land forms the whole or part;
 - (d) the purpose for which the proposed units are to be used;
 - (e) the existing uses of all adjoining lands;
 - (f) the approximate dimensions and layout of the proposed units;
 - (g) natural and artificial features such as buildings or other structures or installations, railways, highways, watercourses, drainage ditches, wetlands and wooded areas within or adjacent to the land proposed to be subdivided;
 - (h) the availability and nature of domestic water supplies;
 - (i) the nature and porosity of the soil;
 - (j) existing contours or elevations as may be required to determine the grade of the highways and the drainage of the land proposed to be subdivided;
 - (k) the municipal services available or to be available to the land; and
 - (l) the nature and extent of any restrictions affecting the land, including restrictive covenants or easements

all as directed by and set out in section 51(17) of the *Planning Act*.

3. Be accompanied by the information prescribed, as authorized by section 51(17), by Ontario *Regulation 544/06* under the *Planning Act*, being:
 1. The name, address, telephone number and, if applicable, the e-mail address of the owner of the subject land, and of the agent if the applicant is the owner’s authorized agent.
 2. The date of the application.
 3. A description of the subject land, including such information as the municipality, or the geographic township in unorganized territory, concession and lot numbers, reference plan and part numbers, and street names and numbers.
 4. Whether there are any easements or restrictive covenants affecting the subject land.
 5. If the answer to section 4 is yes, a description of each easement or covenant and its effect.
 6. If known,
 - (a) whether the subject land was ever the subject of an application for approval of a plan of subdivision under section 51 of the Act, for a consent under section 53 of the Act, for a minor variance, for approval of a site plan, or for an amendment to an official plan, a zoning by-law or a Minister’s zoning order; and
 - (b) if the answer to clause (a) is yes, the file number and status of the application.
 7. The total number of lots or blocks shown on the draft plan, and the number of lots or blocks shown on the draft plan for each of the following uses:
 1. Detached residential.
 2. Semi-detached residential.
 3. Multiple attached residential.
 4. Apartment residential.
 5. Seasonal residential.
 6. Mobile home.
 7. Other residential.
 8. Commercial.
 9. Industrial.
 10. Institutional.
 11. Park or open space.
 12. Roads.
 13. Other.
 8. The total number of units or dwellings shown on the draft plan, and the number of units or dwellings shown on the draft plan for each of the uses listed in section 7, except the uses described in paragraphs 11 and 12 of that section.
 9. In hectares, the total area of land shown on the draft plan, and the area of land shown on the draft plan for each of the uses listed in section 7.
 10. The total number of units or dwellings shown on the draft plan per hectare, and the number of units or dwellings shown on the draft plan per hectare for each of the uses listed in section 7, except the uses described in paragraphs 11 and 12 of that section.
 11. The total number of parking spaces shown on the draft plan, and the number of parking spaces shown on the draft plan for each of the uses listed in section 7, except the uses described in paragraphs 1, 2, 11 and 12 of that section.
 12. If the application is for approval of a condominium description, the number of parking spaces shown on the draft plan for detached and semi-detached residential use.
 13. If one of the uses referred to under section 7, 8, 9, 10 or 11 is identified as “other residential”, “institutional” or “other”, a description of the use.

14. The current designation of the subject land in the applicable official plan.

15. Whether access to the subject land will be,

(a) by a provincial highway, a municipal road that is maintained all year or seasonally, another public road or a right of way; or

(b) by water.

16. If access to the subject land will be by water only, the parking and docking facilities to be used and the approximate distance of these facilities from the subject land and the nearest public road.

17. Whether water will be provided to the subject land by a publicly owned and operated piped water system, a privately owned and operated individual or communal well, a lake or other water body or other means.

18. If the plan would permit development of more than five lots or units on privately owned and operated individual or communal wells,

(a) a servicing options report; and

(b) a hydrogeological report.

19. Whether sewage disposal will be provided to the subject land by a publicly owned and operated sanitary sewage system, a privately owned and operated individual or communal septic system or other means.

20. If the plan would permit development of five or more lots or units on privately owned and operated individual or communal septic systems,

(a) a servicing options report; and

(b) a hydrogeological report.

21. If the plan would permit development of fewer than five lots or units on privately owned and operated individual or communal septic systems, and more than 4500 litres of effluent would be produced per day as a result of the development being completed,

(a) a servicing options report; and

(b) a hydrogeological report.

22. If the plan would permit development of fewer than five lots or units on privately owned and operated individual or communal septic systems, and 4500 litres of effluent or less would be produced per day as a result of the development being completed, a hydrogeological report.

23. Whether the subject land contains any areas of archaeological potential.

24. If the plan would permit development on land that contains known archaeological resources or areas of archaeological potential,

(a) an archaeological assessment prepared by a person who holds a licence that is effective with respect to the subject land, issued under Part VI (Conservation of Resources of Archaeological Value) of the *Ontario Heritage Act*; and

(b) a conservation plan for any archaeological resources identified in the assessment.

25. Whether storm drainage will be provided by sewers, ditches, swales or other means.

26. If the application is for approval of a condominium description,

(a) whether a site plan for the proposed condominium has been approved and whether a site plan agreement has been entered into;

- (b) whether a building permit for the proposed condominium has been issued;
 - (c) whether the proposed condominium is under construction or has been completed;
 - (d) if construction has been completed, the date of completion; and
 - (e) whether the proposed condominium is a conversion of a building containing residential rental units, and in that case the number of units to be converted.
27. Whether the plan is consistent with policy statements issued under subsection 3 (1) of the Act.
 28. Whether the subject land is within an area of land designated under any provincial plan or plans.
 29. If the answer to section 28 is yes, whether the plan conforms to or does not conflict with the applicable provincial plan or plans.
 30. If the applicant is not the owner of the subject land, the owner’s written authorization to the applicant to make the application.
 31. An affidavit or sworn declaration by the applicant that the information required under this Schedule and provided by the applicant is accurate.
4. Be accompanied by such other information or material that the approval authority considers it may need provided the official plan contains provision for such additional requirements (this information should be specified in the local application form; however, the approval authority may require additional information during the course of the review of the application) as directed by section 51(18) of the *Planning Act* and the approval authority’s directions. This will include an application fee set by the approval authority (established under section 69 or 69.1 of the *Planning Act*).

Once an application is filed and the application fee paid the approval authority has 30 days to advise the applicant that the application is complete (section 51 (19.1) of the *Planning Act*). If it advises in the negative, or fails to advise, the applicant may have the OMB determine the issue (Section 51 (19.2 and 19.3 of the *Planning Act*).

2.1.2.4. Notice of Application, Public Meeting, Decision

Notice of Application and Public Meeting not Required

Within 15 days of positive advice (from the authority or the OMB) that the application is complete the approval authority must, in the case of vacant land or common elements condominium applications, give notice of the application, together with prescribed information to the persons and bodies described in section 4 of *Regulation 544/06*. These includes landowners within 120 meters and various agencies. No such notice is required for standard and leasehold condominiums.

The combined effect of Section 51(20)(a) of the *Planning Act* and Section 7 of *Regulation 544/06* requires, in the case of vacant land and common elements condominium applications, that both notice of the application be given, and a public meeting be held, at least 14 days before an approval authority makes a decision approving or refusing the application. In contrast, Section 7 of *Regulation 544/06* makes it clear that neither notice of the application nor the holding of a public meeting is required before making a decision on an application for a standard or leasehold condominium.

Notice of Decision

An approval authority shall, within fifteen days of making a decision to approve or refuse an application, give written notice of its decision to the applicant, each person or body that made a written request for notice of the decision, a municipality or planning board having jurisdiction in the area in which the lands are situate (section 51(37) of the *Planning Act*), and to the Provincial Planning Services Branch of the Ministry of Municipal Affairs and Housing if it has made a request to be notified of decisions on applications for approval (Regulation section 10(2)).

A notice of decision shall include the following:

1. A copy of the decision, including the conditions and the lapsing provision, if any.
2. The last date for filing a notice of appeal, and a statement that the notice of appeal,
 - i. must be filed with the approval authority,
 - ii. must set out the reasons for the appeal, and
 - iii. must be accompanied by the fee required by the Municipal Board.
3. A statement that any of the following may, at any time before the approval of the final plan of subdivision, appeal any of the conditions imposed by the approval authority to the Municipal Board by filing a notice of appeal with the approval authority:
 - i. the applicant,
 - ii. any public body that, before the approval authority made its decision, made oral submissions at a public meeting or written submissions to the approval authority,
 - iii. the Minister,
 - iv. the municipality in which the subject land is located, or the planning board in whose planning area it is located,
 - v. if the subject land is not located in a municipality or planning area, any public body.
4. If applicable, the following statements:
 - i. You will be entitled to receive notice of any changes to the conditions of approval of the proposed plan of subdivision if you have made a written request to be notified of changes to the conditions.
 - ii. No person or public body shall be added as a party to the hearing of an appeal regarding any changes to the conditions of approval unless the person or public body, before the approval authority made its decision, made oral submissions at a public meeting or written submissions to the approval authority, or made a written request to be notified of the changes to the conditions.
5. The following statements:
 - i. Only individuals, corporations or public bodies may appeal decisions in respect of a proposed plan of subdivision to the Ontario Municipal Board. A notice of appeal may not be filed by an unincorporated association or group. However, a notice of appeal may be filed in the name of an individual who is a member of the association or group on its behalf.
 - ii. No person or public body shall be added as a party to the hearing of the appeal of the decision of the approval authority, including the lapsing provisions or the conditions, unless the person or public body, before the decision of the approval authority, made oral submissions at a public meeting or written submissions to the council or, in the Ontario Municipal Board's opinion, there are reasonable grounds to add the person or public body as a party.
6. If it is known that the subject land is the subject of an application under the Act for a minor variance or for an amendment to an official plan, a zoning by-law or a Minister's zoning order, a statement of that fact and the file number of the application.

(*Regulation 544/06* section 10(1)).

2.1.2.5. Public Meetings and Submissions

Although *Ontario Regulation 196/96* does not requires a public meeting to be held it should be noted that it is open to the approval authority, should it so choose, to hold a public meeting. Since the legislation does not deal with public meetings for condominiums, who receives notice of an 'optional' public meeting, and how it is given, is left to the approval authority.

Interested persons may make written submissions to the approval authority at any time prior to the authority making its decision. (section 51(22) of the *Planning Act*)

2.1.2.6. Time Frames for Decisions and Appeals

An appeal of the failure of an approval authority to make a decision (either approving or refusing an application for approval) may be commenced on the 181st day after the application is made (section 51(34)). The application is ‘made’ only when all information required under section 51(17) of the *Planning Act* has been received by the approval authority and the application fee is paid (section 51(19) of the *Planning Act*). The *Condominium Act* does not fix any period following which appeal rights relating to the failure to make a decision expire.

An appeal of a decision approving or refusing an application for approval, an appeal of any conditions imposed to an approval, and an appeal of lapsing provision (under section 51(32) of the *Planning Act*), must be made not later than 20 days after the notice of decision is given under section 50(37) of the *Planning Act* (section 51(39) of the *Planning Act*). The only exception to the latter time limit concerns the appeal, by either the applicant or a public body, of conditions imposed. In such cases the conditions may be appealed (by the applicant or public body) at any time before final approval of the condominium (section 51(43) of the *Planning Act*). Since the notice under section 50(37) is ‘given’ when, for example, the notices have been mailed (if that is the choice of means for service), the practical timetable to consider and commence an appeal is less than three weeks.

An appeal of any changes to conditions imposed to an approval commenced by a person other than the applicant or a public body must be made not later than 20 days after the notice of changed conditions is given under section 50(45) of the *Planning Act* (section 51(48) and (49) of the *Planning Act*). An applicant and public bodies may appeal changed conditions at any time before final approval.

2.1.2.7. Criteria for Approval

In considering the approval of a draft condominium description section 51(24) of the *Planning Act* mandates that an approval authority shall have regard, among other matters, to the health, safety, convenience and welfare of the present and future inhabitants of the municipality and:

(a) the effect of development of the proposed condominium on matters of provincial interest as referred to in section 2 of the *Planning Act* being:

- the protection of ecological systems, including natural areas, features and functions;
- the protection of the agricultural resources of the Province;
- the conservation and management of natural resources and the mineral resource base;
- the conservation of features of significant architectural, cultural, historical, archaeological or scientific interest;
- the supply, efficient use and conservation of energy and water;
- the adequate provision and efficient use of communication, transportation, sewage and water services and waste management systems;
- the minimization of waste;
- the orderly development of safe and healthy communities;
- the adequate provision and distribution of educational, health, social, cultural and recreational facilities;
- the adequate provision of a full range of housing;
- the adequate provision of employment opportunities;
- the protection of the financial and economic well-being of the Province and its municipalities;
- the co-ordination of planning activities of public bodies;
- the resolution of planning conflicts involving public and private interests;

- the protection of public health and safety;
 - the appropriate location of growth and development.
 - the promotion of development that is designed to be sustainable, to support public transit and to be oriented to pedestrians.
- (b)whether the proposed condominium is premature or in the public interest;
- (c)whether the plan conforms to the official plan and adjacent plans of condominium/condominium, if any;
- (d)the suitability of the land for the purposes for which it is to be subdivided;
- (e)the number, width, location and proposed grades and elevations of highways, and the adequacy of them, and the highways linking the highways in the proposed condominium with the established highway system in the vicinity and the adequacy of them;
- (f)the dimensions and shapes of the proposed lots;
- (g)the restrictions or proposed restrictions, if any, on the subject land or the buildings and structures proposed to be erected on it and the restrictions, if any, on adjoining land;
- (h)conservation of natural resources and flood control;
- (i)the adequacy of utilities and municipal services;
- (j)the adequacy of school sites;
- (k)the area of land, if any, that, exclusive of highways, is to be conveyed or dedicated for public purposes; and
- (l) the extent to which the plan’s design optimizes the available supply, means of supplying, efficient use and conservation of energy; and,
- (m) the interrelationship between the design of the proposed plan of subdivision and site plan control matters relating to any development on the land, if the land is also located within a site plan control area designated under subsection 41(2) of this Act or subsection 114 (2) of the *City of Toronto Act, 2006*.

2.1.2.8. Conditions of Approval

An approval authority may impose such conditions to the approval of a plan of condominium as in the opinion of the approval authority are reasonable, having regard to the nature of the development proposed, including a requirement,

- (a) that land be dedicated or other requirements met for park or other public recreational purposes under section 51.1;
- (b) that such highways be dedicated as the approval authority considers necessary;
- (c) when the proposed plan abuts on an existing highway, that sufficient land, other than land occupied by buildings or structures, be dedicated to provide for the widening of the highway to such width as the approval authority considers necessary; and
- (d) that the owner of the land enter into one or more agreements with a municipality, or where the land is in territory without municipal organization, with any minister of the Crown in right of Ontario or planning board dealing with such matters as the approval authority may consider necessary, including the provision of municipal or other services. (section 51(25) of the *Planning Act*)³⁸

³⁸ **269** Pinetree Development Co. Ltd. and Minister of Housing (1976) [charging levies a second time not authorized by predecessor section; note: case is not applicable due to legislative changes but is referenced for principle]
153 L.Chung Development Co. v. Scarborough (City) (Ont. Div. Ct.) (1992) [conditions of approval requiring parking spaces to be common elements not proper for conversion]

In the case of an application for approval in respect of a building or related group of buildings containing one or more premises that is or was used for rented residential purposes, the approval authority, if it requires the applicant to have an engineer or architect or another qualified person to inspect and report on the property (pursuant to *section 9(4)* of the *Condominium Act*), may impose conditions that it considers are reasonable in light of the report (*section 9(5)* of the *Condominium Act*).

2.1.2.9. Notice of Changes to Conditions

Conditions imposed on the approval may be changed by the approval authority at any time before the approval of the final plan of condominium (*section 51(44)* of the *Planning Act*). If the conditions are changed by the authority and it is not of the opinion that the change is minor, written notice of the changes must be given within 15 days thereafter to the applicant, each person or body that made a written request for notice of changes to the conditions, a municipality or planning board having jurisdiction in the area in which the lands are situate, and to the Provincial Planning Services Branch of the Ministry of Municipal Affairs and Housing if it has made a request to be notified of changes (*section 51(45) and (47)* of the *Planning Act*). The notice of change must contain the following information:

1. A copy of the proposed changes to the conditions of draft approval.
2. A statement that the applicant or any public body may, at any time before the approval of the final plan of condominium, appeal any of the conditions of draft approval to the Ontario Municipal Board by filing a notice of appeal with the approval authority.
3. The last date for filing a notice of appeal of the conditions of draft approval and a statement that the notice of appeal must be filed with the approval authority, must set out the reasons for the appeal and must be accompanied by the fee required by the Ontario Municipal Board.
4. The following statement:
Only individuals, corporations or public bodies may appeal decisions in respect of a proposed plan of condominium to the Ontario Municipal Board. A notice of appeal may not be filed by an unincorporated association or group. However, a notice of appeal may be filed in the name of an individual who is a member of the association or group on its behalf

2.1.2.10. Agreements

The conditions of approval may include a requirement to enter into one or more agreements with a responsible municipality or the approval authority (*section 51(25)(d)* of the *Planning Act*). Municipalities are authorized to enter into such agreements (*section 51(26)* of the *Planning Act*) and if, as is usual, they are registered against title to the condominium lands such agreements are enforceable against the owner (declarant) and subsequent owners (i.e. unit purchasers).

Agreements imposed as conditions of approval will deal with matters that, among other things, relate to the implementation of the draft plan and matters on-going after the plan of condominium is registered. Such matters as the construction of municipal services, conveyances of easements or land to the municipality, noise warnings requirements, and inspection of works and services, are examples the myriad of matters that may be addressed in an agreement.

2.1.2.11. Appeals

2.1.2.11.1. Notice of Appeal

The time frames for appeals in the various circumstances which may arise are set out above. Any and all notice of appeal must set out the reasons for the appeal, and be accompanied the appeal fee prescribed under the Ontario Municipal Board Act (presently \$125.00) (see (section 51(39), (43), and (48) of the *Planning Act*)). The reasons for appeal set out in the notice must disclose an apparent land use planning ground upon which the Ontario Municipal Board could give or refuse approval or determine the question as to the condition(s) appealed. Otherwise, the appeal is open to summary dismissal by the Ontario Municipal Board (section 51(53) of the *Planning Act*).

2.1.2.11.2. Approval Authority Duties on Receipt of an Appeal

When an approval authority receives an appeal it must:

1. Compile a record containing:
 1. The original or a certified copy of the application received by the approval authority.
 2. The original or a certified copy of the prescribed information and material received by the approval authority under subsection 51 (17) of the *Planning Act*.
 3. If applicable, the original or certified copy of any other information and material that the applicant was required to provide to the approval authority.
 4. The original or a certified copy of the notice of appeal and the date it was received.
 5. The original or a copy of all written submissions and comments received, and the date they were received.
 6. If the local municipality or planning board gave notice of the application, the original or a certified copy of the affidavit or sworn declaration described in subclause 6 (2) (b) (ii) of *Regulation 544/06*.
 7. If the approval authority gave notice of the application, an affidavit or sworn declaration of an employee of the approval authority certifying that the notice requirements under clause 51 (20) (a) of the *Planning Act* have been complied with.
 8. If the local municipality or planning board held the public meeting, the affidavits or sworn declarations described in clauses 6 (3) (b) and (c).
 9. If the approval authority held the public meeting,
 - i. an affidavit or sworn declaration of an employee of the approval authority certifying that the notice requirements and the requirement for holding a public meeting under clause 51 (20) (b) of the *Planning Act* have been complied with, and
 - ii. an affidavit or sworn declaration of an employee of the approval authority listing all persons and public bodies that made oral submissions at the public meeting.
 10. A copy of the minutes of the public meeting.
 11. A copy of any planning report considered by the approval authority.
2. Forward the record, the notice of appeal, and the appeal fee, to the Municipal Board within 15 days after the last day for appeal (in the case of appeals of decisions to approve/refuse, appeals of lapsing provisions, or appeals by persons other than the applicant or a public body of conditions and changed conditions), or within 15 days after the appeal was filed (in the case of an appeal by an applicant or public body relating to conditions or changed conditions) (section 51(50) of the *Planning Act*).

2.1.2.11.3. Dismissal of Appeals Without a Hearing

An appeal may be summarily dismissed by the Municipal Board on its own initiative or on the motion of any party to the appeal, without holding a hearing, if:

1. (a) it is of the opinion that,
 - (i) the reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the Board could give or refuse to give approval to the draft plan of subdivision or determine the question as to the condition appealed to it,
 - (ii) the appeal is not made in good faith or is frivolous or vexatious;
 - (iii) the appeal is made only for the purpose of delay; or,
 - (iv) the appellant has persistently and without reasonable grounds commenced before the Board proceedings that constitute an abuse of process;
- (b) the appellant did not make oral submissions at a public meeting or did not make written submissions to the approval authority before it gave or refused to give approval to the plan of subdivision and, in the opinion of the Board, the appellant does not provide a reasonable explanation for having failed to make a submission;
- (c) the appellant has not provided written reasons for the appeal;
- (d) the appellant has not paid the fee prescribed under the *Ontario Municipal Board Act*; or
- (e) the appellant has not responded to a request by the Municipal Board for further information within the time specified by the Board (section 51(53) of the *Planning Act*).

2. If, in the Board’s opinion, the application to which the appeal relates is substantially different from the application that was before council at the time of its decision (section 51(53.1) of the *Planning Act*).

Before dismissing an appeal under section 51(53) the Municipal Board must, unless the reason for the proposed dismissal is failure to respond to a request for additional information, notify the appellant and give the appellant the opportunity to make representation on the proposed dismissal (section 51(54) of the *Planning Act*). The motion for dismissal may be the subject of a hearing, but may be done entirely through paper communications/submissions (section 51(54.1) of the *Planning Act*).

All appeals, regardless of subject matter, may be withdrawn before being heard. In all such cases the matter then stands as it would have had no appeal been commenced.

On an appeal the Municipal Board may make any decision that the approval authority could have made.

When an appeal (other than an appeal by the applicant or public body relating to conditions) is dealt with by the Municipal Board by approving a plan of condominium, the Board may direct that the final approval is to be given by the approval authority in which the land is situate (section 51(56.1) of the *Planning Act*). Otherwise, the final approval of the plan will be dealt with by the Municipal Board directly.

2.1.2.12. Lapsing of an Approval

In giving approval to a proposed plan of condominium an approval authority may provide that the approval lapses at the end of period specified by the authority, being not less than three years. In the event of an appeal, the period does not commence to run until the Municipal Board issues its order respecting the appeal (or the appeal is withdrawn) (section 51(32) of the *Planning Act*).

An approval authority may extend the period after which the approval will lapse, and may do so one or more times; however, once an approval lapses it cannot be revived (section 51(33) of the *Planning Act*). There is no appeal from an approval authorities refusal to extend deadline for lapsing of an approval.

In the absence of a lapsing provision the approval does not terminate, no matter how much time may pass since draft approval is given. The option to withdraw an approval of the draft plan of condominium always remains open to the approval authority (section 51(44) of the *Planning Act*).

2.1.2.13. Final Approval

After a draft approval, the applicant will prepare the final plan and, provided the conditions have or will be fulfilled, the approval authority will approve the final plan and it can be tendered for registration in the Land Titles office.

2.1.2.14. Exemptions from Approval

Section 9(6) through *9(10)* of the *Condominium Act* authorize an approval authority to grant an exemption from the provisions of Sections 51 and 51.1 of the *Planning Act*. Such an exemption allows the condominium description to be registered without further strings provided it is accompanied by a certificate of exemption issued by the approval authority. All other requirements of the *Condominium Act* and regulations continue to apply.

The exemption mechanism may be useful to deal with simple standard condominiums, for example, the division of a new triplex into three units and common elements, or a simple common elements condominium, for example a common elements condominium corporation set up to govern a common access road to a small number of properties.

While the exemption authority may be thought of as for use in circumstances analogous to subdivision through the severance consent process (i.e. those which do not call for the complexity of a subdivision plan review), it is not limited in this way. An exemption can be given to condominium descriptions on the scale of hundreds of units as well as to those with, to give an extreme, two units, or to common elements condominium corporation descriptions that encompass large areas and complex facilities, or to vacant land condominium corporation containing large numbers of units.

An exemption frees a condominium description only from *Planning Act* type approval. The description, and all other aspects of an exempted condominium, remain subject to the requirements of the *Condominium Act*, as well as other applicable laws.

The only guidance which the *Condominium Act* gives on the criteria for granting exemptions is that the approval authority must believe ‘the exemption is appropriate in the circumstances’ (*Section 9 (7)*). The ‘circumstances’ will include provincial policy statements under the *Planning Act*, Official Plan policies, zoning, among other matters.

Although the *Condominium Act* does not specifically allow exemptions to be subject to conditions precedent (such as an agreement dealing with the contents of the description to be registered) the procedure may thought of as analogous to part lot control by-laws under Section 50 (7) of the *Planning Act*. It is common for such by-laws to be passed after one or more public controls (including agreement(s)) are in place, although there is no specific authority for such in the *Planning Act*.

It should be noted that, like a decision respecting a part lot control exemption, the decision to grant or not grant an exemption to approval is not subject to appeal to the OMB.

The fact of an exemption from approval (in a case where one is granted) is evidenced by a Certificate of Exemption as provided for by *section 9(3)(b)* of the *Condominium Act*. At the present time, no form of certificate has been prescribed.

2.1.3. Section 51.1

Parkland

An approval authority may impose as a condition of approval of a plan of condominium that land in an amount not exceeding, in the case of a plan proposed for commercial or industrial purposes, 2 per cent and in all other cases 5 per cent of the land included in the plan shall be conveyed to the local municipality for park and other recreational purposes (or dedicated for such purposes if the land is not in a local municipality) (section 51.1 (1)) of the *Planning Act*).

Should such a condition be imposed and the municipality has an official plan that contains specific policies relating to the provision of lands for park or other public recreational purposes, the municipality, in the case of a subdivision proposed for residential purposes, may, in lieu of such conveyance, require that land included in the plan be conveyed to the municipality for park or other public recreational purposes at a rate of one hectare for each 300 dwelling units proposed or at such lesser rate as may be determined by the municipality (section 51.1 (2)) of the *Planning Act*).

The municipality may, in lieu of accepting the conveyance of land, require the payment of money by the owner of the land to the value of the land otherwise required to be conveyed. If such an alternative is opted for by the municipality, the value of the land shall, for the purposes of the payment, be determined as of the day before the draft approval of the plan of condominium (section 51.1 (4)) of the *Planning Act*). In the event of a dispute as to the value of the land, the applicant may pay the amount required by the municipality under protest and make an application, within 30 days of the payment, to the Municipal Board to resolve the dispute (section 51.1 (5) and section 42 (12) of the *Planning Act*).

It should be noted that section 42(7) of the *Planning Act*, which in certain circumstances exempts land from a parks dedication requirement if they have been subject to a previous parks conveyance or payment, is inapplicable to plans of condominium (as it is inapplicable to plans of subdivision) (section 51.1(5)).

2.2 OWNERSHIP

2.2. OWNERSHIP

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2.2.1. Basic Principles

2.2.2. Units and Common Elements

Critical to the essential make-up of every condominium property are common elements and (with the exception of common elements condominiums) units. The former exist as an adjunct to the units, without which the latter could not properly function or exist. In addition to these two critical components, a condominium’s property may also include interests appurtenant to the land of the condominium, such as easements or rights of way over adjoining lands (*section 1(1)*, definition of ‘property’). Alternatively, interests of the latter type may be an asset of the corporation (*section 18*) in which case they are not part of the condominium ‘property’ as defined by the *Condominium Act*).

Units and common elements are real property for all purposes (*section 10*). Ownership of a unit includes ownership of an undivided interest in the common elements as a tenant in common with the other unit owners (*section 11(2)*), with the proportion of the interest applicable to each unit being set out in the declaration (*section 11(3)* and *section 7(2)(c)*). These two ownerships cannot be separately conveyed or otherwise separated (*section 11(4)*). Ownership of a unit and ownership of the interest in the common elements are irrevocably linked. The common elements themselves cannot be partitioned or divided (as is possible if the owner’s tenancy in common was not governed by the *Condominium Act*) (*section 11(5)*).

Each owner is entitled to exclusive ownership and use of the owner’s unit, subject to the *Condominium Act*, the declaration, and the by-laws (*section 11(1)*)¹. In addition, part of the common elements may be designated for the exclusive use of one or more units. All owners may make reasonable use of the common elements (*section 116*)².

2.2.3. Easements Which Exist for All Condominiums

The *Condominium Act* lays in place a basic framework of fundamental easements which are applicable to all condominiums and which cannot be diluted or denied by the declaration or by-laws of a corporation.

2.2.3.1. Easements Appurtenant to Each Unit

The following easements are appurtenant to each unit and are for the benefit of the owner of the unit and the corporation:

¹ **214** Niagara North Condominium Corp. No. 7 v. Goodhew (1997) [requirement to obtain approval for changes to units which impair value of other property, no application to air-conditioner unit]

² **361** York Condominium Corp. No. 288 v. Harbour Square Commercial Inc., (1988) [illegal parking not reasonable]

251- Carleton Condominium Corp. No.279 and Rochon et al. (1987) [satellite dish on roof ordered removed, permission of declarant/corporation irrelevant, no approval by owners, no reference in disclosure statement]

174 and 175 Marafioti v. Metropolitan Toronto Condominium Corp. No. 775 (1994/1997) [deck ordered removed from common elements]

- An easement for the provision of a service through the common elements or any other unit.
- An easement for support by all buildings and structures necessary for providing support to the unit.
- If a building or a part of a building moves after registration of the declaration and description or after having been damaged and repaired but has not been restored to the position occupied at the time of registration of the declaration and description, an easement for exclusive use and occupation over the space of the other units and common elements that would be space included in the unit if the boundaries of the unit were determined by the position of the buildings from time to time after registration of the description and not at the time of registration.
- If a corporation is entitled to use a service or facility in common with another corporation, an easement for access to and for the installation and maintenance of the service or facility over the land of the other corporation, described in accordance with the regulations made under the *Condominium Act* (*section 12(1)*).

2.2.3.2. Easements Appurtenant to the Common Elements

The following easements are appurtenant to the common elements:

- An easement for the provision of a service through a unit or through a part of the common elements of which an owner has exclusive use.
- An easement for support by all units necessary for providing support (*section 12(2)*).

2.2.4. Encumbrances Existing at the Time of Registration

A newly registered condominium may, and most likely will, have one or mortgages registered on title at the time the declaration and description are registered. These may relate to the declarant's acquisition financing for the land purchase, construction financing for buildings and other improvements, and the like. While mortgages such as the foregoing will have provisions in them dealing with payment, discharge, and so forth, the Condominium Act imposes two rules on such encumbrances which ensure that unit owners (whether they are arm's length purchasers, the declarant, or mortgagee's in possession (*section 1(1)* definition of 'owner')) can gain unencumbered title to their unit and common interest:

1. The registration of the declaration and description removes the enforceability of the encumbrance from the common elements, while maintaining it against all the units and the common interests (*section 13*). This ensures that default in respect of a unit encumbered by the mortgage cannot affect the common interest in the common elements on an owner whose unit is free of the encumbrance.
2. An owner may discharge the portion of the encumbrance that is applicable to the owner's unit and common interest by paying the amount of principle and interest attributable to the owner. This portion is the product obtained when the owner's proportionate share of the common interest is multiplied by the sum of the principle and interest (*section 14(1)*). On the payment, the encumbrancer is obliged to give the owner a discharge of the encumbrance as it respects the owner's unit and common interest (*section 14(2)*). Bearing in mind that the mortgagee will have consented to the registration of the condominium (*section 7(2)(b)*), the shares of common interests allocated to the units must have been agreeable to it, and therefore should reflect a fair and reasonable proxy for the related partial discharge. In any event, this provision ensures the ability to discharge the mortgage. A similar provision existed under the old legislation with one potentially substantial difference. The *Condominium Act* fixes the discharge payment to the 'principal and interest' owing, while the old legislation spoke of the 'sum claimed' by the mortgagee (*section 7(9)*). A mortgage which contained a prepayment penalty could require payment of a share of same. The *Condominium Act* is not clear on whether accelerated interest (due to a prepayment) is 'interest' (presumably it is; however, the individual context must be examined), but it is clear that nothing other than principle and interest need be paid to secure a discharge.

2.2.5. Assessment and Property Taxation

For municipal tax purposes a condominium property is divided into ‘parcels’ corresponding to the units and their respective common interests (*section 15(1)*).

The common elements of a condominium other than a common elements condominium are not a parcel(s) and therefore are not the subject of a tax bill. Each unit owner will receive a tax bill for the owner’s unit(s) and related common interests (and the latter will, together with the shares of the other owners, sum to the value intrinsic to the common elements as a whole). There are two exceptions to the foregoing rule:

1. Any part of the common elements of a corporation other than a common elements condominium corporation:
 - which is leased for business purposes
 - on which the lessee carries on an undertaking for gain; and
 - is in the commercial property class prescribed under the Assessment Act (section 5 of *Assessment Act regulation 298 of 98* as amended);

will be constituted as a separate parcel for assessment and taxation (*section 15(3)*); and

2. The common elements of a common elements condominium corporation will form a separate single parcel of assessment and taxation, with the taxes forming part of the condominium’s common expenses (*section 15(4)*).

2.2.5.1. Tax Classes

Under the *Assessment Act* properties are divided into different classes depending upon the nature of the use of the land and buildings as prescribed by the Assessment Act. Units in commercial and industrial condominiums will have a prescribed tax rate, as will units in residential condominiums. Prior to 2003 the rate of taxation of residential units in larger (7 or more residential units) condominiums were distinctly advantaged over their counterparts in the non-condominium rental market. In this regard, the Assessment Act then recognized such condominium residential units as being in the same class as single family homes, duplexes, and multi-unit properties up to 6 units. Ontario Regulation 363/03 removed this inequity and now multi-unit residential properties of 7 units or more, whether they are condominiums or not, are in separate class known as the Multi-Residential Property Class (section 4 of *Assessment Act regulation 298* as amended).

2.3 CORPORATION - GENERAL

2.3 CORPORATION - GENERAL

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A declarant’s act of registering a declaration and description for a condominium converts the declarant’s freehold (or leasehold in the case of a leasehold condominium) interest in the property into a freehold (or leasehold) interest in the units and common elements, brings the property under the governance of the *Condominium Act*, and creates the condominium corporation (*section 2(2)*).

Unlike business corporations such as those incorporated under Ontario’s *Business Corporations Act*, a condominium corporation has no share capital and, consequently, no shareholders. Unlike other types of corporations, the *Corporations Information Act* (which obliges corporations to record certain information on the public record) does not apply to condominium corporations (*section 5(4)* and *section 2* of *48 of 01*). A condominium corporation must have a seal with its name appearing on it (*section 16*). Like a non-share capital corporation incorporated under Ontario’s *Corporations Act*, a condominium corporation has ‘members’, namely the unit owners, who collectively own the corporation in their respective proportions of the common interest (*section 5(1)*); however, the parallel ends at that point. The *Corporations Act* does not apply to condominium corporations (*section 5(3)*). All of the rights, duties, obligations, and authority associated with condominium corporations are found exclusively in the *Condominium Act*.¹

2.3.1. Function of the Corporation

The function of the corporation and its relationship to the owner’s and their interests are usefully understood in the context of the general objects and duties of the corporation as mandated by the *Condominium Act*. In particular:

2.3.1.1. The objects of the corporation are to manage the property, and the assets of the corporation, on behalf of the owners (*section 17(2)*).

2.3.1.2. The general duties of the corporation are:

1. To control, manage and administer the common elements, and the assets of the corporation (*section 17(2)*)².
2. To take all reasonable steps to ensure that
 - the unit owners;
 - the occupiers of units;
 - the lessees of the common elements; and,
 - the agents and employees of the corporation,

comply with

¹ **411-** Peel Condominium Corporation No. 668 (2006) [As creatures of statute condominium corporations must act within their authority. A contract entered into without statutory authority or without adherence to the requisite protocols is void.]

² **065 and 070** Carleton Condominium Corp. No. 441 v. Owners et al. of Carleton Condominium Plan No. 441(1997/1998) [declaration provisions dealing with shared facilities on external lands proper, court will not order amendment to delete same, of value to unit owners]

- the *Condominium Act*;
- the declaration;
- the by-laws; and,
- the rules (*section 17(3)*)¹,

as is their obligation under *section 119*.

2.3.2. Right of Entry to Units

The familiar old chestnut that ‘a persons’ home is their castle’ does not have full application in the context of a condominium even though, as a general rule, an owner has exclusive ownership and use of their unit (*section 11(1)*). For example, a portion of an owner’s interest is in the shared common elements (*section 11(2)*), an owner’s use of their unit is subject to one or more constraints set out in the four controls listed above (*section 17(3)*), and a corporation has the general authority to enter a unit or exclusive use common area, on reasonable notice at any reasonable time, to perform the it’s objects and duties or to exercise it’s powers. A corporation may apply for and receive orders of the court directing compliance should a person not attend to their responsibilities (*section 134*).

2.3.3. Property

While a condominium corporation does not own the common elements (the unit owners do), it may have ownership of real and personal property provided such is acquired for purposes consistent with the objects and duties of the corporation (*section 18(1)*). By way of example, the condominium may own a unit in the condominium that is used for the corporation’s purposes (i.e. a guest suite for visitors to units), or may have a leasehold interest in lands off the condominium property (i.e. used for parking for unit owners). Such real property will be an asset of the corporation (*section 18(1.1)*) which is shared among the owners in the same proportions as the proportions of their common interests (*section 18(2)*).

The corporation may also have an easement interest in lands outside the property, or the common elements themselves may be subject to easement(s) benefiting other lands. Typically these will relate to other property owned by the declarant, or will result from conditions imposed by an approval authority and will be described in, and created by, the declaration and description and their registration (*section 20*). Such easements are created by the registration and separate deeds or other documents are not required to effect their creation (*section 20(3)*).

2.3.4. Dealings with the Common Elements

The corporation may be by-law:

- Lease a part of the common elements (except a part which is exclusively used by less than all of the owners);
- Grant or transfer an easement or licence through the common elements; or,
- Release an easement that is part of the common elements (*section 21(1)*)².

While any such action will affect the owner’s interests as if they had themselves executed the lease etc. (*section 21(2)*), the owner’s will have input as the by-law will not be effective until the owners of a majority of the units of the corporation vote in favour of confirming it (*section 56(10)*).

¹ **401-** Apartments International Inc. v. Metropolitan Toronto Condominium Corp. No. 117 [An action against a condo. corporation for intentional interference in economic relations cannot be sustained where the condo. was simply enforcing it’s rules and there was no proof of damage.]

² **115** Eglinton Place Inc. v. Ontario (Ministry of Consumer and Commercial Relations) (2000) [under old legislation corporation could grant a release of an easement]

2.3.5. Legal action in Relation to the Common Elements

In addition to the authority to make application to court to enforce adherence to the corporation's constitution (i.e. the *Condominium Act*, declaration, by-laws, rules) and agreements (*section 134*) all condominium corporations have the authority:

- to commence and complete action for damages and costs in respect of damage to common elements, the corporation's assets, or individual units¹; and,
- to commence and complete an action with respect to a contract involving the common elements or a unit, even in a case where it is not a party to the agreement (*section 23(1)*)².

Unless the action is to:

- enforce a lien for common expenses;
- to enforce compliance with the constitution; or,
- is an action commenced in the Small Claims Court (i.e. \$10,000.00 or less);

it is a condition precedent to the action's commencement that written notice of general nature of the action be given to all persons in the record of owners maintained under *section 47(2)* (*section 23(2)*)³.

The legal costs of an action of the above type will be borne by the owners on whose behalf the action is commenced in the proportion that their interests are affected (*section 23(3)*). Where only one owner's interests are involved the effect of this section is clear; however, if more than one owner's interests are involved the measure of the relative degree by which their interest 'are affected' will be subjective, as the Condominium Act provides no formula for such a determination.

Money judgments in favour of the corporation (as opposed to a judgment in a representative action brought for an owner) are an asset of the corporation (*section 23(4)*).

On the other side of the coin, the corporation may be sued as the representative of the owners of the units in any matter relating to the common elements or assets of the corporation (*section 23(5)*). A judgment of the payment of money against the corporation is also a judgment against each owner for a portion of the judgment, determined by the proportionate share of the common interests (*section 23(6)*).

2.3.6. Expropriation Notices

In the event part of the common elements are subject to expropriation the expropriating authority must serve the expropriation documents on the corporation and, where the part is also an exclusive use common element, on the

¹ **167** Loader et al. v. Rose Park Wellesley Investments Ltd. et al. (1980) [class action suit not appropriate, corp. should bring action under this section]

372 York Condominium Corp. No. 76 v. Rose Park Wellesley Investments Ltd. et al. (1984) [declarant has no liability for deterioration in common elements where good building practices originally followed]

109 Durham Condominium Corp. No. 76. v. H. Kassinger Construction Ltd. (1995) [corp. may bring action on behalf of existing owners]

196 Middlesex Condominium Corp. No. 87 v. 600 Talbot Street London Ltd.] (1998) [superintendents suite property of corporation, order to declarant to convey title without cost]

095 Crawford v. London (City) (2000) [class proceeding appropriate]

² **378**-York Condominium v. Bramalea Consolidated Developments Ltd. et al.(1975) [a corporation is not a nominal plaintiff in such actions and cannot be required to provide security for costs].

205- Metropolitan Condominium Corp. No. 539 et al. v. Priene Ltd. et al. (1984) [this right was implied in the old legislation]

³ **367** York Condominium Corp. No. 46 v. Medhurst, Hogg & Associates Ltd. et al. (1982) [failure to give notice of action to owners renders process a nullity]

188 Metropolitan Toronto Condominium Corp. No. 539 v. Chapters Inc. (1999) [notice not required where corporation is party to contract]

owner(s) having the exclusive use (*section 24(1)*). The corporation in turn must, within 15 days of receiving the documents, notify all persons on the record of owners maintained under *section 47(2)* that it has been served and make a copy of the documents available for inspection (*section 24(2)*). Expropriation settlement rights and the proceeds of expropriation are transferred to the corporation (*section 24(3)*). *Section 126(2)* provides that the proceeds are to be shared by the owners in accordance with their common interest proportions, except in the case of expropriated exclusive use common elements (in such a case the proceeds are divided among the exclusive use owners according to their interests (*section 126(3)*)).

2.3.7. Planning Act Notices

If the corporation is served with a notice issued under the *Planning Act* (i.e. notice of a public meeting for a proposed zoning amendment for neighbouring property) it must, within 15 days of the service, notify all persons in the record of owners (*section 47(2)*) that it has been served with a notice and make a copy available for inspection (*section 25*).

2.3.8. Occupier Liability

Section 26 provides that the corporation, not the owners, is deemed to be the occupier of the common elements for the purpose of determining liability resulting from breach of the duties of an occupier (*section 26*)¹. In this regard, section 3 of the *Occupiers Liability Act* states:

“An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.

Notwithstanding this allocation of responsibility, any judgment against the corporation for damages due to a breach of its duties as an occupier of land would also be a judgment against the owners in proportion to their respective proportion of the common interests (*section 23(6)*).

¹ **069**-Carroll v. Metropolitan Toronto Condominium Corp. No. 560 (1992) [example of corporation's liability for injury due to a faulty stair in common elements].

2.4 DIRECTORS AND OFFICERS

2.4 DIRECTORS AND OFFICERS

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In examining the topic of condominium directors and officers, it should be borne in mind that the directors of the first board (i.e. those appointed by the declarant under *section 42*) in some respects stand apart from those subsequently elected. For example, the first board appointees may be replaced and removed only at the direction of the declarant (*section 42(2)*) and may during a limited time pass resolutions by written vote without a meeting (*section 42(5)* and *42(6)*).

2.4.1. What is the Responsibility of the Board of Directors?

The mandate of the board of directors is to ‘manage the affairs of the corporation’ (*section 27(1)*).

To “manage” is to exercise a supervisory/executive/administrative/organizational role. Managers direct, and others perform to the direction. The word “affairs” could be readily replaced with the word ‘business’ and still convey the intent, although ‘affairs’ emphasizes that there are a range of subjects to be managed.

Practically speaking, the task of managing condominium affairs will vary from condominium to condominium depending upon the complexity of the property, assets, and operation. For example, a small townhouse condominium (i.e. 16 units) may not have a property manager per se, and the board (or delegated member) may be ‘hands-on’ and hire contractor(s) for specific job(s) after obtaining competing quotes. A condominium of 300 apartment units will almost certainly have a full-time property manager, who may have authority, for example, to engage contractors and, in any event, serves as a layer between the board and the repetitive and routine tasks connected with management.

While the expression ‘the bucks stops here’ is not entirely applicable to the board of a condominium (owner’s are entitled to initiate some matters in default of the board acting or on their own), it is the body primarily responsible for ensuring the provisions of the *Condominium Act*, the declaration, by-laws, and rules are respected and will be the focal point for dissatisfaction of any and all owners.

All of the corporation’s by-laws must be passed by the board.

2.4.2. Directors

2.4.2.1. Qualifications to Become a Director

Anyone is qualified to become a director unless they are mentally incompetent, an undischarged bankrupt, or under 18 years of age (*section 29(1)*). To be clear, there is no requirement that a director own a unit in the condominium. The by-laws (but not the declaration (*section 7(4)*) may impose other qualifications (*section 56(1)(a)*).

2.4.2.2. Loss of Office

A director who:

- Becomes an undischarged bankrupt;
- Becomes mentally incompetent;
- Allows a certificate of lien to be registered against a unit owned by the director and does not obtain it's discharge within 90 days of the lien's discharge,

immediately, automatically, and irrevocably ceases to be a director (*section 29(2)*)

2.4.2.3. Invalid Elections and Appointments

In order to ensure that the act of a board can be relied on by all concerned, including third parties without knowledge of the corporation's affairs, the acts of both directors and officer are valid despite any defect that may afterwards be discovered in their election, appointment, or qualifications (*section 37(2)*).

2.4.2.4. Consent

No person can be elected or (in the case of the declarant-appointed first board) appointed to the board unless they consent (*section 30(1)*). Consent is deemed to be given if the person is present at the meeting when elected or appointed and does not refuse to act as a director (*section 30(2)*). If the person is not present at the election/appointment meeting they may supply their written consent before the meeting, or within 10 days thereafter (*section 30(3)*). If consent is not secured, the election of appointment of the particular director is ineffective (*section 30(4)*).

2.4.2.5. Number of Directors

All types of condominiums must have no less than three persons on the board (*section 27(2)*). The by-laws of the condominium may allow for a greater number and that greater number may be reduced (to no less than three) or increased by a subsequent by-law (*section 27(3)*).

2.4.3. Evolution of the Composition of the Board

2.4.3.1. The First Board and it's Enlargement

Within ten days of the registration of a condominium, the declarant will appoint a slate of persons to be directors until 50% or more of the units in the condominium are conveyed (*section 42*).

This initial slate of directors is, or at least may be, expanded by two directors who are elected by the owners (although it is possible that one position may only be voted on by owners who occupy their units (see below), subject to certain stipulations (see the discussion under ‘Enlargement of the First Board’ in the ‘Transfer of Control by Declarant’). These directors are ‘supernumerary’ in the sense that they will hold office despite even though their election causes the number of board members to exceed the maximum otherwise allowed (*section 42(11)*).

The meeting to elect the two owner-elected directors must be called on written notice to all owners and certain mortgagees sent at least 15 days before the day of the meeting (*section 47(1)*). The notice must include the name and address of each individual who has notified the board in writing, as of the fourth day before the notice is sent, of the intention to be a candidate in the election (*section 28(2)*), the place, date, and hour of the meeting, as well as the fact directors will be elected at the meeting (*section 47(9)*). If 50% or more of the units have been transferred by the declarant and 15% or more of the same units are owner-occupied, then the notice must state that one position on the board is reserved for voting by owners of owner-occupied units (*section 28(3)* and *section 51(6)*) and indicate which persons have notified the board in writing, as of the day before the notice is sent, that they intend to be candidates for the ‘owner-occupant-elected’ position (*section 28(3)*).

2.4.3.2. Owner Elected Board

The first board, as enlarged as discussed above, will hold office until the turn-over meeting called under *section 43*, at which time the owners will elect a new slate of directors (one of whom may be subject to the ‘owner-occupant elected’ position). The number of directors elected at the turn-over meeting will be either three, or such greater number as the by-laws provide (the need and authorization for the ‘supernumerary directors’ having passed). The basic procedure for notice and contents of notice is generally the same as for the enlargement of the first board. The meeting must be called on written notice to all owners and certain mortgagees sent at least 15 days before the day of the meeting (*section 47(1)*). In respect of the election the notice must include the name and address of each individual who has notified the board in writing, as of the fourth day before the notice is sent, of the intention to be a candidate in the election (*section 28(2)*), the place, date, and hour of the meeting, as well as the fact directors will be elected at the meeting (*section 47(9)*). If 50% or more of the units have been transferred by the declarant and 15% or more of the same units are owner-occupied, then the notice must state that one position on the board is reserved for voting by owners of owner-occupied units (*section 28(3)* and *section 51(6)*) and indicate which persons have notified the board in writing, as of the day before the notice is sent, that they intend to be candidates for the ‘owner-occupant-elected’ position (*section 28(3)*).

2.4.3.3. Term of Office

While the first board’s term of office is indefinite (being dependent upon the declarant’s timing in conveying 50% or more of the units), all board members elected at and after the turnover meeting will hold office for three years or, if the by-laws so prescribe, a lesser period (*section 31(1)*). The only circumstance in which a director may stay in office longer than three years (or longer than the lesser period provided by the by-laws, if any) is during an interim period between the expiry of the three years (or less) and the owner’s meeting at which a successor is elected (*section 31(2)*).

By-laws of the corporation can provide for staggered terms for directors or the allocation of directors positions amongst certain units, provided the one owner one vote rule prevails (*section 56(1)(a)*).

2.4.4. Board Meetings

The board (other than the declarant-appointed first board) may only transact business of the corporation at a meeting of the board (*section 32(1)*). It is not possible for the board to pass resolutions, or otherwise conduct business or voting, in writing without a meeting being held or a sufficient quorum being present. Meetings may, however, be held through teleconference or other system that allows the directors to participate concurrently provided:

- The by-laws authorize such meetings
- All directors of the corporation (including those who may be absent from the teleconference meeting) consent (*section 35(5)*).

As with any board meeting, a teleconference board meeting must have a quorum.

2.4.4.1. Calling a Meeting

The *Condominium Act* provides and guarantees authority for a quorum/majority of directors at any time to call a meeting for the transaction of any business (*section 35(1)*). A person calling the meeting (one of the quorum/majority) must, at least ten days before the day of the meeting (unless the by-laws specify a different time frame), give written notice of the meeting to every director (*section 35(2)*). The notice must state the time and place of the meeting and the general nature of the business to be discussed at the meeting (*section 35(3)*). Attendance of a director at the meeting is deemed to be acceptance of the notice unless an objection is expressly made at the meeting (*section 35(4)*).

The by-laws of a condominium corporation may also have special provisions governing the calling of board meetings, including such examples as authorization to a specific officer (such as the president) to call a meeting, authorization for any director to call a meeting in the event of some event, establishment of a fixed schedule of meetings (i.e. the third Thursday of each month), and so forth (*section 35(1), section 56(1)(b)*).

2.4.4.2. Quorum for a Board Meeting

A quorum for a board meeting is a majority of the members of the board (*section 32(2)*). This representation level appears to be fixed by the *Condominium Act* and cannot be altered by by-law. As with any meeting, while directors may leave and enter the meeting during it’s course, a majority of the directors must continue to be present if business is to be transacted.

2.4.4.3. Removal of Directors

As noted above, a director’s position on the board will automatically terminate if one of three conditions (mental incompetence, bankruptcy, undischarged lien) exist (*section 29(2)(a)*). In addition, any director can be removed from office by a vote of the owners. In the case of a director elected under *section 51(6)* by owner-occupants, the director may be removed by a vote of 50% or more of the owner-occupants (*section 51(8)*). Other directors may be removed where the owners of more than 50 % of all the units in the corporation vote in favour of removal (*section 33(1)*).

2.4.4.4. Vacancies

If for any reason one or more persons cease to be a director(s) in mid-term, the remaining board members continue in office and may continue to transact the business at meetings provided only that a quorum of directors remains in office (*section 34(1)*). The remaining quorum may, on a majority vote, appoint any qualified (see above) person to fill the vacancy created on the board until the next following annual general meeting (*section*

¹ **270** Reiners et al. and Mercer et al. (1998) [vote of a majority of owners means a majority vote amongst the majority of owners voting]
194 Metropolitan Toronto Condominium Corp. No. 858 v. Simmelsgaard (1997) [vote to remove directors is majority of votes of a majority of owners]
227 Page v. Lafleche (1997) [vote to remove directors is majority of votes of a majority of owners]

34(2)). At that annual general meeting the owners must elect a person to fill the vacancy, with the term of office of the newly elected director being the balance of the previous directors' term (*section 34(3)*).

Vacancies created backhandedly through a by-law increasing the number of members on the board, cannot be filled by the directors then in office. Such vacancies must be filled by election at a meeting of owners with the newly elected directors term of office not commencing until the by-law (increasing the number of directors) is registered (*section 35(7)*).

Should the number of directors remaining in office be less than a majority of the number of directors the corporation must have (three or greater), the board cannot transact business, and must call and hold, within 30 days of losing a quorum, a meeting of owners to fill all vacancies by election (*section 34(4)*). Should the remaining board members not call and hold the meeting, or if there are no directors in office, any owner can call the meeting (following the procedures described above regarding notice etc.) (*section 34(5)*). The owner calling the meeting is entitled to be reimbursed by the corporation for all reasonable costs incurred in calling the meeting (legal advice, printing, delivery, room arrangements, etc., as and if applicable) (*section 34(6)*).

2.4.5. Officers

Every condominium corporation must have persons holding the offices of president and secretary (*section 36(1)*), or one person holding both offices (*section 36(3)*). While the president must also be a director, neither the secretary nor any other officer of the corporation need be a director (*section 36(1)(a)*). In addition to the president and secretary, the corporation may have other officers as provided by by-law or by resolution of the directors (*section 36(1)*); again, the same person may hold one or more offices (*section 36(3)*).

The president of the corporation must be elected by the directors from amongst themselves. All other officers may be either elected or appointed to office by the board (*section 36(2)*) with the choice of installation turning, perhaps, on whether the officer is an employee, contractor, or the like of the corporation (for example, a treasurer who is also book-keeper), in contrast to being an officer as a member of the board as well.

2.4.6. Standard of Care and Liability

2.4.6.1. Basic Duties of Directors and Officers

A common concern of directors, particularly those who may be unfamiliar with business or law or condominium governance (as condominium purchasers, who go on to be directors, may be), is their liability for acts of the corporation and having to answer to others for their own acts as directors.

As a starting point, directors and offices should take note of their basic obligations, from which there can be no withdrawal or disavowal, but adherence to which ought to be instinctive to the average person. In particular, in exercising their powers and discharging their duties all directors and officers must:

- Act honestly;
- Act in good faith; and,
- Exercise the care, diligence and skill:
 - that a reasonably prudent person would exercise;
 - in comparable circumstances (*section 37(1)*)¹.

¹116 Epp v. Hood (1990) [responsibilities of directors and officers, solicitor client costs to disadvantage owner/applicant]

068- Carleton Condominium Corporation No. 347 v. Trendsetter Developments Ltd.et al. (1992) [directors owe fiduciary duty to corporation]

212 National Trust Co. v. Grey Condominium Corp. No. 36 (1995) [directors are not fiduciaries of the owners]

2.4.6.2. Exculpatory Provision for Directors Relying on the Reports of Others

A breach of any of these duties could lay a director open to liability to a person, including the corporation and owners, suffering damages in consequence of the breach of duty. The first two duties (acting honestly and in good faith) are entirely within the control of an individual director. The adequate exercise of the third duty may depend, in part, upon the performance of others. In the latter case, the ‘reasonably prudent person’s care, diligence and skill’ may well be measured against the particular director’s ability to judge the sufficiency of the work of others and to determine if the product of that work is satisfactory. For example, an reserve fund study may reach various conclusions leading to a recommended reserve fund contribution. If the conclusions based on false premises, a director may be the subject of accusations that the diligence of a reasonably prudent person would have uncovered the false premises, and caused the reports conclusions to be rejected. To avoid exposing directors to such accusations and the uncertain outcome of a civil suit based on them, the *Condominium Act* excepts directors (but not officers) from any liability arising from the good faith reliance (meaning, for example, the director has no knowledge to the contrary) upon:

- financial statements of the corporation that
 - the auditor in a written report; or,
 - an officer of the corporation or a manager under an agreement for the management of the property,
 represents to the director as presenting fairly the financial position of the corporation in accordance with generally accepted accounting principles; or
- a report or opinion of a:
 - lawyer
 - public accountant
 - engineer
 - appraiser; or,
 - other person whose profession lends credibility to the report or opinion (*section 37(3)*).

2.4.6.3. Indemnification

The by-laws of a corporation may (and typically do) provide that every director and every officer of the corporation is to be indemnified and saved harmless by the corporation from any liability (including costs and expenses) which a director sustains or incurs in respect of any proceeding proposed or commenced against the person in respect of anything the person has done, omitted to do or permitted in respect of the execution of the duties of office (*section 38(1)(a)*). In addition, if insurance is reasonably available, a corporation must purchase and maintain insurance against the foregoing risk (*section 39*). However, neither indemnification, nor insurance, can be available to protect a director if the person is in breach of their duty to act honestly and in good faith (*section 38(2) and 39*)¹.

In addition to indemnification and insurance for liability and costs relating to actions and proceedings, the by-laws of a corporation may provide for the corporation to indemnify and save harmless directors and officers from “other costs, charges and expenses that the person sustains or incurs in respect of the affairs of the corporation” (*section 38(1)(b) and 39*). In a sense, this provision is a catch-all, as it encompasses not only liability and costs which are incurred in other than actions and proceedings, but any other expense a director or officer may incur in respect of the corporation’s affairs. For example, an officer or director who registers a notice of lien may incur

¹ 116 Epp v. Hood (1990) [responsibilities of directors and officers, solicitor client costs to disadvantage owner/applicant]

traveling expenses (to the registry office), parking charges, and registration fees. A by-law provision dealing with the foregoing would ensure the entitlement to reimbursement without any further action on the board's part.

2.4.7. Disclosures of Interest

As set out in detail below, directors and officers (collectively called 'officials' in the following discussion) of a corporation are under an obligation to declare any material interest, direct or indirect, that they may have in contracts and transaction, existing and proposed, to which the corporation is a party. The obligation is a continuing obligation such that an interest of an official which arises after a contract is entered into must still be declared. It is not an answer to a failure to declare an interest to say, for example, that the corporation is irretrievably committed to a contract and cannot withdraw regardless of the new interest or its depth. The obligation to disclose applies to officials appointed by the declarant (such as the first board members) except to the extent the transaction is part of the routine organization of the corporation affairs on inception¹, and to those elected by the owners or installed in office by the owner-elected board. In order to promote transparency in the affairs of the corporation, the disclosures of officials of their interests in contracts which the corporation has entered into, before or after the disclosure, must be described in the annual financial statements of the corporation (*section 16(4) and 16 (5) of 48 of 01*).

2.4.7.1. The Interest May be Direct or Indirect

An official's interest in a contract may be 'direct' or indirect' (*section 40(1) and 41*). A direct interest is, self-evidently, an interest which directly benefits/affects the official. For example, an official's sale of personal property to the corporation, the engagement of an official to personally carry out work for the corporation, or the lease of corporate property to an official, will give rise to a direct interest. An indirect interest is one which benefits/affects the official indirectly or, in other words, the effect comes in a roundabout way (but nonetheless comes). Using the foregoing examples, the sale of property to the corporation by a company wholly-owned by the official, the engagement of an official's company to carry out work for the corporation, or the lease of corporate property to an official's company, would all give rise to indirect interests.

2.4.7.2. The Interest Must be That of the Official

An interest that must be declared must be the interest of the official (*section 40(1) and 41*). In the examples given above, had the sale/engagement/lease been not with the official but with, for example, a business associate of the official, or a relative, there is no interest that is an interest of the official. The interests belong to third parties. While the official may well be sympathetic to the interests of the third party, this does not make them the official's interests.

2.4.7.3. What is an 'Interest'?

The *Condominium Act* does not define what 'interest' obliges disclosure by an official. Clearly a pecuniary (money) interest would qualify, whether the interest has the potential for positive or negative money consequences to the official. For example, an official who owned a painting contract business bidding on a contract for the condominium would have an interest. Securing the contract would have positive consequences (or should!). What interests may qualify which do not have a pecuniary implication must be a matter of debate, as there are no condominium legal precedents on the subject. If an official was a supporter of a particular charity which was seeking to lease space in the common elements, would an 'interest' exist which required disclosure? While 'yes' may be argued, it is suggested that predispositions, preferences, and other subjective influences on an officials mind's do not constitute 'interests'. An 'interest' should be something which gives rise to a benefit to, or avoids an impact on, the official.

¹ **234 and 267** Peel Condominium Corporation No. 417 and Tedley Homes Ltd. et al. (1993/1997) [units with zero allocation of common interest sold by declarant to corp., full disclosure, sale valid, disclosure of interest not required by directors]

156 Lambton Condominium Corp. No. 16. v. Plowright (1997)

2.4.7.4. The Interest and the Contract Must Be Material to Require Disclosure

Disclosure is not required unless both the contract and the official's interest in it are 'material' (*section 40(2)* and *41(3)*). 'Material' implies significance, something that matters. For example, an official's ownership of a small number of shares of a public natural gas supplier bidding on a supply contract for a condominium will have an indirect interest in the proposed contract; however, the benefit to the official will be so miniscule (i.e. a 1/1,000,000th share of profits earned by the supplier from the contract) as to be immaterial to the official. The corporation's purchase of donuts for a three person directors meeting would be such a minor transaction that it should be not considered 'material' (whether they are purchased from an official or not) so as to require the disclosure procedure to be followed (imagine, if you will, the minutes of the corporation being littered with the declarations of interest of each of three directors every time donuts are brought in).

Where is the dividing line between materiality and immateriality? The simple answer is there is none and the best advice to any official is to be reminded of their duty to act honestly and in good faith (*section 37*). If one has to seriously think about whether or not a declaration must be made, then one should make a declaration. Legal niceties are best avoided by erring on the side of caution.

2.4.7.5. Special Case for Property Purchases

Should the contract or transaction for which the declaration of interest is made involve the purchase or sale of real or personal property by the corporation that the seller acquired within five years before the date of the of the contract or transaction, the interested official must disclose the cost of the property to the seller, to the extent the information is within the official's knowledge or control (*section 40(3)*).

2.4.7.6. Making the Disclosure – Method and Time

An official's disclosure of interest must be made in writing to the corporation and must set out the nature and extent of the interest (*section 40(1)* and *section 41(1)*).

In the case of director's disclosure of interests in contracts and transactions that ordinarily require board or owners approval the disclosure will be made by the director either:

- At the meeting of the board at which the contract or transaction, proposed or otherwise, is first considered (*section 40(4)(a)*); or,
- If the director is not interested in the contract at the date of the meeting at which it is first considered or entered into, then at the next meeting held after the director becomes so interested (*section 40(4)(b) and (c)*).

In the case of director's disclosure of interests in contracts and transactions which in the ordinary course of the corporation's business would not require approval by the directors or owners, an interest must be declared at the first meeting of the directors held after the director becomes aware of the contract or transaction (*section 40(4)(d)*).

In the case of officers of the corporation who are not directors, the declaration must be made at the first meeting of the board held after the officer becomes aware of the contract or transaction (*section 41(2)*).

In all cases of disclosures of interest, whether made by directors or officers, the disclosure must be entered into the minutes of the meeting of the directors at which the declaration is made (*section 40(5)*).

2.4.7.7. Interested Directors Not to Take Part in the Matter's Consideration

Except for two circumstances, a director with a declared/declarable interest in a contract or transaction must not:

- Be present during the discussion at a meeting;
- Vote on a vote respecting the matter; or,
- Be counted in a quorum on a vote respecting the matter (*section 40(6)*).

The exceptions to the above are where the director's interest in the contract or transaction:

- Is or would be limited solely to the insurance which a corporation may take out pursuant to *section 39* (protecting officials from liability and costs);
- Is or would be limited solely to the remuneration as a director, officer or employee of the corporation (*section 40(6)(a)*); or,
- Arises or would arise solely because the director is a director, officer or employee of the declarant, if the director has been appointed to the first board by the declarant (*section 40(6)(b)*).

2.4.7.8. Confirmation by Owners

In order to put beyond dispute any circumstances in which, for example, a declaration of an interest is not made in accordance with the procedures prescribed, *section 40(6)* provides that if:

- The contract or transaction is confirmed or approved by at least two-thirds of the votes cast at a meeting of owners duly called for that purpose; and,
- The nature and extent of the director's interest in the contract or transaction are declared and disclosed in reasonable detail in the notice calling the meeting then,

provided the official has acted honestly and in good faith the official will not be accountable to the corporation or to the owners for any profit or gain realized from the contract or transaction and the contract or transaction is not voidable by reason only of the directors interest.

2.5 LAWS OF GOVERNANCE – GENERAL

2.5 LAWS OF GOVERNANCE – GENERAL

2.5.1. No Dangerous Activities.....2.5-1
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The *Condominium Act* is replete with provisions mandating, guiding, prescribing, and permitting a variety of procedures rules, principles, and the like which frame seemingly the landscape of every condominium’s governance and environment. Generally these are individually dealt with in interwoven sections of the *Condominium Act*; however, there are a handful of ‘boilerplate’ provisions which both focus on establishing fundamental principles and declare basic principles.

2.5.1. No Dangerous Activities

All persons in all condominiums in Ontario are prohibited from permitting a condition to exist, or to carry on an activity in a unit or in the common elements if the condition or the activity is likely to damage the property or cause injury to an individual¹ (*section 117*).

At first glance this prohibition may seem to be a principle that can be assumed; however, it is a striking exception from the laws which govern the relations between land-owners outside of a condominium. In the latter regard, at common law activities on one property which fall within the foregoing description could only be stopped by means of an application to court for an injunction. Simply proving a likelihood of damage or injury would not guarantee success. In the end, the remedy would be in the discretion of the court. The *Condominium Act* mandate would justify an enforcement order (should the alleged offender not bring the condition to an end or cease the activity voluntarily) on proof of a likelihood of damage to the property or injury (which need not be physical) to an individual. This means proof not of the certainty, or of the likelihood beyond a reasonable doubt, but the likelihood on a balance of probabilities. A disagreement over whether a condition or an activities is dangerous would be the subject of mediation and, should the mediation be ineffective, a court application (*section 132(4)* and *section 134*).

2.5.2. Political Canvassers Entitled to Access

All corporations and their employees and agents are prohibited from restricting reasonable access to the property by a candidate, or their authorized representatives, for election to:

- The House of Commons
- The Legislative Assembly of Ontario
- An office in a municipal government; or,
- An office in a school board,

if access is necessary for the purpose of canvassing or distributing election material (*section 118*).

2.5.3. Compliance with the Condominium Act

Section 119 of the *Condominium Act* obliges

- All corporations
- All directors of a corporation
- All officers of a corporation

¹ **402** - Carleton Condominium Corporation No. 291 v. Lee Weeks and Earleen Crawford (2003) Actions which are a mere nuisance do not constitute the kind of activity “likely to damage the property or cause harm to an individual” sanctioned by Sec. 117; however, “glaring aggressively, ‘flipping the finger’, and using loud abusive language” may.

- All employees of a corporation
- All declarants
- All lessor of leasehold condominiums
- All owners,
- All occupiers of units¹,
- All person having an encumbrance against a unit,

to comply with the *Condominium Act*, and the applicable declaration, by-laws and rules. Owner's are obliged to take all reasonable steps to ensure that occupier's of their unit(s) comply with the foregoing (*section 119(2)*), and give the triumvirate of the corporation, its owners and registered mortgagees, the right to require owners and occupants to comply (*section 119(3)*). In the event the condominium is not yet registered, the obligation to comply is imposed on the declarant and occupiers, with the proposed declaration, by-laws and rules being the yardstick against which compliance is measured (along with the *Condominium Act* itself) (*section 119(4) and (5)*). A breach is may be rectified by an application to court for a compliance order (*section 134*)².

¹ **195**-Metropolitan Toronto Condominium Corp. No. 949 v. Irvine (1992) [tenancy terminated for breach of no pets rule]

² **265** Peel Condominium Corp. No. 78 and Harthen et al. (1978) [compliance order against several persons to remove pets]

2.6 ENFORCEMENT

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2.6.1. Inspectors and Administrators

Ontario’s Superior Court of Justice may appoint an inspector or an administrator on application of any of the following persons:

- A corporation;
- A lessor of a leasehold condominium corporation
- An owner; or,
- A mortgagee of a unit (*section 130 and 131*).

The roles of these two types of court appointed officials are distinctly different but complementary.

2.6.1.1. Inspectors

The function of an inspector is to investigate and/or audit any one or more of the items that the declarant is required to give to the board at the turnover meeting and related thereto, including everything from the corporate seal, minutes book(s), agreements, bills of sale, owners, unit, and employee records, warranties, plans, financial records, disclosure statement, and so forth, as well as current records (financial and otherwise), and investigate the affairs of any person who receives money on behalf of a corporation (*section 130(1)(a) to (d)*). Following the authorized investigation(s) the inspector must report to the applicant and the corporation on the inspector’s activities (*section 130(4)(a)*). On receipt of an inspector’s report the corporation must send a copy to all owners (*section 132(5)*).

The court’s discretion on an application to appoint an inspector is limited only to the extent that it must satisfied the application is made in good faith and that it is in the best interests of the applicant (*section 130(2)*). Should these conclusions be reached and the order given, the appointed inspector has all the powers of a commission under Part II of the *Public Inquiries Act* (*section 130(3)*). A court order appointing an inspector must set a time within which the inspector is to report and set out the activities the inspector must perform (*section 130(4)(a)*) and may make an order as to the costs of the investigation or audit (*section 130(4)(b)*)¹.

¹ **181** McDonough v. York Condominium Corp. No. 41 (1990) [80% vote required (under old legislation) to close pool, inspector appointed]

2.6.1.2. Administrators

The function of an administrator is to exercise court given power or take over one or all of the powers and duties of condominium board (*section 131(3)*). In an extreme example, a court could turn over the entire management and administration of a condominium over to an administrator. On the other hand, it is possible for an administrator's appointment to be narrowly focused (i.e. to take over the board's powers and duties regarding the administration of a shared facilities agreement with another corporation).

The only limit to the court's discretion to make an order appointing an administrator is that it must be of the opinion that it would be just or convenient, having regard to the scheme of the *Condominium Act* and the best interests of the owners (*section 131(2)*). In addition to specifying the administrators powers, and the powers and duties transferred from the board, an order may contain directions and terms (*section 131(3)(c)*). It is open to an administrator to apply to the court at any time for opinion, advice or direction of the court on any question regarding the management or administration of the corporation (*section 131(4)*).

The test found in section 131 of the Act for the appointment of an administrator applies equally to the consideration of the administrator's discharge.¹

2.6.2. Mediation and Arbitration

Mediation is a process intended to induce the resolution of a dispute in an informal, non-legalistic, form, with the mediator acting not as judge per se, but as a person striving to facilitate a settlement of the issue between the parties. Mediation is not a binding process. If the mediator fails to bring the opposite parties together, the issue is left unresolved and the parties are no worse, and no better, off. Arbitration is a quasi-judicial process, in which one or more persons are charged with determining the outcome of the dispute after receiving evidence and representations by the parties. An arbitration can be simple and straightforward, decided by a single person, or equivalent to a civil trial and before three arbitrators. The arbitration process is governed by Ontario's Arbitration Act which, among other things, makes the final decision of the arbitrator(s) the equivalent of a court order.

Mediation and arbitration has been part of the dispute resolution process in Ontario, nationally, and internationally for decades. In the business and regulatory arena, contracts, leases, labour relations, and a host of other matters have long been the subject of these extra-judicial means of resolving differences. In recent years, with a judicial system creaking under the weight of a workload unmatched by resources, a rising sophistication generally with alternate dispute resolution, and a recognition that extra-judicial methods of resolving differences are expeditious, relatively cost effective, and fair, alternate dispute resolution has become ubiquitous and a mandatory pre-condition before the judicial process is fully engaged².

The *Condominium Act* fills a void in the old legislation by introducing alternate dispute resolution as a required process in the specific, but broad-ranging, circumstances set out below:

2.6.2.1. Disputes Regarding Agreements

In this regard, any disagreements between parties to any of the following agreements, must be submitted to mediation and arbitration:

1. An agreement between a declarant and a corporation.
2. An agreement between two or more corporations³.
3. An agreement described in *section 98(1)(b)* of the *Condominium Act* (respecting additions etc. by an owner to the common elements) between a corporation and an owner.
4. An agreement between a corporation and a person for the management of the property (*section 132(1)* and *132(2)*).

¹ 426- Bahadoor v. YCCC No. 82 et al. (2006)

² 207-Metropolitan Condominium Corp. No. 699 and 1177 Yonge Street Inc. (1992) [example of a case under the old legislation that would now be dealt with through the mediation and arbitration process].

³ 404- Lanark Condominium Corporation Number 10 v. 105 North Street Limited [The arbitration provisions of a joint use/shared facilities agreement are not applicable to the question of whether a easement validly existed before the registration of a declaration and description.]

2.6.2.2. Disputes Between the Declarant and Corporation Regarding the Budget Statement

All disagreements between the declarant and the corporation respecting the budget statement for the first year after registration or the declarant's obligation to make good any shortfall must be submitted to mediation and arbitration (*section 132(3)*).

2.6.2.3. Disputes Between the Corporation and Owners Regarding the Declaration, By-Laws and Rules

All declarations are deemed to contain a provision requiring that every disagreement between the corporation and the owners with respect to the declaration, the by-laws, or the rules must be submitted to mediation and arbitration for resolution (*section 132(4)*).

2.6.3.1. Mediation

2.6.3.1.1. Engaging the Mediation Process

As set out above, disputants are mutually obligated to mediate/arbitrate differences if the applicable circumstances exist. In all cases, mediation must take place, or attempted, before the disagreement moves on to arbitration. The *Condominium Act* does not contain detail on how the mediation process is commenced; however, it is clear that either, or any, disputant may initiate the process, and that only one person mediates (two or more is not provided for, nor would it be sensible). A workable procedure would be to prepare and deliver a letter to the opposite disputant(s) providing notice that the dispute must be mediated and proposing one or more specific persons to be the mediator. The proposed mediators should have been contacted by the proposing disputant to determine availability and charges (if any). The opposite disputant(s) should reply by selecting one of the initiating disputants nominees or proposing other person(s) to be mediator. Subject to both parties settling the terms (i.e. payment) of engagement with the selected mediator, the ball will be passed to that person to endeavour to obtain a settlement with respect to the subject of the disagreement (*section 132(5)*).

2.6.3.1.2. No Agreement on Mediator

The *Condominium Act* does not provide for a mechanism to break a failure of the opposite disputants to agree on a mediator. In the event of such a happening, the mediation will simply be skipped; however, it is only the passage of 60 days after the parties submitted the disagreement to mediation which will allow the disputants to move to mediation (*section 132(1)(b)(i)*) by one of the disputants commencing the arbitration process (see below). Although the *Condominium Act* is not clear on when the parties 'submit the disagreement to mediation', a reasonable interpretation is that this is the day the initiating disputant notifies the opposite disputant of the initiation of the process and that disputant's proposed mediator or alternates.

2.6.3.1.3. Mediation

Should the disputants agree on the mediator the process then is turned over to the appointed mediator to confer with the parties and endeavour to obtain a settlement (*section 132(5)*). The mediator is not obliged to search out facts but clearly may receive any information which the disputants may provide during the conference(s) (which may take place in the presence of both/all disputants and/or in separate conferences). There is no requirement to hold a 'hearing session', or even to meet. The mediator can confer with the disputants in any convenient and effective means, whether in person (likely) or teleconference. The objective is to reach a settlement, not to have a solomonic process. Informality is expected, and diplomacy and fairness desired from the mediator.

There is no time limit imposed on the mediator to complete the mediation (successfully or not) and it is in the mediator's discretion to determine that further mediation is fruitless and the mediation must be regarded as having failed. Then the latter determination is made, the mediator delivers a notice to the disputants notifying them that the mediation has failed. Thirty (30) days after such notice is given, any disputant may initiate the arbitration process (*section 132(1)(b)(ii)*).

2.6.3.1.4. Fees and Expenses of Mediation

There is no prohibition on disputants agreeing beforehand on how the fees and expenses of the mediation will be dealt with as between them and such should be considered (although it is recognized that agreement on this topic is unlikely when a larger dispute is in the foreground). Clearly this topic will be pertinent as and when settlement becomes a reality and, in this regard, the Condominium Act requires that the sharing of the mediators fees and expenses be dealt with in any settlement reached. If no settlement is reached, it is up to the mediator to apportion the costs between the disputants and to notify them of the division in the notice advising of the mediations failure (*section 132(6)*).

2.6.3.1.5. Record of Settlement

Should a mediation result in a settlement between the disputants the mediator is required to make a written record of the settlement which shall form part of the agreement or matter that was the subject of the mediation. The result is thus binding on the disputants (*section 132(7)*).

2.6.2.2. Arbitration¹

Should a mediation never get off the ground due to a failure to agree on a mediator, or in the event of failure of the mediation, a disputant may initiate the arbitration process 60 days after the mediation was first submitted (in the first case) or 30 days after the mediator's notice of failure is given, in the second case.

Arbitrations are governed by Ontario's *Arbitrations Act* which contains detailed protocols and rules on how the arbitration is commenced, conducted, and completed. Reference should be had to the *Arbitrations Act* for full information, however, the following summarizes the key features:

- The arbitration is conducted by one arbitrator unless the disputants mutually agree to a larger number (*section 9*);
- In the event of failure of the disputants to agree on the identity of the arbitrator the question may be decided by a judge on application of one of the parties (*section 10*);
- The arbitrator must disclose any circumstance that suggest a reasonable apprehension of bias (*section 11*);
- In an arbitration the parties must be treated equally and fairly and must be given an opportunity to present and respond to a case (*section 19*);
- The arbitrator determines the procedure to be following (*section 20*) and the time and place for the hearing (*section 22*);
- *Sections 14, 15 and 16* (protection of witnesses, evidence at hearings, notice of facts and opinions) of the *Statutory Powers Procedure Act* apply to the arbitration (*section 21*);
- The parties submit statements which define their positions (*section 25*);
- The arbitrator can appoint an expert if needed (*section 28*);
- An arbitral tribunal must decide the dispute in accordance with law, including equity, and may order specific performance, injunctions and other equitable remedies (*section 31*);
- The decision of the arbitrator is binding on the disputants (*section 37*);
- An arbitration decision can be appealed on a question of law (*section 45*) or set aside on application to the court on one of several grounds including that a party was not treated equally or fairly (*section 46*);
- The arbitrator may award costs of the arbitration (*section 54*);
- An arbitration award may be enforced by application to court (*section 50*).

¹ 405- McKinstry et al v York Condominium No. 472 (2003) [The scope of the subjects of the mediation/arbitration procedure should be given a generous interpretation and extend to both disagreements and claims for damages. Disagreements with respect to the Act itself are not required to be submitted to mediation/arbitration.]

2.6.3. Compliance Orders

A keystone of condominium life is that all owner's are guided and governed by the same set of 'laws'. These range from the prescriptions of the *Condominium Act*, to the legislation unique to the particular condominium, namely the declaration, by-laws and rules. Everyone subject to these 'laws' are obliged to respect their edicts and directives and, in some cases, ensure others under their control do likewise, and are entitled to expect others to do the same. While 'laws' set the standards, there must also be an enforcement mechanism which guarantees that differences can be resolved, and respect for the 'laws' obtained, at the initiative of the persons entitled.

Section 134 of the *Condominium Act* provides that any one of:

- An owner¹;
- An occupier of a proposed unit;
- A corporation;
- A declarant;
- A lessor of a leasehold condominium; or,
- A mortgagee of a unit

to apply for a court order enforcing compliance with any provision of²:

¹ **323** *Stulberg v. York Condominium Corp. No. 60* (1981) [application cannot be brought in name of agent of owner]

² **258**-*Key et al. and St. George Holdings Co. Ltd. et al.* (1972) [order to comply not granted as interior changes to units not prohibited]

361 *York Condominium Corp. No. 288 v. Harbour Square Commercial Inc.*, (1988) [compliance order, illegal parking]

192 *Metropolitan Toronto Condominium Corp. No. 776 v. Gifford* (1989) [no pets restriction in declaration enforced strictly]

371 *York Condominium Corp. No. 71 v. Sullivan* (1990) [rule prohibiting commercial vehicle parking, valid, court order to comply]

381 *York Region Condominium Corp. No. 585 v. Gilbert* (1990) [no pets restrictions in declaration and rules enforced]

357-*York Condominium Corp. No. 166 v. Nunez* (1990)

215 *Nipissing Condominium Corp. No. 24 v. Ferris* (1993) [no pets clause, court's discretion not to enforce exercised]

193 *Metropolitan Toronto Condominium Corp. No. 850 v. Oikle* (1994) [prohibition against transient use (temporary accommodation) enforced]

174 and 175 *Marafioti v. Metropolitan Toronto Condominium Corp. No. 775* (1994/1997) [deck ordered removed from common elements]

362 *York Condominium Corp. No. 35 v. Mosseau* (1995) [delay in pursuing enforcement ground for denying order for compliance]

233 *Peel Condominium Corp. No. 338 v. Young* (1996) [restriction in declaration against pets over 25 lbs. Enforced]

235 *Peel Condominium Corp. No. 449 v. Hogg* (1997) [pet prohibition enforced]

341 *Waterloo North Condominium Corp. No. 198 v. Donner* (1997) [prohibition against pets contrary to Human Rights Code where pet assists hearing impaired occupant]

214 *Niagara North Condominium Corp. No. 7 v. Goodhew* (1997) [requirement to obtain approval for changes to units which impair value of other property, no application to air-conditioner unit]

363 and 364 *York Condominium Corp. No. 382 v. Dvorchik* (1992/1997) [rule prohibiting pets over 25 lbs. is valid and enforceable]

213-*Niagara North Condominium Corp. No. 46 v. Chassie* (1999) [court retains discretion not to enforce]

238 *Peel Condominium Corp. No. 516 v. Williams* (1999)

- The *Condominium Act*
- The declaration¹
- The by-laws;
- The rules; or,
- An agreement between two or more condominium corporations for the mutual use, provision or maintenance of facilities or services of any of the parties to the agreement (*section 134(1)*).

It should be noted that occupiers and lessees of registered units, parties to agreements other than those above (i.e. an insurance trustee or manager) are not capable of making such an application in their own right.

It is a pre-condition to making an application that the mediation and arbitration processes (see below) are not available (unless the applicant has failed to obtain compliance using those processes) (*section 134(2)*). Bearing in mind that mediation and arbitration are essentially directed at resolving disagreements (i.e. the issue is about whether something does or does not constitute the violation of a by-law) rather than obtaining enforcement (i.e. an activity clearly violates a by-law but the person causing the violation refuses to comply), a court application would likely be appropriate in any case where the facts and ‘laws’ are clear.

A court may, in addition to granting an order for compliance, require persons named in the order to pay

- Damages incurred by the applicant as a result of the acts of non-compliance; and
- Cost incurred by the applicant in obtaining the order (*section 134(3)*).

Where an application seeks an order to terminate a lease of a unit for residential purposes the court may only grant the relief sought if:

- The lessee is in contravention of a previous court order directing compliance with ‘laws; or,
- The lessee is required to pay common expense contributions (due to the owners default in doing so) and is in default (*section 134(4)*).

Any award of damages or costs obtained by a corporation in a compliance order, together with any additional costs to the corporation in obtaining the order, must be added to the common expenses for the unit and must be paid in a time frame which the corporation may set (failing which a lien would be registered) (*section 134(5)*)².

2.6.4. Oppression Remedy

Where:

- An owner;

283 Rohoman v. York Condominium Corp. No. 141 (2000) [court order to ensure requisitionists can call meeting]

368-York Condominium Corp. No. 511 v. Best Deal Motors & Collision Centre Inc. (2001) [parking in common elements prohibited by order]

¹ **419**- Niagara North Condominium Corp. No. 125 v. Waddington (2007) [Where an application brought by a condominium owner with the knowledge and evidentiary assistance of a condominium corporation to oust a tenant’s pet was dismissed, a subsequent application for identical relief brought by the corporation was properly dismissed as an abuse of process.]

² **078**-Clarke v. Middlesex Condominium Corp. No. 185 (1996) [example of the difficulties the old legislation presented and which are overcome in the *Condominium Act*].

403- Carleton Condominium Corporation No. 555 v. Guy Lagace, Barbara Stinson-Shea and John Bowman Spero [It is implied in the Act that for a condo. corp. to seek costs of a court application from an owner to restrain abusive conduct by the owner’s tenant, the owner must be given prior notice of such activity. Costs payable by an owner will be reduced where the condo. corp. failed to give notice of its intention to take legal action]

407- Metropolitan Toronto Condominium Corp. No. 1385 et. Al v. Skyline Executive Properties Inc. et al (2005) [Section 134(5) of the 1998 Act allows a condo. corp. to lien a unit for its legal and non-legal costs above and beyond costs ordered to be paid by the Court, as well as the latter costs, provided those additional costs were incurred in obtaining the order of the Court (these would not, for example, include the costs of enforcing the order). Such costs include the costs of maintaining an order on appeal.

- A corporation;
- A declarant; or,
- A mortgagee,

makes application and demonstrates to the court that the conduct of:

- An owner;
- A corporation;
- A declarant; or,
- A mortgagee,

is or threatens to be:

- Oppressive; or,
- Unfairly prejudicial

to the applicant, or unfairly disregards the applicants interests, the court can make an order to ‘rectify the matter’ (*section 135(1) and (2)*)¹. In all cases the court retains a discretion to grant or refuse an application for compliance.² A factor will be the quality and weight of the evidence (which would be in written form)³.

An order of this nature can include an order prohibiting the conduct referred to in the application and, most significantly, an order requiring the payment of compensation (*section 135(3)*). It should be noted that compensation is not to be confused with damages. While compensation may include damages, it could also include a payment for inconvenience and the like. For example, a unit owner who suffered through weeks of noise due to loud music in a unit (which violated a noise regulation in the rules) despite complaints lodged with and ignored by the offending unit owner could receive a payment reflecting a fair sum for the period of violation.

A application to court under section 135 need not first proceed through the mediation/arbitration procedure.⁴

2.6.5. False and Misleading Statements

Section 133 of the *Condominium Act* enjoins a declarant from:

- making a material statement or providing material information that is false, deceptive or misleading; or
- omitting a material statement or material information⁵,

in any statement or information the declarant is required to provide under the Condominium Act.

Any breach of the above duty exposes a declarant to an application by a corporation or an owner to recover damages for any loss sustained as a result of reliance on the statement (*section 133(2)*)⁶.

¹ **405-** *McKinstry et al v York Condominium No. 472 (2003)* [The oppression remedy (sec. 135) protects reasonable expectations and should not be unduly restricted but should be given a broad and flexible interpretation that will give effect to the remedy. It applies to protect against both conduct which is unlawful or without authority and conduct which is technically authorized and ostensibly legal. The only prerequisite is that the conduct must be or threaten to be oppressive or unfairly prejudicial to the applicant, or unfairly disregard the interests of the applicant.]

409- *Niedemeier v. York Condominium Corp. NO. 50 (2006)* [While a Corporation acted without authorization to deny an owner access to certain common elements as a ‘self-help’ remedy to obtain the owner’s payment of funds due the Corporation, such conduct is not such as to bring the oppression remedy into play.]

411- *Peel Condominium Corporation No. 668 (2006)* [The oppression remedy has no application against a third party (arm’s length lender) who plays no part in the control and operation of the corporation.]

² **420-** *Little v. Metropolitan Toronto Condominium Corp. No. 590 (2006)* [Section 134(5) of the Act, allows an owner to bring an application to enforce compliance with the Act; however, the remedy is in the discretion of the court. The discretion was not exercised where the corporation acted in good faith and with the consent of 2/3’s of the unit owners (albeit that the consent was not obtained in strict compliance with the Act).]

³ **264** *Peel Condominium Corp. No. 73 and Rogers et al. (1978)*

⁴ **405-** *McKinstry et al v York Condominium No. 472 (2003)*

⁵ **186** *Metropolitan Toronto Condominium Corp No. 858 v. Tornat Construction Inc. (1994)* [failure to disclose adjacent public housing not a material non-disclosure]

⁶ **142** *Jaremko v. Shipp Corp. (1995)* [material non-disclosure, truck parking adjacent to suite, damages]

343 and 344 *Wellington Condominium Corporation No. 61 v. Marilyn Drive Holdings Limited (1994/1998)* [superintendent’s suite corporate property, damages determined by reference to ‘live-out’ super. salary]

236 and 237 *Peel Condominium Corp. No. 505 v. Cam-Valley Homes Ltd. (1999-2001)* [adequacy of disclosure must be determined by the contents of the entire package; vendor has obligation to fulfill contract]

2.6.6. Offences

Every corporation (condominium or otherwise), and every other person who knowingly contravenes any of the following provisions of the Condominium Act:

<u>Section</u>	<u>Content</u>
<i>section 43(1)</i>	requires the calling of the turnover meeting within 21 days after declarant ceases to own majority of units
<i>section 43(3)</i>	requires the board to hold the turnover meeting within 21 days after it is called
<i>section 43(4)</i>	requires the declarant to turn over a number of items and documents to the new board
<i>section 43(5)</i>	requires the declarant to turn over a number of items and documents to the new board within 30 days of the turnover meeting
<i>section 43(7)</i>	requires the declarant to deliver audited financial statements within 60 days of turnover meeting
<i>section 55(1)</i>	requires the corporation to keep a number of specified records
<i>section 72(1)</i>	requires the declarant to deliver a disclosure statement to purchasers
<i>section 81</i>	requires purchasers monies to be held in trust
<i>section 115(1)</i>	requires persons to hold condominium monies in trust
<i>section 115(2)</i>	requires the corporation to maintain a general and a reserve account
<i>section 115(3)</i>	requires corporation's accounts to be located only at certain institutions
<i>section 115(4)</i>	limits the range of eligible securities for corporate investment
<i>section 115(9)</i>	requires persons to keep records of trust monies
<i>section 118</i>	requires corporations to afford access to political canvassers
<i>section 133 (1)</i>	prohibits false or misleading statements
<i>section 143</i>	requires certain inclusions in a disclosure statement for a common elements condominium
<i>section 147(1)</i>	requires certain inclusions in a disclosure statement for a phased condominium
<i>section 147(3)</i>	makes certain statements non-merging on closing
<i>section 152(1)</i>	requires certain additional turnovers in the case of a phased condominium
<i>section 152(2)</i>	requires certain additional turnovers in the case of a phased condominium
<i>section 161(2)</i>	requires certain additional inclusions in a declaration for a vacant land condominium
<i>section 169</i>	requires certain additional inclusions in a declaration for a leasehold condominium

is guilty of an offence and on conviction is liable to a fine of:

- not more than \$100,000.00 if the offender is a corporation; or,
- not more than \$25,000.00 if the offender is person who is not a corporation (*section 137(1)*).

A director or officer of a corporation (condominium or otherwise) who knowingly causes, authorizes, permits, participates in or acquiesces in the commission by the corporation of an of the above offences commits an independent offence (*section 137(3)*).

In addition to entering a conviction and imposing a fine, a court presiding over a conviction may make an order for compliance; however, the court must have jurisdiction otherwise given (*section 137(4)*).

2.6.7. Limitation Period for Offences

A special limitation period is placed on the commission of the offences noted above being the second anniversary of the day on which the facts that gave rise to the offence were discovered (*section 137(3)*).

2.7 AMENDING THE DECLARATION AND DESCRIPTION

2.7 AMENDING THE DECLARATION AND DESCRIPTION

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A declaration contains fundamental information and direction on the governance of a condominium, and a description contains fundamental information on the physical make-up of a condominium. With the exception of amendments consequential on the creation of a phase for a phased condominium, amendments to either the declaration or description (or both) are dependent on the navigation of procedures which are designed to ensure the proposed amendments achieve an adequate consensus amongst the owners, excepting technical changes which may require external approval before being effective. The criteria which will apply to the amendment procedure will depend on the nature of the change being made.

2.7.1. Amendments the Board Can Do On It's Own

Declaration may contain information, constraints, directions, and the like which range from the mundane to the immensely important. Indeed, a specific part of a declaration may be both mundane and immensely important, depending upon one's perspective. Other than amendments creating phases, there is only one class of amendments to the declaration which can be implemented by the board without some form of third party endorsement. Specifically, the board can change the address for service or mailing address of the corporation by registering a notice of change of address in *Form 2 to regulation 49 of 01 (section 108)*. An amendment of this nature will be authorized by resolution of the board.

2.7.2. Amendments Which Do Not Require Consent of the Owners But Require Third Party Endorsement

There are two circumstances in which a corporation, an owner, or interested person may initiate proceedings to change the declaration or description without any form of approval or consent of the owners.

2.7.2.1. Application to Court By the Corporation or an Owner

On application of the corporation or an owner on at least 15 days prior notice to the corporation, and the owners and mortgagees (as listed in the corporation's record maintained under *section 47(2)* as of the 30th day prior to the date the application is made (which will be the day the application is filed with the court)) the court may order the declaration or description to be amended if it is satisfied that the amendment:

- Is necessary or desirable to correct an error or inconsistency that appears in the declaration or description; or,
- Arises out of the carrying out of the intent and purpose of the declaration and description (*section 109(3)*)¹.

¹ **179-Marotta Holdings Ltd. v. 912564 Ontario Inc. (1992)** [example of an application dealt with by the court] **065 and 070 Carleton Condominium Corp. No. 441 v. Owners et al. of Carleton Condominium Plan No. 441(1997/1998)** [declaration provisions dealing with shared facilities on external lands proper, court will not order amendment to delete same]

2.7.2.2. Application to the Director of Titles by the Corporation or an Interested Person

On application of the corporation or an interested person (for example, possibly an owner, a mortgagee, a declarant, or an owner of lands benefited by an easement over the property) the Director of Titles may order an amendment(s) to a declaration or description to correct an error or inconsistency that is apparent on the face of the declaration or description (*section 110(1)*) provided the Director is satisfied that the amendment will correct the error or inconsistency (*section 110(3)*).

The form and manner of giving notice to the corporation and to every owner and mortgagee listed in the *section 47(2)* record is at the direction of the Director of Titles (*section 110(2)*).

In the case of both of the above type of applications, an amendment which is ordered does not take effect until a certified copy of the order for amendments is registered (*section 109(4)* and *110(4)*).

2.7.3. Amendments Requiring the Consent of the Owners

With the exception of declaration changes of service/ mailing address, and amendments ordered on application to the court or the director of titles, every amendment to the declaration or description must receive the written consent of a specified percentage of the unit owners. The minimum percentage required varies depending upon the nature of the change being made by the amendment. Regardless of the level of consent necessary to effect an amendment, the following protocol is to be followed (it should be noted that while all of the steps must be taken, other than the first (board resolution) and last (registration), there is no set order in which they must be taken; the order presented below is a random example):

1. The board must approve the amendment by resolution (*section 107(2)(a)*).
2. Notice of the proposed amendment must be sent in accordance with *section 47(8)* to all mortgagees listed in the corporate records.
3. If less than three years have elapsed since the later of the date:
 - The condominium was registered; and,
 - Of the first agreement of purchase and sale for a unit entered into by the declarant (*section 107(2)(ii)*);

And

 - the declarant still owns at least one unit in the condominium, other than a unit devoted to telecommunications servicing the condominium (*section 107(2)(b)(i)*),

then the declarant must consent to the proposed amendment in writing (*section 107(2)(b)*).

4. The board must call a meeting of the owners for the purpose of considering the proposed amendment (*section 107(1)(c)* and *107(3)*). The notice of the meeting must comply with *section 47* (i.e. be given no less than 15 days before the meeting) and must be accompanied by a copy of the proposed amendment (*section 107(4)*).

5. The written consent of the minimum number of unit owners required for the particular type of change must be obtained (*section 107(2)(d)* or *107((e)*).

6. The corporation must register a copy of the amendment (using Form 1 to *regulation 49 of 01*) no earlier than the 30th day following the day it gave the notice of the owner's meeting (item 2 above) (*section 107(5)*).

2.7.4. Minimum Level of Owner's Written Consent

2.7.4.1. Changes Requiring Written Consent of 90% of the Unit Owners

If the amendment makes a change to:

- the proportions of the common interests allocated to the units;
- the percentage shares of the common expenses allocated to the units;
- the exclusive use common elements; or,
- the allocation of the obligations to repair and maintain the common elements; then,

the written consent of 90% of the owners of the units as at the time the board approved the proposed amendment must be obtained (*section 107(2)(d)*).

2.7.4.2. Changes Requiring Written Consent of 80% of the Unit Owners

The written consent of 90% of the owners of the units as at the time the board approved the proposed amendment must be obtained in all cases other than those requiring 90% consent (*section 107(2)(e)*).

2.7.5. General

Section 7(1) (execution by the declarant) and *section 7(2)(b)* (consent of mortgagees) do not apply to amendments made under *section 107* (i.e. with consent of the owners) (*section 8 of regulation 48 of 01*). Since these sections are not expressly made inapplicable to amendments made by order of the court or the Director of Titles, presumably they are applicable to such amendments.

Amendments made by court order (*section 108*) or by order of the Director of Titles (*section 109*) are exempt from *Planning Act* approval (*section 11 of regulation 48 of 01*). Amendments made under *section 107* which amend the description will require *Planning Act* approval if there will be a conflict with *section 50* of the *Planning Act*.

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3.1 SALE OF UNITS

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3.1.1. Agreement of Purchase and Sale

3.1.1.1. Implied Covenants

Every agreement of purchase and sale of a proposed unit entered into by a declarant before the registration of the declaration and description that creates the unit (or common interest in the case of a common elements condominium (*section 138(4)*) is deemed to contain the following covenants by the declarant:

1. If the proposed unit is for residential purposes, a covenant to take all reasonable steps to sell the other residential units included in the property without delay, except for the units that the declarant intends to lease¹.
2. A covenant to take all reasonable steps to deliver to the purchaser without delay a deed to the unit that is in registerable form².
3. A covenant to hold in trust for the corporation the money, if any, that the declarant collects from the purchaser on behalf of the corporation (*section 78(1)*).

These covenants continue even after the conveyance of a unit (*section 78(2)*) and may be enforced by a purchaser through the application to court for a compliance order (*section 78(3)* and *section 134*).

A declarant who has entered into an agreement of purchase and sale for a proposed unit is under a duty to take all reasonable steps to complete the buildings and register, without delay, the declaration and description (*section 79(1)*)³. An agreement of purchase and sale cannot be terminated by a vendor by reason only of a failure to register the condominium within a time specified in the agreement of purchase and sale (*section 79(2)*), but may apply to court for such a direction (*section 79(3)*).

3.1.2. Disclosure Statements

3.1.2.1. What is a Disclosure Statement?

In general terms, a disclosure statement's longstanding purpose has been to fully and accurately inform purchasers of the condominium's property and amenities, significant features of the condominium constitutional structure, financial projections, and the like.

Under the old condominium legislation the statement was provided by the declarant in relation to residential units (statement were not required for non-residential condominiums) and was required to be reliable. No agreement of purchase and sale was binding until the statement was in the hands of a purchaser. A ten-day 'cooling off' period after the delivery of the statement to the purchaser allowed purchasers the time to review the statement and, should they wish, cancel the agreement to purchase. If material changes arose to the contents of the statement, an amendment had to be delivered, following which another 10 day period began to run during which the purchaser could cancel. False or misleading statements gave purchasers a statutory right to damages for resulting loss.

Also under the old condominium legislation the level of detail needed in a disclosure statement was a matter of debate as the statutory direction was not specific⁴. The uncertainty was tested in numerous court cases, many, if not most, of which were driven by purchasers seeking to rescind their agreements in the face of a falling real estate market.

The requirement and purpose of a disclosure statement is in place in the *Condominium Act*. However, a disclosure statement is required to be delivered to a purchasers of any condominium unit, whether residential, non-residential, or other (*section 72*). The contents of the disclosure statements is prescribed in detail in the *Condominium Act* and *regulation 48* (respectively *sections 72(3)* and *section 17(1)*) and so there is little room for doubt as to what is to be included. An inadequate or incomplete disclosure statement will lay the

¹ **020** Aita et al. v. Silverstone Towers Ltd. (1978)

232 Peel Condominium Corp. No. 199 v. Sanrose Construction (Dixie) Ltd. et al. (1992)

068 Carleton Condominium Corporation No. 347 v. Trendsetter Developments Ltd. et al. (1992)

287 and 288 Scanlon v. Castlepoint Development Corp. (1991/1992)

332 Townsgate 1 Ltd. v. Klein (1994)

152 Kratz v. Parkside Hill Ltd. (1995)

² **297** Singer v. Reemark Sterling I Limited (1992)

289 Scaroni v. Rosepol Holdings Ltd. (1995) [failure to register in timely way, purchaser not bound]

³ **285** Russ-Cad Management Ltd. v. Bayview 400 Industrial Developments Inc. (1992)

106 and 105 Dinicola et al. v. Huang & Danczkay Properties (1996/1998)

⁴ **014 and 015** Abdool v. Somerset Place Developments of Georgetown Ltd. (1991)

agreement open to rescission¹ and, after closing, expose the declarant to liability to the corporation and owners who suffered loss as a result of reliance on the faulty statement (*section 133*)².

3.1.2.2. Cooling off Period and Rescission

No agreement of purchase and sale entered into by a declarant is binding on a purchaser until a current disclosure statement has been delivered to that purchaser (*section 72(2)*)³.

Upon the later of the delivery of the disclosure statement or a fully executed copy of the agreement of purchase and sale a purchaser has ten days to unilaterally rescind the agreement (*section 73(2)*). No reason need be given for rescinding and the decision to rescind cannot be challenged. Any rescission must be in writing and must be given to the declarant or the declarant's solicitor (*section 73(2)*). The method of giving the notice is not set out in the legislation. While personal service by hand delivery is obviously acceptable, other methods are also possible. The agreement of purchase and sale should contain provisions as to how notice is given (i.e by fax, by delivery to a certain address etc.). In addition, during this ten day period the purchaser may elect to pay the purchase price in full upon taking up interim occupancy (if such is applicable). This right is available regardless of any contrary term in the agreement (*section 80(3)*). Should the right be exercised and the monies deposited on interim closing, the declarant will not charge interest on any amount during the period prior to closing (although the purchaser will remain entitled to interest on funds deposited prior to interim closing).

If the purchaser elects to rescind, all money received from the purchaser under the agreement and credited towards the purchase price, together with interest on the money (at 2% below the rate established as the minimum rate at which the Bank makes short-term advances to members of the Canadian Payments Association) to the date of refund (*section 19(2)* and *19(3)*) must be promptly repaid to the purchaser by the declarant (*section 73(3)*).

3.1.2.3. Material Changes in Disclosure Statement

3.1.2.3.1. Vendor's Obligation to Disclose Material Changes

Whenever there is a material change to the information contained or required to be contained in a disclosure statement (or a revised disclosure statement or notice if there have been revisions to the original) delivered to a purchaser, there is an obligation on the declarant to deliver a revised disclosure statement or notice (*section 74(1)*)⁴. The delivery must be made within a reasonable time after the material change occurs and, in any

¹ **043-** Benner et al. v. HLS York Developments Ltd. (1985) [adequate disclosure]

073 Chapman v. HLS York Development Ltd. (1988)

049 Bondy v. P.C. Cove Builders Inc. (1991) [adequate disclosure]

055 Buyanovsky v. Townsgate 1 Ltd. (1993) [disclosure adequate]

186 Metropolitan Toronto Condominium Corp No. 858 v. Tornat Construction Inc. (1994) [failure to disclose adjacent public housing not a material non-disclosure]

072 Ceolaro et al v. York Humber Ltd. et al (1994) [adjacent property ex-landfill site, omission to make disclosure not material, no health issue]

142 Jaremko v. Shipp Corp. (1995) [material non-disclosure, truck parking adjacent to suite, damages]

134 Hidden Valley Lakeside Condominiums Inc. v. Vercaigne (1997)

156 Lambton Condominium Corp. No. 16. v. Plowright (1997)

299 Skyrise Developments Ltd. v. Aldrovandi (1997) [disclosure adequate, purchaser bound]

236 and 237 Peel Condominium Corp. No. 505 v. Cam-Valley Homes Ltd. (1999-2001) [adequacy of disclosure must be determined by the contents of the entire package; vendor has obligation to fulfill contract]

² See chapter 2.6.5.

³ **007** 500 Glencairn Ltd. v. Farkas (1994) [no material amendments, agreement binding on purchaser seeking to rescind]

379 York Humber Ltd. v. Mesa (1997) [no disclosure statement, agreement not binding]

338 Village Grove Corp. v. Collins (1997) [inadequate disclosure of amenities, agreement of purchase and sale not binding]

⁴ **014 and 015** Abdool v. Somerset Place Developments of Georgetown Ltd. (1991) [no material changes, all documents must be looked at]

event, no later than 10 days before final closing of the purchase (section 74(4)). The revised statement or notice must clearly identify all changes that, in the reasonable belief of the declarant, may be material changes, and summarize the particulars of them (section 74(3)).

3.1.2.3.2. What are Material Changes?

Material Changes¹ are subjectively defined in the *Condominium Act* in relation to five criteria; specifically, a material change must be:

- a change or series of changes
- that a reasonable purchaser, on an objective basis
- would regard collectively
- as sufficiently important to the decision to purchase
- that it is likely that the purchaser would not have entered into the agreement (section 74(2)).

Clearly there are boundaries to changes which are material changes. They will not be trivial (for example, the disclosure statement must include the declarant’s name and mailing address. A change to this information could not conceivably be a ‘material change’), but the threshold can be debatable even where the facts are clear. The Condominium Act does declare that certain changes will not be considered ‘material’. These are:

- (a) a change in the contents of the budget of the corporation for the current fiscal year if more than one year has passed since the registration of the declaration and description for the corporation,
- (b) a substantial addition, alteration or improvement within the meaning of section 97(6) that the corporation makes to the common elements after a turn-over meeting has been held under section 43,
- (c) a change in the portion of units or proposed units that the declarant intends to lease,
- (d) a change in the schedule of the proposed commencement and completion dates for the amenities of which construction had not been completed as of the date on which the disclosure statement was made, or
- (e) a change in the information contained in the statement described in section 161(1) of the services provided by the municipality or the Minister of Municipal Affairs and Housing, as the case may be, as described in that subsection, if the unit or the proposed unit is in a vacant land condominium corporation (section 74(2)).

3.1.2.3.3. Declarant’s Incentive and Disincentive to Disclose Changes

Quite apart from the statutory direction of section 74(1) obliging the declarant to disclose material changes within reasonable time, and the risk that the conveyance could collapse in the last ten days before closing (section 74(4)), should the declarant fail to make correct and timely disclosure it can be liable for the purchaser’s consequential damages. This liability arises if the declarant, in a statement or information:

- makes a statement or provides material information which is false, deceptive, or misleading.
- omits a statement or material information that the declarant is required to provide (section 133).

019 Aiken v. Dockside Village Inc. (1993) [no material amendments]
239 Phyllis Israel et al v. Townsgate I et al (1994) [disclosure adequate, purchaser bound]
075 Chien v. Law Development Group (Thornhill) Ltd. (1998) [cumulative changes material, purchaser not bound]
¹ **243** Rassos v. Greystone Walk Ltd (1991) [court ruling on law re: adult lifestyle community not a material change]

While an argument might be raised that so long as no revised disclosure statement is issued, a change which arises after the original disclosure statement is delivered will not give rise to liability as set out above. The argument would be premised on the notion that the original statement was accurate at the time of delivery, and as no other statement had been issued there was no opportunity for false etc. statements, omissions etc. This would not seem to be in the spirit of the legislation and the view that continuous disclosure is the rule, with the outdated disclosures being touchstone against which liability will be measured, is sensible.

The liability for detrimental reliance damages will exist for a period of at least 6 years after the false, misleading statements/omissions are discovered or reasonably discoverable; however, provided the disclosure is made and no rescission results, the declarant can continue with the knowledge the agreement of purchase and sale remains binding and no complaint or liability will arise.

The disincentive to issuing revised statements or notice of change is that it may prompt the purchaser to exercise the election to rescind. In some cases economic realities may oblige a declarant to substantially revisit the plan of condominium, either that or suffer a loss. Losing a sale may be the least of two evils. However, generally a declarant will wish to keep the sale in hand and not provide the opportunity to rescind. The *Condominium Act* does provide the declarant with some middle ground in that while it obliges revised disclosure or notice of material changes, it does not limit revisions or notices to changes that are material. The declarant must identify all changes that it reasonably believes may be material (*section 74(3) and (6)*), but note that this does not constitute an admission that they are material. Should the purchaser elect to rescind, the declarant still has a window of opportunity to test the materiality of the changes which it identified. In any event, the full contents of the revision/notice are opened to the purchaser. It may find information that it regards as a material change and which was not identified by the declarant. It is open to the purchaser to engage the rescission election in such a case (and open to the declarant to challenge the purchasers viewpoint). Should the purchaser not elect to rescind, knowledge of the full contents of the revision/notice is impressed on the purchaser and can ground a defense to a later action for damages.

3.1.2.4. Rescission on Notice of Material Change

A purchaser who receives a revised disclosure statement has 10 days in which to exercise the option of rescinding the agreement on the basis of the existence of a material change. This is done by giving a written notice of rescission to the declarant or declarant’s solicitor (*section 74(7)*). On receipt of a notice of rescission the declarant has ten days to make an application to court for a determination of the materiality of the change (*section 74(8)*). If the declarant fails to make a court challenge, the rescission is final and the declarant must immediately refund all monies paid under the agreement, plus interest to the date of refund (*section 74(9) and 74(10)*).¹ Interest is calculated at 2% below the bank rate (*(section 19(3) of 48 of 01)*). Alternatively, within 10 days of receiving the revised disclosure/notice, the purchaser can make an application to court to determine the materiality of the change(s) (*section 74(5)*). Should the court rule the change(s) are material, the refund must be made within 10 days of the court’s determination (*section 74(10)(b)*).

3.1.2.5. Contents of a Disclosure Statement²

The following is the list of the contents of a disclosure statement (which must cite the date it was made):

- a table of contents prepared in accordance with *section 72(4)* and located at the beginning of the disclosure statement;
- a statement indicating,

¹ 282 Rogers Cove Ltd. v. Slood (1991) [exercise of right of rescission on material change]

197- Milgram v. York Humber Ltd. (1992) [change in number of units, not material change]

007 500 Glencairn Ltd. v. Farkas (1994) [no material amendments, agreement binding on purchaser seeking to rescind]

075 Chien v. Law Development Group (Thornhill) Ltd. (1998) [cumulative changes material, purchaser not bound]

² See Chapter 1.4.10. for special provisions regarding common elements condominiums.

- whether the corporation is a freehold condominium corporation or a leasehold condominium corporation, and
- if the corporation is a freehold condominium corporation, the type of freehold condominium corporation that it is;
- a statement of the name and municipal address of the declarant and the mailing address of the property or the proposed property and its municipal address if available;
- a general description of the property or proposed property including the types and number of buildings, units and recreational and other amenities together with all conditions that apply to the provision of amenities;
- if the declarant has made an application for approval described in *section 9(4)* (conversion of rented residential), a summary of the reports, if any, that the approval authority has required be made under *section 9(4)* and the agreements, if any, that the approval authority has imposed under *section 9(5)* as a condition of approval;
- a statement indicating whether the property or part of the property is or may be subject to the *Ontario New Home Warranty Plan Act* or whether the declarant has enrolled or intends to enrol the proposed units and common elements in the Plan within the meaning of that Act in accordance with the regulations made under that Act;
- a statement whether a building on the property or a unit or a proposed unit has been converted from a previous use;
- a statement whether one or more units or proposed units may be used for commercial or other purposes not ancillary to residential purposes;
- a statement of the portion of units or proposed units which the declarant intends to market in blocks of units to investors;
- a statement of the portion of units or proposed units, to the nearest anticipated 25 per cent, that the declarant intends to lease;
- if construction of amenities is not completed, a schedule of the proposed commencement and completion dates¹;
- a list of the amenities that the declarant proposes to provide to the purchaser during a period of interim occupancy of a proposed unit;
- a copy of the existing or proposed declaration, by-laws, rules and insurance trust agreement, if any;
- a brief description of the significant features of all agreements or proposed agreements mentioned in *section 111*(management), *112* (other agreements), *113*(mutual use agreements) *or 114*(insurance trust) and of all agreements or proposed agreements between the corporation and another corporation;
- a statement of whether, to the knowledge of the declarant, the corporation intends to amalgamate with another corporation or whether the declarant intends to cause the corporation to amalgamate with another corporation within 60 days of the date of registration of the declaration and description for the corporation;
- if an amalgamation is intended a copy of the proposed declaration, description, by-laws and rules for the amalgamated corporation, if available;
- a copy of the budget statement;
- a copy of the budget of the corporation for the current fiscal year if more than one year has passed since the registration of the declaration and description for the corporation;

¹ **338-Village Grove Corp. v. Collins** (1996) [failure to include such information will result in the agreement of purchase and sale being unenforceable.

- a statement setting out the fees or charges, if any, that the corporation is required to pay to the declarant or another person;

(Section 72(3))
- a copy of *sections 73* (dealing with rescission rights) and *Section 74* (material changes) of the *Condominium Act*;
- a statement that, under *subsection 82(8)* of the Act, the declarant is entitled to retain the excess of all interest earned on money held in trust over the interest that it is required to pay to the purchaser under *section 82* of the Act;
- a statement whether a part of the common elements may be used for commercial or other purposes not ancillary to residential purposes;
- if there is no by-law or proposed by-law of the corporation establishing what constitutes a standard unit, a copy of the schedule that the declarant intends to deliver to the board under *section 43(5)(h)* (schedule setting out the standard unit for each class of unit) of the Act;
- a statement,
 - indicating whether visitors must pay for parking and what the anticipated costs are,
 - indicating whether there is visitor parking on the property, and
 - if there is no visitor parking on the property, indicating whether visitor parking is available elsewhere and if so, describing where;
- an identification of the major assets and property that the declarant has indicated that it may provide, even though it is not required to do so;
- an indication of the units and assets that the corporation is required to purchase, the services that it is required to acquire and the agreements and leases that it is required to enter into with the declarant or a subsidiary body corporate, holding body corporate or affiliated body corporate of the declarant; and
- with respect to land that is owned by the declarant, or by a subsidiary body corporate, holding body corporate or affiliated body corporate of the declarant, and that is adjacent to the land described in the description, a statement indicating,
 - the current use of the land,
 - the representations, if any, that the declarant has made respecting the future use of the land, and
 - a summary of the applications, if any, respecting the use of the land that have been submitted to an approval authority.

(Section 17(1))

3.1.2.5.1. Table of Contents

As described above, every disclosure statement must contain a table of contents at its beginning (*section 72(3)(a)*). The table must follow the form, and supply the content, prescribed by *regulation 48 of 01*. With respect to the form, *Form 12 to 48 of 01* is applicable and is set up to contain the meat of the table references in a ‘box’ format for ease (hopefully) of preparation and reading. *Section 72(4)* of the *Condominium Act* sets out minimum inclusions in the table of contents; however, *Form 12* requires each and every item in the bulleted list above to be referenced in the table in the form of a question, along with a “yes” or “no” answer to the question, and a reference to the location in the statement, declaration, by-laws or rules where full information will be found.

3.1.2.5.2. Budget Statement

A budget statement for the one-year period immediately following the registration of the condominium declaration and description is a required inclusion in the disclosure statement (*section 72(3)(q)*). The budget statement must contain a statement of:

- the **common expenses** (i.e. itemized by type) of the corporation
- the proposed **amount of each expense** of the corporation, including
 - the **cost of the reserve fund study** required for the year
 - the **cost of the performance audit** under *section 44* and
 - the **cost of preparing audited financial statements** if *section 43(7)* (which requires audited financials to be delivered by the declarant within 60 days of the turnover meeting) requires the declarant to deliver them within one year following the registration of the declaration and description
- the **type, frequency and level of the services** to be provided
- the projected **monthly common expense contribution for each type of unit**
- the **portion of the common expenses to be paid into a reserve fund**
- the **status of all pending lawsuits material to the property** of which the declarant has actual knowledge and that may affect the property after the registration of a deed to the unit from the declarant to the purchaser
- the amounts of all **current or expected fees, charges, rents or other revenue** to be paid to or by the corporation or by any of the owners **for the use of the common elements or other facilities related to the property**, unless a turn over meeting has been held under *section 43* (i.e. the declarant no longer owns a majority of the units)
- **all services not included in the budget** that the declarant provides, or expenses that the declarant pays **and that might reasonably be expected to become, at any subsequent time, a common expense** and the **projected common expense contribution attributable to each** of those services or expenses for each type of unit
- the **projected amounts in all reserve funds at the end of the current fiscal year**
- a **summary of the most recent reserve fund study**, if any (clearly this would not be applicable to a proposed condominium).

(section 72(6))

3.1.2.5.3. Accountability For Budget Shortfall

The declarant has substantial incentive to be accurate in it's one-year budget forecast. On one hand, overstated expenses and understated revenue (if any) will discourage sales. On the other hand understated expenses or overstated revenue will have to be made good by the declarant (*sections 75(2) and 75(4)*). The rules relating to the latter are as follows:

- Should the total common expenses for the year exceed the budgeted expenses the excess must be paid by the declarant (*section 75(1)*)
- Any excess common expenses attributable to the termination of a management agreement (*section 111*) or other agreement (*section 112*) are not to be included when determining the excess (*section 75(2)*)

- Should total revenue paid to the corporation for use of any part of the common elements or assets or property-related facilities fall short of total budgeted revenue the shortfall must be paid by the declarant (*section 75(2)*)
- Should total revenue exceed budgeted revenue the excess may be applied to reduce any amount owed by the declarant due to excess total common expenses (*section 75(3)*)
- Should total common expenses be less than the budgeted total the ‘savings’ cannot be applied to reduce the amount owed due to a revenue shortfall
- The condominium board must, within 30 days of receiving the audited financial statements for the one year, notify the declarant of the amount it is required to pay (*section 75(5)*)
- The declarant must pay the amount owed within 30 days of receiving the notice (*section 5(6)*)¹.

3.1.3. Reservation Agreements

Proposed condominium units/common interests can be sold (albeit conditionally) prior to draft *Planning Act* approval of the plan of condominium (*section 9(12)*), the only exception being vacant land condominium corporations. All types of proposed units can be the subject of ‘reservation agreements’. Such agreements are recognized in the *Condominium Act* but are not defined or described. Typically, a reservation agreement reserves to a potential purchaser the right to enter into an agreement of purchase and sale, whether on defined terms or on terms to be agreed on. Where the terms are defined the reservation may be an enforceable ‘option’ or ‘put’, otherwise it’s legal value is questionable. For example, an agreement to enter into an agreement (which a reservation agreement is if the terms of the purchase are subject to further agreement) may be comforting to one or both of the parties, but in law it will almost certainly be unenforceable. Nonetheless, for a declarant a reservation agreement presents an opportunity to ‘test the market’ without a full investment in the condominium approval process, and for a potential purchaser it allows a ‘toe to be dipped’ without a full commitment (which may await further details on the proposed condominium).

In times of a ‘hot’ market for a condominium, when the declarant is uncertain about the final pricing for units, reservation agreements can be used to separate clearly serious purchasers from ‘tire-kickers’. The terms of a reservation agreement are up to private agreement. It could provide that whatever payment/deposit is paid on the reservation agreement is refunded to the purchasers if the agreement of purchase and sale is not to the purchaser’s liking or, for example, on the other hand, it could provide that the deposit is forfeited if the purchaser declines to enter into an agreement of purchase and sale on the declarant’s terms. How the funds paid under the reservation agreement are dealt with is up to the contracting parties with two exceptions:

1. Any funds paid under the reservation agreement must be held in trust until it can be paid out to one or the other parties under the agreement’s terms (for example, if the agreement provides that the funds are forfeited if the purchaser does not enter into the agreement of purchase and sale, or returned to the purchaser in the event the option is not exercised or the project is not committed to proceed by a certain date. (*section 81(1)(a)*).
2. Regardless of the terms of the reservation agreement, should a person enter into an agreement of purchase and sale, any money paid to reserve the right to enter into an agreement shall be credited to the purchase price (*section 81(3)*).

It should be noted that unless and until an agreement of purchase and sale is entered into monies paid under the reservation agreement are not purchase monies and no interest is payable on them

¹ **254** Dazol Developments Ltd. and York Condominium Corporation 329 et al (1979) [budget shortfall may not be subject of lien by corporation against units owned by declarant

(unless the parties have contracted otherwise). However, once an agreement of purchase and sale is entered into the reservation monies take on the character of purchase monies and interest accrues on them.

3.1.4. Money Held in Trust¹

All of the following payments made by a person:

1. with respect to reserving a right to enter into an agreement of purchase and sale for the purchaser of a proposed unit (or common interest in the case of a common elements condominium (*section 138(4)*);
2. on account of an agreement of purchaser and sale of a proposed unit; or
3. on account of a sale of a proposed unit;

must be held in trust as soon as they are made (*section 81*).

3.1.4.1. Exception to Rule that Funds to be Held in Trust

The obligation to hold funds in trust does not apply to monies paid on account of the purchase price of property included in the proposed unit that is not to be permanently affixed to the land (*section 81(2)(a)*). Examples of such could be appliances, loose floor coverings, drapes and the like. These items should be separately dealt with in the agreement of purchase and sale so their price is known; otherwise the guesswork involved may oblige the all the monies to be held in trust. Often items such as the foregoing are dealt with in separate agreements entered into after the agreement of purchase and sale. While the agreement could be with the declarant, the subject matter is such that it could well be with a third part contractor/supplier (i.e. a furniture store). In the latter case the *Condominium Act* would have no bearing on the financial terms agreed to. Section 81(2)(a) puts contracts with the declarant on the same footing.

3.1.4.2. Deposit Trustee

The above-described funds cannot be held by the declarant, but must be held in trust (together with any accruing interest) by the declarant’s solicitor or by one of the following persons:

1. Persons, other than the declarant’s solicitor, who are entitled to practise law in Ontario as solicitors;
2. A partnership, other than the declarant’s solicitor, of persons who are entitled to practise law in Ontario as solicitors;
3. Escrow agents for deposits with respect to a project who have entered into a deposit trust agreement with the declarant and either the warranty corporation or an insurer to govern money to be held in trust under *section 81* of the *Condominium Act* with respect to the project (*section 20(1)*).

3.1.4.3. Where funds to be held by the Deposit Trustee

If the deposit trustee is a person other than the declarant’s solicitor, the funds must be held in trust in a separate account designated as a trust account at a bank listed in schedule I or II of the *Bank Act (Canada)*, a trust corporation, a loan corporation, a credit union or a Province of Ontario Savings Office (*section 81(4)*).

If the deposit trustee is the declarant’s solicitor, the funds must be held in a ‘trust account’ in Ontario (*section 81(5)*). While at first blush this may seem to give a full latitude in the choice of deposit institution, trust

¹ See also chapter 1.4.7. for provisions regarding common elements condominiums.

accounts which are acceptable for solicitors are governed by the regulations of the Law Society of Upper Canada and ensure the level of protection and status equal to the above-listed institutions. Unlike deposits held in trust by third party solicitors, a declarant's solicitor need not hold the funds in a 'separate trust account'. The solicitor's mixed trust account (i.e. in which client's funds are generally held) is a satisfactory depository, although it will probably not be agreeable to the declarant as such funds will earn no interest that can be paid to it (interest earned is a separate trust account set up for holding the deposits can be paid to the declarant).

3.1.4.4. Evidence of Compliance

Within ten days of the payment of monies that must be held in trust the declarant must provide written evidence to the person who paid the money that the obligations referred to above have been complied with (section 81(6)). This evidence must be in Form 4 to 49 of 01 (section 39 of 49 of 01) which, amongst other things, will state the name of the institution in which the funds were deposited and the account number, and confirm that any change in the information will be the subject of further notification.

3.1.4.5. Duration of Trust

The funds must be held in trust by the declarant's solicitor or other trustee until one of two events occurs:

1. either the person holding the money in trust disposes of it to the person entitled to it, where the disposal is done in accordance with the *Condominium Act* and an agreement that the person who paid the money has entered into with respect to the proposed unit; or

This would be exemplified by a pay-out to the purchaser due to rescission or termination, or by a pay-out to the declarant when final closing takes place and the funds are to be credited to the purchase price.

2. the declarant ensures that one of the following two types of security is provided for the money, except if the money has been received pursuant to a reservation agreement under section 81(1)(a) and has not been credited to the purchase price under the agreement (section 81(7)(a) and (b)):
 - a) either a deposit receipt executed by the Ontario New Home Warranty Corporation meeting the requirements set out in section 22 of regulation 48 of 01 (section 20(2)2); or,
 - b) an insurance policy(s) protecting the loss of the trust monies and accrued interest that meets the requirements of section 21 of regulation 48 of 01 (section 20(1)1.)

In either of these situations the purchaser's monies are protected by third party guarantees from corporations/institutions which may be regarded as having unimpeachable financial depth.

3.1.4.6. Deposit Receipts

Deposit receipts are issued by the Ontario New Home Warranty Corporation's program of providing a level of protection and construction warranty coverage to buyers of new homes (whether condominium or non-condominium). Since they are restricted to new homes a deposit receipt will never be a security for a purchaser's monies in relation to a non-residential condominium, previously-owned housing, residential condominiums created by conversion (again, no ONHWP receipt is available), a purchase in relation to a common elements condominium (no units means no new dwellings) or vacant lands condominium (unless new dwellings are constructed prior to registration and sale).

The following are the principle features relating to deposit receipts:

- It takes effect only when it has been executed by the beneficiary (purchaser), the warranty corporation, and the declarant, and has been delivered to the declarant's solicitor/trustee holding the monies (*section 22(1)*).
- It only protect payments made on account of agreements of purchase and sale of proposed units. It does not protect monies relating to reservation agreements or on account of a sale of a proposed unit (*section 22(2)*).
- The maximum amount protected is \$20,000.00 unless the receipt specifically provides for a higher limit (*section 22(3)*).
- The receipt must contain a statement that the purchaser's monies in excess of the limit must be held in trust unless an insurance policy is obtained (*section 22(4)*).
- The obligations to the purchaser under the deposit receipt are unaffected by relations between the warranty corporation, the declarant, and any insurer (*section 22(7)*) and the purchaser cannot be charged for any insurance premium on a policy the warranty corporation may take out to underwrite the risk (*section 22(5)*).
- The warranty corporation must provide a proof of loss form to the beneficiary immediately upon receiving a written notice of claim, and must pay any claim within 60 days after the right to payment has been established (*section 22 (8) and 22(9)*).
- The warranty corporation's liability continues until the completion of the purchase, all monies, including interest, have been paid to the purchaser, the warranty corporation has paid out to the extent of its liability, or the fact the warranty corporation has been released is confirmed by the purchaser or a court (*section 22(10)*).
- In the event of a loss, interest is to be paid by the warranty corporation at 2% below the bank rate from the date of the purchaser's payment to the date of payment by the warranty corporation (*section 22(11)*). Interest payable does not reduce the coverage available for purchase monies (i.e. interest payments can be in excess of the \$20,000.00 or other fixed limit).

3.1.4.7. Insurance Policies

The following are the principle features relating to insurance policies:

- It takes effect only when it has been executed by the insurer and the declarant, and has been delivered to the declarant's solicitor/trustee holding the monies (*section 21(1)*).
- The declarant solicitor or trustee shall hold the policy for the beneficiary (purchaser) until the insurer is no longer liable (*section 21 (2)*) or the beneficiary requests it so a claim can be made (*section 21(5)*).
- It protects payments made on account of reservation agreements or on account of a sale of a proposed unit as well as on account of agreements of purchase and sale of proposed units (*section 20(2)(1)*).

- The obligations to the purchaser under the policy are unaffected by relations between the declarant and the insurer (*section 21(7)*) and the premiums for the policy must be paid by the declarant and cannot be directly or indirectly transferred to the purchaser (*section 21(3)*).
- The insurer must provide a proof of loss form to the beneficiary immediately upon receiving a written notice of claim, and must pay any claim within 60 days after the right to payment has been established (*section 21 (6) and 21(7)*).
- The insurer's liability continues until the completion of the purchase, all monies, including interest, have been paid to the purchaser, the insurer has paid out to the extent of its liability, or the fact the insurer has been released is confirmed by the purchaser or a court (*section 22(10)*).
- In the event of a loss, interest is to be paid by the insurer at 2% below the bank rate from the date of the purchaser's payment to the date of payment by the warranty corporation (*section 22(11)*). Interest payable does not reduce the coverage available for purchase monies.

3.1.5. Interest

Unlike the rules under the old legislation, which required artificial arrangements to achieve equity,¹ the *Condominium Act* provides clear rules for the imposition and crediting of interest on deposits and purchase monies.

A purchaser is entitled to be credited with interest on monies which the purchaser has paid on account of the purchase price of the unit or that the declarant credits to the purchase price of a proposed unit (*section 82(1)*). The rate of interest is fixed as of March 31 and October 1 of each year for the following six month period at 2% below the rate established by the Bank of Canada as the minimum rate at which the Bank of Canada makes short-term advances to members of the Canadian Payments Association (*section 19(3)*). For historical and current information on the applicable bank rate, visit the Bank of Canada's website at www.bankofcanada.ca, where information from 1990 to date is posted. As of March 31, 2001, the bank rate was 5.25%, resulting in a deemed interest factor of 3.25% for purchaser's monies.

The interest is calculated from the date of payment by the purchaser to the day the proposed unit is available for possession or occupancy in accordance with the agreement (*section 82(3)*). Following that date no interest accrues in the purchaser's favour and, in the event that the purchase monies are less than the unpaid balance of the purchase price, thereafter interest accrues on the unpaid balance in the declarant's favour at a rate equal to the 'chartered bank administered interest rate for a conventional one year mortgage' (also posted on www.bankofcanada.ca) as of the first of the month in which the purchaser assumes (or is obliged to assume) interim occupancy (*section 80(4)1. and section 19(1)*). The latter interest will be paid by the purchaser as part of the common expenses.

3.1.5.1. Date of Payment and Interest on Interest

Interest credited to a purchaser is, if the declarant so elects, to be paid to the purchaser or credited to the purchase price on the day the declarant delivers the deed/transfer to the purchaser, or otherwise on the day of interim occupancy (*section 82(3)*). Should the declarant elect not to pay/credit interest on interim closing, interest is payable at 2% below the bank rate, to the date of final closing, on the interest which accrued to the date of interim occupancy (*section 82(5) and section 19(3)*)

3.1.5.2. Interest on Termination

In the event the agreement is terminated (i.e a condition in the agreement is not met and will not be waived by one of the parties), the declarant must pay interest at 2% below the bank rate on all monies refunded (*section*

¹ 124-Granovsky v. Richmond Square Development Corp. (1993)

82(7) and *section 19(3)*). The *Condominium Act* is not clear on from when this interest is calculated although from the date of payment would seem sensible. Likewise, in the event of rescission interest is payable on money received/credited to the purchase price at 2% below the bank rate, calculated from the date of payment/credit (*sections 73(3) and 74(9), section 19(3)*).

3.1.5.3. Excess Interest

Given that the rate of interest payable to purchasers is 2% below the bank rate, it is more than possible that the actual interest that accrues on the deposited funds is more than the amount paid out/credited to the purchaser. This will depend on the arrangement that the deposit trustee makes with the deposit institution. Any such 'excess interest' belongs solely to the declarant (*section 82(8)*). This is equitable considering the purchaser's rate of interest is fixed and guaranteed. Any failure to net at least 2% below the bank rate on the deposited funds will result in a penalty to the declarant, and will have no influence on the purchaser's right to the fixed rate.

3.1.6. Status Certificate

3.1.6.1. What is a Status Certificate?

Having reference to the required contents of a status certificate, it can be described as a comprehensive report on the financial, contractual, and constitutional status of a particular unit and the condominium at large, and containing general information such as directors and officers, address for service and the like (reference *section 76(1)*) all of which effectively has the particular corporations guarantee (at least to the purchaser or mortgagee who requested and received the certificate (*section 76(6)*)) of accuracy. Likewise, a recipient is bound with knowledge of the information it contains¹. If material information is omitted, the corporation is unavoidably and undeniably fixed with the representation that no such information existed (*section 76(4)*). As can be appreciated, a status certificate must be assembled with care and consideration by a corporation and, in that context, should be thoroughly examined by the recipient in order to be fully informed².

3.1.6.2. Who is Entitled to Obtain a Status Certificate?

Anyone (not only a purchaser or a mortgagee) may request and be entitled to receive a status certificate (*section 76(1)*) relating to a unit (or common interest in the case of a owner in a common elements condominium), upon payment of a fee not exceeding \$100.00 including all applicable taxes (*section 18(1)*). No authorization is required from the owner and the corporation has no discretion but to provide the certificate within 10 days of receiving the request and payment of the fee (*section 76(3)*).

Although there is no substitute for a full and satisfactory status certificate, a person who properly (i.e with payment) requests, but does not receive within 10 days, a status certificate can proceed with the knowledge that, as between that person and the corporation, and with respect to the particular unit(s):

- there has been no default in the payment of common expenses for the unit;
- the board has not declared any increase in the common expenses for the unit since the date of the budget of the corporation for the current fiscal year; and
- the board has not levied any assessments against the unit since the date of the budget of the corporation for the current fiscal year to increase the contribution to the reserve fund (*section 76(5)*).

3.1.6.3. To Whom is the Application for a Status Certificate Made?

¹ 304 *Stafford v. Frontenac Condominium Corp. No. 11* (1994)

029 *Armstrong et al v. London Life et al* (1999)

² 169 *Lucas et al. v. Durno & Shea* (1985) [customary legal practice is to obtain status certificate]

The *Condominium Act* contains no specific direction as to who is responsible for receiving applications for status certificates. It states only that the application is to be made to ‘the corporation’ (*section 76(1)*). As a matter of principle, any notice given to a director or officer should be notice to the corporation; however, there is no public record of who a corporation’s officers and directors are. The *Condominium Act* allows the *Corporations Information Act* to be applicable to condominiums (*section 5(3)*); however, *regulation 48 of 01* declares that the latter Act does not apply (*section 2*). Had it been otherwise, all of a condominium corporation’s officers and directors names and addresses would have been accessible through a corporate profile search at the Minister of Consumer and Commercial Relations. An interested party may be left with making inquiries at the property or through the property manager (if known) as to who is the, or an, official. As a matter of administration, either the property manager or the corporation’s secretary will be relegated the duty of receiving and responding to requests.

3.1.6.4. What is Contained in a Status Certificate?

A status certificate must be prepared in Form 13 to *regulation 48 of 01*. Form 13 is in a ‘box’ type with full instructions as to use, alternative statements, and the like. The full list of contents is set out in *section 76(1)* of the *Condominium Act* and is summarized as follows:

- a statement of the common expenses for the unit and the default, if any, in payment of the common expenses;
- a statement of the increase, if any, in the common expenses for the unit that the board has declared since the date of the budget of the corporation for the current fiscal year and the reason for the increase;
- a statement of the assessments, if any, that the board has levied against the unit since the date of the budget of the corporation for the current fiscal year to increase the contribution to the reserve fund and the reason for the assessments;
- a statement of the address for service of the corporation;
- a statement of the names and address for service of the directors and officers of the corporation;
- a copy of the current declaration, by-laws and rules;
- a copy of all applications made under *section 109* (made by the corporation or an owner to amend the declaration or description) to amend the declaration for which the court has not made an order;
- a statement of all outstanding judgments against the corporation and the status of all legal actions to which the corporation is a party;
- a copy of the budget of the corporation for the current fiscal year, the last annual audited financial statements and the auditor’s report on the statements;
- a list of all current agreements mentioned in *section 111* (management), *112* (other agreements) or *113* (mutual use agreements) and all current agreements between the corporation and another corporation or between the corporation and the owner of the unit;
- a statement that the person requesting the status certificate has the rights described in *sections 76(7)* and *76(8)* of the *Condominium Act* (to examine the agreements at a reasonable time and location, or to obtain copies of the agreements on payment of reasonable fee) with respect to the agreements described immediately above
- a statement whether the parties have complied with all current agreements mentioned in *section 98(1)(b)* (agreements between the corporation and a particular owner dealing with improvements to the common elements) with respect to the unit;
- a statement with respect to,
- the most recent reserve fund study and updates to it,

- the amount in the reserve fund no earlier than at the end of a month within 90 days of the date of the status certificate, and
- current plans, if any, to increase the reserve fund under section 94(8) (plan for future funding consequent on a reserve fund study);
- a statement of those additions, alterations or improvements to the common elements, those changes in the assets of the corporation and those changes in a service of the corporation that are substantial and that the board has proposed but has not implemented, together with a statement of the purpose of them;
- a statement of the number of units for which the corporation has received notice under *section 83* (requiring owners to give notice of lease to the corporation) that the unit was leased during the fiscal year preceding the date of the status certificate;
- a certificate or memorandum of insurance for each of the current insurance policies;
- a statement of the amounts, if any, that this Act requires be added to the common expenses payable for the unit;
- a statement whether the Superior Court of Justice has made an order appointing an inspector under *section 130* or an administrator under *section 131*.

(Section 76(1))

In addition to the material required by *section 76(1)* of the *Condominium Act* and *section 18* of *regulation 48 of 01*¹, a leasehold condominium corporation’s status certificate must include:

- whether the provisions of the leasehold interests in the property are in good standing and have not been breached; and,
- a statement by the corporation whether the lessor has applied for a termination order under *section 173* (termination by lessor) (*section 170(a)* and *170(b)*).

In addition to the usual requirements of *section 76(1)* of the *Condominium Act* dealing with the contents of status certificates, in the case of a phased condominium until such time as all of the phases are complete and the declarant has disposed of ownership of all units (except a telecommunications unit), a phased condominium’s disclosure statement must include a copy of the disclosure statement relating to the last phase registered (*section 148*).

3.1.6.5. Record of Status Certificates

The corporation must keep a copy of all status certificates that is has issued in the preceding 10 years (*section 15* of *48 of 01*)).

3.1.7. Information on Corporation other than by way of a Status Certificate

Should any person require information regarding any of the following:

- the names and address for service of the directors and officers of the corporation;
- the person responsible for the management of the property of the corporation;
- the person to whom the corporation has delegated the responsibility for providing status certificates (*section 77*),

¹ See chapter 3.1.6.4.

on request the corporation must supply the information without fee¹. As described above (under “To Whom is the Application made”), there is a gap in the chain as the *Condominium Act* does not specify who is to receive an information request for any of the above, or how to obtain the identity of the person who does (the irony is that the satisfaction of the request will provide that very information).

3.1.8. Duty to Register Declaration and Description – No Termination for Delay

Under past condominium legislation agreements of purchase and sale were deemed to contain certain provisions which were directed at ensuring that declarants did not delay in completing and registering a project. In the same vein of consumer protection the past legislation prevented declarants from terminating agreements where the reason was failure to register the project within the time set out in the agreement. This prohibition could only be overcome by court order or the purchasers consent.

The *Condominium Act* carries the effect of these provisions forward and:

- Obliges a declarant who has entered into an agreement of purchase and sale of a proposed unit to take all reasonable steps to complete the buildings required by the agreement and register, without delay, the declaration and description (*section 79(1)*);
- Prohibits a declarant from terminating due to a deadline in registration set out in the agreement unless the purchaser has consented or a court order obtained (*section 79(2)*). In considering an application to terminate the court must consider:
 - the declarant has taken all reasonable steps to register a declaration and description;
 - a declaration and description can be registered within a reasonable period of time; and
 - the failure and inability to register a declaration and description is caused by circumstances beyond the control of the declarant (*section 79(5)*).

3.1.9. Interim Occupancy

An agreement of purchase and sale may permit or require interim occupancy of a proposed unit (*section 80(1)*).

3.1.9.1. What is Interim Occupancy?

Interim Occupancy is defined by the Condominium Act as “the occupancy of a proposed unit before the purchaser receives a deed to the unit that is in registerable form” (*section 80(1)*).

The purpose of the interim occupancy period is allow the purchaser to begin making use of the unit, and for the declarant to begin being reimbursed for occupancy costs pending registration of the condominium. In cases where some units are completed earlier than others (for example in a proposed condominium with more than one building at different stages of construction) and otherwise where occupancy availability and registration are not in sync, interim occupancy is a vehicle which allows the parties to satisfy their separate objectives before all the loose strings are tied together with the registration.

¹ 427- MTCC No. 551 v. Mani Adam (2006) [A requestor does not have to give reasons why a request is made under section 77 for the names and addresses of board members.]

3.1.9.2. Occupancy Fee

During the interim occupancy period, the declarant is entitled to charge a monthly occupancy fee which must not be greater than the following three amounts:

- Interest calculated on a monthly basis on the unpaid balance of the purchase price (if any) at the one-year conventional mortgage rate
- An amount reasonably estimated on a monthly basis for municipal taxes attributable to the unit
- The projected monthly common expense contribution for the unit (*section 80(4)*).

No other amounts can be charged¹.

3.1.9.3. Reserve Fund Contribution – Special Case for Residential

In the case of the interim occupancy of a proposed residential unit for longer than six months, the declarant, from the end of the sixth month to the final closing, must separate any part of the monthly occupancy fee which relates to a projected reserve fund contribution and hold it in trust for transmittal to the corporation upon registration of the condominium (*section 80(5)*). Since such a contribution will typically be a component of the projected common expense, the foregoing requirement adds an additional incentive (other than the statutory mandate and good business sense) to register the condominium as expeditiously as possible.

3.1.9.4. Rights and Duties of Declarant

Should a purchaser assume interim occupancy, the declarant must (regardless of any provision to the contrary in the *Residential Tenancies Act, 2006 (section 80(7))*) satisfy the following obligations:

- to provide those services that the corporation will have a duty to provide to owners after the registration of the declaration and description that creates the unit;
- to repair and maintain the proposed property and the proposed unit in the same manner as the corporation will have a duty to repair after damage and maintain after the registration of the declaration and description that creates the unit;
- within 30 days of the registration of the declaration and description that creates the unit, to notify the purchaser in writing of the date and instrument numbers of the registration, unless within that time the purchaser receives a deed to the unit that is in registerable form.

During the period the declarant has (regardless of any provision to the contrary in the *Residential Tenancies Act (section 80(7))*) the following rights:

- the same right of entry that the corporation will have after the registration of the declaration and description that creates the unit;
- to withhold consent to an assignment of the right to occupy the proposed unit;

¹ 259 Lamb and Costain Ltd. (1985) [additional payment violates statutory restriction, void]

257 Hashim et al. and Costain Ltd. (1986) [additional payment violates statutory restriction, void]

022 Albrecht v. Opemoco Inc. (Ont. H.C.J.) (1989) [additional payment violates statutory restriction, void]

031 Atherley v. Somerset Place Developments of Georgetown Ltd. (1993) [additional charges, vendor failure to abandon demand for payment, purchasers not bound]

032 Atherley v. Somerset Place Developments of Georgetown Ltd. (1995) [dispute about interest on phantom mortgage, tender on purchaser justified]

- to charge a reasonable fee for consenting to an assignment of the right to occupy the proposed unit (*section 80(6)*).

3.1.9.5. Adjustment of Taxes

As noted above, the monthly occupancy charge may include a component for estimated taxes for the unit during the interim occupancy period. The estimate of taxes may vary from the amount of the actual taxes levied. In order that neither the declarant nor the purchaser is unjustly enriched at the others expense, provision is made requiring the declarant to refund to the purchaser any amount paid in excess of the actual taxes (*section 80(8)*) and permitting the declarant to require the purchaser to make good any shortfall between the amount paid and the actual taxes (*section 80(9)*).

3.1.10. Application of the Residential Tenancies Act, 2006

The following provisions of the *Residential Tenancies Act, 2006* are inapplicable to the interim occupancy, and interim occupancy costs, of residential units:

- Section 149, 150 and 151 which deal with care homes
- Section 165, 166 and 167 which deal with mobile home sites
- And sections 105 to 136 (Part VII) which deal with the rules relating to rent (*section 80(10)*).

Declarant as Fiduciary

A declarant is in the position of a fiduciary to purchasers, arm's length owners, and the corporation. The declarant may not put his interests in conflict with theirs¹.

¹ **068** Carleton Condominium Corporation No. 347 v. Trendsetter Developments Ltd. et al. (1992)

3.2 LEASE OF UNITS BY OWNERS

Generally, a unit owner is free to lease out the unit to third parties and neither the declaration nor by-laws of a corporation can prohibit this fundamental right of property ownership¹. A lease includes, in addition to a head lease, a sublease or an assignment of lease (*section 23 of 48 of 01*). There is an obligation on any owner who leases a unit, or renews a lease of the unit, to :

- notify the corporation that the unit is leased;
- provide the corporation with the lessee's name, the owner's address and a copy of the lease or renewal or a summary of it in the *Form 5 to regulation 49 of 01 (section 40 of 49 of 01)*; and
- provide the lessee with a copy of the declaration, by-laws and rules of the corporation (*section 83(1)*).

within 30 days of entering into the lease or renewal.

Owner's must also provide written notice of the termination of a lease (no time frame is prescribed within which such notice must be given) (*section 83(2)*).

The corporation must keep a record of all of the above notices that it receives (*section 83(1)*).

Should an owner fail to pay common expenses the corporation may give notice to a tenant to direct payment of the rent to the corporation to make up the arrears in contributions (*section 87*)².

Lessee/occupants must comply with the declaration, by-laws, rules and the *Condominium Act*³.

¹ **266**-Peel Condominium Corporation No. 11 and Caroe et al. (1974) [a declaration cannot prohibit the renting of a unit by an owner-note this decision is modified by legislation].

207 Metropolitan Condominium Corp. No. 699 and 1177 Yonge Street Inc.(Re) (1998) [provision in declaration prohibiting conveyance of parking unit to non-unit owner does not prevent leasing to others]

² **386**-Yuen v. Peel Condominium Corp. 492 (2000) [owner and tenant are jointly responsible for common expense contribution in case where lease so provides].

³ **195**-Metropolitan Toronto Condominium Corp. No. 949 v. Irvine (1992)

4.1 TRANSFER OF CONTROL BY DECLARANT

4.1 TRANSFER OF CONTROL BY DECLARANT

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4.1.1. The First Board

Under the old legislation the installation of a condominium’s first board was a cumbersome process if the strict letter of the legislation was followed. Several weeks could pass before all procedures were followed and by-laws could be passed and consented to for registration. As a matter of practice, many declarants simply ignored the niceties and installed a board, passed bylaws, and had owners (i.e. the declarant) consent to the by-laws, all on the same day. While cautious solicitors discouraged this practice, it had the appeal of practicality and no apparent prejudice to any interest. Under the *Condominium Act*, new procedures have been introduced which eliminate pointless red tape and give clear direction.

It is the declarant’s responsibility to appoint, within ten days of registration of a condominium, at least three qualified (see *section 29(1)*) persons or such greater number as the declaration requires, to be the first board of the corporation (*section 42(1)* and *42(4)*). While this first board is almost certainly going to be non-arm’s length to the declarant, the board members are bound to exercise the same standard of care, and will be subject to the same liability for breach of duty, and the same rules for disclosure of interest in contracts, as any other director. The declarant’s appointee’s to the board are in office at the declarant’s pleasure, and it may remove and substitute directors at any time up to the turnover meeting (following the declarant’s sale of a majority of the units), at which time a new board will be installed (*section 42(2)* and *42(3)*).

4.1.1.1. Conduct of Business by the First Board – Meetings Not Required

In addition to the usual vehicles available to condominium boards to conduct business (in person or through a real time teleconference system (*section 35*), the declarant appointed board is graced with the convenience of being able to pass resolutions by unanimous written vote (*section 42(5)*). No formal meeting, or simultaneous communication amongst directors, is required. This convenience is not available to any other constituted board and presumably exists in recognition of the probability/certainty that the declarant appointed board will always act with one mind, and no open debate is required on the subject matter of any resolution.

4.1.1.2. Enlargement of the First Board

No later than the 30th day after the declarant has transferred 20% of the units in the condominium, or the 90th day after the declarant transfers the first unit, the first board (unless it was appointed or elected before May 5, 2001 (*section 42(12)*)) must call and hold a meeting of owners. The only exception to this rule is in the case where a declarant has advised the first board in writing that it has conveyed more than one-half of the units (*section 42(7)*).

Although the purpose of holding this meeting is not specified, the *Condominium Act* permits the owners present at the meeting to elect two directors to the first board, provided the owners of a minimum of 25% of the units not owned by the declarant are present at the meeting (*section 42(7)* and *42(8)*). To be counted in the quorum an owner must have been entitled to have received notice of the meeting (an owner who received a conveyance after the notices were sent would not be eligible), must be entitled to vote (an owner would be

ineligible if more than 30 days common expenses are in arrears, and no votes are available for parking and storage unit owners (*section 49*), and must be present or represented by proxy (*section 42(10)*).

The two directors elected by the owners at the meeting are 'supernumerary' in that they are eligible for office regardless of the number of directors stated in the declaration to be the maximum (*section 42(11)*). They are intended to be the owner's 'voice and ears' in the on-going operation of the condominium while the declarant is in control.

4.1.2. Turn-over Meeting

At the time of registration of a condominium the declarant will be the registered owner of all the units and common interests and, as the only 'owner', the only person entitled to vote on and in matters requiring the owners endorsement (such as the organizing bylaws). The declarant will control the majority of the board of directors, and will have selected the property manager in charge of operations, maintenance, and the like. In the normal course, over time (whether days, months, or longer) the declarant will convey units to arm's length purchasers. Eventually (again, in the normal course; exceptions will exist depending on the declarant's intentions), the number or units owned by the declarant will be equal to or less than the number of units owned by other persons. This triggers an event which, under both the old legislation and the *Condominium Act*, is known as the 'turn-over meeting' (*section 43(1)*) at which a new board will be elected and the declarant will turn over possession of certain corporate records and other material.

4.1.2.1. Time for Turn-over Meeting

As stated above, the clock begins on the timing of the turn-over meeting when the declarant ceases to own a majority of the units in the condominium. It should be noted there is no qualification on the term 'unit' and, unlike voting rights, parking and storage units are on the same level as main units such as apartment units. By way of example, in the case of a condominium containing 100 dwelling units, 100 storage units, and 150 parking units, the board would not call the meeting until the declarant had conveyed 175 units of one type or another. When this event occurs the board shall, not more than 21 days thereafter, call the meeting of the owners known as the turn-over meeting (*section 43(2)*) and hold it within 21 days after the calling (*section 43(3)*).

4.1.2.2. How is the Turn-Over Meeting Called?

The first board will resolve by written resolution (if the declarant appointed board has not been joined by two owner-elected directors (*section 42(6)*), or by in person or telephone meeting resolution, to call the meeting. The usual protocols and steps to give notice of an owner's meeting as set out in section 47 must then be followed. Since *section 47(1)(b)* requires the notice to be given at least 15 days before the day of the meeting, the earliest the meeting can be held is 16 days after the date the declarant ceases to own a majority of the units (assuming the board calls and sends notice the same day as the triggering event). The latest it can be held is 42 days after the triggering event.

4.1.2.3. The Turn-Over

4.1.2.3.1. Turn-Over at the Meeting

The two essential agenda items for the turn-over meeting are the election of the new board and the declarant's turnover of certain records and material. These events will occur in the foregoing order. After the election, while the meeting is still continuing, the declarant will turn-over the following to the new board:

- the **seal** of the corporation;
- the **minute book** for the corporation including a copy of the registered declaration, registered by-laws, current rules and minutes of owners' meetings and board meetings;

- copies of all **agreements** entered into by the corporation or the declarant or the declarant’s representatives on behalf of the corporation, including management contracts, deeds, leases, licences and easements;
- copies of all policies of **insurance** and the related certificates or memoranda of insurance and all insurance trust agreements;
- **bills of sale** or transfers for all items that are assets of the corporation but not part of the property;
- the **records** of owners and mortgages contact information for notice purposes (maintained under *section 47(2)*) and the record of notice of leases (maintained under *section 83(3)*); and
- all **records** that it has related to the units or to employees of the corporation (*section 43(4)*).

4.1.2.4. Second Turn-Over by Delivery

Within 30 days after the meeting the declarant must deliver the following to the new board:

- the existing **warranties and guarantees** for all the equipment, fixtures and chattels included in the sale of either the units or common elements that are not protected by warranties and guarantees given directly to a unit purchaser;
- the **as-built** architectural, structural, engineering, mechanical, electrical and plumbing **plans**;
- the **as-built specifications**, indicating all substantive changes, if any, from the original specifications;
- all **existing plans** for underground site services, site grading, drainage and landscaping, and television, radio or other communications services;
- all **other existing plans** and information not mentioned in the above three items that are **relevant** to the repair or maintenance of the property;
- if the property of the corporation is subject to the *Ontario New Home Warranties Plan Act*,
 - **proof**, in the form, if any, prescribed by the Minister, that the units and common elements have been **enrolled in the Plan** within the meaning of that Act in accordance with the regulations made under that Act, and
 - a copy of all **final reports** on inspections that the Corporation within the meaning of that Act requires be carried out on the common elements;
- a table setting out the **responsibilities for repair** after damage and maintenance and indicating whether the corporation or the owners are responsible;
- a schedule setting out **what constitutes a standard unit** for each class of unit that the declarant specifies for the purpose of determining the responsibility for repairing improvements after damage and insuring them;
- all **financial records** of the corporation and of the declarant relating to the operation of the corporation from the date of registration of the declaration and the description;
- if the meeting is **held after nine months following the registration** of the declaration and description, the **reserve fund study** that is required within the year following the registration of the declaration and description;
- all **reserve fund studies** that have been completed or are required to have been completed at the time the meeting is held, **other than the reserve fund study that is required within the year** following the registration of the declaration and description;
- a copy of the **most current disclosure statement** delivered to a purchaser of a unit in the corporation under *section 72* before the meeting (*section 43(5)*).

4.1.2.5. Third Turn-Over by Delivery

Within 60 days after the turn-over meeting the declarant must deliver audited financial statements prepared by the auditor as of the last day of the month in which the meeting is held (*section 43(7)*).

4.1.3. Cost of the Turn-Over

All of the items required to be turned over in the first and second turn-overs referred to above are to be prepared at the declarant's expense except for expenses relating to the reserve fund study(s) (*section 43(6)*). The cost of the audited financial turned over in the third turn-over are prepared at the cost of the corporation (*section 43(7)*).

4.1.4. Default in Turning Over all Required Materials

In the event the declarant fails to comply, without reasonable excuse, to deliver over any required item to be turned over, on application of the corporation a court shall (not may) order the declarant to pay the corporation for the damages it has incurred and pay the costs of the application (*section 43(9)(a) and (b)*). In addition the court may (not shall) order the declarant to pay the corporation an additional amount of up to \$10,000.00 (effectively a punitive penalty) and order the declarant to rectify the default (*section 43(9)(c) and (d)*). Such a failure is also an offence punishable by fine on conviction (*section 137*).

4.2 PERFORMANCE AUDITS

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4.2.1. What is a Performance Audit?

Generally described, a performance audit is an inspection and testing due diligence process targeted at only the common elements of certain condominium corporations. It is carried out by a professional engineer or architect qualified to practice their profession in Ontario (*section 44(1)*) and leads to a report identifying, among other things, any deficiencies in the performance of the common elements that meet the description of a claimable deficiency under the *Ontario New Home Warranties Plan Act (section 44(4))*. At the end of the process the performance audit report is delivered to the board and, if an Ontario New Home Warranty is applicable, to the warranty Corporation (*section 9*).

While the *Condominium Act's* specifications and requirement for a performance audit are new, the old legislation having been silent on the subject, the principle of a review of the technical aspects of the building prior to the expiry of warranty periods has been a standing practice. With relatively clear parameters set for the task, including follow-up by the warranty Corporation (for applicable residential condominiums), a general framework is now in place which will be common to all condominiums which require performance audits (and will serve as a model for those condominiums which have performance audits done voluntarily).

4.2.2. Which Situations Require a Performance Audit?

Performance Audit's are required only for condominiums with one or more residential units in the property and for common elements condominiums (*section 44(1)*). In the first case, the completed performance audit will be delivered to the board and the warranty Corporation (if applicable¹) before the end of the 11th month after registration (*section 44(9)*). This filing with the warranty Corporation serves as a notice of claim under the *Ontario New Home Warranty Plan Act* for the deficiencies noted in the report (*section 44(10)*). Concerning the second case, it is not clear why common elements condominiums have been singled out for the performance audit requirement regardless of use (i.e. residential/ non-residential) or the use of the lands (the 'tied lands') with which it is associated. In any event, since construction in the common elements will be of fundamental importance to the owners of the tied lands, a thorough review by a qualified third party will clearly be of use.

Standard freehold condominiums, leasehold condominiums, vacant land condominiums, and phased condominiums, are all subject to the performance audit requirement, provided one or more units for residential purposes is included in the corporation.

4.2.3. Time for the Performance Audit

The performance audit must be conducted 'no earlier than six months, and no later than 10 months, following registration' of the condominium (*section 44(2)*). The purpose of this 'window' is to allow some time to pass and experience to occur with the completed common elements before the audit is commenced (thereby promoting the exposure of potential and actual defects), but providing a minimum time frame of one month for the studies completion (which would be the case if it is commenced on the last day before the 10th month after registration). The latter ensures that the study is complete before the first year is out and the ONHWP warranty is still in full force.

¹ The warranty Corporation is not involved in non-residential construction or construction which is not new (i.e. a conversion of an existing non-residential building to a residential condominium would not involve the warranty corporation).

4.2.4. Cost of Performance Audit

The performance audit is at the cost of the condominium corporation and forms part of the budget for the first year of its existence (*section 44(3)*). It will be paid through the unit owner's contributions to the common expenses for the year.

4.2.5. Nature of Deficiencies Being Audited

The deficiencies which the performance audit seeks to ferret out and identify are not global in scope. In the case of condominiums containing residential units the deficiencies are those which would give rise to a claim for payment for breach of warranty (*section 44(4(a))* of the *Condominium Act* and section 14 of the *Ontario New Home Warranty Plan Act*). The warranty provided by the warranty Corporation is that with respect to the common elements:

- they are constructed in a workmanlike manner and free from defects in materials including windows, doors and caulking such that the building envelope prevents water penetration;
- that the electrical, plumbing and heating delivery and distribution systems are free from defects in material and work;
- that all exterior cladding is free from defects in material and work resulting in detachment, displacement or physical deterioration;
- they are free from violations of the Ontario Building Code regulations under which the building permit was issued, affecting health and safety, including but not limited to fire safety, insulation, air and vapour barriers, ventilation, heating and structural adequacy;
- they are fit for habitation;
- they are constructed in accordance with the Ontario Building Code;
- there will be no water penetration through the basement or foundation.
- free of major structural defects (which is a defect that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function; or, that materially and adversely affects the use of such building for the purpose for which it was intended; and includes significant damage due to soil movement, major cracks in basement walls, collapse or serious distortion of joints or roof structure and chemical failure of materials, but excluding any defect attributable in whole or in part to a Year 2000 compliance problem, flood damage, dampness not arising from failure of a load-bearing portion of the building, damage to drains or services, damage to finishes and damage arising from acts of God, acts of the owners and their tenants, licensees vites, acts of civil and military authorities, acts of war, riot, insurrection or civil commotion and malicious damage) (7 year warranty from date specified in certificate of completion and possession (section 16 of *ONHWP regulation 892*);

With the exception of the last item the warranty is for a two year period following the date the work was completed for possession.

(Section 13(1) of the *Ontario New Home Warranty Plan Act*, and section 14 and 15(2) of *ONHWP regulation 892*)

Excluded from the above are:

- defects in materials, design and work supplied by the condominium;
- secondary damage caused by defects, such as property damage and personal injury;
- normal wear and tear;
- normal shrinkage of materials caused by drying after construction;
- damage caused by dampness or condensation due to failure by the condominium to maintain adequate ventilation;
- damage resulting from improper maintenance;
- alterations, deletions or additions made by the condominium;
- subsidence of the land around the building or along utility lines, other than subsidence beneath the footings of the building;
- damage resulting from an act of God (section 13(2) of the *Ontario New Home Warranty Plan Act*).
- damage caused by insects and rodents, except where construction is in contravention of the Ontario Building Code;
- damage caused by municipal services or other utilities;
- surface defects in work and materials specified and accepted in writing by the condominium at the date of possession .

(section 13(2) of the *Ontario New Home Warranty Plan Act*)

In a case where the deficiencies would give rise to a claim in respect of the above had the *Ontario New Home Warranty Plan Act* applied (for example, in the case of a non-residential common elements condominium), the performance audit will identify the same deficiencies regardless of the availability of the ONHWP warranty (*section 44(4)(b)*).

4.2.6. Carrying out the Audit

In identifying the deficiencies, the performance auditor must, as a minimum, carry out the following protocol:

- inspect the major components of the buildings on the property which, subject to the regulations made under this Act, include the foundation, parking garage, wall construction, air and vapour barriers, windows, doors, elevators, roofing, mechanical system, electrical system, fire protection system, and elevating devices, as defined in the *Elevating Devices Act*, if any, of the buildings on the property and the telecommunications systems, if any, that service the buildings (section 12(2) of *48 of 01*);

- inspect the sprinkler systems, if any, and the outside parking areas, if any (section (section 12(3) of *48 of 01*);
- review all final reports on inspections that the Corporation within the meaning of the *Ontario New Home Warranties Plan Act* requires be carried out on the common elements; and
- conduct a survey of the owners of the corporation as to what evidence, if any, they have seen of :
 - damage to the units that may have been caused by defects in the common elements, and
 - defects in the common elements that may cause damage to the units.

(Section 44(5))

The auditor has the authority, for the purposes of the audit, to enter on the property, alone or accompanied by a necessary expert, require any person to produce any drawings, specifications, or information that may, on reasonable grounds, be relevant, make inspections, tests, and inquiries, and call upon experts (*section 44(6)*). No one may obstruct the auditor from exercising the powers nor may anyone provide false information or refuse to provide information (*section 44(7)*).

4.2.7. Written Report

The performance auditor must prepare a written report containing at least the following:

- a copy of the person's certificate of authorization within the meaning of the *Professional Engineers Act* or certificate of practice within the meaning of the *Architects Act*, as the case may be;
- details of the inspection and findings made by the person in the course of conducting the audit;
- a statement that the person has reviewed all final reports on inspections carried out for ONHWP;
- a copy of the survey of the owners and a summary of the results of it;
- the deficiencies determined to exist; and
- a copy of the corporation's current declaration and description.

(section 44(8) and section 12(4) of 48 of 01)

4.3 TELECOMMUNICATIONS AGREEMENTS

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4.3.1. What is Telecommunications?

The *Condominium Act* defines the term ‘telecommunications’ as meaning: “the emission, transmission or reception of any combination of signs, signals, writing, images, sound, data, alphanumeric characters or intelligence of any nature by wire, cable, radio or an optical, electromagnetic or any similar technical system” (*section 22(1)*).

Examples of telecommunications include activities relating to systems such as the following:

- Broadcast television signals, whether sent by cable, satellite, or ground signal to antenna
- Telephone and fax communications, whether by wire or air
- Internet communications
- Security video observance systems (on-site)
- Off-site security monitoring of premises

4.3.2. What is a Telecommunications Agreement?

A telecommunications agreement is defined as an “agreement for the provision of services or facilities related to telecommunications to, from or within the property of a corporation and includes a grant or transfer of an easement, lease or licence through the property of a corporation for the purposes of telecommunications” (*section 22(1)*).

4.3.3. Past ‘Abuses’

Ontario’s old condominium legislation, having its roots in a time (the 1960’s) when telecommunications was a monopoly and cable television was only dabbling its feet in the water (and facing the consumer resistance to paying for what was regarded as free), did not address the subject of telecommunications. Buildings were routinely wired for telephone service and electricity, and that was basically all that was expected or required. Ownership of the installed systems, particularly cable, was often gray, with the presumption that it belonged to the supplier. Short form agreements were routinely entered into, possibly entailing permanent easements, which created obstacles for alternative services. Examples of declarant’s directly or indirectly arranging for ownership of a centralized telecommunications ‘hub’ room so that entry of alternate services was effectively impossible without the ‘hub’ room owners consent, or gaining benefit from arranging ‘exclusive service’ to the condominium, arose¹. Changes in the telecommunications environment, including deregulation of telecommunications monopolies, have brought the opening of new opportunities for services and the proliferation and multiplication of the forms and means of telecommunications. The importance of providing specific ground rules for telecommunications availability has been addressed in the *Condominium Act*, particularly as it respects condominiums with residential units.

¹ 061-Carleton Condominium Corp. No. 244 v. Habcom Ltd. (2000) [such arrangements are legitimate].

4.3.4. The New Rules - General

The potential for telecommunications agreements and controls being in place at the time a condominium is created remains and, for most unit purchasers, will be an accepted fact at the time of purchase. The disclosure statement will provide full information (*section 72(3)(n)*). It remains possible for exclusive service arrangements to be in place which may operate indefinitely for non-residential condominiums (*section 22(8)*). However, under the *Condominium Act*, the ability of all condominiums to introduce or accommodate new systems is in place and, in the case of condominiums containing residential units, the ability to terminate telecommunications agreements has been given in specific circumstances.

4.3.4.1. Introducing New Systems

All types of condominiums may, regardless of the presence of an existing system, by resolution of the board (not by by-law):

- Make an agreement for a ‘network upgrade’ (which is undefined but reasonably means an improvement to an existing system that will be available to all users and not only some) to a system which services the units(*section 22(2)(a)*);
- Make an agreement for a new system which is independent (‘unconnected’) to a parallel system that services the units (*section 22(2)(b)*);
- Amend an agreement for an existing system that services the units to permit the supplier to supply all (or part) of the services directly to the unit owners (*section 22(2)(c)*). A properly executed agreement of this nature will override any provision in a declaration which describes such costs as common expenses (*section 22(4)*);

4.3.4.1.1. Condition Precedent to Board Action on Telecommunications Agreements

Before making a commitment to any of the above actions the corporation must follow certain procedural steps to measure the acceptance of the owners (*section 22(3)*).

4.3.4.1.1.1. Substantial Addition, Alteration, Improvement, Change

If the agreement entails a ‘substantial change in a service’ (which includes anything with a cost exceeding 10% of the budgeted common expenses (*section 97(6)*)) then it must be approved by at a duly called meeting by a vote of the owners who own at least 2/3’s of the units (*section 97(4)*).

4.3.4.1.1.2. Non-Substantial Addition, Alteration, Improvement

If the agreement does not obtain a substantial change to a service the corporation must send a notice to all owners:

- Describing the proposed change
- Stating the estimated cost
- Specifying that the owners (meaning any one of them) have the right to requisition a meeting of the owners; and,
- Containing a copy of *section 46* (requisition procedure) and *section 97 (section 97(3)(a))*.

If no owner requisitions a meeting or, in the event a meeting is requisitioned the owners do not vote against the change, then the board may proceed with the agreement (*section 97(3)(b)*).

4.3.5. Use of Hubs – Condominiums with Residential Units Created on or after May 5, 2001

If a condominium created under the *Condominium Act* contains one or more residential units, special provision is made to allow access to a ‘part of the property designed to control, facilitate or provide telecommunications to, from or within the property’ to accommodate the objects of a telecommunications agreement. In this regard, provided the condominium does not have either:

1. an easement over the property described in the description (meaning the entire condominium property, not simply the ‘hub’); or,
2. the right to use the property;

that is adequate for either:

- The telecommunications agreement that it has entered into (after following the above procedures); or,
- The telecommunications system that it intends to install and use on the property (i.e. install to own);

then *section 22(5)* gives the corporation (and the a party to the agreement, if any) a non-exclusive easement over the ‘hub’ part of the property for the purpose of installing and using a telecommunications system. This over-riding, albeit non-exclusive, right is intended to discourage a ‘hub’ owner from presenting an obstacle to the use of an available facility when the alternative is discouraging.

4.3.7. Avoiding Hub Interference

If a part of a property is designed to control, facilitate or provide telecommunications to, from, or within a property and has a system installed in it which will interfere with another system to be installed on the property, the owner is obliged, on 30 days written notice from the corporation, to make all necessary steps that are reasonable to accommodate the intended system (*section 22(6)*).

4.3.8. 10 Year Horizon for Exclusive Easements - Residential

Telecommunications easements pertaining to any condominium property, whether the corporation was created before or after May 5, 2001, that includes one or more residential units, are non-exclusive after the expiry of the later of ten years following the grant of easement and the registration of the condominium (*section 22(8)*).

4.3.9. Termination of Telecommunications Agreements – Residential¹

Except for telecommunication agreements entered into after the turn-over meeting which are non-exclusive, and which make allowance for the installation of alternate systems, a corporation which includes one or more residential units may terminate a telecommunications agreement if:

- At least 10 years have passed since the later of the execution of the agreement and the registration of the condominium;
- By resolution the board has approved the termination of the agreement;
- The owners of more than 50% have of the units consent in writing to the termination; and

¹ **414-** Webb v. MTCC No. 979 (2003) [While there is a serious issue to be tried as to whether a change from one cable provider to another is authorized under the Act, it does not constitute a circumstance which would justify an interim injunction being granted.]

- The corporation gives the other party to the telecommunications agreement 120 written notice of the effective date of termination (*section 22(9)* and *22 (10)*)

4.3.10. Actions on Termination

The other party to a terminated telecommunications agreement has 30 days following the termination to remove any personal property. The removal must be carried out to facilitate the installation of similar telecommunications property and the corporation must be reimbursed for any damage caused to the corporation's property by the removal (*section 22 (11)* and *22 (12)*). If the property is not removed within the 30 days, it is deemed to be abandoned to the corporation (*section 22 (13)*).

4.4 TERMINATION OF AGREEMENTS

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4.4.1. General

Depending upon the extent and complexity of a condominium’s property, it may be a party to one or more agreements with other persons. These agreements may be to provide the corporation with a service or good, or it may be the condominium corporation doing the supply. Two familiar examples of the first type of agreement are management agreements (providing for the engagement of a property manager (corporate or individual) to manage all or some of the tasks of administering and operating the property) and insurance trust agreements (providing for a trustee to receive insurance funds paid for damage to the property). Other agreements not out of the ordinary include agreements with goods and service suppliers such as natural gas, electricity and other utilities providers, waste haulers, landscaping maintainers, snow clearing services, and so forth. An example of the second type of agreement may be the lease or licensing of common elements or property owned by the corporation such as a unit in the condominium.

While agreements with condominium corporations are governed by the general laws of contract, the *Condominium Act* makes special exceptions including special termination provisions in the case of certain agreements. These provisions are detailed below.

4.4.1.1. Management Agreements

Since a declarant has an interest in the operation of a condominium due to the declarant’s accountability for the accuracy of the first year’s budget (*section 75*), and may not have any direct interest or capability or running the operations side of a condominium, one of the first orders of business for the declarant’s board is to authorize the engagement of a property manager.

While the declarant’s board is obligated to act with reasonable prudence and in good faith (*section 37*), a board elected from third party unit owners may have different views as to the terms of a management contract, as well as the identity of the manager. To accommodate the ability to make change the Condominium Act provides that management agreements entered into before the election of the new board at the turn-over meeting held under *section 43(1)* may be terminated unilaterally by resolution (a by-law is neither required nor appropriate) of the board (*section 111(1)*)¹.

The termination cannot be immediate, as written notice of the effective date of termination must be given to the other party to the agreement at least 60 days before the termination date (*section 111(2)*).

4.4.1.2. Agreements for the Provisions of Goods or Services

Agreements for the provision of goods and services on a continuing basis which were entered into before the election of the new board at the turn-over meeting may be terminated by resolution of the new board passed within 12 months of their election (*section 112(1)* and *112(2)I.*) subject to two exceptions (and the general rider set out below). An agreement of the type described cannot be terminated if one or more other parties to the agreement is/are a condominium corporation (*section 112(1)*) or if the agreement is a telecommunications agreement as described in *section 22*.

¹ **230** Peel Condominium Corp. No. 117 v. Peel Condominium Corp No. 82 (1991) [one of three corp.’s cannot terminate joint management agreement]

As with management agreements, a termination of this type of agreement under *section 112* cannot be immediate. Written notice must be given to the other party at least 60 days before the effective date of termination (*section 112(4)*).

Examples of the subject matter of this type of agreement include waste removal, groundskeeping, pool maintenance, utility supply, concierge, superintending, and the like.

4.4.1.3. Agreements for the Provision of Facilities other than on a Non-Profit Basis

Agreements for the provision of facilities other than on a non-profit basis which were entered into before the election of the new board at the turn-over meeting may be terminated by resolution of the new board passed within 12 months of their election (*section 112(1)* and *112(2) 2.*) subject to two exceptions (and the general rider set out below). An agreement of the type described cannot be terminated if one or more other parties to the agreement is/are a condominium corporation (*section 112(1)*) or if the agreement is a telecommunications agreement as described in *section 22*.

As with management agreements, a termination of this type of agreement under *section 112* cannot be immediate. Written notice must be given to the other party at least 60 days before the effective date of termination (*section 112(4)*).

Examples of the subject of this type of agreement include access to recreation, meeting, and parking facilities owned by others off the condominium property.

4.4.1.4. Agreements for the Lease of All or Part of the Common Elements for Business Purposes

Agreements for the lease of all or part of the common elements for business purposes which were entered into before the election of the new board at the turn-over meeting may be terminated by resolution of the new board passed within 12 months of their election (*section 112(1)* and *112(2) 3.*) subject to two exceptions (and the general rider set out below). An agreement of the type described cannot be terminated if one or more other parties to the agreement is/are a condominium corporation (*section 112(1)*) or if the agreement is a telecommunications agreement as described in *section 22*.

As with management agreements, a termination of this type of agreement under *section 112* cannot be immediate. Written notice must be given to the other party at least 60 days before the effective date of termination (*section 112(4)*).

Examples of the subject of this type of agreement include a lease to the declarant for the purposes of operating a sales office, or a lease of a parking area.

4.4.1.5. General Exception to Rights of Termination

The right to terminate given by *section 112* (for the three types of agreement referred to immediately above) is subject to the general rider that no permission is granted to terminate an easement (*section 112(5)*). This provision may have application if an agreement included a requirement to grant or receive an easement as part of the bargain. Clearly, an a conveyance of an easement pursuant to the agreement would not come to an end if the agreement itself were terminated (unless the transfer of easement provided for same).¹

4.4.1.6. Mutual Use Agreements

¹ **347** Winfair Holdings (Lagoon City) v. Simcoe Condominium Corp. No. 46 (1998) [license agreement cannot be terminated at will, substantial change]

Mutual use agreements are agreement entered into between a corporation and one or more other persons (including condominium corporations) which provides for the mutual use, provision, maintenance, or cost-sharing of facilities or services (*section 113(1)*) and may delegate day-to-day operational decisions to a committee¹.

If a mutual use agreement was entered into before the election of the new board at the turn-over meeting any party to the agreement (whether a condominium corporation or not) may, within 12 months following the election, make an application to court for an order terminating the agreement (*section 113(1)*). On such an application, the court may amend or terminate the agreement or any part of it, or make any other necessary order provided it is satisfied which respect to two matters:

1. the disclosure statement did not clearly and adequately disclose the provisions of the agreement in question; and,
2. the agreement or any of its provisions produces a result that is oppressive or unconscionably prejudicial to the corporation or any of its owners (*section 113(3)*).

Both of these findings must be made before the court can exercise its jurisdiction to change the contractual relationship. One finding is not sufficient.

Examples of agreements of this nature are common in projects which part of the project being within one condominium's property and the balance of the project lying within one or more other condominium's property or property owned by a third party. The physical interrelationship may call for the sharing of facilities such as garbage rooms, parking garages, elevators, recreation facilities and so forth, all of which will be governed by agreement (whether called mutual use, reciprocal, shared facilities, or the like).

4.4.1.7. Insurance Trust Agreements

Section 114 of the *Condominium Act* provides that an insurance trust agreement may be terminated by the corporation at any time, and regardless of whether it was entered into before or after the election of the new board at the turn-over meeting, provided only that 60 days written notice is given to the trustee prior to the effective date of termination. This right applies despite anything contained in the agreement itself or anything in the declaration. It is notable that the section does not state whether the termination can be effected by resolution or whether a by-law is required. Since an insurance trust agreement is an 'agreement for the provision of services', arguably a resolution would suffice in the first year after the election of the new board while a by-law would be required thereafter.

4.4.2. Termination of Agreements and Budget Statement Accountability

In general terms, the declarant is financially responsible for the accuracy of the budget statement for the one year period following registration of a condominium (*section 75*). An exception relates to any excess common expenses attributable to the termination of a management agreement or one of the three types of agreements described in *section 112* (see above). Such excess common expenses are not to be included when determining whether there are excess common expenses (*section 75(2)*).

4.4.3. Telecommunication Agreements

Telecommunications agreements are expressly excepted from the agreement termination rights given in *section 111 to 113*. For an explanation of the circumstances and termination rights respecting telecommunications agreements see the section in this book on that topic.

¹ **026-**Amberwood Investments Limited et al. v. Durham Condominium Corporation No. 123 (2000) [positive covenants do not run with the land and require privity of contract].

412- Simcoe Condominium Corp. No. 78 v. Simcoe Condominium Corp. No. 50, 52, 53 et al [Shared facilities agreements which delegate day to day operational and management decisions to a shared facility committee are valid although such decisions are not required to be ratified by the respective boards]

5.1 OWNERS MEETINGS AND VOTES

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Every owner has the right to rely on the corporation to carry its object of managing the property and corporation assets (*section 17(1)*) and its duties, including the taking of all reasonable steps to ensure compliance with the Condominium Act, the declaration, by-laws and rules (*section 17(3)*). An owner also the right to rely on the board properly managing the affairs of the corporation (*section 27(1)*), and the ability to independently secure compliance with the foregoing constitutional directives (*section 134(1)*). In the normal course however, an owner’s most important right is arguably the right to cast a vote (or more than one depending on the units owned) in a variety of matters concerning the corporation’s governance including the election of directors, the introduction of new by-laws, changes to the declaration and corporate assets, and the termination of the governance of the property by the Condominium Act. The rule, in all cases, is one vote per voting unit (not all units can vote but those that can each have only one vote) (*section 51(2)*)¹.

Generally speaking, anything which requires the approval of the owners by vote can only be approved at a meeting of the owners called for the purpose (either singularly or together with other purposes) (*section 45(1)*). Subject to the specific topics discussed below, the conduct of an owner’s meeting is not prescribed by the *Condominium Act*. While by-laws may purport to govern such conduct, it is questionable whether such is allowed as *section 56* of the *Condominium Act* provides no express authority for such corporate legislation. This does not leave a void on the subject. Formal group meetings of condominium owners are, in a practical sense, no different than formal group meetings in a wide variety of other situations. The fundamental purpose is to navigate an agenda while providing fair opportunity for all participants to voice their positions and points of view and call the matters to a vote, all in an orderly fashion. Reference to long-accepted and time-proven rules, such as Robert’s Rules of Parliamentary Procedure (widely carried in bookstores), will provide a useful brief on the questions which may arise regarding the conduct of a meeting. A meeting will be usually be chaired by the corporation’s president, although a stand-in is not irregular (in any case, the chair can be appointed at the meeting by vote of the owner’s present), who is the arbiter of procedure and the captain of progress at the meeting

5.1.1.1. Annual General Meetings

The *Condominium Act* mandates that every corporation hold a general meeting of owners not more than three months after the registration of the condominium and thereafter within six months of the end of each fiscal year of the respective corporation (*section 45(2)*). An auditor must be appointed by the owners at this first

¹ **112 and 113** Eberts v. Carleton Condominium Corp. No. 396 (1999-2000) [one vote per unit is fundamental]

meeting (*section 60(1)*). These annual general meetings may or will address regular business such as elections of directors, appointment of auditors (*section 60(1)*), tabling of financial reports (*section 69(1)*), but it is an iron-clad rule that an owner may raise for discussion at an annual general meeting any matter relevant to the affairs and business of the corporation (*section 45(3)*). This right does not extend to raising such matters off the cuff and calling a vote on them. Only matters dealt with in the notice of meeting can be called to a vote (*section 47(10)*). However, the right to raise discussion on any relevant topic is a valuable and important one in a condominium context, in which communications among owners generally may be considerably less than ideal or, perhaps, non-existent.

5.1.1.2. General Meetings – Call by Board or Requisitioned by Owners

Other than the annual general meeting there is no general requirement for a corporation to hold a general meeting of owners. With the exception of the period leading up to and including the turn-over meeting held under *section 43*, it is conceivable that a condominium may go through much or all of its life without holding any owner’s meeting other than the AGM.

Nonetheless, it is open to the board at all times to call a meeting of owners for the transaction of any business (*section 45(4)*) or, in certain circumstances, for the owners to requisition a meeting (*section 46(1)*).

5.1.1.2.1. Requisitioned Meetings

Any owner, or group of owners, who:

- own not less than 15% of the units;
- are listed in the record maintained under *section 47(2)*; and,
- are entitled to vote,

may requisition a meeting of the owners to deal with business of the requisitioner’s choosing (*section 46(1)*)¹.

With respect to the first of these three criteria it should be noted that in determining whether the 15% level is achieved all units, regardless of their purpose (for example, parking and storage units, or a telecommunications unit) are to be counted. However, all owners in the requisition group must be ‘entitled to vote’ which means that each of them must own at least one unit in addition to a unit which has no vote associated with it (such as a parking or storage unit (*section 49(3)*), and each of their common expense contributions must be current or in arrears by no more than 30 days (*section 49(1)*).

The requisition must be:

- In writing and signed by the requisitionists;
- State the nature of the business to be presented at the meeting; and,
- Be delivered personally or by registered mail to the president or secretary of the board or deposited at the address for service of the corporation (*section 46(2)*).

With respect to the second of these three criteria, if the business to be presented includes the removal or one or more of the directors, the requisition shall state, for each such director, the name and reasons for removal of the director, and whether the director was elected by owner-occupants under *section 51(6)*.

¹ **212-** National Trust Co. v. Grey Condominium Corp. No. 36 (1995)
359 York Condominium Corp. No. 206 v. Almeida & Almeida Landscaping Co. (1992) [sufficiency of requisition questioned, injunction granted]

A board receiving a requisition for a meeting from owners must call and hold the meeting within 35 days of its receipt, unless the requisitionists have requested in the requisition, or consented in writing, that the business be presented at the next following annual general meeting (*section 46(4)*).

Should the board fail in its duty to call and hold the requisitioned meeting, any requisitioner can call (meaning set the time and place and issue notice of the meeting) the meeting provided it must be held no later than 45 days after the notice is first issued (*section 46(5)*)¹. On request a requisitioner is entitled to be reimbursed for their reasonable costs incurred in calling the meeting (*section 46(6)*). Such things as costs incurred in seeking advice on the contents of the notice, preparation, copying and delivery of the notice, would be reimburseable. The costs of holding the meeting are not expressed to be reimburseable.

5.1.2. Notices to Owners and Mortgagees

The *Condominium Act* is replete with directions to provide notices to owners generally, for one or more of a wide range of purposes, including the calling of meetings. In some cases specific directives are given for the subject matter of the notice (for example, *section 97(3)* contains directions for the contents of a notice dealing with changes to the common elements), the following are the general rules (specific matters may have special directions) which are applicable notices to owners and mortgagees and which, if followed, will provide satisfactory service of anything which needs to be given to such persons (*section 54*). Notices must:

- be in writing;
- be given at least 15 days before the day of the meeting if the notice is a notice of meeting of owners; and
- be given to,
 - (i) each owner who has notified the corporation in writing of the owner's name and address for service, and
 - (ii) each mortgagee of a unit who,
 - (A) under the terms of the mortgage, has the right to vote at a meeting of owners in the place of the unit owner or to consent in writing in the place of the unit owner, and
 - (B) has notified the corporation in writing of the right and the mortgagee's name and address for service (*section 47(1)*)
- specify the place, the date and the hour of the meeting, as well as the nature of the business to be presented at the meeting; and
- be accompanied by,
 - i. a copy of all proposed changes to the declaration, by-laws, rules or agreements that are to be discussed at the meeting, and
 - ii. a copy of the requisition, if an owner has made a requisition under section 46 (*section 47(9)*).

In the case of notices of meetings it is critical that the notice deal with all matters which may come to a vote. Any matter other than routine procedure cannot be the subject of a vote unless it is clearly disclosed in the notice of meeting (*section 47(10)*).

5.1.3. Record of Owners and Mortgagees

¹ 238 Peel Condominium Corp. No. 516 v. Williams (1999)

The information required to deliver a notice as directed by *section 47(1)* will be contained in a special record maintained by the corporation (*section 47(2)*), which is used by the corporation only for the purposes of the *Condominium Act* (i.e. it is not a database that could be supplied by the corporation, for a fee or otherwise, to a telecommunications marketer for the purposes of selling subscriptions) (*section 47(3)*).

It is essential to appreciate that the record is the official record. Should a unit change hands and the new owner not notify the corporation of their name(s) and address for service, there can be no complaint if (as may well be the case) the notice is not brought to the new owners attention. It is not the responsibility of the corporation to keep track of changes; rather, it is the responsibility of the respective owner (*section 47(4)* and *47(1)(c)(i)*)¹.

5.1.Record Date

Notices of Meetings

In the case of notices of meetings, the record for notice is ‘frozen’ 20 days before the day of the meeting (*section 47(5)*). Since such a notice must be delivered at least 15 days before the day of the meeting, the effect is that a notice of meeting must be delivered within a tight window. For example, a notice of meeting sent on day one, for a meeting to be held on day forth-five, cannot be delivered with reliance on the record as it stands on day one. In such a case it would be the entries in the record on day 21 which would govern the owners/mortgagees to receive notice. The following illustrates the available window:

Day 1 – Record of Owners is Frozen

Days 1 to 5 – Window for Delivering Notice

Day 21 – Day of Meeting

Application of the ‘window constraint’ to particular situations produces peculiarities. For example, *section 46(5)* permits a requisitionist owner to call a meeting of owners in default of the board doing so; however, the section allows the owner to call a meeting ‘which shall be held within 45 days of the day on which the meeting is called’. To make sense of this in light of the ‘window constraint’ it should be regarded that the meeting is ‘called’ when the first notice of meeting, whether official or not, is delivered, while the last notice(s), which will ensure all persons in the record on the day it is ‘frozen’ are given notice, will be sent out within the five day window.

Other Notices

In the case of any other class of notice to be given to owners/mortgagees the record for notice is ‘frozen’ five (5) days before the notice is given (*section 47(6)*). Since there is no ‘window’ that is (like notices of meetings) is subject to two variables (i.e. the day notice is given and the day of the meeting) the effect is that a person giving notices for matters other than meetings will compile the list of persons to receive notice on day one, and have until day 6 to deliver or send it.

5.1.4. Service of Notice

5.1.4.1. On Owners

A notice to an owner is properly and sufficiently given if it is:

- delivered to the owner personally;
- sent by prepaid mail addressed to the owner at the address for service that appears in the record;

¹ See chapter 5.2.3. regarding access to records.

- sent by facsimile transmission, electronic mail or any other method of electronic communication if the owner agrees in writing that the party giving the notice may give the notice in this manner; or
- delivered at the owner’s unit or at the mail box for the unit unless,
 - (i) the party giving the notice has received a written request from the owner that the notice not be given in this manner, or
 - (ii) the address for service that appears in the record is not the address of the unit of the owner (*section 47(7)*).

5.1.4.2. On Mortgagees

A notice to a mortgagee is properly and sufficiently given if it is:

- delivered to the mortgagee personally;
- sent by prepaid mail addressed to the mortgagee at the address for service that appears in the record; or
- sent by facsimile transmission, electronic mail or any other method of electronic communication if the mortgagee agrees in writing that the party giving the notice may give the notice in this manner (*section 47(8)*).

5.1.5. Waiver of Notice of Meetings

An owner/mortgagee entitled to notice (more particularly be in the (accurately kept) corporate record who is not given notice, is entitled to challenge an outcome (i.e. a vote on approval of a by-law) of the subject matter of the notice. The outcome of a challenge will depend on a variety of factors, but an owner’s mortgagee whose interests are negatively affected would have good grounds in standing on their right to notice (and participation).

In order to eliminate one area of uncertainty, the *Condominium Act* provides that any owner/mortgagee who attends a meeting (or is represented by proxy at a meeting) is deemed to waive any objection to a failure to give the required notice (*section 47(11)*). The only exception is in a case where the owner/mortgagee/representative expressly objects to the failure at the meeting. Clearly this would have no affect on the rights of an owner/mortgagee who was not given the required notice and did not attend the meeting (although it should be recognized that the substance of the giving of notice is what is important, and the form is secondary. An owne/mortgagee who was fully aware beforehand of the subject and other details of a meeting would have an uphill battle convincing a judge that a result should be invalidated).

5.1.6. Loss of an Owner’s Right to Vote

Although all owners will always be entitled to notice, no owner is entitled to vote if any contributions payable in respect of the owner’s unit has been in arrears for 30 days or more at the time of the meeting (*section 49(1)*). An owner can overcome this deprivation by making full payment of the arrears before the meeting is held (*section 49(2)*).

5.1.7. No Votes for Parking, Storage, or Service Units

The general rule that each unit in a condominium is entitles the owner to one vote does not apply to units intended for:

- Parking purposes;

- Storage purposes; or,
- For the purpose of housing
 - i. Services;
 - ii. Facilities; or,
 - iii. Mechanical installation,

unless all of the units in the condominium are used for one or more of the above purposes (*section 49(3)*).

This treatment of such types of units is intended to ensure that units which characterize the primary intended use and purpose of the condominium control the fundamental actions on governance, and that the votes related to these units are not diluted or skewed by one or more votes relating to units with a secondary stake in the condominiums affairs.

It should be noted that this limitation extends no further than the right to vote. Such owner’s remain entitled to the same notice as any other owner.

5.1.8. Mortgagee’s Right To Vote

Where the terms of a mortgage of a unit gives the mortgagee the right to vote or consent in place of the unit owner, and the mortgagee has notified the corporation of this right and the mortgagee’s name and address for service, then by giving notice at any time up to the fifth day before the date of the meeting the mortgagee may exercise this right in place of the owner (*section 48(1)*). The notice must be in writing and given to both the corporation and the unit owner.

In the event there is more than one mortgage on title, both or all of which meet the above circumstances and all of whom have given notice, the right to vote will follow the line or priority of the mortgages¹. Should none of the mortgagees exercise the right then the owner has the right to vote or consent (*section 48(4)*). In the latter regard, exercising the right includes not only giving notice but also turning up at the meeting and voting. A owner who is present at the meeting and otherwise entitled to vote, would be able to cast a vote if a mortgagee who gave notice of intention to exercise the voting right failed to appear.

5.1.9. Quorum

The general requirement for transaction of business at a meeting of owners is the presence of owners who own 25% of the units (*section 50(1)*). The by-laws of a corporation may increase this level to the presence of owners who own 33 1/3 of the units of the corporation (*section 56(1)(c)*).

To count towards a quorum an owner must:

- Be entitled to receive notice of the meeting (i.e. must be in the corporate record on the day it is ‘frozen’)
- Must be entitled to vote (i.e. no mortgagee is in position to exercise the right); and,
- Must be present at the meeting or represented by proxy (*section 50(2)*).

The second criteria makes it clear that owners of parking, storage, and other units without a vote cannot be counted towards the quorum.

¹ 147 Keyes v. Metropolitan Toronto Condominium Corp. 876 (1995) [under the old legislation only the first mortgagee could vote]

Condominiums which have only one owner will have a properly constituted meeting if the owner is present in person or by proxy (*section 50(3)*).

Certain matters (such as termination of the corporation in various circumstances-*section 122*, leasehold lease renewals-*section 174(5)*) require the vote of the owners of 80% of the units, others require 66 2/3's% (substantial changes to the common elements - *section 97(4)*), and others a majority(greater than 50%+) (confirmation of by-laws). While a meeting called for any of these purposes would be properly convened with the presence of the owner's of 25% of the units, unless the minimum number of votes are present the vote cannot be called. Provided the minimum number of votes is present, the question will carry on a majority of the votes cast¹.

5.1.10. Votes for Joint Owners

If a voting unit is owned by more than one person the direction the vote is cast is determined by the preference of the majority of the unit's joint owners. In the event of a tie (i.e. two owners each with a different view) the vote is not counted (*section 51(3)*).

5.1.11. Special Rules for Voting for Directors

Subject to the proviso below, on a vote to elect or remove a member of the board all owners entitled to vote may vote for each member of the board (*section 51(4)*). The effect of this allowance is that if three positions are open on the board then, assuming there are at least three candidates, each owner may cast three votes. Each vote must be cast for a different candidate, and all votes need not be cast (in the foregoing example, an owner may choose to cast two votes and advance the two benefiting candidates at the expense of the third).

5.1.12. Owner-Occupied Units - Elected Director

Where at least 15 per cent of the units of a corporation are owner-occupied on or after time for calling the turn-over meeting required by *section 43*, one position on the board must be a person elected only by the votes of the owner's of the owner-occupied units (*section 51(6)*) and that director can only be removed from office by a votes of the owner-occupants (*section 51(8)*). This right is in addition to the vote for the election or removal of other directors (*section 51(7)*).

5.1.13. Method of Voting

Voting may be done on a show of hands or on a recorded vote. A recorded vote is to be taken whenever any person entitled to vote at the meeting makes a request (*section 52*). The request may be made either before the vote or promptly after it is taken (on a show of hands). The latter option ensures that an 'eyeballing' of the hand vote does justice to the actual vote.

5.1.14. Proxy Voting

An owner who cannot or does not wish to attend a meeting to cast one or more votes may appoint another person, a proxy, who may or may not be another unit owner, to exercise the owner's voting rights (*section 52*).

The instrument appointing the proxy must be in writing under the hand of the appointer (or, should the appointer have an attorney properly authorized under the *Powers of Attorney Act*, by the attorney) and must be

¹ 270-Reiners et al. and Mercer et al. (1988) [explanation of need for minimum number of votes but that majority of those votes carry the question].

194 Metropolitan Toronto Condominium Corp. No. 858 v. Simmelsgaard (1997) [vote to remove directors is majority of votes of a majority of owners]

227 Page v. Lafleche (1997) [vote to remove directors is majority of votes of a majority of owners]

for a particular meeting of owners (a 'global' proxy appointment, indefinite as to time and subject, is not acceptable) (*section 52(4)*).

In the case of a proxy appointment for the election or removal of a director, the instrument of appointment must state the name of the directors for and against whom the proxy is to vote (*section 52(5)*).

Regulation 48 of 01 prescribes three forms (for different circumstances) which may (but not must, and so a different form, adequate to the purpose, is acceptable) be used as the form for appointing a proxy:

- Form 8 may be used in all cases other than the election or removal of a director (section 13(a) of *48 of 01*);
- Form 9 may be used in the case of a proxy that includes a proxy for the election of a director other than for the election of a director for the remainder of the term of a director who has been removed (section 13(b) of *48 of 01*); and,
- Form 10 may be used in the case of a proxy for the removal of a director or the election of a director for the remainder of the term of a director who has been removed (section 13(c) of *48 of 01*).

Instruments appointing proxies must be retained by the corporation for 90 days following the meeting to which they pertain (*section 52(7)*).

5.1.15. Majority Vote Rules

Provided there is a quorum, all votes are decided by the majority of the votes cast (*section 53*). A tie vote will mean the question is lost or will require another vote.

5.2 CORPORATE RECORDS

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5.2.1. Records Which Must Be Kept

5.2.1.1. General

Every condominium corporation is obliged to keep adequate records. *Section 55* mandates that these records must include the following:

1. The financial records of the corporation.
2. A minute book containing the minutes of owners’ meetings and the minutes of board meetings.
3. A copy of the declaration, by-laws and rules.
4. All lists, items, records and other documents mentioned in *section 43(4)* being:
 - the seal of the corporation;
 - the minute book for the corporation including a copy of the registered declaration, registered by-laws, current rules and minutes of owners’ meetings and board meetings;
 - copies of all agreements entered into by the corporation or the declarant or the declarant’s representatives on behalf of the corporation, including management contracts, deeds, leases, licences and easements;
 - copies of all policies of insurance and the related certificates or memoranda of insurance and all insurance trust agreements;
 - bills of sale or transfers for all items that are assets of the corporation but not part of the property;
 - all records that it has related to the units or to employees of the corporation.
5. All lists, items, records and other documents mentioned in *section 43(5)* being:
 - the existing **warranties and guarantees** for all the equipment, fixtures and chattels included in the sale of either the units or common elements that are not protected by warranties and guarantees given directly to a unit purchaser;
 - the **as-built** architectural, structural, engineering, mechanical, electrical and plumbing **plans**;
 - the **as-built specifications**, indicating all substantive changes, if any, from the original specifications;
 - all **existing plans** for underground site services, site grading, drainage and landscaping, and television, radio or other communications services;
 - all **other existing plans** and information not mentioned in the above three items that are **relevant** to the repair or maintenance of the property;
 - if the property of the corporation is subject to the *Ontario New Home Warranties Plan Act*,

- **proof**, in the form, if any, prescribed by the Minister, that the units and common elements have been **enrolled in the Plan** within the meaning of that Act in accordance with the regulations made under that Act, and
 - a copy of all **final reports** on inspections that the Corporation within the meaning of that Act requires be carried out on the common elements;
- a table setting out the **responsibilities for repair** after damage and maintenance and indicating whether the corporation or the owners are responsible;
 - a schedule setting out **what constitutes a standard unit** for each class of unit that the declarant specifies for the purpose of determining the responsibility for repairing improvements after damage and insuring them;
 - all **financial records** of the corporation and of the declarant relating to the operation of the corporation from the date of registration of the declaration and the description;
 - if the meeting is **held after nine months following the registration** of the declaration and description, the **reserve fund study** that is required within the year following the registration of the declaration and description;
 - **all reserve fund studies** that have been completed or are required to have been completed at the time the meeting is held, **other than the reserve fund study that is required within the year** following the registration of the declaration and description;
 - a copy of the **most current disclosure statement** delivered to a purchaser of a unit in the corporation under *section 72* before the meeting (*section 43(5)*).
6. The written performance audit report(s) described in *section 44(8)*.
 7. The records required under *section 47(2)* (owners/mortgagees names and address for service) and *83(3)* (records of notices of lease of units and termination of leases).
 8. A record of all reserve fund studies and all plans to increase the reserve fund under *section 94(8)*.
 9. A copy of all agreements entered into by or on behalf of the corporation.
 10. The report that the corporation receives from an inspector in accordance with *section 130(5)*.
 11. All other records as may be prescribed or specified in the by-laws of the corporation including copies of status certificates issued in the previous ten years (*section 15 of 48 of 01*)

5.2.1.2. Financial Records

Corporation must keep all financial records for at least six years from the end of the last fiscal period to which they relate, or such greater length of time as may be required by any responsible taxing authority (*section 55(2)*).

5.2.3. Examination of Records

All condominium corporations are obliged to permit an owner, a purchaser, or a mortgagee of a unit, or an agent of any of them duly authorized in writing, to examine the records of the corporation at a reasonable time for

all purposes reasonably related to the purposes of the *Condominium Act (section 55(3))*¹. The only exceptions to the foregoing right of access are:

- records relating to employees of the corporation, except for contracts of employment between any of the employees and the corporation;
- records relating to actual or pending litigation or insurance investigations involving the corporation; or
- records relating to specific units or owners unless they relate to the owners unit, the unit being purchased, or the unit that is subject to the mortgage, or, in the case of an owner, records that relate to the owner (*section 55(4)* and *55(5)*)².

5.2.4. Copies of Records

Any person entitled to examine records is entitled to receive copies of them from the corporation within a reasonable time provided a request is made and the person prepays a reasonable fee to compensate the corporation for the labour and copying charges (*section 55(6)*).

Copies of records which have been certified under the corporate seal to be a true copy of a record is admissible in evidence in any proceeding and, in the absence of proof to the contrary, is proof of the facts stated in the copy (*section 55(7)*).

5.2.5. Penalty for Not Providing Access or Copies

If an owner (which by definition includes a mortgagee in possession, but not other mortgagees or purchasers) is denied the right to examine records or obtain copies of records by the corporation, and there is no reasonable excuse for the denial, the corporation must pay \$500.00 to the owner on receiving a written request for payment (*section 55(8)*). If the sum is not paid it can be recovered by action in the Small Claims Court (*section 55(9)*) which may also order the corporation to produce the records for examination (*section 55(10)*).

¹ **283** Rohoman v. York Condominium Corp. No. 141 (2000) [court order to ensure requisitionists can call meeting]
427- MTCC No. 551 v. Mani Adam (2006) [A requestor does not have to give reasons why a request is made under section 77 for the names and addresses of board members.]

² **212-** National Trust Co. v. Grey Condominium Corp. No. 36 (1995) [Inspection rights cannot be limited by by-law]

5.3 BY-LAWS AND RULES

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A condominium corporation’s board makes decisions and takes actions through the passage of resolutions at a board meeting. To pass a resolution a board meeting must be duly called, a motion made and seconded, and a majority of the quorum of directors present must vote in favour of it’s passage.

A board resolution may require nothing other than it’s passage by the board in order to be effective and to be implemented (for example, a board resolution to hire a contractor to undertake maintenance work, or a resolution to commence legal action to enforce the rules or by-laws) or, in the case of resolutions which introduce, amend, or repeal by-laws or rules of the corporation, the opportunity or requirement for confirmation by the owners will be necessary.

5.3.1 By-Laws

Resolutions to make, amend, or repeal by-laws must reasonable and consistent with the *Condominium Act* or the corporation’s declaration (*section 56(6)*) and must fall within one or more of seventeen subject matters, namely:

- a) to govern the number, qualification, nomination, election, resignation, removal, term of office and remuneration (which must fix the remuneration and the period, not exceeding three years, for which it is to be paid (*section 56(2)*) of the directors;
- b) to regulate board meetings, the form of board meetings and the quorum and functions of the board;
- c) to provide that the quorum for the transaction of business at a meeting of owners is those owners who:
 - i. own 33 1/3 per cent of the units of the corporation,
 - ii. are entitled to receive notice of the meeting,
 - iii. are entitled to vote (i.e. are not in +30 days arrears of common expense contributions, own a unit other than parking, storage, and utilities units), and,
 - iv. are present at the meeting or represented by proxy;
- d) to govern the appointment, remuneration, functions, duties, resignation and removal of agents, officers and employees of the corporation and the security, if any, to be given by them to it;
- e) to authorize the borrowing of money to carry out the objects and duties of the corporation provided that if the expenditure is not listed in the budget for the current fiscal year it must be the subject of a by-law to specifically authorize the borrowing (*section 56(3)*);
- f) to authorize the corporation to object to assessments under the *Assessment Act* on behalf of owners if it gives notice of the objections to the owners, and to authorize the defraying of costs of objections out of the common expenses;

- g) to govern the assessment and collection of contributions to the common expenses;
- h) to establish what constitutes a standard unit for each class of unit specified in the by-law for the purpose of determining the responsibility for repairing improvements after damage and insuring them;
- i) to extend the circumstances described in *section 105(2)* under which the lesser of the cost of repair of damage to a unit and any insurance deductible shall be added to the common expenses payable for an owner's unit where the damage to a unit is not caused by the corporation or its director, officers, agents or employees;
- j) to govern the maintenance of the units and common elements;
- k) to restrict the use and enjoyment that persons other than occupants of the units may make of the common elements and assets of the corporation, subject to any agreement made by the corporation with respect to the use and enjoyment of its common elements and assets that it shares with another person;
- l) to govern the management of the property¹;
- m) to govern the use and management of the assets of the corporation;
- n) to specify duties of the corporation in addition to the duties set out in the *Condominium Act* and the declaration;
- o) to establish the procedure with respect to the mediation of disputes or disagreements between the corporation and the owners for the purpose of section 125 (setting the fair market value of the property or part of the common elements for the purpose of payment to owners who voted against a sale of the property) or 132 (settling disagreements respecting various agreements); or
- p) to govern the conduct generally of the affairs of the corporation (*section 56(1)(a) to (p)*);
- q) To establish standards for the occupancy of units for residential purposes (*section 57*, see below)².

By-laws take effect when confirmed by a vote of a majority of the owners of units and are registered on title (*section 56(10)*). If they are not registered they are incapable of enforcement³.

5.3.2. Special Cases

5.3.2.1. By-Laws Regarding Assessment Complaints

Should a corporation pass a by-law to object to assessments on behalf of owners (item (f) above) the Condominium Act relieves the corporation of an liability for an alteration in the assessment of a unit or any other matter relating to the complaint except the costs relating thereto (*section 56(4)*). Among other things, this provision ensures the corporation has no civil liability (other than as it respects costs of the complaint) to the owners or any other person should the complaint result in the assessment (and therefore the related property taxes) being increased. In addition, regardless of a by-law giving the corporation the authority to lodge a complaint, an owner may withdraw a complaint made on the owner's behalf by the corporation at any time before the hearing (*section 56(5)*). Such a withdrawal will put the assessment of the respective unit and common interest beyond review and fix it at the value as set by the assessment authority.

5.3.2.2. By-Laws Respecting Residential Occupancy Standards

¹ **383** York Region Condominium Corp. No. 545 v. 602809 Ontario Limited (1989) [restrictions on parking and use of driveways valid subject of bylaw]

² **365** York Condominium Corp. No. 400 v. Comcraft Services (1988) [age restriction not authorized to be done by by-law, right of ownership]

³ **383** York Region Condominium Corp. No. 545 v. 602809 Ontario Limited (1989) [by-law not proven to be force, cannot be enforced]

A board may by resolution make, amend, or repeal by-laws to establish standards for the occupancy of units for residential purposes (*section 57(1)*). The scope and details of the standards established by such a by-law must be either:

- the occupancy standards contained in a by-law of the municipality in which the property is situate; or,
- not more restrictive than standards that are in accordance with the maximum occupancy for each unit based on the maximum occupancy for which the building in which the units are located are designed (*section 57(2)*).

Municipal occupancy standards by-laws are presently passed under section 15.1 of the *Ontario Building Code Act* and may provide both maintenance and occupancy standards which must be adhered to by owners and occupants. Municipal by-laws passed under this provision may regulate occupancy in relation to standards such as floor area, habitable rooms, and so forth. Should there be no applicable municipal maintenance and occupancy standards by-laws the board is free to establish standards subject to the rider that the allowable occupancy is not more restrictive than standards which will be found in the *Ontario Building Code* for the particular size and type of building (for example, section 3.1.16.1 of the *Ontario Building Code* deals with occupant loading and, in the case of residential occupancy presumes a loading of 2 persons per sleeping room. This factor is applied to a number of standards by the *Building Code* (for example, the number of water closets required section 3.7.4.6). A proposed condominium by-law which presumed a loading of 1 person per sleeping room would be more restrictive and, therefore, could not be passed or, if passed, enforced).

Generally speaking, both municipal occupancy standards by-laws and provincial legislation are liberal with standards in that they address the minimum expected for all applicable circumstances, rather than an ideal. The question might be asked why a condominium corporation would bother to have an occupancy standards by-law when municipal by-laws and provincial regulations are enforceable against unit owners by the responsible authorities and higher standards cannot be imposed. The answer lies in the remedies that are made available to the condominium corporation, in particular:

1. A condominium’s occupancy standards by-law is enforceable by the corporation and other owners, and so is can be enforced using the provisions of the *Condominium Act*. There is no need to prompt a public body to take action;
2. A condominium’s occupancy standards by-law may prohibit persons from occupying units that do not comply with the standards (*section 57(3)*); and,
3. In the event of a contravention of a condominium’s occupancy standards by-law the board can, by resolution, levy against the unit:
 - an assessment for the amount that reasonably reflects the amount by which the contravention increases the cost of maintaining the common elements and repairing them after damage; and
 - an assessment for the amount that reasonably reflects the amount by which the contravention increases the cost of using the utilities that form part of the common expenses (*section 57(4)*).

And any such assessment forms part of the unit’s contribution for common expenses (*section 57(5)*), allowing it to be the subject of a lien if not paid.

5.3.3. Rules

5.3.3.1. General

Boards are authorized to make, amend or repeal rules respecting the use of the common elements and units. Any such rules must be reasonable¹ and consistent with *the Condominium Act*, the declaration, and the by-laws of the corporation (*section 58(2)*) and must be to:

- promote the safety, security or welfare of the owners and of the property and assets of the corporation; or
- prevent unreasonable interference with the use and enjoyment of the common elements, the units or the assets of the corporation (*section 58(1)*).²

Rules which are inconsistent with the *Condominium Act* are deemed to be amended in order that the *Condominium Act* prevails (*section 58(4)*); however, this saving provision does not apply to rules which are inconsistent with the declaration or by-laws of a corporation. In the latter case, the board's lack of authority should render the rule(s) a nullity and unenforceable.

All persons bound by the rules (this would include owners, lessees, occupants, guests and invitees) are obliged to comply with them and they may be enforced in the same manner as by-laws (*section 58(10)*).

5.3.3.2. Exercise of the Board Authority Regarding Rules

A board acts by resolutions and, in the case of rules, all that is required of the board initiate new rules, or amend or repeal old ones is a board resolution adopting the measure. As set out below, such board initiated rules are not immediately effective and are subject to review by the owners. Incorporation of the rules into a by-law is neither required nor is it specifically provided for in the *Condominium Act*. Some of the general subject matter of by-laws (see *section 56*) cross the same ground as potential rules and so, at least in some circumstances, could be worked into a by-law. The procedural requirements for introducing and bring by-laws into effect are different (i.e. rules are not registered on title to take effect or for any other purpose) and, given that the rules may change from time to time as a condominium owners and officials gain experience with the property's environment, adoption by board resolution is appropriate.

5.3.3.3. When Do Rules Take Effect?

5.3.3.3.1. Declarant's Rules

Rules that were proposed by the declarant before the registration are effective from the day of registration of the condominium declaration and description until replaced or confirmed by rule(s) of the Corporation (*section 58(9)*). Rules of this kind require no board action (even by the declarant-appointed board) to be effective.

¹ **363 and 364** York Condominium Corp. No. 382 v. Dvorchik (1992/1997) [rule prohibiting pets over 25 lbs. is valid and enforceable]

342 Wellington Condominium Corp. No. 70 v. Wallace (1998) [rule prohibiting resident parking in common elements is reasonable and enforceable]

400-215 Glenridge Ave. Ltd. Partnership v. Waddington (2005) [Conditions or restrictions contained in the declaration respecting the occupancy of a unit are subject to the same constraint governing the scope of condominium rules found in section 58(1)]

² **277** York Condominium Corp. No. 42 and Melanson (1975) by-law restriction against 'animals' on property is unreasonable]

365 York Condominium Corp. No. 400 v. Comcraft Services (1988) [age restriction not authorized to be done by by-law, right of ownership]

190 Metropolitan Toronto Condominium Corp. No. 702 v. Sonshine (1989) [canopy added to front door in common elements, court order to comply by removing same, breach of rules]

371 York Condominium Corp. No. 71 v. Sullivan (1990) [rule prohibiting commercial vehicle parking, valid, court order to comply]

5.3.3.3.2. Board Initiated Rules

Following the adoption of a rule(s), or amendments or repeals by resolution of the board the board must then give a notice of it to the owners, which notice must include:

- a copy of the rule as made, amended or repealed, as the case may be;
- a statement of the date that the board proposes that the rule will become effective; and
- a statement that the owners have the right to requisition a meeting under *section 46* and the rule becomes effective at the time:

the owners approve it at a meeting of owners, if the board receives a requisition for a meeting under *section 46* within 30 days after the board has given notice of the rule(s) to the owners; or,

30 days after the board has given notice of the rule to the owners, if the board does not receive a requisition for a meeting under *section 46 (section 58(6) and 58(7));*

unless

the rule put forward has substantially the same purpose or effect as a rule that the owners have previously amended or repealed within the preceding two years, in which case the rule is not effective until the owners have expressly approved it, with or without amendment, at a meeting duly called for the purpose (*section 58(8)*)

5.3.4. Amendment of Rules by Owners

Although owners cannot initiate a new rule, they may amend or repeal a rule at a meeting of owners called for that purpose (*section 58(5)*). Such a rule would take effect upon approval and would not require any subsequent action by the board.

5.3.5. Joint By-Laws and Rules

In circumstances where two or more corporations share facilities or services, the boards of those corporations may, at their option¹, make (or amend or repeal) joint by-laws or rules governing the use and maintenance of the shared facilities/services (*section 59(1)*).

5.3.5.1. Joint By-Laws

Joint by-laws are, like ‘single condominium’ by-laws, not effective until the owners of a majority of the units have voted in favour or confirming it, with or without amendment (*section 59(3)*) and the bylaw has been registered by each corporation. The one difference being that the vote(s) in favour of confirmation must be made by a majority of the owners in each respective condominium (*section 59(3)*). The vote of the two (or more) condominium owners may be a joint meeting of the corporations duly called for the purpose (*section 59(5)*).

Once a joint by-law is effective, it cannot be repealed unless and until the same process is followed. A majority of the owners of the units in each respective condominium must vote in favour of the repeal (*section 58(6)*). A single condominium cannot, without matching action by the other condominium(s), effect a repeal.

5.3.5.2. Joint Rules

A joint rule will be adopted by resolutions passed by each (or all) or the boards of the respective condominiums. While a joint rule may deal with precisely the same subject matter as a by-law under *section 59(1)*, it does not require (though may, at the election of one or more owners, lead to a vote on) approval/confirmation by the owners and is not registered on the condominium title.

¹ **412-** Simcoe Condominium Corp. No. 78 v. Simcoe Condominium Corp. No. 50, 52, 53 et al (2006)

Upon passage of the joint rule by resolution of the boards, each board must give a notice of the joint rule to its owners that includes:

- a copy of the joint rule as made, amended or repealed, as the case may be;
- a statement of the date that the boards propose that the joint rule will become effective; and
- a statement that the owners have the right to requisition a meeting under *section 46* and the rule becomes effective at the time:
 - the owners approve it at meetings of owners of each respective corporation or at a joint meeting of owners of all the corporations, if the board of any of the corporations receives a requisition for a meeting under *section 46* within 30 days after the board has given notice of the joint rule(s) to the owners; or,
 - 30 days after the board of each corporation has given notice of the joint rule to its owners, if neither or none of the boards do not receive a requisition for a meeting under *section 46* (*section 59(8)* and *59(9)*);

unless

 - the joint rule put forward has substantially the same purpose or effect as a joint rule that the owners have previously amended or repealed within the preceding two years, in which case the rule is not effective until the owners of each corporation have expressly approved it, with or without amendment, at a separate meetings, or at a joint meeting, duly called for the purpose (*section 59(10)*).

5.3.5.3. Amendment of Rules by Owners

Although the owners of each (or all) corporations cannot initiate a new joint rule, they may amend or repeal a joint rule at a joint meeting of owners, or at a meeting of owners of each corporation, called for that purpose (*section 59(6)*). Such a rule would take effect upon approval and would not require any subsequent action by the board (*section 59(6)*).

5.3.6. Financial Bylaw

A corporation must keep its expenditures in line with its annual budget. Borrowings may be planned for in the budget; however, money cannot be borrowed by a corporation for purposes which are not in the budget. Any need for such an unplanned for borrowing must be authorized by by-law (*section 56(3)*)¹.

¹ **302** Somerset Ridge Development Corp. v. Middlesex Condominium Corp. No. 134 (1991) [special assessments voided, by-law revising budget required]

5.4 FINANCIAL STATEMENTS AND AUDITORS

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5.4.1. Financial Statements

Every corporation is required to prepare, in accordance with the accounting principles specified in the Handbook of the Canadian Institute of Chartered Accountants, and keep the following financial records:

1. a balance sheet;
2. a statement of general operations;
3. a statement of changes in financial position;
4. a statement of reserve fund operations;
5. an indication of the aggregate remuneration paid to the directors in that capacity and the aggregate remuneration paid to the officers in that capacity;
6. a comparison between,
 - a) the amount of contributions to the reserve fund that the corporation has collected, and
 - b) the amount that, according to the board’s plan for funding of the reserve fund under *section 94(8)* of the *Condominium Act*, the corporation was required to collect as contributions to the reserve fund;
7. a comparison between,
 - a) the amount of expenditures from the reserve fund that the corporation has made, and
 - b) the amount of proposed expenditures that, according to the board’s plan for funding of the reserve fund under *section 94(8)* of the *Condominium Act*, the corporation was to have made from the reserve fund; and,
8. in any case where a director or officer makes a disclosure of an interest in a contract or transaction under *section 40 or 41* of the *Condominium Act* and the corporation has entered into the contract or transaction, whether before or after the disclosure, a brief description of the nature of any contract or transaction, the amount of money involved in it and the nature and extent of the director or officer’s interest.

section 66(2) and section 16(1),(3),(4) and (5) of 48 of 01.

With limited exception (see below for condominiums of 24 units or less) the financial statements are audited by the corporation’s auditor who prepares an audit report for the corporation’s audit committee (if any) and/or board of directors. The board must, with the audit report in hand, approve the financial statements (evidenced

by the signature at the bottom of the balance sheet by two authorized directors) and place them before each annual general meeting together with the auditor’s report and all further information regarding the corporation’s financial position that is required by the corporation’s by-laws (*section 66(4)(5)* and *section 69(1)*).

5.4.2. Auditors

5.4.2.1. General Function of an Auditor

With one class of exception, every condominium corporation is required to have an auditor whose function, in essence, is to be an arm’s length overseer of the of the accuracy and completeness of the corporation’s annual financial statements and reporter to the corporation, on behalf of the owners, regarding those statements and audit findings¹.

5.4.2.2. Dispensing With An Auditor – Corporations With 24 Units or Less

In recognition that an auditor’s office is only kept filled and functioning at a cost to the owners, and that in the case of small condominium corporations the expense potentially outweighs the benefit, the owners in a corporation having fewer than 25 units (including parking, storage and utility units) may, with their unanimous written consent, dispense with an audit and, consequently, an auditor until the next following annual general meeting (*section 60(5)*). This self-willed exemption from an audit/auditor may only be made after the turnover meeting has been held (*section 60(5)(a)*), ensuring that in the transition period from registration to the first meeting after the turn-over there is arm’s length oversight of financial statements.

5.4.2.3. Auditor’s Qualifications

The *Condominium Act* prescribes who may not be an auditor, namely any person who:

- is a director, officer or employee of the corporation;
- is a manager under an agreement for the management of the property of the corporation;
- has an interest in a contract to which the corporation is a party; or
- is a partner, employer or employee of a director, officer or employee of the corporation or of a manager under an agreement for the management of the property of the corporation (*section 61*).

Apart from the above, there is no limitation or restriction on the qualifications which a person or persons must have or not have in order to hold the office of auditor for a condominium corporation. Having said this, the proper performance of the office of auditor requires familiarity with and application of formal accounting and auditing principles and procedures. Auditors commonly hold the professional designation of Chartered Accountant or similar accreditation which requires training in the accounting principles and auditing standards specified in the Handbook of the Canadian Institute of Chartered Accountants (reference *section 16* of *48 of 01*).

5.4.2.4. Auditor’s Fees

Whether the auditor is initially appointed by the declarant (as owner of the units) or by new owners, the candidate should (as a practical matter) have been contacted beforehand and terms of engagement settled in principle. In this regard, the remuneration of the auditor must be fixed by the appointor (the owners, the board, or the court as the case may be) (*section 62* and *60(3)*) and this is best done at the time of appointment. It would be

¹ **184-McLean v. Leinblein & Goldhar** (1991) [the auditor's duties are owed not to the owner's but to the corporation).

highly undesirable and inconvenient to risk differences over fees with an appointed auditor and, in any event, the amount(s) should be on the table when the appointment is being considered by the appointee(s).

An auditor or former auditor is entitled to be compensated for expenses and remunerated for attendance(s) at any meeting of the owners if attendance is required by the corporation or any owners (*section 70(5)*).

5.4.2.5. Appointment of the Auditor

Typically a declarant's first order of business after registration will be to appoint a board to pass the proposed by-laws, then, as owner of all the units, approve them at a meeting called for the purpose. At this or other first meeting one item which the *Condominium Act* requires to be dealt with is the appointment of one or more qualified persons to hold office as auditor(s) until the close of the next annual meeting (*section 60(1)*). The office is of sufficient importance that a failure of the owners to appoint an auditor(s) both obliges and empowers the board to do so unilaterally in their stead (*section 60(1)*) and, in default of these two groups acting the court may make the appointment on application of any owner (*section 60(3)*).

In all cases the office of auditor must be kept filled thereafter, with the exception of '24 units or less' corporations whose owners have exercised the option to dispense with an audit (and then only after the turn-over meeting has taken place). The appointment must be reviewed and made afresh at each annual meeting. Should the owners not make the appointment at a particular annual meeting, the auditor in office continues in office until a successor is appointed (*section 60(2)*) either by the owners or by the court on application of an owner.

5.4.2.6. Removal of the Auditor

The owners are empowered to remove an auditor from office at a meeting duly called for the purpose, provided that the owner's must appoint a replacement auditor at the same meeting who will hold office for the remainder of the term (*section 63(1)* and *63(2)*). A vote of a majority of the owners present at the meeting in person or by proxy is required to take this action (*section 63(3)*).

Such a meeting could be called by the board (*section 45(4)*), or on requisition of owners (*section 46*) but notice of the meeting cannot be given until 30 days after the person calling the meeting gives the auditor:

- (a) written notice of the intention to call the meeting, specifying the date on which the notice of the meeting is proposed to be mailed;
- (b) a statement of the name of the auditor who is proposed to be removed and the reasons for the removal; and
- (c) a copy of all material proposed to be sent to the owners in connection with the meeting (*section 63(4)*).

Should an auditor receiving such a notice wish to make representations (in writing only the auditor must send the written representations to the person calling the meeting at least three days before the notice of meeting is given to the owners. The person calling the meeting must include a statement of the name of the auditor who is proposed to be removed and the reasons for removal, and a copy of any representation received, in the notice of meeting. The person calling the meeting is entitled to be reimbursed by the corporation for the cost of including this information in the notice (*section 63(7)*). The notice itself must comply with the requirements of *section 47*.

In a case where the owners vote to remove an auditor but fail in their duty to appoint a replacement, the directors may appoint a qualified person to hold office until the close of the next following annual general meeting or until a successor is appointed, whichever is later (*section 65*).

5.4.2.7. Resignation of the Auditor

An auditor can resign the office at any time with the resignation becoming effective on the day the written resignation is delivered to the corporation, or any later date specified in the resignation letter (*section 64*). The auditor may include written representations in the letter of resignation and, in such event, a copy of the representations must be included in the notice of the next following meeting of the owners (*section 64*).

The vacancy created by a resignation may be filled by appointment by the board with the term of office extending to the next annual meeting or until a successor is appointed, whichever is later (*section 65(2)*).

5.4.2.8. Protection from Civil Action for Statements Made in Good Faith

In order to promote the ability of auditors to effectively carry out their function the *Condominium Act* prohibits the institution of any action or other proceeding for damages against an auditor (past or current) for any oral or written statement made in good faith in the execution of the duty of auditor except statements made in the annual audit report (*section 67(7)*). Accordingly, communications made during the auditor’s audit, or made at required attendances at owners meetings, are shielded from potential civil actions.

5.4.2.9. Right to Notice of Meetings and Communications

In order to keep the auditor informed, the corporation must give the auditor notice of all meetings of owners (regardless of the purpose of the meeting) and all other communications relating to the meetings which the owners are entitled to receive (*section 70(2)*).

5.4.2.10. Audit Committee

The financial affairs of larger condominiums, when taken together with all other responsibilities associated with managing the affairs of a corporation, may be complex enough that introducing a layer of corporate review between the auditor and the board is prudent and efficient. To this end the *Condominium Act* permits any board of a condominium corporation having seven or more directors on its board may, at the option of the directors, elect an audit committee from among themselves to hold office until the next annual general meeting (*section 68(1)*).

Should the directors opt for an audit committee it’s composition must be three persons or more (who will all be board members) and any officers (including the president, secretary, and any other officers) or employees of the corporation must be in the minority (*section 68(2)*) on the committee.

The responsibility of the audit committee is to receive and review the financial statements and the auditor’s report(s) on those statements, hear representations from the auditor (at the auditors request or at the request of the committee) and submit the statements and report to the board (*section 69(3) to 69(5)*). Since the committee members are all also board members, when the documents are tabled with the full board a core of directors will be well-briefed on their contents and the matters which should be brought to the attention of the full board.

5.4.3. Audits and Audit Report

The principle function and duty of the auditor is to make whatever examination is necessary in order to make an annual report on the financial statement on behalf of the owners (*section 67(1)*). To that end the auditor has:

- the right of access at all times to records, documents, accounts and vouchers of the corporation
- the power to require from the directors, officers and employees of the corporation or from persons under contract to the corporation to manage the property or its assets the information and explanations that the auditor considers necessary to make the report (*section 67(2)*).

The auditors report must be prepared in the manner and accordance with the auditing standards specified in the Handbook of the Canadian Institute of Chartered Accountants (section 16(2) of 48 of 01) and shall include the statements that the auditor considers necessary if the corporation’s financial statements are not in accordance with the *Condominium Act* and regulations (i.e the are not prepared in accordance with the accounting principles specified in the Handbook) (*section 67(4)*). If the statement of reserve fund operations and the reserve fund comparisons do not fairly present the information contained in the reserve fund studies that the auditor received this must be stated in the report (*section 67(5)*).

The auditor present the audit report to the audit committee (if any) or directly to the board if there is no audit committee (*section 67(6)*).

5.4.3.1. Tabling Financial Statements and Auditor's Report

The financial statements as approved by the board and the auditor's report must be attached to the notice of the annual general meeting at which they will be tabled (*section 69(2)*). The auditor is entitled (but not obliged) to attend a meeting of owners and to be heard on any part of the business of the meeting that concerns the auditor's report (*section 70(1)*). By giving written notice at least five days before a meeting of owners, a corporation or an owner may require an auditor to attend the meeting for the purpose of answering inquiries concerning the basis upon which the auditor formed the opinion(s) stated in the audit report (*section 70(3)* and *70(6)*). If the notice is given by an owner a copy must also be given to the corporation (*section 70(4)*). The statements and report are received as information to the owners. No approval, endorsement, or other action is required for them by the owners.

5.4.3.2. Amending Financial Statements and Auditor's Report

In the event facts come to the attention of the directors or officers of a corporation after the annual general meeting which require a material adjustment to the financial statements as presented, the board is obliged to make the amendments to the statement(s) (*section 71(1)*). A copy of the amended financial statement(s) and a statement of the facts which gave rise to the amendment(s) must then be immediately sent to the auditor (*section 70(2)*). On receipt of the information the auditor must amend the auditor's report if necessary and, in such case, present it to the audit committee (if any) or the board (if there is no committee) (*section 71(3)*). The board must then mail or deliver a copy of the amended auditor's report to the owners (there is no requirement to also provide the amended financial statements to the owners). If the board fails to mail or deliver the amended report within a reasonable time the auditor must do so in it's place. The corporation must reimburse the auditor for all reasonable costs in this regard (*section 70(5)*).

5.5 COMMON EXPENSES AND LIENS

5.5 COMMON EXPENSES AND LIENS

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Common expenses are the expenses related to the performance of the objects and duties of the corporation and, in addition, all expenses specified in the *Condominium Act* or in a declaration as being common expenses. The total of one hundred percent of the common expenses is allocated amongst the unit owners according to the proportions set out in the declaration and this allocation fixes the respective owner’s obligation to make contribution (*section 84(1)*). The obligation to pay cannot be avoided by an owner waiving or abandoning the right to use the common elements, by the fact an owner is making a claim against the corporation, or by the inability of an owner, due to the corporation’s declaration, by-laws, or rules, to use all or any part of the common elements (*section 84(3)*). The intent of the allocation of common expenses is to achieve an equitable distribution amongst owners. Unusual demands on services may call for the related expense to be interpreted to be outside of the common expenses and payable by the user¹.

5.5.1. Surpluses

In the event the common expenses for a year are less than the contributions to their payment the surplus cannot be distributed to the owners unless and until the corporation is terminated. The surplus must either be applied to future common expenses or paid into the corporation’s reserve fund (for major capital repairs and replacements) (*section 84(2)*).

5.5.2. Lien on Default of Payment

Should an owner default in payment of the owner’s share of the common expenses the corporation will have a lien against the owner’s unit and common interest for the unpaid amount, together with interest owing and all reasonable legal costs and expenses incurred in collecting the amount of the lien (*section 85(1)*)². The right to lien a unit for arrears does not entitle a corporation to lien other units owned by the same person where the common expenses for the other units are not in default.³

5.5.3. Certificate of Lien

The lien has a fixed life unless the corporation takes action to protect it by registering a certificate of lien on title to the owner’s unit within three months after the default that gave rise to the lien (*section 85(2)*). If the three month period has expired without a certificate of lien being registered the lien will be lost. While this will not absolve the owner from the debt, it will oblige the corporation to take legal action to obtain a judgment for the amount owed. Such a procedure is far more cumbersome than a lien registration and, of course, should be avoided whenever possible.

¹ **384 and 385** York Region Condominium Corp. No. 771 v. Year Full Investment (Canada) (1992/1993) [excess water usage, declaration interpreted to exclude same from common expenses]

² **254** Dazol Developments Ltd. and York Condominium Corporation 329 et al (1979) [budget shortfall may not be subject of lien by corporation against units owned by declarant]

186-Metropolitan Toronto Condominium Corp No. 858 v. Tornat Construction Inc. (1994) [portion of lien for unreasonable solicitor’s costs ruled unjustified].

187 Metropolitan Toronto Condominium Corp. No. 1006 v. Hollywood Plaza (1995) [legal costs unreasonable]

302 Somerset Ridge Development Corp. v. Middlesex Condominium Corp. No. 134 (1991) [legal costs for registering liens must be reasonable, may be referred for assessment]

³ **417**- York Condominium Corp. No. 482 v. Christiansen et al (2003)

How is the 'three month' period calculated? The *Condominium Act* itself is silent on this subject; however, section 29(1) of the *Interpretation Act* defines a month as a 'calendar month'. On this basis a part of a month should not be counted. For example, if an owner misses a common expense payment due on January 31 of a year, January would not be counted as a month. The 'three months' would be February, March, and April and a lien registered on or before April 30 would be valid. Similarly, if the payment was due on January 1, a lien registered before April 30 of the same year would be valid.

Registration of a certificate of lien secures payment not only of unpaid common expenses for the preceding three months as well as interest and legal costs, but also protects payment of any unpaid common expenses which arise after the date the certificate is registered (*section 85(3)(a)* and *85(3)(b)*). This provision makes it unnecessary for a corporation to repeatedly register certificates or amend certificates for subsequent defaults, allowing it to rely on the single registration to protect amounts due for three months or less and all future defaults until the total amount owed is paid.

The certificate of lien must be in **Form 6** to *regulation 49 of 01* (*section 41* of *49 of 01*) which requires the amount of the unpaid common expenses to be stated and provides notice that the lien also includes amounts related to defaults after the registration as well as interest and legal costs.

5.5.4. Notice of Lien

Prior to registering a certificate of lien the corporation must give a written notice of lien to the defaulting owner and to every registered encumbrancer. The written notice to the owner must be in **Form 14** to *regulation 48 of 01*, must be given at least 10 days before the certificate is registered, and must be given either by personal service or be sent by prepaid mail at the owner's address listed in the corporation's records (*section 85(4)* and *85(5)*). The written notice to registered encumbrancers must be given before the certificate is registered and must be given by either personal service or registered prepaid mail (*section 86(3)* and *86(4)*). No form of notice is prescribed by the *Condominium Act* or regulations for the notice to encumbrancers although the substance form of notice to the owner should suffice (with adaptation to the situation).

While the *Condominium Act* does not prescribe any consequence if the notice of lien is not given to the defaulting owner, or is given within 10 days of the registration of the certificate of lien, failure to give notice to a registered encumbrancer will result in the lien having a full or limited loss of priority over the encumbrance unless the notice is given (*section 86(5)*). The loss of priority relates to the arrears which accrue during the three months before the notice is given (*section 86(6)*). Using the example of payment due on January 1 or January 31, should the certificate of lien be registered on April 30 and an encumbrancer is not notified until May 1, the lien would lose priority as it respects the January payment. Priority would still be preserved for any arrears which arose subsequent to January 31 (including defaults in payments after May 1) and for interest and legal costs and expenses (*section 86(6)(a)* and *86(6)(b)*).

Priority over unregistered encumbrances will be unaffected by lack of notice since no notice is required to be given to such persons. Provided the lien is registered within the three month period it will be superior to such encumbrances.

5.5.5. Priority

With certain exceptions, a lien which is perfected by notice to the registered encumbrancer(s) and timely registration has priority over the encumbrance (whether registered or unregistered) even though the encumbrance existed prior to the lien arising (*section 86(1)*). The exceptions are:

- A claim by the Crown other than by way of mortgage (for example a claim relating to unpaid capital taxes of a corporate owner) (*section 86(1)(a)*);
- A claim for taxes, charges, rates or assessments levied or recoverable under the Municipal Act, the Education Act, the Local Road Boards Act, the Statute Labour Act or the Local Improvement Act (*section 86(1)(b)*);

- A lien in respect of a unit for non-residential purposes where the payment was in default prior to May 5, 2001 (*section 86(2)*).

5.5.6. Enforcement of a Lien - Foreclosure or Sale

A lien which is protected by timely registration may be enforced in the same manner as a mortgage (*section 85(6)*). Accordingly, foreclosure/power of sale proceedings may be commenced in accordance with the procedures set out in the Mortgages Act. While these procedures are detailed and complex nonetheless a corporation can proceed with the knowledge that the costs will be recouped from the proceeds. Should the corporation not wish to take active steps to satisfy the lien, there is comfort in knowing that the unit will almost certainly not change hands to an arm's length purchaser until the lien is discharged.

5.5.7. Leased Units – Diversion of Rent

In a case where the owner of a unit has leased it to a third party, a corporation may give notice (personal or by prepaid mail) to the lessee requiring it to pay the lesser of the amount of the default and the amount of the rent due under the lease (*section 87(1)*). A copy of the notice must also be given to the owner (*section 87(3)*). On receipt of the notice the lessee must make the required payment to the corporation. The latter obligation applies even if an encumbrancer has acquired the right of the lessor to receive rent under the lease (*section 87(5)*). A payment to the corporation by the lessee is deemed to constitute the payment of rent and cannot be regarded as a default under the lease (*section 87(6)*).

It should be noted that this vehicle of collection is not dependent on a lien being registered or even continuing to exist (i.e. the three month period to protect a lien may have expired, but the right to divert rent to pay related common expense arrears will stand).

5.5.8. Mortgagee's Rights

Given the prejudice that arises to a mortgagee due to unpaid common expenses the Condominium Act gives mortgages certain rights of self-protection. In particular, mortgages are deemed to contain provisions as follows:

- the mortgagee has the right to collect the owner's contribution to the common expenses and shall promptly pay the amount so collected to the corporation on behalf of the owner;
- the owner's default in the obligation to contribute to the common expenses constitutes default under the mortgage;
- the mortgagee has the right to pay,
 - the amounts of the owner's contribution to the common expenses that from time to time fall due and are unpaid in respect of the mortgaged premises,
 - all interest owing and all reasonable legal costs and reasonable expenses that the corporation incurs in connection with the collection or attempted collection of the amounts due, including, where applicable, the costs of preparing and registering a certificate of lien and a discharge of it;
- payments made by the mortgagee under the immediately foregoing, together with interest and all reasonable costs, charges and expenses incurred in respect of the payments, are to be added to the debt secured by the mortgage and to be payable, with interest at the rate payable on the mortgage; and
- if after demand the owner fails to fully reimburse the mortgagee, the mortgage immediately becomes due and payable at the option of the mortgagee.

(*Section 88(1)*)

A mortgagee is entitled, on request and free of charge, to receive from the corporation a written statement setting out the common expenses in respect of the unit and, in the event of default, the amount of the arrears before and after registration of a certificate of lien, and all associated interest and legal costs and expenses (*section 88(2)*).

5.5.9. Discharge of Lien

When the corporation is paid all of the amounts owing under a certificate of lien (i.e. the amount of the arrears before and after registration of a certificate of lien, and all associated interest and legal costs and expenses including the costs of registering the lien and registering its discharge), the corporation is responsible for preparing and registering a discharge of the certificate and advising the owner of the particulars of registration (*section 85(7)*).

6.1 REPAIR AND MAINTENANCE

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6.1.1. Who is Responsible for Repairs and Maintenance?

Unless the declaration provides otherwise:

1. In the case of a condominium corporation created on or after May 5, 2001, the corporation is responsible for:

- Repairing and replacing the units and common elements after damage or failure, (*section 89(1)*, *89(2)¹*, and *90(1)*) excepting only improvements made to a unit (*section 89(2)*)²
- Maintaining the common elements (*section 90(1)*)

And the owners are responsible for:

- Maintaining their respective unit(s) (*section 90(1)*)

2. In the case of a condominium corporation created before May 5, 2001, the corporation is responsible for:

- Repairing the units and common elements after damage or failure, (*section 89(1)*, *89(2)* and *90(1)*)³
- Repairing improvements made to a unit (*section 89(2)*) if the declaration provides that the corporation is responsible for repairing improvements to units after damage, unless the corporation has, by by-law, established what constitutes a standard unit for the unit's class (*section 89(5)*)

And the owners are responsible for:

- Maintaining their respective unit(s) (*section 90(1)*)⁴

6.1.2. Maintenance vs. Repair After Damage

Maintenance responsibilities, whether those of the corporation or a unit owner, include repairing after normal wear and tear (*section 90(2)*)⁵. This is to be distinguished from repairing after damage. As the obligation to repair after damage includes the obligation to repair or replace after damage or failure there may be instances

¹ **415-** Wellington Condominium Corporation No.7 v. Hughes et al (2004) [The obligation under sec. 89(2) to repair or replace after 'damage or failure' does not include normal wear and tear. In the absence of a special provision in the declaration, replacement needed due to normal wear and tear is the responsibility of the owners.]

² **306-**Stephens v. Halton Condominium Corp. No. 183 (1996) [

³ **309** Stockey v. Peel Condominium Corp. No. 174 (1996) [exterior garage doors included in unit]

⁴ **374-**York Condominium Corporation No. 161 et al. v. York-Hanover Ltd., (1983) [description includes fan coils as part of unit]

408- Metropolitan Toronto Condominium Corp. No.545 v. Stein et al (2006) [The principle that the court will not interfere in a rule laid down by a condominium board unless it is clearly unreasonable or contrary to the scheme of the Act has no application to a decision by the board to require owners to adhere to a specified maintenance standard for a fan coil in a unit where the maintenance is the owners responsibility, an alterative standard is not shown to be ineffective, and the board's standard was not embodied in a Rule of the corporation.]

⁵ **050** Boychuk et al. v. Essex Condominium Corp. No. 2 (1987) [replacing a leaky roof is a repair not an addition or alteration]

where the proper characterization of the damage will have significance¹. For example, if a unit includes an air-conditioner which, after several years of use ceases to operate due to the motor bearings giving out, the problem could be argued to be caused by normal wear and tear or caused by 'failure'. As there must be a distinction between these two possibilities it is suggested, in the absence of caselaw specifically on this new provision in the *Condominium Act*, that 'failure' refers to a situation which is not expected i.e. traceable to a fault rather than the consequence of normal use. The distinction will be of significance as maintenance of a unit is (in the absence of special provision in the declaration) the owner's responsibility while repair responsibilities are those of the corporation.

6.1.3. How are 'Improvements' to a Unit Determined?

With reference to the example of a residential unit, a variety of improvements may be made to a bare unit before it is turned over to the purchaser and after ownership is assumed. Such things a kitchen cabinets, wall finishes including wall paper, stucco, floor coverings such a carpets or hardwood, lighting fixtures, and the like, could be introduced. In order to separate improvements made to a unit the *Condominium Act* allows a corporation to pass by-laws defining a 'standard unit' for a class of unit (*section 56(1)(h)*) and requires a declarant to provide, within 30 days of the turn-over meeting, a schedule setting out what constitutes a standard unit for each class (*section 43(1)(h)*). A description of a standard unit in a by-law takes precedence over a description provided by a declarant (*section 89(4)*). 'Class of unit' is not defined in the *Condominium Act*. While a parking unit or a storage unit will be in a class(s) separate from a dwelling unit, it is conceivable that a general class (such as dwelling units) may be divided into more than one class should there be reason and purpose to do so.

By defining a standard unit for a class, a base will be established against which it can be determined whether a particular improvement is part of a unit (in which case the responsibility for repair after damage or failure will, unless the declaration provides otherwise, be the responsibility of the corporation) or is, for want of a better term, an 'extra' (in which case the owner will, special provision aside, be responsible for repair after damage).

While the *Condominium Act* sets no criteria for what may or may not be in the description of a standard unit, logic and fairness suggest that improvements included in the description will be ones which are common across the class. Having said this, it should be emphasized that such is not an express requirement nor is it apparently implied.

6.1.4. Alternative Division of Responsibility Provided by Declaration

The general division of repair and maintenance responsibilities may be overridden by a condominium's declaration. In particular, a declaration may provide:

- That each owner repair the owner's unit after damage (unless there is substantial damage and the corporation is terminated);
- That the owners maintain the common elements or any part of them;
- That each owner shall maintain and repair those parts of the common elements for which the owner has exclusive use; and,
- That the corporation maintain the units or any part of them.

(section 91)

6.1.5. Owner's Default

In the event the declaration alters the usual division of responsibilities and requires an owner to repair after damage (whether in relation to a unit or part of the common elements) and the owner fails to do so within a reasonable time, the corporation shall to the work and the cost is added to the owner's contribution to the common expenses (*section 92(1)* and *92(4)*).

¹ 373-York Condominium Corp. No. 87 v. York Condominium Corp. No. 59 (1983) [repairs includes structural repairs].

In the event the declaration alters the usual division of responsibilities and requires an owner to maintain common elements and the owner fails to do so within a reasonable time, the corporation may do the work and the cost is added to the owner's contribution to the common expenses (*section 92(2)* and *92(4)*).

In the event the owner has an obligation to maintain the owner's respective unit(s) and fails to carry out the obligation in a reasonable time, then provided:

- The failure to maintain presents a potential risk of damage to the property or the assets of the corporation; or,
- There is a potential risk of personal injury to persons on the property;

the corporation may do the work necessary to carry out the obligation and the cost is added to the owner's contribution to the common expenses (*section 92(3)* and *(4)*). It should be noted that a simple failure to maintain a unit that does not satisfy the above criteria will not entitle the corporation to step in and fill the breach; however, it should be borne in mind that a unit is part of the condominium property and so a failure to maintain a unit which could put the unit (and no other part of the property) at risk of damage is a failure which the corporation can rectify. The failure need not put the common interests or other units in jeopardy.

6.1.6. Warranties

Warranties respecting work and materials furnished for a unit are for the benefit of the unit owner, while warranties for work and materials furnished for the common elements shall be for the benefit of the corporation (*section 96(1)* and *96(3)*)¹. In a case where the declaration provides the owner has an obligation to repair after damage/failure (*section 92(1)*), the owner fails to repair, and the corporation steps in to do the repair, or where the the corporation steps in to make good an owner's failure to maintain a unit (*section 92(3)*), the corporation may enforce any applicable warranty (*section 96(2)*).

¹ **059** Carleton Condominium Corp. No. 109 v. Tartan Development Corp. (1995) [ONHWP does not oust implied warranties]

062 Carleton Condominium Corp. No. 32 v. Camdev Corp. (1999) [implied warranty of fitness may be waived by contract]

6.2 RESERVE STUDIES AND FUNDS

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6.2.1. What is a Reserve Fund?

A condominium reserve fund (and there may be more than one even though all will be for the same purpose) is a pool of funds collected as part of the common expenses over the life of the condominium for the sole use in the funding of major repair and replacement of the common elements and assets of the corporation (*section 93(1) to 93(4)*).

The amount to be collected monthly from the owners in order to have a condominium reserve fund which meets the standards of the *Condominium Act*, is determined not by guesswork or undue caution, but on the basis of a detailed physical and financial analysis of the components of the inventory conducted by one of a group of specified professionals (*section 29(1) of 48 of 01*).

Reserve funds are not a new feature to condominium governance. The old legislation required all condominiums to maintain a fund for similar purposes to the present; however, the old legislation did not mandate studies, or any other formal process to set the appropriate common expense charge. Instead, condominiums were mandated to set the contribution at no less than 10% of the other common expenses. Inevitably, condominiums generally opted to collect the 10% and not give material consideration to whether it was sufficient or not for the purpose.

6.2.2. Who is Qualified to Conduct a Reserve Fund Study?

Reflective of the fact that the complexities of reserve fund studies will vary widely from condominium to condominium (consider the depth of a study for a 50 storey commercial-residential tower relative to a study for a common elements condominium consisting of a 1000’ of gravel road), a substantial number of property professionals are qualified to carry out reserve fund studies. Any of the following are qualified:

- Members of the Appraisal Institute of Canada holding the designation of Accredited Appraiser Canadian Institute.
- Persons who hold a certificate of practice within the meaning of the *Architects Act*.
- Members of the Ontario Association of Certified Engineering Technicians and Technologists who are registered as certified engineering technologists under the *Ontario Association of Certified Engineering Technicians and Technologists Act, 1998*.
- Members of the Real Estate Institute of Canada holding the designation of certified reserve planner.
- Persons who hold a certificate of authorization within the meaning of the *Professional Engineers Act*.
- Graduates of Ryerson Polytechnic University with a Bachelor of Technology (Architectural Science) — Building Science Option or Architecture Option.

- Members of the Canadian Institute of Quantity Surveyors holding the designation of professional quantity surveyor.
- Members of the Association of Architectural Technologists of Ontario holding the designation of architectural technologist, architecte-technologue or registered building technologist under the *Association of Architectural Technologists of Ontario Act, 1996* (section 32(1) of 48 of 01).

6.2.3. Arm’s Length to Corporation and Owners

Regardless of technical qualifications, a candidate to carry out a reserve fund study (as well as family) must be at arm’s length to the condominium corporation. If not, the candidate is disqualified. In specific, a person who conducts a reserve fund study shall not:

- be a director, officer or property manager of the corporation;
- directly or indirectly, have an interest in,
- a contract or transaction to which a director or officer of the corporation is a party in a capacity other than as a director or officer of the corporation, or
- a proposed contract or transaction to which a director or officer of the corporation will be a party in a capacity other than as a director or officer of the corporation;
- be the spouse, same-sex partner, son or daughter of a director or officer of the corporation or son or daughter of the spouse or same-sex partner of a director or officer of the corporation;
- be an owner as defined in the Act in relation to the corporation; or
- be a person who lives on the condominium property (section 94(6) and section 32(2) of 48 of 01).

6.2.4. Liability Insurance

Also regardless of technical qualifications, to conduct a reserve fund study a person must be insured under a policy of liability insurance. Because the minimum policy terms are substantial, a large number of professionals qualified by credentials will be outside of the candidate group. The burden of carrying the insurance will be a discouragement to anyone other than a professional committed to the discipline. A qualifying liability policy must include:

- coverage for liability for errors, omissions and negligent acts arising out of conducting or not conducting a reserve fund study, subject to the exclusions, conditions and terms that are consistent with normal insurance industry practice;
- a policy limit for each single claim of not less than \$1 million per occurrence;
- an aggregate policy limit in the amount of not less than \$2 million per year for all claims in the year or an automatic policy limit reinstatement feature; and
- a maximum deductible amount of \$3,500 per occurrence (section 32(4)).

In addition, the person conducting the study must ensure the insurance is valid and the time the study is completed and for at least three years thereafter (section 32(5)). A certificate of insurance must be made available to the corporation on request (section 32(6)).

6.2.5. How are the Contributions Set?

The amount of the contributions to the reserve fund will be set in a finite way when the reserve fund study is completed and a plan for future funding is settled by the corporation. In the period intervening between registration and the final step in the reserve fund process, the *Condominium Act* directs that the contributions to the reserve fund be set at the greater of two amounts; either:

- 10% of the budgeted amount required for the common expenses other than the reserve fund (i.e. the same factor which prevailed under the old legislation); or,
- the amount reasonably expected to provide sufficient funds for the major repair and replacement of the common elements and assets, considering both costs and life expectancy (*section 93(5)* and *93(6)*).

The *Condominium Act* is not clear on who determines, and how, the second amount noted above. It appears that the effect is that the pre-reserve fund study contributions to the reserve fund should be 10% of the common expenses, but may be set at a higher level is that is the determination of the corporation (acting through the board).

6.2.6. Classes/Types of Reserve Fund Studies

6.2.6.1. Comprehensive Study

This class of study (which covers the first reserve fund study of the condominium) must be based on:

- a visual inspection (where practicable) of each item of the common elements and assets having a replacement value of \$500.00 or more, and other inspections if appropriate;
- a verification of records of the corporation;
- interviews with the corporation’s officer, directors and others (*section 30(2)*).

The purpose of this minimum level of diligence is to ensure the disclosure of all pertinent facts concerning the nature and condition of the common element components. For example, an escalator’s repair and replacement cycle is largely a function of operating time. Interviews may disclose that (due to lack of demand) the escalator is only operated when a special request is made and that all owners are agreeable to this. This information would have a material bearing on the eventual estimate of the reserve fund contribution for this component. Visual inspections may disclose unexpected wear and tear or damage, or, in the case of the first study, differences between the specifications of equipment as shown on plans and as found on site. Again, in such an instance there may be an impact on repair and replacement costs and frequency.

In addition to the above steps, as part of preparing the assessment of the life/replacement cycle of each component (*section 29(2)(b)*) a conductor of a reserve fund study must review:

- all existing warranties, guarantees and service contracts for each item in the component inventory;
- the as-built architectural, structural, engineering, mechanical, electrical and plumbing plans for the property that are in the custody or under the control of the corporation;
- the as-built specifications for the buildings that are in the custody or under the control of the corporation;
- the plans for underground site services, site grading, drainage and landscaping, and television, radio or other communications services for the property that are in the custody or under the control of the corporation;
- the repair and maintenance records and schedules in the custody or under the control of the corporation; and

- all other records of the corporation that the person conducting the study requires in order to prepare the assessment (section 30(3)).

Again, the purpose of the direction is to ensure a standard and sufficient level of diligence in the preparation of any and all comprehensive studies.

It should be noted that the conductor of the study is not limited to the above reviews and investigations and the study may contain further information and analysis that the study conductor (or the board) considers appropriate (section 30(5)).

6.2.6.2. Updated Study Based on a Site Inspection

This class of study has the object of updating the condominium’s comprehensive reserve fund study (in it’s original form or, in the event it had been previously updated, updated form) through revision so that it is current to the date of the update (section 27). It must be based on a site inspection and all of the steps set out above for basing and preparing a comprehensive study, apply to an update based on a site inspection (section 30(2) and 30(3)).

6.2.6.3. Updated Study Not Based on a Site Inspection

This class of study has the same object as an update based on site inspection but with a truncated review protocol. As the name implies, no site inspections are required and the basis of this class of study is limited to:

- a verification of records of the corporation; and
- interviews with those of its directors, officers, employees and agents that the person conducting the study considers appropriate (section 30(4)).

It should be noted that the review of records (which include plans, specification and the like) is for the purpose of verification. By implication, the depth of the review in this regard will be less intensive than the review of records required (section 30(3)) for a comprehensive study or update with site inspection.

6.2.7. Time Period to Carry Out Reserve Fund Study

The *Condominium Act* requires a corporation to conduct the first reserve fund study with the year following registration (section 94(4)). This first study, referred to as a ‘comprehensive study’ (section 31(2) of 48 of 01), must be updated at three year intervals (section 94(1) and section 31(3) of 48 of 01). The depth of the triennial update varies depending on the depth of the previous study. For example, the first (comprehensive) study may be followed three years later with an updated study not based on a site inspection, and three years later an updated study based on a site inspection must follow, and three years after that an updated study not based on a site inspection may follow (section 31(3)). There is no requirement (although it is an option) to repeat the first, comprehensive study. A corporation may carry on for decades on the basis of properly sequenced site inspection/no site inspection updates. The thinking clearly is that the updates ensure the regular opportunity to correct misjudgments in the original comprehensive study together with the same in any preceding updates.

6.2.8. Special Case – Time Periods for Old Legislation Condominiums

Condominiums which were registered prior to May 5, 2001 are not required to carry out a reserve fund study immediately. They are allowed until May 5, 2004 to conduct a comprehensive study (section 94(5) and section 31(1)). Thereafter, such condominiums will follow the cycle of updates referred to above. In the event an old legislation condominium has carried out the equivalent of a comprehensive study prior to May 5, 2001, it is

relieved of any obligation to carry out a second comprehensive study. Instead, the next following study for such a situation will an update based on a site inspection conducted no later than May 5, 2004 (section 31(1)).

6.2.9. Components of a Reserve Fund Study

Both comprehensive and update reserve fund studies consist of two components, a physical and a financial analysis (section 29(1)).

The physical analysis consists of:

- an inventory of each item of the common elements and assets of the corporation that requires, or is expected to require within at least 30 years of the date of the study, major repair or replacement where the cost of replacement is not less than \$500; and
- an assessment of each item in the component inventory that states:
 - its actual or estimated year of acquisition;
 - its present or estimated age;
 - its normal expected life;
 - its remaining life expectancy;
 - the estimated year for its major repair or replacement;
 - its estimated cost of major repair or replacement as of the date of the study;
 - the percentage of that cost of major repair or replacement to be covered by the reserve fund; and
 - the adjusted cost resulting from the application of that percentage (section 29(2)).

The financial analysis consists of:

- a description of the financial status of the reserve fund as of the date of the study; and
- a recommended funding plan projected over a period of at least 30 consecutive years, beginning with the current fiscal year of the corporation, that shows the minimum balance of the reserve fund during the period and, for each projected year,
 - i. the estimated cost of major repair or replacement of the common elements and assets of the corporation based on current costs for the year in which the study is conducted,
 - ii. the estimated cost of major repair or replacement of the common elements and assets of the corporation at the estimated time of the repair or replacement based on an assumed annual inflation rate,
 - iii. the annual inflation rate referred to above,
 - iv. the estimated opening balance of the reserve fund,
 - v. the recommended amount of contributions to the reserve fund, determined on a cash flow basis, that are required to offset adequately the expected cost in the year of the expected major repair or replacement of each item in the component inventory,
 - vi. the estimated interest that will be earned on the reserve fund based on an assumed annual interest rate which is stated in the analysis,
 - vii. the total of the above two amounts,

- viii. the increase, if any, expressed as a percentage, in the recommended amount of contributions to the reserve fund over the recommended amount of contributions for the immediately preceding year, and
- ix. the estimated closing balance of the reserve fund (*section 29(3)*).

6.2.10. Mandated Review for Conductor of Study

6.2.10.1. Physical Analysis

As part of the preparation of update of the physical components of the reserve fund study/updates(s) the person conducting the study must review:

- the declaration and description;
- the current by-laws or proposed by-laws, if any, of the corporation establishing what constitutes a standard unit; and
- if there is no such by-law, a copy of the schedule that the declarant intends to deliver or has delivered to the board (pursuant to *section 43(5)(h)*) setting out what constitutes a standard unit for each class that the declarant specifies for the purpose of determining the responsibility for repairing improvements after damage and insuring them (*section 29(4)*).

6.2.10.2. Financial Analysis

As part of the preparation of update of the financial analysis for the reserve fund study/update(s) the person conducting the study must review:

- the most recent audited financial statements of the corporation or, if *section 60* of the *Condominium Act* does not require the corporation to appoint auditors, the most recent financial statements of the corporation;
- all reciprocal cost sharing agreements, if any, of the corporation;
- the most recent reserve fund study of the corporation; and
- the most recent notice, if any, of future funding of the reserve fund sent to the owners by the board under *section 94(9)(a)* of the *Condominium Act* (*section 29(4)*).

6.2.11. Follow-up to a Reserve Fund Study - The Proposed Future Funding Plan

When a completed study is signed by its conductor (*section 30(1)*) it is delivered to the board which then has 120 days to review it and propose a plan for future reserve fund funding. The reserve fund study will, no doubt, contain the conductor’s recommendations for funding; however, it is open to the board to adopt a funding plan which differs from the study, although in all cases the resulting reserve fund must be adequate for its purpose.

The future funding plan must, in the cases of all condominiums except ‘old legislation’ (pre- may 5, 2001) condominiums, ensure that the fund will be adequate for the purpose by the end of the fiscal year following the fiscal year in which the study was completed (*section 94(8)* and *33(1)*). As can be appreciated from the foregoing, the maximum time that can elapse between the submission of a study and the date upon which the reserve fund should be capable of meeting its purpose of major repair and replacement will be just under 24 months (assuming the study is delivered on the first day of one fiscal year, the reserve fund must be ‘in shape’ by the last day of the last month of the following fiscal period).

For 'old legislation' condominiums, the future funding plan must ensure that the fund will be adequate for the purpose by the end of the fifteenth year following the completion of the first reserve fund study after May 5, 2001 (*section 33(2)*). Since such condominiums do not have to update pre-May 5, 2001 studies, or complete first comprehensive studies, until May 5, 2004, (*section 31*) it is conceivable that a reserve fund for an old legislation condominium may not be adequately funded until December 14, 2114. The reason for the different treatment is to allow existing condominiums to phase in the impact of the new reserve fund rules over a period of time, and thereby cushion the 'ticker shock' to existing owners.

When the board has settled a future funding plan to its satisfaction (and resolved to adopt it for use) it must, within 15 days thereafter:

- send to the owners a notice in Form 15 to 48 of 01 (*section 33(3)*) containing a summary of the study, a summary of the proposed plan and a statement indicating the areas, if any, in which the proposed plan differs from the study; and
- send to the auditor a copy of the study, a copy of the proposed plan and a copy of the notice (above) sent to the owners (*section 94(9)*).

Neither the owner's nor the auditor have a right to approve the funding plan (although a plan which was patently deficient could be challenged by way of a separate proceeding) and the board is obliged to implement it within 30 days after the last of the above notices is given (*section 94(10)*).

6.2.12. Cost of Study and Use of Reserve Fund

With one exception, reserve funds may only be used for the funding of major repair and replacement of the common elements and assets of the corporation (*section 93*). The exception pertains to the cost of the reserve fund study(s) which, although a common expense, may be charged to the reserve fund (*section 94(7)*).

The board does not require any approval or consent of the owners to make expenditures out of a reserve fund (although clearly such expenditures must be for the authorized purpose), and the fund itself constitutes an asset of the corporation and is not available for distribution to mortgagees of the units or the owners (except on termination of the corporation) (*section 95*).

6.3 MAKING CHANGES TO THE COMMON ELEMENTS, ASSETS, AND SERVICES

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6.3.1. General

It should be kept in mind that at the time of a condominium’s registration it’s property will have (or, at least, will eventually have) a specific physical form. In the case of the common elements, as a general matter there is no authority in the corporation or an owner to make changes to this physical form without following one or more applicable procedures. Depending upon the extent of the change, the procedure may be simple or relatively complicated. In a similar vein, changes to the assets of the corporation, or a change in a service that the corporation provides to the owners cannot be made without attention to, and adherence, to specified rules.

6.3.2. What is a Change?

A change in the common elements will be an addition, alteration, or improvement (*section 97(2)*). A reasonable improvement to an exclusive use common element area by the owner is not necessarily a change, and minor improvements may be so insignificant as to be irrelevant¹. While a change in the assets of a corporation or in a service supplied are not defined in the *Condominium Act*, ‘additions, alterations, or improvements’ is a workable catch-all for the circumstances which will encompass such a change.

6.3.3. What is Never to be Considered a Change?

In the absence of some special provision, condominium corporations have the obligation to maintain and repair the common elements and to repair the units after damage (*section 89(1)* and *90*). In carrying out these obligations the *Condominium Act* recognizes that it may not be possible or expedient to carry out these obligations without making some changes. For example, should a wood-framed roof made of spruce be blown off a townhouse unit and the repair is done with pine framing, provided the new material meets (or betters) the specifications of the old, it would be reasonable to accommodate such a substitution. To this end, *section 97(1)* provides that if, in carrying out it’s obligations to repair and maintain units and/or common elements, the corporation uses materials that are as ‘reasonably close in quality to the original as is appropriate in accordance with current construction standards’ then the work shall not be considered a change.

¹ **264** Peel Condominium Corp. No. 73 and Rogers et al. (1978) [planting of 4 cedar trees]
251- Carleton Condominium Corp. No.279 and Rochon el al. (1987) [satellite dish on roof ordered removed, permission of declarant/corporation irrelevant, no approval by owners, no reference in disclosure statement]
362 York Condominium Corp. No. 35 v. Mosseau (1995) [changes to windows insignificant]
347 Winfair Holdings (Lagoon City) v. Simcoe Condominium Corp. No. 46 (1998) [repudiation of licence agreement, substantial change, owner’s vote required]

6.3.3.1. Types of Changes – A Matter of Degree

The *Condominium Act* recognizes three levels of change (for the purposes of the discussion below, 'change' refers to a change in the common elements, corporate assets, and service provided) and applies a different procedure for authorizing each type. The types of change, and the related procedures to be followed for each are as follows:

6.3.3.2. Changes Made without Notice

Any change which:

- is necessary to comply with a mutual use agreement under *section 113*;
- is necessary to comply with the requirements imposed by any general or special act, or regulations or bylaws made under that Act;
- in the opinion of the board, is necessary to ensure the safety or security of persons using the property or assets of the corporation or to prevent imminent damage to the property or assets; or,
- has an estimated cost in any given month no more than the greater of \$1,000.00 and 1 % of the annual budgeted common expenses for the current fiscal year (*section 97(2)(a) to (c)*),

may be carried out by resolution of the board and without notice to the owners. A review of the changes eligible for implementation without notice indicates they are those which are obligatory (by contract or by statutory direction), essential and of an urgent nature, or minor in terms of cost.

6.3.3.3. Changes Made With Notice

Any change which does not meet the description of a change that can be made without notice (above) or a substantial change (see below) cannot proceed until the corporation has sent a notice to all owners:

- Describing the proposed change
- Stating the estimated cost
- Specifying that the owners (meaning any one of them) have the right to requisition a meeting of the owners; and
- Containing a copy of *section 46* (requisition procedure) and *section 97* of the *Condominium Act* (*section 97(3)(a)*).

If no owner requisitions a meeting or, in the event a meeting is requisitioned the owners do not vote against the change, then the board may proceed with the change (*section 97(3)(b)*).

6.3.8.4. Substantial Changes

A substantial change is any change having an estimated cost (a total cost and not simply the cost incurred in the fiscal year) exceeding 10% of the annual budgeted common expenses for the current fiscal year, or a change which the board elects to treat as substantial (*section 97(7)*).

A substantial change cannot proceed until it has been approved by at a duly called meeting by a vote of the owners who own at least 66 2/3's of the units (*section 97(4)*)¹.

¹ 181 McDonough v. York Condominium Corp. No. 41 (1990) [80% vote required (under old legislation) to close pool, inspector appointed]

6.3.4. Cost of Changes

The cost of any of the three levels of changes form part of the common expenses and, so, are paid for by the owners in accordance with their proportionate share of the common interest (*section 97(7)*).

6.3.5. Changes Made to the Common Elements by Owners

There may be occasions when an owner desires to make changes to the common elements. This is most likely to be the case where the site of the change is an exclusive use common element (it's use is exclusive to one or more, but not all, owners). For example, an outside balcony to a high-rise apartment unit may be identified as for the exclusive use of the unit occupant/owner. The owner of the unit wishes to lay ceramic tile on the floor of the balcony, covering the raw concrete surface. The new surface would be a change to the common elements and, unless the owner follows the correct procedure, it cannot proceed. Similarly, an area may be set aside in the underground level of a condominium for the parking of cars. The parking spots are assigned to units as exclusive use common elements. One owner wishes to enclose the assigned spot in concrete block and turn the enclosure into a storage room. Again, the work would be a change to the common elements and must be preceded by the requisite procedure.

First and foremost, any proposed change to the common elements by an owner must be examined in light of the Condominium Act and the declaration (*section 98(1)*). If there is no conflict (for example, using the above, the declaration states that the surfaces of balconies shall be kept as bare concrete, or that exclusive use parking areas shall not be used for any other purpose than the parking of vehicles) then the change is capable of being authorized.

To be authorized, one of two procedures will be followed, depending on whether the proposed change concerns the owner's exclusive use common element, or otherwise.

6.3.5.1. Change by an Owner to Owner's Exclusive Use Common Element

If the change is to the owner's exclusive use common element the board must consider whether the proposed change:

- will have an adverse effect on units owned by other owners;
- will give rise to any expense to the corporation;
- will detract from the appearance of buildings on the property;
- will affect the structural integrity of buildings on the property according to a certificate of an engineer, if the proposed addition, alteration or improvement involves a change to the structure of the buildings (*section 98(2)*); and
- will contravene the by-laws or rules and will not have an adverse effect on the rest of the common elements (*section 25(2) of 48 of 01*).

If the board is satisfied that none of these conditions apply (and it may call on the owner to produce evidence to reach the conclusion) then, subject to the owner and the corporation entering into an agreement (which must be registered on title to the owner's unit before the change may proceed (*section 98(3)(b)*) that:

- allocates the cost of the proposed addition, alteration or improvement between the corporation and the owner,
- sets out the respective duties and responsibilities, including the responsibilities for the cost of repair after damage, maintenance and insurance, of the corporation and the owner with respect to the proposed addition, alteration or improvement (*section 98(1)(b)*), and
- specifies who will have the ownership of the proposed addition, alteration, or improvement (*section 25(1) of 48 of 01*);

the board may, by resolution, authorize the change to proceed (*section 97(1)(a)*).

6.3.5.2. Changes by Owner to Other Common Elements (non-exclusive-use)

If the owner's proposed change is to common elements which are not for the owner's exclusive use, the procedures applying to the three levels of change discussed above in relation to changes made by the corporation are applicable. The change may be made without notice to the other owners, with notice (and the option to call the question to vote at a meeting), or with approval of a vote of the owner's of 2/3's of the units (in the case of a substantial change) (*section 98(1)(c)*), with the required procedure being dependent on the nature and magnitude of the proposed change. It should be noted that the notice of any meeting called on the subject must include a copy of the agreement referred to below (*section 98(1)(d)*).

If the requirements of *section 97* are met then, subject to the owner and the corporation entering into an agreement (which must be registered on title to the owner's unit before the change may proceed (*section 98(3)(b)*) the board may authorize the change to proceed (*section 98(1)(a)*).

6.2.5.3. The Agreement

As described above, no change can be made to any part of the common elements by an owner unless the owner enters into an agreement with the corporation dealing with specified matters. The agreement must be registered on title before the work proceeds. The *Condominium Act* specifies that the agreement binds the owner's units and is enforceable against subsequent owners of the unit (*section 98(5)*). Any costs and the like resulting from the owner failing to comply with the agreement may be added to the respective unit's common expenses (for lien purposes) (*section 98(4)*).

7.1 INSURANCE

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7.1.1. Required Insurance

The *Condominium Act* requires a corporation to obtain and maintain three types of insurance:

1. for damage to the units and common elements caused by ‘major perils’ or other perils specified in the declaration or by-laws (*section 99(1)*)¹;
2. against its liability arising from a breach of duty as occupier of the common elements or land that the corporation holds as an asset (*section 102(a)*);and,
3. against its liability arising from the ownership, use or operation of boilers, machinery, pressure vessels and motor vehicles (*section 102(b)*).

7.1.1.1. Insurance for Damage to Units and Common Elements

This type of insurance is to protect against damage to the units and common elements caused by perils specified in the declaration and against ‘major perils’. The latter is defined as perils of:

- Fire
- Lightning
- Smoke
- Windstorm
- Hail
- Explosion
- Water escape
- Strikes
- Riots of Civil Commotion
- Impact by aircraft or vehicles
- Vandalism, and
- Malicious acts (*section 99(2)*)

Insurance of this type does not oblige the corporation to insure against damage to improvements made to a unit (*section 99(4)*). For post-May 5, 2001 condominiums, and pre-May 5, 2001 condominiums which have passed a by-law defining what a standard unit is, improvements to a unit will be determined with reference to the standard unit in the class to which the particular unit belongs (*section 99(5)* and *99(6)*) Any improvement over and above those which are characteristic of the standard unit, must be insured by the respective unit owner

The amount of insurance must be sufficient to cover the replacement cost of the property damaged by the peril insured against, subject only to a ‘reasonable’ deductible (*section 99(7)*) and will, despite any exclusion in the policy, insure against damage resulting from faulty or improper material, workmanship or design that would be insured but for the exclusion. For example, if a joint in a water supply pipe in a common room was improperly soldered and, at some point, burst causing water damage to the floor, any provision in the insurance policy denying

¹ **231** Peel Condominium Corp. No. 16 v. Vaughan (1996) [damage by tenants not covered by condominium policy, insurer subrogated to corporation and may sue tenants]

coverage because the damage was due to negligence in construction would be inoperative. The insurance would cover the damage to the floor (though it is unlikely that it would cover the cost of repairing the pipe itself).

An act of any person which is prejudicial to the corporation or the owners will not void the insurance policy, regardless of its terms (*section 99(8)*). By way of example, if an owner of a unit were to deliberately set fire to a part of the condominium property, that act would not prevent the corporation from claiming on the insurance.

A policy insuring against damage from major perils cannot be terminated unless the insurer has given notice of the cancellation by registered mail to both the corporation and the insurance trustee at least 60 days in advance (*section 99(9)*).

Proceeds of a 'major perils' policy must be paid to the corporation, notwithstanding any contrary provision in any insurance trust agreement, if they are less than 15% of the replacement cost of the property covered by the insurance (*section 100(1)*). The proceeds must be used promptly for repair or replacement, excepting only if the owners have voted to terminate the corporation due to substantial (25% or more of the replacement cost of the property) damage (*section 100(2)*). A mortgagee of the property cannot require that proceeds received under a 'major perils' policy be paid towards the discharge of the mortgage, regardless of any provision to the contrary in the mortgage (*section 100(4)*).

The existence of the corporations 'major perils' policy does not prevent an owner from obtaining separate insurance against loss or damage to the owner's unit or interest in the common elements to cover any inapplicability, inadequacy, or ineffectiveness, of the corporations policy(s) (*section 101(1)*). The separate policies are not to be brought into contribution with each other, although if the corporation maintains more than one 'major perils' policy they will be brought into contribution (*section 101(2)*).

7.1.1.2. Deductibles

As noted above, a 'major perils' policy may contain a 'reasonable' deductible. There is no specific provision allowing a deductible for the other two types of policies; however, this appears to be implicit. Except in a case where an owner, a lessee of an owner, or a person residing in a unit with the permission or knowledge of the owner, causes damage to the owner's unit, any deductible is included in the common expenses (*section 105(1)*)¹. Where the exception applies, the deductible must be added to the common expenses paid for the owner's unit (*section 105(2)*)². The corporation may pass a by-law to extend the circumstances in which the exception will apply, provided the damage is not caused by the corporation, its directors or officers, or an agent or employee (*section 105(3)*). Any deductible which an owner may have to entirely pay is an insurable interest of the owner and may be the subject of insurance taken out by the owner (*section 105(4)*).

7.1.1.3. Vacant Land Condominiums

Unlike all other types of condominiums, vacant land condominium corporation's are not fully bound by the provisions of *section 99* of the *Condominium Act* which mandates that the corporation maintain insurance on the units and common elements on behalf of itself and the owners for damage caused by major and other perils. *Section 159(2)* provides an exemption from this section 'for buildings and structures located on a unit'. *Section 159(3)* of the *Condominium Act* imposes the obligation on the unit owner(s) to obtain and maintain the insurance for damage to the unit that, but for *section 159(2)*, would have had to be obtained by the corporation in respect of the unit.

It should be noted that the obligation to insure against damage to the common elements remains with the vacant land condominium corporation.

¹ 198 Miluzzi v. York Condominium Corp. No. 60 (1996) [\$5000 deductible is reasonable]

308 Stevens et al. v. Simcoe Condominium Corporation No. 60 (1998) [insurance deductible payable by owner]

² 424- Zafir v. York Condo. No. 632 (2007) [While an 'act or omission' referenced in section 105 does not necessarily import a requirement of negligence, a direction from a condominium corporation which increases the likelihood of damage occurring makes it inequitable to hold the owner liable for damages. A lien relating to the foregoing should be discharged.]

7.1.1.4. Existing Policies

Condominiums existing prior to May 5, 2001 which on that date had 'major perils' policies in place are not required to amend the policy(s) to meet the requirements of the *Condominium Act (section 181(1))*. However, when such policy(s) is up for renewal the requirements of *section 99* must be satisfied in the renewal (*section 181(2)*).

7.2 THE CORPORATION’S MONEY

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As part of the on-going operation of a condominium and its affairs money will be collected and remitted by the corporation for a variety of purposes. Money collected will or could include such things as the common expense contributions, revenue from the use or lease of common elements, and insurance proceeds. Until the time comes for the corporation to pay all or any part of such funds out the *Condominium Act* prescribes where and on what terms the money is to be kept on deposit. The rule(s) applicable to such deposit differ depending on whether the funds are ear-marked for one or more reserve fund purposes or otherwise; however, in both cases it can be generally said that, unless some change is made in the future to the regulations, only secure, insured institutions, and conservative investments, may be entrusted with a corporation’s monies.

7.2.1. Where May a Corporation’s Monies be Deposited?

A condominium corporation may have its accounts at one or more of the following institutions:

- A bank listed under Schedule I or II to the Bank Act (Canada);
- A trust corporation;
- A loan corporation;
- A credit union authorized to receive money on deposit; or,
- A Province of Ontario Saving Office (*section 115(3)*).

7.2.2. Every Corporation Must Have At Least Two Accounts

While there is no limit on the number of accounts a condominium may have, every condominium must have at least one account dedicated only to holding reserve fund monies (reserve fund account), and one account dedicated to all other purposes (the general account) (*section 115(2)*). Practically speaking, a corporation should find little or no need to maintain more than one of each type of account although the following situations are examples of those which may justify more than one:

- Where funds on deposit with any one institution covered by the Canada Deposit Insurance Corporation \$60,000.00 insurance may exceed the limit, opening a second account for the purpose at another institution will ensure coverage for the excess (again up to \$60,000.00)
- To make use of a daily interest deposit (non-chequing) account for funds that will be held for under thirty days (at which level other investment instruments may realize a higher yield), pending transfer to a chequing account.

7.2.3. General Directive to Person’s Receiving Money of a Corporation

Any person who receives money on behalf of or for the benefit of the corporation holds it in trust for the performance by the corporation of its duties and obligations (*section 115(1)*), and must pay the money, together with interest and other investment proceeds, into either:

- A general account of the corporation, if the money was not received as contributions from owners to the reserve fund; or,
- A reserve fund account of the corporation, if the money was received as contributions from owners to the reserve fund (*section 115(4)*).

7.2.4. Holding Monies in Eligible Securities

While monies held in accounts are (or should be) readily accessible at all times by a corporation, interest on the deposits may be minimal or, in any event, less than may be obtained if the monies were committed for a fixed period of time. The *Condominium Act* permits monies to be invested in specified 'eligible securities' which, at the present time, are limited to a:

- bond
- debenture
- guaranteed investment certificate
- deposit receipt
- deposit note
- certificate of deposit
- term deposit
- or other similar instrument

provided it is issued by the government of Canada or any province, or is issued by an institution in Ontario insured by the Canada Deposit Insurance Corporation (while the regulations can permit other eligible investments they have not done so) (*section 115(5)*).

In all cases the securities must be:

- Registered in the name of the corporation; or,
- Held in a segregated account under the name of the corporation by a member of the Investment Dealers Association and insured by the Canadian Investor Protection Fund (which guarantee deposits with members up to \$1,000,000.00 in the event of insolvency) (*section 115(6)* and *115(7)*).

There is an important distinction between investing in eligible securities with monies from the general account and monies from reserve fund accounts. In the case of the former the investment must be convertible to cash with 90 days following a request from the board (*section 115(6)(a)*). While investments with reserve fund monies have no such limitation, before making investments with reserve fund monies the board must develop an investment plan based on the anticipated cash requirements of the reserve fund as set out in the most recent reserve fund study (*section 115(8)*). The clear purpose of this requirement is to allow funds to be locked in for determined periods of time which dovetail with calls which will be made on the reserve funds.

7.2.5. Records

Any person receiving money of the corporation is obliged to keep records relating to the receipt and dispositions of all money passing through, or required to pass through, the corporations accounts. Such records must be made available for examination, upon reasonable notice and at all reasonable times, by the corporation, any owner, and any mortgagee (*section 115(9)*).

8.0 TERMINATION OF A CONDOMINIUM

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Just as land and buildings can be brought under the governance of the *Condominium Act* through registration of a declaration and description, so all or part of a condominium can (and in the case of leasehold condominiums presumably always will) be withdrawn from the governance of the *Condominium Act*, the owner’s interests reconstituted as interests in land, assets, and/or rights, and the corporation becomes functus.

There are five ways in which all or part of a condominium’s property may come to be withdrawn from *Condominium Act* governance:

1. Termination with consent;
2. Termination upon substantial damage;
3. Termination upon sale of property;
4. Termination upon expropriation; and,
5. Termination by the court.

Of these five ways, the first three require an endorsing vote by a majority vote of the owners of at least 80% of the units, while the last requires significant consideration of the owner’s general good interests. Set out below is a general summary of the pertinent aspects of each of the above vehicles of termination.

8.1 Termination with Consent

With the endorsement (by vote) of the owners of 80% or more of the units (units with a vote) in a condominium and the written consent of 80% of those persons having registered claims against the property created after registration, the government of the property by the *Condominium Act* is terminated upon registration of a notice of termination (*section 122(1) and (2)*). This notice must be completed in *Form 13 of regulation 49 of 01 (section 47)* and will be accompanied by *Family Law Act* clearances from each unit owner who is an individual (*section 47(3)(b)*).

The *Condominium Act* does not impose any pre-condition or criteria on the circumstances in which a voluntary termination may occur, nor does it mandate who may initiate the process. Clearly this could be done by the board of a corporation, or by owners requisitioning a meeting for the purpose of calling the question.

What claims are registered will be determined by an examination of the title records of the condominium property as of the day of the vote of the owners. “Claims” are defined by the *Condominium Act* as including a ‘right, title, interest, encumbrance or demand of any kind affecting land but does not include the interest of an owner in the owner’s unit or common interest’, while “encumbrance” is defined as a ‘claim that secures the payment of money or the performance of any other obligation and includes a charge under the *Land Titles Act*, a mortgage and a lien’ (*section 1(1)*).

Upon registration of the notice of termination on consent:

1. the *Condominium Act* ceases to govern the property;
2. the owners are tenants in common of the land and interests appurtenant to the land described in the description in the same proportions as their common interests;

3. claims against the land and the interests appurtenant to the land described in the description, that were created before the registration of the declaration and description that made this Act applicable to the land, are as effective as if the declaration and description had not been registered;
4. encumbrances against each unit and common interest, that were created after the registration of the declaration and description that made the *Condominium Act* applicable to the unit, are claims against the interests of the owner in the land and interests appurtenant to the land described in the description and have the same priority as they had before the registration of the notice of termination; and
5. all other claims against the property that were created after the registration of the declaration and description that made the *Condominium Act* applicable to the property are extinguished (*section 127(1)*).

Registration procedures are set out in section 47 and 51 of *49 of 01*.

8.2 Termination Upon Substantial Damage

If damage has occurred to the building and structures on the property which is equal to or greater than 25% of the replacement cost of all buildings and structures on the property (“substantial damage”, *section 123(2)*), the board must initiate a procedure which will lead to the termination of the condominium if the owners of 80% or more of the voting units vote in favour of termination (*section 123(7)*).

Should there be damage which the board considers may constitute substantial damage it must engage at least two qualified persons without affiliation to the board to make estimates of the damage and report within 30 days of the damages occurring (*section 123(3)*). Based on the estimates, the board will then determine whether there has been substantial damage in which case it must then give notice of that determination to the owners (*section 123(5)*). The notice of determination must be in Form 14 to *regulation 49 of 01* (section 47 of *49 of 01*) and specify that:

- the owners have the right, in accordance with section 46 and within 30 days of receiving the notice, to requisition a meeting of owners; and
- the board is required to register a notice terminating the government of the property by the *Condominium Act* if the owners of at least 80% of the units vote in favour of termination (*section 123(6)*).

Should the owners not requisition a meeting (the owners of a minimum of 15% of the units is required), or if the vote is below the required majority of the votes of owners of at least 80% of the units, there will be no termination and the board must proceed to repair the property within a reasonable time (*section 123(10)*). Otherwise, the board must register the notice of termination (in Form 14 to *regulation 49 of 01* (section 47 of *49 of 01*)) within 30 days of the vote (*section 123(9)*).

Upon registration of the notice of termination on substantial damage:

1. the *Condominium Act* ceases to govern the property;
2. the owners are tenants in common of the land and interests appurtenant to the land described in the description in the same proportions as their common interests;
3. claims against the land and the interests appurtenant to the land described in the description, that were created before the registration of the declaration and description that made this Act applicable to the land, are as effective as if the declaration and description had not been registered;

4. encumbrances against each unit and common interest, that were created after the registration of the declaration and description that made the *Condominium Act* applicable to the unit, are claims against the interests of the owner in the land and interests appurtenant to the land described in the description and have the same priority as they had before the registration of the notice of termination; and
5. all other claims against the property that were created after the registration of the declaration and description that made the *Condominium Act* applicable to the property are extinguished (section 127(1)).

Registration procedures are set out in section 47 and 51 of 49 of 01.

8.3 Termination Upon Sale of Property

With the endorsement (by vote) of the owners of 80% or more of the units (units with a vote) in a condominium and the written consent of 80% of those persons having registered claims against the property created after registration, the corporation may sell the whole of the property or a part of the common elements (*section 124(1) and (2)*). the government of the property by the *Condominium Act* terminated upon registration of a notice of termination (*section 122(1) and (2)*). This notice must be completed in Form 13 of *regulation 49 of 01 (section 47)* and will be accompanied by *Family Law Act* clearances from each unit owner who is an individual (*section 47(3)(b) of 49 of 01*).

The *Condominium Act* does not impose any pre-condition or criteria on the circumstances in which a sale may occur, nor does it mandate who may initiate the process. Clearly this could be done by the board of a corporation, or by owners requisitioning a meeting for the purpose of calling the question. Regardless of the sufficiency of a positive vote and written consents from claimants, the board must authorize the sale.

What claims are registered will be determined by an examination of the title records of the condominium property as of the day of the vote of the owners. “Claims” are defined by the *Condominium Act* as including a ‘right, title, interest, encumbrance or demand of any kind affecting land but does not include the interest of an owner in the owner’s unit or common interest’, while “encumbrance” is defined as a ‘claim that secures the payment of money or the performance of any other obligation and includes a charge under the *Land Titles Act*, a mortgage and a lien’ (*section 1(1)*).

When an authorized sale takes place, the board will deliver a deed, a certificate in Form 15 to *regulation 49 of 01 (section 48(2))*, and *Family Law Act* clearances from all owners (section 48(1)(b) of 49 of 01) to the purchaser. The registration of the deed and certificate effects the following:

- (a) the *Condominium Act* ceases to govern the property sold;
- (b) claims against the land and interests appurtenant to the land, that were created before the registration of the declaration and description that made the *Condominium Act* applicable to the land, are as effective as if the declaration and description had not been registered; and
- (c) claims against the property being sold or expropriated, as the case may be, that were created after the registration of the declaration and description that made the *Condominium Act* applicable to that property, are extinguished (*section 127(2)*).

Registration procedures are detailed in sections 48 and 51 of 49 of 01.

The owners at the time of the registration of the deed share in the net proceeds of the sale in the same proportions as their common interests (*section 124(4)*).

8.4 Dissenters Rights

It would be expected that a termination through sale process would not be initiated unless an appreciation of the value of the property was in hand, and a potential purchaser(s) in the wings; however, there is no requirement

for either of these circumstances to be present. Regardless, there may be differing opinions among owners as to whether a voluntary sale is prudent or desirable. In order to protect the minority of owners (who in no case would own more than 20 % of the voting units), the *Condominium Act* gives owners who voted against sale a 30 day window following the positive vote to submit any dispute over the fair market value of the property or part of the common elements to mediation under *section 132 (section 125(1))*. In order to make use of this referral provision, a dissenting owner must give notice of intention to submit a dispute to mediation within 10 days of the positive vote (*section 125(3)*).

A dissenting owner who give notice of intention and submits a dispute on value to mediation will be entitled to payment of the greater of the amount which equal the unit's common interest proportion of the fair market value as determined by the arbitration, and the amount otherwise payable (the share of the net proceeds that is the unit's proportion of the common interests (*section 124(4)*). This rule applies whether the arbitrated fair market value is greater or less than the sale price. If there is a deficiency (the sale price is less than the arbitrated fair market value) the corporation must pay the deficiency to the dissenting owner(s) and the remaining owners bear the cost of same among themselves, as determined by the proportions of their common interests (recalculated, logically, without the dissenting unit owners shares).

8.5 Termination Upon Expropriation

Expropriation is the taking of land, with or without the cooperation of the land owner, by authorized public authorities such as the Province, municipalities, conservation and other special purpose public bodies, for their purposes, Expropriation can only be accomplished by following the processes set out in the *Expropriations Act* of Ontario, including the registration of a plan of expropriation which transfers title to the expropriating authority ([section 9](#) of the *Expropriations Act*).

The *Condominium Act* provides that in the event a condominium property or a part of the common elements is expropriated, the *Condominium Act* ceases to govern the property or the part of the common elements (*section 126(1)*). The result is automatic and is effected upon registration of the plan of condominium.

In the case of an expropriation of part of the common elements, the owners will share in the compensation payable by the expropriating authority in the same proportions as their common interests. The only exception is in a case where the part of the common elements which is expropriated is reserved to the exclusive use of one or more owners but not all the owners. In such case, the compensation will be divided among the owners of the designated units in the proportions in which their interests are affected (*section 126(3)*).

Upon registration of the expropriation plan, in addition to the *Condominium Act* ceasing to govern:

- claims against the land and interests appurtenant to the land, that were created before the registration of the declaration and description that made the *Condominium Act* applicable to the land, are as effective as if the declaration and description had not been registered; and
- claims against the property being sold or expropriated, as the case may be, that were created after the registration of the declaration and description that made the *Condominium Act* applicable to that property, are extinguished (*section 127(2)*).

Details regarding the registration procedures respecting a plan of expropriation are found in [section 50](#) and [51](#) of *49 of 01*.

The net assets of the corporation will be distributed among the owners in the same proportions as the proportions of their common interests (*section 129*).

8.6 Termination By The Court

Section 128 of the *Condominium Act* permits:

- A Corporation
- An owner; or,
- Any person having an encumbrance against a unit and common interest,

to make application to the Superior Court of Justice for an order terminating the government of the property by the *Condominium Act* (*section 128(1)*).

Such an order may be made by the court provided it is of the opinion such is just and equitable having regard to:

- (a) the scheme and intent of the *Condominium Act*;
- (b) the probability of unfairness to the owners if the court does not order termination;
- (c) the probability of confusion and uncertainty in the affairs of the corporation or of the owners if the court does not order termination; and
- (d) the best interests of the owners (*section 128(2)*).

The court can include any and all provisions in the order that it considers appropriate in the circumstances¹.

The order takes effect when it is registered on title. Registration procedures are set out in section 50 and 51 of 49 of 01.

8.7 Distribution of Assets

In all cases where the owners and property cease to be governed by the *Condominium Act* the assets of the corporation are to be first used to pay all claims for the payment of money against the corporation and the balance is distributed among the owners in the same proportions as the proportions of their common interests (*section 129*).

¹ **271** Royal Insurance Company Middlesex CC No. 173 (1998) [order cannot create two corp. from one against will of owners]

9.0 FROM THE OLD LEGISLATION TO THE NEW - TRANSITIONAL PROVISIONS

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The old legislation (Condominium Act, chapter 26 of the Revised Statutes of Ontario, as amended) is repealed by *section 184* of the *Condominium Act*). While this means the old legislation no longer has application to the creation of new condominiums or the governance of all condominiums in Ontario, for certain limited purposes the old legislation still has operation or effect. This limited vitality comes from general principles mandated by Ontario’s *Interpretation Act*, and from specific exceptions provided in the *Condominium Act*. Apart from these principles and exceptions (described below) the old legislation can be relegated to the archives and disregarded for all purposes and regard for all purposes must and should be had only to the new laws (*Condominium Act and regulations 48 and 49 of 2001*).

9.1.1. Interpretation Act

By virtue the *Interpretation Act*, the repeal of the Condominium Act, chapter 26 of the Revised Statutes of Ontario (as amended) does not:

- affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the old Condominium Act;
- affect any offence committed against the old Condominium Act, or any penalty or forfeiture or punishment incurred in respect thereof;
- affect any investigation, legal proceeding or remedy in respect of any such privilege, obligation, liability, penalty, forfeiture or punishment, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the old Condominium Act had not been repealed (section 14).
- all regulations, orders, rules and by-laws made under the old Condominium Act continue good and valid in so far as they are not inconsistent with the Condominium Act until they are annulled and others made in their stead; and
- a reference in an unrepealed Act, or in a rule, order or regulation made thereunder to the old Condominium Act, shall, as regards any subsequent transaction, matter or thing be held and construed to be a reference to the provisions of the Condominium Act relating to the same subject-matter and, if there is no provision in the Condominium Act relating to the same subject-matter, the old Condominium Act stands good and shall be read and construed as unrepealed in so far, and in so far only, as is necessary to support, maintain or give effect to such unrepealed Act, or such rule, order or regulation made thereunder (section 15).

9.1.2. Condominium Act – Transitional Provisions

9.1.2.1. Existing Condominiums Continued as Standard Condominiums

All condominiums created on or before May 4, 2001 are continued as condominium corporations under the *Condominium Act (section 178)* and are recognized as being of the standard type (*section 3 of 48 of 01*).

9.1.2.2. Liens for Common Expense Contributions Continued

A corporation's lien for unpaid common expense contributions that was created under the old legislation is continued as a lien under the *Condominium Act (section 178)*. Such lien's would be limited to those which are the subject of a notice of lien registered on or before May 4, 2001, or which had not expired by May 5, 2001 (under the old *Condominium Act* a lien expired if it was not registered by the end of the third month after default occurred (*section 32(5)*)).

9.1.2.3. Turn-Over Meeting Provisions of Old Condominium Act Apply

The turn-over provisions of the new *Condominium Act (section 43)* do not apply to any condominium corporation created on or before May 4, 2001. Turn-overs of such corporations will continue to be conducted under the directions of *section 26* of the old *Condominium Act (section 179(1))* which provides the declarant must deliver:

- (a) the seal of the corporation;
- (b) the minute book for the corporation, containing the most current copies of the declaration, by-laws, rules and regulations and any amendments thereto;
- (c) copies of all agreements entered into by the corporation or the declarant or the declarant's representatives on behalf of the corporation, including the management contracts, deeds, leases, licences and those items set out in *section 52(6)* of the old *Condominium Act* (i.e. budget statement for first year, amenities completion schedule);
- (d) a record maintained under *section 20(2)* of the old *Condominium Act* (owners and mortgagees service information);
- (e) the existing warranties and guarantees for all the equipment, fixtures and chattels included in the sale of either the units or common elements that are not protected by warranties and guarantees given directly to a unit purchaser;
- (f) the as-built architectural, structural, engineering, mechanical, electrical and plumbing plans;
- (g) the original specifications indicating thereon all material changes;
- (h) the plans for underground site service, site grading, drainage and landscaping together with cable television drawings if available;
- (i) such other available plans and information not mentioned in items (f), (g) or (h) above but relevant to future repair or maintenance of the property;
- (j) an unaudited financial statement prepared as at a date not earlier than thirty days prior to the meeting;

(k) a table depicting the maintenance responsibilities and indicating whether the corporation or the unit owners are responsible;

(l) bills of sale or transfers for all items that are assets of the condominium corporation but not part of the real property;

(m) a list detailing current replacement costs and life expectancy under normal maintenance conditions of all major capital items in the property, including, where applicable, those items set out in section 36(1) of the old Condominium Act (roofs, exteriors of buildings, roads, sidewalks, sewers, heating, electrical and plumbing systems, elevators, laundry, recreational and parking facilities); and

(n) all financial records of the corporation and of the declarant relating to the operation of the corporation from the date of registration of the declaration and the description.

Any failure by the declarant to satisfy the turn-over requirements of section 26 of the old Condominium Act will be an offence under section 55 of the old Condominium Act (*section 179(2)*).

9.1.2.4. Sale and Lease of Units Generally Governed by Old Condominium Act

In any case where, on or before May 5, 2001, a declarant has entered into an agreement of purchase and sale for a unit or proposed unit, sections 51 to 54, excepting section 52(5), of the old Condominium Act, dealing with the sale and lease of units continue to apply (*section 180(1)*) with the qualification that a change to the information in a disclosure statement that arises only as a result of the coming into force of the *Condominium Act* does not constitute a material change (and therefore provides no opportunity for rescission) (*section 180(1)(2)*). The latter rider is preserve the status quo in the relations between the declarant and purchaser regardless of the changes to condominium laws. In addition, sections 34 to 37 of *regulation 96 of 1990* (under the old Condominium Act) continue to apply in the foregoing circumstances (section 64(b) of *regulation 48 of 01*).

The following sections of the *Condominium Act* are inapplicable in a case where the declarant has entered into an agreement of purchase and sale on or before May 5, 2001:

<u>Section</u>	<u>Subject</u>
44	requiring performance audits
72 to 75	dealing with disclosure statement
78 to 82	sale of units including matters such as interim occupancy, trust money, and interest
12	easements appurtenant to the units (<i>section 180(1)</i>)
17	objects and duties of corporations
19	right of entry into exclusive use common elements
20	easements in declaration or phase benefiting or burdening other lands of declarant or imposed as condition of approval
21	lease, grant or easement or license, release of easement, of or respecting the common elements
22	telecommunications agreement (<i>section 64</i> of <i>regulation 48 of 01</i>)

Section 52(5) of the old Condominium Act, which gave a right of damages in favour of a corporation or unit owner who relied on a false, deceptive or misleading statement or omission in a disclosure or other statement or information required by the statute, is inapplicable to proposed or registered condominiums where an agreement of

purchase and sale had been entered before May 6, 2001. In its place, *section 133* of the Condominium Act has full play for all damages arising from such situations.

Set out below are section 51 to 54 of the old Condominium Act followed by section 34 to 37 of *regulation 96 of 1990*:

Sections 51 to 54

Implied covenants in agreement of purchase and sale

51. (1) Every agreement of purchase and sale entered into by a proposed declarant for a proposed unit for residential purposes shall be deemed to contain,

- (a) a covenant by the vendor to take all reasonable steps to register a declaration and description in respect of the property in which the unit is included without delay;
- (b) a covenant by the vendor to take all reasonable steps to sell the other residential units included in the property without delay other than any units mentioned in a statement under clause 54 (1) (c);
- (c) a covenant by the vendor to take all reasonable steps to deliver to the purchaser a registrable deed or transfer of the unit without delay; and
- (d) a provision that the vendor will not collect from the purchaser any money on behalf of the corporation.

Failure to register declaration within a specified period

(2) Despite any provision to the contrary contained therein, an agreement of purchase and sale of a proposed unit for residential purposes shall not be terminated by the proposed declarant only by reason of the failure to register the declaration and description within a period of time specified in the agreement, unless the purchaser consents to the termination in writing.

Application to court

(3) Despite subsection (2), the proposed declarant may apply to a judge of the Ontario Court (General Division) and the judge may by order terminate the agreement if he or she is satisfied that,

- (a) the proposed declarant has taken all reasonable steps to register a declaration and description;
- (b) a declaration and description cannot be registered within a reasonable period of time; and
- (c) the failure and inability to register a declaration and description is caused by circumstances beyond the control of the proposed declarant.

Subsequent registration under Act

(4) The judge may, in an order under subsection (3), provide that a declaration and description shall not be registered in respect of the property in which the proposed unit is included during such period as he or she specifies in the order.

Registration of order

(5) An order under subsection (3) is ineffective until a certified copy thereof is registered.

Payment of purchase price

(6) Where an agreement of purchase and sale entered into by a proposed declarant for a proposed unit for residential purposes permits or requires the purchaser to take possession of or occupy the unit before a deed or transfer of the unit acceptable for registration is delivered to the purchaser, the money paid in respect of such right or obligation to the proposed declarant shall be not greater, on a monthly basis, than the total of the following amounts:

1. The amount of interest that the purchaser would have paid, monthly, in respect of any mortgage or mortgages the purchaser is obligated to assume or give under the agreement of purchase and sale on delivery of a deed or transfer of the unit.
2. An amount reasonably estimated on a monthly basis for municipal taxes attributable to the proposed unit.
3. The projected monthly common expense contribution for that unit. R.S.O. 1990, c. C.26, s. 51 (1-6).

Rights and duties of proposed declarant

(7) Where a purchaser takes possession of a proposed unit for residential purposes under an agreement that permits the purchaser to take possession of or occupy the unit before a deed or transfer of the unit acceptable for registration is delivered to the purchaser, despite the provisions of the Tenant Protection Act, 1997, the proposed declarant,

- (a) shall provide those services and only those services that the proposed corporation will have a duty to provide to owners;
- (b) shall repair and maintain the property and the proposed unit in the same manner as the proposed corporation will have a duty to repair and maintain;
- (c) has the same right of entry that the proposed corporation will have; and
- (d) may withhold consent to an assignment of the occupancy agreement. R.S.O. 1990, c. C.26, s. 51 (7); 1993, c. 27, Sched.; 1997, c. 24, s. 209.

Disclosure before sale

52. (1) An agreement of purchase and sale entered into after the 1st day of June, 1979 by a declarant or proposed declarant of a unit or proposed unit for residential purposes is not binding on the purchaser until the declarant or proposed declarant has delivered to the purchaser a copy of the current disclosure statement and all material amendments thereto.

Rescission of agreement

(2) The purchaser, before receiving delivery of a deed to or transfer of the unit, may rescind the agreement of purchase and sale within ten days after receiving the disclosure statement or, where there has been a material amendment thereto, within ten days after receiving the material amendment.

Notice of rescission

(3) A person may rescind an agreement of purchase and sale under subsection (2) by giving written notice of the rescission to the declarant or proposed declarant or to the solicitor of the declarant or proposed declarant.

On rescission, money to be refunded

(4) Every declarant or proposed declarant who receives notice of rescission under subsection (3) from a person entitled to rescind the agreement of purchase and sale under subsection (2), shall forthwith refund, without penalty

or charge, to the person giving notice, all money that the declarant or proposed declarant received from that person under the agreement that was credited as payment against purchase price.

Where statement false or misleading

~~— (5) Where any statement or material required under this Act to be provided by a declarant or proposed declarant to a purchaser of a unit or proposed unit for residential purposes contains any material statement or information that is false, deceptive or misleading or fails to contain any material statement or information, the corporation or any unit owner who relied on such statement or material is entitled, as against the declarant or the proposed declarant to damages for any loss sustained as a result of such reliance.~~

Disclosure statement

(6) The disclosure statement referred to in subsection (1) shall contain and fully and accurately disclose,

- (a) the name and municipal address of the declarant or proposed declarant and of the property or proposed property;
- (b) a general description of the property or proposed property including the types and number of buildings, units and recreational and other amenities together with any conditions that apply to the provision of amenities;
- (c) the portion of units or proposed units which the declarant or proposed declarant intends to market in blocks of units to investors;
- (d) a brief narrative description of the significant features of the existing or proposed declaration, by-laws and rules governing the use of common elements and units, and of any contracts or leases that may be subject to termination or expiration under section 39;
- (e) a budget statement for the one year period immediately following the registration of the declaration and the description;
- (f) where construction of amenities is not completed, a schedule of the proposed commencement and completion dates; and
- (g) any other matters required by the regulations to be disclosed.

Budget statements

(7) The budget statement mentioned in clause (6) (e) shall set out,

- (a) the common expenses;
- (b) the proposed amount of each expense;
- (c) particulars of the type, frequency and level of the services to be provided;
- (d) the projected monthly common expense contribution for each type of unit;
- (e) a statement of the portion of the common expense to be paid into a reserve fund;

- (f) a statement of the assumed inflation factor;
- (g) a statement of any judgments against the corporation, the status of any pending lawsuits to which the corporation is a party and the status of any pending lawsuits material to the property of which the declarant or proposed declarant has actual knowledge;
- (h) any current or expected fees or charges to be paid by unit owners or any of them for the use of the common elements or part thereof and other facilities related to the property;
- (i) any services not included in the budget that the declarant or proposed declarant provides, or expenses that the declarant or proposed declarant pays and that might reasonably be expected to become, at any subsequent time, a common expense and the projected common expense contribution attributable to each of those services or expenses for each type of unit;
- (j) the amounts in all reserve funds; and
- (k) any other matters required by the regulations to be disclosed.

Inaccurate statement of common expenses

(8) Where the total amount incurred for the common expenses provided for in the budget statement exceeds the total of the proposed amounts set out in the statement, for the period covered by the budget statement mentioned in clause (6) (e), the declarant shall forthwith pay to the corporation the amount of the excess except in respect of increased expenses attributable to the termination of an agreement under section 39. R.S.O. 1990, c. C.26, s. 52 (1-8).

Where revenue shown on budget statement

(9) Where the declarant shows any expected fees, charges, rents or other revenue to be paid to the corporation for the use of the common elements or assets or any part thereof or any other facilities related to the property and,

- (a) where the total amount received is less than the expected fees, charges, rents or other revenue, the declarant shall forthwith pay to the corporation the amount of the deficiency less the amount, if any, that the total of the proposed amounts for common expenses set out in the budget statement mentioned in clause (6) (e) exceeds the total amount incurred for common expenses for the period covered by the budget statement; or
- (b) where the total amount received is more than the expected fees, charges, rents or other revenue, the declarant may set off the amount of the excess against any amount the declarant may be required to pay under subsection (8). R.S.O. 1990, c. C.26, s. 52 (9); 1993, c. 27, Sched.

Trust money

53. (1) All money received by or on behalf of a proposed declarant from a purchaser on account of a sale or an agreement for the purchase and sale of a proposed unit for residential purposes before the registration of the declaration and description, other than money paid as rent or as an occupancy charge, shall, despite the registration of the declaration and description thereafter, be held in trust by the person receiving such money for the person entitled thereto in respect of the agreement and such money shall be held in a separate account designated as a trust account at a bank listed in Schedule I or II to the Bank Act (Canada) or trust corporation or a loan corporation or credit union authorized by law to receive money on deposit or a Province of Ontario Savings Office until,

- (a) its disposition to the person entitled thereto; or

(b) delivery of prescribed security to the purchaser for repayment.

Interest

(2) Where an agreement of purchase and sale referred to in subsection (1) is terminated and the purchaser is entitled to the return of any money paid under the agreement, the proposed declarant shall pay to the purchaser interest on such money at the prescribed rate.

Idem

(3) Subject to subsection (2), where a purchaser of a proposed unit under an agreement of purchase and sale referred to in subsection (1) enters into possession or occupation of the unit before a deed or transfer of the unit acceptable for registration is delivered to the purchaser, the proposed declarant shall pay interest at the prescribed rate on all money received by the proposed declarant on account of the purchase price from the day the purchaser enters into possession or occupation until the day a deed or transfer acceptable for registration is delivered to the purchaser.

Idem

(4) Subject to subsections (2) and (3), the proposed declarant is entitled to any interest earned on the money required to be held in trust under subsection (1). R.S.O. 1990, c. C.26, s. 53.

Leases of units

54. *(1) A declarant or proposed declarant shall not grant a lease of a unit or proposed unit for residential purposes unless,*

(a) the lessee has entered into an agreement made in good faith to purchase the unit;

(b) the lease grants to the lessee an option made in good faith to purchase the unit;

(c) every agreement of purchase and sale of a unit included in the property includes a statement that the unit to be included in the lease is or will be leased and specifies the uses that are or will be permitted by the lease; or

(d) written notice of the lessor's intention to lease the unit has been given to every purchaser under an agreement of purchase and sale, registered owner and mortgagee entitled to vote, and the period referred to in subsection (2) has expired or, where an application is made under subsection (2), it is finally disposed of. R.S.O. 1990, c. C.26, s. 54 (1); 1993, c. 27, Sched.

Application to court

(2) Any person notified under clause (1) (d) may, within twenty-one days after receiving the notice, and on written notice to the declarant, apply to a judge of the Ontario Court (General Division), and the judge, if he or she is of the opinion that the declarant has not taken all reasonable steps to sell the unit, may by order prohibit the declarant from leasing the unit or grant other relief as he or she considers proper.

Contents of notice

(3) The notice mentioned in clause (1) (d) shall specify the unit or units intended to be leased and the uses that will be permitted by the lease but need not set out any other terms or identify any proposed lessee.

Terms of lease

(4) A declarant or proposed declarant may grant leases of a unit or proposed unit for residential purposes for a period in each case not exceeding two years, including renewals, provided that subsection (1) is complied with in respect of each lease.

Exemption

(5) This section does not apply to the renewal of a lease of a unit or proposed unit where the lease was entered into before any agreement of purchase and sale of any unit or proposed unit included in the property is entered into.

Lease defined

(6) In this section,

“lease” includes a licence to use or occupy and any agreement in the nature of a lease.

Regulation 96 of 1990

34. Pursuant to subsection 52 (6) of the Act, a declarant shall provide the following documents with the disclosure statement:

- 1. A copy of the corporation’s declaration or proposed declaration.*
- 2. A copy of the corporation’s by-laws or proposed by-laws.*
- 3. A copy of the corporation’s rules or proposed rules.*
- 4. A copy of any insurance trust agreement or proposed insurance trust agreement*

35. (1) In this section,

“bank rate” means the bank rate established by the Bank of Canada as the minimum rate at which the Bank of Canada makes short-term advances to banks listed in Schedule I to the Bank Act (Canada).

(2) The rate of interest under subsections 53 (2) and (3) of the Act on money held in trust under subsection 53 (1) of the Act shall,

- (a) for the six months immediately following the last day of March of each year, be 2 per cent per annum below the bank rate at the end of the last day of March of that year; and*
- (b) for the six months immediately following the last day of September of each year, be 2 per cent per annum below the bank rate at the end of the last day of September of that year.*

36. (1) In this Regulation,

“insured” means a purchaser under an agreement of purchase and sale of a proposed condominium unit who has paid money to which section 53 of the Act applies, to a declarant and the purchaser’s successors and assigns.

(2) A policy that insures against loss of any money paid by an insured to a declarant to which section 53 of the Act applies and to loss of any interest payable by a declarant to an insured under that section and that is in accordance with this Regulation is prescribed security for the purposes of clause 53 (1) (b) of the Act.

(3) The premiums payable in respect of a policy shall be paid by the declarant.

(4) A policy shall take effect when it has been executed by the insured and by or on behalf of the insurer and the declarant.

(5) The obligations of an insurer to an insured under a policy shall not be affected by,

(a) failure of the declarant to pay any premiums owing under the policy;

(b) failure of the declarant to notify the insurer of the receipt of money to which section 53 of the Act applies from the insured; or

(c) breach of any term or condition of the policy.

(6) An insurer shall, immediately upon receipt of written notice of a claim by an insured under a policy, provide the insured with forms upon which to make proof of loss.

(7) Where an insurer receives written notice of a claim under subsection (6) it shall pay the insured within sixty days after the right of the insured to payment under the policy has been established.

(8) An insurer shall remain liable under a policy until,

(a) a deed or transfer of the unit acceptable for registration is delivered to the insured;

(b) the declarant pays to the insured all money to which section 53 of the Act applies and all interest payable by the declarant to the insured under that section; or

(c) the insurer pays the insured the amount of the loss.

(9) Where an insurer is required to make a payment under a policy, interest at the rate prescribed under section 35 shall be paid to the insured to the date of payment of the loss.

(10) Where a policy contains a provision that derogates in any manner from any right or benefit conferred on an insured by this Regulation such provision is void to the extent that it derogates from such right or benefit

9.1.2.5. Offences Under Old Condominium Act

Any contravention of section 52(5) (damage right for false, deceptive or misleading statements or information or omissions), 52(6) (contents and accuracy of disclosure statement), and 53(1) (trust provisions for purchase monies) of the old Condominium Act is subject to prosecution under section 55 of the old Condominium Act and not the new *Condominium Act* (*section 180(3)*).

9.1.2.6. Current Insurance Policies

Any corporation with a policy of insurance for damage to units and common elements (major peril, replacement cost) under section 27 of the old legislation is not subject to *section 99* of the *Condominium Act* (dealing with the same subject) (*section 181*). However, on expiry of the policy section 99 applies and the renewal policy must meet the new criteria (*section 181(2)*).

9.1.2.7. Reserve Fund Studies

Condominiums which were registered prior to May 5, 2001 are not required to carry out a reserve fund study immediately. They are allowed until May 5, 2004 to conduct a comprehensive study (*section 94(5)* and *section 31(1)*). Thereafter, such condominiums will follow the cycle of updates referred to above. In the event an old legislation condominium has carried out the equivalent of a comprehensive study prior to May 5, 2001, it is relieved of any obligation to carry out a second comprehensive study. Instead, the next following study for such a situation will be an update based on a site inspection conducted no later than May 5, 2004 (*section 31(1)*).

9.1.2.8. Termination of Agreements

Corporations which have entered into agreements of the type described in *section 111* (management) and *112* (continuing provision of goods and services, provision of facilities (other than non-profit; lease of common elements for business purposes) of the *Condominium Act* on or before May 4, 2001, are governed by section 39 of the old Condominium Act with respect to the termination of such agreements (*section 182*), and not *section 111* and *112* of the *Condominium Act*. Section 39 of the old Condominium Act states:

Management agreement

39.(1) The corporation may by by-law terminate, on giving sixty days notice in writing, any agreement between the corporation and any person for the management of the property entered into at a time when the majority of the members of the board were elected when the declarant was the registered owner of a majority of the units.

Agreements expiring

(2) Every agreement for the provision of services on a continuing basis, every lease of the common elements or part thereof for business purposes and every agreement for the provision of recreation facilities to the corporation on other than a non-profit basis entered into by a corporation after the 1st day of June, 1979 and at a time when the majority of the members of the board were elected when the declarant was the registered owner of a majority of the units that does not expire within twelve months after its effective date shall be deemed to expire twelve months after its effective date unless, within the twelve month period, the agreement is ratified by the board at a time when the majority of the board members were elected after the declarant ceased to be the registered owner of a majority of the units.

The most notable difference between the old provisions and the new is that, with respect to the above agreements other than management, an agreement having a term of more than 12 months would automatically expire unless ratified by the corporation. Under the *Condominium Act section 112*, a right to terminate is available but, in the absence of the right's exercise, the agreement(s) will continue in effect.

9.1.2.9. Descriptions Acceptable for Registration But Awaiting Planning Act Approval as of May 5, 2001

In order to minimize inconvenience, cost, and process time, in the case of proposed condominiums which had not received Planning Act approval from the approval authority before May 6, 2001 but whose descriptions were acceptable for registration as of May 5, 2001, various exemptions are provided for such descriptions to avoid the need to make changes in form in the documentation which would otherwise be required to meet the new requirements (*section 63(1)* of *regulation 48 of 01* and *section 52(1)* of *regulation 49 of 01*). These exemptions expire on the 180th day after May 5, 2001 () and any proposed condominium which is not registered by the end of the window will have to adhere to the new requirements for description (*section 63(2)* of *48 of 01* and *section 52(2)* of *49 of 01*).

Condominium Act, 1998

S.O. 1998, CHAPTER 19

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**PART I
DEFINITIONS****Definitions**

1. (1) In this Act,

- “annual general meeting” means a meeting of the owners of a corporation held in accordance with subsection 45 (2); (“assemblée générale annuelle”)
- “approval authority” means the approval authority for the purposes of sections 51, 51.1 and 51.2 of the *Planning Act*; (“autorité approbatrice”)
- “auditor” means a person licensed as a public accountant under the *Public Accounting Act, 2004* who is appointed as an auditor of a corporation under section 60; (“vérificateur”)
- “board” means the board of directors of a corporation; (“conseil”)
- “building” means a building included in a property; (“bâtiment”)
- “by-law” means a by-law of a corporation; (“règlement administratif”)
- “claim” includes a right, title, interest, encumbrance or demand of any kind affecting land but does not include the interest of an owner in the owner’s unit or common interest; (“réclamation”)
- “common elements” means all the property except the units; (“parties communes”)
- “common elements condominium corporation” means a common elements condominium corporation described in subsection 138 (2); (“association condominiale de parties communes”)
- “common expenses” means the expenses related to the performance of the objects and duties of a corporation and all expenses specified as common expenses in this Act or in a declaration; (“dépenses communes”)
- “common interest” means the interest in the common elements appurtenant to,
- (a) a unit, in the case of all corporations except a common elements condominium corporation, or
 - (b) an owner’s parcel of land to which the common interest is attached and which is described in the declaration, in the case of a common elements condominium corporation; (“intérêt commun”)
- “common surplus” means the excess of all receipts of the corporation over the expenses of the corporation; (“excédent commun”)
- “corporation” means a corporation created or continued under this Act; (“association”)
- “declarant” means a person who owns the freehold or leasehold estate in the land described in the description and who registers a declaration and description under this Act, and includes a successor or assignee of that person but does not include a purchaser in good faith of a unit who pays fair market value or a successor or assignee of the purchaser; (“déclarant”)
- “declaration” means a declaration registered under section 2 and all amendments to the declaration; (“déclaration”)
- “deed” includes a transfer under the *Land Titles Act*; (“acte scellé”)
- “description” means a description registered under section 2 and all amendments to the description; (“description”)
- “encumbrance” means a claim that secures the payment of money or the performance of any other obligation and includes a charge under the *Land Titles Act*, a mortgage and a lien; (“sûreté réelle”)
- “freehold condominium corporation” means a corporation in which all the units and their appurtenant common interests are held in fee simple by the owners; (“association condominiale de propriété franche”)
- “leasehold condominium corporation” means a corporation in which all the units and their appurtenant common interests are subject to leasehold interests held by the owners; (“association condominiale de propriété à bail”)
- “lessor”, in relation to a leasehold condominium corporation, means the person who owns the freehold estate in the land described in the description; (“bailleur”)
- “Minister” means the minister responsible for the administration of this Act; (“ministre”)
- “mortgage” includes a charge under the *Land Titles Act*, in which case “mortgagor” and “mortgagee” mean the chargor and the chargee under the charge; (“hypothèque”, “débiteur hypothécaire”, “créancier hypothécaire”)
- “owner” means,
- (a) in relation to a corporation other than a leasehold condominium corporation or a common elements condominium corporation, a person who owns a freehold interest in a unit and its appurtenant common interest and who is shown as the owner in the records of the land registry office in which the description of the corporation is registered, and includes a mortgagee in possession and a declarant with respect to any unit that the declarant has not transferred to another person,
 - (b) in relation to a leasehold condominium corporation, a person who owns a leasehold interest in a unit and its appurtenant common interest and who is shown as the owner in the records of the land registry office in which the description of the corporation is registered, and

includes a mortgagee in possession and a declarant with respect to any unit in which the declarant has not transferred the leasehold interest to another person but does not include a tenant of the owner,

- (c) in relation to a common elements condominium corporation, a person, including the declarant, who owns a common interest in the common elements and a freehold interest in the parcel of land to which the common interest is attached as described in the declaration and who is shown as the owner in the records of the land registry office in which the description of the corporation is registered; (“propriétaire”)

“phased condominium corporation” means a phased condominium corporation to which Part XI applies; (“association condominiale constituée par étape”)

“prescribed” means prescribed by the regulations made under this Act; (“prescrit”)

“property” means the land, including the buildings on it, and interests appurtenant to the land, as the land and interests are described in the description and includes all land and interests appurtenant to land that are added to the common elements; (“propriété”)

“proposed property” means the property described in the declaration and description that are required to be registered to designate a proposed unit as a unit under this Act; (“propriété projetée”)

“proposed unit” means land described in an agreement of purchase and sale that provides for delivery to the purchaser of a deed in registerable form after a declaration and description have been registered in respect of the land; (“partie privative projetée”)

“purchaser of a unit”, in relation to a leasehold condominium corporation, means the purchaser of an owner’s interest in a unit and the appurtenant common interest; (“acquéreur d’une partie privative”)

“registered” means registered under the *Land Titles Act* or the *Registry Act* and “register” and “registration” have corresponding meanings; (“enregistré”, “enregistrer”, “enregistrement”)

“reserve fund” means a reserve fund established under section 93; (“fonds de réserve”)

“reserve fund study” means a reserve fund study described in section 94; (“étude du fonds de réserve”)

“rule” means a rule of a corporation; (“règle”)

“status certificate” means a status certificate described in section 76; (“certificat d’information”)

“unit” means a part of the property designated as a unit by the description and includes the space enclosed by its boundaries and all of the land, structures and fixtures within this space in accordance with the declaration and description; (“partie privative”)

“vacant land condominium corporation” means a vacant land condominium corporation described in subsection 155 (2). (“association condominiale de terrain nu”) 1998, c. 19, s. 1 (1).

Ownership of land

(2) For the purposes of this Act, the ownership of land or of a leasehold interest in land includes the ownership of space or of a leasehold interest in space respectively. 1998, c. 19, s. 1 (2).

Proposed declarant

(3) A reference to a declarant in this Act shall be deemed to include, where applicable, a person who proposes or intends to register a declaration and description. 1998, c. 19, s. 1 (3).

PART II REGISTRATION AND CREATION

CREATION

Registration

2. (1) Subject to the regulations made under this Act and subsection (2), a declaration and description may be registered by or on behalf of the person who owns the freehold or leasehold estate in the land described in the description. 1998, c. 19, s. 2 (1).

Restriction

(2) A declaration and description for a freehold condominium corporation shall not be registered by or on behalf of a person who does not own the freehold estate in the land described in the description. 1998, c. 19, s. 2 (2).

Effect of registration

(3) Upon registration of a declaration and description,

- (a) this Act governs the land and the interests appurtenant to the land, as the land and the interests are described in the description;
- (b) the land described in the description is divided into units and common elements in accordance with the description; and
- (c) a condominium corporation is created. 1998, c. 19, s. 2 (3).

Place of registration

3. (1) The declaration and description shall be registered in,

- (a) the land titles division of the land registry office within the boundaries of which division the land described in the description is situated, if the land registry office has a land titles division; or

- (b) the registry division of the land registry office within the boundaries of which division the land described in the description is situated, if the land registry office does not have a land titles division. 1998, c. 19, s. 3 (1).

Index

(2) A land registrar in whose office a declaration and description are registered shall keep an index of the corporations created by the registrations. 1998, c. 19, s. 3 (2).

Same

(3) The index mentioned in subsection (2) shall be in the form approved by the Director of Titles appointed under section 9 of the *Land Titles Act* and shall be known in English as the Condominium Corporations Index and in French as Répertoire des associations condominiales. 1998, c. 19, s. 3 (3).

Condominium register

(4) A land registrar in whose office a declaration and description are registered shall keep a register in the form approved by the Director of Titles to be known in English as the Condominium Register and in French as Registre des condominiums. 1998, c. 19, s. 3 (4).

Contents of condominium register

(5) Declarations, descriptions, by-laws, notices of termination and other instruments respecting land governed by this Act shall be registered and recorded in the Condominium Register in accordance with the regulations made under this Act and the instructions of the Director of Titles. 1998, c. 19, s. 3 (5).

Real property Acts

4. (1) The *Land Titles Act* or the *Registry Act*, as the case may be, applies in respect of property governed by this Act but, if the provisions of either of those Acts conflict with the provisions of this Act, the provisions of this Act prevail. 1998, c. 19, s. 4 (1).

Rights of tenants

(2) The registration of a declaration and description shall not terminate or otherwise affect the rights under the *Residential Tenancies Act, 2006* of a person who, at the time of the registration, is a tenant of the property or of a part of the property. 1998, c. 19, s. 4 (4).

No termination of tenancy

(3) The registration of a declaration and description does not constitute grounds for a landlord to give notice of termination under Part V of the *Residential Tenancies Act, 2006* to a tenant described in subsection (2). 1998, c. 19, s. 4 (4).

(4) SPENT: 1998, c. 19, s. 4 (4).

Corporation

5. (1) A corporation created or continued under this Act is a corporation without share capital whose members are the owners. 1998, c. 19, s. 5 (1).

Name

(2) The land registrar shall assign a name to each corporation in accordance with the regulations made under this Act. 1998, c. 19, s. 5 (2).

Other Act

(3) The *Corporations Act* does not apply to the corporation. 1998, c. 19, s. 5 (3).

Same

(4) Subject to the regulations made under this Act, the *Corporations Information Act* applies to the corporation. 1998, c. 19, s. 5 (4).

Types of corporations

6. (1) Corporations under this Act consist of the following types:

1. Freehold condominium corporations.
2. Leasehold condominium corporations. 1998, c. 19, s. 6 (1).

Types of freehold corporations

(2) Freehold condominium corporations consist of the following types:

1. Common elements condominium corporations.
2. Phased condominium corporations.
3. Vacant land condominium corporations.
4. Standard condominium corporations that are not any of the corporations mentioned in paragraphs 1, 2 and 3. 1998, c. 19, s. 6 (2).

Restriction on registration

(3) A declaration and description shall not be registered unless the registration would create a freehold condominium corporation or a leasehold condominium corporation. 1998, c. 19, s. 6 (3).

Indication in declaration

(4) The declaration shall state,

- (a) whether the corporation is a freehold condominium corporation or a leasehold condominium corporation; and
- (b) if the corporation is a freehold condominium corporation, the type of freehold condominium corporation that it is. 1998, c. 19, s. 6 (4).

DECLARATION AND DESCRIPTION

Requirements for declaration

7. (1) A declaration shall not be registered unless the declarant has executed it in the manner prescribed by the Act under which it is to be registered. 1998, c. 19, s. 7 (1).

Contents

- (2) A declaration shall contain,
 - (a) a statement that this Act governs the land and interests appurtenant to the land, as the land and the interests are described in the description;
 - (b) the consent of every person having a registered mortgage against the land or interests appurtenant to the land, as the land and the interests are described in the description;
 - (c) a statement of the proportions, expressed in percentages, of the common interests appurtenant to the units;
 - (d) a statement of the proportions, expressed in percentages allocated to the units, in which the owners are to contribute to the common expenses;
 - (e) an address for service, a municipal address for the corporation, if available, and the mailing address of the corporation if it differs from its address for service or municipal address;
 - (f) a specification of all parts of the common elements that are to be used by the owners of one or more designated units and not by all the owners;
 - (g) a statement of all conditions that the approval authority, in approving or exempting the description under section 9, requires the declaration to mention; and
 - (h) all other material that the regulations made under this Act require. 1998, c. 19, s. 7 (2).

Consent

(3) A person shall not withhold the consent mentioned in clause (2) (b) by reason only of the failure of the declarant to enter into a specified number of agreements of purchase and sale for the sale of proposed units. 1998, c. 19, s. 7 (3).

Additional contents

- (4) In addition to the material mentioned in subsection (2) and in any other section in this Act, a declaration may contain,
 - (a) a statement specifying the common expenses of the corporation;
 - (b) conditions or restrictions with respect to the occupation and use of the units or common elements;
 - (c) conditions or restrictions with respect to gifts, leases and sales of the units and common interests;
 - (d) a list of the responsibilities of the corporation consistent with its objects and duties; and
 - (e) a description of the allocation of obligations to maintain the units and common elements and to repair them after damage, which allocation has been done in accordance with this Act. 1998, c. 19, s. 7 (4).

Inconsistent provisions

(5) If any provision in a declaration is inconsistent with the provisions of this Act, the provisions of this Act prevail and the declaration shall be deemed to be amended accordingly. 1998, c. 19, s. 7 (5).

Requirements for description

- 8. (1) Subject to the regulations made under this Act, a description shall contain,
 - (a) a plan of survey showing the perimeter of the horizontal surface of the land and the perimeter of the buildings;
 - (b) architectural plans of the buildings and, if there are any, structural plans of the buildings;
 - (c) a specification of the boundaries of each unit by reference to the buildings or other monuments;
 - (d) diagrams showing the shape and dimensions of each unit and the approximate location of each unit in relation to the other units and the buildings;
 - (e) a certificate of an architect that all buildings have been constructed in accordance with the regulations and, if there are structural plans, a certificate of an engineer that all buildings have been constructed in accordance with the regulations;
 - (f) a certificate signed by an Ontario land surveyor licensed under the *Surveyors Act* stating that the diagrams of the units are substantially accurate;
 - (g) a description of all interests appurtenant to the land that are included in the property; and
 - (h) all other material that the regulations made under this Act require. 1998, c. 19, s. 8 (1).

Preparation of documents

(2) A survey, plan, specification, diagram, certificate or description mentioned in subsection (1) shall be prepared in accordance with the regulations made under this Act. 1998, c. 19, s. 8 (2).

Common elements, units in building

(3) A description shall not be registered unless,

- (a) the property includes common elements; and
- (b) each unit for residential purposes includes one or more buildings or is included in a building. 1998, c. 19, s. 8 (3).

Approval by examiner of surveys

(4) The examiner of surveys appointed under the *Land Titles Act* may require a description or an amendment to a description to be submitted to the examiner of surveys for approval before it is registered. 1998, c. 19, s. 8 (4).

Same

(5) The examiner of surveys shall approve the description or the amendment to the description if satisfied that the document submitted meets the requirements of this section. 1998, c. 19, s. 8 (5).

PLANNING ACT

Subdivision control

9. (1) Section 50 of the *Planning Act* does not apply in respect of,

- (a) dealings with whole units and common interests; or
- (b) easements transferred by or reserved to the corporation. 1998, c. 19, s. 9 (1).

Approvals of descriptions

(2) Subject to this section, the provisions of sections 51, 51.1 and 51.2 of the *Planning Act* that apply to a plan of subdivision apply with necessary modifications to a description or an amendment to a description. 1998, c. 19, s. 9 (2).

Registration

(3) A description or an amendment to a description shall not be registered unless,

- (a) the approval authority has approved it; or
- (b) the approval authority has exempted it from those provisions of sections 51 and 51.1 of the *Planning Act* that would normally apply to it under subsection (2) and it is accompanied by a certificate of exemption issued by the approval authority. 1998, c. 19, s. 9 (3).

Conversion of rented residential premises

(4) If an applicant makes an application for approval in respect of a property that includes a building or related group of buildings containing one or more premises that is used as a rented residential premises or that has been used as a rented residential premises and is vacant, the approval authority may, after consulting with the council of the local municipality in which the property is located if the approval authority is not that municipality, require the applicant to have a person who holds a certificate of authorization within the meaning of the *Professional Engineers Act* or a certificate of practice within the meaning of the *Architects Act* or another qualified person inspect the property and report to the approval authority all matters that the approval authority considers may be of concern. 1998, c. 19, s. 9 (4).

Additional conditions

(5) In addition to the conditions that it may impose under subsection 51 (25) of the *Planning Act*, the approval authority that receives an application described in subsection (4) may impose the conditions that it considers are reasonable in light of the report mentioned in subsection (4). 1998, c. 19, s. 9 (5).

Application for exemption

(6) Before making an application under subsection 51 (16) of the *Planning Act*, the owner of a property or a person authorized in writing by the owner of the property may apply to the approval authority to have the description or any part of the description exempted from those provisions of sections 51 and 51.1 of the *Planning Act* that would normally apply to it under subsection (2). 1998, c. 19, s. 9 (6).

Individual exemption

(7) The approval authority may grant an exemption if it believes the exemption is appropriate in the circumstances. 1998, c. 19, s. 9 (7).

Exemption made by Minister

(8) If the Minister of Municipal Affairs and Housing is the approval authority, that Minister may by regulation provide that the provisions of sections 51 and 51.1 of the *Planning Act* that apply to a plan of subdivision do not apply to a class of description or an amendment to a class of description specified in the regulation. 1998, c. 19, s. 9 (8).

Effect of regulation

(9) The regulation may be restricted to specified geographic areas of Ontario. 1998, c. 19, s. 9 (9).

Exemption made by municipality

(10) If the Minister of Municipal Affairs and Housing is not the approval authority, the approval authority may by by-law provide that the provisions of sections 51 and 51.1 of the *Planning Act* that apply to a plan of subdivision do not apply to a class of description or an amendment to a class of description specified in the by-law. 1998, c. 19, s. 9 (10).

Effect of by-law

(11) The by-law may be restricted to specified geographic areas within the geographic area of the authority. 1998, c. 19, s. 9 (11).

s. 52 of Planning Act

(12) Section 52 of the *Planning Act* applies in respect of a description of a vacant land condominium corporation but does not apply in respect of a description of any other corporation. 1998, c. 19, s. 9 (12).

**PART III
OWNERSHIP****Type of property**

10. Units and common elements are real property for all purposes. 1998, c. 19, s. 10.

Ownership of property

11. (1) Subject to this Act, the declaration and the by-laws, each owner is entitled to exclusive ownership and use of the owner's unit. 1998, c. 19, s. 11 (1).

Same, common elements

(2) The owners are tenants in common of the common elements and an undivided interest in the common elements is appurtenant to each owner's unit. 1998, c. 19, s. 11 (2).

Common interests

(3) The proportions of the common interests are those expressed in the declaration. 1998, c. 19, s. 11 (3).

No separation

(4) The ownership of a unit shall not be separated from the ownership of the common interest and an instrument that purports to separate the ownership of a unit from a common interest is void. 1998, c. 19, s. 11 (4).

No division

(5) Except as provided by this Act, the common elements shall not be partitioned or divided. 1998, c. 19, s. 11 (5).

Easements

12. (1) The following easements are appurtenant to each unit and shall be for the benefit of the owner of the unit and the corporation:

1. An easement for the provision of a service through the common elements or any other unit.
2. An easement for support by all buildings and structures necessary for providing support to the unit.
3. If a building or a part of a building moves after registration of the declaration and description or after having been damaged and repaired but has not been restored to the position occupied at the time of registration of the declaration and description, an easement for exclusive use and occupation over the space of the other units and common elements that would be space included in the unit if the boundaries of the unit were determined by the position of the buildings from time to time after registration of the description and not at the time of registration.
4. If a corporation is entitled to use a service or facility in common with another corporation, an easement for access to and for the installation and maintenance of the service or facility over the land of the other corporation, described in accordance with the regulations made under this Act. 1998, c. 19, s. 12 (1).

Same, common elements

(2) The following easements are appurtenant to the common elements:

1. An easement for the provision of a service through a unit or through a part of the common elements of which an owner has exclusive use.
2. An easement for support by all units necessary for providing support. 1998, c. 19, s. 12 (2).

Effect on encumbrances

13. Upon the registration of the declaration and description, an encumbrance against the common elements is no longer enforceable against the common elements but is enforceable against all the units and common interests. 1998, c. 19, s. 13.

Discharge of encumbrances

14. (1) If an encumbrance registered before the registration of the declaration and description is, by virtue of section 13, enforceable against all the units of a corporation and their common interests, an owner may discharge the portion of the encumbrance that is applicable to the owner's unit and common interest by paying to the encumbrancer the portion of the amount owing on account of principal and interest under the encumbrance that is attributable to the owner's common interest as specified in the declaration. 1998, c. 19, s. 14 (1).

Form

(2) Upon payment of the portion of the encumbrance sufficient to discharge a unit and common interest, and upon demand, the encumbrancer shall give to the owner a discharge of that unit and common interest in accordance with the requirements of the regulations made under this Act. 1998, c. 19, s. 14 (2).

Assessment

15. (1) Each unit, together with its appurtenant common interest, constitutes a parcel for the purpose of municipal assessment and taxation. 1998, c. 19, s. 15 (1).

Common elements

(2) Subject to subsection (3), the common elements of a corporation that is not a common elements condominium corporation do not constitute a parcel for the purpose of municipal assessment and taxation. 1998, c. 19, s. 15 (2).

Exception

(3) A part of the common elements of a corporation that is not a common elements condominium corporation constitutes a separate parcel for the purpose of municipal assessment and taxation if it is leased for business purposes under section 21, the lessee carries on an undertaking for gain on it and it is in the commercial property class prescribed under the *Assessment Act*. 1998, c. 19, s. 15 (3).

Common elements condominium corporation

(4) The common elements of a common elements condominium corporation constitute a parcel for the purpose of municipal assessment and taxation within each municipality in which the common elements or a part of them are located and the municipal taxes levied on the parcel or parcels shall form part of the common expenses of the corporation. 1998, c. 19, s. 15 (4).

PART IV
CORPORATION
GENERAL

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Seal

16. (1) The corporation shall have a seal that the board shall adopt and may change. 1998, c. 19, s. 16 (1).

Name

(2) The name of the corporation shall appear in legible characters on the seal. 1998, c. 19, s. 16 (2).

Objects

17. (1) The objects of the corporation are to manage the property and the assets, if any, of the corporation on behalf of the owners. 1998, c. 19, s. 17 (1).

Duties

(2) The corporation has a duty to control, manage and administer the common elements and the assets of the corporation. 1998, c. 19, s. 17 (2).

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Ensuring compliance

(3) The corporation has a duty to take all reasonable steps to ensure that the owners, the occupiers of units, the lessees of the common elements and the agents and employees of the corporation comply with this Act, the declaration, the by-laws and the rules. 1998, c. 19, s. 17 (3).

Dealing with title to real property

17.1 Nothing in this Act confers on the corporation the power to grant, transfer, lease, release, dispose of or otherwise deal with the title to any real property that the corporation does not own or any interest in real property where the corporation does not own the interest, unless this Act specifically confers the power on the corporation. 2000, c. 26, Sched. B, s. 7 (1).

Assets

18. (1) The corporation may own, acquire, encumber and dispose of real and personal property only for purposes that are consistent with the objects and duties of the corporation. 1998, c. 19, s. 18 (1).

Interests in real property

(1.1) The assets of the corporation do not include any real property that the corporation does not own or any interest in real property where the corporation does not own the interest. 2000, c. 26, Sched. B, s. 7 (2).

Interest in assets

(2) The owners share the assets of the corporation in the same proportions as the proportions of their common interests in accordance with this Act, the declaration and the by-laws. 1998, c. 19, s. 18 (2).

Validity of easement

(3) A grant or transfer of an easement to the corporation is valid even though the corporation does not own land capable of being benefited by the easement. 1998, c. 19, s. 18 (3).

Right of entry

19. On giving reasonable notice, the corporation or a person authorized by the corporation may enter a unit or a part of the common elements of which an owner has exclusive use at any reasonable time to perform the objects and duties of the corporation or to exercise the powers of the corporation. 1998, c. 19, s. 19.

Easements described in declaration or phase

20. (1) An easement described in subsection (2) is created,

- (a) upon the registration of a declaration and description that creates a corporation, if the easement is described in the declaration and description;
or

- (b) upon the registration of an amendment to a declaration and description that creates a phase within the meaning of Part XI in a phased condominium corporation, if the easement is described in the amendment. 1998, c. 19, s. 20 (1).

Application

- (2) Subsection (1) applies to an easement that,
- (a) imposes a benefit or a burden on land owned by the declarant other than the property; or
 - (b) the approval authority requires as a condition of approving the declaration and description for the corporation. 1998, c. 19, s. 20 (2).

Creation of easement

(3) No deed or other document is required to be registered or delivered to the owner of the land benefited by an easement that is created under subsection (1) in order for the easement to be made effective. 1998, c. 19, s. 20 (3).

Validity of easement

(4) An easement that is created under subsection (1) is valid even though the declarant owns the land to be benefited or burdened by the easement in addition to owning the land relating to the easement that is described in the description. 1998, c. 19, s. 20 (4).

Easements and lease of common elements

- 21.** (1) The corporation may by by-law,
- (a) lease a part of the common elements, except a part that the declaration specifies is to be used only by the owners of one or more designated units and not by all the owners;
 - (b) grant or transfer an easement or licence through the common elements; or
 - (c) release an easement that is part of the common elements. 1998, c. 19, s. 21 (1); 2000, c. 26, Sched. B, s. 7 (3).

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Binding on all owners

(2) A lease, grant, transfer or release mentioned in subsection (1), signed by the authorized officers of the corporation, affects the interest of every owner in the common elements as if the lease, grant, transfer or release had been executed by that owner. 1998, c. 19, s. 21 (2); 2000, c. 26, Sched. B, s. 7 (4).

Telecommunications agreements

22. (1) In this section,

“telecommunications” means the emission, transmission or reception of any combination of signs, signals, writing, images, sound, data, alphanumeric characters or intelligence of any nature by wire, cable, radio or an optical, electromagnetic or any similar technical system; (“télécommunications”)

“telecommunications agreement” means an agreement for the provision of services or facilities related to telecommunications to, from or within the property of a corporation and includes a grant or transfer of an easement, lease or licence through the property of a corporation for the purposes of telecommunications. (“convention concernant les télécommunications”) 1998, c. 19, s. 22 (1).

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By-law not required

- (2) Despite subsection 21 (1), a corporation may, by resolution of the board without a by-law,
- (a) make an agreement for a network upgrade to a telecommunications system that services the units of the corporation;
 - (b) make an agreement for a telecommunications system that is not connected to a telecommunications system that services the units of the corporation; or
 - (c) amend an agreement for a telecommunications system that services the units of the corporation to permit the other party to the agreement to supply and invoice part or all of the services directly to the unit owners. 1998, c. 19, s. 22 (2).

Notice required

(3) Subsections 97 (3), (4), (5) and (6) apply to an agreement described in subsection (2) as if it were a change in a service that a corporation provides to the owners. 1998, c. 19, s. 22 (3).

Charge to unit owners

(4) The cost of the services that are invoiced directly to the unit owners under clause (2) (c) shall not form part of the common expenses, despite anything in the declaration. 1998, c. 19, s. 22 (4).

Telecommunications easement

(5) A corporation and a party, if any, that has entered into a telecommunications agreement with the corporation shall have a non-exclusive easement over the part of the property described in clause (b) for the purpose of installing and using a telecommunications system if,

- (a) the corporation was created on or after the day this section comes into force and includes one or more units for residential purposes;
- (b) part of the property is designed to control, facilitate or provide telecommunications to, from or within the property; and
- (c) the corporation does not have an easement over the property described in the description or a right to use the property that is adequate for,
 - (i) the telecommunications agreement that it has entered into with respect to the property, if it has entered into such an agreement, or
 - (ii) the telecommunications system that the corporation intends to install and use on the property, if it has not entered into a telecommunications agreement with respect to the property. 1998, c. 19, s. 22 (5).

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Duty to accommodate easement

(6) If a telecommunications system installed on the part of the property described in clause (5) (b) interferes with a telecommunications system that the corporation intends to have installed and to use on the property described in the description, the owner of the part of the property shall, upon 30 days written notice by the owner of the easement described in subsection (5), take all necessary steps that are reasonable to accommodate the intended telecommunications system. 1998, c. 19, s. 22 (6).

Validity of easement

(7) The easement is valid even though the corporation and the party, if any, that has entered into a telecommunications agreement with the corporation own no land to be benefited by the easement. 1998, c. 19, s. 22 (7).

Easements non-exclusive

(8) If the property of a corporation that includes one or more units for residential purposes is subject to an easement for the purposes of telecommunications and at least 10 years have passed since the later of the execution of the grant of the easement and the registration of the declaration and description, then, despite anything in the grant, the easement shall be deemed to be non-exclusive. 1998, c. 19, s. 22 (8).

Termination of agreements

- (9) A corporation that includes one or more units for residential purposes may terminate a telecommunications agreement if,
- (a) at least 10 years have passed since the later of the execution of the agreement and the registration of the declaration and description;
 - (b) the board has, by resolution, approved the termination of the agreement;
 - (c) the owners of more than 50 per cent of the units at the time the board passes the resolution consent in writing to the termination of the agreement; and
 - (d) the corporation has given the person 120 days written notice of the termination. 1998, c. 19, s. 22 (9).

Exception

- (10) Subsection (9) does not apply to a telecommunications agreement if,
- (a) the corporation entered into the agreement after a new board is elected at a turn-over meeting held under section 43;
 - (b) the agreement is non-exclusive; and
 - (c) the agreement makes allowance for the installation of alternate telecommunications systems. 1998, c. 19, s. 22 (10).

Personal property

(11) If, under subsection (9), a corporation terminates a telecommunications agreement, a party to the agreement may, on giving reasonable notice to the corporation, remove personal property that it owns and that is located on the property that was subject to the agreement within 30 days after the termination of the agreement. 1998, c. 19, s. 22 (11).

Duties on removal

- (12) A party removing personal property under subsection (11) shall,
- (a) carry out the removal in a manner that facilitates the installation of other similar personal property for the purposes of telecommunications; and
 - (b) reimburse the corporation for the damage, if any, that the removal causes to the property of the corporation. 1998, c. 19, s. 22 (12).

Abandonment

(13) A party to a telecommunications agreement that has the right to remove its personal property under subsection (11) shall be deemed to have abandoned the property if it does not remove the property within the time specified in that subsection. 1998, c. 19, s. 22 (13).

Action by corporation

23. (1) Subject to subsection (2), in addition to any other remedies that a corporation may have, a corporation may, on its own behalf and on behalf of an owner,

- (a) commence, maintain or settle an action for damages and costs in respect of any damage to common elements, the assets of the corporation or individual units; and
- (b) commence, maintain or settle an action with respect to a contract involving the common elements or a unit, even though the corporation was not a party to the contract in respect of which the action is brought. 1998, c. 19, s. 23 (1).

Notice to owners

(2) Before commencing an action mentioned in subsection (1), the corporation shall give written notice of the general nature of the action to all persons whose names are in the record of the corporation maintained under subsection 47 (2) except if,

- (a) the action is to enforce a lien of the corporation under section 85 or to fulfil its duty under subsection 17 (3); or
- (b) the action is commenced in the Small Claims Court. 1998, c. 19, s. 23 (2).

Costs

(3) Unless the board determines otherwise, the legal and court costs in an action that the corporation commences or maintains in whole or in part on behalf of any owners in respect of their units shall be borne by those owners in the proportion in which their interests are affected. 1998, c. 19, s. 23 (3).

Judgment as asset

(4) A judgment for payment in favour of the corporation in an action that the corporation commences or maintains on its own behalf is an asset of the corporation. 1998, c. 19, s. 23 (4).

Corporation may be sued

(5) The corporation may, as representative of the owners of the units, be sued in respect of any matter relating to the common elements or assets of the corporation. 1998, c. 19, s. 23 (5).

Judgment against corporation

(6) A judgment for the payment of money against the corporation is also a judgment against each owner at the time of judgment for a portion of the judgment determined by the proportions specified in the declaration for sharing the common interests. 1998, c. 19, s. 23 (6).

Notices under the Expropriations Act

24. (1) For the purposes of the *Expropriations Act*, if the land to be expropriated is part of the common elements of a corporation and does not include any units, any document that an expropriating authority is required or entitled to serve on the owner of the land, including a notice, an appraisal report and an offer of compensation, is sufficiently served on the owners of the land if the expropriating authority serves the document,

- (a) on the corporation; and
- (b) if the land to be expropriated is part of the common elements that the declaration specifies are for the exclusive use of the owners of one or more of the units of the corporation, but not all the owners, on the owners of those units. 1998, c. 19, s. 24 (1).

Notice to owners

(2) Within 15 days of being served with a document under subsection (1), the corporation shall notify all persons whose names are in the record of the corporation maintained under subsection 47 (2) that it has been served with a document for the purposes of the *Expropriations Act* and shall make a copy of the document available for examination by them. 1998, c. 19, s. 24 (2).

Corporation acting for owners

(3) For the purposes of the *Expropriations Act*, all the rights under that Act of the owners of the land to be expropriated in respect of which a document has been served on the corporation under subsection (1) shall be transferred to and exercised by the corporation, subject to section 126. 1998, c. 19, s. 24 (3).

Notices under the Planning Act

25. A corporation that is served with a notice under the *Planning Act* shall, within 15 days of being served, notify all persons whose names are in the record of the corporation maintained under subsection 47 (2) that it has been served with a notice under that Act and shall make a copy of the notice available for examination by them. 1998, c. 19, s. 25.

Occupier's liability

26. For the purposes of determining liability resulting from breach of the duties of an occupier of land, the corporation shall be deemed to be the occupier of the common elements and the owners shall be deemed not to be occupiers of the common elements. 1998, c. 19, s. 26.

DIRECTORS AND OFFICERS**Board of directors**

27. (1) A board of directors shall manage the affairs of the corporation. 1998, c. 19, s. 27 (1).

Number

(2) Subject to subsection 42 (4), the board shall consist of at least three persons or such greater number as the by-laws may provide. 1998, c. 19, s. 27 (2).

Change in number

(3) The corporation may by by-law increase or, subject to subsection (2), decrease the number of directors as set out in its by-laws. 1998, c. 19, s. 27 (3).

Election of directors

28. (1) Subject to subsection 42 (1), the owners shall elect the board of directors in accordance with this Act and the by-laws. 1998, c. 19, s. 28 (1).

Notice of candidates

(2) The notice of a meeting to elect one or more directors shall include the name and address of each individual who has notified the board in writing of the intention to be a candidate in the election as of the fourth day before the notice is sent. 1998, c. 19, s. 28 (2).

Notice of owner-occupant position

(3) If, under subsection 51 (6), one position on the board is reserved for voting by owners of owner-occupied units, the notice of meeting shall include,

- (a) a statement that one position on the board is reserved for voting by owners of owner-occupied units; and
- (b) a statement indicating which persons have notified the board in writing as of the day before the notice is sent that they intend to be candidates for the position on the board reserved for voting by owners of owner-occupied units. 1998, c. 19, s. 28 (3).

Qualifications

29. (1) No person shall be a director if,
- (a) the person is under eighteen years of age;
 - (b) the person is an undischarged bankrupt; or
 - (c) the person is a incapable of managing property within the meaning of the *Substitute Decisions Act, 1992*.

Disqualification

- (2) A person immediately ceases to be a director if,
- (a) the person becomes an undischarged bankrupt or a incapable of managing property within the meaning of the *Substitute Decisions Act, 1992*; or
 - (b) a certificate of lien has been registered under subsection 85 (2) against a unit owned by the person and the person does not obtain a discharge of the lien under subsection 85 (7) within 90 days of the registration of the lien. 1998, c. 19, s. 29 (2).

Consent

30. (1) A person shall not be elected or appointed as a director unless the person consents. 1998, c. 19, s. 30 (1).

Deemed consent

(2) A person shall be deemed to consent if the person is present at the meeting when elected or appointed and does not refuse to act as a director. 1998, c. 19, s. 30 (2).

Written consent

(3) A person who is not present at the meeting may be elected or appointed if the person consents in writing to act as director before the meeting or within 10 days after the meeting. 1998, c. 19, s. 30 (3).

Non compliance

- (4) The election or appointment of a person as director contrary to this section is ineffective. 1998, c. 19, s. 30 (4).

Term

31. (1) Except in the case of directors appointed to the first board of directors under subsection 42 (1), a director is elected for a term of three years or such lesser period as the by-laws may provide. 1998, c. 19, s. 31 (1).

Same

- (2) Despite subsection (1), a director may continue to act until a successor is elected. 1998, c. 19, s. 31 (2).

Conduct of business

32. (1) Subject to subsection 42 (5), the board of a corporation shall not transact any business of the corporation except at a meeting of directors at which a quorum of the board is present. 1998, c. 19, s. 32 (1).

Quorum

- (2) A quorum for the transaction of business is a majority of the members of the board. 1998, c. 19, s. 32 (2).

Removal

33. (1) Subject to subsection 51 (8), a director, other than a director on the first board, may be removed before the expiration of the director's term of office by a vote of the owners at a meeting duly called for the purpose where the owners of more than 50 per cent of all of the units in the corporation vote in favour of removal. 1998, c. 19, s. 33 (1).

Replacement

(2) In accordance with the by-laws dealing with the election of directors, the owners may, at the meeting, elect any person qualified to be a member of the board for the remainder of the term of a director who has been removed. 1998, c. 19, s. 33 (2).

Vacancy

34. (1) If a vacancy arises in the board, the remaining directors may exercise all the powers of the board as long as a quorum of the board remains in office. 1998, c. 19, s. 34 (1).

Replacement made by board

(2) If a vacancy arises in the board and a quorum of the board remains in office, the majority of the remaining members of the board may appoint any person qualified to be a member of the board to fill the vacancy until the next annual general meeting. 1998, c. 19, s. 34 (2).

Replacement made by owners

(3) Subject to subsection 51 (6), at the annual general meeting mentioned in subsection (2) the owners shall elect a person to fill the vacancy that arose under that subsection who shall hold office for the remainder of the term of the director whose position became vacant. 1998, c. 19, s. 34 (3).

Election when no quorum

(4) If a vacancy arises in the board and there are not enough directors remaining in office to constitute a quorum, the remaining directors shall, within 30 days of losing the quorum, call and hold a meeting of owners to fill all vacancies in the board. 1998, c. 19, s. 34 (4).

Owner may call meeting

(5) If the directors do not call and hold the meeting or if there are no directors then in office, an owner may call the meeting. 1998, c. 19, s. 34 (5).

Reimbursement of cost

(6) Upon request, the corporation shall reimburse an owner who calls a meeting under subsection (5) for the reasonable costs incurred in calling the meeting. 1998, c. 19, s. 34 (6).

Increase

(7) Despite subsection (2), a vacancy resulting from an increase in the number of directors shall be filled only by election at a meeting of owners duly called for that purpose and the directors so elected shall not act until the by-law increasing the number of directors is registered under subsection 56 (9). 1998, c. 19, s. 34 (7).

Meetings of directors

35. (1) In addition to meetings of the directors required by the by-laws of the corporation, a quorum of the directors may, at any time, call a meeting for the transaction of any business. 1998, c. 19, s. 35 (1).

Notice

(2) The person calling a meeting of directors shall give a written notice of the meeting to every director of the corporation,

- (a) at least 10 days before the day of the meeting, unless the by-laws specify otherwise; and
- (b) by delivering it to the director personally or by sending it by prepaid mail, courier delivery or electronic communication addressed to the director at the latest address as shown on the records of the corporation, unless the by-laws specify otherwise. 1998, c. 19, s. 35 (2).

Content of notice

(3) The notice shall state the time and place of the meeting and the general nature of the business to be discussed at the meeting. 1998, c. 19, s. 35 (3).

Waiver of notice

(4) A director who attends a meeting shall be deemed to have waived the right to object to a failure to give the required notice unless the director expressly objects to the failure at the meeting. 1998, c. 19, s. 35 (4).

Teleconference

(5) A meeting of the directors may be held by teleconference or another form of communications system that allows the directors to participate concurrently if,

- (a) the by-laws authorize those means for holding a meeting of the directors; and
- (b) all directors of the corporation consent to the means used for holding the meeting. 1998, c. 19, s. 35 (5).

Officers

36. (1) A corporation shall have a president and a secretary and all other officers that are provided for by by-law or by resolution of the directors. 1998, c. 19, s. 36 (1).

Election and appointment

(2) Subject to the by-laws, the directors,

- (a) shall elect the president from among themselves;
- (b) shall appoint or elect the secretary; and
- (c) may appoint or elect one or more vice-presidents or other officers. 1998, c. 19, s. 36 (2).

Holding several offices

(3) The same person may hold two or more offices of the corporation. 1998, c. 19, s. 36 (3).

Standard of care

37. (1) Every director and every officer of a corporation in exercising the powers and discharging the duties of office shall,

- (a) act honestly and in good faith; and
- (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. 1998, c. 19, s. 37 (1).

Validity of acts

(2) The acts of a director or officer are valid despite any defect that may afterwards be discovered in the person's election, appointment or qualifications. 1998, c. 19, s. 37 (2).

Liability of directors

(3) A director shall not be found liable for a breach of a duty mentioned in subsection (1) if the breach arises as a result of the director's relying in good faith upon,

- (a) financial statements of the corporation that the auditor in a written report, an officer of the corporation or a manager under an agreement for the management of the property represents to the director as presenting fairly the financial position of the corporation in accordance with generally accepted accounting principles; or
- (b) a report or opinion of a lawyer, public accountant, engineer, appraiser or other person whose profession lends credibility to the report or opinion. 1998, c. 19, s. 37 (3).

Indemnification

38. (1) Subject to subsection (2), the by-laws of a corporation may provide that every director and every officer of the corporation and the person's heirs, executors, administrators, estate trustees and other legal personal representatives may from time to time be indemnified and saved harmless by the corporation from and against,

- (a) any liability and all costs, charges and expenses that the director or officer sustains or incurs in respect of any action, suit or proceeding that is proposed or commenced against the person for or in respect of anything that the person has done, omitted to do or permitted in respect of the execution of the duties of office; and
- (b) all other costs, charges and expenses that the person sustains or incurs in respect of the affairs of the corporation. 1998, c. 19, s. 38 (1).

Not for breach of duty

(2) No director or officer of a corporation shall be indemnified by the corporation in respect of any liability, costs, charges or expenses that the person sustains or incurs in or about an action, suit or other proceeding as a result of which the person is adjudged to be in breach of the duty to act honestly and in good faith. 1998, c. 19, s. 38 (2).

Insurance

39. If the insurance is reasonably available, a corporation shall purchase and maintain insurance for the benefit of a director or officer against the matters described in clauses 38 (1) (a) and (b) except insurance against a liability, cost, charge or expense of the director or officer incurred as a result of a breach of the duty to act honestly and in good faith. 1998, c. 19, s. 39.

Disclosure by director of interest

40. (1) A director of a corporation who has, directly or indirectly, an interest in a contract or transaction to which the corporation is a party or a proposed contract or transaction to which the corporation will be a party, shall disclose in writing to the corporation the nature and extent of the interest. 1998, c. 19, s. 40 (1).

Interest to be material

(2) Subsection (1) does not apply to a contract or transaction or a proposed contract or transaction unless both it and the director's interest in it are material. 1998, c. 19, s. 40 (2).

Purchase of property

(3) If the contract or transaction or the proposed contract or transaction to which subsection (1) applies involves the purchase or sale of real or personal property by the corporation that the seller acquired within five years before the date of the contract or transaction or the proposed contract or transaction, the director shall disclose the cost of the property to the seller, to the extent to which that information is within the director's knowledge or control. 1998, c. 19, s. 40 (3).

Time of disclosure

- (4) The disclosure required by this section shall be made,
 - (a) at the meeting of the board at which the contract or transaction or the proposed contract or transaction is first considered;
 - (b) if the director is not as of the date of the meeting mentioned in clause (a) interested in the contract or transaction or the proposed contract or transaction, at the next meeting of the directors held after the director becomes so interested;
 - (c) if the director becomes interested in the contract or transaction after it is entered into, at the first meeting of the directors held after the director becomes so interested; or
 - (d) if the contract or transaction or the proposed contract or transaction is one that in the ordinary course of the corporation's business would not require approval by the directors or owners, at the first meeting of the directors held after the director becomes aware of the contract or transaction or the proposed contract or transaction. 1998, c. 19, s. 40 (4).

Minutes

(5) The board shall enter the disclosure made by a director under this section in the minutes of the meeting of the board at which the disclosure was made. 1998, c. 19, s. 40 (5).

Right to vote

(6) The director shall not be present during the discussion at a meeting, vote or be counted in the quorum on a vote with respect to a contract or transaction or a proposed contract or transaction to which subsection (1) applies unless the director's interest in it,

- (a) is or would be limited solely to the insurance described in section 39 or remuneration as a director, officer or employee of the corporation; or
- (b) arises or would arise solely because the director is a director, officer or employee of the declarant, if the director has been appointed to the first board by the declarant under subsection 42 (1). 1998, c. 19, s. 40 (6).

Effect of disclosure

(7) A director who has complied with the requirements of this section and who was acting honestly and in good faith at the time the contract or transaction was entered into, is not, by reason only of holding the office of director, accountable to the corporation or to its owners for any profit or gain realized from the contract or transaction, and the contract or transaction is not voidable by reason only of the director's interest in it. 1998, c. 19, s. 40 (7).

Confirmation by owners

(8) Despite anything in this section, a director who has acted honestly and in good faith is not accountable to the corporation or to the owners for any profit or gain realized from the contract or transaction by reason only of holding the office of director, and the contract or transaction is not voidable by reason only of the director's interest in it if,

- (a) the contract or transaction is confirmed or approved by at least two-thirds of the votes cast at a meeting of owners duly called for that purpose; and
- (b) the nature and extent of the director's interest in the contract or transaction are declared and disclosed in reasonable detail in the notice calling the meeting. 1998, c. 19, s. 40 (8).

Disclosure by officer of interest

41. (1) An officer of a corporation who is not a director and who has, directly or indirectly, an interest in a contract or transaction to which the corporation is a party or a proposed contract or transaction to which the corporation will be a party, shall disclose in writing to the corporation the nature and extent of the interest. 1998, c. 19, s. 41 (1).

Time of disclosure

(2) An officer who is required to make a disclosure under subsection (1) shall make the disclosure at the first meeting of the board held after the officer becomes aware of the contract or transaction or the proposed contract or transaction. 1998, c. 19, s. 41 (2).

Application of s. 40

(3) Subsections 40 (2), (3), (5), (7) and (8) apply to an officer of a corporation who is not a director as if all references to a director in those subsections were references to an officer. 1998, c. 19, s. 41 (3).

TRANSFER OF CONTROL BY DECLARANT

First board of directors

42. (1) Within 10 days after the registration of the declaration and description, the declarant shall appoint the first board of a corporation. 1998, c. 19, s. 42 (1).

Replacements

(2) The declarant may revoke the appointment of a director to the first board and appoint another director to the first board who shall hold office until a new board is elected at a turn-over meeting held under section 43. 1998, c. 19, s. 42 (2).

Term

- (3) The first board shall hold office until a new board is elected at a turn-over meeting held under section 43. 1998, c. 19, s. 42 (3).

Number

- (4) The first board shall consist of three persons or such greater number as the declaration provides. 1998, c. 19, s. 42 (4).

Conduct of business

(5) A written resolution that is adopted by the first board before the owners elect a director to the first board under subsection (8) and that is signed by all the directors entitled to vote on the resolution at a meeting of the first board, is valid even though no meeting is held to vote on the resolution. 1998, c. 19, s. 42 (5).

Owners' meeting

- (6) Subject to subsection (7), the first board shall call and hold a meeting of owners by the later of,
 - (a) the 30th day after the day by which the declarant has transferred 20 per cent of the units in the corporation; and
 - (b) the 90th day after the declarant transfers the first unit in the corporation. 1998, c. 19, s. 42 (6).

Exception

(7) The first board is not required to call or hold the meeting mentioned in subsection (6) if, by the day set for the meeting, the declarant no longer owns a majority of the units and advises the first board in writing of that fact. 1998, c. 19, s. 42 (7).

Election of directors

(8) At the meeting mentioned in subsection (6), the owners, other than the declarant, may elect two directors to the first board. 1998, c. 19, s. 42 (8).

Quorum

(9) Despite subsection 50 (1), at the meeting mentioned in subsection (6), the quorum for the election of directors under subsection (8) is those owners who own 25 per cent of the units in the corporation not owned by the declarant. 1998, c. 19, s. 42 (9).

Determination of quorum

(10) To count towards the quorum, an owner must have been entitled to receive notice of the meeting, must be entitled to vote at a meeting and shall be present at the meeting or represented by proxy. 1998, c. 19, s. 42 (10).

Increased number

(11) A director elected to the first board under subsection (8) shall hold office in addition to the directors appointed to the first board even if the addition of an elected director results in more directors on the board than the declaration allows. 1998, c. 19, s. 42 (11).

Transition

(12) The owners other than the declarant shall not be entitled to elect a director under subsection (8) if the corporation's first board was appointed or elected on or before the day this section comes into force. 1998, c. 19, s. 42 (12).

Turn-over meeting

43. (1) The board elected or appointed at a time when the declarant owns a majority of the units shall, not more than 21 days after the declarant ceases to be the registered owner of the majority of the units, call a meeting of owners to elect a new board. 1998, c. 19, s. 43 (1).

Who may call meeting

(2) If the board does not call the meeting within the required time, an owner or a mortgagee having the right to vote under section 48 may call the meeting. 1998, c. 19, s. 43 (2).

Time of meeting

(3) The board shall hold the meeting within 21 days after it is called. 1998, c. 19, s. 43 (3).

Things to turn over

(4) At the meeting, the declarant shall deliver to the board elected at the meeting,

- (a) the seal of the corporation;
- (b) the minute book for the corporation including a copy of the registered declaration, registered by-laws, current rules and minutes of owners' meetings and board meetings;
- (c) copies of all agreements entered into by the corporation or the declarant or the declarant's representatives on behalf of the corporation, including management contracts, deeds, leases, licences and easements;
- (d) copies of all policies of insurance and the related certificates or memoranda of insurance and all insurance trust agreements;
- (e) bills of sale or transfers for all items that are assets of the corporation but not part of the property;
- (f) the records maintained under subsection 47 (2) and subsection 83 (3); and
- (g) all records that it has related to the units or to employees of the corporation. 1998, c. 19, s. 43 (4).

Same, after meeting

(5) The declarant shall deliver to the board within 30 days after the meeting,

- (a) the existing warranties and guarantees for all the equipment, fixtures and chattels included in the sale of either the units or common elements that are not protected by warranties and guarantees given directly to a unit purchaser;
- (b) the as-built architectural, structural, engineering, mechanical, electrical and plumbing plans;
- (c) the as-built specifications, indicating all substantive changes, if any, from the original specifications;
- (d) all existing plans for underground site services, site grading, drainage and landscaping, and television, radio or other communications services;
- (e) all other existing plans and information not mentioned in clause (b), (c) or (d) that are relevant to the repair or maintenance of the property;
- (f) if the property of the corporation is subject to the *Ontario New Home Warranties Plan Act*,
 - (i) proof, in the form, if any, prescribed by the Minister, that the units and common elements have been enrolled in the Plan within the meaning of that Act in accordance with the regulations made under that Act, and
 - (ii) a copy of all final reports on inspections that the Corporation within the meaning of that Act requires be carried out on the common elements;
- (g) a table setting out the responsibilities for repair after damage and maintenance and indicating whether the corporation or the owners are responsible;
- (h) a schedule setting out what constitutes a standard unit for each class of unit that the declarant specifies for the purpose of determining the responsibility for repairing improvements after damage and insuring them;
- (i) all financial records of the corporation and of the declarant relating to the operation of the corporation from the date of registration of the declaration and the description;
- (j) if the meeting is held after nine months following the registration of the declaration and description, the reserve fund study that is required within the year following the registration of the declaration and description;
- (k) all reserve fund studies that have been completed or are required to have been completed at the time the meeting is held, other than the reserve fund study that is required within the year following the registration of the declaration and description;
- (l) a copy of the most current disclosure statement delivered to a purchaser of a unit in the corporation under section 72 before the meeting; and
- (m) all other material that the regulations made under this Act require to be given to the board. 1998, c. 19, s. 43 (5).

Cost

(6) The items mentioned in subsections (4) and (5) shall be prepared at the declarant's expense, except for the items mentioned in clauses (5) (j) and (k) which shall be prepared at the expense of the corporation. 1998, c. 19, s. 43 (6).

Audited financial statements

(7) The declarant shall deliver to the board within 60 days after the meeting audited financial statements of the corporation prepared by the auditor, on behalf of the owners and at the expense of the corporation, as of the last day of the month in which the meeting is held. 1998, c. 19, s. 43 (7).

Application

(8) The corporation may make an application to the Superior Court of Justice for an order under subsection (9). 1998, c. 19, s. 43 (8), S.O. 2001, c. 26.

Court order

- (9) The court, if satisfied that the declarant has, without reasonable excuse, failed to comply with subsection (4), (5) or (7),
- (a) shall order that the declarant pay damages to the corporation for the loss it incurred as a result of the declarant's acts of non-compliance with subsection (4), (5) or (7), as the case may be;
 - (b) shall order that the declarant pay the corporation's costs of the application;
 - (c) may order the declarant to pay to the corporation an additional amount not to exceed \$10,000; and
 - (d) may order the declarant to comply with subsection (4), (5) or (7), as the case may be. 1998, c. 19, s. 43 (9).

Performance audit

44. (1) If the property of the corporation includes one or more units for residential purposes or if the corporation is a common elements condominium corporation, the board shall retain a person who holds a certificate of authorization within the meaning of the *Professional Engineers Act* or a certificate of practice within the meaning of the *Architects Act* to conduct a performance audit of the common elements described in the description on behalf of the corporation. 1998, c. 19, s. 44 (1).

Time for audit

(2) A performance audit shall be conducted no earlier than six months, and no later than 10 months, following the registration of the declaration and description. 1998, c. 19, s. 44 (2).

Cost

(3) The corporation shall pay the cost of the performance audit and it shall form part of the corporation's budget for the year following the registration of the declaration and description. 1998, c. 19, s. 44 (3).

Purpose

(4) The person who conducts the performance audit shall determine whether there are any deficiencies in the performance of the common elements described in the description after construction has been completed on them that,

- (a) may give rise to a claim for payment out of the guarantee fund under section 14 of the *Ontario New Home Warranties Plan Act* to the corporation; or
- (b) subject to the regulations made under this Act, would give rise to a claim described in clause (a) if the property of the corporation were subject to that Act. 1998, c. 19, s. 44 (4).

Duties

- (5) In making the determination, the person who conducts the performance audit shall,
- (a) inspect the major components of the buildings on the property which, subject to the regulations made under this Act, include the foundation, parking garage, wall construction, air and vapour barriers, windows, doors, elevators, roofing, mechanical system, electrical system, fire protection system and all other components that are prescribed;
 - (b) subject to the regulations made under this Act, inspect the landscaped areas of the property;
 - (c) review all final reports on inspections that the Corporation within the meaning of the *Ontario New Home Warranties Plan Act* requires be carried out on the common elements; and
 - (d) conduct a survey of the owners of the corporation as to what evidence, if any, they have seen of,
 - (i) damage to the units that may have been caused by defects in the common elements, and
 - (ii) defects in the common elements that may cause damage to the units. 1998, c. 19, s. 44 (5).

Powers for audit

- (6) The person who conducts a performance audit may, for the purpose of the audit,
- (a) enter onto the property at any reasonable time either alone or accompanied with any expert that the person considers necessary for the audit;
 - (b) require any person to produce any drawings, specifications or information that may on reasonable grounds be relevant to the audit;
 - (c) make all examinations, tests or inquiries that may on reasonable grounds be relevant to the audit; and
 - (d) call upon any expert for the assistance that the person considers necessary in conducting the audit. 1998, c. 19, s. 44 (6).

No obstruction

(7) No person shall obstruct a person who is exercising powers under this section or provide false information or refuse to provide information to the person. 1998, c. 19, s. 44 (7).

Contents

- (8) The person who conducts a performance audit shall prepare a written report that includes,
- (a) a copy of the person's certificate of authorization within the meaning of the *Professional Engineers Act* or certificate of practice within the meaning of the *Architects Act*, as the case may be;
 - (b) details of the inspection and findings made by the person in the course of conducting the audit;
 - (c) a statement that the person has reviewed all final reports described in clause (5) (c);
 - (d) a copy of the survey described in clause (5) (d) and a summary of the results of it;
 - (e) the determination that subsection (4) requires the person to make; and
 - (f) all other material that the regulations made under this Act require. 1998, c. 19, s. 44 (8).

Submission of report

(9) Before the end of the 11th month following the registration of the declaration and description, the person who conducts a performance audit shall,

- (a) submit the report to the board; and
- (b) file the report with the Corporation within the meaning of the *Ontario New Home Warranties Plan Act* if the property is subject to that Act. 1998, c. 19, s. 44 (9).

Claim under other Act

(10) The filing of the report with the Corporation within the meaning of the *Ontario New Home Warranties Plan Act* shall be deemed to constitute a notice of claim that the corporation gives to the Corporation within the meaning of that Act under the regulations made under that Act for the deficiencies disclosed in the report. 1998, c. 19, s. 44 (10).

OWNERS

Meetings

45. (1) Subject to the other requirements of this Act, anything that this Act requires to be approved by a vote of any of the owners shall be approved only at a meeting of owners duly called for that purpose. 1998, c. 19, s. 45 (1).

Annual general meeting

(2) The board shall hold a general meeting of owners not more than three months after the registration of the declaration and description and subsequently within six months of the end of each fiscal year of the corporation. 1998, c. 19, s. 45 (2).

Matters for annual general meeting

(3) At an annual general meeting, an owner may raise for discussion any matter relevant to the affairs and business of the corporation. 1998, c. 19, s. 45 (3).

Other meetings

(4) The board may at any time call a meeting of owners for the transaction of any business, and the notice of the meeting shall specify the nature of the business. 1998, c. 19, s. 45 (4).

Requisition for meeting

46. (1) A requisition for a meeting of owners may be made by those owners who at the time the board receives the requisition, own at least 15 per cent of the units, are listed in the record maintained by the corporation under subsection 47 (2) and are entitled to vote. 1998, c. 19, s. 46(1).

Form of requisition

- (2) The requisition shall,
- (a) be in writing and be signed by the requisitionists;
 - (b) state the nature of the business to be presented at the meeting; and
 - (c) be delivered personally or by registered mail to the president or secretary of the board or deposited at the address for service of the corporation. 1998, c. 19, s. 46 (2).

Same, removal of directors

(3) If the nature of the business to be presented at the meeting includes the removal of one or more of the directors, the requisition shall state, for each director who is proposed to be removed, the name of the director, the reasons for the removal and whether the director occupies a position on the board that under subsection 51 (6) is reserved for voting by owners of owner-occupied units. 1998, c. 19, s. 46 (3).

Duty of board

- (4) Upon receiving a requisition mentioned in subsection (1), the board shall,
- (a) if the requisitionists so request in the requisition or consent in writing, add the business to be presented at the meeting to the agenda of items for the next annual general meeting; or

(b) otherwise call and hold a meeting of owners within 35 days. 1998, c. 19, s. 46 (4).

Non-compliance

(5) If the board does not comply with subsection (4), a requisitioner may call a meeting of owners which shall be held within 45 days of the day on which the meeting is called. 1998, c. 19, s. 46 (5).

Reimbursement of cost

(6) Upon request, the corporation shall reimburse a requisitioner who calls a meeting under subsection (5) for the reasonable costs incurred in calling the meeting. 1998, c. 19, s. 46 (6).

Notice to owners

47. (1) A notice that is required to be given to owners shall,

- (a) be in writing;
- (b) be given at least 15 days before the day of the meeting if the notice is a notice of meeting of owners; and
- (c) be given to,
 - (i) each owner who has notified the corporation in writing of the owner's name and address for service, and
 - (ii) each mortgagee of a unit who,
 - (A) under the terms of the mortgage, has the right to vote at a meeting of owners in the place of the unit owner or to consent in writing in the place of the unit owner, and
 - (B) has notified the corporation in writing of the right and the mortgagee's name and address for service. 1998, c. 19, s. 47 (1).

Record of owners and mortgagees

(2) A corporation shall maintain a record of the names and addresses for service that it receives under subsection (1). 1998, c. 19, s. 47 (2).

Use of record

(3) A corporation shall use the record for the purposes of this Act, and no other purpose. 1998, c. 19, s. 47 (3).

Change in address

(4) A person whose name is in the record shall notify the corporation in writing of all changes in the address for service. 1998, c. 19, s. 47 (4).

Record date

(5) In the case of a notice of meeting of owners, the persons whose names appeared in the record 20 days before the day of the meeting shall be deemed to be the persons to whom the notice is required to be given under subsection (1). 1998, c. 19, s. 47 (5).

Same, other notice

(6) In the case of a notice to owners that is not a notice of meeting of owners, the persons whose names appeared in the record 5 days before the day the notice is given shall be deemed to be the persons to whom the notice is required to be given under subsection (1). 1998, c. 19, s. 47 (6).

Service on owner

- (7) A notice that is required to be given to an owner shall be,
- (a) delivered to the owner personally;
 - (b) sent by prepaid mail addressed to the owner at the address for service that appears in the record;
 - (c) sent by facsimile transmission, electronic mail or any other method of electronic communication if the owner agrees in writing that the party giving the notice may give the notice in this manner; or
 - (d) delivered at the owner's unit or at the mail box for the unit unless,
 - (i) the party giving the notice has received a written request from the owner that the notice not be given in this manner, or
 - (ii) the address for service that appears in the record is not the address of the unit of the owner. 1998, c. 19, s. 47 (7).

Service on mortgagee

- (8) A notice that is required to be given to a mortgagee shall be,
- (a) delivered to the mortgagee personally;
 - (b) sent by prepaid mail addressed to the mortgagee at the address for service that appears in the record; or
 - (c) sent by facsimile transmission, electronic mail or any other method of electronic communication if the mortgagee agrees in writing that the party giving the notice may give the notice in this manner. 1998, c. 19, s. 47 (8).

Content of notice of meeting

- (9) A notice of meeting of owners shall,
- (a) specify the place, the date and the hour of the meeting, as well as the nature of the business to be presented at the meeting; and

(b) be accompanied by,

- (i) a copy of all proposed changes to the declaration, by-laws, rules or agreements that are to be discussed at the meeting, and
- (ii) a copy of the requisition, if an owner has made a requisition under section 46. 1998, c. 19, s. 47 (9).

Matters at meeting

(10) No vote shall be taken at a meeting of owners on any matter other than routine procedure unless that matter was clearly disclosed in the notice of the meeting. 1998, c. 19, s. 47 (10).

Waiver of notice

(11) An owner or mortgagee who attends a meeting or who is represented by proxy at a meeting shall be deemed to have waived the right to object to a failure to give the required notice, unless the person expressly objects to the failure at the meeting. 1998, c. 19, s. 47 (11).

Mortgagee's right to vote

48. (1) A mortgagee of a unit who is entitled to receive notice of a meeting of owners has the right to vote at the meeting in the place of the unit owner or to exercise the right, if any, of the unit owner to consent in writing if the mortgagee gives notice to the corporation and to the owner at least four days before the date of the meeting of the mortgagee's intention to exercise the right. 1998, c. 19, s. 48 (1).

More than one mortgagee

(2) If a unit is subject to more than one mortgage for which the mortgagee has the right to vote at a meeting of owners in the place of the owner or to consent in writing in the place of the owner, the mortgagee who has priority may exercise the right and in that case no other mortgagee may exercise the right. 1998, c. 19, s. 48 (2).

Same

(3) If a mortgagee who has priority fails to exercise the right, the mortgagee who is next in priority may exercise the right and in that case no other mortgagee may exercise the right. 1998, c. 19, s. 48 (3).

Voting by owner

(4) If none of the mortgagees who have the right exercises the right, the owner has the right to vote at a meeting of owners subject to subsection 51 (1) or to consent in writing. 1998, c. 19, s. 48 (4).

Loss of owner's right to vote

49. (1) An owner is not entitled to vote at a meeting if any contributions payable in respect of the owner's unit have been in arrears for 30 days or more at the time of the meeting. 1998, c. 19, s. 49 (1).

Payment of arrears

(2) An owner who is not entitled to vote under subsection (1) may vote if the corporation receives payment of the arrears with respect to the owner's unit before the meeting is held. 1998, c. 19, s. 49 (2).

Parking or storage unit

(3) No owner shall vote in respect of a unit that is intended for parking or storage purposes or for the purpose of housing services or facilities or mechanical installations unless all the units in the corporation are used for one or more of those purposes. 1998, c. 19, s. 49 (3).

Quorum

50. (1) A quorum for the transaction of business at a meeting of owners is those owners who own 25 per cent of the units of the corporation, unless a by-law registered in accordance with subsection 56 (9) after this subsection comes into force provides that the quorum is those owners who own $33\frac{1}{3}$ per cent of the units of the corporation. 1998, c. 19, s. 50 (1).

Determination of quorum

(2) To count towards the quorum, an owner must have been entitled to receive notice of the meeting, must be entitled to vote at a meeting and shall be present at the meeting or represented by proxy. 1998, c. 19, s. 50 (2).

Where only one owner

(3) If a corporation has only one owner, the owner present in person or by proxy constitutes a meeting. 1998, c. 19, s. 50 (3).

Voting

51. (1) To vote at a meeting of owners, an owner must have been entitled to receive notice of the meeting and must be entitled to vote at the meeting. 1998, c. 19, s. 51 (1).

One vote per unit

(2) All voting by owners shall be on the basis of one vote per unit. 1998, c. 19, s. 51 (2).

Joint owners

(3) The majority of the owners of a unit may exercise the right to vote in respect of the unit but the vote shall not be counted if there are two or more owners of the unit and they are evenly divided on how to exercise the vote. 1998, c. 19, s. 51 (3).

Voting for directors

(4) Subject to this section, on a vote to elect or to remove a member of the board all owners entitled to vote may vote for each member of the board. 1998, c. 19, s. 51 (4).

Definition

(5) In subsections (6), (7) and (8),

“owner-occupied unit” means a unit of an owner who is entitled to vote in respect of the unit at a meeting to elect or to remove a director where the unit is used for residential purposes and the owner has not leased the unit within the 60 days before notice is given for the meeting, as shown by the record that the corporation is required to maintain under subsection 83 (3). 1998, c. 19, s. 51 (5).

Reserved position

(6) If at least 15 per cent of the units of the corporation are owner-occupied units on or after the time at which the board is required to call a turn-over meeting under section 43, no persons other than the owners of owner-occupied units may elect a person to or remove a person from one of the positions on the board. 1998, c. 19, s. 51 (6).

Other positions

(7) Nothing in subsection (6) affects the right of the owner of an owner-occupied unit to vote to elect or to remove any members of the board other than the member who occupies the position mentioned in that subsection. 1998, c. 19, s. 51 (7).

Removal

(8) A director elected under subsection (6) may be removed before the expiration of the director’s term of office by a vote of the owners at a meeting duly called for the purpose where the owners of more than 50 per cent of all of the owner-occupied units in the corporation vote in favour of removal. 1998, c. 19, s. 51 (8).

Method of voting

52. (1) On a show of hands or on a recorded vote, votes may be cast either personally or by proxy. 1998, c. 19, s. 52 (1).

Request for recorded vote

(2) At a meeting of owners, a person entitled to vote at the meeting may request that a recorded vote be held on any item scheduled for a vote either before or promptly after the vote. 1998, c. 19, s. 52 (2).

Proxy

(3) A proxy need not be an owner. 1998, c. 19, s. 52 (3).

Appointment of proxy

(4) Subject to the regulations made under this Act and subsection (5), an instrument appointing a proxy shall be in writing under the hand of the appointer or the appointer’s attorney and shall be for a particular meeting of owners. 1998, c. 19, s. 52 (4).

Proxy for voting for directors

(5) An instrument appointing a proxy for the election or removal of a director at a meeting of owners shall state the name of the directors for and against whom the proxy is to vote. 1998, c. 19, s. 52 (5).

Prescribed form

(6) An instrument appointing a proxy may be in the prescribed form. 1998, c. 19, s. 52 (6).

Record of corporation

(7) The corporation shall retain all instruments appointing a proxy for a meeting of owners as a record of the corporation for 90 days following the date of the meeting. 1998, c. 19, s. 52 (7).

Majority voting

53. Unless otherwise provided in this Act, all questions proposed for the consideration of the owners at a meeting of owners shall be determined by a majority of the votes cast by owners present at the meeting in person or by proxy if there is a quorum at the meeting. 1998, c. 19, s. 53.

Service on owner or mortgagee

54. Unless this Act indicates otherwise, anything required to be given to an owner or a mortgagee under this Act is sufficiently served if it is given in accordance with subsection 47 (7) or (8), as the case may be. 1998, c. 19, s. 54.

Records

55. (1) The corporation shall keep adequate records, including the following records:

1. The financial records of the corporation.
2. A minute book containing the minutes of owners’ meetings and the minutes of board meetings.
3. A copy of the declaration, by-laws and rules.
4. All lists, items, records and other documents mentioned in subsections 43 (4) and (5).
5. The report described in subsection 44 (8) that the corporation receives from the person who conducts a performance audit.
6. The records required under subsection 47 (2) and 83 (3).
7. A record of all reserve fund studies and all plans to increase the reserve fund under subsection 94 (8).
8. A copy of all agreements entered into by or on behalf of the corporation.
9. The report that the corporation receives from an inspector in accordance with subsection 130 (5).

10. All other records as may be prescribed or specified in the by-laws of the corporation. 1998, c. 19, s. 55 (1).

Financial records

(2) The corporation shall keep all financial records for at least six years from the end of the last fiscal period to which they relate, in addition to satisfying the requirements of any taxing authority of Ontario, the government of Canada or any other jurisdiction to which the corporation is subject. 1998, c. 19, s. 55 (2).

Examination of records

(3) Upon receiving a written request and reasonable notice, the corporation shall permit an owner, a purchaser or a mortgagee of a unit or an agent of one of them duly authorized in writing, to examine the records of the corporation, except those records described in subsection (4), at a reasonable time for all purposes reasonably related to the purposes of this Act. 1998, c. 19, s. 55 (3).

Exception

(4) The right to examine records under subsection (3) does not apply to,

- (a) records relating to employees of the corporation, except for contracts of employment between any of the employees and the corporation;
- (b) records relating to actual or pending litigation or insurance investigations involving the corporation; or
- (c) subject to subsection (5), records relating to specific units or owners. 1998, c. 19, s. 55 (4).

Same

(5) Clause (4) (c) does not prevent,

- (a) an owner, a purchaser or a mortgagee of a unit or an agent of one of them from examining records under subsection (3) that relate to the unit of the owner, the unit being purchased or the unit that is subject to the mortgage, as the case may be; or
- (b) an owner of a unit or an agent of the owner from examining records under subsection (3) that relate to the owner. 1998, c. 19, s. 55 (5).

Copies of records

(6) The corporation shall, within a reasonable time, provide copies of the records to a person examining them, if the person so requests and pays a reasonable fee to compensate the corporation for the labour and copying charges. 1998, c. 19, s. 55 (6).

Admissible evidence

(7) A copy that a corporation has certified under its seal to be a true copy of a record is admissible in evidence and, in the absence of evidence to the contrary, is proof of the facts stated in it. 1998, c. 19, s. 55 (7).

Penalty for non-compliance

(8) A corporation that without reasonable excuse does not permit an owner or an agent of an owner to examine records or to copy them under this section shall pay the sum of \$500 to the owner on receiving a written request for payment from the owner. 1998, c. 19, s. 55 (8).

Recovery of sum

(9) The owner may recover the sum from the corporation by an action in the Small Claims Court. 1998, c. 19, s. 55 (9).

Order for production of records

(10) If a corporation without reasonable excuse does not permit an owner or an agent of an owner to examine records or to copy them under this section, the Small Claims Court may order the corporation to produce the records for examination. 1998, c. 19, s. 55 (10).

BY-LAWS AND RULES

By-laws

56. (1) The board may, by resolution, make, amend or repeal by-laws, not contrary to this Act or to the declaration,

- (a) to govern the number, qualification, nomination, election, resignation, removal, term of office and remuneration of the directors, subject to subsection (2);
- (b) to regulate board meetings, the form of board meetings and the quorum and functions of the board;
- (c) to provide that the quorum for the transaction of business at a meeting of owners is those owners who own $33\frac{1}{3}$ per cent of the units of the corporation, subject to subsection 50 (2);
- (d) to govern the appointment, remuneration, functions, duties, resignation and removal of agents, officers and employees of the corporation and the security, if any, to be given by them to it;
- (e) subject to subsection (3), to authorize the borrowing of money to carry out the objects and duties of the corporation;
- (f) to authorize the corporation to object to assessments under the *Assessment Act* on behalf of owners if it gives notice of the objections to the owners, and to authorize the defraying of costs of objections out of the common expenses;
- (g) to govern the assessment and collection of contributions to the common expenses;
- (h) to establish what constitutes a standard unit for each class of unit specified in the by-law for the purpose of determining the responsibility for repairing improvements after damage and insuring them;
- (i) to extend the circumstances described in subsection 105 (2) under which an amount shall be added to the common expenses payable for an owner's unit for the purposes of subsection 105 (3);

- (j) to govern the maintenance of the units and common elements;
- (k) to restrict the use and enjoyment that persons other than occupants of the units may make of the common elements and assets of the corporation, subject to any agreement made by the corporation with respect to the use and enjoyment of its common elements and assets that it shares with another person;
- (l) to govern the management of the property;
- (m) to govern the use and management of the assets of the corporation;
- (n) to specify duties of the corporation in addition to the duties set out in this Act and the declaration;
- (o) to establish the procedure with respect to the mediation of disputes or disagreements between the corporation and the owners for the purpose of section 125 or 132; or
- (p) to govern the conduct generally of the affairs of the corporation. 1998, c. 19, s. 56 (1).

Remuneration of directors

(2) A by-law relating to the remuneration of directors shall fix the remuneration and the period not exceeding three years for which it is to be paid. 1998, c. 19, s. 56 (2).

Borrowing by-law

(3) A corporation shall not borrow money for expenditures not listed in the budget for the current fiscal year unless it has passed a by-law under clause (1) (e) specifically to authorize the borrowing. 1998, c. 19, s. 56 (3).

Assessment appeal

(4) If the board has made a by-law under clause (1) (f), the corporation shall have the capacity and authority to appeal under section 40 of the *Assessment Act* on behalf of owners but shall not be liable for an alteration in the assessment of a unit or for any other matter relating to the appeal, except for the costs of the appeal. 2008, c. 7, Sched. A, s. 18.

Same

(5) Despite a by-law made under clause (1) (f), on written notice to the board and to the Assessment Review Board given before the hearing of an appeal under section 40 of the *Assessment Act*, an owner may withdraw an appeal that the corporation has made on the owner's behalf. 2008, c. 7, Sched. A, s. 18.

By-laws to be reasonable

(6) The by-laws shall be reasonable and consistent with this Act and the declaration. 1998, c. 19, s. 56 (6).

Same, proposed by-laws

(7) By-laws proposed by the declarant before the registration of a declaration and description shall be reasonable and consistent with this Act and the proposed declaration. 1998, c. 19, s. 56 (7).

Inconsistent provisions

(8) If any provision in a by-law or a proposed by-law is inconsistent with the provisions of this Act, the provisions of this Act shall prevail and the by-law or proposed by-law, as the case may be, shall be deemed to be amended accordingly. 1998, c. 19, s. 56 (8).

Registration

(9) For each by-law of a corporation, an officer of the corporation shall certify a copy of the by-law as a true copy and the corporation shall register the copy in,

- (a) the land titles division of the land registry office within the boundaries of which division the land described in the description is situated, if the land registry office has a land titles division; or
- (b) the registry division of the land registry office within the boundaries of which division the land described in the description is situated, if the land registry office does not have a land titles division. 1998, c. 19, s. 56 (9).

When by-law effective

(10) A by-law is not effective until,

- (a) the owners of a majority of the units of the corporation vote in favour of confirming it, with or without amendment; and
- (b) a copy of it is registered in accordance with subsection (9). 1998, c. 19, s. 56 (10).

Same, proposed by-law

(11) Despite subsection (10), a by-law proposed by the declarant before the registration of the declaration and description shall be effective until it is replaced or confirmed by a by-law of the corporation that takes effect in accordance with subsection (10). 1998, c. 19, s. 56 (11).

Occupancy standards by-law

57. (1) Subject to section 56, the board may, by resolution, make, amend or repeal by-laws not contrary to this Act or the declaration that establish standards for the occupancy of units of the corporation for residential purposes. 1998, c. 19, s. 57 (1).

Standards

(2) The standards shall be,

- (a) the occupancy standards contained in a by-law passed by the council of a municipality in which the land of the corporation is situated; or
- (b) subject to the regulations made under this Act, standards that are not more restrictive than standards that are in accordance with the maximum occupancy for each unit based on the maximum occupancy for which the building in which the units are located is designed. 1998, c. 19, s. 57 (2).

Prohibition

(3) A by-law passed under subsection (1) may prohibit persons from occupying units of the corporation that do not comply with the standards set out in the by-law. 1998, c. 19, s. 57 (3).

Assessments

(4) If the board has passed a by-law under subsection (1) and a person contravenes the standards for the occupancy of a unit set out in the by-law, the board may, by resolution, levy against the unit,

- (a) an assessment for the amount that reasonably reflects the amount by which the contravention increases the cost of maintaining the common elements and repairing them after damage; and
- (b) an assessment for the amount that reasonably reflects the amount by which the contravention increases the cost of using the utilities that form part of the common expenses. 1998, c. 19, s. 57 (4).

Part of common expenses

(5) The assessments mentioned in subsection (4) shall form part of the contribution to the common expenses payable for the unit. 1998, c. 19, s. 57 (5).

Rules

58. (1) The board may make, amend or repeal rules respecting the use of common elements and units to,

- (a) promote the safety, security or welfare of the owners and of the property and assets of the corporation; or
- (b) prevent unreasonable interference with the use and enjoyment of the common elements, the units or the assets of the corporation. 1998, c. 19, s. 58 (1).

Rules to be reasonable

(2) The rules shall be reasonable and consistent with this Act, the declaration and the by-laws. 1998, c. 19, s. 58 (2).

Same, proposed rules

(3) Rules proposed by the declarant before the registration of a declaration and description shall be reasonable and consistent with this Act, the proposed declaration and the proposed by-laws. 1998, c. 19, s. 58 (3).

Inconsistent provisions

(4) If any provision in a rule or a proposed rule is inconsistent with the provisions of this Act, the provisions of this Act shall prevail and the rule or proposed rule, as the case may be, shall be deemed to be amended accordingly. 1998, c. 19, s. 58 (4).

Amendment by owners

(5) The owners may amend or repeal a rule at a meeting of owners duly called for that purpose. 1998, c. 19, s. 58 (5).

Notice of rule

(6) Upon making, amending or repealing a rule, the board shall give a notice of it to the owners that includes,

- (a) a copy of the rule as made, amended or repealed, as the case may be;
- (b) a statement of the date that the board proposes that the rule will become effective; and
- (c) a statement that the owners have the right to requisition a meeting under section 46 and the rule becomes effective at the time determined by subsections (7) and (8). 1998, c. 19, s. 58 (6).

When rule effective

(7) Subject to subsection (8), a rule is not effective until,

- (a) the owners approve it at a meeting of owners, if the board receives a requisition for the meeting under section 46 within 30 days after the board has given notice of the rule to the owners; or
- (b) 30 days after the board has given notice of the rule to the owners, if the board does not receive a requisition for the meeting under section 46 within those 30 days. 1998, c. 19, s. 58 (7).

Same

(8) A rule or an amendment to a rule that has substantially the same purpose or effect as a rule that the owners have previously amended or repealed within the preceding two years is not effective until the owners approve it, with or without amendment, at a meeting duly called for that purpose. 1998, c. 19, s. 58 (8).

Same, proposed rule

(9) Despite subsection (7), a rule proposed by the declarant before the registration of the declaration and description shall be effective until it is replaced or confirmed by a rule of the corporation that takes effect in accordance with subsection (7). 1998, c. 19, s. 58 (9).

- 147A** (10) All persons bound by the rules shall comply with them and the rules may be enforced in the same manner as the by-laws. 1998, c. 19, s. 58 (10).

Joint by-laws and rules

- 147B** **59.** (1) The boards of two or more corporations may make, amend or repeal joint by-laws or rules governing the use and maintenance of shared facilities and services. 1998, c. 19, s. 59 (1).

Application to corporations

- (2) A joint by-law or rule is a by-law or rule, as the case may be, of each corporation. 1998, c. 19, s. 59 (2).

When joint by-law effective

- (3) A joint by-law is not effective until,
 (a) the majority of the owners of the units of each corporation vote in favour of confirming it, with or without amendment; and
 (b) each corporation registers a copy of it in accordance with subsection 56 (9). 1998, c. 19, s. 59 (3).

Joint meeting

- (4) The vote of the owners under clause (3) (a) may be at a joint meeting of the corporations duly called for that purpose. 1998, c. 19, s. 59 (4).

Repeal of joint by-law

- (5) Once a joint by-law is effective, it is effective until the owners of a majority of the units of each corporation vote in favour of repealing it and a copy of the repealing by-law is registered in accordance with subsection 56 (9). 1998, c. 19, s. 59 (5).

Amendment of joint rule

- (6) The owners of each corporation may amend or repeal a joint rule at a joint meeting of owners of the corporations or at a meeting of owners of each corporation if the meeting has been duly called for that purpose. 1998, c. 19, s. 59 (6).

Notice of joint rule

- (7) Upon making, amending or repealing a joint rule, the board of each corporation shall give a notice of the joint rule to its owners that includes,
 (a) a copy of the rule as made, amended or repealed, as the case may be;
 (b) a statement of the date that the boards propose that the rule will become effective; and
 (c) a statement that the owners have the right to requisition a meeting under section 46 and the rule becomes effective at the time determined by subsections (8), (9) and (10). 1998, c. 19, s. 59 (7).

When joint rule effective

- (8) Subject to subsection (10), if the board of any of the corporations receives a requisition for a meeting under section 46 within 30 days after it gives notice of the joint rule to its owners, the joint rule is not effective until the owners approve it at a joint meeting of owners of the corporations or at a meeting of owners of each corporation. 1998, c. 19, s. 59 (8).

Same, no requisition

- (9) Subject to subsection (10), if the board of none of the corporations receives a requisition for a meeting under section 46 within 30 days after it gives notice of the joint rule to its owners, the joint rule is not effective until 30 days after the board of each corporation has given notice of the joint rule to its owners. 1998, c. 19, s. 59 (9).

Same, previous rule

- (10) A joint rule or an amendment to a joint rule that has substantially the same purpose or effect as a joint rule that the owners have previously amended or repealed within the preceding two years is not effective until the owners of each corporation approve it, with or without amendment, at a joint meeting of owners of the corporations or at a meeting of owners of each corporation duly called for that purpose. 1998, c. 19, s. 59 (10).

AUDITORS AND FINANCIAL STATEMENTS

Appointment of auditor

- 60.** (1) At their first meeting, the owners shall appoint one or more persons qualified to be auditors to hold office as auditors until the close of the next annual general meeting and, if the owners do not do so, the board shall make the necessary appointments as expeditiously as possible. 1998, c. 19, s. 60 (1).

Same, subsequent years

- (2) At each annual general meeting, the owners shall appoint one or more persons qualified to be auditors to hold office as auditors until the close of the next annual general meeting and, if the owners do not do so, the auditor in office continues in office until a successor is appointed. 1998, c. 19, s. 60 (2).

Appointment by court

- (3) If for any reason no auditor is appointed as required by this section, the Superior Court of Justice may, on the application of an owner,
 (a) appoint one or more persons qualified to be auditors to hold office as auditors until the close of the next annual general meeting;

- (b) fix the remuneration that the corporation shall pay for the services of the auditor who is appointed; and
- (c) fix the amount that the corporation shall pay to the owner for the cost of the application. 1998, c. 19, s. 60 (3), S.O. 2000, C. 26.

Notice of appointment

(4) The corporation shall give notice in writing to an auditor of the appointment immediately after the appointment is made. 1998, c. 19, s. 60 (4).

Exception

- (5) The owners of a corporation shall not appoint auditors under subsection (2) at an annual general meeting if,
 - (a) a turn-over meeting has been held under section 43;
 - (b) the corporation consists of fewer than 25 units; and
 - (c) as of the date of the meeting, all the owners consent in writing to dispense with the audit mentioned in subsection 67 (1) until the next annual general meeting. 1998, c. 19, s. 60 (5).

Qualifications

- 61.** No person shall act as auditor of a corporation if the person,
- (a) is a director, officer or employee of the corporation;
 - (b) is a manager under an agreement for the management of the property of the corporation;
 - (c) has an interest in a contract to which the corporation is a party; or
 - (d) is a partner, employer or employee of a person mentioned in clause (a) or (b). 1998, c. 19, s. 61.

Remuneration

- 62.** The remuneration of an auditor shall be fixed,
- (a) by the owners if the auditor is appointed by the owners; or
 - (b) by the board if authorized by the owners to do so or if the auditor is appointed by the board. 1998, c. 19, s. 62.

Removal

63. (1) The owners may remove an auditor before the expiration of the auditor's term of office at a meeting duly called for that purpose. 1998, c. 19, s. 63 (1).

Replacement

(2) If the owners remove an auditor under subsection (1), they shall, at the same meeting, appoint a person qualified to be an auditor to act as auditor for the remainder of the term of the auditor who was removed. 1998, c. 19, s. 63 (2).

Approval

(3) The removal of an auditor and the appointment of an auditor under subsection (2) requires the approval of the majority of votes cast by the owners who are present at the meeting in person or by proxy. 1998, c. 19, s. 63 (3).

Notice to auditors

- (4) At least 30 days before giving the owners notice of a meeting for the purpose of removing an auditor, the person calling the meeting shall give to the auditor,
- (a) written notice of the intention to call the meeting, specifying the date on which the notice of the meeting is proposed to be mailed;
 - (b) a statement of the name of the auditor who is proposed to be removed and the reasons for the removal; and
 - (c) a copy of all material proposed to be sent to the owners in connection with the meeting. 1998, c. 19, s. 63 (4).

Right to make representations

(5) An auditor may make written representations to the corporation concerning the proposed removal of the auditor or the appointment of another person to fill the office of auditor. 1998, c. 19, s. 63 (5).

Method

(6) In order to make representations under subsection (5), an auditor shall send them to the person calling the meeting at least three days before the mailing of the notice of the meeting. 1998, c. 19, s. 63 (6).

Notice of meeting

- (7) The person calling the meeting shall, at the expense of the corporation, include in the notice of the meeting,
- (a) a statement of the name of the auditor who is proposed to be removed and the reasons for the removal; and
 - (b) a copy of all representations received. 1998, c. 19, s. 63 (7).

Resignation

64. (1) A resignation of an auditor becomes effective at the time a written resignation is delivered to the corporation or at the time specified in the resignation, whichever is later. 1998, c. 19, s. 64 (1).

Representations

(2) In a resignation, the auditor may make written representations to the corporation concerning the resignation and in that case the corporation shall attach a copy of the representations to the notice of the next meeting of owners. 1998, c. 19, s. 64 (2).

Vacancy

65. (1) If a vacancy arises in the office of auditor, the directors may appoint any person qualified to be an auditor to hold office as auditor to fill the vacancy. 1998, c. 19, s. 65 (1).

Term of replacement

(2) An auditor appointed under subsection (1) shall hold office until the close of the next annual general meeting or until a successor is appointed, whichever is later. 1998, c. 19, s. 65 (2).

Financial statements

66. (1) A corporation shall have its financial statements prepared in the prescribed manner and in accordance with generally accepted accounting principles as are prescribed. 1998, c. 19, s. 66 (1).

Contents

(2) The financial statements shall include,

- (a) a balance sheet;
- (b) a statement of general operations;
- (c) a statement of changes in financial position;
- (d) a statement of reserve fund operations;
- (e) prescribed information relating to the reserve fund study and the operation of the reserve fund;
- (f) an indication of the aggregate remuneration paid to the directors in that capacity and the aggregate remuneration paid to the officers in that capacity; and
- (g) the additional statements or information that the regulations made under this Act require. 1998, c. 19, s. 66 (2).

Approval

(3) The board shall approve the financial statements before placing them before an annual general meeting. 1998, c. 19, s. 66 (3).

Form of approval

(4) The approval shall be evidenced by the signature at the bottom of the balance sheet by two of the directors duly authorized to sign. 1998, c. 19, s. 66 (4).

Audit

67. (1) The auditor shall, every year, make the examination that is necessary in order to make an annual report on the financial statements to the corporation on behalf of the owners. 1998, c. 19, s. 67 (1).

Right of access

(2) The auditor has right of access at all times to all records, documents, accounts and vouchers of the corporation and is entitled to require from the directors, officers and employees of the corporation or from persons under contract to the corporation to manage the property or its assets the information and explanations that, in the auditor's opinion, are necessary in order to make the report. 1998, c. 19, s. 67 (2).

Standards

(3) The auditor's report shall be prepared in the prescribed manner and in accordance with generally accepted auditing standards as are prescribed. 1998, c. 19, s. 67 (3).

Contents of report

(4) The auditor shall include in the report the statements that the auditor considers necessary if the corporation's financial statements are not in accordance with the requirements of this Act and the regulations made under it. 1998, c. 19, s. 67 (4).

Same, reserve fund study

(5) The auditor shall state in the report whether the statement of reserve fund operations and any other prescribed information relating to the operation of the reserve fund and contained in the financial statements do not fairly present the information contained in the reserve fund studies that the auditor has received. 1998, c. 19, s. 67 (5).

Presentation of report

(6) The auditor shall present the auditor's report to the audit committee described in subsection 68 (1) or to the board if there is no audit committee. 1998, c. 19, s. 67 (6).

Immunity

(7) Except with respect to the contents of the report, no action or other proceeding for damages shall be instituted against an auditor or a former auditor for any oral or written statement made in good faith in the execution or intended execution of the duty as auditor under this Act. 1998, c. 19, s. 67 (7).

Audit committee

68. (1) If the number of directors of the corporation is more than six, the directors may elect annually from among their number a committee to be known as the audit committee to hold office until the next annual general meeting. 1998, c. 19, s. 68 (1).

Members

(2) The audit committee shall be composed of at least three directors and the majority of committee members shall not consist of officers or employees of the corporation. 1998, c. 19, s. 68 (2).

Review of statements

(3) On receiving the financial statements, the auditor's report and an amended auditor's report, if any, the audit committee shall review them and submit them to the board. 1998, c. 19, s. 68 (3).

Auditor to appear

(4) The auditor has the right to appear before and be heard at any meeting of the audit committee and shall appear before the committee when the committee so requires. 1998, c. 19, s. 68 (4).

Meeting at auditor's request

(5) At the request of the auditor, the audit committee shall convene a meeting of the committee to consider all matters the auditor believes should be brought to the attention of the board or the committee members. 1998, c. 19, s. 68 (5).

Delivery of statements

69. (1) The board shall place before each annual general meeting,

(a) the financial statements as approved by the board;

(b) the auditor's report; and

(c) all further information respecting the financial position of the corporation that the by-laws of the corporation require. 1998, c. 19, s. 69 (1).

Copy with notice of meeting

(2) The corporation shall attach to the notice of the annual general meeting a copy of the financial statements and the auditor's report. 1998, c. 19, s. 69 (2).

Right to attend meeting

70. (1) The auditor is entitled to attend a meeting of owners and to be heard on any part of the business of the meeting that concerns the office of the auditor. 1998, c. 19, s. 70 (1).

Notice of meetings

(2) The corporation shall give the auditor notice of all meetings of owners and all other communications relating to the meetings that the owners are entitled to receive. 1998, c. 19, s. 70 (2).

Attendance required

(3) The corporation or an owner may require that an auditor or a former auditor attend a meeting of owners for the purpose of answering inquiries described in subsection (6) by giving written notice to the person whose attendance is required, at least five days before the meeting, that the person's presence is required. 1998, c. 19, s. 70 (3).

Notice to corporation

(4) An owner who gives written notice to an auditor or former auditor under subsection (3) shall give a copy of the notice to the corporation. 1998, c. 19, s. 70 (4).

Remuneration for attendance

(5) If an auditor or a former auditor is required to attend a meeting of owners, the corporation shall compensate the auditor or former auditor, as the case may be, for expenses and pay the reasonable remuneration that it deems appropriate. 1998, c. 19, s. 70 (5).

Duty to answer questions

(6) At a meeting of owners, the auditor or former auditor, as the case may be, if present, shall answer inquiries concerning the basis upon which the person formed the opinion stated in the person's reports. 1998, c. 19, s. 70 (6).

Amendment of statements

71. (1) The board shall amend the corporation's financial statements if facts come to the attention of the directors or officers of a corporation after the annual general meeting and the facts require a material adjustment to the financial statements that were presented at the meeting. 1998, c. 19, s. 71 (1).

Copy of amended statements

(2) Immediately after making an amendment, the corporation shall send to the auditor a statement of the facts that gave rise to the amendment and a copy of the amended financial statements. 1998, c. 19, s. 71 (2).

Amendment of auditor's report

(3) On receiving the statements furnished under subsection (2), the auditor shall amend the auditor's report if the auditor is of the opinion that it is necessary and in that case shall present it to the audit committee or to the board if there is no audit committee. 1998, c. 19, s. 71 (3).

Delivery of amended report

(4) The board shall mail or deliver a copy of the amended report to the owners. 1998, c. 19, s. 71 (4).

Same, by auditor

(5) If the board does not mail or deliver a copy of the amended report to the owners within a reasonable time, the auditor shall mail or deliver a copy of the amended report to the owners and the corporation shall reimburse the auditor for the reasonable costs incurred in the mailing or the delivery. 1998, c. 19, s. 71 (5).

PART V SALE AND LEASE OF UNITS

DISCLOSURE REQUIREMENTS

Disclosure statement

72. (1) The declarant shall deliver to every person who purchases a unit or a proposed unit from the declarant a copy of the current disclosure statement made by the declarant for the corporation of which the unit or proposed unit forms part. 1998, c. 19, s. 72 (1).

Purchaser not bound

(2) An agreement of purchase and sale of a unit or a proposed unit entered into by a declarant is not binding on the purchaser until the declarant has delivered to the purchaser a copy of the current disclosure statement. 1998, c. 19, s. 72 (2).

Contents

(3) A disclosure statement shall specify the date on which it is made and shall contain,

- (a) a table of contents prepared in accordance with subsection (4) and located at the beginning of the disclosure statement;
- (b) a statement indicating,
 - (i) whether the corporation is a freehold condominium corporation or a leasehold condominium corporation, and
 - (ii) if the corporation is a freehold condominium corporation, the type of freehold condominium corporation that it is;
- (c) a statement of the name and municipal address of the declarant and the mailing address of the property or the proposed property and its municipal address if available;
- (d) a general description of the property or proposed property including the types and number of buildings, units and recreational and other amenities together with all conditions that apply to the provision of amenities;
- (e) if the declarant has made an application for approval described in subsection 9 (4), a summary of the reports, if any, that the approval authority has required be made under subsection 9 (4) and the agreements, if any, that the approval authority has imposed under subsection 9 (5) as a condition of approval;
- (f) a statement indicating whether the property or part of the property is or may be subject to the *Ontario New Home Warranty Plan Act* or whether the declarant has enrolled or intends to enrol the proposed units and common elements in the Plan within the meaning of that Act in accordance with the regulations made under that Act;
- (g) a statement whether a building on the property or a unit or a proposed unit has been converted from a previous use;
- (h) a statement whether one or more units or proposed units may be used for commercial or other purposes not ancillary to residential purposes;
- (i) a statement of the portion of units or proposed units which the declarant intends to market in blocks of units to investors;
- (j) a statement of the portion of units or proposed units, to the nearest anticipated 25 per cent, that the declarant intends to lease;
- (k) if construction of amenities is not completed, a schedule of the proposed commencement and completion dates;
- (l) a list of the amenities that the declarant proposes to provide to the purchaser during a period of interim occupancy of a proposed unit under section 80;
- (m) a copy of the existing or proposed declaration, by-laws, rules and insurance trust agreement, if any;
- (n) a brief description of the significant features of all agreements or proposed agreements mentioned in section 111, 112, 113 or 114 and of all agreements or proposed agreements between the corporation and another corporation;
- (o) a statement of whether, to the knowledge of the declarant, the corporation intends to amalgamate with another corporation or whether the declarant intends to cause the corporation to amalgamate with another corporation within 60 days of the date of registration of the declaration and description for the corporation;
- (p) if an amalgamation is intended under clause (o), a copy of the proposed declaration, description, by-laws and rules for the amalgamated corporation, if available;
- (q) a copy of the budget statement described in subsection (6);
- (r) a copy of the budget of the corporation for the current fiscal year if more than one year has passed since the registration of the declaration and description for the corporation;
- (s) a statement setting out the fees or charges, if any, that the corporation is required to pay to the declarant or another person; and
- (t) all other material that the regulations made under this Act require. 1998, c. 19, s. 72 (3).

Table of contents

(4) The table of contents in the disclosure statement shall be in the prescribed form, shall indicate whether the declaration, by-laws, rules or the proposed declaration, by-laws or rules of the corporation or any other material in the disclosure statement deal with the following matters and, if so, shall indicate where the matters are dealt with:

1. A statement indicating,
 - i. whether the corporation is a leasehold condominium corporation or a freehold condominium corporation, and
 - ii. if the corporation is a freehold condominium corporation, the type of freehold condominium corporation that it is.
2. The property or part of the property is or may be subject to the *Ontario New Home Warranties Plan Act* or the proposed units and common elements are enrolled or are intended to be enrolled in the Plan within the meaning of that Act in accordance with the regulations made under that Act.
3. A building on the property or a unit or a proposed unit has been converted from a previous use.
4. One or more units or proposed units may be used for commercial or other purposes not ancillary to residential purposes.
5. A provision exists with respect to pets on the property or the proposed property.
6. There exist restrictions or standards with respect to the occupancy or use of units or proposed units or the use of common elements or proposed common elements that are based on the nature or design of the facilities and services on the property or on other aspects of the buildings located on the property.
7. A statement of the portion of units or proposed units, to the nearest anticipated 25 per cent, that the declarant intends to lease.
8. A statement whether the proportion, expressed in percentages, of the common interest appurtenant to any unit or proposed unit differs in an amount of 10 per cent or more from that appurtenant to any other unit or proposed unit of the same type, size and design.
9. A statement whether the proportion, expressed in percentages, in which the owner of any unit or proposed unit is required to contribute to the common expenses differs in an amount of 10 per cent or more from that required of the owner of any other unit or proposed unit of the same type, size and design.
10. A statement whether any unit or proposed unit is exempt from a cost attributable to the rest of the units or proposed units.
11. Part or the whole of the common elements or the proposed common elements are subject to a lease or licence.
12. A statement whether parking is allowed in or on a unit, on the common elements or on a part of the common elements of which an owner has exclusive use and a statement of the restrictions on parking.
13. Any other statement specified in the regulations made under this Act. 1998, c. 19, s. 72 (4).

Copy of budget

(5) On the request of the declarant, the corporation shall, promptly and without charge, provide a copy of its budget for the current fiscal year to the declarant. 1998, c. 19, s. 72 (5).

Budget statement

(6) The budget statement is a statement for the one-year period immediately following the registration of the declaration and description and shall contain,

- (a) a statement of the common expenses of the corporation;
- (b) a statement of the proposed amount of each expense of the corporation, including the cost of the reserve fund study required for the year, the cost of the performance audit under section 44 and the cost of preparing audited financial statements if subsection 43 (7) requires the declarant to deliver them within one year following the registration of the declaration and description;
- (c) particulars of the type, frequency and level of the services to be provided;
- (d) a statement of the projected monthly common expense contribution for each type of unit;
- (e) a statement of the portion of the common expenses to be paid into a reserve fund;
- (f) a statement of the status of all pending lawsuits material to the property of which the declarant has actual knowledge and that may affect the property after the registration of a deed to the unit from the declarant to the purchaser;
- (g) a statement of the amounts of all current or expected fees, charges, rents or other revenue to be paid to or by the corporation or by any of the owners for the use of the common elements or other facilities related to the property, unless a turn over meeting has been held under section 43;
- (h) a statement of all services not included in the budget that the declarant provides, or expenses that the declarant pays and that might reasonably be expected to become, at any subsequent time, a common expense and the projected common expense contribution attributable to each of those services or expenses for each type of unit;
- (i) a statement of the projected amounts in all reserve funds at the end of the current fiscal year;
- (j) a summary of the most recent reserve fund study, if any; and
- (k) all other material that the regulations made under this Act require. 1998, c. 19, s. 72 (6).

Rescission of agreement

73. (1) A purchaser who receives a disclosure statement under subsection 72 (1) may, in accordance with this section, rescind the agreement of purchase and sale before accepting a deed to the unit being purchased that is in registerable form. 1998, c. 19, s. 73 (1).

Notice of rescission

(2) To rescind an agreement of purchase and sale under this section, a purchaser or the purchaser's solicitor shall give a written notice of rescission to the declarant or to the declarant's solicitor who must receive the notice within 10 days of the later of,

- (a) the date that the purchaser receives the disclosure statement; and
- (b) the date that the purchaser receives a copy of the agreement of purchase and sale executed by the declarant and the purchaser. 1998, c. 19, s. 73 (2).

Refund upon rescission

(3) If a declarant or the declarant's solicitor receives a notice of rescission from a purchaser under this section, the declarant shall promptly refund, without penalty or charge, to the purchaser, all money received from the purchaser under the agreement and credited towards the purchase price, together with interest on the money calculated at the prescribed rate from the date that the declarant received the money until the date the declarant refunds it. 1998, c. 19, s. 73 (3).

Material changes in disclosure statement

74. (1) Whenever there is a material change in the information contained or required to be contained in a disclosure statement delivered to a purchaser under subsection 72 (1) or a revised disclosure statement or a notice delivered to a purchaser under this section, the declarant shall deliver a revised disclosure statement or a notice to the purchaser. 1998, c. 19, s. 74 (1).

Definition

(2) In this section,

"material change" means a change or a series of changes that a reasonable purchaser, on an objective basis, would have regarded collectively as sufficiently important to the decision to purchase a unit or proposed unit in the corporation that it is likely that the purchaser would not have entered into an agreement of purchase and sale for the unit or the proposed unit or would have exercised the right to rescind such an agreement of purchase and sale under section 73, if the disclosure statement had contained the change or series of changes, but does not include,

- (a) a change in the contents of the budget of the corporation for the current fiscal year if more than one year has passed since the registration of the declaration and description for the corporation,
- (b) a substantial addition, alteration or improvement within the meaning of subsection 97 (6) that the corporation makes to the common elements after a turn-over meeting has been held under section 43,
- (c) a change in the portion of units or proposed units that the declarant intends to lease,
- (d) a change in the schedule of the proposed commencement and completion dates for the amenities of which construction had not been completed as of the date on which the disclosure statement was made, or
- (e) a change in the information contained in the statement described in subsection 161 (1) of the services provided by the municipality or the Minister of Municipal Affairs and Housing, as the case may be, as described in that subsection, if the unit or the proposed unit is in a vacant land condominium corporation. 1998, c. 19, s. 74 (2).

Contents of revised statement

(3) The revised disclosure statement or notice required under subsection (1) shall clearly identify all changes that in the reasonable belief of the declarant may be material changes and summarize the particulars of them. 1998, c. 19, s. 74 (3).

Time of delivery

(4) The declarant shall deliver the revised disclosure statement or notice to the purchaser within a reasonable time after the material change mentioned in subsection (1) occurs and, in any event, no later than 10 days before delivering to the purchaser a deed to the unit being purchased that is in registerable form. 1998, c. 19, s. 74 (4).

Purchaser's application to court

(5) Within 10 days after receiving a revised disclosure statement or a notice under subsection (1), a purchaser may make an application to the Superior Court of Justice for a determination whether a change or a series of changes set out in the statement or notice is a material change. 1998, c. 19, s. 74 (5). S.O. 2000, c. 26.

Rescission after material change

(6) If a change or a series of changes set out in a revised disclosure statement or a notice delivered to a purchaser constitutes a material change or if a material change occurs that the declarant does not disclose in a revised disclosure statement or notice as required by subsection (1), the purchaser may, before accepting a deed to the unit being purchased that is in registerable form, rescind the agreement of purchase and sale within 10 days of the latest of,

- (a) the date on which the purchaser receives the revised disclosure statement or the notice, if the declarant delivered a revised disclosure statement or notice to the purchaser;
- (b) the date on which the purchaser becomes aware of a material change, if the declarant has not delivered a revised disclosure statement or notice to the purchaser as required by subsection (1) with respect to the change; and
- (c) the date on which the Superior Court of Justice makes a determination under subsection (5) or (8) that the change is material, if the purchaser or the declarant, as the case may be, has made an application for the determination. 1998, c. 19, s. 74 (6), S.O. 2000, c. 26.

Notice of rescission

(7) To rescind an agreement of purchase and sale under this section, a purchaser or the purchaser's solicitor shall give a written notice of rescission to the declarant or to the declarant's solicitor. 1998, c. 19, s. 74 (7).

Declarant's application to court

(8) Within 10 days after receiving a notice of rescission, the declarant may make an application to the Superior Court of Justice for a determination whether the change or the series of changes on which the rescission is based constitutes a material change, if the purchaser has not already made an application for the determination under subsection (5). 1998, c. 19, s. 74 (8), S.O. 2000, c. 26.

Refund upon rescission

(9) A declarant who receives a notice of rescission from a purchaser under this section shall refund, without penalty or charge, to the purchaser, all money received from the purchaser under the agreement and credited towards the purchase price, together with interest on the money calculated at the prescribed rate from the date that the declarant received the money until the date the declarant refunds it. 1998, c. 19, s. 74 (9).

Time of refund

(10) The declarant shall make the refund,

- (a) within 10 days after receiving a notice of rescission, if neither the purchaser nor the declarant has made an application for a determination described in subsection (5) or (8) respectively; or
- (b) within 10 days after the court makes a determination that the change is material, if the purchaser has made an application under subsection (5) or the declarant has made an application under subsection (8). 1998, c. 19, s. 74 (10).

Accountability for budget statement

75. (1) The declarant is accountable to the corporation under this section for the budget statement that covers the one-year period immediately following the registration of the declaration and description. 1998, c. 19, s. 75 (1).

Common expenses

(2) The declarant shall pay to the corporation the amount by which the total actual amount of common expenses incurred for the period covered by the budget statement, except for those attributable to the termination of an agreement under section 111 or 112, exceeds the total budgeted amount. 1998, c. 19, s. 75 (2).

Revenue

(3) The declarant shall pay to the corporation the amount by which the total actual amount of fees, charges, rents and other revenue paid or to be paid to the corporation, during the period covered by the budget statement, for the use of any part of the common elements or assets or of any other facilities related to the property, is less than the total budgeted amount. 1998, c. 19, s. 75 (3).

Set-off

(4) If the total actual amount of revenue described in subsection (3) exceeds the total budgeted amount, the declarant may deduct the excess from any amount payable under subsection (2). 1998, c. 19, s. 75 (4).

Notice of payment

(5) After receiving the audited financial statements for the period covered by the budget statement, the board shall compare the actual amount of common expenses and revenue described in subsections (2) and (3) for the period covered by the budget statement with the budgeted amounts and shall, within 30 days of receiving the audited financial statements, give written notice to the declarant of the amount that the declarant is required to pay to the corporation under this section. 1998, c. 19, s. 40 (6). 1998, c. 19, s. 75 (5).

Time for payment

(6) Within 30 days of receiving the notice, the declarant shall pay the corporation the amount that it is required to pay under this section. 1998, c. 19, s. 75 (6).

Status certificate

76. (1) The corporation shall give to each person who so requests a status certificate with respect to a unit in the corporation, in the prescribed form, that specifies the date on which it was made and that contains,

- (a) a statement of the common expenses for the unit and the default, if any, in payment of the common expenses;
- (b) a statement of the increase, if any, in the common expenses for the unit that the board has declared since the date of the budget of the corporation for the current fiscal year and the reason for the increase;
- (c) a statement of the assessments, if any, that the board has levied against the unit since the date of the budget of the corporation for the current fiscal year to increase the contribution to the reserve fund and the reason for the assessments;
- (d) a statement of the address for service of the corporation;
- (e) a statement of the names and address for service of the directors and officers of the corporation;
- (f) a copy of the current declaration, by-laws and rules;
- (g) a copy of all applications made under section 109 to amend the declaration for which the court has not made an order;
- (h) a statement of all outstanding judgments against the corporation and the status of all legal actions to which the corporation is a party;

- (i) a copy of the budget of the corporation for the current fiscal year, the last annual audited financial statements and the auditor's report on the statements;
- (j) a list of all current agreements mentioned in section 111, 112 or 113 and all current agreements between the corporation and another corporation or between the corporation and the owner of the unit;
- (k) a statement that the person requesting the status certificate has the rights described in subsections (7) and (8) with respect to the agreements mentioned in clause (j);
- (l) a statement whether the parties have complied with all current agreements mentioned in clause 98 (1) (b) with respect to the unit;
- (m) a statement with respect to,
 - (i) the most recent reserve fund study and updates to it,
 - (ii) the amount in the reserve fund no earlier than at the end of a month within 90 days of the date of the status certificate, and
 - (iii) current plans, if any, to increase the reserve fund under subsection 94 (8);
- (n) a statement of those additions, alterations or improvements to the common elements, those changes in the assets of the corporation and those changes in a service of the corporation that are substantial and that the board has proposed but has not implemented, together with a statement of the purpose of them;
- (o) a statement of the number of units for which the corporation has received notice under section 83 that the unit was leased during the fiscal year preceding the date of the status certificate;
- (p) a certificate or memorandum of insurance for each of the current insurance policies;
- (q) a statement of the amounts, if any, that this Act requires be added to the common expenses payable for the unit;
- (r) a statement whether the Superior Court of Justice has made an order appointing an inspector under section 130 or an administrator under section 131, S.O. 2000 c. 26.
- (s) all other material that the regulations made under this Act require. 1998, c. 19, s. 76 (1).

Fee for certificate

- (2) The corporation may charge the prescribed fee for providing the status certificate. 1998, c. 19, s. 76 (2).

Time for giving certificate

- (3) The corporation shall give the status certificate within 10 days after receiving a request for it and payment of the fee charged by the corporation for it. 1998, c. 19, s. 76 (3).

Omission of information

- (4) If a status certificate that a corporation has given under subsection (1) omits material information that it is required to contain, it shall be deemed to include a statement that there is no such information. 1998, c. 19, s. 76 (4).

Default in giving certificate

- (5) A corporation that does not give a status certificate within the required time shall be deemed to have given a certificate on the day immediately after the required time has expired stating that,
 - (a) there has been no default in the payment of common expenses for the unit;
 - (b) the board has not declared any increase in the common expenses for the unit since the date of the budget of the corporation for the current fiscal year; and
 - (c) the board has not levied any assessments against the unit since the date of the budget of the corporation for the current fiscal year to increase the contribution to the reserve fund. 1998, c. 19, s. 76 (5).

Effect of certificate

- (6) The status certificate binds the corporation, as of the date it is given or deemed to have been given, with respect to the information that it contains or is deemed to contain, as against a purchaser or mortgagee of a unit who relies on the certificate. 1998, c. 19, s. 76 (6).

Examination of agreements

- (7) Upon receiving a written request and reasonable notice, the corporation shall permit a person who has requested a status certificate and paid the fee charged by the corporation for the certificate, or an agent of the person duly authorized in writing, to examine the agreements mentioned in clause (1) (k) at a reasonable time and at a reasonable location. 1998, c. 19, s. 76 (7).

Copies of agreements

- (8) The corporation shall, within a reasonable time, provide copies of the agreements to a person examining them, if the person so requests and pays a reasonable fee to compensate the corporation for the labour and copying charges. 1998, c. 19, s. 76 (8).

Information on corporation

- 77. On the request of any person, the corporation shall, without fee, provide the names and address for service of the directors and officers of the corporation, the person responsible for the management of the property of the corporation and the person to whom the corporation has delegated the responsibility for providing status certificates. 1998, c. 19, s. 77.

SALE OF UNITS

Implied covenants

78. (1) Every agreement of purchase and sale of a proposed unit entered into by a declarant before the registration of the declaration and description that creates the unit shall be deemed to contain the following covenants by the declarant:

1. If the proposed unit is for residential purposes, a covenant to take all reasonable steps to sell the other residential units included in the property without delay, except for the units that the declarant intends to lease.
2. A covenant to take all reasonable steps to deliver to the purchaser without delay a deed to the unit that is in registerable form.
3. A covenant to hold in trust for the corporation the money, if any, that the declarant collects from the purchaser on behalf of the corporation. 1998, c. 19, s. 78 (1).

No merger of covenants

(2) The covenants shall be deemed not to merge by operation of law on delivery to the purchaser of a deed that is in registerable form. 1998, c. 19, s. 78 (2).

Compliance order

(3) If the declarant breaches a covenant described in subsection (1), the purchaser under the agreement of purchase and sale may make an application for an order under section 134 and an order may be made under that section. 1998, c. 19, s. 78 (3).

Duty to register declaration and description

79. (1) A declarant who has entered into an agreement of purchase and sale of a proposed unit shall take all reasonable steps to complete the buildings required by the agreement subject to all prescribed requirements and to register, without delay, a declaration and description in respect of the property in which the proposed unit will be included. 1998, c. 19, s. 79 (1).

No right to terminate

(2) Despite any provision to the contrary in the agreement of purchase and sale, the declarant is not entitled to terminate an agreement of purchase and sale of a proposed unit by reason only of the failure to register the declaration and description within a period of time specified in the agreement, unless the purchaser consents to the termination in writing. 1998, c. 19, s. 79 (2).

Application to court

(3) Despite subsection (2), if a declaration and description have not been registered, the declarant may, upon 15 days written notice to the purchasers of all proposed units in the property affected by the declaration and description, make an application to the Superior Court of Justice for an order terminating the agreements of purchase and sale of the purchasers. 1998, c. 19, s. 79 (3), S.O. 2000, c. 26.

Subsequent registration

(4) The court may, in the order, provide that a declaration and description shall not be registered in respect of the property in which the proposed units will be included during a period specified in the order. 1998, c. 19, s. 79 (4).

Considerations

(5) On an application for an order, the court shall consider whether,

- (a) the declarant has taken all reasonable steps to register a declaration and description;
- (b) a declaration and description can be registered within a reasonable period of time; and
- (c) the failure and inability to register a declaration and description is caused by circumstances beyond the control of the declarant. 1998, c. 19, s. 79 (5).

Registration of order

(6) The order is ineffective until a certified copy of it is registered. 1998, c. 19, s. 79 (6).

Interim occupancy

80. (1) An agreement of purchase and sale may permit or require interim occupancy of a proposed unit. 1998, c. 19, s. 80 (1).

Definition

(2) In this section,

“interim occupancy” means the occupancy of a proposed unit before the purchaser receives a deed to the unit that is in registerable form. 1998, c. 19, s. 80 (2).

Right to pay in full

(3) Despite any provision to the contrary in the agreement of purchase and sale, before the expiry of the time period mentioned in subsection 73 (2) for rescinding the agreement, a purchaser may elect to pay in full, on assuming interim occupancy of the proposed unit, the balance of the purchase price remaining after deducting the amounts paid under the agreement before assuming interim occupancy. 1998, c. 19, s. 80 (3).

Occupancy fee

(4) If the purchaser assumes interim occupancy of a proposed unit or is required to do so under the agreement of purchase and sale, the declarant may charge the purchaser a monthly occupancy fee which shall not be greater than the total of the following amounts:

1. Where applicable, interest calculated on a monthly basis on the unpaid balance of the purchase price at the prescribed rate.

2. An amount reasonably estimated on a monthly basis for municipal taxes attributable to the unit.
3. The projected monthly common expense contribution for the unit. 1998, c. 19, s. 80 (4).

Reserve fund contribution

(5) If the declarant charges the purchaser a monthly occupancy fee for interim occupancy of a proposed unit for residential purposes for longer than six months and the monthly occupancy fee includes a projected contribution to the reserve fund of the corporation, then, with respect to the occupancy fee for each month after the sixth month, the declarant shall hold in trust and remit to the corporation upon registering the declaration and description the portion of the monthly occupancy fee that represents the projected contribution to the reserve fund. 1998, c. 19, s. 80 (5).

Rights and duties of declarant

- (6) If a purchaser assumes interim occupancy of a proposed unit, the declarant,
- (a) shall provide those services that the corporation will have a duty to provide to owners after the registration of the declaration and description that creates the unit;
 - (b) shall repair and maintain the proposed property and the proposed unit in the same manner as the corporation will have a duty to repair after damage and maintain after the registration of the declaration and description that creates the unit;
 - (c) has the same right of entry that the corporation will have after the registration of the declaration and description that creates the unit;
 - (d) may withhold consent to an assignment of the right to occupy the proposed unit;
 - (e) may charge a reasonable fee for consenting to an assignment of the right to occupy the proposed unit; and
 - (f) shall, within 30 days of the registration of the declaration and description that creates the unit, notify the purchaser in writing of the date and instrument numbers of the registration, unless within that time the purchaser receives a deed to the unit that is in registerable form. 1998, c. 19, s. 80 (6).

Application

(7) The rights and duties described in subsection (6) apply despite any provision to the contrary in the *Residential Tenancies Act, 2006* 1998, c. 19, s. 80 (11).

Refund of municipal taxes

(8) The declarant shall, on delivering to the purchaser a deed that is in registerable form or as soon as is practicable after delivery, refund to the purchaser the portion of the monthly occupancy fee that the purchaser has paid on account of municipal taxes attributable to the proposed unit in excess of the amount actually assessed against the unit. 1998, c. 19, s. 80 (8).

Municipal taxes payable

(9) If the portion of the monthly occupancy fee that the purchaser has paid on account of municipal taxes attributable to the proposed unit is insufficient to pay the amount actually assessed against the unit, the declarant may require the purchaser to pay the difference between the two amounts. 1998, c. 19, s. 80 (9).

Non-application

(10) Sections 149, 150, 151, 165, 166, and 167 and Part VII of the *Residential Tenancies Act, 2006* do not apply to interim occupancy and monthly occupancy fees charged under this section. See: 2000, c. 26, Sched. B, ss. 7 (6), 20 (4).

(11) SPENT: 1998, c. 19, s. 80 (11).

(12) SPENT: 1998, c. 19, s. 80 (12).

Money held in trust

81. (1) A declarant shall ensure that a trustee of a prescribed class or the declarant's solicitor receives and holds in trust all money, together with interest earned on it, as soon as a person makes a payment,

- (a) with respect to reserving a right to enter into an agreement of purchase and sale for the purchase of a proposed unit;
- (b) on account of an agreement of purchase and sale of a proposed unit; or
- (c) on account of a sale of a proposed unit. 1998, c. 19, s. 81 (1).

Exception

- (2) Subsection (1) does not apply to money received,
- (a) on account of the purchase of personal property included in the proposed unit that is not to be permanently affixed to the land; or
 - (b) as an occupancy fee under subsection 80 (4). 1998, c. 19, s. 81 (2).

Reservation money

(3) If a person has paid money to reserve a right to enter into an agreement of purchase and sale for the purchase of a proposed unit and subsequently enters into such an agreement with the declarant, the declarant shall, on entering into the agreement, credit the money received to the purchase price under the agreement, despite any provision of the agreement. 1998, c. 19, s. 81 (3).

Trustee

(4) Upon receiving money that is required to be held in trust under subsection (1), a trustee of a prescribed class shall hold the money in trust in a separate account in Ontario designated as a trust account at a bank listed in Schedule I or II to the *Bank Act* (Canada), a trust corporation, a loan corporation, or a credit union. 1998, c. 19, s. 81 (4).

Declarant's solicitor

(5) Upon receiving money that is required to be held in trust under subsection (1), the declarant's solicitor shall hold the money in trust in a trust account in Ontario. 1998, c. 19, s. 81 (5).

Evidence of compliance

(6) Within 10 days of the payment of the money under subsection (1), the declarant shall provide to the person who paid the money written evidence, in the form prescribed by the Minister, of compliance with subsection (1) and one of subsections (4) and (5). 1998, c. 19, s. 81 (6).

Duration of trust

(7) Despite the registration of a declaration and description, the person who holds money in trust under subsection (1) shall hold it in trust until,

- (a) the person holding the money in trust disposes of it to the person entitled to it, where the disposal is done in accordance with this Act and an agreement that the person who paid the money has entered into with respect to the proposed unit; or
- (b) the declarant ensures that security of a prescribed class is provided for the money, except if the money has been received under clause (1) (a) and has not been credited to the purchase price under the agreement. 1998, c. 19, s. 81 (7).

Interest

82. (1) The declarant shall pay interest at the prescribed rate to the purchaser on all money that a person pays on account of the purchase price of a proposed unit or that the declarant credits to the purchase price of a proposed unit. 1998, c. 19, s. 82 (1).

Money released from trust

(2) The interest is payable on the money even if, under clause 81 (7) (b), the declarant provides security of a prescribed class for the money. 1998, c. 19, s. 82 (2).

Calculation

(3) The interest shall be calculated from the day the person pays the money received until the day the proposed unit is available for possession or occupancy in accordance with the purchaser's agreement of purchase and sale with the declarant. 1998, c. 19, s. 82 (3).

Time of payment

(4) The interest shall be paid to the purchaser by way of payment or set-off,

- (a) on the day the declarant delivers to the purchaser a deed to the proposed unit that is in registerable form, if the declarant so elects; or
- (b) on the day the proposed unit is available for possession or occupancy in accordance with the purchaser's agreement of purchase and sale with the declarant, otherwise. 1998, c. 19, s. 82 (4).

Compound interest

(5) A declarant who elects to pay the interest to the purchaser on the day of delivering to the purchaser a deed to the proposed unit that is in registerable form shall, on that day, pay interest to the purchaser at the prescribed rate on the interest that the declarant is required to pay under subsection (1). 1998, c. 19, s. 82 (5).

Calculation

(6) The declarant shall pay the interest payable under subsection (5) from the day the proposed unit is available for possession or occupancy in accordance with the purchaser's agreement of purchase and sale with the declarant until the day of payment. 1998, c. 19, s. 82 (6).

Terminated agreements

(7) If an agreement of purchase and sale provides that a purchaser is entitled to a return of money paid under the agreement upon termination of the agreement and the agreement is terminated, the declarant shall pay interest at the prescribed rate to the purchaser on the money returned. 1998, c. 19, s. 82 (7).

Excess interest

(8) The declarant is entitled to the excess of all interest earned on money held in trust over the interest it is required to pay under this section. 1998, c. 19, s. 82 (8).

LEASE OF UNITS

Notification by owner

83. (1) The owner of a unit who leases the unit or renews a lease of the unit shall, within 30 days of entering into the lease or the renewal, as the case may be,

- (a) notify the corporation that the unit is leased;
- (b) provide the corporation with the lessee's name, the owner's address and a copy of the lease or renewal or a summary of it in the form prescribed by the Minister; and
- (c) provide the lessee with a copy of the declaration, by-laws and rules of the corporation. 1998, c. 19, s. 83 (1).

Termination of lease

(2) If a lease of a unit is terminated and not renewed, the owner of the unit shall notify the corporation in writing. 1998, c. 19, s. 83 (2).

Record of notices

(3) A corporation shall maintain a record of the notices that it receives under this section. 1998, c. 19, s. 83 (3).

**PART VI
OPERATION**

COMMON EXPENSES

Contribution of owners

163 **84.** (1) Subject to the other provisions of this Act, the owners shall contribute to the common expenses in the proportions specified in the declaration. 1998, c. 19, s. 84 (1).

Common surplus

(2) A common surplus in a corporation shall be applied either against future common expenses or paid into the reserve fund, and except on termination, shall not be distributed to the owners or mortgagees of the units. 1998, c. 19, s. 84 (2).

No avoidance

(3) An owner is not exempt from the obligation to contribute to the common expenses even if,

(a) the owner has waived or abandoned the right to use the common elements or part of them;

(b) the owner is making a claim against the corporation; or

(c) the declaration, by-laws or rules restrict the owner from using the common elements or part of them. 1998, c. 19, s. 84 (3).

Lien upon default

164 **85.** (1) If an owner defaults in the obligation to contribute to the common expenses, the corporation has a lien against the owner's unit and its appurtenant common interest for the unpaid amount together with all interest owing and all reasonable legal costs and reasonable expenses incurred by the corporation in connection with the collection or attempted collection of the unpaid amount. 1998, c. 19, s. 85 (1).

Expiration of lien

(2) The lien expires three months after the default that gave rise to the lien occurred unless the corporation within that time registers a certificate of lien in a form prescribed by the Minister. 1998, c. 19, s. 85 (2).

Certificate of lien

(3) A certificate of lien when registered covers,

(a) the amount owing under all of the corporation's liens against the owner's unit that have not expired at the time of registration of the certificate;

(b) the amount by which the owner defaults in the obligation to contribute to the common expenses after the registration of the certificate; and

(c) all interest owing and all reasonable legal costs and reasonable expenses that the corporation incurs in connection with the collection or attempted collection of the amounts described in clauses (a) and (b), including the costs of preparing and registering the certificate of lien and a discharge of it. 1998, c. 19, s. 85 (3).

Notice to owner

(4) At least 10 days before the day a certificate of lien is registered, the corporation shall give written notice of the lien to the owner whose unit is affected by the lien. 1998, c. 19, s. 85 (4).

Service of notice

(5) The corporation shall give the notice by personal service or by sending it by prepaid mail addressed to the owner at the address for service that appears in the record of the corporation maintained under subsection 47 (2). 1998, c. 19, s. 85 (5).

Lien enforcement

(6) The lien may be enforced in the same manner as a mortgage. 1998, c. 19, s. 85 (6).

Discharge of lien

(7) Upon payment of the amounts described in subsection (3), the corporation shall prepare and register a discharge of the certificate of lien in the form prescribed by the Minister and shall advise the owner in writing of the particulars of the registration. 1998, c. 19, s. 85 (7).

Priority of lien

86. (1) Subject to subsection (2), a lien mentioned in subsection 85 (1) has priority over every registered and unregistered encumbrance even though the encumbrance existed before the lien arose but does not have priority over,

(a) a claim of the Crown other than by way of a mortgage;

(b) a claim for taxes, charges, rates or assessments levied or recoverable under the *Municipal Act, 2001*, the *City of Toronto Act, 2006*, the *Education Act*, the *Local Roads Boards Act* or the *Statute Labour Act*; or

(c) a lien or claim that is prescribed. 1998, c. 19, s. 86 (1); 2002, c. 17, Sched. F, Table.

Exception, non-residential lien

(2) A lien in respect of a unit for non-residential purposes does not have priority under this section in respect of the amount by which the owner of the unit has defaulted in the obligation to contribute to the common expenses before the coming into force of this section. 1998, c. 19, s. 86(2).

Notice of lien

(3) The corporation shall, on or before the day a certificate of lien is registered, give written notice of the lien to every encumbrancer whose encumbrance is registered against the title of the unit affected by the lien. 1998, c. 19, s. 86 (3).

Service of notice

(4) The corporation shall give the notice by personal service or by sending it by registered prepaid mail addressed to the encumbrancer at the encumbrancer's last known address. 1998, c. 19, s. 86 (4).

Effect of no notice

(5) Subject to subsection (6), the lien loses its priority over an encumbrance unless the corporation gives the required notice to the encumbrancer. 1998, c. 19, s. 86 (5).

Priority if notice late

(6) If a corporation gives notice of a lien to an encumbrancer after the day the certificate of lien is registered, the lien shall have priority over the encumbrance to the extent of,

- (a) the arrears of common expenses that accrued during the three months before the day notice is given and that continue to accrue subsequent to that day; and
- (b) all interest owing on the arrears and all reasonable legal costs and reasonable expenses incurred by the corporation in connection with the collection or attempted collection of the arrears. 1998, c. 19, s. 86 (6).

Default with respect to leased unit

87. (1) If an owner who has leased a unit defaults in the owner's obligation to contribute to the common expenses, the corporation may, by written notice to the lessee, require the lessee to pay to the corporation the lesser of the amount of the default and the amount of the rent due under the lease. 1998, c. 19, s. 87 (1).

Service on lessee

(2) The corporation shall give the notice to the lessee by personal service or by sending it by prepaid mail addressed to the lessee at the address of the unit. 1998, c. 19, s. 87 (2).

Notice to owner

(3) If the corporation gives a notice to a lessee, it shall give a copy of the notice to the owner of the unit that the lessee has leased. 1998, c. 19, s. 87 (3).

Service on owner

(4) The corporation shall give the copy of the notice to the owner by personal service or by sending it by prepaid mail addressed to the owner at the address for service that appears in the record of the corporation maintained under subsection 47 (2). 1998, c. 19, s. 87 (4).

Rent paid to corporation

(5) Upon receiving a notice under subsection (1), the lessee shall make the required payment to the corporation even if an encumbrancer of the unit has acquired the right of the lessor to receive rent under the lease. 1998, c. 19, s. 87 (5).

No default in lease

(6) The payment to the corporation shall constitute payment towards rent under the lease and the lessee shall not by reason only of the payment to the corporation be considered to be in default of an obligation in the lease. 1998, c. 19, s. 87 (6).

Mortgagee's rights

88. (1) Every mortgage of a unit shall be deemed to contain a provision that,

- (a) the mortgagee has the right to collect the owner's contribution to the common expenses and shall promptly pay the amount so collected to the corporation on behalf of the owner;
- (b) the owner's default in the obligation to contribute to the common expenses constitutes default under the mortgage;
- (c) the mortgagee has the right to pay,
 - (i) the amounts of the owner's contribution to the common expenses that from time to time fall due and are unpaid in respect of the mortgaged premises,
 - (ii) all interest owing and all reasonable legal costs and reasonable expenses that the corporation incurs in connection with the collection or attempted collection of the amounts described in subclause (i), including, where applicable, the costs of preparing and registering a certificate of lien and a discharge of it;
- (d) payments made by the mortgagee under clause (c), together with interest and all reasonable costs, charges and expenses incurred in respect of the payments, are to be added to the debt secured by the mortgage and to be payable, with interest at the rate payable on the mortgage; and

- (e) if after demand the owner fails to fully reimburse the mortgagee, the mortgage immediately becomes due and payable at the option of the mortgagee. 1998, c. 19, s. 88 (1).

Statement of common expenses

- (2) A corporation shall, on request and free of charge, provide to the mortgagee of a unit a written statement setting out the common expenses in respect of the unit and, if there is a default in the payment of them, the amounts described in subsection 85 (3) in respect of the unit. 1998, c. 19, s. 88 (2).

REPAIR AND MAINTENANCE

Repair after damage

- 166 **89.** (1) Subject to sections 91 and 123, the corporation shall repair the units and common elements after damage. 1998, c. 19, s. 89 (1).

Extent of obligation

- 166A (2) The obligation to repair after damage includes the obligation to repair and replace after damage or failure but, subject to Determination of improvements

- (3) For the purpose of this section, the question of what constitutes an improvement to a unit shall be determined by reference to a standard unit for the class of unit to which the unit belongs. 1998, c. 19, s. 89 (3).

Standard unit

- (4) A standard unit for the class of unit to which the unit belongs shall be,

- (a) the standard unit described in a by-law made under clause 56 (1) (h), if the board has made a by-law under that clause;
- (b) the standard unit described in the schedule mentioned in clause 43 (5) (h), if the board has not made a by-law under clause 56 (1) (h). 1998, c. 19, s. 89 (4).

Transition, existing corporations

- (5) A corporation that was created before the day this section comes into force and that had the obligation of repairing after damage improvements made to a unit before the registration of the declaration and description shall continue to have the obligation unless it has, by by-law, established what constitutes a standard unit for the class of unit to which the unit belongs. 1998, c. 19, s. 89 (5).

Maintenance

- 167 **90.** (1) Subject to section 91, the corporation shall maintain the common elements and each owner shall maintain the owner's unit. 1998, c. 19, s. 90 (1).

Normal repairs included

- (2) The obligation to maintain includes the obligation to repair after normal wear and tear but does not include the obligation to repair after damage. 1998, c. 19, s. 90 (2).

Provisions of declaration

- 91.** The declaration may alter the obligation to maintain or to repair after damage as set out in this Act by providing that,

- (a) subject to section 123, each owner shall repair the owner's unit after damage;
- (b) the owners shall maintain the common elements or any part of them;
- (c) each owner shall maintain and repair after damage those parts of the common elements of which the owner has the exclusive use; and
- (d) the corporation shall maintain the units or any part of them. 1998, c. 19, s. 91.

Work done for owner

- 92.** (1) If the declaration provides that the owner has an obligation to repair after damage and the owner fails to carry out the obligation within a reasonable time after damage occurs, the corporation shall do the work necessary to carry out the obligation. 1998, c. 19, s. 92 (1).

Same, maintenance

- (2) If the declaration provides that the owner has an obligation to maintain the common elements or any part of them and the owner fails to carry out the obligation within a reasonable time, the corporation may do the work necessary to carry out the obligation. 1998, c. 19, s. 92 (2).

Same, maintenance of units

- (3) If an owner has an obligation under this Act to maintain the owner's unit and fails to carry out the obligation within a reasonable time and if the failure presents a potential risk of damage to the property or the assets of the corporation or a potential risk of personal injury to persons on the property, the corporation may do the work necessary to carry out the obligation. 1998, c. 19, s. 92 (3).

Cost

- (4) An owner shall be deemed to have consented to the work done by a corporation under this section and the cost of the work shall be added to the owner's contribution to the common expenses. 1998, c. 19, s. 92 (4).

Reserve fund

- 93.** (1) The corporation shall establish and maintain one or more reserve funds. 1998, c. 19, s. 93 (1).

Purpose of fund

(2) A reserve fund shall be used solely for the purpose of major repair and replacement of the common elements and assets of the corporation. 1998, c. 19, s. 93 (2).

Designation not required

(3) A fund set up for the purpose mentioned in subsection (2) shall be deemed to be a reserve fund even though it may not be so designated. 1998, c. 19, s. 93 (3).

Contributions to fund

(4) The corporation shall collect contributions to the reserve fund from the owners, as part of their contributions to the common expenses. 1998, c. 19, s. 93 (4).

Amount of contributions

(5) Unless the regulations made under this Act specify otherwise, until the corporation conducts a first reserve fund study and implements a proposed plan under section 94, the total amount of the contributions to the reserve fund shall be the greater of the amount specified in subsection (6) and 10 per cent of the budgeted amount required for contributions to the common expenses exclusive of the reserve fund. 1998, c. 19, s. 93 (5).

Same, after first reserve fund study

(6) The total amount of the contributions to the reserve fund after the time period specified in subsection (5) shall be the amount that is reasonably expected to provide sufficient funds for the major repair and replacement of the common elements and assets of the corporation, calculated on the basis of the expected repair and replacement costs and the life expectancy of the common elements and assets of the corporation. 1998, c. 19, s. 93 (6).

Income earned

(7) Interest and other income earned from the investment of money in the reserve fund shall form part of the fund. 1998, c. 19, s. 93 (7).

Reserve fund study

94. (1) The corporation shall conduct periodic studies to determine whether the amount of money in the reserve fund and the amount of contributions collected by the corporation are adequate to provide for the expected costs of major repair and replacement of the common elements and assets of the corporation. 1998, c. 19, s. 94 (1).

Contents of study

(2) A reserve fund study shall be of the prescribed class, shall include the material that is prescribed for its class and shall be performed in accordance with the standards that are prescribed for its class. 1998, c. 19, s. 94 (2).

Updates

(3) For the purposes of this Act, an update to a reserve fund study shall constitute a class of reserve fund study. 1998, c. 19, s. 94 (3).

Time of study

(4) A corporation created on or after this section comes into force shall conduct a reserve fund study within the year following the registration of the declaration and description and subsequently at the prescribed times. 1998, c. 19, s. 94 (4).

Same, existing corporations

(5) A corporation created before the day this section comes into force shall conduct a reserve fund study at the prescribed times. 1998, c. 19, s. 94 (5).

Person conducting study

(6) A reserve fund study shall be conducted by a person of a prescribed class who shall have no affiliation with the board or with the corporation that is contrary to the regulations made under this Act. 1998, c. 19, s. 94 (6).

Cost of study

(7) The cost of conducting the study shall be a common expense which the board may charge to the reserve fund. 1998, c. 19, s. 94 (7).

Plan for future funding

(8) Within 120 days of receiving a reserve fund study, the board shall review it and propose a plan for the future funding of the reserve fund that the board determines will ensure that, within a prescribed period of time and in accordance with the prescribed requirements, the fund will be adequate for the purpose for which it was established. 1998, c. 19, s. 94 (8).

Copy of plan

(9) Within 15 days of proposing a plan, the board shall,

- (a) send to the owners a notice containing a summary of the study, a summary of the proposed plan and a statement indicating the areas, if any, in which the proposed plan differs from the study; and
- (b) send to the auditor a copy of the study, a copy of the proposed plan and a copy of the notice sent to the owners under clause (a). 1998, c. 19, s. 94 (9).

Implementation of proposed plan

(10) The board shall implement the proposed plan after the expiration of 30 days following the day on which the board complies with subsection (9). 1998, c. 19, s. 94 (10).

Use of reserve fund

95. (1) No part of a reserve fund shall be used except for the purpose mentioned in subsection 93 (2). 1998, c. 19, s. 95 (1).

Board's use

(2) The board does not require the consent of the owners to make an expenditure out of a reserve fund. 1998, c. 19, s. 95 (2).

No distribution

(3) The amount of a reserve fund shall constitute an asset of the corporation and shall not be distributed to the mortgagees of the units or, except on termination of the corporation, to the owners of the units. 1998, c. 19, s. 95 (3).

Warranties

96. (1) All warranties given with respect to work and materials furnished for a unit shall be for the benefit of an owner. 1998, c. 19, s. 96 (1).

Enforcement by corporation

(2) The corporation may enforce the warranties mentioned in subsection (1) on behalf of an owner if the corporation does work on behalf of the owner under section 92. 1998, c. 19, s. 96 (2).

Same, common elements

(3) All warranties given with respect to work and materials furnished for the common elements shall be for the benefit of the corporation. 1998, c. 19, s. 96 (3).

CHANGES TO COMMON ELEMENTS AND ASSETS

Changes made by corporation

97. (1) If the corporation has an obligation to repair the units or common elements after damage or to maintain them and the corporation carries out the obligation using materials that are as reasonably close in quality to the original as is appropriate in accordance with current construction standards, the work shall be deemed not to be an addition, alteration or improvement to the common elements or a change in the assets of the corporation for the purpose of this section. 1998, c. 19, s. 97 (1).

Changes made without notice

(2) A corporation may, by resolution of the board and without notice to the owners, make an addition, alteration or improvement to the common elements, a change in the assets of the corporation or a change in a service that the corporation provides to the owners if,

- (a) it is necessary to make the addition, alteration, improvement or change to comply with an agreement mentioned in section 113 or the requirements imposed by any general or special Act or regulations or by-laws made under that Act;
- (b) in the opinion of the board, it is necessary to make the addition, alteration, improvement or change to ensure the safety or security of persons using the property or assets of the corporation or to prevent imminent damage to the property or assets; or
- (c) subject to the regulations made under this Act, the estimated cost, in any given month or other prescribed period, if any, of making the addition, alteration, improvement or change is no more than the greater of \$1,000 and 1 per cent of the annual budgeted common expenses for the current fiscal year. 1998, c. 19, s. 97 (2).

Changes made on notice

(3) A corporation may make an addition, alteration or improvement to the common elements, a change in the assets of the corporation or a change in a service that the corporation provides to the owners if,

- (a) the corporation has sent a notice to the owners that,
 - (i) describes the proposed addition, alteration, improvement or change,
 - (ii) contains a statement of the estimated cost of the proposed addition, alteration, improvement or change indicating the manner in which the corporation proposes to pay the cost,
 - (iii) specifies that the owners have the right, in accordance with section 46 and within 30 days of receiving the notice, to requisition a meeting of owners, and
 - (iv) contains a copy of section 46 and this section; and
- (b) one of the following conditions has been met:
 1. The owners have not requisitioned a meeting in accordance with section 46 within 30 days of receiving a notice under clause (a).
 2. The owners have requisitioned a meeting in accordance with section 46 within 30 days of receiving a notice under clause (a) but have not voted against the proposed addition, alteration, improvement or change at the meeting. 1998, c. 19, s. 97 (3).

Approval of substantial change

(4) Despite subsection (3), the corporation shall not make a substantial addition, alteration, improvement to the common elements, a substantial change in the assets of the corporation or a substantial change in a service that the corporation provides to the owners unless the owners who own at least $66\frac{2}{3}$ per cent of the units of the corporation vote in favour of approving it. 1998, c. 19, s. 97 (4).

Meeting

(5) The vote shall be taken at a meeting duly called for the purpose of subsection (4). 1998, c. 19, s. 97 (5).

Meaning of substantial change

- (6) For the purposes of subsection (4), an addition, alteration, improvement or change is substantial if,
- (a) its estimated cost, based on its total cost, regardless of whether part of the cost is incurred before or after the current fiscal year, exceeds the lesser of,
 - (i) 10 per cent of the annual budgeted common expenses for the current fiscal year, and
 - (ii) the prescribed amount, if any; or
 - (b) the board elects to treat it as substantial. 1998, c. 19, s. 97 (6).

Cost of changes

(7) The cost of an addition, alteration, improvement or change that the corporation makes under this section shall form part of the common expenses. 1998, c. 19, s. 97 (7).

Changes made by owners

- 98.** (1) An owner may make an addition, alteration or improvement to the common elements that is not contrary to this Act or the declaration if,
- (a) the board, by resolution, has approved the proposed addition, alteration or improvement;
 - (b) the owner and the corporation have entered into an agreement that,
 - (i) allocates the cost of the proposed addition, alteration or improvement between the corporation and the owner,
 - (ii) sets out the respective duties and responsibilities, including the responsibilities for the cost of repair after damage, maintenance and insurance, of the corporation and the owner with respect to the proposed addition, alteration or improvement, and
 - (iii) sets out the other matters that the regulations made under this Act require;
 - (c) subject to subsection (2), the requirements of section 97 have been met in cases where that section would apply if the proposed addition, alteration or improvement were done by the corporation; and
 - (d) the corporation has included a copy of the agreement described in clause (b) in the notice that the corporation is required to send to the owners. 1998, c. 19, s. 98 (1).

No notice or approval

- (2) Clauses (1) (c) and (d) do not apply if the proposed addition, alteration or improvement relates to a part of the common elements of which the owner has exclusive use and if the board is satisfied on the evidence that it may require that the proposed addition, alteration or improvement,
- (a) will not have an adverse effect on units owned by other owners;
 - (b) will not give rise to any expense to the corporation;
 - (c) will not detract from the appearance of buildings on the property;
 - (d) will not affect the structural integrity of buildings on the property according to a certificate of an engineer, if the proposed addition, alteration or improvement involves a change to the structure of the buildings; and
 - (e) will not contravene the declaration or any prescribed requirements. 1998, c. 19, s. 98 (2).

When agreement effective

- (3) An agreement described in clause (1) (b) does not take effect until,
- (a) the conditions set out in clause (1) (a) and subsection (2) have been met or the conditions set out in clauses (1) (a), (c) and (d) have been met; and
 - (b) the corporation has registered it against the title to the owner's unit. 1998, c. 19, s. 98 (3).

Lien for default under agreement

(4) The corporation may add the costs, charges, interest and expenses resulting from an owner's failure to comply with an agreement to the common expenses payable for the owner's unit and may specify a time for payment by the owner. 1998, c. 19, s. 98 (4).

Agreement binds unit

- (5) An agreement binds the owner's unit and is enforceable against the owner's successors and assigns. 1998, c. 19, s. 98 (5).

INSURANCE

Property insurance

99. (1) The corporation shall obtain and maintain insurance, on its own behalf and on behalf of the owners, for damage to the units and common elements that is caused by major perils or the other perils that the declaration or the by-laws specify. 1998, c. 19, s. 99 (1).

Definition

- (2) In subsection (1),

"major perils" means the perils of fire, lightning, smoke, windstorm, hail, explosion, water escape, strikes, riots or civil commotion, impact by aircraft or vehicles, vandalism or malicious acts. 1998, c. 19, s. 99 (2).

Exclusion ineffective

(3) An exclusion in the insurance required by this section is not effective with respect to damage resulting from faulty or improper material, workmanship or design that would be insured, but for the exclusion. 1998, c. 19, s. 99 (3).

Improvements not included

(4) The obligation to insure under subsection (1) does not include insurance for damage to improvements made to a unit. 1998, c. 19, s. 99(4).

Determination of improvements

(5) For the purpose of this section, the question of what constitutes an improvement to a unit shall be determined by reference to a standard unit for the class of unit to which the unit belongs. 1998, c. 19, s. 99 (5).

Standard unit

(6) A standard unit for the class of unit to which the unit belongs shall be,

- (a) the standard unit described in a by-law made under clause 56 (1) (h), if the board has made a by-law under that clause;
- (b) the standard unit described in the schedule mentioned in clause 43 (5) (h), if the board has not made a by-law under clause 56 (1) (h). 1998, c. 19, s. 99 (6).

Amount of recovery

(7) Subject to a reasonable deductible, the insurance required under this section shall cover the replacement cost of the property damaged by the perils to which the insurance applies. 1998, c. 19, s. 99 (7).

Breach of policy

(8) Despite anything in an insurance policy issued under this section, no act of any person shall be deemed to be a breach of the conditions of the policy if the act is prejudicial to the interests of the corporation or the owners. 1998, c. 19, s. 99 (8).

Termination

(9) An insurance policy issued under this section shall be deemed to include a clause that the insurer shall not terminate the insurance contract unless the insurer gives the corporation and the insurance trustee, if any, at least 60 days notice by registered mail. 1998, c. 19, s. 99 (9).

Proceeds

100. (1) Despite anything contained in an insurance trust agreement that the corporation has entered into with an insurance trustee, if the proceeds of an insurance policy issued under section 99 are less than 15 per cent of the replacement cost of the property covered by the policy, the insurer shall pay the proceeds to the corporation or the person whom the corporation specifies. 1998, c. 19, s. 100 (1).

Use of insurance proceeds

(2) Upon the proceeds being available, the corporation shall promptly use them for the repair or replacement of the damaged units and common elements, unless the owners have voted to terminate because of substantial damage in accordance with section 123. 1998, c. 19, s. 100 (2).

Payment from Ontario New Home Warranties Plan

(3) A corporation that receives a payment out of the guarantee fund under subsection 14 (3) or (4) of the *Ontario New Home Warranties Plan Act* for remedial work to the common elements shall promptly use the payment for the remedial work, unless,

- (a) the owners have voted to terminate because of substantial damage in accordance with section 123; or
- (b) the corporation has already completed and paid for the remedial work. 1998, c. 19, s. 100 (3).

Limitation, mortgage

(4) Despite any provision in a mortgage or subsection 6 (2) of the *Mortgages Act*, a mortgagee may not require that proceeds received under an insurance policy on the property or on a part of the property or a payment received out of the guarantee fund under subsection 14 (3) or (4) of the *Ontario New Home Warranties Plan Act* be applied towards the discharge of the mortgage; a requirement that contravenes this subsection is void. 1998, c. 19, s. 100 (4).

Double coverage

101. (1) Insurance that a corporation obtains and maintains under section 99 shall be deemed not to be other insurance for the purpose of any prohibition of or condition against other insurance in a policy of an owner insuring against loss of or damage to the owner's unit or the owner's interest in the common elements and covering only to the extent that the insurance placed by the corporation is inapplicable, inadequate or ineffective. 1998, c. 19, s. 101 (1).

No reciprocal contribution

(2) Despite section 150 of the *Insurance Act*, an insurance policy issued under section 99 and any other insurance policy, except another policy under section 99, are not liable to be brought into contribution with each other. 1998, c. 19, s. 101 (2).

Other insurance

102. The corporation shall obtain and maintain,

- (a) insurance against its liability resulting from a breach of duty as occupier of the common elements or land that the corporation holds as an asset; and
- (b) insurance against its liability arising from the ownership, use or operation, by or on its behalf, of boilers, machinery, pressure vessels and motor vehicles. 1998, c. 19, s. 102.

Capacity to maintain insurance

103. (1) Nothing in this Act shall be construed to restrict the capacity of a corporation, an owner or any other person to obtain and maintain insurance in respect of an insurable interest. 1998, c. 19, s. 103 (1).

Same

(2) For the purposes of sections 99 and 102, the corporation shall be deemed to have an insurable interest in the units and common elements. 1998, c. 19, s. 103 (2).

Disclosure by insurer

104. An insurer under an insurance policy required by this Act shall provide the corporation with a certificate or memorandum of insurance declaring the coverage carried by the corporation on behalf of all owners. 1998, c. 19, s. 104.

Deductible

105. (1) Subject to subsection (2) and (3), if an insurance policy obtained by the corporation in accordance with this Act contains a deductible clause that limits the amount payable by the insurer, the portion of a loss that is excluded from coverage shall be a common expense. 1998, c. 19, s. 105 (1).

Owner's responsibility

(2) If an owner, a lessee of an owner or a person residing in the owner's unit with the permission or knowledge of the owner through an act or omission causes damage to the owner's unit, the amount that is the lesser of the cost of repairing the damage and the deductible limit of the insurance policy obtained by the corporation shall be added to the common expenses payable for the owner's unit. 1998, c. 19, s. 105 (2).

Same, by-law

(3) The corporation may pass a by-law to extend the circumstances in subsection (2) under which an amount shall be added to the common expenses payable for an owner's unit if the damage to the unit was not caused by an act or omission of the corporation or its directors, officers, agents or employees. 1998, c. 19, s. 105 (3).

Owner's insurable interest

(4) The amount payable by an owner under this section or as a result of a by-law passed under this section constitutes an insurable interest of the owner. 1998, c. 19, s. 105 (4).

Act prevails

106. If any provision of an insurance policy required by section 99 or 102 or any part of the *Insurance Act* conflicts with anything in this Act, the provisions of this Act apply. 1998, c. 19, s. 106.

AMENDMENTS TO THE DECLARATION AND DESCRIPTION**Amendments with owners' consent**

107. (1) The corporation shall not amend the declaration or the description except in accordance with this section. 1998, c. 19, s. 107 (1).

Conditions

(2) The corporation may amend the declaration or the description if,

- (a) the board, by resolution, has approved the proposed amendment;
- (b) the declarant has consented to the proposed amendment in writing if,
 - (i) at the time the board approved the proposed amendment, the declarant had not transferred all of the units except for the part of the property described in subsection 22 (5), and
 - (ii) less than three years have elapsed from the later of the date of registration of the declaration and description and the date that the declarant first entered into an agreement of purchase and sale for a unit in the corporation;
- (c) the board has held a meeting of owners in accordance with subsections (3) and (4);
- (d) the owners of at least 90 per cent of the units at the time the board approved the proposed amendment have consented to it in writing, if it makes a change in a matter described in clause 7 (2) (c), (d) or (f) or 7 (4) (e);
- (e) the owners of at least 80 per cent of the units at the time the board approved the proposed amendment have consented to it in writing, in all cases apart from a case described in clause (d); and
- (f) the corporation has, in accordance with subsection 47 (8), sent a notice of the proposed amendment to all mortgagees whose names appeared in the record of the corporation maintained under subsection 47 (2) at the time the board approved the proposed amendment. 1998, c. 19, s. 107 (2).

Meeting of owners

(3) The board shall call a meeting of owners for the purpose of considering the proposed amendment. 1998, c. 19, s. 107 (3).

Notice of meeting

(4) The board shall give the owners a notice of the meeting which shall include a copy of the proposed amendment. 1998, c. 19, s. 107 (4).

Registration

(5) The corporation shall register a copy of an amendment made under this section but shall not register the copy until after the expiration of 30 days following the time at which it gave the notice described in clause (2) (f). 1998, c. 19, s. 107 (5).

Form of registration

(6) The registered copy of the amendment shall include a certificate, in the form prescribed by the Minister, made by the officers authorized to act on behalf of the corporation that certifies that the amendment complies with the requirements of this section. 1998, c. 19, s. 107 (6).

When amendment effective

(7) An amendment made under this section is ineffective until the copy of the amendment has been registered. 1998, c. 19, s. 107 (7).

Change of address for service

108. Despite section 107, the board may change the address for service or the mailing address of the corporation by registering a notice of change of address in the form prescribed by the Minister. 1998, c. 19, s. 108.

Court order

109. (1) The corporation or an owner may make an application to the Superior Court of Justice for an order to amend the declaration or description. 1998, c. 19, s. 109 (1). S.O. 2000, c. 26.

Notice of application

(2) The applicant shall give at least 15 days notice of an application to the corporation and to every owner and mortgagee who, on the 30th day before the application is made, is listed in the record of the corporation maintained under subsection 47 (2), but the applicant is not required to give notice to the applicant. 1998, c. 19, s. 109 (2).

Grounds for order

(3) The court may make an order to amend the declaration or description if satisfied that the amendment is necessary or desirable to correct an error or inconsistency that appears in the declaration or description or that arises out of the carrying out of the intent and purpose of the declaration or description. 1998, c. 19, s. 109 (3).

Registration

(4) An amendment under this section is ineffective until a certified copy of the order has been registered. 1998, c. 19, s. 109 (4).

Order of Director of Titles

110. (1) The corporation or an interested person may apply to the Director of Titles appointed under section 9 of the *Land Titles Act* for an order to amend the declaration or description to correct an error or inconsistency that is apparent on the face of the declaration or description, as the case may be. 1998, c. 19, s. 110 (1).

Notice of application

(2) The applicant shall give notice of the application in the form and manner that the Director of Titles directs to the corporation and to every owner and mortgagee listed in the record of the corporation maintained under subsection 47 (2) whose interest would be affected by the amendment, but the applicant is not required to give notice to the applicant. 1998, c. 19, s. 110 (2).

Grounds for order

(3) The Director of Titles shall make an order to amend the declaration or description if satisfied that the amendment will correct an error or inconsistency that is apparent on the face of the declaration or description, as the case may be. 1998, c. 19, s. 110 (3).

Registration

(4) An amendment under this section is ineffective until a certified copy of the order has been registered. 1998, c. 19, s. 110 (4).

TERMINATION OF AGREEMENTS

Management agreements

111. (1) Subject to subsection (2), a corporation may, by resolution of the board, terminate an agreement for the management of the property that it has entered into with a person before the owners elected a new board at a meeting held in accordance with subsection 43 (1). 1998, c. 19, s. 111 (1).

Notice

(2) To terminate an agreement, the board shall give at least 60 days notice in writing of the date of termination to the person with whom the corporation entered into the agreement. 1998, c. 19, s. 111 (2).

Other agreements

112. (1) Subject to subsection (4), a corporation may, by resolution of the board within 12 months following the election of a new board at a meeting held in accordance with subsection 43 (1), terminate an agreement mentioned in subsection (2) that the corporation has entered into with a person other than another corporation before the election of the new board. 1998, c. 19, s. 112 (1).

Application

(2) Subsection (1) applies to the following agreements:

1. An agreement for the provision of goods or services on a continuing basis.
2. An agreement for the provision of facilities to the corporation on other than a non-profit basis.

3. A lease of all or part of the common elements for business purposes. 1998, c. 19, s. 112 (2).

Non-application

(3) Subsection (1) does not apply to a telecommunications agreement within the meaning of section 22. 1998, c. 19, s. 112 (3).

Notice

(4) To terminate an agreement, the board shall give at least 60 days notice in writing of the date of termination to the person with whom the corporation entered into the agreement. 1998, c. 19, s. 112 (4).

Exception, easements

(5) Nothing in this section permits the termination of an easement created by an instrument in writing except in accordance with the instrument. 1998, c. 19, s. 112 (5).

Mutual use agreements

113. (1) If a corporation and a person have entered into an agreement for the mutual use, provision or maintenance or the cost-sharing of facilities or services before the owners elected a new board at a meeting held in accordance with subsection 43 (1), any party to the agreement may, within 12 months following the election, make an application to the Superior Court of Justice for an order under subsection (3). 1998, c. 19, s. 113 (1).

Non-application

(2) Subsection (1) does not apply to a telecommunications agreement within the meaning of section 22. 1998, c. 19, s. 113 (2).

Court order

(3) The court may make an order amending or terminating the agreement or any of its provisions or may make any other order that the court deems necessary if it is satisfied that,

- (a) the disclosure statement did not clearly and adequately disclose the provisions of the agreement; and
- (b) the agreement or any of its provisions produces a result that is oppressive or unconscionably prejudicial to the corporation or any of the owners. 1998, c. 19, s. 113 (3).

Insurance trust agreements

114. Despite anything contained in an insurance trust agreement that a corporation has entered into with an insurance trustee and anything in the declaration, the corporation may terminate the agreement by giving at least 60 days notice in writing of the termination date to the trustee. 1998, c. 19, s. 114.

MISCELLANEOUS

Corporation's money

115. (1) A person who receives money on behalf of or for the benefit of the corporation, including money received from owners as contributions to the common expenses or the reserve fund, shall hold the money, together with interest and other proceeds earned from investing it, in trust for the performance by the corporation of its duties and obligations. 1998, c. 19, s. 115 (1).

Corporation's accounts

(2) A corporation shall maintain one or more accounts in its name designated as general accounts and one or more accounts in its name designated as reserve fund accounts. 1998, c. 19, s. 115 (2).

Location of accounts

(3) Each of the accounts shall be located in Ontario at a bank listed under Schedule I or II to the *Bank Act* (Canada), a trust corporation, a loan corporation, a credit union authorized by law to receive money on deposit. 1998, c. 19, s. 115 (3).

Deposit of money

(4) Subject to subsections (6) and (7), the person who receives money on behalf of or for the benefit of the corporation shall pay the money, together with interest and other proceeds earned from investing it, into,

- (a) a general account of the corporation, if the money was not received as contributions from owners to the reserve fund; or
- (b) a reserve fund account of the corporation, if the money was received as contributions from owners to the reserve fund. 1998, c. 19, s. 115 (4).

Definition

(5) In subsections (6) and (7),

“eligible security” means a bond, debenture, guaranteed investment certificate, deposit receipt, deposit note, certificate of deposit, term deposit or other similar instrument that,

- (a) is issued or guaranteed by the government of Canada or the government of any province of Canada,
- (b) is issued by an institution located in Ontario insured by the Canada Deposit Insurance Corporation or the Deposit Insurance Corporation of Ontario, or
- (c) is a security of a prescribed class.

Investment

- (6) The board may invest all or any part of the money in the corporation's general accounts in eligible securities if,
- (a) they are convertible to cash within 90 days following a request by the board; and
 - (b) they are,
 - (i) registered in the name of the corporation, or
 - (ii) held in a segregated account under the name of the corporation by a member of the Investment Dealers Association of Canada and insured by the Canadian Investor Protection Fund. 1998, c. 19, s. 115 (6).

Same, reserve fund accounts

- (7) Subject to subsection (8), the board may invest all or any part of the money in the corporation's reserve fund accounts in eligible securities if they are,
- (a) registered in the name of the corporation; or
 - (b) held in a segregated account under the name of the corporation by a member of the Canadian Investment Dealers Association and insured by the Canadian Investor Protection Fund. 1998, c. 19, s. 115 (7).

Investment plan

(8) Before investing any part of the money in the corporation's reserve fund accounts, the board shall develop an investment plan based on the anticipated cash requirements of the reserve fund as set out in the most recent reserve fund study. 1998, c. 19, s. 115 (8).

(9) A person who receives money under subsection (1) shall keep records relating to the receipt and disposition of all money under this section and shall, upon reasonable notice and at all reasonable times, make the records available for examination by the corporation, an owner or a mortgagee. 1998, c. 19, s. 115 (9).

Use of common elements by owners

179 **116.** An owner may make reasonable use of the common elements subject to this Act, the declaration, the by-laws and the rules. 1998, c. 19, s. 116.

Dangerous activities

117A **117.** No person shall permit a condition to exist or carry on an activity in a unit or in the common elements if the condition or the activity is likely to damage the property or cause injury to an individual. 1998, c. 19, s. 117.

Entry by canvassers

118. No corporation or employee or agent of a corporation shall restrict reasonable access to the property by candidates, or their authorized representatives, for election to the House of Commons, the Legislative Assembly or an office in a municipal government or school board if access is necessary for the purpose of canvassing or distributing election material. 1998, c. 19, s. 118.

Compliance with Act

119. (1) A corporation, the directors, officers and employees of a corporation, a declarant, the lessor of a leasehold condominium corporation, an owner, an occupier of a unit and a person having an encumbrance against a unit and its appurtenant common interest shall comply with this Act, the declaration, the by-laws and the rules. 1998, c. 19, s. 119 (1).

Responsibility for occupier

(2) An owner shall take all reasonable steps to ensure that an occupier of the owner's unit and all invitees, agents and employees of the owner or occupier comply with this Act, the declaration, the by-laws and the rules. 1998, c. 19, s. 119 (2).

Right against owner

(3) A corporation, an owner and every person having a registered mortgage against a unit and its appurtenant common interest have the right to require the owners and the occupiers of units to comply with this Act, the declaration, the by-laws and the rules. 1998, c. 19, s. 119 (3).

Proposed unit

(4) Until the declarant registers a declaration and description and the by-laws and rules of the corporation come into force, an occupier of a proposed unit shall comply with this Act, the declaration and the by-laws and rules proposed by the declarant; the declarant shall take all reasonable steps to ensure that the occupier complies with this section. 1998, c. 19, s. 119 (4).

Right against occupier

(5) Until the declarant registers a declaration and description and the by-laws and rules of the corporation come into force, an occupier of a proposed unit has the right to require the occupiers of the other units in the proposed corporation to comply with this Act, the declaration and the by-laws and rules proposed by the declarant. 1998, c. 19, s. 119 (5).

PART VII AMALGAMATION

Amalgamation

120. (1) Subject to the regulations made under this Act, two or more leasehold condominium corporations or two or more freehold condominium corporations of the same type may amalgamate by registering a declaration and description amalgamating the corporations if,

- (a) the board of each amalgamating corporation has held a meeting in accordance with subsections (2) and (3);

- (b) the owners of at least 90 per cent of the units of each corporation as of the date of that corporations's meeting have, within 90 days of the meeting, consented in writing to the registration of the declaration and description; and
- (c) the corporations have complied with all prescribed requirements. 1998, c. 19, s. 120 (1).

Meeting of owners

(2) The board of each amalgamating corporation shall call a meeting of owners for the purpose of considering a declaration and description amalgamating the corporations. 1998, c. 19, s. 120 (2).

Notice of meeting

- (3) The board shall give the owners a notice of the meeting which shall include,
 - (a) a copy of the proposed declaration and description of the amalgamated corporation and a copy of the proposed budget for the corporation's first year of operation;
 - (b) a copy of all proposed by-laws and rules of the amalgamated corporation;
 - (c) a certificate as to the status for each amalgamating corporation in the form prescribed by the Minister;
 - (d) for each amalgamating corporation, the auditor's report on the last annual financial statements of the corporation, if it is not included in the certificate mentioned in clause (c); and
 - (e) all additional statements and information that the regulations made under this Act require. 1998, c. 19, s. 120 (3).

Signing of declaration

(4) The declaration of an amalgamated corporation shall not be registered unless the officers of each amalgamating corporation who are duly authorized to sign on behalf of the corporation have signed the declaration. 1998, c. 19, s. 120 (4).

Part VIII not applicable

(5) Part VIII does not apply to an amalgamation carried out under this section but does apply to an amalgamated corporation after the registration of its declaration and description. 1998, c. 19, s. 120 (5).

Effect of registration

- 121.** (1) On registration of a declaration and description for an amalgamated corporation,
- (a) the amalgamating corporations are amalgamated and continue as one corporation;
 - (b) the units and common interests of the amalgamating corporations are continued as units and common interests in the amalgamated corporation;
 - (c) all encumbrances, easements and leases that affected the units or common elements of the amalgamating corporations are continued as encumbrances, easements and leases respectively that affect the units or common elements, as the case may be, of the amalgamated corporation;
 - (d) all declarations, descriptions, by-laws and rules of the amalgamating corporations cease to apply;
 - (e) the directors of the amalgamating corporations constitute the first directors of the amalgamated corporation;
 - (f) the proposed by-laws and rules mentioned in clause 120 (3) (b) shall be the by-laws and rules respectively of the amalgamated corporation until the corporation amends or replaces them;
 - (g) the amalgamated corporation possesses all the assets, rights and privileges and is subject to all liabilities, including civil, criminal and quasi-criminal, and all contracts, agreements, warranties and debts of each of the amalgamating corporations;
 - (h) a conviction against, or ruling, order or judgment in favour of or against an amalgamating corporation may be enforced by or against the amalgamated corporation; and
 - (i) the amalgamated corporation shall be deemed to be the party plaintiff or the party defendant, as the case may be, in all civil actions commenced by or against an amalgamating corporation before the amalgamation becomes effective. 1998, c. 19, s. 121 (1).

First auditors

(2) Immediately following the registration of a declaration and description for an amalgamated corporation, the directors shall appoint one or more auditors who shall hold office until the close of the meeting of owners described in subsection (3). 1998, c. 19, s. 121 (2).

Subsequent directors

(3) The first directors of an amalgamated corporation shall hold office until the owners elect their successors at a meeting which the first directors shall call and hold within 60 days following the registration of the declaration and description for the corporation. 1998, c. 19, s. 121 (3).

Subsequent auditors

(4) At the meeting the owners shall, subject to section 60 with necessary modifications, appoint successors for the auditors mentioned in subsection (2). 1998, c. 19, s. 121 (4).

PART VIII TERMINATION

Termination with consent

122. (1) A corporation shall register a notice terminating the government of the property by this Act if,

- (a) the owners of at least 80 per cent of the units, at the date of the vote, vote in favour of termination; and
- (b) at least 80 per cent of those persons who, at the date of the vote, have registered claims against the property, that were created after the registration of the declaration and description that made this Act applicable to the property, consent in writing to the termination. 1998, c. 19, s. 122 (1).

Notice of termination

(2) The notice of termination shall be in the form prescribed by the Minister, shall be signed by the authorized officers of the corporation and shall include a certificate stating that the persons described in clause (1) (b) have consented in writing to the termination. 1998, c. 19, s. 122 (2).

Termination upon substantial damage

123. (1) The registration of a notice under subsection (7) terminates the government of the property by this Act. 1998, c. 19, s. 123 (1).

Definition

(2) In this section,

“substantial damage” means damage for which the cost of repair is estimated to equal or exceed 25 per cent of the replacement cost of all the buildings and structures located on the property. 1998, c. 19, s. 123 (2).

Estimates of damage

(3) If damage occurs to a building or a structure located on the property that, in the opinion of the board, may constitute substantial damage, the board shall have at least two persons, who shall have no affiliation with the board and who, in the opinion of the board, are qualified, make estimates of the damage within 30 days after the occurrence of the damage. 1998, c. 19, s. 123 (3).

Determination by board

(4) The board shall determine whether, based on the estimates, there has been substantial damage. 1998, c. 19, s. 123 (4).

Notice of determination

(5) If the board determines that there has been substantial damage, it shall give notice of its determination to the owners. 1998, c. 19, s. 123 (5).

Contents of notice

(6) The notice shall specify that,

- (a) the owners have the right, in accordance with section 46 and within 30 days of receiving the notice, to requisition a meeting of owners; and
- (b) the board is required to register a notice terminating the government of the property by this Act if the condition described in subsection (7) is met. 1998, c. 19, s. 123 (6).

Vote for termination

(7) The board shall register a notice terminating the government of the property by this Act if the owners of at least 80 per cent of the units, at the date of the vote, vote in favour of termination. 1998, c. 19, s. 123 (7).

Form of notice

(8) The notice shall be in the form prescribed by the Minister and shall be signed by the authorized officers of the corporation. 1998, c. 19, s. 123 (8).

Time of registration

(9) The board shall register the notice within 30 days of a vote in favour of termination under subsection (7). 1998, c. 19, s. 123 (9).

Repairs if no termination

(10) If there is no vote in favour of termination under subsection (7), the corporation shall, within a reasonable time, repair the damage to the building or structure located on the property. 1998, c. 19, s. 123 (10).

Termination upon sale of property

124. (1) If the corporation sells the property or a part of the common elements, this Act ceases to govern the property being sold. 1998, c. 19, s. 124 (1).

Authorization of sale

(2) The corporation shall not sell the property or a part of the common elements unless,

- (a) the owners of at least 80 per cent of the units, at the date of the vote, vote in favour of the sale;
- (b) at least 80 per cent of those persons who, at the date of the vote, have registered claims against the property being sold, that were created after the registration of the declaration and description that made this Act applicable to the property being sold, consent in writing to the sale; and
- (c) if the sale is for only part of the common elements and includes common elements that are for the use of the owners of certain designated units and not all the owners, the owners of the designated units consent in writing to the sale. 1998, c. 19, s. 124 (2).

Conveyance

(3) When a sale takes place, the board shall deliver to the purchaser the following documents signed by the authorized officers of the corporation: a deed and a certificate in the form prescribed by the Minister stating that the persons who, under subsection (2), are required to vote in favour of the sale or consent in writing to the sale have done so. 1998, c. 19, s. 124 (3).

Proceeds

(4) Subject to subsection (5), the owners at the time of the registration of the deed shall share the net proceeds of the sale in the same proportions as their common interests. 1998, c. 19, s. 124 (4).

Same

(5) The portion of the proceeds of the sale that is attributable to a portion of the common elements that is for the use of the owners of certain designated units, and not all the owners, shall be divided among the owners of the designated units in the proportions in which their interests are affected. 1998, c. 19, s. 124 (5).

Right of dissenters

125. (1) A corporation that has made a sale under section 124 and every owner in the corporation shall be deemed to have made an agreement that an owner who has dissented on the vote authorizing the sale may, within 30 days of the vote, submit to mediation a dispute over the fair market value of the property or the part of the common elements that has been sold, determined as of the time of the sale. 1998, c. 19, s. 125 (1).

Application of s. 132

(2) If an owner submits a dispute to mediation, section 132 applies to the dispute with necessary modifications as if it were a disagreement under that section. 1998, c. 19, s. 125 (2).

Notice

(3) An owner who submits a dispute to mediation shall give the corporation notice of intention within 10 days after the vote authorizing the sale. 1998, c. 19, s. 125 (3).

Entitlement to amount

(4) An owner who serves a notice of intention is entitled to receive from the proceeds of the sale the amount the owner would have received if the sale price had been the fair market value as determined by the arbitration. 1998, c. 19, s. 125 (4).

Deficiency

(5) The corporation shall pay to each of the owners who served a notice of intention, the deficiency in the amount to which the owner is entitled if the proceeds of the sale are inadequate to pay the amount. 1998, c. 19, s. 125 (5).

Liability

(6) The owners other than those who dissented on the vote authorizing the sale are liable for the amount of the deficiency payments determined by the proportions of their common interests. 1998, c. 19, s. 125 (6).

Common expenses of other owners

(7) The corporation shall add the amount of the liability of each of the owners who voted in favour of the sale to the common expenses appurtenant to the units of those owners and may specify a time for payment by each of those owners. 1998, c. 19, s. 125 (7).

Expropriation

126. (1) Upon expropriation of the property or a part of the common elements under the *Expropriations Act*, this Act ceases to govern the property or the part of the common elements, as the case may be. 1998, c. 19, s. 126 (1).

Proceeds

(2) Subject to subsection (3), if part of the common elements is expropriated under the *Expropriations Act*, the owners shall share the proceeds in the same proportions as their common interests. 1998, c. 19, s. 126 (2).

Same

(3) The portion of the proceeds received on expropriation under the *Expropriations Act* that is attributable to a portion of the common elements that is for the use of the owners of certain designated units, and not all the owners, shall be divided among the owners of the designated units in the proportions in which their interests are affected. 1998, c. 19, s. 126 (3).

Effect of registration

127. (1) Upon registration of a notice of termination under section 122 or 123,

- (a) this Act ceases to govern the property;
- (b) the owners are tenants in common of the land and interests appurtenant to the land described in the description in the same proportions as their common interests;
- (c) claims against the land and the interests appurtenant to the land described in the description, that were created before the registration of the declaration and description that made this Act applicable to the land, are as effective as if the declaration and description had not been registered;
- (d) encumbrances against each unit and common interest, that were created after the registration of the declaration and description that made this Act applicable to the unit, are claims against the interests of the owner in the land and interests appurtenant to the land described in the description and have the same priority as they had before the registration of the notice of termination; and

- (e) all other claims against the property that were created after the registration of the declaration and description that made this Act applicable to the property are extinguished. 1998, c. 19, s. 127 (1).

Same, sale or expropriation

- (2) Upon the registration of a deed and a certificate under section 124 or upon expropriation under section 126,
- (a) this Act ceases to govern the property being sold or expropriated, as the case may be;
 - (b) claims against the land and interests appurtenant to the land, that were created before the registration of the declaration and description that made this Act applicable to the land, are as effective as if the declaration and description had not been registered; and
 - (c) claims against the property being sold or expropriated, as the case may be, that were created after the registration of the declaration and description that made this Act applicable to that property, are extinguished. 1998, c. 19, s. 127 (2).

Termination by court

128. (1) A corporation, an owner, or a person having an encumbrance against a unit and common interest, may make an application to the Superior Court of Justice for an order terminating the government of the property by this Act. 1998, c. 19, s. 128 (1), S.O. 200, c. 26.

Grounds for order

- (2) The court may order that the government of the property by this Act be terminated if the court is of the opinion that the termination would be just and equitable, having regard to,
- (a) the scheme and intent of this Act;
 - (b) the probability of unfairness to the owners if the court does not order termination;
 - (c) the probability of confusion and uncertainty in the affairs of the corporation or of the owners if the court does not order termination; and
 - (d) the best interests of the owners. 1998, c. 19, s. 128 (2).

Contents of order

- (3) The court may include in the order all provisions that it considers appropriate in the circumstances. 1998, c. 19, s. 128 (3).

Registration of order

- (4) If the court makes an order terminating the government of the property by this Act, the applicant shall register the order. 1998, c. 19, s. 128 (4).

Distribution of assets

129. When the owners and the property cease to be governed by this Act,

- (a) the assets of the corporation shall be used to pay all claims for the payment of money against the corporation; and
- (b) the remainder of the assets of the corporation shall be distributed among the owners in the same proportions as the proportions of their common interests. 1998, c. 19, s. 129.

PART IX ENFORCEMENT

Inspector

130. (1) Upon application by the corporation, a lessor of a leasehold condominium corporation, an owner or a mortgagee of a unit, the Superior Court of Justice may make an order appointing an inspector to,

- (a) investigate the items that the declarant is required to give to the board under subsections 43 (4), (5) and (7);
- (b) investigate the corporation's records mentioned in subsection 55 (1);
- (c) investigate the affairs of a person mentioned in subsection 115 (1); or
- (d) conduct an audit of the accounts and records mentioned in section 43, 55 or 115. 1998, c. 19, s. 130 (1), S.O. 2000, c.26.

Grounds for order

(2) The court may make the order if it is satisfied that the application is made in good faith and that the order is in the best interests of the applicant. 1998, c. 19, s. 130 (2).

Powers of inspector

(3) The inspector shall have the powers of a commission under Part II of the *Public Inquiries Act* that the order states and when the inspector exercises those powers, that Part applies to the inspector's investigation or audit as if it were an inquiry under that Act. 1998, c. 19, s. 130 (3).

Contents of order

- (4) In the order, the court,
- (a) shall require the inspector to make a written report within a specified time to the applicant for the order and to the corporation on the activities that the order requires the inspector to perform; and
 - (b) may make an order as to the costs of the investigation or audit or any other matter as it deems proper. 1998, c. 19, s. 130 (4).

Summary of report

(5) The board shall send a summary of the report to the owners. 1998, c. 19, s. 130 (5).

Administrator

181AA

131. (1) Upon application by the corporation, a lessor of a leasehold condominium corporation, an owner or a mortgagee of a unit, the Superior Court of Justice may make an order appointing an administrator for a corporation under this Act if at least 120 days have passed since a turn-over meeting has been held under section 43. 1998, c. 19, s. 131 (1); 2000, c. 26, Sched. B, s. 7 (7).

Grounds for order

(2) The court may make the order if the court is of the opinion that it would be just or convenient, having regard to the scheme and intent of this Act and the best interests of the owners. 1998, c. 19, s. 131 (2).

Contents of order

(3) The order shall,

- (a) specify the powers of the administrator;
- (b) state which powers and duties, if any, of the board shall be transferred to the administrator; and
- (c) contain the directions and impose the terms that the court considers just. 1998, c. 19, s. 131 (3).

Application for direction

(4) The administrator may apply to the court for the opinion, advice or direction of the court on any question regarding the management or administration of the corporation. 1998, c. 19, s. 131 (4).

Mediation and arbitration

181A

132. (1) Every agreement mentioned in subsection (2) shall be deemed to contain a provision to submit a disagreement between the parties with respect to the agreement to,

- (a) mediation by a person selected by the parties unless the parties have previously submitted the disagreement to mediation; and
- (b) unless a mediator has obtained a settlement between the parties with respect to the disagreement, arbitration under the *Arbitration Act, 1991*,
 - (i) 60 days after the parties submit the disagreement to mediation, if the parties have not selected a mediator under clause (a), or
 - (ii) 30 days after the mediator selected under clause (a) delivers a notice stating that the mediation has failed. 1998, c. 19, s. 132 (1).

Application

(2) Subsection (1) applies to the following agreements:

1. An agreement between a declarant and a corporation.
2. An agreement between two or more corporations.
3. An agreement described in clause 98 (1) (b) between a corporation and an owner.
4. An agreement between a corporation and a person for the management of the property. 1998, c. 19, s. 132 (2).

Disagreements on budget statement

(3) The declarant and the board shall be deemed to have agreed in writing to submit a disagreement between the parties with respect to the budget statement described in subsection 72 (6) or the obligations of the declarant under section 75 to mediation and arbitration in accordance with clauses (1) (a) and (b) respectively. 1998, c. 19, s. 132 (3).

Disagreements between corporation and owners

(4) Every declaration shall be deemed to contain a provision that the corporation and the owners agree to submit a disagreement between the parties with respect to the declaration, by-laws or rules to mediation and arbitration in accordance with clauses (1) (a) and (b) respectively. 1998, c. 19, s. 132 (4).

Duty of mediator

(5) A mediator appointed under clause (1) (a) shall confer with the parties and endeavour to obtain a settlement with respect to the disagreement submitted to mediation. 1998, c. 19, s. 132 (5).

Fees and expenses

- (6) Each party shall pay the share of the mediator's fees and expenses that,
- (a) the settlement specifies, if a settlement is obtained; or
 - (b) the mediator specifies in the notice stating that the mediation has failed, if the mediation fails. 1998, c. 19, s. 132 (6).

Record of settlement

(7) Upon obtaining a settlement between the parties with respect to the disagreement submitted to mediation, the mediator shall make a written record of the settlement which shall form part of the agreement or matter that was the subject of the mediation. 1998, c. 19, s. 132 (7).

False, misleading statements

133. (1) A declarant shall not, in a statement or information that the declarant is required to provide under this Act,

- 182 (a) make a material statement or provide material information that is false, deceptive or misleading; or
 (b) omit a material statement or material information that the declarant is required to provide. 1998, c. 19, s. 133 (1).

Right to damages

(2) A corporation or an owner may make an application to the Superior Court of Justice to recover damages from a declarant for any loss sustained as a result of relying on a statement or on information that the declarant is required to provide under this Act if the statement or information,

- 183 (a) contains a material statement or material information that is false, deceptive or misleading; or
 (b) does not contain a material statement or material information that the declarant is required to provide. 1998, c. 19, s. 133 (2); 2000, c. 26, Sched. B, s. 7 (7).

Compliance order

- 184 **134.** (1) Subject to subsection (2), an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of a leasehold condominium corporation or a mortgagee of a unit may make an application to the Superior Court of Justice for an order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules or an agreement between two or more corporations for the mutual use, provision or maintenance or the cost-sharing of facilities or services of any of the parties to the agreement. 1998, c. 19, s. 134 (1); 2000, c. 26, Sched. B, s. 7 (7).

Pre-condition for application

(2) If the mediation and arbitration processes described in section 132 are available, a person is not entitled to apply for an order under subsection (1) until the person has failed to obtain compliance through using those processes. 1998, c. 19, s. 134 (2).

Contents of order

- (3) On an application, the court may, subject to subsection (4),
 (a) grant the order applied for;
 (b) require the persons named in the order to pay,
 (i) the damages incurred by the applicant as a result of the acts of non-compliance, and
 (ii) the costs incurred by the applicant in obtaining the order; or
 185 (c) grant such other relief as is fair and equitable in the circumstances. 1998, c. 19, s. 134 (3).

Order terminating lease

(4) The court shall not, under subsection (3), grant an order terminating a lease of a unit for residential purposes unless the court is satisfied that,
 (a) the lessee is in contravention of an order that has been made under subsection (3); or
 (b) the lessee has received a notice described in subsection 87 (1) and has not paid the amount required by that subsection. 1998, c. 19, s. 134 (4).

Addition to common expenses

- 185A (5) If a corporation obtains an award of damages or costs in an order made against an owner or occupier of a unit, the damages or costs, together with any additional actual costs to the corporation in obtaining the order, shall be added to the common expenses for the unit and the corporation may specify a time for payment by the owner of the unit. 1998, c. 19, s. 134 (5).

Oppression remedy

- 185B **135.** (1) An owner, a corporation, a declarant or a mortgagee of a unit may make an application to the Superior Court of Justice for an order under this section. 1998, c. 19, s. 135 (1); 2000, c. 26, Sched. B, s. 7 (7).

Grounds for order

(2) On an application, if the court determines that the conduct of an owner, a corporation, a declarant or a mortgagee of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant, it may make an order to rectify the matter. 1998, c. 19, s. 135 (2).

Contents of order

- (3) On an application, the judge may make any order the judge deems proper including,
 (a) an order prohibiting the conduct referred to in the application; and
 (b) an order requiring the payment of compensation. 1998, c. 19, s. 135 (3).

Other remedies

136. Unless the Act specifically provides the contrary, nothing in this Act restricts the remedies otherwise available to a person for the failure of another to perform a duty imposed by this Act. 1998, c. 19, s. 136.

Offences

137. (1) Every corporation under this Act or any other Act and every other person who knowingly contravenes subsection 43 (1), (3), (4), (5), (7), 55 (1) or 72 (1), section 81, subsection 115 (1), (2), (3), (4) or (9), section 118, subsection 133 (1), section 143, subsection 147 (1), (3), 152 (1), (2) or 161 (2) or section 169 is guilty of an offence and on conviction is liable to a fine of,

- (a) not more than \$100,000, if the person is a corporation within the meaning of this Act or any other Act; or
- (b) not more than \$25,000, if the person is not a corporation within the meaning of this Act or any other Act. 1998, c. 19, s. 137 (1).

Directors and officers

(2) It is an offence for a director or officer of a corporation within the meaning of this Act or any other Act to knowingly cause, authorize, permit, participate in or acquiesce in the commission by the corporation of an offence mentioned in subsection (1). 1998, c. 19, s. 137 (2).

Limitation

(3) No proceeding under this section shall be commenced after the second anniversary of the day on which the facts upon which the proceeding is based first came to the knowledge of the Director designated under the *Ministry of Consumer and Business Services Act*.

Compliance order

(4) The court hearing the proceeding may make an order requiring a person convicted of an offence to comply with the provisions of the Act that the person has contravened, if the court has competent jurisdiction to make the order. 1998, c. 19, s. 137 (4).

PART X COMMON ELEMENTS CONDOMINIUM CORPORATIONS

Creation

138. (1) Subject to the regulations made under this Act, a declarant may register a declaration and description that create common elements but do not divide the land into units. 1998, c. 19, s. 138 (1).

Type

(2) The type of corporation created by the registration of a declaration and description under subsection (1) shall be known as a common elements condominium corporation. 1998, c. 19, s. 138 (2).

Requirements for registration

(3) A declaration and description for a common elements condominium corporation shall not be registered unless the registration would create a freehold condominium corporation that is not a vacant land condominium corporation or, except as provided in the regulations made under this Act, a phased condominium corporation. 1998, c. 19, s. 138 (3).

Application

(4) Subject to this Part, Parts I to IX and XIV apply with necessary modifications to a common elements condominium corporation, except that,

- (a) references to a unit or a proposed unit shall be deemed to be references to a common interest in the corporation or a proposed common interest in the corporation, respectively;
- (b) references to a mortgagee of a unit shall be deemed to be references to a mortgagee of a common interest appurtenant to an owner's parcel of land mentioned in subsection 139 (1); and
- (c) references to a common interest appurtenant to a unit shall be deemed to be references to a common interest appurtenant to an owner's parcel of land mentioned in subsection 139 (1). 1998, c. 19, s. 138 (4).

Other corporations

(5) This Part does not apply to a corporation that is not a common elements condominium corporation. 1998, c. 19, s. 138 (5).

Owners' land

139. (1) A declaration for a common elements condominium corporation shall not be registered unless each of the owners of a common interest in the corporation,

- (a) also owns the freehold estate in a parcel of land,
 - (i) that is not included in the land described in the description,
 - (ii) that, subject to the regulations made under this Act, is situated within the boundaries of the land titles and registry divisions of the land registry office in which the description of the corporation is registered, and
 - (iii) to which the *Land Titles Act* applies or for which a certificate of title has been registered under the *Certification of Titles Act* as that Act read immediately before subsection 2 (1) of Schedule 17 to the *Good Government Act, 2009* came into force; and

(b) has signed a certificate in a form prescribed by the Minister stating the owner consents to the registration of the declaration and the notice described in subclause (2) (b) (i).

Non-severable from common interest

(2) Upon the registration of a declaration and description for a common elements condominium corporation,

- (a) the common interest of an owner in the corporation attaches to the owner's parcel of land; and
- (b) the declarant shall register against each owner's parcel of land,
 - (i) a notice in the form prescribed by the Minister that sets out the information contained in clause (a), and
 - (ii) a copy of the certificate described in clause (1) (b). 1998, c. 19, s. 139 (2).

Division of parcel

(3) Subject to the regulations made under this Act, if an owner's parcel of land is divided into two or more new parcels, the owners of the new parcels are joint owners of the common interest attached to the original parcel. 1998, c. 19, s. 139 (3).

Common interest preserved

(4) Despite any other Act, upon the sale of the parcel of land of an owner in a common elements condominium corporation or the enforcement of an encumbrance registered against the parcel, the common interest of the owner in the corporation is not terminated or severed from the parcel, but continues to be attached to the parcel. 1998, c. 19, s. 139 (4).

Lien

(5) If an owner defaults in the obligation to contribute to the common expenses of a common elements condominium corporation, the corporation has a lien against the owner's parcel of land. 1998, c. 19, s. 139 (5).

Same

(6) The lien is a lien for the purposes of sections 85 and 86. 1998, c. 19, s. 139 (6).

Priority of lien

(7) Despite section 86, the lien does not have priority over an encumbrance registered against an owner's parcel of land before the common interest of the owner attached to it unless the encumbrancer agrees in writing otherwise. 1998, c. 19, s. 139 (7).

Contents of declaration

140. In addition to the requirements of subsection 7 (2), a declaration for a common elements condominium corporation shall contain,

- (a) a statement that the common elements are intended for the use and enjoyment of the owners;
- (b) a legal description of the parcels of land mentioned in subsection 139 (1); and
- (c) all other material that the regulations made under this Act require. 1998, c. 19, s. 140.

185C

Contents of description

141. Clauses 8 (1) (c), (d), (f) and 8 (3) (b) do not apply to a description for a common elements condominium corporation. 1998, c. 19, s. 141.

Subdivision control

142. Section 50 of the *Planning Act* does not apply in respect of dealings with common interests in a common elements condominium corporation. 1998, c. 19, s. 142.

Disclosure statement

143. In addition to the requirements of subsection 72 (3), a disclosure statement for a common interest in a common elements condominium corporation shall contain,

- (a) a statement that the common interest attaches to the owner's parcel of land described in the declaration of the corporation and cannot be severed from the parcel upon the sale of the parcel or the enforcement of an encumbrance registered against the parcel; and
- (b) all other material that the regulations made under this Act require. 1998, c. 19, s. 143.

Repair after damage and insurance

144. (1) Sections 89 and 90 and clauses 91 (a) and (d) do not apply to a common elements condominium corporation. 1998, c. 19, s. 144 (1).

Repair after damage and maintenance

(2) Subject to clauses 91 (b) and (c) and section 123, the corporation shall repair and replace the common elements after damage or failure and shall maintain them. 1998, c. 19, s. 144 (2).

Insurance

(3) References to a unit in sections 99 to 105 shall be deemed not to apply to a common elements condominium corporation. 1998, c. 19, s. 144 (3).

**PART XI
PHASED CONDOMINIUM CORPORATIONS**

Type of corporation

145. (1) Subject to the regulations made under this Act, the declarant may create additional units or common elements in a corporation in accordance with this Part after the registration of the declaration and description if,

- (a) the corporation is a freehold condominium corporation;
- (b) except as provided in the regulations made under this Act, the corporation is not a vacant land condominium corporation or a common elements condominium corporation;
- (c) the declaration indicates that the corporation is a phased condominium corporation;
- (d) the description contains a legal description of the land that will be the servient tenement within the meaning of section 151; and
- (e) the board has been elected at a meeting of owners held at a time when the declarant did not own a majority of the units. 1998, c. 19, s. 145 (1).

Type of corporation

(2) A corporation that meets the criteria described in subsection (1) shall be known as a phased condominium corporation. 1998, c. 19, s. 145 (2).

Definition

(3) In this Part,

“phase” means the additional units and common elements in a phased condominium corporation that are created in accordance with this Part upon the registration of an amendment to both the declaration and description. 1998, c. 19, s. 145 (3).

Application

(4) Subject to this Part, Parts I to IX and XIV apply with necessary modifications to a phased condominium corporation. 1998, c. 19, s. 145 (4).

Same

(5) For the purposes of subsection (4), a reference to the registration of the declaration and description in section 13, subsection 14 (1), 22 (4), 56 (11), 58 (9), 78 (1), 80 (6), 122 (1) or (2), 124 (2) or (3), 127 (1) or (2) shall be deemed, if applicable, to be a reference to the registration of the amendments to the declaration and description required for creating a phase. 1998, c. 19, s. 145 (5).

Other corporations

(6) This Part does not apply to a corporation that is not a phased condominium corporation. 1998, c. 19, s. 145 (6).

Creation of phase

146. (1) A phase that contains units may be created only in the blocks of numbers of units, during the time periods and in accordance with the requirements that are prescribed. 1998, c. 19, s. 146 (1).

Phase containing common elements

(2) A phase that contains common elements may be created only during the time periods and in accordance with the requirements that are prescribed. 1998, c. 19, s. 146 (2).

Method of creation

(3) To create a phase, the declarant shall register an amendment to both the declaration and description. 1998, c. 19, s. 146 (3).

Amendment to declaration

(4) The amendment to the declaration required for creating a phase shall include,

- (a) the consent of every person having a registered mortgage against the land included in the phase or interests appurtenant to the land, as the land and the interests are described in the amendment to the description required for creating the phase;
- (b) a statement of the proportions, expressed in percentages, of the common interests appurtenant to the units in the corporation after the creation of the phase;
- (c) a statement of the proportions, expressed in percentages allocated to the units in the corporation, in which the owners after the creation of the phase are to contribute to the common expenses;
- (d) a specification of all parts of the common elements contained in the phase that are to be used by the owners of one or more designated units and not by all the owners;
- (e) a statement of all conditions that the approval authority, in approving or exempting under section 9 the amendment to the description required for creating the phase, requires the amendment to the declaration to mention; and
- (f) all other material that the regulations made under this Act require. 1998, c. 19, s. 146 (4).

Amendment to description

(5) The amendment to the description required for creating a phase shall include,

- (a) the material mentioned in subsection 8 (1) prepared with respect to the phase;
- (b) a legal description of the land that will be the servient tenement within the meaning of section 151; and
- (c) all other material that the regulations made under this Act require. 1998, c. 19, s. 146 (5).

Same

(6) Subsection 8 (2) and clause 8 (3) (b) apply with necessary modifications to the amendment. 1998, c. 19, s. 146 (6).

Consent of owners not required

(7) Section 107 does not apply to amendments to the declaration that comply with subsection (4) or to amendments to the description that comply with subsections (5) and (6). 1998, c. 19, s. 146 (7).

Completion of buildings

(8) The amendments to the declaration and description required for creating a phase shall not be registered unless all facilities and services have been installed or provided as the municipality in which the land of the corporation is situated, or the Minister of Municipal Affairs and Housing if the land is not situated in a municipality, determines are necessary to ensure the independent operation of the corporation if no subsequent phases are created. 1998, c. 19, s. 146 (8).

Security

(9) Despite subsection (8), a declarant may register the amendments to the declaration and description required for creating a phase, even though certain facilities and services have not been installed or provided, if the municipality or the Minister of Municipal Affairs and Housing, as the case may be, agrees that the declarant provide to a specified person a bond or other security that is sufficient to ensure the installation or provision of the facilities and services. 1998, c. 19, s. 146 (9).

Partial release

(10) The person holding the bond or other security may provide a partial release of it to the declarant with the consent of the municipality or the Minister of Municipal Affairs and Housing, as the case may be. 1998, c. 19, s. 146 (10).

Full release

(11) The person holding the bond or other security shall not release it in full until,

- (a) all the facilities and services covered by the bond, or other security have been installed or provided in accordance with the regulations made under this Act; and
- (b) the municipality or the Minister of Municipal Affairs and Housing, as the case may be, consents. 1998, c. 19, s. 146 (11).

Disclosure statement

147. (1) In addition to the requirements of subsection 72 (3), a disclosure statement for a unit or a proposed unit in a phased condominium corporation shall contain,

- (a) a statement whether the declarant intends to create one or more phases after the creation of the unit or proposed unit;
- (b) a statement that the declarant is not required to create a phase after the creation of the unit or proposed unit;
- (c) a statement that sets out the projected year of registration of the amendments to the declaration and description required for creating each phase that the declarant intends to create after the creation of the unit or proposed unit;
- (d) a statement that sets out, for each phase that the declarant intends to create after the creation of the unit or proposed unit,
 - (i) the approximate number of the units included in the phase and a legal description of the land included in the phase,
 - (ii) the approximate location of the buildings and structures to be contained in the phase and a description of the facilities and services to be contained in the phase,
 - (iii) a statement of the proportions, expressed in percentages, of the common interests and common expenses attributable to the units after the creation of the phase,
 - (iv) a statement of the facilities and services that the owners will share after the creation of the phase, and
 - (v) a statement that there are no representations with respect to the quality of materials or appearance of buildings other than those specifically set out as representations in the disclosure statement; and
- (e) all other material that the regulations made under this Act require. 1998, c. 19, s. 147 (1).

Not material changes

(2) A change in the matters described in subclause (1) (d) (i) and a change in the matters described in subclause (1) (d) (iii) if it is the result only of a change in the number of units included in the phase shall be deemed not to be a material change within the meaning of section 74. 1998, c. 19, s. 147 (2).

No merger of statements

(3) The statements described in clause (1) (d) and made by a declarant in a disclosure statement with respect to a phase that is created after the creation of the unit or proposed unit to which the disclosure statement related are enforceable against the declarant and shall be deemed not to merge by operation of law when a deed that is in registerable form is delivered to the purchaser of the unit or proposed unit. 1998, c. 19, s. 147 (3).

Obligations for phase

(4) If a unit or proposed unit is part of a phase,

- (a) a reference to the registration of the declaration and description in subsection 72 (3) or (6), 74 (2) or 75 (1) shall be deemed to be a reference to the registration of the amendments to the declaration and description required for creating the phase; and
- (b) the reference in subsection 75 (2) to the termination of an agreement under section 111 or 112 shall be deemed to be a reference to the termination of an agreement under section 111 or 112 that affects the property contained in the phase. 1998, c. 19, s. 147 (4).

Copy of disclosure statement

(5) Within 15 days of registering the amendments to the declaration and description required for creating a phase, the declarant shall send to the corporation a copy of the most current disclosure statement delivered to the purchasers of units in the phase. 1998, c. 19, s. 147 (5).

Status certificate

148. In addition to the requirements of subsection 76 (1), a status certificate for a unit in a phased condominium corporation shall contain a copy of the disclosure statement that the corporation has received from the declarant under subsection 147 (5) with respect to the phase that contains the unit unless the declarant,

- (a) has completed all phases described in the disclosure statement; and

- (b) no longer owns any of the units in the phases except for the part of the property assigned to control, facilitate or provide telecommunications to, from or within the property. 1998, c. 19, s. 148.

Corporation's remedy

149. (1) The declarant shall not register the amendments to the declaration and description required for creating a phase until at least 60 days after delivering to the corporation,

- (a) a copy of the disclosure statement delivered to a purchaser of a unit in the corporation most recently before the registration of the declaration and description;
- (b) a copy of the proposed amendments to the declaration and description required for creating the phase; and
- (c) a statement specifying all differences between the proposed amendments to the declaration and description required for creating the phase and the following matters with respect to the phase that were described in the disclosure statement mentioned in clause (a):
 1. The matters described in subclauses 147 (1) (d) (ii) and (iv).
 2. The matters described in subclause 147 (1) (d) (iii) if they differ from the proposed amendments to the declaration and description required for creating the phase for a reason other than a change in the number of units included in the phase. 1998, c. 19, s. 149 (1).

Application for injunction

(2) Before the earlier of the registration date of the proposed amendments to the declaration and description required for creating a phase and 60 days after receiving the documents described in clauses (1) (a), (b) and (c), the corporation may make an application to the Superior Court of Justice for an injunction to prevent the registration if any of the differences described in clause (1) (c) are material and detrimentally affect the corporation or the use and enjoyment of the property by the owners. 1998, c. 19, s. 149 (2), S.O. 2000, c. 26.

Grounds for injunction

(3) If the court is satisfied that the grounds for the application exist, it may grant the injunction or award damages to the corporation. 1998, c. 19, s. 149 (3).

Contents of order

- (4) The court may include in the order all provisions that it considers appropriate in the circumstances. 1998, c. 19, s. 149 (4).

Restriction on declarant

(5) If the corporation makes an application for an injunction under subsection (2), the declarant is not entitled to register a declaration and description to create a corporation on the land to be included in the phase, instead of registering the amendments required for creating the phase, unless 120 days have passed after the court has made a final disposition of the application for the injunction. 1998, c. 19, s. 149 (5).

Remedy of purchasers

150. (1) Within 15 days of registering the amendments to the declaration and description required for creating a phase, the declarant shall send a copy of the amendments to the corporation and the owners. 1998, c. 19, s. 150 (1).

Damages from declarant

(2) A person who purchased a unit or proposed unit in the corporation before the registration of the amendments to the declaration and description required for creating a phase is entitled to recover damages from the declarant for a difference between the following matters disclosed in the disclosure statement delivered to the person and the registered amendments if the difference is material and detrimentally affects the use and enjoyment of the person's unit:

1. The matters described in subclauses 147 (1) (d) (ii) and (iv).
2. The matters described in subclause 147 (1) (d) (iii) if they differ from the registered amendments for a reason other than a change in the number of units included in the phase. 1998, c. 19, s. 150 (2).

Court order

(3) Upon application by the person, the Superior Court of Justice may make an order requiring the declarant to pay to the person the damages to which the person is entitled under subsection (2). 1998, c. 19, s. 150 (3), S.O. 2000, c.26.

Easements

151. (1) Upon registration of a declaration and description for a phased condominium corporation or the amendments to the declaration and description required for creating a phase, the following easements are created, where necessary, for the benefit of the units and common elements:

1. An easement for the provision of services over the servient tenement.
2. An easement for support from the servient tenement.
3. An easement for access to and for the installation and maintenance of the services and facilities that the corporation is entitled to use over the servient tenement.
4. An easement for access to public roads over the servient tenement. 1998, c. 19, s. 151 (1).

Definition

- (2) In subsection (1),

“servient tenement” means the land owned by the declarant that is not included in the phase, including the buildings and structures on the land. 1998, c. 19, s. 151 (2).

Turn-over obligations

152. (1) In addition to the items mentioned in subsection 43 (4), the declarant shall give to the board at the first meeting held under section 43,
- (a) a copy of the statements described in subsection 147 (1); and
 - (b) all other material that the regulations made under this Act require. 1998, c. 19, s. 152 (1).

Obligation upon creation of phase

(2) Upon the registration of the amendments to the declaration and description required for creating a phase, the declarant shall turn over to the board all materials mentioned in subsections (1) and 43 (4) and clauses 43 (5) (a) to (h) and (l) and (m) that relate to the phase and that the declarant has not previously turned over to the board. 1998, c. 19, s. 152 (2).

Non-application of s. 43

(3) Subsections 43 (4) and (5) do not apply to the declarant if the board is required to hold a meeting of owners under section 43 after the declarant has turned over to the board the materials mentioned in subsection (2). 1998, c. 19, s. 152 (3).

Application

(4) The corporation may make an application to the Superior Court of Justice for an order under subsection (5). 1998, c. 19, s. 152 (4), S.O. 2000, c.26.

Court order

- (5) If the court is satisfied that the declarant is required to comply with subsection (2) and has not done so without reasonable excuse, the court,
- (a) shall order that the declarant pay damages to the corporation for the loss it incurred as a result of the declarant’s acts of non-compliance with subsection (2);
 - (b) shall order that the declarant pay the corporation’s costs of the application;
 - (c) may order the declarant to pay to the corporation an additional amount not to exceed \$10,000; and
 - (d) may order the declarant to comply with subsection (2). 1998, c. 19, s. 152 (5).

Election of directors

(6) If, 30 days after the registration of the amendments to the declaration and description required for creating a phase, the declarant owns a majority of the units in the corporation, the board shall, at the request of the declarant, call a meeting of owners to elect a new board which shall hold office until a board is elected as required by subsection 43 (1). 1998, c. 19, s. 152 (6).

Corporation’s obligations for phase

153. (1) If the declarant registers the amendments to the declaration and description required for creating a phase and the phase contains one or more units for residential purposes, the board shall have a performance audit of the common elements contained in the phase conducted on behalf of the corporation. 1998, c. 19, s. 153 (1).

Application of s. 44

- (2) Section 44 applies to the performance audit, except that,
- (a) references in that section to the registration of the declaration and description shall be deemed to be references to the registration of the amendments; and
 - (b) references in that section to the common elements shall be deemed to be references to the common elements contained in the phase. 1998, c. 19, s. 153 (2).

Financial statements

(3) Within 90 days of the registration of the amendments to the declaration and description required for creating a phase, the corporation shall have the financial statements required by subsection 66 (2) prepared and sections 66 to 71 apply to them. 1998, c. 19, s. 153 (3).

Reserve fund study

(4) Within the prescribed time following the registration of the amendments to the declaration and description required for creating a phase, the corporation shall conduct a reserve fund study in accordance with section 94 with respect to the phase. 1998, c. 19, s. 153 (4).

Termination of agreements

154. (1) Subject to subsection (2), after the registration of the amendments to the declaration and description required for creating a phase, a corporation may, by resolution of the board, terminate an agreement for the management of the property contained in the phase that the declarant entered into on behalf of the corporation before the registration of the amendments. 1998, c. 19, s. 154 (1).

Notice

(2) To terminate an agreement, the board shall give at least 60 days notice in writing of the date of termination to the person with whom the declarant entered into the agreement. 1998, c. 19, s. 154 (2).

Other agreements

(3) Subject to subsection (4) and subsection 112 (5), within 12 months following the first election of the board under section 43 after the registration of the amendments to the declaration and description required for creating a phase, the corporation may, by resolution of the board, terminate an agreement described in subsection 112 (2), that the declarant has entered into on behalf of the corporation before the registration of the amendments and that affects the property contained in the phase. 1998, c. 19, s. 154 (3).

Notice

(4) To terminate an agreement, the board shall give at least 60 days notice in writing of the date of termination to the person with whom the declarant entered into the agreement. 1998, c. 19, s. 154 (4).

Mutual use agreements

(5) If a declarant on behalf of a corporation has entered into an agreement for the mutual use, provision or maintenance or the cost-sharing of facilities or services before the registration of the amendments to the declaration and description required for creating a phase, and the agreement affects the property contained in the phase, any party to the agreement may, within 12 months following the first election of the board under section 43 after the registration of the amendments, make an application to the Superior Court of Justice for an order under subsection (6). 1998, c. 19, s. 154 (5), S.O. 2000, c. 26.

Court order

(6) The court may make an order described in subsection 113 (3) if the requirements of that subsection are met. 1998, c. 19, s. 154 (6).

PART XII VACANT LAND CONDOMINIUM CORPORATIONS

Creation

155. (1) Subject to the regulations made under this Act, a declarant may register a declaration and description that create a corporation in which, at the time of the registration,

- (a) one or more units are not part of a building or structure and do not include any part of a building or structure; and
- (b) none of the units are located above or below any other unit. 1998, c. 19, s. 155 (1).

Type of corporation

(2) The type of corporation created by the registration of declaration and description under subsection (1) shall be known as a vacant land condominium corporation. 1998, c. 19, s. 155 (2).

Requirements for registration

(3) A declaration and description for a vacant land condominium corporation shall not be registered unless the registration would create a freehold condominium corporation that is not a common elements condominium corporation or, except as provided in the regulations made under this Act, a phased condominium corporation. 1998, c. 19, s. 155 (3).

Application

(4) Subject to this Part, Parts I to IX and XIV apply with necessary modifications to a vacant land condominium corporation. 1998, c. 19, s. 155 (4).

Other corporations

(5) This Part does not apply to a corporation that is not a vacant land condominium corporation. 1998, c. 19, s. 155 (5).

Contents of declaration

156. (1) If a unit in a vacant land condominium corporation is to include a building or structure constructed after the registration of the declaration and description, the declaration may contain restrictions with respect to,

- (a) the size, location, construction standards, quality of materials and appearance of the building or structure;
- (b) architectural standards and construction design standards of the building or structure;
- (c) the time of commencement and completion of construction of the building or structure; and
- (d) the minimum maintenance requirements for the building or structure. 1998, c. 19, s. 156 (1).

Permitted restrictions

(2) A restriction contained in the declaration shall be consistent with the conditions imposed by the approval authority in approving or exempting the description under section 9. 1998, c. 19, s. 156 (2).

Contents of description

157. (1) A description of a vacant land condominium corporation shall contain,

- (a) a plan of survey showing the perimeter of the horizontal surface of the land, the perimeter of the buildings and structures on the common elements and the boundaries of each unit;
- (b) subject to section 158, architectural plans of the buildings and structures included in the common elements and, if there are any, structural plans of them;

- (c) subject to section 158, a certificate of an architect that the buildings included in the common elements have been constructed in accordance with the regulations and, if there are structural plans, a certificate of an engineer that the buildings have been constructed in accordance with the regulations;
- (d) a description of all interests appurtenant to the land that are included in the property; and
- (e) all other material that the regulations made under this Act require. 1998, c. 19, s. 157 (1).

Application

- (2) Subsection 8 (1) and clause 8 (3) (b) do not apply to vacant land condominium corporations. 1998, c. 19, s. 157 (2).

Buildings on common elements

158. (1) A declaration and description of a vacant land condominium corporation that show buildings, structures, facilities and services to be included in the common elements shall not be registered unless,

- (a) all buildings, structures, facilities and services shown in the declaration and description to be included in the common elements have been completed, installed and provided in accordance with the regulations made under this Act; or
- (b) the declarant provides to a person or body, including an approval authority, specified by the municipality in which the land is situated, or the Minister of Municipal Affairs and Housing if the land is not situated in a municipality, a bond or other security that is acceptable to the municipality or the Minister, as the case may be, and that is sufficient to ensure that,
 - (i) the buildings and structures will be completed and installed in accordance with the regulations made under this Act,
 - (ii) the facilities and services will be installed and provided, and
 - (iii) the items described in clauses 157 (1) (b) and (c) will be included in an amendment to the description. 1998, c. 19, s. 158 (1).

Partial release

(2) The person holding the bond or other security may provide a partial release of it to the declarant with the consent of the municipality or the Minister of Municipal Affairs and Housing, as the case may be. 1998, c. 19, s. 158 (2).

Full release

- (3) The person holding the bond or other security shall not release it in full until,
 - (a) all the buildings, structures, facilities and services to be included in the common elements have been completed and installed in accordance with the regulations made under this Act; and
 - (b) the declarant has registered an amendment to the description consisting of the items described in clauses 157 (1) (b), (c) and (e). 1998, c. 19, s. 158 (3).

Consent of owners not required

- (4) Section 107 does not apply to an amendment to the description if the amendment complies with clause (3) (b). 1998, c. 19, s. 158 (4).

Status of buildings in corporation

159. (1) The buildings and structures located on a unit or on the common elements of a vacant land condominium corporation, whether or not the buildings and structures had been constructed at the time of the registration of the declaration and description, are real property and form part of the unit or common elements respectively. 1998, c. 19, s. 159 (1).

Insurance

(2) The corporation is exempt from the obligation to obtain and maintain the insurance described in section 99 for buildings and structures located on a unit. 1998, c. 19, s. 159 (2).

Owner to insure

(3) The owner of a unit shall obtain and maintain the insurance for damage to the unit that, but for subsection (2), the corporation would have had to obtain with respect to the unit. 1998, c. 19, s. 159 (3).

By-laws

160. In addition to the power to make, amend or repeal by-laws under subsection 56 (1), the board of a vacant land condominium corporation may, subject to section 56, make, amend or repeal by-laws, not contrary to the declaration, specifying minimum maintenance requirements for a unit or a building or structure located on a unit. 1998, c. 19, s. 160.

Disclosure statement

161. (1) Before delivering the first disclosure statement mentioned in section 72, the declarant with respect to a unit or a proposed unit in a vacant land condominium corporation shall request from the municipality in which the land is situated or from the Minister of Municipal Affairs and Housing if the land is not situated in a municipality, a statement of the services provided by the municipality or the Minister, as the case may be, including the construction and maintenance of roads. 1998, c. 19, s. 161 (1).

Contents

(2) In addition to the material required under subsection 72 (3), a disclosure statement relating to the purchase of a unit or a proposed unit in a vacant land condominium corporation shall include,

- (a) whatever statement that the declarant has received from the municipality or the Minister of Municipal Affairs and Housing, as the case may be, in response to a request; and

(b) all other material that the regulations made under this Act require. 1998, c. 19, s. 161 (2).

If no statement received

(3) If the declarant has not received any statement in response to a request within 30 days of making it, the disclosure statement shall contain a statement that the declarant has requested a statement under subsection (1) but has not received any statement in response to the request. 1998, c. 19, s. 161 (3).

Repair and maintenance

162. (1) Subject to the regulations made under this Act, sections 89, 90, 91 and 92 do not apply to a vacant land condominium corporation. 1998, c. 19, s. 162 (1).

Extent of obligations

(2) For the purpose of this section, the obligation to repair after damage includes the obligation to repair and replace after damage or failure and the obligation to maintain includes the obligation to repair after normal wear and tear but does not include the obligation to repair after damage. 1998, c. 19, s. 162 (2).

Common elements

(3) A vacant land condominium corporation shall maintain the common elements and repair them after damage. 1998, c. 19, s. 162 (3).

Units

(4) The owner of a unit in a vacant land condominium corporation shall maintain the owner's unit and repair it after damage. 1998, c. 19, s. 162 (4).

Work done for owner

(5) If an owner of a unit in a vacant land condominium corporation fails to maintain the owner's unit within a reasonable time or to repair it within a reasonable time after damage, the corporation may maintain or repair the unit, as the case may be. 1998, c. 19, s. 162 (5).

Cost

(6) An owner shall be deemed to have consented to the repairs or maintenance carried out by the corporation and the cost of the work shall be added to the owner's contribution to the common expenses. 1998, c. 19, s. 162 (6).

Substantial damage

163. (1) If the board of a vacant land condominium corporation determines under section 123 that substantial damage has occurred to a building located on a unit and the owners do not vote for termination under that section, the owner of the unit may elect,

- (a) not to repair the damage; or
- (b) to replace the building with a different building, subject to this Act, the declaration and the by-laws. 1998, c. 19, s. 163 (1).

Owner's duty

(2) An owner of a unit who elects not to repair the damage shall, as closely as is reasonably possible, restore the land on which the building was located to the state that the land was in immediately before the construction of the building. 1998, c. 19, s. 163 (2).

Restoration done by corporation

(3) If the owner of the unit does not do the restoration within a reasonable time, the corporation may do it. 1998, c. 19, s. 163 (3).

Cost

(4) The owner shall be deemed to have consented to the restoration done by the corporation and the cost of the restoration shall be added to the owner's contribution to the common expenses. 1998, c. 19, s. 163 (4).

PART XIII LEASEHOLD CONDOMINIUM CORPORATIONS

Creation

164. (1) Subject to the regulations made under this Act, a declarant may register a declaration and description that divide the leasehold estate in the land described in the description into units and common elements. 1998, c. 19, s. 164 (1).

Type

(2) The type of corporation created by the registration of a declaration and description under subsection (1) shall be known as a leasehold condominium corporation. 1998, c. 19, s. 164 (2).

Application

(3) Subject to this Part, Parts I to IX and XIV apply with necessary modifications to a leasehold condominium corporation. 1998, c. 19, s. 164 (3).

Other corporations

(4) This Part does not apply to a corporation that is not a leasehold condominium corporation. 1998, c. 19, s. 164 (4).

Leasehold interest of owners

165. (1) Each leasehold interest in a unit in a leasehold condominium corporation and its appurtenant common interest is valid even if the lessor is the owner of the leasehold interest and in that case the legal title and the leasehold interest shall be deemed not to merge. 1998, c. 19, s. 165 (1).

Same term

(2) All leasehold interests in units in a leasehold condominium corporation and their appurtenant common interests shall be for the same term. 1998, c. 19, s. 165 (2).

Term before renewal

(3) The term of the leasehold interests before a renewal under section 174 shall be not less than 40 years less a day and not more than 99 years as specified in the declaration. 1998, c. 19, s. 165 (3).

Lessor's consent not required

(4) The owner of a unit in a leasehold condominium corporation may, without the consent of the lessor, transfer, mortgage, lease or otherwise deal with the leasehold interest in the unit. 1998, c. 19, s. 165 (4).

Transfer of unit

(5) The owner of a unit in a leasehold condominium corporation may not transfer less than the whole leasehold interest in the unit and its appurtenant common interest. 1998, c. 19, s. 165 (5).

Form of transfer

(6) A leasehold interest in a unit in a leasehold condominium corporation shall be transferred in accordance with section 105 of the *Land Titles Act*, even if the land included in a leasehold condominium corporation is situated within the boundaries of a registry division. 1998, c. 19, s. 165 (6).

Application of Residential Tenancies Act, 2006

(7) The *Residential Tenancies Act, 2006* does not apply to the leasehold interest of an owner of a unit in a leasehold condominium corporation and its appurtenant common interest but does apply to a lease of an owner's leasehold interest in a unit. 1998, c. 19, s. 165 (8).

(8) SPENT: 1998, c. 19, s. 165 (8).

Declaration

166. (1) A declaration for a leasehold condominium corporation shall not be registered unless it is executed by the lessor. 1998, c. 19, s. 166 (1).

Contents

- (2) In addition to the requirements of subsection 7 (2), a declaration for a leasehold condominium corporation shall contain,
- (a) a statement of the term of the leasehold interests of the owners;
 - (b) a schedule setting out the amount of rent for the property payable by the corporation on behalf of the owners to the lessor and the times at which the rent is payable for at least the first five years immediately following the registration of the declaration and description;
 - (c) a formula to determine the amount of rent for the property payable by the corporation on behalf of the owners to the lessor and the times at which the rent is payable during the remainder of the term of the owners' leasehold interests following the time for which the schedule described in clause (b) states the amount of rent payable;
 - (d) a schedule of all provisions of the leasehold interests that affect the property, the corporation and the owners; and
 - (e) all other material that the regulations made under this Act require. 1998, c. 19, s. 166 (2).

Leasehold interests in property

(3) Provisions of the leasehold interests in the property are not binding on the property, the corporation or the owners unless the declaration sets them out and states that they are binding. 1998, c. 19, s. 166 (3).

Amendment of declaration

(4) An amendment to the declaration that affects the leasehold interests in the property is not effective unless the lessor has consented in writing to the amendment. 1998, c. 19, s. 166 (4).

Description

167. (1) In addition to the requirements of section 8, a description for a leasehold condominium corporation shall contain all other material that the regulations made under this Act require. 1998, c. 19, s. 167 (1).

Registration

(2) In addition to the requirements of section 8 and subject to the regulations made under this Act, a description for a leasehold condominium corporation shall not be registered unless the buildings and improvements to the property form part of the property. 1998, c. 19, s. 167 (2).

Amendment to description

(3) An amendment to the description that affects the leasehold interests in the property is not effective unless the lessor has consented in writing to the amendment. 1998, c. 19, s. 167 (3).

Leasehold estate in property

168. (1) A leasehold condominium corporation shall, on behalf of the owners, exercise all rights and perform all obligations of the owners with respect to the leasehold estate in the property. 1998, c. 19, s. 168 (1).

Same

(2) The owners shall not exercise the rights or perform the obligations mentioned in subsection (1). 1998, c. 19, s. 168 (2).

Mediation

(3) The lessor and the corporation shall be deemed to have agreed that either party may submit to mediation a disagreement on the interpretation of the provisions of the leasehold interests in the property that bind the property. 1998, c. 19, s. 168 (3).

Application of s. 132

(4) If the lessor or the corporation submits a disagreement to mediation, section 132 applies to it. 1998, c. 19, s. 168 (4).

Disclosure statement

169. In addition to the matters mentioned in subsection 72 (3), a disclosure statement in the case of a leasehold condominium corporation shall include,

- (a) a statement by the declarant whether the provisions of the leasehold interests in the property are in good standing and have not been breached; and
- (b) all other material that the regulations made under this Act require. 1998, c. 19, s. 169.

Status certificate

170. In addition to the material mentioned in subsection 76 (1), a status certificate in the case of a leasehold condominium corporation shall include,

- (a) a statement by the corporation whether the provisions of the leasehold interests in the property are in good standing and have not been breached;
- (b) a statement by the corporation whether the lessor has applied for a termination order under section 173; and
- (c) all other material that the regulations made under the Act require. 1998, c. 19, s. 170.

Rent for property

171. (1) The rent for the property that a leasehold condominium corporation is required to pay to the lessor on behalf of the owners and all other amounts necessary to comply with the provisions of the leasehold interest affecting the property are a common expense. 1998, c. 19, s. 171 (1).

Contribution of owners

(2) The corporation shall collect from each owner, as part of the owner's contribution to the common expenses, a portion of the rent and the amounts described in subsection (1) based on the proportion of contributions to the common expenses for the owner's unit set out in the declaration. 1998, c. 19, s. 171 (2).

Payment to lessor

(3) The corporation shall remit to the lessor, from the contributions collected from the owners under subsection (2), the amounts to which the lessor is entitled under the provisions of the leasehold interest affecting the property. 1998, c. 19, s. 171 (3).

Consent of lessor for termination

172. A leasehold condominium corporation shall not register a notice of termination under section 122 or 123 or sell the property or a part of the common elements under section 124 unless the lessor has consented to and executed the notice or the agreement of purchase and sale, as the case may be. 1998, c. 19, s. 172.

Termination by lessor

173. (1) The lessor shall not terminate a leasehold interest in a unit in a leasehold condominium corporation unless the lessor has been granted an order terminating the leasehold interests in all of the units. 1998, c. 19, s. 173 (1).

Application

(2) The lessor may make an application to the Superior Court of Justice for an order terminating all of the leasehold interests, if a leasehold condominium corporation,

- (a) has failed to remit to the lessor the amounts to which the lessor is entitled under the provisions of the leasehold interest affecting the property; or
- (b) has failed to comply with a court order. 1998, c. 19, s. 173 (2), S.O. 2000, c. 26.

Grounds for order

(3) On an application, the court may make an order if it is satisfied that the order is just and equitable, having regard to the scheme and intent of this Act and the interests of all persons that would be affected by the order. 1998, c. 19, s. 173 (3).

Contents of order

(4) The order may provide that all of the leasehold interests are terminated subject to the conditions set out in the order or may contain any other provision that the court considers appropriate in the circumstances. 1998, c. 19, s. 173 (4).

Registration of order

(5) If the court makes an order terminating all of the leasehold interests, the lessor shall register the order. 1998, c. 19, s. 173 (5).

Expiration of leasehold interests

174. (1) At least five years before the end of the term of the leasehold interests in the units in a leasehold condominium corporation, the lessor shall give the corporation,

- (a) a written notice of intention to renew all the leasehold interests that sets out the provisions applicable to the renewal; or
- (b) a written notice of intention not to renew all the leasehold interests. 1998, c. 19, s. 174 (1).

Term of renewal

(2) A renewal of the leasehold interests shall be for at least 10 years or the greater term specified in the notice. 1998, c. 19, s. 174 (2).

Notice to owners

(3) Upon receiving the notice, the corporation shall send a copy of it to the owners. 1998, c. 19, s. 174 (3).

Failure to give notice

(4) If the lessor does not give the required notice, the lessor shall be deemed to have given the notice required to renew the leasehold interests for 10 years subject to the same provisions that govern the leasehold interests before the renewal and the corporation shall send a notice of that fact to the owners. 1998, c. 19, s. 174 (4).

Owners' vote for termination

(5) The leasehold interests shall be renewed for the term and subject to the provisions specified in the notice or the deemed notice, as the case may be, unless the owners who own at least 80 per cent of the units cast a vote against the renewal no later than one year after the notice or the deemed notice, as the case may be, was given to the corporation. 1998, c. 19, s. 174 (5).

Notice of termination

(6) The corporation shall give notice to the lessor if, under subsection (5), the owners vote against the renewal. 1998, c. 19, s. 174 (6).

Registration of notice

(7) The lessor shall prepare a notice in the form prescribed by the Minister stating whether the leasehold interests have been renewed or not and register the notice in,

- (a) the land titles division of the land registry office within the boundaries of which division the land described in the description is situated, if the land registry office has a land titles division; or
- (b) the registry division of the land registry office within the boundaries of which division the land described in the description is situated, if the land registry office does not have a land titles division. 1998, c. 19, s. 174 (7).

New provisions upon renewal

(8) If the leasehold interests are renewed subject to provisions that are different from those that applied before the renewal, the declaration shall be deemed to be amended to contain the provisions that apply upon the renewal and the corporation shall register a copy of the provisions as an amendment to the declaration. 1998, c. 19, s. 174 (8).

Consent of owners not required

(9) Section 107 does not apply to an amendment to the declaration if the amendment complies with subsection (8). 1998, c. 19, s. 174 (9).

Effect of termination or expiration

175. (1) In the case of a leasehold condominium corporation, upon the registration of a notice of termination under section 122 or 123, the registration of a deed to the property under section 124, expropriation under section 126, the registration of an order under section 128 or 173 (or such other date, if any, specified in the registered order) or the registration of a notice under section 174 that the leasehold interests in the units have not been renewed (or such other date, if any, specified in the registered notice),

- (a) this Act ceases to govern the property;
- (b) the leasehold interests in the units are terminated;
- (c) claims against the leasehold interests that do not secure the payment of money are extinguished, unless the lessor consented to their registration, in which case they are continued against the lessor's interest; and
- (d) claims against the leasehold interests that secure the payment of money are claims against the persons who were owners of the leasehold interests immediately before the termination of those interests, and not against the land. 1998, c. 19, s. 175 (1).

Same

(2) Section 127 does not apply to a leasehold condominium corporation. 1998, c. 19, s. 175 (2).

Appointment of trustee

(3) Despite section 129, before the time at which this Act ceases to govern the property, the corporation shall appoint a trustee to pay out the money remaining in the corporation's reserve fund in accordance with this section. 1998, c. 19, s. 175 (3).

Distribution of money

(4) When this Act ceases to govern the property, the trustee shall pay out the money remaining in the reserve fund at that time in accordance with the following priorities:

1. To the lessor, the amount, if any, that is required to repair damage to the property that has not been repaired.

2. To each of the owners, a share of the balance in the same proportion as their common interests, subject to subsection (5). 1998, c. 19, s. 175 (4).

Payment of secured claims

(5) Before paying out a share of money payable to an owner, the trustee shall deduct from the share the amount of claims against the owner that secure the payment of money and shall remit the deduction to the persons entitled to the claims. 1998, c. 19, s. 175 (5).

PART XIV GENERAL

Act prevails

176. This Act applies despite any agreement to the contrary. 1998, c. 19, s. 176.

Regulations

177. (1) The Lieutenant Governor in Council may make regulations,

1. classifying corporations, properties or persons for the purposes of the regulations;
2. specifying prohibitions, restrictions and other requirements that apply to the registration of a declaration and description in respect of any type of corporation;
3. specifying requirements for the construction of the buildings described in a description for the purpose of a certificate mentioned in clause 8 (1) (e) or 157 (1) (c);
4. specifying material to be included in a declaration, a description, a report of a performance audit mentioned in subsection 44 (8), a table of contents, a disclosure statement, a budget statement, a status certificate, an agreement described in clause 98 (1) (b) or a notice of meeting mentioned in subsection 120 (3);
5. specifying deficiencies for the purpose of a performance audit under section 44 and governing the obligations of the person who conducts the audit;
6. requiring corporations to keep books, accounts and records and governing the books, accounts and records that corporations are required to keep;
7. governing the determination of occupancy standards under section 57;
8. specifying the form and content of financial statements and audit reports;
9. prescribing rates of interest payable under this Act, including rates of interest that shall be paid on money required to be held in trust under this Act;
10. governing funds intended for the payment of common expenses;
11. classifying reserve fund studies for the purposes of section 94;
12. governing the contents of any or all classes of reserve fund studies, the standards that shall be observed in conducting them and the times at which they shall be conducted;
13. prescribing the persons who may conduct any or all classes of reserve fund studies and specifying the qualifications of the persons and the affiliations for the purposes of subsection 94 (6) that disentitle the persons from conducting the reserve fund studies;
14. governing the cost mentioned in clause 97 (2) (c);
15. specifying restrictions on the right of corporations to amalgamate under section 120 and requirements for corporations to fulfill in order to amalgamate;
16. specifying restrictions on the right of a declarant to register a declaration and description to create a common elements condominium corporation, a vacant land condominium corporation or a leasehold condominium corporation and specifying requirements for the declarant to fulfill in order to make the registrations, including requirements for the purpose of section 157;
17. respecting the manner in which a common interest attaches to an owner's parcel of land for the purpose of subsection 139 (3);
18. specifying restrictions on the right of a declarant to register an amendment to a declaration and description required for creating a phase in a phased condominium corporation and specifying requirements for the declarant to fulfill in order to make the registrations;
19. governing the manner in which sections 89, 90, 91 and 92 apply to a vacant land condominium corporation;
20. prescribing the amounts of fees that are payable or chargeable under this Act;
21. prescribing forms, other than forms mentioned in this Act as forms prescribed by the Minister, and providing for their use;
22. prescribing any matter mentioned in this Act as prescribed, other than forms mentioned in this Act as forms prescribed by the Minister;
23. respecting any matter that this Act mentions may be or shall be dealt with in the regulations;
24. exempting any class of corporations, properties or persons from any provision of this Act or the regulations;
25. respecting any matter necessary or advisable to carry out the intent and purpose of this Act. 1998, c. 19, s. 177 (1).

Minister's regulations

(2) The Minister may make regulations,

1. respecting the registration and recording of declarations, descriptions, amendments to declarations or descriptions, by-laws, notices of termination and other instruments;
2. governing the method of describing land or any interest in land in instruments affecting a property or part of a property;
3. governing surveys, plans, specifications, certificates, descriptions and diagrams, and prescribing procedures for their registration and amendment;
4. prescribing the duties of officers appointed under the *Land Titles Act* or the *Registry Act* for the purpose of this Act;
5. requiring the payment of fees to officers appointed under the *Land Titles Act* or the *Registry Act* and prescribing the amounts of the fees;
6. respecting the names of corporations and requiring that the name of a corporation indicate whether the corporation is a freehold, leasehold, common elements, phased or vacant land condominium corporation;
7. governing the circumstances and the manner in which the *Corporations Information Act* is to apply to corporations, including the time at which that Act is to apply;
8. requiring that a description in respect of any class of properties contain a survey of the properties showing the units and common elements, in lieu of or in addition to the requirements of section 8;
9. prescribing the material required to be contained in the certificate as to the status of an amalgamating corporation for the purpose of clause 120 (3) (c);
10. prescribing forms described in this Act as forms prescribed by the Minister and providing for their use. 1998, c. 19, s. 177(2).

Application of regulations

(3) A provision of a regulation may be made to apply to,

- (a) all corporations or any class or type of corporations;
- (b) all properties or any class of properties; or
- (c) all persons or any class of persons. 1998, c. 19, s. 177 (3).

Incorporation by reference

(4) A regulation made under subsection (1) that prescribes any of the following things may adopt by reference, with the changes, if any, that the Lieutenant Governor in Council considers advisable, any principle, standard, code or formula, as it reads at the time the regulation is made or as it is amended from time to time, whether before or after the time at which the regulation is made:

1. The manner in which financial statements of a corporation are to be prepared or generally accepted accounting principles for the purpose of those statements.
2. The manner in which the auditor's report described in subsection 67 (1) is to be prepared or generally accepted auditing standards for the purpose of that report. 2001, c. 9, Sched. D, s. 3 (4).

Transition

178. (1) Corporations created under the *Condominium Act*, being chapter C.26 of the Revised Statutes of Ontario, 1990, are continued as corporations under this Act. 1998, c. 19, s. 178 (1).

Lien

(2) A corporation's lien that was created under the *Condominium Act* for the default of an owner in the obligation to contribute to the common expenses is continued as a lien under subsection 85 (1) of this Act. 1998, c. 19, s. 178 (2).

Transition, turnover

179. (1) If the corporation was created under the *Condominium Act*, being chapter C.26 of the Revised Statutes of Ontario, 1990, section 43 does not apply and section 26 of that Act, as it existed immediately before the coming into force of section 184, continues to apply. 1998, c. 19, s. 179 (1).

Offences under former Act

(2) Section 55 of the *Condominium Act*, as it existed immediately before the coming into force of section 184, continues to apply with respect to contraventions of subsection 26 (3) of that Act.

Same, disclosure

180. (1) If, on or before the day sections 44, 72 to 75 and 78 to 82 come into force, the declarant with respect to a corporation has entered into one or more agreements of purchase and sale for a unit or proposed unit in the corporation,

- (a) those sections do not apply; and
- (b) subject to subsection (2), sections 51 to 54 of the *Condominium Act*, being chapter C.26 of the Revised Statutes of Ontario, 1990, except for subsection 52 (5) of that Act, as those sections existed immediately before the coming into force of section 184, continue to apply.

Not a material amendment

(2) For the purposes of subsection 52 (2) of the *Condominium Act*, being chapter C.26 of the Revised Statutes of Ontario, 1990, a change to the information required to be contained in a disclosure statement that arises only as a result of the coming into force of this Act does not constitute a material amendment to the disclosure statement.

Offences under former Act

(3) Section 55 of the Condominium Act, as it existed immediately before the coming into force of section 184, continues to apply with respect to contraventions of subsection 52 (5), (6), or 53 (1) of that Act.

Same, insurance

181. (1) If, at the time section 99 comes into force, the corporation has entered into an insurance policy under section 27 of the Condominium Act, being chapter C.26 of the Revised Statutes of Ontario, 1990, that has not expired, section 99 does not apply and section 27 of that Act, as it existed immediately before the coming into force of section 184, continues to apply.

Act applies to renewals

(2) Despite subsection (1), section 99 applies if the corporation renews an insurance policy described in that subsection after section 100 comes into force.

Same, termination of agreements

182. If the corporation has entered into an agreement described in sections 111 and 112 before those sections come into force, those sections do not apply and section 39 of the Condominium Act, being chapter C.26 of the Revised Statutes of Ontario, 1990, as that section existed immediately before the coming into force of section 184, continues to apply.

Same, regulations

183. Despite section 184, the Lieutenant Governor in Council may by regulation revoke regulations made under section 59 of the Condominium Act, being chapter C.26 of the Revised Statutes of Ontario, 1990, as that section read immediately before section 184 comes into force, if the Minister makes a regulation under subsection 177 (2) that is inconsistent with those regulations.

Repeal

184. The Condominium Act, being chapter C.26 of the Revised Statutes of Ontario, 1990, as amended by the Statutes of Ontario, 1993, chapter 27, Schedule, 1994, chapter 23, section 62 and 1997, chapter 5, section 63, is repealed.

Amendments to Ontario New Home Warranties Plan Act

185. (1) Section 14 of the Ontario New Home Warranties Plan Act is repealed and the following substituted:

Compensation

14. (1) Subject to the regulations, a person who has entered into a contract to purchase a home from a vendor is entitled to receive payment out of the guarantee fund for the amount that the person paid to the vendor as a deposit to be credited to the purchase price under the contract on closing if,

- (a) the person has exercised a statutory right to rescind the contract before closing; or
- (b) the person has a cause of action against the vendor resulting from the fact that title to the home has not been transferred to the person because,
 - (i) the vendor has gone into bankruptcy,
 - (ii) the vendor has fundamentally breached the contract.

Same, construction contract

(2) Subject to the regulations, an owner of land who has entered into a contract with a builder for the construction of a home on the land and who has a cause of action against the builder for damages resulting from the builder's failure to substantially perform the contract, is entitled to receive payment out of the guarantee fund of the amount by which the amount paid by the owner to the builder under the contract exceeds the value of the work and materials supplied to the owner under the contract.

Same, breach of warranty

(3) Subject to the regulations, an owner of a home is entitled to receive payment out of the guarantee fund for the cost of the remedial work required to correct a breach of warranty if,

- (a) the person became the owner of the home through receiving a transfer of title to it from a vendor or through the substantial performance by a builder of a contract to construct the home on land owned by the person; and
- (b) the person has a cause of action against the vendor or the builder, as the case may be, for damages resulting from the breach of warranty.

Same, major structural defect

(4) Subject to the regulations, an owner who suffers damage because of a major structural defect mentioned in clause 13 (1) (b) is entitled to receive payment out of the guarantee fund for the cost of the remedial work required to correct the major structural defect if the owner makes a claim within four years after the warranty expires or such longer time under such conditions as are prescribed.

Interpretation, substantial performance

(5) For the purposes of this section, a contract is substantially performed if it is substantially performed within the meaning given by subsection 2 (1) of the Construction Lien Act.

Other recovery

(6) In assessing the amount for which a person is entitled to receive payment out of the guarantee fund under this section, the Corporation shall take into consideration any benefit, compensation, indemnity payable, or the value of work and materials furnished to the person from any source.

Performance

(7) The Corporation may perform or arrange for the performance of any work in lieu of or in mitigation of damages claimed under this section.

(2) Section 15 of the Act is repealed and the following substituted:

Condominiums

15. For the purposes of sections 13 and 14,

(a) a condominium corporation shall be deemed to be the owner of the common elements of the corporation;

(b) subject to clauses (c) and (d), if dwelling units are included in the property of a condominium corporation, the warranties on the common elements of the corporation take effect on the date of the registration of the declaration and description;

(c) no warranties shall take effect on the common elements of a common elements condominium corporation or a vacant land condominium corporation;

(d) the warranties on common elements of a phased condominium corporation, that are added to the corporation after the registration of the declaration and description take effect on the date of the registration of the amendments to the declaration and description that created them; and

(e) the amalgamation of two or more condominium corporations does not affect or extend the warranties on the common elements of the amalgamating corporations.

(3) Section 22 of the Act is amended by adding the following subsections:

Limitations

(3) A proceeding under clause (1) (a) shall not be commenced after the first anniversary of the day on which the facts upon which the proceeding is based first came to the knowledge of the Registrar.

Same

(4) A proceeding under clause (1) (b) shall not be commenced after the second anniversary of the day on which the facts that gave rise to the offence were discovered.

(4) Clause 23 (1) (f) of the Act is repealed and the following substituted:

(f) governing agreements entered into between the Corporation and vendors or builders.

(5) Subsection 23 (1) of the Act, as amended by the Statutes of Ontario, 1994, chapter 27, section 94, is further amended by adding the following clause:

(l.1) specifying information that a person is required to include in a claim for compensation from the guarantee fund.

(6) Subsection 23 (1) of the Act, as amended by the Statutes of Ontario, 1994, chapter 27, section 94, is further amended by adding the following clause:

(m.1) allowing prescribed persons to inspect homes during or after their construction and requiring builders or vendors to pay the costs of inspections.

(7) Clause 23 (1) (o) of the Act is repealed and the following substituted:

(o) prescribing forms for the purposes of the Corporation and forms for claims for compensation from the guarantee fund.

186. Subsection 21(1) of the *Tenant Protection Act, 1997* is amended by adding the following paragraph:

3.1 To allow a person who holds a certificate of authorization within the meaning of the *Professional Engineers Act* or a certificate of practice within the meaning of the *Architects Act* or another qualified person to make a physical inspection of the rental unit to satisfy a requirement imposed under subsection 9(4) of the *Condominium Act, 1998*.

187. This Act comes into force on a day to be named by proclamation of the Lieutenant Governor.

188. The short title of this Act is the *Condominium Act, 1998*.

CONDOMINIUM ACT, 1998

Ontario Regulation 48 of 01

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REGULATION 48 OF 01 AMENDED TO 300/05

PART I
DEFINITIONS AND APPLICATION**Definitions**

1. In this Regulation,

“amalgamation” means an amalgamation under Part VII of the Act and “amalgamate” has a corresponding meaning;

“beneficiary” means a person on whose behalf a payment described in subsection 81 (1) of the Act has been made in respect of a proposed unit or a proposed common interest in a common elements condominium corporation and includes the person’s successors and assigns;

“Condominium Corporations Index” means the Condominium Corporations Index mentioned in subsection 3 (3) of the Act;

“Condominium Register” means the Condominium Register mentioned in subsection 3 (4) of the Act;

“deposit receipt” means a deposit receipt described in paragraph 2 of subsection 20 (2);

“easement” means an easement, right of way, right or licence in the nature of an easement, *profit à prendre* or other incorporeal hereditament, but does not include any of those that arise by operation of law;

“insurer” means the insurer under a policy;

“land registrar” means the land registrar in whose registry or land titles division, as the case may be, the property is situated;

“parcel of tied land” means a parcel of land described in clause 139 (1) (a) of the Act in the case of a common elements condominium corporation and to which a common interest of an owner in the corporation attaches under clause 139 (2) (a) of the Act;

“phase” means the additional units and common elements in a phased condominium corporation that are created in accordance with Part XI of the Act upon the registration of an amendment to both the declaration and description;

“policy” means a policy described in paragraph 1 of subsection 20 (2);

“standard condominium corporation” means a freehold condominium corporation that is not a common elements condominium corporation or a vacant land condominium corporation;

“warranty corporation” means the corporation designated under section 2 of the *Ontario New Home Warranties Plan Act*. O. Reg. 48/01, s. 1.

Non-application of Corporations Information Act

2. Despite subsection 5 (4) of the Act, the *Corporations Information Act* does not apply to any corporations. O. Reg. 48/01, s. 2.

Standard condominium corporations

3. Corporations created before Part II of the Act came into force and continued as corporations under subsection 178 (1) of the Act are classified as standard condominium corporations. O. Reg. 48/01, s. 3.

PART II
DECLARATION AND DESCRIPTION**Place of registration**

4. A declaration and description shall not be registered unless,

- (a) the property described in Schedule A to the declaration, is situated entirely within the boundaries of one land titles division, the *Land Titles Act* applies to all the property and the declarant is the registered owner of the property with an absolute title under that Act; or
- (b) the property described in Schedule A to the declaration, is situated entirely within the boundaries of one registry division, the *Registry Act* applies to all the property and the declarant holds a certificate of title to the property issued under Part I of the *Certification of Titles Act* within 10 years before the registration. O. Reg. 48/01, s. 4.

Contents

5. (1) A declaration shall not be received for registration unless,

- (a) it is executed by the declarant;
- (b) it meets the execution requirements for registration of a transfer/deed of land under the *Land Titles Act* or the *Registry Act*, as the case may be;
- (c) the first page of the declaration contains a statement that the registration of the declaration and description will create a standard condominium corporation;
- (d) it contains schedules known as Schedules A, B, C, D, E, F and G;
- (e) the land registrar has received the description for the property and it is capable of being registered; and
- (f) the declaration complies with this Regulation and all other legal requirements. O. Reg. 48/01, s. 5 (1).

(2) Schedule A shall include,

- (a) a description of the land and interests appurtenant to the land intended to be governed by the Act, including a description of every easement, as shown on the description that, upon the registration of the declaration and description, will be appurtenant to the land or to which the land will be subject; and

- (b) a statement signed by the solicitor registering the declaration that, in his or her opinion, based on the parcel register or abstract index and the plans and documents recorded in them,
- (i) the legal description is correct,
 - (ii) the easements mentioned in clause (a) will exist in law upon the registration of the declaration and description, and
 - (iii) the declarant is the registered owner of the land and appurtenant interests. O. Reg. 48/01, s. 5 (2).
- (3) Schedule B shall contain the consent under clause 7 (2) (b) of the Act, in Form 1, of every person having a registered mortgage against the land or interests appurtenant to the land, as the land and the interests are described in the description. O. Reg. 48/01, s. 5 (3).
- (4) Schedule C shall,
- (a) specify the boundaries of each unit by reference to the buildings or monuments mentioned in subsections 6 (4), (5) and (6) of Ontario Regulation 49/01;
 - (b) fully describe the monuments mentioned in subsections 6 (4), (5) and (6) of Ontario Regulation 49/01 and the relationship of the boundaries of the units to them;
 - (c) contain a statement signed by an Ontario land surveyor licensed under the *Surveyors Act* certifying that the written description of the monuments and boundaries of the units accurately corresponds with the diagrams of the units described in clause 8 (1) (d) of the Act and shown on the plans of survey of the description prepared in accordance with Ontario Regulation 49/01. O. Reg. 48/01, s. 5 (4).
- (5) Schedule D shall contain,
- (a) a statement of the proportions, expressed in percentages totalling 100 per cent, of the common interests appurtenant to the units; and
 - (b) a statement of the proportions, expressed in percentages totalling 100 per cent, allocated to the units, in which the owners are to contribute to the common expenses. O. Reg. 48/01, s. 5 (5).
- (6) Schedule E shall contain a statement specifying the common expenses of the corporation or may be left blank if the declarant so elects. O. Reg. 48/01, s. 5 (6).
- (7) Schedule F shall contain a specification of all parts of the common elements that are to be used by the owners of one or more designated units and not by all the owners or shall indicate that there are no such parts if that is the case. O. Reg. 48/01, s. 5 (7).
- (8) Schedule G shall contain,
- (a) a certificate, in Form 2, of an architect certifying that all buildings on the property have been constructed in accordance with the regulations made under the Act, with respect to all or some matters listed in the paragraphs of the definition of “has been constructed” in subsection 6 (1); or
 - (b) one or more certificates of an engineer, in Form 2, certifying that all buildings on the property have been constructed in accordance with the regulations made under the Act, with respect to all or some matters listed in the paragraphs of the definition of “has been constructed” in subsection 6 (1). O. Reg. 48/01, s. 5 (8).
- (9) Every matter listed in the paragraphs of the definition of “has been constructed” in subsection 6 (1) shall be certified to in the certificates in Form 2 that are contained in Schedule G. O. Reg. 48/01, s. 5 (9).
- (10) A declaration may contain schedules in addition to the schedules that it is required to contain under this Regulation. O. Reg. 48/01, s. 5 (10).

Construction complete

6. (1) For the purposes of subsection 5 (8),

“has been constructed” means, with respect to each building on the property, constructed at least to the following state:

1. The exterior building envelope, including roofing assembly, exterior wall cladding, doors and windows, caulking and sealants, is weather resistant if required by the construction documents and has been completed in general conformity with the construction documents.
2. Floor assemblies are constructed to the sub-floor.
3. Walls and ceilings of the common elements, excluding interior structural walls and columns in a unit, are completed to the drywall (including taping and sanding), plaster or other final covering.
4. All underground garages, if any, have walls and floor assemblies in place.
5. All elevating devices, if any, as defined in the *Elevating Devices Act*, are licensed under that Act if it requires a licence, except for elevating devices contained wholly in a unit and designed for use only within the unit.
6. All installations with respect to the provision of water and sewage services are in place.
7. All installations with respect to the provision of heat and ventilation are in place and heat and ventilation can be provided.
8. All installations with respect to the provision of air conditioning, if any, are in place.
9. All installations with respect to the provision of electricity are in place.

10. All indoor and outdoor swimming pools, if any, are roughed in to the extent that they are ready to receive finishes, equipment and accessories.
11. Subject to paragraphs 2 and 3, the boundaries of the units are completed to the drywall (not including taping and sanding), plaster or other final covering, and perimeter doors are in place. O. Reg. 48/01, s. 6 (1).

(2) Despite paragraph 2 of subsection (1), with respect to units intended for non-residential purposes that are not ancillary to units intended for residential purposes, the lowermost floor does not have to be in place if it is at grade. O. Reg. 48/01, s. 6 (2).

(3) Despite paragraphs 3 and 11 of subsection (1), with respect to units intended for non-residential purposes that are not ancillary to units intended for residential purposes, wall or ceiling coverings, interior perimeter doors, interior partitions or walls between units or between units and common elements do not have to be in place. O. Reg. 48/01, s. 6 (3).

Restrictions: amalgamation

7. (1) A declaration shall not be registered if,

- (a) it contains provisions requiring an owner, a future owner or anyone on the owner's or future owner's behalf to consent in writing to an amalgamation; or
- (b) it contains provisions relating to an amalgamation. O. Reg. 48/01, s. 7 (1).

(2) If a declaration contains a provision that is inconsistent with subsection (1), the declaration shall be deemed to contain another provision stating that the inconsistent provision is void. O. Reg. 48/01, s. 7 (2).

Amendments

8. An amendment made under section 107 of the Act to a declaration is exempt from subsection 7 (1) of the Act and clause 7 (2) (b) of the Act and is not required to contain any statements or schedules described in section 5 that are in the registered declaration and that are not being amended by the amendment. O. Reg. 48/01, s. 8.

Contents

9. (1) A description shall not be received for registration unless,

- (a) it complies with all legal requirements; and
- (b) the land registrar has received the declaration for the property and it is capable of being registered. O. Reg. 48/01, s. 9 (1).

(2) Despite clause 8 (1) (b) of the Act, a description of a corporation shall not contain the architectural plans described in that clause if,

- (a) it contains the structural plans described in that clause; and
- (b) Schedule G to the declaration does not contain the certificate of an architect described in clause 5 (8) (a). O. Reg. 48/01, s. 9 (2).

(3) Despite clause 8 (1) (e) of the Act, a description of a corporation shall not contain the certificates described in that clause. O. Reg. 48/01, s. 9 (3).

(4) In addition to all other material that it is required to contain, a description shall contain a description of all easements and similar interests to which the property is subject. O. Reg. 48/01, s. 9 (4).

(5) The description of the easements and similar interests to which the property is subject and the description of the interests appurtenant to the property required by clause 8 (1) (g) of the Act shall be combined and shall be in Form 3. O. Reg. 48/01, s. 9 (5).

Forms

10. (1) The land registrar's certificate of registration that clause 11 (1) (a) of Ontario Regulation 49/01 requires to be on the description shall be in Form 4. O. Reg. 48/01, s. 10 (1).

(2) The surveyor's certificate that clause 11 (1) (c) of Ontario Regulation 49/01 requires to be on the description shall be in Form 5. O. Reg. 48/01, s. 10 (2).

(3) The certificate that clause 11 (1) (e) or (f) or subsection 21 (2) of Ontario Regulation 49/01 requires to be on the description and that is made by the declarant or, if the description is being registered to effect an amalgamation, the persons authorized to bind each of the amalgamating corporations, shall be in Form 6. O. Reg. 48/01, s. 10 (3).

(4) The surveyor's certificate that clause 11 (3) (b) of Ontario Regulation 49/01 requires to be on the description shall be in Form 7. O. Reg. 48/01, s. 10 (4).

Amendments

11. All persons are exempt from subsections 9 (2) and (3) of the Act when applying to register an amendment to the description made under section 109 or 110 of the Act. O. Reg. 48/01, s. 11.

PART III GENERAL

Performance audit

12. (1) In subsection (2),

“telecommunications” means the emission, transmission or reception of any combination of signs, signals, writing, images, sound, data, alphanumeric characters or intelligence of any nature by wire, cable, radio or an optical, electromagnetic or any similar technical system. O. Reg. 48/01, s. 12 (1).

(2) For the purpose of clause 44 (5) (a) of the Act, the person who conducts the performance audit shall inspect the elevating devices, as defined in the *Elevating Devices Act*, if any, of the buildings on the property and the telecommunications systems, if any, that service the buildings. O. Reg. 48/01, s. 12 (2).

(3) For the purpose of clause 44 (5) (b) of the Act, the person who conducts the performance audit shall inspect the sprinkler systems, if any, and the outside parking areas, if any. O. Reg. 48/01, s. 12 (3).

(4) In addition to the material specified in subsection 44 (8) of the Act, the written report mentioned in that subsection shall also include a copy of the current declaration and description registered in respect of the corporation, including all amendments to that declaration and description. O. Reg. 48/01, s. 12 (4).

Proxies

13. An instrument appointing a proxy to vote at a meeting of owners may be in,

- (a) Form 8, in the case of a proxy, other than for the election or removal of a director;
- (b) Form 9, in the case of a proxy that includes a proxy for the election of a director, other than for the election of a director for the remainder of the term of a director who has been removed; or
- (c) Form 10, in the case of a proxy that includes a proxy for the removal of a director or the election of a director for the remainder of the term of a director who has been removed. O. Reg. 48/01, s. 13.

By-laws

14. The certificate of the officer of a corporation mentioned in subsection 38 (1) of Ontario Regulation 49/01 in respect of a by-law shall be in Form 11. O. Reg. 48/01, s. 14.

Records

15. The corporation shall keep copies of the status certificates that it has issued under section 76 of the Act within the previous 10 years. O. Reg. 48/01, s. 15.

Financial statements

16. (1) A corporation shall have its financial statements prepared in the manner and in accordance with the accounting principles specified in the Handbook of the Canadian Institute of Chartered Accountants. O. Reg. 48/01, s. 16 (1).

(2) The auditor’s report mentioned in subsection 67 (1) of the Act shall be prepared in the manner and in accordance with the auditing standards specified in the Handbook of the Canadian Institute of Chartered Accountants. O. Reg. 48/01, s. 16 (2).

(3) In addition to the material specified in subsection 66 (2) of the Act, the financial statements shall also include,

- (a) a comparison between,
 - (i) the amount of contributions to the reserve fund that the corporation has collected, and
 - (ii) the amount that, according to the board’s plan for funding of the reserve fund under subsection 94 (8) of the Act, the corporation was required to collect as contributions to the reserve fund; and
- (b) a comparison between,
 - (i) the amount of expenditures from the reserve fund that the corporation has made, and
 - (ii) the amount of proposed expenditures that, according to the board’s plan for funding of the reserve fund under subsection 94 (8) of the Act, the corporation was to have made from the reserve fund. O. Reg. 48/01, s. 16 (3).

(4) If a director makes a disclosure of an interest in a contract or transaction under section 40 of the Act and the corporation has entered into the contract or transaction, whether before or after the disclosure, the financial statements shall also include a brief description of the nature of the contract or transaction, the amount of money involved in it and the nature and extent of the director’s interest in it. O. Reg. 48/01, s. 16 (4).

(5) If an officer makes a disclosure of an interest in a contract or transaction under section 41 of the Act and the corporation has entered into the contract or transaction, whether before or after the disclosure, the financial statements shall also include a brief description of the nature of the contract or transaction, the amount of money involved in it and the nature and extent of the officer’s interest in it. O. Reg. 48/01, s. 16 (5).

Disclosure statement

17. (1) In addition to the material specified in subsection 72 (3) of the Act, a disclosure statement mentioned in that subsection shall include,

- (a) a copy of sections 73 and 74 of the Act;
- (b) a statement that, under subsection 82 (8) of the Act, the declarant is entitled to retain the excess of all interest earned on money held in trust over the interest that it is required to pay to the purchaser under section 82 of the Act;
- (c) a statement whether a part of the common elements may be used for commercial or other purposes not ancillary to residential purposes;
- (d) if there is no by-law or proposed by-law of the corporation establishing what constitutes a standard unit, a copy of the schedule that the declarant intends to deliver to the board under clause 43 (5) (h) of the Act;

- (e) a statement,
 - (i) indicating whether visitors must pay for parking and what the anticipated costs are,
 - (ii) indicating whether there is visitor parking on the property, and
 - (iii) if there is no visitor parking on the property, indicating whether visitor parking is available elsewhere and if so, describing where;
- (f) an identification of the major assets and property that the declarant has indicated that it may provide, even though it is not required to do so;
- (g) an indication of the units and assets that the corporation is required to purchase, the services that it is required to acquire and the agreements and leases that it is required to enter into with the declarant or a subsidiary body corporate, holding body corporate or affiliated body corporate of the declarant; and
- (h) with respect to land that is owned by the declarant, or by a subsidiary body corporate, holding body corporate or affiliated body corporate of the declarant, and that is adjacent to the land described in the description, a statement indicating,
 - (i) the current use of the land,
 - (ii) the representations, if any, that the declarant has made respecting the future use of the land, and
 - (iii) a summary of the applications, if any, respecting the use of the land that have been submitted to an approval authority. O. Reg. 48/01, s. 17 (1).
- (2) In subsection (1),

“affiliated body corporate” means a body corporate that is deemed to be affiliated with another body corporate under subsection 1 (4) of the *Business Corporations Act*;

“body corporate” means a body corporate with or without share capital;

“holding body corporate” means a body corporate that is deemed to be the holding body of another body corporate under subsection 1 (3) of the *Business Corporations Act*;

“subsidiary body corporate” means a body corporate that is deemed to be a subsidiary of another body corporate under subsection 1 (2) of the *Business Corporations Act*. O. Reg. 48/01, s. 17 (2).

- (3) The table of contents in the disclosure statement mentioned in subsection 72 (4) of the Act shall be in Form 12. O. Reg. 48/01, s. 17 (3).

Status certificate

- 18. (1) A status certificate shall be in Form 13. O. Reg. 48/01, s. 18 (1).

(2) The fee that a corporation may charge for providing a status certificate, including all material that is required to be included in it, shall not exceed \$100, inclusive of all applicable taxes. O. Reg. 48/01, s. 18 (2).

Sale of units

19. (1) The prescribed rate of interest for the purpose of paragraph 1 of subsection 80 (4) of the Act shall be the rate of interest that the Bank of Canada has most recently reported as the chartered bank administered interest rate for a conventional one year mortgage as of the first of the month in which the purchaser assumes interim occupancy of a proposed unit or is required to do so under the agreement of purchase and sale. O. Reg. 48/01, s. 19 (1).

- (2) In subsection (3),

“bank rate” means the bank rate established by the Bank of Canada as the minimum rate at which the Bank of Canada makes short-term advances to members of the Canadian Payments Association. O. Reg. 48/01, s. 19 (2).

- (3) The prescribed rate of interest for the purpose of subsections 73 (3), 74 (9) and 82 (1), (5) and (7) of the Act shall be,
 - (a) for the period from April 1 to September 30 of each year, 2 per cent per annum below the bank rate at the end of March 31 of that year; and
 - (b) for the period from October 1 of each year to March 31 in the following year, 2 per cent per annum below the bank rate at the end of September 30 immediately before that October. O. Reg. 48/01, s. 19 (3).

Trustees and security

- 20. (1) The following classes are prescribed as trustees for the purpose of subsection 81 (1) of the Act:

1. Persons, other than the declarant’s solicitor, who are entitled to practise law in Ontario as solicitors.
2. A partnership, other than the declarant’s solicitor, of persons who are entitled to practise law in Ontario as solicitors.
3. Escrow agents for deposits with respect to a project who have entered into a deposit trust agreement with the declarant and either the warranty corporation or an insurer to govern money to be held in trust under section 81 of the Act with respect to the project. O. Reg. 48/01, s. 20 (1).

- (2) The following classes are prescribed as security for the purpose of clause 81 (7) (b) of the Act:

1. Policies that insure against the loss of payments described in subsection 81 (1) of the Act and the interest payable by the declarant on the payments, that meet the requirements of section 21 and that are in effect.

2. Deposit receipts executed by the warranty corporation that provide for compensation to a beneficiary in accordance with section 22, that meet the requirements of that section and that are in effect. O. Reg. 48/01, s. 20 (2).

Insurance policies

21. (1) A policy shall take effect when it has been executed by or on behalf of the insurer and the declarant and when it has been delivered to the trustee or the declarant's solicitor holding the money for which the policy is being provided as security. O. Reg. 48/01, s. 21 (1).

(2) The trustee or the declarant's solicitor, as the case may be, shall hold the policy in trust for the beneficiary until the insurer is no longer liable under it in accordance with subsection (8). O. Reg. 48/01, s. 21 (2).

(3) The declarant shall pay the premiums in respect of a policy and shall not directly or indirectly transfer the cost of the premiums to the beneficiary. O. Reg. 48/01, s. 21 (3).

(4) The obligations of the insurer to the beneficiary under a policy shall not be affected by,

- (a) failure of the declarant to pay any premiums owing under the policy;
- (b) failure of the declarant to notify the insurer of the receipt of payments described in subsection 81 (1) of the Act; or
- (c) breach of any term or condition of the policy. O. Reg. 48/01, s. 21 (4).

(5) Upon request, the trustee or the declarant's solicitor, as the case may be, shall deliver the policy to the beneficiary so that the beneficiary can make a claim under it. O. Reg. 48/01, s. 21 (5).

(6) Immediately upon receiving written notice of a claim by the beneficiary under a policy, the insurer shall provide the beneficiary with forms upon which to make proof of loss. O. Reg. 48/01, s. 21 (6).

(7) An insurer that receives written notice of a claim under subsection (6) shall pay the beneficiary within 60 days after the right of the beneficiary to payment under the policy has been established. O. Reg. 48/01, s. 21 (7).

(8) An insurer shall remain liable under a policy until,

- (a) the declarant delivers to the beneficiary a deed in registerable form to the unit, in respect of which the beneficiary or a person on the beneficiary's behalf has made a payment described in subsection 81 (1) of the Act;
- (b) the declarant pays the beneficiary all money paid under subsection 81 (1) of the Act and interest on it payable by the declarant under the Act;
- (c) the insurer pays the beneficiary the amount of the loss;
- (d) the beneficiary acknowledges in writing that,
 - (i) the beneficiary is not entitled to the payments made by or on behalf of the beneficiary under subsection 81 (1) of the Act in respect of a proposed unit in the corporation and the interest payable on the payments by the declarant, and
 - (ii) the insurer is no longer liable under the policy; or
- (e) a court of competent jurisdiction has made a final determination that the beneficiary is not entitled to the payments made by or on behalf of the beneficiary under subsection 81 (1) of the Act in respect of a proposed unit in the corporation and the interest payable on the payments by the declarant. O. Reg. 48/01, s. 21 (8).

(9) An insurer who is required to make a payment under a policy shall pay interest to the beneficiary to the date of payment of the loss at the rate prescribed under subsection 19 (3). O. Reg. 48/01, s. 21 (9).

(10) A provision in a policy that derogates in any manner from any right or benefit that this section confers on a beneficiary is void to the extent that it derogates from the right or benefit. O. Reg. 48/01, s. 21 (10).

Deposit receipts

22. (1) A deposit receipt shall take effect when it has been executed by the beneficiary and by or on behalf of the warranty corporation and the declarant and when it has been delivered to the trustee or the declarant's solicitor, as the case may be, holding the money for which the deposit receipt is being provided as security. O. Reg. 48/01, s. 22 (1).

(2) A deposit receipt shall contain a statement that payments described in clause 81 (1) (a) or (c) of the Act are not covered by a deposit receipt and that they must be held in trust in accordance with section 81 of the Act. O. Reg. 48/01, s. 22 (2).

(3) A deposit receipt shall not constitute prescribed security for the purposes of paragraph 2 of subsection 20 (2) unless, by the terms of the deposit receipt, the amount of compensation that the warranty corporation is liable to pay to a beneficiary under it is,

- (a) if the amount of the payments described in clause 81 (1) (b) of the Act made by or on behalf of the beneficiary is \$20,000 or less, the amount so paid; or
- (b) if the amount of the payments described in clause 81 (1) (b) of the Act made by or on behalf of the beneficiary is more than \$20,000, \$20,000 or such greater amount that may be provided under the deposit receipt. O. Reg. 48/01, s. 22 (3).

(4) A deposit receipt that establishes a limit on the liability of the warranty corporation shall not constitute prescribed security for the purposes of paragraph 2 of subsection 20 (2) unless it contains a statement that whatever amount is paid by or on behalf of the beneficiary to the declarant in excess of the limit is subject to section 81 of the Act. O. Reg. 48/01, s. 22 (4).

- (5) The beneficiary is not liable for the payment to an insurer of any premium payable in respect of a policy of insurance that the warranty corporation takes out to insure its obligation to pay under a deposit receipt. O. Reg. 48/01, s. 22 (5).
- (6) The declarant shall not directly or indirectly charge the beneficiary for any costs relating to the deposit receipt. O. Reg. 48/01, s. 22 (6).
- (7) The obligations of the warranty corporation to the beneficiary under a deposit receipt shall not be affected by,
- (a) failure of the declarant to comply with any term or condition of the declarant's agreement with the warranty corporation;
 - (b) failure of the declarant to notify the warranty corporation or its insurer or insurers of the receipt of payments described in clause 81 (1) (b) of the Act;
 - (c) failure of the warranty corporation to notify its insurer or insurers of the receipt of payments described in clause 81 (1) (b) of the Act;
 - (d) breach of any term or condition of the deposit receipt; or
 - (e) breach by the beneficiary or the declarant of any term or condition of a policy of insurance that the warranty corporation takes out to insure its obligation to pay under a deposit receipt. O. Reg. 48/01, s. 22 (7).
- (8) Immediately upon receiving written notice of a claim by the beneficiary under a deposit receipt, the warranty corporation shall provide the beneficiary with forms upon which to make proof of loss. O. Reg. 48/01, s. 22 (8).
- (9) If the warranty corporation receives written notice of a claim under subsection (8), it shall pay the beneficiary within 60 days after the right of the beneficiary to payment under the deposit receipt has been established. O. Reg. 48/01, s. 22 (9).
- (10) The warranty corporation shall remain liable under a deposit receipt until,
- (a) the declarant delivers to the beneficiary a deed in registerable form to the unit in respect of which the beneficiary or a person on the beneficiary's behalf has made a payment described in clause 81 (1) (b) of the Act;
 - (b) the declarant pays the beneficiary all money paid under clause 81 (1) (b) of the Act and interest on it payable by the declarant under the Act;
 - (c) the warranty corporation pays to the beneficiary the amount of the loss to the extent of the warranty corporation's liability under the deposit receipt;
 - (d) the beneficiary acknowledges in writing that,
 - (i) the beneficiary is not entitled to the payments made by or on behalf of the beneficiary under subsection 81 (1) of the Act in respect of a proposed unit in the corporation and the interest payable on the payments by the declarant, and
 - (ii) the insurer is no longer liable under the policy; or
 - (e) a court of competent jurisdiction has made a final determination that the beneficiary is not entitled to the payments made by or on behalf of the beneficiary under subsection 81 (1) of the Act in respect of a proposed unit in the corporation and the interest payable on the payments by the declarant. O. Reg. 48/01, s. 22 (10).
- (11) If the warranty corporation is required to make a payment under a deposit receipt, it shall pay interest to the beneficiary to the date of payment of the loss at the rate prescribed under subsection 19 (3). O. Reg. 48/01, s. 22 (11).
- (12) A provision in a deposit receipt that derogates in any manner from any right or benefit that this section confers on a beneficiary is void to the extent that it derogates from the right or benefit. O. Reg. 48/01, s. 22 (12).

Lease of units

23. For the purpose of section 83 of the Act,

“lease” includes a sublease or assignment of lease. O. Reg. 48/01, s. 23.

Notice of lien

24. The notice that subsection 85 (4) of the Act requires the corporation to give to the owner for a lien mentioned in that subsection shall be in Form 14. O. Reg. 48/01, s. 24.

Changes to common elements

25. (1) In addition to the matters specified in clause 98 (1) (b) of the Act, the agreement described in that clause shall specify who will have the ownership of the proposed addition, alteration or improvement to the common elements under subsection 98 (2) of the Act. O. Reg. 48/01, s. 25 (1).

(2) For the purpose of clause 98 (2) (e) of the Act, the board must be satisfied that the proposed addition, alteration or improvement to the common elements under subsection 98 (2) of the Act will not contravene the by-laws or rules of the corporation and will not have an adverse effect on the rest of the common elements. O. Reg. 48/01, s. 25 (2).

Termination

26. Sections 122 and 123 of the Act do not apply to a corporation if the total of the proportions, expressed in percentages, of the common interests, as specified in the registered declaration, is not equal to 100 per cent. O. Reg. 48/01, s. 26.

PART IV RESERVE FUND STUDIES

Definitions

27. In this Part,

“component inventory” means an inventory, in a reserve fund study of a corporation, of each item of the common elements and assets of the corporation that requires, or is expected to require within at least 30 years of the date of the study, major repair or replacement where the cost of replacement is not less than \$500;

“comprehensive study” means a comprehensive reserve fund study that meets the requirements of this Regulation;

“updated study based on a site inspection” means a comprehensive study that has been revised so that it is current as of the date of the revision, where the revision is based on a site inspection of the property and where the revision has been conducted in accordance with the requirements of this Regulation;

“updated study not based on a site inspection” means a comprehensive study that has been revised so that it is current as of the date of the revision, where the revision is not based on a site inspection of the property and where the revision has been conducted in accordance with the requirements of this Regulation. O. Reg. 48/01, s. 27.

Classes

28. The following classes of reserve fund studies are established:

1. Comprehensive study.
2. Updated study based on a site inspection.
3. Updated study not based on a site inspection. O. Reg. 48/01, s. 28.

Contents of studies

29. (1) A reserve fund study shall consist of a physical analysis and a financial analysis. O. Reg. 48/01, s. 29 (1).

(2) The physical analysis shall consist of,

(a) the component inventory of the corporation; and

(b) an assessment of each item in the component inventory that states its actual or estimated year of acquisition, its present or estimated age, its normal expected life, its remaining life expectancy, the estimated year for its major repair or replacement, its estimated cost of major repair or replacement as of the date of the study, the percentage of that cost of major repair or replacement to be covered by the reserve fund and the adjusted cost resulting from the application of that percentage. O. Reg. 48/01, s. 29 (2).

(3) The financial analysis shall consist of,

(a) a description of the financial status of the reserve fund as of the date of the study; and

(b) a recommended funding plan projected over a period of at least 30 consecutive years, beginning with the current fiscal year of the corporation, that shows the minimum balance of the reserve fund during the period and, for each projected year,

(i) the estimated cost of major repair or replacement of the common elements and assets of the corporation based on current costs for the year in which the study is conducted,

(ii) the estimated cost of major repair or replacement of the common elements and assets of the corporation at the estimated time of the repair or replacement based on an assumed annual inflation rate,

(iii) the annual inflation rate described in subclause (ii),

(iv) the estimated opening balance of the reserve fund,

(v) the recommended amount of contributions to the reserve fund, determined on a cash flow basis, that are required to offset adequately the expected cost in the year of the expected major repair or replacement of each item in the component inventory,

(vi) the estimated interest that will be earned on the reserve fund based on an assumed annual interest rate,

(vii) the annual interest rate described in subclause (vi),

(viii) the total of the amounts described in subclauses (v) and (vi),

(ix) the increase, if any, expressed as a percentage, in the recommended amount of contributions to the reserve fund over the recommended amount of contributions for the immediately preceding year, and

(x) the estimated closing balance of the reserve fund. O. Reg. 48/01, s. 29 (3).

(4) In preparing or updating the component inventory of the corporation, the person conducting the study shall review,

(a) the declaration and description;

(b) if any, the current by-laws or proposed by-laws of the corporation establishing what constitutes a standard unit; and

(c) if there is no by-law described in clause (b), a copy of the schedule that the declarant intends to deliver or has delivered to the board under clause 43 (5) (h) of the Act. O. Reg. 48/01, s. 29 (4).

(5) In preparing or updating the financial analysis described in subsection (3), the person conducting the study shall review,

- (a) the most recent audited financial statements of the corporation or, if section 60 of the Act does not require the corporation to appoint auditors, the most recent financial statements of the corporation;
- (b) all reciprocal cost sharing agreements, if any, of the corporation;
- (c) the most recent reserve fund study of the corporation; and
- (d) the most recent notice, if any, of future funding of the reserve fund sent to the owners under clause 94 (9) (a) of the Act. O. Reg. 48/01, s. 29 (5).

Method of conducting studies

- 30.** (1) The person conducting a reserve fund study shall sign it. O. Reg. 48/01, s. 30 (1).
- (2) A comprehensive study or an updated study based on a site inspection shall be based on,
 - (a) a visual site inspection of the property, including a visual inspection of each item in the component inventory where practicable;
 - (b) all other inspections of each item in the component inventory that the person conducting the study considers appropriate or necessary;
 - (c) a verification of records of the corporation; and
 - (d) interviews with those of the corporation's directors, officers, employees and agents that the person conducting the study considers appropriate. O. Reg. 48/01, s. 30 (2).
 - (3) As part of preparing the assessment described in clause 29 (2) (b) in a comprehensive study or updating the assessment in an updated study based on a site inspection, the person conducting the study shall review,
 - (a) all existing warranties, guarantees and service contracts for each item in the component inventory;
 - (b) the as-built architectural, structural, engineering, mechanical, electrical and plumbing plans for the property that are in the custody or under the control of the corporation;
 - (c) the as-built specifications for the buildings that are in the custody or under the control of the corporation;
 - (d) the plans for underground site services, site grading, drainage and landscaping, and television, radio or other communications services for the property that are in the custody or under the control of the corporation;
 - (e) the repair and maintenance records and schedules in the custody or under the control of the corporation; and
 - (f) all other records of the corporation that the person conducting the study requires in order to prepare the assessment. O. Reg. 48/01, s. 30(3).
 - (4) An updated study not based on a site inspection shall be based on a verification of records of the corporation and interviews with those of its directors, officers, employees and agents that the person conducting the study considers appropriate. O. Reg. 48/01, s. 30 (4).
 - (5) In addition to the material that a reserve fund study is required to contain, the study may contain all further information and analysis that the person conducting the study or the board considers appropriate or necessary. O. Reg. 48/01, s. 30 (5).

Time for studies

- 31.** (1) A corporation created before the day section 94 of the Act comes into force shall conduct a comprehensive study within three years of that day except if,
- (a) on that day it has a comprehensive study that meets the requirements of this Regulation; and
 - (b) it conducts an updated study based on a site inspection within three years of that day. O. Reg. 48/01, s. 31 (1).
- (2) The reserve fund study that subsection 94 (4) of the Act requires a corporation created on or after the day section 94 of the Act comes into force to conduct within the year following the registration of the declaration and description shall be a comprehensive study. O. Reg. 48/01, s. 31 (2).
- (3) A corporation shall conduct a reserve fund study within three years of completing the reserve fund study that it is required to conduct under subsection (1) or (2), as the case may be, and after that, within every three years after completing the immediately preceding reserve fund study. O. Reg. 48/01, s. 31 (3).
- (4) A reserve fund study that a corporation is required to conduct under subsection (3) shall be,
- (a) a comprehensive study;
 - (b) an updated study not based on a site inspection, if the immediately preceding reserve fund study for the corporation was a comprehensive study or an updated study based on a site inspection; or
 - (c) an updated study based on a site inspection, if the immediately preceding reserve fund study for the corporation was an updated study not based on a site inspection. O. Reg. 48/01, s. 31 (4).

Person conducting studies

- 32.** (1) Subject to subsection (2), the following classes are prescribed as persons who may conduct a reserve fund study:
1. Members of the Appraisal Institute of Canada holding the designation of Accredited Appraiser Canadian Institute.
 2. Persons who hold a certificate of practice within the meaning of the *Architects Act*.

3. Members of the Ontario Association of Certified Engineering Technicians and Technologists who are registered as certified engineering technologists under the *Ontario Association of Certified Engineering Technicians and Technologists Act, 1998*.
 4. Members of the Real Estate Institute of Canada holding the designation of certified reserve planner.
 5. Persons who hold a certificate of authorization within the meaning of the *Professional Engineers Act*.
 6. Graduates of Ryerson Polytechnic University with a Bachelor of Technology (Architectural Science) — Building Science Option or Architecture Option.
 7. Members of the Canadian Institute of Quantity Surveyors holding the designation of professional quantity surveyor.
 8. Members of the Association of Architectural Technologists of Ontario holding the designation of architectural technologist, architecte-technologue or registered building technologist under the *Association of Architectural Technologists of Ontario Act, 1996*. O. Reg. 48/01, s. 32 (1).
- (2) A person who conducts a reserve fund study shall not,
- (a) be a director, officer or property manager of the corporation;
 - (b) directly or indirectly, have an interest in,
 - (i) a contract or transaction to which a director or officer of the corporation is a party in a capacity other than as a director or officer of the corporation, or
 - (ii) a proposed contract or transaction to which a director or officer of the corporation will be a party in a capacity other than as a director or officer of the corporation;
 - (c) be the spouse, son or daughter of a director or officer of the corporation or son or daughter of the spouse of a director or officer of the corporation;
 - (d) be an owner as defined in the Act in relation to the corporation; or
 - (e) be a person who lives on the property managed by the corporation under section 17 of the Act. O. Reg. 48/01, s. 32 (2).
- (3) In subsection (2),

“spouse” means,

- (a) a spouse as defined in section 1 of the *Family Law Act*, or
- (b) either of two persons who live together in a conjugal relationship outside marriage. O. Reg. 48/01, s. 32 (3).
- (4) A person who conducts a reserve fund study shall be insured under a policy of liability insurance that includes,
 - (a) coverage for liability for errors, omissions and negligent acts arising out of conducting or not conducting a reserve fund study, subject to the exclusions, conditions and terms that are consistent with normal insurance industry practice;
 - (b) a policy limit for each single claim of not less than \$1 million per occurrence;
 - (c) an aggregate policy limit in the amount of not less than \$2 million per year for all claims in the year or an automatic policy limit reinstatement feature; and
 - (d) a maximum deductible amount of \$3,500 per occurrence. O. Reg. 48/01, s. 32 (4).
- (5) A person who conducts a reserve fund study shall ensure that the policy of liability insurance is valid at the time the reserve fund study is completed and is kept valid for a period of at least three years after that time. O. Reg. 48/01, s. 32 (5).
- (6) Upon request, the person shall provide to the corporation a certificate of the policy of liability insurance. O. Reg. 48/01, s. 32 (6).

Plan for future funding

33. (1) Except in the case of a corporation to which subsection (2) applies, the prescribed period of time for the purpose of subsection 94 (8) of the Act shall be the fiscal year of the corporation following the fiscal year in which the reserve fund study is completed. O. Reg. 48/01, s. 33 (1).
- (2) In the case of all reserve fund studies that a corporation created before the day section 94 of the Act comes into force is required to conduct after that date under subsection 31 (1) and within 15 years after the date of the first reserve fund study that it is required to conduct after that coming into force date, the prescribed period of time for the purpose of subsection 94 (8) of the Act shall be 15 years from the date of that first reserve fund study.
- (3) The notice that the board is required to send under subsection 94 (9) of the Act shall be in Form 15. O. Reg. 48/01, s. 33 (3).

PART V AMALGAMATION

Conditions for amalgamation

34. (1) No corporations may amalgamate unless,

- (a) they are standard condominium corporations;
- (b) in respect of each of the amalgamating corporations that is a phased condominium corporation, all phases have been completed or more than 10 years have passed since the registration of the declaration and description that created the corporation;
- (c) in respect of each of the amalgamating corporations, a turn-over meeting has been held under section 43 of the Act, or a predecessor of it, and, to the best of the knowledge of the board, the declarant has delivered to the board everything that section, or a predecessor of it, required the declarant to deliver;
- (d) each of the amalgamating corporations has conducted, in accordance with Part IV, a comprehensive reserve fund study or an updated study based on a site inspection within the year before the board gives the owners the notice of meeting described in subsection 120 (3) of the Act; and
- (e) each of the amalgamating corporations has entered into an interim agreement with each other dealing with the conduct of the affairs of each of the corporations from the day that the board of the first corporation to give the notice of meeting described in subsection 120 (3) of the Act has given that notice, until the corporations amalgamate or until their boards determine that the amalgamation will not proceed. O. Reg. 48/01, s. 34 (1).

(2) The agreement mentioned in clause (1) (e) shall deal with matters including expenditures from the reserve fund, borrowing of funds, making, amending or repealing by-laws, entering into new contracts, initiation of any legal proceedings, any substantial addition, alteration, or improvement to the common elements, any substantial change in the assets of the corporation, and any substantial change in a service that the corporation provides to the owners. O. Reg. 48/01, s. 34 (2).

(3) The agreement mentioned in clause (1) (e) shall not contravene the regulations made under the Act or the declaration, by-laws or rules of each of the amalgamating corporations. O. Reg. 48/01, s. 34 (3).

(4) In addition to the requirements of subsection 120 (3) of the Act, the notice of meeting described in that subsection shall include,

- (a) a copy of the comprehensive reserve fund study or the updated study based on a site inspection that the corporation is required to conduct under clause (1) (d);
- (b) a copy of the interim agreement described in clause (1) (e);
- (c) an estimate of the costs of carrying out the proposed amalgamation for each of the amalgamating corporations; and
- (d) one of the following statements:
 1. A statement describing the provisions of the proposed declaration, description, by-laws and rules that, in the opinion of the board giving the notice, differ significantly from those contained in the declaration, description, by-laws and rules of the amalgamating corporation.
 2. A statement that there are no provisions in the proposed declaration, description, by-laws and rules that, in the opinion of the board giving the notice, differ significantly from those contained in the declaration, description, by-laws and rules of the amalgamating corporation. O. Reg. 48/01, s. 34 (4).

(5) The consent in writing mentioned in clause 120 (1) (b) of the Act,

- (a) must not be executed before the meeting held in accordance with subsections 120 (2) and (3) of the Act; and
- (b) must be executed by,
 - (i) if the owner is an individual, the owner,
 - (ii) if the owner is a corporation, the persons authorized to bind the corporation, or
 - (iii) if a mortgagee is entitled to execute the consent in the place of the owner under section 48 of the Act, the individual mortgagee or, if the mortgagee is a corporation, the persons authorized to bind the corporation. O. Reg. 48/01, s. 34 (5).

Place of registration

35. (1) Section 4 does not apply to a declaration and description that are being registered to effect an amalgamation. O. Reg. 48/01, s. 35 (1).

(2) A declaration and description that are being registered to effect an amalgamation shall not be registered unless,

- (a) the property described in the description is situated entirely within the boundaries of one land titles division and the *Land Titles Act* applies to all the property; or
- (b) the property described in the description is situated entirely within the boundaries of one registry division and the *Registry Act* applies to all the property. O. Reg. 48/01, s. 35 (2).

Declaration

36. (1) This section applies to a declaration only if it is being registered to effect an amalgamation. O. Reg. 48/01, s. 36 (1).

(2) Subsection 7 (1) of the Act and clause 5 (1) (a) of this Regulation, do not apply to a declaration. O. Reg. 48/01, s. 36 (2).

(3) In addition to the requirements of subsection 5 (1), a declaration shall not be received for registration unless,

- (a) it is executed by the officers of each amalgamating corporation who are duly authorized to sign on behalf of the corporation; and
- (b) the property consists only of the property of each of the amalgamating corporations and there is no change in the boundaries of the units of each of the amalgamating corporations. O. Reg. 48/01, s. 36 (3).

(4) A declaration shall not be received for registration if the amalgamated corporation would be a phased condominium corporation. O. Reg. 48/01, s. 36 (4).

(5) Despite clause 5 (2) (b), the statement of the solicitor contained in Schedule A to the declaration and described in that clause shall not contain the statement described in subclause 5 (2) (b) (iii) but, if there are easements that will merge and no longer exist in law upon the registration of the declaration and description, the statement of the solicitor shall set out a legal description of the easements and the most recent registered instrument number in which they are fully described and shall contain a statement that the easements will merge and no longer exist in law upon the registration of the declaration and description. O. Reg. 48/01, s. 36 (5).

(6) Clause 7 (2) (b) of the Act does not apply to a declaration and despite clause 5 (1) (d), a declaration shall not contain a Schedule B. O. Reg. 48/01, s. 36 (6).

(7) In addition to the requirements of subsection 5 (4), Schedule C to the declaration shall contain,

- (a) a list indicating all units in the amalgamating corporations and what units they will become in the amalgamated corporation; and
- (b) a list indicating all units in the amalgamated corporation and what units they were in the amalgamating corporations. O. Reg. 48/01, s. 36 (7).

(8) In addition to the requirements of clause 5 (4) (c), the statement of an Ontario land surveyor contained in Schedule C to the declaration and described in that clause shall certify that the lists described in clauses (7) (a) and (b) are accurate and complete. O. Reg. 48/01, s. 36 (8).

(9) Subsection 5 (6) does not apply to a declaration. O. Reg. 48/01, s. 36 (9).

(10) Schedule E to the declaration shall contain a statement specifying the common expenses of the amalgamated corporation or may be left blank if the amalgamating corporations so elect. O. Reg. 48/01, s. 36 (10).

(11) Despite clause 5 (1) (d), a declaration shall not contain a Schedule G. O. Reg. 48/01, s. 36 (11).

(12) In addition to the requirements of subsection 7 (2) of the Act, a declaration shall include,

- (a) a statement by the persons authorized to bind each of the amalgamating corporations that their corporation has complied with section 120 of the Act and the regulations made under the Act; and
- (b) a statement by the persons authorized to bind each of the amalgamating corporations that is a phased condominium corporation, that all phases have been completed or more than 10 years have passed since the registration of the declaration and description that created the amalgamating corporation. O. Reg. 48/01, s. 36 (12).

(13) Clause 7 (1) (b) does not apply to a declaration. O. Reg. 48/01, s. 36 (13).

Description

37. Clauses 8 (1) (b) and (e) of the Act do not apply to a description effecting an amalgamation. O. Reg. 48/01, s. 37.

Reserve fund studies

38. (1) Section 31 and subsections 33 (1) and (2) do not apply to an amalgamated corporation. O. Reg. 48/01, s. 38 (1).

(2) An amalgamated corporation shall conduct a comprehensive reserve fund study within three years of the date that any of the amalgamating corporations completes the latest reserve fund study that it is required to conduct before the amalgamation. O. Reg. 48/01, s. 38 (2).

(3) An amalgamated corporation shall conduct a reserve fund study within three years of completing the reserve fund study that it is required to conduct under subsection (2) and, after that, within every three years after completing the immediately preceding reserve fund study. O. Reg. 48/01, s. 38 (3).

(4) A reserve fund study that an amalgamated corporation is required to conduct under subsection (3) shall be,

- (a) a comprehensive study;
- (b) an updated study not based on a site inspection, if the immediately preceding reserve fund study for the corporation was a comprehensive study or an updated study based on a site inspection; or
- (c) an updated study based on a site inspection, if the immediately preceding reserve fund study for the corporation was an updated study not based on a site inspection. O. Reg. 48/01, s. 38 (4).

(5) Except in the case of a corporation to which subsection (6) applies, the prescribed period of time for the purpose of subsection 94 (8) of the Act shall be the fiscal year of the corporation following the fiscal year in which the reserve fund study is completed. O. Reg. 48/01, s. 38 (5).

(6) In the case of all reserve fund studies that an amalgamated corporation, of which all the amalgamating corporations were created before the day section 94 of the Act comes into force, is required to conduct within 10 years after the date of the earliest reserve fund study that any of the incorporating corporations was required to conduct under subsection 31 (1), the prescribed period of time for the purpose of subsection 94 (8) of the Act shall be 10 years from the date of the earliest reserve fund study that any of the amalgamating corporations was required to conduct under subsection 31 (1). O. Reg. 48/01, s. 38 (6).

PART VI COMMON ELEMENTS CONDOMINIUM CORPORATIONS

Place of registration

39. In addition to the requirements of section 4, a declaration and description for a common elements condominium corporation shall not be registered unless,

- (a) if the *Land Titles Act* applies to the property described in the description, all the parcels of tied land are situated entirely within the boundaries of the land titles division within which the property is situated and the owner of the freehold estate in each of the parcels is the registered owner of the parcel with an absolute title under that Act; or
- (b) if the *Registry Act* applies to the property described in the description, all the parcels of tied land are situated entirely within the boundaries of the registry division within which the property is situated and the owner of the freehold estate in each of the parcels holds a certificate of title to the parcel issued under Part I of the *Certification of Titles Act* within 10 years before the registration.

Capacity to convey parcels under Planning Act

39.1 In addition to the requirements of section 4, a declaration and description for a common elements condominium corporation shall not be registered unless, at the time of registration, each parcel of tied land would be capable of being individually conveyed, or otherwise dealt with, without contravening section 50 of the *Planning Act*. O. Reg. 59/02

Declaration

40. (1) In addition to the requirements of subsection 5 (1), a declaration for a common elements condominium corporation shall not be received for registration unless,

- (a) the first page of the declaration contains,
 - (i) a statement that the registration of the declaration and description will create a common elements condominium corporation, and
 - (ii) a statement that a parcel of tied land may not be divided into two or more parcels unless an amendment is registered to the declaration that takes into account the division of the parcel of tied land; and
 - (b) it contains schedules known as Schedules H, I and J.
- (2) Despite clause 5 (1) (c), the first page of a declaration for a common elements condominium corporation shall not contain the statement described in that clause.
- (3) In addition to the requirements of subsection 5 (3), Schedule B to the declaration for a common elements condominium corporation shall contain a consent in Form 16 of every person having a registered mortgage against a parcel of tied land.
- (4) Despite clause 5 (1) (d), a declaration for a common elements condominium corporation shall not contain a Schedule C.
- (5) Subsection 5 (5) does not apply to a declaration for a common elements condominium corporation.
- (6) Schedule D to the declaration for a common elements condominium corporation shall contain,
- (a) a statement that the common elements are intended for the use and enjoyment of the owners for the purpose of clause 140 (a) of the Act;
 - (b) a legal description of the parcels of tied land for the purpose of clause 140 (b) of the Act;
 - (c) a statement of the proportions, expressed in percentages totalling 100 per cent, of the common interest that will attach to each parcel of tied land; and
 - (d) a statement of the proportions, expressed in percentages totalling 100 per cent, allocated to the parcels of tied land, in which the owners are to contribute to the common expenses.
- (7) Subsection 5 (7) does not apply to a declaration for a common elements condominium corporation.
- (8) Schedule F to the declaration for a common elements condominium corporation shall contain a specification of all parts of the common elements that are to be used by the owners of one or more designated common interests and not by all the owners or shall indicate that there are no such parts if that is the case.
- (9) Despite clause 5 (1) (d), a declaration for a common elements condominium corporation shall not contain a Schedule G if the declaration and description show that there are no buildings, structures, facilities or services included in the common elements.
- (10) Subsections 5 (8) and (9) and section 6 do not apply to a declaration for a common elements condominium corporation.
- (11) Schedule G to the declaration for a common elements condominium corporation shall contain,
- (a) a certificate, in Form 17, of an architect certifying that,
 - (i) all buildings and structures that the declaration and description show are included in the common elements have been completed and installed in accordance with the regulations made under the Act, with respect to all or some matters listed in the paragraphs of the definition of “has been completed and installed” in section 41, and
 - (ii) some or all of the facilities and services that the declaration and description show are included in the common elements have been installed and provided in accordance with the definition of “has been installed and provided” in section 41; or
 - (b) one or more certificates of an engineer, in Form 17, certifying that,
 - (i) all buildings and structures that the declaration and description show are included in the common elements have been completed and installed in accordance with the regulations made under the Act, with respect to some matters listed in the paragraphs of the definition of “has been completed and installed” in section 41, and
 - (ii) some or all of the facilities and services that the declaration and description show are included in the common elements have been installed and provided in accordance with the definition of “has been installed and provided” in section 41.
- (12) In a declaration for a common elements condominium corporation,

- (a) every matter listed in the paragraphs of the definition of “has been completed and installed” in section 41 shall be certified to in the certificates in Form 17 that are contained in Schedule G; and
- (b) the certificates in Form 17 that are contained in Schedule G shall certify that all facilities and services that the declaration and description show are included in the common elements have been installed and provided in accordance with the definition of “has been installed and provided” in section 41. O. Reg. 48/01, s. 40 (12).
- (13) If the declaration and description for a common elements condominium corporation show that there are no buildings or structures included in the common elements, the certificates in Form 17 contained in the declaration shall not contain the certification described in subclauses (11) (a) (i) and (b) (i) and clause (12) (a) does not apply to the declaration. O. Reg. 48/01, s. 40 (13).
- (14) If the declaration and description for a common elements condominium corporation show that there are no facilities or services included in the common elements, the certificates in Form 17 contained in the declaration shall not contain the certification described in subclauses (11) (a) (ii) and (b) (ii) and clause (12) (b) does not apply to the declaration. O. Reg. 48/01, s. 40 (14).
- (15) Schedule H shall contain,
- (a) a list, in individual items numbered consecutively beginning with the number “1”, of all buildings, structures, facilities and services that are included in the common elements; and
- (b) a brief description of each item sufficient to identify it. O. Reg. 48/01, s. 40 (15).
- (16) The list shall show each of the items identified under one of the following headings as appropriate:
1. Buildings and structures.
 2. Facilities and services. O. Reg. 48/01, s. 40 (16).
- (17) Schedule I shall be the certificate that is described in clause 139 (1) (b) of the Act, that is in the form required by subsection 43 (1) of Ontario Regulation 49/01 and that is signed by each of the owners of a common interest in the corporation. O. Reg. 48/01, s. 40 (17).
- (18) Schedule J shall be the notice that is described in clause 139 (2) (b) of the Act and that is in the form required by subsection 43 (2) of Ontario Regulation 49/01. O. Reg. 48/01, s. 40 (18).

Construction complete

41. For the purposes of subsections 40 (11) and 56 (7),

“has been completed and installed” means, with respect to each building and structure that the declaration and description show are included in the common elements, constructed at least to the following state:

1. The exterior building envelope, including roofing assembly, exterior wall cladding, doors and windows, caulking and sealants, is weather resistant if required by the construction documents and has been completed in general conformity with the construction documents.
2. Floor assemblies are constructed and completed to the final covering.
3. Walls and ceilings are completed to the drywall (including taping and sanding), plaster or other final covering.
4. All underground garages, if any, have walls and floor assemblies in place.
5. All elevating devices, if any, as defined in the *Elevating Devices Act*, are licensed under that Act if it requires a licence.
6. All installations with respect to the provision of water and sewage services, if any, are in place and operable.
7. All installations with respect to the provision of heat and ventilation, if any, are in place and heat and ventilation can be provided.
8. All installations with respect to the provision of air conditioning, if any, are in place and operable.
9. All installations with respect to the provision of electricity, if any, are in place and operable.
10. All indoor and outdoor swimming pools, if any, are completed and operable;

“has been installed and provided” means, with respect to the facilities and services that the declaration and description show are included in the common elements, installed and provided in accordance with the requirements of the municipalities in which the land is situated or the requirements of the Minister of Municipal Affairs and Housing, if the land is not situated in a municipality. O. Reg. 48/01, s. 41.

Parcels of tied land

42. (1) A declarant is exempt from clause 139 (2) (b) of the Act. O. Reg. 48/01, s. 42 (1).

(2) Subsection 139 (3) of the Act does not apply to a common elements condominium corporation. O. Reg. 48/01, s. 42 (2).

(3) A parcel of tied land set out in Schedule D to the declaration may not be divided into two or more parcels of tied land unless an amendment is registered to the declaration that takes into account the division of the parcel of tied land. O. Reg. 48/01, s. 42 (3).

Description

43. (1) Subsection 9 (2) does not apply to a description for a common elements condominium corporation. O. Reg. 48/01, s. 43 (1).

(2) Despite clause 8 (1) (b) of the Act, a description for a common elements condominium corporation shall not contain the architectural plans described in that clause if,

- (a) it contains the structural plans described in that clause and, in accordance with subsection 40 (11), Schedule G to the declaration does not contain the certificate of an architect mentioned in that subsection; or
- (b) the declaration and description for the corporation show that there are no buildings, structures, facilities or services included in the common elements. O. Reg. 48/01, s. 43 (2).

Provisions for owner-occupied units

44. Subsections 28 (3), 46 (3) and 51 (5) to (8) of the Act do not apply to a common interest in a common elements condominium corporation. O. Reg. 48/01, s. 44.

Security

45. (1) Subsection 20 (2) and section 22 do not apply to a common elements condominium corporation. O. Reg. 48/01, s. 45 (1).

(2) The following class is prescribed as security for the purpose of clause 81 (7) (b) of the Act: policies that insure against the loss of payments described in subsection 81 (1) of the Act and the interest payable by the declarant on the payments, that meet the requirements of section 21 and that are in effect. O. Reg. 48/01, s. 45 (2).

Insurance policies

46. (1) Subsections 21 (2) and (8) do not apply to a common elements condominium corporation. O. Reg. 48/01, s. 46 (1).

(2) In the case of a common elements condominium corporation, the trustee or the declarant's solicitor, as the case may be, shall hold the policy in trust for the beneficiary until the insurer is no longer liable under it in accordance with subsection (3). O. Reg. 48/01, s. 46 (2).

(3) In the case of a common elements condominium corporation, an insurer shall remain liable under a policy until,

- (a) the declarant delivers to the beneficiary a deed in registerable form to the common interest in the corporation, in respect of which the beneficiary or a person on the beneficiary's behalf has made a payment described in subsection 81 (1) of the Act;
- (b) the declarant pays the beneficiary all money paid under subsection 81 (1) of the Act and interest on it payable by the declarant under the Act;
- (c) the insurer pays the beneficiary the amount of the loss;
- (d) the common interest, in respect of which the beneficiary or a person on the beneficiary's behalf has made a payment described in subsection 81 (1) of the Act, has attached to the beneficiary's parcel of tied land;
- (e) the beneficiary acknowledges in writing that,
 - (i) the beneficiary is not entitled to the payments made by or on behalf of the beneficiary under subsection 81 (1) of the Act in respect of a proposed common interest in the corporation and the interest payable on the payments by the declarant, and
 - (ii) the insurer is no longer liable under the policy; or
- (f) a court of competent jurisdiction has made a final determination that the beneficiary is not entitled to the payments made by or on behalf of the beneficiary under subsection 81 (1) of the Act in respect of a proposed common interest in the corporation and the interest payable on the payments by the declarant. O. Reg. 48/01, s. 46 (3).

PART VII PHASED CONDOMINIUM CORPORATIONS

Definition

47. In this Part,

“servient lands” means the land owned by the declarant that is not included in the property upon the registration of the declaration and description, or the most recent amendments to the declaration and description, but that will be included in the property after the declarant has created all phases that it is entitled to create in the corporation, including the buildings and structures on the land. O. Reg. 48/01, s. 47.

Place of registration

48. (1) Section 4 does not apply to a phased condominium corporation. O. Reg. 48/01, s. 48 (1).

(2) A declaration and description for a phased condominium corporation shall not be registered unless,

- (a) the property and the servient lands, as the property and those lands are described in Schedule A to the declaration, are situated entirely within the boundaries of one land titles division, the *Land Titles Act* applies to all the property and, if any, the servient lands and the declarant is the registered owner of the property and, if any, the servient lands, with an absolute title under that Act; or
- (b) the property and the servient lands, as the property and those lands are described in Schedule A to the declaration, are situated entirely within the boundaries of one registry division, the *Registry Act* applies to all the property and, if any, the servient lands and the declarant holds a certificate of title to the property and, if any, the servient lands, issued under Part I of the *Certification of Titles Act* within 10 years before the registration. O. Reg. 48/01, s. 48 (2).

Declaration

49. (1) Despite clause 5 (1) (c), the first page of a declaration for a phased condominium corporation shall not contain the statement described in that clause. O. Reg. 48/01, s. 49 (1).

(2) In addition to the requirements of subsection 5 (1), a declaration for a phased condominium corporation shall not be received for registration unless the first page of the declaration contains a statement that the registration of the declaration and description will create a standard condominium corporation that is a phased condominium corporation. O. Reg. 48/01, s. 49 (2).

(3) In addition to the requirements of clause 5 (2) (b), the statement of a solicitor contained in Schedule A to the declaration for a phased condominium corporation and described in that clause shall set out a legal description of the lands that will be the servient lands and shall contain a statement that the legal description is a legal description of the servient lands. O. Reg. 48/01, s. 49 (3).

(4) In addition to the requirements of subsection 5 (3), Schedule B to the declaration of a phased condominium corporation shall contain the consent, in Form 1, of every person having a registered mortgage against the servient lands. O. Reg. 48/01, s. 49 (4).

Description

50. Despite clause 145 (1) (d) of the Act, a description of a phased condominium corporation shall not contain the legal description of the lands that will be the servient lands. O. Reg. 48/01, s. 50.

Restrictions on creating phases

51. Amendments to a declaration and description creating a phase shall not be registered unless,

- (a) the corporation is a standard condominium corporation;
- (b) the declaration contains the statement described in subsection 49 (2);
- (c) Schedule A to the declaration contains the legal description of the lands that will be the servient lands;
- (d) the phase contains at least one unit;
- (e) the units and common elements included in the phase are not part of an existing building on the property;
- (f) more than 60 days have passed since the registration of the declaration and description that created the corporation or the registration of the latest amendments to the declaration and description creating a phase, whichever is the later;
- (g) there is no outstanding application to the Superior Court of Justice for an injunction under subsection 149 (2) of the Act and the Superior Court has not issued an injunction to prevent the registration of the amendments creating the phase;
- (h) the amendments are registered no later than 10 years after the registration of the declaration and description that created the corporation; and
- (i) the amendments comply with all other legal requirements. O. Reg. 48/01, s. 51.

Amendment to declaration for phase

52. (1) Except as provided in this section, sections 5 and 6 do not apply to an amendment to a declaration creating a phase. O. Reg. 48/01, s. 52 (1).

(2) An amendment to a declaration creating a phase shall not be received for registration unless,

- (a) it is executed by the declarant;
- (b) it meets the execution requirements for registration of a transfer/deed of land under the *Land Titles Act* or the *Registry Act*, as the case may be;
- (c) it contains a statement that at least 60 days have passed since the declarant delivered to the corporation the documents described in clauses 149 (1) (a), (b) and (c) of the Act;
- (d) it contains a statement setting out the date on which the board was elected at a meeting of owners and stating that,
 - (i) the meeting was held at a time when the declarant did not own the majority of the units,
 - (ii) more than 60 days have passed since the registration of the declaration and description that created the corporation or the registration of the latest amendments to the declaration and description creating a phase, whichever is the later, and
 - (iii) there is no outstanding application to the Superior Court of Justice for an injunction under subsection 149 (2) of the Act and the Superior Court has not issued an injunction to prevent the registration of the amendments creating the phase;
- (e) it replaces Schedule A to the declaration with Schedule A described in subsection (3);
- (f) it amends Schedule B to the declaration to include the consent, in Form 18, of every person having a registered mortgage against the land included in the phase or interests appurtenant to the land, as the land and the interests are described in the amendment to the description required for creating the phase;
- (g) it amends Schedule C to the declaration to include, with respect to the land included in the phase, the material that subsection 5 (4) requires;
- (h) it replaces Schedule D to the declaration with Schedule D described in subsection (4);
- (i) it amends Schedule F to the declaration to include,
 - (i) a specification of all parts of the common elements contained in the phase that are to be used by the owners of one or more designated units and not by all the owners or,
 - (ii) a statement that there are no parts described in subclause (i), if that is the case;
- (j) it amends Schedule G to the declaration to include the material described in subsection (5); and
- (k) it contains a schedule known as Schedule K. O. Reg. 48/01, s. 52 (2).

- (3) Schedule A to the amendment to the declaration shall contain,
- (a) the description of the property that was included in Schedule A to the declaration, as originally registered, except for the easements that will merge and no longer exist in law upon the registration of the amendment to the declaration and that are described in the Schedule as required by subclause (e) (i), and the description shall be identified as “FIRSTLY” or “PREMIÈREMENT”;
 - (b) the descriptions, in order of their registration, of all phases that have already been created, as described in amendments to Schedule A to the declaration, except for the easements that will merge and no longer exist in law upon the registration of the amendment to the declaration and that are described in the Schedule as required by subclause (e) (i), and the descriptions shall be identified consecutively starting with “SECONDLY” or “DEUXIÈMEMENT”;
 - (c) a legal description, identified with the next consecutive ordinal number, of the land included in the phase and interests appurtenant to the land intended to be governed by the Act, including a description of every easement, as shown on the amendment to the description that, upon the registration of the amendments to the declaration and description, will be appurtenant to the phase or to which the phase will be subject;
 - (d) a statement signed by the solicitor registering the amendment to the declaration that sets out a legal description of the lands that will be the servient lands, if any, and that states that, in his or her opinion, based on the parcel register or abstract index and the plans and documents recorded in them,
 - (i) the legal description mentioned in clause (c) is correct,
 - (ii) the easements mentioned in clause (c) will exist in law upon the registration of the amendment to the declaration and description creating the phase,
 - (iii) the legal description of the land that will be the servient lands is set out in the solicitor’s statement, and
 - (iv) the declarant is the registered owner of the land included in the phase and interests appurtenant to the land; and
 - (e) if there are easements that will merge and no longer exist in law upon the registration of the amendment to the declaration, a statement signed by the solicitor registering the amendment to the declaration that,
 - (i) sets out a legal description of the easements and the most recent registered instrument number in which they are fully described, and
 - (ii) states that, in his or her opinion, based on the parcel register or abstract index and the plans and documents recorded in them, the easements will merge and no longer exist in law upon the registration of the amendment to the declaration. O. Reg. 48/01, s. 52 (3).
- (4) Schedule D to the amendment to the declaration shall contain,
- (a) a statement of the proportions, expressed in percentages totalling 100 per cent, of the common interests appurtenant to the units in the corporation after the creation of the phase; and
 - (b) a statement of the proportions, expressed in percentages totalling 100 per cent, allocated to the units in the corporation, in which the owners after the creation of the phase are to contribute to the common expenses. O. Reg. 48/01, s. 52 (4).
- (5) The material to be added to Schedule G to the declaration is,
- (a) the certificates, with respect to the land included in the phase, that subsections 5 (8) and (9) and section 6 require; and
 - (b) a statement from any of the municipalities in which the land included in the phase is situated, or from the Minister of Municipal Affairs and Housing if the land is not situated in a municipality, that,
 - (i) all facilities and services have been installed or provided as the person making the statement determines are necessary to ensure the independent operation of the corporation if no subsequent phases are created, or
 - (ii) a bond or other security has been posted that is sufficient to ensure the independent operation of the corporation if no subsequent phases are created. O. Reg. 48/01, s. 52 (5).
- (6) The statement described in clause (5) (b) shall be signed by a person authorized to bind the municipality or the Minister making the statement. O. Reg. 48/01, s. 52 (6).
- (7) For the purposes of clause 146 (11) (a) of the Act, the facilities and services covered by the bond or the security mentioned in that clause have been installed or provided when there are no facilities and services remaining to be installed or provided that the person making the statement described in clause (5) (b) determines are necessary to ensure the independent operation of the corporation if no subsequent phases are created. O. Reg. 48/01, s. 52 (7).
- (8) Schedule K to the amendment to the declaration shall contain,
- (a) a statement of all conditions that the approval authority, in approving or exempting under section 9 of the Act the amendment to the description creating the phase, requires the amendment to the declaration to mention; or
 - (b) a statement that there are no conditions described in clause (a), if that is the case. O. Reg. 48/01, s. 52 (8).
- (9) An amendment to a declaration creating a phase may also contain,
- (a) an amendment to Schedule E to the declaration specifying the common expenses of the corporation, whether or not the Schedule has been previously left blank; or
 - (b) any other amendments to the declaration that are a result solely of creating the phase. O. Reg. 48/01, s. 52 (9).

Amendment to description for phase

53. (1) Despite clause 146 (5) (b) of the Act, an amendment to a description creating a phase shall not contain the legal description of the lands that will be the servient lands. O. Reg. 48/01, s. 53 (1).

(2) Subsections 9 (4) and (5) do not apply to an amendment to a description creating a phase. O. Reg. 48/01, s. 53 (2).

(3) In addition to all other material that it is required to contain, an amendment to a description creating a phase shall contain a description of all easements and similar interests to which the land included in the phase is subject. O. Reg. 48/01, s. 53 (3).

(4) The description of the easements and similar interests to which the land included in the phase is subject and the description of the interests appurtenant to the land required by clause 8 (1) (g) of the Act shall be combined and shall be in Form 3. O. Reg. 48/01, s. 53 (4).

Forms for amendments creating phase

54. (1) Amendments to the declaration and description creating a phase shall be in Form 19. O. Reg. 48/01, s. 54 (1).

(2) Subsection 10 (1) does not apply to an amendment to a description creating a phase. O. Reg. 48/01, s. 54 (2).

(3) The land registrar's certificate of registration that clause 11 (1) (a) of Ontario Regulation 49/01 requires to be on an amendment to a description creating a phase shall be in Form 20. O. Reg. 48/01, s. 54 (3).

Disclosure statement

55. In addition to the material specified in subsection 72 (3) of the Act, a disclosure statement mentioned in that subsection for a phased condominium corporation shall include a statement that no amendments to the declaration and description creating a phase may be registered after more than 10 years after the registration of the declaration and description that created the corporation. O. Reg. 48/01, s. 55.

PART VIII VACANT LAND CONDOMINIUM CORPORATIONS

Declaration

56. (1) In addition to the requirements of subsection 5 (1), a declaration for a vacant land condominium corporation shall not be received for registration unless,

- (a) despite clause 155 (1) (a) of the Act, none of the units are part of a building or structure and none of the units include part of a building or structure, except if a building or structure is located entirely within the boundaries of the unit;
- (b) the first page of the declaration contains a statement that the registration of the declaration and description will create a vacant land condominium corporation; and
- (c) it contains a schedule known as Schedule H that complies with subsections 40 (15) and (16). O. Reg. 48/01, s. 56 (1).

(2) Despite clause 5 (1) (c), the first page of a declaration for a vacant land condominium corporation shall not contain the statement described in that clause. O. Reg. 48/01, s. 56 (2).

(3) Subsection 5 (4) does not apply to a declaration for a vacant land condominium corporation. O. Reg. 48/01, s. 56 (3).

(4) Schedule C to the declaration for a vacant land condominium corporation shall contain a statement signed by an Ontario land surveyor licensed under the *Surveyors Act* certifying that the boundaries of the units are controlled by the monuments illustrated on the plan of survey described in clause 157 (1) (a) of the Act. O. Reg. 48/01, s. 56 (4).

(5) Despite clause 5 (1) (d), a declaration for a vacant land condominium corporation shall not contain a Schedule G if the declaration and description show that there are no buildings, structures, facilities or services included in the common elements. O. Reg. 48/01, s. 56 (5).

(6) Subsections 5 (8) and (9) and section 6 do not apply to a declaration for a vacant land condominium corporation. O. Reg. 48/01, s. 56 (6).

(7) Schedule G to the declaration for a vacant land condominium corporation shall contain the statement described in clause (8) (b) or,

- (a) a certificate, in Form 17, of an architect certifying that,
 - (i) all buildings and structures that the declaration and description show are included in the common elements have been completed and installed in accordance with the regulations made under the Act, with respect to all or some matters listed in the paragraphs of the definition of "has been completed and installed" in section 41, and
 - (ii) some or all of the facilities and services that the declaration and description show are included in the common elements have been installed and provided in accordance with the definition of "has been installed and provided" in section 41; or
- (b) one or more certificates of an engineer, in Form 17, certifying that,
 - (i) all buildings and structures that the declaration and description show are included in the common elements have been completed and installed in accordance with the regulations made under the Act, with respect to some matters listed in the paragraphs of the definition of "has been completed and installed" in section 41, and
 - (ii) some or all of the facilities and services that the declaration and description show are included in the common elements have been installed and provided in accordance with the definition of "has been installed and provided" in section 41. O. Reg. 48/01, s. 56 (7).

(8) If Schedule G to the declaration for a vacant land condominium corporation does not contain the required certificates described in clause (7) (a) or (b), it shall contain,

- (a) a statement by the declarant that the certificates will be included in an amendment to the description; and

- (b) a statement from any of the municipalities in which the land is situated, or the Minister of Municipal Affairs and Housing if the land is not situated in a municipality, stating that a bond or other security that is acceptable to the municipalities in which the land is situated or the Minister, as the case may be, has been posted that is sufficient to ensure that,
 - (i) the buildings and structures that the declaration and description show are included in the common elements will be completed and installed in accordance with the regulations made under the Act,
 - (ii) the facilities and services that the declaration and description show are included in the common elements will be installed and provided in accordance with the regulations made under the Act,
 - (iii) the items described in clause 158 (3) (b) of the Act will be included in an amendment to the description. O. Reg. 48/01, s. 56 (8).
- (9) The statement described in clause (8) (b) shall be signed by a person authorized to bind the municipality or the Minister, as the case may be. O. Reg. 48/01, s. 56 (9).
- (10) In a declaration for a vacant land condominium corporation,
 - (a) every matter listed in the paragraphs of the definition of “has been completed and installed” in section 41 shall be certified to in the certificates in Form 17 that are contained in Schedule G; and
 - (b) the certificates in Form 17 that are contained in Schedule G shall certify that all facilities and services that the declaration and description show are included in the common elements have been installed and provided in accordance with the definition of “has been installed and provided” in section 41. O. Reg. 48/01, s. 56 (10).
- (11) If the declaration and description for a vacant land condominium corporation show that there are no buildings or structures included in the common elements, the certificates in Form 17 contained in the declaration shall not contain the certification described in subclauses (7) (a) (i) and (b) (i) and clause (10) (a) does not apply to the declaration. O. Reg. 48/01, s. 56 (11).
- (12) If the declaration and description for a vacant land condominium corporation show that there are no facilities or services included in the common elements, the certificates in Form 17 contained in the declaration shall not contain the certification described in subclauses (7) (a) (ii) and (b) (ii) and clause (10) (b) does not apply to the declaration. O. Reg. 48/01, s. 56 (12).

Description

- 57. (1) Subsections 9 (2), (3) and (5) do not apply to a description for a vacant land condominium corporation. O. Reg. 48/01, s. 57 (1).
- (2) Despite clause 157 (1) (b) of the Act, a description for a vacant land condominium corporation shall not contain the architectural plans described in that clause if,
 - (a) it contains the structural plans described in that clause and, in accordance with subsection 56 (7), Schedule G to the declaration does not contain the certificate of an architect mentioned in that subsection; or
 - (b) the declaration and description for the corporation show that there are no buildings, structures, facilities or services included in the common elements. O. Reg. 48/01, s. 57 (2).
- (3) Despite clause 157 (1) (c) of the Act, a description of a corporation shall not contain the certificates described in that clause. O. Reg. 48/01, s. 57 (3).
- (4) The description of the easements and similar interests to which the property is subject and the description of the interests appurtenant to the property required by clause 157 (1) (d) of the Act shall be combined and shall be in Form 3. O. Reg. 48/01, s. 57 (4).

Amendment to description

- 58. (1) Despite subsection 157 (1) of the Act and clause 158 (3) (b) of the Act, an amendment described in that clause to the description for a vacant land condominium corporation shall be in Form 21 and shall not contain the material described in clauses 157 (1) (a), (c) and (d) of the Act. O. Reg. 48/01, s. 58 (1).
- (2) A declarant is exempt from subsections 9 (2) and (3) of the Act when applying to register an amendment described in clause 158 (3) (b) of the Act to the description for a vacant land condominium corporation. O. Reg. 48/01, s. 58 (2).
- (3) If Schedule G to the declaration for a vacant land condominium corporation is required to contain the certificates described in clause 56 (7) (a) or (b) and does not contain them, the amendment described in clause 158 (3) (b) of the Act to the description shall contain them. O. Reg. 48/01, s. 58 (3).

PART IX LEASEHOLD CONDOMINIUM CORPORATIONS

Restrictions on creation

- 59. A declaration and description for a leasehold condominium corporation shall not be registered unless,
 - (a) the term of the leasehold interests in the units in the corporation and their appurtenant common interests is the same as, or less than, the unexpired term of the leasehold interest affecting the property;
 - (b) the owners of the leasehold interests in the units in the corporation are the owners, as tenants in common, of the leasehold estate in the property under a lease with the lessor; and
 - (c) one of the following situations applies:

1. The property described in the description is situated entirely within the boundaries of one land titles division, the *Land Titles Act* applies to all the property, the lessor is the registered owner of the property with an absolute title under that Act and the declarant is the registered owner of a leasehold parcel of land that consists of or includes the property.
2. The property described in the description is situated entirely within the boundaries of one registry division, the *Registry Act* applies to all the property and the lessor holds a certificate of title to the property issued under Part I of the *Certification of Titles Act* within 10 years before the registration. O. Reg. 48/01, s. 59.

Declaration

60. (1) In addition to the requirements of subsection 5 (1), a declaration for a leasehold condominium corporation shall not be received for registration unless,

- (a) it is executed by the lessor;
 - (b) the first page of the declaration contains,
 - (i) a statement that the registration of the declaration and description will create a leasehold condominium corporation, and
 - (ii) a statement that the building and improvements to the property form part of the property;
 - (c) it contains schedules known as Schedules L and M; and
 - (d) it contains a statement that no person shall terminate the leasehold interest in the units and their appurtenant common interests except in accordance with the Act. O. Reg. 48/01, s. 60 (1).
- (2) Despite clause 5 (1) (c), the first page of a declaration for a leasehold condominium corporation shall not contain the statement described in that clause. O. Reg. 48/01, s. 60 (2).
- (3) Schedule L shall set out all provisions of the leasehold interests that affect the property, the corporation and the owners and that are binding on them, and shall include,
- (a) a statement that the provisions of the leasehold interests set out in the Schedule are binding on the property, the corporation and the owners;
 - (b) a statement of the term of the leasehold interests of the owners;
 - (c) a schedule setting out the amount of rent for the property payable by the corporation on behalf of the owners to the lessor and the times at which the rent is payable for at least the first five years immediately following the registration of the declaration and description; and
 - (d) a formula to determine the amount of rent for the property payable by the corporation on behalf of the owners to the lessor and the times at which the rent is payable during the remainder of the term of the owners' leasehold interests following the time for which the schedule described in clause (c) states the amount of rent payable. O. Reg. 48/01, s. 60 (3).
- (4) Schedule M shall contain a statement signed by the solicitor registering the declaration that, in his or her opinion, based on the parcel register or abstract index and the plans and documents recorded in them,
- (a) the lessor is the registered owner of the freehold estate in the land and appurtenant interests;
 - (b) the declarant is the registered owner of the leasehold estate in the land and appurtenant interests; and
 - (c) the lease of the declarant in the land and appurtenant interests is a valid and subsisting lease for a term, for which the statement specifies the length. O. Reg. 48/01, s. 60 (4).

Amendment to declaration

61. The amendment that subsection 174 (8) of the Act requires a leasehold condominium corporation to register to the declaration shall be in Form 22. O. Reg. 48/01, s. 61.

Forms

- 62.** (1) The notice that clause 174 (1) (a) of the Act requires the lessor to give a leasehold condominium corporation if the lessor intends to renew all the leasehold interests shall be in Form 23. O. Reg. 48/01, s. 62 (1).
- (2) The notice that clause 174 (1) (b) of the Act requires the lessor to give a leasehold condominium corporation if the lessor intends to not renew all the leasehold interests shall be in Form 24. O. Reg. 48/01, s. 62 (2).
- (3) The notice that subsection 174 (4) of the Act requires the corporation to send to the owners shall be in Form 25. O. Reg. 48/01, s. 62 (3).
- (4) The notice that subsection 174 (6) of the Act requires the corporation to give to the lessor shall be in Form 26. O. Reg. 48/01, s. 62 (4).

PART X TRANSITIONAL

Declaration and description

63. (1) If, before the day Part II of the Act comes into force, a description, including an amendment to a description, was acceptable for registration except for not having the approval or exemption from approval under the *Planning Act* required by section 50 of the *Condominium Act*,

- (a) sections 5, 6, 8, 9, 10 and 11 and Forms 1 to 7 do not apply to the description, including the amendment to the description, and the declaration, including the amendment to the declaration, that is required to accompany the description; and

- (b) despite section 63 of this Regulation, sections 2, 8 and 9, subsections 15 (1), (2) and (3) and Forms 7, 8 and 9 of Regulation 96 of the Revised Regulations of Ontario, 1990 and Regulation 97 of the Revised Regulations of Ontario, 1990, as they read immediately before that day, continue to apply to the description, including the amendment to the description, and the declaration, including the amendment to the declaration, that is required to accompany the description. O. Reg. 48/01, s. 63 (1).

(2) This section is revoked on the 180th day after the day Part II of the Act comes into force. OReg. 48/01, s. 63 (2).

Disclosure and sale of units

64. If, on or before the day sections 44, 72 to 75 and 78 to 82 of the Act come into force, the declarant with respect to a corporation has entered into one or more agreements of purchase and sale for a unit or proposed unit in the corporation,

- (a) sections 12, 17 and 19 to 22 do not apply; and
- (b) despite subsection 63 (1) of this Regulation, sections 34 to 37 of Regulation 96 of the Revised Regulations of Ontario, 1990, as those sections existed immediately before the revocation of that Regulation, continue to apply. O. Reg. 48/01, s. 64.

Form 1

Condominium Act, 1998

CONSENT
(SCHEDULE B TO DECLARATION)
(under clause 7 (2) (b) of the Condominium Act, 1998)

(Strike out whichever is not applicable:

1. I (We) have a registered mortgage within the meaning of clause 7 (2) (b) of the Condominium Act, 1998, registered as Number in the Land Registry Office for the Land Titles (or Registry) Division of

OR

I (We) have a mortgage registered against land owned by the declarant that is included in the property but not included in a phase, including the buildings and structures on the land, registered as Number in the Land Registry Office for the Land Titles (or Registry) Division of.....)

2. I (We) consent to the registration of (strike out whichever is not applicable: this declaration / this amendment to the declaration, which is not an amendment for creating a phase), pursuant to the Act, against the land or the interests appurtenant to the land, as the land and the interests are described in the description.

(If the mortgage is a registered mortgage within the meaning of clause 7 (2) (b) of the Condominium Act, 1998, include the following paragraph:)

3. I (We) postpone the mortgage and the interests under it to the declaration and the easements described in Schedule A to the declaration.

4. I am (We are) entitled by law to grant this consent (if applicable, add: and postponement.)

Dated this day of

.....
(signature)

.....
(print name)

(In the case of a corporation, affix corporate seal or add a statement that the persons signing have the authority to bind the corporation.)

O. Reg. 48/01, Form 1.

Form 2

Condominium Act, 1998

**CERTIFICATE OF ARCHITECT OR ENGINEER
(SCHEDULE G TO DECLARATION FOR A STANDARD OR LEASEHOLD CONDOMINIUM CORPORATION)
(under clause 8 (1) (e) or (h) of the *Condominium Act, 1998*)**

I certify that:

[Strike out whichever is not applicable:
Each building on the property

OR

(In the case of an amendment to the declaration creating a phase:
Each building on the land included in the phase)]

has been constructed in accordance with the regulations made under the *Condominium Act, 1998*, with respect to the following matters:

(Check whichever boxes are applicable)

1. The exterior building envelope, including roofing assembly, exterior wall cladding, doors and windows, caulking and sealants, is weather resistant if required by the construction documents and has been completed in general conformity with the construction documents.
2. Except as otherwise specified in the regulations, floor assemblies are constructed to the sub-floor.
3. Except as otherwise specified in the regulations, walls and ceilings of the common elements, excluding interior structural walls and columns in a unit, are completed to the drywall (including taping and sanding), plaster or other final covering.
4. All underground garages have walls and floor assemblies in place.

OR

There are no underground garages.

5. All elevating devices as defined in the *Elevating Devices Act* are licensed under that Act if it requires a licence, except for elevating devices contained wholly in a unit and designed for use only within the unit.

OR

There are no elevating devices as defined in the *Elevating Devices Act*, except for elevating devices contained wholly in a unit and designed for use only within the unit.

6. All installations with respect to the provision of water and sewage services are in place.
7. All installations with respect to the provision of heat and ventilation are in place and heat and ventilation can be provided.
8. All installations with respect to the provision of air conditioning are in place.

OR

There are no installations with respect to the provision of air conditioning.

9. All installations with respect to the provision of electricity are in place.
10. All indoor and outdoor swimming pools are roughed in to the extent that they are ready to receive finishes, equipment and accessories.

OR

There are no indoor and outdoor swimming pools.

11. Except as otherwise specified in the regulations, the boundaries of the units are completed to the drywall (not including taping and sanding), plaster or other final covering, and perimeter doors are in place.

Dated this day of

.....
(signature)

.....
(print name)
(Strike out whichever is not applicable:
Architect
Professional Engineer)

O. Reg. 48/01, Form 2.

Form 3

Condominium Act, 1998

SCHEDULE OF APPURTENANT AND SERVIENT INTERESTS <i>(in the case of an amendment to a description creating a phase in a phased condominium corporation, add: FOR THE PHASE)</i> <i>(under clauses 8 (1) (g) and (h) of the Condominium Act, 1998 or clauses 157 (1) (d) and (e) of the Act,</i> <i>in the case of a vacant land condominium corporation)</i>				
	Part	Plan	Described In	Notes (if any)
TOGETHER WITH (APPURTENANT INTERESTS)				1.
SUBJECT TO (SERVIENT INTERESTS)				2.

Notes:

1. *If some, but not all, units have appurtenant interests, place a check mark in this box and add a note that identifies those units and the instrument in which the interests are described.*
2. *If a unit or part of a unit is subject to servient interests, place a check mark in this box and add a note that identifies all those units and parts of a unit and the instrument in which the interests are described.*

O. Reg. 48/01, Form 3.

Form 4

Condominium Act, 1998

CERTIFICATE OF REGISTRATION

.....
(name of land titles or registry division, excluding the number)

.....
(type of corporation i.e. standard, common elements, vacant land, leasehold)

CONDOMINIUM PLAN NO. (identify condominium plan)

[In the case of a common elements condominium corporation, indicate the following only if there are parts of the common elements that are to be used by one or more designated owners and not by all owners:

LEVEL (or LEVELS) to]

[If the sheet designates units, include the following:

UNIT (or UNITS) to]

Registered in the Land Registry Office for the Land Titles (or Registry) Division of at
o'clock on the day of

.....
(signature)
Land Registrar

O. Reg. 48/01, Form 4.

Form 5

Condominium Act, 1998

SURVEYOR'S CERTIFICATE

I certify that:

1. This survey and plan are correct and in accordance with the Condominium Act, 1998, the Surveys Act, the Surveyors Act and the Land Titles Act (or Registry Act, as the case may be) and the regulations made under them.

2. The survey was completed on the day of,

(For all condominium corporations except common elements condominium corporations and vacant land condominium corporations, include the following paragraph on each of the sheets designating units:)

3. The diagrams of the units shown on this plan are substantially accurate.

(If the plan is of Crown land and was prepared under the instructions of the Surveyor General of Ontario, include the following paragraph:)

4. This plan and the field notes were prepared from an actual survey performed under my personal supervision and I was present on the site during the progress of this survey.

Dated this day of,

.....
(signature)

.....
(print name)
Ontario Land Surveyor

O. Reg. 48/01, Form 5.

Form 6

Condominium Act, 1998

CERTIFICATE OF DECLARANT OR OF AMALGAMATING CORPORATIONS

[For all condominium corporations except common elements condominium corporations:

This is to certify that the property included in (in the case of an amendment to a description creating a phase, add: the phase shown on) this plan has been laid out into units and common elements in accordance with my instructions.]

(In the case of a common elements condominium corporation:

This is to certify that the property included in this plan has been laid out into common elements in accordance with my instructions.)

(In the case of a leasehold condominium corporation:

This is to certify that the building and improvements to the property form part of the property.)

Dated this day of,

[For all condominium corporations except if the description is being registered to effect an amalgamation:

Declarant:

.....
(signature)

.....
(print name)

.....
(signature)

.....
(print name)

(In the case of a corporation, affix corporate seal or add a statement that the persons signing have the authority to bind the corporation.)]

[If the description is being registered to effect an amalgamation, add the following for each amalgamating corporation:

..... Condominium Corporation No.

.....
(signature)

.....
(print name)

.....
(signature)

.....
(print name)

(Affix corporate seal or add a statement that the persons signing have the authority to bind the corporation.)]

O. Reg. 48/01, Form 6.

Form 7

Condominium Act, 1998

SURVEYOR'S CERTIFICATE EXCLUSIVE USE COMMON ELEMENTS

I certify that this plan of survey accurately shows the extent and location of the exclusive use portions of the common elements.

Dated this day of,

.....
(signature)

.....
(print name)
Ontario Land Surveyor

O. Reg. 48/01, Form 7.

Form 8

Condominium Act, 1998

PROXY FOR GENERAL MATTERS
(under subsection 52 (6) of the Condominium Act, 1998)

TO: (name of condominium corporation) Condominium Corporation No.
(known as the "Corporation")

1. I am (We are)

the registered owner(s),
authorized to act on behalf of the registered owner(s),
the mortgagee(s), or
authorized to act on behalf of the mortgagee(s)

[If the Corporation is any condominium corporation but a common elements condominium corporation:
Strike out whichever is not applicable:

of (state suite number and municipal address)

OR

of Unit, Level, of (identify condominium plan)]

[If the Corporation is a common elements condominium corporation:
Strike out whichever is not applicable:

of (state suite number and municipal address),

OR

of (provide brief description),

being the parcel of land to which a common interest in the Corporation is attached.]

2. I (We) appoint, if present, or failing him or her,, if present, to be a proxy
(known as the "Proxy") and to attend and vote on my (our) behalf at the meeting of owners to be held on theday of
....., and at any adjournment of the meeting (known as the "Meeting").

3. The Proxy may vote on my (our) behalf in respect of all matters that may come before the Meeting, except for any election or
removal of a director

(If applicable add: and subject to any instructions set out below),

as I (we) could do if personally present at the Meeting.

[If the Proxy is being instructed on how to vote, add:

I (We) instruct the Proxy to vote (set out whether the Proxy is to vote in favour of or against a particular matter)].

4. I (We) revoke all proxies previously given.

(If you are the mortgagee(s) or you are authorized to act on behalf of the mortgagee(s), include the following paragraph:)

5. The mortgagee(s) has/have complied with section 48 of the Condominium Act, 1998 and under that section has/have the right to
vote at the Meeting in the place of the registered owner(s).

Dated this day of, at (circle whichever is applicable: a.m./p.m.)

.....
(signature)

.....
(print name)

.....
(signature)

.....
(print name)

(In the case of a corporation, affix corporate seal or add a statement that the persons signing have the authority to bind the corporation.)

(If you are authorized to act on behalf of the registered owner(s) or mortgagee(s), attach a copy of the document that gives you this authorization.)

O. Reg. 48/01, Form 8.

Form 9

Condominium Act, 1998

PROXY FOR GENERAL MATTERS AND FOR THE ELECTION OF DIRECTORS
(under subsection 52 (6) of the *Condominium Act, 1998*)

TO: (name of condominium corporation) Condominium Corporation No.
(known as the "Corporation")

1. I am (We are)
 - the registered owner(s),
 - authorized to act on behalf of the registered owner(s),
 - the mortgagee(s), or
 - authorized to act on behalf of the mortgagee(s)

*[If the Corporation is any condominium corporation but a common elements condominium corporation:
Strike out whichever is not applicable:*
of (state suite number and municipal address)

OR

of Unit, Level, of (identify condominium plan)]

*[If the Corporation is a common elements condominium corporation:
Strike out whichever is not applicable:*
of (state suite number and municipal address),

OR

of (provide brief description),
being the parcel of land to which a common interest in the Corporation is attached.]

2. I (We) appoint, if present, or failing him or her,, if present, to be a proxy (known as the "Proxy") and to attend and vote on my (our) behalf at the meeting of owners to be held on the day of, and at any adjournment of the meeting (known as the "Meeting").
3. The Proxy may vote on my (our) behalf in respect of all matters that may come before the Meeting, subject to the instructions set out below, as I (we) could do if personally present at the Meeting.

(If applicable, include the following paragraph:)

4. I (We) instruct the Proxy to nominate, if necessary, and to vote for the candidates named below and in the order set out below. The candidates are or may be candidates for those positions on the board of directors for which all owners may vote at the Meeting:

**Candidates for Positions on the Board
for which all owners may vote**

1.
Candidate's Name
2.
Candidate's Name
3.
Candidate's Name
4.
Candidate's Name

(additional names may be added)

Note: Print the name of any individual whom you wish to elect to the board of directors. Your Proxy may only vote for individuals whose names are set out above and who, at the time of the vote, are candidates. If you list more names than positions available on the board of directors, your Proxy will vote in the order set out above up to the number of positions that are available.

(If applicable, add the following paragraph:)

I (We) instruct the Proxy to nominate, if necessary, and to vote for the candidate set out below for the position on the board of directors for which only owners of owner-occupied units may vote under subsection 51 (6) of the *Condominium Act, 1998*:

**Candidates for the Position on the Board
for which only owners of owner-occupied units may vote**
(if applicable under subsection 51 (6) of the *Condominium Act, 1998*)

.....
Candidate's Name

Note: Your Proxy may only vote for one candidate.

[This provision may be included at the option of the person giving the proxy:

In the event that the candidate for which the Proxy has been directed to vote, ceases to be a candidate for any reason, the Proxy is to vote for the following candidate instead: (set out the name of the alternate candidate for whom the Proxy is instructed to vote)].

(If applicable include the following paragraph:)

5. I (We) revoke all proxies previously given.

(If you are the mortgagee(s) or you are authorized to act on behalf of the mortgagee(s), include the following paragraph:)

6. The mortgagee(s) has/have complied with section 48 of the *Condominium Act, 1998* and under that section has/have the right to vote at the Meeting in the place of the registered owner(s).

Dated this day of, at *(circle whichever is applicable: a.m./p.m.)*

.....
(signature)

.....
(print name)

.....
(signature)

.....
(print name)

(In the case of a corporation, affix corporate seal or add a statement that the persons signing have the authority to bind the corporation.)

(If you are authorized to act on behalf of the registered owner(s) or mortgagee(s), attach a copy of the document that gives you this authorization.)

O. Reg. 48/01, Form 9.

Form 10

Condominium Act, 1998

PROXY FOR GENERAL MATTERS AND FOR THE REMOVAL OF DIRECTORS AND ELECTION OF SUBSTITUTES (under subsection 33 (2) of the Condominium Act, 1998)

TO: (name of condominium corporation) Condominium Corporation No. (known as the "Corporation")

- 1. I am (We are) the registered owner(s), authorized to act on behalf of the registered owner(s), the mortgagee(s), or authorized to act on behalf of the mortgagee(s)

[If the Corporation is any condominium corporation but a common elements condominium corporation: Strike out whichever is not applicable: of (state suite number and municipal address)

OR

of Unit, Level, of (identify condominium plan)]

[If the Corporation is a common elements condominium corporation: Strike out whichever is not applicable: of (state suite number and municipal address),

OR

of (provide brief description), being the parcel of land to which a common interest in the Corporation is attached.]

- 2. I (We) appoint, if present, or failing him or her,, if present, to be a proxy (known as the "Proxy") and to attend and vote on my (our) behalf at the meeting of owners to be held on the day of, and at any adjournment of the meeting (known as the "Meeting").
3. The Proxy may vote on my (our) behalf in respect of all matters that may come before the Meeting, subject to the instructions set out below, as I (we) could do if personally present at the Meeting.
4. I (We) instruct the Proxy to vote as indicated below in respect of the removal of director(s) from the board of directors of the Corporation:

Table with 3 columns: Name of Director, In favour of removal, Against removal. Includes dotted lines for text entry.

Note: If a Director's position is the position for which only owners of owner-occupied units can vote, indicate that only owners of owner-occupied units may vote in favour of or against removal of this Director.

- (If applicable, include the following paragraph:)
5. If the vote for removal of director(s) from the board of directors of the Corporation is successful, I (we) instruct the Proxy to nominate, if necessary, and to vote for the candidates named below and in the order set out below. The candidates are or may be candidates for those positions on the board of directors for which all owners may vote at the Meeting:

Candidates for Positions on the Board for which all owners may vote

- 1. Candidate's Name
2. Candidate's Name
3. Candidate's Name
4. Candidate's Name
5. Candidate's Name

(additional names may be added)

Note: Print the name of any individual whom you wish to elect to the board of directors. Your Proxy may only vote for individuals whose names are set out above and who, at the time of the vote, are candidates.

(If applicable, add the following paragraph:)

I (We) instruct the Proxy to nominate, if necessary, and to vote for the candidate set out below for the position on the board of directors for which only owners of owner-occupied units may vote under subsection 51 (6) of the Condominium Act, 1998:

Candidates for the Position on the Board for which only owners of owner-occupied units may vote (if applicable under subsection 51 (6) of the Condominium Act, 1998)

Candidate's Name

Note: Your Proxy may only vote for one candidate.

[This provision may be included at the option of the person giving the proxy:

In the event that the candidate for which the Proxy has been directed to vote, ceases to be a candidate for any reason, the Proxy is to vote for the following candidate instead: (set out the name of the alternate candidate for whom the Proxy is instructed to vote)]

- 6. I (We) revoke all proxies previously given.

(If you are the mortgagee(s) or you are authorized to act on behalf of the mortgagee(s), include the following paragraph:)

- 7. Under section 48 of the Condominium Act, 1998, the mortgagee(s) has/have the right to vote at the Meeting in the place of the registered owner(s).

Dated this day of at (circle whichever is applicable: a.m./p.m.)

(signature)
(print name)
(signature)
(print name)

(In the case of a corporation, affix corporate seal or add a statement that the persons signing have the authority to bind the corporation.)

(If you are authorized to act on behalf of the registered owner(s) or mortgagee(s), attach a copy of the document that gives you this authorization.)

Form 11

Condominium Act, 1998

CERTIFICATE IN RESPECT OF A BY-LAW
(under subsection 56 (9) of the Condominium Act, 1998)

..... (name of condominium corporation) Condominium Corporation No. (known as the "Corporation") certifies that:

- 1. The copy of By-law Number, attached as Schedule A, is a true copy of the By-law.
2. The By-law was made in accordance with the Condominium Act, 1998.
3. The owners of a majority of the units of the Corporation have voted in favour of confirming the By-law.

(If the By-law is a joint by-law under section 59 of the Act, include the following paragraph:)

- 4. The By-law is a joint by-law made under section 59 of the Act and is not effective until the corporations that made it, being (names of corporations), have each registered a copy of the joint by-law in accordance with subsection 56 (9) of the Act.

Dated this day of,

..... Condominium Corporation No.

(signature)

(print name)

(signature)

(print name)

(Affix corporate seal or add a statement that the persons signing have the authority to bind the corporation.)

O. Reg. 48/01, Form 11.

Form 12

Condominium Act, 1998

**DISCLOSURE STATEMENT
TABLE OF CONTENTS**
(under subsection 72 (4) of the *Condominium Act, 1998*)

Declarant's name:

Declarant's municipal address:

Brief legal description of the property/proposed property:

Mailing address of the property/proposed property:

Municipal address of the property/proposed property (if available):

Condominium corporation: (*identify condominium plan, if available*) (known as the "Corporation")

The Table of Contents is a guide to where the disclosure statement deals with some of the more common areas of concern to purchasers. Purchasers should be aware that the disclosure statement, which includes a copy of the existing or proposed declaration, by-laws and rules, contains provisions that are of significance to them, only some of which are referred to in this Table of Contents.

Purchasers should review all documentation.

In this Table of Contents,

- "unit" or "units" include proposed unit or units;
- "common elements" includes proposed common elements;
- "common interest" includes a proposed common interest; and
- "property" includes proposed property.

This disclosure statement deals with significant matters, including the following:

Matter		Specify the article, paragraph (and/or clause) and page number where the matter is dealt with in the existing or proposed declaration, by-laws, rules or other material in the disclosure statement
<p><i>(Strike out whichever is not applicable:</i></p> <p>1. The Corporation is a leasehold condominium corporation.</p> <p style="text-align: center;">OR</p> <p>The Corporation is a freehold condominium corporation that is a (common elements, vacant land or standard) condominium corporation, <i>(for standard condominium corporations, add the following if applicable: which will be phased.)</i></p>		Refer to: _____
<p>2. The property or part of the property is or may be subject to the <i>Ontario New Home Warranties Plan Act</i>.</p>	<p>Yes No <input type="checkbox"/> <input type="checkbox"/></p>	Refer to: _____
<p><i>(For all condominium corporations except common elements condominium corporations:</i></p> <p>3. The common elements and the units are enrolled or are intended to be enrolled in the Plan within the meaning of the <i>Ontario New Home Warranties Plan Act</i> in accordance with the regulations made under that Act.)</p> <p>Note: Enrolment does not necessarily mean that claimants are entitled to warranty coverage. Entitlement to warranty coverage must be established under the <i>Ontario New Home Warranties Plan Act</i>.</p>	<p>Yes No <input type="checkbox"/> <input type="checkbox"/></p>	Refer to: _____

Matter		Specify the article, paragraph (and/or clause) and page number where the matter is dealt with in the existing or proposed declaration, by-laws, rules or other material in the disclosure statement
4. A building on the property or <i>(for all condominium corporations except common elements condominium corporations: a unit)</i> has been converted from a previous use.	Yes <input type="checkbox"/> No <input type="checkbox"/>	Refer to: _____
5. One or more units or a part of the common elements may be used for commercial or other purposes not ancillary to residential purposes.	Yes <input type="checkbox"/> No <input type="checkbox"/>	Refer to: _____
6. A provision exists with respect to pets on the property.	Yes <input type="checkbox"/> No <input type="checkbox"/>	Refer to: _____
7. There exist restrictions or standards with respect to the use of common elements or <i>for all condominium corporations except common elements condominium corporations: the occupancy or use of units)</i> that are based on the nature or design of the facilities and services on the property or on other aspects of the buildings located on the property.	Yes <input type="checkbox"/> No <input type="checkbox"/>	Refer to: _____
<p><i>(For all condominium corporations except common elements condominium corporations:</i></p> <p>8. The declarant intends to lease a portion of the units.)</p> <p><i>(In the case of a common elements condominium corporation:</i> The declarant intends to lease a portion of the common interests.)</p> <p><i>(If “Yes”, add:</i> The portion of units (or the common interests, as the case may be) to the nearest anticipated 25 per cent, that the declarant intends to lease is per cent.)</p>	<p>Yes <input type="checkbox"/> No <input type="checkbox"/></p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/></p>	<p>Refer to: _____</p> <p>Refer to: _____</p>
<p><i>(For all condominium corporations except common elements condominium corporations, include the following paragraph:)</i></p> <p>9. The common interest appurtenant to one or more units differs in an amount of 10 per cent or more from that appurtenant to any other unit of the same type, size and design.</p> <p><i>(If “Yes”, identify the units where this difference exists and what the difference is, expressed as a percentage.)</i></p>	<p>Yes <input type="checkbox"/> No <input type="checkbox"/></p>	<p>Refer to: _____</p>
<p><i>(For all condominium corporations except common elements condominium corporations, include the following paragraph:)</i></p> <p>10. The amount that the owner of one or more units is required to contribute to the common expenses differs in an amount of 10 per cent or more from that required of the owner of any other unit of the same type, size and design.</p> <p><i>(If “Yes”, identify the units where this difference exists and what the difference is, expressed as a percentage.)</i></p>	<p>Yes <input type="checkbox"/> No <input type="checkbox"/></p>	<p>Refer to: _____</p>
<p><i>(For all condominium corporations except common elements condominium corporations:</i></p> <p>11. One or more units are exempt from a cost attributable to the rest of the units.)</p> <p><i>(In the case of a common elements condominium corporation:</i> One or more common interests that is attached or will attach to an owner’s parcel</p>	<p>Yes <input type="checkbox"/> No <input type="checkbox"/></p>	<p>Refer to: _____</p>

Matter		Specify the article, paragraph (and/or clause) and page number where the matter is dealt with in the existing or proposed declaration, by-laws, rules or other material in the disclosure statement
of land are exempt from a cost attributable to the rest of the common interests.)	Yes <input type="checkbox"/> No <input type="checkbox"/>	Refer to: _____
12. There is an existing or proposed by-law establishing what constitutes a standard unit. <i>(If "No", add: Under clause 43 (5) (h) of the Condominium Act, 1998, the declarant is required to deliver to the board a schedule setting out what constitutes a standard unit.)</i>	Yes <input type="checkbox"/> No <input type="checkbox"/>	Refer to: _____
13. Part or the whole of the common elements are subject to a lease or licence.	Yes <input type="checkbox"/> No <input type="checkbox"/>	Refer to: _____
14. Parking for owners is allowed: <i>(except in the case of a common elements condominium corporation:</i> (a) in or on a unit; (b) on the common elements; (c) on a part of the common elements of which an owner has exclusive use. <i>(If "Yes" to any of clauses (a), (b) and (c), add: There are restrictions on parking.)</i>	Yes <input type="checkbox"/> No <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/>	Refer to: _____ _____ _____
15. Visitors must pay for parking. <i>(If "Yes", add: The anticipated costs are)</i> There is visitor parking on the property. <i>[If "No", add: Visitor parking is available in the following location: (describe where)]</i>	Yes <input type="checkbox"/> No <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/>	Refer to: _____ _____ _____
16. The declarant may provide major assets and property, even though it is not required to do so. <i>(If "Yes", identify the major assets and property involved.)</i>	Yes <input type="checkbox"/> No <input type="checkbox"/>	Refer to: _____
17. The corporation is required: (a) to purchase units or assets; <i>(If "Yes", identify the units and assets involved.)</i> (b) to acquire services; <i>(If "Yes", identify the services involved.)</i> (c) to enter into agreements or leases with the declarant or a subsidiary body corporate, holding body corporate or affiliated body corporate of the declarant.	Yes <input type="checkbox"/> No <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/>	Refer to: _____ _____ Refer to: _____ _____ Refer to: _____ _____

Matter		Specify the article, paragraph (and/or clause) and page number where the matter is dealt with in the existing or proposed declaration, by-laws, rules or other material in the disclosure statement
<i>(If "Yes", identify the agreements and leases involved.)</i>		
<p>18. The declarant or a subsidiary body corporate, holding body corporate or affiliated body corporate of the declarant owns land adjacent to the land described in the description.</p> <p><i>(If "Yes", complete the following:</i></p> <p>(1) The current use of the land is <i>(describe use)</i></p> <p>(2) The declarant has made representations respecting the future use of the land. <i>(If "Yes", add the following: The disclosure statement contains a statement of the representations.)</i></p> <p>(3) Applications have been submitted to an approval authority respecting the use of the land. <i>(If "Yes", add the following: The disclosure statement contains a summary of the applications.)]</i></p>	<p>Yes No <input type="checkbox"/> <input type="checkbox"/></p> <p>Yes No <input type="checkbox"/> <input type="checkbox"/></p> <p>Yes No <input type="checkbox"/> <input type="checkbox"/></p>	<p>Refer to: _____</p> <p>Refer to: _____</p> <p>Refer to: _____</p>
<p><i>(In the case of a standard condominium corporation, include the following paragraph:)</i></p> <p>19. To the knowledge of the declarant, the Corporation intends to amalgamate with another corporation or the declarant intends to cause the Corporation to amalgamate with another corporation within 60 days of the date of registration of the declaration and description for the Corporation.</p>	<p>Yes No <input type="checkbox"/> <input type="checkbox"/></p>	<p>Refer to: _____</p>
<p><i>(In the case of a common elements condominium corporation, include the following paragraph:)</i></p> <p>20. Under clause 143 (a) of the <i>Condominium Act, 1998</i>, the common interest is attached or will attach to the owner's parcel of land described in the declaration and cannot be severed from the parcel upon the sale of the parcel or the enforcement of an encumbrance registered against the parcel.</p>		
<p><i>(In the case of a common elements condominium corporation or a vacant land condominium corporation, include the following paragraph:)</i></p> <p>21. The declaration contains a list of the buildings, structures, facilities and services to be included in the common elements.</p>		<p>Refer to: Schedule H to the declaration</p>
<p><i>(In the case of a vacant land condominium corporation, include the following paragraph:)</i></p> <p>22. There are the following restrictions with respect to the construction of a building or structure on a unit after the registration of the declaration and description:</p> <p>(a) the size, location, construction standards, quality of materials and appearance of the building or structure;</p> <p>(b) architectural standards and construction design standards of the building or structure;</p> <p>(c) the time of commencement and completion of construction of the building or structure;</p> <p>(d) the minimum maintenance requirements for the building or structure.</p>	<p>Yes No <input type="checkbox"/> <input type="checkbox"/></p>	<p>Refer to: _____</p> <p>Refer to: _____</p> <p>Refer to: _____</p> <p>Refer to: _____</p>

Form 13

Condominium Act, 1998

STATUS CERTIFICATE
(under subsection 76 (1) of the *Condominium Act, 1998*)

..... (name of condominium corporation) Condominium Corporation No.
(known as the "Corporation") certifies that as of the date of this certificate:

Instruction for a common elements condominium corporation

(If the Corporation is a common elements condominium corporation, change all references in this certificate to terms in Column 1 to references to the terms in Column 2.)

COLUMN 1	COLUMN 2
unit(s)	common interest(s) in the Corporation
unit owner(s)	the owner(s) of a common interest in the Corporation

General Information Concerning the Corporation

- Mailing address:
- Address for service:
- Name of property manager:
Address:
Telephone number:
- The directors and officers of the Corporation are:

Name	Position	Address for service	Telephone Number
.....

Common Expenses

[If the Corporation is any condominium corporation but a common elements condominium corporation:

- The owner of Unit Level (Suite number address)
of (identify condominium plan), registered in the Land Registry Office for the Land Titles (or Registry) Division of

[If the Corporation is a common elements condominium corporation:

The owner of the common interest in the Corporation attached to (provide description, as set out in Schedule D to the declaration, of the parcel of land to which the common interest in the Corporation is attached), registered in the Land Registry Office for the Land Titles (or Registry) Division of, (known as the "Parcel"])

(Strike out whichever is not applicable:
is not in default in the payment of common expenses.

OR

is in default in the payment of common expenses in the amount of \$

[If applicable add:
and a certificate of lien has been registered against

*(if the Corporation is any condominium corporation but a common elements condominium corporation: the unit)
(if the Corporation is a common elements condominium corporation: the Parcel)].*

- A payment on account of common expenses for the unit in the amount of \$..... is due on (next due date) for the period (date) to (date). This amount includes the amount of any increase since the date of the budget of the Corporation for the current fiscal year as described in paragraph 10.
- The Corporation has the amount of \$ in prepaid common expenses for the unit.

- 8. There are no amounts that the *Condominium Act, 1998* requires to be added to the common expenses payable for the unit *[if applicable add: except (set out details and provide brief description)]*.

Budget

- 9. The budget of the Corporation for the current fiscal year is accurate and may result in

(Strike out whichever is not applicable:
a surplus of \$

OR

a deficit of \$

- 10. *[Strike out whichever is not applicable:*

Since the date of the budget of the Corporation for the current fiscal year, the common expenses for the unit have not been increased.

OR

Since the date of the budget of the Corporation for the current fiscal year, the common expenses for the unit have been increased by \$..... per month because *(set out the reason for the increase)]*.

- 11. *[Strike out whichever is not applicable:*

Since the date of the budget of the Corporation for the current fiscal year, the board has not levied any assessments against the unit to increase the contribution to the reserve fund or the Corporation’s operating fund or for any other purpose.

OR

Since the date of the budget of the Corporation for the current fiscal year, the board has levied the following assessments against the unit to increase the contribution to the reserve fund or the Corporation’s operating fund or for any other purpose: . *(set out the amounts and the reason for the assessments)]*.

- 12. The Corporation has no knowledge of any circumstances that may result in an increase in the common expenses for the unit *[if applicable add: except (give particulars of any potential increase, including any assessment levied by the board against the unit, and the reason for it)]*.

Reserve Fund

- 13. The Corporation’s reserve fund amounts to \$..... as of*(specify a date that is no earlier than at the end of a month within 90 days of the date of this certificate)*.

- 14. *[Strike out whichever is not applicable:*

The most recent reserve fund study conducted by the board was a *(specify the class of reserve fund study)* dated and prepared by *(name of person who conducted the reserve fund study)*. The next reserve fund study will be conducted before *(set out the date by which the next reserve fund study must be conducted as required by the regulations made under the Act)*.

OR

(If no reserve fund study has been conducted by the board, state:

A reserve fund study will be conducted before *(set out the date by which the reserve fund study must be conducted as required by the regulations made under the Act)]*.

- 15. *(If a notice has not been sent to the owners under subsection 94 (9) of the Condominium Act, 1998, include the following paragraph:)*

The balance of the reserve fund at the beginning of the current fiscal year was \$ In accordance with the budget of the Corporation for the current fiscal year, the annual contribution to be made to the reserve fund in the current fiscal year is \$, and the anticipated expenditures to be made from the reserve fund in the current fiscal year amount to \$..... . The board anticipates that the reserve fund will/will not be adequate in the current fiscal year for the expected costs of major repair and replacement of the common elements and assets of the Corporation.

- 16. *[If a notice has been sent to the owners under subsection 94 (9) of the Condominium Act, 1998, include the following statements and a copy of the most recent notice for the unit with this certificate and mention it in the list of documents forming part of this certificate:*

The board has sent to the owners a notice dated *(date of the most recent notice)* containing a summary of the reserve fund study, a summary of the proposed plan for future funding of the reserve fund and a statement indicating the areas, if any, in which the proposed plan differs from the study. The proposed plan for future funding of the reserve fund has not been implemented because *(give reason)*.

OR

The proposed plan for future funding has been implemented and the total contribution each year to the reserve fund is being made as set out in the Contribution Table included in the notice *(if applicable add: except (set out why contributions are not being made in accordance with the Contribution Table and whether this will be addressed))*.

17. There are no plans to increase the reserve fund under a plan proposed by the board under subsection 94 (8) of the *Condominium Act, 1998*, for the future funding of the reserve fund *[if applicable add: except (give details of any increase, including any increase in the common expenses payable for the unit or assessment against the unit)]*.

Legal Proceedings, Claims

18. There are no outstanding judgments against the Corporation *[if applicable add: except (give amount of judgment and brief particulars)]*.
19. The Corporation is not a party to any proceeding before a court of law, an arbitrator or an administrative tribunal *[if applicable add: except (give brief particulars and the status of those proceedings to which the Corporation is a party)]*.
20. The Corporation has not received a notice of or made an application under section 109 of the *Condominium Act, 1998* to the Superior Court of Justice for an order to amend the declaration and description, where the court has not made the order *[if applicable add: except(give particulars)]*.
21. The Corporation has no outstanding claim for payment out of the guarantee fund under the *Ontario New Home Warranties Plan Act*, *[if applicable add: except (give brief particulars and the status of any claims that have been made)]*.
22. *[Strike out whichever is not applicable:*
There is currently no order of the Superior Court of Justice in effect appointing an inspector under section 130 of the *Condominium Act, 1998* or an administrator under section 131 of the *Condominium Act, 1998*.

OR

There is currently an order of the Superior Court of Justice in effect appointing an inspector under section 130 of the *Condominium Act, 1998* or an administrator under section 131 of the *Condominium Act, 1998*. *(If applicable, include a copy of the order with this certificate and mention it in the list of documents forming part of this certificate)*.

Agreements with owners relating to changes to the common elements

23. *[Strike out whichever is not applicable:*
The unit is not subject to any agreement under clause 98 (1) (b) of the *Condominium Act, 1998* relating to additions, alterations or improvements made to the common elements by the unit owner.

OR

The unit is subject to one or more agreements under clause 98 (1) (b) of the *Condominium Act, 1998* relating to additions, alterations or improvements made to the common elements by the unit owner. To the best of the Corporation's information, knowledge and belief, the agreements have been complied with by the parties *(if applicable add: except (give particulars)*.

(If applicable, include a copy of the agreements with this certificate and mention them in the list of documents forming part of this certificate.)

Leasing of Units

24. *[Strike out whichever is not applicable:*
The Corporation has not received notice under section 83 of the *Condominium Act, 1998*, that any unit was leased during the fiscal year preceding the date of this status certificate.

OR

The Corporation has received notice under section 83 of the *Condominium Act, 1998*, that *(set out the number) unit(s) was (were) leased during the fiscal year preceding the date of this status certificate.]*

Substantial changes to the common elements, assets or services

25. There are no additions, alterations or improvements to the common elements, changes in the assets of the Corporation or changes in a service of the Corporation that are substantial and that the board has proposed but has not implemented *[if applicable add: except(give a brief description and a statement of their purpose)]*.

Insurance

26. The Corporation has secured all policies of insurance that are required under the *Condominium Act, 1998*.

Phased condominium corporations

27. *(Strike out whichever is not applicable:*
The declarant has completed all phases described in the disclosure statement that the Corporation has received from the declarant under subsection 147 (5) of the *Condominium Act, 1998* with respect to the phase that contains the unit.

OR

The declarant has not completed all phases described in the disclosure statement that the Corporation has received from the declarant under subsection 147 (5) of the *Condominium Act, 1998* with respect to the phase that contains the unit.)

28. *(Strike out whichever is not applicable:*

The declarant does not own any of the units in the phases, including units that are part of the property designed to control, facilitate or provide telecommunications to, from or within the property.

OR

The declarant does not own any of the units in the phases, except for units that are part of the property designed to control, facilitate or provide telecommunications to, from or within the property.

OR

The declarant owns one or more of the units in the phases, but not units that are part of the property designed to control, facilitate or provide telecommunications to, from or within the property.

OR

The declarant owns one or more of the units in the phases, including one or more of the units that are part of the property designed to control, facilitate or provide telecommunications to, from or within the property.

Vacant land condominium corporations

29. If the Corporation is a vacant land condominium corporation, all buildings, structures, facilities and services shown in Schedule H to the declaration have been completed, installed and provided, except *(list which items, by reference to Schedule H, have not yet been completed, installed and provided).*

Leasehold condominium corporations

30. Name of lessor:
 Address:
 Telephone number:

31. *[Strike out whichever is not applicable:*

The provisions of the leasehold interests in the property are in good standing and have not been breached.

OR

The provisions of the leasehold interests in the property are not in good standing and have been breached in the following ways:*(provide details)].*

32. The lessor *(strike out whichever is not applicable:* has/has not) applied under section 173 of the *Condominium Act, 1998* for an order terminating the leasehold interests in the property.

Attachments

33. The following documents are attached to this status certificate and form part of it:
- (a) a copy of the current declaration, by-laws and rules, *(if applicable, add: which include an occupancy standards by-law);*
 - (b) a copy of the budget of the Corporation for the current fiscal year, its last annual audited financial statements and the auditor’s report on the statements;
 - (c) a list of all current agreements mentioned in section 111, 112 or 113 of the *Condominium Act, 1998* and all current agreements between the Corporation and another corporation or between the Corporation and the owner of the unit;
 - (d) a certificate or memorandum of insurance for each of the current insurance policies.

[if applicable add the following items:

- (e) a copy of all applications made under section 109 of the *Condominium Act, 1998* to amend the declaration or description for which the court has not made an order;
- (f) a copy of the schedule that the declarant has delivered to the board setting out what constitutes a standard unit, if there is no by-law of the Corporation establishing what constitutes a standard unit;
- (g) a copy of all agreements, if any, described in clause 98 (1) (b) of the *Condominium Act, 1998* that bind the unit;
- (h) a copy of a notice dated *(date of the most recent notice)* containing a summary of the reserve fund study, a summary of the proposed plan for future funding of the reserve fund and a statement indicating the areas, if any, in which the proposed plan differs from the study;

- (i) a copy of an order appointing an inspector under section 130 of the *Condominium Act, 1998* or an administrator under section 131 of the *Condominium Act, 1998*;
- (j) a copy of the disclosure statement that the Corporation has received from the declarant under subsection 147 (5) of the *Condominium Act, 1998* with respect to the phase that contains the unit unless the declarant has completed all phases described in the disclosure statement and the declarant does not own any of the units in the phases except for the part of the property designed to control, facilitate or provide telecommunications to, from or within the property;
- (k) a copy of an application by the lessor for a termination order under section 173 of the *Condominium Act, 1998*;
- (l) if the leasehold interests in the units of the Corporation have been renewed and an amendment to the declaration has not yet been registered under subsection 174 (8) of the *Condominium Act, 1998*, a copy of the provisions that apply upon renewal.]

Rights of person requesting certificate

34. The person requesting this certificate has the following rights under subsections 76 (7) and (8) of the *Condominium Act, 1998* with respect to the agreements listed in subparagraph 33 (c) above:
1. Upon receiving a written request and reasonable notice, the Corporation shall permit a person who has requested a status certificate and paid the fee charged by the Corporation for the certificate, or an agent of the person duly authorized in writing, to examine the agreements listed in subparagraph 33 (c) at a reasonable time and at a reasonable location.
 2. The Corporation shall, within a reasonable time, provide copies of the agreements to a person examining them, if the person so requests and pays a reasonable fee to compensate the Corporation for the labour and copying charges.

Dated this day of,

..... Condominium Corporation No.

.....
(signature)

.....
(print name)

.....
(signature)

.....
(print name)

(Affix corporate seal or add a statement that the persons signing have the authority to bind the corporation.)

O. Reg. 48/01, Form 13.

Form 14

Condominium Act, 1998

NOTICE OF LIEN TO OWNER
(under subsection 85 (4) of the Condominium Act, 1998)

TO: (name of owner(s))
..... (name of condominium corporation) Condominium Corporation No.
notifies you that it has a lien under the Condominium Act, 1998 against:

[For all condominium corporations except common elements condominium corporations:
Unit (No.), Level (No.), of (identify condominium plan),
registered in the Land Registry Office for the Land Titles (or Registry) Division of]

[In the case of a common elements condominium corporation:
..... (provide registerable description of the parcel of land to which the common interest in the Condominium Corporation
is attached), registered in the Land Registry Office for the Land Titles (or Registry) Division of, (known as the
"Parcel")]

for the total amount of \$..... (set out amount) as of the date of this notice consisting of:

- (a) unpaid common expenses in the amount of \$;
(b) interest on the unpaid common expenses, which amounts to \$..... and is calculated as follows:
(set out details of calculation);
(c) reasonable legal costs and reasonable expenses in the amount of \$..... incurred by the Condominium Corporation in
connection with the collection or attempted collection of the amounts described in clauses (a) and (b). The amount claimed under
clause (c) consists of
(set out particulars).

If the total amount of \$....., together with interest on the unpaid common expenses at \$..... (set out amount) per day from the
date of this notice to the date of payment, is not paid by (set out the date of the day that is at least 10 days after this notice is
given), the Condominium Corporation is entitled to register a certificate of lien against the unit (or in the case of a common elements
condominium corporation: the Parcel) and additional amounts, including the costs of preparing and registering the certificate of lien and
a discharge of it, will become payable and will be secured by the lien.

The lien may be enforced in the same manner as a mortgage.

Dated this day of,

..... Condominium Corporation No.

.....
(signature)

.....
(print name)

.....
(signature)

.....
(print name)

[Affix corporate seal or add a statement that the persons signing have the authority to bind the corporation.]

O. Reg. 48/01, Form 14.

Form 15

Condominium Act, 1998

NOTICE OF FUTURE FUNDING OF THE RESERVE FUND
(under subsection 94 (9) of the Condominium Act, 1998)

TO: All owners in (identify condominium plan)

OR

[For all condominium corporations except common elements condominium corporations:

TO: The owners of Unit(s), Level(s), (identify condominium plan)]

[In the case of a common elements condominium corporation:

TO: The owners of a common interest in (name of condominium corporation) attached to (describe parcel(s) of land affected)]

The board has received and reviewed a (specify class of reserve fund study) dated, prepared by (state name of person conducting the reserve fund study), and has proposed a plan for the future funding of the reserve fund that the board has determined will ensure that, in accordance with the regulations made under the Condominium Act, 1998, the reserve fund will be adequate for the major repair and replacement of the common elements and assets of the corporation.

This notice contains:

- 1. A summary of the reserve fund study.
2. A summary of the proposed funding plan.
3. A statement indicating the areas, if any, in which the proposed funding plan differs from the reserve fund study.

At the present time the average contribution per unit (or in the case of a common elements condominium corporation: per common interest) per month to the reserve fund is \$, Based on the proposed funding plan, the average increase in contribution per unit (or in the case of a common elements condominium corporation: per common interest) per month will be \$..... (state the amount of the increase for each of the three fiscal years following the year in which the reserve fund study is completed. If the contribution is to be increased in the fiscal year in which the reserve fund study is completed, also state the amount of that increase.)

OR

At the present time the contribution in respect of your unit(s) (or in the case of a common elements condominium corporation: in respect of your common interest(s)) per month to the reserve fund is \$..... . Based on the proposed funding plan, the increase in contribution in respect of your unit(s) (or in the case of a common elements condominium corporation: in respect of your common interest(s)) will be \$..... (state the amount of the increase for each of the three fiscal years following the year in which the reserve fund study is completed. If the contribution is to be increased in the fiscal year in which the reserve fund study is completed, also state the amount of that increase.)

The proposed funding plan will be implemented beginning on (set out the date of a day that is more than 30 days after the day on which this notice is sent to the owners).

Dated this day of,

..... Condominium Corporation No.

(signature)

(print name)

(signature)

(print name)

(Affix corporate seal or add a statement that the persons signing have the authority to bind the corporation.)

SUMMARY OF RESERVE FUND STUDY

The following is a summary of the (specify class of reserve fund study) dated, prepared by (name of person conducting the reserve fund study) for (name of condominium corporation) (known as the "Reserve Fund Study").

Subsection 94 (1) of the *Condominium Act, 1998*, requires the corporation to conduct periodic studies to determine whether the amount of money in the reserve fund and the amount of contributions collected by the corporation are adequate to provide for the expected costs of major repair and replacement of the common elements and assets of the corporation. As a result, the corporation has obtained the Reserve Fund Study.

The estimated expenditures from the reserve fund for the next thirty (30) years are set out in the CASH FLOW TABLE. In this summary, the term "annual contribution" means the total amount to be contributed each year to the reserve fund, exclusive of interest earned on the reserve fund. The recommended annual contribution for (set out the fiscal year following the year in which the study is completed, unless the contribution is to be increased in the current fiscal year, then set out the current fiscal year) is \$, based on the estimated expenditures and the following:

Opening Balance of the Reserve Fund: \$
 Minimum Reserve Fund Balance during the projected period \$
 Assumed Annual Inflation Rate for Reserve Fund Expenditures: %
 Assumed Annual Interest Rate for interest earned on the Reserve Fund: %

The Reserve Fund Study can be examined (set out details e.g. whether a written request and reasonable notice are required as set out in subsection 55 (3) of the *Condominium Act, 1998*, where and when it can be examined).

CASH FLOW TABLE

Opening Balance of the Reserve Fund: \$
 Minimum Reserve Fund Balance (as indicated in this table) \$
 Assumed Annual Inflation Rate for Reserve Fund Expenditures: %
 Assumed Annual Interest Rate for interest earned on the Reserve Fund: %

Year	Opening Balance	Recommended Annual Contribution	Estimated Inflation Adjusted Expenditures	Estimated Interest Earned	Percentage Increase in Recommended Annual Contribution	Closing Balance
Show each of 30 consecutive years, beginning with the current fiscal year						

SUMMARY OF PROPOSED PLAN FOR FUTURE FUNDING OF THE RESERVE FUND

The following is a summary of the board's proposed plan for the future funding of the reserve fund.

The board of (name of condominium corporation) has reviewed the (specify class of reserve fund study) dated, prepared by (name of person conducting the reserve fund study) for the corporation (known as the "Reserve Fund Study") and has proposed a plan for the future funding of the reserve fund that the board has determined will ensure that, in accordance with the regulations made under the *Condominium Act, 1998*, the reserve fund will be adequate for the major repair and replacement of the common elements and assets of the corporation.

The board has adopted the funding recommendations of the Reserve Fund Study and will implement them as set out in the Contribution Table.

The total annual contribution recommended under the proposed funding plan for the current fiscal year is \$....., which (strike out whichever is not applicable: is the same amount that has already been budgeted OR represents an increase of % over the amount already budgeted).

OR

The board has not adopted the funding recommendations of the Reserve Fund Study and has proposed a plan for the future funding of the reserve fund as set out in the Contribution Table based on the following:

Opening Balance of the Reserve Fund: \$
 Minimum Reserve Fund Balance during the projected period \$
 Assumed Annual Inflation Rate for Reserve Fund Expenditures: %

Assumed Annual Interest Rate for interest earned on the Reserve Fund:

The total annual contribution recommended under the proposed funding plan for the current fiscal year is \$, which
(strike out whichever is not applicable: is the same amount that has already been budgeted OR represents an increase of

 % over the amount already budgeted).

The Proposed Plan for Future Funding of the Reserve Fund can be examined *(set out details: e.g. whether a written request and reasonable notice are required as set out in subsection 55 (3) of the Condominium Act, 1998, where and when it can be examined).*

CONTRIBUTION TABLE

Year	A Annual Contribution*	% Increase Over Previous Year	B Other Contribution (e.g. special assessment, loan)	A + B Total Contribution Each Year to Reserve Fund
Show each of 30 consecutive fiscal years, beginning with the current fiscal year			(provide amount, description and when in the fiscal year each item is to be contributed)	

*The term "annual contribution" means the amount to be contributed each year to the reserve fund from the monthly common expenses.

**DIFFERENCES BETWEEN
 THE RESERVE FUND STUDY AND
 THE PROPOSED PLAN FOR FUTURE
 FUNDING OF THE RESERVE FUND**

The Plan for Future Funding of the Reserve Fund proposed by the board differs from the Reserve Fund Study in the following respects:
 *(specify differences).*

O. Reg. 48/01, Form 15.

Form 16

Condominium Act, 1998

CONSENT TO ATTACHMENT OF A COMMON INTEREST
(SCHEDULE B TO DECLARATION FOR A COMMON ELEMENTS
CONDOMINIUM CORPORATION)
(under clause 140 (c) of the Condominium Act, 1998)

- 1. I (We) have a mortgage registered as Number in the Land Registry Office for the Land Titles (or Registry) Division of against a parcel of land (known as the "Parcel") to which a common interest in a common elements condominium corporation (known as the "Corporation") will attach upon the registration of the attached declaration (known as the "Declaration") dated and the description (known as the "Description") creating the Corporation.
- 2. I (We) acknowledge that, upon the registration of the Declaration and Description, the Parcel will become subject to all encumbrances, if any, outstanding against the property described in Schedule A to the Declaration.
- 3. I (We) consent to the registration of a notice in the prescribed form indicating that a common interest in the Corporation, as the common interest is set out in Schedule D to the Declaration, attaches to the Parcel upon the registration of the Declaration and Description.

Dated this day of,

.....
(signature)

.....
(print name)

(In the case of a corporation, affix corporate seal or add a statement that the persons signing have the authority to bind the corporation.)

O. Reg. 48/01, Form 16.

Form 17

Condominium Act, 1998

CERTIFICATE OF ARCHITECT OR ENGINEER
 (SCHEDULE G TO DECLARATION FOR A COMMON ELEMENTS
 OR VACANT LAND CONDOMINIUM CORPORATION)
 (under clauses 8 (1) (e) and (h) or clauses 157 (1) (c) and (e) of the *Condominium Act, 1998*)

I certify that:

- I. Each building and structure that the declaration and description show are included in the common elements has been constructed in accordance with the regulations made under the *Condominium Act, 1998*, with respect to the following matters:

(Check whichever boxes are applicable)

- 1,2,3 The declaration and description show that there are no buildings or structures included in the common elements.

OR

1. The exterior building envelope, including roofing assembly, exterior wall cladding, doors and windows, caulking and sealants, is weather resistant if required by the construction documents and has been completed in general conformity with the construction documents.
2. Floor assemblies of the buildings and structures are constructed and completed to the final covering.
3. Walls and ceilings of the buildings and structures are completed to the drywall (including taping and sanding), plaster or other final covering.
4. All underground garages have walls and floor assemblies in place.

OR

There are no underground garages.

5. All elevating devices as defined in the *Elevating Devices Act* are licensed under that Act if it requires a licence, except for elevating devices contained wholly in a unit and designed for use only within the unit.

OR

There are no elevating devices as defined in the *Elevating Devices Act*, except for elevating devices contained wholly in a unit and designed for use only within the unit.

6. All installations with respect to the provision of water and sewage services are in place and operable.

OR

There are no installations with respect to the provision of water and sewage services.

7. All installations with respect to the provision of heat and ventilation are in place and heat and ventilation can be provided.

OR

There are no installations with respect to the provision of heat and ventilation.

8. All installations with respect to the provision of air conditioning are in place.

OR

There are no installations with respect to the provision of air conditioning.

9. All installations with respect to the provision of electricity are in place and operable.

OR

There are no installations with respect to the provision of electricity.

10. All indoor and outdoor swimming pools are roughed in to the extent that they are ready to receive finishes, equipment and accessories.

OR

There are no indoor and outdoor swimming pools.

[Strike out whichever is not applicable:

II. All facilities and services that the declaration and description show are included in the common elements

OR

The following facilities and services that the declaration and description show are included in the common elements:

..... *(specify by reference to the item numbers in Schedule H)]*

have been installed and provided in accordance with the requirements of the municipalities in which the land is situated or the requirements of the Minister of Municipal Affairs and Housing, if the land is not situated in a municipality.

Dated this day of,

.....
(signature)

.....
(print name)
(Strike out whichever is not applicable:
Architect
Professional Engineer)

O. Reg. 48/01, Form 17.

Form 18

Condominium Act, 1998

CONSENT AND POSTPONEMENT
(AMENDMENT TO SCHEDULE B TO DECLARATION OF A
PHASED CONDOMINIUM CORPORATION TO CREATE A PHASE)
(under clause 146 (4) (a) of the Condominium Act, 1998)

- 1. I (We) have a registered mortgage within the meaning of clause 146 (4) (a) of the *Condominium Act, 1998*, registered as Number in the Land Registry Office for the Land Titles (or Registry) Division of
- 2. The declaration was registered as Instrument No. on the day of
- 3. I (We) consent to the registration of this amendment to the declaration, pursuant to the Act, against the land included in the phase or interests appurtenant to the land, as the land and the interests are described in the amendment to the description, for the purpose of creating the phase.
- 4. I (We) postpone the mortgage and the interests under it to the declaration and the easements described in Schedule A to the declaration, as amended by this amendment.
- 5. I am (We are) entitled by law to grant this consent and postponement.

Dated this day of,

.....
(signature)

.....
(print name)

(In the case of a corporation, affix corporate seal or add a statement that the persons signing have the authority to bind the corporation.)

O. Reg. 48/01, Form 18.

Form 19

Condominium Act, 1998

AMENDMENT TO DECLARATION AND
DESCRIPTION TO CREATE A PHASE
(subsection 146 (3) of the *Condominium Act, 1998*)

AMENDMENT TO DECLARATION

I (We) state that:

1. The board has been elected at a meeting of owners held on(*set out date*) at a time when I (we), the declarant, did not own the majority of the units.
2. More than 60 days have passed since the registration of the declaration and description or the registration of the latest amendments to the declaration and description creating a phase, whichever is the later.
3. There is no outstanding application to the Superior Court of Justice for an injunction under subsection 149 (2) of the *Condominium Act, 1998* and the Superior Court has not issued an injunction to prevent the registration of the amendments creating the phase.

The declaration of (*name of condominium corporation*) Standard Condominium Corporation No. registered as Instrument No. on the day of,, (known as the "Declaration") is amended as follows:

1. Schedule A is replaced with Schedule A attached.
 2. Schedule B is amended to include the attached consents.
 3. Schedule C is amended to include the material identified as Amendments to Schedule C attached.
 4. Schedule D is replaced with Schedule D attached.
- (*If applicable add the following:*)
5. Schedule E is amended to include the statement set out in Amendments to Schedule E attached.)
 6. Schedule F is amended to include the material identified as Amendments to Schedule F attached.
 7. Schedule G is amended to include the material identified as Amendments to Schedule G attached.
 8. Schedule K attached is added to the Declaration.

(*If applicable add the following:*)

9. The Declaration is otherwise amended as set out in the material attached and identified as "Other Amendments to the Declaration".)

AMENDMENT TO DESCRIPTION

The description identified as (*identify condominium plan as specified in the regulations made under the Act*) is amended as follows:

1. Part I of the description is amended to include the following prepared by, O.L.S. and dated:

.....(*set out number of sheets in the amendment to the perimeter plan of survey*) sheets of a perimeter plan of survey, designated as sheet(s) of(*set out number of sheets in Part I as amended*), and

.....(*set out number of sheets in the amendment to the sheets designating units*) sheets designating units for the land included in the phase, designated as sheet(s) of (*set out number of sheets in Part I as amended*).

(*If applicable add the following:*)
 2. Part II of the description is amended to include (*set out number*) sheets designated as sheet(s) of an exclusive use portions survey for the land included in the phase prepared by, O.L.S. and dated
- (*If applicable add the following:*)
3. Part (*insert number of Part*) is added consisting of architectural plans of the buildings on the land included in the phase prepared by and dated

(If applicable add the following:

4. Part ...(insert number of Part) is added consisting of structural plans of the buildings on the land included in the phase prepared by and dated

Dated this day of

Declarant:

.....
(signature)

.....
(print name)

.....
(signature)

.....
(print name)

(In the case of a corporation, affix corporate seal or add a statement that the persons signing have the authority to bind the corporation.)

O. Reg. 48/01, Form 19.

Form 20

Condominium Act, 1998

CERTIFICATE OF REGISTRATION OF AMENDMENT TO
DECLARATION AND DESCRIPTION CREATING A PHASE

.....
(name of land titles or registry division, excluding the number)

STANDARD CONDOMINIUM PLAN NO. (identify condominium plan)

LEVEL (or LEVELS) to

[If the sheet designates units, include the following:

UNIT (or UNITS) to]

Amendment to the declaration and description, registered in the Land Registry Office for the Land Titles (or Registry) Division of as
Instrument No. at o'clock on the day of

.....
(signature)
Land Registrar

O. Reg. 48/01, Form 20.

Form 21

Condominium Act, 1998

AMENDMENT TO DESCRIPTION FOR A VACANT LAND CONDOMINIUM CORPORATION (under clause 158 (3) (b) of the Condominium Act, 1998)

The description identified as (identify condominium plan as specified in the regulations made under the Act) is amended to include:

(Check whichever boxes are applicable:)

Part III consisting of architectural plans of the buildings and structures included in the common elements prepared by and dated

Part IV consisting of structural plans of the buildings and structures included in the common elements prepared by and dated

One or more attached certificates of an architect or an engineer in Form 17. (Identify each certificate by the date executed and the architect or engineer who signed it.)

The following sheets of the description, that have been revised to reflect the items mentioned above: (describe the sheets e.g. Part I, Sheet 1).

Dated this day of

Declarant:

..... (signature)

..... (print name)

..... (signature)

..... (print name)

(In the case of a corporation, affix corporate seal or add a statement that the persons signing have the authority to bind the corporation.)

O. Reg. 48/01, Form 21.

Form 22

Condominium Act, 1998

AMENDMENT TO DECLARATION FOR A LEASEHOLD CONDOMINIUM CORPORATION (under subsection 174 (8) of the Condominium Act, 1998)

The leasehold interests in the units in (name of condominium corporation) Leasehold Condominium Corporation No. and their appurtenant common interests have been renewed as set out in the Notice of Renewal of the leasehold interests in a leasehold condominium corporation that is registered as Number in the Land Registry Office for the Land Titles (or Registry) Division of

The renewal is subject to the provisions set out below that are different from those that applied before the renewal.

The declaration of (name of condominium corporation) Leasehold Condominium Corporation No. registered as Instrument No. on the day of,, is amended accordingly.

Provision in declaration prior to renewal: Upon renewal, provision changed to:(e.g. term, rent, etc.)

Dated this day of,

.... Leasehold Condominium Corporation No. ...

(signature)

(print name)

(signature)

(print name)

(Affix corporate seal or add a statement that the persons signing have the authority to bind the corporation.)

O. Reg. 48/01, Form 22.

Form 23

Condominium Act, 1998

NOTICE OF INTENTION TO RENEW THE LEASEHOLD INTERESTS IN A LEASEHOLD CONDOMINIUM CORPORATION (under clause 174 (1) (a) of the Condominium Act, 1998)

TO:(name of condominium corporation) Leasehold Condominium Corporation No. (known as the "Corporation")

- 1. The leasehold interests in the units in (name of condominium corporation) Leasehold Condominium Corporation No. and their appurtenant common interests (those leasehold interests and common interests are known as the "leasehold interests") are due to expire on (set out the date, which must be at least five years after the date of this notice).
2. The lessor, (name of lessor), intends to renew all the leasehold interests subject to the same provisions that govern them as of the date of this notice, except for the changes set out below:

Provision in declaration before renewal: Upon renewal, provision would change to:
.....(e.g. term, rent, etc.)
.....
(Note: under subsection 174(2) of the Act, the renewal must be for a term of at least 10 years or more.)

- 3. All other provisions governing the leasehold interests would remain the same.
4. The leasehold interests shall be renewed, as set out above, unless the owners who own at least 80 per cent of the units cast a vote against the renewal not later than one year after this notice is given to the Corporation.

Dated this day of,

.....
(signature of lessor)
.....
(print name)

(In the case of a corporation, affix corporate seal or add a statement that the persons signing have the authority to bind the corporation.)

O. Reg. 48/01, Form 23.

Form 24

Condominium Act, 1998

NOTICE OF INTENTION NOT TO RENEW THE LEASEHOLD INTERESTS IN A LEASEHOLD CONDOMINIUM CORPORATION (under clause 174 (1) (b) of the Condominium Act, 1998)

TO: (name of condominium corporation) Leasehold Condominium Corporation No.

- 1. The leasehold interests in the units in (name of condominium corporation) Leasehold Condominium Corporation No. and their appurtenant common interests (those leasehold interests and common interests are known as the "leasehold interests") are due to expire on (set out the date, which must be at least five years after the date of this notice).
2. The lessor, (name of lessor), does not intend to renew the leasehold interests.
3. Upon the expiry date, section 175 of the Condominium Act, 1998 applies and the leasehold interests are terminated.

Dated this day of

..... (signature)

..... (print name)

(In the case of a corporation, affix corporate seal or add a statement that the persons signing have the authority to bind the corporation.)

O. Reg. 48/01, Form 24.

Form 25

Condominium Act, 1998

NOTICE OF DEEMED RENEWAL OF LEASEHOLD INTERESTS IN A LEASEHOLD CONDOMINIUM CORPORATION (under subsection 174 (4) of the Condominium Act, 1998)

TO: All the owners in (name of condominium corporation) Leasehold Condominium Corporation No. (known as the "Corporation")

- 1. The leasehold interests in the units in (name of condominium corporation) Leasehold Condominium Corporation No. (known as the "Corporation") and their appurtenant common interests (those leasehold interests and common interests are known as the "leasehold interests") are due to expire on (set out expiry date).
2. The lessor, (name of lessor), has not given the Corporation notice of its intention to renew or not to renew the leasehold interests as required under subsection 174 (1) of the Condominium Act, 1998.
3. As a result, the lessor is deemed to have given the notice required to renew the leasehold interests for 10 years effective (set out the expiry date), subject to the same provisions that govern the leasehold interests before the renewal.
4. The leasehold interests shall be renewed, as set out above, unless the owners who own at least 80 per cent of the units cast a vote against the renewal not later than (set out the date that is four years before the expiry date).

Dated this day of

..... Leasehold Condominium Corporation No.

(signature)

(print name)

(signature)

(print name)

(Affix corporate seal or add a statement that the persons signing have the authority to bind the corporation.)

O. Reg. 48/01, Form 25.

Form 26

Condominium Act, 1998

NOTICE OF NON-RENEWAL OF LEASEHOLD INTERESTS IN A LEASEHOLD CONDOMINIUM CORPORATION (under subsection 174 (6) of the Condominium Act, 1998)

TO: (name of lessor) (known as the "Lessor")

1. The leasehold interests in the units in (name of condominium corporation) Leasehold Condominium Corporation No. (known as the "Corporation") and their appurtenant common interests (those leasehold interests and common interests are known as the "leasehold interests") are due to expire on..... (set out expiry date).

[Strike out whichever is not applicable:

2. The Lessor gave the Corporation a notice dated (set out date) of its intention to renew the leasehold interests as required under subsection 174 (1) of the Condominium Act, 1998.

OR

Under subsection 174 (4) of the Condominium Act, 1998, the Lessor was deemed to have given the Corporation the notice required to renew the leasehold interests for 10 years subject to the same provisions that govern the leasehold interests before the renewal.]

3. The owners who own at least 80 per cent of the units cast a vote against the renewal on (set out the date of the vote).

4. As a result, the leasehold interests will expire on (set out expiry date).

Dated this day of

..... Leasehold Condominium Corporation No.

(signature)

(print name)

(signature)

(print name)

(Affix corporate seal or add a statement that the persons signing have the authority to bind the corporation.)

O. Reg. 48/01, Form 26.

CONDOMINIUM ACT, 1998

REGULATION 49 OF 01

PART I DESCRIPTION	
DEFINITIONS AND GENERAL	
1	Definitions
2	Contents of description

PLANS OF SURVEY	
3	General requirements
4	Perimeter plan of survey
5	Diagrams and boundaries of units
6	Monumentation
7	Designation of levels
8	Designation of units
9	Application of O. Reg. 42/ 96
10	Appurtenant and subject interests
11	Forms on sheets

ARCHITECTURAL AND STRUCTURAL PLANS	
12	Interpretation
13	Architectural plans
14	Structural
15	Copies

PROCEDURE FOR REGISTERING THE DESCRIPTION	
16	Submission to the examiner
17	Submission to the land registrar
18	Amendment to registered description

AMENDMENT TO DESCRIPTION CREATING A PHASE	
19	Contents of amendment
20	Appurtenant and servient interests
21	Forms on sheets
22	Procedure for registering amendment
APPLICATION OF PART	
23	Application of Part

PART II REGISTRATION AND RECORDING	
DEFINITIONS AND INTERPRETATION	
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**PART I
DESCRIPTION**

DEFINITIONS AND GENERAL

Definitions

1. In this Part,

“amalgamation” means an amalgamation under Part VII of the Act and “amalgamate” has a corresponding meaning;

“architectural plans” means the architectural plans mentioned in,

- (a) clause 8 (1) (b) of the Act, in the case of a corporation that is not a vacant land condominium corporation, or
- (b) clause 157 (1) (b) of the Act, in the case of a vacant land condominium corporation;

“cut cross”, “iron bar”, “rock bar”, “rock post”, “short standard iron bar” and “standard iron bar” have the same meaning as in subsection 1 (1) of Ontario Regulation 525/91 made under the *Surveyors Act*;

“examiner” means the examiner of surveys appointed under the *Land Titles Act*;

“exclusive use portion” means a part of the common elements that is to be used by,

- (a) the owners of one or more designated units, but not all the owners, in the case of a corporation that is not a common elements condominium corporation, or
- (b) the owners of one or more common interests in the corporation, but not all the owners, in the case of common elements condominium corporation;

“exclusive use portions survey” means the part of the plans of survey that shows the exclusive use portions;

“land registrar” means the land registrar in whose registry or land titles division, as the case may be, the property is situated;

“perimeter plan of survey” means the plan of survey described in,

- (a) clause 8 (1) (a) of the Act, in the case of a corporation that is not a vacant land condominium corporation, or
- (b) clause 157 (1) (a) of the Act, in the case of a vacant land condominium corporation;

“phase” means the additional units and common elements in a phased condominium corporation that are created in accordance with Part XI of the Act upon the registration of an amendment to both the declaration and description;

“plans of survey” means the description except for the architectural plans and the structural plans;

“registered” means registered under the *Registry Act* or the *Land Titles Act*;

“structural plans” means the structural plans mentioned in,

- (a) clause 8 (1) (b) of the Act, in the case of a corporation that is not a vacant land condominium corporation, or
- (b) clause 157 (1) (b) of the Act, in the case of a vacant land condominium corporation;

“surveyor” means an Ontario land surveyor licensed under the *Surveyors Act*. O. Reg. 49/01, s. 1.

Contents of description

2. (1) A description, other than an amendment to a description, shall consist of,

- (a) Part I consisting of the perimeter plan of survey and, except in the case of a vacant land condominium corporation, the separate sheets of the plans of survey that designate the units, if any;
- (b) Part II consisting of the exclusive use portions survey, if the property includes exclusive use portions;
- (c) Part III consisting of the architectural plans, if any;
- (d) Part IV consisting of the structural plans, if any; and
- (e) as many other parts as the surveyor preparing the plans of survey considers appropriate. O. Reg. 49/01, s. 2 (1).

(2) The first sheet in the description, other than an amendment to the description, shall be the perimeter plan of survey and shall include an index that shows, for each part of the description,

- (a) the number of the part;
- (b) the number of sheets in the part or, if the part does not contain any sheets, the indication “NIL” or “RIEN”; and
- (c) a brief explanation of the contents of the part. O. Reg. 49/01, s. 2 (2).

(3) The sheets in each part of the description, other than an amendment to the description, shall be numbered consecutively beginning with the number “1”. O. Reg. 49/01, s. 2 (3).

- (4) Each sheet in the description, other than an amendment to the description, shall indicate,
 - (a) the number of the sheet and the total number of sheets in the part in which it is located;
 - (b) the part in which it is located; and
 - (c) if the sheet is in the plans of survey, the total number of parts in the description. O. Reg. 49/01, s. 2 (4).
- (5) If the sheet shows the certificate of registration signed by the land registrar and described in clause 11 (1) (a), the information described in clauses (4) (a), (b) and (c) shall be in a location adjacent to the certificate. O. Reg. 49/01, s. 2 (5).
- (6) In the case of a phased condominium corporation and sheets of the plans of survey, the information described in clauses (4) (a), (b) and (c) shall be placed in the column labelled "Sheet/Part" or "Feuille/partie" in one of the following tables:

Sheet/Part	Date

Feuille/partie	Date

O. Reg. 49/01, s. 2 (6).

- (7) The table shall contain the number of blank rows following the entry described in subsection (6) that corresponds to the number of phases that the declarant is entitled to create in the corporation. O. Reg. 49/01, s. 2 (7).

PLANS OF SURVEY

General requirements

3. Plans of survey shall be prepared from a current survey as described in subsection 1 (2) of Ontario Regulation 43/96 and shall be in accordance with this Regulation. O. Reg. 49/01, s. 3.

Perimeter plan of survey

4. (1) If a description is being registered to effect an amalgamation and the properties of the amalgamating corporations are not contiguous, each sheet of the perimeter plan of survey in the description shall include a key plan illustrating the locations of the properties of the amalgamating corporations in relation to one another. O. Reg. 49/01, s. 4 (1).

(2) In addition to the requirements of clause 8 (1) (a) of the Act, the perimeter plan of survey in the case of a common elements condominium corporation shall show the perimeter of the structures on the common elements. O. Reg. 49/01, s. 4 (2).

Diagrams and boundaries of units

5. (1) Subsections (2) to (6) do not apply to a vacant land condominium corporation. O. Reg. 49/01, s. 5 (1).

(2) The diagrams of the units as described in clause 8 (1) (d) of the Act shall be shown on,

- (a) the perimeter plan of survey, except in the case of a phased condominium corporation;
- (b) the separate sheets of the plans of survey that designate the units; or
- (c) the perimeter plan of survey, except in the case of a phased condominium corporation, and the separate sheets of the plans of survey that designate the units. O. Reg. 49/01, s. 5 (2).

(3) The sheets of the plans of survey that designate the units shall refer to Schedule C to the declaration. O. Reg. 49/01, s. 5 (3).

(4) The specification of the boundaries of each unit as described in clause 8 (1) (c) of the Act shall be shown on plan views and cross sections but no plan view or cross section is required for more than one unit with identical boundaries to other units. O. Reg. 49/01, s. 5 (4).

(5) The plan views and cross sections shall be shown on the sheets of the plans of survey that designate the units or, if it is impractical to do so, on a separate sheet of the plans of survey. O. Reg. 49/01, s. 5 (5).

(6) If the plan views and cross sections are shown on a separate sheet of the plans of survey, the sheets of the plans of survey that designate the units shall include a cross-reference to the separate sheet. O. Reg. 49/01, s. 5 (6).

(7) Except with respect to units in a vacant land condominium corporation, section or perspective drawings, sufficiently accurate to portray the vertical relationship of all levels, shall be drawn on each sheet of the plans of survey that designates the units or that shows the exclusive use portions. O. Reg. 49/01, s. 5 (7).

Monumentation

6. (1) In this section,

"monument" includes a monument mentioned in Ontario Regulation 525/91 made under the *Surveyors Act* and any other thing, device or object used to mark or witness a boundary of surveyed land. O. Reg. 49/01, s. 6 (1).

(2) Every exterior angle of the property shall be defined by a standard iron bar, a short standard iron bar, a rock bar, a rock post or a cut cross. O. Reg. 49/01, s. 6 (2).

(3) Walls, floors, ceilings or other physical features shall be adopted as the monuments that control the boundaries of exclusive use portions if the boundaries are located within the building or within six metres from a building situated on the property. O. Reg. 49/01, s. 6 (3).

(4) In the case of a corporation that is not a vacant land condominium corporation, subject to subsections (5) and (6), walls, floors, ceilings or other physical features shall be adopted as the monuments that control the boundaries of units if the boundaries are located within the building or within six metres from a building situated on the property. O. Reg. 49/01, s. 6 (4).

(5) If, under subsection 6 (2) of Ontario Regulation 48/01, the lowermost floor of a building does not have to be in place at the time of registration of the description and if it is not in place at that time, the lower limit of units on the lowermost floor shall be defined by a horizontal plane defined by measurement and referenced to existing physical features of the property. O. Reg. 49/01, s. 6 (5).

(6) If, under subsection 6 (3) of Ontario Regulation 48/01, the walls between units or between units and the common elements of a building do not have to be in place at the time of registration of the description and if they are not in place at that time, the boundaries of units shall be defined by cut crosses or a vertical plane defined by measurement and referenced to existing physical features of the property. O. Reg. 49/01, s. 6 (6).

(7) Except in a vacant land condominium corporation, an angle in the boundary of a unit that is not defined by a monument mentioned in subsection (4), (5) or (6) shall be defined by an iron bar, a rock post or a cut cross. O. Reg. 49/01, s. 6 (7).

(8) In a vacant land condominium corporation,

(a) at least one-quarter of the total number of corners and angles in the boundaries of the property and the units shall be defined by a standard iron bar, a rock bar or a rock post;

(b) the corners and angles in the boundaries of the property and the units not defined by a monument mentioned in clause (a) shall be defined by an iron bar or a cut cross; and

(c) monuments shall be planted at points not more than 150 metres apart. O. Reg. 49/01, s. 6 (8).

(9) An angle in the boundary of an exclusive use portion that is not defined by a monument mentioned in subsection (3) shall be defined by an iron bar, a rock post or a cut cross. O. Reg. 49/01, s. 6 (9).

(10) Despite subsections (7), (8) and (9), monumentation of exclusive use portions or units intended for parking purposes under those subsections may be limited to the angles in the exterior boundaries of tiers of those portions or units, as the case may be. O. Reg. 49/01, s. 6 (10).

(11) Subject to this section, Ontario Regulation 525/91, except sections 5 to 9, applies to properties. O. Reg. 49/01, s. 6 (11).

Designation of levels

7. (1) In the plans of survey, the levels of the property on or above ground level shall be numbered consecutively, in ascending order, beginning with the number "1" and the levels of the property below ground level shall be lettered consecutively, in descending order and in alphabetic sequence, beginning with the letter "A". O. Reg. 49/01, s. 7 (1).

(2) The plan of survey of each level of the property shall be on a separate sheet of the plans of survey that is designated by the word "Level" or "Niveau" followed by the number or letter of the level, except that the same sheet may include the plan of survey of two or more levels if it is possible to do so while complying with the requirements for registration of the description. O. Reg. 49/01, s. 7 (2).

Designation of units

8. (1) In the plans of survey, every unit of the property shall be designated by the word "UNIT" or the words "PARTIE PRIVATIVE" followed by a number. O. Reg. 49/01, s. 8 (1).

(2) The units shall be numbered consecutively beginning with the number "1" on each level but there shall not be more than one unit designated on each level by the same number. O. Reg. 49/01, s. 8 (2).

(3) The exclusive use portions shall be designated by numbers or letters or by numbers and letters. O. Reg. 49/01, s. 8 (3).

(4) Subsection (3) does not apply to exclusive use portions, to which the sole access is directly from the units whose owners are entitled to use the portions, if they are clearly shown by light lines of uniform width, which may be broken, on the plans of survey. O. Reg. 49/01, s. 8 (4).

(5) Subject to subsection (4), the limits of units, common elements and exclusive use portions shall be shown on the plans of survey by solid lines that are significantly heavier than the lines described in section 17 of Ontario Regulation 42/96. O. Reg. 49/01, s. 8 (5).

Application of O. Reg. 42/96

9. (1) Sections 3 to 8, clauses 13 (1) (a) to (f), subsection 13 (3) and sections 15 to 28 of Ontario Regulation 42/96 do not apply to the diagrams of the units as described in clause 8 (1) (d) of the Act or to the exclusive use portions survey. O. Reg. 49/01, s. 9 (1).

(2) Despite subsection (1), clauses 13 (1) (b) and (c), subsection 13 (3) and sections 15, 16 and 21 of Ontario Regulation 42/96 apply to the diagrams of the units as described in clause 8 (1) (d) of the Act or to the exclusive use portions survey if the boundaries of the units or exclusive use portions, as the case may be, are located six metres or more from a building situated on the property. O. Reg. 49/01, s. 9 (2).

Appurtenant and subject interests

10. (1) All interests that are appurtenant to the property, or that will be upon the registration of the declaration and description, shall be shown on the perimeter plan of survey in light, broken or unbroken, lines of uniform width and shall be labelled unless they are,

(a) described as a subdivision unit as defined in subsection 1 (1) of Ontario Regulation 43/96; or

(b) described in an instrument registered with the approval of the examiner of surveys. O. Reg. 49/01, s. 10 (1).

(2) All easements and similar interests to which the property is subject, or will be upon the registration of the declaration and description, shall be shown on the perimeter plan of survey in light, broken or unbroken, lines of uniform width and shall be labelled. O. Reg. 49/01, s. 10 (2).

(3) Easements that will merge in law upon the registration of the declaration and description, as set out in the solicitor's statement in Schedule A to the declaration, do not have to be shown on the perimeter plan of survey. O. Reg. 49/01, s. 10 (3).

Forms on sheets

11. (1) Each sheet of the plans of survey, except for the sheets of the exclusive use portions survey, shall show,

- (a) in the upper right corner, the certificate of registration signed by the land registrar in the form that is required by Ontario Regulation 48/01;
- (b) immediately below the certificate of registration, Form 3 of Ontario Regulation 43/96, if the approval of the examiner is required;
- (c) immediately below the certificate of registration, or Form 3 of Ontario Regulation 43/96 if the approval of the examiner is required, the certificate signed by a surveyor in the form that is required by Ontario Regulation 48/01,
 - (i) stating that the survey and plan are correct and in accordance with the Act, the *Surveys Act*, the *Surveyors Act* and the *Land Titles Act* (or the *Registry Act*, as the case may be) and the regulations made under them,
 - (ii) stating the date on which the survey was completed,
 - (iii) except in the case of a vacant land condominium corporation, if the sheet designates units, stating that the diagrams of the units on the plan are substantially accurate as required by clause 8 (1) (f) of the Act, and
 - (iv) if the plan is of Crown land and was prepared under the instructions of the Surveyor General of Ontario, stating that the plan and the field notes were prepared from an actual survey performed under the surveyor's personal supervision and that the surveyor was present on the site during the progress of the survey;
- (d) immediately below the certificate mentioned in clause (c), the notation "Declaration registered as Number" if the registered declaration is in English or "Déclaration enregistrée sous le numéro" if the registered declaration is in French;
- (e) except in the case of a description that is being registered to effect an amalgamation, the certificate by the declarant in the form that is required by Ontario Regulation 48/01 stating that the property included in the plans of survey has been laid out into,
 - (i) units and common elements in accordance with the declarant's instructions, except in the case of a common elements condominium corporation, or
 - (ii) common elements in accordance with the declarant's instructions, in the case of a common elements condominium corporation; and
- (f) in the case of a description that is being registered to effect an amalgamation, the certificate in the form that is required by Ontario Regulation 48/01 signed by the persons authorized to sign on behalf of the amalgamating corporations and stating that the property included in the plans of survey has been laid out into units and common elements in accordance with the instructions of the corporations. O. Reg. 49/01, s. 11 (1).

(2) Each sheet of the perimeter plan of survey shall show immediately below the notation described in clause (1) (d), Form 3 of Ontario Regulation 48/01 that is a description of all interests that are appurtenant to the property and all easements or similar interests to which the property is subject. O. Reg. 49/01, s. 11 (2).

(3) Each sheet of the exclusive use portions survey shall show,

- (a) the identification of the condominium plan in accordance with subsection 27 (2) except for the number assigned as part of the name of the corporation under subsection 27 (3); and
- (b) the certificate signed by a surveyor in the form that is required by Ontario Regulation 48/01 stating that the sheet of that survey accurately shows the extent and location of the portions. O. Reg. 49/01, s. 11 (3).

ARCHITECTURAL AND STRUCTURAL PLANS

Interpretation

12. In sections 13 and 14, drawings are current to a certain date if they incorporate or include change orders, change directives, supplemental instructions and all other changes of which the person who prepared the drawings knows as of that certain date. O. Reg. 49/01, s. 12.

Architectural plans

13. (1) In the case of a corporation that is not a common elements condominium corporation or a vacant land condominium corporation, the architectural plans shall be,

- (a) copies of the architectural drawings of the buildings on the property prepared by a person who holds a certificate of practice as defined in the *Architects Act* that are current to the date of registration; or
- (b) drawings that, as of the date of registration, contain sufficient information to enable the buildings to be constructed and that show all changes made to the date of registration, if copies of the architectural drawings described in clause (a) are unavailable or inadequate for the purposes of construction or if the building code made under the *Building Code Act, 1992* or its successor does not require those drawings for the buildings. O. Reg. 49/01, s. 13 (1).

(2) In the case of a common elements condominium corporation or a vacant land condominium corporation, the architectural plans shall be,

- (a) copies of the architectural drawings of the buildings and structures included in the common elements prepared by a person who holds a certificate of practice as defined in the *Architects Act* that are current to the date of registration; or

(b) drawings that, as of the date of registration, contain sufficient information to enable the buildings and the structures included in the common elements to be constructed and that show all changes made to the date of registration, if copies of the architectural drawings described in clause (a) are unavailable or inadequate for the purposes of construction or if the building code made under the *Building Code Act, 1992* or its successor does not require those drawings for the buildings and structures. O. Reg. 49/01, s. 13 (2).

(3) Each sheet of the architectural plans shall show the identification of the condominium plan in accordance with subsection 27 (2) except for the number assigned as part of the name of the corporation under subsection 27 (3). O. Reg. 49/01, s. 13 (3).

Structural plans

14. (1) In the case of a corporation that is not a common elements condominium corporation or a vacant land condominium corporation, the structural plans shall be copies of the structural engineering drawings of the buildings on the property prepared by a person who holds a certificate of authorization as defined in the *Professional Engineers Act* that are current to the date of registration. O. Reg. 49/01, s. 14 (1).

(2) In the case of a common elements condominium corporation or a vacant land condominium corporation, the structural plans shall be copies of the structural engineering drawings of the buildings and structures included in the common elements prepared by a person who holds a certificate of authorization as defined in the *Professional Engineers Act* that are current to the date of registration. O. Reg. 49/01, s. 14 (2).

(3) Each sheet of the structural plans shall show the identification of the condominium plan in accordance with subsection 27 (2) except for the number assigned as part of the name of the corporation under subsection 27 (3). O. Reg. 49/01, s. 14 (3).

Copies

15. The architectural and structural plans shall not include any notes, words or symbols that indicate that the right to make or distribute copies is in any way restricted. O. Reg. 49/01, s. 15.

PROCEDURE FOR REGISTERING THE DESCRIPTION

Submission to the examiner

16. (1) In addition to the requirements of subsection 6 (6) of Ontario Regulation 43/96, if the description is submitted to the examiner for approval, a copy of the proposed declaration shall be submitted and the examiner may require one set of paper prints of the architectural plans and one set of paper prints of the structural plans, if any, to be submitted. O. Reg. 49/01, s. 16 (1).

(2) In the case of a corporation that is not a vacant land condominium corporation, if the examiner requires a description to be submitted for approval, the examiner is not required to approve the items specified in clause 8 (1) (b), clause 8 (1) (f) if applicable, and clauses 8 (1) (g) and (h) of the Act that are included in a complete submission but the examiner is required to approve the items specified in clause 8 (1) (a) and, if applicable, clauses 8 (1) (c) and (d) of the Act. O. Reg. 49/01, s. 16 (2).

(3) In the case of a vacant land condominium corporation, if the examiner requires a description to be submitted for approval, the examiner is not required to approve the items specified in clauses 157 (1) (b), (d) and (e) of the Act that are included in a complete submission but the examiner is required to approve the item specified in clause 157 (1) (a) of the Act. O. Reg. 49/01, s. 16 (3).

Submission to the land registrar

17. (1) In addition to the requirements of clauses 7 (2) (b) and (c) and subsection 7 (3) of Ontario Regulation 43/96, the person registering the description shall deliver to the land registrar,

- (a) the original plans of survey and three paper prints of them signed by the surveyor;
 - (b) the one or two paper prints of the plans of survey that are signed by the surveyor and required by subsection 51 (60) of the *Planning Act*;
 - (c) one set of paper prints of the architectural plans, if any; and
 - (d) one set of paper prints of the structural plans, if any. O. Reg. 49/01, s. 17 (1).
- (2) Upon registering the description, the land registrar shall,
- (a) fill in the date of registration of the description in the column labelled "Date" in the table described in subsection 2 (6), if any, that appears on each sheet of the plans of survey;
 - (b) complete the certificate of registration mentioned in clause 11 (1) (a) on the plans of survey and fill in the particulars of registration of the description on the paper prints of the plans of survey;
 - (c) fill in the registration number of the declaration in the notation described in clause 11 (1) (d) on the plans of survey and the paper prints of them;
 - (d) fill in the identification of the condominium plan in accordance with subsection 27 (2) on,
 - (i) each sheet of the exclusive use portions survey and the paper prints of it,
 - (ii) each sheet of the paper prints of the architectural plans, if any, and
 - (iii) each sheet of the paper prints of the structural plans, if any;
 - (e) retain the original plans of survey, one paper print of them and the paper prints of the architectural plans and the structural plans, if any;
 - (f) transmit one paper print of the plans of survey to the Ontario Property Assessment Corporation;
 - (g) transmit the one or two paper prints of the plans of survey that are described in subsection 51 (60) of the *Planning Act* to the approval authority within the meaning of that subsection;

- (h) transmit the paper print of the plans of survey submitted under subsection 7 (3) of Ontario Regulation 43/96 to the Association of Ontario Land Surveyors; and
- (i) if the registrant has delivered to the land registrar additional copies of the plans of survey at the time of registration, fill in the particulars of registration on them and return them to the registrant. O. Reg. 49/01, s. 17 (2).

Amendment to registered description

18. In addition to the requirements of subsection 17 (2), upon registering an amendment to a registered description, other than an amendment creating a phase, the land registrar shall,

- (a) mark the original portion of the description that is superseded by the amendment to show that an amendment has been registered in substitution for it;
- (b) retain in the land registry office and make available for inspection when required the original portion of the description that is superseded by the amendment;
- (c) integrate the amendment with the description but mark the amendment clearly to show the fact that it is an amendment and the date of its registration;
- (d) make the entries in the Condominium Register that are required to reflect the registration of the amendment; and
- (e) transmit one paper print of the portion of the description, as amended by the amendment, to each of the Ontario Property Assessment Corporation and the approval authority within the meaning of subsection 51 (60) of the *Planning Act*. O. Reg. 49/01, s. 18.

AMENDMENT TO DESCRIPTION CREATING A PHASE

Contents of amendment

- 19.** (1) An amendment to a description creating a phase shall consist of,
- (a) the perimeter plan of survey of the land included in the phase;
 - (b) separate sheets of the plans of survey that designate the units included in the phase;
 - (c) the exclusive use portions survey for the land included in the phase, if the land includes exclusive use portions;
 - (d) architectural plans, if any, of the buildings included in the phase, shown as the next available part in the description and prepared in accordance with sections 13 and 15; and
 - (e) structural plans, if any, of the buildings included in the phase, shown as the next available part in the description and prepared in accordance with sections 14 and 15. O. Reg. 49/01, s. 19 (1).
- (2) The perimeter plan of survey of the land included in the phase shall not show any units and shall include a key plan illustrating the location of the phase in relation to the existing property. O. Reg. 49/01, s. 19 (2).
- (3) The first sheet of the perimeter plan of survey of the land included in the phase shall include an index that shows the information described in clauses 2 (2) (a), (b) and (c) for each part included in the description as amended by the amendment. O. Reg. 49/01, s. 19 (3).
- (4) The sheets in the perimeter plan of survey of the land included in the phase shall be numbered consecutively beginning with the next consecutive number after the end of the perimeter plan of survey contained in the description for the existing property. O. Reg. 49/01, s. 19 (4).
- (5) The separate sheets of the plans of survey that designate the units included in the phase shall be numbered consecutively beginning with the next consecutive number after the end of the separate sheets of the plans of survey that designate the units included in the existing property, taking into account the integration described in clause 22 (1) (a). O. Reg. 49/01, s. 19 (5).
- (6) The sheets in the exclusive use portions survey for the land included in the phase shall be numbered consecutively beginning with the next consecutive number after the end of the exclusive use portions survey contained in the description for the existing property. O. Reg. 49/01, s. 19 (6).
- (7) Each sheet that the amendment to the description creating a phase will add to the plans of survey shall,
- (a) include one of the tables in the form set out in subsection 2 (6) which shall be in a location adjacent to the certificate of registration signed by the land registrar and described in clause 11 (1) (a) if the sheet shows the certificate; and
 - (b) indicate, in the column labelled “Sheet/Part” or “Feuille/partie” in the table,
 - (i) the number of the sheet and the total number of sheets in the part of the description to which it is to be added, and
 - (ii) the part in which the sheet is located and the total number of parts in the description. O. Reg. 49/01, s. 19 (7).
- (8) The table shall contain the number of blank rows following the entry described in clause (7) (b) that corresponds to the number of phases that the declarant is entitled to create in the corporation after the current phase. O. Reg. 49/01, s. 19 (8).

Appurtenant and servient interests

- 20.** (1) Section 10 does not apply to the perimeter plan of survey of the land included in the phase. O. Reg. 49/01, s. 20 (1).
- (2) All interests that are appurtenant to the land included in a phase, or that will be upon the registration of the amendments to the declaration and description creating the phase, shall be shown on the perimeter plan of survey of the land included in the phase in light, broken or unbroken, lines of uniform width and shall be labelled unless they are,

(a) described as a subdivision unit as defined in subsection 1 (1) of Ontario Regulation 43/96; or

(b) described in an instrument registered with the approval of the examiner of surveys. O. Reg. 49/01, s. 20 (2).

(3) All easements and similar interests to which the land included in a phase is subject, or will be upon the registration of the amendments to the declaration and description creating the phase, shall be shown on the perimeter plan of survey of the land included in the phase in light, broken or unbroken, lines of uniform width and shall be labelled. O. Reg. 49/01, s. 20 (3).

(4) Easements that will merge in law upon the registration of the amendments to the declaration and description creating a phase, as set out in the solicitor's statement in the amendment to Schedule A to the declaration, do not have to be shown on the perimeter plan of survey of the land included in the phase. O. Reg. 49/01, s. 20 (4).

Forms on sheets

21. (1) Clauses 11 (1) (a), (b), (c) and (d) apply to each sheet that the amendment to the description creating a phase will add to that part of the plans of survey, other than the exclusive use portions survey, but clauses 11 (1) (e) and (f) and subsection 11 (2) do not apply to those sheets. O. Reg. 49/01, s. 21 (1).

(2) In addition to the requirements of subsection 11 (1), each sheet that the amendment to the description creating a phase will add to that part of the plans of survey, other than the exclusive use portions survey, shall show the certificate by the declarant in the form that is required by Ontario Regulation 48/01 stating that the property included in the phase shown in the amendment to the plans of survey has been laid out into units and common elements in accordance with the declarant's instructions. O. Reg. 49/01, s. 21 (2).

(3) In addition to the requirements of subsection 11 (1), each sheet that the amendment to the description creating a phase will add to the perimeter plan of survey shall show, immediately below the notation described in clause 11 (1) (d), Form 3 of Ontario Regulation 48/01 that is a description of all interests that are appurtenant to the land included in the phase and all easements or similar interests to which the land is subject. O. Reg. 49/01, s. 21 (3).

(4) Subsection 11 (3) applies to each sheet that the amendment to the description creating a phase will add to the exclusive use portions survey. O. Reg. 49/01, s. 21 (4).

Procedure for registering amendment

22. (1) Upon registration of an amendment to a description creating a phase, the surveyor for the declarant shall attend at the land registry office and, under the supervision of the land registrar or the examiner of surveys,

(a) integrate the sheets of the amendment into the description so that,

(i) the sheets of the perimeter plan of survey of the land included in the phase follow immediately after the end of the perimeter plan of survey contained in the description before the registration of the amendment,

(ii) the separate sheets of the plans of survey that designate the units included in the phase follow immediately after the end of the separate sheets of the plans of survey that designate the units included in the property before the registration of the amendment, and

(iii) the sheets of the exclusive use portions survey for the land included in the phase follow immediately after the end of the exclusive use portions survey contained in the description before the registration of the amendment;

(b) amend the numbering of the sheets and the parts in the description to reflect the integration described in clause (a);

(c) cross off the most recent index described in subsection 2 (2) included in the description and insert a reference to the sheet of the perimeter plan of survey on which the updated index appears;

(d) cross off the most recent row included in the table described in subsection 2 (6) that appears on each sheet of the plans of survey, except for the sheets of the amendment, but ensure that row still remains legible; and

(e) indicate in the column labelled "Sheet/Part" or "Feuille/partie" in the next available row in each of the tables described in clause (d),

(i) the number of the sheet and the total number of sheets in the part of the description in which the table appears, and

(ii) the part in which the sheet is located and the total number of parts in the description. O. Reg. 49/01, s. 22 (1).

(2) In addition to the requirements of subsection 17 (2), upon registering an amendment to a description creating a phase, the land registrar shall,

(a) fill in the date of registration of the amendment in the column labelled "Date" in the table described in subsection 2 (6) that appears on each sheet of the plans of survey after the changes described in clause (1) (e) have been made; and

(b) make the entries in the Condominium Register that are required to reflect the registration of the amendment. O. Reg. 49/01, s. 22 (2).

APPLICATION OF PART

Application of Part

23. (1) This Part does not apply to descriptions and amendments to descriptions if, before the day Part II of the Act comes into force, the descriptions and amendments to descriptions were acceptable for registration except for not having the approval or exemption from approval under the *Planning Act* required by section 50 of the *Condominium Act*. O. Reg. 49/01, s. 23 (1).

(2) This section is revoked on the 180th day after the day Part II of the Act comes into force. O. Reg. 49/01, s. 23 (2).

PART II REGISTRATION AND RECORDING

DEFINITIONS AND INTERPRETATION

Definitions

- 24.** (1) In this Part,
- “amalgamation” means an amalgamation under Part VII of the Act and “amalgamate” has a corresponding meaning;
- “Common Elements and General Index” means the part of the Condominium Register for the property established by the Director of Titles and known as the Common Elements and General Index;
- “Condominium Corporations Index” means the Condominium Corporations Index mentioned in subsection 3 (3) of the Act;
- “Condominium Register” means the Condominium Register mentioned in subsection 3 (4) of the Act;
- “Constitution Index” means the part of the Condominium Register for the property established by the Director of Titles and known as the Constitution Index;
- “easement” means an easement, right of way, right or licence in the nature of an easement, *profit à prendre* or other incorporeal hereditament, but does not include any of those that arise by operation of law;
- “land registrar” means the land registrar in whose registry or land titles division, as the case may be, the property is situated;
- “parcel of tied land” means a parcel of land described in clause 139 (1) (a) of the Act in the case of a common elements condominium corporation and to which a common interest of an owner in the corporation attaches under clause 139 (2) (a) of the Act;
- “Property Index” means the part of the Condominium Register for the property established by the Director of Titles and known as the Property Parcel Register if the *Land Titles Act* applies to the property and the Property Abstract Index if the *Registry Act* applies to the property;
- “standard condominium corporation” means a freehold condominium corporation that is not a common elements condominium corporation or a vacant land condominium corporation;
- “unit” includes the common interest appurtenant to the unit;
- “Unit Index” means the part of the Condominium Register for the property established by the Director of Titles and known as the Unit Register or the Parcel Register if the *Land Titles Act* applies to the property and the Unit Index if the *Registry Act* applies to the property. O. Reg. 49/01, s. 24 (1).
- (2) For the purposes of this Part, the records of a property are automated if the system of automated information recording and retrieval and property mapping described in section 15 of the *Land Registration Reform Act* is available for the records with respect to the property in the appropriate land registry office. O. Reg. 49/01, s. 24 (2).

Condominium Register

25. For the purposes of the *Land Titles Act* and the *Registry Act*, the Condominium Register shall be deemed to be a register or an abstract index, respectively, for the parcel of land that comprises the property. O. Reg. 49/01, s. 25.

DECLARATION AND DESCRIPTION

Interpretation

26. In sections 27, 28 and 29, a declaration or a description does not include an amendment to a declaration or a description. O. Reg. 49/01, s. 26.

Land registrar’s duties before recording

- 27.** (1) If a declaration and description are received for registration, the land registrar shall,
- (a) endorse on the declaration and description the day, hour and minute of receipt, which shall be the same for both the declaration and the description;
 - (b) assign to the declaration a registration number in the series of numbers used for instruments dealing with land;
 - (c) assign an identification to the description in accordance with subsection (2);
 - (d) assign a name to the corporation in accordance with subsection (3); and
 - (e) record in the Condominium Corporations Index the particulars with reference to the registrations that the Director of Titles specifies. O. Reg. 49/01, s. 27 (1).
- (2) The identification that the land registrar assigns to the description shall consist of,
- (a) if the declaration and description are in English, the following items in the following order:
 1. The name of the land titles or registry division in which the land described in the description is situated, excluding the number of the division.
 2. The applicable words in English specified in subsection (4) for the type of corporation involved.
 3. The words “Condominium Plan No.”.
 4. The number assigned as part of the name of the corporation under paragraph 4 of clause (3) (a) ; or

- (b) if the declaration and description are in French and are capable of being registered in that language, the following items in the following order:
1. The words “Plan d’association condominiale”.
 2. The applicable words in French specified in subsection (4) for the type of corporation involved.
 3. The number assigned as part of the name of the corporation under paragraph 3 of clause (3) (b).
 4. The word “de” and the name of the land titles or registry division in which the land described in the description is situated, excluding the number of the division. O. Reg. 49/01, s. 27 (2).
- (3) The name that the land registrar assigns to the corporation shall consist of,
- (a) if the declaration and description are in English, the following items in the following order:
1. The name of the land titles or registry division in which the land described in the description is situated, excluding the number of the division.
 2. The applicable words in English specified in subsection (4) for the type of corporation involved.
 3. The words “Condominium Corporation No.”.
 4. The next available consecutive number; or
- (b) if the declaration and description are in French and are capable of being registered in that language, the following items in the following order:
1. The words “Association condominiale”.
 2. The applicable words in French specified in subsection (4) for the type of corporation involved.
 3. The next available consecutive number.
 4. The word “de” and the name of the land titles or registry division in which the land described in the description is situated, excluding the number of the division. O. Reg. 49/01, s. 27 (3).
- (4) The words mentioned in subsections (2) and (3) for the type of corporation involved are,
- (a) the word “Standard” or “ordinaire” in the case of a standard condominium corporation;
 - (b) the words “Common Elements” or “de parties communes” in the case of a common elements condominium corporation;
 - (c) the words “Vacant Land” or “de terrain nu” in the case of a vacant land condominium corporation; and
 - (d) the word “Leasehold” or “de propriété à bail” in the case of a leasehold condominium corporation. O. Reg. 49/01, s. 27 (4).
- (5) Subject to this Regulation, no person may change the name of a corporation after the land registrar assigns it. O. Reg. 49/01, s. 27 (5).
- (6) Amalgamating corporations shall continue after an amalgamation as the amalgamated corporation with the name that the land registrar assigns under this section. O. Reg. 49/01, s. 27 (6).

Land registrar’s recording duties

28. (1) If a land registrar receives, for registration under the *Land Titles Act*, a declaration and description for a freehold condominium corporation and if the records of the property are not automated, the land registrar shall,

- (a) record the declaration and description in,
 - (i) the existing parcel register for the land that includes the property, except if the declaration and description are being registered to effect an amalgamation, or
 - (ii) the Constitution Index, the Common Elements and General Index, and the Property Index for each of the amalgamating corporations, if the declaration and description are being registered to effect an amalgamation;
- (b) re-enter the property in the Property Index which, if the declaration and description are being registered to effect an amalgamation, is the Property Index for the amalgamated corporation;
- (c) record the declaration and description in the Constitution Index;
- (d) record, in the Common Elements and General Index and in order of registration,
 - (i) all instruments affecting the property, including the declaration and description, except if the declaration and description are being registered to effect an amalgamation, or
 - (ii) all instruments registered in the Common Elements and General Index for each of the amalgamating corporations, if the declaration and description are being registered to effect an amalgamation;
- (e) subject to subsection (4), establish a Unit Index for each unit, if any, included in the property;

- (f) if the declaration and description are being registered to effect an amalgamation, re-enter, in the Unit Index for each unit included in the property of the amalgamated corporation and in order of registration, all instruments recorded against the corresponding unit of the amalgamating corporations; and
- (g) if the declaration and description are for a common elements condominium corporation, record, in the parcel register for each parcel of tied land, the notice and the copy of the certificate described in clause 139 (2) (b) of the Act that are Schedules I and J respectively to the declaration. O. Reg. 49/01, s. 28 (1).
- (2) If a land registrar receives, for registration under the *Land Titles Act*, a declaration and description for a leasehold condominium corporation and if the records of the property are not automated, the land registrar shall,
- (a) record the declaration and description on the leasehold parcel for the property;
- (b) record, in the Property Index and in the Common Elements and General Index and in order of registration, all instruments affecting the leasehold estate in the property, including the declaration and description;
- (c) record the declaration and description in the Constitution Index; and
- (d) establish a Unit Index for each unit included in the property. O. Reg. 49/01, s. 28 (2).
- (3) If a land registrar receives, for registration under the *Registry Act*, a declaration and description and if the records of the property are not automated, the land registrar shall,
- (a) record the declaration and description in,
- (i) the existing abstract index for the land that includes the property, except if the declaration and description are being registered to effect an amalgamation, or
- (ii) the Constitution Index, the Common Elements and General Index, and the Property Index for each of the amalgamating corporations, if the declaration and description are being registered to effect an amalgamation;
- (b) prepare a Property Index for the property;
- (c) if the declaration and description are not being registered to effect an amalgamation, record in the Property Index,
- (i) the certificate of title under the *Certification of Titles Act*, making a general reference to the exceptions, limitations, qualifications and reservations in Schedule B to the certificate,
- (ii) the instruments mentioned in Schedule C to the certificate,
- (iii) all instruments registered after the effective date of the certificate and before the date of registration of the declaration and description, and
- (iv) the declaration and description;
- (d) if the declaration and description are being registered to effect an amalgamation, record in the Property Index a reference to the Property Indexes of each of the amalgamating corporations;
- (e) record the declaration and description in the Constitution Index;
- (f) record the declaration and description in the Common Elements and General Index;
- (g) subject to subsection (4), establish a Unit Index for each unit, if any, included in the property; and
- (h) if the declaration and description are for a common elements condominium corporation, record, in the abstract index of each parcel of tied land, the notice and the copy of the certificate described in clause 139 (2) (b) of the Act that are Schedules I and J respectively to the declaration. O. Reg. 49/01, s. 28 (3).
- (4) If the declaration and description are being registered to effect an amalgamation, the Unit Index that the land registrar establishes under clause (1) (e) or (3) (g) shall be in accordance with the list of all units in the amalgamated corporation that is set out in Schedule C to the declaration. O. Reg. 49/01, s. 28 (4).
- (5) If a land registrar receives, for registration, a declaration and description that are not being registered to effect an amalgamation and if the records of the property are automated, the land registrar shall,
- (a) record the declaration and description in,
- (i) the existing parcel register for the land that includes the property, if the declaration and description are for a freehold condominium corporation, or
- (ii) the existing leasehold parcel register for the land that includes the property, if the declaration and description are for a leasehold condominium corporation;
- (b) establish a Unit Index for each unit included in the property;
- (c) re-enter the property in the Unit Index for each unit included in the property; and
- (d) record the declaration and description in the Unit Index for each unit included in the property. O. Reg. 49/01, s. 28 (5).

(6) If a land registrar receives, for registration, a declaration and description that are being registered to effect an amalgamation and if the records of the property are automated, the land registrar shall,

- (a) record the declaration and description in the Unit Index for each unit included in the amalgamating corporations;
- (b) establish a Unit Index for each unit included in the property in accordance with the list of all units in the amalgamated corporation that is set out in Schedule C to the declaration; and
- (c) re-enter, in the Unit Index for the corresponding units of the amalgamated corporation and in order of registration, all instruments affecting the units of the amalgamating corporations, including the declaration and description. O. Reg. 49/01, s. 28 (6).

(7) If a land registrar receives a declaration and description for a common elements condominium corporation for registration and if the records of the property are automated, the land registrar shall,

- (a) record the declaration and description in the existing parcel register for the land that includes the property;
- (b) establish a new parcel register for the property;
- (c) re-enter the property in the new parcel register; and
- (d) record, in the parcel register for each parcel of tied land, the declaration, the description, the notice described in subclause 139 (2) (b) (i) of the Act that is Schedule I to the declaration and the copy of the certificate described in subclause 139 (2) (b) (ii) of the Act that is Schedule J to the declaration. O. Reg. 49/01, s. 28 (7).

Extension of *Land Titles Act*

29. (1) If a declaration and description are registered in an area to which the *Land Titles Act* does not apply, if the application of that Act is subsequently extended to the area and if the land registry office for the land titles division is combined with the land registry office for the registry division,

- (a) the land registrar shall establish a new Condominium Register when the first declaration and description are registered in the land registry office for the land titles division; and
- (b) the Condominium Corporations Index previously established shall be continued. O. Reg. 49/01, s. 29 (1).

(2) If a declaration and description are registered in an area to which the *Land Titles Act* does not apply, the application of that Act is subsequently extended to the area and the land registry office for the land titles division is not combined with the land registry office for the registry division, the land registrar shall not make any further entry in the Condominium Corporations Index in the land registry office for the registry division unless it relates to a declaration and description previously registered under the *Registry Act*. O. Reg. 49/01, s. 29 (2).

OTHER INSTRUMENTS

Index for additional units

30. If a land registrar receives, for registration, an amendment to a declaration and a description that purports to add any units to the property, the land registrar shall,

- (a) establish a Unit Index for each unit included in the amendment; and
- (b) if the records of the property are automated, record in each Unit Index established under clause (a) all instruments affecting the unit. O. Reg. 49/01, s. 30.

Automated system

31. (1) Subject to section 34, if a land registrar receives an instrument for registration after the registration of the declaration and description of a corporation that is not a common elements condominium corporation and if the records of the property are automated, the land registrar shall record the instrument,

- (a) in the Unit Index for each unit included in the property that it purports to affect; and
- (b) in the Unit Index for each unit included in the property, if it purports to affect all or part of the common elements. O. Reg. 49/01, s. 31 (1).

(2) Subject to section 34, if a land registrar receives for registration an instrument that purports to affect all or part of the property of a common elements condominium corporation and if the records of the property are automated, the land registrar shall record the instrument in the parcel register for the property. O. Reg. 49/01, s. 31 (2).

(3) An instrument to which subsection (1) or (2) applies includes an amendment to a declaration or a description, but not a declaration, a description or an amendment to a declaration and a description that purports to add any parcels of tied land to the property. O. Reg. 49/01, s. 31 (3).

- (4) If a land registrar receives for registration,
 - (a) an instrument that purports to be one of the following in respect of a common elements condominium corporation: a certificate of lien described in subsection 85 (2) of the Act in respect of unpaid common expenses, a partial or complete discharge of that certificate or a partial discharge of an encumbrance; and
 - (b) the records of the property are automated,

the land registrar shall record the instrument in the parcel register for the parcel of tied land. O. Reg. 49/01, s. 31 (4).

Additional parcels of tied land

32. If a land registrar receives, for registration, an amendment to a declaration and a description that purports to add any parcels of tied land to the property, the land registrar shall record the amendment,

- (a) in the parcel register for each additional parcel of tied land to which the *Land Titles Act* applies;
- (b) in the abstract index for each additional parcel of tied land to which the *Registry Act* applies;
- (c) in the parcel register for the land that includes the property if the records of the property are automated; and
- (d) in the Constitution Index and the Common Elements and General Index if the records of the property are not automated. O. Reg. 49/01, s. 32.

Non-automated system

33. (1) Subject to subsection (2) and section 34, if a land registrar receives an instrument, other than a by-law or an amendment to a declaration or description, for registration after the registration of the declaration and description and if the records of the property are not automated, the land registrar shall record the instrument in,

- (a) the Common Elements and General Index if it purports to affect,
 - (i) all or part of the common elements included in the property and all of the following: the units or, in the case of a common elements condominium corporation, the parcels of tied land, or
 - (ii) all or part of the common elements included in the property, but no units or parcels of tied land;
- (b) the Common Elements and General Index and the Unit Index for each unit included in the property that it purports to affect, if it purports to affect all or part of the common elements included in the property and some, but not all, of the units;
- (c) the Common Elements and General Index and the parcel register or the abstract index, as the case may be, for each parcel of tied land that it purports to affect, if it purports to affect all or part of the common elements included in the property and some, but not all, of the parcels of tied land in the case of a common elements condominium corporation;
- (d) the Unit Index for each unit included in the property that it purports to affect, if it purports to affect no specific part of the common elements included in the property and one or more units, but not all of the units; or
- (e) the parcel register or the abstract index, as the case may be, for each parcel of tied land that it purports to affect, if it purports to affect no specific part of the common elements included in the property and one or more, but not all of the parcels of tied land in the case of a common elements condominium corporation. O. Reg. 49/01, s. 33 (1).

(2) A land registrar shall record an instrument in the Common Elements and General Index and the Property Index if,

- (a) the land registrar receives it for registration after the registration of the declaration and description;
- (b) it is,
 - (i) a complete discharge of an encumbrance recorded in the Property Index,
 - (ii) an application for a caution under the *Land Titles Act*, or
 - (iii) a deed or other instrument by which ownership of the property is changed and that is received for registration before the registration of a deed of any unit included in the property;
- (c) it purports to affect all common elements included in the property and all of the following: the units or, in the case of a common elements condominium corporation, the parcels of tied land; and
- (d) the records of the property are not automated. O. Reg. 49/01, s. 33 (2).

(3) If a land registrar receives, for registration, an instrument that is a by-law or an amendment to the declaration and description, other than an amendment that purports to add parcels of tied land to the property, and if the records of the property are not automated, the land registrar shall record the instrument in the Constitution Index and in,

- (a) the Unit Index for each unit mentioned in the instrument if it purports to affect one or more, but not all the units included in the property;
- (b) the parcel register or the abstract index, as the case may be, for each parcel of tied land that it purports to affect, if it purports to affect one or more, but not all of the parcels of tied land in the case of a common elements condominium corporation; and
- (c) the Common Elements and General Index, if it purports to affect part but not all of the common elements included in the property. O. Reg. 49/01, s. 33 (3).

Terminations

34. Despite sections 31 and 33, if a notice of termination mentioned in section 122 or 123 of the Act, a deed for a sale under section 124 of the Act, a plan of expropriation for an expropriation described in section 126 of the Act or an order for termination mentioned in section 128 of the Act purports to affect all units and common elements included in the property and is received for registration after the registration of the declaration and description, sections 47 to 51 apply to it. O. Reg. 49/01, s. 34.

FORMS

Amendments

35. The certificate described in subsection 107 (6) of the Act that is required to be included in an amendment to the declaration or the description under section 107 of the Act shall be in Form 1. O. Reg. 49/01, s. 35.

Notice of change of address

36. (1) A notice changing the address for service or the mailing address of a corporation under section 108 of the Act shall be in Form 2. O. Reg. 49/01, s. 36 (1).

(2) The land registrar shall record the notice in the Condominium Corporations Index and, in addition, if the records of the property are automated,

- (a) in the Unit Index for each unit of the corporation, in the case of a corporation that is not a common elements condominium corporation; and
- (b) in the parcel register for the property, in the case of a common elements condominium corporation. O. Reg. 49/01, s. 36 (2).

Proof of enrolment, new home

37. The proof mentioned in subclause 43 (5) (f) (i) of the Act that the units and common elements have been enrolled in the Plan within the meaning of the *Ontario New Home Warranties Plan Act* in accordance with the regulations made under that Act shall be in Form 3, signed by the Registrar under that Act or a Deputy Registrar appointed under that Act. O. Reg. 49/01, s. 37.

By-laws

38. (1) A land registrar shall not receive the certified copy of a by-law mentioned in subsection 56 (9) of the Act for registration unless the certificate of the officer of the corporation is in the required form and states that,

- (a) the copy is a true copy of the by-law;
- (b) the by-law was made in accordance with the Act;
- (c) the owners of a majority of the units of the corporation have voted in favour of confirming the by-law; and
- (d) if the by-law is a joint by-law made under section 59 of the Act, it is not effective until the corporations that made it have each registered a copy of it in accordance with subsection 56 (9) of the Act. O. Reg. 49/01, s. 38 (1).

(2) Despite subsection 18 (1) of the *Registry Act*, a by-law of a corporation shall not be entered in the by-law index under that subsection. O. Reg. 49/01, s. 38 (2).

Money held in trust

39. The evidence of compliance mentioned in subsection 81 (6) of the Act with respect to money held in trust under section 81 of the Act shall be in Form 4. O. Reg. 49/01, s. 39.

Lease or renewal

40. (1) The summary mentioned in clause 83 (1) (b) of the Act in respect of a lease or a renewal of a lease of a unit shall be in Form 5, signed by the owner of the unit. O. Reg. 49/01, s. 40 (1).

(2) The summary mentioned in clause 83 (1) (b) of the Act in respect of a lease or a renewal of a lease of a common interest in a common elements condominium corporation shall be in Form 5, signed by the owner of the common interest. O. Reg. 49/01, s. 40 (2).

Notice of lien

41. (1) A certificate of lien mentioned in subsection 85 (2) of the Act shall be in Form 6. O. Reg. 49/01, s. 41 (1).

(2) A discharge of a certificate of lien mentioned in subsection 85 (7) of the Act shall be in Form 7. O. Reg. 49/01, s. 41 (2).

Status certificate

42. (1) A certificate mentioned in clause 120 (3) (c) of the Act as to the status for each amalgamating corporation shall be in Form 8. O. Reg. 49/01, s. 42 (1).

(2) The certificate shall be dated no earlier than the 14th day before the date that the board gives the owners the notice of meeting described in subsection 120 (3) of the Act. O. Reg. 49/01, s. 42 (2).

Common elements condominium corporations

43. (1) A certificate described in clause 139 (1) (b) of the Act by an owner in a common elements condominium corporation shall be in Form 9. O. Reg. 49/01, s. 43 (1).

(2) A notice described in subclause 139 (2) (b) (i) of the Act stating that the common interest of an owner in the corporation attaches to the owner's parcel of tied land shall be in Form 10. O. Reg. 49/01, s. 43 (2).

Leasehold condominium corporations

44. (1) A notice described in subsection 174 (7) of the Act stating that the leasehold interests in the units in a leasehold condominium corporation have been renewed shall be in Form 11. O. Reg. 49/01, s. 44 (1).

(2) A notice described in subsection 174 (7) of the Act stating that the leasehold interests in the units in a leasehold condominium corporation have not been renewed shall be in Form 12. O. Reg. 49/01, s. 44 (2).

DESCRIPTION OF LAND

Description of land

45. (1) The description of a unit in an instrument received for registration shall consist of,

- (a) the unit number;
 - (b) the number or letter of the level of the unit;
 - (c) the identification of the condominium plan specified in subsection 27 (2);
 - (d) a reference to the name of the municipality in which the property is located at the time of execution of the instrument; and
 - (e) the unit's property identifier if the records of the property are automated. O. Reg. 49/01, s. 45 (1).
- (2) An instrument that purports to affect the title of a common interest attached to a parcel of tied land in the case of a common elements condominium corporation shall describe the parcel in accordance with the requirements of Ontario Regulation 43/96, together with,
- (a) the words "together with an appurtenant common interest in" if the instrument is in English and is acceptable for registration, or the words "ainsi que l'intérêt commun qui se rattache à la parcelle et qui est relié à l' " if the instrument is in French and is acceptable for registration;
 - (b) the name assigned to the corporation under subsection 27 (3); and
 - (c) a reference to the name of the municipality in which the property is located at the time of execution of the instrument. O. Reg. 49/01, s. 45 (2).
- (3) An instrument that purports to affect the title of all units and common elements included in the property may describe the property as follows in the following order:
1. The words "all the units and common elements in" if the instrument is in English and is acceptable for registration, or the words "toutes les parties privatives et parties communes du" if the instrument is in French and is acceptable for registration.
 2. The identification of the condominium plan specified in subsection 27 (2).
 3. A reference to the name of the municipality in which the property is located at the time of execution of the instrument.
 4. The property identifiers of all the units, if the records of the property are automated. O. Reg. 49/01, s. 45 (3).
- (4) An instrument that purports to affect the title of the common elements included in the property, but no units, may describe the land affected as follows in the following order:
1. The words "all the common elements in" if the instrument is in English and is acceptable for registration, or the words "toutes les parties communes du" if the instrument is in French and is acceptable for registration.
 2. The identification of the condominium plan specified in subsection 27 (2).
 3. A reference to the name of the municipality in which the property is located at the time of execution of the instrument.
 4. The property identifiers of,
 - i. all the units, if the corporation is not a common elements condominium corporation and the records of the property are automated, or
 - ii. the condominium plan, if the corporation is a common elements condominium corporation and the records of the property are automated. O. Reg. 49/01, s. 45 (4).
- (5) An instrument that purports to affect the title of part of the common elements included in the property, but no units, may, with the approval of the examiner of surveys, describe the land affected by reference to physical features or the extent of levels illustrated on the plans of survey included in the registered description for the property. O. Reg. 49/01, s. 45 (5).

Discharge of pre-existing encumbrance

46. A discharge of a portion of an encumbrance under subsection 14 (2) of the Act shall be in a form, having regard to the nature of the encumbrance, sufficient for registration under the *Land Titles Act* or the *Registry Act*, as the case may be, and shall describe the land in accordance with section 45. O. Reg. 49/01, s. 46.

TERMINATION

Notice of termination

47. (1) A notice of termination mentioned in section 122 of the Act shall be in Form 13. O. Reg. 49/01, s. 47 (1).
- (2) A notice of termination mentioned in section 123 of the Act shall be in Form 14. O. Reg. 49/01, s. 47 (2).
- (3) A land registrar shall not receive for registration a notice of termination in Form 13 or 14 unless,
- (a) it is executed by the authorized officers of the corporation; and
 - (b) for each owner that is an individual,
 - (i) the notice is accompanied by a consent to the termination given by the owner's spouse within the meaning of subsection 21 (1) of the *Family Law Act*,
 - (ii) a court order described in clause 21 (1) (c) of the *Family Law Act* is attached to the notice, together with a statement or affidavit of a solicitor that the court order is in full force and effect and has not been stayed, or

(iii) the notice is accompanied by one of the statements described in subsection 21 (3) of the *Family Law Act* made by the individual or the individual's attorney under subsection 21 (4) of that Act. O. Reg. 49/01, s. 47 (3).

(4) A land registrar who receives for registration a notice of termination in Form 13 or 14 shall record it in,

- (a) the Unit Index for each unit included in the property, if the records of the property are automated;
- (b) the parcel register for the property and the parcel register for each parcel of tied land, if the records of the property are automated and the corporation is a common elements condominium corporation;
- (c) the Constitution Index, the Common Elements and General Index, the Property Index, the Unit Index for each unit included in the property and the parcel register or the abstract index, as the case may be, for each parcel of tied land, if the records of the property are not automated;
- (d) the freehold parcel register and the leasehold parcel register relating to the property, if the corporation is a leasehold condominium corporation and the *Land Titles Act* applies to the property; and
- (e) the abstract index relating to the property, if the corporation is a leasehold condominium corporation and the *Registry Act* applies to the property. O. Reg. 49/01, s. 47 (4).

(5) In recording a notice of termination in Form 13 or 14, the land registrar shall describe the executing parties as,

- (a) the corporation, described by the name assigned to it under subsection 27 (3);
- (b) in the case of a freehold condominium corporation, all the owners as tenants in common, described as,
 - (i) "all the former owners as tenants in common" if the notice is in English, or
 - (ii) "tous les anciens propriétaires comme tenants communs" if the notice is in French; and
- (c) in the case of a leasehold condominium corporation, all the former owners of the leasehold interests in the units, described as,
 - (i) "all the former owners" if the notice is in English, or
 - (ii) "tous les anciens propriétaires" if the notice is in French. O. Reg. 49/01, s. 47 (5).

(6) In the case of a leasehold condominium corporation to which the *Land Titles Act* applies, the land registrar shall record, on the freehold parcel register relating to the property and in priority of their registration, all claims that are continued against the lessor's interest in the property under section 175 of the Act. O. Reg. 49/01, s. 47 (6).

Deed for sale

48. (1) A land registrar shall not receive for registration a deed for a sale of the property or a part of the common elements under section 124 of the Act unless,

- (a) it is executed by the authorized officers of the corporation;
- (b) except in the case of a deed for part of the common elements that are for the use of all the owners, for each owner that is an individual and that voted in favour of the sale,
 - (i) the deed is accompanied by a consent given by the owner's spouse within the meaning of subsection 21 (1) of the *Family Law Act*,
 - (ii) a court order described in clause 21 (1) (c) of the *Family Law Act* is attached to the deed, together with a statement or affidavit of a solicitor that the court order is in full force and effect and has not been stayed, or
 - (iii) the deed is accompanied by one of the statements described in subsection 21 (3) of the *Family Law Act* made by the individual or the individual's attorney under subsection 21 (4) of that Act;
- (c) it is accompanied by the certificate described in subsection 124 (3) of the Act; and
- (d) in the case of a leasehold condominium corporation, it contains a statement by the authorized officers of the corporation that the lessor has consented to and executed the agreement of purchase and sale for the land described in the deed. O. Reg. 49/01, s. 48 (1).

(2) The certificate described in subsection 124 (3) of the Act shall be in Form 15. O. Reg. 49/01, s. 48 (2).

(3) A land registrar who receives for registration a deed for a sale of the property or a part of the common elements under section 124 of the Act shall record it in,

- (a) the Unit Index for each unit included in the property, if the records of the property are automated;
- (b) the following places if the records of the property are automated and the corporation is a common elements condominium corporation:
 - 1. The parcel register for the property.
 - 2. The parcel register for each parcel of tied land, if the deed is for a sale of the property;
- (c) the Constitution Index, the Common Elements and General Index, the Property Index, the Unit Index for each unit included in the property and the parcel register or the abstract index, as the case may be, for each parcel of tied land, if the records of the property are not automated and the land being sold is all of the property;

- (d) the Common Elements and General Index, if the records of the property are not automated and the land being sold is a part of the common elements;
- (e) the freehold parcel register and the leasehold parcel register relating to the property, if the corporation is a leasehold condominium corporation and the *Land Titles Act* applies to the property; and
- (f) the abstract index relating to the property, if the corporation is a leasehold condominium corporation and the *Registry Act* applies to the property. O. Reg. 49/01, s. 48 (3).

(4) In the case of a leasehold condominium corporation to which the *Land Titles Act* applies, the land registrar shall record, on the freehold parcel register relating to the property and in priority of their registration, all claims that are continued against the lessor's interest in the property under section 175 of the Act. O. Reg. 49/01, s. 48 (4).

Expropriation

49. (1) A land registrar who receives for registration a plan of expropriation for an expropriation under section 126 of the Act shall record it in,

- (a) the Unit Index for each unit included in the property, if the records of the property are automated;
- (b) the following places if the records of the property are automated and the corporation is a common elements condominium corporation;
 1. The parcel register for the property.
 2. The parcel register for each parcel of tied land, if the land being expropriated is all of the property;
- (c) the Constitution Index, the Common Elements and General Index, the Property Index, the Unit Index for each unit included in the property and the parcel register or the abstract index, as the case may be, for each parcel of tied land, if the records of the property are not automated and the land being expropriated is all of the property;
- (d) the Common Elements and General Index and the Unit Index for each unit or part of a unit being expropriated, if the records of the property are not automated and the land being expropriated is part, but not all, of the common elements;
- (e) the freehold parcel register and the leasehold parcel register relating to the property, if the corporation is a leasehold condominium corporation and the *Land Titles Act* applies to the property; and
- (f) the abstract index relating to the property, if the corporation is a leasehold condominium corporation and the *Registry Act* applies to the property. O. Reg. 49/01, s. 49 (1).

(2) In the case of a leasehold condominium corporation to which the *Land Titles Act* applies, the land registrar shall record, on the freehold parcel register relating to the property and in priority of their registration, all claims that are continued against the lessor's interest in the property under section 175 of the Act. O. Reg. 49/01, s. 49 (2).

Court order

50. (1) An order made by a court under section 128 or 173 of the Act terminating the government of the property by the Act does not take effect with respect to the property until it is registered. O. Reg. 49/01, s. 50 (1).

(2) If an order mentioned in subsection (1) contains conditions, a land registrar shall not receive the order for registration unless there is attached to the order a statement or affidavit made by the solicitor for the registrant, stating that the conditions contained in the order have been complied with. O. Reg. 49/01, s. 50 (2).

- (3) A land registrar who receives for registration an order mentioned in subsection (1) shall record it in,
 - (a) the Unit Index for each unit included in the property, if the records of the property are automated;
 - (b) the parcel register for the property and the parcel register for each parcel of tied land, if the records of the property are automated and the corporation is a common elements condominium corporation;
 - (c) the Constitution Index, the Common Elements and General Index, the Property Index, the Unit Index for each unit included in the property and the parcel register or the abstract index, as the case may be, for each parcel of tied land, if the records of the property are not automated;
 - (d) the freehold parcel register and the leasehold parcel register relating to the property, if the corporation is a leasehold condominium corporation and the *Land Titles Act* applies to the property; and
 - (e) the abstract index relating to the property, if the corporation is a leasehold condominium corporation and the *Registry Act* applies to the property. O. Reg. 49/01, s. 50 (3).

(4) In the case of a leasehold condominium corporation to which the *Land Titles Act* applies, the land registrar shall record, on the freehold parcel register relating to the property and in priority of their registration, all claims that are continued against the lessor's interest in the property under section 175 of the Act and in accordance with the order mentioned in subsection (1). O. Reg. 49/01, s. 50 (4).

New parcel register or abstract index

51. (1) A land registrar who receives for registration a notice of termination mentioned in section 122 or 123 of the Act in respect of a freehold condominium corporation, a deed for a sale of the property of a freehold condominium corporation under section 124 of the Act, a plan of expropriation for an expropriation of the property of any corporation under section 126 of the Act or an order for termination mentioned in section 128 of the Act in respect of a freehold condominium corporation, shall open,

- (a) a new parcel register for the land included in the property, if the land is registered under the *Land Titles Act*; or

- (b) a new abstract index under subsection 83 (3) of the *Registry Act* for the land included in the property, if the land is registered under that Act. O. Reg. 49/01, s. 51 (1).
- (2) A land registrar who receives for registration a deed for a sale of part of the common elements of a freehold condominium corporation under section 124 of the Act or a plan of expropriation for an expropriation of part of the common elements of any corporation under section 126 of the Act, shall open,
- (a) a new parcel register for the part, if the part is registered under the *Land Titles Act*; or
- (b) a new abstract index for the part under subsection 83 (3) of the *Registry Act*, if the part is registered under that Act. O. Reg. 49/01, s. 51 (2).
- (3) The new parcel register shall describe the affected land by using a description that,
- (a) contains the description of the land as it was described in,
- (i) Schedule A to the declaration, except in the case of land included in the property of an amalgamated corporation, or
- (ii) Schedule A to each of the declarations described in subsection (4), in the case of land included in the property of an amalgamated corporation;
- (b) takes into account all changes from the legal description in Schedule A to the declaration made since the registration of the declaration, except in the case of land included in the property of an amalgamated corporation; and
- (c) takes into account all changes from the legal description in Schedule A to the declarations described in subsection (4) that were made after the registration of each of those declarations and before the termination, in the case of land included in the property of an amalgamated corporation. O. Reg. 49/01, s. 51 (3).
- (4) The declarations mentioned in subclause (3) (a) (ii) and clause (3) (c) are,
- (a) the declaration of each of the amalgamating corporations that was not itself an amalgamated corporation, as that declaration existed immediately before the amalgamation; and
- (b) the declaration of each corporation that was not itself an amalgamated corporation and that was a predecessor of one of the amalgamating corporations that was an amalgamated corporation, as that declaration existed immediately before the amalgamation. O. Reg. 49/01, s. 51 (4).
- (5) The land registrar shall record in the new parcel register,
- (a) all claims that apply to the land in accordance with section 127 or 175 of the Act, as the case may be;
- (b) all claims that apply to the land in accordance with the order for termination mentioned in section 128 of the Act; and
- (c) the notice of termination, deed for a sale, plan of expropriation or order for termination, as the case may be. O. Reg. 49/01, s. 51 (5).
- (6) The new parcel register shall describe the owners of the land as a result of the registration,
- (a) by name as tenants in common, followed by an indication of the proportion of their interest, in the case of a notice of termination mentioned in section 122 or 123 of the Act;
- (b) by name, in the case of a deed for a sale under section 124 of the Act;
- (c) by name of the expropriating authority, in the case of a plan of expropriation under section 126 of the Act; or
- (d) by the method that the land registrar considers most suitable, having regard to the order, in the case of an order for termination mentioned in section 128 of the Act. O. Reg. 49/01, s. 51 (6).
- (7) Upon opening the new abstract index for the land, the land registrar shall,
- (a) take into account all additions to or sale of part of the common elements;
- (b) record in the abstract index the notice of termination, deed for a sale, plan of expropriation or order for termination, as the case may be; and
- (c) note in the abstract index the fact that land was previously subject to the *Condominium Act, 1998* and the identification of the condominium plan. O. Reg. 49/01, s. 51 (7).

PART III TRANSITIONAL

Transition

52. (1) If, before the day Part II of the Act comes into force, a description was acceptable for registration except for not having the approval or exemption from approval under the *Planning Act* required by section 50 of the *Condominium Act*,

- (a) clauses 27 (1) (c) and (d) and subsections 27 (2), (3) and (4) do not apply to the corporation; and
- (b) despite subsection 65 (1) of Ontario Regulation 48/01, clauses 4 (1) (c) and (e) of Regulation 96 of the Revised Regulations of Ontario, 1990, as they read immediately before that day, continue to apply to the corporation. O. Reg. 49/01, s. 52 (1).

(2) This section is revoked on the 180th day after the day Part II of the Act comes into force. OReg. 49/01, s. 52 (2).

Form 1

Condominium Act, 1998

AMENDMENT TO DECLARATION OR DESCRIPTION
(under section 107 of the Condominium Act, 1998)

..... Condominium Corporation No. amends, as set out in the attached Schedule:
its declaration registered as Instrument No.
its description identified as (identify condominium plan as specified in subsection 27 (2) of Ontario Regulation 49/01).

We certify that the amendment to the declaration/description that is set out in the attached Schedule complies with the requirements of section 107 of the Condominium Act, 1998.

Dated this day of,

..... Condominium Corporation No.

.....
(signature)

.....
(print name)

.....
(signature)

.....
(print name)

(Affix corporate seal or add a statement that the persons signing have the authority to bind the corporation.)

[In the case of a leasehold condominium corporation, if the amendment affects the leasehold interests in the property, add the following:
I (We) consent to the amendment to the declaration/description that is set out in the Schedule.

.....
(signature of lessor)

.....
(print name)

(In the case of a corporation, affix corporate seal or add a statement that the persons signing have the authority to bind the corporation.)]

O. Reg. 49/01, Form 1.

Form 2

Condominium Act, 1998

NOTICE OF CHANGE OF ADDRESS
(under section 108 of the Condominium Act, 1998)

..... Condominium Corporation No. gives notice that it changes:
its address for service to
its mailing address to

Dated this day of

..... Condominium Corporation No.

.....
(signature)

.....
(print name)

.....
(signature)

.....
(print name)

(Affix corporate seal or add a statement that the persons signing have the authority to bind the corporation.)

O. Reg. 49/01, Form 2.

Form 3

Condominium Act, 1998

PROOF OF ENROLMENT
IN THE ONTARIO NEW HOME WARRANTIES PLAN
(subclause 43 (5) (f) (i) of the Condominium Act, 1998)

I certify that the units described below and the common elements of (identify condominium plan as specified in subsection 27 (2) of Ontario Regulation 49/01) have been enrolled in the Plan within the meaning of the Ontario New Home Warranties Plan Act in accordance with the regulations made under that Act.

Enrolment does not necessarily mean that claimants are entitled to warranty coverage. Warranty coverage is only available to claimants who are entitled to receive payment under the Ontario New Home Warranties Plan Act.

Unit No. Level No. (identify condominium plan) Enrolment Number

.....

Dated this day of,

.....
Registrar or Deputy Registrar of the
Ontario New Home Warranty Program

O. Reg. 49/01, Form 3.

Form 4

Condominium Act, 1998

EVIDENCE OF COMPLIANCE
(subsection 81 (6) of the Condominium Act, 1998)

To: (name and address of person who paid money under subsection 81 (1) of the Condominium Act, 1998)

I (We) certify that:

1. I am (We are)

(Check whichever box is applicable:)

- the declarant's solicitor.
a partner in the partnership of solicitors (state name of partnership) that is the declarant's solicitor.
a solicitor employed by the partnership of solicitors (state name of partnership) that is the declarant's solicitor.
a trustee of a prescribed class. (if so, specify which class)

2. On (date),

[strike out whichever is not applicable:

I (we)

OR

the declarant's solicitor, a partnership in which I am a partner (or: an employee)]

received the amount of \$ (known as "the money") that you paid under subsection 81 (1) of the Condominium Act, 1998 in respect of the purchase or a right to the purchase of:

[For all condominium corporations except common elements condominium corporations:

a proposed unit described (provide brief description).]

[In the case of a common elements condominium corporation:

a proposed common interest in (name of condominium corporation).]

[If the declarant's solicitor or a partner in or a solicitor employed by a partnership of solicitors that is the declarant's solicitor, state:

3. I am (We are) holding the money in trust in the following trust account in Ontario:

(provide trust account number, name, address and telephone number of institution)]

OR

[If trustee of a prescribed class state:

I am holding the money in trust in a separate account in Ontario designated as a trust account and identified as (provide account number) at (name, address and telephone number of bank listed in Schedule I or II to the Bank Act (Canada), a trust corporation, a loan corporation, a credit union or a Province of Ontario Savings Office.)]

4. You will receive notice if there is any change of (strike out whichever is not applicable: declarant's solicitor, trustee) holding the money in trust before that person no longer has any obligations, under the Condominium Act, 1998 or the regulations made under it, relating to the money or any security of a prescribed class that the declarant may provide for the money.

Dated this day of ,

(signature)

(print name)

(signature)

(print name)

(In the case of a corporation, affix corporate seal or add a statement that the person signing has the authority to bind the corporation.)

(address)

.....
*(telephone number and,
if any, fax number)*

O. Reg. 49/01, Form 4.

Form 5

Condominium Act, 1998

SUMMARY OF LEASE OR RENEWAL
(clause 83 (1) (b) of the Condominium Act, 1998)

TO: (name of condominium corporation)

1. This is to notify you that:

[Strike out whichever is not applicable:

a written or oral (strike out whichever is not applicable: lease, sublease, assignment of lease)

OR

a renewal of a written or oral (strike out whichever is not applicable: lease, sublease, assignment of lease)]

has been entered into for:

[For all condominium corporations except common elements condominium corporations:

Unit(s), Level(s) (include any parking or storage units that have been leased)]

[In the case of a common elements condominium corporation:

the common interest in the condominium corporation, being the interest attached to
(provide brief description of the parcel of land to which the common interest in the Condominium Corporation is attached)]

on the following terms:

Name of lessee(s) (or sublessee(s)):

Telephone number:

Fax number, if any:

Commencement date:

Termination date:

Option(s) to renew:
(set out details)

Rental payments:
(set out amount and when due)

Other information:
(at the option of the owner)

- 2. I (We) have provided the (strike out whichever is not applicable: lessee(s), sublessee(s)) with a copy of the declaration, by-laws and rules of the condominium corporation.
3. I (We) acknowledge that, as required by subsection 83 (2) of the Condominium Act, 1998, I (we) will advise you in writing if the (strike out whichever is not applicable: lease, sublease, assignment of lease) is terminated.

Dated this day of,

.....
(signature of owner(s))

.....
(print name of owner(s))

(In the case of a corporation, affix corporate seal or add a statement that the persons signing have the authority to bind the corporation.)

.....
(address)

.....
(telephone number)

.....
(fax number, if any)

O. Reg. 49/01, Form 5.

Form 6

Condominium Act, 1998

CERTIFICATE OF LIEN
(under subsection 85 (2) of the Condominium Act, 1998)

..... Condominium Corporation No. certifies that it has a lien under the Condominium Act, 1998 against:

[For all condominium corporations except common elements condominium corporations:

Unit (No.), Level (No.), of (identify condominium plan), registered in the Land Registry Office for the Land Titles (or Registry) Division of]

[In the case of a common elements condominium corporation:

.....(provide description, as set out in Schedule D to the declaration, of the parcel of land to which the common interest in the Condominium Corporation is attached), registered in the Land Registry Office for the Land Titles (or Registry) Division of]

for:

- (a) unpaid common expenses in the amount of \$ as of the date of this certificate;
(b) the amount by which the owner defaults in the obligation to contribute, after the registration of this certificate, to the common expenses which include all amounts that under the Act are added to or form part of the common expenses; and
(c) all interest owing and all reasonable legal costs and reasonable expenses that the Condominium Corporation incurs in connection with the collection or attempted collection of the amounts described in clauses (a) and (b), including the costs of preparing and registering this certificate of lien and a discharge of it.

Upon payment of the amounts described above, the Condominium Corporation shall prepare and register a discharge of this certificate of lien and shall advise the owner in writing of the particulars of registration.

This lien does not secure payments of common expenses that became due more than three months before the date of registration of this certificate.

Dated this day of,

..... Condominium Corporation No.

.....
(signature)

.....
(print name)

.....
(signature)

.....
(print name)

(Affix corporate seal or add a statement that the persons signing have the authority to bind the corporation.)

O. Reg. 49/01, Form 6.

Form 7

Condominium Act, 1998

DISCHARGE OF CERTIFICATE OF LIEN
(under subsection 85 (7) of the Condominium Act, 1998)

..... Condominium Corporation No., having received payment of the amounts mentioned in the Certificate of Lien
registered as Instrument No. in respect of:

[For all condominium corporations except common elements condominium corporations:

Unit (No.), Level (No.), of (identify condominium plan), registered in the Land Registry Office for
the Land Titles (or Registry) Division of, discharges the Unit from the Lien pursuant to subsection 85 (7) of the
Condominium Act, 1998.]

[In the case of a common elements condominium corporation:

..... (provide description, as set out in Schedule D to the declaration, of the parcel of land to which the common interest in the
Condominium Corporation is attached), registered in the Land Registry Office for the Land Titles (or Registry) Division of,
discharges the land from the Lien pursuant to subsection 85 (7) of the Condominium Act, 1998.]

Dated this day of,

..... Condominium Corporation No.

.....
(signature)

.....
(print name)

.....
(signature)

.....
(print name)

(Affix corporate seal or add a statement that the persons signing have the authority to bind the corporation.)

O. Reg. 49/01, Form 7.

Form 8

Condominium Act, 1998

STATUS CERTIFICATE IN AMALGAMATION
(under clause 120 (3) (c) of the *Condominium Act, 1998*)

IN THE MATTER OF a Proposed Amalgamation of (*names of amalgamating condominium corporations*)

The purpose of this certificate is to provide information to the owners of the amalgamating corporations to assist them in making a decision on whether to consent to the amalgamation.

..... (*name of one of the amalgamating condominium corporations*) Condominium Corporation No. (known as the "Corporation") certifies that as of the date of this certificate:

General Information Concerning the Corporation

- 1. Mailing Address:
- 2. Address for Service:
- 3. Name of property manager:
Address:
Telephone number:
- 4. The directors and officers of the Corporation are:

Name	Position	Address for Service	Telephone Number
.....			

Common Expenses

- 5. *[Strike out whichever is not applicable:*
There is no default in the payment of common expenses by any of the owners.

OR

The owners of the following units in the Corporation are in default of payment of common expenses in the following amounts:

Unit	Level	Suite number	Amount
.....			

(indicate whether a certificate of lien has been registered against each unit)

- 6. The Corporation has the amount of \$..... in prepaid common expenses from the owners.
- 7. There are no amounts that the *Condominium Act, 1998* requires to be added to the common expenses payable by the owners *[if applicable add: except (set out details and provide brief description)].*

Budget

- 8. The budget of the Corporation for the current fiscal year is accurate and may result in

(Strike out whichever is not applicable:
a surplus of \$.....

OR

a deficit of \$).

- 9. *[Strike out whichever is not applicable:*
Since the date of the budget of the Corporation for the current fiscal year, the common expenses have not been increased.

OR

Since the date of the budget of the Corporation for the current fiscal year, the common expenses have been increased by \$..... for the year because *(set out the reason for the increase)].*

- 10. *[Strike out whichever is not applicable:*
Since the date of the budget of the Corporation for the current fiscal year, the board has not levied any assessments to increase the contribution to the Corporation's reserve fund.

OR

Since the date of the budget of the Corporation for the current fiscal year, the board has levied the following assessments to increase the contribution to the Corporation's reserve fund: (set out the amounts and the reason for the assessments)].

11. The Corporation has no knowledge of any circumstances that may result in an increase in the common expenses [if applicable add: except(give particulars of any potential increase arising as a result of the proposed amalgamation or otherwise, including any assessment, and the reason for it)].

Reserve Fund

12. The Corporation's reserve fund amounts to \$..... as of (specify a date that is no earlier than at the end of a month immediately before the date of this certificate).

13. The most recent reserve fund study conducted by the board was a (specify the class of reserve fund study) dated and prepared by(name of person who conducted the reserve fund study).

14. (If the board of the Corporation has not sent a notice to the owners under subsection 94 (9) of the Condominium Act, 1998 after receiving the reserve fund study described in paragraph 13, include the following paragraph:)

The balance of the reserve fund at the beginning of the current fiscal year was \$..... . In accordance with the budget of the Corporation for the current fiscal year, the annual contribution to be made to the reserve fund in the current fiscal year is \$....., and the anticipated expenditures to be made from the reserve fund in the current fiscal year amount to \$..... . The board anticipates that the reserve fund will/will not be adequate in the current fiscal year for the expected costs of major repair and replacement of the common elements and assets of the Corporation.

15. [If the board of the Corporation has sent a notice to the owners under subsection 94 (9) of the Condominium Act, 1998 after receiving the reserve fund study described in paragraph 13, include the following statements and a copy of the most recent notice for one of the units with this certificate and show it in the list of documents forming part of this certificate:

The board has sent to the owners a notice dated (date of the most recent notice) containing a summary of the reserve fund study, a summary of the proposed plan for future funding of the reserve fund and a statement indicating the areas, if any, in which the proposed plan differs from the study. The proposed plan for future funding of the reserve fund has not been implemented because (give reason).

OR

The proposed plan for future funding has been implemented and the total contribution each year to the reserve fund is being made as set out in the Contribution Table included in the notice (if applicable add: except (set out why contributions are not being made in accordance with the Contribution Table and whether this will be addressed and, if so, in what manner)].

16. There are no plans to increase the reserve fund under a plan proposed by the board under subsection 94 (8) of the Condominium Act, 1998, for the future funding of the reserve fund [if applicable add: except (give details of any increase, including any increase in the common expenses or any assessments)].

Legal Proceedings, Claims

17. There are no convictions against, or rulings, orders or judgments in favour of or against the Corporation [if applicable add: except(give brief particulars and, if applicable, amount)].

18. The Corporation is not a party to any proceeding before a court of law, an arbitrator or an administrative tribunal [if applicable add: except(give brief particulars and the status of those proceedings to which the Corporation is a party)].

19. The Corporation has not received a notice of an application under section 109 of the Condominium Act, 1998 to the Superior Court of Justice for an order to amend the declaration and description, where the court has not made the order [if applicable add: except(give particulars)].

20. The Corporation is not aware of any criminal or quasi-criminal liabilities to which it may be subject.

21. The Corporation has no outstanding claim for payment out of the guarantee fund under the Ontario New Home Warranties Plan Act [if applicable add: except (give brief particulars and the status of any claims that have been made)].

22. [Strike out whichever is not applicable:

There is currently no order of the Superior Court of Justice in effect appointing an inspector under section 130 of the Condominium Act, 1998 or an administrator under section 131 of the Condominium Act, 1998.

OR

There is currently an order of the Superior Court of Justice in effect appointing an inspector under section 130 of the Condominium Act, 1998 or an administrator under section 131 of the Condominium Act, 1998. (If applicable, include a copy of the order with this certificate and show it in the list of documents forming part of this certificate)].

Agreements with owners relating to changes to the common elements

23. [Strike out whichever is not applicable: No unit is subject to an agreement (or agreements) under clause 98 (1) (b) of the Condominium Act, 1998 relating to additions, alterations or improvements made to the common elements by the unit owner.

OR

The following units, (set out the description of the units), are subject to an agreement (or agreements) under clause 98 (1) (b) of the Condominium Act, 1998 relating to additions, alterations or improvements made to the common elements by the unit owners. To the best of the Corporation's information, knowledge and belief, the agreements have been complied with by the parties (if applicable add: except(give particulars)).

Leasing of Units

24. [Strike out whichever is not applicable: The Corporation has not received notice under section 83 of the Condominium Act, 1998, that any unit was leased during the fiscal year preceding the date of this certificate.

OR

The Corporation has received notice under section 83 of the Condominium Act, 1998, that (set out the number) unit(s) was (were) leased during the fiscal year preceding the date of this certificate.]

Substantial changes to the common elements, assets or services

25. There are no additions, alterations or improvements to the common elements, changes in the assets of the Corporation or changes in a service of the Corporation that are substantial and that the board has proposed but has not implemented [if applicable add: except (give a brief description and a statement of their purpose)].

Insurance

26. The Corporation has secured all policies of insurance that are required under the Condominium Act, 1998.

Attachments

27. The following documents are attached to this certificate and form part of it:

- (a) a copy of the budget of the Corporation for the current fiscal year, its last annual audited financial statements and the auditor's report on the statements;
(b) a list of all current agreements mentioned in section 111, 112 or 113 of the Condominium Act, 1998 and all current agreements between the Corporation and another condominium corporation or between the Corporation and any owner, that includes the names of the parties, a brief description of the nature of the agreement, its duration and approximate value;
(c) a list of the assets of the Corporation, a description of the services that the Corporation provides to the owners and the facilities included in the common elements;
(d) a list of the warranties of the Corporation;
[if applicable add the following items:
(e) a copy of a notice dated (date of the most recent notice) containing a summary of the reserve fund study, a summary of the proposed plan for future funding of the reserve fund and a statement indicating the areas, if any, in which the proposed plan differs from the study;
(f) a copy of an order appointing an inspector under section 130 of the Condominium Act, 1998 or an administrator under section 131 of the Condominium Act, 1998; and
(g) a copy of all applications made under section 109 of the Condominium Act, 1998 to amend the declaration or description for which the court has not made an order.]

Dated this day of

..... Condominium Corporation No.

(signature)

(print name)

(signature)

(print name)

(Affix corporate seal or add a statement that the persons signing have the authority to bind the corporation.)

O. Reg. 49/01, Form 8.

Form 9

Condominium Act, 1998

CERTIFICATE OF OWNER
IN THE MATTER OF A COMMON ELEMENTS CONDOMINIUM CORPORATION
(SCHEDULE I TO DECLARATION)
(under clause 139 (1) (b) of the Condominium Act, 1998)

- 1. I am (We are) the owner(s) of the freehold estate in ... (provide a registrable description of the parcel of land to which a common interest in the common elements condominium corporation will attach) (known as the "Parcel").
2. I (We) consent to the registration of the attached declaration to create a common elements condominium corporation (known as the "Corporation") on ... (provide a brief legal description sufficient to identify the property).
3. I (We) acknowledge that, upon registration of the declaration and the description, the Parcel will become subject to all encumbrances, if any, outstanding against the property described in Schedule A to the declaration.
4. I (We) consent to the registration of a notice in the prescribed form against the Parcel indicating that a common interest in the Corporation, as the common interest is set out in Schedule D to the declaration, attaches to the Parcel upon the registration of the declaration and description.

Dated this ... day of ...

... (signature of owner)

... (print name of owner)

(In the case of a corporation, affix corporate seal or add a statement that the persons signing have the authority to bind the corporation.)

O. Reg. 49/01, Form 9.

Form 10

Condominium Act, 1998

NOTICE OF ATTACHMENT OF A COMMON INTEREST
IN A COMMON ELEMENTS CONDOMINIUM CORPORATION
(SCHEDULE J TO DECLARATION)
(under clause 139 (2) (b) of the Condominium Act, 1998)

Take notice that:

1. The attached declaration and the description creates a common elements condominium corporation (known as the "Corporation").
2. A common interest in the Corporation, as the common interest is set out in Schedule D to this declaration, attaches to the following parcel of land (known as the "Parcel"): (provide the registrable description of the parcel of land as set out in Schedule D to the declaration).
3. The common interest cannot be severed from the Parcel upon the sale of the Parcel or the enforcement of an encumbrance registered against the Parcel.
4. A copy of the certificate of the owner of the Parcel consenting to the registration of the declaration and this notice is attached to this declaration as Schedule I.
5. If the owner of the Parcel defaults in the obligation to contribute to the common expenses of the Corporation, the Corporation has a lien against the Parcel.

Dated this day of,

Declarant:

.....
(signature)

.....
(print name)

.....
(signature)

.....
(print name)

(In the case of a corporation, affix corporate seal or add a statement that the persons signing have the authority to bind the corporation.)

O. Reg. 49/01, Form 10.

Form 11

Condominium Act, 1998

NOTICE OF RENEWAL OF THE LEASEHOLD INTERESTS
IN A LEASEHOLD CONDOMINIUM CORPORATION
(under subsection 174 (7) of the Condominium Act, 1998)

The leasehold interests in the units in (name of condominium corporation) Leasehold Condominium Corporation No. and their appurtenant common interests (those leasehold interests and common interests are known as the "leasehold interests") registered in the Land Titles (or Registry) Division of are due to expire on

The leasehold interests have been renewed for a further term of years,

Dated this day of,

.....
(signature of lessor)

.....
(print name)

(In the case of a corporation, affix corporate seal or add a statement that the persons signing have the authority to bind the corporation.)

O. Reg. 49/01, Form 11.

Form 12

Condominium Act, 1998

NOTICE OF NON-RENEWAL OF THE LEASEHOLD INTERESTS
IN A LEASEHOLD CONDOMINIUM CORPORATION
(under subsection 174 (7) of the Condominium Act, 1998)

The leasehold interests in the units in (name of condominium corporation) Leasehold Condominium Corporation No. and their appurtenant common interests (those leasehold interests and common interests are known as the "leasehold interests"), registered in the Land Registry Office for the Land Titles (or Registry) Division of are due to expire on (set out the expiry date).

The leasehold interests will not be renewed.

Upon the expiry date, section 175 of the Condominium Act, 1998 applies and the leasehold interests are terminated.

Dated this day of,

.....
(signature of lessor)

.....
(print name)

(In the case of a corporation, affix corporate seal or add a statement that the persons signing have the authority to bind the corporation.)

O. Reg. 49/01, Form 12.

Form 13

Condominium Act, 1998

NOTICE OF TERMINATION
(under subsection 122 (2) of the Condominium Act, 1998)

..... Condominium Corporation No. gives notice under subsection 122 (2) of the Condominium Act, 1998 terminating the government of the property by the Act.

The Corporation gives this Notice in respect of the property included in(identify condominium plan) registered in the Land Registry Office for the Land Titles (or Registry) Division of

We certify that:

- (a) the owners of at least 80 per cent of the units (or, in the case of a common elements condominium corporation, the common interests) at the date of the vote in respect of termination, voted in favour of termination; and
(b) at least 80 per cent of those persons who, at the date of the vote in respect of termination, had registered claims against the property, that were created after the registration of the declaration and description that made the Condominium Act, 1998 applicable to the property, have consented in writing to the termination.

[Strike out whichever is not applicable:

In the case of a freehold condominium corporation, upon registration of this Notice, subsection 127 (1) of the Condominium Act, 1998 applies and the Act ceases to govern the property.

The owners of the property are all the former unit owners (or, in the case of a common elements condominium corporation, all the former owners of the common interests) as tenants in common, in the same proportions as their common interests described in the Declaration registered as Instrument No. (add as necessary: and as amended by Instrument No.(s)

OR

In the case of a leasehold condominium corporation, upon registration of this Notice, subsection 175 (1) of the Condominium Act, 1998 applies, the Act ceases to govern the property and the leasehold interests in the units are terminated.]

Dated this day of

..... Condominium Corporation No.

(signature)

(print name)

(signature)

(print name)

(Affix corporate seal or add a statement that the persons signing have the authority to bind the corporation.)

[In the case of a leasehold condominium corporation, add the following:

I am (We are) the lessor of the property and consent to the registration of this Notice terminating the government of the property by the Condominium Act, 1998.

(signature of lessor)

(print name)

(In the case of a corporation, affix corporate seal or add a statement that the persons signing have the authority to bind the corporation.)]

Form 14

Condominium Act, 1998

NOTICE OF TERMINATION
(under subsection 123 (8) of the Condominium Act, 1998)

..... Condominium Corporation No. gives notice under subsection
123 (8) of the Condominium Act, 1998 terminating the government of the property by the Act.

The Corporation gives this Notice in respect of the property included in (identify condominium plan)
registered in the Land Registry Office for the Land Titles (or Registry) Division of

We certify that the Corporation has complied with the requirements of section 123 of the Condominium Act, 1998.

[Strike out whichever is not applicable:

In the case of a freehold condominium corporation:

Upon registration of this Notice, subsection 127 (1) of the Condominium Act, 1998 applies and the Act ceases to govern the property.

The owners of the property are all the former unit owners (or, in the case of a common elements condominium corporation, all the former owners of
the common interests) as tenants in common, in the same proportions as their common interests described in the Declaration registered as
Instrument No. (add as necessary: and as amended by Instrument No.(s)

OR

In the case of a leasehold condominium corporation:

Upon registration of this Notice, subsection 175 (1) of the Condominium Act, 1998 applies, the Act ceases to govern the property and the leasehold
interests in the units are terminated.]

Dated this day of,

..... Condominium Corporation No.

(signature)

(print name)

(signature)

(print name)

(Affix corporate seal or add a statement that the persons signing have the authority to bind the corporation.)

[In the case of a leasehold condominium corporation, add the following:

I am (We are) the lessor of the property and consent to the registration of this Notice terminating the government of the property by the
Condominium Act, 1998.

(signature of lessor)

(print name)

(In the case of a corporation, affix corporate seal or add a statement that the persons signing have the authority to bind the corporation)].

O. Reg. 49/01, Form 14.

Form 15

Condominium Act, 1998

CERTIFICATE IN THE MATTER OF A SALE
(under subsection 124 (3) of the Condominium Act, 1998)

IN THE MATTER OF A SALE of the property included in ... (identify condominium plan) ...
registered in the Land Registry Office for the Land Titles (or Registry) Division of ... to ...
(name of purchaser)

OR

IN THE MATTER OF A SALE of a part of the common elements included in ... (identify condominium plan) ...
registered in the Land Registry Office for the Land Titles (or Registry) Division of ... and more particularly described as
... (provide description) to ... (name of purchaser)

... Condominium Corporation No. ...
certifies that the persons who, under subsection 124 (2) of the Condominium Act, 1998, are required to vote in favour of the sale or consent in
writing to the sale have done so.

Dated this ... day of ...

... Condominium Corporation No. ...
(signature)
(print name)
(signature)
(print name)

(Affix corporate seal or add a statement that the persons signing have the authority to bind the corporation.)

O. Reg. 49/01, Form 15.

ONTARIO NEW HOME WARRANTIES PLAN ACT

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ONTARIO NEW HOME WARRANTIES PLAN ACT

R.S.O. 1990, c. O. 31, Amended to S.O. 2001, c. 9

Definitions

1. In this Act,

“builder” means a person who undertakes the performance of all the work and supply of all the materials necessary to construct a completed home whether for the purpose of sale by the person or under a contract with a vendor or owner; (“constructeur”)

“Corporation” means the corporation designated under section 2; (“Société”)

“guarantee fund” means the provision made by the Corporation for compensation under the Plan; (“fonds de garantie”)

“home” means,

- (a) a self-contained one-family dwelling, detached or attached to one or more others by common wall,
- (b) a building composed of more than one and not more than two self-contained, one-family dwellings under one ownership,
- (c) a condominium dwelling unit, including the common elements, or
- (d) any other dwelling of a class prescribed by the regulations as a home to which this Act applies,

and includes any structure or appurtenance used in conjunction therewith, but does not include a dwelling built and sold for occupancy for temporary periods or for seasonal purposes; (“logement”)

“inspector” means an inspector appointed by the Corporation under section 18; (“inspecteur”)

“Minister” means the Minister of Consumer and Business Services; (“ministre”)

“owner” means a person who first acquires a home from its vendor for occupancy, and the person’s successors in title; (“propriétaire”)

“Plan” means the Ontario New Home Warranties Plan referred to in section 11; (“Régime”)

“prescribed” means prescribed by the regulations; (“prescrit”)

“Registrar” means the Registrar appointed by the Corporation under section 3; (“registrateur”)

“regulations” means the by-laws of the Corporation made under section 23; (“règlements”)

“sell” includes entering into an agreement to sell; (“vendre”)

“Tribunal” means the Licence Appeal Tribunal; (“Tribunal”)

“vendor” means a person who sells on his, her or its own behalf a home not previously occupied to an owner and includes a builder who constructs a home under a contract with the owner; (“vendeur”)

“warranty” means a warranty set out in section 13. (“garantie”) R.S.O. 1990, c. O.31, s. 1; 1999, c. 12, Sched. G, s. 30 (1).

Designation of Corporation

2. (1) The Lieutenant Governor in Council shall designate a non-profit corporation incorporated without share capital under the *Corporations Act* to be the Corporation for the purposes of this Act.

Objects

- (2) Upon its designation, the objects of the Corporation are extended to include,
- (a) the administration of the Ontario New Home Warranties Plan;
 - (b) the establishment and administration of a guarantee fund providing for the payment of compensation under section 14, whether by the establishment of a fund for the purpose or by contract with licensed insurers;
 - (c) assisting in the conciliation of disputes between vendors and owners; and
 - (d) engaging in undertakings for the purpose of improving communications between vendors and owners.

Application of *Insurance Act*

(3) The *Insurance Act* does not apply to the Corporation and its undertakings in respect of any matter within its objects or authorized by this Act. R.S.O. 1990, c. O.31, s. 2.

Registrar

3. (1) The Corporation shall appoint a Registrar who shall perform the duties and exercise the powers given to the Registrar by this Act and the regulations under the supervision of the Corporation and who shall perform such other duties as are assigned by the Corporation. R.S.O. 1990, c. O.31, s. 3.

Deputy Registrars

(2) The Corporation may appoint one or more Deputy Registrars who have and may exercise the powers and duties of the Registrar that the Registrar specifies.

References to Registrar

(3) If the Registrar so specifies, references in this Act and the regulations to the Registrar shall be deemed to refer to a Deputy Registrar. 1998, c. 18, Sched. E, s. 187.

Revenues and expenses

4. All money payable under this Act to the Corporation shall be retained by the Corporation and applied to defray the expenses incurred and expenditures made in the carrying out of its duties under this Act and otherwise for the purposes of its objects set out in subsection 2 (2). R.S.O. 1990, c. O.31, s. 4.

Annual report

5. (1) The Corporation shall make a report annually to the Minister upon the affairs of the Corporation. 2000, c. 26, Sched. B, s. 15 (1).

Tabling

- (2) The Minister shall,

- (a) submit the report to the Lieutenant Governor in Council;
- (b) lay the report before the Assembly if it is in session; and
- (c) deposit the report with the Clerk of the Assembly if the Assembly is not in session. 2000, c. 26, Sched. B, s. 15 (1).

Disclosure by Corporation

(3) The Corporation may give a copy of its report under subsection (1) to other persons before the Minister complies with subsection (2). 2000, c. 26, Sched. B, s. 15 (1).

Registration required

6. No person shall act as a vendor or a builder unless the person is registered by the Registrar under this Act. R.S.O. 1990, c. O.31, s. 6.

Registration of vendors and builders

7. (1) An applicant is entitled to registration by the Registrar except where,
- (a) having regard to the applicant's financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of the applicant's undertakings;
 - (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on the applicant's undertakings in accordance with law and with integrity and honesty;
 - (c) the applicant is a corporation and,
 - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its undertakings, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its undertakings will not be carried on in accordance with law and with integrity and honesty; or
 - (d) in the case of an application for registration as a builder, the applicant does not have sufficient technical competence to consistently perform the warranties.

Conditions of registration

(2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant or imposed by the Tribunal or prescribed by the regulations.

Registration not transferable

(3) A registration is not transferable. R.S.O. 1990, c. O.31, s. 7.

Refusal to register

8. (1) Subject to section 9, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 7.

Revocation and refusal to renew

(2) Subject to section 9, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 7, if the registrant were an applicant, or where the registrant has a record of breaches of warranties or of failure or unwillingness to complete performance of contracts or is in breach of a term or condition of the registration. R.S.O. 1990, c. O.31, s. 8.

Notice of proposal to refuse or revoke

9. (1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefor, on the applicant or registrant.

Notice requiring hearing

(2) A notice under subsection (1) shall state that the applicant or registrant is entitled to a hearing by the Tribunal if the applicant or registrant mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Registrar and the Tribunal.

Powers of Registrar where no hearing

(3) Where an applicant or registrant does not require a hearing by the Tribunal in accordance with subsection (2), the Registrar may carry out the proposal stated in the notice under subsection (1).

Powers of Tribunal

(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

Conditions of order

(5) The Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of this Act.

Parties

(6) The Registrar, the applicant or registrant who has required the hearing and such other persons as the Tribunal may specify are parties to proceedings before the Tribunal under this section.

Voluntary cancellation

•(7) The Registrar may cancel a registration upon the request in writing of the registrant and this section does not apply to the cancellation.

Continuance pending renewal

(8) Where, within the time prescribed therefor or, if no time is prescribed, before expiry of the registration, a registrant has applied for renewal of a registration and paid the prescribed fee, the registration shall be deemed to continue,

- (a) until the renewal is granted; or

- (b) where the registrant is served with notice that the Registrar proposes to refuse to grant the renewal, until the time for giving notice requiring a hearing has expired and, where a hearing is required, until the Tribunal has made its order. R.S.O. 1990, c. O.31, s. 9 (1-8).

Appeal

(9) Even if a registrant appeals an order of the Tribunal under section 11 of the *Licence Appeal Tribunal Act, 1999*, the order takes effect immediately but the Tribunal may grant a stay until the disposition of the appeal. 1999, c. 12, Sched. G, s. 30 (2).

Further applications

10. A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed. R.S.O. 1990, c. O.31, s. 10.

Ontario New Home Warranties Plan

11. (1) The Ontario New Home Warranties Plan is continued under the name Ontario New Home Warranties Plan in English and Régime de garanties des logements neufs de l'Ontario in French and is comprised of the warranties and the guarantee fund and compensation provided for by this Act.

Disclosures on entering into contract

(2) When a vendor enters into a contract for the sale of a home to an owner or for the construction of a home for an owner, the vendor shall deliver to the owner such documentation and notices respecting the Plan as are prescribed by the regulations. R.S.O. 1990, c. O.31, s. 11.

Notice of commencing construction

12. A builder shall not commence to construct a home until the builder has notified the Corporation of the fact, has provided the Corporation with such particulars as the Corporation requires and has paid the prescribed fee to the Corporation. R.S.O. 1990, c. O.31, s. 12.

Warranties

13. (1) Every vendor of a home warrants to the owner,
- (a) that the home,
 - (i) is constructed in a workmanlike manner and is free from defects in material,
 - (ii) is fit for habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code;
 - (b) that the home is free of major structural defects as defined by the regulations; and
 - (c) such other warranties as are prescribed by the regulations.

Exclusions

- (2) A warranty under subsection (1) does not apply in respect of,
- (a) defects in materials, design and work supplied by the owner;

- (b) secondary damage caused by defects, such as property damage and personal injury;
- (c) normal wear and tear;
- (d) normal shrinkage of materials caused by drying after construction;
- (e) damage caused by dampness or condensation due to failure by the owner to maintain adequate ventilation;
- (f) damage resulting from improper maintenance;
- (g) alterations, deletions or additions made by the owner;
- (h) subsidence of the land around the building or along utility lines, other than subsidence beneath the footings of the building;
- (i) damage resulting from an act of God;
- (j) damage caused by insects and rodents, except where construction is in contravention of the Ontario Building Code;
- (k) damage caused by municipal services or other utilities;
- (l) surface defects in work and materials specified and accepted in writing by the owner at the date of possession.

Certificate of completion

(3) The vendor of a home shall deliver to the owner a certificate specifying the date upon which the home is completed for the owner's possession and the warranties take effect from the date specified in the certificate.

Term of warranty under subs. (1)

(4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.

Privity of contract

(5) A warranty is enforceable even though there is no privity of contract between the owner and the vendor.

Application of warranties

(6) The warranties set out in subsection (1) apply despite any agreement or waiver to the contrary and are in addition to any other rights the owner may have and to any other warranty agreed upon. R.S.O. 1990, c. O.31, s. 13.

Compensation

14. (1) Subject to the regulations, a person who has entered into a contract to purchase a home from a vendor is entitled to receive payment out of the guarantee fund for the amount that the person paid to the vendor as a deposit to be credited to the purchase price under the contract on closing if,

- (a) the person has exercised a statutory right to rescind the contract before closing; or
- (b) the person has a cause of action against the vendor resulting from the fact that title to the home has not been transferred to the person because,

- (i) the vendor has gone into bankruptcy, or
- (ii) the vendor has fundamentally breached the contract.

Same, construction contract

(2) Subject to the regulations, an owner of land who has entered into a contract with a builder for the construction of a home on the land and who has a cause of action against the builder for damages resulting from the builder's failure to substantially perform the contract, is entitled to receive payment out of the guarantee fund of the amount by which the amount paid by the owner to the builder under the contract exceeds the value of the work and materials supplied to the owner under the contract.

Same, breach of warranty

(3) Subject to the regulations, an owner of a home is entitled to receive payment out of the guarantee fund for damages resulting from a breach of warranty if,

- (a) the person became the owner of the home through receiving a transfer of title to it or through the substantial performance by a builder of a contract to construct the home on land owned by the person; and
- (b) the person has a cause of action against the vendor or the builder, as the case may be, for damages resulting from the breach of warranty.

Same, major structural defect

(4) Subject to the regulations, an owner who suffers damage because of a major structural defect mentioned in clause 13 (1) (b) is entitled to receive payment out of the guarantee fund for the cost of the remedial work required to correct the major structural defect if the owner makes a claim within four years after the warranty expires or such longer time under such conditions as are prescribed.

Interpretation, substantial performance

(5) For the purposes of this section, a contract is substantially performed if it is substantially performed within the meaning given by subsection 2 (1) of the *Construction Lien Act*.

Other recovery

(6) In assessing the amount for which a person is entitled to receive payment out of the guarantee fund under this section, the Corporation shall take into consideration any benefit, compensation, indemnity payable, or the value of work and materials furnished to the person from any source.

Performance

(7) The Corporation may perform or arrange for the performance of any work in lieu of or in mitigation of damages claimed under this section.

1998, c. 19, ss. 185 (1), 187.

Condominiums

15. For the purposes of sections 13 and 14,

- (a) a condominium corporation shall be deemed to be the owner of the common elements of the corporation;
- (b) subject to clauses (c) and (d), if dwelling units are included in the property of a condominium corporation, the warranties on the common elements of the corporation take effect on the date of the registration of the declaration and description;
- (c) no warranties shall take effect on the common elements of a common elements condominium corporation or a vacant land condominium corporation;
- (d) the warranties on common elements of a phased condominium corporation, that are added to the corporation after the registration of the declaration and description take effect on the date of the registration of the amendments to the declaration and description that created them; and
- (e) the amalgamation of two or more condominium corporations does not affect or extend the warranties on the common elements of the amalgamating corporations.

1998, c. 19, ss. 185 (2), 187.

Liability of vendor

15.1 For the purposes of sections 13 and 14, a person, who at any time has registered as a vendor under this Act with respect to a home, for which the builder has complied with section 12 and has substantially completed the construction, shall be deemed to be a vendor of the home even if another person sells the home to an owner or completes a transaction to sell the home to an owner. 1998, c. 18, Sched. E, s. 188.

Notice of decision under s. 14

16. (1) Where the Corporation makes a decision under section 14, it shall serve notice of the decision, together with written reasons therefor, on the person or owner affected.

Notice requiring hearing

(2) A notice under subsection (1) shall state that the person or owner served is entitled to a hearing by the Tribunal if the person or owner mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Corporation and the Tribunal.

Powers of Tribunal

(3) Where a person or owner gives notice in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and may by order direct the Corporation to take such action as the Tribunal considers the Corporation ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Corporation.

Parties

(4) The Corporation, the person or owner who has required the hearing and such other persons as the Tribunal may specify are parties to proceedings before the Tribunal under this section. R.S.O. 1990, c. O.31, s. 16.

Conciliation of disputes

17. (1) The Corporation may, upon the request of an owner, conciliate any dispute between the owner and a vendor.

Idem

(2) Where there is a dispute between a vendor and an owner arising out of the contract, neither party shall commence any proceeding in respect thereof until after fifteen days after the party notifies the Corporation of the dispute for the purpose of giving the Corporation an opportunity to effect conciliation.

Information to Corporation

(3) Each party to a dispute shall supply the Corporation with such particulars thereof as the Corporation requires.

Arbitration

(4) Every agreement between a vendor and prospective owner shall be deemed to contain a written agreement to submit present or future differences to arbitration, subject to appeal to the Divisional Court, and the *Arbitrations Act* applies. R.S.O. 1990, c. O.31, s. 17.

Inspectors

18. (1) The Corporation shall appoint inspectors for the purposes of this Act.

Power of entry

(2) An inspector may, for the purpose of inspecting a home during its construction, enter in or upon and inspect the premises constituting the site of the construction at any time without a warrant.

Powers of inspector

(3) For the purposes of an inspection, the inspector may,

- (a) require the production of the drawings and specifications of a home or any part thereof, including any drawings prescribed by the regulations, for his or her inspection and may require information from any person concerning any matter related to a home or part thereof;
- (b) be accompanied by any person who has special or expert knowledge of any matter in relation to a home or part thereof; and
- (c) alone or in conjunction with such other person or persons possessing special or expert knowledge, make such examinations, tests, or inquiries as are necessary for the purposes of the inspection.

Obstruction of inspectors

(4) No person shall hinder, obstruct, molest or interfere with or attempt to hinder, obstruct, molest or interfere with an inspector in the exercise of a power or performance of a duty under this Act. R.S.O. 1990, c. O.31, s. 18.

Restraining order

19. (1) Where it appears to the Corporation that any vendor or builder does not comply with this Act or the regulations, despite the imposition of any penalty in respect of such non-compliance and in addition to any other rights it may have, the Corporation may apply to the Superior Court of Justice for an order directing such person to comply with such provision and, upon the application, the court may make the order or such other order as the court thinks fit. R.S.O. 1990, c. O.31, s. 19 (1); 2000, c. 26, Sched. B, s. 15 (5).

Appeal

(2) An appeal lies to the Divisional Court from an order made under subsection (1). R.S.O. 1990, c. O.31, s. 19 (2).

Service of notice

20. Any notice or document required by this Act to be served or given may be served or given personally or by registered mail addressed to the person to whom notice is to be given at the person's last known address and, where notice is served or given by mail, the service shall be deemed to have been made on the fifth day after the day of mailing unless the person to whom the notice is given establishes that the person, acting in good faith, through absence, accident, illness or other cause beyond the person's control, did not receive the notice, or did not receive the notice until a later date. R.S.O. 1990, c. O.31, s. 20.

Certificate of evidence

21. The following statements are admissible in evidence as proof, in the absence of evidence to the contrary, of the facts stated in them for all purposes in any proceeding or prosecution, without the need for proving the office or signature of the Registrar, if the statements purport to be certified by the Registrar:

1. A statement as to the registration or non-registration of any person.
2. A statement as to the filing or non-filing of any document or material required or permitted to be filed with the Corporation.
3. A statement as to any other matter pertaining to a registration, non-registration, filing or non-filing of any person. 1998, c. 18, Sched. E, s. 189.

Offences

22. (1) Every person who,

- (a) knowingly furnishes false information in any application under this Act or in any statement or return required to be furnished under this Act or the regulations; or
- (b) contravenes section 6 or 12 or subsection 18 (4),

and every director or officer of a corporation who knowingly concurs in such furnishing or contravention is guilty of an offence and on conviction is liable to a fine of not more than \$25,000 or to imprisonment for a term of not more than one year, or to both.

Corporation

(2) Where a corporation is convicted of an offence under subsection (1), the maximum penalty that may be imposed upon the corporation is \$100,000 and not as provided therein. R.S.O. 1990, c. O.31, s. 22.

Limitations

(3) A proceeding under clause (1) (a) shall not be commenced after the first anniversary of the day on which the facts upon which the proceeding is based first came to the knowledge of the Registrar.

Same

(4) A proceeding under clause (1) (b) shall not be commenced after the second anniversary of the day on which the facts that gave rise to the offence were discovered.

1998, c. 19, ss. 185 (3), 187.

By-laws

23. (1) The Corporation may make by-laws,

- (a) governing applications for registration of vendors and builders and the expiration and renewal of registration;
- (b) prescribing the terms and conditions of registration;
- (c) requiring the payment of fees on applications for registration or renewal of registration and prescribing the amounts thereof;
- (d) prescribing the fees payable by builders to the Corporation in respect of the construction of a home or any class of home;
- (e) governing applications for and the issuance of certificates under subsection 13 (3);
- (f) governing agreements entered into between the Corporation and vendors or builders;

1998, c. 19, ss. 185 (4), 187.

- (g) providing for the establishment and maintenance of the guarantee fund and governing procedures for claiming and determining claims for compensation from the guarantee fund;
- (h) governing the procedures for conciliation of disputes and providing for the payment and refunding of fees respecting requests for conciliation;
- (i) prescribing classes of dwellings that are homes;
- (j) specifying warranties in addition to those provided for in clause 13 (1) (a) or (b) and the time of expiration thereof;
- (k) defining major structural defects for the purpose of clause 13 (1) (b);
- (l) requiring vendors and builders to be bonded or to provide other security in such form, on such terms and with such collateral security as are prescribed, and providing for the forfeiture of bonds or other security and for the disposition of the proceeds;
- (l.1) specifying information that a person is required to include in a claim for compensation from the guarantee fund;

1998, c. 19, ss. 185 (5), 187

- (m) subrogating the Corporation or a named insurer to any right of recovery of a person in respect of a claim paid out of the insurance under the Plan and costs and providing the terms and conditions under which an action to enforce such rights may be begun, conducted and settled;
- (m.1) allowing prescribed persons to inspect homes during or after their construction and requiring builders or vendors to pay the costs of the inspections;

1998, c. 19, ss. 185 (6), 187.

- (n) prescribing any matter required or authorized by this Act to be, or referred to in this Act as, prescribed by the regulations;
- (o) prescribing forms for the purposes of the Corporation and forms for claims for compensation from the guarantee fund. R.S.O. 1990, c. O.31, s. 23 (1); 1994, c. 27, s. 94; 1998, c. 18, Sched. E, s. 190; 1998, c. 19, s. 185 (4-7).

Legislation Act, 2006, Part III

(2) A by-law passed under subsection (1) shall be deemed to be a regulation to which Part III (Regulations) of the *Legislation Act, 2006* applies. R.S.O. 1990, c. O.31, s. 23 (2); 2006, c. 21, Sched. F, s. 136 (1).

Act binds Crown

- (3) This Act, except sections 6 to 10, binds the Crown. R.S.O. 1990, c. O.31, s. 23 (3).

Ontario New Home Warranties Plan Act
R.R.O. 1990, REGULATION 892
ADMINISTRATION OF THE PLAN
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**PART I
INTERPRETATION**

1. In this Regulation,

- “building” means, in respect of a post June 30, 2012 home, the principal structure in which one or more residential dwellings are located, including in the case of condominiums, common element facilities, but excluding in all cases any structure or appurtenance used in connection with a dwelling such as a fence, deck, sauna, swimming pool, spa, antenna, canopy, patio, sidewalk, driveway, utility shed or storage tank; (“bâtiment”)
- “business day” means any day other than Saturday, Sunday or a holiday; (“jour ouvrable”)
- “certificate of completion and possession” means the certificate required by subsection 13 (3) of the Act; (“certificat d’achèvement et de prise de possession”)
- “common elements” of any condominium project has the meaning ascribed by the *Condominium Act, 1998*; (“parties communes”)
- “conciliation” means a process whereby the Corporation determines whether a disputed item listed on a notice of claim given to the Corporation under this Regulation, including section 4 or any of sections 4.2 to 4.6, is covered by a warranty and whether repairs or compensation are required; (“conciliation”)
- “condominium corporation” means, in respect of any condominium project, the corporation created or continued under the *Condominium Act, 1998*; (“association condominiale”)
- “condominium project” means the lands and interests appurtenant thereto that are described or proposed to be described in any description required by the *Condominium Act, 1998* and which include or are proposed to include units to be used as homes; (“projet condominial”)
- “construction contract” means an agreement between a builder and an owner of land which provides for the construction of a home on the land; (“contrat de construction”)
- “contracted home” means a home constructed pursuant to a construction contract; (“logement sur contrat”)
- “Corporation” means Tarion Warranty Corporation; (“Société”)
- “co-share arrangement” means an arrangement, in respect of a major structural defect claim made under the Act in respect of a condominium project or a home, under which a registrant who is the vendor of the project or the home, as the case may be, agrees in writing to pay the Corporation,
 - (a) the least of the following amounts if the claim involves common elements of a condominium project:
 - (i) the cost to the Corporation of resolving all major structural defect claims in respect of the common elements of the project,
 - (ii) 5 per cent of the aggregate sale price of all homes in the project,
 - (iii) \$750,000,
 - (iv) the maximum amount payable on the claim as a result of any other liability cap set out under the Act, or
 - (b) the least of the following amounts if the claim involves a home but does not involve common elements:
 - (i) the cost to the Corporation of resolving all major structural defect claims in respect of the home,
 - (ii) 5 per cent of the sale price of the home,
 - (iii) \$300,000,
 - (iv) the maximum amount payable on the claim as a result of any other liability cap set out under the Act; (“accord de partage des coûts”)
- “date of possession” means the date on which the home is completed for possession by an owner as specified in the applicable certificate of completion and possession; (“date de prise de possession”)
- “date of registration” means the date on which the declaration and description required by the *Condominium Act, 1998* are registered in the proper land registry office in respect of a condominium project; (“date d’enregistrement”)
- “date of transfer” means the date on which deposits are applied on account of the purchase price payable under a purchase agreement with respect to a home; (“date de transfert”)
- “deposit receipt” means a receipt executed by the Corporation, with provision for execution by the vendor and the purchaser, confirming to the purchaser the benefits of the Plan in respect of the purchase agreement; (“récépissé de dépôt”)
- “deposits” means, in respect of a home, all money received before the date of possession by or on behalf of the vendor from a purchaser on account of the purchase price payable under a purchase agreement, and, in the case of a condominium dwelling unit, includes money received by or on behalf of the vendor after the date of possession and prior to the date of transfer but does not include money,
 - (a) paid under the purchase agreement as rent or as an occupancy charge and not part of the purchase price, or
 - (b) specified in the purchase agreement as money paid under subsection 80 (4) of the *Condominium Act, 1998*; (“dépôts”)
- “initial claim period” means the following period with respect to a warranty claim with respect to a home:

1. The 30-day period beginning immediately after the date of possession, if the home has a date of possession on or after October 1, 2003 and before September 1, 2005.
2. The 31-day period beginning immediately after the date of possession, if the home has a date of possession on or after September 1, 2005; (“période de réclamation initiale”)

“insurers” means the insurers for the time being under any contract or contracts of insurance establishing the guarantee fund;

“interest” means the interest at the rate or rates prescribed under the *Condominium Act, 1998* required to be paid by the vendor on deposits; (“intérêt”)

“major structural defect” means,

- (a) in respect of a post June 30, 2012 home, any defect in work or materials in respect of a building, including a crack, distortion or displacement of a structural load-bearing element of the building, if it,
 - (i) results in failure of a structural load-bearing element of the building,
 - (ii) materially and adversely affects the ability of a structural load-bearing element of the building to carry, bear and resist applicable structural loads for the usual and ordinary service life of the element, or
 - (iii) materially and adversely affects the use of a significant portion of the building for usual and ordinary purposes of a residential dwelling and having regard to any specific use provisions set out in the purchase agreement for the home, or
- (b) in respect of a home that is enrolled after December 31, 1990 and that is not a post June 30, 2012 home, any defect in work or materials, including any defect that results in significant damage due to soil movement, major cracks in basement walls, collapse or serious distortion of joints or roof structure and chemical failure of materials, if the defect,
 - (i) results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function, or
 - (ii) materially and adversely affects the use of such building for the purpose for which it was intended,

but does not include any defect attributable in whole or in part to a Year 2000 compliance problem, flood damage, dampness not arising from failure of a load-bearing portion of the building, damage to drains or services, damage to finishes, malicious damage or damage arising from acts of God, acts of the owners or their tenants, licensees or invitees, acts of civil or military authorities or acts of war, riot, insurrection or civil commotion; (“vice de construction important”)

“major structural defect claim period” means,

- (a) the period beginning immediately after the date of possession and ending on the seventh anniversary of the date of possession, in the case of a warranty claim made under section 4.6, or
- (b) the period beginning immediately after the registration date of the declaration and description for the condominium project and ending on the seventh anniversary of the registration date, in the case of a warranty claim made under section 5.7; (“période de réclamation pour vice de construction important”)

“major structural defect form” means,

- (a) the form that the Corporation requires for a claim made under subsection 14 (4) of the Act for a home, in the case of a warranty claim made under section 4.6 of this Regulation, or
- (b) the form that the Corporation requires for a warranty claim that an owner makes in respect of the common elements of a condominium project and submits to the Corporation under subsection 14 (4) of the Act, in the case of a warranty claim made under section 5.7 of this Regulation; (“formule relative aux vices de construction importants”)

“post June 30, 2012 home” means,

- (a) in the case of a home of a type not described in clause (c) of the definition of “home” in section 1 of the Act, a home where the parties signed the purchase agreement or the construction contract on or after July 1, 2012, and
- (b) in the case of a home of a type described in clause (c) of the definition of “home” in section 1 of the Act, a home where the first arm’s length purchase agreement for a home in the condominium project was signed on or after July 1, 2012;

“pre-delivery inspection date” means the date, on or before the date of possession, on which the vendor and either one or both of the purchaser and the purchaser’s designate conduct an inspection of the home; (“date de l’inspection préalable à la prise de possession”)

“principal” of any corporate applicant or registrant means a person who beneficially owns, directly or indirectly, more than 10 per cent of its outstanding voting shares; (“actionnaire principal”)

“purchase agreement” means an agreement between a vendor and any person providing for the purchase by such person of a home; (“convention d’achat”)

“purchaser” means a person who enters into a purchase agreement with a vendor for the purchase of a home and includes an assignee of the purchaser’s interest in a purchase agreement; (“acheteur”)

“second-year claim period” means,

- (a) the period beginning immediately after the first anniversary of the date of possession and ending on the second anniversary of the date of possession, in the case of a warranty claim made under section 4.4, or
- (b) the period beginning immediately after the first anniversary of the registration date of the declaration and description for the condominium project and ending on the second anniversary of the registration date, in the case of a warranty claim made under section 5.6; (“période de réclamation de deuxième année”)

“second-year form” means,

- (a) the form that the Corporation requires for a warranty claim that an owner submits to the Corporation during the second-year claim period, in the case of a warranty claim made under section 4.4, or
- (b) the form that the Corporation requires for a warranty claim that an owner makes in respect of the common elements of a condominium project and submits to the Corporation during the second-year claim period, in the case of a warranty claim made under section 5.6; (“formule de réclamation de deuxième année”)

“soil movement” means subsidence, expansion or lateral movement of the soil not caused by flood, earthquake, act of God or any other cause beyond the reasonable control of the builder; (“mouvement du sol”)

“structural load-bearing element” means a structural portion or component of a building that is subjected to or designed to carry loads, excluding wind or earthquake loads, in addition to the weight of all permanent structural and non-structural components of the building; (“élément structural porteur”)

“warranty certificate” means, in respect of any home or the common elements of any condominium project, the warranty certificate to be issued by the Corporation to the owner or condominium corporation, confirming the warranties provided for in section 13 of the Act; (“certificat de garantie”)

“warranty claim” means a claim for breach of warranty under subsection 14 (3) or (4) of the Act; (“réclamation au titre de la garantie”)

“warranty period”, for a warranty described in subsection 13 (1) of the Act, means the period beginning on the date on which the warranty takes effect under subsection 13 (3) or section 15 of the Act and ending on the date that the warranty expires; (“période de garantie”)

“Year 2000 compliance problem” means a problem that results from,

- (a) a value for the current date that causes an interruption in operation, degradation in performance, change in functionality or misrepresentation of information,
- (b) data-based processing that does not behave consistently for dates prior to, during and after the year 2000,
- (c) data calculations involving either a single century or multiple centuries that cause an abnormal ending or generate incorrect results, or

(d) failure to recognize the year 2000, or any year divisible by four, as a leap year. (“problème de conformité à l’an 2000”) “year-end claim period” means the following period with respect to a warranty claim with respect to a home:

1. The 30-day period ending on the first anniversary of the date of possession, if the home has a date of possession on or after October 1, 2003 and before September 1, 2005.
2. The 31-day period ending on the first anniversary of the date of possession, if the home has a date of possession on or after September 1, 2005; (“période de réclamation de fin d’année”) R.R.O. 1990, Reg. 892, s. 1; O. Reg. 430/99, s. 1; O. Reg. 138/01, s. 1; O. Reg. 142/02, s. 1; O. Reg. 320/03, s. 1; O. Reg. 32/05, s. 1; O. Reg. 483/05, s. 1; O. Reg. 9/09, s. 1; O. Reg. 274/10, s. 1; O. Reg. 87/12, s. 1.

**PART II
THE PLAN**

ENROLMENT OF HOMES IN THE PLAN

1.1 (1) Forthwith upon the issue of a building permit authorizing the construction of a home, other than a condominium dwelling unit, but including a contracted home, the builder shall enrol the home in the Plan by submitting to the Registrar a completed enrolment form as provided by the Corporation together with the enrolment fee set out in Schedule A. O. Reg. 274/10, s. 2.

(2) Not less than 30 days before the commencement of construction of a condominium project, the builder shall enrol the condominium project and each unit of it in the Plan by submitting to the Registrar a completed enrolment form as provided by the Corporation together with the enrolment fee set out in Schedule A. O. Reg. 274/10, s. 2.

(3) Upon the sale by a vendor of any home, including a contracted home, the builder shall provide to the Corporation confirmation in the prescribed form of the final sale price, to enable the Corporation to confirm or adjust the enrolment fee paid under subsection (1) or (2), as the case may be. O. Reg. 274/10, s. 2.

(4) Subject to subsection (5), if a builder has enrolled in the Plan a home, construction of which has not been commenced or which has been commenced but which is not fit for habitation, and if the home is acquired from the builder by a vendor, by way of conveyance, foreclosure or otherwise, it shall be re-enrolled in the Plan by submitting to the Corporation a completed enrolment fee set out in Schedule A. O. Reg. 274/10, s. 2.

(5) If a home referred to in subsection (4) vests in a trustee in bankruptcy, it shall be re-enrolled only if it was or is subject to a purchase agreement and if the Corporation has paid or is liable to make a payment to the purchaser under subsection 14 (1) of the Act. O. Reg. 274/10, s. 2.

DELIVERY OF DOCUMENTS

2. (1) In connection with the sale or construction of a home, the requirements for the delivery of documents under the Plan are as follows:

1. In the case of a condominium project, promptly following the provision of the required security acceptable to the Corporation and the enrolment of the common elements of the condominium project, the Corporation shall, upon request by the registrant, deliver to the registrant a deposit receipt for every dwelling unit for which security was provided.
2. On the date of possession, the vendor shall deliver to the owner a combined certificate of completion and possession and warranty certificate.
3. In the case of a condominium project that qualifies for warranty coverage on the common elements under the Act, on or promptly following the date of registration of the condominium corporation,

the vendor shall deliver to the condominium corporation a combined certificate of completion and possession and warranty certificate for the common elements.

4. For every home with a date of possession on or after October 1, 2003, the vendor shall deliver to the purchaser, on or before the pre-delivery inspection date, the most current edition of the document entitled *Homeowner Information Package* published by the Corporation, which edition applies to the home.
5. For every home with a date of possession on or after October 1, 2003, the vendor shall, on the pre-delivery inspection date, complete and sign a certificate of completion and possession form and a pre-delivery inspection form approved by the Corporation and deliver a copy of the completed and signed forms to the purchaser.
6. Within 15 days from the date of possession of each home sold by a vendor, the vendor shall submit to the Corporation the completed and signed certificate of completion and possession form mentioned in paragraph 5.
7. Upon the request of the owner or the Corporation, the vendor shall provide to the owner and the Corporation a completed and signed copy of the pre-delivery inspection form mentioned in paragraph 5. O. Reg. 142/02, s. 2; O. Reg. 320/03, s. 2; O. Reg. 172/09, s. 1; O. Reg. 204/13, s. 1 (1).

(2) The vendor may satisfy the requirement described in paragraph 4 of subsection (1) by providing a URL link, URI link or other similar Internet link approved and designated by the Corporation to the applicable edition of the document entitled *Homeowner Information Package* on the Corporation’s website, in an electronic mail to the purchaser’s address for electronic mail set out in the purchase agreement or otherwise confirmed in writing by the purchaser. O. Reg. 204/13, s. 1 (2).

CERTIFICATES OF COMPLETION AND POSSESSION

3. (1) When, pursuant to a purchase agreement or construction contract, a home is completed for possession by the owner, the vendor or builder shall complete and execute the form of certificate of completion and possession required by the Corporation setting forth the date of possession and the name of the builder (if other than the vendor), identifying any surface defects in work and materials not accepted by the owner and listing any unfinished work. R.R.O. 1990, Reg. 892, s. 3 (1); O. Reg. 142/02, s. 3 (1).

(2) In the case of a condominium project that qualifies for warranty coverage on the common elements under the Act, the vendor shall similarly complete and execute the form of certificate of completion and possession required by the Corporation for the common elements, setting forth the date of registration, identifying any surface defects in work and materials in respect of the common elements not accepted by the condominium corporation and listing any unfinished work required in connection with the common elements. R.R.O. 1990, Reg. 892, s. 3 (2); O. Reg. 142/02, s. 3 (2).

**PART II.1
CLAIMS**

CLAIMS — NOT CONDOMINIUM COMMON ELEMENTS

4. (1) Each person with a claim under the Plan shall give written notice of the claim to the Corporation in the format that the Corporation specifies. R.R.O. 1990, Reg. 892, s. 4 (1); O. Reg. 483/05, s. 2 (1).

(2) Forthwith upon receipt by the Corporation of such notice, the Corporation shall furnish or make available to the claimant with such forms as it or the insurers may reasonably require for the purpose of establishing and verifying the claimant’s loss. R.R.O. 1990, Reg. 892, s. 4 (2); O. Reg. 483/05, s. 2 (2).

(3) REVOKED: O. Reg. 483/05, s. 2 (3).

(4) Promptly after receipt by the Corporation of all information reasonably required to be furnished to it in respect of the claim and after determination of any disputes between the claimant and the vendor as to the liability of the vendor, the Corporation shall serve notice of its decision under section 14 of the Act. R.R.O. 1990, Reg. 892, s. 4 (4).

(5) Claims or conciliations for delayed closing or delayed occupancy made under Ontario Regulation 165/08 (Warranty for Delayed Closing or Delayed Occupancy) made under the Act for all homes with a date of possession on or after May 1, 2004 shall be made in accordance with the administrative procedures for delayed closing or delayed occupancy published by the Corporation. O. Reg. 117/04, s. 1; O. Reg. 166/08, s. 1.

(6) The fees payable by the vendor in connection with conciliations for delayed closing or delayed occupancy made under Ontario Regulation 165/08 (Warranty for Delayed Closing or Delayed Occupancy) made under the Act for all homes with a date of possession on or after May 1, 2004 are as set out in Schedule A. O. Reg. 117/04, s. 1; O. Reg. 166/08, s. 1; O. Reg. 172/09, s. 2.

4.1 (1) Subsections 4 (1) and (2), this section and sections 4.2 to 4.6 apply, and subsections 4 (4), (5) and (6) do not apply, to all claims made in respect of homes with a date of possession on or after October 1, 2003, excluding,

- (a) claims made in respect of the common elements of a condominium project; and
- (b) claims for delayed closing or delayed occupancy made under Ontario Regulation 165/08 (Warranty for Delayed Closing or Delayed Occupancy) made under the Act in respect of homes with a date of possession on or after May 1, 2004. O. Reg. 117/04, s. 2 (1); O. Reg. 483/05, s. 3 (1); O. Reg. 166/08, s. 1.

(2) REVOKED: O. Reg. 9/09, s. 2 (1).

(3) During the first year of the warranty period, the owner shall submit to the Corporation a warranty claim only within one or both of the following time periods:

- 1. The initial claim period.
- 2. The year-end claim period. O. Reg. 320/03, s. 3; O. Reg. 483/05, s. 3 (2); O. Reg. 9/09, s. 2 (2).

(4)-(7) REVOKED: O. Reg. 87/12, s. 2.

(8) Submission by regular mail is effective on,

- (a) the post-mark date if the Corporation receives it within 10 days of the expiry of the period during which this section or any of sections 4.2 to 4.6 permit the submission; or
- (b) the date that the Corporation receives it, otherwise. O. Reg. 483/05, s. 3 (4)

(9) REVOKED: O. Reg. 274/10, s. 4.

INITIAL CLAIMS

4.2 (1) In this section,

“initial claim form” means the form that the Corporation requires for a warranty claim that an owner submits to the Corporation during the initial claim period. O. Reg. 9/09, s. 3 (1).

(2) In order to make a warranty claim during the initial claim period, the owner shall complete and submit to the Corporation an initial claim form. O. Reg. 9/09, s. 3 (1).

(3) An owner may submit only one initial claim form for a home. O. Reg. 9/09, s. 3 (1).

(4) If the owner submits more than one initial claim form for a home, the only one of those forms that shall be effective for the purpose of the Act and the regulations shall be,

(a) the first form that the owner submits, if the home has a date of possession on or after October 1, 2003 and before September 1, 2005;

(b) the first form that the Corporation receives, if the home has a date of possession on or after September 1, 2005. O. Reg. 483/05, s. 4 (3); O. Reg. 9/09, s. 3 (2).

(5) Subject to subsection (6) and section 5.1, if a home has a date of possession on or after October 1, 2003 and before September 1, 2005 and if an owner submits an initial claim form with respect to the home to the Corporation during the initial claim period, the vendor shall have until the end of the 150th day after the date on which the Corporation receives the form to repair or resolve the claim items that are listed on the form and that are covered by a warranty. O. Reg. 9/09, s. 3 (3).

(6) If the vendor does not repair or resolve all of the claim items listed on the initial claim form mentioned in subsection (5) by the end of the 120th day after the date on which the Corporation receives the form, the owner may request a conciliation by contacting the Corporation at any time from the 121st day to the 150th day, both inclusive, after the date on which the Corporation receives the form. O. Reg. 483/05, s. 4 (3); O. Reg. 9/09, s. 3 (4).

(7) If the owner does not request conciliation under subsection (6) or if the owner cancels the conciliation requested under that subsection, the owner shall be deemed to have withdrawn all claim items listed on the initial claim form that the vendor does not repair or resolve by the end of the 150th day after the date on which the Corporation receives the form. O. Reg. 483/05, s. 4 (3); O. Reg. 9/09, s. 3 (4).

(8) Subject to subsection (9) and section 5.1, if a home has a date of possession on or after September 1, 2005 and if an owner submits an initial claim form to the Corporation with respect to the home during the initial claim period, the vendor shall have until the end of the 181st day after the date of possession to repair or resolve the claim items that are listed on the form and that are covered by a warranty. O. Reg. 9/09, s. 3 (5).

(9) If the vendor does not repair or resolve all of the claim items listed on the initial claim form mentioned in subsection (8) by the end of the 151st day after the date of possession, the owner may request a conciliation by contacting the Corporation at any time from the 152nd day to the 181st day, both inclusive, after the date of possession. O. Reg. 9/09, s. 3 (5).

(10) If the owner does not request conciliation under subsection (9) or if the owner cancels the conciliation requested under that subsection, the owner shall be deemed to have withdrawn all claim items listed on the initial claim form that the vendor does not repair or resolve by the end of the 181st day after the date of possession. O. Reg. 9/09, s. 3 (5).

(11) If the owner requests conciliation under subsection (6) or (7), the vendor shall have 30 days after the date of the owner's request to repair or resolve all of the claim items listed on the initial claim form that are covered by warranty. O. Reg. 483/05, s. 4 (3); O. Reg. 9/09, s. 3 (6).

(12) The owner may resubmit a warranty claim in accordance with section 4.3, 4.4 or 4.6 for any claim item that subsection (7) or (10) deems the owner to have withdrawn, if the warranty period applicable to the claim item has not expired before the date of resubmission. O. Reg. 483/05, s. 4 (3).

YEAR-END CLAIMS

4.3 (1) In this section,

“year-end form” means the form that the Corporation requires for a warranty claim that an owner submits to the Corporation during the year-end claim period. O. Reg. 483/05, s. 5; O. Reg. 9/09, s. 4.

(2) In order to make a warranty claim during the year-end claim period, the owner shall complete and submit to the Corporation a year-end form. O. Reg. 483/05, s. 5; O. Reg. 9/09, s. 4.

(3) If the home has a date of possession on or after October 1, 2003 and before September 1, 2005 and if the owner submits more than one year-end form under subsection (2), the claim items listed on the last year-end form submitted to the Corporation for the home shall replace the claim items listed on all other year-end forms submitted for the home. O. Reg. 483/05, s. 5.

(4) Subject to subsection (5) and section 5.1, if a home has a date of possession on or after October 1, 2003 and before September 1, 2005 and if an owner submits a year-end form with respect to the home to the Corporation during the year-end claim period, the vendor shall have until the end of the 150th day after the later of the date on which the Corporation receives the form and the day before the first anniversary of the date of possession to repair or resolve the claim items that are listed on the form and that are covered by a warranty. O. Reg. 483/05, s. 5; O. Reg. 9/09, s. 4.

(5) If the vendor does not repair or resolve all of the claim items listed on the year-end form mentioned in subsection (4) by the end of the 120th day after the later of the date on which the Corporation receives the form and the day before the first anniversary of the date of possession, the owner may request a conciliation by contacting the Corporation at any time from the 121st day to the 150th day, both inclusive, after the later of the date on which the Corporation receives the form and the day before the first anniversary of the date of possession. O. Reg. 483/05, s. 5.

(6) If the owner does not request conciliation under subsection (5) or if the owner cancels the conciliation requested under that subsection, the owner shall be deemed to have withdrawn all claim items listed on the year-end form that the vendor does not repair or resolve by the end of the 150th day after the later of the date on which the Corporation receives the form and the day before the first anniversary of the date of possession. O. Reg. 483/05, s. 5.

(7) If a home has a date of possession on or after September 1, 2005, an owner may submit only one year-end form for the home and only the first year-end form that the Corporation receives for the home shall be effective for the purpose of the Act and the regulations. O. Reg. 483/05, s. 5.

(8) Subject to subsection (9) and section 5.1, if a home has a date of possession on or after September 1, 2005 and if an owner submits a year-end form to the Corporation with respect to the home during the year-end claim period, the vendor shall have until the end of the 150th day after the first anniversary of the date of possession to repair or resolve the claim items that are listed on the form and that are covered by a warranty. O. Reg. 483/05, s. 5; O. Reg. 9/09, s. 4.

(9) If the vendor does not repair or resolve all of the claim items listed on the year-end form mentioned in subsection (7) by the end of the 120th day after the first anniversary of the date of possession, the owner may request a conciliation by contacting the Corporation at any time from the

121st day to the 150th day, both inclusive, after the first anniversary of the date of possession. O. Reg. 483/05, s. 5.

(10) If the owner does not request conciliation under subsection (9) or if the owner cancels the conciliation requested under that subsection, the owner shall be deemed to have withdrawn all claim items listed on the year-end form that the vendor does not repair or resolve by the end of the 150th day after the first anniversary of the date of possession.

(11) If the owner requests conciliation under subsection (5) or (9), the vendor shall have 30 days after the date of the owner's request to repair or resolve all of the claim items listed on the year-end form that are covered by warranty.

(12) The owner may resubmit a warranty claim in accordance with section 4.4 or 4.6 for any claim item that subsection (6) or (10) deems the owner to have withdrawn, if the warranty period applicable to the claim item has not expired before the date of resubmission. O. Reg. 483/05, s. 5.

SECOND-YEAR CLAIMS

4.4 (1) REVOKED: O. Reg. 274/10, s. 5.

(2) In order to make a warranty claim during the second-year claim period, the owner shall complete and submit to the Corporation a second-year form. O. Reg. 320/03, s. 3; O. Reg. 9/09, s. 5 (1).

(3) Subject to subsection (4) and section 5.1, if an owner submits a second-year form to the Corporation during the second-year claim period, the vendor shall have until the end of the 150th day from the date on which the Corporation receives the form to repair or resolve the claim items that are listed on the form and that are covered by a warranty.

(4) If the vendor does not repair or resolve all of the claim items listed on the second-year form by the 120th day from the date on which the Corporation receives the form, the owner may request a conciliation by contacting the Corporation at any time between the 121st day and the 150th day, both inclusive, from the date on which the Corporation receives the form.

(5) If the owner does not request conciliation under subsection (4), or if the owner cancels the conciliation requested under that subsection, the owner shall be deemed to have withdrawn all claim items listed on the second-year form that the vendor does not repair or resolve by the end of the 150th day after the date on which the Corporation receives the form.

(6) If the owner requests conciliation under subsection (4), the vendor shall have 30 days after the date of the owner's request to repair or resolve all of the claim items listed on the second-year form that are covered by warranty.

(7) The owner may resubmit a warranty claim in accordance with this section or section 4.6 for any claim item that subsection (5) deems the owner to have withdrawn, if the warranty period applicable to the claim item has not expired before the date of resubmission. O. Reg. 483/05, s. 6 (3).

4.5 REVOKED: O. Reg. 483/05, s. 7.

MAJOR STRUCTURAL DEFECT CLAIMS — YEARS 3 THROUGH 7

4.6 (1) REVOKED: O. Reg. 274/10, s. 6.

(2) In order to make a claim under subsection 14 (4) of the Act for a home that is not a post June 30, 2012 home, the owner shall complete and submit to the Corporation a major structural defect form during the major structural defect claim period. O. Reg. 9/09, s. 6; O. Reg. 87/12, s. 3.

(3) After receiving a major structural defect form for a home, the Corporation shall, within the time period specified in subsection (4),

(a) conduct an inspection of the home or an assessment of the claim items listed on the form, without doing an inspection of the home; and

(b) issue to the owner a report setting out the Corporation's assessment of the claim items listed on the form. O. Reg. 483/05, s. 8; O. Reg. 87/12, s. 3 (2).

(4) For the purpose of subsection (3), the time period is,

(a) the 10 days after the Corporation receives the major structural defect form, if the home has a date of possession on or after October 1, 2003 and before September 1, 2005; or

(b) the 30 days after the Corporation receives the major structural defect form, if the home has a date of possession on or after September 1, 2005. O. Reg. 483/05, s. 8; O. Reg. 87/12, s. 3 (2).

CONCILIATION OF DISPUTES

5. (0.1) Section 4 applies, and subsection 5 (2) and section 5.1 do not apply, to claims and conciliations for delayed closing or delayed occupancy made under Ontario Regulation 165/08 (Warranty for Delayed Closing or Delayed Occupancy) made under the Act for all homes with a date of possession on or after May 1, 2004. O. Reg. 117/04, s. 4; O. Reg. 166/08, s. 1.

(1) An owner who requires conciliation of a dispute between the owner and the vendor shall make request therefor to the Corporation and both the owner and the vendor shall each pay to the Corporation the applicable conciliation fee set out in Schedule A. R.R.O. 1990, Reg. 892, s. 5 (1).

(2) REVOKED: O. Reg. 483/05, s. 9.

(3) If the Corporation determines that the remedial work will require time to complete, the Corporation shall continue to conduct such inspections of the home as the Corporation considers necessary until the work has been completed. R.R.O. 1990, Reg. 892, s. 5 (3).

(4) If the Corporation determines that the conciliation reveals one or more defects that is covered by a warranty, the Corporation shall refund to the owner the conciliation fee paid by the owner. O. Reg. 172/09, s. 3.

(5) If the Corporation determines that the conciliation should not be chargeable to the vendor, the Corporation shall refund to the vendor the conciliation fee paid by the vendor. O. Reg. 172/09, s. 3.

5.1 (1) This section applies, and subsection 5 (2) does not apply, to all homes, excluding the common elements of a condominium project, with a date of possession on or after October 1, 2003. O. Reg. 320/03, s. 4.

(2) If an owner requests conciliation in accordance with section 4.2, 4.3 or 4.4, the Corporation shall, at any time between the 30th day and the 60th day, both inclusive, from the date of the request for conciliation, conduct a conciliation and issue to the owner and the vendor a report setting out the

Corporation’s assessment of whether the claim items are covered by a warranty and the repairs or compensation, if any, required. O. Reg. 320/03, s. 4; O. Reg. 483/05, s. 10.

(3) The vendor shall have a further 30 days from the date on which the report is issued to complete the repairs or pay the compensation required in the report. O. Reg. 320/03, s. 4.

(4) If the vendor does not complete the repairs or pay the compensation, the Corporation shall, subject to subsection 14 (3) of the Act and section 6, pay the compensation out of the guarantee fund to the owner or shall perform or arrange for the performance of the repairs. O. Reg. 320/03, s. 4.

CLAIMS — CONDOMINIUM COMMON ELEMENTS

5.2 (1) In sections 5.3 to 5.8,

“first-year claim period” means the period beginning immediately after the registration date of the declaration and description for the condominium project and ending on the first anniversary of that date; (“période de réclamation de première année”)

“first-year form” means the form that the Corporation requires for a warranty claim that an owner makes in respect of the common elements of a condominium project and submits to the Corporation during the first-year claim period; (“formule de réclamation de première année”)

“owner” means, in respect of common elements of a condominium project, means the condominium corporation. (“propriétaire”) O. Reg. 274/10, s. 7.

(2) Sections 5.3 to 5.8 apply to warranty claims made in respect of common elements of a condominium project registered on or after July 1, 2010. O. Reg. 274/10, s. 7.

(3) Sections 4 to 5.1 do not apply to warranty claims made in respect of common elements of a condominium project registered on or after July 1, 2010. O. Reg. 274/10, s. 7.

5.3, 5.4 REVOKED: O. Reg. 87/12, s. 4.

CONDOMINIUM COMMON ELEMENTS — FIRST-YEAR CLAIMS

5.5 (1) In order to make a warranty claim during the first-year claim period in respect of the common elements of a condominium project, the owner shall complete and submit to the Corporation a first-year form. O. Reg. 274/10, s. 7.

(2) An owner may submit one or more first-year forms to the Corporation at any time during the first-year claim period. O. Reg. 274/10, s. 7.

(3) If an owner submits a first-year form to the Corporation during the first-year claim period, the vendor shall have until the end of the 18-month period from the first anniversary of the registration date of the declaration and description for the condominium project to repair or resolve the claim items listed on the form. O. Reg. 274/10, s. 7.

(4) If the vendor does not repair or resolve the claim items listed on the first-year form submitted in accordance with this section by the end of the period specified in subsection (3), the owner may request a conciliation by contacting the Corporation at any time within 60 days after the end of the period specified in that subsection. O. Reg. 274/10, s. 7.

(5) If the owner does not request a conciliation under subsection (4) or if the owner cancels the conciliation requested under that subsection, the owner shall be deemed to have withdrawn all claim items listed on the first-year form that the vendor does not repair or resolve by the end of the period specified in subsection (3). O. Reg. 274/10, s. 7.

(6) If the owner requests a conciliation under subsection (4), the vendor shall have 90 days from the date of the owner's request to repair or resolve the claim items listed on the first-year form. O. Reg. 274/10, s. 7.

(7) If an owner requests conciliation under subsection (4) and the vendor does not repair or resolve the claim items within the 90 days from the date of the request, the Corporation shall, at any time between the 91st day and the 150th day, both inclusive, from the date of the request, conduct a conciliation and issue to the owner and the vendor a report setting out the Corporation's assessment of whether the claim items are covered by a warranty. O. Reg. 274/10, s. 7.

(8) The vendor shall have a further 90 days from the date on which the report is issued to complete the repairs or otherwise resolve all warranted items set out in the report. O. Reg. 274/10, s. 7.

(9) If the vendor does not complete the repairs or otherwise resolve all warranted items set out in the report, the Corporation shall, subject to subsection 14 (3) of the Act and section 6 of this Regulation, pay compensation out of the guarantee fund to the owner or shall perform or arrange for the performance of any required work. O. Reg. 274/10, s. 7.

CONDOMINIUM COMMON ELEMENTS — SECOND-YEAR CLAIMS

5.6 (1) In order to make a warranty claim during the second-year claim period in respect of the common elements of a condominium project, the owner shall complete and submit to the Corporation a second-year form. O. Reg. 274/10, s. 7.

(2) REVOKED: O. Reg. 87/12, s. 5.

(3) If an owner submits a second-year form to the Corporation during the second-year claim period, the vendor shall have until the end of the six-month period from the second anniversary of the registration date of the declaration and description for the condominium project to repair or resolve the claim items listed on the form. O. Reg. 274/10, s. 7.

(4) If the vendor does not repair or resolve all of the claim items listed on the second-year form submitted in accordance with this section by the end of the period specified in subsection (3), the owner

may request a conciliation by contacting the Corporation at any time within 60 days after the end of the period specified in that subsection. O. Reg. 274/10, s. 7.

(5) If the owner does not request a conciliation under subsection (4) or if the owner cancels the conciliation requested under that subsection, the owner shall be deemed to have withdrawn all claim items listed on the second-year form that the vendor does not repair or resolve by the end of the period specified in subsection (3). O. Reg. 274/10, s. 7.

(6) If the owner requests a conciliation under subsection (4), the vendor shall have 90 days from the date of the owner’s request to repair or resolve the claim items listed on the second-year form. O. Reg. 274/10, s. 7.

(7) If an owner requests a conciliation under subsection (4) and the vendor does not repair or resolve the claim items within 90 days from the date of the request, the Corporation shall, at any time between the 91st day and the 150th day, both inclusive, from the date of the request, conduct a conciliation and issue to the owner and the vendor a report setting out the Corporation’s assessment of whether the claim items are covered by a warranty. O. Reg. 274/10, s. 7.

(8) The vendor shall have a further 90 days from the date on which the report is issued to complete the repairs or otherwise resolve all warranted items set out in the report. O. Reg. 274/10, s. 7.

(9) If the vendor does not complete the repairs or otherwise resolve all warranted items set out in the report, the Corporation shall, subject to subsection 14 (3) of the Act and section 6 of this Regulation, pay compensation out of the guarantee fund to the owner or shall perform or arrange for the performance of any required work. O. Reg. 274/10, s. 7.

CONDOMINIUM COMMON ELEMENTS — MAJOR STRUCTURAL DEFECT CLAIMS

5.7 (1) In order to make a warranty claim under subsection 14 (4) of the Act in respect of the common elements of a condominium project that does not include any post June 30, 2012 homes, the owner shall complete and submit to the Corporation a major structural defect form during the major structural defect claim period. O. Reg. 274/10, s. 7; O. Reg. 87/12, s. 6 (1).

(2) REVOKED: O. Reg. 87/12, s. 6 (2).

(3) If an owner submits a major structural defect form to the Corporation under subsection (1) during the major structural defect claim period, the Corporation shall conduct a conciliation and issue to the owner a report setting out the Corporation’s assessment of whether the claim items listed on the form are covered by the major structural defect warranty. O. Reg. 274/10, s. 7.

CONDOMINIUM COMMON ELEMENTS — CONCILIATION OF DISPUTES

5.8 (1) In connection with a warranty claim made in respect of common elements of a condominium project under section 5.5 or 5.6, the Corporation may, at any time, conduct a conciliation if the Corporation determines that the parties are not acting reasonably to resolve the items listed on the first-year form or the second-year form, as the case may be, that the owner submits to the Corporation. O. Reg. 274/10, s. 7.

(2) If the Corporation conducts a conciliation in accordance with any of sections 5.5, 5.6, 5.7 or this section, the vendor and owner shall each pay to the Corporation the applicable conciliation fee set out in Schedule A. O. Reg. 274/10, s. 7.

(3) If the Corporation determines that the conciliation reveals one or more defects that is covered by a warranty, the Corporation shall refund to the owner the conciliation fee paid by the owner. O. Reg. 274/10, s. 7.

(4) If the Corporation determines that the conciliation should not be chargeable to the vendor, the Corporation shall refund to the vendor the conciliation fee paid by the vendor. O. Reg. 274/10, s. 7.

POST JUNE 30, 2012 HOMES — MAJOR STRUCTURAL DEFECT CLAIMS — YEARS 3 THROUGH 7

5.9 (1) In order to make a major structural defect claim in respect of a post June 30, 2012 home, the owner shall complete and submit to the Corporation a major structural defect form during the major structural defect claim period.

(2) If an owner submits a major structural defect form to the Corporation during the major structural defect claim period, the vendor shall have until the 90th day from the day on which the Corporation receives the form to repair or resolve the claim items that are listed on the form and that are covered by a warranty. O. Reg. 87/12, s. 7.

(3) If the vendor does not repair or resolve all of the claim items listed on the major structural defect form by the 90th day from the day on which the Corporation receives the form, the owner may request a conciliation by contacting the Corporation at any time from the 91st day to the 120th day after the date on which the Corporation receives the form. O. Reg. 87/12, s. 7.

(4) If the owner does not request a conciliation under subsection (3) or cancels the conciliation requested under that subsection, the owner shall be deemed to have withdrawn all claim items listed in the major structural defect form that the vendor does not repair or resolve by the 90th day from the day on which the Corporation receives the form.

(5) If the owner requests a conciliation under subsection (3), the Corporation shall schedule a conciliation within a reasonable time after the request is made. O. Reg. 87/12, s. 7.

(6) If the conciliation of the claim requires physical investigation, the owner shall provide reasonable access and cooperation to the Corporation and the vendor to allow the Corporation or any person designated by the Corporation to conduct whatever investigation is reasonably required for the purpose of assessing the claim. O. Reg. 87/12, s. 7.

(7) If the owner does not comply with subsection (6), the Corporation may deny the claim. O. Reg. 87/12, s. 7.

(8) After conducting the conciliation, the Corporation shall issue a report setting out its finding as to whether or not each claim item constitutes a major structural defect and, if so, a recommendation for either compensation or repair.

(9) Within 10 days from the date the Corporation issues the report described in subsection (8), the vendor shall enter into,

- (a) an agreement with the owner and the Corporation under which the vendor undertakes to resolve the defect directly with the owner, either by way of repair or compensation; or
- (b) a written co-share arrangement with the Corporation in respect of each claim item. O. Reg. 87/12, s. 7.

(10) The Corporation shall resolve the claim directly with the owner, either by paying compensation out of the guarantee fund to the owner or performing or arranging to perform the required work, if,

- (a) the vendor does not comply with subsection (9);
- (b) the vendor enters into an agreement described in clause (9) (a) but fails to comply with it and the owner is not in any way responsible for the failure; or
- (c) the vendor enters into an arrangement described in clause (9) (b). O. Reg. 87/12, s. 7.

GENERAL

5.10 The Corporation may, in its sole discretion, extend or abridge any time specified in sections 4.1 to 4.6, 5.1, 5.2, 5.5 to 5.7 and 5.9 if it determines that,

- (a) the vendor is unable or unwilling to repair or resolve the claim items covered by a warranty;
- (b) the warranty claim,
 - (i) relates to items involving health and safety, seasonal repairs or an emergency, or
 - (ii) involves other extraordinary circumstances; or
- (c) the specified times begin in, end in or span the period from December 24 of one year to January 1 of the following year, both inclusive. O. Reg. 87/12, s. 7.

5.11 (1) A person who submits a form to the Corporation under any of sections 4.1 to 4.6, 5.1, 5.2, 5.5 to 5.7 and 5.9 shall submit the form,

- (a) by hand, courier or facsimile transmission;
- (b) to the Corporation’s designated portal for purchasers on the Internet; or
- (c) by regular mail or registered mail except during a general interruption of postal service. O. Reg. 87/12, s. 7.

(2) Submission by hand or courier is effective on the day that the Corporation receives it, if that day is a business day, and otherwise on the next business day. O. Reg. 87/12, s. 7.

(3) Submission by facsimile transmission or to the Corporation’s designated portal for purchasers on the Internet is effective on the day sent, whether it is a business day or not. O. Reg. 87/12, s. 7.

- (4) Submission by regular mail is effective on,
 - (a) the post-mark date if the Corporation receives it within 10 days of the expiry of the period during which the applicable section requires the submission; or
 - (b) the date that the Corporation receives it, otherwise. O. Reg. 87/12, s. 7.

LIMITS OF LIABILITY

6. (1) In the case of a home of a type referred to in clause (a) or (b) of the definition of “home” in section 1 of the Act, the maximum amount payable to a person out of the guarantee fund in respect of a claim under subsection 14 (1) or (2) of the Act is,

- (a) \$20,000 in respect of a claim in relation to a purchase agreement, or a construction contract, entered into before February 1, 2003; or
- (b) \$40,000 in respect of a claim in relation to a purchase agreement, or a construction contract, entered into on or after February 1, 2003. O. Reg. 2/03, s. 1.

(2) In the case of a home that is a condominium dwelling unit, the maximum amount payable to a person out of the guarantee fund in respect of a claim under subsection 14 (1) of the Act is \$20,000, plus the amount of interest that has accrued, until the time of payment, on the net principal amount payable out of the guarantee fund in respect of the claim. O. Reg. 2/03, s. 1.

(2.1) In subsection (2),

“net principal amount” means the lesser of,

- (a) \$20,000, and
- (b) the amount of deposit paid by the person to a vendor as a credit towards the purchase price under the contract on closing minus amounts required to be deducted from the deposit amount under subsection 14 (6) of the Act. O. Reg. 2/03, s. 1.

(3) In the case of a home of a type referred to in clause (a) or (b) of the definition of “home” in section 1 of the Act, the maximum amount payable to an owner out of the guarantee fund in respect of a claim made under subsection 14 (3) or 14 (4) of the Act is,

- (a) \$100,000 if the claim relates to a purchase agreement, or a construction contract, entered into before September 1, 2004 and under which the home has a date of possession before July 1, 2006;
- (b) \$150,000 if the claim relates to a purchase agreement, or a construction contract, entered into on or after September 1, 2004 and under which the home has a date of possession before July 1, 2006; or
- (c) \$300,000 if the claim relates to purchase agreement, or a construction contract, under which the home has a date of possession on or after July 1, 2006. O. Reg. 246/04, s. 1 (1); O. Reg. 343/06, s. 1 (1).

(4) In the case of a condominium dwelling unit, the maximum amount payable to an owner out of the guarantee fund in respect of a claim made under subsection 14 (3) or 14 (4) of the Act is,

- (a) \$100,000 if the claim relates to a purchase agreement, or a construction contract, entered into before September 1, 2004 and under which the condominium dwelling unit, excluding common elements, has a date of possession before July 1, 2006;
- (b) \$150,000 if the claim relates to a purchase agreement, or a construction contract, entered into on or after September 1, 2004 and under which the condominium dwelling unit, excluding common elements, has a date of possession before July 1, 2006; or
- (c) \$300,000 if the claim relates to a purchase agreement, or a construction contract, under which the condominium dwelling unit, excluding common elements, has a date of possession on or after July 1, 2006. O. Reg. 246/04, s. 1 (1); O. Reg. 343/06, s. 1 (2).

(5) A condominium corporation that has a claim under subsection 14 (3) or (4) of the Act with respect to a condominium project is entitled, subject to subsection (8), to be paid out of the guarantee fund the

cost of rectification of defective work in respect of the common elements of the condominium project. R.R.O. 1990, Reg. 892, s. 6 (5); O. Reg. 138/01, s. 2 (2).

(6) Liability under subsection (3) or (4) is limited to damage to the home only and liability under subsection (5) is limited to damage to the common elements only and there is no liability for any other damage, direct or indirect.

(7) Liability in respect of the cost of completion of a home is limited to 2 per cent of the sale price of the home or \$5,000, whichever is the greater. R.R.O. 1990, Reg. 892, s. 6 (7).

(8) Subject to subsection (8.1), the maximum amount payable out of the guarantee fund in respect of a claim relating to the common elements of a condominium project is the lesser of,

- (a) \$2,500,000; or
- (b) an amount equal to \$50,000 multiplied by the number of condominium dwelling units in the condominium project.

(8.1) As part of the maximum amount payable out of the guarantee fund to a condominium corporation under subsection (8), the maximum amount payable in respect of a claim relating to the common elements of a condominium project registered on or after September 1, 2004, for damage caused by environmentally harmful substances or hazards, deleterious substances, mould or any other fungal or bacterial contamination, is the lesser of,

- (a) \$100,000; or
- (b) an amount equal to \$2,000 multiplied by the number of condominium dwelling units in the condominium project. O. Reg. 246/04, s. 1 (3).

(9) The limits set out in this section in connection with payments made in respect of a home or in respect of common elements of a condominium project are aggregate total limits for all claims made in respect of the home or common elements of the condominium project and the limits shall be reduced by the amounts of any payments made from the guarantee fund in respect of the home or common elements of the condominium project. O. Reg. 451/09, s. 1.

(10) As part of the maximum amount payable to an owner out of the guarantee fund under subsection (3), (4) or (8), the maximum amount payable in respect of a sewage disposal system is \$25,000 per home, in the case of a home that the builder was required to enrol in the Plan after June 30, 1993 and under section 8. O. Reg. 334/93, s. 1.

(11) As part of the maximum amount payable to an owner out of the guarantee fund under subsection (3) or (4), the maximum amount payable in respect of homes sold under purchase agreements, or constructed under construction contracts, entered into on or after September 1, 2004, for damage caused by environmentally harmful substances or hazards, deleterious substances, mould or any other fungal or bacterial contamination, is \$15,000 per home. O. Reg. 246/04, s. 1 (3).

(12) Despite anything in this section, in the case of a condominium project, the maximum aggregate amount payable out of the guarantee fund in respect of claims made under subsection 14 (3) or (4) of the Act relating to all homes and common elements in the condominium project is \$50,000,000 if the first arm's length purchase agreement for a home in the condominium project is entered into in good faith on or after July 1, 2010. O. Reg. 275/10, s. 1.

GUARANTEE FUND

7. (1) The Corporation shall establish and maintain a guarantee fund with a licensed insurer or insurers acceptable to the board of directors under a contract or contracts approved by the board from time to time. R.R.O. 1990, Reg. 892, s. 7 (1).

(2) Under such a contract, the insurers shall agree to indemnify the Corporation for those sums which the Corporation is obligated to pay by reason of settlement of any dispute, judgment, action or claim arising under the Plan during the term of the contract. R.R.O. 1990, Reg. 892, s. 7 (2).

(3) Despite subsections (1) and (2), the Corporation may establish and administer an uninsured fund as part of the guarantee fund and out of which it may pay claims made under the Plan. R.R.O. 1990, Reg. 892, s. 7 (3).

8. REVOKED: O. Reg. 274/10, s. 8.

8.1 REVOKED: O. Reg. 498/09, s. 1.

**PART III
REGISTRATION**

APPLICATION FOR REGISTRATION

9. (1) Each applicant desiring registration under the Plan shall complete, execute and deliver to the Registrar such form or forms of application as the Registrar may require from time to time. R.R.O. 1990, Reg. 892, s. 9 (1).

(2) The application shall set forth the full name and address of the applicant, the type of business organization of the applicant, the names and addresses of all officers, directors and principals of corporate applicants and of all partners and members of applicants who are partnerships and other unincorporated associations, a brief history of the applicant's business experience, customer references, particulars of bonding arrangements, an estimate of the number and type of homes expected to be built by the applicant during the twelve months following the date of application, inventories of homes and such other information as the Registrar may reasonably require. R.R.O. 1990, Reg. 892, s. 9 (2).

(3) The applicant shall furnish to the Registrar:

1. An agreement between the applicant and the Corporation providing for the respective rights and obligations of the parties as to the enrolment of homes under the Plan, the performance of work by builders, the sale of homes by vendors and such other matters as the Corporation may reasonably require, such agreement to be in such form as may be required by the Corporation and to be fully completed and executed by the applicant in duplicate.
2. A letter from a bank chartered under the *Bank Act* (Canada) or from a corporation registered under the *Loan and Trust Corporations Act*, as to the financial position of the applicant.
3. Financial statements of the applicant and such other information relating to the applicant's financial affairs as the Registrar may require.
4. Where the applicant is not a builder, evidence satisfactory to the Registrar that the applicant has a continuing agreement or agreements with at least one registrant who is a builder whereby such registrant agrees to perform the work required to meet the warranty obligations of the applicant under the Plan.
- 4.1 Security for any claim relating to the applicant for any loss, cost or expense paid or payable by the Corporation in such amount and in such form as the Registrar may determine.
5. Such additional documentation related to the application as the Registrar may reasonably require. R.R.O. 1990, Reg. 892, s. 9 (3); O. Reg. 430/99, s. 2 (1).

(4) With each application for registration under the Plan, the applicant shall pay to the Corporation the applicable registration fee set out in Schedule A. O. Reg. 172/09, s. 4.

(4.1) If the applicant proposes to enter into a deposit trust agreement to fulfil the obligation to provide security to the Corporation as required by subparagraph 10.1 i of section 1 of Regulation 894 of the Revised Regulations of Ontario, 1990 (Terms and Conditions of Registration of Builders and Vendors) made under the Act, the applicant shall pay to the Corporation the fee set out in Schedule A with respect to the deposit trust agreement. O. Reg. 172/09, s. 4.

(5) An applicant who fails to comply with the requirements of this section may be refused registration by the Registrar. O. Reg. 430/99, s. 2 (2).

RENEWAL OF REGISTRATION

10. (1) Every registration and renewal thereof expires one year after the date it is granted to the registrant. R.R.O. 1990, Reg. 892, s. 10 (1).

(2) Every registrant shall apply for renewal of registration not less than 30 days before the date on which the registration expires, giving full particulars of any change in the facts set forth in the most recent application for registration or renewal of registration on record. O. Reg. 142/02, s. 4.

(2.1) The Registrar may permit an applicant to apply for renewal of registration after the time specified in subsection (2) if the Registrar determines that doing so would not be contrary to the public interest and that the applicant would be entitled to registration under section 7 of the Act if the applicant were applying for registration. O. Reg. 172/09, s. 5 (1).

(3) Every applicant for renewal of registration shall complete, execute and deliver to the Registrar such form or forms of application and such other documentation as the Registrar may provide from time to time. R.R.O. 1990, Reg. 892, s. 10 (3).

(4) With each application for renewal of registration under the Plan, the applicant shall pay to the Corporation the renewal fee set out in Schedule A. O. Reg. 172/09, s. 5 (2).

11., 12 REVOKED: (PART IV) O. Reg. 430/99, s. 3.

**PART V
SUBROGATION** 194

13. (1) The Corporation shall be subrogated to all rights of recovery of a person to whom payment in respect of a claim has been made out of the guarantee fund under the Act and may maintain an action in its own name or the name of the person against any other person against whom the action lies in respect of such rights of recovery. R.R.O. 1990, Reg. 892, s. 13 (1).

(2) The Corporation is entitled under its rights of recovery to conduct legal proceedings, including an action for damages, the quantum of which shall be limited to the amount paid out of the guarantee fund by the Corporation to the person whose rights are subrogated to the Corporation, including any legal costs, plus all costs incurred by the Corporation in the subrogated action. R.R.O. 1990, Reg. 892, s. 13 (2).

(3) Any amount recovered by the Corporation shall be applied,

- (a) first, to payment of costs actually incurred by the Corporation in any action or any related action and in levying execution;
- (b) second, to reimbursement of the Corporation for the amount of compensation paid by the Corporation to the person out of the guarantee fund; and
- (c) third, the balance, if any, to payment of the person whose rights are subrogated. R.R.O. 1990, Reg. 892, s. 13 (3).

(4) Any settlement or release does not bar the rights of the Corporation unless the Corporation has concurred therewith in writing. R.R.O. 1990, Reg. 892, s. 13 (4).

(5) Any person who has been paid money out of the guarantee fund by the Corporation shall forthwith notify the Corporation of any action that such person has brought against any person who caused or contributed to the damages that resulted in the said payment by the Corporation out of the guarantee fund. R.R.O. 1990, Reg. 892, s. 13 (5).

**PART VI
WARRANTIES**

WATER PENETRATION

14. (1) Every vendor of a new home warrants to the owner that there will be no water penetration through the basement or foundation of the home. O. Reg. 9/09, s. 7.

(2) The warranty described in subsection (1) applies only in respect of claims made during a two-year warranty period ending on the second anniversary of the date of possession. O. Reg. 9/09, s. 7.

GENERAL

15. (1) In this section,

“building envelope” means the wall and roof assemblies that contain the building space, and includes all those elements of the assembly that contribute to the separation of the outdoor and indoor environments so that the indoor environment can be controlled within acceptable limits; (“enveloppe”)

“delivery and distribution systems” include all wires, conduits, pipes, junctions, switches, receptacles and seals, but does not include appliances, fittings and fixtures; (“réseaux de distribution”)

“exterior cladding” means all exterior wall coverings and includes siding and above-grade masonry as required and detailed in the relevant sections of the Ontario Building Code under which the Building Permit was issued. (“habillage extérieur”)

(2) Every vendor of a new home warrants to the owner,

- (a) that the home is constructed in a workmanlike manner and is free from defects in materials including windows, doors and caulking such that the building envelope of the home prevents water penetration;
- (b) that the electrical, plumbing and heating delivery and distribution systems are free from defects in material and work;
- (c) that all exterior cladding of the home is free from defects in material and work resulting in detachment, displacement or physical deterioration;
- (d) that the home is free from violations of the Ontario Building Code regulations under which the Building Permit was issued, affecting health and safety, including but not limited to fire safety, insulation, air and vapour barriers, ventilation, heating and structural adequacy; and
- (e) that the home is free of major structural defects. R.R.O. 1990, Reg. 892, s. 15 (2); O. Reg. 697/92, s. 1.

(2.1) A major structural defect claim in respect of a post June 30, 2012 home does not extend to any damages or claims,

- (a) in respect of any elevating device as defined in subsection 1 (1) of Ontario Regulation 209/01 (Elevating Devices) made under the *Technical Standards and Safety Act, 2000* but does not include the surrounding structure of the building housing the device;
- (b) in respect of any appliances that form part of the heating or cooling apparatus, equipment or system, whether for water, air or other substances, including furnaces, air conditioners, chillers and heat recovery ventilators;
- (c) resulting from dampness not arising from failure of a structural load-bearing element of the building;
- (d) resulting from acts or omissions of an owner, a tenant, a licensee or invitee;
- (e) resulting from acts of civil or military authorities or acts of war, riot, insurrection or civil commotion;
- (f) resulting from a flood not caused by the vendor or builder; or
- (g) resulting from anything to which a warranty does not apply under subsection 13 (2) of the Act. O. Reg. 87/12, s. 8.

(3) The warranties described in subsection (2) apply only in respect of claims made during a two-year warranty period ending on the second anniversary of the date of possession, in respect of homes that were enrolled, or should have been enrolled, after December 31, 1990. O. Reg. 9/09, s. 8.

(4) The warranties described in subsection (2) are prescribed under clause 13 (1) (c) of the Act. R.R.O. 1990, Reg. 892, s. 15 (4).

16. If a home was enrolled after December 31, 1990, the claim for damages because of a major structural defect may be made at any time during the major structural defect claim period. O. Reg. 9/09, s. 9.

17. REVOKED: O. Reg. 166/08, s. 2.

SUBSTITUTIONS

18. (1) Every vendor of a new home warrants to the owner that the vendor shall make no substitutions in those items of construction or finishing for which the purchaser is entitled to make selection pursuant to the purchase agreement without the written consent of the purchaser. R.R.O. 1990, Reg. 892, s. 18 (1).

(2) Subsection (1) does not apply where,

(a) the purchaser, having been notified, does not make a selection within thirty days after executing the purchase agreement or within such other time period as may be agreed; or

(b) an item selected under clause (a) is not available and the purchaser does not make a selection within seven days of receiving written notice from the vendor or within such other time period as may be agreed that the item is unavailable. R.R.O. 1990, Reg. 892, s. 18 (2).

(3) Every vendor of a new home warrants to the owner that where the purchaser fails to make a selection under clause (2) (a) or (b) that the vendor will make a selection on the purchaser’s behalf that is of equal or better quality than the original selection as set out in the purchase agreement. R.R.O. 1990, Reg. 892, s. 18 (3).

19. Every vendor of a new home warrants to the purchaser that, where the vendor makes a substitution with respect to an item that is referred to in the purchase agreement that is not an item that is to be selected by the purchaser, the item will be of equal or better quality than the item referred to in the purchase agreement. R.R.O. 1990, Reg. 892, s. 19.

19.1 REVOKED: O. Reg. 166/08, s. 3.

ELIGIBILITY

20. A claim may be made under subsection 18 (1) or section 19 only where,

(a) the transaction closes; and

(b) the claim is made by an owner during a one-year warranty period ending on the first anniversary of the date of possession. R.R.O. 1990, Reg. 892, s. 20; O. Reg. 166/08, s. 4; O. Reg. 9/09, s. 10.

21. (1) Subject to subsections (2) and (3), for the purposes of section 18, written notice may be given personally or sent by electronic mail, fax, courier or registered mail to the purchaser at the address or contact numbers specified in the purchase agreement or at any replacement address or contact numbers supplied in accordance with the purchase agreement. O. Reg. 166/08, s. 5.

(2) Written notice under section 18 shall not be sent by registered mail if there is a postal stoppage or interruption at the time the notice is sent. O. Reg. 166/08, s. 5.

(3) If written notice under section 18 is sent by registered mail within five days before a postal stoppage or interruption commences or during such a stoppage or interruption, the sending of the notice shall not be effective. O. Reg. 166/08, s. 5.

(4) Written notice given or sent in accordance with this section is deemed to have been given and received,

- (a) on the day of delivery or sending, if the notice was given personally or sent by electronic mail or fax and that day is a business day;
- (b) on the next business day after the day of delivery or sending, if the notice was given personally or sent by electronic mail or fax and the day of delivery or sending is not a business day;
- (c) on the second business day after the day of sending, if sent by courier; and
- (d) subject to subsection (3), on the fifth business day after the day of sending, if sent by registered mail. O. Reg. 166/08, s. 5.

22. REVOKED: O. Reg. 166/08, s. 6.

23. (1), (2) REVOKED: O. Reg. 166/08, s. 7.

(3) The warranties in subsection 18 (1) and section 19 apply to purchase agreements entered into after the 30th day of June, 1988. O. Reg. 117/91, s. 2.

24. REVOKED: O. Reg. 166/08, s. 8.

SCHEDULE A

Registration Fees		Amounts in Canadian \$
1. (1)	In this paragraph:	
	“control” with respect to a person, means the power to direct or significantly influence, either directly or indirectly, the management, policies, or business affairs of the person, whether through the holding of voting interests, or otherwise, as determined by the Registrar; (“contrôle”)	
	“re-seller vendor” means a vendor selling a home who is not the original vendor of the home; (“revendeur”)	
	“umbrella vendor or builder” means a vendor or builder that controls or is controlled by one or more other vendors or builders. (“groupe vendeur ou constructeur”)	
(2)	The fee for registration of a vendor or builder who is not an umbrella vendor or builder or a re-seller vendor is	2,500
(3)	The fee for registration of a vendor or builder who is an umbrella vendor or builder is	600
(4)	The fee for registration of a vendor who is a re-seller vendor and not an umbrella vendor or builder is	350
(5)	The fee payable by a vendor for each deposit trust agreement that the vendor enters into is	500
Renewal of Registration Fees		
2. (1)	In this paragraph:	
	“fast track renewal of registration” means the renewal of the registration of a vendor or builder if the Registrar determines that it is possible to determine the entitlement of the applicant to the renewal under subsection 7 (1) of the Act on an expedited basis; (“renouvellement rapide de l’inscription”)	
	“regular renewal of registration” means the renewal of the registration of a vendor or builder that is not a fast track renewal of registration. (“renouvellement ordinaire de l’inscription”)	
(2)	The fee for a regular renewal of registration is	500
(3)	The fee for a fast track renewal of registration is	300
(4)	If the application for the renewal is made after the time specified in subsection 10 (2) of this Regulation and the Registrar permits the application under subsection 10 (2.1) of this Regulation, the fee for the renewal of registration, in addition to the fee chargeable under subparagraph (2) or (3), is	500

Enrolment and Re-enrolment Fee		
3. (1)	The enrolment fee for every home of a type referred to in clauses (a), (b) and (c) of the definition of “home” in section 1 of the Act is as follows:	
	Sale Price of the Home	Fee
	\$100,000 or less	385
	over \$100,000 up to and including \$150,000	430
	over \$150,000 up to and including \$200,000	500
	over \$200,000 up to and including \$250,000	570
	over \$250,000 up to and including \$300,000	640
	over \$300,000 up to and including \$350,000	710
	over \$350,000 up to and including \$400,000	780
	over \$400,000 up to and including \$450,000	850
	over \$450,000 up to and including \$500,000	920
	over \$500,000 up to and including \$550,000	1,000
	over \$550,000 up to and including \$600,000	1,050
	over \$600,000 up to and including \$650,000	1,100
	over \$650,000 up to and including \$700,000	1,150
	over \$700,000 up to and including \$750,000	1,200
	over \$750,000 up to and including \$800,000	1,250
	over \$800,000 up to and including \$850,000	1,300
	over \$850,000 up to and including \$900,000	1,350
	over \$900,000 up to and including \$950,000	1,400
over \$950,000 up to and including \$1,000,000	1,450	
greater than \$1,000,000	1,500	
(2)	The sale price of a home referred to in subparagraph (1) is the total value of consideration, directly or indirectly payable by an owner in an agreement of purchase and sale or construction contract, excluding any applicable taxes.	
(3)	The re-enrolment fee per home is	
		50
4.	REVOKED: O. Reg. 498/09, s. 2 (2).	

Conciliation Fees		
5.	The fee payable by an owner of a dwelling unit for a conciliation of a dispute under section 5 is,	
	(a) if the request for conciliation is made before July 1, 2009	50

	(b) if the request for conciliation is made on or after July 1, 2009	250
6.	The fee payable by a vendor of a dwelling unit for a conciliation of a dispute under section 5 is,	
	(a) if the request for conciliation is made before July 1, 2009,	
	(i) for the first conciliation with respect to each 25 units or fewer sold by the vendor	no fee
	(ii) for each conciliation after the first conciliation with respect to each 25 units or fewer sold by the vendor	550
	(b) if the request for conciliation is made on or after July 1, 2009	1,000
6.1	The fee payable by a condominium corporation as the owner of common elements for a conciliation of a dispute under any of sections 5.5 to 5.8 is	1,000
6.2	The fee payable by the vendor of common elements for a conciliation of a dispute under any of sections 5.5 to 5.8 is	3,000
Delayed Closing and Delayed Occupancy Fees		
7. (1)	This paragraph applies to claims for compensation made under section 2 or 3 of Ontario Regulation 165/08 (Warranty for Delayed Closing or Delayed Occupancy) made under the Act for delayed closing or delayed occupancy.	
(2)	In this paragraph,	
	“delayed occupancy administration fee” means the fee payable by the vendor fixed by the Corporation for a request for conciliation of a claim made under section 2 or 3 of Ontario Regulation 165/08 (Warranty for Delayed Closing or Delayed Occupancy) made under the Act, for every home with a date of possession on or after May 1, 2004, in accordance with the Corporation’s administrative procedures; (“droits en cas de retard d’occupation”)	
	“delayed occupancy re-assessment fee” means the fee payable by the vendor fixed by the Corporation for re-assessment of a decision of the Corporation in respect of a claim made under section 2 or 3 of Ontario Regulation 165/08 (Warranty for Delayed Closing or Delayed Occupancy) made under the Act, for every home with a date of possession on or after May 1, 2004, in accordance with the Corporation’s administrative procedures. (“droits de réexamen en cas de retard d’occupation”)	
(3)	This paragraph applies, and paragraph 6 of this Schedule does not apply, to all requests for conciliation of a claim made under section 2 or 3 of Ontario Regulation 165/08 (Warranty for Delayed Closing or Delayed Occupancy) made under the Act, for every home with a date of possession on or after May 1, 2004.	

(4)	The delayed occupancy administration fee is,	
	(a) for all homes with a date of possession between May 1, 2004 and December 31, 2004, both inclusive	600
	(b) for all homes with a date of possession between January 1, 2005 and December 31, 2005, both inclusive	1,200
	(c) for all homes with a date of possession on or after January 1, 2006	600
(5)	The delayed occupancy re-assessment fee, which is non-refundable, is	350
8. (1)	This paragraph applies to claims for compensation made under section 5 or 6 of Ontario Regulation 165/08 (Warranty for Delayed Closing or Delayed Occupancy) made under the Act for delayed closing or delayed occupancy.	
(2)	In this paragraph,	
	“delayed closing or occupancy administration fee” means the fee payable by the vendor fixed by the Corporation in respect of a claim for compensation made under section 5 or 6 of Ontario Regulation 165/08 (Warranty for Delayed Closing or Delayed Occupancy) made under the Act if a conciliation is needed to settle the claim and if the Corporation pays any part of the claim.	
(3)	The delayed closing or occupancy administration fee is	500

O. Reg. 172/09, s. 6; O. Reg. 498/09, s. 2; O. Reg. 274/10, s. 9; O. Reg. 87/12, s. 9.

**Ontario New Home Warranties Plan Act
R.R.O. 1990, REGULATION 894**

TERMS AND CONDITIONS OF REGISTRATION OF BUILDERS AND VENDORS

0.1 (1) In this Regulation,

“building”, “condominium project”, “construction contract”, “co-share arrangement”, “date of possession”, “major structural defect”, “post June 30, 2012 home”, “purchase agreement” and “purchaser” have the same meaning as in Regulation 892 (Administration of the Plan) of the Revised Regulations of Ontario, 1990 made under the Act; (“bâtiment”, “projet condominial”, “contrat de construction”, “accord de partage des coûts”, “date de prise de possession”, “vice de construction important”, “logement postérieur au 30 juin 2012”, “convention d’achat” and “acheteur”)

“controlling principal”, in respect of a builder, means a person or combination of persons that either alone or together have a direct or indirect controlling interest in the builder. (“commettant contrôlant”) O. Reg. 321/03, s. 1; O. Reg. 33/05, s. 1 (1); O. Reg. 88/12, s. 1.

(2) A builder is associated with another builder if each of them has the same controlling principal. O. Reg. 33/05, s. 1 (2).

1. The following are conditions of every registration under the Plan:

0.1 The Registrar may require an applicant for registration as a builder to complete a written examination on the technical competence to perform the warranties if,

- i. the applicant has not previously been registered as a builder,
- ii. the applicant has had a previous application for registration refused, or has had a previous registration revoked, or
- iii. the applicant has previously been registered and,
 - A. more than three years have elapsed since the expiration or termination of the registration,
 - B. the applicant is a corporation and its officers or directors have changed since the date of the registration, or
 - C. the Corporation has received written notice of a claim against the guarantee fund with respect to a home sold or built by the applicant.

0.2 The Registrar may interview an applicant for registration as a vendor or builder or a registrant with respect to the person’s entitlement to registration if,

- i. the person has not previously been registered in the capacity that the person is registered or is applying for registration,
- ii. the person has had a previous application for registration refused or has had a previous registration revoked, or
- iii. the person has previously been registered and,
 - A. more than three years have elapsed since the expiration or termination of the registration,
 - B. the person is a corporation and its officers or directors have changed since the date of the registration, or
 - C. the Corporation has received written notice of a claim against the guarantee fund with respect to a home sold or built by the person.

0.3 An applicant for registration as a vendor or builder or a registrant shall,

- i. within the time period specified by the Registrar, provide such information or material relating to the person’s entitlement to registration as the Registrar requires, and
- ii. at the request of the Registrar, have the information and material verified by affidavit.

0.4 If a vendor or builder of a post June 30, 2012 home is in breach of a warranty in respect of a major structural defect in the home and applies for registration or renewal of registration, then in deciding whether the applicant is entitled to the registration or renewal of registration, the Registrar may have regard to,

- i. whether the applicant has fully repaired the defect, fully compensated the owner for the defect or fully indemnified and saved harmless the Corporation for the defect, and
- ii. any issue involving the technical competence of the applicant that the major structural defect reveals.

1. The registrant shall prominently display the certificate of registration at the registrant’s principal business address as indicated in the application for registration.

2. The registrant shall allow the duly authorized representatives of the Corporation free access to the registrant's books and records during normal business hours for the purpose of confirming matters relating to the Plan.
3. The registrant shall diligently perform or cause to be performed all obligations imposed under the Plan and under any agreement made with the Corporation in respect of the Plan.
- 3.1 The registrant, and where applicable its officers and directors, whether in connection with the registrant or other registrants, shall, at all times, carry out each of their undertakings to the Corporation in accordance with the law and with integrity and honesty. Without limiting the generality of the foregoing, it is a breach by the registrant of this condition of registration if the registrant, or where applicable any of its officers or directors, whether in connection with the registrant or other registrants, fails, at any time,
 - i. to fully indemnify the Corporation for all monies paid out by the Corporation to third parties for which the registrant or any of its officers or directors is responsible,
 - ii. to fully honour and comply with any outstanding guarantee or indemnity given to and in favour of the Corporation,
 - iii. to provide truthful, accurate and complete financial information to the Corporation as and when required, or
 - iv. to diligently perform or cause to be performed all obligations imposed under the Plan and under any agreement made with the Corporation in respect of the Plan.
4. The registrant shall indemnify and save harmless the Corporation and the insurers for the time being under any contract or contracts of insurance establishing the guarantee fund, from any loss which they or any of them may suffer by reason of the registrant's failure to diligently perform or cause to be performed all obligations imposed under the Plan and under any agreement made with the Corporation in respect of the Plan. The Corporation may waive the obligation to indemnify and save harmless the Corporation and the insurers set out in this paragraph if the registrant and the Corporation enter into a co-share arrangement or if,
 - i. the loss relates to a warranty claim under clause 13 (1) (a) or (b) of the Act or under section 14 or subsection 15 (2) of Regulation 892 of the Revised Regulations of Ontario, 1990 (Administration of the Plan) made under the Act,
 - ii. the Corporation, under section 16 of the Act, has served a notice of a decision made under section 14 of the Act denying a claim for payment out of the guarantee fund,
 - iii. the registrant, and any associated builder, is in full compliance with the Act and the regulations and all agreements with the Corporation throughout the conciliation and appeal processes described in section 17 of the Act, and
 - iv. the registrant has fully and completely co-operated with the Corporation throughout the conciliation and appeal processes described in section 17 of the Act and has participated in the processes as required by the Corporation.
- 4.0.1 Except in the case of a home to which the Act applies on or after May 1, 2009, if the claim relates to a home of a type referred to in clause (a) or (b) of the definition of "home" in section 1 of the Act or a condominium dwelling unit, excluding common elements, the obligation to indemnify set out in paragraph 4 is limited to,
 - i. \$100,000, plus applicable interest, administrative fees and legal costs, if the purchase agreement or a construction contract for the home was entered into before September 1, 2004 and the home has a date of possession before July 1, 2006, or
 - ii. \$150,000, plus applicable interest, administrative fees and legal costs, if the purchase agreement or a construction contract for the home was entered into on or after September 1, 2004 or if, under the purchase agreement or construction contract, the home has a date of possession on or after July 1, 2006.
- 4.0.2 If there is any contract or agreement between a vendor and the Corporation or between a builder and the Corporation that purports to limit the indemnity obligations of the vendor or the builder and that conflicts or is inconsistent with the indemnity obligations of the vendor or the builder as set out in this Regulation, including without limitation paragraphs 3.1 and 4, then, to the extent of any conflict or inconsistency, this Regulation prevails.
- 4.1 The registrant shall pay an administration fee to the Corporation equal to 15 per cent of the amount that is paid out of the guarantee fund in payment of claims in respect of the registrant.

- 4.2 The registrant shall pay to the Corporation interest at the rate of 1.5 per cent per month, calculated daily, on all amounts that the registrant owes to the Corporation; the registrant shall make the interest payments on the first day of each month following the date of default in repaying the amounts owed until the amounts owed are repaid in full.
5. The registrant shall from time to time, at the registrant's expense, furnish to the following persons the documents relating to the Plan that the Registrar reasonably requires to be furnished:
 - i. The Registrar.
 - ii. The purchasers who have entered into a purchase agreement with the registrant.
 - iii. The owners who have entered into a construction contract with the registrant.
 - iv. The owners of a home to whom the registrant has transferred title to the home.
6. The registrant shall furnish the Registrar with such information relating to the registrant's financial affairs and position as the Registrar may reasonably request.
- 6.1 The Corporation may inspect a home on which a registered builder has commenced construction if, when applying for registration, the builder was an applicant described in the subparagraphs of paragraph 0.1; the builder shall pay a fee of \$125 per inspection per home to the Corporation at the time the Corporation directs.
- 6.2 The Corporation may inspect a home on which a registered builder has commenced construction if the builder has previously been registered and has had a dispute conciliated by the Corporation; the builder shall pay an inspection fee of \$225 per home to the Corporation at the time the Corporation directs.
- 6.3 The Corporation may issue to the builder of a home that it inspects a list of deficiencies in the construction of the home that must be corrected to bring the home into compliance with the Act and the regulations; a builder who receives a list of deficiencies shall correct them within a reasonable period of time.
- 6.4 If the results of an examination or interview by the Registrar or an inspection by the Corporation demonstrate that a registrant does not have the necessary technical competence to be registered under the Act, the Registrar may require the registrant, as a condition for continuing to be registered, to,
 - i. limit the number of homes the registrant constructs,
 - ii. post security with the Corporation, or
 - iii. successfully complete a course of study that the Registrar specifies.
7. The registrant shall, without undue delay, complete the construction of every home commenced by the registrant in accordance with the Act.
8. A registrant shall offer for sale and take all reasonable steps to complete the sale of every home commenced by the registrant in accordance with the Act within two years after the date on which the building permit for the home is issued.
- 8.1 In connection with any purchase agreement for a home signed on or after January 1, 2011, the registrant shall not charge, as an adjustment or readjustment to the purchase price of the home, any amount as reimbursement for a sum paid or payable by the registrant to a third party unless the sum is ultimately paid to the third party. If the registrant charges an amount to the owner in contravention of this paragraph, the registrant shall forthwith readjust with the owner. Nothing in this paragraph restricts or prohibits the registrant and the owner from agreeing on how to allocate as between them, rebates, refunds or incentives provided by the federal government, a provincial or municipal government or an agency of any such government before or after the completion of the purchase agreement.
9. It is a condition of registration that where, as a result of the financial position or the level of technical competence of a registrant, the registrant has consented to conditions limiting the number of homes the registrant may construct or limiting the registrant to the construction of a particular class of homes, the registrant shall not, without the prior written consent of the Registrar, commence to construct,
 - i. homes in excess of the maximum number permitted to be constructed, or
 - ii. homes of any class the construction of which is restricted.
10. The registrant shall, within fifteen days after the event, notify the Registrar in writing,
 - i. of any change in address of the registrant for correspondence relating to the Plan,
 - ii. where the registrant is other than a corporation or an individual, of any change in the members or partners of the registrant, and
 - iii. where the registrant is a corporation,
 - A. of any change in the officers or directors of the registrant,

- B. of any person who becomes the beneficial owner, directly or indirectly, of more than 10 per cent of the outstanding voting shares of the registrant.
- 10.1 The registrant shall, if requested at any time by the Registrar to do so,
 - i. provide security to the Corporation in such amount and in such form as the Registrar may determine for any claim, loss or expense paid or payable by the Corporation relating to the registrant,
 - ii. replace one form of security previously provided to the Corporation with another,
 - iii. provide security to the Corporation additional to that already provided in such amount and in such form as the Registrar may determine, and
 - iv. promptly fulfil any term and condition imposed upon the registrant by the Registrar in connection with the release by the Corporation of the whole or any part of any security provided to the Corporation by the registrant.
 11. The registrant shall give prompt written notice to the Registrar of any material change in any of the information contained in or accompanying the application of the registrant for registration or for renewal of registration under the Plan.
 - 11.1 For every home with a date of possession on or after October 1, 2003, in respect of which the registrant acts as a vendor or a builder, the registrant shall conduct a pre-delivery inspection of the home with either one or both of the purchaser and the purchaser's designate on or before the date of possession, without charging a fee.
 - 11.2 In every purchase agreement or construction contract entered into on or after October 1, 2003 for a home, in respect of which the registrant acts as a vendor or a builder, the registrant shall include a provision whereby the parties agree that the registrant and either one or both of the purchaser and the purchaser's designate will, on or before the date of possession, meet at the home and conduct the pre-delivery inspection of the home described in paragraph 11.1.
 - 11.3 In every purchase agreement or construction contract entered into on or after October 1, 2003 for a home, in respect of which the registrant acts as a vendor or a builder, the registrant shall include a provision stating that,
 - i. the registrant shall deliver to the purchaser, no later than the date of the pre-delivery inspection described in paragraph 11.1, the most current freehold or condominium edition, as applicable, of the document entitled *Homeowner Information Package* published by the Corporation, and
 - ii. the document entitled *Homeowner Information Package* is also available from the Corporation.
 - 11.4 If the Registrar so requests at any time, the registrant shall participate in the training or complete the courses of study that the Registrar reasonably requires.
 - 11.5 If the Registrar so requests at any time, the registrant shall provide the Registrar with all information relating to the registrant's record of closing delays or occupancy delays that the Registrar reasonably requests.
 - 11.6 If the information provided by the registrant under paragraph 11.5 or the results of an examination or interview by the Registrar or an inspection by the Corporation demonstrate that a registrant has not complied with the warranties set out in Ontario Regulation 165/08 (Warranty for Delayed Closing or Delayed Occupancy) made under the Act, the Registrar may require the registrant, as a condition for continuing to be registered, to,
 - i. refrain from entering into any purchase agreement until after a particular date or event,
 - ii. disclose to purchasers all information regarding the potential for closing delays or occupancy delays relating to a purchase agreement that the Registrar reasonably requires,
 - iii. limit the number of homes that the registrant constructs,
 - iv. post security with the Corporation, or
 - v. successfully complete a course of study that the Registrar specifies.
 12. On request, the registrant shall furnish to the Registrar proof that the following Addendum forms part of every purchase agreement entered into before July 1, 2008 in respect of every home of a type described in clause (a) or (b) of the definition of "home" in section 1 of the Act constructed by the registrant.

TARION WARRANTY CORPORATION —
Sections 1 to 6

This Document Contains Important Information for the Consumer

ADDENDUM TO AGREEMENT OF PURCHASE AND SALE —
Sections 1 to 6

This addendum forms part of the Agreement of Purchase and Sale

Between:

.....
..... (“Purchaser”)

and

.....
..... (“Vendor”)

dated,
(the “Agreement”)

DISCLOSURE

1. Purchasers should note that the Agreement may contain provisions about some or all of the following:
 - (i) There may be rights or conditions by which the Vendor may terminate this Agreement regardless of whether or not the Purchaser is in default;
 - (ii) It may be a condition of closing that the Purchaser be approved by mortgage lenders(s);
 - (iii) The rate payable on any mortgage in the Agreement may be subject to increase;
 - (iv) The Vendor may have the right to alter plans and specifications or substitute materials without notice;
 - (v) The purchase price in the Agreement may be increased or adjusted by certain additional costs or charges. (In addition, purchasers are advised that on closing and registration, certain fees and taxes will be payable to the Province of Ontario.)

If the Purchaser cannot identify or understand any of these provisions the Purchaser should discuss them with the Vendor or salesperson.

The Purchaser is advised to consult a solicitor before signing the Agreement.

PLANNING STATUS

2. The current planning status of the land is:
 - (i) If the land in the Agreement is within a Plan of Subdivision, the Plan of Subdivision IS/IS NOT registered;

And

- (ii) A building permit for construction of the dwelling IS/IS NOT available for issuance by the municipality after application has been submitted and all municipal review completed.

ONTARIO NEW HOME WARRANTIES PLAN

3. The Ontario New Home Warranties Plan registration number for the Builder is
 , and
- the enrolment number for the dwelling is
 , (if available).

BUILDER

4. For further information about this Agreement and your home, the Vendor may be contacted at:
-

 (address) (telephone) (attention)

It is recommended that the Purchaser contact the Vendor prior to the closing date to determine that construction is proceeding on schedule and that closing may occur on time.

EXTENSION AND TERMINATION

- 5. (i) If the Vendor cannot close the transaction by the closing date in the Agreement because additional time is required for construction of the dwelling, the Vendor shall extend the closing date one or more times as may be required by the Vendor by notice in writing to the Purchaser as soon as reasonably possible and in any event prior to the closing date or extended closing date, all extensions in the aggregate not to exceed 120 days. However, the vendor shall not extend closing if the parties have specifically agreed in writing that the Vendor cannot, and the Purchaser does not waive this covenant.
- (ii) The Vendor shall take all reasonable steps to construct the dwelling without delay.

- (iii) If the closing date in the Agreement has been extended for 120 days and the Vendor still requires further time for construction of the dwelling, unless subsequent to the closing date in the Agreement the parties otherwise agree, the Purchaser may terminate the Agreement within the 10 days immediately after the 120 days have elapsed by delivering or mailing notice in writing to the Vendor at the address shown above (which notice may also be given between solicitors), and upon the giving of such notice this Agreement shall be at an end and all sums paid by the Purchaser shall be returned without interest or deduction. However, if the Purchaser does not terminate as above, closing shall be deemed to be extended to a date 5 days following completion of the dwelling as required by the Agreement but, unless the parties otherwise agree, not later than a further 120 days after the initial 120 day period. If by this further time the dwelling is not constructed in accordance with the Agreement and if the parties do not otherwise agree, the Agreement shall be at an end and all sums paid by the Purchaser shall be returned without deduction and there shall be no further rights between the parties unless the Vendor is in breach of the vendor's covenant in 5 (ii) above to construct without delay. If the Agreement is so ended, interest shall be payable on all sums paid by the Purchaser, for the period commencing 120 days after the closing date in the Agreement at a rate 1% below the rate paid by the Province of Ontario Savings Office savings accounts as of the date on which the Agreement ended.
- (iv) Despite any provision to the contrary contained in it, the Agreement shall not be terminated by the Vendor by reason of failure to complete the dwelling as specified in the Agreement within a period of time or by a date specified in the Agreement, extended as above, unless the Purchaser consents to the termination in writing or the Agreement is ended pursuant to 5 (iii) above.
- (v) Where there is conflict or ambiguity between the Agreement and this Addendum this Addendum shall prevail.
- (vi) The Vendor may exclude extensions of the closing date reasonably required as a result of a strike, a fire, a flood, an act of God or a civil insurrection (an "Event") when calculating the 120 days referred to in 5 (i) and (iii) only if the Vendor delivers the notices described in 5 (vii) to the Purchaser.
- (vii) If an extension of the closing date referred to in 5 (i) or (iii) above is reasonably required as a result of an Event, then the Vendor shall provide the following notices to the Purchaser:
 - (A) As soon as reasonably possible but not later than 20 days after the Vendor knows or ought reasonably to have known that the Event has commenced, the Vendor shall provide written notice to the Purchaser setting out a brief description of the Event and an estimate, if available, of the possible length of extension that may be required as a result of the Event; and
 - (B) As soon as reasonably possible but not later than 20 days after the conclusion of the Event, the Vendor shall provide written notice to the Purchaser setting out a brief description of the particular Event that was the cause of the extension, the number of days by which the closing date is extended as a consequence of the Event, and the new closing date now in effect as a result of the Event.

(viii) If an Event occurs and the closing date is reasonably required to be extended as a result of the Event, but the Vendor has failed to provide the notices described in 5 (vii), then the Purchaser shall have the option of sending written notice to both the Tarion Warranty Corporation and the Vendor. The notice shall contain a request for a formal extension of the closing date to accommodate the delay in completing the dwelling caused by the Event. The Purchaser shall send the notice no later than 40 days after the conclusion of the Event. Following receipt of the notice, the Tarion Warranty Corporation shall determine the length of a reasonable extension period that the Vendor ought reasonably to have implemented, and shall confirm its determination by notice in writing to both the Vendor and the Purchaser. The extension period as so determined shall be deemed to be excluded from the calculation of the 120 days referred to in 5 (i) and (iii) above, and the Agreement shall be deemed to be extended accordingly.

(ix) 5 (vi), (vii) and (viii) apply to all Agreements entered into on or after November 1, 2000.

6. For further information about anything contained in this Addendum or about the warranties available to purchasers under the *Ontario New Home Warranties Plan Act*, please contact your lawyer and the Tarion Warranty Corporation, toll free, at 1-888-463-6466 during regular business hours, Monday through Friday.

R.R.O. 1990, Reg. 894, s. 1; O. Reg. 691/94, s. 1; O. Reg. 431/99, s. 1; O. Reg. 557/00, s. 1; O. Reg. 52/02, s. 1; O. Reg. 321/03, s. 2; O. Reg. 33/05, s. 2; O. Reg. 344/06, s. 1; O. Reg. 167/08, s. 1; O. Reg. 173/09, s. 1; O. Reg. 507/10, s. 1; O. Reg. 88/12, s. 2; O. Reg. 161/12, s. 1.

Ontario New Home Warranties Plan Act
ONTARIO REGULATION 165/08
WARRANTY FOR DELAYED CLOSING OR DELAYED OCCUPANCY

DEFINITIONS

Definitions

1. In this Regulation,

- “common elements condominium corporation”, “phased condominium corporation” and “vacant land condominium corporation” have the same meaning as in subsection 1 (1) of the *Condominium Act, 1998*;
- “condominium home” means a home of a type described in clause (c) of the definition of “home” in section 1 of the Act; (“logement condominial”)
- “condominium phase” has the meaning set out in the definition of “phase” in subsection 145 (3) of the *Condominium Act, 1998*; (“étape condominiale”)
- “condominium project” means the land and interests appurtenant to the land, as the land and interests are described or proposed to be described in any description required by the *Condominium Act, 1998* and includes units and proposed units, as those terms are defined in that Act, that are to be used as homes; (“projet condominial”)
- “freehold home” means a home of a type described in clause (a) or (b) of the definition of “home” in section 1 of the Act; (“logement franc”)
- “parcel of tied land” means a parcel of land described in clause 139 (1) (a) of the *Condominium Act, 1998* to which a common interest of an owner in a common elements condominium corporation attaches under clause 139 (2) (a) of that Act; (“parcelle de bien-fonds lié”)
- “purchase agreement” and “purchaser” have the same meaning as in Regulation 892 of the Revised Regulations of Ontario, 1990 (Administration of the Plan) made under the Act; (“acheteur”, “convention d’achat”)
- “vacant land condominium home” means a home constructed on a unit in a vacant land condominium corporation and sold by a vendor to a purchaser at the same time as the unit, where occupancy of the home is not provided before the closing of the sale of the unit. (“logement condominial de terrain nu”) O. Reg. 165/08, s. 1; O. Reg. 160/12, s. 1.

NON-APPLICATION OF REGULATION

Contracted homes

1.1 This Regulation does not apply to a contracted home within the meaning of Regulation 892 of the Revised Regulations of Ontario, 1990 (Administration of Plan) made under the Act. O. Reg. 160/12, s. 2.

PURCHASE AGREEMENTS ENTERED INTO BEFORE JULY 1, 2008

Delayed closing, freehold homes

- 2. (1) This section applies to a purchase agreement that the parties have entered into before July 1, 2008 for a freehold home with a closing date fixed on or after September 1, 1988. O. Reg. 165/08, s. 2 (1).
- (2) Every vendor under a purchase agreement to which this section applies warrants to the owner that the vendor shall comply with the Addendum to the purchase agreement that is set out in paragraph 12 of section 1 of Regulation 894 of the Revised Regulations of Ontario (Terms and Conditions of Registration of Builders and Vendors) made under the Act. O. Reg. 165/08, s. 2 (2).
- (3) Every vendor under a purchase agreement to which this section applies warrants to the owner that the vendor shall compensate the owner in accordance with subsection (4) in the event of,
 - (a) a delay in closing that is more than five days beyond the later of the date originally fixed for closing the purchase agreement and the closing date as extended under clause (6) (a) or (b), if the delay commences on or before June 30, 2009; or

(b) a delay in closing beyond the later of the date originally fixed for closing the purchase agreement and the closing date as extended under clause (6) (a) or (b), if the delay commences after June 30, 2009. O. Reg. 165/08, s. 2 (3).

(4) The compensation mentioned in subsection (3) shall be for all direct costs caused by the delay that the owner incurs in an amount that does not exceed \$100 a day for living expenses and \$5,000 in total.

(5) Subsection (3) does not apply to the period of delay in closing caused by a strike, fire, flood, act of God or civil insurrection. O. Reg. 165/08, s. 2 (5).

(6) Subject to paragraph 5 of the Addendum mentioned in subsection (2), subsection (3) does not apply if,

(a) the vendor extends the closing beyond the original closing date after giving written notice to the purchaser at least 65 days before the original closing date; or

(b) the vendor extends the closing for not more than 15 days beyond the original closing date or beyond the extended closing date mentioned in clause (a), after giving written notice to the purchaser at least 35 days before the original closing date or the extended closing date mentioned in clause (a). O. Reg. 165/08, s. 2 (6).

(7) A breach of the warranty described in subsection (3) is a breach of warranty for the purposes of subsection 14 (3) of the Act. O. Reg. 165/08, s. 2 (7).

(8) No claim for compensation under subsection (3) may be made unless,

(a) the transaction closes; and

(b) the claim is made by an owner within one year after the date upon which the home is completed for possession. O. Reg. 165/08, s. 2 (8).

(9) If a claim for compensation under subsection (3) is made, compensation shall be calculated from the later of the original closing date and the closing date as extended under clause (6) (a) or (b). O. Reg. 165/08, s. 2 (9).

Delayed occupancy, condominium homes

3. (1) Subject to subsections (2) and (3), this section applies to a purchase agreement that the parties have entered into on or after April 1, 1991 and before July 1, 2008 for a condominium home. O. Reg. 165/08, s. 3 (1).

(2) If, before July 1, 2008, parties have entered into one or more arm's length purchase agreements in good faith for condominium homes in a condominium project, other than one involving a phased condominium corporation or a vacant land condominium corporation, this section applies to all purchase agreements for all condominium homes in the condominium project and section 6 does not apply to any of those purchase agreements. O. Reg. 165/08, s. 3 (2).

(3) If, before July 1, 2008, parties have entered into one or more arm's length purchase agreements in good faith for condominium homes in a condominium phase, this section applies to all purchase agreements for all condominium homes in the condominium phase and section 6 does not apply to any of those purchase agreements. O. Reg. 165/08, s. 3 (3).

(4) Every vendor under a purchase agreement to which this section applies warrants to the purchaser that the vendor shall compensate the owner in accordance with subsection (5) in the event of,

(a) a delay in occupancy of the condominium home that is more than five days beyond the later of the confirmed occupancy date fixed as set out in subsections (7) and (8) and the confirmed occupancy date as extended under clause (12) (a) or (b), if the delay commences on or before June 30, 2009; or

(b) a delay in occupancy of the condominium home beyond the later of the confirmed occupancy date fixed as set out in subsections (7) and (8) and the confirmed occupancy date as extended under clause (12) (a) or (b), if the delay commences after June 30, 2009. O. Reg. 165/08, s. 3 (4).

(5) The compensation mentioned in subsection (4) shall be for all direct costs caused by the delay that the purchaser incurs in an amount that does not exceed \$100 a day for living expenses and \$5,000 in total. O. Reg. 165/08, s. 3 (5).

(6) Subsection (4) does not apply to a period of delay in occupancy caused by strike, fire, flood, act of God or civil insurrection. O. Reg. 165/08, s. 3 (6).

(7) Every purchase agreement to which this section applies shall contain a confirmed occupancy date or a tentative occupancy date, clearly identified as such. O. Reg. 165/08, s. 3 (7).

(8) If the purchase agreement contains a tentative occupancy date, a confirmed occupancy date shall be established by written notice delivered to the purchaser,

(a) not more than 30 days after the completion of the roof slab or of the roof trusses and sheathing, as the case may be, or on an earlier date or event set out in the purchase agreement; and

(b) at least 120 days before the confirmed occupancy date. O. Reg. 165/08, s. 3 (8).

(9) A confirmed occupancy date established under subsection (8) shall not differ from the tentative occupancy date unless the purchase agreement so permits. O. Reg. 165/08, s. 3 (9).

(10) If a tentative occupancy date has been given and the vendor fails to set a confirmed occupancy date as specified in subsection (8) at least 90 days before the tentative occupancy date, the tentative occupancy date becomes the confirmed occupancy date for the purpose of calculating compensation under subsection (4). O. Reg. 165/08, s. 3 (10).

(11) If the vendor is able to provide occupancy before the confirmed occupancy date, the vendor warrants that occupancy before that date will not be required unless the purchaser consents in writing, and upon such consent, the revised date becomes the confirmed occupancy date for the purpose of calculating compensation payable under subsection (4). O. Reg. 165/08, s. 3 (11).

(12) The vendor may extend the confirmed occupancy date,

(a) by a maximum of 120 days if the vendor gives written notice to the purchaser at least 65 days before the confirmed occupancy date; or

(b) by a maximum of 15 days if the vendor gives written notice to the purchaser at least 35 days before the confirmed occupancy date or an extension of it under clause (a). O. Reg. 165/08, s. 3 (12).

(13) A breach of the warranty described in subsection (4) is a breach of warranty for the purposes of subsection 14 (3) of the Act. O. Reg. 165/08, s. 3 (13).

(14) No claim for compensation under subsection (4) may be made unless,

(a) it is made within one year after the date of possession;

(b) the condominium home is occupied; and

(c) the purchaser is not in default of the purchaser's obligations under the purchase agreement. O. Reg. 165/08, s. 3 (14).

(15) If a claim for compensation under subsection (4) is made, compensation shall be calculated from the later of the confirmed occupancy date and the confirmed occupancy date as extended under clause (12) (a) or (b). O. Reg. 165/08, s. 3 (15).

Notice

4. (1) Subject to subsections (2) and (3), for the purposes of sections 2 and 3, written notice may either be given personally or sent by prepaid ordinary mail to the purchaser at the address in the purchase agreement or at the last known address. O. Reg. 165/08, s. 4 (1).

(2) Written notice shall not sent by mail if there is a postal stoppage or interruption at the time the notice is sent, but rather shall be given personally. O. Reg. 165/08, s. 4 (2).

(3) If written notice is sent by mail within five days before a postal stoppage or interruption commences or during such a stoppage or interruption, the sending of the notice shall not be effective. O. Reg. 165/08, s. 4 (3).

(4) Subject to subsection (3), the purchaser is deemed to have received written notice sent by mail on the fifth business day after the date of its mailing. O. Reg. 165/08, s. 4 (4).

PURCHASE AGREEMENTS ENTERED INTO BETWEEN JULY 1, 2008 AND OCTOBER 1, 2012

Delayed closing

5. (1) If parties enter into a purchase agreement for a freehold home or a vacant land condominium home on or after July 1, 2008 and before October 1, 2012, the following are conditions of registration under the Plan:

1. The vendor shall ensure that the parties complete the applicable one of the following documents, for which the form is available for inspection at the offices of the Corporation during normal business hours, and that the completed document forms part of the purchase agreement:
 - i. The Freehold Home Addendum (Tentative Closing Date) dated April 20, 2008 or April 22, 2009.
 - ii. The Freehold Home Addendum (Firm Closing Date) dated April 20, 2008 or April 22, 2009.
2. Upon request, the vendor shall furnish to the Registrar proof that the applicable document described in paragraph 1, as completed by the parties, forms part of the purchase agreement.

(2) If parties enter into a purchase agreement for a freehold home or a vacant land condominium home on or after July 1, 2008 and before October 1, 2012, the vendor warrants to the purchaser that the vendor will comply with the requirements applicable to the home that are imposed by section 9 of the applicable Addendum that paragraph 1 of subsection (1) requires form part of the purchase agreement, even if the vendor has not complied with that paragraph. O. Reg. 160/12, s. 3 (3).

Delayed occupancy

6. (1) Subject to subsections 3 (2) and (3), if, on or after July 1, 2008 and before October 1, 2012, parties enter into a purchase agreement for a condominium home, other than a vacant land condominium home, the following are conditions of registration under the Plan:

1. The vendor shall ensure that the parties complete the applicable one of the following documents, for which the form is available for inspection at the offices of the Corporation during normal business hours, and that the completed document forms part of the purchase agreement:
 - i. The Condominium Home Addendum (Tentative Occupancy Date) dated April 20, 2008 or April 22, 2009.
 - ii. The Condominium Home Addendum (Firm Occupancy Date) dated April 20, 2008 or April 22, 2009.
2. Upon request, the vendor shall furnish to the Registrar proof that the applicable document described in paragraph 1, as completed by the parties, forms part of the purchase agreement.

(2) Subject to subsections 3 (2) and (3), if, on or after July 1, 2008 and before October 1, 2012, parties enter into a purchase agreement for a condominium home, other than a vacant land condominium home, the vendor warrants to the purchaser that the vendor will comply with the requirements applicable to the home that are imposed by section 9 of the Condominium Home Addendum (Tentative Closing Date) or the Condominium Home Addendum (Firm Closing Date), as the case may be, that paragraph 1 of subsection (1) requires form part of the purchase agreement, even if the vendor has not complied with that paragraph.

PURCHASE AGREEMENTS ENTERED INTO ON OR AFTER OCTOBER 1, 2012

Delayed closing

7. (1) If parties enter into a purchase agreement for a freehold home or a vacant land condominium home on or after October 1, 2012, the following are conditions of registration under the Plan:

1. The vendor shall ensure that the parties complete the applicable one of the following documents, for which the form is available for inspection at the offices of the Corporation during normal business hours, and that the completed document forms part of the purchase agreement:
 - i. The Freehold Home Addendum (Tentative Closing Date) dated October 1, 2012.
 - ii. The Freehold Home Addendum (Firm Closing Date) dated October 1, 2012.
2. Upon request, the vendor shall furnish to the Registrar proof that the applicable document described in paragraph 1, as completed by the parties, forms part of the purchase agreement. O. Reg. 160/12, s. 5.

(2) If parties enter into a purchase agreement for a freehold home or a vacant land condominium home on or after October 1, 2012, the vendor warrants to the purchaser that the vendor will comply with the requirements applicable to the home that are imposed by section 7 of the applicable Addendum that paragraph 1 of subsection (1) requires form part of the purchase agreement, even if the vendor has not complied with that paragraph.

Delayed occupancy

8. (1) Subject to subsections (3) to (6), if, on or after October 1, 2012, parties enter into a purchase agreement for a condominium home in a condominium project for which the description has been registered or is proposed to be registered under the *Condominium Act, 1998* or a purchase agreement for a freehold home on a parcel of tied land for a common elements condominium corporation, the following are conditions of registration under the Plan:

1. The vendor shall ensure that the parties complete the applicable one of the following documents, for which the form is available for inspection at the offices of the Corporation during normal business hours, and that the completed document forms part of the purchase agreement:
 - i. The Condominium Home Addendum (Tentative Occupancy Date) dated October 1, 2012 if the agreement is not for a freehold home on a parcel of tied land for a common elements condominium corporation.
 - ii. The Condominium Home Addendum (Firm Occupancy Date) dated October 1, 2012 if the agreement is not for a freehold home on a parcel of tied land for a common elements condominium corporation.
 - iii. The Limited Use Freehold Addendum (Tentative Occupancy Date) dated October 1, 2012 if the agreement is for a freehold home on a parcel of tied land for a common elements condominium corporation.
 - iv. The Limited Use Freehold Addendum (Firm Occupancy Date) dated October 1, 2012 if the agreement is for a freehold home on a parcel of tied land for a common elements condominium corporation.
2. Upon request, the vendor shall furnish to the Registrar proof that the applicable document described in paragraph 1, as completed by the parties, forms part of the purchase agreement. O. Reg. 160/12, s. 5.

(2) If, on or after October 1, 2012, parties enter into a purchase agreement for a condominium home in a condominium project for which the description has been registered or is proposed to be registered under the *Condominium Act, 1998* or a purchase agreement for a freehold home on a parcel of tied land for a common elements condominium corporation, the vendor warrants to the purchaser that the vendor will comply with the requirements applicable to the home that are imposed by section 7 of the applicable Addendum, that paragraph 1 of subsection (1) requires form part of the purchase agreement, even if the vendor has not complied with that paragraph. O. Reg. 160/12, s. 5.

(3) If, before October 1, 2012, parties have entered into one or more arm's length purchase agreements in good faith for condominium homes in a condominium project, other than one involving a phased condominium corporation or vacant land condominium corporation, then section 6 applies to all purchase agreements for all condominium homes in the condominium project and this section does not apply to those purchase agreements.

(4) If, before October 1, 2012, parties have entered into one or more arm's length purchase agreements in good faith for a freehold home on a parcel of tied land for a common elements condominium corporation, then section 5 applies to all purchase agreements for all parcels of tied land for the condominium corporation and this section does not apply to those purchase agreements. O. Reg. 160/12, s. 5.

(5) If, before October 1, 2012, parties have entered into one or more arm's length purchase agreements in good faith for condominium homes in a phase as defined in subsection 145 (3) of the *Condominium Act, 1998*, other than in a vacant land condominium corporation, then section 6 applies to all purchase agreements for all condominium homes in the phase and this section does not apply to those purchase agreements. (6) Despite subsection (3), (4) or (5), a vendor may elect to use the otherwise applicable form specified in subsection (1) for any purchase agreement signed on or after July 1, 2012. O. Reg. 160/12, s. 5.

Planning Act
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Interpretation

1. (1) In this Act,

“area of employment” means an area of land designated in an official plan for clusters of business and economic uses including, without limitation, the uses listed in subsection (5), or as otherwise prescribed by regulation; (“zone d’emploi”)

“area of settlement” means an area of land designated in an official plan for urban uses including urban areas, urban policy areas, towns, villages, hamlets, rural clusters, rural settlement areas, urban systems, rural service centres or future urban use areas, or as otherwise prescribed by regulation; (“zone de peuplement”)

“committee of adjustment” means a committee of adjustment constituted under section 44; (“comité de dérogation”)

“First Nation” means a band as defined in the *Indian Act* (Canada); (“Première Nation”)

“land division committee” means a land division committee constituted under section 56; (“comité de morcellement des terres”)

“local appeal body” means an appeal body for certain local land use planning matters, constituted under section 8.1; (“organisme d’appel local”)

“local board” means any school board, public utility commission, transportation commission, public library board, board of park management, board of health, police services board, planning board or any other board, commission, committee, body or local authority established or exercising any power or authority under any general or special Act with respect to any of the affairs or purposes of a municipality or of two or more municipalities or portions thereof; (“conseil local”)

“Minister” means the Minister of Municipal Affairs and Housing; (“ministre”)

“Municipal Board” means the Ontario Municipal Board; (“Commission des affaires municipales”)

“prescribed” means prescribed by the regulations; (“prescrit”)

“provincial plan” means,

- (a) the Greenbelt Plan established under section 3 of the *Greenbelt Act, 2005*,
- (b) the Niagara Escarpment Plan established under section 3 of the *Niagara Escarpment Planning and Development Act*,
- (c) the Oak Ridges Moraine Conservation Plan established under section 3 of the *Oak Ridges Moraine Conservation Act, 2001*,
- (d) a development plan approved under the *Ontario Planning and Development Act, 1994*,
- (e) a growth plan approved under the *Places to Grow Act, 2005*, or
- (f) a prescribed plan or policy or a prescribed provision of a prescribed plan or policy made or approved by the Lieutenant Governor in Council, a minister of the Crown, a ministry or a board, commission or agency of the Government of Ontario; (“plan provincial”)

“public body” means a municipality, a local board, a ministry, department, board, commission, agency or official of a provincial or federal government or a First Nation; (“organisme public”)

“public work” means any improvement of a structural nature or other undertaking that is within the jurisdiction of the council of a municipality or a local board; (“travaux publics”)

“regulations” means regulations made under this Act. (“règlements”)

“renewable energy generation facility” has the same meaning as in the *Electricity Act, 1998*; (“installation de production d’énergie renouvelable”)

“renewable energy project” has the same meaning as in the *Green Energy Act, 2009*; (“projet d’énergie renouvelable”)

“renewable energy testing facility” has the same meaning as in the *Green Energy Act, 2009*; (“installation d’évaluation du potentiel en énergie renouvelable”)

“renewable energy testing project” has the same meaning as in the *Green Energy Act, 2009*; (“projet d’évaluation du potentiel en énergie renouvelable”)

“renewable energy undertaking” means a renewable energy generation facility, a renewable energy project, a renewable energy testing facility or a renewable energy testing project; (“entreprise d’énergie renouvelable”)

“residential unit” means a unit that,

- (a) consists of a self-contained set of rooms located in a building or structure,
- (b) is used or intended for use as residential premises, and
- (c) contains kitchen and bathroom facilities that are intended for the use of the unit only. (“unité d’habitation”) R.S.O. 1990, c. P.13, s. 1; 1994, c. 23, s. 3 (2); 1996, c. 4, s. 1 (1-3); 2002, c. 17, Sched. B, s. 1; 2004, c. 18, s. 1; 2006, c. 23, s. 1 (1-4); 2009, c. 12, Sched. K, s. 1; 2009, c. 12, Sched. L, s. 19.

Limitation

(2) The term “public body” in subsection (1) excludes all ministries of the Province of Ontario except the Ministry of Municipal Affairs and Housing in respect of subsections 17 (24), (36) and (40), 22 (7.4), 34 (19), 38 (4), 45 (12), 51 (39), (43) and (48) and 53 (19) and (27). 1996, c. 4, s. 1 (4); 2006, c. 23, s. 1 (5).

Designation

(3) Despite subsection (2), the Minister may by regulation designate any other ministry of the Province of Ontario to be a public body for the purpose of the provisions referred to in subsection (2). 1996, c. 4, s. 1 (4).

Exclusion

(4) The Minister may by regulation exclude any board, commission, agency or official of the Province of Ontario from the definition of “public body” set out in subsection (1) in respect of the provisions referred to in subsection (2). 1996, c. 4, s. 1 (4).

Uses re “area of employment”

- (5) The uses referred to in the definition of “area of employment” in subsection (1) are,
 - (a) manufacturing uses;
 - (b) warehousing uses;
 - (c) office uses;
 - (d) retail uses that are associated with uses mentioned in clauses (a) to (c); and
 - (e) facilities that are ancillary to uses mentioned in clauses (a) to (d). 2006, c. 23, s. 1 (6).

Information and material to be made available to public

1.0.1 Information and material that is required to be provided to a municipality or approval authority under this Act shall be made available to the public. 2006, c. 23, s. 2.

Purposes

1.1 The purposes of this Act are,

- (a) to promote sustainable economic development in a healthy natural environment within the policy and by the means provided under this Act;
- (b) to provide for a land use planning system led by provincial policy;
- (c) to integrate matters of provincial interest in provincial and municipal planning decisions;
- (d) to provide for planning processes that are fair by making them open, accessible, timely and efficient;
- (e) to encourage co-operation and co-ordination among various interests;
- (f) to recognize the decision-making authority and accountability of municipal councils in planning. 1994, c. 23, s. 4.

PART I PROVINCIAL ADMINISTRATION

Provincial interest

2. The Minister, the council of a municipality, a local board, a planning board and the Municipal Board, in carrying out their responsibilities under this Act, shall have regard to, among other matters, matters of provincial interest such as,

- (a) the protection of ecological systems, including natural areas, features and functions;
- (b) the protection of the agricultural resources of the Province;
- (c) the conservation and management of natural resources and the mineral resource base;
- (d) the conservation of features of significant architectural, cultural, historical, archaeological or scientific interest;
- (e) the supply, efficient use and conservation of energy and water;
- (f) the adequate provision and efficient use of communication, transportation, sewage and water services and waste management systems;
- (g) the minimization of waste;
- (h) the orderly development of safe and healthy communities;
- (h.1) the accessibility for persons with disabilities to all facilities, services and matters to which this Act applies;
- (i) the adequate provision and distribution of educational, health, social, cultural and recreational facilities;
- (j) the adequate provision of a full range of housing, including affordable housing;
- (k) the adequate provision of employment opportunities;
- (l) the protection of the financial and economic well-being of the Province and its municipalities;
- (m) the co-ordination of planning activities of public bodies;

- (n) the resolution of planning conflicts involving public and private interests;
- (o) the protection of public health and safety;
- (p) the appropriate location of growth and development;
- (q) the promotion of development that is designed to be sustainable, to support public transit and to be oriented to pedestrians. 1994, c. 23, s. 5; 1996, c. 4, s. 2; 2001, c. 32, s. 31 (1); 2006, c. 23, s. 3; 2011, c. 6, Sched. 2, s. 1.

Decisions of councils and approval authorities

2.1 When an approval authority or the Municipal Board makes a decision under this Act that relates to a planning matter, it shall have regard to,

- (a) any decision that is made under this Act by a municipal council or by an approval authority and relates to the same planning matter; and
- (b) any supporting information and material that the municipal council or approval authority considered in making the decision described in clause (a). 2006, c. 23, s. 4.

Policy statements

3. (1) The Minister, or the Minister together with any other minister of the Crown, may from time to time issue policy statements that have been approved by the Lieutenant Governor in Council on matters relating to municipal planning that in the opinion of the Minister are of provincial interest. R.S.O. 1990, c. P.13, s. 3 (1).

Minister to confer

(2) Before issuing a policy statement, the Minister shall confer with such persons or public bodies that the Minister considers have an interest in the proposed statement. 1994, c. 23, s. 6 (1).

Notice

(3) If a policy statement is issued under subsection (1), the Minister shall cause it to be published in *The Ontario Gazette* and shall give such further notice of it, in such manner as the Minister considers appropriate, to all members of the Assembly and to any other persons or public bodies that the Minister considers have an interest in the statement. 1994, c. 23, s. 6 (1).

Idem

(4) Each municipality that receives notice of a policy statement under subsection (3) shall in turn give notice of the statement to each local board of the municipality that it considers has an interest in the statement. R.S.O. 1990, c. P.13, s. 3 (4).

Policy statements and provincial plans

(5) A decision of the council of a municipality, a local board, a planning board, a minister of the Crown and a ministry, board, commission or agency of the government, including the Municipal Board, in respect of the exercise of any authority that affects a planning matter,

- (a) shall be consistent with the policy statements issued under subsection (1) that are in effect on the date of the decision; and
- (b) shall conform with the provincial plans that are in effect on that date, or shall not conflict with them, as the case may be. 2006, c. 23, s. 5.

Same

(6) Comments, submissions or advice affecting a planning matter that are provided by the council of a municipality, a local board, a planning board, a minister or ministry, board, commission or agency of the government,

- (a) shall be consistent with the policy statements issued under subsection (1) that are in effect on the date the comments, submissions or advice are provided; and
- (b) shall conform with the provincial plans that are in effect on that date, or shall not conflict with them, as the case may be. 2006, c. 23, s. 5.

Duties of Minister unaffected

(7) Except as provided in subsections (5) and (6), nothing in this section affects nor restricts the Minister in carrying out the Minister's duties and responsibilities under this Act. 1996, c. 4, s. 3.

(8), (9) REPEALED: 1996, c. 4, s. 3.

Review

(10) The Minister shall, at least every five years from the date that a policy statement is issued under subsection (1), ensure that a review of the policy statement is undertaken for the purpose of determining the need for a revision of the policy statement. 1994, c. 23, s. 6 (3).

Delegation of Minister's powers

4. (1) The Minister, on the request of the council of any municipality, may, by order, delegate to the council any of the Minister's authority under this Act, other than the authority to approve or the authority to exempt from approval the official plan or amendments to the official plan of the municipality of which it is the council and, where the Minister has delegated any such authority, the council has, in lieu of the Minister, all the powers and rights of the Minister in respect thereof and the council shall be responsible for all matters pertaining thereto, including, without limiting the generality of the foregoing, the referral of any matter to the Municipal Board. R.S.O. 1990, c. P.13, s. 4 (1); 1996, c. 4, s. 4 (1); 1999, c. 12, Sched. M, s. 21; 2006, c. 23, s. 6.

Same

(2) The Minister, on the request of the planning board of any planning area in a territorial district, may, by order, delegate to the planning board any of the Minister's authority under this Act, other than the authority to approve or the authority to exempt from approval an official plan or amendments to an official plan, and where the Minister has delegated any such authority the planning board has, in lieu of the Minister, all the powers and rights of the Minister in respect thereof and the planning board shall be responsible for all matters pertaining thereto, including, without limiting the generality of the foregoing, the referral of any matter to the Municipal Board. R.S.O. 1990, c. P.13, s. 4 (2); 1996, c. 4, s. 4 (2).

Delegation where no request is made

(2.1) The Minister may, after the prescribed notice is given, by order delegate to the council of an upper-tier municipality or a single-tier municipality any of the Minister's authority described in subsection (1) if the municipality has an official plan. 2002, c. 17, Sched. B, s. 2.

Delegation to planning board

(2.2) The Minister may, after the prescribed notice is given, by order delegate to a planning board any of the Minister's authority described in subsection (2) if the planning board has an official plan. 1996, c. 4, s. 4 (3).

(3) REPEALED: 1994, c. 23, s. 7.

Conditions

(4) A delegation made by the Minister under this section may be subject to such conditions as the Minister may by order provide. 1996, c. 4, s. 4 (4).

Withdrawal of delegation of powers

(5) The Minister may by order, accompanied by a written explanation therefor, withdraw any delegation made under this section and, without limiting the generality of the foregoing, such withdrawal may be either in respect of one or more applications for approval specified in the order or in respect of any or all applications for approval made subsequent to the withdrawal of the delegation, and immediately following any such withdrawal the council or the planning board, as the case may be, shall forward to the Minister all papers, plans, documents and other material in the possession of the municipal corporation or the planning board that relate to any matter in respect of which the authority was withdrawn and of which a final disposition was not made by the council or the planning board prior to such withdrawal. R.S.O. 1990, c. P.13, s. 4 (5); 1993, c. 26, s. 49 (4); 1996, c. 4, s. 4 (5).

Further delegation of powers

5. (1) Where the Minister has delegated any authority to a council under section 4, such council may, in turn, by by-law, and subject to such conditions as may have been imposed by the Minister, delegate any of such authority, other than the authority to approve official plans or the authority to exempt from approval plans as official plans or amendments to official plans, to a committee of council or to an appointed officer identified in the by-law either by name or position occupied and such committee or officer, as the case may be, has, in lieu of the Minister, all the powers and rights of the Minister in respect of such delegated authority and shall be responsible for all matters pertaining thereto including the referral of any matter to the Municipal Board. R.S.O. 1990, c. P.13, s. 5 (1); 1996, c. 4, s. 5 (1).

Limitation

(2) Despite subsection (1), a council may not delegate the authority to approve or the authority to exempt from approval amendments to official plans without the prior written approval of the Minister, which approval may be subject to such further conditions as the Minister considers appropriate. R.S.O. 1990, c. P.13, s. 5 (2); 1996, c. 4, s. 5 (2).

Further delegation of powers

(3) In addition to the authority of a council to, in turn, delegate any authority under subsection (1), where the Minister has delegated to a council his or her authority for the giving of consents under section 53, such council may, in turn, by by-law, and subject to such conditions as may have been imposed by the Minister, delegate the authority for the giving of consents to a committee of adjustment constituted under section 44.

Conditions

(4) A delegation made by a council under subsection (1) or (3) may be subject to such conditions as the council may by by-law provide and as are not in conflict with any conditions provided by order of the Minister under section 4.

Withdrawal of delegation of powers

(5) A council may by by-law withdraw any delegation made under subsection (1) or (3), whereupon subsection 4 (5) applies with necessary modifications. R.S.O. 1990, c. P.13, s. 5 (3-5).

Consultation

6. (1) In this section,

“ministry” means any ministry or secretariat of the Government of Ontario and includes a board, commission or agency of the Government. R.S.O. 1990, c. P.13, s. 6 (1); 1998, c. 15, Sched. E, s. 27 (3).

Planning policies

(2) A ministry, before carrying out or authorizing any undertaking that the ministry considers will directly affect any municipality, shall consult with, and have regard for, the established planning policies of the municipality. R.S.O. 1990, c. P.13, s. 6 (2).

Grants

7. The Minister may, out of the money appropriated therefor by the Legislature, make grants of money to assist in the performing of any duty or function of a planning nature. R.S.O. 1990, c. P.13, s. 7.

PART II LOCAL PLANNING ADMINISTRATION

Planning advisory committee

8. (1) The council of a municipality may appoint a planning advisory committee composed of such persons as the council may determine.

Joint planning by agreement

(2) The councils of two or more municipalities may enter into agreement to provide for the joint undertaking of such matters of a planning nature as may be agreed upon and may appoint a joint planning advisory committee composed of such persons as they may determine.

Remuneration

(3) Persons appointed to a committee under this section may be paid such remuneration and expenses as the council or councils may determine, and where a joint committee is appointed, the councils may by agreement provide for apportioning to their respective municipalities the costs of the payments. R.S.O. 1990, c. P.13, s. 8.

Local appeal body

8.1 (1) If a municipality meets the prescribed conditions, the council may by by-law constitute and appoint one appeal body for certain local land use planning matters, composed of such persons as the council considers advisable, subject to subsections (3), (4) and (5). 2006, c. 23, s. 7.

Local and upper-tier municipalities

(2) For greater certainty, this section applies to both local and upper-tier municipalities. 2006, c. 23, s. 7.

Term and qualifications

(3) A person who is appointed to the local appeal body,

(a) shall serve for the prescribed term, or if no term is prescribed, for the term specified in the by-law; and

(b) shall have the prescribed qualifications, if any. 2006, c. 23, s. 7.

Eligibility criteria

(4) In appointing persons to the local appeal body, the council shall have regard to any prescribed eligibility criteria. 2006, c. 23, s. 7.

Restriction

- (5) The council shall not appoint to the local appeal body a person who is,
- (a) an employee of the municipality;
 - (b) a member of a municipal council, land division committee, committee of adjustment, planning board or planning advisory committee; or
 - (c) a member of a prescribed class. 2006, c. 23, s. 7.

Power to hear appeals

- (6) The council may by by-law empower the local appeal body to hear appeals under,
- (a) subsection 45 (12);
 - (b) subsections 53 (14), (19) and (27); or
 - (c) the provisions listed in both clauses (a) and (b). 2006, c. 23, s. 7.

Effect of by-law under subs. (6)

- (7) If a by-law has been passed under subsection (6),
- (a) the local appeal body has all the powers and duties of the Municipal Board under the relevant provisions of this Act;
 - (b) all references in this Act to the Municipal Board in connection with appeals shall be read as references to the local appeal body; and
 - (c) appeals under the relevant provisions shall be made to the local appeal body, not to the Municipal Board. 2006, c. 23, s. 7.

Prescribed requirements

(8) The local appeal body shall comply with any prescribed requirements including, without limitation, requirements for the rules governing the practice and procedure before the local appeal body. 2006, c. 23, s. 7.

Fee

(9) An appellant shall pay to the local appeal body any fee that the council establishes by by-law. 2006, c. 23, s. 7.

Appeal

(10) An appeal lies from the local appeal body to the Divisional Court, with leave of the Divisional Court, on a question of law. 2006, c. 23, s. 7.

Saving

(11) For greater certainty, the local appeal body does not have power to make determinations under subsection 53 (4.1). 2006, c. 23, s. 7.

Exception, related appeals

- (12) Despite subsection (7), an appeal under a provision listed in subsection (6) shall be made to the Municipal Board, not to the local appeal body, if a related appeal,
- (a) has previously been made to the Board and has not yet been finally disposed of; or

- (b) is made to the Board together with the appeal under a provision listed in subsection (6). 2006, c. 23, s. 7.

Same

(13) For the purposes of subsections (12) and (16), an appeal is a related appeal with respect to an appeal under a provision listed in subsection (6) if it is made,

- (a) under section 17, 22, 34, 36, 38, 41 or 51 or in relation to a development permit system; and
(b) in respect of the same matter as the appeal under a provision listed in subsection (6). 2006, c. 23, s. 7.

Dispute

(14) A person may make a motion for directions to have the Municipal Board determine a dispute about whether subsection (12) or (16) applies to an appeal. 2006, c. 23, s. 7.

Final determination

(15) The Municipal Board's determination under subsection (14) is not subject to appeal or review. 2006, c. 23, s. 7.

O.M.B. to assume jurisdiction

(16) If an appeal has been made to a local appeal body under a provision listed in subsection (6) but no hearing has begun, and a notice of appeal is filed in respect of a related appeal, the Municipal Board shall assume jurisdiction to hear the first-mentioned appeal. 2006, c. 23, s. 7.

Same

(17) When the Municipal Board assumes jurisdiction as described in subsection (16), the local appeal body,

- (a) shall immediately forward to the Board all information and material in its possession that relates to the appeal; and
(b) shall not take any further action with respect to the appeal. 2006, c. 23, s. 7.

Withdrawal of power

(18) The Minister may by order, accompanied by a written explanation for it, withdraw the power given to a local appeal body under subsections (6) and (7), and the order may be in respect of the appeals specified in the order, subject to subsection (19), or in respect of any or all appeals made after the order is made. 2006, c. 23, s. 7.

Exception

(19) An order made under subsection (18) does not apply to an appeal if the hearing before the local appeal body has begun on or before the date of the order. 2006, c. 23, s. 7.

Effect of withdrawal

- (20) If an order is made under subsection (18),
(a) the Municipal Board shall hear all appeals to which the order applies; and
(b) the local appeal body to which the order relates shall forward to the Board all information and material in its possession that relates to any appeal to which the order applies. 2006, c. 23, s. 7.

Revocation of withdrawal

(21) The Minister may by order, accompanied by a written explanation for it, revoke all or part of an order made under subsection (18). 2006, c. 23, s. 7.

Exception

(22) An order made under subsection (21) does not apply to an appeal if the hearing before the Municipal Board has begun on or before the date of the order. 2006, c. 23, s. 7.

Effect of revocation

(23) If an order is made under subsection (21),

- (a) the local appeal body shall hear all appeals to which the order applies; and
- (b) the Municipal Board shall forward to the local appeal body all information and material in its possession that relates to any appeal to which the order applies. 2006, c. 23, s. 7.

Restriction

(24) This section does not authorize a municipality to,

- (a) establish a joint local appeal body together with one or more other municipalities; or
- (b) empower a local appeal body that is established by another municipality to hear appeals. 2006, c. 23, s. 7.

City of Toronto

(25) This section does not apply with respect to the City of Toronto. 2006, c. 23, s. 7.

Transition

(26) This section does not apply with respect to an appeal that is made before the day a by-law passed under subsection (6) by the council of the relevant municipality comes into force. 2006, c. 23, s. 7.

Planning area defined by Minister

9. (1) The Minister may define and name a planning area consisting of the whole of two or more municipalities that are situated in a territorial district or consisting of the whole of one or more municipalities and territory without municipal organization.

Planning board for planning area

(2) Where a planning area is defined under subsection (1), the Minister shall establish the planning board for the planning area and specify the name of the board and the number of members to be appointed to it by the council of each municipality within the planning area and the number of members, if any, to be appointed by the Minister.

Appointments to board

(3) The council of each municipality shall appoint to the planning board the number of members specified by the Minister under subsection (2) and, after the initial appointments, the appointments shall be made by each successive council as soon as practicable after the council is organized.

Term of office

(4) The members,

- (a) appointed by the council of each municipality shall hold office for the term of the council that appointed them; and

(b) appointed by the Minister shall hold office for the term specified by the Minister in their appointment,

and until their successors are appointed. R.S.O. 1990, c. P.13, s. 9.

Planning area in unorganized territory

10. The Minister may define and name a planning area consisting of territory without municipal organization and may establish and name a planning board for the planning area and appoint the members thereof. R.S.O. 1990, c. P.13, s. 10.

Body corporate

11. (1) A planning board is a body corporate and a majority of its members constitutes a quorum.

Chair

(2) A planning board shall annually elect a chair and a vice-chair who shall preside in the absence of the chair.

Secretary-treasurer, employees, consultants

(3) A planning board shall appoint a secretary-treasurer, who may be a member of the board, and may engage such employees and consultants as are considered appropriate.

Execution of documents

(4) The execution of documents by a planning board shall be evidenced by the signatures of the chair or the vice-chair and of the secretary-treasurer, and the corporate seal of the board. R.S.O. 1990, c. P.13, s. 11.

Estimates

12. (1) A planning board established by the Minister for a planning area consisting of one municipality and territory without municipal organization shall submit annually to the council of the municipality an estimate of its financial requirements for the year and the council may amend such estimate and shall pay to the secretary-treasurer of the planning board out of the money appropriated for the planning board such amounts as may be requisitioned from time to time.

Two or more municipalities

(2) In the case of a planning board established for a planning area consisting of two or more municipalities or consisting of two or more municipalities and territory without municipal organization, the planning board shall annually submit its estimates to the council of each of such municipalities together with a statement as to the proportion thereof to be chargeable to each municipality.

When estimates binding

(3) If the estimates submitted under subsection (2) are approved, or are amended and approved, by the councils of municipalities representing more than one-half of the population of the planning area for which the board was established, the estimates are binding on all the municipalities.

Notification

(4) After the estimates have been approved as provided in subsection (3), the planning board shall so notify each municipality involved and shall notify each such municipality of the total approved estimates and the amount thereof chargeable to it, based on the apportionment set out in the statement submitted under subsection (2).

Where apportionment not satisfactory

(5) If the council of any municipality is not satisfied with the apportionment, it may, within fifteen days after receiving the notice under subsection (4), notify the planning board and the secretary of the Municipal Board that it desires the apportionment to be made by the Board.

Power of O.M.B.

(6) The Municipal Board shall hold a hearing and determine the apportionment and its decision is final.

Payment

(7) Each municipality shall pay to the secretary-treasurer of the planning board such amounts as may be requisitioned from time to time up to the amount determined by the planning board under subsection (4) or by the Municipal Board under subsection (6), as the case may be. R.S.O. 1990, c. P.13, s. 12.

Municipal grants

13. Any municipality within a planning area may make grants of money to the planning board of the planning area. R.S.O. 1990, c. P.13, s. 13.

Duties of planning board

14. (1) A planning board shall provide advice and assistance in respect of such planning matters affecting the planning area as are referred to the board,

- (a) by the councils to which the board submits its estimates under section 12, or by any of such councils; or
- (b) by the Minister, in the case of a planning board appointed for a planning area consisting solely or partially of territory without municipal organization.

Preparation of official plan

(2) A planning board shall prepare a plan suitable for adoption as the official plan of the planning area, or at the request of any of the councils mentioned in subsection (1), prepare a plan suitable for adoption as the official plan of the municipality of which it is the council. R.S.O. 1990, c. P.13, s. 14.

Joint planning areas

14.1 (1) The councils of two or more local municipalities that are within one or more counties whether or not they form part of a county for municipal purposes may by by-law define a municipal planning area, establish a municipal planning authority for the area and specify the name of the authority.

Approval of by-law

(2) The council of a municipality shall not pass a by-law under subsection (1) unless the proposed by-law is approved by the Minister after consulting with the council of any affected county.

Body corporate

(3) A municipal planning authority is a body corporate.

Composition

(4) All the members of a municipal planning authority shall be members of council.

Number of members

(5) The council of each local municipality shall appoint to the municipal planning authority the number of members prescribed and, after the initial appointments, the appointments shall be made by each successive council as soon as possible after the council is organized.

Term

(6) The members of the municipal planning authority shall hold office for the term of the council that appointed them and until their successors are appointed.

Vacancies

(7) If a vacancy occurs from any cause, the council shall, as soon as possible, appoint a member of its council to the municipal planning authority who shall hold office for the remainder of the unexpired term. 1994, c. 23, s. 8.

Municipal planning authority

14.2 (1) Each member of a municipal planning authority is entitled to one vote. 1994, c. 23, s. 8.

Quorum

(2) A majority of the members of a municipal planning authority constitutes a quorum. 1994, c. 23, s. 8.

Chair

(3) A municipal planning authority shall annually elect a chair and a vice-chair who shall preside in the absence of the chair. 1994, c. 23, s. 8.

Secretary-treasurer

(4) A municipal planning authority shall appoint a secretary-treasurer who may be a member of the authority. 1994, c. 23, s. 8.

Documents

(5) The execution of documents by a municipal planning authority shall be evidenced by the signatures of the chair or the vice-chair and of the secretary-treasurer and the corporate seal of the authority. 1994, c. 23, s. 8.

Records, inspection

(6) The secretary-treasurer shall keep on file minutes and records of all applications and the decisions on them and of all other business of the authority, and section 253 of the *Municipal Act, 2001* applies with necessary modifications in respect of the documents kept. 1994, c. 23, s. 8; 2002, c. 17, Sched. B, s. 3.

Finance

14.3 (1) On or before March 31 of each year, a municipal planning authority shall determine its financial requirements and the proportion of it to be chargeable to each municipality and shall notify the council of each of the municipalities within the municipal planning area of its financial requirements together with a statement as to the proportion of it to be chargeable to each municipality.

Determination by O.M.B.

(2) If the council of any municipality is not satisfied with the apportionment, it may, within 15 days after receiving the notice, notify the municipal planning authority and the Municipal Board that it desires the apportionment to be made by the Board.

Hearing

(3) The Municipal Board shall hold a hearing and determine the apportionment and its decision is final.

Payments

(4) Each municipality shall pay to the secretary-treasurer of the municipal planning authority such amounts as may be requisitioned from time to time up to the amount determined by the municipal planning authority under subsection (1) or by the Municipal Board under subsection (3), as the case may be. 1994, c. 23, s. 8.

County levy

(5) If a municipal planning authority has been established, a county shall raise the amounts required for county land use planning purposes by levying a special rate on rateable property not in the municipal planning area. 1997, c. 29, s. 65.

Expansion

14.4 (1) A municipal planning authority may, upon the request of the council of a local municipality that is within a county, whether or not it forms part of the county for municipal purposes, by by-law redefine the municipal planning area to add the municipality to the planning area and rename the municipal planning authority.

Approval of by-law

(2) A municipal planning authority shall not pass a by-law under subsection (1) unless the proposed by-law is approved by the Minister after consulting with the council of any affected county.

Appointments

(3) The council of a municipality added to a municipal planning authority under subsection (1) shall, as soon as possible, appoint to the authority the number of members prescribed and, after the initial appointment, the appointments shall be made by each successive council, as soon as possible, after the council is organized. 1994, c. 23, s. 8.

Removal

14.5 (1) Upon the request of the council of a local municipality that is within a municipal planning area, the municipal planning authority shall by by-law redefine the municipal planning area to remove the municipality from the planning area and may rename the municipal planning authority.

Approval

(2) A municipal planning authority shall not pass a by-law under subsection (1) unless the proposed by-law is approved by the Minister.

Adjustment

(3) The members of a municipal planning authority appointed by a local municipality which is removed from the authority shall cease to be members of the authority on the date the by-law passed under subsection (1) comes into effect. 1994, c. 23, s. 8.

Dissolution

14.6 (1) A municipal planning authority may by by-law dissolve the municipal planning area and the municipal planning authority.

Approval

(2) A municipal planning authority shall not pass a by-law under subsection (1) unless the proposed by-law is approved by the Minister.

Dissolution by Minister

(3) The Minister may by order dissolve a municipal planning area and a municipal planning authority.

Assets, liabilities

(4) All the assets and liabilities of a municipal planning authority dissolved under this section are assets and liabilities of the municipalities that formed part of the municipal planning area and, if such municipalities cannot agree as to the disposition of the assets and liabilities, the Municipal Board, upon the application of one or more of the municipalities, shall direct a final disposition.

Same

(5) If assets or liabilities are transferred or assigned to a municipality under an agreement or an order of the Municipal Board under this section, the municipality stands in the place of the municipal planning authority for all purposes.

Transitional matters

(6) Despite this or any other Act, the Minister may by order provide for transitional matters which, in the opinion of the Minister, are necessary or expedient to establish, expand or dissolve a municipal planning authority or to remove a municipality from a municipal planning authority. 1994, c. 23, s. 8.

Official plan

14.7 (1) If land in a municipal planning area is covered by the official plan of a county, the parts of the official plan which affect the land in the municipal planning area shall be deemed for all purposes to be the official plan of the municipal planning authority on the day the municipal planning authority is established and the county shall forward to the municipal planning authority all papers, plans and documents and other material that relate to the parts of the official plan that are deemed to be the official plan of the municipal planning authority.

Restriction

(2) The council of a county shall not exercise any power under section 17 in respect of land in the county that is in a municipal planning area. 1994, c. 23, s. 8.

Preparation of plan

(3) A municipal planning authority shall prepare and adopt a plan and, unless exempt from approval, submit it for approval as an official plan in respect of the land in the municipal planning area that is not covered by an official plan deemed under subsection (1) to be the official plan of the municipal planning authority. 1994, c. 23, s. 8; 1996, c. 4, s. 6 (1).

Application

(4) Section 17 applies with necessary modification to the preparation and adoption of a plan by a municipal planning authority and, unless exempt from approval, the approval of the plan as an

official plan as though the planning authority were the council of the municipality and the secretary-treasurer were the clerk of the municipality. 1996, c. 4, s. 6 (2).

Deemed official plan

(5) If land that is in a local municipality that forms part of a county for municipal purposes is removed from a municipal planning area, the parts of the official plan of the municipal planning authority which affect the land removed from the municipal planning area shall be deemed for all purposes to be the official plan of the county on the day the by-law removing the land is passed and the municipal planning authority shall forward to the county all papers, plans and documents and other materials that relate to the parts of the plan that are deemed to be the official plan of the county.

Revocation

(6) If land that is in a local municipality that does not form part of a county for municipal purposes is removed from a municipal planning area, the parts of the official plan which affect the land removed from the municipal planning area are revoked.

Deemed plan

(7) If land that is in a local municipality that forms part of a county for municipal purposes is in a municipal planning area that is dissolved, the parts of the official plan of the municipal planning authority which affect land in the local municipality shall be deemed for all purposes to be the official plan of the county on the day the municipal planning authority is dissolved.

Revocation

(8) If land that is in a local municipality that does not form part of a county for municipal purposes is in a municipal planning area that is dissolved, the parts of the official plan of the municipal planning authority which affect land in the local municipality are revoked.

Conformity with upper tier plan

(9) Section 27 applies with necessary modifications to the official plan of a planning authority as though the official plan of the municipal planning authority were the official plan of a county and the municipal planning authority were the council of a county. 1994, c. 23, s. 8.

Deemed council, municipality

14.8 (1) Sections 2 and 3, subsections 4 (1), (4) and (5), 5 (1), (2), (4) and (5), 6 (2), 8 (1) and (3), sections 16, 16.1, 17, 20, 21, 22, 23 and 26, subsection 51 (37) and (45), sections 62.1, 65, 66, 68 and 69 apply to a municipal planning area or a municipal planning authority, as appropriate, and the municipal planning area and municipal planning authority shall be deemed to be a municipality or a council of a municipality, respectively, for those purposes. 1994, c. 23, s. 8.

(2) REPEALED: 1996, c. 4, s. 7.

Upper-tier municipalities, planning functions

15. The council of an upper-tier municipality, on such conditions as may be agreed upon with the council of a lower-tier municipality, may,

- (a) assume any authority, responsibility, duty or function of a planning nature that the lower-tier municipality has under this or any other Act; or
- (b) provide advice and assistance to the lower-tier municipality in respect of planning matters generally. 2002, c. 17, Sched. B, s. 4.

PART III OFFICIAL PLANS

Contents of official plan

16. (1) An official plan shall contain,
- (a) goals, objectives and policies established primarily to manage and direct physical change and the effects on the social, economic and natural environment of the municipality or part of it, or an area that is without municipal organization; and
 - (b) such other matters as may be prescribed. 2006, c. 23, s. 8.

Same

- (2) An official plan may contain,
- (a) a description of the measures and procedures proposed to attain the objectives of the plan;
 - (b) a description of the measures and procedures for informing and obtaining the views of the public in respect of a proposed amendment to the official plan or proposed revision of the plan or in respect of a proposed zoning by-law; and
 - (c) such other matters as may be prescribed. 2006, c. 23, s. 8.

Second unit policies

- (3) Without limiting what an official plan is required to or may contain under subsection (1) or (2), an official plan shall contain policies that authorize the use of a second residential unit by authorizing,
- (a) the use of two residential units in a detached house, semi-detached house or rowhouse if no building or structure ancillary to the detached house, semi-detached house or rowhouse contains a residential unit; and
 - (b) the use of a residential unit in a building or structure ancillary to a detached house, semi-detached house or rowhouse if the detached house, semi-detached house or rowhouse contains a single residential unit. 2011, c. 6, Sched. 2, s. 2.
- (4) REPEALED: 1996, c. 4, s. 8 (2).

Prescribed process

16.1 The council of a municipality or a planning board may by by-law elect to follow the prescribed processes and develop the materials prescribed for the preparation of an official plan and any processes followed or materials developed in the preparation of the plan may be considered under the *Environmental Assessment Act* with respect to any requirement that it must meet under that Act. 1994, c. 23, s. 9.

Approvals

17. (1) Except as otherwise provided in this section, the Minister is the approval authority in respect of the approval of a plan as an official plan for the purposes of this section. 1996, c. 4, s. 9.

Approval by upper-tier municipality

- (2) An upper-tier municipality is the approval authority in respect of an official plan of a lower-tier municipality for the purposes of this section if the upper-tier municipality has an approved official plan. 2002, c. 17, Sched. B, s. 5 (1).
- (3) REPEALED: 2002, c. 17, Sched. B, s. 5 (2).

Upper-tier become approval authority

(4) On the day that all or part of a plan that covers an upper-tier municipality comes into effect as the official plan of a municipality, the upper-tier municipality is the approval authority in respect of the approval of a plan as an official plan of a lower-tier municipality. 2002, c. 17, Sched. B, s. 5 (3).

(5) REPEALED: 2002, c. 17, Sched. B, s. 5 (4).

Removal of power

(6) The Minister may by order, accompanied by a written explanation for it, remove the power given under subsection (2) or (4) and the order may be in respect of the plan or proposed official plan amendment specified in the order or in respect of any or all plans or proposed official plan amendments submitted for approval after the order is made. 1996, c. 4, s. 9; 2002, c. 17, Sched. B, s. 5 (5).

Transfer of approval authority

(7) If an order is made under subsection (6), the Minister becomes the approval authority in respect of the plans and proposed official plan amendments to which the order relates and the council of the former approval authority shall forward to the Minister all papers, plans, documents and other material that relate to any matter in respect of which the power was removed and of which a final disposition was not made by the approval authority. 1996, c. 4, s. 9.

Revocation

(8) If the Minister revokes the order or part of the order made under subsection (6), the council reverts back to being the approval authority in respect of all plans or proposed official plan amendments to which the revoked order or revoked part of the order applied. 1996, c. 4, s. 9.

Exemption

(9) Subject to subsection 26 (6), the Minister may by order exempt a plan or proposed official plan amendment from his or her approval under this section and the order may be in respect of the plan or proposed official plan amendment specified in the order or in respect of any or all plans or proposed official plan amendments. 1996, c. 4, s. 9; 2006, c. 23, s. 9 (1).

Authority to exempt

(10) The Minister may by order authorize an approval authority to pass a by-law,

- (a) exempting any or all plans or proposed official plan amendments from its approval under this section; and
- (b) exempting a plan or proposed official plan amendment from its approval under this section. 1996, c. 4, s. 9.

Conditions

(11) An exemption under subsection (9) or (10) or an authorization under subsection (10) may be subject to such conditions as the Minister or the approval authority may provide in the order or by-law. 1996, c. 4, s. 9.

Removal of exemption or authorization

(12) The Minister may by order or an approval authority may by by-law, accompanied by a written explanation for it, remove any exemption made under subsection (9) or (10) or any authorization made under subsection (10). 1996, c. 4, s. 9.

Mandatory adoption

(13) A plan shall be prepared and adopted and, unless exempt from approval, submitted for approval by the council of a prescribed municipality. 2002, c. 17, Sched. B, s. 5 (6).

Discretionary adoption

(14) The council of a municipality not prescribed under subsection (13) may prepare and adopt a plan and, unless the plan is exempt from approval, submit it for approval. 2002, c. 17, Sched. B, s. 5 (7).

Consultation and public meeting

(15) In the course of the preparation of a plan, the council shall ensure that,

- (a) the appropriate approval authority is consulted on the preparation of the plan and given an opportunity to review all supporting information and material and any other prescribed information and material, even if the plan is exempt from approval;
- (b) the prescribed public bodies are consulted on the preparation of the plan and given an opportunity to review all supporting information and material and any other prescribed information and material;
- (c) adequate information and material, including a copy of the current proposed plan, is made available to the public, in the prescribed manner, if any; and
- (d) at least one public meeting is held for the purpose of giving the public an opportunity to make representations in respect of the current proposed plan. 2006, c. 23, s. 9 (2).

Open house

(16) If the plan is being revised under section 26 or amended in relation to a development permit system, the council shall ensure that at least one open house is held for the purpose of giving the public an opportunity to review and ask questions about the information and material made available under clause (15) (c). 2006, c. 23, s. 9 (2).

Notice

(17) Notice of the public meeting required under clause (15) (d) and of the open house, if any, required under subsection (16) shall,

- (a) be given to the prescribed persons and public bodies, in the prescribed manner; and
- (b) be accompanied by the prescribed information. 2006, c. 23, s. 9 (2).

Timing of open house

(18) If an open house is required under subsection (16), it shall be held no later than seven days before the public meeting required under clause (15) (d) is held. 2006, c. 23, s. 9 (2).

Timing of public meeting

(19) The public meeting required under clause (15) (d) shall be held no earlier than 20 days after the requirements for giving notice have been complied with. 2006, c. 23, s. 9 (2).

Information and material

(19.1) The information and material referred to in clause (15) (c), including a copy of the current proposed plan, shall be made available to the public at least 20 days before the public meeting required under clause (15) (d) is held. 2006, c. 23, s. 9 (2).

Participation in public meeting

(19.2) Every person who attends a public meeting required under clause (15) (d) shall be given an opportunity to make representations in respect of the current proposed plan. 2006, c. 23, s. 9 (2).

Alternative procedure

(19.3) If an official plan sets out alternative measures for informing and obtaining the views of the public in respect of amendments that may be proposed for the plan and if the measures are complied with, subsections (15) to (19.2) do not apply to the proposed amendments, but subsections (19.4) and (19.6) do apply. 2006, c. 23, s. 9 (2).

Open house

(19.4) If subsection (19.3) applies and the plan is being revised under section 26 or amended in relation to a development permit system,

- (a) the council shall ensure that at least one open house is held for the purpose of giving the public an opportunity to review and ask questions about the proposed amendments; and
- (b) if a public meeting is also held, the open house shall be held no later than seven days before the public meeting. 2006, c. 23, s. 9 (2).

Information

(19.5) At a public meeting under clause (15) (d), the council shall ensure that information is made available to the public regarding who is entitled to appeal under subsections (24) and (36). 2006, c. 23, s. 9 (2).

Where alternative procedures followed

(19.6) If subsection (19.3) applies, the information required under subsection (19.5) shall be made available to the public at a public meeting or in the manner set out in the official plan for informing and obtaining the views of the public in respect of the proposed amendments. 2006, c. 23, s. 9 (2).

Submissions

(20) Any person or public body may make written submissions to the council before a plan is adopted. 1996, c. 4, s. 9.

Comments

(21) The council shall provide to any person or public body that the council considers may have an interest in the plan adequate information and material, including a copy of the plan and, before adopting the plan, shall give them an opportunity to submit comments on it up to the time specified by the council. 1996, c. 4, s. 9; 2006, c. 23, s. 9 (3).

Adoption of plan

(22) When the requirements of subsections (15) to (21), as appropriate, have been met and the council is satisfied that the plan as finally prepared is suitable for adoption, the council may by by-law adopt all or part of the plan and, unless the plan is exempt from approval, submit it for approval. 1996, c. 4, s. 9.

Notice

(23) The council shall, not later than 15 days after the day the plan was adopted, ensure that written notice is given of its adoption containing the prescribed information to,

- (a) the appropriate approval authority, whether or not the plan is exempt from approval, unless the approval authority has notified the municipality that it does not wish to receive copies of the notices of adoption;
- (b) each person or public body that filed with the clerk of the municipality a written request to be notified if the plan is adopted; and
- (c) any other person or public body prescribed. 1996, c. 4, s. 9.

Right to appeal

(24) If the plan is exempt from approval, any of the following may, not later than 20 days after the day that the giving of notice under subsection (23) is completed, appeal all or part of the decision of council to adopt all or part of the plan to the Municipal Board by filing a notice of appeal with the clerk of the municipality:

1. A person or public body who, before the plan was adopted, made oral submissions at a public meeting or written submissions to the council.
2. The Minister.
3. The appropriate approval authority.
4. In the case of a request to amend the plan, the person or public body that made the request. 2006, c. 23, s. 9 (4).

No appeal re second unit policies

(24.1) Despite subsection (24), there is no appeal in respect of the policies described in subsection 16 (3), including, for greater certainty, any requirements or standards that are part of such policies. 2011, c. 6, Sched. 2, s. 3 (1).

Exception

(24.2) Subsection (24.1) does not apply to an official plan or official plan amendment adopted in accordance with subsection 26 (1). 2006, c. 23, s. 9 (4).

Notice of appeal

(25) The notice of appeal filed under subsection (24) must,

- (a) set out the specific part of the plan to which the notice applies, if the notice does not apply to all of the plan;
- (b) set out the reasons for the appeal; and
- (c) be accompanied by the fee prescribed under the *Ontario Municipal Board Act*. 1996, c. 4, s. 9.

Timing

(26) For the purposes of subsections (24) and (36), the giving of written notice shall be deemed to be completed,

- (a) where notice is given by personal service, on the day that the serving of all required notices is completed;
- (b) where notice is given by mail, on the day that the mailing of all required notices is completed; and

- (c) where notice is given by telephone transmission of a facsimile of the notice, on the day that the transmission of all required notices is completed. 1996, c. 4, s. 9.

Decision final

(27) If no notice of appeal is filed under subsection (24) in respect of all or part of the decision of council and the time for filing appeals has expired,

- (a) the decision of council or the part of the decision that is not the subject of an appeal is final; and
- (b) the plan or part of the plan that was adopted and that is not the subject of an appeal comes into effect as an official plan or part of an official plan on the day after the last day for filing a notice of appeal. 1996, c. 4, s. 9.

Declaration

(28) A sworn declaration of an employee of the municipality or of the approval authority that notice was given as required by subsection (23) or (35) or that no notice of appeal was filed under subsection (24) or (36) within the time allowed for appeal is conclusive evidence of the facts stated in it. 1996, c. 4, s. 9.

Forwarding of record, etc.

(29) If a notice of appeal under subsection (24) is filed, the clerk of the municipality shall ensure that,

- (a) a record is compiled which includes the prescribed information and material;
- (b) the record, the notice of appeal and the fee prescribed under the *Ontario Municipal Board Act* are forwarded to the Municipal Board within 15 days after the last day for filing a notice of appeal;
- (c) the notice of appeal and the record are forwarded to the appropriate approval authority within 15 days after the last day for filing a notice of appeal, whether or not the plan is exempt from the requirement for an approval, unless the approval authority has notified the municipality that it does not wish to receive copies of the notices of appeal and the records; and
- (d) such other information or material as the Municipal Board may require in respect of the appeal is forwarded to the Board. 1996, c. 4, s. 9; 1999, c. 12, Sched. M, s. 22 (2).

Exception

(29.1) Despite clause (29) (b), if all appeals under subsection (24) in respect of all or part of the decision of council are withdrawn within 15 days after the last day for filing a notice of appeal, the municipality is not required to forward the materials described under clauses (29) (b) and (d) to the Municipal Board and under clause (29) (c) to the appropriate approval authority. 1999, c. 12, Sched. M, s. 22 (3).

Where appeals withdrawn

(29.2) If all appeals under subsection (24) in respect of all or part of the decision of council are withdrawn within 15 days after the last day for filing a notice of appeal, clauses (30) (a) and (b) apply. 1999, c. 12, Sched. M, s. 22 (3).

Withdrawal of appeals

(30) If all appeals under subsection (24) in respect of all or part of the decision of council are withdrawn and the time for filing appeals has expired, the secretary of the Municipal Board shall notify the clerk of the municipality that made the decision and,

- (a) the decision or the part of the decision that was the subject of an appeal is final; and
- (b) the plan or part of the plan that was adopted and in respect of which all appeals have been withdrawn comes into effect as an official plan or part of an official plan on the day the last outstanding appeal has been withdrawn. 1996, c. 4, s. 9.

Same

(30.1) Subsection (30) also applies, with necessary modifications, when there is no longer any appeal with respect to a particular part of the decision of council as the result of a partial withdrawal of one or more appeals. 2006, c. 23, s. 9 (5).

Record

(31) If the plan is not exempt from approval, the council shall cause to be compiled and forwarded to the approval authority, not later than 15 days after the day the plan was adopted, a record which shall include the prescribed information and material and any fee under section 69 or 69.1. 1996, c. 4, s. 9.

Other information

(32) An approval authority may require that a council provide such other information or material that the approval authority considers it may need. 1996, c. 4, s. 9.

Refusal to consider

(33) Until the approval authority has received the information, material and fee referred to in subsection (31),

- (a) the approval authority may refuse to accept or further consider the plan; and
- (b) the time period referred to in subsection (40) does not begin. 1996, c. 4, s. 9.

Action by approval authority

(34) The approval authority may confer with any person or public body that it considers may have an interest in the plan and may,

- (a) approve, modify and approve as modified or refuse to approve a plan; or
- (b) approve, modify and approve as modified or refuse to approve part or parts of the plan. 1996, c. 4, s. 9.

Notice

(35) If the approval authority makes a decision under subsection (34) it shall ensure that written notice of its decision containing the prescribed information is given to,

- (a) the council or planning board that adopted the plan;
- (b) each person or public body that made a written request to be notified of the decision;
- (c) each municipality or planning board to which the plan would apply if approved; and
- (d) any other person or public body prescribed. 1996, c. 4, s. 9.

Appeal to O.M.B.

(36) Any of the following may, not later than 20 days after the day that the giving of notice under subsection (35) is completed, appeal all or part of the decision of the approval authority to the Municipal Board by filing a notice of appeal with the approval authority:

1. A person or public body who, before the plan was adopted, made oral submissions at a public meeting or written submissions to the council.
2. The Minister.
3. In the case of a request to amend the plan, the person or public body that made the request. 2006, c. 23, s. 9 (6).

No appeal re second unit policies

(36.1) Despite subsection (36), there is no appeal in respect of the policies described in subsection 16 (3), including, for greater certainty, any requirements or standards that are part of such policies. 2011, c. 6, Sched. 2, s. 3 (2).

Exception

(36.2) Subsection (36.1) does not apply to an official plan or official plan amendment adopted in accordance with subsection 26 (1). 2006, c. 23, s. 9 (6).

Contents of notice

(37) The notice of appeal under subsection (36) must,

- (a) set out the specific part or parts of the plan to which the notice of appeal applies unless the notice applies to all of the plan;
- (b) set out the reasons for the appeal; and
- (c) be accompanied by the fee prescribed under the *Ontario Municipal Board Act*. 1996, c. 4, s. 9.

Decision final

(38) If no notice of appeal is filed under subsection (36) in respect of all or part of the decision of the approval authority and the time for filing appeals has expired,

- (a) the decision of the approval authority or the part of the decision that is not the subject of an appeal is final; and
- (b) the plan or part of the plan that was approved and that is not the subject of an appeal comes into effect as an official plan or part of an official plan on the day after the last day for filing a notice of appeal. 1996, c. 4, s. 9.

Withdrawal of appeals

(39) If all appeals made under subsection (36) in respect of all or part of the decision of the approval authority are withdrawn and if the time for filing notice of appeal has expired, the secretary of the Municipal Board shall notify the approval authority that made the decision and,

- (a) the decision or that part of the decision that was the subject of the appeal is final; and
- (b) the plan or part of the plan that was approved and in respect of which all the appeals have been withdrawn comes into effect as an official plan or part of an official plan on the day the last outstanding appeal has been withdrawn. 1996, c. 4, s. 9.

Appeal to O.M.B.

(40) If the approval authority fails to give notice of a decision in respect of all or part of a plan within 180 days after the day the plan is received by the approval authority, any person or public body may appeal to the Municipal Board with respect to all or any part of the plan in respect of which no notice of a decision was given by filing a notice of appeal with the approval authority. 1996, c. 4, s. 9; 2004, c. 18, s. 3 (1).

Notice of appeal

(41) A notice of appeal filed under subsection (40) must,

- (a) set out the specific part of the plan to which the appeal applies, if the notice does not apply to all of the plan; and
- (b) be accompanied by the fee prescribed under the *Ontario Municipal Board Act*. 1996, c. 4, s. 9.

Documents to O.M.B.

(42) If an approval authority receives a notice of appeal under subsection (36) or (40), it shall ensure that,

- (a) a record is compiled which includes the prescribed information and material;
- (b) the record, notice of appeal and the fee prescribed under the *Ontario Municipal Board Act* are forwarded to the Municipal Board within 15 days after the last day for filing a notice of appeal under subsection (36) or within 15 days after the notice of appeal under subsection (40) was filed, as the case may be; and
- (c) such other information or material as the Municipal Board may require in respect of the appeal is forwarded to the Board. 1996, c. 4, s. 9.

Exception

(42.1) Despite clause (42) (b), if all appeals in respect of all or part of the plan are withdrawn within 15 days after the last day for filing a notice of appeal under subsection (36) or within 15 days after the notice of appeal under subsection (40) was filed, the approval authority is not required to forward the materials described under clauses (42) (b) and (c) to the Municipal Board. 1999, c. 12, Sched. M, s. 22 (3).

Appeals withdrawn, decision

(42.2) If all appeals made under subsection (36) in respect of all or part of the decision of the approval authority are withdrawn within 15 days after the last day for filing a notice of appeal, clauses (39) (a) and (b) apply. 1999, c. 12, Sched. M, s. 22 (3).

Appeals withdrawn, plan

(42.3) If all appeals under subsection (40) with respect to all or part of a plan are withdrawn within 15 days after the last day for filing a notice of appeal, the approval authority may proceed to make a decision under subsection (34) in respect of all or part of the plan, as the case may be. 1999, c. 12, Sched. M, s. 22 (3).

Appeals withdrawn

(43) If all appeals under subsection (40) with respect to all or part of a plan are withdrawn, the Municipal Board shall notify the approval authority and the approval authority may proceed to make a decision under subsection (34) in respect of all or part of the plan, as the case may be. 1996, c. 4, s. 9.

Hearing

(44) On an appeal to the Municipal Board, the Board shall hold a hearing of which notice shall be given to such persons or such public bodies and in such manner as the Board may determine. 1996, c. 4, s. 9.

Restriction re adding parties

(44.1) Despite subsection (44), in the case of an appeal under subsection (24) or (36), only the following may be added as parties:

1. A person or public body who satisfies one of the conditions set out in subsection (44.2).
2. The Minister.
3. The appropriate approval authority. 2006, c. 23, s. 9 (7).

Same

(44.2) The conditions mentioned in paragraph 1 of subsection (44.1) are:

1. Before the plan was adopted, the person or public body made oral submissions at a public meeting or written submissions to the council.
2. The Municipal Board is of the opinion that there are reasonable grounds to add the person or public body as a party. 2006, c. 23, s. 9 (7).

New evidence at hearing

(44.3) This subsection applies if information and material that is presented at the hearing of an appeal under subsection (24) or (36) was not provided to the municipality before the council made the decision that is the subject of the appeal. 2006, c. 23, s. 9 (7).

Same

(44.4) When subsection (44.3) applies, the Municipal Board may, on its own initiative or on a motion by the municipality or any party, consider whether the information and material could have materially affected the council's decision and, if the Board determines that it could have done so, it shall not be admitted into evidence until subsection (44.5) has been complied with and the prescribed time period has elapsed. 2006, c. 23, s. 9 (7).

Notice to council

(44.5) The Municipal Board shall notify the council that it is being given an opportunity to,

- (a) reconsider its decision in light of the information and material; and
- (b) make a written recommendation to the Board. 2006, c. 23, s. 9 (7).

Council's recommendation

(44.6) The Municipal Board shall have regard to the council's recommendation if it is received within the time period referred to in subsection (44.4), and may but is not required to do so if it is received afterwards. 2006, c. 23, s. 9 (7).

Conflict with SPPA

(44.7) Subsections (44.1) to (44.6) apply despite the *Statutory Powers Procedure Act*. 2006, c. 23, s. 9 (7).

Dismissal without hearing

(45) Despite the *Statutory Powers Procedure Act* and subsection (44), the Municipal Board may dismiss all or part of an appeal without holding a hearing on its own initiative or on the motion of any party if,

- (a) it is of the opinion that,
 - (i) the reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the plan or part of the plan that is the subject of the appeal could be approved or refused by the Board,
 - (ii) the appeal is not made in good faith or is frivolous or vexatious,
 - (iii) the appeal is made only for the purpose of delay, or
 - (iv) the appellant has persistently and without reasonable grounds commenced before the Board proceedings that constitute an abuse of process;
- (b) REPEALED: 2006, c. 23, s. 9 (10).
- (c) the appellant has not provided written reasons with respect to an appeal under subsection (24) or (36);
- (d) the appellant has not paid the fee prescribed under the *Ontario Municipal Board Act*; or
- (e) the appellant has not responded to a request by the Municipal Board for further information within the time specified by the Board. 1996, c. 4, s. 9; 2006, c. 23, s. 9 (8-10).

Same

(45.1) Despite the *Statutory Powers Procedure Act* and subsection (44), the Municipal Board may, on its own initiative or on the motion of the municipality, the appropriate approval authority or the Minister, dismiss all or part of an appeal without holding a hearing if, in the Board's opinion, the application to which the appeal relates is substantially different from the application that was before council at the time of its decision. 2006, c. 23, s. 9 (11).

Representation

(46) Before dismissing all or part of an appeal, the Municipal Board shall notify the appellant and give the appellant the opportunity to make representation on the proposed dismissal but this subsection does not apply if the appellant has not complied with a request made under clause (45) (e). 2000, c. 26, Sched. K, s. 5 (1).

Dismissal

(46.1) Despite the *Statutory Powers Procedure Act*, the Municipal Board may dismiss all or part of an appeal after holding a hearing or without holding a hearing on the motion under subsection (45) or (45.1), as it considers appropriate. 2006, c. 23, s. 9 (12).

Dismissal

(47) If the Municipal Board dismisses all appeals made under subsection (24) or (36) in respect of all or part of a decision without holding a hearing and if the time for filing notices of appeal has expired, the secretary of the Municipal Board shall notify the clerk of the municipality or the approval authority and,

- (a) the decision or that part of the decision that was the subject of the appeal is final; and
- (b) any plan or part of the plan that was adopted or approved and in respect of which all the appeals have been dismissed comes into effect as an official plan or part of an official plan on the day after the day the last outstanding appeal has been dismissed. 1996, c. 4, s. 9.

Same

(48) If the Municipal Board dismisses an appeal under subsection (40) without holding a hearing and if there is no other appeal in respect of the same matter, the secretary of the Board shall notify the approval authority and the approval authority may then proceed to make a decision under subsection (34) in respect of all or part of the plan, as the case may be. 1996, c. 4, s. 9.

Transfer

(49) If a notice of appeal under subsection (24), (36) or (40) is received by the Municipal Board, the Board may require that a municipality or approval authority transfer to the Board any other part of the plan that is not in effect and to which the notice of appeal does not apply. 1996, c. 4, s. 9.

Powers of O.M.B.

(50) On an appeal or a transfer, the Municipal Board may approve all or part of the plan as all or part of an official plan, make modifications to all or part of the plan and approve all or part of the plan as modified as an official plan or refuse to approve all or part of the plan. 1996, c. 4, s. 9.

Same

(50.1) For greater certainty, subsection (50) does not give the Municipal Board power to approve or modify any part of the plan that,

- (a) is in effect; and
- (b) was not dealt with in the decision of council to which the notice of appeal relates. 2006, c. 23, s. 9 (13).

Matters of provincial interest

(51) Where an appeal is made to the Municipal Board under this section, the Minister, if he or she is of the opinion that a matter of provincial interest is, or is likely to be, adversely affected by the plan or the parts of the plan in respect of which the appeal is made, may so advise the Board in writing not later than 30 days before the day fixed by the Board for the hearing of the appeal and the Minister shall identify,

- (a) the provisions of the plan by which the provincial interest is, or is likely to be, adversely affected; and
- (b) the general basis for the opinion that a matter of provincial interest is, or is likely to be, adversely affected. 2004, c. 18, s. 3 (2).

No hearing or notice required

(52) The Minister is not required to give notice or to hold a hearing before taking any action under subsection (51). 2004, c. 18, s. 3 (2).

Confirmation by L.G. in C.

(53) If the Municipal Board has received notice from the Minister under subsection (51), the decision of the Board is not final and binding in respect of the provisions identified in the notice unless the Lieutenant Governor in Council has confirmed the decision in respect of the provisions. 2004, c. 18, s. 3 (2).

Action of L.G. in C.

(54) The Lieutenant Governor in council may confirm, vary or rescind the decision of the Municipal Board in respect of the provisions of the plan identified in the notice and in doing so may direct the Minister to modify the provisions of the plan. 2004, c. 18, s. 3 (2).

Delegation of approval authority

17.1 (1) If an upper-tier municipality is the approval authority under section 17 in respect of the approval of official plans of lower-tier municipalities, the council may by by-law delegate all or any of the authority to approve amendments to official plans to a committee of council or to an appointed officer identified in the by-law by name or position occupied. 2002, c. 17, Sched. B, s. 6.

Conditions

(2) A delegation of authority made by a council under subsection (1) may be subject to such conditions as the council by by-law provides. 1994, c. 23, s. 10.

Withdrawal of delegation

(3) A council may by by-law withdraw a delegation of authority made by it under subsection (1) and the withdrawal may be in respect of one or more requests for approval specified in the by-law or any or all requests for approval in respect of which a final disposition was not made by the committee or officer before the withdrawal. 1994, c. 23, s. 10.

Recommendation of plan

18. (1) Where a plan is prepared by a planning board, the plan shall not be recommended to any council for adoption as an official plan unless it is approved by a vote of the majority of all the members of the planning board. R.S.O. 1990, c. P.13, s. 18 (1).

Submission of plan to council

(2) When the plan is approved by the planning board, the board shall submit a copy thereof, certified by the secretary-treasurer of the board to be a true copy,

- (a) in the case of a plan prepared for a planning area, to the council of each municipality that is within the planning area; and
- (b) in the case of a plan prepared at the request of a single municipality, to the council of that municipality,

together with a recommendation that it be adopted by the council. R.S.O. 1990, c. P.13, s. 18 (2).

Adoption of plan

(3) Each council to which the plan is submitted may, subject to subsections 17 (15) to (22), by by-law adopt the plan and the clerk of each municipality, the council of which adopted the plan, shall provide the secretary-treasurer of the planning board with a certified copy of the adopting by-law and shall comply with subsections 17 (23), (32), (33) and (34). R.S.O. 1990, c. P.13, s. 18 (3); 1994, c. 23, s. 11 (1); 1996, c. 4, s. 11 (1).

Submission of plan

(4) When the secretary-treasurer of the planning board has received a certified copy of an adopting by-law from a majority of the councils to which the plan was submitted, he or she shall, unless it is exempt from an approval, submit the plan for approval together with each certified copy of the adopting by-law and subsections 17 (31) to (50.1) apply with necessary modifications in respect of the plan as if the planning board were the council of a municipality and the secretary-treasurer of the planning board were the clerk of the municipality. 1996, c. 4, s. 11 (2); 2006, c. 23, s. 10 (1).

Application of subss. 17 (15-50)

(5) Where a planning area consists of the whole of one or more municipalities and territory without municipal organization subsections 17 (15) to (50.1) apply, with necessary modifications, in respect of the part of the planning area that consists of territory without municipal organization as though the planning board were the council of a municipality and the secretary-treasurer of the planning board were the clerk of the municipality. R.S.O. 1990, c. P.13, s. 18 (5); 1994, c. 23, s. 11 (3); 1996, c. 4, s. 11 (3); 2006, c. 23, s. 10 (2).

Unorganized territory

19. In a planning area consisting solely of territory without municipal organization, section 17 applies with necessary modifications to a plan being prepared and adopted by a planning board and that is to come into effect as the official plan of the planning board as if the planning board were a council of a municipality and the secretary-treasurer were the clerk. 1996, c. 4, s. 12.

Deemed council

19.1 Sections 34 to 39 and 45 apply in respect of land within the planning area consisting of territory without municipal organization and the planning board shall be deemed to be a council of a local municipality and the secretary-treasurer of the planning board shall be deemed to be the clerk of the municipality for those purposes. 1994, c. 23, s. 12.

Lodging of plan

20. (1) A certified copy of the official plan shall be lodged in the office of the clerk of each municipality to which the plan or any part of the plan applies.

Who to lodge plan

- (2) The lodging required by subsection (1) shall be carried out,
- (a) in the case of an official plan that applies to only one municipality or part thereof or to only one municipality and territory without municipal organization, by the clerk of the municipality; and
 - (b) in the case of an official plan that applies to more than one municipality or parts thereof, by the clerk of the municipality that has the largest population.

Public inspection

(3) All copies lodged under subsection (1) shall be available for public inspection during office hours. R.S.O. 1990, c. P.13, s. 20.

Amendment or repeal of plan

21. (1) Except as hereinafter provided, the provisions of this Act with respect to an official plan apply, with necessary modifications, to amendments thereto or the repeal thereof, and the council of a municipality that is within a planning area may initiate an amendment to or the repeal of any official plan that applies to the municipality, and section 17 applies to any such amendment or repeal. R.S.O. 1990, c. P.13, s. 21 (1).

- (2) REPEALED: 1994, c. 23, s. 13.

Request for amendment

22. (1) If a person or public body requests a council to amend its official plan, the council shall,
- (a) forward a copy of the request and the information and material required under subsections (4) and (5), if any to the appropriate approval authority, whether or not the requested amendment is exempt from approval; and

- (b) hold a public meeting under subsection 17 (15) or comply with the alternative measures set out in the official plan. 1996, c. 4, s. 13; 2004, c. 18, s. 4 (1); 2006, c. 23, s. 11 (1).

Request to planning board

(2) If a person or public body requests a planning board to amend its official plan and the plan applies in whole or in part to territory without municipal organization, the planning board or council of the municipality having jurisdiction over the land to which the proposed amendment applies shall,

- (a) forward a copy of the request and the information and material required under subsections (4) and (5), if any to the appropriate approval authority, whether or not the requested amendment is exempt from approval; and
- (b) hold a public meeting under subsection 17 (15) or comply with the alternative measures set out in the official plan. 1996, c. 4, s. 13; 2004, c. 18, s. 4 (2); 2006, c. 23, s. 11 (2).

No open house or public meeting

(3) Despite subsections (1) and (2), the requirement to hold a public meeting under subsection 17 (15) does not apply if the council or the planning board refuses to adopt an amendment to its official plan requested by a person or public body. 2006, c. 23, s. 11 (3).

Consultation

(3.1) The council or planning board,

- (a) shall permit applicants to consult with the municipality or planning board, as the case may be, before submitting requests under subsection (1) or (2); and
- (b) may, by by-law, require applicants to consult with the municipality or planning board as described in clause (a). 2006, c. 23, s. 11 (3).

Prescribed information

(4) A person or public body that requests an amendment to the official plan of a municipality or planning board shall provide the prescribed information and material to the council or planning board. 1996, c. 4, s. 13.

Other information

(5) A council or a planning board may require that a person or public body that requests an amendment to its official plan provide any other information or material that the council or planning board considers it may need, but only if the official plan contains provisions relating to requirements under this subsection. 2006, c. 23, s. 11 (4).

Refusal and timing

(6) Until the council or planning board has received the information and material required under subsections (4) and (5), if any, and any fee under section 69,

- (a) the council or planning board may refuse to accept or further consider the request for an amendment to its official plan; and
- (b) the time periods referred to in paragraphs 1 and 2 of subsection (7.0.2) do not begin. 2006, c. 23, s. 11 (4).

Response re completeness of request

(6.1) Within 30 days after the person or public body that requests the amendment pays any fee under section 69, the council or planning board shall notify the person or public body that the information and material required under subsections (4) and (5), if any, have been provided, or that they have not been provided, as the case may be. 2006, c. 23, s. 11 (4).

Motion re dispute

(6.2) Within 30 days after a negative notice is given under subsection (6.1), the person or public body or the council or planning board may make a motion for directions to have the Municipal Board determine,

- (a) whether the information and material have in fact been provided; or
- (b) whether a requirement made under subsection (5) is reasonable. 2006, c. 23, s. 11 (4).

Same

(6.3) If the council or planning board does not give any notice under subsection (6.1), the person or public body may make a motion under subsection (6.2) at any time after the 30-day period described in subsection (6.1) has elapsed. 2006, c. 23, s. 11 (4).

Notice of particulars and public access

(6.4) Within 15 days after the council or planning board gives an affirmative notice under subsection (6.1), or within 15 days after the Municipal Board advises the clerk of its affirmative decision under subsection (6.2), as the case may be, the council or planning board shall,

- (a) give the prescribed persons and public bodies, in the prescribed manner, notice of the request for amendment, accompanied by the prescribed information; and
- (b) make the information and material provided under subsections (4) and (5) available to the public. 2006, c. 23, s. 11 (4).

Final determination

(6.5) The Municipal Board's determination under subsection (6.2) is not subject to appeal or review. 2006, c. 23, s. 11 (4).

Notice of refusal

(6.6) A council or planning board that refuses a request to amend its official plan shall, not later than 15 days after the day of the refusal, ensure that written notice of the refusal, containing the prescribed information, is given to,

- (a) the person or public body that made the request;
- (b) each person or public body that filed a written request to be notified of a refusal;
- (c) the appropriate approval authority; and
- (d) any prescribed person or public body. 2006, c. 23, s. 11 (4).

Appeal to O.M.B.

(7) When a person or public body requests an amendment to the official plan of a municipality or planning board, any of the following may appeal to the Municipal Board in respect of all or any part of the requested amendment, by filing a notice of appeal with the clerk of the municipality or the secretary-treasurer of the planning board, if one of the conditions set out in subsection (7.0.2) is met:

1. The person or public body that requested the amendment.

2. The Minister.
3. The appropriate approval authority. 2006, c. 23, s. 11 (5).

Consolidated Hearings Act

(7.0.1) Despite the *Consolidated Hearings Act*, the proponent of an undertaking shall not give notice to the Hearings Registrar under subsection 3 (1) of that Act in respect of an amendment requested under subsection (1) or (2) unless,

- (a) one of the conditions set out in subsection (7.0.2) is met;
- (b) if the plan is exempt from approval, the requested amendment has been adopted under subsection 17 (22);
- (c) the approval authority makes a decision under subsection 17 (34); or
- (d) the time period referred to in subsection 17 (40) has expired. 2006, c. 23, s. 11 (5).

Conditions

(7.0.2) The conditions referred to in subsections (7) and (7.0.1) are:

1. The council or the planning board fails to adopt the requested amendment within 180 days after the day the request is received.
2. A planning board recommends a requested amendment for adoption and the council or the majority of the councils fails to adopt the requested amendment within 180 days after the day the request is received.
3. A council, a majority of the councils or a planning board refuses to adopt the requested amendment.
4. A planning board refuses to approve a requested amendment under subsection 18 (1). 2006, c. 23, s. 11 (5).

Time for appeal

(7.0.3) A notice of appeal under paragraph 3 or 4 of subsection (7.0.2) shall be filed no later than 20 days after the day that the giving of notice under subsection (6.6) is completed. 2006, c. 23, s. 11 (5).

Appeals restricted re certain amendments

(7.1) Despite subsection (7) and subsections 17 (36) and (40), there is no appeal in respect of,

- (a) a refusal or failure to adopt an amendment described in subsection (7.2); or
- (b) a refusal or failure to approve an amendment described in subsection (7.2). 2006, c. 23, s. 11 (6).

Application of subs. (7.1)

(7.2) Subsection (7.1) applies in respect of amendments requested under subsection (1) or (2) that propose to,

- (a) alter all or any part of the boundary of an area of settlement in a municipality;
- (b) establish a new area of settlement in a municipality; or
- (c) amend or revoke the policies described in subsection 16 (3), including, for greater certainty, any requirements or standards that are part of such policies. 2006, c. 23, s. 11 (6); 2011, c. 6, Sched. 2, s. 4.

Same

(7.3) If the official plan contains policies dealing with the removal of land from areas of employment, subsection (7.1) also applies in respect of amendments requested under subsection (1) or (2) that propose to remove any land from an area of employment, even if other land is proposed to be added. 2006, c. 23, s. 11 (6).

Exception

(7.4) Despite subsection (7.1), a person or public body may appeal to the Municipal Board in respect of all or any part of a requested amendment described in clause (7.2) (a) or (b) if the requested amendment,

- (a) is in respect of the official plan of a lower-tier municipality; and
- (b) conforms with the official plan of the upper-tier municipality. 2006, c. 23, s. 11 (6).

Contents

- (8) A notice of appeal under subsection (7) shall,
 - (a) set out the specific part of the requested official plan amendment to which the appeal applies, if the notice of appeal does not apply to all of the requested amendment; and
 - (b) be accompanied by the fee prescribed under the *Ontario Municipal Board Act*. 1996, c. 4, s. 13.

Record and forwarding material

(9) The clerk of a municipality or the secretary-treasurer of a planning board who receives a notice of appeal under subsection (7) shall ensure that,

- (a) a record is compiled which includes the prescribed information and material;
- (b) the notice of appeal, the record and the fee are forwarded to the Municipal Board within 15 days after the notice is received;
- (c) the notice of appeal and the record are forwarded to the appropriate approval authority within 15 days after the notice is received, whether or not the plan is exempt from approval, unless the approval authority has notified the municipality or the planning board that it does not wish to receive copies of the notices of appeal and the records; and
- (d) such other information or material as the Municipal Board may require in respect of the appeal is forwarded to the Board. 1996, c. 4, s. 13; 1999, c. 12, Sched. M, s. 23 (1).

Exception

(9.1) Despite clause (9) (b), if all appeals under subsection (7) are withdrawn within 15 days after the notice of appeal is filed, the municipality or planning board is not required to forward the materials described under clauses (9) (b) and (d) to the Municipal Board or under clause (9) (c) to the appropriate approval authority. 1999, c. 12, Sched. M, s. 23 (2).

Appeals withdrawn, amendment

(9.2) If all appeals under subsection (7) brought in accordance with paragraph 1 or 2 of subsection (7.0.2) in respect of all or any part of the requested amendment are withdrawn within 15 days after the date that the most recent notice of appeal was filed, the council or planning board may, unless there are any outstanding appeals, proceed to give notice of the public meeting to be held under subsection 17 (15) or adopt or refuse to adopt the requested amendment, as the case may be. 2006, c. 23, s. 11 (7).

Decision final

(9.3) If all appeals under subsection (7) brought in accordance with paragraph 3 or 4 of subsection (7.0.2) in respect of all or any part of the requested amendment are withdrawn within 15 days after the last day for filing a notice of appeal, the decision of the council or planning board is final on the day that the last outstanding appeal has been withdrawn. 2006, c. 23, s. 11 (7).

Other information

(10) A person or public body that files a notice of appeal under subsection (7) shall provide to the Municipal Board the prescribed information or material and such other information as the Board may require. 1996, c. 4, s. 13.

Application

(11) Subsections 17 (44) to (44.7), (45), (45.1), (46), (46.1), (49), (50) and (50.1) apply with necessary modifications to a requested official plan amendment under this section, except that subsections 17 (44.1) to (44.7) and (45.1) do not apply to an appeal under subsection (7) of this section, brought in accordance with paragraph 1 or 2 of subsection (7.0.2). 2006, c. 23, s. 11 (8).

Matters of provincial interest

(11.1) Where an appeal is made to the Municipal Board under this section, the Minister, if he or she is of the opinion that a matter of provincial interest is, or is likely to be, adversely affected by the amendment or any part of the amendment in respect of which the appeal is made, may so advise the Board in writing not later than 30 days before the day fixed by the Board for the hearing of the appeal and the Minister shall identify,

- (a) the provisions of the amendment or any part of the amendment by which the provincial interest is, or is likely to be, adversely affected; and
- (b) the general basis for the opinion that a matter of provincial interest is, or is likely to be, adversely affected. 2004, c. 18, s. 4 (9).

No hearing or notice required

(11.2) The Minister is not required to give notice or to hold a hearing before taking any action under subsection (11.1). 2004, c. 18, s. 4 (9).

Confirmation by L.G. in C.

(11.3) If the Municipal Board has received notice from the Minister under subsection (11.1), the decision of the Board is not final and binding in respect of the provisions of the amendment or the provisions of any part of the amendment identified in the notice unless the Lieutenant Governor in Council has confirmed the decision in respect of those provisions. 2004, c. 18, s. 4 (9).

Action of L.G. in C.

(11.4) The Lieutenant Governor in Council may confirm, vary or rescind the decision of the Municipal Board in respect of the provisions of the amendment or the provisions of any part of the amendment identified in the notice and in doing so may direct the Minister to modify the amendment to the plan. 2004, c. 18, s. 4 (9).

Withdrawal of appeal

(12) If all appeals under subsection (7) brought in accordance with paragraph 1 or 2 of subsection (7.0.2) are dismissed by the Municipal Board without holding a hearing or are withdrawn, the secretary of the Board shall notify the council or the planning board and the council

or the planning board may proceed to give notice of the public meeting or adopt or refuse to adopt the requested amendment, as the case may be. 1996, c. 4, s. 13; 2004, c. 18, s. 4 (10); 2006, c. 23, s. 11 (9).

Same

(13) If all appeals under subsection (7) brought in accordance with paragraph 3 or 4 of subsection (7.0.2) are dismissed by the Municipal Board without holding a hearing or are withdrawn, the secretary of the Board shall notify the council or the planning board and the decision of the council or the planning board is final on the day that the last outstanding appeal has been withdrawn or dismissed. 1996, c. 4, s. 13; 2006, c. 23, s. 11 (10).

Request by Minister to amend plan

23. (1) Where the Minister is of the opinion that a matter of provincial interest as set out in a policy statement issued under section 3 is, or is likely to be, affected by an official plan, the Minister may request the council of a municipality to adopt such amendment as the Minister specifies to an official plan and, where the council refuses the request or fails to adopt the amendment within such time as is specified by the Minister in his or her request, the Minister may make the amendment. R.S.O. 1990, c. P.13, s. 23 (1).

Hearing by O.M.B.

(2) Where the Minister proposes to make an amendment to an official plan under subsection (1), the Minister may, and on the request of any person or municipality shall, request the Municipal Board to hold a hearing on the proposed amendment and the Board shall thereupon hold a hearing as to whether the amendment should be made. R.S.O. 1990, c. P.13, s. 23 (2).

Refusal to refer to O.M.B.

(3) Despite subsection (2), where the Minister is of the opinion that a request of any person or municipality made under subsection (2) is not made in good faith or is frivolous or vexatious or is made only for the purpose of delay, the Minister may refuse the request. R.S.O. 1990, c. P.13, s. 23 (3).

Notice

(4) Where the Minister has requested the Municipal Board to hold a hearing as provided for in subsection (2), notice of the hearing shall be given in such manner and to such persons as the Board may direct, and the Board shall hear any submissions that any person may desire to bring to the attention of the Board. R.S.O. 1990, c. P.13, s. 23 (4).

Decision of O.M.B.

(5) The Municipal Board, after the conclusion of the hearing, shall make a decision as to whether the proposed amendment, or an alternative form of amendment, should be made but the decision is not final and binding unless the Lieutenant Governor in Council has confirmed it. R.S.O. 1990, c. P.13, s. 23 (5); 1994, c. 23, s. 15 (1); 2004, c. 18, s. 5 (1).

Powers of L.G. in C.

(6) The Lieutenant Governor in Council may confirm, vary or rescind the decision of the Municipal Board made under subsection (5) and in doing so may direct the Minister to amend the plan in such manner as the Lieutenant Governor in Council may determine. 2004, c. 18, s. 5 (2).

Public works and by-laws to conform with plan

24. (1) Despite any other general or special Act, where an official plan is in effect, no public work shall be undertaken and, except as provided in subsections (2) and (4), no by-law shall be passed for any purpose that does not conform therewith. R.S.O. 1990, c. P.13, s. 24 (1); 1999, c. 12, Sched. M, s. 24.

Pending amendments

(2) If a council or a planning board has adopted an amendment to an official plan, the council of any municipality or the planning board of any planning area to which the plan or any part of the plan applies may, before the amendment to the official plan comes into effect, pass a by-law that does not conform with the official plan but will conform with it if the amendment comes into effect. 2006, c. 23, s. 12.

Same

(2.1) A by-law referred to in subsection (2),

(a) shall be conclusively deemed to have conformed with the official plan on and after the day the by-law was passed, if the amendment to the official plan comes into effect; and

(b) is of no force and effect, if the amendment to the official plan does not come into effect. 2006, c. 23, s. 12.

Preliminary steps that may be taken where proposed public work would not conform with official plan

(3) Despite subsections (1) and (2), the council of a municipality may take into consideration the undertaking of a public work that does not conform with the official plan and for that purpose the council may apply for any approval that may be required for the work, carry out any investigations, obtain any reports or take other preliminary steps incidental to and reasonably necessary for the undertaking of the work, but nothing in this subsection authorizes the actual undertaking of any public work that does not conform with an official plan. R.S.O. 1990, c. P.13, s. 24 (3).

Deemed conformity

(4) If a by-law is passed under section 34 by the council of a municipality or a planning board in a planning area in which an official plan is in effect and, within the time limited for appeal no appeal is taken or an appeal is taken and the appeal is withdrawn or dismissed or the by-law is amended by the Municipal Board or as directed by the Board, the by-law shall be conclusively deemed to be in conformity with the official plan, except, if the by-law is passed in the circumstances mentioned in subsection (2), the by-law shall be conclusively deemed to be in conformity with the official plan on and after the day the by-law was passed, if the amendment to the official plan comes into effect. 1994, c. 23, s. 16 (2); 1996, c. 4, s. 14 (2).

Acquisition of lands in accordance with provisions of plan

25. (1) If there is an official plan in effect in a municipality that includes provisions relating to the acquisition of land, which provisions have come into effect after the 28th day of June, 1974, the council may, in accordance with such provisions, acquire and hold land within the municipality for the purpose of developing any feature of the official plan, and any land so acquired or held may be sold, leased or otherwise disposed of when no longer required. R.S.O. 1990, c. P.13, s. 25 (1); 1994, c. 23, s. 17; 1996, c. 4, s. 15.

Contribution towards cost

(2) Any municipality may contribute towards the cost of acquiring land under this section. R.S.O. 1990, c. P.13, s. 25 (2).

Updating official plan

26. (1) If an official plan is in effect in a municipality, the council of the municipality that adopted the official plan shall, not less frequently than every five years after the plan comes into effect as an official plan or after that part of a plan comes into effect as a part of an official plan, if the only outstanding appeals relate to those parts of the plan that propose to specifically designate land uses,

- (a) revise the official plan as required to ensure that it,
 - (i) conforms with provincial plans or does not conflict with them, as the case may be,
 - (ii) has regard to the matters of provincial interest listed in section 2, and
 - (iii) is consistent with policy statements issued under subsection 3 (1); and
- (b) revise the official plan, if it contains policies dealing with areas of employment, including, without limitation, the designation of areas of employment in the official plan and policies dealing with the removal of land from areas of employment, to ensure that those policies are confirmed or amended. 2006, c. 23, s. 13.

Effect of provincial plan conformity exercise

- (2) For greater certainty, the council revises the official plan under subsection (1) if it,
 - (a) amends the official plan, in accordance with another Act, to conform with a provincial plan; and
 - (b) in the course of making amendments under clause (a), complies with clauses (1) (a) and (b) and with all the procedural requirements of this section. 2006, c. 23, s. 13.

Consultation and special meeting

- (3) Before revising the official plan under subsection (1), the council shall,
 - (a) consult with the approval authority and with the prescribed public bodies with respect to the revisions that may be required; and
 - (b) hold a special meeting of council, open to the public, to discuss the revisions that may be required. 2006, c. 23, s. 13.

Notice

(4) Notice of every special meeting to be held under clause (3) (b) shall be published at least once a week in each of two separate weeks, and the last publication shall take place at least 30 days before the date of the meeting. 2006, c. 23, s. 13.

Public participation

(5) The council shall have regard to any written submissions about what revisions may be required and shall give any person who attends the special meeting an opportunity to be heard on that subject. 2006, c. 23, s. 13.

No exemption from approval

(6) An order under subsection 17 (9) does not apply to an amendment made under subsection (1). 2006, c. 23, s. 13.

Declaration

(7) Each time it revises the official plan under subsection (1), the council shall, by resolution, declare to the approval authority that the official plan meets the requirements of subclauses (1) (a) (i), (ii) and (iii). 2006, c. 23, s. 13.

Direction by approval authority

(8) Despite subsection (1), the approval authority may, at any time, direct the council of a municipality to undertake a revision of all or part of any official plan in effect in the municipality and when so directed the council shall cause the revision to be undertaken without undue delay. 2006, c. 23, s. 13.

Updating zoning by-laws

(9) No later than three years after a revision under subsection (1) or (8) comes into effect, the council of the municipality shall amend all zoning by-laws that are in effect in the municipality to ensure that they conform with the official plan. 2006, c. 23, s. 13.

Minister may request amendment to zoning by-law

(10) The Minister may, if he or she is of the opinion that a zoning by-law in effect in the municipality does not conform with the official plan as revised under subsection (1) or (8), request the council of the municipality to pass an amendment to the zoning by-law to achieve conformity. 2006, c. 23, s. 13.

Amendments to conform to official plan

27. (1) The council of a lower-tier municipality shall amend every official plan and every by-law passed under section 34, or a predecessor of it, to conform with a plan that comes into effect as the official plan of the upper-tier municipality. 2002, c. 17, Sched. B, s. 7.

Failure to make amendments

(2) If the official plan of an upper-tier municipality comes into effect as mentioned in subsection (1) and any official plan or zoning by-law is not amended as required by that subsection within one year from the day the plan comes into effect as the official plan, the council of the upper-tier municipality may amend the official plan of the lower-tier municipality or zoning by-law, as the case may be, in the like manner and subject to the same requirements and procedures as the council that failed to make the amendment within the one-year period as required. 2002, c. 17, Sched. B, s. 7.

Deemed by-law

(3) An amending by-law passed under subsection (2) by the council of an upper-tier municipality shall be deemed for all purposes to be a by-law passed by the council of the municipality that passed the by-law that was amended. 2002, c. 17, Sched. B, s. 7.

Conflicts

(4) In the event of a conflict between the official plan of an upper-tier municipality and the official plan of a lower-tier municipality, the plan of the upper-tier municipality prevails to the extent of the conflict but in all other respects the official plan of the lower-tier municipality remains in effect. 2002, c. 17, Sched. B, s. 7.

PART IV COMMUNITY IMPROVEMENT

Community improvement project area

28. (1) In this section,

“community improvement” means the planning or replanning, design or redesign, resubdivision, clearance, development or redevelopment, construction, reconstruction and rehabilitation, improvement of energy efficiency, or any of them, of a community improvement project area, and the provision of such residential, commercial, industrial, public, recreational, institutional, religious, charitable or other uses, buildings, structures, works, improvements or facilities, or spaces therefor, as may be appropriate or necessary; (“améliorations communautaires”)

“community improvement plan” means a plan for the community improvement of a community improvement project area; (“plan d’améliorations communautaires”)

“community improvement project area” means a municipality or an area within a municipality, the community improvement of which in the opinion of the council is desirable because of age, dilapidation, overcrowding, faulty arrangement, unsuitability of buildings or for any other environmental, social or community economic development reason. (“zone d’améliorations communautaires”) R.S.O. 1990, c. P.13, s. 28 (1); 2001, c. 17, s. 7 (1, 2); 2006, c. 23, s. 14 (1).

Affordable housing

(1.1) Without limiting the generality of the definition of “community improvement” in subsection (1), for greater certainty, it includes the provision of affordable housing. 2006, c. 23, s. 14 (2).

Designation of community improvement project area

(2) Where there is an official plan in effect in a local municipality or in a prescribed upper-tier municipality that contains provisions relating to community improvement in the municipality, the council may, by by-law, designate the whole or any part of an area covered by such an official plan as a community improvement project area. R.S.O. 1990, c. P.13, s. 28 (2); 2006, c. 23, s. 14 (3).

Acquisition and clearance of land

(3) When a by-law has been passed under subsection (2), the municipality may,

- (a) acquire land within the community improvement project area with the approval of the Minister if the land is acquired before a community improvement plan mentioned in subsection (4) comes into effect and without the approval of the Minister if the land is acquired after the community improvement plan comes into effect;
- (b) hold land acquired before or after the passing of the by-law within the community improvement project area; and
- (c) clear, grade or otherwise prepare the land for community improvement. R.S.O. 1990, c. P.13, s. 28 (3); 2001, c. 17, s. 7 (3).

Community improvement plan

(4) When a by-law has been passed under subsection (2), the council may provide for the preparation of a plan suitable for adoption as a community improvement plan for the community improvement project area and the plan may be adopted and come into effect in accordance with subsections (5) and (5.1). 2006, c. 32, Sched. C, s. 47 (1).

Restriction re upper-tier municipality

(4.0.1) The community improvement plan of an upper-tier municipality may deal only with prescribed matters. 2006, c. 23, s. 14 (4).

(4.1)-(4.4) REPEALED: 2006, c. 32, Sched. C, s. 47 (1).

Same

(5) Subsections 17 (15), (17), (19) to (19.3), (19.5) to (24), (25) to (30.1), (44) to (47) and (49) to (50.1) apply, with necessary modifications, in respect of a community improvement plan and any amendments to it. 2006, c. 32, Sched. C, s. 47 (1).

Same

(5.1) The Minister is deemed to be the approval authority for the purpose of subsection (5). 2006, c. 32, Sched. C, s. 47 (1).

Same

(5.2) Despite subsection (5), if an official plan contains provisions describing the alternative measures mentioned in subsection 17 (19.3), subsections 17 (15), (17) and (19) to (19.2) do not apply in respect of the community improvement plan and any amendments to it, if the measures are complied with. 2006, c. 32, Sched. C, s. 47 (1).

Powers of council re land

(6) For the purpose of carrying out a community improvement plan that has come into effect, the municipality may,

- (a) construct, repair, rehabilitate or improve buildings on land acquired or held by it in the community improvement project area in conformity with the community improvement plan, and sell, lease or otherwise dispose of any such buildings and the land appurtenant thereto;
- (b) sell, lease or otherwise dispose of any land acquired or held by it in the community improvement project area to any person or governmental authority for use in conformity with the community improvement plan. R.S.O. 1990, c. P.13, s. 28 (6); 2001, c. 17, s. 7 (6).

Grants or loans re eligible costs

(7) For the purpose of carrying out a municipality's community improvement plan that has come into effect, the municipality may make grants or loans, in conformity with the community improvement plan, to registered owners, assessed owners and tenants of lands and buildings within the community improvement project area, and to any person to whom such an owner or tenant has assigned the right to receive a grant or loan, to pay for the whole or any part of the eligible costs of the community improvement plan. 2006, c. 23, s. 14 (8).

Eligible costs

(7.1) For the purposes of subsection (7), the eligible costs of a community improvement plan may include costs related to environmental site assessment, environmental remediation, development, redevelopment, construction and reconstruction of lands and buildings for rehabilitation purposes or for the provision of energy efficient uses, buildings, structures, works, improvements or facilities. 2006, c. 23, s. 14 (8).

Grants or loans between upper and lower-tier municipalities

(7.2) The council of an upper-tier municipality may make grants or loans to the council of a lower-tier municipality and the council of a lower-tier municipality may make grants or loans to the council of the upper-tier municipality, for the purpose of carrying out a community improvement plan that has come into effect, on such terms as to security and otherwise as the council considers appropriate, but only if the official plan of the municipality making the grant or loan contains provisions relating to the making of such grants or loans. 2006, c. 23, s. 14 (8).

Maximum amount

(7.3) The total of the grants and loans made in respect of particular lands and buildings under subsections (7) and (7.2) and the tax assistance as defined in section 365.1 of the *Municipal Act, 2001* or section 333 of the *City of Toronto Act, 2006*, as the case may be, that is provided in respect of the lands and buildings shall not exceed the eligible cost of the community improvement plan with respect to those lands and buildings. 2006, c. 23, s. 14 (8); 2006, c. 32, Sched. C, s. 48 (3).

(8) REPEALED: 2006, c. 32, Sched. C, s. 47 (3).

Application of s. 32 (2, 3)

(9) Subsections 32 (2) and (3) apply with necessary modifications to any loan made under subsection (7) of this section. R.S.O. 1990, c. P.13, s. 28 (9).

Conditions of sale, etc.

(10) Until a by-law or amending by-law passed under section 34 after the adoption of the community improvement plan is in force in the community improvement project area, no land acquired, and no building constructed, by the municipality in the community improvement project area shall be sold, leased or otherwise disposed of unless the person or authority to whom it is disposed of enters into a written agreement with the municipality that the person or authority will keep and maintain the land and building and the use thereof in conformity with the community improvement plan until such a by-law or amending by-law is in force, but the municipality may, during the period of the development of the plan, lease any land or any building or part thereof in the area for any purpose, whether or not in conformity with the community improvement plan, for a term of not more than three years at any one time. R.S.O. 1990, c. P.13, s. 28 (10).

Registration of agreement

(11) An agreement concerning a grant or loan made under subsection (7) or an agreement entered into under subsection (10), may be registered against the land to which it applies and the municipality shall be entitled to enforce the provisions thereof against any party to the agreement and, subject to the provisions of the *Registry Act* and the *Land Titles Act*, against any and all subsequent owners or tenants of the land. R.S.O. 1990, c. P.13, s. 28 (11); 2006, c. 23, s. 14 (10).

Debentures

(12) Despite subsection 408 (3) of the *Municipal Act, 2001* or any regulation under section 256 of the *City of Toronto Act, 2006*, debentures issued by the municipality for the purpose of this section may be for such term of years as the debenture by-law, with the approval of the Municipal Board, provides. 2002, c. 17, Sched. B, s. 9; 2006, c. 32, Sched. C, s. 47 (4).

Dissolution of area

(13) When the council is satisfied that the community improvement plan has been carried out, the council may, by by-law, dissolve the community improvement project area. R.S.O. 1990, c. P.13, s. 28 (13).

Agreement re studies and development

29. (1) A municipality, with the approval of the Minister, may enter into agreement with any governmental authority or any agency thereof created by statute, for the carrying out of studies and the preparation and implementation of plans and programs for the development or improvement of the municipality.

Where approval of Minister not required

(2) Despite subsection (1), a municipality may enter into agreement with one or more other municipalities under subsection (1) without the approval of the Minister. R.S.O. 1990, c. P.13, s. 29.

Agreements for grants in aid of community improvement

30. The Minister, with the approval of the Lieutenant Governor in Council, and a municipality may enter into agreement providing for payment to the municipality on such terms and conditions and in such amounts as may be approved by the Lieutenant Governor in Council to assist in the community improvement of a community improvement project area as defined in section 28, including the carrying out of studies for the purpose of selecting areas for community improvement. R.S.O. 1990, c. P.13, s. 30.

31. REPEALED: 1997, c. 24, s. 226 (1).

Note: Despite the repeal of section 31, an order made under that section is continued as an order made under the corresponding provision of the *Building Code Act, 1992*. See: 1997, c. 24, ss. 226 (2), 228.

Grants or loans for repairs

32. (1) When a by-law under section 15.1 of the *Building Code Act, 1992* is in force in a municipality, the council of the municipality may pass a by-law for providing for the making of grants or loans to the registered owners or assessed owners of lands in respect of which an order has been made under subsection 15.2 (2) of that Act to pay for the whole or any part of the cost of the repairs required to be done, or of the clearing, grading and levelling of the lands, on such terms and conditions as the council may prescribe. R.S.O. 1990, c. P.13, s. 32 (1); 1997, c. 24, s. 226 (3).

Loans collected as taxes, lien on land

(2) The amount of any loan made under a by-law passed under this section, together with interest at a rate to be determined by the council, may be added by the clerk of the municipality to the collector's roll and collected in like manner as municipal taxes over a period fixed by the council, and such amount and interest shall, until payment thereof, be a lien or charge upon the land in respect of which the loan has been made.

Registration of certificate

(3) A certificate signed by the clerk of the municipality setting out the amount loaned to any owner under a by-law passed under this section, including the rate of interest thereon, together with a description of the land in respect of which the loan has been made, sufficient for registration, shall be registered in the proper land registry office against the land, and, upon repayment in full to the municipality of the amount loaned and interest thereon, a certificate signed by the clerk of the municipality showing such repayment shall be similarly registered, and thereupon the lien or charge upon the land in respect of which the loan was made is discharged. R.S.O. 1990, c. P.13, s. 32 (2, 3).

Demolition control area

33. (1) In this section,

“dwelling unit” means any property that is used or designed for use as a domestic establishment in which one or more persons may sleep and prepare and serve meals; (“logement”)

“residential property” means a building that contains one or more dwelling units, but does not include subordinate or accessory buildings the use of which is incidental to the use of the main building. (“immeuble d’habitation”) R.S.O. 1990, c. P.13, s. 33 (1).

Establishment of demolition control area by by-law

(2) When a by-law under section 15.1 of the *Building Code Act, 1992* or a predecessor thereof is in force in a municipality or when a by-law prescribing standards for the maintenance and occupancy of property under any special Act is in force in a municipality, the council of the local municipality may by by-law designate any area within the municipality to which the standards of maintenance and occupancy by-law applies as an area of demolition control and thereafter no person shall demolish the whole or any part of any residential property in the area of demolition control unless the person is the holder of a demolition permit issued by the council under this section. R.S.O. 1990, c. P.13, s. 33 (2); 1997, c. 24, s. 226 (4).

Council may issue or refuse to issue permit

(3) Subject to subsection (6), where application is made to the council for a permit to demolish residential property, the council may issue the permit or refuse to issue the permit.

Appeal to O.M.B.

(4) Where the council refuses to issue the permit or neglects to make a decision thereon within thirty days after the receipt by the clerk of the municipality of the application, the applicant may appeal to the Municipal Board and the Board shall hear the appeal and either dismiss the same or direct that the demolition permit be issued, and the decision of the Board shall be final.

Notice of appeal

(5) The person appealing to the Municipal Board under subsection (4) shall, in such manner and to such persons as the Board may direct, give notice of the appeal to the Board.

Application for demolition permit where building permit issued

(6) Subject to subsection (7), the council shall, on application therefor, issue a demolition permit where a building permit has been issued to erect a new building on the site of the residential property sought to be demolished.

Conditions of demolition permit

(7) A demolition permit under subsection (6) may be issued on the condition that the applicant for the permit construct and substantially complete the new building to be erected on the site of the residential property proposed to be demolished by not later than such date as the permit specifies, such date being not less than two years from the day demolition of the existing residential property is commenced, and on the condition that on failure to complete the new building within the time specified in the permit, the clerk of the municipality shall be entitled to enter on the collector's roll, to be collected in like manner as municipal taxes, such sum of money as the permit specifies, but not in any case to exceed the sum of \$20,000 for each dwelling unit contained in the residential property in respect of which the demolition permit is issued and such sum shall, until payment thereof, be a lien or charge upon the land in respect of which the permit to demolish the residential property is issued.

Registration of notice

(8) Notice of any condition imposed under subsection (7) may be registered in the proper land registry office against the land to which it applies.

Registration of certificate

(9) Where the clerk of the municipality adds a sum of money to the collector's roll under subsection (7), a certificate signed by the clerk setting out the sum added to the roll, together with a

description of the land in respect of which the sum has been added to the roll, sufficient for registration, shall be registered in the proper land registry office against the land, and upon payment in full to the municipality of the sum added to the roll, a certificate signed by the clerk of the municipality showing such payment shall be similarly registered, and thereupon the lien or charge upon the land in respect of which the sum was added to the roll is discharged.

Appeal to O.M.B.

(10) Where an applicant for a demolition permit under subsection (6) is not satisfied as to the conditions on which the demolition permit is proposed to be issued, the applicant may appeal to the Municipal Board for a variation of the conditions and, where an appeal is brought, the Board shall hear the appeal and may dismiss the same or may direct that the conditions upon which the permit shall be issued be varied in such manner as the Board considers appropriate, and the decision of the Board shall be final.

Application to council for relief from conditions of demolition permit

(11) Where a condition has been imposed under subsection (7) and the holder of the demolition permit considers that it is not possible to complete the new building within the time specified in the permit or where the holder of the permit is of the opinion that the construction of the new building has become not feasible on economic or other grounds, the permit holder may apply to the council of the municipality for relief from the conditions on which the permit was issued.

Notice of application

(12) Notice of application under subsection (11) shall be sent by registered mail to the clerk of the municipality not less than sixty days before the time specified in the permit for the completion of the new building and, where the council under subsection (14) extends the time for completion of the new building, application may similarly be made for relief by sending notice of application not less than sixty days before the expiry of the extended completion time.

Extension of time

(13) Despite subsection (12), the council may, at any time, extend the date specified in that subsection for the making of an application for relief from the conditions on which the permit was issued.

Powers of council on application

(14) Where an application is made under subsection (11), the council shall consider the application and may grant the same or may extend the time for completion of the new building for such period of time and on such terms and conditions as the council considers appropriate or the council may relieve the person applying from the requirement of constructing the new building.

Appeal to O.M.B.

(15) Any person who has made application to the council under subsection (11) may appeal from the decision of the council to the Municipal Board within twenty days of the mailing of the notice of the decision, or where the council refuses or neglects to make a decision thereon within thirty days after the receipt by the clerk of the application, the applicant may appeal to the Municipal Board and the Board shall hear the appeal and the Board on the appeal has the same powers as the council has under subsection (14) and the decision of the Board shall be final.

Offence

(16) Every person who demolishes a residential property, or any portion thereof, in contravention of subsection (2) is guilty of an offence and on conviction is liable to a fine of not

more than \$50,000 for each dwelling unit contained in the residential property, the whole or any portion of which residential property has been demolished.

Standards for health and safety remain in force

(17) The provisions of any general or special Act and any by-law passed thereunder respecting standards relating to the health or safety of the occupants of buildings and structures remain in full force and effect in respect of residential property situate within an area of demolition control. R.S.O. 1990, c. P.13, s. 33 (3-17).

Certain proceedings stayed

(18) Subject to subsection (17), an application to the council for a permit to demolish any residential property operates as a stay to any proceedings that may have been initiated under any by-law under section 15.1 of the *Building Code Act, 1992* or a predecessor thereof or under any special Act respecting maintenance or occupancy standards in respect of the residential property sought to be demolished, until the council disposes of the application, or where an appeal is taken under subsection (4), until the Municipal Board has heard the appeal and issued its order thereon. R.S.O. 1990, c. P.13, s. 33 (18); 1997, c. 24, s. 226 (5).

Exemption re Building Code

(19) Where a permit to demolish residential property is obtained under this section, it is not necessary for the holder thereof to obtain the permit mentioned in subsection 8 (1) of the *Building Code Act, 1992*. R.S.O. 1990, c. P.13, s. 33 (19); 1997, c. 24, s. 226 (6).

PART V

LAND USE CONTROLS AND RELATED ADMINISTRATION

Zoning by-laws

34. (1) Zoning by-laws may be passed by the councils of local municipalities:

Restricting use of land

1. For prohibiting the use of land, for or except for such purposes as may be set out in the by-law within the municipality or within any defined area or areas or abutting on any defined highway or part of a highway.

Restricting erecting, locating or using of buildings

2. For prohibiting the erecting, locating or using of buildings or structures for or except for such purposes as may be set out in the by-law within the municipality or within any defined area or areas or upon land abutting on any defined highway or part of a highway.

Marshy lands, etc.

3. For prohibiting the erection of any class or classes of buildings or structures on land that is subject to flooding or on land with steep slopes, or that is rocky, low-lying, marshy, unstable, hazardous, subject to erosion or to natural or artificial perils.

Contaminated lands; sensitive or vulnerable areas

- 3.1 For prohibiting any use of land and the erecting, locating or using of any class or classes of buildings or structures on land,
 - i. that is contaminated,
 - ii. that contains a sensitive groundwater feature or a sensitive surface water feature, or

- iii. that is within an area identified as a vulnerable area in a drinking water source protection plan that has taken effect under the *Clean Water Act, 2006*.

Natural features and areas

- 3.2 For prohibiting any use of land and the erecting, locating or using of any class or classes of buildings or structures within any defined area or areas,
 - i. that is a significant wildlife habitat, wetland, woodland, ravine, valley or area of natural and scientific interest,
 - ii. that is a significant corridor or shoreline of a lake, river or stream, or
 - iii. that is a significant natural corridor, feature or area.

Significant archaeological resources

- 3.3 For prohibiting any use of land and the erecting, locating or using of any class or classes of buildings or structures on land that is the site of a significant archaeological resource.

Construction of buildings or structures

4. For regulating the type of construction and the height, bulk, location, size, floor area, spacing, character and use of buildings or structures to be erected or located within the municipality or within any defined area or areas or upon land abutting on any defined highway or part of a highway, and the minimum frontage and depth of the parcel of land and the proportion of the area thereof that any building or structure may occupy.

Minimum elevation of doors, etc.

5. For regulating the minimum elevation of doors, windows or other openings in buildings or structures or in any class or classes of buildings or structures to be erected or located within the municipality or within any defined area or areas of the municipality.

Loading or parking facilities

6. For requiring the owners or occupants of buildings or structures to be erected or used for a purpose named in the by-law to provide and maintain loading or parking facilities on land that is not part of a highway. R.S.O. 1990, c. P.13, s. 34 (1); 1994, c. 23, s. 21 (1, 2); 1996, c. 4, s. 20 (1-3); 2006, c. 22, s. 115.

Pits and quarries

- (2) The making, establishment or operation of a pit or quarry shall be deemed to be a use of land for the purposes of paragraph 1 of subsection (1). R.S.O. 1990, c. P.13, s. 34 (2).

Area, density and height

- (3) The authority to regulate provided in paragraph 4 of subsection (1) includes and, despite the decision of any court, shall be deemed always to have included the authority to regulate the minimum area of the parcel of land mentioned therein and to regulate the minimum and maximum density and the minimum and maximum height of development in the municipality or in the area or areas defined in the by-law. 2006, c. 23, s. 15 (1).

City of Toronto

- (3.1) Subsection (3) does not apply with respect to the City of Toronto. 2006, c. 23, s. 15 (2).

Interpretation

(4) A trailer as defined in subsection 164 (4) of the *Municipal Act, 2001* or subsection 3 (1) of the *City of Toronto Act, 2006*, as the case may be, and a mobile home as defined in subsection 46 (1) of this Act are deemed to be buildings or structures for the purpose of this section. 2006, c. 32, Sched. C, s. 47 (5).

Prohibition of use of land, etc., availability of municipal services

(5) A by-law passed under paragraph 1 or 2 of subsection (1) or a predecessor of that paragraph may prohibit the use of land or the erection or use of buildings or structures unless such municipal services as may be set out in the by-law are available to service the land, buildings or structures, as the case may be. R.S.O. 1990, c. P.13, s. 34 (5).

Certificates of occupancy

(6) A by-law passed under this section may provide for the issue of certificates of occupancy without which no change may be made in the type of use of any land covered by the by-law or of any building or structure on any such land, but no such certificate shall be refused if the proposed use is not prohibited by the by-law. R.S.O. 1990, c. P.13, s. 34 (6).

Use of maps

(7) Land within any area or areas or abutting on any highway or part of a highway may be defined by the use of maps to be attached to the by-law and the information shown on such maps shall form part of the by-law to the same extent as if included therein. R.S.O. 1990, c. P.13, s. 34 (7).

Acquisition and disposition of non-conforming lands

(8) The council may acquire any land, building or structure used or erected for a purpose that does not conform with a by-law passed under this section and any vacant land having a frontage or depth less than the minimum established for the erection of a building or structure in the defined area in which such land is situate, and the council may dispose of any of such land, building or structure or may exchange any of such land for other land within the municipality. R.S.O. 1990, c. P.13, s. 34 (8); 1996, c. 4, s. 20 (4).

Excepted lands and buildings

- (9) No by-law passed under this section applies,
- (a) to prevent the use of any land, building or structure for any purpose prohibited by the by-law if such land, building or structure was lawfully used for such purpose on the day of the passing of the by-law, so long as it continues to be used for that purpose; or
 - (b) to prevent the erection or use for a purpose prohibited by the by-law of any building or structure for which a permit has been issued under subsection 8 (1) of the *Building Code Act, 1992*, prior to the day of the passing of the by-law, so long as the building or structure when erected is used and continues to be used for the purpose for which it was erected and provided the permit has not been revoked under subsection 8 (10) of that Act. R.S.O. 1990, c. P.13, s. 34 (9); 2009, c. 33, Sched. 21, s. 10 (1).

By-law may be amended

(10) Despite any other provision of this section, any by-law passed under this section or a predecessor of this section may be amended so as to permit the extension or enlargement of any land, building or structure used for any purpose prohibited by the by-law if such land, building or structure continues to be used in the same manner and for the same purpose as it was used on the day such by-law was passed. R.S.O. 1990, c. P.13, s. 34 (10).

Consultation

(10.0.1) The council,

- (a) shall permit applicants to consult with the municipality before submitting applications to amend by-laws passed under this section; and
- (b) may, by by-law, require applicants to consult with the municipality as described in clause (a). 2006, c. 23, s. 15 (3).

Prescribed information

(10.1) A person or public body that applies for an amendment to a by-law passed under this section or a predecessor of this section shall provide the prescribed information and material to the council. 1996, c. 4, s. 20 (5).

Other information

(10.2) A council may require that a person or public body that applies for an amendment to a by-law passed under this section or a predecessor of this section provide any other information or material that the council considers it may need, but only if the official plan contains provisions relating to requirements under this subsection. 2006, c. 23, s. 15 (4).

Refusal and timing

(10.3) Until the council has received the information and material required under subsections (10.1) and (10.2), if any, and any fee under section 69,

- (a) the council may refuse to accept or further consider the application for an amendment to the by-law; and
- (b) the time period referred to in subsection (11) does not begin. 2006, c. 23, s. 15 (4).

Response re completeness of application

(10.4) Within 30 days after the person or public body that makes the application for an amendment to a by-law pays any fee under section 69, the council shall notify the person or public body that the information and material required under subsections (10.1) and (10.2), if any, have been provided, or that they have not been provided, as the case may be. 2006, c. 23, s. 15 (4).

Motion re dispute

(10.5) Within 30 days after a negative notice is given under subsection (10.4), the person or public body or the council may make a motion for directions to have the Municipal Board determine,

- (a) whether the information and material have in fact been provided; or
- (b) whether a requirement made under subsection (10.2) is reasonable. 2006, c. 23, s. 15 (4).

Same

(10.6) If the council does not give any notice under subsection (10.4), the person or public body may make a motion under subsection (10.5) at any time after the 30-day period described in subsection (10.4) has elapsed. 2006, c. 23, s. 15 (4).

Notice of particulars and public access

(10.7) Within 15 days after the council gives an affirmative notice under subsection (10.4), or within 15 days after the Municipal Board advises the clerk of its affirmative decision under subsection (10.5), as the case may be, the council shall,

- (a) give the prescribed persons and public bodies, in the prescribed manner, notice of the application for an amendment to a by-law, accompanied by the prescribed information; and
- (b) make the information and material provided under subsections (10.1) and (10.2) available to the public. 2006, c. 23, s. 15 (4).

Final determination

(10.8) The Municipal Board's determination under subsection (10.5) is not subject to appeal or review. 2006, c. 23, s. 15 (4).

Notice of refusal

(10.9) When a council refuses an application to amend its by-law, it shall, not later than 15 days after the day of the refusal, ensure that written notice of the refusal, containing the prescribed information, is given to,

- (a) the person or public body that made the application;
- (b) each person and public body that filed a written request to be notified of a refusal; and
- (c) any prescribed person or public body. 2006, c. 23, s. 15 (4).

Appeal to O.M.B.

(11) Where an application to the council for an amendment to a by-law passed under this section or a predecessor of this section is refused or the council refuses or neglects to make a decision on it within 120 days after the receipt by the clerk of the application, any of the following may appeal to the Municipal Board by filing a notice of appeal with the clerk of the municipality:

1. The applicant.
2. The Minister. 2006, c. 23, s. 15 (5).

Consolidated Hearings Act

(11.0.1) Despite the *Consolidated Hearings Act*, the proponent of an undertaking shall not give notice to the Hearings Registrar under subsection 3 (1) of that Act in respect of an application for an amendment to a by-law unless the council has made a decision on the application or the time period referred to in subsection (11) has expired. 2006, c. 23, s. 15 (5).

Appeal to O.M.B.

- (11.0.2) The Municipal Board shall hear the appeal under subsection (11) and shall,
- (a) dismiss it;
 - (b) amend the by-law in such manner as the Board may determine; or
 - (c) direct that the by-law be amended in accordance with the Board's order. 2006, c. 23, s. 15 (5).

Time for filing certain appeals

(11.0.3) A notice of appeal under subsection (11) with respect to the refusal of an application shall be filed no later than 20 days after the day that the giving of notice under subsection (10.9) is completed. 2006, c. 23, s. 15 (5).

Appeals restricted re certain amendments

(11.0.4) Despite subsection (11), there is no appeal in respect of all or any part of an application for an amendment to a by-law if the amendment or part of the amendment proposes to implement,

- (a) an alteration to all or any part of the boundary of an area of settlement; or
- (b) a new area of settlement. 2006, c. 23, s. 15 (5).

Same

(11.0.5) Despite subsection (11), if the official plan contains policies dealing with the removal of land from areas of employment, there is no appeal in respect of all or any part of an application for an amendment to a by-law if the amendment or part of the amendment proposes to remove any land from an area of employment, even if other land is proposed to be added. 2006, c. 23, s. 15 (5).

Withdrawal of appeal

(11.1) If all appeals under subsection (11) are withdrawn, the secretary of the Municipal Board shall notify the clerk of the municipality and the decision of the council is final and binding or the council may proceed to give notice of the public meeting or pass or refuse to pass the by-law, as the case may be. 1999, c. 12, Sched. M, s. 25 (1).

Information and public meeting; open house in certain circumstances

(12) Before passing a by-law under this section, except a by-law passed pursuant to an order of the Municipal Board made under subsection (11.0.2) or (26),

- (a) the council shall ensure that,
 - (i) sufficient information and material is made available to enable the public to understand generally the zoning proposal that is being considered by the council, and
 - (ii) at least one public meeting is held for the purpose of giving the public an opportunity to make representations in respect of the proposed by-law; and
- (b) in the case of a by-law that is required by subsection 26 (9) or is related to a development permit system, the council shall ensure that at least one open house is held for the purpose of giving the public an opportunity to review and ask questions about the information and material made available under subclause (a) (i). 2006, c. 23, s. 15 (6); 2009, c. 33, Sched. 21, s. 10 (2).

Notice

(13) Notice of the public meeting required under subclause (12) (a) (ii) and of the open house, if any, required by clause (12) (b),

- (a) shall be given to the prescribed persons and public bodies, in the prescribed manner; and
- (b) shall be accompanied by the prescribed information. 2006, c. 23, s. 15 (6).

Timing of open house

(14) The open house required by clause (12) (b) shall be held no later than seven days before the public meeting required under subclause (12) (a) (ii) is held. 2006, c. 23, s. 15 (6).

Timing of public meeting

(14.1) The public meeting required under subclause (12) (a) (ii) shall be held no earlier than 20 days after the requirements for giving notice have been complied with. 2006, c. 23, s. 15 (6).

Participation in public meeting

(14.2) Every person who attends a public meeting required under subclause (12) (a) (ii) shall be given an opportunity to make representations in respect of the proposed by-law. 2006, c. 23, s. 15 (6).

Alternative procedure

(14.3) If an official plan sets out alternative measures for informing and securing the views of the public in respect of proposed zoning by-laws, and if those measures are complied with, subsections (12) to (14.2) do not apply to the proposed by-laws, but subsections (14.4) and (14.6) do apply. 2006, c. 23, s. 15 (6).

Open house

(14.4) If subsection (14.3) applies and the proposed by-law is required by subsection 26 (9) or is related to a development permit system,

- (a) the council shall ensure that at least one open house is held for the purpose of giving the public an opportunity to review and ask questions about the proposed by-law; and
- (b) if a public meeting is also held, the open house shall be held no later than seven days before the public meeting. 2006, c. 23, s. 15 (6).

Information

(14.5) At a public meeting under subclause (12) (a) (ii), the council shall ensure that information is made available to the public regarding who is entitled to appeal under subsections (11) and (19). 2006, c. 23, s. 15 (6).

Where alternative procedures followed

(14.6) If subsection (14.3) applies, the information required under subsection (14.5) shall be made available to the public at a public meeting or in the manner set out in the official plan for informing and securing the views of the public in respect of proposed zoning by-laws. 2006, c. 23, s. 15 (6).

Information to public bodies

(15) The council shall forward to such public bodies as the council considers may have an interest in the zoning proposal sufficient information to enable them to understand it generally and such information shall be forwarded not less than twenty days before passing a by-law implementing the proposal. R.S.O. 1990, c. P.13, s. 34 (15); 1994, c. 23, s. 21 (5).

Conditions

(16) If the official plan in effect in a municipality contains policies relating to zoning with conditions, the council of the municipality may, in a by-law passed under this section, permit a use of land or the erection, location or use of buildings or structures and impose one or more prescribed conditions on the use, erection or location. 2006, c. 23, s. 15 (7).

Same

(16.1) The prescribed conditions referred to in subsection (16) may be made subject to such limitations as may be prescribed. 2006, c. 23, s. 15 (7).

Same

(16.2) When a prescribed condition is imposed under subsection (16),

- (a) the municipality may require an owner of land to which the by-law applies to enter into an agreement with the municipality relating to the condition;
- (b) the agreement may be registered against the land to which it applies; and

- (c) the municipality may enforce the agreement against the owner and, subject to the *Registry Act* and the *Land Titles Act*, any and all subsequent owners of the land. 2006, c. 23, s. 15 (7).

City of Toronto

(16.3) Subsections (16), (16.1) and (16.2) do not apply with respect to the City of Toronto. 2006, c. 23, s. 15 (8).

Further notice

(17) Where a change is made in a proposed by-law after the holding of the public meeting mentioned in subclause (12) (a) (ii), the council shall determine whether any further notice is to be given in respect of the proposed by-law and the determination of the council as to the giving of further notice is final and not subject to review in any court irrespective of the extent of the change made in the proposed by-law. R.S.O. 1990, c. P.13, s. 34 (17); 2006, c. 23, s. 15 (9).

Notice of passing of by-law

(18) If the council passes a by-law under this section, except a by-law passed pursuant to an order of the Municipal Board made under subsection (11.0.2) or (26), the clerk of the municipality shall give written notice of the passing of the by-law not later than 15 days after the day the by-law is passed in the manner and in the form and to the persons or public bodies prescribed and the notice shall contain the prescribed information. 1994, c. 23, s. 21 (7); 1996, c. 4, s. 20 (7); 2009, c. 33, Sched. 21, s. 10 (3).

Appeal to O.M.B.

(19) Not later than 20 days after the day that the giving of notice as required by subsection (18) is completed, any of the following may appeal to the Municipal Board by filing with the clerk of the municipality a notice of appeal setting out the objection to the by-law and the reasons in support of the objection, accompanied by the fee prescribed under the *Ontario Municipal Board Act*:

1. The applicant.
2. A person or public body who, before the by-law was passed, made oral submissions at a public meeting or written submissions to the council.
3. The Minister. 2006, c. 23, s. 15 (10).

No appeal re second unit policies

(19.1) Despite subsection (19), there is no appeal in respect of a by-law that gives effect to the policies described in subsection 16 (3), including, for greater certainty, no appeal in respect of any requirement or standard in such a by-law. 2011, c. 6, Sched. 2, s. 5.

When giving of notice deemed completed

(20) For the purposes of subsection (19), the giving of written notice shall be deemed to be completed,

- (a) where notice is given by publication in a newspaper, on the day that such publication occurs;
- (b) where notice is given by personal service, on the day that the serving of all required notices is completed;
- (c) where notice is given by mail, on the day that the mailing of all required notices is completed; and

- (d) where notice is given by telephone transmission of a facsimile of the notice, on the day that the transmission of all required notices is completed. R.S.O. 1990, c. P.13, s. 34 (20); 1994, c. 23, s. 21 (9).

When by-law deemed to have come into force

(21) When no notice of appeal is filed under subsection (19), the by-law shall be deemed to have come into force on the day it was passed except that where the by-law is passed under circumstances mentioned in subsection 24 (2) the by-law shall not be deemed to have come into force on the day it was passed until the amendment to the official plan comes into effect. R.S.O. 1990, c. P.13, s. 34 (21); 1994, c. 23, s. 21 (10); 1996, c. 4, s. 20 (8).

Affidavit re no appeal, etc.

(22) An affidavit or declaration of an employee of the municipality that notice was given as required by subsection (18) or that no notice of appeal was filed under subsection (19) within the time allowed for appeal shall be conclusive evidence of the facts stated therein. R.S.O. 1990, c. P.13, s. 34 (22); 1996, c. 4, s. 20 (9).

Record

(23) The clerk of a municipality who receives a notice of appeal under subsection (11) or (19) shall ensure that,

- (a) a record that includes the prescribed information and material is compiled;
- (b) the notice of appeal, record and fee are forwarded to the Municipal Board within 15 days after the last day for filing a notice of appeal under subsection (11.0.3) or (19), as the case may be; and
- (c) such other information or material as the Municipal Board may require in respect of the appeal is forwarded to the Board. 2006, c. 23, s. 15 (11).

Withdrawal of appeals

(23.1) If all appeals to the Municipal Board under subsection (19) are withdrawn and the time for appealing has expired, the secretary of the Board shall notify the clerk of the municipality and the decision of the council is final and binding. 1993, c. 26, s. 53 (3).

Exception

(23.2) Despite clause (23) (b), if all appeals under subsection (19) are withdrawn within 15 days after the last day for filing a notice of appeal, the municipality is not required to forward the materials described under clauses (23) (b) and (c) to the Municipal Board. 1999, c. 12, Sched. M, s. 25 (2).

Decision final

(23.3) If all appeals to the Municipal Board under subsection (19) are withdrawn within 15 days after the last day for filing a notice of appeal, the decision of the council is final and binding. 1999, c. 12, Sched. M, s. 25 (2).

Hearing and notice thereof

(24) On an appeal to the Municipal Board, the Board shall hold a hearing of which notice shall be given to such persons or bodies and in such manner as the Board may determine. R.S.O. 1990, c. P.13, s. 34 (24).

Restriction re adding parties

(24.1) Despite subsection (24), in the case of an appeal under subsection (11) that relates to all or part of an application for an amendment to a by-law that is refused, or in the case of an appeal under subsection (19), only the following may be added as parties:

1. A person or public body who satisfies one of the conditions set out in subsection (24.2).
2. The Minister. 2006, c. 23, s. 15 (12).

Same

(24.2) The conditions mentioned in paragraph 1 of subsection (24.1) are:

1. Before the by-law was passed, the person or public body made oral submissions at a public meeting or written submissions to the council.
2. The Municipal Board is of the opinion that there are reasonable grounds to add the person or public body as a party. 2006, c. 23, s. 15 (12).

New information and material at hearing

(24.3) This subsection applies if information and material that is presented at the hearing of an appeal described in subsection (24.1) was not provided to the municipality before the council made the decision that is the subject of the appeal. 2006, c. 23, s. 15 (12).

Same

(24.4) When subsection (24.3) applies, the Municipal Board may, on its own initiative or on a motion by the municipality or any party, consider whether the information and material could have materially affected the council's decision, and if the Board determines that it could have done so, it shall not be admitted into evidence until subsection (24.5) has been complied with and the prescribed time period has elapsed. 2006, c. 23, s. 15 (12).

Notice to council

(24.5) The Municipal Board shall notify the council that it is being given an opportunity to,

- (a) reconsider its decision in light of the information and material; and
- (b) make a written recommendation to the Board. 2006, c. 23, s. 15 (12).

Council's recommendation

(24.6) The Municipal Board shall have regard to the council's recommendation if it is received within the time period mentioned in subsection (24.4), and may but is not required to do so if it is received afterwards. 2006, c. 23, s. 15 (12).

Conflict with SPPA

(24.7) Subsections (24.1) to (24.6) apply despite the *Statutory Powers Procedure Act*. 2006, c. 23, s. 15 (12).

Dismissal without hearing

(25) Despite the *Statutory Powers Procedure Act* and subsections (11.0.2) and (24), the Municipal Board may dismiss all or part of an appeal without holding a hearing, on its own initiative or on the motion of any party, if,

- (a) it is of the opinion that,
 - (i) the reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the Board could allow all or part of the appeal,

- (ii) the appeal is not made in good faith or is frivolous or vexatious,
 - (iii) the appeal is made only for the purpose of delay, or
 - (iv) the appellant has persistently and without reasonable grounds commenced before the Board proceedings that constitute an abuse of process;
- (a.1) REPEALED: 2006, c. 23, s. 15 (15).
- (b) the appellant has not provided written reasons for the appeal;
 - (c) the appellant has not paid the fee prescribed under the *Ontario Municipal Board Act*; or
 - (d) the appellant has not responded to a request by the Municipal Board for further information within the time specified by the Board. 1994, c. 23, s. 21 (11); 1996, c. 4, s. 20 (11, 12); 2006, c. 23, s. 15 (13-15); 2009, c. 33, Sched. 21, s. 10 (4).

Representation

(25.1) Before dismissing all or part of an appeal, the Municipal Board shall notify the appellant and give the appellant the opportunity to make representation on the proposed dismissal but this subsection does not apply if the appellant has not complied with a request made under clause (25) (d). 2000, c. 26, Sched. K, s. 5 (2).

Same

(25.1.1) Despite the *Statutory Powers Procedure Act* and subsections (11.0.2) and (24), the Municipal Board may, on its own initiative or on the motion of the municipality or the Minister, dismiss all or part of an appeal without holding a hearing if, in the Board's opinion, the application to which the appeal relates is substantially different from the application that was before council at the time of its decision. 2006, c. 23, s. 15 (16).

Dismissal

(25.2) Despite the *Statutory Powers Procedure Act*, the Municipal Board may dismiss all or part of an appeal after holding a hearing or without holding a hearing on the motion under subsection (25) or (25.1.1), as it considers appropriate. 2006, c. 23, s. 15 (17).

Powers of O.M.B.

- (26) The Municipal Board may,
- (a) dismiss the appeal; or
 - (b) allow the appeal in whole or in part and repeal the by-law in whole or in part or amend the by-law in such manner as the Board may determine or direct the council of the municipality to repeal the by-law in whole or in part or to amend the by-law in accordance with the Board's order. R.S.O. 1990, c. P.13, s. 34 (26).

Matters of provincial interest

(27) Where an appeal is made to the Municipal Board under subsection (11) or (19), the Minister, if he or she is of the opinion that a matter of provincial interest is, or is likely to be, adversely affected by the by-law, may so advise the Board in writing not later than 30 days before the day fixed by the Board for the hearing of the appeal and the Minister shall identify,

- (a) the part or parts of the by-law by which the provincial interest is, or is likely to be, adversely affected; and

(b) the general basis for the opinion that a matter of provincial interest is, or is likely to be, adversely affected. 2004, c. 18, s. 6 (3).

No hearing or notice required

(28) The Minister is not required to give notice or to hold a hearing before taking any action under subsection (27). 2004, c. 18, s. 6 (3).

No order to be made

(29) If the Municipal Board has received notice from the Minister under subsection (27) and has made a decision on the by-law, the Board shall not make an order under subsection (11.0.2) or (26) in respect of the part or parts of the by-law identified in the notice. 2004, c. 18, s. 6 (3); 2009, c. 33, Sched. 21, s. 10 (5).

Action of L.G. in C.

(29.1) The Lieutenant Governor in Council may confirm, vary or rescind the decision of the Municipal Board in respect of the part or parts of the by-law identified in the notice and in doing so may repeal the by-law in whole or in part or amend the by-law in such a manner as the Lieutenant Governor in Council may determine. 2004, c. 18, s. 6 (3).

Coming into force

(30) If one or more appeals have been filed under subsection (19), the by-law does not come into force until all of such appeals have been withdrawn or finally disposed of, whereupon the by-law, except for those parts of it repealed or amended under subsection (26) or as are repealed or amended by the Lieutenant Governor in Council under subsection (29.1), shall be deemed to have come into force on the day it was passed. 1996, c. 4, s. 20 (13); 2004, c. 18, s. 6 (4).

Unappealed portions

(31) Despite subsection (30), before all of the appeals have been finally disposed of, the Municipal Board may make an order providing that any part of the by-law not in issue in the appeal shall be deemed to have come into force on the day the by-law was passed. 1993, c. 26, s. 53 (5).

Method

(32) The Municipal Board may make an order under subsection (31) on its own initiative or on the motion of any person or public body. 1993, c. 26, s. 53 (5); 1996, c. 4, s. 20 (14); 2006, c. 23, s. 15 (18).

Notice and hearing

(33) The Municipal Board may,

- (a) dispense with giving notice of a motion under subsection (32) or require the giving of such notice of the motion as it considers appropriate; and
- (b) make an order under subsection (31) after holding a hearing or without holding a hearing on the motion, as it considers appropriate. 1993, c. 26, s. 53 (5).

Notice

(34) Despite clause (33) (a), the Municipal Board shall give notice of a motion under subsection (32) to any person or public body who filed with the Board a written request to be notified if a motion is made. 1993, c. 26, s. 53 (5); 1994, c. 23, s. 21 (14).

No distinction on the basis of relationship

35. (1) REPEALED: 1996, c. 4, s. 21 (1).

No distinction on the basis of relationship

(2) The authority to pass a by-law under section 34, subsection 38 (1) or section 41 does not include the authority to pass a by-law that has the effect of distinguishing between persons who are related and persons who are unrelated in respect of the occupancy or use of a building or structure or a part of a building or structure, including the occupancy or use as a single housekeeping unit. 1994, c. 2, s. 43.

Provision of no effect

(3) A provision in a by-law passed under section 34, subsection 38 (1) or section 41 or in an order made under subsection 47 (1) is of no effect to the extent that it contravenes the restrictions described in subsection (2). 1994, c. 2, s. 43; 1996, c. 4, s. 21 (2).

(4) REPEALED: 1996, c. 4, s. 21 (3).

By-laws to give effect to second unit policies

35.1 (1) The council of each local municipality shall ensure that the by-laws passed under section 34 give effect to the policies described in subsection 16 (3). 2011, c. 6, Sched. 2, s. 6.

Regulations

(2) The Minister may make regulations,

- (a) authorizing the use of residential units referred to in subsection 16 (3);
- (b) establishing requirements and standards with respect to residential units referred to in subsection 16 (3). 2011, c. 6, Sched. 2, s. 6.

Regulation applies as zoning by-law

(3) A regulation under subsection (2) applies as though it is a by-law passed under section 34. 2011, c. 6, Sched. 2, s. 6.

Regulation prevails

(4) A regulation under subsection (2) prevails over a by-law passed under section 34 to the extent of any inconsistency, unless the regulation provides otherwise. 2011, c. 6, Sched. 2, s. 6.

Exception

(5) A regulation under subsection (2) may provide that a by-law passed under section 34 prevails over the regulation. 2011, c. 6, Sched. 2, s. 6.

Regulation may be general or particular

(6) A regulation under subsection (2) may be general or particular in its application and may be restricted to those municipalities or parts of municipalities set out in the regulation. 2011, c. 6, Sched. 2, s. 6.

Holding provision by-law

36. (1) The council of a local municipality may, in a by-law passed under section 34, by the use of the holding symbol “H” (or “h”) in conjunction with any use designation, specify the use to which lands, buildings or structures may be put at such time in the future as the holding symbol is removed by amendment to the by-law. R.S.O. 1990, c. P.13, s. 36 (1).

Condition

(2) A by-law shall not contain the provisions mentioned in subsection (1) unless there is an official plan in effect in the local municipality that contains provisions relating to the use of the holding symbol mentioned in subsection (1). R.S.O. 1990, c. P.13, s. 36 (2).

Appeal to O.M.B.

(3) Where an application to the council for an amendment to the by-law to remove the holding symbol is refused or the council refuses or neglects to make a decision thereon within 120 days after receipt by the clerk of the application, the applicant may appeal to the Municipal Board and the Board shall hear the appeal and dismiss the same or amend the by-law to remove the holding symbol or direct that the by-law be amended in accordance with its order. R.S.O. 1990, c. P.13, s. 36 (3); 1994, c. 23, s. 22 (1); 2004, c. 18, s. 7 (1).

Matters of provincial interest

(3.1) Where an appeal is made to the Municipal Board under subsection (3), the Minister, if he or she is of the opinion that a matter of provincial interest is, or is likely to be, adversely affected by the by-law, may so advise the Board in writing not later than 30 days before the day fixed by the Board for the hearing of the appeal and the Minister shall identify,

- (a) the part or parts of the by-law by which the provincial interest is, or is likely to be, adversely affected; and
- (b) the general basis for the opinion that a matter of provincial interest is, or is likely to be, adversely affected. 2004, c. 18, s. 7 (2).

No hearing or notice required

(3.2) The Minister is not required to give notice or to hold a hearing before taking any action under subsection (3.1). 2004, c. 18, s. 7 (2).

No order to be made

(3.3) If the Municipal Board has received notice from the Minister under subsection (3.1) and has made a decision on the by-law, the Board shall not make an order under subsection (3) in respect of the part or parts of the by-law identified in the notice. 2004, c. 18, s. 7 (2).

Action of L.G. in C.

(3.4) The Lieutenant Governor in Council may confirm, vary or rescind the decision of the Municipal Board in respect of the part or parts of the by-law identified in the notice and in doing so may repeal the by-law in whole or in part or amend the by-law in such a manner as the Lieutenant Governor in Council may determine. 2004, c. 18, s. 7 (2).

Application of subss. 34 (10.7, 10.9-25.1)

(4) Subsections 34 (10.7) and (10.9) to (25.1) do not apply to an amending by-law passed by the council to remove the holding symbol, but the council shall, in the manner and to the persons and public bodies and containing the information prescribed, give notice of its intention to pass the amending by-law. R.S.O. 1990, c. P.13, s. 36 (4); 1994, c. 23, s. 22 (2); 1996, c. 4, s. 22; 2009, c. 33, Sched. 21, s. 10 (6).

Increased density, etc., provision by-law

37. (1) The council of a local municipality may, in a by-law passed under section 34, authorize increases in the height and density of development otherwise permitted by the by-law that will be permitted in return for the provision of such facilities, services or matters as are set out in the by-law.

Condition

(2) A by-law shall not contain the provisions mentioned in subsection (1) unless there is an official plan in effect in the local municipality that contains provisions relating to the authorization of increases in height and density of development.

Agreements

(3) Where an owner of land elects to provide facilities, services or matters in return for an increase in the height or density of development, the municipality may require the owner to enter into one or more agreements with the municipality dealing with the facilities, services or matters.

Registration of agreement

(4) Any agreement entered into under subsection (3) may be registered against the land to which it applies and the municipality is entitled to enforce the provisions thereof against the owner and, subject to the provisions of the *Registry Act* and the *Land Titles Act*, any and all subsequent owners of the land. R.S.O. 1990, c. P.13, s. 37.

Interim control by-law

38. (1) Where the council of a local municipality has, by by-law or resolution, directed that a review or study be undertaken in respect of land use planning policies in the municipality or in any defined area or areas thereof, the council of the municipality may pass a by-law (hereinafter referred to as an interim control by-law) to be in effect for a period of time specified in the by-law, which period shall not exceed one year from the date of the passing thereof, prohibiting the use of land, buildings or structures within the municipality or within the defined area or areas thereof for, or except for, such purposes as are set out in the by-law.

Extension of period by-law in effect

(2) The council of the municipality may amend an interim control by-law to extend the period of time during which it will be in effect, provided the total period of time does not exceed two years from the date of the passing of the interim control by-law. R.S.O. 1990, c. P.13, s. 38 (1, 2).

Notice of passing of by-law

(3) No notice or hearing is required prior to the passing of a by-law under subsection (1) or (2) but the clerk of the municipality shall, in the manner and to the persons and public bodies and containing the information prescribed, give notice of a by-law passed under subsection (1) or (2) within thirty days of the passing thereof. R.S.O. 1990, c. P.13, s. 38 (3); 1994, c. 23, s. 23 (1).

Appeal to O.M.B.

(4) Any person or public body to whom notice of a by-law was given under subsection (3) may, within sixty days from the date of the passing of the by-law, appeal to the Municipal Board by filing with the clerk of the municipality a notice of appeal setting out the objection to the by-law and the reasons in support of the objection. R.S.O. 1990, c. P.13, s. 38 (4); 1994, c. 23, s. 23 (2).

Application

(5) If a notice of appeal is filed under subsection (4), subsections 34 (23) to (26) apply with necessary modifications to the appeal. 1996, c. 4, s. 23.

When prior zoning by-law again has effect

(6) Where the period of time during which an interim control by-law is in effect has expired and the council has not passed a by-law under section 34 consequent on the completion of the review or

study within the period of time specified in the interim control by-law, or where an interim control by-law is repealed or the extent of the area covered thereby is reduced, the provisions of any by-law passed under section 34 that applied immediately prior to the coming into force of the interim control by-law again come into force and have effect in respect of all lands, buildings or structures formerly subject to the interim control by-law. R.S.O. 1990, c. P.13, s. 38 (6).

Where by-law appealed

(6.1) If the period of time during which an interim control by-law is in effect has expired and the council has passed a by-law under section 34 consequent on the completion of the review or study within the period of time specified in the interim control by-law, but there is an appeal of the by-law under subsection 34 (19), the interim control by-law continues in effect as if it had not expired until the date of the order of the Municipal Board or until the date of a notice issued by the secretary of the Board under subsection 34 (23.1) unless the interim control by-law is repealed. 1994, c. 23, s. 23 (3).

Prohibition

(7) Where an interim control by-law ceases to be in effect, the council of the municipality may not for a period of three years pass a further interim control by-law that applies to any lands to which the original interim control by-law applied.

Application of s. 34 (9)

(8) Subsection 34 (9) applies with necessary modifications to a by-law passed under subsection (1) or (2). R.S.O. 1990, c. P.13, s. 38 (7, 8).

Temporary use provisions

39. (1) The council of a local municipality may, in a by-law passed under section 34, authorize the temporary use of land, buildings or structures for any purpose set out therein that is otherwise prohibited by the by-law. R.S.O. 1990, c. P.13, s. 39 (1).

(1.1), (1.2) REPEALED: 2002, c. 17, Sched. B, s. 11 (1).

Area and time in effect

(2) A by-law authorizing a temporary use under subsection (1) shall define the area to which it applies and specify the period of time for which the authorization shall be in effect, which shall not exceed three years from the day of the passing of the by-law. 2002, c. 17, Sched. B, s. 11 (2).

Extension

(3) Despite subsection (2), the council may by by-law grant further periods of not more than three years each during which the temporary use is authorized. R.S.O. 1990, c. P.13, s. 39 (3).

Non-application of cl. 34 (9) (a)

(4) Upon the expiry of the period or periods of time mentioned in subsections (2) and (3), clause 34 (9) (a) does not apply so as to permit the continued use of the land, buildings or structures for the purpose temporarily authorized. R.S.O. 1990, c. P.13, s. 39 (4).

Garden suites

39.1 (1) As a condition to passing a by-law authorizing the temporary use of a garden suite under subsection 39 (1), the council may require the owner of the suite or any other person to enter into an agreement with the municipality dealing with such matters related to the temporary use of the garden suite as the council considers necessary or advisable, including,

- (a) the installation, maintenance and removal of the garden suite;
- (b) the period of occupancy of the garden suite by any of the persons named in the agreement; and
- (c) the monetary or other form of security that the council may require for actual or potential costs to the municipality related to the garden suite. 2002, c. 17, Sched. B, s. 12; 2009, c. 33, Sched. 21, s. 10 (7).

Definition

(2) In this section,

“garden suite” means a one-unit detached residential structure containing bathroom and kitchen facilities that is ancillary to an existing residential structure and that is designed to be portable. 2002, c. 17, Sched. B, s. 12.

Area and time in effect

(3) Despite subsection 39 (2), a by-law authorizing the temporary use of a garden suite shall define the area to which it applies and specify the period of time for which the authorization shall be in effect, which shall not exceed 20 years from the day of the passing of the by-law. 2011, c. 6, Sched. 2, s. 7.

Extension

(4) Despite subsection (3), the council may by by-law grant further periods of not more than three years each during which the temporary use is authorized. 2002, c. 17, Sched. B, s. 12.

Non-application

(5) Upon the expiry of the period or periods of time mentioned in subsections (3) and (4), clause 34 (9) (a) does not apply so as to permit the continued use of the garden suite. 2002, c. 17, Sched. B, s. 12.

Agreement exempting owner from requirement to provide parking

40. (1) Where an owner or occupant of a building is required under a by-law of a local municipality to provide and maintain parking facilities on land that is not part of a highway, the council of the municipality and such owner or occupant may enter into an agreement exempting the owner or occupant, to the extent specified in the agreement, from the requirement of providing or maintaining the parking facilities. R.S.O. 1990, c. P.13, s. 40 (1).

Payment of money

(2) An agreement entered into under subsection (1) shall provide for the making of one or more payments of money to the municipality as consideration for the granting of the exemption and shall set forth the basis upon which such payment is calculated. R.S.O. 1990, c. P.13, s. 40 (2).

Special account

(3) All money received by a municipality under an agreement entered into under this section shall be paid into a special account and,

- (a) the money in that account shall be applied for the same purposes as a reserve fund established under the *Municipal Act, 2001* or the *City of Toronto Act, 2006*, as the case may be;
- (b) the money in that account may be invested in securities in which the municipality is permitted to invest under the *Municipal Act, 2001* or the *City of Toronto Act, 2006*, as the case may be;

- (c) earnings derived from the investment of the money in the special account shall be paid into that account; and
- (d) the auditor of the municipality, in the auditor's annual report, shall report on the activities and position of the account. 2002, c. 17, Sched. B, s. 13 (1); 2006, c. 32, Sched. C, s. 47 (6).

Registration of agreement

(4) An agreement entered into under this section may be registered in the proper land registry office against the land to which it applies and, when so registered, any money payable to the municipality under the agreement that has become due for payment shall have priority lien status as described in section 1 of the *Municipal Act, 2001* or section 3 of the *City of Toronto Act, 2006*, as the case may be. 2002, c. 17, Sched. B, s. 13 (2); 2006, c. 32, Sched. C, s. 47 (7).

Certificate

(5) When all money payable to the municipality under an agreement registered under subsection (4) has been paid, or such agreement has been terminated, the clerk of the municipality shall, at the request of the owner of the land, provide a certificate in a form registrable in the proper land registry office, certifying that the money has been paid or that the agreement has been terminated. R.S.O. 1990, c. P.13, s. 40 (5).

Site plan control area

41. (1) In this section,

“development” means the construction, erection or placing of one or more buildings or structures on land or the making of an addition or alteration to a building or structure that has the effect of substantially increasing the size or usability thereof, or the laying out and establishment of a commercial parking lot or of sites for the location of three or more trailers as defined in subsection 164 (4) of the *Municipal Act, 2001* or subsection 3 (1) of the *City of Toronto Act, 2006*, as the case may be, or of sites for the location of three or more mobile homes as defined in subsection 46 (1) of this Act or of sites for the construction, erection or location of three or more land lease community homes as defined in subsection 46 (1) of this Act. R.S.O. 1990, c. P.13, s. 41 (1); 1994, c. 4, s. 14; 2002, c. 17, Sched. B, s. 14 (1); 2006, c. 32, Sched. C, s. 47 (8).

Exception

(1.1) The definition of “development” in subsection (1) does not include the placement of a portable classroom on a school site of a district school board if the school site was in existence on January 1, 2007. 2006, c. 23, s. 16 (1).

Establishment of site plan control area

(2) Where in an official plan an area is shown or described as a proposed site plan control area, the council of the local municipality in which the proposed area is situate may, by by-law, designate the whole or any part of such area as a site plan control area. R.S.O. 1990, c. P.13, s. 41 (2).

Designation of site plan control area

(3) A by-law passed under subsection (2) may designate a site plan control area by reference to one or more land use designations contained in a by-law passed under section 34. R.S.O. 1990, c. P.13, s. 41 (3).

Consultation

(3.1) The council,

- (a) shall permit applicants to consult with the municipality before submitting plans and drawings for approval under subsection (4); and
- (b) may, by by-law, require applicants to consult with the municipality as described in clause (a). 2006, c. 23, s. 16 (2).

Approval of plans or drawings

(4) No person shall undertake any development in an area designated under subsection (2) unless the council of the municipality or, where a referral has been made under subsection (12), the Municipal Board has approved one or both, as the council may determine, of the following:

1. Plans showing the location of all buildings and structures to be erected and showing the location of all facilities and works to be provided in conjunction therewith and of all facilities and works required under clause (7) (a), including facilities designed to have regard for accessibility for persons with disabilities.
2. Drawings showing plan, elevation and cross-section views for each building to be erected, except a building to be used for residential purposes containing less than twenty-five dwelling units, which drawings are sufficient to display,
 - (a) the massing and conceptual design of the proposed building;
 - (b) the relationship of the proposed building to adjacent buildings, streets, and exterior areas to which members of the public have access;
 - (c) the provision of interior walkways, stairs, elevators and escalators to which members of the public have access from streets, open spaces and interior walkways in adjacent buildings;
 - (d) matters relating to exterior design, including without limitation the character, scale, appearance and design features of buildings, and their sustainable design, but only to the extent that it is a matter of exterior design, if an official plan and a by-law passed under subsection (2) that both contain provisions relating to such matters are in effect in the municipality;
 - (e) the sustainable design elements on any adjoining highway under a municipality's jurisdiction, including without limitation trees, shrubs, hedges, plantings or other ground cover, permeable paving materials, street furniture, curb ramps, waste and recycling containers and bicycle parking facilities, if an official plan and a by-law passed under subsection (2) that both contain provisions relating to such matters are in effect in the municipality; and
 - (f) facilities designed to have regard for accessibility for persons with disabilities. R.S.O. 1990, c. P.13, s. 41 (4); 2002, c. 9, s. 56 (1); 2006, c. 23, s. 16 (3, 4); 2009, c. 33, Sched. 21, s. 10 (9).

Exclusions from site plan control

(4.1) The following matters relating to buildings described in paragraph 2 of subsection (4) are not subject to site plan control:

1. Interior design.
2. The layout of interior areas, excluding interior walkways, stairs, elevators and escalators referred to in subparagraph 2 (c) of subsection (4).
3. The manner of construction and standards for construction. 2006, c. 23, s. 16 (5).

Dispute about scope of site plan control

(4.2) The owner of land or the municipality may make a motion for directions to have the Municipal Board determine a dispute about whether a matter referred to in paragraph 1 or 2 of subsection (4) is subject to site plan control. 2006, c. 23, s. 16 (5).

Final determination

(4.3) The Municipal Board's determination under subsection (4.2) is not subject to appeal or review. 2006, c. 23, s. 16 (5).

Drawings for residential buildings

(5) Despite the exception provided in paragraph 2 of subsection (4), the council of the municipality may require the drawings mentioned therein for a building to be used for residential purposes containing less than twenty-five dwelling units if the proposed building is to be located in an area specifically designated in the official plan mentioned in subsection (2) as an area wherein such drawings may be required. R.S.O. 1990, c. P.13, s. 41 (5).

Proviso

(6) Nothing in this section shall be deemed to confer on the council of the municipality power to limit the height or density of buildings to be erected on the land. R.S.O. 1990, c. P.13, s. 41 (6).

Conditions to approval of plans

(7) As a condition to the approval of the plans and drawings referred to in subsection (4), a municipality may require the owner of the land to,

- (a) provide to the satisfaction of and at no expense to the municipality any or all of the following:
 1. Subject to the provisions of subsections (8) and (9), widenings of highways that abut on the land.
 2. Subject to the *Public Transportation and Highway Improvement Act*, facilities to provide access to and from the land such as access ramps and curbing and traffic direction signs.
 3. Off-street vehicular loading and parking facilities, either covered or uncovered, access driveways, including driveways for emergency vehicles, and the surfacing of such areas and driveways.
 4. Walkways and walkway ramps, including the surfacing thereof, and all other means of pedestrian access.
 - 4.1 Facilities designed to have regard for accessibility for persons with disabilities.
 5. Facilities for the lighting, including floodlighting, of the land or of any buildings or structures thereon.
 6. Walls, fences, hedges, trees, shrubs or other groundcover or facilities for the landscaping of the lands or the protection of adjoining lands.
 7. Vaults, central storage and collection areas and other facilities and enclosures for the storage of garbage and other waste material.
 8. Easements conveyed to the municipality for the construction, maintenance or improvement of watercourses, ditches, land drainage works, sanitary sewage facilities and other public utilities of the municipality or local board thereof on the land.

9. Grading or alteration in elevation or contour of the land and provision for the disposal of storm, surface and waste water from the land and from any buildings or structures thereon;
- (b) maintain to the satisfaction of the municipality and at the sole risk and expense of the owner any or all of the facilities or works mentioned in paragraphs 2, 3, 4, 5, 6, 7, 8 and 9 of clause (a), including the removal of snow from access ramps and driveways, parking and loading areas and walkways;
- (c) enter into one or more agreements with the municipality dealing with and ensuring the provision of any or all of the facilities, works or matters mentioned in clause (a) or (d) and the maintenance thereof as mentioned in clause (b) or with the provision and approval of the plans and drawings referred to in subsection (4);
- (c.1) enter into one or more agreements with the municipality ensuring that development proceeds in accordance with the plans and drawings approved under subsection (4);
- (d) subject to subsection (9.1), convey part of the land to the municipality to the satisfaction of and at no expense to the municipality for a public transit right of way. R.S.O. 1990, c. P.13, s. 41 (7); 1996, c. 4, s. 24 (1, 2); 2006, c. 23, s. 16 (6, 7).

Where area is in upper-tier municipality

- (8) If an area designated under subsection (2) is within an upper-tier municipality, plans and drawings in respect of any development proposed to be undertaken in the area shall not be approved until the upper-tier municipality has been advised of the proposed development and afforded a reasonable opportunity to require the owner of the land to,
 - (a) provide to the satisfaction of and at no expense to the upper-tier municipality any or all of the following:
 - (i) subject to subsection (9), widenings of highways that are under the jurisdiction of the upper-tier municipality and that abut on the land,
 - (ii) subject to the *Public Transportation and Highway Improvement Act*, where the land abuts a highway under the jurisdiction of the upper-tier municipality, facilities to provide access to and from the land such as access ramps and curbing and traffic direction signs,
 - (iii) where the land abuts a highway under the jurisdiction of the upper-tier municipality, offstreet vehicular loading and parking facilities, either covered or uncovered, access driveways, including driveways for emergency vehicles, and the surfacing of such areas and driveways,
 - (iv) where the land abuts a highway under the jurisdiction of the upper-tier municipality, grading or alteration in elevation or contour of the land in relation to the elevation of the highway and provision for the disposal of storm and surface water from the land,
 - (v) where the land abuts a highway under the jurisdiction of the upper-tier municipality, facilities designed to have regard for accessibility for persons with disabilities;
 - (b) enter into one or more agreements with the upper-tier municipality dealing with and ensuring the provision of any or all of the facilities, works or matters mentioned in clause (a) or (c) and the maintenance thereof at the sole risk and expense of the owner, including the removal of snow from access ramps and driveways and parking and loading areas;

- (c) subject to subsection (9.1), convey part of the land to the upper-tier municipality to the satisfaction of and at no expense to the municipality for a public transit right of way. 2002, c. 17, Sched. B, s. 14 (2); 2006, c. 23, s. 16 (8).

Widening must be described in official plan

(9) An owner may not be required to provide a highway widening under paragraph 1 of clause (7) (a) or under paragraph 1 of clause (8) (a) unless the highway to be widened is shown on or described in an official plan as a highway to be widened and the extent of the proposed widening is likewise shown or described. R.S.O. 1990, c. P.13, s. 41 (9).

Limitation

(9.1) An owner of land may not be required to convey land under clause (7) (d) or (8) (c) unless the public transit right of way to be provided is shown on or described in an official plan. 1994, c. 23, s. 24 (3); 1996, c. 4, s. 24 (3).

Registration of agreements

(10) Any agreement entered into under clause (7) (c) or (c.1) or under clause (8) (b) may be registered against the land to which it applies and the municipality is entitled to enforce the provisions thereof against the owner and, subject to the provisions of the *Registry Act* and the *Land Titles Act*, any and all subsequent owners of the land. R.S.O. 1990, c. P.13, s. 41 (10); 2002, c. 17, Sched. B, s. 14 (3); 2006, c. 23, s. 16 (9).

Application of *Municipal Act, 2001* or *City of Toronto Act, 2006*

(11) Section 446 of the *Municipal Act, 2001* or section 386 of the *City of Toronto Act, 2006*, as the case may be, applies to any requirements made under clauses (7) (a) and (b) and to any requirements made under an agreement entered into under clause (7) (c) or (c.1). R.S.O. 1990, c. P.13, s. 41 (11); 2002, c. 17, Sched. B, s. 14 (4); 2006, c. 23, s. 16 (10); 2006, c. 32, Sched. C, s. 47 (9).

Appeal to O.M.B.

(12) If the municipality fails to approve the plans or drawings referred to in subsection (4) within 30 days after they are submitted to the municipality or if the owner of the land is not satisfied with any requirement made by the municipality under subsection (7) or by the upper-tier municipality under subsection (8) or with any part thereof, including the terms of any agreement required, the owner may require the plans or drawings or the unsatisfactory requirements, or parts thereof, including the terms of any agreement required, to be referred to the Municipal Board by written notice to the secretary of the Board and to the clerk of the municipality or upper-tier municipality, as appropriate. 2002, c. 17, Sched. B, s. 14 (5).

Hearing

(12.1) The Municipal Board shall hear and determine the matter in issue and determine the details of the plans or drawings and determine the requirements, including the provisions of any agreement required, and the decision of the Board is final. 2002, c. 17, Sched. B, s. 14 (5).

Classes of development, delegation

(13) Where the council of a municipality has designated a site plan control area under this section, the council may, by by-law,

- (a) define any class or classes of development that may be undertaken without the approval of plans and drawings otherwise required under subsection (4) or (5); and

- (b) delegate to either a committee of the council or to an appointed officer of the municipality identified in the by-law either by name or position occupied, any of the council's powers or authority under this section, except the authority to define any class or classes of development as mentioned in clause (a). R.S.O. 1990, c. P.13, s. 41 (13).

Proviso

(14) Section 35a of *The Planning Act*, being chapter 349 of the Revised Statutes of Ontario, 1970, as it existed on the 21st day of June, 1979, shall be deemed to continue in force in respect of any by-law passed under that section on or before that day. R.S.O. 1990, c. P.13, s. 41 (14).

Certain agreements declared valid and binding

(15) Every agreement entered into by a municipality after the 16th day of December, 1973 and before the 22nd day of June, 1979, to the extent that the agreement deals with facilities and matters mentioned in subsection 35a (2) of *The Planning Act*, being chapter 349 of the Revised Statutes of Ontario, 1970, as it existed on the 21st day of June, 1979, is hereby declared to be valid and binding. R.S.O. 1990, c. P.13, s. 41 (15).

City of Toronto

(16) This section does not apply to the City of Toronto, except for subsection (1.1), paragraph 1 of subsection (4), subparagraph 2 (f) of subsection (4) and paragraph 4.1 of clause (7) (a), which provisions apply with necessary modifications. 2006, c. 23, s. 16 (11).

Conveyance of land for park purposes

42. (1) As a condition of development or redevelopment of land, the council of a local municipality may, by by-law applicable to the whole municipality or to any defined area or areas thereof, require that land in an amount not exceeding, in the case of land proposed for development or redevelopment for commercial or industrial purposes, 2 per cent and in all other cases 5 per cent of the land be conveyed to the municipality for park or other public recreational purposes. R.S.O. 1990, c. P.13, s. 42 (1).

Definition

(2) For the purposes of subsection (3),

“dwelling unit” means any property that is used or designed for use as a domestic establishment in which one or more persons may sleep and prepare and serve meals. R.S.O. 1990, c. P.13, s. 42 (2).

Alternative requirement

(3) Subject to subsection (4), as an alternative to requiring the conveyance provided for in subsection (1), in the case of land proposed for development or redevelopment for residential purposes, the by-law may require that land be conveyed to the municipality for park or other public recreational purposes at a rate of one hectare for each 300 dwelling units proposed or at such lesser rate as may be specified in the by-law. R.S.O. 1990, c. P.13, s. 42 (3).

Official plan requirement

(4) The alternative requirement authorized by subsection (3) may not be provided for in a by-law passed under this section unless there is an official plan in effect in the local municipality that contains specific policies dealing with the provision of lands for park or other public recreational purposes and the use of the alternative requirement. R.S.O. 1990, c. P.13, s. 42 (4).

Use and sale of land

(5) Land conveyed to a municipality under this section shall be used for park or other public recreational purposes, but may be sold at any time. R.S.O. 1990, c. P.13, s. 42 (5).

Payment instead of conveyance

(6) The council of a local municipality may require the payment of money to the value of the land otherwise required to be conveyed under this section in lieu of the conveyance. 2006, c. 23, s. 17 (1).

No building without payment

(6.1) If a payment is required under subsection (6), no person shall construct a building on the land proposed for development or redevelopment unless the payment has been made or arrangements for the payment that are satisfactory to the council have been made. 2006, c. 23, s. 17 (1).

Redevelopment, reduction of payment

(6.2) If land in a local municipality is proposed for redevelopment, a part of the land meets sustainability criteria set out in the official plan and the conditions set out in subsection (6.3) are met, the council shall reduce the amount of any payment required under subsection (6) by the value of that part. 2006, c. 23, s. 17 (1).

Same

(6.3) The conditions mentioned in subsection (6.2) are:

1. The official plan contains policies relating to the reduction of payments required under subsection (6).
2. No land is available to be conveyed for park or other public recreational purposes under this section. 2006, c. 23, s. 17 (1).

Determination of value

(6.4) For the purposes of subsections (6) and (6.2), the value of the land shall be determined as of the day before the day the building permit is issued in respect of the development or redevelopment or, if more than one building permit is required for the development or redevelopment, as of the day before the day the first permit is issued. 2006, c. 23, s. 17 (1).

Where land conveyed

(7) If land has been conveyed or is required to be conveyed to a municipality for park or other public purposes or a payment of money in lieu of such conveyance has been received by the municipality or is owing to it under this section or a condition imposed under section 51.1 or 53, no additional conveyance or payment in respect of the land subject to the earlier conveyance or payment may be required by a municipality in respect of subsequent development or redevelopment unless,

- (a) there is a change in the proposed development or redevelopment which would increase the density of development; or
- (b) land originally proposed for development or redevelopment for commercial or industrial purposes is now proposed for development or redevelopment for other purposes. 1994, c. 23, s. 25.

Non-application

(8) Despite clauses 74.1 (2) (h) and (i), subsection (7) does not apply to land proposed for development or redevelopment if, before this subsection comes into force, the land was subject to a condition that land be conveyed to a municipality for park or other public purposes or that a payment of money in lieu of such conveyance be made under this section or under section 51 or 53. 1994, c. 23, s. 25.

Changes

(9) If there is a change under clause (7) (a) or (b), the land that has been conveyed or is required to be conveyed or the payment of money that has been received or that is owing, as the case may be, shall be included in determining the amount of land or payment of money in lieu of it that may subsequently be required under this section on the development, further development or redevelopment of the lands or part of them in respect of which the original conveyance or payment was made. 1994, c. 23, s. 25.

Disputes

(10) In the event of a dispute between a municipality and an owner of land on the value of land determined under subsection (6.4), either party may apply to the Municipal Board to have the value determined and the Board shall, in accordance as nearly as may be with the *Expropriations Act*, determine the value of the land and, if a payment has been made under protest under subsection (12), the Board may order that a refund be made to the owner. 1994, c. 23, s. 25; 2006, c. 23, s. 17 (2).

Same

(11) In the event of a dispute between a municipality and an owner of land as to the amount of land or payment of money that may be required under subsection (9), either party may apply to the Municipal Board and the Board shall make a final determination of the matter. 1994, c. 23, s. 25.

Payment under protest

(12) If there is a dispute between a municipality and the owner of land under subsection (10), the owner may pay the amount required by the municipality under protest and shall make an application to the Municipal Board under subsection (10) within 30 days of the payment of the amount. 1994, c. 23, s. 25.

Notice

(13) If an owner of land makes a payment under protest and an application to the Municipal Board under subsection (12), the owner shall give notice of the application to the municipality within 15 days after the application is made. 1994, c. 23, s. 25.

Park purposes

(14) The council of a municipality may include in its estimates an amount to be used for the acquisition of land to be used for park or other public recreational purposes and may pay into the fund provided for in subsection (15) that amount, and any person may pay any sum into the same fund. 1994, c. 23, s. 25.

Special account

(15) All money received by the municipality under subsections (6) and (14) and all money received on the sale of land under subsection (5), less any amount spent by the municipality out of its general funds in respect of the land, shall be paid into a special account and spent only for the acquisition of land to be used for park or other public recreational purposes, including the erection,

improvement or repair of buildings and the acquisition of machinery for park or other public recreational purposes. 1994, c. 23, s. 25; 2009, c. 33, Sched. 21, s. 10 (10).

Investments

(16) The money in the special account may be invested in securities in which the municipality is permitted to invest under the *Municipal Act, 2001* or the *City of Toronto Act, 2006*, as the case may be, and the earnings derived from the investment of the money shall be paid into the special account, and the auditor in the auditor's annual report shall report on the activities and status of the account. 1994, c. 23, s. 25; 1996, c. 32, s. 82 (5); 2002, c. 17, Sched. B, s. 15; 2006, c. 32, Sched. C, s. 47 (10).

Application of subs. 34 (12-34)

43. (1) Subsections 34 (12) to (34) do not apply to a by-law that amends a by-law only to express a word, term or measurement in the by-law in a unit of measurement set out in Schedule I of the *Weights and Measures Act* (Canada) in accordance with the definitions set out in Schedule II of that Act and that,

- (a) does not round any measurement so expressed further than to the next higher or lower multiple of 0.5 metres or 0.5 square metres, as the case may be; or
- (b) does not vary by more than 5 per cent any measurement so expressed. R.S.O. 1990, c. P.13, s. 43 (1); 1993, c. 26, s. 55.

Effect of amendment that conforms with subs. (1)

(2) Any land, building or structure that otherwise conforms with a by-law passed under section 34 or a predecessor thereof or an order made by the Minister under section 47 or a predecessor thereof does not cease to conform with the by-law or order by reason only of an amendment to the by-law or order that conforms with subsection (1). R.S.O. 1990, c. P.13, s. 43 (2).

Committee of adjustment

44. (1) If a municipality has passed a by-law under section 34 or a predecessor of such section, the council of the municipality may by by-law constitute and appoint a committee of adjustment for the municipality composed of such persons, not fewer than three, as the council considers advisable. R.S.O. 1990, c. P.13, s. 44 (1).

Copy of by-law to Minister

(2) Where a by-law is passed under subsection (1), a certified copy of the by-law shall be sent to the Minister by registered mail by the clerk of the municipality within thirty days of the passing thereof. R.S.O. 1990, c. P.13, s. 44 (2).

Term of office

(3) The members of the committee who are not members of a municipal council shall hold office for the term of the council that appointed them and the members of the committee who are members of a municipal council shall be appointed annually. R.S.O. 1990, c. P.13, s. 44 (3).

Idem

(4) Members of the committee shall hold office until their successors are appointed, and are eligible for reappointment, and, where a member ceases to be a member before the expiration of his or her term, the council shall appoint another eligible person for the unexpired portion of the term. R.S.O. 1990, c. P.13, s. 44 (4).

Quorum

(5) Where a committee is composed of three members, two members constitute a quorum, and where a committee is composed of more than three members, three members constitute a quorum. R.S.O. 1990, c. P.13, s. 44 (5).

Vacancy not to impair powers

(6) Subject to subsection (5), a vacancy in the membership or the absence or inability of a member to act does not impair the powers of the committee or of the remaining members. R.S.O. 1990, c. P.13, s. 44 (6).

Chair

(7) The members of the committee shall elect one of themselves as chair, and, when the chair is absent through illness or otherwise, the committee may appoint another member to act as acting chair. R.S.O. 1990, c. P.13, s. 44 (7).

Secretary-treasurer, employees

(8) The committee shall appoint a secretary-treasurer, who may be a member of the committee, and may engage such employees and consultants as is considered expedient, within the limits of the money appropriated for the purpose. R.S.O. 1990, c. P.13, s. 44 (8).

Remuneration

(9) The members of the committee shall be paid such compensation as the council may provide. R.S.O. 1990, c. P.13, s. 44 (9).

Filing of documents, etc.

(10) The secretary-treasurer shall keep on file minutes and records of all applications and the decisions thereon and of all other official business of the committee, and section 253 of the *Municipal Act, 2001* or section 199 of the *City of Toronto Act, 2006*, as the case may be, applies with necessary modifications to such documents. R.S.O. 1990, c. P.13, s. 44 (10); 2002, c. 17, Sched. B, s. 16; 2006, c. 32, Sched. C, s. 47 (11).

Rules of procedure

(11) In addition to complying with the requirements of this Act, the committee shall comply with such rules of procedure as are prescribed. R.S.O. 1990, c. P.13, s. 44 (11).

Powers of committee

45. (1) The committee of adjustment, upon the application of the owner of any land, building or structure affected by any by-law that is passed under section 34 or 38, or a predecessor of such sections, or any person authorized in writing by the owner, may, despite any other Act, authorize such minor variance from the provisions of the by-law, in respect of the land, building or structure or the use thereof, as in its opinion is desirable for the appropriate development or use of the land, building or structure, if in the opinion of the committee the general intent and purpose of the by-law and of the official plan, if any, are maintained. R.S.O. 1990, c. P.13, s. 45 (1); 2006, c. 23, s. 18 (1); 2009, c. 33, Sched. 21, s. 10 (11).

Restriction

(1.1) Subsection (1) does not allow the committee to authorize a minor variance from conditions imposed under subsection 34 (16) of this Act or under subsection 113 (2) of the *City of Toronto Act, 2006*. 2006, c. 23, s. 18 (2).

Other powers

- (2) In addition to its powers under subsection (1), the committee, upon any such application,
- (a) where any land, building or structure, on the day the by-law was passed, was lawfully used for a purpose prohibited by the by-law, may permit,
 - (i) the enlargement or extension of the building or structure, if the use that was made of the building or structure on the day the by-law was passed, or a use permitted under subclause (ii) continued until the date of the application to the committee, but no permission may be given to enlarge or extend the building or structure beyond the limits of the land owned and used in connection therewith on the day the by-law was passed, or
 - (ii) the use of such land, building or structure for a purpose that, in the opinion of the committee, is similar to the purpose for which it was used on the day the by-law was passed or is more compatible with the uses permitted by the by-law than the purpose for which it was used on the day the by-law was passed, if the use for a purpose prohibited by the by-law or another use for a purpose previously permitted by the committee continued until the date of the application to the committee; or
 - (b) where the uses of land, buildings or structures permitted in the by-law are defined in general terms, may permit the use of any land, building or structure for any purpose that, in the opinion of the committee, conforms with the uses permitted in the by-law. R.S.O. 1990, c. P.13, s. 45 (2).

Power of committee to grant minor variances

(3) A council that has constituted a committee of adjustment may by by-law empower the committee of adjustment to grant minor variances from the provisions of any by-law of the municipality that implements an official plan, or from such by-laws of the municipality as are specified and that implement an official plan, and when a committee of adjustment is so empowered subsection (1) applies with necessary modifications. R.S.O. 1990, c. P.13, s. 45 (3).

Time for hearing

(4) The hearing on any application shall be held within thirty days after the application is received by the secretary-treasurer. R.S.O. 1990, c. P.13, s. 45 (4).

Notice of hearing

(5) The committee, before hearing an application, shall in the manner and to the persons and public bodies and containing the information prescribed, give notice of the application. R.S.O. 1990, c. P.13, s. 45 (5); 1994, c. 23, s. 26 (1).

Hearing

(6) The hearing of every application shall be held in public, and the committee shall hear the applicant and every other person who desires to be heard in favour of or against the application, and the committee may adjourn the hearing or reserve its decision. R.S.O. 1990, c. P.13, s. 45 (6).

Oaths

(7) The chair, or in his or her absence the acting chair, may administer oaths. R.S.O. 1990, c. P.13, s. 45 (7).

Decision

(8) No decision of the committee on an application is valid unless it is concurred in by the majority of the members of the committee that heard the application, and the decision of the committee, whether granting or refusing an application, shall be in writing and shall set out the reasons for the decision, and shall be signed by the members who concur in the decision. R.S.O. 1990, c. P.13, s. 45 (8).

Conditions in decision

(9) Any authority or permission granted by the committee under subsections (1), (2) and (3) may be for such time and subject to such terms and conditions as the committee considers advisable and as are set out in the decision. R.S.O. 1990, c. P.13, s. 45 (9).

Agreement re terms and conditions

(9.1) If the committee imposes terms and conditions under subsection (9), it may also require the owner of the land to enter into one or more agreements with the municipality dealing with some or all of the terms and conditions, and in that case the requirement shall be set out in the decision. 2006, c. 23, s. 18 (3).

Registration of agreement

(9.2) An agreement entered into under subsection (9.1) may be registered against the land to which it applies and the municipality is entitled to enforce the agreement against the owner and, subject to the *Registry Act* and the *Land Titles Act*, against any and all subsequent owners of the land. 2006, c. 23, s. 18 (3).

Notice of decision

(10) The secretary-treasurer shall not later than ten days from the making of the decision send one copy of the decision, certified by him or her,

- (a) to the Minister, if the Minister has notified the committee by registered mail that he or she wishes to receive a copy of all decisions of the committee;
- (b) to the applicant; and
- (c) to each person who appeared in person or by counsel at the hearing and who filed with the secretary-treasurer a written request for notice of the decision,

together with a notice of the last day for appealing to the Municipal Board. R.S.O. 1990, c. P.13, s. 45 (10).

Additional material

(11) Where the secretary-treasurer is required to send a copy of the decision to the Minister under subsection (10), he or she shall also send to the Minister such other information and material as may be prescribed. R.S.O. 1990, c. P.13, s. 45 (11).

Appeal to O.M.B.

(12) The applicant, the Minister or any other person or public body who has an interest in the matter may within 20 days of the making of the decision appeal to the Municipal Board against the decision of the committee by filing with the secretary-treasurer of the committee a notice of appeal setting out the objection to the decision and the reasons in support of the objection accompanied by payment to the secretary-treasurer of the fee prescribed by the Municipal Board under the *Ontario Municipal Board Act* as payable on an appeal from a committee of adjustment to the Board. 1994, c. 23, s. 26 (2).

Idem

(13) The secretary-treasurer of a committee, upon receipt of a notice of appeal filed under subsection (12), shall forthwith forward the notice of appeal and the amount of the fee mentioned in subsection (12) to the Municipal Board by registered mail together with all papers and documents filed with the committee of adjustment relating to the matter appealed from and such other documents and papers as may be required by the Board. R.S.O. 1990, c. P.13, s. 45 (13).

Exception

(13.1) Despite subsection (13), if all appeals under subsection (12) are withdrawn within 15 days after the last day for filing a notice of appeal, the secretary-treasurer is not required to forward the materials described under subsection (13) to the Municipal Board. 1999, c. 12, Sched. M, s. 26.

Decision final

(13.2) If all appeals under subsection (12) are withdrawn within 15 days after the last day for filing a notice of appeal, the decision of the committee is final and binding and the secretary-treasurer of the committee shall notify the applicant and file a certified copy of the decision with the clerk of the municipality. 1999, c. 12, Sched. M, s. 26.

Where no appeal

(14) If within such 20 days no notice of appeal is given, the decision of the committee is final and binding, and the secretary-treasurer shall notify the applicant and shall file a certified copy of the decision with the clerk of the municipality. R.S.O. 1990, c. P.13, s. 45 (14); 1994, c. 23, s. 26 (3).

Where appeals withdrawn

(15) Where all appeals to the Municipal Board are withdrawn, the decision of the committee is final and binding and the secretary of the Board shall notify the secretary-treasurer of the committee who in turn shall notify the applicant and file a certified copy of the decision with the clerk of the municipality. R.S.O. 1990, c. P.13, s. 45 (15); 1994, c. 23, s. 26 (4).

Hearing

(16) On an appeal to the Municipal Board, the Board shall, except as provided in subsections (15) and (17), hold a hearing of which notice shall be given to the applicant, the appellant, the secretary-treasurer of the committee and to such other persons or public bodies and in such manner as the Board may determine. R.S.O. 1990, c. P.13, s. 45 (16); 1994, c. 23, s. 26 (5).

Dismissal without hearing

(17) Despite the *Statutory Powers Procedure Act* and subsection (16), the Municipal Board may dismiss all or part of an appeal without holding a hearing, on its own initiative or on the motion of any party, if,

- (a) it is of the opinion that,
 - (i) the reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the Board could allow all or part of the appeal,
 - (ii) the appeal is not made in good faith or is frivolous or vexatious,
 - (iii) the appeal is made only for the purpose of delay, or
 - (iv) the appellant has persistently and without reasonable grounds commenced before the Board proceedings that constitute an abuse of process;

- (b) the appellant has not provided written reasons for the appeal;
- (c) the appellant has not paid the fee prescribed under the *Ontario Municipal Board Act*; or
- (d) the appellant has not responded to a request by the Municipal Board for further information within the time specified by the Board. 1994, c. 23, s. 26 (6); 2006, c. 23, s. 18 (4, 5).

Representation

(17.1) Before dismissing all or part of an appeal, the Municipal Board shall notify the appellant and give the appellant the opportunity to make representation on the proposed dismissal but this subsection does not apply if the appellant has not complied with a request made under clause (17) (d). 2000, c. 26, Sched. K, s. 5 (3).

Dismissal

(17.2) The Municipal Board may dismiss all or part of an appeal after holding a hearing or without holding a hearing on the motion under subsection (17), as it considers appropriate. 2000, c. 26, Sched. K, s. 5 (3).

Powers of O.M.B.

(18) The Municipal Board may dismiss the appeal and may make any decision that the committee could have made on the original application. R.S.O. 1990, c. P.13, s. 45 (18).

Amended application

(18.1) On an appeal, the Municipal Board may make a decision on an application which has been amended from the original application if, before issuing its order, written notice is given to the persons and public bodies who received notice of the original application under subsection (5) and to other persons and agencies prescribed under that subsection. 1993, c. 26, s. 56; 1994, c. 23, s. 26 (7).

Exception

(18.1.1) The Municipal Board is not required to give notice under subsection (18.1) if, in its opinion, the amendment to the original application is minor. 1996, c. 4, s. 25 (1).

Notice of intent

(18.2) Any person or public body who receives notice under subsection (18.1) may, not later than thirty days after the day that written notice was given, notify the Board of an intention to appear at the hearing or the resumption of the hearing, as the case may be. 1993, c. 26, s. 56; 1994, c. 23, s. 26 (8).

Order

(18.3) If, after the expiry of the time period in subsection (18.2), no notice of intent has been received, the Board may issue its order. 1993, c. 26, s. 56.

Hearing

(18.4) If a notice of intent is received, the Board may hold a hearing or resume the hearing on the amended application or it may issue its order without holding a hearing or resuming the hearing. 1996, c. 4, s. 25 (2).

Notice of decision

(19) When the Municipal Board makes an order on an appeal, the secretary of the Board shall send a copy thereof to the applicant, the appellant and the secretary-treasurer of the committee. R.S.O. 1990, c. P.13, s. 45 (19).

Idem

(20) The secretary-treasurer shall file a copy of the order of the Municipal Board with the clerk of the municipality. R.S.O. 1990, c. P.13, s. 45 (20).

Mobile homes, land lease community homes

46. (1) In this section,

“land lease community home” means any dwelling that is a permanent structure where the owner of the dwelling leases the land used or intended for use as the site for the dwelling, but does not include a mobile home; (“maison de communauté de terrains à bail”)

“mobile home” means any dwelling that is designed to be made mobile, and constructed or manufactured to provide a permanent residence for one or more persons, but does not include a travel trailer or tent trailer or trailer otherwise designed; (“maison mobile”)

“parcel of land” means a lot or block within a registered plan of subdivision or any land that may be legally conveyed under the exemption provided in clause 50 (3) (b) or clause 50 (5) (a). (“parcelle de terrain”) R.S.O. 1990, c. P.13, s. 46 (1); 1994, c. 4, s. 15 (1).

One mobile home per parcel of land

(2) Unless otherwise authorized by a by-law in force under section 34 or an order of the Minister made under clause 47 (1) (a), or a permit issued under section 13 of the *Public Lands Act*, no person shall erect or locate or use or cause to be erected, located or used, a mobile home except on a parcel of land as defined in subsection (1), and in no case except as otherwise so authorized shall any person erect, locate or use or cause to be erected, located or used more than one mobile home on any such parcel of land. R.S.O. 1990, c. P.13, s. 46 (2).

One land lease community home per parcel of land

(2.1) Unless otherwise authorized by a by-law in force under section 34 or an order of the Minister made under clause 47 (1) (a), or a permit issued under section 13 of the *Public Lands Act*, no person shall construct or erect or locate or use or cause to be constructed, erected, located or used a land lease community home except on a parcel of land as defined in subsection (1), and in no case except as otherwise so authorized shall any person construct, erect, locate or use or cause to be constructed, erected, located or used more than one land lease community home on any such parcel of land. 1994, c. 4, s. 15 (2).

Saving

(3) This section does not apply to prevent the continued use in the same location of any mobile home that,

- (a) was erected or located and in use prior to the 1st day of June, 1977; or
- (b) was erected or located in accordance with a building permit issued prior to the 1st day of June, 1977. R.S.O. 1990, c. P.13, s. 46 (3).

Same

(4) This section does not apply to prevent the continued use in the same location of any land lease community home that,

- (a) was constructed, erected or located and in use prior to the day the *Land Lease Statute Law Amendment Act, 1994* receives Royal Assent; or
- (b) was constructed, erected or located in accordance with a building permit issued prior to the day the *Land Lease Statute Law Amendment Act, 1994* receives Royal Assent. 1994, c. 4, s. 15 (3).

Power of Minister re zoning and subdivision control

47. (1) The Minister may by order,

- (a) in respect of any land in Ontario, exercise any of the powers conferred upon councils by section 34, 38 or 39, but subsections 34 (11) to (34) do not apply to the exercise of such powers; and
- (b) in respect of any land in Ontario, exercise the powers conferred upon councils by subsection 50 (4). R.S.O. 1990, c. P.13, s. 47 (1); 1994, c. 23, s. 27 (1).

Power of Minister to allow minor variances

(2) Where an order has been made under clause (1) (a), the Minister, in respect of the lands affected by the order, has all the powers in respect of such order as a committee of adjustment has under subsections 45 (1) and (2) in respect of a by-law passed under section 34, but subsections 45 (4) to (8) and (10) to (20) do not apply to the exercise by the Minister of such powers. R.S.O. 1990, c. P.13, s. 47 (2).

Order prevails over by-law in event of conflict

(3) In the event of a conflict between an order made under clause (1) (a) and a by-law that is in effect under section 34 or 38, or a predecessor thereof, the order prevails to the extent of such conflict, but in all other respects the by-law remains in full force and effect. R.S.O. 1990, c. P.13, s. 47 (3).

Deemed by-law of municipality

(4) The Minister may, in the order or by separate order, provide that all or part of an order made under clause (1) (a) and any amendments to it in respect of land in a municipality, the council of which has the powers conferred by section 34, shall be deemed for all purposes, except the purposes of section 24, to be and to always have been a by-law passed by the council of the municipality in which the land is situate. 2001, c. 9, Sched. J, s. 2 (1).

Notice

(5) No notice or hearing is required prior to the making of an order under subsection (1) but the Minister shall give notice of any such order within thirty days of the making thereof in such manner as the Minister considers proper and shall set out in the notice the provisions of subsections (8), (9) and (10). R.S.O. 1990, c. P.13, s. 47 (5).

Idem

- (6) The Minister shall cause a duplicate or certified copy of an order made under clause (1) (a),
 - (a) where the land affected is situate in a local municipality, to be lodged in the office of the clerk of the municipality, or where the land affected is situate in two or more local municipalities, in the office of the clerk of each of such municipalities; and

- (b) where the land affected is situate in territory without municipal organization, to be lodged in the proper land registry office, where it shall be made available to the public as a production. R.S.O. 1990, c. P.13, s. 47 (6); 2002, c. 17, Sched. B, s. 17.

Registration

(7) The Minister shall cause a certified copy or duplicate of an order made under clause (1) (b) to be registered in the proper land registry office. R.S.O. 1990, c. P.13, s. 47 (7).

Revocation or amendment

(8) The Minister may, on his or her own initiative or at the request of any person or public body, by order, amend or revoke in whole or in part any order made under subsection (1). R.S.O. 1990, c. P.13, s. 47 (8); 1994, c. 23, s. 27 (2).

Information

(8.1) A request under subsection (8) shall include the prescribed information and material and such other information or material as the Minister may require. 1993, c. 26, s. 57 (2).

Refusal to consider

(8.2) The Minister may refuse to accept or further consider a request under subsection (8) until the prescribed information and material and the required fee are received. 1994, c. 23, s. 27 (3).

Notice

(9) Except as provided in subsection (10), the Minister before amending or revoking in whole or in part an order made under subsection (1) shall give notice or cause to be given notice thereof in such manner as the Minister considers proper and shall allow such period of time as he or she considers appropriate for the submission of representations in respect thereof. R.S.O. 1990, c. P.13, s. 47 (9).

Hearing by O.M.B.

(10) Where an application is made to the Minister to amend or revoke in whole or in part any order made under subsection (1), the Minister may, and on the request of any person or public body shall, request the Municipal Board to hold a hearing on the application and thereupon the Board shall hold a hearing as to whether the order should be amended or revoked in whole or in part. R.S.O. 1990, c. P.13, s. 47 (10); 1994, c. 23, s. 27 (4).

Reasons

(10.1) A request for a hearing must set out the reasons for the request and be accompanied by the fee prescribed under the *Ontario Municipal Board Act*. 1994, c. 23, s. 27 (5).

Refusal to refer

- (11) The Minister may refuse to refer a request under subsection (10) to the Municipal Board if,
- (a) the Minister is of the opinion that,
 - (i) the reasons set out in the request do not disclose any apparent land use planning ground upon which the Municipal Board could amend or revoke or refuse to revoke all or part of the order,
 - (ii) the request is not made in good faith or is frivolous or vexatious, or
 - (iii) the request is made only for the purpose of delay;

- (b) the person or public body requesting the hearing has not provided written reasons for the request. 1994, c. 23, s. 27 (6); 1996, c. 4, s. 26 (1).

Notice of hearing

(12) Where the Minister has requested the Municipal Board to hold a hearing as provided for in subsection (10), notice of the hearing shall be given in such manner and to such persons as the Board may direct, and the Board shall hear any submissions that any person may desire to bring to the attention of the Board. R.S.O. 1990, c. P.13, s. 47 (12).

Dismissal without hearing

(12.1) Despite the *Statutory Powers Procedure Act* and subsection (10), the Municipal Board may dismiss a request to hold a hearing without holding a hearing, on its own initiative or on the motion of any party, if,

- (a) it is of the opinion that,
- (i) the reasons set out in the request do not disclose any apparent land use planning ground upon which the Board could amend or revoke or refuse to amend or revoke all or part of the order,
 - (ii) the request is not made in good faith or is frivolous or vexatious,
 - (iii) the request is made only for the purpose of delay, or
 - (iv) the person or public body requesting the hearing has persistently and without reasonable grounds commenced before the Board proceedings that constitute an abuse of process;
- (b) the person or public body requesting the hearing has not provided written reasons for the request;
- (c) the person or public body requesting the hearing has not paid the fee prescribed under the *Ontario Municipal Board Act*; or
- (d) the person or public body requesting the hearing has not responded to a request by the Municipal Board for further information within the time specified by the Board. 1994, c. 23, s. 27 (7); 1996, c. 4, s. 26 (2); 2006, c. 23, s. 19 (1, 2).

Representation

(12.2) Before dismissing a request to hold a hearing, the Municipal Board shall notify the person or public body requesting the hearing and give the person or public body the opportunity to make representation on the proposed dismissal but this subsection does not apply if the person or public body has not complied with a request made under clause (12.1) (d). 2000, c. 26, Sched. K, s. 5 (4).

Dismissal

(12.3) The Municipal Board may dismiss a request after holding a hearing or without holding a hearing on the motion under subsection (12.1), as it considers appropriate. 2000, c. 26, Sched. K, s. 5 (4).

Decision of O.M.B.

(13) The Municipal Board after the conclusion of the hearing shall make a decision to either amend or revoke the order in whole or in part or refuse to amend or revoke the order in whole or in part and the Minister shall give effect to the decision of the Board. R.S.O. 1990, c. P.13, s. 47 (13); 1996, c. 4, s. 26 (3).

Minister's notice re matters of provincial interest

(13.1) If the Municipal Board has been requested to hold a hearing as provided for in subsection (10) and the Minister is of the opinion that a matter of provincial interest is, or is likely to be, adversely affected by the requested amendment or revocation, the Minister may so notify the Board in writing, not later than 30 days before the day fixed by the Board for the hearing. 2006, c. 23, s. 19 (3).

Same

(13.2) The Minister's notice shall identify,

- (a) the provisions of the order by whose amendment or revocation the provincial interest is, or is likely to be, adversely affected; and
- (b) the general basis for the opinion that a matter of provincial interest is, or is likely to be, adversely affected. 2006, c. 23, s. 19 (3).

Same

(13.3) The Minister is not required to give notice or to hold a hearing before giving notice under subsection (13.1). 2006, c. 23, s. 19 (3).

Effect of notice

(13.4) If the Municipal Board receives notice from the Minister under subsection (13.1), the decision of the Board is not final and binding with respect to the amendment or revocation of provisions identified in the notice, until the Lieutenant Governor in Council confirms the decision in that respect. 2006, c. 23, s. 19 (3).

Power of Lieutenant Governor in Council

(13.5) The Lieutenant Governor in Council may confirm, vary or rescind the Municipal Board's decision with respect to the amendment or revocation of provisions identified in the notice, and may direct the Minister to amend or revoke the order, in whole or in part. 2006, c. 23, s. 19 (3).

Notification of decision

(14) A copy of the decision of the Municipal Board shall be sent to each person who appeared at the hearing and made representations and to any person who in writing requests a copy of the decision. R.S.O. 1990, c. P.13, s. 47 (14).

(15)-(17) REPEALED: 1994, c. 23, s. 27 (8).

Effect of land use order

(18) An order of the Minister made under clause (1) (b) has the same effect as a by-law passed under subsection 50 (4). R.S.O. 1990, c. P.13, s. 47 (18).

Deemed by-law

(19) The Minister may, in the order or by separate order, provide that all or part of an order made under clause (1) (a) and any amendments to it in respect of land in the planning area of a planning board shall be deemed to be and to always have been a by-law passed under section 34 by the planning board in which the land is situate. 2001, c. 9, Sched. J, s. 2 (2).

Where licence, etc., not to issue

48. Despite the provisions of any other general or special Act, a licence, permit, approval or permission shall not be issued or granted nor any utility or service provided by a utilities distributor or a public or Crown agency in respect of any land, building or structure where the proposed use of the land or the erection or proposed use of the building or structure would be in contravention of

section 46 or of an order made under section 47 or of a by-law passed by a planning board under section 34 or 38. R.S.O. 1990, c. P.13, s. 48; 1994, c. 23, s. 28; 2006, c. 23, s. 20.

Power of entry

49. (1) In this section,

“officer” means an officer who has been assigned the responsibility of enforcing section 46, orders of the Minister made under clause 47 (1) (a) or zoning by-laws passed under section 34.

Entry and inspection

(2) Subject to subsection (3), where an officer believes on reasonable grounds that section 46, an order of the Minister made under clause 47 (1) (a) or a by-law passed under section 34 or 38 is being contravened, the officer or any person acting under his or her instructions may, at all reasonable times and upon producing proper identification, enter and inspect any property on or in respect of which he or she believes the contravention is occurring. R.S.O. 1990, c. P.13, s. 49 (1, 2).

Where warrant required

(3) Except under the authority of a search warrant issued under section 49.1, an officer or any person acting under his or her instructions shall not enter any room or place actually used as a dwelling without requesting and obtaining the consent of the occupier, first having informed the occupier that the right of entry may be refused and entry made only under the authority of a search warrant. R.S.O. 1990, c. P.13, s. 49 (3); 1994, c. 2, s. 45 (1).

Obstruction

(4) No person shall obstruct or attempt to obstruct an officer or a person acting under the officer’s instructions in the exercise of a power under this section. 1994, c. 2, s. 45 (2).

Search warrant

49.1 (1) A provincial judge or justice of the peace may at any time issue a warrant in the prescribed form authorizing a person named in the warrant to enter and search a building, receptacle or place if the provincial judge or justice of the peace is satisfied by information on oath that there are reasonable grounds to believe that,

- (a) an offence under section 67 has been committed; and
- (b) the entry and search will afford evidence relevant to the commission of the offence. 1994, c. 2, s. 46; 1997, c. 24, s. 226 (7).

Seizure

(2) In a search warrant, the provincial judge or justice of the peace may authorize the person named in the warrant to seize anything that, based on reasonable grounds, will afford evidence relevant to the commission of the offence.

Receipt and removal

(3) Anyone who seizes something under a search warrant shall,

- (a) give a receipt for the thing seized to the person from whom it was seized; and
- (b) bring the thing seized before the provincial judge or justice of the peace issuing the warrant or another provincial judge or justice to be dealt with according to law.

Expiry

(4) A search warrant shall name the date upon which it expires, which shall be not later than fifteen days after the warrant is issued.

Time of execution

(5) A search warrant shall be executed between 6 a.m. and 9 p.m. unless it provides otherwise.

Other matters

(6) Sections 159 and 160 of the *Provincial Offences Act* apply with necessary modifications in respect of any thing seized under this section. 1994, c. 2, s. 46.

PART VI SUBDIVISION OF LAND

Interpretation

50. (1) In this section and in section 53, “consent” means,

- (a) where land is situate in a lower-tier municipality, a consent given by the council of the upper-tier municipality,
- (b) where land is situate in a single-tier municipality that is not in a territorial district, a consent given by the council of the single-tier municipality,
- (c) where land is situate in a prescribed single-tier municipality that is in a territorial district, a consent given by the council of the single-tier municipality, and
- (d) except as otherwise provided in clauses (a), (b) and (c), a consent given by the Minister. 2002, c. 17, Sched. B, s. 18.

References include delegates

(1.0.1) A reference in subsection (1) and in section 53 to the Minister includes a delegate of the Minister under sections 4 and 55 and a reference to a council includes a delegate of a council under section 54. 2002, c. 17, Sched. B, s. 18.

Removal of power

(1.1) The Minister may by order, accompanied by a written explanation for it, remove the powers of the council of a municipality under this section and sections 53 and 57 and the order may be in respect of one or more applications for a consent, an approval under subsection (18) or for a certificate of validation specified in the order or in respect of any or all applications for consents, approvals under subsection (18) or for certificates of validation made after the order is made. 1994, c. 23, s. 29 (2).

Minister to grant consents, etc.

(1.2) If an order is made under subsection (1.1), the Minister has the power of the council to grant consents, to give approvals under subsection (18) or to issue a certificate of validation in respect of applications to which the order relates and the council shall forward to the Minister all papers, plans, documents and other materials that relate to any matter in respect of which the powers were removed and of which a final disposition was not made by the council before the power was removed. 1994, c. 23, s. 29 (2).

Effect of revocation

(1.3) If the Minister revokes the order or part of the order made under subsection (1.1), the power to grant consents, give approvals under subsection (18) or issue certificates of validation reverts back to the council in respect of all applications to which the revoked order or revoked part of the order applied. 1994, c. 23, s. 29 (2).

Delegation

(1.4) If an order is made under subsection (1.1) in respect of land that is located in a municipal planning area, the Minister may by order delegate to the municipal planning authority the power which was removed from the council to grant consents, to give approvals under subsection (18) or to issue certificates of validation and the delegation may be subject to such conditions as the order provides. 1994, c. 23, s. 29 (2).

Effect of revocation

(1.5) If the Minister revokes the order or part of the order made under subsection (1.4), the power of the municipal planning authority to grant consents, to give approvals under subsection (18) or to issue certificates of validation reverts back to the Minister in respect of all applications to which the revoked order or revoked part of the order applies and the municipal planning authority shall forward to the Minister all papers, plans, documents and other materials that relate to any matter to which the revoked order or part of the order applies and of which a final disposition was not made by the municipal planning authority before the order or part of the order was revoked. 1994, c. 23, s. 29 (2).

Proviso

(2) For the purposes of this section, land shall be deemed and shall always have been deemed not to abut land that is being conveyed or otherwise dealt with if it abuts such land on a horizontal plane only. R.S.O. 1990, c. P.13, s. 50 (2).

Mining rights

(2.1) For the purposes of this section, land shall be deemed and shall always have been deemed to exclude mining rights in or under land but not mining rights on the land. 1994, c. 23, s. 29 (2).

Subdivision control

(3) No person shall convey land by way of a deed or transfer, or grant, assign or exercise a power of appointment with respect to land, or mortgage or charge land, or enter into an agreement of sale and purchase of land or enter into any agreement that has the effect of granting the use of or right in land directly or by entitlement to renewal for a period of twenty-one years or more unless,

- (a) the land is described in accordance with and is within a registered plan of subdivision;
- (b) the grantor by deed or transfer, the person granting, assigning or exercising a power of appointment, the mortgagor or chargor, the vendor under an agreement of purchase and sale or the grantor of a use of or right in land, as the case may be, does not retain the fee or the equity of redemption in, or a power or right to grant, assign or exercise a power of appointment in respect of, any land abutting the land that is being conveyed or otherwise dealt with other than land that is the whole of one or more lots or blocks within one or more registered plans of subdivision;
- (c) the land or any use of or right therein is being acquired or disposed of by Her Majesty in right of Canada, Her Majesty in right of Ontario or by any municipality;
- (d) the land or any use of or right therein is being acquired for the purpose of an electricity distribution line, electricity transmission line, hydrocarbon distribution line or hydrocarbon

transmission line within the meaning of Part VI of the *Ontario Energy Board Act, 1998* and in respect of which the person acquiring the land or any use of or right therein has made a declaration that it is being acquired for such purpose, which shall be conclusive evidence that it is being acquired for such purpose;

- (d.1) the land or any use of or right therein is being acquired, directly or by entitlement to renewal for a period of 21 or more years but not more than 50 years, for the purpose of a renewable energy generation facility or renewable energy project, and in respect of which the person acquiring the land or any use of or right therein has made a declaration that it is being acquired for such purpose, which shall be conclusive evidence that it is being acquired for such purpose;
- (e) the land or any use of or right therein is being acquired for the purposes of flood control, erosion control, bank stabilization, shoreline management works or the preservation of environmentally sensitive lands under a project approved by the Minister of Natural Resources under section 24 of the *Conservation Authorities Act* and in respect of which an officer of the conservation authority acquiring the land or any use of or right therein has made a declaration that it is being acquired for any of such purposes, which shall be conclusive evidence that it is being acquired for such purpose;
- (f) a consent is given to convey, mortgage or charge the land, or grant, assign or exercise a power of appointment in respect of the land or enter into an agreement in respect of the land;
- (g) the land or any use of or right therein was acquired for the purpose of an electricity distribution line, electricity transmission line, hydrocarbon distribution line or hydrocarbon transmission line within the meaning of Part VI of the *Ontario Energy Board Act, 1998* and is being disposed of to the person from whom it was acquired; or
- (h) the only use of or right in land that is granted is an easement or covenant under the *Conservation Land Act*. R.S.O. 1990, c. P.13, s. 50 (3); 1998, c. 15, Sched. E, s. 27 (4-6); 2006, c. 23, s. 21 (1); 2009, c. 12, Sched. K, s. 2 (1).

Designation of plans of subdivision not deemed registered

(4) The council of a local municipality may by by-law designate any plan of subdivision, or part thereof, that has been registered for eight years or more, which shall be deemed not to be a registered plan of subdivision for the purposes of subsection (3). R.S.O. 1990, c. P.13, s. 50 (4).

Part-lot control

(5) Where land is within a plan of subdivision registered before or after the coming into force of this section, no person shall convey a part of any lot or block of the land by way of a deed, or transfer, or grant, assign or exercise a power of appointment in respect of a part of any lot or block of the land, or mortgage or charge a part of any lot or block of the land, or enter into an agreement of sale and purchase of a part of any lot or block of the land or enter into any agreement that has the effect of granting the use of or right in a part of any lot or block of the land directly or by entitlement to renewal for a period of twenty-one years or more unless,

- (a) the grantor by deed or transfer, the person granting, assigning or exercising a power of appointment, the mortgagor or chargor, the vendor under an agreement of purchase and sale or the grantor of a use of or right in land, as the case may be, does not retain the fee or the equity of redemption in, or a power or right to grant, assign or exercise a power of appointment in respect of, any land abutting the land that is being conveyed or otherwise

dealt with other than land that is the whole of one or more lots or blocks within one or more registered plans of subdivision;

- (b) the land or any use of or right therein is being acquired or disposed of by Her Majesty in right of Canada, Her Majesty in right of Ontario or by any municipality;
- (c) the land or any use of or right therein is being acquired for the purpose of a utility line within the meaning of the *Ontario Energy Board Act, 1998* and in respect of which the person acquiring the land or any use of or right therein has made a declaration that it is being acquired for such purpose, which shall be conclusive evidence that it is being acquired for such purpose;
- (c.1) the land or any use of or right therein is being acquired, directly or by entitlement to renewal for a period of 21 or more years but not more than 50 years, for the purpose of a renewable energy generation facility or renewable energy project, and in respect of which the person acquiring the land or any use of or right therein has made a declaration that it is being acquired for such purpose, which shall be conclusive evidence that it is being acquired for such purpose;
- (d) the land or any use of or right therein is being acquired for the purposes of flood control, erosion control, bank stabilization, shoreline management works or the preservation of environmentally sensitive lands under a project approved by the Minister of Natural Resources under section 24 of the *Conservation Authorities Act* and in respect of which an officer of the conservation authority acquiring the land or any use of or right therein has made a declaration that it is being acquired for any of such purposes, which shall be conclusive evidence that it is being acquired for such purpose;
- (e) the land that is being conveyed, or otherwise dealt with is the remaining part of a lot or block, the other part of which was acquired by a body that has vested in it the right to acquire land by expropriation;
- (f) a consent is given to convey, mortgage or charge the land or grant, assign or exercise a power of appointment in respect of the land or enter into an agreement in respect of the land;
- (g) the land or any use of or right therein was acquired for the purpose of a utility line within the meaning of the *Ontario Energy Board Act, 1998* and is being disposed of to the person from whom it was acquired; or
- (h) the only use of or right in land that is granted is an easement or covenant under the *Conservation Land Act*. R.S.O.1990, c. P.13, s. 50 (5); 1998, c. 15, Sched. E, s. 27 (7-9); 2006, c. 23, s. 21 (2); 2009, c. 12, Sched. K, s. 2 (2).

Conveyance of remaining part

(6) Despite subsections (3) and (5), where land is the remaining part of a parcel of land, the other part or parts of which parcel have been the subject of a consent given under clause (3) (f) or (5) (f), the whole of the remaining part may be conveyed or otherwise dealt with before the other part or parts are conveyed or otherwise dealt with, provided that the remaining part is conveyed or otherwise dealt with before the consent mentioned above lapses under subsection 53 (43). R.S.O. 1990, c. P.13, s. 50 (6); 1994, c. 23, s. 29 (3).

Designation of lands not subject to part-lot control

(7) Despite subsection (5), the council of a local municipality may by by-law provide that subsection (5) does not apply to land that is within such registered plan or plans of subdivision or parts of them as are designated in the by-law. 1996, c. 4, s. 27 (3).

Requirement for approval of by-law

(7.1) A by-law passed under subsection (7) does not take effect until it has been approved by the appropriate approval authority for the purpose of sections 51 and 51.1 in respect of the land covered by the by-law. 1996, c. 4, s. 27 (3).

Exemption from approval

(7.2) An approval under subsection (7.1) is not required if the council that passes a by-law under subsection (7) is authorized to approve plans of subdivision under section 51. 1996, c. 4, s. 27 (3).

Expiration of by-law

(7.3) A by-law passed under subsection (7) may provide that the by-law expires at the expiration of the time period specified in the by-law and the by-law expires at that time. 1996, c. 4, s. 27 (3).

Extension of time period

(7.4) The council of a local municipality may, at any time before the expiration of a by-law under subsection (7), amend the by-law to extend the time period specified for the expiration of the by-law and an approval under subsection (7.1) is not required. 1996, c. 4, s. 27 (3).

Amendment or repeal

(7.5) The council of a local municipality may, without an approval under subsection (7.1), repeal or amend a by-law passed under subsection (7) to delete part of the land described in it and, when the requirements of subsection (28) have been complied with, subsection (5) applies to the land affected by the repeal or amendment. 1996, c. 4, s. 27 (3).

Exception

(8) Nothing in subsections (3) and (5) prohibits, and subsections (3) and (5) shall be deemed never to have prohibited, the giving back of a mortgage or charge by a purchaser of land to the vendor of the land as part or all of the consideration for the conveyance of the land, provided that the mortgage or charge applies to all of the land described in the conveyance. R.S.O. 1990, c. P.13, s. 50 (8).

Part of building or structure

(9) Nothing in subsections (3) and (5) prohibits the entering into of an agreement that has the effect of granting the use of or right in a part of a building or structure for any period of years. R.S.O. 1990, c. P.13, s. 50 (9).

Exception

(10) This section does not apply to an agreement entered into under section 2 of the *Drainage Act*. R.S.O. 1990, c. P.13, s. 50 (10).

Application to ARDD

(11) This section does not apply so as to prevent the Agricultural Rehabilitation and Development Directorate of Ontario from conveying or leasing land where the land that is being conveyed or leased comprises all of the land that was acquired by the Directorate under one registered deed or transfer. R.S.O. 1990, c. P.13, s. 50 (11).

Exception to application of subs. (3, 5)

(12) Where a parcel of land is conveyed by way of a deed or transfer with a consent given under section 53, subsections (3) and (5) of this section do not apply to a subsequent conveyance of, or other transaction involving, the identical parcel of land unless the council or the Minister, as the case may be, in giving the consent, stipulates either that subsection (3) or subsection (5) shall apply to any such subsequent conveyance or transaction. R.S.O. 1990, c. P.13, s. 50 (12).

Reference to stipulation

(13) Where the council or the Minister stipulates in accordance with subsection (12), the certificate provided for under subsection 53 (42) shall contain a reference to the stipulation, and if not so contained the consent shall be conclusively deemed to have been given without the stipulation. R.S.O. 1990, c. P.13, s. 50 (13); 1994, c. 23, s. 29 (5).

Effect of contravention

(14) Where land is within a registered plan of subdivision or within a registered description under the *Condominium Act* or where land is conveyed, mortgaged or charged with a consent given under section 53 or a predecessor thereof, any contravention of this section or a predecessor thereof or of a by-law passed under a predecessor of this section or of an order made under clause 27 (1) (b), as it existed on June 25, 1970, of *The Planning Act*, being chapter 296 of the Revised Statutes of Ontario, 1960, or a predecessor thereof, that occurred before the registration of the plan of subdivision or description or before the giving of a certificate under subsection 53(42) stating that a consent has been given, as the case may be, does not and shall be deemed never to have had the effect of preventing the conveyance of or creation of any interest in the land, but this subsection does not affect the rights acquired by any person from a judgment or order of any court given or made on or before December 15, 1978. 1994, c. 23, s. 29 (6).

Simultaneous conveyances, etc., of abutting lands

(15) Where a person conveys land or grants, assigns or exercises a power of appointment in respect of land, or mortgages or charges land, or enters into an agreement of sale and purchase of land, or enters into any agreement that has the effect of granting the use of or right in land directly or by entitlement to renewal for a period of twenty-one years or more by way of simultaneous conveyances of abutting lands or by way of other simultaneous dealings with abutting lands, the person so conveying or otherwise dealing with the lands shall be deemed for the purposes of subsections (3) and (5) to retain, as the case may be, the fee or the equity of redemption in, or the power or right to grant, assign or exercise a power of appointment in respect of, land abutting the land that is being conveyed or otherwise dealt with but this subsection does not apply to simultaneous conveyances or other simultaneous dealings involving the same parties acting in their same respective capacities. R.S.O. 1990, c. P.13, s. 50 (15).

Partial discharges, etc., effect of

(16) Where a person gives a partial discharge of a mortgage on land or gives a partial cessation of a charge on land, the person giving the partial discharge or partial cessation shall be deemed to hold the fee in the lands mentioned in the mortgage or charge and to retain, after the giving of the partial discharge or partial cessation, the fee in the balance of the lands, and for the purposes of this section shall be deemed to convey by way of deed or transfer the land mentioned in the partial discharge or partial cessation. R.S.O. 1990, c. P.13, s. 50 (16).

Saving

(17) Subsection (16) does not apply to a partial discharge of mortgage or partial cessation of charge where the land described in the partial discharge or partial cessation,

- (a) is the same land in respect of which a consent to convey has previously been given;
- (b) includes only the whole of one or more lots or blocks within a registered plan of subdivision, unless such plan of subdivision has been designated under subsection (4);
- (c) is owned by Her Majesty in right of Canada or Her Majesty in right of Ontario or by any municipality; or
- (d) is land to which clause (3) (g) or (5) (g) applies. R.S.O. 1990, c. P.13, s. 50 (17); 1998, c. 15, Sched. E, s. 27 (10).

Foreclosure or exercise of power of sale

(18) No foreclosure of or exercise of a power of sale in a mortgage or charge shall have any effect in law without the approval of the Minister or of the council authorized to give a consent under section 53, as the case may be, other than a council authorized to give a consent pursuant to an order under section 4, unless all of the land subject to such mortgage or charge is included in the foreclosure or exercise of the power of sale, but this subsection does not apply where the land foreclosed or in respect of where the power of sale is exercised comprises only,

- (a) the whole of one or more lots or blocks within one or more registered plans of subdivision;
- (b) one or more parcels of land that do not abut any other parcel of land that is subject to the same mortgage or charge;
- (c) the identical parcel of land that has been the subject of a consent to convey given under section 53 and the consent did not stipulate that subsection (3) or (5) applies to any subsequent conveyance or transaction; or
- (d) the whole of the remaining part of a parcel of land, the other part or parts of which parcel have been the subject of a consent to convey given under section 53 and the consent did not stipulate that subsection (3) or (5) applies to any subsequent conveyance or transaction. R.S.O. 1990, c. P.13, s. 50 (18); 1993, c. 26, s. 58 (1); 1994, c. 23, s. 29 (7); 1996, c. 4, s. 27 (4).

Criteria

(18.1) No approval shall be given by a council under subsection (18) unless the approval conforms with the prescribed criteria. 1993, c. 26, s. 58 (2).

Release of interest by joint tenant or tenant in common

(19) Where a joint tenant or tenant in common of land releases or conveys the tenant's interest in such land to one or more other joint tenants or tenants in common of the same land while holding the fee in any abutting land, either alone or together with any other person, the tenant shall be deemed, for the purposes of subsections (3) and (5), to convey such land by way of deed or transfer and to retain the fee in the abutting land. R.S.O. 1990, c. P.13, s. 50 (19).

Partition orders

(20) No order made under the *Partition Act* for the partition of land shall have any effect in law unless,

- (a) irrespective of the order, each part of the land described in the order could be conveyed without contravening this section; or
- (b) a consent is given to the order. R.S.O. 1990, c. P.13, s. 50 (20).

Conveyance, etc., contrary to section not to create or convey interest in land

(21) An agreement, conveyance, mortgage or charge made, or a power of appointment granted, assigned or exercised in contravention of this section or a predecessor thereof does not create or convey any interest in land, but this section does not affect an agreement entered into subject to the express condition contained therein that such agreement is to be effective only if the provisions of this section are complied with. R.S.O. 1990, c. P.13, s. 50 (21).

Exception re prescribed statements

(22) Where a deed or transfer,

- (a) contains a statement by the grantor, verifying that to the best of the grantor's knowledge and belief the deed or transfer does not contravene this section;
- (b) contains a statement by the grantor's solicitor, verifying that,
 - (i) he or she has explained the effect of this section to the grantor,
 - (ii) he or she has made inquiries of the grantor to determine that the deed or transfer does not contravene this section,
 - (iii) based on the information supplied by the grantor, to the best of the solicitor's knowledge and belief, the deed or transfer does not contravene this section, and
 - (iv) he or she is an Ontario solicitor in good standing; and
- (c) contains a statement by the grantee's solicitor, verifying that,
 - (i) he or she has investigated the title to the land and, where relevant, to abutting land,
 - (ii) he or she is satisfied that the record of title to the land and, where relevant, to abutting land, reveals no existing contravention of this section or a predecessor thereof or of a by-law passed under a predecessor of this section or of an order made under clause 27 (1) (b), as it existed on the 25th day of June, 1970, of *The Planning Act*, being chapter 296 of the Revised Statutes of Ontario, 1960, or a predecessor thereof, that has the effect of preventing the conveyance of any interest in the land,
 - (iii) to the best of his or her knowledge and belief, the deed or transfer does not contravene this section, and
 - (iv) he or she acts independently of the grantor's solicitor and is an Ontario solicitor in good standing; and
- (d) is registered under the *Land Titles Act* or the *Registry Act*,

any contravention of this section or a predecessor thereof or of a by-law passed under a predecessor of this section or of an order made under clause 27 (1) (b), as it existed on the 25th day of June, 1970, of *The Planning Act*, being chapter 296 of the Revised Statutes of Ontario, 1960, or a predecessor thereof, does not and shall be deemed never to have had the effect of preventing the conveyance of any interest in the land, but this subsection does not affect the rights acquired by any person from a judgment or order of any court given or made on or before the day the deed or transfer is registered. R.S.O. 1990, c. P.13, s. 50 (22).

Search period re *Planning Act*

(23) For the purposes of the statement referred to in subclause (22) (c) (ii), a solicitor is not required to investigate the registered title to the land except with respect to the time since the registration of the most recent deed or transfer affecting the same land and containing the statements referred to in clauses (22) (a), (b) and (c). R.S.O. 1990, c. P.13, s. 50 (23).

Exempting orders

(24) The Minister may by order designate any part of Ontario as land to which subsection (22) shall not apply after the day a certified copy or duplicate of the order is registered in the proper land registry office in a manner approved by the Director of Land Registration appointed under the *Registry Act*. R.S.O. 1990, c. P.13, s. 50 (24).

Offence

(25) Every person who knowingly makes a false statement under subsection (22) is guilty of an offence and on conviction is liable to a fine not exceeding the aggregate of the value of,

- (a) the land in respect of which the statement is made; and
- (b) the relevant abutting land,

determined as of the day of registration of the deed or transfer containing the false statement. R.S.O. 1990, c. P.13, s. 50 (25).

Copy of by-law to be lodged with approval authority

(26) A certified copy or duplicate of every by-law passed under subsection (4) shall be lodged by the clerk of the municipality in the office of the approval authority. 2006, c. 23, s. 21 (3).

When by-law effective

(27) A by-law passed under subsection (4) is not effective until the requirements of subsection (28) have been complied with. R.S.O. 1990, c. P.13, s. 50 (27).

Registration of by-law

(28) A certified copy or duplicate of every by-law passed under this section shall be registered by the clerk of the municipality in the proper land registry office. R.S.O. 1990, c. P.13, s. 50 (28).

Notice

(29) No notice or hearing is required prior to the passing of a by-law under subsection (4), but the council shall give notice of the passing of any such by-law within thirty days of the passing thereof to each person appearing on the last revised assessment roll to be the owner of land to which the by-law applies, which notice shall be sent to the last known address of each such person. R.S.O. 1990, c. P.13, s. 50 (29).

Hearing by council

(30) The council shall hear in person or by an agent any person to whom a notice was sent under subsection (29), who within twenty days of the mailing of the notice gives notice to the clerk of the municipality that the person desires to make representations respecting the amendment or repeal of the by-law. R.S.O. 1990, c. P.13, s. 50 (30).

Division of land by will

50.1 (1) No provision in a will that purports to subdivide land is of any effect to subdivide that land unless, irrespective of that provision, each part of the land divided could be conveyed without contravening section 50.

Retroactive effect

(2) Subsection (1) applies even though the will was made before the 26th day of July, 1990 unless the person who made the will died on or before that date.

Tenants in common

(3) If a provision in a will is of no effect to subdivide land under subsection (1), the beneficiaries that would have been entitled to the land if the provision had been effective shall hold the undivided land as tenants in common. 1991, c. 9, s. 1.

(4) REPEALED: 1991, c. 9, s. 1.

(5) REPEALED: 1991, c. 9, s. 1.

(6) REPEALED: 1991, c. 9, s. 1.

Plan of subdivision approvals

51. (1), (2) REPEALED: 2002, c. 17, Sched. B, s. 19 (1).

Minister is approval authority

(3) Except as otherwise provided in this section, the Minister is the approval authority for the purposes of this section and section 51.1. 1999, c. 12, Sched. M, s. 28 (1).

Deemed approval authority

(3.1) If the Minister has delegated any authority under this section to a council or planning board, in accordance with section 4, the council or planning board is deemed to be the approval authority in respect of the land to which the delegation applies for the purposes of this section and section 51.1. 2009, c. 33, Sched. 21, s. 10 (12).

Single-tier municipality

(4) If land is in a single-tier municipality that is not in a territorial district, the single-tier municipality is the approval authority for the purposes of this section and section 51.1, except as otherwise prescribed. 2002, c. 17, Sched. B, s. 19 (2).

Upper-tier municipality

(5) Subject to subsection (6), if land is in an upper-tier municipality with an approved official plan, the upper-tier municipality is the approval authority for the purposes of this section and section 51.1. 2002, c. 17, Sched. B, s. 19 (3).

Timing, upper-tier as approval authority

(5.1) On the day that all or part of a plan that covers all of an upper-tier municipality comes into effect as the official plan of the municipality, the upper-tier municipality is the approval authority under subsection (5). 2002, c. 17, Sched. B, s. 19 (3).

Prescribed lower-tier municipality

(6) If land is in a prescribed lower-tier municipality, the lower-tier municipality is the approval authority for the purposes of this section and section 51.1. 2002, c. 17, Sched. B, s. 19 (3).

Prescribed single-tier municipality in a territorial district

(7) If land is in a prescribed single-tier municipality that is in a territorial district, the municipality is the approval authority for the purposes of this section and section 51.1. 2002, c. 17, Sched. B, s. 19 (3).

(8)-(10) REPEALED: 2002, c. 17, Sched. B, s. 19 (4).

Removal of power

(11) The Minister may by order, accompanied by a written explanation for it, remove the power given under subsection (3.1), (4), (5), (6) or (7) and the order may be in respect of the applications

specified in the order or in respect of any or all applications made after the order is made. 1994, c. 23, s. 30; 1996, c. 4, s. 28 (2); 2002, c. 17, Sched. B, s. 19 (5); 2009, c. 33, Sched. 21, s. 10 (13).

Minister to be approval authority

(12) If an order is made under subsection (11), the Minister becomes the approval authority in respect of the applications to which the order relates and the council of the former approval authority shall forward to the Minister all papers, plans, documents and other material that relate to any matter in respect of which the power was removed and of which a final disposition was not made by the council before the power was removed. 1994, c. 23, s. 30.

Revocation

(13) If the Minister revokes the order or part of the order made under subsection (11), the council reverts back to being the approval authority in respect of all applications to which the revoked order or revoked part of the order applies. 1994, c. 23, s. 30.

Delegation

(14) If an order is made under subsection (11) in respect of land that is located in a municipal planning area, the Minister may by order delegate to the municipal planning authority the power to approve proposed plans of subdivision which was removed from the council and the municipal planning authority becomes the approval authority in respect of the applications to which the order made under this subsection relates and the delegation may be subject to such conditions as the order provides. 1994, c. 23, s. 30.

Effect of revocation

(15) If the Minister revokes the order or part of the order made under subsection (14), the Minister reverts back to being the approval authority in respect of all applications to which the revoked order or revoked part of the order applies and the municipal planning authority shall forward to the Minister all papers, plans, documents and other material that relate to any matter to which the revoked order or part of the order applies and of which a final disposition was not made by the municipal planning authority before the order or part of the order was revoked. 1994, c. 23, s. 30.

Application

(16) An owner of land or the owner's agent duly authorized in writing may apply to the approval authority for approval of a plan of subdivision of the land or part of it. 1994, c. 23, s. 30.

Consultation

(16.1) The approval authority,

- (a) shall permit applicants to consult with it before submitting applications under subsection (16); and
- (b) in the case of an approval authority that is a municipality, may, by by-law, require applicants to consult with it as described in clause (a). 2006, c. 23, s. 22 (1).

Contents

(17) The applicant shall provide the approval authority with the prescribed information and material and as many copies as may be required by the approval authority of a draft plan of the proposed subdivision drawn to scale and showing,

- (a) the boundaries of the land proposed to be subdivided, certified by an Ontario land surveyor;

- (b) the locations, widths and names of the proposed highways within the proposed subdivision and of existing highways on which the proposed subdivision abuts;
- (c) on a small key plan, on a scale of not less than one centimetre to 100 metres, all of the land adjacent to the proposed subdivision that is owned by the applicant or in which the applicant has an interest, every subdivision adjacent to the proposed subdivision and the relationship of the boundaries of the land to be subdivided to the boundaries of the township lot or other original grant of which the land forms the whole or part;
- (d) the purpose for which the proposed lots are to be used;
- (e) the existing uses of all adjoining lands;
- (f) the approximate dimensions and layout of the proposed lots;
- (g) natural and artificial features such as buildings or other structures or installations, railways, highways, watercourses, drainage ditches, wetlands and wooded areas within or adjacent to the land proposed to be subdivided;
- (h) the availability and nature of domestic water supplies;
- (i) the nature and porosity of the soil;
- (j) existing contours or elevations as may be required to determine the grade of the highways and the drainage of the land proposed to be subdivided;
- (k) the municipal services available or to be available to the land proposed to be subdivided; and
- (l) the nature and extent of any restrictions affecting the land proposed to be subdivided, including restrictive covenants or easements. 1994, c. 23, s. 30; 1996, c. 4, s. 28 (3).

Other information

(18) An approval authority may require that an applicant provide any other information or material that the approval authority considers it may need, but only if the official plan contains provisions relating to requirements under this subsection. 2006, c. 23, s. 22 (2).

Refusal and timing

(19) Until the approval authority has received the information and material required under subsections (17) and (18), if any, and any fee under section 69 or 69.1,

- (a) the approval authority may refuse to accept or further consider the application; and
- (b) the time period referred to in subsection (34) does not begin. 2006, c. 23, s. 22 (2).

Response re completeness of application

(19.1) Within 30 days after the applicant pays any fee under section 69 or 69.1, the approval authority shall notify the applicant and the clerk of the municipality in which the land is located or the secretary-treasurer of the planning board in whose planning area the land is located that the information and material required under subsections (17) and (18), if any, have been provided, or that they have not been provided, as the case may be. 2006, c. 23, s. 22 (2).

Motion re dispute

(19.2) Within 30 days after a negative notice is given under subsection (19.1), the applicant or the approval authority may make a motion for directions to have the Municipal Board determine,

- (a) whether the information and material have in fact been provided; or

(b) whether a requirement made under subsection (18) is reasonable. 2006, c. 23, s. 22 (2).

Same

(19.3) If the approval authority does not give any notice under subsection (19.1), the applicant may make a motion under subsection (19.2) at any time after the 30-day period described in subsection (19.1) has elapsed. 2006, c. 23, s. 22 (2).

Notice of particulars and public access

(19.4) Within 15 days after the approval authority gives an affirmative notice under subsection (19.1), or within 15 days after the Municipal Board advises the approval authority and the clerk or secretary-treasurer of its affirmative decision under subsection (19.2), as the case may be, the council or planning board shall,

- (a) give the prescribed persons and public bodies, in the prescribed manner, notice of the application, accompanied by the prescribed information; and
- (b) make the information and material provided under subsections (17) and (18) available to the public. 2006, c. 23, s. 22 (2).

Final determination

(19.5) The Municipal Board's determination under subsection (19.2) is not subject to appeal or review. 2006, c. 23, s. 22 (2).

Notice

(20) At least 14 days before a decision is made by an approval authority under subsection (31), the approval authority shall ensure that,

- (a) notice of the application is given, if required by regulation, in the manner and to the persons and public bodies and containing the information prescribed; and
- (b) a public meeting is held, if required by regulation, notice of which shall be given in the manner and to the persons and public bodies and containing the information prescribed. 1996, c. 4, s. 28 (4).

Request

(21) An approval authority may request that a local municipality or a planning board having jurisdiction over the land that is proposed to be subdivided give notice of the application or hold the public meeting referred to in subsection (20) or do both. 1996, c. 4, s. 28 (4).

Responsibilities

(21.1) A local municipality or planning board that is requested to give the notice referred to in clause (20) (a) shall ensure that,

- (a) the notice is given in accordance with the regulation made under clause (20) (a); and
- (b) the prescribed information and material are submitted to the approval authority within 15 days after the notice is given. 1996, c. 4, s. 28 (4).

Same

(21.2) A local municipality or planning board that is requested to hold the public meeting referred to in clause (20) (b) shall ensure that,

- (a) notice of the meeting is given in accordance with the regulation made under clause (20) (b);

- (b) the public meeting is held; and
- (c) the prescribed information and material are submitted to the approval authority within 15 days after the meeting is held. 1996, c. 4, s. 28 (4).

Written submissions

(22) Any person or public body may make written submissions to the approval authority before the approval authority makes its decision under subsection (31). 1994, c. 23, s. 30.

Consultation

(23) The approval authority may confer with the persons or public bodies that the approval authority considers may have an interest in the approval of the proposed subdivision. 1994, c. 23, s. 30.

Criteria

(24) In considering a draft plan of subdivision, regard shall be had, among other matters, to the health, safety, convenience, accessibility for persons with disabilities and welfare of the present and future inhabitants of the municipality and to,

- (a) the effect of development of the proposed subdivision on matters of provincial interest as referred to in section 2;
- (b) whether the proposed subdivision is premature or in the public interest;
- (c) whether the plan conforms to the official plan and adjacent plans of subdivision, if any;
- (d) the suitability of the land for the purposes for which it is to be subdivided;
- (e) the number, width, location and proposed grades and elevations of highways, and the adequacy of them, and the highways linking the highways in the proposed subdivision with the established highway system in the vicinity and the adequacy of them;
- (f) the dimensions and shapes of the proposed lots;
- (g) the restrictions or proposed restrictions, if any, on the land proposed to be subdivided or the buildings and structures proposed to be erected on it and the restrictions, if any, on adjoining land;
- (h) conservation of natural resources and flood control;
- (i) the adequacy of utilities and municipal services;
- (j) the adequacy of school sites;
- (k) the area of land, if any, within the proposed subdivision that, exclusive of highways, is to be conveyed or dedicated for public purposes;
- (l) the extent to which the plan's design optimizes the available supply, means of supplying, efficient use and conservation of energy; and
- (m) the interrelationship between the design of the proposed plan of subdivision and site plan control matters relating to any development on the land, if the land is also located within a site plan control area designated under subsection 41 (2) of this Act or subsection 114 (2) of the *City of Toronto Act, 2006*. 1994, c. 23, s. 30; 2001, c. 32, s. 31 (2); 2006, c. 23, s. 22 (3, 4).

Conditions

(25) The approval authority may impose such conditions to the approval of a plan of subdivision as in the opinion of the approval authority are reasonable, having regard to the nature of the development proposed for the subdivision, including a requirement,

- (a) that land be dedicated or other requirements met for park or other public recreational purposes under section 51.1;
- (b) that such highways, including pedestrian pathways, bicycle pathways and public transit rights of way, be dedicated as the approval authority considers necessary;
- (b.1) that such land be dedicated for commuter parking lots, transit stations and related infrastructure for the use of the general public using highways, as the approval authority considers necessary;
- (c) when the proposed subdivision abuts on an existing highway, that sufficient land, other than land occupied by buildings or structures, be dedicated to provide for the widening of the highway to such width as the approval authority considers necessary; and
- (d) that the owner of the land proposed to be subdivided enter into one or more agreements with a municipality, or where the land is in territory without municipal organization, with any minister of the Crown in right of Ontario or planning board dealing with such matters as the approval authority may consider necessary, including the provision of municipal or other services. 1994, c. 23, s. 30; 2005, c. 26, Sched. B, s. 1; 2006, c. 23, s. 22 (5).

Agreements

(26) A municipality or approval authority, or both, may enter into agreements imposed as a condition to the approval of a plan of subdivision and the agreements may be registered against the land to which it applies and the municipality or the approval authority, as the case may be, is entitled to enforce the provisions of it against the owner and, subject to the *Registry Act* and the *Land Titles Act*, any and all subsequent owners of the land. 1994, c. 23, s. 30.

Land outside municipalities

(27) If the land proposed to be subdivided is located in territory without municipal organization, any minister of the Crown in right of Ontario or planning board may enter into agreements imposed as a condition to the approval of a plan of subdivision and the agreement may be registered against the land to which it applies and the minister or the planning board is entitled to enforce the provisions of it against the owner and, subject to the *Registry Act* and the *Land Titles Act*, any and all subsequent owners of land. 1994, c. 23, s. 30.

(28)-(30) REPEALED: 1996, c. 4, s. 28 (5).

Decision

(31) The approval authority may give or refuse to give approval to a draft plan of subdivision. 1994, c. 23, s. 30.

Lapse of approval

(32) In giving approval to a draft plan of subdivision, the approval authority may provide that the approval lapses at the expiration of the time period specified by the approval authority, being not less than three years, and the approval shall lapse at the expiration of the time period, but if there is an appeal under subsection (39) the time period specified for the lapsing of approval does not begin until the date the Municipal Board's decision is issued in respect of the appeal or from the date of a notice issued by the Board under subsection (51). 1994, c. 23, s. 30; 2006, c. 23, s. 22 (6).

Extension

(33) The approval authority may extend the approval for a time period specified by the approval authority and may further extend it but no extension is permissible if the approval lapses before the extension is given. 1994, c. 23, s. 30.

Appeal to O.M.B.

(34) If an application is made for approval of a plan of subdivision and the approval authority fails to make a decision under subsection (31) on it within 180 days after the day the application is received by the approval authority, the applicant may appeal to the Municipal Board with respect to the proposed subdivision by filing a notice with the approval authority, accompanied by the fee prescribed under the *Ontario Municipal Board Act*. 1994, c. 23, s. 30; 1996, c. 4, s. 28 (6); 2004, c. 18, s. 8.

Consolidated Hearings Act

(34.1) Despite the *Consolidated Hearings Act*, the proponent of an undertaking shall not give notice to the Hearings Registrar under subsection 3 (1) of that Act in respect of an application for approval of a draft plan of subdivision unless the approval authority has given or refused to give approval to the draft plan of subdivision or the time period referred to in subsection (34) has expired. 2006, c. 23, s. 22 (7).

Record

(35) An approval authority that receives a notice of appeal under subsection (34) shall ensure that,

- (a) a record is compiled which includes the prescribed information and material; and
- (b) the record, the notice of appeal and the fee are forwarded to the Municipal Board within 15 days after the notice is filed. 1994, c. 23, s. 30; 1996, c. 4, s. 28 (7).

Exception

(35.1) Despite clause (35) (b), if all appeals under subsection (34) are withdrawn within 15 days after the last day for filing a notice of appeal, the approval authority is not required to forward the materials described under clause (35) (b) to the Municipal Board. 1999, c. 12, Sched. M, s. 28 (3).

Where all appeals withdrawn

(35.2) If all appeals under subsection (34) are withdrawn within 15 days after the last day for filing a notice of appeal, the approval authority may proceed to make a decision under subsection (31). 1999, c. 12, Sched. M, s. 28 (3).

Withdrawal

(36) If an appeal under subsection (34) is withdrawn, the Municipal Board shall notify the approval authority and the approval authority may proceed to make a decision under subsection (31). 1994, c. 23, s. 30.

Notice

(37) If the approval authority gives or refuses to give approval to a draft plan of subdivision, the approval authority shall, within 15 days of its decision, give written notice of it, containing the prescribed information, to,

- (a) the applicant;
- (b) each person or public body that made a written request to be notified of the decision;

- (c) REPEALED: 1996, c. 4, s. 28 (8).
- (d) a municipality or a planning board for a planning area in which the land to be subdivided is situate; and
- (e) any other person or public body prescribed. 1994, c. 23, s. 30; 1996, c. 4, s. 28 (8).
- (38) REPEALED: 1996, c. 4, s. 28 (9).

Appeal

(39) Subject to subsection (43), not later than 20 days after the day that the giving of notice under subsection (37) is completed, any of the following may appeal the decision, the lapsing provision or any of the conditions to the Municipal Board by filing with the approval authority a notice of appeal that must set out the reasons for the appeal, accompanied by the fee prescribed under the *Ontario Municipal Board Act*:

1. The applicant.
2. A person or public body who, before the approval authority made its decision, made oral submissions at a public meeting or written submissions to the approval authority.
3. The Minister.
4. The municipality in which the land is located or the planning board in whose planning area the land is located.
5. If the land is not located in a municipality or in the planning area of a planning board, any person or public body. 2006, c. 23, s. 22 (8).

Notice completed

(40) For the purpose of subsections (39) and (49), the giving of written notice shall be deemed to be completed,

- (a) where notice is given by personal service, on the day that the serving of all required notices is completed;
- (b) where notice is given by mail, on the day that the mailing of all required notices is completed; and
- (c) where notice is given by telephone transmission of a facsimile of the notice, on the day that the transmission of all required notices is completed. 1994, c. 23, s. 30.

No appeal

(41) If no appeal is filed under subsection (39) or (48), subject to any other right of appeal that may be exercised under this section and subject to subsection (44), the decision of the approval authority to give or to refuse to give approval to a draft plan of subdivision shall be deemed to have been made on the day after the last day for appealing the decision. 1994, c. 23, s. 30.

Declaration

(42) A sworn declaration by an employee of the approval authority that notice was given as required by subsection (37) or (45) or that no notice of appeal was filed under subsection (39) or (48) within the time allowed for appeal is conclusive evidence of the facts stated in it. 1994, c. 23, s. 30.

Appeal

(43) At any time before the approval of the final plan of subdivision under subsection (58), any of the following may appeal any of the conditions to the Municipal Board by filing with the approval authority a notice of appeal that must set out the reasons for the appeal, accompanied by the fee prescribed under the *Ontario Municipal Board Act*:

1. The applicant.
2. A public body that, before the approval authority made its decision, made oral submissions at a public meeting or written submissions to the approval authority.
3. The Minister.
4. The municipality in which the land is located or the planning board in whose planning area the land is located.
5. If the land is not located in a municipality or in the planning area of a planning board, any public body. 2006, c. 23, s. 22 (9).

Withdrawal of approval

(44) The approval authority may, in its discretion, withdraw the approval of a draft plan of subdivision or change the conditions of such approval at any time before the approval of the final plan of subdivision under subsection (58). 1994, c. 23, s. 30.

Notice

(45) If the approval authority changes the conditions to the approval of a plan of subdivision under subsection (44) after notice has been given under subsection (37), the approval authority shall, within 15 days of its decision, give written notice of the changes containing the information prescribed to,

- (a) the applicant;
- (b) REPEALED: 1996, c. 4, s. 28 (11).
- (c) each person or public body that made a written request to be notified of changes to the conditions;
- (d) a municipality or a planning board for a planning area in which the land to be subdivided is situate; and
- (e) any other person or public body prescribed. 1994, c. 23, s. 30; 1996, c. 4, s. 28 (11); 2000, c. 26, Sched. K, s. 5 (5).

(46) REPEALED: 1996, c. 4, s. 28 (12).

No notice

(47) An approval authority is not required to give written notice under subsection (45) if, in the opinion of the approval authority, the change to conditions is minor. 1994, c. 23, s. 30.

Appeal

(48) Any of the following may appeal any of the changed conditions imposed by the approval authority to the Municipal Board by filing with the approval authority a notice of appeal that must set out the reasons for the appeal, accompanied by the fee prescribed under the *Ontario Municipal Board Act*:

1. The applicant.

2. A person or public body who, before the approval authority gave approval to the draft plan of subdivision, made oral submissions at a public meeting or written submissions to the approval authority or made a written request to be notified of changes to the conditions.
3. The Minister.
4. The municipality in which the land is located or the planning board in whose planning area the land is located.
5. If the land is not located in a municipality or in the planning area of a planning board, any person or public body. 2006, c. 23, s. 22 (10).

Restriction

(49) If the person appealing the changed conditions is other than the applicant or a public body, the appeal must be filed not later than 20 days after the day that the giving of written notice under subsection (45) is completed. 1994, c. 23, s. 30; 1996, c. 4, s. 28 (13).

Record

(50) An approval authority that receives a notice of appeal under subsection (39), (43) or (48) shall ensure that,

- (a) a record is compiled which includes the prescribed information and material; and
- (b) the record, notice of appeal and the fee are forwarded to the Municipal Board within 15 days after the last day for filing a notice of appeal under subsection (39) or (49) or within 15 days after the notice of appeal under subsection (43) or (48) was received by the approval authority. 1994, c. 23, s. 30.

Exception

(50.1) Despite clause (50) (b), if all appeals are withdrawn within 15 days after the last day for filing a notice of appeal under subsection (39) or (49) or within 15 days after the notice of appeal under subsection (43) or (48) was received by the approval authority, the approval authority is not required to forward the materials described under clause (50) (b) to the Municipal Board. 1999, c. 12, Sched. M, s. 28 (3).

Deemed decision

(50.2) If all appeals are withdrawn within 15 days after the last day for filing a notice of appeal under subsection (39) or (49) or within 15 days after the notice of appeal under subsection (43) or (48) was received by the approval authority, the decision of the approval authority shall be deemed to have been made on the day after the day all appeals have been withdrawn, subject to any other right of appeal that may be exercised under this section and subject to subsection (44). 1999, c. 12, Sched. M, s. 28 (3).

Appeals withdrawn

(51) If all appeals under subsection (39) or (48) are withdrawn and the time for appealing has expired or if all appeals under subsection (43) are withdrawn, the secretary of the Municipal Board shall notify the approval authority and the decision of the approval authority shall be deemed to have been made on the day after the day all appeals have been withdrawn, subject to any other right of appeal that may be exercised under this section and subject to subsection (44). 1994, c. 23, s. 30.

Hearing

(52) On an appeal, the Municipal Board shall hold a hearing, notice of which shall be given to such persons or public bodies and in such manner as the Board may determine. 1994, c. 23, s. 30.

Restriction re adding parties

(52.1) Despite subsection (52), in the case of an appeal under subsection (39), (43) or (48), only the following may be added as parties:

1. A person or public body who satisfies one of the conditions set out in subsection (52.2).
2. The Minister.
3. The appropriate approval authority.
4. The municipality in which the land is located or the planning board in whose planning area the land is located.
5. If the land is not located in a municipality or in the planning area of a planning board, any person or public body. 2006, c. 23, s. 22 (11).

Same

(52.2) The conditions mentioned in paragraph 1 of subsection (52.1) are:

1. Before the approval authority made its decision with respect to the plan of subdivision, the person or public body made oral submissions at a public meeting or written submissions to the approval authority, or made a written request to be notified of changes to the conditions.
2. The Municipal Board is of the opinion that there are reasonable grounds to add the person or public body as a party. 2006, c. 23, s. 22 (11).

New evidence at hearing

(52.3) This subsection applies if information and material that is presented at the hearing of an appeal under subsection (39), (43) or (48) was not provided to the approval authority before it made the decision that is the subject of the appeal. 2006, c. 23, s. 22 (11).

Same

(52.4) When subsection (52.3) applies, the Municipal Board may, on its own initiative or on a motion by the approval authority or any party, consider whether the information and material could have materially affected the approval authority's decision and, if the Board determined that it could have done so, it shall not be admitted into evidence until subsection (52.5) has been complied with and the prescribed time period has elapsed. 2006, c. 23, s. 22 (11).

Notice to approval authority

(52.5) The Municipal Board shall notify the approval authority that it is being given an opportunity to,

- (a) reconsider its decision in light of the information and material; and
- (b) make a written recommendation to the Board. 2006, c. 23, s. 22 (11).

Approval authority's recommendation

(52.6) The Municipal Board shall have regard to the approval authority's recommendation if it is received within the time period mentioned in subsection (52.4), and may but is not required to do so if it is received afterwards. 2006, c. 23, s. 22 (11).

Conflict with *SPPA*

(52.7) Subsections (52.1) to (52.6) apply despite the *Statutory Powers Procedure Act*, 2006, c. 23, s. 22 (11).

Dismissal without hearing

(53) Despite the *Statutory Powers Procedure Act* and subsection (52), the Municipal Board may dismiss an appeal without holding a hearing on its own initiative or on the motion of any party, if,

- (a) it is of the opinion that,
 - (i) the reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the Board could give or refuse to give approval to the draft plan of subdivision or determine the question as to the condition appealed to it,
 - (ii) the appeal is not made in good faith or is frivolous or vexatious,
 - (iii) the appeal is made only for the purpose of delay, or
 - (iv) the appellant has persistently and without reasonable grounds commenced before the Board proceedings that constitute an abuse of process;
- (b) REPEALED: 2006, c. 23, s. 22 (14).
- (c) the appellant has not provided written reasons for the appeal;
- (d) the appellant has not paid the fee prescribed under the *Ontario Municipal Board Act*; or
- (e) the appellant has not responded to a request by the Municipal Board for further information within the time specified by the Board. 1994, c. 23, s. 30; 1996, c. 4, s. 28 (14, 15); 2006, c. 23, s. 22 (12-14).

Same

(53.1) Despite the *Statutory Powers Procedure Act* and subsection (52), the Municipal Board may, on its own initiative or on the motion of the municipality, the appropriate approval authority or the Minister, dismiss all or part of an appeal without holding a hearing if, in the Board's opinion, the application to which the appeal relates is substantially different from the application that was before council at the time of its decision. 2006, c. 23, s. 22 (15).

Representation

(54) Before dismissing an appeal, the Municipal Board shall notify the appellant and give the appellant the opportunity to make representation on the proposed dismissal but this subsection does not apply if the appellant has not complied with a request made under clause (53) (e). 2000, c. 26, Sched. K, s. 5 (6).

Dismissal

(54.1) Despite the *Statutory Powers Procedure Act*, the Municipal Board may dismiss all or part of an appeal after holding a hearing or without holding a hearing on the motion under subsection (53) or (53.1), as it considers appropriate. 2006, c. 23, s. 22 (16).

Decision

(55) If all appeals under subsection (39), (43) or (48) are dismissed or withdrawn, the secretary of the Municipal Board shall notify the approval authority and the decision of the approval authority shall be deemed to have been made on the day after the day the last outstanding appeal has been dismissed or withdrawn, subject to any other right of appeal that may be exercised under this section and subject to subsection (44). 1994, c. 23, s. 30.

Powers

(56) On an appeal under subsection (34) or (39), the Municipal Board may make any decision that the approval authority could have made on the application and on an appeal under subsection (43) or (48) shall determine the question as to the conditions appealed to it. 1994, c. 23, s. 30.

Final approval

(56.1) If, on an appeal under subsection (34) or (39), the Municipal Board has given approval to a draft plan of subdivision, the Board may, by order, provide that the final approval of the plan of subdivision for the purposes of subsection (58) is to be given by the approval authority in which the land is situate. 1999, c. 12, Sched. M, s. 28 (3).

Change of conditions

(56.2) If the final approval of a plan of subdivision is to be given under subsection (56.1), the Municipal Board may change the conditions of the approval of the draft plan of subdivision under subsection (44) at any time before the approval of the final plan of subdivision by the approval authority. 1999, c. 12, Sched. M, s. 28 (3).

When draft plan approved

(57) When the draft plan is approved, the person seeking to subdivide may proceed to lay down the highways and lots upon the ground in accordance with the *Surveys Act* and with the *Registry Act* or the *Land Titles Act*, as the case may be, and to prepare a plan accordingly certified by an Ontario land surveyor. 1994, c. 23, s. 30.

Final approval of plan

(58) Upon presentation by the person seeking to subdivide, the approval authority may, if satisfied that the plan is in conformity with the approved draft plan and that the conditions of approval have been or will be fulfilled, approve the plan of subdivision and, once approved, the final plan of subdivision may be tendered for registration. 1994, c. 23, s. 30.

Withdrawal of approval

(59) If a final plan of subdivision is approved under subsection (58), but is not registered within 30 days of the date of approval, the approval authority may withdraw its approval. 1994, c. 23, s. 30.

Duplicates

(60) In addition to any requirement under the *Registry Act* or the *Land Titles Act*, the person tendering the plan of subdivision for registration shall deposit with the land registrar a duplicate, or when required by the approval authority two duplicates, of the plan of a type approved by the approval authority, and the land registrar shall endorse on it a certificate showing the number of the plan and the date when the plan was registered and shall deliver the duplicate or duplicates to the approval authority. 1994, c. 23, s. 30.

Saving

(61) The approval of a plan of subdivision does not operate to release any person from doing anything that the person may be required to do by or under the authority of any other Act. 1994, c. 23, s. 30.

Parkland

51.1 (1) The approval authority may impose as a condition to the approval of a plan of subdivision that land in an amount not exceeding, in the case of a subdivision proposed for commercial or industrial purposes, 2 per cent and in all other cases 5 per cent of the land included in the plan shall be conveyed to the local municipality for park or other public recreational purposes or, if the land is not in a municipality, shall be dedicated for park or other public recreational purposes.

Other criteria

(2) If the approval authority has imposed a condition under subsection (1) requiring land to be conveyed to the municipality and if the municipality has an official plan that contains specific policies relating to the provision of lands for park or other public recreational purposes, the municipality, in the case of a subdivision proposed for residential purposes, may, in lieu of such conveyance, require that land included in the plan be conveyed to the municipality for park or other public recreational purposes at a rate of one hectare for each 300 dwelling units proposed or at such lesser rate as may be determined by the municipality.

Payment in lieu

(3) If the approval authority has imposed a condition under subsection (1) requiring land to be conveyed to the municipality, the municipality may, in lieu of accepting the conveyance, require the payment of money by the owner of the land,

- (a) to the value of the land otherwise required to be conveyed; or
- (b) where the municipality would be entitled to require a conveyance under subsection (2), to the value of the land that would otherwise be required to be so conveyed.

Determination of value

(4) For the purpose of determining the amount of any payment required under subsection (3), the value of the land shall be determined as of the day before the day of the approval of the draft plan of subdivision.

Application

(5) Subsections 42 (2), (5) and (12) to (16) apply with necessary modifications to a conveyance of land or a payment of money under this section. 1994, c. 23, s. 31.

Delegation to committee or officer

51.2 (1) If a council of a municipality is the approval authority under section 51 in respect of the approval of plans of subdivision, the council may by by-law delegate all or any part of the authority to approve plans of subdivision to a committee of council or to an appointed officer identified in the by-law by name or position occupied. 1994, c. 23, s. 31; 2002, c. 17, Sched. B, s. 20 (1).

Delegation to lower-tier municipality

(2) If an upper-tier council is the approval authority under section 51 in respect of the approval of plans of subdivision, the council may, after the prescribed notice is given, by by-law delegate all or any part of the authority to approve plans of subdivision to a lower-tier municipality in respect of land situate in the lower-tier municipality. 2002, c. 17, Sched. B, s. 20 (2).

Delegation

(2.1) Despite subsections 74 (2) and 74.1 (1), an upper-tier council may delegate the authority to approve plans of subdivision under subsection (2) with respect to applications made before March 28, 1995. 2002, c. 17, Sched. B, s. 20 (3).

Delegation to planning authority

(3) If a council is the approval authority under section 51 in respect of the approval of plans of subdivision, the council may, after the prescribed notice is given, by by-law delegate all or any part of the authority to approve plans of subdivision to a municipal planning authority in respect of land situate in the municipal planning area. 1994, c. 23, s. 31; 2002, c. 17, Sched. B, s. 20 (4).

Further delegation

(4) If authority is delegated to a council under subsection (2), the council may in turn by by-law delegate all or any part of the authority to a committee of council or to an appointed officer identified in the by-law by name or position occupied. 1994, c. 23, s. 31.

Same

(5) If authority is delegated to a municipal planning authority under subsection (3) or subsection 51 (14), the municipal planning authority may in turn by by-law delegate all or any part of the authority to a committee of the municipal planning authority or to an appointed officer identified in the by-law by name or position occupied. 1994, c. 23, s. 31.

Conditions

(6) A delegation of authority made by a council or municipal planning authority under this section may be subject to such conditions as the council or municipal planning authority by by-law provides. 1994, c. 23, s. 31.

Withdrawal of delegation

(7) A council or a municipal planning authority may by by-law withdraw a delegation of authority made by a council or a municipal planning authority under this section and such withdrawal may be either in respect of one or more plans of subdivision specified in the by-law or any or all plans of subdivision in respect of which a final disposition was not made before the withdrawal. 1994, c. 23, s. 31.

Sale of lands in accordance with unregistered plan prohibited

52. (1) No person shall subdivide and offer for sale, agree to sell or sell land by a description in accordance with an unregistered plan of subdivision, but this subsection does not prohibit any person from offering for sale or agreeing to sell land by a description in accordance with a plan of subdivision in respect of which draft approval has been given under section 51.

Definition

(2) In subsection (1),

“unregistered plan of subdivision” does not include a reference plan of survey under section 150 of the *Land Titles Act* that complies with the regulations under that Act or a plan deposited under Part II of the *Registry Act* in accordance with the regulations under that Act. R.S.O. 1990, c. P.13, s. 52.

Consents

53. (1) An owner of land or the owner’s agent duly authorized in writing may apply for a consent as defined in subsection 50 (1) and the council or the Minister, as the case may be, may, subject to this section, give a consent if satisfied that a plan of subdivision of the land is not necessary for the proper and orderly development of the municipality. 1994, c. 23, s. 32.

Prescribed information

(2) The applicant for a consent shall provide the council or the Minister with the prescribed information or material. 1996, c. 4, s. 29 (1).

Other information

(3) A council or the Minister may require that a person or public body that makes an application for a consent provide any other information or material that the council or the Minister considers it or he or she may need, but only if the official plan contains provisions relating to requirements under this subsection. 2006, c. 23, s. 23 (1).

Refusal and timing

(4) Until the council or the Minister has received the information and material required under subsections (2) and (3), if any, and any fee under section 69 or 69.1,

- (a) the council or the Minister may refuse to accept or further consider the application for a consent; and
- (b) the time period referred to in subsection (14) does not begin. 2006, c. 23, s. 23 (1).

Motion re dispute

(4.1) The applicant, the council or the Minister may make a motion for directions to have the Municipal Board determine,

- (a) whether the information and material required under subsections (2) and (3), if any, have in fact been provided; or
- (b) whether a requirement made under subsection (3) is reasonable. 2006, c. 23, s. 23 (1).

Final determination

(4.2) The Municipal Board's determination under subsection (4.1) is not subject to appeal or review. 2006, c. 23, s. 23 (1).

Notice

(5) At least 14 days before a decision is made by the council or the Minister, the council or the Minister shall ensure that,

- (a) notice of the application is given, if required by regulation, in the manner and to the persons and public bodies and containing the information prescribed; and
- (b) a public meeting is held, if required by regulation, notice of which shall be given in the manner and to the persons and public bodies and containing the information prescribed. 1996, c. 4, s. 29 (1).

Request by council

(6) A council may request that a local municipality having jurisdiction over the land that is the subject of the application for consent give notice of the application or hold the public meeting referred to in subsection (5) or do both. 1996, c. 4, s. 29 (1).

Request by Minister

(7) The Minister may request that a local municipality or planning board having jurisdiction over the land that is the subject of the application for consent give notice of the application or hold the public meeting referred to in subsection (5) or do both. 1996, c. 4, s. 29 (1).

Responsibilities

(7.1) A local municipality or planning board that is requested under subsection (6) or (7) to give notice shall ensure that,

- (a) the notice is given in accordance with the regulation made under clause (5) (a); and
- (b) the prescribed information and material are submitted to the council or the Minister, as the case may be, within 15 days after the notice is given. 1996, c. 4, s. 29 (1).

Same

(7.2) A local municipality or planning board that is requested under subsection (6) or (7) to hold a public meeting shall ensure that,

- (a) notice of the meeting is given in accordance with the regulation made under clause (5) (b);
- (b) the public meeting is held; and
- (c) the prescribed information and material are submitted to the council or the Minister, as the case may be, within 15 days after the meeting is held. 1996, c. 4, s. 29 (1).

Written submissions

(8) Any person or public body may make written submissions to the council or the Minister before the council or the Minister gives or refuses to give a provisional consent. 1994, c. 23, s. 32.

Procedure

(9) A council in dealing with applications for consent shall comply with such rules of procedure as are prescribed. 1994, c. 23, s. 32.

Council to confer

(10) A council, in determining whether a provisional consent is to be given, shall confer with the persons or public bodies prescribed. 1994, c. 23, s. 32.

Minister may confer

(11) The Minister in determining whether a provisional consent is to be given may confer with the persons or public bodies that the Minister considers may have an interest in the application. 1994, c. 23, s. 32.

Powers

(12) A council or the Minister in determining whether a provisional consent is to be given shall have regard to the matters under subsection 51 (24) and has the same powers as the approval authority has under subsection 51 (25) with respect to the approval of a plan of subdivision and subsections 51 (26) and (27) and section 51.1 apply with necessary modifications to the granting of a provisional consent. 1994, c. 23, s. 32.

Parks

(13) If, on the giving of a provisional consent, land is required to be conveyed to a municipality for park or other public recreational purposes and the council of the municipality requires the payment of money to the value of the land in lieu of the conveyance, for the purpose of determining the amount of the payment, the value of the land shall be determined as of the day before the day the provisional consent was given. 1994, c. 23, s. 32.

Appeal to O.M.B.

(14) If an application is made for a consent and the council or the Minister fails to make a decision under subsection (1) on the application within 90 days after the day the application is

received by the clerk of the municipality or the Minister, the applicant may appeal to the Municipal Board with respect to the consent application by filing a notice with the clerk of the municipality or the Minister, accompanied by the fee prescribed under the *Ontario Municipal Board Act*. 1994, c. 23, s. 32; 1996, c. 4, s. 29 (2); 2004, c. 18, s. 9.

Consolidated Hearings Act

(14.1) Despite the *Consolidated Hearings Act*, the proponent of an undertaking shall not give notice to the Hearings Registrar under subsection 3 (1) of that Act in respect of an application requested under subsection (1) unless the council or the Minister has given or refused to give a provisional consent or the time period referred to in subsection (14) has expired. 2006, c. 23, s. 23 (2).

Record

(15) If the clerk of the municipality or the Minister receives a notice of appeal under subsection (14), the clerk of the municipality or the Minister shall ensure that,

- (a) a record is compiled which includes the prescribed information and material; and
- (b) the record, the notice of appeal and the fee are forwarded to the Municipal Board within 15 days after the notice is filed. 1994, c. 23, s. 32; 1996, c. 4, s. 29 (3).

Appeal withdrawn

(16) If an appeal under subsection (14) is withdrawn, the Municipal Board shall notify the council or Minister and the council or the Minister may proceed to make a decision under subsection (1). 1994, c. 23, s. 32.

Exception

(16.1) Despite clause (15) (b), if all appeals under subsection (14) are withdrawn within 15 days after the last day for filing a notice of appeal, the clerk of the municipality or the Minister is not required to forward the materials described under clause (15) (b) to the Municipal Board. 1999, c. 12, Sched. M, s. 29.

Where all appeals withdrawn

(16.2) If all appeals under subsection (14) are withdrawn within 15 days after the last day for filing a notice of appeal, the council or the Minister may proceed to make a decision under subsection (1). 1999, c. 12, Sched. M, s. 29.

Notice of decision

(17) If the council or the Minister gives or refuses to give a provisional consent, the council or the Minister shall ensure that written notice of it is given within 15 days, containing the information prescribed to,

- (a) the applicant;
- (b) each person or public body that made a written request to be notified of the decision or conditions;
- (c) REPEALED: 1996, c. 4, s. 29 (4).
- (d) the Minister, with respect to a decision by a council to give a provisional consent, if the Minister has notified the council that he or she wishes to receive a copy of all decisions made to give a provisional consent; and
- (e) any other person or public body prescribed. 1994, c. 23, s. 32; 1996, c. 4, s. 29 (4).

(18) REPEALED: 1996, c. 4, s. 29 (5).

Appeal

(19) Any person or public body may, not later than 20 days after the giving of notice under subsection (17) is completed, appeal the decision or any condition imposed by the council or the Minister or appeal both the decision and any condition to the Municipal Board by filing with the clerk of the municipality or the Minister a notice of appeal setting out the reasons for the appeal, accompanied by the fee prescribed under the *Ontario Municipal Board Act*. 1994, c. 23, s. 32; 1996, c. 4, s. 29 (6).

Notice completed

(20) For the purpose of subsections (19) and (27), the giving of written notice shall be deemed to be completed,

- (a) where notice is given by personal service, on the day that the serving of all required notices is completed;
- (b) where notice is given by mail, on the day that the mailing of all required notices is completed; and
- (c) where notice is given by telephone transmission of a facsimile of the notice, on the day that the transmission of all required notices is completed. 1994, c. 23, s. 32.

No appeal

(21) If no appeal is filed under subsection (19) or (27), subject to subsection (23), the decision of the council or the Minister, as the case may be, to give or refuse to give a provisional consent is final. 1994, c. 23, s. 32.

Declaration

(22) A sworn declaration by an employee of the municipality or the Ministry of Municipal Affairs and Housing that notice was given under subsection (17) or (24) or that no notice of appeal was filed under subsection (19) or (27) within the time allowed for appeal is conclusive evidence of the facts stated in it. 1994, c. 23, s. 32; 1996, c. 4, s. 29 (7).

Change of conditions

(23) The council or the Minister, as the case may be, may change the conditions of a provisional consent at any time before a consent is given. 1994, c. 23, s. 32.

Notice

(24) If the council or the Minister changes conditions of a provisional consent under subsection (23) after notice has been given under subsection (17), the council or the Minister shall ensure that written notice of the changes containing the information prescribed is given within 15 days to,

- (a) the applicant;
- (b) each person or public body that made a written request to be notified of changes to the conditions;
- (c) the Minister, with respect to a change of conditions by council, if the Minister has notified the council that he or she wishes to receive a copy of the changes of conditions; and
- (d) any other person or public body prescribed. 1994, c. 23, s. 32; 1996, c. 4, s. 29 (8).

(25) REPEALED: 1996, c. 4, s. 29 (9).

No notice required

(26) The council or the Minister, as the case may be, is not required to give written notice under subsection (24) if, in the council's or the Minister's opinion, the change to conditions is minor. 2009, c. 33, Sched. 21, s. 10 (14).

Appeal

(27) Any person or public body may, not later than 20 days after the giving of notice under subsection (24) is completed, appeal any of the changed conditions imposed by the council or the Minister by filing with the clerk of the municipality or the Minister a notice of appeal setting out the reasons for the appeal, accompanied by the fee prescribed under the *Ontario Municipal Board Act*. 1994, c. 23, s. 32; 1996, c. 4, s. 29 (10).

Record

(28) If the clerk or the Minister, as the case may be, receives a notice of appeal under subsection (19) or (27), the clerk or the Minister shall ensure that,

- (a) a record is compiled which includes the information and material prescribed; and
- (b) the record, the notice of appeal and the fee are forwarded to the Municipal Board within 15 days after the last day for filing a notice of appeal under subsection (19) or (27). 1994, c. 23, s. 32.

Appeals withdrawn

(29) If all appeals under subsection (19) or (27) are withdrawn and the time for appealing has expired, the Municipal Board shall notify the council or the Minister, as the case may be, and subject to subsection (23), the decision of the council or the Minister to give or refuse to give a provisional consent is final. 1994, c. 23, s. 32.

Exception

(29.1) Despite clause (28) (b), if all appeals under subsection (19) or (27) are withdrawn within 15 days after the last day for filing a notice of appeal, the clerk of the municipality or the Minister is not required to forward the materials described under clause (28) (b) to the Municipal Board. 1999, c. 12, Sched. M, s. 29.

Decision final

(29.2) If all appeals under subsection (19) or (27) are withdrawn within 15 days after the last day for filing a notice of appeal, the decision of the council or the Minister, subject to subsection (23), to give or refuse to give a provisional consent is final. 1999, c. 12, Sched. M, s. 29.

Hearing

(30) On an appeal, the Municipal Board shall hold a hearing, of which notice shall be given to such persons or public bodies and in such manner as the Board may determine. 1994, c. 23, s. 32; 1996, c. 4, s. 29 (11).

Dismissal without hearing

(31) Despite the *Statutory Powers Procedure Act* and subsection (30), the Municipal Board may dismiss an appeal without holding a hearing, on its own initiative or on the motion of any party, if,

- (a) it is of the opinion that,

- (i) the reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the Board could give or refuse to give the provisional consent or could determine the question as to the condition appealed to it,
 - (ii) the appeal is not made in good faith or is frivolous or vexatious,
 - (iii) the appeal is made only for the purpose of delay, or
 - (iv) the appellant has persistently and without reasonable grounds commenced before the Board proceedings that constitute an abuse of process;
- (b) the appellant did not make oral submissions at a public meeting or did not make written submissions to the council or the Minister before a provisional consent was given or refused and, in the opinion of the Board, the appellant does not provide a reasonable explanation for having failed to make a submission;
- (c) the appellant has not provided written reasons for the appeal;
- (d) the appellant has not paid the fee prescribed under the *Ontario Municipal Board Act*; or
- (e) the appellant has not responded to a request by the Municipal Board for further information within the time specified by the Board. 1994, c. 23, s. 32; 1996, c. 4, s. 29 (12); 2006, c. 23, s. 23 (3, 4).

Representation

(32) Before dismissing an appeal, the Municipal Board shall notify the appellant and give the appellant the opportunity to make representation on the proposed dismissal but this subsection does not apply if the appellant has not complied with a request made under clause (31) (e). 2000, c. 26, Sched. K, s. 5 (7).

Dismissal

(32.1) The Municipal Board may dismiss an appeal after holding a hearing or without holding a hearing on the motion under subsection (31), as it considers appropriate. 2000, c. 26, Sched. K, s. 5 (7).

Decision final

(33) If all appeals under subsection (19) or (27) are dismissed or withdrawn, the Municipal Board shall notify the council or the Minister and, subject to subsection (23), the decision of the council or the Minister to give or refuse to give a provisional consent is final. 1994, c. 23, s. 32.

Powers

(34) On an appeal under subsection (14) or (19), the Municipal Board may make any decision that the council or the Minister, as the case may be, could have made on the original application and on an appeal of the conditions under subsection (27), the Board shall determine the question as to the condition or conditions appealed to it. 1994, c. 23, s. 32.

Amended application

(35) On an appeal, the Municipal Board may make a decision on an application which has been amended from the original application if, at any time before issuing its order, written notice is given to the persons and public bodies prescribed under subsection (10) and to any person or public body conferred with under subsection (11) on the original application. 1994, c. 23, s. 32.

No written notice

(35.1) The Municipal Board is not required to give written notice under subsection (35) if, in the opinion of the Board, the amendment to the original application is minor. 1996, c. 4, s. 29 (13).

Notice

(36) Any person or public body that receives notice under subsection (35) may, not later than 30 days after the day that written notice was given, notify the Municipal Board of an intention to appear at the hearing or the resumption of the hearing, as the case may be. 1994, c. 23, s. 32.

Order

(37) If, after the expiry of the time period in subsection (36), no notice of intent has been received, the Municipal Board may issue its order. 1994, c. 23, s. 32.

Notice received

(38) If a notice of intent under subsection (36) is received, the Municipal Board may hold a hearing or resume the hearing on the amended application or issue its order without holding a hearing or resuming the hearing. 1994, c. 23, s. 32; 1996, c. 4, s. 29 (14).

Consent

(39) If the decision of the Municipal Board under subsection (34) is that a provisional consent be given, the council or the Minister shall give the consent, but if conditions have been imposed, the consent shall not be given until the council or the Minister is satisfied that the conditions have been fulfilled. 1994, c. 23, s. 32.

Same

(40) If the decision of the council or the Minister on an application is that provisional consent be given and there has been no appeal under subsection (19) or (27), subject to subsection (23), the consent shall be given, but if conditions have been imposed the consent shall not be given until the council or the Minister is satisfied that the conditions have been fulfilled. 1994, c. 23, s. 32.

Conditions not fulfilled

(41) If conditions have been imposed and the applicant has not, within a period of one year after notice was given under subsection (17) or (24), whichever is later, fulfilled the conditions, the application for consent shall be deemed to be refused but, if there is an appeal under subsection (14), (19) or (27), the application for consent shall not be deemed to be refused for failure to fulfil the conditions until the expiry of one year from the date of the order of the Municipal Board issued in respect of the appeal or from the date of a notice issued by the Board under subsection (29) or (33). 1994, c. 23, s. 32.

Certificate

(42) When a consent has been given under this section, the clerk of the municipality or the Minister, as the case may be, shall give a certificate to the applicant stating that the consent has been given and the certificate is conclusive evidence that the consent was given and that the provisions of this Act leading to the consent have been complied with and that, despite any other provision of this Act, the council or the Minister had jurisdiction to grant the consent and after the certificate has been given no action may be maintained to question the validity of the consent. 1994, c. 23, s. 32.

Lapse of consent

(43) A consent given under this section lapses at the expiration of two years from the date of the certificate given under subsection (42) if the transaction in respect of which the consent was given

is not carried out within the two-year period, but the council or the Minister in giving the consent may provide for an earlier lapsing of the consent. 1994, c. 23, s. 32.

Where delegation

(44) If a land division committee or a committee of adjustment has had delegated to it the authority for the giving of consents, any reference in this section to the clerk of the municipality shall be deemed to be a reference to the secretary-treasurer of the land division committee or committee of adjustment. 1994, c. 23, s. 32.

Delegation of authority to give consents

54. (1) The council of an upper-tier municipality may by by-law delegate to the council of a lower-tier municipality the authority for the giving of consents under section 53 in respect of land situate in the lower-tier municipality. 2002, c. 17, Sched. B, s. 21 (1).

Delegation

(1.1) The council of a county may by by-law delegate to a municipal planning authority the authority for the giving of consents under section 53 in respect of land in a municipal planning area. 1994, c. 23, s. 33 (2).

Further delegation

(2) Where authority is delegated to a council under subsection (1), such council may, in turn, by by-law, delegate the authority or any part of such authority, to a committee of council, to an appointed officer identified in the by-law by name or position occupied or to a committee of adjustment. R.S.O. 1990, c. P.13, s. 54 (2).

Included powers

(2.1) If council has delegated its authority to give consents under subsection (1), (1.1), (2), (2.3), (4) or (5), that delegation shall be deemed to include the authority to give approvals under subsection 50 (18) and to issue certificates of validation under section 57 in respect of land situate in the lower-tier municipality. 1993, c. 26, s. 61 (1); 1994, c. 23, s. 33 (3); 2002, c. 17, Sched. B, s. 21 (2).

Limitation

(2.2) Section 53 does not apply in the exercise of authority under subsection (2.1) to give approvals under subsection 50 (18) or to issue certificates of validation. 1994, c. 23, s. 33 (4).

Further delegation

(2.3) If authority is delegated to a municipal planning authority under subsection (1.1) or (5) or subsection 50 (1.4), the municipal planning authority may, in turn, by by-law delegate the authority or any part of the authority to a committee of the municipal planning authority or to an appointed officer identified in the by-law by name or position occupied. 1994, c. 23, s. 33 (5).

(3) REPEALED: 1994, c. 23, s. 33 (6).

Delegation to committee of council, etc.

(4) Except as delegated under subsection (1) or (1.1), the authority or any part of such authority of the council of an upper-tier municipality may be delegated by the council to a committee of council, to an appointed officer identified in the by-law by name or position occupied or to a land division committee. R.S.O. 1990, c. P.13, s. 54 (4); 1994, c. 23, s. 33 (7); 2002, c. 17, Sched. B, s. 21 (3).

Delegation, single-tier municipalities

(5) The council of a single-tier municipality authorized to give a consent under section 53 may by by-law delegate the authority of the council under section 53 or any part of that authority to a committee of council, to an appointed officer identified in the by-law by name or position occupied, to a municipal planning authority or to the committee of adjustment. 2002, c. 17, Sched. B, s. 21 (4).

Committee of adjustment

(6) Where, under subsection (2) or (5), a committee of adjustment has had delegated to it the authority to give a consent, section 53 applies with necessary modifications and subsections 45 (4) to (20) do not apply in the exercise of that authority. 1994, c. 23, s. 33 (9).

Same

(6.1) Where, under subsection (2) or (5), a committee of adjustment has the authority to give approvals under subsection 50 (18) and the authority to issue certificates of validation under section 57, subsection 45 (8) applies in the exercise of that authority, but subsections 45 (4) to (7) and (9) to (20) do not apply. 1993, c. 26, s. 61 (3).

Conditions

(7) A delegation of authority made by a council or a municipal planning authority under this section may be subject to such conditions as the council or the municipal planning authority by by-law provides and the council or the municipal planning authority may by by-law withdraw the delegation of authority but, where authority delegated under subsection (1) or (1.1) is withdrawn, all applications for consent, for approval under subsection 50 (18) or for the issuance of a certificate of validation under section 57 made prior to the withdrawal shall continue to be dealt with as if the delegation had not been withdrawn. 1994, c. 23, s. 33 (10).

District land division committee, delegation

55. (1) The Minister by order may constitute and appoint one or more district land division committees composed of such persons as he or she considers advisable and may by order delegate thereto the authority of the Minister to give consents under section 53, the authority to give approvals under subsection 50 (18) or the authority to issue certificates of validation under section 57 in respect of such lands situate in a territorial district as are defined in the order. R.S.O. 1990, c. P.13, s. 55 (1); 1993, c. 26, s. 62 (1).

Conditions and withdrawal of delegation

(2) A delegation made by the Minister under subsection (1) may be subject to such conditions as the Minister may by order provide and the Minister may by order withdraw any delegation. R.S.O. 1990, c. P.13, s. 55 (2).

Body corporate

(2.1) A district land division committee is a body corporate. 1994, c. 23, s. 34 (1).

Application of s. 44

(3) Where the Minister has delegated his or her authority to a district land division committee under subsection (1), subsections 44 (5), (6), (7), (8), (10) and (11) apply with necessary modifications. R.S.O. 1990, c. P.13, s. 55 (3).

Agreements

(4) A district land division committee may enter into agreements imposed as a condition to the giving of a consent in respect of land situate in territory without municipal organization and subsection 51 (26) applies with necessary modifications to any such agreement. R.S.O. 1990, c. P.13, s. 55 (4); 1994, c. 23, s. 34 (2).

Remuneration

(5) The members of a district land division committee appointed under this section shall be paid such remuneration as is provided for by the order appointing them. R.S.O. 1990, c. P.13, s. 55 (5).

Fees

(6) A district land division committee may prescribe a tariff of fees for the processing of applications, which shall be designed to meet only the anticipated cost to the committee in respect of the processing of applications. 1993, c. 26, s. 62 (2).

Land division committee

56. (1) The council of an upper-tier municipality may by by-law constitute and appoint a land division committee composed of such persons, not fewer than three, as the council considers advisable. R.S.O. 1990, c. P.13, s. 56 (1); 2002, c. 17, Sched. B, s. 22.

Application of subss. 44 (2-11)

(2) Subsections 44 (2) to (11) apply, with necessary modifications, where a land division committee is constituted under subsection (1) of this section. R.S.O. 1990, c. P.13, s. 56 (2).

Validation certificate

57. (1) A council authorized to give a consent under section 53, other than a council authorized to give a consent pursuant to an order under section 4, may issue a certificate of validation in respect of land described in the certificate, providing that the contravention of section 50 or a predecessor of it or of a by-law passed under a predecessor of section 50 or of an order made under clause 27 (1) (b), as it read on the 25th day of June, 1970, of *The Planning Act*, being chapter 296 of the Revised Statutes of Ontario, 1960, or a predecessor of it does not have and shall be deemed never to have had the effect of preventing the conveyance of or creation of any interest in such land. 1993, c. 26, s. 63; 1996, c. 4, s. 30 (1).

Limitation

(2) A certificate of validation under subsection (1) or an order of the Minister under subsection (3) does not affect the rights acquired by any person from a judgment or order of any court given or made on or before the day on which the certificate is issued or order is made. 1993, c. 26, s. 63.

Territorial district

(3) If the Minister has authority to give consents under section 53, the Minister may by order exercise the powers conferred upon a council by subsection (1) in respect of land in a territorial district. 2002, c. 17, Sched. B, s. 23.

Proviso

(4) No order shall be made by the Minister under subsection (3) in respect of land situate in a local municipality unless the council of the local municipality in which the land is situate has by by-law requested the Minister to make such order, and the council has the power to pass that by-law. 1993, c. 26, s. 63; 2009, c. 33, Sched. 21, s. 10 (15).

Conditions

(5) A council may, as a condition to the passage of a by-law under subsection (4), impose such conditions in respect of any land described in the by-law as it considers appropriate. 1993, c. 26, s. 63.

Criteria for consideration

(6) In considering whether to issue a certificate under subsection (1), regard shall be had to the prescribed criteria. 1993, c. 26, s. 63.

Criteria for certificate

- (7) No certificate shall be issued by a council under subsection (1) unless,
- (a) the land described in the certificate conforms with the prescribed criteria; or
 - (b) the Minister, by order, has exempted that land from the criteria. 1993, c. 26, s. 63.

Conditions

(8) A council or the Minister may, as a condition to issuing a certificate of validation or order, impose such conditions in respect of any land described in the certificate or order as it considers appropriate. 1993, c. 26, s. 63.

Proviso

(9) Nothing in this section derogates from the power a council or the Minister has to grant consents referred to in section 53. 1993, c. 26, s. 63.

PART VII GENERAL

Acquisition of land

58. The *Municipal Act, 2001* or the *City of Toronto Act, 2006*, as the case may be, applies to the acquisition of land under this Act. 2006, c. 32, Sched. C, s. 47 (12).

Power to clear, grade, etc., lands acquired

59. When a municipality has acquired or holds lands for any purpose authorized by this Act, the municipality may clear, grade or otherwise prepare the land for the purpose for which it has been acquired or is held. R.S.O. 1990, c. P.13, s. 59.

Exchange of lands

60. When a municipality acquires land for any purpose authorized by this Act, the whole or partial consideration therefor may be land then owned by the municipality. R.S.O. 1990, c. P.13, s. 60.

Fair hearing

61. Where, in passing a by-law under this Act, a council is required by this Act, by the provisions of an official plan or otherwise by law, to afford any person an opportunity to make representation in respect of the subject-matter of the by-law, the council shall afford such person a fair opportunity to make representation but throughout the course of passing the by-law the council shall be deemed to be performing a legislative and not a judicial function. R.S.O. 1990, c. P.13, s. 61.

Not subject to Act

62. (1) An undertaking of Hydro One Inc. (as defined in subsection 2 (1) of the *Electricity Act, 1998*) or Ontario Power Generation Inc. (as defined in subsection 2 (1) of that Act) that has been

approved under the *Environmental Assessment Act* is not subject to this Act. 1998, c. 15, Sched. E, s. 27 (11); 2002, c. 1, Sched. C, s. 4.

Subsidiaries included

(2) For the purposes of subsection (1), a reference to a corporation is deemed to include a subsidiary of that corporation. 1998, c. 15, Sched. E, s. 27 (11).

Exempt undertakings

62.0.1 (1) An undertaking or class of undertakings within the meaning of the *Environmental Assessment Act* that relates to energy is not subject to this Act or to section 113 or 114 of the *City of Toronto Act, 2006* if,

- (a) it has been approved under Part II or Part II.1 of the *Environmental Assessment Act* or is the subject of,
 - (i) an order under section 3.1 or a declaration under section 3.2 of that Act, or
 - (ii) an exempting regulation made under that Act; and
- (b) a regulation under clause 70 (h) prescribing the undertaking or class of undertakings is in effect. 2006, c. 23, s. 24.

Same

(2) An undertaking referred to in subsection 62 (1) that has been approved under the *Environmental Assessment Act* is not subject to section 113 or 114 of the *City of Toronto Act, 2006*. 2006, c. 23, s. 24.

Renewable energy undertakings

Policy statements and provincial plans

62.0.2 (1) Despite any Act or regulation, the following do not apply to a renewable energy undertaking, except in relation to a decision under section 28 or Part VI:

1. A policy statement issued under subsection 3 (1).
2. A provincial plan, subject to subsection (2). 2009, c. 12, Sched. K, s. 3.

Exception

- (2) Subsection (1) does not apply in respect of,
 - (a) the Niagara Escarpment Plan;
 - (b) another provincial plan, if the provincial plan is prescribed for the purposes of this subsection; or
 - (c) a provision of another provincial plan, if the provision is prescribed for the purposes of this subsection. 2009, c. 12, Sched. K, s. 3.

Official plans

(3) For greater certainty, an official plan does not affect a renewable energy undertaking. 2009, c. 12, Sched. K, s. 3.

Same

- (4) Section 24 does not apply to,

- (a) the undertaking of a public work that is a renewable energy undertaking or is intended to facilitate or support a renewable energy undertaking;
- (b) the passing of a by-law with respect to a public work described in clause (a); or
- (c) the passing of a by-law that is intended to facilitate or support a renewable energy undertaking. 2009, c. 12, Sched. K, s. 3.

Demolition control area

(5) A by-law passed under section 33 does not apply to a renewable energy undertaking. 2009, c. 12, Sched. K, s. 3.

By-laws and orders under Part V

(6) A by-law or order passed or made under Part V does not apply to a renewable energy undertaking. 2009, c. 12, Sched. K, s. 3.

Transition, existing agreements

(7) An agreement that is entered into under Part V before the day subsection 4 (1) of Schedule G to the *Green Energy and Green Economy Act, 2009* comes into force applies to a renewable energy project, and to any related renewable energy testing facility and renewable energy testing project, until the day a renewable energy approval is issued under section 47.5 of the *Environmental Protection Act* in relation to the renewable energy project. 2009, c. 12, Sched. K, s. 3.

Development permit system

(8) A regulation or by-law made or passed under section 70.2 does not apply to a renewable energy undertaking. 2009, c. 12, Sched. K, s. 3.

***City of Toronto Act, 2006*, ss. 113, 114**

(9) A by-law passed under section 113 or 114 of the *City of Toronto Act, 2006* does not apply to a renewable energy undertaking. 2009, c. 12, Sched. K, s. 3.

***Ontario Planning and Development Act, 1994*, s. 17**

(10) An order made under section 17 of the *Ontario Planning and Development Act, 1994* does not apply to a renewable energy undertaking. 2009, c. 12, Sched. K, s. 3.

Variation of notice requirements

62.1 The Minister, the council of a municipality or a planning board may by agreement with a First Nation vary or waive the prescribed notice requirements to a band in respect of an official plan, a zoning by-law or any application under this Act. 1994, c. 23, s. 37.

Deemed compliance

63. If the Minister, the council of a municipality, a planning board or the Municipal Board exercises any authority under this Act, including giving an approval, an exemption from an approval or a consent, the provisions of this Act that relate to or are requirements for the exercise of the authority shall be deemed to have been complied with upon the decision becoming final. 1996, c. 4, s. 32; 1999, c. 12, Sched. M, s. 30.

64. REPEALED: 2009, c. 33, Sched. 2, s. 59 (1).

Discretionary dispute resolution techniques

65. The Minister, the council of a municipality, a local board, a planning board or the Municipal Board or their agents shall, if they consider it appropriate, at any time before a decision is made

under this Act, use mediation, conciliation or other dispute resolution techniques to attempt to resolve concerns or disputes in respect of any planning application or matter. 1994, c. 23, s. 39.

Effect where authority delegated

66. If the Minister or the council delegates an authority under this Act, including the authority to give an approval, an exemption from an approval or a consent, the exercise of the authority and the decision of the delegate has the same force and effect as if it were the exercise of authority or the decision of the Minister or the council, as the case may be. 1996, c. 4, s. 33.

Penalty

67. (1) Every person who contravenes section 41, section 46, subsection 49 (4) or section 52 or who contravenes a by-law passed under section 34 or 38 or an order made under section 47 and, if the person is a corporation, every director or officer of the corporation who knowingly concurs in the contravention, is guilty of an offence and on conviction is liable,

- (a) on a first conviction to a fine of not more than \$25,000; and
- (b) on a subsequent conviction to a fine of not more than \$10,000 for each day or part thereof upon which the contravention has continued after the day on which the person was first convicted. 1994, c. 2, s. 48.

Corporation

(2) Where a corporation is convicted under subsection (1), the maximum penalty that may be imposed is,

- (a) on a first conviction a fine of not more than \$50,000; and
- (b) on a subsequent conviction a fine of not more than \$25,000 for each day or part thereof upon which the contravention has continued after the day on which the corporation was first convicted,

and not as provided in subsection (1).

Order of prohibition

(3) Where a conviction is entered under subsection (1), in addition to any other remedy or any penalty provided by law, the court in which the conviction has been entered, and any court of competent jurisdiction thereafter, may make an order prohibiting the continuation or repetition of the offence by the person convicted. R.S.O. 1990, c. P.13, s. 67 (2, 3).

Proceeds of fines

67.1 If an offence has been committed under section 41, 52 or 67 or under a by-law passed under section 34 or 38, and a proceeding in respect of the offence is undertaken by the municipality or planning board and a conviction has been entered, the proceeds of any fine in relation to the offence shall be paid to the treasurer of the municipality or secretary-treasurer of the planning board and section 2 of the *Administration of Justice Act* and section 4 of the *Fines and Forfeitures Act* do not apply in respect of the fine. 1996, c. 4, s. 34; 1997, c. 24, s. 226 (8).

Exception

68. (1) Despite section 53 of the *Assessment Act*, it is not an offence to disclose the information referred to therein to any employee of a municipality or of a planning board who declares that such information is required in the course of his or her planning duties. R.S.O. 1990, c. P.13, s. 68 (1); 1994, c. 23, s. 41 (1).

Offence

(2) An employee of a municipality or of a planning board who wilfully discloses or permits to be disclosed the information referred to in subsection (1) to any other person not likewise entitled in the course of his or her duties to acquire or have access to the information is guilty of an offence and on conviction is liable to a fine of not more than \$5,000. R.S.O. 1990, c. P.13, s. 68 (2); 1994, c. 23, s. 41 (2).

Exception

(3) This section does not prevent disclosure of such information by any person when being examined as a witness in an action or other proceeding in a court or in an arbitration. R.S.O. 1990, c. P.13, s. 68 (3).

Tariff of fees

69. (1) The council of a municipality, by by-law, and a planning board, by resolution, may establish a tariff of fees for the processing of applications made in respect of planning matters, which tariff shall be designed to meet only the anticipated cost to the municipality or to a committee of adjustment or land division committee constituted by the council of the municipality or to the planning board in respect of the processing of each type of application provided for in the tariff. R.S.O. 1990, c. P.13, s. 69 (1); 1996, c. 4, s. 35 (1).

Reduction or waiver of fees

(2) Despite a tariff of fees established under subsection (1), the council of a municipality, a planning board, a committee of adjustment or a land division committee in processing an application may reduce the amount of or waive the requirement for the payment of a fee in respect of the application where the council, planning board or committee is satisfied that it would be unreasonable to require payment in accordance with the tariff. R.S.O. 1990, c. P.13, s. 69 (2); 1996, c. 4, s. 35 (2).

Payment under protest: appeal to O.M.B.

(3) Any person who is required to pay a fee under subsection (1) for the processing of an application in respect of a planning matter may pay the amount of the fee under protest and thereafter appeal to the Municipal Board against the levying of the fee or the amount of the fee by giving written notice of appeal to the Municipal Board within thirty days of payment of the fee. R.S.O. 1990, c. P.13, s. 69 (3); 1996, c. 4, s. 35 (3).

Hearing

(4) The Municipal Board shall hear an appeal made under subsection (3) and shall dismiss the appeal or direct that a refund payment be made to the appellant in such amount as the Board determines. R.S.O. 1990, c. P.13, s. 69 (4).

Fees

69.1 (1) The Minister may charge fees for the processing of applications to the Minister in respect of planning matters including the approval of an official plan or official plan amendment. 1993, c. 26, s. 64 ; 1994, c. 23, s. 42.

Same

(2) The Minister may reduce the amount of or waive the payment of a fee described under subsection (1). 1993, c. 26, s. 64.

Fees

69.2 (1) If a prescribed municipality fails to adopt a plan and submit it for approval as an official plan, the Minister may charge fees to the municipality for the processing of planning applications by the Minister in respect of land situate in the municipality, including the approval of an official plan or official plan amendment. 1994, c. 23, s. 43; 2002, c. 17, Sched. B, s. 25.

Reduction

(2) The Minister may reduce the amount of or waive the payment of a fee described under subsection (1). 1994, c. 23, s. 43.

Proviso

(3) Nothing in this section prevents the Minister from charging a fee under section 69.1 in addition to a fee under this section. 1994, c. 23, s. 43.

Regulations

70. The Lieutenant Governor in Council may make regulations,

(a)-(f) REPEALED: 1996, c. 4, s. 36.

(g) prescribing the form of a warrant and the form in which the information on oath will be taken under section 49.1;

(h) for the purposes of section 62.0.1, prescribing an undertaking or class of undertakings that relates to energy. 1994, c. 23, s. 44; 1996, c. 4, s. 36; 2006, c. 23, s. 25.

Regulations

70.1 (1) The Minister may make regulations,

1. prescribing forms for the purposes of this Act and providing for their use;
2. prescribing information and material that are to be provided under this Act and the manner in which they are to be provided;
3. prescribing the manner in which any notice is to be given under this Act, including the persons or public bodies to whom it shall be given, the person or public bodies who shall give the notice and the contents of the notice;
4. prescribing the timing requirements for any notice given under any provision of this Act;
5. prescribing information and material that must be included in any record;
6. prescribing plans or policies and provisions of those plans or policies for the purposes of clause (f) of the definition of “provincial plan” in subsection 1 (1);
7. prescribing any ministry of the Province of Ontario to be a public body under subsection 1 (3);
8. excluding any board, commission, agency or official from the definition of “public body” under subsection 1 (4);
9. prescribing conditions for the purpose of subsection 8.1 (1);
10. prescribing a term for the purpose of clause 8.1 (3) (a) and qualifications for the purpose of clause 8.1 (3) (b);
11. prescribing eligibility criteria for the purpose of subsection 8.1 (4);
12. prescribing classes for the purpose of clause 8.1 (5) (c);
13. prescribing requirements for the purpose of subsection 8.1 (8);

14. prescribing the methods for determining the number of members from each municipality to be appointed to a municipal planning authority under subsection 14.1 (5);
15. prescribing matters for the purpose of clause 16 (1) (b) and for the purpose of clause 16 (2) (c);
16. prescribing the processes to be followed and the materials to be developed under section 16.1;
17. prescribing municipalities for the purposes of subsection 17 (13) and section 69.2;
18. prescribing information and material for the purposes of clauses 17 (15) (a) and (b), public bodies for the purposes of clause 17 (15) (b) and the manner of making information and material available for the purposes of clause 17 (15) (c);
19. prescribing, for the purposes of clauses 17 (17) (a) and (b), clause 22 (6.4) (a), clause 34 (10.7) (a), clauses 34 (13) (a) and (b) and clause 51 (19.4) (a),
 - i. persons and public bodies,
 - ii. the manner of giving notice, and
 - iii. information;
20. prescribing time periods for the purpose of subsections 17 (44.4), 34 (24.4) and 51 (52.4);
21. prescribing public bodies for the purpose of clause 26 (3) (a);
22. prescribing upper-tier municipalities for the purpose of subsection 28 (2);
23. prescribing matters for the purpose of subsection 28 (4.0.1);
24. prescribing conditions for the purpose of subsection 34 (16) and limitations for the purpose of subsection 34 (16.1);
25. prescribing rules of procedure for committees of adjustment;
26. prescribing criteria for the purposes of subsection 50 (18.1) and subsection 57 (6);
27. requiring that notice be given under subsections 51 (20) and 53 (5);
28. prescribing rules of procedure under subsection 53 (9) for councils and their delegates;
29. prescribing persons or public bodies for the purposes of subsection 53 (10);
30. prescribing rules of procedure for district land division committees constituted under section 55;
31. prescribing any other matter that is referred to in this Act as prescribed, other than matters that are prescribed under sections 70, 70.2 and 70.3. 2006, c. 23, s. 26.

Same

(2) A regulation made under this section or section 70 may be general or particular in its application. 1994, c. 23, s. 45.

Development permit system

70.2 (1) The Lieutenant Governor in Council may, by regulation,

- (a) establish a development permit system that local municipalities may by by-law adopt to control land use development in the municipality; or
- (b) delegate to local municipalities the power to establish a development permit system upon such conditions as may be set out in the regulation. 1994, c. 23, s. 46.

Contents

- (2) A regulation under subsection (1) may,
- (a) vary, supplement or override any provision in Part V or any municipal by-law passed under Part V as necessary to establish a development permit system;
 - (b) authorize or require a local municipality to pass a by-law to vary, supplement or override a by-law passed under Part V as necessary to establish a development permit system;
 - (c) exempt a municipality which has adopted or established a development permit system from any provision of Part V set out in the regulation;
 - (d) prohibit a municipality which has adopted or established a development permit system from passing a by-law under those provisions of Part V that are specified in the regulation;
 - (e) set out procedures for appealing to the Municipal Board in respect of a development permit or a condition in a permit, including prescribing persons or public bodies that may appeal to the Board in that regard;
 - (f) prescribe policies that must be contained in an official plan before a development permit system may be adopted or established;
 - (g) prescribe conditions or criteria that must be met before a municipality passes a by-law adopting or establishing a development permit system;
 - (h) prescribe conditions or criteria that must be met before a development permit may be issued or that must be included in a development permit;
 - (i) prescribe powers that the municipality may exercise in administering a development permit system;
 - (j) limit or restrict the manner in which municipalities may exercise the power to issue development permits or pass by-laws adopting or establishing a development permit system;
 - (k) establish different standards or procedures for different municipalities or classes of municipalities;
 - (l) authorize the municipalities to appoint employees to carry out the duties required under the development permit system and delegate to them the powers necessary to carry out these duties;
 - (m) require any owner of land, upon the request of the municipality, to enter into agreements with the municipality as a condition to obtaining a development permit;
 - (n) revoke any provision in a development permit by-law or any condition in a development permit in respect of any defined area and set out other provisions or conditions that apply in respect of that area;
 - (o) prescribe provisions that must be contained in a development permit system;
 - (p) exempt any development or class of development, any municipality or class of municipality or any areas from a development permit area or a development permit by-law;
 - (q) provide for transitional matters that may be necessary to implement a development permit system or to cease using a development permit system. 1994, c. 23, s. 46.

Same

(3) A regulation under this section may be general or particular in its application and may be restricted to those municipalities set out in the regulation. 1994, c. 23, s. 46.

Conflicts

(4) A regulation made under this section prevails over the provisions of any other Act that are specified in the regulation. 1994, c. 23, s. 46.

Registration of agreement

(5) An agreement entered into under clause (2) (m) may be registered against the land to which it applies and the municipality may enforce its provisions against the owner and, subject to the *Registry Act* and the *Land Titles Act*, any and all subsequent owners of the land. 1994, c. 23, s. 46; 2006, c. 23, s. 27.

Deemed conformity with official plan

(6) If a development permit by-law is passed under this section by the council of a municipality in which an official plan is in effect, subsection 24 (4) applies to the by-law in the same manner as if it were a by-law passed under section 34. 1994, c. 23, s. 46.

Conformity with upper tier plans

(7) If an approval authority has approved an official plan adopted by an upper-tier municipality, every development permit by-law that is then in effect in the area affected by the plan shall be amended to conform with the plan and subsections 27 (2) to (4) apply, with necessary modifications, to the amendment. 1994, c. 23, s. 46; 2002, c. 17, Sched. B, s. 27.

Offence

(8) Every person who contravenes a development permit by-law passed under this section or the conditions of a development permit is guilty of an offence and on conviction is liable to the fines set out in section 67 and section 67 applies to the offence. 1994, c. 23, s. 46.

Regulations

70.3 (1) The Lieutenant Governor in Council may by regulation authorize municipalities to pass by-laws establishing a system for allocating sewage and water services to land that is the subject of an application under section 51 upon such conditions as may be set out in the regulation.

Contents of regulations

- (2) A regulation under subsection (1) may,
- (a) prescribe conditions or criteria that must be met before a municipality passes a by-law establishing a system;
 - (b) prescribe powers that the municipality may exercise in administering the system including the power to issue permits or collect fees;
 - (c) prescribe policies that must be contained in an official plan before a system may be established;
 - (d) require that the official plan of the municipality contain policies regarding the allocation of services;
 - (e) authorize the by-law to apply to any class of plan of subdivision or description under the *Condominium Act* in respect of which draft approval was given before or after the by-law was passed; and

(f) provide for transitional matters that may be necessary to implement a system.

Same

(3) A regulation under this section may be general or particular in its application and may be restricted to those municipalities set out in the regulation. 1994, c. 23, s. 47.

Applications

(3.1) Despite sections 74 and 74.1, a regulation under this section may apply to any application for approval of a plan of subdivision or an application for approval of a condominium description under the *Condominium Act* in respect of which draft approval was given before or after this subsection came into force. 1996, c. 4, s. 38.

Conflicts

(4) A regulation made under this section prevails over the provisions of any other Act that are specified in the regulation. 1994, c. 23, s. 47.

Regulations

70.4 (1) The Minister may make regulations,

- (a) providing for transitional matters respecting matters and proceedings that were commenced before or after the *Strong Communities (Planning Amendment) Act, 2004* came into force;
- (b) modifying or replacing all or any part of the definition of “area of settlement” in subsection 1 (1). 2004, c. 18, s. 10.

Same

(2) Without limiting clause (1) (a), a regulation under that clause may,

- (a) determine which matters and proceedings may be continued and disposed of under this Act, as it read on the day immediately before the *Strong Communities (Planning Amendment) Act, 2004* came into force and which matters and proceedings must be continued and disposed of under this Act as it read on the day the *Strong Communities (Planning Amendment) Act, 2004* came into force;
- (b) for the purpose of clause (1) (a), deem a matter or proceeding to have been commenced on the date or in the circumstances prescribed in the regulation. 2004, c. 18, s. 10.

Retroactive

(3) A regulation under this section may be retroactive to December 15, 2003. 2004, c. 18, s. 10.

Scope

(4) A regulation under this section may be general or particular in its application. 2004, c. 18, s. 10.

Conflict

(5) A regulation under clause (1) (a) prevails over any provision of this Act specifically mentioned in the regulation. 2004, c. 18, s. 10.

Regulations

70.5 (1) The Minister may make regulations,

- (a) providing for transitional matters respecting matters and proceedings that were commenced before or after the effective date;

- (b) modifying or replacing all or any part of the definition of “area of employment” in subsection 1 (1). 2006, c. 23, s. 28.

Same

- (2) A regulation under clause (1) (a) may, without limitation,
- (a) determine which matters and proceedings may be continued and disposed of under this Act, as it read on the day before the effective date, and which matters and proceedings must be continued and disposed of under this Act as it read on the effective date;
- (b) for the purpose of clause (1) (a), deem a matter or proceeding to have been commenced on the date or in the circumstances prescribed in the regulation. 2006, c. 23, s. 28.

Retroactive

- (3) A regulation under clause (1) (a) may be retroactive to December 12, 2005. 2006, c. 23, s. 28.

Scope

- (4) A regulation under this section may be general or particular in its application. 2006, c. 23, s. 28.

Conflict

- (5) A regulation under clause (1) (a) prevails over any provision of this Act specifically mentioned in the regulation. 2006, c. 23, s. 28.

Definition

- (6) In this section,

“effective date” means the date on which section 28 of the *Planning and Conservation Land Statute Law Amendment Act, 2006* comes into force. 2006, c. 23, s. 28.

Conflict

71. In the event of conflict between the provisions of this and any other general or special Act, the provisions of this Act prevail. R.S.O. 1990, c. P.13, s. 71.

Repeal of joint official plans

72. (1) REPEALED: 1994, c. 23, s. 48.

Repeal of joint official plans

(2) Unless continued in force by an order made by the Minister under subsection (3), every official plan of a joint planning area, other than an official plan that was adopted by the council of a county and other than an official plan of a joint planning area in a territorial district, that was in effect immediately before the 1st day of August, 1983, shall be deemed to have been repealed two years from that day, if not sooner repealed.

Continuation of joint official plans

(3) The Minister may by order provide for the remaining in force of any joint official plan or part or parts thereof that would otherwise be deemed to be repealed under subsection (2) and in such order may make such provision for the effectual continuation of such plan or the part or parts thereof as the Minister considers necessary, including provision for the allocation of the plan or part or parts thereof to any local municipality or county situate wholly or partly within the area to which the plan applies.

Amendment or repeal

(4) The Minister may approve any amendment or repeal of an official plan of a joint planning area that may be proposed by the council of any municipality affected by the official plan. R.S.O. 1990, c. P.13, s. 72 (2-4).

Continuation

72.1 Even though this Act may be amended after an official plan came into effect, the official plan remains in effect but may be amended or repealed in accordance with this Act as amended. 1996, c. 4, s. 39.

Planning areas and boards dissolved

73. (1) Except as provided in subsection (3), on the 1st day of August, 1983, all planning areas including joint planning areas and subsidiary planning areas together with the planning boards thereof were dissolved.

Assets and liabilities

(2) All the assets and liabilities of a planning board dissolved by this section are, in the case of a planning board of a planning area consisting of part or all of one municipality, assets and liabilities of such municipality and in the case of a planning board of a joint planning area, assets and liabilities of the municipalities that form part of the joint planning area and if such municipalities cannot agree as to the disposition of the assets and liabilities, the Municipal Board, upon the application of one or more of the municipalities, shall direct a final disposition thereof.

Planning areas that are continued

(3) Each planning area that immediately before the 1st day of August, 1983, consisted of the whole of two or more municipalities that are situate in a territorial district or consisted of the whole of one or more municipalities and territory without municipal organization or consisted solely of territory without municipal organization shall continue as a planning area under this Act without any change in name until altered or dissolved by the Minister.

Planning boards that are continued

(4) Each planning board of a planning area mentioned in subsection (3) shall continue as a planning board under this Act without any change in name or constitution until the planning area is dissolved or the name or constitution of the planning board is changed by the Minister. R.S.O. 1990, c. P.13, s. 73.

Transition

74. (1) In this section,
“former Act” means *The Planning Act*, being chapter 379 of the Revised Statutes of Ontario, 1980. R.S.O. 1990, c. P.13, s. 74 (1).

Matters, etc., continued

(2) Despite the repeal of the former Act by section 73 of the *Planning Act, 1983*, being chapter 1, any matter or proceeding mentioned in subsection (3) that was commenced under the former Act before the 1st day of August, 1983, shall be continued and finally disposed of under the former Act. R.S.O. 1990, c. P.13, s. 74 (2).

When matters, etc., deemed commenced

(3) For the purposes of subsection (2), a matter or proceeding shall be deemed to have been commenced, in the case of,

- (a) an official plan or an amendment thereto or a repeal thereof, on the day the by-law adopting the plan or adopting or proposing the amendment or repeal of the plan is passed;
- (b) redevelopment under section 22 of the former Act, on the day the by-law designating the redevelopment area is passed;
- (c) subdivision of land under section 36 of the former Act, on the day the application is made under subsection (1) of that section;
- (d) a zoning by-law or an amendment thereto, on the day the by-law is passed;
- (e) development in a site plan control area, on the day the application is made under subsection 40 (4) of the former Act;
- (f) an application made to a committee of adjustment, a land division committee or planning board for a planning area in a territorial district, on the day the application is made; and
- (g) an application to the Minister for a consent under section 29 of the former Act, on the day the application is made. R.S.O. 1990, c. P.13, s. 74 (3).

Request to amend official plan

(4) Despite clause (3) (a), where a request to initiate an amendment to an official plan was received by a council before the 1st day of August, 1983,

- (a) if the council refuses to propose the amendment or fails to propose it within thirty days from the receipt of the request and the person who made the request requests the Minister to refer the proposal to the Municipal Board, the matter shall be continued and finally disposed of under the former Act; or
- (b) if the council accedes to the request, the matter shall be continued and finally disposed of under either the former Act or under this Act as determined by the council. R.S.O. 1990, c. P.13, s. 74 (4); 2009, c. 33, Sched. 2, s. 59 (2).

Report of planning board

(5) In the case of a request to initiate an amendment to an official plan that is continued and finally disposed of under the former Act as mentioned in subsection (4), section 17 of the former Act pertaining to the obtaining of a planning board report do not apply. R.S.O. 1990, c. P.13, s. 74 (5).

Request to amend zoning by-law

(6) Despite clause (3) (d), where an application to amend a zoning by-law was received by a council before the 1st day of August, 1983,

- (a) if the council refuses the application or refuses or neglects to make a decision thereon within one month after the receipt of the application and the applicant appeals to the Municipal Board, the matter shall be continued and finally disposed of under the former Act;
- (b) if the council accedes to the request, the matter shall be continued and finally disposed of under either the former Act or under this Act as determined by the council. R.S.O. 1990, c. P.13, s. 74 (6); 2009, c. 33, Sched. 2, s. 59 (3).

Transition

74.1 (1) Any matter or proceeding mentioned in subsection (2) that was commenced before March 28, 1995 shall be continued and finally disposed of under this Act as it read on March 27, 1995. 1996, c. 4, s. 40 (1).

Same

(2) For the purposes of subsection (1), a matter or proceeding shall be deemed to have been commenced, in the case of,

- (a) an official plan or an amendment to it or a repeal of it, on the day the by-law adopting the plan or adopting the amendment or repeal of the plan is passed;
- (b) a request for an official plan amendment by any person or public body, on the day the request was received, whether or not the official plan amendment is adopted;
- (c) a zoning by-law or an amendment to it, on the day the by-law is passed;
- (d) an application for an amendment to a zoning by-law that has been refused or has not been decided before the day this section comes into force, on the day the application is made;
- (e) development in a site plan control area, on the day the application under subsection 41 (4) is made;
- (f) an application for a minor variance under section 45, on the day the application is made;
- (g) an application to amend or revoke an order under section 47, on the day the application is made;
- (h) an application for the approval of a plan of subdivision under section 51, on the day the application is made; and
- (i) an application for a consent under section 53, on the day the application is made. 1994, c. 23, s. 50; 1996, c. 4, s. 40 (2).

Transition

75. (1) Any matter or proceeding that was commenced on or after March 28, 1995 but before this section came into force shall be continued and finally disposed of under this Act as it read on the day before this section came into force.

Determination of date

(2) For the purposes of subsection (1), a matter or proceeding shall be deemed to have been commenced on the day determined under subsection 74.1 (2).

Exception

(3) Despite subsection (1), in exercising any authority in respect of a matter or proceeding referred to in subsection (5), the council of a municipality, a local board, a planning board, the Minister and the Municipal Board, shall have regard to the policy statements issued under subsection 3 (1) if,

- (a) the matter or proceeding was commenced on or after March 28, 1995; and
- (b) no decision has been made in respect of the matter or proceeding. 1996, c. 4, s. 41.

Exception, comments, etc.

(4) Despite subsection (1), in providing any comments, submissions or advice with respect to any matter or proceeding referred to in subsection (5), a minister or a ministry, board, commission

or agency of the government shall have regard to the policy statements issued under subsection 3 (1), if,

- (a) the matter or proceeding was commenced on or after March 28, 1995; and
- (b) no decision has been made in respect of the matter or proceeding. 1996, c. 4, s. 41; 1998, c. 15, Sched. E, s. 27 (12).

Deemed commencement

(5) For the purposes of clauses (3) (a) and (4) (a), a matter or proceeding shall be deemed to have been commenced,

- (a) in the case of a request for an official plan amendment by any person or public body, on the day the request was received, whether or not the official plan amendment is adopted;
- (b) in the case of an application for an amendment to a zoning by-law under section 34 that has been refused or has not been decided before the day this section comes into force, on the day the application is made;
- (c) in the case of an application for a minor variance under section 45, on the day the application is made;
- (d) in the case of an application for the approval of a plan of subdivision under section 51, on the day the application is made; and
- (e) in the case of an application for a consent under section 53, on the day the application is made.

Determination of date of decision

(6) For the purposes of clauses (3) (b) and (4) (b), a decision shall be deemed to have been made,

- (a) in the case of a request for an amendment to an official plan by any person or public body, on the day that,
 - (i) the council or planning board adopts all or part of the amendment,
 - (ii) the council or planning board refuses to adopt all or part of the amendment, or
 - (iii) the approval authority proposes to approve, modifies and approves or refuses to approve all or part of the amendment;
- (b) in the case of an application for an amendment to a zoning by-law under section 34, on the day that,
 - (i) the council passes the amending by-law, or
 - (ii) the council refuses the application to amend the by-law;
- (c) in the case of an application for a minor variance under section 45, on the day a decision is made by the committee of adjustment;
- (d) in the case of an application for the approval of a plan of subdivision under section 51, on the day that the approval authority decides to give or refuses to give approval to the draft plan under subsection 51 (31); and
- (e) in the case of an application for a consent under section 53, on the day the council or the Minister gives or refuses to give a provisional consent.

Transition

(7) If subsection (3) applies to all or part of an official plan, subsection 3 (8) of this Act, as it read before the coming into force of section 3 of the *Land Use Planning and Protection Act, 1996*, does not apply to the plan. 1996, c. 4, s. 41.

Transition – residential units

76. (1) If on November 16, 1995, a detached house, semi-detached house or row house was used or occupied as two residential units, section 1, subsections 16 (2), (3) and (4), 31 (3.1) and (3.2), 35 (1), (3) and (4) and 51 (28), (29) and (30) of this Act and Ontario Regulation 384/94, as they read on November 15, 1995, continue to apply to that house.

Same

(2) Section 1, subsections 16 (2), (3) and (4), 31 (3.1) and (3.2), 35 (1), (3) and (4) and 51 (28), (29) and (30) of this Act and Ontario Regulation 384/94, as they read on November 15, 1995, continue to apply to a detached house, a semi-detached house or a row house if on or before the day on which subsection 20 (1) of the *Land Use Planning and Protection Act, 1996* comes into force,

- (a) a permit has been issued under section 8 or 10 of the *Building Code Act* permitting the erection, alteration, occupancy or use of the house for two residential units; and
- (b) the building permit has not been revoked under section 8 of the *Building Code Act, 1996*, c. 4, s. 42.

County of Oxford

77. (1) The County of Oxford may exercise all the powers of a lower-tier municipality under this Act, and no lower-tier municipality in the County of Oxford shall, except as provided in this section, exercise any powers under this Act. 2002, c. 17, Sched. B, s. 28.

Committee of adjustment

(2) The council of each lower-tier municipality in the County of Oxford shall be deemed to be a committee of adjustment. 2002, c. 17, Sched. B, s. 28.

Powers of lower-tier municipality

(3) A lower-tier municipality in the County of Oxford may exercise the powers provided in section 28, except under subsection 28 (12), and in sections 29, 30, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 44, 45, 46 and 69. 2002, c. 17, Sched. B, s. 28; 2006, c. 23, s. 29 (1).

Non-application of subs. (2)

(3.1) If a lower-tier municipality passes a by-law constituting and appointing a committee of adjustment under subsection 44 (1), subsection (2) of this section ceases to apply to the council of the lower-tier municipality on the day the by-law comes into force, except with respect to matters that, on that day, are before the council and have not been finally disposed of. 2006, c. 23, s. 29 (2).

Conflicts

(4) Despite subsection (3), if there is a conflict between a by-law passed by the County of Oxford and a by-law passed by a lower-tier municipality in the exercise of a power under subsection (3), the by-law of the County of Oxford prevails. 2002, c. 17, Sched. B, s. 28.

Land division committee

(5) Subsection 54 (1) does not apply to the County of Oxford and the County of Oxford may be or may constitute and appoint a land division committee for the purpose of giving consents under this Act. 2002, c. 17, Sched. B, s. 28.

Planning Act**ONTARIO REGULATION 544/06****PLANS OF SUBDIVISION****CONTENTS**

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Definitions

1. In this Regulation,

“hazard distance” means the distance established as the hazard distance applicable to the propane operation referenced in a risk and safety management plan required under Ontario Regulation 211/01 (Propane Storage and Handling) made under the *Technical Standards and Safety Act, 2000*; (“distance de danger”)

“propane operation” means an operation in respect of which a person is required to prepare a risk and safety management plan under Ontario Regulation 211/01 (Propane Storage and Handling) made under the *Technical Standards and Safety Act, 2000*; (“installation de propane”)

“propane operator” means a person who is required to prepare a risk and safety management plan under Ontario Regulation 211/01 (Propane Storage and Handling) made under the *Technical Standards and Safety Act, 2000*; (“exploitant d’une installation de propane”)

“reserve” means a tract of land, the legal title of which is vested in the Crown in right of Canada, that has been set apart by the Crown for the use and benefit of a First Nation; (“réserve”)

“subject land” means the land to which a proposed plan of subdivision applies. (“terrain visé”) O. Reg. 544/06, s. 1; O. Reg. 468/09, s. 1.

Information and material to be provided by applicant (s. 51 (17) of Act)

2. The information and material to be provided by an applicant for approval of a plan of subdivision, for the purposes of subsection 51 (17) of the Act, are set out in Schedule 1. O. Reg. 544/06, s. 2.

Notice (“complete application”) (s. 51 (19.4) of Act)

3. (1) Section 4 applies, with necessary modifications, to a notice given under subsection 51 (19.4) of the Act. O. Reg. 544/06, s. 3 (1).

(2) The notice referred to in subsection (1) may be given together with notice of an application, notice of a public meeting or both, for the purposes of subsection 51 (20) of the Act, or may be given separately. O. Reg. 544/06, s. 3 (2).

Notice of application for approval of plan of subdivision (s. 51 (20) (a) of Act)

4. (1) Notice of an application for approval of a plan of subdivision under clause 51 (20) (a) of the Act shall be given in the manner described in the following subsections of this section:

1. Subsection (2) or (5).
2. Subsection (7).
3. Subsection (8).
4. Subsection (9). O. Reg. 544/06, s. 4 (1).

(2) Notice shall be given,

- (a) by personal service or ordinary mail, to every owner of land within 120 metres of the subject land and every owner of land within 120 metres of land that abuts the subject land and is owned by the same person that owns the subject land; and
- (b) by posting a notice, clearly visible and legible from a public highway or other place to which the public has access, at every separately assessed property within the subject land or, if

posting on the property is impractical, at a nearby location chosen by the official described in subsection (6). O. Reg. 544/06, s. 4 (2).

(3) For the purposes of clause (2) (a), the owner of land is deemed to be the person shown on the last revised assessment roll of the municipality or on the current provincial land tax roll at the address shown on the roll but, if the approval authority is a municipality and the clerk of the municipality has received written notice of a change of ownership, the notice shall be given to the new owner instead, at the address set out in the notice. O. Reg. 544/06, s. 4 (3).

(4) For the purposes of clause (2) (a), if a condominium development is located within 120 metres of the subject land, notice may be given to the condominium corporation, according to its most recent address for service or mailing address as registered under section 7 of the *Condominium Act, 1998*, instead of being given to all owners assessed in respect of the condominium development. O. Reg. 544/06, s. 4 (4).

(5) Notice shall be given by publishing it in a newspaper that, in the opinion of the official described in subsection (6), is of sufficiently general circulation in the area adjoining the subject land that it would give the public reasonable notice of the application. O. Reg. 544/06, s. 4 (5).

(6) The official for the purposes of subsections (2) and (5) is,

(a) the clerk of the municipality, if the approval authority is,

(i) the council of the municipality or a committee of the council, or

(ii) an appointed officer;

(b) the secretary-treasurer of the municipal planning authority, if the approval authority is,

(i) a municipal planning authority or a committee of the authority, or

(ii) an appointed officer;

(c) the secretary-treasurer of the planning board, if the approval authority is a planning board; and

(d) an employee of the Ministry of Municipal Affairs and Housing, if the approval authority is the Minister. O. Reg. 544/06, s. 4 (6).

(7) Every person and public body that has given the approval authority a written request for a notice to which this section applies (including the person's or public body's address) shall be given notice by personal service, ordinary mail or fax. O. Reg. 544/06, s. 4 (7).

(8) Notice shall be given, by personal service, ordinary mail or fax, to all the following persons and public bodies except those who have notified the approval authority that they do not wish to receive notice:

1. The clerk of every local municipality or the secretary-treasurer of every municipal planning authority or planning board having jurisdiction in the area to which the plan of subdivision would apply.
2. The clerk of every upper-tier municipality having jurisdiction in the area to which the plan of subdivision would apply.
3. The secretary of every school board having jurisdiction in the area to which the plan of subdivision would apply.
4. The secretary-treasurer of every conservation authority having jurisdiction in the area to which the plan of subdivision would apply.

5. The secretary of every municipal or other corporation operating an electric utility in the local municipality or planning area to which the plan of subdivision would apply.
 6. The Executive Vice-President, Law and Development, of Ontario Power Generation Inc.
 7. The secretary of Hydro One Inc.
 8. The secretary of every company operating a natural gas utility in the local municipality or planning area to which the plan of subdivision would apply.
 9. The secretary of every company operating an oil or natural gas pipeline in the local municipality or planning area to which the plan of subdivision would apply.
 - 9.1 Every propane operator of a propane operation, if,
 - i. any part of the propane operation's hazard distance is within the area to which the plan of subdivision would apply, and
 - ii. the approval authority has been notified of the propane operation's hazard distance by a director appointed under section 4 of the *Technical Standards and Safety Act, 2000*.
 10. If any of the subject land is within 300 metres of a railway line, the secretary of the company operating the railway line.
 11. The secretary of every company operating as a telecommunication infrastructure provider in the area to which the plan of subdivision would apply.
 12. The chair or secretary of the municipal heritage committee of the municipality, if any, if the land to which the plan of subdivision would apply includes or adjoins a property or district designated under Part IV or V of the *Ontario Heritage Act*.
 13. If any of the subject land is within or abuts the area covered by the Niagara Escarpment Plan, the senior planner of the district office of the Niagara Escarpment Commission having jurisdiction over that land or the area that it abuts, as the case may be.
 14. The Niagara Parks Commission, if any of the subject land adjoins the Niagara Parkway and is in the jurisdiction of the Niagara Parks Commission.
 15. The St. Lawrence Parks Commission, if any of the subject land adjoins the 1000 Islands Parkway and is within the jurisdiction of the St. Lawrence Parks Commission under section 9 of the *St. Lawrence Parks Commission Act*.
 16. Parks Canada, if any of the subject land adjoins a historic site, park or historic canal under the jurisdiction of Parks Canada.
 17. The clerk of every municipality and the secretary-treasurer of every municipal planning authority or planning board, if any part of the municipality, municipal planning area or planning area is within one kilometre of the area to which the plan of subdivision would apply.
 18. The chief of every First Nation council, if the First Nation is located on a reserve any part of which is within one kilometre of the area covered by the proposed plan of subdivision.
O. Reg. 544/06, s. 4 (8); O. Reg. 468/09, ss. 2, 3.
- (9) If the approval authority of a proposed plan of subdivision is not the Minister, notice shall be given, by personal service, ordinary mail or fax, to the regional director of the Ministry of Municipal Affairs and Housing Municipal Services Office responsible for the region that includes the municipality or planning area where the subject land is located, if the regional director has

given the approval authority a written request to be given notice of applications for approval of plans of subdivision. O. Reg. 544/06, s. 4 (9).

(10) A notice, other than a notice that is given by posting as described in clause (2) (b), shall include the following:

1. A description of the proposed plan of subdivision.
2. A description of the land or a key map showing the location of the land proposed to be subdivided.
3. Where and when additional information regarding the proposed plan of subdivision will be available to the public for inspection.
4. The following statements:
 - i. If a person or public body does not make oral submissions at a public meeting, if one is held, or make written submissions to (*name of the approval authority*) in respect of the proposed plan of subdivision before the approval authority gives or refuses to give approval to the draft plan of subdivision, the person or public body is not entitled to appeal the decision of (*name of the approval authority*) to the Ontario Municipal Board.
 - ii. If a person or public body does not make oral submissions at a public meeting, if one is held, or make written submissions to (*name of the approval authority*) in respect of the proposed plan of subdivision before the approval authority gives or refuses to give approval to the draft plan of subdivision, the person or public body may not be added as a party to the hearing of an appeal before the Ontario Municipal Board unless, in the opinion of the Board, there are reasonable grounds to do so.
5. The following statement:
 - i. If you wish to be notified of the decision of (*name of the approval authority*) in respect of the proposed plan of subdivision, you must make a written request to (*name and address of the approval authority*).
6. If it is known that the land proposed to be subdivided is the subject of an application under the Act for a minor variance or for an amendment to an official plan, a zoning by-law or a Minister's zoning order, a statement of that fact and the file number of the application. O. Reg. 544/06, s. 4 (10).

(11) A notice given to the persons and public bodies set out in subsections (8) and (9) shall also include a copy of the application. O. Reg. 544/06, s. 4 (11).

(12) A notice that is given by posting as described in clause (2) (b) shall include the following:

1. A description of the proposed plan of subdivision.
2. Where and when additional information and material regarding the proposed plan of subdivision will be available to the public for inspection.
3. How to obtain a copy of the notice described in subsection (10). O. Reg. 544/06, s. 4 (12).

Public meeting (s. 51 (20) (b) of Act)

5. (1) If the land that is the subject of an application for approval of a plan of subdivision under subsection 51 (16) of the Act is located in a municipality or in the planning area of a planning board, the approval authority shall ensure that a public meeting is held under clause 51 (20) (b) of the Act. O. Reg. 544/06, s. 5 (1).

(2) The public meeting shall be held no sooner than 14 days after the requirements for giving notice of the meeting have been complied with. O. Reg. 544/06, s. 5 (2).

(3) Subsections 4 (1) to (9) apply, with necessary modifications, to giving notice of a public meeting under subsection (1). O. Reg. 544/06, s. 5 (3).

(4) A notice, other than a notice that is given by posting as described in clause 4 (2) (b), shall include the following:

1. The date, time and location of the public meeting.
2. A description of the proposed plan of subdivision.
3. A description of the land or a key map showing the location of the land proposed to be subdivided.
4. The following statements:
 - i. If a person or public body does not make oral submissions at the public meeting or make written submissions to (*name of the approval authority*) in respect of the proposed plan of subdivision before the approval authority gives or refuses to give approval to the draft plan of subdivision, the person or public body is not entitled to appeal the decision of (*name of the approval authority*) to the Ontario Municipal Board.
 - ii. If a person or public body does not make oral submissions at the public meeting or make written submissions to (*name of the approval authority*) in respect of the proposed plan of subdivision before the approval authority gives or refuses to give approval to the draft plan of subdivision, the person or public body may not be added as a party to the hearing of an appeal before the Ontario Municipal Board unless, in the opinion of the Board, there are reasonable grounds to do so. O. Reg. 544/06, s. 5 (4).

(5) A notice that is given by posting as described in clause 4 (2) (b) shall include the following:

1. The date, time and location of the public meeting.
2. A description of the proposed plan of subdivision.
3. Where and when additional information and material regarding the proposed plan of subdivision will be available to the public for inspection.
4. How to obtain a copy of the notice described in subsection (4). O. Reg. 544/06, s. 5 (5).

Request by approval authority (s. 51 (21) of Act)

6. (1) This section applies if an approval authority makes a request to a local municipality or planning board under subsection 51 (21) of the Act. O. Reg. 544/06, s. 6 (1).

(2) If the approval authority requests that the local municipality or planning board give notice of an application for approval of a plan of subdivision,

- (a) the notice shall include, if the approval authority so directs, a request to submit any written comments to the approval authority; and
- (b) the local municipality or planning board shall submit to the approval authority,
 - (i) a certified copy of the notice described in subsection 5 (4), and
 - (ii) an affidavit or sworn declaration by an employee of the local municipality or planning board certifying that the notice requirements under clause 51 (20) (a) of the Act have been complied with. O. Reg. 544/06, s. 6 (2).

- (3) If the approval authority requests that the local municipality or planning board hold a public meeting, the local municipality or planning board shall submit to the approval authority,
- (a) the original or a copy of all written submissions and comments received by the local municipality or the planning board on or before the day the public meeting was held;
 - (b) an affidavit or sworn declaration by an employee of the local municipality or planning board certifying that the notice requirements and the requirement for holding a public meeting under clause 51 (20) (b) of the Act have been complied with;
 - (c) an affidavit or sworn declaration by an employee of the local municipality or planning board listing all persons and public bodies that made oral submissions at the public meeting; and
 - (d) a copy of the minutes of the public meeting. O. Reg. 544/06, s. 6 (3).

Condominiums

7. Sections 3 to 6 do not apply to an application for approval of a condominium description, other than an application for approval of a vacant land condominium description or a common elements condominium description. O. Reg. 544/06, s. 7; O. Reg. 468/09, s. 4.

Record compiled by approval authority for O.M.B. (s. 51 (35) (a) of Act)

8. A record compiled by the approval authority and forwarded to the Municipal Board under clause 51 (35) (a) of the Act shall include the following:

1. The original or a certified copy of the application received by the approval authority.
2. The original or a certified copy of the prescribed information and material received by the approval authority under subsection 51 (17) of the Act.
3. If applicable, the original or certified copy of any other information and material that the applicant was required to provide to the approval authority.
4. The original or a certified copy of the notice of appeal and the date it was received.
5. The original or a copy of all written submissions and comments received, and the date they were received.
6. If the local municipality or planning board gave notice of the application, the original or a certified copy of the affidavit or sworn declaration described in subclause 6 (2) (b) (ii).
7. If the approval authority gave notice of the application, an affidavit or sworn declaration of an employee of the approval authority certifying that the notice requirements under clause 51 (20) (a) of the Act have been complied with.
8. If the local municipality or planning board held the public meeting, the affidavits or sworn declarations described in clauses 6 (3) (b) and (c).
9. If the approval authority held the public meeting,
 - i. an affidavit or sworn declaration of an employee of the approval authority certifying that the notice requirements and the requirement for holding a public meeting under clause 51 (20) (b) of the Act have been complied with, and
 - ii. an affidavit or sworn declaration of an employee of the approval authority listing all persons and public bodies that made oral submissions at the public meeting.
10. A copy of the minutes of the public meeting.

11. A copy of any planning report considered by the approval authority. O. Reg. 544/06, s. 8.

Notice of approval authority's decision (s. 51 (37) of Act)

9. (1) Notice of the approval authority's decision under subsection 51 (37) of the Act shall include the following:

1. A copy of the decision, including the conditions and the lapsing provision, if any.
2. The last date for filing a notice of appeal, and a statement that the notice of appeal,
 - i. must be filed with the approval authority,
 - ii. must set out the reasons for the appeal, and
 - iii. must be accompanied by the fee required by the Municipal Board.
3. A statement that any of the following may, at any time before the approval of the final plan of subdivision, appeal any of the conditions imposed by the approval authority to the Municipal Board by filing a notice of appeal with the approval authority:
 - i. the applicant,
 - ii. any public body that, before the approval authority made its decision, made oral submissions at a public meeting or written submissions to the approval authority,
 - iii. the Minister,
 - iv. the municipality in which the subject land is located, or the planning board in whose planning area it is located,
 - v. if the subject land is not located in a municipality or planning area, any public body.
4. If applicable, the following statements:
 - i. You will be entitled to receive notice of any changes to the conditions of approval of the proposed plan of subdivision if you have made a written request to be notified of changes to the conditions.
 - ii. No person or public body shall be added as a party to the hearing of an appeal regarding any changes to the conditions of approval unless the person or public body, before the approval authority made its decision, made oral submissions at a public meeting or written submissions to the approval authority, or made a written request to be notified of the changes to the conditions.
5. The following statements:
 - i. Only individuals, corporations or public bodies may appeal decisions in respect of a proposed plan of subdivision to the Ontario Municipal Board. A notice of appeal may not be filed by an unincorporated association or group. However, a notice of appeal may be filed in the name of an individual who is a member of the association or group on its behalf.
 - ii. No person or public body shall be added as a party to the hearing of the appeal of the decision of the approval authority, including the lapsing provisions or the conditions, unless the person or public body, before the decision of the approval authority, made oral submissions at a public meeting or written submissions to the council or, in the Ontario Municipal Board's opinion, there are reasonable grounds to add the person or public body as a party.

6. If it is known that the subject land is the subject of an application under the Act for a minor variance or for an amendment to an official plan, a zoning by-law or a Minister's zoning order, a statement of that fact and the file number of the application. O. Reg. 544/06, s. 9 (1).

(2) If the approval authority of a proposed plan of subdivision is not the Minister, notice of the decision of the approval authority under subsection 51 (37) of the Act shall be given, by personal service, ordinary mail or fax, to the regional director of the Ministry of Municipal Affairs and Housing Municipal Services Office responsible for the region that includes the municipality or planning area where the subject land is located, if the regional director has given the approval authority a written request to be given notice of its decisions on applications for approval of plans of subdivision. O. Reg. 544/06, s. 9 (2).

Notice of changes to conditions of draft approval (s. 51 (45) of Act)

10. (1) Notice of changes to the conditions of draft approval of a plan of subdivision under subsection 51 (45) of the Act shall include the following:

1. A copy of the proposed changes to the conditions of draft approval.
2. A statement that any of the following may, at any time before the approval of the final plan of subdivision, appeal any of the conditions of draft approval to the Municipal Board by filing a notice of appeal with the approval authority:
 - i. the applicant,
 - ii. any public body that, before the approval authority made its decision, made oral submissions at a public meeting or written submissions to the approval authority,
 - iii. the Minister,
 - iv. the municipality in which the subject land is located, or the planning board in whose planning area it is located,
 - v. if the subject land is not located in a municipality or planning area, any public body.
3. The last date for filing a notice of appeal, and a statement that the notice of appeal,
 - i. must be filed with the approval authority,
 - ii. must set out the reasons for the appeal, and
 - iii. must be accompanied by the fee required by the Municipal Board.
4. The following statements:
 - i. Only individuals, corporations or public bodies may appeal decisions in respect of a proposed plan of subdivision to the Ontario Municipal Board. A notice of appeal may not be filed by an unincorporated association or group. However, a notice of appeal may be filed in the name of an individual who is a member of the association or group on its behalf.
 - ii. No person or public body shall be added as a party to the hearing of an appeal regarding any changed conditions imposed by the approval authority, unless the person or public body, before the approval authority made its decision, made oral submissions at a public meeting or written submissions to the approval authority, or made a written request to be notified of the changes to the conditions. O. Reg. 544/06, s. 10 (1).

(2) If the approval authority of a proposed plan of subdivision is not the Minister, notice of changes to the conditions of approval of a plan of subdivision under subsection 51 (45) of the Act

shall be given, by personal service, ordinary mail or fax, to the regional director of the Ministry of Municipal Affairs and Housing Municipal Services Office responsible for the region that includes the municipality or planning area where the subject land is located, if the regional director has given the approval authority a written request to be given notice of changes to the conditions of approval of plans of subdivision. O. Reg. 544/06, s. 10 (2).

Record compiled by approval authority for O.M.B. (s. 51 (50) (a) of Act)

11. A record compiled by the approval authority and forwarded to the Municipal Board under clause 51 (50) (a) of the Act shall include the following:

1. The information and material set out in section 8.
2. A copy of the decision of the approval authority, including the conditions and the lapsing provision, if any.
3. A statement by an employee of the approval authority as to whether the decision of the approval authority,
 - i. is consistent with the policy statements issued under subsection 3 (1) of the Act,
 - ii. conforms to or does not conflict with any applicable provincial plan or plans, and
 - iii. conforms to the official plan of the municipality or planning board.
4. If applicable, an affidavit or sworn declaration by an employee of the approval authority certifying that the notice requirements under subsection 51 (37) of the Act have been complied with.
5. If applicable, a copy of the proposed changes to the conditions of draft approval.
6. If applicable, an affidavit or sworn declaration by an employee of the approval authority certifying that the notice requirements under subsection 51 (45) of the Act have been complied with. O. Reg. 544/06, s. 11.

Transition

12. Despite the revocation of Ontario Regulation 196/96 (Plans of Subdivision) made under the Act, the following shall be continued and disposed of as if Ontario Regulation 196/96 had not been revoked:

1. Any matter or proceeding that is deemed to have been commenced before May 22, 1996, under section 75 of the Act.
2. Any matter or proceeding that is commenced on or after May 22, 1996 but before the day this Regulation comes into force. O. Reg. 544/06, s. 12.
13. OMITTED (REVOKES OTHER REGULATIONS). O. Reg. 544/06, s. 13.
14. OMITTED (PROVIDES FOR COMING INTO FORCE OF PROVISIONS OF THIS REGULATION). O. Reg. 544/06, s. 14.

SCHEDULE 1

INFORMATION AND MATERIAL TO BE PROVIDED WITH AN APPLICATION UNDER
SUBSECTION 51 (17) OF THE ACT

1. The name, address, telephone number and, if applicable, the e-mail address of the owner of the subject land, and of the agent if the applicant is the owner's authorized agent.

2. The date of the application.
3. A description of the subject land, including such information as the municipality, or the geographic township in unorganized territory, concession and lot numbers, reference plan and part numbers, and street names and numbers.
4. Whether there are any easements or restrictive covenants affecting the subject land.
5. If the answer to section 4 is yes, a description of each easement or covenant and its effect.
6. If known,
 - (a) whether the subject land was ever the subject of an application for approval of a plan of subdivision under section 51 of the Act, for a consent under section 53 of the Act, for a minor variance, for approval of a site plan, or for an amendment to an official plan, a zoning by-law or a Minister's zoning order; and
 - (b) if the answer to clause (a) is yes, the file number and status of the application.
7. The total number of lots or blocks shown on the draft plan, and the number of lots or blocks shown on the draft plan for each of the following uses:
 1. Detached residential.
 2. Semi-detached residential.
 3. Multiple attached residential.
 4. Apartment residential.
 5. Seasonal residential.
 6. Mobile home.
 7. Other residential.
 8. Commercial.
 9. Industrial.
 10. Institutional.
 11. Park or open space.
 12. Roads.
 13. Other.
8. The total number of units or dwellings shown on the draft plan, and the number of units or dwellings shown on the draft plan for each of the uses listed in section 7, except the uses described in paragraphs 11 and 12 of that section.
9. In hectares, the total area of land shown on the draft plan, and the area of land shown on the draft plan for each of the uses listed in section 7.
10. The total number of units or dwellings shown on the draft plan per hectare, and the number of units or dwellings shown on the draft plan per hectare for each of the uses listed in section 7, except the uses described in paragraphs 11 and 12 of that section.
11. The total number of parking spaces shown on the draft plan, and the number of parking spaces shown on the draft plan for each of the uses listed in section 7, except the uses described in paragraphs 1, 2, 11 and 12 of that section.

12. If the application is for approval of a condominium description, the number of parking spaces shown on the draft plan for detached and semi-detached residential use.

13. If one of the uses referred to under section 7, 8, 9, 10 or 11 is identified as “other residential”, “institutional” or “other”, a description of the use.

14. The current designation of the subject land in the applicable official plan.

15. Whether access to the subject land will be,

(a) by a provincial highway, a municipal road that is maintained all year or seasonally, another public road or a right of way; or

(b) by water.

16. If access to the subject land will be by water only, the parking and docking facilities to be used and the approximate distance of these facilities from the subject land and the nearest public road.

17. Whether water will be provided to the subject land by a publicly owned and operated piped water system, a privately owned and operated individual or communal well, a lake or other water body or other means.

18. If the plan would permit development of more than five lots or units on privately owned and operated individual or communal wells,

(a) a servicing options report; and

(b) a hydrogeological report.

19. Whether sewage disposal will be provided to the subject land by a publicly owned and operated sanitary sewage system, a privately owned and operated individual or communal septic system or other means.

20. If the plan would permit development of five or more lots or units on privately owned and operated individual or communal septic systems,

(a) a servicing options report; and

(b) a hydrogeological report.

21. If the plan would permit development of fewer than five lots or units on privately owned and operated individual or communal septic systems, and more than 4500 litres of effluent would be produced per day as a result of the development being completed,

(a) a servicing options report; and

(b) a hydrogeological report.

22. If the plan would permit development of fewer than five lots or units on privately owned and operated individual or communal septic systems, and 4500 litres of effluent or less would be produced per day as a result of the development being completed, a hydrogeological report.

23. Whether the subject land contains any areas of archaeological potential.

24. If the plan would permit development on land that contains known archaeological resources or areas of archaeological potential,

(a) an archaeological assessment prepared by a person who holds a licence that is effective with respect to the subject land, issued under Part VI (Conservation of Resources of Archaeological Value) of the *Ontario Heritage Act*; and

- (b) a conservation plan for any archaeological resources identified in the assessment.
- 25. Whether storm drainage will be provided by sewers, ditches, swales or other means.
- 26. If the application is for approval of a condominium description,
 - (a) whether a site plan for the proposed condominium has been approved and whether a site plan agreement has been entered into;
 - (b) whether a building permit for the proposed condominium has been issued;
 - (c) whether the proposed condominium is under construction or has been completed;
 - (d) if construction has been completed, the date of completion; and
 - (e) whether the proposed condominium is a conversion of a building containing residential rental units, and in that case the number of units to be converted.
- 27. Whether the plan is consistent with policy statements issued under subsection 3 (1) of the Act.
- 28. Whether the subject land is within an area of land designated under any provincial plan or plans.
- 29. If the answer to section 28 is yes, whether the plan conforms to or does not conflict with the applicable provincial plan or plans.
- 30. If the applicant is not the owner of the subject land, the owner's written authorization to the applicant to make the application.
- 31. An affidavit or sworn declaration by the applicant that the information required under this Schedule and provided by the applicant is accurate.

O. Reg. 544/06, Sched. 1.

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¹ **068** Carleton Condominium Corporation No. 347 v. Trendsetter Developments Ltd.et al. (1992)
[individual controlling the declarant is good faith purchaser]]

212- National Trust Co. v. Grey Condominium Corp. No. 36 (1995)[owner by mortgage default not a declarant]

423 - MTCC 1250 V The Mastercraft Group et. at.(2007)) While parties may not be at arm's length, that in itself is not proof that a transaction between them is not made in good faith within the meaning of the definition of 'declarant' in the Act)

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² **384 and 385** York Region Condominium Corp. No. 771 v. Year Full Investment (Canada) (1992/1993)[excess water usage, declaration interpreted to exclude same from common expenses]

248 Basmadjian and York Condominium Corp. No. 52 (1981) [rental administration fee cannot be charged to individual owner by declaration or otherwise]

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³ **266** Peel Condominium Corporation No. 11 and Caroe et al. (1974) [declaration cannot prohibit renting of unit to third party]

365 York Condominium Corp. No. 400 v. Comcraft Services (1988) [age restriction not authorized to be done by by-law, right of ownership, must be in declaration]

192 Metropolitan Toronto Condominium Corp. No. 776 v. Gifford (1989) [no pets clause enforced]

355 York Condominium Corp. No. 122 v. Sibblis (1989) [satellite dish in excl. use common elements, compliance order refused by court]

381 York Region Condominium Corp. No. 585 v. Gilbert (1990) [no pets restrictions in declaration and rules enforced]

377 York Condominium Corporation No. 216 v. Dudnik (Div. Ct.) (1991) [provision restricting occupant's age invalid, discrimination on the basis of family status]

215 Nipissing Condominium Corp. No. 24 v. Ferris (1993) [no pets clause, court's discretion not to enforce exercised]

193 Metropolitan Toronto Condominium Corp. No. 850 v. Oikle (1994) [prohibition against transient use (temporary accommodation) enforced]

233 Peel Condominium Corp. No. 338 v. Young (1996) [restriction in declaration against pets over 25 lbs enforced]

235 Peel Condominium Corp. No. 449 v. Hogg (1997) [pet prohibition enforced]

341 Waterloo North Condominium Corp. No. 198 v. Donner (1997) [prohibition against pets contrary to Human Rights Code where pet assists hearing impaired occupant]

207 Metropolitan Condominium Corp. No. 699 and 1177 Yonge Street Inc.(Re) (1998) [provision in declaration prohibiting conveyance of parking unit to non-unit owner does not prevent leasing to others]

400 215 Glenridge Ave. Ltd. Partnership v. Waddington (2005) (Conditions or restrictions contained in the declaration respecting the occupancy of a unit are subject to the same constraint governing the scope of condominium rules found in section 58(1), namely, they are to promote the safety, security of the owners/property or prevent unreasonable interference with the use/enjoyment of the property. Consequently, a blanket prohibition against pets will not be enforced).

419 Niagara North Condominium Corp. No. 125 v. Waddington (2007) [Where an application brought by a condominium owner with the knowledge and evidentiary assistance of a condominium corporation to oust a tenant's pet was dismissed, a subsequent application for identical relief brought by the corporation was properly dismissed as an abuse of process.]

413 Waterloo North Condominium Corp. No.186 v. Weidner (2003) (A 'no pets' clause in a declaration is enforceable in the absence of evidence of a violation of the Ontario Human Rights Code.)

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⁴ **058-** Carleton Condominium Corp No. 106 et al. v. Mastercraft Development Corp. Ltd (1985) [corporation has no claim to proceeds for declarants sale of parking spaces]

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065 and 070 Carleton Condominium Corp. No. 441 v. Owners et al. of Carleton Condominium Plan No. 441(1997/1998) [declaration provisions dealing with shared facilities on external lands proper, court will not order amendment to delete same]

294 Simcoe Condominium Corp. No. 67 v. McDermott (1998) [order directing removal/replacement of exterior window]

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309 Stockey v. Peel Condominium Corp. No. 174 (1996) [exterior garage doors included in unit]

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134 Hidden Valley Lakeside Condominiums Inc. v. Vercaigne (1997) [recreational development is residential]

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375 York Condominium Corporation No. 167 et al. v. Newrey Holdings (1980) [unit owned by declarant and rented to corp. for janitor's suite was not part of the property]

058- Carleton Condominium Corp No. 106 et al. v. Mastercraft Development Corp. Ltd (1985) [corporation has no claim to proceeds for declarant's sale of parking spaces]

380 York North Condominium Corp. No. 5 v. Van Horne Clipper Properties Ltd. (1987) [superintendents suite not corporation property, declarant entitled to proceeds on sale to corp.]

185 Metropolitan Condominium Corp. No. 979 v. Camrost York Development Corp. (1995) [declarant entitled to annual fee paid by third party for use of easement over common elements but created before registration]

234 and 267 Peel Condominium Corporation No. 417 and Tedley Homes Ltd. et al. (1993/1997) [units with zero allocation of common interest sold by declarant to corp., full disclosure, sale valid, disclosure of interest not required by directors]

343 and 344 Wellington Condominium Corporation No. 61 v. Marilyn Drive Holdings Limited (1994/1998) [superintendent's suite corporate property, damages determined by reference to 'live-out' super. salary]

196 Middlesex Condominium Corp. No. 87 v. 600 Talbot Street London Ltd.] (1998) [superintendent's suite corporate property, order made to require declarant to convey to corp. free of charge]

Statute Citations

124A - Peel Standard Condominium Corporation No. 668 v Dayspring Phase I Limited , Brampton et al. (2006) Condominium corporation is a creature of statute and if it enters into a contract which, in form and substance, does not comply with the enabling legislation then the contract is unenforceable.

125 -⁹ 065 **and** **070** Carleton Condominium Corp. No. 441 v. Owners et al. of Carleton Condominium Plan No. 441(1997/1998) [declaration provisions dealing with shared facilities on external lands proper, court will not order amendment to delete same, of value to unit owners]

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115 Eglinton Place Inc. v. Ontario (Ministry of Consumer and Commercial Relations) (2000) [corporation may grant a release of an easement]

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134 Hidden Valley Lakeside Condominiums Inc. v. Vercaigne (1997) [recreational development is residential]

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¹⁰**115** Eglinton Place Inc. v. Ontario (Ministry of Consumer and Commercial Relations) (2000)
[corporation may grant a release of an easement]

¹¹ **134** Hidden Valley Lakeside Condominiums Inc. v. Vercaigne (1997) [recreational development is residential]

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414- Webb v. MTCC No. 979 (2003) (While there is a serious issue to be tried as to whether a change from one cable provided to another is authorized under the Act, it does not constitute a circumstance which would justify an interim injunction being granted).

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167 Loader et al. v. Rose Park Wellesley Investments Ltd. et al. (1980) [class action suit not appropriate, corp. should bring action under this section]

372 York Condominium Corp. No. 76 v. Rose Park Wellesley Investments Ltd. et al. (1984) [declarant has no liability for deterioration in common elements where good building practices originally followed]

109 Durham Condominium Corp. No. 76. v. H. Kassinger Construction Ltd. (1995) [corp. may bring action on behalf of existing owners]

196 Middlesex Condominium Corp. No. 87 v. 600 Talbot Street London Ltd.] (1998) [superintendents suite property of corporation, order to declarant to convey title without cost]

095 Crawford v. London (City) (2000) [class proceeding appropriate]

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205- Metropolitan Condominium Corp. No. 539 et al. v. Priene Ltd. et al. (1984) [this right was implied in the old legislation]

060- Carleton Condominium Corp. No. 11 v. Shenkman Corp. Ltd (1985) [damages for faulty common elements]

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188 Metropolitan Toronto Condominium Corp. No. 539 v. Chapters Inc. (1999) [notice not required where corporation is party to contract]

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069 Carroll v. Metropolitan Toronto Condominium Corp. No. 560 (1992)[liability for injury damages caused by faulty stair]

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270 Reiners et al. and Mercer et al. (1998) [vote of a majority of owners means a majority vote amongst the majority of owners voting]

194 Metropolitan Toronto Condominium Corp. No. 858 v. Simmelsgaard (1997) [vote to remove directors is majority of votes of a majority of owners]

227 Page v. Lafleche (1997) [vote to remove directors is majority of votes of a majority of owners]

133 -

116 Epp v. Hood (1990) [responsibilities of directors and officers, solicitor client costs to disadvantage owner/applicant]

068 Carleton Condominium Corporation No. 347 v. Trendsetter Developments Ltd.et al. (1992) [directors owe fiduciary duty to corporation]

212 National Trust Co. v. Grey Condominium Corp. No. 36 (1995) [directors are not fiduciaries of the owners]

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116 Epp v. Hood (1990) [responsibilities of directors and officers, solicitor client costs to disadvantage owner/applicant]

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234 and 267 Peel Condominium Corporation No. 417 and Tedley Homes Ltd. et al. (1993/1997) [units with zero allocation of common interest sold by declarant to corp., full disclosure, sale valid, disclosure of interest not required by directors]

156 Lambton Condominium Corp. No. 16. v. Plowright (1997)

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359 York Condominium Corp. No. 206 v. Almeida & Almeida Landscaping Co. (1992) [sufficiency of requisition questioned, injunction granted]

212 National Trust Co. v. Grey Condominium Corp. No. 36 (1995)

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238 Peel Condominium Corp. No. 516 v. Williams (1999)

283 Rohoman v. York Condominium Corp. No. 141 (2000) [court order to ensure requisitionists can call meeting]

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147 Keyes v. Metropolitan Toronto Condominium Corp. 876 (1995) [under the old legislation only the first mortgagee could vote]

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112 and 113 Eberts v. Carleton Condominium Corp. No. 396 (1999-2000) [one vote per unit is fundamental]

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383 York Region Condominium Corp. No. 545 v. 602809 Ontario Limited (1989) [restrictions on parking and use of driveways valid subject of bylaw]

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248 Basmadjian and York Condominium Corp. No. 52 (1981) [rental administration fee cannot be charged to individual owner by declaration or bylaw]

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365 York Condominium Corp. No. 400 v. Comcraft Services (1988) [age restriction not authorized to be done by by-law, right of ownership]

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302 Somerset Ridge Development Corp. v. Middlesex Condominium Corp. No. 134 (1991) [special assessments voided, by-law revising budget required]

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050 Boychuk et al. v. Essex Condominium Corp. No. 2 (1987) [confirmation may be deemed as authorized by by-law]

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383 York Region Condominium Corp. No. 545 v. 602809 Ontario Limited (1989) [by-law not proven to be force, cannot be enforced]

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³⁰ **277** York Condominium Corp. No. 42 and Melanson (1975) [by-law restriction against ‘animals’ on property is unreasonable]

365 York Condominium Corp. No. 400 v. Comcraft Services (1988) [age restriction not authorized to be done by by-law, right of ownership]

190 Metropolitan Toronto Condominium Corp. No. 702 v. Sonshine (1989) [canopy added to front door in common elements, court order to comply by removing same, breach of rules]

371 York Condominium Corp. No. 71 v. Sullivan (1990) [rule prohibiting commercial vehicle parking, valid, court order to comply]

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³¹ **363 and 364** York Condominium Corp. No. 382 v. Dvorchik (1992/1997) [rule prohibiting pets over 25 lbs. is valid and enforceable]

342 Wellington Condominium Corp. No. 70 v. Wallace (1998) [rule prohibiting resident parking in common elements is reasonable and enforceable]

408 Metropolitan Toronto Condominium Corp. No.545 v. Stein et al (2006) (The principle that the court will not interfere in a rule laid down by a condominium board unless it is clear unreasonable or contrary to the scheme of the Act has no application to a decision by the board to require owners to adhere to a specified maintenance standard for a fan coil in a unit where the maintenance is the owners responsibility, an alterative standard is not shown to be ineffective, and the board’s standard was not embodied in a Rule of the corporation.)

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401-Apartment International Inc. v. Metropolitan Toronto Condominium Corp. No. 117 (2002) (An action against a condo. corporation for intentional interference in economic relations cannot be sustained where the condo. was simply enforcing its rules and there was no proof of damage).

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412- Simcoe Condominium Corp. No. 78 v. Simcoe Condominium Corp. No. 50, 52, 53 et al (2006) (The provisions of section 59 (joint by-laws) are optional, not mandatory. Shared facilities agreements which delegate day to day operational and management decisions to a shared facility committee are valid although such decisions are not required to be ratified by the respective boards.)

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043- Benner et al. v. HLS York Developments Ltd. (1985) [adequate disclosure]

015 and 014 and 015 Abdool v. Somerset Place Developments of Georgetown Ltd. (1991)

055 Buyanovsky v. Townsgate 1 Ltd. (1993) [disclosure adequate]

186 Metropolitan Toronto Condominium Corp No. 858 v. Tornat Construction Inc. (1994) [failure to disclose adjacent public housing not a material non-disclosure]

072 Ceolaro et al v. York Humber Ltd. et al (1994) [adjacent property ex-landfill site, omission to make disclosure not material, no health issue]

239 Phyllis Israel et al v. Townsgate I et al (1994) [disclosure adequate, purchaser bound]

142 Jaremko v. Shipp Corp. (1995) [material non-disclosure, truck parking adjacent to suite, damages]

134 Hidden Valley Lakeside Condominiums Inc. v. Vercaigne (1997) [inadequate disclosure statement]

156 Lambton Condominium Corp. No. 16. v. Plowright (1997)

049 Bondy v. P.C. Cove Builders Inc. (1991) [adequate disclosure]

236 and 237 Peel Condominium Corp. No. 505 v. Cam-Valley Homes Ltd. (1999-2001)
[adequacy of disclosure must be determined by the contents of the entire package; vendor has obligation to fulfill contract]

196 Middlesex Condominium Corp. No. 87 v. 600 Talbot Street London Ltd.] (1998) [consideration of principles of disclosure]

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379 York Humber Ltd. v. Mesa (1997) [no disclosure statement, agreement not binding]

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338 Village Grove Corp. v. Collins (1997) [inadequate disclosure of amenities, agreement of purchase and sale not binding]

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282 Rogers Cove Ltd. v. Slood (1991) [exercise of right of rescission on material change]

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015 and 014 and 015 Abdool v. Somerset Place Developments of Georgetown Ltd. (1991) [no material changes, all documents must be looked at]

197- Milgram v. York Humber Ltd. (1992) [change in number of units, not material change]

019 Aiken v. Dockside Village Inc. (1993) [no material amendments]

075 Chien v. Law Development Group (Thornhill) Ltd. (1998) [cumulative changes material, purchaser not bound]

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243 Rassos v. Greystone Walk Ltd (1991) [court ruling on law re: adult lifestyle community not a material change]

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282 Rogers Cove Ltd. v. Slood (1991) [exercise of right of rescission on material change]
500 Glencairn Ltd. v. Farkas (1994) [no material amendments, agreement binding on purchaser seeking to rescind]

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254 Dazol Developments Ltd. and York Condominium Corporation 329 et al (1979) [budget shortfall may not be subject of lien by corporation against units owned by declarant

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427 - MTCC No. 551 v. Mani Adam (2006) (A requestor does not have to give reasons why a request is made under section 77 for the names and addresses of board members.)

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⁴⁰ **169** Lucas et al. v. Durno & Shea (1985) [customary legal practice is to obtain status certificate]

029 Armstrong et al v. London Life et al (1999)

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020 Aita et al. v. Silverstone Towers Ltd. (1978)

068 Carleton Condominium Corporation No. 347 v. Trendsetter Developments Ltd. et al. (1992)

232 Peel Condominium Corp. No. 199 v. Sanrose Construction (Dixie) Ltd. et al. (1992)

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289 Scaroni v. Rosepol Holdings Ltd . (1995) [failure to register in timely way, purchaser not bound]

297 Singer v. Reemark Sterling I Limited (1992)

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285 Russ-Cad Management Ltd. v. Bayview 400 Industrial Developments Inc. (1992)

287 and 288 Scanlon v. Castlepoint Development Corp. (1991/1992)

332 Townsgate 1 Ltd. v. Klein (1994)

152 Kratz v. Parkside Hill Ltd. (1995)

160 -

259 Lamb and Costain Ltd. (1985) [additional payment violates statutory restriction, void]

257 Hashim et al. and Costain Ltd. (1986) [additional payment violates statutory restriction, void]

022 Albrecht v. Opemoco Inc. (Ont. H.C.J.) (1989) [additional payment violates statutory restriction, void]

031 Atherley v. Somerset Place Developments of Georgetown Ltd. (1993) [additional charges, vendor failure to abandon demand for payment, purchasers not bound]

032 Atherley v. Somerset Place Developments of Georgetown Ltd. (1995) [dispute about interest on phantom mortgage, tender on purchaser justified]

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340 Ward-Price v. Mariners Haven Inc. et al.; Clement et al., Third Parties (2000) [under the old legislation interest was not a trust obligation]

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170 Lucy v. Shipp Corp. (1991) [interest claim, class action appropriate]

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⁴⁷ **384 and 385** York Region Condominium Corp. No. 771 v. Year Full Investment (Canada) (1992/1993)[excess water usage, declaration interpreted to exclude same from common expenses]

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⁴⁸ **254** Dazol Developments Ltd. and York Condominium Corporation 329 et al (1979) [budget shortfall may not be subject of lien by corporation against units owned by declarant]

302 Somerset Ridge Development Corp. v. Middlesex Condominium Corp. No. 134 (1991) [legal costs must be reasonable, amount may be referred for assessment]

187 Metropolitan Toronto Condominium Corp. No. 1006 v. Hollywood Plaza (1995) [legal costs unreasonable]

417 York Condominium Corp. No. 482 v. Christiansen et al (2003) (The right of a Corporation to lien a unit for arrears of common expenses does not entitle it to lien other units owned by the same person where the common expenses for those units are not in default).

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⁴⁹ **211** National Trust Co. v. Grey Condominium Corp. No. 36 (1993) [mortgagee in possession, rents must be paid to common expenses ahead of owners debt]

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⁵⁰ **373** York Condominium Corp. No. 87 v. York Condominium Corp. No. 59 (1983) [repair should not be interpreted in a narrow way]

374 York Condominium Corporation No. 161 et al. v. York-Hanover Ltd., (1983)

262 Manton and York Condominium Corp. No. 461 (1984) [obligation to maintain includes obligation to correct structural fault]

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415- Wellington Condominium Corporation No.7 v. Hughes et al (2004) (The obligation under sec. 89(2) to repair or replace after ‘damage or failure’ does not include normal wear and tear. In the absence of a special provision in the declaration, replacement needed due to normal wear and tear is the responsibility of the owners).

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⁵¹ **309** Stockey v. Peel Condominium Corp. No. 174 (1996) [exterior garage doors included in unit]

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⁵² **062** Carleton Condominium Corp. No. 32 v. Camdev Corp. (1999) [implied warranty of fitness may be waived by contract]

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⁵³ **060-** Carleton Condominium Corp. No. 11 v. Shenkman Corp. Ltd (1985) [damages for faulty common elements]

059 Carleton Condominium Corp. No. 109 v. Tartan Development Corp. (1995) [ONHWP does not oust implied warranties]

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⁵⁴ **050** Boychuk et al. v. Essex Condominium Corp. No. 2 (1987) [replacing roof not an alteration or addition]

347 Winfair Holdings (Lagoon City) v. Simcoe Condominium Corp. No. 46 (1998) [repudiation of licence agreement, substantial change, owner's vote required]

414 Webb v. MTCC No. 979 (2003) (While there is a serious issue to be tried as to whether a change from one cable provided to another is authorized under the Act, it does not constitute a circumstance which would justify an interim injunction being granted.)

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⁵⁵ **181** McDonough v. York Condominium Corp. No. 41 (1990) [80% vote (old legislation)required to close pool, inspector appointed]

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362 York Condominium Corp. No. 35 v. Mosseau (1995) [a minor change may be so insignificant as to be irrelevant]

251- Carleton Condominium Corp. No.279 and Rochon et al. (1987) [satellite dish on roof ordered removed, permission of declarant/corporation irrelevant, no approval by owners, no reference in disclosure statement]

174 and 175 Marafioti v. Metropolitan Toronto Condominium Corp. No. 775 (1994/1997) [deck ordered removed from common elements]

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231 Peel Condominium Corp. No. 16 v. Vaughan (1996) [damage by tenants not covered by condominium policy, insurer subrogated to corporation and may sue tenants]

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⁵⁸ **198** Miluzzi v. York Condominium Corp. No. 60 (1996) [\$5000 deductible is reasonable]

308 Stevens et al. v. Simcoe Condominium Corporation No. 60 (1998) [insurance deductible payable by owner]

424 - Zafir v. York Condo. No. 632 (2007) (While an 'act or omission' referenced in section 105 does not necessarily import a requirement of negligence, a direction from a condominium corporation which increases the likelihood of damage occurring makes it inequitable to hold the owner liable for damages. A lien relating to the foregoing should be discharged.)

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065 and 070 Carleton Condominium Corp. No. 441 v. Owners et al. of Carleton Condominium Plan No. 441(1997/1998) [declaration provisions dealing with shared facilities on external lands proper, court will not order amendment to delete same]

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230 Peel Condominium Corp. No. 117 v. Peel Condominium Corp No. 82 (1991) [one of three corp.'s cannot terminate joint management agreement]

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347 Winfair Holdings (Lagoon City) v. Simcoe Condominium Corp. No. 46 (1998) [license agreement cannot be terminated at will, substantial change]

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026 Amberwood Investments Limited et al. v. Durham Condominium Corporation No. 123 (2000)
[mutual use agreement, positive covenants do not run with land]

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251- Carleton Condominium Corp. No.279 and Rochon et al. (1987) [satellite dish on roof ordered removed, permission of declarant/corporation irrelevant, no approval by owners, no reference in disclosure statement]

174 and 175 Marafioti v. Metropolitan Toronto Condominium Corp. No. 775 (1994/1997)
[deck ordered removed from common elements]

179A-

402- Carleton Condominium Corporation No. 291 v. Lee Weeks and Earleen Crawford (2003) (Actions which are a mere nuisance do not constitute the kind of activity “likely to damage the property or cause harm to an individual” sanctioned by Sec. 117; however, “glaring aggressively, ‘flipping the finger’, and using loud abusive language” may. An application under Section 117 will be referred to trial where issues of credibility arise.)

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271 Royal Insurance Company Middlesex CC No. 173 (1998) [order cannot create two corp. from one against will of owners]

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181 McDonough v. York Condominium Corp. No. 41 (1990) [80% vote required (under old legislation) to close pool, inspector appointed]

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426 - Bahadoor v. YCCC No. 82 et al. (2006) (The test found in section 131 of the Act for the appointment of an administrator should apply equally to the consideration of the discharge of an administrator.)

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405- McKinstry et al v York Condominium No. 472 (2003) (The scope of the subjects of the mediation/arbitration procedure should be given a generous interpretation and extend to both disagreements and claims for damages. Disagreements with respect to the Act itself are not required to be submitted to mediation/arbitration.)

404- Lanark Condominium Corporation Number 10 v. 105 North Street Limited (2005) (The arbitration provisions of a joint use/shared facilities agreement are not applicable to the question of whether a easement validly existed before the registration of a declaration and description).

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073 Chapman v. HLS York Development Ltd. (1988)

186 Metropolitan Toronto Condominium Corp No. 858 v. Tornat Construction Inc. (1994) [failure to disclose adjacent public housing not a material non-disclosure]

142 Jaremko v. Shipp Corp. (1995) [material non-disclosure, truck parking adjacent to suite, damages]

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343 and 344 Wellington Condominium Corporation No. 61 v. Marilyn Drive Holdings Limited (1994/1998) [superintendent's suite corporate property, damages determined by reference to 'live-out' super. salary]

236 and 237 Peel Condominium Corp. No. 505 v. Cam-Valley Homes Ltd. (1999-2001) [adequacy of disclosure must be determined by the contents of the entire disclosure package]

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371 York Condominium Corp. No. 71 v. Sullivan (1990) [rule prohibiting commercial vehicle parking, valid, court order to comply]

196 Middlesex Condominium Corp. No. 87 v. 600 Talbot Street London Ltd.] (1998) [superintendent's suite corporate property, order made to require declarant to convey to corp. free of charge]

196 Middlesex Condominium Corp. No. 87 v. 600 Talbot Street London Ltd.] (1998) [superintendents suite property of corporation, order to declarant to convey title without cost]

238 Peel Condominium Corp. No. 516 v. Williams (1999)

283 Rohoman v. York Condominium Corp. No. 141 (2000) [court order to ensure requisitionists can call meeting]

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264 Peel Condominium Corp. No. 73 and Rogers et al. (1978) [relief is discretionary]

265 Peel Condominium Corp. No. 78 and Harthen et al. (1978)

215 Nipissing Condominium Corp. No. 24 v. Ferris (1993) [no pets clause, court's discretion not to enforce exercised]

362 York Condominium Corp. No. 35 v. Mosseau (1995) [delay in pursuing enforcement may result in court's discretion being exercised to refuse enforcement]

233 Peel Condominium Corp. No. 338 v. Young (1996) [restriction in declaration against pets over 25 lbs. Enforced]

[FOOTNOTE 185 CITATIONS ARE CONTINUED ON THE NEXT PAGE]

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235 Peel Condominium Corp. No. 449 v. Hogg (1997) [pet prohibition enforced]

341 Waterloo North Condominium Corp. No. 198 v. Donner (1997) [prohibition against pets contrary to Human Rights Code where pet assists hearing impaired occupant]

294 Simcoe Condominium Corp. No. 67 v. McDermott (1998) [order directing removal/replacement of exterior window]

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407- Metropolitan Toronto Condominium Corp. No. 1385 et. Al v. Skyline Executive Properties Inc. et al (2005) (Unlike the provisions of the old Condominium Act, Section 134(5) of the 1998 Act allows a condo. corp. to lien a unit for it's legal and non-legal costs above and beyond costs ordered to be paid by the Court, as well as the latter costs, provided those additional costs were incurred in obtaining the order of the Court (these would not, for example, include the costs of enforcing the order). Such costs include the costs of maintaining an order on appeal. The burden of proving non-legal costs were incurred in obtaining the order lies with the Corporation.)

420 - Little v. Metropolitan Toronto Condominium Corp. No. 590 (2006) Section 134(5) of the Act, allows an owner to bring an application to enforce compliance with the Act; however, the remedy is in the discretion of the court. The discretion was not exercised where the corporation acted in good faith and with the consent of 2/3's of the unit owners (albeit that the consent was not obtained in strict compliance with the Act).

185B

405-McKinstry et al v York Condominium No. 472 (2003) (The oppression remedy (sec. 135) protects reasonable expectations and should not be unduly restricted but should be given a broad and flexible interpretation that will give effect to the remedy. It applies to protect against both conduct which is unlawful or without authority and conduct which is technically authorized and ostensibly legal. The only prerequisite is that the conduct must be or threaten to be oppressive or unfairly prejudicial to the applicant, or unfairly disregard the interests of the applicant.
A section 135 application need not first proceed through the mediation/arbitration procedure.)

409-Niedemeier v. York Condominium Corp. NO. 50 (2006) (While a Corporation acted without authorization to deny an owner access to certain common elements as a 'self-help' remedy to obtain the owner's payment of funds due the Corporation, such conduct is not such as to bring the oppression remedy into play.)

411- Peel Condominium Corporation No. 668 (2006) (The oppression remedy has no application against a third party (arm's length lender) who plays no part in the control and operation of the corporation.)

185C

418- York Condominium Corp. Nos. 968 and 1002 v Schickendanz Bros. Limited and York Region Comment Element Condo Corp. No. 967 (2006) (A provision in a declaration exempting certain POTL from the payment of common expenses pending the happening of a specified event is not contrary to the Act and is valid and enforceable.)

186 -

260-Lambert Island Ltd. and Attorney-General of Ontario (1972) [not possible under the old legislation]

**ONTARIO NEW HOME
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CITATION REFERENCES**

187 -

040 Beer et al. v. Townsgate I Limited et al. (1995)

052 Brownstones East Limited Partnership v. Ontario New Home Warranty Program (1992)

201 Morin v. Ontario New Home Warranty Program (1992)

220 and 225 - Ontario New Home Warranty Program v. Marchant Building Corp. (1989/1991)

274 Sunforest Investment Corp et al. and ONHWP (1997)

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040 Beer et al. v. Townsgate I Limited et al. (1995)

049 Bondy v. P.C. Cove Builders Inc. (1991)

221 Ontario New Home Warranty Program v. Meadows of White Oaks II Ltd (1988)

274 Sunforest Investment Corp et al. and ONHWP (1997)

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154 Lakewood by the Park Ltd. v. Ontario Home Warranty Program (1991)

279 Robinson v. ONHWP et al (1994)

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102 DeSoto Developments Ltd. v. Ontario New Home Warranty Program (1992)

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059 Carleton Condominium Corp. No. 109 v. Tartan Development Corp. (1995)

142 Jaremko v. Shipp Corp. (1995)

369 York Condominium Corp. No. 528 v. Ontario New Home Warranty Program (1987)

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093 Counsel Holdings Canada Limited v. The Chanel Club Limited et al. (1999)

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